

BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION

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| WASHINGTON UTILITIES AND |) | |
| TRANSPORTATION COMMISSION, |) | DOCKET NO. UT-033011 |
| |) | |
| Complainant, |) | |
| |) | ORDER NO. 18 |
| v. |) | |
| |) | |
| ADVANCED TELECOM GROUP, |) | SUA SPONTE ORDER RESCINDING |
| INC., et al. |) | PORTION OF PARAGRAPH NO. 42 |
| |) | OF ORDER NO. 16 AND ORDER |
| Respondents. |) | NO. 17; ORDERING CHANGE IN |
| |) | LOCATION OF DEPOSITIONS |
| |) | |

1 **Synopsis.** *This Order rescinds a portion of paragraph No. 42 of Order No. 16 and the decision in Order No. 17 concerning the effect of WAC 480-07-410(2), and requires that the depositions of Mr. Smith and Mr. Gray be taken in Minneapolis, Minnesota, and Cedar Rapids, Iowa.*

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,¹ 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

¹ 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.

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 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.
- 11 On October 26, 2004, Administrative Law Judge Rendahl entered Order No. 16 in this proceeding, an order granting in part and denying in part the motions of Eschelon and McLeodUSA, requiring the depositions of Mr. Smith and Mr. Gray, and granting the request to rescheduled the depositions. The Order directed the parties to further discuss the location of the depositions.
- 12 On the afternoon of October 26, 2004, counsel for Eschelon requested a conference call with the Administrative Law Judge and other parties to discuss the scheduling and location of the depositions. Present on the call were counsel for Eschelon, McLeodUSA, and Qwest. Counsel for Staff was not available to participate in the conference call. During the call, the parties agreed that Mr. Smith would be made available for deposition on November 22, 2004, and that Mr. Gray would be made available for deposition on November 19, 2004. The parties remain in dispute concerning the location of the depositions.
- 13 On October 28, 2004, Staff submitted a letter to the Commission in support of holding the depositions of Mr. Smith and Mr. Gray in Minneapolis and Cedar Rapids, respectively.

14 On October 28, 2004, Administrative Law Judge Rendahl entered Order No. 17 in this proceeding denying the portion of the motions of Eschelon and McLeodUSA requesting a change in the location of the depositions, and requiring that the depositions of Mr. Smith and Mr. Gray be taken in Olympia or Seattle, Washington.

15 **Location of the Depositions.** Order No. 17 in this proceeding resolved the remaining issue presented in the motions of Eschelon and McLeodUSA for protective orders against deposition and required the depositions of Mr. Smith and Mr. Gray be taken in Olympia or Seattle, Washington. The Order relied upon a finding that the Commission's procedural rules, namely WAC 480-07-410(2), require depositions to be taken in Olympia, unless the parties agree to a different location. *See Order No. 17, ¶ 18.*

16 As discussed in Order No. 17, Eschelon and McLeodUSA assert that the depositions of Mr. Smith and Mr. Gray should be held in the location where the presidents of the two companies reside, Minneapolis and Cedar Rapids. *Eschelon Motion at 3; see also Ahlers Declaration, ¶ 5; McLeodUSA Motion at 3.* McLeodUSA noted that corporate officers are generally entitled to having depositions taken in the place in which the officer resides. *McLeodUSA Motion at 3.* Eschelon notes that Mr. Smith's prior two depositions were held in Minneapolis, and that Qwest's counsel could just as easily travel to Minneapolis, Minnesota, as to Olympia, Washington. *Eschelon Motion at 3.*

17 Qwest objects to the companies' requests for a change of location of the depositions. *Qwest Response 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.*

- 18 Commission Staff raises a concern that paragraph 42 of Order No. 16 includes a conclusion of law that the Commission's procedural rules provide that depositions will be held in Olympia unless the parties and the presiding officer agree to a different location. Staff asserts that the rule in WAC 480-07-410(2) as referring to a "deposition conference," and that such conferences are different from depositions. *Staff's October 28, 2004, letter at 1.* Staff asserts that a deposition conference "appears to relate to resolving procedural issues rather than including the deposition itself as was the case in the former rules." *Id.*
- 19 **Discussion and Decision.** Upon further review of Commission Staff's October 28, 2004, letter and the Commission's procedural rules, it appears that paragraph 42 of Order No. 16 and the decision in Order No. 17 were based on an incomplete analysis of the rules. The rule addressed in paragraph 42 of Order No. 16 and in Order No. 17, WAC 480-07-410(2), refers to depositions conferences, not depositions, and requires deposition conferences to be held in Olympia unless the parties and the presiding officer agree to a different location.
- 20 A review of WAC 480-07-410(2) and former WAC 480-09-480(6)(b) indicates that a deposition conference is a deposition held in the presence of an administrative law judge or presiding officer, or a conference to "facilitate the deposition process." Not all depositions require the presence of a presiding officer. In this proceeding, Qwest notified only the parties of the scheduled depositions and did not notify the Administrative Law Judge or request a deposition conference or assistance in facilitating the deposition process. The matter only came to the Commission's attention upon the motions of Eschelon and McLeodUSA to quash the depositions or change the time and location of the depositions. The Commission's procedural rule concerning depositions, in particular WAC 480-07-410(2), is best interpreted to require depositions be held in Olympia only when they are taken as a part of a deposition conference where the presiding officer is present, or upon the agreement of the parties.

