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BEFORE THE ARIZONA CORPORATION COMMISSION

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IN THE MATTER OF)
QWEST CORPORATION'S)
COMPLIANCE WITH SECTION 252(e))
OF THE TELECOMMUNICATIONS)
ACT OF 1996)
_____)

DOCKET NO. RT-00000F-02-0271

**QWEST CORPORATION'S REPLY TO RESPONSES TO
QWEST'S COMMENTS REGARDING FILING OBLIGATIONS
[PUBLIC VERSION]**

By Procedural Order dated May 20, 2002, the Hearing Division of the Arizona Corporation Commission (the "Commission") issued an amended procedural order, directing Qwest Corporation ("Qwest") to reply to other parties' comments regarding Qwest's filing obligations under Section 252 of the Telecommunications Act of 1996 (the "1996 Act"). Qwest hereby submits its Reply to the Responding Comments submitted by the Residential Utility Consumer Office ("RUCO"), AT&T Communications of the Mountain States, Inc. and TCG Phoenix (collectively "AT&T") and Time Warner Telecom of Arizona, LLC ("Time Warner").

Qwest believes that the Commission does not need to take action on this matter at this time. No party can point to an established standard defining the scope of agreements that are subject to the filing and pre-approval requirements of Section 252(e). Rather, it is an issue subject to good-faith differences of interpretation. Qwest has filed approximately 100 interconnection agreements in Arizona and hundreds more across its fourteen-state region since enactment of the 1996 Act. The allegations against Qwest raised for the first time in Minnesota

simply question whether Qwest drew the line in the right place between what must be filed and what need not be filed.

The issue is resolved going forward, because Qwest has filed a Petition for Declaratory Ruling (the "Petition") with the FCC seeking a nationwide policy on a matter that should not be subject to different interpretations in each state. Pending the FCC's consideration of Qwest's Petition, Qwest has committed to "over-file" — to file and seek approval of every agreement with a CLEC that even arguably falls within the broadest standard that any party has suggested. Thus, the only issue left to be decided is whether Qwest drew the line in the correct place with respect to a limited number of past agreements with CLECs. As Qwest demonstrated in its initial comments and support in this Reply, the governing statute supports Qwest's position that none of those agreements must have been filed and certainly that Qwest was acting in good faith in concluding that they did not need to be filed.

I. THE ISSUES IN THE UNFILED AGREEMENTS CASE HAVE NO BEARING ON QWEST'S 271 APPLICATION

Both AT&T and RUCO expend considerable effort arguing that the matters at issue in this unfiled agreements case should impact Qwest's 271 proceeding in Arizona. Their arguments are without merit because the Section 271 proceedings are not an appropriate forum to consider every dispute between a CLEC and an ILEC, the specific agreements targeted by AT&T and RUCO do not undermine the integrity of the Section 271 proceeding, and Qwest has already taken affirmative steps to resolve the unfiled agreements issues on a going-forward basis.

A. Section 271 Dockets Are Not a Catch-All for Every ILEC-CLEC Dispute.

Without in any way diminishing the importance of the issues underlying the "unfiled agreements" cases, they nevertheless are not appropriate matters for consideration as part of the Section 271 public interest inquiry. That docket is not a vehicle for resolving the

legal ambiguities concerning Qwest's obligations under Sections 251 and 252 or other unresolved questions about the interpretation and application of the Act:

As the Commission stated in the *SWBT Texas Order*, despite the comprehensiveness of our local competition rules, there will inevitably be, in any section 271 proceeding, new and unresolved interpretive disputes about the precise content of an incumbent LEC's obligations to its competitors — disputes that our rules have not yet addressed and that do not involve *per se* violations of self-executing requirements of the Act. The section 271 process simply could not function as Congress intended if we were generally required to resolve all such disputes as a precondition to granting a section 271 application. . . . [Section 271 proceedings] are often inappropriate forums for the considered resolution of industry-wide local competition questions of general applicability. . . . [F]ew of the substantive obligations contained in the local competition provisions of sections 251 and 252 are altogether self-executing; they rely for their content on the Commission's rules. 1/

Indeed, the United States Court of Appeals for the District of Columbia Circuit expressly rejected AT&T's attempt to convert Bell Atlantic's Section 271 proceeding in New York into the same sort of global referendum on the ILEC that the commenters seek to create here. In agreeing with the FCC that CLECs should not be permitted to raise collateral issues, the court held that the sweeping inquiry AT&T sought to foment would cast the Section 271 process adrift from its statutory moorings:

1/ See Memorandum Opinion and Order, *Joint Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Kansas and Oklahoma*, 16 FCC Rcd 6237 ¶ 19 (2001), modified, *Sprint Communications Co. v. FCC*, 274 F.3d 549 (D.C. Cir. 2001) ("*SBC Kansas/Oklahoma Order*") (footnotes omitted, emphasis added); see also Memorandum Opinion and Order, *Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services in Texas*, 15 FCC Rcd 18354 ¶¶ 23-27 (2000) ("*SBC Texas Order*").

Given the deference we owe the Commission, especially where, as here, it has made a judgment about the most efficient way to proceed in a complex administrative matter, we find its interpretation of the statute reasonable. The Commission's concerns about encumbering the ninety-day administrative process and prolonging litigation, thus delaying BOC entry into long distance markets, seem well-founded. Under AT&T's interpretation of the statute, parties to section 271 proceedings could challenge (before both the Commission and this court) virtually every aspect of the agency's local competition regulations – including TELRIC, as AT&T counsel conceded at oral argument. Such a challenge would further complicate these already enormously complex proceedings, requiring the Commission, in addition to resolving the many other issues before it, to present a comprehensive defense of TELRIC, all within the ninety days prescribed by the statute. We would then have to determine whether TELRIC was the appropriate pricing methodology, and in doing so we would create a holding that would supplant any pending petitions for review of the underlying TELRIC orders, at least in this Circuit. We thus agree with the FCC that allowing collateral challenges could change the nature of section 271 proceedings from an expedited process focused on an individual applicant's performance into a wide-ranging, industry-wide examination of telecommunications law and policy. ^{2/}

RUCO cites *Sprint Communications Co. L.P. v. Federal Communications*

Comm'n ^{3/} to argue for a wide ranging inquiry into whether the unfiled agreements indicate a lack of “unfettered competition toward which the Act strives.” (RUCO Comments, at 3).

However, *Sprint Communications* provides no support for such a position. In that case, parties opposing SBC's 271 application in Kansas and Oklahoma brought forth specific data regarding the lack of competition in the local market in those states as evidence that SBC was engaged in a “price squeeze.” 274 F.3d at 554. ^{4/} The FCC had summarily dismissed such a claim without

^{2/} *AT&T Corp. v. FCC*, 220 F.3d 607, 631 (D.C. Cir. 2000) (emphasis added).

^{3/} 274 F.3d 549 (D.C. Cir. 2001).

^{4/} The court defined “price squeeze” as “charging prices for inputs that precluded competition from firms relying on those inputs.” *Id.* at 553.

providing any reasoning directly addressing it. The appeals court remanded the case back to the FCC to specifically consider the “price squeeze” issue as part of its public interest inquiry. *Id.* at 555. However, the court did not vacate the FCC’s decision granting SBC’s 271 application. *Id.* at 556.

RUCO provides no specific complaint regarding Qwest’s conduct similar to the “price squeeze” issue in *Sprint Communications*. Rather, RUCO generally asserts that some agreements appear to relate to billing, some appear to give preferential treatment, some involve agreements to withdraw from Qwest’s 271 docket, many are confidential; 5/ and concludes that there may have been “collusive or otherwise coordinated interdependent conduct,” which bears further scrutiny. (RUCO Comments, at 3). These broad allegations represent the sort of general referendum on an ILEC the D.C. Circuit rejected in *AT&T Corp. v. FCC*.

The kinds of “unfiled agreements” at issue are hardly novel. ILECs that have been granted Section 271 approval in other states no doubt settled disputes with CLECs as well, but no state (or CLEC) to Qwest’s knowledge ever expressed any concern in those proceedings. There is no need for this Commission to expend further resources and time in the Section 271 dockets with this ancillary dispute.

5/ Both RUCO and AT&T imply that confidential agreements between Qwest and CLECs are improper, and routinely refer to these as “secret” agreements. CLEC and ILEC concerns regarding proprietary information are understandable; business contracts are routinely kept confidential, and both wholesale and retail telecommunications customers frequently request confidential treatment of the terms of their arrangements. Qwest takes very seriously its obligation to respect the confidentiality of its dealings with its customers, whether wholesale or retail. Qwest does not suggest, however, that any customer has a legitimate expectation of confidentiality for a term of an agreement that falls within Sections 251 or 252. There is no basis for AT&T’s pejorative attempt to suggest something is wrong with this normal business practice.

