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BEFORE THE ARIZONA CORPORATION C
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2007 DEC -6 P 4: 18

AZ CORP COMMISSION
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IN THE MATTER OF THE APPLICATION
OF THE COMPLAINT OF ESCHELON
TELECOM OF ARIZONA, INC. AGAINST
QWEST CORPORATION

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

STAFF'S REPLY BRIEF

I. INTRODUCTION.

In this case, Qwest Corporation ("Qwest") denied Eschelon the ability to expedite an order to restore full working service to a facility which provides services 24/7 to approximately 3,000 disabled children and adults ("the Rehabilitation Center").¹ Despite Eschelon's repeated attempts to escalate the dispute within Qwest and obtain an expedite of its order to restore the line to the Rehabilitation Center, Qwest continued to deny Eschelon's request because Eschelon would not sign an Amendment to its Interconnection Agreement ("ICA").

Despite Eschelon having the ability to expedite under its current ICA, Qwest refused to expedite Eschelon's order because Eschelon would not sign an amendment to its ICA giving Qwest the right to charge Eschelon \$200 per day for expedites in the future. Qwest relies upon the Change Management Process ("CMP") to make material changes to CLEC affecting processes even though a CLEC's rights under its ICA are adversely affected.² But, when the CMP was in the process of being adopted, the parties recognized this possibility and included specific language in the CMP governing document to prohibit utilization of the CMP to trump or adversely affect a party's rights under its existing ICA.

This case is about not only a breach of Eschelon's ICA, but inappropriate use of the CMP to affect a material change to all CLEC's rights under their current ICAs with Qwest. The original expedite process worked the same for all CLECs. The Change Request by Covad would have

¹ See Genung Direct Test., Ex. S-1 at 2.

² The CMP was developed as a result of the Section 271 proceeding and provides a means for CLEC input into changes to Qwest's Operations Support Systems ("OSS") Interfaces, Products and Processes. Genung Direct Test., Ex. S-1 at 7-8.

OSRB

1 resulted in an additional expedite process for CLECs for a fee. As an additional process, its
2 implementation would have been consistent with Eschelon's ICA and the ICAs of other CLECs and
3 would have resulted in parity between them. Instead, Qwest attempted to substitute the process
4 requested by Covad for the prior process in use under its ICAs, which materially affected CLEC
5 rights under their ICAs.³

6
7 Finally, Staff's recommendations are reasonable and should be adopted by the Commission.
8 The Staff's recommendation regarding the expedite process is consistent with the interim process
9 adopted by the ALJ in this matter. Staff believes that the Commission should require Qwest to make
10 the interim expedite process adopted by the ALJ in this matter available for all CLECs in Arizona
11 until this matter is reviewed in Phase III of the Wholesale Pricing Docket.

12 **II. DISCUSSION.**

13 **A. Qwest's Arguments to the Contrary Notwithstanding, Qwest's Actions were** 14 **Inconsistent with its Current ICA with Eschelon.**

15 **1. The Parties' current ICA gave Eschelon the capability to expedite orders.**

16 Qwest's current ICA allowed Eschelon the capability to expedite orders and Qwest should
17 have honored Eschelon's requests to expedite. *No defense that Qwest offers in this case can*
18 *overcome this basic fact.*

19 To justify its refusal to expedite Eschelon's order, Qwest relies in its Brief upon several
20 provisions in its ICA with Eschelon which state that if a due date earlier than the standard due date
21 interval is requested by Eschelon, an expedite charge may apply.⁴ However even assuming that
22 Qwest was correct that it had the ability to charge Eschelon \$200.00 per day for every order in the
23 future under the current ICA, the record is uncontroverted that Eschelon offered to pay the \$200.00
24 fee in this instance and that Qwest still refused to expedite the order. Qwest still claimed that
25 Eschelon first had to execute a new Amendment to its ICA with Qwest before Qwest would expedite

26
27 ³ The Expedite Process is a procedure that is followed when a CLEC requests an earlier due date than the standard
28 interval from Qwest for the installation of wholesale products and services. See Genung Direct Test., Ex. S-1 at 6-7. The
original process only allowed emergency expedites for no fee. Covad's request would have provided a CLEC the ability
to request an expedite for non-emergency reasons for a fee.

