STOEL RIVES LLP
ATTORNEYS AT LAW

600 University Street, Suite 3600
Seattle, Washington 98101
main 206.624.0900
fax 206.386.7500
www.stoel.com

TIMOTHY J. O'CONNELL
Direct (206) 386-7562
tjoconnell@stoel.com

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VIA FEDERAL EXPRESS

Public Utility Commission of Oregon
Attn: Filing Center
550 Capitol Street NE, #215
Salem, OR 97308-2148

Re: Docket No. 34
Filing of Wholesale Advantage Services Agreement by Eschelon Telcom of Washington, Inc. and Advanced Telcom, Inc.

Dear Sir/Madam:

This law firm represents Verizon Services Corp. and its affiliates in this matter. On August 17, 2005, Eschelon Telcom, Inc. and Advanced Telcom, Inc. (collectively, "Eschelon") filed a Petition for a Declaratory Ruling with the Public Utility Commission of Oregon ("Commission") asking the Commission to rule on whether the Wholesale Advantage Services Agreement ("Advantage Agreement") between Eschelon and Verizon Services Corp. ("Verizon") must be filed and approved under OAR 860-016-0020. The filing was made improperly by Eschelon, and the Commission should decline Eschelon's invitation to consider the Advantage Agreement for approval as an interconnection agreement.

The Advantage Agreement does not govern the provision of any unbundled network elements within the meaning of section 251(c)(3) of the Communications Act of 1934, as amended (the "Act"), and thus is not subject to approval by the Commission under section 252 of the Act. As the Federal Communications Commission ("FCC") squarely held in the *Qwest Declaratory Ruling*, the Act specifically and expressly ties the requirements in section 252 to the substantive requirements set out in section 251(b) and (c).[1] Where the parties negotiate terms for access to a facility that need *not* be unbundled under section 251(c), it follows that the requirements in

[1] Memorandum Opinion and Order, *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)*, 17 FCC Rcd 19337, 19338-39 (2002) (explaining that section 252 applies to "only those agreements that contain an ongoing obligation relating to section 251(b) or (c)."). Any other result, the FCC stressed, would create "unnecessary regulatory impediments to commercial relations between incumbent and competitive LECs." *Id.*

section 252 do not apply. Accordingly, any agreements regarding wholesale offerings to replace elements that no longer need to unbundled under section 251 are not subject to the filing and approval requirements of section 252.

The filing requirement in section 252(a)(1) is triggered by a "request for interconnection, services, or network elements *pursuant to section 251*." 47 U.S.C. § 252(a)(1) (emphasis added). Upon receiving such a request, an incumbent local exchange carrier ("ILEC") "may negotiate and enter into a binding agreement with the requesting ... carrier," and the resulting agreement "shall be submitted to the State Commission" for review and approval. *Id.* A commercial agreement addressing wholesale services to replace elements that no longer need to be unbundled under section 251(c)(3) is not an agreement negotiated in response to a request made "pursuant to section 251." On the contrary, such an agreement is a result of negotiations undertaken pursuant to the parties' joint interest in establishing a workable, commercial arrangement *outside the scope of section 251*. Indeed, it would rob section 252(a)(1)'s "pursuant to" clause of all meaning to suggest that *any* agreement addressing access to ILEC networks on a wholesale basis automatically triggers section 252, regardless of whether the agreement, or the negotiations leading to it, are intended to meet the particular requirements section 251(b) or (c).[2]

In the case of the Advantage Agreement at issue, Eschelon made a request for an element that Verizon is not required to unbundle under section 251(c)(3). Specifically, Eschelon made a request for a "replacement" service for UNE-P, because in the *TRRO*, the FCC removed local circuit switching from the list of unbundled network elements required to be provided under subsection 251(c)(3).[3] See, e.g., 47 C.F.R. § 51.319(d)(2)(i) ("An incumbent LEC is not required to provide access to local circuit switching on an unbundled basis to requesting telecommunications carriers for the purpose of serving end-user customers using DS0 capacity loops."). Verizon accommodated the request through the negotiation of a commercial agreement to govern "local circuit switched dialtone services." Thus, Eschelon's request that led to negotiation of the Advantage Agreement was not made "pursuant to section 251," and the

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[2] Section 251(c)(1) confirms that analysis. That provision mandates that ILECs negotiate and, if necessary, arbitrate – pursuant to the processes set out in section 252 – "the particular terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of subsection (b) and this subsection." 47 U.S.C. § 251(c)(1). An ILEC's willingness to provide commercially-negotiated wholesale arrangements that need not be made available pursuant to section 251(b) or (c) plainly has nothing to do with its "fulfill[ment] [of] the duties described" in section 251(b) or (c). It follows that an agreement that results from that willingness to negotiate such commercial wholesale arrangements voluntarily is likewise outside the scope of section 252.

