BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

ESCHELON TELECOM OF WASHINGTON, INC. Petitioner/Complainant, v. QWEST CORPORATION, Respondent.	DOCKET NO. UT-033039 QWEST'S ANSWER IN OPPOSITION TO ESCHELON'S PETITION FOR RECONSIDERATION

I. INTRODUCTION

1 Qwest Corporation ("Qwest") hereby answers the Petition for Reconsideration ("Petition") filed in this matter by Eschelon Telecom of Washington, Inc. ("Eschelon"). Eschelon filed its Petition on February 17, 2004, requesting reconsideration of the Commission's *Final Order Granting Petition, In Part*, ("Order") issued by the Washington State Utilities and Transportation Commission ("Commission") on February 6, 2003. Eschelon asks the Commission to reconsider its conclusion that Eschelon is entitled to its opt-in request only as of August 14, 2003.

2 In its Order, the Commission held that Eschelon was not entitled to opt-in to the UNE-Star pricing amendment to McLeod's interconnection agreement with Qwest until Eschelon submitted

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

a valid opt-in request. The Commission found that Eschelon had not made a sufficient opt-in request until August 14, 2003. Eschelon requests reconsideration of that finding.

3 The Commission should affirm its decision about the August 14, 2003 effective date of Eschelon's opt-in request. There is nothing in the record or in Eschelon's Petition that casts the facts and conclusions in this case in a different light than when the Commission decided this issue on February 6, 2004. That decision was informed by a review of the record, the parties' written briefs, and detailed oral argument. Eschelon's October 29, 2002 request was not a proper opt-in request because it was vague with regard to the termination date of the new rates and was not clear as to how or what Eschelon intended to "opt-in" to because Eschelon's contract rate and terms were different from the McLeod rate and terms prior to McLeod's rate reduction.

II. DISCUSSION

4 Eschelon's Petition raises no new issues, and does not state any basis for reconsideration. For the most part, Eschelon simply disagrees with the Commission's analysis, but presents no new rationale that would support a different outcome. Indeed, the Commission's decision in this case focused on the ambiguities inherent in Eschelon's October 29, 2002 "opt-in" letter. However, no amount of explanation today can remove those ambiguities, and Eschelon's discussion fails to do so. Basically, Eschelon asserts, as it has all through this case, that its October 29, 2002 request was a clear opt-in and that Qwest's request for clarification was unwarranted and improper. Eschelon also asserts that if the Commission disagrees with its primary argument, then there were events in February or April of 2003 that should constitute proper opt-in requests. Qwest will address each of these arguments below.

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

A. Eschelon's October 29, 2002 Request Was Vague and Unclear and Did Not Constitute a Valid Opt-In.

5 In the Order the Commission found that an opt-in request becomes effective "when a proper opt-in request is presented to the incumbent carrier." *Order* at ¶ 26. The Commission found that the October 29, 2002 letter was not clear and that a proper opt-in request was not made until August 14, 2003. This finding is amply supported by the record in this case and should not be disturbed. In fact, the Commission summed up this issue succinctly in paragraph 27 of the Order, as follows:

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

6 In Section I. of its Petition, Eschelon again asserts that its opt-in request was detailed and specific. However, a review of the October 29, 2002 Eschelon request demonstrates that it is no more clear today than it was in October 2002 or in January 2004 when the parties appeared before the Commission for oral argument. The flaws include a lack of specificity with regard to the termination date of the new rate, and a lack of specificity with regard to the request itself. In its Petition, Eschelon attempts to breeze past these issues and gloss over the lack of clarity in the request. Eschelon claims that its request specifically identified the requested arrangement and what terms it would supersede in the existing agreement. This is simply not so.

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

7 Eschelon first claims that the request is specific with regard to the termination date requested, quoting the following language from the request: "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." As Qwest pointed out during oral argument, a plain reading of the request in context indicates that Eschelon is not attempting to limit the rates through the end of 2003.[1] Rather, this statement is a description of the *page* of the McLeod agreement, but does not limit Eschelon's request to those dates. The effect of granting Eschelon's request would have been to extend the effective date of the rate through 2005, something Qwest was clearly not obligated to do. Thus, this language is vague and appropriately gave rise to Qwest's need for clarification.

8 Eschelon next claims that the request specifically identified the terms in Eschelon's existing agreement that would be superseded as a result of the opt-in. This is also incorrect. In support of its contention, Eschelon quotes the following portion of its request: "Eschelon requests that page 9 of Attachment 3.2 of Eschelon's Interconnection Agreement Amendment terms with Qwest, *dated November 15, 2000*, 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…". Eschelon claims that "[a] more specific statement of the superseded language is difficult to imagine." *Petition at p.3*. To the contrary, as the Commission found, the ambiguity in the request is readily apparent.