⁴ See Qwest's Opening Post-Hearing Br. at 3.

1 any orders in the future, other than orders involving Qwest caused errors. Thus, the fact that there
2 was a provision in Qwest's current ICA with Eschelon which stated that an expedite charge may
3 apply, is no defense since Eschelon agreed to pay the fee Qwest requested, and Qwest still refused to
4 restore service under the current ICA.⁵

5 **2. Eschelon was entitled to have its Order expedited under the mutually**
6 **agreed upon process in affect under the Parties' ICA.**

7 Moreover, the parties had agreed upon a long-standing practice in effect between Qwest and
8 Eschelon for approximately 5 years where Qwest did not charge for emergency expedites, or what are
9 called "Expedites Requiring Approval." Qwest set forth the list of emergency conditions in its Brief:

- 10 "- Fire
11 - Flood
12 - Medical emergency
13 - National emergency
14 - Conditions where your end-user is completely out of service
(primary line)
15 - Disconnect in error by Qwest
16 - Requested service necessary for your end-user's grand opening
17 event delayed for facilities or equipment reasons with a future RFS
18 date
19 - Delayed orders with a future RFS date that meet any of the above
described conditions
20 - National Security
21 - Business Classes of Service unable to dial 911 due to previous
22 order activity
23 - Business Classes of Service where hunting, call forwarding or voice
24 mail features are not working correctly due to previous order activity
25 where the end-users business is being critically affected."⁶

19 Qwest explained in its Brief that the list "let the CLECs know when Qwest would accept and
20 when Qwest would reject a request for an expedite."⁷

21 Staff witness Genung testified that her review of the information provided by both Qwest and
22 Eschelon indicated that in her opinion Eschelon's customer met the "medical emergency" criteria.⁸
23 Qwest, on the other hand, relied upon information obtained "after the fact" to claim that no medical
24 emergency existed.⁹ Qwest incredibly argues in its Brief that the Rehabilitation Center "has no
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27 ⁵ Novak Direct Test., Ex. Q-5 at 12.

⁶ Qwest Opening Post-Hearing Br. at 6-7.

⁷ *Id.* at 7

⁸ Genung Direct Test., Ex. S-1 at 25.

⁹ Tr. at 429.

1 greater need for 911 service than any typical business.”¹⁰ Yet, a Qwest witness testified that there are
2 approximately two 911 calls per month from the facility.¹¹ In fact, during the T1 service outage,
3 Qwest testified that a client went into heart distress.¹² One of the Qwest witnesses also testified that
4 the exact impact of the T1 outage could not be determined with certainty and that the facility would
5 need to provide any further clarification on that issue.¹³

6 Qwest also argues that the facility did not qualify for a medical emergency because the
7 facility was still able to use their primary service and call 911.¹⁴ What Qwest fails to acknowledge,
8 however, is the fact that service to the individual rooms of the facility was disrupted by the T1
9 outage, and given the nature of the people served by the facility, the ability to dial 911 from the
10 individual rooms would be very important.

11 Qwest also alleges that Eschelon requested and actually drafted the letter from the
12 Rehabilitation Center which stated that the loss of the T1 facility created a medical emergency in the
13 Center’s opinion.¹⁵ But, there was absolutely no evidence produced by Qwest in the record to
14 suggest that Eschelon had authored the letter. Nor was there any evidence presented by Qwest that
15 the Center would sign or had signed a letter believing the contents of the letter to be false or untrue,
16 simply to obtain service faster when as Qwest would have one believe there was no medical
17 emergency.

