

ORIGINAL



BEFORE THE ARIZONA CORPORATION COMMISSION

RECEIVED

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

MARC SPITZER
Chairman
WILLIAM A. MUNDELL
Commissioner
JEFF HATCH-MILLER
Commissioner
MIKE GLEASON
Commissioner
KRISTIN K. MAYES
Commissioner

Arizona Corporation Commission

DOCKETED

DEC 19 2003

2003 DEC 19 P 3:49

AZ CORP COMMISSION
DOCUMENT CONTROL

DOCKETED BY *[Signature]*

Docket No.: T-01051B-03-0668

IN THE MATTER OF THE
COMPLAINT OF ESCHELON
TELECOM OF ARIZONA, INC.
AGAINST QWEST CORPORATION

QWEST CORPORATION'S REPLY
BRIEF

As Qwest noted in its Opening Brief, the only issue for decision in this proceeding is whether Eschelon should receive a retroactive credit for a recently implemented UNE platform rate. Qwest's Opening Brief at 1. Underlying this determination is Eschelon's claim that its communications with Qwest were proper opt-in requests under Section 252(i) of the Telecommunications Act of 1996, and that its communications were sufficiently clear that Qwest should have understood and implemented them immediately. Qwest has previously outlined the reasons it believes that Eschelon's letters in late 2002 and early 2003 were not clear and proper opt-in requests, primarily because they did not recognize any obligation whatsoever for Eschelon to accept any related terms and conditions or specify the service package desired along with the lower rates.¹

¹ Much of the dispute has centered around the relevance of term and volume commitments. The FCC's *First Report & Order In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, FCC 96-325 ("FCC's First Report & Order") specifically recognized that term and volume commitments are likely to be relevant to rates:

For instance, where an incumbent LEC and a new entrant have agreed upon a rate contained in a five-year agreement, section 252(i) does not necessarily entitle a third party to receive the same rate for a three-year commitment. Similarly, that one carrier has negotiated a volume

1 Equally important, however, Eschelon's requests were ambiguous and have
2 changed significantly over time, so it becomes obvious that Qwest simply did not have
3 enough information to understand what Eschelon actually wanted with its opt-in request in
4 order to be able to determine the appropriate related terms and conditions. Eschelon
5 stated in its initial letter in October, 2002, that it wanted the same UNE platform rate
6 contained in a recent amendment to the interconnection agreement between Qwest and
7 McLeod. Joint Statement of Facts ("SOF"), Ex. A. Qwest did not then and does not now
8 believe that this request for a naked rate term was a proper opt-in request given the
9 differences in the service packages Qwest was providing to McLeod and Eschelon.
10 Nevertheless, Qwest responded that it would "work with Eschelon to better meet its
11 needs," and requested that Eschelon contact Director of Interconnection Agreements
12 Larry Christensen, Qwest's subject matter expert, to clarify what service Eschelon wanted
13 and what terms and conditions were appropriate. SOF, Ex. B. This pattern was repeated
14 several times in subsequent correspondence. SOF, Exs. C & D; Eschelon's Motion for
15 Summary Judgment ("MSJ"), Ex. 1; Ex. A (this brief).²

16 Throughout this period, Eschelon failed to make contact or work constructively
17 with Qwest's subject matter expert, so Qwest was not able to make a determination about
18 what terms and conditions would likely be acceptable to Eschelon until September of
19
20

21 discount on loops does not automatically entitle a third party to obtain
22 the same rate for a smaller amount of loops.

23 FCC's First Report & Order, ¶ 15. Qwest raised these issues in its initial response to
24 Eschelon as examples of likely relevant terms and conditions, but it is important to bear in
25 mind that Qwest did not, as Eschelon suggests, refuse Eschelon's request or take a hard
26 and fast position about term and volume. Qwest simply asked Eschelon to contact its
27 subject matter expert, Director of Interconnection Agreements Larry Christensen, for
28 clarification on these and other issues.

² Exhibit A to this brief is a response to a previous letter from Eschelon discussing
numerous ongoing issues between the parties. The only information relevant to this
dispute is on page 7. The sections dealing with other matters have been redacted.

1 2003.³ Nevertheless, Qwest remained willing at all times to resolve this matter in a
2 reasonable manner through communication and compromise. Shortly after the ALJ in the
3 related Minnesota proceeding found that Eschelon was not entitled to the lower rate
4 through 2005, Qwest offered Eschelon an amendment containing the lower rates until
5 December 31, 2003, the same ending date as the McLeod rate. That amendment has been
6 executed and filed with the Commission. Qwest's Motion to Dismiss ("MTD"), Ex. C.

