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March 9, 2007

*Via Federal Express*

Arizona Corporation Commission  
**DOCKETED**

**MAR 12 2007**

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

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RE: *In the Matter of the Petition of Eschelon Telecom of Arizona, Inc. for Arbitration with Qwest Corporation, Pursuant to 47 U.S.C. Section 252 of the Federal Telecommunications Act of 1996*  
Docket Nos. T-034106A-06-0572 & T-01051B-06-0572

Dear Sir or Madam:

Enclosed for filing in connection with the above-referenced matter please find the original and 15 copies of Eschelon Telecom of Arizona, Inc.'s Memorandum in Opposition to Qwest Corporation's Motion to Dismiss Rate Issues, Affidavit of Douglas Denney, and Affidavit of Service.

I have also enclosed an additional copy of the Memorandum. Kindly date-stamp your receipt and return the stamped copy in the enclosed self-addressed, stamped envelope.

Sincerely,

  
Gregory Merz

Enclosures

cc: Maureen Scott, ACC (w/enclosure via FedEx)  
Ernest G. Johnson, ACC (w/enclosure via FedEx)  
Lynn A. Farmer, ACC (w/enclosure via FedEx)  
Norman Curtright, Qwest (w/enclosure via FedEx)  
Jason Topp, Qwest (w/enclosure via messenger)

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1                                   **BEFORE THE ARIZONA CORPORATION COMMISSION**

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MIKE GLEASON  
Chairman  
JEFF HATCH-MILLER  
Commissioner  
KRISTIN K. MAYES  
Commissioner  
WILLIAM MUNDELL  
Commissioner  
GARY PIERCE  
Commissioner

In the Matter of the Petition of                                    )  
Eschelon Telecom of Arizona, Inc. for                            )  
Arbitration with Qwest Corporation,                            )       Docket Nos.   T-03406A-06-0572  
Pursuant to 47 U.S.C. Section 252 of the                        )  
Federal Telecommunications Act of 1996                        )       T-01051B-06-0572

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26                                   **ESCHELON TELECOM OF ARIZONA, INC's MEMORANDUM**  
27                                   **IN OPPOSITION TO QWEST CORPORATION'S MOTION**  
28                                   **TO DISMISS RATE ISSUES**

29  
30  
31                                   **INTRODUCTION**

32                   Eschelon Telecom of Arizona, Inc. ("Eschelon") respectfully submits this  
33 memorandum in opposition to the motion of Qwest Corporation ("Qwest") to dismiss  
34 certain issues regarding unapproved rates (Issues 22-90(c) through 22-90(l)) from this  
35 arbitration proceeding. Eschelon raised, in its arbitration petition, rates for certain  
36 products and services required to be offered under Section 252 of the  
37 Telecommunications Act at cost-based rates, but for which the Commission has not  
38 approved a rate, and has requested that the Commission establish an interim rate for those

1 products and services.<sup>1</sup> Qwest has moved to dismiss these issues on the grounds that rate  
2 issues are not appropriate for determination in arbitration proceedings, but rather, must be  
3 referred to a cost case.

4 Qwest's motion is without merit and should be denied for the following reasons:

5 (1) The establishment of interim rates is properly within the scope of this interconnection  
6 arbitration proceeding; (2) Qwest is not permitted to unilaterally impose non-cost based  
7 UNE rates; (3) Eschelon's proposed interim rates proposal assumes that permanent rates  
8 will be established following full review in a cost case; (4) consideration of Eschelon's  
9 proposed interim rates will not make this proceeding unduly complicated; and (5)

10 Qwest's criticisms of the methodology that produced Eschelon's proposed interim rates  
11 are irrelevant to the pending motion and factually incorrect.

12 **DISCUSSION**

13  
14 **I. The Establishment Of Interim Rates Is Properly Within The Scope Of This**  
15 **Interconnection Arbitration Proceeding**

16  
17 The appropriate scope of this proceeding is established by federal law. Section  
18 252(b)(4)(c) of the Federal Telecommunications Act (the "Act") requires the  
19 Commission to resolve each issue set forth in the petition.<sup>2</sup> The Act expressly envisions  
20 that individual arbitration proceedings may involve rates issues. To that end, Section  
21 252(c) requires that a state commission, "in resolving *by arbitration*" any open issues and  
22 imposing conditions upon the parties to the agreement, "*shall establish any rates* for  
23 interconnection, services or network elements according to subsection (d) of this

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<sup>1</sup> Rate elements at issue are set out in the chart that is found at page 200 of the Direct Testimony of Douglas Denney.

<sup>2</sup> 47 U.S.C. § 252(b)(4)(c).

1 section.”<sup>3</sup> The FCC’s rules also recognize that state commissions may set rates in  
2 arbitration proceedings and therefore impose a duty to produce in negotiations cost data  
3 relevant to setting rates in arbitration.<sup>4</sup> There would be no reason to require that this data  
4 be provided if rates were not proper subject for arbitration, and therefore the rule  
5 specifically refers to cost data relevant to setting rates “in arbitration.”<sup>5</sup>

6 The Indiana Commission relied on these requirements of the federal Act in  
7 rejecting a claim that a rate issue could only be determined in a generic cost proceeding  
8 and not an arbitration.<sup>6</sup> There, Ameritech argued, as Qwest argues here, that because rate  
9 issues impact multiple CLECs, such issues are not appropriate for determination in an  
10 arbitration proceeding. The Indiana Commission disagreed:

11 The ruling here potentially impacts the relationship and the  
12 interconnection agreements of many if not all ILECs and  
13 CLECs. However, Ameritech overlooks the plain language  
14 and express intent of Section 252(c)(2) of TA-96 which  
15 holds that in resolving any open issues by arbitration, a

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<sup>3</sup> 47 U.S.C. § 252(c) (emphasis added). Section 252(d) of the Act sets forth the applicable pricing standards for interconnection, network elements, and resale at wholesale rates of ILEC retail services. It states that rates shall be cost-based and nondiscriminatory. 47 U.S.C. § 252(d)(1)(A)(i) & (ii).

