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1 MR. WOLTERS: Richard S. Wolters on behalf of
2 AT&T.

3 ALJ RODDA: And WorldCom, are you represented
4 on the phone this morning?

5 MR. DIXON: Yes, this is Thomas F. Dixon,
6 D-i-x-o-n, appearing on behalf of WorldCom and its
7 regulated subsidiaries.

8 ALJ RODDA: Great.

9 Mr. Campbell, are you making an appearance
10 this morning?

11 MR. CAMPBELL: Thank you, Your Honor. Tom
12 Campbell of the law firm of Lewis & Roca on behalf of
13 Eschelon Telecom, and with me is Mr. Dennis Ahlers who
14 is in-house counsel for Eschelon Telecom.

15 ALJ RODDA: Great.

16 Are there any other interested parties that
17 wish to make an appearance before I get to Staff?

18 Okay. And on behalf of Commission Staff.

19 MS. SCOTT: Maureen Scott and Gary Horton on
20 behalf of Commission Staff.

21 ALJ RODDA: Great. Welcome, everybody, to
22 the Arizona Corporation Commission.

23 First thing I would like to do this morning
24 is to address, you'll notice that I did not get
25 around -- I had a lot of things planned for Friday,

1 one of which was addressing Qwest's motion to strike.
2 So if you were waiting at your mailbox for a
3 Procedural Order that addresses that, that motion, you
4 don't have to wait. I'll let you know how I'm ruling
5 right now.

6 I've decided to the extent that Qwest's
7 motion is seeking a blanket striking of the testimony
8 not to grant that motion. The Commission will afford
9 the testimony of Mr. Deanhardt the appropriate weight,
10 and the Commission is fully capable of determining
11 appropriate testimony.

12 The next thing I wanted to ask you all about
13 before we get started with public comment and then
14 opening statements is the confidentiality, and in
15 particular, RUCO's testimony. I only received a copy
16 of the nonredacted version of the testimony. Is there
17 a redacted version of the testimony?

18 MR. POZEFSKY: There is, Your Honor.

19 ALJ RODDA: Okay. And -- okay. So when I
20 compare the two, I can determine, because my version
21 is all in yellow, and I thought, it can't all be
22 confidential. There has to be something that's not,
23 right?

24 MR. POZEFSKY: Ms. Diaz Cortez's is all
25 confidential. Mr. Deanhardt's is partially

1 confidential. There is a public version of
2 Mr. Deanhardt's testimony.

3 ALJ RODDA: Okay. And so when we mark
4 testimony, when there's testimony that has a redacted
5 and nonredacted version, we mark both copies. The
6 redacted version will get filed in Docket Control just
7 like any testimony. The nonredacted or confidential
8 version will be filed under seal.

9 MR. SPIVACK: Your Honor, may I ask, what is
10 the numbering convention you would like us to use for
11 the testimony? Should we refer to it as
12 Exhibit 1, 2, 3, 4?

13 ALJ RODDA: Yes, and we can call it Qwest,
14 Q-1, 2, 3, 4, because there's so many parties. That's
15 probably easiest.

16 MR. SPIVACK: All right. Thank you.

17 ALJ RODDA: Is there anything else you want
18 me to address preliminarily before we get started this
19 morning?

20 MS. RENFRO: Madam Hearing Officer, Darcy
21 Renfro from Fennemore Craig on behalf of Qwest.

22 I don't know -- there are four parties from,
23 that wish to be admitted pro hac vice in this action,
24 and there are three motions that have been filed
25 before you and one that was just filed today. The

1 parties are Doug Nazarian, Douglas Nazarian, Martha
2 Russo, and Cynthia Mitchell. Those applications to
3 appear pro hac vice, motions filed by Timothy Berg are
4 before the Commission currently, and this morning we
5 filed an additional motion to admit Peter Spivack
6 pro hac vice in this action. And I would like to at
7 this time move to admit all four parties in this
8 action on behalf of Qwest.

9 ALJ RODDA: Okay. Are there any objections
10 to the admission? I had only seen the one prior, so
11 thank you, Ms. Renfro, for bringing that up.

12 We'll admit Nazarian, Mitchell, Russo, and
13 Spivack pro hac vice.

14 MS. RENFRO: Thank you.

15 ALJ RODDA: Anything else?

16 Okay. Let me then ask if there are any
17 members of the public present this morning who wish to
18 make public comment in this matter. Let the record
19 reflect that no one in the public is coming forward to
20 make public comment.

21 So we'll start with opening statements, and
22 Qwest, I guess, Mr. Spivack, is that you?

23 MR. SPIVACK: Yes, thank you.

24 Madam Hearing Officer, Chairman,

25 Mr. Commissioner, Counsel, in our testimony, we've

1 tried to address three issues: First, how future
2 compliance with Section 252(e) will be assured and how
3 Qwest will operate as a company before this
4 Commission; second, to give summaries that we believe
5 relevant to determining why past noncompliance
6 occurred; and third, to talk about appropriate
7 remedies, at least as to comment as to the remedies
8 that have been offered by other parties. Especially
9 in view of the lack of discrimination that we believe
10 for most of the unfiled agreements that are at issue,
11 in the context of Arizona, and Arizona as the FCC has
12 found has the second most competitive
13 telecommunications market in the country. So let me
14 talk about each of those a little bit, if I may.

15 As to future compliance, what we've tried to
16 do is implement changes that will assure this
17 Commission that our conduct will be compliant with
18 Section 252(e) in the future. Those changes include
19 changes in management from the very top down through
20 the wholesale executive management, changes in the
21 review process for agreements so that a Wholesale
22 Agreement Review Committee has been created that will
23 be and has been charged with the responsibility for
24 reviewing all agreements for compliance with
25 Section 252(e), changes in the review standards so

1 that settlement agreements are now part of that
2 process, changes in training so that there's an
3 emphasis on compliance, and compliance with what is
4 now we believe a standard that has been set forth by
5 the FCC that can be nationally applicable that our
6 people will focus on and work with in trying to comply
7 with Section 252(e).

8 Let me talk a little bit about how our
9 testimony relates to past issues of noncompliance. We
10 certainly recognize the issues and the problems that
11 are present in this docket with past compliance, and
12 it's not how Qwest will operate as a company in the
13 future before this Commission or before any other
14 Commission.

15 What we've tried in our testimony to provide
16 is some context around that past noncompliance. Part
17 of it is there was unclear national standard that had
18 been set forth by the FCC, by a Commission, or by any
19 court. To try to address that, we filed a petition
20 for declaratory relief before the FCC last year, and
21 we articulated a standard that we thought could be
22 applicable and that was a standard that was part of
23 our advocacy. But there was a second equally and
24 perhaps more important purpose for filing that
25 petition, and that was just to get an answer to that

1 question. We have one now, and that's a standard that
2 we are abiding by and living with.

