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Also Present:

Todd L. Lundy, Qwest
Adam L. Sherr, Qwest
Dennis Ahlers, Eschelon (via telephone)

EXAMINATION INDEX

Table with 2 columns: EXAMINATION BY, PAGE NO.
4 MS. ENDEJAN 5
6 MR. KOPTA 162
7 MR. CROMWELL 170
8 MR. LIPSCHULTZ 173
9 MR. NAZARIAN 179

EXHIBIT INDEX

Table with 3 columns: EXHIBIT NO., DESCRIPTION, PAGE NO.
13 A Notebook containing testimony from Thomas L. Wilson, Exhibits TLW-1 through TLW-80. 5
15 B 12-page Interpretive and Policy Statement-Arbitration Proceedings, Docket No. UT-960269, dated June 1996 8
18 C 6-page FairPoint Settlement Agreement, Docket No. UT-033011, dated 5/4/04 29
19 D 7-page Electric Lightwave Settlement Agreement, Docket No. UT-033011, dated May 2004 31
22 E 7-page Memorandum Opinion and Order, WC Docket No. 02-89, dated 10/4/02 46
24 F 10-page Agreement between American Telephone Technology, Inc., and US West Communications, CDS-000118-0201 97

BE IT REMEMBERED that on Wednesday, July 21, 2004, at 1400 Evergreen Park Drive SW, Olympia, Washington, at 9:32 a.m., before, CHRISTY SHEPPARD, CCR, Notary Public in and for the State of Washington, appeared THOMAS L. WILSON, the witness herein; WHEREUPON, the following proceedings were had, to wit:

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(Exhibit No. A marked for identification.)

THOMAS L. WILSON, having been first duly sworn by the Notary, deposed and testified as follows:

EXAMINATION

BY MS. ENDEJAN:

Q Good morning, Mr. Wilson. My name is Judy Endejan, and I'm here today to represent Eschelon Telecom of Washington, Inc., one of the respondents in this case. Let me ask you a couple of preliminary questions

Page 22

1 Eschelon's failure to file was intended to harm any third  
 2 party or competition in any way?  
 3 A No, I don't think I have any direct evidence of that.  
 4 Q Did you ever view any of the Eschelon agreements at issue  
 5 in this case as attempts to enforce the obligations in  
 6 this existing ICA with Qwest?  
 7 A Well, I have read the letter the Eschelon executives sent  
 8 to the Colorado Commission, and I may have attached it as  
 9 an exhibit to my testimony. I got it in discovery from  
 10 Eschelon, wherein I think there is some indications  
 11 there, or perhaps in an affidavit by Eschelon, that they  
 12 felt that they were obtaining through the secret  
 13 agreements what they were otherwise legally entitled to  
 14 receive under the Act, but that's the basis of my  
 15 understanding on that. And I realize that's how the  
 16 Eschelon executives felt at the time.  
 17 Q Did you ever investigate any representations made by  
 18 Qwest to Eschelon about the duty to file interconnection  
 19 agreements?  
 20 A No.  
 21 Q Could I direct your attention to Page 3 of your  
 22 testimony, specifically the last sentence of the page.  
 23 Do you see that?  
 24 A Beginning At line 14 with, "I will?"  
 25 Q No. Mine is Line 3, Page 17, last sentence reading, "In

Page 23

1 conclusion, I will offer recommendations regarding  
 2 penalty."  
 3 A Oh, sorry. I missed the period there. Yes, I see that.  
 4 Thank you.  
 5 Q And if you could turn to Page 127 of your testimony. Do  
 6 you see the final section there that reads, "Staff  
 7 recommendation for penalties"?  
 8 A Yes, ma'am.  
 9 Q Okay. Now I'm a little confused by the passage there  
 10 because on Page 3 you said you offer recommendations  
 11 regarding penalties, but on Line 9 of Page 27 you are  
 12 saying essentially Staff ultimately leaves the issue up  
 13 to the Commission.  
 14 So are you or are you not making a recommendation  
 15 regarding penalties against Eschelon and other parties in  
 16 this case?  
 17 A Staff is making recommendations about penalties. Our  
 18 recommendation is how many days late, or how many days  
 19 the violation occurred, and then we are leaving it up to  
 20 the Commission to determine the actual dollar value to  
 21 assign to each penalty because this is something of new  
 22 ground for us and we didn't have a past experience to go  
 23 on.  
 24 Q So if I were Commissioner Showalter sitting in a hearing  
 25 and I turn to you and say, "Mr. Wilson, what do you think

