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BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

LeRoy Koppendrayner
Marshall Johnson
Ken Nickolai
Phyllis A. Reha
Gregory Scott

Chair
Commissioner
Commissioner
Commissioner
Commissioner

In the Matter of the Complaint of Eschelon
Telecom of Minnesota, Inc. Against Qwest
Corporation Inc.

ISSUE DATE: December 1, 2003

DOCKET NO. P-421/C-03-627

ORDER PERMITTING OPT-IN AND
REQUIRING REFUND

PROCEDURAL HISTORY

On April 23, 2003, Eschelon Telecom of Minnesota, Inc. (Eschelon) filed a complaint against Qwest Corporation, Inc. (Qwest) alleging, among other things, that Qwest was charging Eschelon higher rates for UNE-Star than it charges McLeodUSA (McLeod), and that Qwest's refusal to make UNE-star available to Eschelon at the same rate it is provided to McLeod was contrary to the parties' Interconnection Agreement (ICA) and Minnesota statutes (the Opt-In Issue).¹

On June 2, 2003, the Commission's NOTICE AND ORDER FOR HEARING referred the matter to the Office of Administrative Hearings for contested case proceedings.

On July 15, 2003, Qwest filed a motion for summary judgement with the Administrative Law Judge (ALJ) requesting that Eschelon's opt-in request and claim for damages be rejected, that Eschelon's request be treated as a request for negotiation,² and that a process be set up for negotiating or arbitrating Eschelon's request.

On July 15, Eschelon filed its initial brief.

On August 7, 2003, the Department of Commerce (DOC) filed a response, Qwest filed reply comments, and Eschelon filed a reply brief.

¹ The complaint also alleged that Eschelon is entitled to a refund of payments for private lines that should have been available to Eschelon as combinations of unbundled network elements known as EELs. This issue will not be addressed in this Order.

² Pursuant to 47 U.S.C. § 251(c)(1) and the dispute resolution process contained in the parties' ICA.

On September 4, 2003, the ALJ issued her Recommendation that: a) Qwest's motion for summary disposition be denied, b) Eschelon may opt into the pricing portion of the Qwest/McLeod ICA, but only for the duration of the agreement with McLeod, and b) the Commission has the authority to require Qwest to provide a refund to Eschelon for the lower rate from the date of Eschelon's request.

On September 19, 2003, Eschelon requested that the Opt-In Issue addressed in the September 4, 2003, recommendation of the ALJ be bifurcated from the remaining issues in this docket. There was no objection to Eschelon's request.

On October 2, 2003, the ALJ issued an Order granting bifurcation of the Opt-In Issue addressed in her September 4, 2003 recommendation from the remaining issues in this docket. The Opt-In issue was forwarded to the Commission for consideration.

On November 4, 2003, Qwest filed comments regarding the ALJ's September 4, 2003, recommendation.

On November 12, 2003, Eschelon filed a motion to strike Qwest's comments as untimely.

On November 13, 2003, the matter came before the Commission.

FINDINGS AND CONCLUSIONS

I. Eschelon's Complaint and Background

A. The Complaint

Eschelon alleged that Qwest refused to give it the same UNE-Star rates that Qwest made available to McLeod unless Eschelon agreed to all other terms and conditions of the Qwest/McLeod Amendment to their ICA. These terms and conditions would require that Eschelon take the same volume requirements, service limitations and termination date as McLeod.

B. Background

The Telecommunications Act of 1996 (the Act)³ was enacted to foster competition in local telephone service. It imposed certain requirements on incumbent local exchange carriers (ILECs), such as Qwest, to facilitate competing telecommunications carriers entering the market. One of the Act's provisions requires that an ILEC make available to any other carrier the services it provides under a negotiated ICA, under certain conditions. A competing carrier may exercise this opt-in right without further negotiation and may "pick and choose" from the services offered as long as the carrier selects the service under the same terms and conditions set forth in the agreement.⁴

³ Pub.L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of title 47, United States Code).

⁴ 47 U.S.C. § 252 (i).

In 1999 Eschelon and Qwest entered into an ICA⁵ which was subsequently amended November 15, 2000. This amendment provided for Eschelon to purchase UNE-Star at the rate of \$27.00 per month in Minnesota. This amendment was to expire on December 31, 2005.

In September of 2002, Qwest and McLeod entered into an amendment to their ICA, which changed the pricing of UNE-Star for McLeod. It provided for a reduction of the UNE-Star rate to McLeod from \$27.00 per month to \$24.50 per month. The amendment provided that the applicable rate would revert to the previous rate of \$27.00 per month after December 31, 2003.

In an October 29, 2002 letter to Qwest, Eschelon requested to opt-in to that part of the Qwest/McLeod ICA "...consisting of Platform recurring rates that are effective from September 20, 2002, until December 31, 2003."