3 We've also attempted to talk some about the
4 reasons for the past noncompliance in our testimony.
5 And again, for most of the agreements, not all
6 certainly, but for most of the agreements we believe
7 there was an issue of line drawing, and that as Larry
8 Brotherson talks about and will speak about in his
9 testimony, that there was an attempt at Qwest to use
10 general principles and not to have the appropriate
11 regulatory review which should have been in place and
12 we believe is now in place. But in the context of
13 there not being a standard, we believe that the line
14 drawing is not or was not always clear.

15 And part of the, I think the evidence or the,
16 one thing that shows that or is relevant to that at
17 least is if you look at Staff and how Staff has
18 attempted to analyze these agreements in the context
19 of its first report in June of 2002 and its
20 supplemental report in August of 2002 and in its
21 testimony filed in February of 2003. In the first
22 report, there were 25 agreements Staff felt were
23 required to be filed which had not been filed. In the
24 supplemental report, there were 28, and in the
25 testimony there are again 28. But those 28 are

1 actually different from, and there are 12 to 13
2 estimates of agreements that are new and have been
3 changed in that list of 28. And that shows that it's
4 not perhaps a clear line that can be drawn in all
5 cases. You know, granted, there was discovery that
6 shed light on the issues for Staff, but at least some
7 of that I think is attributable to that these are
8 matters of judgment and exercise of judgment, and
9 perhaps we drew the line in the wrong place, and we
10 hope that in the future we will draw it in the right
11 place.

12 We've also presented testimony about the lack
13 of discrimination for many of these agreements. We
14 believe that the CLECs in Arizona receive high quality
15 wholesale standards and that that allows them to
16 compete effectively in the Arizona market. And in our
17 testimony, Dana Filip and Kathy Lucero address the
18 service quality provided by Qwest and what we believe
19 is the resulting lack of discrimination to CLECs.

20 In addition to the issues of past and future
21 compliance with Section 252(e), some of the issues in
22 this docket relate to whether conduct occurred, and
23 I'm referring here really to the Eschelon and McLeod
24 discount agreements that Staff and RUCO have provided
25 testimony on. And we think here the issue really is

1 not so much a filing issue as instead whether the
2 written agreements fairly represent the terms of the
3 parties' transactions, if the Commission finds the
4 facts that Staff and RUCO advocate.

5 We've tried to present facts for the
6 Commission to consider on this through the testimony
7 of Larry Brotherson and the testimony of Judy Rixe,
8 but we believe more importantly that we've solved the
9 problem of whether an agreement fairly represents all
10 of the terms of the transaction on a going forward
11 basis, and we've done that through these changes that
12 I talked about, through the compliance training,
13 through the review committee which now is composed of
14 representatives from six different departments, so
15 that every transaction will be fully analyzed and
16 understood, and that those will address that problem
17 on a going forward basis.

18 This docket also involves nonparticipation or
19 nonopposition agreements to regulatory proceedings,
20 some of the merger proceedings and some 271
21 proceedings. We have also tried to address that on a
22 going forward basis. We've agreed to file any
23 agreements that include withdrawal from a generic
24 docket as a provision of the agreement with this
25 Commission, and we will present those agreements to

1 this Commission for its review and approval.

2 On a past basis, we've tried in the testimony
3 to provide some context for those agreements, and that
4 context is that we believe there were attempts in good
5 faith to resolve disputes between Qwest and the CLECs,
6 that they were consistent with public policy, at least
7 in the intent, to support resolution of disputes
8 between parties. But we've heard the Commission's
9 concerns loud and clear about those types of
10 agreements, and that's why we are committing that
11 those agreements to the extent they're entered into in
12 the future will be presented to this Commission for
13 its review and approval.

14 So that leaves the question of past, of
15 remedies for past conduct if the Commission finds the
16 facts as RUCO and Staff advocate. And I want to state
17 that Qwest wants to work with Staff to address
18 remedies and to bring to the Commission ideas for
19 creative options that will address the competitive
20 harm from the agreements, rather than simply a fine
21 that would go into the general fund and wouldn't
22 benefit CLECs and telecommunications consumers.

23 We've submitted some testimony to comment on
24 proposed remedies from Staff and RUCO, and that
25 testimony is from Harry Shooshan who has done a review

1 of RUCO proposals and Staff proposals and made some
2 comments about those.

3 So in summary, let me say that we believe
4 Qwest has worked well with CLECs in Arizona and that
5 the evidence of that, the proof is really in the
6 pudding. We believe that because of the amount of
7 competition in the state, the fact that the percentage
8 of lines owned in Arizona is greater than any other
9 state other than New York in the country.

10 We've tried to implement measures that we
11 feel address future compliance and will assure the
12 Commission of future compliance. We've suggested
13 additional measures such as an independent monitor to
14 give the Commission an independent review and
15 assurance that Qwest is complying with Section 252(e),
16 and we will commit to work with Staff to bring forward
17 other remedies that will benefit consumers and
18 competitors in Arizona.

19 Thank you.

20 ALJ RODDA: Thank you, Mr. Spivack.

21 Mr. Pozefsky.

22 MR. POZEFSKY: Thank you, Your Honor. Thank
23 you, Commissioners.

24 ALJ RODDA: Make sure you pull your mike
25 close to you.

1 MR. POZEFSKY: Your Honor, if I may, I just
2 have a few brief parts of my opening statement which
3 will cover some confidential material. I'll advise
4 the Commission when I get to that. Thank you.

5 Your Honor, Commissioner Spitzer,
6 Commissioner Gleason, nondiscrimination by incumbent
7 local exchange carriers is a bedrock principle of the
8 Telecommunications Act of 1996. Qwest intentionally
9 and deliberately violated this fundamental principle
10 by not filing interconnection terms and in so doing
11 undermined competition in the State of Arizona and
12 compromised the integrity of the 271 process before
13 this Commission.

14 The relationship between the competitive
15 local exchange carrier, commonly known as the CLEC,
16 and the incumbent local exchange carrier, the ILEC, is
17 symbiotic. The CLEC is in the business to provide
18 telecommunications services to its customers. To do
19 that, they need to interconnect with the ILEC who has
20 the infrastructure.

21 Under Section 251 of the Telecom Act, the
22 terms under which the ILEC interconnects with the CLEC
23 cannot be discriminatory to other CLECs. The Act
24 imposes a number of obligations on the ILEC to assure
25 that the terms in the interconnection agreements that

1 they negotiate and enter into with the CLECs are made
2 available to other CLECs who may want to opt in.

