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IN THE MATTER OF THE PETITION OF
ESCHELON TELECOM OF ARIZONA, INC.
FOR ARBITRATION WITH QWEST
CORPORATION, PURSUANT TO 47 U.S.C.
SECTION 252 OF THE FEDERAL
TELECOMMUNICATIONS ACT OF 1996

DOCKET NOS. T-01051B-06-0572 and T-03406A-06-0572

QWEST CORPORATION'S EXCEPTIONS TO THE ADMINISTRATIVE LAW

JUDGE'S RECOMMENDED OPINION AND ORDER

Qwest Corporation ("Qwest") submits these exceptions to the Administrative Law Judge's Recommended Opinion and Order ("ROO") issued in this proceeding on February 22, 2008.

I. Introduction and Summary

This interconnection arbitration between Qwest and Eschelon Telecom of Arizona, Inc. ("Eschelon"), arises under Section 252 of the Telecommunications Act of 1996 ("the Act"). After a lengthy period of negotiations, Qwest and Eschelon were unable to reach agreement on more than 30 different issues relating to the Arizona interconnection agreement ("ICA") that is the subject of this proceeding. Based on Qwest's 12 years of experience as an incumbent local exchange carrier ("ILEC") operating under the obligations imposed by the Act, it is highly unusual to have this level of disagreement with a competitive local exchange carrier ("CLEC") in attempting to negotiate an ICA. While ICA negotiations do not always lead to agreement on all issues, Qwest typically is able to resolve all but a handful of issues with most CLECs. As Qwest

1 described in its post-hearing brief, the unusually large number of unresolved issues in this case is
2 directly attributable to a series of ICA proposals from Eschelon that (1) are inconsistent with the
3 requirements of the Act and governing FCC orders; (2) seek to fundamentally alter business
4 processes that Qwest, Arizona CLECs, and state commissions agreed upon long ago and that
5 have been functioning smoothly for years; (3) would require Qwest to make significant,
6 expensive changes to its electronic operation support systems ("OSSs") without compensation;
7 and (4) would result in Eschelon being permitted to micro-manage certain aspects of Qwest's
8 wholesale business to its benefit and to the potential detriment of other CLECs.

9 In the ROO, the Administrative Law Judge responds to most of Eschelon's improper
10 proposals by rejecting them and thereby ensuring that the ICA resulting from this proceeding is
11 consistent with the Act and FCC rulings and preserves Qwest's right to continue operating its
12 wholesale business based upon the processes that Qwest, CLECs, and state commissions have
13 developed in cooperation with each other over the past decade. With just a few exceptions,
14 Qwest supports the ROO and respectfully requests that the Commission adopt it with the modest
15 modifications described below.

16 Two of the modifications that Qwest is seeking through these exceptions are in the nature
17 of clarifications, as the ROO overlooks settlements that Qwest and Eschelon reached on two
18 issues that were resolved during the course of the arbitration. First, in connection with Issue 9-
19 43, titled "UNE Conversions and Circuit ID," the ROO properly permits Qwest to assess charges
20 to recover the costs it incurs to convert certain network elements leased by Eschelon from
21 unbundled network elements ("UNEs") to tariffed private line service. The ROO finds further
22 that such "charges should be considered interim and subject to refund pending a final
23 determination of the appropriate charge."¹ This ruling, however, overlooks the fact that in the
24 Commission's "Wire Center Docket,"² Qwest has entered into a settlement agreement with

25 _____
26 ¹ ROO at 45.

² Docket No. T-03632A-06-0091, *et. al.*

1 Eschelon and other CLECs that establishes a charge of \$25 for Qwest's conversions of UNEs to
2 private line and other alternative services. Contrary to the ROO, the settlement agreement
3 provides that the charge shall remain in place for at least three years and does not contemplate
4 refunds if the charge is altered after three years. In a Recommended Opinion and Order issued in
5 the Wire Center Docket on February 22, 2008, the Administrative Law Judge recommended
6 approval of the settlement agreement, including approval of the \$25 charge and agreed ICA
7 language implementing that charge.³ The ICA in this case should include this agreed ICA
8 language, not language based on the ruling in the ROO.

9 Second, although the ROO recognizes that Qwest and Eschelon settled Issue 9-51, titled
10 "Unbundled Dark Fiber Termination Rate," and submitted notice of that settlement to the
11 Commission on July 18, 2007, the ROO nonetheless includes an analysis and ruling on that issue
12 that deviates from the settlement the parties reached. Qwest assumes this is an oversight and,
13 accordingly, asks that the ruling relating to this issue be removed from the ROO. Removal is
14 supported by the Act's preference for negotiated resolution of disputes and the provision in
15 Section 252 that limits the arbitration authority to resolving "open" or disputed issues between
16 parties. Further, Eschelon has authorized Qwest to state in these exceptions that it has no
17 objection to closure of this issue as described in the attached notice of settlement ("Attachment
18 A").

