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BEFORE THE ARIZONA CORPORATION COMMISSION

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Commissioner

Arizona Corporation Commission
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In the Matter of the Complaint of Eschelon Telecom of Arizona, Inc. Against Qwest Corporation	)	Docket No. T-01051B-03-0668

ESCHELON TELECOM OF ARIZONA, INC.'S REPLY BRIEF

I. INTRODUCTION

Eschelon Telecom, Inc. ("Eschelon") files this Brief in response to Qwest's Opening Brief ("Qwest Brief"). Contrary to Qwest's assertions, the issue for decision in this case is whether Eschelon is entitled to the same rate for UNE-Star for the same period of time as McLeod. Soon after Qwest reduced the rate to McLeod, Eschelon made a request to opt in to the same rates as McLeod for UNE-Star for the same time period as McLeod. The terms and conditions insisted upon by Qwest as a condition of such an opt-in are not legitimately related to the terms requested by Eschelon, and Qwest has not met

its burden of proving that they are. Rather, Qwest attempts to divert attention from its lack of proof on this point by raising red herrings such as its alleged confusion about Eschelon's request and by mischaracterizing Eschelon's valid opt-in request as a request for retroactive rates. Finally, Qwest attempts to demonstrate that a victory for Eschelon on this same issue at the Minnesota Public Utilities Commission should be ignored.

Eschelon has addressed many of the points raised by Qwest in Eschelon's Complaint, in its Response to Qwest's Motion to Dismiss, and in its Motion for Summary Judgment and will try not to repeat itself in this Reply. However, Qwest's Brief repeats claims that require Eschelon to once again explain the context of its request. The previous filings by Qwest have failed to show that the differences between the Eschelon and McLeod agreements have anything to do with the rate reduction given to McLeod. Therefore, Eschelon's opt-in request should be granted.

II. QWEST'S CLAIMS OF CONFUSION ABOUT ESCHELON'S REQUEST DO NOT PROVIDE A JUSTIFICATION FOR DENYING ESCHELON'S REQUEST.

Qwest's justification for denying Eschelon's opt-in request now appears to be that Eschelon's initial request was either not clear or different from its current request. Eschelon's response is twofold. First, the request was and is very clear and consistent. Second, assuming that Qwest now understands Eschelon's request in full, it has not stated any justification for continuing to deny it.

A. Eschelon's Request Was that it Be Allowed to Purchase UNE-Star at the Reduced McLeod Rate for the Same Time Period as McLeod.

Qwest agrees that December 31, 2003 is the appropriate end date for the lower UNE-Star rates. *See* Qwest Reply in Support of Motion to Dismiss, at 1-2. However, Qwest continues to claim, all evidence to the contrary notwithstanding, that Eschelon only recently asked for this end date and that it originally asked for that rate until December 2005. However, as the facts clearly demonstrate, that is not the case. As is clear from the record, Eschelon's request was for the same rate as McLeod for the same period of time as McLeod.

In its October 29, 2002, letter to Qwest, Eschelon made the following request: "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." SOF, Exhibit A (emphasis added). This request was straight-forward and direct. Eschelon even included, as part of its request, a copy of the page of the McLeod agreement that it referenced in its request, namely page 2 of the amendment in question. *See* SOF, Exhibit A. That page also states: "Platform recurring rates, effective on September 20, 2002 and ending December 31, 2003."[1]

[1] That page of the amendment further states: "Apart from the foregoing, all other terms and conditions of the IA, as amended, including without limitation, the term thereof, shall remain unchanged and in full force and effect." SOF, Exhibit A. Thus, if Eschelon's request to opt-in to page 2 of this amendment was honored, Eschelon would retain all other terms of its agreement as amended, including the additional charges due to the AIN amendment, and the termination date, but would get the McLeod rates for the period of September 20, 2002 to December 31, 2003.

On January 16, 2003, Eschelon wrote a second letter to Qwest and repeated that it had "requested to opt-in to page 2 of the Amendment to Attachment 3.2 of the Qwest/McLeod Amendment, which consisted of platform recurring rates that are effective from September 20, 2002, until December 31, 2003." SOF, Exhibit C. Again, on February 10, 2003, Eschelon raised this issue in a letter to Qwest stating: "Eschelon has asked that Qwest decrease our rates by the same amounts as McLeod's rates were decreased, for the same period as McLeod."[2] February 10, 2003 letter, attached as Exhibit 1.[3]

There is simply nothing about this request to justify Qwest's claim that it interpreted it as a request for the McLeod rates until December 31, 2005. Certainly, such an interpretation cannot be the justification for denying an opt-in request. If it were, it would always be to the advantage of Qwest to "misunderstand" even the most direct of requests, such as this one.

