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*Attorneys for Qwest Corporation*

**BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH**

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<b>IN RE:</b>	:	
	:	Docket No. 05-049-62
<b>PETITION OF MCLEODUSA</b>	:	
<b>TELECOMMUNICATIONS</b>	:	<b>PRE-HEARING BRIEF OF QWEST</b>
<b>SERVICES, INC., FOR</b>	:	<b>CORPORATION</b>
<b>ENFORCEMENT OF</b>	:	
<b>INTERCONNECTION</b>	:	
<b>AGREEMENT</b>	:	
<b>WITH QWEST CORPORATION</b>	:	

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In accordance with the scheduling order issued by the Public Service Commission of Utah (“Commission”) on April 11, 2005, Qwest Corporation (“Qwest”), by and through its counsel, submits this Pre-hearing Brief in response to the issues presented in the Petition for Enforcement of Interconnection Agreement (“Petition”) filed by McLeodUSA Telecommunication Services, Inc. (“McLeod”).

As explained in detail below, the Petition identified two issues for resolution: (1) Qwest's demand for a security deposit under the parties' interconnection agreement ("ICA"), and (2) the parties' obligations to follow the dispute resolution provisions in the event of a default. However, these two issues were both rendered moot on April 13, 2005, when Qwest withdrew its demand for a security deposit pursuant to the terms of the parties' ICA. By continuing to press forward with this docket despite Qwest's withdrawal of its demand for a security deposit, it is clear that McLeod is now seeking to obtain nothing more than an advisory opinion from this Commission. Since the Commission is not empowered to render advisory opinions, it should dismiss this docket.

## **I. FACTUAL BACKGROUND**

This dispute arises out of McLeod's deteriorating financial condition, and a dispute between McLeod and Qwest Communications Corporation ("QCC"), regarding charges and payments pertaining to certain telecommunications traffic between those carriers.

The McLeod/QCC dispute resulted in the filing of two separate lawsuits, in two separate jurisdictions, over the course of two consecutive days earlier this year. On February 24, 2005, QCC filed a complaint against McLeod in Colorado state court concerning this dispute. On February 25, 2005, McLeod filed suit against QCC and Qwest in federal court in Iowa.

At the time these two lawsuits were filed, and despite the fact that its dispute was with QCC, McLeod refused to pay Qwest for certain charges incurred for tariffed

services that it had ordered from Qwest. The amount of those charges totaled approximately \$2.5 million.

Approximately three weeks later, on March 16, 2005, McLeod made a form 8K filing with the United States Securities and Exchange Commission and it released a press release, both of which indicated that it was in serious financial trouble.

The form 8K filing explained that McLeod's lenders had agreed to forbear from exercising their remedies following certain specified defaults by McLeod including their failure to make scheduled amortization payments and interest payments to those lenders.

McLeod's press release was even more dire. In the press release McLeod explained:

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.*" (Emphasis added)

Upon learning of McLeod's self reported financial problems, and because McLeod was withholding a large sum of money from Qwest, Qwest sent McLeod multiple letters on March 21, 2005, demanding a security deposit pursuant to the parties' ICAs in several states. Qwest's letter demanded that McLeod pay the security deposit by April 1, 2005, or Qwest would *commence the process* of pursuing its recourse under the ICA and applicable Utah law.<sup>1</sup>

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<sup>1</sup> See, e.g., *Sears v. Riemersma*, 655 P.2d 1105, 1109 (1982) ("[R]espondent was justified in requiring assurances that the appellants would pay their fair share of the improvements and in delaying performance as long as negotiations continued"; citing Restatement (Second) of Contracts § 251(1) (1979)); see also Restatement (Second) of Contracts § 251(1) ("Where

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, payments and from terminating services to McLeod.

On March 23, 2005, the federal district court in Iowa granted McLeod’s petition and issued the TRO against Qwest. The TRO, which currently remains in effect, prevents Qwest and QCC 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 service . . . .”

