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COMMISSIONERS

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GARY PIERCE

AZ CORP COMMISSION
DOCKET CONTROL

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

NOTICE OF ERRATA FILING

The Arizona Corporation Commission Staff ("Staff") filed its Post-Hearing Brief yesterday in accordance with the Procedural Schedule in this case. Staff has included another copy of its Brief attached to this Notice which strikes two redundant sentences contained in Section III of the Brief, corrects several typographical errors and which contains other minor corrections to the Brief that was filed on Wednesday of this week.

RESPECTFULLY submitted this 26th day of October, 2007.

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Legal Division
Arizona Corporation Commission
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Arizona Corporation Commission
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1 Original and Thirteen (13) copies of the
2 foregoing were filed this 26th day of
3 October, 2007, with:

3 Docket Control
4 Arizona Corporation Commission
5 1200 West Washington Street
6 Phoenix, Arizona 85007

5 Copies of the foregoing were mailed
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1 **BEFORE THE ARIZONA CORPORATION COMMISSION**

2 **COMMISSIONERS**

3 MIKE GLEASON - Chairman
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8 IN THE MATTER OF THE APPLICATION
9 OF THE COMPLAINT OF ESCHELON
10 TELECOM OF ARIZONA, INC. AGAINST
11 QWEST CORPORATION

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STAFF'S POST-HEARING BRIEF

12 **I. Introduction**

13 This case involves a complaint by Eschelon Telecom of Arizona, Inc. ("Eschelon"), a
14 competitor of Qwest Corporation ("Qwest"), alleging that Qwest was denying it the ability to
15 expedite¹ Local Service Requests ("LSRs") under its existing Interconnection Agreement ("ICA")
16 unless it signed an Amendment to its ICA which substantially changed its rights under the long-
17 standing process that had been mutually understood and utilized by both Qwest and Eschelon.

18 Qwest relies upon the Change Management Process ("CMP") to justify its actions. Qwest
19 argues that the CMP is the Commission approved process for changes of this nature and that it
20 satisfies the "mutually developed" language contained in Eschelon's ICA. Eschelon takes issue with
21 Qwest's position that the process was "mutually developed". Eschelon argues that the process was
22 unilaterally developed by Qwest and imposed upon its competitors.

23 The Staff's position is that Qwest should have waited until the current ICA with Eschelon
24 expired before insisting upon a material change in how it would handle expedites, unless Eschelon
25 agreed to the change in process. In the end, it is clear that with respect to this change, it was material
26 and affected the rights of the parties under the long-standing expedite process in effect under existing
27 ICAs. Certain Competitive Local Exchange Carriers ("CLECs"), at least some of those that regularly
28 followed and participated in the CMP, expressed their objection, and in some cases confusion,

¹ "The Expedite Process is a procedure that is followed when a CLEC requests an earlier due date than the standard interval from Qwest for the installation of wholesale products and services." Genung Direct Test., Ex. S-1 at 6-7.

1 over the changes made to the process by Qwest in a succession of different versions to the expedite
2 process presented in the CMP. In fact, one CLEC objected that it had already signed the Amendment
3 under an earlier version presented by Qwest and that Qwest subsequently imposed a material change
4 to the way that Amendment worked.

5 In addition, the CMP process was never intended to trump or change a CLEC's rights under
6 its existing ICA. This issue was the subject of considerable discussion in the Section 271 workshops
7 held by the Commission when it approved the process as part of Qwest's 271 application. The
8 document codifying the CMP process clearly states that if there is a conflict between the ICA or
9 rights under the ICA and the CMP, the ICA controls.

10 In addition to believing that Eschelon was aggrieved in this case, the Staff believes that other
11 CLECs may have been as well by the succession of changes to the expedite process in the CMP,
12 which ultimately resulted in a material change to the existing process. The changes went well beyond
13 the original Change Request of Covad which was for an optional expedite process for non-emergency
14 circumstances. Because Qwest also explained the Amendment as an optional process for CLECs, the
15 Staff has recommended that Qwest offer CLECs the new process represented by the Version 30
16 Amendment as another option in addition to the process for emergency expedites under their existing
17 ICAs. Staff has made other recommendations discussed herein that should be adopted by the
18 Commission as well, including: 1) inclusion of a definition of design and non-design services in
19 Qwest's Arizona Tariffs; 2) inclusion of expedites of Unbundled Loops in ICA negotiations, and 3)
20 adoption of a Performance Indicator Definition ("PID") for Expedites of Unbundled Loops.

21 **II. Procedural History**

22 On April 14, 2006, Eschelon filed a Complaint with the Commission against Qwest alleging
23 that Qwest had refused to provide both repairs for disconnects in error and the capability to expedite
24 orders for unbundled loops under the repair and expedite language of the Qwest-Eschelon ICA.

25 By Procedural Order dated June 6, 2006, the Commission's Utilities Division Staff was
26 ordered to participate in this case. A subsequent Procedural Order dated August 16, 2006 established
27 a procedural schedule in this case, which was subsequently modified by request of the parties on
28 January 11th 2007. The Procedural Order also adopted an interim process for expedites. The interim

1 process preserved Eschelon's ability to obtain no-cost emergency expedites but required Eschelon to
2 pay for non-emergency expedites.²

3 Qwest, Eschelon and Staff filed testimony on the issues raised in this case. On February 23,
4 2007, Qwest and Eschelon filed a Joint Motion Submitting Settlement Agreement. Pursuant to a
5 Procedural Order, Utilities Division Staff was ordered to file response to the Settlement Agreement
6 by March 9, 2007. The conditional Settlement Agreement³ provided that for the length of time that
7 the current interconnection agreement between Qwest and Eschelon remains the binding
8 interconnection agreement between the parties in Arizona, Qwest agrees to interpret the expedite
9 provisions of the agreement to allow Eschelon in Arizona to obtain expedited due dates on all
10 products, including unbundled loops and other products categorized by Qwest as "designed services"
11 according to the old process a/k/a Expedites Requiring Approval process pursuant to which Qwest
12 will grant Eschelon's requests for an expedite at no charge under specified conditions.

13 The Utilities Division Director filed a response on March 9, 2007 indicating that Staff
14 believed the Settlement Agreement could be in the public interest if it included the following Staff
15 conditions:

- 16 (1) Qwest should continue to support the same Expedite Process that has been
17 used in the past for all products and services (including unbundled loops)
18 if the order meets any of the Emergency criteria or conditions or where the
19 customer's safety may be an issue if the Expedite is not processed. No
20 additional charge should be applied beyond the standard installation
21 charge.
- 22 (2) Qwest should continue with the enhancement to the Expedites &
23 Escalations Overview Process, as originally requested by Covad, offering
24 an option to CLECs to expedite Orders when the situation does not meet
25 the emergency criteria or conditions. This option should be offered to all
26 CLECs via an amendment to the CLEC's current Interconnection
27 Agreement and may involve a charge when the option is utilized by the
28 CLEC.
- 29 (3) Qwest should reimburse the additional \$1800 plus interest (if applicable)
30 that was charged to Eschelon in this particular Complaint.
- 31 (4) Due to the nature of this particular Complaint which stemmed from an
32 Eschelon caused error in disconnection of an incorrect number, Eschelon
33 should implement a training or refresher training program for its

27 ² June 6, 2006 Procedural Order at p. 2.

28 ³The Settlement Agreement was conditional because it was contingent upon comments to be filed by Staff. The
Agreement allowed either Qwest or Eschelon (or both) to opt out of the Agreement within 10 calendar days of receipt of
Staff's comments and proceed to hearing.

1 representatives stressing the importance of accuracy when ordering
2 changes to their customers' service in order to try to avoid or minimize
unnecessary customer service outages.

3 (5) Qwest should include a definition of designed and non-designed services
in its Arizona tariffs and interconnection agreements.

4 (6) Staff recommends that a performance measurement for expedites of
5 Unbundled Loops be developed through CMP and that the rate(s) for
expedites be considered as part of the next cost docket.⁴

6 As was their right under the Settlement Agreement, both Eschelon and Qwest opted-out of the
7 Settlement Agreement, albeit for different reasons. Eschelon stated that its intent "is to be party to a
8 settlement agreement in this matter *only if* the resolution is in the public interest."⁵ Qwest stated that
9 "[g]iven that the Staff filed comments recommending additional conditions, Qwest is exercising its
10 right to opt out of the settlement in its entirety."⁶

11 A hearing was held on August 28 and 29, 2007. Staff presented Pamela Genung as its witness
12 in this matter.

13 **III. Facts Underlying the Eschelon Complaint**

14 The following facts were taken from the testimony of Qwest Witness Jean Novak's Direct
15 Testimony and a chronology of events prepared by Eschelon in response to Staff Data Request 3.⁷
16 On March 8, 2006, Qwest received a Local Service Request ("LSR") from Eschelon to disconnect a
17 DS1 Capable loop for one of its customers.⁸ Eschelon had actually intended to disconnect an analog
18 2-wire unbundled loop, so apparently Eschelon erred in initially identifying the loop to be
19 disconnected.⁹ The Disconnect was requested for March 15, 2006.¹⁰ The DS1 Capable Loop served
20 a customer in Mesa, Arizona which is a non-profit organization that serves people with disabilities.¹¹
21 On March 15, 2006, Qwest sent a completion notice to Eschelon informing it of the disconnect.¹²
22 Shortly thereafter, Eschelon was contacted by its customer that its service was not working.¹³

23
24 ⁴ Staff Report, dated March 9, 2007 at 4-5.

25 ⁵ Eschelon Telecom of Arizona, Inc.'s Notice of Opt-Out and Request for Procedural Conference dated March 16,
2007, at 2.

26 ⁶ Qwest Corporation's Notice of Withdrawal from Settlement Agreement, dated March 16, 2007, at 1.

27 ⁷ See Genung Direct Test., Ex. S-1 att 1.

28 ⁸ Novak Direct Test., Ex. Q-5 at 9. Eschelon acknowledges that it requested this disconnect in error.

⁹ Genung Direct Test., Ex. S-1, att. 1 at 2.

