



# Davis Wright Tremaine LLP

ANCHORAGE BELLEVUE LOS ANGELES NEW YORK PORTLAND SAN FRANCISCO SEATTLE SHANGHAI WASHINGTON, D.C.

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

SUITE 2300  
1300 SW FIFTH AVENUE  
PORTLAND, OR 97201-5682

TEL (503) 241-2300  
FAX (503) 778-5299  
www.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, IC 11

Dear Sir or Madam:

Enclosed for filing please find the MCLEODUSA TELECOMMUNICATIONS SERVICES,  
INC.'S, SUPPLEMENT TO 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

A handwritten signature in black ink, appearing to read 'Mark P. Trinchero', with a large, sweeping flourish at the end.

Mark P. Trinchero

MPT:fw

Enclosure

cc: Alex Duarte  
William Courter

**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. IC 11**

**MCLEODUSA TELECOMMUNICATIONS SERVICES, INC.'S,  
SUPPLEMENT TO MOTION FOR EMERGENCY RELIEF**

**INTRODUCTION**

On March 30, 2005, McLeodUSA Telecommunications Services, Inc. ("McLeodUSA"), through its undersigned counsel, and pursuant to ORS § 756.040 and OAR 860-016-0050(10), filed two pleadings with the Oregon Public Utility Commission ("Commission"): "Complaint of McLeodUSA Telecommunications Services, Inc. for Enforcement of Interconnection Agreement with Qwest Corporation and for Violation of ORS 759.455" (hereinafter "McLeodUSA's Complaint"); and, "McLeodUSA Telecommunications Services, Inc. Motion for Emergency Relief" (hereinafter "McLeodUSA's Motion"). Pursuant to the Ruling and Notice of Conference issued by Administrative Law Judge ("ALJ") Grant on April 1, 2005, McLeodUSA hereby files this Supplement to its Motion.

As more fully described in McLeodUSA's Complaint, this action arises out of Qwest Corporation's (hereinafter "Qwest") March 21, 2005 "Notice of Demand for OR Interconnection Agreement Security Deposit" (hereinafter "Qwest's Demand Letter").<sup>1</sup> Qwest's Demand Letter claims that McLeodUSA must pay Qwest a security deposit of \$372,545.98 under its Oregon interconnection agreement with Qwest (hereinafter "the ICA") no later than April 1, 2005. Qwest's Demand Letter threatened order suspension, disconnection of services and termination

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<sup>1</sup> See McLeodUSA's Complaint, Exhibit C. McLeodUSA received fourteen such letters from Qwest covering each State in which McLeodUSA and Qwest have interconnection agreements.

of the ICA in the event McLeodUSA failed to make the requested security deposit by close of business April 1, 2005.

Given Qwest's threat to disconnect services as of April 1, 2005, McLeodUSA filed both its Complaint and Motion. The Motion requests that the Commission consider both the Complaint and the Motion on an emergency basis and to rule that Qwest may not demand a security deposit from McLeodUSA at this time. The Motion further requests that the Commission order that 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.

On Friday, April 1, 2005, counsel for McLeodUSA, counsel for Qwest, and ALJ Grant conferred by telephone regarding the Complaint and the Motion. Based upon representations by Qwest that it would not suspend order activity, disconnect services or terminate the ICA while the Temporary Restraining Order (hereinafter "TRO") issued by the Iowa Federal District Court remains in effect<sup>2</sup>, the parties agreed that the Commission did not need to resolve the Motion on April 1, 2005. The parties agreed, however, that despite Qwest's representations regarding the TRO, the issue of whether the parties must abide by the dispute resolution procedures in the ICA should be heard and resolved as early as possible. Accordingly, ALJ Grant issued the April 1, 2005 Ruling and Notice of Conference scheduling a conference on Wednesday April 6, 2005, at 1:30 p.m. to address the issue. McLeodUSA urges the Commission to issue an order requiring Qwest to abide by the dispute resolution provisions of the ICA.