3 Section 252 of the Act requires the ILECs to
4 file the agreements so that the Commission can
5 determine that they are nondiscriminatory. Filing
6 requirement also assures that the agreement terms are
7 publicly known so that other CLECs have the
8 opportunity to pick and choose the terms they want.

9 The intent of the Act was to foster
10 competition by making available the same terms to all
11 the CLECs. In other words, the purpose of the Act is
12 to level the playing field. It is only after the ILEC
13 has made its network fully available to the CLECs and
14 has shown it does not discriminate that it should be
15 considered for 271 approval.

16 Qwest engaged in a scheme to provide access
17 to some competitors on terms that were not available
18 to other competitors. The scheme involved two of
19 Qwest's larger wholesale competitors, McLeod and
20 Eschelon, who not only went along willingly but also
21 assisted Qwest in discriminating against the
22 competitors.

23 The scheme involved discounts or rebates to
24 Eschelon and McLeod based on their volume purchases.
25 Qwest carried out the scheme by deliberately failing

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1 to file the agreements which contained key terms to
2 the business relationships. Qwest filed and made
3 public other terms that did not tell the whole story
4 and when viewed separately from the unfiled agreements
5 were unattractive.

6 The impact on competition was significant.
7 The full impact may never be known. What is known is
8 that Eschelon and McLeod had a preferential position
9 in the Arizona market including receiving discounts
10 that were not available to other CLECs. Qwest paid
11 Eschelon \$2.54 million in discounts through September
12 2001, and McLeod has paid slightly over, and this part
13 is confidential, Your Honor.

14 ALJ RODDA: Well, I don't want to have the
15 room, I would have to empty the room and come back.
16 Is it -- we can either do it at the end of opening --

17 MR. POZEFSKY: I'll keep the numbers
18 separate.

19 Blank amount in discounts through September
20 2001. The financial benefit to Qwest included
21 significant purchase commitments from Eschelon and
22 McLeod as well as the money saved by not providing the
23 same discount to other CLECs.

24 In addition, Qwest gained the ultimate
25 advantage in that it was able to get Eschelon and

1 McLeod to agree to not participate in the 271 process.
2 This was an integral condition of the partnerships
3 since Eschelon and McLeod were experiencing
4 significant service problems with Qwest. While Qwest
5 was clearly aware of its service problems with
6 Eschelon and McLeod, it was representing to this
7 Commission in the 271 docket that its operational
8 support systems were providing appropriate access to
9 its competitors.

10 Qwest claims that it failed to file its
11 agreements with Eschelon and McLeod because it
12 misunderstood the law. However, the testimony and
13 documents that RUCO will present show that Qwest
14 deliberately structured the deals to avoid filing so
15 that it could gain its own advantages.

16 Qwest claims that the FCC had not yet set a
17 national standard for determining what agreements
18 should be filed, so Qwest had its own narrow
19 interpretation of what the Act required to be filed.
20 However, Qwest's own behavior is inconsistent with
21 Qwest's explanation because Qwest failed to file
22 agreements that fell within its own interpretation of
23 the Act's filing requirements.

24 Qwest's true reasons for not filing
25 interconnection agreements were much more

1 Qwest-McLeod partnership involved an unfiled oral
2 agreement whereby Qwest paid McLeod kickbacks of up to
3 ten percent on its volume purchases over a three-year
4 period. In agree, McLeod agreed to withdraw objection
5 to Qwest's 271 application.

6 Both Qwest and McLeod denied that Qwest
7 offered McLeod a volume discount, but whatever anyone
8 wants to call it, McLeod was getting a price break
9 unavailable to all of Qwest's competitors other than
10 Eschelon. The partners disguised the kickbacks in two
11 take or pay purchase agreements, each executed in
12 October of 2000. Both agreements, involving core
13 pricing terms, were not filed at the time they were
14 executed. The interconnection amendment setting forth
15 a \$43.5 million price tag for converting to the
16 UNE-Star platform, however, was filed. Competitors
17 considering the UNE-Star would not, however, have been
18 aware of the unfiled settlement agreements which
19 reveal the true price of the conversion was at most
20 \$11 million. A subsequent agreement provided McLeod
21 with an escalation procedure that had also been made
22 available to Eschelon, but since the agreement was
23 never filed, a similar escalation procedure was never
24 made available to other CLECs.

25 Qwest's partnership with Eschelon was even

1 more deceitful. After months of negotiations, Qwest
2 and Eschelon executed a series of agreements in
3 November of 2000. In one of the undisclosed
4 agreements, Qwest agreed to pay Eschelon ten percent
5 of its purchases from Qwest in exchange for consulting
6 and network-related services. This was a sham, for,
7 among other reasons, the consulting services bore no
8 relationship to the amount of purchases made by
9 Eschelon.

10 In another unfiled agreement executed on
11 November 15, 2000, Eschelon agreed to purchase at
12 least \$150 million worth of services from Qwest over a
13 five-year period. Eschelon's agreement to not oppose
14 Qwest's 271 applications was memorialized in a letter
15 agreement that was not filed.

16 Another aspect of that agreement which was
17 also not filed was an escalation procedure made only
18 available to one other Qwest competitor, and that was
19 McLeod. As was the case with the Qwest-McLeod
20 partnership, the agreement which set forth the
21 \$10 million purchase price that Eschelon agreed to pay
22 to convert to the UNE-Star platform was filed. To the
23 competitor considering conversion to UNE-Star, the
24 publicly-stated price was misleading, as Qwest agreed
25 on the same date to pay Eschelon \$10 million, but that

1 agreement was not filed with the Commission. The
2 conspirators' conduct violated the Federal Act, state
3 law, and the Commission's rules. In addition, you can
4 order them to cease their criminally fraudulent
5 practices.

6 One last point: There is a lot of evidence
7 in this case, and other parties for the purpose of
8 distraction will present evidence in an effort to
9 create confusion. Boiled down, this is a
10 straightforward fraudulent scheme case with simple and
11 uncomplicated facts. Before this docket was even
12 opened, the parties themselves documented their
13 actions extensively, and as you will see, left no room
14 for misinterpretation of their intent.

15 Thank you.

16 ALJ RODDA: Can I see how many people in the
17 room have not executed a protection agreement? Okay.
18 Did you want to -- I could --

19 MR. POZEFSKY: Your Honor, I don't know what
20 the normal proceeding is with confidential portions.
21 However, I would be happy to make that information
22 available in the proceeding at some point when the
23 proceeding closes or prior to its closing when we take
24 a break or something, however you want to handle that.