9 The primary problem with this request is that Eschelon references the November 15, 2000 amendment to its interconnection agreement. However, as Qwest has pointed out previously, that amendment was superseded in July of 2001 and as of October 2002 that amendment was of

[1] Tr. At 8-9.

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

no effect.[2] Thus, Eschelon could not have legitimately sought to amend that amendment. Clearly, what Eschelon was trying to do was reference its prior $24.00 rate in that amendment, but in doing so it created two ambiguities – first, the question of how one can amend a provision that has already been superseded, and second, the question of how the request was to impact the then-current rate of $24.35 with the AIN feature package that was a part of that rate.

B. Qwest Sought Legitimate Clarification from Eschelon – Qwest's Assertions That Eschelon's Request was Ambiguous are Amply Supported by the Record.

10 In Sections II and III of its Petition, Eschelon focuses on arguing that Qwest's response to the "opt-in" request was insufficient. Of course, Eschelon's success on this point depends upon the Commission being convinced that Eschelon's request was clear in the first instance. If, as Qwest contends and the Commission has already concluded, the request was unclear, Qwest's response to the request is largely irrelevant. Because the request was insufficient, Qwest could have simply denied it. However, Qwest did not simply deny the request. Indeed, it identified the areas in the request that were unclear and that prevented treating the request as an opt-in, and asked Eschelon to respond to those areas.

11 As already amply discussed in written pleadings and oral argument,[3] Qwest was legitimately confused about the period of time that Eschelon was asking for the McLeod rates. Eschelon's request, if implemented exactly as written, would have extended the life of the McLeod rates for two additional years. The Commission reviewed Eschelon's opt-in request in light of the fact

---

[2] Qwest's Comments on Recommended Decision, paras. 11-12. Eschelon avoided addressing the question of how Qwest was supposed to handle the fact that Eschelon and McLeod did not have the same services at the same price. The request specified that the rate Eschelon opted-in to would be the McLeod $21.16 rate. That rate does not cover the additional cost incurred by the service package Eschelon was, and is continuing to purchase, which at that time was $24.35 per month, whereas McLeod's previous price was $24.00. This squarely raises the uncertainty of whether Qwest was to implement Eschelon's request literally and eliminate the additional AIN features and listings and give Eschelon the McLeod pricing, or whether Eschelon was really seeking a new, lower rate for its UNE-E service with the additional features included. Qwest asked this question of Eschelon and received no response until August of 2003, many months after the original request.

[3] TR. 20; Comments at paragraphs 11-13.

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

that the request was the only information Qwest had when it made the initial determination that the request was not a proper opt-in. The Commission concluded that it was ambiguous. Given the ambiguity, Qwest was justified in asking for clarification.

12 Eschelon's request *avoids* committing to the same terms and conditions as McLeod, *avoids* discussing the different pre-existing pricing between Eschelon's and McLeod's agreements, and *avoids* committing to the termination date of the McLeod pricing. Thus, Qwest was entirely justified in treating the request as a request for negotiation, not opt-in, and requesting additional information from Eschelon, which was not provided. The relevant language of Eschelon's "opt-in" request is as follows:

> 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,* 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. (emphasis added).

13 It is critical to an understanding of this case that the October 29, 2002, request be understood in terms of the effect of implementing this request as written. It is clear that if this request was implemented as written, Eschelon would have the benefit of the McLeod rates without agreeing to all related terms and conditions, most notably the termination date. This is improper under an opt-in request.[4] As written, Eschelon's request would simply substitute *prices* from the McLeod

[4] *In the Matter of the Implementation of Section 252(i) of the Telecommunications Act of 1996, Interpretive and Policy Statement (First Revision), Docket No. UT-990355*, principle 8. Principle 8 states that "An interconnection agreement or arrangement made available pursuant to Section 252(i) must be made available for the

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

agreement into the Eschelon agreement, not the full McLeod amendment. Thus, Eschelon was asking Qwest to insert new prices into the Eschelon agreement which would have resulted in those new prices being effective for the entire term of the Eschelon agreement instead of only for the term of the underlying McLeod agreement. Notably, the last sentence of Eschelon's request as quoted above only identifies a start date for the McLeod rates, *not* the corresponding termination date. This is improper for an opt-in, and Qwest reasonably sought to explore this issue in its November 8, 2002 letter to Eschelon. Eschelon refused to respond, and even at the time it filed its Petition in September 2003, Eschelon was asserting that it was entitled to a longer term for the McLeod pricing than the term of the McLeod amendment.

