

- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

In the Matter of the Formal Complaint of)
David Tabish, dba Tabish Insurance) DOCKET NO. 07-2263-01
Services vs. Eschelon Telecom, Inc.) REPORT AND ORDER
)

ISSUED: March 27, 2007

SYNOPSIS

Having determined the Commission is without authority to abrogate the challenged early termination provision or to award monetary relief of the type sought by Complainant, the Commission dismissed that portion of the complaint. However, the Commission further concluded that Eschelon Telecom, Inc. (“Eschelon”) failed to timely honor Complainant’s request to terminate service for three telephone lines and toll free service and therefore ordered Eschelon to remove from Complainant’s current outstanding balance any charges accruing on or after July 20, 2006, for the said three telephone lines and toll free service and to refund to Complainant any monies previously collected, and not already refunded or credited to Complainant’s account, for service accruing on or after July 20, 2006, for the said three telephone lines and toll free service.

By The Commission:

PROCEDURAL HISTORY

On January 3, 2007, Complainant David Tabish, doing business as Tabish Insurance Services, filed a formal complaint against Respondent Eschelon Telecom, Inc. (“Eschelon” or “Company”) claiming Eschelon provided poor service and engaged in improper billing, including the imposition of unjust cancellation fees. Complainant seeks a refund of amounts previously paid to Eschelon, an end to harassing billings, and payment of expenses for time and travel to resolve this matter.

On January 18, 2007, Eschelon filed its response to the complaint claiming all billings presented to Complainant, then totaling \$2,830, including past due balances and early

termination charges, are accurate and correct. Eschelon further stated it is willing to waive the remaining balance on Complainant's accounts in exchange for a final payment by Complainant of \$1,800.

On January 30, 2007, the Division of Public Utilities ("Division") filed a memorandum recommending the Commission schedule a hearing in this matter.

This matter came on for hearing before the Administrative Law Judge on February 21, 2007. Complainant represented himself and provided sworn testimony. Cathy Murray, Manager, Regulatory Affairs, appeared for Eschelon and provided sworn testimony, as did Kate Will, a Customer Service Specialist for Eschelon.

At hearing, the Administrative Law Judge requested Eschelon provide additional materials via post-hearing filing, including copies of all contracts entered into between Eschelon and Complainant, as well as copies of all notes and information relating to Complainant's dealings with Eschelon in requesting termination of his telecommunications services. The Administrative Law Judge also informed Complainant that Complainant would have one week from the date of Eschelon's post-hearing filing to file any objections or comments regarding said filing and that, absent any objection, the documents provided by Eschelon would be entered into evidence.

On March 6, 2007, Eschelon submitted a post-hearing memorandum with attachments A through J. On March 21, 2007, the Commission received Complainant's memorandum responding to Eschelon's post-hearing filing. Although Complainant's memorandum continues to advocate Complainant's position taken at hearing, it contains no

objection to the admission of Eschelon's filing. Therefore, the Commission hereby admits into evidence Eschelon's memorandum of March 6, 2007, now marked as Eschelon 5, with said attachments A through J marked and admitted as Eschelon 5.1 through 5.10, respectively. Likewise, Complainant's memorandum filed March 21, 2007, is hereby marked and admitted as Tabish 6.

BACKGROUND

According to documents filed by Eschelon, Complainant first contracted for service from Eschelon in late August 2000 under the name of Wardley Insurance Services in Salt Lake City, Utah ("Redwood Road Account"). In April 2001, Complainant added Internet service to this account and changed the name on the account to Tabish Insurance. In late December 2002, Complainant requested his Redwood Road Account services be moved to an address in West Jordan, Utah, along with the addition of two toll free numbers and a remote call forward line.

The original agreement with Eschelon concerning this Redwood Road Account was for a five-year term commencing August 15, 2000, but this agreement was superceded by a service upgrade agreement signed by Complainant on October 19, 2004. This revised agreement carried a 36-month term. As a result of this service upgrade and previously requested service offerings, as of October 2004, Complainant maintained five business lines on his Redwood Road Account.

On October 15, 2004, Complainant also entered into an additional agreement with Eschelon for services to his residence in South Jordan, Utah ("High Meadow Drive Account").

This agreement carried a 24-month term for voice service and a 36-month term for DSL service. Complainant thereafter received a single, consolidated monthly statement from Eschelon which billed for service on both the Redwood Road Account and the High Meadow Drive Account.

Complainant testified he first contacted Eschelon on July 10, 2006,¹ to request the disconnection of three of the business lines associated with his Redwood Road Account and to transfer the two remaining lines to a third-party purchaser of his business, effective July 15, 2006. Complainant also testified he intended that his toll free lines on the Redwood Road Account also be disconnected as a result of his July 10, 2006, request to “cancel all services”.

