Decision No. R04-0021-I

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 03F-405T

ESCHELON TELECOM OF COLORADO, INC.,

COMPLAINANT,

V.

QWEST CORPORATION,

RESPONDENT.

INTERIM ORDER OF ADMINISTRATIVE LAW JUDGE MANA L. JENNINGS-FADER DENYING MOTIONS FOR SUMMARY JUDGMENT, FINDING PROCEEDING NO LONGER ACCELERATED, ORDERING ANSWER TO BE FILED, AND SETTING PREHEARING CONFERENCE

Mailed Date: January 7, 2004

I. STATEMENT

1. On September 16, 2003, Eschelon Telecom of Colorado, Inc. (Complainant or Eschelon), filed an Accelerated Formal Complaint (Complaint) against Qwest Corporation (Respondent or Qwest). Appended to the Complaint are nine exhibits. The Complaint is not verified. The Complaint commenced this proceeding.

2. Eschelon served its Complaint on Qwest by hand-delivery and by United States Mail on September 16, 2003. *See* Certificate of Service attached to Complaint.

3. On September 16, 2003, the Commission served its Order to Satisfy or Answer on Qwest. In that Order, the Commission directed the Respondent to the procedures contained in Rule 4 *Code of Colorado Regulations* (CCR) 723-1-61(k), governing accelerated complaints.

4. On September 16, 2003, the Commission issued its Order Setting Hearing and Notice of Hearing in this docket. That Order established a hearing date of October 28, 2003.

5. On September 22, 2003, the undersigned Administrative Law Judge (ALJ) issued Decision No. R03-1081-I. That decision, *inter alia*, set out the procedural schedule for this proceeding and established a prehearing conference for October 15, 2003.

6. Complainant and Respondent are the only parties in this docket.

7. On October 3, 2003, the Complainant and Respondent filed a Joint Motion for Entry of New Procedural Schedule. In that filing the parties stated their belief that this case could be resolved on cross-motions for summary judgment. On October 6, 2003, by Decision No. R03-1112-I, the ALJ granted this motion, vacated the scheduled hearing, and established a procedural schedule for the filing of cross-motions for summary judgment.

8. On November 7, 2003, Eschelon and Qwest each filed a Motion for Summary Judgment.

9. On November 21, 2003, Eschelon and Qwest each filed a response to the Motion for Summary Judgment filed by the other party.

10. On December 3, 2003, each party filed a reply to the other party's response.

11. On December 12, 2003, Eschelon filed a Notice of Supplemental Authority.

12. In its Complaint Eschelon alleges that Qwest refused "to honor its contractual, statutory, and other obligations to provide interconnection at non-discriminatory rates[.]" Complaint at 1. Specifically, Eschelon alleges that Qwest has Commission-approved Interconnection Agreements with Eschelon and with McLeodUSA Telecommunications Services, Inc. (McLeodUSA).[1] Eschelon alleges that Qwest refused to make UNE-Star, an Unbundled Network Element platform offered by Qwest, available to Eschelon at the same rate as Qwest made UNE-Star available to McLeodUSA. To remedy this alleged discriminatory treatment, Eschelon asks the Commission: (a) to order Qwest to provide UNE-Star to Eschelon at the same rate as that product is provided to McLeodUSA; (b) to find that, because it has refused to provide the requested UNE-Star at the non-discriminatory rate, Qwest has been in continuous violation of its legal obligations to Eschelon since September 2001; and (c) to order Qwest to refund the amount by which Eschelon overpaid for the UNE-Star product from September 2001 to the present. Eschelon seeks relief under both federal and state law.

13. Each party asserts that the Commission has subject matter jurisdiction over this proceeding. The ALJ agrees.

14. Before addressing the cross-Motions for Summary Judgment, the ALJ must determine the scope of the proceeding as it is now postured. In the period since the Complaint was filed, Eschelon and Qwest amended their Interconnection Agreement (ICA). On September 29, 2003, they executed an amendment which permitted Eschelon to purchase UNE-

[1] Eschelon states that each Interconnection Agreement has been amended and that each amendment has been approved by the Commission. *See* Echelon's Motion for Summary Judgment at 4-5. Qwest does not challenge these statements.

