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Commissioner

7
8 **IN THE MATTER OF THE COMPLAINT OF**
9 **ESCHELON TELECOM OF ARIZONA, INC.**
10 **AGAINST QWEST CORPORATION**

DOCKET NOS. T-03406A-06-0257
T-01051B-06-0257

QWEST CORPORATION'S
APPLICATION FOR REHEARING OF
OCTOBER 23, 2008 ORDER,
DECISION NO. 70557

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15 Pursuant to Arizona Revised Statute Section 40-253(A) and R14-3-111, Qwest
16 Corporation ("Qwest") hereby requests that the Arizona Corporation Commission
17 ("Commission") rehear and reconsider Order No. 70557 (the "Order") on each of the issues
18 determined against Qwest over Qwest's objections. Respectfully, Qwest seeks rehearing and
19 reconsideration because the Order:

- 20
- 21 1. Errs in finding that Qwest breached its interconnection agreement ("ICA") with
- 22 Eschelon Telecom of Arizona, Inc. ("Eschelon") by jointly developing expedite
- 23 procedures for unbundled loops in the Change Management Process adopted by
- 24 the Commission, as the plain language of the ICA and the other record evidence
- 25 all show that the ICA allowed for this development;
- 26

- 1 2. Errs in requiring Qwest to expedite emergency orders for unbundled loops *for all*
2 *CLECs in Arizona without charge by amending its PCAT (wholesale product*
3 *catalogue)* because to do so *will modify forty-two voluntarily negotiated,*
4 *Commission approved, Qwest interconnection agreements with other CLECs*
5 *who did not even participate in this proceeding, and whose contracts are not*
6 *part of the record;* and
- 7 3. Errs in requiring Qwest to expedite emergency orders for unbundled loops *for all*
8 *CLECs in Arizona without charge* because this conflicts with the FCC precedent
9 that unbundled loops are not analogous to POTS services, expedites are not a
10 Section 251 service (and therefore the Commission cannot set rates), and this is in
11 any case below-TELRIC rates.

12 Qwest accordingly requests that the Commission rehear and reconsider the Order, and requests
13 that the Commission adopt an order on reconsideration that would follow the proposed order
14 Qwest had submitted with its Objections to the Administrative Law Judge's Recommended
15 Order on October 1, 2008.

16

17 **I. FACTS**

18 In its Objections to the Recommended Order, Qwest summarized the record evidence,
19 and for brevity incorporates that fact discussion by reference here.

20 In essence, “[e]xpedites are the ability to request provisioning of a service order faster
21 than ... the standard provisioning interval.” Order at 5, n.4. Under the current ICA, the parties
22 “shall mutually develop expedite procedures...” ICA at § 3.2.2.12.¹ On three separate
23 occasions, the ICA states that “expedite charges may apply” when Eschelon seeks to expedite an
24

25 ¹ Eschelon and Qwest have arbitrated a new ICA before the Arizona Commission. The
26 Commission's decision is still subject to refinement; however, the new ICA should take effect
relatively soon.

1 order. ICA at §§ 3.2.4.1, 3.2.4.3.1 & 3.2.4.4. The Order recognizes these facts. Order at 10:7 &
2 31:¶20.

3 The Change Management Process (“CMP”) is the industry-created, Commission-
4 approved means of developing processes for interconnection. See, *Exhibit Q-3 (Martain Direct)*
5 *at 5:23-6:8 & 7:14-8:6; Exhibit E-1, Attachment A-9 at 166-272; Bonnie Johnson Transcript*
6 *at 31:23-32:20*. The Order recognizes that “CMP can be an effective tool for Qwest and those
7 entities with interconnection agreements with Qwest to mutually manage processes and
8 procedures in an industry with rapidly changing technologies.” Order at 26:17-19.

9 The Expedites and Escalations Process is one of the processes that evolved in CMP.
10 Between 2001 and the present, the expedite process was modified 18 times in CMP. *Jill*
11 *Martain Transcript 387:10-21*. Eschelon participated in each and every CMP meeting,
12 including those where the expedite process was developed. *Jill Martain Transcript at 327:1-*
13 *328:4*. Indeed, Eschelon recommended and obtained changes to the expedite process in CMP.
14 *Id. at 330:21-331:5; 411:18-23*.

15 In the CMP, a “Pre-Approved Expedite Process” was developed, into which many
16 CLECs opted, to obtain expedites for any reason by agreeing to pay a \$200 per day fee. *Jill*
17 *Martain Transcript at 328:19-329:23*. In order to qualify for the new process, CLECs were
18 required to sign a contract amendment. *Id. See also Bonnie Johnson Transcript at 44:14-17*. No
19 one disputed or challenged the new process, and many CLECs opted into the new process and
20 voluntarily signed the requisite contract amendment. *Jill Martain Transcript at 408:23-409:15*.