7 Eschelon now claims that its intention was always clear, and that it consistently
8 requested the McLeod rate for a term ending December 31, 2003. Eschelon' MSJ at 2-3.
9 This contention does not conform with Qwest's understanding at the time of the initial
10 requests, and is directly contradicted by Eschelon's position in the Minnesota proceeding.
11 Qwest's Reply in Support of MTD, Ex. A at 2 (requesting rates "over a longer period of
12 time"); Eschelon's Response to MTD, Ex. 1 at 7. To the extent Eschelon has offered
13 clarification of its original request, it has been primarily through the litigation process, and
14 has not been either clear or consistent.

15 In particular, Eschelon now claims that a February 10, 2003 letter from Richard
16 Smith at Eschelon to Patricia Engels at Qwest sufficiently clarified its requests.
17 Eschelon's MSJ at 3 n.3. The February 10th letter does contain language indicating that
18 Eschelon might have been willing to accept a lower rate ending in December 2003, but the
19 letter also adds a new demand – a retroactive price change going back to September,
20 2002.⁴ Eschelon's MSJ, Ex. 1 at 5-6. Qwest once again responded, not by refusing to
21

22 ³ Eschelon's attorney did telephone Mr. Christensen once, but did not significantly
23 clarify Eschelon's position and did not follow up afterward as Mr. Christensen had
24 expected. Qwest's MTD, Ex. A.

25 ⁴ Eschelon has not cited any authority to support its claim that the rate should be
26 retroactive to the date of the agreement with McLeod. In fact, Eschelon cites authority
27 that a subsequently negotiated term becomes available for opt-in "once the subsequent
28 agreement is filed with, and approved by, the state commission." Eschelon's MSJ at 5,
citing the FCC's 1996 First Report and Order, ¶ 1316. The McLeod amendment became
effective in Arizona by operation of law on December 18, 2002.

1 allow an opt-in, but by stating that Qwest was willing to “further discuss this item,” and
2 asking Eschelon once again to contact Larry Christensen. *See* Ex. A at 7. Shortly after
3 Qwest’s response, Eschelon filed the Minnesota complaint claiming that it was entitled to
4 the lower rate until 2005.

5 Eschelon attempts to explain the inconsistency in its position regarding the
6 termination date by distinguishing between the “term of the reduced rate” and the
7 “termination dates of the two agreements.” Eschelon’s MSJ at 9. Qwest agrees that these
8 are two different concepts, but the distinction does not explain why Eschelon argued to
9 the Minnesota Commission that it was entitled to the lower rate through 2005. In any
10 event, Eschelon apparently recognizes now that the duration of the reduced rate is a
11 legitimately related term of the McLeod agreement. Qwest also believes that the
12 termination date of the agreement as a whole is a legitimately related term of the
13 agreement. The latter dispute is of limited relevance, however, given that the parties have
14 agreed to an amendment where the lower rate terminates in 2003, but the agreement will
15 then continue in effect until 2005 with the old rates.

16 Finally, in its Motion for Summary Judgment Eschelon once again raises the
17 argument that Qwest must show a higher cost of service to Eschelon, or show that it is not
18 technically feasible to provide service to Eschelon, in accordance with the standard set
19 forth in 47 C.F.R. § 51.809(b). *See* Eschelon’s MSJ at 5. As the Minnesota ALJ
20 recognized, that standard is not relevant to this dispute because Qwest did not deny
21 service to Eschelon. *See* Eschelon’s Response to MTD, Ex. 1 at 8. Qwest simply asked
22 for clarification and a minimal level of cooperation in processing the opt-in request, if in
23 fact Eschelon actually wanted to pursue an opt in request rather than a negotiated
24

25 Even the Minnesota Commission only ordered credits dating back to Eschelon’s
26 initial rate request. SOF, Ex. E at 6. If any retroactive credits are due, they should only
27 be calculated to the date the Commission finds the terms of Eschelon’s opt-in request
28 were reasonably clear and complete. Qwest believes that this date would be, at most, a
few days before Qwest actually offered the amendment based on clarification gained from
the litigation in Minnesota and Washington. *See* Qwest’s Opening Brief at 2.

1 agreement. Eschelon preferred to make a vague request, delay for several months, and
2 then litigate. Eschelon should not be rewarded for its dilatory conduct.

3 RESPECTFULLY SUBMITTED this 19th day of December, 2003.

4 FENNEMORE CRAIG

5 

6 Timothy Berg

7 Theresa Dwyer

8 Al Arpad

9 3003 N. Central Avenue, Suite 2600

10 Phoenix, AZ 85012

11 (602) 916-5000

12 -and-

13 Todd L. Lundy

14 QWEST CORPORATION

15 1801 California Street, Suite 4900

16 Denver, Colorado 80202

17 *Attorneys for Qwest Corporation*

18 ORIGINAL +13 copies filed this
19 19th day of December, 2003:

20 Docket Control

21 ARIZONA CORPORATION COMMISSION

22 1200 West Washington

23 Phoenix, AZ 85007

24 COPY hand-delivered this 19th day of December, 2003:

25 Chris Kempley, Chief Counsel

26 Legal Division

27 ARIZONA CORPORATION COMMISSION

28 1200 West Washington

Phoenix, AZ 85007

1 Jane Rodda, Chief Administrative Law Judge
2 Hearing Division
3 ARIZONA CORPORATION COMMISSION
4 1200 West Washington
5 Phoenix, AZ 85007

