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VIA FACSIMILE, EMAIL (E-Filing) AND U. S. MAIL

April 5, 2005

Honorable Michael Grant
Presiding Administrative Law Judge
Oregon Public Utility Commission
P. O. Box 2148
Salem, OR 97308-2148

Re: IC 11 (McLeod)- Response to McLeod's Supplement to Motion for Emergency Relief

Dear Judge Grant:

Pursuant to Your Honor's April 1, 2005 Ruling, enclosed please find the original and five copies of Qwest's Response to McLeodUSA's Supplement to Motion for Emergency Relief. As I mentioned on April 1, 2005, my assistant Carla Butler is on vacation this week, and I have not yet learned the Commission's new E-Filing procedures. Thus, I kindly request that the Commission be patient with me in the event there is a glitch in the filing. Nevertheless, I do plan on sending this filing through the PUC Filing Center email address.

If you have any questions regarding this matter, please feel free to call me at your convenience. Thank you for your attention to this matter.

Very truly yours,

Alex M. Duarte

cc: Mark Trincherro, Esq. (w/ encls.)

**BEFORE THE
PUBLIC UTILITY COMMISSION OF OREGON**

IC 11

COMPLAINT OF McLEODUSA)	
TELECOMMUNICATIONS SERVICES, INC.,)	QWEST’S RESPONSE TO
FOR ENFORCEMENT OF)	MCLEODUSA’S SUPPLEMENT TO
INTERCONNECTION AGREEMENT WITH)	MOTION FOR EMERGENCY
QWEST CORPORATION)	RELIEF
_____)	
)	
)	

Pursuant to Presiding Administrative Law Judge Michael Grant’s April 1, 2005 ruling, Qwest Corporation (“Qwest”) hereby responds to the supplement to the motion for emergency relief that complainant McLeodUSA Telecommunication Services, Inc. (“McLeod”) filed on April 4, 2005. McLeod’s supplement to the motion pertains to the security deposit issue that is part of its Complaint for Enforcement of Interconnection Agreement with Qwest Corporation (“Complaint”) which McLeod filed with this Commission on March 30, 2005 pursuant to ORS 759.455 and OAR 860-016-0050. Qwest responds that it is not necessary to address the security deposit issue on an emergency or expedited basis, and that any action by the Commission with respect to this issue, and indeed the entire complaint, should be stayed or dismissed.¹

¹ Preliminarily, Qwest notes that McLeod states that “[t]he *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.” (Supplement to Motion, p. 2 (emphasis added).) That is not so. Indeed, Qwest’s Oregon counsel was neither fully knowledgeable about these issues nor authorized to make such representations at that time. Rather, all that Qwest’s Oregon counsel agreed was that Qwest would not object to responding to McLeod’s supplemental letter on the security deposit issue (which McLeod’s counsel said would be only “a couple of pages”) on an expedited basis (i.e., with filings by close of business on Monday and Tuesday, April 4 and 5, 2005). However, counsel for Qwest advised counsel for McLeod that based on *what he knew about the issues*, there did not appear to be an emergency regarding the security deposit issue, especially given that the issue that appeared to drive the motion for emergency relief (the disconnection issue) had been resolved. (Indeed, at the time Qwest’s counsel had just returned from being out of the office for almost two weeks, and had not yet read the complaint or emergency motion, and thus he specifically qualified his understanding.) Nevertheless, Qwest’s counsel did *not* “agree” that the security deposit issue “should be heard and resolved as early as possible.”

BACKGROUND

This complaint arises from McLeod's deteriorating financial condition, its refusal to provide adequate security, and its failure to live up to its financial obligations to Qwest. The genesis of the dispute arises from an unrelated issue between McLeod and Qwest Communications Corporation ("QCC") regarding charges and payments pertaining to certain telecommunications traffic. In the course of that dispute, QCC exercised its lawful rights by withholding payments for charges it believes that McLeod had incorrectly billed QCC. In retaliation, and even though Qwest was not involved in the McLeod-QCC dispute, McLeod refused to pay certain Qwest charges for Qwest tariffed services in a current total amount of approximately \$2.5 million. McLeod did not state any grounds for withholding such payments from Qwest and, indeed, had no basis for withholding payment for the services that Qwest provisioned.