21 After further developments of the expedite process in CMP, on October 19, 2005, Qwest
22 proposed the expedite process that is at issue in this case - Version 30 to the Expedite Process -in
23 CMP. *Exhibit Q-4 (Martain Rebuttal) at Attachment JM-R7*. While some CLECs (including
24 Eschelon) raised concerns about the Version 30 change, it is undisputed that it was jointly
25 developed in CMP; Eschelon participated in the meetings where Version 30 was developed; and
26 Qwest followed the CMP processes “to the letter” as Version 30 was developed. *Jill Martain*

1 *Transcript at 333:23-334:15.*

2 Despite these facts, the Commission found that (1) joint development of Version 30
3 breached the Eschelon ICA, (2) ordered Qwest to modify the expedite process such that all
4 CLECs in Arizona could obtain emergency expedites for free even though they had voluntarily
5 agreed to pay \$200 per day for such expedites, and (3) premised these decisions on a comparison
6 of unbundled loops to POTS in violation of FCC precedent and judicial precedent.

7

8 **II. ARGUMENT**

9

10 Qwest seeks rehearing from the Commission pursuant to Arizona Revised Statute Section
11 40-253(A) and the Commission's rule R14-3-111. Such an application "give[s] the Commission
12 the opportunity to correct its own errors before a party seeks judicial relief." *Save Our Valley*
13 *Ass'n v. Arizona Corp. Comm'n*, 216 Ariz. 216, 165 P.3d 194 ¶17 (Ariz. Ct. App. 2007). In this
14 case, the Order errs for each of the reasons stated in Qwest's Objections to the Recommended
15 Order and also because the Order requires Qwest to change its PCAT to provide emergency
16 expedites for free regardless of the type of product.

17

18 **A. The Order Errs in Concluding that Qwest Breached the Eschelon ICA by**
19 **Developing Version 30 in CMP.**

20

21 As stated above, the ICA requires the parties to "mutually develop expedite procedures"
22 and expressly provides that on expedited orders, "expedite charges may apply." By definition,
23 processes implemented in the Change Management Process are "mutually developed." *See, e.g.,*
24 *Jill Martain Transcript at 336:3-6 & 336:18-23.* Indeed, Qwest and Eschelon went to CMP
25 every time the word "develop" was used in the ICA. *See Bonnie Johnson Transcript at 56:16-*
26 *60:14 & 61:15-63:13.*

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

6 It is contrary to traditional contract interpretation to add language to an already clear
7 written contract provision. “The object of all rules of interpretation is to arrive at the intention of
8 the parties **as expressed in the contract.**” *R. Arizona Jury Instructions (Civil) 4th Contract 26* n.1
9 (emphasis added, quoting *United Cal. Bank v. Prudential Ins. Co.*, 140 Ariz. 238, 261, 681 P.2d
10 390, 413 (Ct. App. 1983)); *Grubb & Ellis Mgmt. Servs.*, 213 Ariz. at 86 (court must enforce
11 contract as written). “[P]romises should not be found by process of implication if they would be
12 inconsistent with express provisions that there is no reason to set aside or to hold inoperative.” 6-
13 25 Corbin on Contracts §564. “When the language of a contract is clear and unambiguous, effect
14 must be given to its terms, and the court, under the guise of constructions, cannot reject what the
15 parties inserted or insert what the parties elected to omit.” *DeLoach v. Lorillard Tobacco Co.*,
16 391 F.3d 551, 558 (4th Cir. 2004) (internal quotation marks omitted). *See, e.g., Omni Quartz v.*
17 *CVS Corp.*, 287 F.3d 61, 64-65 (2d Cir. 2002) (trial court correctly enforced express language of
18 contract; “[w]hatever Omni’s greater hopes or expectations may have been, they were not part of
19 the parties’ ultimate agreement.”).

20 It is especially erroneous to insert the word “agree” where the parties omitted it in
21 §3.2.2.12. First, the contract contains an integration clause stating that the contract can only be
22 amended by the parties in writing. *Exhibit C-1 at §53.1*. Adding the word “agree” in this
23 section directly contradicts the integration clause. Second, the tribunal must interpret this
24 provision of the ICA in the context of the whole agreement: “We interpret contracts to give
25 effect to all their parts. When interpreting a contract . . . it is fundamental that a court attempt
26 to ascertain and give effect to the intention of the parties at the time the contract was made if at

1 all possible.” *Hanson v. Tempe Life Care Vill., Inc.*, 162 P.3d 665, 666-667 (Ariz. Ct. App.
2 2007) (internal quotation marks omitted; citing *inter alia*, *Kintner v. Wolfe*, 102 Ariz. 164, 168,
3 426 P.2d 798, 802 (1967)).

