

**BEFORE THE WASHINGTON STATE  
UTILITIES AND TRANSPORTATION COMMISSION**

WASHINGTON UTILITIES AND	)	DOCKET NO. UT-033011
TRANSPORTATION COMMISSION,	)	
	)	ORDER NO. 12
Complainant,	)	
	)	ORDER GRANTING MOTIONS
v.	)	TO DISMISS ALLEGATIONS
	)	RELATING TO ESCHELON,
ADVANCED TELECOM GROUP,	)	MCLEODUSA, AND SBC
INC., et al.	)	AGREEMENTS; APPROVING
	)	AND ADOPTING ESCHELON
Respondents.	)	AND MCLEODUSA
	)	SETTLEMENT AGREEMENTS
	)	
	)	
	)	
.....	)	

**SYNOPSIS**

1 *In this Order, the Commission grants Staff's motions to dismiss allegations relating to an agreement between Qwest and SBC and certain agreements between Qwest and Eschelon, and Qwest and McLeodUSA. The Commission also approves separate settlement agreements between Commission Staff, Eschelon, and McLeodUSA as consistent with the law and the public interest.*

**BACKGROUND**

2 **Nature of the Proceeding.** This is a complaint proceeding brought by the Washington Utilities and Transportation Commission (Commission), through its Staff, against Qwest Corporation (Qwest) and 13 competitive local exchange carriers (CLECs) alleging that the companies entered into certain interconnection agreements and failed to file, or timely file, the agreements with the Commission

as required by state and federal law. The complaint also alleges that the companies entered into certain other agreements to resolve disputes, but that the carriers violated federal and state law by failing to make terms and conditions available to other requesting carriers, providing unreasonable preferences, and engaging in rate discrimination.

3 **Procedural History.** On February 12, 2004, the Commission entered Order No. 05 in this proceeding, an order resolving motions to dismiss and for summary determination filed by the parties.<sup>1</sup> In that Order, the Commission determined that both incumbent local exchange carriers (ILECs) and CLECs are required under Section 252 of the Telecommunications Act of 1996 (Act)<sup>2</sup> to file interconnection agreements with state commissions. *Order No. 05, ¶48.* On June 2, 2004, the Commission entered Order No. 07 in this proceeding, affirming the Commission's determination concerning the Section 252 filing requirements of ILECs and CLECs.

4 On August 13, 2004, Commission Staff filed with the Commission a settlement agreement and narrative, between Staff and Eschelon Telecom of Washington, Inc. (Eschelon), requesting an order approving the settlement agreement. Staff also filed a motion to dismiss allegations relating to agreements between Eschelon and Qwest. For purposes of this Order, the agreement and narrative between Staff and Eschelon will be referred to as the Eschelon Settlement and Eschelon Narrative.

5 The settlement provides that Eschelon will file responsive testimony and requests that the Commission not act on the settlement until August 30, 2004. In order to allow additional time for Eschelon to file such testimony, Staff and Eschelon requested an extension of time to file responsive testimony until

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<sup>1</sup> A complete summary of the procedural history in this docket prior to the date the Commission entered Order No. 05 is contained in paragraphs 3-13 of Order No. 05.

<sup>2</sup> Pub. L. No. 104-104, 100 Stat. 56, *codified at* 47 U.S.C. § 151 *et seq.*

August 30, 2004. On August 13, 2004, Qwest electronically submitted a letter objecting to the proposed settlement and requesting an extension of time to file reply testimony and the hearing dates, should the Commission grant an extension of time to file responsive testimony. By notice dated August 13, 2004, the Commission granted extensions of time to file responsive and reply testimony. By notice dated August 17, 2004, the Commission requested responses to proposals by Staff and Qwest to reschedule the hearing dates. Public Counsel, Time Warner, Eschelon, Qwest and Staff filed letters in response.

6 On August 19, 2004, Qwest filed with the Commission a Response to Settlement Agreement Between Staff and Eschelon.

7 On August 20, 2004, Commission Staff filed with the Commission settlement agreement and accompanying narrative statement between Staff and McLeodUSA Telecommunications, Inc. (McLeodUSA), requesting an order approving the settlement agreement. The settlement agreement is substantially similar to the Eschelon Settlement. Staff also filed a motion to dismiss allegations relating to agreements between McLeodUSA and Qwest. For purposes of this Order, the agreement and narrative between Staff and McLeodUSA will be referred to as the McLeodUSA Settlement and McLeodUSA Narrative. Also on August 20, 2004, Commission Staff filed with the Commission a motion to dismiss allegations relating to an agreement between SBC Telecom, Inc. (SBC) and Qwest.

