

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

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IDAHO PUBLIC
UTILITIES COMMISSION

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PETITION OF MCLEODUSA)
TELECOMMUNICATIONS SERVICES,)
INC., FOR ENFORCEMENT OF)
INTERCONNECTION AGREEMENT)
WITH QWEST CORPORATION)
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Docket No. MTI-T-05-01

**PETITION OF MCLEODUSA TELECOMMUNICATIONS SERVICES, INC.,
FOR ENFORCEMENT OF INTERCONNECTION AGREEMENT
WITH QWEST CORPORATION**

McLeodUSA Telecommunications Services, Inc. ("McLeodUSA"), through its undersigned counsel, and pursuant to Idaho Code § 61-501, petitions the Idaho Public Utilities Commission ("Commission") for enforcement of its interconnection agreement with Qwest Corporation ("Qwest"). This 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. Qwest has recently demanded that McLeodUSA pay more than \$15.9 million to Qwest within 10 days—\$971,870.45 in Idaho alone—or Qwest will "suspend order activity" and "disconnect services" provided to McLeodUSA. Rather than follow the clear terms of the interconnection agreement regarding dispute resolution, Qwest has made extortionate demands rather than adopt the approach of established telecommunications carriers that respect their contractual obligations. McLeodUSA seeks an order from this Commission that Qwest may not demand a security deposit and that Qwest may not "suspend order activity" or "disconnect services" until all procedures for dispute resolution in the interconnection agreement have been satisfied. Because

Qwest has threatened to “suspend order activity” and “disconnect services” on April 1, 2005, McLeodUSA asks this Commission to provide McLeodUSA with its requested relief on an expedited, emergency basis, and has filed a Motion for Emergency Relief concurrently with this Petition.

JURISDICTION

1. Both McLeodUSA and Qwest are authorized to provide local exchange services in the State of Idaho pursuant to certificates issued by this Commission.
2. Pursuant to Section 252 of the Telecommunications Act of 1996 (the “Act”), McLeodUSA opted in an Interconnection Agreement (the “Interconnection Agreement” or “Agreement”) that was filed with the Commission on September 18, 2000, and approved by the Commission on November 13, 2000. A copy of the relevant portions of the Agreement are attached as Exhibit A and incorporated herein.
3. State commissions have the authority to interpret and enforce agreements they approve when post-approval disputes arise. *Michigan Bell Tel. Co. v. Strand*, 305 F.3d 580, 583 (6th Cir. 2002); *Michigan Bell Tel. Co. v. Climax Tel. Co.*, 202 F.3d 862, 868 (6th Cir.), *cert. denied*, 531 U.S. 816 (2000).
4. Thus, the Commission has clear jurisdiction to interpret the terms of the Interconnection Agreement as alleged herein.
5. In addition, the Commission has jurisdiction to consider this Petition pursuant to Idaho Code § 61-501.

PARTIES

6. McLeodUSA is a competitive local exchange carrier certified to provide local exchange service [and intrastate interexchange service] in Idaho. Correspondence regarding this

Petition should be sent to McLeodUSA at the following address:

William Courter
Assistant General Counsel
McLeodUSA Telecommunications Services, Inc.
6400 C Street, SW
Cedar Rapids, IA 52406

- and -

Mark Trinchero
DAVIS WRIGHT TREMAINE LLP
1300 SW Fifth Avenue, Suite 2300
Portland, OR 97201-5682

7. Qwest is an incumbent local exchange carrier certified to provide local exchange service [and intrastate interexchange service] in Idaho.

STATEMENT OF FACTS

8. This dispute is about Qwest's attempt to demand a security deposit for services and facilities it provides to McLeodUSA under the terms of the Interconnection Agreement, even though the Interconnection Agreement does not allow Qwest to do so. This dispute is also about Qwest's attempt to ignore the dispute resolution provisions of the Interconnection Agreement and to take unilateral action to terminate service to McLeodUSA, to refuse to process orders for service by McLeodUSA, to terminate the Interconnection Agreement with McLeodUSA, and to effectively leave customers served by McLeodUSA stranded without access to the public switched network and customers served by carriers other than McLeodUSA. Action by this Commission is needed to compel Qwest to honor the terms of the Agreement it executed with McLeodUSA and to continue to provide services and facilities to McLeodUSA.