4 Where a contract plainly uses a specific word or phrase (such as that the parties will
5 “develop and agree” versus, the parties will “develop”), the absence of that phrase in another
6 provision shows the parties’ intent to omit it as to that provision. *See, e.g., In re Hoffman Bros.*
7 *Packing Co.*, 173 B.R. 177, 184 (Bankr. Fed. App. 1994) (in interpreting union’s agreement with
8 employer, “[t]he union should be bound not only by the language it chose to use but also by what
9 it chose to omit,” citing *KCW Furniture, Inc. v. NLRB*, 634 F.2d 436 (9th Cir. 1980)). *Cf.*
10 *Western Vegetable Oils Co. v. Southern Cotton Oil Co.*, 141 F.2d 235, 237 (9th Cir. 1944)
11 (deliberate omission of arbitration provision from form contract showed “intention to abrogate
12 the arbitration rule.”). *Here, Eschelon and Qwest used the word “agree” to add substantive*
13 *requirements in at least 82 other provisions of the ICA. Renee Albersheim Direct at 188:8-*
14 *0189:23. This shows the absence of the word “agree” in Section 3.2.2.12 was the parties’*
15 *intentional omission from that provision.* Taken in the context of the rest of the ICA, the
16 absence of the word “agree” in this section shows the parties intended that omission. As such,
17 the conclusion in the Order that Qwest breached the ICA because Eschelon did not “agree” to
18 Version 30 is erroneous as a matter of law.

19 Qwest therefore requests that the Commission grant rehearing and reconsider the Order in
20 its entirety, because it is erroneous to find that Qwest breached its ICA with Eschelon.

21
22 **B. In Requiring Qwest to Offer All CLECs in Arizona Free Expedites When**
23 **Emergency Conditions Exist, The Order Violates Section 251(a) of the 1996 Act.**

24
25 Despite the concern of the Commission to protect what the Commission found to be
26 Eschelon’s “contract right[s]” (Order at 25:18), and to leave the development of an expedite PID

1 to a “forum where all affected parties can participate,” (Order at 32, ¶36) the Order
2 *simultaneously modifies forty-two interconnection agreements with LECs who did not*
3 *participate in this proceeding.* The Order does so purposefully by requiring Qwest to amend its
4 PCAT to provide expedites on the terms ordered in this complaint proceeding, instead of
5 according to the terms provided by interconnection agreements. In this regard, the Order thus
6 violates Section 251, which provides that approved interconnection agreements are binding.

7 Qwest has completed its preliminary analysis of the CLEC interconnection agreements
8 that are amended by the Order. *Affidavit of Larry Christensen, attached and marked as Exhibit*
9 *A.* Mr. Christensen states that Qwest has entered into binding, voluntary agreements with forty-
10 two CLECs in Arizona that provide terms for handling expedites that are different from the terms
11 that the Commission require in the Order. The expedite provisions in those agreements were
12 either incorporated into an existing agreement by amendment, or were part of the originally
13 negotiated or adopted agreements. Mr. Christensen attaches a list of those agreements to his
14 affidavit, showing the date the agreements were signed. Mr. Christensen states that each of these
15 was filed by Qwest with the Commission for approval under Section 252(e) of the Act, that all
16 were allowed to take effect, and that none were rejected.

17 In this case, the Order plainly modifies other Qwest interconnection agreements which
18 the Commission had allowed to take effect. The Order itself recognizes that “some CLECs did
19 not object to the new [expedite] process....” Order at 25:17-18. Indeed, it is undisputed that
20 many CLECs voluntarily agreed to the new Version 30 process, agreed to pay a \$200 per day
21 fee, signed amendments to their ICAs, and the Commission allowed these contract amendments
22 to take effect. Qwest provided a partial listing of those agreements in its Post Hearing Brief.²
23 Further, evidence in the hearing established that many CLECs agreed to the process well before
24 Version 30, the change complained of by Eschelon in this proceeding, was proposed and adopted

25 _____
26 ² See also, Qwest Corporation’s Exceptions to the ALJ’s Recommended Order dated October 1,
2008 at 9-10, n.4.

1 in CMP. *Exhibit Q-1 (Albersheim Direct) at 9:13-21*. Despite these undisputed facts, the Order
2 finds that “Qwest should provide expedites in delineated emergency situations to all Arizona
3 CLECs on the same terms it provides them to Eschelon.” Order at 28:16-19 and Order at 33
4 (third ordering clause).

