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UTILITIES COMMISSION

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BEFORE THE PUBLIC UTILITIES COMMISSION OF IDAHO

IN RE:) **Docket No. MTI-T-05-01**
)
PETITION OF MCLEODUSA) **RESPONSE OF QWEST**
TELECOMMUNICATIONS SERVICES,) **CORPORATION TO MCLEODUSA**
INC., FOR ENFORCEMENT OF) **TELECOMMUNICATIONS**
INTERCONNECTION AGREEMENT) **SERVICES, INC. MOTION FOR**
WITH QWEST CORPORATION) **EMERGENCY RELIEF**
)
)

Qwest Corporation, ("Qwest"), by and through its undersigned counsel, responds to the McLeodUSA Telecommunication Services, Inc. ("McLeod") Motion for Emergency Relief ("Motion") pertaining to its Petition for Enforcement of Interconnection Agreement with Qwest Corporation ("Petition"). Both documents were filed with the Idaho Public Utilities Commission ("Commission") on March 30, 2005. Qwest responds that it is not necessary to hear McLeod's petition on an emergency basis, and that any action by the Commission with respect to this matter should be stayed or dismissed.

I. BACKGROUND

This Petition 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 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's 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 services provisioned by Qwest.

Because of the significant amount of money McLeod 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 McLeod files for protection from its creditors in bankruptcy court. On March 21, 2005, Qwest sent a security deposit demand letter to McLeod pursuant to the parties' interconnection agreement ("ICA") in each state. The Idaho letter is included as Exhibit A to this Response.¹ The Qwest demand letter requested that McLeod provide the specified deposit by April 1 or Qwest would commence the process of pursuing its remedies provided for under the ICA and applicable Idaho law. The requested deposit

¹ QC also sent payment and security demand letters for QC services purchased under the tariff, and QCC also sent payment and security demand letters.

was equal to the estimated billings for two months of McLeod services ordered under the ICA in the state of Idaho.

The dispute between the parties' over payment and Qwest's right to demand a security deposit are the subject of litigation in Colorado and Iowa. 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. On February 25, 2005, McLeod sued 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 the Qwest 14-state region. The court granted McLeod's motion and the TRO, which is in effect until April 12, 2005, states 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. . . ."

On March 30, 2005, McLeod filed the instant petition with this Commission requesting similar, if not identical relief to what the District Court previously granted in the TRO. McLeod seeks an order from this Commission that Qwest may not demand a security deposit, suspend order activity, or disconnect services, not just until April 1st, but until after ICA dispute resolution procedures have been completed. Further, McLeod requests this relief on an expedited basis. Qwest responds that McLeod is not entitled to the extraordinary relief that it has requested.

II. DISCUSSION

A. The Commission Does Not Have the Authority to Grant the Relief Requested.

As a threshold matter, it is not apparent that it is within the lawful authority of the Commission to grant the relief requested by McLeod. McLeod essentially seeks an order enjoining Qwest from enforcing a provision of the ICA. Idaho law does not permit the Commission to grant injunctive relief:

The Utilities Commission cannot exercise a judicial power. The judicial power of this state is vested in the courts, and the legislature cannot vest judicial power in the public Utilities Commission.

Humbird Lumber Company v. Public Utilities Commission, 39 Idaho 505, 513, 228 P. 271, 273 (1924) (citations omitted).

While the relief McLeod seeks is not labeled an injunction, McLeod's Motion for Emergency Relief, amounts to a restraining order. As the *Humbird* case demonstrates, the Idaho court will look to the effect of the relief, and not its label, in determining whether the scope of the Commission's powers has been exceeded:

While it is not labeled an injunction, and is not in the language usually employed in a restraining order, it is nothing more nor less than a restraining order, an injunction. The power to issue a restraining order is judicial in character, and can only be exercised by the supreme court and the district courts.

Id. 39 Idaho at 514, 228 P. at 274.

The Commission has only such powers as has been granted by the legislature,² and in this instance the grant of the authority by the legislature does not allow for the exercise of equitable relief. Nor does Idaho Code § 61-501, cited by McLeod, grant this

² *Washington Water Power v. Kootenai Environmental Alliance*, 99 Idaho 875, 879, 591 P.2d 122, 126 (1979).

