BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

ESCHELON TELECOM OF WASHINGTON Petitioner/Complainant, v. QWEST CORPORATION, Respondent. ……	)	DOCKET NO. UT-033039 **ESCHELON'S REPLY BRIEF**

I. INTRODUCTION AND SUMMARY.

Eschelon Telecom of Washington, Inc. (Eschelon), in accordance with the orders of the Commission, files this Reply to Qwest's Initial Brief. It is apparent from Qwest's Brief that it does not understand the "pick and choose" concept embodied in Section 252(i) of the Telecommunications Act (the Act), the FCC's rules and orders and the Policy Statement of this Commission and has refused Eschelon's request based on that misunderstanding.

Eschelon agrees with Qwest that the "only issue that remains for determination in this proceeding is the effective date of the McLeod rate." Qwest Brief at 1.

II. THE EFFECTIVE DATE OF THE MCLEOD RATE FOR ESCHELON IS SEPTEMBER 20, 2002.

Contrary to Qwest's claim, the effective date of the McLeod rate is the effective date stated in the McLeod agreement--September 20, 2002. Among the terms in the McLeod agreement requested by Eschelon in its pick and choose request was the following: "Platform recurring rates, effective on September 20, 2002 and ending

December 31, 2003". (Complaint Exhibit 7, October 29, 2000 letter to Qwest.) Thus Eschelon's request is for the same effective date and term as that provided in the McLeod agreement.

Qwest mischaracterizes Eschelon's request as one for a "backdated" effective date. Eschelon is not requesting a "backdated" effective date anymore than McLeod did, it is simply requesting the same effective date as is in the McLeod agreement. The McLeod agreement states that the lower rates are effective September 20, 2002, and that was part of Eschelon's request.

Qwest's claim that the effective date must be the same as the date the opt-in is approved by the Commission can not be taken seriously. First, that was not the case for the McLeod amendment. While the McLeod agreement provided that it was effective on September 20, 2002, it was not approved by the Commission until October 9, 2002. Thus while the amendment was not effective until approved by the Commission, when that approval was granted it necessarily included an approval of the effective date of the rate, as a part of that amendment. When Qwest and McLeod negotiated this amendment, one of the terms they negotiated and made a term of their agreement was the effective date of the new, lower, rate. In effect, they agreed to "backdate" the effective date of the rate from whatever date the amendment was approved to September 20, 2002. As such it is a term of the agreement that can be, and was, the subject of Eschelon's pick and choose request. Surely, Qwest would not claim that Eschelon should pick the McLeod rate without taking the effective date of the rate along with it.

Second, the only reason that any so-called "backdating" is required is because Qwest refused to honor the request when made. Eschelon made its opt-in request on October 29, 2002, just twenty days after the Commission had approved the McLeod

amendment in question. Thus Eschelon's request was very timely. Had Qwest granted Eschelon's request at the time, Eschelon's opt-in would have been only twenty days after Commission approval and the "backdating" would have been only twenty days more than the "backdating" provided to McLeod. In the alternative and at the very least, Eschelon's opt-in should be effective from the date of its request, October 29, 2002. To find that Eschelon in entitled to opt-in to the rate but only once the matter has been disputed and litigated would be to punish Eschelon for Qwest's unjustified refusal to honor the opt-in request.

III. ESCHELON MADE A LEGITIMATE PICK AND CHOOSE OPT-IN REQUEST.

A. A Pick and Choose Request, by Definition, Means that Eschelon Need Not Opt-in to All Terms and Conditions.

Qwest asserts that Eschelon did not make a "proper" request and therefore the September 20, 2002 effective date does not apply. However, under Qwest's definition of a "proper" opt-in request, no pick and choose request would ever be "proper".[1]

For example, Qwest claims that Eschelon did not make a "proper" opt-in request because …"the request did not contain a request for identical terms and conditions as McLeod…." Qwest Brief at 6. This claim demonstrates Qwest's basic misunderstanding of the "pick and choose" concept embodied in the Act and FCC rules. The very idea behind "pick and choose" is that a carrier need not take all of the identical terms and conditions as the underlying agreement.

