BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION, Complainant, v. ADVANCED TELECOM GROUP, INC.; ET AL. Respondents.	)	DOCKET NO. UT-033011 ESCHELON'S REPLY TO RESPONSES TO MOTIONS TO DISMISS

INTRODUCTION

Eschelon Telecom of Washington, Inc. (Eschelon) files this brief in reply to the responses to the motions to dismiss or for summary determination filed by the Washington Utilities and Transportation Commission Staff (Staff) and other parties in this docket. Eschelon incorporates into this response the arguments it made in its Motion to Dismiss filed on November 7, 2003.

I. THE CONTEXT OF THE FCC 'S STATEMENTS CONFIRM THAT THE FILING REQUIREMENT RESTS SOLELY WITH ILECS.

Staff, along with the Public Counsel and Qwest Corporation (Qwest), takes issue with the arguments made by Eschelon and other CLECs that Section 252 of the Act obligates only ILECs to file interconnection agreements. These parties attempt to dismiss or minimize statements in the FCC's First Report and Order that support that position. However, these parties can point to absolutely no language in the Act, the rules or FCC orders that imposes the obligation on CLECs.

For example, Staff and Qwest argue that the language, cited by Eschelon and other parties, from Paragraph 1230 of the First Report and Order[1] ("We note that section 252 does not impose any obligations on utilities other than incumbent LECs, and does not grant rights to entities that are not telecommunications providers.") should not be relied upon because it is taken "out of context". If, by this, they mean that the statements should not be relied upon because they were not made in the context of addressing who has a duty to file interconnection agreements, this argument is not helpful. All parties concede that the Act or the rules do not directly address that issue. If the rules or the Act or FCC orders explicitly addressed who had the duty to file, we would not be having this argument. In the absence of such a direct statement in the law we are left to examine what the FCC has said to see if it will help the process of interpretation. Where Congress has not directly addressed the question at issue, it is appropriate to turn to the interpretation of the administrative agency charged with administering the statute in question. *United States v. 313.34 Acres of Land*, 923 F.2d 698, 701 (9th Cir.,1991). It is not an answer to such a process to simply state that the statement is taken out of context. Rather one must examine the context to see if it provides clues to intent and interpretation. In this case, when considered in context, the FCC's statement fully supports Eschelon's interpretation that the filing requirement rests with the ILECs.

While it is true that the FCC's statement in Paragraph 1230 of the First Report and Order was made in the context of a discussion about access to facilities or property, a careful reading of the order demonstrates that the statement itself is much broader in its application. At that point in its order the FCC is explaining the limitations on the right to

[1] *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499 (1996) (First Report and Order),

invoke the section 252 procedures to gain such access, and it concludes that Section 252 may only be invoked by CLECs against ILECs, and can not be used by ILECs against CLECs. However, since nothing in the text of section 252 explicitly addresses access to facilities or property nor prohibits those as subjects of an agreement or an arbitration under section 252, how does the FCC reach this conclusion?[2] Because, says the FCC, the only utilities that section 252 imposes any obligations on are ILECs. Since the procedures and requirements of section 252 only impose obligations on ILECs, reasons the FCC, that section can not be used to impose access obligations on any other utilities, including CLECs. Thus, when examined in context, the FCC was making a much broader statement about the meaning and effect of Section 252. It was saying that, even though section 252 by its terms does not address the issue of access to facilities of property because section 252 only imposes obligations on ILECs, it could not be used to impose such obligations on CLECs. Such a statement, when taken in context, is entirely incompatible with an interpretation that section 252 implicitly imposes filing obligations on CLECs.

Qwest makes a similar "out of context" argument as to Paragraph 1437 of the First Report and Order, where the FCC again, consistent with its statement in Paragraph 1320, indicates that the filing responsibility is on the ILECs. ("Incumbent LECs…are required to file with state commissions all interconnection agreements entered into with other carriers…").[3] Qwest argues that this language should not be considered because it is made in the context of Section 252(i). In discussing such opt-in rights, says Qwest, the

[2] Nothing in Section 252 indicates, for example, that an ILEC could not make access to CLEC facilities or property an issue as part of an arbitrated agreement under 252(b) and that the state commission could not resolve it in the ILECs favor. Yet, the FCC says that this can not happen under section 252, because Section 252 imposes obligations only on ILECs.

[3] Neither Staff nor Public Counsel addressed this statement in their Responses.

