BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

ESCHELON TELECOM OF WASHINGTON, INC. Petitioner/Complainant, v. QWEST CORPORATION, Respondent.	)	**DOCKET NO. UT-033039** **PETITION FOR RECONSIDERATION OF ESCHELON TELECOM OF WASHINGTON, INC.**

INTRODUCTION

Eschelon Telecom of Washington, Inc. (Eschelon), pursuant to WAC 480-07-870, hereby requests reconsideration of the *Final Order Granting Petition, In Part,* (Order) issued by the Washington State Utilities and Transportation Commission (Commission) on February 6, 2003. In particular, Eschelon asks the Commission to reconsider its conclusion that Eschelon is entitled to its opt-in request only as of August 14, 2003.

In its Order the Commission confirmed that Eschelon was entitled to opt-in to the UNE-Star pricing amendment to McLeod's interconnection agreement with Qwest. The Commission also confirmed that the Commission has the authority to order a refund of the difference between the two rates. However, the Commission found that Eschelon had not made a sufficient opt-in request until August 14, 2003. Eschelon requests reconsideration of that finding.

I. ESCHELON'S INITIAL OPT-IN REQUEST WAS DETAILED AND SPECIFIC AND COMPLIED WITH THE COMMISSION'S POLICY STATEMENT ON "PICK AND CHOOSE."

In the Order the Commission finds that an opt in request becomes effective "when a proper opt-in request is presented to the incumbent carrier." *Order* at ¶ 26. The Commission finds that a proper opt-in request was not made until August 14, 2003. While the Order does not specifically define a "proper" request, this Commission has stated the requirements for such a request in its Policy Statement on "pick and choose." There the Commission stated that the requirements for an opt-in request "must be presented by the requesting carrier to an appropriate representative of the ILEC in writing, and specify the particular arrangement requested and any relevant terms in the existing agreement to be superseded." *Interpretive and Policy Statement on Section 252(i) "pick and choose,"* Docket No. UT-990355, at ¶ 23. Eschelon submits that its October 29, 2002 opt-in request clearly meets that standard.

A review of the October 29, 2002 Eschelon request[1] (October 29 request) demonstrates that, in accordance with the Policy Statement, that request is specifically identified the requested arrangement and what terms it would supersede in the existing agreement. (October 29, 2002 request-Attachment 1 hereto). Included in that request was the following information:

1. The request contained an identification of the specific terms of the McLeod arrangement that Eschelon wished to opt into. Eschelon's letter was very specific about which terms it was opting into, including the specific period of time for which it wished to opt-in. The letter stated: "Eschelon requests to opt-in to page 2 of the

[1] Exhibit 7 to the Complaint, attached as Attachment 1.

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.)" The "page 2" referred to was physically attached to the letter to ensure that their could be no doubt about the requested terms.

The terms requested in the letter, and which appear on page 2 of the McLeod Amendment, include the time period during which the rates are effective ("Platform recurring rates, effective on September 20, 2002 and ending December 31, 2003:") as well as the rates in question.

2. The request specifically identified the terms in Eschelon's existing agreement that would be superseded as a result of the opt-in. The October 29 request specified in detail that only specific portions of page 9 of Attachment 3.2 to Eschelon's UNE-Star amendment would be superseded as a result of the opt-in. "Eschelon requests that page 9 of Attachment 3.2 of Eschelon's Interconnection Agreement Amendment terms with Qwest, dated November 15, 2000, [2](Attachment 2, hereto) 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..." (October 29 request, pp. 1-2). A more specific statement of the superseded language is difficult to imagine.

Eschelon submits that its October 29 request met both of the requirements of an opt-in request as stated in the Commission's Policy Statement. That initial request was quite detailed and specific and certainly sufficient to put Qwest on notice of the nature of Eschelon's pick and choose request. [3]

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[2] Page 9 of Exhibit 4 to Complaint, attached as Attachment 2.

