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BEFORE THE ARIZONA CORPORATION COMMISSION

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AZ CORP 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

RUCO'S NOTICE OF FILING

The Residential Utility Consumer Office ("RUCO") respectfully provides notice of the Minnesota's Administrative Law Judges proposed Findings of Fact, Conclusions, Recommendation and Memorandum, a public version copy of which is attached hereto.

RESPECTFULLY SUBMITTED this 23rd day of September, 2002.

Daniel W. Pozefsky
Staff Attorney

Arizona Corporation Commission
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6-2500-14782-2
P-421/C-02-197

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE PUBLIC UTILITIES COMMISSION

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

FINDINGS OF FACT, CONCLUSIONS, RECOMMENDATION AND MEMORANDUM

Hearings in this matter were held on April 29-May 2, 2002 and August 6, 2002, at St. Paul, Minnesota. The record closed on September 13, 2002, upon issuance of the final ruling on the contents of the record.

Qwest Corporation ("Qwest") was represented by Peter S. Spivack, Cynthia Mitchell and Douglas R. M. Nazarian, Hogan & Hartson, LLP, 555 Thirteenth Street, N.W., Washington, D.C. 20004-1109. Qwest Corporation was also represented by Jason D. Topp, 200 S. 5th Street, Room 395, Minneapolis, MN 55402.

The Minnesota Department of Commerce ("Department" or "DOC") was represented by Steven H. Alpert, Assistant Attorney General, 525 Park Street, Suite 200, St. Paul, MN 55103-2106.

AT&T Communications of the Midwest, Inc., TCG Minnesota, Inc., and AT&T Broadband Phone of Minnesota, Inc. (collectively "AT&T") was represented by Gary B. Witt and Steven H. Weigler, AT&T Law Department, 1875 Lawrence Street, Suite 1575, Denver, CO 80202.

Onvoy, Inc. was represented by Michael J. Hoff and Joy Gullikson, 1405 6th Avenue North, 3rd Floor, Plymouth, MN 55441.

WorldCom, Inc. was represented by Gregory R. Merz, Grey, Plant, Mooty, Mooty & Bennett, 3400 City Center, 33 South 6th Street, Minneapolis, MN 55402, and Lesley James Lehr, 638 Summit Avenue, St. Paul, MN 55101.

The Residential Utility and Small Business Division of the Office of Attorney General ("OAG") was represented by Mary R. Crowson, Assistant Attorney General, 445 Minnesota Street, Suite 900, St. Paul, MN 55101.

Time Warner Telecom of Minnesota was represented by John F. Gibbs and Rebecca M. Liethen, Robins, Kaplan, Miller & Ciresi, 2800 LaSalle Plaza, 800 LaSalle Avenue, Minneapolis, MN 55402.

Z-Tel Communications, Inc., a non-party participant, was represented by Mark J. Ayotte, Briggs and Morgan, 2200 First National Bank Bldg., 332 Minnesota Street, St. Paul, MN 55101.

The staff of the Minnesota Pubic Utilities commission ("Commission") was represented by Kevin O'Grady.

NOTICE

Notice is hereby given that pursuant to Minn. Stat. § 14.61, and the Rules of Practice of the Public Utilities Commission and the Office of Administrative Hearings, exceptions to this report, if any, by any party adversely affected must be filed within 10 days of the mailing date hereof and replies to exceptions within 10 days after that, or such other date as established by the Commission's Executive Secretary.

Questions regarding the filing of exceptions should be directed to Dr. Burl Haar, Executive Secretary, Minnesota Public Utilities Commission, Suite 350 Metro Square, 121 Seventh Place East, St. Paul, MN 55101. Exceptions must be specific and stated and numbered separately. Oral argument before a majority of the Commission will be permitted to all parties adversely affected by the Recommendation who request such argument. Such request must accompany the filed exceptions or reply, and an original and 14 copies of each document should be filed with the Commission.

The Minnesota Public Utilities Commission will make the final determination of the matter after the expiration of the period for filing exceptions as set forth above, or after oral argument, if such is requested and had in the matter.

Further notice is hereby given that the Commission may, at its own discretion, accept or reject the Administrative Law Judge's Recommendation and that said Recommendation has no legal effect unless expressly adopted by the Commission as its final order.

STATEMENT OF ISSUES

When the Commission referred this matter to the Office of Administrative Hearings on March 12, 2002, the Commission defined the following four issues to be addressed in the contested case hearing:

1. Whether the agreements or any portion thereof (including terminated agreements) needed to be filed with the Commission for review;

2. If the agreements needed to be filed, whether they were filed under other settings;

3. Whether there were any exculpatory reasons why the agreements were not filed; and

4. Recommendations as to whether disciplinary action/penalties are appropriate.

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

Statutory Framework – Jurisdiction and Authority

1. Minn. Stat. § 237.081 authorizes the Commission to investigate any matter relating to any telephone service.

2. Minn. Stat. § 237.09 prohibits discrimination in intrastate service.

3. Minn. Stat. § 237.121 prohibits unreasonable or discriminatory restrictions on resale.

4. Minn. Stat. § 237.16, subd. 5 grants the Commission authority to revoke or temporarily suspend a certificate of authority for intentional violation of the Commission's rules or orders, or intentional violation of any applicable state or federal law relating to the provision of telephone or telecommunications service.

5. Minn. Stat. § 237.462 authorizes the Commission to assess monetary penalties for knowing and intentional violations of: (1) sections 237.09, 237.121, and 237.16; or (2) any duty of a telephone company imposed upon it by section 251, paragraph (a), (b), or (c) of the Telecommunications Act of 1996 that relates to service provided in the state. The statute goes on to set forth procedures and a list of considerations the Commission must consider when assessing a penalty.

6. Section 252(a) of the Telecommunications Act of 1996 addresses procedures for negotiating, arbitrating, and obtaining approval of interconnection agreements. With regard to voluntary negotiations, § 252(a)(1) provides that upon receiving a request for interconnection, services, or network elements pursuant to section 251 (which establishes a general duty to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers) an incumbent LEC may negotiate "a binding agreement" with the requesting carrier without regard to the standards set forth in subsections (b) and (c) of section 251. Section 252(a)(1) provides that the agreement shall include a detailed schedule of itemized charges "for interconnection and each service or network element included in the agreement." The agreement shall be submitted to the State commission for approval under § 252(e).[1] The state commission must approve or reject a negotiated agreement within 90 days of submission;[2] it may reject a negotiated agreement only if the agreement discriminates

[1] *See* 47 U.S.C. § 252(a)(1).
[2] *Id.* § 252(e)(4).

against other telecommunications carriers not a party to the agreement, or if the agreement is not consistent with the public interest, convenience, and necessity.[3]

7. With regard to arbitrated agreements, § 252(c) provides that the state commission shall ensure that the agreement meets the requirements of § 251; establishes rates for interconnection, services, or network elements pursuant to § 252(d); and provides a schedule for implementing the terms and conditions of the agreement. An arbitrated agreement shall be submitted to the state commission, which must approve or reject the agreement within 30 days.[4] The state commission may reject it if the agreement fails to meet the requirements of § 251 or the pricing standards of § 252(d).[5]

8. Once an agreement is approved, whether through negotiation or arbitration, a state commission shall make a copy of each approved agreement available for public inspection and copying.[6] In addition, any LEC shall make available any "interconnection, service, or network element provided under an agreement approved under this section" to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement (commonly referred to as "pick and choose").[7]

9. Section 251(b)(1) prohibits LECs from imposing unreasonable or discriminatory conditions on resale, and § 251(c)(2)(D) requires LECs to provide interconnection on rates, terms and conditions that are nondiscriminatory. Section 251(c)(3) requires ILECS to provide access to network elements on an unbundled basis on rates, terms and conditions that are nondiscriminatory.

10. Congress intended not only that state commissions safeguard the public from discriminatory agreements and those that are not in the public interest, but that state commissions become a repository for agreements from which CLECs can pick and choose terms favorable to their individual situations from agreements already approved, without going through expensive negotiations or arbitration proceedings. This "repository" function is the mechanism by which CLECs can be assured that they are obtaining nondiscriminatory treatment by the ILEC. In its First Report and Order, the FCC summarized the policy reasons for requiring that all interconnection agreements be filed, even those negotiated before passage of the 1996 Act:

> As a matter of policy, moreover, we believe that requiring filing of all interconnection agreements best promotes Congress's stated goals of opening up local markets to competition, and permitting interconnection on just, reasonable, and nondiscriminatory terms. State commissions should have the opportunity to review all agreements, including those that were negotiated before the new law was enacted, to ensure that such

[3] *Id.* § 252((e)(2).
[4] *Id.* § 252(e)(4).
[5] *Id.* § 252(e)(2).
[6] *Id.* § 252(h).
[7] *Id.* § 252(i).

> agreements do not discriminate against third parties, and are not contrary to the public interest. In particular, preexisting agreements may include provisions that violate or are inconsistent with the procompetitive goals of the 1996 Act, and states may elect to reject such agreements under section 252(e)(2)(A). Requiring all contracts to be filed also limits an incumbent LEC's ability to discriminate among carriers, for at least two reasons. First, requiring public filing of agreements enables carriers to have information about rates, terms, and conditions that an incumbent LEC makes available to others. Second, any interconnection, service or network element provided under an agreement approved by the state commission under Section 252 must be made available to any other requesting telecommunications carrier upon the same terms and conditions, in accordance with Section 252(i).[8]

11. There are no exceptions to this rule. If the substance of an agreement makes the agreement an interconnection agreement, then it must be filed regardless of its title or how it was negotiated. An agreement to settle disputes, for example, can also be an interconnection agreement, as the Commission found in the MCIWorldCom Order discussed below. A "business-to-business" agreement can also be an interconnection agreement.

12. The unfiled agreements at issue in this case are negotiated, rather than arbitrated agreements. Section 252(a) permits negotiated agreements based on a request for "interconnection, services, or network elements" pursuant to section 251. The only express requirement of negotiated agreements is that they contain, at minimum, a detailed schedule of itemized charges "for interconnection and each service or network element" included in the agreement. The pick and choose provision similarly allows CLECs to adopt any term or condition relating to "interconnection, service, or network element" provided under an approved agreement. These sections of the statute, read together, clearly and unambiguously require that negotiated agreements concerning interconnection, services, or network elements and the rates therefor be filed for approval by the state commission. If the parties negotiate an amendment to an earlier, approved agreement, whether it is characterized as a contractual amendment or settlement of a dispute, the amendment should also be filed so that the Commission may perform its function of ensuring that, as amended, the agreements do not discriminate, are not contrary to the public interest, and are available to other telecommunications carriers under § 252(i).

13. The Commission independently reached the conclusion in two different dockets that all interconnection agreements and interconnection agreement amendments must be filed with the Commission under 47 U.S.C. §252. Qwest was a party to both dockets.

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[8] *Local Competition First Report and Order,* 11 FCC Rcd at 15499, ¶ 167. *See also id.* at ¶ 168: "[c]onversely, excluding certain agreements from public disclosure could have anticompetitive consequences."

14. Two years ago, in its "Order Approving Settlement" in Docket No. P-421/C-97-1348 (the "MCIWorldcom Order"), the Commission reviewed a settlement agreement (the "Minnesota Agreement") between Qwest and MCIWorldcom containing service quality guarantees related to provisioning different network elements. While MCIWorldcom argued that the attachment to the Minnesota Agreement setting out the guarantees amended its interconnection agreement, Qwest (then U S WEST) argued that the attachment merely constituted a side agreement, separate from the interconnection agreement. Qwest also argued that it would honor the agreement in any event; that other carriers were free to negotiate similar terms directly with Qwest; and that participation in the wholesale service quality docket was an obvious substitute for adopting the proposed settlement language.[9]

15. The Commission rejected Qwest's arguments and held that the Minnesota Agreement amended MCIWorldcom's interconnection agreement, thus making its terms available for pick and choose by other CLECs under § 252(i). The Commission found that an agreement that has "prospective application governing the quality of service" that an ILEC will offer a CLEC must be made available to other carriers under § 252(i). It held:

> The Commission is not persuaded [by USWC's arguments]. To open the local telecommunications market to competition, Congress directed incumbent local telephone companies to permit competitors to interconnect on reasonable terms. And, where terms are deemed reasonable for one party, they should be deemed reasonable for other parties as well. This principle is reflected in 47 U.S.C. § 252(i), as noted above. Furthermore, an incumbent telephone company must offer nondiscriminatory access to UNEs, 47 U.S.C. § 251(c)(3), and interconnection that is at least equal in quality to that provided to any other party, § 251(c)(2)(C). The terms of Attachment A have prospective application governing the quality of service that USWC will offer MCIW. Having found the terms of Attachment A reasonable, the Commission is compelled to ensure that other CLECs have the opportunity to receive USWC's service on an equal basis. § 252(e)(2)(B).
>
> Moreover, even if the Commission were not required to conclude that Attachment A amends the USWC/MCIW interconnection agreements, the Commission has ample reason to prefer that result. The self-executing nature of the agreement may promote administrative efficiency and avert future complaints. Both the Department and Eschelon note that making this agreement a part of MCIW's interconnection agreements – thus making it available to other CLECs – would spare other CLECs, government agencies, and USWC itself the expense of re-litigating this issue in the

[9] *In the Matter of a Complaint of MCImetro Access Transmission Services, Inc. Against U S WEST Communications, Inc. for Anticompetitive Conduct*, Docket P-421/C-97-1348, *Order Approving Settlement*, September 18, 2000, at 4-5 (the "MCIWorldcom Order").

> context of other interconnection agreements. That is no small consideration: The Department notes that the interconnection language that Attachment A is designed to effectuate is virtually identical to the language in the USWC/AT&T interconnection agreement; that interconnection agreement has been widely adopted by other CLECs.
>
> Of course, nothing in this decision will impair a CLEC's discretion to negotiate or arbitrate for different terms, this decision will merely make the Attachment A terms available for adoption.[10]

16. The second time the Commission addressed this issue arose in the context of a complaint brought by Dakota Telecom, Inc. ("DTI") against Qwest. DTI complained that Qwest (then U S WEST) violated its interconnection agreement with DTI by not completing calls between DTI's customers and exchanges that had Extended Area Service with Pipestone, Marshall, and Luverne.[11] The parties (and a number of intervenors) settled the action by entering into an agreement that was, in all material respects, the same as the USLink Agreement referred to in the Department's Amended Verified Complaint at Paragraphs 239 - 251. The Commission reviewed the agreement and held as follows:

> The Commission has analyzed the settlement terms and finds that they require Qwest to do things that the Company was not required to do under the existing interconnection agreement. For instance, in local calling areas not currently served by an official local tandem, the Settlement Agreement requires Qwest to provide CLECs with local transit service to allow CLECs to complete EAS calls to and from the exchanges included in Commission Approved EAS calling areas.
>
> As such, the Settlement Agreement amends the interconnection agreements between Qwest and the CLECs signing the settlement agreement. The parties' interconnection agreements, as amended by the settlement terms, will be available to any CLEC requesting a copy pursuant to Section 252(i) of the Federal Telecommunications Act.

17. The MCIWorldCom Order establishes that an agreement that has "prospective application governing quality of service" must be made available to other CLECs under § 252(i). Similarly, the DTI Order establishes the Commission's view that any agreement that amends the interconnection agreement between a CLEC and an ILEC is an interconnection agreement that must be made available to other CLECs

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[10] *Id.* at 5.

