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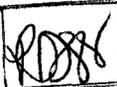
**IN THE MATTER OF THE COMPLAINT OF  
ESCHELON TELECOM OF ARIZONA, INC.  
AGAINST QWEST CORPORATION**

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

**QWEST CORPORATION'S  
RESPONSE TO POST-HEARING  
BRIEFS OF ESCHELON AND STAFF**

Arizona Corporation Commission  
**DOCKETED**

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## I. INTRODUCTION

Eschelon Telecom of Arizona ("Eschelon") and the Commission Staff ("Staff")'s post-hearing briefs do not present any persuasive arguments against the fundamental truth that the record demonstrates: Qwest Corporation ("Qwest") has acted in accordance with the Eschelon interconnection agreement ("ICA") and the Commission-approved Change Management Process ("CMP" or "Change Management"). Eschelon and Staff's complaint is not really with the ICA; rather, Eschelon does not like the fact that in this one, limited circumstance Change Management did not work to the exclusive benefit of Eschelon and Staff hypothesizes that it did not work to the exclusive benefit of other CLECs as well. As a result, Eschelon and Staff now claim the system is broken. This is the equivalent of claiming the Constitution is broken because it does not prohibit flag burning.

The facts show that there was neither a breach of ICA nor a breakdown of CMP. Eschelon has proposed hundreds of changes in CMP, 82% of which were developed into active processes. Qwest has a history of working with the CLEC industry in CMP. The telecommunications industry in Qwest's 14-state region has used Change Management to create uniform processes that work exceedingly well. The audited data from Commission-approved performance measures show these processes have helped Qwest deliver uniformly positive service to the CLEC community over the last several years. The process is not broken simply because Qwest can use CMP to institute process changes too.<sup>1</sup>

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<sup>1</sup> Staff makes the radical recommendation that CLECs should demand that all processes be included in the ICAs going forward so that the processes cannot be modified in Change Management. This position ignores history. This is where the industry started shortly after passage of the 1996 Act. Many ICAs were different and had different requirements and different processes. This made it exceedingly difficult for Qwest to perform at an acceptable level of quality. It could not create uniform processes for the industry. This very issue drove the CLEC community to demand CMP. CMP has worked very well; the facts make this point plain. To knee jerk back to the past because CMP worked to Eschelon's disadvantage one time is shortsighted and will cause far more damage than good.

Indeed, Eschelon itself used Change Management to help develop the subject “Expedites and Escalations Process” (hereinafter “Expedite Process”) in conformance with their ICA.<sup>2</sup> Here, Qwest modified the Expedite Process in CMP to ensure it could get paid for delivering expedited due dates to CLECs, including Eschelon. Eschelon is attempting to argue that the free expedites Qwest historically provided in emergency conditions should bind Qwest now that Qwest is making expedites available for non-emergency conditions. Eschelon’s position directly contradicts (1) the express language of the ICA, (2) Eschelon’s own interpretation of the ICA, and (3) the facts that show Eschelon has always had the capability to expedite but Eschelon chose not to institute the current process because it did not want to pay the fee contemplated in the ICA. Thus the essence of Eschelon’s complaint is: Eschelon does not want to pay for expedites even though the ICA states on three separate occasions that “expedite charges may apply.” The sky is not falling as Eschelon suggests; to the contrary, it is long past time that Eschelon starts paying Qwest for the expedites Qwest provides. Qwest respectfully requests that the Commission find in all respects for Qwest, reject the allegations in Eschelon’s complaint, and reject the recommendations that Staff proposes.

## II. ARGUMENT

Qwest addressed most of the arguments raised by Eschelon and Staff in Qwest’s Opening Post-Hearing Brief and therefore incorporates that brief by reference here to avoid repetition. At the outset, however, it is critical to note that Eschelon’s Opening Brief exaggerates and

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<sup>2</sup> Eschelon recommended and obtained changes in Version 22 of the Expedites Process. *Jill Martain Transcript at 330:21-331:5; 411:18-23*. Eschelon tries to claim that it did not change the process, but simply documented an undocumented process. This is faulty and Eschelon knows it. Documenting an undocumented process is a Level 2 change. Version 22 went through as a Level 3 Change, meaning it added changes to a process that had a moderate effect on CLEC operating procedures. Thus, by definition, Eschelon added to, modified and enhanced the Expedites process in Change Management. This is additional evidence that the parties used CMP to mutually develop the expedite process.

completely misstates many facts.<sup>3</sup> To respond to each factual inaccuracy in Eschelon's 125+ pages of brief and tables is not feasible or even necessary, because Qwest's Opening Brief states the facts correctly, with specific citations to the record in support. Therefore, to the extent specific factual inaccuracies are not addressed in this brief, Qwest relies on its statement of the correct facts in its Opening Brief and on the record in this case.

**A. Qwest Continues to Provide the Capability to Expedite Service Orders for Unbundled Loops Despite Eschelon and Staff's Arguments to the Contrary.**

To assert breach of contract, Eschelon and Staff argue that Qwest breached Section 3.2.2.13 of the ICA because Version 30 of the Expedite process denied Eschelon the "capability to expedite a service order." Eschelon Brief at 24-32. The specific provision on which Eschelon bases this argument reads as follows:

3.2.2.13 Expedites: U S WEST shall provide CO-PROVIDER the capability to expedite a service order. Within two (2) business hours after a request from CO-PROVIDER for an expedited order, U S WEST shall notify CO-PROVIDER of U S WEST's confirmation to complete, or not complete, the order within the expedited interval.

*Eschelon ICA (Incorporated into the record by reference but no Exhibit No. given; hereinafter Exhibit C-1 (Contract 1)) at Attachment 5.* Eschelon and Staff argue the development of Version 30 contravened this section because Eschelon can no longer expedite orders for unbundled loops. In actuality, that means Eschelon cannot do so unless it pays the fee.

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<sup>3</sup> Some of the factual inaccuracies are identified specifically in the substance of the brief. However, one assertion bears special mention. Eschelon speculates, without any evidence at all, that the true reason Qwest instituted the Pre-Approved Expedite Process in Version 11 was to create parity across product lines. Eschelon Brief at 5-7. To get to this erroneous position, they ask the Commission to find that Renee Albersheim and Jill Martain of Qwest were both less than candid in their testimony. To make such an outrageous accusation, they need much more than their rank speculation. For another instance, Eschelon asserts that Qwest does not expedite orders for unbundled loops (e.g., Eschelon Brief at 18-19, asserting that previously Eschelon could obtain expedites at no charge when emergency conditions were met, including for unbundled loop orders (DS0 and DS1), and after Versions 27 and 30, Eschelon cannot "because Qwest rejects those orders"); the record shows instead that Qwest in fact does continue to expedite orders for unbundled loops when Qwest has disconnected in error at no charge. *Renee Albersheim Transcript at 279:16-25.*

Based on the unambiguous<sup>4</sup> language of the ICA, to which the Commission must give effect as written (*see* Eschelon Brief at 30, n. 145, citing *e.g.*, *Hadley v. Southwest Properties, Inc.*, 116 Ariz. 503, 506, 570 P.2d 190, 193 (1977)), Qwest still provides the capability to expedite unbundled loops. Reading this provision in light of the other provisions of the contract, as the Commission must,<sup>5</sup> the ICA unambiguously states that the expedite process is subject to development by the parties and that Qwest can charge for expedites: therefore, making Version 30 available for Eschelon to opt into satisfies the 3.2.2.13 obligation. Specifically, the section immediately preceding it states that the parties will “mutually develop” expedite procedures:

3.2.2.12 Expedite Process: U S WEST and CO-PROVIDER shall mutually develop expedite procedures to be followed when CO-PROVIDER determines an expedite is required to meet subscriber service needs.