[3] Qwest's protestations of confusion about Eschelon's request border on the absurd. Despite the clear request to import the McLeod rates into the Eschelon agreement without other changes to the Eschelon agreement, Qwest claimed that somehow, if that request were granted Eschelon would among other things,

II. QWEST'S CLAIMS OF CONFUSION ARE CONTRADICTED BY THE RECORD AND ARE NOT CREDIBLE.

It was Qwest's claim in this case that it did not understand Eschelon's request on October 29, 2002 and was unable to understand it until almost ten months later, including five months after Eschelon had filed a complaint in Minnesota on this very issue. The Commission appeared to base its decision on this issue in part, because of Qwest's claim of uncertainty about Eschelon's request. However, an examination of the record fails to support, and in fact contradicts, Qwest's claim that the request was not clear.

For example, Qwest claimed it was confused about the period of time that Eschelon was asking for the McLeod rates and that it interpreted the request as a request to obtain the lower rates for the entire remaining term of the Eschelon agreement. It somehow had this belief, despite the fact that Eschelon's letter specifically stated that its request was to opt-into page 2 of the McLeod amendment "consisting of Platform recurring rates that are effective from September 20, 2002, until December 31, 2003." As if that were not specific enough Eschelon went on to explain that among the items that would be placed in the Eschelon agreement as a result of the opt-in would be the language from the McLeod amendment that would "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." The letter specifically repeated that the opt-in included "the specified time period within the term of the Eschelon Amendment (Emphasis added.) In addition, the

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lose additional options and reduce the term of its agreement by two years. Declaration of Larry Christiansen at ¶ 3. Even the most casual reading of Eschelon's request makes it clear that the granting of Eschelon's request would do nothing of the sort. It is clear that Qwest was not analyzing Eschelon's request as stated in the October 29 letter but rather analyzing what it thought Eschelon's request should be if it was a proper opt-in request under Qwest's interpretation of the law.

notation on page 2 of the McLeod amendment to which the letter refers, states: "Platform recurring rates, effective on September 20, 2002 and ending December 31, 2003."

Thus Eschelon clearly stated that it was opting into both the rates and the time period associated with those rates. Nowhere in that request is there any statement to the contrary. If Qwest was confused on this point it certainly was not as a result of anything that Eschelon said or didn't say in its request. Eschelon cannot be held responsible for Qwest's unreasonable and illogical interpretations of the request.

Finally, any unexpressed doubts on this issue were surely cleared up upon receipt of Eschelon's February 10, 2003 letter, which states, in relevant part "Eschelon has asked that Qwest decrease our rates by the same amounts as McLeod's rates were decreased, for the same period as McLeod." See attached at ¶ 6. (Emphasis added). Not even Qwest can claim that it interpreted 'the same period as McLeod" to mean for two years longer than McLeod.

Qwest also claimed confusion regarding the AIN amendment to Eschelon's agreement and the related additional $0.35 charge. Qwest claims to have been absolutely stumped as to what would happen to the AIN amendment if Eschelon imported the McLeod rates into Eschelon's existing agreement. As has been shown, Eschelon clearly asked to retain its entire agreement while opting into the McLeod rates. That agreement would therefore include the AIN amendment, which had a $0.35 rate additive associated with it. As Administrative Law Judge Mace found "Qwest was fully aware that Eschelon's UNE-Star pricing provision included both the $24.00 price for UNE-Star and a 35-cent adder not directly related to UNE-Star itself..." *Recommended Decision to*

Grant Petition, at ¶ 32. Certainly, the Commission must demand at least some minimal amount of discernment from Qwest when analyzing an opt-in request.

Furthermore, despite Qwest's attempts to claim that this amendment fundamentally changed the agreement and could not simply be added on as a rate additive, that is exactly what the AIN amendment did and what Eshelon's opt-in assumed. Indeed, when Qwest claimed it finally understood Eschelon's request it agreed to a rate "reflecting the McLeod UNE-P pricing ($21.16 for Washington, plus a $0.35 increment for AIN and listing services)." Christensen Declaration at ¶ 7. Attached at Attachment 5. Furthermore, contrary to the statement at ¶ 27 of the Order, Qwest admitted that McLeod's agreement gives it the same right to purchase AIN features and listings under its agreement that Eschelon does under its agreement, despite the absence of this amendment in its agreement. See, Qwest responses to ESCH 01-004 and 005, attached to Eschelon's Reply Brief as Eschelon Exhibit 13, pp. 22-23. It is hardly surprising that the Administrative Law Judge found Qwest's claims to the contrary to be disingenuous. *Recommended Decision to Grant Petition* at ¶ 31.

