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THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION

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IN THE MATTER OF THE PETITION OF
MCLEODUSA TELECOMMUNICATIONS SERVICES,
INC. FOR ENFORCEMENT OF INTERCONNECTION
AGREEMENT WITH QWEST CORPORATION

TC05-057

=====

Transcript of Proceedings
March 31, 2005

ORIGINAL

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BEFORE THE PUBLIC UTILITIES COMMISSION,
GARY HANSON, CHAIRMAN (by telephone)
BOB SAHR, VICE CHAIRMAN
DUSTY JOHNSON, COMMISSIONER

COMMISSION STAFF
Rolayne Ailts Wiest
John J. Smith
Greg Rislov
Harlan Best
Keith Senger
Martin Bettmann
Heather Forney

APPEARANCES

Brett Koenecke, McLeodUSA
Melissa Thompson, Qwest Corporation
Thomas Welk, Qwest Corporation

Reported By Cheri McComsey Wittler, RPR

PRECISION REPORTING
L I M I T E D

1 THE PUBLIC UTILITIES COMMISSION
2 OF THE STATE OF SOUTH DAKOTA
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4 IN THE MATTER OF THE PETITION OF
5 MCLEODUSA TELECOMMUNICATIONS SERVICES, TC05-057
6 INC. FOR ENFORCEMENT OF INTERCONNECTION
7 AGREEMENT WITH QWEST CORPORATION
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9 Transcript of Proceedings
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24 Heather Forney
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26 APPEARANCES
27
28 Brett Koenecke, McLeodUSA
29 Melissa Thompson, Qwest Corporation
30 Thomas Welk, Qwest Corporation
31
32 Reported By Cheri McComsey Wittler, RPR

1 APPEARANCES BY TELEPHONE 2
2 Colleen Sevoid
3 Pat Mastel
4 Bill Heaston
5 Mary Lohnes
6 -----
7 TRANSCRIPT OF PROCEEDINGS, held in the
8 above-entitled matter, at the South Dakota State
9 Capitol, LRC Rooms 1 and 2, 500 East Capitol Avenue,
10 Pierre, South Dakota, on the 31st day of March 2005,
11 commencing at 4:15 p.m.
12 -----
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16 Of Action To United States District
17 Court For The District Of Colorado 12 12 12
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1 VICE CHAIRMAN SAHR: It is Thursday,
2 March 31, 2005 at approximately 4:15 p.m. This is
3 the time and place for the ad hoc meeting of the
4 South Dakota Public Utilities Commission. We are
5 here in LRC Rooms 1 and 2 in the State Capitol
6 Building in Pierre, and the item that we are here
7 to take up is TC05-057, In the Matter of the
8 Petition of McLeodUSA Telecommunications Services,
9 Inc. for Enforcement of Interconnection Agreement
10 with Qwest Corporation.
11 And the question today is shall the Commission
12 grant McLeodUSA's Motion For Emergency Relief.
13 My name is Bob Sahr. I am Vice Chairman of
14 the South Dakota Public Utilities Commission. With
15 me here in Pierre is Commissioner Dusty Johnson,
16 and joining us via telephone is Chairman
17 Gary Hanson.
18 And with that, Mr. Koenecke, I believe as
19 moving party we would hear from McLeod first.
20 Please do use the mike.
21 MR. KOENECKE: Thanks, Commissioner.
22 I hope one of these three is working.
23 Brett Koenecke from Pierre, representing McLeod. I
24 appreciate very much the Commission and staff
25 making arrangements this afternoon to hear from me

1 on this matter.
2 The papers which we have filed and put on
3 record I think are to the point with respect to the
4 matter and perhaps given the further developments
5 of today and this afternoon I'll probably just move
6 straight to that and where we're at this afternoon.
7 I have been part of a group of lawyers
8 nationwide and I presume Qwest has a group also
9 working on the same matter. And we've gotten our
10 directives, of course, from people in McLeod
11 headquarters in Cedar Rapids.
12 MR. WELK: This is Tom Welk. I'm
13 sorry. I can't hear you. You're breaking up.
14 MR. KOENECKE: Well, I'm microphone
15 number 3, and I'm at the end of my rope, Tom. Is
16 that better?
17 MR. WELK: A little bit better,
18 yeah.
19 MR. KOENECKE: I'll just get up and
20 move.
21 (Mr. Koenecke moves to different microphone)
22 MS. THOMPSON: Brett, if you're
23 speaking, we can't hear you at all now.
24 MR. WELK: I don't think he's
25 speaking, Melissa.

1 MR. SMITH: He's moving at the
 2 moment.
 3 MR. KOENECKE: Qwest served notice
 4 on McLeod that it was requesting a security deposit
 5 from McLeod nationwide under the terms of
 6 Interconnection Agreements in place. They have an
 7 Interconnection Agreement with McLeod here in
 8 South Dakota. The Interconnection Agreement that
 9 we have here that we're considering makes mention
 10 that no security deposit will be required.
 11 They've also made threats that they'll
 12 discontinue service as of 5 p.m. tomorrow evening.
 13 And so that's the impetus for the Emergency Motion
 14 that you're hearing here this afternoon. Since
 15 those documents were put together and filed Qwest
 16 has agreed that the -- and I would -- Qwest
 17 certainly won't let me put words in their mouth,
 18 but I think it's fair to state that Qwest has said
 19 that the terms of a Temporary Restraining Order
 20 issued by a Federal Court in Iowa would apply at
 21 least until April 12 and perhaps past that
 22 depending on the response from the Federal Judge in
 23 Colorado as to some of the issues that we are
 24 discussing here this afternoon.
 25 We have asked Qwest to agree that they would