*Id.* Eschelon admitted the expedite process was not static and can change through mutual development. *Doug Denney Transcript at 132:3-133:12*. Qwest’s Opening Brief explained at length that Version 30 was mutually developed in CMP and indeed that all processes developed in CMP are mutually developed – it is the very nature of CMP.

Likewise, several provisions in close proximity to 3.2.2.13 expressly allow Qwest to charge fees for expedites:

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<sup>4</sup> Staff claims that Qwest acknowledges the ICA is ambiguous on the process to use for developing expedites, but this mischaracterizes Qwest’s arguments. The ICA’s terms are clear and unambiguous: Section 3.2.2.12 provides that the parties will mutually develop expedite procedures; Section 3.2.2.13 provides that Qwest will provide capability to expedite and notify whether it will complete requested expedites; and several sections provide that “expedite charges may apply.” There is nothing ambiguous about these terms; the evidence shows that CMP is the location where the processes are mutually developed. *See, e.g., Bonnie Johnson Transcript at 31:23-32:20*.

<sup>5</sup> *Kirkeby-Natus Corp. v. Kramlich*, 470 P.2d 696, 701 (Ariz. Ct. App. 1970) (“A particular clause in a contract cannot be interpreted as if it stood by itself, but the court must take into consideration the entire contract,” internal quotation marks omitted); Restatement (2<sup>nd</sup>) of Contracts §203(a) (“an interpretation which gives a reasonable, lawful, and effective meaning to all the terms is preferred to an interpretation which leaves a part unreasonable, unlawful, or of no effect”). *See also* Eschelon Brief at 31 n.150 (“contract should be interpreted, when possible, to give effect to all of its provisions,” citing *inter alia, Allen v. Honeywell Retirement Earnings Plan*, 382 F. Supp. 2d 1139, 1165 (D. Ariz. 2005)).

3.2.4.2.1 If CO-PROVIDER requests a due date earlier than the standard due date interval, then *expedite charges may apply*.

3.2.4.3.1 If CO-PROVIDER requires a due date earlier than the U S WEST offered due date and U S WEST agrees to meet the CO-PROVIDER required due date, then that required due date becomes the committed due date and *expedite charges may apply*.

3.2.4.4 Subsequent to an initial order submission, CO-PROVIDER may request a new/revised due date that is earlier than the committed due date. If U S WEST agrees to meet that new/revised due date, then that new/revised due date becomes the committed due date and *expedite charges may apply*.

*Exhibit C-1* (emphasis added). These provisions state that the parties intended to develop the procedures for expediting service orders that allowed Qwest to charge unspecified fees for performing expedites.<sup>6</sup>

As Qwest's Opening Brief shows in greater detail, Qwest met its obligations both before and after January 2006: Qwest mutually developed with Eschelon the expedite procedures to follow (in CMP), and Qwest has always provided Eschelon the capability to expedite service orders. Beginning with Version 30 of the expedite process, Eschelon has simply chosen to not avail itself of that capability – and its only stated reason for that course of action is it wants expedites for free. Yet neither Eschelon nor Staff can point to any provision in the contract that limits the “expedite charges [that] may apply.” Accordingly, Eschelon has not met its burden of proving a breach of contract.

This is true even if the Commission were to believe that the ICA is ambiguous in some regard. To the extent the ICA has ambiguous terms, then the Commission must construe it in accordance with the evidence of the parties' intent. *Leikvold v. Valley View Community Hosp.*, 688 P.2d 170, 174 (Ariz. 1984) (construe ambiguous term based on extrinsic evidence of intent

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<sup>6</sup> Eschelon argues that Section 1.1 of Attachment 1 to the ICA mandates TELRIC pricing for expedites; that is not the case. That section merely refers to the Act generically. Moreover, it does not mention expedites or expediting due dates at all.

to determine the real meaning); *Associated Students of University of Ariz. v. Arizona Bd. of Regents*, 584 P.2d 564, 568-569 (Ariz. Ct. App. 1978) (court adopts the parties' construction of ambiguous contract unless it does violence to the express language of the contract); *Dobrota v. Free Serbian Orthodox Church "St. Nicholas"*, 952 P.2d 1190, 1196-1197 ¶30 (Ariz. Ct. App. 1998) (adopt parties' understanding of contract unless it contradicts the express language of the contract). The parties' intent is plain from their participation in CMP to have the expedite process developed over time through CMP. Eschelon acknowledged CMP is the place where the parties develop processes. ***Bonnie Johnson Transcript at 31:23-32:20 & 36:10-38:1.***

In contrast, Eschelon and Staff's arguments depend on unreasonable interpretations of the clause in 3.2.2.13. Their interpretations are unreasonable because they ignore the parties' plain intent demonstrated in the express terms of the ICA. Specifically, Eschelon and Staff's interpretations:

- (1) ignore that the ICA says the parties will mutually *develop* the expedite process, and that they did so through CMP;
- (2) would require Qwest to provide expedites on each and every type of service order, each and every time Eschelon requests one; and
- (3) would require (according to Staff) that Qwest to do so without charge until the ICA terminates (Staff Brief at 10-11), or according to Eschelon, without charge until Eschelon agrees to the price.

Each of these arguments is baseless as Qwest shows below.

1. ***The Commission Should Interpret the ICA's Requirement of "Mutually Developing" the Expedite Process as Satisfied by Development in CMP.***

The CMP satisfies the "mutual development" required in Section 3.2.2.12.

The controlling rule of contract interpretation requires that the ordinary meaning of language be given to words where circumstances do not show a different meaning is applicable. ... A contract must be construed so that every part is given effect, and each section of an agreement must be read in relation to each other to bring harmony, if possible, between all parts of the writing. ... As a corollary, the court will not construe one provision in a contract so as to render another provision meaningless. ... The court must apply a standard of reasonableness in contract interpretation.

*Chandler Medical Bldg. Partners v. Chandler Dental Group*, 175 Ariz. 273, 277 (Ariz. Ct. App. 1993) (citations omitted; construed contract term "obligate" by use of Black's Law Dictionary definition).