<sup>4</sup> 47 C.F.R. § 51.301(c)(8)(iii) (“If proven to the Commission, an appropriate state commission, or a court of competent jurisdiction, the following actions or practices, among others, violate the duty to negotiate in good faith: . . . (8) Refusing to provide information necessary to reach agreement. Such refusal includes, but is not limited to: . . . (ii) Refusal by an incumbent LEC to furnish *cost data* that would be relevant to *setting rates* if the parties were *in arbitration.*”) (emphasis added).

<sup>5</sup> *Id.*

<sup>6</sup> *In the Matter of Petition of Buytel Communications, Inc. for Arbitration Pursuant to Section 252(b) to Resolve Open Issues for an Interconnection Agreement with Ameritech Indiana*, 2002 Ind. PUC LEXIS 277 (I.U.R.C. 2002). Remarkably although the Indiana Commission expressly rejected the very argument that Qwest is making here, this was one of the cases cited by Qwest in support of its motion to dismiss. See Qwest Corporation’s Motion to Dismiss Rate Issues at p. 6. Qwest’s description of the case reflects Ameritech’s argument, not the Commission’s holding.

1 State Commission shall “establish any rates for  
2 interconnection, services, or network elements . . . .”<sup>7</sup>  
3

4 The Indiana Commission further observed:  
5

6 The establishment of rates is precisely the type of issue that  
7 the Arbitration provisions of TA-96 were promulgated to  
8 address. While generic proceedings such as that  
9 established in Cause No. 40611 can promote the  
10 competition and policy goals of TA-96 by permitting the  
11 full development and exploration of forward-looking costs,  
12 nothing in TA-96 or in the FCC’s rules permits such a  
13 generic proceeding to limit a requesting carrier’s right to  
14 petition a state commission to arbitrate such an unresolved  
15 issue.<sup>8</sup>  
16

17 Similarly, the Minnesota commission has implicitly rejected Qwest’s argument.

18 The Minnesota Commission recently approved the Administrative Law Judges’ (ALJs’)   
19 ruling setting an interim rate for expedited orders (Issue 12-67) in the Minnesota Qwest-   
20 Eschelon arbitration proceeding.<sup>9</sup>

21 The interim rate issues on which Qwest seeks dismissal are issues that were raised   
22 in Eschelon’s petition for arbitration.<sup>10</sup> Eschelon has filed testimony in support of its   
23 proposed interim rates.<sup>11</sup> As a matter of federal law, these issues fall within the

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<sup>7</sup> *In the Matter of Buytel*, 2002 Ind. PUC LEXIS 277 at \*17-18.

<sup>8</sup> *Id.* at \*20.

<sup>9</sup> See Arbitrators’ Report, *In the Matter of the Petition of Eschelon Telecom Inc. for Arbitration of an Interconnection Agreement with Qwest Corporation Pursuant to 47 U.S.C. §252(b) of the Federal Telecommunications Act of 1996* [“Minnesota Qwest-Eschelon ICA Arbitration”], OAH No. 3-2500-17369-2; MPUC Docket No. P-5340,421/IC-06-768 (Jan. 16, 2006) (“MN Arbitrators’ Report”), ¶¶ 222; affirmed by a 4-0 vote of the Minnesota PUC on March 6, 2007 (written order not yet issued).

<sup>10</sup> See Petition of Eschelon Telecom of Arizona, Inc. for Arbitration of Intercarrier Negotiations with Qwest Corporation under the Telecommunications Act of 1996, at p. 101-02; Exhibit 3 (Joint Disputed Issues Matrix at pp. 229-41; Exhibit 5 (Proposed Exhibits to the Interconnection Agreement) at Ex. A).

<sup>11</sup> Direct Testimony of Douglas Denney at 197-209; Rebuttal Testimony of Douglas Denney at 120-30; Surrebuttal Testimony of Douglas Denney at 137-49.

1 appropriate scope of this arbitration. As indicated in the testimony of the Minnesota  
2 Department of Commerce Staff:

3 “my understanding is that any issue that has been negotiated by the parties may be  
4 brought to the state commission for arbitration. For example, I am aware of a  
5 case, *US West Communications, Inc. versus Minnesota Public Utilities*  
6 *Commission*, F. Supp. 2d 968, 985 (Dist. Minn. 1999), in which the court found  
7 that the list of interconnection obligations contained in 47 U.S.C. § 251(b) and (c)  
8 does not set forth a comprehensive listing of what parties *may* negotiate, and if  
9 *any* issues are unresolved by negotiation, they are proper items for arbitration. . . .  
10 the court held that:

11  
12 “The only limitations placed upon any individual issue addressed by a  
13 state commission during arbitration are that the issue must be: (1) an open  
14 issue and (2) that resolution of the issue does not violate or conflict with  
15 §251.”<sup>12</sup>  
16

17 Qwest appears to recognize the relevance of issues of costs and rates in  
18 proceedings to establish a new interconnection agreement. Specifically, Qwest’s witness,  
19 Mr. Easton, has testified that, “For carriers who are negotiating an amendment or a new  
20 agreement, as part of the negotiations process, the cost support will be provided if  
21 requested.”<sup>13</sup> This statement is consistent with the requirement under federal law that  
22 cost data relevant to setting rates be provided in connection with interconnection  
23 negotiations.<sup>14</sup> Although giving lip service to this legal obligation, Qwest would then  
24 foreclose any Commission review of this information by claiming that rates and cost

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<sup>12</sup> Minnesota Qwest-Eschelon ICA Arbitration, Staff (Ms. Doherty) Reply Testimony, p. 9, line 4 – p. 10, line 6 (citing *US West Communications v. Minnesota Public Utilities Commission*, F. Supp 2d 968, 985-86 (D. Minn. 1999)).

