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December 5, 2007

Via Federal Express

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Docket Control – Utilities Division
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Arizona Corporation Commission
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RE: *In the Matter of Complaint of Eschelon Telecom of Arizona, Inc.
against Qwest Corporation*
Docket Nos. T-01051B-06-0257; T-03406A-06-0257

Dear Sir or Madam:

Enclosed for filing in connection with the above-referenced matter please find the original and 15 copies of Eschelon Telecom of Arizona, Inc.'s Post-Hearing Reply Brief and Affidavit of Service.

Sincerely,

Gregory Merz

Enclosures

cc: Jane Rodda, ALJ (w/enclosure via FedEx)
Jason Topp, Qwest (w/enclosure via FedEx)
Maureen Scott (w/enclosure via FedEx)
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Docket Nos. T-01051B-06-0257; T-03406A-06-0257

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BEFORE THE ARIZONA CORPORATION COMMISSION

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

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

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

AFFIDAVIT OF SERVICE

STATE OF MINNESOTA)
) ss.
COUNTY OF HENNEPIN)

Tobe L. Goldberg, being first duly sworn, deposes and says on oath that on the 5th day of December, 2007, she served the attached:

Eschelon Telecom of Arizona, Inc.'s Post-Hearing Reply Brief

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Dated: 12/5/2007

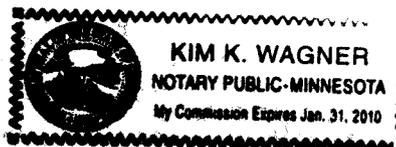
Tobe L. Goldberg

Tobe L. Goldberg

Subscribed and sworn to before me
this 5th day of December, 2007.

Kim K. Wagner

Notary Public



SERVICE LIST

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

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

POST-HEARING REPLY BRIEF OF ESCHELON TELECOM OF ARIZONA, INC.

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1 **I. INTRODUCTION**

2 Eschelon Telecom of Arizona, Inc. (“Eschelon”) provides this Reply to the Opening
3 Briefs of Qwest Corporation (“Qwest”) and Staff. Eschelon addresses the burden of proof and
4 requested relief, followed by arguments in reply to Qwest’s other claims.

5 **II. BURDEN OF PROOF AND REQUESTED RELIEF**

6
7 **A. Burden of Proof**

8 On pages 3 and 19 of its Opening Brief, Qwest states that Eschelon has the burden of
9 proof. With respect to Qwest’s affirmative defenses,¹ however, Qwest is the complainant for its
10 own claims and therefore has the burden of establishing its affirmative defenses.² In any event,
11 for any claim for which the burden of proof is on Eschelon, Eschelon has met that burden. The
12 evidence amply supports Eschelon’s claims. Based on the evidence in this case, for example,
13 Staff concluded that Qwest breached the interconnection agreement (“ICA”);³ Qwest
14 discriminated against Eschelon and other CLECs to the extent that discrimination means
15 disparity (*i.e.*, “lack of” parity);⁴ several remedies proposed by Staff should be adopted to serve

¹ In its Answer, Qwest asserts a number of affirmative defenses. See Qwest Answer, pp. 15-16 (under the heading “Affirmative Defenses”).

² *Grubb & Ellis Management Services, Inc. v. 407417 B.C., L.L.C.*, 213 Ariz. 83, 89, 138 P.3d 1210, 1216 (Ariz. Ct. App. 2007) (“The proponent of an affirmative defense has the burden of pleading and proving it.”); *Pfeil v. Smith*, 183 Ariz. 63, 65, 900 P.2d 12, 14 (Ariz. Ct. App. 1995) (“In a civil action, the burden of proof is by a preponderance of the evidence, and the defendant has the burden of proving affirmative defenses.”).

³ Staff Opening Brief, p. 37, lines 2-3 (“Qwest breached the terms of its existing ICA with Eschelon by denying Eschelon the capability to expedite LSRs.”); see also Hrg. Ex. S-1 (Staff Testimony), Executive Summary, Conclusion No. 1 (“Qwest did not adhere to the terms and conditions of the current Qwest-Eschelon Interconnection Agreement. . .”).

⁴ Staff Opening Brief, p. 30, lines 7-9 (“In Staff’s opinion, the new system designed by Qwest suffers from a lack of uniformity or parity”); *id.* p. 29, lines 19-20 (“nothing could be farther from parity or uniformity than the process resulting from Version 11 and Version 30 of the CMP”); *id.* p. 29, line 11 (“Qwest’s Parity and Uniformity Claims are Without Merit”); *id.* p. 31, line 19 (rejecting Qwest’s superior service argument).

1 the public interest;⁵ Qwest has violated a Commission Order by effectively withdrawing its
2 SGAT;⁶ Qwest has imposed a fee in CMP even though rates are outside the scope of CMP;⁷ and
3 Qwest abridged Eschelon's rights and the rights of other CLECs.⁸

4 Eschelon also established its claim of anti-competitive conduct.⁹ Previously, the
5 Commission said: "To allow Qwest to simply put rates into effect, without the agreement
6 of the CLEC in a particular case through a negotiated interconnection agreement, could
7 be a great impediment to competition."¹⁰ Indeed, Eschelon showed that is what happened
8 here. Qwest chose to withhold service and reject orders rather than pursue the applicable
9 ICA dispute resolution provisions or request approval of a fixed fee.¹¹ Qwest now
10 concedes that the "entire purpose"¹² of its expedite amendment was to obtain the fixed
11 fee that Qwest "demanded,"¹³ which Qwest did without first obtaining Commission
12 approval.¹⁴ In Minnesota, ALJs found that expedites are "necessary for Eschelon to

⁵ Staff Opening Brief, p. 34, line 1. In its Complaint, Eschelon asserted that Qwest's conduct is not in the public interest and violates public policy. See, e.g., Complaint, ¶21, p. 8, lines 18-20 (citing A.R.S. §40-334); ¶F, p. 13, line 22.

⁶ Staff Opening Brief, p. 35, lines 18-20. In its Complaint, Eschelon quoted the SGAT, including its language in both 4.156 and 7.4.7 that "Qwest agrees that CLEC shall not be held to the requirements of the PCAT." See, e.g., Complaint, ¶11(B), p. 5, lines 22-24. See also Staff Opening Brief, p. 21, lines 4-5 (citing Tr. Vol. II, p. 322, lines 7-10, Albersheim). Eschelon stated in its Complaint that these provisions of the SGAT, along with other provisions cited in the Complaint, collectively show a regulatory regime designed to ensure that Qwest cannot undermine Commission approved ICA terms by unilaterally altering them through its own PCAT. Complaint, ¶12, p. 6, lines 14-16.

⁷ Hrg. Ex. S-1, Staff, p. 29, lines 4-5; see also Hrg. Ex. Q-3 (Martain Dir.), p. 29, line 1 (outside scope); Tr. Vol. I, p. 191, lines 16-17 (Albersheim) ("The change at issue here is the *imposition of the fee* to expedite orders for design services.") (emphasis added).

⁸ Staff Opening Brief, p. 37, lines 5-6.

⁹ Complaint, p. 1, line 23 & p. 8, lines 18-20.

¹⁰ Decision No. 66242, Docket No. T-00000A-97-0238 (Qwest's 271 application) (Sept. 16, 2003) (adopting recommendations of Staff) at ¶108, lines 19-21.

¹¹ Eschelon Opening Brief, pp. 20-23.

¹² Qwest Opening Brief, p. 11; see also Tr. Vol. I, p. 191, lines 16-17 (Albersheim) ("imposition of the fee"). See Row 10 of Exhibit 5 to Eschelon Opening Brief.

¹³ Qwest Opening Brief, p. 13, line 2; see Complaint, p. 1, line 21 ("demanding" an amendment).

¹⁴ Staff Opening Brief, p. 16, lines 9-10 ("where in it could have been reviewed and approved by the Commission"); *id.* p. 30, lines 23-25 ("an attempt . . . apparently to remove the rate from Commission oversight"). See also Complaint, p. 6, lines 20-21, ¶13 and footnote 1.

1 respond to the unusual needs of customers and *to compete effectively*.¹⁵ In this case,
2 Qwest's witness acknowledged that CLECs need the capability to receive expedited
3 service to avoid being placed at a competitive disadvantage,¹⁶ but that Qwest does *not*
4 offer expedite capability to Eschelon for unbundled loops per the ICA.¹⁷ Eschelon has a
5 right to choose to order unbundled loops over other products such as resale or QPP,¹⁸ and
6 access to those loops must be nondiscriminatory.¹⁹

7

8 **B. Requested Relief**

9 In its Opening Brief, Qwest asks the Commission to reject Eschelon's claims and "find in
10 all respects for Qwest."²⁰ This includes Qwest's requests that the Commission set the expedite
11 rate at \$200 per day²¹ and that the Commission reject the Staff's request that relief be made
12 available to other CLECs.²² Eschelon's requested relief is summarized below in the Conclusion
13 (Section IV of this Reply Brief). Here, Eschelon will first address the relief requested regarding
14 the wholesale rate for expedites and then the relief requested as to other CLECs.

¹⁵ Arbitrators' Report, *In the Matter of the Petition of Eschelon Telecom, Inc., for Arbitration of an Interconnection Agreement with Qwest Corporation Pursuant to 47 U.S.C. §252(b) of the Federal Telecommunications Act of 1996*, MN OAH 3-2500-17369-2; MPUC No. P-5340,421/IC-06-768 (Jan. 16, 2006) [MN Arbitrators' Report"], at ¶ 215 (emphasis added), *aff'd* in the MN PUC's March 30, 2007 Order Resolving Arbitration Issues in the same docket ["MN Order Resolving Arbitration Issues"].

¹⁶ Tr., Vol. II, p. 254, lines 6-11 (Albersheim).

¹⁷ Tr. Vol. II, p. 229, lines 9-12 (Albersheim). See Eschelon Opening Brief, p. 3, line 6 – p. 4, line 7.

¹⁸ FCC First Report and Order ¶12; FCC Third Report and Order ¶¶5-7; TRRO ¶2 (all three quoted in footnote below). See also Staff Opening Brief, p. 29, lines 16-17 ("CLECs are "entitled, under Section 251 of the Act, to TELRIC rates for wholesale elements which meet the impairment standard."). See also ICA Attachment 3, Sections 1 & 2 and subparts (provided in Exhibit 2 to Eschelon Opening Brief).

¹⁹ See CFR §51.313 & FCC First Report and Order ¶268 (the requirement to provide "access" to UNEs must be read broadly, concluding that the Act requires that UNEs "be provisioned in a way that would make them useful."). See also ICA Attachment 3, ¶ 2.1; see *id.* ¶¶ 1.1 & 1.2.2 (see Exhibit 2 to Eschelon Opening Brief).

²⁰ Qwest Opening Brief, p. 45.

²¹ Qwest Opening Brief, pp. 16-17; see also Tr. Vol. I, p. 179, lines 7-9 (Mr. Steese opening).

²² Qwest Opening Brief, pp. 40-42.

1 **1. Wholesale Rate for Expedites**

2 Notably absent from Qwest's Opening Brief is discussion of the wholesale
3 Individual Case Basis ("ICB") expedite rate approved by the Commission²³ or the
4 Commission's Order in the UNE Cost Docket finding that "Qwest is directed to develop
5 cost studies for all services offered in this docket on an ICB price basis in Phase III.
6 Qwest should make every effort to develop reasonable cost-based prices for such services
7 even if it has little or no experience actually provisioning the services."²⁴ Because Qwest
8 "offered in this docket on an ICB price basis" the provision of expedites, expedite
9 charges are subject to this Order.²⁵

10 Unlike a fixed rate, an ICB rate takes into account the particular circumstances of
11 what is being requested and, thus, varies depending on the activities that Qwest must
12 perform.²⁶ The Staff pointed out in its Opening Brief that, at Qwest's urging, the
13 Commission rejected Staff's position to establish a fixed rate for expedites in the latest
14 Wholesale Pricing Docket.²⁷ Qwest asked for and was authorized to charge on an ICB
15 basis.²⁸ Qwest documented the Commission approved ICB rate, as well as Qwest's
16 commitment to seek a TELRIC rate in the next cost docket, in its Arizona SGAT.²⁹

²³ Staff Opening Brief, p. 16, lines 3-5.

²⁴ *Phase II UNE Cost Docket*, Phase II Opinion and Order, Decision No. 64922, June 12, 2002, p. 75. See Exhibit DD-4.

²⁵ See Hrg. Ex. E-4 (Denney Reb.), pp. 40-41.

²⁶ Tr. Vol. I, p. 155, lines 5-10.

²⁷ Staff Opening Brief, p. 16, lines 5-7.

²⁸ Staff Opening Brief, p. 16, lines 8-11.

²⁹ See Hrg. Ex. E-3 (Webber/Denney) at JW-C - AZ SGAT Exhibit A, p. 14 of 19 at §9.20.14 for the Expedite rate element (which is listed as "ICB" with a reference to footnote 5). SGAT footnote 5 states: "Rates for this element will be proposed in Arizona Cost Docket Phase III and may not reflect what will be proposed in Phase III. There may be additional elements designated for Phase III beyond what are reflected here." *Id.* p. 16, note 5.

1 a. **Although the Commission has Approved a Cost-Based Wholesale ICB**
2 **Rate for Expedites, Qwest Will Continue to Require a Non-Cost**
3 **Based Retail Fixed Rate, Absent an Explicit Commission Ruling.**
4

5 If the Commission were silent on the expedite charge in this case, the ICB rate should
6 apply per the Commission's cost docket order. So, why does Eschelon ask the Commission to
7 comment further upon the expedite charge? The answer, quite simply, is because Qwest has
8 unilaterally supplanted the Commission's wholesale ICB rate with a fixed retail rate of \$200 per
9 day (when a CLEC signs Qwest's amendment). The evidence shows that Qwest refuses to
10 provide expedites for an ICB rate, even though Commission approved rates are available for
11 calculating the charge on an ICB basis.³⁰ Specifically, Qwest's witness admitted that Qwest
12 "applies" the ICB rate – not by taking into account the particular circumstances of what is being
13 requested in an individual case – but rather by charging a fixed rate of \$200 per day in every
14 case.³¹ Therefore, if an ICB rate is confirmed, an explicit ruling is needed that an ICB rate is not
15 equal to a fixed rate of \$200 per day.

16 Instead of addressing the approved expedite charge in Arizona and Qwest's non-
17 compliance with the Order "to develop reasonable cost-based prices for such services,"³²
18 Qwest refers in its Opening Brief to expedite rates that other carriers allegedly charge in
19 other states.³³ Qwest provided no evidence that those other carriers went ahead and
20 charged the alleged rates *despite* an applicable state commission order setting a different

³⁰ See Hrg. Ex. E-1 (Johnson Dir.), A-7, at 000138.

³¹ Tr. Vol. II, p. 298, lines 13-16 (Albersheim) ("Q. Is it your position that the ICB rate is equal to \$200 per day? A. It is my understanding that that is how Qwest applies it."). Although Qwest states that it applies an ICB rate in this manner, Qwest does not apply it per the Commission's cost docket order alone but instead requires an ICA amendment that refers, not to an ICB rate, but to a fixed rate of \$200 per day. Qwest's testimony shows that if Qwest is left to interpret "ICB," it will interpret it as a fixed rate of \$200 per day.

³² *Phase II UNE Cost Docket*, Phase II Opinion and Order, Decision No. 64922, June 12, 2002, p. 75. See Exhibit DD-4.

³³ Qwest Opening Brief, p. 16 (citing hearing transcript of Ms. Million's live testimony). Although there were two rounds of pre-filed testimony, Qwest provided no evidence of these claims in its written testimony. Instead, it threw out these alleged numbers, with little or no context, on the witness stand.

1 rate – which is what Qwest seeks in this case. Qwest is asking after-the-fact to continue
2 to charge a rate that it chose to charge instead of following the Commission’s order. The
3 old adage about “seeking forgiveness, not permission,” should not apply to Commission
4 orders. Especially with its greater resources, Qwest may assign a low probability to its
5 actions being challenged by CLECs due to a high probability that CLECs are unlikely to
6 challenge rates on a rate-by-rate basis, given the resource demands, expense, and time
7 commitment necessary for a challenge. There is very little downside to Qwest adopting a
8 “seek forgiveness, not permission” approach, therefore, if the Commission allows it
9 without consequence to Qwest.

10 Qwest failed to explain why – if the fixed \$200 per day rate were appropriate –
11 Qwest did not simply come to the Commission to obtain prior Commission approval
12 before implementing it for wholesale services.³⁴ Instead, Qwest blames Eschelon. In its
13 Opening Brief, Qwest states:

14 Eschelon is the poster child for why Version 30 is necessary. Qwest specifically
15 demanded an amendment to interconnection agreements to ensure that CLECs, such as
16 Eschelon, would pay the expedite charges. “One position constantly taken by Eschelon is
17 that *they would not pay any fee that was not set forth in Exhibit A to their*
18 *Interconnection Agreement or approved by a state cost docket.*” Jean Novak Transcript
19 at 428:9-13.³⁵
20

21 Although Qwest derides Eschelon,³⁶ Qwest has not provided any satisfactory explanation as to
22 why Eschelon’s position that rates should be in the ICA or approved by the Commission is

³⁴ Staff Opening Brief, p. 30, lines 23-25 (“an attempt . . . apparently to remove the rate from Commission oversight”); *id.* p. 16, lines 9-10 (“where in it could have been reviewed and approved by the Commission”). See also Compliant, p. 6, lines 20-21, ¶13 and footnote 1.

³⁵ Qwest Opening Brief, p. 13, lines 1-5 (emphasis modified).

³⁶ The term “poster child” is “usually used metaphorically, meaning a shining example or model of its type; in this context, it is generally a term of derision.” Wikipedia, available at http://en.wikipedia.org/wiki/Poster_child. This is not the only instance in which Qwest, in the absence of facts, resorts to derision. See Answer, p. 1, line 17 (“intractability”); Qwest Opening Brief, p. 32 (“sour grapes”).

1 anything but reasonable. Eschelon established that its position is consistent with the language of
2 the ICA,³⁷ as well as the findings made by Staff and adopted by this Commission in the Qwest
3 271 proceedings.³⁸ The federal Act requires that the rates, terms, and conditions of
4 interconnection be included in an ICA filed with the Commission and that rates meet the Act's
5 cost-based standard.³⁹ Qwest's position that it may supplant a Commission ordered rate with an
6 unapproved rate without prior Commission approval should be rejected. Qwest's defense that its
7 conduct is justified because it used CMP for the purpose of supplanting the Commission ordered
8 rate should also be rejected.⁴⁰ The Commission did not defer its jurisdiction and authority to
9 Qwest in CMP.

