BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION, Complainant, v. ADVANCED TELECOM GROUP, INC; ALLEGIANCE TELECOM, INC.; AT&T CORP; COVAD COMMUNICATIONS COMPANY; ELECTRIC LIGHTWAVE, INC.; ESCHELON TELECOM, INC. f/k/a ADVANCED TELECOMMUNICATIONS, INC.; FAIRPOINT COMMUNICATIONS SOLUTIONS, INC.; GLOBAL CROSSING LOCAL SERVICES, INC.; INTEGRA TELECOM, INC.; MCI WORLDCOM, INC.; McLEODUSA, INC.; SBC TELECOM, INC.; QWEST CORPORATION; XO COMMUNICATIONS, INC. f/k/a NEXTLINK COMMUNICATIONS, INC., Respondents	Docket No. UT-033011 RESPONSE OF QWEST CORPORATION TO MOTIONS TO DISMISS AND MOTIONS FOR SUMMARY DETERMINATION

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I. INTRODUCTION

Qwest Corporation ("Qwest") hereby files this Response to the Motions to Dismiss and for Summary Determination filed by Commission Staff ("Staff"), Advanced TelCom, Inc. ("ATG"), Eschelon Telecom of Washington, Inc. ("Eschelon"), FairPoint Carrier Services, Inc. ("FairPoint"), Global Crossing Local Services, Inc. ("Global Crossing"), Integra Telecom of Washington ("Integra"), McLeodUSA Telecommunications, Inc. ("McLeod"), SBC Telecom, Inc. ("SBC"), and XO Washington, Inc. ("XO").

II. SUMMARY OF ARGUMENT

The Telecommunications Act of 1996 (the "Act") does not limit the responsibility for filing interconnection agreements under Section 252 to ILECs. The language, structure and purpose of the Act are most consistent with an obligation for filing agreements applicable to both ILECs and CLECs, and the FCC has not ordered otherwise. Further, the Uniform Commercial Code ("UCC") law on "course of dealing" in interpreting ambiguous contract terms is not applicable to interpreting a statutory filing requirement.

Additionally, after reviewing the filings of Staff and the various CLECs, Qwest agrees that four additional agreements should be dismissed from the complaint.

III. ARGUMENT

The CLECs filing motions in this docket offer two general arguments for why the filing obligation under Section 252 of the Act applies only to ILECs and does not apply to CLECs. Eschelon and McLeod each argue that despite the Act's silence on the issue, the structure of the Act and the FCC First Report and Order places the Section 252 filing obligation only upon the ILEC.[1] FairPoint, Integra, and SBC analogize to "course of dealing" rules under the UCC to argue that only the ILEC has the responsibility to file.[2] The Commission should reject both of these rationales and hold that the filing obligation under Section 252(e) applies to CLECs as well as ILECs.

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[1] *See, e.g., Eschelon's Brief in Support of Motion to Dismiss at 2-5 (November 7, 2003).*

[2] *See, e.g., FairPoint Carrier Services, Inc.'s Motion for Summary Determination at 15-18 (Nov. 7, 2003).*

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A. The Section 252(e) Filing Requirement Applies Equally to ILECs and CLECs

1. The language and structure of the Act indicate that the filing obligation is not placed solely on any one party.

In Sections 251 and 252 of the Act, if an obligation or duty is placed on a particular carrier or a particular class of carriers, the Act clearly states this. For example, Section 251(a) defines the duties of telecommunications carriers generally, Section 251(b) defines the duties of local exchange carriers, and Section 251(c) defines the duties of incumbent local exchange carriers.[3] However, Section 252(e) pointedly does *not* specify that a particular party is responsible for filing interconnection agreements. That Section states that "[a]ny interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission."

Eschelon and McLeod point out that Section 251(c) places extra obligations upon ILECs.[4] From this they conclude that only the ILEC has the obligation to file interconnection agreements. However, these Section 251(c) obligations have nothing to do with filing interconnection agreements. Rather, they relate to the actual interconnection of the networks and the provisioning of related services. Indeed, if the argument forwarded by Eschelon and McLeod is correct, it would just as easily compel the conclusion that because Section 251(b) places extra obligations on all local exchange carriers (beyond those placed upon telecommunications carriers generally), all local exchange carriers have the obligation to file interconnection agreements. In fact, the only conclusion to be drawn from the fact that Section 251 specifies certain obligations for certain types of carriers is that when Congress intended to create limitations to the Act's obligations, it did so explicitly.