¹⁰ Novak Direct Test., Ex. Q-5 at 9.

¹¹ *Id.*

¹² *Id.* At 10.

¹³ Genung Direct Test., Ex. S-1, att. 1 at 1.

1 Eschelon performed trouble isolation and determined that the trouble was in Qwest's network.¹⁴
2 Eschelon opened a Qwest repair ticket.¹⁵ Once the trouble report was issued, the service was
3 restored for a brief period of time.¹⁶ Qwest told Eschelon that Qwest had found a missing cross
4 connect in the Qwest Central Office which Qwest then repaired.¹⁷ However, apparently because the
5 disconnect process from the first order placed by Eschelon had not yet been completed, the DS1
6 Capable Loop was disconnected once again on March 15, 2006.¹⁸ The next day, March 16, 2006,
7 Eschelon's customer contacted its Repair Service Bureau and told Eschelon that it was out of service
8 again.¹⁹ Eschelon again performed trouble isolation and determined that the customer's T1 was out
9 of service again. Further testing indicated that the trouble was in Qwest's network.²⁰ Eschelon
10 called Qwest's repair center and during that call was told that there was a disconnect order placed
11 against the circuit and that Eschelon would have to submit a new order to Qwest to restore the
12 service.²¹ The same day, Eschelon submitted a LSR to order a new DS1 Capable Loop and requested
13 a due date of March 23, 2006.²²

14 Qwest witness Novak stated in her testimony that the order did not request expedited service.
15 (it did not "check the box on the LSR concerning an expedite with a "Y", which would have let
16 Qwest know that Eschelon wanted to expedite the order.")²³ However, the next day a representative
17 from Eschelon contacted the Qwest Call Center and asked that the order be expedited.²⁴ Qwest
18 rejected the request for an expedited due date.

19 Eschelon then called the Qwest call center to open a Qwest tier two escalation ticket to
20 request an expedite.²⁵ It was denied so Eschelon opened a tier three escalation ticket. Another denial

21 _____
22 ¹⁴ Novak Direct Test., Ex. Q-5 at 10.

¹⁵ *Id.*; see also Genung Direct Test., att. 1 at 1.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Novak Direct Test., Ex. Q-5 at 10.

¹⁹ Genung Direct Test., Ex. S-1, att. 1 at 2.

²⁰ *Id.*

²¹ *Id.*

²² *Id.* Apparently Qwest's Expedite process provides two options for a CLEC to request an expedite. Eschelon followed the second option which was to submit the request with a due date interval from Qwest's Service Interval Guide ("SIG") or the parties' ICA and then the CLEC is to call the Qwest Call Center. Qwest's standard interval for a DS1 loop per Qwest's SIG is 5 days.

²³ *Id.* at 11.

²⁴ *Id.*

²⁵ *Id.*

1 was received by Eschelon so it opened a Qwest tier four escalation. Eschelon was told that it must
2 sign Qwest's expedite contract amendment before Qwest would expedite the due date.²⁶ Eschelon
3 indicated to Qwest at that time the "medical nature of the residents at this center and the urgent need
4 for service."²⁷ Eschelon also told Qwest it would pay for the expedite.²⁸ Later that day, March 17,
5 2006, Eschelon's request for expedite was again denied because it had not signed an amendment to
6 its ICA.²⁹ Eschelon apparently sent Qwest a letter from its customer which outlined the critical need
7 for service due to the medical nature of the residents (children and adults with disabilities).³⁰

8 Qwest Witness Novak's testimony confirms the reason for the denial; she "specifically
9 informed Eschelon that the request did not qualify for expedited orders on unbundled loops because it
10 did not satisfy the requirements of the expedite process set forth in the Commission approved
11 CMP."³¹ Qwest witness Novak further stated that:

12 "…the Minneapolis Center Team lead reviewed all the facts surrounding the
13 requested expedite including the letter Eschelon had faxed to Qwest describing
14 the business activities of the Rehabilitation Center. Based on Eschelon not having
15 an expedite amendment and based on the fact that there was no medical
16 emergency, Qwest denied the expedite request for the third time."³²

17 But it was established at the hearing, that Qwest relied upon information received after the
18 Eschelon complaint was filed, to determine, in its opinion, that no medical emergency existed.

19 The next day Eschelon informed Qwest that it was submitting an ASR, ordering a special
20 access service (DS1 private line) out of the Qwest retail tariff and would pay the expedite charges set
21 forth in that tariff.³³ Because it was a weekend, the order could not be filled until March 20, 2006,
22 the following Monday.³⁴

23 Qwest's new expedite process developed through the CMP took effect on or about January 3,
24 2006. Between January 3, 2006 and March 7, 2006, Eschelon submitted more than 10 requests for

25 ²⁶ *Id.* at 3.

26 ²⁷ *Id.*

27 ²⁸ *Id.*; accord Novak Direct Test., Ex. Q-5 at 12.

28 ²⁹ Genung Direct Test., Ex. S-1, att. 1 at 3.

29 ³⁰ *Id.* at 4.

30 ³¹ Novak Direct Test., Ex. Q-5 at 11.

31 ³² *Id.* at 12.

32 ³³ *Id.* at 13.

33 ³⁴ *Id.*

1 expedites. Qwest refused each such request because “as required by CMP, the Eschelon ICA did not
2 contain a rate for expediting an order.”³⁵

3 **IV. Eschelon Was Entitled to Have Its Order Expedited by Qwest under the Existing**
4 **Interconnection Agreement.**

5 **A. Eschelon’s ICA Provided for Expedites for all Products**

6 Eschelon opted into Qwest’s ICA with AT&T as it was permitted to do under 47 U.S.C.
7 § 252(i) of the Telecommunications Act of 1996 (“1996 Act”). Eschelon first opted into the
8 Qwest/AT&T ICA in early 2000.³⁶ That ICA, which is still the existing ICA, stated that Qwest shall
9 provide Eschelon the capability to expedite a service order. Section 3.2.2.1.3 of the Qwest/Eschelon
10 ICA states:

11 “Expedites: U S WEST shall provide CO-PROVIDER the capability to
12 expedite a service order. Within two (2) business hours after a request from
13 CO-PROVIDER for an expedited order, U S WEST shall notify CO-Provider of
14 U S WEST’s confirmation to complete, or not complete, the order within the
15 expedited interval.”

16 Further, it was established at the hearing that the ICA did not limit Eschelon’s capability to
17 expedite non-design services only, but covered both design and non-design services.³⁷

18 Qwest provided Eschelon with the capability to expedite a service order until January 3, 2006,
19 when it began to deny all requests for expedites placed by Eschelon.

20 Qwest admitted in testimony that it denied every Eschelon request for an expedite after
21 January 3, 2006, for design services. Qwest further admitted at the hearing that it would no longer
22 expedite any Eschelon orders in the future under its ICA for design services until Eschelon signed an
23 Amendment to its ICA allowing Qwest to charge \$200.00 per day.

24 Qwest witnesses testified at the hearing that despite their rejection of Eschelon expedites and
25 intent to reject them in the future, Eschelon still had the “capability” to expedite under its ICA, and
26 thus there was no breach of the ICA. The following exchange relating to this issue took place
27 between Charles Steese, Qwest’s attorney and Eschelon Witness Doug Denney at the hearing:

28 ³⁵ *Id.* at 7.

³⁶ Tr. at 258.

³⁷ Tr. at 227.

1 Q. [BY QWEST ATTORNEY STEESE] And so you say that it removed the
2 ability at all to expedite. You mean the ability to expedite unbundled loop
3 orders; true?

4 A. [ESCHELON WITNESS DENNEY] That's correct.

* * * * *

5 Q. I said Qwest still has the – provides the ability to allow you to check on
6 the LSR that you want to expedite an order; correct?

7 A. Right, I mean, and Ms. Johnson is really the expert on that. My
8 understanding from talking to her is that we have the option of either
9 checking the LSR or calling in for an expedite, that that's Qwest's current
10 – that would be Qwest's process to do an expedite.

11 Q. And Qwest didn't remove those processes, did it? The internal processes
12 that were available that if an appropriate order comes in it can get the
13 order processed on an expedited basis, they're still in place; right?

14 A. No. If we get back – if we tried to order an expedited loop, you reject that
15 order. Can we check a box? Yes, but you reject the order. You say it's –
16 you say we can't expedite that.

17 Q. I understand. But the box is still there; true?

18 A. The box is there, I believe.

19 Q. And the people are still there you can call; true?

20 A. I mean, if you're going to reject the order, I don't – they may be there.

21 Q. If you can answer my question, please. The people are still there that you
22 can call like you did for the rehabilitation center; true?

23 A. There are people there that will reject our order, yes, that's true.

24 Q. And the methods and procedures are still in place for expediting orders;
25 correct?

26 A. That I disagree with. The methods and procedures were what we have in
27 our contract. That's basically what has been removed. We can't expedite
28 anymore.³⁸

As incredulous as it may seem, Qwest is arguing that even though it intended to reject and did reject every request for expedite placed by Eschelon for design services, Eschelon still had the "capability" to expedite because it could check a box for an expedited due date or ask someone at Qwest for an expedited due date, even it though had no ability anymore to actually obtain an expedite, because Qwest had unilaterally changed the expedite process.

³⁸ Tr. at 136-138.

1 Qwest also argues that it did not breach its ICA by denying any expedites for design services
2 after January 3, 2006, because it is within Qwest's sole discretion whether or not to grant expedites.³⁹
3 Ms. Albersheim testified there was no conflict between the CMP created process and Eschelon's
4 ICA, because the "contract contains the general provision that expedites are available and the process
5 will be made available; but it leaves to Qwest's discretion whether or not expedites will be
6 granted."⁴⁰ But on cross-examination, Ms. Albersheim admitted that Qwest's discretion was not
7 boundless but rather there were criteria that defined which orders were entitled to expedited due dates
8 under the Expedites Requiring Approval process, the process in effect under the parties' long-
9 standing course of dealing under their current ICA.⁴¹ Ms. Albersheim elaborated on those "bounds"
10 in the following exchange during the hearing:

11 "Q. [BY STAFF ATTORNEY MS. SCOTT]: ..Let me ask you this, though,
12 because from your testimony it leads one to the conclusion that Qwest's
13 ability to expedite is so discretionary that there are no bounds to that
14 discretion.