In this case, the parties did not intend for "mutually develop" to mean that both parties would *agree* with the final outcome, because elsewhere in the ICA the parties expressly stated that they would "mutually develop and agree," "mutually agree" or that they would "agree." ***Renee Albersheim Direct at 188:8-0189:23*** (over 80 provisions in the ICA state that the parties would agree). Thus the express language of the ICA shows the parties distinguished between mutually developing and mutually agreeing, in accordance with the common meaning and of the word "development." See Qwest Opening Brief at 22-26. The facts show that in every instance that the ICA provides for development of processes, the parties did so in CMP. ***Exhibits Q-20, 21, 22 & Q-24; see generally Bonnie Johnson Transcript at 56:16-63:13.*** Indeed, Eschelon admits "Qwest requires" development of "changes to go through change management." ***Id. at 61:15-63:13.***

Eschelon's primary argument against CMP having satisfied the "mutual development" of the expedite process is essentially that instead of being a mutual process for changes in

procedures, the only 'mutual' aspect in CMP is that the industry developed the CMP procedures. Eschelon Brief at 26-29. Despite CMP being industry-developed, and despite CMP's elaborate provision for CLEC input and dialogue with Qwest concerning proposed changes, Eschelon asserts that CMP allows Qwest to unilaterally push through changes. This position is contravened by the CMP document itself, and Eschelon's own testimony which shows the many different ways it can participate and effect changes in CMP. The CMP document itself gives CLECs many opportunities to participate. Indeed, Eschelon's record for using CMP to effect change is staggering. Eschelon has been a long-time, active participant in CMP, and due to the fact that Qwest has adopted many of Eschelon's proposed changes through CMP (*Jill Martain Transcript at 327:1-328:4*), Eschelon's assertions of unfairness and lack of mutual participation do not ring true. Rather, this appears to be plain opportunism.<sup>7</sup>

Staff meanwhile argues that CMP was irrelevant to the expedite process between Qwest and Eschelon, because Staff views the issue as one to be determined statically based on the procedures and charges in effect at the time (the year 2000) that Eschelon opted into the ICA. *I.e.*, Staff claims that "Qwest should have waited until the current ICA with Eschelon expired" before moving away from providing emergency expedites for free. Staff Brief at 18 & 20-21. In other words, Staff claims that – even though the current ICA allows development and even

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<sup>7</sup> Staff appears to share in Eschelon's view that CMP did not result in mutual development at least as to Versions 27 and 30, because the final outcome did not change based on comments received from CLEC's on the notice. Staff Brief at 21-22. This position ignores the fact that mutual development often has some party or parties disagreeing with the final outcome. If CMP had to wait for everyone to agree, many issues would never be resolved. Moreover, this argument ignores that the CLECs – including Eschelon – chose not to pursue the CMP procedures in place for formally objecting and giving further input into the change. *Jill Martain Transcript at 335:44-336:2* (after the ad hoc call for Version 30, no one raised any additional issues; no one asked to change implementation; no one sought escalation; no one sought postponement; no one sought dispute resolution). Eschelon claims this complaint case is dispute resolution brought under the CMP; however, that is impossible because the procedures for following dispute resolution in CMP were not followed. *Jill Martain Transcript at 392:10-394:17*. Instead, this is a complaint case for breach of contract.

though it gives Qwest the right to charge for expedites – because Qwest had given away expedites in the past, it was duty-bound to continue with this process throughout the duration of the ICA. For this proposition, Staff does not cite a single case. This is not surprising as the position is contrary to the law and contrary to the view of both parties. *See, e.g., Doug Denney Transcript at 132:3-133:12.*

Staff's argument ignores that the Commission must accept the parties' interpretation unless it does violence to the express language. *Associated Students*, 584 P.2d at 568-569 (court adopts the parties' construction of ambiguous contract unless it does violence to the express language of the contract); *Dobrota*, 952 P.2d at 1196-1197 (same). Staff's position is also contrary to the law because Staff turns to pre-contract practices instead of the most important extrinsic evidence of the parties' intent: their interpretations in performing the ICA prior to the dispute:

[E]xpress terms are given greater weight than course of performance, course of dealing, and usage of trade, ***course of performance is given greater weight than course of dealing or usage of trade***, and course of dealing is given greater weight than usage of trade.

Restatement (2<sup>nd</sup>) of Contracts § 203(b) (emphasis added). *See, e.g., Crone v. Amado*, 69 Ariz. 389, 397-398 (Ariz. 1950) (construing contract according to the parties' interpretation prior to dispute arising); *Associated Students of University of Ariz. v. Arizona Bd. of Regents*, 584 P.2d 564, 568-569 (Ariz. Ct. App. 1978) ("The acts of parties under a contract, before disputes arise, are the best evidence of the meaning of doubtful contractual terms," citing *Brown et al. v. Cowden Livestock Co.*, 187 F.2d 1015 (9th Cir. 1951)); *Paragon Resources, Inc. v. National Fuel Gas Distribution Corp.*, 695 F.2d 991, 997-998 (5th Cir. 1983) (parties' interpretation is entitled to great, if not controlling, weight). Thus, the Commission must give greater weight to the express language of the contract and the parties' course of performance (post-contract

conduct) rather than to prior 'course of dealing' in the industry at the time that Eschelon opted into the ICA.

In this case, the language of the ICA itself also marks an express departure from the existing, pre-ICA practices: the ICA states that the parties would mutually develop the expedite procedures and that "expedite charges may apply." Where an express contract provision conflicts with the prior course of dealing, the Commission cannot require the parties to continue the prior practice.

***Just as parties to agreements often depart from general usage as to the meaning of words or other conduct, so they may depart from a usage of trade. Similarly, they may change a pattern established by their own prior course of dealing. Their meaning in such cases is ordinarily to be ascertained as a fact,*** no penalty is attached by the law of contracts to their failure to conform to the usages of others or to their own prior usage.

Restatement (2<sup>nd</sup>) of Contracts § 203 cmt d (emphasis added) (in cases of conflict, order of importance is express language, course of performance, and then course of dealing). *See also* Restatement (2<sup>nd</sup>) of Contracts § 223 (defining course of dealing and providing that "[u]nless otherwise agreed, a course of dealing between the parties gives meaning to or supplements or qualifies their agreement" and deferring to Section 203 regarding cases of conflict between express terms and course of dealing); *Arok Constr. Co. v. Indian Constr. Servs.*, 174 Ariz. 291, 298-299 (Ariz. Ct. App. 1993) (quotes Section 223 of the Restatement for the definition of course of dealing); A.R.S. § 47-2202 (2007) (Title 47, Uniform Commercial Code, Chapter 2, Sales; evidence of course of performance and course of dealing to supplement or explain, but not to contradict express contract).

The course of dealing cases Staff cites (*Koenen v. Royal Buick Co.*, 162 Ariz. 376, 381 (Ariz. Ct. App. 1989); *Keith Equip. Co. v. Casa Grande Cotton Fin. Co.*, 187 Ariz. 259, 261-262 (Ariz. Ct. App. 1996); and *Arok*) define "course of dealing," but do not involve application of the

principle to facts such as this case presents. Here, the parties' agreement (a) expressly departs from prior dealing/practice in the industry, and the parties' performance of the agreement (b) shows the parties understood the expedite process was to develop going forward, and (c) the parties understood CMP was the place to develop the Expedite Process. Staff's reliance on the course of dealing prior to the ICA ignores the law, the contract language, the parties' understanding of the contract, and the superior course of performance of going to CMP to develop processes for the ICA, including the Expedite Process.