The TRO was initially issued for a period of 20 days, and was effective by its express terms to and including April 12, 2005. However, after the TRO was issued the Iowa case was transferred to the federal courts in Colorado under the first filed doctrine. Before agreeing to transfer the case to the federal courts in Colorado, the federal court in Iowa sought and obtained Qwest’s agreement that if the case was transferred to the federal courts in Colorado, Qwest would agree to let the TRO “remain in effect until the TRO is modified, extended, or rescinded by the Colorado court.”

The federal court in Colorado has taken no action on the TRO, and has not yet scheduled a hearing on the matter. The TRO issued by the federal court in Iowa currently remains in effect preventing Qwest from terminating McLeod and from demanding a security deposit from McLeod.

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reasonable grounds arise to believe that the obligor will commit a breach by non-performance that would of itself give the obligee a claim for damages for total breach under § 243, the obligee may demand adequate assurance of due performance and may, if reasonable, suspend any performance for which he has not already received the agreed exchange until he receives such assurance.”)

On March 30, 2005, McLeod filed its Petition, and an emergency motion, with this Commission. The Petition identified two issues for resolution: Qwest's demand for a security deposit under the ICA, and the parties' obligations to follow the dispute resolution provisions in the event of a default. More specifically, McLeod's Petition requested a ruling from this Commission "that Qwest may not disconnect or discontinue providing telecommunications services under the Parties' Interconnection Agreement or demand a security deposit from McLeodUSA at this time." The Petition also requested a ruling from the Commission "that *in the event of a default* under the Interconnection Agreement, Qwest must follow the dispute resolution provisions of the Interconnection Agreement and may not 'suspend order activity,' 'disconnect services,' or terminate the Agreement until those dispute resolution procedures have been completed." Petition at 10 (Requested Relief Paragraph).

On April 1, 2005, Qwest filed its Response to McLeod's request for emergency relief ("Qwest Response"). In Qwest's Response it noted, among other things, that it had not declared McLeod in default under the parties' ICA; that in the event of a default McLeod would have thirty days to cure such default; that Qwest did not intend to suspend order activity or disconnect services to McLeod on April 1, 2005; and that since the TRO was still in effect there was no need for the Commission to take emergency action. Qwest, therefore, requested that McLeod's request for relief be denied.

On April 11, 2005, Qwest filed its Motion to Dismiss, Stay or Extend McLeod's Petition arguing that the issues presented in McLeod's Petition were not ripe for review, and that the TRO presented the type of extraordinary circumstances described in Utah

Code Ann. § 54-8b-17(1)(e)(i) such that the forty-five day time lines set forth in this section should be extended.

On April 13, 2005, Qwest formally withdrew its demand for a security deposit from McLeod pursuant to the parties' ICA. Following the withdrawal of its demand for a security deposit, Qwest filed a Supplemental Motion to Dismiss McLeod's Petition on the same day arguing that the issues raised by McLeod in its Petition were now moot.

Later that same day, McLeod responded to Qwest's April 11, 2005, Motion by filing its Opposition to Qwest's Motion to Dismiss, Stay, or For Extension of Time ("Opposition"). In its Opposition, McLeod argued that the Commission needed to address the legitimacy of Qwest's demand for a security deposit given that McLeod was timely in its payments to Qwest under the ICA. McLeod then recast its argument concerning the second issue identified in the Requested Relief section of its Petition. Recognizing that Qwest had never declared McLeod to be in default under the ICA, McLeod argued that the Commission should require Qwest to follow the dispute resolution provisions in section 26.19.1 of the ICA since McLeod "disputed" Qwest's demand for a security deposit.

McLeod has not responded to Qwest's Supplemental Motion to Dismiss.

