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May 14, 2003

AZ CORP COMMISSION
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Maureen A. Scott
Arizona Corporation Commission
Legal Division
1200 W. Washington Street
Phoenix, Arizona 85007

VIA AIRBORNE EXPRESS

Re: In Re the Matter of Qwest Corporation's Compliance with Section 252(e)
Docket No. RT-00000F-02-0271

Dear Ms. Scott:

Enclosed is the Reply Brief of Eschelon Telecom of Arizona, Inc. in connection with the above-referenced matter.

Please feel free to contact me with any questions.

Sincerely,

Dennis D. Ahlers
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(612) 436-6249

Arizona Corporation Commission

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MAY 15 2003

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Enclosure

cc: Service List

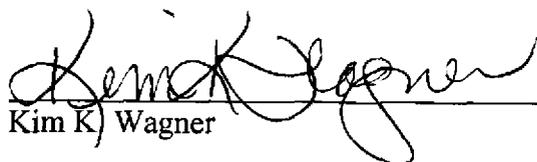
CERTIFICATE OF SERVICE

I certify that the original and 13 copies of the **Reply Brief of Eschelon Telecom of Arizona, Inc.** in Docket No. RT-00000F-02-0271, was sent by Airborne Express on May 14, 2003 to:

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A copy of the foregoing was also provided by U.S. Mail to the attached service list

Dated this 14th day of May, 2003.



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Commissioner

Arizona Corporation Commission
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In the Matter of Qwest Corporation's)
Compliance With Section 252(e) of the)
Telecommunications Act of 1996)
_____)

Docket No: RT-00000F-02-0271

REPLY BRIEF OF ESCHELON TELECOM OF ARIZONA, INC.

INTRODUCTION

Eschelon Telecom of Arizona, Inc. respectfully submits this Reply Brief for the consideration of the Commission. This Brief replies to arguments made by the Residential Utility Consumer Office (RUCO) concerning penalties for Eschelon and also addresses the recent Order by the Minnesota Public Utilities Commission in a similar case.

I. No Party Has Refuted The Due Process And Discrimination Issues Raised by Eschelon.

In its Prehearing Statement and opening argument, Eschelon raised due process concerns under state and federal law in response to proposals to impose penalties on Eschelon in this Docket. No party addressed these issues in their initial briefs. These

concerns are substantial and legitimate. Penalties can not be imposed on Eschelon in this Docket in a manner consistent with due process.

Also, as pointed out in Eschelon's initial brief the specific penalties recommended by Staff and RUCO--discriminatory future rates--violate the Telecommunications Act and state law. Again, the parties did not address this point in any detail in their briefs. The discriminatory future rates that would result from Staff and RUCO's proposals would not withstand legal scrutiny and must be rejected.

As Eschelon has previously stated, it is not taking the position that it should escape all consequences for its actions in this matter. Eschelon regrets its participation and if it had it to do over, would do it differently. However, this is not the proper proceeding to explore these issues as to Eschelon. Not surprisingly, as pointed out in Eschelon's initial brief, the factual basis for penalties for Eschelon is skimpy because no party focused on Eschelon since this was a proceeding about Qwest.¹ This is a proceeding about the activities of Qwest and the penalties to be imposed on Qwest.

II. The Minnesota Commission Unfiled Agreements Decision.

On April 30, 2003 the Minnesota Public Utilities Commission issued its Order After Reconsideration On Own Motion in Docket No. P-421/C-02-197. *In the Matter of the Complaint of the Minnesota Department of Commerce Against Qwest Corporation Regarding Unfiled Agreements*. Attachment 3. The Minnesota Commission had originally ordered Qwest to provide a 10% discount on all services to all CLECs, except Eschelon and McLeod, for a period of twenty-four months backward and 24 months into the future. Order Assessing Penalties, April 30, 2003. On reconsideration the Commission reduced the look-back period from 24 to 18 months to more closely reflect

¹ As RUCO's own witness, Mr. Deanhardt, admitted, his investigation was of Qwest's conduct and there was no separate investigation into McLeod or Eschelon's conduct. Tr. Vol. III, p. 641:6-10.

the actual time that the agreements were in effect. The Commission also decided to totally eliminate the forward-looking discount since Eschelon and McLeod did not receive payment for future periods. The Commission concluded that there was no "clearly defined equitable basis for the forward-looking remedy... " because there was no evidence that the agreements provided forward-looking benefits. The Commission noted that this eliminated the provision in its earlier order that disqualified Eschelon and McLeod from the forward-looking discount and thus made Eschelon's due process and discriminatory rate objections to that provision moot. *Id.*, p. 10.

The Minnesota Commission clarified that Eschelon's ineligibility for discounts for the past period was a recognition that Eschelon had already obtained those discounts. Eschelon has stated that it has no objection to a similar remedy in this case.

In key respects, the Minnesota case is similar to the case before this Commission, as it relates to Eschelon's arguments. In Minnesota, as in Arizona, the investigation was of Qwest, although proposals were made by parties to penalize Eschelon and McLeod. The Minnesota Commission ultimately decided that it should not penalize Eschelon in that proceeding. The Minnesota Commission made it clear that because this was a complaint proceeding brought against Qwest, it was not ordering penalties for Eschelon or McLeod. "This is a complaint proceeding brought by the Department against Qwest pursuant to Minn. Stat. §237.462. The proceeding and the Commission's Orders have properly focused on the actions of Qwest and any remedies ordered by that Order are aimed at restoring the CLECs that Qwest discriminated against." *Order After Reconsideration on Own Motion*, p. 11.

While the Arizona Commission is obviously not bound by the decision of the Minnesota Commission, the Minnesota Commission faced many of the same issues and its order is well reasoned and persuasive.

