

BEFORE THE WASHINGTON STATE  
UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND	)	DOCKET NO. UT-033011
TRANSPORTATION COMMISSION,	)	
	)	ORDER NO. 16
Complainant,	)	
	)	ORDER GRANTING, IN PART,
v.	)	AND DENYING, IN PART,
	)	ESCHELON AND McLeodUSA'S
ADVANCED TELECOM GROUP,	)	MOTIONS FOR PROTECTIVE
INC., et al.	)	ORDER AGAINST DEPOSITION
	)	
Respondents.	)	
.....	)	

**SYNOPSIS**

1     *This Order denies the motions of Eschelon and McLeodUSA for protective orders to quash the depositions of Mr. Smith and Mr. Gray, respectively. The Order grants the requests of Eschelon and McLeodUSA to reschedule the depositions, but requires the parties to further work to address the issue of the location of the depositions given the schedules and burdens of both parties. The Order allows Qwest to file supplemental reply testimony relating to the testimony of Mr. Smith and Mr. Gray on December 6, 2004, instead of the reply testimony deadline of November 8, 2004.*

**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 other telecommunications companies alleging that the companies entered into certain interconnection

agreements identified in Exhibit A to the Amended Complaint,<sup>1</sup> 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 agreements to resolve disputes, but that the agreements 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 **Appearances.** Christopher Swanson, Assistant Attorney General, Olympia, Washington, represents Commission Staff. Daniel Waggoner, Davis Wright Tremaine, LLP, Seattle, Washington, and Gary Witt, AT&T Law Department, Denver, Colorado, represent AT&T Communications of the Pacific Northwest and TCG Seattle (AT&T). Karen S. Frame, Senior Counsel, Denver, Colorado, represents Covad Communications Company. Charles L. Best, attorney, Vancouver, WA, represents Electric Lightwave, LLC. Judith A. Endejan, Graham & Dunn, PC, Seattle, Washington, and Dennis J. Ahlers, Senior Attorney, Minneapolis, Minnesota, represent Eschelon Telecom of Washington, Inc. (Eschelon). Richard A. Finnigan, Law Office of Richard A. Finnigan, Olympia, Washington, represents Fairpoint Carrier Services, Inc., f/k/a Fairpoint Communications Solutions, Corp., Integra Telecom of Washington, Inc., and SBC Telecom, Inc. Greg Kopta, Davis Wright Tremaine, LLP, Seattle, Washington represents Global Crossing Local Services, Inc., and XO Washington, Inc. Dan Lipschultz, Moss & Barnett, Minneapolis, Minnesota, represents McLeodUSA Telecommunications Services, Inc. (McLeodUSA). Arthur A. Butler, Ater Wynne, LLP, Seattle, Washington, and Michel Singer Nelson, Regulatory Attorney, Denver, Colorado, represent WorldCom, Inc. and its subsidiaries doing business in Washington (n/k/a MCI, Inc.). Arthur A. Butler, Ater Wynne, LLP, Seattle, Washington, represents Time Warner Telecom of Washington, LLC (TWTC). Lisa A. Anderl, Associate General Counsel, and Adam Sherr, Senior

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<sup>1</sup> The Commission issued a Complaint against the parties on August 14, 2003, and issued an Amended Complaint on August 15, 2003 to include Exhibits A and B to the Complaint.

Attorney, Seattle, Washington, Todd Lundy, Associate General Counsel, Denver, Colorado, and Peter S. Spivak and Douglas R. M. Nazarian, Hogan & Hartson, Washington, D.C., represent Qwest. Robert Cromwell, Assistant Attorney General, Seattle, Washington, represents Public Counsel.

- 4 **Procedural History.** On August 14, 2003, the Commission issued a Complaint in this proceeding against Qwest and 13 other telecommunications companies. The Commission issued an Amended Complaint on August 15, 2003, attaching Exhibits A and B, which were omitted from the original complaint. Exhibit A to the Amended Complaint identifies 52 agreements that Qwest and the 13 competitive local exchange carriers (CLECs) allegedly failed to file, or timely file, with the Commission. Exhibit B identifies 25 additional agreements with CLECs that Qwest allegedly failed to file with the Commission, and which allegedly 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.
- 5 On August 13, 2004, Commission Staff filed with the Commission a settlement agreement and narrative between Staff and Eschelon, requesting an order approving the settlement agreement. The settlement agreement provided that Eschelon would file responsive testimony in this proceeding.
- 6 On September 1, 2004, Eschelon filed with the Commission the prefiled responsive testimony of Richard A. Smith. On September 16, 2004, Qwest filed with the Commission a Motion to Strike Testimony of Stephen C. Gray and Richard A. Smith.
- 7 On October 20, 2004, Qwest served on counsel for Eschelon a notice of the deposition of Mr. Smith for October 28, 2004. On October 21, 2004, Qwest served on counsel for McLeodUSA a notice of the deposition of Mr. Gray for October 29, 2004.