<sup>13</sup> Rebuttal Testimony of William Easton at p. 35, line 16-18.

<sup>14</sup> 47 C.F.R. § 51.301(c)(8)(iii) (quoted in above footnote).

1 issues are beyond the scope of arbitration proceedings, despite express language in the  
2 same federal rule referring specifically to arbitration.<sup>15</sup>

3 **II. Qwest Is Not Permitted to Unilaterally Impose Non-Cost Based UNE Rates**

4 In support of its motion, Qwest states that it is requesting “deferring consideration  
5 of these rate issues.”<sup>16</sup> In short, now that it has provided little or no cost support in this  
6 record for the rates it proposes in Exhibit A – despite every opportunity to do so – it  
7 wants a second bite at the apple even before the issues are heard in this case. In the  
8 intervening “deferment” time period, Eschelon is supposed to pay Qwest’s unsupported  
9 wish list of rates for an indefinite period of time. Very often, in cost cases, Qwest does  
10 not obtain commission approval, with no modification, of Qwest’s “going-in” position  
11 for its desired rate. Commissions often approve something less than any one party’s wish  
12 list of desired rates. Certainly, commissions generally do not order rates that are *greater*  
13 *than* Qwest’s own proposed rates (making Qwest’s proposals the highest possible rates to  
14 be imposed).

15 In Section 22.6 and subparts of the proposed interconnection agreement (Issue 22-  
16 90), Eschelon proposes a process for ensuring that Qwest’s “going-in” positions or  
17 “wish-list” rates are not unilaterally implemented and then remain in effect indefinitely  
18 with no action by Qwest to support the rates to the Commission or Commission approval  
19 of those rates. That process explicitly anticipates and allows for Commission  
20 establishment of interim rates before or after Qwest files cost support with the  
21 Commission.<sup>17</sup> As discussed by Mr. Denney, Eschelon’s proposal follows a commission

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<sup>15</sup> *Id.*

<sup>16</sup> Qwest Corporation’s Motion to Dismiss at 1.

<sup>17</sup> Proposed ICA Sections 22.6.1 and 22.6.1.1. Qwest appears to be attempting to

1 decision in Minnesota.<sup>18</sup> Minnesota is currently the only Qwest state in which Exhibit A  
2 contains no rates for certain items for which Qwest has neither obtained a Commission-  
3 approved rate or filed cost support and complied with that process and yet Qwest must  
4 provide the product under the terms of the interconnection agreement. In the other states  
5 (including Arizona), Qwest currently may force its wish list rates upon CLECs by  
6 refusing to provide the product at all if CLECs do not sign an amendment containing its  
7 unapproved rates.<sup>19</sup> The result in Minnesota is the appropriate result when Qwest has  
8 both not met its burden to show that its rates meet the cost-based standard and not taken  
9 reasonable steps to obtain interim or permanent rates from the Commission. Although  
10 Eschelon is proposing the Minnesota process (with the same results) in Arizona and other

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interpret the language in a manner that limits establishment of interim rates to a cost proceeding after Qwest files its cost support, but that is not what the language (including the portion agreed upon by Qwest) provides. *See* 22.6.1.1 (including a scenario under which Qwest has *not* filed cost support but the Commission *has* set interim rates, so the Commission-established interim rates – and not Qwest’s proposed rates – apply).

<sup>18</sup> Denney Direct, pp. 193-194. October 2, 2002 Order in MN PUC Docket CI-01-1375 (“MN 271 Cost” Docket). Specifically, “Summary of the Commission’s findings and conclusions” contains the following provisions on pp. A-6 and A-7: “**Price Under Development:** Qwest shall obtain Commission approval before charging for a UNE or process that it has previously offered without charge. Qwest may negotiate an interim price for a UNE and service not previously offered in Minnesota provided that Qwest file a permanent price, and related cost support, with the Commission within 60 days of offering the UNE or service. ALJ Report p. 64. ....**New UNE Price:** When offering a new UNE, Qwest shall file a cost-based price, together with an adequate description of the UNE’s application, for Commission review within 60 days of offering. Qwest may charge a negotiated rate immediately if part of an approved interconnection agreement (ICA), provided the ICA is filed for Commission review within 60 days.”

<sup>19</sup> *See, e.g.,* Direct Testimony of Pamela Genung, *In re. Complaint of Eschelon Telecom of Arizona, Inc. Against Qwest Corporation*, ACC Docket No. T-01051B-06-0257, T-03406A-06-0257 (Jan. 30, 2007) (“Staff Expedite Testimony”), p. 34, lines 10-11 (“CLECs should not be forced into signing” Qwest’s expedite amendment with Qwest’s \$200 per day rate). Arizona Staff added that “since CLEC interconnection agreements are voluntarily negotiated or arbitrated,” Qwest could have taken the issue to arbitration under the Qwest-Eschelon ICA, “rather than trying to force Eschelon into signing an amendment.” *Id.* p. 36, line 21 – p. 37, line 2.

1 states, Qwest is proposing a watered-down version that omits the key pieces of the  
2 Minnesota process that prevent Qwest from charging unsupported, unapproved rates  
3 when it should not do so. Qwest seeks to avoid establishment of interim rates to  
4 guarantee itself the ability to charge its unapproved wish list rates as long as possible  
5 under that watered-down version, if adopted.

