

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Leroy Koppendrayer  
Marshall Johnson  
Ken Nickolai  
Thomas Pugh  
Phyllis A. Reha

Chair  
Commissioner  
Commissioner  
Commissioner  
Commissioner

In the Matter of the Petition of Eschelon  
Telecom, Inc. for Arbitration of an  
Interconnection Agreement with Qwest  
Corporation Pursuant to 47 U.S.C. § 252(b)

ISSUE DATE: June 23, 2006

DOCKET NO. P-5340,421/IC-06-768

ORDER REFERRING MATTER TO THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR ARBITRATION, ASSIGNING  
ARBITRATORS, AND GIVING NOTICE OF  
FIRST PREHEARING CONFERENCE

**PROCEDURAL HISTORY**

On May 26, 2006, Eschelon timely filed a petition to arbitrate with Qwest a number of unresolved issues pursuant to Sections 251 and 252 of the Telecommunications Act of 1996 (the Act). The parties agreed that the window for submitting an arbitration petition to the Commission opened on May 9, 2006, and closed on June 5, 2006.

On May 31, 2006, Qwest filed motions to dismiss from arbitration a number of cost issues being addressed in the recently opened generic cost case, and to stay consideration of certain issues related to the FCC's *Triennial Review Remand Order*.

On June 6, 2006, Eschelon filed a response to Qwest's May 31, 2006 motions.

The Commission met on June 15, 2006 to consider this matter.

**FINDINGS AND CONCLUSIONS**

**I. Eschelon's Petition**

In its petition filed May 26, 2006, Echelon requested that the Commission arbitrate approximately 165 unresolved issues in accordance with Sections 251 and 252 of the Act and that the Commission approve an interconnection agreement (ICA) that includes all of the negotiated terms and, with respect to all disputed points, all resolutions proposed by Eschelon.

## **II. Status Clarification at Hearing**

At the hearing, Eschelon reported that the Companies have resolved several issues identified in Eschelon's petition, that they were in agreement that the unresolved issues should be referred to the Office of Administrative Hearings (OAH), and that they had agreed to extend the Commission's end date for deciding the arbitrated issues.<sup>1</sup>

Eschelon further reported that the remaining issue in dispute for the Commission at this time was whether to grant Eschelon's request that the Commission referral of the unresolved issues to the OAH should include a request that the Administrative Law Judge assigned to the arbitration or the Department first subject the unresolved issues to mediation, rather than proceeding directly into formal arbitration.

At the hearing, Qwest opposed Eschelon's request for mediation. Qwest stated that it was unwilling to mediate these issues. Qwest stated that in any negotiation the prospect of a third party decision-maker actually deciding the issue if no agreement was reached was an important incentive to agreement.

## **III. Decision to Arbitrate**

### **A. Background**

Section 252(b)(1) of the federal Telecommunications Act of 1996 (the Act)<sup>2</sup> establishes the right of a negotiating party to request arbitration from a State commission:

During the period from the 135<sup>th</sup> to the 160<sup>th</sup> day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiation under this section, the carrier or any other party to the negotiation may petition a State commission to arbitrate any open issues.

Section 252(b)(2)(A) of the Act imposes three conditions for a valid arbitration filing. First, the petitioner must be a party to the negotiations. Second, the petitioner must file its request within the prescribed 135 to 160 day window following the request for negotiation. Finally, the petitioner must include as part of its petition all relevant documentation concerning the issues and the parties' positions on those issues.

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<sup>1</sup> 47 U.S.C. § 252(b)(4)(C) requires state commissions to complete an arbitration within nine months after the date on which the local exchange company (LEC) received the request to negotiate. Eschelon initiated negotiations on October 9, 2003 but the parties subsequently agreed to extend the effective negotiation request date, most recently agreeing that the period to request arbitration (beginning 135 days after negotiation is requested) began May 9, 2006. This agreement effectively set the negotiation request date as December 26, 2005. Accordingly, absent the Companies' agreement to extend the end date, all outstanding issues would be resolved nine months from that date.

<sup>2</sup> Pub.L.No. 104-104, 110 Stat. 56, codified in various sections of Title 47, United States Code.

## **B. Commission Action**

The Commission finds that Eschelon has met all three conditions in the Act as well as the more specific filing requirements of Minn. Rules, Part 7812.1700, Subp.1. First, Eschelon is one of the two parties to the negotiation. Second, Eschelon filed its petition in a timely manner.<sup>3</sup> Finally, Eschelon's petition clearly states the issues it has submitted for arbitration and states the position of the parties on each issue.