8 On August 24, 2004, Qwest filed a request for an additional two-week extension of time to file responsive and reply testimony to allow the Commission to consider Qwest's objections to the settlements before the testimony is filed. Qwest also noted in its request that its August 19, 2004, response to the Eschelon Settlement should extend also to the McLeod Settlement

9 On August 24, 2004, the Commission issued a notice providing an opportunity to file replies to Qwest's response to the Eschelon Settlement and to respond to Qwest's request for an additional extension of time.

10 On August 26, 2004, the Commission issued a notice granting an extension of time to file responsive and reply testimony until Monday, September 13, 2004, and Monday, November 8, 2004, respectively. The Commission also notified parties that the hearing scheduled for the week of November 1, 2004, had been rescheduled to the week of January 10, 2005, and that the remainder of the procedural schedule was canceled.

### **MEMORANDUM**

#### **A. Motions to Dismiss Allegations.**

11 The focus of the Commission's Complaint and Amended Complaint in this proceeding is to address interconnection agreements under Section 252 of the Act. Staff and Eschelon have determined that Agreement Nos. 17A, 18A, 20A, and 23A between Qwest and Eschelon are not interconnection agreements. Likewise, Staff and McLeodUSA have determined that Agreement Nos. 41A, 42A, and 46A between Qwest and McLeodUSA are not such agreements, and Staff and SBC have determined that Agreement No. 10A is not such an agreement. No party contests or objects to Staff's motions to dismiss allegations. Based upon the information presented in Staff's motions and the Eschelon and McLeod Settlements, the motions to dismiss should be granted and all allegations against Eschelon, McLeodUSA, SBC, and Qwest relating to Agreement Nos. 10A, 17A, 18A, 20A, 23A, 41A, 42A, and 46A should be dismissed.

**B. Eschelon and McLeodUSA Settlements.**

- 12 **Settlement Terms.** The Eschelon Settlement addresses the following nine agreements between Qwest and Eschelon, at paragraph 8:
- Agreement No. 1A, dated February 28, 2002;
  - Agreement No. 2A, dated July 21, 2000;
  - Agreement No. 3A, dated November 15, 2000;
  - Agreement No. 4A, dated November 15, 2000;
  - Agreement No. 5A, dated July 3, 2001;
  - Agreement No. 6A, dated July 31, 2001;
  - Agreement No. 12A, dated March 3, 2002;
  - Agreement No. 19A, dated November 15, 2000; and
  - Agreement No. 21A, dated November 15, 2000.
- 13 The McLeodUSA Settlement addresses four agreements between Qwest and McLeodUSA, an April 28, 2000, agreement referred to as Agreement No. 8A, an October 21, 2000, agreement referred to as Agreement No. 9A, an October 28, 2000, agreement referred to as Agreement No. 44A, and an October 26, 2000, agreement referred to as Agreement No. 45A. *McLeodUSA Agreement*, ¶ 9.
- 14 Eschelon, McLeodUSA, and Staff agree that certain agreements are not interconnection agreements. Staff agrees to file motions to dismiss allegations relating to Agreement Nos. 17A, 18A, 20A, and 23A between Qwest and Eschelon and Agreement Nos. 41A, 42A, and 46A between Qwest and McLeodUSA. *Eschelon Settlement*, ¶ 7; *McLeodUSA Settlement*; ¶ 8.
- 15 In their settlement agreements, Eschelon and McLeod accept and agree to be bound by the terms of Order No. 05, and admit that Agreement Nos. 1A through 6A, 8A, 9A, 12A, 19A, 21A, 44A, and 45A are interconnection agreements. *Eschelon Settlement*, ¶¶ 6, 8; *McLeodUSA Settlement*, ¶¶ 7, 9. Eschelon and McLeod

each agree to pay a penalty of \$25,000. *Eschelon Settlement*, ¶ 13; *McLeodUSA Settlement*, ¶ 14. Eschelon and McLeodUSA assert that at the time the agreements were executed, they believed the obligation to file the agreements with state commissions rested solely with Qwest, but admit that they have a legal obligation to file and seek Commission approval for all interconnection agreements. *Eschelon Settlement*, ¶¶ 8, 9; *McLeodUSA Settlement*, ¶¶ 9, 10.

