BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION, Complainant, v. ADVANCED TELECOM GROUP, INC.; ET AL. Respondents.	)	DOCKET NO. UT-033011 BRIEF IN SUPPORT OF MOTION TO DISMISS

INTRODUCTION

Eschelon Telecom of Washington, Inc. ("Eschelon") respectfully submits this brief in support of its Motion to Dismiss in the above referenced matter. This brief addresses the allegations in the Amended Complaint ("Complaint") that Eschelon (along with the other respondents) violated state and federal law by failing to file, with the Washington Utilities and Transportation Commission ("Commission"), certain agreements between Qwest Corporation ("Qwest") and Eschelon. The Complaint orders an investigation into the alleged violations concerning these agreements (these agreements will be collectively referred to as the "unfiled agreements" or "agreements") and asks for a determination of whether monetary penalties should be imposed against the respondents.

Eschelon moves for dismissal of the First, Second and Fourth Causes of Action in the above-referenced Complaint on the basis that they fail to state a claim upon which relief can be granted. The courts have stated that motions to dismiss for failure to state a claim must be denied unless it appears beyond doubt that the plaintiff can prove no set of facts, consistent with the complaint, which would entitle the plaintiff to relief and that the factual allegations in the

complaint are presumed to be true for purposes of the motion. *Roe v. Quality Transportation Services,* 838 P.2d 128, 130 (WA 1992). As Eschelon will show, the state and federal statutes in question impose no requirement to file the agreements in question upon Eschelon. Therefore, as a matter of law, those causes of action must be dismissed.

The Complaint alleges three causes of action regarding Eschelon (and the other CLEC respondents). The Complaint alleges that Eschelon violated 47 U.S.C. §252(a), 47 U.S.C. §252(e) and R.C.W. 80.36.150, by failing to file the agreements in question with the Commission. In this brief, Eschelon discusses the state and federal law requirements applicable to the filing of interconnection agreements. As this discussion will demonstrate, Eschelon, as a competitive local exchange carrier ("CLEC") was not required by state or federal law to file the agreements with the Commission. As the incumbent local exchange carrier ("ILEC"), Qwest bore the responsibility for the filing of any interconnection agreements and amendments, including the responsibility to have filed any of the unfiled agreements that may be properly viewed as interconnection agreement amendments. [1] For these reasons all causes of action in this matter pertaining to Eschelon should be dismissed.

I. THE FCC HAS STATED THAT SECTION 252 OF THE ACT DOES NOT IMPOSE ANY OBLIGATIONS ON ANYONE OTHER THAN ILECS.

The Telecommunications Act of 1996 ("the Act") requires that interconnection agreements be submitted to the State commission for approval.[2] The First and Second Causes of Action in the Complaint allege a violation of this requirement by Eschelon (and the other

[1] For purposes of its Motion to Dismiss Eschelon is assuming that the agreements in question meet the definition of an interconnection agreement, without conceding that issue.
[2] *47 U.S.C. § 252(e).*

respondents) for failure to file the agreements.[3] However, the Complaint fails to acknowledge that the Act does not explicitly specify who has the duty to file such agreements.

Since the Act does not expressly state who has the obligation to submit agreements for approval, the determination of who has that duty must be garnered from the context of the broader obligations imposed in the Act, specifically, the unique obligations imposed on ILECs.[4] In examining those obligations the Commission must be guided by the interpretations of the Act by the Federal Communications Commission (FCC). Placing the obligation to file the agreements on the ILEC is consistent with the fundamental public policy underlying the entirety of the Act and with FCC pronouncements concerning the Act.

In August of 1966, the FCC issued its First Report and Order to implement the Act and adopt rules consistent with the Act.[5] In the course of its discussion regarding the options available for CLECs to gain access to the facilities or property of an incumbent LEC the FCC noted that a CLEC could invoke the arbitration and negotiation procedures of Section 252 to gain such access. [6] As a part of its discussion of the pertinent provisions of Section 252, including the negotiation and arbitration procedures, the FCC stated: "We note that section 252 does not impose any obligations on utilities other than incumbent LECs, and does not grant rights to entities that are not telecommunications providers."[7] (Emphasis added.)

Thus, no less of an authority on the Federal Act than the FCC has stated that Section 252 places no obligations on anyone other than the ILECs. Obviously, Eschelon can not have violated a statute that does not impose any obligations upon it.

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[3] While the Complaint alleges these as two separate causes of action there is in fact only one requirement and therefore can only be one violation. Section 252(a) simply states that an agreement shall be submitted pursuant to 252(e). Therefore, a failure to file such an agreement would only constitute one violation.