1 withdraw the demand letter, which if I recall
 2 correctly was dated March 23, and also agree to
 3 follow the terms of the dispute resolution process
 4 which are outlined in the Interconnection
 5 Agreement, and we failed to reach agreement with
 6 them this afternoon on that basis.
 7 I'm left then this afternoon to ask the
 8 Commission to consider the Emergency Motion to put
 9 in place a course of events which will keep the
 10 telephones on for customers in South Dakota and
 11 keep the Interconnection Agreement in place to
 12 prohibit Qwest from taking the unilateral action
 13 which it apparently wishes to take and to I guess
 14 be in somewhat repose pending the decisions of
 15 Federal Judges in two states away from our own.
 16 I'd be glad to answer the questions that the
 17 Commissioners might have of me. At this point I'll
 18 let Qwest confirm or not the representations I've
 19 made, and we can set this up for further argument.
 20 Thank you.
 21 VICE CHAIRMAN SAHR: Thank you.
 22 Qwest.
 23 MS. THOMPSON: Yes. Good afternoon,
 24 Commissioners. This is Melissa Thompson calling in
 25 on behalf of Qwest. And I want to come back and

1 summarize a little bit what is before the
 2 Commission this afternoon. McLeod made two filings
 3 here that are the subject of this afternoon's
 4 hearing. One was a Petition For Enforcement Of An
 5 Interconnection Agreement, and the other was a
 6 Motion For Emergency Relief.
 7 The Petition and the substantive matters
 8 alleged in that Petition are not properly the
 9 subject of today's emergency hearing. The only
 10 filing on the table this afternoon -- indeed, the
 11 only decision before the Commission this afternoon
 12 is whether McLeod is entitled to emergency relief.
 13 To be entitled to some form of injunction or other
 14 type of emergency relief McLeod must demonstrate a
 15 risk of imminent harm. It cannot do so.
 16 This dispute was originally cast from
 17 pleadings that Qwest filed in State Court in
 18 Colorado. That case was removed to Federal
 19 District Court. Then McLeod filed an action in
 20 Iowa Federal District Court. That action included
 21 a Motion for a TRO and a Complaint. The Iowa
 22 Federal District Court granted that Motion and
 23 issued a TRO.
 24 Subsequently, Qwest filed a Motion arguing
 25 that that case should be heard in Colorado rather

1 than in Iowa because Qwest filed first in Colorado
 2 before McLeod filed in Iowa. However, pending
 3 decision on that Motion and as a result of concerns
 4 expressed by the Iowa Court, Qwest filed a Report.
 5 And in that Report Qwest made representations which
 6 are very consistent with what Mr. Koenecke just
 7 said to you, which is that Qwest agreed to comply
 8 with the terms of the TRO issued by the Iowa
 9 Federal District Court. That is, Qwest agreed not
 10 to disconnect any services, pending the outcome of
 11 the Motion under consideration in the Iowa Federal
 12 District Court with respect to which court,
 13 Colorado or Iowa, will actually hear the case and
 14 pending any other further proceedings with respect
 15 to that.
 16 So at the present moment Qwest is complying
 17 with the terms of the Temporary Restraining Order,
 18 and it has no intention to do otherwise. In fact,
 19 in Colorado McLeod's attorney this very day, and it
 20 has already been filed, filed a Notice of
 21 Withdrawal of its Motion For Emergency Relief, and
 22 I'd like to read some of that notice to you. And
 23 actually I faxed a -- or rather I e-mailed this
 24 notice to John Smith and Rolayne Wiest about
 25 40 minutes ago.

1 The Notice says, McLeodUSA Telecommunications
 2 Services, Inc. through its undersigned counsel
 3 hereby provides notice that it may now withdraw its
 4 Motion seeking emergency relief from this
 5 Commission in connection with its Complaint filed
 6 in this Docket. And it goes on to say that, Based
 7 upon Qwest's representations and conditional upon
 8 written receipt of those representations Qwest said
 9 McLeod agreed to file the withdrawal.

10 And in the last paragraph counsel for McLeod
 11 says, While the need for immediate Commission
 12 intervention has been averted, McLeod will need to
 13 seek additional relief from this Commission. And
 14 it goes on from there. So even McLeod has
 15 acknowledged the Report that Qwest has filed before
 16 the Iowa Federal District Court and has
 17 acknowledged at least in Colorado that there is no
 18 need to seek emergency relief. Indeed, they've
 19 withdrawn their Motion. And there are no material
 20 differences between Colorado and South Dakota. The
 21 TRO entered in Iowa, any agreement that Qwest has
 22 made there applies to services in South Dakota.

23 If the Commission would, you know, feel at all
 24 reassured by what other states are doing in
 25 addition to Colorado, in North Dakota about

1 30 minutes ago I received an e-mail from their
 2 Executive Director, and all that North Dakota has
 3 requested is an affirmative representation from
 4 Qwest that it will not discontinue services. So,
 5 you know, I'm simply sending the Executive Director
 6 an e-mail with the Report attached to it, and
 7 they're setting this matter for the next Commission
 8 hearing to determine whether there's a prima facie
 9 case.

10 So really McLeod cannot demonstrate any harm
 11 with respect to the emergency relief that it seeks.
 12 It is not entitled to that relief. This case
 13 should proceed on the basis of McLeod's Petition.
 14 Qwest has 20 days to respond to that Petition,
 15 20 days from the date of filing, and Qwest would
 16 respectfully ask the Commission to deny McLeod's
 17 request for emergency relief.

18 MR. WELK: This is Tom Welk. I'd
 19 like to add that I assume that the Report, Melissa,
 20 has been filed with the Commission and the Notice
 21 and we'd ask that those be made part of the record
 22 that's being made in this proceeding.

23 MS. THOMPSON: Yes, Tom. That's
 24 correct. Both John Smith and Rolayne Wiest
 25 received copies of those earlier today.

1 MR. WELK: So we would move to have
 2 those marked as Exhibits 1 and 2 in connection with
 3 these proceedings.

4 VICE CHAIRMAN SAHR: Mr. Koenecke,
 5 do you have any objections? Have you had a chance
 6 to look at the documents?

7 MR. KOENECKE: Thank you,
 8 Commissioner. I have a copy of the Notice of
 9 Withdrawal. I'm not exactly sure what Tom -- or
 10 Mr. Welk is calling the Report.