10 **b. The Rate When the Emergency Conditions are Met - Exceptions to**
11 **Charging⁴¹**
12

13 When the emergency conditions are met (which occurs when resources are available⁴²),
14 expedites should be available at no additional cost,⁴³ as Qwest has not shown that it incurs any
15 cost not already recovered in the recurring rate.⁴⁴ In its Opening Brief, Staff said:

³⁷ See ICA, Attachment ("Att.") 1, ¶1.1, Exhibit 2 to Eschelon Opening Brief. When Commission-approved rates do not appear in the ICA, Qwest charges them pursuant to the Rates and Charges General Principle that charges must be in accordance with Commission rules and regulations. *See id.*

³⁸ See Decision No. 66242, Docket No. T-00000A-97-0238 (Qwest's 271 application) (Sept. 16, 2003) (*cited in* Complaint, p. 6 at footnote 1) at ¶105 ("In its Report and Recommendation, Staff stated that the rates included in the SGAT should reflect the Commission-approved rates resulting from the latest wholesale pricing docket in Arizona. These rates were most recently set in Docket No. T-00000A-00-0194. If the CLEC interconnection agreement does not include rates for the work or service requested, then Qwest can and should use SGAT rates, as these are Commission-approved rates.").

³⁹ 47 U.S.C. §252(h) & (i); *id.* at §252 (d).

⁴⁰ Qwest states that it agrees rates are outside the scope of CMP. Hrg. Ex. Q-3, Martain Dir., p. 29, line 1; Hrg. Ex. E-1, A-7 at 000129 (Qwest CMP Response) ("discussion around rates associated with an Interconnection Agreement are outside the scope of the CMP process"); *see also* Hrg. Ex. S-1, Staff, p. 29, lns 4-5. Nonetheless, Qwest's Opening Brief is noticeably silent on how Qwest can impose a fee via CMP when rates are outside the scope of CMP.

⁴¹ See also Eschelon Opening Brief, p. 11 & pp. 58-59.

⁴² Per Qwest's PCAT, the emergency-based Expedites Requiring Approval (at no additional fee) are subject to resource availability; the fee-added Pre-Approved Expedites are not. *See* Hrg. Ex. E-2, BJJ-N (Expedites PCAT); *see also* Hrg. Ex. E-1, A-2 at 000062, #3 [Version 11 Eschelon Comment ("impact resources") and Qwest CMP Response]; Hrg. Ex. Q-4 at JM-R1 (June 29, 2004 CMP meeting minutes).

⁴³ Hrg. Ex. S-1 (Staff Testimony), Executive Summary, Conclusion No. 1.

1 Qwest has not demonstrated that, given its policies to allow emergency
2 expedites through January 3, 2006 without charge, it's desire to now
3 charge \$200 for this previously free service is justified, and that the
4 activity is not already recovered in an existing rate.⁴⁵
5

6 **c. The Rate When the Emergency Conditions are Not Met - The General**
7 **Rule**
8

9 All Parties have requested that the Commission set an expedite rate in this case.⁴⁶ All
10 Parties have recognized that the Commission, though it has previously established an ICB rate,
11 may set a fixed rate in this case.⁴⁷ All Parties also request that the rate be available to all
12 CLECs,⁴⁸ although Qwest only wants that to be the case if its \$200 per day retail rate is
13 adopted.⁴⁹

14 The Parties disagree as to what the wholesale rate should be.⁵⁰ As the Staff's witness
15 concluded,⁵¹ and as indicated in this Commission's previous order,⁵² expedites should be

⁴⁴ Hearing Exhibit E-5 (transcript excerpts from Arizona arbitration hearing between Eschelon and Qwest) at p. 200, lines 16-20; Hearing Exhibit E-6 (transcript excerpts from Washington arbitration hearing between Eschelon and Qwest) at 193:23-194:2.

⁴⁵ Staff Opening Brief, p. 16, lines 22-26; *see also* p. 29, lines 16-17 ("CLECs are 'entitled, under Section 251 of the Act, to TELRIC rates for wholesale elements which meet the impairment standard.'"). Hrg. Ex. S-1 (Staff Testimony), Executive Summary, Conclusion Nos. 1, 2 & 7; *see also* Tr. Vol. I, p. 155, lines 20-23.

⁴⁶ *Qwest* – Tr. Vol. I, p. 179, lines 7-9 (Mr. Steese opening) ("And so we, in the end, will ask Your Honor to . . . allow Qwest to charge this \$200 per day rate to expedite."); *Qwest* Opening Brief, p. 45 ("find in all respects for Qwest"); *Eschelon* – E.g., Complaint, ¶I, Page 14, lines 1-3; *Eschelon* Opening Brief, second page of Executive Summary and Rows 36 & 37 to Table 5 to *Eschelon* Opening Brief; *Staff* – Staff Opening Brief, p. 37.

⁴⁷ *Qwest* – Tr. Vol. I, p. 179, lines 7-9 (Mr. Steese opening) ("\$200 per day" fixed rate); *Eschelon* – E.g., Table 5 to *Eschelon* Opening Brief at Row 36, pp. 25-26 (maximum rate) & footnote 75 on p. 24 (\$100 fixed interim rate); Hrg. Ex. E-4 (Denney Reb.), p. 8, line 12 – p. 9, line 6 (\$100 fixed interim rate); Tr. Vol. I, p. 156, line 21 – p. 157, line 2 (Denney) (\$40 fixed interim rate, in light of Qwest recent MN cost study); *Staff* – Staff Opening Brief, p. 17, lines 4-6 ("at a **minimum**," the \$200 per day fixed charge) (emphasis added).

⁴⁸ *Qwest* – Hrg. Ex. Q-1 (Albersheim Dir.), p. 14, lines 7-10; *Eschelon* – E.g., *Eschelon* Opening Brief, pp. 33-37; *Staff* – Staff Opening Brief, p. 37; Hrg. Ex. S-1, Staff Conclusion #2, Staff Executive Summary. Regarding Staff and *Eschelon*, *see also* Exhibit 4 to *Eschelon* Opening Brief.

⁴⁹ Hrg. Ex. Q-2 (Albersheim Reb.), p. 16, lines 3-16.

⁵⁰ See rate proposals in above footnote 47.

⁵¹ Hrg. Ex. S-1 (Staff Testimony), Executive Summary, Conclusion No. 7.

⁵² *Phase II UNE Cost Docket*, Phase II Opinion and Order, Decision No. 64922, June 12, 2002, p. 75. See Exhibit DD-4.

1 available on a nondiscriminatory basis at TELRIC rates.⁵³ As Qwest has acknowledged, the
2 ability to expedite service is necessary to CLECs' ability to compete effectively.⁵⁴ Thus, to
3 allow Qwest to charge an inflated rate, even on an interim basis, would only serve to
4 unreasonably burden competition. The Commission should (i) reject Qwest's proposed non-cost
5 based fixed rate of \$200 per day and (ii) confirm the ICB rate or set a more certain fixed interim
6 rate.

7 i. The Commission Should Reject Qwest's Non-Cost Based Rate.

8 Qwest admitted that its proposed rate is not a cost-based (TELRIC) rate.⁵⁵ Therefore, it
9 does not comply with this Commission's Order that "Qwest should make every effort to develop
10 *reasonable cost-based prices* for such services."⁵⁶ In its Opening Brief, Staff suggested that the
11 Commission could order Qwest to "make permanent the interim process in effect under the June
12 6, 2006 Procedural Order for all expedites for all CLECs."⁵⁷ To the extent the Staff is referring
13 to the structure of the interim process (to provide expedites at no additional cost when the
14 emergency conditions are met and to provide expedites for a fee when they are not met),
15 Eschelon agrees that structure should be adopted. Regarding the rate, Staff suggests that, "*at a*
16 *minimum,*" the \$200 per day fixed charge could apply to non-emergency expedites, on an
17 interim basis pending further Commission review to establish a cost-based rate.⁵⁸ This
18 recognizes that the Commission could reasonably decide to order a different, and lower, interim

⁵³ See also MN Arbitrators' Report, MN OAH 3-2500-17369-2; MPUC No. P-5340,421/IC-06-768 (Jan. 16, 2007) ¶222 ("A TELRIC study should be done."); MN Order Resolving Arbitration Issues (same MPUC docket; Mar. 30, 2007), pp. 17-19 (affirming and concluding that, instead of opening a new docket to establish the appropriate rate, the matter should be referred to the cost docket already underway). Thus, Qwest has developed a cost study, which it filed in the UNE cost case in Minnesota. See Tr. Vol. 1, p. 156, lines 17-22 (see Hrg. Ex. E-11).

⁵⁴ Tr., Vol. II, pl 254, lines 6-11 (Albersheim).

⁵⁵ Qwest Opening Brief, p. 16 ("The rate is not a TELRIC rate . . .").

⁵⁶ *Phase II UNE Cost Docket*, Phase II Opinion and Order, Decision No. 64922, June 12, 2002, p. 75 (emphasis added). See Exhibit DD-4.

⁵⁷ Staff Opening Brief, p. 37.

⁵⁸ Staff Opening Brief, p. 17, lines 4-6 (emphasis added).

1 expedite rate. In other words, Staff's use of "at a minimum"⁵⁹ suggests that the \$200 per day rate
2 is a last resort and indicates that it is not a requisite part of the recommendation. There is no
3 reason, based on the extensive evidence in this case, to resort to a bare minimum remedy. As
4 discussed below, the evidence shows that the \$200 per day charge significantly exceeds Qwest's
5 costs. In response to Staff's suggestion, Exhibit 6 to this Reply Brief⁶⁰ is a proposed amendment
6 containing the language of the interim process in effect under the June 6, 2006 Procedural
7 Order,⁶¹ with modifications including a \$100 per order interim rate (which is discussed below).⁶²

8 To allow Qwest to continue to charge its inflated rate, even for an interim period (of
9 indeterminate length for each CLEC choosing to receive that rate), is unreasonable. The
10 Commission could not have envisioned, when it ordered a wholesale ICB rate for expedites and
11 required Qwest to develop cost-based pricing for any element subject to an ICB rate, that Qwest
12 would supplant that approved ICB rate with an excessive non-cost based fixed retail rate for
13 expedites. Qwest should not be rewarded for doing so by being allowed to continue charging
14 that rate.

15 At the time of the June 6, 2006 Procedural Order, which established a process for
16 obtaining expedited service while this proceeding is pending, no party had filed testimony in this
17 case. The interim relief was put in place to allow the parties to present their case, and now that
18 the parties have expended substantial resources to do so, a decision on the merits should be
19 reached. Since the Order was issued, Qwest filed testimony in this proceeding acknowledging
20 that its current \$200 per day expedite rate is not cost-based⁶³ and advancing its theory that

⁵⁹ Staff Opening Brief, p. 17, lines 4-6.

⁶⁰ Eschelon Exhibits 1 through 5 are attached to Eschelon's Opening Brief.

⁶¹ See Exhibit 6 to this Reply Brief at ¶1.2 & Attachment A.

⁶² Also, the "boilerplate" language of the proposed amendment is based upon boilerplate in other approved amendments entered into between Qwest and Eschelon.

⁶³ Hrg. Ex. Q-7, p. 7, lines 15-21.

1 expedites are not required to be provided at cost-based rates is because expedites are a “superior
2 service” that fall outside the scope of Section 251.⁶⁴ As Staff correctly concluded, “Expedites
3 are not a ‘superior service’ to what Qwest provides itself,”⁶⁵ thus rejecting the only rationale that
4 Qwest has advanced for its claimed right to charge a rate of \$200 per day.

5 Even more importantly, at the time the Procedural Order was entered, neither Eschelon
6 nor the ALJ had the benefit of the expedites cost study that Qwest subsequently filed in
7 Minnesota pursuant to an order of the Minnesota Commission.⁶⁶ What that cost study shows is
8 that, *by Qwest’s own calculation*, Qwest’s costs to expedite service are less than a third of the
9 \$200 per day rate that it has imposed on CLECs.⁶⁷ These facts were not known at the time of the
10 entry of the Procedural Order and there is no reason, in light of this evidence, that the \$200 per
11 day expedite rate ordered by the Procedural Order should be continued.⁶⁸ The Commission
12 should reject Qwest’s \$200 per day rate.

13 ii. The Commission May Confirm the ICB Rate or Set a More Certain Fixed
14 Interim Rate.

15 a) *ICB Rate Using Commission-Approved Rates*
16

17 As discussed above, the Commission has set an ICB expedite rate. This Commission’s
18 previous order (stating that “Qwest should make every effort to develop *reasonable cost-based*
19 *prices* for such services”⁶⁹) may reasonably be interpreted as requiring Qwest to use
20 Commission-approved cost-based prices whenever possible in applying an ICB rate. If
21 Commission approved rates are used in the calculation of the ICB rate, the Commission

⁶⁴ Hrg. Ex. Q-7, p. 4, lines 17-21.

⁶⁵ Staff Opening Brief, p. 31, line 19.

⁶⁶ See Hrg. Ex. E-11 (\$65.85 per day, using an average to obtain a per day rate from the study’s total per expedite charge).

⁶⁷ See Hrg. Ex. E-11; Tr. Vol. II, p. 511, line 24 – p. 512, line 20.

⁶⁸ See Hrg. Ex. E-4, p. 59, line 7 – p.61, line 10.

⁶⁹ *Phase II UNE Cost Docket*, Phase II Opinion and Order, Decision No. 64922, June 12, 2002, p. 75 (emphasis added). See Exhibit DD-4.

1 approved dispatch and labor rates will apply if the expedite causes an additional dispatch or
2 Qwest must perform other work due to the expedite in addition to that which Qwest must
3 ordinarily do when performing an installation, and they will not apply if the expedite does not
4 cause Qwest to perform such additional activities.⁷⁰ If the Commission confirms an ICB rate,
5 which is applied on an individual (*i.e.*, not fixed or per day) basis, the Commission should
6 indicate that an ICB rate is not equal to a fixed rate of \$200 per day to avoid certain disputes
7 should Qwest continue to apply an ICB rate as \$200 per day.

8

9 *b) ICB Rate With Qwest's Previous Maximum*

10 Based on the evidence in this case, the Commission may establish a maximum rate
11 applying the cost principle articulated in Qwest's previous Arizona tariff retail rate: "in no event
12 shall the charge exceed fifty percent (50%) of the total nonrecurring charges associated with the"
13 order.⁷¹ The 50% would be applied to the Commission approved UNE rates for the applicable
14 non-recurring installation charge. If, for example, the CLEC orders a DS1 capable loop with a
15 basic installation, the approved non-recurring installation charge is \$87.93,⁷² so the maximum
16 additional expedite fee would be half of that amount (\$43.97). If, for example, the CLEC orders
17 a DS1 capable loop using the coordinated installation with testing option, the approved non-

⁷⁰ See Rows 11 and 36 in Exhibit 5 to Eschelon Opening Brief. See, e.g., Hrg. Ex. E-1 (Johnson Dir.), A-7 at 000138.

⁷¹ See Qwest's Tariff F.C.C. #1, Original Page 5-25 (quoted in Hrg. Ex. E-4, Denney Reb., p. 62).

⁷² SGAT Exhibit A, §9.2.5.1.1, with footnote A designation. The SGAT states, for footnote A: "Unless otherwise indicated, all rates are pursuant to Arizona Corporation Commission Dockets listed below: A: Cost Docket T-00000A-00-0194 Phase II Order No. 64922 Effective 6/12/02"). See Hrg. Ex. E-1 (Johnson Dir.), Att. B (SGAT Exhibit A excerpts) at 001674-001675.

1 recurring installation charge is \$197.07,⁷³ so the maximum additional expedite fee would be half
2 of that amount (\$98.54).

3 Mr. Denney explained that an additional expedite charge for the smaller number of
4 activities involved in expediting an installation that approaches or even exceeds the amount of
5 the Commission-approved charge for all of the activities for an entire installation of a facility
6 should more than amply compensate Qwest for performing the installation activities more
7 quickly.⁷⁴ An ICB rate in conjunction with a maximum limit on that rate, until a fixed rate is set
8 in another docket, would be consistent both with Qwest's earlier rejection of a fixed rate in the
9 Wholesale Pricing Docket⁷⁵ and the Commission's previous order. As Qwest has not taken
10 action on its own in Arizona to comply with the Commission's previous order that "Qwest
11 should make every effort to develop reasonable cost-based prices for such services,"⁷⁶ the
12 Commission may implement this maximum limit on the expedite charge to better reflect Qwest's
13 costs where Qwest has not done so in its pricing.

14 c) *Fixed Interim Rate*

15 Despite Qwest's previous opposition to a fixed wholesale expedite rate,⁷⁷ Qwest not only
16 elects to charge fixed pricing today (provided a CLEC will sign an amendment containing the
17 \$200 per day fixed rate), but also argues in this case in favor of certainty and predictability with
18 respect to a fixed expedite rate.⁷⁸ Given that Qwest's unilateral decision to apply an ICB rate as

⁷³ SGAT Exhibit A, §9.2.5.3.1, with footnote A designation (indicating a Commission approved rate – see above footnote). See Hrg. Ex. E-1 (Johnson Dir.), Att. B (SGAT Exhibit A excerpts) at 001674-001675.

⁷⁴ Hrg. Ex. E-4 (Denney Reb.), pp. 59-60 & 62.

⁷⁵ Staff Opening Brief, p. 16, lines 5-7.

⁷⁶ *Phase II UNE Cost Docket*, Phase II Opinion and Order, Decision No. 64922, June 12, 2002, p.

75. See Exhibit DD-4.

⁷⁷ Staff Opening Brief, p. 16, lines 5-7.

⁷⁸ See, e.g., Hrg. Ex. Q-2 (Albersheim Reb.), p. 12, lines 10-15 ("Qwest does not violate the agreement by refusing to expedite orders for design services unless Eschelon agrees to pay a \$200 per day fee. . . . If anything, the current expedite process gives CLECs *more certainty* that expedites will be

1 a fixed rate⁷⁹ has contributed to this dispute and, if continued, will certainly lead to additional
2 disputes, it is reasonable to set a fixed interim rate until an expedite rate is set is another
3 proceeding to avoid future disputes. The Commission should specify an interim rate that
4 approximates Qwest's costs and not a rate that the evidence establishes is far in excess of
5 Qwest's costs.

