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 INITIAL BRIEF

I. INTRODUCTION

On September 12, 2003, Eschelon Telecom of Washington, Inc. ("Eschelon") filed a Petition for Enforcement and Complaint ("Petition") pursuant to WAC 480-09-530. Eschelon alleged that Qwest Corporation ("Qwest") had improperly refused its request pursuant to Section 252(i) of the Telecommunications Act of 1996 to opt into the UNE-P rate in McLeod's interconnection agreement, that Qwest had improperly discriminated against Eschelon, and that Eschelon was entitled to damages as a consequence. On September 26, 2003 Qwest filed its answer ("Answer") denying the allegations in the Petition.

The Washington Utilities and Transportation Commission ("Commission") held a prehearing conference on October 7, 2003, and issued a prehearing conference order on October 14, 2003.

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

Pursuant to that order, and by agreement of the parties, this matter is being addressed by simultaneous initial and reply briefs. The only issue that remains for determination in this proceeding is the effective date of the McLeod rate. This issue involves consideration of whether a refund to Eschelon is appropriate.

As set forth herein, the effective date of the McLeod rate should be November 12, 2003, which is the date that the Commission ordered in Docket No. UT-990385. This effective date is consistent with the Commission's practice, the parties' interconnection agreement, and the Commission's orders in other cases. Eschelon has claimed that the effective date of the agreement should be backdated, and that it is thus entitled to a refund. This claim is apparently based on the argument that Eschelon opted into the McLeod rate at an earlier date, and on the theory that its discrimination claim supports backdating the effective date.

However, Eschelon is not to entitled an earlier effective date or a refund for a number of reasons. First, Eschelon did not properly opt into the McLeod agreement, but rather asked to amend its own agreement and then refused to negotiate such an amendment. Second, "opt ins," even if properly requested, are not self-executing under Washington law. Third, Eschelon cannot show any discrimination or unlawful rates. Finally, the Commission does not have jurisdiction to award damages to Eschelon.

II. BACKGROUND/FACTS

The issue that remains for determination in this proceeding is the effective date of the McLeod rate. This issue involves consideration of whether Eschelon is entitled to a refund. The facts upon which this case may be decided are set forth in the Petition and Answer, including the attachments thereto. Qwest will not engage in a lengthy recitation of those facts, but will refer to the appropriate documents as necessary.

The relevant facts can be summarized as follows. Qwest and Eschelon are parties to a Commission-approved interconnection agreement, including various amendments to that agreement. All such amendments have previously been submitted to and approved by the Commission pursuant to various orders in Docket No. UT-990385. Qwest is also party to an interconnection agreement with McLeodUSA ("McLeod"). The interconnection agreements between Qwest and Eschelon and Qwest

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

and McLeod contain similar, but not identical, provisioning and pricing terms, including the provision of certain AIN features to Eschelon at an incremental additional price of $0.35 per line per month. *See, generally, Answer, at ¶¶ 4-7 and attached Christensen Declaration, at ¶ 3.* They also have different termination dates, with the Eschelon agreement expiring on December 31, 2005 and the McLeod agreement expiring on December 31, 2003. *Answer, at ¶ 12.*

The present dispute began on October 29, 2002 when Eschelon demanded to "opt in" to the rates contained in the McLeod interconnection agreement without otherwise amending the terms and conditions set forth in its own interconnection agreement, *i.e.*, Eschelon demanded to cut and paste the McLeod rates into the Eschelon agreement without regard to the differences between the two arrangements or the manner in which the rates specific to each arrangement were calculated. *See Exhibits 7 and 8 to the Petition.*

Eschelon's Petition acknowledges that the features purchased by Eschelon vary from the features sought by McLeod, resulting in an incremental difference of $0.35 more for Eschelon than McLeod. It was not until August 14, 2003, *more than nine months after the purported "opt in,"* that Eschelon agreed to pay the incremental amount, as opposed to simply demanding the McLeod rates.[1] In order to amend Eschelon's interconnection agreement to reflect Eschelon's requested pricing, Qwest explained to Eschelon that each of these issues needed to be resolved through negotiation. Eschelon did not attempt to engage in such negotiations, despite Qwest's express willingness to do so. *Answer, at ¶ 7.*

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

[1] McLeod also made volume purchase commitments that Eschelon has not made. Although Qwest is no longer asserting those volume commitments must be adopted, they were a legitimate issue early on in this case.