6 Nonetheless, Qwest states that it is requesting “deferring consideration of these  
7 rate issues to a different procedural process that the parties *have agreed upon* for  
8 determining rates.”<sup>20</sup> In fact, Eschelon and Qwest have *not* agreed on a different process  
9 for determining rates. Eschelon has proposed language to be included in the ICA, which  
10 Qwest has not agreed to, providing that “Qwest shall obtain Commission approval before  
11 charging for a UNE process that it previously offered without charge” and that “For a  
12 UNE or process that Qwest previously offered without charge, the rates in Exhibit A do  
13 not apply until Qwest obtains Commission approval or the Parties agree to a negotiated  
14 rate.”<sup>21</sup> These are open, disputed issues in this case (Issue Nos. 22-90 and 22-90(a)). The  
15 language further provides that, when the parties are unable to agree on a negotiated rate,  
16 the Commission, not Qwest, will establish the interim rate. The portion of Section 22.6  
17 to which Qwest *has* agreed specifically contemplates that Commission establishment of  
18 interim rates may occur *before* Qwest files its cost support<sup>22</sup> – *i.e.*, in a forum outside of  
19 a cost proceeding commenced with the filing of Qwest’s cost support. This arbitration is  
20 such a forum.

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<sup>20</sup> Qwest Corporation’s Motion to Dismiss at 1 (emphasis added).

<sup>21</sup> Rebuttal Testimony of Douglas Denney, p. 121, lines 8-9. Proposed ICA Section 22.6.1 (Issue 22-90).

<sup>22</sup> Proposed ICA Section 22.6.1.1 (black text).

1           What Eschelon's proposed language would not permit is what Qwest is seeking to  
2 do here: simply impose rates that have not been agreed to and that the Commission has  
3 not reviewed. As discussed, Eschelon's proposal is intended to incorporate into the ICA  
4 the process that was ordered by the Minnesota Commission in connection with the  
5 Minnesota 271 case. In that case, the Minnesota Commission prohibited Qwest from  
6 charging a rate for a Section 251 product for which there is no Minnesota Commission-  
7 approved rate without petitioning for approval of the rate.<sup>23</sup>

8           Qwest has not agreed to Eschelon's proposal regarding unapproved rates. Rather  
9 than addressing interim rates in this arbitration, Qwest's solution is to unilaterally impose  
10 excessive, non-cost based rates on Eschelon. Thus, the result of Qwest's position, if  
11 accepted would be to incorporate into the arbitrated ICA rates that have not been agreed  
12 to by Eschelon or approved by the Commission, which rates include rates that were  
13 developed using inputs that are inconsistent with inputs that have been ordered by the  
14 Commission and rates for which Qwest has provided either no cost support or cost  
15 support that is insufficiently detailed.<sup>24</sup> The Commission has held that the burden is on  
16 Qwest to prove its costs,<sup>25</sup> yet Qwest would effectively reverse that burden by requiring  
17 Eschelon to pay Qwest's demanded rates for a potentially long period of time based on  
18 no evidence in this record and no Commission scrutiny in the meantime.

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<sup>23</sup> Direct Testimony of Douglas Denney, p. 193, lines 7-11. Proposed ICA Section 22.6.1.1 (Issue 22-90(a)).

<sup>24</sup> See Direct Testimony of Douglas Denney, p. 201, line 1-205, line 18.

<sup>25</sup> *In the Matter of the Investigation Into Qwest Corporation's Compliance With Certain Wholesale Pricing Requirements for Unbundled Network Elements and Resale Discounts*, Docket No. T-00000A-00-194, Phase II Order 64922 at 84 ("The burden of proof to establish a proper cost basis under the 1996 Act is on Qwest Corporation.").

1 Qwest's position is particularly problematic in light of Qwest's refusal to agree to  
2 language proposed by Eschelon confirming that neither party waives its rights to Qwest a  
3 cost proceeding to establish a Commission-approved rate to replace an interim rate.<sup>26</sup>

4 Thus, on the one hand, Qwest takes the position that rates are only appropriately  
5 considered in a cost case and, on the other hand, Qwest will not agree to clearly recognize  
6 Eschelon's right to request a cost case.

7 **III. Eschelon's Proposed Interim Rates Proposal Assumes That Permanent Rates**  
8 **Will Be Established Following Full Commission Review In A Cost Case**

9  
10 Eschelon does not intend that this arbitration proceeding will take the place of a  
11 cost case. Rather, Eschelon's proposed rates are expressly interim in nature, to be  
12 replaced by final rates that will be established in a cost case, in which all CLECs would  
13 have an opportunity to participate.<sup>27</sup> During the interim period, the interim rates will be  
14 available for opt-in by other CLECs under Section 252(i) of the Act.

15 Consideration of Eschelon's interim rate proposals in this case is fully consistent  
16 with this Commission's prior orders. In particular, in one of the previous cost dockets  
17 cited by Qwest, the Commission held that "For new services proposed by Qwest with a  
18 new rate that has not been reviewed and approved by the Commission, the interim rate

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<sup>26</sup> See Direct Testimony of Douglas Denney at p. 177, line 20-p.179, line 14.

<sup>27</sup> Further, Qwest may request a true-up of interim rates. *See, e.g.*, Proposed Interconnection Agreement at Section 1.7.1.1; *see also* Easton Rebuttal, p. 2, lines 6-7 (recognizing the Commission may order a true-up). Thus, if the final rate ends up being more than the interim rate, this agreed upon provision will make Qwest whole. Although Qwest may claim that this true up provision would also operate to protect Eschelon, thus obviating the need to determine interim rates in this case, the difference is that Eschelon seeks interim rates that have been reviewed and established by the Commission and Qwest seeks to foreclose such review in order to unilaterally impose a rate, thus assuring that Eschelon pays the highest possible rate in the interim.