[3] *In the Matter of Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange* Carriers, WC Docket No. 04-313, CC Docket No. 01-338, Order on Remand, RCC 04-290 (rel. Feb. 4, 2005) ("*TRRO*") ¶¶ 199-228.

resulting agreement is not an agreement within the meaning of subsection 252(a)(1) requiring Commission approval. For the reasons explained below, language in the Advantage Agreement that addresses one of the components of UNE-P (a DS0 Loop) does not change the fact that the Advantage Agreement deals solely with UNE-P replacement, not an unbundled element covered by Section 251.

Eschelon expressly concurred with this assessment in the Advantage Agreement, agreeing that: (i) the services provided under the Advantage Agreement do not constitute a request by Eschelon for unbundled access pursuant to section 251 of the Act and (ii) the Advantage Agreement is not subject to section 252 of the Act (including the state commission filing requirement).[4] In fact, by filing the Advantage Agreement for approval by the Commission as an interconnection agreement, Eschelon violated that same provision of the Advantage Agreement, in which Eschelon agreed that it will not claim that the services provided thereunder are subject to section 251 of the Act.[5]

Moreover, Eschelon's claim that the terms of the Advantage Agreement permit Eschelon to file the agreement with the Commission is wrong. Eschelon is permitted to file the Advantage Agreement with a state commission only if it is ordered to do so in a "final, non-appealable order."[6] The Commission has not issued a "final, non-appealable" order requiring Eschelon to file the Advantage Agreement as an interconnection agreement. The orders cited by Eschelon apply to commercial agreements of Qwest executed in the past, and have no application to the Advantage Agreement between Eschelon and Verizon.

The rationale used by the Commission in the order cited by Eschelon does not apply to the Advantage Agreement and therefore provides no support for Eschelon's claim that the Commission should review that agreement. The Commission's determination in Order No. 04-661 that the Qwest Platform Plus agreement had to be filed for approval under section 252 of the Act predated the *TRRO* and relied on the Commission's view that the purpose of the FCC's "*Interim Rules Order*" was to "continue the § 251 unbundling obligations of incumbent LECs until such time as permanent rules can be adopted."[7] Permanent rules superseding the *Interim Rules Order* were adopted by the FCC in the *TRRO* and, and as discussed above, those rules

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[4] Advantage Agreement Section 35.1.

[5] Verizon demanded by letter dated September 29, 2005 that Eschelon withdraw its filing with the Commission, but to date Eschelon has failed to do so.

[6] Advantage Agreement Section 35.2.

[7] Order No. 04-661 (Nov. 9, 2004), *In the Matter of MCImetro ACCESS TRANSMISSION SERVICES, L.L.C., and QWEST CORPORATION For Approval of a Negotiated Agreement Under the Telecommunications Act of 1996*, ARB 6(14) and (15) at 3-4.

clearly remove any section 251 unbundling obligation on the local circuit switching services governed by the Advantage Agreement.

Please note that the Advantage Agreement addresses only dialtone services provided as a combination of local circuit switching and DS0 loops; it does not cover terms, conditions or rates applicable to standalone DS0 loops. Standalone DS0 loops remain governed exclusively by the parties' interconnection agreement and the charges set forth therein applicable to standalone DS0 loops have no bearing on the charges set forth in the Advantage Agreement for the dialtone services provided.

In sum, Eschelon breached the Advantage Agreement by filing it with the Commission, and it is not appropriate for the Commission to consider the agreement as an interconnection agreement subject to approval under section 252 of the Act. Accordingly, the Commission should reject Eschelon's Petition, and should not review the Advantage Agreement for approval under section 252.

Sincerely,

Timothy J. O'Connell

cc: Dennis Ahlers