Qwest further evidences its lack of recognition of Eschelon's right to pick and choose by quoting Principle 2 of the Commission's Policy Statement on Pick and Choose[2]

[1] Qwest's linkage between a "proper" request and the effective date is problematic. If a request was not "proper" it would not have to be granted at all and thus the effective date would not be an issue.

to the effect that to pick and choose a term of an agreement, a carrier must "adopt the original contract language verbatim." Qwest Brief at 7. Apparently, Qwest interprets this to as requiring that Eschelon adopt all of the original contract language verbatim. However, in the pick and choose context it is the contract language that is opted into that must be taken verbatim and that is exactly what Eschelon did.

Qwest also asserts that the pick and choose request was not proper because Eschelon was using it to amend its agreement. Again, it is the very purpose of a pick and choose request to alter an existing agreement. As Principle 5 of the Policy Statement provides: "An interconnecting carrier that enters into a negotiated or arbitrated agreement may modify its agreement by invoking its rights under Section 252(i) and the pick and choose rule during the term of its agreement."

It is can not be disputed that a carrier can pick and choose terms from different agreements, without taking all of the terms of the underlying agreement. As the FCC has stated about the rejection of the "all or nothing" approach:

> "At the time GNAPs first sought to interconnect with Bell Atlantic, carriers were subject to the Eighth Circuit's interpretation of section 252(i). As a result, requesting carriers such as GNAPs were required to opt- into an existing contract as a whole **rather than "pick and choose" different elements from different existing contracts.** *Iowa Utils. Bd.,* 120 F.3d at 800-801. The Supreme Court has since overturned the Eighth Circuit's interpretation of section 252(i) and reinstated the Commission's "pick and choose" approach. *AT&T Corp.* 119 S.Ct. at 738; *see generally* 47 C.F.R. § 51.809. *In the Matter of Global NAPs, Inc. Petition for Preemption of Jurisdiction of the New Jersey Board of Public Utilities Regarding Interconnection Dispute with Bell Atlantic - New Jersey, Inc.,* CC Docket No. 99-154, 14 FCC Rcd. 12,530, August 3, 1999. (emphasis added).

[2] Docket No. UT-990355.

Eschelon has the right to amend its own agreement by means of an opt-in request and that is exactly what Eschelon attempted to do. Thus, Eschelon's request is valid and the effective date is September 20, 2002.

B. Eschelon Did Not Demand An Extension of the Effective Date of the McLeod Pricing.

Qwest's second reason for claiming that Eschelon's request was not "proper" is based on the allegation that…"Eschelon refused to accept the December 31, 2003 termination date for McLeod pricing…"Qwest Brief at 8.[3] This is just plain incorrect. Eschelon's original request was very clear. It stated, in relevant part: "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." (Eschelon Initial Brief, p. 47, Exhibit-7) Later in that same letter Eschelon explained that it wanted to place the requested terms into its agreement …"to indicate the specified time period with 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." Eschelon even attached page 2 of the McLeod Amendment to its letter. That page states in relevant part "Platform recurring rates, effective on September 20, 2002 and ending December 31, 2003". *See* Eschelon Initial Brief, p. 47-Exhibit 6).

Eschelon's request was specific and was consistent with Principle 8 of the Commission's Policy Statement, which provides that an arrangement made available

[3] Qwest continues to assert that Eschelon really made an opt-in request for the McLeod rate for the total term of Eschelon's agreement. But that is clearly not the request made in Eschelon's October 29, 2002 letter, nor in subsequent correspondence. For example, in a February 10, 2003 letter, Eschelon repeated its request stating: "…Eschelon has asked that Qwest decrease our rates by the same amounts as McLeod's rates were decreased, for the same period as McLeod."(emphasis added). Exhibit 12, attached, page 15.

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. That is exactly what Eschelon requested.

It was not Eschelon that sought to change any dates in the agreement, it was Qwest. Qwest insisted that any attempt to opt-in to the reduced McLeod UNE-Star rate must be accompanied by an agreement to change Eschelon's termination date by two years. Eschelon never refused to accept the December 31, 2003 termination of the McLeod pricing. What Eschelon refused to accept was the shortening of the Eschelon termination date by two years due to its request to obtain McLeod pricing for the same time period as McLeod. Qwest has shown no reason for this demand, let alone any legitimate relationship to McLeod's reduced rate. This unreasonable demand, along with the demand that Eschelon meet the totally unreachable volume requirements of the McLeod agreement, neither of which were relevant to the rate reduction, made further discussions futile and constituted an unjustified refusal of Eschelon's request.

