ORDER NO. 08-365

ENTERED 07/07/08

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

ARB 775

In the Matter of ESCHELON TELECOM OF OREGON, INC. Petition for Arbitration of an Interconnection Agreement with QWEST CORPORATION, Pursuant to Section 252(b) of the Telecommunications Act.	)	ORDER

DISPOSITION: ARBITRATOR'S DECISION APPROVED WITH MODIFICATIONS

Procedural History

On October 10, 2006, Eschelon Telecom of Oregon, Inc. (Eschelon), filed a petition with the Public Utility Commission of Oregon (Commission) requesting arbitration of an interconnection agreement (ICA or agreement) with Qwest Corporation (Qwest), pursuant to the Telecommunications Act of 1996 (Act). The parties agreed to waive the statutory timeline due to the number of arbitrations pending in different states. Pursuant to a revised schedule proposed by the parties and approved by the Arbitrator, Qwest responded to the petition on April 23, 2007.

Telephone conferences were held in this matter in April and June, 2007, to discuss various procedural matters. Standard Protective Order No. 07-178 was issued on July 7, 2007.

The arbitration hearing was rescheduled twice at the request of the parties. Rounds of testimony were filed on May 11, May 25, and June 8, 2007. The hearing was held on August 14, 2007, in Salem, Oregon. Post-hearing briefs were filed by the parties on October 26, 2007.

On March 26, 2008, the Arbitrator issued a decision, attached to this order as Appendix A. Eschelon and Qwest filed exceptions to the Arbitrator's Decision on April 29, 2008.

On May 5, 2008, Qwest filed objections to the exceptions filed by Eschelon regarding Issue 22-90 (Interim rates). Eschelon responded to Qwest's objections on the same date. The Arbitrator subsequently agreed to the parties' proposal to file additional comments regarding the interim rate issue. Qwest and Eschelon filed additional comments on May 13 and May 27, 2008, respectively.

Statutory Authority

The standards for arbitration are set forth in 47 U.S.C. §252(c):

> In resolving by arbitration under subsection (b) any open issues and imposing conditions upon the parties to the agreement, a State commission shall--
>
> (1) ensure that such resolution and conditions meet the requirements of section 251, including the regulations prescribed by the [Federal Communications] Commission pursuant to section 251;
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> (2) establish any rates for interconnection, services, or network elements according to subsection (d); and
>
> (3) provide a schedule for implementation of the terms and conditions by the parties to the agreement.

Qwest Exceptions.

Issue 5-9 – Definition of "Repeatedly Delinquent" – Frequency of Delinquency.

This issue is addressed at pages 25-27 of the Arbitrator's Decision. The dispute between the parties relates to how often Eschelon may be delinquent in payments before Qwest may require a security deposit. The Arbitrator adopted Eschelon's proposal that payment is "repeatedly delinquent" and therefore subject to a security deposit demand if it is made more than 30 days after the due date for three consecutive months. Qwest proposed to define "repeatedly delinquent" to mean payment of any undisputed amount more than 30 days after the payment due date, three or more times during a 12-month period on the same billing account number. This language is contained in the Oregon SGAT as well as in Qwest's Oregon ICAs with AT&T and Covad.

The Arbitrator found that Eschelon's proposal is more clearly designed to protect against the risk of nonpayment, whereas Qwest's language is better designed to encourage timely payment. The Decision also holds that (a) the late-payment penalties already included in the ICA adequately address Qwest's concerns regarding untimely payment, and (b) security deposits should be implemented with caution because of the potential to jeopardize Eschelon's cash flow and operations. The record shows that the "three consecutive month" standard adopted by the Arbitrator is consistent with a decision recently entered by the Minnesota Commission in the Eschelon/Qwest arbitration in that state. It is also included in Qwest ICAs in Utah and Washington. [1]

In its exceptions, Qwest reiterates that the Arbitrator's Decision on this issue differs from the language included in the Oregon SGAT and other Qwest ICAs in Oregon. It also contends that there is no support for the conclusion that Qwest's proposal is designed to prevent slow payment rather than nonpayment and emphasizes that the deposit requirement is only triggered for failure to pay undisputed bills. In addition, Qwest maintains that the three-consecutive month rule "is an extremely high standard – one that is so high, that, if the situation arose, Qwest would likely be forced to seek disconnection rather than take the more intermediate and less drastic step of demanding a deposit."[2]

