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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

IN RE:	:	Docket No. 05-049-62
PETITION OF MCLEODUSA TELECOMMUNICATIONS SERVICES, INC., FOR ENFORCEMENT OF INTERCONNECTION AGREEMENT WITH QWEST CORPORATION	:	**MCLEODUSA'S OPENING BRIEF IN SUPPORT OF ITS PETITION**

McLeodUSA Telecommunications Services, Inc. ("McLeodUSA") provides this Opening Brief in Support of McLeodUSA's Petition for Enforcement of Interconnection Agreement with Qwest ("Petition"). Qwest Corporation's ("Qwest's") eleventh hour withdrawal of its March 21, 2005, letters demanding security deposits of approximately $16 million ("March 21 Letters"), does not resolve the issue of Qwest's authority to demand any such deposit when McLeodUSA has an unblemished payment history under the parties' Interconnection Agreement ("ICA" or "Agreement"). Nor does that letter address Qwest's contention that it need not comply with the dispute resolution provisions

of the Agreement when McLeodUSA contests a deposit demand. Those issues remain in dispute.

The Commission has primary jurisdiction over interpretation and enforcement of ICAs governing the relationship between Qwest and other carriers in Utah,[1] and the Commission should not abdicate that responsibility. Rather, the Commission should retain jurisdiction and should require Qwest to comply with the provisions of the parties' Agreement. Those provisions require Qwest to negotiate *all* disputes arising under the ICA, including disputes over security deposits. Qwest improperly rebuffed McLeodUSA's attempts to initiate the dispute resolution process in response to Qwest's deposit demand. The ICA authorizes Qwest to demand a security deposit only when McLeodUSA has an unsatisfactory payment history under the ICA. McLeodUSA has a spotless history of paying undisputed amounts due under the ICA. The Commission, therefore, should issue an order enforcing Qwest's obligations to comply with the dispute resolution provisions and to limit any demand for a security deposit to circumstances in which McLeodUSA is repeatedly delinquent in making payments required by the Agreement.

BACKGROUND

McLeodUSA's Petition and Opposition to Qwest's Motion to Dismiss, Stay, or for Extension of Time ("Opposition") provide the principle background information on the issues presented to the Commission for resolution. McLeodUSA will not repeat that information here, but supplements it by explaining events that have occurred since McLeodUSA's last filing.

[1] *E.g., Contact Communications v. Qwest*, 246 F. Supp. 2d 1184 (D. Wyo. 2003).

McLeodUSA filed its Opposition on April 13, 2005. By letter dated that same day, Qwest notified McLeodUSA that Qwest was withdrawing its March 21 Letters ("April 13 Letter"). In that letter, Qwest expressly reserved any and all rights to demand future security deposits under the same conditions as those underlying the March 21 Letters. Qwest also filed a Supplemental Motion to Dismiss the Petition based on the April 13 Letter, claiming that no case or controversy exists any longer.

Qwest's actions, however, have not been consistent with that representation. McLeodUSA learned that on April 13, 2005, a Qwest representative contacted McLeodUSA's largest customer and suggested that it was in jeopardy of losing its telephone service because of millions of dollars that McLeodUSA allegedly owed Qwest in security deposits. Affidavit of Thomas B. McCoy ("McCoy Aff.") (attached as Exhibit A). Qwest thus adheres to its position that it can demand a deposit from McLeodUSA under the current circumstances, and Qwest continues to threaten such action.

DISCUSSION

A. Qwest's April 13 Letter Does Not Render This Proceeding Moot.

Qwest has attempted to undermine the Commission's jurisdiction to resolve the dispute between Qwest and McLeodUSA by withdrawing the March 21 Letters. Qwest's withdrawal of its unlawful demand for a security deposit under the ICA, however, does not render McLeodUSA's Petition moot. Courts universally hold that voluntary cessation of a challenged practice does not deprive a tribunal of jurisdiction to determine the legality of that practice, unless the party asserting mootness can prove that party cannot reasonably be expected to engage in that conduct in the future. The Supreme Court, for example, stated:

> It is well settled that "a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of a practice." "[I]f it did, the courts would be compelled to leave '[t]he defendant . . . free to return to his old ways.'" In accordance with this principle, the standard we have announced for determining whether a case has been mooted by the defendant's voluntary conduct is stringent: "A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." The "heavy burden of persua[ding] the court that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness.[2]

Qwest has not even approached compliance with this standard. Qwest's April 13 Letter does not resolve the parties' underlying disputes concerning the applicability of the ICA's dispute resolution process to deposit demands or Qwest's ability to demand a deposit when McLeodUSA has an unblemished record of timely payments under the ICA. The second paragraph of that letter states:

> The withdrawal of the letters of demand for security under the Interconnection Agreements does not constitute an admission by Qwest of the truth, accuracy or merit of any fact or principle of law asserted by McLeod, including but not limited to any purported interpretation of any term or condition of any of the Interconnection Agreements. Qwest does not waive and expressly reserves any and all rights to take any action with respect to any other security deposit demand, any notice of default or default, or any conduct taken in the future under the Interconnection Agreements.

