MARK P. TRINCHERO
Direct (503) 778-5318
marktrinchero@dwt.com

March 30, 2005

VIA E-MAIL AND UPS

Public Utilities Commission of Oregon
550 Capitol Street N.E., Suite 215
Salem, Oregon 97301-2551

Re: In re Complaint of McLeodUSA Telecommunications Services, Inc., for Enforcement of Interconnection Agreement with Qwest Corporation

Dear Sir or Madam:

Enclosed for filing please find the following documents:

1. COMPLAINT OF MCLEODUSA TELECOMMUNICATIONS SERVICES, INC., FOR ENFORCEMENT OF INTERCONNECTION AGREEMENT WITH QWEST CORPORATION AND FOR VIOLATION OF ORS 759.455; and

2. MCLEODUSA TELECOMMUNICATIONS SERVICES, INC., MOTION FOR EMERGENCY RELIEF.

Thank you for your assistance and please feel free to call if you have any questions.

Very truly yours,

Davis Wright Tremaine LLP

/s/ Mark P. Trinchero

Mark P. Trinchero

MPT:fw

Enclosure
cc: Alex Duarte

BEFORE THE OREGON PUBLIC UTILITY COMMISSION

IN RE:	)	
COMPLAINT OF MCLEODUSA TELECOMMUNICATIONS SERVICES, INC., FOR ENFORCEMENT OF INTERCONNECTION AGREEMENT WITH QWEST CORPORATION AND FOR VIOLATION OF ORS 759.455	)	**Docket No. _____**

MCLEODUSA TELECOMMUNICATIONS SERVICES, INC., MOTION FOR EMERGENCY RELIEF

McLeodUSA Telecommunications Services, Inc. ("McLeodUSA"), through its undersigned counsel, and pursuant to ORS § 756.040 and OAR 860-016-0050(10), moves the Oregon Public Utility Commission ("Commission") for emergency relief. This Motion seeks emergency consideration of the McLeodUSA Complaint for Enforcement of Interconnection Agreement with Qwest Corporation ("Qwest") and for Violation of ORS 759.455 ("Complaint") filed concurrently herewith.

As explained in greater detail in the Complaint, McLeodUSA is seeking relief in a dispute between McLeodUSA and Qwest over Qwest's right, under the interconnection agreement between McLeodUSA and Qwest approved by this Commission ("ICA"), to demand a security deposit from McLeodUSA for services provided under the ICA, and to discontinue services to McLeodUSA should McLeodUSA not comply with Qwest's demand by 5 pm Mountain Standard Time on April 1, 2005. Qwest demanded on March 21, 2005, that McLeodUSA pay more than $15.9 million to Qwest within 10 days—$372,545.98 in Oregon alone—or Qwest will "suspend order activity" and "disconnect services" provided to McLeodUSA.

McLeodUSA seeks an order from this Commission that Qwest may not demand a security deposit and that Qwest may not "suspend order activity" or "disconnect services" until all procedures for dispute resolution in the interconnection agreement have been satisfied. Because Qwest has threatened to "suspend order activity" and "disconnect services" on April 1, 2005, McLeodUSA asks this Commission to provide McLeodUSA with its requested relief on an expedited, emergency basis.

The Commission has the authority to grant the emergency relief requested by McLeodUSA. Qwest has threatened to terminate service to McLeodUSA, which would leave all of McLeodUSA's residential and business customers without the ability to complete telephone calls to end users served by carriers other than McLeodUSA. The Commission has authority to grant emergency relief to protect the health and safety of Oregon residents. ORS § 756.040; *see also* OAR § 860-011-0000(3) (making applicable to this Commission ORCP 79, authorizing issuance of temporary restraining orders and preliminary injunctions).

For the foregoing reasons, McLeodUSA asks the Commission to consider the McLeodUSA Complaint and Motion on an emergency basis, and to rule that Qwest may not demand a security deposit from McLeodUSA at this time. McLeodUSA further requests that the Commission order that in the event of a default under the ICA, Qwest must follow the dispute

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resolution provisions in the ICA and may not "suspend order activity," "disconnect services," or terminate the ICA until those dispute resolution procedures have been completed.

DATED this 30th day of March, 2005.

Respectfully submitted,

Mark Trinchero
DAVIS WRIGHT TREMAINE LLP
1300 SW Fifth Avenue, Suite 2300
Portland, OR 97201-5682
Telephone: (503) 241-2300
Facsimile: (503) 778-5299
E-mail: marktrinchero@dwt.com

ATTORNEYS FOR MCLEODUSA TELECOMMUNICATIONS, INC.

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing "MCLEODUSA TELECOMMUNICATIONS SERVICES, INC., MOTION FOR EMERGENCY RELIEF" upon the parties named on the attachment.

I further certify that said copies were placed in sealed envelopes addressed to said partys'/attorneys' last known addresses as shown and deposited in the United States Mail at Portland, Oregon, and that the postage thereon was prepaid.

DATED this 30th day of March, 2005.

DAVIS WRIGHT TREMAINE LLP

By: Mark P. Trinchero by D. Reed
Mark P. Trinchero
Attorney for McLeodUSA

SERVICE LIST
McLeod Motion

ALEX M DUARTE
QWEST CORPORATION
421 SW OAK ST STE 810
PORTLAND OR 97204
alex.duarte@qwest.com

BEFORE THE OREGON PUBLIC UTILITY COMMISSION

IN RE:	)	
COMPLAINT OF MCLEODUSA TELECOMMUNICATIONS SERVICES, INC., FOR ENFORCEMENT OF INTERCONNECTION AGREEMENT WITH QWEST CORPORATION	)	**Docket No. _____**

COMPLAINT OF MCLEODUSA TELECOMMUNICATIONS SERVICES, INC., FOR ENFORCEMENT OF INTERCONNECTION AGREEMENT WITH QWEST CORPORATION AND FOR VIOLATION OF ORS 759.455

McLeodUSA Telecommunications Services, Inc. ("McLeodUSA"), through its undersigned counsel, and pursuant to ors 759.455 and OAR § 860-016-0050, files this Complaint with the Oregon Public Utility Commission ("Commission") for enforcement of its interconnection agreement ("ICA") with Qwest Corporation ("Qwest"). This Complaint stems from a dispute between McLeodUSA and Qwest over Qwest's right under the interconnection agreement to demand security deposits from McLeodUSA for services provided under the ICA, and to discontinue services to McLeodUSA should McLeodUSA not comply with Qwest's demand. Qwest has recently demanded that McLeodUSA pay more than $15.9 million to Qwest within 10 days—$372,545.98 in Oregon alone—or Qwest will "suspend order activity" and "disconnect services" provided to McLeodUSA. Rather than follow the clear terms of the ICA regarding dispute resolution, Qwest has made extortionate demands rather than adopt the approach of established telecommunications carriers that respect their contractual obligations. McLeodUSA seeks an order from this Commission that Qwest may not demand a security deposit and that Qwest may not "suspend order activity" or "disconnect services" until all procedures for dispute resolution in the ICA have been satisfied. Because Qwest has threatened

to "suspend order activity" and "disconnect services" on April 1, 2005, McLeodUSA asks this Commission to provide McLeodUSA with its requested relief on an expedited, emergency basis, and has filed a Motion for Emergency Relief concurrently with this Complaint.

JURISDICTION

1. Both McLeodUSA and Qwest are authorized to provide local exchange services in the State of Oregon pursuant to certificates issued by this Commission.

2. Pursuant to Section 252 of the Telecommunications Act of 1996 (the "Act"), on October 25, 2000 McLeodUSA and Qwest entered into an adoption agreement whereby McLeodUSA adopted the interconnection agreement between Qwest and Electric Lightwave, Inc. (the "ICA"). The ICA was filed with the Commission on December 1, 2000, and acknowledged by the Commission on December 19, 2000. A copy of the relevant portions of the Agreement are attached as Exhibit A and incorporated herein.

3. State commissions have the authority to interpret and enforce agreements they approve when post-approval disputes arise. *Michigan Bell Tel. Co. v. Strand*, 305 F.3d 580, 583 (6th Cir. 2002); *Michigan Bell Tel. Co. v. Climax Tel. Co.*, 202 F.3d 862, 868 (6th Cir.), *cert. denied*, 531 U.S. 816 (2000). This Commission is also authorized to remedy violations of the "Prohibited Acts" statute, ORS 759.455.

4. Thus, the Commission has clear jurisdiction to interpret the terms of the ICA as alleged herein.

5. In addition, the Commission has jurisdiction to consider this Petition pursuant to ORS § 756.040 and OAR § 860-011-0000(3) (making applicable to this Commission ORCP 79, authorizing issuance of temporary restraining orders and preliminary injunctions).

PARTIES

6. McLeodUSA is a competitive local exchange carrier certified to provide local exchange service [and intrastate interexchange service] in Oregon. Correspondence regarding this Petition should be sent to McLeodUSA at the following address:

William Courter
Assistant General Counsel
McLeodUSA Telecommunications Services, Inc.
6400 C Street, SW
Cedar Rapids, IA 52406

- and –

Mark Trinchero
DAVIS WRIGHT TREMAINE LLP
1300 SW Fifth Avenue, Suite 2300
Portland, OR 97201-5682

7. Qwest is an incumbent local exchange carrier certified to provide local exchange service [and intrastate interexchange service] in Oregon. Correspondence regarding this Petition should be sent to Qwest at:

Alex Duarte
Senior Attorney - Policy and Law
Qwest
421 Oak Street
Suite 810
Portland, Oregon 97204

STATEMENT OF FACTS

8. This dispute is about Qwest's attempt to demand a security deposit for services and facilities it provides to McLeodUSA under the terms of the ICA, even though the ICA does not allow Qwest to do so. This dispute is also about Qwest's attempt to ignore the dispute resolution provisions of the Interconnection Agreement and to take unilateral action to terminate service to McLeodUSA, to refuse to process orders for service by McLeodUSA, to terminate the ICA with McLeodUSA, and to effectively leave customers served by McLeodUSA stranded

without access to the public switched network and to customers served by carriers other than McLeodUSA. Action by this Commission is needed to compel Qwest to honor the terms of the ICA it executed with McLeodUSA and to continue to provide services and facilities to McLeodUSA.

9. Qwest's most recent conduct in violation of the ICA comes on the heels of other incidents of unlawful conduct by Qwest in violation of separate contracts with McLeodUSA and in violation of its own tariffs, which are currently the subject of litigation before federal courts in Iowa and Colorado. The substance of those disputes is explained in detail in the Opinion and Temporary Restraining Order granted by a federal judge on March 23, 2005, attached as Exhibit B. Although information regarding those disputes is not necessary to resolve this dispute, the background places Qwest's current conduct in context. McLeodUSA views Qwest's most recent attempt to extort funds from McLeodUSA in the guise of demanding a security deposit as an exercise of its monopoly power as the provider of essential services and facilities to McLeodUSA to coerce settlement of the certain claims now pending in federal court in Iowa and Colorado on terms unfavorable to McLeodUSA.

