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BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

MIKE GLEASON - Chairman
WILLIAM A. MUNDELL
JEFF HATCH-MILLER
KRISTIN K. MAYES
GARY PIERCE

Arizona Corporation Commission

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IN THE MATTER OF:

ESCHELON TELECOM OF ARIZONA, INC.

Complainant,

vs.

QWEST CORPORATION,

Respondent.

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

DECISION NO. 70557

OPINION AND ORDER

DATE OF HEARING:

August 28, 29 and 30, 2007

PLACE OF HEARING:

Phoenix, Arizona

ADMINISTRATIVE LAW JUDGE:

Jane L. Rodda

APPEARANCES:

Mr. Gregory R. Merz, GRAY PLANT MOOTY, on behalf of Eschelon Telecom of Arizona, Inc.;

Mr. Charles W. Steese, STEESE & EVANS, PC and Mr. Norman G. Curtright, QWEST CORPORATION, on behalf of Qwest Corporation; and

Ms. Maureen Scott, Senior Staff Counsel, Legal Division, on behalf of the Utilities Division of the Arizona Corporation Commission.

BY THE COMMISSION:

Procedural History

On April 14, 2006, Eschelon Telecom of Arizona, Inc. ("Eschelon" or "Complainant") filed with the Arizona Corporation Commission ("Commission") a Complaint against Qwest Corporation ("Qwest" or "Respondent") alleging that Qwest refused to provide both repairs for disconnects in

1 error and the capability to expedite orders for unbundled loops under the repair and expedite language
2 of the Qwest-Eschelon Interconnection Agreement ("ICA").

3 On April 27, 2006, Qwest and Eschelon filed an Agreement of Parties for Extension of Time
4 to Answer the Complaint in this matter, giving Qwest until May 12, 2006 to file its Answer.

5 On May 12, 2006, Qwest filed its Answer to Eschelon's Complaint.

6 By Procedural Orders dated May 16, 2006, and May 19, 2006, a procedural conference was
7 scheduled for May 23, 2006.

8 At the procedural conference on May 23, 2006, counsel for the parties appeared and discussed
9 their desire to implement an interim resolution regarding repairs and the capability to expedite orders
10 for unbundled loops through the resolution of this proceeding. Each party agreed that an accounting
11 and a "true-up" to settle outstanding financial matters would be made based upon any decision issued
12 in this matter. The parties were not in agreement regarding the particulars of the interim resolution,
13 and were therefore ordered by Procedural Order dated May 23, 2006, to file proposed schedules and
14 interim resolutions for the consideration of the Administrative Law Judge.

15 On June 2, 2006, both Eschelon and Qwest filed their proposed schedules and interim
16 resolutions. By Procedural Order dated June 6, 2006, Eschelon's interim proposal was implemented,
17 the matter was set for hearing, and procedural deadlines were established. The June 6, 2006,
18 Procedural Order also ordered the Commission's Utilities Division ("Staff") to participate in the
19 proceeding. The interim process established in the June 6, 2006, Procedural Order allowed Eschelon
20 to obtain emergency expedites at no cost, but required Eschelon to pay for non-emergency expedites.

21 On June 9, 2006, Qwest filed a Motion to Reconsider the Hearing Schedule because its
22 counsel was involved in other hearings that would preclude a hearing in this matter before January
23 2007.

24 On June 14, 2006, Eschelon Filed a Response to Qwest's Motion to Reconsider Hearing
25 Schedule, objecting to Qwest's request.

26 On June 26, 2006, Eschelon filed a Motion for Leave to Obtain Responses to Requests for
27 Admissions and Accompanying Data Request. The parties were disputing how many data requests
28 Eschelon should be allowed to serve on Qwest.

1 On July 7, 2006, Qwest filed a Response to Eschelon's Motion for Leave to Obtain Responses
2 to Requests for Admissions and Accompanying Data Request.

3 By Procedural Order dated July 14, 2006, the Hearing Division set a Procedural Conference
4 to discuss discovery issues on July 27, 2006.

5 On July 14, 2006, Eschelon filed the Direct Testimony of James Webber and Bonnie Johnson,
6 and a Motion for Summary Judgment, or, in the Alternative, Partial Summary Judgment.

7 On July 19, 2006, Qwest filed a Request for Hearing on its Motion to Reconsider the Hearing
8 Schedule.

9 On July 21, 2006, Eschelon filed its Response to Qwest's Request for Hearing

10 By Procedural Orders dated July 28, 2006, and July 31, 2006, the parties were ordered to file
11 a joint proposed procedural schedule, any limitations on the amount of discovery that had been
12 imposed by either party were lifted, and Qwest was ordered to file Direct Testimony by August 21,
13 2006, and respond to the Eschelon Motion for Summary Judgment by August 18, 2006.

14 On August 7, 2006, on behalf of the parties, Eschelon filed a Proposed Procedural Schedule.

15 On August 11, 2006, Eschelon filed a Request to Adopt Proposed Procedural Schedule and
16 stated that Eschelon, Qwest and Staff had reached agreement on the proposed schedule.

17 By Procedural Order dated August 16, 2006, the proposed schedule was adopted and the
18 matter was set for hearing to commence on February 20, 2007. On August 18, 2006, Qwest filed a
19 Response to Eschelon's Motion for Summary Judgment.

20 On August 28, 2006, Qwest filed the Direct Testimony of Jill Martain, Renee Albersheim,
21 Jean L. Novak and Teresa K. Million. On August 29, 2006, Qwest filed a Notice of Errata to provide
22 replacement copies of the exhibits of Jill Martain, to distinguish them from similarly named exhibits
23 that were filed in connection with Qwest's Response to the Motion for Summary Judgment.

24 On September 15, 2006, Eschelon filed its Reply Brief in connection with its Motion for
25 Summary Judgment.

26 On January 27, 2007, Eschelon, Qwest and Staff jointly filed a Request for Modification of
27 Procedural Schedule, with the hearing date to remain the same.

28 By Procedural Order dated January 11, 2007, the proposed modified schedule was adopted.

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

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

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

8 On February 23, 2007, Eschelon and Qwest filed a Settlement Agreement that conditionally
9 resolved the matter. The Settlement Agreement expressly provided that the parties had the right to
10 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. In its
12 Comments, Staff stated it had concerns about the opt out provision of the Settlement Agreement
13 which Staff believed could prevent Staff from commenting on the agreement, but concluded that the
14 Settlement Agreement could be in the public interest if it included Staff recommendations that the
15 expedite process be continued at no charge; that Qwest should reimburse the \$1,800 that was charged
16 Eschelon in the incident that led to the Complaint; that Eschelon should implement a training
17 program to prevent a re-occurrence of the incident leading to the complaint; that Qwest should
18 include a definition of "design" and "non-designed" services in its Arizona tariffs and interconnection
19 agreements; and that a performance measure for expedites of unbundled loops be developed through
20 the Change Management Process.

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

24 By Procedural Orders dated March 22, 2007 and April 2, 2007, a procedural conference was
25 set to discuss whether there would be a benefit to consolidating the Complaint with a pending
26 arbitration between Qwest and Eschelon (Docket No. T-03406A-06-0572 et al.), in which one of the
27 disputed issues was the treatment of expedited orders.

28 On April 2, 2007, Qwest filed a Brief in Opposition to the proposed consolidation of the

1 Complaint and Arbitration.

2 All parties opposed consolidation of the Complaint with the Arbitration. By Procedural Order
3 dated May 16, 2007, the matter was set for hearing to commence on August 28, 2007.

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

6 On October 24, 2007, Eschelon, Qwest and Staff filed their Opening Briefs. On October 26,
7 2007, Staff filed a Notice of Errata, correcting typographical and other minor errors in its Opening
8 Brief.