In addition, both Eschelon and Staff make much of the fact that before implementing Version 30, Qwest required Eschelon and other CLECs to sign a written amendment, as though this shows that Qwest used CMP improperly to unilaterally change the ICA. *E.g.*, Staff Brief at 15, 20. Qwest required a written amendment from Eschelon and other CLECs because when Qwest has billed Eschelon for charges, Eschelon refuses to pay them unless they expressly appear in the ICA or in a written amendment to it. *Jean Novak Transcript at 428:9-13*. ("One position constantly taken by Eschelon is that they would not pay any fee that was not set forth in Exhibit A to their Interconnection Agreement or approved by a state cost docket."); *Id. at 428:14-15* (Eschelon's position "led to outstanding payments of over \$3 million."). There is no conflict between the CMP development of Version 30 and the terms of the ICA.

**2. *Qwest Provides Eschelon the Capability to Expedite Service Orders on All Types of Service Orders in Certain Circumstances.***

Eschelon also argues that Qwest breached the contract because (according to them) it completely denies CLECs the ability to expedite orders for unbundled loops. For this proposition, Eschelon cites Renee Albersheim of Qwest. Eschelon Brief at 25-26. Eschelon does not, however, cite all of Ms. Albersheim's testimony. Ms. Albersheim made clear that Qwest continues to expedite at no cost every time Qwest disconnects an unbundled loop in error:

Q. I will ask you to assume that Qwest mistakenly disconnects an unbundled loop of Eschelon's in error today, will Qwest expedite that unbundled loop today without charge with no amendments?

A. That's correct. Qwest doesn't charge when disconnect is Qwest's error.

Q. And so there are circumstances when an unbundled loop will be expedited for Eschelon under the current Interconnection Agreement?

A. Yes.

*Renee Albersheim Transcript at 279:16-25.* The same is true for all categories of service orders. Thus, there are times when Qwest does expedite all categories of service orders. Eschelon and Staff's true complaint is that Qwest does not expedite for free when emergency conditions exist under the old policy. However, the contract does not include the words "emergency conditions," "medical emergency" or anything of the type. It simply says that procedures shall be mutually developed, which has occurred.

A contract must be interpreted so provisions have a reasonable interpretation. Normally, a reasonable interpretation gives practical effect to a contractual term. *See, e.g., Quantum Communs. Corp. v. Star Broad., Inc.*, 473 F. Supp. 2d 1249, 1264-1265 (S.D. Fla. 2007) ("contracts are to be interpreted to provide a reasonable, practical and lawful meaning to their terms," internal quotation marks omitted); *Alternative Thinking Sys. v. Simon & Schuster, Inc.*, 853 F. Supp. 791, 795 (S.D.N.Y. 1994) ("in searching for the probable intent of the parties ... the aim is a practical interpretation of the expressions of the parties to the end that there be a realization of [their] reasonable expectations."). Obviously, the ICA does not require Qwest to expedite all service orders; it requires the ability to expedite some service orders. If it required the expedite of all service orders, it would have said so; moreover, the language in the ICA giving Qwest discretion to reject a request for an expedite makes plain it does not apply to all service orders. Thus, so long as Version 30 gives some reasonable meaning to the "capability"

to expedite service orders, Qwest cannot have breached the ICA. Qwest's interpretation does far more than that. Under Version 30:

1. Qwest will expedite all POTS orders when emergency conditions exist under the Expedites Requiring Approval process;
2. Qwest will expedite any type of service order when Qwest disconnects the order in error at no charge;
3. Qwest will expedite orders for design services (other than when Qwest disconnects in error, which are then expedited at no charge) at the request of the CLEC for \$200/day for the expedite.

Version 30 gives meaning to every aspect of the Eschelon ICA. Qwest does expedite service orders; Eschelon and Staff simply argue that it should expand the situations when Qwest is willing to expedite service orders. The contract does not contain this level of detail.<sup>8</sup>

Eschelon attempts to limit Qwest's contractual discretion regarding expedites to "determining whether the request met one of the emergency conditions" (Eschelon Brief at 32) based on the parties' development of expedite processes prior to January 2006. Staff similarly appears to argue that Qwest's discretion was limited to criteria "under the Expedites Requiring Approval process, the process in effect" prior to January 2006. Staff Brief at 9. Again, the words "emergency conditions" are found no where in the ICA. These arguments (a) support Qwest's point that the ICA expressly authorized the development of the expedite process, which led to Version 30 instituting the fee that Eschelon now challenges as unauthorized; and (b) ignore that

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<sup>8</sup> Eschelon and Staff argue that CMP cannot change a process that "abridges" a party's rights. *See, e.g.*, Staff Brief at 21. They claim this process change impacted Eschelon, so it cannot take effect. This interpretation makes no sense; Level 3 and Level 4 changes in CMP are by definition changes that impact a party, and that is not the same as abridging contractual rights, which the CMP document prohibits. The CMP document only prohibits denying a party a right set by contract, or a party's "legal" rights, not changing processes. Thus, the interpretation set forth by Staff and Eschelon would negate the purpose of CMP altogether, which is not a reasonable interpretation and is therefore contrary to law.

nothing in either the ICA or the expedite process prior to Version 30 limited Qwest's discretion to determine whether it could or could not complete requested expedites. The contract does not state the types of service orders Qwest must be willing to expedite; Eschelon and Staff's interpretation of the ICA attempts to add the words "emergency conditions." The Commission must interpret the actual words of the ICA, not those Eschelon wishes were there.

Qwest's point is that the ICA does not require Qwest to expedite each and every type of service order; nor does it require Qwest to accept every request to expedite. The ICA requires that Qwest provide a means to expedite generally, and Qwest has done so. Previous to Version 30, Qwest provided expedites for emergencies, but did not make expedites available for non-emergencies. With Version 30, Qwest expedites POTS orders when emergency conditions exist, and expedites design services in any situation for a fee.

The ICA expressly states that rights are not waived unless waived expressly in writing. *Exhibit C-1 at* § 34.2 ("No course of dealing or failure of either Party to strictly enforce any term, right, or condition of this Agreement in any instance shall be construed as a general waiver or relinquishment of such term, right or condition."). Qwest has never waived its rights to mutually develop the expedite process, nor has it waived its right to apply expedite charges. Eschelon's complaint in fact is an excellent demonstration of why the Commission should not interpret this provision as requiring Qwest to expedite every time that Eschelon requests it: *Eschelon wants Qwest to expedite orders for free even when the expedite is necessary due to an error by Eschelon.* Eschelon Brief at 40, n.189; 44. *Eschelon is thus asking the Commission to make Qwest its insurer, as though Qwest is responsible for, and should pay any price associated with, fixing Eschelon errors.*

Because Qwest has continued to perform the ICA's requirements as to expedite capability for Eschelon, there is no reason to consider the arguments concerning the duty of good faith and fair dealing, or illusory/unenforceable contracts (Eschelon Brief at 32-33; Staff Brief at 9), regarding Qwest's ICA obligation to provide the capability to expedite generally.