10. The issues pending in those cases are completely separate from the issues raised in this Complaint. Although Qwest tries to merge those issues with its rights under the ICA, the Commission must act to stop the ploy. At all times, McLeodUSA has performed all of its obligations under the ICA, has paid all invoices for services and facilities provided by Qwest under the ICA, and has otherwise complied in all respects with the terms and conditions of the ICA.

11. On March 21, 2005, McLeodUSA received fourteen (14) letters from Stephen G. Hansen, Vice President, Carrier Relations, Worldwide Wholesale Markets, Qwest

Communications, including one to James LeBlanc of McLeodUSA Telecom and Lauraine Harding of McLeodUSA, Inc., regarding the ICA in the state of Oregon ("Qwest Demand Letter"). A copy of the Qwest Demand Letter is attached as Exhibit C and incorporated herein.

12. In the Qwest Demand Letter, Qwest notified McLeodUSA that Qwest "requires a security deposit to continue the provisioning of services ordered by [McLeodUSA] under the Interconnection Agreement between the parties[.]" The basis for the demand was as follows:

> After investigation and review of McLeod's unsatisfactory creditworthiness, recent public statements of McLeodUSA concerning its financial condition, history of late payments, and outstanding balances under the Interconnection Agreement and other agreements, tariffs, or accounts, Qwest demands a deposit, based on two months' average total billings under the Interconnection Agreement in the State of Oregon, to safeguard Qwest's financial interests.

13. Qwest demanded a security deposit in the amount of $372,545.98 for the state of Oregon that must be received by 5:00 p.m. Mountain Standard Time on April 1, 2005. Similar amounts were demanded in thirteen (13) other states, so that the combined total of deposits that Qwest sought to collect from McLeodUSA within ten days from the date of the Qwest Demand Letter was $15,920,431.42.

14. The Qwest demand came with a specific threat if the money was not received by the deadline:

> Qwest will commence the process of terminating the Interconnection Agreement, suspending order activity, disconnecting services, and/or any other remedy available to it under law or equity in the State of Oregon.

15. The Qwest Demand Letter did not refer to any section of the ICA that gave Qwest the right to demand a security deposit. It did not refer to any section of the ICA that gave Qwest the right to suspend order activity, disconnect services, terminate the ICA, or seek any of the other relief identified. As McLeodUSA demonstrates below, the ICA does not permit Qwest to take any of the actions stated. Even if Qwest were permitted to demand a security deposit under

the ICA —and it is not—the only recourse available to Qwest for McLeodUSA's failure to comply with such a demand would be to invoke the Dispute Resolution provisions of the ICA.

16. On March 22, 2005, McLeodUSA responded to the Qwest Demand Letter and informed Qwest that, unless Qwest could identify with specificity the facts that satisfy the requirements for a security deposit, McLeodUSA rejected the Qwest demand. A copy of the McLeodUSA March 22, 2005 response is attached as Exhibit D and incorporated herein.

17. On March 24, 2005, McLeodUSA provided a second response the Qwest Demand Letter and notified Qwest that McLeodUSA was invoking the Dispute Resolution provisions of the ICA and designated Joseph Ceryanec, Group Vice President, Controller and Treasurer, as the McLeodUSA representative authorized to resolve the dispute. A copy of the McLeodUSA March 24, 2005 response is attached as Exhibit E and incorporated herein.

18. It is clear not only that Qwest's most recent demand for money has no basis in the ICA, but the remedy that Qwest seeks is also in complete disregard of the terms and conditions in the ICA .

19. The ICA applies only to those services specifically identified in the Agreement and related to the local competition provisions in the Act. In particular, the scope of the ICA is limited to unbundled network elements, interconnection facilities, reciprocal compensation arrangements, and resale of Qwest's retail services.

20. McLeodUSA has never been delinquent in payments to Qwest for services provided to McLeodUSA under the ICA. Services provided by Qwest under the ICA are invoiced separately from services provided under either Qwest's tariffs or the Wholesale

Services Agreement.[1] McLeodUSA is current on all invoices from Qwest for services provided under the ICA.

A. Qwest Has No Right To Demand A Security Deposit Under The Interconnection Agreement

21. Nothing in the ICA gives Qwest the right to demand a security deposit from McLeodUSA at this time. Section (A)3.4.3 of Part A of the General Terms provides Qwest's rights to a security deposit under certain conditions, but none of the conditions allowing Qwest to invoke those rights have been satisfied. First, Section (A)3.4.3 is a subsection of Section (A)3.4 titled "Payment." Section (A)3.4.1 defines the scope of Section (A)3.4: "Amounts payable under this Agreement are due and payable within thirty (30) calendar days after the date of invoice." (emphasis added) Thus, any rights to a security deposit under Section (A)3.4.3 are limited to security for payments made for services provided under the ICA. Therefore, Qwest is wrong to make the connection as it does in the Qwest Demand Letter that "outstanding balances under the Interconnection Agreement and other agreements, tariffs, or accounts," justify its demand that McLeodUSA provide Qwest with a security deposit. Section (A)3.4.3 does not grant rights to Qwest to demand a security deposit for payments under another agreement or under a Qwest tariff.

22. Section (A)3.4.3 provides as follows:

> [Qwest] will determine McLeod's credit status based on previous payment history with [Qwest] or credit reports such as Dun and Bradstreet. If McLeod has not established satisfactory credit with [Qwest] or if McLeod is repeatedly delinquent in making its payments, [Qwest] may require a deposit to be held as security for the payment of charges. "Repeatedly delinquent" means being thirty (30) calendar days or more delinquent for three (3) consecutive months.

23. Qwest fails to satisfy any of these conditions. Taking the second condition first,

[1] To the extent McLeodUSA has withheld payment as a defensive measure to counter Qwest's withholding of funds owed for McLeodUSA's provision of exchange access services, those withheld payments were for services provided either under the Qwest tariffs or under a separate Wholesale Services Agreement. See Exhibit B at 5.

Qwest does not allege, and could certainly not prove, that McLeodUSA has been "repeatedly delinquent" on any payments under the ICA. As stated above, McLeodUSA is current on all invoices for services provided by Qwest under the ICA.

24. The other condition that if satisfied would permit Qwest to demand a security deposit is whether McLeodUSA has established "satisfactory credit" with Qwest. The previous sentence of the section defines what determines McLeodUSA's credit status and what constitutes "satisfactory credit": previous payment history by McLeodUSA or credit reports such as Dun and Bradstreet. As stated above, McLeodUSA is current on all invoices for services provided by Qwest under the Interconnection Agreement, and has paid all previous invoices from Qwest in a timely fashion. Therefore, McLeodUSA's "previous payment history" under the ICA is stellar. As for "credit reports such as Dun and Bradstreet," reliance on these reports was clearly intended to be a substitute in the absence of a previous payment history. Since McLeodUSA has established an exemplary history of payments under the ICA, there is no basis to refer to any other source to determine McLeodUSA's creditworthiness.

25. Section (A)3.4.5 does not permit Qwest to demand a security deposit at this time either. It provides, "[Qwest] may review McLeod's credit standing and modify the amount of deposit required." This provision permits Qwest to modify the amount collected as a security deposit, but only if Qwest first has the right to demand a security deposit. Because Qwest does not have that right, Section (A)3.4.5 is not applicable.

B. Even If Qwest Were Permitted To Demand A Security Deposit From McLeodUSA, Failure To Pay The Security Deposit Only Triggers The Default Provisions Of The Agreement

26. As demonstrated above, Qwest has no right under the ICA to demand a security deposit from McLeodUSA at this time. Even if Qwest had the right to demand a security

deposit, failure by McLeodUSA to pay the security deposit triggers only the default provisions of the Agreement and does not permit Qwest to "suspend order activity" or "disconnect services" as Qwest has threatened to do.

27. If Qwest were to have the right to demand a security deposit from McLeodUSA, and McLeodUSA were to fail to comply with the Qwest demand, McLeodUSA's conduct could constitute a "default in the payment of any amount due" under the ICA. Section (A) 3.13 of the Agreement provides the remedy available to Qwest in the event of a default. First, Qwest must provide McLeodUSA with written notice of the default. Obviously, such notice cannot be provided prior to the date of default because there would have been no default prior to the deadline for performance. Therefore, assuming Qwest has the right to demand payment of a security deposit by April 1, 2005, and assuming McLeodUSA were not to comply with the demand, Qwest would be obligated to provide written notice of default to McLeodUSA on or after April 1, 2005.

28. McLeodUSA then would have thirty (30) days to cure the default. If McLeodUSA were to not cure the default within thirty days, the ICA permits Qwest only to seek relief in accordance with the Dispute Resolution provisions. In no situation does a "default in the payment of any amount due" under the Agreement permit Qwest to "suspend order activity," "disconnect services," or even terminate the ICA.

C. Qwest Is Obligated To Follow The Dispute Resolution Provisions Of The Interconnection Agreement In The Event Of A Default

29. In the event of a "default in the payment of any amount due" under the ICA, written notice by Qwest, and a McLeodUSA failure to cure the default in a timely manner, Qwest would be obligated to follow the dispute resolution provisions of the ICA.

30. Informal dispute resolution is a prerequisite to formal dispute resolution, and

informal dispute resolution is initiated by written request. Section (A) 3.17.1 of the ICA requires the parties to designate an employee to review and resolve the dispute. If at the end of sixty (60) days, the dispute has not been resolved, the ICA requires the parties to designate an employee at no less than the level of a Vice President to meet and negotiate resolution of the dispute. Section (A)3.17.1. The parties are required to negotiate a resolution of the dispute for at least thirty (30) days. If the parties are unable to resolve the dispute within thirty days, then either party may seek court intervention, or if both parties consent, arbitration. Sections (A) 3.17.2 and .3. Nothing in the dispute resolution provisions permits Qwest to short-circuit the dispute resolution process by "suspending order activity" or "disconnecting services" prior to a decision by either the court reviewing the dispute, or the designated arbitrator.

31. Based on the foregoing, it is clear that Qwest does not have the right under the ICA to demand a security deposit from McLeodUSA at this time. Even if Qwest were to have such a right, and if McLeodUSA were not to comply with the demand, Qwest would be required to follow the dispute resolution provisions of the ICA. Nothing in the ICA permits Qwest to take the actions that Qwest has threatened to take, namely "suspend order activity" or "disconnect services."

REQUESTED RELIEF

32. McLeodUSA asks the Commission to open a contested case proceeding based on this Petition and, following such hearings or procedures to which the Parties may be entitled, rule that Qwest may not demand a security deposit from McLeodUSA at this time. McLeodUSA further requests that in the event of a default under the Interconnection Agreement, Qwest must follow the dispute resolution provisions in the ICA and may not "suspend order activity,"

"disconnect services," or terminate the ICA until those dispute resolution procedures have been completed.

DATED this 30th day of March, 2005.