## **II. DISCUSSION**

### **A. The Issues Raised in McLeod's Petition Are Moot.**

In its Petition McLeod requested that the Commission resolve two issues: (1) whether Qwest had the right to demand a security deposit pursuant to the parties' ICA

and (2) whether the parties' were required to follow the dispute resolution provisions of the ICA in the event of a default. More specifically, McLeod requested the following:

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 disconnect or discontinue providing telecommunications services under the Parties' Interconnection Agreement or 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 Interconnection Agreement and may not "suspend order activity," "disconnect services," or terminate the Agreement under those dispute resolution procedures have been completed. Petition at 10 (Requested Relief Paragraph) (emphasis added).

These two issues were the direct result of Qwest's March 21, 2005 demand for security. McLeod admitted as much in its Petition when it stated, "[t]his Petition 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 agreement, and to discontinue services to McLeodUSA should McLeodUSA not comply with Qwest's demand." Petition at 1 (emphasis added). With Qwest's withdrawal of its demand for a security deposit, there is simply no continuing controversy regarding the demand for a security deposit and McLeod's Petition is now moot.

In addition, there is nothing left for the parties to discuss, or to litigate, under the dispute resolution provisions of paragraph 26.19.1. This section of the parties' ICA provides as follows:

If any claim, controversy or dispute between the Parties, their agents, employees, officers, directors or affiliated agents ("Dispute") cannot be settled through negotiation, it may be resolved by arbitration conducted by a single arbitrator engaged in the practice of law, under the then current

rules of the American Arbitration Association (“AAA”), or by complaint to the Public Service Commission of Utah, pursuant to state law. . . . ICA ¶ 26.19.1.

In its Petition, McLeod asked the Commission to rule that the parties would be required to follow this dispute resolution provision “*in the event of a default* under the Interconnection Agreement . . .” McLeod Petition, (Requested Relief Paragraph).

Aside from the fact that McLeod opted out of this ICA provision by filing a complaint with, and requesting a TRO from, the federal courts in Iowa, it is simply undisputed that Qwest never declared McLeod to be in default under the ICA. Even if Qwest had done so, there is nothing in the default section of the ICA that suggests Qwest would first have to go through the dispute resolution provisions of the parties’ ICA *before* it declared McLeod to be in default. To be sure, the default provisions of the ICA state as follows:

If either Party defaults in the payment of any amount due hereunder, or if either Party violates any other provision of this Agreement, and such default or violation shall continue for thirty (30) days after written notice thereof, the other Party may seek legal and/or regulatory relief. 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. ICA ¶ 26.12.

There is no language in this provision of the ICA that requires the parties to first go through the dispute resolution provisions found in section 26.19.1. To the contrary, requiring the parties to proceed directly to dispute resolution would render the cure period described in this default section meaningless.

In any event, this “dispute” has also been rendered moot. As argued by McLeod in its Opposition, “McLeod issued a letter to Qwest informing Qwest that McLeodUSA disputed its demand for a deposit . . .” Opposition at 5-6. Since McLeod’s “dispute”

was based on Qwest's demand for a security deposit, Qwest's withdrawal of this demand has eliminated the need for the parties to discuss, or litigate, this issue under the dispute resolution provisions of the ICA.

Because the circumstances giving rise to this controversy have been eliminated through Qwest's withdraw of its demand for a security deposit, the Commission must now dismiss McLeod's Petition as moot. *See, Richards v. Baum*, 914 P.2d 719, 720 (Utah 1996) citing *Merhish v. H.A. Folsom & Assocs.*, 646 P.2d 731, 732 (Utah 1982) (“[t]he strong judicial policy against giving advisory opinions dictates that courts refrain from adjudicating moot questions. . . . ‘An appeal is moot if during the pendency of the appeal circumstances change so that the controversy is eliminated, thereby rendering the relief requested impossible or of no legal effect.’ *Franklin Fin. v. New Empire Dev. Co.*, 659 P.2d 1040, 1043 (Utah 1983)”).

RESPECTFULLY SUBMITTED: April 19, 2005.

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## CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing **PRE-HEARING BRIEF OF QWEST CORPORATION** was served on the following by electronic mail on April 19, 2005:

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