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SEP 15 2006

Arizona Corporation Commission  
Docket Control - Utilities Division  
1200 West Washington Street  
Phoenix, AZ 85007

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RE: In the Matter of the Complaint of Eschelon Telecom of Arizona, Inc.  
Against Qwest Corporation  
Docket Nos. T-03406A-06-0257; T-01051B-06-0257

Dear Sir/Madam:

Enclosed for filing is the original and 15 copies of Eschelon Telecom of Arizona, Inc.'s Motion for Leave to File Reply Brief and Reply Brief in connection with the above-referenced docket. Also enclosed is a certificate of service.

Sincerely,

Kim K. Wagner  
Senior Legal Secretary  
Eschelon Telecom, Inc.  
(612) 436-6225 (direct)  
(612) 436-6816 (fax)

Enclosures

cc: Charles Steese (overnight express mail)  
Amy Bjelland, Administrative Law Judge (overnight express mail)  
Maureen Scott (overnight express mail)  
Ernest G. Johnson (overnight express mail)  
Norman Curtright (overnight express mail)  
Melissa Thompson (overnight express mail)

BEFORE THE ARIZONA CORPORATION COMMISSION

**COMMISSIONERS**

JEFF HATCH-MILLER – Chairman  
WILLIAM A. MUNDELL  
MARC SPITZER  
MIKE GLEASON  
KRISTIN K. MAYES

IN THE MATTER OF THE COMPLAINT OF ) DOCKET NO. T-03406A-06-0257  
ESCHELON TELECOM OF ARIZONA, INC. ) DOCKET NO. T-01051B-06-0257  
AGAINST QWEST CORPORATION )

**Certificate of Service**

I hereby certify that an original and 15 copies of the attached Eschelon Telecom of Arizona, Inc.'s Motion for Leave to File Reply Brief and Reply Brief was filed on September 14, 2006, via FedEx Overnight Express Mail with:

Arizona Corporation Commission  
Docket Control – Utilities Division  
1200 West Washington Street  
Phoenix, AZ 85007

With copies via FedEx Overnight Express Mail to:

Charles W. Steese  
Steese & Evans  
6400 S. Fiddlers Green Circle, Suite 1820  
Denver, CO 80111

Amy Bjelland  
Administrative Law Judge  
Arizona Corporation Commission  
1200 West Washington  
Phoenix, AZ 85007

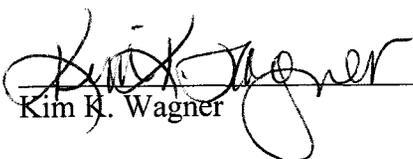
Maureen Scott  
Arizona Corporation Commission  
1200 West Washington  
Phoenix, AZ 85007

Ernest G. Johnson  
Arizona Corporation Commission  
1200 West Washington  
Phoenix, AZ 85007

Norman Curtright  
Qwest Corporation  
20 East Thomas Road, 16<sup>th</sup> Floor  
Phoenix, AZ 85012

Melissa K. Thompson  
Senior Attorney  
Qwest Services Corporation  
1801 California Street, 10<sup>th</sup> Floor  
Denver, CO 80202

Dated: September 14, 2006

  
\_\_\_\_\_  
Kim K. Wagner

1                                   **BEFORE THE ARIZONA CORPORATION COMMISSION**

2  
3   **JEFF HATCH-MILLER**

4                   **Chairman**

5   **MARC SPITZER**

6                   **Commissioner**

7   **WILLIAM MUNDELL**

8                   **Commissioner**

9   **MIKE GLEASON**

10                  **Commissioner**

11   **KRISTIN MAYES**

12                  **Commissioner**

**ORIGINAL**

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15   **IN THE MATTER OF THE COMPLAINT OF )**  
16   **ESCHELON TELECOM OF ARIZONA, INC. )**  
17   **AGAINST QWEST CORPORATION )**

DOCKET NO. T-01051B-06-0257  
                  T-03406A-06-0257

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**ESCHELON TELECOM OF  
ARIZONA, INC.'S MOTION  
FOR LEAVE TO FILE  
REPLY BRIEF**

28                   Eschelon Telecom of Arizona, Inc., hereby respectfully moves for leave to file the  
29   accompanying brief in reply to Qwest's Response to Eschelon's Motion for Summary  
30   Judgment, or in the Alternative, Partial Summary Judgment, which Response was served  
31   by Qwest on August 18, 2006. The other procedural deadlines in this case have been  
32   established by agreement of the parties. Consistent with that practice, Eschelon has  
33   sought Qwest's agreement to Eschelon's filing of its reply brief on or before September  
34   19, but Qwest has not responded to that request.

35                   The next scheduled deadline in this case in this case, which is the deadline for the  
36   staff to submit testimony, is not until January 9, 2007, and the hearing is not scheduled to

1 begin until January 23. Accordingly, the filing of Eschelon's reply brief will not cause  
2 any delay in this proceeding, nor will it prejudice any parties. Further, Eschelon believes  
3 that the reply brief will be of assistance to the Administrative Law Judge and the  
4 Commission in its consideration of Eschelon's motion.

5  
6 Dated: September 14, 2006

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By:   
Karen L. Clauson  
Senior Director of Interconnection/  
Associate General Counsel  
Eschelon Telecom, Inc.  
730 2<sup>nd</sup> Ave. South, Suite 900  
Minneapolis, MN 55402  
Telephone: 612-436-6026  
Facsimile: 612-436-6816  
(admitted pro hac vice)

Gregory Merz  
500 IDS Center  
80 South Eighth Street  
Minneapolis, MN 55402  
Telephone: 612 632 3257  
Facsimile: 612 632 4257  
(admitted pro hac vice)

Michael W. Patten  
J. Matthew Derstine  
Roshka, DeWulf & Patten, PLC  
One Arizona Center  
400 East Van Buren Street, Suite 800  
Phoenix, Arizona 85004

COUNSEL FOR ESCHELON TELECOM  
OF ARIZONA, INC.