Respectfully submitted,

Mark Trinchero
DAVIS WRIGHT TREMAINE LLP
1300 SW Fifth Avenue, Suite 2300
Portland, OR 97201-5682
Telephone: (503) 241-2300
Facsimile: (503) 778-5299
E-mail: marktrinchero@dwt.com

ATTORNEYS FOR MCLEODUSA
TELECOMMUNICATIONS SERVICES, INC.

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing "COMPLAINT OF MCLEODUSA TELECOMMUNICATIONS SERVICES, INC., FOR ENFORCEMENT OF INTERCONNECTION AGREEMENT WITH QWEST CORPORATION AND FOR VIOLATION OF ORS 759.455" upon the parties named on the attachment.

I further certify that said copies were placed in sealed envelopes addressed to said partys'/attorneys' last known addresses as shown and deposited in the United States Mail at Portland, Oregon, and that the postage thereon was prepaid.

DATED this 30th day of March, 2005.

DAVIS WRIGHT TREMAINE LLP

By: Mark P. Trinchero by D. Reed
Mark P. Trinchero
Attorney for McLeodUSA

SERVICE LIST
McLeod Complaint

ALEX M DUARTE
QWEST CORPORATION
421 SW OAK ST STE 810
PORTLAND OR 97204
alex.duarte@qwest.com

provision of this Agreement. The failure of either Party to enforce any of the provisions of this Agreement or the waiver thereof in any instance shall not be construed as a general waiver or relinquishment on its part of any such provision, but the same shall, nevertheless, be and remain in full force and effect.

(A)3.14 Disclaimer of Agency

Except for provisions herein expressly authorizing a Party to act for another, nothing in this Agreement shall constitute a Party as a legal representative or agent of the other Party, nor shall a Party have the right or authority to assume, create or incur any liability or any obligation of any kind, express or implied, against or in the name or on behalf of the other Party unless otherwise expressly permitted by such other Party. Except as otherwise expressly provided in this Agreement, no Party undertakes to perform any obligation of the other Party whether regulatory or contractual, or to assume any responsibility for the management of the other Party's business.

(A)3.15 Nondisclosure

(A)3.15.1 All information, including but not limited to specifications, microfilm, photocopies, magnetic disks, magnetic tapes, drawings, sketches, models, samples, tools, technical information, data, employee records, maps, financial reports, and market data, (i) furnished by one Party to the other Party dealing with end user specific, facility specific, or usage specific information, other than end user information communicated for the purpose of providing directory assistance or publication of directory database, or (ii) in written, graphic, electromagnetic, or other tangible form and marked at the time of delivery as "Confidential" or "Proprietary", or (iii) communicated and declared to the receiving Party at the time of delivery, or by written notice given to the receiving Party within ten (10) calendar days after delivery, to be "Confidential" or "Proprietary" (collectively referred to as "Proprietary Information"), shall remain the property of the disclosing Party. A Party who receives Proprietary Information via an oral communication may request written confirmation that the material is Proprietary Information. A Party who delivers Proprietary Information via an oral communication may request written confirmation that the Party receiving the information understands that the material is Proprietary Information.

(A)3.15.2 Upon request by the disclosing Party, the receiving Party shall return all tangible copies of Proprietary Information, whether written, graphic or otherwise, except that the receiving Party may retain one copy for archival purposes.

(A)3.15.3 Each Party shall keep all of the other Party's Proprietary Information confidential and shall use the other Party's Proprietary Information

any mark anywhere in the world which is identical or confusingly similar to the Marks or which is so similar thereto as to constitute a deceptive colorable imitation thereof or to suggest or imply some association, sponsorship, or endorsement by the Owners. The Owners make no warranties regarding ownership of any rights in or the validity of the Marks.

(A)3.11 Warranties

NOTWITHSTANDING ANY OTHER PROVISION OF THIS AGREEMENT, THE PARTIES AGREE THAT NEITHER PARTY HAS MADE, AND THAT THERE DOES NOT EXIST, ANY WARRANTY, EXPRESS OR IMPLIED, INCLUDING BUT NOT LIMITED TO WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE.

(A)3.12 Assignment

(A)3.12.1 Neither Party may assign or transfer (whether by operation of law or otherwise) this Agreement (or any rights or obligations hereunder) to a third party without the prior written consent of the other Party. Notwithstanding the foregoing, either Party may assign or transfer this Agreement to a corporate affiliate or an entity under its common control. If ELI's assignee or transferee has an Interconnection agreement with USW, the Parties shall meet and negotiate the resolution of conflicts and discrepancies between the assignee's or transferee's Interconnection agreement and this Agreement. To the extent the Parties cannot agree to a resolution, the Dispute Resolution provisions shall apply. Any attempted assignment or transfer that is not permitted is void ab initio. Without limiting the generality of the foregoing, this Agreement shall be binding upon and shall inure to the benefit of the Parties' respective successors and assigns. Nothing in the foregoing is intended to alter ELI's rights pursuant to Section 252(i) of the Telecommunications Act as set forth Section (A)3.33.

(A)3.12.2 Without limiting the generality of the foregoing subsection, any merger, dissolution, consolidation or other reorganization of ELI, or any sale, transfer, pledge or other disposition by ELI of securities representing more than 50% of the securities entitled to vote in an election of ELI's board of directors or other similar governing body, or any sale, transfer, pledge or other disposition by ELI of substantially all of its assets, shall be deemed a transfer of control.

(A)3.13 Default

If either Party defaults in the payment of any amount due hereunder, or if either Party violates any other material provision of this Agreement, and such default or violation shall continue for thirty (30) calendar days after written notice thereof, the other Party may seek relief in accordance with the Dispute Resolution

(A)3.20 Responsibility for Environmental Contamination

Neither Party shall be liable to the other for any costs whatsoever resulting from the presence or release of any environmental hazard that either Party did not introduce to the affected work location. Both Parties shall defend and hold harmless the other, its officers, directors and employees from and against any losses, damages, claims, demands, suits, liabilities, fines, penalties and expenses (including reasonable attorneys' fees) that arise out of or result from (i) any environmental hazard that the indemnifying Party, its contractors or agents introduce to the work locations or (ii) the presence or release of any environmental hazard for which the indemnifying Party is responsible under applicable law.

(A)3.21 Notices

Any notices required by or concerning this Agreement shall be sent to the Parties at the addresses shown below:

USW
Director - Interconnect
1801 California, Room 2410
Denver, CO 80202

With copy to:
U S WEST Law Department
Attention: General Counsel, Interconnection
1801 California Street, 49th Floor
Denver, CO 80202

ELI
Government and Industry Affairs
4400 N.E. 77th Avenue
Vancouver WA, 98662

Each Party shall inform the other of any changes in the above addresses.

(A)3.22 Responsibility of Each Party

Each Party is an independent contractor, and has and hereby retains the right to exercise full control of and supervision over its own performance of its obligations under this Agreement and retains full control over the employment, direction, compensation and discharge of all employees assisting in the performance of such obligations. Each Party will be solely responsible for all matters relating to payment of such employees, including compliance with social security taxes, withholding taxes and all other regulations governing such matters. Each Party will be solely responsible for proper handling, storage, transport and disposal at its own expense of all (i) substances or materials that it or its contractors or agents bring to, create or assume control over at work locations or, (ii) waste resulting therefrom or otherwise generated in connection

resolved by arbitration. Such an arbitration proceeding shall be conducted by a single arbitrator, knowledgeable about the telecommunications industry. The arbitration proceedings shall be conducted under the then current rules of the American Arbitration Association ("AAA"). The Federal Arbitration Act, 9 U.S.C. Sections 1-16, not state law, shall govern the arbitrability of the Dispute. The arbitrator shall not have authority to award punitive damages. All expedited procedures prescribed by the AAA rules shall apply. The arbitrator's award shall be final and binding and may be entered in any court having jurisdiction thereof. Each Party shall bear its own costs and attorneys' fees, and shall share equally in the fees and expenses of the arbitrator. The arbitration proceedings shall occur in the Denver, Colorado metropolitan area. It is acknowledged that the Parties, by mutual, written agreement, may change any of these arbitration practices for a particular, some, or all Dispute(s).

(A)3.17.4 Should it become necessary to resort to court proceedings to enforce a Party's compliance with the dispute resolution process set forth herein, and the court directs or otherwise requires compliance herewith, then all of the costs and expenses, including its reasonable attorney fees, incurred by the Party requesting such enforcement shall be reimbursed by the non-complying Party to the requesting Party.

(A)3.17.5 Nothing in this Section is intended to divest or limit the jurisdiction and authority of the Commission or the Federal Communications Commission as provided by state or federal law.

(A)3.17.6 No Dispute, regardless of the form of action, arising out of this Agreement, may be brought by either Party more than two (2) years after the cause of action accrues.

(A)3.18 Controlling Law

This Agreement was negotiated by the Parties in accordance with the terms of the Act and the laws of the state where service is provided hereunder. It shall be interpreted solely in accordance with the terms of the Act and the applicable state law in the state where the service is provided.

(A)3.19 Joint Work Product

This Agreement is the joint work product of the Parties and has been negotiated by the Parties and their respective counsel and shall be fairly interpreted in accordance with its terms and, in the event of any ambiguities, no inferences shall be drawn against either Party.

only in connection with this Agreement. Neither Party shall use the other Party's Proprietary Information for any other purpose except upon such terms and conditions as may be agreed upon between the Parties in writing.

(A)3.15.4 Unless otherwise agreed, the obligations of confidentiality and non-use set forth in this Agreement do not apply to such Proprietary Information as:

(A)3.15.4.1 was at the time of receipt already known to the receiving Party free of any obligation to keep it confidential evidenced by written records prepared prior to delivery by the disclosing Party; or

(A)3.15.4.2 is or becomes publicly known through no wrongful act of the receiving Party; or

(A)3.15.4.3 is rightfully received from a third person having no direct or indirect secrecy or confidentiality obligation to the disclosing Party with respect to such information; or

(A)3.15.4.4 is independently developed by an employee, agent, or contractor of the receiving Party which individual is not involved in any manner with the provision of services pursuant to the Agreement and does not have any direct or indirect access to the Proprietary Information; or

(A)3.15.4.5 is disclosed to a third person by the disclosing Party without similar restrictions on such third person's rights; or

(A)3.15.4.6 is approved for release by written authorization of the disclosing Party; or

(A)3.15.4.7 is required to be made public by the receiving Party pursuant to applicable law or regulation provided that the receiving Party shall give sufficient notice of the requirement to the disclosing Party to enable the disclosing Party to seek protective orders.

(A)3.15.5 Nothing herein is intended to prohibit a Party from supplying factual information about its network and Telecommunications Services on or connected to its network to regulatory agencies including the Federal Communications Commission and the Commission so long as any confidential obligation is protected.

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(A)3.15.6 Effective Date Of This Section. Notwithstanding any other provision of this Agreement, the Proprietary Information provisions of this Agreement shall apply to all information furnished by either Party to the other in furtherance of the purpose of this Agreement, even if furnished before the date of this Agreement.