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

10 On March 31, 2008, Eschelon filed Supplemental Authority of the Arbitrators Report and
11 Decision in the Oregon arbitration (Docket No, ARB-775).¹

12 Background of Complaint

13 Eschelon is a facilities-based Competitive Local Exchange Carrier ("CLEC") providing
14 telecommunication services in Arizona, and uses a combination of its own facilities with Qwest
15 network elements to provide service to its customers. The Commission approved an ICA between
16 Eschelon and Qwest on April 28, 2000.² Eschelon opted into the interconnection agreement between
17 AT&T and Qwest.³

18 Eschelon alleges that Qwest violated the parties' ICA by failing to provide Eschelon with
19 expedites according to the terms of the ICA.⁴ In particular, Eschelon asserts the ICA, and the parties'
20 course of dealing under the ICA, require Qwest to provide repairs for disconnects in error and for
21 expedites in emergency circumstances to Eschelon at no additional charge. Eschelon alleges that
22 commencing in 2006, Qwest attempted to force Eschelon to sign an ICA amendment and pay \$200
23 per day for expedites even in emergency situations. In March 2006, after mistakenly disconnecting
24 the service to one of its customers, Eschelon attempted to restore service on an expedited basis. The

25 _____
26 ¹ Expedites are discussed as Issue No. 12-767 in the Oregon arbitration.

27 ² Ex E-1, Johnson Direct at 11.

28 ³ *Id.*

⁴ Expedites are the ability to request provisioning of a service order faster than would be available under the standard provisioning interval. A provisioning interval is the number of days (or hours) from the time a CLEC submits a service request/order until the service is scheduled to be delivered.

1 end user was a rehabilitation center that provides services to children and adults with disabilities⁵ and
 2 which Eschelon claims requires 24 hour 911 service. Qwest refused to expedite re-establishment of
 3 service. Eschelon states it was forced to order a special access private line circuit, instead of
 4 receiving service under the terms of the ICA. In addition, Eschelon asserts that over the objection of
 5 multiple CLECs, Qwest has used its Change Management Process ("CMP") and changed its
 6 wholesale product catalogue ("PCAT")⁶ to indicate that Qwest need not provide expedited orders for
 7 any unbundled loops, even when the CLEC's ICA has language supporting expedites.

8 Qwest argues that the \$200 per day expedite charge is permissible because the ICA expressly
 9 provides that Qwest may recover its costs and expenses for expedites. Qwest asserts that the CMP is
 10 an industry-wide process that every CLEC is entitled to join, and that the expedite process was
 11 established and then modified many times through the CMP without objection. Qwest asserts that
 12 Eschelon used the CMP to implement changes to the expedite process and that it is obvious that
 13 everyone in the industry knew that the CMP was where the expedites and escalations processes were
 14 mutually developed.

15 The Expedite Process

16 Two processes have been developed with respect to expedites. In 2000, when Eschelon and
 17 Qwest entered into their ICA, the emergency "Expedites Requiring Approval" process applied to all
 18 product types. Under this process, a CLEC desiring to expedite a due date had to satisfy one of the
 19 delineated emergency conditions.

20 In February 2004, Covad asked to modify the emergency Expedites Requiring Approval
 21 process so that CLECs could obtain an expedited due date for any reason. Covad's request resulted
 22 in the creation of the "Pre-Approved Expedite" process, which only applies to specified listed
 23 products. CLECs wishing to qualify for the "Pre-Approved Expedite" process were required to sign
 24 a contract amendment. Under this process, CLECs could obtain expedited due dates for the
 25 specified products for a charge of \$200 per day. Once a CLEC opted into the "Pre-Approved
 26 Expedite" process, the delineated products were no longer eligible for the emergency expedites.

27 _____
 28 ⁵ The parties consider the name of the rehabilitation center to be confidential information.

⁶ Complaint at 2.

1 Many CLECs opted into the "Pre-Approved Expedite Process" and executed amendments to
2 their ICAs, but Eschelon did not, and remained subject to the "Expedites Requiring Approval"
3 process.

4 On September 12, 2005, in the CMP, Qwest proposed PCAT Version 27 in order to add 2-
5 wire and 4-wire loops to the products subject to the "Pre-Approved Expedite" process. Qwest states
6 that the change was motivated by its desire that all design services would be subject to the Pre-
7 Approval Process and all POTS⁷ services would be subject to the emergency Expedites Requiring
8 Approval process.⁸ Qwest states that the only party to file comments about the proposed Version 27
9 change in CMP was Eschelon, and that Eschelon's comments "acknowledged that the two-wire/four-
10 wire would be included, and they were inquiring about the rate."⁹ Qwest states it responded to the
11 comment, Version 27 took effect, and as a result, every CLEC that had signed an amendment to take
12 service under the "Pre-approved Expedite" process could obtain an expedited due date on any design
13 service for \$200 a day and the emergency conditions process was no longer available for any CLEC
14 signing the amendment.¹⁰ CLECs, such as Eschelon, who did not sign the amendment to partake in
15 the "Pre-Approved Expedite" process remained subject to the emergency Expedites Requiring
16 Approval process for all products.

17 Qwest claims that having two different expedite processes created the potential for abuse and
18 claims of discrimination.¹¹ Qwest testified that various CLECs were caught abusing the emergency
19 conditions process by using the same doctor's excuse over and over to justify a purported medical
20 emergency.¹² Qwest states that it wanted to eliminate disparity and treat all customers the same. As
21 a result, on October 19, 2005, Qwest proposed PCAT Version 30 to the Expedite Process for
22

23 ⁷ Plain Old Telephone Service. Qwest categorizes various products as being "design" or "non-design." According to
24 Qwest a non-design service, also known as POTS, is a basic telephone service, which is provisioned out of Qwest's Loop
25 Facility Assignment and Central System ("LFACS") database. Qwest claims a "design" service is a more complex
26 service, and is provisioned out of both LFACS and the Trunk Inventory Record Keeping System ("TIRKS"). Qwest
states that provisioning intervals for designed services are generally longer than for non-designed services, as
provisioning designed services is more complex. An unbundled loop is an example of a designed service. Ex Q-1,
Albersheim Direct at 3-4.

26 ⁸ Tr at 332:11- 333:2.

27 ⁹ Tr at 333:20-22.

27 ¹⁰ Tr at 408:22-409:15.

28 ¹¹ Tr at 330:7-332:20.

¹² Tr at 400:9-402:24, Ex Q-3 Martain Direct at 24:15-25:11.

1 consideration in the CMP.¹³ Version 30 brought all design products, including unbundled loops,
 2 under the Pre-Approved Expedite process. Qwest claims that before proposing Version 30 that
 3 would bring all CLECs under the Pre-Approval Expedite Process, Qwest conducted an investigation
 4 of its ICAs to be sure that an amendment requiring payment of \$200 per day would not conflict with
 5 those contracts.¹⁴ Qwest concluded that the proposed amendment would not conflict with any ICA,
 6 and specifically that it did not conflict with the Eschelon ICA.¹⁵ After the implementation of Version
 7 30, if CLECs wanted to expedite an order for design products, Qwest required language in the ICA
 8 agreeing to pay the \$200 per day fee. After Version 30, there was no separate emergency expedite
 9 process for design products.

10 The Rehabilitation Center Incident

11 On March 8, 2006, Qwest received a request to disconnect a DS1 Capable Loop serving the
 12 Rehabilitation Center in Mesa, Arizona. The Rehabilitation Center provides services and job training
 13 to 3,000 people with disabilities. The Center had several lines into the facility including business
 14 lines and a separate DS1 Capable Loop (otherwise known as a "T1") which was broken down into
 15 individual lines for each room.¹⁶ Qwest confirmed with Eschelon that Qwest had received the
 16 Eschelon order and that it would disconnect the line on March 15, 2006, as requested. Qwest sent the
 17 confirmation to Eschelon twice. On March 15th, Qwest disconnected the loop on schedule. As it
 18 turned out, however, Eschelon erred in identifying the loop to be disconnected, and had intended to
 19 disconnect an analog 2-wire unbundled loop.

20 When the Rehabilitation Center reported that it had lost service on the T1, Eschelon
 21 performed a trouble isolation and determined that the trouble was on Qwest's network.¹⁷ Eschelon
 22 contacted Qwest and asked that the line be repaired not knowing that another department within
 23 Eschelon had issued the disconnect order. The line went back in service briefly after the repair ticket.
 24 However, because issuing a repair ticket against a disconnect order is not a proper process, the
 25 Rehabilitation Center lost service again on March 15th, as the remainder of the disconnect process

26 ¹³ Ex Q-3 Martain Direct at 26; Ex Q-4, Martain Rebuttal at attachment JM-R7.

27 ¹⁴ Tr at 333:7-10.

28 ¹⁵ Tr at 333:7-10; 430:17-341:5; 349:3-8; 383:3-21.

¹⁶ Tr at 429:7-10.

¹⁷ Ex Q-5, Novak Driect at 10.