III. RUCO's Allegations and Recommendations About Eschelon Are Misplaced In This Docket And Are Unfounded.

Despite the fact that this Docket is an investigation of Qwest and has been consistently noticed as such, RUCO continues to make allegations about Eschelon's actions and recommendations for penalties to be imposed on Eschelon. RUCO not only attempts to put Eschelon on trial in a case about Qwest, but it attempts to prove a criminal case against Eschelon in an administrative hearing about Qwest, before an agency that has no criminal jurisdiction. RUCO's inappropriate and reckless allegations should be rejected along with its proposed penalties.

Eschelon will not attempt to respond to each item of speculation about Eschelon's motives or intent put forth by RUCO. We will leave that to when and if an investigation of Eschelon's activities is conducted. Again, this proceeding is not the time or place for these allegations to be discussed. Without getting into details, suffice it to say that Eschelon denies RUCO's charges that it violated any criminal or civil statutes in conjunction with the agreements in question. Should a proceeding about Eschelon's conduct be initiated, Eschelon is confident that these allegations would be refuted by the evidence.²

As Eschelon stated in its initial brief, no one has alleged that Eschelon had any duty to file an interconnection agreement--that duty falls on the ILEC, in this case Qwest. In fact, Qwest has admitted that it has the filing obligation. *See*, Attachment 2, Qwest letter. Hard-pressed to come up with a requirement that applies to Eschelon, RUCO resorts to citing criminal statutes as authority for civil, administrative penalties, while admitting that the Commission has no jurisdiction to impose criminal penalties. RUCO Brief at 26. RUCO attempts to bootstrap its argument to provide for administrative

penalties by claiming that Eschelon's actions somehow violated A.R.S. § 40-203.

However, it is impossible for Eschelon or any other telephone company to violate that statute. That statute simply states the powers and duties granted to the Commission by the legislature.³

The plain and simple fact is that this is not an investigation of Eschelon and is not the appropriate place to impose penalties on Eschelon. Eschelon is entitled to appropriate notice and due process before any penalties can be imposed.

In conclusion, while Eschelon strongly disagrees with the conclusions that RUCO reaches about Eschelon, as well as its recommendations for penalties, those are issues to be addressed in another proceeding. Eschelon will respond to the allegations at that time and place. For now, the issue is confined to the actions of Qwest and proposed remedies for those actions.

IV. Conclusion.

Eschelon's purpose for participating in this case is to protect itself from being penalized without appropriate due process. It is not Eschelon's purpose in this matter to excuse itself from consequences or to justify its behavior. However, this is an investigation of Qwest and should not be used as an excuse to penalize Eschelon without giving Eschelon a full and fair opportunity to explain and refute any accusations against it. Eschelon understands and accepts that one consequence of this case is that its competitors will have access to the benefits of its past agreements with Qwest without having to incur all of the costs associated with those benefits. Proposals for imposing

² For a brief response to the RUCO allegations, see Staff Exhibit S-13, Attachment 1, which is Eschelon's response to the allegations of RUCO witness Clay Deanhardt in the Minnesota proceeding.

³ Likewise, the cases cited by RUCO for support of its position that Eschelon has violated criminal statutes, do not support its theory of the case. Unlike this matter, those cases are instances of affirmative false statements made to a government agency, by an applicant for government funds or benefits. See, cases cited in *State v. Sommer*, 155 Ariz. 145, 745 P.2d 203, 204 (1987).

additional penalties on Eschelon in this docket, however, are not justified and must be rejected, consistent with due process and state and federal telecommunications law.

Respectfully submitted,

Dated: May 14, 2003



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EXHIBIT S-13

RT-00000F-02-0271

Pages 1-9 are

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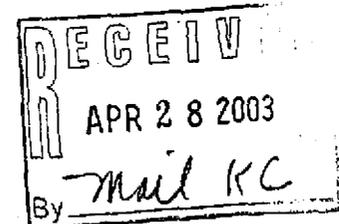
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April 24, 2003

Docket Control
ARIZONA CORPORATION COMMISSION
1200 West Washington
Phoenix, AZ 85007



Re: Qwest - § 252(e)
Docket No. RT-00000F-02-0271

Dear Sir/Madam:

Qwest submits this letter in response to Eschelon's "Informational Filing Regarding Agreement between Qwest Corporation and Eschelon Telecom, Inc." in which Eschelon provided the Commission with a recent settlement Agreement between Qwest and Eschelon. In that filing, Eschelon indicated that it would have preferred to have "Qwest file the Agreement with the Commission for guidance and a determination of any filing obligation," rather than having Qwest determine whether Section 252 dictates that Agreement be filed. Eschelon also indicated that it "does not have all of the information necessary to determine whether a § 252 filing is necessary (such as whether any other CLEC is similarly situated and desires essentially the same Agreement)."

Qwest doubts that the various state commissions in its region would favor a policy whereby Qwest perfunctorily provides all agreements to the state commissions for their "guidance and determination of any filing obligation," regardless of whether the agreements meet the filing standard of Section 252. To the contrary, in both informal and formal discussions with the states, commissions have indicated that Qwest should not abdicate its responsibility to determine whether a filing under Section 252 is required, but should exercise its judgment in applying the standards of Section 252. Consistent with Qwest's understanding of the states' expectations and the terms of the Agreements itself, Qwest accepts this responsibility.