(A)3.16 Survival

Any liabilities or obligations of a Party for acts or omissions prior to the cancellation or termination of this Agreement; any obligation of a Party under the provisions regarding indemnification, Confidential or Proprietary Information, limitations of liability, and any other provisions of this Agreement which, by their terms, are contemplated to survive (or to be performed after) termination of this Agreement, shall survive cancellation or termination hereof.

(A)3.17 Dispute Resolution

(A)3.17.1 If any claim, controversy or dispute between the Parties, their agents, employees, officers, directors or affiliated agents should arise, and the Parties do not resolve it in the ordinary course of their dealings (the "Dispute"), then it shall be resolved in accordance with the dispute resolution process set forth in this Section. Each notice of default, unless cured within the applicable cure period, shall be resolved in accordance herewith.

(A)3.17.2 At the written request of either Party, and prior to any other formal dispute resolution proceedings, each Party shall designate an employee to review and resolve the dispute. If at the end of sixty (60)] calendar days the dispute has not been resolved to both parties satisfaction, the dispute shall be given over to an officer-level employee, at no less than the vice president level, to review, meet, and negotiate, in good faith, to resolve the Dispute. The Parties intend that these negotiations be conducted by non-lawyer, business representatives, and the locations, format, frequency, duration, and conclusions of these discussions shall be at the discretion of the representatives. By mutual agreement, the representatives may use other procedures, such as mediation, to assist in these negotiations. The discussions and correspondence among the representatives for the purposes of these negotiations shall be treated as Confidential Information developed for purposes of settlement, and shall be exempt from discovery and production, and shall not be admissible in any subsequent arbitration or other proceedings without the concurrence of both of the Parties.

(A)3.17.3 If the vice-presidential level representatives have not reached a resolution of the Dispute within thirty (30) calendar days after the matter is referred to them, then either Party may seek legal or regulatory intervention as provided by state or federal law. Alternatively, with mutual consent of the Parties, a dispute may be

three (3) consecutive months. The deposit may not exceed the estimated total monthly charges for a two (2) month period. The deposit may be a surety bond, a letter of credit with terms and conditions acceptable to USW or some other form of mutually acceptable security such as a cash deposit. Required deposits are due and payable within ten (10) calendar days after demand in accordance with Commission requirements.

(A)3.4.4 Interest will be paid on cash deposits at the rate applying to deposits under applicable Commission rules, regulations, or Tariffs. Cash deposits and accrued interest will be credited to the appropriate Party's account or refunded, as appropriate, upon the earlier of the termination of this Agreement or the establishment of satisfactory credit, which will generally be one full year of timely payments in full by ELI. The fact that a deposit has been made does not relieve either Party from any requirements of this Agreement.

(A)3.4.5 Either Party may review the others credit standing and modify the amount of deposit required.

(A)3.4.6 The late payment charge for amounts that are billed under this Agreement and not paid by the due date shall be, unless otherwise specified in this agreement:

i. 0.0003 per day compounded daily for the number of calendar days from the payment due date to, and including, the date payment is made, that would result in an annual percentage rate of 12% or

ii. the highest lawful rate, whichever is less.

If late payment charges for services are not permitted by local jurisdiction, this provision shall not apply.

(A)3.5 Taxes

Each Party purchasing services hereunder shall pay or otherwise be responsible for all federal, state, or local sales, use, excise, gross receipts, transaction or similar taxes, fees or surcharges levied against or upon such purchasing Party (or the providing Party when such providing Party is permitted to pass along to the purchasing Party such taxes, fees or surcharges), except for any tax on either Party's corporate existence, status or income. Whenever possible, these amounts shall be billed as a separate item on the invoice. To the extent a sale is claimed to be for resale tax exemption, the purchasing Party shall furnish the providing Party a proper resale tax exemption certificate as authorized or required by statute or regulation by the jurisdiction providing said resale tax exemption. Until such time as a resale tax exemption certificate is provided, no exemptions will be applied.

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disputed issues and to approve a new interconnection agreement consistent with the results of the arbitration so that the Parties will have an effective interconnection/resale agreement.

(A)3.3 Proof of Authorization

Where so indicated in specific sections of this Agreement, each Party shall be responsible for obtaining and having in its possession Proof of Authorization ("POA"). POA shall consist of documentation acceptable to the end user's selection. Such selection may be obtained in the following ways:

(A)3.3.1 The end user's written Letter of Authorization.

(A)3.3.2 The end user's electronic authorization by use of an 8XX number.

(A)3.3.3 The end user's oral authorization verified by an independent third party (with third party verification as POA).

(A)3.4 Payment

(A)3.4.1 Amounts payable under this Agreement are due and payable within thirty (30) calendar days after the date of invoice.

(A)3.4.2 Should either Party dispute, in good faith, any portion of the monthly billing under this Agreement, the disputing Party will notify the other in writing within forty-five (45) calendar days of the receipt of such billing, identifying the amount, reason and rationale of such dispute. Notwithstanding the foregoing, all payments shall be made in accordance with (A)3.4.1. Both ELI and USW agree to expedite the investigation of any disputed amounts in an effort to resolve and settle the dispute prior to initiating any other rights or remedies. Should the dispute be resolved in a manner requiring a refund, reimbursement will include the resolved amount plus interest from the date payment was due. The amount of interest will be calculated using the late payment factor that would have applied to such amount had it not been paid on time. Similarly, in the event payment was withheld for a disputed charge, and upon resolution of the matter it is determined that such payments should have been made, the resolved amount is to be paid with interest on the withheld amount, subject to the above provisions.

(A)3.4.3 Both Parties will determine the credit status of the other Party based on previous payment history or credit reports such as Dun and Bradstreet. If either Party has not established satisfactory credit with the other Party or is repeatedly delinquent in making its payments, the other Party may require a deposit to be held as security for the payment of charges. "Repeatedly delinquent" means being thirty (30) calendar days or more delinquent for

of service to other carriers or to either Party's end users, and each Party may discontinue or refuse service if the other Party violates this provision. Upon such violation, either Party shall provide the other Party notice of such violation at the earliest practicable time.

(A)3.1.4 Each Party is solely responsible for the services it provides to its end users and to other Telecommunications Carriers.

(A)3.1.5 The Parties shall work cooperatively to minimize fraud associated with third-number billed calls, calling card calls, and any other services related to this Agreement.

(A)3.1.6 Nothing in this Agreement shall prevent either Party from seeking to recover the costs and expenses, if any, it may incur in (a) complying with and implementing its obligations under this Agreement, the Act, and the rules, regulations and orders of the FCC and the Commission, and (b) the development, modification, technical installation and maintenance of any systems or other infrastructure which it requires to comply with and to continue complying with its responsibilities and obligations under this Agreement.

(A)3.2 Term of Agreement

This Agreement shall become effective upon Commission approval, pursuant to Sections 251 and 252 of the Act, and shall continue in force and effect until terminated by either Party providing one hundred sixty (160) days written notice of termination to the other Party; provided, however, that such notice of termination shall not be given prior to three (3) years from Commission approval minus one hundred and sixty (160) days. The day the notice is served will determine the starting point for a 160 day negotiation period (in accordance with 252(b)(1) of the Act).

(A)3.2.1 If the Parties are unable to negotiate a new agreement following provision of the one hundred and sixty (160) day notice of termination, the window of opportunity to file for arbitration to resolve outstanding contractual issues in accordance with the Act will end on the termination date specified in the notice and an arbitration petition will have to be filed.

(A)3.2.2 If the Parties are able to reach agreement, this Agreement shall continue for the brief period of time needed to secure the Commission's approval of an adoption or a new interconnection/resale agreement. In the case of Section (A)3.2.1, this Agreement will expire on the termination date specified in the one hundred and sixty (160) day notice referenced above unless a petition for arbitration has been filed, but if such a petition has been filed then this Agreement shall continue for the brief period necessary for the Commission to act and resolve the

Telecommunications Carrier shall be treated as a common carrier under the Act only to the extent that it is engaged in providing Telecommunications Services, except that the Federal Communications Commission shall determine whether the provision of fixed and mobile satellite service shall be treated as common carriage.

(A)2.58 "Telecommunications Services" means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.

(A)2.59 "Wire Center" denotes a building or space within a building, that serves as an aggregation point on a given carrier's network, where transmission facilities are connected or switched. Wire Center can also denote a building where one or more Central Offices, used for the provision of Basic Exchange Telecommunications Services and Access Services, are located. However, for purposes of Collocation service, Wire Center shall mean those points eligible for such connections as specified in the FCC Docket No. 91-141, and rules adopted pursuant thereto.

(A)2.60 "xDSL" refers to a set of service enhancing copper technologies, including but not limited to Asymmetric Digital Subscriber Loop (ADSL), High Bit Rate, or Hybrid Digital Subscriber Loop (HDSL) and Integrated Digital Subscriber Loop (IDSL), that are designed to provide digital communications services over copper loops, either in addition to or instead of normal analog voice service. xDSL Loops means Loops that have been conditioned, if necessary, and at the appropriate charge if any, by USW to carry the appropriate xDSL signals.

(A)2.61 Terms not otherwise defined here, but defined in the Act shall have the meaning defined there. Where a term is defined in the regulations implementing the Act but not in this Agreement, unless the context requires otherwise, the Parties intend to adopt the definition as set forth in said regulations.

(A)3. TERMS AND CONDITIONS

(A)3.1 General Provisions

(A)3.1.1 Each Party shall use its best efforts to comply with the Implementation Schedule provisions that will be mutually agreed upon by the Parties.

(A)3.1.2 The Parties are each solely responsible for participation in and compliance with national network plans, including the National Network Security Plan and the Emergency Preparedness Plan.

(A)3.1.3 Neither Party shall use any service related to or use any of the services provided in this Agreement in any manner that interferes with other persons in the use of their service, prevents other persons from using their service, or otherwise impairs the quality

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

MCLEODUSA TELECOMMUNICATIONS SERVICES, INC., Plaintiff, vs. QWEST CORPORATION and QWEST COMMUNICATIONS CORPORATION, Defendants.	No. C 05-0039-MWB **MEMORANDUM OPINION AND ORDER REGARDING PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER And TEMPORARY RESTRAINING ORDER**

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This is one of two lawsuits arising from a payment dispute between telecommunications companies, plaintiff McLeodUSA Telecommunications Services, Inc., and defendants Qwest Corporation and Qwest Communications Corporation. These parties provide each other with various services for initiation or completion of intrastate, interstate, wireless, wire-line, long-distance, and "toll free" (8YY) calls to and from each other's customers. Although the parties held litigation at bay pursuant to a standstill agreement, that agreement expired on February 23, 2005, and both McLeodUSA and Qwest Communications Corporation have filed lawsuits, McLeodUSA's in this court, and Qwest's in Colorado. In this action, McLeodUSA has now moved for a temporary restraining order or preliminary injunction to maintain the *status quo* pending judicial or other resolution of the parties' dispute.

