BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

ESCHELON TELECOM OF WASHINGTON Petitioner/Complainant, v. QWEST CORPORATION, Respondent. ……	)	DOCKET NO. UT-033039 **BRIEF IN SUPPORT OF ESCHELON'S MOTION FOR SUMMARY DETERMINATION**

INTRODUCTION

On September 12, 2003, Eschelon Telecom of Washington, Inc. (Eschelon) filed this Complaint because Qwest Corporation (Qwest) refused to allow Eschelon to opt-in to the rates that Qwest charges McLeodUSA, one of Eschelon's competitors for a service known as UNE-Star. Qwest's refusal to allow Eschelon to obtain the same rates as McLeod is a violation of state and federal law and a breach of the parties' Interconnection Agreement (ICA).

Eschelon is entitled to the same rate as McLeod pursuant to Section 252(i), of the Telecommunications Act of 1996 (the Act), often known as the "opt-in" or "pick and choose" provision of the Act, and RCW 80.36.170, 180 and 186, which require that Qwest make UNE-Star available at nondiscriminatory rates and pursuant to its Interconnection Agreement (Agreement). As a matter of law, Eschelon is entitled to opt in to the McLeod rate for UNE-Star for the same period as McLeod.

I. BACKGROUND

The present proceeding was initiated when Eschelon filed its Complaint with this Commission on September 12, 2003. On September 26, 2003, Qwest Corporation (Qwest) filed its Answer to Eschelon's Complaint. On October 14, 2003, the Administrative Law Judge issued a Prehearing Order noting that the parties had agreed to submit the matter on dispositive motions. Subsequently, the Administrative Law Judge issued orders extending the dates on for motions and briefs to November 21, 2003. Eschelon incorporates by reference its Complaint and Exhibits.

On April 23, 2003, Eschelon Telecom of Minnesota, Inc. filed a complaint with the Minnesota Public Utilities Commission seeking the McLeod rate for UNE-Star in that state. The Minnesota proceeding involved the same request and issues as this matter. The Administrative Law Judge in the Minnesota proceeding, on the basis of summary judgment briefs filed by the parties, ruled that Eschelon was entitled to the same rate for UNE-Star as McLeod for the same duration that the rate was available to McLeod.[1]

While this matter has been pending the parties agreed to an amendment that resolves a portion of the dispute. (Exhibit 10, attached).[2] The amendment provides for an agreed upon rate equivalent to the McLeod rate, plus a $.35 per month increment, for the period of October 1, 2003 to December 31, 2003. Thereafter, the rate reverts to the original rate for the remaining two years of the Eschelon agreement.[3]

[1] In a meeting on November 13, 2003, the Minnesota Commission voted to grant Eschelon's request and order Qwest to provide the McLeod rate to Eschelon. A written order is pending.
[2] All Exhibits are attached hereto.
[3] The agreement provides that it shall not be deemed an admission by either party concerning the remaining issues in this Complaint.

II. JURISDICTION.

Both Federal and State law as well as the ICA confer jurisdiction on the Commission to grant the relief requested by Eschelon in this matter. The basis of Eschelon's Complaint is the "pick and choose" provision of the Act, 47 USC§ 252(i), and the applicable rules promulgated by the FCC. The FCC has made it clear that it is the state commissions that should examine the issue "in the first instance". See, *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499 (1996) (First Report and Order), ¶1321.

In addition, the Commission has issued a Policy Statement on "Pick and Choose" in which it concluded that it has jurisdiction over requests under Section 252(i) and suggested procedures for an expedited process to handle such claims. Policy Statement - "Pick and Choose", Docket UT-990355, November 30, 1999.

RCW 80.36.170, 180 and 186 and 47 USC § 252(e) also provide jurisdiction for this Commission to determine whether rates are discriminatory. RCW 80.04.220 provides that the Commission with authority to award reparations.

Finally, the parties have agreed to Commission jurisdiction in the ICA as Part A, Section 27.2 provides that disputes about interconnection may be brought to this Commission for resolution.

II. STATEMENT OF FACTS.

A review of Eschelon's Complaint and Qwest's Answer indicate that there are no material facts in dispute. Rather the dispute is about the law and the interpretation of amendments and other documents.