[11] *In the Matter of a Complaint by Dakota Telecom, Inc. Against Qwest Corporation*, Docket No. P-421/C-00-373, *Order Approving Settlement*, July 25, 2001, p. 1 (the "DTI Order").

under § 252(i). The only mechanism for making such agreements available under § 252(i) is to submit each for approval by the Commission under § 252(e).

18. There is no statutory definition for the term "interconnection agreement." Nonetheless, the Act, the FCC and the Commission have all given broad but clear guidance as to what an interconnection agreement is. In addition, industry practice since the passage of the Act has also helped define the term.

19. Several different definitions have been proposed in this hearing. The standard used by the Department (the "Department Proposed Standard") is "whether the provision created a concrete and specific legal obligation for Qwest to do something or refrain from doing something on a forward-looking basis to meet the requirements of §§ 251(b) and (c)."[12]

20. AT&T proposes a five step analysis, as follows:

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.

[12] Ex. 200 at 9.

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.

21. OAG proposed "any binding agreement that includes any term of interconnection or the provisioning of services or network elements which in turn are used to provide telecommunications services to the public."

22. Other state utilities commissions have considered this question in their own investigations of some of the agreements at issue here. One, the Iowa Utilities Board, has reached the conclusion that an interconnection agreement is "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. This definition includes any agreement modifying or amending any part of an existing interconnection agreement."[13]

23. In its post-hearing memorandum, Qwest argues, "The 1996 Act requires the filing of only a detailed schedule of rates and a description of services" (the "Qwest Proposed Standard").[14] In its proposed findings, Qwest argues for limiting filings to "a detailed schedule of itemized charges for interconnection and each service or network element included in the agreement."[15]

24. In Section 4 of its Statement of Generally Available Terms and Conditions for Interconnection, Unbundled Network Elements, Ancillary Services, and Resale of Telecommunications Services Provided by Qwest Corporation in the State of Minnesota ("SGAT"), however, Qwest defines an interconnection agreement as "an agreement entered into between Qwest and CLEC for Interconnection, Unbundled Network Elements or other services as a result of negotiations, adoption and/or arbitration or a combination thereof pursuant to Section 252 of the Act."

25. The interconnection relationship between ILECs and CLECs can change over time (particularly based on technological changes). CLECs differ among themselves. The boundaries of what must be in an interconnection agreement must be fluid enough to recognize these differences, but they also must be fluid to reflect the underlying goals of the Act. They must allow flexibility in contractual relationships, while at the same time, preventing discrimination by ILECs.

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[13] Order Making Tentative Findings, Giving Notice for Purposes of Civil Penalties, and Granting Opportunity to Request Hearing In Re: AT&T Corporation v. Qwest Corporation, Docket No. FCU-02-02, May 29, 2002, at 8.
[14] Qwest Memorandum at 3.
[15] Qwest Proposed Findings at 36.

26. Qwest's proffered standard, which would leave most of the important details regarding interconnection and UNE access for unfiled side agreements, would leave it free to grant favoritism to its chosen CLECs over others, without the ability of any regulatory body to oversee its conduct.

27. As the Supreme Court recognized, the Commission cannot determine if Qwest is providing discriminatory rates unless it knows every service offered in exchange for that rate, which means the Commission must know the "details" that Qwest argues should be excluded from interconnection agreements.[16]

28. While the Department, AT&T, OAG, the Iowa Utilities Board, and Qwest's SGAT may have used different words, the bottom line is that all of the definitions being discussed in this litigation (other than that currently proffered by Qwest) are, at the core, the same.

29. To the extent that the parties have requested a specific definition of "interconnection agreement" for use on a going-forward basis, it should be defined as any contractual agreement or amendment thereto, whether negotiated or arbitrated, between an ILEC and any other telecommunications carrier, that concerns the rates, terms, or conditions for provision of interconnection, services, or network elements

Procedural History

30. In the summer of 2001, the Department began an investigation to determine if Qwest was engaged in anticompetitive conduct in Minnesota. As a part of that investigation the Department retained a consultant who reviewed more than 70 agreements between Qwest and CLECs. Out of those 70+ agreements, 11 were selected to serve as the basis of the Department's initial complaint.[17]

31. On February 14, 2002, the Department filed a complaint against Qwest, claiming Qwest violated state and federal law by not submitting for Commission approval the eleven agreements with competitive local exchange carriers ("CLEC"). On March 1, 2002, Qwest filed its answer to the complaint. On that same date, Qwest also filed a conditional Application for Approval of Certain Negotiated Agreement Provisions between Qwest and Advanced Telecommunications, Inc. (now Eschelon), Covad Communications Company, Small CLECs, McLeod USA, and US Link and Info Tel Communications, LLC.

32. On March 5, 2002, the Commission met and deliberated about the complaint and the joint (DOC and Qwest) request for an expedited proceeding. The Commission determined to refer the matter to the Office of Administrative Hearings for contested case proceedings, requesting that it be heard on an expedited time schedule

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[16] *See American Telephone and Telegraph v. Central Office Telephone Company, Inc.,* 524 U.S. 214, 118 S.Ct. 1956 (1998).
[17] Tr. 1:18-20.

following the guidelines set forth in Minn. Stat. § 237.462, subd. 6. The Commission set forth the issues outlined above.

33. On March 19, 2002, the Department filed an amended complaint, and on April 11, 2002, Qwest filed an amended answer. An initial prehearing conference was held on March 20, and the first Prehearing Order was issued on April 3. That Order set the hearing to begin on April 29.

34. On April 29, 2002, the hearing did begin, and extended until May 2.

35. Later in the month of May, the parties were preparing for hearings in the so-called public interest docket.[18] Those hearings began on May 28 and continued into early June. As the parties were preparing for those hearings, however, a number of issues arose which reflected the interplay between this docket (the "unfiled agreements" docket) and the public interest docket. There were a number of motions and prehearing conferences to sort out what should be discussed in each docket. On May 20, 2002, the Department learned of another unfiled agreement that it had not previously been able to document. On May 21, the Department filed a motion in the public interest docket, seeking to delay a portion of that hearing while it could develop its evidence on the newly-discovered unfiled agreement. On May 22, a prehearing conference was held and the Administrative Law Judge ruled that the public interest hearing would go forward as scheduled on May 28, but that the Department could bring a motion to reopen the unfiled agreements docket to present the newly-discovered evidence. The Administrative Law Judge also informed the parties that the hearing record from this unfiled agreements docket, including any reopened portions, would become part of the hearing record in the public interest proceeding. On May 23, the Administrative Law Judge issued an Order memorializing the decisions on the various motions discussed on the previous day.[19] The next day, May 24, the Department moved to reopen the unfiled agreements docket to submit evidence with regard to the newly-discovered agreement. The motion was granted, and the parties proceeded with discovery. On June 14, 2002, the Department filed its Second Amended Complaint, adding the allegation that Qwest had entered into an oral agreement to provide McLeod USA with an 8% to 10% discount on all purchases made by McLeod from Qwest between October 2, 2000 and December 31, 2003.[20]

36. On June 4, a telephone conference was held concerning the scope and schedule of the reopened hearing. It was determined that the scope was limited solely to McLeod III, and that the hearing would be held on July 1. This date proved to be optimistic, as numerous discovery disputes arose between Qwest, the Department, and McLeod. The hearing date was moved to July 17, and then to August 6. The hearing did, in fact, occur on August 6, and was completed in one day. Initial briefs were filed on August 23, reply briefs on September 4, and proposed findings on September 11.

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[18] *In the Matter of a Commission Investigation into Qwest's Compliance with Section 271(d)(3)(C) of the Telecommunications Act of 1996 that the Requested Authorization Is Consistent with the Public Interest, Convenience and Necessity*; PUC Docket No. P-421/CI-01-1373; OAH Docket No. 6-2500-14488-2.
[19] 18th Prehearing Order, May 23, 2002.
[20] This will be referred to hereafter as McLeod III.

Analysis of the Individual Agreements

I. ESCHELON AGREEMENT I

37. On February 28, 2000 U S WEST Communications, Inc. ("U S WEST") and Advanced Telecommunications, Inc. ("ATI") entered into the Confidential / Trade Secret Stipulation Between ATI and U S WEST ("Eschelon Agreement I"). ATI is the predecessor in interest to Eschelon Telecom Inc. ("Eschelon"). U S WEST is the predecessor in interest to Qwest.[21]

38. Qwest did not submit Eschelon Agreement I to the Commission for approval under 47 U.S.C. § 252(e) until March 1, 2002, in response to the Department's complaint in this matter.

39. The specific terms set out in Paragraphs 7, 10-12 and 14 of Eschelon Agreement I do not appear in any approved interconnection agreement or amendment thereto between Qwest and Eschelon.[22]

Paragraph 7

40. Paragraph 7 of Eschelon Agreement I contains a provision by which "the parties agree that for settlement purposes that reciprocal compensation for terminating internet traffic shall be paid at the most favorable rates and terms contained in an agreement executed to date by U S WEST."[23]

41. 47 U.S.C. § 251(b)(5) requires local exchange carriers to establish reciprocal compensation arrangements for the transport and termination of telecommunications.

42. Paragraph 7 of Eschelon Agreement I obligated Qwest to pay reciprocal compensation for terminating internet traffic to Eschelon at the most favorable rates and terms contained in an agreement executed by U S WEST at the time it entered into Eschelon Agreement I.[24]

43. Paragraph 7 of the Eschelon Agreement establishes rates for interconnection. Accordingly, 47 U.S.C. §§ 252(a) and (e) required Qwest to file the terms in Paragraph 7 of Eschelon Agreement I with the Commission.

44. By failing to file Paragraph 7 of Eschelon Agreement I for approval by the Commission, Qwest violated 47 U.S.C. §§ 252(a) and (e).

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[21] *See* Statement of Undisputed Facts (SUF) ¶ 2.
[22] SUF ¶¶ 6-9; Ex. 200 – WCD-12 (Qwest response to DOC 054-057 in the 197 Docket.
[23] SUF ¶12; Ex. 200 – WCD-1.
[24] Ex. 200 – WCD-1.

45. Qwest knowingly and intentionally violated 47 U.S.C. §§ 252(a) and (e) in that Qwest knew that those statutes required Paragraph 7 of Eschelon Agreement I to be filed with the Commission but intentionally did not make the required filing.

46. By failing to make this provision available to other CLECs, Qwest knowingly and intentionally discriminated against them in violation of 47 U.S.C. § 251.

Paragraph 10

47. Paragraph 10 of Eschelon Agreement I contains a provision by which "[w]ith respect to termination liability assessments (TLA) and while the Minnesota Commission continues to have an open docket on this issue, [U S WEST] agrees to continue to suspend such assessments in Minnesota when a [U S WEST] customer converts to an ATI customer on a resale basis and to credit ATI with any such TLA payments ATI has made in Minnesota."[25]

48. On October 13, 1998, following U S WEST's filing of tariff and price list revisions imposing termination charges on contract customers choosing to substitute a reseller for U S WEST as the provider of contract services, the Commission had rejected U S WEST's tariff and ordered U S WEST to seek approval before filing a new tariff.

49. U S WEST appealed the Commission's decision to the Minnesota Court of Appeals. On May 4, 1999 the Court of Appeals reversed and remanded the Commission's decision in the original complaint.[26] The Court rejected the Commission's finding that the original tariff language itself prohibited the application of TLAs in resale situations. The Court also found that the Commission had reasonably concluded that the purpose of the tariff was cost recovery, and the Court therefore remanded the case for specific findings on costs and other relevant factors.

50. On June 10, 1999, U S WEST entered into a stipulation with the Commission and agreed to file revised TLA provisions and dismiss its appeal. In return the Commission agreed to act on the new filing under an expedited proceeding and to either delegate a Commission subcommittee or a lead Commissioner to the filing.

51. U S WEST proposed imposing a TLA of 17.66% of the monthly contract rate for each month the customer did not take service directly (the same amount as a reseller's wholesale discount) from Qwest during the first year of the contract, with the rate dropping to 9% during the subsequent contract years.

52. The Commission ruled that Qwest did not meet the Commission's standards of support for the TLA charges and therefore the charges were not just and reasonable rates. The Commission also ruled that the TLA provisions unreasonably restricted resale under Minnesota law, and released an order on October 2, 2001 rejecting the tariff revisions.

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[25] SUF ¶ 15; Ex. 200 – WCD-1.

[26] *Info Tel Communications, LLC v. Minnesota Public Utilities Com'n*, 592 N.W. 2d 880 (Minn. App. 1999).

53. 47 U.S.C. § 251(c)(4) requires ILECs to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not carriers. It also imposes a duty on ILECs not to prohibit, and not to impose discriminatory terms and conditions on, the resale of such services.

54. Paragraph 10 of Eschelon Agreement 1 obligated Qwest to suspend the TLAs on a going forward basis and to credit Eschelon for TLA payments made by Eschelon in Minnesota prior to the date of Eschelon Agreement I. This enhanced Eschelon's ability to obtain and service customers.

55. 47 U.S.C. § 251(c)(4)(B) prohibits ILECs from imposing discriminatory terms and conditions on resale.

56. Paragraph 10 of Eschelon Agreement I relates to the rates paid by Eschelon to resell Qwest services. Accordingly, 47 U.S.C. §§ 252(a) and (e) required Qwest to file the terms in Paragraph 10 of Eschelon Agreement I with the Commission.

57. By failing to file Paragraph 10 of Eschelon Agreement I for approval by the Commission, Qwest violated 47 U.S.C. §§ 252(a) and (e).

58. Qwest knowingly and intentionally violated 47 U.S.C. §§ 252(a) and (e) in that Qwest knew that those statutes required Paragraph 10 of Eschelon Agreement I to be filed with the Commission but intentionally did not make the required filing.

59. By failing to make this provision available to other CLECs, Qwest knowingly and intentionally discriminated against them in violation of 47 U.S.C. § 251.

Paragraphs 11 and 12

60. Paragraphs 11 and 12 of Eschelon Agreement I contain a provision by which Qwest agreed to locate a Coach and a Service Delivery Coordinator on Eschelon's premises, and to dedicate a provisioning team to handle order processing for Eschelon.[27]

61. 47 U.S.C. § 251(c)(3) requires ILECs to provide to any requesting carrier for the provisioning of a telecommunications service, access to unbundled network elements on rates, terms and conditions that are non-discriminatory and meet the requirements of § 251 and § 252.

62. Paragraphs 11 and 12 of Eschelon Agreement I obligated Qwest to provide a dedicated provisioning team to work on-site at Eschelon and help Eschelon gain access to Qwest UNEs.

63. Paragraphs 11 and 12 of Eschelon Agreement I describe the services that Qwest will provide for rates set out in Eschelon Agreement II (see below). In *American Telephone and Telegraph v. Central Office Telephone Company, Inc.*, 524 U.S. 214,

[27] SUF ¶ 21.

118 S.Ct. 1956 (1998), the Supreme Court held that the term "rates" includes terms that involve the provisioning of services and billing. Accordingly, 47 U.S.C. §§ 252(a) and (e) required Qwest to file the terms in Paragraphs 11 and 12 of Eschelon Agreement I with the Commission.