1 its retail and reseller/QPP CLEC customers is “comparing apples to oranges.” Indeed,  
2 according to Qwest, because the interval for a DS-1 capable unbundled loop is shorter  
3 than the interval for a DS-1 private line, it must follow that the terms under which it  
4 expedites an order for a DS-1 capable unbundled loop are actually more favorable than  
5 the terms it provides to its retail customers.

6 Qwest’s argument overlooks the fact that both Qwest and Eschelon use the same  
7 facilities – which Qwest has described as a “pipe” – to provide POTS service to  
8 customers. In requiring facilities-based CLECs like Eschelon to pay a \$200 per day  
9 charge that Qwest does not, itself, incur in order to expedite service to its POTS retail and  
10 reseller/QPP CLEC customers, Qwest is subjecting those facilities-based CLECs to less  
11 favorable terms than Qwest provides to itself. Such differential treatment is  
12 discriminatory because it does not provide Eschelon with a meaningful opportunity to  
13 compete.

#### 14 ARGUMENT

15 I. Eschelon is entitled, pursuant to the prohibition in the Telecommunications  
16 Act and the interconnection agreement against discrimination, to receive  
17 expedited service on terms that are no less favorable than the terms on which  
18 Qwest provides expedited service to itself in order to serve its retail POTS  
19 and its reseller/QPP CLEC customers.

20  
21 The rationale that Qwest now offers to justify its discriminatory practices with  
22 respect to expedited service is markedly different from the one that it offered when it first  
23 implemented its new expedites policy. When Eschelon objected to that policy on the  
24 ground that it would result in customers obtaining POTS services from CLECs and  
25 Qwest being treated differently, Qwest responded that, because it does not sell

1 Unbundled Loops to end users, the comparison to retail services was inappropriate.

2 Qwest stated:

3 Qwest does not sell Unbundled Loops to its end user  
4 customers so it is not appropriate to make a comparison to  
5 retail in this situation. Qwest is selling a pipe, not a  
6 switched POTS service. The DS0 UBL product can be  
7 used for services other than a POTS type service and Qwest  
8 does not know what service the CLEC is providing its end  
9 user with the DS0 pipe. Therefore, Qwest's position is that  
10 there is not the parity component that is being raised with  
11 this comment.<sup>1</sup>

12

13 In other words, Qwest took the position then that there was *no* retail analogue for  
14 unbundled loops. Presumably, in Qwest's view this meant that it could subject loops to  
15 such onerous conditions as it saw fit. Now, faced with the obvious flaws in that position,  
16 Qwest beats a hasty retreat. Qwest's new position is not that there is no retail analogue  
17 for unbundled loops, but rather, that the correct analogue is Qwest's tariffed private line  
18 service. Qwest's new position is similarly flawed.

19 Qwest uses its new rationale to argue that, because it expedites loop orders on the  
20 same terms as it provides expedited private line service, this means that its expedite  
21 policy is nondiscriminatory. Qwest's argument requires the Commission to take an  
22 improperly narrow view of the Telecommunications Act's prohibition on discrimination.  
23 The Telecommunications Act requires Qwest to provide Eschelon with expedited service  
24 on terms that are no less favorable than those it provides either to its customers *or to*  
25 *itself*.<sup>2</sup> Although Qwest attempts to obscure the issue with a lengthy and irrelevant

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<sup>1</sup> Exhibit BJJ A-7 at 000124 ("Qwest CMP Response, Exhibit BJJ A-7"). Note that, throughout this Reply, use of "BJJ" refers to attachments to the Direct Testimony of Bonnie Johnson.

<sup>2</sup> 47 C.F.R. § 51.313(b); *see also* 47 C.F.R. § 51.311(b) ("To the extent technically feasible, the quality of an unbundled network element, as well as the quality of the access to such unbundled network element, that an incumbent provides to a requesting carrier shall be at least equal in quality to that which the incumbent provides to itself."); *see also* Exhibit 1 to Complaint, Qwest-Eschelon ICA, Part A, ¶3.1.3.

1 discussion regarding the differences between “designed” and “non-designed” services,  
2 Qwest cannot dispute that both Eschelon and Qwest provide POTS services to their  
3 respective end user customers using these same facilities.<sup>3</sup>

4 An unbundled loop is an input – or, as Qwest has characterized it, a “pipe” – that  
5 Eschelon and other facilities-based CLECs use to provide services, including POTS  
6 services, to end user customers. Qwest does not dispute that Eschelon uses the pipe that  
7 it obtains from Qwest to provide POTS service to its end user customers. To the  
8 contrary, Qwest in responding to Eschelon’s objection in CMP, recognized that the  
9 “pipe” can be used for POTS services but said that it “can be used for services other than  
10 POTS type service and Qwest does not know what service the CLEC is providing its end  
11 user with the DS0 pipe.”<sup>4</sup> Thus, Qwest took the position that it could expedite  
12 Eschelon’s request for DS0 and DS1 capable loops on terms different than those it  
13 applies to expedite POTS service for itself and its own retail customers because Eschelon  
14 *could* use that pipe to provide a service other than POTS service. Qwest’s rationale for  
15 different treatment falls apart, however, when Eschelon is using this pipe to provide  
16 POTS service, as was the case with the particular customer at issue here. This Arizona  
17 Customer did not have working telephone service, including 911 service, in the

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<sup>3</sup> Although Qwest would have the Commission believe that “designed” and “non-designed” services are so radically different that it is simply impossible to reasonably compare the two, it does not dispute that, from sometime before 2001, when Eschelon entered into its current ICA, until January 3, 2006, Qwest provided expedited service for unbundled loops under “emergency” conditions at no additional charge, just as it did, and continues to do, for its retail POTS customers and for its reseller/QPP CLEC customers. *See, e.g., Answer*, p. 9 ¶14, lines 24-25. Qwest does not contend that it is not technically feasible to provide expedited service for unbundled loops on the same terms as it provides expedited service for its POTS customers and its reseller/QPP CLEC customers; it just chooses not to.