Page 24

1 we should do to penalize the parties who failed to file  
 2 interconnection agreements?" What would you say to her?  
 3 A I would say to her that I would recommend that she count  
 4 the number of violations for each party and apply a  
 5 thousand dollars per violation.  
 6 Q For each agreement? It doesn't matter whether it's a  
 7 letter or a full-blown settlement agreement?  
 8 A For every one of the agreements the Staff has complained  
 9 about in this case, yes, each one.  
 10 Q Let me try to understand something, Mr. Wilson. Is  
 11 Staff's purpose here to obtain compliance with the newly  
 12 understood filing obligation with respect to the filing  
 13 of ICAs, or is it to penalize CLECs for past conduct in  
 14 failing to file?  
 15 MR. SWANSON: Objection. I believe  
 16 that calls for attorney/client privileged information.  
 17 MS. ENDEJAN: Well --  
 18 MR. SWANSON: Maybe you could restate  
 19 your question.  
 20 Q (By Ms. Endejan) Let's go to some foundational questions  
 21 then. Mr. Wilson, when were you first tasked with being  
 22 the Staff witness in this docket?  
 23 A Well, I began working on the case in late in 2002 and  
 24 once the docket number -- once the complaint was issued  
 25 and the docket number assigned, I was assigned lead

Page 25

1 Staff. And I built a work plan that was approved by my  
 2 supervisor wherein I would be the witness.  
 3 Q And who is your supervisor?  
 4 A At that time it was Glen Blackman.  
 5 Q Did Mr. Blackman give you any specific direction as to  
 6 what he wanted you to investigate in this docket?  
 7 MR. SWANSON: Again, I'm concerned  
 8 that you are going to attorney/client privileged  
 9 information as to what were the motivations, and what was  
 10 the intentions in bringing this litigation forward.  
 11 MS. ENDEJAN: Well, I didn't ask  
 12 anything about that. I asked a specific question about  
 13 what this witness was charged with by his supervisor who  
 14 is not an attorney. That's a completely fair question,  
 15 and I will take it to Ms. Rendhal if I have to.  
 16 MR. SWANSON: I believe attorney work  
 17 product, rather another objection, can include the  
 18 communications of non-attorneys in preparation for  
 19 litigation. I can look up the citation if that would be  
 20 helpful, and I would go to Ms. Rendahl about it as well.  
 21 MS. ENDEJAN: You can preserve your  
 22 objection, and we may have to, but I want to know what  
 23 Mr. Wilson was told to do by Mr. Blackman in this docket.  
 24 Q (By Ms. Endejan) Can you answer that question  
 25 specifically? I don't believe that invades any work

1 Q It's purely -- you know, you either did it or you didn't  
 2 inquiry in your view?  
 3 A That's the first cut in the analysis and then you go to  
 4 look at the weight of the harm for each one perhaps.  
 5 Q Okay. Well, let's go there then.  
 6 A Okay.  
 7 Q Is it your view that the weight of the harm from the  
 8 failure to file is equal as to all of the Exhibit A  
 9 agreements?  
 10 A I have looked at them with that in mind, and I have  
 11 concluded that it's not possible for me to assign  
 12 different weights to different agreements. I think that  
 13 they are all equally harmful.  
 14 Hypothetically, maybe there is another way to weigh  
 15 it, but I didn't find any difference in that manner.  
 16 Q When you considered that question, what kind of criteria  
 17 did you think through in your head?  
 18 A Necessity and impairment, for example. The impact on a  
 19 CLEC's ability to compete, the availability of  
 20 prerequisites for local competition.  
 21 Q Any others?  
 22 A Not off the top of my head.  
 23 Q So when you thought through--  
 24 A Excuse me. Economic efficiency.  
 25 Q So when you thought through whether you could weight the