9. Qwest's most recent conduct in violation of the Interconnection Agreement comes on the heels of other incidents of unlawful conduct by Qwest in violation of separate contracts with McLeodUSA and in violation of its own tariffs, which are currently the subject of litigation

before federal courts in Iowa and Colorado. The substance of those disputes is explained in detail in the Opinion and Temporary Restraining Order granted by a federal judge on March 23, 2005, attached as Exhibit B. Although information regarding those disputes is not necessary to resolve this dispute, the background places Qwest's current conduct in context. McLeodUSA views Qwest's most recent attempt to extort funds from McLeodUSA in the guise of demanding a security deposit as an exercise of its monopoly power as the provider of essential services and facilities to McLeodUSA to coerce settlement of the certain claims now pending in federal court in Iowa and Colorado on terms unfavorable to McLeodUSA.

10. The issues pending in those cases are completely separate from the issues raised in this Petition. Although Qwest tries to merge those issues with its rights under the Interconnection Agreement, the Commission must act to stop the ploy. At all times, McLeodUSA has performed all of its obligations under the Interconnection Agreement, has paid all invoices for services and facilities provided by Qwest under the Interconnection Agreement, and has otherwise complied in all respects with the terms and conditions of the Interconnection Agreement.

11. On March 21, 2005, McLeodUSA received fourteen (14) letters from Stephen G. Hansen, Vice President, Carrier Relations, Worldwide Wholesale Markets, Qwest Communications, including one to James LeBlanc of McLeodUSA Telecom and Lauraine Harding of McLeodUSA, Inc., regarding the Agreement for interconnection in the state of Idaho ("Qwest Demand Letter"). A copy of the Qwest Demand Letter is attached as Exhibit C and incorporated herein.

12. In the Qwest Demand Letter, Qwest notified McLeodUSA that Qwest "requires a security deposit to continue the provisioning of services ordered by [McLeodUSA] under the

Interconnection Agreement between the parties[.]” The basis for the demand was as follows:

After investigation and review of McLeod’s unsatisfactory creditworthiness, recent public statements of McLeodUSA concerning its financial condition, history of late payments, and outstanding balances under the Interconnection Agreement and other agreements, tariffs, or accounts, Qwest demands a deposit, based on two months’ average total billings under the Interconnection Agreement in the State of Idaho, to safeguard Qwest’s financial interests.

13. Qwest demanded a security deposit in the amount of \$971,870.45 for the state of Idaho that must be received by 5:00 p.m. Mountain Standard Time on April 1, 2005. Similar amounts were demanded in thirteen (13) other states, so that the combined total of deposits that Qwest sought to collect from McLeodUSA within ten days from the date of the Qwest Demand Letter was \$15,920,431.42.

14. The Qwest demand came with a specific threat if the money was not received by the deadline:

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 Idaho.

15. The Qwest Demand Letter did not refer to any section of the Interconnection Agreement that gave Qwest the right to demand a security deposit. It did not refer to any section of the Agreement that gave Qwest the right to suspend order activity, disconnect services, terminate the Agreement, or seek any of the other relief identified. As McLeodUSA demonstrates below, the Agreement does not permit Qwest to take any of the actions stated. Even if Qwest were permitted to demand a security deposit under the Interconnection Agreement—and it is not—the only recourse available to Qwest for McLeodUSA’s failure to comply with such a demand would be to invoke the Dispute Resolution provisions of the Agreement.

16. 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. A copy of the McLeodUSA March 22, 2005 response is attached as Exhibit D and incorporated herein.

17. On March 24, 2005, McLeodUSA provided a second response the Qwest Demand Letter and notified Qwest that McLeodUSA was invoking the Dispute Resolution provisions of the Interconnection Agreement and designated Joseph Ceryanec, Group Vice President, Controller and Treasurer, as the McLeodUSA representative authorized to resolve the dispute. A copy of the McLeodUSA March 24, 2005 response is attached as Exhibit E and incorporated herein.