11 MS. THOMPSON: I think I heard you,
 12 Mr. Koenecke. This is Melissa Thompson. The
 13 Report is the first document that I e-mailed you
 14 this morning at about 10 or 11 o'clock.

15 MR. SMITH: That's the document
 16 entitled Report To Court Regarding Transfer Of
 17 Actions To United States District Court For The
 18 District Of Colorado filed with the United States
 19 District Court in Cedar Rapids.

20 MS. THOMPSON: Yes.

21 MR. SMITH: And you want to call
 22 that, what, Exhibit 1?

23 MS. THOMPSON: Yeah. Sure. We can
 24 call the Report Exhibit 1.

25 MR. SMITH: And we'll call the other

1 document that you're referencing is McLeod's Notice
 2 of Withdrawal of its Motion For Emergency Relief;
 3 is that correct? Is that the one you were
 4 referencing?

5 MS. THOMPSON: Yes, sir.

6 MR. SMITH: And that will be
 7 Exhibit 2.

8 (Exhibits 1 and 2 are marked for identification)

9 MS. THOMPSON: I also -- I know you
 10 may have been on your way to the hearing,
 11 Mr. Koenecke, but I did copy you on the e-mail,
 12 distributing that. I assumed you might have it.

13 MR. KOENECKE: I do have that.
 14 Thank you.

15 MR. SMITH: Is there an objection to
 16 the --

17 MR. KOENECKE: None, no.

18 MR. SMITH: -- admission of these?
 19 I mean, these are -- okay. I'm going to admit them
 20 unless there's a disagreement from the Commission.

21 VICE CHAIRMAN SAHR: Ms. Thompson,
 22 did you have anything else?

23 MS. THOMPSON: No. That's all.

24 VICE CHAIRMAN SAHR: Mr. Welk?
 25 Mr. Welk, did you have anything else?

1 MR. WELK: Nothing other than a
 2 procedural matter that we have in deference to
 3 McLeod's filing. You know, we have appeared here
 4 today, but we are not waiving any objections that
 5 we may have by the appearance here in regard to any
 6 of the procedural irregularities that have happened
 7 regarding this emergency hearing or the
 8 Commission's jurisdiction regarding this matter.
 9 But in deference to the plight that is exposed by
 10 McLeod, we are appearing today and responding as
 11 best we can, but the first time I heard about this
 12 was near 5 o'clock last night. So I just wanted
 13 the Commission to know that.

14 VICE CHAIRMAN SAHR: Thank you. Did
 15 we have any comments from either PrairieWave or
 16 Midcontinent?

17 MR. HEASTON: This is Bill Heaston
 18 on behalf of PrairieWave. We want to be sure that
 19 we -- the Commission understands that PrairieWave
 20 is a customer both of McLeod and Qwest. Regardless
 21 of how this thing comes out we -- our interest is
 22 ensuring that we continue to have service and
 23 because both of them provide substantial service to
 24 us and that's why we made an appearance at this
 25 hearing.

1 Thank you.

2 VICE CHAIRMAN SAHR: Thank you.
 3 Mr. Heaston, I do appreciate those comments and
 4 perspective. Do you have any particular position
 5 on the Motion that's before the Commission?

6 MR. HEASTON: No. We're not a part
 7 of the dispute, underlying dispute, and we're just
 8 here as a customer that wants to be sure we have
 9 continued service.

10 VICE CHAIRMAN SAHR: Thank you.
 11 Ms. Lohnes.

12 MS. LOHNES: Midcontinent's position
 13 would be much the same as PrairieWave.

14 VICE CHAIRMAN SAHR: Thank you very
 15 much. Why don't we go to staff, and then we'll
 16 give Mr. Koenecke the option to make additional
 17 comments.

18 MS. AILTS WIEST: Would it be okay
 19 if I asked a question?

20 VICE CHAIRMAN SAHR: Please, go
 21 ahead. You may just for the record want to note
 22 who you are.

23 MS. AILTS WIEST: This is
 24 Rolayne Wiest. I had a question for Ms. Thompson.
 25 That would be I think you -- you stated that you

1 would commit to not disconnecting any customers.
 2 MS. THOMPSON: Up to and through
 3 whatever decision is made by the Iowa and Colorado
 4 Federal District Courts.

5 MS. AILTS WIEST: What do you mean
 6 up to and through whatever decision is made?

7 MS. THOMPSON: Let me just back up.
 8 And I apologize for repeating things that the folks
 9 there may already understand. We got this Motion
 10 pending in Iowa Federal District Court with regard
 11 to removing the case to Colorado based on the first
 12 filed rule. What McLeod has agreed to in
 13 conjunction with that Motion is if the Iowa Federal
 14 District Court sends the case back to Colorado,
 15 which is what we anticipate, then McLeod has agreed
 16 to expeditiously file for another TRO and another
 17 Complaint in Colorado. And we would basically have
 18 another hearing on the same matter that was already
 19 conducted in Iowa. And Qwest has agreed to comply
 20 with the Iowa Federal District Court's TRO up
 21 through and including the Colorado proceeding.

22 Normally under the law once the Iowa Federal
 23 District Court transferred the case back to
 24 Colorado, the TRO issued by that court would
 25 dissolve. But Qwest has agreed that that will not

1 be the case in this instance, that it will continue
 2 to honor and comply with the terms of the TRO up to
 3 and through any decision by the Colorado Federal
 4 District Court.

5 MS. AILTS WIEST: A decision on the
 6 new TRO that --

7 MS. THOMPSON: New Motion for
 8 Temporary Restraining Order and Complaint.

9 MS. AILTS WIEST: And if that isn't
 10 granted, then Qwest would then possibly start to
 11 disconnect services.

12 MS. THOMPSON: It would just depend
 13 on what the Court decided.

14 MS. AILTS WIEST: So when you
 15 mention that you -- with respect to this proceeding
 16 I think you talked about, you know, the original
 17 Petition filed with McLeod and that you would file
 18 an Answer or something in 20 days. Is that what
 19 you stated earlier?