18 Qwest further argues in its Brief that:

19 Eschelon never informed the Rehabilitation Center that it could request
20 and obtain an expedited order for a separate fee. [Cite omitted]. The
21 Center specifically stated that this is a fact they would have liked to
have known. [Cite omitted].¹⁶

22 But, it is immaterial whether Eschelon informed the Center that it could request and obtain an
23 expedited order for a separate fee since as already discussed above, Eschelon had offered to pay
24 Qwest the separate fee in this instance to have the order expedited without success. Qwest simply

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26 ¹⁰ Qwest Opening Post-Hearing Br. at 15.

27 ¹¹ Tr. at 431-432.

28 ¹² *Id.* at 431.

¹³ *Id.* at 472-474.

¹⁴ Qwest Opening Post-Hearing Br. at 15.

¹⁵ Qwest Opening Post-Hearing Brief at 15.

¹⁶ *Id.* at 16.

1 refused to expedite the order under any circumstance short of Eschelon signing a new amendment to
2 its ICA.

3 **3. Qwest's current ICAs did not support the \$200 charge for all expedites in**
4 **the future which is why Qwest needed to obtain an Amendment to its**
5 **Interconnection Agreement.**

6 Despite the above, Qwest argues that its actions were consistent with its current ICA.¹⁷
7 However, there are several other problems with this position. First, looking solely at the Eschelon
8 and Qwest ICA, that document required that the process be "mutually developed" by Qwest and
9 Eschelon. Substantial evidence in the record supports the fact that the process was not "mutually
10 developed" but was instead unilaterally imposed upon the CLECs by Qwest through the CMP. As
11 already discussed, there was a mutually agreed upon long-standing process already in place that
12 Qwest, Eschelon and other CLECs had been using.

13 Because of the significant and material changes imposed by Qwest to that process, Qwest had
14 to obtain amendments to its ICAs, not only with Eschelon, but with all CLECs in order to implement
15 those changes. If Qwest's position in this case was correct, Qwest could simply begin charging the
16 per day \$200.00 fee for all expedites. But, Qwest did not and could not do this, because the rate was
17 not contained in its ICAs. Thus, Qwest had to require each CLEC, including Eschelon, to sign an
18 amendment to their ICAs.

19 Eschelon wanted to stay with the current process available under its ICA. Because Eschelon
20 would not agree to sign the new agreement with Qwest, Qwest simply began denying all of
21 Eschelon's requests to expedite orders under its current ICA, which was inappropriate.¹⁸

22 Indeed, even Qwest appeared to recognize that the new process was inconsistent with its ICAs
23 in the following Company response dated July 15, 2005 to Eschelon's comments on Covad's Change
24 Request:

25 * * * *

26 **3. ...Qwest did not want to shut the door for its Interconnect**
27 **customers because of existing contractual obligations, so is offering**
28 **those customers two options:** 1) To be able to expedite without

¹⁷ Qwest Opening Post-Hearing Br. at 18.

¹⁸ Novak Direct Test., Ex. Q-5 at 7.

1 reason for a per-day improved rate, like the Retail and Access
2 customer, or 2) Continue with the existing process that is in place.”
(Emphasis added).

3 **B. Qwest has Completely Misconstrued Staff's Position on the Interrelationship of**
4 **the Expedite Process with the CMP Process in its Brief.**