1 was completed in the ordinary course.¹⁸ That same date Qwest sent a completion notice to Eschelon
2 informing it of the disconnect.

3 On March 16, 2006, Eschelon was contacted by its customer that service was not working.¹⁹
4 Eschelon performed another trouble isolation and determined that the problem was on Qwest's
5 network. When Eschelon contacted Qwest's repair center, it was informed that there was a
6 disconnect placed on the circuit and that Eschelon would have to submit a new order to Qwest to
7 restore service.²⁰ The same day Eschelon submitted a new order for a DS1 Capable Loop. The order
8 did not request an expedited due date. On March 17, 2006, at 12:38 p.m., Eschelon called and asked
9 that the order be expedited no later than Monday, March 20, 2006. Qwest rejected the request for the
10 expedited due date.

11 During the course of March 17, 2006, Eschelon escalated the matter in an attempt to have the
12 order expedited. Eschelon was informed that Qwest was denying the request because Eschelon had
13 not signed the expedite amendment.²¹ Eschelon faxed Qwest a copy of a letter purportedly from the
14 Rehabilitation Center, in which the customer outlined the need for service due to the medical nature
15 of the residents, who were children and adults with disabilities. Qwest continued to deny the request
16 because Eschelon did not have a signed ICA amendment.²²

17 On March 18, 2006, Eschelon submitted an Access Service Request for a new Special Access
18 DS1 private line circuit (the retail equivalent of a DS1 Capable Loop) and requested a due date of
19 March 18, 2006. Qwest informed Eschelon that it would not have a service order writer that could
20 process the order until March 20, 2006, and would be able to have the line installed that same day.
21 The DS1 private line circuit was installed and in service on the afternoon of March 20, 2008. Qwest
22 charged Eschelon \$1,800 to expedite the order (\$200 per day).

23 Eschelon's Position

24 Eschelon argues that Qwest breached the terms of their ICA by refusing to provide Eschelon
25 with the capacity to expedite loop orders after January 3, 2006. Eschelon states that the contract

26 ¹⁸ Tr at 48:13-18; 68:18-69:25.

27 ¹⁹ Ex S-1, Genung Direct, att1 at 1.

28 ²⁰ Ex S-1, Genung Direct att 1 at 11.

²¹ Ex S-1 Genung Driect, att 1 at 3.

²² Ex S-1 Genung Direct, att 1 at 4.

1 language of the ICA expressly provides that Qwest “shall provide” Eschelon with “the capability to
 2 expedite a service order.” Eschelon asserts that the relevant ICA provisions do not distinguish
 3 between whether a service is a “design” (unbundled loops) or “non-design” (i.e. “POTS”) service.
 4 Eschelon states that the fact that Qwest provided Eschelon with expedited loops under the ICA for
 5 nearly six years shows that both Qwest and Eschelon understood that the expedite provision of the
 6 contract applied to unbundled loops. Furthermore, Eschelon asserts that the ICA provides that the
 7 parties “shall mutually develop expedite procedures”, and that when Qwest changed the expedite
 8 process in the CMP over the objection of Eschelon and other CLECs, it violated this provision of the
 9 ICA.

10 Section 3.2 of Attachment A to the ICA addresses the requirements of how Qwest will
 11 provide Eschelon with expedites. Eschelon points specifically to the following ICA provisions as
 12 applicable to the current dispute:²³

13 Att5, ¶3.2.2.12 Expedite Process: [Qwest] and [CLEC] shall mutually
 14 develop expedite procedures to be followed when CO-PROVIDER
 determines an expedite is required to meet subscriber service needs.

15 Att5, ¶3.2.2.13 Expedites: [Qwest] shall provide [CLEC] the capability to
 16 expedite a service order. Within two (2) business hours after a request
 17 from [CLEC] for an expedited order, [Qwest] shall notify CO-PROVIDER
 of [Qwest’s] confirmation to complete, or not complete, the order within
 the expedited interval.

18 Part A, ¶31.1 [Qwest] shall conduct all activities and interfaces which are
 19 provided for under this Agreement with [CLEC] in a carrier-neutral, non-
 discriminatory manner.

20 Att.1, ¶1.2 [N]othing in this Agreement shall prevent a Party through the
 21 dispute resolution process described in this Agreement from seeking to
 recover the costs and expenses, if any, it may incur

22 Part A, ¶ 27.2 In the event [CLEC] and [Qwest] are unable to agree on
 23 certain items during the term of this Agreement, the Parties may identify
 such issues for arbitration before the Commission

24 Eschelon acknowledges that Section 3.2.4.2.1 of Attachment 5 to the ICA provides that “expedite
 25 charges may apply.”²⁴ Eschelon asserts, however, that the ICA provides that charges must be in
 26

27 ²³ Ex 1 to Eschelon Opening Brief.

28 ²⁴ Section 3.2.4.2.1 provides: “If CO-PROVIDER requests a due date earlier than the standard due date interval, then expedite charges may apply.”

1 accordance with Commission rules and regulations, and that the Commission has approved an
 2 Individual Case Basis ("ICB") rate for expedites.²⁵ Eschelon argues that in some cases applying an
 3 ICB rate would not result in additional charges (over and above the installation charge) for the
 4 expedite because Qwest does not incur additional costs for expedites that are not already recovered
 5 in other charges. According to Eschelon, Qwest provides emergency-based expedites (for no
 6 additional charge) only when resources are available; if resources are not available, Qwest rejects the
 7 order. Therefore, Eschelon asserts, Qwest does not incur any costs to add resources. Eschelon
 8 argues further that, under an ICB rate, a charge would result if the CLEC is then willing to pay to
 9 make resources available and Qwest makes them available for the purpose of providing the expedite.

10 Eschelon witnesses testified that from 2000, when the parties entered into the ICA, until
 11 January 2, 2006, Qwest provided expedites to Eschelon at no additional charge when certain
 12 specified emergency conditions were met. Those emergency conditions that were eligible for
 13 expedites at no additional charge included:

14 Fire;

15 Flood;

16 Medical Emergency;

17 National Emergency;

18 Conditions where end-user is completely out of service (primary line);

19 Disconnect in error by Qwest;

20 Requested service necessary for end-user's grand opening event delayed for facilities
 or equipment reasons with a future Ready For Service ("RFS") date;

21 Delayed orders with a future RFS date that meet any of the above described
 conditions;

22 National Security;

23 Business Classes of Service unable to dial 911 due to previous order activity;

24 Business Classes of Service where hunting, call forwarding or voice mail features are
 25 not working correctly due to previous order activity where the end-users business is
 26 being critically affected.

27
 28 ²⁵ Decision No. 64922 (June 12, 2002) (Phase II of the Qwest Cost Docket) at 75.

1 Eschelon states that not all of the above conditions were documented in the PCAT at the same time.
 2 In addition, Eschelon claims that although not separately noted in Qwest's PCAT list, Qwest granted
 3 requests for expedites at no additional charge in emergencies when resources were available for
 4 CLEC disconnects in error.²⁶ Eschelon testified further that expedites in emergency situations at no
 5 additional charge were available under the existing ICA for all products, including unbundled
 6 loops.²⁷

7 In February 2004, Covad, another CLEC, wanted the ability to expedite an order for any
 8 reason for a fee. Covad utilized the CMP to request such a process to expedite provisioning for a fee
 9 in non-emergency situations. Eschelon submitted comments in the CMP on Covad's proposed
 10 enhancement to the expedite process. In response, Eschelon states Qwest committed that: 1) it
 11 would "continue with the existing process that is in place" (i.e. implementation of the Covad Change
 12 Request ("CR") would not result in replacing the existing emergency-based option); and (2) "this
 13 will not impact resources" (i.e. resources would remain available to process expedite requests under
 14 the existing emergency-based option even with the addition of the optional fee-added alternative).²⁸
 15 Eschelon states that when Qwest implemented PCAT Version 11, which created a process for
 16 expedites for a fee, it deleted a sentence that read: "All expedite requests require approval to ensure
 17 resource availability."

18 Eschelon states following the implementation of Version 11, Eschelon continued to receive
 19 expedites, including unbundled loops (DS0 and DS1), at no charge when emergency conditions were
 20 met. Further, Eschelon states that in its PCAT, Qwest referred to two options under which expedites
 21 would be available: "Expedites Requiring Approval" (emergency-based) and "Pre-Approved
 22 Expedites" ("fee added").²⁹ Eschelon asserts that during this time Qwest offered, and continues to
 23 offer, expedites for its retail customers at no additional charge under the circumstances listed in its
 24 tariff.³⁰

25
 26 ²⁶ Tr. at 95; Ex E-1 Johnson Direct, Att D at 000444-000445 (containing examples of CLEC disconnect in errors where
 Qwest granted the expedite requests for loop orders).