- 16 Eschelon and McLeodUSA agree to file any future interconnection agreements within 30 days of execution, and to file any interconnection agreement not yet filed with the Commission within 45 days of approval of the settlement agreements. *Eschelon Settlement*, ¶¶ 10, 11; *McLeodUSA Settlement*, ¶¶ 11, 12. If approved, the settlement agreements will resolve all issues raised against Eschelon and McLeodUSA in the Complaint and Amended Complaint issued by the Commission. *Eschelon Settlement*, ¶ 20; *McLeodUSA Settlement*, ¶ 21.
- 17 As noted above, the settlements provide that Eschelon and McLeodUSA will remain parties to the proceeding, sponsor and provide responsive testimony and exhibits, and make a witness available for direct and cross-examination at the hearing.<sup>3</sup> *Eschelon Settlement*, ¶ 14; *McLeodUSA Settlement*, ¶15.
- 18 The parties entered into the settlement agreements to avoid the additional expense, uncertainty and delay involved in litigation of the issues in this docket. *Eschelon Settlement*, ¶ 19; *McLeodUSA Settlement*, ¶ 20. The parties assert that the settlement agreements are consistent with the law and the public interest, as Eschelon and McLeodUSA accept the terms of Order No. 05, agree to penalties for not filing the agreements listed above with the Commission, and understand and agree to comply with their Section 252 filing obligations in the future. *Eschelon Narrative*, ¶¶ 5, 7; *McLeodUSA Narrative*, ¶¶ 5, 7.

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<sup>3</sup> The settlements refer inconsistently to Eschelon and McLeodUSA providing reply testimony and responsive testimony. The Commission interprets the settlements to mean that the two parties plan to file responsive testimony.

19 The parties assert that the penalty amounts, \$25,000 per company, are “small in proportion to the overall harm that may have been caused by Qwest and all the competitive local exchange carriers identified in the Complaint and Amended Complaint.” *Eschelon Narrative*, ¶ 6; *McLeodUSA Narrative*, ¶ 6. Eschelon and McLeodUSA assert that the settlement is in the public interest given the willingness of the companies to own up to their obligations and duties to file, the strong deterrent effect of the penalties, the companies’ bargaining positions with respect to Qwest, and the willingness of the companies to provide testimony and evidence. *Id.*

20 **Qwest Objections.** Qwest objects to the portions of the settlement agreements in which Eschelon and McLeodUSA agree to file responsive testimony. Specifically, Qwest objects that the provisions of the settlements that call for Eschelon and McLeodUSA to file “what may amount to be direct testimony adverse to Qwest and supportive of Staff’s complaint in the responsive round of testimony.” *Qwest Response at 2.*

21 Qwest objects that the topics for the responsive testimony set forth in the settlements do not appear to be responsive to Mr. Wilson’s direct testimony. *Id. at 2.* Qwest asserts that the settlement provisions allow Staff to have two rounds of direct testimony, and that Qwest will be prejudiced if Eschelon and McLeodUSA are able to file testimony. *Id. at 2-3.*

22 Qwest also objects to the portions of the settlements that seek to preserve Eschelon and McLeodUSA’s party status despite settlement. *Id. at 1-2.* Qwest asserts that the Commission’s procedural rules, WAC 480-07-340, do not recognize party status based on a desire to provide information when the party does not have an interest in the proceedings. *Id. at 2, n.1.*

23 Qwest requests that the Commission reject paragraphs 2 and 14 of the Eschelon Settlement and paragraphs 2 and 15 of the McLeodUSA settlement, and limit Eschelon and McLeodUSA to filing testimony that is responsive to Staff's direct testimony. *Id. at 1-2.*

24 **Staff Response.** In reply, Staff asserts that the standard for considering settlement agreements is "whether a proposed settlement agreement meets all pertinent legal and policy standards," and whether the settlement is in the public interest. *Staff Reply at 1, citing WAC 480-07-740.* Staff asserts that Qwest objects to due process concerns, *i.e.*, a legal standard, not whether the settlement agreements are in the public interest. *Id.*

25 Staff asserts that Qwest's objections are premature and that any potential prejudice may be cured through the procedural protections provided in the schedule in this proceeding and the Commission's procedural rules. *Id. at 1-2.* Staff asserts that Qwest will have an opportunity to respond to any testimony filed by Eschelon and McLeodUSA in the reply round of testimony and that Qwest may move to strike any testimony that it finds inappropriate. *Id. at 3, 9.* Staff objects to Qwest's request for an order limiting the scope of the proposed testimony.