I. INTRODUCTION

A. Factual Background

To understand the dispute leading to McLeodUSA's request for a temporary restraining order, a brief discussion of trade terminology and the relationship between the parties is necessary. This background is drawn primarily from McLeodUSA's Complaint, to which no answer has yet been filed, and the documents in support of McLeodUSA's motion for a temporary restraining order or preliminary injunction.

The Telecommunications Act of 1996, 47 U.S.C. § 151, *et seq.*, subdivided local telephone companies (or "local exchange carriers") into two different groups: the former monopoly local telephone companies, which are termed incumbent local exchange carriers ("ILECs"), and new entrants to the local market, which are called competitive local exchange carriers ("CLECs"). *See* Richard E. Wiley, *et al.*, *Communications Law 2004: Contentious Times in a Shifting Landscape*, 813 PLI/Pat 287, 300 (December 2004) (discussing telecommunications technology following passage of the 1996 Act). McLeodUSA is a CLEC. Among other things, McLeodUSA provides access service to various customers, including long distance carriers (technically known as interexchange carriers ("IXCs")) and wireless carriers (technically known as commercial mobile radio service carriers ("CMRS")). Defendant Qwest Corporation is an ILEC and Qwest Communications Corporation is an IXC providing long distance telephone services, including toll free services, to customers throughout the United States.

When a customer of a CMRS (wireless carrier) calls an IXC's (long distance carrier) customer, the CMRS must connect to the Public Switched Telephone Network ("PSTN"). The CMRS can *choose* to connect to the PSTN through either an ILEC or a CLEC. Therefore, as a CLEC, McLeodUSA would provide a means by which a CMRS can access the PSTN. When a CMRS customer that has chosen McLeodUSA to connect to the PSTN places a call, the call is routed through McLeodUSA's facilities to the IXC (long distance carrier).

A "toll free" call is a call in which the IXC's customer ("toll free customer") is the person called. This "toll free customer" is assigned an 8YY area code number—and calls to "toll free customers" are termed "8YY traffic." In the case of 8YY traffic, the "toll free customer" has agreed with the IXC to pay the IXC for the incoming call, typically at a set rate per minute. In such instances, the IXC is obligated to pay McLeodUSA for the

access that enabled the toll free call to reach the IXC, and hence, ultimately reach the "toll free customer." Where the call originates from a wireless telephone, the call is routed from the CMRS's Mobile Telecommunications Switching Office ("MTSO") to a McLeodUSA facility (or "trunk") which connects the CMRS's MTSO to the McLeodUSA PSTN switch. If the call is a toll free call, the call is routed through McLeodUSA, and then, at the IXC's option, either directly to the IXC whose customer is being called or indirectly through the ILEC.

In this competitive market, McLeodUSA provides financial incentives to CMRSs and institutions (i.e. hotels, colleges, airports) in order to encourage them to do business with McLeodUSA rather than the incumbent ILEC. In return for an agreement of CMRSs or institutions to connect via McLeodUSA's facilities, McLeodUSA provides them a commission based on revenues McLeodUSA receives from providing access services to IXCs in connection with 8YY traffic direct to the IXC's customers. Therefore, in order to meet its contractual obligations with CMRSs committed to using McLeodUSA to connect, McLeodUSA bills and collects access charges for providing access services to IXCs in connection with the completion of long distance calls from the customers of other carriers to an IXC's toll free customers, including 8YY wireless calls.

McLeodUSA alleges that it has been providing both interstate and intrastate access service to Qwest for years under federal and state tariffs or implied contracts. Complaint, Doc. No. 2, at ¶ 14. During that time, McLeodUSA has billed Qwest for inter- and intrastate access charges on a regular basis. Qwest paid these bills without objection until payment was due for access services billed in April 2004. Qwest refused to pay McLeodUSA for any access services, both provided under tariff and implied contract, billed by McLeodUSA during April and May of 2004. Qwest contends that McLeodUSA has improperly inserted itself as the "originator" of certain wireless calls and has

improperly, or fraudulently, claimed origination access fees for wireless customers by billing Qwest as if McLeodUSA were actually the originator of the calls. For access services billed by McLeodUSA from June 2004 through November 2004, Qwest refused to pay approximately 50% of each bill. McLeodUSA contends the total amount billed, but unpaid, is approximately $5.5 million.

Since June 19, 2001, Qwest Communications Corporation has provided McLeodUSA with certain services pursuant to a Wholesale Services Agreement. Additionally, Qwest Communications Corporation provides certain services to McLeodUSA pursuant to tariff. Qwest bills McLeodUSA for the services that it provides both under the Wholesale Services Agreement and pursuant to tariff. When the parties failed to come to some agreement regarding Qwest's withholding of payment to McLeodUSA, on about September 30, 2004, McLeodUSA began to withhold amounts billed to it pursuant to the Wholesale Services Agreement. From September 30, 2004, through November 2004, McLeodUSA withheld approximately $3.8 million in payment due to Qwest in order to set-off the $5.5 million McLeodUSA alleges it was owed by Qwest.

In December 2004, McLeodUSA and Qwest entered into a standstill agreement by which they agreed to stop the withholding of payments from one another at least until the agreement expired on February 23, 2005. McLeodUSA alleges that, should Qwest resume withholding payments for McLeodUSA's services, it would impair McLeodUSA's cash flow to the point that it will threaten McLeodUSA's ability to continue providing services to its other customers, including residential consumers and small businesses. Upon the expiration of the standstill agreement, Qwest filed suit in Colorado state court, and McLeodUSA filed the present lawsuit in this federal court. McLeodUSA has since removed the Colorado action to Colorado federal court.

On March 18, 2005, in a letter to McLeodUSA on Qwest Communications letterhead, authored by Steven Hansen—identified as "Vice President-Carrier Relations, Worldwide Wholesale Markets"—Qwest asserted that McLeodUSA was in default of its payment obligations to Qwest, that McLeodUSA had failed to provide a previously requested security amount of $900,000.00 dollars, and that unless payment of both the past due amount of $836,083.72 and the $900,000.00 security deposit was made by 5:00 p.m. Mountain Standard Time on March 23, 2005, Qwest might immediately terminate the services it provides to McLeodUSA under the Wholesale Services Agreement. Motion for Temporary Restraining Order and/or Preliminary Injunction, Doc. No. 24, Exhibit D.

A second letter from Qwest to McLeodUSA, also dated March 18, 2005, and authored by Steven Hansen, stated that McLeodUSA continued to be in default for payment to Qwest for tariffed services and that the past due amount was $287,207.94. This letter demanded immediate payment of the past due amount, and stated that "Qwest will suspend order activity and/or disconnect the referenced services if payment on the past due amount is not made within five (5) calendar days." Motion for Temporary Restraining Order and/or Preliminary Injunction, Doc. No. 24, Exhibit E. This letter also stated that McLeodUSA failed to provide Qwest with a $2,852,944.00 security deposit, which Qwest previously demanded be posted by November 29, 2004. Qwest, therefore, contended in the letter that it "may suspend order activity and/or disconnect the referenced services if payment on the past due amount is not made within thirty (30) calendar days." *Id.* The letter stated, further, that McLeodUSA would not receive any further notice prior to suspension of tariffed services, and that if tariffed services are suspended, Qwest would require full payment of all outstanding charges, the payment of late fees, *and* the posting of the security deposit before restoring services. *Id.*

In an affidavit submitted by McLeodUSA, McLeodUSA avers that it received the two letters discussed just above on Monday, March 21, 2005.

B. Procedural Background

On February 24, 2005, Qwest Communications Corporation, one of the defendants in this matter, filed an action against McLeodUSA in the District Court, City and County of Denver, Colorado. Qwest Corporation, which is a party to McLeodUSA's lawsuit in this court, is not a party to the lawsuit in Colorado. McLeodUSA has since removed that action to the United States District Court for the District of Colorado ("Colorado Action") (Doc. No. 25). McLeodUSA has also represented that it will, on or about March 23, 2005, file a motion to dismiss the Colorado Action, or to transfer the Colorado Action to Iowa. McLeodUSA also represents that it has advised the Qwest defendants of its intent to move to dismiss the Colorado Action.

On February 25, 2005, McLeodUSA filed its own Complaint in this court alleging the following eight causes of action: (1) declaratory judgment that McLeodUSA has not breached its payment obligations to Qwest; (2) breach of contract and/or tariff; (3) breach of implied contract under the constructive ordering doctrine; (4) action on open account; (5) breach of implied contract based on quantum meruit; (6) unjust enrichment; (7) prima facie tort under the Restatement (Second) of Torts § 870; and (8) declaratory judgment that Qwest is in breach of its contract to pay McLeodUSA for access services. *See* Complaint, Doc. No. 2. In its Statement Of Pendency Of Colorado Action, McLeodUSA avers that this lawsuit was filed less than twenty-four hours after Qwest Communication Corporation filed the Colorado Action. Qwest requested, and was granted, an extension of time until April 20, 2005, in which to file an answer to McLeodUSA's Complaint. (Doc. Nos. 10 & 11).

On March 22, 2005, McLeodUSA filed four documents with the court: (1) a First Amended and Verified Complaint (Doc. No. 21); (2) the Affidavit of Todd M. Lechtenberg ("Lechtenberg Affidavit") (Doc. No. 23); (3) a Motion for Temporary Restraining Order And/Or Preliminary Injunction and accompanying supportive memorandum (Doc. No. 24); and (4) Plaintiff's Statement of Pendency of Colorado Action (Doc. No. 25). In essence, McLeodUSA's Motion for Temporary Restraining Order And/Or Preliminary Injunction requests the court prevent Qwest from terminating its services to McLeodUSA as threatened by the March 18, 2005, letters.

The court heard telephonic oral argument on McLeodUSA's Motion for Temporary Restraining Order And/Or Preliminary Injunction on March 23, 2005. At the hearing, McLeodUSA was represented by Ky Elaine Kirby, who argued the motion, and Richard M. Rindler of Swidler, Berlin, Shereff, Friedman, L.L.P., in Washington, D.C., and by local counsel Diane Kutzko and Richard S. Fry of Shuttleworth & Ingersoll in Cedar Rapids, Iowa. Qwest Corporation and Qwest Communications Corporation were represented by Amy L. Benson of Brownstein, Hyatt & Farber, P.C., in Denver, Colorado, who argued the motion, and by local counsel Dennis Wayne Johnson and Sheila K. Tipton of Dorsey & Whitney in Des Moines, Iowa, and Qwest's in-house counsel Kevin Magnusson, Doug Shiao, and Lauren Schmidt. The arguments were lively and informative. The court must now provide expedited consideration to McLeodUSA's request for a temporary restraining order.