<sup>4</sup> Qwest CMP Response, Exhibit BJJ A-7 at 000124. A DS0 and a DS1 differ with respect to the size of the pipe. Where a DS0 represents a single channel that is capable of carrying a single conversation, a DS1 consists of 24 channels and is capable of carrying up to 24 conversations simultaneously. Using a DS1 capable loop, Eschelon may provide multiple lines carrying POTS service to a single subscriber at a single location, rather than purchasing numerous DS0 loops to the same location. *See Direct Testimony of Bonnie Johnson* at 6.

1 individual rooms of the rehabilitation center.<sup>5</sup> In such situations, a Customer is not  
2 concerned about the nature of the “pipe” delivering the POTS service; it just wants its  
3 POTS service up and working. When both Qwest and Eschelon use the pipe to provide  
4 POTS service, and Qwest provides that pipe to itself on terms that are more favorable  
5 than those under which it provides it to Eschelon, the anticompetitive effect of that  
6 difference is apparent.

7 The POTS service that Eschelon provides to its end user customers competes with  
8 the POTS service that Qwest provides and that QPP/reseller CLECs provide, as in this  
9 case in which either company could have been providing POTS, including 911, to the  
10 rehabilitation center. Although Qwest does not refer to the facility it provides to itself to  
11 serve POTS customers as an “unbundled loop,” it remains that Qwest and Eschelon use  
12 the same facility, the same “pipe,” to provide POTS service.<sup>6</sup> Qwest does not claim that,  
13 when it expedites POTS service to its retail or reseller/QPP customers, it “charges itself”  
14 a \$200 day charge. The cost that Qwest incurs to expedite service is what Qwest  
15 “charges itself” to provide expedited service. Eschelon has already stated its willingness  
16 to pay a cost-based rate for expedite service. What it is not willing to do is pay an  
17 arbitrarily established, obviously non-cost-based rate that places it at a competitive  
18 disadvantage.<sup>7</sup> At least in situations like the one involving the customer whose need for  
19 expedited service gave rise to this complaint, where Eschelon is using a DS-1 capable

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<sup>5</sup> Direct Testimony of Bonnie Johnson, pp. 28-30; Complaint, ¶¶22-41; *see also* Answer p. 13, lines 28-31 & p. 14, line 33.

<sup>6</sup> Qwest CMP Response, Exhibit BJJ A-7 at 000124; *see also* Direct Testimony of Bonnie Johnson at pages 5-6.

<sup>7</sup> *See* First Report and Order, *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98 (August 8, 1996) (“*First Report and Order*”) at ¶¶ 860-861 (price differences based on factors other than cost are discriminatory). Although Eschelon invited Qwest to provide evidence that would give rise to a disputed issue of material fact regarding Qwest’s cost of providing expedited service, Qwest has implicitly declined that invitation.

1 loop to provide POTS service, Qwest should not be able to subject the facilities that  
2 Eschelon uses to provide that service to charges that are less favorable than the costs that  
3 Qwest, itself, incurs in serving its retail POTS or reseller/QPP CLEC customers, because  
4 doing so gives Qwest and its reseller/QPP CLEC customers a distinct competitive  
5 advantage over Eschelon.<sup>8</sup>

6 **II. Qwest's discriminatory treatment of other CLECs does not excuse its**  
7 **discriminatory treatment of Eschelon.**

8  
9 Qwest argues that, because other CLECs have signed amendments to their ICAs  
10 adopting Qwest's new "fee added" expedites process, it is prohibited by the  
11 nondiscrimination obligations under the Telecommunications Act from providing  
12 Eschelon with expedites under the no additional fee option for "emergency" expedites.<sup>9</sup>  
13 First, the evidence in the record regarding the circumstances under which other CLECs  
14 may have signed Qwest's expedites amendment comes from statements made by Integra  
15 (a CLEC) in CMP. There, Qwest's own documentation shows that Integra made clear its  
16 understanding of what it agreed to when it signed Qwest's "expedite amendment":

17 Integra objects to Qwest proposed change to remove the  
18 existing approval required expedite process for designed  
19 products. When Integra signed the Qwest Expedite  
20 Amendment we were not advised that by signing the  
21 amendment it would change the current Expedites  
22 Requiring Approval process. We signed the amendment  
23 believing that this would ADD to our options of having an  
24 order completed outside the standard interval. When  
25 Integra signed the amendment UBL DS0 loops were not  
26 included as a product on the list of products in the "Pre-  
27 Approved Expedites" list. When the UBL DS0 was added  
28 to this list Integra did not comment as at that time we still

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<sup>8</sup> See Eschelon's opening memorandum at 17-19.

<sup>9</sup> Qwest Response at 12.