8 On October 22, 2004, the presiding officer, Administrative Law Judge Ann E. Rendahl, entered Order No. 1 in this proceeding, granting, in part, Qwest's motion to strike the testimony of Mr. Smith and Mr. Gray.

9 Also on October 22, 2004, Eschelon submitted electronically to the Commission the Motion of Eschelon Telecom of Washington, Inc. for Protective Order Against Deposition, attaching the Declaration of Dennis Ahlers in Support of Motion for Protective Order. On the same day, McLeodUSA submitted electronically to the Commission the Motion of McLeodUSA Telecommunications Service, Inc., for Protective Order Against Deposition.

10 By notices dated October 22, 2004, and October 25, 2004, the Commission required responses to Eschelon and McLeodUSA's motions to be filed with the Commission by Noon on Tuesday, October 26, 2004. On October 26, 2004, Qwest filed a response to Eschelon and McLeodUSA's motions. No other party filed a response.

### MEMORANDUM

11 **Eschelon's Motion for Protective Order.** In its Motion for Protective Order Against Deposition, Eschelon seeks to quash the deposition of Richard A. Smith that Qwest has noticed for 9:30 a.m. on Thursday, October 28, 2004. Eschelon asserts that there is no need for the deposition and the schedule for the deposition is overly burdensome. *Eschelon Motion at 2.* Eschelon submits the Declaration of Dennis Ahlers, Director and Senior Counsel for Eschelon, in support of the motion.

12 First, Eschelon asserts that Mr. Smith, the President and Chief Executive Officer for the Company, will be traveling or in meetings in Minnesota relating to Eschelon's recently announced acquisition of Advanced TelCom Inc. (ATI) until November 17, 2004. *Id.*; *see, also Ahlers Declaration, ¶ 1.* In particular, Mr. Smith is

currently scheduled to meet with Eschelon's investors and Executive Council on October 28, 2004, and to attend a Board of Directors' meeting on Friday, October 29, 2004. *Id.*

- 13 Second, Eschelon asserts that attorneys for Qwest have deposed Mr. Smith twice relating to the "unfiled agreements" at issue in this proceeding. *Eschelon Motion at 2-3; Ahlers Declaration at ¶¶ 3-4.* Mr. Smith was deposed during the summer of 2004 in relation to a federal district court proceeding in Washington, and in 2002 relating to the Arizona Corporation Commission's investigation into unfiled agreements in that state. *Id.* Eschelon notes that Qwest counsel, Mr. Nazarian, attended the deposition relating to the Arizona proceeding, and that Qwest has possession of the deposition transcripts. *Eschelon Motion at 3; Ahlers Declaration, ¶¶ 3-4.* Eschelon asserts that Qwest must demonstrate the need for specific additional questions before the deposition is allowed to go forward, and suggests that Qwest use written discovery to answer any questions not already addressed in the prior depositions. *Eschelon Motion at 3.*
- 14 Lastly, Eschelon argues that, even if the Commission were to allow the deposition, Mr. Smith cannot attend a deposition on October 28, 2004. *Id.* Eschelon requests that the deposition, if necessary at all, should be rescheduled to a later date given that the deadline set for depositions in this proceeding is December 15, 2004. *Id. at 4.* Eschelon also asserts that the deposition should be held in Minneapolis, Minnesota, the headquarters for Eschelon. *Id. at 3; see also Ahlers Declaration, ¶ 5.* Eschelon notes that the prior two depositions were held in Minneapolis, and that Qwest's counsel could just as easily travel to Minneapolis, Minnesota, as to Olympia, Washington. *Id.*
- 15 **McLeodUSA's Motion for Protective Order.** In its Motion for Protective Order Against Deposition, McLeodUSA seeks to quash the deposition of Stephen C. Gray that Qwest has noticed for 9:30 a.m. on Friday, October 29, 2004.