19 Qwest has a small number of additional exceptions that are more substantive in nature.
20 Qwest asks that the Commission alter the recommended change of law provision to give parties
21 an incentive to act quickly to update the contract when they believe that a change in law should
22 result in more favorable contract language. (Issue 2-4). Qwest also asks that the Commission
23 reject the ROO's proposed standard for triggering Qwest's right to demand a deposit from

24 _____
25 ³ Recommended Opinion and Order, *In the Matter of the Application of DIECA*
26 *Communications, et al., to Address Key UNE Issues Arising from Triennial Review Remand*
Order, Including Approval of Qwest Wire Center Lists, Docket Nos. T-03632A-06-0091, et al.
(Ariz. Commission, Feb. 22, 2008) ("Wire Center ROO").

1 Eschelon in the event of non-payment of undisputed bills. Under the ROO, Eschelon would
2 have to fail to make undisputed payments 50% of the time for six months before Qwest would
3 have the right to demand a deposit. Qwest urges the Commission to reject this improperly
4 lenient standard and to adopt instead the standard negotiated in the Section 271 workshops
5 relating to Qwest's applications for entry into in-region long distance markets. (Issue 5-9).
6 Qwest further asks that the Commission reject a recommendation in the ROO that Qwest be
7 required to provide records that it cannot provide without expensive systems changes or manual
8 searches. In the alternative, Qwest asks that the Commission include a ruling in the final
9 arbitration order that gives Qwest cost recovery for these changes, consistent with Qwest's right
10 to cost recovery under Section 252(d)(1) of the Act. (Issues 7-18 and 7-19). Finally, Qwest
11 urges the Commission to adopt language consistent with Qwest's current processes for handling
12 orders for which Qwest has provided a notice indicating that the due date may be in jeopardy.
13 (Issues 12-71, 72, 73).

14 II. Exceptions

15 A. **Issue 2-4 ("Effective Date of Date of Legally Binding Changes of Law"): The ROO** 16 **leaves open the potential for retroactive legal interpretation with its proposed** 17 **language for the effective date of legally binding changes.**

18 Issue 2-4 involves a dispute over situations where a Commission or other regulatory
19 order is unclear regarding its effective date. Eschelon's proposal provides a presumption that, in
20 such an event, the change of law is effective on the date of the order. Qwest opposed Eschelon's
21 language because it has experienced CLEC efforts to obtain substantial refunds based on
22 interpretation of legal changes that they asserted years after the purported change took place.
23 Qwest proposed that a party wishing to change ICA language based on a change of law may do
24 so at any time, but the amendment will only be effective on a going forward basis unless the
25 company provides notice within 30 days of the change of law.

26 The ROO rejects Qwest's proposed language, based on a conclusion that Qwest's
proposal "could provide an incentive to one party to delay notice and the implementation of an

1 adverse change in law”⁴ In other words, the ALJ was apparently concerned about the
2 possibility that Qwest would know of a change of law, hide it from Eschelon, and then take
3 advantage of any delay in an Eschelon request to amend the agreement. The ALJ’s concern on
4 this point is not based on evidence. Eschelon has not identified a single situation where Qwest
5 has used such a tactic. To the contrary, such a scenario is unlikely to ever occur. Eschelon has
6 demonstrated time and time again that it is aware of legal changes and has ample ability to assert
7 its rights associated with any such changes.

8 By contrast, this Commission is well aware of the litigation that can result from
9 complaints in several states seeking refunds of substantial funds based on a legal theory devised
10 after the purported change in law.⁵ The following language proposed by Qwest prevents such
11 tactics and should be adopted:

12 . . . When a regulatory body or court issues an order causing a
13 change in law and that order does not include a specific
14 implementation date, a Party may provide notice to the other Party
15 within thirty (30) Days of the effective date of that order and any
16 resulting amendment shall be deemed effective on the effective
17 date of the legally binding change or modification of the Existing
18 Rules for rates, and to the extent practicable for other terms and
conditions, unless otherwise ordered. In the event neither Party
provides notice within thirty (30) Days, the effective date of the
legally binding change shall be the effective date of the
amendment unless the Parties agree to a different date. . . .