The purpose of imposing a security deposit is to protect Qwest from financial loss in circumstances where it faces a legitimate threat of nonpayment. Under the ICA, the maximum deposit amount is equal to two months' charges, making it important to limit deposits to circumstances where they are truly necessary.[3] Qwest's proposed language would allow it to impose a deposit if Eschelon's payment is late three times in a 12-month period. At the hearing, Qwest testified that Eschelon has a history of late payment and asserted that its proposal will provide "the proper incentive for timely payment."[4]

We agree with the Arbitrator that Qwest's proposal is better suited toward ensuring timely payment than it is toward protecting against the risk of nonpayment. Under Qwest's proposed language, Eschelon could be forced to pay a deposit where it makes regular payments that are occasionally overdue. As the Arbitrator recognized, however, the threat of nonpayment does not exist in those circumstances, and the late-payment charges in the ICA are the appropriate mechanism for addressing "slow-pay" situations. We are persuaded that the "three consecutive month" standard adopted by the Arbitrator is reasonable.

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[1] Eschelon/9, Denny/93.

[2] Qwest Exceptions at 4.

[3] The record does not disclose the charges paid by Eschelon in Oregon. Eschelon pays Qwest approximately $55 million per year in all states in which it does business. Qwest Exceptions at 3, citing Eschelon/133, Denny/46.

[4] Qwest/13, Easton/25, line 12.

Issue 9-61 and subparts (a)–(c) – Loop Multiplexing Combinations.

This issue is addressed at pages 55-59 of the Arbitrator's Decision. The dispute between the parties relates to whether a Loop Multiplexing Combination (LMC) is a UNE that must be provided at TELRIC rates pursuant to the Act. Although LMC is currently made available to CLECs at Commission-approved TELRIC rates, Qwest contends that the FCC and a number of state regulatory agencies have recently concluded that LMC is not a UNE. Eschelon disagrees.

The Arbitrator stated:

> From a procedural standpoint, this issue presents essentially the same problem posed by Qwest's suggested treatment of UCCRE; that is, Qwest wants to discontinue a product that has been made available to Eschelon and other CLECs at Commission-approved TELRIC rates. Again, the trouble with this approach is that other CLECs are deprived of the opportunity to contribute to the outcome because they cannot participate in this arbitration proceeding.[5] To correct this situation, Qwest should request a simultaneous amendment of its ICAs to reflect its interpretation of the law regarding multiplexing and LMC. This will enable all interested CLECs to weigh in on the matter, and, to the extent the parties cannot reach agreement, allow the issue to be resolved via the dispute resolution process set forth in the ICAs.
>
> Even if there were no procedural obstacles to Qwest's approach, there remain outstanding questions regarding the FCC's stance on multiplexing when provided as part of a loop-mux combination. As demonstrated above, the FCC has made a number of statements regarding multiplexing that are susceptible to different interpretation. A more extensive factual and legal examination of this issue is necessary before the Commission (or other decision-making body) can make a fully informed decision on this matter.

In its exceptions, Qwest reiterates that the Commission should decide in this arbitration proceeding that LMC is not a UNE. Although Qwest makes cogent arguments in support of its position, we find that the procedural approach recommended by the Arbitrator is more reasonable, particularly in view of the fact that LMC is currently

[5] OAR 860-016-0030(6) provides that only the two negotiating parties will have full party status in an arbitration proceeding before the Commission.

made available to other CLECs at Commission-approved TELRIC rates. At the same time, we believe that Qwest should be held harmless until such time as a final determination is made regarding the legal status of LMC service. Accordingly, the charges for any LMC service provisioned by Qwest from the date of this order until a final and unappealable decision is rendered shall be subject to true-up.

Issues 12-71, 12-72, and 12-73 – Jeopardies.

This issue is addressed at pages 67-71 of the Arbitrator's Decision. The dispute between the parties centers around Eschelon's proposal to include language in the ICA classifying jeopardies and requiring Qwest to send a Firm Order Confirmation or "FOC" at least a day before the attempted delivery of service. The Arbitrator adopted Eschelon's proposals.

In its exceptions, Qwest challenges the decision to require a FOC "at least a day before" the attempted delivery of service. Qwest argues that the Arbitrator incorrectly concluded that there was substantial evidence in the record demonstrating that Qwest had already committed to provide a FOC one day in advance of service delivery.