27 ²⁷ Ex E-1 Johnson Direct at 11-12.

28 ²⁸ Ex E-2 Johnson Rebuttal at 9.

29 Eschelon Opening Brief at 16.

28 ³⁰ Ex Q-3 Martain Direct at 40.

1 Eschelon claims that Qwest initiated additional changes to its expedite procedures over
 2 CLEC objections. In October 2005, Qwest announced a Qwest-initiated change via the CMP written
 3 notice process, regarding expedites to take effect on January 3, 2006 (“Version 30”).³¹ Eschelon
 4 states that it and other CLECs objected to the proposed change, and also escalated another Qwest-
 5 initiated change announced in the same timeframe. (“Version 27”).³² In Version 27, Qwest added
 6 2w/4w Analog Unbundled Loops and Port In/Port Within requests to the list of products included in
 7 the Pre-Approved Expedite Process that were previously listed as exceptions. Thus, Version 27
 8 moved 2w/4w Analog Unbundled Loops from the Expedites Requiring Approval Process to the Pre-
 9 Approved Expedite Process, where an expedite charge applied. Version 30 changed the expedite
 10 process to require an ICA amendment that provided for the per day expedite charge. Without the
 11 amendment, Qwest would no longer grant an expedite request unless it was due to a Qwest caused
 12 reason. Eschelon asserts that because notification of Version 30 changes was made before the
 13 Version 27 changes had been incorporated into the PCAT, the notification for Version 30 did not
 14 reflect the Version 27 change to add the 2w/4w Analog Unbundled Loops to the Pre-Approved
 15 Expedite Category and resulted in confusion among the CLEC community.

16 Eschelon states that before the Qwest-initiated changes that led to Versions 27 and 30,
 17 Eschelon could obtain expedites (including for unbundled loop orders, DS0 and DS1) at no
 18 additional charge when the emergency conditions were met. Eschelon states that after these
 19 changes, Eschelon could not obtain expedites in emergencies because Qwest rejected the orders.
 20 Eschelon argues that “rejecting customer orders – of a type previously not rejected—as a means to
 21 enforce an unwanted change is ‘forcing’ that change on other carriers.”³³ Eschelon claims that there
 22 was no CLEC discussion, drafting, advance notice of or other involvement in the development of
 23 Versions 27 and 30, which is contrary to Qwest’s claims that Eschelon was involved in “the process
 24 underlying the development of every aspect of the expedite process”.³⁴ Eschelon asserts there was no
 25 relationship between the Qwest-initiated changes in Version 27 and Version 30 to the earlier work in
 26

27 ³¹ Ex E-1, Johnson Direct, at 19.

28 ³² Ex E-2, Johnson Rebuttal at BJJ-K.

³³ Eschelon Opening Brief at 19.

³⁴ Tr at 188.

1 the CMP on expedite terms.³⁵

2 Eschelon argues that changes that come out of the CMP may not alter a party's contract
3 rights without its consent. Eschelon cites the CMP document which provides:

4 In cases of conflict between the changes implemented through this CMP
5 and any CLEC interconnection agreement (whether based on the Qwest
6 SGAT or not), the rates, terms and conditions of such interconnection
7 agreement shall prevail as between Qwest and the CLEC party to such
8 interconnection agreement. In addition, if changes implemented through
9 this CMP do not necessarily present a direct conflict with a CLEC
interconnection agreement, but would abridge or expand the rights of a
party to such agreement, the rates, terms and conditions of such
interconnection agreement shall prevail as between Qwest and the CLEC
party to such agreement.

10 Eschelon asserts that Qwest knew that Eschelon did not agree to the Qwest-initiated changes,
11 but Qwest did not request dispute resolution under the ICA or request prior-Commission approval
12 before imposing its \$200/day expedite fee. Furthermore, Eschelon asserts Qwest should have
13 applied the Commission-approved ICB rate, and not a charge that has not been approved by the
14 Commission. In addition, Eschelon states Qwest should have provided the expedites, billed
15 Eschelon for them, and then handled any payment and billing disputes according to the terms of the
16 ICA.

17 Staff's Position

18 It is Staff's position that Qwest should have waited until the current ICA with Eschelon
19 expired before insisting on a material change in how to handle expedites, unless Eschelon agreed to
20 the change in process. Staff believes that Qwest's change to the expedite process was a material
21 change that affected the rights of the parties to the ICA. Staff asserts that the CMP was never
22 intended to trump or change a CLEC's rights under an existing ICA. Staff states the CMP was
23 subject to considerable discussion in the Section 271 workshops and the CMP document clearly
24 states that if there is a conflict between the ICA and the CMP, the ICA controls.

25 Staff believes that CLECs other than Eschelon may have been aggrieved by the succession of
26 changes to the expedite process in the CMP, as the changes went far beyond the Change Request
27 originated by Covad. Because Qwest explained the Amendment as an optional process for CLECs,

28 ³⁵ Eschelon Opening Brief at 17.

1 Staff recommends that Qwest offer CLECs the new Version 30 process as another option in addition
 2 to the process for emergency expedites under the existing ICAs. Staff also recommends: 1)
 3 including a definition of design and non-design services in Qwest's Arizona Tariffs; (2) including
 4 expedites of Unbundled Loops in ICA negotiating; and 3) adopting a Performance Indicator
 5 Definition ("PID") for Expedites of Unbundled Loops in its Performance Assurance Plan ("PAP").

6 Staff believes and argues that Eschelon was entitled to have its order for the Rehabilitation
 7 Center expedited under the existing ICA with Qwest. Staff asserts that Section 3.2.2.1.3 of the ICA
 8 clearly gives Eschelon the capability to expedite a service order. Staff believes further that the
 9 evidence presented at the hearing established that the ICA did not limit Eschelon's capability to
 10 expedite non-design services only, but covered both design and non-design services.³⁶ Further,
 11 Staff argues that prior to January 3, 2006, Qwest provided Eschelon with the capability to expedite a
 12 service order, and the mutually acceptable and long-standing course of dealing between the parties
 13 supports Eschelon's position. Staff notes that when a contract is ambiguous, Arizona law permits
 14 evidence on the parties' course of dealing.³⁷

15 Staff believes that the circumstances involving the Rehabilitation Center met the emergency
 16 condition requirement. According to Staff, the end user's primary line was completely out of
 17 service, and the nature of the customer qualified the order to be expedited without charge based on a
 18 medical emergency. Staff notes that the letter from the Rehabilitation Center provided to Qwest as a
 19 basis to expedite the order provided in part:

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

23 Staff asserts that Qwest's witness, Ms. Novak, based her conclusion that there was no
 24 medical emergency on information that Ms. Novak obtained after Eschelon filed this complaint and
 25 not on information available and known at the time of the incident.³⁸ In any case, Staff continues to
 26 believe that given the nature of the facility, testimony that there are at least two 911 calls per month

27 ³⁶ Tr at 227.

³⁷ *Keith Equipment Company v. Casa Grande Cotton Finance Company*, 187 Ariz. 259, 928 P.2d 683 (App. 1996).

28 ³⁸ Tr at 429.

1 from the facility, and the fact that individual rooms did not have 911 capability, the medical
2 emergency condition was met and Qwest should have expedited Eschelon's order. Staff states it is
3 inappropriate for Qwest to rely on information obtained after the fact and for litigation purposes, to
4 suggest that no medical emergency condition existed.

5 Staff asserts that an amendment to Eschelon's ICA was not required because Eschelon could
6 already obtain emergency expedites without charge under its existing ICA. Moreover, Staff asserts
7 Qwest's \$200 per day charge conflicts with the Commission's finding in the latest Wholesale Pricing
8 Docket which authorized a charge for expedites on an Individual Case Basis ("ICB"). Staff states
9 that in the last cost docket Qwest did not proposed a fixed rate for expedites, but ultimately urged the
10 Commission to adopt Staff witnesses' recommendation to establish fixed rates for those services for
11 which Qwest had proposed ICB rates. Staff agrees with Eschelon that Qwest has not shown that the
12 costs of performing expedites, a service that Qwest used to provide for free, is not already recovered
13 in an existing rate. In addition, Staff states that while Qwest relies on the CMP to implement the
14 \$200 charge, rates are not set as part of the CMP process. Staff argues that at a minimum, the \$200
15 charge should apply to non-emergency expedites only on an interim basis subject to review in the
16 Phase III Cost Docket.

