

**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

**ESCHELON TELECOM OF WASHINGTON, INC. PETITION FOR REVIEW
AND REQUEST FOR EXTENSION OF TIME TO REPLY**

April 21, 2008

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I. INTRODUCTION

1. Eschelon Telecom of Washington, Inc. (“Eschelon”), 730 2nd Ave. South, Suite 900, Minneapolis, MN 55402, respectfully submits this Petition for Review (“Petition for Review”) of the Arbitrator’s Report and Decision, Order No. 16 dated January 18, 2008 (“Arbitrator’s Report”),¹ and requests relief pursuant to 47 U.S.C. §§ 251-252, 47 C.F.R. § 51, WAC 480-07-630, and WAC 480-07-640.

2. ***Request for Extension of Time to Reply.*** The Arbitrator’s Report was served on January 18, 2008. Given that the Parties have had approximately three months, instead of the usual thirty days, for drafting petitions for review, the standard time of ten days for filing an answer to petitions for review is relatively short. The rule allows either ten days or “such other term as is established by notice or order.”² Eschelon asked counsel for Qwest about an extension of time for replies, and Qwest’s counsel indicated that she anticipated no objection from Qwest. Eschelon requests an additional ten days to review the Petitions for Review and respond, which would result in a deadline for filing replies of May 12, 2008.

3. ***Petition for Review - Payment and Deposits.*** Although the Arbitrator recommends that Qwest prevail on a number of issues in the arbitration (as summarized in Appendix A to the Arbitrator’s Report), Eschelon does not address every one of those issues in this Petition for Review. Instead, Eschelon addresses the important issue of

¹ All references to the Updated Disputed Issues Matrix are to the Updated Disputed Issues Matrix dated August 23, 2007. (See footnote 199 to page 1 of Appendix A to the Arbitrator’s Report.)

² WAC 480-07-640(a)(ii).

Payment and Deposits (Issue Nos. 5-6 – 5-13).³ Payment and Deposits is a topic for which the Arbitrator recommends resolving some parts of the topic in favor of Eschelon and other parts in favor of Qwest. Eschelon recognizes that the Arbitrator has in this manner attempted to strike a balance of all the competing interests. Therefore, as to the portions which the Arbitrator recommends resolving in favor of Qwest, Eschelon asks here *not* for a rejection of the Arbitrator’s recommendation.⁴ Rather, Eschelon requests language modifications (described below) to ensure the Arbitrator’s recommended findings are fully reflected in the ICA’s Payment and Deposit provisions. The Arbitrator recommends rejecting Eschelon’s request for prior Commission approval before disconnecting service or discontinuing order processing. If the Commission adopts Eschelon’s proposed modified language which is set forth below in response to the Arbitrator’s recommended findings, no prior Commission approval will be required, as proposed by Qwest and recommended by the Arbitrator. The language modifications will help ensure that the intended balance struck by the Arbitrator is achieved, as the language provides additional clarification that unpaid amounts must be undisputed and adequate notice must be given, as also recommended by the Arbitrator.

4. Additional clarity in the ICA language will help avoid future disputes. In the Verizon-CLEC interconnection arbitration before the Commission, for example, this Commission pointed to the likelihood of reducing the opportunity for future disputes as a

³ The Payment and Deposit issues are discussed in Eschelon’s Post-Hearing Brief at pages 6-13. *See also* Hrg. Ex. 130 (Denney Dir.), pp. 50-76; Hrg. Ex. 137 (Denney Reb.), pp. 29-58; Hrg. Ex. 152 (Denney Surreb.), pp. 46-69.

⁴ Because of the inter-related nature of the various sub-issues related to Deposits, if Qwest files an exception as to those sub-issues decided adversely to it, Eschelon similarly takes exception from the sub-issues that were decided adversely to it, as Qwest-requested rejection of certain recommended findings may, if adopted, change the balance struck by the Arbitrator.

basis for including specific contract language in approximately half of the issues addressed by the Commission in its order.⁵

II. DISCUSSION:

Discontinuation of Order Processing and Disconnection (Issues 5-6, 5-7 and 5-7(a))⁶