6 Based on the evidence in this case, the Commission, for example, could allow Qwest to
7 charge the above-described maximum rate for each expedite, rather than calculating an ICB rate
8 in each individual case up to a maximum amount. In other words, if in a particular case when
9 the emergency conditions were not met, Qwest did not need to dispatch and any additional
10 activities were minimal, so the resulting ICB expedite fee would be less than the maximum
11 allowable charge, Qwest would nonetheless be allowed to charge the higher maximum charge
12 (50% of the approved wholesale NRC) to gain certainty with respect to the rate, on an interim
13 basis.

14 Alternatively, based on the evidence in this case, the Commission may order a \$100 per
15 order interim rate. Mr. Denney testified that Eschelon has proposed, in the arbitration
16 proceeding that is now pending before the Commission, an interim rate of \$100 per order
17 expedited.⁸⁰ Mr. Denney provided, for purposes of comparison, Qwest's rates for other services
18 that offer reasonable points of reference, including: the approved rate for basic installation of a
19 DS1 capable loop (\$87.93); the rate for Qwest's "express service," which Qwest offers to its
20 residential customers to obtain access line dial tone prior to the standard installation date (\$22);

granted by establishing the conditions under which expedites are automatically approved.") (emphasis added). The primary condition under which expedites are automatically approved is an amendment containing the \$200 per day fee. *See id.*

⁷⁹ Tr. Vol. II, p. 298, lines 13-16 (Albersheim) ("Q. Is it your position that the ICB rate is equal to \$200 per day? A. It is my understanding that that is how Qwest applies it.").

⁸⁰ Hrg. Ex. E-4 (Denney Reb.) (dated Feb. 13, 2007), p. 59 line 1.

1 and the rate for a Due Date change, which allows the due date to be changed to a later date than
2 originally scheduled (\$10.22).⁸¹ What these points of comparison show is both that Qwest's
3 \$200 per day rate is unreasonable and that Eschelon's \$100 per order interim rate proposal
4 represents a compromise that is more than reasonable. For a five-day expedite, Qwest's \$200
5 per day expedited rate results in a charge of \$1,000 – ten times Eschelon's proposed interim rate.

6 The unreasonableness of Qwest's \$200 per day proposal and the reasonableness of
7 Eschelon's \$100 per order interim rate proposal were further confirmed when Qwest filed its
8 own cost study in Minnesota.⁸² Qwest's cost study results in an almost \$200 *per expedite*
9 charge, which Qwest divides by three⁸³ to achieve Qwest's desired result of a per day rate (in the
10 amount of \$65.85 per day).⁸⁴ Qwest's proposed \$200 per day expedite charge here is more than
11 three times higher than what Qwest believes a TELRIC-based analysis produces. The difference
12 of \$134.15 per day represents a cost advantage to Qwest which, according to Qwest's study,
13 faces an economic cost of \$65.85 per day for expedites for its own retail customers, while Qwest
14 proposes to charge Eschelon \$200 per day. This fact alone should be sufficient to reject Qwest's
15 rate proposal for expedites.

16 It is important to note that the cost study filed by Qwest in the pending Minnesota
17 proceeding represents Qwest's "going in" position, before scrutiny by other parties and before
18 any adjustments that may be implemented by the Minnesota Commission. The Qwest expedite

⁸¹ Hrg. Ex. E-4 (Denney Reb.), p. 58 line 8 - p. 59, line 12.

⁸² See Hrg. Ex. E-11 (dated June 29, 2007).

⁸³ See Hrg. Ex. E-11 at 3 of 6 (".33 probability is average number of days (3) order is expedited"). That Qwest's expedite study calculates Qwest's proposed total costs of *an expedite* and simply divides this number by an alleged three day average shows that Qwest's proposed costs do not vary by the number of days the order is requested to be expedited. In all instances in which the expedite request is something other than Qwest's assumed 3 days, based on Qwest's proposed application on a "per day" basis, Qwest will either double recover expedite costs (if the request is for more than 3 days) or under-recover expedite costs (if the request is for 1 or 2 days).

⁸⁴ See Hrg. Ex. E-11 at 1 & 6 of 19 ("TELRIC Common").

1 cost study incorporates a number of flaws.⁸⁵ When reasonable adjustments are made to Qwest's
2 study, a \$40.00 flat per order charge would be a more reasonable rate.⁸⁶ Again, this shows that
3 Eschelon's \$100 per order interim rate proposal represents a more than reasonable interim rate.

4 Whether the Commission confirms an ICB rate or sets a more certain interim fixed rate,
5 the rate should be made available to other CLECs via an ICA amendment, as discussed in the
6 next section.

7 **2. Relief as to Other CLECs**

8 Eschelon has consistently made it clear, from the filing of its Complaint⁸⁷ through the
9 filing of its Brief,⁸⁸ that Qwest's unilateral conduct in CMP should be reversed as to all CLECs
10 so that nondiscriminatory terms are offered to all CLECs.⁸⁹ If a CLEC decides it is happy with
11 its current arrangement, as alleged by Qwest, then the CLEC may choose not to take advantage
12 of any relief made available to it.⁹⁰ But, that will be the CLEC's option, and not a discriminatory
13 and unreasonable term inappropriately imposed by Qwest without prior Commission oversight.

14 Qwest, in contrast, opposes making any relief in this case available to any CLEC other
15 than Eschelon,⁹¹ even if the CLEC has opted into identical ICA language or has substantially

⁸⁵ Tr. Vol. I (Denney), p. 156, lines 23-24.

⁸⁶ Tr. Vol. I (Denney), p. 156, line 24 – p. 157, line 2.

⁸⁷ See, e.g., Complaint, ¶42, p. 13, lines 1-3 (conduct that violates the public interest “denies Eschelon *and other CLECs* a meaningful opportunity to complete”); *id.* pp. 13-14, ¶¶D-F & K.

⁸⁸ See, e.g., Exhibit 4 to Eschelon Opening Brief.

⁸⁹ See Hrg. Ex. S-1 (Staff Testimony) at Staff Conclusion #2, Staff Executive Summary (“This option should be *offered to all CLECs*. . . .”); Tr. Vol. I, p. 129, lines 11-15 (Denney) (“Eschelon agrees with the recommendations that Staff has cited in its summary, and we believe that those recommendations are consistent with the relief sought by Eschelon in this complaint.”).

⁹⁰ Eschelon Opening Brief, pp. 52-53. It is not necessary to “nullify” CLEC contracts (see Qwest Opening Brief, p. 43), as an amendment can be made available for the CLEC to sign at the CLEC's option. *See id.* Qwest overly complicates implementation of the Staff's recommendations, which Qwest describes as “extraordinary.” See Qwest Opening Brief, p. 41. For example, Qwest says it “makes absolutely no sense whatsoever” to define terms if they are not in ICAs or tariffs. *See id.* p. 44. This is easily solved by stating that, if an ICA or a tariff uses the term design[ed] or non-design[ed] to refer to a service, then the term must be defined in that ICA or tariff.

⁹¹ Qwest Opening Brief, pp. 18-19 & 40-44.

1 similar language⁹² or is one of the CLECs that has opted into the SGAT containing the
2 Commission approved ICB rate.⁹³ If the Commission finds that Qwest's conduct in
3 implementing and enforcing the changes described in the Complaint violated ICA terms, Qwest
4 should not violate the same terms in other CLECs' ICAs, particularly when those terms are based
5 on the SGAT containing the Commission approved ICB rate.

6 Qwest then attempts to bootstrap its own opposition to applying relief to all CLECs into a
7 claim against Eschelon. Specifically, Qwest accuses Eschelon of seeking to obtain a
8 "staggering" competitive advantage over other CLECs.⁹⁴ Qwest is the party seeking to prevent
9 other CLECs from obtaining emergency expedites for unbundled loops and fee-added expedites
10 at TELRIC rates, even if they are made available to Eschelon in this case.⁹⁵ Qwest attempts to
11 justify its position by saying that it has already implemented its retail rate for all of its wholesale
12 customers, so Eschelon would allegedly be an exception.⁹⁶ Applying this line of reasoning,

⁹² See Hrg. Ex. S-1 (Staff Testimony), p. 35, lines 15-16 ("67% contain per-CMP charge initiation language that allows expedites and charges but does not identify the specific charge"). CLECs in Arizona that have opted in to the AT&T ICA have the same terms as the Eschelon ICA (see Hrg. Ex. E-1, Att. A-7, at 000134-000136).

⁹³ CLECs in Arizona have opted in to the SGAT. See Tr. Vol. II, p. 303, lines 16-17 (Albersheim). Thus, they have an ICB expedite rate for UNEs in their ICAs. See Hrg. Ex. E-3 (Webber/Denney) at JW-C - AZ SGAT Exhibit A, p. 14 of 19 at §9.20.14 for the Expedite rate element (which is listed as "ICB" with a reference to footnote 5). Qwest carefully asserts on page 43 of its Opening Brief (with emphasis added) that "testimony was presented that the SGAT did not have any language about expedites *in the body of the contract*," without mentioning that Qwest's witness admitted the SGAT contains an approved expedite rate for UNEs. See Tr. Vol. II, p. 305, lines 15-19 & p. 306, lines 23-25 (Albersheim). This is certainly convincing evidence of the need to include terms in ICAs going forward. In the meantime, however, this Commission has said the approved rate applies. See Decision No. 66242, Docket No. T-00000A-97-0238 (Qwest's 271 application) (Sept. 16, 2003) (*cited in* Complaint, p. 6 at footnote 1) at ¶105 ("In its Report and Recommendation, Staff stated that the rates included in the SGAT should reflect the Commission-approved rates resulting from the latest wholesale pricing docket in Arizona. These rates were most recently set in Docket No. T-00000A-00-0194. If the CLEC interconnection agreement does not include rates for the work or service requested, then Qwest can and should use SGAT rates, as these are Commission-approved rates.").

⁹⁴ Qwest Opening Brief, p. 38; *see id.* pp. 17, 32-33 & 37; Tr. Vol. I, p. 178, line 23 - p.179, line 4 (Mr. Steese opening). See Row 1 in Exhibit 5 to Eschelon Opening Brief.

⁹⁵ Qwest Opening Brief, pp. 18-19 & 40-44.

⁹⁶ Qwest Opening Brief, p. 10 ("Qwest had also transitioned all of its retail customers, wholesale customers, and interexchange carrier customers to the Pre-Approved Expedite Process.").

1 Qwest could implement any unreasonable or illegal term, so long as Qwest violated the rights of
2 all wholesale customers uniformly.⁹⁷

3 In addition, if the Commission finds that Qwest's conduct in implementing and enforcing
4 the changes described in the Complaint violated the public interest or state or federal law, as
5 alleged by Eschelon in its Complaint,⁹⁸ Qwest should not continue the offending conduct as to
6 other CLECs. For example, in Minnesota, Eschelon made an individual complaint against Qwest
7 regarding an individual situation in which Eschelon lost its end user customer due to a Qwest
8 mistake in processing a wholesale order for Eschelon.⁹⁹ Eschelon prevailed.¹⁰⁰ Although it was
9 an individual complaint by Eschelon, the Minnesota Commission ordered procedures that apply
10 to CLECs generally, and not to Eschelon alone.¹⁰¹ The Minnesota Commission ruled that
11 "Qwest failed to provide adequate service at several key points in the customer transfer process
12 and that these inadequacies reflect system failures that must be addressed."¹⁰² In a later order in
13 the same case finding Qwest's compliance filing inadequate, the Minnesota Commission's
14 ordering paragraphs regarding the required contents of Qwest's next compliance filing included
15 several items that referred to "all" Qwest wholesale orders and CLECs generally (not only

⁹⁷ As Staff points out on page 29 (lines 15-17) of its Opening Brief, "uniformity (unless one accepts Qwest's position that expedites are a superior service) may not be lawful in this case" because "CLECs are entitled, under Section 251 of the Act, to TELRIC rates for wholesale elements which meet the impairment standard." In other words, when a UNE is available under the ICA, charging the same price for wholesale and retail is not nondiscriminatory. See Hrg. Ex. E-4 (Denney Reb.), p. 51, lines 8-11 ("It is incorrect to equate not providing a wholesale service *at the same price* as a retail service with superior service, because it confuses these concepts and inappropriately collapsed the two questions into one").

⁹⁸ See Complaint, ¶42, p. 13, lines 1-3: Conduct that violates the public interest "denies Eschelon **and other CLECs** a meaningful opportunity to complete." See Eschelon Opening Brief, pp. 33-37.

⁹⁹ MN PUC Docket No. P-421/C-03-616 ("MN 616 Docket").

¹⁰⁰ Order Finding Service Inadequate and Requiring Compliance Filing, *In the Matter of a Request by Eschelon Telecom for an Investigation Regarding Customer Conversion by Qwest and Regulatory Procedures*, Docket No. P-421/C-03-616, (July 30, 2003) ("MN 616 Order").

¹⁰¹ See MN 616 Order.

¹⁰² MN 616 Order, p. 5.

1 Eschelon).¹⁰³ Examples include: “Procedures for extending the error acknowledgment
2 procedures . . . to *all* Qwest errors in processing wholesale orders” and “Procedures for making
3 the acknowledgement process readily accessible to competitive local exchange *carriers*,
4 including procedures for identifying clearly the person(s) to whom requests for
5 acknowledgments should be directed.”¹⁰⁴ The Arizona Commission is likewise able to act in the
6 public interest, and its authority is not nearly so limited as Qwest would suggest.

8 III. ADDITIONAL ARGUMENT

9 A. Qwest Incorrectly Claims that Eschelon has “Dropped” its Discrimination Count.¹⁰⁵

10

11 Qwest states that, as to the discrimination count of the Complaint, “Eschelon
12 alleged that Qwest’s process for expediting service orders discriminated against CLECs
13 who ordered unbundled loops. See, e.g., Complaint at ¶21.”¹⁰⁶ Qwest claims that (1)
14 Eschelon has “since dropped this allegation”;¹⁰⁷ (2) there are only two counts to
15 Eschelon’s Complaint, so the alleged dropping of one claim leaves only a breach of
16 contract claim;¹⁰⁸ and (3) Eschelon’s discrimination claim is limited to discrimination
17 based on the means of delivering service (*i.e.*, that Qwest “discriminated against CLECs
18 who ordered unbundled loops”).¹⁰⁹ Each of these claims is incorrect.

¹⁰³ Order, MN 616 Docket (Nov. 13, 2003), pp. 4-5.

¹⁰⁴ Order, MN 616 Docket (Nov. 13, 2003), p. 4 (*emphasis added*).

¹⁰⁵ Qwest Opening Brief, p. 17.

¹⁰⁶ Qwest Opening Brief, p. 17 (second sentence after Heading III(A)).

¹⁰⁷ Qwest Opening Brief, p. 17.

¹⁰⁸ Qwest Opening Brief, p. 17.

¹⁰⁹ Qwest Opening Brief, p. 17. With respect to Qwest’s claim that it “uniformly” or consistently applied two processes (*see id.*), see Rows 8 & 9 of Exhibit 5 to Eschelon Opening Brief.

1 **1. Eschelon Continues to Pursue This Discrimination Claim: Qwest**
2 **Cannot Discriminate Based on the Means of Delivering Service.**
3

4 As to Qwest's first allegation, although Qwest readily provides a citation to a
5 specific paragraph of the Complaint for Eschelon's discrimination claim, Qwest provides
6 no citation at all for its assertion that Eschelon dropped this claim.¹¹⁰ Qwest cannot
7 provide a citation, because there is none. At no point did Eschelon amend its Complaint
8 or otherwise withdraw its discrimination claims, including discrimination based on the
9 means of delivering service. Instead of pointing to any action by Eschelon which would
10 be required to withdraw its discrimination claims, Qwest relies on its allegation that
11 "Eschelon did not spend one moment at hearing trying to prove that Qwest
12 discriminates."¹¹¹ In fact, *Qwest* chose not to "spend one moment" crossing Eschelon's
13 witnesses about Eschelon's discrimination claims at the hearing, even though these
14 claims were expressly asserted in the Complaint and discussed in Eschelon's pre-filed
15 testimony.¹¹² Because the direct testimony was pre-filed in this case, the parties did not
16 present live direct testimony.¹¹³ Nonetheless, contrary to the claim by Qwest's counsel
17 during his opening,¹¹⁴ Mr. Denney discussed discrimination (including the need for

¹¹⁰ Qwest Opening Brief, p. 17.

¹¹¹ Qwest Opening Brief, p. 18.

¹¹² Instead, Qwest said it would delay its opening statement until after the conclusion of cross of Eschelon's witnesses, and then Qwest claimed in its opening statement that Eschelon had dropped its discrimination claim. Tr., Vol. I, p. 166, lines 12-21, Mr. Steese opening. See Rows 1, 5 & 6 of Exhibit 5 to Eschelon's Opening Brief.

¹¹³ There were witness summaries, but they were short. Eschelon's witnesses stayed within the ten-minute time limit set by the ALJ for witness summaries, providing insufficient time to re-state in their summaries each and every aspect of Eschelon's case. Cf. Tr., Vol. I, p. 192, lines 15-17 (Mr. Merz objection based on time to Ms. Albersheim witness summary).

¹¹⁴ Tr. Vol. I, p. 166, lines 16-18 ("And we just got done hearing their witnesses, and we didn't hear a single person talk about discrimination.").

1 nondiscriminatory, cost-based rates) in his summary and in response to cross by Staff.¹¹⁵
2 Likewise, if Qwest had chosen to cross him about discrimination based on the means of
3 delivering service, Mr. Denney would have answered those questions. Even if Eschelon
4 had not discussed discrimination at the hearing, there is no requirement that a party repeat
5 all of its claims during the hearing, when those claims are clearly in the record through
6 extensive pre-filed testimony.¹¹⁶

7 Qwest focuses on one aspect of Eschelon's discrimination claims – discrimination
8 based on means of delivering service (*i.e.*, discrimination “against CLECs who ordered
9 unbundled loops”¹¹⁷ and in favor of CLECs who provide service using a Qwest POTS
10 product, such as QPP or resold POTS). Although, as discussed below, there is more to
11 the discrimination count of Eschelon's Complaint, this portion of paragraph 21 of the
12 Complaint states (with emphasis added): “Qwest must provide access to UNEs on
13 nondiscriminatory terms for all CLECs (*facility-based and non-facility based*), as well as
14 for Qwest itself. *See* 47 C.F.R. 51.313.” Federal law provides that Qwest may not refuse
15 to provide a facilities-based carrier using unbundled network elements (UNEs)¹¹⁸ with
16 service on the same terms that it provides to itself, its retail customers, and its CLEC

¹¹⁵ *Summary*: Tr. Vol. I, p. 127, line 21 – p. 128, line 2; p. 128, lines 11-12; p. 128, line 10 – p. 129, line 10; *Cross by Staff*: *Id.* p. 150, lines 1-24; p. 152, line 25 – p. 153, line 15.