17 Staff argues that Qwest's position that the CMP worked as it was intended to impose the
18 \$200 fee, and that Qwest had a right to modify the parties' rights under their existing ICAs, is not
19 supportable as the CMP cannot be used to unilaterally abridge Eschelon's rights under the ICA.
20 Staff believes that in proposing its new expedite process, Qwest impermissibly abridged Eschelon's
21 rights under the ICA. Staff believes that Qwest's position is undercut by the number of CLEC
22 objections to the charge and the confusion surrounding Versions 27 and 30 and the CMP process.
23 Contrary to Qwest's position that the ICA was ambiguous about the process used to mutually agree
24 to the expedite process, Staff argues there was a long-standing expedite process in existence under
25 the ICA. Further, Staff notes that the CMP document is clear that even if there is no direct conflict
26 with the language of the ICA, if the CMP abridges a party's rights under the ICA, the CLEC does

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1 not have to accept it.³⁹

2 Moreover, Staff argues that even if the CMP met the requirements of the ICA to mutually
3 develop a process, Versions 27 and 30 for the expedite process were not mutually developed. Staff
4 states that Qwest evidently did not consider the comments of Eschelon, Integra and Priority One as
5 formal objections to the implementation of Version 30.⁴⁰ Staff believes, however, that the numerous
6 formal objections filed by CLECs are testament to the fact the process amendments effectuated
7 through Versions 27 and 30 were not mutually developed.⁴¹ Integra objected to removing the
8 existing approval process for designed products and stated when it signed the amendment Integra
9 believed that it would add to its options for expedites.⁴² Qwest also acknowledges that there were
10 informal CLEC objections regarding the changes.⁴³ While Staff is uncertain how many CLECs were
11 adversely affected by proffered Version 30, Staff is confident there are more than the four whose
12 objections are documented.

13 In Staff's opinion, when Qwest required CLECs to sign an amendment to their ICAs in order
14 to implement Version 30 of the expedite process, it was giving credence to Eschelon's position
15 concerning the force of the CMP. Staff observes that Qwest is trying to have as much detail
16 concerning processes put into documents that are not subject to Commission oversight, but subject
17 only to Qwest's discretion. Staff asserts that by claiming that all of the "details" are actually
18 "processes and procedures" which Qwest should control, Qwest is granting itself "carte blanche"
19 authority to make changes no matter the impact on the CLEC's existing rights. Staff recommends
20 that Qwest should be required to put the details of processes that impact CLECs into its
21 interconnection agreements and tariffs to avoid having unfettered control.⁴⁴

22 Staff recommends that due to the implementation problems with Versions 11, 27 and 30, and
23 the concerns surrounding Qwest's new expedite process, Qwest should be required to make
24 permanent the interim process now in effect under the June 6, 2006, Procedural Order for Expedites

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26 ³⁹ Ex S-1 Genung Direct at 9.

27 ⁴⁰ Tr at 376-77.

28 ⁴¹ Ex E-1 Johnson Direct, BJJ-A at 13.

⁴² Staff Brief at 27; Ex E-1 Johnson Direct at BJJ-A at 13.

⁴³ Tr at 367.

⁴⁴ Staff Opening Brief at 24.

1 for all CLECs.⁴⁵ Staff notes that when Qwest originally proposed Version 11 in response to a
2 request from Covad for a process to expedite orders for any reasons, Qwest stated that the process
3 was optional, and would not substitute for the existing emergency process. Qwest required CLECs
4 wishing to take service under Version 11 to execute an amendment to their ICA.

5 Staff believes that Qwest's proposed expedite system does not promote parity or uniformity.
6 The end user does not see a difference in design or non-design services, yet those using non-design
7 services can get emergency expedites at no charge while design customers can get expedites for any
8 reason, but must pay \$200 per day. Staff states that Qwest created the alleged problems with
9 uniformity and parity when it failed to provide a truly optional process as Covad had requested for
10 expedites under non-emergency circumstances. An optional process would have allowed the CLEC
11 to continue to get emergency expedites for no additional charge and non-emergency expedites for a
12 \$200 per day fee.

13 Staff does not believe that Qwest's claims of CLEC abuse support the change in the expedite
14 process. Qwest's witness testified about the potential for CLECs to abuse the system to receive
15 expedites for free, but also testified that she did not receive such complaints personally.⁴⁶
16 Furthermore, Qwest admits that the potential for abuse exists for non-design services as much as for
17 design services.⁴⁷

18 Staff further recommends that Qwest should be required to reimburse Eschelon for the
19 \$1,800 Eschelon paid for the private line at the Rehabilitation Center. In addition, because Qwest
20 has found the distinction between design and non-design services is a crucial distinction for
21 provisioning processes, Staff recommends that Qwest should include a definition of both design and
22 non-design services in its tariffs and interconnection agreements. Staff recommends that Qwest be
23 required to develop a PID to track its performance on expedites and that Qwest should be required to
24 update its SGAT. Staff states that by effectively withdrawing the SGAT in favor of the "negotiation
25 template" Qwest has supplanted the Commission review process with its own process.

26 _____
27 ⁴⁵ The interim process provides that Eschelon does not pay extra charges for emergency expedites, but is required to pay
the charge for all other expedites.

28 ⁴⁶ Tr at 420-412.

⁴⁷ Tr at 372-75.

1 Qwest's Position

2 Qwest asserts that all of its actions with respect to expedites have been consistent with the
 3 ICA: (1) the parties' ICA specifically states that Qwest may charge for expedites; (2) Qwest
 4 developed the expedite process (Version 30) in CMP and Eschelon participated in the development
 5 at every step; (3) Version 30 states that Qwest is entitled to a fee for expediting unbundled loops;
 6 and (4) under both Version 30 and the emergency conditions process, Qwest acted appropriately to
 7 reject a request to expedite an unbundled loop order for the Rehabilitation Center. Qwest argues that
 8 implementing Version 30 is consistent with the plain language of the ICA, consistent with the parties
 9 course of dealing to develop processes under the ICA in CMP, and consistent with the requirements
 10 of the 1996 Act.

11 Qwest asserts that the parties consistently used the CMP to develop expedite procedures, and
 12 Version 30 to the Expedite Process was developed in CMP. Qwest argues that when Version 30 was
 13 proposed, Eschelon, and all other CLECs, had rights to challenge Qwest's proposed change to the
 14 expedite process. Qwest states that Eschelon requested an "ad hoc" call to discuss the proposed
 15 change, and during such call Jill Martain of Qwest explained the proposed change.⁴⁸ Qwest states
 16 that after the call, no one raised any additional issues, no one sought dispute resolution and Eschelon
 17 never claimed the proposed change violated the terms of its ICA.⁴⁹ Qwest claims that as no one
 18 raised any additional issues with Version 30 in CMP, Qwest concluded the development process was
 19 complete and implemented the process. Qwest extended the time to implement Version 30 from the
 20 standard 15 day interval, to two and one half months, or until January 3, 2006, to give CLECs
 21 additional time.⁵⁰

22 Qwest asserts that Eschelon first raised an argument that Version 30 conflicted with its ICA
 23 when it filed this Complaint. Qwest states that on the very day that Version 30 went into effect,
 24 Eschelon asked Qwest to expedite a due date for an unbundled loop using the emergency Expedites
 25 Requiring Approval process.⁵¹ Qwest states the request was rejected because Eschelon had not
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27 ⁴⁸ Tr at 367:2-10.

⁴⁹ Tr at 407:13-16; 408:5-8; 413:13-17.

⁵⁰ Tr at 334:2-5.

28 ⁵¹ Tr at 428:21-24.

1 agreed to pay the \$200 per day to expedite such orders. Further, Qwest states the same scenario
2 occurred on several different occasions in January and February 2006. Qwest claims that Jean
3 Novak, Qwest's Account Manager for Eschelon, had "many discussions" with Eschelon about the
4 new expedite process and there was "never any confusion about the expedite process."⁵² Qwest
5 states that Eschelon refused to adapt to the amended expedite process and that it did not claim that
6 Version 30 violated their ICA during this period.

