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BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

ESCHELON TELECOM OF
WAHSINGTON, INC.

Petitioner and
Complainant,

v.

QWEST CORPORATION,

Respondent.

Docket No. UT-033039

QWEST'S ANSWER TO ESCHELON'S
PETITION FOR ENFORCEMENT OF
SECTION 252(i) AND COMPLAINT

I. INTRODUCTION

1. Qwest Corporation ("Qwest") hereby files its answer to Eschelon's September 16, 2003 Petition for Enforcement of Section 252(i) and Complaint ("Petition"). The Petition contains a claim pursuant to Section 252(i) of the Act and a claim of discriminatory rates. Both claims are without merit.

In its first claim Eschelon alleges that Qwest refused to provide Eschelon with the same pricing that Qwest has given to McLeod in violation of Section 252(i) of the Act, which allows a carrier to opt into the terms and conditions in another carrier's interconnection agreement, provided certain conditions are met. Eschelon makes this allegation in complete disregard of the factual record, which establishes that (1) Qwest did not refuse to provide McLeod pricing to

1 Eschelon; (2) Eschelon purchases a product that contains different features, is offered pursuant to a
2 contract applying to a different time period, and applies for different volumes from the product
3 McLeod purchases; and (3) Eschelon has failed to attempt to negotiate an interconnection
4 agreement amendment consistent with its pricing request.

5 In its second claim, Eschelon alleges that Qwest engaged in discriminatory pricing as to
6 Eschelon. Qwest denies this claim. Qwest's obligation under federal and state law is to charge
7 Eschelon the rates in the interconnection agreement in effect between the parties. At all times
8 relevant to this proceeding, Qwest has charged Eschelon lawful rates as contained in the
9 interconnection agreement between the parties. The fact is that Eschelon did not properly avail
10 itself of its right to negotiate a new agreement despite repeated attempts by Qwest to engage
11 Eschelon in negotiations. Thus, Qwest has charged Eschelon lawful, non-discriminatory rates.

12 2. Qwest observes that this Petition is purportedly brought pursuant to WAC 480-09-
13 530 and WAC 480-09-400 and RCW 80.04.110. However, the two provisions in the WAC are
14 incompatible with one another, as WAC 480-09-530 sets up an expedited schedule for purposes of
15 petitions for enforcement of interconnection agreements, while WAC 480-09-400 sets an entirely
16 different schedule for purposes of conducting a non-expedited adjudicative proceeding. Further,
17 RCW 80.04.110 is the Commission's general complaint statute, which allows a party to request
18 much broader relief than does WAC 480-09-530, and sets a 10-month deadline for resolution of
19 the proceeding, as compared with 75 days under WAC 480-09-530. Finally, Eschelon has not
20 otherwise complied with WAC 480-09-530(1)(a). Nevertheless, Qwest does not at this juncture
21 feel prejudiced by these technical defects in the petition, and is filing this answer as if WAC 480-
22 09-530 was properly invoked and applicable. It may be that some of the timing and other issues
23 raised here can be resolved in the prehearing conference scheduled for October 7, 2003.

24 3. Additionally, Eschelon's Petition suffers from more serious jurisdictional defects.
25 In large measure, Eschelon seeks monetary damages. Its claim for a "refund" under RCW
26 80.04.220 is not well taken, and is essentially a claim of damages. However, RCW 80.04.220 is

1 limited to complaints regarding excessive or exorbitant rates. The rates charged to Eschelon
2 during all relevant periods was a negotiated rate contained in Eschelon's approved interconnection
3 agreement, and cannot be held to be excessive or exorbitant. Further, RCW 80.04.240 limits such
4 actions to a period of six months from the date the rates were charged. This Commission does not
5 have the authority to award monetary damages. The Commission has consistently recognized this
6 fact, and very recently affirmed it in the AT&T complaint against Verizon concerning Verizon's
7 access charges. *AT&T v. Verizon*, Docket No. UT-020406, Eleventh Supplemental Order, ¶ 34.
8 Eschelon's forum for such relief is not this Commission, but rather through a complaint in state or
9 federal court. In sum, Eschelon's claims have no merit. Qwest respectfully requests that the
10 Commission dismiss Eschelon's Petition.