Moreover, a filing requirement is not dictated—as Eschelon asserts—by whether another "CLEC is similarly situated and desires the same Agreement;" rather, the filing obligation of Section 252 depends upon whether the agreements creates "ongoing obligation[s] pertaining to resale, number portability, dialing parity, access to rights-of-way, reciprocal compensation,

ATTACHMENT 2

FENNEMORE CRAIG

Docket Control

April 24, 2003

Page 2

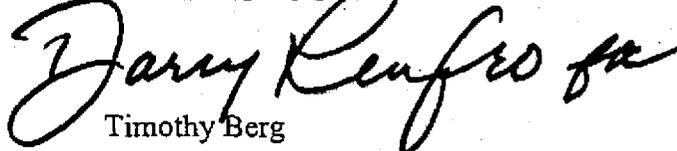
interconnection, unbundled network elements, or collocation."¹ Indeed, the FCC specifically rejected the notion that "all agreements between an incumbent LEC and a requesting carrier" must be filed, or that agreements entered into as "settlements of disputes" must be filed, with the terms made "generally available" to all CLECs.²

Applying the appropriate Section 252 standard to the recent Agreement between Qwest and Eschelon, Qwest's internal Wholesale Agreement Review Committee determined on April 8, 2003 that the Agreement did not create an ongoing term of interconnection, and accordingly did not require filing as a Section 252 agreement. The Committee decided that, by its terms, the Agreement compromised a billing dispute between the parties over the applicability of the Bulk Loop Amendment³ to certain loop installations during the contract period—which ended over a year ago. Because the Agreement is a backward-looking settlement of a dispute arising out of an expired agreement, Qwest determined that no ongoing obligations were created, and thus Section 252 did not require that the Agreement be filed.

To avoid even the appearance of impropriety, however, Qwest explicitly agreed that that Agreement was not confidential, and that either party could submit it to the state commissions for informational purposes. Consistent with its obligations under the Act (and what Qwest believes are the expectations of the state commissions), Qwest determined that it need not file the Agreement for approval under Section 252. Of course, if the Commission does wish to discuss further the application of the filing standard to this Agreement, please contact the undersigned.

Sincerely,

FENNEMORE CRAIG



Timothy Berg

TB/clv

cc: Karen Clauson
All Parties on Service List

¹ *In the Matter of Qwest Communications International Inc. Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements under Section 252(a)(1)*, WC Docket No. 02-89, *Memorandum Opinion and Order*, FCC 02-276, ¶ 8 (rel. Oct. 4, 2002) (emphasis in original).

² *Id.* at n. 26 (emphasis in original).

³ This amendment was previously filed with the state commissions.

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

LeRoy Koppendrayer
Ellen Gavin
Marshall Johnson
Phyllis A. Reha
Gregory Scott

Chair
Commissioner
Commissioner
Commissioner
Commissioner

In the Matter of the Complaint of the
Minnesota Department of Commerce Against
Qwest Corporation Regarding Unfiled
Agreements

ISSUE DATE: April 30, 2003

DOCKET NO. P-421/C-02-197

ORDER AFTER RECONSIDERATION ON
OWN MOTION

PROCEDURAL HISTORY

On February 28, 2003, the Commission issued its ORDER ASSESSING PENALTIES in this matter.

On March 10, 2003, Qwest filed a petition for reconsideration.

On March 20, 2003, Eschelon and McLeod filed petitions for reconsideration.

On March 20, 2003, responses to Qwest's petition for reconsideration were filed by the Minnesota Department of Commerce (the Department), AT&T Communications of the Midwest (AT&T), MCI WorldCom (MCI), Time Warner, the CLEC Coalition and the NWB/US WEST Retiree Association (the Retirees).

On March 31, 2003, the Department and Qwest filed responses to McLeod's and Eschelon's petitions for reconsideration and Eschelon filed a response to McLeod's petition.

The Commission met on April 8, 2003 to consider this matter.

On April 10, 2003, the Commission issued a notice that it would meet on April 14, 2003 to clarify on its own motion its decision regarding the interstate access services purchased from Qwest.

On April 11, 2003, AT&T filed comments supporting inclusion of interstate access services among those for which Qwest would be required to give a retroactive ten percent discount.

The Commission met on April 14, 2003 to further consider this matter.

FINDINGS AND CONCLUSIONS

I. COMMISSION'S FEBRUARY 28, 2002 ORDER

In its February 28, 2003 Order, in addition to the \$25,955,000 monetary penalty imposed in Order Paragraph 1, the Commission required Qwest to make restitution for its knowing and intentional anti-competitive and discriminatory actions. The restitution required by the Commission took two principal forms:

- **Secret Provision Availability:** the Commission required Qwest to make available to the disfavored competitive local exchange carriers (CLECs) provisions that it had secretly made available to the favored CLECs¹ and
- **Returns/Discounts and Rebates:** the Commission required Qwest to return to the disfavored CLECs amounts paid in excess of what the favored CLECs paid for certain services pursuant to the secret agreements, to give the CLECs the same rebates on access lines and platform lines that it gave to Eschelon, and to make certain Minnesota products and services available to the disfavored CLECs for a period of two years at the discounted price given the favored CLECs.

Specifically, in addition to the \$25,955,00 monetary penalty, the Commission ordered restitutional remedies as follows:

1) Secret Provision Availability: Starting with the date of the Order, the disfavored CLECs would be able to avail themselves of the same terms given to the favored CLECs and would be able to do so for the same length of time that Qwest provided these terms to the favored CLECs. See Order Paragraph 2 of the February 28, 2003 Order.

2) Returns/Discounts: To remedy the fact that Qwest secretly gave Eschelon and McLeod a ten percent discount on certain of Qwest's goods and services pursuant to agreements intended to last for five years, the Commission required Qwest to give to the disfavored CLECs the approximate benefit that Qwest gave the favored CLECs. Specifically, the Commission required Qwest to return to each disfavored CLEC the difference between the amount the CLEC paid during a set two year period for Minnesota goods and services and the amount it would have paid for those goods and services if Qwest had given it the same 10% discount it gave Eschelon and McLeod (Order Paragraph 3a). The Commission also required Qwest to give each disfavored CLEC a 10% discount on all such goods and services in Minnesota that the CLEC would purchase during a two-year period beginning with the Order date. See Order Paragraph 4.