1 shall be no more than the rate Qwest has proposed.”<sup>28</sup> Thus, for the kind of rates that are  
2 at issue here – elements for which no Commission-approved rate has been set – the  
3 Commission did not authorize Qwest to charge, even on an interim basis, any rate that it  
4 saw fit. Rather, the Commission identified Qwest’s proposed rate as the *ceiling* and  
5 anticipated that the interim rate might well be *lower* than the rate Qwest proposed. This  
6 could only happen if CLECs were to be given a fair opportunity to negotiate a rate or  
7 challenge Qwest’s proposed rate outside the context of a cost case, such as in an  
8 arbitration proceeding like this one.

9 Similarly, in cases cited by Qwest, state commissions have held that the  
10 establishment of interim rates is appropriate in an arbitration proceeding. Thus, the  
11 Washington Commission explained the relationship between generic cost proceedings  
12 and arbitration proceedings as follows:

13 The Commission stated that rates adopted in the pending  
14 arbitrations would be interim rates, pending the completion  
15 of the generic proceeding. Accordingly, the price proposals  
16 made in this arbitration have been reviewed with the goal  
17 of determining which offers a more reasonable interim rate,  
18 more closely based on what we believe to be accurately  
19 determined cost levels based on the evidence specifically  
20 submitted in this docket, our recent prior actions regarding  
21 cost studies, and our expertise as regulators.<sup>29</sup>

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<sup>28</sup> *In the Matter of the Investigation Into Qwest Corporation’s Compliance With Certain Wholesale Pricing Requirements for Unbundled Network Elements and Resale Discounts*, Docket No. T-00000A-00-194, Phase II Order Decision 64922, at p. 81.

<sup>29</sup> *In the Matter of the Petition for Arbitration of an Interconnection Agreement Between TCG Seattle and U S WEST Communications, Inc., Pursuant to 47 U.S.C. § 252*, 1997 Wash. UTC LEXIS 9 at \*5 (W.U.T.C. 1997); *see also In the Matter of the Petition of Ace Telephone Company*, 2006 Mich. PSC LEXIS 51 at \*12 (M.P.S.C. 2006) (adopting interim rates for reciprocal compensation, pending approval of new rates in a separate proceeding); *see also In the Matter of the Sprint Communications Company L.P.’s Petition for Arbitration of Interconnection Rates, Terms, Conditions, and Related Agreements with GTE of the North, Inc.*, 1997 Ind. PUC LEXIS 9 at \*21-22 (I.P.U.C. 1997) (establishing “interim proxy” rates in arbitration to be subject to true up upon the

1  
2 Other cases cited by Qwest concern attempts to change rates or rate-setting  
3 methodologies that have been previously *approved* by the state commission.<sup>30</sup> These  
4 cases are distinguishable from the situation presented here, in which Eschelon is seeking  
5 to establish interim rates for elements for which there is no Commission approved rate  
6 and Qwest is seeking to impose, without Commission approval, rates that it has not  
7 proven accurately reflect Qwest's costs. Indeed, here it is Qwest, not Eschelon, that  
8 seeks to change established costing methodologies by proposing rates that have been  
9 developed using cost inputs that are inconsistent with cost inputs previously ordered by  
10 the Commission.<sup>31</sup>

11 **IV. Consideration Of Eschelon's Proposed Interim Rates Will Not Make This**  
12 **Proceeding Unduly Complicated**

13  
14 Qwest argues that the cost issues presented by Eschelon's petition should be  
15 deferred for the sake of "efficiency," suggesting that those issues are too complicated to

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completion of a cost case).

<sup>30</sup> *In the Matter of the Petition of AT&T Wireless Services, Inc., for Arbitration of Interconnection Rates, Terms, and Conditions Pursuant to the Telecommunications Act of 1996*, 1997 Ore. PUC LEXIS 183 at \*35-36 (O.P.U.C. 1997) (rejecting pricing proposal by U S WEST that reflected a departure from Commission-established cost methodology); *Application of AT&T Communications of California, Inc., for Arbitration of an Interconnection Agreement with Pacific Bell Telephone Company Pursuant to Section 252(d) of the Telecommunications Act of 1996*, 2000 Cal. LEXIS 564 at \*46 (C.P.U.C. 2000) (rejecting request to update existing rates in context of arbitration proceeding); *In the Matter of Complaint by Ionex Communications, Inc., Against Southwestern Bell Telephone Company for Charging Improper Rates for Unbundled Network Elements*, 2000 Kan. PUC LEXIS 1133 \*119 (K.C.C. 2000) (rejecting effort to negotiate rates different from those approved in prior generic cost proceeding).

<sup>31</sup> *See* Direct Testimony of Douglas Denney at p. 203, lines 3 – 5; cf. Rebuttal Testimony of Qwest witness Teresa Million at p. 28, line 21 – p. 29, line 1 (asserting that "Qwest is not obligated when it calculates costs for new elements subsequent to a Commission decision in a cost docket to rigidly follow the inputs ordered in that docket.")

1 be dealt with in the context of this proceeding.<sup>32</sup> However, consistent with the interim  
2 nature of the rate determination to be made in this case, neither party has presented the  
3 kind of complex cost evidence that Qwest has claimed is not appropriate for  
4 consideration in an arbitration proceeding.<sup>33</sup> To the contrary, notwithstanding the cost  
5 issues presented by Eschelon's petition, Qwest has offered no cost studies. Teresa  
6 Million, the person identified by Qwest as its cost witness, attaches no exhibits to any of  
7 the three rounds of testimony and only in her rebuttal testimony does she address the  
8 unapproved rate issues that Qwest is seeking to dismiss from this case, devoting fewer  
9 than six pages of her 31 page rebuttal testimony to those issues. Eschelon's cost witness,  
10 Mr. Denney, in contrast, does provide a full explanation of the bases for Eschelon's  
11 proposed interim rates, but that explanation is simple and straightforward and does not  
12 require in depth analysis of complicated cost studies.<sup>34</sup> Mr. Denney's pre-filed testimony  
13 concerning the unapproved rate issues makes up only a small portion of Mr. Denney's  
14 total testimony in this case. Contrary to Qwest's claims, dismissing the unapproved rate  
15 issues will not have the effect of substantially shortening the proceeding or simplifying  
16 the case.

