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 REPLY BRIEF

I. INTRODUCTION

Pursuant to the schedule previously established in this case, Qwest Corporation ("Qwest") hereby files its reply brief and responds to the allegations and argument in the opening brief filed by Eschelon Telecom of Washington, Inc. ("Eschelon").

The only issue that remains for determination in this proceeding is the effective date of the McLeod rate. Eschelon claims in its initial brief, as it did in its Petition, that it is entitled to the McLeod rate from the date that that rate was offered to McLeod and that it is entitled to a refund of the difference between its rates and the McLeod rate from September 20, 2002 until the parties amended the Eschelon agreement effective November 13, 2003. Eschelon is wrong. As set forth in Qwest's initial brief, Eschelon has established no basis for the relief it requests. In this reply brief, Qwest will respond

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specifically to the arguments presented in Eschelon's initial brief.

II. FACTS

Qwest agrees with Eschelon that there are no material facts in dispute. However, Qwest does dispute Eschelon's characterization of some of those facts, as set forth below.

In paragraph 4 of the Statement of Facts, Eschelon states that the McLeod and Eschelon Amendments were "virtually identical except for the volume commitments and termination dates." Qwest disputes that the Amendments were "virtually identical". Items are either identical or they are not. In this case, the Amendments at issue had significant differences, including volume commitments and termination dates. Thus, they were neither identical nor were they virtually identical.

In paragraph 6 of the Statement of Facts, Eschelon provides an excerpt of a letter it sent to Qwest in October 2002. Eschelon implies by that excerpt that it has agreed all along to accept the termination date of the McLeod rate, which is December 31, 2003. However, this implication is highly inaccurate. A more complete view of Eschelon's demand reveals that it refused to accept the McLeod termination date and demanded that the McLeod rate be *extended for two additional years*.[1] Eschelon's refusal to accept the McLeod termination was one of the reasons that Qwest believed that Eschelon had not made a proper opt in request. Had Eschelon made it clear from the beginning that it did not wish to extend the termination date, the parties would have had one less impediment to reaching an agreement.

In paragraph 7 of the Statement of Facts, Eschelon claims that Qwest repeatedly refused to grant Eschelon's request. Qwest does not believe that that is an accurate statement of the facts based on the undisputed evidence in the record. What is clear is that Eschelon did not make a proper opt in request and Qwest sought clarification and/or negotiations to bring the matter to closure, but that Eschelon refused to provide clarification or engage in negotiations.

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[1] *See, e.g., Petition at paragraph 23 and Tr. 6.* See also the correspondence between the companies where Qwest asked Eschelon to accept the McLeod termination date and Eschelon never responded to that request. *Petition at Exhibit 8.*

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III. ARGUMENT

Eschelon claims that is has a right to the exact same rates as McLeod and makes three main arguments in support of that claim. First, Eschelon claims that the Act allows it to "pick and choose" provisions of other agreements under Section 252(i). *Petition at p. 6.* Second, Eschelon states that the Act and state law prohibit discriminatory rates. *Id.* Third, Eschelon claims that the parties' interconnection agreement contains a "most favored nations" clause that requires Qwest to give Eschelon the same rates it gave to McLeod. *Id.*

Qwest has addressed these issues in its opening brief, and will not repeat those arguments here. In essence, Eschelon's first and third points are the same, since Section 252(i) provides the same rights as a most favored nations clause. Qwest addressed the Section 252(i) issues in its initial brief at pages 6-9 and explained there that while Eschelon has certain indisputable rights under Section 252(i), Eschelon failed entirely in this case to properly invoke those rights. Eschelon failed to request an adoption of identical terms, refused to agree to the proper termination date, and did not respond to Qwest's requests for clarification or negotiation. Thus, Eschelon had no right to the McLeod rates under either Section 252(i) or the most favored nations clause in its interconnection agreement.

Eschelon's second point addresses discriminatory rates. Qwest responded to this issue in its initial brief at pages 9-11. The rates in the Eschelon agreement were approved as part of the parties' interconnection agreement and must be presumed to be lawful. Eschelon has not established discrimination because it cannot show that Qwest charged a different rate for the same services under similar terms and conditions. As Qwest pointed out, Eschelon and McLeod receive different service packages in contracts with different volume commitments and different termination dates. Eschelon paid a higher rate than McLeod because it has certain features it receives that McLeod does not. Prior to the September 2002 amendment to McLeod's pricing, Eschelon's rate was $24.35, while McLeod's rate was $24.00. Although Qwest has previously described Eschelon's agreement as having an incremental $0.35 charge, the contracts did not reflect identical rates to McLeod and Eschelon with an additive of $0.35 to Eschelon – rather, the contracts reflected different rates to each carrier, with Eschelon's rate

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being higher.[2] Different rates to these parties under these circumstances are not discriminatory, especially when Qwest repeatedly sought clarification from Eschelon about whether it wanted to continue to receive and pay for the features that were a unique part of its contract, and Eschelon refused to provide that clarification, but stubbornly insisted on the McLeod rates.