18. It is clear not only that Qwest's most recent demand for money has no basis in the Interconnection Agreement, but the remedy that Qwest seeks is also in complete disregard of the terms and conditions in the Agreement.

19. The Interconnection Agreement applies only to those services specifically identified in the Agreement and related to the local competition provisions in the Act. In particular, the scope of the Interconnection Agreement is limited to unbundled network elements, interconnection facilities, reciprocal compensation arrangements, and resale of Qwest's retail services.

20. McLeodUSA has never been delinquent in payments to Qwest for services provided to McLeodUSA under the Interconnection Agreement. Services provided by Qwest under the Interconnection Agreement are invoiced separately from services provided under either Qwest's tariffs or the Wholesale Services Agreement.¹ McLeodUSA is current on all invoices from Qwest for services provided under the Interconnection Agreement.

¹ To the extent McLeodUSA has withheld payment as a defensive measure to counter Qwest's withholding of funds owed for McLeodUSA's provision of exchange access services, those withheld payments were for services provided either under the Qwest tariffs or under a separate Wholesale Services Agreement. See Exhibit B at 5.

A. Qwest Has No Right To Demand A Security Deposit Under The Interconnection Agreement.

21. Nothing in the Interconnection Agreement 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 Interconnection Agreement. 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.

22. 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.

23. 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 Interconnection Agreement. As stated above,

McLeodUSA is current on all invoices for services provided by Qwest under the Agreement.

24. 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 Interconnection Agreement 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 Interconnection Agreement, there is no basis to refer to any other source to determine McLeodUSA’s creditworthiness.

25. 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

26. As demonstrated above, Qwest has no right under the Interconnection Agreement 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 Agreement and does not permit Qwest to “suspend order activity” or “disconnect services” as Qwest has threatened to do.

27. 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 Interconnection Agreement. 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.

28. McLeodUSA then would have thirty (30) days to cure the default. If McLeodUSA were to not cure the default within thirty days, the Interconnection Agreement 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 Interconnection Agreement.

C. Qwest Is Obligated To Follow The Dispute Resolution Provisions Of The Interconnection Agreement In The Event Of A Default.

29. In the event of a “default in the payment of any amount due” under the Interconnection Agreement, 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 Agreement.

30. Formal dispute resolution under the Interconnection Agreement is initiated by written request. Section (A)3.17.2 and .3 requires the parties to designate an officer-level employee at no less than the level of a Vice President to meet and negotiate resolution of the dispute. 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 demand arbitration of the dispute before a single arbitrator knowledgeable about the telecommunications industry. 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 the arbitrator.

31. Based on the foregoing, it is clear that Qwest does not have the right under the Interconnection Agreement 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 Agreement. Nothing in the Interconnection Agreement permits Qwest to take the actions that Qwest has threatened to take, namely “suspend order activity” or “disconnect services.”

REQUESTED RELIEF

32. 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 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 until those dispute resolution procedures have been completed.

Dated this 30th day of March, 2005.

Respectfully submitted,

Mark Trincher
by Peter Richardson

Mark Trincher, OSB 88322
DAVIS WRIGHT TREMAINE LLP
1300 SW Fifth Avenue, Suite 2300
Portland, OR 97201-5682
Telephone: (503) 241-2300
Facsimile: (503) 778-5299
E-mail: marktrinchero@dwt.com

Peter Richardson

Peter Richardson, ISB 3195
RICHARDSON & O'LEARY
515 N. 28th Street
Boise, ID 83702
Telephone: (208) 938-7901
Facsimile: (208) 938-7904
E-mail: peter@richardsonandoleary.com

ATTORNEYS FOR MCLEODUSA
TELECOMMUNICATIONS SERVICES, INC.