Qwest also claims that Eschelon's position on this issue has only recently changed and that Eschelon asked for the rate until 2005 in this proceeding. However, it can point to nothing to confirm this belief, and its only reference to any statement in this case is a

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[2] Much of the confusion surrounding this issue is due to the fact that the end of the term of the lower rate and the termination date of the McLeod agreement are the same date. Thus, it is not always clear when a reference is made to the same terms and conditions if this is a reference to the termination date of the agreement or the term of the availability of the lower rate.

[3] At Qwest's request, Eschelon has attached to this Reply a redacted version of this letter and requests that this version of the February 10, 2003 letter replace in the record the version previously filed.

reference to paragraph 24 of Eschelon's Complaint. *See* Qwest Reply in Support of Motion to Dismiss at 1. However, that paragraph simply states Eschelon's position that it should not have to accept the termination date of the McLeod agreement to obtain the terms requested. As explained, the terms requested were the McLeod rate for the same period as McLeod. Eschelon's argument on this point was in response to Qwest's insistence that in order to have those terms, Eschelon must agree to accept the termination date of the McLeod agreement, thereby shortening its right to UNE-E, even at the higher rate, by two full years.

Qwest has consistently attempted to equate the termination date of the McLeod agreement with the term of the lower McLeod rate and has caused much confusion in doing so. It is true that the Administrative Law Judge in the Minnesota case found that Eschelon had asked for the rate until December 2005. However, that finding resulted from Eschelon's alternative claim of discrimination and its argument that, because there was no cost basis for charging a different rate based on the duration of the agreement, there was no reason to limit its availability—an argument that Eschelon has not repeated here. Eschelon never claimed in the Minnesota case, nor did the Administrative Law Judge find, that its original opt-in request included a request to obtain the McLeod rate until December

2005.[4] As is obvious from the correspondence, Eschelon's opt-in request was for the same time period as McLeod.

B. Qwest's Refusal to Grant Eschelon's Opt-In Request Is Unjustified Because It Is Based on Terms Not Legitimately Related to the Terms Requested.

Qwest also alleges confusion about Eschelon's position on other differences between the two agreements as justification for not agreeing to the request. This alleged confusion is a moot point. Qwest has made it clear that, even if it had understood Eschelon's request fully and completely, it would not have granted the request because Eschelon would not agree to the volume requirements and the termination date of the McLeod agreement.

Nevertheless, Qwest implies that if only it had understood Eschelon's request from the start, it would have granted it, noting that when Eschelon's request was clarified to Qwest's satisfaction, Qwest "voluntarily offered to waive other related terms and conditions and offered Eschelon a rate equivalent to the McLeod rate plus the $.35

[4] Qwest also claims that a statement in a brief filed by Eschelon in Minnesota evidences a claim by Eschelon that its opt-in request was for the lower rate until 2005. *See* Qwest Reply in Support of Motion to Dismiss, at 1. For similar reasons, this statement is taken out of context and misinterpreted by Qwest.

incremental charge for additional services."[5] Qwest Brief at 2. This is revisionist history. Qwest's "voluntary" waiver of the volume and termination date occurred only after Eschelon had filed complaints in several states and the Administrative Law Judge in the Minnesota case had ruled in Eschelon's favor. Furthermore, Qwest's characterization of it as a "voluntary waiver" makes it clear that Qwest believes it has no obligation to allow the opt-in, even when all of the issues have been clarified. This is evidenced by its continuing refusal to honor Eschelon's request.

From the start, Qwest insisted that the volume requirements and the termination date of the McLeod agreement were an absolute requirement for obtaining the McLeod rate. *See* SOF, Exhibit B at 2 (stating that Eschelon's right to receive the rates in the McLeod agreement conditioned upon Eschelon's agreement to the same terms and conditions, including "the volume commitments set forth in section 2.3 of the Qwest-McLeod interconnection agreement and its December 31, 2003 termination date"); SOF, Exhibit D ("Qwest will allow Eschelon to obtain the McLeod rates, but to obtain the rates, Eschelon must also opt-in to the same service (and associated terms and conditions) to which those rates apply.")