Furthermore, it is clear that any alleged confusion about the status of this amendment and rate additive made no difference in Qwest's evaluation of Eschelon's request because Qwest made it clear that Eschelon could only obtain the McLeod rates if it took all of the terms and conditions of McLeod amendment, including the volume requirements and termination date. Thus, according to Qwest's own statements of what it was willing to accept, further clarification of this point would not have changed Qwest's position about Eschelon's request.

III. QWEST'S RESPONSE DID NOT EXPRESS CONFUSION ABOUT ESCHELON'S REQUEST AND DID NOT CLEARLY STATE ITS OBJECTIONS TO THE REQUEST.

The party requesting an opt-in is not the only party to the transaction that has an obligation to put the other party on notice. The ILEC's response "must state all objections to the request and all exceptions to its duty to make arrangements available under Section 252(i)." *Policy Statement on Pick and Choose* at ¶ 20. In this instance, Qwest's response did not directly state objections to Eschelon's request at all. Rather it stated Qwest's position on what constitutes a valid opt-in request and implied, without directly stating it, that Eschelon's request was being rejected because it did not meet Qwest's test for such a request. It then offered to negotiate with Eschelon if it were willing to change its request from a "pick and choose" of specific terms in the McLeod agreement to an opt-in to the entire agreement. Of course, such an opt-in request would have required no negotiation.

Given Qwest's statement of what a valid opt-in request consisted of, it is difficult to understand what it is that would have been negotiated. Certainly, Qwest's response does not indicate that those terms and conditions are negotiable. In fact, it clearly states just the opposite. In addition, the Commission's Policy Statement specifically provides that a requesting carrier is not required to engage in negotiations prior to petitioning for enforcement of a "pick and choose" request. A requesting carrier is entitled to is notice of what specific objections the ILEC has to its request. Instead Qwest provided a carefully crafted letter that rejects Eschelon's request without every directly saying so and invites Eschelon to discuss a different opt-in request in which the terms and conditions are non-negotiable.

A proper response to a request is crucial because the CLEC does not know whether it has to seek enforcement through litigation until it has received notice from the ILEC of the ILEC's position on its request. Unlike the ILEC in a situation of an improper request, the CLEC actually suffers financial harm due to an insufficient response. It delays the CLECs evaluation of the merits of its position and eventual enforcement of the request. In contrast, delay in understanding a CLEC's request imposes no financial harm on the ILEC, and in fact such a delay is of financial benefit to the ILEC.

A careful reading of Qwest's response to Eschelon's initial request, as reflected in its letter of November 8, 2002, (November 8 letter)[4] demonstrates that Qwest understood Eschelon's request, but disagreed that Eschelon had a right to obtain it. In that letter Qwest speculates that Eschelon simply does not understand that the only possible valid "pick and choose" request is one in which Eschelon must take all of the terms of the McLeod amendment and discard all provisions in its existing agreement that differ from the McLeod amendment. Qwest clearly understood, or should have had it read the request, that that was not what Eschelon was requesting. Qwest made it clear that Eschelon's request, as stated, was unacceptable, its only uncertainty was about whether Eschelon would still want to opt-in under Qwest's conditions.

In the first paragraph of its November 8 letter Qwest not only did not claim that it did not understand the request. In fact it accurately paraphrased Eschelon's request as follows: "Your letter requests that pursuant to Section 251(i) of the Telecommunications Act of 1996 Eschelon's existing interconnection agreement with Qwest be amended to

[4] Exhibit 8 to Complaint, attached hereto as Attachment 3.

add the rates included in the amended interconnection agreements between Qwest and McLeod." Thus Qwest clearly understood, as it would have to from reading the October 29 request, that Eschelon is asking to keep its existing agreement and import the McLeod rates.

Likewise, the second paragraph of the letter expresses no confusion about Eschelon's request. Rather it states Qwest's interpretation of the law regarding opt-in requests. The third paragraph identifies the differences between the Eschelon and McLeod agreements and in effect states that, under Qwest's interpretation of the law, Eschelon's request is improper because it attempts to opt-into a portion of the McLeod agreement without taking all of the terms and conditions. Qwest asserts that Eschelon must take the volume commitments and termination date and other terms contained in the McLeod agreement. Again, no confusion is expressed about Eschelon's request, only a statement of what Qwest believes are the parameters of any valid "pick and choose" request.