[4] *See, e.g., 47 U.S.C. § 251(c).*

[5] *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499 (1996) (First Report and Order),

[6] *First Report and Order*, ¶ 1227.

Nor is this an isolated statement by the FCC regarding the obligations under Section 252 of the Act. For example, as part of its First Report and Order the FCC promulgated a rule to implement Section 252 (i) of the Act. That Section, sometimes known as the "pick and choose" provision of the Act, allows CLECs to opt-in to interconnection agreements of others with the intent of preventing discrimination between CLECs. The FCC's "pick and choose" rule provides, in relevant part:

> An incumbent LEC shall make available without unreasonable delay to any requesting telecommunications carrier any individual interconnection, service, or network element arrangement contained in any agreement to which it is a party that is approved by a state commission pursuant to section 252 of the Act, upon the same rates, terms, and conditions as those provided in the agreement. 47 CFR § 51.809 (1997). (emphasis added).

The effect of this FCC rule is to place the duty to file agreements on the shoulders of the ILEC, since it is the ILEC that has the duty to make the terms of any interconnection agreement available to others. In discussing Section 252(i) of the Act and the effect of the FCC's rule implementing that provision the FCC stated: "Incumbent LECs, including small incumbent LECs, are required to file with state commissions all interconnection agreements entered into with other carriers, including adjacent incumbent LECs. *First Report and Order* at ¶ 1437. Thus, the FCC has made it clear that it is the ILEC's obligation to file interconnection agreements with state commissions so as to make ILEC facilities and services available to other CLECs.

Other statements in the First Report and Order confirm the FCC position that it is the ILECs obligation to make sure that agreements were available for opt-in. ". . . incumbent LECs must permit third parties to obtain access under section 252(i) to any individual interconnection, service, or network element arrangement." *First Report and Order* ¶1314. "Moreover, incumbent LEC's efforts to restrict availability of interconnection, services or elements under

[7] *Id*., ¶ 1230.

section 252(i) must also comply with the 1996 Act's general nondiscrimination provisions." *Id* at ¶ 1315.

In contrast to its statements about the filing obligation of ILECs, the FCC has not imposed any such requirements on CLECs. The FCC's conclusion that Section 252 imposes obligations only upon ILECs should be afforded deference in light of the FCC's obligations to interpret the Act and the failure of the Act to specify who has the obligation to file.

II. THE FCC'S CONCLUSION THAT FILING AGREEMENTS IS THE DUTY OF ILECS IS CONSISTENT WITH THE NONDISCRIMINATION PROVISIONS OF THE ACT.

Placing the obligation to file agreements on the ILEC and not on the CLEC is consistent with the overall purpose and scheme of the Federal Telecommunications Act. As the Act, regulators, and competitors all recognize, the power in the ILEC-CLEC relationship resides entirely with the incumbent. Without the incumbent, competitors do not exist. The simple fact is that competitors must constantly approach incumbents such as Qwest to obtain access to wholesale services and network elements. On the other hand, the incumbent requires nothing from its competitors and only loses revenue as those competitors succeed and flourish.

Therefore, the Act places several obligations upon the ILEC, including the duty to provide nondiscriminatory access to the network elements on an unbundled basis at any technically feasible point, on rates, terms, and conditions that are just, reasonable, and nondiscriminatory and in accordance with the requirements of Section 252.[8] In placing these obligations on the ILEC, Congress recognized that the actions of the incumbents, as the wholesale provider of the services necessary for competition, held the key to determining whether competition would develop. The one offering the services and facilities in interconnection agreements is the incumbent, not CLECs. Since it is the ILEC that is making its

services and elements available under these agreements it logically bears the obligation of filing the agreements.

Throughout its First Report and Order, and indeed in subsequent proceedings, the FCC recognizes that Congress has specifically designed the Act to address the ILECs' superior bargaining power and the ILECs' incentives (or lack thereof) in dealing with competitive carriers.[9] The FCC noted that "as distinct from bilateral commercial negotiation, the new entrant comes to the table with little or nothing the incumbent needs or wants."[10] At the same time, the new entrant is entirely dependent on the ILEC for the services required in order to enter the market. Given this, the FCC has appropriately focused on the obligations of the incumbents under the Act and has thus far declined to extend significant regulatory obligations, such as the filing of interconnection agreements, to CLECs.