Section 252(e) requires agreements to be submitted to the State commission, but does not contain an explicit limitation on the obligation to file them. The most natural reading of this section is that this responsibility falls upon both parties to the agreement.[5]

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[3] *47 U.S.C. § 251.*

[4] *Eschelon Motion at 5; McLeod Motion at 2 – 3.*

[5] Although it is not binding, the Commission's *Interpretive and Policy Statement Regarding Negotiation, Mediation, Arbitration, and Approval of Agreements Under the Telecommunications Act of 1996, Docket No. UT-960269 (June 28, 1996)* ("Interpretive Statement"), supports a joint-filing requirement under the Act. The Interpretive Statement provides

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2. The purpose of the Act is best served by placing the filing obligation on both ILECs and CLECs.

The purpose of the Act is best served by providing incentive to both parties to an interconnection agreement to file it.[6] Section 251 imposes a duty that rates, terms, and conditions of interconnection be provided on a nondiscriminatory basis. Section 252(i) pick-and-choose rules are the primary mechanism for preventing discrimination.[7] Whether an agreement is filed by the ILEC or CLEC is irrelevant to meeting this purpose of the Act. All that is necessary is that the agreement be filed. A joint filing obligation creates a system of checks and balances that increases the likelihood that the interconnection agreements are filed. If one party fails to file an agreement, it would still be available to other CLECs because the other party to the agreement would be required to file it.

The Act places a duty upon both ILECs and CLECs to negotiate in good faith the terms and conditions of the interconnection agreements.[8] If each party is obligated to memorialize and file their interconnection agreements, they have additional incentive to live up to their obligation to negotiate in good faith. For example, it would discourage claims by either party that there were any side agreements altering interconnection terms from those in the filed agreement because each party would be aware that: a) the only valid interconnection agreements are those memorialized and approved by the Commission; and b) each party was responsible to see that the agreement is filed and approved. Once an agreement is negotiated and interconnection services are to be provided according to the agreement, both parties are equally well situated to file that interconnection agreement with the State

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that the *parties* shall notify the Commission when a request for negotiation is made, suggesting both ILECs and CLECs share the responsibility of keeping the Commission apprised of interconnection negotiations and agreements. *Id.* at 2 The Interpretive Statement also notes that requests for approval, and accompanying materials, can be filed "jointly or separately by the parties to the agreement." *Id.* at 9. Nothing in this language suggests that a CLEC is excluded from the obligation to ensure that interconnection agreements are properly filed.

[6] Both Eschelon and McLeod fail to adequately acknowledge that the Act was meant not just to open local markets to competition, but also to do so in a deregulatory framework that promoted privately negotiated agreements. See *Telecommunications Act of 1996, Joint Managers Statement, S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. 1 (1996).*

[7] *In Re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd 15499, at ¶ 1296 (1996) ("First Report and Order").*

[8] *47 U.S.C. § 252(c)(1).*

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commission.

Eschelon and McLeod also argue that only the ILEC knows what terms have been offered to other competitors. This is inaccurate. CLECs that are entering an interconnection agreement know whether the terms of that agreement are in accordance with the terms of the SGAT or other filed interconnection agreements. They are again in an equal position to the ILEC to file their interconnection agreements.

3. The FCC did not rule or state in the First Report and Order that the Section 252(e) filing requirement applied solely to ILECs.

Eschelon and McLeod both argue that Sections 251 and 252, as interpreted by the Federal Communications Commission ("FCC") in its First Report and Order, only impose a filing obligation on ILECs.[9] Such an interpretation misconstrues the FCC's First Report and Order by taking statements out of context.

In Paragraph 1230 of the First Report and Order (cited by both Eschelon and McLeod), the FCC was not discussing the filing requirement of Section 252. Rather, the FCC was discussing the proper procedure for seeking access to an ILEC's poles, ducts, conduits and rights-of-way and resolving complaints related to seeking that access.[10] The FCC noted that both 47 U.S.C. § 224 and 47 U.S.C. § 251(b)(4) addressed this issue and outlined different complaint procedures.[11] Having already described the complaint procedure employed by Section 224 in paragraphs 1222 – 1225, the FCC in paragraphs 1226 – 1231 was describing how the complaint procedure would operate for an entity seeking access to rights-of-way under Section 251(b)(4) and Section 252, and how that procedure was different from the Section 224 procedure.