20 MS. THOMPSON: Yes.

21 MS. AILTS WIEST: And so there's no
 22 guarantee then that that answer would be filed
 23 prior to the time a TRO might be dissolved?

24 MS. THOMPSON: I'm not sure --

25 MS. AILTS WIEST: It could be

1 dissolved any time after April, what was it, 12 or
 2 13?
 3 MS. THOMPSON: No. There's going to
 4 be a decision before then with respect to the
 5 Motion that's pending in Iowa Federal District
 6 Court as to which court is going to hear the
 7 matter.
 8 MS. AILTS WIEST: Go ahead.
 9 MS. THOMPSON: Yeah. So at that
 10 point if it stays in Iowa, I assume the Court is
 11 going to revisit the TRO as April 12 approaches.
 12 If it's moved to Colorado, there will be a new
 13 hearing on the Motion with respect to the TRO and
 14 then if the Court grants McLeod's TRO, at that
 15 point then we'd have a new date.
 16 MS. AILTS WIEST: And you wouldn't
 17 agree to orally commit to not disconnect services
 18 or discontinue the taking of orders until the
 19 Commission has had time -- this Commission has had
 20 time to hear McLeod's Petition?
 21 MS. THOMPSON: No. This matter is
 22 properly before the Federal District Courts in Iowa
 23 and Colorado. The matter to be decided today is
 24 whether McLeod is entitled to emergency relief.
 25 That is the only decision on the table for this

1 afternoon.
 2 It's not fair to Qwest to consider any other
 3 substantive matter. I mean, I got notice of this
 4 at about 8 o'clock last night. I didn't even see
 5 the filing until this morning. So the only issue
 6 is, is McLeod entitled to emergency relief, is
 7 there any justification for that emergency relief?
 8 No, there is not because Qwest has agreed it
 9 is not going to disconnect any customers or any
 10 services.
 11 MS. AILTS WIEST: That's all I have
 12 right now.
 13 VICE CHAIRMAN SAHR: Thank you.
 14 Mr. Koenecke.
 15 MR. KOENECKE: Thank you,
 16 Commissioner. I'm struck and I'm left this
 17 afternoon to say what's imminent and what's
 18 immediate. We've heard Qwest say that apparently,
 19 as I understand it, they're not willing to agree
 20 not to do what they say they're going to do before
 21 the time to answer the Petition runs. They are not
 22 willing to tell me in writing that they'll agree to
 23 follow the terms of the Interconnection Agreement
 24 with respect to this demand for security deposit or
 25 for the dispute resolution process as contained

1 therein.
 2 MS. THOMPSON: Brett, I'm sorry.
 3 This is Melissa Thompson. I can't hear you.
 4 MR. KOENECKE: You've said that
 5 you're not willing to tell me in writing that
 6 you're willing to follow the terms of the
 7 Interconnection Agreement with respect to dispute
 8 resolution, processes the arbitration, or with
 9 respect with -- you're not going to ask for a
 10 security deposit. So I'm left with -- if you turn
 11 me down this afternoon, when am I coming back
 12 asking for the same thing? Next week, two weeks?
 13 What's the difference going to be then? I don't
 14 know the answer to that.
 15 It seems to me that we're going to be talking
 16 about the same questions either now or then and do
 17 you let the Federal District Courts in two other
 18 states decide it or not. That's kind of where I'm
 19 left this afternoon. I wish that I had been more
 20 able to reflect on what happened this afternoon,
 21 the breakdown of discussions between Qwest and
 22 McLeod. I didn't have that luxury, thanks to your
 23 speediness in organizing this meeting this
 24 afternoon.
 25 But, as I sit here, I'm just left to think is

1 it going to be next week or when is it going to be
 2 that I'm in here asking for the same thing, for you
 3 to enforce those terms that I showed you in writing
 4 yesterday afternoon.
 5 So with that, thank you very much for hearing
 6 me this afternoon. I appreciate your indulgence.
 7 VICE CHAIRMAN SAHR: Yes, Ms. Wiest.
 8 MS. AILTS WIEST: I guess I have a
 9 proposal or a recommendation from staff, and I
 10 think the fact that this has been heard on very
 11 little notice -- and I understand Mr. Koenecke's
 12 point about coming back here in two weeks with
 13 perhaps the same Motion, but at this point it is
 14 pending in Federal Court, though I do understand
 15 Mr. Koenecke's point from the Petition that it may
 16 not exactly be the exact same matter but based on
 17 Qwest's statements that it will not discontinue --
 18 and I'm reading this from the Colorado Motion to
 19 Withdraw, discontinue the taking of orders or
 20 disconnecting services at this point in time, and I
 21 would think that would be up until -- well, until
 22 the next court action, whether it be the Iowa or
 23 the Colorado Court.
 24 At this point in time I would say that the
 25 Commission should deny the Motion For Emergency

1 Relief, fully understanding that the Commission
 2 certainly could be back here in the next two weeks.
 3 VICE CHAIRMAN SAHR: And maybe this
 4 isn't a question for Mr. Koenecke or maybe it's for
 5 Ms. Thompson, but if one of the Courts rules
 6 against McLeod, what sort of time frame are you
 7 talking about for actually having services turned
 8 off? I mean, is Mr. Koenecke going to have an
 9 adequate opportunity to come back and file before
 10 this Commission?
 11 And maybe that is more of a question for
 12 Qwest. I mean, is it going to be the decision
 13 comes out, a switch is flipped, and service is off?
 14 Or is there going to be a little bit of a time
 15 frame in which Mr. Koenecke might be able to refile
 16 and come before the Commission?
 17 So I guess I'll pose that to Ms. Thompson.
 18 MS. THOMPSON: Commissioner Sahr,
 19 yeah, I mean, I think the answer is yes. And I
 20 believe that any court order ruling against McLeod
 21 will in all likelihood provide that kind of time
 22 period. And Qwest is not going to be unreasonable.
 23 Qwest doesn't want to disconnect services to
 24 customers itself so --
 25 You know, a lot of this, for the Commission's