The Commission finds that the Arbitrator's Decision on this issue should be affirmed. The decision details several reasons why Eschelon's proposal is superior to Qwest's. All of these reasons are persuasive. Moreover, despite Qwest's claim to the contrary, there is sufficient evidence in the record to justify the Arbitrator's conclusion that the weight of the evidence supports Eschelon's position regarding Qwest's commitment to provide advance notice.[6]

In affirming the Arbitrator's Decision on this issue, it is important to reemphasize that if Qwest and Eschelon are able to clear a Qwest-caused jeopardy and deliver service on the original due date without a FOC or with an untimely FOC, it will not count as a missed Qwest commitment for purposes of the performance indicators (PIDs) in Qwest's Performance Assurance Plan (PAP). The "one-day" notice requirement ensures that Eschelon will have an adequate opportunity to prepare to receive service, and further that it will not be penalized (by receiving a CNR and delayed service due date) under circumstances where a Qwest jeopardy cannot be cleared and a new FOC has not been issued.

[6] Appendix A at 71, ftn. 207.

Eschelon Exceptions.

Issues 1-1 and 1-1(a)-(e) – Interval Changes and Placement.

This issue is addressed at pages 7-11 of the Arbitrator's Decision. The dispute deals with whether certain service provisioning intervals should be addressed in the Change Management Process (CMP)[7] or, alternatively, included in the ICA. Service provisioning intervals are extremely important to Eschelon because they directly impact the quality of service provided to customers and ultimately the success of its business operation. Eschelon seeks to include service intervals in the ICA to provide a greater level of business certainty and to prevent Qwest from unilaterally increasing intervals through the CMP.

The Arbitrator found that the CMP includes procedures that can be readily implemented by Eschelon to protect itself against unilateral changes in service intervals. This fact, together with the fact that service intervals are rarely lengthened, persuaded the Arbitrator to find that service intervals currently addressed in the CMP need not be included in the ICA.

Eschelon challenges the Arbitrator's Decision regarding service intervals. It argues, *inter alia,* that the decision misapprehends Eschelon's need for business certainty, misconstrues the interrelationship between the ICA and the governing CMP Document, and inaccurately suggests that the decision will reduce the prospect of litigation. In addition, Eschelon emphasizes that other states have concluded that service intervals should be included in the ICA.

Upon review, the Commission concludes that the Arbitrator's Decision regarding Issue 1.1 is reasonable and should be affirmed. We find that the decision provides Eschelon with the requisite level of business certainty, as well as protection from the possibility of unilateral action on Qwest's part. As emphasized by the Arbitrator, it is very rare for Qwest to seek to lengthen a service interval. If Qwest should propose such a change, the CMP provides a ready means of postponing the change until it can be reviewed by an independent decision maker. This process can be easily implemented by Eschelon and produces a decision without delay or unnecessary expense.

Eschelon's claim that the Arbitrator's Decision is inconsistent with Section 1.0 of the governing CMP Document (defining the relationship between the ICA and CMP) is misplaced.[8] The decision does not require that service intervals currently included in the ICA must now be dealt with in the CMP. Rather, it merely states that service intervals currently included in the CMP shall remain subject to that process. As the Arbitrator noted, the decision merely retains the status quo regarding the treatment of service provisioning intervals.

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[7] The CMP is discussed at length in the Arbitrator's Decision. See Appendix A at 2-7.

[8] Section 1.0 of the governing CMP Document is set forth in Appendix A at 7.

Issue 22-90 – Unapproved Rates.

This issue is addressed at pages 75-77 of the Arbitrator's Decision. The dispute between the parties concerns whether the ICA should include procedures for establishing rates where Commission-approved rates do not exist. Eschelon proposed including Sections 22.6.1 and 22.6.1.1 in the ICA, requiring that Qwest obtain Commission approval before charging for a UNE or process that it previously offered without charge. The Arbitrator did not adopt Eschelon's proposals, citing several concerns with the recommended language.

In its comments, Eschelon proposes simplifying Section 22.6.1 as follows:

> 22.6.1 Qwest shall obtain Commission approval before charging for a UNE or process that Qwest has provided previously at no additional charge. Qwest may request a generic cost proceeding pursuant to Commission rules and procedures or, if the rate is negotiated, may request Commission approval of an amendment to this Agreement.

The Commission finds that the revised language proposed by Eschelon effectively eliminates the concerns raised by the Arbitrator while retaining the basic concept that Qwest should obtain Commission approval before charging for a UNE or process previously offered without charge. We agree with Eschelon that such a requirement is reasonable and appropriate. Moreover, we agree that it will minimize the likelihood of complaint proceedings to litigate rate changes arising from this particular scenario. Accordingly, we conclude that Eschelon's revised language for Section 22.6.1 should be included in the ICA.

