

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF IOWA  
CENTRAL DIVISION**

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QWEST CORPORATION d/b/a “CenturyLink QC,” WINDSTREAM COMMUNICATIONS, LLC f/k/a “Windstream Communications, Inc.,” and MCLEOD-USA TELECOMMUNICATIONS SERVICES, L.L.C.,

Plaintiffs,

v.

CITY OF DES MOINES, IOWA,

Defendant.

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Case No. 4:15-cv-305

**COMPLAINT**

Come now Plaintiffs Qwest Corporation d/b/a “CenturyLink QC” (“CenturyLink”), Windstream Communications, LLC f/k/a “Windstream Communications, Inc.” (“Windstream”), and McLeod-USA Telecommunications Services, L.L.C. (“McLeod”), and for their Complaint against the City of Des Moines, Iowa (“Des Moines”), state as follows:

**I. INTRODUCTION**

1. Plaintiffs bring this Complaint to challenge a recently increased annual management fee (“Increased Management Fee”) that will drastically increase the Plaintiffs’ costs for placing and maintaining their telecommunications facilities and other facilities in the public rights-of-way (“PROW”). The Increased Management Fee is unlawful for several reasons.

2. First, Congress has recognized that excessive fees imposed by local governments for use of the PROW distort competition and negatively impact the provision of

telecommunications services. Congress thus adopted Section 253 of the Communications Act of 1934, as amended, 47 U.S.C. § 253 (“Section 253”), to preempt fees for use of the PROW that are not fair, reasonable, and non-discriminatory, and that materially inhibit telecommunications carriers from competing in a fair and balanced legal and regulatory environment.

3. The application of the Increased Management Fee to Plaintiffs is not fair, reasonable, and non-discriminatory, as required by Section 253.

4. Second, the Iowa General Assembly has long recognized that telecommunications services are crucial public utility services. The General Assembly further has recognized that excessive fees imposed by local governments for use of the PROW negatively impact the provision of these public utility services. The General Assembly thus adopted Iowa Code § 480A.3 to limit local governments to imposing PROW fees to the recovery of “only those management costs caused by the public utility’s activity in the [PROW].”

5. The Increased Management Fee seeks recovery of alleged costs that go beyond management costs that are caused by the Plaintiffs’ activities in the PROW, in violation of Iowa Code § 480A.3.

6. In adopting the Increased Management Fee, Des Moines stated that it relied on the decision in *Kragnes v. City of Des Moines*, 801 N.W.2d 492 (Iowa 2012), where the court held that certain components of the franchise fees charged to the electric and gas utilities pursuant to Iowa Code § 364.2 were sufficiently related to Des Moines’ costs to avoid being labeled as “taxes” under Iowa law.

7. As is evident, *Kragnes* did not involve the application of the standard set forth in Iowa Code § 480A.3, which is stricter and more demanding than the general standard for determining whether fees are “taxes.”

8. *Kragnes* further did not establish that the costs sought to be recovered by Des Moines through its franchise fee were recoverable as a matter of law, even under Iowa Code § 364.2.

9. *Kragnes* additionally did not address, much less approve, an allocation of Des Moines' costs to utilities based on their linear feet of PROW occupancy, which Des Moines is attempting to do through the Increased Management Fee.

10. Finally, *Kragnes* did not address whether the fees at issue were preempted by Section 253.

11. The facts show that the Increased Management Fee violates both Section 253 and Iowa Code § 480A.3 as applied to the Plaintiffs, and the *Kragnes* decision does not counsel otherwise.

12. Additionally, Des Moines has added a provision to its Municipal Code, Section 102-766(d), which allows Des Moines to demand "in-kind" services from Plaintiffs as a condition for placing their facilities in the PROW. The Iowa General Assembly has specifically denied Des Moines the authority to make this demand by adopting Iowa Code § 480A.4. There is no set of circumstances under which such a demand by Des Moines could be lawful.

13. Plaintiffs therefore request declarations that the Increased Management Fee and Des Moines Municipal Code Section 102-766(d) are unlawful, and an order permanently enjoining Des Moines from enforcing these requirements.

## II. PARTIES

14. Plaintiff CenturyLink is a Colorado corporation with its principal place of business in Monroe, Louisiana.

15. Plaintiff Windstream is a Delaware limited liability company with its principal place of business in Little Rock, Arkansas.

16. Plaintiff McLeod is an Iowa limited liability company with its principal place of business in Little Rock, Arkansas.

17. Defendant Des Moines is a municipality organized and incorporated in accordance with the laws of Iowa.

### **III. JURISDICTION AND VENUE**

18. Jurisdiction is proper in this Court under 28 U.S.C. § 1331 and § 1367 in that one or more claims arises under federal law, and the state law claims are so related to the federal claims that they form the same case or controversy under Article III of the United States Constitution.