¹ In its petition for reconsideration, Qwest incorrectly and consistently referred to this requirement as an "opt-in" remedy authorized by and subject to Section 251 of the Federal Telecommunications Act of 1996. The Commission's Order is clear, however, that Order Paragraph 2 was not creating opt-in opportunities under Section 251, but was acting under the Commission's authority to remediate the effects of Qwest's discrimination under state law. See Order at page 19.

3) **Rebates:** To remedy the fact that Qwest had secretly given Eschelon rebates on certain services pursuant to 1) Eschelon Unfiled Agreement V - paragraph 5, 2) Eschelon Unfiled Agreement IV - paragraph 2, and 3) Eschelon Unfiled Agreement V - paragraph 3, the Commission required Qwest to give the same rebates to the disfavored CLECs for services that the disfavored CLECs purchased from Qwest during the time that the rebate arrangements were available to Eschelon. See Order Paragraphs 3b, 3c, and 3d, respectively.

The Commission provided that the \$25,955,000 penalty would be stayed if Qwest agreed to comply with the restitutorial remedies and would abate completely upon completion of the restitutorial remedies. Order Paragraph 5.

Finally, due to the benefit received by the specially favored CLECs, Eschelon and McLeod, the Commission did not allow them to receive credits or payments in connection with the backward looking remedies and partially disqualified them from the forward looking discount, as described in detail in Order Paragraph 6.

II. QWEST'S PETITION FOR RECONSIDERATION

A. Qwest's Objections to the Monetary Penalty

Qwest acknowledged that the Commission discusses the statutory factors appearing in Minn. Stat. § 237.462, but objected that the Commission did not adequately review and apply these statutory factors during the meeting. While it is not incumbent upon decision-makers to articulate and discuss during their deliberations every legally relevant factor, the Commission notes that most of the factors were in fact specifically discussed: seriousness of the infractions, intentionality, Qwest's history of past violations, the number of the violations, and the economic benefit of the violations to Qwest. Clearly the Commission's deliberations were informed by and occurred within the conceptual framework of Minn. Stat. § 237.462.²

² Qwest suggested that the Commission's purpose in setting the penalty amount was to provide an incentive for Qwest to seek a stay of that penalty by accepting the restitutorial remedies crafted by the Commission and that such a purpose exceeded the Commission's statutory authority. While the Commission's Order shows that the penalty amount was fully justified by consideration of the specific statutory factors discussed therein, the Commission does not concede Qwest's premise that considering what would motivate Qwest to perform a reasonable set of restitutorial measures is precluded by the statute. The statute clearly acknowledges the existence of "other factors that justice may require, as determined by the Commission." Minn. Stat. § 237.462, Subd. 2(9). Considering what level of fine (subject to stay) would motivate Qwest to remedy its knowing and intentional discrimination against the disfavored CLECs and to restore the damaged competitive marketplace in Minnesota by giving the disfavored CLECs approximately the same deal Qwest gave the favored CLECs would surely be such a factor. In any event, since the Commission has on its own motion eliminated the stay provision in this Order, Qwest's allegation is now moot.

The Commission's Order is its official decision. Like a court, the Commission issues an Order based on the entire record before it and it is in light of that record that the Commission's Order is to be evaluated and any insufficiency shown. In its Order, the Commission cited evidence in the record for each statutory factor and gave those factors appropriate weight and due discussion in reaching its conclusions. Order, pages 7 - 19.

B. Qwest's Objections to What It Called "Opt-in Remedies"

In its petition for reconsideration, Qwest misconstrued the Commission's restitutional remedies (secret provision availability, returns/discounts, and rebates, as described above) as "opt-in remedies" subject to Section 251 and 252 of the Federal Telecommunications Act of 1996.

Further, Qwest incorrectly asserted in its petition at page 5 that the Commission's Order described the restitutional remedies as "opt-in remedies" subject to Section 251 and 252 of the Federal Telecommunications Act of 1996. In fact, the Order's only reference to "opt-in" was in recounting Qwest's proposal to allow CLECs to opt-in to 21 of the 26 initially unfilled provisions. Order at page 14. The Commission clearly rejected Qwest's opt-in proposal and chose instead to make all 26 provisions available to the disfavored CLECs as part of a "restitutional remedy." Order at page 14.

The Commission's other restitutional remedies (the returns/discounts provided in Order Paragraphs 3a and 4 and the rebates directed under Order Paragraphs 3b, 3c, and 3d) are clearly authorized under state law (see discussion below) and are not constrained by the "opt-in" provisions of Sections 251 and 252. The Commission's Order is clear that Order Paragraphs 2, 3, and 4 were not creating opt-in opportunities under federal law, but were providing remedies under the Commission's state authority to remediate the effects of Qwest's discrimination. The Commission expressed the state law basis for its prescription for appropriate remediation by prefacing its list of appropriate remedial measures (secret agreement availability, return/discounts, and rebates) as follows:

Local competitors and local competition that have been unquestionably harmed by Qwest's anti-competitive and discriminatory actions must be restored to the greatest extent feasible. While the Commission cannot turn back the clock and let competition proceed as it would have absent this anti-competitive activity, the Commission can take realistic steps in that direction as part of the Commission's authority to remediate the effects of Qwest's discrimination. [Footnote citing Minnesota's anti-discrimination statutes omitted.] Order at page 19.

