

BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION

ESCHELON TELECOM OF)	DOCKET NO. UT-033039
WASHINGTON, INC.,)	
)	
Petitioner/Complainant,)	ORDER NO. 03
)	
v.)	
)	RECOMMENDED DECISION TO
QWEST CORPORATION,)	GRANT PETITION
)	
Respondent.)	
.....)	

1 **SYNOPSIS:** *The recommended decision would grant Eschelon the right to opt-in to the UNE-Star pricing amendment of McLeod’s interconnection agreement with Qwest for the full term of that amendment and the decision would require Qwest to refund to Eschelon any amount paid by Eschelon in excess of the McLeod price during the full term of the amendment to the McLeod-Qwest agreement.*

2 **Proceedings.** Docket No. UT-033039 involves a petition filed by Eschelon Telecom of Washington, Inc. (Eschelon) for enforcement of its interconnection agreement with Qwest Corporation (Qwest) pursuant to Section 252(i) of the Federal Telecommunications Act of 1996 and a complaint against Qwest pursuant to the Commission's Interpretive and Policy Statement in Docket No. UT-990355 and WAC 480-09-530.

3 **Parties.** Dennis D. Ahlers, attorney, Minneapolis, Minnesota, represents Eschelon. Lisa Anderl, attorney, Seattle, Washington represents Qwest.

I. MEMORANDUM

4 **Petition.** In its petition, Eschelon alleges that Qwest refused Eschelon’s request to opt in to the UNE-Star¹ rates contained in McLeodUSA’s (McLeod’s)

¹ UNE-Star, UNE-Eschelon (UNE-E), and UNE-McLeod (UNE-M), are names for the provision of the unbundled network element-platform (UNE-P) by which a competitive local exchange carrier

interconnection agreement unless Eschelon agreed to all other terms and conditions of the McLeod agreement, including volume requirements and termination date. However, on September 27, 2003, Qwest and Eschelon amended their agreement to incorporate the McLeod UNE-Star rate and the expiration date for that rate—December 31, 2003. Therefore, the only issue that remains to be resolved is whether Eschelon is also entitled to the McLeod rate from September 20, 2002, the commencement date for the rate in the McLeod amendment, or the November 12, 2003 date upon which the Commission approved the amendment to Eschelon’s interconnection agreement with Qwest that contains the McLeod UNE-Star rate.

5 **Applicable law.** Eschelon filed its petition for enforcement under section 252(i)² of the Telecommunications Act of 1996 (the Act)³ and WAC 480-09-530 (now WAC 480-07-650).⁴ The Telecommunications Act of 1996 was intended to encourage competition in provision of local telephone service. It imposed certain conditions on incumbent local exchange carriers (ILECs), such as Qwest, that would assist competitive local exchange carriers (CLECs) to enter the market. Section 252(i) of the Act permits a CLEC to obtain from an incumbent carrier any provision of an approved interconnection agreement with any other CLEC under the same terms and conditions as provided in the approved agreement.⁵ The CLEC may exercise this opt-in right without further negotiation, and may “pick and choose” from the services offered, as long as: 1) it is technically feasible for the ILEC to provide the service; 2) it is not more costly for the ILEC to provide it;⁶ and 3) the CLEC also takes any terms and conditions shown by the ILEC to be

(CLEC) purchases from Qwest, on a wholesale basis, unbundled network elements (a loop, transport and termination), thus enabling the CLEC to provide a complete retail telecommunications service to the CLEC’s customer. Qwest agrees that the terms UNE-P, UNE-Star, UNE-M and UNE-E may be used interchangeably. *See Qwest’s Answer to Eschelon’s Petition at 3, fn. 1 and Exhibit 12 to Eschelon’s Reply Brief.* The terms are referred to in this order as UNE-Star.

² *Interpretive and Policy Statement on Section 252(i) “pick and choose,” Docket No. UT-990355 (Interpretive and Policy Statement),* November 30, 1999, ¶ 29 (provides that a petition for enforcement of pick and choose rights under 252(i) may be filed pursuant to WAC 480-09-530 (now WAC 480-07-650)).

³ *Pub.L.No. 104-104, 110 Stat. 56, Title 47 United States Code.*

⁴ The Commission’s revised procedural rules became effective January 1, 2004.