[5] Qwest argues that even though the additional AIN rate of $.35 was specifically designed for Eschelon and the amendment provides for a renegotiation of that rate if usage changes, its presence in the Eschelon agreement is somehow related to the lower UNE-Star rate for McLeod. *See* Qwest Brief, at 4 n.1. Rather, this proves Eschelon's point that the amendment is unrelated to the underlying UNE-P rate and is an add-on to that rate. As Qwest admits, if McLeod had entered into such an amendment, its rate additive would have been different based on its unique usage pattern. *Id.* Thus, the amendment is not related to the McLeod rate, it is related to and varies with Eschelon's usage. Furthermore, Eschelon objects to Qwest's so-called hypothetical example in Footnote 1, as being based upon evidence that is not in the record.

Eschelon has previously explained in detail the lack of relationship between those terms and the McLeod rate and that the burden of proof on this issue is on Qwest. Indeed, the burden of proving that relationship was placed on the ILEC to prevent the ILEC from preventing opt-in by inserting unrelated provisions into an agreement that would be impossible for others to accept: "[F]ailure to make provisions available on an unbundled basis could encourage an incumbent LEC to insert into its agreement onerous terms for a service or element that the original carrier does not need, in order to discourage subsequent carriers from making a request under that agreement." First Report and Order, ¶ 1312.

In this case, the volume requirements of the McLeod agreement are five hundred fifty percent (550%) greater than the Eschelon requirements, which are impossible for Eschelon to meet. *See* SOF, ¶ 9(b). Despite this difference, the rates in the original UNE-Star agreements were the same. No changes were made to these terms when the rates were reduced for McLeod. No showing has been made that the cost of providing this service varies by volume. In addition, the termination date of the McLeod agreement was a full two years sooner than the Eschelon agreement. SOF, ¶ 9(a). Again, the termination dates did not change when the rate was reduced. Furthermore, the one relationship that did exist with the lower rate—the period of time for which it was available—was a term that Eschelon agreed to as a part of its original request. No relationship has been shown between these requirements and the reduced rate.

III. THE MINNESOTA PUBLIC UTILITIES COMMISSION CORRECTLY RULED FOR ESCHELON ON THIS ISSUE.

Qwest argues that the Order of the Minnesota Public Utilities Commission should not be given much weight. Obviously, that Order is not binding on this Commission, and Eschelon is not claiming that it is. However, it is particularly relevant and persuasive in this case because the facts and law are identical.

Qwest selectively cites to certain portions of the Order that it argues favor its position. However, the Commission made several key determinations that led to its ruling in favor of Eschelon.[6] Among those conclusions are the following:

1. Eschelon has properly asserted a claim that its opt-in rights were violated by Qwest.
2. Eschelon is entitled to the price reduction given to McLeod for the time period that the rates are available to McLeod.
3. The other terms that Qwest would require Eschelon to adopt were not legitimately related to the lower price negotiated between Qwest and McLeod and were not required to be identical.
4. Qwest was required to provide the lower rate from the date that Eschelon made its first opt-in request.

[6] The Minnesota case is based on the same amendments to the ICA and the same correspondence between the parties as in this case. The amendments in question were identical for all states in which Eschelon operates, and the opt-in request and other correspondence also was the same for all of those states.

5. Qwest improperly denied Eschelon the lower rate for the period after that date.

6. Qwest should provide a refund of the difference between the two rates to Eschelon from the date of Eschelon's request.

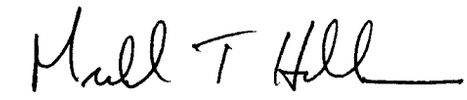
See SOF, Exhibit E at 6-7.

IV. CONCLUSION.

Eschelon has made a valid and proper opt-in request pursuant to the Telecommunications Act of 1996. The conditions that Qwest has attempted to impose on that request are unreasonable and unrelated to the terms requested. Eschelon is entitled to have the same rates as McLeod for UNE-Star for the same time period as McLeod. The Commission should order Qwest to agree to that request and to provide a credit to Eschelon for the difference in the rates paid and the rates to which Eschelon was entitled.

DATED this 19th day of December, 2003.

LEWIS AND ROCA LLP



Thomas H. Campbell
Michael T. Hallam
40 N. Central Avenue
Phoenix, Arizona 85004

-and-

LEWIS AND ROCA LLP
LAWYERS

Dennis D. Ahlers
ESCHELON TELECOM OF ARIZONA, INC.
730 Second Avenue South,
Suite 1200
Minneapolis, MN 55402

Attorneys for Eschelon Telecom of Arizona, Inc.