5 In its Opening Post-Hearing Brief, Qwest completely misconstrued Staff's position on both
6 the Expedite Process and the CMP.¹⁹ Qwest states that “Staff claims that under the ICA, Qwest is
7 wedded to the Expedite Process in effect at the time Qwest and Eschelon entered into the ICA.”²⁰
8 But, this is not Staff's position. Qwest cited to testimony provided at the hearing by Staff which was
9 clarified on redirect.²¹ It is not Staff's position that the parties to an ICA are wedded to the expedite
10 process in existence at that time. It is Staff's position that the parties can agree to any changes to the
11 expedite process or any other process through the CMP or any other forum that they may choose. In
12 this case, there were many changes to the expedite process that were made over the years and agreed
13 to by both Qwest and the CLECs. Certainly those types of changes to the expedite process that are
14 agreed to by both parties are acceptable. But, in this case, the change that was imposed by Qwest
15 was not agreed to by all parties and adversely impacted CLEC rights under their existing ICA. The
16 CMP document itself provides that this is not allowed. This issue was debated extensively in the 271
17 workshops on the CMP. No party wanted or believed that the CMP process should affect their rights
18 under their existing ICAs with Qwest.

19 Further, as Ms. Genung pointed out in her testimony, the language that was inserted in the
20 CMP governing document on this point did not only cover direct conflicts with the ICA:

21 “Q. Does the CMP have complete authority in implementing changes?

22 A. No, the CMP document provides that ‘in cases of conflict between the changes
23 implemented through this CMP and any CLEC Interconnection Agreement
24 (whether based on the Qwest Statement of Generally Available Terms and
25 Conditions (“SGAT” or not), the rates, terms and conditions of such
26 Interconnection Agreement shall prevail as between Qwest and the CLEC
27 party to such Interconnection Agreement.

It also mentioned that ‘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,

28 ¹⁹ *Id.* at 26-27.

²⁰ *Id.* at 26.

²¹ Tr. at 595-598.

1 terms and conditions of such Interconnection Agreement shall prevail as
2 between Qwest and the CLEC party to such Agreement.”²²

3 **C. Qwest had Many Other Options Available to it Rather Than Unilaterally**
4 **Changing a Process which had a Material Impact upon CLECs under Their**
5 **Current ICAs.**

6 Qwest argues in its Brief that it is Staff’s position that “because Qwest expedited orders for
7 unbundled loops at no charge in the past, it was contractually obligated to continue to do so at no
8 charge until the ICA was amended.”²³ But this is not Staff’s position. Certainly, the ICA states that
9 Qwest “may” charge for expedites. But, Qwest had chosen not to charge for emergency expedites
10 under its current ICAs. For this reason, the record shows that there was no rate listed or contained in
11 its ICA with Eschelon, or other CLECs.

12 Notwithstanding, Qwest had several options available to it in this case. First, Qwest could
13 have worked with the CLECs and developed a process and a rate that was acceptable to all parties. It
14 still probably would have been necessary for Qwest to obtain an amendment to its ICAs, but with
15 CLEC agreement, this would not have been a problem. Second, Qwest could have implemented the
16 Covad Change Request consistent with what Covad intended, which was to develop a separate
17 process for expedites in non-emergency circumstances for a fee.²⁴ Such a process change would have
18 been consistent with all of Qwest’s current ICAs. Qwest had yet a third option. Qwest could have
19 asked the Commission in Phase III of the Wholesale Pricing docket to adopt a new fee for expedites.
20 In the Wholesale Pricing docket, the Commission, at Qwest’s request, approved an ICB rate for
21 expedites. Qwest could have petitioned the Commission to change the ICB rate to a fixed rate and
22 provided support for its contention that the rate should vary between design and non-design services.
23 But, again Qwest did not do this. Fourth, Qwest knowing that there was a problem, also could have
24 opted to come to the Commission under the Dispute Resolution provisions of the CMP. But Qwest
25 did not do this either. Instead, it resorted to a “self-help” remedy and simply stopped complying with
26 its ICAs for CLECs like Eschelon that would not sign the new agreement which would allow Qwest
27 to charge \$200.00 per day for expedites in the future.

28 ²² Genung Direct Test., Ex. S-1 at 9.

²³ Qwest Opening Post-Hearing Br. at 28.

²⁴ Genung Direct Test., Ex. S-1 at 29.