Therefore, Eschelon meets the three conditions for arbitration filings under the Act, and the Commission grants the request for arbitration.

Regarding Eschelon's request that the Commission require mediation before arbitration begins, the Commission is reluctant to do so in the face of Qwest's opposition to mediating these issues. Mutual agreement by parties to mediate appears to be a practical, if not legally required, necessity. Nor does the Commission believe that a separate period of mediation antedating the commencement of the arbitration process is the most efficient way to secure resolution of the disputed issues. The immanency of an arbitrator's decision can be a potent incentive for the Companies to reach a compromise that both parties can live with. The Commission will therefore refer the matter to the OAH with no specific request to conduct mediation prior to commencing the arbitration process.

At the same time, the Commission believes it may be helpful for the Department to use its good offices to assist the parties in resolving as many issues as possible through mutual discussion prior to and even during the arbitration process. The Commission will therefore ask the Department to facilitate discussion between the Companies, thereby effecting an informal mediation of the unresolved issues.

## **IV. Issues to Arbitrate**

Section 252(b)(1) of the Act allows a negotiating party to seek Commission arbitration of any open issues. Section 252(b)(4)(C), requires the Commission to resolve each issue set forth in the petition for arbitration and the response. Accordingly, the parties in this arbitration shall address all the unresolved issues raised in Eschelon's petition and any additional unresolved issues raised in Qwest's response to that petition. Of course, the parties may still resolve any open issues through negotiations.

Eschelon's petition identifies approximately 165 unresolved issues, presented under the following five categories: rates, service interval tables, individual case basis, interval advice adoption letter, and interval interim advice adoption letter.

The arbitration will address all the unresolved issue, including those issues on which the parties have agreed in principle, but not yet reduced to writing.

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<sup>3</sup> Eschelon filed its petition within the arbitration request window agreed upon by the Companies, i.e. between May 9, 2006 and June 5, 2006.

## **V. Assignment of Arbitrators**

The Commission will refer the unresolved issues in Eschelon's petition to the Office of Administrative Hearings for arbitration proceedings under Minn. Rules, Part 7812.1700. The Administrative Law Judge assigned as Lead Arbitrator for this arbitration is Kathleen Sheehy (612-341-7602). She will have the assistance of Administrative Law Judge Steve M. Mihalchick.

The Commission requests that the arbitrators conduct the arbitration consistent with the Commission's arbitration rules, Minn. Rules Part 7612.1700.

## **VI. Prehearing Conference**

The arbitrators shall hold at least one prehearing conference no later than ten days after the response to the arbitration petition is filed. Parties are to receive notice of the prehearing conference at least 48 hours in advance. The notice may be provided in writing by mail, hand-delivery or facsimile, or orally by telephone. Minn. Rules, Part 7812.1700, Subp. 16.

The first prehearing conference will be held Friday, June 30, 2006 at 9:00 A.M. in the Commission's Small Hearing Room on the Third Floor of the Metro Square Building, 121-East 7th Place, St. Paul, MN 5101.

The arbitrator may hold as many prehearing conferences as necessary to ensure the fair and expeditious conduct of the arbitration. The prehearing conferences may be used to set the hearing schedule and guidelines, and to consider all other relevant procedural matters, including identification and narrowing of issues, amendments to documents, limitations on the number of witnesses, and discovery.

## **VII. Informal Facilitation of Resolution**

Preceding and concurrent with the arbitration itself, the Department is requested and encouraged to facilitate discussion between the parties, thereby effecting an informal mediation of the issues.

## **VIII. Time Constraints**

The Companies have agreed to waive the nine month deadline established by 47 U.S.C. § 252(b)(4)(C) for deciding arbitrated issues. Nevertheless, a reasonably timely resolution of the issues, consistent with the desirability of thorough and just resolution of the issues, is requested.

## **ORDER**

1. The Commission hereby refers the unresolved issues in Eschelon's petition to the Office of Administrative Hearings for arbitration pursuant to Minn. Rules, Part 7812.1700 and assigns Administrative Law Judges Kathleen Sheehy and Steve Mihalchick to serve as arbitrators for this matter.

2. The first prehearing conference in this matter will be held Friday, June 30, 2006 at 9:00 A.M. in the Commission's Small Hearing Room on the Third Floor of the Metro Square Building at 121 - East 7th Place, St. Paul, MN 55401.
3. The parties are encouraged to resolve as many issues as possible before going to Arbitration and the Department of Commerce is requested to facilitate the parties' discussion towards resolution before and during the arbitration.
4. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar  
Executive Secretary

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