5 Section 251 of the 1996 Act provides that interconnection agreements shall be “binding,”
6 and the Ninth Circuit has expressly ruled that state commissions cannot override interconnection
7 agreements by use of general authority. This is true of both arbitrated and voluntarily negotiated
8 contract terms which the Commission allowed to take effect pursuant to Section 252(e),³ because
9 Section 252(a)(1) of the 1996 Act provides that parties have the right to negotiate binding
10 agreements irrespective of whether the terms meet the substantive standards of the 1996 Act:

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

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47 U.S.C. § 252(a)(1) (emphasis added). *See, e.g., W. Radio Servs. Co. v. Qwest*, 530 F.3d 1186,
1190 (9th Cir. 2008); *Southwestern Bell Tel. Co. v. Brooks Fiber Communications of Okla., Inc.*,

³ 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.

1 235 F.3d 493, 496-97 (10th Cir. 2000). Thus, in negotiating interconnection agreements, parties
2 need not follow the standards set by the Act.

3 Under Section 252(e)(2)(A), once Qwest and the several CLECs who agreed to Version
4 30 by written amendments of their ICAs had entered into those terms, the Commission could
5 have rejected those amendments only if they “discriminate[d] against a carrier not a party or
6 [were] not consistent with ‘the public interest, convenience, and necessity.’” *Verizon Md., Inc. v.*
7 *PSC*, 535 U.S. 635, 638-639 (2002) (quoting Section 252(e)(2)(A)).

8 Unless the Commission rejects the negotiated agreement on those grounds when it is
9 submitted for Commission approval, the carriers are bound to follow their agreements. *Verizon*
10 *Maryland*, 535 U.S. at 638. On remand from the Supreme Court, the Fourth Circuit elaborated
11 on the binding nature of negotiated ICA terms:

12 If the parties enter into an agreement by voluntary negotiation, they may agree
13 ‘without regard to the standards set forth’ in §251(b) and §251(c). *Id.* §252(a)(1).
14 They must still, however, spell out how they will fulfill the duties imposed by
15 §251. *See id.* §251(c)(1). When an agreement, like the one voluntarily negotiated
16 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).

17 *Verizon Md. Inc. v. Global NAPs, Inc.*, 377 F.3d 355, 364 (4th Cir. 2004) (emphasis added).
18 “Federal law thus gives [a party to an interconnection agreement] the right to insist that it be held
19 only to the terms of the interconnection agreement to which it actually agreed.” *Verizon Md. Inc.*
20 *v. RCN Telecom Servs.*, 232 F. Supp. 2d 539, 551 (D. Md. 2002), *rev’d in part on other grounds*,
21 *Verizon v. Global NAPs*, 377 F.3d 355 (4th Cir. 2004). *See also AT&T Communs. v. Pac-West*
22 *Telecomm Inc.*, 2008 U.S. Dist. LEXIS 61740, *32-35 (N.D. Cal. Aug. 12, 2008) (discussing
23 “the FCC’s goals of encouraging voluntary negotiations to address intercarrier compensation,”
24 and importance that state commission decisions not override or conflict with such negotiated
25 agreements).
26

1 Nor can the Commission overwrite interconnection agreements by use of general
2 regulatory authority. *Pacific Bell v. California Public Utilities Commission*, 325 F.3d 1114,
3 1121 (9th Cir. 2003). In *Pacific Bell*, the California PUC issued a decision and “did not consider
4 or analyze any specific interconnection agreement.” *Id.* The Court found that issuing an
5 industry impacting decision without reference to the ICAs, and overruling ICAs in the process,
6 constituted “retroactive rule-making” and violated the 1996 Act:

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

12 *Id.* at 1127. The court continued:

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

21 *Id.* In sum, the court rejected the California PUC’s attempt to use general regulatory authority to
22 override interconnection agreements. The *Pacific Bell* decision shows that the Commission
23 cannot use the Eschelon ICA as a proxy for all other ICAs, nor order Qwest to amend the PCAT
24 for the avowed purpose of changing the amount Qwest can contractually receive when it
25 expedites unbundled loop orders for other CLECs pursuant to existing ICAs.

26 The Order in this case requires Qwest to modify, through its PCAT, all of its

1 interconnection agreements, despite there being no “evidence of the terms of interconnection
2 agreements with other carriers” before the Commission. Order at 28:14-15. Indeed, the only
3 evidence on this point – what expedite terms other CLECs agreed upon with Qwest – shows it is
4 indisputable that the Order conflicts with the many CLECs agreements that had voluntarily
5 agreed to pay the \$200 per day fee to obtain expedites. Accordingly, the Commission should
6 rehear and reconsider the Order, as to requiring Qwest to provide emergency expedites
7 categorically for all CLECs, for free.

8
9 **C. Requiring Qwest to Provide Emergency Expedites for “Free” Also Violates the 1996**
10 **Act Because Qwest Is Entitled to At Least TELRIC Rates for All Expedites.**

11
12 The Order is also contrary to law insofar as it requires Qwest to provide expedites under
13 specified emergency conditions *free of charge* to Eschelon and to all other CLECs in Arizona.

