The Honorable Ann E. Rendahl
[Service Date: December 12, 2003]

BEFORE THE
WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION, Complainant, v. ADVANCED TELCOM, INC., d/b/a ADVANCED TELCOM GROUP; AT&T COMMUNICATIONS OF THE PACIFIC NORTHWEST and TCG SEATTLE; COVAD COMMUNICATIONS COMPANY; ELECTRIC LIGHTWAVE, LLC.; ESCHELON TELECOM OF WASHINGTON, INC.; FAIRPOINT CARRIER SERVICES, INC. f/k/a FAIRPOINT COMMUNICATIONS SOLUTIONS CORP.; GLOBAL CROSSING LOCAL SERVICES, INC.; INTEGRA TELECOM OF WASHINGTON, INC.; McLEODUSA, TELECOMMUNICATIONS SERVICES, INC.; SBC TELECOM, INC.; QWEST CORPORATION; WORLDCOM, INC.; and XO WASHINGTON, INC., f/k/a NEXTLINK COMMUNICATIONS, INC., Respondents.	Docket No. UT-033011 **TIME WARNER TELECOM'S RESPONSE TO QWEST'S MOTION TO DISMISS AND FOR SUMMARY DETERMINATION**

I. INTRODUCTION

1. Intervenor, Time Warner Telecom of Washington LLC ("Time Warner Telecom"), by and through its attorneys of record, Ater Wynne LLP, hereby submits its Response to Qwest's

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Motion to Dismiss and for Summary Determination. Time Warner Telecom's concern is with product and service discounts that Qwest secretly negotiated with two favored CLECs, Eschelon and McLeod.

2. In its Motion Qwest argues that the causes of action alleged in the Commission's Complaint should be dismissed as to the Eschelon and McLeod agreements, because those agreements either contained only backward-looking consideration, do not themselves create binding obligations related to providing local services, do not have effect in Washington, or were available for opt-in on Qwest's website. But Qwest's Motion does not tell the full story about these agreements, their relationship to one another, and their relationship to other secret oral agreements.

3. Significantly, in a recent order recommending rejection of a proposed settlement of the unfilled agreements case in Arizona[1] (copy attached as Attachment A), Arizona Corporation Commission Administrative Law Judge Jane Rodda described the Eschelon and McLeod agreements and their derivation in some depth. The real story of those agreements is best told in ALJ Rodda's words; therefore, Time Warner Telecom quotes the relevant description at length:

> In its investigation, Staff identified 42 agreements that it believed Qwest should have filed with the Commission for approval pursuant to Section 252(e). Qwest agreed that 14 of them contained terms that pertain to Section 251(b) or (c) services and were still in effect. Qwest filed these agreements in September 2002 and the Commission approved them in Decision No. 65475 (December 19, 2002)[2]. Staff

[1] Opinion and Order, In the Matters of Qwest Corporation's Compliance with §271, Qwest Corporation's Compliance with Section 252(e), and Order to Show Cause. ACC Docket Nos, T-00000A-97-0238, RT-00000F-02-0271, T-01051B-02-0871 (Issued December 1, 2003)("Arizona Order").

[2] In approving the agreements, the Commission did not approve specific provisions that would have: prevented participation in other dockets; required confidentiality; required confidential private binding arbitration in lieu of bringing an action before this Commission; or required interpretation under Colorado law.

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and Qwest disagreed about whether the remaining 28 agreements were required to be filed under Section 252(e). Qwest disputed that these agreements fell under the Section 252 requirement for a variety of reasons, including that some had been terminated or superceded, some contained only backward-looking provisions, others were form agreements, or they didn't involve Section 251(b) or (c) services. A list of the 28 interconnection agreements that Staff claims Qwest should have filed is attached as Exhibit B hereto.

Among the 28 agreements Staff believed Qwest should have filed were a series of agreements with Eschelon and McLeod. At the hearing, Staff and RUCO presented evidence that the agreements with Eschelon and McLeod were drafted specifically in an attempt to avoid the filing requirements of Section 252 in order to avoid having other CLECs opt into favorable provisions. In 2000, Eschelon and McLeod were two of Qwest's largest resellers. Both wanted to move away from reselling Centrex products and wanted to provide service over an unbundled network element platform ("UNE-P"). Under UNE-P, they believed they would earn higher margins and be able to collect their own access fees.

In the summer of 2000, McLeod and Qwest began negotiations that resulted in a Confidential Billing Settlement Agreement entered into on September 29, 2000, in which McLeod agreed to pay Qwest an amount for the conversion from resale to UNE-P. Qwest and McLeod finalized their agreement on October 26, 2000, when they executed a series of six agreements. The key component of these agreements was the creation of a product called UNE-Star (or UNE-M when purchased by McLeod). The UNE-M product is a flat-rated UNE platform that converted McLeod resold lines directly to UNE-P. With UNE-M, McLeod would avoid the provisioning issues associated with UNE-P, such as submitting individual Local Service Requests ("LSRs") for each line.