Far from proving with absolute clarity that its conduct giving rise to the Petition will *not* recur, Qwest expressly reserves its alleged right to repeat that same conduct, virtually guarantying that it *will* recur. Qwest sales representatives, moreover, are suggesting to McLeodUSA customers in Utah that their service is "in jeopardy of being

[2] *Friends of the Earth, Inc. v. Laidlaw Environmental Servs., Inc.*, 528 U.S. 167, 189, 120 S. Ct. 693, 145 L. Ed. 2d 610, 632 (2000) (quoting *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982); *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953); *United States v. Concentrated Phosphate Export Assn., Inc.*, 393 U.S. 199, 203 (1968)) (citations omitted).

disconnected because of millions of dollars in deposits that McLeodUSA owed Qwest." McCoy Aff. (Exhibit A). Qwest obviously continues to believe that there is a live and continuing dispute. Qwest's withdrawal of its March 21 Letters thus is nothing more than a ploy to get the Commission to dismiss McLeodUSA's Petition.

The Third U.S. Circuit Court of Appeals refused to dismiss a case as moot under comparable circumstances in *Dow Chemical Co. v. U.S. Environmental Protection Agency*, 605 F.2d 673 (3d Cir. 1979). In that case, the EPA sought dismissal of an appeal because the agency had withdrawn its regulation that was the basis of the underlying suit. The court, however, concluded that the case was not moot because a concrete dispute existed between the parties and that the EPA had not changed its legal position with respect to that dispute:

> The EPA has not altered its substantive stance, it has merely withdrawn its regulation for technical reasons with the declaration that it will be resubmitted. If this action by the EPA were alone sufficient to render a live dispute moot, the timing and venue of judicial review could be effectively controlled by the agency.[3]

Similarly here, Qwest has not altered its substantive stance that it may demand a deposit under the ICA regardless of McLeodUSA's payment history under the ICA and that Qwest need not comply with the dispute resolution provisions of the ICA when McLeodUSA disputes such a demand.

The court in *Dow Chemical* also found that the EPA's adherence to its legal position could continue to have a present effect on the company: "To delay adjudication here would not leave the parties in the same position they occupied before the EPA took action – rather it would leave Dow under a non-speculative threat of agency action while

[3] *Id*. at 679.

delaying any decision on the legality of that action."[4] Qwest's interpretation of the ICA also leaves McLeodUSA under the non-speculative threat of another deposit demand while delaying any decision on the legality of such a demand, as well as subject to Qwest's efforts to use that threat to frighten McLeodUSA's customers into obtaining service from Qwest. The Commission, like the Third Circuit, should not "dismiss a genuine and concrete controversy for what in this case amounts to a technical reason, brought about by the party seeking such dismissal."[5]

McLeodUSA's Petition will not become moot unless Qwest concedes that it only may demand a deposit under the parties' ICA if McLeodUSA fails to make timely payments under the Agreement and that the ICA's dispute resolution process applies to a dispute over any future deposit demand. Until Qwest makes such binding representations, the Commission remains presented with a controversy that it should resolve.

B. Qwest Must Comply With the Dispute Resolution Provisions of the ICA if McLeodUSA Disputes a Deposit Demand.

Section 26.19 of the parties' ICA governs dispute resolution, and subsection 26.19.1 provides, in relevant part, "If *any* claim, controversy or dispute between the Parties . . . cannot be settled through *negotiation*, it may be resolved by arbitration . . . or by complaint to the Public Service Commission of Utah, pursuant to state law." (Emphasis added.) The Agreement thus requires that any dispute arising under the ICA must be negotiated and, if necessary, arbitrated or resolved by the Commission.

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[4] *Id*.

[5] *Id*.; *see Hooker Chemical Co. v. EPA*, 642 F.2d 48, 52 (3rd Cir. 1981) (stating, "A controversy still smolders when the defendant has voluntarily, but not necessarily permanently, ceased to engage in the allegedly wrongful conduct," and concluding "that an appeal will not be deemed moot if there is a reasonable likelihood that the parties will contest the same issues in a subsequent proceeding").

McLeodUSA disputes Qwest's authority to demand a deposit when McLeodUSA has a spotless record of payments to Qwest under the ICA. Accordingly, McLeodUSA notified Qwest of the dispute in response to Qwest's March 21 deposit demand letters and requested negotiations. Petition, Exs. D & E. Qwest refused.

Qwest has yet to identify any basis on which Qwest may refuse to negotiate the current dispute over Qwest's authority to demand a deposit from McLeodUSA. The phrase "any claim, controversy or dispute between the Parties" means "any claim, controversy or dispute between the Parties," including a dispute over Qwest's authority to demand a security deposit when McLeodUSA is not repeatedly delinquent in making payments under the ICA. As a practical matter, moreover, the Commission should not be required to resolve a dispute between the parties when the parties have not even engaged in negotiations to try to resolve that dispute themselves. The Commission, therefore, should require Qwest to comply with the dispute resolution provisions of the ICA when McLeodUSA invokes those procedures in response to a demand for deposit from Qwest.

C. Qwest May Not Demand a Deposit From McLeodUSA When McLeodUSA Is Not Repeatedly Delinquent in Making Payments of Undisputed Amounts Due Under the ICA.

