[Service Date February 6, 2004]

BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION

ESCHELON TELECOM OF WASHINGTON, INC.,	)	DOCKET NO. UT-033039
Petitioner/Complainant,	)	ORDER NO. 04
v.	)	
QWEST CORPORATION,	)	FINAL ORDER GRANTING PETITION, IN PART
Respondent.	)	
. . . . .	)	

1 ***SYNOPSIS*****:** *This order confirms the right of Eschelon to opt-in to a UNE-Star pricing amendment to McLeod's interconnection agreement with Qwest from the date of Eschelon's first sufficient opt-in request (August 14, 2003) until the termination date of the McLeod amendment. Qwest is directed to refund to Eschelon all amounts paid by Eschelon in excess of the McLeod price from August 14, 2003, until the termination of the pricing arrangement in the McLeod-Qwest amendment on December 31, 2003.*

2 **Proceedings.** Docket No. UT-033039 involves a petition 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, represented Eschelon before the Administrative Law Judge; Judith Endejan, attorney, Seattle, represented Eschelon at oral argument on review. Lisa Anderl, attorney, Seattle, Washington represented Qwest.

I. MEMORANDUM

4 **Petition.** Eschelon petitioned on September 12, 2003, for enforcement of its interconnection agreement with Qwest, alleging that Qwest improperly refused Eschelon's request to opt in to the UNE-Star[1] rates contained in an amendment to McLeodUSA's (McLeod's) interconnection agreement unless Eschelon agreed to all other terms and conditions of the McLeod agreement, including volume requirements and termination date.

5 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. The Commission approved the amendment on November 13, 2003. The issues remaining for resolution under the petition are whether Eschelon is entitled to the McLeod rate at any time prior to the November 12, 2003 date upon which the Commission approved the Eschelon-Qwest amendment and, if so, whether the Commission has the authority to direct that Qwest refund the amounts improperly overcollected.

6 **Initial order.** The matter was heard before Administrative Law Judge Theodora Mace. The parties agreed to present their evidence to the Administrative Law Judge without an oral hearing. The ALJ entered her recommended decision on January 9, 2004, ruling that Eschelon is entitled to the McLeod rate from the inception of the McLeod-Qwest amendment until the termination of the rate provision, and that the Commission could and should order Qwest to refund any amounts collected in excess of that rate.

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[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 (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. The terms are referred to in this order as UNE-Star.

7 **Post-order process.** Qwest commented on the order, opposing the result of the initial order; Eschelon responded. The Commission matter was set for oral presentations to the Commission at a continued session of the open meeting on January 21, 2004.

8 **Commission Decision.** The Commission finds that Eschelon is entitled to the Qwest-McLeod rate from the date on which Eschelon clarified its opt-in request to make its intentions clear, on August 14, 2003. The Commission has authority to order a refund of the overcollected amounts by virtue of its authority to enforce interconnection agreements, and directs Qwest to make a refund.

II. DISCUSSION

9 **Background.** This matter is the Commission review of the recommended decision of an administrative law judge under former WAC 480-09-530, which provides a mechanism for enforcement of interconnection agreements.[2] Eschelon is a competitive local exchange carrier, or CLEC, which operates in the state of Washington. It provides retail services (as relevant for this proceeding) by obtaining the facilities to do so from Qwest as "unbundled network elements," or UNEs. A package of network elements necessary to provide local service is called the UNE platform, or UNE-P, called UNE-Star in this order. The arrangement by which Eschelon obtains the facilities necessary to support its local customers in Qwest's territory is an interconnection agreement, a vehicle established in the Telecommunications Act of 1996, or Telecom Act. It purchased UNE-Star at a rate of $24 per month, and an additional set of features, called the AIN, at a rate of $0 .35 per month. They were billed collectively at one rate, $24.35 per month in an agreement whose terms call for expiration on December 31, 2005.

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[2] That rule has been readopted and recodified as WAC 480-07-650 as of January 1, 2004.