The most relevant facts are as follows:

1. Eschelon and Qwest entered into an Interconnection Agreement (Agreement or Interconnection Agreement) that was approved by the Commission on February 24, 2000 in Docket No. UT-990385.

2. On October 1, 2000, Qwest and McLeodUSA entered into an Amendment to their Interconnection Agreement. Exhibit 3 to Complaint. That Amendment provided for UNE-M or UNE-Star at the recurring rates listed in Attachment 3.2 to that Amendment. The Platform recurring rate for Washington was $24.00 per month. The termination date of the amendment was December 31, 2003. The Amendment was filed with and approved by the Commission.

3. On November 15, 2000, Qwest and Eschelon entered into a UNE-Star Amendment to their Interconnection Agreement. (Exhibit 4 to Complaint). This Amendment provided for the purchase of UNE-Star at the rates provided in Attachment 3.2 of that Amendment. The Platform Recurring rate for Washington was $24.00 per month, the same as in the McLeod amendment. The termination date of the Eschelon amendment was December 31, 2005. The Amendment was filed with and approved by the Commission.

4. The McLeod and Eschelon Amendments were virtually identical except for the volume commitments and the termination dates.

5. On or about September of 2002, McLeodUSA and Qwest entered into an Amendment of their Interconnection Agreement. This document amended the pricing of UNE-Star for McLeodUSA. (Exhibit 6 to Complaint). The Amendment reduced the UNE-Star rates in Washington from $24.00 per month to $21.16 per month for McLeod. The remainder of

the agreement, including the termination date of December 31, 2003, and volume commitments, remained unchanged.

6. On October 29, 2003, Eschelon notified Qwest ,in writing, that it wished to opt-in to the UNE-Star rates recently made available to McLeod. (See, Exhibit 7 to Complaint). In that letter Eschelon stated its request as follows: "Eschelon requests to opt-in to page 2 of the amendment to Attachment 3.2 of the Qwest-McLeod Interconnection Agreement, consisting of Platform recurring rates that are effective from September 20, 2002, until December 31, 2003." Eschelon enclosed the referenced page of the McLeod agreement with it request.

7. Thereafter, Qwest repeatedly refused to grant Eschelon's request. (See letters from Qwest, Complaint Exhibit 8).

8. In refusing Eschelon's opt-in request Qwest has insisted that Eschelon must agree to the other terms and conditions of the Qwest/McLeodUSA Amendment, including the volume requirements and the termination date in order to pick and choose the McLeod rate. See, Corbetta Letter and Rosenthal letter, Exhibit 8 to Complaint.

9. On September 12, 2003, Eschelon filed the Complaint in this action.

10. On September 29, 2003, the Qwest and Eschelon agreed to an amendment to the ICA, in which the parties agreed to a rate for the period of October 1, 2003 to December 31, 2003, as well as for the remaining two years of the Eschelon agreement. Therefore, the remaining issue is whether Eschelon is entitled to the McLeod rate for some or all of the previous twelve months that it was available to McLeod.

III. SUMMARY DETERMINATION IS APPROPRIATE WHERE THERE IS NO GENUINE ISSUE AS TO ANY MATERIAL FACT

This Motion is brought pursuant to WAC 480-09-426(2). Summary judgment must be granted when there is a clear showing of the absence of any genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. CR 56(c). A question of fact may be determined as a matter of law when reasonable minds could reach but one conclusion. Vallandigham v. Clover Park School Dist. No. 400,--- P.3d ----, 2003 WL 22663803, Wash.App. Div. 2, Nov 12, 2003. In determining whether summary judgment is appropriate, the pleadings, answers to interrogatories, and admissions on file should be considered. *Atherton Condo. Apartment-Owners Ass'n Bd. of Directors v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990)

IV. ARGUMENT

A. Eschelon Has a Right to the Same Rates as McLeod for UNE-Star.

On October 29, 2002, pursuant to Section 252(i) of the Act, Eschelon requested to opt into the McLeod UNE Star rate for the same time period it was available to McLeod. Specifically, Eschelon's request stated: "Eschelon requests to opt-in to page 2 of the amendment to Attachment 3.2 of the Qwest-McLeod Interconnection Agreement, consisting of Platform recurring rates that are effective from September 20, 2002, until December 31, 2003." As a matter of law, Eschelon is entitled to "pick and choose" the McLeod rate and to receive that rate for the same period of time as McLeod.

