

**BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION**

In the Matter of the Petition of Qwest Corporation for Arbitration with Eschelon Telecom, Inc., Pursuant to 47 U.S.C. Section 252 of the Federal Telecommunications Act of 1996

Docket No. UT-063061

**QWEST CORPORATION'S MOTION  
TO DISMISS ISSUES INVOLVING  
PROPOSED RATES FOR WHOLESALE  
PRODUCTS AND SERVICES**

**I. INTRODUCTION**

- 1* Qwest Corporation ("Qwest") respectfully submits this motion to dismiss issues from this arbitration that relate to Echelon Telecom, Inc.'s ("Echelon") request for the Commission to set interim rates for multiple interconnection services and elements. Echelon's request for the Commission to set rates is improper for several reasons and should be rejected.
- 2* First, as this Commission and other state commissions have consistently recognized, an interconnection arbitration between a single incumbent local exchange carrier ("ILEC") and a single competitive local exchange carrier ("CLEC") is not the appropriate forum in which to set wholesale rates that will ultimately apply to multiple carriers. The proper forum is one in which all interested carriers have an opportunity to participate and present their positions.

Second, Eschelon's attempt to use this proceeding for rate-setting purposes violates an *agreed* provision in the parties' interconnection agreement ("ICA") establishing a specific process for setting rates that the Commission has not previously addressed in a generic cost docket. That agreed provision, unlike the approach Eschelon is pursuing here, requires Qwest to submit proposed rates and "cost support" to the Commission outside this arbitration proceeding. Under the provision, Qwest will request that the Commission review its proposed rates and supporting materials, and Eschelon and other CLECs will have the opportunity to respond to Qwest's proposals. Third, setting rates in this arbitration instead of in a proceeding that allows for broader participation creates the risk of inconsistent rulings and will result in administrative inefficiencies.

3 For these reasons and those discussed below, Qwest respectfully requests that the Commission issue an order (1) dismissing the rate issues -- Issue Nos. 22-90 (a) through (f) -- from this proceeding, and (2) directing the parties to follow the process established by ICA Section 22.6.1 for setting rates that the Commission has not previously addressed in a generic cost docket proceeding.

## II. BACKGROUND

4 The extensive negotiations preceding this arbitration left many issues unresolved, including issues that Qwest has routinely agreed upon with other CLECs. As a result, Qwest was required to include dozens of issues in the petition for arbitration it filed with the Commission on August 9, 2006. Although Qwest and Eschelon have resolved some issues since Qwest filed its petition, dozens of disputed issues and sub-issues still remain. Even with the incremental progress the parties have made through their negotiations, this arbitration continues to be a substantial undertaking that requires an investment of significant resources. With the large number of unresolved issues already before the Commission in this proceeding, there is no reason to take on additional issues that will be addressed outside this arbitration.

5 While it became apparent during the pre-arbitration negotiations that the parties would not resolve a large number of issues, Qwest at least thought that the parties had reached substantial agreement on a process for establishing rates relating to interconnection services and elements for which the Commission has not previously set rates. Specifically, Qwest agreed to Eschelon's own proposal under which, in the absence of agreement on a negotiated rate, Qwest would submit cost studies and proposed rates to the Commission *outside the arbitration proceeding*, and the Commission would either adopt or modify Qwest's proposed rates. This process was defined in Eschelon's proposed Section 22.6.1, which provided in full as follows:

22.6.1. If Qwest offers a Section 251 product or service for which a price/rate has not been approved by the Commission in a TELRIC Cost Docket ("unapproved rate"), Qwest shall develop a TELRIC cost-based rate and submit that rate and related cost support to the Commission for review within sixty (60) days of the later of (1) the Effective Date of this Agreement, or (2) Qwest offering the rate to CLEC, unless the Parties agree in writing upon a negotiated rate. If the Parties do not agree upon a negotiated rate and the Commission does not establish an Interim Rate, CLEC may order, and Qwest shall provision, such product or service using such Qwest proposed rate until the Commission orders a rate. In such cases, the Qwest proposed rate (including the aforementioned sixty (60) Day period) shall be an Interim Rate under this Agreement.

6 Qwest agreed to this provision because it strikes a proper balance between the parties' competing interests and established an efficient, fair process for establishing rates relating to newly offered products and services. The process permits Qwest to charge appropriate cost-based rates and, with Commission review of those rates, protects Eschelon from unilateral imposition of rates it finds objectionable. Equally important, the requirement for Qwest to submit the rates and "cost support" to the Commission for review gives other interested carriers the opportunity to comment on the rates. The opportunity for other carriers to participate in the rate-setting process eliminates the potential need for repetitive litigation of the same rates with multiple CLECs, the possibility of inconsistent rates from one CLEC to another, and the prospect of unnecessary expenditures of resources to resolve disputes on a

piece-meal basis.

