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October 4, 2005

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**VIA FEDERAL EXPRESS**

Carole Washburn, Executive Secretary  
Washington Utilities & Transportation Commission  
1300 Evergreen Park Drive, SW  
Olympia, WA 98504

**Re: Docket No. UT-023036**  
***Filing of Wholesale Advantage Services Agreement by Eschelon Telcom of***  
***Washington, Inc. and Advanced Telcom, Inc.***

Dear Ms. Washburn:

This law firm represents Verizon Northwest Inc. and Verizon Services Corp. in this matter. On August 16, 2005, Eschelon Telcom, Inc. and Advanced Telcom, Inc. (collectively, "Eschelon") made two filings with the Washington Utilities and Transportation Commission ("Commission") related to the Wholesale Advantage Services Agreement ("Advantage Agreement") between Eschelon and Verizon Services Corp. ("Verizon"). The filings were made improperly by Eschelon, and the Commission should reject Eschelon's request that the Advantage Agreement be considered by the Commission for approval as an amendment to Eschelon's interconnection agreements with Verizon.

The Advantage Agreement does not govern the provision of any unbundled network elements within the meaning of section 251(c)(3) of the Communications Act of 1934, as amended (the "Act"), and thus is not subject to approval by the Commission under section 252 of the Act. As the Commission found in the context of line sharing, where "the only network element a CLEC requests from an ILEC is one that the FCC has removed from the list of required elements under subsection 251(c)(3), the CLEC cannot be said to have made a request for a network element 'pursuant to section 251'" and an agreement memorializing such a request "is not an agreement within the meaning of subsection 252(a)(1)."<sup>1</sup>

That is precisely the case here: Eschelon made a request for a UNE-P "replacement" service, because in the *TRRO*, the FCC removed local circuit switching from the list of unbundled

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<sup>1</sup> Order No. 02 (April 19, 2005) Dismissing *Petition of Multiband Communications, LLC For Approval of Line Sharing Agreement With Qwest Corporation Pursuant to Section 252 of the Telecommunications Act of 1996*, Docket No. UT-053005 ("*Line Sharing Agreement Order*") at 11-12.



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network elements required to be provided under subsection 251(c)(3).<sup>2</sup> See, e.g., 47 C.F.R. § 51.319(d)(2)(i) (“An incumbent LEC is not required to provide access to local circuit switching on an unbundled basis to requesting telecommunications carriers for the purpose of serving end-user customers using DS0 capacity loops.”). Verizon accommodated the request through the negotiation of a commercial agreement to govern “local circuit switched dialtone services.” Thus, as with the line sharing agreement between Qwest and Multiband in Docket No. UT-053005, the Advantage Agreement concerns only a service that is not covered by section 251 of the Act, and is not an agreement within the meaning of subsection 252(a)(1) requiring Commission approval.<sup>3</sup> For the reasons explained below, language in the Advantage Agreement that addresses one of the components of UNE-P (a DS0 Loop) does not change the fact that the Advantage Agreement deals solely with UNE-P replacement, not an unbundled element covered by Section 251.

Eschelon expressly concurred with this assessment in the Advantage Agreement, agreeing that: (i) the services provided under the Advantage Agreement do not constitute a request by Eschelon for unbundled access pursuant to section 251 of the Act and (ii) the Advantage Agreement is not subject to section 252 of the Act (including the state commission filing requirement).<sup>4</sup> In fact, by filing the Advantage Agreement for approval by the Commission as an interconnection agreement amendment, Eschelon violated that same provision of the Advantage Agreement, in which Eschelon agreed that it will not claim that the services provided thereunder are subject to section 251 of the Act.<sup>5</sup>

Moreover, Eschelon’s claim that the terms of the Advantage Agreement permit Eschelon to file the agreement with the Commission is wrong. Eschelon is permitted to file the Advantage Agreement with a state commission only if it is ordered to do so in a “final, non-appealable order.”<sup>6</sup> The Commission has not issued a “final, non-appealable” order requiring Eschelon to

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<sup>2</sup> *In the Matter of Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313, CC Docket No. 01-338, Order on Remand, RCC 04-290 (rel. Feb. 4, 2005) (“TRRO”) ¶¶ 199-228.

<sup>3</sup> This result is also consistent with the “*Qwest Declaratory Ruling*” issued by the FCC. Memorandum Opinion and Order, *Qwest Communications International Inc. Petition for Declaratory Ruling on the Scope of the Duty To File and Obtain Prior Approval of Negotiated Contractual Arrangements Under Section 252(a)(1)*, 17 FCC Rcd 19337 (2002). Just as the Commission found with regard to the Qwest – Multiband line sharing agreement, because the Advantage Agreement does not pertain to an unbundled network element within the meaning of section 251, it is not an agreement that relates to ongoing obligations for services that ILECs have a duty to provide under sections 251(b) and (c) of the Act. See *Line Sharing Agreement Order* at 13 (citing to *Qwest Declaratory Ruling*).

<sup>4</sup> Advantage Agreement Section 35.1.

<sup>5</sup> Verizon demanded by letter dated September 29, 2005 that Eschelon withdraw its filing with the Commission, but to date Eschelon has failed to do so.

<sup>6</sup> Advantage Agreement Section 35.2.



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file the Advantage Agreement as an amendment to existing interconnection agreements. The orders cited by Eschelon apply to commercial agreements of Qwest executed in the past, and have no application to the Advantage Agreement between Eschelon and Verizon.

The rationale utilized by the Commission in the orders cited by Eschelon does not apply to the Advantage Agreement. For example, the Commission's order requiring that Qwest's Platform Plus agreement be filed for approval under section 252 of the Act relied on a contractual structure in which the loop component of Qwest's platform service was not provided under the commercial agreement, but rather under the terms (including pricing) of a section 251 interconnection agreement amendment executed concurrently with the commercial agreement.<sup>7</sup> In contrast, the services provided under the Advantage Agreement are comprehensive dialtone services that include governing terms, conditions and rates for the *combination* of local circuit switching and DS0 loops provided. The rates for standalone DS0 loops in the parties' interconnection agreement have no bearing on the charges set forth in the Advantage Agreement for dialtone services provided; rather all the rates for the services provided in the Advantage Agreement (including charges applicable to the loop component of the Advantage service) are set forth in the Advantage Agreement itself. Moreover, the Advantage Agreement addresses *only* dialtone services provided as a combination of local circuit switching and DS0 loops; it does not cover terms, conditions or rates applicable to standalone DS0 loops. Standalone DS0 loops remain governed exclusively by the parties' interconnection agreement.

In any event, Eschelon breached the Advantage Agreement by filing it with the Commission, and it is not appropriate for the Commission to consider the agreement as an interconnection agreement amendment subject to approval under section 252 of the Act. Accordingly, the Commission should reject Eschelon's request for approval.

Sincerely,



Timothy J. O'Connell

cc: Dennis Ahlers

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<sup>7</sup> Order No. 01 (October 20, 2004), *Matter of Request of MCIMETRO ACCESS TRANSMISSION SERVICES, LLC and QWEST CORPORATION For Approval of Negotiated Interconnection Agreement, in its Entirety, Under the Telecommunications Act of 1996*, Docket Nos. UT-960310 and UT-043084 ("Qwest Platform Order") at 14-16.