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BEFORE THE ARIZONA CORPORATION COMMISSION

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

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

QWEST CORPORATION'S  
EXCEPTIONS TO ALJ'S  
RECOMMENDED ORDER

Qwest Corporation ("Qwest") hereby submits Exceptions to the Recommended Opinion and Order filed in this docket ("Recommended Order"). The Recommended Order erroneously finds that Qwest breached its interconnection agreement ("ICA") with Eschelon Telecom of Arizona, Inc. ("Eschelon") by jointly developing expedite procedures for unbundled loops in the Change Management Process adopted by the Arizona Corporation Commission ("Commission"). The Recommended Order requires Qwest to expedite emergency orders for unbundled loops *for all CLECs in Arizona without charge*. In so doing, the Recommended Order negates several amendments to interconnection agreements in violation of law and without factual basis, sets a below-TELRIC rate for expedites, and extends the Commission's ratemaking authority far beyond that authorized by law. Qwest therefore takes exception with these findings and conclusions. Qwest also seeks clarification of ¶38 of the Recommended Order to ensure that the Recommended Order only intended to obligate Qwest to provide free expedites for emergency

conditions for the duration of the existing Eschelon ICA, and not beyond. Qwest respectfully requests that the Commission modify the Recommended Order as set forth below.

**I. FACTS**

“Expedites are the ability to request provisioning of a service order faster than ... the standard provisioning interval.” Recommended Order at 5, n.4. Under the current ICA, the parties “shall mutually develop expedite procedures....” ICA at § 3.2.2.12.<sup>1</sup> On three separate occasions, the ICA states that “expedite charges may apply” when Eschelon seeks to expedite an order. ICA at §§ 3.2.4.1, 3.2.4.3.1 & 3.2.4.4. The Recommended Order recognizes these facts. Order at p. 10:7 & ¶20.

During the Section 271 process, the telecommunications industry created the Change Management Process (“CMP”). *Exhibit Q-3 (Martain Direct) at 5:23-6:8 & 7:14-8:6; Exhibit E-1, Attachment A-9 at 166-272.* The Commission approved this process. The CMP is where all types of processes are developed. *Bonnie Johnson Transcript at 31:23-32:20.* The Recommended Order recognized that “CMP can be an effective tool for Qwest and those entities with interconnection agreements with Qwest to mutually manage processes and procedures in an industry with rapidly changing technologies.” Recommended Order at 26:17-19. The Expedites and Escalations Process is one of the processes that evolved in CMP. Between 2001 and the present, the expedite process was modified 18 times in CMP. *Jill Martain Transcript 387:10-21.*

Eschelon participated in each and every CMP meeting, including those where the expedite process was developed:

Eschelon by far is the largest user of our CMP process. They routinely use the CMP to create processes to implement the terms of their Interconnection

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<sup>1</sup> Eschelon and Qwest have arbitrated a new ICA before the Arizona Commission. The Commission’s decision is still subject to ongoing debate; however, the new ICA should take effect relatively soon.

Agreement. They have attended 100 percent of the monthly meetings since April of 2001. Eschelon alone has submitted 19 percent of the total change requests that were accepted by Qwest. Of the 63 requests received to change a disposition of a Qwest notice Eschelon submitted 41 or 65 percent of those requests. For example, if a CLEC believes that a Level II notice that Qwest issues to document an undocumented existing process is really a change to a manual process, they can request that they change the level of disposition from a Level 2 to a Level 3 notice. They have submitted comments on approximately 50 percent of all of the e-mails that have been submitted to the CMP mailbox. They are a member of the Oversight Committee, which requires that their members have a comprehensive knowledge of CMP processes. They were the voice of the CLEC community providing readouts from the meeting that is held with the CLEC community the Monday before Qwest's CMP meeting. And they have routinely asked for and obtained changes to the process. Eschelon has submitted 228 change requests of which 188 have been implemented. It's obvious[] from ... how often Eschelon uses the CMP that it does so to implement the processes that will be used with the Interconnection Agreement.

*Jill Martain Transcript at 327:1-328:4.* Indeed, Eschelon recommended and obtained changes to the expedite process in CMP. *Id. at 330:21-331:5; 411:18-23.*

Historically, CLECs could obtain expedited due dates only when a defined set of emergency conditions existed. *Exhibit Q3 (Martain Direct) at 34-35.* However, in February 2004, Covad submitted a change request in CMP to modify the Expedites Process so CLECs could obtain an expedited due date on certain products for any reason. *Bonnie Johnson at 43:19-22; Renee Albersheim at 203:4-11; Jill Martain at 328:19-329:23.* This Change Request (Version 11) spawned the "Pre-Approved Expedite" process. Any CLEC that opted into this process agreed they could request and obtain expedited due dates for certain products (primarily unbundled loops); however, all expedited due dates for these products would be subject to a \$200 per day fee. Covad and others willingly agreed to pay a \$200 per day fee for the ability to obtain expedites for any reason. *Jill Martain Transcript at 328:19-329:23.* In order to qualify for the new process, CLECs were required to sign a contract amendment. *Id. See also Bonnie Johnson Transcript at 44:14-17.* Once a CLEC signed the amendment, it was well known and understood that the old

emergency process was no longer available to the CLEC for all products subject to the Pre-Approved Expedites Process. Eschelon admits this fact. *Bonnie Johnson Transcript at 44:18-45:13* (“That is true. ... -- once you signed that amendment, you could no longer get emergency expedites, even if the condition existed, for the products that were on the preapproved list.”). No one disputed or challenged the new process, and many CLECs opted into the new process and voluntarily signed the requisite contract amendment. *Jill Martain Transcript at 408:23-409:15*.

On September 12, 2005, Qwest proposed in CMP that 2-wire and 4-wire loops become a part of the new Pre-Approved Expedites process. *Jill Martain Transcript at 332:11-18* (Version 27). This change was made so that all design services (which includes all types of unbundled loops) would be subject to the Pre-Approved Expedites process, and all POTS services would be subject to the emergency Expedites Requiring Approval process. *Id. at 332:11-333:2*. The only party who filed comments about the proposed change was Eschelon, and they “acknowledge[ed] that the two-wire/four-wire would be included, and they were inquiring about the rate.” *Id. at 333:20-22*. Therefore, Version 27 of the Expedites Process went into effect without objection.

After Version 27 went into effect, the CLEC community had two choices. First, some CLECs (like Eschelon) continued to use the old process; they could only obtain expedited due dates when emergency conditions existed, and, when they existed, Qwest would expedite the order free of charge. *Id. at 329:20-330:13*. Second, other CLECs (like Covad) used the new process. They could expedite POTS orders for free under emergency conditions and expedite unbundled loop orders by paying a \$200 per day fee. *Id. at 408:22-409:15*. Qwest had also transitioned all of its retail customers and carrier customers to the new process; thus, there was exact parity for everyone, except those like Eschelon who had not opted into the new process. *Id. at 330:13-19*.