64. By failing to file Paragraphs 11 and 12 of Eschelon Agreement I for approval by the Commission, Qwest violated 47 U.S.C. §§ 252(a) and (e).

65. Qwest knowingly and intentionally violated 47 U.S.C. §§ 252(a) and (e) in that Qwest knew that those statutes required Paragraphs 11 and 12 of Eschelon Agreement I to be filed with the Commission but intentionally did not make the required filing.

66. Qwest filed an Interconnection Agreement Amendment stating that "[f]or 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."[28] That filing was insufficient to satisfy Qwest's obligations under 47 U.S.C. § 252.

67. By failing to make this provision available to other CLECs, Qwest knowingly and intentionally discriminated against them in violation of 47 U.S.C. § 251.

Paragraph 14

68. Paragraph 14 of Eschelon Agreement I contains a provision by which the parties agreed to alternative dispute resolution procedures "in addition to the dispute resolution mechanism provided under the Interconnection Agreement."[29]

69. Paragraph 14 of Eschelon Amendment I expressly modified the terms of the interconnection agreement between Qwest and Eschelon. Under Commission precedent set in the WorldCom Order and the Dakota Telecom Order, Qwest had an obligation to file the provision with the Commission.

70. A term that defines how a CLEC and an ILEC will resolve disputes over interconnection is a term of interconnection. Similarly, a term that defines how a CLEC and an ILEC will resolve disputes over the provisioning of network elements is a term for providing access to those UNEs, and a term that defines how a CLEC and an ILEC will resolve disputes regarding services is a term for providing those services

71. 47 U.S.C. § 251 requires ILECs to provide interconnection, network elements and services on a non-discriminatory basis.

72. Paragraph 14 obligated Qwest to abide by the alternative dispute resolution procedures it describes when a dispute arises with Eschelon regarding interconnection, network elements or services.

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[28] Ex. 1.
[29] Ex. 200 – WCD-1.

73. Paragraph 14 of Eschelon Agreement I describes terms for provisioning interconnection and access to UNEs at the rates set forth in Eschelon's interconnection agreement with Qwest. The term "rates" includes terms that involve the provisioning of services and billing. Accordingly, 47 U.S.C. §§ 252(a) and (e) required Qwest to file the terms in Paragraph 14 of Eschelon Agreement I with the Commission.

74. By failing to file Paragraph 14 of Eschelon Agreement I for approval by the Commission, Qwest violated 47 U.S.C. §§ 252(a) and (e).

75. Qwest knowingly and intentionally violated 47 U.S.C. §§ 252(a) and (e) in that Qwest knew that those statutes required Paragraph 14 of Eschelon Agreement I to be filed with the Commission but intentionally did not make the required filing.

76. Qwest gave Eschelon certain rights through Paragraph 14 that CLECs could not obtain anywhere else. For example, Paragraph 14 permits written discovery and one oral deposition in any arbitration arising from a dispute under its provisions. Qwest's SGAT, however, permits no discovery "except for the exchange of documents deemed necessary by the Arbitrator to an understanding and determination of the dispute."[30] There is no approved interconnection agreement in Minnesota that gives any CLEC the same dispute resolution mechanism set forth in Paragraph 14.[31]

77. By failing to make this provision available to other CLECs, Qwest knowingly and intentionally discriminated against them in violation of 47 U.S.C. § 251.

ESCHELON AGREEMENT II

78. On July 21, 2000 Qwest and Eschelon entered into an agreement entitled Trial Agreement ("Eschelon Agreement II").[32]

79. Qwest did not submit Eschelon Agreement II to the Commission for approval under 47 U.S.C. § 252(e) until March 1, 2002, in response to the Department's complaint in this matter.

80. The specific terms set out in Eschelon Agreement II do not appear in any approved interconnection agreement or amendment thereto between Qwest and Eschelon.[33]

81. Eschelon Agreement II contains detailed provisions – including rates, roles and responsibilities – for creating and operating Qwest's on-site provisioning team at Eschelon.[34] Qwest provided no other CLEC in Minnesota with an on-site provisioning team.

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[30] SGAT § 5.18.3.2, Exhibit WCD-15.
[31] Ex. 200 – WCD-12 (Qwest's Response to DOC 060 in the 814 Docket).
[32] SUF ¶ 26.
[33] SUF ¶ 32; Ex. 200 – WCD-12 (Qwest response to DOC 059 in the 197 Docket).
[34] Ex. 200 – WCD-2.

82. 47 U.S.C. § 251(c)(3) requires ILECs to provide to any requesting carrier for the provisioning of a telecommunications service, access to unbundled network elements on rates, terms and conditions that are non-discriminatory and meet the requirements of § 251 and § 252.

83. Eschelon Agreement II obligated Qwest to provide a dedicated provisioning team to work on-site at Eschelon and help Eschelon gain access to Qwest UNEs.

84. Eschelon Agreement II describes in detail the services that Qwest will provide for the rate of $9,206 per month. The term "rates" includes terms that involve the provisioning of services and billing. Accordingly, 47 U.S.C. §§ 252(a) and (e) required Qwest to file the terms of Eschelon Agreement II with the Commission.

85. By failing to file Eschelon Agreement II for approval by the Commission, Qwest violated 47 U.S.C. §§ 252(a) and (e).

86. Qwest knowingly and intentionally violated 47 U.S.C. §§ 252(a) and (e) in that Qwest knew that those statutes required it to file Eschelon Agreement II with the Commission but intentionally did not make the required filing.

87. Qwest filed an Interconnection Agreement Amendment stating that "[f]or 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."[35] That filing was insufficient to satisfy Qwest's obligations under 47 U.S.C. § 252.

88. By failing to make this provision available to other CLECs, Qwest knowingly and intentionally discriminated against them in violation of 47 U.S.C. § 251.

II. ESCHELON AGREEMENT III

89. On November 15, 2000 Qwest and Eschelon entered into a letter agreement ("Eschelon Agreement III").[36]

90. Qwest terminated Eschelon Agreement III on March 1, 2002.[37]

91. Qwest did not submit Eschelon Agreement III to the Commission for approval under 47 U.S.C. § 252(e) until March 1, 2002, in response to the Department's complaint in this matter.[38]

92. The specific terms set out in Section 2 of Eschelon Agreement III do not appear in any approved interconnection agreement or amendment thereto between Qwest and Eschelon.[39]

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[35] Ex. 1.
[36] SUF ¶ 34.
[37] SUF ¶ 36.
[38] SUF ¶ 41.

93. The specific terms set out in Section 3 of Eschelon Agreement III do not appear in any interconnection agreement or amendment thereto between Qwest and Eschelon that the Commission has approved.[40]

94. [BEGIN TRADE SECRET] [END TRADE SECRET] The phrase concerning Interconnection Agreements does not appear in the final version of Eschelon III.

95. Trial Exhibits 227 and 228 establish that Qwest took affirmative action specifically for the purpose of keeping Eschelon Agreement III from being filed with the Commission.

Section 2

96. Section 2 of Eschelon Agreement III requires Qwest to participate in quarterly meetings with Eschelon, attended by executives from both companies at the vice-president or above level, to discuss business and interconnection issues

97. Section 2 of Eschelon Agreement III amended Eschelon's interconnection agreement with Qwest in the same way as Paragraph 14 of Eschelon Agreement I did. It created a new obligation for Qwest relating to interconnection and the provisioning of UNEs that did not exist in the Eschelon interconnection agreement.

98. A term that defines how a CLEC and an ILEC will work with each other on interconnection issues and address concerns regarding access to UNEs and other services is a term for providing interconnection, access to UNEs and/or telecommunications services.

99. 47 U.S.C. § 251 requires ILECs to provide interconnection, network elements and services on a non-discriminatory basis.

100. Section 2 of Eschelon Agreement III obligated Qwest to provide senior executives to meet with Eschelon on a quarterly basis to discuss interconnection, access to UNEs and services.

101. Section 2 of Eschelon Agreement III describes terms for provisioning interconnection and access to UNEs at the rates set forth in Eschelon's interconnection agreement with Qwest. The term "rates" includes terms that involve the provisioning of services and billing. Accordingly, 47 U.S.C. §§ 252(a) and (e) required Qwest to file the terms in Section 2 of Eschelon Agreement III with the Commission.

102. By failing to file Section 2 of Eschelon Agreement III for approval by the Commission, Qwest violated 47 U.S.C. §§ 252(a) and (e).

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[39] Ex. 200 – WCD-12 (Qwest response to DOC 061 in the 197 Docket).
[40] Ex. 200 – WCD-12 (Qwest response to DOC 062 in the 197 Docket).

103. Qwest knowingly and intentionally violated 47 U.S.C. §§ 252(a) and (e) in that Qwest knew that those statutes required Section 2 of Eschelon Agreement III to be filed with the Commission but intentionally did not make the required filing.

104. The Act requires Qwest not to discriminate when providing interconnection, access to network elements and services. Qwest gave Eschelon certain rights through Section 2 of Eschelon Agreement III that CLECs could not obtain anywhere else. There is no approved interconnection agreement in Minnesota that requires Qwest to provide any CLEC with the same level of access to Qwest senior executives on a quarterly basis.[41]

105. By failing to make this provision available to other CLECs, Qwest knowingly and intentionally discriminated against them in violation of 47 U.S.C. § 251.

106. Section 1.3 of the Eighth Amendment to Eschelon Interconnection Agreement states that "[t]he Parties wish to establish a business-to-business relationship and have agreed that they will attempt to resolve all differences or issues that may arise under the Agreements or this Amendment under an escalation process to be established between the parties." This is not a sufficient filing to satisfy 47 U.S.C. § 252 with respect to Section 2 of Eschelon Agreement III.

Section 3

107. Section 3 of Eschelon Agreement III committed Qwest to respond to a six-level escalation process for resolving interconnection disputes. It also committed Qwest's ultimate decision maker, its CEO, to address disputes that reached the third level of the escalation procedures. Finally, it contains a provision by which Eschelon and Qwest agreed to waive primary jurisdiction in any state utility or service commission and to waive tariff limitations on damages or other limitations on reasonably foreseeable damages.

108. Level 1 of the escalation process requires Qwest to make Vice Presidents available to discuss Eschelon's interconnection issues. Level 2 involves Senior Vice Presidents. Level 3 involves CEOs. Level 4 is arbitration. Level 5 is a return to CEOs, and Level 6 is litigation in state or federal courts. Levels 1, 2, 3 and 5 are assigned 10 business days for completion. Level 4 allows either party to request expedited arbitration to be completed within 90 days.

109. In addition, Section 3 provides that if a dispute reaches Level 6, "the parties waive (a) primary jurisdiction in any state utility or service commission; and (b) any tariff limitations on damages or other limitation on actual damages, to the extent such damages are reasonably foreseeable and acknowledging each party's duty to mitigate damages."

110. 47 U.S.C. § 251 requires ILECs to provide interconnection, network elements and services on a non-discriminatory basis.

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[41] Ex. 200 – WCD-13 (Qwest's Response to DOC 062 in the 814 Docket).

111. Section 3 obligated Qwest to participate in a well-defined set of escalation procedures for resolving problems arising under its interconnection agreement with Eschelon. Section 3 expressly says that it applies to all business disputes between Qwest and Eschelon, "including but not limited to, their Interconnection Agreements and Amendments." Terms and conditions for resolving disputes regarding interconnection and the provisioning of network elements are terms and conditions for providing those things to CLECs.

112. Section 3 of Eschelon Agreement III describes terms for provisioning interconnection and access to UNEs at the rates set forth in Eschelon's interconnection agreement with Qwest. The term "rates" includes terms that involve the provisioning of services and billing. Accordingly, 47 U.S.C. §§ 252(a) and (e) required Qwest to file the terms in Section 3 of Eschelon Agreement III with the Commission.

113. By failing to file Section 3 of Eschelon Agreement III for approval by the Commission, Qwest violated 47 U.S.C. §§ 252(a) and (e).

114. Qwest knowingly and intentionally violated 47 U.S.C. §§ 252(a) and (e) in that Qwest knew that those statutes required Section 3 of Eschelon Agreement III to be filed with the Commission but intentionally did not make the required filing.

115. The Act requires Qwest not to discriminate when providing interconnection, access to network elements and services. Qwest gave Eschelon certain rights through Section 3 of Eschelon Agreement III that CLECs could not obtain anywhere else. There is no approved interconnection agreement in Minnesota that requires Qwest to provide any CLEC with the same escalation process and/or waivers on jurisdiction and damage waivers.[42]

116. The escalation procedures made available to CLECs generally, as cited by Qwest witness Dana Filip[43] begin with the Service Delivery Coordinator and end at the Senior Director / Vice President level.[44] The six-level procedures in Eschelon Agreement III, in contrast, start at the Vice President level. Accordingly, Section 3 of Eschelon Agreement III allows Eschelon to start the escalation process where, according to Qwest's testimony, the process for every other CLEC ends.

117. By failing to make this provision available to other CLECs, Qwest knowingly and intentionally discriminated against them in violation of 47 U.S.C. § 251.

118. Section 1.3 of the Eighth Amendment to Eschelon Interconnection Agreement states that "[t]he Parties wish to establish a business-to-business relationship and have agreed that they will attempt to resolve all differences or issues that may arise under the Agreements or this Amendment under an escalation process to be established between the parties." This is not a sufficient filing to satisfy 47 U.S.C. § 252 with respect to Section 3 of Eschelon Agreement III.

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[42] Ex. 200 – WCD-13 (Qwest's Responses to DOC 063 and DOC 064 in the 814 Docket).
[43] Ex. 74, 10–11
[44] Ex. 7 at 2.

III. ESCHELON AGREEMENT IV

119. On November 15, 2000, Qwest and Eschelon entered into an agreement titled Confidential Amendment to Confidential / Trade Secret Stipulation ("Eschelon Agreement IV").[45]

120. Qwest terminated Eschelon Agreement IV on March 1, 2002.

121. Qwest did not submit Eschelon Agreement IV to the Commission for approval under 47 U.S.C. § 252(e) until March 1, 2002, in response to the Department's complaint in this matter.

122. The specific terms set out in Paragraph 3 of Eschelon Agreement IV do not appear in any approved interconnection agreement or amendment thereto between Qwest and Eschelon.[46]

123. The specific terms set out in Paragraph 2 of Eschelon Agreement IV do not appear in any approved interconnection agreement or amendment thereto between Qwest and Eschelon.[47]

Paragraph 3

124. In Paragraph 3 of Eschelon Agreement IV, Qwest agreed to provide Eschelon with a 10% discount on all of the "aggregate billed charges for all purchases made by Eschelon from Qwest from November 15, 2000 through December 31, 2005."

125. The discount applied to all purchases made by Eschelon from Qwest, including but not limited to switched access fees and Eschelon's purchases of interconnection, UNEs, tariffed services, and other telecommunications services covered by the Act.

126. The "consulting" arrangement described in Paragraph 3 of Eschelon Agreement IV was a sham designed to conceal the discount that Qwest agreed to provide Eschelon. The purported payment outlined in Paragraph 3 for the alleged consulting services had no rational relationship to the services to be provided by Eschelon. Instead, Qwest agreed to pay Eschelon "an amount that is ten percent (10%) of the aggregate billed charges for all purchases made by Eschelon from Qwest from November 15, 2000 through December 31, 2005" regardless of the quantity or quality of work done by Eschelon.