B. The Unfiled Agreements Have Not Affected the Integrity of the Section 271 Proceedings.

RUCO and AT&T misconstrue Qwest's November 15, 2000 agreement with Eschelon Telecommunications, Inc., by selectively quoting a single sentence from the agreement out of context. (RUCO Comments, at 2; AT&T Comments, at 8 n.12, 21.) They suggest this agreement calls Qwest's 271 application into question. If anything, this agreement viewed fairly actually promotes the objectives of Section 271. Indeed, there is nothing wrong or inconsistent with Qwest's burden under Section 271 for Qwest to agree to satisfy customer concerns and, if it does so, for that customer to agree not to oppose Qwest's Section 271 application.

The Confidential Agreement is an unremarkable document. It provides that Qwest and Eschelon will "(1) develop an implementation plan by which to mutually improve the companies' business relations and to develop a multi-state interconnection agreement; (2) arrange quarterly meetings between executives of each company to address unresolved and/or anticipated business issues; and (3) establish and follow escalation procedures designed to facilitate and expedite business-to-business dispute solutions."^{6/} Furthermore, "if an agreed upon Plan is in place by April 30, 2001, Eschelon agrees to not oppose Qwest's efforts regarding Section 271 approval or to file complaints before any regulatory body concerning issues arising out of the Parties' Interconnection Agreements" (emphasis added). As such, Eschelon and Qwest agreed to deal in good faith with each other to create and execute a plan to address business issues between the companies. If it worked, the parties agreed that this plan also would satisfy any concerns Eschelon might have regarding Qwest's Section 271 efforts – if it did not, Eschelon was free to say so, to the state commissions or anyone else. In the same way,

^{6/} A copy of the Confidential Agreement was previously submitted to the Administrative Law Judge and those parties who signed the Protective Order.

Eschelon's agreement to not oppose Qwest's Section 271 application was not linked to any payment, but was expressly contingent upon the parties' ability to agree upon and implement a plan that satisfied Eschelon.

There is, of course, nothing sinister or nefarious if Qwest enters into an agreement designed to improve its business relationship with one of its customers without any resort to the regulatory process. Indeed, AT&T's own witness in the Washington State 271 docket testified that an agreement of this nature is unobjectionable for Section 271 purposes so long as the Act did not require Qwest to file the agreement at issue in the first place:

Q. [Chairwoman Showalter] Well, okay, I will repeat the question. I understood your testimony to raise two objections. One is these agreements need to be filed, but the other is that these were secret agreements not to oppose each other in a regulatory proceeding. So are you saying that you have no objection to this kind of agreement unless it is also the kind of agreement that must be filed with the Commission?

A. [Diane F. Roth, AT&T] I think in large part that's correct. The reality of business is that there are negotiations, there are settlements on issues, and a lot of times they settle billing disputes as well as regulatory proceeding. But I think what makes these secret interconnection agreements unique is the obligation under the federal law to negotiate them and also to file them publicly. And what I object to is then intertwining that obligation with an agreement not to file complaints or be involved in 271. So it's the intertwining of the two, if you will, that I object to.

Q. So if these other agreements, not this one, but if these other agreements need not be filed with the Commission as an interconnection agreement, then you have no objection to them and feel they don't demonstrate anything one way or the other in the context of 271?

A. I would agree with that, but I would also have to focus on the if in your statement. If those other agreements aren't interconnection agreements, then I don't have the same kind of an objection as I do if they are. And it's our company's position that they do fall under the federal law in terms of the obligation to negotiate for interconnection and the other elements that are part of the federal law. ^{7/}

When Qwest changes its processes in response to concerns Eschelon expressed directly to Qwest about its wholesale service delivery, all of Qwest's CLEC customers benefit, just as they would if Eschelon raised its concerns in a regulatory setting. If anything, then, agreements that improve processes and procedures that benefit provisioning of wholesale services to all CLECs, and to develop a multi-state interconnection agreement, promote the interests underlying Section 271. AT&T's suggestion to the contrary not only is incorrect, but contradicts the sworn testimony of its own official in another Section 271 docket.

C. Qwest Has Taken Multiple Steps to Address and Resolve the Issues Related to Its Filing Obligations.

Qwest understands and takes seriously the concerns raised by the Arizona Corporation Commission, other state commissions and CLECs in the "unfiled agreements" context, and has responded affirmatively to those concerns in a number of ways that address both the underlying legal issues and the overriding policy concerns.

First, Qwest filed its FCC Petition on April 23, 2002, and, in so doing, asked the FCC to define once and for all the scope of ILEC-CLEC agreements subject to Section 252(a)(1)'s filing requirements. Qwest's FCC Petition sets forth Qwest's understanding of the Act and its legislative history and purposes in detail and opens Qwest's position for public

^{7/} Testimony of Diane F. Roth, *In the Matter of the Investigation into U S West Communication, Inc.'s Compliance with Section 271 of the Telecommunications Act of 1996*, Docket No. UT-003022, excerpt at 51:11-52:18 (emphasis added). (Ex. 1 at 52:11-18.)

comment and debate. Opening comments to the FCC Petition were filed on May 29, 2002, reply comments are due by June 13, 2002, and the FCC will consider all of these submissions thereafter. Because these important questions now have been presented formally and squarely to the FCC, this Commission can expect a definitive answer on the threshold standard in the foreseeable future.

Second, until the FCC rules on Qwest's FCC Petition, Qwest has committed voluntarily 8/ to file and seek approval of all contracts, agreements, and letters of understanding with CLECs that create forward-looking obligations to meet the requirements of Section 251(b) or (c) – a commitment that goes well beyond the requirements of Section 252(a). Qwest also will work with the state commissions and their staffs on the treatment of agreements that may be close to this standard.

Third, Qwest has begun the process of forming a committee of senior managers from its Legal Affairs, Policy and Law, Wholesale Business Development, Wholesale Service Delivery, and Network divisions that will review all agreements involving Qwest's in-region wholesale activities and ensure that Qwest complies with both the above commitment and any ruling the FCC issues on Qwest's petition. 9/

Thus, whatever the merits of the arguments criticizing Qwest's filing decisions (and Qwest continues to believe those arguments have no merit), these issues are resolved going forward. Qwest had already been filing numerous agreements that it believed fell within Section

8/ See Letter from Mr. R. Steven Davis, Sr. Vice President, Policy and Law, Qwest Corporation, to Chairman William A. Mundell. A copy of this letter is attached as Exhibit 2 to this Reply.

9/ *Id.*

252(a)'s requirements before these proceedings began. As for the relatively few contractual arrangements in dispute, the FCC's ruling on Qwest's Petition either will vindicate Qwest's interpretation of Section 252(a) or articulate a new standard for how this section must be applied to everyone's agreements. And in the meantime, Qwest has agreed to file on a going-forward basis the range of agreements its opponents assert should be filed. Even if this Commission were to credit the unproven allegations in AT&T's and RUCO's comments, because of the proactive steps that Qwest is taking there is no issue that this Commission need address in advance of an FCC ruling on Qwest's Petition.

II. QWEST MAINTAINED A GOOD-FAITH BELIEF THAT IT DID NOT NEED TO FILE THE AGREEMENTS AT ISSUE

The commenters would have this Commission believe that the law and the factual evidence leave no doubt whatsoever that Qwest has violated the Act and discriminated against CLECs. Reply briefs are not appropriate vehicles for detailed analyses of the governing law and facts. It is, however, important for this Commission to understand two things. One, there is no ruling by a court, 10/ the FCC, or any state commission articulating the scope of ILEC-CLEC agreements that must be filed as "interconnection agreements" for purposes of Section 252(a)(1). 11/ Second, the reading of Section 252 most consistent with the Act's legislative

10/ In a bit of dicta, one district court has noted that "[a]n 'interconnection agreement' under the act consists of detailed technological and monetary provisions that may be arrived at through voluntary negotiation." *TCG Milwaukee, Inc. v. Public Service Commission*, 980 F. Supp. 992, 995 (W.D. Wis. 1997). Qwest does not consider this a working definition of interconnection agreement for two reasons. First, the issue of the Scope of the Section 252(a)(1) filing requirement was not before the court, so the reference to interconnection agreement is dicta. Second, the description given by the court is no more detailed than the language of the statute itself, thus it gives no further guidance to judge what the scope of interconnection agreement is.

11/ On May 29, 2002, the Iowa Utilities Board issued an order of tentative findings, which represented the first instance in which any official state or federal agency or court has directly addressed the scope of interconnection agreement under Section 252(a)(1). *In Re: AT&T Corp. v.*

history and overriding procompetitive and deregulatory purposes indicates that the agreements at issue in the Minnesota docket (and those of the other states) in fact fall outside the bounds of what Qwest was required to file.