15 A. [BY QWEST WITNESS MS ALBERSHEIM]: By the terms of the
16 contract there are no bounds.

17 Q. Do you use – with respect to criteria for expediting orders, do you apply
18 the same criteria in the case of any order involving, let's say, yourself or
19 the CLECs? Are the same criteria used?

20 A. Yes, and again Ms. Martain can get more specific on that. But, yes, we
21 very conscious of developing the same terms and conditions for expedites,
22 both to CLECs and to our retail customers.

23 Q. And you don't use a separate list for CLEC customers than you use or
24 different factors for CLEC customers than you use for yourself?

25 A. No. If you are speaking what qualifies as an emergency expedite, they are
26 the same qualifications.

27 Q. Okay. So there is no – you don't discriminate in favor of your customers
28 with respect to expedites or the ability to expedite versus CLEC
29 customers?

30 A. No, we don't.

31 Q. So there are some bounds on your discretion then?

32 ³⁹ *Id.* at 263.

33 ⁴⁰ *Id.* at 264.

34 ⁴¹ *Id.* at 264.

1 A. We have put them on ourselves by establishing our procedures for
2 expedites. We have established our bounds, and our bounds are the same
3 for CLECs and retail customers.

3 Q. And perhaps legal requirements regarding discrimination and
4 nondiscrimination might have defined some of those bounds as well?

4 A. Yes.”⁴²

5 **B. The Mutually Acceptable and Long-Standing Course of Dealing Between the**
6 **Parties Supports Eschelon’s Position**

7 In this case, the ICA between the parties clearly states that Qwest is to provide Eschelon the
8 capability to expedite orders.⁴³ The contract also stated that Qwest may charge for expedites.⁴⁴ The
9 ICA also stated that the expedite process was to be mutually developed.⁴⁵

10 The ICA was ambiguous on what the expedite process would be other than to say that it
11 would be mutually developed by the parties.

12 When a contract is ambiguous, Arizona law permits evidence on the parties’ course of
13 dealing.⁴⁶ Such evidence is allowed to “give particular meaning to or supplement or qualify terms of
14 an agreement.”⁴⁷ Put another way, “a course of dealing” is a sequence of previous conduct between
15 the parties to an agreement which is fairly to be regarded as establishing a common basis of
16 understanding for interpreting their expressions and other conduct.⁴⁸

17 An Expedite process was already in place at the time that Eschelon first opted into the
18 Qwest/AT&T Agreement back in 2000 and the parties consistently followed that process.⁴⁹ That
19 process provided for expedites for both Design and Non-Design products without charge under
20 certain emergency conditions.⁵⁰ That process was eventually set out in the Qwest Product Catalog
21 (“PCAT”), in Version 1.

22
23
24 ⁴² *Id.* at 263-264.

⁴³ Qwest-Eschelon ICA at Section 3.2.2.13.

⁴⁴ *Id.* at Section 3.2.4.2.1.

⁴⁵ *Id.* at Section 3.2.2.12.

⁴⁶ *Keith Equipment Company v. Casa Grande Cotton Finance Company*, 187 Ariz. 259, 928 P.2d 683 (App. 1996).

⁴⁷ 187 Ariz., at 262, 928 P.2d at 686 (citing A.R.S. § 47-1205(c) and *Koenen v. Royal Buick Co.*, 162 Ariz. 376, 783 P.2d 822 (App. 1989)(“where terms in written contract are ambiguous, course of dealing evidence admissible to explain them”).

⁴⁸ *AROK Const. Company v. Indian Const. Services*, 174 Ariz. 291, 848 P.2d 870 (App. 1993).

⁴⁹ Genung Direct Test., Ex. S-1 at 18.

⁵⁰ *Id.*

1 The process provided that expedites would be provided at no charge for both Design and Non-
2 Design services under any of the following circumstances:

- 3 • Fire
- 4 • Flood
- 5 • Medical Emergency
- 6 • National Emergency
- 7 • Conditions where the end-user is completely out of service (Primary line)
- 8 • Disconnect in error by Qwest
- 9 • Requested service is necessary for end-user's grand opening event delayed for
10 facilities or equipment reasons with a future RFS date
- 11 • Delayed orders with a future RFS date that meets any of the above-mentioned
12 conditions
- 13 • National Security
- 14 • Business classes of service are unable to dial 911 due to previous order
15 activity
- 16 • Business classes of service where hunting, call forwarding or voice mail
17 features are not working correctly due to previous order activity where the
18 end-users business is being critically affected.

19 Medical Emergencies were added to the expedites and escalation process through PCAT
20 Version 6 but testimony elicited at the hearing established that it was an existing process:

21 Q. [BY ESCHELON ATTORNEY MERZ] And Version 6 added medical
22 emergencies to the PCAT list of emergency conditions; correct?

23 A. [BY QWEST WITNESS MARTAIN] Correct. It was an existing process
24 that was not documented.

25 * * * * *

26 A. Version 6's effective date was May 27th of 2003.

27 Q. And I believe you already said this, but the addition of medical emergency
28 for the PCAT list documented something that was already in place;
correct?

A. That's correct.

Q. And so the fact that something is added to the PCAT list of emergency
conditions doesn't necessarily mean that it's a new condition, correct?

A. If it's issued at Level 2, that would be correct."⁵¹

Eschelon's actions were consistent with the long-standing process and course of dealing
between the parties. Qwest's actions were not.

⁵¹ Tr. at 379-80.

1 **C. Eschelon’s Customer Met the Medical Emergency Requirement**

2 With respect to the Rehabilitation Center, Staff Witness Genung testified that the customer’s
3 expedite order fell under the conditions where the end-user is completely out of service (primary
4 line), and thus was entitled to an expedite without charge under the existing process.⁵² Staff Witness
5 Genung also testified that due to the nature of the customer, the order could also be classified as a
6 medical emergency, another circumstance which entitled Eschelon to an expedited service date
7 without charge.⁵³ The Eschelon customer in the middle of this dispute wrote the following in a letter
8 dated March 17, 2006 to Eschelon which was provided to Qwest as a basis to expedite restoration of
9 service:

10 “[REDACTED] is a non-profit community rehabilitation organization that
11 provides critical health care services, both inpatient and outpatient, to individuals
12 with high level and urgent care needs. Our organization has been serving children
and adults with severe developmental, physical and behavioral health needs in the
east valley since 1957.

13 Two days ago our centralized phone system went down. Eschelon reports the
14 need for proof of the nature our services to expedite re-installation of our phone
services via T-1. We have spent the last 24 hours in the middle of a dispute
15 between Eschelon and Qwest as to the reason for the discontinuation of service.
Frankly, we don’t care. Our disabled citizens are in jeopardy and could be at
16 great risk without telephone service to be able to communicate healthcare, urgent
care and programmatic needs. Please be advised that we have elevated this matter
17 to our legal counsel. I trust this issue will be taken care of immediately.”⁵⁴

18 Despite this, Qwest Witness Ms. Novak testified at the hearing that:

19 “Qwest denied the expedite request because it did not meet the criteria for an
20 unbundled loop which required a signed amendment. It also did not meet the
criteria of a medical emergency.”⁵⁵

21 Ms. Novak also testified that Staff was mistaken in its conclusion that when the customer’s T-
22 1 was disconnected by Qwest, a medical emergency existed.⁵⁶ She based her conclusion not on
23 information she had available to her at the time of the service outage but based upon information
24 obtained by Qwest in an interview between Qwest attorneys and Eschelon’s customer regarding this
25 incident conducted after Eschelon filed its complaint in this docket.⁵⁷

26 ⁵² Genung Direct Test., Ex. S-1 at 25-26.

27 ⁵³ *Id.*

28 ⁵⁴ *Id.* at att. 8.

⁵⁵ Tr. at 430.

⁵⁶ *Id.* at 431.

⁵⁷ *Id.* at 429.

1 Ms. Novak testified that the Rehabilitation Center is a company that serves 3,000 people with
2 disabilities, gives them jobs and helps them become productive members of society.⁵⁸ The
3 Rehabilitation Center had several telephone lines into their facility.⁵⁹ They had primary lines into the
4 business, and they had a T1 that allowed lines into the individual rooms.⁶⁰

5 Despite the letter submitted by the Center to Eschelon which was presented to Qwest, Ms.
6 Novak stated that (from information obtained later) no medical emergency existed because 911
7 services were available at all times to the facility.⁶¹ It seemed incongruous that Qwest did not seem
8 troubled that 911 service to the individual rooms affected by the outage was not available, given the
9 nature of the facility and its residents. In this regard, Ms. Novak stated: "...however, from a medical
10 perspective no more of a medical emergency than any other business."⁶²

11 Yet, she acknowledged that "[t]he Rehabilitation Center in an interview with Qwest personnel
12 stated that the need for the 911 service is about two calls per month for its 3,000 clients."⁶³

13 She also acknowledged that during the outage:

14 "...The Rehabilitation Center did have an event that required 911 services when a
15 client went into heart distress. The Rehabilitation Center called 911 and
everything worked out well."⁶⁴

16 What is not known is what room the client with heart distress was in and if it was one of the
17 affected rooms, how much time elapsed before 911 could be notified because the client could not dial
18 911 from his or her own room. On the other hand, if the client experiencing problems was not in a
19 room affected by the outage, everything would have worked out well. If the client was in a room
20 affected by the outage, Qwest is fortunate, in Staff's opinion, that everything worked out well.

21 On cross-examination, Ms. Novak admitted that she had escalated the issue to higher
22 management in Qwest and they would not reconsider because Eschelon had not signed an ICA
23 amendment.

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26 ⁵⁸ *Id.* at 429.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* at 432.

⁶² *Id.* at 431.

⁶³ *Id.* at 431-32.

⁶⁴ *Id.* at 431.

