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BEFORE THE ARIZONA CORPORATE 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 REPLY IN
SUPPORT OF MOTION TO DISMISS

SCOPE OF COMPLAINT

Before addressing the substance of Eschelon Telecom of Arizona, Inc.'s ("Eschelon") Response to Qwest Corporation's ("Qwest") Motion to Dismiss, Qwest notes that Eschelon has seemingly narrowed the scope of its Complaint. The Complaint itself appeared to argue that Eschelon was entitled to opt into the McLeod UNE-Star rates for a much longer period of time than provided in the McLeod agreement. See Complaint at 7-8, ¶ 24. Eschelon had similarly requested that the duration of the McLeod pricing be extended in the Minnesota proceeding, a request the Minnesota ALJ denied. Response, Exhibit 1 (Minnesota Recommended Order) at 7-8.

Eschelon now states that it is not requesting the McLeod rates past December 31, 2003.¹ Accordingly, Qwest is prepared to stipulate that December 31, 2003 would be the

¹ Eschelon implies that it has never sought to extend the duration of the McLeod pricing. Eschelon Response at 9. This is clearly wrong. See Reply Brief of Eschelon Telecom of Minnesota, Inc. at 2, attached as Exhibit A ("Eschelon is asking to pay the same rates as McLeod for the same service, for a longer term than McLeod . . ."). Eschelon sought to extend the duration of the McLeod pricing in its Minnesota complaint, and Qwest reasonably interpreted Eschelon's Arizona Complaint as asking for the same extended duration that was denied in Minnesota. Eschelon's change of position only serves to highlight the ambiguity of Eschelon's original request. It was precisely to avoid such confusion that Qwest asked for clarification when Eschelon first notified Qwest that it wanted to opt into the McLeod agreement. See Complaint, Exhibit 7. Unfortunately, Eschelon failed to give any meaningful response, either to negotiate an amendment to its interconnection agreement or to clarify the scope of the original opt-in request.

1 appropriate end date for the lower UNE-Star rates if Eschelon were to opt into the relevant
2 provisions of the McLeod Agreement. In fact, as Qwest pointed out in its Motion to
3 Dismiss, Qwest has already agreed to give Eschelon the McLeod rate until December 31,
4 2003. See Qwest's Answer and Motion to Dismiss at 4-5, ¶ 12 & Exhibit C thereto. This
5 leaves only one issue in this proceeding – Eschelon's request for a retroactive starting date
6 for the rates.

7 **REPLY IN SUPPORT OF MOTION TO DISMISS**

8 In deciding whether to grant Qwest's Motion to Dismiss for failure to state a claim,
9 the Commission need only determine whether Eschelon's Complaint states a claim under
10 Section 252(i) of the Telecommunications Act of 1996 (the "Act"), 47 U.S.C. § 252(i).
11 This is because all of Eschelon's claims are premised on the allegation that Qwest violated
12 § 252(i) of the Act. However, under the facts as alleged by Eschelon, Qwest as a matter
13 of law cannot have violated § 252(i) and, as a result, this matter should be dismissed.

14 **ARGUMENT**

15 **I. Eschelon has not stated any claim apart from its § 252(i) claim.**

16 Eschelon argues that its complaint sets forth three separate claims against Qwest:
17 (1) that Qwest violated Eschelon's "opt-in" rights under § 252(i) of the Act; (2) that
18 Qwest charged discriminatory rates in violation of § 252 and A.R.S. § 40-248, § 40-334,
19 and § 40-361; and (3) that Qwest violated Eschelon's contractual rights under the
20 interconnection agreement between Eschelon and Qwest. Eschelon's argument
21 notwithstanding, a cursory review of the complaint clearly establishes that all three claims
22 rest upon the assertion that Qwest violated Eschelon's "opt-in" rights under § 252(i) of the
23 Act.

24 **A. Eschelon's discriminatory pricing claim depends on its § 252(i) claim.**

25 Eschelon's claim that Qwest engaged in discriminatory pricing is belied by
26 Eschelon's concession that at all times relevant to this action, Qwest charged Eschelon the
27 rates contained in the parties' interconnection agreement and approved by this
28 Commission on February 2, 2001. See Complaint ¶ 14. Qwest's obligation under federal

1 and state law is to charge Eschelon the rates in the interconnection agreement approved by
2 the Commission. See Decision No. 62489 (Approving Agreement, Apr. 28, 2000);
3 Decision No. 63336 (Approving 7th Amendment, Feb. 2, 2001). Thus, the only manner in
4 which Qwest could have engaged in discriminatory pricing would be if Qwest violated
5 § 252(i) of the Act by refusing to amend the agreement in accordance with the opt-in or
6 negotiation provisions of the Act. The correspondence attached to Eschelon's Complaint
7 clearly shows that Qwest did not refuse to amend Eschelon's interconnection agreement.
8 Qwest responded to Eschelon's "opt-in" request with a reasonable request for clarification
9 and, alternatively, an offer to renegotiate the interconnection agreement. Eschelon
10 Response at 7. Eschelon failed to give any meaningful response.