Because Qwest misconstrued the Commission's remedies as "opt-in" remedies under Sections 251 and 252, Qwest's objections along those lines are without merit.

C. Qwest's Denial That the Commission Has Authority Under State Law to Remediate the Effects of Qwest's Knowing and Intentional Violations of State Laws Prohibiting Anti-Competitive and Discriminatory Behavior

Qwest alleged that neither federal nor state law authorizes the remedies contained in the Order.

Minnesota telecommunications statutes, however, contain two broad grants of authority to the Commission to punish and rectify violation of the state's telecommunications laws. The Commission's authority to correct Qwest's knowing and intentional discrimination against certain CLECs and their customers and the resulting injury to the competitive market in Minnesota is well grounded in these statutes.

1. The Competitive Enforcement Statutes: Minn. Stat. §§ 237.461 and 237.462

Minn. Stat. § 237.461, Subd. 1 states:

This chapter . . . may be enforced by any one or combination of: criminal prosecution, action to recover civil penalties, injunction, action to compel performance, and other appropriate action. (Emphasis added.)

And Minn. Stat. § 237.462, Subd. 9 states in relevant part:

The payment of a penalty does not preclude the use of other enforcement provisions, under which penalties are not assessed, in connection with the violation or violations for which the penalty was assessed. (Emphasis added.)

The restitutional remedies adopted by the Commission aim to correct the wrong done by Qwest when it knowingly and intentionally violated specific provisions of Chapter 237 and federal law. These remedies give to the disfavored CLECs, to the greatest extent prudent and feasible, the benefits that Qwest denied to those CLECs and instead secretly gave to certain favored CLECs. As such, these remedies are exactly the kind of ". . . other appropriate action" authorized by the statute.

2. The Complaint Statute: Minn. Stat. § 237.081

Minn. Stat. § 237.081, Subd. 4 authorizes the Commission to rectify Qwest's discrimination by any Order that is just and reasonable. The remedial discretion granted includes authority to set just and reasonable rates and prices:

Whenever the commission finds, after a proceeding under subdivision 2, that (1) . . . , (2) that any rate, toll, tariff, charge, or schedule, or any regulation, measurement, practice, act, or omission affecting or relating to the production, transmission, delivery, or furnishing of telephone service or any service in connection with telephone service, is in any respect unreasonable, insufficient, or unjustly discriminatory, or (3) . . . , the commission shall make an order respecting the tariff, regulation, act, omission, practice, or service that is just and reasonable and, if applicable, shall establish just and reasonable rates and prices. (Emphasis added.)

The Commission's Order and the restitutional remedies contained therein, which included setting the rates and prices at which the disfavored CLECs may receive certain services for a reasonable length of time, sought to give those disfavored CLECs, to the greatest prudent feasible extent, the benefits that Qwest denied to those CLECs and instead gave to the favored CLECs. They are exactly the kind of Order and remedies that the statute authorizes.

Qwest relied on the Minnesota Supreme Court's decision in *Peoples Natural Gas Co. v. Minnesota PUC*, 369 NW2d 530 (Minn. 1985) to establish that the Commission has no authority to require a telecommunications company to issue a refund after engaging in discriminatory pricing. However, the authority at issue in *Peoples* was the Commission's prospective rate-making authority. By contrast, in the current context of a complaint brought under Minn. Stat. § 237.081, the Commission's statutory authority is much wider. Minn. Stat. § 237.081 authorizes the Commission, upon finding discrimination, to make an Order that is "just and reasonable", adding "and if applicable, [the Commission] shall establish just and reasonable rates." Rather than limiting the Commission's authority to setting rates and precluding authority to order third-party payments (the returns/discounts and rebates to the disfavored CLECs), Minn. Stat. § 237.081 grants the Commission broad authority to issue any Order that is "just and reasonable".

In short, the returns/discounts and rebates ordered in this Order are just and reasonable as required by Minn. Stat. § 237.081 for the following reasons:

- **Returns/discounts:** Minn. Stat. § 237.06 states: "All unreasonable . . . charges are hereby declared to be unlawful." The charges Qwest imposed on the disfavored CLECs in excess of what they charged the favored CLECs who received the ten percent discount are discriminatory and unreasonable and hence "unlawful" pursuant to Minn. Stat. § 237.06. Accordingly, it is just, reasonable, and consistent with equitable principles for the Commission to direct that Qwest return to the disfavored CLECs the unlawful amounts it has collected from them. Clearly, Qwest should return to the disfavored CLECs the amount it wrongfully and unlawfully obtained from them. An Order compelling Qwest to do so is a "just and reasonable" Order, as authorized by Minn. Stat. § 237.081.
- **Rebates³:** The amounts Qwest charged the disfavored CLECs for access and platform lines exceeded the net per-line amounts charged Eschelon (initial charge minus an applicable portion of the \$2, \$13, and \$16 rebates) pursuant to secret unfiled agreements with Eschelon. The amounts Qwest charged the disfavored CLECs which exceeded the net amount it charged Eschelon are discriminatory and unreasonable and hence "unlawful" pursuant to Minn. Stat. § 237.06. Accordingly, it is just and reasonable for the Commission to direct that Qwest return to the disfavored CLECs the unlawful amounts it collected from them. By failing to give the disfavored CLECs the same per-line rebates it gave to Eschelon, Qwest is wrongfully retaining money (the unrebated amounts) from the disfavored CLECs.⁴ The amounts wrongfully withheld from each CLEC should be disbursed to them. An Order compelling Qwest to do so meets the "just and reasonable" standard established in Minn. Stat. § 237.081.