One of the agreements entered into on October 26, 2000 is the Fourth Amendment to the Qwest/McLeod Interconnection Agreement in Arizona, which McLeod filed with the Commission on December 26, 2000. This document sets out the publicly disclosed terms and conditions of the UNE-M product. In this agreement, McLeod agreed to pay Qwest $43.5 million to convert to the UNE-M platform. McLeod agreed *inter alia* to maintain a minimum number of local exchange lines, to remain on "bill and keep" for the exchange of Internet-related traffic, and to provide rolling 12-month forecasted line volumes. Qwest agreed *inter alia* to provide daily usage information to McLeod so that McLeod could bill interexchange companies and others for switched access.

In addition to the publicly disclosed Fourth Amendment to the Interconnection Agreement, on October 26, 2000, Qwest and McLeod also entered into several agreements that were not filed or otherwise made public. One was the Purchase Agreement in which McLeod agreed to purchase from Qwest Communications Corporation ("QCC", Qwest's affiliate), its subsidiaries or affiliates, a certain

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amount of services and products over a multi-year period. No. 15 on Exhibit B. At the same time, they entered into a Purchase Agreement in which QCC and its subsidiaries agreed to purchase products from McLeod over the same multi-year period. No. 16 on Exhibit B. McLeod and Qwest also entered into an Amendment to Confidential Billing Settlement Agreement which revised the Confidential Billing Settlement Agreement entered into on September 29, 2000. No. 13 on Exhibit B. This Amendment revised the earlier agreement to conform with the ultimately agreed upon payment amount from McLeod for the conversion and agrees with the amount set forth in the Fourth Amendment to the Interconnection Agreement that was filed.

In addition to these written agreements, McLeod claims that it and Qwest entered into two oral agreements, one of which provided a 10 percent discount on McLeod's purchases from Qwest and the other precluded McLeod from participating in Qwest's Section 271 application. (No. 14 on Exhibit B. (RUCO's Section 252 Initial Brief p. 30) Blake Fisher, McLeod's vice president and chief planning and development officer, who was involved in the negotiations, testified in his deposition that in developing the UNE-Star product, McLeod was not satisfied that the pricing was sufficiently low to justify McLeod keeping its traffic on Qwest's network. Thus, Qwest and McLeod agreed to enter into the Purchase Agreements whereby McLeod would purchase goods and services from Qwest and Qwest agreed to provide McLeod with discounts ranging from 6.5 percent to 10 percent if McLeod's purchases exceeded its take-or-pay commitments. (RUCO's Section 252 Initial Brief at p. 128) Mr. Fisher stated that Qwest did not want to put the discount agreement into writing because Qwest was concerned that other CLECs might feel entitled to the same discount. In response to Mr. Fisher's concerns that the discount provision was not in writing, Qwest agreed to a take-or-pay agreement to purchase products from McLeod. According to Mr. Fisher, the amount of the Qwest take-or-pay commitment was calculated by applying the discount factor to a projected amount ofpurchases by McLeod from Qwest.

Qwest made payments to McLeod pursuant to the Purchase Agreements from October 2000 through September 2001. Qwest prepared spreadsheets that calculated the amount of the payment by applying the 10 percent discount factor to all purchases made by McLeod during the relevant time period. (RUCO's Section 252 Initial Brief at p. 31) After McLeod would confirm the accuracy of the spreadsheets, McLeod would send Qwest an invoice. Qwest paid invoices for the period October 2000 through March 2001, April 2001 through June 2001, and July 2001 through September 2001. Qwest did not make payments on the amount that would have been due for the fourth quarter of 2001 because this is when the Department of Commerce in Minnesota began investigating the discount agreement. Various Qwest emails and notes relating to the negotiations with McLeod and with the calculation of the discount due are consistent with Mr. Fisher's account of

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events. Although no written agreement refers to a 10 percent discount in McLeod's purchases, Qwest acted consistently with the existence of such discount.

On November 15, 2000, Qwest and Eschelon entered into an Escalation Procedures and Business Solutions Letter, in which the parties agreed: to develop an implementation plan; that Eschelon agreed to not oppose Qwest efforts to obtain Section 271 approval or file any complaints with any regulatory body concerning interconnection agreements provided the plan was in place by April 30, 200l; that Qwest would send a vice president level or above executive to attend quarterly meetings with Eschelon to address, discuss and attempt to resolve business issues and disputes and issues related to the parties' interconnection agreements; that Qwest would adopt a six-level set of escalation procedures that gave Eschelon access to Qwest's senior management; and that Qwest would waive limitations on damages. (No.5 on Exhibit B; Kalleberg Section 252 testimony at p.30)

Also, on November 5, 2000, Qwest and Escehlon entered into the Confidential Amendment to Confidential/Trade Secret Stipulation in which Eschelon agreed to purchase at least $15 million of telecommunication services between October l, 2000 and September 30, 2001 and Qwest agreed to pay Eschelon $10 million to resolve issues related to the UNE platform and switched access. (No. 4 on Exhibit B; Kalleberg Section 252 testimony at p. 29) In addition, Eschelon agreed to provide consulting and network-related services and Qwest agreed to pay Eschelon 10 percent of the aggregate billed charges for all of Eschelon's purchases from Qwest From November 15, 2000 through December 31, 2005. Qwest also agreed to credit Eschelon $13.00 per UNE-platform line per month for each month during which Qwest failed to provide Eschelon with accurate daily usage information.