Various CLECs were caught red-handed abusing the emergency conditions process, for example using the same doctor's excuse over and over again to justify a purported "medical emergency." *Id. at 400:9-402:24; Exhibit Q-3 (Martain Direct) at 24:15-25:11.* As a result, Qwest determined it should level the playing field, eliminate the disparity, and treat all customers – CLECs, IXCs and retail customers – identically. *Jill Martain Transcript at 332:17-333:1.*

As a result, on October 19, 2005, Qwest proposed Version 30 to the Expedite Process in CMP. *Exhibit Q-4 (Martain Rebuttal) at Attachment JM-R7.* This entire dispute centers on Version 30. While some CLECs (including Eschelon) raised concerns about the process, it is undisputed that Version 30 was jointly developed in CMP; Eschelon participated in the meetings where Version 30 was developed; and Qwest followed the CMP processes "to the letter" as Version 30 was developed. *Jill Martain Transcript at 333:23-334:15.* It is true that Version 30 impacted Eschelon by forcing them to pay \$200 per day to expedite unbundled loop orders; however, Version 30 had no impact on the vast majority of CLECs who had already opted into the new process and had already bound themselves to pay the \$200/day fee to expedite unbundled loop orders. *Jill Martain Transcript at 408:22-409:15.*<sup>2</sup>

On the very day Version 30 went into effect – January 3, 2006 – Eschelon asked Qwest to expedite a due date for an unbundled loop using the old emergency Expedites Requiring Approval process. *Jean Novak Transcript at 428:21-24.* Qwest rejected the request because Eschelon had not agreed to pay \$200/day to expedite such orders. On March 8, 2007, Qwest received a request to disconnect a DS1 Capable Loop serving the Rehabilitation Center in Mesa, Arizona. The Rehabilitation Center at that location provides jobs for people with disabilities.

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<sup>2</sup> This \$200 per day fee is consistent with equivalent rates in the industry. *Terry Million Transcript at 497:12-23 & 529:23-25* (AT&T charges \$675, Verizon between \$500 and \$1500 per expedite, and BellSouth also charges \$200 per day).

*Jean Novak Transcript at 429:7-10.* The Rehabilitation Center had several phone lines into the facility including business lines and a separate DS1 Capable Loop that was broken down into individual lines for each room.<sup>3</sup> *Id. at 429:11-14.* Qwest disconnected the loop as requested; however, it ended up that Eschelon had made a mistake and had asked Qwest to disconnect the wrong loop.

The facts concerning what occurred at the Rehabilitation Center are undisputed:

- On March 8, 2006, Qwest received an order from Eschelon to disconnect the DS1 Capable Unbundled Loop (otherwise known as a T1) serving the Rehabilitation Center's individual rooms. Qwest confirmed to Eschelon that Qwest had received the Eschelon order and confirmed that Qwest would disconnect the line on March 15 as requested. Qwest sent the confirmation to Eschelon twice.
- On March 15, Qwest disconnected the loop on schedule as requested.
- Eschelon contacted Qwest and asked that the line be repaired not knowing that another department within Eschelon had issued a disconnect order. However, issuing a repair ticket against a disconnected service is an improper process. Thus, the disconnection was processed as scheduled.
- The Rehabilitation Center lost the DS1 portion of its service on March 15, due to Eschelon's own error. Eschelon acknowledges as much.
- On March 16, Eschelon submitted a new order for a DS1 Capable Unbundled Loop. The order did not request an expedited due date.
- On Friday, March 17, 2006 at 12:38 p.m., Eschelon called and asked that the order be expedited no later than Monday, March 20, 2006.
- One hour later, Qwest denied the expedite request because Eschelon did not meet the criteria for expediting an order for an Unbundled Loop, which requires a signed agreement.
- Over the weekend, Eschelon ordered a DS1 private line from Qwest's tariffs (the retail equivalent of a DS1 Capable Loop), and Qwest charged Eschelon \$1800 to expedite the order (\$200 per day as expressly set forth in the tariff).

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<sup>3</sup> Contrary to the suggestions in the Recommended Order, at this location, the Rehabilitation Center is not a medical facility providing in-patient, outpatient or residential services. Instead, it is an adult day care center that teaches disabled persons a skill. *Exhibit Q-6, p.4:5-26 & JN-R4.*

- Qwest got the DS1 private line up and operational the afternoon of March 20, 2006 – the very day requested by Eschelon.

Recommended Order at 8-9. There is disputed testimony about whether these facts would have qualified as an emergency condition under the old emergency process. Eschelon used the situation at the Rehabilitation Center as the basis of its complaint in this proceeding.

## II. ARGUMENT

### A. The ALJ Erroneously Concluded that Qwest Breached the Eschelon ICA by Developing Version 30 in CMP.

As stated above, the ICA requires the parties to “mutually develop expedite procedures” and expressly provides that on expedited orders, “expedite charges may apply.” By definition, processes implemented in the Change Management Process are “mutually developed.” *See, e.g., Jill Martain Transcript at 336:3-6 & 336:18-23.* Indeed, Qwest and Eschelon went to CMP every time the word “develop” was used in the ICA. *See Bonnie Johnson Transcript at 56:16-60:14 & 61:15-63:13.*

Despite this, the Recommended Order found that Version 30 violated Eschelon’s ICA because “[t]here is no evidence Eschelon ever agreed to the Version 30 expedite process....” Recommended Order at 25:21-26. However, the ICA does not state that the parties “shall mutually develop *and agree*” on an expedite process. The ICA just requires that expedite processes be mutually developed. The Recommended Order erroneously reads the word “agree” into §3.2.2.12 of the parties’ ICA.

It is contrary to traditional contract interpretation to add language to an already clear written contract provision. “The object of all rules of interpretation is to arrive at the intention of the parties *as expressed in the contract.*” *R. Arizona Jury Instructions (Civil) 4<sup>th</sup> Contract 26 n.1* (emphasis added, quoting *United Cal. Bank v. Prudential Ins. Co.*, 140 Ariz. 238, 261, 681 P.2d

390, 413 (Ct. App. 1983)); *Grubb & Ellis Mgmt. Servs.*, 213 Ariz. at 86 (court must enforce contract as written). “[P]romises should not be found by process of implication if they would be inconsistent with express provisions that there is no reason to set aside or to hold inoperative.” 6-25 Corbin on Contracts §564. “When the language of a contract is clear and unambiguous, effect must be given to its terms, and the court, under the guise of constructions, cannot reject what the parties inserted or insert what the parties elected to omit.” *DeLoach v. Lorillard Tobacco Co.*, 391 F.3d 551, 558 (4th Cir. 2004) (internal quotation marks omitted). *See, e.g., Omni Quartz v. CVS Corp.*, 287 F.3d 61, 64-65 (2d Cir. 2002) (trial court correctly enforced express language of contract; “[w]hatever Omni’s greater hopes or expectations may have been, they were not part of the parties’ ultimate agreement.”).

It is especially true in this case that inserting the word “agree” where the parties omitted it in §3.2.2.12 would be error. First, the contract contains an integration clause stating that the contract can only be amended by the parties in writing. *Exhibit C-1 at §53.1*. Adding the word “agree” in this section directly contradicts the integration clause. Second, the tribunal must interpret this provision of the ICA in the context of the whole agreement: “We interpret contracts to give effect to all their parts. .... When interpreting a contract . . . it is fundamental that a court attempt to ascertain and give effect to the intention of the parties at the time the contract was made if at all possible.” *Hanson v. Tempe Life Care Vill., Inc.*, 162 P.3d 665, 666-667 (Ariz. Ct. App. 2007) (internal quotation marks omitted; citing *inter alia, Kintner v. Wolfe*, 102 Ariz. 164, 168, 426 P.2d 798, 802 (1967)).

Where a contract plainly uses a specific word or phrase (such as that the parties will “develop and agree” versus, the parties will “develop”), the absence of that phrase in another provision shows the parties’ intent to omit it as to that provision. *See, e.g., In re Hoffman Bros.*

*Packing Co.*, 173 B.R. 177, 184 (Bankr. Fed. App. 1994) (in interpreting union's agreement with employer, "[t]he union should be bound not only by the language it chose to use but also by what it chose to omit," citing *KCW Furniture, Inc. v. NLRB*, 634 F.2d 436 (9th Cir. 1980)). Cf. *Western Vegetable Oils Co. v. Southern Cotton Oil Co.*, 141 F.2d 235, 237 (9th Cir. 1944) (deliberate omission of arbitration provision from form contract showed "intention to abrogate the arbitration rule."). *Here, Eschelon and Qwest used the word "agree" to add substantive requirements in at least 82 other provisions of the ICA. Renee Albersheim Direct at 188:8-0189:23. This shows the absence of the word "agree" in Section 3.2.2.12 was the parties' intentional omission from that provision.* Taken in the context of the rest of the ICA, the absence of the word "agree" in this section shows the parties intended that omission. As such, the conclusion in the Recommended Order that Qwest breached the ICA because Eschelon did not "agree" to Version 30 is erroneous as a matter of law.