Some agreements – such as typical interconnection agreements or amendments to an ILEC’s interconnection agreement with a CLEC describing basic interconnection services, unbundled network elements, and rates – pose no such interpretive difficulties. The problem arises with respect to agreements covering issues one or more steps removed from the nuts and bolts of interconnection, *e.g.*, agreements settling prior disputes between an ILEC and CLEC, agreements establishing granular details of broad provisioning obligations contained in an interconnection agreement, agreements establishing details of dispute resolution procedures, and the like. Those sorts of agreements fall, by all accounts, into a vast gray area that no tribunal has clarified or resolved to date.

A. The Governing Standard Has Never Been Defined and, Indeed, There Is No Consensus on What the Act Requires.

The commenters do not, and cannot, cite any ruling handed down before these proceedings began by the FCC, a court, a state commission, or any other body defining the range of agreements or provisions that must be filed under Section 252(a)(1) of the Act. There also is

Qwest Corp., Docket No. FCU-02-2 (Iowa Department of Commerce, Utilities Board, May 29, 2002). The Iowa Utilities Board adopted the following definition of interconnection agreement: “a negotiated or arbitrated contractual arrangement between an ILEC and a CLEC that is binding; relates to interconnection, services, or network elements, pursuant to § 251, or defines or affects the prospective interconnection relationship between two LECs.” *Id.* at 8. Qwest maintains that this definition is too broad and refers the Commission to its arguments contained in its comments and this reply. Also, this highlights the need for the FCC to provide one standard because the Iowa definition would arguably capture routine paperwork and retrospective settlements of past disputes, while the Minnesota Department of Commerce would exempt such agreements from filing. *See* Testimony of W. Clay Deanhardt on behalf of the Department of Commerce, *Minnesota “Unfiled Agreements” Docket*, April 22, 2002. (Ex. 3 at 16:11-22.)

no uniform position from Qwest's opponents in the various state proceedings as to what the standard should be. Two examples make this point:

- A provision should be filed, according to Minnesota Department of Commerce expert, W. Clay Deanhardt, if "a provision created a concrete and specific legal obligation for Qwest to do something or refrain from doing something on a looking-forward basis to meet the requirements of §§ 251(b) and (c)." Mr. Deanhardt characterized his standard as "a permutation of part of the FCC's test for whether an [ILEC] like Qwest can obtain approval under 47 U.S.C. § 271 to provide interLATA long distance services." 12/ However, Mr. Deanhardt admitted that the FCC has not to date issued any definitive standard, and that his proposed standard was not expressed in any statute, rule or case. 13/

- After admitting that "[t]he Act does not define 'terms and conditions' or interconnection," AT&T proffered the following comprehensive, five-part standard to the Iowa Public Utilities Board:

12/ Testimony of W. Clay Deanhardt on behalf of the Department of Commerce, *Minnesota "Unfiled Agreements" Docket*, April 22, 2002. (Ex. 4 at 9:9-10:1.)

It should be noted that the Administrative Law Judge presiding over the Minnesota "unfiled agreements" hearing specifically ruled that he would disregard testimony by Mr. Deanhardt and any other witness on legal issues, including the governing standard. Qwest includes this discussion here only to demonstrate the inability of the parties critical of Qwest to articulate a uniform standard among themselves.

13/ See Transcript of Hearing, *Minnesota "Unfiled Agreements" Docket*, April 29, 2002, at 131:16-20 ("Q. And you'd agree that the FCC has never defined the term interconnection agreement directly; is that correct? A. Like I said in my testimony, I have not been able to find a definition from the FCC for that term."), and 132:17-25 ("Q. Now, has the test you've articulated been adopted by any state public utilities commission in its literal terms? A. Certainly I have not urged its adoption. I also have not reviewed all 50 states to determine if anyone has adopted a test that is basically it or something similar. Q. So you don't know? A. Yeah, I don't know."). (Ex. 5.)

The standard for whether an agreement is subject to the filing requirements of sections 251 and 252 should be based on the following:

1. The word “agreement” must be interpreted broadly to cover comprehensive interconnection agreements as well as agreements which cover only specific segments, fragments, or parts of the overall interconnection arrangement between carriers.
2. If the agreement has been negotiated between the incumbent and another carrier, and it relates to “interconnection with the local exchange carrier’s network,” then the agreement should be subject to commission approval, and filed pursuant to section 252(h).
3. Guidance on the question of whether a particular agreement relates to interconnection should be obtained initially from other, previously filed agreements. If the subject matter of the agreement in question is similar to that of a previously filed agreement, then the new agreement should be subject to commission approval, and filed pursuant to section 252(h).
4. Further guidance on the question of whether a particular agreement relates to interconnection should be obtained by asking whether and to what extent the terms and conditions of the agreement in question constitute or allow discrimination between and among CLECs, or provide an advantage to one CLEC at the expense or to the detriment of another.
5. In the event the agreement is identical to a previously filed agreement, either in whole or in part, then the fact that the previously filed agreement remains open to public inspection does not eliminate or even diminish the obligation of the incumbent to seek approval for and file the second agreement. 14/

There is no dispute, not even among Qwest’s opponents, that these proposals have never been adopted by any court, the FCC, a state commission, an administrative law judge, or anyone else – indeed, before the recent proceedings in Minnesota, these issues and the governing standards never have been considered. 15/ And although these particular definitions come at the

14/ Initial Brief of AT&T Communications of the Midwest, Inc. and AT&T Local Services, *In re: AT&T Corp. v. Qwest Corporation*, Docket No. FCU-02-2 (Iowa Utilities Board) (filed April 18, 2002). (Ex. 6 at 5, 7-8.)

15/ Again, Qwest acknowledges the recent tentative ruling by the Iowa Utilities Board.

question in different ways, it is difficult to imagine any agreement of any kind between and ILEC and a CLEC that would not need to be filed and approved under either or both of them.

It is even more difficult to imagine, however, that Congress intended that the Act, which was designed fundamentally to deregulate the telecommunications industry, would require state commissions to review and approve every agreement between ILECs and CLECs. 16/ There simply is no way to read the Act itself and its legislative history in a manner consistent with the approach that the commenters advocate.

B. Section 252(a)(1) of the Act Requires ILECs to File Agreements Relating to the Rates and Associated Service Descriptions for Interconnection, Services and Network Elements.

In addressing this question, Qwest looks to the language of Section 252(a)(1) itself and the underlying purposes of the Act. As Qwest argued to the FCC and the Commission, the 90-day prior approval process applies only to the most significant aspects of a negotiated agreement, *i.e.*, the rates and associated service descriptions for interconnection, services and network elements, because that line takes into account the prerequisite articulated in Section 252(a)(1) itself: “a detailed schedule of itemized charges for interconnection and each service or network element included in the agreement.” The standards articulated by AT&T and others in this docket give no weight or meaning to this express limitation on the scope of agreements that must be filed and approved. 17/

16/ In interpreting the Act the FCC has ruled that several types of agreements between a CLEC and ILEC, are outside of the Sections 251 and 252 requirements. Qwest has already addressed these in more detail in its initial comments. (Qwest Comments, at 26).

17/ In fact, RUCO and Time Warner make no effort to offer a general definition of interconnection agreement.

Qwest's reading of Section 252(a)(1) properly balances the competing public interests in the 1996 Act, as articulated by Congress. Qwest's line preserves regulatory oversight (notwithstanding the associated costs in terms of delay) in connection with activities covering the most important interconnection matters, but permits – as Congress intended – normal, unregulated business dealings in all other aspects of the ILEC/CLEC business relationship. The Act reflects Congress's preference that ILEC-CLEC agreements be formed to the maximum extent possible through private negotiations between the parties,^{18/} and in that respect departs significantly from the tariffing framework of the past, in which regulators stood in the shoes of consumers (or interconnecting carriers) and established a standard set of terms and conditions. Indeed, FCC Commissioner Michael J. Copps expressed this underlying theme of the Act when he commented as follows in regard to the recent approval of BellSouth's Section 271 application: "Our expectation is that BellSouth's performance will continue to improve and that it will work cooperatively with other carriers through their business-to-business relationships to resolve any issues that develop."^{19/}

The Act eschews a system in which regulators, in the first instance, play the most significant role in working through every aspect of the ILEC–CLEC relationship. Instead, the Act establishes a paradigm in which carriers are expected to negotiate matters of mutual interest among themselves. That is a paradigm to which Qwest has sought to adhere in its dealings with CLECs. And as such, Qwest believes that the Act never contemplated that ILECs would file and

^{18/} S. 652, Telecommunications Competition and Deregulation Act of 1995, Report of the Committee on Commerce, Science, and Transportation, S. Rep. No. 104-23, at 19 (March 30, 1995).

^{19/} Statement of Commissioner Michael J. Copps, *In the Matter of Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc. and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Georgia and Louisiana*, Federal Communications Commission, CC Docket No. 02-35 (May 15, 2002).

seek approval of, subject to a 90-day regulatory review, the kinds of agreements that the commenters have placed at issue in this docket.