McLeodUSA asserts that there is no need for the deposition and the schedule for the deposition is overly burdensome. *McLeodUSA Motion at 1.*

- 16 First, McLeodUSA asserts that Mr. Gray is not available for deposition on October 29, 2004, due to his responsibilities as President of McLeodUSA. *Id. at 2.* McLeodUSA asserts that Mr. Gray's duties are especially pressing due to the need to prepare year-end reports and participation in the Federal Communications Commission's triennial review rulemaking. *Id.* While Mr. Gray's responsibilities and prior commitments prevent him from appearing at a deposition on one-week's notice, McLeodUSA asserts that Mr. Gray would be available on November 19, 2004, at the earliest, but prefers that Mr. Gray be deposed on December 2, 2004. *Id.*
- 17 Second, McLeodUSA asserts that it filed Mr. Gray's testimony with the Commission on August 31, 2004, and responded to interrogatories issued by Qwest relating to the testimony on September 30, 2004. *Id.* McLeodUSA asserts that it is unreasonable and overly burdensome to require a deposition of Mr. Gray by October 29, 2004, given that the deadline for depositions in this proceeding is set for December 15, 2004. *Id.* McLeodUSA asserts that Qwest should pursue written discovery through further interrogatories, and that if it is clear following these responses that a deposition is necessary, a deposition can be scheduled prior to December 15, 2004. *Id. at 2-3.*
- 18 Finally, as with Eschelon, McLeodUSA objects to Qwest's scheduling the deposition to be held in Olympia, Washington, rather than McLeodUSA's headquarters in Cedar Rapids, Iowa. *Id. at 3.* McLeodUSA noted that corporate officers are generally entitled to having depositions taken in the place in which the officer resides. *Id.* McLeodUSA requests that if the deposition of Mr. Gray is allowed, the deposition should be rescheduled to a date and location more convenient to Mr. Gray. *Id. at 3-4.* McLeodUSA further notes that it is not

additional burden to ask Qwest's counsel to travel to Cedar Rapids than to travel to Olympia. *Id. at 3.*

- 19 **Qwest's Response.** Qwest requests the Commission deny the motions of Eschelon and McLeodUSA asserting that neither company meets the standard for special protective orders in WAC 480-07-420(3), *i.e.*, annoyance, embarrassment, oppression or undue burden or expense. *Qwest Motion at 2.*
- 20 Qwest asserts that it is entitled to depose Mr. Smith and Mr. Gray in advance of filing reply testimony, now due November 8, 2004, and in time to review transcripts of the depositions prior to filing reply testimony. *Id. at 3.* Qwest asserts that WAC 480-07-401(1) allows a party to "depose any person identified by another party as a potential witness," and that the only issue between the parties is the timing and venue of the depositions. *Id. at 3-4.* Qwest asserts that, given the decisions in Order No. 15 in this proceeding allowing, in part, the testimony of Mr. Gray and Mr. Smith as responsive testimony, it must be given the opportunity to inquire into the nature of the testimony prior to filing responsive testimony. *Id. at 4.*
- 21 Qwest asserts that neither McLeodUSA or Eschelon has demonstrated that the depositions would cause them annoyance, embarrassment, oppression or undue burden or expense, as required for such an order by WAC 480-07-420(3). *Id. at 5.* Eschelon and McLeodUSAUSA have filed testimony in the proceeding and Qwest asserts that it is only fair to allow Qwest to inquire into the matters alleged in the testimony. *Id.* Qwest objects to the claims that Mr. Smith and Mr. Gray have busy schedules, and objects to them placing this matter behind their other obligations. *Id.*
- 22 Qwest objects to the companies' requests for a change of location of the depositions. *Id. at 6.* Qwest asserts that the Commission's rules require depositions to be held in Olympia unless the parties and the presiding officer

agree to another location. *Id.*, citing WAC 480-07-410(2). Qwest argues that there would be a burden on Qwest's Washington-based attorneys should they be required to travel to Minneapolis or Cedar Rapids. *Id.* at 6.

23 Qwest also objects to the alternatives to deposition proposed by Eschelon and McLeodUSA. *Id.* at 6. Qwest asserts that McLeodUSA and Eschelon presented testimony as agreed to in the settlements with Commission Staff, and bear the responsibility to make their witnesses available for a timely deposition. *Id.* at 7.

24 Alternatively, should the Commission find that the depositions should not take place on the dates noticed, Qwest proposes that the depositions be rescheduled to permit Mr. Gray and Mr. Smith to appear for depositions in Olympia on November 19 and 22, 2004, and to reschedule the submission of reply testimony from November 8 to December 6, 2004. *Id.* at 7-8. Qwest further requests that the discovery cutoff and deposition cutoff be modified to allow Qwest and Staff to test each other's reply testimony. *Id.* at 8. Further, Qwest suggests that the evidentiary hearing schedule be modified to allow fining of surrebuttal testimony. *Id.*

25 **Discussion and Decision.** Eschelon's motion to quash to deposition of Mr. Smith is denied. Eschelon's motion requesting that the deposition be rescheduled is granted. Similarly McLeodUSA's motion to quash the deposition of Mr. Gray is denied, and the portion of McLeodUSA's motion requesting rescheduling is granted. Further discussions between the parties are necessary concerning the location of the depositions, despite the Commission's rule WAC 480-07-410(2), to avoid further delays and expense for all parties.