10 Parties to interconnection agreements have the right to "opt-in" to terms of the interconnection agreements of others. On September 20, 2002, McLeodUSA and Qwest amended their interconnection agreement to provide UNE-P for $21.16 per month, in an amendment whose terms were to expire on December 31, 2003. McLeod does not purchase AIN facilities under a single rate with its UNE-Star.

11 Eschelon wrote Qwest on October 29, 2002, asking to opt-into the McLeod pricing amendment from the date of its inception to December 31, 2003.[3] Qwest responded on November 8, 2002, that it needed clarification of the request, pointing out that Eschelon received different services, and asking whether Eschelon agreed to other terms and conditions relevant to the McLeod agreement.[4] Eschelon failed to respond for an extended period; the next correspondence in the file is a letter from Qwest to Eschelon dated February 14, 2003, which refers to an Eschelon-Qwest letter of January 16, 2003,[5] and which implies that Eschelon took the November 8 letter to be a rejection.

12 The parties engaged in other correspondence. In particular, on August 14, 2003, Eschelon wrote Qwest, stating its intention to file a request for enforcement, saying in part as follows:

> "Eschelon would concede that if the McLeodUSA rate were imported . . . the [resulting] rate would be $.35 higher . . ."

13 Eschelon filed in Washington for enforcement of its agreement on September 12, 2003. The parties on September 27, 2003 agreed to an amendment of the Eschelon-Qwest interconnection agreement incorporating the McLeod pricing terms, which this Commission approved on November 13, 2003. The agreement

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[3] It asked, to add the McLeod rates, "as noted," to the Eschelon agreement. Doing so would not make sense in the Eschelon agreement.

[4] Qwest noted that the services differed between the two agreements, and said that it was unable to determine exactly what Eschelon wanted.

provides for the Eschelon agreement to incorporate the McLeod pricing for the UNE-Star, but with AIN features added at the AIN price that was incorporated in the prior the Eschelon agreement. The agreement provides for the reduced UNE-P pricing to terminate on the McLeod termination date, December 31, 2003.

14 Eschelon contends that Qwest wrongly denied Eschelon the opt-in rights provided by law, and seeks a refund of the rate it was allegedly overcharged, beginning as of the inception of the McLeod agreement on September 20, 2002. Qwest disputes the claim, arguing that Eschelon is entitled to the revised rate only from the date on which the Commission approved the Eschelon-Qwest amendment incorporating the rate, November 13, 2003, and that the Commission's authority to order refunds of unlawfully collected rates is limited so as to bar much or all of Eschelon's claim.

15 **Recommended decision.** The presiding Administrative Law Judge entered an order on January 9, 2004, recommending that the Commission did have authority to order a refund of overcollections, and that the refund should begin as of the date of the McLeod amendment, September 20, 2002. Qwest filed arguments in opposition to the order, urging that the Commission had no authority to order refunds as of that date and that, in any event, the rate could not become effective prior to the date of the Commission approval, November 13, 2003. Eschelon responded, supporting the recommended decision.

16 **Applicable law.** The rights, obligations, and remedies of parties to interconnection agreements are governed by the terms of the Telecom Act, by various rules and decisions of the Federal Communications Commission or FCC, and by rules and decisions of this Commission and statutes of the State of Washington.

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[5] This letter is not in the record.

17 Eschelon filed its petition for enforcement under section 252(i)[6] of the Telecommunications Act of 1996 (the Act)[7] and WAC 480-09-530 (now WAC 480-07-650).[8] The Act was intended to encourage competition in the 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.

18 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.[9] 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;[10] and 3) the CLEC also takes any terms and conditions shown by the ILEC to be "legitimately related"[11] to the opt-in selection. State commissions have authority to enforce interconnection agreements, including pick and choose provisions of those agreements.[12] This Commission has specific statutory authority to take actions, conduct proceedings, and enter orders as permitted by or contemplated in the Telecom Act,[13] including the authority to enforce the