11 B. Eschelon's contractual claim depends on its § 252(i) claim.

12 Eschelon alleges Qwest violated the interconnection agreement by charging
13 Eschelon higher rates for UNE-Star than Qwest charges McLeod. Specifically, Eschelon
14 alleges that Qwest violated Sections 2.1 and 2.9.1 of the interconnection agreement.
15 These sections provide:

16 2.1 [Qwest] shall offer Network Elements to [Eschelon] on an
17 unbundled basis on rates terms and conditions that are just,
18 reasonable, and non-discriminatory in accordance with the terms and
conditions of this Agreement. . . .

19 2.9.1 [If Qwest] provides any Network Element that is not identified in
20 this Agreement to itself, to its own subscribers, to a [Qwest] Affiliate
21 or to any other Person, Qwest shall make available the same
22 Network Element to [Eschelon] on terms and conditions no less
23 favorable to [Eschelon] than those provided to itself or to any other
party.

24 See Agreement, Attachment 3, Sections 2.1 and 2.9.1 (Exhibit 1 to Complaint).

25 The problem with Eschelon's contractual claim is twofold. First—and most
26 fundamental to a proper analysis of Eschelon's Complaint—Sections 2.1 and 2.9.1 do not
27 impose any obligations beyond Qwest's preexisting obligations under the Telecom Act.
28 Sections 2.1 and 2.9.1 are redundant in the sense that they merely insert Qwest's
obligations under § 252(i) of the Telecom Act into the interconnection agreement.

1 Consequently, Qwest cannot violate these sections of the interconnection agreement
2 without also violating its obligations under § 252(i) of the Act.

3 Second, Qwest's obligation under Section 2.9.1 applies only to "Network Elements
4 not identified in this Agreement." As Eschelon concedes, however, UNE-Star is a
5 network element identified in the agreement. See Attachment 32, Amendment No. 7 to
6 the Interconnection Agreement (Exhibit 3 to Complaint). Thus, even if Sections 2.1 and
7 2.9.1 imposed contractual duties beyond Qwest's statutory duties, which they do not,
8 Section 2.9.1 does not apply in this situation. Thus, Eschelon has not stated a contractual
9 claim.

10 **II. Qwest could not have violated § 252(i) under the facts alleged by Eschelon.**

11 Eschelon concedes that it sought to "opt-in" to the UNE-Star rates in the McLeod
12 agreement without accepting any other terms in the McLeod agreement. See, e.g.,
13 Complaint at 7, ¶ 22. Section 252(i) of the Telecom Act does not grant Eschelon this
14 right. The Section reads:

15 A local exchange carrier shall make available any interconnection, service,
16 or network element provided under an agreement approved under this
17 section to which it is a party to any other requesting telecommunications
18 carrier upon *the same terms and conditions* as those provided in the
agreement.

19 47 U.S.C. § 252(i) (emphasis added). Because Eschelon actually wanted a different
20 package of services at a different volume for a different period of time, Eschelon's request
21 for the naked pricing term from the McLeod agreement was not an "opt-in" as defined
22 under the Act.

23 Moreover, the correspondence attached to Eschelon's Complaint shows that Qwest
24 did not refuse Eschelon's purported opt-in request, but rather requested that Eschelon
25 clarify the scope of its request or, alternatively, enter into negotiations. See, Complaint,
26 Exhibit 7. It is undisputed that, in response to Qwest's inquiries, Eschelon never even
27 attempted to clarify the scope of its request, particularly its position with regard to the key
28 contract terms establishing volume commitments, duration, or the related services

1 packaged with Eschelon's version of the UNE-Star service.² As Eschelon's changing
2 position on the duration of the McLeod pricing demonstrates, Qwest has been genuinely
3 unable to determine exactly what Eschelon was requesting to opt into. Because Eschelon
4 refused to specify the scope of its opt-in request, Qwest could not have violated § 252(i)
5 of the Telecom Act as Eschelon asserts.

