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BEFORE THE ARIZONA CORPORATION COMMISSION

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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

**QWEST CORPORATION'S OPENING  
BRIEF**

The only issue for decision in this proceeding is whether Eschelon should receive retroactive credit for recently implemented lower rates. Eschelon claims that Qwest denied an opt-in request from Eschelon in October of 2002, and that Eschelon should therefore receive the lower rate from the date of its purported opt-in request. Qwest disputes the basis of Eschelon's claim.

The undisputed facts are set forth in a joint statement submitted by the parties, along with an appendix containing the relevant correspondence. Qwest has already set forth its position at some length in its Motion To Dismiss And Answer To Complaint, filed October 6, 2003, and its Reply In Support Of Motion To Dismiss, filed November 7, 2003. Accordingly, Qwest will attempt to summarize its arguments briefly, and will address one additional issue – interpretation of the Minnesota Order dealing with the same purported opt-in request.

On October 29, 2002, Eschelon sent Qwest a letter requesting to opt into "the Platform recurring rates" from Qwest's interconnection agreement with McLeod. Joint Statement of Undisputed Facts ("SOF"), Ex. A. Eschelon's letter made no mention of the differences between the Eschelon and McLeod agreements, and also failed to mention any other terms and conditions legitimately related to the McLeod pricing term. Qwest responded by asking whether Eschelon wanted to accept all legitimately related terms and

1 conditions in accordance with Section 252 (i) and 47 C.F.R. 51.809, or whether Eschelon  
2 wanted to enter into negotiations for different terms and conditions. SOF, Ex. B.

3 Eschelon has never directly responded to Qwest's inquiry. Instead, Eschelon has  
4 persistently demanded that Qwest implement the McLeod rates without attaching any  
5 other terms or conditions whatsoever, and has filed a series of complaints with state utility  
6 commissions. SOF, Ex. C, E. Because the 1996 Act and accompanying regulations do  
7 not permit an opt-in where the requesting carrier refuses to accept legitimately related  
8 terms and conditions, Qwest continued its good faith attempts to clarify the nature of  
9 Eschelon's request. SOF, Ex. D.

10 On August 14, 2003, in a complaint filing, Eschelon finally clarified that it was  
11 willing to continue paying an extra \$.35 for additional services that had been included as  
12 part of the UNE-E platform rate. Qwest Corporation's Motion To Dismiss And Answer  
13 To Complaint ("Qwest Motion to Disimiss"), Ex. B. On September 4, 2003, the ALJ in  
14 the Minnesota complaint proceedings decided that the termination date of the McLeod  
15 agreement was legitimately related to the pricing term. Eschelon Telecom of Arizona,  
16 Inc.'s Response To Motion To Dismiss And, Or In The Alternative, Request For  
17 Additional Time For Discovery ("Eschelon Response"), Ex. 1 ("Minnesota ALJ  
18 Recommendation") at 8. Since the Minnesota ALJ Recommendation, Eschelon has  
19 changed its position and is no longer seeking a different expiration date for the rates.  
20 Eschelon Response at 9. This position is not consistent with the position Eschelon took in  
21 Minnesota. Minnesota ALJ Recommendation at 7. Eschelon's current position is also not  
22 consistent with Qwest's understanding of Eschelon's intent at the time the original request  
23 was made.

24 Shortly after these important terms had been clarified, Qwest voluntarily offered to  
25 waive other related terms and conditions, and offered Eschelon a rate equivalent to the  
26 McLeod rate plus the \$.35 incremental charge for additional services. Qwest and  
27 Eschelon entered into an amendment reflecting the new rates on or shortly after  
28

1 September 26, 2003. Qwest Motion to Dismiss, Ex. C. Qwest believes that it has acted  
2 promptly and in good faith to meet its obligations under Section 252(i) of the Act.

3 The correspondence between the parties clearly shows that Qwest did not refuse to  
4 amend Eschelon's interconnection agreement. Qwest responded to Eschelon's purported  
5 opt-in request with a reasonable request for clarification and, alternatively, an offer to  
6 renegotiate the interconnection agreement. The delay in this matter resulted directly from  
7 Eschelon's failure to make a lawful opt-in request, and its steadfast refusal to modify (or  
8 even clarify) its request until August and September of this year.