¹¹⁶ See, e.g., Hr. Ex. E-3 (Web./Denney Dir.), p. 7, line 9 – p. 8, line 14; p. 22, lines 1-3; p. 24, lines 6-10, p. 25, line 1 – p. 46, line 6. Hrg. Ex. E-4 (Denney Reb.), p. 25, line 11 – p. 26, line 7; p. 28, line 24 – p. 29 line 8 (quoting Complaint, p. 2 line 17 – p. 3, line 6); p. 42, line 7 – p. 69, line 15. Hrg. Ex. E-2 (BJJ Reb.), p. 6, FN 9; p. 19, FN 58.

¹¹⁷ Qwest Opening Brief, p. 17 (citing Complaint at ¶21).

¹¹⁸ Although Qwest in its Answer (¶2, p. 4, lines 1-2), denied that Eschelon is a facilities-based CLEC (despite admitting that Eschelon has its own switch in Arizona), the FCC recognizes that a CLEC which has some of its own facilities (e.g., a switch) and also orders UNEs from the ILEC is a facilities-based carrier. See, e.g., TRRO ¶62 (“facilities-based competitors relying upon UNEs”). This is in contrast to non-facilities based Resale, when the CLEC relies upon all ILEC facilities (including switching), and obtains a wholesale discount. The choice of whether to provide service using all of its own facilities, its own facilities and UNEs, or resale belongs to the CLEC. See FCC First Report and Order, ¶¶172, 325, 328, 635, 1164. As resale is more expensive, for example, a CLEC may choose to use UNEs. See FCC First Report and Order, ¶325.

1 reseller (*i.e.*, non-facilities-based) or QPP (*i.e.*, per Qwest “non-design”) customers.¹¹⁹
2 (As discussed in Eschelon’s Opening Brief, “same terms” in this context does not mean
3 “same price.”¹²⁰)

4 The first two of these bases for comparison (itself and its retail customers)
5 provide ample basis for finding that CLECs are entitled to the relief recommended by
6 Staff and Eschelon.¹²¹ In addition, Qwest cannot discriminate based on the means the
7 CLEC chooses to use to deliver service to its own End User Customers (*e.g.*, by
8 unbundled loops, resale, or other means).¹²² Ms. Johnson testified:

¹¹⁹ See, *e.g.*, Hrg. Ex.E-3 (Webber/Denney Dir.), p. 26 (citing CFR §51.313 and FCC First Report and Order).

¹²⁰ See Eschelon Opening Brief, pp. 8, 48, 50-51. Qwest takes its argument collapsing the difference between retail and wholesale so far as to argue that “its retail customers . . . would [not] be able to effectively compete if Eschelon is given this competitive advantage.” Qwest Opening Brief, p. 17. Qwest retail customers are not competing in the wholesale market. As to any alleged “competitive advantage,” providing all CLECs with an option of obtaining expedite on nondiscriminatory terms at cost-based rates, as recommended by the Staff witness and Eschelon, will ensure that Eschelon does not have a competitive advantage not offered to other CLECs. See Eschelon Opening Brief, pp. 51-53; Staff Opening Brief, p. 29, lines 15-17. See also Exhibit 6 to this Reply Brief (proposed expedite amendment).

¹²¹ See Eschelon Opening Brief, p. 4 at footnote 14. Although Eschelon indicated in its Opening Brief that the Commission “need not” reach this particular issue (as there are ample other grounds for finding discrimination), *see id.*, Eschelon did not withdraw this aspect of its discrimination claim. If the issue of discrimination based on means of delivering the service is reached, it should be resolved against Qwest, as the law does not allow Qwest to discriminate in this manner.

¹²² FCC First Report and Order ¶12, stating: “The Act contemplates three paths of entry into the local market -- the construction of new networks, the use of unbundled elements of the incumbent’s network, and resale. The 1996 Act requires us to implement rules that eliminate statutory and regulatory barriers and remove economic impediments to each. We anticipate that some new entrants will follow multiple paths of entry as market conditions and access to capital permit. Some may enter by relying at first entirely on resale of the incumbent’s services and then gradually deploying their own facilities. This strategy was employed successfully by MCI and Sprint in the interexchange market during the 1970’s and 1980’s. Others may use a combination of entry strategies simultaneously -- whether in the same geographic market or in different ones. Some competitors may use unbundled network elements in combination with their own facilities to serve densely populated sections of an incumbent LEC’s service territory, while using resold services to reach customers in less densely populated areas. Still other new entrants may pursue a single entry strategy that does not vary by geographic region or over time. Section 251 neither explicitly nor implicitly expresses a preference for one particular entry strategy. Moreover, given the likelihood that entrants will combine or alter entry strategies over time, an attempt to indicate such a preference in our section 251 rules may have unintended and undesirable results. Rather, our obligation in this proceeding is to establish rules that will ensure that all pro-competitive entry strategies may be explored. As to success or failure, we look to the market, not to regulation, for the answer.”; *see* FCC Third Report and Order ¶¶5-7 (recognizing “that there will be a continuing need for all three of the arrangements Congress set forth in section 251 to remain available to competitors so that they can serve different types of customers in different geographic areas”

1 In some situations, Eschelon provides basic local services, including dial tone and
2 911 capability, to its customers using analog (one channel – “DS0”) unbundled
3 loops. In other situations, Eschelon purchases a bigger “pipe” (a DS1 capable
4 loop, which has up to 24 channels) from Qwest to carry its end user customer’s
5 services. Using a DS1 capable loop, Eschelon may provide multiple lines
6 carrying Plain Old Telephone Service (“POTS”) type services to a single
7 subscriber at a single location, rather than purchasing numerous individual
8 unbundled DS0 loops to that same location. In these instances, Eschelon will
9 typically serve this customer with a single DS1 loop instead of multiple DS0s.¹²³
10

11 In CMP, Qwest characterized the line or loop as a “pipe” over which services may be
12 provided.¹²⁴ Specifically, Qwest said: “Qwest is selling a pipe; not a switched POTS
13 service.”¹²⁵ Regardless of whether the facility is called a loop, a line, a pipe or some
14 other name, it is the facility over which the carrier (Qwest or CLEC) provides its services
15 to the End User Customer.¹²⁶ As Staff pointed out in its Opening Brief, the non-design
16 POTS services are the same “to the End User Customer” as comparable design
17 services.¹²⁷ Ms. Johnson likewise pointed to the End User Customer’s perspective in
18 Eschelon’s objections in CMP to PCAT Version 30.¹²⁸ In other words, a customer
19 receiving basic local service, including dial tone and 911 capability, is receiving basic
20 local service whether that service is delivered via a Qwest facility being used by Qwest,

while encouraging competitors to deploy their own facilities); see TRRO ¶2 (taking additional steps to encourage more facilities-based competition, and maintaining access to UNEs and resale).

¹²³ Hrg. Ex. E-1 (Johnson Direct), p. 5, line 19 – p. 6, line 7.

¹²⁴ Hrg. Ex. E-1 (Johnson Direct), Att. A-7 at 000124.

¹²⁵ Hrg. Ex. E-1 (Johnson Direct), Att. A-7 at 000124.

¹²⁶ Hrg. Ex. E-3 (Webber/Denney Direct), p. 34 at footnote 31. See also *id.* p. 35, lines 5-7 (“Just because Qwest does not have a product for itself or its retail customers under that same name, does not change the fact that Qwest utilizes the loop facility when serving its retail customers.”).

¹²⁷ Staff Opening Brief, p. 30, lines 2-3 (“non-design services which to the end user customer are the same as comparable design services”).

¹²⁸ Hrg. Ex. E-1 (Johnson Direct), Att. A-7 at 000125 (“Qwest’s new process now treats CLEC POTS customers differently than Qwest POTS customers. . . . The result is that though from the customer perspective the service is the same, Qwest now proposes to treat them differently for the expedite process.”).

1 or a Qwest facility being used by CLEC (via resale, UNEs, or QPP), or a CLEC owned
2 facility.

3 Qwest initially took the position that it may offer Eschelon less favorable terms
4 for expedited loop orders than it does for expediting service to Qwest's other wholesale
5 customers because it believes there is no retail analogue for loops.¹²⁹ After Eschelon
6 exposed the flaws in Qwest's retail analogue argument,¹³⁰ Qwest said that whether a
7 retail analogue exists is *not* the basis for its position; rather it is based on the distinction
8 between design and non-design services.¹³¹ In other words, Qwest seeks to defeat this
9 aspect of Eschelon's discrimination claim by arguing that a non-design service is
10 different from a design service.¹³² Qwest states that a "non-design service, also known as
11 POTS ('Plain Old Telephone Service') is a very basic telephone service. QPP is one type
12 of POTS type service offered to CLECs."¹³³ Qwest claims, therefore, that as a non-design
13 service, QPP "cannot be compared"¹³⁴ to unbundled loops because, per Qwest, loops are
14 "design" services.

15 At the same time, Qwest argues that, when ordering the pipe to be used to deliver
16 services to the customer, Eschelon can order QPP (a "very basic" non-design service)
17 instead of unbundled loops (a "design" service or facility) to provide the same service to

¹²⁹ Hrg. Ex. E-1 (Johnson Direct), Att. A-7 at 000124 (Qwest CMP Response).

¹³⁰ See Hrg. Ex. E-3 (Webber/Denney Direct), pp. 7-8; see also Exhibit 5 to Eschelon Opening Brief at Row 34 and footnote 66 (the legal test is equally stringent regardless of whether there is a retail analogue).

¹³¹ Hrg. Ex. Q-1 (Albersheim Direct), p. 3, lines 13-17. Qwest's counsel again argues on page 34 of Qwest's Opening Brief basically that "Qwest makes the distinction based on the fact that there is no retail analog for unbundled loops." See *id.* p. 3 lines 13-14 (Albersheim). Apparently it is now Qwest's counsel that "has not understood the true basis for the distinction." *Id.* p. 3, line 15. Qwest's own witness testified that the true basis for the distinction is not whether or not there is a retail analogue, but "because Qwest has two types of services: designed services and non-designed services." *Id.* p. 3, lines 16-17.

¹³² Hrg. Ex. Q-3 (Martain Direct), p. 33.

¹³³ Hrg. Ex. Q-3 (Martain Direct), p. 33, lines 16-18.

¹³⁴ Hrg. Ex. Q-3 (Martain Direct), p. 33, line 7.

1 Eschelon's customers in emergencies without paying \$200 per day.¹³⁵ In other words,
2 Qwest itself compares these design and non-design services (despite its own testimony
3 that they "cannot be compared"¹³⁶). Qwest wants it both ways – arguing that these
4 services cannot be compared, while comparing them itself when convenient to do so. Its
5 claim is internally inconsistent and unsound.

6 From its comparison of non-design QPP with design unbundled loops, Qwest
7 concludes that Eschelon will not "be unable to serve customers who need immediate
8 service; it only means that Eschelon will be unable to serve customers that want
9 immediate service with unbundled loops."¹³⁷ Eschelon has a right, however, to provision
10 its customer using unbundled loops,¹³⁸ regardless of what different choices Qwest claims
11 it would make if it were running Eschelon's business.¹³⁹ In providing more favorable
12 expedite terms in emergencies to QPP CLECs than to facilities-based CLECs like
13 Eschelon, Qwest is providing Eschelon's competitors with more favorable access to the
14 loop or "pipe," contrary to prohibitions against discrimination.

15 Moreover, by seeking to require Eschelon to purchase Qwest's expensive QPP
16 product that uses both loops and switching purchased from Qwest, Qwest attempts to
17 keep the customer on Qwest's facilities, instead of allowing Eschelon nondiscriminatory

¹³⁵ Qwest Opening Brief, p. 36 ("Thus, to the extent a customer needs a line delivered immediately and emergency circumstances exist, Eschelon can order QPP and serve the customer using that method."); *id.* p. 36 ("if Eschelon wants to avoid the \$200 per day expedite fee, it can – by ordering the proper service; namely, QPP").

¹³⁶ Hrg. Ex. Q-3 (Martain Direct), p. 33, line 7. In contrast to Qwest's testimony, Staff recognized that they can be compared when referring to services provided over non-design facilities that are "comparable" to services provided over design facilities. See Staff Opening Brief, p. 30, lines 2-3 ("non-design services which to the end user customer are the same as comparable design services").

¹³⁷ Qwest Opening Brief, p. 36.

¹³⁸ FCC First Report and Order ¶12; FCC Third Report and Order ¶¶5-7; TRRO ¶2 (all three quoted footnote 121 above). See also CFR §51.313; FCC First Report and Order ¶268.

¹³⁹ Qwest, in contrast, asserts its right to "run its business." See Hrg. Ex. Q-3 (Martain Direct), p. 30, lines 16-18.

1 use of unbundled loops purchased from Qwest in conjunction with Eschelon owned
2 facilities (e.g., its switch¹⁴⁰) in Arizona. Thus, Qwest's position not only discriminates
3 based on the means of delivering service, but also violates public policy, as also alleged
4 in Paragraph 21 of the Complaint,¹⁴¹ because it is contrary to the policy of encouraging
5 facilities-based competition.¹⁴²

6 **2. Qwest Erroneously Characterizes this Case as Limited to Breach of**
7 **Contract in an Attempt to Avoid Relief for Other CLECs.**

8
9 As to Qwest's second allegation, that there are only two counts to Eschelon's
10 Complaint (so the alleged dropping of one claim leaves only a breach of contract
11 claim),¹⁴³ the Complaint itself is evidence that this is not the case.¹⁴⁴ Qwest builds on its
12 erroneous characterization of the case as involving only a breach of contract claim by
13 attempting to show that the alleged only remaining count in the Complaint was not raised
14 in CMP¹⁴⁵ and therefore the Commission should reject the Staff's recommendation as to
15 other CLECs because it "has no place in a complaint case for breach of contract."¹⁴⁶ This
16 approach is factually and legally unsound.

¹⁴⁰ In Qwest's Answer (¶2, p. 4, lines 1-2), Qwest admitted that Eschelon has its own switch in Arizona.

¹⁴¹ Complaint, ¶21, p. 8, lines 18-19; *see also id.*, p. 13, ¶F ("violation of public policy").

¹⁴² See TRRO ¶2 (taking additional steps to encourage more facilities-based competition, and maintaining access to UNEs and resale).

¹⁴³ Qwest Opening Brief, pp. 17 & 40.

¹⁴⁴ The Complaint alleges violation of contractual and statutory claims (p. 1, lines 11-14 & p. 3, lines 23-25, ¶4); breach of contract (p. 8, ¶¶19-20 & p. 13, ¶¶A-C); violation of state and federal law, including laws requiring provision of access to UNEs on just, reasonable and nondiscriminatory terms and non-discrimination based on the means of delivering service and based on what Qwest provides to itself and its retail customers (p. 8, ¶21 & p. 13, ¶¶D-E); anti-competitive conduct (p. 8, ¶21 & p. 13, ¶F); and violation of the public interest and public policy (¶21, p. 8, lines 18-19; & p. 13, ¶F).

¹⁴⁵ Qwest Opening Brief, p. 12 (with bold and italics in original): "***Most importantly, Eschelon never claimed that the proposed change violated the terms of the ICA.***"; *see also id.* p. 13 ("Eschelon never claimed that Version 30 violated their ICA."); p. 24 ("Eschelon never informed Qwest during the CMP (indeed, until immediately before filing this Complaint in April 2006) that Version 30 violated the terms of its ICA").

¹⁴⁶ Qwest Opening Brief, p. 2 (last sentence before Heading II).

1 Eschelon specifically raised the impact of Qwest's changes on the interconnection
2 agreement in its objections in CMP to Version 30.¹⁴⁷ While Eschelon did not use the
3 legal term "breach," Eschelon said Qwest is "failing to keep its commitments made to
4 CLECs in CMP" that "If a CLEC chooses not to amend their Interconnection
5 Agreement, the current expedite criteria and process will be used."¹⁴⁸ Eschelon
6 complained that Qwest was "unilaterally imposing charges via a process change in
7 CMP."¹⁴⁹ Eschelon also said that "the proposed change is discriminatory to CLECs and
8 their customers."¹⁵⁰ Such discrimination is also a breach of contract under the ICA.¹⁵¹ In
9 addition, Qwest's assertion that "Eschelon *first* raised an argument that Version 30
10 conflicted with their ICA when they *filed* this action"¹⁵² is also inaccurate because
11 Eschelon raised this issue with Qwest service management, interconnection, and legal
12 personnel in letters before filing this action.¹⁵³

13 Even assuming Eschelon had made no reference to any breach of contract, there is
14 no requirement to assert breach of contract claims in CMP. As Mr. Denney discussed on
15 pages 21-22 of his rebuttal testimony (Hrg. Ex. E-4), CLEC CMP participants are largely
16 operational personnel.¹⁵⁴ During CMP's development (known as the "Redesign"¹⁵⁵ of

¹⁴⁷ Tr. Vol. I, p. 188, lines 2-3 (Albersheim) (acknowledging that "Eschelon timely complained about the changes to Version 30").

¹⁴⁸ Hrg. Ex. E-1 (Johnson Direct), Att. A-7 at 000124.

¹⁴⁹ Hrg. Ex. E-1 (Johnson Direct), Att. A-7 at 000124.

¹⁵⁰ Hrg. Ex. E-1 (Johnson Direct), Att. A-7 at 000125.

¹⁵¹ ICA Part A, ¶31.1, at Exhibit 1 to Eschelon Opening Brief, p. 3 (quoted on p. 10 of Eschelon Opening Brief). See also ICA Att. 3, §2.1 ("[Qwest] shall offer Network Elements to [CLEC] on an unbundled basis on rates, terms, and conditions that are just, reasonable, and non-discriminatory in accordance with the terms and conditions of this Agreement."), at Exhibit 2 to Eschelon Opening Brief.

¹⁵² Qwest Opening Brief, p. 13 (heading) (emphasis modified).