There are three interrelated legal bases by which Eschelon is entitled to the relief requested. First, the Act allows Eschelon to "pick and choose" provisions of other agreements, second the Act and state law prohibit discriminatory rates and third, the Interconnection Agreement between Eschelon and Qwest contains a "most favored nation" clause that entitles

Eschelon to the rates provided to McLeod. In effect, the Act provides that Qwest can not charge higher rates to Eschelon than it charges to McLeod, for the same service. Third, the parties' ICA provides that Qwest must provide network elements to Eschelon on rates, terms and conditions that are non-discriminatory and no less favorable than those provided to itself or any other party. ICA, Attachment 3, Sections 2.1 and 2.9.1. (Exhibit 2). These three rationales are variations on one theme—Eschelon is entitled to receive nondiscriminatory rates from Qwest and are encompassed in the right to "pick and choose" from another CLECs interconnection agreement.

B. The Pick and Choose Provisions of the Act, Which Are Designed to Prevent Discriminatory Rates, Require Qwest to Permit Eschelon to Opt Into the Same Rates as McLeod.

Section 251 of the Act requires that interconnection and unbundled element rates provided by an ILEC be nondiscriminatory. The Act provides methods for competitive local exchange carriers (CLECs) like Eschelon to take advantage of their right to nondiscriminatory rates. The primary method is to allow CLECs to "pick and choose" provisions from the interconnection agreements of other CLECs as provided in Section 252(i) of the Act. The FCC made it clear that the Act's nondiscrimination provisions apply to an incumbent local exchange carrier's (ILEC's) attempts to restrict availability of provisions under section 252(i). First Report and Order, ¶ 1315.

Section 252(i) of the Act states:

> a local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under [section 252] to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement. 47 USC 252(i).

The FCC promulgated a rule to implement 252 (i) which is codified at 47 CFR § 51.809 (1997) (the rule is reproduced at Exhibit 9). The FCC's 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.

In its Order implementing its rule, the FCC has stated that section 252(i) is "a primary tool of the 1996 Act for preventing discrimination under section 251. First Report & Order, ¶1296.

Eschelon's Interconnection Agreement contains a "most favored nation" clause that provides that Qwest must provide network elements to Eschelon on rates, terms and conditions no less favorable than those provided to itself or any other party. See, Part A, Part III, Sec. 37, pp. 28-29 of the Eschelon Interconnection Agreement, attached as Exhibit 2.

The FCC pointed out that a "most favored nation" clause, like that included in Eschelon's interconnection agreement, is another method to ensure nondiscriminatory rates, and concluded that Section 252(i) itself acts as a most favored nation clause. The FCC stated at Paragraph 1316 of its First Report &Order:

> We further conclude that section 252(i) entitles all parties with interconnection agreements to "most favored nation" status regardless of whether they include "most favored nation" clauses in their agreements. Congress's command under section 252 (i) was that parties may utilize any individual interconnection, service, or element in publicly filed interconnection agreements and incorporate it into the terms of their interconnection agreement. <u>This means that any requesting carrier may avail itself of more advantageous terms and conditions subsequently negotiated by any other carrier for the same individual interconnection, service, or element once the subsequent agreement is filed with, and approved by, the state commission.</u> We believe the approach we adopt will maximize competition by ensuring that carriers' obtain access to terms and elements on a nondiscriminatory basis. (emphasis added).

C. Eschelon Can Not Be Required To Adopt Terms That Qwest Cannot Prove are Legitimately Related To The Term Requested.

There can be no dispute that the law allows Eschelon to pick and choose portions of the McLeod agreement. However, Qwest refused to honor Eschelon's request. Qwest insisted that it need not allow Eschelon to pick and choose the McLeod rates unless Eschelon agreed to the

same termination date and volume requirements as McLeod. (See, Exhibit 8) The November 8, 2002 letter to Eschelon from Qwest state that to obtain McLeod's UNE-Star rate Eschelon must agree to the same terms and conditions as McLeod, including the volume commitments and the termination date. Eschelon is only required to take other terms of the McLeod agreement if those terms are legitimately related to the rate.