17 Further, Qwest greatly exaggerates the administrative challenges associated with  
18 the evidentiary proceedings in this case. In the Minnesota arbitration case, the  
19 evidentiary hearing concluded in less than four and one-half days, with the last partial

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<sup>32</sup> See Qwest Corporation's Motion to Dismiss Rate Issues at 2.

<sup>33</sup> See Qwest Corporation's Motion to Dismiss Rate Issues at 7.

<sup>34</sup> A chart that clearly describes the bases for each of Eschelon's proposed interim rates is provided at page 202 of Mr. Denney's Direct Testimony. Further explanation is provided at pages 203 through 205 of that testimony. Exhibit DD-16 provides a detailed description of the modifications that Mr. Denney made to the Qwest cost studies to produce Eschelon's proposed interim rate.

1 day devoted to examination of witnesses testifying on behalf of the Minnesota  
2 Department of Commerce. During the hearing, the parties reached agreement on a  
3 number of issues and since the conclusion of that hearing a number of other issues have  
4 settled. Thus, the Arizona case involves significantly fewer issues than did the  
5 Minnesota case and fewer witnesses will testify at the Arizona hearing than testified at  
6 the Minnesota hearing. At the recent procedural conference in this case, counsel for both  
7 Qwest and Eschelon indicated that the hearing will not likely take the full five days that  
8 have been allocated. Certainly an evidentiary hearing of less than five days is not  
9 extraordinarily long.

10         There is no requirement in ICA Section 22.6 (including the portions of that  
11 language agreed upon by Qwest) requiring that the Commission establish the *interim* rate  
12 in any kind of generic or multi-party proceeding. If Qwest succeeds here in obtaining a  
13 deferment of issues already presented and ready for resolution, Eschelon – after incurring  
14 all the expenses of litigating the issue here – under Section 22.6 would have to make a  
15 separate request to the Commission for an interim rate, for which Eschelon would have to  
16 re-file the same evidence that it already filed in this case. The Commission will still need  
17 to review the evidence and rule on the interim rate proposals at that time. Qwest’s  
18 deferment proposal is the one that results in additional work, inefficiencies, and  
19 unnecessary delay. Qwest could have brought its motion to dismiss early in the case, as it  
20 did in Minnesota, if it truly believed that these issues should not be decided here.  
21 However, because Qwest waited until now, when the parties have submitted their  
22 testimony and are on the eve of hearing, Qwest’s motion is contrary to the goal of  
23 efficiency, not in furtherance of that goal. The Commission should not allow Qwest to

1 put off for another, unspecified day what is already properly submitted to and pending  
2 before the Commission today.

3 **V. Qwest's Criticisms Of The Methodology That Produced Eschelon's Proposed**  
4 **Interim Rates Are Irrelevant To The Pending Motion And Factually**  
5 **Incorrect.**  
6

7 Qwest has, in support of its motion to dismiss, leveled a number of criticisms at  
8 the analysis upon which Eschelon's interim rates are based. Although these are certainly  
9 arguments that Qwest is free to make in the arbitration proceeding to attempt to convince  
10 the Commission that Eschelon's proposed interim rates should not be adopted, these  
11 arguments are not a reason why these issues should not even be considered in this case.  
12 Qwest has had ample opportunity in three rounds of testimony to present evidence to  
13 rebut Eschelon's analysis. Qwest will have a further opportunity to cross examine Mr.  
14 Denney on the issues that it has raised. Qwest's motion offers no basis to conclude that  
15 the ALJ and the Commission will be unable to evaluate the evidence presented and  
16 determine an appropriate interim rate that is most in keeping with the requirement that the  
17 prices that Qwest charges for Section 252 elements and products be based on costs.

18 Further, the criticisms that Qwest has made are based on incorrect facts. Thus,  
19 Qwest claims that Mr. Denney has proposed averaging ordered rates.<sup>35</sup> In fact, as Mr.  
20 Denney explains in his testimony, he did not develop Eschelon's proposed rates based on  
21 averaging, but rather, only provides averages of rates set in states where Eschelon does  
22 business for purposes of comparison.<sup>36</sup> Qwest also claims that Mr. Denney "arbitrarily  
23 cut Qwest's proposed rate in half."<sup>37</sup> As Mr. Denney explains, however, he only cut

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<sup>35</sup> Qwest Corporation's Motion to Dismiss Rate Issues at 4.

<sup>36</sup> Surrebuttal Testimony of Douglas Denney at p. 145, lines 12-15.

<sup>37</sup> Qwest Corporation's Motion to Dismiss Rate Issues at 4.

1 Qwest's proposed rate in half if Qwest failed to provide *any* cost support for the proposed  
2 rate.<sup>38</sup> The Commission has held that it is Qwest's burden to prove its rates and Qwest  
3 has an obligation under to provide cost support for its proposed rates. Absent cost  
4 support, the Commission would be justified in setting a rate of zero for these elements  
5 unless and until Qwest can carry its burden. Thus, Eschelon's willingness to pay, on an  
6 interim basis, half of Qwest's proposed rate for these elements represents a compromise  
7 on the part of Eschelon.