¹⁵³ Hrg. Ex. E-1 (Johnson Direct), Att. A-7 at 000130-000139. Excerpts from the ICAs for multiple states, including Arizona, were attached to one of the letters. *Id.* at 000134-000136. Eschelon specifically identified Versions 27 and 30 as subject to the escalation and dispute resolution. *Id.* at 000137.

¹⁵⁴ See also Tr. Vol. I, p. 65, line 20 – p. 66, line 5 (Ms. Johnson) ("A. Well, I think the personnel in change management are business personnel that often don't know the details of the contract, so -- Q. But

1 CMP), New Edge expressed concern that operational personnel may not be familiar with
2 laws and contract terms. For example, an operational participant may not recognize
3 when a CMP (formerly known as CiCMP) change breaches an interconnection
4 agreement. Qwest assured New Edge and CLECs that this would not be a problem.
5 Specifically, the following exchange took place on the record:

6 MS. BEWICK [New Edge]: A quick question: Is part of the discussion
7 going to revolve around -- the issue of what generally is happening in
8 CiCMP revolves around, a lot of time, technical specific type issues that
9 are being changed and how that relates to the regulatory, legal type
10 processes; sort of that gap of CiCMP is designed, as I understand it,
11 predominantly to be addressing operational issues, *but sometimes the end*
12 *result of what can come out of that process can make a change that*
13 *impacts an ICA or something like that. And we may not have the people*
14 *who can address that particular decision on those -- in the CiCMP*
15 *meetings because you are dealing with operational people.* So is that sort
16 of concept, that gap, being addressed anywhere in this redesign look?

17 MR. CRAIN [Qwest]: I would say it's addressed in two ways: First of all,
18 it has been addressed in these workshops by inserting language into the
19 SGAT that indicated that the contract language controls over anything that
20 could come out of the Change Management Process -- *a contract is a*
21 *contract*, and I believe that's the same for any other ICA, as well.¹⁵⁶

22 Qwest's argument is contrary to the intent of its own CMP Document. The above-quoted
23 exchange shows that there is no requirement in CMP that CLEC participants must claim
24 that a CMP change violates the terms of the ICA in CMP before the CLEC may bring an
25 action for breach of contract. Qwest certainly cited no authority providing that comments

you know the details of your contract; true? A. I don't know our current contract in detail, no. I probably know the contract that we're negotiating much better. Q. Because you have been living through it in the arbitration process? A. Correct. So -- but no, I don't -- I don't really know the details of our existing contract.”). Nonetheless, as discussed above, Ms. Johnson did identify that Qwest's changes were inconsistent with Qwest's assurances regarding the ICA and discriminatory. Hrg. Ex. E-1 (Johnson Direct), Att. A-7 at 000124-125.

¹⁵⁵ CMP “Redesign” refers to the meetings of Qwest and CLECs to develop CMP, including the CMP Document. See Hrg. Ex. E-2 (Johnson Reb.), p. 3, line 14 – p. 4, line 2 & Atts. BJJ-G, BJJ-H & BJJ-I.

¹⁵⁶ Transcript of 271 CMP Workshop Number 6, Colorado Public Utilities Commission Docket Number 97I-198T (Aug. 22, 2001), p. 291, line 17 – p. 292 line 13 (emphasis added) (quoted in Hrg. Ex. E-4, Denney Rebuttal, pp. 21-22).

1 in CMP have a preclusive effect that overrides the laws of contract and discrimination
2 and applicable statutes of limitations. To the contrary, the CMP Document itself says a
3 CLEC may bring dispute resolution to the Commission “at any time.”¹⁵⁷ As Qwest’s
4 attorney said, a contract is a contract. Whether the contract was breached depends on the
5 terms of the contract and not any discussion or lack of discussion of the contract in CMP.

6 Contrary to Qwest’s claim that this case is limited to breach of contract, the
7 Complaint also clearly seeks reversal of Qwest’s non-mutual conduct in CMP.¹⁵⁸ Qwest
8 refers (erroneously¹⁵⁹) to a lack of evidence about other CLECs’ contracts, but even if it
9 were accurate, it ignores Eschelon’s other challenges to Qwest’s implementing and
10 enforcing changes wrongfully via CMP. The CMP Document allows a single CLEC to
11 come to the Commission to seek reversal of Qwest conduct in CMP.¹⁶⁰ While this case is
12 a formal complaint and not an arbitration or a generic docket,¹⁶¹ this case is much broader

¹⁵⁷ Hrg. Ex. E-1 (Johnson Direct), Att. A-9 at 000259 (CMP Document §15.0).

¹⁵⁸ Complaint, page 1, lines 16-21 & ¶¶9-21, including discussion of the PCAT Version 27 and 30 “notices to CLECs” in ¶¶14-15. *See also* Tr. Vol. 1, p. 38, lines 4-5 (Johnson); Hrg. Ex. E-1 at A-7, p. 000137 (April 3, 2006 Escalation and Dispute Resolution letter identifying, in addition to the ICA, both the joint McLeod/Eschelon escalation of PCAT Version 27 and Eschelon’s objections to PCAT Version 30 as subject of this dispute which, if not resolved, would be brought to the Commission in this case). Eschelon’s objections to Version 30 were not limited to Eschelon but also applied to other CLECs. *See, e.g., id.* at A-7, p. 000124 (“Qwest is now failing to keep the commitments it made to CLECs in CMP . . . by now changing its position on expedites and unilaterally imposing charges via a process change in CMP.”) & 000125 (“The change Qwest is proposing is discriminatory to CLECs and their customers.”) & 000126 (“Qwest’s further change, significantly impacts a CLEC’s business”).

¹⁵⁹ Qwest states that “no party submitted evidence about any other ICAs” and that Staff did not “review Qwest’s ICAs with other parties,” Qwest Opening Brief, p. 19; *see also id.* pp. 40-41. That is not the case. *See* Hrg. Ex. S-1 (Staff Testimony), p. 35, lines 8-18. Both Eschelon and Qwest submitted evidence of comments made by other CLECs about their own ICAs. *See id.* p. 30, lines 1-14 & Hrg. Ex. E-1 (Johnson Direct), p. 24. In addition, CLECs in Arizona that have opted in to the AT&T ICA have the same terms as the Eschelon ICA (*see* Hrg. Ex. E-1, Att. A-7, at 000134-000136), and CLECs in Arizona that have opted in to the SGAT (*see* Tr. Vol. II, p. 303, lines 16-17, Albersheim) have an ICB expedite rate for UNEs in their ICAs. *See* Hrg. Ex. E-3 (Webber/Denney) at JW-C - AZ SGAT Exhibit A, p. 14 of 19 at §9.20.14 for the Expedite rate element (which is listed as “ICB” with a reference to footnote 5). *See* Tr. Vol. II, p. 305, lines 15-19 & p. 306, lines 23-25 (Albersheim).

¹⁶⁰ Hrg. Ex. E-1 (Johnson Direct), Att. A-9 at 000259 (CMP Document §15.0).

¹⁶¹ Qwest Opening Brief, p. 18.

1 than alleged by Qwest,¹⁶² and the relief proposed by Staff in its Executive Summary and
2 by Eschelon is appropriate in this case.¹⁶³ The Commission should reject Qwest's
3 argument that no relief may be granted to other CLECs because this case is limited to
4 breach of an individual contract, as the latter premise is faulty.

5

6 **3. Like the Complaint, Eschelon's Discrimination Count is Broader than**
7 **Asserted by Qwest, and Eschelon Continues to Pursue the Other**
8 **Aspects of this Count as Well.**
9

10 As to Qwest's final allegation regarding the supposed dropping of Eschelon's
11 discrimination claim -- that Eschelon's discrimination claim is limited to discrimination
12 based on the means of delivering service¹⁶⁴ -- the Complaint itself is again evidence to
13 the contrary. Qwest cited Paragraph 21 of the Complaint, but referred to only a portion
14 of that paragraph (*i.e.*, that Qwest "discriminated against CLECs who ordered unbundled
15 loops").¹⁶⁵ Paragraph 21 of the Complaint provides:

16 Section 251(c)(3) of the Act requires that Qwest provide access to unbundled
17 network elements ("UNEs"), including unbundled local loops, on just, reasonable
18 and non-discriminatory terms. With respect to the non-discrimination
19 requirement, Qwest must provide access to UNEs on nondiscriminatory terms for
20 all CLECs (facility-based and non-facility based), as well as for Qwest itself. *See*
21 47 C.F.R. 51.313. Qwest has violated the Act's non-discrimination requirement
22 by implementing and enforcing the changes described herein. Qwest's conduct is
23 anti-competitive in violation of state and federal law and the public interest. *See*
24 A.R.S. §40-334.
25

26 This paragraph of the Complaint shows that Eschelon's discrimination claim includes but
27 is not limited to discrimination based on the means of delivering service. Eschelon's

¹⁶² Qwest Opening Brief, p. 18 ("garden variety breach of contract case").

¹⁶³ See, e.g., Exhibit 4 to Eschelon Opening Brief.

¹⁶⁴ Qwest Opening Brief, p. 17.

¹⁶⁵ Qwest Opening Brief, p. 17.

1 discrimination claim also includes discrimination as compared to what Qwest provides to
2 itself and its retail customers,¹⁶⁶ as well as the duty to provide access to UNEs on just,
3 reasonable, and nondiscriminatory terms.¹⁶⁷ Although discrimination based on the means
4 of delivering service also warrants relief, the latter aspects of Eschelon's discrimination
5 claim by themselves warrant the relief recommended by Staff and Eschelon.¹⁶⁸

6 Qwest erroneously asserts that the "Staff recognized these distinctions [between
7 design and non-design] and, *as a result*, found that Qwest did not discriminate."¹⁶⁹ As
8 noted above, Staff pointed out in its Opening Brief that non-design POTS services are the
9 same "to the End User Customer" as comparable design services.¹⁷⁰ Qwest's claim in its
10 Brief is similar to Qwest's previous suggestion that Staff agreed with Qwest that
11 providing expedites to CLECs is superior service and, therefore, not providing expedites
12 to CLECs is not discriminatory,¹⁷¹ which Qwest later admitted was inaccurate.¹⁷² The
13 Staff testimony to which Qwest refers was not within the context of a discussion of the
14 distinction between design and non-design services, and the Staff does not go as far as
15 Qwest suggests.¹⁷³ As discussed on pages 49-50 of Eschelon's Opening Brief, Staff
16 recommends that a "performance measurement for expedites of Unbundled Loops be

¹⁶⁶ Complaint, p.8, ¶21 ("as well as for Qwest itself") & *id.* p. 13, ¶E ("its retail customers").

¹⁶⁷ Complaint, p. 1, lines 11-27, p.8, ¶¶ & *id.* pp. 13-14, ¶¶ D-E, H-I.

¹⁶⁸ Eschelon Opening Brief, p. 4 at footnote 4. See Hrg. Ex. E-4 (Denney Rebuttal), Section A (pp. 4-15) and Section C (pp. 35-69).

¹⁶⁹ Qwest Opening Brief, p. 18 (emphasis added).

¹⁷⁰ Staff Opening Brief, p. 30, lines 2-3 ("non-design services which to the end user customer are the same as comparable design services").

¹⁷¹ Hrg. Ex. Q-2 (Albersheim Reb.), p. 4, lines 3-4 (emphasis added) (with no citation to Staff Testimony). See also *id.*, p. 17, lines 11-12 ("These conclusions raised by Staff establish, in and of themselves, that Eschelon seeks a superior service from Qwest.").

¹⁷² Tr. Vol. II, p. 221, lines 10-11 (Albersheim). See Staff Opening Brief, p. 31, line 19 (rejecting Qwest's superior service argument).

¹⁷³ Hrg. Ex. S-1 (Staff Testimony), p. 32, line 23 – p. 33, line 10.

1 developed through CMP.”¹⁷⁴ Without the kind of data and analysis described by Staff,
2 there is no PID to measure performance from which to continue to analyze whether there
3 is a pattern and practice of discrimination over time. While there may not be data yet for
4 PID purposes, the Staff concluded that the evidence in this case showed that Qwest
5 discriminated against Eschelon and other CLECs – with discrimination being disparity, or
6 a “lack of” parity.¹⁷⁵ The Staff’s recommendations are also consistent with other aspects
7 of Eschelon’s discrimination claim – that rates should not be imposed unilaterally by
8 Qwest to avoid Commission oversight¹⁷⁶ but rather must be just, reasonable, and
9 nondiscriminatory.¹⁷⁷

¹⁷⁴ Hrg. Ex. S-1, Staff Conclusion #7, Staff Executive Summary.

¹⁷⁵ Staff Opening Brief, p. 30, lines 7-9 (“In Staff’s opinion, the new system designed by Qwest suffers from a lack of uniformity or parity”); *id.* p. 29, lines 19-20 (“nothing could be farther from parity or uniformity than the process resulting from Version 11 and Version 30 of the CMP”); *id.* p. 29, line 11 (“Qwest’s Parity and Uniformity Claims are Without Merit”).

¹⁷⁶ Staff Opening Brief, pp. 30-31. See Hrg. Ex. E-3 (Webber/Denney Direct), p. 38, lines 1-3. See TRRO ¶¶50-53 (in the context of rejecting an ILEC special access argument, the FCC said: “If incumbent LECs are able to avoid unbundling obligations under section 251(c)(3) simply by providing a federally tariffed special access alternative, they would be able to eliminate the *states* from any role in implementing local competition under the Act, including their *role in establishing prices at which UNEs are available to competitors*. This result would be antithetical to the shared framework Congress established for *regulatory oversight* of telecommunications services and carriers.” *Id.* ¶53, emphasis added).

¹⁷⁷ Tr. Vol. I, p. 155, lines 20-23. (Staff Cross of Denney); Hrg. Ex. S-1, Staff Conclusion #7, Staff Executive Summary. See also Hrg. Ex. E-4 (Denney Reb.), p. 44, lines 9-15 (citations omitted; emphasis added), stating: “The issue is not whether a term (*e.g.*, “expedite”) is itemized on the minimum list of “UNEs”; *the issue is nondiscriminatory access to UNEs*. In ¶268 of its *First Report and Order*, the FCC found that the requirement to provide ‘access’ to UNEs must be read broadly, concluding that the Act requires that UNEs ‘be provisioned in a way that would make them useful.’ Expedites are needed to make UNEs useful. *Nondiscriminatory access to UNEs must be provided at cost-based rates.*”

1 **B. Qwest Fails to Show Any Legitimate Course of Dealing to Impose a Fee or**
2 **Impose a Term that Conflicts With, Abridges, or Expands ICA Rights in**
3 **CMP, as Eschelon Established that Both are Outside the Scope of CMP.**

4 Qwest has repeatedly referred to a course of dealing to address issues in CMP¹⁷⁸
5 with no mention, until now,¹⁷⁹ that its interconnection agreement with Eschelon (and
6 AT&T and any other CLECs opting into that agreement) expressly provides:

7 No course of dealing or failure of either Party to strictly enforce any term, right,
8 or condition of this Agreement in any instance shall be construed as a general
9 waiver or relinquishment of such term, right, or condition.¹⁸⁰
10

11 In language clearly applicable to unbundled loops (“design” services),¹⁸¹ the ICA
12 mandates (“shall provide”) the provision of expedite capability.¹⁸² The above-quoted
13 provision clearly shows that Eschelon has not waived or relinquished that right.¹⁸³

14 Although Qwest attributes a course of dealing argument to Eschelon,¹⁸⁴ Eschelon
15 did not argue course of dealing or waiver. Eschelon argued that the parties’ conduct

¹⁷⁸ See, e.g., Answer, p. 15, lines 12-14 (“The course of conduct and dealings between the parties evidence that processes adopted in the Commission-approved Change Management Process are binding on the parties.”) (“affirmative defense”); Tr., Vol. I, p. 166, lines 6-11 (Mr. Steese opening); *see also id.* p. 168, lines 2-4 & p. 171, lines 24-25 & p. 175, lines 1-12.

¹⁷⁹ Qwest Opening Brief, p. 29. Qwest also refers to this argument as “course of performance.” *See id.* at p. 31. Although Qwest now recognizes this ICA language, and even though Qwest cites the Restatement (Second) of Contracts extensively, Qwest does not quote Restatement (Second) of Contracts sec. 223(2), which provides (with emphasis added): “(2) *Unless otherwise agreed*, a course of dealing between the parties gives meaning to or supplements or qualifies their agreement.” Qwest suggests the ICA Waiver provision is preclusive of the Staff’s argument (*but see* footnote 1 to Row 3 of Brief Ex. 5), while at the same time not does not acknowledge preclusive effect as to its own course of dealing argument. Whether Section 223(2) or any other aspect of course of dealing is considered or not, Qwest’s position is internally inconsistent.

¹⁸⁰ Qwest-Eschelon ICA, Part A, ¶34.2.

¹⁸¹ Qwest conceded at the hearing that the expedite capability that the ICA refers to applies to both design and non-design services. Tr. Vol. II, p. 227, lns 13-17 (Albersheim). *See also* Row 12 to Exhibit 5 to Eschelon Opening Brief.

¹⁸² ICA Att. 5, ¶3.2.2.13 (see Exhibit 1 to Eschelon Opening Brief, p. 1).

¹⁸³ Qwest, in contrast, has pointed to no term, right, or condition of the ICA that mandates that Qwest must charge for expedites when the emergency conditions are met. With respect to the Staff’s course of dealing argument and how it relates to this language, see footnote 1 to Row 3 of Exhibit 5 to Eschelon Opening Brief.

¹⁸⁴ See, e.g. Qwest Opening Brief, p. 29, lines 2-5 (with no cite to any Eschelon testimony).