6 **CONCLUSION**

7 Eschelon concedes that it tried to "opt-in" to McLeod's rates without accepting any
8 of McLeod's other terms, including expiration and volume. Further, Eschelon failed to
9 respond to Qwest's legitimate inquiries as to what terms Eschelon was requesting. These
10 concessions make it impossible to conclude that Qwest violated § 252(i) of the Telecom
11 Act. Thus, Eschelon states no claim under § 252(i). Furthermore, without a violation of
12 § 252(i), Eschelon's discriminatory pricing and contractual claims cannot be maintained.
13 Eschelon's Complaint should therefore be dismissed for failure to state a claim.

14 Simply put, this is a situation where the complainant has plead itself out of a claim.
15 The facts that Eschelon alleges cause its claim to fail. Eschelon itself provided all of the
16 information necessary for the Commission to grant Qwest's motion to dismiss.
17 Consequently, the Commission should dismiss the Complaint for failure to state a claim.

18 **RESPONSE TO ESCHELON'S REQUEST FOR ADDITIONAL DISCOVERY**

19 In addition to opposing Qwest's Motion to Dismiss, Eschelon alternatively requests
20 that the motion be treated as a motion for summary judgement, and requests additional
21 time for discovery in accordance with Rule 56(f), Ariz. R. Civ. P. As Eschelon points out,
22 the issues presented here have already been litigated before the Minnesota Commission,
23 and Eschelon stipulated that there were no disputed issues of fact. Eschelon Response,
24

25 ² Because Eschelon never made a reasonably clear opt-in request, it is not necessary to decide whether
26 volume, duration and service package are reasonably related to the UNE-Star pricing within the meaning
27 of the FCC regulations. For the record, Qwest maintains that these terms are all reasonably related to
28 pricing, and therefore cannot be dispensed with by opting into the price alone. Contrary to Eschelon's
assertions, Qwest has never insisted that Eschelon accept all of these terms precisely as outlined in the
McLeod agreement, but instead has maintained that these terms are a proper subject for negotiation.

1 Exhibit 1 at 4. Accordingly, Qwest opposes Eschelon's request for additional discovery.
2 If this matter is decided according to the standards of summary judgment rather than on
3 Qwest's Motion to Dismiss, Qwest believes that the matter can be disposed of
4 expeditiously in the following manner: (1) a procedural order should be issued clarifying
5 the remaining issues for decision; (2) no further discovery should be necessary; and (3)
6 one additional round of simultaneous briefing should be permitted, with accompanying
7 statements of fact supported by affidavits or other documentary exhibits.

8 RESPECTFULLY SUBMITTED this 7th day of November, 2003.

9 FENNEMORE CRAIG

10 

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28

EXHIBIT

A



August 7, 2003

AUG - 8

Beverly J. Heydinger
Administrative Law Judge
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Re: In the matter of the Complaint of Eschelon Telecom of Minnesota, Inc. against
Qwest Corporation, Inc.
MPUC Docket No. P-421/C-03-627

Dear Ms. Heydinger:

Enclosed are an original and one copy of the Reply Brief of Eschelon Telecom of Minnesota, Inc. in connection with the above-referenced matter. By copy of this letter all parties are being served with said document.

Also enclosed is an affidavit of service.

Sincerely,

Kim K. Wagner
Senior Legal Secretary
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(612) 436-6225

Enclosures

cc: Attached Service List

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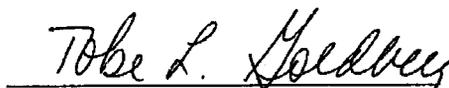
In the matter of the Complaint of)
Eschelon Telecom of Minnesota, Inc.) MPUC Docket No. P421/C-03-627
against Qwest Corporation, Inc.) OAH Docket No. 15-2500-15426-2
)
) **AFFIDAVIT OF SERVICE**

STATE OF MINNESOTA)
) ss.
COUNTY OF HENNEPIN)

Kim K. Wagner, being first duly sworn, deposes and says that on August 7, 2003, at the City of Minneapolis, State of Minnesota, she served the Brief of Eschelon Telecom, Inc.'s by courier and/or U. S. mail, to all parties on the attached service list.


Kim K. Wagner

Subscribed and sworn to before me
this 7th day of August, 2003.


Notary Public



August 6, 2003

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Commissioner
Commissioner**

In the Matter of the Complaint of)
Eschelon Telecom of Minnesota, Inc.)
Against Qwest Corporation.)

