BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

ESCHELON TELECOM OF WASHINGTON, INC. Petitioner and Complainant, v. QWEST CORPORATION, Respondent.	Docket No. UT-033039 QWEST'S COMMENTS ON ORDER NO. 3, RECOMMENDED DECISION TO GRANT PETITION

I. INTRODUCTION

1 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.

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2 Pursuant to the prehearing conference order, and by agreement of the parties, this matter was addressed by simultaneous initial and reply briefs. On January 9, 2004 the Administrative Law Judge issued Order No. 3, a recommended decision to grant Eschelon's petition.

3 In accordance with the schedule set forth in Order No. 3, Qwest hereby files its comments on Order No. 3. Briefly, Qwest respectfully disagrees with the Recommended Decision ("Recommended Decision") on three major issues.

4 First, Qwest believes that the Recommended Decision is in error in finding that Eschelon made a proper opt-in request. There is ample evidence in the record, dating from Eschelon's original letter in October 2002 that shows that Eschelon did not intend to opt into the McLeod amendment. Rather, Eschelon sought different services and a different termination date than the McLeod amendment.

5 In addition, even if Eschelon were allowed to receive the McLeod rate for some period of time, the Recommended Decision erred in allowing Eschelon to "opt into" the McLeod amendment for a period prior to Eschelon's request to do so – this aspect of the Recommended Decision, if precedential, could result in retroactive ratemaking and would undermine the Commission's prior rulings that opt-in requests are not self-executing.

6 Finally, the Recommended Decision erred in its application of RCW 80.36.220 and RCW 80.36.240. While the Commission may indeed be able to order reparations under those statutes, there is no basis in law to order a refund to Eschelon for a period of more than six (6) months prior to the filing of the Petition. Thus, the very most that Eschelon is entitled to is a refund from March 12, 2003 until September 12, 2003.

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II. DISCUSSION

A. Eschelon did not make a proper opt-in request

7 The Recommended Decision is in error in finding that Eschelon made a proper opt-in request. There is ample evidence in the record, dating from Eschelon's original letter in October 2002, that shows that Eschelon did not intend to opt into the McLeod amendment. Rather, Eschelon sought different services and a different termination date than the McLeod amendment.

8 The Recommended Decision recognizes that in order for an opt-in request to be proper, the requesting party must ask for the same terms and conditions, verbatim, and the same term, as the underlying agreement. *Recommended Decision at ¶ 30*. However, in finding that Eschelon made a proper request, the Recommended Decision overlooks critical aspects of Eschelon's request that clearly demonstrate that Eschelon did not have the same pricing or service package as McLeod, did not request the same terms and conditions as McLeod, and did not accept the same termination date as McLeod. Any one of these three conditions causes an opt-in request to fail, but the Recommended Decision erroneously brushes aside these flaws in Eschelon's request and improperly imposes upon Qwest the burden of "fixing" for the CLEC a faulty opt-in request. *Recommended Decision at ¶ 31*.

9 At the time of Eschelon's request, Eschelon and McLeod had different prices in their interconnection agreements, for different service packages. *Recommended Decision at ¶ 22*. Eschelon paid $24.35 for a UNE-E service package that included AIN features and listing and that $24.35 rate was in Eschelon's agreement as a result of a July 31, 2001 amendment. *Recommended Decision at para 11*. That $24.35 rate was the only rate in Eschelon's agreement. McLeod paid $24.00 for a UNE-P service package that did not include all of the features that Eschelon had negotiated for.[1]

[1] Neither the McLeod nor the Eschelon agreements contained an a la carte menu of features and services with a stated price for each one. Rather, each agreement contains a single UNE-P-type product, with different features, at a single rate that was not itemized in any way.

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Recommended Decision at ¶ 8. These are not disputed facts and Eschelon has never denied them. Indeed, the Recommended Decision acknowledged that there were a number of unresolved issues between McLeod and Eschelon that were not resolved until September of 2003, when Eschelon began filing regulatory complaints that clearly stated its intentions, and the parties were able to agree on an amendment. *Id. at ¶ 17*.