19. Venue is proper in this Court under 28 U.S.C. § 1391(b)(1) and (2) in that the Defendant resides in this district and a substantial part of the events giving rise to this case occurred in this district.

### **IV. FACTUAL ALLEGATIONS**

#### **Plaintiffs' Use of the PROW**

20. Plaintiffs are wireline telecommunications carriers providing telecommunications and Internet access services in Iowa, including in Des Moines.

21. To provide these services, the Plaintiffs require access to the PROW to place and maintain their telecommunications network facilities.

22. The PROW includes, but is not necessarily limited, to the space below, above, and/or on streets, roads, highways, bridges, alleys, sidewalks and other public property in Des Moines.

23. The telecommunications network facilities that Plaintiffs place and maintain in the PROW include, but are not limited to, conduits, cables, wires, pedestals, cross-boxes, and telephone poles.

24. The telecommunications and Internet access services that are provided over the facilities in the PROW are a critical benefit to the residents of Des Moines and to those served outside of Des Moines.

25. If Plaintiffs did not have access to the PROW to place and maintain their facilities, Des Moines residents and those served outside of Des Moines could not receive telecommunications and Internet access services in an efficient manner, if at all.

26. In addition to competing with one another, the Plaintiffs compete with carriers that do not place or maintain facilities within the PROW but instead rely to some degree on the use of the facilities of Plaintiffs or other wireline carriers. These carriers include, but are not necessarily limited to, wireless communications carriers, voice-over-Internet-protocol (“VoIP”) providers, and certain competitive local exchange carriers (“non-facilities-based CLECs”).

27. The Plaintiffs also compete with the local cable television company, Mediacom, which uses provides telecommunications and Internet access services over the facilities in the PROW that it also uses to transmit its cable television services.

**Limitations on Local Government Fees for Use of the PROW**

28. In order to encourage and maintain competition in the telecommunications market, Congress established limitations on what local governments may charge carriers for use of the PROW by adopting Section 253, which provides in pertinent part:

(a) In general

No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

\* \* \*

(c) State and local government authority

Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

29. Similarly, in recognition of the critical importance of the public's access to efficient telecommunications services, the Iowa General Assembly provided telecommunications carriers with the statewide right to use and maintain their facilities within the PROW by adopting Iowa Code § 477.1, which provides in pertinent part:

Any person, firm, and corporation, within or without the state, may construct a telegraph or telephone line or cable system along the public roads of the state, or across or under the rivers or over, under, or through any lands belonging to the state or any private individual, and may erect or install necessary fixtures.

30. The Iowa General Assembly similarly established limitations on what local governments such as Des Moines may charge telecommunications carriers and other public utilities for use of the PROW by adopting Iowa Code § 480A.3, which provides in pertinent part:

A local government shall not recover any fee from a public utility for the use of its right-of-way, other than a fee for its management costs. A local government may recover from a public utility only those management costs caused by the public utility's activity in the public right-of-way. A fee or other obligation under this section shall be imposed on a competitively neutral basis. When a local government's management costs cannot be attributed to only one entity, those costs shall be allocated among all users of the public rights-of-way, including the local government itself. The allocation shall reflect proportionately the costs incurred by the local government as a result of the various types of uses of the public rights-of-way.

**Des Moines' Management Fee**

31. For several years, Des Moines imposed an annual management fee on Plaintiffs for their use of the PROW in accordance with certain provisions of the Des Moines Municipal Code and with a fee schedule adopted by Des Moines. The management fee was calculated by

applying \$0.0085 to the number of linear feet of facilities that Des Moines had determined that each of the Plaintiffs had placed in the PROW.

32. On July 27, 2015, the Des Moines City Council adopted Ordinance No. 15,386 (the "Ordinance"). **Exhibit 1.** The Ordinance made several changes to the Des Moines Municipal Code regarding the types of costs that would be included and the manner in which the management fee would be imposed. Attached as **Exhibit 2** is a Council Packet dated July 27, 2015, which includes a redlined version of the Ordinance showing the changes that were made to the specific Municipal Code provisions.

33. On July 27, 2015, and in accordance with the adoption of the Ordinance, the Des Moines City Council also amended its fee schedule ("Fee Schedule Amendment"). **Exhibit 3.** The Fee Schedule Amendment established the Increased Management Fee, which would initially be set at \$0.02/linear foot and then increase each year by an additional \$0.02, until the fee reached \$0.12/linear foot by year six and remained at that level thereafter.