1 showed how the parties mutually interpreted the ICA language for six years.¹⁸⁵ Qwest
2 itself refers to the importance of looking to the “common interpretation” of contract
3 language and cites authority for the proposition that “It is the intent of the parties’ *at the*
4 *time the contract was made* which is controlling.”¹⁸⁶ The evidence clearly shows that
5 CMP was not even in existence at the time the contract was made, but the emergency-
6 based expedite procedures were.¹⁸⁷

7 **1. The CMP Was Made Expressly Contingent Upon the ICA**
8 **Controlling.**
9

10 Notably absent from Qwest’s Opening Brief is any reference to the key language
11 of the Scope provision of the CMP Document:

12 In cases of conflict between the changes implemented through this CMP and any
13 CLEC interconnection agreement (whether based on the Qwest SGAT or not), the
14 rates, terms and conditions of such interconnection agreement shall prevail as
15 between Qwest and the CLEC party to such interconnection agreement. In
16 addition, if changes implemented through this CMP do not necessarily present a
17 direct conflict with a CLEC interconnection agreement, but would abridge or
18 expand the rights of a party to such agreement, the rates, terms and conditions of
19 such interconnection agreement shall prevail as between Qwest and the CLEC
20 party to such agreement.¹⁸⁸
21
22

23 Qwest does admit that the CMP Document governs CMP. Qwest states: “CMP is
24 governed by a ‘Process Document’ created in the Section 271 process by the industry at

¹⁸⁵ Hrg. Ex. E-3 (Webber/Denney Dir.), p. 6, lines 9-11 & FN1 (“I will briefly describe the expedite request process that has existed between Eschelon and Qwest since 2000 *and describe why that process is the process “mutually developed” by the parties* consistent with the ICA.”) (citing “ICA Att. 5, §§ 3.3.3.12, BJJ Attachment A-7 at Document No. 000134” in footnote 1) (emphasis added).

¹⁸⁶ See, e.g. Qwest Opening Brief, pp. 27-28 (citation omitted) (emphasis added).

¹⁸⁷ Tr. Vol. II, p. 260, lines 13-14 (Albersheim) (“I would point out that the contract was entered into before the CMP was fully established”). See Section III(D)(2) below regarding the emergency conditions and whether they were modified or documented.

¹⁸⁸ Qwest CMP Document, §1.0 (“Scope”), Hrg. Ex. 1 (Johnson Dir.), A-9 at 000173. Regarding Qwest’s characterization of this provision at the hearing, see Row 23 of Exhibit 5 to Eschelon Opening Brief.

1 large. . . . This CMP Document defines, in great detail, the manner in which Qwest and
2 the CLECs will jointly develop processes in CMP.”¹⁸⁹ The CMP Document’s detailed
3 definition begins with setting forth how CMP shall *not* be used, and all other terms in the
4 CMP Document are subject to this Scope language. As the above-quoted language
5 shows, CMP shall *not* be used to implement terms that either directly conflict with the
6 ICA or abridge or expand the rights of a party to an ICA. This establishes that there can
7 be no course of dealing by which a CLEC’s active participation in CMP means that the
8 CLEC surrenders its rights under the ICA, including a right to receive expedites for loops
9 and a right to mutuality with respect to procedures for implementing that right.

10 The SGAT, in both Sections 4.156 and 7.4.7, provides: “Qwest agrees that CLEC
11 shall not be held to the requirements of the PCAT.”¹⁹⁰ CLECs not only obtained this
12 assurance from Qwest, which is documented in the SGAT, but also obtained additional
13 assurances about the operation of CMP, such as Qwest’s assurances in 271 proceedings
14 about the meaning of the above-quoted Scope language.¹⁹¹ These documents establish
15 that Eschelon is free to participate actively in CMP while maintaining its ICA rights.
16 Even as to issues properly part of the scope of CMP, the CMP Document recognizes that
17 disagreements will occur and, when they do, CLEC participants do not give up their
18 rights to disagree with Qwest by participating in CMP.¹⁹² CLEC participants retain their

¹⁸⁹ Qwest Opening Brief, p. 4 (citations omitted).

¹⁹⁰ Complaint, p. 5, ¶11(B) (quoting SGAT).

¹⁹¹ Transcript of 271CMP Workshop Number 6, Colorado Public Utilities Commission Docket Number 97I-198T (Aug. 22, 2001), p. 291, line 17 – p. 292 line 13 (quoted in Hrg. Ex. E-4, Denney Rebuttal, pp. 21-22) (quoted above in this Brief).

¹⁹² Qwest erroneously equates participation with mutuality. *See* Qwest Opening Brief, p. 22, stating: “Given that Eschelon and Qwest always participated, the expedite processes were always mutually developed.” The expedite provisions of the ICA do not use the phrase “mutual participation.” The Scope and Dispute Resolution sections of the CMP Document are meant to ensure that CMP participation does not have the consequences that Qwest attempts to impose here.

1 rights to seek a resolution of an issue different from the one Qwest implements in CMP
2 by coming to this Commission.¹⁹³ Qwest's suggestion that it has unfettered discretion to
3 implement any term because it does so in CMP with participation of CLECs is wholly
4 unsupported on the facts and is inconsistent with the CMP Document that governs CMP.
5 This Commission clearly has authority to decide these issues, including deciding them
6 against Qwest after Qwest has implemented its position in CMP.¹⁹⁴

7 Eschelon is able to actively participate in CMP because, before doing so, it
8 received the documented assurances described above. Eschelon helped ensure through
9 CMP Redesign,¹⁹⁵ by obtaining the Scope language, that its participation in CMP would
10 not be construed in the very manner in which Qwest now attempts to construe it. In its
11 Opening Brief, Qwest actually states that the "parties' course of performance in using
12 CMP to 'develop' processes shows the *intent to develop contractual rights in the*
13 *CMP.*"¹⁹⁶ Yet, in its own Brief, albeit in a different section, Qwest cites the integration
14 clause of the ICA providing that the contract can only be amended by the parties in
15 writing.¹⁹⁷ As Staff points out: "By stating that an Amendment would be required if the
16 Interconnection Agreement was contrary to what came out of the CMP, [Qwest]
17 inadvertently gave support to Eschelon's position in this case since Qwest required all

¹⁹³ Hrg. Ex. E-1 (Johnson Direct), Att. A-9 at 000259 (CMP Document §15.0). See the discussion below in Section III(B)(1) regarding the CMP Redesign documentation confirming that CLECs retain their full rights of recourse to the Commission, notwithstanding whether a change has been made through CMP.

¹⁹⁴ Hrg. Ex. E-1 (Johnson Direct), Att. A-9 at 000259 (CMP Document §15.0).

¹⁹⁵ Hrg. Ex. Q-1, Albersheim Dir., p. 25, lines 8-12. See also Hrg. Ex. E-2 (Johnson Dir.), BJJ-G (CMP Redesign Gap Analysis), at 2 (p. 99 of 184), Gap #147(emphasis added).

¹⁹⁶ Qwest Opening Brief, p. 31 (heading) (emphasis added). Note that Qwest quotes the term "develop" rather than the ICA term "mutually develop" (Att. 5, ¶3.2.2.12). Qwest accuses Eschelon of inserting the term "agree" while at the same term Qwest attempts to delete the ICA term "mutually." See Section III(C) below.

¹⁹⁷ Qwest Opening Brief, p. 25 (citing ICA Part A, ¶53.1).

1 CLECs to sign an Amendment to implement Version 30 of the expedite process.”¹⁹⁸ The
2 Scope language and CMP Redesign documentation firmly establish that it was *not* the
3 intent of CMP to modify contractual rights in CMP. As discussed above in Section
4 III(A)(2), CLECs expressed concern in CMP that Qwest would try to do just, that even
5 though CLEC operational personnel would not be familiar with contract issues.¹⁹⁹ If the
6 result in CMP Redesign had been as alleged by Qwest, CLECs would send contract
7 negotiators and not operational personnel to CMP. That is not the case.

8 Eschelon has faithfully and consistently respected the intended purpose of CMP
9 as reflected in the CMP Document, SGAT, and 271 Transcript. Qwest, in contrast, is
10 violating the ground rules²⁰⁰ that were clearly established regarding the Scope of CMP
11 and the effect of the PCAT.²⁰¹ Yet, Qwest says this about Eschelon:

12 The Commission should see Eschelon’s about face for what it is; sour grapes that
13 their course of performance – using CMP to develop processes – did not work to
14 their exclusive benefit this one time. Their allegation that Version 30 violates the
15 ICA is a self-serving about-face that contradicts the parties’ years of performance
16 of the contract through CMP.²⁰²
17

¹⁹⁸ Staff Opening Brief, p. 23, lines 14-17.

¹⁹⁹ Transcript of 271CMP Workshop Number 6, Colorado Public Utilities Commission Docket Number 97I-198T (Aug. 22, 2001), p. 291, line 17 – p. 292 line 13 (quoted in Hrg. Ex. E-4, Denney Rebuttal, pp. 21-22) (quoted above in this Brief).

²⁰⁰ Complaint, p. 6, lines 17-19, ¶12: “Together, these provisions of the ICA, CMP Document, PCAT notices, and SGAT collectively show a regulatory regime designed to ensure that Qwest cannot undermine Commission approved ICA terms by unilaterally altering them through its own PCAT.”

²⁰¹ Complaint, p. 6, lines 20-21, ¶13, stating: “Nonetheless, that is exactly what Qwest has done here, without any attempt to seek prior Commission approval.” *See id.* at footnote 1 to ¶13, stating: “This is not the first time Qwest has done so. Its actions here, for example, are similar to those rejected by this Commission in the Qwest 271 proceeding. Qwest is on notice through these documents and that proceeding that it should not have implemented such a change without first seeking Commission approval. *See, In re. US West Communication, Inc.’s, Compliance with Section 271 of the Telecommunications Act of 1996*, ACC Docket No. T-00000A-97-0238, Decision No. 66242, ¶109 (Sept. 16, 2003).”

²⁰² Qwest Opening Brief, p. 32.

1 At least Qwest's earlier contention of "intractability,"²⁰³ or its more recent allegation that
2 Eschelon is a "poster child,"²⁰⁴ seemed to recognize Eschelon's faithful adherence to a
3 consistent position.²⁰⁵ Now, Qwest argues that Eschelon is inconsistent and has suddenly
4 changed position ("about face"). Eschelon's position in this case, however, remains true
5 to the positions that Eschelon took at that time.²⁰⁶ Although this aspect of CMP is
6 ignored by Qwest in its Brief, the CMP Document makes it clear that Eschelon's position
7 is how the CMP works (or, more accurately, how it *should* work if Qwest adhered to it).

8 The "about-face" which has occurred is that, before Qwest received 271 authority
9 and still had the associated 271 incentives, Qwest committed to the ICA controlling and
10 the PCAT not being enforceable against CLECs. Now, though the language in the SGAT
11 and CMP Document has not changed, Qwest is back sliding and seeking to take
12 advantage of certain CMP procedures while rendering key safeguards in the SGAT and
13 CMP Document void. Staff hit the nail on the head when it said:

14 Qwest is attempting to turn its tariffs and ICAs into shells by claiming that all of
15 the 'details' are actually 'processes and procedures which Qwest should control
16 and accordingly belong in the Qwest PCAT. This gives Qwest carte blanche
17 authority to make any changes no matter what impact they have on the CLEC's
18 existing rights under their ICAs. So this problem does not arise again, Qwest
19 should be required to put the details of CLEC impacting processes into its
20 interconnection agreements and tariffs.²⁰⁷
21

22 Qwest is also trying to turn the Scope and Dispute Resolution sections of the CMP
23 Document into meaningless shells. Despite the clear language of the Scope provision

²⁰³ Answer, p. 1, line 17.

²⁰⁴ Qwest Opening Brief, p. 13, line 1.

²⁰⁵ Qwest Opening Brief, p. 13, line 3 (asserting the position is "constantly taken" by Eschelon). This indirect recognition of Eschelon's consistency of position appears to be an unintended effect of Qwest's derision. See footnote 36 above.

²⁰⁶ Hrg. Ex. E-2 (Johnson Dir.), BJJ-G (CMP Redesign Gap Analysis), at 2 (p. 99 of 184), Gap #147(emphasis added); BJJ-H (CMP Redesign Action Item), at 3 (pp. 167-168), Action Item 227.

²⁰⁷ Staff Opening Brief, p. 24, lines 20-26.

1 regarding abridging or expanding the ICA in addition to direct conflicts, for example, Mr.
2 Steese said at the hearing: “And the *only* time that the processes agreed to in this change
3 management process do not apply is if it conflicts *directly* with the terms of the
4 interconnection agreement.”²⁰⁸ Worse yet, despite the Scope requirement that the ICA
5 controls, Ms. Albersheim testified: “Based on Qwest’s current processes and procedures,
6 which are governed by the CMP and *not by the terms of interconnection agreements*,
7 Qwest offers expedites for free for non designed services under specific circumstances
8 outlined in Qwest’s PCAT.”²⁰⁹

9 Qwest appears to read the Dispute Resolution section of the CMP Document as
10 though it limits challenges to determining whether Qwest followed CMP “to the letter”²¹⁰
11 and, if so, then Qwest has carte blanche to proceed. Nothing in the history or content of
12 the CMP Document supports such a reading. In fact, CLECs specifically took steps in
13 CMP Redesign to prevent Qwest from turning the dispute resolution process and the
14 contract into meaningless shells. In an earlier Qwest draft of proposed SGAT language,
15 Qwest proposed that, if any Qwest documentation “abridges or expands its rights or
16 obligations . . . *and that change has not gone through CMP*, the Parties will resolve the
17 matter under the Dispute Resolution Process.”²¹¹ CLECs responded as follows:

18 The [Qwest-proposed language] “implies that there is *no right of recourse* for a
19 change that does go through CMP and the result is in conflict with the agreement.
20 *That would not be appropriate.* Everything we have heard from Qwest in the
21 redesign is that if a change comes through CMP and is in conflict with a CLEC’s

²⁰⁸ Tr. Vol. I, p. 172, lns 7-19, Mr. Steese opening.

²⁰⁹ Hrg. Ex. Q-1 (Albersheim Dir.), p. 17, lines 15-17.

²¹⁰ Qwest Opening Brief, pp. 3 & 23 (both quoting Martain). See also Hrg. Ex. Q-4 (Martain Reb.), p. 18, lines 18-20, stating: “Qwest should be allowed to keep its existing process in place *as the appropriate CMP procedures were followed* to implement the changes and improvements to the Expedites and Escalations Overview.” (emphasis added).

²¹¹ Hrg. Ex. E-2 (Johnson Dir.), BJJ-G (CMP Redesign Gap Analysis), at 2 (p. 99 of 184), Gap #147 (emphasis added).

1 interconnection agreement, the interconnection agreement is controlling. ***This***
2 ***kind of language in the SGAT guts the contract***, particularly when CMP
3 essentially allows Qwest to run through any change it wants to. Reference to #15:
4 Qwest has the ability to reject/deny CLEC CRs. CLECs do not have the ability to
5 reject/deny Qwest CRs. We need to discuss and find a way to balance the process.
6 As it stands, Qwest CRs go through to completion over CLEC objections,
7 however, CLEC CRs do not go through over Qwest's objection. CLECs have to
8 use the escalation or dispute resolution process either to advance their CRs (when
9 Qwest rejects/denies) or oppose Qwest CRs (when Qwest ignores CLEC
10 objections). Qwest is never put in this position. This applies to product/process
11 and may apply to systems as well (the group should discuss).²¹²
12

13 CLECs retain their full rights of recourse, including the right to seek and obtain a
14 different substantive result (reversing inappropriate Qwest CMP changes). This
15 Commission retains its full authority and oversight role with respect to changes in CMP.
16 In fact, contrary to Qwest's suggested limitation, the CMP Document specifically
17 provides: "This provision is not intended to change the scope of any regulatory agency's
18 authority with regard to Qwest or the CLECs."²¹³ Likewise, the ICA provides that this
19 Commission may resolve disputes between the parties that arise during the term of the
20 ICA.²¹⁴

21 **2. Imposition of a Fee is Outside the Scope of CMP, so CMP is clearly**
22 **not a "Location" for Mutually Developing this Change.**²¹⁵
23

24 Qwest, at least verbally, recognizes that "rates are outside the scope of CMP."²¹⁶
25 This was established in the CMP Redesign meetings, where "it was agreed that

²¹² Hrg. Ex. E-2 (Johnson Dir.), BJJ-G (CMP Redesign Gap Analysis), at 2 (p. 99 of 184), Gap #147(emphasis added).

²¹³ Hrg. Ex. E-1 (Johnson Direct), Att. A-9 at 000259 (CMP Document §15.0).

²¹⁴ ICA, Part A, ¶27.2 (Exhibit 1 to this Brief, p. 3.) See Eschelon Opening Brief, pp. 20-23.

²¹⁵ Qwest Opening Brief, p. 5 (CMP is "the location where expedite procedures would be mutually developed").

²¹⁶ Hrg. Ex. Q-3, Martain Dir., p. 29, line 1; *see also* Hrg. Ex. S-1, Staff, p. 29, lines 4-5. The Scope section states the items that are within the Scope of CMP, and it does not include rates and the application of rates. See Hrg. Ex. E-1 (Johnson Dir.), Att. A-9 at 000173-174 (CMP Document §1.0).

1 discussions on rate change were not in the scope of CMP.”²¹⁷ At the hearing, however,
2 Ms. Albersheim stated during her prepared witness summary that the “change at issue
3 here is the *imposition of the fee* to expedite orders for design services.”²¹⁸ She refers to
4 the Qwest-initiated changes in CMP. This was made even more clear by Qwest counsel
5 in his opening statement:

6 But what did change management do with Versions 27 and 30? Qwest told the
7 CLEC community uniformly, if you don't agree to pay a certain fee, \$200 per day
8 per expedite, we're going to reject the order.²¹⁹

9 In Qwest's Opening Brief (p. 2), Qwest states that “Version 30 simply stated that Qwest
10 is entitled to get paid a fee to expedite orders for unbundled loops.” The above-quoted
11 testimony of Ms. Albersheim and statements of Mr. Steese show, however, that this was
12 no mere statement of a right or reservation of a right. Qwest enforced this change by
13 engaging in self-help and starting to reject orders.²²⁰ Nowhere does Qwest explain why it
14 should be allowed to impose a fee via CMP when imposing a fee is clearly outside the
15 scope of CMP. Particularly given Qwest's clear admissions that rates are outside the
16 scope of CMP and yet the purpose of these changes was to impose a rate, Qwest CMP
17 defense²²¹ may be rejected on this basis alone.

²¹⁷ See CMP Meeting Minutes (May 12, 2002), quoted in Hrg. Ex. E-1 (Johnson Dir.), p. 17, lines 4-6 (with URL provided in footnote 20).

²¹⁸ Tr. Vol. I, p. 191, lines 16-17 (Albersheim) (emphasis added).

²¹⁹ Tr. Vol. I, p. 168, line 23 – p. 169, line 2 (Mr. Steese opening).

²²⁰ Tr. Vol. I, p. 168, line 23 – p. 169, line 2 (Mr. Steese opening) (“we're going to reject the order”). See Complaint, p. 1, line 21; p. 8, line 12; p. 13, line 2 (“self-help”).