9 Under these circumstances, it would be unreasonable to order a retroactive rate  
10 adjustment, and the Commission should not blindly follow the end result of the Minnesota  
11 Order relating to the same rate dispute. The Minnesota Commission apparently ignored  
12 the finding of the ALJ that Qwest did not deny service to Eschelon within the meaning of  
13 47 C.F.R. 51.809. See Minnesota ALJ Recommendation at 8. In fact, Qwest agrees with  
14 most of the logic of the Minnesota ALJ Recommendation. The Minnesota ALJ correctly  
15 ruled that

16 Agreeing to a lower rate . . . for a short duration is significantly  
17 different than locking in the same low rate for a longer period. . . . The  
18 record demonstrates that the duration of the McLeod agreement is, as  
Qwest asserts, "legitimately related" to the lower UNE-Star rate.

19 *Id.* The Minnesota ALJ *rejected* Eschelon's argument that Qwest was not allowed to  
20 insist on the shorter term unless Qwest could "show that the costs of providing the service  
21 to Eschelon are greater than the costs of providing service to McLeod or it is not  
22 technically feasible to do so, as spelled out in the federal regulations." *Id.*, citing 47  
23 C.F.R. § 51.809(b). The Minnesota ALJ correctly held that this regulatory burden of  
24 proof only applies

25 when the ILEC is denying service under the same rates, terms and  
26 conditions. Qwest is not denying service, it is disputing what the  
27 relevant terms and conditions are that legitimately relate to the price  
28 term. As explained above, the record demonstrates that the lower price  
is legitimately related to the duration of the agreement and Eschelon  
must accept the term if it wants the lower price.

1 *Id.* However, the Minnesota ALJ went on to hypothesize about what Qwest's obligations  
2 would be "if Eschelon requests the lower price for the time period granted to McLeod."

3 *Id.* The ALJ ruled that *if* Eschelon had requested the rate for the proper term, Qwest had  
4 not shown that other terms were legitimately related to the McLeod price. *Id.* at 8-9.

5 Qwest obviously disagrees with the Minnesota ALJ's determination that other  
6 terms, including volume and the nature of the service package, were not legitimately  
7 related to the McLeod price.<sup>1</sup> However, even if these other aspects of the Minnesota ALJ  
8 Recommendation were correct, the ALJ clearly found that Qwest did not deny service to  
9 Eschelon within the meaning of the applicable regulations. *Id.* at 8. The ALJ agreed with  
10 Qwest that Eschelon did not, as a factual matter, request to opt into an appropriate  
11 package of related terms in October of 2002 because Eschelon demanded a later  
12 termination date than McLeod. Under these circumstances, Qwest was entitled to dispute  
13 Eschelon's requested termination date, and was entitled to request that Eschelon either  
14 clarify its opt-in request or enter into negotiations. Because Qwest acted reasonably and  
15 did not wrongly deny Eschelon's demand for the naked rate term, there is no basis for

16  
17 <sup>1</sup> Qwest maintains that other differences between the McLeod and Eschelon  
18 interconnection agreements are legitimately related to the price term, including volume  
19 commitments, the provision of CCMS, and the availability of additional features and  
20 listings at a flat rate under the AIN Amendment. The AIN Amendment in particular  
21 changed the basis of the UNE-E rate structure by including several AIN feature and  
22 directory listing options in Eschelon's flat rate for every UNE-E line. The pricing for this  
23 amendment was derived from a weighted average of Eschelon's specific market  
24 penetration for each of these features. SOF ¶ 5. The AIN Amendment further provides  
25 that if Eschelon's usage changes materially, the parties will renegotiate the weighted  
26 average rates. Eschelon Complaint, Ex. 4, ¶ 2.2.

27 As a hypothetical example, if the retail rate for a specific feature were \$1.00 per  
28 month and 10% of Eschelon's customers used that feature, the flat UNE-E rate would  
have been set ten cents higher than the UNE-Star rate in order to account for the cost of  
providing that feature. By contrast, McLeod purchases any additional features and listings  
ordered by its customers from the retail tariff on a per line basis. If McLeod had  
requested to enter a flat rate arrangement similar to Eschelon's, the pricing would have  
been different. If 20% of McLeod's customers used the same feature described in the  
previous example, the McLeod rate would have been set twenty cents higher than the  
UNE-Star rate, and ten cents higher than the UNE-E rate.



1 RESPECTFULLY SUBMITTED this 10<sup>th</sup> day of December, 2003.

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