⁵ *47 USC 252(i).*

⁶ *47 CFR 51.809(b)*; Qwest does not argue that that either cost or technical infeasibility would prevent it from providing UNE-Star to Eschelon as requested.

“legitimately related”⁷ to the opt-in selection. State commissions have authority to enforce interconnection agreements, including pick and choose provisions of those agreements.⁸ ILECs must provide facilities and equipment to CLECs without undue or unreasonable discrimination.⁹

6 WAC 480-07-650 establishes an expedited process whereby a telecommunications company may seek enforcement of its interconnection agreement with another carrier. WAC 480-07-650 permits the parties and the presiding officer to determine the best procedure for conducting the enforcement proceeding. In this proceeding, the parties agreed to proceed on written filings only.¹⁰ Eschelon filed, as its initial brief, a Motion for Summary Determination under WAC 480-09-426 (WAC 480-07-380(2) revised). Under WAC 480-07-380(2), a party may move for summary determination if the pleadings filed in the proceeding show that: 1) there is no genuine issue as to any material fact, and 2) that the moving party is entitled to judgment as a matter of law. Qwest agrees that there is no genuine issue of fact in the proceeding.¹¹

7 **Background.** Eschelon and Qwest first entered into an interconnection agreement, approved by the Commission in Docket No. UT-990385, on February 24, 2000.¹² Several amendments to the agreement have been negotiated and approved since then.

8 Qwest also negotiated an interconnection agreement with McLeod, another CLEC operating in Qwest’s service territory. In October 2000, McLeod and Qwest entered into an amendment to their already existing agreement.¹³ By terms of the amendment, Qwest agreed to provide UNE-Star to McLeod at a recurring rate of \$24.00 per month in the state of Washington. The amendment’s termination date was December 31, 2003. After that, UNE-Star pricing would revert to the charge in effect prior to the amendment.

⁷ *AT&T, et al v. Iowa Utilities Board, et al*, 525 U.S. 366, 396, 119 S.Ct 721 (1999).

⁸ 47 USC 252(e); see also, the Commission’s Interpretive and Policy Statement, that identifies several principles for implementing section 252(i) in interconnection agreements..

⁹ 47 USC 251(c)(2)(D); 27 USC 252(i); 47 CFR 51.809 (1997); RCW 80.01.040; RCW 80.36.170 and .180.

¹⁰ Attached to the written filings of the parties are numerous exhibits related to the dispute.

¹¹ *Qwest reply brief at 2.*

¹² See Exhibit 2 to Petition for relevant excerpts of the agreement.

¹³ Exhibit 3 to Petition.

- 9 In November 2000, Qwest and Eschelon amended their agreement¹⁴ to include a recurring rate for UNE-Star of \$24.00 per month, the same as in the McLeod amendment. The termination date for the Eschelon amendment was December 31, 2005.¹⁵ The amendment was filed with and approved by the Commission on January 24, 2001.
- 10 At that point in time, both the McLeod and Eschelon underlying interconnection agreements contained virtually the same terms, except that the volume commitments in the McLeod agreement were substantially higher¹⁶ than in the Eschelon agreement and the termination dates for each agreement, as well as for the amendments, were different.
- 11 Subsequently, Eschelon and Qwest amended their agreement two times.¹⁷ The purpose of one of the amendments was to establish nonrecurring charges related to UNE-P (UNE-Star).¹⁸ The second amendment allowed Eschelon to purchase switch-based Advanced Intelligent Network (AIN) features, at retail rates, as well as other switch-based features and listing charges, at an additional recurring rate of 35 cents per month, to be included in the UNE-Star rate.¹⁹ The amended attachment to the second amendment shows the UNE-Star rate as a total of \$24.35, rather than as a rate broken down into a component for UNE-Star of \$24.00 and a component for AIN of \$0.35.
- 12 In September 2002, McLeod and Qwest further amended their agreement. This amendment reduced the pricing of UNE-Star from \$24.00 per month to \$21.16 per month.²⁰ McLeod's volume commitments and the December 31, 2003 termination date remained the same.
- 13 In an October 21, 2002 letter to Qwest, Eschelon requested to opt-in to the newly amended McLeod UNE-Star rate.²¹ Eschelon's request states, in part: "Eschelon

¹⁴ *Exhibit 4 to Petition.*

¹⁵ The termination date for Eschelon's underlying interconnection agreement is also December 2005.