34. The Increased Management Fee also includes an annual fee of \$100.00 per unit of equipment in the PROW.

35. The Increased Management Fee will substantially increase the annual payments from the Plaintiffs. For CenturyLink, Des Moines has indicated that it will apply the new linear fee to 4,100,000 linear feet of facilities. For Windstream, Des Moines has indicated that it will apply the new linear fee to 18,000 linear feet of facilities. For McLeod, Des Moines has indicated that it will apply the new linear fee to almost 500,000 linear feet. The result would be a collective increase in annual payments from the Plaintiffs of over \$500,000 by the sixth year.

36. The Increased Management Fee will not be imposed on Plaintiffs' competitors that do not place or maintain facilities within the PROW, including wireless carriers, VoIP providers, and non-facilities-based CLECs.

37. The Increased Management Fee similarly will not be imposed on Mediacom.

38. The Ordinance became effective on August 14, 2015. The Fee Schedule Amendment, including the Increased Management Fee, will become effective on January 1, 2018.

## V. REQUEST FOR RELIEF

### First Claim for Relief

#### **Declaration Pursuant to 28 U.S.C. §§ 2201-02 that the Increased Management Fee Violates 47 U.S.C. § 253 and Is Preempted by the Supremacy Clause**

39. Plaintiffs incorporate and re-allege all prior paragraphs of this Complaint as if fully alleged here.

40. Article VI, Clause 2, of the U.S. Constitution, commonly known as the Supremacy Clause, provides, in relevant part, that “[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”

41. Section 253(a), which is enforceable through the Supremacy Clause, preempts any State or local regulation or other State or local requirements that “prohibit[s] or ha[s] the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.”

42. For each and every year of its implementation, the Increased Management Fee as set forth in the Fee Schedule Amendment will have the effect of prohibiting Plaintiffs from

providing intrastate and interstate telecommunications services by materially limiting or inhibiting their ability to compete in a fair and balanced legal and regulatory environment.

43. In particular, the Increased Management Fee, to the extent that it is absorbed by the Plaintiffs, will materially limit or inhibit Plaintiffs' investment in infrastructure, which in turn will limit or inhibit their ability to compete in a fair and balanced legal and regulatory environment.

44. Similarly, the Increased Management Fee, to the extent that it is passed through to customers, will materially limit or inhibit the Plaintiffs' ability to provide services competitive with services offered by other providers not similarly burdened by the Increased Management Fee.

45. Des Moines' Increased Management Fee is further prohibitive because it is likely that, if left unchallenged, it would be adopted by cities across the State of Iowa, thus exacerbating its unlawful impact.

46. Section 253(c) maintains the authority of a State or local government to manage the PROW and to require "fair and reasonable compensation" from telecommunications providers on a "competitively neutral and nondiscriminatory basis."

47. Des Moines' Increased Management Fee is not fair or reasonable because the increase exceeds Des Moines' costs incurred for managing Plaintiffs' use of the PROW.

48. Des Moines' Increased Management Fee also is discriminatory because it is a revenue-generating fee that is not imposed on Mediacom or on Plaintiffs' competitors that do not maintain their own facilities within the PROW.

49. Plaintiffs therefore request a declaration pursuant to 28 U.S.C. §§ 2201-02 that the Increased Management Fee in the Fee Schedule Amendment is unlawful and preempted by Section 253 for each and every year of its implementation.

**Second Claim for Relief**  
**Request for Injunction Prohibiting Des Moines from Enforcing the Increased Management Fee Against Plaintiffs**

50. Plaintiffs incorporate and re-allege all prior paragraphs of this Complaint as if fully alleged here.

51. For the reasons set forth above, the Increased Management Fee in the Fee Schedule Amendment conflicts with, and therefore is preempted by, Section 253 for each and every year of implementation.

52. Plaintiffs therefore are entitled to an order permanently enjoining Des Moines from enforcing the Increased Management Fee against the Plaintiffs for each and every year of implementation.

**Third Claim for Relief**  
**Declaration Pursuant to 28 U.S.C. §§ 2201-02 that the Increased Management Fee Violates Iowa Code § 480A.3 as Applied to Plaintiffs**

53. Plaintiffs incorporate and re-allege all prior paragraphs of this Petition as if fully alleged here.

54. The Increased Management Fee in the Fee Schedule Amendment is not limited, for any year of implementation, to Des Moines' management costs caused by each of the Plaintiffs' activities in the PROW.

55. Further, the Increased Management Fee is not, for any year of implementation, imposed on a competitively neutral basis in that the competitors of Plaintiffs that are not subject to the Increased Management Fee are not subject to paying the revenue-generating fee.

56. The Increased Management Fee, for each and every year of implementation, otherwise conflicts with Iowa Code § 480A.3 as the fee is applied to the Plaintiffs.