127. Exhibits 479J and 480J show Qwest offering the discount to Eschelon prior to the parties entering into Eschelon Agreement IV

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[45] SUF ¶ 46.
[46] Ex. 200 – WCD-12 (Qwest response to DOC 064 in the 197 Docket).
[47] Ex. 200 – WCD-12 (Qwest response to DOC 065 in the 197 Docket).

128. Exhibit 226 shows Richard Smith, Eschelon's President and Chief Operating Officer, confirming the existence of the discount agreement and suggesting to Qwest a mechanism for masking Eschelon's discount. It was sent to Qwest on November 5, 2000 – ten days before the date the parties executed Eschelon Agreement IV.

129. There is no evidence that, prior to November 5, 2000, Qwest ever considered hiring Eschelon to provide it with consulting services. There is no evidence that, prior to November 15, 2000, Qwest performed any analysis to determine whether it needed consulting services from Eschelon or, if it did, what services it might need. There is no evidence that, prior to November 15, 2000, Qwest made any effort to find the type of "consulting" services described in Eschelon Agreement III from any vendor. There is no evidence that, prior to November 15, 2000, Eschelon was in the consulting business or that providing consulting services to LECs is a part of Eschelon's business.

130. Trial Exhibit 229 shows that the list of purported Eschelon "consulting" teams that Qwest provided to the Department in response to discovery requests was actually a list of teams intended to work on the implementation plan described in Eschelon Agreement III.

131. Paragraph 3 of Eschelon Agreement IV amended Eschelon's interconnection agreement with Qwest by changing the rates set out in the interconnection agreement for interconnection, network elements and services.

132. Under the Commission's MCIWorldcom Order, Paragraph 3 of Eschelon Agreement IV must be filed with the Commission for approval under 47 U.S.C. § 252(e) and availability under § 252(i).

133. 47 U.S.C. § 251 requires Qwest to provide interconnection, network elements and services at rates that are non-discriminatory.

134. Section 252 requires public filing of interconnection agreements to ensure that ILECs do not discriminate through the use of unfiled agreements. § 252(i) puts every similarly situated CLEC on a level playing field in terms of its relationship with Qwest, but the statutory mechanism works only if Qwest's agreements related to pricing and other issues are actually filed with the Commission. The easiest way that an ILEC can discriminate between CLECs is by adjusting its pricing to favor one CLEC over another.

135. Paragraph 3 of Eschelon Agreement IV obligated Qwest to provide Eschelon with a 10% discount on every purchase Eschelon made or makes from Qwest between November 15, 2000 and December 31, 2005. That discount changed all of the prices in Eschelon's interconnection agreement, including those set by the Commission in lengthy cost docket proceedings.

136. Paragraph 3 of Eschelon Agreement IV modifies the rates set forth in Eschelon's interconnection agreement with Qwest. Accordingly, 47 U.S.C. §§ 252(a)

and (e) required Qwest to file the terms in Paragraph 3 of Eschelon Agreement IV with the Commission.

137. By failing to file Paragraph 3 of Eschelon Agreement IV for approval by the Commission, Qwest violated 47 U.S.C. §§ 252(a) and (e).

138. Qwest knowingly and intentionally violated 47 U.S.C. §§ 252(a) and (e) in that Qwest knew that those statutes required Paragraph 3 of Eschelon Agreement IV to be filed with the Commission but intentionally did not make the required filing.

139. The Act requires Qwest not to provide discriminatory rates for interconnection, access to network elements and services. In Paragraph 3 of Eschelon Agreement IV, Qwest provided Eschelon with a discount that CLECs could not obtain anywhere else. There is no approved interconnection agreement in Minnesota that requires Qwest to provide any CLEC with the same discount.[48]

140. By failing to make this provision available to other CLECs, Qwest knowingly and intentionally discriminated against them in violation of 47 U.S.C. § 251.

141. The testimony of Qwest witness Judy Rixe regarding the "consulting" agreement between Qwest and Eschelon is not credible. On May 1, 2002, Ms. Rixe testified "Well, number 1, we don't offer discounts."[49] Her testimony is directly contradicted, however, by Qwest-drafted discount offers she possessed that Qwest produced to the Department only after Ms. Rixe had been cross-examined.[50]

142. On the other hand, Sarah Padula of Popp Communications testified credibly that she had asked Qwest to see the deals with Eschelon and McLeod and was only given partial information. Her company had called a meeting with Qwest and asked why Eschelon and McLeod would have signed such a deal because what she was seeing didn't make economic sense. She was told that there were actually underlying deals that she was unable to see--confidential customer information that she couldn't have. When she asked if she could get a similar deal, Qwest said no. Her company continued to pursue asking because they were losing customers--customers who were telling them that McLeod or Eschelon or Qwest could provide the service that Popp could not. Popp asked again in May of 2001, and again was told that the company could not have those provisions, so Popp never got to see the deals.[51]

Paragraph 2

143. Paragraph 2 of Eschelon Agreement IV contains a provision by which Qwest agreed: "For 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

[48] Ex. 200 – WCD-13 (Qwest's Response to DOC 067(f) in the 814 Docket).
[49] Tr. 3:192.
[50] Exs. 479J, 480J.
[51] Tr. 3:10–11.

Eschelon $13.00 (or pro-rata portion thereof) per platform line per month as long as Eschelon has provided the WTN information to Qwest."

144. 47 U.S.C. § 251 requires Qwest to provide interconnection, network elements and services at rates that are non-discriminatory.

145. Paragraph 2 of Eschelon Agreement IV obligated Qwest to provide Eschelon with a $13.00 (or pro-rata portion thereof) per platform line per month credit when Qwest fails to provide accurate daily usage information to Eschelon. That credit reduced the cost to Eschelon of UNE-platform lines it ordered from Qwest. UNE-Platform lines are UNEs under 47 U.S.C. § 251.

146. Paragraph 2 of Eschelon Agreement IV modifies the rates set forth in Eschelon's interconnection agreement (and amendments) with Qwest. Accordingly, 47 U.S.C. §§ 252(a) and (e) required Qwest to file the terms in Paragraph 2 of Eschelon Agreement IV with the Commission.

147. By failing to file Paragraph 2 of Eschelon Agreement IV for approval by the Commission, Qwest violated 47 U.S.C. §§ 252(a) and (e).

148. Qwest knowingly and intentionally violated 47 U.S.C. §§ 252(a) and (e) in that Qwest knew that those statutes required Paragraph 2 of Eschelon Agreement IV to be filed with the Commission but intentionally did not make the required filing.

149. The Act requires Qwest not to provide discriminatory rates for interconnection, access to network elements and services. In Paragraph 2 of Eschelon Agreement IV, Qwest provided Eschelon with a rate credit that CLECs could not obtain anywhere else. There is no approved interconnection agreement in Minnesota that requires Qwest to provide any CLEC with the same credit.[52]

150. By failing to make this provision available to CLECs other than Eschelon, Qwest knowingly and intentionally discriminated against them in violation of 47 U.S.C. §251.

IV. ESCHELON AGREEMENT V

151. On July 3, 2001 Qwest and Eschelon entered into a letter agreement modifying and amending Eschelon Agreement IV ("Eschelon Agreement V").[53]

152. Qwest did not submit Eschelon Agreement V to the Commission for approval under 47 U.S.C. § 252(e) until March 1, 2002, in response to the Department's complaint in this matter.

153. Qwest terminated Eschelon Agreement V on March 1, 2002.

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[52] Ex. 200 – WCD-13 (Qwest's Response to DOC 066 in the 814 Docket).
[53] SUF ¶ 56.

154. The specific terms set out in the third paragraph of Eschelon Agreement V do not appear in any approved interconnection agreement or amendment thereto between Qwest and Eschelon.[54]

155. The specific terms set out in the fifth paragraph of Eschelon Agreement V do not appear in any approved interconnection agreement or amendment thereto between Qwest and Eschelon.[55]

156. The third paragraph of Eschelon Agreement V contains a provision by which Qwest agreed to increase the $13 per line per month pro rata credit methodology for switched access payments found in Eschelon Agreement IV to $16 per line per month on an interim basis. The findings above regarding Paragraph 2 of Eschelon Agreement IV are therefore applicable to the $16 per line per month credit as well.

157. The fifth paragraph of Eschelon Agreement V contains a provision by which Qwest agrees to pay Eschelon $2 per month per line for Qwest intraLATA toll traffic that terminates to customers served by Eschelon's switch. The payment is a proxy for the amount Eschelon could actually bill Qwest for the termination of intraLATA toll traffic terminating on Eschelon's switch because Qwest either does not, will not, or cannot track such traffic.

158. The reason for the $2 payment is Qwest's failure to provide Eschelon with reliable information that would identify the intraLATA toll calls that terminate on the Eschelon switch. Qwest is the sole source of this information, because only it knows where the calls it passes on for termination on the Eschelon switch actually originate.

159. The $2 payment is in lieu of Qwest providing Eschelon with accurate usage information related to the interconnection of the Eschelon and Qwest networks. Accordingly, the $2 payment is a term of interconnection between Qwest and Eschelon that modifies their interconnection agreement.

160. Qwest's obligation to make a payment to CLECs for terminating intraLATA toll traffic on their networks is typically the subject of an interconnection agreement. Section 7.2.2.3.3 of Qwest's SGAT in Minnesota states, "In the case of Exchange Access (IntraLATA Toll) traffic where Qwest is the designated IntraLATA Toll provider for existing LECs, Qwest will be responsible for payment of appropriate usage rates." SGAT Section 7.2.2.3 generally addresses the issue of intraLATA toll traffic between and among CLECs and ILECs.

161. 47 U.S.C. § 251 requires Qwest to provide interconnection, network elements and services on rates and terms that are non-discriminatory.

162. Paragraph 5 of Eschelon Agreement V obligated Qwest to provide Eschelon with a $2 per month per line for Qwest intraLATA toll traffic that terminates to customers served by Eschelon's switch.

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[54] SUF ¶ 64; Ex. 200 – WCD-12 (Qwest response to DOC 067 in the 197 Docket).
[55] SUF ¶ 65; Ex. 200 – WCD-12 (Qwest response to DOC 068 in the 197 Docket).

163. Paragraph 5 of Eschelon Agreement V modifies the rates Eschelon pays Qwest for interconnection by providing a payment to Eschelon in lieu of providing accurate billing information. Accordingly, 47 U.S.C. §§ 252(a) and (e) required Qwest to file the terms in Paragraph 5 of Eschelon Agreement V with the Commission.

164. By failing to file Paragraph 5 of Eschelon Agreement V for approval by the Commission, Qwest violated 47 U.S.C. §§ 252(a) and (e).

165. Qwest knowingly and intentionally violated 47 U.S.C. §§ 252(a) and (e) in that Qwest knew that those statutes required Paragraph 5 of Eschelon Agreement V to be filed with the Commission but intentionally did not make the required filing.

166. The Act requires Qwest not to provide discriminatory rates for interconnection, access to network elements and services. In Paragraph 5 of Eschelon Agreement V, Qwest provided Eschelon with a payment that similarly-situated CLECs could not obtain anywhere else. There is no approved interconnection agreement in Minnesota that requires Qwest to provide any CLEC with the same credit.[56]

167. By failing to make this provision available to other CLECs, Qwest knowingly and intentionally discriminated against them in violation of 47 U.S.C. § 251.

[56] Ex. 200 – WCD-13 (Qwest's Response to DOC 068 in the 814 Docket).

V. ESCHELON AGREEMENT VI

168. On July 31, 2001 Qwest and Eschelon entered into an agreement titled the Implementation Plan ("Eschelon Agreement VI").

169. Qwest did not submit Eschelon Agreement VI to the Commission for approval under 47 U.S.C. §252(e).

170. With the exception of the formula for calculation of local usage charges in Attachment 3, Qwest terminated Eschelon Agreement VI on March 1, 2002.

171. The specific terms set out in Paragraphs 2.1 through 2.1.3 of Eschelon Agreement VI do not appear in any approved interconnection agreement or amendment thereto between Qwest and Eschelon.[57]

172. The specific terms set out in Paragraph 2.2 and Attachment 2 of Eschelon Agreement VI do not appear in any approved interconnection agreement or amendment thereto between Qwest and Eschelon.[58]

173. The specific terms set out in Paragraph 2.3 of Eschelon Agreement VI do not appear in any approved interconnection agreement or amendment thereto between Qwest and Eschelon.[59]

174. The specific terms set out in Paragraph 3.1 and Attachment 3 of Eschelon Agreement VI do not appear in any approved interconnection agreement or amendment thereto between Qwest and Eschelon.[60]

175. The specific terms set out in Paragraphs 4 through 4.3 of Eschelon Agreement VI do not appear in any approved interconnection agreement or amendment thereto between Qwest and Eschelon.[61]

176. The specific terms set out in Paragraph 8 of Eschelon Agreement VI do not appear in any approved interconnection agreement or amendment thereto between Qwest and Eschelon.[62]

Paragraphs 2.1 through 2.1.3

177. Paragraphs 2.1 through 2.1.3 of Eschelon Agreement VI contain a provision by which Qwest agreed to establish a service account team for Eschelon, set weekly meetings for that team, facilitate other meetings with subject matter experts, and provide Eschelon with policy and process change information electronically.

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[57] Ex. 200 – WCD-12 (Qwest response to DOC 070 in the 197 Docket).
[58] Ex. 200 – WCD-12 (Qwest response to DOC 071 in the 197 Docket).
[59] Ex. 200 – WCD-12 (Qwest response to DOC 072 in the 197 Docket).
[60] Ex. 200 – WCD-12 (Qwest response to DOC 073 in the 197 Docket).
[61] Ex. 200 – WCD-12 (Qwest response to DOC 074 in the 197 Docket).
[62] Ex. 200 – WCD-12 (Qwest response to DOC 075 in the 197 Docket).

178. Paragraphs 2.1 through 2.1.3 require Qwest to provide a service management team for Qwest and defines the role of that team. For example, paragraph 2.1.1 requires the service management team to meet weekly with Eschelon to identify and resolve service-related issues.

179. These paragraphs relate directly to how Qwest will provide interconnection, unbundled network elements and telecommunication services to Qwest. They obligate Qwest to provide a specific team to interface with Eschelon on a regular basis regarding interconnection issues.

180. 47 U.S.C. §251 requires ILECs to provide interconnection, network elements and services on a non-discriminatory basis.

181. Paragraphs 2.1 through 2.1.3 obligate Qwest to create a service management team for Eschelon to do the things described in those paragraphs.

182. Paragraphs 2.1 through 2.1.3 of Eschelon Agreement VI describe the services that Eschelon will receive for the rates set out in its interconnection agreement with Qwest. The term "rates" includes terms that involve the provisioning of services and billing. Accordingly, 47 U.S.C. §§252(a) and (e) required Qwest to file the terms in Paragraphs 2.1 through 2.1.3 of Eschelon Agreement VI with the Commission.

183. By failing to file Paragraphs 2.1 through 2.1.3 of Eschelon Agreement VI for approval by the Commission, Qwest violated 47 U.S.C. §§252(a) and (e).

184. Qwest knowingly and intentionally violated 47 U.S.C. §§252(a) and (e) in that Qwest knew that those statutes required Paragraphs 2.1 through 2.1.3 of Eschelon Agreement VI to be filed with the Commission but intentionally did not make the required filing.

