Decision No. R04-1414

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 03F-405T

ESCHELON TELECOM OF COLORADO, INC.,

COMPLAINANT,

V.

QWEST CORPORATION,

RESPONDENT.

RECOMMENDED DECISION OF ADMINISTRATIVE LAW JUDGE MANA L. JENNINGS-FADER FINDING FOR COMPLAINANT, ORDERING REFUND, AND CLOSING DOCKET

Mailed Date: December 1, 2004

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I. STATEMENT

1. On September 16, 2003, Eschelon Telecom of Colorado, Inc. (Eschelon or Complainant), commenced this proceeding when it filed an Accelerated Formal Complaint against Qwest Corporation (Complaint). The Complaint alleges, as relevant here, that Qwest Corporation (Qwest or Respondent) refused to honor Eschelon's request to opt into a portion of an Interconnection Agreement (ICA) between Qwest and a Competitive Local Exchange Carrier (CLEC) and refused to provide Eschelon the same platform at the same rate provided to that CLEC. Eschelon seeks a refund of overpayments allegedly made to Qwest.

2. On September 17, 2003, the Commission issued to Qwest an Order to Satisfy or Answer the Accelerated Complaint. On that same date, the Commission issued an Order Setting Hearing and Notice of Hearing which set the hearing in this matter for October 28, 2003. By Decision No. R03-1112-I, the undersigned Administrative Law Judge (ALJ) vacated that hearing date after granting the motion of Complainant and Respondent, the only parties in this proceeding, for submission of cross-motions for summary decision.

3. On November 7, 2003, Eschelon submitted a motion for summary decision. On November 21, 2003, Qwest filed a response in opposition to that motion. On December 3, 2003, Eschelon filed a reply in support of its motion.

4. On November 7, 2003, Qwest submitted a motion for summary judgment. On November 21, 2003, Eschelon filed a response in opposition to that motion. On December 3, 2003, Qwest filed a reply in support of its motion.

5. On January 7, 2004, for the reasons stated in the Order, the ALJ denied the cross-motions for summary decision; found that the Complaint was no longer accelerated; and ordered Qwest to file its answer to the Complaint. *See* Decision No. R04-0021-I.

6. On January 20, 2004, Qwest filed its Answer to the Complaint. The Answer put this case at issue.

7. On January 21, 2004, the ALJ held a prehearing conference in this matter. By Decision No. R04-0083-I the ALJ established hearing dates of June 8 and 9, 2004, and a procedural schedule.

8. On March 23, 2004, Complainant filed a Motion to Compel Complete Responses to Second Set of Data Requests, Numbers 1, 2, 3, 5, 8, 9, 10, 14, and 15. Following a hearing on the motion, the ALJ granted that motion in part. *See* Decision No. R04-0377-I.

9. On April 16, 2004, Eschelon filed the Direct Testimony of Dennis D. Ahlers (Ahlers Direct). Fourteen exhibits accompanied that testimony. On that date Eschelon also filed its List of Potential Hearing Exhibits with Attached Copies (Eschelon Exhibit List).

10. On April 16, 2004, Qwest filed the Direct Testimony of Larry T. Christensen (Christensen Direct). Thirteen exhibits accompanied that testimony.

11. On June 1, 2004, Eschelon filed the Answer Testimony of Dennis D. Ahlers. One exhibit accompanied that testimony; this exhibit was the same as Exhibit DDA-14 filed with the Ahlers Direct.

12. On June 1, 2004, Qwest filed the Answer Testimony of Larry T. Christensen (Christensen Answer). One exhibit accompanied that testimony.

13. By Decision No. R04-0595-I, the ALJ granted the oral motion of Eschelon and Qwest to vacate the hearing scheduled for June 8 and 9, 2004, and to submit this case on a stipulated record.

14. On June 8, 2004, Eschelon and Qwest filed a Stipulation Regarding Admission of Pre-Filed Testimony and Exhibits and Waiver of Cross-Examination. As pertinent here, the parties agreed that the following documents, as filed, constitute the record in this proceeding and should be admitted without objection and without cross-examination:

> all exhibits and or [sic] attachments to any and all motions and testimony that have been filed in this docket, in addition to the exhibits identified in Eschelon's List of Exhibits filed April 16, 2004, … the testimony and answer testimony of the witnesses filed by each of the Parties on April 16, 2004 and June 1, respectively, … including any attachments thereto, in addition to all discovery responses of the Parties[.]

15. The record in this proceeding consists of the following documents:

a. the exhibits and/or attachments to the motions filed in this docket;

b. the exhibits identified in the Eschelon Exhibit List;

c. all direct testimony, including all exhibits, filed on April 16, 2004;

d. all answer testimony, including all exhibits, filed on June 1, 2004; and

e. the discovery responses, including attachments, of Eschelon and of Qwest.[1]

16. On July 2, 2004, Eschelon filed its Statement of Position in this matter (Eschelon Statement of Position). Eight exhibits accompanied that filing. On July 16, 2004, Qwest filed its Reply to Eschelon's Statement of Position.

17. On July 2, 2004, Qwest filed its Statement of Position in this matter (Qwest Statement of Position). In support of that filing Qwest submitted the 14 exhibits appended to the Christensen Direct. On July 16, 2004, Eschelon filed its Response to Qwest's Statement of Position. One attachment accompanied that filing.

[1] Although they agreed that all discovery responses would be part of the evidentiary record, Eschelon and Qwest did not file all discovery responses. As a result, the discovery responses admitted into evidence are only those filed in this proceeding by Eschelon or by Qwest. To be part of the evidentiary record in this proceeding, a discovery response must have been filed with the Commission on or before July 16, 2004.

18. The matter was taken under advisement on the written record.

19. Pursuant to § 40-6-109, C.R.S., the record and exhibits of the proceeding together with a written recommended decision are transmitted to the Commission.

II. FINDINGS OF FACT

20. Respondent does not challenge the Commission's jurisdiction over the subject matter of this proceeding or over Respondent's person.

21. Except as noted, there is no dispute with respect to the facts as found here.

22. Complainant is a CLEC which has authority from this Commission to provide local exchange telecommunications service in the Colorado service territory of Qwest.

23. Respondent is an Incumbent Local Exchange Carrier (ILEC) which is authorized to provide local exchange telecommunications service in Colorado.

24. Since March 9, 2000, Qwest and Eschelon (then known as Electro-Tel, Inc.) have had a Commission-approved Interconnection Agreement (Eschelon ICA). Decision No. C00-0245. As relevant to this proceeding, ¶ 24.1 of the Eschelon ICA contains the following dispute resolution provision:

> The Parties recognize and agree that the Commission has continuing jurisdiction to implement and enforce all terms and conditions of this Agreement. Accordingly, the Parties agree that any dispute arising out of or relating to this Agreement that the Parties themselves cannot resolve, [sic] may be submitted to the Commission for resolution.

25. Since February 16, 2001, Qwest and McLeodUSA Telecommunications Services, Inc. (McLeodUSA), have had a Commission-approved ICA (McLeodUSA ICA). Decision No. C01-0156.

26. On or about October 26, 2000, Qwest and McLeodUSA entered into Amendment 8 to the McLeodUSA ICA (McLeodUSA UNE-P Agreement).[2] By this amendment Qwest agreed to provide, and McLeodUSA agreed to purchase, an Unbundled Network Element Platform (UNE-P) product in accordance with the terms, conditions, and rates specified in Attachment 3.2 to that amendment. This is the first reference to UNE-P in the McLeodUSA ICA.

27. As relevant to this proceeding, in the McLeodUSA UNE-P Agreement, McLeodUSA agreed to the following conditions:

> a. Unless terminated early, the McLeodUSA UNE-P Agreement would be in effect through December 31, 2003.
>
> b. McLeodUSA would maintain no fewer than 275,000 local exchange lines purchased from Qwest throughout the Qwest 14-state region and, subject to a specified condition, would maintain on Qwest local exchange lines at least 70% (in terms of physical non-DS1/DS3 facilities) of McLeodUSA's local exchange service in the Qwest 14-state region. In addition, beginning in 2001 McLeodUSA would maintain at least 1,000 lines in each state in the Qwest 14-state region and no fewer than 125,000 lines in Iowa.
>
> c. McLeodUSA could purchase from Qwest, at full retail rates, Digital Subscriber Line and voice mail for resale.