Qwest therefore requests that the Commission reject the Recommended Order in its entirety because Qwest did not breach its ICA with Eschelon.

**B. The ALJ's Finding that Qwest Must Offer All CLECs in Arizona Free Expedites When Emergency Conditions Exist Violates Section 251(a) of the 1996 Act.**

The Recommended Order recognizes that "some CLECs did not object to the new [expedite] process...." Recommended Order at 25:17-18. Indeed, it is undisputed that many CLECs voluntarily agreed to the new process, agreed to pay a \$200 per day fee, signed amendments to their ICAs, and the Commission allowed these contract amendments to take effect.<sup>4</sup> Many of these CLECs agreed to the process well before Version 30 was proposed and

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<sup>4</sup> There are several expedite amendments that took effect by operation of law in Arizona: XO (Docket No. 05-0422) became effective by operation of law November 17, 2004; New Edge (Docket No. T-01051B-04-0776) became effective by operation of law November 26, 2004; Covad was sent to the Commission on September 20, 2004 and became effective by operation of law; AT&T (Docket No. 05-0376, Decision #67995) became effective by operation of law on June 24, 2005; TCG Phoenix (Docket No. 05-0452)

adopted in CMP. *Exhibit Q-1 (Albersheim Direct) at 9:13-21*. Despite these undisputed facts, the Recommended Order finds that “Qwest should provide expedites in delineated emergency situations to all Arizona CLECs on the same terms it provides them to Eschelon” because the Commission set an ICB rate for expedites in the cost docket. Recommended Order at 28:16-19.

The Commission cannot overrule voluntarily negotiated contract terms, especially those the Commission already allowed to take effect pursuant to Section 252(e).<sup>5</sup> Section 252(a)(1) of the 1996 Act provides that parties have the right to negotiate the terms of interconnection agreements, irrespective of whether those terms exceed or fall short of the substantive standards of the 1996 Act, and that such agreements are binding:

Voluntary negotiations. Upon receiving a request for interconnection, services, or network elements pursuant to section 251, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers *without regard to the standards set forth in subsections (b) and (c) of section 251*. The agreement shall include a detailed schedule of itemized charges for interconnection and each service or network element included in the agreement. The agreement, including any interconnection agreement negotiated before the date of enactment of the Telecommunications Act of 1996, shall be submitted to the State commission under subsection (e) of this section.

47 U.S.C. § 252(a)(1) (emphasis added).

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became effective by operation of law on July 23, 2005; McLeod was sent to the Commission on April 1, 2005 and became effective by operation of law; MCIMetro Access was sent to the Commission on March 16, 2005 and became effective by operation of law; Cox Communications was sent to the Commission on November 16, 2004 and effective by operation of law; and Allegiance Telecom was sent to the Commission on October 18, 2004 and became effective by operation of law. All of these amendments became effective before Version 30 was even proposed in CMP.

<sup>5</sup> The Commission has a rule that allows ICAs to take effect by operation of law: Rule R14-2-1508 provides that “[a]ny amendments to an interconnection agreement shall be filed with the Commission and, if not rejected by the Commission within 30 days of filing, such amended agreements will become effective.” The rule continues that the Commission may reject amendments due to “discrimination against nonparty telecommunications carriers, lack of consistency with the public interest, convenience, and necessity, or lack of consistency with applicable state law requirements.” The Commission never rejected any of the expedite amendments.

In interpreting this statute, the United States Supreme Court has expressly stated that carriers can enter into interconnection agreements without regard to the requirements imposed by Section 251(b) and (c) of the 1996 Act:

As we have previously described ... an incumbent LEC **'may negotiate and enter into a binding agreement' with the new entrant 'to fulfill the duties' imposed by §§ 251(b) and (c), but 'without regard to the standards set forth'** in those provisions. §§ 252(a)(1), 251(c)(1). That agreement must be submitted to the state commission for approval, § 252(e)(1), which may reject it if it discriminates against a carrier not a party or is not consistent with 'the public interest, convenience, and necessity,' § 252(e)(2)(A).

*Verizon Md., Inc. v. PSC*, 535 U.S. 635, 638-639 (2002) (emphasis added; citing *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 371 (1999)). The Ninth Circuit found likewise: "[A] requesting carrier must make a request for interconnection to an incumbent carrier, which 'may negotiate and enter into a binding agreement with the requesting . . . carrier . . . without regard' to the substantive standards of § 251." *W. Radio Servs. Co. v. Qwest*, 530 F.3d 1186, 1190 (9th Cir. 2008) (citing Section 252(a)(1)). So has the Tenth Circuit:

The Act directs telephone companies to attempt to agree upon the terms of interconnection through negotiation. § 252(a)(1). If they cannot agree, the Act directs the governing state commission to arbitrate or mediate disputed issues. *Id.* § 252(b)(1). **The duties which the Act imposes are only minimum requirements, and telephone companies may enter into interconnection agreements "without regard" to the Act's requirements. *Id.* § 252(a)(1). The state commission must, however, approve the final agreement. *Id.* § 252(e)(1).**

*Southwestern Bell Tel. Co. v. Brooks Fiber Communications of Okla., Inc.*, 235 F.3d 493, 496-97 (10th Cir. 2000) (emphasis added). Thus, in negotiating interconnection agreements, parties need not follow the standards set by the Act.

Moreover, once local exchange carriers agree to terms, they are bound to follow them, regardless of whether those terms adopt the federal standards. *Verizon Maryland*, 535 U.S. at

638. On remand from the Supreme Court, the Fourth Circuit elaborated on the binding nature of negotiated ICA terms:

If the parties enter into an agreement by voluntary negotiation, they may agree ‘without regard to the standards set forth’ in §251(b) and §251(c). *Id.* §252(a)(1). They must still, however, spell out how they will fulfill the duties imposed by §251. *See id.* §251(c)(1). When an agreement, like the one voluntarily negotiated by Verizon and MCI, is submitted to the state commission for approval, the commission may reject it only if it discriminates against a carrier not a party, or it is not consistent with ‘the public interest, convenience, and necessity.’ *Id.* §252(e)(2)(A). **Once the agreement is approved, the 1996 Act requires the parties to abide by its terms. See §§251(b)-(c).**

*Verizon Md. Inc. v. Global NAPs, Inc.*, 377 F.3d 355, 364 (4<sup>th</sup> Cir. 2004) (emphasis added). “Federal law thus gives [a party to an interconnection agreement] the right to insist that it be held only to the terms of the interconnection agreement to which it actually agreed.” *Verizon Md. Inc. v. RCN Telecom Servs.*, 232 F. Supp. 2d 539, 551 (D. Md. 2002), *rev’d in part on other grounds, Verizon v. Global NAPs*, 377 F.3d 355 (4<sup>th</sup> Cir. 2004). *See also AT&T Communs. v. Pac-West Telecomm Inc.*, 2008 U.S. Dist. LEXIS 61740, \*32-35 (N.D. Cal. Aug. 12, 2008) (discussing the “the FCC’s goals of encouraging voluntary negotiations to address intercarrier compensation,” and importance that state commission decisions not override or conflict with such negotiated agreements).