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[6] *Interpretive and Policy Statement on Section 252(i) "pick and choose," Docket No. UT-990*355 *(Interpretive and Policy Statement),* November 30, 1999, ¶ 29: 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).
[7] *Pub.L.No. 104-104, 110 Stat. 56, Title 47 United States Code.*
[8] The Commission's revised procedural rules became effective January 1, 2004.
[9] *47 USC 252(i).*
[10] *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.
[11] *AT&T, et al v. Iowa Utilities Board, et al, 525 U.S. 366, 396, 119 S.Ct 721 (1999).*
[12] *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.*
[13] *RCW 80.04.610(1).*

terms of interconnection agreements. ILECs must provide facilities and equipment to CLECs without undue or unreasonable discrimination.[14]

19 WAC 480-09-530 establishes an expedited process whereby a telecommunications company may seek enforcement of its interconnection agreement with another carrier. WAC 480-09-530 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.[15] 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.[16]

20 The parties agree that the only issues before the Commission are whether the Commission has authority to order the refund of monies that Qwest collected in excess of the rate to which Eschelon was entitled after the opt-in date and, if so, what that date was. Qwest's initial implicit contention, that Eschelon must agree to conditions such as volume in order to qualify for the McLeod rate, is not argued. At oral argument, Eschelon abandoned its request for refunds for periods prior to the date of its first opt-in request, and it was clear that Eschelon was asking to opt-in only for as long as McLeod enjoyed the rate—that is, until December 31, 2003.

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[14] *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.*

[15] Attached to the written filings of the parties are numerous exhibits related to the dispute.

[16] *Qwest reply brief at 2*.

21 The Commission's interpretive and policy statement on interconnection agreements clearly states the Commission's view that—without some reason to find to the contrary—an opt-in cannot exceed the life of the provision that is opted in. Insofar as we are aware, the Commission has not varied from that approach.[17]

22 Qwest argues that neither RCW 80.04.220 nor RCW 80.04.240 will authorize a refund in this docket prior to six months before the date of the Commission approval of the Eschelon opt-in agreement with Qwest.

23 The Commission disagrees. RCW 80.04.240, which addresses judicial enforcement, provides for a 6-month limitation on refunds when the issue is the "reasonableness" of a rate (RCW 80.04.220). RCW 80.04.240 provides for a two-year limitation on refunds when a company charges more than the lawful rate. Here, if the statute applies, the issue is not whether the rate charged was reasonable, but whether it was lawful. Under federal law, an interconnecting carrier is entitled as a matter of law to opt in to another interconnection agreement, so the issue is not whether Qwest charged an unreasonable rate, but an unlawful rate, and the two-year, not the six-month limitation, would apply.

24 Moreover, this action is undertaken pursuant to RCW 80.36.610, which specifically empowers the Commission to "take actions, conduct proceedings, and enter orders as permitted or contemplated for a state commission under the federal telecommunications act, . . ." The Commission therefore has the power to resolve interconnection disputes under the Act. That power would be

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[17] *In the Matter of the Implementation of Section 252(i) of the Telecommunications Act of 1996, Interpretive and Policy Statement (First Revision), Docket No. UT-990355*. Principle 8 states, "An interconnection agreement or arrangement made available pursuant to Section 252(i) must be made available for the specific time period during which it is provided under the interconnection agreement from which it was selected. For example, if the interconnection arrangement was included in an agreement that expired on December 31, 2000, it must be made available to other carriers only until December 31, 2000."

incomplete if a carrier could extend the time to resolve an interconnection dispute and then enjoy with impurity the benefit of any unlawful rates it collected during the alleged dispute.

25 The Commission therefore has the authority to order the refund of excess amounts collected while a carrier improperly refuses to allow an opt-in to an agreement with a lower rate.

26 As of what date, then, must the Commission calculate Eschelon's entitlement to a refund? If we calculate the date from the time the Commission "approves" an opt-in agreement, the process delay benefits the incumbent carrier—and the Commission has no authority to reject opt-in agreements that are properly requested. The better view is that they become effective as a matter of law when a proper opt-in request is presented to the incumbent carrier.

27 Eschelon argues that its opt-in request was proper as of the date it presented the request to Qwest. Qwest responds that the request was unclear: not only were the dates in question, but the nature of services provided in the UNE platform package was different for the two CLECs, and the Eschelon rate included AIN services that McLeod did not order or receive. The evidence supports Qwest's contentions. Even at oral argument on review, the parties made differing contentions about the nature of the services that McLeod and Eschelon received under their interconnection agreements, and both parties agree that the Eschelon rate included features that McLeod did not receive. It was simply not a ministerial task to implement Eschelon's request, and Qwest's request for clarification was reasonable.