19 **B. Issue 5-9 (“Definition of Repeatedly Delinquent”): The ROO defines "repeatedly**
20 **delinquent" inconsistently with the meaning agreed to in the Section 271 workshops**
21 **and in a manner that permits Eschelon to repeatedly make untimely payments of**
22 **undisputed bills.**

23 The ALJ considered Issues 5-8 and 5-9 in the same section of her recommendation. Both
24 issues relate to the meaning of the term “repeatedly delinquent,” which is used in the ICA to

25 ⁴ ROO, p. 10, l. 3-5.

26 ⁵ See *Qwest v. Arizona Corporation Commission*, No. CU-06-2130-PHX-SRB (D. Arizona
2007).

1 trigger Qwest's right to demand a deposit pursuant to Section 5.4.5. The ALJ recommends
2 adopting Eschelon's positions and inserting the term "material" before delinquent (Issue 5-8)⁶
3 and defining the term so that Qwest's right to demand a deposit would not arise until Eschelon
4 fails to timely pay its bill three times in a six month period.⁷

5 The ALJ's recommended decision is a compromise between Qwest's proposal defining
6 "repeatedly delinquent" as late payments three times in twelve months and Eschelon's definition
7 of three consecutive months. Nonetheless, Qwest takes exception to the ALJ's recommendation
8 on Issue 5-9. The effect of the ruling would be that Qwest could only demand a deposit when
9 Eschelon fails to pay its undisputed bills 50% of the time in a six month period. Over the course
10 of a year, Eschelon could pay its undisputed bills late four out of twelve months without
11 triggering a right for Qwest to demand a deposit. That is not a reasonable standard for any
12 customer-vendor relationship.

13 The ALJ's recommended approach is particularly inappropriate given that this provision
14 only applies to undisputed bills. There is simply no excuse for the failure to pay an undisputed
15 bill, particularly where, as here, the ALJ has required that a payment only be considered
16 delinquent if the payment is materially less than the undisputed amount owed.⁸

17 Qwest's proposal is consistent with the language in its SGAT and the language in many
18 other ICAs between Qwest and other CLECs.⁹ Qwest's position was negotiated and agreed upon
19 in the Section 271 Workshop proceedings by Qwest and other CLECs, and Eschelon has failed to
20 identify a single instance where the current language has resulted in an injustice.¹⁰ Accordingly,
21 the Commission should adopt Qwest's proposed language (with the term "material" inserted) on
22 this issue, which provides:

23 ⁶ ROO, p. 22, l. 24 – p. 25, l. 5.

24 ⁷ ROO, p. 22 p. 20, l. 10-23.

25 ⁸ Hearing Exhibit Q-5 (Easton Direct), p. 22, lines 1-10.

25 ⁹ Hearing Exhibit Q-7 (Easton Rebuttal), p. 24, lines 14-17.

26 ¹⁰ Hearing Exhibit Q-5 (Easton Direct), p. 22, lines 5-10; Hearing Exhibit Q-8 (Easton Surrebuttal), p. 8, lines 11-16.

1 5.4.5 . . . "Repeatedly Delinquent" means payment of any material
2 undisputed . . . amount received more than thirty (30) Days after
3 the Payment Due Date, three (3) or more times during a twelve
4 (12) month period on the same Billing account number

4 **C. Issues 7-18 and 7-19 ("Transit Record Change and Bill Validation"): The ROO
5 improperly requires Qwest to provide detailed information relating to "transit
6 traffic" originated by Eschelon that Eschelon can generate for itself.**

6 Issues 7-18 and 7-19 relate to a request by Eschelon to force Qwest to provide records
7 that Eschelon wishes to use to validate bills that Qwest sends to Eschelon for transit traffic.

8 Eschelon's proposed language for issue 7-18 requires that Qwest provide the records:

9 7.6.3.1 In order to verify Qwest's bills to CLEC for Transit Traffic
10 the billed party may request sample 11-01-XX records for
11 specified offices. These records will be provided by the transit
12 provider in EMI mechanized format to the billed party at no
13 charge, because the records will not be used to bill a Carrier. The
14 billed party will limit requests for sample 11-01-XX data to a
15 maximum of once every six months, provided that Billing is
16 accurate.

14 Eschelon's proposed language for Issue 7-19 lists detail to be included in the records:

15 Qwest will provide the non-transit provider, upon request, bill
16 validation detail including but not limited to: originating and
17 terminating CLLI code, originating and terminating Operating
18 Company Number, originating and terminating state jurisdiction,
19 number of minutes being billed, rate elements being billed, and
20 rates applied to each minute.