IV. QWEST HAS NOT PROVEN THAT ADDITIONAL TERMS ARE LEGITIMATELY RELATED TO THE TERMS OPTED INTO.

There is no dispute that a carrier requesting to pick and choose terms from another agreement must accept all terms and conditions that are legitimately related to those terms. However, the additional terms and conditions that Qwest insisted upon are not legitimately related to the terms Eschelon requested. Therefore, Qwest was not justified in its demands.

Qwest took the position from the start that the volume requirements and termination date of the McLeod agreement are legitimately related to the reduced McLeod rate, and it refused to honor Eschelon's request on that basis. However, the fact

is that there is no relationship between the termination date of the McLeod agreement and the reduced rate. The relationship is between the rate and the 15-month term of that rate. Eschelon agreed to that 15-month term in its request.

The volume requirements are likewise not related to the reduced rate and Qwest is no longer asserting that it is.[4] Again, the volume requirements are the same today as they were originally in both agreements. Those requirements did not change in the McLeod agreement when the rate was reduced.

Qwest has not proven and indeed it can not prove that the termination date and volume requirement of the McLeod agreement had any relationship to the reduction in the rates provided to McLeod.

Qwest also claims that the two amendments to the Eschelon agreement are somehow related to the lower rate given to McLeod. However, the purpose of one of those amendments, as explicitly in that amendment, was to "establish the Non-recurring charges for Unbundled Network Element Platform ("UNE-P")." (Exhibit 5 to Eschelon's initial Brief, page 41 -Exhibit 5). Thus the amendment contains the non-recurring charges associated with UNE-Star. This amendment had no effect on the monthly recurring charges that are the subject of Eschelon's request.

The other amendment involves $0.35 rate additive to the base UNE-Star rate for the ability to purchase AIN features and listings at retail rates. Not only does this have nothing to do with the McLeod rate reduction, Qwest admits that McLeod has the same rights to purchase AIN features and listings under its agreement that Eschelon does under

[4] See, footnote 1, page 3, Qwest Initial Brief.

its agreement, despite the lack of this amendment. See, Qwest Responses to ESCH 01-004 and 005, attached, as Eschelon Exhibit 13, pp. 22-23. Thus, this amendment provides Eschelon with nothing that would justify any rate differential, much less a differential that exceeds the $0.35 additive.

As stated previously, Qwest has the burden of proof on this issue. As the Commission stated in Principle 10: "An ILEC bears the burden of proving that certain terms and conditions are legitimately related to any requested individual interconnection, service, or element arrangements…Arrangements are not "legitimately related" solely because they were negotiated jointly or through *quid pro quo* bargaining."

This is consistent with the FCC's position. It has stated:

> Given the primary purpose of section 252(i) of preventing discrimination, we require incumbent LECs seeking to require a third party agree to certain terms and conditions to exercise its rights under section 252(i) to prove to the state commission that the terms and conditions were legitimately related to the purchase of the individual element being sought. *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499 (1996) (First Report and Order) ¶ 1315. (emphasis added).

The FCC also said that ILECs "… must prove with specificity" that such terms and conditions are legitimately related. First Report and Order, ¶ 1437. (emphasis added).

Qwest has not met this burden.

V. THE COMMISSION HAS THE AUTHORITY TO GRANT THE RELIEF REQUESTED.

Qwest insists that the Commission can not grant Eschelon's request because to do so would be an "award of damages" that is beyond the Commission's authority. Qwest Brief at 11. This is incorrect. First, a Commission order that Qwest honor Eschelon's opt-in request is not an award of damages--it is an order that Eschelon is entitled to the

McLeod rate for the period of September 20, 2002 to December 31, 2003, and that Qwest charge that rate to Eschelon for that period. Given that conclusion, it would be the case that Qwest will have overcharged Eschelon for that period. The Commission clearly has the authority to order a refund of overcharges. See, *Hopkins, Inc. v. GTE Northwest, Inc.*, 947 P.2d 1220, 1225 (WA 1997), ("Although the WUTC cannot award "damages" per se, it is allowed to order refunds of overcharges."). RCW 80.04.220 provides the Commission with the authority to award reparations.

VI. CONCLUSION.

For the reasons stated herein and in previous filings, Eschelon requests that the Commission order Qwest to honor Eschelon's October 29, 2002 opt-in request, find that Eschelon is entitled to the same rate as McLeod (plus $0.35) for the period of September 20,2002 to December 31, 2003, and order Qwest to implement that rate and refund to Eschelon the difference between the two rates for that period.

Respectfully submitted,

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