1 information, is taking place in the context of a
 2 threatened bankruptcy filing by McLeod. And 10-K
 3 filing, very recently McLeod mentioned seeking
 4 relief. So, you know, there's a larger context
 5 here. There's a lot of things going on behind the
 6 scenes and behind this hearing. So, you know, I
 7 think I can answer with a lot of assurance
 8 affirmatively to your question.
 9 VICE CHAIRMAN SAHR: Just to remind
 10 me, I'm sure I can have the court reporter read it
 11 back, but, Ms. Thompson, what was the time period
 12 you were going to assure us that McLeod would not
 13 be turned off?
 14 MS. THOMPSON: Yes. Qwest has
 15 agreed to comply with the TRO up through any
 16 proceedings that may take place in Colorado, and in
 17 exchange for that McLeod agreed if and when the
 18 case is transferred to Colorado to expeditiously
 19 file a Motion for a TRO and Complaint just as it
 20 did in Iowa but revisiting that here in Colorado.
 21 VICE CHAIRMAN SAHR: Do you have any
 22 idea what the earliest time frame would be that
 23 potentially you might be moving towards turning --
 24 MS. THOMPSON: I'm guessing, okay,
 25 -- but I think we are anticipating a decision from the

1 Iowa Federal District Court case, you know,
 2 within -- I would think within a week or two.
 3 VICE CHAIRMAN SAHR: Mr. Koenecke,
 4 do you have any perspective from your clients about
 5 what sort of time frame we're looking at for that
 6 decision?
 7 And I guess what I'm getting at is if we do
 8 follow staff's recommendation, are you going to
 9 have an opportunity to come back and file and make
 10 your argument again, or do we need to do something
 11 today or else we're looking at a decision comes
 12 down and service is shut off, maybe foregoing your
 13 opportunity to state your case?
 14 MR. KOENECKE: Thanks for the
 15 question. And I appreciate it. My understanding
 16 from my client was that they're expecting a
 17 decision next week, and the answer I think if I
 18 understand your question correctly is -- and if I'm
 19 restating it right, is how fast can Qwest shut us
 20 off?
 21 Physically I don't know the answer to that. I
 22 don't know. But that's something that's certainly
 23 a great deal of concern to me and my client.
 24 VICE CHAIRMAN SAHR: Do we have any
 25 other questions from Commissioners?

1 Commissioner Hanson?
 2 CHAIRMAN HANSON: No. Thank you
 3 very much.
 4 VICE CHAIRMAN SAHR: Mr. Smith.
 5 MR. SMITH: Ms. Thompson, I guess
 6 the question I have, just to clarify it for me, is
 7 is it the position of Qwest that the proceeding
 8 that's occurring in Iowa and the proceeding that is
 9 occurring in Colorado encompass --
 10 Let me put it this way. Are the decisions
 11 that are made there binding on Qwest with respect
 12 to its Interconnection Agreements here in
 13 South Dakota?
 14 MS. THOMPSON: Yes. And to kind of
 15 use the wording that you were using in your first
 16 question, Qwest does believe that those proceedings
 17 encompass, for example, South Dakota, North Dakota,
 18 et cetera.
 19 MR. SMITH: And they not only
 20 encompass access charges, which seem to be at the
 21 root of the matter, but they also encompass
 22 Interconnection Agreement --
 23 MS. THOMPSON: Yes. Exactly.
 24 MR. SMITH: -- issues. And maybe
 25 I'll address this question to Mr. Koenecke. If

1 McLeod was willing on the basis of what's happened
2 and the basic same set of things we've heard
3 represented by Qwest here this afternoon to file a
4 withdrawal in Colorado, why is it not willing to do
5 so here?

6 MR. WELK: Mr. Smith, this is
7 Mr. Welk. I can't hear you. You faded away.

8 MR. SMITH: I'm sorry. I was facing
9 toward Brett, and I probably didn't have my mouth
10 in front of this thing. My question to him is
11 assuming, of course, that the proceeding in
12 Colorado is also binding here in South Dakota,
13 which Ms. Thompson just stated that it was, and is
14 also binding with respect to Interconnection
15 Agreement issues as well as access charge issues,
16 and we have all the same representations having
17 been made here in South Dakota, why then is McLeod
18 not willing to do the same thing here that it did
19 in Colorado? And that's my question.

20 MR. KOENECKE: Thank you. And it's
21 a question I wish I had an answer to. I got the
22 Notice of Withdrawal at 4 o'clock like everybody
23 else did on the way up here this afternoon. I can
24 tell you and perhaps I'm going to be answering your
25 question with a question and it would be that I

1 don't know what the terms of the Interconnection
2 Agreement they have in Colorado are.

3 All I do seem to know is that in the 14 states
4 that McLeod is discussing this the agreements all
5 seem to be different. And I don't know whether
6 that had any bearing on what these representations
7 were or not.

8 Finally, I do believe that this was at some
9 level fostered by the activities of the Federal
10 Judges in either Iowa or Colorado, and I don't know
11 to what extent they were able to leverage the
12 document that we see before us this afternoon.

13 That's the best I can do given the time lines
14 I'm operating under.

15 MR. SMITH: So it's at least
16 possible that had -- it's at least possible that
17 had we not had these time constraints your client
18 might have advised you that making a similar filing
19 here might have been acceptable to them?

20 MR. KOENECKE: It's possible, and
21 I -- the context of this afternoon's hearing has to
22 be seen -- and is certainly seen by me in light of
23 Qwest's refusal to say in writing that they're
24 going to follow the terms of the Interconnection
25 Agreement here in South Dakota -- I think that's

1 certainly put a question in my mind as to where
2 this is headed and probably my client's as well.

3 I wish I had more opportunity to confer with
4 them in the 15 to 20 minutes between 4 and when we
5 started this hearing. I didn't have that.