OAH Docket No. 15-2500-15426-2
MPUC Docket No. P-421/C-03-627

**REPLY BRIEF OF ESCHELON
TELECOM OF MINNESOTA, INC.**

INTRODUCTION

Eschelon files this Brief in Reply to Qwest's Motion for Summary Judgment and in further support for Eschelon's request for summary judgment. Eschelon has requested that it be given the same rate for UNE-Star as McLeodUSA. As stated in our Initial Brief this result can come about through different mechanisms, including opt-in under section 252(i) of the Act or the most favored nation clause in the Interconnection Agreement or under the general prohibition of discriminatory that exists in both state and federal law. Qwest's response to Eschelon's request for the same rates for UNE-Star as McLeod is to quibble about the form of the request or to argue that Eschelon must accept other provisions of the McLeod agreement. These responses do not address the fundamental issue--the request to remedy discriminatory rates being charged to two different CLECs for the same service.

The fundamental fact is that, no matter the avenue taken, Eschelon has a right to non-discriminatory rates for UNE-Star. Cf. *American Tel. And Tel. Co. v. Central Office Tel., Inc.*, 524 U.S. 214, 223, 118 S.Ct. 1956, Jan. 15, 1998 ("[T]he policy of non-

discriminatory rates is violated when similarly situated customers pay different rates for the same services. It is that non-discriminatory policy which lies at the heart of the Communications Act.").

As Eschelon pointed out in its initial brief, the requirement to take other provisions of an opted into agreement is limited to those provisions that are legitimately related to each other. Eschelon has shown that the few differences in the McLeod and Eschelon UNE-Star agreements are not reasonably related to the price that McLeod pays and thus are not impediments to Eschelon's request to opt into that price.

Eschelon is asking to pay the same rates as McLeod for the same service, for a longer term than McLeod, and agreeing to purchase AIN features from Qwest at retail rates and pay an additional recurring charge for the privilege of doing so. Instead of embracing this as an opportunity to sell more of its products, both wholesale and retail, over a longer period of time, Qwest is opposing it on technicalities. If the prices paid by McLeod were truly cost-based and if the wholesale market were truly competitive, Qwest would jump at the opportunity to sell more of its products over a longer term at those prices.

ARGUMENT

I. THE FACTS ARE NOT IN DISPUTE.

A review of the filings of the parties confirms that there are no relevant facts in dispute. The facts are delineated in the initial briefs of the parties. The most basic of these undisputed facts is that Eschelon is paying a higher rate for UNE-Star than McLeod is paying. Obviously, this puts Eschelon at a competitive disadvantage with both McLeod and Qwest.

It is also undisputed that at one time Eschelon and McLeod paid exactly the same rate for UNE-Star despite the fact that their agreements terminated on significantly different dates. The subsequent amendment to the McLeod agreement changed the rate but not the termination date. The following chart compares the Eschelon UNE-Star agreement with the original McLeod UNE-Star agreement (UNE-Star 1) and amended McLeod agreement (UNE-Star 2).

| | Eschelon UNE-Star | McLeod UNE-Star 1 | McLeod UNE-Star 2 |
|------------------|--------------------------|--------------------------|--------------------------|
| Price | \$27.00 | \$27.00 | 24.50 |
| Term Date | Dec. 31, 2005 | Dec. 31, 2003 | Dec. 31, 2003 |

As illustrated, the price charged to McLeod for UNE-Star changed significantly between McLeod UNE Star-1 and McLeod UNE-Star 2, but the termination date did not change at all.¹ Thus, Eschelon and McLeod were paying the same rate for UNE-Star initially, despite the two year disparity in termination dates. The same disparity in termination dates between the Eschelon and McLeod exists as to McLeod UNE-Star 2, but the price in the McLeod agreement is reduced significantly. Thus the price and termination date for UNE-Star have fluctuated independently of each other, a clear sign that the price is not related to the termination date.

There is absolutely no basis to even suggest that the cost of and price of providing UNE-Star to McLeod is related to the particular termination date in that agreement. In fact, if price were related to term one would expect the exact opposite result; that is, one

¹ McLeod UNE-Star 1 terminated on December 31, 2003, but would automatically continue until either party gave six months advance written notice of termination. Thus, Qwest had the unilateral right to terminate that agreement on Dec. 31, 2003 by giving six months notice. McLeod Amendment, Oct. 26, 2000, Section 1.10. UNE-Star 2 basically constituted that notice.

would expect the customer with the longest term to obtain the most favorable price.

