BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

ESCHELON TELECOM OF WASHINGTON Petitioner/Complainant, v. QWEST CORPORATION, Respondent. ……	)))))))))))	DOCKET NO. UT-033039 **COMMENTS OF ESCHELON TELECOM, INC. IN SUPPORT OF RECOMMENDED DECISION TO GRANT PETITION**

I. INTRODUCTION.

Eschelon Telecom of Washington, Inc. (Eschelon) files these comments in support of the Recommended Decision to Grant Petition, issued by Administrative Law Judge Theodora M. Mace on January 9, 2004. Eschelon is in full agreement with, and urges the Washington Utilities and Transportation Commission (Commission) to adopt, the Recommended Decision.

The Recommended Decision fully and accurately summarizes the facts, the arguments and the law regarding this matter and is fully supported by the facts and the law. It is also consistent with the decision of the Minnesota Public Utilities Commission on this same dispute in the state of Minnesota. The Minnesota Commission ruled that Eschelon was entitled to the McLeod rate from the date of Eschelon's initial request.[1]

[1] The remedy ordered by the Minnesota Commission differed slightly from the Recommended Decision in that the Minnesota Commission found that Eschelon was entitled to the McLeod rate from the date of Eschelon's request, October 29, 2002, rather than from the effective date provided for in the McLeod agreement, September 20, 2002.

See, *Order Permitting Opt-In and Requiring Refund*, Minnesota Public Utilities Commission, December 1, 2003, a copy of which is attached.

For the reasons stated in the Recommended Decision, as supported by the facts and the law, the Commission should affirm and adopt the Recommended Decision. Eschelon incorporates by reference the briefs it filed in this matter.

II. ESCHELON IS ENTITLED TO THE SAME RATES AS MCLEOD FOR THE SAME PERIOD OF TIME AS MCLEOD.

Eschelon filed its Petition in this matter in order to obtain the same rate for a wholesale service called UNE-Star that is being paid by McLeodUSA (McLeod), a competitor. A primary method for rectifying discriminatory rates under the Act is the ability to "pick and choose" terms from another interconnection agreement pursuant to section 252(i). This Commission has recognized this right in its *Interpretive and Policy Statement on Section 252(i)*, in Docket No. UT-990355.

On October 29, 2002, Eschelon made such an opt-in request to Qwest to obtain the same rate for UNE-Star as McLeod for the same time period that it was available to McLeod--September 20, 2002 to December 31, 2003. That request was not granted by Qwest. After several attempts to obtain the requested rates Eschelon then filed this matter in order to require Qwest to honor the opt-in request.[2] This matter was properly brought before the Commission. The FCC has made it clear that it is the state commissions that should examine the issue of opt-in requests under Section 252(i) of the Act in the first instance. *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499 (1996) (First Report and Order), ¶1321.

[2] The same action has been filed in three other states: Minnesota, Colorado and Arizona.

As indicated by the Administrative Law Judge (ALJ), Qwest and Eschelon agreed on September 27, 2003 to an amendment that incorporated the McLeod rate and the expiration date for that rate..[3] Thus as stated by the ALJ and by Qwest[4], the only issue remaining to be resolved is the initial date on which Eschelon is entitled to the McLeod rate. Qwest argues that Eschelon is entitled to no more than what is provided in that amendment. The Administrative Law Judge correctly found, based upon the facts and the law, that Eschelon is entitled to that rate for the same time period as McLeod.

There are some key conclusions that form the basis for that recommendation. For example, the ALJ found that Eschelon made a proper opt-in request in October of 2002 and that that request specified the terms that Eschelon was opting into which included the effective date of the rate, September 20, 2002, and the expiration date of that rate, December 31, 2003. The record shows that Qwest refused to honor this request, insisted that onerous and unrelated terms were a pre-condition to the opt-in and claimed that negotiations were necessary. Eschelon repeated its request and Qwest repeated its conditions and its request for negotiations. Qwest has argued, in effect, that Eschelon's opt-in rights should only be recognized once Eschelon agreed to negotiate an amendment with Qwest. The ALJ correctly concluded that Eschelon's alleged failure to negotiate is not a valid reason to deny its opt-in request because there is no obligation to negotiate when seeking opt-in rights, citing the Commission's Interpretive and Policy Statement. Recommended Decision, ¶ 32.