185. The Act requires Qwest not to provide discriminatory terms for interconnection, access to network elements and services. In Paragraphs 2.1 through 2.1.3 of Eschelon Agreement VI, Qwest provided Eschelon with an enforceable agreement to provide the specified services to Eschelon. There is no approved interconnection agreement in Minnesota that requires Qwest to provide any CLEC with the same services.[63]

186. Qwest has not established that the service account teams it creates as "standard operating procedure" have the same obligations to their respective CLECs as are set out in Paragraphs 2.1 through 2.1.3 of Eschelon Agreement VI. Even if Qwest had established that this were true, the commitment to Eschelon is binding, whereas Qwest can change its "standard operating procedures" internally, without requiring consent from the CLECs those procedures affect.

[63] Ex. 200 – WCD-13 (Qwest's Response to DOC 086 in the 814 Docket).

187. By failing to make Paragraphs 2.1 through 2.1.3 of Eschelon Agreement VI available to other CLECs, Qwest knowingly and intentionally discriminated against them in violation of 47 U.S.C. §251.

Paragraph 2.2 and Attachment 2

188. Paragraph 2 to Eschelon Agreement VI requires Qwest to provide Eschelon with agreed-upon escalation procedures for day-to-day provisioning issues. Those procedures are described in Attachment 2. These escalation procedures are different than those found in Eschelon Agreement III.

189. The escalation procedures described in Paragraph 2 and Attachment 2 relate directly to how Qwest provisions network elements to Eschelon. The "contacts" described in Attachment 2 at the Des Moines Service Center, for example, are broken out by product type (Private Line, LIS). The "Functions" section for a Tier 1 escalation includes "ASR Order Status", "Questions on Due Dates", "FOC Questions/Resends of FOC's", and "Assisting with ASR Prep." All of these functions relate directly to UNE provisioning

190. Paragraph 2 and Attachment 2 obligate Qwest to take actions related directly to its obligations to provide non-discriminatory interconnection and access to network elements under §251(c).

191. 47 U.S.C. §251 requires ILECs to provide interconnection, network elements and services on a non-discriminatory basis.

192. Paragraph 2 and Attachment 2 of Eschelon Agreement VI describe the services that Eschelon will receive for the rates set out in its interconnection agreement with Qwest. The term "rates" includes terms that involve the provisioning of services and billing. Accordingly, 47 U.S.C. §§252(a) and (e) required Qwest to file the terms in Paragraph 2 and Attachment 2 of Eschelon Agreement VI with the Commission.

193. By failing to file Paragraph 2 and Attachment 2 of Eschelon Agreement VI for approval by the Commission, Qwest violated 47 U.S.C. §§252(a) and (e).

194. The language set out in Paragraph 1.3 of the Eighth Amendment to Eschelon's interconnection agreement with Qwest simply calls for the parties to agree on business processes and is not sufficient to satisfy Qwest's obligations under 47 U.S.C. §§252 or 251. The language in the Eighth Amendment does not disclose the specific commitment set out in Paragraph 2 and Attachment 2 of Eschelon Agreement VI.

195. In Section 9.4 of Attachment 5 to their interconnection agreement, Qwest and Eschelon say that the parties will agree to escalation procedures and contacts.[64] This also is not sufficient to meet Qwest's obligations under 47 U.S.C. §§ 252 and 251 with respect to Paragraph 2 and Attachment 2 of Eschelon Agreement VI. The terms in Eschelon Agreement VI impose specific obligations on Qwest that are not found in the

[64] Ex. 11.

interconnection agreement. The parties themselves felt that their agreement on escalation procedures was significant enough to put into a new, binding, written agreement. If the parties felt the need to enter into a separate written agreement, it is clear they did not believe Section 9.4 of Attachment 5 to the interconnection agreement embodied the same agreement as Paragraph 2 and Attachment 2 of Eschelon Agreement VI.

196. Qwest knowingly and intentionally violated 47 U.S.C. §§252(a) and (e) in that Qwest knew that those statutes required Paragraph 2 and Attachment 2 of Eschelon Agreement VI to be filed with the Commission but intentionally did not make the required filing.

197. The Act requires Qwest not to provide discriminatory terms for interconnection, access to network elements and services. In Paragraph 2 and Attachment 2 of Eschelon Agreement VI, Qwest provided Eschelon with an enforceable agreement to provide the specified escalation procedures to Eschelon. There is no approved interconnection agreement in Minnesota that requires Qwest to provide any CLEC with the same services.[65]

198. By failing to make Paragraph 2 and Attachment 2 of Eschelon Agreement VI available to other CLECs as a contract term, Qwest knowingly and intentionally discriminated against them in violation of 47 U.S.C. §251.

Paragraph 2.3

199. Paragraph 2.3 requires Qwest to make Dana Filip (and/or her designee or successor) available for quarterly meetings to discuss Eschelon service issues. Dana Filip is a Senior Vice President at Qwest.[66] The express purpose of the quarterly meetings with Dana Fillip is to "review the status of Eschelon's service-related issues", so these meetings directly and expressly relate to Qwest providing interconnection and access to network elements. Even though Ms. Filip and other senior executives at Qwest have met with other CLECs, the commitment to Eschelon is binding, whereas Qwest can change its standard operating procedures without requiring consent from other CLECs.

200. Paragraph 2.3 obligated Qwest to make a Senior Vice President at Qwest available quarterly to discuss service related issues with Eschelon. This agreement related directly to Qwest's obligations to provide non-discriminatory interconnection and access to network elements under §251(c).

201. 47 U.S.C. §251 requires ILECs to provide interconnection, network elements and services on a non-discriminatory basis.

202. Paragraph 2.3 of Eschelon Agreement VI describes services that Eschelon will receive for the rates set out in its interconnection agreement with Qwest. The term "rates" includes terms that involve the provisioning of services and billing.

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[65] Ex. 200 – WCD-13 (Qwest's Response to DOC 087 in the 814 Docket).
[66] Ex. 200 – WCD-13 (Qwest's response to DOC 089 in the 814 Docket).

Accordingly, 47 U.S.C. §§252(a) and (e) required Qwest to file the terms in Paragraph 2.3 of Eschelon Agreement VI with the Commission.

203. By failing to file Paragraph 2.3 of Eschelon Agreement VI for approval by the Commission, Qwest violated 47 U.S.C. §§252(a) and (e).

204. The language set out in Paragraph 1.3 of the Eighth Amendment to Eschelon's interconnection agreement with Qwest simply calls for the parties to agree on business processes and is not sufficient to satisfy Qwest's obligations under 47 U.S.C. §§252 or 251. The language in the Eighth Amendment does not disclose the specific commitment set out in Paragraph 2.3 of Eschelon Agreement VI.

205. Qwest knowingly and intentionally violated 47 U.S.C. §§252(a) and (e) in that Qwest knew that those statutes required Paragraph 2.3 of Eschelon Agreement VI to be filed with the Commission but intentionally did not make the required filing.

206. The Act requires Qwest not to provide discriminatory terms for interconnection, access to network elements and services. In Paragraph 2.3 of Eschelon Agreement VI, Qwest provided Eschelon with an enforceable agreement to make its most senior executives available to Eschelon. There is no approved interconnection agreement in Minnesota that requires Qwest to provide any CLEC with the same services.[67]

207. By failing to make the terms in Paragraph 2.3 of Eschelon Agreement VI available to other CLECs in an interconnection agreement, Qwest knowingly and intentionally discriminated against them in violation of 47 U.S.C. §251.

Paragraph 3.1 and Attachment 3

208. Paragraph 3.1 and Attachment 3 set out a detailed methodology for calculating local usage charges associated with UNE-P switching on Eschelon's interLATA and intraLATA toll traffic. In short, they describe the way that Qwest will calculate some of the rates associated with UNE-P for Eschelon.

209. 47 U.S.C. §251(c) requires ILECs to offer for access to unbundled network elements at rates that are non-discriminatory.

210. Paragraph 3.1 and Attachment 3 obligated Qwest to calculate local usage charges for UNE-P to Eschelon in accord with the formula set out in Attachment 3. This established the rate that Eschelon paid Qwest for access to UNE-P.

211. Paragraph 3.1 and Attachment 3 of the Eschelon Agreement VI relate to the rates paid by Eschelon to obtain access to Qwest UNEs. Accordingly, 47 U.S.C. §§252(a) and (e) required Qwest to file the terms in Paragraph 3.1 and Attachment 3 of Eschelon Agreement VI with the Commission.

[67] Ex. 200 – WCD-13 (Qwest's Response to DOC 090 in the 814 Docket).

212. By failing to file Paragraph 3.1 and Attachment 3 of Eschelon Agreement VI for approval by the Commission, Qwest violated 47 U.S.C. §§252(a) and (e).

213. Qwest knowingly and intentionally violated 47 U.S.C. §§252(a) and (e) in that Qwest knew that those statutes required Paragraph 3.1 and Attachment 3 of Eschelon Agreement VI to be filed with the Commission but intentionally did not make the required filing.

214. The Act requires Qwest not to provide discriminatory rates for access to network elements. In Paragraph 3 and Attachment 3.1 of Eschelon Agreement VI, Qwest provided Eschelon with an enforceable agreement to provide Eschelon with access to UNE-P at the rates specified in those provisions. There is no approved interconnection agreement in Minnesota that requires Qwest to provide any CLEC with the same rates.[68]

215. By failing to make this provision available to other CLECs, Qwest knowingly and intentionally discriminated against them in violation of 47 U.S.C. §251.

Paragraphs 4 through 4.3

216. Paragraphs 4 through 4.3 of Eschelon Agreement VI require Qwest to track and report performance measures designed to monitor Qwest's level of service to Eschelon. They also require Qwest to participate in monthly working meetings to review and discuss the measurements, and quarterly executive meetings to review results and set improvement priorities. Paragraph 4.3 requires Qwest to work with Eschelon to develop an action plan to improve service. In sum, these provisions relate directly to how Qwest will provide interconnection and access to network elements to Eschelon.

217. Paragraphs 4 through 4.3 obligated Qwest to track performance measures, meet with Eschelon to discuss those measures and work with Eschelon to develop an action plan to improve service quality. This agreement related directly to Qwest's obligations to provide non-discriminatory interconnection and access to network elements under §251(c).

218. 47 U.S.C. §251 requires ILECs to provide interconnection, network elements and services on a non-discriminatory basis.

219. Paragraphs 4 through 4.3 of Eschelon Agreement VI describe services that Eschelon will receive for the rates set out in its interconnection agreement with Qwest. The term "rates" includes terms that involve the provisioning of services and billing. Accordingly, 47 U.S.C. §§252(a) and (e) required Qwest to file the terms in Paragraphs 4 through 4.3 of Eschelon Agreement VI with the Commission.

220. By failing to file Paragraphs 4 through 4.3 of Eschelon Agreement VI for approval by the Commission, Qwest violated 47 U.S.C. §§252(a) and (e).

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[68] Ex. 200 – WCD-13 (Qwest's Response to DOC 091 in the 814 Docket).

221. Qwest knowingly and intentionally violated 47 U.S.C. §§252(a) and (e) in that Qwest knew that those statutes required Paragraphs 4 through 4.3 of Eschelon Agreement VI to be filed with the Commission but intentionally did not make the required filing.

222. The Act requires Qwest not to provide discriminatory terms for interconnection, access to network elements and services. In Paragraphs 4 through 4.3 of Eschelon Agreement VI, Qwest provided Eschelon with an enforceable agreement to monitor and make service changes based on performance metrics. There is no approved interconnection agreement in Minnesota that requires Qwest to provide any CLEC with the same services.[69]

223. By failing to make the terms in Paragraphs 4 through 4.3 of Eschelon Agreement VI available to other CLECs, Qwest knowingly and intentionally discriminated against them in violation of 47 U.S.C. §251.

Paragraph 8

224. Paragraph 8 of Eschelon Agreement VI contains a provision by which Qwest agreed to take commercially reasonable efforts to ensure that service provided to Eschelon's customers was not adversely affected during the process of converting Eschelon's customers to the UNE-P platform. Under Paragraph 8 Qwest also agreed to provide notice to Eschelon before changes relating to the conversion are made, plan the conversion jointly with Eschelon, and use a phased approach to converting customers over time on an agreed upon schedule.

225. Paragraph 8 obligated Qwest to make efforts related directly to Qwest's obligations to provide non-discriminatory interconnection and access to network elements under §251(c).

226. 47 U.S.C. §251(c)(3) requires ILECs to provide to any requesting carrier for the provisioning of a telecommunications service, access to unbundled network elements on rates, terms and conditions that are non-discriminatory and meet the requirements of §251 and §252.

227. Paragraph 8 of Eschelon Agreement VI describes services that Eschelon will receive for the rates set out for UNE-P in its interconnection agreement with Qwest. The term "rates" includes terms that involve the provisioning of services and billing. Accordingly, 47 U.S.C. §§252(a) and (e) required Qwest to file the terms in Paragraph 8 of Eschelon Agreement VI with the Commission.

228. By failing to file Paragraph 8 of Eschelon Agreement VI for approval by the Commission, Qwest violated 47 U.S.C. §§252(a) and (e).

229. Qwest knowingly and intentionally violated 47 U.S.C. §§252(a) and (e) in that Qwest knew that those statutes required Paragraph 8 of Eschelon Agreement VI to be filed with the Commission but intentionally did not make the required filing.

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[69] Ex. 200 – WCD-13 (Qwest's Responses to DOC 092 and DOC 094 in the 814 Docket).

230. The Act requires Qwest not to provide discriminatory terms for interconnection, access to network elements and services. In Paragraph 8 of Eschelon Agreement VI, Qwest provided Eschelon with an enforceable agreement requiring Qwest to make specific efforts to work with Eschelon in provisioning UNE-P lines. There is no approved interconnection agreement in Minnesota that requires Qwest to provide any CLEC with the same services.[70]

231. By failing to make the terms in Paragraph 8 of Eschelon Agreement VI available to other CLECs, Qwest knowingly and intentionally discriminated against them in violation of 47 U.S.C. §251.

VI. COVAD AGREEMENT

232. On April 19, 2000 Covad Communications Company and U S WEST entered into the U S WEST Service Level Agreement with Covad Communications Company (the "Covad Agreement").[71]

233. Qwest did not submit the Covad Agreement to the Commission for approval under 47 U.S.C. § 252(e) until March 1, 2002, in response to the Department's complaint in this matter.

234. The specific terms set out in Sections 1-4 of the Covad Agreement do not appear in any approved interconnection agreement or amendment thereto between Qwest and Covad.[72]

Section 1

235. Section 1 of the Covad Agreement contains provisions by which Qwest agrees to provide "90% of Covad's Firm Order Confirmation (FOC) dates within 48 hours of receipt of properly completed service requests for POTS unbundled loop services" and to notify Covad of "any facility shortages for DSL capable, ISDN capable and DS1 capable services within the same 48 hour period." Qwest also agrees to provide "90% of Covad's FOC dates within 72 hours of receipt of properly completed service requests" for "DSL capable, ISDN capable and DS1 capable unbundled loop services" and, as part of that 72-hour FOC process, to "dispatch a technician to verify the existence of suitable facilities."[73]

236. The FOC relates to the ILEC's obligation to provide access to network elements under 47 U.S.C. § 251(c)(3).

237. Section 1 of the Covad agreement obligated Qwest to meet the FOC intervals and service quality metrics described above. Qwest agreed to do these things to help it meet its obligations under 47 U.S.C. § 251.