Instead, McLeod, with the shortest term, is getting the most favorable price.

A claim of unreasonable discrimination under the Act consists of three elements:

(1) whether the services are "like," (2) if so, whether the services were provided under different terms or conditions, and (3) whether any such difference was reasonable.

National Communications Ass'n, Inc. v. AT&T Corp., 238 F.3d 124, 127 (2nd Cir. N.Y.) Jan. 12, 2001. In that respect, the courts have recognized that because two services are "like," such that they shared a "functional similarity," there was "good cause to suspect that there was little justification for [a] large difference in the rates charged[.]" *Id.* at 130, citing *Western Union Int'l, Inc. v. FCC*, 568 F.2d 1012, 1017-18 n.11 (2d Cir. 1977).

That is exactly the case here, where we have virtually identical services with a large difference in rates.

II. ESCHELON IS ONLY REQUIRED TO ACCEPT LEGITIMATELY RELATED TERMS.

Qwest claims that Eschelon's request ignores two aspects of the McLeod agreement--the termination date and the absence of an additional charge for AIN features. Qwest Motion at 4. However, Qwest's argument ignores a basic tenant of non-discriminatory rates and the right to "pick and choose" provided by the Act, namely that Eschelon is only required to accept those terms that are legitimately related to the term requested. In this instance neither the termination date, nor the right to purchase AIN features, is legitimately related to the price McLeod pays for UNE-Star. It is that price that Eschelon is looking to port into its agreement.

A. Eschelon Can Not Be Required to Accept a Termination Date that is Not Related to the Price.

As explained in Eschelon's Initial Brief, the FCC and the U.S. Supreme Court have ruled that a CLEC seeking to opt into an arrangement of another CLEC need not take all terms included in the requested agreement. They have ruled that CLECs like Eschelon need take only those portions of the agreement that are legitimately related to the requested portion of the agreement.² Here, Eschelon is already taking the same service as contained in the McLeod agreement and doing so under a virtually identical agreement with the same terms and conditions. It has requested the same price. The only term in the McLeod agreement that Qwest has claimed is relevant to the price and therefore must be accepted by Eschelon is the termination date.³ Qwest Motion at 4. As has been demonstrated, the history and content of UNE-Star make it clear that the price is not related to the termination date and vice versa. If the termination date is not legitimately related to the price, it need not be included as part of the opt in.

The FCC has made it clear that CLECs have the ability, under the "pick and choose" provisions of the Act, to mix and match different portions of different agreements.

"At the time GNAPs first sought to interconnect with Bell Atlantic, carriers were subject to the Eighth Circuit's interpretation of section 252(i). As a result, requesting carriers such as GNAPs were required to opt- into an existing contract as a whole rather than **"pick and choose" different elements from different existing contracts.** *Iowa Utils. Bd.*, 120 F.3d at 800-801. The Supreme Court has since overturned the Eighth Circuit's interpretation of section 252(i) and reinstated the Commission's "pick and choose" approach. *AT&T Corp.* 119 S.Ct. at 738; see

² . *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499 (1996) (First Report and Order), ¶1321. (Section XIV. B. Requirements of Section 252(i) and *AT&T, et al. V. Iowa Utilities Bd.*, 525 U.S. 366, 119 S.Ct. 721 (1999).

³ While Qwest also points out that the AIN provision in the Eschelon agreement is a difference between the two agreements, since it is not in the McLeod agreement it is not a term of that agreement that Eschelon must opt into. Its relevance, or lack thereof, to Eschelon's request, is discussed below.

generally 47 C.F.R. § 51.809. In the Matter of Global NAPs, Inc. Petition for Preemption of Jurisdiction of the New Jersey Board of Public Utilities Regarding Interconnection Dispute with Bell Atlantic - New Jersey, Inc., CC Docket No. 99-154, 14 FCC Rcd. 12,530, August 3, 1999. (emphasis added).

For most agreements and most terms of an agreement one might expect the termination date to be related to the price. However, if, as here, the termination date is not legitimately related to the price, its adoption can not be required as a condition for importing that portion of the agreement into Eschelon's agreement. To require the inclusion of a term that is not legitimately related to the term requested as a condition of an opt in, would be to facilitate discrimination through the tactic of simply including unrelated terms in an agreement that the parties know their competitors would find onerous.