11 II. DISCUSSION

12 4. The first allegation in Eschelon's Petition is that Qwest has refused to give
13 Eschelon the same rate for UNE-Star¹ that it agreed to provide McLeod. A simple review of the
14 documents relied upon by Eschelon in making its allegations reveal that Qwest never refused to
15 amend Eschelon's pricing. Eschelon cites November 8, 2002 and February 14, 2003 letters from
16 Qwest to Eschelon as support for the allegation that "Qwest has repeatedly refused to do so [offer
17 the McLeod prices] unless Eschelon agrees to all other terms and conditions of the Qwest/McLeod
18 USA Amendment." Petition, ¶ 18.

19 5. Even a cursory reading of these letters makes clear that Qwest has never refused to
20 modify its interconnection agreement with Eschelon. Instead, Qwest raised some valid concerns
21 related to Eschelon's opt-in request and asked Eschelon to negotiate an interconnection agreement
22 amendment. For example, the November 8, 2003 letter from Qwest states clearly that Qwest has
23 concerns that Eschelon has not properly requested an opt-in and describes certain related terms and
24 conditions that would be included in an opt-in to the McLeod pricing. After recounting these

25 ¹ As noted in the Petition, the terms UNE-P, UNE-Star, UNE-M and UNE-E may be used interchangeably in this
26 proceeding.

1 concerns, Qwest states in that letter:

2 We have been unable to ascertain from your letter (a) whether
3 Eschelon understands that the service it would be receiving if to
4 chose to opt-in to the McLeod agreement would differ from the
5 service it is receiving today, and (b) whether Eschelon would agree
6 to the same terms and conditions to which McLeod has agreed. If
7 so, please contact Larry Christensen, at 303-896-4686, to initiate the
8 necessary arrangements, including appropriate contractual
9 amendments.

10 6. This response is in substance identical to the response Qwest has given Eschelon
11 every time Eschelon has made such a request. There has never been any follow-up by Eschelon to
12 initiate negotiations to alter its interconnection agreement, other than a phone call by Mr. Dennis
13 Ahlers to Larry Christensen on April 4, 2003, in which Mr. Ahlers asked some general questions
14 about Qwest's opt-in policy and on the issues raised by Qwest and promised to follow up with Mr.
15 Christensen. Mr. Ahlers did not follow up, and instead Eschelon filed this Petition.

16 7. Qwest has told Eschelon that there were a number of issues associated with
17 Eschelon's opt-in request. For example, the term of the McLeod agreement provides for modified
18 pricing through December 31, 2003, at which point the pricing agreement terminates. Eschelon
19 asserts in its Petition that the effective dates of the agreement are irrelevant, and that it should be
20 able to obtain pricing for the term of its own contract. Eschelon cites no law, policy, or precedent
21 in support of this position, which is in fact contrary to the Commission's interpretive and policy
22 statement on this very issue. That statement provides that when a carrier wishes to opt into a
23 provision of another agreement, it does so subject to the termination or expiration date of the
24 underlying agreement.² Additionally, as Eschelon's Petition acknowledges, the features purchased
25 by Eschelon vary from the features sought by McLeod, resulting in an incremental difference of
26 \$0.35 per UNE-P more for Eschelon than McLeod. It was not until August 14, 2003 that Eschelon
agreed to pay the incremental amount, as opposed to simply demanding the McLeod rates. Third,

² In the Matter of the Implementation of Section 252(i) of the Telecommunications Act of 1996, Interpretive and Policy Statement (First Revision), principles 6 and 8.

1 McLeod made volume purchase commitments that Eschelon has not made. In order to amend
2 Eschelon's interconnection agreement to reflect Eschelon's requested pricing, Qwest explained to
3 Eschelon that each of these issues needed to be resolved through negotiation. Eschelon did not
4 attempt to engage in such negotiations, despite Qwest's express willingness to do so.

5 8. The Telecommunications Act sets forth a specific process for addressing such
6 issues. Specifically, a CLEC may request to opt-in to an existing interconnection agreement
7 pursuant to Section 252(i) or the CLEC may request to negotiate an amendment to its
8 interconnection agreement pursuant to Section 251(c)(1).

9 9. Eschelon has not taken either step. While it purports to want to opt into McLeod
10 pricing provisions, Qwest has reasonably questioned such requests, because the McLeod prices do
11 not apply to the service that Eschelon orders. As the Petition points out, Eschelon receives and
12 pays for certain features beyond those purchased by McLeod and for which the McLeod pricing
13 applies. Eschelon never clarified whether it was requesting McLeod pricing for all of the features
14 it currently requests (a request Qwest would reject) or is requesting some sort of hybrid pricing (a
15 request that is not really an opt-in, but rather a request for an amendment to the Eschelon
16 interconnection agreement). Had Qwest accepted the opt-in request, the resulting amendment
17 would have altered the Eschelon service package and Qwest could no longer have provided the
18 additional features and listings at the incremental \$0.35 Eschelon had previously negotiated.