(A)3. TERMS AND CONDITIONS

(A)3.1 General Provisions

- (A)3.1.1 Each Party shall use its best efforts to comply with the Implementation Schedule provisions that will be mutually agreed upon by the Parties.
- (A)3.1.2 The Parties are each solely responsible for participation in and compliance with national network plans, including the National Network Security Plan and the Emergency Preparedness Plan.
- (A)3.1.3 Neither Party shall use any service related to or use any of the services provided in this Agreement in any manner that interferes with other persons in the use of their service, prevents other persons from using their service, or otherwise impairs the quality of service to other carriers or to either Party's end users, and each Party may discontinue or refuse service if the other Party violates this provision. Upon such violation, either Party shall provide the other Party notice of such violation at the earliest practicable time.
- (A)3.1.4 Each Party is solely responsible for the services it provides to its end users and to other Telecommunications Carriers.
- (A)3.1.5 The Parties shall work cooperatively to minimize fraud associated with third-number billed calls, calling card calls, and any other services related to this Agreement.
- (A)3.1.6 Nothing in this Agreement shall prevent either Party from seeking to recover the costs and expenses, if any, it may incur in (a) complying with and implementing its obligations under this Agreement, the Act, and the rules, regulations and orders of the FCC and the Commission, and (b) the development, modification, technical installation and maintenance of any systems or other infrastructure which it requires to comply with and to continue complying with its responsibilities and obligations under this Agreement.

(A)3.2 Term of Agreement

This Agreement shall become effective upon Commission approval, pursuant to Sections 251 and 252 of the Act, shall terminate on February 15, 2002, and shall be binding upon the Parties during that term. After the date specified above, this Agreement shall continue in force and effect until terminated by either Party's providing written notice of termination to the other Party at least ninety (90) days in advance of the specified date of termination. In the event of such termination, existing or pending service arrangements made available under this Agreement shall continue in total without interruption under either a) a new or adoption agreement executed by the Parties, or b) tariff terms and conditions generally available to all Co-Providers and resellers.

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- (A)3.2.1 If the Parties are unable to negotiate a new agreement following provision of the ninety (90) day notice of termination, the window of opportunity to file for arbitration to resolve outstanding contractual issues in accordance with the Act will end on the termination date specified in the notice and an arbitration petition will have to be filed.
- (A)3.2.2 If the Parties are able to reach agreement, this Agreement shall continue for the brief period of time needed to secure the Commission's approval of an adoption or a new interconnection/resale agreement. In the case of Section (A)3.2.1, this Agreement will expire on the termination date specified in the ninety (90) day notice referenced above unless a petition for arbitration has been filed, but if such a petition has been filed then this Agreement shall continue for the brief period necessary for the Commission to act and resolve the disputed issues so that the Parties will have an effective interconnection/resale agreement.

(A)3.3 Proof of Authorization

Where so indicated in specific sections of this Agreement, each Party shall be responsible for obtaining and having in its possession Proof of Authorization ("POA"). POA shall consist of documentation of the end user's selection. Such selection may be obtained in the following ways:

- (A)3.3.1 The end user's written Letter of Authorization.
- (A)3.3.2 The end user's electronic authorization by use of an 8XX number.
- (A)3.3.3 The end user's oral authorization verified by an independent third party (with third party verification as POA).
- (A)3.3.4 A prepaid returnable postcard supplied by the new local service provider which has been signed and returned by end user. The new local service provider will wait fourteen (14) calendar days after mailing the postcard before placing an order to change.

The Parties shall make POAs available to each other upon request. A charge of \$100.00 ("slamming charge") will be assessed if the POA cannot be provided supporting the change in service provider. If there is a conflict between the end user designation and the other Party's written evidence of its authority, the Parties shall honor the designation of the end user and change the end user back to the previous service provider.

(A)3.4 Payment

- (A)3.4.1 Amounts payable under this Agreement are due and payable within thirty (30) calendar days after the date of invoice.