1 Q. [BY ESCHELON ATTORNEY MERZ]:My question was whether
2 when you talked to the center team, the people that you talked to as
3 Eschelon's advocate, did you urge those people to consider allowing
4 Eschelon to have the expedite even though it had not signed an
5 amendment?

6 A. [QWEST WITNESS NOVAK] Yes, I did.

7 Q. And who did you tell that to?

8 A. I talked to Chris Seward.

9 Q. And what did you tell Ms. Seward?

10 A. I told her that, you know, I found out that that letter had been sent from the
11 Rehabilitation Center and that it had been reviewed by the center and that
12 the escalation had been denied. And I asked her if there was any other
13 way that it could be considered.

14 Q. And her response was what?

15 A. She said that she would take it one management level up.

16 Q. And what did she do?

17 A. She came back to me an hour or so later and said that it had been denied,
18 that we have to be consistent with our process to make sure that we are
19 providing parity for all customers and that would include having an
20 amendment."⁶⁵

21 Given the nature of the facility, the occurrence of at least two (2) 911 calls per month, and the
22 fact that individual rooms to the facility did not have 911 capability, Staff continues to believe that a
23 medical emergency existed and Qwest should have put its disagreement with Eschelon aside and
24 expedited Eschelon's order.⁶⁶ It is inappropriate for Qwest to rely upon information obtained after
25 the fact and for litigation purposes, to suggest that no medical emergency existed.

26 The fact that Qwest placed considerable reliance upon information derived after the Eschelon
27 Complaint is also evident from the following testimony of Witness Novak at the hearing:

28 "Q. [BY ESCHELON ATTORNEY MERZ]: ...You say, 'after Eschelon
29 complained I performed some research and verified that the Rehabilitation
30 Center had additional lines into the facility'. Do you see that?

31 A. [MS. NOVAK] Yes, I do.

32 Q. After Eschelon complained, what are you referring to there?

33 ⁶⁵ *Id.* at 434-435.

34 ⁶⁶ *See. tr.* at 441. (Qwest had the dispute resolution available to it but did not exercise it). Staff Genung also testified
35 that "Qwest should have expedited the request first and then followed up afterwards with the dispute resolution process.
36 Genung Direct Test., Ex. S-1 at 34.

1 A. After the Eschelon complaint – well, even before the Eschelon complaint,
2 I started gathering data to do a review to see if there was anything that I
3 could do in the future that would be more helpful. And then what I did is I
performed a search in our system and found that there were additional
lines in the Rehabilitation Center.

4 Q. You go on to say, ‘I have been informed based on an interview with
5 personnel at the Rehabilitation Center that the Rehabilitation Center was
6 fully aware of the fact that they had 911 service through existing lines.’
Do you see that?

7 A. Yes, I do.

8 Q. And you were referring here to an interview that was conducted by
Qwest’s attorney; is that right?

9 A. It was an interview conducted by Qwest personnel, correct.

10 * * * * *

11 Q. That was an interview that was conducted after Eschelon filed its
12 complaint in this case?

13 A. I don’t remember. I did not get a formal copy of it.

14 Q. When Eschelon requested its emergency expedite in connection with the
15 Rehabilitation Center, was it Qwest’s practice to have attorneys interview
the customer in order to determine whether the emergency conditions had
been satisfied?

16 A. I cannot answer that question.

17 Q. Well, were you aware of any CLEC request for an emergency expedite
18 where you had Qwest’s attorneys interview the customer to determine
whether the conditions had been satisfied?

19 A. I have no knowledge. I cannot answer that.”⁶⁷

20 On cross examination, Ms. Novak conceded that direct contacts with the CLEC’s customer to
21 determine whether a medical emergency existed was outside the norm and had not been done before
22 to the best of her recollection.⁶⁸

23 **D. An Amendment to Eschelon’s Interconnection Agreement Was Not Required**
24 **Because Eschelon Could Already Obtain Emergency Expedites without Charge**
Under its Existing ICA with Qwest.

25 Qwest should not have required Eschelon to sign an Amendment to its ICA to obtain an
26 expedite under the long-standing process in effect between Qwest and Eschelon. Eschelon was
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28 ⁶⁷ *Id.* at 452-53.
⁶⁸ *Id.* at 456-57.

1 entitled to expedites under its current ICA; and for no charge when an emergency medical situation
2 existed.

3 Moreover, Qwest's actions in charging the \$200.00 rate for expedites for design services
4 conflict with the Commission's finding in the latest Wholesale Pricing Docket which authorized
5 Qwest to charge for expedites on an Individual Case Basis ("ICB"). At Qwest's urging, the
6 Commission rejected Staff witness Dunkel's position to establish fixed rates for all ICB rates
7 proposed by Qwest. One of the ICB rates proposed by Qwest was of course for expedites.

8 Qwest did not in the last Wholesale Pricing Docket propose a fixed rate, such as the \$200.00
9 rate for expedites which it now wants to charge, where in it could have been reviewed and approved
10 by the Commission. Instead, Qwest asked for and was authorized by the Commission, to address
11 rates on an individual case or ICB basis.

12 ICB rates are typically used and proposed when the costs vary from case to case and
13 uniform rates are not appropriate. Ms. Albersheim was questioned about the ICB rate approved by
14 the Commission at the hearing:

15 "Q. [BY ESCHELON ATTORNEY MERZ]: Isn't it the case that the
16 reason for the amendment is to have Eschelon agree to pay \$200
17 per day rather than the ICB rate that has been approved by the
Commission?"

18 A. I'm not sure the two are mutually exclusive, but again, I think I
19 must defer to Ms. Million.

20 Q. Is it your position that the ICB rate is equal to \$200 per day?

21 A. It is my understanding that that is how Qwest applies it."⁶⁹

22 In addition, during the hearing on this matter, Eschelon's attorney introduced evidence that a
23 Qwest witness had testified in several recent arbitrations, including Arizona, that if Qwest wants to
24 put in place a separate rate for an activity, it needs to establish or prove that the cost of performing
25 that activity is not already recovered in an existing rate.⁷⁰ Qwest has not demonstrated that, given its
26 policies to allow emergency expedites through January 3, 2006 without charge, and it's desire to now

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28 ⁶⁹ *Id.* at 298.

⁷⁰ *Id.* at 231.

1 charge \$200 for this previously free service is justified, and that the activity is not already recovered
2 in an existing rate.

3 In addition while Qwest relies upon the CMP process to implement the \$200.00 charge, rates
4 and the application of rates are outside of the CMP process.⁷¹ At a minimum, the \$200.00 charge
5 should apply to a non-emergency expedite only on an interim basis subject to review in the Phase III
6 Costing Docket.

7 **V. The Qwest Change Management Process Does Not Support Qwest's Actions**

8 **A. Qwest Relies Upon the Change Management Process to Defend its Actions**

9 Qwest would have one believe that the CMP process worked just as it should have in this case
10 and that Qwest had a right to change parties' rights under their existing ICAs. This is belied by the
11 fact, however, that there were innumerable objections by CLECs to the change imposed by Qwest
12 and the considerable confusion that surrounded Versions 27 and 30 of the expedite and escalation
13 process introduced by Qwest through the CMP.

14 An overview of the CMP process is necessary to understand the arguments of the parties. As
15 Staff Witness Genung testified, the CMP is a process that developed as a result of the Section 271
16 proceeding.⁷² The Section 271 proceeding examined Qwest's compliance with Section 271 and
17 Section 272 requirements necessary for Qwest to gain entry into the in-region, interLATA
18 telecommunications market.⁷³ The CMP provides a means for CLEC input into changes to Qwest's
19 Operations Support Systems ("OSS") Interfaces, Products and Processes.⁷⁴ Changes that are
20 addressed through CMP typically include those that support or affect pre-ordering,
21 ordering/provisioning, maintenance/repair and billing capabilities, and production support issues
22 surrounding local exchange services provided by CLECs to their end-users.⁷⁵ Those processes and
23 procedures are then codified in the Qwest PCAT.⁷⁶

24 Both Qwest and the CLECs can propose changes to processes through the CMP. Ms. Genung
25 described how the process works in the following passage from her Direct Testimony:

26 ⁷¹ Genung Direct Test., Ex. S-1 at 7; Johnson Direct Test., Ex. E-1 at 17.

27 ⁷² Genung Direct Test., Ex. S-1 at 7.

28 ⁷³ *Id.*

⁷⁴ *Id.* at 8.

⁷⁵ *Id.*

⁷⁶ *Id.* at 27.

1 “CLECs can use the CMP to request two categories of changes;
2 products/processes and system changes. A CLEC’s product/process change
3 proposal is submitted to Qwest via a Change Request through the
4 cmDcr@qwest.com mailbox. Qwest then reviews the Change Request to obtain a
5 high level understanding of the change being requested by the CLEC. Qwest
6 subsequently schedules a call with the CLEC and Qwest representatives to clarify
7 the request. The CLEC presents the proposed change at the next monthly CMP
8 meeting. Afterwards, Qwest evaluates the Change Request in more detail and
9 develops a draft response. In Qwest’s response to the CLEC, it advises the CLEC
10 whether the Change Request is accepted or denied. If the proposed change is
11 denied, Qwest provides the CLEC with the reason for the denial.”⁷⁷

12 In her testimony, Ms. Genung explained the five levels or classifications of product/process
13 changes addressed through the CMP.⁷⁸ Level 0 changes do not change the meaning of
14 documentation and do not alter CLEC operating changes.⁷⁹ Level 1 changes are time critical
15 corrections to a Qwest product/process and do not alter CLEC operating procedures.⁸⁰ Level 2
16 changes have a minimal effect upon CLEC operating procedures.⁸¹ Level 3 changes have a moderate
17 effect on CLEC operating procedures and require more lead-time before implementation.⁸² Finally,
18 Level 4 changes have a major effect on existing CLEC operating procedures or that require the
19 development of new procedures.⁸³

20 As relates to this Complaint, existing expedite procedures were already in place and being
21 used prior to April 28, 2000, when the Commission approved Eschelon’s opt-in to the AT&T ICA in
22 Arizona.⁸⁴ As discussed above that process covered both Design and Non-Design Products without
23 an expedite fee for certain emergency conditions.⁸⁵ Qwest and Eschelon operated under this long-
24 standing expedite process for over 5 years. The CMP process did not come into existence until
25 2003, after Qwest’s Arizona Section 271 application was approved by the FCC, well after Eschelon’s
26 existing ICA became effective.⁸⁶

27 ⁷⁷ *Id.* at 10.