25 ALJ RODDA: Okay. All right.

1 MR. POZEFSKY: Or I could file an opening
2 statement.

3 ALJ RODDA: Or you could file your opening
4 statement under seal.

5 MR. POZEFSKY: Yes, I could do that.

6 ALJ RODDA: Okay. That might be the easiest
7 way right now.

8 MR. POZEFSKY: Okay.

9 ALJ RODDA: Okay. Thank you.

10 Mr. Wolters.

11 MR. WOLTERS: AT&T doesn't have an opening
12 statement, Your Honor.

13 ALJ RODDA: Mr. Dixon.

14 MR. DIXON: Thank you, Your Honor. WorldCom
15 also does not have an opening statement.

16 ALJ RODDA: Mr. Campbell.

17 MR. CAMPBELL: Thank you, Your Honor.

18 Your Honor, Chairman Spitzer, Commissioner
19 Gleason, Eschelon is a relatively small
20 telecommunications company. It has 5,000 customers in
21 Arizona, it has 39 employees in Arizona, and primarily
22 provides service to small businesses in Arizona and
23 must use heavily what's called the UNE-P unbundled
24 element platform service or facility that it gets from
25 Qwest to provide the service to these small

1 businesses.

2 Several years ago, when Eschelon was
3 beginning its business and trying to deal with then
4 U S WEST in a difficult market and a competitive
5 market, they were having numerous problems with
6 U S WEST. When Qwest purchased U S WEST, Eschelon was
7 pleased to hear the statements of the new management
8 of Qwest who said that they were going to treat CLECs
9 like customers rather than competitors and try, wanted
10 to work with the CLEC community.

11 Based on that, Eschelon decided to try to
12 work on a business to business relationship with Qwest
13 to solve its service and cost effectiveness problems
14 that it had with Qwest, to work through negotiation
15 rather than litigation. As part of that process, it
16 entered into a series of contracts, and many of those
17 contracts Qwest demanded remain confidential. As a
18 result of entering into those contracts that remained
19 confidential, Eschelon is here today.

20 I wanted to point out that Eschelon has
21 participated in this proceeding and has provided
22 information, Mr. Smith has provided a deposition. I
23 think RUCO referred to him. Ms. Clauson has provided
24 a deposition. We have provided voluminous information
25 to the Commission, to Staff, and to RUCO. We have not

1 filed discovery objections. We have not tried to
2 withhold anything from this Commission in this
3 process. We have also participated fully in the
4 reopened 271 proceedings to provide information that
5 was kept from the Staff at an earlier date.

6 We appreciate the work that Staff and RUCO
7 has done in conducting this investigation and
8 conducting its analysis. However, we take issue with
9 one aspect of this particular proceeding and that's
10 why we're appearing in this proceeding, and we filed a
11 prehearing statement that lays that out, but I just
12 want to highlight a few points.

13 The portion of this case that we take issue
14 with is the fact that Staff and RUCO are recommending
15 penalties against Eschelon in this case. They are
16 also recommending penalties against McLeod, which I
17 guess is equally interesting since McLeod has not even
18 intervened in this proceeding or the 271 proceeding.
19 The penalties we're talking about are orders to Qwest
20 to provide discounts to our competitors and excluding
21 Eschelon from those discounts, and secondly, in the
22 case of RUCO, ordering a minimum of a \$100,000 payment
23 from Eschelon as part of this proceeding.

24 We think those penalties have two flaws.
25 One, it violates Eschelon's due process. As was laid

1 out in our prehearing statement, the order defining
2 the scope in this proceeding, the order put out by
3 this Commission, is explicit that it focuses on Qwest
4 and that the remedies focus on Qwest. There is no
5 aspect of that order discussing potential remedies
6 against Eschelon, and we feel that any kind of penalty
7 against Eschelon entered in this proceeding will
8 violate due process for that reason.

9 Let me hasten to add, as I said last week, we
10 are not taking the position that the Commission is
11 without jurisdiction to look at penalties against
12 Eschelon if based on this record they believe some are
13 appropriate, but we think that would need to be
14 separately noticed and separately investigated.

15 The second objection that we have to the
16 penalties against Eschelon in this case are that they
17 are discriminatory. In their simplest sense, they
18 order Qwest to charge Eschelon different prices,
19 higher prices, for the same services that they will be
20 providing to its competitors, and as RUCO pointed out,
21 that violates the Federal Discrimination Act. It also
22 violates ARS 40-334 and the Commission's
23 Rule 14-2-1112.

24 Now, let me make this caveat. Eschelon is
25 not complaining about any kind of result here that has

1 the effect of allowing other CLECs to catch up with
2 whatever benefit the Commission determines Eschelon
3 received from these contracts. We ask that as you
4 look at that benefit, and Mr. Pozefsky mentioned a
5 potential number, that you look at the broad picture.
6 In addition to looking at the revenues received by
7 Eschelon, you look at things like the cost we incurred
8 in preparing the audits and in giving up certain
9 claims that we had in return for those benefits.

10 But that's not really our objection. Our
11 objection is that once those competitors have been
12 brought even, that this proceeding or the
13 recommendations of the Staff and RUCO go further than
14 that, and they say for some future time period,
15 everybody but Eschelon and McLeod will get additional
16 discounts that we will not get. And we feel that
17 portion of the remedy violates the discrimination
18 provisions. If we have a full hearing on penalties
19 later, we can also deal with issues about whether
20 McLeod and Eschelon should be treated the same because
21 of different facts. This paints everybody with a
22 broad brush stroke, doesn't look at the real details
23 of the different agreements.

24 So our position here, with all due respect to
25 the Staff and RUCO, and we have cooperated, is that it

1 is not appropriate for the Commission in this
2 proceeding to adopt penalties against Eschelon, and
3 that even in some future proceeding, a penalty that is
4 based on discriminatory pricing will violate federal
5 and state law and will be inappropriate.

6 Thank you, Your Honor.

7 CHMN. SPITZER: Ms. Rodda, Mr. Campbell, I do
8 have a question for you, if I may.

9 MR. CAMPBELL: Certainly.

10 CHMN. SPITZER: I heard your oral
11 presentation, and comparing that with the pleading you
12 filed, I'm trying to come to grips with your
13 definition of a penalty as applied to Eschelon. You
14 conceded Eschelon received discounts that were not
15 available to other CLECs other than McLeod, is that
16 not true?

17 MR. CAMPBELL: Yes.

18 CHMN. SPITZER: And you recognize the
19 Commission has the authority to address the fact that
20 Eschelon and McLeod received discounts not available
21 to other CLECs by authorizing discounts to the other
22 CLECs, and that's not a penalty, that in and of itself
23 does not constitute a penalty against your client.

24 MR. CAMPBELL: I think once those discounts,
25 just to make my position clear, Chairman Spitzer, if I

1 may, once those discounts exceed the payments that
2 Eschelon had received previously, then it would
3 constitute a penalty. The other problem I think with
4 those particular penalties phrased that way is that
5 setting up a discount to exclude somebody across the
6 board will violate the anti-discrimination provisions.
7 What I would say is we do agree that we have no
8 objection to other CLECs with some mechanism catching
9 up.