14 The Order states:

15
16 The ICA provides that Qwest may charge for expedites. *Specifically, the ICA*
17 *provides that the charge for expedites will be on an ICB*, as had been approved
18 by the Commission in the Qwest Cost Docket. Under ICB pricing, Qwest is
19 permitted to charge a fee based on the costs it incurs for the service. Qwest's
20 \$200 per day charge is not ICB pricing, but is, as Qwest acknowledges, a market-
21 based rate. It is not clear from this record whether Qwest incurs any additional
22 costs for providing an expedite since the process only provides for expedites if
23 Qwest has resources available. There may be some cost associated with
24 determining if there are resources available after a request to expedite is received,
25 but we cannot determine here what those costs would be. Eschelon and Qwest are
26 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.

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

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

7 30. End users do not distinguish between “design” and “non-design” services.

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

13 Order at 31-32 ¶¶29-31. Thus, the Order acknowledges that Qwest may incur additional costs in
14 expediting due dates, but nonetheless orders Qwest to provide expedites under emergency
15 conditions for free to all CLECs regardless of those additional costs.

16 As shown below, the Commission’s rationale for imposing these costs on Qwest errs
17 because (1) the law that has developed under the 1996 Act regarding provisioning of unbundled
18 loops shows the Commission wrongly concluded that Qwest must provide the same terms on
19 unbundled loops as POTS, and the evidence in the record shows the same point – that unbundled
20 loops are not simply a CLEC equivalent to Qwest’s use of POTS for its customers; (2) the Order
21 conflicts with the better reasoned law on this point, that expediting is not a Section 251 service;
22 and (3) the Commission is requiring Qwest to provide service to CLECs at less than TELRIC
23 rates.

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

Where services are not comparable, Qwest cannot be required to provide comparable
treatment for CLECs on one product as it does for other products to its own retail customers. In

1 this case, the Order errs by considering POTS and unbundled loops as comparable.

2 Provisioning of POTS services is not analogous to provisioning unbundled loops. See
3 e.g., *In re BellSouth Corp.*, 13 FCC Rcd 20599, 20717 ¶198 (FCC Oct. 13, 1998) (“the
4 provisioning of unbundled local loops has no retail analogue”); *Id.* at ¶87 n.248 (ordering and
5 provisioning of UNEs generally has no retail analogue); *In re Deployment of Wireline Services*
6 *Offering Advanced Telecommunications Capability and Implementation of the Local*
7 *Competition Provisions of the Telecommunications Act of 1996*, 14 FCC Rcd 20912, 20962
8 n.248 (FCC Dec. 9, 1999); *21st Century Telecom of Illinois, Inc. v. Illinois Bell Telephone*
9 *Company*, 2000 Ill. PUC LEXIS 489 *74-75 (Ill. PUC June 15, 2000) (work required to
10 provision an unbundled loop is substantially more extensive than work required to do ‘line
11 translation’ to provision a retail POTS line). ***Indeed, Staff specifically recognizes “[t]here is no***
12 ***‘retail analogue for expedites of the installation of unbundled loops.’ Exhibit S-1 at 32:19-***
13 ***33:11*** (emphasis added). In Arizona, as in all other Qwest states, the provisioning of unbundled
14 loops is, and always has been, categorized as a UNE that has no retail analog.

15 Despite this clear national precedent, the Order rationalizes that because CLECs use
16 unbundled loops to compete against Qwest’s POTS services, the same expedite conditions must
17 apply to unbundled loops as well. This conclusion errs in looking at an end result instead of at
18 whether the services are analogous.

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

26 For the foregoing reasons, the Order’s conclusion that Qwest must expedite orders for

1 unbundled loops for free because Qwest does not charge for expedites for POTS services in
2 emergency situations, is in error. In fact, the evidence is clear that Qwest charges the same fee to
3 expedite analogous retail services. As such, the Commission should amend the Order by making
4 the changes that Qwest had set forth in Exhibit A to its Objections to the Recommended Order.⁴

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

7 “[B]y its very nature” this case concerns Eschelon’s “request to shorten the standard
8 provisioning interval.” *Bonnie Johnson at 24:25-25:4*. For unbundled loops, Qwest’s
9 obligation is not one of non-discrimination, but Qwest must provide an “efficient carrier a
10 ‘meaningful opportunity to compete.’” *In re Bell Atlantic New York*, FCC 99-404, ¶44 (Rel.
11 December 22, 1999). Qwest does that by provisioning unbundled loops in accordance with the
12 standard provisioning interval. *See e.g., Bell Atlantic New York*, 15 FCC Rcd 3953 at ¶8. This is
13 all that Section 251(c)(3) of the Act requires. Thus, an expedite is by definition a request to get
14 more than a meaningful opportunity to compete, something more than Section 251 requires.