Viewed in this context and read in its entirety, it is clear that Eschelon and McLeod are incorrect in their argument that Paragraph 1230 applies to the filing requirement of Section 252(e). In

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[9] *Eschelon Motion at 3; McLeod Motion at 3 – 4.*

[10] *First Report and Order at ¶¶ 1226 – 1227.*

[11] *First Report and Order at ¶ 1226.*

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that Paragraph, the FCC stated: "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. Therefore, section 252 may be invoked in lieu of section 224 only by a telecommunications carrier and only if it is seeking access to the facilities or property of an incumbent LEC." This quote serves to distinguish the Section 252 complaint procedure, which only applied to requests by a telecommunications carrier for access to poles, ducts, conduits or rights-of-way made to ILECs, from Section 224, which applied to requests by any entity for access to poles, ducts, conduits, or rights-of-way made to any local exchange carrier.[12]

Similarly, the quotes drawn from the First Report and Order paragraphs 1314, 1315 and 1437 can be understood to impose the filing obligation solely on ILECs only if they are taken out of context. The discussion in those paragraphs deals solely with the requirements of Section 252(i).[13] It is logical that in discussing Section 252(i) opt-in rights the FCC would speak in terms of ILECs, because ILECs, as the owners of most of the necessary infrastructure, are the local exchange carriers that are generally providing the interconnection services under the agreements. Thus, it is only the ILECs that will be target of any opt-in requests. This logic does not extend to the Section 252(e) context where ILECs and CLECs are equally able to file interconnection agreements they have executed.

B. UCC Law on Course of Dealing in Interpreting Contracts is Not Relevant to Interpreting a Statutory Filing Requirement

FairPoint, Integra and SBC argue that because Sections 251 and 252 do not specifically delineate whether an ILEC or CLEC has the obligation to file an interconnection agreement, the course of dealing (in the sense of the course of dealing provisions of the Washington UCC[14]) between ILECs and CLECs should determine who has the filing obligation. The law on course of dealing under

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12 *First Report and Order at ¶ 1230; 47 U.S.C. §§ 224(a).*

13 *First Report and Order at ¶¶ 1296 – 1323 and 1437 - 1440.*

14 *RCW 62A.1-205(1).*

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the UCC is irrelevant to interpreting statutory filing obligations.

In interpreting contracts under the UCC, the course of dealing of the parties can shed light on establishing "a common basis of understanding for interpreting [the contracting parties'] expressions and other conduct," and, thus aid in interpreting what the parties intended when drafting their contract.[15] While this provision has been applied in a non-UCC contractual context, it has not been applied in a non-contract case such as the present situation.[16]

It is no surprise that this rule of contract interpretation has *not* been previously applied to interpret a statute, because in questions of statutory interpretation the intent of the parties affected by the statute is irrelevant to the meaning of the statute or interpreting Congressional intent.[17] In the present situation, the filing obligation of Section 252 was not created by any contract between ILECs and CLECs, nor was it created by the rules or regulations of the Commission. Rather, it was created by Congress. Private parties may not alter the mandates of the Act as passed by Congress through contract, course of dealing, or any other means.

Even if the course of dealing of the parties could shed light on the Section 252 filing requirement, the CLECs' assertion that "it is the ILEC that almost always files the agreement with the state commission" is insufficient to establish that only the ILEC has the obligation to file interconnection agreements.[18] The only thing that this "course of dealing" establishes is that an ILEC usually files the agreement – and, indeed, it implicitly concedes the point that CLECs *sometimes* files interconnection agreements. It does not follow that the CLEC is relieved of any statutory responsibility for filing if the ILEC fails to file the agreement.

Also, the CLECs mischaracterize the Minnesota proceeding and resulting order. The

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[15] *RCW 62A.1-205(1).*

[16] *Cf. Smith v. Skone & Connors Produce, Inc., 26 P.3d 981, 986 (Wash. App. 2001) (noting that relying on contracting parties' course of dealing to interpret a contract arises from the UCC and "applies by analogy to other contracts") (emphasis added).*

[17] *See Commissioner of Internal Revenue v. Engle, 464 U.S. 206, 217 (1984) (noting that the aim of statutory interpretation is to find the interpretation that can most fairly be said to be embedded in the statute and consistent with Congress's purpose).*

