

1 BEFORE THE PUBLIC UTILITIES COMMISSION
2 OF THE STATE OF MINNESOTA

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4
5 Leroy Koppendrayer, Chair
6 Gregory Scott, Commissioner
7 Marshall Johnson, Commissioner
8 Phyllis Reha, Commissioner

9 In the Matter of the Consideration
10 of Petitions for Reconsideration
11 of the Complaint of the Minnesota
12 Department of Commerce Against
13 Qwest Corporation Regarding Unfiled
14 Agreements

15 PUC Docket No: P-421/C-02-197

16 Minnesota Public Utilities Commission
17 350 Metro Square Building
18 121 Seventh Place East
19 St. Paul, Minnesota
20 Large Hearing Room
21 April 8, 2003

22 Met, pursuant to notice, at 9:30 in the
23 morning.

24
25 COURT REPORTER: Angie D. Threlkeld, RPR CRR

1 the fine and then perhaps staying a portion of the
2 fine. I might consider that. But I'll have to see,
3 hear the other -- arguments of the other parties.

4 CHAIR KOPPENDRAYER: Mr. Lipschultz, you
5 want to go first?

6 MR. LIPSCHULTZ: No.

7 CHAIR KOPPENDRAYER: No?

8 MR. LIPSCHULTZ: Mr. Chair,
9 Commissioners, generally we would agree with and
10 support the direction you're headed in.

11 CHAIR KOPPENDRAYER: Thank you.

12 MR. LIPSCHULTZ: And the only -- And the
13 only caveat we would have from McLeod's perspective
14 is the access-related remedies, the 13 or \$16
15 remedy, which really relates to originating access
16 on UNE-P, and the \$2 per line remedy that really
17 relates to terminating access.

18 And just to point out -- and it wasn't
19 clear from your order whether this was clearly
20 understood -- but those payments were made to
21 Eschelon pursuant to unfiled agreements Eschelon had
22 with Qwest. McLeod didn't have those agreements,
23 have access to those agreements, or receive those
24 payments.

25 And with the caveat I think that Qwest

1 suggested, that payments should be made but only to
2 the extent money has not already been received, I
3 think that's a reasonable remedy that ought to be
4 applied equitably to all who didn't receive those
5 payments, which would include McLeod. And with that
6 small caveat, I think we would support the direction
7 you're headed in.

8 COMMISSIONER SCOTT: That was fairly
9 smooth. Fairly smooth.

10 CHAIR KOPPENDRAYER: But let me add to
11 that that under this, what we are considering,
12 McLeod is out.

13 COMMISSIONER SCOTT: Yeah. I didn't move
14 to --

15 CHAIR KOPPENDRAYER: And --

16 COMMISSIONER SCOTT: -- reconsider it
17 McLeod. That's why --

18 CHAIR KOPPENDRAYER: And -- And if --
19 unless, which you have every right to, you appeal,
20 my idea of this then, we wouldn't take up the docket
21 looking at whether or not you're culpable because
22 you're out and that's your penalty, but you're out
23 completely.

24 MR. LIPSCHULTZ: And, Mr. Chair,
25 Commissioner, we understood that -- I certainly

1 understood the direction you were headed in, which
2 was why I characterized my point as a caveat, and --
3 but understood that if this commission sees fit to
4 put this matter to rest, put it behind you, that's
5 certainly something McLeod would support and would
6 like to see happen. I can tell you that for sure.

7 CHAIR KOPPENDRAYER: And then there's no
8 but we want. Okay? You understand that?

9 MR. LIPSCHULTZ: Mr. Chair, I certainly
10 understand that. But just would put out for your
11 consideration before you make a final decision that,
12 in effect, to have a policy -- to make a policy
13 decision here that's equitable across the board that
14 holds to the principle that you ought to get what
15 you didn't get, if you do that, if you follow that
16 line and that policy, then McLeod would have access
17 to those access-related remedies and Eschelon would
18 not.

19 CHAIR KOPPENDRAYER: Well, but -- but,
20 Mr. Lipschultz, you make it really difficult for us
21 to find that equitable ground when we were looking
22 at settlements and then all of the sudden everybody
23 agrees that those really weren't settlements,
24 including McLeod, that -- So, you know, somebody
25 threw the ball up and everybody shot the other

1 direction, including McLeod. So how are we to
2 determine what's equitable?