7 After Eschelon initially proposed this provision, it modified the provision in an attempt to impose several additional obligations on Qwest. These proposed modifications to Eschelon's initial proposal and to the parties' agreed language are among the disputed issues in the arbitration, but they are not material to this motion. The proposed modifications do not alter the basic rate-setting process established by the agreed language in Section 22.6.1.<sup>1</sup>

8 Despite the parties' agreement on the rate-setting process established by Section 22.6.1, Eschelon is requesting that the Commission establish interim rates in this arbitration for 23 products and services for which the Commission has not previously set rates. In the testimony of Douglas Denney, Eschelon presents proposed rates for these products and services, along with evidence purporting to support each of its rate proposals. The following table, copied from Mr. Denney's direct testimony, lists the rate elements and rates that Eschelon is asking the Commission to address:

**Table. The Basis for Eschelon's Rate Proposal for Issue 22-90(a) through 22-90(f).**

Issues#	Exhibit A Section	Rate Element	Eschelon's Rate Proposal
22-90(a)	8.81	Quote Preparation Fee (uses rate from 8.1.1.2) (NRC)	\$820.21
	8.1.1.2	Augment Quote Preparation Fee (NRC)	\$820.21
22-90(b)	8.8.4	ICDF Collocation – DS3 Circuit, per Two legs (NRC)	\$329.00
22-90 (c)	8.15.2.1	Special Site Assessment Fee (NRC)	\$529.00
	8.15.2.2	Network Systems Assessment Fee (NRC)	\$831.00
	10.7.10	Transfer of Responsibility (Access to Poles, Ducts, Conduits and Rights of Way ) (NRC)	\$60.08
	10.7.12.1	Microduct Occupancy Fee, per Microduct, per Foot, per Year (RC)	\$0.2906
	12.3	Daily Usage Record file, per Record (RC)	\$0.000464
	9.28	Private Line / Special Access to Unbundled Lop Conversion (NRC)	\$26.94

<sup>1</sup> Eschelon's modifications to its original proposal include: (1) a provision that would preclude Qwest from assessing any charge for "a UNE or process it previously offered without charge," absent approval by the Commission; (2) expanding the scope of the filing process for rates and "cost support" to include "new" Section 251 products and services and products Qwest previously offered at rates that have not been approved by the Commission; and (3) a requirement for Qwest to provide to Eschelon a copy of the "cost support" filed with the Commission.

<b>Table. The Basis for Eschelon's Rate Proposal for Issue 22-90(a) through 22-90(f).</b>			
Issues#	Exhibit A Section	Rate Element	Eschelon's Rate Proposal
22-90 (d)	9.23.6.5	Private Line / Special Access to LMC Conversion (NRC)	\$29.64
	9.23.7.6	Private Line / Special Access to EEL Conversion (NRC)	\$26.94
22-90 (e)	9.6.12	Private Line / Special Access to UDIT Conversion (NRC)	\$84.49
	9.23.6.8.1	LMC Rearrangement - DS0 (NRC)	\$82.88
	9.23.6.8.2	LMC Rearrangement –High Capacity (NRC)	\$110.02
	9.23.7.7.1	EEL Rearrangement – DS0 (NRC)	\$82.88
	9.23.7.7.2	EEL Rearrangement – High Capacity (NRC)	\$110.02
2-90(f)	8.13.1.1	Quote Preparation Fee (QPF), per Office (NRC)	\$441.00
	8.13.1.2.1	Less Than 60 Amps (NRC)	\$346.00
	8.13.1.2.2	Equal to 60 Amps (NRC)	\$346.00
	8.12.1.2.3	Greater Than 60 Amps (NRC)	\$587.00
	8.13.1.3	Power Off, per Feed Set, per Secondary Feed (NRC)	\$587.00
	8.13.1.4	Power Maintenance Charge (Reservation Charge), per Fuse Set (RC)	\$37.00
	8.13.2.1	Quote Preparation Fee (QPF), per Office (NRC)	\$441.00

9 The substantial reductions to Qwest's rates that Eschelon is proposing are based upon Mr. Denney's arbitrary determinations that inputs to Qwest's cost studies are improper or not supported by sufficient documentation. In some cases, Eschelon's reductions are based upon arbitrary averaging of rates ordered by other state commissions. By demanding consideration of these rates and rate elements in this arbitration, Eschelon is defeating the very purpose of the agreed language in Section 22.6.1. Instead of an efficient process involving all interested carriers, Eschelon is now advocating the inefficient approach of addressing rates in a single arbitration involving only two carriers. And, instead of a process that would ensure consistency of rates among CLECs, Eschelon's proposal creates a real risk of inconsistency in rates and potential claims of discriminatory rate application.