E[2] at rates comparable to those for UNE-M.[3] The amendment permitted Eschelon to purchase UNE-E at those rates through December 31, 2003.[4] As a result of this ICA amendment, Eschelon states in its recitation of material facts not in dispute that the "issue remaining [in this proceeding] is whether Eschelon was entitled to the McLeod recurring rate [for the UNE platform product] when requested [in September 2001] and if so, for what period of time." Eschelon Reply to Qwest's Response to Eschelon's Motion for Summary Judgment at 2.

15. Eschelon has limited the scope of this proceeding to these issues: (a) whether Qwest has been in continuous violation of its legal obligations to Eschelon from September 2001 to a date in 2003; and (b) if so, what remedy is appropriate for that violation. Thus, in this proceeding Eschelon no longer seeks a Commission order requiring Qwest, on a going-forward basis, to provide UNE-E as the same rate as that charged for UNE-M. The parties resolved this aspect of the Complaint through the September 29, 2003, amendment to their ICA.

16. With the scope of this proceeding now clarified, the ALJ turns to the cross-Motions for Summary Judgment.

17. "Summary judgment is appropriate only if there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." *HealthONE v. Rodriguez*, 50 P.3d 879, 887 (Colo. 2002) (citations omitted); *see also* Colo.R.Civ.P. 56(c). Summary judgment "is a drastic remedy, to be granted *only* when there is a clear showing that the controlling standards have been met." *Id.* at 887-88 (emphasis supplied). Even if "it is

[2] This is the Unbundled Network Element platform product purchased by Eschelon from Qwest under its ICA.

[3] This is the Unbundled Network Element platform product purchased by McLeodUSA from Qwest under its ICA.

[4] December 31, 2003, is the date on which the McLeodUSA-Qwest ICA provision setting the lower UNE-M rate terminated.

extremely doubtful that a genuine issue of fact exists[,] … summary judgment is not appropriate in cases of doubt." *Abrahamsen v. Mountain States Telephone and Telegraph Company*, 494 P.2d 1287, 1290 (Colo. 1972). A fact is "material," for purposes of a motion for summary judgment, if it will affect the outcome of the case. *Gadlin v. Metrex Research Corporation*, 76 P.3d 928 (Colo. App. 2003).

18. Because the ALJ finds that genuine issues of material fact remain in this proceeding, the Motion for Summary Judgment filed by Eschelon will be denied.[5] For the same reason, the Motion for Summary Judgment filed by Qwest will be denied.

19. To prevail in this proceeding Complainant must establish by a preponderance of the evidence that Respondent violated the requirements of 47 U.S.C. § 252(i) and 47 *Code of Federal Regulations* (CFR) § 51.809.[6] As pertinent here, these provisions require an Incumbent Local Exchange Carrier (ILEC), under certain conditions and without unreasonable delay, to make available to any other telecommunications carrier the services and the Unbundled Network Elements (UNEs or elements) which the ILEC provides under an ICA to one telecommunications carrier. A requesting carrier may exercise its "opt-in" rights without further negotiations and, so long as a service is requested under the same terms and conditions as those in the ICA in which

[5] The ALJ did not follow or adopt the decision of the Minnesota Public Utilities Commission in Docket No. P-421/C-03-627, which Complainant provided as Supplemental Authority. The ALJ also did not follow or adopt the decision of the Minnesota Administrative Law Judge (in that same docket) upon which Complainant relied heavily in its arguments. First, the decisions are those of a sister state commission and are not binding in Colorado. Second, the facts presented in the Minnesota proceeding are not in the record before the ALJ at this time (*e.g.*, no certified, attested to, or verified copy of the Minnesota record or of any pertinent filing was made available). Third, whatever the facts presented in Minnesota, based on the facts presented in the instant case in Colorado, there are genuine issues of material fact which preclude the granting of summary judgment.