At hearing, Qwest and Eschelon informed the Commission that they had filed an amendment to their ICA reflecting their agreement that Eschelon will pay \$24.85⁶ per month for UNE-Star for the period from October 1 through December 31, 2003. After December 31, 2003, the UNE-Star rate to Eschelon will revert back to the previous \$27.00 per month rate.

However, Qwest and Eschelon indicated that they did not reach agreement on the issue of whether Eschelon was entitled to receive the reduced rate of \$24.85 retroactive to the date of Eschelon's request to opt-in.

II. Positions of the Parties

A. Eschelon

Eschelon stated that immediately after McLeod and Qwest entered into an amendment of their ICA, which amended the pricing of UNE-Star for McLeod, Eschelon asked Qwest to give it the same UNE-Star rates as those made available to McLeod.⁷ It argued that under Eschelon's ICA with Qwest, Qwest was required to provide network elements to Eschelon at rates, terms and conditions no less favorable than those provided to itself or any other party. Further, it argued that the Telecommunications Act of 1996, in 47 U.S.C. § 252(i), provides that Qwest must provide network elements to Eschelon at the same rates, terms and conditions as it provides to McLeod.

⁵ The ICA was approved by the Commission on October 4, 1999 in Docket No. P-5340,421/M-99-1223.

⁶ The \$24.85 per month rate to Eschelon reflects the McLeod rate of \$24.50 plus \$.35 for Advanced Intelligence Network (AIN) features that Eschelon purchases beyond those purchased by McLeod.

⁷ Eschelon agreed that its UNE-Star rate should be 35 cents more than the rate to McLeod due to the agreed-to charge for access to AIN features.

Eschelon stated that Qwest would not allow Eschelon to receive the rate given to McLeod without Eschelon also accepting the termination date in the McLeod agreement and other conditions, including volume requirements. Eschelon argued that it was only required to take the terms and conditions that were legitimately related to the requested part of the agreement and that neither the termination date nor volume requirements were tied to the UNE-Star rates. For this reason Eschelon argued that it should receive the lower UNE-Star rates until December 31, 2005, the expiration date of its UNE-Star amendment to the ICA. In the alternative, Eschelon argued that it should be entitled to UNE-Star at the McLeod rate for the same period of time McLeod is entitled to the lower rate.

Finally, Eschelon argued that, contrary to Qwest's assertion, Eschelon was not asking for damages, but rather was asking that its request for nondiscriminatory rates be honored from the date of its request.

B. Qwest

Qwest argued that Eschelon's claim related to the McLeod pricing and its claim for money damages should be dismissed. It argued that although Eschelon had the right to opt-in to the Qwest/McLeod agreement, Eschelon was required to take all terms and conditions that were reasonably related to the terms that were being sought. In this case, Qwest argued that Eschelon was required to accept the expiration date of the McLeod pricing agreement and the volume commitments contained in the agreement.

Qwest argued that because Eschelon has rejected critical terms of the McLeod agreement, it was not seeking to opt-in. Rather, Eschelon was seeking to negotiate an amendment to its ICA pursuant to 47 U.S.C. § 251(c)(1) and the parties' ICA. For this reason, Qwest argued that the Commission should direct the parties to negotiate an amendment to their ICA.

Finally, Qwest argued that the Commission does not have the authority to award retroactive money damages as requested by Eschelon nor is Eschelon entitled to a retroactive refund. Qwest argued that the lower price to McLeod was legitimately related to the duration of the agreement and Eschelon must accept the term if it wants the price.

Since Eschelon refused to agree to the expiration date, Eschelon's claim for a retroactive award is invalid.

C. DOC

The DOC argued that Eschelon is entitled to the same reduction in price as McLeod received for UNE-Star. It argued that Federal Communication Commission (FCC) rules⁸ allow Eschelon to pick and choose provisions from ICAs of other competitive local exchange carriers (CLECs) unless Qwest can prove that the costs of providing the service to Eschelon are greater than the costs of providing it to the original carrier. It argued that Qwest has not met this burden.

⁸ 47 C.F.R. §51.809.

However, the DOC agreed with Qwest that Eschelon should be bound by the duration of the price reduction to McLeod. Therefore, Eschelon should receive the benefit of the reduced pricing until the stated December 31, 2003 expiration date, or longer if the agreement provides for it.

The DOC also argued that since Eschelon established that Qwest improperly provided McLeod more favorable pricing than Eschelon, the Commission has the authority to order a retroactive refund. It argued that the lower rate to Eschelon should be deemed effective as of the date Eschelon first requested to adopt that rate, and for the remainder of the term of the McLeod amendment or for as long as McLeod continues to benefit from that rate.