1                   believed the Expedites Requiring Approval process was in  
2                   place for our use.<sup>10</sup>  
3  
4    What this comment by Integra shows is that the fact that a CLEC signed an amendment  
5    does not mean that it agreed with the changes that Qwest was implementing. Like  
6    Integra, other CLECs may simply have not known what Qwest intended or, if after Qwest  
7    later disclosed its intent and they did understand, felt they had no real choice but to sign.  
8    Indeed, as admitted by Qwest, CLECs in addition to Eschelon<sup>11</sup> did, in fact, object in the  
9    Change Management Process (“CMP”) to Qwest’s exclusion of unbundled loops from  
10   the emergency-based expedites option.<sup>12</sup>

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<sup>10</sup>       Exhibit BJJ A-7 at 000127-000128 (Qwest CMP Response posted on Qwest’s website, quoting Integra CMP comments). Similarly, the same Qwest CMP Response posted on Qwest’s website quotes Eschelon’s 11/05 CMP comments on the Qwest CMP expedites notification. Eschelon’s CMP comments state in part: “Eschelon relied upon Qwest’s response and based its decision to comment, or not comment, on that response. Qwest is now failing to keep the commitments it made to CLECs in CMP, and in its response to Covad, by now changing its position on expedites and unilaterally imposing charges via a process change in CMP.” Exhibit BJJ A-7 at 000124-000126.

<sup>11</sup>       See Qwest’s Responses to Eschelon’s Second Set of Data Requests (June 22, 2006) (attached [“Qwest Response to Admissions”]). In response to Eschelon’s Request for Admission No. 1-1, Qwest admits that Eschelon joined McLeod’s CMP escalation related to expedites (“001A(b)”); In response to Eschelon’s Request for Admission No. 1-3, Qwest admits that, in CMP, Eschelon requested and participated in an ad hoc CMP call during which Qwest and CLECs discussed two Qwest CMP expedites notifications (“003A(a),” “003A(b),” “003A(c),” & “003A(d)”); In response to Eschelon’s Request for Admission No. 1-4, Qwest admits that “in CMP Eschelon followed the CMP comments process and submitted comments on November 11, 2005 regarding Qwest’s CMP notice” regarding Version 30 of the expedites and escalation PCAT (“004A”). Qwest admits that Eschelon’s comments in CMP said in part: “Qwest’s proposed change to remove the existing approval required expedite process for designed products will negatively impact Eschelon and its customers. Qwest said its basis for this change is “parity” and that Qwest retail charges for all expedites for “designed” services. However, this claim of “parity” is misleading as Qwest’s new process now treats CLEC POTS customers differently than Qwest POTS customers. Qwest defines parity based on whether a service is “designed.” Qwest has chosen to apply the “design” process to DS0 UBLs, but not to its own POTS customers. The result is that though from the customer perspective the service is the same, Qwest now proposes to treat them differently for the expedite process. The change Qwest is proposing is discriminatory to CLECs and their customers.” See *id.*; see also Exhibit BJJ A-7 at 000124-000126.

<sup>12</sup> *Id.* In response to Eschelon’s Request for Admission No. 1-2, Qwest admits that Covad, Velocity, AT&T, and ELI (in addition to Eschelon) joined McLeod’s CMP escalation related to Qwest’s Version 27 expedites PCAT (“002A”). In response to Eschelon’s Request for Admission No. 1-5, Qwest admits that multiple CLECs submitted comments in CMP regarding Qwest’s Version 30 of the expedites PCAT, including Integra’s comments (quoted above), and that “three of five CLECs (including Eschelon) providing comments in CMP referred to discrimination and/or a competitive disadvantage” (“005A(b)” & “005A(c)”); see also Exhibit BJJ A-7 at 000123-000128 (Qwest CMP Response, quoting CLEC comments).

1           Second, and more importantly, whether other CLECs have agreed to amend their  
2 ICAs to eliminate emergency expedites for unbundled loops is irrelevant to the issue  
3 presented by Eschelon's summary judgment motion. For reasons discussed here and in  
4 Eschelon's opening memorandum, Qwest's practice of providing less favorable expedite  
5 terms to facilities-based CLECs than Qwest provides to itself and its retail POTS and  
6 reseller/QPP CLEC customers is discriminatory. That Qwest subjects other CLECs, in  
7 addition to Eschelon, to similarly discriminatory treatment hardly stands as an excuse for  
8 discrimination.

9           Third, Qwest's argument is based on the incorrect belief that ICA terms must be  
10 identical for all CLECs. Nothing in the Telecommunications Act requires that the terms  
11 and conditions of an interconnection agreement be identical for all CLECs. To the  
12 contrary, the purpose and structure of the Act reflect exactly the opposite: that an  
13 interconnection agreement should be tailored to accommodate the specific needs of the  
14 CLEC that is a party to it, in order to provide that CLEC with a "meaningful opportunity  
15 to compete."

16           Thus, the Act requires that the ILEC engage in negotiations with any CLEC that  
17 requests it and, when those negotiations do not result in a completed agreement, to  
18 participate in arbitration. The Act does not provide for negotiations and arbitration  
19 between the ILEC and the "CLEC community," generally. It does not provide for state  
20 commissions to conduct generic dockets in order to develop identical terms and  
21 conditions for all CLECs. The Act does not limit the ILEC's obligation to that of simply  
22 filing a tariff that reflects terms and conditions of interconnection. Rather, it requires that

1 the ILEC negotiate in good faith with each individual CLEC that requests such  
2 negotiations.

3 In the context of the requirement for in-region interLATA entry, the Act permits  
4 the incumbent to satisfy those requirements, in part, by making available a commission-  
5 approved “statement of the terms and conditions that the company generally offers to  
6 provide such access and interconnection” (commonly referred to as a “Statement of  
7 Generally Available Terms” or “SGAT”).<sup>13</sup> Had Congress intended that the  
8 interconnection agreement be a “one size fits all” documents, it would have provided the  
9 SGAT as the sole means by which terms and conditions of interconnection would be  
10 made available by ILEC. That it did not do so shows that Congress recognized the need  
11 for individual CLECs to be able to enter into agreements that are specific to their  
12 particular competitive needs.