Commission authority to enter injunctive relief. Section 61-501 instead provides a general grant of authority to the Commission to regulate public utilities.

B. No Expedited Relief Is Warranted.

Even if it were in within the authority of the Commission to order the relief requested by McLeod, such demand for expedited relief is premature and unnecessary. First, the TRO issued by the federal court in Iowa remains in effect until April 12, 2005 unless otherwise vacated by action of the court. Qwest has moved the Iowa court to have the Iowa proceeding transferred or stayed under the “first filed” doctrine. Qwest’s “first filed” doctrine is essentially that because Qwest filed a claim in Colorado before McLeod filed its claim in Iowa, the proper forum to hear the dispute is the Colorado court. If the Court grants the “first filed” motion, by operation of law, the TRO would be dissolved. However, to protect against this result, the Court obtained assurances from Qwest counsel that if the stay or transfer were granted, the TRO issued by the Iowa Court on March 23, 2005 will remain in effect until modified, extended or rescinded by the District Court in Colorado. Exhibit B to this Response, *Report to Court Regarding Transfer of Action to United States District of Colorado*.

Qwest is bound by the TRO until it expires on April 12, 2005 (if the case is not transferred) or until the Colorado court acts on the TRO if the case is transferred to Colorado. 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. The TRO specifically prohibits Qwest from “terminating or threatening to terminate services to McLeodUSA” and “requiring security from McLeodUSA as a precondition to the start or continuation of any such service.” Exhibit B to McLeod Petition, *Mem. &*

Opinion, at 1. 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, McLeod is protected by the TRO and McLeod has no basis for a claim that Qwest will disconnect service on April 1, 2005 and, therefore no basis for emergency relief. Indeed, based upon this status, McLeod withdrew its request for emergency relief filed with the Colorado Public Utilities Commission. Exhibit C to this Response, *McLeodUSA’s Notice of Withdrawal of Its Motion for Emergency Relief*.

Second, even if Qwest were not restrained by the TRO, emergency action by this Commission is not necessary because Qwest fully intends to comply with the ICA and applicable law in enforcing the security deposit. The Idaho 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 Idaho.*" Exhibit A to this Response, *Security Deposit Letter*, p. 1 (emphasis added). In Idaho, in accord with the ICA, Qwest could initiate the process in Section (A)3.13 regarding default, which would require another notice to McLeod, and thirty days for McLeod to cure the default, prior to Qwest seeking legal or equitable relief. It has never been, and is not now Qwest’s intent to disconnect service to McLeod on April 1, 2005. Consequently, McLeod's claim that Qwest is going to disconnect services to end users on April 1, 2005 is completely unfounded.

The issue underlying McLeod’s request that the Commission step into this dispute in an extraordinary manner is the same the issue that is the subject of the TRO, and which is squarely before the federal court. Furthermore, McLeod has failed to exhaust all of its

normal contractual remedies. The Petition prematurely and unnecessarily seeks relief to which McLeod is not entitled.

C. 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, since there is no “emergency” to justify the extraordinary relief demanded by McLeod. Nevertheless, on the merits, McLeod is also incorrect. Qwest has unassailable grounds in the ICA to demand a deposit. The Idaho ICA states, “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.” ICA Section (A)3.4.3. The evaluation of McLeod’s credit status is an ongoing process. As the ICA states, “Qwest will determine McLeodUSA’s credit status on previous payment history with Qwest or credit reports such as Dun and Bradstreet.” ICA Section (A)3.4.3. The ICA, on its face, 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 commonsense approach to protecting its interest in the event of a McLeod bankruptcy. Of primary concern to Qwest (and the triggering event for the security deposit demand) was McLeod’s own 8-K filing on March 17, 2005 to the Securities & Exchange Commission wherein McLeod revealed that its revenues sharply declined in the fourth quarter of 2004; it had to seek forbearance from interest payments to its lenders; and it was seeking to sell the company. As the 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 to this Response, p. 3. 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.*”

Exhibit E to this Response, *McLeod Press Release*, p. 4 (Mar. 16, 2005)

(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 posed by McLeod was 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 because the unpaid Qwest tariff charges were “invoiced separately” from services ordered under the ICA. McLeod Petition, at 6-7. The fact that the unpaid charges were contained in different McLeod accounts is of no consequence, however, since Qwest has the discretion under the ICA to consider McLeod’s overall credit profile in determining the security deposit requirement. The non-payment or late payment of any Qwest invoice, not just 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 non-payment of 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.