The only uncertainty expressed by Qwest is stated at the end of the third paragraph where Qwest states that it is" unable to ascertain" the following two things from Eschelon's request. "(a) whether Eschelon understands that the service it would be receiving if it chose to opt-in to the McLeod agreement would differ from the service it is receiving today, and (b) whether Eschelon would agree to the same terms and conditions to which McLeod has agreed." (Emphasis added.) Thus Qwest did not express a lack of understanding by Qwest but by Eschelon. As indicated by Qwest's summary of Eschelon's request in the first paragraph and as is obvious from Eschelon's request itself, Qwest did not and could not have understood Eschelon's request as one requesting a

different service or including all terms and conditions of the McLeod agreement. It is apparent that Qwest is not asking a question about Eschelon's request, it is asking whether Eschelon would still want to go through with an opt-in if it had to take all terms and conditions of the McLeod agreement. It then states that if Eschelon is willing to opt-in under those conditions, it should contact Qwest. "If so, please contact Larry Christensen at 303-896-4686."(Emphasis added). Thus, Qwest's response to Eschelon's request was not confusion about what Eschelon wanted, it was a rejection of Eschelon's request and a question about whether Eschelon would want to opt-into the entire McLeod agreement. Qwest's invitation to call Mr. Christensen if Eschelon would agree to the same terms and conditions as McLeod was not responded to, because Eschelon would not and could not agree to those terms and conditions.

In short, Eschelon was not willing to agree to Qwest's "all or nothing" mandate. As Eschelon insisted at that time and as both this Commission and the Minnesota Commission have now found, Qwest was wrong in its assertion that Eschelon had to adopt all the terms of the McLeod amendment and jettison all the terms of the Eschelon agreement in order to "pick and choose" the terms requested.

In conclusion, a review of Eschelon's request and Qwest's reply demonstrates there was no confusion about Eschelon's request. It was just unacceptable to Qwest. The only uncertainty stated is whether Eschelon was willing to change its request to meet the standards of Qwest's incorrect version of "pick and choose". As has been found, Eschelon was correct in its assertion that it was not required to do so.

IV. IF THE OCTOBER 29 LETTER IS NOT SUFFICIENT NOTICE OF THE REQUEST, SUBSEQUENT COMMUNICATIONS CLARIFIED ANY CONFUSION EARLIER THAN AUGUST 14, 2003.

If the Commission continues to find that the October 29 request was not sufficient to trigger Eschelon's opt-in rights, the record shows that subsequent events cleared up any doubt long before August 14, 2003.

For example, in a February 10, 2003 letter to Qwest, Eschelon repeated its request specifying that it was asking for the same amount of rate reduction as McLeod and for the same time period. ("Eschelon has asked that Qwest decrease our rates by the same amounts as McLeod's rates were decreased, for the same period as McLeod. Qwest has refused, stating that Eschelon must take the same volume requirements, service limitations and termination date as they appear in the McLeod agreement to get the same rates." (Emphasis added). (February 10, 2003 letter to Patricia A. Engels, Eschelon Reply Brief, page14.-Attachment 4. This letter certainly resolved any remaining doubt about the time period covered by Eschelon's request as well as the rates requested.

Finally, after several requests by Eschelon and several responses by Qwest to the effect that any request would have to include all of the McLeod terms, on April 23, 2003, Eschelon filed a complaint with the Minnesota Public Utilities Commission. Even Qwest admits that it understood Eschelon's request at that point. "Eschelon's communication to Qwest of what it really wanted came through the Minnesota Complaint." Declaration of Larry Christiansen, dated Sept. 25, 2003, ¶ 7. Thus, if the Commission continues to find that neither Eschelon's October 29 letter nor subsequent correspondence sufficiently

V. CONCLUSION.

The Commission should reconsider its decision about the effective date of Eschelon's opt-in request in light of a careful reading of the original correspondence between the parties and application of the standard for an opt-in request as stated in the Commission's Policy Statement on Pick and Choose. A reevaluation of Eschelon's request in this light demonstrates that its request was quite detailed and specific and should be found to be sufficient to trigger Qwest's opt-in obligations. In the alternative, the Commission should find that the request was sufficient as of either February 10, 2003 or April 23, 2003.

Respectfully submitted,

Dated: February 17, 2004

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