FCC spoke in terms of ILECs "because ILECs, as the owners of most of the necessary infrastructure, are the local exchange carriers that are generally providing the interconnection services under the agreements." Qwest Response at 5. However, this argument supports Eschelon's interpretation. Because the ILECs are the ones from who other CLECs will be seeking interconnection, it is logical that it is the ILECs who would have the duty to file the agreements with the state commissions.

Furthermore, it is Qwest that is taking this statement out of context. The context of Paragraph 1437 is a discussion about the reporting, recordkeeping and compliance duties imposed on small entities, including CLECs, as a result of Section 252(i). This discussion is required by Section 603 of the Regulatory Flexibility Act (RFA), 5 U.S.C. §603. Among the requirements of the RFA is an analysis of whether or to what extent the FCC's rules impose reporting, recordkeeping and other compliance requirements on "small entities", which in this case, includes CLECs. It is in this context that the FCC states at Paragraph 1437 of its Order that its rules do not impose compliance requirements on any small entities. The FCC said, in relevant part, at Paragraph 1437 of its First Report and Order:

> "Our decisions in this section of the Order do not subject any small entities to reporting, recordkeeping or other compliance requirements. Incumbent LECs, including small incumbent LECs, are required to file with state commissions all interconnection agreements entered into with other carriers, including adjacent incumbent LECs. Incumbent LECs must also permit third parties to obtain any individual interconnection, service or network element arrangement on the same terms and conditions as those contained in any agreement approved under section 252." (Emphasis added.)

The FCC states quite clearly that its rules implementing section 252(i) do not impose any compliance requirements on small entities, like CLECs, noting that ILECs have the requirement to file all interconnection agreements entered into with other carriers. Thus, contrary to Qwest's argument, this discussion is directly in context and

strongly supports the conclusion that the filing requirement is directly and solely on the ILECs.

II. COMPLAINANT'S CAN CITE TO NO PROVISION IMPOSING THE FILING REQUIREMENT ON CLECS.

While Staff, Qwest, and Public Counsel downplay FCC statements that the duty to file interconnection agreements is on Qwest, they can cite to no equivalent language supporting an opposite conclusion. Rather, they are left with attempting to draw dubious conclusions from tangential portions of the Act or from silence.

Staff and Qwest argue that where Congress intends its requirements to apply to only one class of company, it expressly says so. Staff Motion at 5, Qwest Response at 2. But obviously, Congress does not always express its intentions on this issue as explicitly as these parties contend; for if it did, it would not have been necessary for the FCC to point out in its order that section 252 only imposes obligations on ILECs when it comes to access to property or facilities. It is pure speculation to argue that silence on the issue indicates an affirmative duty for CLECs to file. Given the consequences proposed by Staff in this case for failure to file, one would expect that if CLECs were required to file agreements in addition to ILECs, Congress would have explicitly said so.

Staff argues that section 252(h) of the Act supports its argument because that section allows the State commission to charge a fee to both parties to the agreement to cover the costs of approving and filing the agreement. But that section addresses the issue of payment for the costs of the proceeding, not who has a duty to file an agreement. It indicates nothing about the duty to file. In fact, the language of 252(h) expressly differentiates between the parties to an agreement and the party filing the agreement. Section 252 states that, in the case of an interconnection agreement the fee may be charged to the parties "to the agreement", however, as to a statement under 252(f), the

costs may be charged to the party "filing the statement." If Congress had meant the filing requirement for interconnection agreements to be placed on both parties, it would have presumably used the same phrase in referring to both documents. Thus it would have provided, as to both agreements and statements, that the costs would be imposed on the parties "filing" the agreement. It did not do so.

Finally, Staff and Qwest make various arguments that, in their opinion, the purposes of Section 252(i) would be "better served" if CLECs are obligated to file interconnection agreements. While that may be their opinion, the issue is not what Congress should or might have required, it is what it did actually require. Neither Staff nor Qwest can point to language in the Act or the FCC's Rules or the order establishing those rules that places the obligation to file on CLECs. The most they can do is argue about what Congress should have done. Meanwhile, the statements made by the FCC on the issue clearly support the interpretation that the requirement to file interconnection agreements rests with the ILECs.

III. DISMISSAL IS APPROPRIATE AS TO DOCUMENTS THAT DO NOT MEET THE DEFINITION OF AN INTERCONNECTION AGREEMENT.

In its Response, Staff recommends dismissal of several individual agreements from this matter. Eschelon agrees with and asks the Commission to approve of Staff's determination that agreements No. 11, 22, and 24 between Eschelon and Qwest are agreements that need not be filed with this Commission and thus dismissal is proper as to those agreements.