3. ***The Commission Must Interpret the ICA as Allowing Qwest to Charge the Expedite Fee.***

It is also unreasonable to interpret Section 3.2.2.13 as prohibiting Qwest from instituting a fee to charge for expedites. Yet in arguing that Qwest is not providing a capability to expedite a service order, Eschelon is interpreting the clause in just that manner. Section 3.2.2.13 must be interpreted to give effect to, and in harmony with, other provisions of the parties' agreement. *Chandler Medical Bldg.*, 175 Ariz. at 277; *Hanson v. Tempe Life Care Vill., Inc.*, 162 P.3d 665, 666-667 (Ariz. Ct. App. 2007); *see also* Eschelon Brief at 31, citing *Allen*, 382 F. Supp. 2d at 1165; *Central Arizona Water Conservation Dist. v. United States*, 32 F. Supp. 1117, 1128 (D. Ariz. 1998). Several provisions in the ICA expressly recognize that Qwest has the right to charge for expedites, as Eschelon and Staff both recognize (Eschelon Brief at 10; Staff Brief at 10). Exhibit C-1, at Attmt. 5, §§ 3.2.4.2.1, 2.3.4.3.1 & 3.2.4.4. ***The ICA does not limit the types or circumstances of expedites for which Qwest can charge a fee. The ICA also does not limit the price that Qwest could charge for expedites.*** Indeed, 3.2.2.12 leaves the expedite process for the parties to mutually develop. As Qwest states in its Opening Brief, if the parties had intended that mutual *agreement* was required for expedite charges, they would have said so here as they did elsewhere in the contract. See Qwest Opening Brief at 25-26.

Indeed, Eschelon's position – that it should not have to pay an expedite fee until it agrees to the specific price of the fee – makes meaningless each of the provisions that expressly provide “expedite charges may apply.” If the ICA actually gave Eschelon the right to obtain expedites

for free until it agrees to the price that Qwest can charge, as a practical matter, why would Eschelon ever agree to a price? Eschelon would simply refuse to agree to a price, and continue receiving expedites for free indefinitely - which directly contradicts Sections 3.2.4.2.1, 2.3.4.3.1, and 3.2.4.4. This shows the flaw in Eschelon's position.<sup>9</sup>

Eschelon further argues that the implied duty of good faith and fair dealing prevents Qwest from purportedly deciding that "Eschelon would no longer have the capability to expedite loop orders" for free as it had done under the ICA previous to Version 30. Eschelon Brief at 32-33. This argument errs in at least two regards. *Most importantly, there are no facts to support the contention that Eschelon no longer has the capability to expedite loop orders.* Rather, the facts show that Version 30 developed in CMP is the procedure for CLECs such as Eschelon to request expedites of service orders. Under that procedure, expedites are available for loop orders, at a price of \$200 per day. Eschelon recognizes that the existing ICA gave Qwest the right to charge for expedites, and recognizes that Version 30 provides an expedite procedure for loop orders. Eschelon Brief at 10. Rather than a lack of expedite capability, the problem for Eschelon is that it believes the price is too high and wishes in hindsight that it had changed the terms regarding expedite charges before opting into the ICA.

There is also no violation of the implied duty of good faith and fair dealing, in Qwest implementing its express right to charge a fee for expediting service orders. The implied duty of good faith cannot be construed to require actions that contradict express terms of the contract. *Kuehn v. Stanley*, 208 Ariz. 124, 132 (Ariz. Ct. App. 2004); *Carma Developers, Inc. v. Marathon*

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<sup>9</sup> Eschelon and Staff also argue that Qwest misused CMP by creating rates to impose rates without seeking Commission approval for the rates. Eschelon Brief at 56-57. The fee that Qwest charges for expediting services is a market rate, not a TELRIC rate. As such, Commission approval is not required. Qwest notes it did not use CMP to develop the fee in question, as Staff suggests (Staff Brief at 17); rather, Qwest set the fee based on the fact that others were charging that amount, i.e., the market rate. It used CMP to impose a process to ensure CLECs had contracts with provisions requiring payment of the rate.

*Dev. California, Inc.*, 2 Cal. 4th 342, 826 P.2d 710, 728 (Cal. 1992) (quoting *VTR, Inc. v. Goodyear Tire & Rubber Co.*, 303 F. Supp. 773, 777-78 (S.D.N.Y. 1969) (“We are aware of no reported case in which a court has held the covenant of good faith may be read to prohibit a party from doing that which is expressly permitted by an agreement. On the contrary, as a general matter, implied terms should never be read to vary express terms.”)). Thus, the covenant cannot require Qwest provide expedites at no charge.

The ICA gives Qwest the express right to charge for expediting service orders, and does not state criteria for, or limits on, what Qwest could charge for those expedites. Exhibit C-1, Attachment 5, Sections 3.2.4.2.1, 3.2.4.3.1, 3.2.4.4 (quoted *supra*). Implementing its right to charge for expedites therefore cannot be a violation of good faith or fair dealing. In addition, Qwest instituted the expedite fee through the CMP process, which both parties had used to develop their contractual relationship. It is therefore difficult to see how Eschelon could assert that Qwest’s means of implementing the fee is a violation of good faith or fair dealing.

#### **4. Conclusion Regarding Eschelon’s Claim for Breach of the ICA.**

Eschelon has not shown Qwest breached the ICA in introducing Version 30 of the Expedite Process mutually developed in CMP. The Commission should find for Qwest on Eschelon’s claim. In addition, Staff’s arguments about the ICA do not recognize the express language of the contract and the parties’ interpretation of the contract. There is no basis for granting the relief that Staff proposes. Accordingly, the Commission should find that Qwest has complied with the ICA, and if Eschelon wishes to expedite an order then they must pay the fee described in the current expedite process, Version 30.

**B. There is Absolutely No Evidence that the Rehabilitation Center Experienced a Medical Emergency, and Therefore, Qwest Properly Charged Eschelon to Expedite the Service Order.**

The Staff and Eschelon both claim that the Rehabilitation Center experienced a “medical emergency” justifying an expedite of the DS1 Capable Loop under the Expedites Requiring Approval Process. They base this position exclusively on (a) the nature of the facility; (b) a letter issued on the Rehabilitation Center’s letterhead; and (c) their belief that under the old process Qwest would have checked to see whether a true medical emergency existed.

The uncontroverted facts developed at hearing show that Staff and Eschelon’s view is wholly unsupported:

- During the time the Rehabilitation Center’s T-1 was out of service, the Center had telephone service with the primary lines into the business. *Jean Novak, Transcript at 431:17-22*. Indeed, during the time the T1 was down, the Rehabilitation Center was able to use their primary service, call 911, and get medical care. *Id.*
- The Rehabilitation Center has no greater need for 911 service than any typical business. *Id. at 432:3-8*.
- As to the letter on the Rehabilitation Center’s stationary, Eschelon requested the letter, and Eschelon – not the end-user – actually drafted the memo. *Exhibit Q-6 (Novak Rebuttal) at 3*. Eschelon has no evidence to the contrary. *Bonnie Johnson Transcript at 48:13-49:24*.
- Indeed, the Center specifically informed Qwest there was no medical emergency. *Jean Novak, Transcript at 450:17-23*.

There was no medical emergency; none of the facts suggest otherwise.