Because of the significant amount of money that McLeod had wrongfully withheld from Qwest and because of recent public statements McLeod made about its bleak financial situation, Qwest became very concerned about its financial exposure to McLeod in the event that McLeod files for protection from its creditors in bankruptcy court. Thus, on March 21, 2005, Qwest sent a security deposit demand letter to McLeod pursuant to the parties' interconnection agreement ("ICA") in each state. (The Oregon letter is included as Exhibit A to the Complaint.)² The Qwest demand letter requested that McLeod provide the specified deposit by April 1, 2005, or Qwest would commence the process of pursuing its rights provided for under the ICA and applicable Oregon law. The requested deposit was equal to the estimated billings for two months of McLeod services ordered under the ICA in the State of Oregon.

² Qwest also sent payment and security demand letters for Qwest Corporation services purchased under the tariff, and QCC also sent payment and security demand letters.

The disputes between the parties regarding payment and Qwest's right to demand a security deposit have been the subject of litigation in Colorado and Iowa. Specifically, on February 24, 2005, QCC filed a complaint against McLeod in Colorado state court concerning the dispute, which has since been removed to federal court.³ The next day, February 25, 2005, McLeod sued both *Qwest* and QCC in federal court in Iowa.

On March 22, 2005, McLeod filed for a temporary restraining order ("TRO") in federal district court in Iowa seeking to prevent Qwest from demanding security deposits and payments and from terminating services to McLeod throughout Qwest's 14-state region. The Iowa court granted McLeod's motion. The TRO, which was in effect until April 12, 2005, stated in pertinent part that Qwest and QCC are "restrained from . . . terminating or threatening to terminate services to McLeodUSA or requiring security from McLeodUSA as a precondition to the start or continuation or any such services. . . ." The restraining language in the order issued by the Iowa federal court is broad. Accordingly, McLeod injected into the Iowa TRO the issues relating to payment, security deposits, and termination of services provided under the interconnection agreements.

Thereafter, on April 1, 2005, the Iowa federal court transferred the case to the Colorado federal court, after Qwest had filed a motion to dismiss or transfer under the "first filed" doctrine, and after Qwest assured the Iowa federal court that Qwest would not disconnect services or stop taking orders unless the Colorado federal court were to vacate, modify or otherwise change the existing TRO. Accordingly, the protections of the TRO are still in effect unless or until the Colorado federal court vacates, modifies or otherwise changes it.

³ QCC's Complaint has been amended to include, among other things, claims asserted on behalf of Qwest Corporation.

On March 30, 2005, McLeod filed the instant interconnection enforcement complaint with this Commission, pursuant to ORS 759.455 and OAR 860-016-0050, requesting similar (if not identical) relief to what McLeod requested before the Iowa federal Court and that the Court granted in the TRO, and that is still in effect in the Colorado federal case. McLeod seeks an order from this Commission that Qwest may not demand a security deposit, suspend order activity, or disconnect services, not only until April 1st, but until after ICA dispute resolution procedures have been completed. Further, although McLeod no longer seeks emergency relief regarding disconnection by April 1st (in light of Qwest's assurances that it will not disconnect services unless the Colorado court vacates, modifies or otherwise changes the injunction), it does continue to seek relief, on an *expedited basis*, regarding the security deposit issue. Qwest responds that, for a variety of reasons, McLeod is not entitled to the expedited relief that it has requested.