### III. ARGUMENT

#### A. An Interconnection Arbitration Between Two Carriers Is Not The Proper Forum For Setting Rates That May Apply To Multiple Carriers.

10 Few issues have more significance for ILEC-CLEC relationships than the rates that ILECs are permitted to charge for the products and services they provide under the Telecommunications Act of 1996 ("the Act"). Section 252(d)(1) requires cost-based rates for these products and

services, which the FCC has interpreted to mean rates based on the pricing methodology known as "TELRIC" ("total element long run incremental cost"). As the Commission is aware from past wholesale cost dockets in Washington, there is often sharp disagreement among ILECs and CLECs concerning appropriate TELRIC assumptions, cost studies, and rates. These issues are typically complex and therefore, if they cannot be resolved through negotiations, can require time-consuming and resource-intensive proceedings. Further, because Section 252(d)(1) imposes a requirement of rates that are nondiscriminatory, it is important that all carriers with an interest in rates for particular elements and services have the opportunity to participate in Section 251/252 setting proceedings.

11 For these reasons, state commissions have consistently recognized that the time-compressed interconnection arbitrations between individual carriers conducted pursuant to Section 252 are not an ideal forum for setting rates for wholesale products and services.<sup>2</sup> Instead, this Commission and most other commissions have addressed wholesale rates in generic proceedings open to all carriers with an interest in the products and services at issue. In an order issued in 1997, for example, this Commission recognized the impracticality of resolving wholesale rates in arbitration proceedings and established a generic proceeding for that purpose. The Commission explained:

[T]he cost studies that are being proposed are voluminous and complex and are not susceptible of thorough review in the time frames, or with the resources, available for arbitration.<sup>3</sup>

12 In a procedural context analogous to this case, the California Commission rejected AT&T's

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<sup>2</sup> Section 252(b)(4)(C) requires state commissions to resolve arbitration issues "not later than 9 months after the date on which the local exchange carrier received the request under this section." Because of the logistical challenges caused by arbitrations in six states, Qwest and Eschelon have waived this statutory deadline in Washington and other states. However, the waiver is not intended to be of indefinite duration.

<sup>3</sup> *In the Matter of Petition for Arbitration of an Interconnection Agreement between TCG Seattle and U S WEST Communications, Inc.*, Docket No. UT-960326, 1997 Wash. UTC LEXIS 9 at \*12 (Wash. UTC 1997). While the cases cited herein show that this is the general practice of state commissions, the administrative law judge in the recent Arizona arbitration between Qwest and Eschelon did not grant Qwest's motion to dismiss rate issues from that proceeding, ruling that "should be addressed in a final Order of the Commission rather than in a Procedural Order."

request to address a TELRIC rate in an arbitration. The Commission found that AT&T's proposal was an improper attempt to circumvent established rate-setting procedures, explaining that the preferred approach is to "address the need to update cost studies in our generic proceeding where all interested parties can be represented, and not in the context of an arbitration between only two parties."<sup>4</sup> The Indiana Commission reached the same conclusion in an arbitration in which, like this one, there were no approved rates for the services at issues. The Commission ruled that setting rates "can and should" occur in a proceeding separate from an arbitration.<sup>5</sup> Multiple other states commissions have reached the same conclusion.<sup>6</sup>

13 These rulings are grounded in common sense and basic notions of efficiency. If rates are going to apply to multiple carriers, they should be determined in proceedings that permit input from all interested carriers. Further, since rate-setting issues can be time-consuming and complex, they are not optimally addressed in time-sensitive arbitration proceedings that typically involve multiple disputed issues unrelated to rates. Here, Eschelon's demand that the Commission set interim rates in this proceeding – which already includes dozens of disputed issues unrelated to rates – is directly at odds with these important procedural and substantive concerns. Moreover, as discussed below, a decision to dismiss the interim rate issues from this proceeding will not preclude Eschelon from challenging Qwest's proposed rates, as the parties' agreed ICA language expressly provides that opportunity.

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<sup>4</sup> *Application by AT&T Communications of California, Inc. for Arbitration with Pacific Bell Telephone Co.*, 2000 Cal. PUC LEXIS 564 at \*45-46 (Cal. PUC 2000).

<sup>5</sup> *In the Matter of Sprint Communications Co. L.P.'s Petition for Arbitration with GTE of the North, Inc.*, 1997 Ind. PUC LEXIS 9, \*21-22 (Ind. PUC 1997).