8 Qwest has disputed that it failed to provide cost studies, claiming that "Qwest's  
9 records" show that studies were provided relating to ICDF Collocation (Issue 22-90(f)),  
10 Transfer of Responsibility (Access to Poles, Ducts, and Rights of Way) (Issue 22-90(k)),  
11 and Microduct Occupancy Fee (Issue 22-90(l)) were provide on August 18, 2006, March  
12 16, 2006, and March 16, 2006, respectively.<sup>39</sup> Mr. Denney's records, however, show that  
13 he did not receive anything from Qwest on March 16.<sup>40</sup> What Qwest provided on August  
14 18 was not a cost study, but a Qwest spreadsheet populated with rates for ICDF  
15 Collocation rates.<sup>41</sup> This study did not include any cost support for the rates listed.  
16 Further, for one of the elements – ICDF Collocation, DS1 Circuits – the non-recurring  
17 rate proposed by Qwest in Exhibit A in this case (\$395.07) is more than five times higher

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<sup>38</sup> Surrebuttal Testimony of Douglas Denney at p. 148, line 10-12.

<sup>39</sup> Qwest has not produced the "records" to which it refers. Mr. Denney noted Qwest's failure to provide cost studies, describing precisely which cost studies had not been provided, in his direct testimony that was filed in this case on November 8, 2006. *See* Direct Testimony of Douglas Denney at p. 202. Qwest has had ample opportunity since then to either provide these studies or provide evidence that they had already been provided. Had Qwest in fact provided these studies, it presumably would be able to point to some evidence of that; instead, Qwest relies on unsupported assertions contained in a legal brief.

<sup>40</sup> Affidavit of Douglas Denney at ¶ 2.

1 than the rate listed on the Qwest August spreadsheet for Arizona (\$75.83).<sup>42</sup> The  
2 recurring rate proposed by Qwest for this element (\$1.13) is more than 25% higher than  
3 the rate listed on the Qwest August spreadsheet for Arizona (\$0.86).<sup>43</sup> To the extent this  
4 information provided by Qwest shows anything, it shows that, at least for these elements,  
5 Qwest's proposed, unapproved rates exceed even Qwest's calculation of its costs.

6 **CONCLUSION**

7 For the foregoing reasons, Eschelon respectfully requests that Qwest's motion to  
8 dismiss rate issues be denied. Eschelon's proposed interim rates are properly raised in  
9 Eschelon's arbitration petition and are appropriately determined in this proceeding.

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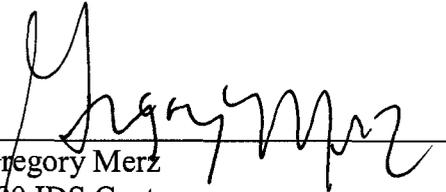
<sup>41</sup> Affidavit of Douglas Denney at ¶ 2, Ex. A.

<sup>42</sup> Affidavit of Dougals Denney, Ex. B.

<sup>43</sup> *Id.*

1 Dated: March 9, 2007

2 GRAY, PLANT, MOOTY, MOOTY  
3 & BENNETT, P.A.

4  
5  
6  
7 By: 

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32  
33 COUNSEL FOR ESCHELON TELECOM  
34 OF ARIZONA, INC.  
35

36  
37  
38 GP:2074835 v1  
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1                                   **BEFORE THE ARIZONA CORPORATION COMMISSION**

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MIKE GLEASON  
Chairman  
JEFF HATCH-MILLER  
Commissioner  
KRISTIN K. MAYES  
Commissioner  
WILLIAM MUNDELL  
Commissioner  
GARY PIERCE  
Commissioner

18 In the Matter of the Petition of                                    )  
19 Eschelon Telecom of Arizona, Inc. for                            )  
20 Arbitration with Qwest Corporation,                            )           Docket Nos. T-03406A-06-0572  
21 Pursuant to 47 U.S.C. Section 252 of the                        )                            T-01051B-06-0572  
22 Federal Telecommunications Act of 1996                        )  
23  
24

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25  
26                                   **AFFIDAVIT OF DOUGLAS DENNEY**

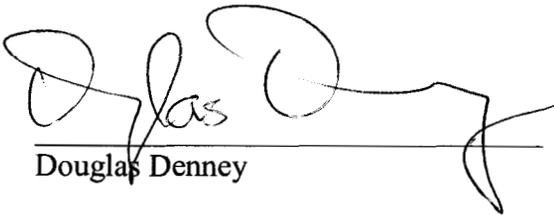
27  
28           Douglas Denney, upon being sworn, states as follows:

29           1.       I am employed by Eschelon Telecom, Inc., as Senior Manager of Costs  
30 and Policy and have submitted testimony in this case on a variety of issues presented in  
31 Eschelon Telecom of Arizona, Inc.'s petition for arbitration in the above-captioned  
32 matter, including with respect to interim rates proposed by Eschelon. I am submitting  
33 this affidavit in connection with Eschelon's opposition to Qwest's motion to dismiss the  
34 interim rate issues presented by Eschelon's petition.

35           2.       I have reviewed my records and, to the best of my knowledge, I did not  
36 receive cost studies from Qwest on March 16, 2006, as alleged by Qwest in support of its  
37 motion to dismiss, nor am I aware of such studies having been provided to anyone at

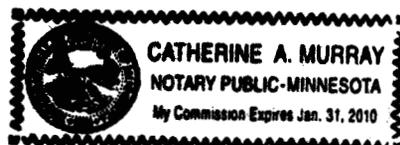
1 Eschelon. I did receive an email from Qwest on August 18, 2006, which attached a  
2 spreadsheet that listed purportedly cost-based rates for various ICDF Collocation rate  
3 elements the fourteen states in Qwest's ILEC territory. A copy of this spreadsheet is  
4 attached as Exhibit A. This spreadsheet is not a cost study. It does not provide any  
5 support for how the rates were calculated, nor has such support, to my knowledge, been  
6 provided to Eschelon.