¹⁶ *Compare Exhibits 3 and 4 to Petition.*

¹⁷ *Eschelon reply brief at 7.*

¹⁸ *Exhibit 5 to Eschelon initial brief.*

¹⁹ *Attachment A to Qwest reply brief.*

²⁰ *Exhibit 6 to Petition.*

²¹ *Exhibit 7 to Petition.*

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’s letter also asks that Qwest “indicate the specified time period within the terms of the Eschelon Amendment that the McLeod Amendment rates apply (e.g., effective as of September 20, 2002).”

- 14 Qwest responded with two letters, dated November 8, 2002 and February 14, 2003. In these letters, Qwest points out that under its interconnection agreement, Eschelon receives certain CLASS²² features and directory listings that McLeod does not, and that the McLeod volume commitments and termination dates are different from those in the Eschelon agreement. Qwest did not specifically reject Eschelon’s opt-in request in either of these letters, but neither did it accede to the request.
- 15 On September 12, 2003, Eschelon filed the instant petition for enforcement of the interconnection agreement. In its petition, Eschelon requested that the Commission require Qwest to provide UNE-Star at the same rate as contained in the most recent amendment to the McLeod agreement for the full time period of the amendment—September 20, 2002 to the date of filing the petition.
- 16 On September 27, 2003, Qwest agreed to provide UNE-Star to Eschelon at \$21.16 per month, the same as in the McLeod agreement.²³ Also, Eschelon agreed to pay the 35-cent AIN charge in addition to that. The only remaining issue is whether Eschelon should receive the McLeod rate for the same period as in the McLeod amendment, that is, from September 20, 2002 to December 31, 2003, rather than from November 12, 2003 to December 31, 2003, as Qwest argues.

²² Custom Local Area Signaling Services (CLASS). CLASS consists of number translation services, such as call forwarding and caller identification. These features are the AIN features for which Eschelon agreed to pay an additional 35 cents pursuant to the July 2001 amendment to the Qwest/Eschelon agreement.

²³ *Exhibit 10 to Eschelon’s Motion for Summary Determination*. The agreement also provides that it will not be deemed an admission by either party concerning the remaining issues in the Complaint (Petition).

II. DISCUSSION AND DECISION

A. DOES ESCHELON HAVE A RIGHT TO THE MCLEOD RATE FOR THE FULL PERIOD OF THE MCLEOD AMENDMENT?

- 17 Many of the arguments raised by the parties are related to issues resolved by their September 27, 2003 agreement. However, it is necessary to review some of these arguments here because they also relate to the issue of the time period for which the amended price should be effective. Eschelon asserts that it has a right to the McLeod rate from September 20, 2002, the date the \$21.16 UNE-Star rate became effective for McLeod, until December 31, 2003, the date the \$21.16 rate terminated in the McLeod amendment because the time period of the McLeod rate's effect is "legitimately related" to the rate itself.²⁴ Eschelon contends that its request for a September 20, 2002 effective date is very clearly identified in the second paragraph of its October 29, 2002 opt-in request.²⁵
- 18 Eschelon argues that Qwest wanted Eschelon to agree to shorten the term of its underlying agreement in order to obtain the McLeod price term. Eschelon refused to agree to this on the premise that the only time term legitimately related to the McLeod amendment consisted of the effective dates for the amendment. Initially, the date of most concern to the parties was the expiration date, which in the McLeod amendment was December 31, 2003. The expiration date of the underlying Eschelon agreement was December 31, 2005. However, Eschelon contends that its opt-in request clearly identified that it wanted the McLeod price term for the time period from September 20, 2002, to December 31, 2003. Since the agreement between Qwest and Eschelon was previously amended to allow Eschelon to opt in to the McLeod \$24.00 UNE-Star rate, without the requirement of further modification to the terms of Eschelon's underlying agreement, Eschelon contends that Qwest did not properly require modification to the agreement under the opt-in request for the \$21.16 UNE-Star rate.
- 19 Eschelon contends that Qwest's repeated argument that Eschelon refused to negotiate with regard to Eschelon's pick and choose request must be rejected

²⁴ *AT&T, et al v. Iowa Utilities Board, et al*, 525 U.S. 366, 396, 119 S. Ct. 721 (1999).