7 Qwest argues that in any case, the Rehabilitation Center's DS1 Capable Loop would not
8 qualify under the emergency Expedites Requiring Approval Process, even if that process were still in
9 place after Version 30 was implemented. Qwest asserts that it is undisputed that the Rehabilitation
10 Center had telephone service with the primary lines into the business, and was able to make 911 calls.
11 Qwest claims also that the Rehabilitation Center has no greater need of 911 service than any typical
12 business.

13 Qwest argues further there is nothing to suggest that its rate of \$200 per day is unreasonable.
14 Qwest argues there is a value to an expedited order, and that its rate of \$200 per day to expedite
15 orders for unbundled loops is consistent with industry practice. Qwest acknowledges that it is not a
16 TELRIC rate, but a market rate. Qwest states that other telecommunication providers charge for
17 expedites (e.g., AT&T charges \$675, Verizon charges between \$500 and \$1,500, and BellSouth
18 charges \$200 per day). Qwest asserts that many other CLECs have opted into Version 30 of the
19 Expedite Process and Qwest is not aware of any other CEC complaining about the \$200 per day
20 charge.

21 Qwest argues that its Pre-Approved Expedite Process is consistent with Eschelon's ICA, and
22 thus, Qwest did not breach the ICA by developing a modified process for expediting design services
23 orders in CMP. Qwest notes that the ICA provides that Qwest and Eschelon shall "mutually
24 develop" an expedite procedure;⁵³ the procedure must include the "capability to expedite a service
25 order";⁵⁴ the procedure must ensure that Qwest will confirm whether it will or will not expedite an
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27 ⁵² Tr 428:19-429:4.

28 ⁵³ Section 3.2.2.12 Attachment 5 of the Eschelon ICA.

⁵⁴ Section 3.2.2.12.

1 order within two business hours;⁵⁵ and the procedure cannot deny Qwest the ability to obtain
2 payments altogether, as expedite charges “may” apply.

3 Qwest asserts the Pre-Approved Expedite Process satisfies each of the criteria. Qwest
4 believes the crux of the dispute turns on the term “mutually develop.” Qwest argues that Eschelon
5 admits that the place where processes are mutually developed is in the Change Management
6 Process.⁵⁶ Qwest asserts that each version of the expedite process was documented, commented
7 upon, and created over time using a defined process, which means it was “developed.” According to
8 Qwest, Eschelon participated in “100%” of the CMP meetings. Thus, Qwest argues, since both
9 Qwest and Eschelon participated in the CMP process, the expedite process was “mutually
10 developed.” Qwest states that Qwest and Eschelon went to the CMP every time the word “develop”
11 was used in the ICA. Thus, when the ICA required the parties to “develop” a process for 911
12 database integrity and for local number portability and to implement ANSI standards, the parties
13 utilized CMP.

14 Qwest states that Eschelon is interpreting the term “mutually develop” as “mutually develop
15 and agree”, when in fact the ICA does not contain the word “agree”. Thus, Qwest argues Eschelon
16 would have the Commission interpret the ICA, not according to its plain language, but by adding the
17 word “agree.” Qwest argues this is contrary to traditional contract interpretation to add language to
18 an already clear, written contract provision. Qwest claims there are at least 82 other provisions of the
19 ICA in which the parties use the word “agree” to add substantive requirement. This shows, Qwest
20 argues, that the absence of the word “agree” in Section 3.2.2.12, was an intentional omission from
21 that provision.

22 Qwest argues that the ICA provides in three separate sections that Qwest “may” charge for
23 expedites, and that Eschelon’s and Staff’s position that because at one time it did not charge for
24 expedites, that it can never charge for them is contrary to the law. According to Qwest, a party’s
25 course of performance can never be used to eviscerate a contract term.⁵⁷ Qwest argues that the ICA
26 deals with the issue directly in Section 34 which provides:

27 ⁵⁵ *Id.*

28 ⁵⁶ Tr at 31:23-32:20; Tr at 36:1-38:1.

⁵⁷ Restatement (2nd) of Contracts § 203(b).

1
2 34. Waivers

3 34.1 No waiver of any provisions of this Agreement and no
4 consent to any default under this Agreement shall be effective
5 unless the same shall be in writing and properly executed by or on
6 behalf of the Party against whom such waiver is claimed.

7 34.2 No course of dealing or failure of either Party to strictly
8 enforce any term, right, or condition of this Agreement in any
9 instance shall be construed as a general waiver or relinquishment
10 of such terms, right or condition.

11 Qwest argues Eschelon has provided no evidence to suggest why the Commission should ignore the
12 non-waiver clause in this case.

13 In addition, Qwest argues that the parties' course of performance in using CMP to develop
14 processes shows the parties' intent to develop contractual rights in the CMP. The Restatement (2nd)
15 of Contracts § 202(4) states that "[w]here an agreement involves repeated occasions for performance
16 by either party with knowledge of the nature of the performance and opportunity for objection to it by
17 the other, any course of performance accepted or acquiesced in without objection is given great
18 weight in the interpretation of the agreement." Qwest cites an Arizona Court of Appeals case which
19 found, "[t]he acts of parties under a contract, before disputes arise, are the best evidence of the
20 meaning of doubtful contract terms."⁵⁸ Qwest asserts that the parties' course of performance shows
21 they used the CMP extensively without objection or complaint.

22 Qwest also argues that Eschelon is seeking "special treatment" that conflicts with the parties'
23 ICA and the CMP. Qwest asserts that Eschelon is the only CLEC that has raised a formal concern
24 about Version 30. Qwest argues Eschelon is seeking a benefit over Qwest, inter-exchange carriers
25 who purchase using the tariff, and other CLECs who utilize the expedite procedures set forth in the
26 CMP. Qwest also argues that Eschelon's position would violate the plain language of the ICA that
27 requires Qwest to treat Eschelon like every other carrier.⁵⁹ Qwest states that in Version 30 Qwest is
28 attempting to treat all CLECs the same, and CLECs across the region and 14 CLECs in Arizona have
adopted the unbundled loops expedite terms that were developed in CMP. Qwest claims that when it
submitted Version 30, its goal was to ensure parity between customers.⁶⁰

⁵⁸ *Associated Students of the Univ. of Ariz. V. Arizona Bd. Of Regents*, 120 Ariz. 100, 105, 584 P.2d 564, 569 (Ct. app. 1978).

⁵⁹ Section 31.2 "[Qwest] shall conduct all activities . . . in a carrier-neutral, nondiscriminatory manner."

⁶⁰ Tr at 333:23-224:5.

1 Moreover, Qwest argues that its Version 30 Pre-Approved Expedite Process provides
 2 Eschelon a meaningful opportunity to compete, and Eschelon is asking the Commission to order a
 3 superior service in violation of the 1996 Act. Qwest states there because there is no retail analog for
 4 2-wire and 4-wire analog loops, the standard under the 1996 Act is that Qwest must provide an
 5 “efficient carrier a ‘meaningful opportunity’ to compete.”⁶¹ Qwest asserts that by satisfying
 6 Commission-approved performance measures, Qwest is providing CLECs a meaningful opportunity
 7 to complete. Qwest argues that a request to provision an unbundled loop faster than the standard five
 8 day interval is by definition a request for superior service. Qwest asserts it would not gain a
 9 competitive advantage by failing to expedite such orders, as every commission has found that Bell
 10 Operating Companies (“BOCs”) have no comparable service to analog loops. Qwest states that this
 11 does not mean that Eschelon cannot meet the needs of customers who want immediate service with
 12 unbundled loops. Qwest asserts that in Arizona, Eschelon could serve customers with a product
 13 known as QPP,⁶² a POTS service, which can be expedited using the emergency Expedites Requiring
 14 Approval process applicable to all POTS service.

15 Qwest states that CLECs are already obtaining superior service on the provision of DS1 and
 16 DS3 capable loops, and a requirement to expedite for free (or at TELRIC rates) would only
 17 exacerbate the problem. The Rehabilitation Center’s line at issue was a DS1 Capable Loop. Qwest
 18 states DS1 and DS3 capable loops have a retail analog, the DS1 and DS3 private line. As a result of
 19 the 271 docket, Qwest is required to provide the DS1 capable loop in five business days, but offers a
 20 T1 (equivalent to the DS1 private line) to its retail customers in nine business days. Qwest argues
 21 that if the Commission adopts Eschelon’s interpretation of the ICA, Eschelon could get service the
 22 next day at no additional cost which would give Eschelon a great competitive advantage.

