

Robert C. Brown
Qwest Services Corporation
1801 California, 10th Floor
Denver, CO 80202
(303) 383-6642
(303) 296-3132 (fax)
robert.brown@qwest.com

Gregory B. Monson (2294)
Ted D. Smith (3017)
Stoel Rives LLP
201 South Main Street, Suite 1100
Salt Lake City, Utah 84111
(801) 328-3131
(801) 578-6999 (fax)
gbmonson@stoel.com
tsmith@stoel.com

Attorneys for Qwest Corporation

BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

IN RE:	:	Docket No. 05-049-62
	:	
PETITION OF MCLEODUSA	:	QWEST CORPORATION'S
TELECOMMUNICATIONS	:	MOTION TO DISMISS, STAY, OR
SERVICES, INC., FOR	:	FOR EXTENSION OF TIME
ENFORCEMENT OF	:	TO RESPOND TO MCLEODUSA
INTERCONNECTION	:	TELECOMMUNICATIONS
AGREEMENT	:	SERVICES, INC.
WITH QWEST CORPORATION	:	PETITION FOR ENFORCEMENT
	:	OF INTERCONNECTION
	:	AGREEMENT WITH QWEST

Qwest Corporation, (“Qwest”), by and through its counsel, hereby moves that the Public Service Commission of Utah (“Commission”) dismiss or stay McLeodUSA Telecommunication Services, Inc. (“McLeod’s”) Petition for Enforcement of Interconnection Agreement with Qwest Corporation (“Petition”).

For the reasons set forth herein, Qwest believes that it is currently prohibited from proceeding with the issues raised by McLeod in its Petition based on the terms of the Temporary Restraining Order issued by the United States District Court for the Northern District of Iowa. Moreover, the issues in this docket were not ripe for either emergency or expedited adjudication when McLeod filed its Petition. As a result, this case should be dismissed.

I. BACKGROUND

This docket was opened on March 30, 2005, when McLeod filed its Petition, and emergency motion, seeking to prevent Qwest from demanding a security deposit and from discontinuing services or disconnecting McLeod pursuant to the parties' interconnection agreement ("ICA"). On April 1, 2005, Qwest filed its Response to McLeod's request for emergency relief ("Qwest Response") attaching thereto several relevant documents related to the dispute. On April 4, 2005, Qwest filed supplemental authority relating to the request for emergency relief.

The genesis of the dispute, however, 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 that does not fall under the ICA between Qwest and McLeod. 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. McLeod subsequently removed that action to federal court in Denver. On February 25, 2005, McLeod filed suit against QCC and Qwest in federal court in Iowa.

At the time, 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 (attached as Exhibit D to Qwest's April 1, 2005 Response) 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.*"

McLeod Press Release (Mar. 16, 2005), attached as Exhibit E to Qwest's April 1, 2005 Response.

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. The following day, 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 court 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” See Temporary Restraining Order attached to McLeod’s Petition. 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 Qwest sought to have the action in the Iowa federal courts 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 nonetheless agreed to let the TRO “remain in effect until the TRO is modified, extended, or rescinded by the Colorado court.” See Exhibit B to Qwest’s April 1, 2005 Response. On April 1, 2005, the Iowa action was transferred to the federal courts in Colorado. 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.

II. DISCUSSION

A. The Issues Raised in McLeod's Petition Are Not Ripe.

The issues raised in McLeod's Petition are not ripe for adjudication. In its Petition, and in its Motion for Emergency Relief, McLeod urges this Commission to declare that Qwest may not disconnect or discontinue providing telecommunications services under the parties' ICA, or demand a security deposit at this time. McLeod claims that such relief is necessary on an emergency basis because Qwest threatened to 'suspend order activity' and 'disconnect services' on April 1, 2005. Contrary to McLeod's claims, Qwest did not threaten to suspend order activity or disconnect services on April 1, 2005. Instead, in that letter Qwest indicated that it would *commence the process* of terminating the ICA, suspending order activity, disconnecting services, and/or any other remedy available to it under law or equity in the State of Utah. As part of this process, however, Qwest would first be required to declare McLeod in default under the terms of the ICA. Notably, Qwest has not served McLeod with any notice of default. Had Qwest done so, McLeod would have had thirty days to cure such default before any further action could be taken. *See* ¶ 26.12 of the parties' ICA. Because no default notice was issued by Qwest, the issues raised in McLeod's Petition could not be ripe for adjudication. As a result, this case should be dismissed.