28. Attachment 3.2 stated the terms, conditions, and rates for the new UNE-P platform purchased by McLeodUSA. The offering "only appl[ied] to additions to existing CENTREX common blocks established prior to October 1, 2000, and only appl[ied] to business local exchange customers served through this unbundled network element platform where facilities exist." *Id.* at ¶ III.F. Attachment 3.2 provided for a recurring rate of $34 per month per line in Colorado and an additional charge of $0.295 for each 50-minute increment > 525 minutes

[2] Complaint at Exhibit 4; Ahlers Direct at Exhibit DDA-1; Christensen Direct at Exhibit Q-1. This was the first amendment to the McLeodUSA ICA in Colorado. Decision No. C01-0406 at ¶ I.1.

of use per month per line in Colorado.[3] Attachment 3.2 also listed the features included in flat-rated business and those included in existing Centrex common blocks. With respect to other features and functions, ¶ III.G of Attachment 3.2 stated:

> Any features or functions not explicitly provided for in this Amendment shall be provided only for a charge (both recurring and nonrecurring) based on Qwest's rates to provide such service in accordance with the terms and conditions of the appropriate tariff or Agreement for the applicable jurisdiction.

29. The Commission approved the McLeodUSA UNE-P Agreement on April 23, 2001. Decision No. C01-0406.

30. On or about November 15, 2000, Qwest and Eschelon entered into the sixth Amendment to the Eschelon ICA (Eschelon UNE-P Agreement).[4] By this amendment Qwest agreed to provide, and Eschelon to purchase, a UNE-P platform in accordance with the terms, conditions, and rates specified in Attachment 3.2 to the Eschelon UNE-P Agreement. This is the first reference to UNE-P in the Eschelon ICA.

31. As relevant here, in the Eschelon UNE-P Agreement, Eschelon agreed to the following conditions:

> a. Unless terminated early, the Eschelon UNE-P Agreement would be in effect through December 31, 2005.
>
> b. Eschelon would maintain no fewer than 50,000 business access lines (*i.e.*, local exchange service lines) purchased from Qwest throughout the Qwest 14-state region and, subject to a specified condition, would maintain on Qwest local exchange lines at least 80% (in terms of physical facilities) of Eschelon's local exchange service in the Qwest region. In addition, Eschelon agreed to maintain, by the end of 2001, at least 1,000 business access lines in at least 8 of 11 specified markets and agreed to meet or to exceed a stated number of

[3] This additional charge is the same in the Eschelon UNE-P Agreement and the McLeodUSA UNE-P Agreement, remained constant throughout the period in question, and is not at issue in this proceeding. Thus, although it is present in both Agreements and the subsequent Amendments, this rate is not discussed further.

[4] Christensen Direct at Exhibit Q-2.

business access lines purchased from Qwest in each year from 2000 through and including the end of calendar year 2005.

c. Eschelon could purchase from Qwest, at full retail rates, Digital Subscriber Line and voice mail for resale.

32. Attachment 3.2 to the Eschelon UNE-P Agreement stated the terms, conditions, and rates for the Eschelon UNE-P platform. The offering "only appl[ied] to additions to existing CENTREX common blocks established prior to October 1, 2000, and only appl[ied] to business local exchange customers served through the unbundled network element platform where facilities exist." *Id.* at ¶ III.F. Attachment 3.2 provided for a recurring rate of $34 per month per line in Colorado.[5] That attachment also listed the features included in flat-rated business and those included in existing Centrex common blocks.[6] With respect to other features and functions, ¶ III.G of Attachment 3.2 to the Eschelon UNE-P Agreement stated:

> Any features or functions not explicitly provided for in this Amendment shall be provided only for a charge (both recurring and nonrecurring) based on Qwest's rates to provide such service in accordance with the terms and conditions of the appropriate tariff or Agreement for the applicable jurisdiction.

33. The Commission approved the Eschelon UNE-P Agreement on January 4, 2001. Decision No. C01-0006.

34. The two agreements contained different terms and conditions with respect to: (a) the number of local access lines to be purchased from Qwest; (b) the percentage of local exchange service which had to be maintained on Qwest local exchange lines;[7] (c) the markets in which each was required to operate; (d) the Advanced Intelligent Network (AIN) features

[5] *See* note 3, *supra*.

[6] This list appears to be identical to the list of features in Attachment A to the McLeodUSA UNE-P Agreement. However, Qwest provided McLeodUSA with Advanced Intelligent Network features under the McLeodUSA Agreement. *See* Christensen Answer at Exhibit Q-14 at 2. These features were not provided to Eschelon under the Eschelon UNE-P Agreement.

[7] Together, these first two terms and conditions are sometimes referred to as the volume commitments.

included in the platform recurring rate of $34;[8] and (e) the duration of the agreement. The two agreements contained the same terms and conditions with respect to: (a) the Unbundled Network Elements (UNEs) which constituted the UNE-P product; (b) the majority of the features to be provided at the flat recurring rate for the product; (c) the ability to purchase (at full retail rates) Digital Subscriber Lines and voice mail from Qwest for resale; (d) the exchange of traffic on a "bill and keep" basis; and (e) the ability to purchase (at tariff rates) additional features or functions from Qwest.

35. Notwithstanding the differences in the terms and conditions, the recurring rate for the UNE-P product purchased by Eschelon under the Eschelon UNE-P Agreement and the recurring rate for the UNE-P product purchased by McLeodUSA under the McLeodUSA UNE-P Agreement were identical.

36. On July 31, 2001, Qwest and Eschelon entered into an amendment to change "the recurring charges provided in connection with the Unbundled Network Element Platform ('UNE-P') and the features available on a flat-rated basis with UNE-P." Eschelon 2001 UNE-P Amendment[9] at ¶ 1. Generally speaking, for an increase in the flat rate, this agreement added features and directory listing options to the UNE-P product contained in the Eschelon UNE-P Agreement. Specifically with respect to the recurring rates for the platform, the Eschelon 2001 UNE-P Amendment deleted the recurring rate of $34 per month per line in Colorado and replaced it with a recurring rate of $34.35 per month per line in Colorado. With respect to features, the Eschelon 2001 UNE-P Amendment deleted the list of features contained in Attachment 3.2 to the Eschelon UNE-P Agreement and replaced it with the list contained in

[8] Christensen Answer at Exhibit Q-14 at 2.

[9] Complaint at Exhibit 5; Ahlers Direct at Exhibit DDA-4; Christensen Direct at Exhibit Q-4.

Exhibit A to the Amended Attachment 3.2. This list contains more features than those contained in Attachment 3.2 to the Eschelon UNE-P Agreement and contains more features than those contained in Attachment 3.2 to the McLeodUSA UNE-P Agreement. The Eschelon 2001 UNE-P Amendment provides, at ¶ 2.2, that "Eschelon may purchase Advanced Intelligent Network ('AIN') features to be placed on UNE-P at retail rates not to exceed commission approved rates, including recurring and non-recurring charges, if any."[10]

37. The Eschelon 2001 UNE-P Amendment allowed Eschelon to purchase at retail rates specified switched-based AIN features with UNE-P,[11] to obtain other switch-based features with UNE-P, and to have additional directory listing services with UNE-P.[12] The platform recurring rate per line per month increased by $0.35 to account for the additional directory listing services and features. The additional $0.35 per line per month, which was calculated based on a weighted average of retail rates for the newly-added features and listings and on Eschelon's specific market penetration, applied to all Eschelon lines irrespective of whether a specific line actually was using the features and listing services.[13]

38. As relevant here, the Eschelon UNE-P Agreement was amended once more in July 2001.[14] That amendment added 1FB with Custom Call Management System (CCMS) as an option available under the UNE-P product purchased by Eschelon, and it also added some non-

[10] This provision implemented the term and condition found in the Eschelon UNE-P Agreement which allowed Eschelon to purchase features and functions at tariff rates. Eschelon UNE-P Agreement at ¶ III.G of Attachment 3.2. Identical language is in the McLeodUSA UNE-P Agreement at ¶ III.G of Attachment 3.2.