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[70] Ex. 200 – WCD-13 (Qwest's Response to DOC 097 in the 814 Docket).
[71] SUF ¶ 80.
[72] SUF ¶ 86; Ex. 200 –WCD-12 (Qwest's response to DOC 77-80 in the 197 Docket).
[73] SUF ¶ 90.

238. Section 1 of the Covad Agreement describes terms for provisioning interconnection and access to UNEs at the rates set forth in Covad's interconnection agreement with Qwest. The term "rates" includes terms that involve the provisioning of services and billing. Accordingly, 47 U.S.C. §§ 252(a) and (e) required Qwest to file the terms in Section 1 of the Covad Agreement with the Commission.

239. By failing to file Section 1 of the Covad Agreement for approval by the Commission, Qwest violated 47 U.S.C. §§ 252(a) and (e).

240. Qwest knowingly and intentionally violated 47 U.S.C. §§ 252(a) and (e) in that Qwest knew that those statutes required Section 1 of the Covad Agreement to be filed with the Commission but intentionally did not make the required filing.

241. The Act requires Qwest not to discriminate when providing interconnection, access to network elements and services. Qwest gave Covad certain rights through Section 1 of the Covad Agreement that CLECs could not obtain anywhere else. There is no approved interconnection agreement in Minnesota that requires Qwest to provide any CLEC with the same provisions as those set out in Section 1 of the Covad Agreement.[74]

242. By failing to make this provision available to other CLECs, Qwest knowingly and intentionally discriminated against them in violation of 47 U.S.C. § 251.

Section 2

243. Section 2 sets out a performance standard for Qwest's delivery of loops to Covad. It requires Qwest, when facilities are available and loop conditioning is not required, to provide Covad with unbundled loop service that is consistent with Qwest's Service Interval Guide (SIG) dated March 31, 2000 at least 90% of the time. It also required Qwest to provide Covad with line sharing service at any interval agreed to in a line sharing amendment at least 90% of the time.[75]

244. An agreement that requires Qwest to meet a particular standard in its delivery of unbundled loops is a term of providing access to network elements under 47 U.S.C. § 251(c)(3).

245. Section 2 of the Covad agreement obligated Qwest to meet the provisioning deadline in its SIG 90% of the time. Qwest's obligation helped it meet its obligations under 47 U.S.C. § 251.

246. Section 2 of The Covad Agreement describes terms for provisioning interconnection and access to UNEs at the rates set forth in Covad's interconnection agreement with Qwest. The term "rates" includes terms that involve the provisioning of services and billing. Accordingly, 47 U.S.C. §§ 252(a) and (e) required Qwest to file the terms in Section 2 of the Covad Agreement with the Commission.

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[74] Ex. 200 – WCD-13 (Qwest's Responses to DOC 044 through DOC 047 in the 814 Docket).
[75] SUF ¶ 91.

247. By failing to file Section 2 of the Covad Agreement for approval by the Commission, Qwest violated 47 U.S.C. §§ 252(a) and (e).

248. Qwest knowingly and intentionally violated 47 U.S.C. §§ 252(a) and (e) in that Qwest knew that those statutes required Section 2 of the Covad Agreement to be filed with the Commission but intentionally did not make the required filing.

249. The Act requires Qwest not to discriminate when providing interconnection, access to network elements and services. Qwest gave Covad certain rights through Section 2 of the Covad Agreement that CLECs could not obtain anywhere else. There is no approved interconnection agreement in Minnesota that requires Qwest to provide any CLEC with the same provisions as those set out in Section 2 of the Covad Agreement

250. By failing to make this provision available to other CLECs, Qwest knowingly and intentionally discriminated against them in violation of 47 U.S.C. § 251.

Section 3

251. In Section 3 of the Covad Agreement Qwest agrees to reduce the incidence of failure on new Covad circuits to less than 10% within the first 30 calendar days.[76]

252. An agreement that requires Qwest to meet a particular standard in its delivery of unbundled loops is a term of providing access to network elements under 47 U.S.C. § 251(c)(3).

253. Section 3 of the Covad agreement obligated Qwest to reduce the incidence of post-delivery loop failure to less than 10% of the time. Qwest's commitment in Section 3 helped it meet its obligations under 47 U.S.C. § 251.

254. Section 3 of The Covad Agreement describes terms for provisioning interconnection and access to UNEs at the rates set forth in Covad's interconnection agreement with Qwest. the term "rates" includes terms that involve the provisioning of services and billing. Accordingly, 47 U.S.C. §§ 252(a) and (e) required Qwest to file the terms in Section 3 of the Covad Agreement with the Commission.

255. By failing to file Section 3 of the Covad Agreement for approval by the Commission, Qwest violated 47 U.S.C. §§ 252(a) and (e).

256. Qwest knowingly and intentionally violated 47 U.S.C. §§ 252(a) and (e) in that Qwest knew that those statutes required Section 3 of the Covad Agreement to be filed with the Commission but intentionally did not make the required filing.

257. The Act requires Qwest not to discriminate when providing interconnection, access to network elements and services. Qwest gave Covad certain rights through Section 3 of the Covad Agreement that CLECs could not obtain

[76] SUF ¶ 92.

anywhere else. There is no approved interconnection agreement in Minnesota that requires Qwest to provide any CLEC with the same provisions as those set out in Section 3 of the Covad Agreement.[77]

258. By failing to make this provision available to those other CLECs, Qwest knowingly and intentionally discriminated against them in violation of 47 U.S.C. § 251.

Section 4

259. Section 4 of the Covad Agreement provides that for service requests held due to line conditioning, U S WEST will "provide Covad the option of paying for the line conditioning at the appropriate rate approved by the relevant State Commissions, which U S WEST will complete in 24 days or less 90% of the time." Section 4 of the Covad Agreement also contains notification provisions, service requirements and service levels applicable when an "end user customer is served by digital loop carrier or off pair gain.[78]

260. An agreement that requires Qwest to meet a particular standard in its delivery of unbundled loops is a term of providing access to network elements under 47 U.S.C. § 251(c)(3).

261. Section 4 of the Covad agreement obligated Qwest to condition unbundled loops it delivered to Covad within certain operational and time parameters. Qwest's commitment in Section 4 helped it meet its obligations under 47 U.S.C. § 251.

262. Section 4 of the Covad Agreement describes terms for provisioning interconnection and access to UNEs at the rates set forth in Covad's interconnection agreement with Qwest. The term "rates" includes terms that involve the provisioning of services and billing. Accordingly, 47 U.S.C. §§ 252(a) and (e) required Qwest to file the terms in Section 4 of the Covad Agreement with the Commission.

263. By failing to file Section 4 of the Covad Agreement for approval by the Commission, Qwest violated 47 U.S.C. §§ 252(a) and (e).

264. Qwest knowingly and intentionally violated 47 U.S.C. §§ 252(a) and (e) in that Qwest knew that those statutes required Section 4 of the Covad Agreement to be filed with the Commission but intentionally did not make the required filing.

265. The Act requires Qwest not to discriminate when providing interconnection, access to network elements and services. Qwest gave Covad certain rights through Section 4 of the Covad Agreement that CLECs could not obtain anywhere else. There is no approved interconnection agreement in Minnesota that requires Qwest to provide any CLEC with the same provisions as those set out in Section 4 of the Covad Agreement.[79]

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[77] Ex. 200 – WCD-13 (Qwest's Response to DOC 048 in the 814 Docket).
[78] SUF ¶ 93.
[79] Ex. 200 – WCD-13 (Qwest's Response to DOC 048 in the 814 Docket).

266. By failing to make this provision available to other CLECs, Qwest knowingly and intentionally discriminated against them in violation of 47 U.S.C. § 251.

267. At the time of the execution of the Covad Agreement, U S WEST/Qwest was typically completing line conditioning in more than 24 days for all CLECs.[80]

VII. SMALL CLEC AGREEMENT

270. On April 28, 2000, U S WEST and 10 rural competitive local exchange carriers (the "Small CLECs") entered into the Confidential Stipulation Between Small CLECs and U S WEST.[81]

271. Qwest did not submit the entire Small CLEC Agreement to the Commission for approval under 47 U.S.C. §252(e) until March 1, 2002, in response to the Department's complaint in this matter.

272. The version of the Small CLEC Agreement submitted to the Commission in Docket No. P3009, 30052, 5096, 421, 3017/PA-99-1192 did not contain Paragraph 3.[82]

273. The specific terms set out in Paragraph 3 of the Small CLEC Agreement did not appear in any approved interconnection agreement or amendment thereto between Qwest and the Small CLECs prior to the opening of this docket.

274. Paragraph 3 states in part: "Subject to the closure of the Merger, effective March 17, 2002, and subject to technical feasibility, U S WEST will permit all Small CLECs operating in Minnesota the ability to adopt the terms of any effective interconnection agreements that were voluntarily negotiated and entered into by U S WEST and CLECs in any other state in U S WEST's operating territory, subject to the following conditions:

> This provision does not apply to terms that were ever reached as the result of an arbitrated decision or any other decision in a contested case action, unless the terms which the CLEC seeks to adopt are present in interconnection agreements in a minimum of four states in U S WEST's territory . . . .
>
> The provisions in paragraph 3 3.a, 3.b., and 3.c. shall remain confidential between U S WEST and the Small CLECs and shall be implemented through an interconnection agreement amendment to be filed and effective on March 17, 2002, and which will expire on December 31, 2003. The requirements of confidentiality expire on March 17, 2002.[83]

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[80] Direct Testimony of Kathleen Lucero, Ex. 63 at p. 13.
[81] SUF ¶ 94.
[82] Ex. 200 – WCD-14.
[83] SUF ¶ 101.

275. Qwest and the Small CLECs intentionally filed a misleading settlement document with the ALJ and the Commission that did not include the pick-and-choose provision cited in the Complaint or disclose that it even existed.[84]

276. Counsel for the Small CLECs did tell the Commission that his client had "filed two settled items with the Commission, but also have a confidential agreement on another item."[85] Even though it was represented at this hearing, Qwest did nothing to expand on this to inform the Commission what was contained in the confidential agreement.

277. Because of the Small CLEC Agreement, the Small CLEC parties to the agreement did not have to waste resources negotiating for terms with Qwest that they could opt into through Paragraph 3. Non-party CLECs did not have the same options. Moreover, having advance knowledge of the opt-in provision gave the CLEC parties to the agreement long-range planning options that other CLECs did not have.

278. The agreement itself establishes that Qwest knew the terms of the agreement had to be filed with the Commission. Paragraph 3 of the agreement expressly provides that it will be implemented by filing the agreement with the Commission on March 17, 2002.[86]

279. Qwest knew that the agreement had to be included as part of an interconnection agreement but wanted to keep its existence confidential for as long as possible to preclude other CLECs from taking advantage of it.

280. By failing to file Paragraph 3 of Small CLEC Agreement for approval by the Commission, Qwest violated 47 U.S.C. §§252(a) and (e).

281. Qwest knowingly and intentionally violated 47 U.S.C. §§252(a) and (e) in that Qwest knew that those statutes required Paragraph 3 of Small CLEC Agreement to be filed with the Commission but intentionally did not make the required filing.

282. By failing to make this provision available to other CLECs, Qwest knowingly and intentionally discriminated against them in violation of 47 U.S.C. §251.

VIII. MCLEOD AGREEMENT I

283. On April 28, 2000 Qwest and McLeod entered into the Confidential Billing Settlement Agreement ("McLeod Agreement I").[87]

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[84] See Exhibit 200 – WCD-14.
[85] See Transcript of Proceedings at 151-153, In the Matter of the Merger of the Parent Corporation of Qwest Communications Corporation, LCI International Telecom Corp., USLD Communications, Inc., Phoenix Network, Inc., and U S West Communications, Inc., MPUC Docket No. P-3009, 3052,6096,421,3017/PA-99-1192 (April 25, 2000).
[86] Ex. 200 – WCD 8, ¶ 3.
[87] SUF ¶ 102.

284. Qwest did not submit McLeod Agreement I to the Commission for approval under 47 U.S.C. § 252(e) until March 1, 2002, in response to the Department's complaint in this matter.

285. The specific terms set out in Paragraph 2.d of McLeod Agreement I do not appear in any approved interconnection agreement or amendment thereto between Qwest and McLeodUSA.[88]

286. Paragraph 2.d of McLeod Agreement I contains a provision by which McLeod and Qwest agreed to apply all final Commission orders setting rates prospectively from April 30, 2000, not to bill each other for any true-ups associated with final commission orders that affected interim prices, and to release claims for such true-ups.

287. The agreement goes on to provide that any rates set by state commissions will be applied prospectively, and not retroactively. Paragraph 2.d affected rates for interconnection and UNEs, one of the core components of interconnection agreements.

288. Qwest agreed to do these things to help it meet its obligations to provide interconnection and access to network elements under 47 U.S.C. § 251.

289. Paragraph 2.d obligated Qwest to charge the rates in McLeodUSA's interconnection agreement and not require a true up. By failing to file Paragraph 2.d of McLeod Agreement I for approval by the Commission, Qwest violated 47 U.S.C. §§ 252(a) and (e).

290. Qwest knowingly and intentionally violated 47 U.S.C. §§ 252(a) and (e) in that Qwest knew that those statutes required Paragraph 2.d of McLeod Agreement I to be filed with the Commission but intentionally did not make the required filing.

291. By failing to make this provision available to other CLECs, Qwest knowingly and intentionally discriminated against them in violation of 47 U.S.C. § 251.

IX. MCLEOD AGREEMENT II

292. On October 26, 2000 Qwest and McLeod entered into the Confidential Agreement Re: Escalation Procedures and Business Solutions ("McLeod Agreement II").[89]

293. Qwest did not submit McLeod Agreement II to the Commission for approval under 47 U.S.C. § 252(e) until March 1, 2002, in response to the Department's complaint in this matter.

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[88] SUF ¶ 109.
[89] SUF ¶ 111.

294. Sections 2 and 3 of McLeod Agreement II provide for quarterly executive meetings and a six-level escalation process.

295. The specific terms set out in Sections 2 and 3 of McLeod Agreement II do not appear in any approved interconnection agreement or amendment thereto between Qwest and McLeodUSA.[90]

Section 2

296. Section 2 of McLeod Agreement II created an obligation in Qwest to have senior executives meet with McLeodUSA on a quarterly basis. It is substantially the same in wording and scope to Section 2 of Eschelon Agreement III. It amended McLeod's interconnection agreement with Qwest in that it created a new obligation for Qwest relating to interconnection and the provisioning of UNEs that did not exist in the McLeod interconnection agreement.

297. As with Section 2 of Eschelon Agreement III, set out above, a term that defines how a CLEC and an ILEC will work with each other on interconnection issues and address concerns regarding access to UNEs and other services is a term for providing interconnection, access to UNEs and/or telecommunications services.

298. 47 U.S.C. § 251 requires ILECs to provide interconnection, network elements and services on a non-discriminatory basis.

299. Section 2 of McLeod Agreement II I obligated Qwest to provide senior executives to meet with McLeod on a regular basis to discuss interconnection, access to UNEs and services.