- 21 The Commission's rules further state "Parties should use CR 30 of the Washington superior court civil rules as a guide when conducting depositions." WAC 480-07-410(3). The Commission intended in WAC 480-07-410(3) that parties use CR 30 as a guide when taking depositions. While CR 30 does not address the location of a deposition, it does state that attendance of witnesses may be compelled by subpoena. *See CR 30(a)*. Court Rule 45 addresses the place of examination for depositions, and identifies that "a nonresident of the state may be required to attend only in the county in which he is served with a subpoena, or within 40 miles of the place of service, or at such other convenient place as is fixed by an order of the court." *CR 45(d)(2)*.
- 22 Based upon this analysis, it is reasonable that the depositions of Mr. Smith and Mr. Gray be taken in locations more convenient to those witnesses than Olympia or Seattle, Washington. The burden on Mr. Smith and Mr. Gray to travel to Washington State, given their schedules, is great. As discussed in the telephone conference on October 26, 2004, Qwest's counsel Mr. Nazarian will be traveling to Olympia for the depositions, so travel to the Midwest is no additional burden on him. Washington counsel for Qwest may either attend the deposition in person, or may attend via telephone conference, which counsel for Eschelon and McLeodUSA agreed to facilitate.
- 23 Paragraph 42 of Order No. 16 and Order No. 17, including the findings in paragraph 18 that the Commission's procedural rules require depositions to be taken in Olympia, unless the parties agree to a different location, are rescinded. The depositions of Mr. Smith and Mr. Gray are not required by WAC 480-07-410(2) to be taken in Olympia, but must be taken in Minneapolis, Minnesota and Cedar Rapids, Iowa.

FINDINGS OF FACT

- 24 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.
- 25 (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.
- 26 (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.
- 27 (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.
- 28 (4) On October 26, 2004, Administrative Law Judge Rendahl entered Order No. 16 in this proceeding granting, in part, and denying, in part, the

motions of Eschelon and McLeod for protective order against depositions. Paragraph No. 42 of Order No. 16 included a conclusion of law concerning WAC 480-07-410(2).

- 29 (5) On October 28, 2004, Administrative Law Judge Rendahl entered Order No. 17 in this proceeding denying the motions of Eschelon and McLeodUSA requesting a change in location of depositions. Order No. 17 relied upon a finding that WAC 480-07-410(2) requires depositions to be taken in Olympia, unless the parties agree to a different location.

CONCLUSIONS OF LAW

30 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.

- 31 (1) The Commission has jurisdiction over the subject matter of this proceeding and the parties to the proceeding.
- 32 (2) The Commission's procedural rule concerning depositions, in particular WAC 480-07-410(2), requires depositions be held in Olympia only when they are taken as a part of a deposition conference where the presiding officer is present, or upon the agreement of the parties.
- 33 (3) The Commission's procedural rule concerning depositions provides that "Parties should use CR 30 of the Washington superior court civil rules as a guide when conducting depositions." WAC 480-07-410(3).

- 34 (4) CR 30 does not address the location of a deposition, but does state that attendance of witnesses may be compelled by subpoena. *See CR 30(a).*
- 35 (5) Court Rule 45 addresses the place of examination for depositions, and identifies that “a nonresident of the state may be required to attend only in the county in which he is served with a subpoena, or within 40 miles of the place of service, or at such other convenient place as is fixed by an order of the court.” *CR 45(d)(2).*

ORDER

THE COMMISSION ORDERS:

- 36 (1) The portion of paragraph 42 of Order No. 1, addressing WAC 480-07-410(2), is rescinded.
- 37 (2) Order No. 17, including the findings in paragraph 18 that the Commission’s procedural rules require depositions to be taken in Olympia, unless the parties agree to a different location, is rescinded.
- 38 (3) The portion of 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 seeking a change in location of the deposition is granted.
- 39 (4) The portion of the Motion of McLeodUSA Telecommunications Service, Inc. for Protective Order Against Deposition seeking a change in location of the deposition is granted.

- 40 (5) The depositions of Mr. Smith and Mr. Gray must be taken in Minneapolis, Minnesota, and Cedar Rapids, Iowa, respectively, or another location convenient to the witnesses.

Dated at Olympia, Washington, and effective this 5th day of November 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).