II. LEGAL ANALYSIS

A. Standards For A Temporary Restraining Order

As this court explained in past cases, it is well-settled in this circuit that applications for preliminary injunctions and temporary restraining orders[1] are generally measured against the standards set forth in *Dataphase Sys., Inc. v CL Sys., Inc.*, 640 F.2d 109, 113 (8th Cir. 1981) (*en banc*). *See Doctor John's, Inc. v. City of Sioux City, Iowa*, 305 F. Supp. 2d 1022, 1033-34 (N.D. Iowa 2004); *Branstad v. Glickman*, 118 F. Supp. 2d 925, 937 (N.D. Iowa 2000); *Uncle B's Bakery, Inc. v. O'Rourke*, 920 F. Supp. 1405, 1411 (N.D. Iowa 1996). These factors include (1) the movant's probability of success on the merits, (2) the threat of irreparable harm to the movant absent the injunction, (3) the

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[1] In *Branstad*, this court also discussed in some detail the differences between a temporary restraining order and a preliminary injunction. *See Branstad*, 118 F. Supp. 2d at 935-937. Suffice it to say that, in that case, the court found the following factors should be considered to distinguish a TRO from a preliminary injunction: (1) whether the hearing was *ex parte* or adversarial; (2) whether the adversarial hearing allowed the basis for the relief requested to be strongly challenged; (3) whether the order expired, by its own terms, within the ten days provided by Rule 65(b); and (4) the "substance" of the order. *Id.* In this case, the court held an "adversarial" rather than an *ex parte* conference with the parties, but it did not hold the sort of "adversary hearing," including presentation of evidence beyond the affidavits and exhibits filed with McLeodUSA's motion and by Qwest in response, that allowed the basis for the requested order to be "strongly challenged," such that it would be "'particularly unjustified'" to classify the resulting order as a temporary restraining order. *See id.* at 936 (quoting *Sampson v. Murray*, 415 U.S. 61, 87 (1974)). Moreover, the court has every intention that this order for injunctive relief will expire in ten days, unless within that time, good cause is shown for extending it for a like period. *Id.* (citing FED. R. CIV. P. 65(b)). Finally, the "substance" of this order is intended to be a temporary restraining order, rather than a preliminary injunction, not least because of the expedited nature of the proceedings and ruling and the limited nature of the relief that will be granted. *Id.* (citing *Baker Elec. Coop. v. Chaske*, 28 F.3d 1466, 1472 (8th Cir. 1994)). Therefore, this order is a temporary restraining order, not a preliminary injunction. *Id.*

balance between the harm and the injury that the injunction's issuance would inflict on other interested parties, and (4) the public interest. *Dataphase*, 640 F.2d at 114; *accord Doctor John's, Inc.*, 305 F. Supp. 2d at 1033; *Branstad*, 118 F. Supp. 2d at 937 (quoting similar factors from *Entergy, Ark., Inc. v. Nebraska*, 210 F.3d 887, 898 (8th Cir. 2000)); FED. R. CIV. P. 65(b)(1).

"'A district court has broad discretion when ruling on requests for preliminary injunctions, and [the appellate court] will reverse only for clearly erroneous factual determinations, an error of law, or an abuse of that discretion.'" *Entergy, Ark., Inc.*, 210 F.3d at 898 (quoting *United Indus. Corp. v. Clorox Co.*, 140 F.3d 1175, 1179 (8th Cir. 1998)). The court assumes that it has the same discretion when ruling on a request for a temporary restraining order. As the Eighth Circuit Court of Appeals has also explained,

> These factors are not a rigid formula. However, "[t]he basis of injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies." *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 506-07, 79 S. Ct. 948, 3 L. Ed. 2d 988 (1959). Thus, to warrant a preliminary injunction, the moving party must demonstrate a sufficient threat of irreparable harm. *See Adam-Mellang v. Apartment Search, Inc.*, 96 F.3d 297, 299 (8th Cir. 1996).

Bandag, Inc. v. Jack's Tire & Oil, Inc., 190 F.3d 924, 926 (8th Cir. 1999); *Baker Elec. Co-op., Inc. v. Chaske*, 28 F.3d 1466, 1472 (8th Cir. 1994) ("No single factor in itself is dispositive; in each case all of the factors must be considered to determine whether on balance, they weigh towards granting the injunction. However, a party moving for a preliminary injunction is required to show the threat of irreparable harm.") (internal quotation marks and citations omitted).

The court will, therefore, consider each of the *Dataphase* factors in turn, to determine whether McLeodUSA has established that the balance of the *Dataphase* factors weighs in favor of issuance of a temporary restraining order in this case.

B. Consideration Of The Dataphase Factors

1. Likelihood of success on the merits

a. The nature of the requirement

In prior cases, this court has explained the meaning of "likelihood of success on the merits" in the context of a motion for a preliminary injunction as follows:

> "[A]t the early stage of a preliminary injunction motion, the speculative nature of this particular ['likelihood of success'] inquiry militates against any wooden or mathematical application of the test. Instead, a court should flexibly weigh the case's particular circumstances to determine whether the balance of equities so favors the movant that justice requires the court to intervene to preserve the status quo until the merits are determined." *United Indus. Corp. v. Clorox Co.*, 140 F.3d 1175, 1179 (8th Cir. 1998) (internal citations and quotation marks omitted). Thus, the court is not deciding whether the movant for a preliminary injunction will ultimately win. *Heather K. v. City of Mallard*, 887 F. Supp. 1249, 1258 (citing *Glenwood Bridge, Inc. v. City of Minneapolis*, 940 F.2d 367, 371 (8th Cir. 1991)). Rather, as this court explained in its consideration of the "*Dataphase* factors" in *Curtis 1000, Inc. v. Youngblade*, 878 F. Supp. 1224 (N.D. Iowa 1995),
>
> > Likelihood of success on the merits requires that the movant find support for its position in governing law. In order to weigh in the movant's favor, the movant's success on the merits must be "at least . . . sufficiently likely to support the kind of relief it requests."
>
> *Youngblade*, 878 F. Supp. at 1247 (citations omitted).

Branstad, 118 F. Supp. 2d at 939; ; *accord Doctor John's, Inc.*, 305 F. Supp. 2d at 1034 (quoting this section of *Branstad*); *B & D Land and Livestock Co. v. Veneman*, 231 F. Supp. 2d 895, 906-07 (N.D. Iowa 2002) (also quoting this section of *Branstad*). Thus, "likelihood of success on the merits" necessarily requires consideration of the law applicable to the plaintiff's claims.

b. Application

Here, McLeodUSA relies on several rulings of the Federal Communications Commission as supporting its contentions that the rates it charged Qwest for its services were reasonable, that Qwest was required to pay the full amounts charged to it by McLeodUSA, and that Qwest was not entitled to withhold its payments. Similarly, McLeodUSA has relied on contract and implied contract theories to establish that it was entitled to "defensively" withhold its own payments to Qwest for services provided by Qwest. While Qwest asserts that there is also sufficient basis to find that McLeodUSA cannot, ultimately, prevail on the merits of its claims, the court cannot resolve the merits of the underlying dispute simply to determine whether or not temporary relief is appropriate; indeed, this court is "not deciding whether the movant for [a temporary restraining order] will ultimately win." *Id.*

Rather, "likelihood of success on the merits," for purposes of a temporary restraining order, means only that "the movant find support for its position in governing law." *Id.* There is sufficient support for McLeodUSA's position under governing law, as cited by McLeodUSA, to find that McLeodUSA has the necessary "likelihood of success on the merits" to warrant temporary relief. *See id.* Moreover, "'at the early stage of a [temporary restraining order] motion, the speculative nature of this ["likelihood of success"] inquiry militates against any wooden or mathematical application of the test'"

in favor of a "'flexibl[e] weigh[ing of] the case's particular circumstances to determine whether the balance of equities so favors the movant that justice requires the court to intervene to preserve the status quo until the merits are determined.'" *Id.* (quoting *United Indus. Corp.*, 140 F.3d at 1179). Under the circumstances of this case, the ultimate determination of the merits will be a very fact-intensive process. In the meantime, McLeodUSA's contentions are at least plausible for the court to intervene to maintain the *status quo* until the merits can be reached. *Id.* Finally, the determination of whether or not to issue a temporary restraining order does not depend solely upon the movant's "likelihood of success on the merits," but upon the balancing of all of the pertinent *Dataphase* factors. *See Baker Elec. Co-op., Inc.*, 28 F.3d at 1472 ("No single factor in itself is dispositive; in each case all of the factors must be considered to determine whether on balance, they weigh towards granting the injunction") (internal quotation marks and citations omitted). Here, this *Dataphase* factor is at worst neutral and at best weighs in favor of issuance of a temporary restraining order.

2. Irreparable harm

The second *Dataphase* factor is "irreparable harm." *See, e.g., Dataphase*, 640 F.2d at 114. As this court has also explained,

> "'The basis of injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies.'" *Bandag, Inc.*, 190 F.3d at 926 (quoting *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 506- 07, 79 S. Ct. 948, 3 L. Ed. 2d 988 (1959)). "Thus, to warrant a preliminary injunction, the moving party must demonstrate a sufficient threat of irreparable harm." *Id.*; *Adam-Mellang v. Apartment Search, Inc.*, 96 F.3d 297, 299 (8th Cir. 1996) ("'[T]he failure to show irreparable harm is, by itself, a sufficient ground upon which to deny a preliminary injunction.'") (quoting *Gelco Corp. v. Coniston Partners*, 811

> F.2d 414, 418 (8th Cir. 1987)). Various considerations may be relevant to a determination of "irreparable harm." For example, a movant's delay in seeking relief or objecting to the actions the movant seeks to enjoin "belies any claim of irreparable injury pending trial." *Hubbard Feeds v. Animal Feed Supplement*, 182 F.3d 598, 603 (8th Cir. 1999). Moreover, an adequate showing of "irreparable harm" cannot be something that has never been the focus of the underlying lawsuit. *See United States v. Green Acres Enters., Inc.*, 86 F.3d 130, 133 (8th Cir. 1996). A sufficient showing on this factor can be made, for example, by showing that the movant has no adequate remedy at law. *Baker Elec. Co-op.*, 28 F.3d at 1473. Conversely, where the movant has an adequate legal remedy, a preliminary injunction will not issue. *See Frank B. Hall & Co. v. Alexander & Alexander, Inc.*, 974 F.2d 1020, 1025 (8th Cir. 1992). Even where money damages are available to compensate for some of the harm to the movant, other less tangible injuries cannot be so easily valued or compensated, so that the availability of money damages that do not fully compensate the movant do not preclude a preliminary injunction. *Glenwood Bridge*, 940 F.2d at 371-72.

Branstad, 118 F. Supp. 2d at 941-42; *accord Doctor John's, Inc.*, 305 F. Supp. 2d at 1039 (quoting this portion of *Branstad*); *B & D Land and Livestock Co.*, 231 F. Supp. 2d at 910 (also quoting this portion of *Branstad*).