[11] Thus, Eschelon was able to offer these additional switching features to its end users. If an end-user requested any of the additional features, Eschelon would pay Qwest's retail rates for the requested features.

[12] Affidavit of Larry Christensen in support of Qwest Motion for Summary Judgment (Christensen Aff.) at ¶ 4; Ahlers Direct at 11:19-12:7.

[13] Christensen Aff. at ¶ 4; Christensen Direct at 10:5.

[14] Christensen Aff. at ¶ 4; Ahlers Direct at 12:13-15.

recurring charges. Neither of these changes resulted in an increase in the recurring rate established in Amended Attachment 3.2 appended to the Eschelon 2001 UNE-P Amendment.[15]

39. The Commission approved both the Eschelon 2001 UNE-P Amendment and the second July amendment in November 2001. Decision No. C01-1221.

40. On September 19, 2002, Qwest and McLeodUSA entered into an amendment to the McLeodUSA UNE-P Agreement (McLeodUSA 2002 UNE-P Amendment).[16] This amendment provided that: (a) the McLeodUSA 2002 UNE-P Amendment would terminate on December 31, 2003 (the same termination date as the McLeodUSA UNE-P Agreement); (b) the price established in the McLeodUSA UNE-P Agreement (*i.e.*, recurring rate for the product of $34 per line per month) would apply for a commercially reasonable period after December 31, 2003 in the event McLeodUSA had any open circuits with Qwest after that date; and (c) from September 20, 2002 through and including December 31, 2003, the recurring charge for the UNE-P product purchased by McLeodUSA would be $27.05 per month per line in Colorado. This reduction in the recurring charge was the only change made in the rates, terms, and conditions for the UNE-P product purchased by McLeodUSA under the McLeodUSA UNE-P Agreement.[17]

[15] Christensen Direct at Exhibit Q-5 (1FB POTS with CCMS feature set available at $34.35, the same price as 1FB POTS without the CCMS feature set).

[16] Complaint at Exhibit 6; Ahlers Direct at Exhibit DDA-6; Christensen Direct at Exhibit Q-3.

[17] The McLeodUSA 2002 UNE-P Amendment specifically states: "Apart from the foregoing, all other terms and condition of the [McLeodUSA ICA, including the UNE-P Agreement], as amended, including without limitation, the term thereof, shall remain unchanged and in full force and effect." Complaint at Exhibit 6 at 2; Ahlers Direct at Exhibit DDA-6 at 2; Christensen Direct at Exhibit Q-3 at 2.

41. The Commission approved the McLeodUSA 2002 UNE-P Amendment on November 4, 2002.[18] Decision No. C02-1240.

42. On October 29, 2002, Eschelon sent to Qwest a letter which states on the subject line "Re: Opt-In Request" (Eschelon October letter).[19] The letter (at 1-2) contains the following request, made pursuant to § 252(i) of the federal Telecommunications Act of 1996 (the Act) (emphasis supplied):

> On or about September 19 or 20, 2002, Qwest filed, with the state commissions, an Amendment to its Interconnection Agreement with McLeod, for approval under Section 252(e) [of the Act]. Page 2 of that Amendment (attached) replaced a portion of Attachment 3.2 of the McLeod/Qwest Amendment dated October 26, 2000 [*i.e.*, the McLeodUSA UNE-P Agreement]. *Eschelon 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.* (See attached.)
>
> Eschelon requests that page 9 of Attachment 3.2 of Eschelon's Interconnection Agreement Amendment terms with Qwest, dated November 15, 2000 [*i.e.*, Eschelon UNE-P Agreement], be amended to *add the rates in the attached page from the McLeod Amendment to the end of the "Platform recurring rates" column*, under the heading "Prices for Offering," and to *indicate the specified time period within the term of the Eschelon Amendment that the McLeod Amendment rates apply* (*e.g.*, effective as of September 20, 2002), *as noted on page 2 of the McLeod Amendment*. Eschelon's request applies to … Colorado[.]

43. Attached to the Eschelon October letter was page 2 of the McLeodUSA 2002 UNE-P Amendment. That page states, as relevant here:

> Platform recurring rates, effective on September 20, 2002 and ending December 31, 2003:
>
> * * *

[18] This is the earliest date on which a request to opt into the reduced payment provision, including all legitimately related terms and conditions, could be effective. *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 Interconnection Between Local Exchange Service Providers and Commercial Radio Service Providers*, First Report and Order, CC Docket Nos. 96-98 & 95-185, FCC 96-325 (rel. Aug. 8, 1996) (*First Report and Order*), at ¶¶ 1315-16.

[19] Complaint at Exhibit 7; Ahlers Direct at Exhibit DDA-7; Christensen Direct at Exhibit Q-7.

> CO $27.05
>
> * * *
>
> Apart from the foregoing, all other terms and condition of the [McLeodUSA ICA, including the UNE-P Agreement], as amended, including without limitation, the term thereof, shall remain unchanged and in full force and effect.

44. The Eschelon October letter requested only the stated amendment. According to Mr. Ahlers, at the time it submitted its request, Eschelon understood that, once the requested opt-in was in place, Eschelon "would receive the same UNE-P product it was already receiving at the McLeod rate, for the same time period as McLeod. This opt-in would not change [Eschelon's] UNE-P amendment in any other respects, meaning that the amendments would remain in place, including the additional $.35 per month and the non-recurring rates."[20]

45. Qwest responded to the Eschelon October letter on November 8, 2002 (Qwest November letter).[21] The letter, at 1, describes the request that "Eschelon's existing interconnection agreement with Qwest be amended to add the rates included in" the McLeodUSA 2002 UNE-P Amendment and recites the legal requirement that a requesting carrier must accept the terms and conditions legitimately related to the provision into which the requesting carrier seeks to opt. The Qwest November letter, at 1-2, then states that the rates in the McLeodUSA 2002 UNE-P Amendment "apply to the service offered pursuant to that agreement, not to the service offered in another agreement." Finally, Qwest states that it is unclear about the Eschelon request and sets out its understanding of what must be done. It begins by noting

> that the features and functions of the service that is the subject of the existing Qwest-Eschelon interconnection agreement differ in certain respects from the service that is the subject of Qwest's agreement with

[20] Ahlers Direct at 14:7-11.

[21] Complaint at Exhibit 8; Ahlers Direct at Exhibit DDA-8; Christensen Direct at Exhibit Q-8.

> McLeod. For example, under its current agreement, Eschelon is provided CLASS features and additional types of directory listings. In addition, as noted above, the express terms of Section 252(i) and the FCC Rule 51.809(a) condition Eschelon's right to receive the rates in the McLeod agreement on Eschelon's agreement to the same terms and conditions [as those contained in the McLeodUSA UNE-P Agreement]. This would include, for example, the volume commitments set forth in section 2.3 of the Qwest-McLeod interconnection agreement and its December 31, 2003 termination date.
>
> [Qwest is] unable to ascertain from your letter (a) whether Eschelon understands that the service it would be receiving if it chose to opt-in to the McLeod agreement would differ from the service it is receiving today, and (b) whether Eschelon would agree to the same terms and conditions to which McLeod has agreed. If so, please contact Larry Christensen, at [telephone number], to initiate the necessary arrangements, including appropriate contractual amendments. Qwest will act expeditiously to accommodate any such request.

46. Eschelon took the Qwest November letter as a rejection of the Eschelon opt-in request.[22]

47. November 27, 2002 was the 20th business day following Qwest's receipt of the Eschelon October letter.

48. Eschelon took no action at that time concerning either the possible invitation to Eschelon to contact Qwest for further discussion (one interpretation of the Qwest November letter) or the perceived rejection of the opt-in request which allowed Eschelon to commence an action to force Qwest to permit the requested opt-in (another interpretation of the Qwest November letter). In addition, Qwest took no action at that time to follow-up with Eschelon concerning the opt-in request.

49. By letter dated January 16, 2003, Eschelon wrote to Qwest about the Qwest November letter (Eschelon January letter).[23] This January correspondence was prompted by a

[22] Ahlers Direct at 19:10-14.