Eschelon further argues that it cannot be required to accept terms and conditions that are not legitimately related to the provision that it wants to opt in to. *Eschelon Brief at pp 8-10.* Qwest agrees. The Act and the rules are clear on this point, and the Commission has also recognized and accepted this point in its Interpretive and Policy Statement.[3] Eschelon goes on to claim that neither the volume commitments nor the termination date are legitimately related terms. *Id.* Eschelon is clearly mistaken here. Qwest has discussed at length, and will not repeat here, how and why the termination date is a legitimately related term and why Qwest has no obligation to honor an "opt in" request that purports to extend the termination date of the underlying agreement or provision.[4]

Eschelon next asserts that Qwest has argued that Eschelon must amend its agreement to eliminate any differences between its agreement and McLeod's. *Eschelon Brief at p. 12.* Qwest is at somewhat of a loss to respond to this argument, because Qwest has never made that argument or that demand on Eschelon. Qwest only sought clarification from Eschelon as to what Eschelon was requesting, including whether it wanted to continue to receive AIN features and listings and would continue to pay for them, as those features and that pricing were not a part of the McLeod agreement. Qwest repeatedly offered to negotiate with Eschelon, but did not demand that Eschelon alter any other terms of its interconnection agreement.

Finally, Qwest believes it is necessary at this point to address the issue of a refund. While the issue of a refund is central to this case, Eschelon spends only one sentence discussing the basis upon

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[2] This rate difference is one of the reasons why Eschelon could not simply "opt in" to the McLeod rate – contrary to Eschelons' assertions, the parties did not have identical rates in their contracts. Thus, Eschelon's attempt to simply adopt the McLeod rate sheet must fail. *Cf., Eschelon's Petition, Exhibit 3, page 7,* showing a rate of $24.00 to McLeod, and Attachment A hereto, the Eschelon amendment of July 31, 2001 showing a rate of $24.35.

[3] *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 10.*

[4] *See Qwest's Answer at ¶ 12 and Qwest's Initial Brief at Section III.B.2., pp 8-9.*

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which the Commission could order a refund. At page 3 of its brief, Eschelon states "RCW 80.04.220 provides that (sic) the Commission with authority to award reparations." However, Eschelon completely fails to discuss the criteria or standards that apply to a determination that reparations are appropriate. Clearly, there is no basis under RCW 80.04.220 in this case to award damages to Eschelon.

RCW 80.04.220 provides as follows:

> When complaint has been made to the commission concerning the reasonableness of any rate, toll, rental or charge for any service performed by any public service company, and the same has been investigated by the commission, and the commission has determined that the public service company has charged an excessive or exorbitant amount for such service, and the commission has determined that any party complainant is entitled to an award of damages, the commission shall order that the public service company pay to the complainant the excess amount found to have been charged, whether such excess amount was charged and collected before or after the filing of said complaint, with interest from the date of the collection of said excess amount.

This provision requires in the first instance that a complaint be made regarding the reasonableness of any rate charged by Qwest. Assuming, for purposes of this discussion, that Eschelon's petition qualifies as such a complaint, the Commission must find that Qwest has charged an excessive or exorbitant amount for a service. Eschelon has made no such allegation in this case, and indeed there are no facts upon which such a finding could be made.[5] Further, because Eschelon has not shown that it made a proper opt in request, and because Eschelon refused to negotiate with Qwest, there is no basis for finding that the previously-approved rates for Eschelon were excessive.

Eschelon's request also ignores the other critical statutory provision, RCW 80.04.240, which essentially provides that the complainant must bring an action in superior court to collect any amount ordered by the Commission. Thus, RCW 80.04.220 does actually not give the Commission authority to award damages or order a refund. Finally, RCW 80.04.240 limits the complaint's right of action as follows:

> All complaints concerning overcharges resulting from collecting unreasonable rates and charges or from collecting amounts in excess of lawful rates shall be filed with the commission within six months in cases involving the collection of unreasonable rates [RCW80.04.220] and two years in cases involving the collection of more than lawful rates from the time the cause of action accrues . . ..

[5] Eschelon's claim that the rates charged were discriminatory has been shown to be unfounded. *Qwest's Initial Brief at pp. 9-11.*

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Since Eschelon's complaint invokes RCW 80.04.220, a six month statute of limitations applies. The complaint was filed on September 12, 2003 and it therefore could not reach back further than March 12, 2003. Thus, under no circumstances is Eschelon entitled to relief from September 20, 2002 as it originally claimed in its Petition.

IV. CONCLUSION

Eschelon has not established that it made a proper opt in request. Indeed, the facts show that its opt in request did not comport with the law or the Commission's Interpretive and Policy Statement regarding opt in requests. The parties have now voluntarily amended the Eschelon agreement at a rate that is higher than the McLeod rate through 2003; the Eschelon rate is $0.35 higher than the McLeod rate. Eschelon has received all the relief to which it is entitled. The complaint should therefore be dismissed, and no refund ordered.

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 5th day of December, 2003.

QWEST

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