28 According to the information of record, the first communication from Eschelon to Qwest that clearly specified what Eschelon wanted to opt-into is the letter of August 14 in which Eschelon notified Qwest of its intention to pursue enforcement of its interconnection agreement. That was the first time that

Eschelon advised Qwest of exactly what opt-in provisions Eschelon wanted, and to which it was entitled.

29 Negotiations of parties must be straightforward and in good faith. Here, Qwest's response was prompt and its concerns were well-founded and expressed in a straightforward way. We see no excessive delay.

30 Our result differs from that of the recommended order in two principal regards. First, Eschelon conceded the issue of refunds prior to the initial presentation of the opt-in request.[18] Second, the Commission finds that the initial opt-in request was not sufficient, and for the reasons noted above, begins the timing of refunds with the date of presentation of a clear (sufficient) opt-in request.

III. FINDINGS OF FACT

31 (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.

32 (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.

33 (3) Qwest is an incumbent local exchange carrier, as defined in the Act, furnishing basic local exchange services in the state of Washington.

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[18] The Commission will not approve an opt-in agreement to be effective prior to the date of the presentation of a sufficient opt-in request without a strong showing that doing so is lawful and that it is proper under the circumstances.

34 (4) Eschelon is a competitive local exchange carrier, as defined in the Act, providing basic local exchange service in the state of Washington.

35 (5) McLeodUSA is a competitive local exchange carrier, as defined in the Act, providing basic local exchange service in the state of Washington.

36 (6) Qwest and Eschelon have negotiated interconnection agreements that have been approved by the Commission in Docket No. UT-980385.

37 (7) Qwest and McLeod have negotiated interconnection agreements that have been approved by the Commission.

38 (8) Eschelon 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.

39 (9) Eschelon presented a sufficient opt-in request on August 14, 2003, specifying clearly the terms of the McLeod agreement that Eschelon wanted to opt-into and the consequence to the Eschelon agreement.

IV. CONCLUSIONS OF LAW

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

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) The Commission is authorized in RCW 80.04.610 to "take actions, conduct proceedings, and enter orders as permitted or contemplated for a state commission under the federal telecommunications act, . . ." Under this provision of law, the Commission has the authority to resolve all of the issues in this dispute.

43 (4) 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.

44 (5) The Eschelon opt-in request is effective, and the Eschelon agreement contains the requested McLeod rate provision, from the date Eschelon presented a sufficient statement of its request to Qwest until the date the provision terminated in the McLeod agreement—from August 14, 2003, until December 31, 2003.

45 (6) Qwest must make available to Eschelon the McLeod amendment price for UNE-Star from the date of Eschelon's sufficient request until the termination of the McLeod amendment: August 14, 2003, to December 31, 2003.

46 (7) Qwest must refund to Eschelon any amount it collected from Eschelon for UNE-Star in excess of the $21.16 rate from August 14, 2003, to December 31, 2003.

V. ORDER

The Commission Orders That

47 (1) Eschelon is entitled to opt-in to the $21.16 McLeod UNE-Star pricing amendment from August 14, 2003, to December 31, 2003.

48 (2) Qwest must refund any amounts it charged Eschelon for UNE-Star in excess of the $21.16 rate during the period specified above. The refund must be made within 30 days of the date of the Commission's final order.

DATED at Olympia, Washington, and effective this 6th day of February, 2004.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MARILYN SHOWALTER, Chairwoman

RICHARD HEMSTAD, Commissioner

PATRICK J. OSHIE, Commissioner

NOTICE TO PARTIES: This is a final order of the Commission. In addition to judicial review, administrative relief may be available through a petition for reconsideration, filed within 10 days of the service of this order pursuant to RCW 34.05.470 and WAC 480-07-850, or a petition for rehearing pursuant to RCW 80.04.200 or RCW 81.04.200 and WAC 480-07-870.