10 CHMN. SPITZER: All right. So at least to
11 the degree of what we will define as the catch up,
12 which is the amount of the discounts, the cumulative
13 total of discounts received by Eschelon, that such
14 catch up to other CLECs would not constitute a penalty
15 against Eschelon nor would it violate the federal
16 discrimination provisions?

17 MR. CAMPBELL: It would certainly not
18 constitute a penalty to Eschelon. I guess depending
19 on the structure, somebody could make an argument
20 about the anti-discrimination aspects of it, but I
21 think it could be structured in a way to solve that
22 problem.

23 CHMN. SPITZER: Okay. How do you deal with
24 the temporal concern which is the CLECs are attempting
25 to build market share, the discounts received by

1 Eschelon and McLeod were available in a time frame
2 while CLECs were attempting to build market share, so
3 in addition to the time value of money, in other words
4 the discount received in 2000 is clearly more valuable
5 to the extent of the discount rate than a discount
6 received in 2003 or 2004? The fact that Eschelon and
7 McLeod were able to, based on those discounts, obtain
8 clients, customers, and revenue streams is an
9 unfairness, and simply computing the amount of the
10 discount doesn't redress the wrong done to the CLECs
11 who did not have access to those agreements.

12 MR. CAMPBELL: I think that is a valid point
13 similar to the one I was making in my opening
14 statement, Chairman Spitzer, that in looking at this
15 aspect of the remedy, you have to look at that sort of
16 time value of money factor, as well as the cost that
17 Eschelon incurred on the other side of the ledger, the
18 cost Eschelon may have incurred in achieving those
19 payments that the other parties will not have to incur
20 such as the audit cost. And it leads me to say
21 why --

22 CHMN. SPITZER: Audit cost, Counsel?

23 MR. CAMPBELL: In achieving the consulting
24 fee payments and the payments, there were certain
25 costs that Eschelon incurred laid out in my pleading,

1 and also, in part laid out in my pleading, and also
2 claims they had to give up. But it leads me, both
3 your question and my opening I think illustrate why
4 the due process concern issue is important here, not
5 just for the due process rights but for the record
6 before this case. There isn't a record in this
7 proceeding that would address the issue that you just
8 raised, Chairman Spitzer, about how you balance the
9 time value of money and the impact on competition, and
10 it's in large part because it has been focusing on
11 Qwest, Qwest remedies.

12 CHMN. SPITZER: Counsel, final question at
13 issue here, and I suppose this started with the letter
14 I filed in the docket and the responses by Qwest, I
15 believe it was in March of this year, of a distinction
16 between a settlement of outstanding disputes between
17 an RBOC and a CLEC which if appropriate is favored by
18 public policy as opposed to an improper linkage of
19 unresolved issues and unrelated issues, the 271 aspect
20 was of concern to me. I didn't see that addressed in
21 your pleading. What's your position with regard to
22 how a finder of fact would ultimately cast the
23 agreement or agreements between Eschelon, your client,
24 and Qwest?

25 MR. CAMPBELL: In terms of whether they were

1 settlement agreements or embodied other --

2 CHMN. SPITZER: Whether there was a, on the
3 one hand, Qwest's argument that this is an appropriate
4 settlement of disputed issues as opposed to the
5 argument by Staff and RUCO that we have the improper
6 linkage of unrelated issues. And I won't use the word
7 contract adhesion, that's a term of art in contract
8 law, but the relationship between CLEC and RBOC is
9 unique.

10 MR. CAMPBELL: Right. Well, our position
11 first of all on the adhesion point is that obviously
12 Eschelon didn't have the same bargaining leverage that
13 Qwest did at all in these transactions. With respect
14 to the 271 nonparticipation provision that you
15 referenced, Eschelon felt that if Qwest made the
16 service improvements that we had hoped they would that
17 it wouldn't be necessary to participate in 271. And
18 you may recall Eschelon sent a letter to the
19 Commission at about this time saying that they were
20 entering into negotiations with Qwest and wouldn't be
21 participating in at least the upcoming 271 cases.

22 At the same time, my, to answer your question
23 fairly, I think that when you look at all the
24 agreements together, there are some provisions of
25 those agreements that are clearly settlements of

1 disputes, past disputes, and other aspects that are
2 clearly prospective contracts dealing with prospective
3 issues and prospective arrangements. So it's a mix.

4 CHMN. SPITZER: Okay. And I guess the final
5 thought for, to gauge your reaction, I don't want to
6 use up too much time here, save most of it for the
7 hearing, but I would like to know your general views
8 from an introductory matter.

9 Lawyers tend to focus on legal issues, but we
10 have a fairly substantial economic issue, and it's
11 derived I think from the '96 Act which is a
12 requirement imposed upon the RBOCs to make their
13 networks open on a wholesale basis to competitors.
14 And it's been argued recently by the lobbyists for the
15 RBOCs in Washington that this is an "unnatural act"
16 and therefore cannot be sustained, but nevertheless,
17 at least for now, the law of the United States is the
18 RBOCs' networks are to be opened up to competitors,
19 and from an economic point of view, you have a
20 conflict. And the term contract adhesion I alluded to
21 earlier really is derived from the so-called unnatural
22 act where the incumbent is leasing facilities to
23 competitors to take away its customers.

24 And I'm wondering, we have a complicated
25 series of agreements between your client and Qwest.

1 How much of, or what, to what proportionate degree is
2 the, are the settlements derived from this economic
3 relationship in which Eschelon felt it was imperative
4 to maintain the good will of the RBOC as opposed to
5 settling disputes or a belief that if this all worked
6 out Eschelon could support 271? How much is derived
7 from the simple economics of this structure imposed by
8 Congress?

9 MR. CAMPBELL: I don't know how to quantify
10 that, Chairman Spitzer. Certainly that's an aspect of
11 it. There's no question that that's an aspect of it.
12 Qwest was Eschelon's sole supplier for the product
13 that they needed. We didn't have anyplace else to
14 turn for the product that we needed. To the extent it
15 wasn't provided to us in a timely, acceptable fashion,
16 we lost customers, either existing customers or we
17 lost potential future customers. So we had -- our,
18 the view, the economic view that I think, the choice
19 that we had in the year 2000, Chairman Spitzer, was
20 that to try to take these Qwest comments about a new
21 day at face value and negotiate as best we could
22 without the economic leverage or devote substantial
23 resources to regulatory and court litigation.

24 CHMN. SPITZER: And, of course, going into
25 litigation doesn't save you the customers that are

1 angry and quit.