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

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

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

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

Qwest also told Eschelon that there were other issues associated with Eschelon's opt in request. For example, the term of the McLeod agreement provides for modified pricing through December 31, 2003, at which point the pricing agreement terminates. Eschelon asserted in its Petition that the effective dates of the agreement are irrelevant, and that it should be able to obtain pricing for the term of its own contract through December 31, 2005. As Qwest pointed out in its Answer, Eschelon's claim is directly contradicted by the Commission's interpretive and policy statement on this precise issue. *Answer, at ¶*

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

7.[2]

III. ARGUMENT

A. The Effective Date of the McLeod Rate for Eschelon is November 12, 2003.

It is clear from the facts in this case that the earliest effective date of the McLeod rate for Eschelon must be the date that the Commission approved the pricing amendment to the parties' interconnection agreement. That date is November 12, 2003. *See, Order Approving Negotiated Thirteenth Amended Agreement Adding Provisions for Unbundled Element Platform Pricing, Docket No. UT-990385.*

The Commission has previously stated that interconnection agreement amendments are effective when approved by the Commission, and that opt in requests are not self-executing.[3] The Commission orders approving other amendments to Eschelon's interconnection agreement explicitly state that further amendments must be submitted to the Commission for approval.[4] The rate that Eschelon paid under its interconnection agreement prior to the most recent amendment were rates that were approved by the Commission and were otherwise lawful and proper. Thus, there is no legal or equitable basis upon which to establish an earlier effective date for the McLeod rate. It follows that there is also no basis upon which to order a refund.

B. The Effective Date Should Not Be Backdated

As Qwest noted in its Answer, Eschelon's request for a "backdated" effective date and refund is

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[2] *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,* principles 6 and 8. Principle 8 states that "An interconnection agreement or arrangement made available pursuant to Section 252(i) must be made available for the 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," Eschelon has since abandoned this claim, but it remains relevant to the issue in this case since it supports Qwest's contention that Eschelon never asked for a proper opt in to the McLeod agreement.

[3] *See, Nextlink v. U S WEST, Docket No. UT-990340, Commission Order Adopting Recommended Decision, In Part, and Modifying Recommended Decision, In Part, September 9, 1999*, ¶ 19. Nextlink had made what the Commission concluded was a legitimate and proper opt in request under Section 252(i). However, the Commission specifically rejected Nextlink's argument that its opt in request was self-executing, noting that all amendments must be submitted to and approved by the Commission.

[4] *See*, e.g., Commission orders in Docket No. UT-990385 dated March 13, 2002 (¶ 19); April 25, 2002 (¶ 19); July 11, 2002 (¶ 19); Sept. 25, 2002 (¶ 20); April 30, 2003 (¶ 19).

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

not properly before this Commission. Eschelon has demonstrated no legal or equitable right to a "backdated" rate when it did not properly opt in or negotiate a rate change. Clearly, Eschelon will argue that it has some sort of legal or equitable right to have the effective date backdated to September 20, 2002. *Petition, Prayer for Relief, at ¶ 1.* Qwest is unaware of any legal authority supporting such backdating, especially in light of the Commission's prior ruling that even a proper opt in request is not self-executing. Prior to September 29, 2003, when it signed the amendment, Eschelon had never made a proper opt in request to obtain the McLeod rate, and had never negotiated such a rate with Qwest.

1. Eschelon did not make a proper opt in request

Eschelon will no doubt argue that it is entitled to an earlier effective date because it made a proper opt in request and that Qwest unjustifiably refused the request. However, as the facts above show, the opt in request was not a proper request – the request did not contain a request for the identical terms and conditions as McLeod, and it contained a demand to extend the effective date of the McLeod pricing beyond that which Qwest was obligated to offer.[5]

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

Section 252(i) of the Act requires an incumbent LEC to make available any interconnection, service or network element provided under any agreement to any requesting carrier on the same terms and conditions. See 47 CFR § 51.809(a), which states:

> An incumbent LEC shall make available without unreasonable delay to any requesting telecommunications carrier any individual interconnection, service, or network element arrangement contained in any agreement to which it is a party that is approved by a state commission pursuant to section 252 of the Act upon the same rates, terms, and conditions as those provided in the agreement. An incumbent LEC may not limit the availability of any individual interconnection, service, or network element

[5] At this point in this proceeding Qwest has offered and Eschelon has accepted an amendment to the parties' interconnection agreement that resolves the pricing issue on a going forward basis. However, the issue must still be discussed in order for the Commission to conclude that Eschelon's request was not a true opt in request.

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

> only to those requesting carriers serving a comparable class of subscribers or providing the same service (i.e., local, access, or interexchange) as the original party to the agreement.

The FCC and federal courts have made clear that section 252(i) has limits. That is, a carrier opting in to an agreement must accept all "legitimately related" terms and conditions of the agreement it is requesting. *AT&T v. Iowa Util. Bd., 525 U.S. 366, 369, 119 S.Ct. 721, 738 (1999) citing In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd 15499 (1996) ("FCC First Report & Order") at ¶ 1315.* Qwest has always been willing to satisfy its pick and choose obligations under section 252(i), as the FCC has defined those obligations.