300. Section 2 of McLeod Agreement II describes terms for provisioning interconnection and access to UNEs at the rates set forth in Eschelon's interconnection agreement with Qwest. The term "rates" includes terms that involve the provisioning of services and billing. Accordingly, 47 U.S.C. §§ 252(a) and (e) required Qwest to file the terms in Section 2 of McLeod Agreement II with the Commission.

301. By failing to file Section 2 of McLeod Agreement II for approval by the Commission, Qwest violated 47 U.S.C. §§ 252(a) and (e).

302. Qwest knowingly and intentionally violated 47 U.S.C. §§ 252(a) and (e) in that Qwest knew that those statutes required Section 2 of McLeod Agreement II to be filed with the Commission but intentionally did not make the required filing.

303. The Act requires Qwest not to discriminate when providing interconnection, access to network elements and services. Qwest gave McLeod certain rights through Section 2 of McLeod Agreement II that CLECs could not obtain anywhere else. There is no approved interconnection agreement in Minnesota that requires

[90] SUF ¶ 118 and ¶ 119.

Qwest to provide any CLEC with the same level of access to Qwest senior executives on a quarterly basis.[91]

304. By failing to make this provision available to other CLECs, Qwest knowingly and intentionally discriminated against them in violation of 47 U.S.C. § 251.

305. The Eighth Amendment to McLeod Interconnection Agreement states that "[t]he Parties wish to establish a business-to-business relationship and have agreed that they will attempt to resolve all differences or issues that may arise under the Agreements or this Amendment under an escalation process to be established between the parties." This is not a sufficient filing to satisfy 47 U.S.C. § 252 with respect to Section 2 of McLeod Agreement II.

Section 3

306. As with Eschelon III, set out above, Section 3 of McLeod Agreement II committed Qwest to respond to a multi-level escalation process for resolving interconnection disputes. It also committed Qwest's ultimate decision maker, its CEO, to address disputes that reached the third level of the escalation procedures. It also contains a provision by which McLeod and Qwest agreed to waive primary jurisdiction in any state utility or service commission and to waive tariff limitations on damages or other limitation on reasonably foreseeable damages.

307. 47 U.S.C. § 251 requires ILECs to provide interconnection, network elements and services on a non-discriminatory basis.

308. Section 3 obligated Qwest to participate in a well-defined set of escalation procedures for resolving problems arising under its interconnection agreement with McLeod. Section 3 expressly says that it applies to all business disputes between Qwest and McLeod, including but not limited to, their Interconnection Agreements and Amendments. Terms and conditions for resolving disputes regarding interconnection and the provisioning of network elements are terms and conditions for providing those things to the CLECs. Section 3 of McLeod Agreement II describes terms for provisioning interconnection and access to UNEs at the rates set forth in Eschelon's interconnection agreement with Qwest. The term "rates" includes terms that involve the provisioning of services and billing. Accordingly, 47 U.S.C. §§ 252(a) and (e) required Qwest to file the terms in Section 3 of McLeod Agreement II with the Commission.

310. By failing to file Section 3 of McLeod Agreement II for approval by the Commission, Qwest violated 47 U.S.C. §§ 252(a) and (e).

311. Qwest knowingly and intentionally violated 47 U.S.C. §§ 252(a) and (e) in that Qwest knew that those statutes required Section 3 of McLeod Agreement II to be filed with the Commission but intentionally did not make the required filing.

[91] Ex. 200 – WCD-13 (Qwest's Response to DOC 062 in the 814 Docket).

312. The Act requires Qwest not to discriminate when providing interconnection, access to network elements and services. Qwest gave McLeod certain rights through Section 3 of McLeod Agreement II that other CLECs could not obtain anywhere else. There is no approved interconnection agreement in Minnesota that requires Qwest to provide any CLEC with the same escalation process and/or waivers on jurisdiction and damage waivers.[92]

313. By failing to make this provision available to other CLECs, Qwest knowingly and intentionally discriminated against them in violation of 47 U.S.C. § 251.

314. The escalation procedures made available to CLECs generally, as cited by Qwest witness Dana Filip,[93] begin with the Service Delivery Coordinator and end at the Senior Director / Vice President level.[94] The multi-level procedures in McLeod Agreement II, in contrast, start at the Vice President level. Accordingly, Section 3 of McLeod Agreement II allows McLeod to start the escalation process where, according to Qwest's testimony, the process for every other CLEC ends.

315. The Eighth Amendment to McLeod Interconnection Agreement states that "[t]he Parties wish to establish a business-to-business relationship and have agreed that they will attempt to resolve all differences or issues that may arise under the Agreements or this Amendment under an escalation process to be established between the parties." This is not a sufficient filing to satisfy 47 U.S.C. § 252 with respect to Section 3 of McLeod Agreement II.

X. MCLEOD AGREEMENT III

316. On or about October 26, 2000, Qwest and McLeodUSA entered into an oral agreement whereby Qwest would provide discounts to McLeodUSA for all purchases made by McLeodUSA from Qwest ("McLeod Agreement III").

317. Blake O. Fisher testified as to the negotiation and execution of the discount agreement both in his affidavit dated June 12, 2002,[95] and again at his deposition taken by Qwest on June 27, 2002.[96]

318. The discount ranged from 6.5% to 10% depending on the volume of purchases made by McLeodUSA from Qwest over the course of a year, but the discount is only available to McLeodUSA if it meets minimum purchase volume commitments from Qwest.

319. The discount applied both to McLeodUSA's purchase of unbundled network elements ("UNEs") under the Act as well as to its payments for switched

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[92] Ex. 200 – WCD-13 (Qwest's Responses to DOC 063 and DOC 064 in the 814 Docket).
[93] Ex. 74 AT 10 – 11.
[94] Ex. 7 at 2.
[95] Ex. 402J, Deposition Exhibit 3, ¶¶ 2, 18 – 20.
[96] Ex. 402J at 33–35; 37– 40; 43.

access, wholesale long distance and tariffed retail services (which are not covered under the Act). And, the discount applied to all purchases made by McLeodUSA both within Qwest's 14-state ILEC territory and outside of that region.

320. Mr. Fisher's testimony is credible and supported by the documentary evidence in this case.

321. The existence of the discount agreement is also confirmed by the course of conduct engaged in by the parties after October 26, 2000. Specifically, the affidavit testimony of Lori Deutmeyer confirms that Qwest calculated "preferred vendor payments" to McLeodUSA by multiplying the dollar amount of McLeodUSA purchases from Qwest in a given time period by a 10% discount factor.[97] Ms. Deutmeyer's testimony is credible and supported by the documentary evidence in this case.

322. The discount schedule agreed to by Qwest and McLeodUSA is set out in Exhibit 427J and Exhibit 3 to Mr. Fisher's Affidavit.[98]

323. Mr. Fisher asked Greg Casey and Audrey McKenney from Qwest to put the discount agreement in writing, but they would not do so.[99] Mr. Casey and Ms. McKenney were concerned that other CLECs might feel entitled to the same discount if the agreement were written and made public.[100]

324. When Mr. Fisher expressed concern over the enforceability of the oral agreement for the discount, Qwest suggested that it would enter into its own take-or-pay agreement to purchase products from McLeod.[101] The amount of the Qwest take-or-pay commitment was calculated by applying an 8% discount factor to a projected amount of purchases by McLeod from Qwest.[102]

325. The October 26, 2000 written agreement by Qwest to purchase "products" from McLeodUSA was merely a mechanism for securing some portion of the discount Qwest agreed to pay.[103]

326. Prior to October 26, 2000, Qwest offered discounts of various amounts to McLeodUSA. The amount of the discounts offered varied based on the dollar amount of purchases that McLeodUSA would make from Qwest.[104] Qwest made presentations to McLeodUSA that included discussions of the discounts being offered.[105]

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[97] Ex. 401J, ¶¶ 2-12.
[98] Ex. 440J.
[99] Ex. 402J, 58:6 – 59:9.
[100] *Id.* at 59.
[101] Fisher Affidavit ¶¶ 22-23.
[102] *Id.* at ¶ 23.
[103] Ex. 404J; Ex. 402J, 37 – 40.
[104] Exs. 417J, 420J, 421J, 423J, 424J, 425J, 426J and 427J: Fisher Affidavit, Exhibits 2 (created jointly with McLeodUSA) and 3.
[105] Exs. 416J, 417J.

327. Qwest also created documents during the course of its negotiations with McLeodUSA that show Qwest considering the financial impact of the various discount offers it made to McLeodUSA.[106]

328. McLeodUSA responded to Qwest's discount proposals with proposals of its own.[107]

329. Between October 26, 2000 and the beginning of 2002, Qwest calculated and paid amounts due to McLeodUSA under the terms of the discount agreement described by Mr. Fisher.[108]

330. During that same time period, both McLeodUSA and Qwest referred to the discount in communications exchanged between them.[109]

331. In the spring of 2001, McLeodUSA and Qwest entered into new negotiations. One issue discussed in those negotiations was the possibility of increasing the discount level that the parties had agreed to in October, 2000, by adding a new tier for increased McLeodUSA purchase amounts.[110]

332. In the summer of 2001, Qwest and McLeodUSA entered into negotiations to reduce the cost of ISDN/PRI circuits to McLeodUSA. As part of those discussions, Qwest sent documents to McLeodUSA expressly stating that the October 26, 2000 discount would not apply to further reduce the prices being offered by Qwest to McLeodUSA.[111] Qwest further circulated e-mails internally discussing how to accommodate the discount agreement in the ISDN/PRI proposal Qwest was preparing for McLeodUSA.[112]

333. The documents refer to the discount variously as a "discount", a "refund", a "preferred vendor payment" and a "credit", among other things. Regardless of what the payment is called, Qwest agreed to and did make payments to McLeodUSA that reduced the rates McLeodUSA paid for UNEs, wholesale telecommunications services, interconnection services, tariffed services, retail services, access charges and every other product and service purchased by McLeodUSA from Qwest.

334. There is no evidence of any communication between Qwest and McLeodUSA occurring between October 26, 2000 and the date the Department filed its initial complaint in this docket (February 14, 2002) in which Qwest tells McLeodUSA that there is no discount agreement.

335. There is no evidence of any communication within Qwest occurring between October 26, 2000 and the date the Department filed its initial complaint in this

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[106] Exs. 414J, 423J, 426J, 428J.
[107] Exs. 415J, 419J, 422J and 464J; Fisher Affidavit Exhibit 2 (created jointly with Qwest).
[108] Exs. 401J (Exhibits 1-5), 407J, 408J, 409J, 410J, 411J, 412J, 413J and 458J.
[109] Exs. 432J, 433J, 434J, 436J, 437J, 439J, 440J, 442J and 459J.
[110] Exs. 436J, 437J, 439J, 440J.
[111] Ex. 442J.
[112] Exs. 441J, 443J, 444J.

docket (February 14, 2002) informing anyone at Qwest that there is no discount agreement with McLeodUSA.

336. The testimony of Audrey McKenney that Qwest did not enter into a discount agreement with McLeodUSA is not credible. Ms. McKenney would not directly answer questions from the Department or the Court asking whether Qwest had ever offered McLeodUSA a discount.[113] In addition, the substantial majority of the documents in evidence were created contemporaneously with the events at issue and directly contradict Ms. McKenney's testimony. Finally, Ms. McKenney offered Eschelon financial incentives to (a) withhold information from regulators that may be relevant to Qwest's Section 271 applications, and (b) covertly assist Qwest in manipulating various regulatory proceedings.[114] There is a real question about her respect for the regulatory process.

337. 47 U.S.C. § 251 requires Qwest to provide interconnection, network elements and services at rates that are non-discriminatory.

338. McLeod Agreement III obligated Qwest to provide McLeodUSA with a discount of between 6.5% and 10% on every purchase McLeodUSA made or makes from Qwest between October 2, 2000 and December 31, 2003, so long as McLeodUSA meets certain minimum purchase commitments. That discount changed all of the prices in McLeodUSA's interconnection agreement, including those set by the Commission in lengthy cost docket proceedings.

339. 47 U.S.C. §§ 252(a) and (e) required Qwest to reduce the terms of McLeod Agreement III to writing and file McLeod Agreement III with the Commission.

340. McLeod Agreement III modifies the rates set forth in McLeodUSA's interconnection agreement with Qwest. Accordingly, 47 U.S.C. §§ 252(a) and (e) required Qwest to file McLeod Agreement III with the Commission.

341. By failing to file McLeod Agreement III for approval by the Commission, Qwest violated 47 U.S.C. §§ 252(a) and (e).

342. Qwest knowingly and intentionally violated 47 U.S.C. §§ 252(a) and (e) in that Qwest knew that those statutes required McLeod Agreement III to be filed with the Commission but intentionally did not make the required filing.

343. The Act requires Qwest not to provide discriminatory rates for interconnection, access to network elements and services. In McLeod Agreement III, Qwest provided McLeodUSA with a discount that CLECs could not obtain anywhere else. There is no approved interconnection agreement in Minnesota that requires Qwest to provide any CLEC with the same discount.

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[113] Tr. 5:114–118.
[114] Ex. 240A.

344. By failing to make this provision available to other CLECs, Qwest knowingly and intentionally discriminated against them in violation of 47 U.S.C. § 251.

345. As of February, 2002, McLeodUSA had received more than [BEGIN TRADE SECRET] [END TRADE SECRET] in discount payments from Qwest.[115]

XI. THE USLINK AGREEMENT

348. On July 14, 1999, U S WEST entered into an agreement with USLink, Inc. and InfoTel Communications, LLC (the "USLink Agreement").[116]

349. Qwest did not submit the USLink Agreement to the Commission for approval under 47 U.S.C. §252(e) until march 1, 2002, in response to the Department's complaint in this matter.

350. Under the USLink Agreement, Qwest agreed to provide tandem switching functionality for the Brainerd, Duluth, Fargo, Fergus Falls, Grand Rapids, Hibbing, Little Falls, Owattona, Rochester, St. Cloud, Wadena, and Willmar Qwest end offices ("USLink Agreement End Offices").[117]

351. The Commission has already ruled, in the DTI Order, that language nearly identical to that found in the USLink Agreement had to be filed with the Commission and made available to other CLECs under 47 U.S.C. §252(i). [118]

352. By failing to file US Link Agreement for approval by the Commission, Qwest violated 47 U.S.C. §§252(a) and (e).

353. Qwest knowingly and intentionally violated 47 U.S.C. §§252(a) and (e) in that Qwest knew that those statutes required US Link Agreement to be filed with the Commission but intentionally did not make the required filing.

354. By failing to make this provision available to those other CLECs, Qwest knowingly and intentionally discriminated against them in violation of 47 U.S.C. §251.

Public Interest Implications

355. There is overlap between this unfiled agreements proceeding and the public interest portion of Qwest's Section 271 proceeding pending before this Commission. A number of parties in the public interest proceeding argued that the Commission ought to consider Qwest's behavior in connection with the unfiled

[115] Ex. 401J, ¶¶ 9 –11.
[116] SUF ¶ 121.
[117] SUF ¶ 127.

[118] In the Matter of a Complaint by Dakota Telecom, Inc. Against Qwest Corporation, Docket No. P-421/C-00-373, *Order Approving Settlement*, July 25, 2001, (the "DTI Order").

agreements when it determines whether there were any unusual circumstances that would affect the Commission's recommendation to the FCC concerning Qwest's application for long-distance authority. In his report in the public interest case, this Administrative Law Judge stated that he would address the public interest issues arising from these unfiled agreements in his report in the unfiled agreements case.