C. Other Sections of the Act and the FCC First Report and Order Do Not Define the Scope of Interconnection Under Section 252(a)(1).

AT&T argues for a broad reading of the filing requirement based on the FCC First Report and Order implementing the local competition provisions of the Act²⁰ (“First Report and Order”). The section of the First Report and Order cited by AT&T does not represent an endorsement of a generally broad definition of interconnection agreement. Rather, it is answering the fairly specific question of whether pre-1996 interconnection agreements needed to be filed. In deciding that these earlier interconnection agreements needed to be filed the FCC referenced the importance of nondiscrimination, public information concerning rates, etc., but it did so in the context of considering whether a particular class of interconnection agreements needed to be filed. The First Report and Order does not address which agreements between an ILEC and CLEC should be considered interconnection agreements in the first place.

AT&T stresses the importance of an ILEC’s nondiscrimination duty and Section 252(i)’s pick-and-choose provisions. Both are important mechanisms in ensuring competition under the Act, but neither requires disclosure of every conceivable agreement reached between a CLEC and ILEC, as AT&T seems to argue. First, Section 252(i) makes pick-and-choose applicable to interconnection agreements filed under Section 252(a)(1); it does not define or modify “interconnection agreements.”

Second, AT&T’s argument is based on an improperly broad view of the scope of Section 252(i). Section 252(i) does not allow a CLEC total freedom to pick and choose

²⁰ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, *slip op.* ¶167 (FCC Aug. 8, 1996).

provisions from filed interconnection agreements; nor does it require an ILEC to treat all CLECs exactly the same. If providing a term to a requesting CLEC would be too costly, or technically unfeasible, then an ILEC is exempted from the Section 252(i) filing requirement. *See AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 396 (1999). ^{21/} Also, “[t]he [FCC] has said that an incumbent LEC can require a requesting carrier to accept all terms that it can prove are ‘legitimately related’ to the desired term.” *Id.* (quoting First Report & Order ¶ 1315). Thus, Section 252(i) pick and choose and the Act’s general nondiscrimination duty do not mean each CLEC is treated with absolute equality.

III. RESPONDENTS’ COMMENTS ON PUBLIC AGREEMENTS

A. Eschelon Agreements

1. Confidential/Trade Secret Stipulation Between ATI and U S WEST Dated February 28, 2000

AT&T points out that, by terms of this agreement, Qwest agreed to implement wholesale service quality measures, or “Service Performance Measurements,” in the states where Eschelon does business. An agreement to measure service quality, however, is not an agreement to provide service, and is not necessarily subject to Sections 251 and 252 of the Act. Moreover, PID measurements are part of the 271 process, and Qwest provides such measurements for CLECs doing business in Arizona, as well as other states, to measure its performance.

^{21/} “[The regulation implementing Section 252(i)] exempts incumbents who can prove to the state commission that providing a particular interconnection service or network element to a requesting carrier is either (1) more costly than providing it to the original carrier, or (2) technically infeasible. 47 C.F.R. § 51.809(b). And it limits the amount of time during which negotiated agreements are open to requests under this section.” *Id.* “[S]ection 252(i) permits differential treatment based on the LEC’s cost of serving a carrier.” *See* First Report and Order, 11 FCC Rcd 15499, ¶ 1317 (1996).

AT&T states that Qwest also agreed to pay Eschelon compensation for Internet-related terminating traffic “at the most favorable rates and terms contained in an agreement executed by USWC.” ¶ 7. However, at the time this agreement was entered into, the FCC had already ruled that compensation for terminating Internet-related traffic was interstate in nature and not necessarily subject to Sections 251 and 252 of the Act. ^{22/} Also, as shown in the unrebutted testimony in Minnesota, the “most favorable rates and terms” were those ordered by the Minnesota Public Utilities Commission. Those rates, which were subsequently approved as final local switching and tandem transmission rates by this Commission in the Generic Cost Docket Proceedings, were the basis for compensation for usage for the period through September 30, 2000. (Brotherson Direct Testimony, Ex 7 at 19; Downey Direct Testimony, Ex 8 at 4.)

AT&T also notes that Qwest also agreed to dedicate an on-site “coach” “who is knowledgeable of and experienced in working with all different groups and functions within USWC related to provisioning.” ¶ 11. However, this specific agreement was part of a filed interconnection agreement: Eschelon’s on-site service management arrangement is covered in the Eschelon Interconnection Agreement Amendment Terms, §§ 2.10 (Ex 9 at 3), which was filed and approved by the Minnesota Public Utilities Commission. An amendment was only filed in Minnesota because the service management team was to be located in Eschelon’s Minnesota offices, to deal with Minnesota order processing issues. A minor implementation detail like this – the location where the team was to work – hardly rises to the level of an interconnection agreement that is required to be filed.

^{22/} *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Declaratory Ruling, 14 FCC Rcd 3689 (1999), *remanded*, *Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1 (D.C. Cir. 2000).

2. Confidential [Letter] Agreement Dated November 15, 2000, from Greg Casey, Qwest, to Richard A. Smith, Eschelon Telecom, Inc.

As AT&T points out, the November 15 agreement establishes escalation procedures. The procedure contains 6 levels. The fifth level is CEO-to-CEO discussions. The sixth level is the initiation of litigation in either federal or state court. However, the specific details of escalation procedures are integrally connected to how Qwest and a particular CLEC manage their specific business-to-business relationship with one another. Because CLECs vary in size, service sensitivity, and problem-solving approaches, Qwest has found it impracticable to make such procedures and arrangements "generic." As a consequence, Qwest had a good-faith belief that this operating arrangement did not need to be filed because it was already the subject of an amendment, and because it relates to the detailed implementation of a business-to-business relationship with Eschelon. 23/

3. Confidential Amendment to Confidential/Trade Secret Stipulation Dated November 15, 2000, Between Qwest and Eschelon Telecom, Inc.

Under this agreement, Eschelon agreed to provide "consulting and network-related services." AT&T and Time Warner wrongly characterize Qwest's payment for these services as a discount on aggregate billed charges for the period November 15, 2000, through December 31, 2005. Qwest received valuable consulting services, which Eschelon was in a unique position to provide, under this agreement. 24/ This provision did not need to be filed as an interconnection agreement amendment because it related to bona fide consulting and network-

23/ The Confidential [Letter] Agreement dated October 26, 2000, from Greg Casey, Qwest, to Blake Fisher, McLeod USA, Inc., contains substantially similar provisions regarding quarterly executive meetings and a six-level escalation procedure, including jurisdictional and damage limitation waivers, as those contained in the November 15, 2000 Eschelon Agreement. As with the provisions in this Eschelon Agreement, this agreement was not subject to the filing requirements of Section 252.

24/ Qwest Comments, at 27.

related services to be provided by Eschelon to Qwest, rather than a term of interconnection. By entering into this agreement with Eschelon, Qwest did not discriminate against other carriers because Eschelon was uniquely situated to provide these services, and in any event, purchases for consulting and network-related services are not regulated under the Telecommunications Act and therefore do not have to be included in a filed interconnection agreement under Section 252(a)(1). 25/

4. Confidential Amendment to Confidential/Trade Secret Stipulation Dated November 15, 2000, Between Qwest and Eschelon Telecom, Inc. and Letter Agreement Dated July 3, 2001, from Audrey McKenney, Qwest, to Richard A. Smith, Eschelon Telecom, Inc.

Under the terms of paragraph 3 of the November 15, 2000 Confidential Amendment to the Confidential Trade Secret Stipulation, “[f]or any month (or partial month), from November 1, 2000 until the mechanized process is in place, during which Qwest fails to provide accurate daily usage information for Eschelon’s use in billing switched access, Qwest will credit Eschelon \$13.00 (or pro-rata portion thereof) per platform line per month as long as Eschelon has provided the WTN information to Qwest.” 26/ Following this interim agreement, Eschelon continued to dispute the accuracy of Qwest's switched access data. (July 3, 2001 Switched Access Dispute Letter.) Eschelon asserted that the Qwest tapes recording switched access minutes were lower than the minutes that Eschelon was experiencing. (*Id.*) As a further

25/ For the same reasons, the two 10/26/00 McLeod Purchase Agreements did not have to be filed. Similarly, other agreements that do not involve services provided by competitive local exchange carriers – such as the 12/31/01 McLeod Confidential Billing Settlement with QCC and the 2/12/01 McLeod Confidential Agreement to Provide Directory Assistance Database Entry Services – are outside Section 252’s filing and pre-approval requirements.