Although he was told the disconnect and transfer could not occur until July 20, 2006, Complainant thereafter assumed his request had been honored until August 2006 when he heard from the third-party purchaser who had received a statement from Eschelon that continued to bill for all of the business lines associated with his Redwood Road Account, including those Complainant had requested be disconnected in July 2006. Because Eschelon was threatening to terminate service to all lines if payment was not made, the third-party purchaser paid Eschelon \$662 as billed. Complainant then reimbursed the third-party purchaser and began his dispute with Eschelon, claiming the Company had failed to terminate service on the Redwood Road Account as requested in July 2006.

Due to this ongoing dispute, his telephone and written contacts with Eschelon, past experience with Eschelon’s customer service, and Eschelon’s continued threat to terminate

¹Eschelon’s customer service records indicate this first call occurred on July 12, 2006, rather than July 10. However, given the facts presented, the exact date on which this contact occurred is irrelevant to our resolution of this matter.

service to both the Redwood Road Account and High Meadow Drive Account, Complainant terminated his High Meadow Drive Account on September 1, 2006.

In addition, because Complainant and the third-party purchaser had not completed the required service transfer agreement for Eschelon regarding the two Redwood Road Account telephone lines that Complainant had requested be transferred to the third-party purchaser, Eschelon continued to provide service for these two lines until January 2007 and to bill Complainant's account accordingly. On January 6, 2007, having discovered that the toll free service had not been cancelled as intended in July 2006, Complainant contacted Eschelon to request termination of the toll free service and the remaining two telephone lines still associated with the Redwood Road Account. Eschelon disconnected these lines on January 12, 2007.

Eschelon claims both the Redwood Road Account and the High Meadow Drive Account are governed by its Eschelon Telecom Communications Service Agreement Terms and Conditions ("Terms and Conditions"). The "Early Termination Charge" section on page 2 of these Terms and Conditions provides in part:

Term plans provide Customers with discounts off base rates in consideration for Customer's agreeing to commit to an extended term period. Unless otherwise noted Termination Charges for early termination of the services ordered under this Agreement are equal to the monthly discount extended to Customer in consideration for agreeing to the term agreement, multiplied by the number of months the discount was received by the Customer (or fraction thereof) plus any termination charges paid to Customer's previous carrier by Eschelon.

Such Termination Charges are in addition to any due but unpaid recurring, and all unpaid nonrecurring charges, including any installation charges waived by Eschelon. In addition, if a router or other hardware was provided to Customer as part of a promotional

package, Eschelon has the right to retrieve the hardware or its value from customer upon early termination of service from Eschelon.

Based on when Complainant entered into the agreements governing his Redwood Road Account and High Meadow Drive Account, as well as the September 2006 termination request for the High Meadow Drive Account, Eschelon calculates Complainant terminated service on his Redwood Road Account approximately one year early while the High Meadow Drive Account was terminated just one month early. Eschelon has assessed early termination charges totaling \$1,338.00 on the High Meadow Drive Account consisting of unearned discounts on local services, unearned discounts on DSL services, waived installation charges, taxes applied to these additional charges, and a \$100 equipment fee for the DSL modem that will be credited back to the account when Complainant returns the modem to the Company. The High Meadow Drive Account also has an unpaid balance for service rendered of approximately \$80. The unpaid balance on the Redwood Road Account is approximately \$1,520, of which \$958.51 is for early termination charges.

DISCUSSION, FINDINGS, AND CONCLUSIONS

In reviewing this matter, we first determine what service terminations and transfers Complainant requested, and when he requested them. Given Complainant's testimony that his initial request to Eschelon sought cancellation of all services under his Redwood Road Account except for the transfer of two lines to the third-party purchaser, and given the limited customer service data relating to Complainant's request provided by Eschelon in its post-hearing

filing,² we find in favor of the Complainant on this point. Therefore, on or after Eschelon's promised July 20, 2006, service termination date, Complainant should not have been assessed any service charges for the three lines and toll free service for which he requested termination.

With respect to early termination charges, we conclude that Eschelon may levy such charges on Complainant's Redwood Road Account and High Meadow Drive Account because Complainant terminated service under those accounts prior to expiration of their respective terms of service. The facts presented make clear that Complainant voluntarily requested termination of service on both accounts. Furthermore, in signing various service agreements with Eschelon, Complainant repeatedly acknowledged that he had been made aware of and agreed to the Terms and Conditions that contain the early termination provision noted above. In such a case, this Commission is without authority to abrogate the challenged early termination provision or to award monetary relief of the type sought by Complainant.³

Finally, we find that Eschelon properly terminated service to the remaining two lines on the Redwood Road Account on January 12, 2007, in accordance with Complainant's request of January 6, 2007.