1 Qwest further argues in its Brief that the \$200.00 rate it had imposed was consistent with
2 industry practice.²⁵ But this is dubious. In looking at a recent order of the North Carolina
3 Commission, regarding the \$200.00 BellSouth proposed to charge at the time, that Commission
4 stated in part:

5 As noted by the Public Staff in its proposed order, the \$200 per circuit,
6 per day rate from BellSouth's federal access tariff that BellSouth
7 proposes as its rate to the Joint Petitioners is the rate BellSouth charges
8 its large retail customers. However, there is no cost support for the
9 rate.²⁶

10 Unlike Qwest's per day charge, Bellsouth's proposal in North Carolina was a per circuit
11 charge. And the Minnesota Commission declined to accept Qwest's proposed \$200.00 rate and
12 instead referred the matter to its pending TELRIC pricing docket.²⁷ In Minnesota, Eschelon
13 proposed a \$100.00 interim rate which is the same rate it is proposing on an interim basis in its
14 arbitration with Qwest in Arizona. Staff's Initial Brief at page 17 was not intended in any way to
15 imply that a \$200 per day charge, even on an interim basis would be appropriate.

16 **D. The CMP does not Justify Qwest's Actions.**

17 Qwest believes that the CMP process justifies its actions in this case.²⁸ It argues in its Brief
18 that "[t]he parties course of performance in using CMP to 'develop' processes shows the intent to
19 develop contractual rights in the CMP."²⁹ But, as discussed above, this is contradicted by the CMP
20 document itself. The parties developed the CMP process as part of the 271 workshop process and
21 specifically agreed that the CMP would not be used to develop contractual rights, unless parties
22 agreed to any changes which would affect their rights under their existing ICAs. So it is just plain
23 wrong on Qwest's part to suggest that the use of CMP "shows the intent to develop contractual rights
24 in the CMP."

25 While the CMP process was not in place at the time the Eschelon-Qwest ICA was adopted,
26 Qwest argues that the parties' course of dealing over the past few years was to use the CMP for the

27 ²⁵ Qwest Opening Post-Hearing Br. at 16.

²⁶ *Re NewSouth Communications Corp.*, 2005 WL 707683 (N.C.U.C.) Docket No. P-772 et al. (February 8, 2006).

²⁷ *In the Matter of Qwest's Application for commission Review of TELRIC Rates*, et al., 2007 WL 1804383
(Minn.P.U.C.), P-421/AM-06-713 et al (March 30, 2007).

²⁸ Qwest Opening Post-Hearing Br. at 31.

²⁹ *Id.*

1 “mutual development” of process changes.³⁰ This sleight of hand by Qwest does not justify its
2 actions in this case. The ICA provides that the expedite process provided for in the Eschelon-Qwest
3 ICA is to be “mutually developed”. Qwest imports this critical language from the ICA and attempts
4 to equate it with the CMP process. But, as this case demonstrates, the CMP process has aspects to it
5 where processes are not “mutually developed.” In this case the changes to the process were
6 unilaterally developed by Qwest and unilaterally imposed upon Eschelon without its consent. Other
7 CLECs expressed confusion about the meaning of the various amendments. Qwest witnesses
8 acknowledged that other CLECs may have been confused as well.³¹

9 Further, Qwest discusses at length in its Brief the meaning of “mutually developed.”³² It is
10 interesting to note that its discussion focuses solely upon the term “develop” versus “agree.”³³ Qwest
11 virtually ignores the term “mutually” in its whole discussion of this issue.³⁴ Black’s Law Dictionary
12 defines “mutual” as:

13 Common to both parties. Interchangeable; reciprocal; each acting in
14 return or correspondence to the other; given and received; - spoken of
15 an engagement or relation in which like duties and obligations are
exchanged.