26 AT&T appears to misunderstand this provision as providing Eschelon with a flat \$13 per line per month. (AT&T’s Comments, at 13-14.) In fact, the agreement expressly provides for a *pro-rata* portion of \$13 per line per month adjusted according to the amount Eschelon is able to collect from IXCs for switched access.

compromise, Qwest agreed to a joint audit and increased the interim dispute resolution methodology to \$16 per line per month (subject to final true-up). (*Id.*)

As the express terms of these agreements make clear, this credit was offered only if Qwest failed to provide accurate daily usage information until a mechanized process for UNE Star was in place. Eschelon disputed Qwest's ability to provide accurate switched access records and retained PricewaterhouseCoopers to perform an audit of the switched access records under the UNE Star Platform. Qwest's determination that this provision fell outside Section 252 is a reasonable one, particularly in light of the fact that settlement agreements that involve retrospective payments are not subject to the filing requirements of the Act.

Furthermore, this dispute came about because of the UNE Star platform, a different unbundled network element platform than the UNE-P that AT&T purchases. At the time Eschelon purchased UNE Star, UNE Star did not have a tracking mechanism. Therefore, Qwest implemented a manual work-around process. Because no CLECs other than McLeod and Eschelon purchased the UNE Star platform, none were similarly situated and could even be eligible for the credit. Accordingly, despite AT&T's claims, no discrimination occurred.

5. Qwest/Eschelon Implementation Plan Dated July 31, 2001

AT&T notes that the Implementation Plan provides for regular meetings to address Eschelon service-related issues. ¶¶ 2.3 and 2.5. Qwest routinely meets with CLECs regarding service issues, and as established by the PID data, provides the same level of service to all CLECs. It is difficult to see how an agreement to meet to discuss such issues is within Section 252's filing and pre-approval requirements.

AT&T also points out that the Agreement also provides an escalation chart, at ¶ 2.2 and Attachment 2, and a detailed methodology for calculating local usage charges

associated with UNE-E switching, at ¶ 3.1 and Attachment 3. These provisions are provided to all CLECs: The escalation chart is standard, with only the particular CLEC's name being changed, and the methodology for calculating UNE-E switching simply replicates the method that Qwest uses to calculate switching for other CLECs to the UNE-E platform that Eschelon purchased.

AT&T also states that the Agreement also addresses coordinated conversion of Qwest enhancements to UNE-P. ¶ 8. The Agreement, however, merely commits that Qwest will take "commercially reasonable" steps to coordinate the conversion with Eschelon – as Qwest would with any wholesale customer about to conduct a large-scale conversion from one platform to another.

6. Settlement Agreement Dated March 1, 2002, between Qwest and Eschelon Telecom, Inc.

AT&T notes that Eschelon and Qwest determined to settle their disputes and release all claims through this agreement. AT&T makes no argument that this agreement comes within the filing and pre-approval requirements of Section 252(e). The fact that the settlement agreement terminates other agreements has no bearing whatsoever on whether or not this agreement needed to be filed. In fact, it is an example of an ILEC-CLEC agreement that could not be subject to those filing requirements under any reasonable interpretation of Section 252(e). In addition to settling the parties' disputes, the agreement implements Qwest's new commitment, discussed above, 27/ to go well beyond the requirements of Section 252(a) until the FCC rules on Qwest's Petition: Paragraph 3(c) provides that the only term of the agreement that even arguably creates going-forward obligations – but even that paragraph only states that Attachment 3 will be

27/ See *supra* at 9.

filed as an interconnection agreement amendment in any state in which Eschelon obtains services and facilities from Qwest. This agreement raises absolutely no regulatory concerns.

B. Covad Agreement

AT&T points to the Covad agreement, which addresses Firm Order Confirmation (“FOC”) intervals, whereby Qwest agreed to provide 90% of Covad’s FOC dates within 48 hours of receipt of a properly completed service request for POTs unbundled loop service.^{28/} In actuality, the FOC targets contained in the Covad Agreement were actually less stringent than Qwest’s own internal standards. ^{29/} (Minnesota Beck Direct Testimony at 6, Ex. 10) Qwest’s mechanized process automatically issued FOCs in 24 hours from the time of receipt. Moreover, Qwest’s internal service goal, at the time the Covad Agreement was executed, was to provide 90% of FOC dates to *all* CLECs within 24 hours of receipt for *all* unbundled loop services. (*Id.*) None of these processes was changed for Covad and, therefore, no discrimination occurred.

C. McLeod Agreements

AT&T contends that McLeod USA entered into agreements that contain terms on subscriber list information charges, reciprocal compensation arrangement for local and Internet-related traffic, ^{30/} quarterly meetings and escalation procedures (including CEO meetings). ^{31/}

Section 2.d of McLeod Agreement I provides in part that “[s]ubject to merger closure and *in consideration for the bill and keep arrangement agreed upon [in Section 2.c]*” the

²⁸ U S WEST Service Level Agreement with Covad Communications Company-Unbundled Loop Services, dated April 19, 2000.

²⁹ The ROC established a 24-hour FOC requirement for all unbundled loops.

³⁰ Confidential Billing Settlement Agreement dated April 28, 2000, between Qwest and McLeod USA, Inc.

³¹ Confidential [Letter] Agreement dated October 26, 2000, from Greg Casey, Qwest, to Blake Fisher, McLeod USA, Inc.

parties would apply all final Commission orders setting rates prospectively from April 30, 2000, not bill each other for any true-ups associated with final Commission orders that affected interim prices, and release claims for such true-ups. This agreement was a settlement of a dispute. McLeod and Qwest disagreed over whether the Minnesota PUC's final order reducing the resale discount rate applied retroactively or prospectively. Qwest contended that the reduced discount rate applied retroactively; McLeod contended that it applied prospectively only. The parties resolved this dispute by agreeing that Qwest would pay the final Commission ordered reciprocal compensation rate prospectively only. McLeod also agreed to enter into a bill and keep agreement regarding reciprocal compensation (in which neither billed each other for reciprocal compensation for local and Internet-related traffic), and to withdraw from intervening in the Minnesota proceeding for the approval of the merger between Qwest and U S WEST. This settlement appealed to Qwest, because of the large and increasing expense posed by reciprocal compensation.

D. SBC Telecom, Inc. Agreement

Qwest agreed to process SBC Telecom, Inc.'s service orders for the establishment and testing of SBCT's network upon execution of the unfiled agreement but prior to state approval of the interconnection agreement.³²

³² Letter agreement dated June 1, 2000, from Kathy Fleming, Qwest, to Thomas W. Hartmann, SBC Telecom, Inc.

IV. RESPONDENTS' COMMENTS ON CONFIDENTIAL AGREEMENTS

**REDACTED VERSION - TRADE SECRET INFORMATION
SUBJECT TO PROTECTIVE AGREEMENT**

V. CONCLUSION

For the foregoing reasons, the ACC should reject the arguments of AT&T, Time Warner, and RUCO. These issues are being actively considered by the FCC, and the ACC should await the FCC's development of a national policy. Furthermore, these issues are not appropriate for consideration in the Section 271 docket and should not interfere with the Commission's progress in that proceeding.

Respectfully Submitted this 31st day of May, 2002.

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Attorneys for Qwest Corporation

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Phoenix, Arizona 85007

COPY of the foregoing hand-delivered
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A handwritten signature in cursive script, appearing to read "Alan J. Vofsi", is written over a horizontal line.

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BEFORE THE WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION

In the Matter of the)
Investigation into)
))
U S WEST COMMUNICATIONS, INC.'s) Docket No. UT-003022
) (Excerpt)
Compliance with Section 271 of) Pages 1 to 60
the Telecommunications Act of)
1996)
-----)
In the Matter of)
)) Docket No. UT-003040
U S WEST COMMUNICATIONS, INC.'s) (Excerpt)
) Pages 1 to 60
Statement of Generally)
Available Terms Pursuant to)
Section 252(f) of the)
Telecommunications Act of 1996)
_____)

A hearing in the above matters was held on
May 13, 2002, at 10:00 a.m., at 1300 South Evergreen
Park Drive Southwest, Room 206, Olympia, Washington,
before Administrative Law Judge ANN RENDAHL and
CHAIRWOMAN MARILYN SHOWALTER and COMMISSIONER PATRICK J.
OSHIE and COMMISSIONER RICHARD HEMSTAD.

Joan E. Kinn, CCR, RPR
Court Reporter

0052

1 them publicly. And what I object to is then
2 intertwining that obligation with an agreement not to
3 file complaints or be involved in 271. So it's the
4 intertwining of the two, if you will, that I object to.

5 Q. So if these other agreements, not this one,
6 but if these other agreements need not be filed with the
7 Commission as an interconnection agreement, then you
8 have no objection to them and feel they don't
9 demonstrate anything one way or the other in the context
10 of 271?

11 A. I would agree with that, but I would also
12 have to focus on the if in your statement. If those
13 other agreements aren't interconnection agreements, then
14 I don't have the same kind of an objection as I do if
15 they are. And it's our company's position that they do
16 fall under the federal law in terms of the obligation to
17 negotiate for interconnection and the other elements
18 that are part of the federal law.

19 Q. In general, what distinguishes as a factual
20 matter those other agreements that you say need to be
21 filed because they are interconnection agreements from
22 this one; what are the sorts of things that cause an
23 agreement to fall over into the category of agreements
24 that need to be filed?