6 MR. SMITH: Let me see here. I had
7 one last question, I think, for Ms. Thompson, and
8 it follows up on Vice Chairman Sahr's question
9 regarding time.

10 Would Qwest be willing to also represent here
11 on the record as to some at least minimal level of
12 notice to this Commission before it would undertake
13 any action to either suspend order or to disconnect
14 customers?

15 MS. THOMPSON: I'm hesitating
16 because what you're asking is a little beyond the
17 scope of my authority and representation of the
18 company.

19 MR. SMITH: Well, I'm asking for
20 just something informal, as informal as a letter or
21 e-mail giving us enough time to hold a proceeding
22 like this. And, again, Mr. Welk has raised the
23 issue of us scrambling here and having a tough time
24 going through all the procedural niceties, but when
25 we have less than 24 hours to do something, it puts

1 us in that position.

2 And all I'm asking you is whether Qwest is
3 willing to -- I'm just going to say to do the right
4 thing and give us sufficient time to hold a similar
5 proceeding if it's necessary for us to do so to
6 protect our --

7 MS. THOMPSON: Well, now you really
8 put me on the spot, but, yes, I can affirmatively
9 say yes.

10 MR. WELK: Mr. Smith, this is
11 Mr. Welk. I think one way of thinking about
12 procedurally how to do this for just the benefit of
13 everyone and that is I think it would be
14 appropriate to require Qwest when a decision is
15 reached in any of the courts to supplement that and
16 file it as part of this record. That way -- and
17 I'm assuming, Melissa, we don't have any problem
18 notifying all of the Commissions when the Federal
19 Judges decide whatever they're going to decide.

20 MS. THOMPSON: That's a very good
21 idea.

22 MR. WELK: And so as part of a
23 prospective order in this case if you require us to
24 file that as part of this record, then it will put
25 all parties on notice that participated at least as

1 what has happened in the other states so you don't
2 have to search it out and the staff doesn't have to
3 that there will be a requirement that those
4 material events be advised to all parties of the
5 proceeding.

6 VICE CHAIRMAN SAHR: This is
7 Commissioner Sahr. I have a follow-up question for
8 Qwest. If we had a situation where either by
9 granting the TRO or through some type of agreement
10 from you --

11 Well, here's what my question is. If the
12 court order comes down and we have some sort of
13 requirement that you have to wait 24 or 48 hours
14 before turning off McLeod, thereby giving them the
15 opportunity to file something or to refile, if you
16 will, what -- you know, obviously there is a
17 potential you don't get paid for that time period.

18 Is that the harm that you would suffer under
19 those circumstances or are there some other harms
20 or am I missing something when I'm trying to
21 balance the potential harm to McLeod, other
22 carriers, and to customers out there across the
23 state?

24 MS. THOMPSON: No. And I understand
25 your question, Commissioner Sahr. I think Qwest

1 the immediate and irreparable harm criteria -- and,
2 again, I don't know that those -- the standards of
3 the Commission -- there's no explicit equitable
4 jurisdiction of the Commission, you know, so I
5 think our legal standards we rely on are more our
6 regulatory authority which speaks in language like
7 unreasonable conduct and that kind of thing.

8 Now I would certainly think the Court's
9 criteria for equitable relief are a very good
10 indicator of what's reasonable or unreasonable.
11 But what I thought may be -- and instead of
12 ordering something that is a contingent irreparable
13 harm order, would be to either accept Qwest --
14 Ms. Thompson's representation to us that she will
15 give us some minimal level of notice and I wouldn't
16 mind getting how much, and I think, you know, I
17 think something like three days so that we can make
18 sure we at least comply nicely with, you know, the
19 kind of procedural kind of notice that is likely to
20 hold up as having been adequate is available to us.

21 And whether we do that by order or whether
22 Qwest would prefer just to stipulate on the record
23 that you'll do that. But what we don't want is to
24 be caught between a rock and a hard place, and I
25 think we have a right not to be.

1 could live with that.

2 VICE CHAIRMAN SAHR: Mr. Koenecke,
3 how fast can you write?

4 MS. THOMPSON: Well, he wrote pretty
5 darn fast this time.

6 MR. KOENECKE: You know me,
7 Commissioner. I'm Johnny-on-the-spot.

8 VICE CHAIRMAN SAHR: Well, we need
9 24-hour notice. We all know that.

10 MR. KOENECKE: 36 to 48 seems to
11 allow for the necessities.

12 VICE CHAIRMAN SAHR: Thank you. I
13 mean, my inclination would be, and I'll just see if
14 Qwest has any big heartburn on this, would be to
15 grant the Request For Emergency Relief and to allow
16 it to go forward 48 hours after any court decision
17 that might come down that would permit Qwest in its
18 opinion to turn off service to McLeod.

19 MS. THOMPSON: Commissioner Sahr,
20 did you say grant the Motion For Emergency Relief?

21 VICE CHAIRMAN SAHR: Well, I think
22 we could grant it, and I'm going to look at our
23 General Counsel. I want to make sure I tee up the
24 Motion correctly.

25 MR. SMITH: I think because of maybe

1 ADMINISTRATIVE LAW JUDGE:
2 Mr. Smith, what is the binding effect, if any, on
3 Qwest if they make such representation on the
4 record?

5 MR. SMITH: Well, I think if they
6 make that representation to us on the record, as
7 far as I'm concerned, it's a stipulation.

8 MS. THOMPSON: We could -- you know,
9 I could send a cover letter confirming the
10 stipulation in the record if Mr. Koenecke would be
11 more comfortable with something like that, but
12 certainly not going to contravene something we've
13 agreed to before this Commission.

14 MR. SMITH: Can I get a stipulation
15 right now -- can the Commission get a stipulation
16 that Qwest will provide this Commission with at
17 least 36 hours' notice following the dissolution of
18 any applicable federal TRO or other follow-on
19 preliminary injunction prior to disconnecting
20 service or impairing order activity?