²⁵ *Petition, Exhibit 7*.

because the FCC²⁶ does not require negotiation regarding opt-in requests under section 252(i).

20 Finally, Eschelon argues that Qwest's failure to honor its opt in request for McLeod's UNE-Star amendment violates federal and state prohibitions against unreasonable discrimination.²⁷

21 Qwest argues that Eschelon should receive the McLeod rate of \$21.16 only for the period from November 12, 2003, the date the Commission approved the September 27, 2003 amendment to the Eschelon agreement that contains the McLeod UNE-Star rate.²⁸

22 Qwest states that Eschelon acknowledges its agreement is different from McLeod's. Because of the amendment to the Eschelon agreement, Eschelon's UNE-Star rate became \$24.35. Qwest contends that Eschelon's opt-in request for the \$21.16 rate would have eliminated the AIN services Eschelon received for the monthly charge of 35 cents and that Eschelon only agreed to pay the additional 35 cents to retain those AIN services in August 2003, rather than folding the 35 cents into the \$21.16 rate, at which time, Qwest agreed to charge Eschelon the \$21.16 rate for UNE-Star.

23 In support of its proposed November 12, 2003 effective date, Qwest argues that interconnection agreements are effective only when approved by the Commission and that opt-in requests are not self-executing.²⁹ The current Eschelon amendment containing the \$21.16 pricing provision for UNE-Star only became effective on November 12, 2003 when the Commission approved it.

24 Second, Qwest argues that the effective date should not be "backdated" to September 20, 2002 because Eschelon's opt-in request did not seek adoption of "original contract language verbatim" in accord with Principle 2 of the

²⁶ *First Report and Order, Docket 96-98, 11 FCC Rcd 15499 (1996)(First Report and Order)*, ¶ 1321. See also *In re Global Naps, Inc., CC Docket No. 99-154, 14 FCC Rcd. 12530, (August 3, 1999)*, ¶ 4.

²⁷ 47 U.S.C. 251(c)(1)(D) and (3)(authority of state commissions to enforcement Qwest provision of facilities and equipment on a just, reasonable and nondiscriminatory basis); RCW 80.36.170; RCW 80.36.180.

²⁸ *Docket No. UT-990385.*

²⁹ *Interpretive and Policy Statement on section 252(i), Docket No. UT-990355, November 30, 1999.*

Commission's "pick and choose" Policy Statement. Qwest argues that, because the McLeod price of \$21.16 did not apply to the UNE-Star plus AIN services Eschelon was receiving for \$24.35, the requested opt-in would have altered Eschelon's service package with regard to the features and listings it received for the additional 35 cents per month. Thus, Qwest contends, Eschelon did not request the required verbatim opt-in.

25 Moreover, Qwest asserts that Eschelon demanded to extend the effective date of the McLeod pricing term to December 2005, the same as the expiration date of the Eschelon agreement. Qwest contends the expiration term of the McLeod pricing amendment was a term legitimately related to the pricing term. Qwest bases its contention that Eschelon refused to accept the McLeod 2003 termination date on: 1) the paragraph in Eschelon's petition³⁰ that the UNE-Star rates were not dependent on the termination dates contained in the underlying agreements and 2) on Eschelon's failure to respond to Qwest's correspondence asking Eschelon to accept the McLeod termination date.³¹

26 Finally, Qwest rejects Eschelon's discrimination claim as unwarranted. Qwest claims that it provides different services to Eschelon and McLeod, with different terms and conditions. Under such circumstances, different pricing is not unreasonably discriminatory.³²

27 Eschelon disputes Qwest's contention that its petition requests approval of "backdating," stating that Eschelon wants only the exact term of the McLeod pricing amendment, which commenced on September 20, 2002 and expired December 31, 2003. Eschelon argues that if Qwest's argument were accepted, then McLeod could not have received the amended pricing for the term of its amendment, since the effective date of the pricing was September 20, 2002 and the Commission did not approve the McLeod amendment until October 9, 2002. In fact, Eschelon points out, the only reason so-called "backdating" is necessary here is because of Qwest's refusal to honor Eschelon's timely October 29, 2002 request to opt-in to the McLeod pricing term approved by the Commission on October 9, 2002.