In this case, Eschelon has not opted in to an existing agreement and refused to negotiate an amendment. In addition, the Commission's Interpretive and Policy Statement on Section 252(i) provides guidance regarding the reasonableness of Qwest's actions. Principle 2 of the Statement provides that a carrier requesting individual arrangements in an agreement must "adopt the original contract language verbatim."[6] Eschelon's request fails on that front as well. Eschelon did not want to accept the McLeod contract language verbatim, because that would have meant changes to the service Eschelon was receiving. Thus, while Eschelon purported to want to opt into McLeod pricing provisions, Qwest reasonably questioned such requests, because the McLeod prices do not apply to the service that Eschelon orders. Eschelon never clarified whether it was requesting McLeod pricing for all of the features it currently requests (a request Qwest would reject) or was requesting some sort of hybrid pricing (a request that is not really an opt in, but rather a request for an amendment to the Eschelon interconnection agreement). Had Qwest accepted the "opt in" request, the resulting amendment would have altered the Eschelon service package and Qwest could no longer have provided the additional features and listings at the incremental $0.35 Eschelon had previously negotiated.

The undisputed facts are clear. Eschelon has cloaked its attempt to bypass the structured interconnection negotiation process with an unfounded claim that Qwest violated its pick and choose and

[6] *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 2.

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

non-discrimination obligations. Contrary to Eschelon's unfounded assertions, the facts make clear that Eschelon did and still does purchase an interconnection product from Qwest different in kind and on different terms and conditions than McLeod. Qwest repeatedly offered to negotiate the new pricing structure suggested by Eschelon, an offer Eschelon ignored in favor of filing this complaint. Eschelon's complaint should thus be dismissed as Eschelon does not have the right to "opt in" to the rates in an interconnection agreement that is different in kind without regard to the differing terms and conditions between the two agreements.

2. Eschelon refused to accept the December 31, 2003 termination date for the McLeod pricing.

The fact that Eschelon refused to accept the December 31, 2003 termination date for the McLeod pricing further demonstrates that Eschelon did not make a proper opt in request. As Qwest has pointed out, the Eschelon and McLeod pricing arrangements expire on different dates. Eschelon should not be permitted to ignore the two-year difference in the expiration dates of the two agreements by "opting in" to the McLeod rates – which would have the effect of extending expired rates for the life of Eschelon's agreement. Eschelon's position is counter to the Principle 8 of the Commission's Statement, cited and quoted in footnote 2 above. While Eschelon has abandoned its request to extend the termination date, it is clear that even up to the prehearing conference in this matter on October 7, 2003, Eschelon was asserting that it was entitled to do so. That assertion alone is fatal to Eschelon's request to "opt in" to the McLeod rate, and supports Qwest's refusal to allow such an "opt in."

Had the parties negotiated the Eschelon request, they perhaps would have resolved their differences and reached an agreement to be filed for approval with this Commission before September 2003. Alternatively, perhaps, they would have negotiated to impasse and invoked dispute resolution. In either event, they would have followed the path prescribed in the Act. Instead, Eschelon skipped entirely its obligation to negotiate a request to amend its agreement in favor of stubbornly asserting an "opt in" right that did not exist and then needlessly engaging the resources of the Commission by filing this complaint. Eschelon and other carriers should be discouraged from avoiding negotiations in favor of

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

regulatory litigation.

C. Eschelon's Discrimination Claim is Unfounded and Does Not Support Backdating.

The provision of different services to Eschelon and McLeod, with different terms and conditions at different rates is not discrimination. Qwest agrees, as any reasonable party must, that state and federal law prohibit discrimination in the provision of telecommunications services.[7] However, it is not discrimination under the Act for Qwest, as an incumbent LEC, to negotiate separately with two carriers to agree to different terms and conditions for the provision of different services. Indeed, the Act encourages carriers to negotiate unique arrangements tailored to their individual needs and circumstances.

In this case, McLeod and Eschelon separately negotiated arrangements with Qwest, each agreement containing unique terms and conditions in addition to some similar and some identical terms and conditions. This Commission approved each arrangement and then each was subsequently amended in very different ways. Eschelon receives features that McLeod does not. Eschelon's agreement has an extended term while McLeod's is about to expire. The volume commitments differ based on the size of the carriers. In other words, the Act has worked as intended and both McLeod and Eschelon now have a unique, negotiated and approved interconnection arrangement with Qwest. As a party to its own arbitrated and negotiated interconnection agreement, it is too late in the day for Eschelon to cry discrimination.