19 10. In its Petition, Eschelon now asserts that it wishes to obtain the McLeod price,
20 adjusted by \$.35 to reflect differences in the products Eschelon and McLeod purchase. This is not
21 an opt-in request pursuant to 252(i), but rather a request for an amendment to the Eschelon
22 interconnection agreement that clearly should be negotiated. The record establishes that Qwest is
23 willing to negotiate such an amendment. Eschelon has never followed up on Qwest's repeated
24 invitations to enter into such negotiations.

25 11. As set forth in the attached Declaration of Larry Christensen, Qwest has recently
26 offered Eschelon an amendment that incorporates the McLeod pricing. It also includes the \$0.35

1 increment that Eschelon has acknowledged they desire to maintain and should apply. Thus, it
2 appears as though the issues in dispute here have been narrowed to a single question – whether
3 Eschelon is entitled to receive the McLeod pricing for a term longer than the term contained in the
4 McLeod agreement. As discussed below, it is clear that it is not.³

5 12. The expiration date of an agreement is clearly a related term to the pricing portion
6 of the agreement. This assertion is consistent with this Commission’s interpretative and policy
7 statement on opt-in rights, and is affirmed by common sense.

8 First, the Commission’s interpretive and policy statement with regard to a carrier’s opt-in
9 rights clearly states that the carrier’s right to opt into a specific provision of an agreement, or an
10 entire agreement, is limited to the term of the underlying agreement.⁴ This is consistent with what
11 Qwest has told Eschelon since February 2002, and Eschelon’s position to the contrary is
12 unsupported by fact or law.

13 Eschelon claims that the term of the agreement cannot be related to price because both
14 Eschelon and McLeod started out with identical prices but different expiration dates. However,
15 that logic does not hold. While Qwest might have been willing to agree to a termination date of
16 12/03 with McLeod and 12/05 with Eschelon when rates were \$24.00, it does not follow that
17 Qwest would or should be willing to agree to a price reduction for Eschelon that lasts two years
18 longer than the reduction extended to McLeod. Thus, Qwest’s willingness to negotiate a rate of
19 \$21.16 with McLeod was integrally related to the fact that that rate would expire on December 31,
20 2003. It does not follow that Qwest would be willing to extend that term for two additional years,
21 and indeed it is not. Thus, Eschelon is entitled to the McLeod rates only until December 31, 2003.

22 Second, common sense dictates that the term of the agreement is integrally related to the
23 prices contained in the agreement. If it were not, absurd results would follow. For example, in

24 ³ Qwest does not believe Eschelon’s request for a “backdated” effective date and refund is properly before this
25 Commission, and therefore believes that only the expiration date is properly at issue. Eschelon has demonstrated no
26 legal or equitable right to a “backdated” rate when it did not properly opt in or negotiate a rate change.

⁴ *Id.*

1 this case, if Eschelon were permitted to extend the McLeod pricing until 2005, another carrier
2 could negotiate an interconnection agreement with an expiration of 2008, then opt into the
3 Eschelon pricing that would expire in 2005, and effectively extend it for another three years. A
4 third carrier could later negotiate different prices to expire in 2010, and in 2007 could opt into the
5 Eschelon pricing. It is easy to see how carriers could “leap frog” the expiration dates and
6 essentially preserve these rates in perpetuity. Qwest does not believe that that is consistent with
7 the opt-in provisions of the Act, or with the Commission’s policy. That strategy should not be
8 condoned by allowing Eschelon to extend the McLeod pricing beyond December 31, 2003.

9 13. The Parties do not disagree that an amendment is required to change the rates for
10 Eschelon’s platform service. The 1996 Act imposes an obligation on Qwest to negotiate with
11 CLECs regarding amendments to interconnection agreements. Qwest has indicated repeatedly it is
12 ready and willing to engage in negotiations. Qwest welcomes an effort on the part of Eschelon to
13 engage in such negotiation. However, Eschelon should not be permitted to use a regulatory
14 complaint to usurp the negotiation process and Qwest urges this Commission to dismiss
15 Eschelon’s Petition as not ripe and without merit.

16 III. ANSWER

17 Qwest responds to the specific allegations in the Petition as follows:

18 Introduction And Parties

19 14. On information and belief, Qwest admits the allegations in paragraphs 1-3 to the
20 extent they contain factual assertions about the existence of Eschelon. Qwest denies the
21 allegations in the last two sentences of paragraph 1.