2 MR. CAMPBELL: And it is a timely process as
3 the Chairman knows.

4 CHMN. SPITZER: Thank you.

5 Ms. Rodda.

6 ALJ RODDA: Thank you, Commissioner Spitzer.

7 Ms. Scott.

8 MS. SCOTT: Thank you, Judge Rodda, Chairman
9 Spitzer, Commissioner Gleason.

10 RUCO did a very good job summarizing the
11 transactions that took place before Eschelon and
12 McLeod, so I'm not going to focus on those
13 transactions in my summary. What I would like to do
14 is just give a short history of the earlier portions
15 of this docket for those who are not familiar with the
16 procedural history, and then also briefly summarize
17 Staff's position.

18 The issue of Qwest's compliance with
19 Section 252(e) of the Act was first raised in
20 Minnesota in February, 2002. Section 252(e) of the
21 Act requires the ILEC to file all interconnection
22 agreements with the state Commission for approval. In
23 Minnesota, the Department of Commerce filed a
24 complaint against Qwest alleging that they had not
25 filed certain agreements with the Commission for

1 approval as required. Not long after, this Commission
2 commenced its own investigation into this issue.

3 Staff was ordered to submit all of the
4 unfiled agreements under seal for review by the
5 Commission. There were approximately 90-some
6 agreements that were ultimately put into the record of
7 this docket. The Commission gave all parties in both
8 the 271 proceeding and this proceeding an opportunity
9 to comment on the issues raised. During this initial
10 phase of the proceeding, limited comments were
11 received. Staff's first report was based in large
12 part upon comments filed by Qwest and AT&T, both of
13 which filed extensive written comments on the
14 underlying statutory construction arguments for a
15 narrow versus a broad reading of the statute.

16 At a subsequent procedural conference held to
17 discuss further action in this matter, additional
18 facts were raised by RUCO, WorldCom, and others,
19 including the existence of oral agreements which led
20 to additional discovery and investigation. Chairman
21 Spitzer also sent a letter to parties asking for
22 comment on the effect of the nonparticipation clauses
23 contained in the agreements on the 271 record. Staff
24 issued a supplemental report on August 14th, 2002.

25 Staff's supplemental report was based upon

1 the comments received in response to Chairman
2 Spitzer's letter as well as discovery conducted by
3 Staff on all of the CLECs doing business in Arizona.
4 The comments and responses reviewed by Staff indicated
5 that most CLECs with the exception of Eschelon
6 believed that all of the agreements that constituted
7 interconnection agreements between them and Qwest had
8 been filed with the Commission for approval. However,
9 the discovery also indicated the existence of an oral
10 agreement providing a pricing discount with McLeod as
11 well as evidence that Qwest willfully and
12 intentionally chose not to file certain agreements
13 between itself and McLeod and Eschelon with the
14 Commission for approval as it is required to do so, or
15 to do.

16 In addition, at that time, RUCO issued its
17 own investigative report which also found that Qwest
18 had acted intentionally in not filing certain
19 agreements with Eschelon and McLeod with the
20 Commission for approval. Staff's supplemental report,
21 therefore, found that additional investigation was
22 needed to determine whether Qwest acted in contempt of
23 the Commission rules in not filing the Eschelon and
24 McLeod agreements with the Commission. If it was
25 found that Qwest had acted intentionally, then Staff's

1 position was that additional penalties would be
2 appropriate under ARS 40-424.

3 The facts uncovered by Staff's witness Marta
4 Kalleberg as well as RUCO's witnesses Clay Deanhardt
5 and Mary Lee Diaz Cortez all demonstrate the fact that
6 agreements existed between Qwest, Eschelon, and McLeod
7 which affected ongoing interconnection terms and
8 conditions that had not been filed by Qwest with the
9 Commission. Moreover, the facts will also demonstrate
10 that Qwest's actions were intentional in not filing
11 these agreements.

12 Staff also believes that the agreements which
13 contain broad nonparticipation clauses preventing
14 others from participating in regulatory proceedings
15 before the Commission were also intentionally and
16 willfully not filed by Qwest.

17 Qwest attempts to argue that the standard for
18 filing was unclear. Staff disagrees. Staff believes
19 that the standard for filing was very clearly set
20 forth in the 1996 Act. Staff does concede, however,
21 that there was some confusion on the part of CLECs
22 whether certain agreements had to be filed.

23 Staff also would be the first to admit that
24 there are also some gray areas which were ultimately
25 resolved by the FCC's order. Agreements with at least

1 nine carriers in this docket, carriers other than
2 Eschelon and McLeod, Staff believes could reasonably
3 be construed to fall within a category where Qwest had
4 legitimate interpretational differences. However,
5 this is not the case with respect to the Eschelon and
6 McLeod agreements, and the evidence with respect to
7 Eschelon and McLeod is that Qwest knew that many of
8 these agreements should have been filed with the
9 Commission. However, Qwest chose not to file them
10 with the Commission specifically because it did not
11 wish to make the benefits of these agreements
12 available to other CLECs to opt into.

13 Qwest also attempts to make a case that no
14 harm resulted from its failure to file the agreements.
15 However, as the testimony of Staff's witness and
16 RUCO's witnesses demonstrate, discrimination did occur
17 with respect to other CLECs and harm to the integrity
18 of the Commission's regulatory processes including the
19 271 process did unquestionably result. Staff's
20 additional recommended penalties recognize that
21 Qwest's actions in not filing the Eschelon and McLeod
22 agreements and the agreements containing
23 nonparticipation clauses was intentional, willful, and
24 contrary to Commission rules and federal rules.

25 In sum, it's Staff's position that Qwest's

1 behavior with regard to the Eschelon and McLeod
2 agreements and the nonparticipation agreements were
3 designed to intentionally deceive the Commission and
4 circumvent the regulatory process and that
5 discrimination and harm to other CLECs and competition
6 in Arizona resulted. While Staff recognizes that the
7 monetary penalties it is recommending in this
8 proceeding are very large, Staff believes these
9 remedies are appropriate given the nature of Qwest's
10 conduct and the impact of it in Arizona.

11 ALJ RODDA: Thank you, Ms. Scott.

12 Commissioner Gleason or Commissioner Spitzer,
13 do you have anything?

14 We'll take a ten-minute break, and then we'll
15 start with Mr. Brotherson.

16 (A recess ensued.)