Despite this, Eschelon and Staff ask the Commission to engage in guesswork as to what the Commission believes Qwest “would have done” under the old process. In other words, they are in essence stating that after Eschelon created the false indication that a medical emergency existed, they believe Qwest would have probably provided the expedite even though no actual medical emergency existed. Eschelon should not be rewarded for creating a false impression of

medical emergency. Moreover, Eschelon has not met its burden of proof. Speculation is not adequate to carry the day – the record must show facts, not guesses, to support a Commission decision. *Verizon Cal., Inc. v. Peevey*, 462 F.3d 1142, 1150 (9th Cir. 2006) (commission decision reversible if not supported by substantial evidence); *Tucson Elec. Power Co. v. Arizona Corp. Comm'n*, 132 Ariz. 240, 245 (Ariz. 1982) (commission’s decisions reviewed for whether supported by “evidence of substance”); *Grand Canyon Trust v. Ariz. Corp. Comm'n*, 210 Ariz. 30, 34 (Ariz. Ct. App. 2005). Finally, this shows why Qwest should be compensated for providing expedites. It is simply too easy for a CLEC to create a ruse for situations when the CLEC disconnects in error. Given these facts, it is fair to argue Eschelon’s objective is to bail them out of their own errors.

Under no circumstances should the Commission find that Qwest owes Eschelon anything for the problem that Eschelon – by its own admission – created at the Rehabilitation Center.

**C. Eschelon’s Demand for Expedites on Terms and Conditions More Favorable Than That Which Qwest Provides to Itself is a Request for “Superior Service” in Violation of the Act.**

***1. A Request to Expedite an Analog Loop is a Request for Superior Service.***

Eschelon and Staff both argue that if Qwest is not required to provide expedited due dates for free, they must do so at TELRIC rates instead of the market rates proposed by Qwest. This position fails at every conceivable level. First they claim the parties agree that “Eschelon is entitled to expedites for unbundled loops” because “Qwest provides expedites on design services.” Eschelon Brief at 48. Second they claim that expedites are legally mandated by the nondiscrimination doctrine in the Act. *Id.* at 50. Third, they claim that the Act mandates TELRIC prices for anything connected to the provision of UNEs.<sup>10</sup> Each one of these points is

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<sup>10</sup> Eschelon argues on more than one occasion that Terry Million testified Qwest expedites orders for all of its retail customers using the emergency conditions standard. *See, e.g.*, Eschelon Brief at 47, n. 220.

fundamentally flawed for the same reason – there is no retail analog to the provision of unbundled analog loops. It is widely recognized that the provision of 2-wire and 4-wire analog loops have no retail analog. *See e.g., In re BellSouth Corp.*, 13 FCC Rcd 20599, 20717 ¶198 (FCC Oct. 13, 1998) (“the provisioning of unbundled local loops has no retail analogue”); *Id.* at ¶87 n.248 (ordering and provisioning of UNEs generally has no retail analogue); *In re Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 14 FCC Rcd 20912, 20962 n.248 (FCC Dec. 9, 1999); *21st Century Telecom of Illinois, Inc. v. Illinois Bell Telephone Company*, 2000 Ill. PUC LEXIS 489 \*74-75 (Ill. PUC June 15, 2000) (work required to provision an unbundled loop is substantially more extensive than work required to do ‘line translation’ to provision a retail POTS line). Indeed, Staff recognizes **“[t]here is no ‘retail analogue for expedites of the installation of unbundled loops.’”** *Exhibit S-1 at 32:19-33:11* (emphasis added). Once this point is conceded, as it must be, Eschelon and Staff’s position crumbles.

When no retail analog exists, the nondiscrimination provisions of the Act go by the wayside and the Act requires Qwest to provide an “efficient carrier a ‘meaningful opportunity to compete.’” *In re Bell Atlantic New York*, FCC 99-404, ¶44 (Rel. December 22, 1999). The law is unequivocal that Qwest provides Eschelon a meaningful opportunity to compete by provisioning service in accordance with the Commission-approved performance measures. *See e.g., In re Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York*, 15 FCC

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This is absolutely not the case. Ms. Million started her answer with the word “guess” and said “as it’s appropriate for Qwest’s retail and other wholesale customers.” This obviously means to the extent Qwest provides a parallel service, it is appropriate to provide the same to CLECs. Qwest does this by offering expedites in emergency conditions to all customers who order POTS services, including CLECs. Staff admits this point. *Exhibit S-1 (Staff Direct) at 32:19-33:11.*

Rcd 3953 ¶8 (Rel. Dec. 22, 1999); *In re Application by SBC Communications Inc., et al., Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services In Texas*, 15 FCC Rcd 18354, 18361-18362 ¶13 n.33 (FCC Rel. June 30, 2000); *In re Application by Verizon New England Inc. et al., for Authorization to Provide In-Region, InterLATA Services In Maine*, 17 FCC Rcd 11659 ¶7 (FCC Rel. June 19, 2002); *Re U. S. WEST Communications, Inc.*, 2002 WL 1378630, ¶7 (Ariz. Corp. Comm. May 21, 2002). These benchmarks require Qwest to provision analog loops in five business days. ***Exhibit Q-1 (Albersheim Direct) at pp. 5-7 & 13-15*** (citing [www.qwest.com/wholesale/results/roc.html](http://www.qwest.com/wholesale/results/roc.html)).

A request to provision an order for an unbundled loop faster than the intervals set forth in the 271 docket is by definition a request for a superior service. ***Terry Million Transcript at 518:11-519:2***. Any argument that Qwest would gain a competitive advantage by failing to expedite such orders is baseless, as every commission has found (and even the Staff admits) that BOCs have no comparable service to analog loops. Thus, a CLEC seeking to expedite an order for an unbundled analog loop is seeking to obtain more than a meaningful opportunity to compete, meaning a superior service. A request to obtain a superior service violates the 1996 Act. *Iowa Utilities Board v. AT&T*, 120 F.3d 753, 812-813 (8<sup>th</sup> Cir. 1997), *aff'd in part and rev'd in part*, 525 U.S. 366, 397 (1999). A vast percentage of the loops ordered in Arizona are unbundled analog loops. See [www.qwest.com/wholesale/results/roc.html](http://www.qwest.com/wholesale/results/roc.html) (AZ performance metrics OP-3 for loops). Thus, as to unbundled loops (other than DS1 and DS3 Capable Loops), asking Qwest to expedite constitutes a request for superior service in and of itself. As a result, Qwest is entitled to charge market rates.

As stated in Qwest's Opening Brief, this does not mean that Eschelon will be unable to serve customers who need immediate service; it only means that Eschelon will be unable to serve

customers that want immediate service with unbundled loops. Eschelon admits that it serves a large percentage of its customers – 17 percent – in Arizona through a product known as QPP. *Exhibit E-1 (Johnson Direct) at 5:7-15.* QPP is a POTS service. *Bonnie Johnson Transcript at 42:8-23.* Thus, Eschelon can serve such customers using QPP, and can expedite a service order using the emergency Expedites Requiring Approval at no additional charge.