[23] Ahlers Direct at Exhibit DDA-10; Christensen Direct at Exhibit Q-9.

statement in a letter, dated December 16, 2002 and submitted by Qwest to the Arizona Corporation Commission, in which Qwest stated that it had not denied the Eschelon opt-in request and was awaiting further contact from Eschelon.[24]

50. In its January letter, at 1, Eschelon first stated its opt-in request ("opt-in to page 2 of the Amendment to Attachment 3.2 of the Qwest/McLeod Amendment, which consisted of platform recurring rates that are effective from September 20, 2002, until December 31, 2003") and its view that "Qwest would not agree to Eschelon's request unless Eschelon agreed to adopt all of the terms and conditions in the McLeod agreement[,]" which Eschelon took as a rejection of the request. Eschelon then made, at 1-2, three specific requests for information:

> a. "so that Eschelon can understand its options, please explain in detail how the service that Eschelon would be receiving if it chose to opt-in to the McLeod Amendment as Qwest would allow it, would differ from the service it is receiving today. In your response, please reference the section of the McLeod or Eschelon agreement/amendment to which you are referring and please provide a copy of the applicable McLeod agreement so that we may compare the documents";
>
> b. "[a]lthough you don't explicitly state it, [Eschelon assumes] from this statement that McLeod is not provided CLASS features under its agreement with Qwest. Is that correct? Please provide a copy of the McLeod agreement and a reference to the portion that addresses this issue. Also specifically delineate those 'additional types of directory listings' that would not be available under the McLeod contract"; and
>
> c. "[t]o the extent not addressed above, please specify which terms and conditions in the McLeod agreement would apply to Eschelon should it opt-in to the McLeod Amendment in question."

51. On February 10, 2003, Eschelon sent a letter to the Qwest Executive Vice President, Wholesale Markets (Eschelon February letter).[25] This letter outlines the substance of the opt-in issue, states the position of each party, and asks for a pricing change retroactive to

[24] Ahlers Direct at Exhibit DDA-9.

[25] Christensen Direct at Exhibit Q-11. This exhibit contains only the portions of this letter which are relevant to this matter.

September 2002, and a credit for the monies allegedly overpaid by Eschelon. The letter states, at 5, that Eschelon wants Qwest to decrease the Eschelon UNE-P recurring rates by the same amount and for the same time period as the McLeodUSA UNE-P recurring rates were reduced.

52. On February 14, 2003, Qwest responded to the Eschelon January letter (Qwest February letter).[26] Qwest restated its position that "Qwest will allow Eschelon to obtain the [requested McLeod UNE-P recurring rates], but to obtain the rates, Eschelon must also opt-in to the same service (and associated terms and conditions) to which those McLeod rates apply." Qwest also offered to send to Eschelon (but did not include) a copy of the McLeodUSA Amendment. Although the Qwest February letter states that it "is in response to your January 16, 2003 letter," Qwest did not provide any of the requested information and did not provide the requested documents.

53. On April 1, 2003, Qwest's Executive Vice President, Wholesale Markets, responded to the Eschelon February letter (Qwest April letter).[27] After reciting the exchange of correspondence through the Qwest February letter, the Qwest April letter states (at 7):

> There has been no further contact from Eschelon on this subject until your [February 10th] letter. Qwest remains willing to meet to further discuss this item. No pricing changes can take place unless an amendment is executed. A meeting of the subject matter experts can best facilitate a discussion and clarification of these issues. Please contact Larry Christiansen [sic], who can be reached at [telephone number], to initiate this meeting.

54. The Qwest April letter neither responded to the three requests for information nor provided the documents requested in the Eschelon January letter.

[26] Complaint at Exhibit 8; Ahlers Direct at Exhibit DDA-11; Christensen Direct at Exhibit Q-10.

[27] Ahlers Direct at Exhibit DDA-12 (entire letter); Christensen Direct at Exhibit Q-12 (portions only).

55. On April 4, 2003, there was a telephone conference about the Eschelon opt-in request.[28] Mr. Ahlers represented Eschelon, Messrs. Christensen and Corbetta represented Qwest, and the conversation lasted approximately 20 minutes. Until discussions prompted by Eschelon's filing of a complaint against Qwest in Minnesota, this telephone call was the only direct contact concerning the opt-in request other than the exchange of letters detailed above.

56. During the telephone conversation, Eschelon asked whether it remained, and Qwest acknowledged that it did remain, Qwest's position that, as a precondition to Eschelon's opting-in to the McLeodUSA 2002 UNE-P Amendment, Eschelon must agree to the termination date and the volume commitments contained in the McLeodUSA UNE-P Agreement. Qwest expressed a willingness to negotiate the issues and stressed the importance of such a negotiation if Eschelon wished to avail itself of the McLeodUSA UNE-P product recurring rate. Eschelon stated that it would discuss the matter internally and get back to Qwest with a response. Eschelon elected not to contact Qwest following the April telephone discussion.

57. On April 14, 2003, Eschelon filed a formal complaint against Qwest before the Minnesota Public Utilities Commission.

58. On August 14, 2003, Eschelon served on Qwest the notice required by Rule 4 *Code of Colorado Regulations* (CCR) 723-44-7.2.3 and by Rule 4 CCR 723-1-61(k).[29]

59. Eschelon filed its Complaint in Colorado on September 16, 2003.

60. On September 29, 2003, Qwest and Eschelon entered into an amendment to change the monthly recurring rates for the UNE-P product purchased by Eschelon (referred to in

[28] Christensen Aff. at ¶ 6; Affidavit of Dennis D. Ahlers in support of Eschelon Motion for Summary Decision (Ahlers Aff.) at ¶ 4.

[29] Complaint at Exhibit 2; Eschelon Exhibit List at No. 7; Christensen Direct at Exhibit Q-13.

the amendment as UNE-E) (Eschelon 2003 UNE-P Amendment).[30] This amendment provided that in Colorado the recurring rate for UNE-E for platform per month per line would be $27.40 (the $27.05 rate from the McLeodUSA 2002 UNE-P Amendment plus the additional $0.35 from the Eschelon 2001 UNE-P Amendment).[31] This rate was in effect from September 29, 2003 through and including December 31, 2003. Beginning January 1, 2004 and continuing until the December 31, 2005 termination of the Eschelon UNE-P Agreement, the recurring rate for the UNE-P product purchased by Eschelon reverts to $34.35 per month per line; this is the rate found in the Eschelon 2001 UNE-P Amendment.

61. The Eschelon 2003 UNE-P Amendment changed only the rate as stated above. The Eschelon 2003 UNE-P Amendment did not change or affect the volume commitments, the feature sets, the expiration date, the markets in which Eschelon is required to operate, or any other term or condition pertaining to the UNE-P product purchased by Eschelon.[32]

62. Prior to the execution of the Eschelon 2003 UNE-P Amendment, there was simply an exchange of e-mails between Qwest and Eschelon.[33] Insofar as the record shows, this was the extent of the interaction between Qwest and Eschelon regarding the Eschelon 2003 UNE-P Amendment. The parties did not negotiate the terms of the Eschelon 2003 UNE-P Amendment.

63. The Eschelon 2003 UNE-P Amendment was effective upon execution.[34] The Amendment was executed on September 29, 2003, upon the signature of Qwest. Thus,

[30] Eschelon Exhibit List at No. 15; Christensen Direct at Exhibit Q-6.
[31] Christensen Aff. at ¶ 9.
[32] Christensen Aff. at ¶ 9.
[33] Christensen Answer at Exhibit Q-14.
[34] Eschelon Exhibit List at No. 15 at 2; Christensen Direct at Exhibit Q-6 at 2.

September 29, 2003, appears to be the last date on which Eschelon paid the $34.35 recurring rate for the UNE-P product it purchased. Thereafter, it appears that Eschelon paid the $27.05 recurring rate paid by McLeodUSA plus $0.35. September 29, 2003 is the end point for any refund which may be due to Eschelon.

64. The difference between the Eschelon recurring rate of $34.35 for its UNE-P product and the requested recurring rate of $27.40[35] is $6.95 per line per month. This per line per month difference multiplied by 18,509 (*i.e.*, the total Eschelon UNE-P line count from November 1, 2002 through and including September 30, 2003) results in the total refund of $128,638 requested by Eschelon.[36]

65. The UNE-P product purchased by McLeod and the UNE-P product purchased by Eschelon each contain the same UNEs: loops, shared interoffice transport, and switching. The switching included the switching features identified in Attachment 3.2 to the McLeodUSA UNE-P Agreement and to the Eschelon UNE-P Agreement.