28 ⁷⁸ *Id.* at 15-17.

29 ⁷⁹ *Id.* at 15.

30 ⁸⁰ *Id.*

31 ⁸¹ *Id.* at 16.

32 ⁸² *Id.*

33 ⁸³ *Id.*

34 ⁸⁴ *Id.* at 18.

35 ⁸⁵ *Id.*

36 ⁸⁶ Tr. at 330.

1 Ms. Genung describes the various versions of the Expedite process discussed in the CMP and
2 the evolution of the process over time.⁸⁷ Most of the changes were immaterial. Four versions are
3 relevant to this Complaint. Version 1 (“V1”) documented the existing Expedite Process and formally
4 documented the process for the CLECs on the Qwest Wholesale Website.⁸⁸ It was handled via a
5 CLEC product notification with an announcement date of September 20, 2001, effective
6 immediately.⁸⁹

7 Version 11 (“V11”) was in response to a Covad change request for the capability to expedite a
8 request when the situation did not meet the emergency criteria.⁹⁰ In response to Covad’s request,
9 Qwest created the “Pre-Approved Expedite Process” which allowed CLECs the opportunity to
10 receive an expedited due date regardless of the reason, but for a \$200.00 per day fee.⁹¹ Qwest also
11 renamed the existing process as the “Expedites Requiring Approval Process” which allowed the
12 CLECs to obtain expedites for no charge when certain emergency conditions were met, including a
13 Qwest disconnect in error.⁹² CLECs desiring to receive the new expedite process in addition to the
14 old process, were required to sign an Amendment to their ICA.⁹³ Certain CLECs signed an
15 Amendment at this time to obtain the additional expedite process; others did not.⁹⁴ Qwest
16 characterized the new process as an optional process in written materials distributed to the CLECs.⁹⁵

17 Version 27 (“V27”) added 2w/4w Analog Unbundled Loops and Port In/Port Within requests
18 to the list of products to be included in the Pre-Approved Expedite Process that were previously listed
19 as exceptions, thus removing these products from the Expedites Requiring Approval Process where
20 an expedite was completed at no additional charge when the Emergency conditions were met.⁹⁶ The
21 resulting effect was that the 2w/4w Analog Unbundled Loops were moved from the Expedites
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24 ⁸⁷ *Id.* at 19-23.

25 ⁸⁸ *Id.* at 19.

26 ⁸⁹ *Id.*

27 ⁹⁰ *Id.* at 20.

28 ⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ Tr. at 330.

⁹⁵ Johnson Direct Test., Ex. E-1 at 21-22.

⁹⁶ Genung Direct Test., Ex. S-1 at 22.

1 Requiring Approval Process to the Pre-Approved Expedite Process where an expedite charge
2 applied.⁹⁷

3 Version 30 (“V30”) changed the process to require expedite language in a CLEC’s ICA where
4 expedites are associated with a per day expedite charge for products included in the Pre-Approved
5 Expedite Process.⁹⁸ If the CLEC’s ICA did not contain the appropriate expedite language, Qwest
6 stated that it would no longer grant the expedite request unless it was due to a Qwest caused reason.⁹⁹

7 The notification of V30 changes was made prior to V27 changes being updated in the PCAT.
8 The notification for V30 thus did not reflect the V27 change to add 2w/4w Analog Unbundled Loops
9 to the Pre-Approved Expedite Category.¹⁰⁰ This resulted in considerable confusion among the CLEC
10 community.¹⁰¹

11 **B. Qwest’s Course of Dealing Argument is Without Merit**

12 Qwest also raises a “course of dealing” argument in this case. Qwest argues that even though
13 the CMP process was not in effect at the time Eschelon entered into its ICA with Qwest, that the
14 CMP process controls Eschelon’s rights under its ICA.

15 Qwest’s arguments in this regard are two-fold. First, Qwest argues that its ICA with Eschelon
16 is ambiguous with respect to the process to be used to come to mutual agreement on the expedite
17 process. Finding ambiguity where none truly exists since there was a long-standing expedite process
18 in existence under the Eschelon ICA, Qwest then argues that the parties’ course of dealing since 2004
19 has been to use the CMP process to effect changes to the expedites and escalation process. This then
20 forms the basis for Qwest to argue that its actions in effecting a substantive change to the rights of
21 Eschelon and other CLECs under their existing ICAs were appropriate through the CMP process.

22 Even if Qwest’s argument is accepted, the CMP document expressly provides that the process
23 is not intended to abridge a parties’ rights under its existing interconnection agreement. Moreover, as
24 Ms. Genung testified the language in the CMP document is very explicit: even if there is no direct
25 conflict with the language of the ICA, if the CMP abridges a parties rights under that ICA, the CLEC

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27 ⁹⁷ *Id.*

⁹⁸ *Id.* at 23.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

1 does not have to accept it.¹⁰² The ICA prevails. In that Qwest through its actions in the CMP was
2 proposing a new process to charge Eschelon for expedites in circumstances that it had not charged for
3 in the past under its ICA, Eschelon's rights were abridged or adversely affected. Moreover, Qwest
4 witnesses testified that the CMP is used to manage the PCAT.¹⁰³ Yet on cross examination, Ms.
5 Albersheim conceded that "...the SGAT provides that a CLEC shall not be held to requirements of
6 the PCAT."¹⁰⁴

7 Second, Qwest argues that the CMP process meets the requirements in its ICA with Eschelon
8 that the expedite process be mutually developed. But as discussed below, this was not the case with
9 V 27 and V 30 of the PCAT.

10 **C. The Changes to the Expedites Process were not "Mutually Developed" as**
11 **required by Eschelon's ICA**

12 Eschelon's ICA with Qwest provided for the mutual development of Expedite procedures
13 between Qwest and Eschelon.¹⁰⁵

14 A long-standing Expedite process was in place which was mutually acceptable and
15 understood and utilized by both Eschelon and Qwest for over 5 years. That process was the
16 Expedites Requiring Approval process. The CMP changes in this case were not "mutually
17 developed." Eschelon and the other CLECs had little to no meaningful say in the process ultimately
18 designed by Qwest as is apparent from the following testimony at the hearing in this case:

19 Q. [BY ESCHELON ATTORNEY MERZ] If Qwest gives notice of a
20 proposed change and CLECs object, Qwest can still implement that
change; is that right?

21 A. [BY QWEST WITNESS MARTAIN] Could I have an example, please?

22 Q. Expedites, Version 30.

23 A. Okay.

24 Q. In the case of Version 30, Qwest proposed a change, CLECs objected,
25 Qwest implemented that change, correct?

26 A. Qwest did not receive any formal objections to Version 30. There are
processes we can work through to further discuss the situation.

27 ¹⁰² Genung Direct Test., Ex. S-1 at 9.

28 ¹⁰³ Tr. at 315.

¹⁰⁴ *Id.* at 322.

¹⁰⁵ Genung Direct Test., Ex. S-1 at 17.

1 Q. Didn't we see formal objections from Eschelon and Integra and Priority
2 One?

3 A. Those were – those were comments to the notice, but again, no escalation,
4 no disputes, no postponements, no oversight committee.

5 Q. You were aware of an objection; they didn't just object hard enough? Is
6 that what you are testifying to?¹⁰⁶

7 The numerous formal objections filed by the CLECs are also testament to the fact that the
8 process amendments effectuated through Versions 27 and 30 were not mutually developed. Qwest
9 admitted that there were also informal CLEC objections regarding the changes.¹⁰⁷

10 Finally, Eschelon witness Johnson testified as follows:

11 “The CMP process for products and processes is largely one-sided with
12 Qwest exercising unilateral power to override any changes or objections
13 that an individual CLEC or multiple CLECs raise. In fact as discussed in
14 detail below, when Eschelon and other CLECs objected to a change
15 Qwest proposed to the expedite process through CMP, Qwest nonetheless
16 implemented the change over the CLEC's objections.”¹⁰⁸

17 **D. CLECs Are not Required to Accept Changes from the Change Management
18 Process if those Changes Abridge the CLECs Existing Rights under Its ICA**

19 As discussed, Staff believes that the crux of this issue is really resolved by the language of the
20 CMP document itself. Ms. Genung testified as to how this issue was addressed in the CMP
21 document itself:

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

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

30 It is also mentioned that ‘if changes implemented through this CMP do
31 not necessarily present a direct conflict with a CLEC Interconnection
32 Agreement, but would abridge or expand the rights of a party to such
33 Agreement, the rates, terms and conditions of such Interconnection
34 Agreement shall prevail as between Qwest and the CLEC party to such
35 Agreement.’¹⁰⁹

36 ¹⁰⁶ Tr. at 376-77.

37 ¹⁰⁷ Tr. at 367.

38 ¹⁰⁸ Ex. E-1 (Johnson) p. 17.

39 ¹⁰⁹ Genung Direct Test., Ex. S-1 at 9.

1 Again, there is no reference to the CMP in the current Qwest-Eschelon ICA, because it did
2 not exist at the time the ICA was entered into.¹¹⁰ The Eschelon ICA required the parties' to mutually
3 develop a process. A process was in place at that time which both parties mutually understood,
4 agreed to and utilized for over 5 years. Qwest's unilateral actions through the CMP abridged
5 Eschelon's existing rights under its current ICA.

6 However, even if the Commission were to accept Qwest's course of dealing argument,
7 Versions 27 and 30 still abridged Eschelon's rights under its existing ICA and as such Eschelon did
8 not have to acquiesce to the narrowing of its rights under its existing ICA.