However, there are additional agreements that Staff addressed in its Response that, on their face do not meet the requirements of an interconnection agreement under the Act and therefore can not be the basis for an alleged violation.

Agreement No. 17. As Qwest stated in its Motion to Dismiss, Agreement No. 17 is not an interconnection agreement. It is a unilateral expression about a possible future agreement. It creates no obligations regarding 251(b) or (c) obligations. See, Qwest Motion, p. 13. Staff's reply mischaracterizes this document as an agreement and states that it "provides for an implementation plan". Staff Response, p. 12. However, it is clear that this document does not "provide" for anything, but merely expresses one party's expectations about the development of an implementation plan in the future. Staff's argument that the letter includes subjects related to interconnection is not on point. Virtually all correspondence between Eschelon and Qwest, or indeed any CLEC and ILEC, concerns those subjects, but no one would argue that each piece of correspondence must be filed with the Commission. If it is not an agreement and creates no ongoing obligations it is not required to be filed under the Act. Eschelon agrees with Qwest that Agreement No. 17 is, on its face, not an interconnection agreement and should be dismissed from this matter.

Agreement No. 20. In its Motion to Dismiss, Qwest moved for dismissal as to Agreement No. 20 on the grounds that it is a letter that did not create any ongoing 251(b) or (c) obligations. Staff responds that this letter is "an ongoing agreement regarding the rates for interconnection, unbundled network elements, and reciprocal compensation." Staff's description of the letter is incorrect on its face. The letter, dated August 1, 2001, addresses the issue of reciprocal compensation to be paid to Eschelon by Qwest for periods prior to January 1, 2001. It is a statement by Eschelon of its position, not an agreement. It did not affect 251(b) or (c) services on an ongoing basis. The letter creates no obligations between the parties. It is a unilateral statement by Eschelon concerning its intent regarding potential claims against Qwest for a prior period. This letter was sent at

the same time that the issue of reciprocal compensation for periods after January 1, 2001 was agreed upon and filed as an amendment to the interconnection agreement.

This letter creates no obligations from Qwest to Eschelon and in fact, could be construed as a waiver of any potential past obligations to Eschelon by Qwest. It lists the various services for which Eschelon would not be billing Qwest for periods prior to January 1, 2001. It hardly seems likely that another CLEC would want to opt-in to a waiver of potential bills that it might want to impose on Qwest. Contrary to Staff's contention, this letter meets none of the criteria for an interconnection agreement. Therefore, contrary to Staff's response, dismissal is proper as to Agreement No. 20.

Agreement No. 23. In its Motion to Dismiss, Qwest moved for dismissal as to Agreement No. 23 on the basis that it did not create any ongoing obligations regarding the substance of the interconnection agreement. In its Response, Staff does not address Qwest's argument but simply makes the conclusory statement that the document amends the interconnection agreement. The document, by its terms, is a settlement agreement of past disputes and acknowledgment of an agreement to "discuss an agreement" as to an implementation plan for a methodology to be used by the Parties in the future. As such it creates no ongoing obligations and is not an interconnection agreement. Dismissal is proper as to Agreement No. 23.

For the reasons stated by Qwest and Eschelon and if the Commission determines to proceed with this matter as to Eschelon, it should dismiss the following agreements from this proceeding: Agreements 17, 20, and 23. In addition, as proposed by Staff and supported by the arguments of the parties, Agreements 11, 22, and 24 should be dismissed.

Furthermore, Commission Staff admits that the Commission's Rules do not require parties to file interconnection agreements pursuant to RCW 80.36.150. Staff Response at 10. Therefore, consistent with Staff's admission, and for the reasons stated in the Motions to Dismiss of Eschelon the other parties, the Fourth Cause of Action must be dismissed against Eschelon.

CONCLUSION

In conclusion, Commission Staff admits that the Commission's Rules do not require parties to file interconnection agreements pursuant to RCW 80.36.150. Staff Response at 10. Staff further admits that there is no time frame for the filing of such agreements in the Act. Staff Response at 10. Staff can not point to a single statement in the Act or the FCC's rules that explicitly impose a filing requirement on CLECs, while the FCC has clearly signaled that that duty falls on the ILECs. For these reasons, this matter should be dismissed in its entirety as to Eschelon and other CLEC Respondents.

Respectfully submitted,

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Dennis D. Ahlers
Senior Attorney
Eschelon Telecom, Inc.
730 2nd Avenue South, Suite 1200
Minneapolis, MN 55402-2456
(612) 436-6692
ddahlers@eschelon.com
Attorney for Eschelon Telecom, Inc.