10 In considering this case, the Commission should scrutinize Eschelon's opt-in request, as that request was the only information Qwest had when it made the initial determination that the request was not a proper opt-in. It would appear that Eschelon very carefully drafted that request to avoid committing to the same terms and conditions as McLeod, to avoid discussing the different pre-existing pricing between Eschelon's and McLeod's agreements, and to avoid committing to the termination date of the McLeod pricing. Thus, Qwest was entirely justified in treating the request as a request for negotiation, not opt-in, and requesting additional information from Eschelon, which was not provided. The relevant language of Eschelon's "opt-in" request is as follows:

> 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. (See attached.) Eschelon requests that page 9 of Attachment 3.2 of Eschelon's Interconnection Agreement Amendment terms with Qwest, *dated November 15, 2000,* be amended to *add the rates in the attached page* from the McLeod Amendment to the end of the "Platform recurring rates" column, under the heading "Prices for Offering," and to indicate the specified time period within 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. (emphasis added).

It is critical to an understanding of this case that this request be understood in terms of the effect of implementing this request as written.

11 First, Eschelon does not cite to its then-effective interconnection agreement amendment and the pricing contained in the February 24, 2002 amendment. It cites back to the November 15, 2000 pricing amendment that was superceded by the February 2002 amendment. Thus, Eschelon avoided

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addressing the question of how Qwest was supposed to handle the fact that Eschelon and McLeod did not have the same services at the same price. The request specified that the rate Eschelon opted-in to would be the McLeod $21.16 rate. That rate does not cover the additional cost incurred by the service package Eschelon was, and is continuing to purchase.

12 This squarely raises the question of whether Qwest was to implement this request literally and eliminate the additional AIN features and listings and give Eschelong the McLeod pricing, or whether Eschelon was really seeking a new, lower rate for its UNE-E service with the additional features included. Qwest asked this question of Eschelon and received no response until August of 2003, many months after the original request. On this point the Recommended Decision improperly places the burden of deciphering out what Eschelon intended on Qwest, stating that Qwest "could have honored Eschelon's opt-in request . . . while continuing to charge Eschelon the 35-cent adder for AIN features." *Recommended Decision at ¶ 31.* It should not be Qwest's obligation or right to unilaterally "fix" or interpret a request that is unclear. Rather, the burden should be on the carrier seeking opt-in to craft a clear and proper request, and to respond to Qwest in a timely way when Qwest affirmatively seeks such clarification.

13 Second, it is clear that if this request was implemented as written, Eschelon would have the benefit of the McLeod rates without agreeing to all related terms and conditions, most notably the termination date. This is improper under an opt-in request.[2] As written, Eschelon's request would simply substitute *prices* from the McLeod agreement into the Eschelon agreement, not the full McLeod amendment. Thus, Eschelon was asking Qwest to insert new prices into the Eschelon agreement which would have resulted in those new prices being effective for the entire term of the Eschelon

[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*, principle 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." Thus, it is clear that the Commission's guidance on this issue to date is that the termination date of an agreement is a term that is related to the underlying agreement for purposes of opt-in requests.

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agreement instead of only for the term of the underlying agreement. Notably, the last sentence of Eschelon's request as quoted above only identifies a start date for the McLeod rates, not the corresponding termination date. This is improper for an opt-in, and Qwest reasonably sought to explore this issue in its November 8, 2002 letter to Eschelon. Eschelon refused to respond, and even at the time it filed its Petition in September 2003, Eschelon was asserting that it was entitled to a longer term for the McLeod pricing than the term of the McLeod amendment.

B. The effective date of an opt-in cannot be prior to the date of the opt-in request

14 Even if Eschelon were allowed to receive the McLeod rate for some period of time, the Recommended Decision erred in allowing Eschelon to "opt into" the McLeod amendment for a period prior to Eschelon's request to do so – this aspect of the Recommended Decision, if precedential, could result in retroactive ratemaking and would undermine the Commission's prior rulings that opt-in requests are not self-executing. In addition, such a result is anticompetitive.