21 MS. THOMPSON: Yes. So stipulated.

22 COMMISSIONER JOHNSON: Mr. Smith,
23 Commissioner Johnson again. Is there a reason the
24 36 is a better number than 48?

25 MR. SMITH: No. It's just one more

1 day. I don't know. Mr. Welk raised the issue of
2 procedural defects, and I don't know what you had
3 in mind, Tom, obviously, you know, but --

4 MR. WELK: I'm not going to
5 contravene the stipulations of Ms. Thompson on
6 behalf of the company. I mean, it seems to me the
7 most practical thing to do is to enter an order
8 that denies the emergency relief, requires us to
9 report to the Commission and all parties all
10 material orders of the respective courts as to this
11 matter and then not to allow consistent with --
12 whether it's 36 or 48, that those disconnections
13 not occur as to orders or impairment of service.
14 And you've got an order in place that we have to
15 comply with.

16 MR. SMITH: And I didn't mean
17 36 hours. I meant 72. I'm sorry.

18 MR. WELK: You meant what?

19 MR. SMITH: 72 hours. Three days.
20 So we can get the stuff and, you know, make sure
21 bona fide notices and parties can be prepared. I
22 mean, is that not reasonable? And we can do that
23 in the form of an Order.

24 MS. THOMPSON: Yeah. I like the
25 idea of 48 hours better, but we can live with 72.

1 accurately reflects what we discussed. I would
2 prefer to see the time frame be a little shorter
3 than 72. I think 48 hours is fair and sufficient.

4 COMMISSIONER JOHNSON: Mr. Presiding
5 Chairman, I'm not quite sure how to word this so
6 after I make the Motion I would be happy to have a
7 friendly amendment if it's required, but I would
8 make a Motion to deny the Motion by McLeod for
9 emergency relief, to require Qwest to report any
10 court proceedings to the Commission, and to require
11 that Qwest wait at least 72 hours before turning
12 off any service to McLeod after any final court
13 proceedings in Colorado or Iowa.

14 VICE CHAIRMAN SAHR: I will second.

15 CHAIRMAN HANSON: And I concur.

16 VICE CHAIRMAN SAHR: Thank you very
17 much. Hopefully the parties can continue to work
18 towards something that's mutually acceptable.

19 MR. KOENECKE: Thank you,
20 Commissioners.

21 MS. THOMPSON: Thank you.

22 MR. WELK: Thank you, everybody.
23 (The hearing concluded at 5 o'clock p.m.)
24
25

1 MR. SMITH: Well, you know how we
2 had to scramble this time. That was 24 hours or
3 less.

4 MS. THOMPSON: Well, twice the
5 amount of time and we probably would have been in
6 good shape.

7 MR. SMITH: Twice the amount of
8 time? Well, I guess that's up to the Commission at
9 this point. I'm not going to argue about it. I
10 apologize for the 36-hour --

11 COMMISSIONER JOHNSON: I want to
12 make sure that, Tom, you had suggested that the
13 proper move for the Commission would be to deny the
14 Motion by McLeod, to require Qwest to report any
15 court proceedings to the Commission, and to not
16 allow any shut off of service within either 48 or
17 72 hours after final court proceedings in either
18 Colorado or Iowa; is that right?

19 MR. WELK: Whatever Melissa thinks
20 the appropriate -- I don't have the authority, she
21 does, on what those are. I'm just getting the
22 procedural aspects, but that would be my
23 recommendation on the Order.

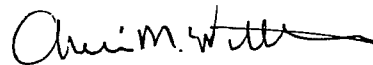
24 COMMISSIONER JOHNSON: Ms. Thompso
25 MS. THOMPSON: Yes. That certainly

1 STATE OF SOUTH DAKOTA)
2 :SS CERTIFICATE
3 COUNTY OF HUGHES)
4

5 I, CHERI MCCOMSEY WITTLER, a Registered
6 Professional Reporter and Notary Public in and for the
7 State of South Dakota:

8 DO HEREBY CERTIFY that as the duly-appointed
9 shorthand reporter, I took in shorthand the proceedings
10 had in the above-entitled matter on the 31st day of
11 March 2005, and that the attached is a true and
12 correct transcription of the proceedings so taken.

13 Dated at Pierre, South Dakota this 5th day
14 of April 2005.
15
16

17 

18 Cheri McComsey Wittler,
19 Notary Public and
20 Registered Professional Reporter
21
22
23
24
25

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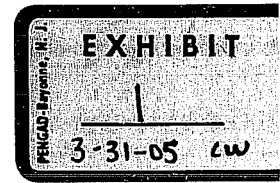
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IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

<p>MCLEOD USA TELECOMMUNICATIONS SERVICES, INC.</p> <p style="text-align: center;">Plaintiff,</p> <p>v.</p> <p>QWEST CORPORATION AND QWEST COMMUNICATIONS CORPORATION,</p> <p style="text-align: center;">Defendant.</p>	<p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p>	<p>CASE NO. 1:05-cv-00039-MWB</p> <p>REPORT TO COURT REGARDING TRANSFER OF ACTION TO UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO</p>
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**REPORT TO COURT REGARDING TRANSFER OF ACTION TO UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLORADO**

As requested by this Court during the March 30, 2005 telephonic hearing on Defendant Qwest's Motion to Stay or Dismiss, Qwest submits the following Report on its position regarding transfer to the United States District Court for the District of Colorado:

1. Qwest and McLeod are currently subject to the terms of the temporary restraining order ("TRO") issued by this Court on March 23, 2005. This TRO is scheduled to expire on April 12, 2005.
2. Through its Motion to Stay or Dismiss filed with this Court on March 24, 2005, Qwest has requested that this action be dismissed or stayed pursuant to the ruling of the United States District Court for the District of Colorado in Qwest's first-filed parallel action, Civil Action No. 05-WM-506-OES.
3. In the March 30, 2005 telephonic hearing on Qwest's Motion to Stay or Dismiss, this Court requested Qwest's position on the following issue: whether, if this Court decides to

transfer this action to the District of Colorado, Qwest agrees to let the TRO issued by this Court on March 23, 2005 to remain in effect until the TRO is modified, extended, or rescinded by the Colorado court.