14 Qwest also sought legitimate clarification regarding the AIN amendment to Eschelon's agreement and the difference in pricing between the $24.00 rate previously charged to McLeod and the $24.35 rate in the Eschelon agreement. Eschelon claims hat the "Commission must demand at least some minimal amount of discernment from Qwest when analyzing an opt-in request." *Petition at p. 6.* However, as Qwest has previously pointed out, it is not and should not be Qwest's duty to "fix" a defective request and unilaterally interpret it in a way that Qwest finds meaningful. Surely, this would lead to more and larger disputes than are presented here. The better outcome, as this Commission recognized, is to demand a minimally sufficient opt-in request from the requesting carrier.

15 Eschelon goes on to claim that Qwest's request for clarification on the AIN features issue was irrelevant, because the parties still had a dispute about the termination date and volume requirements in the McLeod amendment. *Petition at p. 6.* This is simply wrong. Qwest sought

---

specific time period during which it is provided under the interconnection agreement from which it was selected. For example, if the interconnection arrangement was included in an agreement that expired on December 31, 2000, it must be made available to other carriers only until December 31, 2000." Thus, it is clear that the Commission's guidance on this issue to date is that the termination date of an agreement is a term that is related to the underlying agreement for purposes of opt-in requests.

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

clarification of all three issues, and if Eschelon had provided that clarification the parties would not have had a dispute. The fact that Qwest subsequently decided not to pursue the issue on volume commitments is of no import – what is clear is that the parties disagreed over whether this was a proper request, Qwest raised at least three issues on which it sought clarification, and Eschelon failed to respond.

16 Eschelon next argues, at pages 7 – 11 of its Petition, that Qwest's November 8, 2002 response was somehow legally insufficient. However, in order for Qwest to have an obligation to respond to an opt-in request, the requesting party must provide a clear notice, including a statement that it is willing to adopt the relevant terms verbatim. Eschelon failed even this minimal requirement. Nevertheless, Qwest provided a prompt, clear, and professional response seeking clarification. Nothing in Eschelon's Petition provides any evidence to the contrary. In fact, Eschelon's argument makes it clear that Qwest actually did think that it understood the request, but that Qwest's understanding of the request was such that it was not a proper opt-in, for all of the reasons discussed above with regard to termination date and other terms and conditions. *Petition at p. 9*. Thus, the clarification Qwest sought was clarification from Eschelon whether it was requesting a true opt-in or a new negotiated agreement. *Id.* This is certainly permissible, and if Eschelon had responded to Qwest's letter promptly, the parties would likely not be before the Commission now.

C. Eschelon's Subsequent Communications did not Provide Clarity Prior to August 14, 2003.

17 Eschelon finally argues that if the Commission continues to find that the October 29 request was not sufficient to trigger Eschelon's opt-in rights, the Commission should find that other events prior to August 14, 2003, cleared up any confusion and constituted a proper opt-in request. Eschelon first argues that it cleared everything up in a February 10, 2003 letter to Pat Engles at

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

Qwest. However, this letter was insufficient for a number of reasons. First, it was not sent to the proper person at Qwest, as Eschelon had repeatedly been directed to discuss this matter with Larry Christensen. Second, the letter did not address the AIN features pricing. Third, the letter did not in fact clear up the termination date issue, as Eschelon continued to argue that it did not need to accept the McLeod termination date even up to the time it filed its complaint in Washington in September 2003. Thus, this letter does not support Eschelon's argument.

18 Finally, Eschelon argues that the date of filing its complaint with the Minnesota Public Utilities Commission (April 23, 2003) should be the opt-in trigger date. Eschelon claims that "[e]ven Qwest admits that it understood Eschelon's request at that point," citing a portion of Larry Christensen's declaration that states: "Eschelon's communication to Qwest of what it really wanted came through the Minnesota Complaint." However, there is no basis in this record to conclude that Qwest understood Eschelon's request as of the date of the filing of the complaint or simply that the meaning became clear to Qwest as the complaint process unfolded. The Commission's finding in this case that Eschelon's August 14, 2003 letter was the first sufficient notice is supported by the record and should not be altered based on Eschelon's speculative interpretation of Mr. Christensen's declaration after it has seen other avenues of relief closed.

III. CONCLUSION

19 The Commission should affirm its decision about the August 14, 2003 effective date of Eschelon's opt-in request. Eschelon Eschelon has failed to present facts or arguments in its Petition that require or even support a reversal of the Commission's findings and conclusions. The Commission's remedy in this case, which is to deny Eschelon relief until a proper opt-in request was submitted, is wholly appropriate. This provides both parties the proper incentives in future dealings. The Commission's decision of February 6, 2004 in this docket should be affirmed and the Petition for Reconsideration should be denied.

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

Dated this 1st day of March, 2004.

QWEST

_____

Lisa A. Anderl, WSBA #13236
Adam L. Sherr, WSBA #25291
1600 7th Avenue, Room 3206
Seattle, WA 98191
Phone: (206) 398-2500

Attorneys for Qwest Corporation

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040