**2. *Qwest's Decision to Expedite DS1 and DS3 Capable Loops at \$200/Day Affords CLECs a Superior Service; There is No Room To Complain.***

The unbundled loop at issue with the Rehabilitation Center was a DS1 Capable Loop. The performance metrics recognize that DS1 Capable Loops and DS3 capable Loops do have a retail analog, specifically DS1 and DS3 private lines. *Exhibit Q-1 (Albersheim Direct) at 13:5-18.* See also, *In re Verizon Pennsylvania, Inc.*, 16 FCC Rcd 17419, 17479 ¶110 (FCC Sep. 19, 2001) (parity between unbundled transport and retail DS3). It is undisputed that the Commission ordered Qwest to provision these high capacity loops to CLECs faster than they do for their own retail customers. *Exhibit Q-1 (Albersheim Direct) at 13:5-18.*

Eschelon asserts that Qwest defines nondiscrimination to mean nondiscriminatory pricing. As shown above, that is not the case. Moreover, for DS1 and DS3 Capable Loops, CLECs including Eschelon already have a significant pricing advantage because the intervals are shorter. Thus, Qwest is already providing CLECs with superior service; requests to expedite only exacerbate the problem. Qwest is therefore entitled to provide expedites at market rates.

**3. *Eschelon's Demand that Qwest Expedite Service Orders on Unbundled Loops is a Request for Superior Service.***

“[B]y its very nature” this case concerns Eschelon’s “request to shorten the standard provisioning interval.” *Bonnie Johnson at 24:25-25:4.* For unbundled loops, Qwest’s obligation is not one of non-discrimination, but Qwest must provide an “efficient carrier a ‘meaningful opportunity to compete.’” *In re Bell Atlantic New York*, FCC 99-404, ¶44 (Rel.

December 22, 1999). Qwest does that by provisioning unbundled loops in accordance with the standard provisioning interval. See e.g., *Bell Atlantic New York*, 15 FCC Rcd 3953 at ¶8. Thus, an expedite is a request to get more than a meaningful opportunity to compete.

Both the Kentucky and Florida Commissions have found the 1996 Act does not require BOCs to provide expedited due dates. *In re Joint Petition for Arbitration of Newsouth Communications Corp.*, 2006 Ky. PUC LEXIS 159 at Issue 86 (Ky. PUC March 14, 2006); *In re Joint Petition by NewSouth et al.*, 2005 Fla. PUC LEXIS 634 \*150, Order No. PSC-05-0975-FOF-TP (Fla. PSC Oct. 11, 2005). In those cases, these commissions approved BellSouth's expedite fee of \$200 per day for CLECs because BellSouth charged the same fee to expedite similar retail services.

In support of applying TELRIC to all expedites, Eschelon cites decisions from other state commissions that plainly did *not* consider expedites for services such as unbundled loops, that have no retail analogue. For instance, Eschelon cites the North Carolina commission's decision *In re NewSouth Communications Corp.*, 2006 WL 707683 (N.C.U.C. Feb. 8, 2006). In *NewSouth*, the commission plainly was not requiring that the incumbent expedite unbundled loops:

The Commission continues to agree with the Public Staff that, if technically feasible, an ILEC should provide a CLP with access to UNEs *at least equal in quality to that which the ILEC provides to itself*. The Commission also believes that expediting 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).

*In re NewSouth*, \*47. The same is true of the Minnesota commission's decision, *In re Petition of Eschelon*, 2007 Minn. PUC LEXIS 41 (March 30, 2007) ("Qwest must provide UNEs to CLECs on the same terms and conditions that it provides them to its own retail operations"). Likewise,

the Delaware commission's decision did not address the types of services for which Verizon would expedite CLEC orders. *In re Verizon Delaware*, 2002 WL 31521484, 2002 Del. PSC LEXIS 103 ¶101 (June 4, 2002). Therefore, the Commission should not find these decisions persuasive regarding Qwest's expediting of services that have no retail analog. Indeed, to the contrary, these decisions specifically refer to UNEs that "Qwest provides to itself." Qwest does not provide unbundled loops for itself. Accordingly, the Commission should find the Minnesota, North Carolina and Delaware decisions are persuasive authority of Qwest's position in this case.

**D. The Commission Should Not Adopt Staff's Other Recommendations Proposing Changes to Qwest's Tariffs, ICA Negotiations, and Performance Indicator Definitions Because the Record Shows No Changes are Needed.**

Respectfully, Qwest must point out that Staff's post-hearing brief is heavy on far-reaching requests and light on authority in support of those requests. The only legal citations that Staff offers in support of its arguments were the inapposite cases Staff cited to define course of dealing for purposes of contract interpretation. To achieve the results Staff seeks, the Commission must essentially disapprove retroactively not only the Eschelon ICA but many other ICAs it already approved pursuant to 47 U.S.C. § 252(e). Staff does not offer a single authority to support the argument that Eschelon's breach of contract case can or should be stretched beyond Eschelon to the industry at large. This is because the federal courts have already expressly held to the contrary

First, even as to the Eschelon ICA – which is in the record of this case – the Commission cannot revisit its approval of an ICA years later, regardless of whether the Commission was deciding issues as to only the Eschelon ICA or if the Commission issued an order to purportedly apply to all ICAs.

***The CPUC's only authority over interstate traffic is its authority under 47 U.S.C. § 252 to approve new arbitrated interconnection agreements and to***

*interpret existing ones according to their own terms.* By promulgating a generic order binding on existing interconnection agreements without reference to a specific agreement or agreements, the CPUC acted contrary to the Act's requirement that interconnection agreements are binding on the parties, or, at the very least, it acted arbitrarily and capriciously in purporting to interpret "standard" interconnection agreements.

*Pac. Bell v. Pac-West Telecomm, Inc.*, 325 F.3d 1114, 1125-1126 (9th Cir. 2003) (emphasis added); reiterated in *Verizon Cal., Inc. v. Peevey*, 462 F.3d 1142, 1153 (9th Cir. 2006). As the Ninth Circuit notes in *Pacific Bell*, Section 252 gives the Commission authority to interpret approved ICAs but not to effectively change the terms of ICAs:

***The CPUC's resort to its general rule-making authority also is inconsistent with the Act because it effectively changes the terms of "applicable interconnection agreements" in California, and therefore contravenes the Act's mandate that inter-connection agreements have the binding force of law.*** See 47 U.S.C. § 252(a)(1). Indeed, the point of § 252 is to replace the comprehensive state and federal regulatory scheme with a more market-driven system that is self-regulated through negotiated interconnection agreements.

*Id.* at 1127 (emphasis added). Indeed, even if the Ninth Circuit had not ruled plainly on this very question, the express terms of Section 252 clearly show that state commissions do not have authority to subsequently disapprove ICA terms. *See, e.g., Pacific Bell*, 325 F.3d at 1125-1129.

Moreover, the Eschelon ICA (and many others in Arizona) are negotiated contracts, thus directly involving the section of the Act to which the Ninth Circuit points as most directly violated when a state commission retroactively changes an interconnection agreement, 47 U.S.C. § 252(a)(1) (parties "may negotiate and enter into a binding agreement ... without regard to the standards set forth in subsection (b) and (c) of section 251.") The Staff's requests fly in the face of Qwest's ability to negotiate ICAs; moreover, the Commission already approved these ICAs so therefore, they are in the public interest.