66. There are differences in the features and directory listings provided with the UNE-P product purchased by McLeodUSA and with the UNE-P product purchased by Eschelon.[37]

67. Notwithstanding the Eschelon January letter in which Eschelon requested that Qwest provide a list of the terms and conditions of the McLeodUSA UNE-P Agreement which Eschelon would have to accept to obtain the recurring rate paid by McLeodUSA, Qwest did not

[35] This amount is calculated by adding the McLeodUSA rate of $27.05 and the $0.35 which Eschelon agreed to pay for additional features and directory listings.

[36] Ahlers Direct at Exhibit DDA-14. This exhibit shows the Eschelon UNE-P line count for every month in the period November 2002 through and including September 2003.

[37] Christensen Direct at Exhibit Q-5 (comparison of features); Christensen Answer at Exhibit Q-14 at 2 (McLeodUSA obtained AIN features in 2000 as part of the McLeodUSA UNE-P Agreement; Eschelon obtained AIN features in 2001 as part of Eschelon 2001 UNE-P Amendment).

provide that information until it responded to discovery propounded by Eschelon in this case. In April 2004 Qwest stated that Eschelon would have to accept the following terms and conditions from the McLeodUSA UNE-P Agreement: (a) the December 31, 2003 expiration date (*see* McLeodUSA UNE-P 2002 Amendment); (b) the requirement that the parties agree to meet no later than July 1, 2003 to discuss conversion plans (*see* McLeodUSA UNE-P 2002 Amendment); (c) the markets in which it would be required to operate (*see* McLeodUSA UNE-P Agreement at ¶ 2.6); (d) a limited set of switch features and directory listings (*see* McLeodUSA UNE-P Agreement at Attachment 3.2); and (e) the volume commitments (*see* McLeodUSA UNE-P Agreement at ¶ 2.3).[38]

III. APPLICABLE LAW

68. Section 252(i) of the Act, also referred to as the opt-in provision or the most favored nation provision, states:

> A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement under [§ 252] to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

69. At all times relevant to this proceeding, the Federal Communications Commission (FCC) rule implementing this statutory provision was found in 47 *Code of Federal Regulations* (CFR) § 51.809.[39] As pertinent here, Rule 51.809 provided:

> (a) An incumbent LEC shall make available without unreasonable delay to any requesting telecommunications carrier any individual interconnection, service, or network element arrangement contained in any

[38] Ahlers Direct at Exhibit DDA-3; Qwest response to Esch 02-004 (discovery response references the Christensen Aff. as containing additional terms and conditions which Eschelon must accept to obtain the rate from the McLeodUSA 2002 UNE-P Amendment; cited affidavit at ¶ 8, however, merely states the terms and conditions identified in the discovery response); *see also id.*, Qwest response to Esch 02-005S1.

[39] Subsequent to the events which underlie this proceeding, the FCC changed its interpretation of § 252(i) of the Act, replacing the pick and choose concept with the all-or-nothing concept. *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Second Report and Order, CC Docket Nos. 01-338, FCC 04-164 (rel. July 13, 2004). This change does not affect this case.

> agreement to which it is a party that is approved by a state commission pursuant to section 252 of the Act, upon the same rates, terms, and conditions as those provided in the agreement. * * *
>
> (b) The obligations of paragraph (a) of this section shall not apply where the incumbent LEC proves to the state commission that:
>
> (1) The cost of providing a particular interconnection, service, or element to the requesting telecommunications carrier are greater than the costs of providing it to the telecommunications carrier that originally negotiated the agreement, or
>
> (2) The provision of a particular interconnection, service, or element to the requesting carrier is not technically feasible.

70. As relevant here, so long as a carrier requests a service or a UNE under the same terms and conditions as those in the ICA in which the service or UNE is offered, a requesting carrier may pick and choose from among the offered services and UNEs.[40] The opt-in provision allows a carrier to adopt provisions from other Commission-approved ICAs regardless of the provisions of a pre-existing binding agreement (*e.g.,* ICA) between the requesting carrier and the ILEC.

71. The ILEC bears the burden of establishing that additional provisions are legitimately related to the provision sought by a requesting carrier. *First Report and Order* at ¶¶ 1315 and 1437. In addition, in Colorado the ILEC must identify those legitimately related provisions in writing in response to an opt-in request. Rule 4 CCR 723-44-7.2.2; Decision No. R01-1193 at 11-12.

72. A requesting carrier may exercise its opt-in rights without engaging in further negotiations with the ILEC. *See* Decision No. C96-1186 at 20-21 (allow requesting carrier to use any interconnection, network element, or service from another ICA upon requesting carrier's

[40] *First Report and Order* at ¶ 1316 ("any requesting carrier may avail itself of more advantageous terms and conditions subsequently negotiated by any other carrier for the same individual interconnection, service, or element once the subsequent agreement is filed with, and approved by, the state commission.").

acceptance of all legitimately related terms and conditions). This Commission interpretation is consistent with the FCC's interpretation of the Act. *In the Matter of Global NAPs, Inc., Petition for Preemption of Jurisdiction of the New Jersey Board of Public Utilities Regarding Interconnection Dispute with Bell Atlantic-New Jersey, Inc.*, Memorandum Opinion and Order, CC Docket No. 99-154, FCC 99-199 (rel. Aug. 3, 1999), at ¶4 ("[n]egotiation is not required to implement … opt-in arrangement; indeed, neither party may alter the terms of the underlying agreement"); *see First Report and Order* at ¶ 1321 (a requesting carrier "shall be permitted to obtain its statutory rights on an expedited basis. … [T]he nondiscriminatory, pro-competition purpose of section 252(i) would be defeated were requesting carriers required to undergo a lengthy negotiation and approval process pursuant to section 251 before being able to utilize the terms of a previously approved agreement.").

73. In the *First Report and Order* at ¶ 1315,[41] the FCC discussed the meaning of "same terms and conditions" as that phrase is used in § 252(i) of the Act.[42] As relevant here, the FCC determined:

> that the "same terms and conditions" that an incumbent LEC may insist upon shall relate solely to the individual interconnection, service, or element being requested under section 252(i). … Given the primary purpose of section 252(i) of preventing discrimination, we require incumbent LECs seeking to require a third party agree to certain terms and conditions to exercise [the third party's opt-in] rights under section 252(i) to prove to the state commission that the terms and conditions were legitimately related to the purchase of the individual element being sought. By contrast, incumbent LECs may not require as a "same" term or condition the new entrant's agreement to terms and conditions relating to other interconnection, services, or elements in the approved [ICA]. Moreover, incumbent LEC efforts to restrict availability of

[41] *See also* Decision No. R01-1193 at 10-12 (Hearing Commissioner Gifford's discussion of "legitimately related" in context of Qwest's Statement of Generally Available Terms and Conditions).

[42] This discussion also provides a gloss on the meaning of the phrase "same rates, terms, and conditions" in 47 CFR § 51.809.

> interconnection, services, or elements under section 252(i) also must comply with the 1996 Act's general nondiscrimination requirements.

74. The nondiscrimination requirements to which the FCC refers are found generally in §§ 251 and 252 of the Act and are discussed in the *First Report and Order* at ¶¶ 851-62. There the FCC determined that the term "nondiscriminatory" as used in the Act is a more stringent standard than that established in 47 U.S.C. § 202(a) ("unjust and unreasonable discrimination"). Thus, the FCC concluded, at ¶ 860, that "price differences, such as volume and term discounts, *when based upon legitimate variations in costs* are permissible under the 1996 Act, *if justified*." (Emphasis supplied.) The FCC went on to determine, at ¶ 861, that "price differences based not on cost differences but on … other factors not reflecting costs, the requirements of the Act, or applicable rules, would be discriminatory and not permissible under the new standard."

75. The Commission has adopted rules governing, and providing for expedited treatment of, adoption of portions of previously-approved Interconnection Agreements and Amendments. Rule 4 CCR 723-44-7 and especially Rule 4 CCR 723-44-7.2 and its subparts. These rules implement § 252(i) of the Act and fulfill the Commission's obligation to flesh out "the details of the procedures for making agreements [and portions of agreements] available to requesting carriers on an expedited basis." *First Report and Order* at ¶ 1321.