Qwest cites to an FCC Order for the proposition that a carrier opting into an agreement must take its expiration date. *In re Global NAPs South, Inc.*, DA-99-1552, 15 FCC Rcd 23318 (rel. Aug. 5, 1999) However, that case is not on point. First, in the Global NAPs case there was no allegation that the termination date was not related to the other provisions in the agreement. Thus the context was not one of a party arguing that the termination date was unrelated to the requested terms. In fact, that question was not even before the FCC. Rather, the issue before the FCC was whether to preempt the Virginia Commission's jurisdiction over an arbitration proceeding under Section 252(e)(5) of the Act. The FCC concluded that GNAPs petition did not meet the criteria for preemption of a state commission decision. It made no determination on the opt-in rights of Global NAPs South. Therefore, the statements in that order, quoted by Qwest for support of its position on opt-in and termination dates, are dicta, stated in the abstract,

and implicitly assume that the expiration date is legitimately related to the provisions of the agreement being opted into.

Qwest also cites to an "Interpretive and Policy Statement" of the Washington Utilities and Transportation Commission (WUTC) for the proposition that a party must always take the termination date of the agreement opted into.⁴ However, as with the FCC case, the Washington Commission was not addressing the opt in issue in the context of a dispute about whether the termination date was legitimately related to the other aspects of the agreement. Rather, the Commission was obviously presuming, for the sake of its statement, that the termination date was reasonable related to the terms chosen.

In fact, in a subsequent case involving the opt-in issue the Washington Commission specifically found that a term of an agreement being opted into could be severed from the expiration date of the agreement where the two were not legitimately related to each other. "We reject U S West's argument that the term requiring the parties to initiate negotiations on a new agreement is inseparable from the expiration date in the MFS Agreement. The requirement that negotiations be conducted is severable from the expiration date of the agreement because termination of the agreement does not depend on negotiations being conducted." Order, *Advanced Telecom Group, Inc. v. U S WEST Communications, Inc.*, Docket No. UT-993003, February 15, 2000, ¶ 55. (Emphasis added) See Exhibit R-1 attached.

Application of the Washington Commission's reasoning to Eschelon's case would lead to a conclusion that price is severable from the expiration date of the agreement because the termination date of the agreement does not depend upon the price.

⁴ The Commission made it clear that this document was neither an order nor a rule and was not binding on the Commission or parties. Interpretive Statement, ¶ 10-11.

This decision is perfectly consistent with Principle 10 of the Washington Commission "Policy Statement", which states, in part : "An ILEC bears the burden of proving that certain terms and conditions are legitimately related to any requested individual interconnection, service, or element arrangements." An ILEC may impose additional terms and conditions as part of an arrangement only if the ILEC proves to the Commission that the interconnection, services or elements comprising the arrangement are either technically inseparable or are related in a way that separation will cause an increase in underlying cost. Arrangements are not "legitimately related" solely because they were negotiated jointly or through *quid pro quo* bargaining." Policy Statement at ¶22.

Qwest also fails to cite the portion of the statement in which the Commission acknowledges that the FCC had described Section 252(i) as a "primary tool" of the Act for preventing improper discrimination among carriers. *Id.* at ¶ 5, page 2. This statement is adopted by the Commission as a part of Principle 5: "In addition, the pick and choose rule constrains an ILEC's ability to discriminate among CLECs."

Thus, when one goes beyond the abstract statements about termination dates and the assumption that such date is related to the remainder of the terms, one discovers that the termination date, must be related to the price, before a CLEC can be required to take both.

B. Even if the McLeod Termination Date Applies Eschelon is Entitled to the Same Rate as McLeod Until Then.

Even if Qwest's termination date argument were relevant, it would only be relevant as to the period of time for which the McLeod price would be available to Eschelon, it would not replace the Eschelon termination date for UNE-Star. Therefore,

even under Qwest's reasoning Eschelon should be entitled to the McLeod rate until the termination date of December 31, 2003, at which time the rate would revert back to the existing Eschelon rate for the remaining two years of the Eschelon agreement. This is because the December 31, 2003 termination date is not really a date for termination of the agreement, rather it is a date for termination of the McLeod price. The McLeod UNE-Star 2 agreement provides that should McLeod fail to convert its UNE-Star services to another service by the December 31, 2003 termination date, the prices in McLeod's previous amendment--the same prices presently paid by Eschelon--"shall apply to all such services that McLeodUSA has failed to convert." Thus, after December 31, 2003, McLeod can continue to purchase UNE-Star at the Eschelon rate for already existing customers. The agreement does not include a specific date by which UNE-Star will be terminated to McLeod. Rather it provides that UNE-Star will continue to be provided for existing customers of McLeod after December 31, 2003 for "a commercially reasonable conversion period." See McLeod UNE-Star 2 Amendment attached as Exhibit R-2. Theoretically at least, McLeod could continue to purchase UNE-Star at the Eschelon rate for as long as Eschelon, or longer.