Secondly, as to the rest of Qwest's ICAs in Arizona – the other carriers' ICAs are not even before the Commission in Eschelon's Complaint; are not in evidence; and may or may not

be consistent with Eschelon's ICA. As the above quoted excerpt from *Pacific Bell* states, it would be contrary to the 1996 Act, or at the least arbitrary and capricious, to make a decision as to other ICAs. *Pacific Bell*, 325 F.3d at 1125-1129. "*Pacific Bell* ... voided generic orders that purported to affect existing interconnection agreements without reference to any single, specific agreement..." *Peevey*, 462 F.3d at 1153. These reasons alone should lead the Commission to focus its attention on Eschelon and on interpreting the contract as it stands, not disapproving its terms. This is not a case about the industry at large.

In addition, however, the specific requests made by Staff simply make no sense when evaluated with any degree of scrutiny. Each will be discussed in turn.

***1. The Commission Should Not Revert to Version 11 of the Expedite Process.***

Staff claims the Commission should force Qwest to revert back to Version 11 of the Expedite Process as Staff believes it was intended when it was created. Staff believes Qwest originally planned to offer Version 11 as an additional service, meaning emergency expedites would be available on all products and the Expedites Requiring Approval Process would be available for all products in non-emergency situations. That was never the intent of Version 11. Indeed, Bonnie Johnson of Eschelon admits Staff's factual assertions on this point are incorrect:

Q. But the only way you could take advantage of the preapproved expedite process was if you signed an amendment. I think you said that in your summary.

A. That's what Qwest required, yes.

Q. And once you signed that amendment, any service that was delineated in the preapproved expedite process was subject to the \$200 per day charge; correct?

A. That's correct. It was -- that product was no longer eligible for the emergency requiring approval process.

Q. Now, let's make sure that we're on the same page here, and let's assume that you work at Company ABC, not Eschelon --

A. Uh-huh.

Q. -- and you have signed this amendment. And your customer goes down, not a Qwest caused problem, and they have a true medical emergency in this location. Despite the fact that they have a medical emergency, because they signed the amendment they are subject to the \$200 per day expedite for that unbundled loop; true?

A. That is true. ... -- once you signed that amendment, you could no longer get emergency expedites, even if the condition existed, for the products that were on the preapproved list.

**Bonnie Johnson Transcript at 44:18-45:13.** Staff claims that due to confusion experienced by CLECs on this point, the Commission should strike Version 27, strike Version 30 and force Qwest to provide Version 11 to the entire CLEC community in Arizona. Obviously Eschelon was not confused. Indeed, if Staff's position were correct, Eschelon would have opted into the new process because it would have provided an additional option. Eschelon did no such thing because it knew once it opted into the new process, emergency expedites were no longer available for specified products.

Many CLECs, including Covad and McLeod, opted into the new process and signed the requisite contract amendment long before Verison 30 came into existence. **Jill Martain Transcript at 408:23-409:15.** Staff's proposal to modify contracts violates all of the legal provisions set forth above; it also ignores the fact that these CLECs entered into the Pre-Approved Expedites Process before Version 27 and therefore Version 30 did not impact them. Thus, Staff's argument is simply not consistent with the facts. The Commission should, once again, focus on the breach of contract case brought by Eschelon.

**2. The Commission Should Not Order Qwest to Create a PID for Expedites Because There is No Evidence of a Need for a PID and a Process Exists to Bring that Request to the Industry.**

Staff asks the Commission to a require Qwest to create a PID because "Staff does not believe that the OP3 PID tracks commitments met with respect to Expedites as a separate category." Staff Motion at 35. As Staff acknowledged, the PIDs already include expedited orders in them. **Exhibit Q-2 (Albersheim Rebuttal) at 13:12-14:19. Staff Transcript at 566:20-567:17** (process already exists for PID development and believes current PIDs already captures

expedites). Published and audited performance data shows Qwest meets very high percentage of its dues dates. See [www.qwest.com/wholesale/results](http://www.qwest.com/wholesale/results). There is no evidence – indeed no suggestion – that Qwest fails to meet due dates when it agrees to provide an expedite. This case is about the circumstances when Eschelon’s contract requires Qwest to perform an expedite. Eschelon never testified that it also had concerns about Qwest’s ability to meet expedited due dates. This PID request is a complete red herring.

Moreover, Staff’s request for a PID ignores that a forum exists for presenting proposals for new PIDs. *Exhibit Q-2 (Albersheim Rebuttal) at 13:6-11*. At hearing Staff appeared to concede that this docket was not the appropriate forum for PID issues. *Staff Transcript at 593:2-11*. If Staff truly believes this is necessary, it should take the recommendation to the proper forum to see whether the industry believes a PID to determine the percentage of times Qwest meets expedited due dates on a stand alone basis is necessary. This complaint proceeding for breach of contract is the wrong place to make this request.

**3. *The Commission Should Not Require Qwest to Define Design Services in Tariffs because the Phrase “Design Services” Is Not Referenced in the Tariffs.***

Staff’s request to define “design services” in contracts and tariffs makes absolutely no sense whatsoever. They claim a definition is appropriate because it is not in the ICAs or tariffs. Staff Motion at 34-325. It is not defined in those documents because the term “design services” is not used in either the tariffs or contracts. *Renee Albersheim Transcript at 223:1-8 & 292:18-0293:2*. Staff seemed to acknowledge this point: *Staff Transcript at 567:18-568:5 & 569:18-21*. There is no need to define a term that is not used in the documents. Instead the specific product names are used in both the tariffs and the contracts. The specific products named are defined in both the tariffs and the contracts. The Pre-Approved Expedites process specifically names each of the products that it applies to. As Judge Rodda appeared to recognize in her

questions, "I mean if they list every single product, isn't that even better than having some higher definition." *Staff Transcript at 592:12-13.*

**4. *The Commission Should Not Require Qwest to Update Its SGAT.***

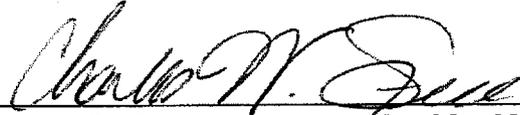
Staff's final argument is that "Qwest should be required to immediately update its SGAT." Staff Motion at 35-37. They claim Qwest has "effectively withdrawn" the document. The SGAT was created in the 271 process. It literally took years of time with workshops occurring for weeks upon weeks to get the SGAT created. The amount of resources necessary to create the document was staggering. Since the 271 docket, the FCC has issued many new decisions, including, but not limited to, TRO and TRRO. The FCC has significantly changed many legal requirements through changes in the law. The SGAT has change of law provisions. Qwest has created its Template ICA to account for these changes, and it is available for CLEC review and consideration. The industry has been working through these issues in private negotiations resulting in agreements approved by the Commission. In addition, if there are issues in dispute, they are arbitrated before the Commission as well. There is no need for the time intensive workshop process to begin anew. The industry has not made such a request. Moreover, the Commission should not issue a decision in a private complaint case that has industry wide application and could result in expenditure of thousands upon thousands of hours of time for all involved. This is, simply put, the wrong forum to make such a decision.

**III. CONCLUSION**

Eschelon simply does not have the evidence to support its breach of contract claim. WHEREFORE, for all of the aforementioned reasons, Qwest respectfully requests that the Commission reject Eschelon's claim, and find in all respects for Qwest.

RESPECTFULLY SUBMITTED this 6<sup>th</sup> day of December, 2007.

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