16 In addition, it is interesting that Qwest relies upon course of dealing to establish that the
17 process was “mutually developed” but criticizes Staff when it suggests that there was a course of
18 dealing between the parties with respect to the expedite process itself.³⁵ Qwest relies upon Section
19 34.2 of the ICA to attempt to undercut Staff’s course of dealing arguments. Section 34.2 of the ICA
20 states “No course of dealing or failure of either Party to strictly enforce any term, right or condition
21 of this Agreement in any way shall be construed as a general waiver or relinquishment of such term,
22 right or condition.”³⁶ But this provision could easily undercut Qwest’s course of dealing arguments as
23 well. Qwest is trying to suggest that the contract’s provisions requiring the “mutual development” of
24 an expedite process have been replaced by the parties’ use or course of dealing involving CMP.

25
26 ³⁰ *Id.*

³¹ Tr. at 367.

³² Qwest Opening Post-Hearing Br. at 24.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 28-30.

³⁶ Qwest Opening Post-Hearing Br. at 29.

1 However, to the extent that CMP does not result in the “mutual development” of an expedite process
2 (such as this case) Eschelon is being asked to waive or relinquish that right under its ICA, which
3 Section 34.2 prohibits.

4 On the other hand, Staff’s course of dealing argument do not in any way result in a general
5 waiver or relinquishment of Qwest’s ability to charge under the ICA. As discussed above, Qwest
6 had several options in this regard, but failed to utilize any of them. It could have mutually developed
7 a process that was acceptable to Eschelon. It could have used the CMP to implement changes, but
8 did not have the right to “require” CLECs to sign an amendment for a material change to the process,
9 without their understanding and agreement. It surely did not have the right to say “sign or no more
10 expedited orders” as it did in Eschelon’s case. Qwest also could have proposed this change in Phase
11 III of the Wholesale Pricing Docket.

12 **E. The Provision of Expedites is Not a Superior Service as Qwest Argues.**

13 Since the last Wholesale Pricing Docket, Qwest has apparently changed its position, and now
14 argues that the provision of expedites is a superior service and as such the Commission has no
15 jurisdiction over the rate that Qwest can charge.³⁷

16 In its Brief, Qwest relies upon a decision of the Kentucky Public Service Commission and the
17 Florida Public Service Commission to support its position that providing expedited due dates is a
18 superior service.³⁸ But there is authority against Qwest’s position also.

19 The North Carolina Utilities Commission, when presented with the same issue, held as
20 follows:

21
22 The Commission does not believe that BellSouth provided any new or
23 compelling arguments which warrant a change in the Commission’s
24 decision on this issue. The Commission continues to agree with the
25 Public Staff that, if technically feasible, an ILEC should provide a CLP
26 with access to UNEs at least equal in quality to that which the ILEC
27 provides to itself. The Commission also believes that expediting
28 service to customers is simply one method by which BellSouth can
provide access to UNEs and that, since Bellsouth offers service
expedites to its retail customers, it must provide service expedites at
TELRIC rates pursuant to Section 251 and Rule 51.311(b). As noted

37 *Id.* at 38.

38 See *In re New South Communications Corp.*, 2006 WL 1520259, Ky. P.S.C., No. 2004-00044, ID 148419, (March 14, 2006); See also, *In re New South Communications Corp.*, 2005 WL 3071262, Fla.P.S.C., No. 040130-TP, PSC-05-1136-PCO-TP, (November 10, 2005).

1 by the Public Staff in its proposed order, the \$200 per circuit, per day
2 rate from BellSouth's federal access tariff that BellSouth proposes as
3 its rate to the Joint Petitioners is the rate BellSouth charges its large
4 retail customers. However, there is no cost support for the rate. Based
5 upon the foregoing, the Commission finds it appropriate to uphold the
6 RAO in this regard.³⁹