DISCUSSION

I. The Commission does not have the authority to grant the injunctive relief requested

As a threshold matter, it is not apparent that it is within the Commission's lawful authority to grant the injunctive relief McLeod requests. McLeod essentially seeks a declaratory order enjoining Qwest from enforcing an ICA provision. Moreover, McLeod demands such relief on an expedited or emergency basis. Such relief clearly constitutes equitable or injunctive relief, and, unlike a court of general jurisdiction, the Commission does not have such equitable or injunctive powers.⁴

As support for its argument that the Commission has jurisdiction here, McLeod cites to ORS 759.040, which merely sets forth the Commission's general powers, and OAR 860-011-000(3), which merely provides that the Oregon Rules of Civil Procedure generally govern Commission proceedings. However, McLeod fails to cite to any statute that confers on the

⁴ For that reason, McLeod's requested relief is also premature. This is so because McLeod presumes that Qwest will engage in an anticipatory breach of the ICA. That clearly has not occurred, and if it were to occur, then McLeod might have some type of claim for breach of contract, in an appropriate forum, but that clearly is not now.

Commission authority to issue *equitable or injunctive relief*. As the Commission knows, the Commission has only such powers as has been granted by the Legislature, and in this instance, the Legislature's grant of the authority does not allow for the exercise of equitable or injunctive relief.

II. McLeod fails to meet the procedural requirements of OAR 860-016-0050

McLeod brings this complaint under ORS 759.455 (the so-called "prohibited acts" statute) and OAR 860-016-0050. However, McLeod fails to meet the procedural requirements of OAR 860-016-0050, including the requirements of the 10-day written notice under OAR 860-016-0050(3)(a), among other requirements. McLeod's complaint also does not include several requirements in OAR 860-016-0050(2), including a statement of facts supported by written testimony or one or more affidavits. For these reasons alone, the Commission should completely deny McLeod's complaint and motion.

III. The security deposit issues are currently before the Colorado federal court

In addition, there is no need for this Commission to address the complaint, including the security deposit issues that are the basis for McLeod's motion and supplement, because these security deposit issues are currently before the Colorado federal court by the transfer of the Iowa TRO. Indeed, it appears that by filing multiple complaints before state commissions (as of this date, McLeod had filed complaints before thirteen commissions), McLeod is essentially forum shopping in the obvious hopes that it may obtain favorable (or at least conflicting) piecemeal state commission decisions that it might later be able to leverage against Qwest in other states and forums. However, the issue is currently before the Colorado federal court as a result of the transfer of the Iowa case and the Iowa TRO. Thus, it is not only unadvisable for this Commission (or any commission) to address these issues, but it is also unnecessary and duplicative.

Accordingly, the Commission should deny McLeod's requested relief in favor of the Colorado federal court addressing these issues in the context of McLeod's request for a federal TRO. Thus, the Commission should defer to the court to resolve these issues.

IV. No expedited relief is warranted

Even if it were in within the Commission's authority to order the relief that McLeod requests, and the Commission were to determine not to defer to the Colorado federal court, McLeod's demand for expedited relief is premature and unnecessary.

First, for the same reasons that McLeod has agreed to withdraw that part of its request dealing with the disconnection issue, there is no need for an expedited or emergency relief on the security deposit issue. As stated above, the Iowa court very recently transferred the proceeding under the "first-filed" doctrine, after the Iowa court obtained assurances from Qwest that if the stay or transfer were granted, the court's March 23, 2005 TRO issued would remain in effect until the federal court in Colorado modifies, extends or rescinds the TRO. (*See* Exhibit B, Report to Court Regarding Transfer of Action to United States District of Colorado.) Thus, Qwest is bound by the TRO until the Colorado court acts on it.

Further, Qwest has not and will not take any action to demand a security deposit (or terminate service) while the TRO is in place, as the TRO expressly prevents such actions. Indeed, the TRO specifically prohibits Qwest from "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." (*See* TRO, Exhibit B to McLeod's Complaint, p. 23 (emphasis added).)

McLeod asks this Commission "to rule that Qwest may not demand a security deposit from McLeod at this time," yet this request is fully covered by the TRO. In light of this fact,

McLeod is protected by the TRO, and thus McLeod has no basis for a claim that the security deposit issue should be decided on an expedited basis. Indeed, based upon this status, McLeod agreed to withdraw its request for emergency relief regarding the disconnection issue in Oregon, as well as in other states, including Colorado. (*See e.g.*, Exhibit C, McLeodUSA’s Notice of Withdrawal of Motion for Emergency Relief.)