<sup>6</sup> *See, e.g., In the Matter of Complaint by Ionex Communications, Inc. Against Southwestern Bell Telephone Co.*, 2000 Kan. PUC LEXIS 1133, \*118-21 (Kan. PUC 2000) (absent unique circumstances, rates set in generic cost proceedings govern in individual arbitrated interconnection agreements); *In the Matter of the Review of Ameritech Ohio's Economic Costs*, 1998 Ohio PUC LEXIS 748, \*1 (Ohio PUC 1998) ("[T]he best manner in which to fully examine Ameritech's TELRIC studies was to do so in a proceeding dedicated solely to those issues."); *In the Matter of the Petition of AT&T Wireless Services, Inc. for Arbitration*, 1997 Ore. PUC LEXIS 183, \*35-36 (Ore. PUC 1997) (observing that the Oregon Commission has consistently based rates in arbitrations on rates and pricing methodologies established in generic pricing proceedings).

**B. There Is No Merit To Eschelon's Claims That The Act Requires The Commission To Resolve Rate Issues In This Proceeding Instead Of In A Broader Proceeding.**

14 Eschelon claims incorrectly that the requirement in Section 252(c) for state commissions acting as arbitrators to resolve open issues and establish rates pursuant to Section 252(d) mandates that rates be set in an arbitration, not in a broader proceeding involving all interested parties. While state commissions are required to resolve open issues and to set rates, Section 252 does not preclude states from resolving rate issues in generic proceedings instead of arbitrations. Indeed, as discussed above, that is precisely what this Commission and other state commissions have consistently done. In doing so, these commissions have acted pursuant to their arbitration and rate-setting authority and thus are carrying out their statutory responsibility to set rates for Section 251 services.<sup>7</sup>

15 Here, the parties' agreed language in Section 22.6.1 of the ICA establishes the same type of generic proceeding that this Commission and others have used to resolve rates for interconnection agreements. As provided in that section, Qwest will submit its proposed rates and "cost support" to the Commission, and Eschelon (and other interested CLECs) will be permitted to respond to Qwest's proposals. Acting pursuant to its arbitration authority, this Commission will then issue an order setting rates for the rate elements at issue.

16 Accordingly, there is no merit to Eschelon's claim that resolving rates as contemplated by Section 22.6.1 instead of in this arbitration will result in an abdication of the Commission's arbitration responsibilities. On the contrary, the Commission would be discharging those responsibilities fairly and efficiently.

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<sup>7</sup> The authority of states to set prices under the Act is limited to setting rates for Section 251 services while serving as an arbitrator under Section 252. See 47 U.S.C. §§ 252(c)(2), (d)(1); First Report and Order, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499 at ¶ 625 (1996) ("[A]lthough the states have the crucial role of setting specific rates in arbitrations, the Commission must establish a set of national pricing principles in order to implement Congress's national policy framework.") (emphasis added). Accordingly, in setting rates in generic cost dockets, state commissions are acting pursuant to their arbitration authority to establish rates for Section 251 services.



C. **Dismissing Rate Issues from This Proceeding Will Not Result in Qwest Unilaterally Imposing Rates on Eschelon.**

17 Based on prior exchanges relating to this issue, Eschelon is likely to argue that the parties have not agreed upon a process for determining rates for new elements and services and that Qwest's request to dismiss rate issues is just an attempt to unilaterally impose rates on Eschelon. According to Eschelon, dismissal of the rate issues will permit Qwest to impose its proposed, unreviewed rates indefinitely, as Qwest will be able to refrain from initiating review by the Commission while continuing to impose its proposed rates.

18 This argument is unfounded, as it ignores the agreed language in Section 22.6.1. Under that language, Qwest must submit to the Commission a TELRIC rate and cost support by the "within sixty (60) days of the later of (1) the Effective Date of [the] Agreement, or (2) Qwest offering the rate to CLEC. . . ." Thus, there is a short and fixed deadline for Qwest to initiate the Commission's review of proposed rates. The presence of this deadline in the parties' agreed language eliminates any concern that through inaction, Qwest will be able to perpetuate its proposed rates indefinitely.

19 Eschelon's argument also is premised on the incorrect assertion that the parties have not reached agreement on a process for establishing rates for elements and services for which there are not existing Commission-approved rates. The agreed language quoted above from Section 22.6.1 plainly establishes such a process, requiring Qwest to submit rates and cost support for review by the Commission within the time specified.

20 The parties disagree concerning whether Qwest should be permitted to charge a rate prior to the Commission's review of Qwest's rate proposal, with Eschelon taking the extraordinary position that Qwest should be prohibited from charging anything (*i.e.*, should be required to provide products and services for free). But that disagreement, contrary to Eschelon's claim,

does not mean there is an absence of agreement on a process for establishing Commission-approved rates.

21 In sum, Eschelon's claim that dismissal will result in Qwest unilaterally imposing its rates indefinitely is entirely unfounded.

#### IV. CONCLUSION

22 For the reasons stated, Qwest respectfully requests that the Commission dismiss from this proceeding the rate issues encompassed by Issue Nos. 22-90(a) – (f).

DATED this 6<sup>th</sup> day of April, 2007.

QWEST

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