The FCC's "pick and choose" rule provides that Qwest can only overcome the obligation to allow Eschelon to pick and choose "where the incumbent proves to the state commission" that either the costs of providing the service to the requesting carrier, (Eschelon), are greater than the costs of providing it to the original carrier (McLeod) or it is not technically feasible to provide the service to the requesting carrier. 47 CFR § 51.809(b). In other words the burden is on Qwest to prove that "pick and choose" is not appropriate here because of cost or technical feasibility. Neither of these exceptions apply in this case. Qwest has not alleged, and there is no basis to do so, that the costs of providing UNE-Star differ between Eschelon and McLeod. The second exception, technical infeasibility, is obviously not applicable since Qwest is already providing UNE-Star to Eschelon.

As the Supreme Court stated in upholding the FCC "pick and choose" rule, "[T]he Commission has said that an incumbent LEC can require a requesting carrier to accept all terms that it can prove are "legitimately related" to the desired term… Section 252(i) certainly demands no more than that." *AT&T, et al v. Iowa Utilities Board, et al*, 525 U.S. 366, 396,119 S. Ct.721 (1999). (emphasis added).

Likewise, the Fifth Circuit responded to an argument by Southwestern Bell that a CLEC could only opt into the provisions of an existing agreement if the CLEC seeks no additions or changes to that agreement, by ruling that an ILEC can only require it to "accept all terms that [the ILEC] can prove are 'legitimately related to the desired term." *Bell Telephone Co. v Waller*

Creek Communications, Inc. C.A. 5 (Tex.) 2000, 221 F.3d 812, 818 (emphasis added). Another court has noted that this result also is fully consistent with the plain terms of the statute itself and with the statute's purpose of promoting a level playing field as between different competitors. *AT&T Communications of Southern States, Inc. v GTE Florida, Inc*. 123 F. Supp. 2d 1318, 1327 N.D. Florida (2000).

Thus the presumption of the law is that a pick and choose request should be honored. The burden is on the ILEC to prove that other terms are legitimately related to the requested term and therefore must be taken along with the desired terms. Qwest can not do so.

1. The Reduction to McLeod's Rate Is Not Legitimately Related to the Termination Dates or Volume Requirements that Qwest Demands.

The lack of a legitimate relationship between the reduced McLeod rate and the volume requirements and termination date is evidenced by a comparison of the original UNE-Star Agreements. Eschelon and McLeod entered into UNE-Star agreements within 45 days of each other in 2000. The agreements, including the rates, were identical with the exception of the termination date and volume.

As Qwest knows, requiring Eschelon to agree to the volume requirement in the McLeod agreement would make it impossible for Eschelon to qualify for the McLeod rate, as McLeod's volumes are five times that of Eschelon. This difference did not dictate a different rate in the initial UNE-Star agreements and there is no evidence that the UNE-Star cost varies by volume. This demand was not appropriate because this term is not legitimately related to the rate reduction given to McLeod.[4]

[4] Qwest no longer seems to be relying on this difference as a reason for its denial. When asked for differences between the two agreements, Qwest listed four items and volume was not among them. *See* Exhibit 11 attached.

The termination date of the McLeod agreement was at that time, and remains, December 31, 2003. The termination date of the Eschelon Agreement was and remains December 31, 2005. McLeod's commitment to purchase at least 275,000 local exchange lines per year has remained constant as has Eschelon's commitment to purchase at least 50,000 access lines per year. Both agreements contain Attachment 3.2, which set out otherwise identical terms and conditions for the two companies.

In September of 2002, McLeod and Qwest entered into the amendment of their UNE-Star Agreement that reduced the price of UNE-Star without changing any other terms. The McLeod UNE-Star agreement termination date remained December 31, 2003, the volume commitments did not change, nothing other than the rate changed. This was purely and simply a rate reduction. Qwest has never explained why this unilateral rate reduction was given to McLeod or how the reduction was related to terms that did not change when the rates changed.

In its Answer Qwest claims that the termination date was related to the lower price because—"an agreement to accept lower rates for 15 months is far different from an agreement to do so for 39 months". However, that comparison is not applicable and can not be a valid reason for rejection of Eschelon's request since Eschelon's request was to have the McLeod rate for exactly the same time as McLeod--from September 20, 2002 to December 31, 2003. Thus, Qwest would be getting the same rate from Eschelon for exactly the same period that it agreed to accept it from McLeod after which the rate would revert back to the higher rate.[5] Therefore, Qwest's argument about the relationship of the lower rates to the term is simply not applicable.