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<sup>2</sup> See McLeodUSA Complaint, Exhibit B. On April 1, 2005, the complaint pending before the Iowa Federal District Court was transferred to the Colorado Federal District Court. The TRO remains in effect. The Colorado Federal District Court has yet to adopt a schedule in the newly transferred case.

## ARGUMENT

### A. Qwest has no Right to Demand a Security Deposit Under the Interconnection Agreement

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.

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.

Qwest fails to satisfy any of these conditions. Taking the second condition first, Qwest does not allege, and could certainly not prove, that McLeodUSA has been "repeatedly delinquent" on any payments under the ICA. As stated in McLeodUSA's Complaint, McLeodUSA is current on all invoices for services provided by Qwest under the ICA.<sup>3</sup>

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<sup>3</sup> McLeodUSA's Complaint, p. 4, ¶ 10.

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.

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**

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 ICA and does not permit Qwest to “suspend order activity” or “disconnect services” as Qwest has threatened to do.

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.

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**

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.

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.

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.”

McLeodUSA has attempted to invoke the dispute resolution provisions of the ICA. As set forth in McLeodUSA’s Complaint, 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.<sup>4</sup> On March 24, 2005, McLeodUSA provided a second response to 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.<sup>5</sup> Qwest has not responded to either letter.

In negotiations relating to the emergency relief sought before this and the other 13 State Commissions, McLeodUSA has requested that Qwest withdraw its Demand Letter. Qwest has refused to do so. McLeodUSA has also requested that Qwest commit in writing that it will not rely upon the Demand Letter to claim retroactively that a default occurred on April 1, 2005. Qwest has refused to do so. McLeodUSA believes that Qwest has refused to agree to these requests and refused to agree to follow the dispute resolution procedures in the ICA because Qwest desires to claim at a later date that any potential default under the ICA for non-payment of the disputed security deposit should relate back to April 1, 2005.

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<sup>4</sup> McLeodUSA’s Complaint, p. 6, ¶ 16, and Exhibit D.

<sup>5</sup> McLeodUSA’s Complaint, p. 6, ¶ 17, and Exhibit E.

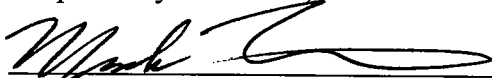
Qwest has taken a similar approach in the past. In a dispute with McLeodUSA over access charges, Qwest sent letters to McLeodUSA in November 2004, demanding security deposits under a wholesale long distance carrier service agreement and Qwest tariffs. Following expiration of a standstill order, Qwest declared that McLeodUSA was in breach of its wholesale long distance carrier services agreement and the Qwest tariff requirements for a deposit pursuant to the November 2004 letters. In other words, Qwest attempted to relate everything back as if McLeodUSA had been in default of those agreements/tariffs pending resolution of the dispute. Qwest cannot be permitted to use this ruse in the instant dispute. The Commission must order Qwest to abide by the dispute resolution provisions of its ICA.

**RELIEF REQUESTED**

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 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 4<sup>th</sup> day of April, 2005.

Respectfully submitted,



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

ATTORNEYS FOR MCLEODUSA  
TELECOMMUNICATIONS, INC.



CERTIFICATE OF SERVICE

IC 11

I hereby certify that I served a copy of the foregoing "MCLEODUSA TELECOMMUNICATIONS SERVICES, INC.'S, SUPPLEMENT TO 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 4<sup>th</sup> day of April, 2005.

DAVIS WRIGHT TREMAINE LLP

By: 

Mark P. Trincherro

Attorney for McLeodUSA

SERVICE LIST  
IC 11

WILLIAM COURTER  
MCLEODUSA TELECOMMUNICATIONS  
SERVICES INC  
6400 C ST SW  
CEDAR RAPIDS IA 52406-3177  
wcourter@mcleodusa.com

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