Therefore, the ALJ concluded that accepting the Qwest argument as to the need to negotiate an opt-in and the resultant delay of the effective date of the rate opted into would contradict the purpose of section 252(i) which is to allow CLECs to obtain

[3] The Parties agreed that this amendment would not be deemed an admission by either party about

favorable terms from other agreements without lengthly negotiation and delay. The ALJ found that Qwest's claim that the UNE-Star service provided to McLeod and Eschelon are not the same is disingenuous[5] and that Qwest was engaging in purposeful delay in insisting upon unrelated terms and requiring negotiations as a prerequisite to honoring the opt-in request.[6]

These findings emphasize the reason that Eschelon's request must be honored for the full time period in question. As the ALJ put it, "accepting Qwest's recommendation would contradict the purpose of section 252(i), which is to allow CLECs to obtain favorable connection terms without the need for lengthy negotiation and delay."[7]

Based upon all of the facts and the relevant law, the ALJ correctly found that Eschelon is entitled to the McLeod rate for the same time period as McLeod, starting on September 20, 2002, since that was a specific term of the McLeod agreement that was explicitly tied to the rate.[8]

III. THE COMMISSION HAS THE AUTHORITY TO ORDER QWEST TO PROVIDE THE MCLEOD RATE FOR THE TIME PERIOD REQUESTED.

Contrary to the claims of Qwest, the ALJ concluded that the Commission has the authority to enforce a pick and choose request and therefore has the authority to order Qwest to refund the difference between the two rates from September 20, 2002 to the effective date of the recent amendment. The Commission has the authority to make determinations about opt-in requests and to order the relief necessary to enforce opt-in

---

Eschelon's remaining claim in this case.

[4] Qwest Initial Brief, Nov. 21, 2003, p.2.

[5] Recommended Decision, ¶ 31.

[6] Recommended Decision, ¶ 32.

[7] Recommended Decision, ¶ 33, citing 47 CFR 51.809.

[8] Eschelon concedes that the effective rate for the period in question would be the same rate as provided in the recent amendment-$21.51, consisting of the $21.16 McLeod rate and the $0.35 rate additive due to the AIN amendment.

rights under section 252(i). Under Qwest's argument, even if the Commission found that Eschelon made a proper opt-in request and that Qwest was unjustified in refusing to honor it, the Commission could do nothing about it. As the ALJ stated, if the Commission is limited to only granting opt-in requests related to future time periods, Qwest and other ILECs would have every incentive to deny such requests and fight such requests as long as possible. The purposeful delay that the ALJ found that Qwest engaged in here would be rewarded under such an interpretation, while Eschelon would be punished for Qwest's delay. That is neither the intent nor the effect of the Act, nor of state statutes.

The Commission has the authority to enforce the Act including the authority to enforce opt-in requests. An order that Eschelon is entitled to the McLeod rate for the period of September 20, 2002 to December 31, 2003, pursuant to a request under section 252(i) and the parties interconnection agreement, and that Qwest must charge that rate to Eschelon for that period is well within the Commission's authority under the Act. This claim was brought well within the appropriate limitations for Eschelon's claim under the interconnection agreement.. RCW 80.04.220 also provides the Commission with the authority to award reparations.

Given the conclusion that Eschelon is entitled to the rate for the period of time requested, it would be the case that Qwest will have overcharged Eschelon for that period, by charging it more than the lawful rate under the Act. 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.").

Therefore, under both the Act and state law the Commission can grant the relief requested by Eschelon and recommended in the Recommended Decision To Grant Petition.

CONCLUSION.

For the reasons stated herein, in previous filings and in the Recommended Decision, the Commission should 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,

Dated: January ___, 2004

Dennis D. Ahlers
MN # 0154386
Senior Attorney
Eschelon Telecom, Inc.
730 2nd Avenue South, Suite 1200
Minneapolis, MN 55402-2456
(612) 436-6249 (Direct)
(612) 436-6349 (Fax)
ddahlers@eschelon.com
Attorney for Eschelon Telecom, Inc.

Judith A. Endejan
WSBA # 11016
GRAHAM & DUNN PC
Pier 70
2801 Alaskan Way, Suite 300
Seattle, WA 98121-1128
(206) 624-8300(Phone)
(206) 340-9599 (Fax)
Email: jendejan@grahamdunn
Attorneys for Eschelon Telecom of Washington, Inc.