[6] This is the minimum burden on Complainant. The Complaint also alleges that Respondent violated at least these provisions of state law: §§ 40-3-101, 40-3-102, 40-3-106, and 40-6-119, C.R.S. Because it is unnecessary to do so to decide the pending cross-Motions, the ALJ does not reach, address, or decide whether these cited statutory provisions are separate bases for the Complaint or whether they require different proof than the alleged violations of federal law.

the service is offered, may "pick and choose" from among the offered services. The pick and choose (or most favored nation) 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. *See* Decision No. C96-1186 at 17.

20. In the *First Report and Order*[7] at ¶ 1315,[8] the Federal Communications Commission (FCC) discussed the meaning of "same terms and conditions," as that phrase is used in 47 U.S.C. § 252(i). As relevant here, the FCC determined:

> Given the primary purpose of [47 U.S.C.] 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] 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 interconnection, services, or elements under section 252(i) also must comply with the [federal Telecommunications Act of 1996's] general nondiscrimination requirements.

21. This FCC discussion is also a gloss on the meaning of the phrase "same rates, terms, and conditions" which appears in 47 CFR § 51.809.

[7] *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*).

[8] *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).

22. In light of the foregoing, discussion of the controlling legal principles, review of the cross-Motions for Summary Judgment, and their supporting documentation,[9] establish that at least the following genuine issues of material fact exist:

(a) What are the elements contained in the product offering UNE-M? What are the elements contained in the product offering UNE-E? Is the UNE-M product offering the same as, or substantially the same as, the product offering UNE-E?

(b) Did Eschelon submit or make a request to Qwest to obtain UNE-M and, if so, on what date?[10]

(c) Was Qwest within its rights to seek "clarification" from Eschelon as to Eschelon's September 2001 request for UNE-M? If so, what are the bounds of such a request for "clarification"? If so, did Eschelon clarify the scope of its request and, if so, when? Did Qwest use its request for "clarification" to delay unreasonably the provisioning of the requested product?[11]

(d) What terms and conditions, if any, are "legitimately related" to the UNE-M product offering so that Eschelon, as a requesting carrier, must accept them as terms and conditions to which it agrees when it chooses the UNE-M product offering?

[9] For purposes of deciding the pending cross-Motions only, the ALJ considered the documents attached to the Complaint and to each Motion for Summary Judgment even though the documents were not verified, certified, or attested to by an affiant. *See* Colo.R.Civ.P. 56(c) and 56(e) (motion for summary judgment to be supported by attested, certified, or otherwise verified documents and affidavits).

[10] The remainder of the listed issues assumes that, at some time, Eschelon made such a request.

[11] Qwest's request that Eschelon and Qwest subject matter experts meet and Qwest's request that Eschelon and Qwest renegotiate (whatever Qwest may have meant by that term) the ICA raise the same issues.

(e) Did Eschelon accept the "legitimately related" terms and conditions of UNE-M and, if so, when?

(f) What is the date, if any, from which Qwest unreasonably delayed its provisioning of UNE-M to Eschelon?

(g) Is September 29, 2003, the date on which Qwest no longer unreasonably delayed its provisioning of UNE-M to Eschelon? If not, what is that date?

(h) Should the Commission should order Qwest to pay a refund to Eschelon for the delay in the provisioning of UNE-M to Eschelon? If so, how should that refund amount be calculated?

23. The material facts identified in this Order do not constitute, and are not intended to constitute, an exhaustive list. They are provided to identify *some* of the genuine issues of material fact which remain to be resolved. Undoubtedly, others exist.