If it is determined that Eschelon must take the same term and termination date as McLeod in order to obtain the McLeod price, that should not replace the termination date for UNE-Star for Eschelon, but should merely limit the time period that the McLeod rate is available to Eschelon. Since Qwest is has already agreed to sell UNE-Star to Eschelon until December 31, 2005, and has agreed to provide UNE-Star to McLeod for an indeterminate period of time after December 31, 2003, at the Eschelon rate, it certainly

can not claim that making UNE-Star available to Eschelon at that price after December 31, 2003, is somehow justified by the decision to opt into McLeod rates.

C. Eschelon is Not Required to Change its Agreement to Opt Into McLeod's.

As stated, other than the termination date, the only difference between the two agreements cited in Qwest's Motion is a provision in Eschelon's agreement that allows Eschelon to purchase certain features with UNE-Star, including AIN features, at retail rates, in return for an additional charge. See, Eschelon AIN Amendment, dated July 31, 2001, attached as Exhibit R-3. Pursuant to that amendment Eschelon agreed to pay an additional \$.35 per month recurring rate, raising Eschelon's rate to \$27.35 per month for UNE-Star in Minnesota. As a part of that amendment Eschelon has the right to purchase additional AIN features at retail rates.⁵ Opting into the McLeod UNE-Star rate should not and does not affect this portion of Eschelon's agreement. Nothing in the Act or the rules requires Eschelon to eliminate provisions in its agreement as a condition of opting into a provision of another agreement, especially where, as here, those provisions do not conflict and are separately priced.

The two agreements are not in conflict on this point since the McLeod agreement does not contain this provision. The Eschelon AIN provision is separately priced and, as stated in the amendment, is "based on Eschelon's customer profile and anticipated feature usage". Therefore, the AIN amendment is not related to McLeod's UNE-Star price and its absence from McLeod's agreement is not related to the McLeod price. Since this separate amendment has its own price additive and is not legitimately related to the price

⁵ The \$.35 charge does not pay for to the additional features, it merely gives Eschelon the right to purchase those features, at retail rates, in conjunction with UNE-Star.

paid for UNE-Star by McLeod, its presence in the Eschelon agreement is irrelevant to Eschelon's request for the McLeod rate.

Furthermore, it is unclear whether the McLeod and Eschelon agreements actually differ on access to AIN features. Responses to Information Requests cast considerable doubt on whether Eschelon is getting anything for the additional \$.35, that McLeod is not already getting. Qwest has stated in its responses to Esch. 03-001 and 03-002 (Exhibit R-4 attached) that McLeod, despite the absence of the AIN amendment, is able to purchase and is purchasing AIN features with UNE-Star at retail rates.⁶ Its authority to do this, according to Qwest, is Attachment 3.2, Paragraph G. of the McLeod UNE-Star amendment, which states:

"Any features or functions not explicitly provided for in this Amendment shall be provided only for a charge (both recurring and nonrecurring), based upon Qwest's rates to provide such service in accordance with the terms and conditions of the appropriate tariff or Agreement for the applicable jurisdiction."

Attachment 3.2, Paragraph G. of the Eschelon UNE-Star agreement contains the identical language.

This is further proof that the Eschelon AIN amendment is not related to the McLeod price. While it is less than clear what Eschelon's amendment provides that McLeod is not already getting, Eschelon is not contesting that charge in this proceeding and is willing to continue paying the additional \$.35 per month and retain the AIN amendment. Either way, it is not an obstacle to Eschelon's opt in request.

⁶ As part of its response to an information request from the Department of Commerce, DOC 008, attached as Exhibit R-5, Qwest stated that if Eschelon opted into the McLeod agreement, it "would have to give up AIN features and Directory listings ... since those features are not included in the McLeod Agreement." Qwest's response to Esch 03-001, however, makes it clear that Qwest does in fact provide AIN features and directory listings to McLeod in conjunction with UNE-Star.