B. Extraordinary Conditions Exist Which Prevent This Docket From Going Forward Under The Expedited Procedures Outlined in Utah Code Ann. § 54-8b-17.

As set forth above, the issues raised in McLeod's Petition are not ripe for adjudication and this docket should be dismissed. To the extent the Commission disagrees with Qwest's position, however, it should stay any further action pending a

resolution of the TRO rather than forcing the parties to litigate this matter under the expedited procedures set forth in Utah Code Ann. § 54-8b-17.

McLeod filed its Petition pursuant to Utah Code Ann. §§ 54-8b-2.2(1)(e) & 54-8b-16. Among other things, § 54-8b-16 gives the Commission authority to enforce the terms of a Commission approved ICA. Under normal circumstances the Commission would take action as necessary to enforce the terms of an ICA within 45 days from the date a petition was filed. See, Utah Code Ann. § 54-8b-17(1)(e). However, when extraordinary conditions exist, the Commission is not bound by this 45 day deadline. *Id.* § 54-8b-17(1)(e)(i). This is a case where extraordinary conditions exist which warrant extending the hearing and decision deadlines that would otherwise apply.

As described above, McLeod obtained a TRO against Qwest on March 23, 2005. The language of the TRO is sufficiently broad to preclude Qwest from further demands of security under the ICA or terminating service provided under the ICA. Moreover, the TRO is still in effect and Qwest is bound by its terms until the federal court in Colorado takes some action to modify, extend or rescind its terms. And the language of the TRO is such that the issues raised in McLeod's petition filed with this Commission are the subject of the federal court action. Given the express terms of the TRO, if this docket moves forward the Commission and the federal court could issue inconsistent orders which raise not only the prospect of conflicting directives, but also whether the Commission has the authority to issue such orders. To protect against this potential outcome, the Commission should dismiss this action pending resolution of the TRO.

In the alternative, Qwest requests this Commission find that the issuance of the TRO presents extraordinary conditions that warrant extending the time frames in this

proceeding beyond those set forth in section 54-8b-17, that Qwest be granted a suitable extension of time to answer McLeod's Petition, and that the any future hearing in this matter be set beyond the 25 day deadline found in section 54-8b-17.

RESPECTFULLY SUBMITTED: April 11, 2005.

Gregory B. Monson
Ted D. Smith
Stoel Rives LLP

Robert C. Brown
Qwest Services Corporation

Attorneys for Qwest Corporation

CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing **QWEST CORPORATION'S MOTION TO DISMISS, STAY, OR FOR EXTENSION OF TIME TO RESPOND TO MCLEODUSA TELECOMMUNICATIONS SERVICES, INC. PETITION FOR ENFORCEMENT OF INTERCONNECTION AGREEMENT WITH QWEST** was served on the following by electronic mail on April 11, 2005:

Gregory J. Kopta
DAVIS WRIGHT TREMAINE LLP
2600 Century Square
1501 Fourth Ave.
Seattle, WA 98101
gregkopta@dwt.com

William Courter
Assistant General Counsel
McLeodUSA
6400 C Street, SW
Cedar Rapids, IA 52404
wcourter@mcleodusa.com

Michael Ginsberg
Assistant Attorney General
Patricia E. Schmid
Assistant Attorney General
500 Heber M. Wells Building
160 East 300 South
Salt Lake City, UT 84114
mginsberg@utah.gov
pschmid@utah.gov