5. For Payment and Deposit issues, the Arbitrator recommends striking a balance that incorporates, and rejects, some of each Party's proposals. Specifically, the Arbitrator recommends (1) rejecting Eschelon's proposals requiring prior Commission approval before discontinuing order processing and disconnecting service (Issues 5-6 and 5-7), as well as Eschelon's proposal that the deposit requirement may be triggered by an amount described as "non-de minimus" (Issue 5-8) and the date a deposit is due should be set by the Commission when a deposit dispute is before the Commission (Issue 5-11); and (2) rejecting Qwest's definition of "repeatedly delinquent" (Issue 5-9), as well as Qwest's open-ended, unilateral approach to review of credit standing (Issue 5-13).⁷

6. Eschelon continues to believe that, in light of the great potential for harm, not only to Eschelon, but to Eschelon's customers, it is appropriate to require Qwest to obtain Commission approval before discontinuing acceptance of Eschelon's orders and before disconnecting service to Eschelon (which in turn disconnects service to Eschelon's end users). However, if the Commission is inclined to adopt the Arbitrator's recommendation to allow Qwest to discontinue order processing and disconnect service without

⁵ *Washington Order No. 18* (Docket No. UT-043013) (Sept. 22, 2005) at ¶¶ 28, 31-32, 36, 42, 48, 58, 64; *see also* Conclusions of Law ¶¶ 102, 104, 105, 106, 111, 112.

⁶ Issues 5-6 and 5-7 are addressed in Eschelon's Post-Hearing Brief at pages 6-9.

⁷ The Arbitrator correctly observes that Issue 5-12 was an alternative proposal, so it should not be addressed. *See* Arbitrator's Report at ¶60. Regarding Issues 5-9 and 5-13, there is ample support in the record for adopting Eschelon's language, as recommended by the Arbitrator. If Qwest requests review of the Arbitrator's recommendations as to Issues 5-9 and 5-13, Eschelon will provide a response to Qwest's petition for review of these issues.

Commission approval, Eschelon believes that the Commission should also modify the ICA language to give effect to the protections relied upon by the Arbitrator.

7. In making recommendations on these issues, the Arbitrator relies upon the following facts: (A) Eschelon has received *adequate notice* before any remedy is implemented;⁸ and (B) the remedies of disconnection and discontinuation of order processing apply only when the amounts due are *undisputed*.⁹

A. Adequate Notice

8. With respect to the first point (adequate notice), the Arbitrator states: “The notice provision gives Eschelon the opportunity to make payment without adversely affecting the interests of end user customers.”¹⁰ Both Sections 5.4.2 (discontinuation of order processing) and 5.4.3 (disconnection), however, state: “If Qwest does not act” (to discontinue order processing or to disconnect service), “on the date specified in the ten (10) business days notice, and the billed Party’s noncompliance continues, nothing contained herein shall preclude the Billing Party’s right” [to discontinue orders or disconnect] “*without further notice*.”¹¹

9. There is no time limitation in Qwest’s language. Therefore, Qwest could send a notice; Eschelon could respond to the notice with what it believes is a satisfactory payment or explanation; and – after months or even a year or more of processing orders – Qwest could suddenly disrupt Eschelon’s orders or disconnect service without any notice beyond the original dated one. Eschelon would have no reason to expect discontinuation

⁸ Arbitrator’s Report at ¶¶42 & 48.

⁹ Arbitrator’s Report at ¶¶42 & 48 (with emphasis in italics on “*undisputed*” in both paragraphs).

¹⁰ Arbitrator’s Report at ¶48.

¹¹ Updated Disputed Issue Matrix, pp. 17 & 20 (emphasis added).

of order processing or disconnection without notice at the much later date. Therefore, affected Washington end user customers could also be completely caught by surprise.

10. For example, if Qwest does not disconnect Eschelon's service on the date specified in its initial notice, Eschelon may believe that Qwest agrees that there is no noncompliance that would result in disconnection. Eschelon may have responded with an explanation, rather than a payment, and with no further notice or response from Qwest, reasonably concluded that there was no longer an issue. If, weeks or months later, Qwest disconnects service to Eschelon (which in turn disconnects service to Eschelon's end user customers being provisioned using that service) "without further notice,"¹² it will be impossible to give effect to the Arbitrator's finding that Eschelon will have had a full "opportunity to make payment without adversely affecting the interests of end user customers."¹³ The customers (Eschelon and its end users) will already have been disconnected. Also, the service may no longer be available if Eschelon later prevails in a dispute resolution and Qwest is ordered to re-connect service. For example, Qwest may have used the disconnected facilities for another purpose and thus placed the re-connect order in a held status. If Eschelon later prevails before the Commission, it will be a hollow victory if Eschelon has lost its customers because of the wrongful service disruption.