In this case, the Recommended Order, with one stroke of the pen, proposes to overrule many voluntarily negotiated interconnection agreement amendments that the Commission allowed to take effect, even though there was not any “evidence of the terms of interconnection agreements with other carriers” before the Commission. Recommended Order at 28:14-15. It is a violation of the Act to extend this decision to other carriers. *Pacific Bell v. California Public Utilities Commission*, 325 F.3d 1114, 1121 (9<sup>th</sup> Cir. 2003). In *Pacific Bell*, the California PUC issued a decision and “did not consider or analyze any specific interconnection agreement.” *Id.*

The Court found that issuing an industry impacting decision without reference to the ICAs, and overruling ICAs in the process, constituted “retroactive rule-making” and violated the 1996 Act:

The CPUC’s resort to its general rule-making authority also is inconsistent with the Act because it effectively changes the terms of “applicable interconnection agreements” in California, and therefore contravenes the Act’s mandate that interconnection agreements have the binding force of law. *See 47 U.S.C. § 252(a)(1)*. Indeed, the point of § 252 is to replace the comprehensive state and federal regulatory scheme with a more market-driven system that is self-regulated through negotiated interconnection agreements. *See, e.g., Bell Atl.-Pa., 271 F.3d at 499* (“The Act’s clear preference is for [ ] negotiated agreements.”).

*Id.* at 1127. The court continued:

Although the CPUC’s generic orders were adopted pursuant to its general rule-making authority, the district court suggested that in doing so, it was interpreting ‘standard agreements’ under § 252. The record does not support this characterization of the two orders. It is clear from the record that when the CPUC issued its orders, it did not consider a specific interconnection agreement or even a specific reciprocal compensation provision. Furthermore, there is no evidence in the record that there was a ‘model’ or ‘standard’ agreement that the ILECs and CLECs in California followed in negotiating their interconnection agreements. To suggest that the CPUC could interpret an agreement without reference to the agreement at issue is inconsistent with the CPUC’s weighty responsibilities of contract interpretation under § 252. As noted by one court, ‘the agreements themselves and state law principles govern the questions of interpretation of the contracts and enforcement of their provisions.’ *Southwestern Bell v. PUC, 208 F.3d [475] at 485 [(5th Cir. 2000)]*.

*Id.* In sum, the court rejected the California PUC’s attempt to use general regulatory authority to override interconnection agreements.

The *Pacific Bell* decision is remarkably similar to the facts presented in the Recommended Order, and shows that the Commission cannot use the Eschelon ICA as a proxy for all other ICAs. This is especially true when it is an undisputed fact presented at hearing that many CLECs voluntarily agreed to pay the \$200 per day fee to obtain expedites. The court correctly found “inter-connection agreements have the binding force of law.” *Id.* (citing 47 U.S.C. § 252(a)(1)). In sum, the Act requires the Commission to enforce, not eviscerate, the

contract amendments that adopted the \$200 per day expedite fee. Language in the Recommended Order mandating that Qwest expedite orders for unbundled loops for free, instead of the negotiated \$200 per day, violates the Act. As such, the Commission should amend the Recommended Order by making the changes set forth in the attached *Exhibit A*.<sup>6</sup>

C. **The Portion of the Recommended Order Stating That Qwest Must Provide Expedites for "Free" Violates the Act.**

The Recommended Order is also contrary to law insofar as it requires Qwest to provide expedites under specified emergency conditions *free of charge* to Eschelon and to all other CLECs in Arizona. The Recommended Order states:

The ICA provides that Qwest may charge for expedites. *Specifically, the ICA provides that the charge for expedites will be on an ICB*, as had been approved by the Commission in the Qwest Cost Docket. Under ICB pricing, Qwest is permitted to charge a fee based on the costs it incurs for the service. Qwest's \$200 per day charge is not ICB pricing, but is, as Qwest acknowledges, a market-based rate. It is not clear from this record whether Qwest incurs any additional costs for providing an expedite since the process only provides for expedites if Qwest has resources available. There may be some cost associated with determining if there are resources available after a request to expedite is received, but we cannot determine here what those costs would be. Eschelon and Qwest are in the midst of finalizing a replacement ICA, and the provisions of that contract will govern the expedite process going forward. However, for the duration of this contract, Qwest should provide expedites to Eschelon for all types of products in emergency situations for no additional charge, which conforms to the parties' long-standing practice prior to January 2006. The appropriateness of the ICB pricing for expedites will be considered in Phase III of the Cost Docket.

Recommended Order at 26:1-13 (footnote omitted; emphasis added). In the specific findings and conclusions, the Recommended Order expanded on this discussion:

29. It is reasonable to require that for the duration of the current ICA, Eschelon is entitled to receive expedites for all types of products in the delineated emergency circumstances for no additional charge, and shall pay the \$200 per day charge for non-emergency expedites.

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<sup>6</sup> The attached Exhibit presumes the Commission disagrees with Qwest and finds that Qwest breached the existing ICA with Eschelon. If the Commission agrees that Qwest did not breach the ICA, the entire Recommended Order must be re-written. However, if the Commission focuses on the errors of fact and law beyond the breach, it should make the changes set forth in the attached Exhibit.

30. End users do not distinguish between "design" and "non-design" services.

31. Qwest provides expedites to its own retail customers for no additional charge in emergency services. It would be unfair not to allow Eschelon to provide expedites to its end users on the same terms as Qwest provides the service to its customers, regardless of any other distinction between "design" and "non-design" services.

Recommended Order at 31 ¶¶29-31. Thus, the Recommended Order acknowledges that Qwest may incur additional costs in expediting due dates, but orders Qwest to provide expedites under emergency conditions for free to all CLECs under the theory that, because Qwest provides its own customers with expedites (on non-design services) for free, it must do so for CLECs as well (on all services). This conclusion is incorrect at every level.

**1. *Qwest Does Not Expedite Orders for Comparable Services For Its Retail Customers for Free; The Recommended Order Errs in Comparing Unbundled Loops to POTS Services.***

Qwest does not disagree that as a general matter it should provide comparable treatment for CLECs as it does for its own retail customers. However, that rule cannot be applied if services are not comparable. The law is settled that the provisioning of POTS services are not analogous to unbundled loops, and the Recommended Order errs by equating the two, and concluding that Qwest must provide expedites for free because it does so for its own customers. Specifically, the Recommended Order states that because Qwest expedites POTS services at no charge for its retail customers, it must expedite orders for unbundled loops for free for CLECs. This is simply incorrect as a matter of law.

The FCC and state commissions across the land have rejected this notion of comparing loops with POTS services. *See e.g., In re BellSouth Corp.*, 13 FCC Rcd 20599, 20717 ¶198 (FCC Oct. 13, 1998) ("the provisioning of unbundled local loops has no retail analogue"); *Id.* at

¶87 n.248 (ordering and provisioning of UNEs generally has no retail analogue); *In re Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 14 FCC Rcd 20912, 20962 n.248 (FCC Dec. 9, 1999); *21st Century Telecom of Illinois, Inc. v. Illinois Bell Telephone Company*, 2000 Ill. PUC LEXIS 489 \*74-75 (Ill. PUC June 15, 2000) (work required to provision an unbundled loop is substantially more extensive than work required to do 'line translation' to provision a retail POTS line). ***Indeed, Staff specifically recognizes "[t]here is no 'retail analogue for expedites of the installation of unbundled loops.'*** ***Exhibit S-1 at 32:19-33:11*** (emphasis added). In Arizona, as in all other Qwest states, the provisioning of unbundled loops are, and always have been categorized as, UNEs that have no retail analog.

Despite this clear national precedent, the Recommended Order rationalizes that because CLECs use unbundled loops to compete against Qwest's POTS services, the same expedite conditions must apply to unbundled loops as well. That conclusion is wrong, because unbundled loops and POTS services are not analogous.