III. THE COMMISSION HAS THE AUTHORITY TO GRANT THE RELIEF REQUESTED.

Qwest claims that the Commission cannot provide Eschelon the relief it requests, nondiscriminatory rates from the date requested, because the Commission has no authority to award damages. This argument misses the mark for two reasons: 1) Eschelon is not asking for an award of damages; it is asking for a determination that Eschelon is entitled to the same rate as McLeod from the date requested, and 2) the Commission has ample authority to enforce the Telecommunications Act and the Interconnection Agreement, both of which entitle Eschelon to the relief requested--non-discriminatory rates.

Eschelon is not asking for damages, it is asking that its request for non-discriminatory rates be honored from the date of its request. There can be no dispute that the Commission can order Qwest to provide UNE-Star to Eschelon at the same, non-discriminatory rates that the service is provided to McLeod. Non-discrimination rates can not be provided if the Commission can not order those rates to be effective as of the date of the request. If the Commission can not order Qwest to provide a service or element at non-discriminatory rates to a CLEC from the date of the request, then Qwest has every incentive to delay an opt in proceeding or other discrimination complaint for as long as possible. The Act and state law certainly is not intended to operate to reward delay by ILECs. As the Supreme Court stated in finding that the Commission had the authority to order refunds, "our mission is to construe the statutory language consistent with the legislature's intent and in a sensible manner that avoids unreasonable, unjust, or absurd results." *In re Application of Minnegasco*, 565 N.W. 2d 706, 712 (Minn. 1997).

Pursuant to Part A, Section 37 of its interconnection agreement with Eschelon, Qwest is obligated to provide network elements to Eschelon "on rates, terms and conditions no less favorable to [Eschelon] than those provided to itself or any other party." Pursuant to Attachment 7, Section 16 of the Interconnection agreement Qwest is obligated to reimburse Eschelon for Overcharges and incorrect charges. If the Commission determines that Eschelon is entitled to the same rate as McLeod as of Eschelon's request for that rate, Eschelon is entitled to reimbursement and the Commission can require Qwest to abide by the interconnection agreement and reimburse Eschelon for the overcharges.

Furthermore, even if the order to provide nondiscriminatory rates were somehow considered to be an order for damages, the Minnesota Court of Appeals has specifically held that the Public Utilities Commission has the authority to order refunds under Minn. Stat. 237.081. *In Re MIPA*, 1997 WL 793132 (Minn. App.).⁷ Minn. Stat. §237.081, Subd. 4 authorizes the Commission to "make an order respecting the tariff, regulation, act, omission, practice, or service that is just and reasonable and, if applicable..... establish just and reasonable rates and prices." In the *MIPA* case, the Court of Appeals found that the "MPUC had implied authority to order refunds under Minn. Stat. 237.081." In doing so it noted that unlike some other Commission statutes, Minn. Stat. 237.081 does not limit the Commission's authority to award only prospective relief. *Id.* at 3.

The Commission has ample authority to order Qwest to provide UNE-Star to Eschelon at the same rate and for the same time period as McLeod.

⁷ This is an unpublished opinion and is being cited as such and a copy provided to all parties as required by Minn. St. Sec. 480A.08(3) as Exhibit R-6. Although Qwest specifically addressed Minn. Stat. § 237.081, and although the case involved Qwest, Qwest failed to acknowledge its existence in its Motion.

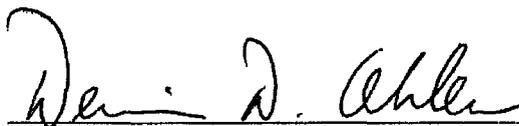
CONCLUSION

Under state and federal law and pursuant to its interconnection agreement Eschelon is entitled to nondiscriminatory rates for UNE-Star. The facts are not disputed, and they demonstrate that Eschelon is being charged discriminatory rates. The history of the agreement and its terms make it clear that the price charged to McLeod is not reasonable related to the termination date of its agreement. Since Eschelon pays a separate rate for access to AIN features, it is also clear that the existence of that element in Eschelon's agreement is not related to the basic UNE-Star rate and not an impediment to opt-in.

The Commission should find that Eschelon is entitled to non-discriminatory rates for UNE-Star and is so entitled from the date of its request. Eschelon requests that Qwest be ordered to provide UNE-Star to Eschelon at the same rate as McLeod from the date of Eschelon's request to the termination of Eschelon's UNE-Star agreement. In the alternative, the Commission should order Qwest to provide UNE-Star to Eschelon at the McLeod rate for the same period of time it provided it to McLeod and thereafter revert back to current Eschelon rates until the expiration date of Eschelon's agreement.

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Respectfully submitted,



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