22 15. Qwest admits the allegations in paragraphs 4 and 5, except the entity name in the
23 Petition should be Qwest Corporation, and the correct address for Qwest in Seattle is set forth in
24 the signature block of this answer. Qwest further denies that it is the “dominant monopoly
25 provider of local exchange service in Washington.” To the contrary, in the business market in
26 which Eschelon chooses to compete, Qwest has recently initiated a proceeding before this

1 Commission to establish that Qwest's services are subject to effective competition (Docket No.
2 UT-030614).

3 16. Qwest denies the allegations in paragraph 6 of the Petition, and specifically denies
4 that "immediate relief" or any other type of expedited proceeding is warranted.

5 17. Qwest denies the allegations in paragraph 7 of the Petition, and specifically denies
6 that it was obligated to charge Eschelon different rates than are contained in the parties'
7 interconnection agreement.

8 18. Qwest denies the allegations in paragraph 8 of the Petition, and specifically denies
9 that Eschelon is entitled to any "refund" or that the Commission has authority to order a refund.
10 Qwest also denies that it should be subject to any penalty with regard to the issues raised in the
11 Petition.

12 **Jurisdiction**

13 19. Eschelon has never requested that Qwest negotiate an interconnection agreement
14 amendment on this issue. Accordingly, Qwest denies that 47 USC § 251(c)(1)(D) and (3) provide
15 this Commission with jurisdiction. Eschelon has not asked for the enforcement of an
16 interconnection agreement. Accordingly, Qwest denies that 47 U.S.C. § 252(e) confers
17 jurisdiction on this Commission. Eschelon has not sought to opt-into the McLeod agreement
18 without modifying its terms. Accordingly 47 U.S.C. § 252(i) and 47 C.F.R. 51.809 do not provide
19 this Commission with jurisdiction. Eschelon's asserted state law bases for jurisdiction are based
20 on federal rights of which Eschelon has demonstrated no violation by Qwest. Accordingly, Qwest
21 denies that this Commission has jurisdiction to hear this dispute as pled by Eschelon.

22 20. Qwest admits that Eschelon notified Qwest on August 14, 2003 that it intended to
23 file this Petition. Qwest denies that it did not respond to the notice letter – counsel for Eschelon
24 was contacted telephonically regarding the notice letter, and on September 17, 2003, Qwest
25 transmitted to Eschelon the interconnection agreement amendment discussed in paragraph 11
26 above. This amendment was transmitted after Eschelon sent the Petition to Qwest, but before

1 Qwest was aware of the Petition.

2 **Statement of Facts**

3 21. Qwest admits that it entered into an interconnection agreement with Eschelon as
4 asserted in paragraph 11 of the Petition. Qwest denies that Eschelon has quoted relevant portions
5 of the agreement.

6 22. Answering paragraph 12, Qwest denies that the interconnection agreement dispute
7 resolution provision contained in Exhibit 2 is applicable to this dispute. Eschelon has not alleged
8 a violation of any provisions within the interconnection agreement.

9 23. Qwest admits the allegations in paragraphs 13-17 with respect to the existence of
10 amendments and approvals by the Washington Commission. Qwest disagrees with, and therefore
11 denies the descriptions of the agreements and the implications urged by Eschelon. For example, in
12 Paragraph 15 Eschelon implies that pricing and termination dates as between McLeod and Qwest
13 and Eschelon and Qwest must necessarily always be parallel. For reasons explained herein, that is
14 simply not accurate, and a rate that Qwest was willing to agree to through December 31, 2003 is
15 not the same as a rate that Qwest would necessarily be willing to agree to for two additional years.

16 24. Answering paragraph 18, Qwest admits that Eschelon has made inquiries regarding
17 UNE-Star rates offered to McLeod. Qwest denies that it has refused to provide those rates to
18 Eschelon and denies that it would only agree to such rates in the event Eschelon agreed to *all*
19 terms and conditions in the McLeod amendment. To the contrary, Qwest has raised legitimate
20 questions regarding Eschelon's requests and expressed a willingness to negotiate. Eschelon by
21 contrast has failed to specify the precise terms it is seeking from Qwest, has refused to respond to
22 questions from Qwest and has refused to negotiate. Instead, Eschelon seeks a retroactive change
23 to the rates contained in its interconnection agreement, which is improper.