For the foregoing reasons, McLeod's request for relief should be denied.

Respectfully submitted this 1st day of April, 2005.



Mary S. Hobson
Stoel Rives LLP

Adam Sherr
Qwest

Attorneys for Qwest Corporation

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of April, 2005, I served the foregoing **RESPONSE OF QWEST CORPORATION TO MCLEODUSA TELECOMMUNICATIONS SERVICES, INC. MOTION FOR EMERGENCY RELIEF** upon all parties of record in this matter as follows:

Jean Jewell, Secretary
Idaho Public Utilities Commission
472 West Washington Street
P.O. Box 83720
Boise, Idaho 83720-0074
jjewell@puc.state.id.us

 X Hand Delivery
 U. S. Mail
 Overnight Delivery
 Facsimile
 Email

Weldon Stutzman
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472 West Washington Street
P.O. Box 83720
Boise, Idaho 83720-0074
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 X Hand Delivery
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William Courter
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6400 C Street SW
Cedar Rapids, IA 52406

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Attorney for McLeod

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Brandi L. Gearhart, PLS
Legal Secretary to Mary S. Hobson
Stoel Rives LLP

EXHIBIT A
to Response of Qwest Corporation to McLeodUSA Telecommunications Services, Inc.'s
Motion for Emergency Relief



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1801 California Street
Suite 2400
Denver, CO 80202
Telephone: 303-896-1250
Facsimile: 303-896-8887

Steven Q. Hansen
Vice President, Carrier Relations
Worldwide Wholesale Markets

March 21, 2005

Via Overnight Mail
James LeBlanc
Vendor Manager
McLeodUSA Telecom
First Place Tower
15 E. 5th St., Ste. 1500
Tulsa, Oklahoma 74103

Lauraine Harding
Sr. Manager, Interconnect Negotiation
McLeodUSA, Inc.
6400 C Street SW
P.O. Box 3177
Cedar Rapids, IA 52406-1377

RE: Notice of Demand for ID Interconnection Agreement Security Deposit

Dear Sir/Madam,

This letter is to notify you that Qwest Corporation ("Qwest") requires a security deposit to continue the provisioning of services ordered by McLeodUSA Telecommunications Services, Inc. and its CLEC affiliates (collectively, "McLeodUSA") under the Interconnection Agreement between the parties in the State of Idaho. 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.

The security deposit shall be in the form of a wire transfer of immediately available funds or an irrevocable letter of credit in the amount of \$971,870.45. It must be received in ten (10) calendar days. If the security deposit is not received by 5:00 p.m. Mountain Standard Time on April 1, 2005, 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.

If payment is processed by wire, it should be directed to—
First National Bank of Omaha
c/o Qwest Corporation
Omaha NE 68197
ABA No. 104000016
Qwest Bank Acct. No. 36204689

The deposit will be held for a period of at least twelve (12) months and will be maintained in accordance with the terms of the Interconnection Agreement or applicable law. Additional security may be required,

March 21, 2005

as necessary and allowable under the Interconnection Agreement or applicable law. Should disconnection occur, Qwest will require full payment of all outstanding charges and the posting of the security deposit, and late payment charges will apply in accordance with the Interconnection Agreement. Additionally other charges may apply to have the account re-established. If service order processing is interrupted, all outstanding charges and the posting of the security deposit, including any additional past due amounts are due prior to restoration.

Qwest reserves any and all rights and remedies it has under the Interconnection Agreement and applicable law, including any remedies it may have if McLeod fails to meet the terms set forth above. Qwest also reserves the right to request to increase the deposit or request additional deposits from McLeod under any other agreements between Qwest and McLeod as well as under any other tariffs.