³⁰ *Petition at ¶23.*

³¹ *Petition Exhibit 8; see also, Qwest's reply brief at 2, fn. 1.*

³² *Cole v. WUTC, 79 Wn 2d 302 (1971)* (a difference in utility rates does not, of itself, constitute an unlawful discrimination.)

28 Eschelon also contends that Qwest is arguing that the Commission's Interpretive and Policy Statement means Eschelon would have to the whole of McLeod's agreement verbatim in order to exercise pick and choose rights. Eschelon points out that its October 29, 2002 opt-in request demonstrates that Eschelon did seek adoption verbatim of the McLeod pricing provision.³³ In addition, Eschelon did not demand an extension of the effective date of the McLeod pricing provision, but rather explicitly requested the same term.³⁴ Eschelon only refused to accept a shortening of its overall agreement in return for the pricing amendment. Since initially both Eschelon and McLeod had the same UNE-Star pricing but different expiration dates for their underlying agreements, Eschelon contends that there is no legitimate relationship between the term of the McLeod agreement and the reduced rate it received. The only legitimate relationship was between the reduced rate and the term the rate would be in effect.

29 With regard to the effect of the amendment that added the 35-cent AIN charge to Eschelon's UNE-Star rate, Eschelon contends that this charge is unrelated to the recurring charge of \$24.00 for UNE-Star and that Qwest knew this. Furthermore, McLeod has the same right to purchase such AIN features.

30 **Decision.** The Commission has the authority to enforce interconnection agreements, including review of contested "pick and choose" requests under section 252(i).³⁵ Pursuant to Eschelon's motion for summary determination, a review of the facts presented by the parties supports a recommendation that, as a matter of law, the term—September 20, 2002 to December 31, 2003—of the McLeod rate, to which Eschelon seeks opt-in rights, is legitimately related to the rate itself. By its October 21, 2002 opt-in letter to Qwest, Eschelon properly requested to opt-in to the McLeod provision, verbatim, for the same period it was in effect for McLeod.

31 Qwest's arguments, claiming that Eschelon's opt-in request was not proper, or that Eschelon improperly failed to negotiate, are unpersuasive. Qwest's contention that the \$24.35 rate that appears in Eschelon's most recent prior pricing amendment is not for the same services included in the McLeod amendment is unfounded. It is clear from a review of all the filings and exhibits

³³ *Petition Exhibit 7.*

³⁴ *Id.*

³⁵ *Section 252(e); see also Local Competition Order.*

that the \$24.35 rate is composed of a 35-cent charge for AIN features and a \$24.00 charge for UNE-Star. For Qwest to claim otherwise is disingenuous.³⁶ Therefore, when Eschelon requested to opt-in to the amended McLeod UNE-Star rate, it was requesting an opt-in for the identical UNE-Star rate, and the identical time period that the rate would be in effect for McLeod. Qwest could have honored Eschelon's opt-in request for the UNE-Star pricing provision, while continuing to charge Eschelon the 35-cent adder for AIN features. In so doing, Qwest would have fulfilled its 252(i) obligations and left in dispute only the question of the appropriateness of folding the adder into the UNE-Star rate.

- 32 With regard to Eschelon's obligation to negotiate with Qwest, it is well-settled that a CLEC has no obligation to negotiate with an incumbent carrier when seeking opt-in rights under section 252(i).³⁷ It may well be that judging when pick and choose is appropriate and when negotiation is appropriate is difficult depending on the fact situation involved. However, the purpose behind the pick and choose provision is to prevent situations where the incumbent carrier improperly delays implementing a pick and choose request, by saying that negotiation is required, and in so doing discourages competition. Based on the history of UNE-Star pricing in amendments to the Eschelon and McLeod agreement, it appears that Qwest was engaging in purposeful delay because Qwest was fully aware that Eschelon's UNE-Star pricing provision included both the \$24.00 price for UNE-Star and a 35-cent adder not directly related to UNE-Star itself, and also that Eschelon had explicitly requested only the time term of the McLeod amendment in its opt-in request for the pricing provision. In such a situation, there is no obligation on behalf of the CLEC to negotiate.
- 33 Qwest's recommendation of a November 12, 2003 effective date for Eschelon's amended UNE-Star price should be rejected. Eschelon explicitly indicated it was requesting to opt-in for a term beginning on September 20, 2002. Eschelon requested to opt-in to the new McLeod rate almost immediately after the McLeod rate was approved by the Commission. While it is true that an agreement is effective only upon Commission approval, this does not mean that the agreement cannot contain valid terms that predate the approval date. If the Commission were to accept Qwest's recommendation here, McLeod itself would

³⁶ See *Qwest reply brief* at 3.