17 ALJ RODDA: Let's go back on the record.

18 We've got Mr. Brotherson on the stand. Have
19 you been sworn in yet?

20 MR. BROTHERSON: I have not.

21

22

23

24

25

1 LARRY B. BROTHERRSON,
2 called as a witness on behalf of Qwest, having been
3 first duly sworn by the Certified Court Reporter, was
4 examined and testified as follows:

5

6

DIRECT EXAMINATION

7

8 Q. (BY MR. SPIVACK) Mr. Brotherson, I have
9 placed before you for identification four exhibits.
10 Marked as Q-1 is your direct testimony, public
11 version, with attached Exhibits LBB-1 to LBB-25.
12 Qwest-2 is your direct testimony, trade secret
13 version, with a version of LBB-1 attached. Qwest-3 is
14 your rebuttal testimony, the public version, with
15 Exhibits LBB-29 to LBB-33 attached. And Qwest-4 is
16 your trade secret rebuttal testimony with exhibits
17 LBB-26 to LBB-28 attached. Do you have those before
18 you?

19 A. I do.

20 Q. And are those --

21 MR. SPIVACK: Your Honor, would you like me
22 to move these in one at a time or go through each one?

23 ALJ RODDA: No. Are there any objections to
24 Q-1, 2, 3, or 4?

25 Mr. Wolters.

1 MR. WOLTERS: Your Honor, I take it that to
2 the extent that the witnesses are testifying about
3 legal issues that the Commission will give the
4 appropriate weight to that testimony and that we do
5 not have to get into a big discussion over legal
6 testimony.

7 ALJ RODDA: Yes, please, let's not do that.

8 MR. WOLTERS: With that, I have no
9 objections.

10 ALJ RODDA: All right. We will admit Q-1,
11 Q-2, Q-3 and Q-4.

12 MR. SPIVACK: Thank you, Your Honor. I
13 presume that includes the attached exhibits?

14 ALJ RODDA: And the attached exhibits. But
15 clarify for me, Q-1 is the public version of the
16 direct testimony, and you said that did include LBB-1?

17 MR. SPIVACK: Yes.

18 Q. (BY MR. SPIVACK) Mr. Brotherson, could you
19 check, on the public version, does that have a version
20 of LBB-1 attached?

21 A. The exhibit?

22 Q. Yes.

23 A. It starts with LBB-2.

24 MR. SPIVACK: Thank you, Your Honor, for the
25 clarification.

1 ALJ RODDA: Okay. So for purposes of this
2 hearing, LBB-1 is confidential, and LBB-26 through
3 28 --

4 MR. SPIVACK: That's correct.

5 ALJ RODDA: -- but LBB-2 through 25 is public
6 and LBB-29 through 33 is public.

7 MR. SPIVACK: That's correct.

8 ALJ RODDA: Okay.

9 Q. (BY MR. SPIVACK) Mr. Brotherson, could you
10 summarize your testimony for us, please.

11 A. Sure.

12 The purpose of my testimony today is to point
13 out a number of facts for the Commission's
14 consideration in the proceedings. First, I talk about
15 how at the time these settlement agreements were
16 negotiated, there was no clear standard as to what
17 should or should not be filed. There was a general
18 principle that interconnection agreements should be
19 filed, that settlement agreements were not filed.
20 There was also I would say confusion in the law
21 regarding reciprocal compensation for ISP traffic
22 which was also involved. Even Staff has said they can
23 understand that someone could have a problem with the
24 standard. We certainly agree with that.

25 Second, my testimony addresses the

1 discrimination issue by identifying that other
2 contracts, form agreements, or SGAT language was on
3 file and available for CLECs, and in terms of the
4 penalties that the discriminatory impact to CLECs was
5 not there in terms of the fact that they could avail
6 themselves to similar provisions in other contracts.

7 Third, with respect to McLeod and Eschelon
8 agreements, Mr. Deanhardt and Staff have looked at
9 these agreements and drawn certain inferences. I
10 wanted to in my testimony point out facts for the
11 Commission to consider that are inconsistent with
12 those inferences.

13 Finally, my testimony addresses the remedial
14 steps Qwest has taken to avoid these problems in the
15 future. We filed with the FCC, the FCC has
16 articulated a standard, and after that standard was
17 articulated, Qwest has used it. We certainly welcome
18 the clarity it provides. We have set up a formal
19 process with a Review Committee to apply these
20 standards to any settlement agreements and make sure
21 this doesn't happen in the future. We've been
22 reviewing agreements since last June for any ongoing
23 agreements or settlements, and Qwest has agreed to an
24 independent auditor to assure this Commission that our
25 actions and the remedial steps that we've taken are in

1 fact working.

2 And that summarizes my testimony.

3 MR. SPIVACK: Thank you, Mr. Brotherson.

4 I would tender Mr. Brotherson for
5 cross-examination.

6 ALJ RODDA: Mr. Pozefsky.

7 MR. POZEFSKY: Thank you, Your Honor. Your
8 Honor, most of my cross-examination I have a feeling
9 is going to go into confidential stuff. If
10 Mr. Brotherson's original direct testimony is
11 confidential, I have a lot of questions out of that,
12 starting right from the get-go. So I guess my request
13 at this point is to let's make this under seal.

14 ALJ RODDA: Okay.

15 Mr. Wolters.

16 MR. WOLTERS: Judge Rodda, we have our state
17 manager here, Pat Cushman. He has not had an
18 opportunity to sign Exhibit A, but he will do so
19 shortly. I would ask if Qwest has objections to him
20 remaining in the room. Like I say, he is state
21 manager for regulatory affairs.

22 ALJ RODDA: Do you have any objections to him
23 staying in the room?

24 MR. SPIVACK: No, Your Honor, we do not.

25 MR. WOLTERS: Thank you.

1 ALJ RODDA: Any other issues related to the
2 confidentiality issue? Okay.

3 I have to ask anyone in the room who hasn't
4 executed a confidentiality agreement to please leave,
5 and I will turn off the Listen Line. It is my
6 understanding that both parties on the bridge line,
7 Mr. Dixon and Mr. Dougherty, have executed the
8 agreement.

9 MR. DIXON: This is Tom Dixon, Your Honor,
10 and that is correct. I have executed the agreement
11 and will comply with it.

12 MR. DOUGHERTY: So have I.

13 ALJ RODDA: For anyone listening in, I will
14 turn off the PA system, but we will be back when we
15 can.

16 MR. SPIVACK: Your Honor, just about the
17 protective order, Mr. Lundy has let me know, there may
18 be some Qwest employees in the room who haven't
19 executed a protective agreement. If we could have the
20 same agreement and make sure that they sign the
21 protective agreement.

22 ALJ RODDA: Okay. Does anyone have any
23 objection? Mr. Quinn says he hasn't signed it yet.

24 Okay. That's fine.

25 MR. POZEFSKY: Your Honor, one other thing as

1 far as procedural matters. I have handed to the court
2 reporter and also copies to all the parties a list of
3 RUCO's exhibit list. I've enclosed as Exhibit No. 1
4 RUCO's testimony of Ms. Cortez, Mr. Johnson, and
5 Mr. Deanhardt, and that's the confidential version. I
6 don't have the public version with me, but I will
7 provide a copy down here and will mark that
8 separately.