19 Qwest opposes Eschelon's proposals on two grounds. Qwest opposes Eschelon imposing the
20 obligation to provide the records (Issue 7-18), because Qwest does not create the records in the
21 manner Eschelon seeks. In order to provide them to Eschelon, Qwest would need to undertake
22 very costly systems changes or else will need to incur significant manual research costs.¹¹

23 Furthermore, Qwest opposed Eschelon's description of the contents of the records (Issue 7-19)

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26 ¹¹ Hearing Exhibit Q-7 (Easton Rebuttal), p. 30, lines 21-23 – p. 31, lines 1-5.

1 because the transit records it currently produces do not contain most of the data listed in
2 Section 7.6.4.¹²

3 In ordering Qwest to provide the requested records (Issue 7-18), the ALJ stated with
4 respect to the contents of the records that “. . . we are not requiring Qwest to provide more
5 information than the records currently contain.”¹³ Qwest has three exceptions to the ALJ's
6 decision. First, the Commission should strike the language of these paragraphs entirely. More
7 accurate and efficient bill validation can take place looking at Eschelon's own records. In the
8 event there is a discrepancy between Eschelon's records and Qwest's bills, billing dispute
9 resolution procedures exist to iron out such disputes.¹⁴ Such an approach is much more efficient
10 than creating an obligation to create systems capability to sort out and retrieve records in a
11 manner inconsistent with the way such records are pulled now.

12 Second, the Commission should strike the language in section 7.6.4. Requiring Qwest to
13 provide records “if available” could lead to a dispute down the road, either with Eschelon or
14 some other company that opts into this agreement over whether the information required by the
15 paragraph is “available.” The apparent intent behind the ALJ's decision is identical to the intent
16 behind the decision by the Minnesota Commission. There, the Commission struck Eschelon's
17 proposed section 7.6.4 to eliminate any confusion on the issue.¹⁵ This Commission should do the
18 same.

19 Finally, the Commission should permit cost recovery in the event that it decides to
20 impose these requirements on Qwest. Eschelon's requirement is inefficient, duplicative and of
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23 ¹² Hearing Exhibit Q-5 (Easton Direct), p. 18, lines 18-23 – p. 19, lines 1-8.

24 ¹³ ROO, p. 28, l. 8-9.

25 ¹⁴ See Hearing Exhibit J-1, Multi-state ICA, Section 21.8.

26 ¹⁵ See Attachment A, *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)*, Docket No. P-5340,421/IC-06-768, Order Clarifying Arbitration Issues and Requiring Filed Interconnection Agreement, (February 4, 2008) at 6-7.

1 no benefit to Qwest. Eschelon causes these costs and should be ordered to compensate Qwest
2 for these expenses pursuant to Qwest's right of cost recovery under Section 252(d)(1) of the Act.

3 **D. Issue 9-43 (Non-recurring Charge for UNE Conversions): The ROO overlooks the**
4 **settlement between Qwest and Arizona CLECs that establishes a non-recurring**
5 **charge of \$25 for conversions of UNEs to alternative services.**

6 As discussed above, Qwest, Eschelon, and other Arizona CLECs entered into a
7 settlement agreement in the Wire Center Docket that includes an agreed, negotiated non-
8 recurring charge of \$25 for the activities Qwest performs to convert UNEs to alternative
9 services. The Administrative Law Judge's Recommended Opinion and Order issued in the Wire
10 center Docket on February 22, 2008, recommends approval of the settlement agreement,
11 including approval of the \$25 non-recurring charge for conversions.¹⁶

12 While the ROO in this case properly permits Qwest to assess charges to recover the costs
13 it incurs for these conversions, it provides that such "charges should be considered interim and
14 subject to refund pending a final determination of the appropriate charge."¹⁷ However, as shown
15 by the following language, the settlement agreement from the Wire Center Docket provides that
16 the charge shall remain in place for at least three years and does not include any language
17 granting refunds if the charge is altered after three years:

18 Qwest will, for at least three (3) years from the Effective Date of this Settlement
19 Agreement, assess an effective non-recurring charge of \$25 for each facility
20 converted from a UNE to an alternative service or product under this Settlement
21 Agreement.

22 Consistent with this provision of the settlement agreement, Qwest and Eschelon (and
23 other CLECs) have agreed upon the following ICA language, which is incorporated into the
24 settlement agreement:

25 _____
26 ¹⁶ Wire Center ROO at para. 50, p. 33.

¹⁷ ROO at 45.