7 3. The rates set out in the spreadsheet ICDF Collocation for DS1 Circuits are  
8 not the same as the rates that Qwest has proposed to charge. The rates that Qwest is  
9 proposing for this element are reflected on Exhibit A to the proposed interconnection  
10 agreement, the relevant page of which is attached as Exhibit B. The ICDF Collocation  
11 for DS1 Circuits element is listed at line 8.8.3. The non-recurring rate proposed by  
12 Qwest in this case (\$395.07) is more than five times higher than the rate listed on the  
13 spreadsheet for Arizona (\$75.83). The recurring rate proposed by Qwest for this element  
14 (\$1.13) is more than 25% higher than the rate listed on the spreadsheet for Arizona  
15 (\$0.86).

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Douglas Denney

Subscribed and sworn to before me this  
Ninth day of March, 2007.

  
Notary Public



ICDF 14 State Summary

AZ		CO		ID		IA		MN		MT		NE		NM		ND		OR		SD		UT		WA		WY		
9364	9365	9366	9367	9368	9369	9370	9371	9372	9373	9374	9375	9376	9377	9378	9379	9380	9381	9382	9383	9384	9385	9386	9387	9388	9389	9390	9391	
TELRIC + Common																												
\$2,345.76	\$2,426.42	\$2,171.94	\$2,239.65	\$2,269.27	\$2,048.13	\$2,219.13	\$2,230.05	\$2,152.03	\$2,204.17	\$2,178.09	\$2,259.59	\$2,222.52	\$2,222.52	\$1,661.96	\$16.86	\$20.84	\$17.80	\$20.08	\$19.00	\$17.96	\$21.13	\$18.13	\$21.18	\$20.29	\$19.70	\$17.66	\$19.84	\$14.25
\$75.83	\$79.96	\$71.59	\$73.84	\$74.93	\$66.21	\$73.30	\$73.53	\$71.07	\$71.26	\$71.69	\$74.58	\$73.83	\$73.83	\$54.52	\$0.86	\$1.03	\$0.91	\$1.02	\$0.90	\$0.90	\$1.08	\$0.92	\$1.07	\$1.01	\$0.99	\$0.91	\$1.03	\$0.83
\$1,304.51	\$1,321.08	\$1,182.27	\$1,218.70	\$1,232.69	\$1,138.99	\$1,205.11	\$1,213.31	\$1,168.92	\$1,225.77	\$1,187.47	\$1,228.04	\$1,199.14	\$1,199.14	\$909.49	\$8.37	\$10.49	\$8.91	\$10.06	\$9.50	\$8.96	\$10.56	\$9.08	\$10.63	\$10.13	\$9.88	\$8.81	\$9.92	\$8.20
\$261.48	\$264.81	\$236.98	\$244.28	\$247.09	\$228.31	\$241.56	\$243.20	\$234.31	\$245.70	\$238.02	\$246.16	\$240.36	\$182.30	\$2.21	\$2.60	\$2.25	\$2.53	\$2.39	\$2.34	\$2.86	\$2.65	\$2.28	\$2.65	\$2.48	\$2.24	\$2.48	\$2.48	\$2.09

Rate Elements

DS0 Circuit (per 200 legs) - Nonrecurring  
 DS0 Circuit (per 200 legs) - Recurring  
 DS1 Circuit (per 2 legs) - Nonrecurring  
 DS1 Circuit (per 2 legs) - Recurring  
 DS3 Circuit (per 2 legs) - Nonrecurring  
 DS3 Circuit (per 2 legs) - Recurring  
 Fiber Circuit (per 2 legs) - Nonrecurring  
 Fiber Circuit (per 2 legs) - Recurring



AFFIDAVIT OF SERVICE BY MAIL

STATE OF MINNESOTA    )  
  ) ss  
COUNTY OF HENNEPIN    )

Joyce Pedersen, being first duly sworn, deposes and says on oath that on the 9th day of March, 2007, she served the attached:

Eschelon Telecom of Arizona, Inc.'s Memorandum in Opposition to Qwest Corporation's Motion to Dismiss Rate Issues, and

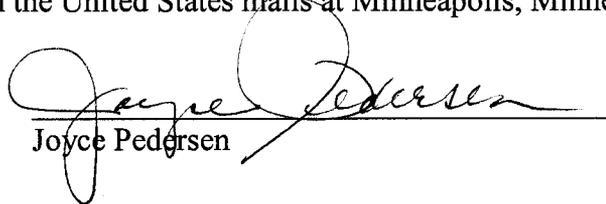
Affidavit of Douglas Denney

In re: *In the Matter of the Petition of Eschelon Telecom of Arizona, Inc. for Arbitration with Qwest Corporation, Pursuant to 47 U.S.C. Section 252 of the Federal Telecommunications Act of 1996*  
Docket Nos. T-034306A-06-0572 & T-01051B-06-0572

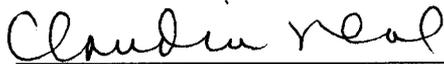
upon the following:

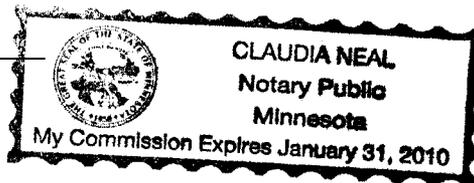
*See attached Service List*

by arranging for the deposit of a true and correct copy thereof in a sealed envelope duly addressed to the above, postage prepaid, in the United States mails at Minneapolis, Minnesota.

  
Joyce Pedersen

Subscribed and sworn to before me this  
9th day of March, 2007.

  
Notary Public:  
My Commission Expires:



Re: *In the Matter of the Petition of Eschelon Telecom of Arizona, Inc. for Arbitration with Qwest Corporation, Pursuant to 47 U.S.C. Section 252 of the Federal Telecommunications Act of 1996*

Docket Nos. T-034306A-06-0572  
T-01051B-06-0572  
Service List (11/28/06)

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

Lynn Farmer  
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