13 The Telecommunications Act’s requirement that interconnection agreements be  
14 publicly filed is one of the Act’s primary mechanisms for preventing discrimination. The  
15 Act not only requires that interconnection agreements be publicly filed and approved by  
16 the state commission, it entitles a CLEC to opt-in to an interconnection agreement  
17 entered into by another CLEC, providing:

18 A local exchange carrier shall make available any interconnection, service,  
19 or network element provided under an agreement approved under this  
20 section to which it is a party to any other requesting telecommunications  
21 carrier upon the same terms and conditions as those provided in the  
22 agreement.<sup>14</sup>  
23

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<sup>13</sup> 47 U.S.C. § 271(c)(1)(B).

<sup>14</sup> 47 U.S.C. § 252(i); *see also* 47 C.F.R. § 51.809.

1 In requiring that terms and conditions of interconnection be made available on an equal  
2 basis to all CLECs, Section 252(i) plays a critical role in assuring that the ILEC does not  
3 engage in discrimination. As the FCC has observed:

4 Requiring all contracts to be filed also limits an incumbent LEC's ability  
5 to discriminate among carriers, for at least two reasons. First, requiring  
6 public filing of agreements enables carriers to have information about  
7 rates, terms, and conditions that an incumbent LEC makes available to  
8 others. Second, any interconnection, service or network element provided  
9 under an agreement approved by the state commission under section 252  
10 must be made available to any other requesting telecommunications  
11 carrier upon the same terms and conditions, in accordance with section  
12 252(i).<sup>15</sup>

13  
14 Because the Act allows a CLEC to opt in to an interconnection agreement entered into by  
15 another CLEC, the terms of conditions of interconnection need not be identical for all  
16 CLECs; they merely must be equally available to all.

17 **III. Qwest cannot satisfy its obligation under the ICA to provide Eschelon with**  
18 **the capability to receive expedited service by requiring Eschelon to amend its**  
19 **ICA as a condition of receiving expedited service.**

20  
21 Much of Qwest's Response is taken up with a lengthy discussion of CMP.

22 Although recognizing that Eschelon's ICA requires Qwest to provide Eschelon with the  
23 capability to request expedited service via mutually developed procedures, it points to  
24 CMP as allowing Qwest to change its policies regarding expedited service without  
25 amending the ICA and over Eschelon's objection. At this point, it is sufficient to note  
26 that, although Eschelon vigorously disputes Qwest's characterization of its CMP process  
27 and, in particular, the manner in which Qwest could use that process to trump Eschelon's  
28 contract rights, those issues are not presented by Eschelon's motion for summary

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<sup>15</sup> *First Report and Order* at ¶ 167; *see also, id.* at ¶ 1321 (concluding that allowing a CLEC to opt in to an existing interconnection agreement on an expedited basis "furthers Congress's stated goals of opening up local markets to competition and permitting interconnection on just, reasonable, and nondiscriminatory terms . . . .")

1 judgment. For purposes of this motion, Eschelon does not contest the history of CMP;  
2 indeed, that history is irrelevant to Eschelon's summary judgment motion. Regardless of  
3 what may have transpired during the 271 process and the development of CMP, it is  
4 undisputed that the end result of those efforts was the CMP Document, whose contents  
5 are similarly undisputed.<sup>16</sup> In fact, Qwest refers to the CMP Document as "Commission  
6 approved."<sup>17</sup> Nothing in CMP or the CMP Document authorizes Qwest to engage in  
7 discrimination. Moreover, the CMP Document provides that any individual CLEC that is  
8 dissatisfied with any action taken by Qwest in CMP can pursue a remedy before the state  
9 commission at any time with or without prior process,<sup>18</sup> exactly as Eschelon has done  
10 here.<sup>19</sup>

11 Qwest also argues that "the Eschelon ICA makes plain that Qwest does not need  
12 to expedite service orders simply because Eschelon requests an expedite," noting that the

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<sup>16</sup> Exhibit BJJ A-9 (Qwest Wholesale Change Management Document); *also* available at [http://www.qwest.com/wholesale/downloads/2006/060130/QwestWholesaleChangeManagementDocument\\_01\\_30\\_06\\_1.doc](http://www.qwest.com/wholesale/downloads/2006/060130/QwestWholesaleChangeManagementDocument_01_30_06_1.doc). The CMP Document (at Section 1.0) provides: "In cases of conflict between the changes implemented through this CMP and any CLEC interconnection agreement (whether based on the Qwest SGAT or not), the rates, terms and conditions of such interconnection agreement shall prevail as between Qwest and the CLEC party to such interconnection agreement. In addition, if changes implemented through this CMP do not necessarily present a direct conflict with a CLEC interconnection agreement, but would abridge or expand the rights of a party to such agreement, the rates, terms and conditions of such interconnection agreement shall prevail as between Qwest and the CLEC party to such agreement." *Id.*

<sup>17</sup> See, e.g., Answer, p. 2 line 6 & lines 17-18; p. 3 line 8.

<sup>18</sup> See Exhibit BJJ A-9 (Qwest Wholesale Change Management Document) at p. 100 (000259) (indicating that "a party" has the choice -- "may"-- pursue the dispute resolution process in §15.0 of the CMP Document) (stating "This process does not limit any party's right to seek remedies in a regulatory or legal arena at any time."); (stating "Without the necessity for a prior ADR Process, Qwest or any CLEC may submit the issue, following the commission's established procedures, with the appropriate regulatory agency requesting resolution of the dispute.") Further, even without these provisions, Eschelon would still have a right to pursue a complaint to challenge actions taken in CMP. Eschelon has the right, under its ICA, to pursue resolution of disputes by filing a complaint with the Commission. See Qwest-Eschelon ICA Part A, §27.2; see also Exhibit BJJ A-9 at §1.0 (quoted in above footnote).