²²¹ Qwest Answer, pp. 15-16 (under the heading “Affirmative Defenses”); see Hrg. Ex. S-1 (Staff Testimony), p. 7, lines 15-16 (Q. What role did the CMP play in this particular case? Qwest has based its position on the CMP.”)

1 **3. Qwest Incorrectly States that Eschelon Admits that the Place Where**
2 **These Terms are Mutually Developed is in CMP.**²²²
3

4 Instead of acknowledging Eschelon's clear position that CMP is not the forum for
5 imposing a fee or implementing changes affecting the ICA terms,²²³ Qwest attempts to
6 characterize Ms. Johnson's live testimony as an admission that CMP is the proper
7 forum.²²⁴ Specifically, on pages 5 and 21 of Qwest's testimony, Qwest quotes the
8 following testimony by Ms. Johnson (with the same emphasis in both original
9 quotations):

10 Qwest Emphasis:

11 A. *Qwest requires us as CLECs to do that, though our existing interconnection*
12 *agreement says a mutually developed process and it does not specify where that*
13 *needs to happen. But yes, that is Qwest's requirement that we go through*
14 *CMP.*²²⁵
15

16 Qwest misses the point. A simple change in highlighting, to emphasize the true key
17 words, makes this clear:

18 Eschelon Emphasis:

19 A. Qwest *requires* us as CLECs to do that, *though* our existing *interconnection*
20 *agreement* says a mutually developed process and it does not specify where that
21 needs to happen. But yes, *that is Qwest's requirement* that we go through
22 *CMP.*²²⁶
23

24 Ms. Johnson, in response to this and other questions by Qwest,²²⁷ distinguished between
25 what the ICA really provides and what Qwest instead requires. As indicated in the

222 Qwest Opening Brief, p. 20 (last two lines).

223 Hrg. Ex. E-1 (Johnson Dir.), p. 15, line 12 – p. 17, line 9.

224 Qwest Opening Brief, p. 20 (last two lines).

225 Tr. Vol. I, p. 32, lines 16-20 (Johnson) (with emphasis added by Qwest).

226 Tr. Vol. I, p. 32, lines 16-20 (Johnson) (with emphasis added by Eschelon).

227 Tr. Vol. I, p. 32, lines 16-20 (Johnson); see also Tr. Vol. I p. 59 lines 6-17; p. 59 line 21 – 60 line
14; p. 60 lines 3-11; p. 61 lines 12-14; p. 62 line 23 – 63 line 8; p. 62 line 9-13; p. 62 lines 14-21; p. 62
lines 22-23 (all indicating Qwest requires use of CMP). Ms. Johnson pointed out that, if Eschelon
attempted another alternative, such as going to the Qwest service manager, the Qwest service manager will
only refer the issue to CMP. *See id.* p. 60, lines 3-11.

1 above-quoted language (“though”), Qwest’s requirement is not the same as the ICA
2 requirement, because the ICA “does not specify”²²⁸ that CMP is the forum to mutually
3 develop changes. Ms. Johnson also pointed out that, unlike the ICA which “says a
4 *mutually* developed process,” in CMP the “end result is that we can’t stop it if Qwest
5 chooses to implement” a change.²²⁹ This is fully consistent with Ms. Johnson’s pre-filed
6 testimony that the “CMP process for products and processes is largely one-sided, with
7 Qwest exercising unilateral power to override any changes or objections that an
8 individual CLEC or multiple CLECs raise.”²³⁰

9

10 **4. Qwest’s After-the-Fact Claim that the Purpose of its Version 30 Change was**
11 **Gaming or Abuse is Erroneous and is Contrary to Qwest’s Admission that**
12 **the Purpose of the Change was Imposition of a Fee.**
13

14 In addition to Qwest’s own description at the hearing of the purpose of Version 27 and
15 Version 30 CMP changes as imposition of a fee,²³¹ Qwest adds in its Opening Brief that the
16 “entire purpose”²³² of the amendment was to obtain the Qwest fee.²³³ Nonetheless, Qwest
17 continues to maintain separately in its Opening Brief that the purpose of the Qwest-initiated
18 changes was to remedy “foul play and claims of discrimination.”²³⁴ Qwest claims that having
19 one emergency-based process for CLECs without an amendment and another for CLECs with an

²²⁸ See also Tr. Vol. I, p. 61, lines 6-7 (Johnson) (“That’s the place Qwest says, but *that’s not what this says.*”).

²²⁹ Tr. Vol. I, p. 37, line 25 – p. 38, line 1 (Johnson) (emphasis added).

²³⁰ Hrg. Ex. E-1 (Johnson Dir.), p. 18, lines 14-16.

²³¹ Tr. Vol. I, p. 191, lines 16-17 (Albersheim); Tr. Vol. I, p. 168, line 23 – p. 169, line 2 (Mr. Steese opening).

²³² Qwest Opening Brief, p. 11; *see also* Tr. Vol. I, p. 191, lines 16-17 (Albersheim) (“imposition of the fee”). *See* Row 10 of Exhibit 5 to Eschelon Opening Brief.

²³³ Qwest Opening Brief, p. 13, line 2.

²³⁴ Qwest Opening Brief, p. 10; *see also id.* p. 33 (“gaming the system”) and (“potential for intercarrier squabbles”).

1 amendment created an incentive to abuse the emergency based process.²³⁵ The example Qwest
2 gives is a CLEC allegedly using the same doctor's excuse over and over again to obtain an
3 emergency-based expedite at no additional charge.²³⁶ As the same doctor's excuse was allegedly
4 used "over and over again," this was an identifiable problem that could be addressed directly
5 with the alleged offending CLEC. Qwest does not explain why the incentive would be greater
6 with two processes (where there is an alternative) than before with one (when, if CLEC doesn't
7 show an emergency condition, CLEC doesn't get the expedite at all).

8 If there had been a widespread problem with CLECs requesting emergency expedites
9 under circumstances that did not meet the emergency conditions, Qwest would have identified
10 that problem when announcing the changes that it now says are designed to address the problem.
11 When Qwest announced its Versions 27 and 30 PCAT changes, however, Qwest made no
12 mention of alleged abuse.²³⁷ Now, Qwest admits that the purpose of these Qwest-initiated PCAT
13 changes was imposition of a fee. Staff correctly concludes that Qwest's claims of CLEC abuse
14 "were not behind the changes" and do not support the change implemented by Qwest.²³⁸

15

16 **C. Qwest's Arguments Fail to Give Effect to the ICA's Requirement that Expedite**
17 **Procedures Must be "Mutually Developed."**²³⁹

18

19 Qwest states that "[t]he entire focus of this dispute is on the term 'mutually develop.'"²⁴⁰

20 Eschelon included the language of ICA paragraph 3.2.2.12 containing this phrase in Exhibit 1 to

21 its Complaint (which is also Exhibit 1 to Eschelon's Opening Brief). Eschelon's witnesses each

²³⁵ Qwest Opening Brief, p. 10.

²³⁶ Qwest Opening Brief, p. 10.

²³⁷ Hrg. Ex. 1 (Johnson Dir.), p. 11, line 17 – p. 12, line 2.

²³⁸ Staff Opening Brief, pp. 32-33..

²³⁹ Qwest's refusal to provide Eschelon with the capability to expedite an order for a loop, as required by the parties' ICA, is discussed in Eschelon Opening Brief, pp. 25-26 and in Exhibit 5 to Eschelon Opening Brief, at Rows 3, 15 and 24.

²⁴⁰ Qwest Opening Brief, p. 20; *id.* citing ICA, Att. 5, ¶3.2.2.12.

1 used the phrase “mutually developed” (without the phrase “and agree”) in pre-filed testimony.²⁴¹
2 With respect to this ICA term,²⁴² however, Qwest has focused its energies on attempting to
3 demonstrate that Eschelon has sometimes used the word “agree” in conjunction with the phrase
4 “mutually develop.”²⁴³ Qwest then concludes that “Eschelon asks the Commission to interpret
5 the ICA, not according to its plain meaning, but by adding the word ‘agree.’”²⁴⁴ In an interesting
6 twist, Qwest then proceeds to use the term “develop” instead of “mutually develop.” Qwest
7 begins by defining “developed” but not “mutually,”²⁴⁵ as Qwest did at the hearing,²⁴⁶ and then
8 Qwest repeatedly refers to the word “develop” in quotation marks (omitting the word “mutually”
9 before it each time).²⁴⁷ Qwest provided examples²⁴⁸ of non-expedite provisions of the ICA using
10 the term “develop” but none of them used the term “mutually develop.”²⁴⁹ Qwest compares the

²⁴¹ Hrg. Ex. E-1 (Johnson Dir.), p. 6, line 16; Hrg. Ex. E-3 (Webber/Denney), p. 6, lines 10-11, p. 7, line 2, p. 9, lines 22-23, p. 10, lines 5-6, p. 13, lines 3-4, p. 23, line 15; Hrg. Ex. E-4 (Denney Reb.), p. 19, lines 6 & 10-11, p. 20, lines 5, 12-13.

²⁴² ICA, Att. 5, ¶3.2.2.12 (Exhibit 1, p. 1, to Eschelon Opening Brief) (“[Qwest] and [CLEC] shall mutually develop procedures to be followed when [CLEC] determines an expedite is required to meet subscribers service needs.”).

²⁴³ Qwest Opening Brief, p. 24 (“Eschelon’s witnesses interpret the phrase ‘mutually develop’ as ‘mutually develop and agree’”); Tr., Vol. I, p. 169, ln 23 – p. 170, ln 4, Mr. Steese opening (“So what they do is they turn forward to Section 3.2.2.12, and they say the process wasn’t, quote, mutually developed. And actually, it was interesting to hear Mr. Denney, because he would never use the word mutually developed. He consistently said -- and I encourage you to look at the transcript – mutually developed and agreed upon.”). (*But see* Row 16 to Exhibit 5 to Eschelon Opening Brief.) In addition, Qwest expended resources counting the number of times that the word “agree” is used in the ICA, while introducing no evidence of the number of times that the words “mutual” or “mutually developed” are used. See Qwest Opening Brief, p. 25 (82 times for “agree”). In any event, Qwest failed to establish the relevance of alleged conduct with respect to provisions using “develop” when none used the applicable term “mutually developed,” and none dealt with expedites, etc.

²⁴⁴ Qwest Opening Brief, p. 24.

²⁴⁵ Qwest Opening Brief, p. 26, lines 2-3.

²⁴⁶ Eschelon Opening Brief, pp. 27-28 and footnote 132.

²⁴⁷ Qwest Opening Brief, p. 22 (twice); p. 23 (four times), p. 26 & p. 31 (heading).

²⁴⁸ Qwest provided a few examples at the hearing (Hrg. Exs. Q-23 – Q-25) but made no attempt to show they were exhaustive, even if the connection Qwest attempted to make between the ICA examples and CMP had been proven. Nonetheless, on page 22 of Qwest’s Opening Brief (with emphasis added), Qwest states: “Qwest and Eschelon went to CMP *every time* the word ‘develop’ was used in the ICA.” This unverified assertion is unsupported in the record. In any event, none of the non-expedite examples used the phrase “mutually developed.”

²⁴⁹ See Hrg. Exs. Q-23 – Q-25; Qwest Opening Brief, pp. 22-23.

1 phrase “parties ‘will develop and agree’” with the phrase “the parties will develop”²⁵⁰ and not
2 with a phrase “the parties will *mutually* develop.” Applying Qwest’s reasoning, Qwest is asking
3 the Commission to interpret the ICA, not according to its plain meaning, but by deleting the
4 word “mutually.” The word “mutually,” however, is a key and integral part of the ICA language.
5 The language of a contract must be given effect as written.²⁵¹ Qwest has recognized the
6 applicability of this rule.²⁵² Therefore, as the ICA is written, the word “mutually” must be given
7 effect.

8 Qwest’s argument that the word “agree” would need to be added to the ICA with respect
9 to procedures to be “developed” per the ICA,²⁵³ ignores the fact that “mutually” is synonymous
10 with “in agreement.”²⁵⁴ Thus, there is no reason for this particular provision to also include the
11 redundant word “agree.” Qwest asserts that “*Qwest developed* the subject Expedite Process
12 (“Version 30”) in CMP, and *Eschelon participated* in the development every step of the way.”²⁵⁵
13 Thus, even Qwest characterizes its role as “develop[ing]” the process and Eschelon’s role, in
14 contrast, as that of a participant. Further, this characterization glosses over the specific nature of
15 Eschelon’s participation, which was limited to *objecting* – along with other CLECs – to the
16 Qwest-initiated changes so they would not be implemented.²⁵⁶ Qwest’s response to this
17 participation by CLECs was to impose the fee anyway.²⁵⁷ Particularly because Eschelon
18 expressly objected to Qwest’s change that took away Eschelon’s capability to expedite a loop

²⁵⁰ Qwest Opening Brief, p. 22 (quoting Merriam-Webster’s).

²⁵¹ *Hadley v. Southwest Properties, Inc.*, 116 Ariz. 503, 506, 570 P.2d 190, 193 (1977); *Amfac Distribution Corporation v. J.B. Contractors, Inc.*, 146 Ariz. 19, 24, 703 P.2d 556, 570 (Ariz. Ct. App. 1985).

²⁵² Qwest Opening Brief, pp. 25 & 31 (citations omitted); see also Tr. Vol. I, p. 182, lines 19-21 (Albersheim) (““gives meaning to each and every word of those provision”).

²⁵³ Qwest Opening Brief, pp. 22-24.

²⁵⁴ Roget’s Int’l Thesaurus (4th ed. 1977).

²⁵⁵ Qwest Opening Brief, p. 2 (emphasis added). With respect to Qwest’s claim that Eschelon was involved in every aspect of the alleged development of Version 30 in CMP, see Eschelon Opening Brief, pp. 17-18.

²⁵⁶ Multiple CLEC objections (See Hrg. Ex. E-1, Att. A-7, at 000123-000128).

²⁵⁷ Tr. Vol. I, p. 168, line 23 – p. 169, line 2 (Mr. Steese opening).

1 order, the procedure was not mutually developed. As Commission Staff accurately observes in
2 its Opening Brief: "The CMP changes in this case were not 'mutually developed.' Eschelon and
3 other CLECs had little to no meaningful say in the process ultimately designed by Qwest . . .

4 .²⁵⁸

5

6 **D. Qwest Incorrectly Describes the Relief Sought by Staff and Eschelon and from that**
7 **Erroneously Concludes that They are Materially Inconsistent.**²⁵⁹
8

9 Qwest claims that Staff's position on breach of contract was rejected by both parties.²⁶⁰

10 However, Mr. Denney testified: "Eschelon agrees with the recommendations that Staff has cited
11 in its summary, and we believe that those recommendations are consistent with the relief sought
12 by Eschelon in this complaint."²⁶¹ With its Opening Brief, Eschelon provided Exhibit 4, entitled
13 "Staff Recommendations are Within Scope of Complaint, Despite Qwest's Claim the Case is
14 Narrower." It demonstrates that the Complaint encompasses the relief requested by Eschelon
15 and Staff, particularly given that all that is required in Arizona is notice pleading.²⁶²

²⁵⁸ Staff Opening Brief at 21.

²⁵⁹ Qwest Opening Brief, pp. 26-30.

²⁶⁰ Qwest Opening Brief, p. 26.

²⁶¹ Tr. Vol. I, p. 129, lines 11-15. Eschelon discusses its request for relief in Section II(B) above and provides a summary in the Conclusion (Section IV) below. Staff provided its recommended relief in the Executive Summary to Staff Testimony (Hrg. Ex. S-1).

²⁶² See *Yes on Prop 200 v. Napolitano*, 215 Ariz. 458, 160 P.3d 1216, 1229 (Az Ct. App. June 28, 2007) ("In a notice-pleading state, such as Arizona, 'a complaint need only have a statement of the ground upon which the court's jurisdiction depends, a statement of the claim showing that the pleader is entitled to relief and a demand for judgment.'"); *Drew v. United Producers and Consumers Cooperative*, 161 Ariz. 331, 778 P.2d 1227 (Ariz. 1989) (construing claim for "damages" broadly, to include claim for lost profits as well as claim for property damage); *Rosenberg v. Rosenberg*, 123 Ariz. 589, 601 P.2d 589, 592-93 (Ariz. 1979) (holding that where claim was for lump sum due under a divorce decree, award of unpaid child support and past medical expenses was not beyond the scope of the complaint and stating, "Arizona is a notice pleading state, and therefore does not require extensive fact pleading. We feel that plaintiff's complaint sufficiently placed defendant on notice of the relief sought.") (citation omitted).

1 Qwest concedes that, to the extent there are differences, they are only “slightly”
2 different.²⁶³ A more important point here is that Staff’s independent conclusions are far more
3 similar to Eschelon’s position than Qwest’s position.

4 1. **The Current List of Emergency Conditions, Including Version 22,**
5 **Should Apply.**
6

7 Qwest states: “Staff claims under the ICA, Qwest is wedded to the Expedite Process in
8 effect at the time Qwest and Eschelon entered into the ICA. As a result, Staff claim Qwest is
9 bound to offer expedites on unbundled loops for free even though the language in the ICA gives
10 Qwest the right to charge for expedites.”²⁶⁴ This is largely an issue of semantics, with Qwest
11 making broad assumptions about interpretation of the vague term “wedded” and use of the word
12 “process” in this context. When the Staff’s live testimony (quoted on page 27 of Qwest’s
13 Opening Brief) is read together with Staff’s pre-filed testimony, including the conclusions in its
14 Executive Summary, the result is consistent the contract principles Qwest cites in its Opening
15 Brief. As Qwest points out, “it is the intent of the parties *at the time the contract was made*
16 which is controlling.”²⁶⁵ Immediately after Qwest cites this legal principle, Qwest points to one
17 of Staff’s recommendations and states “Version 11 came into existence four years after the
18 parties executed the ICA.”²⁶⁶ Qwest does not mention in this discussion in its Brief that its
19 position is that CMP is controlling, even though CMP also came into existence years after the
20 parties executed the ICA.²⁶⁷ If Staff’s position is “irreconcilable”²⁶⁸ for this reason, then so is
21 Qwest’s position, as Qwest is also relying upon the law relating to the time the contract was
22 made.