Further still, even if Qwest were not restrained by the TRO, there is no need for an expedited Commission ruling because Qwest fully intends to comply with the ICA and applicable law in enforcing the security deposit. The Oregon letter made this clear in stating that if the security deposit is not received, “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.” (*See* Exhibit A, Security Deposit Letter, at 1 (emphasis added).) In Oregon, in accord with the ICA, Qwest could initiate the process of section (A)3.13 regarding default, which would require another notice to McLeod, and 30 days for McLeod to cure the default prior to Qwest seeking legal or equitable relief.

In effect, the McLeod requests that the Commission step into this dispute in an unripe and extraordinary manner when the issues are the subject of the TRO, are squarely before the federal court, and the ICA first requires completion of expressed procedures before the issue of termination ever arises. The Complaint and the motion for emergency relief prematurely and unnecessarily seek relief to which McLeod is not entitled.

V. Qwest has demanded a security deposit in accord with the ICA

Qwest does not believe that the Commission needs to rule on the merits of the security deposit demand, especially since there is no “emergency” to justify the extraordinary relief that

McLeod demands. Be that as it may, McLeod is also incorrect on the merits. Qwest has unassailable grounds in the ICA to demand a deposit. The Oregon ICA states in pertinent part:

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. (ICA, § (A)3.4.3.)

This clause is not qualified by language requiring Qwest to prove in a Commission proceeding or through the dispute resolution provision that McLeod has been repeatedly delinquent in payments under the ICA. To the contrary, it provides Qwest the unconditioned right to request such a deposit if McLeod becomes a credit risk.

Under the circumstances described below, Qwest is taking a common sense approach to protecting its interests in the event of a McLeod bankruptcy. Of primary concern to Qwest (and the triggering event to the security deposit demand) was McLeod's own 8-K filing on March 17, 2005 to the Securities and Exchange Commission (SEC), in which McLeod itself revealed that (1) its revenues sharply declined in the fourth quarter of 2004; (2) it had to seek forbearance from interest payments to its lenders; and (3) it was seeking to sell the company. As McLeod's 8-K explained, McLeod's "Lenders have agreed to forbear from exercising any remedies as a result of certain specified defaults under the Credit Facilities anticipated by the Company during the forbearance period, including, without limitation, the failure to make scheduled amortization payments under the Credit Facilities and interest payments under the Credit Agreement." (Exhibit D.)

A press release coincident with the 8-K filing confirmed Qwest's worst fears:

There can be no assurance that we will be able to reach an agreement with our lenders regarding a capital restructuring or continued forbearance and covenant relief prior to the end of the initial forbearance period on May 23, 2005. There also can be no assurance that we will be able to identify a suitable strategic partner or buyer In the event these alternatives are not available to the Company, it is *likely* that we will elect to forgo making future principal and interest payments to our lenders . . . or, alternatively, the

Company could be forced to seek protection from its creditors. (See McLeod Press Release (March 16, 2005), Exhibit E (emphasis added).)

On the news of the 8-K filing, McLeod's common stock plunged by almost *half in one day*. In light of McLeod's own statements of its financial risk, and the likelihood of insolvency, Qwest -- one of McLeod's largest creditors -- would have been foolish to not have taken action to protect its interests.

The credit risk that McLeod poses has been exacerbated by the fact that McLeod wrongfully withheld nearly \$2.5 million for Qwest *tariffed* services. McLeod argues that Qwest cannot base a security deposit demand under the ICA on the fact that McLeod had failed to pay its Qwest bills simply because the unpaid Qwest tariff charges were "invoiced separately" from services ordered under the ICA. (McLeod Complaint, pp. 6-7, ¶ 20.) The fact that the unpaid charges were contained in different McLeod accounts is of no relevance, however, especially since Qwest clearly has the discretion under the ICA to consider McLeod's overall credit profile in determining the security deposit requirement. The non-payment or delinquency in payment of any Qwest invoice, not merely the ICA accounts, would be relevant to any credit profile.