6 Ernest Johnson, Director
7 Utilities Division
8 ARIZONA CORPORATION COMMISSION
9 1200 West Washington
10 Phoenix, AZ 85007

11 COPY mailed this 19th day of December, 2003:

12 Thomas H. Campbell
13 Michael T. Hallam
14 LEWIS AND ROCA LLP
15 40 N. Central Avenue
16 Phoenix, Arizona 85004

17 Dennis D. Ahlers
18 ESCHELON TELECOM, INC.
19 730 Second Avenue South, Suite 1200
20 Minneapolis, MN 55402-2456

21 

22 PHX/1494358

23
24
25
26
27
28

EXHIBIT

A

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

Patricia A. Engels
Executive Vice President
Wholesale Markets

1801 California Street, 52nd Floor
Denver, Colorado 80202

303 992 3066 direct line
303 296 4098 fax



April 1, 2003

Mr. Richard A. Smith
President and Chief Operating Officer
Eschelon Telecom, Inc.
730 2nd Avenue South, Suite 1200
Minneapolis, MN 55402

Dear Rick,

I appreciate the opportunity to respond to the comprehensive list of issues that you sent to me in your letter dated February 10, 2003. As you stated in your opening, many people at Qwest have worked with you on these subjects including the key leadership of our organizations. Qwest has thoroughly investigated and responded to each one of these issues in the past. Nevertheless, we took the time to again review each area based on the points delineated in your letter. Listed below are our findings:

REDACTED

Mr. Richard Smith
Page 2

REDACTED

Mr. Richard Smith
Page 3

REDACTED

Mr. Richard Smith
Page 4

REDACTED

Mr. Richard Smith
Page 5

REDACTED

Mr. Richard Smith
Page 6

REDACTED

Mr. Richard Smith

Page 7

6. Qwest Should Give Eschelon the Rates that Qwest Agreed to Give McLeod for UNE-M.

This issue was addressed in a series of correspondence between Eschelon and Qwest between October 29, 2002, and February 14, 2003. (See Attachment I)

October 29, 2002 – Eschelon's original request to Qwest seeking to opt-in to the McLeod's amendment (filed 9-19-02 with the state commissions) delineating UNE-Star platform recurring rates.

November 8, 2002 – Qwest's response indicating our willingness to work with Eschelon to meet its needs and a clarification of product differences between UNE-M and UNE-E. Letter identified Larry Christiansen, Director – Interconnection Agreements, as the Qwest contact point.

January 16, 2003 – Eschelon's response misinterpreting Qwest's November 8, 2002 letter.

February 14, 2003 – Qwest's response reiterating that Eschelon may opt-in to the McLeod amendment as long as the rates apply to the same service (and associated terms and conditions) to which those McLeod rates apply. Again, Larry Christiansen is identified as Qwest's contact point to initiate a meeting for further discussion.

There has been no further contact from Eschelon on this subject until your letter. Qwest remains willing to meet to further discuss this item. No pricing changes can take place unless an amendment is executed. A meeting of the subject matter experts can best facilitate a discussion and clarification of these issues. Please contact Larry Christiansen, who can be reached on 303-896-4686, to initiate this meeting.

REDACTED

Mr. Richard Smith
Page 8

REDACTED

Mr. Richard Smith
Page 9

REDACTED

Mr. Richard Smith
Page 10

REDACTED

Mr. Richard Smith
Page 11

REDACTED

Conclusion

I believe this is a full response to all of the issues raised in your letter. Qwest will continue to work with Eschelon in an open environment to resolve business issues. As you indicated in our meeting, Eschelon wants a strong business relationship with Qwest. In that vein, I have asked my team to do everything possible to meet that objective. I would ask you to make the same request of your leadership team so that together we can move our business relationship forward. Qwest values Eschelon as a customer. I look

⁵ See Eschelon Reply Comments at 3.

⁶ Qwest's representative was correct when it informed Eschelon that its contract in Oregon does not provide for DS1-capable loops with basic installation; but due to the unique situation of this configuration not having a separate price in Oregon until Qwest's February 10 commitment, Qwest has processed orders for DS-1-capable loops in Oregon without testing.

⁷ See Notice from Larry Christensen, Director of Business Development, Qwest, and January 27, 2003.

Mr. Richard Smith

Page 12

forward to your review of our response and will make time available to answer any questions that may arise.

Sincerely,

A handwritten signature in cursive script that reads "Pat Engels". The signature is written in black ink and is positioned above the printed name.

Patricia Engels

Executive Vice President - Wholesale Markets

Qwest Communications

Attachments