24 **Claim Pursuant to Section 252(I) of the Act**

25 25. With respect to the allegations in paragraphs 19 and 20, Qwest states that Section
26 252 (i), 47 C.F.R. 51.809, and the Supreme Court decision speak for themselves, and denies any

1 suggestion that Eschelon properly attempted to avail itself of any rights it might have under
2 applicable law.

3 26. Qwest denies the allegations in paragraph 21, and specifically denies that the term
4 of the agreement is not related to the pricing provisions.

5 27. Qwest denies the allegations in paragraph 22. The rates in the McLeod agreement
6 are and were related to the volume commitments contained therein. Qwest also denies that a
7 reduction in rates from \$24.00 to \$21.16 constitutes a reduction by a "third." Nevertheless, as set
8 forth in the Declaration of Larry Christensen, Qwest has determined that for purposes of
9 compromise and to resolve the disputes herein, it is willing to offer the McLeod pricing to
10 Eschelon without the volume commitments.

11 28. Qwest denies the allegations in paragraph 23. As set forth in paragraph 12 above,
12 the termination date of the McLeod agreement was integrally related to Qwest's agreement to
13 reduce McLeod's rates. Obviously, an agreement to accept lower rates for 15 months is far
14 different from an agreement to do so for 39 months, and an agreement to the former does not
15 mandate acceptance of the latter.

16 29. Qwest denies the allegations in paragraph 24. Eschelon did not acknowledge the
17 \$0.35 difference in its request to opt-in to the McLeod prices.

18 30. Qwest admits the allegations in paragraph 25.

19 31. Qwest denies the allegations in paragraph 26, except that Qwest agrees that Section
20 252(i) of the Act imposes certain opt-in requirements. Qwest specifically denies that Eschelon
21 ever attempted to properly opt into the McLeod agreement, or that Qwest was obligated to offer
22 Eschelon terms and conditions from the McLeod agreement without including legitimately related
23 terms. Eschelon's actions establish that it did not want to opt-in to the McLeod rates with the
24 McLeod set of feature and listing options. Under those circumstances, it was appropriate for
25 Qwest to request negotiations, which Eschelon refused to enter into.
26

1 **Claim of Discriminatory Rates**

2 32. Qwest denies the allegations contained in paragraphs 27 – 33 of the complaint.
3 Qwest specifically denies Eschelon’s characterization of the parties’ interconnection agreement in
4 paragraph 27. Qwest denies that Eschelon has properly characterized the law in paragraph 28.
5 Qwest also denies that it has discriminated against Eschelon as set forth in paragraphs 29, 30 and
6 31. Furthermore, Qwest denies that it has overcharged Eschelon or that it is liable for refunds, as
7 it has at all times charged Eschelon rates contained in the parties’ interconnection agreement.

8 **IV. PRAYER FOR RELIEF**

9 33. For the reasons outlined above, Qwest denies that Eschelon is entitled to an
10 expedited proceeding. This Petition does not allege a violation of an interconnection agreement
11 and alleges a historical damages dispute that does not warrant expedited relief. Qwest denies that
12 Eschelon is entitled to any of the relief set forth in the final paragraphs 1 – 4 of the Petition.

13 **V. AFFIRMATIVE DEFENSES**

14 34. Eschelon’s Petition fails to state a claim or allege facts upon which relief can be
15 granted. Accordingly, Eschelon’s Petition should be dismissed with prejudice and on the merits.

16 35. Eschelon’s claim for UNE-Star pricing is barred because Eschelon has not sought
17 to opt-into the terms and conditions associated with the McLeod agreement that is the subject of
18 Eschelon allegations but has instead sought to enter into an agreement that contains different
19 pricing, different terms and conditions and different applicable time periods than the McLeod
20 agreement. Despite these differences, Eschelon has failed to act on repeated invitations from
21 Qwest to negotiate an amendment to their interconnection agreement that modifies pricing.

22 36. To the extent this Petition seeks monetary damages, Qwest denies that this
23 Commission has jurisdiction over such a dispute.

24 37. The claim is barred by the statute of limitations.

25 **VI. REQUESTED RELIEF**

26 Qwest respectfully requests that this Commission:

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- 37. Dismiss Eschelon's Petition for failure to state a claim upon which relief can be granted.
- 38. Dismiss Eschelon's Petition based on a lack of jurisdiction.
- 39. Deny Eschelon's request for an expedited proceeding.
- 40. Deny Eschelon's other claims for relief.
- 41. Grant such further relief as it deems reasonable and necessary.

RESPECTFULLY SUBMITTED this 26th day of September, 2003.

QWEST

/s/ Lisa A. Anderl
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