³ The rebates in question are: the \$2 rebate per access line given to Eschelon pursuant to Eschelon V, paragraph 2; the \$13 rebate per platform line pursuant to Eschelon IV, paragraph 2; and the \$16 rebate per platform line pursuant to Eschelon V, paragraph 3.

⁴ A process for determining that amount for each CLEC will be discussed in the following section and prescribed in this Order. Ordering Paragraphs 2, 3, and 4.

3. No Federal Preemption

Since the Commission draws authority for its remedies from state law rather than federal, the key consideration regarding federal law is **not** whether it authorizes the remedial measures adopted by the Commission, but whether it prohibits the Commission from using its state authority to address Qwest's knowing and intentional violations of Minnesota's statutes' prohibition of anti-competitive and discriminatory behavior.

Federal law clearly does not prevent the Commission from taking the measures, as closely defined in this Order, under state law. In fact, the federal act specifically authorizes the Commission to use state law and procedures in implementing the act. See, e.g. 47 U.S.C. § 251(d)(3); 47 U.S.C. § 252(e)(3); and 47 U.S.C. § 253(b) which states:

Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis, and consistent with section 254 [universal service], requirements necessary to . . . protect the public safety and welfare

And the FCC's Nine State Order⁵, rather than preempting state action on unfiled agreements, suggested that states have broad authority to hear complaints, conduct investigations, and determine appropriate remedies under federal and state law. While specifically recognizing opt-in as an important mechanism to remedy discrimination, the FCC did not disapprove state Commissions exercising their remedial authority under state law in cases like the present one, i.e. where the Commission has before it a careful, thorough record demonstrating Qwest's knowing and intentional violation of federal law and state statutes prohibiting anti-competitive and discriminatory conduct.

In sum, Minnesota's complaint process (Minn. Stat. § 237.081) and remedial authority thereunder and Minnesota's enforcement statutes (Minn. Stat. §§ 237.461 and 237.462) authorize the Commission to impose reasonable consequences when Qwest does not conform to state law prohibiting anti-competitive and discriminatory conduct. The Commission's imposition of such reasonable consequences is not prohibited by the Federal Telecommunications Act of 1996.

III. COMMISSION'S RECONSIDERATION ON ITS OWN MOTION

The Commission will modify the restitutorial remedies of its February 28, 2003 Order⁶ on its own motion as follows.

A. Shortening the Look-Back Period of Paragraph 3a

Regarding, Order Paragraph 3a, the Commission will reduce the length of the look-back period from 24 to 18 months. The disfavored CLECs will be entitled to a ten percent discount on all Minnesota products and services purchased from Qwest during the 18 month period starting November 15, 2000 and ending May 15, 2002.

⁵ Qwest 271 Order, FCC WC Docket No. 02-314 (Dec.20, 2003).

⁶ Order Paragraphs 2, 3a - 3d, 4, 5, and 6.

The 18 month period is reasonable and conservative because Qwest itself has acknowledged that the McLeod ten percent discount agreement was in effect for 18 months (January 1, 2001 through June 30, 2002).⁷

Further, the November 15, 2000 start date for the period is reasonable because as the ALJ found and Qwest has acknowledged, Eschelon's ten percent discount agreement (Eschelon IV) began on November 15, 2000.⁸

Finally, the designated stop date, May 15, 2002, results from a mathematical calculation, i.e. 18 months after the selected start date, November 15, 2000.

B. Specifically Including Offsets in the Calculation of Rebates Required by Order Paragraphs 3b, 3c, and 3d

Regarding the rebate remedies provided by Order Paragraphs 3b, 3c, and 3d, the Commission will clarify how the amounts that Qwest is to rebate to the disfavored CLECs will be calculated. The various per line rebates (\$2, \$13, and \$16) given to Eschelon compensated Eschelon for Qwest's failure to provide billing information Eschelon needed to bill its customers.

Since the disfavored CLECs may nevertheless have been able to bill their customers for some access line and platform lines during the periods in question, it is appropriate that rebates should not be automatically given for each access and platform line, but that offset should be made for any access line and platform line charges actually billed by the disfavored CLECs during this time period. Qwest will have the burden to show the reasonableness of the amounts it rebates, but Qwest and the CLECs will need to exchange relevant billing information to calculate the net rebate amounts due the disfavored CLECs. Accordingly, the Commission will establish a reasonable timetable for the calculation, payment, and report on these rebates. See Order Paragraphs 2, 3, and 4.

C. Eliminating the Looking Forward Discount Provided by Order Paragraph 4

The 24-month forward-looking discount period provided by Order Paragraph 4 will be eliminated.

The justification for the forward-looking discount was the Commission's understanding that the sizeable payments that Qwest paid to Eschelon and McLeod when their secret ten percent discount agreements were terminated essentially gave Eschelon and McLeod the monetary benefit of the remaining term of their agreements. Based on this understanding, it was reasonable to require Qwest to give the disfavored CLECs the ten percent discount for a period of time approximately equal to what remained on the Eschelon and McLeod agreements when they were terminated. This would have essentially evened things up for the disfavored CLECs.

In their petitions for reconsideration, however, Eschelon and McLeod stated that the payments they received at the termination of their secret ten percent discount agreements were for the most part not to compensate them for the future value of their agreements but were to settle other

⁷ Qwest's Motion for Reconsideration, page 22.

⁸ Ibid at page 22.

unrelated claims they had against Qwest. No party has submitted evidence which disputes Eschelon and McLeod's statements about the nature of the end-of-agreement payments they received. The Commission is unable to conclude on the basis of the record that their claims are erroneous and is unwilling to prolong this proceeding by initiating a contested case proceeding to scrutinize these claims further.