26 Staff asserts that the practice of providing adverse testimony as a part of a settlement is not a violation of due process principles, noting that this is a long-accepted practice in criminal law referred to as "turning state's evidence." *Id. at 3-4.* Staff asserts that in a civil context, which may result in only a money judgment, there is less of a due process interest at stake. *Id. at 4, citing Nguyen v. Dep't of Health, 144 Wn. 2. 516, 527-528 (2001).*



27 Staff agrees with Qwest that any testimony filed by Eschelon or McLeodUSA should be responsive to Staff's direct testimony, but disputes Qwest's assertion that any testimony adverse to Qwest should be filed in the direct round of testimony. *Id. at 4-5.* Staff notes that in multiple party proceedings before the Commission parties may be favorably aligned on some issues, and not on others, and that no Commission rule requires the filing of testimony by similarly aligned parties at the same filing phase. *Id. at 5-7.*

28 Addressing Qwest's arguments as to Eschelon and McLeodUSA's party status, Staff asserts that party status is based upon interest in the proceeding rather than a desire to provide information in the proceeding. *Id. at 7-8.* Staff asserts that Eschelon and McLeodUSA are properly respondents to the Amended Complaint and have an interest in supporting their settlement agreements as well as in testifying in the proceeding. *Id. at 8.*

29 **Discussion and Decision.** Based on the information provided in the Eschelon and McLeodUSA Settlements and accompanying narratives, the Commission finds pursuant to WAC 480-07-740(1)(d) that a settlement hearing would not assist it in determining whether to approve the proposed settlement agreements. The ultimate determination to be made by the Commission in this proceeding is whether approving the settlement agreements is "lawful, the settlement terms are supported by an appropriate record, and [whether] the result is consistent with the public interest in light of all the information available to the commission." WAC 480-07-750(1).

30 The Eschelon and McLeodUSA Settlements are consistent with Section 252 and the Commission's finding concerning Section 252 filing obligations in Order No. 05. Eschelon and McLeodUSA agree to be bound by the provisions of Order No. 05 and to file interconnection agreements in the future within 30 days of execution of the agreement, and to file any outstanding agreements within 45 days of approval of the settlements. The settlement agreements are in the public

interest, as they reduce the expense, uncertainty and delay of litigation. The settlement agreements allow parties an efficient way to effect future compliance and acknowledge their Section 252 filing obligations through specific terms and appropriate penalties.

31 Paragraphs 2 and 14 of the Eschelon Settlement and paragraphs 2 and 15 of the McLeodUSA Settlement, which provide that Eschelon and McLeodUSA will file responsive testimony, are not unlawful or contrary to the public interest. As respondents in the proceeding, Eschelon and McLeodUSA had the option of filing testimony in response to Staff's direct testimony even without entering into settlement agreements. Eschelon and McLeodUSA's party status as respondents is not affected by the settlements.

32 The Commission's procedural rules allow parties to file motions to strike portions of any testimony. *See WAC 480-07-375(1)(d)*. Qwest may also respond to testimony filed by Eschelon and McLeodUSA in the reply round of testimony. Given the extended procedural schedule in this proceeding, there is ample time for the Commission to consider such a motion or motions prior to the scheduled formal hearing. There is no need to impose the limitations Qwest requests to Eschelon's and McLeodUSA's proposed responsive testimony as the Commission's procedural rules allow the Commission to address any objections to the testimony after it has been filed.

33 The information provided in the settlement agreements, accompanying narrative statements, and the record in this proceeding support the agreements reached in the settlements as well as the Commission's approval of the settlement agreements. The parties expressed the basis and justification for the settlements in the settlement agreements themselves and in the narrative statements.

34 Based on the record developed in this proceeding, we find the issues pending against Eschelon and McLeodUSA in this complaint proceeding are adequately addressed and resolved by the terms of the Eschelon and McLeodUSA Settlements. Under these circumstances, we are satisfied that the settlement agreements are lawful, appropriate, and consistent with the public interest. We approve and adopt the Eschelon and McLeodUSA Settlements as the full and final resolution of all issues pending against Eschelon and McLeodUSA in Docket No. UT-033011.