Issue 22-90(b)-(ae) – Rate Levels.

This issue is addressed at pages 77-82 of the Arbitrator's Decision. Both Qwest and Eschelon agree that the Commission should adopt interim rates for numerous products and services currently provided under unapproved rates. They further agree that the interim rates should remain in effect until permanent rates are established in a comprehensive cost study docket. The dispute relates to the methodology that should be used to develop the interim rates.

Qwest proposed that interim rates be established using TELRIC-based rates approved by the New Mexico Public Utility Commission in its 2005 wholesale cost docket. Alternatively, Eschelon recommended interim rates based on a number of different methodologies. For reasons unnecessary to repeat here, the Arbitrator rejected the interim rate methodologies proposed by the parties and instead recommended establishing interim rates using an average of all commission-approved rates within Qwest's service territory, excluding the highest and lowest rates from the calculation.

In its exceptions, Eschelon continues to support its original interim rate proposals. If, however, the Commission decides to use the Arbitrator's methodology, Eschelon recommends the following modifications:[9]

- Where Arbitrator's method produces a rate that is higher than Eschelon's proposed rate but lower than Qwest's proposed rate, the Arbitrator's proposed rate should be adopted

- Where Arbitrator's method produces a rate higher than Qwest's proposed rate, Qwest's proposed rate should be adopted[10]

- Where Arbitrator's method produces a rate lower than Eschelon's proposed rate, Eschelon's rate should be adopted[11]

In support of its proposals, Eschelon states that:

> It is reasonable to expect that an interim rate adopted by the Commission, if not either of the proposals made by the parties, would at least fall somewhere in between them. In other words, ***as a guiding principle, the rate proposals made by each party in this case should define the lower and upper bounds of the interim rate.*** (Emphasis in original.)[12]

[9] Eschelon classifies the interim rate proposals into two broad categories: (1) 108 rates in the "expected" scenario in which Qwest has proposed a rate that is higher than Eschelon; and (2) 29 rates in the "irregular" scenario in which Qwest's proposed rate is lower than Eschelon's proposed rate, for a total of 137 disputed rates. The recommendations listed immediately below apply to the expected scenario. Eschelon contends that logic dictates that all 29 rates in the irregular scenario should be based on Qwest's proposed lower rate. Eschelon Exceptions at 29, Eschelon Surreply at 7-8, ftn. 27.

[10] According to Eschelon, the Arbitrator's method produces a rate greater than Qwest's proposed rate in 63 cases.

[11] According to Eschelon, the Arbitrator's method produces a rate lower than Eschelon's proposed rate in 16 cases.

[12] Eschelon Exceptions at 30.

Qwest opposes Eschelon's proposed modifications to the Arbitrator's interim rate methodology. Under Eschelon's approach, nearly half of the disputed rates would be based on the New Mexico rates originally proposed by Qwest, since those rates are lower than the regionwide average calculated using the Arbitrator's method.[13] Qwest asserts that:

> This is indeed ironic, since it was Eschelon who loudly protested during the arbitration that no rates should be based upon New Mexico. According to Eschelon, it would be improper to base rates on one state, particularly a state like New Mexico that, according to Eschelon, bears no similarity to Oregon. It is obvious why Eschelon has abandoned the principles it espoused in challenging Qwest's New Mexico proposal. In many cases, the New Mexico rates are lower than the region-wide averages (reflecting the reasonableness of Qwest's original proposal), and Eschelon is willing now to adopt those rates because it is more interested in the lowest possible rates than in pricing principles and consistency of methodology.[14]

In its surreply comments, Eschelon rejects Qwest's characterization of its proposed modifications to the Arbitrator's interim rate methodology. It disputes Qwest's claims regarding methodological inconsistency and contends that all of the interim rate proposals forwarded for consideration incorporate more than one methodology. Eschelon also denies that its proposed modifications are designed to produce the lowest rates possible. Rather, it states:

> [I]f the Arbitrator's methodology is used, modifying it to reflect the guiding principle will help balance out the use of several low density states (including New Mexico) that do not closely approximate costs in Oregon. This does not mean, if the Arbitrator's methodology is used, that there will be no New Mexico rates (despite Eschelon's objections in the case to them), but it does mean that some balance will be added to the methodology to account for the use of multiple low density states.[15]

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[13] In contrast, Eschelon's proposed rates would serve as a price floor for only 16 rates. Eschelon's modifications would therefore result in 47 rates (63 minus 16) that are lower than those produced by the Arbitrator's method. Qwest Response at 3.