Sincerely,

Steven Hansen /DH

Steven Hansen
Vice President, Carrier Relations

Cc: Ken Burkhardt, CFO

EXHIBIT B

**to Response of Qwest Corporation to McLeodUSA Telecommunications Services, Inc.'s
Motion for Emergency Relief**

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

MCLEOD USA TELECOMMUNICATIONS
SERVICES, INC.

Plaintiff,

v.

QWEST CORPORATION AND
QWEST COMMUNICATIONS
CORPORATION,

Defendant.

)
) CASE NO. 1:05-cv-00039-MWB
)
)

) **REPORT TO COURT**
) **REGARDING TRANSFER OF**
) **ACTION TO UNITED STATES**
) **DISTRICT COURT FOR THE**
) **DISTRICT OF COLORADO**
)
)
)

**REPORT TO COURT REGARDING TRANSFER OF ACTION TO UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLORADO**

As requested by this Court during the March 30, 2005 telephonic hearing on Defendant Qwest's Motion to Stay or Dismiss, Qwest submits the following Report on its position regarding transfer to the United States District Court for the District of Colorado:

1. Qwest and McLeod are currently subject to the terms of the temporary restraining order ("TRO") issued by this Court on March 23, 2005. This TRO is scheduled to expire on April 12, 2005.

2. Through its Motion to Stay or Dismiss filed with this Court on March 24, 2005, Qwest has requested that this action be dismissed or stayed pursuant to the ruling of the United States District Court for the District of Colorado in Qwest's first-filed parallel action, Civil Action No. 05-WM-506-OES.

3. In the March 30, 2005 telephonic hearing on Qwest's Motion to Stay or Dismiss, this Court requested Qwest's position on the following issue: whether, if this Court decides to

transfer this action to the District of Colorado, Qwest agrees to let the TRO issued by this Court on March 23, 2005 to remain in effect until the TRO is modified, extended, or rescinded by the Colorado court.

4. Through this Report, Qwest agrees that, if this Court stays this action or transfers this action to the District of Colorado, the TRO issued by this Court on March 23, 2005 will remain in effect until the TRO is modified, extended, or rescinded by the District of Colorado. Qwest also requests that, as a condition of this agreement, Plaintiff McLeodUSA be required to cooperate with Qwest and to use its best efforts to ensure that a hearing on the existing TRO is quickly and expeditiously scheduled in the Colorado court.

Respectfully submitted,

/s/ Amy L. Benson

Date: March 30, 2005

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Dennis W. Johnson (PK0002613)
Amy M. Omvig (PK0018363)
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ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF SERVICE

The undersigned certifies that on March 30, 2005, the foregoing instrument was electronically filed with the Court using the CM/ECF system and served upon all parties to the above case and/or to each of the attorneys of record herein at their respective addresses disclosed on the pleadings:

By: Electronic Service **AND/OR**
By: U.S. Mail FAX
 Hand Overnight
 Delivered Courier
 E-mail Other _____

/s/ Amy M. Omvig _____

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ATTORNEYS FOR PLAINTIFF

EXHIBIT C
to Response of Qwest Corporation to McLeodUSA Telecommunications Services, Inc.'s
Motion for Emergency Relief

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO**

Docket No. _____

IN THE MATTER OF THE COMPLAINT OF MCLEODUSA TELECOMMUNICATIONS
SERVICES, INC., FOR ENFORCEMENT OF AN INTERCONNECTION AGREEMENT
WITH QWEST CORPORATION

**MCLEODUSA'S NOTICE OF WITHDRAWAL OF
ITS MOTION FOR EMERGENCY RELIEF**

McLeodUSA Telecommunications Services, Inc. ("McLeodUSA"), through its undersigned counsel, hereby provides notice that it may now withdraw its Motion seeking emergency relief from this Commission in connection with its Complaint filed in this docket. However, McLeodUSA also provides notice through this pleading that it will be required to seek separate interim relief from this Commission, albeit on a somewhat less expedited basis.