76. Rule 4 CCR 723-44-7.2 and its subparts govern the situation, such as the one at issue here, in which a requesting carrier seeks to adopt only selected portions of an approved ICA. That Rule does not insist that any special language be used in making a request but does require the requesting carrier to provide as an attachment to its request "a proposed amendment … specifying in detail the provisions or sections [of the approved ICA] to be adopted."

77. Rule 4 CCR 723-44-7.2.2 requires a formal written response to a request to opt into only a portion of an approved Interconnection Agreement. In that formal written response, the Rule states that the ILEC shall

> either accept[] the … amendment, and sign[] the … amendment, or identify[] those additional provisions that the ILEC believes are legitimately related and must also be included as part of the … amendment.

78. Rule 4 CCR 723-44-7.2.2 also provides that an "ILEC shall have a reasonable period of time [within which] to submit [its] formal written response" to a request to opt into only a portion of an approved Interconnection Agreement. That Rule then defines and establishes the parameters of "reasonable period of time" as follows: "*In no event shall a reasonable period of time be deemed to be greater than twenty (20) business days from [the ILEC's] receipt of the requesting letter*" (emphasis supplied).

79. These are the statutory provisions, rules, and legal principles which govern this case.

IV. DISCUSSION

80. There are four issues in this proceeding: First, was the Eschelon October letter a valid opt-in request? Second, if it was a valid request, was the delay between the date on which the valid request was made and the date on which Eschelon received the requested recurring rate reasonable? Third, and related to the second issue, did Qwest establish that the identified terms and conditions which it insisted the Eschelon adopt as a condition of opting into the McLeodUSA UNE-P Amendment were legitimately related to the requested rate? Fourth, if the first question is answered in the affirmative and the second and third questions are answered in the negative, what is the appropriate remedy to be imposed for Qwest's failure to permit Eschelon to opt into the McLeodUSA UNE-P Amendment within a reasonable time?

81. In this case Complainant bears the burden of proof by a preponderance of the evidence with respect to issues one, two, and four. Respondent bears the burden of proof by a preponderance of the evidence with respect to issue three. *See* Rule 4 CCR 723-1-82(a). Eschelon has met its burden of proof with respect to the allegations in the Complaint and with respect to the appropriate remedy in this case. Qwest has not met its burden of proof on the issue of whether the terms and conditions which it sought to require Eschelon to accept were legitimately related to the McLeodUSA recurring rate for the UNE-P platform. Each issue is discussed below.

82. The first issue presented is whether Eschelon made a valid opt-in request in October 2002.

83. Eschelon argues that the Eschelon October letter was a valid request in that it was clear, unambiguous, and contained all essential elements: the rates requested, the time period during which the requested rates would be applicable, and the statement that all other terms and conditions would remain unchanged. Eschelon further asserts that its letter indicated that it was ready, willing, and able to accept the legitimately related terms and conditions related to the McLeodUSA reduced recurring rate for the UNE-P product.

84. Qwest argues that the Eschelon October letter, standing alone, was not a valid opt-in request on which Qwest could reasonably act without more information. This is Qwest's principal argument in this proceeding. *See generally* Qwest's Statement of Position. According to Qwest, at least the following resulted in the request's being unclear: by October 2002 the Eschelon UNE-P arrangement and the McLeodUSA UNE-P arrangement were not identical in

that the recurring rates which were the starting points were different;[43] the feature set, the related terms and conditions, and the directory listing options were not the same; each arrangement had different volume commitment provisions; and the termination dates of the McLeodUSA UNE-P Agreement and of the Eschelon UNE-P Agreement were not the same. It is Qwest's position that these points needed to be discussed and clarified before the Eschelon October letter could be considered a valid opt-in request. Qwest asserts that, because those discussions never occurred due to Eschelon's obstinateness, no valid opt-in request existed on which to take action.

85. The evidence of record establishes, and the ALJ finds, that Respondent received a valid request to opt into the McLeodUSA rates on October 29, 2002. First, the Eschelon October letter states the rate, the scope, and the duration of the requested opt-in. An objective third party reading the Eschelon October letter could and would have understood exactly what Eschelon was requesting. Second, the Eschelon October letter meets the requirements of Rule 4 CCR 723-44-7.2. Appended to the letter is the precise language which Eschelon seeks to add to its UNE-P Agreement. Third, the Qwest assertions that the differences between the UNE-P product purchased by McLeodUSA and the UNE-P product purchased by Eschelon rendered the letter unclear or ambiguous do not address the question of whether the letter was a valid request but, instead, go to the issue of whether there are terms and conditions which are legitimately related to the McLeodUSA UNE-P rate which Eschelon sought. Qwest could have obtained -- and, in this case, should have obtained -- any needed clarification through discussions with Eschelon during the 20 business day period provided by Rule 4 CCR 723-44-7.2.2 for just such a purpose. Qwest cannot avoid its statutory and rule-imposed obligations by the simple

[43] The referenced starting points are the $34 per month per line for McLeodUSA and the $34.35 per month per line for Eschelon.

expedient of deciding for itself that an opt-in request is vague, ambiguous, or uncertain and, therefore, is not a valid request.[44] Qwest's argument is contrary to the clear language of the statute and applicable regulations and, if accepted by the Commission, would eviscerate a critically important provision of the Act. The Eschelon October letter was a valid opt-in request received by Qwest on October 29, 2002.

86. The second issue presented is whether, given that there was a valid request, the delay between the date on which the valid request was made and the date on which Eschelon received the requested reduced rate was reasonable.

87. Eschelon argues that Qwest uses the claim of confusion in an attempt to explain away the unreasonable delay in granting the requested opt into the McLeodUSA UNE-P Amendment. Eschelon asserts that the claim of confusion was not raised until after litigation was commenced and that, in any event, the restatement of the Eschelon request in the Qwest November letter is evidence that there was no confusion on Qwest's part about the opt-in request. Eschelon points out that, without any negotiations, Qwest agreed to the requested lower rate in September 2003 without any other change to the Eschelon UNE-P Agreement as amended in 2001. Eschelon argues that Qwest opposed the opt-in request but was not confused by it. Eschelon asserts that the delay was unreasonable.

88. Qwest argues there was no unreasonable delay in view of the confusing nature of the request contained in the Eschelon October letter. Qwest points out that, in its November letter, it responded quickly to the Eschelon October letter; informed Eschelon that the

[44] Qwest exacerbated the problem when it failed to inform Eschelon in clear terms that Qwest did not consider the Eschelon October letter to be a valid opt-in request, thereby creating uncertainty about the status of the request. Qwest's failure to be clear resulted in the apparent misunderstanding about the status of the request (*i.e.*, was it or was it not rejected) discussed in the Eschelon January letter and in the Qwest April letter.

request needed to be clarified; and offered to discuss the request with Eschelon. Qwest asserts that its position has not changed since the November letter, that it remained open to discussions throughout the process, and that Eschelon's unexplained refusal to engage in discussions of any type was the primary cause of any delay. Qwest disputes the characterization of the Eschelon 2003 UNE-P Amendment as an opt-in and describes it as a negotiated amendment. Qwest maintains that it has a right to obtain clarification of opt-in requests; that it should not be forced to act on a request which it does not understand; and that it "does not, as a matter of practice, and in this case did not, treat partial opt-in requests as ministerial tasks; rather, Qwest always engages in discussion with the requesting CLEC in order to appropriately accommodate its request." Qwest's Reply at 1. As a corollary, Qwest asserts that "[i]mplicit in the obligation of an ILEC to permit opt-in is the corresponding obligation of the requesting carrier to make clear its opt-in request so that the ILEC can properly accommodate the opt-in request." Qwest's Statement of Position at 6-7.

89. The evidence of record establishes, and the ALJ finds, that the delay between the date on which the valid request was received (*i.e.*, October 29, 2002) and the expiration of the 20 business day period provided by Commission rule (*i.e.*, November 27, 2004) was reasonable. The evidence of record establishes, and the ALJ finds, that the delay beginning on November 28, 2002 and ending on September 29, 2003 with the Eschelon 2003 UNE-P Amendment did not comport with the requirement of Rule 4 CCR 723-44-7.2.2; was *per se* unreasonable; and, therefore, constituted an unreasonable delay within the meaning of 47 CFR § 51.809.