³⁷ *Interpretive and Policy Statement, Docket No. UT-990355, November 30, 1999, ¶ 30; see also Nextlink v. U.S. West, Docket No. UT-990340, September 9, 1999 at ¶ 39.*

not have been able to obtain the \$21.16 rate for the full term of the amendment, since Commission approval was not granted until some time after the effective date stated in the amendment. Furthermore, accepting Qwest's recommendation would contradict the purpose of section 252(i), which is to allow CLECs to obtain favorable connection terms without need for lengthy negotiation and delay.³⁸

34 Since it is recommended that, as a matter of law, Eschelon is entitled to opt-in to the McLeod pricing amendment, Eschelon's discrimination claim need not be addressed in this decision.

B. IS ESCHELON ENTITLED TO A REFUND?

35 Eschelon argues that under RCW 80.04.220,³⁹ the Commission has the authority to require Qwest to refund the amount above \$21.16 it collected from Eschelon for the period from September 20, 2002 until the Commission approved the price amendment on November 12, 2003. In the alternative, Eschelon argues that a Commission order requiring Qwest to honor Eschelon's opt-in request falls neither under reparations, pursuant to RCW 80.04.220, nor is it an award of damages. Rather, would it simply be an order confirming that Eschelon is entitled to a certain rate for a certain period of time.

36 Qwest disputes the Commission's authority to require Qwest to pay any overcharges pursuant to the amended UNE-Star price for Eschelon. Qwest points out that the Commission has recently affirmed that it has no authority to award damages.⁴⁰ Moreover, Qwest contends that Eschelon has not met the provisions of RCW 80.04.220 because it has not filed a complaint; has not identified excessive or exorbitant charges on the part of Qwest; has not made a proper opt-in request; has ignored RCW 80.04.240 which requires an action in Superior Court to collect any amounts ordered by the Commission; and, has failed to bring a complaint within the six-month period contemplated in the latter statutory provision.

³⁸ 47 CFR 51.809.

³⁹ RCW 80.04.220 establishes a complaint procedure whereby a party may request the Commission to order a public service company any excess or exorbitant amount the company may have charged for its services, from the date of the collection of the excessive amount.

⁴⁰ *AT&T v. Verizon*, Docket No. UT-020406, Eleventh Supplemental Order, August 12, 2003, ¶ 34. See also *Hopkins v. GTE*, 89 Wn App 1, 947 P.2d 1220 (1997).

37 **Decision.** The Commission has the authority to enforce interconnection agreements, including the authority to require Qwest to honor a pick and choose request made under the agreement.⁴¹ The Commission may exercise that authority by approving an amendment to an interconnection agreement, as it did with the McLeod amendment implementing the \$21.16 UNE-Star rate. In that instance, the rate was effective back to September 20, 2002, even though Commission approval came later. In this case, it is recommended that since, as a matter of law, Eschelon is entitled to pick and choose the McLeod UNE-Star rate and the term of that rate, Eschelon is entitled to receive that rate for the period of the McLeod amendment from September 20, 2002. Therefore, Qwest should be required to refund to Eschelon the difference between the \$24.00 rate and the \$21.16 rate from September 20, 2002 until November 12, 2003, when Qwest officially began charging Eschelon the \$21.16 rate. Without granting such relief to Eschelon, ILECs such as Qwest would have an incentive to delay granting opt-in requests.

38 The Commission also has authority under RCW 80.04.220 to require Qwest to refund to Eschelon any money collected in excess of the \$21.16 UNE-Star rate for the time period from September 20, 2002 to December 31, 2003. Contrary to Qwest's assertions, Eschelon: 1) did file a complaint (contained in its petition for enforcement); 2) has identified excessive charges by Qwest for provision of UNE-Star for the September 20-2002 to December 31, 2003 period; and, 3) did make a proper opt-in request, as discussed above. Whether or not Eschelon will go to court to obtain enforcement of a Commission-ordered refund under RCW 80.04.220 is irrelevant to whether or not the Commission has the authority to take such an action based on its review of the facts and the law.