1. On March 30, 2005, shortly after the Complaint was filed in this docket, a brief telephone conference/hearing was held, attended by the chief Administrative Law Judge, counsel for Qwest, and the undersigned counsel for McLeodUSA. During that telephone call, counsel for Qwest acknowledged that the Temporary Restraining Order issued by the United States District Court for the Northern District of Iowa ("Iowa TRO") prevented Qwest from taking the actions threatened in its March 21, 2005 letter, including the disconnection of Colorado subscribers served by McLeodUSA. Based upon this representation, and conditional upon receipt of written confirmation of these representations, McLeodUSA agreed to file this withdrawal.

2. On the morning of March 31, 2005, an additional telephonic hearing was held between the parties and the chief Administrative Law Judge. During that hearing, Qwest's

counsel reported that Qwest had made assurances to the U.S. District Court Judge presiding over the federal case in Iowa, the Hon. Mark W. Bennett, that Qwest would continue to honor the terms of the Iowa TRO should a decision issue to transfer the Iowa federal case to Colorado, at least until such time as the U.S. District Court in Colorado has an opportunity to rule on a motion for a new temporary restraining order filed by McLeodUSA. Qwest's counsel reiterated that a letter confirming his statements made at the previous afternoon's hearing, as well as this new information, would be forthcoming.

3. The undersigned received the letter from Qwest via fax just before noon today. A copy of that letter is attached hereto as Exhibit A. While the letter accurately reflects the commitments made by Qwest *to the Iowa Court* in connection with its request to transfer the federal case in Iowa to Colorado, it contains no mention of the commitments made orally *to this Commission* by Qwest counsel yesterday afternoon. Most notably, an oral commitment was made that Qwest acknowledged not only the existence of the Iowa TRO, but that the scope of the Iowa TRO prevented Qwest from taking any action to discontinue the taking of orders from McLeodUSA or disconnecting services under the parties' Colorado Interconnection Agreement ("Agreement"). The letter contains no mention of this key commitment.

4. Notwithstanding this deficiency in the written confirmation provided by Qwest, McLeodUSA will nevertheless withdraw its Motion for Emergency Relief. Qwest counsel's verbal commitments were clear, and as he correctly pointed out, those commitments were made by a licensed attorney authorized to bind Qwest to those commitments. While the non-responsiveness of the letter is frustrating, it is inconceivable that Qwest would willfully violate the Iowa TRO and the commitments made to this Commission, and intentionally disconnect service to thousands of Colorado homes and businesses after assuring the Commission it would

not do so.

5. While the need for immediate Commission intervention has been averted, McLeodUSA will need to seek additional relief from this Commission, albeit on a less expedited basis, to ensure that any claim of default made by Qwest can be disputed and resolved under the terms of the agreement. McLeodUSA's concern is that Qwest may claim default relating back to its original security deposit demand, and attempt to circumvent the dispute resolution provisions of the Agreement and this Commission's jurisdiction to protect Colorado subscribers from disconnection without notice. Such a pleading will be filed as soon as practically possible.

Respectfully submitted,

MCLEODUSA TELECOMMUNICATIONS
SERVICES, INC

By: 

Andrew R. Newell (#31121)

KRYS BOYLE, P.C.
600 Seventeenth Street
Suite 2700, South Tower
Denver, Colorado 80202
(720) 889-2237
(303) 893-2882
anewell@krysboyle.com

Counsel for McLeodUSA

CERTIFICATE OF SERVICE

I hereby certify that an original and 15 copies of the foregoing **MCLEODUSA'S NOTICE OF WITHDRAWAL OF ITS MOTION FOR EMERGENCY RELIEF** was hand delivered this 31st day of March, 2005, to the following addressee:

Mr. Doug Dean, Director
COLORADO PUBLIC UTILITIES COMMISSION
Logan Tower, Office Level 2
1580 Logan Street
Denver, CO 80203

and a copy of the foregoing was mailed by depositing same in the U.S. Mail, postage prepaid this 31st day of March, 2005, with additional electronic courtesy copies to the chief Administrative Law Judge, as well as to the following addressees:

David McGann, Esq.
Qwest Corporation
1005 17th St., Suite 200
Denver, CO 80202

James Greenwood, Director
Colorado Office of Consumer Counsel
1580 Logan Street, Office Level 7
Denver, CO 80203

Steven Southwick
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1525 Sherman St.
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