3 COMMISSIONER REHA: I -- I would like to
4 add that usually a party that is seeking an
5 equitable result has to come forward with -- with
6 clean hands. I think that's the general rule in
7 equity. And, unfortunately -- I know that you did
8 cooperate with the department after the fact and
9 helped in the investigation and so forth; but I
10 think, unfortunately, McLeod hasn't come forward
11 seeking equitable relief with clean hands because
12 you were a participant in the illegal agreements.

13 So -- But it would not be my intent, just
14 to let you know, Mr. Lipschultz -- I want to put an
15 end to this -- that we would -- that I would want to
16 continue an investigation or have some kind of
17 contested case to determine what penalties would be
18 for both Eschelon and McLeod.

19 MR. LIPSCHULTZ: Mr. Chair, Commissioner
20 Reha, that's comforting to hear. And I can tell you
21 that McLeod's top priority is to put this matter to
22 rest. McLeod's a competitive carrier that needs to
23 be focused. It needs to be focused on running its
24 business, trying to compete in an increasingly
25 difficult market. So to the extent you put this to

1 rest, I've certainly put out there on the table for
2 you to consider McLeod's concern about an otherwise
3 discriminatory remedy; but, again, McLeod's top
4 concern and priority is to put this matter behind
5 it.

6 CHAIR KOPPENDRAYER: So you just want to
7 fall on the ball and not fumble it again. Okay.

8 MR. LIPSCHULTZ: I've just fallen on the
9 ball, and I'm ready to head off into the locker
10 room.

11 COMMISSIONER SCOTT: But, Mr. Chair,
12 before he goes --

13 CHAIR KOPPENDRAYER: That was yours. I'm
14 sorry.

15 COMMISSIONER SCOTT: -- you agree with
16 Mr. Topp that the offsets for the 13 and \$16 should
17 be incorporated into our order?

18 MR. LIPSCHULTZ: Mr. Chair, Commissioner
19 Scott, to the extent carriers were paid for portions
20 of the amount that these \$2, 13, \$16 payments were
21 intended, I think that that's a reasonable,
22 rational, and equitable approach to take. I don't
23 think this commission is looking at equitable
24 remedies as a way to pile on or add additional
25 punishment to Qwest. I think you're looking at it

1 as a way to give carriers what they otherwise would
2 have gotten.

3 COMMISSIONER SCOTT: Yeah.

4 MR. LIPSCHULTZ: And -- And just taking
5 at face value what Qwest said, to be honest I think
6 it's only fair that amounts received should be
7 deducted from --

8 COMMISSIONER SCOTT: Okay.

9 MR. LIPSCHULTZ: -- the remedies that
10 would be paid.

11 COMMISSIONER SCOTT: Okay.

12 CHAIR KOPPENDRAYER: Mr. Bradley.

13 MR. BRADLEY: I too support the direction
14 in which you are moving. I too represent that my
15 clients were not looking for a windfall as a result
16 of this. To the extent that Qwest has already paid
17 my clients terminating access revenues, those should
18 be offset against the \$2.

19 I would tell you that I know closely that
20 11 of my clients came up with 11 different ways to
21 try to solve this problem; and I think that the
22 correct solution is the \$2, offset by whatever they
23 were actually paid, rather than trying to figure out
24 whether they did it right or didn't do it right.

25 With regard to the 13 and 16, same idea.

1 I have one client, USLink, who's affected by that.
2 It is my understanding that they did not issue CABS
3 bills because of this problem. And, therefore, I
4 believe that they will be entitled to the full
5 amount.

6 I would suggest -- and I didn't come with
7 prepared language --

8 COMMISSIONER SCOTT: No. But on our
9 break -- on the break --

10 MR. BRADLEY: Yeah.

11 COMMISSIONER SCOTT: -- when these folks
12 are doing their thing, get language for us.

13 MR. BRADLEY: I will try. Here's the
14 concept. The concept is that Qwest has the burden
15 of proof. That's clear under the FCC rules that
16 we're entitled to adopt. And if there's an
17 offsetting reason why we shouldn't, Qwest should
18 have the burden. I would suggest that Qwest should
19 be directed to meet with the affected CLECs and
20 resolve this matter within 30 days and do a
21 compliance filing. That's my suggestion on that
22 point.

23 With regard to the access issue, I have
24 struggled for a month trying to figure out if there
25 was some way -- because I knew that that was

1 probably the straw that was keeping this thing from
2 getting resolved, and I have not got a solution to
3 the access issue. However, if there is a solution,
4 it may be to limit it to intrastate access. I do
5 believe -- and the reason I've not been able to
6 solve this, originally I was going to try to say,
7 well, maybe only CLECs would get it. But this was a
8 discrimination in access. It is a state tariffed
9 service. It should have been applied equally to
10 everybody, IXCs and CLECs alike, because it's an
11 access service. But you may want to limit it to
12 your intrastate access services.