9 Qwest Witness Novak pretty much conceded that Eschelon's rights had been affected when
10 she testified: "[i]nterconnection agreements should not contain such product, process and systems
11 operation specifics that these items cannot be managed via the CMP as intended."¹¹¹ She further
12 testified that "Any such provisions in the Interconnection Agreement would make it impossible for
13 the CMP participant to change without first obtaining an amendment and agreement from the parties
14 to that Interconnection Agreement."¹¹² By stating that an Amendment would be required if the
15 Interconnection Agreement was contrary to what came out of the CMP, she inadvertently gave
16 support to Eschelon's position in this case since Qwest required all CLECs to sign an Amendment to
17 implement Version 30 of the expedite process.

18 In attempting to clarify this point with Ms. Novak, the following exchange occurred at the
19 hearing:

20 "Q. [BY STAFF COUNSEL MS. SCOTT]: Okay. So it's your belief
21 that what comes out of the CMP process shouldn't require an
22 amendment to the Interconnection Agreement?

23 A. [QWEST WITNESS NOVAK]: No. What I am saying is the
24 processes should not be in the Interconnection Agreement; they
25 belong in the PCAT and therefore can be managed in the CMP via
26 the PCAT.

27 Q.So if, as in this case, a process that came out of the CMP
28 affected the rights of a party under their current Interconnection
Agreement, then it is Qwest's position that that party or CLEC
would not be required to implement that in its Interconnection
Agreement through an amendment unless it wanted to; correct?

¹¹⁰ *Id.* at 27.

¹¹¹ Tr. at 265

¹¹² *Id.*

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A. If I understand you, the CMP cannot impose an obligation on a CLEC that is contrary to its Interconnection Agreement. And that is stated in the CMP document itself.

But that is part of why the processes should not be detailed in an Interconnection Agreement itself because then the CMP cannot operate on the processes without affecting an amendment.

Q. Well, but, if the – would you agree with me that if the particular – if a party enters into a Interconnection Agreement on April 1st of 2000, let’s say, and Qwest has provisions of a PCAT in effect which more specifically detail some general provisions contained in the Interconnection Agreement, at the date of its adoption, would you agree with me that those PCAT provisions would be the prevailing provisions and would apply to that Interconnection Agreement?

A. I’m not sure I would use those terms. The PCAT further defines how the provisions of the Interconnection Agreement would be implemented. So it goes into the processes used to satisfy the terms of the Interconnection Agreement.

Q. But the Interconnection Agreement itself is the agreement between parties at that point in time, correct?

A. Yes.

Q. And that agreement can’t be expanded or the party’s rights adversely affected based upon events subsequent to the agreement?

A. They should not be, that’s correct.”¹¹³

Qwest’s position in this case is not difficult to understand. Qwest desires to have as much of the detail put into documents that are not subject to State commission oversight but rather are subject to only Qwest’s discretion. Qwest is attempting to turn its tariffs and ICAs into “shells”¹¹⁴ by claiming that all of the “details” are actually “processes and procedures” which Qwest should control and accordingly belong in the Qwest PCAT. This gives Qwest carte blanche authority to make any changes no matter what impact they have on the CLEC’s existing rights under their ICAs. So this problem does not arise again, Qwest should be required to put the details of CLEC impacting processes into its interconnection agreements and tariffs.

¹¹³ *Id.* at 266-68.
¹¹⁴ *Id.* at 354. (“The processes aren’t described in our tariffs that I am aware of.”)

1 **VI. Due to the Implementation Problems with Versions 11, 27 and 30 of the PCAT, and the**
2 **Concerns Surrounding Qwest's New Expedite Process, Qwest Should Be Required to**
3 **Make Permanent The Interim Process Now In Effect Under The June 6, 2006**
4 **Procedural Order for Expedites for all CLECs**

5 **A. Qwest Unilaterally and Inappropriately Expanded the Covad Change Request to**
6 **Abridge CLEC Rights under the Current Process**

7 The testimony establishes that Version 11 resulted from a change request submitted by Covad
8 in February, 2004, in which it asked for "a formal process to expedite an order that requires an
9 interval that is shorter than what is currently available for that product."¹¹⁵ The request was not
10 specific to design services.¹¹⁶ Covad's request was for both design and non-design services.¹¹⁷ In
11 response to Covad's request, Qwest came out with Version 11, and what is known as the Preapproved
12 Expedites Process.¹¹⁸ Qwest materials described the process as optional.¹¹⁹ CLECs were not
13 required to sign an Amendment, if they did not want the Preapproved Expedites Process.¹²⁰ Qwest
14 witnesses testified that some CLECs signed the Amendment to the ICA so they could obtain the
15 benefits of the new expedite process.¹²¹ However, Qwest testimony offered in this proceeding
16 suggests that the process was not optional.¹²²

17 The CLEC notification for Version 11 was sent on June 29, 2004, with an implementation
18 date of July 31, 2004.¹²³ The CLEC notification for Version 27 which moved 2w/4w Unbundled
19 Loops to the Pre-Approved Expedite Process which contained a \$200 per day fee, was issued on
20 September 12, 2005 with an implementation date of October 27, 2005.¹²⁴ Finally, the CLEC
21 notification for Version 30 (which changed the process to require expedite language in a CLEC's
22 Interconnection Agreement or they had to sign an Amendment) was issued on October 19, 2005, with
23 an implementation date of January 3, 2006.¹²⁵

24 ¹¹⁵ *Id.* at 202.

25 ¹¹⁶ *Id.* at 202-03.

26 ¹¹⁷ *Id.* at 205.

27 ¹¹⁸ *Id.*

28 ¹¹⁹ Johnson Direct Test., Ex. E-1 at 21-22.

¹²⁰ Tr. at 329.

¹²¹ Tr. at 330.

¹²² Tr. at 329.

¹²³ Genung Direct. Test., Ex. S-1 at 20.

¹²⁴ *Id.* at 22.

¹²⁵ *Id.* at 23.

1 In the end, Qwest's new process was not optional. Qwest unilaterally through the CMP
2 process changed Eschelon's and other CLEC's rights to get expedites under emergency
3 circumstances for any design services. Instead, Qwest effectuated a new process where CLECs such
4 as Eschelon had to pay \$200 per day for any expedites for design services under all circumstances
5 including emergency conditions as well, unless caused by a problem by Qwest. The scope of the
6 Covad request was discussed at the hearing:

7 "Q. [BY QWEST ATTORNEY STEESE]: And Version 11 was a
8 change request brought by Covad, true?

9 A. [MS JOHNSON]: Version 11 was created as a result of Covad's
10 change request, yes.

11 Q. And what Covad wanted was the ability to get unbundled loops
12 expedite when the CLEC had caused the disconnect in error;
13 correct?

14 A. Covad wanted an optional process to expedite orders that did not
15 meet the emergency expedite criteria.

16 Q. Do you recall the specific reason being given by Covad was
17 specifically because they, if they disconnected an order in error,
18 they wanted to be able to get it expedited?

19 A. I understand that that's – you know, that that's a part of minutes in
20 the Covad CR.

21 Q. And as Version 11 was implemented, many CLECs, Covad
22 included – I'm assuming you know, maybe you don't – signed an
23 amendment for the preapproved expedite process; true?

24 A. I don't know who signed the amendment or when.

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

28 A. That's what Qwest required, yes.

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

A. That's correct. It was – that product was no longer eligible for the
emergency requiring approval process.¹²⁶

¹²⁶ Tr. : 43-44.

1 But Eschelon witness Johnson testified that Qwest originally intended the new non-
2 emergency process to be an optional process in addition to (and not as a substitute for) the existing
3 emergency process.¹²⁷ Ms. Johnson also testified that Qwest represented the process as an optional
4 process.¹²⁸

5 "...And in its June 29, 2004 announcement related to Covad's Change
6 Request, the company stated that: "Qwest is modifying/changing the
7 existing manual Expedite process to incorporate two processes. These are
8 the fee-added Pre-Approved and emergency-based Expedites Requiring
9 Approval. Furthermore, in response to Eschelon's comments on Covad's
10 Change Request, Qwest issued a July 15, 2004 response which states:

11 "3.Qwest did not want to shut the door for its Interconnect
12 customers because of existing contractual obligations, so is
13 offering those customers two options: 1) To be able to expedite
14 without reason for a per-day improved rate, like the Retail and
15 Access customer, or 2) Continue with the existing process that is in
16 place. Qwest is providing the Interconnect customers an additional
17 option. If the CLEC chooses option 2, and the expedite reason is
18 for one of those listed in the PCAT, they are given the same
19 opportunity at having the due date requested."¹²⁹

20 **B. There was Considerable Confusion Among the CLEC Community Regarding
21 Version 27 and Version 30 and Several CLECs filed Formal Objections to the
22 Change Versions**

23 Several of the more active CLECs in the CMP process objected to Qwest's changes.¹³⁰

24 Following is an objection sent to Qwest by Integra on November 3, 2005:

25 "Integra objects to Qwest proposed change to remove the existing approval
26 required expedite process for designed products. When Integra signed the Qwest
27 Expedite Amendment we were not advised that by signing the amendment it
28 would change the current Expedites Requiring Approval process. We signed the
29 amendment believing that this would ADD to our options of having an order
30 completed outside the standard interval. When Integra signed the amendment
31 UBL DS0 loops were not included as a product on the list of products in the "Pre-
32 Approved Expedites" list. When the UBL DS0 was added to this list Integra did
33 not comment at that time, we still believed the Expedites Requiring Approval
34 process was in place for our use."¹³¹

35 Other CLECs filing formal objections to the Versions 27 and 30 changes noticed by Qwest
36 included Covad, McLeodUSA, Eschelon and Priority One.¹³²

37 ¹²⁷ Ex. E-1 (Johnson) pp. 20-21.

38 ¹²⁸ *Id.*

39 ¹²⁹ Johnson Direct Test., Ex. E-1 (Johnson) pp. 21-22.

40 ¹³⁰ Johnson Direct Test., Ex. E-1; BJJ, at 13.

41 ¹³¹ *Id.*, Ex. BJJ-A at 13.