[14] *Id.* at 2.

[15] Eschelon Surreply at 10.

The Commission finds that the averaging approach recommended by the Arbitrator for calculating interim rates is reasonable and should be adopted. We agree that the Arbitrator's proposal effectively addresses the concerns raised regarding the competing proposals advanced by Qwest and Eschelon.

Eschelon recommends that the rates resulting from the Arbitrator's method should be constrained within the upper and lower limits of the parties' original proposals as described above. We see no need to integrate elements of the parties' original proposals into the methodology proposed by the Arbitrator.[16] More specifically, we question whether it is appropriate to extract out individual rates from a particular proposal in order to constrain the results of an entirely different methodology. For example, there are a number of instances where Eschelon's proposed modifications would establish the recurring rate for a product/service using one methodology and the nonrecurring rate for the same product/service using another. Using different methodologies to establish the recurring and the nonrecurring rates of a particular service is inconsistent with the general principles of rate development and increases the possibility that the overall rate will not be compensatory and that a larger disparity between interim rates and final rates will result.

Eschelon also argues that its proposed modifications are necessary to "balance" the results produced by including the rates from low density states in the Arbitrator's methodology. The Commission is not persuaded that the Arbitrator's method necessarily results in the imbalance suggested by Eschelon. While there is information in the record relating to line density, number of lines, number of wire centers, etc., in different Qwest states, that evidence is insufficient to support the assertion that Qwest's Oregon costs closely approximate those in New Mexico (as proposed by Qwest) or those in Qwest's five largest states (as proposed by Eschelon). The Arbitrator's method mitigates these concerns by averaging out the rates from all of the Qwest states, while eliminating the highest and lowest rates from the equation.

Both parties appear to acknowledge that establishing interim rates in an arbitration proceeding is at best an imperfect process, due in large part to the limited data that can be produced within the time frame allowed. In view of these constraints, the principal question facing the Commission is not whether it is somehow possible to adjust the methodology recommended by the Arbitrator to make it "better" (at least in Eschelon's view), but rather whether that methodology will produce reasonable results that can be implemented in a fair and unbiased manner until permanent rates are established. The Commission concludes that the Arbitrator's method satisfies these requirements and should be adopted.[17]

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[16] On page 5 of its Surreply, Eschelon characterizes the Arbitrator's interim rate proposal as incorporating "multiple methodologies." This argument is clearly a stretch. With limited exceptions designed to accommodate special circumstances, the Arbitrator recommends using a single approach to establishing interim rates.

[17] Eschelon points out that there are seven cases for which the Arbitrator's methodology produces no rate. In such cases, the Commission finds that the interim rate should be calculated by averaging Qwest's proposed rate with Eschelon's proposed rate.

Commission Investigations.

The Arbitrator recommends that the Commission initiate a cost study docket to establish permanent rates for Section 251 products and services, as well as investigations relating to UNE conversions and commingled arrangements. See Appendix A at pp. 42-44, 53-55, 77-83. The Commission agrees with the Arbitrator's recommendations and hereby opens investigations into these matters. The PUC staff and the Administrative Hearings Division shall determine the appropriate procedures for notifying interested persons and conducting the investigations.

ORDER

IT IS ORDERED that:

1. The Arbitrator's Decision in this case, attached to and made part of this Order as Appendix A, is adopted as modified herein.

2. Within 30 days of the date of this Order, Qwest and Eschelon shall, in accordance with the provisions of OAR 860-016-0030(12), file an interconnection agreement complying with the terms of the Arbitrator's Decision as modified herein.

Made, entered and effective JUL 07 2008.

Lee Beyer
Chairman

Ray Baum
Commissioner

John Savage
Commissioner

A party may request rehearing or reconsideration of this order pursuant to ORS 756.561. A request for rehearing or reconsideration must be filed with the Commission within 60 days of the date of service of this order. The request must comply with the requirements in OAR 860-014-0095. A copy of any such request must also be served on each party to the proceeding as provided by OAR 860-013-0070(2). A party may appeal this order by filing a petition for review with the Court of Appeals in compliance with ORS 183.480-183.484.