

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 03A-538T

IN THE MATTER OF THE APPLICATION OF MCLEODUSA TELECOMMUNICATIONS SERVICES, INC., FOR RETURN OF FUNDS MISTAKENLY REMITTED TO THE COLORADO LOW INCOME TELEPHONE ASSISTANCE FUND.

**INTERIM ORDER OF
ADMINISTRATIVE LAW JUDGE
MANA L. JENNINGS-FADER
DENYING MOTION FOR SUMMARY
JUDGMENT, GRANTING MOTION
FOR LEAVE TO FILE REPLY,
AND WAIVING RESPONSE TIME**

Mailed Date: July 15, 2004

I. STATEMENT

1. On December 16, 2003, McLeodUSA Telecommunications Services, Inc. (McLeodUSA or Applicant), filed its Application for Return of Funds Mistakenly Remitted to the Colorado Low Income Telephone Assistance Fund (Application). The Application commenced this proceeding.

2. The Commission gave public notice of the Application. *See* Notice of Application Filed, dated December 17, 2003. Staff of the Commission (Staff) intervened of right and requested a hearing in this matter.

3. Each party in this proceeding has filed testimony and exhibits. Hearing in this matter is scheduled for July 22 and 23, 2004.

4. On June 23, 2004, Staff filed a Motion for Summary Judgment (Motion). Appended to that Motion was the Affidavit of Ms. Jamie D. Jack. The Motion principally rests

on Staff's interpretation of paragraph 7.c of the Stipulation and Settlement Agreement (Stipulation) entered into by McLeodUSA, Staff, and Qwest Corporation (Qwest)¹ in 1997, which Stipulation was subsequently accepted by the Commission. See Decision No. R97-0329 entered in Docket No. 96A-495T. Staff interprets ¶ 7.c of that Stipulation as requiring McLeodUSA to pay into the Colorado Low Income Telephone Assistance Fund (Fund or LITAP Fund) irrespective of whether Applicant met the threshold requirement for paying into that Fund as established in Rule 4 *Code of Colorado Regulations* (CCR) 723-13-1 or met the requirements for voluntary participation as set out in Rule 4 CCR 723-13-3.

5. On July 6, 2004, McLeodUSA filed its Response to the Motion (Response). In that Response McLeodUSA presented its interpretation of the Stipulation and requested that the Commission enter summary judgment in McLeodUSA's favor. Applicant also stated that "it may wish to examine Staff's witness regarding the factual foundations, if any, for Staff's desire to read McLeodUSA's certification of public convenience and necessity (CPCN) in a manner that is inconsistent with its prior agreement with McLeodUSA as well as its treatment of other identically situated [Competitive Local Exchange Carriers (CLECs)] in Colorado." Response at 1-2. No affidavit accompanied the Response.

6. On July 13, 2004, Staff filed a Motion for Leave to File a Reply (Motion for Leave). Staff's Reply, with the appended Affidavit of Paul R. McDaniel and Affidavit of William A. Steele, accompanied the Motion for Leave. The Motion for Leave will be granted,

¹ Qwest was then known as U S WEST Communications, Inc.

and the Administrative Law Judge (ALJ) will consider the Reply and its appended affidavits in deciding the Motion for Summary Judgment.²

7. In its Motion for Leave at ¶ 4, Staff states: “The ruling on Staff’s Motion for Summary Judgment hinges on the interpretation of paragraph 7.c of the Stipulation. McLeod’s Response raises the *issue of the parties’ intent at the time the Stipulation was entered into.*” (Emphasis supplied.) To establish Staff’s intent and Qwest’s intent³ with respect to ¶ 7.c of the Stipulation, Staff proffers the Steele Affidavit and the McDaniel Affidavit and then argues that those affidavits “unequivocally establish that the intent of the language of paragraph 7.c of the Stipulation was to require McLeodUSA to pay into the LITAP fund.” Reply at 3.

8. The principles which apply to consideration of a motion for summary judgment are well-known and easily stated: “Summary judgment is appropriate [*i.e.*, should be granted] when the pleadings and supporting documents clearly demonstrate that no issues of material fact exist and the moving party is entitled to judgment as a matter of law. A court must afford all favorable inferences that may be drawn from the undisputed facts to the nonmoving party, and must resolve all doubts as to the existence of a triable issue of fact against the moving party.” *Cotter Corporation v. American Empire Surplus Lines Insurance Company*, 90 P.3d 814, 819 (Colo. 2004). Summary judgment “is a drastic remedy, to be granted *only* when there is a clear showing that the controlling standards have been met.” *HealthONE v. Rodriguez*, 50 P.3d 879, 887-88 (Colo. 2002) (emphasis supplied). Even if “it is extremely doubtful that a genuine issue of fact exists[,] ... summary judgment is not appropriate in cases of doubt.” *Abrahamsen v.*

² In view of the denial of the Motion for Summary Judgment, consideration of the Reply does not adversely impact Applicant. Because of the fast-approaching hearing date and the absence of prejudice to Applicant, response time to the Motion for Leave will be waived.

³ The relevance in this proceeding of Qwest’s intent or understanding is not obvious, but the ALJ accepts the McDaniel Affidavit for purposes of deciding the Motion for Summary Judgment.

Mountain States Telephone and Telegraph Company, 494 P.2d 1287, 1290 (Colo. 1972). A fact is “material,” for purposes of a motion for summary judgment, if it will affect the outcome of the case. *Gadlin v. Metrex Research Corporation*, 76 P.3d 928 (Colo. App. 2003).

9. Applying those principles to the instant case, the ALJ finds and concludes that the Motion should be denied because genuine issues of material fact exist in this proceeding. Staff itself recognized that the issue of the parties’ intent, and their understanding of the ¶ 7.c language, at the time the Stipulation was signed is a pivotal issue in this case. Determination of intent is an issue of fact; and in this case, as Staff recognized, determination of intent is material. This alone is sufficient basis upon which to deny the Motion.

10. The ALJ finds that several issues of material fact exist and so preclude summary judgment. At least the following material facts exist: (a) each party’s understanding of the meaning of the Stipulation (especially ¶ 7.c) at the time the parties entered into the Stipulation; (b) the Commission’s treatment of similarly-situated CLECs (if any) *vis-à-vis* requiring them to pay into the Fund; (c) if the Commission should determine that monies paid by Applicant must be repaid, how much money should be repaid (*e.g.*, the full amount paid by Applicant, an amount less than the full amount) and whether accrued interest should be paid; and (d) again assuming the Commission determines that monies paid by Applicant must be repaid, how that repayment should be accomplished (*e.g.*, lump-sum payment, payments made over time), when payment should be made, and the implications of the repayment choices for McLeodUSA and for the Fund. The material facts identified here do not constitute, and are not intended to constitute, an exhaustive list. They are provided to identify *some* of the genuine issues of material fact which remain to be resolved. Undoubtedly, others exist.

11. In view of the denial of the Motion, the July 22 and 23, 2004, hearing will be held as scheduled. The hearing will not be limited to the issues identified in this Order, but the parties should present evidence to address these issues. The ALJ will permit testimony about these issues, although not addressed in prefiled testimony. The ALJ finds that evidence regarding these issues is relevant to this proceeding and is necessary in order to complete the record.

II. ORDER

A. It Is Ordered That:

1. The Motion for Summary Judgment is denied.
2. The Motion for Leave to File a Reply is granted.
3. Response time to the Motion for Leave to File a Reply is waived.
4. This Order is effective immediately.

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

Administrative Law Judge