42 ¹³² *Id.*

1 McCleod's objection was filed on October 26, 2005. It stated in part:

2 "Qwest announced it will begin charging expedite fee for 2w/4w loops on Oct.
3 27th. Qwest just posted a Expedites and Escalations V30 which still has the
4 2w/4w analog loop exception included. I looked at the previous version (V29)
5 and the exception was also present in that version. Qwest has given until
6 November 3rd to comment on the V30 so I don't see how (1) Qwest can begin
charging tomorrow (Oct. 27th) when the review isn't complete and (2) Qwest can
even claim that 2w/4w analog loops are no longer an exception in the Pre-
Approved Expedite process when it doesn't appear that Qwest has addressed this
issue in prior reviews."¹³³

7 Eschelon filed the following objection on November 3, 2005.

8 "In Qwest's response to Covad's CR PC021904-1, Qwest said: "If a CLEC
9 chooses not to amend their Interconnection Agreement, the current expedite
10 criteria and process will be used." The current "expedite requiring approval
11 process" allows a CLEC to request an expedite, at no charge, when the customer's
12 needs met certain criteria. Eschelon relied upon Qwest's response and based its
13 decision to comment, or not comment, on that response. Qwest is now failing to
14 keep the commitments it made to CLECs in CMP, and in its response to Covad,
15 by now changing its position on expedites and unilaterally imposing charges via a
16 process change in CMP. Qwest's proposed change to remove the existing
approval required expedite process for designed products will negatively impact
Eschelon and its customers. Qwest said its basis for this change is 'parity' and
that Qwest retail charges for all expedites for 'designed' services. However, this
claim of 'parity' is misleading as Qwest's new process now treats CLEC POTS
customers differently than Qwest POTS customers. Qwest defines parity based
on whether a service is 'designed.' Qwest has chosen to apply the 'design'
process to DS0 UBLs, but not to its own POTS customers. The result is that
though from the customer perspective the service is the same, Qwest now
proposes to treat them differently for the expedite process.

17 * * * * *

18 Eschelon also objects to Qwest's addition of UBL DS0 products to the pre-
19 approved list of products. Qwest chose to make the change to the approval
20 required expedite process after it added DS0 loops to the product list for pre-
21 approved products. The result is that CLECs were unable to effectively comment
on a change that now, coupled with Qwest's further change, significantly impacts
a CLEC's business.¹³⁴

22 PriorityOne's objection filed on November 3, 2005, read in part as follows:

23 "Also, PriorityOne objects to Qwest's proposed change to remove the existing
24 approval required expedite process for designed products and note that it will
negatively impact Priority One and its customers."¹³⁵

25 These are complaints from CLECs that are familiar with the process. While Staff is uncertain
26 of the number of CLECs affected, other CLECs in Arizona were surely affected. In fact, Qwest

27
28 ¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

1 Witness Martain admitted that for CLECs that did not participate in the CMP process daily there
2 could be some confusion with Versions 27 and 30.¹³⁶

3 Further when asked on cross-examination whether there were other CLECs that objected in an
4 informal way, Qwest Witness Martain stated:

5 "Well, we had our ad hoc meeting with the CLECs that discussed Version 30.
6 There were some concerns raised at the meeting..."¹³⁷

7 She further stated that "I believe some of those CLECs that had comments on Version 30
8 already had an amendment with us and were participating in the expedite for a fee process."¹³⁸

9 It is clear that the CLECs were confused about the Version 30 Amendment also and what it
10 was intended to do.

11 **C. Qwest's Parity and Uniformity Claims are Without Merit**

12 Qwest also justifies its changes in Versions 27 and 30 due to a need for uniformity.¹³⁹ Qwest
13 states that it charges its retail customers a \$200.00 per day charge for expedites, in accordance with
14 its Tariff approved by the Commission.¹⁴⁰

15 However, uniformity (unless one accepts Qwest's position that expedites are a superior
16 service), may not be lawful in this case. CLECs are entitled, under Section 251 of the Act, to
17 TELRIC rates for wholesale elements which meet the impairment standard. If Qwest is including the
18 \$200.00 per day charge for expedites in its retail tariff, it is unlikely that the rate is TELRIC based.

19 Further, nothing could be farther from parity or uniformity than the process resulting from
20 Version 11 and Version 30 of the CMP. Ms. Albersheim testified as to the impacts of both:

21 "Q. [BY QWEST ATTORNEY STEESE]: And for POTS services when will
22 Qwest accept an expedite today?

23 A. [MS. ALBERSHEIM]: Today it will accept an expedite if the POTS
24 service meets the criteria of the emergency conditions and resources are
25 available.

26 Q. What about for design service?

27 ¹³⁶ Tr. at 365.

¹³⁷ *Id.* at 367.

¹³⁸ *Id.* at 369.

28 ¹³⁹ Tr. at 332 and 338.

¹⁴⁰ Tr. at 332.

1 A. For design service, we don't have the limitations of emergency conditions. All
2 design services may be expedited if resources are available; however, there
3 would be a charge of \$200 per day."¹⁴¹

4 Thus, non-design services which to the end-user customer are the same as comparable design
5 services, Qwest's CLEC customer can get emergency expedites at no charge. There is no option for
6 these customers to get expedites, for a fee, under non-emergency circumstances. On the other hand,
7 for design services, customers can get expedites under any circumstances but must always pay
8 \$200.00. And, for design services, the CLEC must pay \$200.00 for emergency expedites as well. In
9 Staff's opinion, the new system designed by Qwest suffers from a lack of uniformity or parity. Thus,
10 the need to rush to get it in place to ensure uniformity or parity, as Qwest witnesses testified, is a
11 paradox.

12 Moreover, on cross-examination, Ms. Martain stated that from 2001 through 2004 Qwest's
13 access tariff allowed expedites under a fee-add option as well as emergency expedites, but she
14 claimed that despite the language Qwest only granted expedites on emergency conditions for all
15 customers.¹⁴² So in this case, there may have been parity, but at the expense of Qwest not following
16 its tariff.

17 Qwest created the uniformity and parity problems itself when it failed to provide a truly
18 optional process as Covad had requested for expedites under non-emergency circumstances. It was
19 an alternative process, meaning that if you signed the V 11 Amendment you had to pay a \$200.00 fee
20 for both emergency and non-emergency expedites.¹⁴³ An optional process would have allowed the
21 CLEC to continue to get emergency expedites for no charge and non-emergency expedites for a
22 \$200.00 fee per day. That is the only reason Qwest ended up with three categories of CLECS under
23 its new expedite process.¹⁴⁴ Qwest created its own need for uniformity and parity.

24 **D. Qwest's "Superior Service" Claims are Without Merit**

25 In an attempt to justify its \$200.00 rate and apparently to remove the rate from Commission
26 oversight, Qwest argues that expedites are a "superior service".¹⁴⁵ Qwest Witnesses Theresa Million

27 ¹⁴¹ Tr. at 284-85.

28 ¹⁴² *Id.* at 357-58.

¹⁴³ Tr. at 44.

¹⁴⁴ See Tr. : 45-56.

¹⁴⁵ Tr. at 493.

1 and Renee Albersheim both testified that expedites are a “superior service”. At the hearing, Ms.
2 Albersheim testified as follows:

3 “Given that this is a request for a superior service, as Ms. Million will testify in
4 more detail, we do not believe that TELRIC rates have applicability in this
circumstance.”¹⁴⁶

5 Ms. Albersheim further testified that “...they’re superior in that they are beyond what we are
6 required to provide under the terms of the Telecommunications Act.”¹⁴⁷ However, this position
7 misconstrues the holding of the Eighth Circuit Court of Appeals which first addressed the issue of
8 “superior service”.

9 The Eighth Circuit case Qwest is referring to is *Iowa Utilities Board v. FCC*.¹⁴⁸ In that case,
10 the Eighth Circuit ruled that the FCC rules, requiring ILECs to provide CLECs interconnection and
11 unbundled network elements superior in quality to that which the ILEC provided to itself were
12 invalid and contrary to the statutory requirement that the ILEC provide interconnection “at least equal
13 in quality” to that provided by the ILEC to itself.¹⁴⁹ The Eighth Circuit stated:

14 “Nothing in the statute requires the ILECs to provide superior quality
15 interconnection to its competitors. The phrase ‘at least equal in quality’
16 establishes a minimum level for the quality of interconnection; it does not require
17 anything more. We maintain our view that the superior quality rules cannot stand
18 in light of the plain language of the Act for all the reasons we previously
expressed. [Cite omitted.] We also note that it is self-evident that the Act
prevents an ILEC from discriminating between itself and a requesting competitor
with respect to the quality of the interconnection provided.”¹⁵⁰

19 Expedites are not a “superior service” to what Qwest provides itself. Qwest witnesses in fact
20 testified that Qwest provides the capability to expedite to itself the same as it does to its
21 competitors.¹⁵¹

22 Q. [BY STAFF COUNSEL MS. SCOTT]...But that’s another issue.
23 I guess the issue that I want to explore with you is the options that
24 Qwest makes available to its own customers, including expedites,
and the need for the CLECs to have similar options for their
customers.

26 ¹⁴⁶ *Id.*

27 ¹⁴⁷ *Id.* at 197.

¹⁴⁸ 120 F.3d 753 (8th Cir. 1997), *aff’d in part and rev’d in part*, 525 U.S. 366 (1999).

28 ¹⁴⁹ *Id.* at p. 758.

¹⁵⁰ *Id.*

¹⁵¹ Tr. at 518-520.

1 So in emergency circumstances, you would agree with me that it's
2 appropriate that the CLEC have the ability to expedite as well;
correct?

3 A. [QWEST WITNESS MS MILLION] I would guess that in
4 emergency circumstances it's appropriate for CLECs just as it's
appropriate for Quest's retail and other wholesale customers.

5 Q. And there may be other instances where Qwest wants the ability to
6 expedite for its customers other than emergency circumstances;
correct?

7 A. Yes. I believe that's the basis for the tariff that we filed in
Arizona.

8 Q. Okay. And so CLECs under the same terms would want to have
9 the ability to expedite under those conditions as well; correct?