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

20 Because the Court holds that the ACC does not have authority or jurisdiction to
21 impose Section 271 requirements into ICAs, it follows that the ACC does not
22 have authority to set prices for those 271 elements. Further, even if the ACC did
23 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.

24 ⁴ Qwest’s redlined version of the Recommended Order presumed the Commission would
25 disagree with Qwest and find that Qwest breached the existing ICA with Eschelon. Qwest
26 respectfully believes that finding to be in error, and therefore the entire Order must be re-written,
and if the Commission grants rehearing as Qwest requests on that issue, then Qwest will
accordingly submit a new proposed order.

1 *Id.* at 1079. See also *Verizon New England, Inc. v. Maine Public Utilities Commission*, 509 F.3d
2 1, 9, *rehearing den'd*, 509 F.3d 13, (1st Cir. 2007) (“One issue is whether the states can require
3 that section 271 elements be priced at TELRIC rates. The FCC orders provide carriers the
4 authority to charge the potentially higher just and reasonable rates, in order to limit subsidization
5 and to encourage investment by the competitors. To allow the states to require the lower
6 TELRIC rates directly conflicts with, and undercuts, the FCC's orders. Under preemption
7 principles the state orders must in this respect give way.”).⁵

8 The FCC has not stated that Section 251 requires BOCs to expedite unbundled loop
9 orders. The FCC held that BOCs like Qwest must simply provision unbundled loops in
10 accordance with the standard provisioning interval. See e.g., *Bell Atlantic New York*, 15 FCC
11 Rcd 3953 at ¶8. Any attempt by the Commission to enforce TELRIC rates (i.e., an ICB rate
12 determined in a cost docket) when Qwest expedites an order for an unbundled loop goes beyond
13 anything required by the FCC, conflicts with decisions of the FCC, and violates the Act.

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

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

23 ⁵ Instead of TELRIC rates, FCC orders require “just and reasonable rates.” Many other CLECs
24 have opted into Version 30 of the Expedite Process. Qwest is not aware of any CLEC
25 complaining about the \$200/day rate except for Eschelon. *Exhibit Q-1 (Albersheim Direct) at*
26 *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.

1 *In re Petition of Eschelon Telecom, Inc. for Arbitration with Qwest Corporation Pursuant to 47*
2 *USC Section 252(b) of the Federal Telecommunications Act of 1996, 2008 Ariz. PUC LEXIS*
3 *114, 180-181 (Ariz. PUC May 16, 2008) (adopting Recommended Order of ALJ Rodda). The*
4 *Commission already recognized that expedites are a request for superior service. It would*
5 *violate the Act to set rates for this non-251 service.*

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

11 The Joint Petitioners contend that expedited service is part and parcel of UNE
12 provisioning. The Commission disagrees. Standard provisioning intervals for
13 service are required pursuant to Section 251. BellSouth should also provide non-
14 discriminatory access to expedited service, ***but expedited service is not a Section***
251 obligation.

15 *In re Joint Petition for Arbitration of Newsouth Communications Corp., 2006 Ky. PUC LEXIS*
16 *159 at Issue 86 (Ky. PUC March 14, 2006) (emphasis added). The Florida Commission*
17 *recognized this point as well and specifically rejected a request to require TELRIC rates to*
18 *expedites:*

19 It is clear there is no obligation imposed or implied in Rule 51.311(b) that an
20 incumbent render services to a CLEC superior in quality to those provided to a
21 retail customer ***requesting similar services. So long as rates are identical for all***
requesting parties, CLEC and retail alike, parity exists in the provisioning
22 ***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.

23
24 *In re Joint Petition by NewSouth et al., 2005 Fla. PUC LEXIS 634 *150, Order No. PSC-05-*
25 *0975-FOF-TP (Fla. PSC Oct. 11, 2005) (emphasis added). In that case, the Florida Commission*
26

1 specifically approved BellSouth's expedite fee of \$200 per day for CLECs because BellSouth
2 charged the same fee to expedite similar retail services. *Id.* at *150-151. The Kentucky
3 Commission did the same. *In re Newsouth*, 2006 Ky. PUC LEXIS 159. Thus, at least two
4 commissions have specifically approved the exact expedite charge that Qwest implemented with
5 Version 30 in the CMP. As such, the Commission should amend the Order by making the
6 changes that Qwest had set forth in objecting to the Recommended Order.

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

9 The Order recognizes that "[t]here may be some" additional costs in expediting an order
10 for an unbundled loop, but nonetheless requires Qwest to provide expedited due dates for
11 unbundled loops at no charge anyway. Order at 26:4-8. As stated above, TELRIC principles do
12 not apply to requests to expedite unbundled loops. However, even if TELRIC is applied, free is
13 obviously below Qwest's costs.