The conclusion also overstates the practical differences. CLECs often use DS1 or DS3 Capable Loops (which are unbundled loops) to provide voice services to their customers. In this case, for example, Eschelon ordered a DS1 Capable Loop for the Rehabilitation Center. Qwest too uses comparable DS1 and DS3 private lines to provide POTS services. ***Exhibit Q-1 (Albersheim Direct Testimony) at 12:18-24.*** In the 271 process, the Commission already found DS1 and DS3 private lines ***are*** the retail analogs to DS1 and DS3 Capable Loops. *Id.* For all non-POTS services (including the DS1 and DS3 Capable Loops), Qwest charges all customers that order design services (such as unbundled loops and private lines) a \$200 per day fee.

**Exhibit Q-3 (Martain Direct Testimony) at 32-35.** Thus, there is no disparate treatment between Qwest's expedite charges for the very category of unbundled loop Eschelon used in this very case at the Rehabilitation Center, or in any case where the customer gets its service via DS1 or DS3 circuits.

Additionally, Qwest has kept "parity" for services which are categorized as "POTS." Qwest expedites orders for all POTS services (for Qwest retail and CLECs alike) under emergency circumstances at no charge. **Exhibit Q-1 (Albersheim Direct Testimony) at 10:7-26.** Eschelon admits that it serves a large percentage of its customers in Arizona – 17 percent – through a product known as QPP. **Exhibit E-1 (Johnson Direct) at 5:7-15.** QPP is a POTS service. **Bonnie Johnson Transcript at 42:8-23.** Thus, Eschelon can obtain emergency expedites for free by ordering QPP. **Bonnie Johnson Transcript at 42:8-23.**

For the foregoing reasons, the Recommended Order's conclusion that Qwest must expedite orders for unbundled loops for free because Qwest does not charge for expedites for POTS services in emergency situations, is in error. In fact, the evidence is clear that Qwest charges the same fee to expedite analogous retail services. As such, the Commission should amend the Recommended Order by making the changes set forth in the attached **Exhibit A.**<sup>7</sup>

**2. Expediting Orders for Unbundled Loops is Not a Section 251 Service; as Such, the Commission Does Not Have Authority to Order TELRIC Pricing.**

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

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<sup>7</sup> The attached Exhibit presumes the Commission disagrees with Qwest and finds that Qwest breached the existing ICA with Eschelon. If the Commission agrees that Qwest did not breach the ICA, the entire Recommended Order must be re-written. However, if the Commission focuses on the errors of fact and law beyond the breach, it should make the changes set forth in the attached Exhibit.

December 22, 1999). Qwest does that by provisioning unbundled loops in accordance with the standard provisioning interval. See e.g., *Bell Atlantic New York*, 15 FCC Rcd 3953 at ¶8. This is all that Section 251(c)(3) of the Act requires. Thus, an expedite is by definition a request to get more than a meaningful opportunity to compete, something more than Section 251 requires.

As the Commission knows, it does not have jurisdiction to set TELRIC rates on products and services beyond that specifically mandated by Section 251. In *Qwest Corporation v. Arizona Corporation Commission*, 496 F. Supp. 2d 1069 (D. Ariz. 2007), the Court found that the Commission did not have authority to set TELRIC rates for anything other than services that the FCC required to be unbundled by 251(c)(3):

Because the Court holds that the ACC does not have authority or jurisdiction to impose Section 271 requirements into ICAs, it follows that the ACC does not have authority to set prices for those 271 elements. Further, even if the ACC did have some sort of authority to set prices for Section 271 elements, it would be inappropriate to use TELRIC pricing for those elements in light of FCC rulings.

*Id.* at 1079. See also *Verizon New England, Inc. v. Maine Public Utilities Commission*, 509 F.3d 1, 9, *rehearing den'd*, 509 F.3d 13, (1<sup>st</sup> Cir. 2007) (“One issue is whether the states can require that section 271 elements be priced at TELRIC rates. The FCC orders provide carriers the authority to charge the potentially higher just and reasonable rates, in order to limit subsidization and to encourage investment by the competitors. To allow the states to require the lower TELRIC rates directly conflicts with, and undercuts, the FCC's orders. Under preemption principles the state orders must in this respect give way.”).<sup>8</sup>

The FCC has not stated that Section 251 requires BOCs to expedite unbundled loop orders. The FCC held that BOCs like Qwest must simply provision unbundled loops in

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<sup>8</sup> Instead of TELRIC rates, FCC orders require “just and reasonable rates.” Many other CLECs have opted into Version 30 of the Expedite Process. Qwest is not aware of any CLEC complaining about the \$200/day rate except for Eschelon. *Exhibit Q-1 (Albersheim Direct) at 9:13-21*. Given that others have agreed to pay this rate, and others in the industry have similar rates, there are no facts to suggest the rate is unreasonable. Indeed, all of the evidence is to the contrary.

accordance with the standard provisioning interval. *See e.g., Bell Atlantic New York*, 15 FCC Rcd 3953 at ¶8. Any attempt by the Commission to enforce TELRIC rates (i.e., an ICB rate) when Qwest expedites an order for an unbundled loop goes beyond anything required by the FCC, conflicts with decisions of the FCC, and violates the Act.

The Commission has nearly stated as much, in arbitrating this issue for the Qwest-Eschelon new interconnection agreement.

We find that generally Qwest meets its obligation to provide access to the UNE by provisioning the service within the approved service intervals. The service intervals were set in order to provide CLECs with a meaningful opportunity to compete. We find no convincing authority for us to conclude that expedites are required to provide access to the UNE and have to be provided at TELRIC rates. By definition expedites are "superior" to regular service intervals. Providing an expedite for any reason at a nominal fee would in essence eliminate the approved service interval as an effective measure of Qwest's performance. Under Eschelon's proposal, which allows expedites at a nominal fee, Qwest has legitimate concern that CLECs would routinely request expedites, which could tax resources and affect Qwest's ability to provide service.

*In re Petition of Eschelon Telecom, Inc. for Arbitration with Qwest Corporation Pursuant to 47 USC Section 252(b) of the Federal Telecommunications Act of 1996*, 2008 Ariz. PUC LEXIS 114, 180-181 (Ariz. PUC May 16, 2008) (adopting Recommended Order of ALJ Rodda). The Commission already recognized that expedites are a request for superior service. It would violate the Act to set rates for this non-251 service.

As the Commission noted in its May 16, 2008 order, two other state commissions have likewise found that expedite requests go beyond 251, constitute a request for a superior service, and therefore allowed market rates to take effect. Both the Kentucky and Florida Commissions found the 1996 Act does not require BOCs to provide expedited due dates. For example, the Kentucky Commission ruled:

The Joint Petitioners contend that expedited service is part and parcel of UNE provisioning. The Commission disagrees. Standard provisioning intervals for service are required pursuant to Section 251. BellSouth should also provide non-

discriminatory access to expedited service, **but expedited service is not a Section 251 obligation.**

*In re Joint Petition for Arbitration of Newsouth Communications Corp.*, 2006 Ky. PUC LEXIS 159 at Issue 86 (Ky. PUC March 14, 2006) (emphasis added). The Florida Commission recognized this point as well and specifically rejected a request to require TELRIC rates to expedite:

It is clear there is no obligation imposed or implied in Rule 51.311(b) that an incumbent render services to a CLEC superior in quality to those provided to a retail customer **requesting similar services**. *So long as rates are identical for all requesting parties, CLEC and retail alike, parity exists in the provisioning structure for service expedites*, and there is no conflict with Rule 51.311(b). We reiterate that current regulations do not compel an ILEC to provide CLECs with access superior in quality to that supplied to its own retail customers.