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(A)3.4.2

Should McLeodUSA dispute, in good faith, any portion of the monthly billing under this Agreement, McLeodUSA will notify Qwest in writing within thirty (30) calendar days of the receipt of such billing, identifying the amount, reason and rationale of such dispute. McLeodUSA shall pay all amounts due. Both McLeodUSA and Qwest agree to expedite the investigation of any disputed amounts in an effort to resolve and settle the dispute prior to initiating any other rights or remedies. Should the dispute be resolved in McLeodUSA's favor and the resolved amount did not appear as a credit on McLeodUSA's next invoice from Qwest, Qwest will reimburse McLeodUSA the resolved amount plus interest from the date of payment. The amount of interest will be calculated using the late payment factor that would have applied to such amount had it not been paid on time. Similarly, in the event McLeodUSA withholds payment for a disputed charge, and upon resolution of the matter it is determined that such payments should have been made to Qwest, Qwest is entitled to collect interest on the withheld amount, subject to the above provisions.

Should Qwest dispute, in good faith, any portion of the monthly billing under this Agreement, Qwest will notify McLeodUSA in writing within thirty (30) calendar days of the receipt of such billing, identifying the amount, reason and rationale of such dispute. Qwest shall pay all amounts due. Both McLeodUSA and Qwest agree to expedite the investigation of any disputed amounts in an effort to resolve and settle the dispute prior to initiating any other rights or remedies. Should the dispute be resolved in Qwest's favor and the resolved amount did not appear as a credit on Qwest's next invoice from McLeodUSA, McLeodUSA will reimburse Qwest the resolved amount plus interest from the date of payment. The amount of interest will be calculated using the late payment factor that would have applied to such amount had it not been paid on time. Similarly, in the event Qwest withholds payment for a disputed charge, and upon resolution of the matter it is determined that such payments should have been made to McLeodUSA, McLeodUSA is entitled to collect interest on the withheld amount, subject to the above provisions.

(A)3.4.3

Qwest will determine McLeodUSA's credit status based on previous payment history with Qwest or credit reports such as Dun and Bradstreet. If McLeodUSA has not established satisfactory credit with Qwest or if McLeodUSA 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. The deposit may not exceed the estimated total monthly charges for a two (2) month

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period. The deposit may be a surety bond, a letter of credit with terms and conditions acceptable to Qwest or some other form of mutually acceptable security such as a cash deposit. Required deposits are due and payable within ten (10) calendar days after demand in accordance with Commission requirements.

- (A)3.4.4 Interest will be paid on cash deposits at the rate applying to deposits under applicable Commission rules, regulations, or Tariffs. Cash deposits and accrued interest will be credited to McLeodUSA's account or refunded, as appropriate, upon the earlier of the termination of this Agreement or the establishment of satisfactory credit with Qwest, which will generally be one full year of timely payments in full by McLeodUSA. The fact that a deposit has been made does not relieve McLeodUSA from any requirements of this Agreement.
- (A)3.4.5 Qwest may review McLeodUSA's credit standing and modify the amount of deposit required.
- (A)3.4.6 The late payment charge for amounts that are billed under this Agreement shall be in accordance with Commission requirements.

(A)3.5 Taxes

Each Party purchasing services hereunder shall pay or otherwise be responsible for all federal, state, or local sales, use, excise, gross receipts, transaction or similar taxes, fees or surcharges levied against or upon such purchasing Party (or the providing Party when such providing Party is permitted to pass along to the purchasing Party such taxes, fees or surcharges), except for any tax on either Party's corporate existence, status or income. Whenever possible, these amounts shall be billed as a separate item on the invoice. To the extent a sale is claimed to be for resale tax exemption, the purchasing Party shall furnish the providing Party a proper resale tax exemption certificate as authorized or required by statute or regulation by the jurisdiction providing said resale tax exemption. Until such time as a resale tax exemption certificate is provided, no exemptions will be applied.

(A)3.6 Insurance

McLeodUSA shall at all times during the term of this Agreement, at its own cost and expense, carry and maintain the insurance coverage listed below with insurers having a "Best's" rating of B+XIII.

- (A)3.6.1 Workers' Compensation with statutory limits as required in the state of operation; and Employers' Liability Insurance with limits of not less than \$100,000 each accident.
- (A)3.6.2 Commercial General Liability insurance covering claims for bodily injury, death, personal injury or property damage occurring or

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