1 9.1.13.5.2 For each such facility converted from a UNE to an alternative service
2 arrangement, Qwest will, for at least three (3) years from the effective date in the
3 Wire Center Docket of the initial Commission-Approved Wire Center List, assess
4 an effective net non-recurring charge of \$25 for each such facility converted from
5 a UNE to an alternative service arrangement. Qwest may assess a non-recurring
6 charge in excess of \$25, so long as Qwest provides a clearly identified lump sum
credit within three (3) billing cycles that results in an effective non-recurring
charge of \$25. No additional non-recurring charges apply, other than OSS non-
recurring charges if applicable pursuant to Section 12.7.

7 In addition to establishing that the \$25 charge will be fixed in place for at least three
8 years, the ICA language that is part of the settlement agreement makes it clear that the rate may
9 change after that period and, importantly, does not provide for a refund if the rate does change:

10 9.1.13.5.2.1 The Parties disagree as to the amount of the applicable non-recurring
11 charge after the three-year period identified in this Section. Each Party reserves
12 all of its rights with respect to the amount of the charges after that date. Nothing
13 in this Agreement precludes a Party from addressing the non-recurring charge
14 after that three-year period. A different non-recurring charge will apply, however,
15 only to the extent authorized by applicable regulatory authority, or agreed upon
by the Parties, and reflected in an amendment to this Agreement (pursuant to
Section 2.2 and/or Section 5.30).

16 If the parties had intended the \$25 charge to be subject to a true-up or a refund, they would have
17 so provided in their agreed ICA language. That they did not reflects an absence of such intent
18 and confirms that the \$25 charge is intended to be fixed and not subject to any prospective or
19 retroactive adjustment for at least three years.

20 Consistent with these provisions in the settlement agreement and the ICA language that is
21 part of the settlement agreement, the ROO should be modified to eliminate the statement that the
22 \$25 conversion charge is "interim and subject to refund pending a final determination of the
23 appropriate charge." In place of that language, the final arbitration order should state that the
24 terms and conditions governing the charge are those set forth in the ICA language that is part of
25 the settlement agreement, and the order should direct Qwest and Eschelon to include that
26 language in their ICA. This result is consistent with the Act's preference, as described below in

1 connection with Issue 9-51, that ILECs and CLECs resolve their differences through negotiated
2 resolutions instead of having terms and conditions imposed through arbitration.

3 **E. Issue 9-51 ("Unbundled Dark Fiber Termination Rate"): The ROO overlooks the**
4 **parties' settlement of this issue.**

5 This issued involved a dispute over ICA language that could have limited Qwest's ability
6 to recover the costs it incurs for each termination it performs to provide Eschelon with the
7 network element known as unbundled dark fiber ("UDF"). The dispute centered on the parties'
8 inability to agree upon whether the recurring rate this Commission and other commissions have
9 ordered for dark fiber terminations is for one termination or includes multiple terminations.
10 Following the arbitration hearings in Arizona and other states, the parties reviewed the Qwest
11 cost study underlying this rate and reached agreement concerning the make-up of the rate. Based
12 on that review, the parties reached a settlement and closed this issue with the following language:

13 9.7.5.2.1. a) UDF-IOF Termination (Fixed) Rate Element. This rate element is a
14 recurring rate element and provides a termination at the interoffice FDP within the
15 Qwest Wire Center(s). A UDF-IOF termination charge applies per single strand
16 termination or per pair termination at an FDP or like cross-connect point.

16 As the ALJ acknowledges in the ROO, Qwest and Eschelon jointly filed with the
17 Commission a notice of settlement of this issue on July 19, 2007.¹⁸ A copy of the notice is
18 attached hereto as Attachment A. In the notice, the parties informed the Commission that they
19 "have closed this issue" by agreeing to include the language set forth above "in their
20 interconnection agreement at Section 9.7.5.2.1." Further, the parties expressly removed this
21 "closed" issue from the arbitration, stating that "[w]ith this agreement, there are no remaining
22 disputed issues relating to Arbitration Issue No. 9-51."

23 Despite the parties' settlement and removal of this issue from the arbitration, the ROO
24 includes a substantive analysis and ruling on the issue that deviates from the parties' agreed

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26 ¹⁸ See ROO at 3 ("On July 18, 2007, the parties filed a Joint Notice of Closure of Arbitration Issue 9-51 and Partial
Closure of Arbitration Issue No. 22-90(f).").