<sup>19</sup> See Complaint, *passim*; see also Exhibit BJJ A-7 at 000137 (Eschelon dispute resolution letter indicating in the subject line that the letter is regarding: "Escalation and Request for Dispute Resolution pursuant to the Interconnection Agreements; LSR #17114755 (#D49232945); LSR #17192206 (#N49828418; PON #AZ657718T1FAC); ASR #0607700072 (#C50456587; PON # AZ657718T1FAC); Joint McLeod-Eschelon Escalation #39 Re. PROS.09.12.05.F.03242.Expedites\_Escalations\_V27 - Denied by Qwest 11/4/05; Eschelon 11/3/05 objections to PROS.10.19.05.F.03380.Expedites EscalationsV30.").

1 ICA only requires Qwest to notify Eschelon, within two hours of receiving Eschelon's  
2 expedite request, whether it will provide expedited service.<sup>20</sup> Qwest goes on to argue  
3 that, in denying Eschelon's request for expedited service, it fully satisfied its obligations  
4 under the ICA. It is apparently Qwest's position that, although Eschelon has a contract  
5 right to *request* expedited service, that right does not include the right to actually *receive*  
6 expedited service. What Qwest fails to recognize is that, before January 3, 2006, when  
7 Qwest changed its emergency expedites process to exclude unbundled loops, Eschelon  
8 was able, under its ICA, to obtain loops on an expedited basis at no additional fee under  
9 specified emergency conditions.<sup>21</sup> Prior to the change, the circumstances involving the  
10 specific customer whose loss of service provided the impetus for this complaint would  
11 have qualified for expedited service at no additional charge. After the change, expedited  
12 service to serve this customer was no longer available under the ICA, *even though the*  
13 *language of the ICA itself never changed*. Qwest's decision to deny Eschelon's request  
14 for expedited service was not based on Qwest's determination that the request did not  
15 meet the criteria under which the parties had operated since the beginning of their  
16 interconnection relationship. Rather, Qwest denied that request because it decided that it  
17 would no longer honor those terms.

18 The ICA requires Qwest to provide Eschelon with the capability to order  
19 expedites for any product or service offered under the ICA, including all unbundled  
20 loops.<sup>22</sup> Qwest acknowledges that, pursuant to the ICA, it provided Eschelon with

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<sup>20</sup> Qwest Response at 8.

<sup>21</sup> See, e.g., Answer, p. 9, ¶14, lines 24-25; see also Exhibit BJJ D (Examples of expedite requests approved by Qwest for unbundled loop orders).

<sup>22</sup> See, Complaint Exhibit 1 ("ICA Excerpts"), ICA Attachment 5, Sections 3.2.2.12, 3.2.2.13, 3.2.4.2, 3.2.4.3.

1 expedited service for unbundled loop at no additional charge.<sup>23</sup> It did so from April  
2 2000, when the contract began, until at least July 2005.<sup>24</sup> The parties did not agree to  
3 amend the ICA's expedite provisions. Yet, after Qwest changed its expedite policy,  
4 Qwest took the position that Eschelon could no longer receive expedited loops under its  
5 existing ICA without amendment (even though the CMP Document specifically states  
6 that the ICA controls over CMP<sup>25</sup>). Qwest's action to discontinue providing a service  
7 that it had provided pursuant to the parties' contract for more than five years constitutes a  
8 breach of the Commission approved ICA's expedite terms.

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### CONCLUSION

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For the foregoing reasons and for the reasons set forth in Eschelon's opening memorandum, Eschelon requests that the Commission find, as a matter of law, that to the extent that Eschelon is using an unbundled loop pipe leased from Qwest to provide POTS service, Qwest is required to provide that pipe on an expedited basis on the same terms as the parties operated prior to Qwest excluding unbundled loops from the emergency-based expedites process. Those are the terms under which Qwest provided expedites pursuant to the Commission approved interconnection agreement and under which Qwest provides the same pipe to itself and to its reseller/QPP CLEC customers. The

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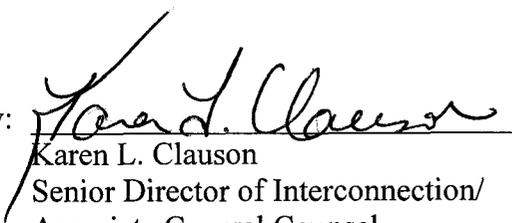
<sup>23</sup> See Qwest Answer at ¶ 14 ("The former expedite process approved by the CMP did not have rates associated with expediting orders for unbundled loops. The expedite process adopted in the Commission-approved-CMP process in July 1995 contained a rate of \$200 per day.")

<sup>24</sup> The CMP change that eliminated the no additional fee option for expediting unbundled loops did not take effect until January 2006. See Qwest Process Notification, dated October 19, 2005 (a copy of which is attached to the Direct Testimony of Bonnie Johnson at Attachment A-6, Document Nos. 000105-106) and Qwest Expedites and Escalations Overview – V30.0 (a copy of which is attached to the Direct Testimony of Bonnie Johnson at Attachment A-6, Document Nos. 000107-1105). Whether the change took effect in July 2005, as Qwest claims, or January 2006, as Eschelon contends, is not material to the resolution of Eschelon's motion. Qwest admits that it provided expedited loops to Eschelon under the ICA at no additional charge for more than five years.

<sup>25</sup> Exhibit BJJ A-9 at §1.0.