10 A. And they do have the ability to expedite under those conditions....¹⁵²

11 **E. Qwest's Claims of CLEC Abuse do not Support the Change in Process**

12 Qwest's concerns with CLEC abuse of the Expedites Requiring Approval process do not
13 support the changes made by Qwest to the Expedites and Escalation process. In her testimony during
14 the hearing, Qwest witness Martain testified as follows:

15 "Yes, there is a great risk there that you can have a CLEC that said, I paid for
expedite but so-and-so over there isn't and they are getting expedites for free.

16 So, it was very hard to manage and became very important to us to make sure that
17 we were doing the right thing and we were making sure that if it was an
emergency, they could have it and if it wasn't, they couldn't because of the other
18 process over here.¹⁵³

19 Yet when asked later if any CLEC had ever complained to Qwest that other CLECs were
20 inappropriately getting expedites for free, Ms. Martain testified that no such complaints were brought
to her personally.¹⁵⁴

21 And, again, the following exchange at the hearing demonstrates that Qwest's concerns over
22 CLEC abuse of the system were not behind the changes it made to the expedite process. Qwest
23 Witness Martain admitted that gaming the system was just as likely with non-design (free) as for non-
24 design services (\$200.00 per day charge):

25 "Q. [BY ESCHELON ATTORNEY MERZ]: And then you talk later on in
26 that same paragraph about a CLEC who is changing a letter from a

27
28 ¹⁵² Tr. at 520.

¹⁵³ *Id.* at 403.

¹⁵⁴ *Id.* at 420-21.

1 medical facility and using the same letter over and over to obtain
expedites?

2 A. [QWEST WITNESS MARTAIN]: That was one of the examples where
3 we were having difficulty.

4 Q. And that was one particular CLEC that you saw doing that?

5 A. One or two. I can't remember. I know one for sure.

6 Q. It wasn't Eschelon?

7 A. No, it was not.

8 * * * * *

9 Q. And later on you talk about other situations where CLECs were issuing
10 orders to disconnect end users for nonpayment and then submitting a new
11 connect order to restore service. That is another example that you refer to;
correct?

12 A. Correct. And then they would try to get us to expedite the install.

13 * * * * *

14 Q. Go to page 25, line 4 – actually line 36. You say, 'These type of situations
15 placed an undue burden on Qwest which subsequently required Qwest to
16 ask additional clarifying questions to determine whether the expedite
request was legitimate.' Do you see that?

17 A. That's correct and I talked about that this morning.

18 * * * * *

19 Q. You are talking about gaming the system essentially, correct?

20 A. Correct.

21 Q. And you wouldn't have more concern with respect to design services
22 about parties gaming the system than you would non-design services,
would you?

23 A. No, I would not.

24 Q. I mean the concern would be the same?

25 A. The concern is the same, so I apologize."¹⁵⁵

26
27
28

¹⁵⁵ *Id.* at 372-75.

1 **VII. Staff's Other Recommendations are in the Public Interest and Should be Adopted.**

2 **A. Qwest Should Be Required to Reimburse Eschelon the \$1800 in Expedites Fees it**
3 **Paid**

4 When Eschelon could not get its order expedited under its ICA, it turned to the only available
5 alternative, ordering out of Qwest's retail services tariff. It ordered a DS1 Private Line out of the
6 Qwest retail services tariff and requested an expedited due date for which it was charged \$1800.00.¹⁵⁶
7 Qwest Witness Novak testified that she assumes that Eschelon has paid Qwest since it is a tariffed
8 rate.¹⁵⁷

9 **B. Qwest Should be Required to Include a Definition of Both Design and Non-**
10 **Design Services in its Tariffs and Interconnection Agreements**

11 Qwest opposes Staff's recommendation to include a definition of both Design and Non-
12 Design Services in its Tariffs and Interconnection Agreements.¹⁵⁸ Staff Witness Genung testified that
13 "Staff was unable to find a definition of design or non-design services in Qwest's intrastate
14 tariffs."¹⁵⁹ Qwest Witness Albersheim concedes that neither the Qwest Tariff or its Interconnection
15 Agreements contain such a definition. Ms. Albersheim testified that she opposed the
16 recommendation because of it is rather "nebulous".¹⁶⁰

17 Yet on cross examination, Ms. Albersheim admitted that the distinction between design and
18 non-design services is a crucial distinction for provisioning processes.¹⁶¹ She also admitted that
19 Qwest is attempting to apply different processes depending on whether a product is design or non-
20 design.¹⁶² When further pressed on this point, Ms. Albersheim stated the following;

21 "Q. [BY ESCHELON ATTORNEY MERZ]: Well, if the distinction between
22 design and non-design services is a critical one, why would Qwest not
want to define that distinction in its tariffs for its customers?

23 A. [BY QWEST WITNESS ALBERSHEIM]: It's a critical one in
24 provisioning processes. I don't believe it's necessary in the tariffs. But if
we put it in the tariffs, we will have to be very precise. That is my point.

25 _____
26 ¹⁵⁶ Tr. at 442.

¹⁵⁷ *Id.*

¹⁵⁸ Tr. at 225.

¹⁵⁹ Genung Direct Test., Ex. S-1 at 23.

¹⁶⁰ Tr. at 225.

¹⁶¹ *Id.* at 224.

¹⁶² *Id.* at 224-25.

1 Q. Well, isn't it the case that when Qwest puts things in its tariffs, it does
endeavor to be precise and accurate?

2 A. Absolutely.

3 * * * * *

4 Q. So that wouldn't be a reason for not putting a definition of design and non-
5 design in the tariff, would it?

6 A. No. I don't believe it really adds value because the tariffs are very
7 specific as to the processes – or the products, excuse me, that they are
describing.”¹⁶³

8 As Ms. Genung testified, Qwest does include a definition of Designed Services in its New
9 Mexico tariff.¹⁶⁴

10 **C. Qwest Should Be Required to Develop a PID to Track Its Performance on
11 Expedites**

12 Qwest also opposes Staff's recommendation that Qwest be required to develop a PID to track
13 its performance on Expedites. Qwest claims that that information is already contained in the OP3
14 PID which tracks commitments met.¹⁶⁵ But Staff does not believe that the OP3 PID tracks
15 commitments met with respect to Expedites as a separate category. Therefore, Staff believes that a
16 new PID to track Qwest's commitments with respect to expedites would be informative and
17 beneficial.

18 **VIII. Qwest Should be Required to Immediately Update its SGAT**

19 Qwest has effectively withdrawn its Arizona Statement of Generally Available Terms and
20 Conditions (“SGAT”) in violation of a Commission Order. Commission Decision No. 66201
21 required Qwest to obtain Commission approval prior to withdrawing its SGAT. The SGAT is the
22 defined statement of generally available terms for CLECs in Arizona.¹⁶⁶ It was established as part of
23 the Section 271 process.¹⁶⁷ It is a form agreement that CLECs could opt into to get the standard
24 terms.¹⁶⁸ According to Ms. Albersheim, Qwest last updated it in April, 2005.¹⁶⁹

25 ¹⁶³ *Id.* at 225-226.

26 ¹⁶⁴ Genung Direct Test., Ex. S-1 at 23. The definitions in the New Mexico tariff were included in Attachments 5 and 7
to Ms. Genung's testimony.

27 ¹⁶⁵ *Id.*

¹⁶⁶ Tr. at 275.

28 ¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 319.

1 During the hearing, Qwest Witness Albersheim testified as follows:

2 "Q. [BY ESCHELON ATTORNEY MERZ]: There were some questions
3 about the status of the SGAT and Arizona? Do you recall that?

4 A. [QWEST WITNESS ALBERSHEIM]: Yes.

5 Q. And you are familiar with that document, are you not?

6 * * * * *

7 A. Yes.

8 Q. That is a document that you and I talked about when we were in Colorado
9 in the arbitration proceedings; correct?

10 B. Yes.

11 Q. You recall that, don't you?

12 A. I do.

13 * * * * *

14 Q. You are aware, based on that document, that Qwest takes the position that
15 the SGAT is no longer available for opt-in by any CLEC in any state?

16 A. I am aware that this states that SGATs are no longer available to opt-in. I
17 believe opt-ins have taken place anyway.

18 The issue for Qwest here is the SGATS that are out of date that the
19 negotiations template is more reflective of current availability of products
20 and services. For example, I think the SGAT still refers to UNEP, which
21 is no longer available.

22 So this document says that the SGATS are no longer available to opt in to
23 and has been replaced with the negotiation template.¹⁷⁰

24 The ramifications of Qwest's actions are obvious. By effectively withdrawing the SGAT as
25 the template interconnection agreement for opt-in by CLECs, and instead using its "negotiation
26 template" which is a unfiled document not subject to State commission review approval, it has
27 supplanted the statutory State Commission review process provided in the Federal Act with its own
28 review process. The Commission should require Qwest to immediately update its Arizona SGAT and
make it available to requesting CLECs.

¹⁷⁰ *Id.* at 300-03. See also Attachment A.

1 **IX. Conclusion.**

2 Qwest breached the terms of its existing ICA with Eschelon by denying Eschelon the
3 capability to expedite LSRs. The long-standing course of dealing between the parties allowed
4 Eschelon to obtain expedites under a well-established process without a fee. Qwest unilaterally
5 changed this process, which resulted in an abridgement of Eschelon's rights and the rights of other
6 CLECs. The process utilized by Qwest was confusing and misunderstood by some CLECs and some
7 CLECs were thereby precluded from filing meaningful comments on the process. Staff recommends
8 that as a result of this complaint, the Commission order Qwest to make permanent the interim process
9 now in effect under the June 6, 2006 Procedural Order for expedites for all CLECS. Staff
10 respectfully requests that the ALJ adopt Staff's other recommendations in this matter.

11 RESPECTFULLY SUBMITTED this 25th day of October, 2007.

12 

13
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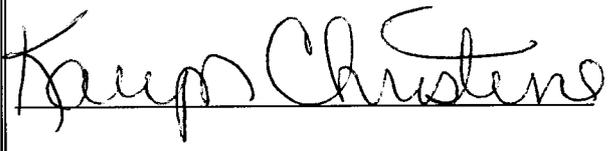
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