²Eschelon testified that if a disconnection discussion is carried out correctly the customer service representative and the customer should address each service and each telephone number on the customer's account on an individual basis and "check them off" to ensure that the customer's termination request is properly processed. However, the customer service records provided by Eschelon do not indicate that such a process was followed and in fact indicate that only two telephone lines, not the three testified to by Complainant, were requested for termination.

³See *Utah Code Annotated* § 54-7-20. See also *Denver & R.G.R.R. v. Public Utils. Comm'n*, 73 Utah 139, 272 P. 939 (1928). Complainant may, however, choose to seek relief in a court of law.

Therefore, having considered the totality of the evidence now before us, we find and conclude that Complainant should have been billed for no Eschelon services on or after July 20, 2006, except the two business lines on the Redwood Road Account that were to be transferred to the third-party purchaser and the lines associated with the High Meadow Drive Account that was not terminated until September 1, 2006. While there is some indication in the record that Eschelon has applied various service credits to Complainant's account throughout the complaint process, it does not appear that these credits were applied to reimburse Complainant for Eschelon's failure to timely terminate the three lines and toll free service in July 2006 as requested by Complainant. Therefore, any charges accruing on or after July 20, 2006, for these three lines and the toll free service that have been billed and not previously credited or refunded to Complainant are ordered credited to the current outstanding balance on Complainant's account.

Furthermore, while we conclude Eschelon may charge early termination fees in accordance with its stated Terms and Conditions, we are not convinced that Eschelon's current calculation of said fees properly takes account of the appropriate termination dates for Complainant's various telephone services as determined in this order. We therefore require Eschelon to recalculate said early termination charges using July 20, 2006, as the termination date for all services under the Redwood Road account except the two lines that were to have been transferred to the third-party purchaser; September 1, 2006, as the termination date for the High Meadow Drive Account; and January 12, 2007, as the termination date for the two remaining lines on the Redwood Road Account. Eschelon shall then provide a final bill to

Complainant along with an accompanying memorandum explaining the calculations resulting in the charges listed on said final bill, along with an explanation of any refunds, credits, or adjustments made to said bill in accordance with this order.

Wherefore, based upon the foregoing information, and for good cause appearing, the Administrative Law Judge enters the following proposed

ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED, that:

1. Eschelon Telecom, Inc., shall ensure that the current outstanding balance on the account of David Tabish does not include any charges accruing on or after July 20, 2006, for the three telephone lines and toll free service that David Tabish requested be disconnected in mid-July 2006. In addition, Eschelon Telecom, Inc., shall refund to David Tabish any monies previously collected, and not already refunded or credited to his account, for service accruing on or after July 20, 2006, for the said three telephone lines and toll free service. Eschelon Telecom, Inc., shall also provide a final bill to Complainant along with an accompanying memorandum explaining the calculations resulting in the charges listed on said final bill, along with an explanation of any refunds, credits, or adjustments to said bill in accordance with this order.

2. That portion of the complaint of David Tabish pertaining to the early termination charges levied by Eschelon Telecom, Inc., is dismissed. Eschelon Telecom, Inc., may levy said charges based upon the termination dates of the respective services.

Pursuant to *Utah Code Annotated* §§ 63-46b-12 and 54-7-15, agency review or rehearing of this order may be obtained by filing a request for review or rehearing with the

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Commission within 30 days after the issuance of the order. Responses to a request for agency review or rehearing must be filed within 15 days of the filing of the request for review or rehearing. If the Commission fails to grant a request for review or rehearing within 20 days after the filing of a request for review or rehearing, it is deemed denied. Judicial review of the Commission's final agency action may be obtained by filing a Petition for Review with the Utah Supreme Court within 30 days after final agency action. Any Petition for Review must comply with the requirements of *Utah Code Annotated* §§ 63-46b-14, 63-46b-16 and the Utah Rules of Appellate Procedure.

DATED at Salt Lake City, Utah, this 27th day of March, 2007.

/s/ Steven F. Goodwill
Administrative Law Judge

Approved and Confirmed this 27th day of March, 2007, as the Report and Order of the Public Service Commission of Utah.

/s/ Ric Campbell, Chairman

/s/ Ted Boyer, Commissioner

/s/ Ron Allen, Commissioner

Attest:

/s/ Julie Orchard
Commission Secretary
G#52795