14 Section 252(d)(1) states that rates for UNEs "shall be based on the cost ... of providing
15 the ... network element ... and nondiscriminatory, and may include a reasonable profit." 47
16 U.S.C. § 252(d)(1). Interpreting this statute, the FCC mandated that state commissions use
17 TELRIC rates as the sole pricing mechanism for 251(c)(3) unbundled network elements. *AT&T*
18 *Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 385 (1999) (FCC has authority to develop pricing
19 methodology which states must follow); *Verizon Communs., Inc. v. FCC*, 535 U.S. 467, 498-501,
20 152 L. Ed. 2d 701, 122 S. Ct. 1646 (2002) (discussing Section 252(d)'s requirement of
21 compensation to incumbents based on cost); *Verizon Cal., Inc. v. Peevey*, 413 F.3d 1069, 1072-
22 1073 (9th Cir. Cal. 2005) (quoting *AT&T Communs. of Ill., Inc. v. Ill. Bell Tel. Co.*, 349 F.3d
23 402, 411 (7th Cir. 2003) ("[f]ederal law requires that any rate for unbundled network elements,
24 adopted by a state commission, comply with TELRIC when adopted.")). Thus the law is plain
25 that requiring BOCs to provide such services for free violates the Act. This Commission's
26 decision to allow Qwest to charge for expedites on an individual case basis pending a TELRIC

1 cost proceeding implicitly acknowledges this. May 16, 2008 Order at *182. Thus, requiring
2 Qwest to expedite orders for unbundled loops at no cost violates the Act. Qwest is entitled to
3 just compensation for expediting due dates beyond the standard interval. As such, the
4 Commission should amend the Order by making the changes set forth in Qwest's redlined
5 proposed order submitted with its Objections to the Recommended Order.

6

7 **III. Conclusion**

8

9 WHEREFORE, for all of the aforementioned reasons, Qwest respectfully requests that
10 the Commission grant rehearing and reconsideration of the Order, and that the Commission
11 instead adopt the proposed order that Qwest submitted with its Objections on October 1, 2008.

12

RESPECTFULLY SUBMITTED this 12th day of November, 2008.

13

14

Attorneys for Defendant, Qwest Corporation

15

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1 ORIGINAL and 13 copies hand-delivered
for filing this 12th day of November 2008, to:

2
3 Docket Control
4 ARIZONA CORPORATION COMMISSION
1200 West Washington Street
Phoenix, AZ 85007

5 Copy of the foregoing hand-delivered
this 12th day of November 2008, to:

6
7 The Honorable Jane Rodda
8 Administrative Law Judge
9 Hearing Division
Arizona Corporation Commission
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Phoenix, Arizona 85007

10

11 Maureen Scott
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14 Ernest G. Johnson, Esq.
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EXHIBIT A

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BEFORE THE ARIZONA CORPORATION COMMISSION

MIKE GLEASON
Chairman
WILLIAM MUNDELL
Commissioner
JEFF HATCH-MILLER
Commissioner
KRISTIN MAYES
Commissioner
GARY PIERCE
Commissioner

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

**DOCKET NOS. T-03406A-06-0257
T-01051B-06-0257**

**AFFIDAVIT OF LARRY
CHRISTENSEN IN SUPPORT OF
QWEST CORPORATION'S
APPLICATION FOR REHEARING
OF DECISION NO. 70557**

My name is Larry Christensen, and by my signature below, I attest that the following are true facts:

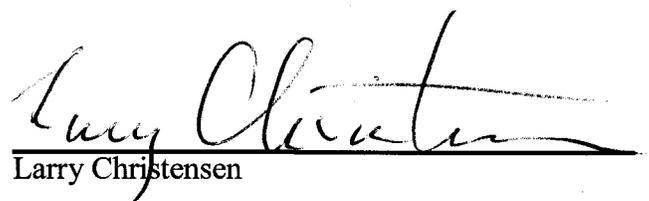
1. I am employed by Qwest Corporation ("Qwest"). My business address is 1801 California Street, 24th Fl, Denver, CO 80111. Since 2001, I have served as the Director of Legal Issues – Wholesale Markets. In that role, my responsibilities include supervision of a team of negotiators and support personnel who are responsible for negotiating and administering wholesale agreements between Qwest and its wholesale customers which includes section 252 Interconnection Agreements with competitive local exchange carriers ("CLECs"). I am generally familiar with the interconnection agreements Qwest has executed and Qwest maintains those agreements in files and data bases kept in the regular course of Qwest's business.

1 I have read Decision No. 70557 (the "Decision"), particularly the portions on page 28,
2 lines 13 through 24, and the findings of fact in paragraph 38, page 32. I understand that the
3 Commission orders Qwest Corporation ("Qwest") to provide expedites in delineated emergency
4 situations to all Arizona CLECs on the same terms that it provides them to Eschelon. The
5 Decision provides at page 26, lines 10-13, "Qwest shall provide expedites to Eschelon for all
6 types of products in emergency situations for no additional charge, which conforms to the
7 parties' long-standing practice prior to January 2006."