11. Particularly if prior Commission approval is not required, the ICA language should be modified to ensure that the notice relied upon by the Arbitrator is actually provided in each case. Eschelon proposes the following modifications (as shown in

¹² Updated Disputed Issue Matrix, pp. 17 & 20 (emphasis added).

¹³ Arbitrator's Report at ¶48.

strikeout and underlining) as an alternative to the language it has already proposed

(which required Commission approval):

Issue 5-6 Discontinuation of Order Processing

5.4.2 One Party may discontinue processing orders for relevant services for the failure of the other Party to make full payment, less any disputed amount as provided for in Section 21.8 of this Agreement, for the relevant services provided under this Agreement within thirty (30) Days following the Payment Due Date (“Non-Compliance”). The Billing Party will notify the other Party in writing and the Commission on a confidential basis at least ten (10) business days prior to discontinuing the processing of orders for the relevant services. If the Billing Party does not refuse to accept additional orders for the relevant services on the date specified in the ten (10) business days notice, and the other Party's ~~Non-~~eCompliance continues, nothing contained herein shall preclude the Billing Party's right to refuse to accept additional orders for the relevant services from the non-complying Party ~~without further notice~~ after an additional ten (10) business days notice. Additionally, the Billing Party may require a deposit (or additional deposit) from the billed Party, pursuant to Section 5.4.5. The Billing Party shall resume order processing without unreasonable delay upon receipt of full payment of all charges, and payment of a deposit, if any, for the relevant services not disputed in good faith under this Agreement. . . .

Issue 5-7 Disconnection

5.4.3 The Billing Party may disconnect any and all relevant services for failure by the billed Party to make full payment, less any disputed amount as provided for in Section 21.8 of this Agreement, for the relevant services provided under this Agreement within sixty (60) Days following the Payment Due Date (“Non-Compliance”). . . . The Billing Party will notify the billed Party in at least ten (10) business days prior to disconnection of the unpaid service(s). In case of such disconnection, all applicable undisputed charges, including termination charges, if any, shall become due. If the Billing Party does not disconnect the billed Party's service(s) on the date specified in the ten (10) business days notice, and the billed Party's ~~Non-~~eCompliance continues, nothing contained herein shall preclude the Billing Party's right to disconnect any or all relevant services of the non-complying Party ~~without further notice~~ after an additional ten (10) business days notice. For reconnection of the non-paid service to occur, the billed Party will be required to make full payment of all past and current undisputed charges under this Agreement for the relevant services. . . .

B. Undisputed Amounts

12. In addition to the modification of the language relating to the notice time period (i.e., the additional ten business days), Eschelon's recommended language above

shows insertion of “(“Non-Compliance”) after the term is defined, and corresponding capitalization of the term “Non-Compliance” later in the paragraph. (This is consistent with the convention in the contract that, generally, defined terms are capitalized when the definition applies.)

13. As indicated above, in addition to the amount of notice, the Arbitrator relied upon the fact that the remedies of disconnection and discontinuation of order processing apply only when the amounts due are *undisputed*.¹⁴ The Arbitrator stated: “it is important to note that this provision is only applicable to *undisputed* billing amounts” (emphasis in original).¹⁵ Both Sections 5.4.2 (discontinuation of order processing) and Section 5.4.3 (disconnection) indicate in the first sentence that the remedy applies only when a party fails to “make full payment, *less any disputed amount*.” (See quoted language, above.) Later in each Section, there is a reference to “non-compliance.” To confirm that “non-compliance” applies only to undisputed amounts, as found by the Arbitrator, Eschelon recommends these minor changes, as shown above, to confirm this fact and help avoid future disputes as to the meaning of non-compliance as used in the ICA.

III. CONCLUSION

14. Eschelon respectfully requests that the Commission review the Arbitrator’s recommendations on the Payment and Deposit issues and order the language modifications described above (in Paragraph 11), which is consistent with the Arbitrator’s recommendations on the merits.

¹⁴ Arbitrator’s Report at ¶¶42 & 48 (with emphasis in italics on “*undisputed*” in both paragraphs).

¹⁵ Arbitrator’s Report at ¶48; *see id.* at ¶42 (emphasis on the word “undisputed” in the original).

15. Eschelon also asks that the deadline for filing responses to Petitions for Review, for both Parties, be set for May 12, 2008.

16. Eschelon appreciates the Commission's and the Arbitrator's consideration of these issues.

April 21, 2008

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