*In re Joint Petition by NewSouth et al.*, 2005 Fla. PUC LEXIS 634 \*150, Order No. PSC-05-0975-FOF-TP (Fla. PSC Oct. 11, 2005) (emphasis added). In that case, the Florida Commission specifically approved BellSouth's expedite fee of \$200 per day for CLECs because BellSouth charged the same fee to expedite similar retail services. *Id.* at \*150-151. The Kentucky Commission did the same. *In re Newsouth*, 2006 Ky. PUC LEXIS 159. Thus, at least two commissions have specifically approved the exact expedite charge that Qwest implemented with Version 30 in the CMP. As such, the Commission should amend the Recommended Order by making the changes set forth in the attached *Exhibit A*.<sup>9</sup>

**3. Requiring Qwest to Provision Expedites For "Free" Does Not Meet Any Costing Standard That May Conceivably Apply.**

The Recommended Order recognizes that "[t]here may be some" additional costs in expediting an order for an unbundled loop, but ordered Qwest to provide expedited due dates for loops at no charge anyway. Recommended Order at 26:4-8. As stated above, TELRIC

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<sup>9</sup> The attached Exhibit presumes the Commission disagrees with Qwest and finds that Qwest breached the existing ICA with Eschelon. If the Commission agrees that Qwest did not breach the ICA, the entire Recommended Order must be re-written. However, if the Commission focuses on the errors of fact and law beyond the breach, it should make the changes set forth in the attached Exhibit.

principles do not apply to requests to expedite unbundled loops. However, even if TELRIC is applied, free is below cost.

Section 252(d)(1) states that rates for UNEs “shall be based on the cost ... of providing the ... network element ... and nondiscriminatory, and may include a reasonable profit.” 47 U.S.C. § 252(d)(1). Interpreting this statute, the FCC mandated that state commissions use TELRIC rates as the sole pricing mechanism for 251(c)(3) unbundled network elements. *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 385 (1999) (FCC has authority to develop pricing methodology which states must follow); *Verizon Communs., Inc. v. FCC*, 535 U.S. 467, 498-501, 152 L. Ed. 2d 701, 122 S. Ct. 1646 (2002) (discussing Section 252(d)’s requirement of compensation to incumbents based on cost); *Verizon Cal., Inc. v. Peevey*, 413 F.3d 1069, 1072-1073 (9th Cir. Cal. 2005) (quoting *AT&T Communs. of Ill., Inc. v. Ill. Bell Tel. Co.*, 349 F.3d 402, 411 (7th Cir. 2003) (“[f]ederal law requires that any rate for unbundled network elements, adopted by a state commission, comply with TELRIC when adopted.”)). Thus the law is plain that requiring BOCs to provide such services for free violates the Act. This Commission’s decision to allow Qwest to charge for expedites on an individual case basis pending a TELRIC cost proceeding implicitly acknowledges this. May 16, 2008 Order at \*182. Thus, requiring Qwest to expedite orders for unbundled loops at no cost violates the Act. Qwest is entitled to just compensation for expediting due dates beyond the standard interval. As such, the Commission should amend the Recommended Order by making the changes set forth in the attached *Exhibit A*.<sup>10</sup>

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<sup>10</sup> The attached Exhibit presumes the Commission disagrees with Qwest and finds that Qwest breached the existing ICA with Eschelon. If the Commission agrees that Qwest did not breach the ICA, the entire Recommended Order must be re-written. However, if the Commission focuses on the errors of fact and law beyond the breach, it should make the changes set forth in the attached Exhibit.

### III. REQUEST FOR CLARIFICATION

The Recommended Order appears contradictory on its face. The recommended decision states that “for the duration of this [Eschelon] contract, Qwest should provide expedites to Eschelon for all types of products in emergency situations for no additional charge....” Recommended Order at 26:10-11. Thus, the impact of the decision would appear to have a short duration given the fact that the new Qwest-Eschelon ICA should be final very soon. However, the Order also states that Qwest must “provide expedites to all carriers with interconnection agreements on the same terms that we are requiring it to provide service to Eschelon.” Recommended Order at 32, ¶38. This second conclusion does not have a set duration. Qwest seeks clarification that Qwest’s obligation under this Recommended Order to other CLECs terminates on the date the new Eschelon ICA takes effect.

### IV. CONCLUSION

WHEREFORE, for all of the aforementioned reasons, Qwest respectfully requests that the Commission modify and clarify the Recommended Order.

RESPECTFULLY SUBMITTED this 1<sup>st</sup> day of October, 2008.

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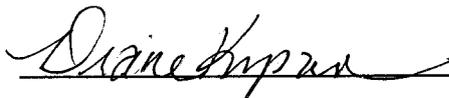
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# **EXHIBIT A**

Analysis and Resolution

The evidence supports a finding that Qwest breached its 2000 ICA with Eschelon when it refused to provide expedites to Eschelon in the delineated emergency situations unless Eschelon agreed to execute an amendment to the ICA that would require Eschelon to pay \$200 for each day expedited. Requiring an ICA amendment in order to receive any type of expedite abridged Eschelon's rights under the contract. Furthermore, Qwest should have expedited the unbundled loop order for the Rehabilitation Center under the emergency expedite procedure that was available to Eschelon under the contract. We find that for the duration of the current ICA, Eschelon is entitled to receive expedites for all POTS types of products in the delineated emergency circumstances for no additional charge, expedites for design services (including unbundled loops) at ICB rates, and shall pay the \$200 per day charge for non-emergency expedites.

The parties' ICA provides that Qwest shall provide Eschelon with the capability to expedite a service order. At the time Eschelon entered into the ICA in 2000, there was a process in place that allowed CLECs to request expedites at no additional charge in certain emergency situations. Later, in Version 1 of the PCAT, that process was incorporated in the Qwest product catalogue. The parties operated under this procedure for several years. That process was available for unbundled loops, and there was no distinction made between "design" and "non-design" services. Even after Covad requested a process in 2004 that would allow CLECs to expedite orders for any reason for a charge, Qwest continued to provide expedites to Eschelon for design services in emergency situations for no additional charge. Until Version 30 of the

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PCAT, which became effective in January 2006, Qwest and Eschelon operated under procedures that allowed Eschelon to request expedites for unbundled loops at no additional charge in emergency circumstances. Qwest claims that the expedite process was mutually modified in the CMP, however the document that guides the operations of the CMP is clear that the CMP cannot be used to abrogate a contract right. Unless Qwest obtained Eschelon's consent to change the expedite process under which they had operated under for many years, Qwest could not unilaterally impose a new process developed in a CMP that impinges upon a substantive contract right. The fact that some CLECs did not object to the new process does not permit Qwest to alter a contract right belonging to Eschelon. The practice of using CMP to develop processes does not eliminate the protection built into the CMP governing document that the ICA rights should prevail over conflicting processes developed in CMP.

While the ICA provides that the parties will mutually develop a process for expedites, it does not specify how they will do so. The CMP may be a proper venue for creating and modifying processes for various services, including expedites, but it does alter the obligation that Eschelon still must agree to a substantial change to a contract right for the change to be effective as to Eschelon. There is no evidence that Eschelon ever agreed to the Version 30 expedite process that would preclude it receiving emergency expedites without signing the amendment.