7 In addition, earlier this year the Minnesota Public Utilities Commission found:

8 In arguing that expediting a UNE is a 'superior service' which Qwest is
9 not obligated to provide at cost – Qwest misapplies a term of art. As
10 noted above, the 8th Circuit and the FCC concluded that the 1996 Act
11 does not provide a basis for the FCC to require ILECs to offer
12 'superior' service – that is, to build facilities for CLECs if the ILEC
13 would not build comparable facilities for itself. In contrast to those
14 circumstances, Qwest not only provides expedited service for itself,
15 Qwest offers the service to others on its tariff. The concerns articulated
16 by the 8th Circuit and the FCC regarding 'superior service' have no
17 relevance to this issue. Based on the arguments of the arbitrators and
18 Eschelon, the Commission finds no legal prohibition on directing
19 Qwest to provide expedited services at cost-based rates. To the
20 contrary, the Commission finds that it is compelled to do so.⁴⁰

21 Staff's position is consistent with the conclusions of the North Carolina and Minnesota
22 Commissions. The Commission should reject Qwest's position that expedites are a "superior
23 service."

24 **F. Qwest's Justifications for the Process Change Fall Short and are not Supported
25 by the Record.**

26 Qwest argues in its Brief that its changes to the expedite process were necessary for several
27 reasons. First, Qwest argues that Eschelon is merely seeking special treatment for itself.⁴¹ But Staff
28 does not accept this argument. It is Qwest that designed the new process, not Eschelon. Eschelon is
29 merely trying to get the benefit of its current ICA with Qwest. Qwest's statement that "CLECs
30 across the region and 14 CLECs in Arizona have adopted the unbundled loops expedite terms that
31 Qwest and the CLECs developed in CMP," is hardly a ringing endorsement of the process. The
32 record indicates that the old process continues in effect in Washington state.⁴² Qwest's tariff for the

33 ³⁹ *Re NewSouth Communications Corp.*, 2006 WL 707683 N.C.U.C., Docket No. P-772 et al. (February 8, 2006).

34 ⁴⁰ *In the Matter of Qwest's Application for Commission Review of TELRIC Rates et al.*, 2007 WL 1804383
(Minn.P.U.C.) Case No. P-421/AM-06-713 et al. (March 30, 2007)

35 ⁴¹ Qwest Opening Post-Hearing Br. at 33.

36 ⁴² Tr. at 307-308.

1 new rate was withdrawn, however, the reason for its withdrawal is not clear.⁴³ In addition, the record
2 indicates that some CLECs in Arizona were confused by the process change and otherwise did not
3 agree with it.⁴⁴

4 Qwest also argues in its Brief that the requirement for CLECs to sign an ICA amendment was
5 to ensure parity between customers.⁴⁵ Qwest refers to testimony by Qwest witness Martain which
6 provided that a failure to implement one uniform process for all unbundled loops created an incentive
7 to game the system and that a new system was needed because CLECs were abusing the current
8 process.⁴⁶ But as discussed in Staff's Initial Brief, the process ultimately devised by Qwest still
9 allows all POTS or non-design customers to get expedites for free. And, Ms. Martain conceded on
10 cross-examination, that the ability to game or for abuse under the system was no greater for non-
11 design services than design services.⁴⁷ Yet Qwest designed the system itself so that design services
12 paid \$200.00 for every expedite and non-design services continued to get emergency expedites for
13 free. Thus, it is difficult to see how Qwest's changes were designed to stem abuse under the old
14 system.

15 Third, Qwest argues that the two different process (*devised by Qwest*) created the potential for
16 foul play and claims of discrimination.⁴⁸ Qwest supported this with the claim that it had transitioned
17 all of its retail customers, wholesale customers, and interexchange carrier customers to the Pre-
18 Approved Expedite Process.⁴⁹ Yet when presented with a similar argument the Minnesota
19 Commission stated:

20
21 Qwest argues that it refrains from discriminating in the provision of
22 expedited access to CLECs. In support of this argument, Qwest invites
23 the Commission to compare the price Qwest charges CLECs at
24 *wholesale* to the \$200 retail price it charges its own customers at *retail*.
25 But the law bars Qwest from discriminating in the wholesale market
specifically – that is, from imposing different terms and conditions for
expedited service on different telecommunications carriers, [footnote
omitted] including itself. [footnote omitted]. Qwest must provide
UNEs to CLECs on the same terms and conditions that it provides them

26 ⁴³ *Id.*

⁴⁴ See Staff's Post-Hearing Br. at 27-29.