[5] The McLeod agreement does not actually terminate on December 31, 2003, instead it allows for continuing purchases past that date "during a reasonable conversion period" at the previous, higher, UNE-Star rate.

2. Amendments to the Eschelon Agreements Are Not Legitimately Related to Eschelon's Request.

Not only does Qwest assert that Eschelon must adopt the termination date and the volume requirement in the McLeod agreement in order to opt into the McLeod rate, Qwest argues that Eschelon must also amend its agreement to eliminate any differences between the two agreements. While that may be Qwest's desire, it is not what the Act requires.

Qwest has identified four differences between the two agreements. (Qwest Response to Esch. 01-003, Exhibit B, attached). The one difference that appears in the McLeod agreement--the termination date-- has already been discussed. The other three differences identified by Qwest are amendments to the Eschelon agreement that do not appear in the McLeod agreement. These amendments are simply not relevant to Eschelon's opt-in request. Eschelon sought to pick and choose the McLeod rates for UNE-Star and import them into the Eschelon agreement, not the other way around. Therefore the relevant question on the issue of "legitimately related terms" is not what additional terms Eschelon has in its agreement, but rather what terms McLeod has in its agreement that are related to the rate. As the FCC has stated, an incumbent LEC, like Qwest,, can require a requesting carrier, like Eschelon, to accept all terms <u>from the requested agreement</u> that are legitimately related to the desired term. First Report & Order, ¶ 1315. (emphasis added).

Qwest's assertions that it offered to negotiate with Eschelon are irrelevant. It is not a prerequisite to bringing a Complaint under Section 252(i) that Eschelon must attempt to negotiate a different agreement with different terms than the one it requested to opt into. As the FCC has stated: "We conclude that the nondiscriminatory, pro-competition purpose of section 252(i) would be defeated were requesting carriers required to undergo a lengthy negotiation and approval process pursuant to section 251 before being able to utilize the terms of a previously approved agreement." First Report and Order, Docket 96-98, 11 FCC Rcd 15499 (1996),¶ 1321.

"Negotiation is not required to implement a section 252(i) opt-in arrangement; indeed neither party may alter the terms of the underlying agreement." *In Re Global Naps, Inc*., CC Docket. No. 99-154, 14 FCC Rcd. 12530, (August 3, 1999), ¶ 4.

If Eschelon's request were granted and the McLeod rate is imported into the Eschelon agreement, these amendments would stay as they are. Eschelon would continue to pay the additional $.35 per month for access to AIN features and listings, it would continue to pay the applicable NRCs. In addition, Eschelon's termination date and volume requirements would remain unchanged, as would the rate after December 31, 2003. This is what the "pick and choose" provision of the Act is designed to do. As the FCC said about Section 252(i):

> This means that any requesting carrier may avail itself of more advantageous terms and conditions subsequently negotiated by any other carrier for the same individual interconnection, service, or element once the subsequent agreement is filed with, and approved by, the state commission. We believe the approach we adopt will maximize competition by ensuring that carriers' obtain access to terms and elements on a nondiscriminatory basis. (emphasis added).

Qwest has not and can not show that the addition terms it demanded from Eschelon as a condition of opt in are related to the price paid by McLeod. That being the case, Eschelon is entitled to opt in to the McLeod UNE-Star rate for the same time period as McLeod.

CONCLUSION

Eschelon and McLeod both purchase UNE-Star pursuant to their Interconnection Agreements. However, Qwest charges Eschelon a higher rate for UNE-Star than it charges McLeod. Whether one views this issue from the point of view of Eschelon's "most favored nation" rights under its Interconnection Agreement, the anti-discrimination provisions of the Act, or the "pick and choose" provisions of the Act, the result is the same – Eschelon is entitled to the same rate as McLeod, for the same time period as McLeod, for UNE-Star.

Wherefore, the Commission should find that Eschelon is entitled to that rate, plus $.35 per month, for the period of September 20, 2002 to December 31, 2003 and order Qwest to credit Eschelon for the difference between the two rates for that time period.

Respectfully submitted,

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