1 relative harm that came about from the failure to file --  
 2 A Okay.  
 3 Q -- your conclusion was that you couldn't really discern a  
 4 way to distinguish among these agreements in terms of the  
 5 type or extent of harm the failure to file caused?  
 6 A No, I really couldn't. And that's because, first of all,  
 7 taking Exhibit 70 where I list all the SGAT taxonomy and  
 8 different services that are available, and you look down  
 9 that list and ask yourself, okay, is collocation more  
 10 important to a CLEC than direct end office trunking, or  
 11 is it more important to them than favorable reciprocal  
 12 compensation, et cetera.  
 13 And it's just impossible for me to say that one is  
 14 more important than the other. Particularly because my  
 15 understanding of the CLEC industry is that there is more  
 16 than 31 flavors of CLECs, and it's been made clear to me  
 17 many times that, you know, one CLEC has a different  
 18 business plan from another, and so CLEC "X" might find  
 19 collocation to be incredibly important, and CLEC "Y"  
 20 might think that features are where it's at for them.  
 21 So that's something that was not possible for a  
 22 staffer to determine. And really that's something that  
 23 should have been determined by the CLECs themselves,  
 24 collecting the opportunity to opt in or out of things.  
 25 They know best what their business is.

1 Q Sure. In thinking through these issues, did you give any  
 2 thought to the range of CLECs that could opt in to a  
 3 particular agreement and whether, for example, certain  
 4 agreements might be more opt inable than others, if  
 5 that's possibly a word?  
 6 A Yes, I did. And, again, when I thought about that range,  
 7 I thought about a range which is extremely diverse. It's  
 8 wide and broad. We have a lot of CLEC activity.  
 9 Washington has always been a procompetition state. We  
 10 have had a lot of competitive entries. It's just been  
 11 very diverse, so I considered the range to be broad.  
 12 Q Let's talk a second about the pick and choose aspect of  
 13 this. Now as of a little more than a week ago the rules  
 14 have changed, right?  
 15 A I have been somewhat involved in these activities and  
 16 haven't really brushed up on events in the other  
 17 Washington totally, but it's my understanding that  
 18 there's been some shifting in the ground by Chairman  
 19 Powell and others.  
 20 Q And so at least as of the middle of July 2004, there is  
 21 no longer a pick or choose rule, there is an  
 22 all-or-nothing rule, right?  
 23 A With all due respect, I don't mean to sound flip, but I  
 24 am going to wait for advice from our attorneys about  
 25 that.

1 Q Fair enough. I'm not going to box you in. We can agree  
 2 at least that the rules have changed recently?  
 3 A I have heard rumors to that effect, yes.  
 4 Q Prior to say a week and a half ago, what was your  
 5 understanding of how the pick and choose rule operated  
 6 for an agreement that was properly filed and approved by  
 7 the Commission?  
 8 It's made -- it's published in some fashion so that  
 9 CLECs can get access to it. How does it work from there?  
 10 A My understanding was based upon the policy and  
 11 interpretive statement on pick and choose issued in about  
 12 1999, the second policy statement the Commission issued,  
 13 it's all based on the rules implementing that policy  
 14 statement adopted in January.  
 15 And I was familiar with all of that material, and  
 16 not so much with the rules that got adopted in January.  
 17 But then prior to filing my testimony and prior to this  
 18 July event in the change of rules, this Commission did go  
 19 through a review of a pick and choose issue between a  
 20 CLEC and Verizon, where Verizon and the CLEC disagreed  
 21 about what the CLEC's obligations were when it opted in  
 22 to another agreement. Namely Verizon -- I will use my  
 23 own words -- loaded up what was available for opt in with  
 24 a bunch of other stuff that they said applied too, and  
 25 said that the CLEC had to accept those conditions as

Page 194

1 well.

2 And the Commission said, no, that's not it. They

3 made it pretty clear that when you opt in to something

4 you have the related terms and conditions that go along

5 with it, but that's it.