ORIGINAL and thirteen (13) copies of the foregoing filed this 19th day of December, 2003, with:

The Arizona Corporation Commission
Utilities Division – Docket Control
1200 W. Washington Street
Phoenix, Arizona 85007

COPIES of the foregoing hand-delivered this 19th day of December, 2003, to:

Jane Rodda, Administrative Law Judge
Hearing Division
Arizona Corporation Commission
1200 W. Washington Street
Phoenix, Arizona 85007

Maureen Scott, Legal Division
Arizona Corporation Commission
1200 W. Washington Street
Phoenix, Arizona 85007

Ernest G. Johnson, Director
Utilities Division
Arizona Corporation Commission
1200 W. Washington Street
Phoenix, Arizona 85007

LEWIS AND ROCA LLP
LAWYERS

COPY of the foregoing mailed
This 19th day of December, 2003, to:

Timothy Berg
Theresa Dwyer
Fennemore Craig, P.C.
3003 N. Central Avenue
Suite 2600
Phoenix, Arizona 85012

Todd L. Lundy
Qwest Corporation
1801 California Street
Suite 4900
Denver, CO 80202

Jayne Williams

EXHIBIT 1

ARIZONA
DOCKET NO. T-01051B-03-0668
ESCHELON 01-007
ATTACHMENT D

February 10, 2003

Ms Patricia A Engels
Executive Vice President
Wholesale Markets
Qwest Communications
1801 California Street, 52nd Floor
Denver, Colorado 80202

Via Airborne Express

Re: Significant Issues in Eschelon's Relationship with Qwest

Dear Pat:

I am writing to follow up on my commitment to you from our meeting last month on January 8, 2003. We agreed that I would put together a list of significant issues in our relationship with Qwest as its second largest CLEC, making $40 million annualized wholesale purchases. I promised to briefly outline the issues, propose my thoughts on how best to resolve them, and then allow you up to sixty days to resolve the issues.

Eschelon's list of issues will be of no surprise to anyone at Qwest who is familiar with our account. We have raised each issue many times and at many different levels within Qwest. As a newcomer now leading Qwest's wholesale services division, I understand that these issues will likely be new to you. However, your predecessors have been well aware of them and have not resolved them. I write this to give you the opportunity that you asked for to resolve these issues within the sixty-day time frame upon which we agreed.

REDACTED

730 Second Avenue South • Suite 1200 • Minneapolis, MN 55402 • Voice (612) 376-4400 • Facsimile (6

Exhibit B-5

REDACTED

6. Qwest Should Give Eschelon the Same Rates for "UNE-Star"[3] that Qwest Agreed to Give McLeod – In September 2002, McLeod and Qwest entered into an amendment to their interconnection agreement that provided for lower rates for UNE-M (McLeod). Eschelon and Qwest entered into a similar agreement; however, Qwest has refused to lower our rates. 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.

Qwest argues that the volume, service and termination provisions are integrally related to the price reduction. This, however, is simply not true. Under the Eschelon and McLeod UNE-Star agreements, Eschelon and McLeod were getting the same rates despite the differences in the contracts. The differences upon which Qwest relies in the Eschelon and McLeod contracts did not change from

[3] "UNE-Star" has been Qwest's internal name for a UNE Platform product that has also been called "UNE-E" when provided to Eschelon and "UNE-M" when provided to McLeod. It is resale at contract rates.

2000 to 2002. If they were related to the new rates, they would have changed as well in 2002. For example, if McLeod's new rates were based on volume, the volume commitments would have gone up when the rates went down. But, only the McLeod rates changed in 2002, the volume requirements, service limitations and termination date did not. The UNE-E (Eschelon) and UNE-M (McLeod) rates were identical in 2000, and under Eschelon's request, the rates would also be identical now. Eschelon requests that Qwest agree to an amendment that would once again give Eschelon the same rates as McLeod for UNE-E (Eschelon) Qwest should change our UNE-Star pricing retroactively to September 2002, and issue a credit of $150,000 for the overpaid amounts, through January 2003. This request has been previously made to Richard Corbetta and Larry Christensen at Qwest, yet no action has been taken by Qwest

REDACTED

Your prompt attention to the issues presented herein will be greatly appreciated. Please do not hesitate to contact me if you have questions or need additional information about any of these issues.

Sincerely,

2/10/03

Richard A. Smith
President & Chief Operating Officer
Eschelon Telecom, Inc.
612.436.6626

Enclosures

cc (w.enc.): John Stanoch, Qwest
Toni Dubuque, Qwest
Jean Novak, Qwest
Richard Busch, Miller Nash