⁴⁵ Qwest Opening Post-Hearing Br. at 33.

⁴⁶ *Id.* at 33 and 10.

⁴⁷ Tr. at 372-375.

⁴⁸ Qwest Opening Post-Hearing Br. at 10.

⁴⁹ *Id.*

1 to its own retail operations, [footnote omitted] regardless of what it
2 charges its retail customers. And the cost Qwest bears to provide
3 expedited access to UNEs for its retail customers is simply the cost of
expediting the service. This is also the cost that CLECs should bear to
expedite access for their customers.⁵⁰

4 Qwest's arguments do not support the changes it made to the expedite process or the method
5 Qwest employed in making those changes.

6 **G. Staff's Conditions are Reasonable.**

7 For the reasons discussed in Staff's Initial Brief, Staff's proposed conditions are reasonable.
8 Staff provides further comment on only one of its recommendations herein because of arguments
9 contained in Qwest's Opening Brief. Qwest argues that Staff is attempting to use this complaint case
10 to obtain relief not only for Eschelon but for the entire CLEC community.⁵¹ This is true, in part only.

11 In Staff's view, there are two issues raised by the Complaint. The first issue is whether
12 Qwest breached its ICA with Eschelon. For this issue, the relief Staff seeks is narrowly tailored to
13 Eschelon. The second issue in Staff's opinion however, is whether Qwest's use of the CMP process
14 was appropriate. For this issue, the relief sought by Staff was necessarily broader because all CLECs
15 were impacted by Qwest's use of the CMP process on this issue. In addition, Qwest is the party that
16 created all of the problems to begin with since it was solely responsible for the changes to the
17 expedite process. Qwest unilaterally changed the expedite process through the CMP which was in
18 effect for all CLECs. The change materially changed the CLECs' rights under their current ICAs.
19 The CMP prohibits changes which affect or narrow a parties' existing rights under their ICAs. Staff
20 does not believe that it is necessary to evaluate the facts that pertain to a specific CLEC or review the
21 specific CLEC's interconnection agreement as Qwest asserts. Because, the fact is, Qwest changed
22 the process for all CLECs when it did not have the right to do so. Qwest had many other options
23 available to it, but unfortunately it did not avail itself of those.

24 Further the relief requested by Eschelon provided for such other relief as the Commission
25 deems appropriate. And, it is clear that this case involves not only the issue of Qwest's breach of the
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28 ⁵⁰ *In the Matter of Qwest's Application for Commission Review of TELRIC Rates Pursuant to 47 U.S.C. Section 251,*
2007 WL 1804383 (Minn.P.U.C.), No. P-421/AM-06-713 et al (March 30, 2007).

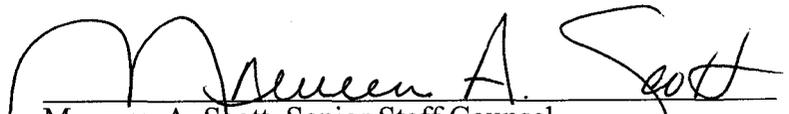
⁵¹ Qwest Opening Post-Hearing Brief at 41.

1 Eschelon ICA but also the CMP process itself and whether Qwest complied with the process
2 approved by the Commission as part of the Section 271 proceeding.

3
4 **III. CONCLUSION.**

5 Staff respectfully requests that the Commission adopt Staff's recommendations herein,
6 including putting in place on a permanent basis the interim relief adopted by the ALJ in this Docket
7 pertaining to the expedite process for all CLECs.

8 RESPECTFULLY SUBMITTED this 6th day of December, 2007.

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10 
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