263 Qwest Opening Brief, p. 26 (third line from bottom).

264 Qwest Opening Brief, pp. 26-27.

265 Qwest Opening Brief, pp. 27-28 (citation omitted) (emphasis added).

266 Qwest Opening Brief, p. 28.

267 Hrg. Ex. S-1 (Staff Testimony), p. 8, lines 14-16.

268 Qwest Opening Brief, p. 28.

1 It is consistent with that law to conclude that, at the time the contract was made, the
2 parties intended the ICA language [which mandates that Qwest provide expedite capability and
3 states charges may (*i.e.*, may not) apply] means at a minimum that Qwest must provide expedite
4 capability for unbundled loops²⁶⁹ and charges may not apply when emergency conditions are met
5 and resources are available. This is, in turn, consistent with Staff's Conclusion No. 1²⁷⁰ and
6 Eschelon's request to receive emergency-based expedites under those circumstances. Qwest
7 mis-states Staff's recommendation when Qwest states that it requires expedites "for free."²⁷¹
8 Staff's Conclusion No. 1 does not use the word free; it provides: "No additional charge should
9 be applied beyond the standard installation charge." Qwest has made no showing that it does not
10 already recover its cost in the installation charge or even that it incurs any additional costs,
11 because resources are already available before Qwest grants emergency expedites. Qwest is also
12 incorrect in stating that Staff requires expedites "for free"²⁷² to the extent Qwest means this to
13 apply to expedites when the emergency conditions are not met (which is how it is phrased,
14 without limitation). Staff's Conclusion Nos. 2 and 7 and Eschelon's proposed relief provide that
15 Qwest may charge when the emergency conditions are not met, at a cost-based rate.

16 Analyzing the parties' intent at the time the contract was made does not mean that the
17 documented list of emergency conditions for CLECs "reverts"²⁷³ back to another time, either at
18 the time of execution of the ICA or at the time Version 11 was instituted. The intent is that
19 Qwest must provide expedite capability for unbundled loops at no additional charge when

²⁶⁹ Qwest conceded at the hearing that the expedite capability that the ICA refers to applies to both design and non-design services. Tr. Vol. II, p. 227, lns 13-17 (Albersheim). See also Row 12 to Exhibit 5 to Eschelon Opening Brief.

²⁷⁰ Hrg, Ex. S-1 (Staff Testimony), Executive Summary, Conclusion No. 1.

²⁷¹ Qwest Opening Brief, p. 27, line 1.

²⁷² Qwest Opening Brief, p. 27, line 1.

²⁷³ Qwest Opening Brief, p. 27, line 4.

1 emergency conditions are met and resources are available. That is the process that Qwest should
2 “continue to support.”²⁷⁴ As to the emergency conditions themselves, Qwest points out that, as
3 with its tariffs,²⁷⁵ they are not set forth in the ICA.²⁷⁶ When looking at the intent of the parties’
4 of the contract at the time it was made, the intent was to have emergency-based expedites. As to
5 procedures regarding the emergency conditions themselves, the intent at the time the contract
6 was made was that procedures would be “mutually developed” on a nondiscriminatory, carrier
7 neutral basis. Those intended terms should be available under the existing ICA until negotiations
8 result in “a change to the contract.”²⁷⁷ In other words, Qwest should not be able to unilaterally
9 change them without agreement or prior Commission approval.

10 **2. Existing Conditions Were Later Documented in the PCAT.**

11 Eschelon presented evidence that, although the list of emergency conditions that Qwest
12 documented in the PCAT for CLECs showed additions over time, those additions to the
13 documented list were not modifications to the process, as alleged by Qwest.²⁷⁸ Qwest was
14 documenting existing processes.²⁷⁹ In response, Qwest states regarding the Version 22 PCAT
15 changes:

16 Eschelon tries to pass this off as documenting an undocumented process and not a true
17 change in process. This is faulty and Eschelon knows it.²⁸⁰
18

19 The record shows that Qwest’s accusations that Eschelon knowingly provided faulty information
20 to the Commission, and tried to “pass this off” to the Commission as something it was not, are
21 baseless. Qwest’s own witness testified that Eschelon came to CMP about these emergency

²⁷⁴ Hrg, Ex. S-1 (Staff Testimony), Executive Summary, Conclusion No. 1.
²⁷⁵ See Tr. Vol. II, p. 353, line 22 – p. 354, line 22; Id., p. 358 line 19 – p. 359 , line 8 (Martain).
²⁷⁶ Tr. Vol. I (Steese cross of Denney), p. 134, lines 9-18.
²⁷⁷ Tr. Vol. III, p. 555, line 21 (Staff).
²⁷⁸ See, e.g., Qwest Opening Brief, p. 27.
²⁷⁹ Tr. Vol. I, p. 33, lines 2-23 (Johnson).
²⁸⁰ Qwest Opening Brief, p. 27 at footnote 1.

1 conditions because Eschelon indicated Qwest was allowing emergency-based expedites for these
2 conditions “*prior to* Version 11.”²⁸¹ As these conditions were not documented in the PCAT until
3 the later Version 22, obviously they were “undocumented” in the PCAT prior to Version 11.
4 Eschelon requested Qwest document them because they had been available to CLECs prior to
5 Version 11 but Qwest for some reason had stopped providing them (perhaps because they were
6 not on the documented list).²⁸² Despite Qwest’s baseless allegation that Eschelon “knows” it
7 was not an existing process, the August 16, 2004 CMP meeting minutes (prepared by Qwest)
8 state: “Bonnie [Johnson] submitted a comment on this issue as Eschelon believes this is an
9 existing process. . . . Bonnie advised her definition of an existing process is, if Qwest is
10 performing the process, it is an existing process.”²⁸³ In response, Jill Martain agreed in CMP in
11 2004 that Qwest would “*continue to* handle feature expedites” until the issue was resolved.²⁸⁴
12 The issue was resolved by documenting the existing process in the PCAT so that Qwest would
13 continue to provide these expedites, as requested by Eschelon.²⁸⁵

14 Despite these contemporaneous Qwest CMP minutes to the contrary, Qwest attempts to
15 justify its allegation by relying not on any facts specific to the CMP discussion but on the CMP
16 level designation. Qwest argues that, in theory, because this notice had a level 3 designation, it
17 could not be a change to an existing process, as changes to an existing process should be level

²⁸¹ Tr. Vol. II, p. 371, lines 11-13 (emphasis added).

²⁸² Hrg. Ex. E-1 (Johnson Dir.), Att. A-2 at 000053 (8/16/04 CMP meeting minutes) (e.g., “Eschelon advised she had tried to expedite a feature and escalation group and Service Manager said they were not able to do this.”). See also Tr. Vol. I, p. 33, lines 2-23 (Johnson) (“A. While Eschelon recommended the changes, those changes resulted from an escalation because they were expedites that Qwest had always performed for us. And when Qwest implemented a prior version of the expedite PCAT, they stopped doing those expedites. I escalated that to CMP, and the end result was work in CMP and these additional criteria being documented. So I wouldn’t describe them as new or additions. I wouldn’t agree that that’s the case.”).

²⁸³ Hrg. Ex. E-1 (Johnson Dir.), Att. A-2 at 000053 (8/16/04 CMP meeting minutes).

²⁸⁴ Hrg. Ex. E-1 (Johnson Dir.), Att. A-2 at 000053 (8/16/04 CMP meeting minutes) (emphasis added).

²⁸⁵ Hrg. Ex. E-1 (Johnson Dir.), Att. A-3 (Version 22 CMP materials).

1 2.²⁸⁶ While the disposition levels are defined in the CMP Document, the CMP Document
2 contains procedures for requesting a change to a level when they are designated incorrectly.²⁸⁷
3 The existence of these level changing procedures shows that the level designations may not
4 always follow the descriptions of the levels. The amount of time to respond increases as the
5 level designation increases (with level 1 being effective immediately and level 4 allowing the
6 most time).²⁸⁸ Once Qwest assigns a level to a CMP notice, requesting a change to the level is
7 optional.²⁸⁹ If, for example, a lower level designation is given and a CLEC needs more time to
8 prepare, the CLEC may have an incentive to request a change to an appropriately higher level to
9 obtain additional response time. In contrast, there is little if any incentive or need to request a
10 lower designation, because that would serve only to shorten the response time. The level
11 designation does not supplant the later CMP minutes, which clearly show that Eschelon had
12 previously received emergency-expedites for these conditions, Qwest stopped providing them,
13 Eschelon went to CMP, and Ms. Martain said Qwest would “continue” to provide them.²⁹⁰

14 IV. CONCLUSION

15 The Commission should reject Qwest’s position that “Staff is wrong on every single
16 point it raises.”²⁹¹ It is not “impossible”²⁹² to find that Qwest’s imposition of a fee via CMP
17 breached the ICA, as is supported by the Staff’s findings. Eschelon has demonstrated that it
18 should prevail on its breach of contract claim. This case is not limited to breach of contract, and
19 Eschelon has demonstrated that it should prevail on the other counts as well. For all the reasons

²⁸⁶ Qwest Opening Brief, p. 27 at footnote 1.

²⁸⁷ Hrg. Ex. E-1 (Johnson Dir.), Att. A-9 (CMP Document) at 000199.

²⁸⁸ Hrg. Ex. Q-3, (Martain Dir.), pp. 11-12.

²⁸⁹ Hrg. Ex. Q-3, (Martain Dir.), p. 12 lines 14-16. See also Hrg. Ex. E-1 (Johnson Dir.), Att. A-9 (CMP Document) at 000199 (CLEC “may” request to change the disposition level).

²⁹⁰ Hrg. Ex. E-1 (Johnson Dir.), Att. A-2 at 000053 (8/16/04 CMP meeting minutes).

²⁹¹ Qwest Opening Brief, p. 27, line 2.

²⁹² Qwest Opening Brief, p. 26.

1 stated, the Commission should grant Eschelon's requested relief (summarized below). The relief
2 is consistent with this Commission's previous orders, the facts, and the law, as well as the
3 recommendations in the Executive Summary to Staff's Testimony.

4 Regarding the Staff's recent suggestion that the Commission order Qwest to adopt the
5 interim process in effect under the June 6, 2006 Procedural Order for all expedites for all
6 CLECs,²⁹³ this is consistent with Eschelon's requested relief, except to the extent that the
7 recommendation may include a \$200 per day rate. Staff's use of "at a minimum"²⁹⁴ indicates
8 that the \$200 per day rate is not a requisite part of the recommendation. The Commission should
9 order a different, and lower, interim expedite rate based on the extensive evidence in this case
10 showing that Qwest's \$200 per day proposed rate is not cost based and excessive and Eschelon's
11 interim rate proposal better approximates costs and is more reasonable.

12 Eschelon has demonstrated that the rate should be based on TELRIC. As Staff
13 correctly concluded: "Expedites are not a 'superior service' to what Qwest provides
14 itself,"²⁹⁵ thus rejecting the only rationale that Qwest has advanced for its claimed right to
15 charge a rate of \$200 per day. If the Commission relies upon the Interim Relief, in
16 addition to replacing the \$200 per day rate with an ICB or \$100 per order interim rate, the
17 Commission should explicitly state, regarding the list of Emergency Conditions
18 (Attachment A to the June 6, 2006 Procedural Order), when another emergency-based
19 condition (such as medical condition or outage) is met, Qwest may not deny the expedite
20 on the grounds that the CLEC caused the disconnect in error. With these adjustments,
21 Eschelon supports the recommendation (reflected in the Interim Relief) to provide

²⁹³ Staff Opening Brief, p. 37.

²⁹⁴ Staff Opening Brief, p. 17, lines 4-6.

²⁹⁵ Staff Opening Brief, p. 31, line 19.

1 expedites at no additional cost when the emergency conditions are met and to provide
2 expedites for a fee when they are not met. These aspects of the Interim Relief are
3 reflected in Eschelon's requested relief. The ordered terms should be made available to
4 other CLECs in the form of an amendment offered by Qwest and distributed by Qwest
5 notice, as well as posted on the Qwest website along with Qwest's other amendment
6 offerings. (See Exhibit 6 to this Reply Brief.)

7 In summary, Eschelon requests the following relief:

8 Expedites of UNE orders will be provided at no additional charge when the
9 emergency conditions are met and resources are available. The emergency
10 conditions available to CLECs at no additional charge for emergency-based
11 expedites will include the conditions today, including the Version 22
12 conditions.²⁹⁶

13
14 When an emergency-based condition (such as medical condition or outage) is
15 met, Qwest may not deny the expedite on the grounds that the CLEC caused a
16 disconnect in error.²⁹⁷

17
18 Consistent with the recommendations of both Eschelon and Staff that expedites
19 are not a superior service and the rate should be TELRIC based, the Commission
20 should reject Qwest's \$200 per day rate, which Qwest admits is "not a TELRIC
21 rate."²⁹⁸ Evidence developed since the entry of the Procedural Order providing
22 for interim relief, including Qwest's own cost study, establishes that \$200 per day
23 far exceeds the costs that Qwest incurs to expedite service. Therefore, it would be
24 inappropriate to allow Qwest to continue to charge this rate, even on an interim
25 basis, as it would be inconsistent with this Commission's order and the
26 requirement of the federal Act that access to UNEs be based on costs.

27
28 In this case, until a different rate is set in another proceeding, the Commission
29 may confirm the ICB rate (including using Commission approved rates in
30 conjunction with a maximum for the charge) or set a more certain fixed interim
31 rate to avoid disputes. A fixed rate, if adopted, should more closely reflect cost-
32 based pricing than Qwest's excessive retail rate. The Commission should order a
33 fixed interim rate of \$100 per order because it more closely approximates cost-

²⁹⁶ See Attachment A to the June 6, 2006 Procedural Order for the list of Emergency Conditions. See also Exhibit 6 to this Reply Brief.

²⁹⁷ Note that Attachment A to the June 6, 2006 Procedural Order does *not* say, after each condition, "unless caused by a CLEC disconnect in error."

²⁹⁸ Qwest Opening Brief, p. 16.

1 based wholesale pricing than Qwest's retail rate and is a more reasonable interim
2 rate. The interim rate should apply when the emergency conditions are not met.
3

4 An ICB expedite rate, if confirmed, should be available *under the existing ICA*
5 (*i.e.*, without amendment, as ICB is an approved rate and applies per the ICA
6 terms) for Eschelon (and CLECs with expedite language in their ICAs which do
7 not have an expedite amendment) and *via an amendment offering* for CLECs with
8 an expedite amendment (*e.g.*, CLECs whose amendment currently has the \$200
9 per day rate). Alternatively, if the Commission adopts a more certain fixed
10 interim rate of \$100 per order, an amendment (such as the one attached as Exhibit
11 6 to this Reply Brief) should be made available to CLECs, including Eschelon.
12

13 Qwest should provide any amendment to CLECs by notice and post it on its
14 website with other available amendments,²⁹⁹ so that CLECs are aware of the
15 availability of the amendment.
16

17 The Commission should find that Eschelon has complied with Conclusion No. 4
18 (regarding training) in the Executive Summary to Staff's Testimony, as Eschelon
19 instituted training and informed Staff of this.³⁰⁰
20

21 The Commission should make such findings and order such additional relief as
22 deemed just and proper.
23

24

²⁹⁹ See <http://www.qwest.com/wholesale/clecs/amendments.html> (where Qwest's amendments, such as its TRRO amendment, are listed as available amendments).

³⁰⁰ See Hrg. Ex. E-4 (Denney Rebuttal) (Feb. 13, 2007), p. 5, line 5 – p. 6, line 2.

1 Signed: December 5, 2007

2 GRAY, PLANT, MOOTY, MOOTY
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4
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35

EXHIBIT 6
PROPOSED EXPEDITE AMENDMENT

**Expedite Amendment
to the Interconnection Agreement between
Qwest Corporation
and**

for the State of Arizona

This Amendment ("Amendment") is to the Interconnection Agreement between Qwest Corporation ("Qwest"), a Colorado corporation, and _____ ("CLEC"). Qwest and CLEC are referred to collectively as "Parties" and individually as "Party."

RECITALS

WHEREAS, the Parties entered into an Interconnection Agreement ("Agreement"), for service in the State of Arizona that was approved on

_____ and

WHEREAS, the Parties wish to amend the Agreement under the terms and conditions contained herein.

AGREEMENT

NOW THEREFORE, in consideration of the mutual terms, covenants and conditions contained in this Amendment and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties agree as follows:

1. Amendment Terms

1.1 The Agreement is for the purpose of setting the Parties' agreed terms and conditions for Expedites in the State of Arizona. The Parties agree the language and rates in this document are for the limited purposes of this Amendment. CLEC and Qwest reserve their rights to assert different language and/or rates in other contexts.

1.2 The Parties shall apply the emergency conditions of Qwest's existing Expedite Requiring Approval as set forth in the Attachment A [a copy of Attachment A is attached to this Amendment]. When those emergency conditions are met, Qwest shall grant the expedite at no additional cost to CLEC for unbundled loops (including DS0 and DS1 capable loops) on an interim basis. When those emergency conditions are not met, CLEC shall pay \$100 per expedite service request for each such expedite for unbundled loops (including DS0 and DS1 capable loops) on an interim basis. In both instances, the expedite charges will be subject to true-up based on the results of the Phase III cost proceeding. These interim terms apply only to expedite requests and associated charges. If other charges ordinarily apply, such as a non-recurring installation charge for an order to restore service after a disconnect in error, CLEC will continue to pay such charges as applicable in the ordinary course. Both Parties will document expedite requests, whether the emergency conditions are met, and charges that are paid or would

be paid if Qwest prevails to allow for calculation of any true-up. This interim resolution is intended to be without prejudice to either Party's position in cost or arbitration proceedings.

2. Effective Date

This Amendment shall be deemed effective upon approval by the Commission; however, the Parties agree to implement the provisions of this Amendment upon execution. In addition to the Questionnaire, all system updates will need to be completed by Qwest. CLEC will be notified when all system changes have been made. Actual order processing may begin once these requirements have been met.

3. Further Amendments

Except as modified herein, the provisions of the Agreement shall remain in full force and effect. Except as provided in the Agreement, this Amendment may not be further amended or altered, and no waiver of any provision thereof shall be effective, except by written instrument executed by an authorized representative of both Parties.

4. Entire Agreement

Other than the publicly filed Agreement and its Amendments, Qwest and CLEC have no agreement or understanding, written or oral, relating to the terms and conditions for expedites in the State of Arizona.

The Parties intending to be legally bound have executed this Amendment as of the dates set forth below, in multiple counterparts, each of which is deemed an original, but all of which shall constitute one and the same instrument.

Signature

Name Printed/Typed

Title

Date

Qwest Corporation

Signature

Name Printed/Typed

Title

Date

Attachment A

Following is a list of conditions where an expedite is granted:

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