Nothing in the parties' Agreement gives Qwest the right to demand a security deposit from McLeodUSA for anything other than repeatedly delinquent payments of undisputed amounts due under the ICA. Section 26.4.4 of the Agreement governs Qwest's rights to a security deposit under certain conditions, but none of the conditions allowing Qwest to invoke those rights has been satisfied. As an initial matter, section 26.4.4 is a subsection of Section 26.4, entitled "Payment." Section 26.4.1 defines the scope of section 26.4: "Amounts payable *under this Agreement* are due and payable within thirty (30) calendar days after the date of invoice." (Emphasis added.) Any rights

to a security deposit under section 26.4.4 are limited to security for payments made for services provided under the ICA. Qwest, therefore, has no legal basis to assert, as it did in its March 21 Letters, that allegedly outstanding balances under "other agreements, tariffs, or accounts" justify a deposit demand under the Agreement.

Nor can Qwest support a demand for deposit as a matter of fact. Section 26.4.4 of the Agreement provides, in relevant part, as follows:

> If [McLeodUSA] is repeatedly delinquent in making its payments, [Qwest] may, in its sole discretion, require a deposit to be held as security for the payment of charges. "Repeatedly delinquent" means being thirty (30) days or more delinquent for three (3) consecutive months.

Qwest fails to satisfy the sole condition under which it can demand a security deposit. Qwest does not dispute that McLeodUSA has an unbroken history of timely payments under the ICA. Qwest thus cannot legitimately contend that McLeodUSA has been "repeatedly delinquent" on any payments under the ICA, or that Qwest is entitled to demand any deposit whatsoever from McLeodUSA under the Agreement.

Qwest disregards these provisions of the ICA and contends that it is relying on section 11.9.1, which provides that Qwest "may require McLeodUSA to make a suitable deposit to be held by [Qwest] as a guarantee of the payment of charges." Qwest's contention is not sustainable. Qwest neglects to mention that section 11.9.1 is part of the terms and conditions in the Agreement that govern McLeodUSA's resale of Qwest retail services. Indeed, the next sentence makes clear, even if the placement of this section in the ICA did not, that the section has very limited applicability: "Any deposit required of an existing *Reseller* is due and payable within ten days after the requirement is imposed." (Emphasis added.) The third sentence reinforces this interpretation and provides a further restriction: "The amount of the deposit shall be the estimated *charges for the resold*

service which will accrue for a two-month period." (Emphasis added.) McLeodUSA resells very few Qwest services in Utah, and any deposit required under this section would be *de minimus* – far, far less than the $1.25 million that Qwest demanded.

Nor do the resale deposit section provisions of the Agreement support any deposit demand. Section 11.9.2 provides, in relevant part:

> When the service is terminated, or when McLeodUSA has established satisfactory credit, the amount of the initial or additional deposit, with any interest due as set forth in applicable Tariffs, will, at McLeodUSA's option, either be credited to McLeodUSA's account or refunded. Satisfactory credit for a Reseller is defined as twelve consecutive months service as a Reseller without a termination for nonpayment and with no more than one notification of intent to terminate service for nonpayment.

McLeodUSA long ago established "satisfactory credit" as that term is defined in this section – McLeodUSA has never had a notification of intent to terminate service for nonpayment for resold services, much less a termination. The ICA cannot reasonably be interpreted to authorize Qwest to demand a deposit that Qwest would only be required immediately to return to McLeodUSA. The only reasonable interpretation of section 11.9.1, therefore, is that Qwest may demand a deposit for resold services only when McLeodUSA has failed to establish or maintain "satisfactory credit" as defined in section 11.9.2. McLeodUSA has established and maintained such credit, and thus Qwest cannot demand a deposit of any kind under the ICA.

It has also been suggested that because Qwest allegedly can demand a deposit from retail customers who are current in their service payments, Qwest may make the same demand of McLeodUSA. Such a suggestion, however, fundamentally ignores the source of Qwest's obligations to McLeodUSA and vice versa. The ICA governs the parties' rights and obligations, regardless of the terms and conditions contained in the

tariffs, price lists, or competitive contracts out of which Qwest provides its retail services. The Commission's obligation is to interpret and enforce the language of the ICA. Where, as here, that language is clear and unambiguous, the Commission must give effect to that language. Qwest's rights with respect to deposit demands of its other customers or carriers, therefore, is irrelevant and should not have any bearing on the Commission's disposition of the Petition.

CONCLUSION

Qwest cannot deprive the Commission of jurisdiction to hear McLeodUSA's Petition by strategically withdrawing its deposit demand letter when a controversy still exists over Qwest's authority to demand a deposit under the ICA. Qwest also cannot justify demanding any deposit as long as McLeodUSA continues to make timely payments of undisputed amounts due under the ICA. Nor can Qwest plausibly contend that disputed deposit demands are somehow exempt from the Agreement's dispute resolution provisions. The Commission, therefore, should issue an order to that effect and requiring Qwest to comply with the applicable provisions of the ICA.

RESPECTFULLY SUBMITTED this 19th day of April, 2005.

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