15 The Recommended Decision concludes that Eschelon should have the benefit of McLeod pricing from September 20, 2002 until December 31, 2003, the entire term of the McLeod amendment. *Recommended Decision at ¶ 37*. The stated rationale for this relief is that without this relief, Qwest would have an incentive to delay granting opt-in requests. *Id.* However, this result is incorrect based on Commission precedent and would be bad policy as well.

16 As Qwest noted in prior filings in this docket, the Commission has previously held that opt-in requests are not self-executing and that amendments to interconnection agreements are effective when approved by the Commission.[3] In this case, the effective date in the McLeod agreement was meant

[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.

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to give McLeod the benefit of the rate as of the date the parties agreed to it, which was necessarily earlier than the Commission would approve the amendment. However, it does not follow that every carrier should receive that same effective date. Such a ruling could produce truly bizarre results and would encourage other CLECs to delay in acting to opt-in, knowing that they could do so at any time. A CLEC who waits until the 35th month of a 36 month agreement to opt-in should not obtain the benefit of the agreement for a full 36 months. Such a result would be tantamount to retroactive ratemaking and would substantially interfere with Qwest's ability to manage its business in terms of accounting for revenues, etc.

17 If indeed the Commission believes that Eschelon made a proper opt-in request, the effective date of any new rate should be no earlier than October 29, 2002, the date on which Echelon made its request for opt-in. This result would be fair to Eschelon in terms of giving Eschelon the benefit of the new rate in parity with McLeod, i.e., on or about the date the parties agreed to the rate. It would accomplish the same goal as the Recommended Decision discussed in that it would provide no incentive to Qwest to delay acting on requests, and it would be fair to McLeod as well.

18 Fairness to McLeod is a consideration because allowing a CLEC the benefit of opting-in to an amendment as of the effective date of the amendment provides an unfair advantage to the CLEC who opts in and an unfair disadvantage to the CLEC who negotiated the terms in the first instance. In a competitive market a carrier or customer who negotiates a good deal with a supplier generally invests time and effort to negotiate what it believes to be favorable terms and conditions. In return for that effort, it receives those terms and conditions as of the effective date of the negotiated agreement. A CLEC who wants to piggy-back on those terms and conditions should be entitled to them only from the date the CLEC affirmatively avails itself of the new terms. Otherwise one CLEC does all the work negotiating good terms, and every other CLEC gets the identical benefit for the identical amount of time. The only fair result in this situation is that each CLEC be permitted to opt-in with an effective date that is related to the date that the CLEC took action to opt-in. Ideally, based on Commission

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precedent cited in footnote 2 herein, that date would be the effective date of an interconnection agreement amendment. However, even under the circumstances in this case it should be no earlier than the date of the opt-in request.

C. There is a six-month statute of limitations on reparations awards

19 Finally, the Recommended Decision erred in its application of RCW 80.36.220 and RCW 80.36.240. While the Commission may indeed be able to order reparations under those statutes, there is no basis in law to order a refund to Eschelon for a period of more than six (6) months prior to the filing of the Petition. Thus, the very most that Eschelon could be entitled to is a refund from March 12, 2003 until September 12, 2003.

20 RCW 80.04.240 limits the complaint's right of action under RCW 80.36.220 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 . . ..

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 could Eschelon be entitled to relief from September 20, 2002 as it originally claimed in its Petition.

21 The Recommended Decision states that a full refund from September 20, 2002 is appropriate, *Recommended* Decision *at ¶ 38,* but does not reconcile that ruling with the statutory provision limiting the action. *Id. at ¶ 36.* The Commission should find that if the petition in this case warrants action under RCW 80.04.220, the action is limited to a claim for six months of reparations as set forth in RCW 80.04.240.

III. CONCLUSION

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22 WHEREFORE, for all the reasons set forth above, Qwest requests that the Commission reverse and modify the Recommended Decision as set forth herein.

DATED this 15th day of January, 2004.

QWEST

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