356. There are five different pubic interest implications arising from the unfiled agreements. First, Qwest's attempt to subvert the "pick and choose" provisions of the Act by not filing the agreements; second, Qwest's attempts to prohibit CLECs from participating in the 271 proceedings; third, Qwest's attempts to prohibit CLECs from participating in the Qwest/US West merger proceeding; fourth, Qwest's attempt to prevent disclosure of negative performance information in the 271 proceeding; and, fifth, Qwest's attempt to have a CLEC become an advocate for Qwest in various commission proceedings whenever Qwest requested it. Each of these will be dealt with separately.

357. Non-discrimination by ILECs is a bedrock principle of the Act. The filing of interconnection agreements, and the pick and choose requirements of Section 252, give life to that principle. By not filing the 12 agreements discussed above, Qwest knowingly prevented other CLECs from picking and choosing their provisions. This demonstrates a hostility to the non-discrimination concept that raises serious questions about how Qwest will cooperate with local competition efforts in the future.

358. Qwest responds that it has taken a number of steps after the existence of these unfiled agreements came to light. Qwest promptly terminated some of the agreements in March 2002, but it did make available for public review the remaining agreements. Qwest filed them as "conditional" amendments to existing interconnection agreements, meaning that if the Commission finds that the agreements should have been filed, then the Commission can treat them as having been filed by Qwest. While they are not available for pick and choose at this time, they are at least available for review by other CLECs, who could try to use them as a basis for negotiations.

359. Qwest has adopted a new internal review procedure to review all negotiations, potential agreement terms, and documentation to determine whether or not they constitute an agreement that must be filed. In addition, Qwest has agreed to "overfile" by filing "all contracts, agreements or letters of understanding between Qwest and CLECs that create obligations to meet the requirements of Section 251(b) or (c) on a going forward basis."[119]

360. On April 23, 2002, Qwest filed a Petition for Declaratory Ruling with the FCC, seeking a declaratory ruling as to which types of agreements must be filed, and which need not be filed.[120]

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[119] Letter from R. Steven Davis to Mark Oberlander, May 13, 2002, attached as Exhibit D to Qwest's Post-Hearing Memorandum.
[120] *Id.*, at Ex. C.

361. With respect to the pubic interest implications of Qwest's obtaining agreements from CLECs not to participate in Section 271 proceedings, Eschelon Agreement III provides, in pertinent part:

> "During development of the [implementation] plan, and thereafter, 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 any complaints before any regulatory body concerning issues arising out of the parties' interconnection agreements. Both before and after April 30, 2001, Eschelon reserves the right, after notice to Qwest, to participate in regulatory cost proceedings or dockets regarding the establishment of rates. Notwithstanding any other provision of this agreement, if no plan is agreed upon by April 30, 2001, the parties will have all remedies available at law and equity in any forum."

This agreement was entered into on November 15, 2000, which was the starting date for the 10% discount which Qwest agreed to give Eschelon on purchases made from that date forward.

362. With respect to McLeod, Blake O. Fischer, who was McLeod's lead negotiator, stated under oath as follows:

> Another component to completing the transaction that gave McLeodUSA access to UNE-M and the purchase volume pricing [discount] was McLeodUSA's agreement to remain neutral regarding Qwest's Section 271 application. Qwest made it clear to me that for Qwest to enter into the UNE-M and volume pricing arrangement, McLeodUSA had to agree to remain neutral on Qwest's Section 271 applications. McLeod USA agreed to remain neutral provided Qwest complied with all of our agreements and with all applicable statutes and regulations.[121]

363. There are five other agreements whereby a CLEC agrees to withdraw opposition to the Qwest/US West merger. They are: (1) Eschelon I; (2) Covad; (3) McLeod I; (4) McLeod II; and (5) Small CLECs. These agreements have been described more fully above. In each of them, the CLEC received something of benefit in exchange for agreeing not to oppose the merger.

364. Going back into the year 2000, Qwest and Eschelon had disagreed about switched access minutes of use. Eschelon believed that Qwest was underreporting access minutes. In an attempt to resolve this dispute, Audrey McKenney of Qwest sent a letter to Richard Smith of Eschelon on July 3, 2001, confirming that the two had agreed to perform an audit. Since November of 2000, Qwest had been paying Eschelon the difference between $13.00 per line per month and the amount that

[121] Affidavit of Blake O. Fisher dated June 12, 2002, in the record of this proceeding as Ex. 473J, attachment WCD-13.

Eschelon was able to bill IXC's for switched access based on the Qwest data. After January 1, 2001, Qwest had been paying the difference between $16.00 per line per month and the amount that Eschelon was able to bill IXC's based on the Qwest data. Eschelon had also been complaining about access records for Qwest's intraLATA toll traffic terminating customers served by an Eschelon switch. In the July 3, 2001, letter, McKenney agreed that Qwest would pay Eschelon $2.00 per line per month for such traffic. Qwest did pay both amounts for the months of July, August and September of 2001, but then quit paying. On October 30, 2001, McKenney sent a proposed Confidential Purchase Agreement to Eschelon. This agreement was signed by McKenney, with a space for Eschelon to sign. Along with it was a Confidential Billing Settlement Agreement, of the same date, also signed by McKenney. It includes an agreement by Eschelon to deliver to Qwest "all reports, work papers, or other documents related to the audit process described in that [July 3, 2001] letter." The matter of destroying the audit report on Qwest's access record adequacy was also discussed in an email from Eschelon's Jeff Oxley to Richard Corbetta on October 22, 2001.

365. The October 30, 2001 proposed Confidential Purchase Agreement signed by McKenney but not by Eschelon contains the following language:

> As part of the services described herein, it is anticipated that the parties will exchange confidential and proprietary information. Specifically, it is anticipated that Qwest shall provide confidential and proprietary, and sensitive information to Eschelon. Accordingly, as a material element of this PA, unless otherwise requested by Qwest or an affiliate, and out of an abundance of caution that Eschelon not misuse (intentionally or by mistake) such information, Eschelon agrees, during the term of this PA, to refrain from initiating or participating in any proceeding (regulatory, judicial, arbitration, or legislative) where Qwest's interests may be implicated, including but not limited to, formal and informal proceedings relating to Qwest's or its affiliates' efforts to obtain relief pursuant to Section 271 of the Telecommunications Act of 1996, including but not limited to, change management process workshops, performance indicator/assurance dockets and cost dockets. Notwithstanding the foregoing, since Eschelon will help Qwest with, including but not limited to, its business process, products and operations, Eschelon shall, when requested by Qwest file supporting testimony/pleadings/comments and testify whenever requested by Qwest in a manner suitable to Qwest (substantively). In addition, upon request by Qwest, Eschelon will withdraw or dismiss existing proceedings.[122]

[122] According to a January 2, 2002 letter from Richard Smith (Eschelon) to Gordon Martin (Qwest), Ms. McKenney later told Mr. Smith that she did not have the authority to make the October 30, 2001 agreements. Ex. 237.

367. On October 8, 2001, Suzy Beesley, on behalf of Richard Smith at Eschelon, sent an email to Dana Filip and Audrey McKenney, both of Qwest, attempting to show how Eschelon had assisted Qwest over the prior two years. Among other benefits, Mr. Smith notes "Eschelon has not made its report card of Qwest's performance available to other carriers or to state commissions or the FCC. These report cards document unsatisfactory performance by Qwest in a number of categories from missed installations to major network outages." Mr. Smith goes on to note "Eschelon has not disclosed any problems it has experienced with Qwest's access of billing records or with Qwest's general billings for UNEs and UNE-E lines." The letter points out that Eschelon has covertly assisted Qwest in dockets in which Eschelon would otherwise have been considered an adverse party. For example, Mr. Smith writes, "In the [sic] Minnesota, Eschelon has helped Qwest in wholesale service quality proceedings by working to reduce differences between CLEC proposed quality measures and Qwest proposed measures and by pointing out defects in Qwest testimony in advance of cross-examination of Qwest witnesses."

PENALTIES

368. The Commission has specifically requested that the ALJ recommend only whether penalties should be assessed. As discussed more fully in the Memorandum, this case gives the Commission the opportunity to fashion a creative remedy. However, the Commission must determine the appropriate penalties based upon the factors in §237.462 and the other applicable statutes. These factors require a few more Findings in order to give the Commission a full view of the considerations listed in the statute.

369. The evidence shows that Qwest gained several significant advantages for itself in exchange for its promises to the CLEC parties to the unfiled agreements. The most significant of these advantages was the promise Qwest extracted from Eschelon and McLeodUSA - two of Qwest's largest wholesale customers - to "remain neutral" during the consideration of Qwest's §271 applications by state and federal regulators.[123]

370. With respect to Eschelon, Qwest had substantial service-related problems that apparently have not been addressed in a number of Minnesota dockets because of this neutrality agreement.[124]

371. Qwest secured guaranteed revenue streams of $150,000,000 from Eschelon and [BEGIN TRADE SECRET] [END TRADE SECRET] from McLeodUSA as part of its discount agreements.[125] By entering into the discount agreement with McLeodUSA, Qwest also secured McLeodUSA's commitment not to take its telecommunications traffic off of Qwest's network.[126]

372. By concealing both discount agreements and keeping them unavailable to other CLECs, Qwest benefited by saving several millions of dollars in Minnesota alone.

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[123] Ex. 200 - WCD-3 and Fisher Affidavit, ¶ 24.
[124] Exs. 235, 236, 237, 239, 240.
[125] Ex. 200 - WCD-4 and Fisher Affidavit, ¶17.
[126] *See* Fisher Affidavit ¶¶ 8 - 17; Ex. 402J at 62-63.

373. Qwest knowingly and intentionally violated §47 U.S.C. §§252 and 251. It intentionally structured agreements to prevent their disclosure as filed interconnection agreements.

374. The testimony in this case from CLECs that were actually harmed by Qwest not making the unfiled agreement terms available to them demonstrates the harm caused by Qwest's intentional conduct to both customers and competitors. It is impossible to calculate the damages to CLECs that have not been able to opt into the agreements, but it is certain that damages would amount to several million dollars for Minnesota alone.

375. Because none of the provisions cited in the Complaint have yet been made available to other CLECs for pick and choose, the harm continues. Qwest's conduct generally harms competition and the growth of CLECs in Minnesota.

376. The Commission should also consider the quid pro quo that Qwest received from its conduct, including the elimination of CLEC participation in regulatory proceedings addressing the public interest, and the damage that caused to the furtherance of competition in Minnesota.

377. Qwest has a history of past violations. In that regard, Qwest tried to avoid its §252 obligations in both the MCIWorldcom docket and the DTI docket. In addition, the Commission recently found that Qwest has engaged in a pattern of anticompetitive behavior in *In the Matter of the Complaint of AT&T Communications of the Midwest Against Qwest Corporation*, Docket No. P-421/C-01-391.

378. Qwest has committed 25 individual violations by failing to file, as required, 25 distinct provisions (found in 12 separate agreements) for interconnection, access to UNEs and/or access to services.

379. The economic benefits gained by Qwest are, at a minimum: (a) the withdrawal of CLECs from the consideration of the Qwest / U S WEST merger; (b) a $150,000,000 purchase commitment from Eschelon; (c) the [BEGIN TRADE SECRET] [END TRADE SECRET] purchase commitment from McLeodUSA; (d) the agreement by McLeodUSA to keep its telecommunications traffic on the Qwest network; (e) the millions of dollars Qwest saved by not making the purchase volume discounts it agreed to with McLeodUSA and Eschelon available to other CLECs, and (f) agreements by two of Qwest's largest wholesale customers (Eschelon and McLeodUSA) to not participate in the consideration of whether Qwest should receive interLATA long distance authority under 47 U.S.C. §271.

380. Qwest has not taken meaningful corrective action to remedy the harm caused by failing to file the specific agreements cited in the complaint. Qwest does intend to seek Commission consideration of a subset of the provisions complained about here, but if and only if the Commission first determines that it must.

381. The fact that Qwest has cancelled some of the Eschelon agreements in an attempt to keep from making them publicly available should be considered as a factor.

382. The seventh statutory factor for consideration is the annual revenue and assets of the company committing the violations, including the assets and revenue of any affiliates that have 50 percent of more common ownership or that own more than 50 percent of the company. According to Qwest's website, Qwest Communications International, Inc., Qwest Corporation's parent, reported annual revenues of over $20 billion and assets of over $74 billion for the year 2001.

383. Qwest has the financial ability to pay any fine assessed by the Commission. The company, including any affiliates that have 50 percent or more common ownership or that own more than 50 percent of the company, has $20 billion in revenue. Ms. McKenney, Qwest's own witness, pointed out in her testimony how insignificant an amount of money [BEGIN TRADE SECRET] [END TRADE SECRET] was to Qwest given its annual expenditures of [BEGIN TRADE SECRET] [END TRADE SECRET] paid to other carriers for network expenses alone.[127]

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Administrative Law Judge and the Commission have jurisdiction in the matter under 47 U.S.C. §§ 251 and 252, and Minn. Stat. §§ 14.50, 237.02, 237.081, 237.16, and 237.462.

2. The Department has demonstrated by a preponderance of the evidence that Qwest has violated the provisions of 47 U.S.C. § 251, as more particularly set out in the Findings of Fact above.

3. The Department has demonstrated by a preponderance of the evidence that Qwest has violated the provisions of 47 U.S.C. § 252, as more particularly set out in the Findings of Fact above.

4. The Department has demonstrated by a preponderance of the evidence that each of Qwest's violations of 47 U.S.C. § 251, were knowing and intentional.

5. The Department has demonstrated by a preponderance of the evidence that each of Qwest's violations of 47 U.S.C. § 252, were knowing and intentional.

6. The Department has demonstrated by a preponderance of the evidence that a penalty is justified under Minn. Stat. § 237.462, subds. 2 and 3. The Commission is not limited, however, to a monetary penalty. Subdivision 9 of that statute explicitly allows the Commission to use other enforcement provisions available to it for these same violations.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

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[127] Tr. 5:117-118.

RECOMMENDATION

IT IS RESPECTFULLY RECOMMENDED that the Commission take action against Qwest for its activities as detailed above.

Dated this 20th day of September 2002.

ALLAN W. KLEIN
Administrative Law Judge

Reported: Court Reported, Shaddix & Assoc.

MEMORANDUM

This unfiled agreements case, when coupled with the Qwest 271 case, presents a unique opportunity for the Commission to be creative in fashioning a remedy that will operate in the best interests of Minnesota ratepayers and telephone users in the future. It is very similar to a situation which occurred in the early 1990s when NSP sought authority to store its spent fuel in dry casks at Prairie Island. That case, which was ultimately resolved by the legislature, ended with a creative solution involving not only permission for NSP to use the dry casks, but also the windpower, biomass, and resource planning mandates that are still very much in operation today. This case, linked as it is with the 271 application, gives the Commission the same kind of chance to forge a creative solution that can benefit the State for years to come.

The Administrative Law Judge does not have any "total package" solutions to suggest to the Commission. Instead, he hopes the parties will be able to offer suggestions to the Commission and that ultimately the Commission is able to create a meaningful package that will benefit local competition in the long term throughout Minnesota.

A.W.K.