23 Finally, in response to Staff’s recommendations, Qwest argues that because this is a complaint
 24 case, the relief Staff advocates is not appropriate. Qwest believes that several of Staff’s
 25 recommendations affect the entire telecommunications industry in Arizona, including those that

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 27 ⁶¹ *In re Bell Atlantic New York*, FCC 99-404, ¶44 (Rel. December 22, 1999).

28 ⁶² QPP is Qwest Platform Plus, which is a combination of the unbundled loop, switching and shared transport, and is a way for CLECs to provide POTS to retail customers that is functionally equivalent to that Qwest provides to its retail customers.

1 Qwest continue to support Expedites Requiring Approval process for “all products” at no additional
 2 charge; that it continue to support the Pre-Approval Expedites Process for “design services” in non-
 3 emergency circumstances for all CLECs; that Qwest should define “design services” in ICAs and
 4 tariffs; that Qwest create a PID for expedited orders in CMP; and that rates for expedited due dates
 5 should be considered as part of the next cost docket. Qwest argues that none of the “extraordinary”
 6 relief Staff seeks has any connection to whether Qwest breached Eschelon’s ICA and the harm, if
 7 any, Qwest caused Eschelon.

8 Qwest also argues that Staff’s recommended relief is without factual basis. For example,
 9 Staff asks that the Commission require Qwest to adhere to certain expedite procedures for all CLECs
 10 and all services, but did not introduce other carriers’ contracts into evidence. Furthermore, Qwest
 11 asserts there was substantial testimony that the disconnect of the DS1 Capable Loop due to
 12 Eschelon’s own error would not qualify under the Expedite Requiring Approval Process, even if the
 13 old policy had remained in effect. Qwest states that Staff simply assumed that a medical emergency
 14 existed due to the nature of the facility.⁶³ Qwest states further that Staff’s request for a PID ignores
 15 the existing forum for proposing new PIDs, and that existing PIDs already include expedited orders.
 16 Qwest further argues that defining “design services” is not necessary as the Pre-Approved Expedites
 17 process specifically names each of the products that it applies to.

18 Analysis and Resolution

19 The evidence supports a finding that Qwest breached its 2000 ICA with Eschelon when it
 20 refused to provide expedites to Eschelon in the delineated emergency situations unless Eschelon
 21 agreed to execute an amendment to the ICA that would require Eschelon to pay \$200 for each day
 22 expedited. Requiring an ICA amendment in order to receive any type of expedite abridged
 23 Eschelon’s rights under the contract. Furthermore, Qwest should have expedited the unbundled loop
 24 order for the Rehabilitation Center under the emergency expedite procedure that was available to
 25 Eschelon under the contract. We find that for the duration of the current ICA, Eschelon is entitled to
 26 receive expedites for all types of products in the delineated emergency circumstances for no
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28 ⁶³ Tr at 574:4-10; 575:3-4; 578:19-24; 579:14-7.

1 additional charge, and shall pay the \$200 per day charge for non-emergency expedites.

2 The parties' ICA provides that Qwest shall provide Eschelon with the capability to expedite a
3 service order.⁶⁴ At the time Eschelon entered into the ICA in 2000, there was a process in place that
4 allowed CLECs to request expedites at no additional charge in certain emergency situations. Later, in
5 Version 1 of the PCAT, that process was incorporated in the Qwest product catalogue. The parties
6 operated under this procedure for several years. That process was available for unbundled loops, and
7 there was no distinction made between "design" and "non-design" services. Even after Covad
8 requested a process in 2004 that would allow CLECs to expedite orders for any reason for a charge,
9 Qwest continued to provide expedites to Eschelon for design services in emergency situations for no
10 additional charge. Until Version 30 of the PCAT, which became effective in January 2006, Qwest
11 and Eschelon operated under procedures that allowed Eschelon to request expedites for unbundled
12 loops at no additional charge in emergency circumstances. Qwest claims that the expedite process
13 was mutually modified in the CMP, however the document that guides the operations of the CMP is
14 clear that the CMP cannot be used to abrogate a contract right. Unless Qwest obtained Eschelon's
15 consent to change the expedite process under which they had operated under for many years, Qwest
16 could not unilaterally impose a new process developed in a CMP that impinges upon a substantive
17 contract right. The fact that some CLECs did not object to the new process does not permit Qwest to
18 alter a contract right belonging to Eschelon. The practice of using CMP to develop processes does
19 not eliminate the protection built into the CMP governing document that the ICA rights should
20 prevail over conflicting processes developed in CMP.

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

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28 ⁶⁴ Att5 ¶ 3.2.2.13.

1 The ICA provides that Qwest may charge for expedites.⁶⁵ Specifically, the ICA provides that
 2 the charge for expedites will be on an ICB, as had been approved by the Commission in the Qwest
 3 Cost Docket. Under ICB pricing, Qwest is permitted to charge a fee based on the costs it incurs for
 4 the service. Qwest's \$200 per day charge is not ICB pricing, but is, as Qwest acknowledges, a
 5 market-based rate. It is not clear from this record whether Qwest incurs any additional costs for
 6 providing an expedite since the process only provides for expedites if Qwest has resources available.
 7 There may be some cost associated with determining if there are resources available after a request to
 8 expedite is received, but we cannot determine here what those costs would be. Eschelon and Qwest
 9 are in the midst of finalizing a replacement ICA, and the provisions of that contract will govern the
 10 expedite process going forward. However, for the duration of this contract, Qwest should provide
 11 expedites to Eschelon for all types of products in emergency situations for no additional charge,
 12 which conforms to the parties' long-standing practice prior to January 2006. The appropriateness of
 13 the ICB pricing for expedites will be considered in Phase III of the Cost Docket.

14 As Staff noted, Qwest seems to desire to have as much detail as possible concerning processes
 15 and procedures documented in its PCAT or other documents outside of interconnection agreements
 16 so that Qwest can manage these processes as easily as possible, but which also takes the management
 17 thereof outside of Commission oversight.⁶⁶ The CMP can be an effective tool for Qwest and those
 18 entities with interconnection agreements with Qwest to mutually manage processes and procedures in
 19 an industry with rapidly changing technologies. However, this is not the first time we have heard
 20 complaints by Eschelon that Qwest is using the CMP to abridge CLEC rights.⁶⁷ In this case, Qwest
 21 claimed to have reviewed all of its interconnection agreements before amending the expedite process
 22 and states that it did not find any conflict. If this is the case, in future reviews Qwest would be well
 23 served to intensify its due diligence in the course of such reviews, or to expand its thinking of what
 24 constitutes a substantive right, because in this case, it is clear that Eschelon was receiving expedites
 25 in emergency situations for no additional charge pursuant to the ICA for many years. Qwest should
 26

27 ⁶⁵ § 3.2.2.1.

⁶⁶ See Staff Opening Brief at 24-25.

28 ⁶⁷ See e.g., Docket No. T-03406A-06-0572 and T-01051B-06-0572 (Eschelon's Petition for the Arbitration of an Interconnection Agreement with Qwest).

1 have known this. It is also undisputed that the Commission approved an ICB rate for expedites in the
2 Qwest Cost Docket, and that the \$200 daily charge for expedites was not an ICB rate. Although not
3 recommended by either Eschelon or Staff in this case, in the future, Qwest is hereby put on notice
4 that in the future, the Commission could fine Qwest for using the CMP to change Commission-
5 approved rates.

6 The ICA does not distinguish between “design” and “non-design” services. End users do not
7 distinguish between “design” and “non-design” services. Qwest provides expedites to its own retail
8 customers for no additional charge in emergency services (Qwest uses “non-design” POTS service to
9 provide service to its retail customers), and as we found in Decision No. 70356 (May 16, 2008), it
10 would be unfair not to allow Eschelon to provide expedites to its end users on the same terms as
11 Qwest provides the service to its customers, regardless of any distinction between “design” and “non-
12 design” services.⁶⁸

13 As for the specific events surrounding the Rehabilitation Center, under the parties’ ICA
14 Eschelon was allowed to request expedited installation of the unbundled loop to serve the
15 Rehabilitation Center under the emergency expedite process. The Rehabilitation Center provides
16 services to a population for whom having ready access to 911 service is important. Consequently, re-
17 establishing service to the Rehabilitation Center qualified as a medical emergency and Eschelon
18 should not have had to pay \$1,800 to expedite installation of the private line. Eschelon was
19 responsible for the price of the unbundled loop. Qwest should reimburse Eschelon for the \$1,800
20 Eschelon paid for expediting, plus interest.