4. Through this Report, Qwest agrees that, if this Court stays this action or transfers this action to the District of Colorado, the TRO issued by this Court on March 23, 2005 will remain in effect until the TRO is modified, extended, or rescinded by the District of Colorado. Qwest also requests that, as a condition of this agreement, Plaintiff McLeodUSA be required to cooperate with Qwest and to use its best efforts to ensure that a hearing on the existing TRO is quickly and expeditiously scheduled in the Colorado court.

Respectfully submitted,

/s/ Amy L. Benson

Date: March 30, 2005

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ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF SERVICE

The undersigned certifies that on March 30, 2005, the foregoing instrument was electronically filed with the Court using the CM/ECF system and served upon all parties to the above case and/or to each of the attorneys of record herein at their respective addresses disclosed on the pleadings:

By: Electronic Service **AND/OR**
By: U.S. Mail FAX
 Hand Overnight
 Delivered Courier
 E-mail Other _____

/S/ Amy M. Omgig

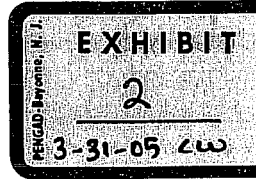
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ATTORNEYS FOR PLAINTIFF



**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO**

Docket No. _____

IN THE MATTER OF THE COMPLAINT OF MCLEODUSA TELECOMMUNICATIONS SERVICES, INC., FOR ENFORCEMENT OF AN INTERCONNECTION AGREEMENT WITH QWEST CORPORATION

**MCLEODUSA'S NOTICE OF WITHDRAWAL OF
ITS MOTION FOR EMERGENCY RELIEF**

McLeodUSA Telecommunications Services, Inc. ("McLeodUSA"), through its undersigned counsel, hereby provides notice that it may now withdraw its Motion seeking emergency relief from this Commission in connection with its Complaint filed in this docket. However, McLeodUSA also provides notice through this pleading that it will be required to seek separate interim relief from this Commission, albeit on a somewhat less expedited basis.

1. On March 30, 2005, shortly after the Complaint was filed in this docket, a brief telephone conference/hearing was held, attended by the chief Administrative Law Judge, counsel for Qwest, and the undersigned counsel for McLeodUSA. During that telephone call, counsel for Qwest acknowledged that the Temporary Restraining Order issued by the United States District Court for the Northern District of Iowa ("Iowa TRO") prevented Qwest from taking the actions threatened in its March 21, 2005 letter, including the disconnection of Colorado subscribers served by McLeodUSA. Based upon this representation, and conditional upon receipt of written confirmation of these representations, McLeodUSA agreed to file this withdrawal.

2. On the morning of March 31, 2005, an additional telephonic hearing was held between the parties and the chief Administrative Law Judge. During that hearing, Qwest's

counsel reported that Qwest had made assurances to the U.S. District Court Judge presiding over the federal case in Iowa, the Hon. Mark W. Bennett, that Qwest would continue to honor the terms of the Iowa TRO should a decision issue to transfer the Iowa federal case to Colorado, at least until such time as the U.S. District Court in Colorado has an opportunity to rule on a motion for a new temporary restraining order filed by McLeodUSA. Qwest's counsel reiterated that a letter confirming his statements made at the previous afternoon's hearing, as well as this new information, would be forthcoming.

3. The undersigned received the letter from Qwest via fax just before noon today. A copy of that letter is attached hereto as Exhibit A. While the letter accurately reflects the commitments made by Qwest *to the Iowa Court* in connection with its request to transfer the federal case in Iowa to Colorado, it contains no mention of the commitments made orally *to this Commission* by Qwest counsel yesterday afternoon. Most notably, an oral commitment was made that Qwest acknowledged not only the existence of the Iowa TRO, but that the scope of the Iowa TRO prevented Qwest from taking any action to discontinue the taking of orders from McLeodUSA or disconnecting services under the parties' Colorado Interconnection Agreement ("Agreement"). The letter contains no mention of this key commitment.

4. Notwithstanding this deficiency in the written confirmation provided by Qwest, McLeodUSA will nevertheless withdraw its Motion for Emergency Relief. Qwest counsel's verbal commitments were clear, and as he correctly pointed out, those commitments were made by a licensed attorney authorized to bind Qwest to those commitments. While the non-responsiveness of the letter is frustrating, it is inconceivable that Qwest would willfully violate the Iowa TRO and the commitments made to this Commission, and intentionally disconnect service to thousands of Colorado homes and businesses after assuring the Commission it would

not do so.

5. While the need for immediate Commission intervention has been averted, McLeodUSA will need to seek additional relief from this Commission, albeit on a less expedited basis, to ensure that any claim of default made by Qwest can be disputed and resolved under the terms of the agreement. McLeodUSA's concern is that Qwest may claim default relating back to its original security deposit demand, and attempt to circumvent the dispute resolution provisions of the Agreement and this Commission's jurisdiction to protect Colorado subscribers from disconnection without notice. Such a pleading will be filed as soon as practically possible.

Respectfully submitted,

MCLEODUSA TELECOMMUNICATIONS
SERVICES, INC

By: 

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Counsel for McLeodUSA

CERTIFICATE OF SERVICE

I hereby certify that an original and 15 copies of the foregoing **MCLEODUSA'S NOTICE OF WITHDRAWAL OF ITS MOTION FOR EMERGENCY RELIEF** was hand delivered this 31st day of March, 2005, to the following addressee:

Mr. Doug Dean, Director
COLORADO PUBLIC UTILITIES COMMISSION
Logan Tower, Office Level 2
1580 Logan Street
Denver, CO 80203

and a copy of the foregoing was mailed by depositing same in the U.S. Mail, postage prepaid this 31st day of March, 2005, with additional electronic courtesy copies to the chief Administrative Law Judge, as well as to the following addressees:

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