8 I have compared the foregoing requirements in the Decision to Qwest's existing
9 interconnection agreements with CLECs in Arizona. My conclusion is as follows: Of the 87
10 approved and pending Interconnection Agreements with wireline companies in Arizona, Qwest
11 has entered into binding, voluntary agreements with forty-two (42) CLECs that provide terms for
12 handling expedites that are different from the terms that the Commission requires in the Order. I
13 have attached to this affidavit a list of those agreements, marked as Larry Christensen Affidavit
14 Attachment A. Attachment A also shows the date the expedite agreements listed thereon were
15 signed by Qwest. The expedite provisions in the agreements listed on Attachment A were either
16 incorporated into an existing agreement by amendment, or were part of the originally negotiated
17 or adopted agreements. I note that some of these agreements were made as long ago as 2004.
18 Each of these agreements was filed by Qwest with the Commission for approval under Section
19 252(e) of the Act, and none were rejected (three are currently pending approval by the
20 Commission).

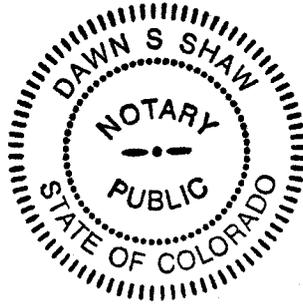
21 Dated: November 11, 2008

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Larry Christensen

1 Subscribed and sworn to me
2 This 11th day of November 2008

3 Notary Public *Dawn S Shaw*
4 My Commission expires: *2/7/12*



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Larry Christensen Affidavit Attachment A

State	Company	Executed By Qwest
Arizona	360networks (USA) inc.	01/05/2006
Arizona	Access Point, Inc.	04/02/2008
Arizona	American Fiber Network Inc.	06/14/2007
Arizona	AT&T Communications of the Mountain States, Inc.	05/20/2005
Arizona	AZX Connect LLC	07/07/2005
Arizona	Bandwidth.com CLEC, LLC	03/04/2008
Arizona	Broadband Dynamics LLC	04/13/2006
Arizona	Bullseye Telecom Inc.	06/09/2008
Arizona	Cbeyond Communications, LLC	12/07/2006
Arizona	Clertech.com, Incorporated	07/18/2008
Arizona	Comcast Phone of Arizona, LLC d/b/a Comcast Digital Phone	01/09/2007
Arizona	CommPartners LLC	02/09/2006
Arizona	Cordia Communications Corp.	01/06/2006
Arizona	Cox Arizona Telcom L.L.C.	11/11/2004
Arizona	DIECA Communications Inc. dba Covad Communications Company	6/1/2006
Arizona	EMC Telecom Corporation	9/18/2008
Arizona	Ernest Communications, Inc.	04/21/2008
Arizona	Gila Local Exchange Carrier, Inc.	01/31/2008
Arizona	Global Crossing Local Services, Inc.	01/29/2008
Arizona	Globetel, Inc.	10/27/2006
Arizona	Granite Telecommunications LLC	10/07/2005
Arizona	Level 3 Communications LLC	12/14/2006
Arizona	Looking Glass Networks Inc.	01/02/2007
Arizona	MCImetro Access Transmission Services LLC	6/30/2006
Arizona	McLeodUSA Telecommunications Services, Inc. dba PAETEC Business Services	2/28/2005
Arizona	Mountain Telecommunications, Inc.	04/13/2006
Arizona	National Brands Inc. (aka Sharenet Communications Company)	08/12/2005
Arizona	Navigator Telecommunications LLC	01/26/2006
Arizona	New Edge Network Inc. dba New Edge Networks	10/21/2004
Arizona	NextG Networks of California Inc. dba NextG Networks West	04/27/2006
Arizona	Pac-West Telecomm, Inc.	02/18/2008
Arizona	QuantumShift Communications, Inc., dba vCom Solutions	10/16/2008
Arizona	Syniverse Technologies, Inc.	12/05/2007
Arizona	TCG Phoenix	05/20/2005
Arizona	Time Warner Telecom of Arizona LLC	04/10/2008
Arizona	Trans National Communications International Inc.	12/13/2006
Arizona	ValuTel Communications Inc.	08/16/2005
Arizona	Vilaire Communications Inc.	02/16/2006
Arizona	Wholesale Carrier Services, Inc.	01/07/2008
Arizona	XO Communications Services, Inc.	05/19/2008
Arizona	Ygnition Networks, Inc.	10/20/2006
Arizona	Ymax Communications Corp.	07/09/2007