

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

LeRoy Koppendrayer	Chair
Ellen Gavin	Commissioner
Marshall Johnson	Commissioner
Phyllis A. Reha	Commissioner
Gregory Scott	Commissioner

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

ISSUE DATE: June 2, 2003

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

NOTICE AND ORDER FOR HEARING

PROCEDURAL HISTORY

On April 23, 2003, Eschelon Telecom of Minnesota, Inc. (Eschelon) filed a complaint against Qwest Corporation Inc.(Qwest) alleging, among other things, that Qwest charges Eschelon higher rates for UNE-Star than it charges McLeodUSA (McLeod). Eschelon also alleged that it is entitled to a refund of payments made for private lines that should have been available to Eschelon as combinations of unbundled network elements known as EELs. Further, Eschelon's complaint requested an expedited hearing under Minn. Stat. § 237.462 Subd.6.

Qwest filed its Verified Answer to the Complaint and Motion to Dismiss on May 8, 2003. Among other things, Qwest denied that Eschelon was entitled to an expedited hearing. Qwest also denied that the Commission has jurisdiction to hear the dispute.

This matter came before the Commission on May 22, 2003.

FINDINGS AND CONCLUSIONS

I. Background

A. Summary of Eschelon's Complaint

Eschelon alleged that Qwest has refused to give it the same UNE-Star rates as those made available to McLeod unless Eschelon agreed to all other terms and conditions of the Qwest/McLeod Amendment to their Interconnection Agreement (ICA). Further, Eschelon alleged that it was entitled to a refund of payments made to Qwest for private lines that should have been

available to Eschelon as combinations of unbundled network elements known as EELs.¹ Eschelon argued that Qwest has refused to reprice the special access circuits Eschelon bought under Qwest's Minnesota and Federal Communications Commission (FCC) Private Line Tariff for use as EEL equivalents and has refused to refund the difference between the UNE and tariffed rates.

Eschelon argued that such actions by Qwest were contrary to the Federal Telecommunication Act of 1996 (the Act),² the parties Interconnection Agreement and Chapter 237 of the Minnesota Statutes.

The complaint requested expedited proceedings, refunds and monetary damages.

B. Qwest's Position

On the issue of the UNE-Star rates, Qwest argued that it has never refused to provide McLeod pricing to Eschelon, that Eschelon purchases a product that contains different features, is offered pursuant to a contract applying to a different time period and applies for different volumes from the McLeod purchase. Further, Qwest argued that Eschelon has failed to attempt to negotiate an interconnection agreement amendment consistent with the pricing request.

On the issue regarding a refund to Eschelon for payments to Qwest for private lines, Qwest argued that Eschelon ordered private line access services from Qwest and those services are governed by federal and state retail tariffs. Eschelon is not entitled to vary those terms. Further, Qwest argued that it advised Eschelon of the availability of EELs but that Eschelon did not take advantage of Qwest's offer.

Qwest also argued that Eschelon's allegations do not warrant expedited relief.

II. Position of the Parties on Jurisdiction

A. Eschelon

Eschelon argued that the Commission has jurisdiction over this matter pursuant to federal and state statutes including:

47 U.S.C. § 251 (c)(2) (D) and (3), giving state commissions the authority to enforce the requirement that Qwest provide facilities and equipment "on rates, terms, and conditions that are just, reasonable and nondiscriminatory...";

¹ An EEL (Enhanced Extended Loop) is a combination of a Loop and dedicated office transport.

² Pub. L. No. 104-104, 110 Stat.56 (codified as amended in scattered sections of title 47, United States Code).

47 U.S.C. § 252(e), giving state commissions authority to enforce interconnection agreements;

47U.S.C. § 252(i), requiring local exchange carriers to make available interconnection provisions to other requesting telecommunications carriers on the same terms and conditions;

Minn. Stat. § 237.081, Subd. 1(a), complaint investigation; and

Minn. Stat. § 237.462, Subds. 1 and 6, competitive enforcement.

B. Qwest

Qwest argued that Eschelon has not requested that Qwest negotiate an interconnection agreement amendment, Eschelon has not asked for the enforcement of an interconnection agreement and Eschelon has not sought to opt-into the McLeod agreement without modifying its terms. For these reasons jurisdiction is not conferred by the federal statutes cited by Eschelon.

Further, Qwest argued that Eschelon's asserted state law bases for jurisdiction are based on federal rights of which Eschelon has shown no violation. Finally, Qwest argued that to the extent the complaint by Eschelon relates to federally tariffed services, Eschelon's claims have been preempted by the FCC.

III. Commission Action

The Commission finds that there are contested issues of material fact arising from this complaint which can best be resolved by referring this matter to the Office of Administrative Hearings (OAH) for contested case proceedings. Besides the factual development of the substantive issues arising from this complaint, it is apparent to the Commission that further factual development is also necessary for determining whether the Commission has jurisdiction in this matter. For these reasons the Commission will refer this matter to the OAH and will request that the Administrative Law Judge provide a recommendation on both the jurisdiction issue and on the substantive issues raised in the complaint.

IV. Procedural Outline

A. Administrative Law Judge

The Administrative Law Judge assigned to this case is Beverly J. Heydinger. Her address and telephone number are as follows: Office of Administrative Hearings, Suite 1700, 100 Washington Square, Minneapolis, Minnesota 55401-2138; (612) 341-7606.

B. Hearing Procedure

Controlling Statutes and Rules

Hearings in this matter will be conducted in accordance with the Administrative Procedure Act, Minn. Stat. §§ 14.57-14.62; the rules of the Office of Administrative Hearings, Minn. Rules, parts 1400.5100 to 1400.8400; and, to the extent that they are not superseded by those rules, the Commission's Rules of Practice and Procedure, Minn. Rules, parts 7829.0100 to 7829.3200.