Qwest disputed that the purchase agreements it entered into with McLeod and Eschelon are subject to the filing requirements of the 1996 Act because an ILEC's contract to purchase services from CLEC vendors do not affect the terms of the CLEC's interconnection. Thus, Qwest argued the Purchase Agreement between QCC and McLeod entered into on October 26, 2000 in which QCC commits to purchase a minimum amount of services from McLeod, and agreements by the CLECs to purchase products and services from Qwest or QCC do not include any commitment by Qwest that is subject to the Section 251/252 regulatory framework. Furthermore, Qwest argued, even if the CLECs' purchase agreements were entered into as a means of conferring discounts to Eschelon and McLeod, only the discount provisions of the agreements would fall within the filing requirement of Section 252.

With respect to the agreements related to the UNE-Star product, Qwest claims that the rates terms and conditions of the UNE-Star were negotiated and filed as amendments to Eschelon's and McLeod's existing interconnection agreements and were subsequently approved by the Arizona Commission. Qwest says these

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> amendments reflect the significant development and implementation costs associated with the UNE-Star products and as a result, of those costs, Qwest required CLECs wishing to purchase the UNE-Star products to make total and annual minimum purchase commitments over a multi-year minimum term. Other requirements included imposing a significant penalty if the CLEC did not meet these minimum commitments; "bill and keep" for reciprocal compensation, including internet traffic; and a one-time, lump sum conversion charge, restricting the offering to business customers and providing end user volume and loop distribution forecasts. Qwest states as approved interconnection amendments, all of the UNE-Star rates, terms and conditions were available to any requesting CLEC in Arizona under Section 252(i). Qwest concedes that certain provisions in un-filed agreements that related to the UNE-Star platform fall within the FCC's recently articulated definition of interconnection agreement, but since no other CLEC purchased a variation of UNE-Star, no other CLEC would have been eligible to opt into the un-filed provision even if they had been filed and approved.

Arizona Order at 4-8.

4. ALJ Rodda did not buy Qwest's arguments that the Eschelon and McLeod agreements did not have to be filed pursuant to Section 252(e). Instead, she found that those agreements, among others, did contain provisions related to on-going obligations concerning resale, UNEs, reciprocal compensation, interconnection and wholesale services in general under Section 251(b) and (c) of the 1996 Telecommunications Act and should have been filed pursuant to Section 252(e). Arizona Order, Finding of Fact 34.

ALJ Rodda also found that:

> 36. As described herein, Qwest granted Eschelon and McLeod significant concessions to induce them to remain on Qwest's system, including: (1) a 10 percent discount[14] on all the carriers' purchases of Qwest services including, not limited to, Section 251(b) and (c) services, for 5 years in Eschelon's case and 3 years in McLeod's case; (2) the creation of the UNE-E and UNE-M product through which Eschelon and McLeod were able to avoid provisioning

[14] The McLeod agreement provided for a discount of up to 10 percent.

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> issues associated with UNE-P; and 3) more favorable escalation procedures, providing for a six-tier escalation process up to and including Qwest's CEO, than available to other carriers.
>
> 37. Qwest purposely structured the agreements with Eschelon and McLeod to avoid its filing obligations under Section 252(e).
>
> 38. By intentionally failing to file its agreements with Eschelon and McLeod that gave those two CLECs discounts on all of their purchases, including services specified under Section 251(b) and (c), and which granted escalation procedures and favorable provisioning procedures not given to other carriers, Qwest willfully and intentionally violated the requirements of Section 252 of the 1996 Act, . . .

Arizona Order at 50-51.

5. For the reasons discussed by Arizona ALJ Rodda, this Commission should find that Qwest was required to file the Eschelon and McLeod agreements giving those carriers a 10 percent discount on all purchases of Qwest's services, including interstate and intrastate switched and special access, Section 251(b) and (c) services, and private line services. The evidence developed in the Arizona proceeding demonstrates clearly that Qwest purposely structured the agreements with Eschelon and McLeod as a sham to avoid its filing obligations under Section 252(e). By doing so, Qwest violated Section 252 of the 1996 Telecommunications Act and harmed other carriers. Competing CLECs, such as Time Warner Telecom, who did not have the advantage of these discounts, were not in a position to match the prices offered by Eschelon and McLeod and thus lost or never acquired many customers. The Commission should correct this harm by fashioning a remedy that makes similar discounts on all services purchased from Qwest available to other carriers.

II. CONCLUSION

6. For the reasons discussed above, Time Warner Telecom requests the Commission deny Qwest's Motion to Dismiss and for Summary Determination with respect to the Eschelon and

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McLeod agreements giving those carriers a 10 percent discount on all purchases of Qwest's services, including interstate and intrastate switched and special access, Section 251(b) and (c) services, and private line services.

RESPECTFULLY SUBMITTED this 12th day of December, 2003.

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 12th day of December, 2003, at Seattle, Washington.

Ren Liu

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