The ICA provides that Qwest may charge for expedites. Specifically, the ICA provides that the charge for expedites will be on an ICB, as had been approved by the Commission in the Qwest Cost Docket. Under ICB pricing, Qwest is permitted to charge a fee based on the costs it incurs for the service. Qwest's \$200 per day

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charge is not ICB pricing, but is, as Qwest acknowledges, a market-based rate. It is not clear from this record whether Qwest incurs any additional costs for providing an expedite since the process only provides for expedites if Qwest has resources available. There may be some cost associated with determining if there are resources available after a request to expedite is received, but we cannot determine here what those costs would be. Eschelon and Qwest are in the midst of finalizing a replacement ICA, and the provisions of that contract will govern the expedite process going forward. However, for the duration of this contract, Qwest should provide expedites to Eschelon for all design services (including all types of unbundled loops) in emergency situations at ICB rates. When the new ICA takes effect, Qwest may charge \$200 per day to expedite orders for design services (which includes all types of unbundled loops) and will not charge Eschelon any additional charge to expedite POTS orders that are subject to the defined, delineated emergency conditions.

**Deleted:** types of products

**Deleted:** for no additional charge, which conforms to the parties' long-standing practice prior to January 2006. The appropriateness of the ICB pricing for expedites will be considered in Phase III of the Cost Docket.

As Staff noted, Qwest seems to desire to have as much detail as possible concerning processes and procedures documented in its PCAT or other documents outside of interconnection agreements so that Qwest can manage these processes as easily as possible, but which also takes the management thereof outside of Commission oversight. The CMP can be an effective tool for Qwest and those entities with interconnection agreements with Qwest to mutually manage processes and procedures in an industry with rapidly changing technologies. However, this is not the first time we have heard complaints by Eschelon that Qwest is using the CMP to abridge CLEC rights. In this case, Qwest claimed to have reviewed all of its interconnection agreements before amending the expedite process and states that it did not find any conflict. If this is

## EXHIBIT A

the case, in future reviews Qwest would be well served to intensify its due diligence in the course of such reviews, or to expand its thinking of what constitutes a substantive right, because in this case, it is clear that Eschelon was receiving expedites in emergency situations for no additional charge pursuant to the ICA for many years. Qwest should have known this. It is also undisputed that the Commission approved an ICB rate for expedites in the Qwest Cost Docket, and that the \$200 daily charge for expedites was not an ICB rate. Although not recommended by either Eschelon or Staff in this case, in the future, Qwest is hereby put on notice that in the future, the Commission could fine Qwest for using the CMP to change Commission-approved rates.

The ICA does not distinguish between "design" and "non-design" services. End users do not distinguish between "design" and "non-design" services. Qwest provides expedites to its own retail customers who order POTS services for no additional charge and charges \$200 per day to all customers (including retail customers) who seek to expedite orders for design services for any reason.

As for the specific events surrounding the Rehabilitation Center, under the parties' ICA Eschelon was allowed to request expedited installation of the unbundled loop to serve the Rehabilitation Center under the emergency expedite process. The Rehabilitation Center provides services to a population for whom having ready access to 911 service is important. Consequently, re-establishing service to the Rehabilitation Center qualified as a medical emergency and Eschelon should not have had to pay \$1,800 to expedite installation of the private line. Eschelon was responsible for the price of the unbundled loop, which should include the ICB

**Deleted:** in emergency services (Qwest uses "non-design" POTS service to provide service to its retail customers), and as we found in Decision No. 70356 (May 16, 2008), it would be unfair not to allow Eschelon to provide expedites to its end users on the same terms as Qwest provides the service to its customers, regardless of any distinction between "design" and "nondesign" services.

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rate for expediting the service. Qwest should reimburse Eschelon for the \$1,800 (less the ICB expedite charge) Eschelon paid for expediting, plus interest.

In addition to resolution of the dispute between the parties, Staff recommends that Qwest should define "design" and "non-design" services in its tariffs and interconnection agreements; that Qwest should develop a PID to track its performance of expedites; and that Qwest should update its SGAT. We find that as it relates to expedites, the distinction between "design" and "non-design" services is not important or relevant, and that there is no need at this time to define the terms "design" and "non-design" as it relates to expedites. The record in this docket does not address the need to include these terms for other purposes, thus, we do not believe such action is supported by this record.

Staff's recommendation to develop a PID to track Qwest's performance of expedites is best addressed in connection with Qwest's Performance Assurance Plan ("QPAP"), and in a forum where all affected parties can participate. In a recent Decision, (Decision No. 70386 (June 13, 2008)), the Commission found that Staff is authorized to open a docket for the purpose of reviewing the QPAP. If Staff or any interested party believes that a PID for expedites is warranted, it is in that docket, or as part of the on-going PID Management Process that the issue should be raised and reviewed.

As we found in Decision No. 70356, Qwest's Arizona SGAT is out of date. Qwest has not sought to withdraw its Arizona SGAT and this document remains a template interconnection agreement available for opt-in. We agree with Staff that Qwest should update its SGAT or seek Commission approval for its withdrawal.

## EXHIBIT A

Staff also recommended that other CLECs be entitled to receive expedites on the same terms as Eschelon. In this proceeding we have not received evidence of the terms of interconnection agreements with other carriers. Thus, we decline to make any ruling that would affect the rights of parties not before us.

Having considered the entire record herein and being fully advised in the premises, the Commission finds, concludes and orders that:

### FINDINGS OF FACT

1. On April 14, 2006, Eschelon filed with the Commission a complaint against Qwest alleging that Qwest has refused to provide both repairs for disconnects in error and the capability to expedite orders for unbundled loops under the repair and expedite language of the Qwest-Eschelon ICA.
2. On May 12, 2006, Qwest filed its Answer to Eschelon's Complaint.
3. By Procedural Order dated June 6, 2006, the matter was set for hearing, procedural deadlines were established, and Eschelon's interim proposal was adopted that allowed Eschelon to obtain emergency expedites at no cost, but required Eschelon to pay for non-emergency expedites. The June 6, 2006 Procedural Order also ordered Staff to participate in the proceeding.
4. On July 14, 2006, Eschelon filed the Direct Testimony of James Webber and Bonnie Johnson, and a Motion for Summary Judgment, or, in the Alternative, Partial Summary Judgment.
5. By Procedural Order dated August 16, 2006, the proposed schedule was adopted and the matter was set for hearing to commence on February 20, 2007.

**Deleted:** In this case, however, Qwest appears to be applying a rate for expedites that is different than the ICB rate approved in the Qwest Cost Docket. Thus, we agree with Staff, that Qwest should provide expedites in the delineated emergency situations to all Arizona CLECs on the same terms that it provides them to Eschelon. At this time, we will not prevent Qwest from charging \$200 per day for non-emergency expedites. The non-emergency or "pre-Approved" expedite is arguably a new product that was not considered in the Cost Docket.

## EXHIBIT A

6. On August 28, 2006, Qwest filed the Direct Testimony of Jill Martain, Renee Albersheim, Jean L. Novak and Teresa K. Million.

7. On January 30, 2007, Staff filed the Direct Testimony of Pamela Genung.

8. On February 13, 2007, Qwest filed the Rebuttal Testimony of Jill Martain, Renee Albersheim, Jean Novak and Teresa Million. On the same date, Eschelon filed the Rebuttal Testimony of Bonnie Johnson and Douglas Denney, who adopted the Direct Testimony of Mr. Webber.

9. On February 14, 2007, a Procedural Conference was convened at the parties' request. At that time, Eschelon and Qwest informed the Commission that they intended to docket a settlement agreement by February 23, 2007, and requested a continuance of the February 23, 2007 hearing.

10. On February 23, 2007, Eschelon and Qwest filed a Settlement Agreement that conditionally resolved the matter. The Settlement Agreement expressly provided that the parties had the right to alter or opt out of the settlement, depending on the content of comments, if any, to be filed by Staff.