25 A. Well, I think in short whether or not it's

MAY 31 2002 10:36 FR QWEST

602 235 3107 TO 99165920

P.02

R. Steven Davis
Sr. Vice President
Policy and Law

1901 California Street, Suite 4750
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Phone 303 896-4200
Facsimile 303 298-8783



May 10, 2002

The Honorable Wm. A. Mundell
Arizona Corporation Commission
1200 W. Washington
Phoenix, AZ 85007

Dear Chairman Mundell:

There has been a lot of publicity over the past few weeks related to certain agreements that Qwest has entered into with competitive local exchange carriers. I am writing to advise you of new policies that Qwest is implementing in this area.

As you may know, ILECs routinely enter into agreements of many kinds with CLECs. Some of them may take effect immediately as in the normal business world. Others must be filed with and pre-approved by state commissions. Qwest itself has filed over 3,200 agreements with CLECs since the passage of the Telecommunications Act, including both initial agreements and amendments. This large number reflects our efforts to work with individual CLECs to meet their specific business needs. However, questions have been raised regarding a relative handful of our arrangements with CLECs. Some parties allege that under Section 252(a) of the Telecommunications Act such agreements also should have first been filed and approved.

Qwest disputes these allegations and is defending the legal line it drew between those agreements that did, and did not, need to be filed. Qwest also has filed a petition with the FCC asking for guidance on where the filing line is drawn.

Meanwhile, however, Qwest is implementing two new policies that will eliminate debate regarding whether Qwest is complying fully with applicable law. First, Qwest will file all contracts, agreements or letters of understanding between Qwest Corporation and CLECs that create obligations to meet the requirements of Section 251(b) or (c) on a going forward basis. We believe that commitment goes well beyond the requirements of Section 252(a). However, we will follow it until we receive a decision from the FCC on the appropriate line drawing in this area. Unless requested by the Commission, Qwest does not intend to file routine day-to-day paperwork, orders for specific services, or settlements of past disputes that do not otherwise meet the above definition.

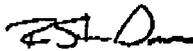
Second, Qwest has reviewed and is enlarging its internal procedures for evaluating contractual arrangements with CLECs and making all necessary filings. Qwest is forming a committee of senior managers from the corporate organizations involved in wholesale agreements: wholesale business development, wholesale service delivery, network, legal affairs attorneys, policy and law attorneys, and public policy. This committee will review agreements involving in-region wholesale activities to ensure that the standard described above is applied prior to the issuance of an FCC ruling, and that any later FCC decision also is implemented fully and completely.

The Honorable Wm. A. Mundell
May 10, 2002

Qwest is implementing these policies to eliminate any question about Qwest' compliance with the requirements of Section 252(a) in this state while Qwest's petition to the FCC is pending. We hope to continue to work with CLECs to meet their individual needs, as we have in the past. This is a practice that we are proud of, and we do not want to see it obscured by controversy over the meaning of Section 252(a), or decisions on line drawing in a small number of situations.

To the extent there are questions or concerns associated with the procedure outlined in this letter, please contact me.

Sincerely,



R. Steven Davis
Senior Vice President
Policy and Law

cc: Commissioner Jim Irvin
Commissioner Marc Spitzer
Docket Control

EXHIBIT 200
Department Of Commerce

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Gregory Scott
Edward A. Garvey
Marshall Johnson
LeRoy Koppendrayner
Phyllis Reha

Chair
Commissioner
Commissioner
Commissioner
Commissioner

**In the Matter of the Complaint of the
Minnesota Department of Commerce
Against Qwest Corporation Regarding
Unfiled Agreements**

**MPUC Docket No.
P-421/C-02-197
OAH Docket No.
6-2500-14782-2**

TESTIMONY OF W. CLAY DEANHARDT
ON BEHALF OF THE DEPARTMENT OF COMMERCE

APRIL 22, 2002

1 to UNEs and/or services. CLECs are in the business of providing telecommunications
2 services to their customers. To do that successfully, they have to interconnect with, or
3 buy UNEs and/or services from, the ILEC. ILECs, on the other hand, only do business
4 with CLECs – which are also their competitors – because the law requires them to do so.
5 As a result, there just isn't much that goes on between an ILEC and a CLEC beyond
6 those essential functions.

7 Similarly, even if a settlement agreement really does settle a pending dispute, it
8 can still contain terms and conditions that meet the test I've just outlined. If it does, those
9 terms must be filed with the Commission under §252. The Commission itself recognized
10 this in the MCIWorldcom Order and the DTI Order.

11 **Q: Does that mean that every agreement between a CLEC and an ILEC needs**
12 **to be filed under §252?**

13 **A:** No, not at all. There are several types of agreements that don't have to be filed.
14 A settlement agreement that resolves only a legitimate past dispute – i.e. a billing dispute
15 – and makes no changes to the CLEC's interconnection arrangements on a forward
16 looking basis would not need to be filed. Neither do agreements for CLECs to purchase
17 items off of the ILEC's tariff. Similarly, some specific agreements implementing the
18 requirements of interconnection agreements – for example, an agreement for a specific
19 collocation site – do not need to be filed.

20 In fact, there were several agreements produced by Qwest to the Department that
21 the Department did not include in its Complaint. Those agreements generally fell into
22 one of the categories I just described.

EXHIBIT 200
Department Of Commerce

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Gregory Scott
Edward A. Garvey
Marshall Johnson
LeRoy Koppendray
Phyllis Reha

Chair
Commissioner
Commissioner
Commissioner
Commissioner

**In the Matter of the Complaint of the
Minnesota Department of Commerce
Against Qwest Corporation Regarding
Unfiled Agreements**

**MPUC Docket No.
P-421/C-02-197
OAH Docket No.
6-2500-14782-2**

TESTIMONY OF W. CLAY DEANHARDT
ON BEHALF OF THE DEPARTMENT OF COMMERCE

APRIL 22, 2002

1 conditions, in accordance with section 252(i). In addition, we believe that
2 having the opportunity to review existing agreements may provide state
3 commissions and potential competitors with a starting point for
4 determining what is "technically feasible" for interconnection.⁸

5 **Q: Has the FCC ever defined the term "interconnection agreement"?**

6 **A:** Not directly, so far as I am aware.

7 **Q: Then what standard did you rely on to determine whether provisions from**
8 **the Secret Agreements should have been filed with the Commission?**

9 **A:** I asked whether the provision created a concrete and specific legal obligation for
10 Qwest to do something or refrain from doing something on a forward-looking basis to
11 meet the requirements of §§ 251(b) and (c).

12 **Q: That seems like a broad standard. Why is that?**

13 **A:** The standard needs to be broad to ensure that the Commission can perform its role
14 under §252(e) to review agreements for non-discrimination and public interest
15 considerations. It is also broad to encompass binding oral agreements as well as written
16 agreements. The goal is to have agreements that affect interconnection and access to
17 network elements filed publicly so that the Commission can perform its role and other
18 CLECs can build their businesses in a competitively level playing field.

19 **Q: Where did the standard come from?**

20 **A:** It's a permutation of part of the FCC's test for whether an Incumbent Local
21 Exchange Carrier ("ILEC") like Qwest can obtain approval under 47 U.S.C. §271 to

⁸ *Local Competition Order*, at ¶ 167.

1 provide interLATA long distance services. The FCC requires an ILEC to demonstrate
2 that it "has a concrete and specific legal obligation to furnish a checklist item upon
3 request pursuant to a state approved interconnection agreement."⁹

4 The checklist items (set out in 47 U.S.C. §271(c)(2)(B)) are mostly specific
5 manifestations of the ILEC's obligations under §251(b) and §251(c). To get §271
6 approval, an ILEC must show that it is providing access and interconnection under
7 interconnection agreements or a Statement of Generally Available Terms and Conditions
8 for interconnection ("SGAT") that meets the requirements of the checklist in a non-
9 discriminatory fashion. 47 U.S.C. §271(c)(2)(A). It is obviously a strong indication that
10 a particular subject matter must be included in interconnection agreements if Qwest's
11 ability to enter the long distance market is dependent on the FCC finding that subject
12 matter addressed in such agreements.

13 **Q: Has the Commission ever addressed the question of what kinds of provisions**
14 **must be filed under §252 and made available for pick and choose under §252(i)?**

15 **A:** Yes, at least twice of which I am aware. Significantly, both times involved
16 agreements to which Qwest was a party, and both involved settlement of ongoing
17 business disputes that had arisen to the level of litigation before the Commission.

⁹ See Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services Inc., d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas, *Memorandum Opinion and Order*, CC Docket No. 00-65, FCC 00-238, Para. 54 (adopted June 30, 2000) (the "SBC Texas Order"); and 47 U.S.C. 271 (c)(2)(B)(iii).