Due to Eschelon's and McLeod's submissions on reconsideration, the Commission finds that the record no longer provides a clearly defined equitable basis for the forward-looking remedy imposed by Order Paragraph 4. The Commission will, therefore, eliminate the forward-looking ten percent discount remedy.

D. Excluding Interstate Access Services From the Look Back Provisions of Paragraph 3a

Also with respect to Paragraph 3a, the February 28, 2003 Order will be modified to exclude interstate access services from the group of services for which the ten percent discount will be available to the disfavored CLECs.

There is a strong equitable claim that the disfavored CLECs should receive the ten percent discount on the interstate access services that they purchased during the 18 month time period delineated in the previous section because the favored CLECs (Eschelon and McLeod) received such a discount on the interstate access services that they purchased. So giving the disfavored CLECs a similar ten percent discount on the interstate access services they purchased during the designated period would be a common sense step towards restoring balance and treating all CLECs equally.

Qwest did not dispute that it gave the ten percent discount on interstate access services purchased by Eschelon and McLeod, but argued strenuously that the Commission is preempted by federal law from ordering Qwest to give the same ten percent discount on interstate access services to the disfavored CLECs. Qwest asserted that a recent federal District Court decision supported its contention.⁹ AT&T responded that federal law does not preempt the Commission from this action and argued that under established standards the Commission retains full power to remedy the harm caused by Qwest. AT&T argued that the cited District Court decision does not support Qwest's position.

The Commission will remove interstate access purchases from the group of services covered by the discount remedy, taking the same conservative approach taken above on the look-back period and on the forward-looking discounts. If competition is to thrive in the evolving telecommunications market, competitors must be able to move forward with certainty. At this point, immediate relief in known quantities is more valuable than the possibility of later relief in greater but unknown quantities. Litigating the preemption issue at this point would not be in the best interests of CLECs, consumers, or the telecommunications marketplace.

⁹ *Qwest Corp. v. Scott*, No. 02-3563 ADM/AJB, 2003 WL 79054 (D. Minn. Jan. 8, 2003).

E. Eliminating the Provision Disqualifying Eschelon and McLeod From the Now Eliminated Forward Looking Discount Period

Since Order Paragraph 4, which provided the forward-looking ten percent discount remedy, will be eliminated, the second sentence of Order Paragraph 6 which refers to the forward-looking ten percent discount remedy will be deleted.

F. Eliminating Opportunity to Stay Monetary Penalty

Minn. Stat. § 237.462, Subd. 3 authorizes the Commission to impose a monetary penalty when the record establishes by a preponderance of the evidence that the penalty is justified based on the factors identified in subdivision 2 of the statute.

The Commission was convinced when it issued the February 28, 2003 Order and it is convinced now that the record surrounding Qwest's knowing and intentional anti-competitive and discriminatory behavior in this matter fully justifies the \$25,955,000 monetary penalty under Minn. Stat. § 237.462 for the reasons set forth in the Commission's February 28, 2003 Order¹⁰.

In Order Paragraph 5 of the February 28, 2003 Order, however, the Commission exercised its discretion to offer Qwest the opportunity to obtain a temporary stay of the monetary penalty (\$25,955,000) if it undertook to comply with the restitutional remedies prescribed in the Order and to obtain a permanent stay of the monetary penalty upon complete compliance with those remedies. In light of the changes in the restitutional remedies made in this Order, the stay provisions are no longer appropriate.

This case has presented the Commission a unique challenge and opportunity. After holding lengthy evidentiary hearings in this case, the Administrative Law Judge (ALJ) found and the Commission has confirmed that Qwest knowingly and intentionally engaged in discriminatory and anti-competitive conduct against the disfavored CLECs, that this conduct had injured both Qwest's competitors and the Minnesota telecommunications market. The ALJ found, and the Commission agrees, that penalties were appropriate under Minn. Stat. § 237.462. The ALJ also noted, however, that the case presented an opportunity to make significant progress toward a fully competitive marketplace by rejecting a purely punitive approach and applying creative solutions. He stated:

This unfiled agreements case, when coupled with the Qwest 271 case, presents a unique opportunity for the Commission to be creative in fashioning a remedy that will operate in the best interests of Minnesota ratepayers and telephone user in the future.

The Administrative Law judge does not have any "total package" solutions to suggest to the Commission. Instead, he hopes the parties will be able to offer suggestions to the Commission and that ultimately the Commission is able to create a meaningful package that will benefit local competition in the long term throughout Minnesota.¹¹

¹⁰ See Order, pages 7-19.

¹¹ ALJ's *Findings of Fact, Conclusions and Recommendations*, page 54.

The February 28 Order was an attempt to forge the kind of creative solution recommended by the Administrative Law Judge within the parameters of the law. It was crafted in the hope that its combination of monetary penalties, restitutional remedies, and option to stay the penalties would bring immediate relief to competitors and long-term benefit to the marketplace. It now seems likely that the Order's approach would instead bring protracted litigation.

Accordingly, the Commission will take a more conventional approach and adopt changes that render this Order considerably less creative. As specifically discussed above, the Commission will 1) shorten the look-back ten percent discount period to 18 months; 2) eliminate the looking-forward ten percent discount; and 3) exempt interstate access charges from the look-back ten percent discount.

At the same time, however, since these changes significantly pare back the restitutional remedies ordered in the February 28, 2003 Order, it is no longer equitable to allow Qwest to escape responsibility for the justly imposed monetary penalty by simply complying with what remains of the restitutional remedies. Moreover, retaining the stay option in these circumstances would undermine the Order's deterrent effect on future knowing and intentional discriminatory and anti-competitive conduct. Accordingly, the option to stay the monetary penalty provided in the February 28, 2003 Order will be removed.