In the present case, the affidavit of Todd M. Lechtenberg, submitted by McLeodUSA in support of its Motion For Temporary Restraining Order And/Or Preliminary Injunction, as supplemented by other exhibits submitted with McLeodUSA's motion, provides sufficient basis for a finding of irreparable harm to McLeodUSA in the absence of injunctive relief. Here, there has been no delay on McLeodUSA's part in seeking to enjoin Qwest's actions that might "belie" McLeodUSA's claim of irreparable injury. *See Branstad*, 118 F. Supp. 2d at 942. Rather, until February 23, 2005, the

parties' dispute was "on hold" pursuant to their standstill agreement. It was not until that standstill agreement expired and Qwest actually began withholding payments again and reiterating demands for payment and deposits that McLeodUSA was realistically faced with the need to seek injunctive relief. Furthermore, it is clear that McLeodUSA has no adequate remedy at law, should Qwest terminate its services, in light of the potential for interruption of McLeodUSA's services to its customers, the adverse impact on its cashflow, and the difficulties that it would have in obtaining adequate alternative services within any reasonable timeframe to prevent collapse of its system. *Id.* Finally, the intangible injuries that McLeodUSA would suffer should Qwest cease providing services to McLeodUSA, arising from the interruption of McLeodUSA's services to its clients, cannot possibly be fully compensated by money damages at some uncertain date in the future. *Id.*

Thus, the "irreparable harm" *Dataphase* factor weighs strongly in favor of the relief McLeodUSA requests in its Motion For Temporary Restraining Order.

3. Balance of harms

As this court explained in *Branstad*,

> The next factor in the *Dataphase* analysis, the "balance of harms," requires the court to consider "the balance between the harm [to the movant] and the injury that the injunction's issuance would inflict on other interested parties, and the public interest." *Pottgen v. Missouri State High Sch. Activities Ass'n*, 40 F.3d 926, 929 (8th Cir. 1994). Whereas "irreparable harm" focuses on the harm or potential harm to the plaintiff of the defendant's conduct or threatened conduct, *Dataphase*, 640 F.2d at 114, the "balance of harm" analysis examines the harm of granting or denying the injunction upon both of the parties to the dispute and upon other interested parties, including the public, as well. *Id.*; *see also Glenwood Bridge*, 940 F.2d at 272. Thus, an illusory harm to the

> movant will not outweigh any actual harm to the nonmovant. *Frank B. Hall*, 974 F.2d at 1023. What must be weighed is the threat to each of the parties' rights and economic interests that would result from either granting or denying the preliminary injunction. *See Baker Elec. Co-op.*, 28 F.3d at 1473. Another consideration is whether the nonmovant has already voluntarily taken remedial action, which either eliminated or reduced the harm to the movant, or showed that such remedial action did not harm the nonmovant. *See Heather K.*, 887 F. Supp. at 1260.

Branstad, 118 F. Supp. 2d at 942-42; *accord Doctor John's, Inc.*, 305 F. Supp. 2d at 1040 (quoting *Branstad*); *B & D Land and Livestock Co.*, 231 F. Supp. 2d at 911 (also quoting *Branstad*).

Here, as explained above, the threat to McLeodUSA's rights, including its economic interests, is substantial. *See id.* at 943. This harm is not "illusory," but real and immediate. *Id.* On the other hand, Qwest has not convinced the court that it will suffer any comparable economic or other harm from an injunction that, in essence, reinstates the *status quo* under the parties' standstill agreement. *Id.* Finally, the court does not find that Qwest has taken any remedial action that would eliminate or reduce the harm to McLeodUSA; rather, Qwest has pressed its claims and demands for payment and deposits. *Id.*

Thus, the "balance of harms" *Dataphase* factor also weighs in favor of immediate, albeit temporary, injunctive relief.

4. The public interest

The last *Dataphase* factor the court must consider is the "public interest." *Entergy, Ark., Inc.*, 210 F.3d at 898; *Bandag, Inc.*, 190 F.3d at 926; *Iowa Right to Life Committee, Inc.*, 187 F.3d at 966. In *Branstad*, this court observed,

> [C]onsideration of the "public interest" factor has frequently invited courts to indulge in broad observations about conduct that is generally recognizable as costly or injurious. *See Heather K.*, F. Supp. at 1260. However, there are more concrete considerations, such as reference to the purposes and interests any underlying legislation was intended to serve, *see id.*, a preference for enjoining inequitable conduct, *see id.* at 1260 n.16, and the "public's interest in minimizing unnecessary costs" to be met from public coffers. *Baker Elec. Co-op.*, 28 F.3d at 1474.

Branstad, 118 F. Supp. 2d at 943; *accord Doctor John's, Inc.*, 305 F. Supp. 2d at 1042 (quoting *Branstad*); *B & D Land and Livestock Co.*, 231 F. Supp. 2d at 912 (also quoting *Branstad*).

Here, there is plainly a substantial public interest in maintaining telecommunication services to McLeodUSA's customers, notwithstanding the dispute between the parties. Indeed, maintenance of telecommunications services at fair costs is the purpose of FCC oversight and telecommunications regulatory legislation. *See, e.g.*, 47 U.S.C. § 151 (the FCC is to consider the public interest in light of the overall purpose of the Communications Act "to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges. . . ."). Thus, the potential interruption of services resulting from Qwest's conduct, if not enjoined, would be contrary to the public interest. Qwest counters that the public interest will not be served if McLeodUSA is treated differently than other customers who do not pay their bills. However, the court finds this argument unconvincing, not least because McLeodUSA *has* paid its bills to Qwest, pursuant to the standstill agreement, and because Qwest has already shown that it considered that the interests that motivated the standstill agreement outweighed the supposed public interest in terminating services to McLeodUSA.

Thus, this final *Dataphase* factor also weighs in favor of issuance of a temporary restraining order. Because all of the pertinent factors weigh in favor of issuance of a temporary restraining order in this case, such a temporary restraining order will issue.

C. Rule 65's Bond Requirement

Because the court finds that it is proper, upon balancing the "*Dataphase* factors" in the circumstances presented here, to issue a temporary restraining order, the court turns to the question of security for its issuance. Rule 65(c) provides, in pertinent part, as follows:

> **(c) Security.** No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of the United States or of an officer or agency thereof.

FED. R. CIV. P. 65(c). The bond posted under Rule 65(c) "is a security device, not a limit on the damages the defendants may obtain against [the movant] if the facts warrant such an award." *Minnesota Mining & Mfg. Co. v. Rauh Rubber, Inc.*, 130 F.3d 1305, 1309 (8th Cir. 1997). The Eighth Circuit Court of Appeals has warned that, "[a]lthough we allow the district court much discretion in setting bond, we will reverse its order if it abuses that discretion due to some improper purpose, or otherwise fails to require an adequate bond or to make the necessary findings in support of its determinations." *Hill v. Xyquad, Inc.*, 939 F.2d 627, 632 (8th Cir. 1991) (citing *Rathmann Group v. Tanenbaum*, 889 F.2d 787, 789 (8th Cir. 1989)). In *Rathmann-Group v. Tanenbaum*, 889 F.2d 787 (8th Cir. 1989), the Eighth Circuit Court of Appeals determined that the district court abused its discretion by not requiring a bond in addition to the $10,000.00 already

posted on the issuance and continuation of a temporary restraining order, which can be read to mean that the bond for a preliminary injunction was mandatory even where a previous bond for a temporary restraining order was in place. *Rathmann-Group*, 889 F.2d at 789. On the other hand, the court cited as support for its decision to remand, *Roth v. Bank of the Commonwealth*, 583 F.2d 527, 539 (6th Cir. 1978), which found error, according to the *Rathmann-Group* court, "not because [the] trial court failed to require a bond in any particular amount, but because [the] court failed to exercise discretion required by Rule 65(c) by expressly considering [the] question of requiring [a] bond," *id.*, which suggests that whether or not a bond is required is in the discretion of the court.

In this case, Qwest demands a bond in the amount of approximately $3 million for an initial ten-day temporary restraining order, or double that, if the court extends the temporary restraining order for an additional ten days. Qwest bases this figure on its contention that the services it will be compelled to provide to McLeodUSA under the temporary restraining order, which it would otherwise terminate, would cost McLeodUSA approximately $15.9 million for a two-month period. Thus, the bond it demands for a ten-day continuation of services is one-sixth of the sum for two months. McLeodUSA counters that Qwest has already withheld $1.7 million more than McLeodUSA has withheld, McLeodUSA is otherwise current on all of its other bills to Qwest, and that Qwest itself has estimated the costs of its services to McLeodUSA for two months to be $3.8 million, not $15.9 million. Thus, McLeodUSA contends that Qwest's demand for a bond in the amount of $3 million is plainly excessive. Qwest replies that it has other offsets against the $1.7 million it purportedly withheld in excess of what McLeodUSA owed for the services presently in dispute. Qwest also points out that McLeodUSA has made public disclosures of its financial difficulties, so that Qwest has reasonable concerns that it will never be paid for services provided under the temporary restraining order.

The court finds that there is insufficient basis in the present record to find that Qwest will actually be out any money for costs and damages incurred by Qwest if it is "found to have been wrongfully enjoined or restrained" to continue its services to McLeodUSA and to make full payments for services it obtains from McLeodUSA. *See* FED. R. CIV. P. 65(c) (purpose of bond). Certainly, Qwest's demand for a bond in the amount of $3 million for ten days of service that it must provide pursuant to the temporary restraining order are out of proportion to Qwest's own estimates of the cost for two months of the services to McLeodUSA *at issue here*, as elsewhere indicated in the record. Moreover, Qwest does not dispute that McLeodUSA was making full payment on its bills from Qwest while the parties were operating under their standstill agreement. Qwest does not appear to the court to be under any greater risk of non-payment for services provided under the temporary restraining order than it was for payment for services under the standstill agreement. Although the court will revisit the question of an appropriate bond for any preliminary injunction, the court concludes, in its discretion, that no bond should be required for the issuance of a temporary restraining order that maintains the *status quo* the parties agreed to under the standstill agreement without any bond, deposit, or other security. *See Rathmann-Group*, 889 F.2d at 789 (suggesting that whether or not a bond is required is in the discretion of the trial court).

D. Extension Of The Temporary Restraining Order

Rule 65(b) provides that a temporary restraining order that was "granted without notice . . . shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes." FED. R. CIV. P. 65(b). The present temporary restraining order is not "granted without notice," but the court will, nevertheless, assume that the ten-day limitation also applies. Therefore, a temporary restraining order entered today would

ordinary expire on April 2, 2005. Rule 65(b), however, also provides that the temporary restraining order may "for good cause [be] extended for a like period." *Id.* (providing that a temporary restraining order may be extended "for a longer period" upon consent of the party against whom it is entered). The court discussed with the parties the necessity of extending the temporary restraining order for a period in excess of ten days, because the undersigned is scheduled to be out of the country, then to try one criminal trial immediately upon his return, followed shortly thereafter by a four-month federal death-penalty trial, making it difficult, if not impossible, to hold a preliminary injunction hearing within ten days. Consequently, the court stated that it intended to extend the temporary restraining order for an additional ten days to and including April 12, 2005. Hearing no objection, the court finds good cause to extend the initial ten days for this temporary restraining order for a "like period" of ten days, to and including April 12, 2005.