To the extent Eschelon is unhappy with its arrangement, it has a remedy; it may request renegotiation. And, the record is clear. Qwest would accommodate such a request. Instead, Eschelon has asserted discrimination where plainly none exists even under the test described in the case law cited by Eschelon. *See National Communs. Ass'n, v. AT&T Corp., 238 F.3d 124, 127 (2d Cir. N.Y. 2001)* (discrimination claim consists of three elements: (1) whether the services are "like"; (2) if so, whether the services were provided under different terms or conditions; and (3) whether any such difference was reasonable.). The Washington Supreme Court has established a similar test, as set forth in

[7] *See*, RCW 80.36.170, .180, and .186.

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

Cole v. WUTC.[8]

> A mere difference in rates does not, of itself, constitute an unlawful discrimination. . . . A comparison of rates may be persuasive and may be controlling, but only when it is shown that the conditions are comparable and that the rates for comparison are just, fair, reasonable, and sufficient.

In *Cole*, the court found lawful a rate for natural gas provided to builders of houses under construction that was lower, per unit consumed, than service to residents of other houses or to later residents of the same houses. In *Model v. Dept. of Public Service*,[9] the court found that differing rates for electric service to neighboring water districts was not unlawful, considering differences in consumption, differences in services, and differences in historical circumstances.

Under these tests, Qwest did not discriminate against Eschelon. The services provided to Eschelon and McLeod are not the same. The relevant terms and conditions are the same in some cases and substantially different in others. The rate differences are inextricably linked to the complete – and negotiated – package of rights and obligations embodied in each of the agreements. In short, Eschelon and McLeod are two carriers paying different rates for different services.[10] This is not discrimination. It is competition. Eschelon's remedy in the first instance is not in the regulatory arena; it is at the bargaining table.

D. <u>The Commission Cannot Award Damages to Eschelon</u>

Eschelon's claim for a refund of the difference between its rate and the McLeod rate is unsupported. However, even if the Commission were to want to order a refund, the Commission is without authority to do so. To do so would be tantamount to an award of damages, which is something the Commission has repeatedly acknowledged it is without authority to order.[11] Any remedy the

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[8] Citations omitted. *Cole v. Wash. Util. & Transp. Comm'n, 79 Wn.2d 302, 485 P.2d 71 (1971),* quoting *State ex rel. Model Water & Light Co. v. Dept of Pub. Serv., 199 Wash. 24 at 36, 90 P.2d 243 (1939).*

[9] *199 Wash. 24 at 36, 90 P.2d 243 (1939).*

[10] *See also, Ting v. AT&T, 319 F.3d 1126, 1140 (9th Cir. 2003)* (in interpreting the non-discrimination obligations of telecommunications carriers, courts have never required strict uniformity, only the avoidance of unjust and unreasonable preferences).

[11] *See, AT&T v. Verizon, Docket No. UT-020406, 11th Supp. Order, ¶ 34,* citing *Hopkins, Inc. v. GTE Northwest, Inc., 89 Wn. App. 1, 947 P.2d 1220 (1997); RCW 80.04.440.* In *AT&T v. Verizon*, the Commission made a finding that some of Verizon's rates violated RCW 80.36.186, but the Commission did not order a refund. Rather, the Commission ordered Verizon to make a tariff filing reducing its rates on a going forward basis. *Id. at ¶ 190.*

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

Commission would order must be implemented on a going forward basis, and because the going forward pricing dispute has been resolved, the Commission can and need take no action.

IV. CONCLUSION

Eschelon's complaint requesting an order that it be permitted to cut and paste rates from the McLeod agreement into the Eschelon agreement without regard to the differences in terms and conditions between the two agreements is not an opt in request under Section 252(i) of the Act. The request ignores the fact that the two arrangements are different in kind, offering a different mix of features applicable to different volumes with different expiration dates. It also ignores the obligation that Eschelon has under the Act to negotiate such new agreements.

Neither federal nor state law governing opt in requests under section 252(i) of the Act requires Qwest to permit Eschelon to adopt the rates of the McLeod arrangement under the circumstances of this case and its claim on these grounds must therefore be rejected. For the same reasons, Eschelon's claim that Qwest discriminated against Eschelon must fail since the facts establish that Qwest has negotiated separate and unique agreements with McLeod and Eschelon, each with different terms and conditions, including rates.

There is no dispute that Eschelon did not request an opt in but instead sought to amend the pricing structure in its own agreement. There is also no dispute that Qwest agreed repeatedly to accommodate Eschelon's request without meaningful response from Eschelon. Ultimately, after Qwest better understood the parameters of Eschelon's request because of the litigation in the various states, the parties amended the Eschelon agreement include the McLeod rates through 2003, with the appropriate additional $0.35 increment. Therefore, Eschelon has received all the relief to which it is entitled. The complaint should therefore be dismissed.

WHEREFORE, for all the reasons set forth above, Qwest requests that the relief requested by Eschelon in its complaint be denied, and that the complaint be dismissed with prejudice.

Dated this 21st day of November, 2003.

QWEST

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

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

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