24. Having determined that this case will proceed to hearing, the ALJ must determine whether this is an accelerated complaint proceeding pursuant to Rule 4 CCR 723-1-61(k). Accelerated complaints are "complaints to enforce interconnection duties and obligations of a telecommunications provider, and complaints for interconnection service quality matters[.]" Rule 4 CCR 723-1-61(k)(1). As discussed above, Eschelon has limited the scope of this proceeding to two issues: (a) whether Qwest has been in continuous violation of its legal obligations to Eschelon from September 2001 to a date in 2003; and (b) if so, what remedy is appropriate for that violation. The Complaint is no longer one to enforce interconnection obligations and duties. In addition, the Complaint contains no allegation pertaining to

interconnection service quality. The ALJ finds that the Complaint does not fall within the scope of Rule 4 CCR 723-1-61(k) and is not an accelerated complaint.

25. The Complaint will be treated as a formal complaint within the general provisions of Rules 4 CCR 723-1-61(a) through (g).

26. In accordance with those Rule provisions, Respondent will be ordered to file, within ten days from the date of this Order, its answer to the Complaint.

27. It is necessary to schedule a hearing and to establish a procedural schedule in this matter. To do so, a prehearing conference will be held on January 21, 2004. The provisions of Rules 4 CCR 723-1-79(b)(3) and 4 CCR 723-1-79(b)(4) govern this prehearing conference.

28. The parties should be prepared to discuss these matters at the prehearing conference: (a) whether testimony in this proceeding should be pre-filed and, if not, the information to be included in the list of witnesses;[12] (b) date by which Complainant will file its list of witnesses and copies of exhibits (or its pre-filed direct testimony and exhibits); (c) date by which Respondent will file its list of witnesses and copies of exhibits (or its pre-filed answer testimony and exhibits); (d) date by which Complainant will file its rebuttal testimony and exhibits (assuming pre-filed testimony and exhibits); (e) date(s) by which each party will file corrected testimony and exhibits (assuming pre-filed testimony and exhibits); (f) date by which each party will file its prehearing motions;[13] (g) date by which the parties will file a stipulation, if settlement is reached; (h) whether a final prehearing conference is necessary and, if it is, the date

[12] For example, the information provided with respect to each witness identified might include: name of the witness, address of the witness, telephone number of the witness, a detailed summary of the witness's testimony, and identification of the exhibit(s) which the witness will sponsor.

[13] This date should be at least 10 days before the final prehearing conference or, if there is no final prehearing conference, 14 days before the hearing.

for that prehearing conference; (i) the number of days required for hearing; (j) hearing dates; and (k) date for post-hearing statements of position and whether the statements should be written or oral and, if written, whether responses should be permitted. Parties should also review, and be prepared to discuss to the extent relevant, the matters contained in Rule 4 CCR 723-1-79(b)(5). Parties may raise any additional issues.

29. In determining the procedural dates and hearing date, the parties should be mindful of the provisions of § 40-6-108(4), C.R.S. That statute establishes the time frame within which a Commission decision should issue in a complaint case.

30. The undersigned expects the parties to come to the prehearing conference with proposed dates for all deadlines. In addition, the parties must consult prior to the prehearing conference with respect to the listed matters. Finally, the parties are encouraged to present, if possible, a procedural schedule and hearing date(s) which are satisfactory to all parties and which satisfy the statute.

II. ORDER

A. It Is Ordered That:

1. The Motion for Summary Judgment filed by Eschelon Telecom of Colorado, Inc., is denied.

2. The Motion for Summary Judgment filed by Qwest Corporation is denied.

3. The Complaint filed by Eschelon Telecom of Colorado, Inc., on September 16, 2003, does not qualify as an accelerated complaint pursuant to Rule 4 *Code of Colorado Regulations* 723-1-61(k) and will not be determined on an accelerated basis.

4. Qwest Corporation shall file its answer to the Complaint within ten days from the date of this Order.

5. A prehearing conference in this docket is scheduled as follows:

DATE: January 21, 2004

TIME: 9:00 a.m.

PLACE: Commission Hearing Room
1580 Logan Street, OL2
Denver, Colorado

6. The parties shall come to the prehearing conference prepared to discuss the matters identified in this Order.

7. This Order shall be effective immediately.

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

_____
Administrative Law Judge

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