**FINDINGS OF FACT**

35 Having discussed above in detail the documentary evidence received in this proceeding concerning all material matters, and having stated findings and conclusions upon issues at impasse among the parties and the reasons and bases for those findings and conclusions, the Commission now makes and enters the following summary of those facts. Those portions of the preceding detailed findings pertaining to the ultimate findings stated below are incorporated into the ultimate findings by reference.

36 (1) Qwest Corporation is a Bell operating company within the definition of 47 U.S.C. § 153(4), and incumbent Local Exchange Company, or ILEC, providing local exchange telecommunications service to the public for compensation within the state of Washington.

37 (2) Eschelon Telecom of Washington, Inc., McLeodUSA Telecommunications, Inc., and SBC Telecom, Inc., are local exchange carriers within the definition of 47 U.S.C. § 153(26), providing local exchange telecommunications service to the public for compensation within the state of Washington, or are classified as competitive telecommunications companies under RCW 80.36.310 - .330.

- 38 (3) The Washington Utilities and Transportation Commission is an agency of the State of Washington vested by statute with the authority to regulate the rates and conditions of service of telecommunications companies within the state, and to take actions, conduct proceedings, and enter orders as permitted or contemplated for a state commission under the Telecommunications Act of 1996.
- 39 (4) Four agreements dated November 14, 2000, November 15, 2000, August 1, 2001, and March 31, 2001, between Qwest Corporation and Eschelon Telecom of Washington, Inc., referred to as Agreement Nos. 17, 18, 20, and 23 in Exhibit A to the Amended Complaint, are not Interconnection Agreements subject to the filing requirements of Section 252 of the Act.
- 40 (5) Three agreements dated April 25, 2000, May 1, 2000, and October 26, 2000, between Qwest Corporation and McLeodUSA Telecommunications, Inc., referred to as Agreement Nos. 41, 42, and 46 in Exhibit A to the Amended Complaint, are not Interconnection Agreements subject to the filing requirements of Section 252 of the Act.
- 41 (6) The June 1, 2000, agreement between SBC Telecom, Inc., and Qwest Corporation, referred to as Agreement No. 10 in Exhibit A to the Amended Complaint, is not an Interconnection Agreement subject to the filing requirements of Section 252 of the Act.

### **CONCLUSIONS OF LAW**

42 Having discussed above in detail all matters material to this decision, and having stated general findings and conclusions, the Commission now makes the following summary conclusions of law. Those portions of the preceding detailed discussion that state conclusions pertaining to the ultimate decisions of the Commission are incorporated by this reference.

- 43 (1) The Commission has jurisdiction over the subject matter of this proceeding and the parties to the proceeding.
- 44 (2) The settlement agreements between Commission Staff and Eschelon Telecom of Washington, Inc., and McLeodUSA Telecommunications, Inc., are consistent with Section 252, the Commission's finding concerning Section 252 filing obligations in Order No. 05, and the Commission's procedural rules. The settlement agreements are in the public interest, as they reduce the expense, uncertainty and delay of litigation.

**ORDER**

**THE COMMISSION ORDERS:**

- 45 (1) Commission Staff's Motions to Dismiss Allegations Relating to Agreement Nos. 10A, 17A, 18A, 20A, 23A, 41A, 42A, and 46A between Qwest Corporation and Eschelon Telecom of Washington, Inc., McLeodUSA Telecommunications, Inc., and SBC Telecom, Inc., are granted.
- 46 (2) The Settlement Agreement between Eschelon Telecom of Washington, Inc., and Commission Staff is approved and adopted as a complete resolution of the issues pending against Eschelon Telecom of Washington, Inc., in the Complaint and Amended Complaint in this Proceeding.
- 47 (3) The Settlement Agreement between McLeodUSA Telecommunications, Inc., and Commission Staff is approved and adopted as a complete resolution of the issues pending against McLeodUSA Telecommunications, Inc., in the Complaint and Amended Complaint in this Proceeding.

- 48 (4) Within 15 days of the service day of this Order, Eschelon Telecom of Washington, Inc., and McLeodUSA Telecommunications, Inc., must each pay a penalty of \$25,000 to the Commission, payable to the Public Service Revolving Fund.

Dated at Olympia, Washington, and effective this 7th day of September, 2004.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MARILYN SHOWALTER, Chairwoman

RICHARD HEMSTAD, Commissioner

PATRICK OSHIE, Commissioner

**NOTICE TO PARTIES: This is an Interlocutory Order of the Commission. Administrative review may be available through a petition for review, filed within 10 days of the service of this Order pursuant to WAC 480-07-810(3).**