21 In addition to resolution of the dispute between the parties, Staff recommends that Qwest
22 should define “design” and “non-design” services in its tariffs and interconnection agreements; that
23 Qwest should develop a PID to track its performance of expedites; and that Qwest should update its
24 SGAT. We find that as it relates to expedites, the distinction between “design” and “non-design”
25 services is not important or relevant, and that there is no need at this time to define the terms “design”
26 and non-design” as it relates to expedites. The record in this docket does not address the need to

27 ⁶⁸ Decision No. 70356 at 82. In the arbitration the Commission adopted Eschelon’s alternative proposal that provides
28 Qwest will only charge for expedites if it would charge its own retail customers for the expedite in the same circumstance.
The arbitration retained the ICB pricing subject to true up.

1 include these terms for other purposes, thus, we do not believe such action is supported by this
2 record.

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

9 As we found in Decision No. 70356, Qwest's Arizona SGAT is out of date.⁶⁹ Qwest has not
10 sought to withdraw its Arizona SGAT and this document remains a template interconnection
11 agreement available for opt-in. We agree with Staff that Qwest should update its SGAT or seek
12 Commission approval for its withdrawal.

13 Staff also recommended that other CLECs be entitled to receive expedites on the same terms
14 as Eschelon. In this proceeding we have not received evidence of the terms of interconnection
15 agreements with other carriers. Thus, normally, we would decline to make any ruling that would
16 affect the rights of parties not before us. In this case, however, Qwest appears to be applying a rate
17 for expedites that is different than the ICB rate approved in the Qwest Cost Docket. Thus, we agree
18 with Staff, that Qwest should provide expedites in the delineated emergency situations to all Arizona
19 CLECs on the same terms that it provides them to Eschelon. The Commission's resolution of this
20 complaint in Eschelon's favor will necessarily result in Qwest's implementation, under Section 15 of
21 its CMP document, of the Commission's findings in this Order in Qwest's PCAT, which is
22 referenced in its expedite amendment. At this time, we will not prevent Qwest from charging \$200
23 per day for non-emergency expedites. The non-emergency or "pre-Approved" expedite is arguably a
24 new product that was not considered in the Cost Docket.

25 * * * * *

26 Having considered the entire record herein and being fully advised in the premises, the
27

28 ⁶⁹ Decision No. 70356 at 54.

1 Commission finds, concludes, and orders that:

2 **FINDINGS OF FACT**

3 1. On April 14, 2006, Eschelon filed with the Commission a Complaint against Qwest
4 alleging that Qwest has refused to provide both repairs for disconnects in error and the capability to
5 expedite orders for unbundled loops under the repair and expedite language of the Qwest-Eschelon
6 ICA.

7 2. On May 12, 2006, Qwest filed its Answer to Eschelon's Complaint.

8 3. By Procedural Order dated June 6, 2006, the matter was set for hearing, procedural
9 deadlines were established, and Eschelon's interim proposal was adopted that allowed Eschelon to
10 obtain emergency expedites at no cost, but required Eschelon to pay for non-emergency expedites.
11 The June 6, 2006 Procedural Order also ordered Staff to participate in the proceeding.

12 4. On July 14, 2006, Eschelon filed the Direct Testimony of James Webber and Bonnie
13 Johnson, and a Motion for Summary Judgment, or, in the Alternative, Partial Summary Judgment.

14 5. By Procedural Order dated August 16, 2006, the proposed schedule was adopted and
15 the matter was set for hearing to commence on February 20, 2007.

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

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

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

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

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

1 filed by Staff.

2 11. On March 9, 2007, Staff filed Comments to the proposed Settlement Agreement. Staff
3 expressed concerns about the opt out provision of the Settlement Agreement which Staff believed
4 could prevent Staff from commenting on the agreement, but concluded that the Settlement
5 Agreement could be in the public interest if it included Staff recommendations that the expedite
6 process be continued at no charge; that Qwest reimburse the \$1800 that it charged Eschelon to
7 expedite the order for the Rehabilitation Center; that Eschelon implement a training program to
8 prevent a re-occurrence of the incident leading to the complaint; that Qwest include a definition of
9 "design" and "non-design" services in its Arizona tariffs and interconnection agreements; and that a
10 performance measure for expedites of unbundled loops be developed through the Change
11 Management Process.

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

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

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

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

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

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

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

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

1 20. The ICA provides that Qwest may charge for expediting an order. The contract refers
2 to an ICB price.

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

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

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

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

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

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

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

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

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

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

28 31. Qwest provides expedites to its own retail customers for no additional charge in

1 emergency services. It would be unfair not to allow Eschelon to provide expedites to its end users on
2 the same terms as Qwest provides the service to its customers, regardless of any other distinction
3 between "design" and "non-design" services.

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

9 33. Qwest should reimburse Eschelon for the \$1,800, plus interest⁷⁰ that Eschelon paid to
10 expedite service to the Rehabilitation Center.

11 34. Staff recommends that Qwest should define "design" and "non-design" services in its
12 tariffs and interconnection agreements; that Qwest should develop a PID to track its performance of
13 expedites; and that Qwest should update its SGAT.

14 35. As it relates to expedites, the distinction between "design" and "non-design" services
15 is not important or relevant, and there is no need at this time to define the terms "design" and "non-
16 design" as it relates to expedites. Neither does this record support the need to include the definition
17 of "design" or "non-design" products in ICAs or Qwest's tariffs for purposes other than expedites.

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

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

23 38. It appears that Qwest has modified the Commission-approved ICB rate for expedites
24 by charging all carriers \$200 per day to expedite in all situations. Staff recommends that Qwest
25 provide expedites to all carriers with interconnection agreements on the same terms that we are
26 requiring it to provide service to Eschelon. We concur with Staff, and caution Qwest to review its
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28 ⁷⁰ Interest shall be paid at the rate provided for in the ICA if any; otherwise at the applicable statutory rate.

1 procedures so that the CMP is not utilized to change Commission-approved rates.

2 **CONCLUSIONS OF LAW**

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

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

8 3. The Commission has jurisdiction over Qwest and Eschelon and the subject matter of
9 the Complaint pursuant to 47 U.S.C. §251(c)(2)(D) and (3) and §47 CFR §51.313 and A.R.S. §§ 40-
10 424, 40-246, 40-248, 40-249, 40-334 and 40-361.

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

14 **ORDER**

15 IT IS THEREFORE ORDERED that for the duration of their 2000 interconnection agreement
16 Qwest Corporation shall provide Eschelon Telecom of Arizona, Inc. with the ability to expedite all
17 types of service in the delineated emergency circumstances for no additional charge.

18 IT IS FURTHER ORDERED that for the duration of the interconnection agreement, Eschelon
19 Telecom of Arizona, Inc. shall pay the Qwest Corporation assessed per day charge for non-
20 emergency expedites.

21 IT IS FURTHER ORDERED that, under Section 15 of the CMP, Qwest shall incorporate the
22 Commission's findings in Finding of Fact No. 38 into Qwest's PCAT, which shall apply on a
23 prospective basis.

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

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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.

BY ORDER OF THE ARIZONA CORPORATION COMMISSION.



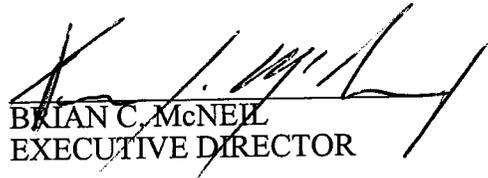
CHAIRMAN

COMMISSIONER


COMMISSIONER
COMMISSIONER

COMMISSIONER

IN WITNESS WHEREOF, I, BRIAN C. McNEIL, Executive Director of the Arizona Corporation Commission, have hereunto set my hand and caused the official seal of the Commission to be affixed at the Capitol, in the City of Phoenix, this 23rd day of Oct., 2008.


BRIAN C. McNEIL
EXECUTIVE DIRECTOR

DISSENT 

DISSENT 

1 SERVICE LIST FOR: QWEST CORPORATION and ESCHELON
2 TELECOM

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