1 VOLUME 1
2 BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
3 OF THE STATE OF MINNESOTA
4
5

6 In the Matter of the Complaint
7 of the Minnesota Department of
8 Commerce Against Qwest Corporation
9 Regarding Unfiled Agreements

10
11
12 OAH DOCKET NO. 6-2500-14782-2
13 PUC DOCKET NO. P-421/C-02-197
14

15 Minnesota Public Utilities Commission
350 Metro Square Building
16 121 Seventh Place East
St. Paul, Minnesota
17

18
19
20 Met, pursuant to notice, at 9:30 in the
21 morning on April 29, 2002.
22

23
24 BEFORE: Judge Allan Klein
25 REPORTER: Angie D. Threlkeld, RPR CRR

- 1 A No, they're not. Interconnection is defined.
2 Network elements are defined. I believe services is
3 defined, although don't quote me on that one because
4 I don't -- I believe it is, but I'd have to look at
5 it again to confirm that, that recollection. So
6 those things are certainly defined at a minimum.
- 7 Q Would you agree that your test is not stated in the
8 text of the act?
- 9 A I would say it's not stated word for word. It comes
10 from the act.
- 11 Q But it's not stated in the act; correct?
- 12 A Not in that language, no.
- 13 Q And would you agree that your test has not been
14 stated by the FCC, the Federal Communications
15 Commission?
- 16 A Again, not in those words, no. It does come from
17 FCC orders though, including the SBC Texas 271
18 order.
- 19 Q And you'd agree that the FCC has never defined the
20 term interconnection agreement directly; is that
21 correct?
- 22 A Like I said in my testimony, I have not been able to
23 find a definition from the FCC for that term.
- 24 Q Now, there have been a number of different court
25 cases that have -- as a business person one might

1 look at in trying to get some clarity under the act;
2 correct?

3 A Or one might ask one's lawyers to look at, yes.

4 Q True. And one of those is Competitive
5 Telecommunications Association versus FCC; correct?

6 A Off the top of my head, I can't say one way or the
7 other. I don't know.

8 Q You're not familiar with that case?

9 A Not by title. If that's one of the ones that you
10 cited in your prehearing memorandum, then I probably
11 at least read an excerpt of it. But --

12 Q All right. So you're not familiar with that case
13 here in the Eighth Circuit?

14 A No.

15 Q So you're not familiar that it's controlling legal
16 authority in the Eighth Circuit?

17 A I would think that either the judge or the lawyers
18 might be able to tell you whether or not it's
19 controlling legal authority.

20 Q Okay. Now, has the test that you've articulated
21 been adopted by any state public utilities
22 commission in its literal terms?

23 A Certainly I have not urged its adoption. I also
24 have not reviewed all 50 states to determine if
25 anyone has adopted a test that is basically it or

1 something similar.

2 Q So you don't know?

3 A Yeah, I don't know.

4 Q Now, one of the things that Ms. Gullikson asked you
5 related to Section 252(i); correct?

6 A Yes. Well, I think so, yes. She asked me about
7 opting in.

8 Q And is that what you understood her reference to be?

9 A I think she was asking generally if people could opt
10 in, which is why I believe I also talked about the
11 most favored nations clause. But in terms of
12 specific regulatory issues, I believe the 252(i) is
13 the process for opting in, yes.

14 Q Okay. And would you agree that one of the
15 determinations a business person might have to make
16 is, you know, how and to what a carrier opts in, a
17 business person and an ILEC, for example?

18 A Okay. There are several potential considerations.
19 So if you can maybe give me the specific
20 hypothetical, I can agree or not agree. But --

21 Q Well --

22 A -- since you kind of added the ILEC piece at the
23 end, I'm not sure I can -- I'm not sure I'm being
24 asked from an ILEC perspective, a CLEC perspective,
25 or what I'm being asked.

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APR 18 2002

IOWA UTILITIES BOARD

DATE: APRIL 17, 2002

COMPANY NAME: AT&T COMMUNICATIONS OF THE MIDWEST, INC. AND
AT&T LOCAL SERVICES

SUBJECT MATTER: AT&T'S INTIAL BRIEF

PERSON TO CONTACT: MARY B. TRIBBY
GARY B. WITT
1875 LAWRENCE ST. SUITE 1500
DENVER, CO 80202
TELEPHONE: (303) 298-6163
FACSIMILE: (303) 298-6301

INITIAL FILING: NO

DOCKET NUMBERS: FCU-02-2

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and public inspection requirements, together with the so-called "pick and choose" provisions of section 252(i), are all intended to facilitate the enforcement of the nondiscrimination requirements of 47 U.S.C. 251(c)(2)(C) and (D).²

The importance of these nondiscrimination provisions to new entrants cannot be overstated. Quite simply, they are essential to the development and growth of competition, and their elimination would further an ILEC's ability to exercise its market power. Any proposal to eliminate or reduce the approval, filing, and "pick and choose" requirements of the federal Act

[I]s based upon the erroneous premise that incumbent local exchange carriers ("ILECs") are eager to enter into interconnection agreements with their potential competitors and that only the ILECs' obligations under 47 U.S.C. §§252(i) and 252(e) stand in the way of widespread voluntary arrangements. The reality, of course, is that ILECs have little or no incentive to negotiate with potential competitors and every incentive to engage in discrimination to prevent any significant erosion of their local monopolies.

See Reply Comments of AT&T Corp., In the Matter of Petition of Mpower Communications Corp. for Establishment of New Flexible Contract Mechanism Not Subject to "Pick and Choose," CC Docket No. 01-117, July 18, 2001, p. 1, attached here as Exhibit A.

The Act does not define "terms and conditions" or "interconnection," nor does it define the appropriate scope of an interconnection agreement. However, over the six or more years in which the Act has been in effect, there have been innumerable agreements negotiated between carriers, and approved by various state commissions including the Iowa Utilities Board. Most of these agreements were thoroughly and painstakingly negotiated, and in many cases arbitration was necessary in order for them to be concluded

² These approval, filing, and "pick and choose" provisions have been recognized by the FCC as being "central to the statutory scheme and to the emergence of competition." See *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Interconnection Between Local Exchange*

Furthermore, the Act does not make allowance for avoiding the approval and filing requirements in the event a new agreement is identical to a previously filed agreement, either in whole or in part. Certainly the fact that a subsequent agreement is identical in some manner to a filed agreement should make it easier and quicker for the approval process to be completed. However, the Act does not eliminate the approval process based on the fact that a new agreement matches one already on file.

Lastly in this regard, because of the “pick and choose” provisions of section 252(i), it is clear that the approval and filing of an agreement is necessary even if the agreement does not cover or address all or even a substantial portion of the total issues involved in interconnection. An agreement need not cover all, or even a majority, of the many aspects of interconnection in order to be an interconnection agreement subject to the approval and filing requirements of section 251(c).

C. Conclusion

The standard for whether an agreement is subject to the filing requirements of sections 251 and 252 should be based on the following:

1. The word “agreement” must be interpreted broadly to include comprehensive interconnection agreements as well as agreements which cover only specific segments, fragments, or parts of the overall interconnection arrangement between carriers.
2. If the agreement has been negotiated between the incumbent and another carrier, and it relates to “interconnection with the local exchange carrier’s network,” then the agreement should be subject to commission approval, and filed pursuant to section 252(h).
3. Guidance on the question of whether a particular agreement relates to interconnection should be obtained initially from other, previously filed agreements. If the subject matter of the agreement in question is similar to that of a previously filed agreement, then the new agreement should be subject to commission approval, and filed pursuant to section 252(h).

4. Further guidance on the question of whether a particular agreement relates to interconnection should be obtained by asking whether and to what extent the terms and conditions of the agreement in question constitute or allow discrimination between and among CLECs, or provide an advantage to one CLEC at the expense or to the detriment of another.
5. In the event the agreement is identical to a previously filed agreement, either in whole or in part, then the fact that the previously filed agreement remains open to public inspection does not eliminate or even diminish the obligation of the incumbent to seek approval for and file the second agreement.

Respectfully submitted this 18th day of April, 2002.

**AT&T COMMUNICATIONS OF THE
MIDWEST, INC. AND AT&T LOCAL
SERVICES**

By: *Gary B. Witt*
Mary B. Tribby
Gary B. Witt
1875 Lawrence Street, Suite 1575
Denver, Colorado 80202
(303) 298-6163

1 **Q: WHY DID ESCHELON STOP BILLING QWEST FOR RECIPROCAL**
2 **COMPENSATION AFTER NOVEMBER 2000?**

3 A: Eschelon and Qwest modified the existing Interconnection contract reciprocal
4 compensation term and terminated the February 28, 2000 term for Internet-related
5 traffic on November 15, 2000. This agreement was filed as an Interconnection
6 Agreement Amendment with the Minnesota Public Utilities Commission.