III. CONCLUSION

Upon the foregoing, the court concludes that McLeodUSA's March 22, 2005, Motion for Temporary Restraining Order And/Or Preliminary Injunction (Doc. No. 24) should be, and hereby is, **granted** to the extent that the court will issue the attached temporary restraining order.

A hearing on McLeodUSA's Motion For Preliminary Injunction **shall be held at 8:00 a.m. on Saturday, April 9, 2005, in the third floor courtroom of the Federal Courthouse in Sioux City, Iowa.**

IT IS SO ORDERED.

DATED this 23rd day of March, 2005.

Mark W. Bennett

MARK W. BENNETT
CHIEF JUDGE, U. S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA

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

MCLEODUSA TELECOMMUNICATIONS SERVICES, INC., Plaintiff, vs. QWEST CORPORATION and QWEST COMMUNICATIONS CORPORATION, Defendants.	No. C 05-0039-MWB **TEMPORARY RESTRAINING ORDER**

WHEREAS, this matter came before the court pursuant to the March 22, 2005, Motion for Temporary Restraining Order And/Or Preliminary Injunction (Doc. No. 24) of plaintiff McLeodUSA Telecommunications Services, Inc. (McLeodUSA),

AND WHEREAS, pursuant to Rule 65 of the Federal Rules of Civil Procedure, the court finds that termination by Qwest Corporation and/or Qwest Communications Corporation of services to McLeodUSA; imposition of a security requirement upon McLeodUSA; the withholding of further amounts by Qwest in set off against McLeodUSA invoices; and failure of any of the parties to make full payment of their current and future invoices from one another would impose irreparable harm or injury or the threat of such irreparable harm or injury upon McLeodUSA, and upon further consideration of all other relevant factors,

DEFENDANTS QWEST CORPORATION and QWEST COMMUNICATIONS CORPORATION are hereby **temporarily restrained** from (1) terminating or threatening to terminate services to McLeodUSA or requiring security from McLeodUSA as a precondition to the start or continuation of any such services; (2) withholding any further

amounts in set off against McLeodUSA invoices; and (3) failing to make full payment of their current and future invoices to McLeodUSA until expiration of this temporary restraining order. **Plaintiff McLeodUSA** is likewise required to make full payment of its current and future invoices from Qwest Corporation or Qwest Communications Corporation until expiration of this temporary restraining order.

The court finds good cause for extension of this temporary restraining order for an additional ten days beyond the initial ten days a temporary restraining order may remain in force pursuant to Rule 65(b) of the Federal Rules of Civil Procedure, owing to scheduling conflicts with other equally urgent matters. Therefore, this temporary restraining order shall remain in full force and effect **to and including April 12, 2005,** or until such time as this temporary restraining order is dissolved or vacated, by this court or a reviewing court.

This temporary restraining order shall be binding upon the parties to this action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of this order.

This temporary restraining order shall issue without the posting of any bond, as the court finds insufficient evidence that either Qwest Corporation or Qwest Communications Corporation will incur any costs and damages incurred if they are "found to have been wrongfully enjoined or restrained" to continue their services to McLeodUSA and to make full payments for services they obtain from McLeodUSA. *See* FED. R. CIV. P. 65(c) (purpose of bond).

IT IS SO ORDERED.

DATED this 23rd day of March, 2005.

Mark W. Bennett

MARK W. BENNETT
CHIEF JUDGE, U. S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA

Qwest
Spirit of Service

Qwest Communications
1801 California Street
Suite 2400
Denver, CO 80202
Telephone: 303-896-1250
Facsimile: 303-896-8887

Steven Q. Hansen
Vice President, Carrier Relations
Worldwide Wholesale Markets

March 21, 2005

Via Overnight Mail
James LeBlanc
Vendor Manager
McLeodUSA Telecom
First Place Tower
15 E. 5th St., Ste. 1500
Tulsa, Oklahoma 74103

Lauraine Harding
Sr. Manager, Interconnect Negotiation
McLeodUSA, Inc.
6400 C Street SW
P.O. Box 3177
Cedar Rapids, IA 52406-1377

RE: Notice of Demand for OR Interconnection Agreement Security Deposit

Dear Sir/Madam,

This letter is to notify you that Qwest Corporation ("Qwest") requires a security deposit to continue the provisioning of services ordered by McLeodUSA Telecommunications Services, Inc. and its CLEC affiliates (collectively, "McLeodUSA") under the Interconnection Agreement between the parties in the State of Oregon. After investigation and review of McLeod's unsatisfactory creditworthiness, recent public statements of McLeodUSA concerning its financial condition, history of late payments, and outstanding balances under the Interconnection Agreement and other agreements, tariffs, or accounts, Qwest demands a deposit, based on two months' average total billings under the Interconnection Agreement in the State of Oregon, to safeguard Qwest's financial interests.

The security deposit shall be in the form of a wire transfer of immediately available funds or an irrevocable letter of credit in the amount of $372,545.98. It must be received in ten (10) calendar days. If the security deposit is not received by 5:00 p.m. Mountain Standard Time on April 1, 2005, Qwest will commence the process of terminating the Interconnection Agreement, suspending order activity, disconnecting services, and/or any other remedy available to it under law or equity in the State of Oregon.

If payment is processed by wire, it should be directed to—
First National Bank of Omaha
c/o Qwest Corporation
Omaha NE 68197
ABA No. 104000016
Qwest Bank Acct. No. 36204689

The deposit will be held for a period of at least twelve (12) months and will be maintained in accordance with the terms of the Interconnection Agreement or applicable law. Additional security may be required,

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as necessary and allowable under the Interconnection Agreement or applicable law. Should disconnection occur, Qwest will require full payment of all outstanding charges and the posting of the security deposit, and late payment charges will apply in accordance with the Interconnection Agreement. Additionally other charges may apply to have the account re-established. If service order processing is interrupted, all outstanding charges and the posting of the security deposit, including any additional past due amounts are due prior to restoration.

Qwest reserves any and all rights and remedies it has under the Interconnection Agreement and applicable law, including any remedies it may have if McLeod fails to meet the terms set forth above. Qwest also reserves the right to request to increase the deposit or request additional deposits from McLeod under any other agreements between Qwest and McLeod as well as under any other tariffs.

Sincerely,

Steven Hansen /DH

Steven Hansen
Vice President, Carrier Relations

Cc: Ken Burkhardt, CFO

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PAGE 2 OF 2

March 22, 2005

Mr. Steve Hansen
Vice President – Carrier Relations
Qwest Communications
1801 California Street
Suite 2400
Denver, CO 80202

Re: Deposit Demand Letter – Arizona, Colorado, Idaho, Washington, Oregon, Montana, New Mexico, Utah

Dear Mr. Hansen:

This letter responds to your letter dated March 21, 2005, addressed to McLeodUSA Telecommunications Services, Inc., attention J.J. LeBlanc and Lauraine Harding, in which Qwest demands security deposit in the form of an irrevocable letter of credit or a wire transfer of immediately available funds, and threatens suspension of order activity, disconnection or other remedies. In support of Qwest's deposit demand, your letter cites, among other items, a "history of late payments, outstanding balances under the Interconnection Agreement and other agreements, tariffs, or accounts."

As Qwest has been informed on several prior occasions, McLeodUSA withheld payments from Qwest (a) for non-interconnection agreement charges, and (b) only in direct response to the impermissible and unlawful self-help that Qwest and its affiliates have first undertaken in 2004 with respect to access charges assessed by McLeodUSA. Self-help is an unjust and unlawful practice in violation of Section 201(b) of the Act, and the FCC has consistently declared that if an interexchange carrier disputes a CLEC's presumptively reasonable charges, then the IXC must pay the charges first and protest second. Qwest failed to follow the law, leaving McLeodUSA no practical alternative but to defensively set off against Qwest's non-interconnection agreement invoices to McLeodUSA amounts properly due and owing to Qwest.

To the contrary, the McLeodUSA payment record with Qwest is stellar, with the only exception involving this access charge dispute where we were forced to withhold in direct response to your unjust and unlawful actions.

Accordingly, McLeodUSA disagrees with critical factual representations that form the basis for Qwest's deposit demand. Second, your demand deposit for the States of Arizona, Colorado, Idaho, Washington, Oregon, Montana, New Mexico and Utah is inconsistent with the terms of our interconnection agreement ("ICA"). A deposit may

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PAGE 1 OF 2

only be required if McLeodUSA has not established a satisfactory credit or is repeatedly delinquent in making payments, neither of which basis is satisfied in this case. Unless Qwest can identify with specificity the facts that satisfy the permissible basis for its demand deposit pursuant to the terms of the controlling ICA, McLeodUSA rejects your deposit demand. If Qwest attempts to enforce its impermissible demand deposit inconsistent with the terms of our interconnection agreement, McLeodUSA reserves any and all rights and remedies available to it under law or equity for Qwest's intentional violation of the ICA.

Please contact me to discuss the deposit demand at your earliest convenience.

Sincerely,

Ken Burckhardt
Executive Vice President and
Chief Financial Officer

cc: Roland Thornton

EXHIBIT D
PAGE 2 OF 2

March 24, 2005

VIA OVERNIGHT MAIL

Qwest Communications
Director-Interconnection Compliance
1801 California Street, Suite 2410
Denver, CO 80202

RE: Notice of Informal Dispute Resolution - OR

Dear Director-Interconnection Compliance:

Pursuant to Section 26 of the Interconnection Agreement ("ICA") for the State of Oregon between McLeodUSA Telecommunications Services, Inc. ("McLeodUSA") and Qwest Communications ("Qwest"), McLeodUSA notifies Qwest that it is invoking the informal dispute resolution process regarding the recent demand by Qwest for a security deposit.

Pursuant to the McLeodUSA letter dated March 22, 2005 and addressed to Steve Hansen, Vice-President – Carrier Relations, which states our position disputing the Qwest demand for a security deposit, McLeodUSA designates Joseph Ceryanec, Group Vice President, Controller and Treasurer, as the McLeodUSA representative authorized to resolve the Dispute. Joseph Ceryanec can be reached at 319-790-7399. McLeodUSA requests that Qwest designate its representative as required by the ICA.

In light of the Qwest threat to suspend service or disconnect our order activity if a security deposit is not received by 5 pm Mountain Standard Time on April 1, 2005, McLeodUSA demands a response to this informal dispute notice no later than 2 pm Central Standard Time on March 28, 2005. McLeodUSA reserves all rights and remedies available to it under law or equity.

Sincerely,

William H. Courter
Assistant General Counsel

cc: Steve Hansen (notice VIA EMAIL)
Qwest General Counsel, Interconnection
Joseph Ceryanec
Roy McGraw
William A. Haas
Julia Redman-Carter

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