6 Q So prior to a week and a half ago, your understanding was

7 that if a CLEC wanted to opt in to something that had

8 been made available, the CLEC would have to agree to

9 accept the terms related to the provision that they

10 wanted to opt in to right?

11 A Yes.

12 Q And there could be some dispute about what the range of

13 related terms was?

14 A That's right. That's why our rules and policies have

15 included the provision that when a CLEC tries to opt in

16 to an agreement, they have to notify the ILEC that they

17 want to opt in to it, and then the ILEC has 15 days to

18 object to it and bring it down here for a decision to

19 implement that kind of issue.

20 Q So it is not correct to say that a CLEC can just cherry

21 pick individual terms out of agreements without

22 considering what related terms and conditions may go

23 along with those terms, right?

24 A I will go along with that generally speaking. You know,

25 I mean, we have to be careful, but like you just said

Page 195

1 there might be a dispute about what is related, but

2 generally speaking I would agree with you.

3 Q And in fact you can't get a whole lot more specific than

4 the level we just discussed without actually looking at

5 an agreement and seeing the provision at issue and what

6 else is in that agreement, correct?

7 A Right.

8 Q And in fact in listening to your answers to questions

9 from Eschelon earlier today, it seemed to me what you

10 were saying is you don't even just look at the one

11 agreement in certain context, but in fact you may have to

12 look at a series of agreements, right?

13 A That's entirely possible. You have to take them in

14 context. And I was looking at the series that were all

15 signed the same day in Minneapolis. I envision a group

16 of people sitting around the table and doing that. You

17 know, I just envision a lot of winking going along

18 perhaps.

19 Q But putting aside whatever winking happened or didn't, if

20 the series of agreements signed in November plus or minus

21 2000, between Qwest and Eschelon had been filed and

22 approved, now we are in the realm of a hypothetical, but

23 as I understand what you were saying earlier today and

24 what you are saying now, that whole series of agreements

25 would have to be considered collectively in order to

Page 196

1 understand the business relationship between Qwest and

2 Eschelon, and thus what terms were or were not related to

3 a particular provision someone would want to opt in to

4 from those agreements?

5 A I think that the parties probably would have insisted on

6 that, and would have framed their filing accordingly to

7 make sure that happened.

8 Q Right.

9 A That was not a risk though because they weren't filed and

10 they weren't subject to that happening.

11 Q I understand. We will get there.

12 A Okay.

13 Q Let's say you had a CLEC whose entire business model was

14 based on reselling of Qwest local service.

15 A All right.

16 Q And let's say that there is an agreement between Qwest

17 and another CLEC that was entirely on UNE-P, and the

18 agreement said that Qwest would give the UNE-P ten

19 percent discount off the filed UNE-P rate?

20 A Okay.

21 Q Is it your understanding of the pick and choose rule that

22 the resale CLEC could come in and opt in to the ten

23 percent discount under those circumstances?

24 A No, they would not be able to do that.

25 Q Why is that?

Page 197

1 A Because they are purchasing resale and not UNE-P.

2 Q So if a CLEC is purchasing a platform different from the

3 one that is at issue in the agreement, then it can't opt

4 in to -- it can't cross products to make a better deal

5 for itself, right?

6 A I think that's true. And I would like to just caveat

7 that with the fact that I know that a lot of people will

8 argue that resale and UNE-P are the same thing. I'm not

9 agreeing to that either.

10 Q And I'm certainly not trying to hold you to any position

11 like that.

12 A You can't opt in to something for "A" and apply it to

13 "B." Right.

14 Q Okay. You said a minute ago, and I actually really liked

15 this phrase, that there are more than 31 flavors of

16 CLECs, right?

17 A Yeah.

18 Q And by that, you followed -- from that you followed up

19 and said they have different business models and

20 different target customers and that kind of thing, right?

21 A Let me also add that they themselves possess different

22 capabilities and resources.

23 Q Sure. They have a different level of financing. They

24 have different personnel, with different technical or

25 business schools, right?