III. FINDINGS OF FACT

39 Having discussed in detail the evidence concerning all material matters and having stated our findings of fact and conclusions of law in the text of the order, the Commission now makes the following summary of those findings. Those portions of the preceding detailed findings and conclusions pertaining to the Commission's ultimate findings and conclusions in this matter are incorporated by this reference.

⁴¹ Section 252(e); RCW 80.36.610; Interpretive and Policy Statement ¶¶ 2-4.

- 40 (1) The Washington Utilities and Transportation Commission is an agency of the State of Washington, vested by statute with authority to regulate in the public interest the rates, services, facilities and practices of telecommunications companies in the state.
- 41 (2) The Washington Utilities and Transportation Commission is designated in the Telecommunications Act of 1996 as the agency responsible for arbitrating and approving interconnection agreements between telecommunications carriers, pursuant to sections 251 and 252 of the Act.
- 42 (3) Qwest is an incumbent local exchange carrier, as defined in the Act, furnishing basic local exchange services in the state of Washington.
- 43 (4) Eschelon is a competitive local exchange carrier, as defined in the Act, providing basic local exchange service in the state of Washington.
- 44 (5) McLeod is a competitive local exchange carrier, as defined in the Act, providing basic local exchange service in the state of Washington.
- 45 (6) Qwest and Eschelon have negotiated interconnection agreements that have been approved by the Commission in Docket No. UT-980385.
- 46 (7) Qwest and McLeod have negotiated interconnection agreements that have been approved by the Commission.
- 47 (8) Eschelon properly requested to opt in to the UNE-Star \$21.16 pricing amendment contained in a Commission-approved agreement between Qwest and McLeod for the term established in the McLeod amendment of September 20, 2002 to December 31, 2003.
- 48 (9) Qwest failed to demonstrate that the commencement date contained in the McLeod amendment was not legitimately related to the UNE-Star price contained in that amendment.

IV. CONCLUSIONS OF LAW

- 49 (1) The Commission has jurisdiction over the subject matter and parties to this proceeding.
- 50 (2) The Washington Utilities and Transportation Commission is designated in the Telecommunications Act of 1996 as the agency responsible for arbitrating and approving interconnection agreements between telecommunications carriers, pursuant to sections 251 and 252 of the Act.
- 51 (3) Pursuant to Section 252(i) of the Act, a local exchange carrier must 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 on the same terms and conditions as those provided in the agreement.
- 52 (4) Qwest must make available to Eschelon the McLeod amendment price for UNE-Star for the full term that the McLeod amendment was in effect: September 20, 2002 to December 31, 2003.
- 53 (5) Based on Eschelon's opt in right to the \$21.16 UNE-Star rate from September 20, 2002 to December 31, 2003, Qwest must refund to Eschelon any amount it collected from Eschelon in excess of that rate for the full term of the rate from September 20, 2002 to December 31, 2003.

V. RECOMMENDED DECISION

54 IT IS RECOMMENDED That Eschelon is entitled to opt-in to the \$21.16 McLeod UNE-Star pricing amendment for the full period of the McLeod amendment, September 20, 2002 to December 31, 2003. It is further ordered that Qwest shall refund any amounts it charged Eschelon for UNE-Star in excess of the \$21.16 rate during the full period of the amendment. The refund must be made within 30 days of the date of the Commission's final order.

DATED at Olympia, Washington, and effective this 9th day of January 2004.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

THEODORA M. MACE
Administrative Law Judge

Pursuant to WAC 480-07-650, this docket will be taken up by the Commission at an open meeting on January 21, 2004 at 1:00 p.m. The parties may file written comments regarding this recommended decision on or before January 15, 2004. The parties may also make oral argument during the open meeting. The parties should advise the Commission by noon on January 13, 2004 whether or not they desire an opportunity to make oral argument at the open meeting. If oral argument is desired, Eschelon will be allowed 20 minutes for opening argument, Qwest will have 30 minutes to respond and then Eschelon will have 10 minutes to reply. If the parties wish to divide their allotted time differently, they should also advise the Commission of that by noon on January 13, 2004.