IV. PETITIONS TO RECONSIDER FILED BY ESCHELON AND MCLEOD

Since the Commission will eliminate the forward-looking ten percent discount remedial measure¹² as discussed above in Part III, McLeod's objections to being determined ineligible in whole or in part¹³ for that remedy are moot.

In addition, the Commission finds that McLeod's objection to being excluded from the backward-looking measures are not persuasive, particularly in light of the Commission having reduced the time period of the look-back period from 24 to 18 months.

The Commission clarifies that no part of the Commission's February 28, 2003 Order or the current Order should be viewed as a penalty against either company for their involvement in the unfiled agreements. This is a complaint proceeding brought by the Department against Qwest pursuant to Minn. Stat. § 237.462. The proceeding and the Commission's Orders have properly focused on the actions of Qwest and any remedies ordered by that Order are aimed at restoring the CLECs that Qwest discriminated against. To the extent that Eschelon and McLeod were not similarly disfavored, there is no need to give them the remedies given the other CLECs. Understood in this context, then, any ineligibility they have for the remedies given the disfavored CLECs is not a penalty to Eschelon and McLeod but simply in recognition that they do not need these remedies to be fairly treated.

¹² The forward-looking discount remedy was provided in Order Paragraph 4 of the February 28, 2003 Order, at page 21.

¹³ Order Paragraph 6 of the February 28, 2003 Order stated that Eschelon and McLeod would not be eligible for their forward-looking ten percent discount remedy until they had purchased from Qwest services whose ten percent discounts would equal the amount of the amounts received from Qwest as compensation for the value of their terminated agreements. Order at page 21.

ORDER

1. On its own motion, the Commission has reconsidered the February 28, 2003 Order and modifies that Order as follows:
 - a. modifies Order Paragraph 3a:
 - 3a. Qwest shall give, either in cash or by credit at the CLEC's choice, the equivalent of a 10% discount on all Minnesota products and services, excluding interstate access services, that the CLEC purchased from Qwest between November 15, 2000 and ~~November 15, 2002~~ May 15, 2002. Services covered are those stated in Eschelon IV, Paragraph 3: all purchases made by Eschelon from Qwest, including but not limited to switched access fees and purchases of interconnection, UNEs, tariffed services, and other telecommunications services covered by the Act. This is the equivalent of giving them the benefit of the Eschelon IV price for a ~~24~~ 18 month period starting on November 15, the day the Eschelon IV agreement became effective.
 - b. modifies Order Paragraphs 3b, 3c, and 3d as follows:
 - 3b. Qwest shall also give, in cash or by credit against future purchases at the affected CLEC's choice, \$2 per access line purchased during the time Eschelon V, paragraph 5 was in effect. The \$2 payment shall be offset by the amounts collected by the affected CLECs from Qwest for the terminating access services for which the payment was intended to apply. This is the equivalent of giving them the benefit of Eschelon V, paragraph 5.
 - 3c. For each month that Qwest did not provide accurate daily usage information to a CLEC (other than Eschelon) during the time that Eschelon IV, paragraph 2 was in effect, Qwest shall give that CLEC a \$13 credit for each platform line ordered by the CLEC during that time period. The \$13 payment shall be offset by the amounts billed by the affected CLECs for the originating and terminating access services for which the payment was intended to apply. Qwest shall have the burden of proof with respect to the appropriateness of any offset. This is the equivalent of giving them the benefit of Eschelon IV, paragraph 2.
 - 3d. For each month that Qwest did not provide accurate daily usage information to a CLEC (other than Eschelon) during the time that Eschelon V, paragraph 3 was in effect, Qwest shall give that CLEC a \$16 credit for each platform line ordered by the CLEC during that time period. The \$16 payment shall be offset by the amounts billed by the affected CLECs for the originating and terminating access services for which the payment was intended to apply. Qwest shall have the burden of proof with respect to the appropriateness of any offset. This is the equivalent of giving them the benefit of Eschelon V, paragraph 3.

c. deletes Order Paragraph 4:

~~4. Qwest shall give a 10% discount on all Qwest products and services provided in Minnesota to each Minnesota CLEC during a 24-month period commencing on the date of this Order. This is the equivalent of giving them the benefit of Eschelon IV, paragraph 5 except that the services for which the 10% discount is available under this Order is limited to services in Minnesota.~~

d. deletes Order Paragraph 5:

~~5. The monetary penalty assessed in Order Paragraph 1 above will be stayed if Qwest undertakes to comply with Order Paragraphs 2, 3a-d, and 4. The penalty shall be permanently stayed upon completed compliance with Order Paragraphs 2, 3a-d, and 4.~~

e. modifies Order Paragraph 6 as follows:

6. Eschelon and McLeod shall not be eligible for payments or credits under Order Paragraphs 3a-d. ~~And, in view of contract termination amounts received from Qwest as compensation for the value of their terminated agreements, they shall be ineligible for the 10% discount under Order Paragraph 4 until they have purchased from Qwest services whose 10% discounts (if given) equal the amount of any such payments.~~

2. Within 90 days of this Order, Qwest shall inform each affected CLEC of the amount Qwest's records indicate the CLEC may be entitled to receive pursuant to Order Paragraphs 3b, 3c, and 3d, subject to offset as provided by those Paragraphs.
3. Within 90 days of the date Qwest gives CLECs the information required in Order Paragraph 2, Qwest shall rebate to each CLEC the amount which the CLEC is actually entitled to receive after adjusting for any offsets attributable to the CLEC pursuant to Order Paragraphs 3b, 3c, and 3d.
4. Within 30 days of Qwest making the rebates required by Order Paragraph 3, Qwest shall file a report with the Commission on this activity.
5. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

(S E A L)

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