The reason that the Act requires filing of the agreements and the reason for the concern when agreements are not filed, is the potential for discrimination. The Act prohibits discriminatory provision of interconnection, unbundled access, resale and collocation by ILECs.[11] As stated above, prevention of discrimination is accomplished, under the Act, by having the agreements filed with the state commissions and making them available for "opt-in" by other CLECs through Section 252(i) of the Act. Indeed, the FCC has stated that section 252(i) is "a primary tool of the 1996 Act for preventing discrimination under section 251." [12] As stated, the FCC has ruled that it is the ILEC's obligation to make the agreements available for opt-in.

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[8] *47 U.S.C. § 251(c)(3).*
[9] *See, e.g., First Report and Order,* ¶ 15.
[10] *Id.*
[11] 47 U.S.C §251(c).
[12] *First Report & Order*, ¶1296.

Recognizing that the burden of filing agreements is on the ILEC is consistent with the Act's intent to prevent discrimination. This is true because one party and one party alone knows of the existence of all interconnection agreements – the ILEC. It is the ILEC that is the one common party to all interconnection agreements. It is the ILEC that has the monopoly over access to the network. It is the ILEC that can often unilaterally enforce its views as to how to permit access to that network. It is the ILEC that knows whether it has extended terms more favorable to one competitor than to another. It is the ILEC, therefore, that has the duty and responsibility to file all interconnection agreements with the appropriate regulatory bodies.

In conclusion, the Complaint does not state any basis for its allegation that Eschelon had a duty under either Section 252(a) or Section 252(e) of the Act to file the agreements in question. The statutory provisions cited do not require CLECs, like Eschelon, to file the agreements. The Complaint does not allege the violation of any FCC rule enacted to enforce and interpret those sections of the Act. In fact, FCC rules and orders make it clear that the duty to file the interconnection agreements with the Commission rested with Qwest, not with Eschelon. The FCC's statement that Section 252 places no obligations on anyone other than ILECs is consistent with its position as stated in its rules and elsewhere in the First Report and Order as well as with both the language and spirit of the Act.

Since Section 252 of the Act imposes no obligations on Eschelon, Eschelon can not, as a matter of law, be found to have violated that Section. Therefore, and for all of the above stated reasons, the First and Section Causes of Action against Eschelon must be dismissed.

III. STATE LAW DOES NOT REQUIRE A CLEC TO FILE INTERCONNECTION AGREEMENTS FOR APPROVAL.

The Fourth Cause of Action in the Complaint alleges that Eschelon violated RCW 80.36.150 by failing to file the agreements in question. However, as will be shown, the statute in

question fails to place on CLECs, like Eschelon, the obligation to file interconnection agreements with this Commission. In fact, Washington Statutes are completely silent on the issue of the filing of interconnection agreements under the Act. While the Complaint alleges that Eschelon violated RCW 80.36.150 by failing to file the agreements, that statute creates no such obligation for Eschelon. As will be demonstrated that statute does not apply to the agreements at hand and does not apply to Eschelon.

RCW 80.36.150 does not apply to Eschelon for several reasons. First, as stated in the complaint at paragraph 28: "RCW 80.36.150 requires telecommunications companies providing noncompetitive services through contracts to make those services available to all purchasers under the same or substantially the same circumstances under the same rate, terms, and conditions set forth in the contract." Thus, as admitted in the Complaint, the statute requires "telecommunications companies providing noncompetitive services" to make the services available. Eschelon does not provide noncompetitive services to other CLECs. The agreements in question are ones in which Eschelon is the purchaser, not the provider, of interconnection and other noncompetitive services from Qwest. Thus, to the extent that this statute is applicable at all to the agreements at issue, it creates a duty for the Qwest to file agreements, but not for CLECs like Eschelon.

Second, the statute, on its face, does not require the filing of all contracts by all telecommunications companies. Rather, by its terms the statute provides for filing of contracts only "as and when required by" the Commission. Thus there must be an independent order or rule requiring the filing of particular agreements for the statute to be operative. Even if such a rule existed, the statute would not provide a basis for finding a violation by Eschelon, unless the rule or order specified that CLECs had the obligation to make the filing. This reading of the

statute is confirmed by the fact that the statute specifically requires that the Commission shall adopt rules that provide for the filing of such contracts. The Fourth Cause of Action does not allege any violation of Commission rules. Indeed, it could not because no rules providing for the filing of agreements between telecommunications companies have been adopted by the Commission. While the Commission has imposed rules that require the filing of tariffs and price lists and retail contracts, it has not done so as to interconnection agreements. See WAC 480-8-142.