[18] *FairPoint Motion at 15.*

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Minnesota Commission clarified that no part of the order should be viewed as a penalty against Eschelon or McLeod because only Qwest was a named defendant in that particular docket. The Minnesota Commission considered opening a docket to investigate the conduct of Eschelon and McLeod, but declined to do so because it felt the remedies ordered in the Qwest docket, specifically the exclusion of Eschelon and McLeod from certain remedies, adequately redressed any wrong the companies may have done in participating in the agreements in question, so long as Eschelon and McLeod agreed not to appeal the commission decision in the Qwest docket.[19] It is inaccurate to suggest that the Minnesota Commission only penalized Qwest because it believed the filing obligation only applied to Qwest. Moreover, among states in Qwest's region that have explicitly addressed to whom the filing requirement applies, the prevailing rule is that both ILECs and CLECs are obligated to file their interconnection agreement.[20]

C. Three Agreements Moved for Dismissal by CLECs Should Also be Dismissed From The Complaint Against Qwest

In Qwest's Motion to Dismiss and Motion for Summary Determination, Qwest moved to dismiss all of the Exhibit B agreements and sixteen Exhibit A agreements. Qwest also moved for summary determination on thirteen additional Exhibit A agreements. After reviewing the motions of

[19] At a hearing on February 2, 2003, the Minnesota Public Utilities Commission ("MPUC") indicated that it would investigate possible wrongdoing of Eschelon and McLeod in a separate docket if those CLECs agreed to abide by the ruling in Qwest's docket. *See Exhibit 1.* At a hearing on April 8, 2003 after Eschelon and McLeod indicated that they would not appeal the MPUC order in Qwest's docket, the MPUC voted to close the separate docket against Eschelon and McLeod. *See Exhibit 2.*

[20] Colorado, Iowa, Montana, New Mexico, North Dakota, Oregon, and South Dakota all explicitly provide that the interconnection agreement filing obligation applies to both ILECs and CLECs. *See, 4 Colo. Code Reg. 723-44-4.4 (stating that the preference is for an application for approval of an interconnection agreement to "be made jointly by the parties")*; *In re AT&T Corp. v. Qwest Corp., State of Iowa Department of Commerce Utilities Board, Docket No. FCU-02-2, Order at 5 (May 29, 2002) (holding that the obligation to file applies to both parties to an agreement) (Attached as Exhibit 3); Mont. Admin. R. 38.5.4054(10) (stating that negotiated interconnection agreements shall be submitted by the parties for approval); N.M. Admin. Code 17.11.18.17(F) (stating that the "negotiating parties" shall submit interconnection agreements for approval); N.D. Admin. Code § 69-02-10-30 (stating that the parties shall jointly file any interconnection agreement reached through negotiation); Or. Admin. R. 860-016-0020 (stating that after parties reach an interconnection agreement "they shall file an application with the commission seeking approval"); S.D. Admin. R. 20:10:32:21 (stating that each party to a negotiated interconnection agreement shall submit a copy of the agreement for approval).* Utah does not explicitly address whether the filing requirement applies to both CLECs and ILECs, but does specify that when a CLEC requests interconnection it shall report that fact to the Utah commission, suggesting that CLECs share in the responsibility to notify the commission of developments relating to interconnection. *See Utah Admin. Code 746-349-4(A).* Arizona's rule is ambiguous about who is obligated to file interconnection agreements. *Ariz. Admin. Code 14-2-1506.* Idaho, Nebraska and Wyoming do not address the filing requirement for interconnection agreements in their statutes or administrative codes.

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Staff and the various CLECs, Qwest notes that if the CLEC motions are granted, there are three additional agreements that should be dismissed from the Complaint. The agreements are:

- Exhibit A, No. 27: Confidential Settlement Agreement between Qwest and ATG dated June 30, 2000.
- Exhibit A, No. 36: Confidential Billing Settlement Agreement between U S WEST Communications, Inc. ("Qwest") and NEXTLINK Communications, Inc. ("XO") dated May 12, 2000.
- Exhibit A, No. 52: Settlement Agreement and Release between Qwest and Global Crossing dated September 18, 2000.

Qwest also wishes to clarify that its Motion to Dismiss included the Allegiance agreement, Exhibit A, No. 13. Qwest discussed Staff's September 4, 2003 motion to dismiss the Allegiance agreement and concurred in Staff's rationale for dismissal of the agreement, but inadvertently failed to include the agreement in its list of agreements for which it was moving for dismissal in either the introduction or conclusion of its Motion.

IV. CONCLUSION

For foregoing reasons, the Commission should hold that the filing obligation applies equally to CLECs and ILECs and should also dismiss Agreements No. 13, 27, 36, and 52 of Exhibit A.

RESPECTFULLY SUBMITTED this 12th day of December 2003.

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