90. The Commission has determined that an ILEC may have up to 20 business days from receipt of an opt-in request within which to determine the scope of the request, to conduct necessary discussions with the requesting carrier, and to submit to the requesting carrier a written

response to the opt-in request. *See* Rule 4 CCR 723-44-7.2.2. The Qwest November letter was an attempt by Qwest to ascertain the scope of the opt-in request and to initiate discussion with Eschelon, was an appropriate initial response to the Eschelon October letter, and was within the parameters of the Rule. On the basis of Rule 4 CCR 723-44-7.2.2 and the evidentiary record, the ALJ finds that it was reasonable for Qwest to take 20 business days (*i.e.*, to and including November 27, 2002) to discuss the opt-in request with Eschelon.

91. The difficulty arises for Qwest, however, at the expiration of the 20 business day period created by Rule 4 CCR 723-44-7.2.2. That Rule unambiguously states: "In no event shall a reasonable period of time be deemed to be greater than twenty (20) business days from the receipt of the requesting letter by the ILEC." By November 27, 2002, at the latest, Qwest was required to send Eschelon a written response that *either* accepted and signed the requested amendment *or* identified the specific provisions that Qwest believed were legitimately related to the requested rate and so would have to be included as part of the opt-in. *Id.* As evidenced by the clear language of the Rule, the Commission has determined that a delay beyond the 20 business day period is *per se* unreasonable.

92. Qwest did not comply with this Rule. Qwest did not accept and sign an amendment on or before November 27, 2002.[45] In addition, although the Qwest November letter generally stated the need for Eschelon to agree to additional terms and conditions in order to

[45] Contrary to Qwest's assertion, a requesting carrier may exercise its opt-in rights without engaging in further negotiations with the ILEC. *See* Decision No. C96-1186 at 20-21; *In the Matter of Global NAPs, Inc., Petition for Preemption of Jurisdiction of the New Jersey Board of Public Utilities Regarding Interconnection Dispute with Bell Atlantic-New Jersey, Inc.*, Memorandum Opinion and Order, CC Docket No. 99-154, FCC 99-199 (rel. Aug. 3, 1999), at ¶4; *First Report and Order* at ¶ 1321. Rule 4 CCR 723-44-7.2 confirms and implements this right with its requirement that the requesting carrier supply "a proposed amendment … specifying in detail the provisions or sections [of the approved ICA] to be adopted."

obtain the rate contained in the McLeodUSA UNE-P Amendment,[46] Eschelon did not receive a list of the specific terms and conditions until April 2004 when Qwest responded to discovery propounded by Eschelon in this case. On the basis of Rule 4 CCR 723-44-7.2.2 and the evidentiary record, the ALJ finds that the delay which began on November 28, 2002 and continued through and including September 29, 2003[47] was unreasonable because Qwest did not provide a written response which complied with the Rule requirements within the time specified by the Rule and did not grant the opt-in request.

93. The third issue presented is whether Qwest established that the identified terms and conditions which it insisted Eschelon adopt as a condition of opting into the McLeodUSA UNE-P Amendment were legitimately related to the requested rate.[48] This is the issue as to which Qwest bears the burden of proof.

94. Qwest argues that the terms and conditions of the two UNE-P products were different and that the recurring rates for the two products reflected those differences. In April 2004, Qwest stated that Eschelon would have had to accept the following terms and conditions from the McLeodUSA UNE-P Agreement: (a) the December 31, 2003 expiration date

[46] Other correspondence from Qwest contained the same or similar references. That correspondence, however, occurred after November 27, 2002.

[47] Whether one characterizes the Eschelon 2003 UNE-P Amendment as an opt-in or as a negotiation is, in this case, a distinction without a difference. September 29, 2003 is the date on which Eschelon and Qwest signed an agreement lowering the recurring rate for the UNE-P product purchased by Eschelon without effecting any other change to the Eschelon ICA as amended. As this was the precise result sought by Eschelon in its October letter, the practical effect was to grant the requested opt-in.

[48] Qwest may be excused from its § 252(i) of the Act obligation if it proves to the Commission that the cost of providing the requested UNE-P product to Eschelon exceeds the cost of providing that product to McLeodUSA or if it establishes that providing the requested UNE-P product is not technically feasible. 49 CFR § 51.809(b). Qwest does not argue here that a cost difference existed in providing the requested UNE-P product to McLeodUSA and to Eschelon. *See generally* Qwest's Statement of Position (absence of cost difference argument). To the extent that there may be evidence on this issue presented by Qwest witness Christensen, the ALJ finds that evidence to be unpersuasive because it consists solely of conclusory statements and lacks any supporting data and because it does not identify which (if either) of the UNE-P products was the more expensive to provide. Qwest also did not raise a technical feasibility issue. Qwest rested its defense on the absence of a valid opt-in request (its primary argument) and on the existence of legitimately related terms and conditions.

(*see* McLeodUSA UNE-P 2002 Amendment); (b) the requirement that the parties agree to meet no later than July 1, 2003 to discuss conversion plans (*see* McLeodUSA UNE-P 2002 Amendment); (c) the markets in which it would be required to operate (*see* McLeodUSA UNE-P Agreement at ¶ 2.6); (d) the limited set of switch features and directory listings (*see* McLeodUSA UNE-P Agreement at Attachment 3.2); and (e) the volume commitments (*see* McLeodUSA UNE-P Agreement at ¶ 2.3). These are the terms and conditions which Qwest asserts were, from the beginning, legitimately related to the reduced McLeodUSA UNE-P product recurring rate and, thus, Eschelon would have had to accept them in order to receive the McLeodUSA rate. In Qwest's view, the Eschelon 2003 UNE-P Amendment was a negotiated agreement, and not an opt-in, because it preserved the features and listing options unique to the UNE-P product purchased by Eschelon and established a rate unique to that UNE-P product.

95. Eschelon states that Qwest did not identify specific terms and conditions which it asserted were legitimately related to the reduced UNE-P recurring rate until April 2004, after the Complaint was filed. Eschelon contends that Qwest was required to establish that the terms and conditions identified at the time Qwest responded to the opt-in request (and not at some later date) were legitimately related to the requested rate. As Qwest did not identify any such terms and conditions when it responded to the opt-in request, Eschelon argues that Qwest now is precluded from identifying any allegedly legitimately related terms and conditions. Even if Qwest were permitted to identify legitimately related terms and conditions after-the-fact, Eschelon asserts that Qwest provided no evidentiary support for its argument that the listed terms and conditions were legitimately related to the lower McLeodUSA rate which Eschelon sought to obtain through opt-in. Finally, Eschelon argues that the Eschelon 2002 UNE-P Amendment is *prima facie* and conclusive proof that the identified terms and conditions were not legitimately

related to the lower UNE-P recurring rate because none of those provisions was changed when the Eschelon UNE-P recurring rate was lowered.

96. The evidence of record establishes, and the ALJ finds, that Qwest did not meet its burden of proof to establish that the terms and conditions identified as being legitimately related to the requested lower UNE-P product recurring rate were legitimately related to that lower rate.

97. First, pursuant to Rule 4 CCR 723-44-7.2.2 Qwest had the obligation to inform Eschelon, within a specified time frame, of the terms and conditions Qwest considered to be legitimately related to the McLeodUSA UNE-P product recurring rate. Qwest cannot evade that responsibility by dint of a letter as vaguely worded as the Qwest November letter. Qwest did not meet its regulation-imposed obligation to inform Eschelon, on or before November 27, 2002, of the precise terms and conditions which Qwest considered to be legitimately related to the McLeodUSA UNE-P product recurring rate.

98. Second, Qwest did not identify specific terms and conditions until April 2004. Qwest did not act reasonably when it failed timely to identify the terms and conditions which it now asserts were legitimately related to the reduced McLeodUSA recurring rate. The Qwest argument that Eschelon was responsible for the delay because Eschelon did not or would not accept legitimately related terms and conditions is unpersuasive in light of Qwest's failure to identify those terms and conditions notwithstanding Rule 4 CCR 723-44-7.2.2 and the Eschelon January letter which specifically requested that Qwest identify those terms and conditions.