11. On March 9, 2007, Staff filed Comments to the proposed Settlement Agreement. Staff expressed concerns about the opt out provision of the Settlement Agreement which Staff believed could prevent Staff from commenting on the agreement, but concluded that the Settlement Agreement could be in the public interest if it included Staff recommendations that the expedite process be continued at no charge; that Qwest reimburse the \$1800 that it charged Eschelon to expedite the order for the Rehabilitation Center; that Eschelon implement a training program to prevent a re-occurrence of the incident leading to the complaint; that Qwest include a

## EXHIBIT A

definition of "design" and "non-design" services in its Arizona tariffs and interconnection agreements; and that a performance measure for expedites of unbundled loops be developed through the Change Management Process.

12. On March 16, 2007, Eschelon filed a Notice of Opt-out of the Settlement Agreement and requested a Procedural Conference. On the same date, Qwest filed a notice of Withdrawal from Settlement Agreement.

13. By Procedural Order dated May 16, 2007, the matter was set for hearing to commence on August 28, 2007.

14. The hearing convened as scheduled before a duly authorized Administrative Law Judge on August 28, 2007.

15. On October 24, 2007, Eschelon, Qwest and Staff filed their Opening Briefs. On October 26, 2007, Staff filed a Notice of Errata, correcting typographical and other minor errors in its Opening Brief.

16. On December 6, 2007, the parties filed their Reply Briefs.

17. The Commission approved an ICA between Eschelon and Qwest on April 28, 2000. Eschelon had opted into the interconnection agreement between AT&T and Qwest.

18. When Eschelon opted into the ICA, there was an existing process for expediting orders for services that allowed Eschelon to request that an unbundled loop be expedited at no additional charge if one of a number of emergency conditions was met.

19. The ICA does not distinguish between "design" and "non-design" services.

20. The ICA provides that Qwest may charge for expediting an order. The contract

## EXHIBIT A

refers to an ICB price as set by the Commission in the cost-docket.

21. Even after Covad requested a process in 2004 that would allow CLECs to expedite orders for any reason for a charge, Qwest continued to provide expedites to Eschelon for design services in emergency situations for no additional charge.

22. Qwest provided expedites for unbundled loops to Eschelon in emergency circumstances for no additional charge from 2000 until January 2006.

23. Commencing with PCAT Version 30, which became effective as of January 3, 2006, Qwest would not provide expedites to Eschelon for any reason on any design service, unless Eschelon would execute an amendment to its ICA that would allow Qwest to charge Eschelon \$200 per day for an expedited order.

Deleted: or product

24. Qwest claims Version 30 was mutually developed in CMP.

25. The CMP may not be used to alter a party's contract rights without its consent. The CMP document provides that in cases where changes are implemented in CMP that conflict with ICAs, the ICA prevails.

26. Eschelon has never agreed to the terms of Version 30.

27. Qwest violated its 2000 ICA with Eschelon when it refused to provide expedites on design services to Eschelon in the delineated emergency situations unless Eschelon agreed to execute an amendment to the ICA that would require Eschelon to pay \$200 for each day expedited. By requiring an ICA amendment in order to receive expedites of design services, Qwest abridged Eschelon's rights under the contract.

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28. Qwest should have expedited the unbundled loop order for the Rehabilitation Center under the emergency expedite procedure that was available to Eschelon under the

EXHIBIT A

contract.

29. It is reasonable to require that for the duration of the current ICA, Eschelon is entitled to receive expedites for all POTS services under delineated emergency circumstances for no additional charge, shall pay an ICB rate to expedite all design services (including all types of unbundled loops) in emergency circumstances. and shall pay the \$200 per day fee for non-emergency expedites.

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30. End-users do not distinguish between "design" services and "non-design" services.

31. Qwest provides expedites to its own retail customers who order POTS services for no additional charge in emergency services. It would be unfair not to allow Eschelon to provide expedites to its end-users who obtain POTS type services via Qwest on the same terms as Qwest provides the services to its customers.

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32. The Rehabilitation Center provides services to a population of disabled persons for whom having ready access to 911 service is important. Consequently, re-establishing service to the Rehabilitation Center in March 2006, as discussed herein, qualified as a medical emergency and under the ICA, Qwest was not allowed to require Eschelon to pay \$1,800, to expedite installation of the private line. Instead, Qwest was only allowed to charge an ICB rate.

33. Qwest should reimburse Eschelon for the \$1,800 (less the ICB rate), plus interest that Eschelon paid to expedite service to the Rehabilitation Center.

34. Staff recommends that Qwest should define "design" and "non-design" services in its tariffs and interconnection agreements; that Qwest should develop a PID to track

its performance of expedites; and that Qwest should update its SGAT.

35. As it relates to expedites, the distinction between "design" and "non-design" services is important and relevant. ~~Nonetheless, given that all UNEs are design services,~~ there is no need at this time to define the terms "design" and "non-design" as it relates to expedites. Neither does this record support the need to include the definition of "design" or "non-design" products in ICAs or Qwest's tariffs for purposes other than expedites.

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36. The benefits of developing a PID to track Qwest's performance of expedites is best addressed in a forum where all affected parties can participate, such as in connection with a review of Qwest's Performance Assurance Plan or as part of the on-going PID Management Process.

37. Qwest's Arizona SGAT is out of date. Qwest should update its SCAT or seek Commission approval for its withdrawal, within 60 days.

CONCLUSIONS OF LAW

1. Qwest is an incumbent local exchange carrier within the meaning of Section 251(h) of the Telecommunications Act of 1996, and a public service corporation pursuant to Arizona Constitution Article 15.

2. Eschelon is a facilities-based local exchange carrier, certificated to provide local exchange service in Arizona pursuant to Decision No. 62751 (July 25, 2000).

3. The Commission has jurisdiction over Qwest and Eschelon and the subject matter of the Complaint pursuant to 47 U.S.C. §251(c)(2)(D) and (3) and §47 CFR §51.313 and A.R.S. §§ 40-424, 40-246, 40-248, 40-249, 40-334 and 40-361.

Deleted: 38. It appears that Qwest has modified the Commission-approved ICB rate for expedites by charging all carriers \$200 per day to expedite in all situations. Staff recommends that Qwest provide expedites to all carriers with interconnection agreements on the same terms that we are requiring it to provide service to Eschelon. We concur with Staff, and caution Qwest to review its procedures so that the CMP is not utilized to change Commission-approved rates.¶

## EXHIBIT A

4. Qwest violated its 2000 ICA with Eschelon when it refused to provide expedites to Eschelon in the delineated emergency situations unless Eschelon agreed to execute an amendment to the ICA that would require Eschelon to pay \$200 for each day expedited.

### ORDER

IT IS THEREFORE ORDERED that for the duration of their 2000 interconnection agreement Qwest Corporation shall provide Eschelon Telecom of Arizona, Inc. with the ability to expedite all types of service in the delineated emergency circumstances for no additional charge if it is a POTS service and at ICB rates if it is a design service (including all types of unbundled loops).

IT IS FURTHER ORDERED that for the duration of the interconnection agreement, Eschelon Telecom of Arizona, Inc. shall pay the Qwest Corporation assessed \$200 per day charge for nonemergency expedites.

IT IS FURTHER ORDERED that within fifteen days of the effective date of this Order, Qwest Corporation shall reimburse Eschelon Telecom of Arizona, Inc. for the \$1,800 (less the ICB rate), plus interest, that Eschelon paid to expedite service for the Rehabilitation Center in March of 2006.

**Deleted:** IT IS FURTHER ORDERED that Qwest shall provide expedites to all carriers with interconnection agreements with Qwest in Arizona on the same terms as it provides expedites to Eschelon Telecom of Arizona, Inc. ¶

IT IS FURTHER ORDERED that Qwest Corporation shall update its Arizona SGAT or seek approval to have its SGAT withdrawn within 60 days of the Effective Date of this Decision.

IT IS FURTHER ORDERED that this Decision shall become effective immediately.