1 resolution. Qwest assumes that this ruling is included in the ROO through inadvertence, since it
2 is undisputed that the parties closed the issue and announced their resolution of it in their July 18
3 notice of closure. Instead of the parties' agreed language, the ROO adopts the following ICA
4 language, with the deviations from the parties' settled language shown in italics:

5 9.7.5.2.1. a) UDF-IOF Termination (Fixed) Rate Element. This rate element is a
6 recurring rate element and provides a termination at the interoffice FDP within the
7 Qwest Wire Center(s). *Two UDF-IOF terminations apply per pair. Termination
charges apply for each intermediate office terminating at an FDP or like cross-
connect point.*

8 The differences between this language and the language the parties agreed upon are material and
9 go to the heart of the parties' prior dispute concerning the number of termination charges that
10 may apply to UDF. The Commission should correct this mistake in the ROO by removing the
11 entire discussion of Issue 9-51 from the final arbitration order. Eschelon has authorized Qwest to
12 state in these exceptions that it has no objection to closure of this issue as described in the
13 attached notice of settlement.

14 It is fundamental that state commissions should give full effect to settlements that ILECs
15 and CLECs reach in interconnection arbitrations. Indeed, the Act is structured to encourage
16 parties to resolve their disputes voluntarily through negotiations. As described by the United
17 States Court of Appeals for the Eighth Circuit, voluntary negotiations are the "preferred method"
18 for establishing rates and terms that apply to UNEs.¹⁹ A failure to remove the discussion of Issue
19 9-51 from the final arbitration order would thus be directly at odds with the structure of the Act.

20 Additionally, the Commission does not have the jurisdictional authority to address Issue
21 9-51 since it is, as described by the parties, a "closed" issue. The authority of state commissions
22 serving as arbitrators under the Act is limited to resolving "open issues" that parties have been
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25 ¹⁹ *Iowa Utils. Bd. v. FCC*, 120 F.3d at 801 ("The structure of the Act reveals the Congress's
26 preference for voluntarily negotiated interconnection agreements between incumbent LECs and
their competitors over arbitrated agreements"), *rev'd on other grounds, AT&T v. Iowa Utils. Bd.*,
525 U.S. 366 (1999).

1 unable to resolve through negotiations.²⁰ This limitation reflects the Act's preference for
2 negotiated resolutions over arbitrations. Because Issue 9-51 is a closed issue, the Commission
3 has no statutory authority to address it. For this additional reason, the Commission should
4 remove the discussion of this issue from the final arbitration order.

5 **F. Issues 12-71, 12-72, 12-73 ("Jeopardy Notices"): The ROO improperly imposes a**
6 **requirement relating to Qwest's issuance of "firm order confirmations" that**
7 **deviates from Qwest's practice for other CLECs and that should be addressed**
8 **through the "Change Management Process," not through an ICA.**

8 These issues relate to the treatment of orders for which Qwest provides a jeopardy notice
9 indicating that the due date may be missed for a particular order. Qwest argued that such
10 procedures, because they impact all CLECs, should be handled in change management processes
11 and not in the interconnection agreement. The ALJ adopted Eschelon's position and the
12 following language:

13 12.2.7.2.4.4 A jeopardy caused by Qwest will be classified as a
14 Qwest jeopardy, and a jeopardy caused by CLEC will be classified
15 as Customer Not Ready (CNR). Nothing in this Section
16 12.2.7.2.4.4 modifies the Performance Indicator Definitions (PIDs)
set forth in Exhibit B and Appendices A and B to Exhibit K of this
Agreement.

17 12.2.7.2.4.4.1 There are several types of jeopardies. Two of these
18 types are: (1) CLEC or CLEC End User Customer is not ready or
19 service order is not accepted by the CLEC (when Qwest has tested
20 the service to meet all testing requirements.); and (2) End User
21 Customer access was not provided. For these two types of
22 jeopardies, Qwest will not characterize a jeopardy as CNR or send
23 a CNR jeopardy to CLEC if a Qwest jeopardy exists, Qwest
attempts to deliver the service, and Qwest has not sent an FOC
notice to CLEC after the Qwest jeopardy occurs but at least the day
before Qwest attempts to deliver the service. CLEC will
nonetheless use its best efforts to accept the service. If needed, the

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25 ²⁰ 47 U.S.C. Section 252 (b)(1). *See, e.g., Coserv Ltd. Liability Corp. v. Southwestern Bell*, 350
26 F.3d 482 (5th Cir. 2003) (defining the "open issues" state commissions are authorized to resolve
as arbitrators).

1 Parties will attempt to set a new appointment time on the same day
2 and, if unable to do so, Qwest will issue a Qwest Jeopardy notice
3 and a FOC with a new Due Date.