1 Telecommunications Act and the interconnection agreement entitle Eschelon to those  
2 terms.

3  
4 Dated: September 14, 2006

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7  
8 By: 

9 Karen L. Clauson  
10 Senior Director of Interconnection/  
11 Associate General Counsel  
12 Eschelon Telecom, Inc.  
13 730 2<sup>nd</sup> Ave. South, Suite 900  
14 Minneapolis, MN 55402  
15 Telephone: 612-436-6026  
16 Facsimile: 612-436-6816  
17 (admitted pro hac vice)

18  
19 Gregory Merz  
20 500 IDS Center  
21 80 South Eighth Street  
22 Minneapolis, MN 55402  
23 Telephone: 612 632 3257  
24 Facsimile: 612 632 4257  
25 (admitted pro hac vice)

26  
27 Michael W. Patten  
28 J. Matthew Derstine  
29 Roshka, DeWulf & Patten, PLC  
30 One Arizona Center  
31 400 East Van Buren Street, Suite 800  
32 Phoenix, Arizona 85004

33  
34 COUNSEL FOR ESCHELON TELECOM  
35 OF ARIZONA, INC.  
36

GP:1994302 v1

Arizona  
T-03406A-06-0257/T-01051B-06-0257  
ESCH 02-001A(b)

INTERVENOR: Eschelon Telecom of Arizona, Inc. ("Eschelon")

REQUEST NO: 001A(b)

Request for Admission No. 02:

Admit that, in CMP, Eschelon joined McLeod's Escalation #39 PROS.  
09.12.05.F.03242. Expedites\_ Escalations V27.

RESPONSE:

Qwest objects to this request because ESCH 02-001A is actually two separate Requests for Admission. Qwest will answer each question individually and separately.

Without waiving its objection, Qwest admits that Eschelon joined McLeod's Escalation #39 PROS. 09.12.05.F.03242. Expedites\_ Escalations V27.

Respondent: Jill Martain

Arizona  
T-03406A-06-0257/T-01051B-06-0257  
ESCH 02-003A(a)

INTERVENOR: Eschelon Telecom of Arizona, Inc. ("Eschelon")

REQUEST NO: 003A(a)

Request for Admission No. 04:

(Reference, e.g., Document No. 000117.) Admit that in CMP (a) Eschelon requested a CMP ad hoc call to discuss Qwest notice PROS. 10.19.05.F.03380. ExpeditesEscalations V30.

RESPONSE:

Qwest objects to this request because ESCH 02-003A is actually four separate Requests for Admission. Qwest will answer each question individually and separately. See Qwest's responses to ESCH 02-003A, parts (a), (b), (c) and (d).

Without waiving its objection, (a) Qwest admits that Eschelon requested a CMP ad hoc call to discuss Qwest notice PROS. 10.19.05.F.03380. ExpeditesEscalations V30.

Respondent: Jill Martain

Arizona  
T-03406A-06-0257/T-01051B-06-0257  
ESCH 02-003A(b)

INTERVENOR: Eschelon Telecom of Arizona, Inc. ("Eschelon")

REQUEST NO: 003A(b)

Request for Admission No. 05:

(Reference, e.g., Document No. 000117.) Admit that in CMP (b) that such a CMP ad hoc call was held,

RESPONSE:

Qwest objects to this request because ESCH 02-003A is actually four separate Requests for Admission. Qwest will answer each question individually and separately. See Qwest's responses to ESCH 02-003A, parts (a), (b), (c) and (d).

Without waiving its objection, (b) Qwest admits that such a CMP ad hoc call was held.

Respondent: Jill Martain

Arizona  
T-03406A-06-0257/T-01051B-06-0257  
ESCH 02-003A(c)

INTERVENOR: Eschelon Telecom of Arizona, Inc. ("Eschelon")  
REQUEST NO: 003A(c)

Request for Admission No. 06:

(Reference, e.g., Document No. 000117.) Admit that in CMP (c) that Versions 27 and 30 of the Escalations & Overview PCAT were discussed on that CMP ad hoc call, and

RESPONSE:

Qwest objects to this request because ESCH 02-003A is actually four separate Requests for Admission. Qwest will answer each question individually and separately. See Qwest's responses to ESCH 02-003A, parts (a), (b), (c) and (d).

Without waiving its objection, (c) Qwest admits that Versions 27 and 30 of the Escalations & Overview PCAT were discussed on that CMP ad hoc call.

Respondent: Jill Martain

Arizona  
T-03406A-06-0257/T-01051B-06-0257  
ESCH 02-003A(d)

INTERVENOR: Eschelon Telecom of Arizona, Inc. ("Eschelon")  
REQUEST NO: 003A(d)

Request for Admission No. 07:

(Reference, e.g., Document No. 000117.) Admit that in CMP (d) that Eschelon participated in that CMP ad hoc call.

RESPONSE:

Qwest objects to this request because ESCH 02-003A is actually four separate Requests for Admission. Qwest will answer each question individually and separately. See Qwest's responses to ESCH 02-003A, parts (a), (b), (c) and (d).

Without waiving its objection, (d) Qwest admits that Eschelon participated in that CMP ad hoc call.

Respondent: Jill Martain

Arizona  
T-03406A-06-0257/T-01051B-06-0257  
ESCH 02-004A

INTERVENOR: Eschelon Telecom of Arizona, Inc. ("Eschelon")

REQUEST NO: 004A

Request for Admission No. 08:

In Paragraph 14(B), p. 10, lines 24-25 of its Answer, Qwest states that Qwest sent notices to Eschelon describing the process but Eschelon did nothing. In Proc. Conf. Tr., p. 14, lines 1-6 (Document No. 001663), Qwest said that Eschelon "never complained" in CMP. See also Proc. Con. Tr., p. 11, lines 3-6 & lines 15-18 (Document Nos. 001661-001662.) (Reference, e.g., Document Nos. 000124-126.) Admit that in CMP Eschelon followed the CMV P comment process and submitted comments on November 11, 2005 regarding Qwest's CMP notice PROS. 10.19.05.F.03380.ExpeditesEscalationsV30 in which Eschelon said:

"In Qwest's response to Covad's CR PC021904-1, Qwest said: "If a CLEC chooses not to amend their Interconnection Agreement, the current expedite criteria and process will be used." The current "expedite requiring approval process" allows a CLEC to request an expedite, at no charge, when the customer's needs met certain criteria. Eschelon relied upon Qwest's response and based its decision to comment, or not comment, on that response. Qwest is now failing to keep the commitments it made to CLECs in CMP, and in its response to Covad, by now changing its position on expedites and unilaterally imposing charges via a process change in CMP. Qwest's proposed change to remove the existing approval required expedite process for designed products will negatively impact Eschelon and its customers. Qwest said its basis for this change is "parity" and that Qwest retail charges for all expedites for "designed" services. However, this claim of "parity" is misleading as Qwest's new process now treats CLEC POTS customers differently than Qwest POTS customers. Qwest defines parity based on whether a service is "designed." Qwest has chosen to apply the "design" process to DSO UBLs, but not to its own POTS customers. The result is that though from the customer perspective the service is the same, Qwest now proposes to treat them differently for the expedite process. The change Qwest is proposing is discriminatory to CLECs and their customers. A CLEC DSO UBL and a Qwest retail 1FB functionally are the same service. A DSO loop is merely a POTS line that Qwest chose to provision using a design flow process. For example, a customer could request an expedite using the approval required process when ordering service from Qwest (e.g. a 1FB), and would not have to pay additional charges for the expedite. However, if the customer orders service from a CLEC via a DSO loop and the customer requests an expedite from the CLEC, the CLEC and the customer would have to pay an additional charge for the same basic service.

Eschelon objects to Qwest's proposed changes to the current approval required expedite process because it is discriminatory to CLECs and CLEC customers. In addition, because Eschelon relied upon Qwest's comments to Covad's CR, Eschelon also objects to Qwest's addition of UBL DSO products to the pre-approved list of products. Qwest chose to make the change to the approval required expedite process after it added DSO loops to the product list for pre-approved products. The result is that CLECs were unable to effectively comment on a change that now, coupled with Qwest's further change, significantly impacts a CLEC's business."

RESPONSE:

Qwest objects to Eschelon's characterization of Qwest's Answer. Eschelon isolates a few words and takes the document out of context. Paragraph 14(B)

of Qwest's Answer must be read in totality to understand the meaning. Thus, Qwest objects and denies the implications of the introductory clauses to this Request for Admission. Qwest only responds to the following request: "Admit that in CMP Eschelon followed the CMP comments process and submitted comments on November 11, 2005 regarding Qwest's CMP notice PROS.10.19.05.F.0380. ExpeditesEscalationsV30 in which Eschelon said: [quote omitted]."

Without waiving its above-stated objection, Qwest admits that in CMP Eschelon followed the CMP comments process and submitted comments on November 11, 2005 regarding Qwest's CMP notice PROS.10.19.05.F.0380. ExpeditesEscalationsV30 in which Eschelon said: [quote omitted]."

Respondent: Legal and Jill Martain

Arizona  
T-03406A-06-0257/T-01051B-06-0257  
ESCH 02-002A

INTERVENOR: Eschelon Telecom of Arizona, Inc. ("Eschelon")  
REQUEST NO: 002A

Request for Admission No. 03:

(Reference, e.g., Document Nos. 000120-121.) Admit that in CMP Qwest included escalation participants, including Eschelon, Covad, Velocity, AT&T, ELI, and VCI, in Qwest's response to Escalation #39 PROS. 09.12.05.F.03242. Expedites Escalations V27.

RESPONSE:

Except with regard to VCI, Qwest admits that Qwest included escalation participants, including Eschelon, Covad, Velocity, AT&T, and ELI in Qwest's response to Escalation #39 PROS. 09.12.05.F.03242. Expedites Escalations V27.

Respondent: Jill Martain

Arizona  
T-03406A-06-0257/T-01051B-06-0257  
ESCH 02-005A(b)

INTERVENOR: Eschelon Telecom of Arizona, Inc. ("Eschelon")

REQUEST NO: 005A(b)

Request for Admission No.10:

(Reference, e.g., Document Nos. 000123-000128.) Admit that (b) three of five CLECs (including Eschelon) providing comments in CMP referred to discrimination and/or a competitive disadvantage; and that

RESPONSE:

Qwest objects to this request because Request for Admission ESCH 02-005A is actually three separate questions. Qwest will answer each RFA individually and separately. See also Qwest's responses to ESCH 02-005A, parts (a) and (c).

Without waiving its objection, Qwest admits that three of five CLECs (including Eschelon) providing comments in CMP referred to discrimination and/or a competitive disadvantage.

Respondent: Jill Martain

Arizona  
T-03406A-06-0257/T-01051B-06-0257  
ESCH 02-005A(c)

INTERVENOR: Eschelon Telecom of Arizona, Inc. ("Eschelon")

REQUEST NO: 005A(c)

Request for Admission No. 011:

(Reference, e.g., Document Nos. 000123-000128.) Admit that (c) Integra said in its comments that "Integra objects to Qwest proposed change to remove the existing approval required expedite process for designed products. When Integra signed the Qwest Expedite Amendment we were not advised that by signing the amendment it would change the current Expedites Requiring Approval process. We signed the amendment believing that this would ADD to our options of having an order completed outside the standard interval. When Integra signed the amendment UBL DSO loops were not included as a product on the list of products in the "Pre-Approved Expedites" list. When the UBL DSO was added to this list Integra did not comment as at that time we still believed the Expedites Requiring Approval process was in place for our use."

RESPONSE:

Qwest objects to this request because Request for Admission ESCH 02-005A is actually three separate questions. Qwest will answer each RFA individually and separately. See also Qwest's responses to ESCH 02-005A, parts (a) and (b).

Without waiving its objection, Qwest admits that Integra stated the above-cited quote in its comments.

Respondent: Jill Martain