III. The ALJ's Findings and Recommendations

The ALJ made the following findings and recommendations:

- A. That the Commission deny Qwest's motion for Summary Judgement. The ALJ found that Eschelon properly asserted a claim for the denial of its opt-in rights under the Telecommunications Act of 1996, and that the Commission has the authority to resolve the claim.
- B. That Eschelon may opt into that portion of the ICA between Qwest and McLeod providing for a price of \$24.50 for UNE-Star services, but only for the duration of the agreement with McLeod.
- C. That the Commission has the authority to require Qwest to provide a refund to Eschelon for the lower rate from the date of Eschelon's request.

The ALJ found that Eschelon properly asserted a claim that Qwest violated Eschelon's opt-in rights. The ALJ stated that the issue for the Commission was whether there were any terms that were legitimately related to the price Qwest gave McLeod, or whether Eschelon is entitled to the lower rate without additional terms.

Further, the ALJ found that there was a significant difference between Eschelon locking in the lower McLeod rate for the same duration as McLeod and Eschelon locking in that rate for a longer period. If the rate was locked in for Eschelon for a longer period than for McLeod, it would be more advantageous to Eschelon than McLeod. Thus, the ALJ found that Qwest should be required to offer the lower rate to Eschelon for the same period of time that McLeod was to receive the lower rate. The ALJ found that the record clearly demonstrated that the lower UNE-Star rate was legitimately related to the duration of the McLeod agreement.

However, the ALJ found that the other terms that Qwest would require Eschelon to adopt were not legitimately related to the lower price negotiated between Qwest and McLeod and were not required to be identical.

The ALJ also found that the Commission's authority includes establishing reasonable rates and prices. Minn. Stat. § 237.081, subd. 4. The ALJ found that it follows that if Qwest improperly denied service to Eschelon for the time that Eschelon requested it, and the Commission determines that a lower price was required, the Commission could require Qwest to amend its past billing to reflect the lower rate. This would result in a refund or credit to Eschelon. To hold otherwise would give an incumbent local exchange carrier an incentive to delay granting an opt-in request.

IV. Commission Action

The Commission concurs in the ALJ's finding that Eschelon has properly asserted a claim that its opt-in rights were violated by Qwest. The Commission, therefore, will deny Qwest's request for summary judgement.

The Commission also agrees with the ALJ and the DOC that Eschelon is entitled to the price reduction given to McLeod, but only for the time period that the rates are available to McLeod. This is just and reasonable under the circumstances. The Commission finds that the record supports that the duration of the McLeod agreement was legitimately related to the lower UNE-Star rate that Qwest and McLeod agreed upon. The amendment between Qwest and McLeod clearly sets forth that after December 31, 2003, the reduced rate to McLeod will revert back to the original \$27.00 rate. To give the lower rate to Eschelon for the duration of the Eschelon/Qwest ICA would give Eschelon an advantage over McLeod and defeat the time limitation negotiated between Qwest and McLeod.

For the above reasons, the Commission will allow Eschelon to opt into the part of the ICA between Qwest and McLeod that provides for a price of \$24.85 for UNE-Star services through December 31, 2003. The parties have agreed that Eschelon may receive the lower rates from October 1, 2003 through December 31, 2003.

Finally, The Commission finds that Qwest was required to provide the lower rate of \$24.85 from the date that Eschelon made its first request to opt-in, that is October 29, 2002. Qwest improperly denied Eschelon the lower rate for the period after this date. Therefore the Commission will order Qwest to provide a refund to Eschelon to reflect the lower rate from October 29, 2002. This retroactive relief will correct Qwest's improper denial of Eschelon's proper request for the rate given to McLeod. Without such relief to Eschelon, incumbent local exchange carriers such as Qwest would have an incentive to delay granting opt-in requests.

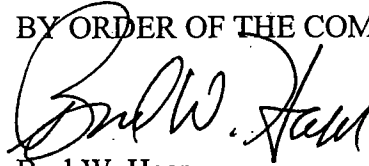
The Commission will so order.

ORDER

1. Qwest's motion for summary judgement is denied.
2. The Commission concurs in and adopts the findings, conclusions and recommendations of the ALJ.
3. Eschelon may opt into that portion of the interconnection agreement between Qwest and McLeod providing for UNE-Star services at a price of \$24.85 for the duration of the agreement with McLeod.
4. Eschelon and Qwest shall file an amendment to their interconnection agreement within 30 days of the date of this Order.
5. Qwest shall provide a refund to Eschelon for the lower rate from the date of Eschelon's request, October 29, 2002, within thirty days of this Order.

6. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION



Burl W. Haar
Executive Secretary

(SEAL)

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