13 And those are my only comments.

14 COMMISSIONER JOHNSON: Thank you.

15 CHAIR KOPPENDRAYER: Thank you.

16 Mr. Ahlers, are you going to help
17 Mr. Lipschultz into the locker room?

18 MR. CRAIN: Here's the football.

19 MR. AHLERS: Well, I'm not in favor of
20 locker -- sports analogies right now because my team
21 lost last night. But the matters before the
22 commission in the motion I would say that Eschelon
23 has no -- no opposition to any of those positions.

24 CHAIR KOPPENDRAYER: Thank you.

25 Mr. Witt.

1 out of this one, whether -- whether they want to --

2 COMMISSIONER REHA: Fine. You're right.

3 CHAIR KOPPENDRAYER: All in favor of the
4 motion signify by saying aye.

5 ALL COMMISSIONERS: Aye.

6 CHAIR KOPPENDRAYER: Opposed same sign.
7 Motion carries 4/0.

8 COMMISSIONER JOHNSON: I was hoping it
9 wouldn't turn out that way, that we would have had
10 that all settled and let the company move on in a
11 new -- whole new wave. But here we go.

12 CHAIR KOPPENDRAYER: Mr. Oberlander, I
13 believe that brings us to item number 2.

14 MR. OBERLANDER: Commissioners, just a
15 point of clarification. I'm not sure in my own mind
16 if the commission intentionally -- or has completed
17 its discussion regarding the roles played by the
18 CLECs and is ready to move on to item number 2.

19 COMMISSIONER REHA: Are you referring to
20 the Eschelon/McLeod --

21 MR. OBERLANDER: Yes.

22 COMMISSIONER REHA: -- item?

23 Well, Mr. Chair, if a motion's in order
24 at this point, I would move that we -- and I don't
25 know how to say this -- that we -- I think the

1 department has an open docket potentially to
2 investigate McLeod and Eschelon with respect to
3 their participation in the unfiled agreements. And
4 I would -- I would move that any investigation be
5 closed.

6 CHAIR KOPPENDRAYER: You're --
7 Commissioner Reha, you're moving that that docket
8 that the department open we close?

9 COMMISSIONER REHA: Right. I think --
10 Didn't we -- Give me some -- What --

11 MR. OBERLANDER: Commissioners, staff has
12 provided brief information about this as issue E in
13 the briefing papers. If you look on page 29, staff
14 did have some proposed options for the commission.

15 COMMISSIONER REHA: Okay.

16 CHAIR KOPPENDRAYER: My understanding
17 though is that the department hasn't pursued that
18 investigation. They have a docket, but they're
19 not -- they haven't done nothing with it.

20 Mr. Doyle.

21 MR. DOYLE: Mr. Chair, the department was
22 essentially waiting for the outcome of this. And at
23 this time the docket is still open. It is a
24 department investigation, and I think the department
25 would be the one to close it. But if that's the

1 direction that the commission wishes to go, we
2 certainly will do that.

3 COMMISSIONER REHA: I think in the
4 briefing papers at issue E it does say, Should the
5 commission open an investigation at the role played
6 by CLECs in the unfiled agreements matter. And I
7 would move --

8 CHAIR KOPPENDRAYER: Say no.

9 COMMISSIONER REHA: -- E-3, no, do not
10 pursue an investigation in --

11 CHAIR KOPPENDRAYER: E.

12 COMMISSIONER REHA: -- this matter.

13 CHAIR KOPPENDRAYER: Okay. Then we're
14 simply -- That's simply advice to the department?

15 COMMISSIONER SCOTT: Right.

16 COMMISSIONER REHA: Correct.

17 COMMISSIONER SCOTT: And I also think we
18 should be careful not to have in this order any
19 language about the commission having done something
20 to penalize McLeod or Eschelon.

21 COMMISSIONER REHA: I agree.

22 COMMISSIONER SCOTT: This was not a
23 penalize McLeod or Eschelon docket.

24 COMMISSIONER REHA: I agree.

25 COMMISSIONER SCOTT: But I'm fine

1 supporting the motion.

2 CHAIR KOPPENDRAYER: Any other
3 discussion?

4 All in favor signify by saying aye.

5 ALL COMMISSIONERS: Aye.

6 CHAIR KOPPENDRAYER: Motion carries 4/0.
7 (Proceedings concluded at 1:50 p.m.)

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