4 12.2.7.2.4.4.2 If CLEC establishes to Qwest that a jeopardy was
5 not caused by CLEC, Qwest will correct the erroneous CNR
6 classification and treat the jeopardy as a Qwest jeopardy.

7 The ALJ recognized that these provisions would change Qwest's processes in one respect: "...
8 if Qwest does not issue the FOC at least a day in advance then it cannot characterize the failure
9 to deliver as a CNR (customer not ready jeopardy)."²¹ The ALJ was comfortable with this
10 change because "Eschelon should not be required to commit resources to accept delivery after
11 being notified that Qwest might not be able to deliver the service as expected."²²

12 However, this conclusion ignores the record. Eschelon and Qwest agreed that they make
13 every effort to deliver service on time even without an FOC.²³ Thus, Eschelon will devote the
14 resources to accepting the service regardless of whether the missed delivery is classified as
15 CNR.²⁴ Furthermore, a CNR classification has no adverse consequences for Eschelon.²⁵ CNR
16 classification means that the order is excluded from performance measuring statistics.²⁶ Under
17 the ALJ's recommendation, it would now be counted as a Qwest miss. Furthermore, the current
18 process does not result in delays of service to Eschelon customers. The record demonstrates that
19 Eschelon and Qwest do a good job of scrambling and providing service either on time or as soon
20 as it is possible thereafter.²⁷

21 ²¹ ROO, p. 87, l. 19-20.

22 ²² ROO, p. 87, l.20-23.

23 ²³ Hearing Transcript, p. 82, line 14 – p. 84, line 1 and p. 343, lines 15-18; Hearing Exhibit Q-2
24 (Albersheim Rebuttal), p. 62, lines 5-9 and p. 63, lines 4-17.

25 ²⁴ Hearing Transcript, p. 343, lines 15-21 and p. 345, lines 6-17.

26 ²⁵ Hearing Transcript, p. 90, line 19 – p. 91, line 17; Hearing Exhibit Q-2 (Albersheim Rebuttal),
27 p. 62, lines 16-21 – p. 63, lines 1-3; Hearing Exhibit Q-4 (Albersheim Surrebuttal), p. 28, lines 8-
23.

28 ²⁶ *Id.*

29 ²⁷ Hearing Transcript, p. 343, lines 15-21 and p. 345, lines 6-17.

1 Qwest respectfully suggests that if the ICA is to contain language addressing this issue,
2 that the language reflect current processes. Qwest offers the following language for the
3 Commission's consideration:

4 12.2.7.2.4.4 A jeopardy caused by Qwest will be classified as a
5 Qwest jeopardy, and a jeopardy caused by CLEC will be classified
6 as Customer Not Ready (CNR). Nothing in this Section
7 12.2.7.2.4.4 modifies the Performance Indicator Definitions (PIDs)
8 set forth in Exhibit B and Attachments 1, 2 and 3 to Exhibit K of
9 this Agreement.

10 12.2.7.2.4.4.1 There are several types of jeopardies. Two of these
11 types are: (1) CLEC or CLEC End User Customer is not ready or
12 service order is not accepted by the CLEC (when Qwest has tested
13 the service to meet all testing requirements.); and (2) End User
14 Customer access was not provided. For these two types of jeopardies,
15 Qwest will not characterize a jeopardy as CNR or send a CNR
16 jeopardy to CLEC if a Qwest jeopardy exists, Qwest attempts to
17 deliver the service, and Qwest has not sent an FOC notice to CLEC
18 after the Qwest jeopardy occurs but ~~at least the day~~ before Qwest
19 attempts to deliver the service. CLEC will nonetheless use its best
20 efforts to accept the service. If needed, the Parties will attempt to set
21 a new appointment time on the same day and, if unable to do so,
22 Qwest will issue a Qwest Jeopardy notice and a FOC with a new Due
23 Date.

24 12.2.7.2.4.4.2 If CLEC establishes to Qwest that a jeopardy was
25 not caused by CLEC, Qwest will correct the erroneous CNR
26 classification and treat the jeopardy as a Qwest jeopardy.

19 This language reflects current processes and properly takes orders out of the performance
20 calculation in the PID when the parties are unable to deliver a circuit.

21 CONCLUSION

22 Qwest appreciates the hard work and careful consideration that went into the ROO.
23 Qwest requests that the ROO be adopted by the Commission with the modifications suggested
24 herein.

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DATED this 7th day of March, 2008.

PERKINS COIE BROWN & BAIN P.A.