Indeed, in all commercial relationships, non-payment or late payments to unrelated third-party vendors are clearly relevant to a company's credit profile. Here, there is nothing more commercially relevant than McLeod's admitted delinquency in paying other Qwest bills. To Qwest, in the event of a McLeod insolvency, it will make no difference which invoice was not paid; it will all end up wrongfully depriving Qwest of monies for services that it rendered to McLeod.

VI. Summary resolution of the security deposit issues is not appropriate

Finally, even if this Commission were to determine that it has authority to grant the relief that McLeod seeks, and further, that it should not defer to the Colorado federal court pending resolution of the issues surrounding the TRO, McLeod essentially seeks a summary adjudication of

the security deposit, but without the submission of any evidence whatsoever. The ICA delineates Commission-approved processes for the issuance of default notices and notices of termination, and absent completion of those procedures, it is premature for the Commission to act. Only after the parties have followed the processes delineated in the ICA regarding notice of default, the ability to cure, and notice of termination are the issues ripe for Commission determination. And when the issues are ripe for Commission resolution, and if the issues have not been determined in another forum, the Commission should follow its rules of procedure for determining issues of fact. Indeed, McLeod itself admits that it seeks a contested case hearing in this matter.

Throughout its complaint, motion and supplement to the motion, McLeod makes certain factual assertions, but without any evidentiary support, much less a concession by Qwest that the facts are undisputed. For example, although McLeod correctly quotes from section (A)3.4.3 of the Oregon ICA that McLeod adopted from the ELI/Qwest ICA (which provisions are not in dispute, and which allow both parties to require security deposits), it then goes on to make numerous factual representations. These include, most notably, that “Qwest fails to satisfy any of [the] conditions” that allow Qwest to demand a security deposit from McLeod. There are numerous other specific disputed factual issues, including whether McLeod has been “repeatedly delinquent,” whether McLeod’s “previous payment history” has been adequate, whether credit report results (including but not limited to Dun and Bradstreet results) are adequate, whether McLeod is in fact “current on all invoices” or “has paid all previous invoices from Qwest in a timely fashion,” whether McLeod’s previous payment history has been “stellar,” and whether reliance on credit reports “was clearly intended to be a substitute in the absence of a previous payment history.”⁵

⁵ That last argument makes no sense, because, taking McLeod’s argument to its logical conclusion, credit reports could not be used, no matter how weak a CLEC’s current credit status was, so long as the CLEC had a “previous payment history.”

Clearly, McLeod wants to delay timely implementation of procedures authorized under the interconnection agreement. This is especially so because a grant of the relief that McLeod requests would result in McLeod delaying (through the dispute resolution process) the requirement that it pay Qwest security deposits to protect Qwest from further credit risk as a result of McLeod's precarious financial situation. However, these are highly fact-specific, and *disputed*, issues that are not appropriate for what is essentially a summary adjudication in less than a week from the filing of McLeod's complaint (a complaint which is procedurally improper in any event). This is simply not appropriate. On this basis alone, and assuming the Commission determines to retain this matter, the Commission should deny the motion for emergency relief and should, at a minimum, set a reasonable procedural schedule to have these issues addressed with testimony and other evidence.

CONCLUSION

For the foregoing reasons, Qwest respectfully submits that the Commission should deny McLeod's complaint and especially its motion for emergency relief.

DATED: April 5, 2005

Respectfully submitted,

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CERTIFICATE OF SERVICE

IC 11

I hereby certify that on the 5th day of April 2005, I served the foregoing **QWEST'S RESPONSE TO McLEODUSA'S SUPPLEMENT TO MOTION FOR EMERGENCY RELIEF** in the above entitled docket on the following persons via U.S. Mail, by mailing a correct copy to them in a sealed envelope, with postage prepaid, addressed to them at their regular office address shown below, and deposited in the U.S. post office at Portland, Oregon.

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DATED this 5th day of April, 2005

QWEST CORPORATION

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