7 **Q: DID QWEST PAY THE RECIPROCAL COMPENSATION BILLED BY**
8 **ESCHELON DURING 2000?**

9 A: Qwest only paid for usage through September 30, 2000, pursuant to the terms of the
10 Interconnection Agreement Amendment.

11 **Q: HOW DID ESCHELON AND QWEST BILL FOR RECIPROCAL**
12 **COMPENSATION AFTER SEPTEMBER 30, 2000?**

13 A: Effective October 1, 2000 and under the provisions of Section 1.2 of the
14 interconnection agreement amendment, Eschelon and Qwest began operating under a
15 "bill and keep" arrangement in which neither party paid each other for local and ISP
16 traffic going forward.

17 **Q: WHAT RATES DID QWEST PAY FOR ESCHELON MOUS DURING 2000?**

18 A: The rates that Qwest paid to Eschelon for MOUs billed by Eschelon were the local
19 switching and tandem transport rates that were the final ordered rates from the
20 Commission associated with the Minnesota Generic Cost Docket Proceedings.

21 **Q: WERE THE AGREEMENTS THAT QWEST BASED ITS PAYMENTS TO**
22 **ESCHELON ON AVAILABLE AND ON FILE?**

23 A: Yes.

1 **Q: WHAT RATES DID QWEST PAY FOR ESCHELON MOUS**
2 **DURING 2000?**

3 A: The rates that Qwest paid to Eschelon for MOUs billed by Eschelon were
4 the local switching and tandem transport rates that were the final ordered rates from the
5 Commission associated with the Minnesota Generic Cost Docket Proceedings. The
6 MOUs billed by Eschelon were not split between voice or ISP traffic.

7 *Reciprocal Compensation Paid to McLeod*

8 **Q: ARE YOU FAMILIAR WITH THE RECIPROCAL**
9 **COMPENSATION PAID TO MCLEOD?**

10 A: Yes. Tracking reciprocal compensation to McLeod has been part of my
11 job duties.

12 **Q: DOES MCLEOD PRESENTLY BILL QWEST FOR RECIPROCAL**
13 **COMPENSATION?**

14 A: No. In October 2000, McLeod and Qwest entered into a "bill and keep"
15 agreement in which neither billed each other for reciprocal compensation for local and
16 internet-related traffic.

17 **Q: HOW DID THE BILL AND KEEP AGREEMENT COME ABOUT?**

18 A: McLeod and Qwest had a dispute over whether the Minnesota Public
19 Utilities Commission's final order reducing the resale discount rate applied retroactively
20 or prospectively. Qwest contended that the reduced discount rate applied retroactively;
21 McLeod contended that it applied prospectively only.

22 **Q: HOW DID MCLEOD AND QWEST RESOLVE THIS DISPUTE?**

23 A: McLeod and Qwest agreed that Qwest would pay the final Commission
24 ordered reciprocal compensation rate prospectively only. Under the agreement, Qwest
25 agreed to apply the final Commission reciprocal compensation rate prospectively, and

December 6, 2000

DEC 7 2000



Burl W. Haar, Ph.D.
 Executive Secretary
 Minnesota Public Utilities Commission
 121 7th Place East, Suite 350
 Saint Paul, MN 55101-2147

**Re: Eighth Amendment to the Interconnection Agreement between Eschelon
 Telecom of Minnesota, Inc. and Qwest Corporation
 Docket No.: P5340, 421/M-99-1223**

Dear Dr. Haar:

Enclosed for filing with the Minnesota Public Utilities Commission are the original and 15 copies of the above-referenced Amendment to the Interconnection Agreement which was approved by the Commission on October 4, 1999, in Docket No. P5340, 421/M-99-1223. This Eighth Amendment amends several provisions in the Interconnection Agreement, including issues of reciprocal compensation, billing, provisioning, UNEs, and pricing, among others. The Amendment will be filed in all states in which Eschelon and Qwest have an Interconnection Agreement.

-I have enclosed an extra copy of this letter. Please date stamp and return it in the stamped, self-addressed envelope also enclosed.

Sincerely,

Dennis D. Ahlers
 Senior Attorney
 Eschelon Telecom, Inc.
 (612) 436-6249 (Direct Voice)
 (612) 436-6349 (Direct Fax)

Enclosures

cc: Attached Service List
 Laurie Korneffel, Senior Attorney, Qwest
 Priti Patel, Assistant Attorney General, Minnesota AGO

AMENDMENT NO. 8 TO THE INTERCONNECTION AGREEMENT

BETWEEN

ESCHELON TELECOM OF MINNESOTA, INC.

AND

QWEST CORPORATION

IN

MINNESOTA

This Amendment No. 8 (Amendment) is made and entered into between Eschelon Telecom of Minnesota, Inc. (Eschelon) f.k.a. Cady Telemanagement, inc. and Qwest Corporation (Qwest) f.k.a. US WEST Communications, Inc.

Eschelon and Qwest entered into an Interconnection Agreement (Agreement for service in the state of Minnesota which was approved by the Minnesota Public Utilities Commission (Commission) on October 4, 1999. The parties now wish to amend the Agreement as provided in this Amendment, the terms of which are attached.

2.8 Beginning January 1, 2001, to provide Qwest with rolling 12 month forecasted volumes, including access line volumes, to the central office level, updated quarterly, and where marketing campaigns are conducted.

2.9 To hold Qwest harmless in the event of disputes between Eschelon and other carriers regarding the billing of access or other charges associated with usage measured by a Qwest switch, provided that Qwest cooperates in any investigation related to such a dispute to the extent necessary to determine the type and accuracy of such usage.

2.10 For at least a one-year period, Eschelon agrees to pay Qwest for the services of a Qwest dedicated provisioning team to work on Eschelon's premises.

2.11 For at least a six week period, Eschelon agrees to participate with Qwest in a loop cutover trial.

3. In consideration of the agreements and covenants set forth above and the entire group of covenants provided in section 2, all taken as a whole and fully integrated with the terms and conditions described below and throughout this Amendment, with such consideration only being adequate if all such agreements and covenants are made and are enforceable, Qwest agrees to the following:

3.1 In consideration for Eschelon's agreement in section 2.1 of this agreement, to waive and release all charges associated with conversion from resold services to the unbundled network platform and for terminating Eschelon contracts for services purchased from Qwest for resale as described in this Amendment.

3.2 To provide throughout the term of this Amendment the Platform described herein and in Attachment 3.2, regardless of regulatory or judicial decisions on components, including pricing, of an unbundled network element platform, upon the rates, terms and conditions in the Attachment to section 3.2.

3.3 To provide daily usage information to Eschelon for the working telephone numbers supplied to Qwest by Eschelon, so that Eschelon can bill interexchange or other companies switched access or other rates as appropriate.

3.4 As described in section 1.2 of this agreement, to reach agreement and remain on a "bill and keep" basis for the exchange of local traffic and Internet-related traffic with Eschelon, throughout the territories where Qwest is currently the incumbent local exchange service provider until December 31, 2005.

3.5 To provide electronic interfaces to adequately support the product described in the Attachment to section 3.2.

**BEFORE THE
STATE OF MINNESOTA
PUBLIC UTILITIES COMMISSION**

Gregory Scott	Chair
Edward A. Garvey	Commissioner
R. Marshall Johnson	Commissioner
LeRoy Koppendraye	Commissioner
Phyllis Reha	Commissioner

**In the Matter of the Complaint of the
Minnesota Department of Commerce
Against Qwest Corporation**

)
) **Docket No. P-421/C-02-197**
)
) **OAH Docket No. 6-2500-14782**
)

**QWEST CORPORATION'S WRITTEN DIRECT TESTIMONY
OF KENNETH H. BECK**

1 **Q. HOW DID THIS STANDARD DIFFER FROM QWEST'S INTERNAL**
2 **STANDARD?**

3 A. The FOC targets contained in the Covad Agreement were actually less stringent
4 than Qwest's own internal standards.

5 **Q. WHAT WAS QWEST'S INTERNAL STANDARD?**

6 A. Qwest's internal target, at that time the Covad Agreement was executed, was to
7 provide 90% of FOC dates within 24 hours of receipt for all unbundled loop
8 services.

9 **Q. DID THIS TARGET APPLY TO JUST COVAD?**

10 A. No. It applied to all CLECs.

11 **Q. ARE THERE ANY DOCUMENTS THAT ILLUSTRATE THIS?**

12 A. Yes. Marked as Defendant's Exhibit 31 is a true and correct copy of the March
13 29, 2000 Qwest Communications Service Interval Guide for Resale and
14 Interconnection Services ("SIG"). Defendant's Exhibit 31 was produced and
15 maintained in the regular course of business.

16 **Q. IS THE SIG A PUBLIC DOCUMENT?**

17 A. Yes

18 **Q. ON WHAT PAGE OF THE DOCUMENT IS THIS GUIDELINE STATED?**

19 A. It is on page 44-45.

20 **[TRADE SECRET BEGINS**