26 Qwest must be given an opportunity to depose Mr. Smith and Mr. Gray concerning their response testimony. Despite the prior depositions of Mr. Smith, he remains a fact witness in this proceeding. It is clear, however, that the timing and location of the depositions are a stumbling block to the depositions noticed



by Qwest. Mr. Smith has demonstrated his inability to attend a deposition noted for October 28, 2004, and Mr. Gray has demonstrated similar, but less specific, scheduling conflicts. The Commission has scheduled depositions in other cases in locations other than Olympia. Qwest, Eschelon, and McLeodUSA must work together to schedule depositions for Mr. Smith and Mr. Gray no later than November 22 at a location to be determined, and Qwest may file supplemental reply testimony by December 6, 2004, to address that portion of the testimony of Mr. Smith and Mr. Gray that remains following Order No. 15 in this proceeding. A prehearing conference will be scheduled to determine whether it is necessary to make other changes to the procedural schedule.

#### FINDINGS OF FACT

- 27 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.
- 28 (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.
- 29 (2) Eschelon Telecom of Washington, Inc., and McLeodUSA Telecommunications, 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.

- 30 (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.
- 31 (4) On August 14, 2003, the Commission issued a complaint against Qwest Corporation and 13 other telecommunications companies in this proceeding alleging violations of state and federal law concerning 52 agreements listed in Exhibit A and an additional 25 agreements listed in Exhibit B.
- 32 (5) On September 1, 2004, Eschelon Telecom of Washington, Inc., filed with the Commission the prefiled responsive testimony of Richard A. Smith as provided in the settlement agreement between Staff and Eschelon Telecom of Washington, Inc.
- 33 (6) On September 9, 2004, McLeodUSA Telecommunications, Inc., filed with the Commission the prefiled responsive testimony of Stephen C. Gray, as provided in the settlement agreement between Staff and McLeodUSA Telecommunications, Inc.
- 34 (7) On September 16, 2004, Qwest Corporation filed with the Commission its Motion to Strike Testimony of Stephen C. Gray and Richard A. Smith. Commission Staff and Public Counsel filed answers to Qwest Corporation's motions on September 24, 2004, while Time Warner Telecom of Washington, Inc., filed an answer on September 27, 2004.

- 35 (9) On October 20, 2004, Qwest served on counsel for Eschelon Telecom of Washington, Inc., a notice of the deposition of Mr. Smith for October 28, 2004. On October 21, 2004, Qwest served on counsel for McLeodUSA Telecommunications Services, Inc., a notice of the deposition of Mr. Gray for October 29, 2004.
- 36 (10) On October 22, 2004, the presiding officer, Administrative Law Judge Ann E. Rendahl, entered Order No. 15 in this proceeding, granting in part Qwest's motion to strike the testimony of Mr. Smith and Mr. Gray.
- 37 (11) Mr. Smith and Mr. Gray are fact witnesses in this proceeding.
- 38 (12) Mr. Smith and Mr. Gray are not available to appear at depositions scheduled for October 28 and 29, 2004.
- 39 (13) Reply testimony in this proceeding is scheduled to be filed with the Commission by November 8, 2004.

#### CONCLUSIONS OF LAW

40 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.

- 41 (1) The Commission has jurisdiction over the subject matter of this proceeding and the parties to the proceeding.

- 42 (2) The Commission's procedural rules provide that a party may depose any person identified by another party as a potential witness, and that such depositions will be held in Olympia, unless the parties and the presiding officer agree to a different location. *WAC 480-07-410(1) and (2)*.

**ORDER**

**THE COMMISSION ORDERS:**

- 43 (1) The Motion of Eschelon Telecom of Washington, Inc., for Protective Order Against Deposition and the Declaration of Dennis Ahlers in Support of Motion for Protective Order is granted in part and denied in part, such that Mr. Smith must appear for a deposition by Qwest Corporation, but the October 28, 2004, deposition will be rescheduled to a time and location to be determined by the parties.
- 44 (2) The Motion of McLeodUSA Telecommunications Service, Inc. for Protective Order Against Deposition is granted in part and denied in part, such that Mr. Gray must appear for a deposition by Qwest Corporation, but the October 29, 2004, deposition will be rescheduled to a time and location to be determined by the parties.

Dated at Olympia, Washington, and effective this 26<sup>th</sup> day of October, 2004.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

ANN E. RENDAHL  
Administrative Law Judge

**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)*.