99. Third, most of the terms and conditions identified by Qwest as being legitimately related to the lower UNE-P recurring rate given to McLeodUSA in 2002 are not legitimately related to the lower rate. The McLeodUSA UNE-P Agreement had a December 31, 2003 expiration date; specified the markets in which McLeodUSA would be required to operate; had a

prescribed set of switch features and directory listings; and contained volume commitments. With these terms and conditions, the original recurring rate for the UNE-P product purchased by McLeodUSA was $34. Following the McLeodUSA 2002 UNE-P Amendment, these terms and conditions were unchanged, but the recurring rate for the UNE-P product was reduced to $27.05. Qwest failed to provide persuasive evidence explaining how these unchanged terms and conditions could be considered legitimately related to the reduced rate.[49]

100. Fourth and finally, Qwest failed to explain by persuasive evidence why Eschelon received the requested reduced recurring rate in September 2003 without a change in the terms and conditions which Qwest has previously identified as being legitimately related to that same lower rate. That Qwest reduced the rate without a change in the identified terms and conditions undercuts its assertion that the terms and conditions were legitimately related to the reduced rate given to McLeodUSA and requested by Eschelon.

101. The fourth issue presented is the appropriate remedy to be imposed on Qwest for its failure to permit Eschelon to opt into the McLeodUSA UNE-P Amendment within a reasonable time.

102. Eschelon argues that a refund of the difference between the recurring rate it paid for the UNE-P product it purchased and the recurring rate it would have paid if Qwest had agreed to the opt-in request is the appropriate remedy. To do otherwise, according to Eschelon, would reward Qwest for its failure to comply with statutory and regulatory requirements because Qwest

[49] Similarly, Qwest did not provide persuasive evidence to explain why the original Eschelon UNE-P Agreement, which had a different termination date, different provisions governing markets in which Eschelon would operate, and different volume commitments than the McLeodUSA UNE-P Agreement, nonetheless had the same recurring rate for the UNE-P product (*i.e.*, $34 per month per line) as the original McLeodUSA UNE-P Agreement. Given this fact, it is reasonable to assume that the terms are not legitimately related to the recurring rate because, if they were legitimately related, the recurring rates would have been different *ab initio*.

would retain monies which it should not have received. According to Eschelon, this would provide an incentive to Qwest to violate the law and to delay unreasonably legitimate opt-in requests.

103. Qwest does not address this issue because, in its view, it has not violated any statutory or regulatory requirement.

104. With respect to the fourth issue presented, the evidence of record establishes, and the ALJ finds, that the appropriate remedy for Qwest's failure to meet the requirements of 47 U.S.C. § 252(i), 47 CFR § 51.809, and Rule 4 CCR 723-44-7.2.2 is a refund to Eschelon of any amount paid in excess of a recurring rate of $27.40 per month per line for the UNE-P product for the period November 28, 2002 through and including September 29, 2003. The ALJ agrees with Eschelon that permitting Qwest to retain these monies would be tantamount to rewarding Qwest for the unreasonable delay and refusal to act on the Eschelon opt-in request.

105. Because no evidence was presented on the issue of prejudgment interest, no pre-judgment interest will be ordered to be paid on the amount to be refunded. Should Qwest fail to refund in full the amount owed to Eschelon on or before the 30th day following the effective date of this Order, however, Qwest will be ordered to pay interest, at the Commission-established customer deposit rate for telecommunications carriers, on the unpaid refund amount.

V. CONCLUSIONS OF LAW

106. The Commission has subject matter jurisdiction over this proceeding and personal jurisdiction over Respondent.

107. Complainant is a CLEC, is certificated to provide telecommunications services in Colorado, and is subject to the jurisdiction of the Commission.

108. Respondent is an ILEC, is certificated to provide telecommunications services in Colorado, and is subject to the jurisdiction of the Commission.

109. Pursuant to § 252(i) of the Act, a local exchange carrier must make available to a requesting carrier any interconnection, network element, or service provided under an agreement approved under § 252. The local exchange carrier must make the requested interconnection, network element, or service available on the same terms and conditions as those provided in the approved agreement. Pursuant to 49 CFR § 51.809, an ILEC must make the requested interconnection, network element, or service available without unreasonable delay. In Rule 4 CCR 723-44-7.2.2 the Commission established 20 business days from the date of receipt of an opt-in request as the outer limit of the reasonable period of time available to an ILEC to respond to a request to opt into only a portion of an approved agreement. Any delay in excess of that 20 business day period is *per se* unreasonable.

110. The request of Complainant to opt into the recurring rates established in the McLeodUSA 2002 UNE-P Amendment was a valid opt-in request. The opt-in request was pending and in effect from October 29, 2002 through and including September 29, 2003 (the date on which the Eschelon 2003 UNE-P Amendment became effective).

111. Commencing on November 28, 2003, Respondent failed to respond without unreasonable delay to Complainant's request to opt into the recurring rates established in the McLeodUSA 2002 UNE-P Amendment. By this failure Respondent violated the statutory and rule requirements.

112. Complainant was entitled to the requested opt-in and was harmed by Respondent's violation of the statute and rules because, during the period of November 28, 2002 through and including September 29, 2003, Complainant paid an excessive and discriminatory recurring rate per month per line for the UNE-P product which it purchased from Respondent.

113. Complainant is entitled to a refund of any amounts which Respondent charged Complainant in excess of the recurring rate of $27.40[50] per month per line for the UNE-P product purchased by Complainant during the period November 28, 2002 through and including September 29, 2003.[51]

114. Respondent will be ordered to pay Complainant the refund within 30 days of the effective date of this Order.

115. No interest will be assessed on the refund through and including the 30th day following the effective date of this Order. If Respondent does not pay Complainant the refund within 30 days of the effective date of this Order, interest on the unpaid balance of the refund will accrue at the customer deposit interest rate for telecommunications carriers commencing on the 31st day following the effective date of this Order.

116. Pursuant to § 40-6-109(2), C.R.S., the ALJ recommends that the Commission enter the following order.

[50] This amount is calculated by adding the McLeodUSA rate of $27.05 and the $0.35 which Eschelon agreed to pay for additional features and directory listings.

[51] While Qwest must calculate the exact amount due to Eschelon, the evidence establishes that the amount is approximately $115,266. Ahlers Direct at Exhibit DDA-14.

VI. ORDER

A. The Commission Orders That:

1. Within 30 days of the effective date of this Order, Qwest Corporation shall refund to Eschelon Telecom of Colorado, Inc., any amounts Qwest Corporation charged Eschelon Telecom of Colorado, Inc., in excess of a recurring rate of $27.40 per month per line for the UNE-P product purchased by Eschelon Telecom of Colorado, Inc., from November 28, 2002 through and including September 29, 2003.

2. If Qwest Corporation fails to pay the refund as required by Ordering Paragraph 1, then commencing on the 31st day following the effective date of this Order, interest on the unpaid balance shall accrue at the Commission-established customer deposit interest rate for telecommunications carriers.

3. Docket No. 03F-405T is closed.

4. This Recommended Decision shall be effective on the day it becomes the Decision of the Commission, if that is the case, and is entered as of the date above.

5. As provided by § 40-6-109, C.R.S., copies of this Recommended Decision shall be served upon the parties, who may file exceptions to it.

a) If no exceptions are filed within 20 days after service or within any extended period of time authorized, or unless the decision is stayed by the Commission upon its own motion, the recommended decision shall become the decision of the Commission and subject to the provisions of § 40-6-114, C.R.S.

b) If a party seeks to amend, modify, annul, or reverse basic findings of fact in its exceptions, that party must request and pay for a transcript to be filed, or the parties may

stipulate to portions of the transcript according to the procedure stated in § 40-6-113, C.R.S. If no transcript or stipulation is filed, the Commission is bound by the facts set out by the administrative law judge and the parties cannot challenge these facts. This will limit what the Commission can review if exceptions are filed.

6. If exceptions to this Decision are filed, they shall not exceed 30 pages in length, unless the Commission for good cause shown permits this limit to be exceeded.

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

_____
Administrative Law Judge

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