57. In accordance with Iowa Code § 480A.5, the Plaintiffs requested that Des Moines review the Increased Management Fee as it was proposed and not to adopt the fee. After consideration of the request, Des Moines chose to move forward to adopt the fee for the reasons set forth in the Exhibit 2 Council Packet.

58. Accordingly, the Plaintiffs request a declaration pursuant to 28 U.S.C. §§ 2201-02 that the Increased Management Fee in the Fee Schedule Amendment conflicts with, and therefore is preempted by, Iowa Code § 480A.3 for each and every year of implementation.

**Fourth Claim for Relief**  
**Request for Injunction Prohibiting Des Moines from Enforcing the Increased Management Fee Against Plaintiffs**

59. Plaintiffs incorporate and re-allege all prior paragraphs of this Petition as if fully alleged here.

60. For the reasons set forth above, the Increased Management Fee in the Fee Schedule Amendment conflicts with, and therefore is preempted by, Iowa Code § 480A.3 for each and every year of implementation.

61. Plaintiffs therefore are entitled to an order permanently enjoining Des Moines from enforcing the Increased Management Fee against the Plaintiffs for each and every year of implementation.

**Fifth Claim for Relief**  
**Declaration Pursuant to 28 U.S.C. §§ 2201-02 that Municipal Code Section 102-766(d), as Amended by the Ordinance, Is Unlawful as a Matter of Law**

62. Plaintiffs incorporate and re-allege all prior paragraphs of this Petition as if fully alleged here.

63. Iowa Code § 480A.4 prohibits local governments from imposing in-kind requirements on public utilities, such as free or discounted services and free or discounted use of facilities, as a condition for occupying the PROW.

64. Further, Plaintiffs are prohibited from engaging in unjust or unreasonable discrimination in pricing or practices under 47 U.S.C. § 202.

65. Des Moines Municipal Code Section 102-766(d), as amended by the Ordinance, allows Des Moines to impose in-kind services on public utilities at Des Moines' discretion.

66. There is no set of circumstances under which an in-kind services demand by Des Moines would be lawful.

67. If left unchallenged, Des Moines Municipal Code Section 102-766(d), as amended by the Ordinance, could be adopted by cities across the State of Iowa, thus exacerbating its unlawful impact.

68. The Plaintiffs request a declaration pursuant to 28 U.S.C. §§ 2201-02 that Des Moines Municipal Code Section 102-766(d), as amended by the Ordinance, conflicts with, and therefore is preempted by, Iowa Code § 480A.4.

**Sixth Claim for Relief**  
**Request for Injunction Prohibiting Des Moines from Enforcing Municipal Code Section 102-766(d), as Amended by the Ordinance**

69. Plaintiffs incorporate and re-allege all prior paragraphs of this Petition as if fully alleged here.

70. For the reasons set forth above, Des Moines Municipal Code Section 102-766(d), as amended by the Ordinance, conflicts with, and therefore is preempted by, Iowa Code § 480A.4.

71. Plaintiffs therefore are entitled to an order permanently enjoining Des Moines from enforcing Des Moines Municipal Code Section 102-766(d), as amended by the Ordinance.

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WHEREFORE, Plaintiffs Qwest Corporation d/b/a “CenturyLink QC,” Windstream Communications, LLC f/k/a “Windstream Communications, Inc.,” and McLeod-USA Telecommunications Services, L.L.C. respectfully request that this Court enter an order:

1) declaring the Increased Management Fee in the Fee Schedule Amendment in conflict with and preempted by Section 253 for each and every year of implementation, as applied to the Plaintiffs;

2) declaring the Increased Management Fee in the Fee Schedule Amendment in conflict with and preempted by Iowa Code § 480A.3 for each and every year of implementation, as applied to the Plaintiffs;

3) permanently enjoining Des Moines, its officers, agents, servants, employees, and attorneys and those persons in active concert or participation with it who receive actual notice of the Order by personal service or otherwise, from enforcing the Increased Management Fee in the Fee Schedule Amendment against the Plaintiffs for each and every year of implementation;

4) declaring Des Moines Municipal Code Section 102-766(d), as amended by the Ordinance, in conflict with, and therefore preempted by, Iowa Code § 480A.4;

5) permanently enjoining Des Moines, its officers, agents, servants, employees, and attorneys and those persons in active concert or participation with it who receive actual notice of the Order by personal service or otherwise, from enforcing Des Moines Municipal Code Section 102-766(d), as amended by the Ordinance; and

6) awarding the Plaintiffs their costs of suit and whatever further relief the Court deems just.

Respectfully submitted this 4th day of September, 2015.

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\*Pro hac vice applications are being filed  
contemporaneously this Complaint