Copies of these rules and statutes may be purchased from the Print Communications Division of the Department of Administration, 117 University Avenue, St. Paul, Minnesota 55155; (651) 297-3000. These rules and statutes also appear on the State of Minnesota's website at www.revisor.leg.state.mn.us.

The Office of Administrative Hearings conducts contested case proceedings in accordance with the Minnesota Rules of Professional Conduct and the Professionalism Aspirations adopted by the Minnesota State Bar Association.

Right to Counsel and to Present Evidence

In these proceedings, parties may be represented by counsel, may appear on their own behalf, or may be represented by another person of their choice, unless otherwise prohibited as the unauthorized practice of law. They have the right to present evidence, conduct cross-examination, and make written and oral argument. Under Minn. Rules, part 1400.7000, they may obtain subpoenas to compel the attendance of witnesses and the production of documents.

Parties should bring to the hearing all documents, records, and witnesses necessary to support their positions.

Discovery and Informal Disposition

Any questions regarding discovery under Minn. Rules, parts 1400.6700 to 1400.6800 or informal disposition under Minn. Rules, part 1400.5900 should be directed to Marc Fournier, Public Utilities Rates Analyst, Minnesota Public Utilities Commission, 121 Seventh Place East, Suite 350, St. Paul, Minnesota 55101-2147, (651)296-3793; or Karen Hammel, Assistant Attorney General, 1100 NCL Tower, 445 Minnesota Street, St. Paul, Minnesota 55101, (651) 297-1852.

Protecting Not-Public Data

State agencies are required by law to keep some data not public. Parties must advise the Administrative Law Judge if not-public data is offered into the record. They should take note that any not-public data admitted into evidence may become public unless a party objects and requests relief under Minn. Stat. § 14.60, subd. 2.

Accommodations for Disabilities; Interpreter Services

At the request of any individual, this agency will make accommodations to ensure that the hearing in this case is accessible. The agency will appoint a qualified interpreter if necessary. Persons must promptly notify the Administrative Law Judge if an interpreter is needed.

Scheduling Issues

The times, dates, and places of public and evidentiary hearings in this matter will be set by order of the Administrative Law Judge after consultation with the Commission and intervening parties.

Notice of Appearance

Any party intending to appear at the hearing must file a notice of appearance (Attachment A) with the Administrative Law Judge within 20 days of the date of this Notice and Order for Hearing.

Sanctions for Non-compliance

Failure to appear at a prehearing conference, a settlement conference, or the hearing, or failure to comply with any order of the Administrative Law Judge, may result in facts or issues being resolved against the party who fails to appear or comply.

C. Parties and Intervention

The current parties to this case are Qwest and Eschelon. Other persons wishing to become formal parties shall promptly file petitions to intervene with the Administrative Law Judge. They shall serve copies of such petitions on all current parties and on the Commission. Minn. Rules, part 1400.6200.

D. Prehearing Conference

A prehearing conference will be held in this case on Wednesday, June 11, 2003, at 9:30 a.m. in the Small Hearing Room of the Public Utilities Commission, 121 Seventh Place East, Suite 350, St. Paul, Minnesota 55101. Persons participating in the prehearing conference should be prepared to discuss time frames, scheduling, discovery procedures, and similar issues. Potential parties are invited to attend the pre-hearing conference and to file their petitions to intervene as soon as possible.

V. Application of Ethics in Government Act

The lobbying provisions of the Ethics in Government Act, Minn. Stat. §§ 10A.01 et seq., may apply to this case. Persons appearing in this proceeding may be subject to registration, reporting, and other requirements set forth in that Act. All persons appearing in this case are urged to refer to the Act and to contact the Campaign Finance and Public Disclosure Board, telephone number (651) 296-5148, with any questions.

VI. Ex Parte Communications

Restrictions on ex parte communications with Commissioners and reporting requirements regarding such communications with Commission staff apply to this proceeding from the date of this Order. Those restrictions and reporting requirements are set forth at Minn. Rules, parts 7845.7300-7845.7400, which all parties are urged to consult.

ORDER

1. The Commission hereby refers this case to the Office of Administrative Hearings for contested case proceedings as set forth above.
2. A prehearing conference shall be held on Wednesday June 11, 2003, at 9:30 a.m. in the Small Hearing Room, Public Utilities Commission, 121 Seventh Place East, Suite 350, St. Paul, Minnesota 55101.
3. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

(S E A L)

This document can be made available in alternative formats (i.e., large print or audio tape) by calling (651) 297-4596 (voice), (651) 297-1200 (TTY), or 1-800-627-3529 (TTY relay service).

BEFORE THE MINNESOTA OFFICE OF ADMINISTRATIVE HEARINGS
100 Washington Square, Suite 1700
Minneapolis, Minnesota 55401-2138

FOR THE MINNESOTA PUBLIC UTILITIES COMMISSION
121 Seventh Place East Suite 350
St. Paul, Minnesota 55101-2147

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Telecom of Minnesota, Inc. Against Qwest
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MPUC Docket No. P-421/C-03-627

OAH Docket No.

NOTICE OF APPEARANCE

Name, Address and Telephone Number of Administrative Law Judge:

Beverly J. Heydinger, Office of Administrative Hearings, Suite, 1700, 100 Washington Square,
Minneapolis, Minnesota 55401; (612) 341-7606.

TO THE ADMINISTRATIVE LAW JUDGE:

You are advised that the party named below will appear at the above hearing.

NAME OF PARTY:

ADDRESS:

TELEPHONE NUMBER:

PARTY'S ATTORNEY OR OTHER REPRESENTATIVE:

OFFICE ADDRESS:

TELEPHONE NUMBER:

SIGNATURE OF PARTY OR ATTORNEY: _____

DATE: _____