The Washington courts have held that where a statute that requires rules to be promulgated by the Commission, there can not be a violation of the statute unless those rules are promulgated and a violation of those rules occurs. *Judd v. AT&T, et al*. 66 P. 3d 1102. That case involved a statute that required the Commission to promulgate rules regarding certain disclosures by telephone companies. The court found that the statute in question, in and of itself, did not impose a requirement that telephone companies make the disclosures at issue. Rather the statute directed the WUTC to assure the required disclosures through the promulgation of rules. Therefore the failure by the defendants to make the disclosures would not be an actionable failure by the defendants unless the Commission promulgated the rules and those rules were violated. As the Court stated: "This interpretation properly places responsibility on the WUTC to promulgate rules…" Id at 1107. See also *Budget Rent A Car Corporation v. Washington State Department of Licensing*, 997 P.2d 420, 424 (WA 2000). ("Under the Washington APA, unless a statute specifically requires adoption of a rule, agencies may develop policy either by rulemaking or adjudication." (emphasis added); *Newman v*. Chater, 87 F.3d 358, 361 (9th Cir. 1996). ("a primary purpose of requiring agencies to act by regulation is to prevent ad hoc policy determinations. When Congress says that the Commission shall prescribe circumstances by

regulation, we see no reason why the Commission should be entitled to prescribe circumstances by other means.") Jacober *v. Sunn*, 715 P. 2d 813 (1986). (statutory amendments did not become operative until rules implementing the amendment were adopted). Therefore, this statute in and of itself did not create a filing requirement for these agreements.

The Commission has addressed the issue of interconnection agreements in Interpretive and Policy Statements. In the *Interpretive and Policy Statement Regarding Negotiation, Mediation, Arbitration and Approval of Agreements Under the Telecommunications Act* in Docket No. UT-960269, the Commission addressed many issues surrounding interconnection agreements. Nowhere does it require CLECs to file the agreements for approval.

The Commission also issued an Interpretive and Policy Statement on the "pick and choose" provisions of Section 252(i) of the Act. Docket UT-990355, April 12, 2000. In that Statement there is again no statement of the obligation of CLECs to file the agreements. The Statement does state that the Act "is intended to foster local exchange competition by imposing certain requirements on incumbent local exchange companies (ILECs) that are designed to facilitate the entry of competitive local exchange companies (CLECs)." Statement at ¶ 1. (emphasis added). That statement also acknowledges that the FCC rule provides "that an ILEC must make available any individual interconnection, service, or network element arrangement contained in any approved agreement." Statement, ¶13. (emphasis added). Thus to the extent the Commission has addressed the issue of making an agreement available to others, it has acknowledged that that obligation is with the ILEC.

The Fourth Cause of Action also alleges that Eschelon violated R.C.W. 80.36.150 because it failed to file one agreement "in a timely manner." However, R.C.W. 80.36.150 does not specify a time for the filing of agreements. In fact, it does not provide that agreements be

filed "in a timely manner." Its only reference to when an agreement should be filed is the statement that agreements shall be filed with the Commission" as and when required by it…" As stated previously, the Commission has not adopted rules specific to the filing of interconnection agreements, and thus has not prescribed any requirements for the timely filing of agreements. Since the statute in question does not prescribe a time for filing of agreements and no rules have been promulgated delineating such a requirement, Eschelon can not be found to have violated such a requirement. Thus, the allegation that Eschelon violated the statute by failing to file an agreement in a timely manner must be dismissed as a matter of law.

In conclusion, R.C.W. 80.36.150 does not apply to Eschelon, imposes no duty upon Eschelon to file interconnection agreements, and states no standard for the timeliness of the filing of any agreements. No rules have been promulgated, as is required under the statute, that provide for the filing of interconnection agreements. If the statute creates any duty to file the agreements in question, that duty falls solely upon the provider of the services in question which is Qwest.

Therefore, and for all of the above stated reasons, Eschelon respectfully urges that the Fourth Cause of Action be dismissed as to Eschelon.

CONCLUSION

In conclusion, Section 252 of the Act does not impose the obligation to file interconnection agreements on CLECs like Eschelon. To the contrary, the FCC has found that the Federal Telecommunications Act of 1996 places on the incumbent the responsibility of filing interconnection agreements with state commissions and stated that Section 252 of the Act places obligations only on incumbents. In addition, the state statute cited as the basis for alleging a violation of law by Eschelon places no obligation on Eschelon regarding the agreements. For all

of these reasons, the First, Second and Fourth Causes of Action should be dismissed as to Eschelon.

Respectfully submitted,

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