By: _____


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ORIGINAL and 15 COPIES of the foregoing
hand delivered on March 7, 2008, to:

Docket Control
ARIZONA CORPORATION COMMISSION
1200 West Washington Street
Phoenix, Arizona 85007

COPY of the foregoing hand delivered
on March 7, 2008, to:

The Honorable Jane Rodda
Administrative Law Judge
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Phoenix, Arizona 85007

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Legal Division
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27 Kaye Leach

13141-0714/LEGAL14047631.1

Attachment A

ORIGINAL

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BEFORE THE ARIZONA CORPORATION COMMISSION

2007 JUL 18 P 3:38

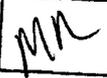
1
2 **MIKE GLEASON**
 Chairman
3 **WILLIAM MUNDELL**
 Commissioner
4 **JEFF HATCH-MILLER**
 Commissioner
5 **KRISTIN MAYES**
 Commissioner
6 **GARY PIERCE**
 Commissioner

AZ CORP COMMISSION
DOCKET CONTROL

Arizona Corporation Commission
DOCKETED

JUL 18 2007

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8
9 **IN THE MATTER OF THE PETITION OF**
10 **ESCHELON TELECOM OF ARIZONA, INC.**
11 **FOR ARBITRATION WITH QWEST**
12 **CORPORATION, PURSUANT TO 47 U.S.C.**
13 **SECTION 252 OF THE FEDERAL**
14 **TELECOMMUNICATIONS ACT OF 1996**

DOCKET NOS. T-01051B-06-0572
T-03406A-06-0572

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**JOINT NOTICE OF CLOSURE OF ARBITRATION ISSUE NO. 9-51 AND PARTIAL
CLOSURE OF ARBITRATION ISSUE NO. 22-90(f)**

Qwest Corporation and Eschelon Telecom of Arizona, Inc., submit this notice to inform the Commission that they have resolved Arbitration Issue No. 9-51 and partially resolved Issue No. 22-90(f).

Issue No. 9-51 is described in testimony and the Issues Matrix as "Application of UDF-IOF Termination (Fixed) Rate Element," and it is numbered in Eschelon's testimony as "Subject Matter No. 22A." The parties have closed this issue by agreeing to include the following language in their interconnection agreement at Section 9.7.5.2.1:

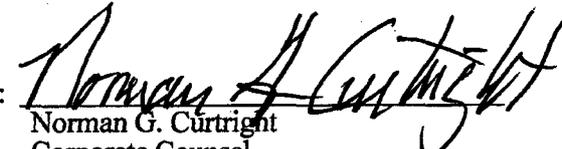
9.7.5.2.1. a) UDF-IOF Termination (Fixed) Rate Element. This rate element is a recurring rate element and provides a termination at the interoffice FDP within the Qwest Wire Center(s). A UDF-IOF termination charge applies per single strand termination or per pair termination at an FDP or like cross-connect point.

1 In addition to this language, the parties will include in Exhibit A of their interconnection
2 agreement the rate of \$3.33 at Section 9.7.4.1.4 for "UDF-IOF Single Strand Termination." With
3 this agreement, there are no remaining disputed issues relating to Issue No. 9-51.

4 With respect to Arbitration Issue No. 22-90(f), this issue concerns the appropriate
5 nonrecurring rates for "ICDF Collocation" for DS1 circuits, per two legs, and for DS3 circuits,
6 per two legs. This issue is among those described in testimony and the Issues Matrix as
7 "Unapproved Rates," which is numbered in Eschelon's testimony as "Subject Matter No. 45."
8 The parties have partially closed this issue by agreeing upon the nonrecurring rate of \$75.83 for
9 ICDF Collocation for DS1 circuits, per two legs. This rate will be included in Section 8.8.3 of
10 Exhibit A to the parties' interconnection agreement.¹ The parties have not agreed upon the
11 nonrecurring rate for ICDF Collocation for DS3 circuits, per two legs, and that portion of Issue
12 No. 22-90(f) remains in dispute.

13 RESPECTFULLY SUBMITTED this 18th day of July, 2007.

14 QWEST CORPORATION

15
16 By: 
17 Norman G. Curtright
18 Corporate Counsel
19 20 East Thomas Road, 16th Floor
20 Phoenix, Arizona 85012
21 Telephone: (602) 630-2187

22
23
24
25 _____
26 ¹ The parties also have agreed to update the recurring rate for this rate element by adopting the
monthly rate of \$0.86.

1 ORIGINAL and 13 copies hand-delivered
for filing this 18th day of July, 2007, to:

2

3 Docket Control
ARIZONA CORPORATION COMMISSION
4 1200 West Washington Street
Phoenix, AZ 85007

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this 18th day of July, 2007, to:

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Diane Hyman