9 ALJ RODDA: Okay. We're going to mark the
10 transcript from this point.

11 (The following pages contain confidential
12 information.)

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CONFIDENTIAL

CONFIDENTIAL PAGES
BOUND UNDER SEPARATE
SEALED COVER:

52 through 131.

1 (Continuation of open hearing.)

2

3 ALJ RODDA: Ms. Scott was going to raise a
4 procedural issue.

5 MS. SCOTT: Yes, Staff has prepared a list of
6 all the unfiled agreements that were submitted by
7 Qwest and other parties into the record of this
8 proceeding, and we would like to file this list as a
9 joint exhibit, if the other parties would agree to
10 that, and also put the contracts themselves into the
11 record here. They are right now marked as
12 confidential, and I have a copy for yourself and also
13 for the --

14 ALJ RODDA: Witness or court reporter?

15 MS. SCOTT: Court reporter. I'm sorry.

16 ALJ RODDA: Okay. Has everyone had a chance
17 to look at Staff's list of the agreements?

18 MR. POZEFSKY: Your Honor, I believe that's
19 one of the exhibits that I had at least marked.

20 ALJ RODDA: Well, you marked the list, but
21 she's asking I think for the admission of the
22 underlying agreements.

23 MR. SPIVACK: Your Honor, I --

24 MR. DIXON: Your Honor, this is Tom Dixon.
25 If I could ask a question. I'm sorry, I'm getting

1 somewhat of an echo. Are you getting that from my
2 end?

3 ALJ RODDA: No.

4 MR. DIXON: Okay.

5 The only question I have about Staff's
6 introduction of the contracts, I want to make sure I
7 know what contracts relating to WorldCom are being
8 entered. Three were discussed. To my knowledge, two
9 have been approved by the Commission. However, the
10 June 29 what is called Confidential Billing and
11 Settlement Agreement was made public without the
12 settlement number. So I guess I am asking is Staff
13 introducing that same document with that same
14 redaction.

15 MS. SCOTT: Staff would note that all three
16 of the WorldCom agreements are on this list, and
17 therefore, we would be submitting all three of those
18 agreements now to put into the record. They are
19 classified as confidential, however.

20 MR. DIXON: All right. That's what I wasn't
21 clear on. I have no objection as long as they are
22 treated as confidential or at least those portions
23 which we previously requested be treated as
24 confidential be treated as such, to either the list or
25 the contracts.

1 ALJ RODDA: All right. Thank you, Mr. Dixon.
2 You had a comment, Mr. Spivack?

3 MR. SPIVACK: Your Honor, I was just going to
4 state Qwest's position which is we have no objection
5 either. We think since we produced these agreements,
6 we certainly would stipulate to their authenticity and
7 their foundation as business records.

8 ALJ RODDA: Okay.

9 MR. WOLTERS: AT&T would have no objection
10 and would support Staff in its request.

11 MR. POZEFSKY: Same with RUCO.

12 MR. CAMPBELL: Eschelon would have no
13 objection. I will note, though, for the record
14 something Mr. Wolters mentioned before. If you look
15 at Qwest Document No. 90, it is a Time Warner
16 agreement. I believe there are filings pending in
17 this case objecting to that because it is actually an
18 agreement in Colorado, not Arizona.

19 MS. SCOTT: I would note for the record there
20 are other agreements on here that may deal with other
21 states. However, we wanted to file a list of all of
22 the agreements that were filed with us as not being
23 filed in Arizona and the accompanying agreements.
24 Even though we did not find that some of them should
25 have been filed as interconnection agreements, we

1 wanted Your Honor to have all of the agreements and
2 the complete list.

3 ALJ RODDA: Okay. So we'll admit the
4 agreements subject to their various confidentiality
5 provisions. We would note that not all of these
6 agreements are necessarily, I'm not sure what the word
7 is I'm looking for, relevant. That's not exactly the
8 word I'm looking for, but --

9 MR. CAMPBELL: In the case that we had, it
10 was just the Colorado agreement that was inadvertently
11 produced to the Staff.

12 ALJ RODDA: And I will note for those of you
13 on the phone that they're a lovely rainbow color.

14 THE COURT REPORTER: This will be Joint-1, is
15 that correct?

16 MS. SCOTT: Yes, we would like the list
17 marked as a joint exhibit.

18 ALJ RODDA: I think this is my first joint
19 exhibit in seven years.

20 MR. WOLTERS: And I guess I would ask Staff
21 then that when referring to an agreement, if we were
22 going to use this list to actually refer to the
23 agreements for purposes of briefing, do we want to
24 refer to it as a Joint Exhibit 1, Exhibit or
25 Contract 1, or how do we want to refer to these

1 agreements globally?

2 MS. SCOTT: One way of doing it would be to
3 call it Joint Exhibit 1-1, Joint Exhibit 1-2, through
4 96. There are 96 agreements.

5 ALJ RODDA: Okay. So if the record is not
6 clear, Joint Exhibit 1 and its accompanying 96
7 subparts, which are the agreements themselves, is
8 admitted.

9 Is there anything else, Ms. Scott?

10 MS. SCOTT: No. I do have a few questions
11 for the witness, though.

12 ALJ RODDA: Yes, I knew you had a few
13 questions, but before you get to your questions --

14 MR. WOLTERS: I just have one question. I
15 note there are some Eschelon agreements on the list,
16 and a number of those were public and were produced in
17 Minnesota. Were they marked as confidential --

18 MS. SCOTT: Yes.

19 MR. WOLTERS: -- in the joint exhibit?

20 MS. SCOTT: I guess what I would suggest with
21 respect to that is since we are all uncertain as to
22 actually which are confidential now and which are not
23 that perhaps the parties get together after the
24 hearing and come to agreement on which of these
25 contracts can, the terms can be referred to publicly

1 and which are still subject to the confidentiality
2 restriction. For now, though, I would prefer to keep
3 them all confidential because I can't say for certain
4 which ones have been disclosed at this point and which
5 ones have not.

6 ALJ RODDA: Mr. Campbell.

7 MR. CAMPBELL: Yes. Eschelon, if it is okay
8 with Qwest, Eschelon is happy to waive any
9 confidentiality on the 18 Eschelon agreements that are
10 listed here, if that would make it easier for the
11 hearing. I think Qwest would have to sign off on
12 that, too, but it would be fine with us.

13 MR. SPIVACK: We have no objection to that.

14 ALJ RODDA: Excellent.

15 MR. SPIVACK: I mean, I think from our
16 standpoint, as Mr. Wolters referred, part of our
17 concern with marking things as confidential is that
18 CLECs have a chance, who are parties to the agreement
19 have a chance to weigh in and say whether or not it is
20 their position that the agreement should be
21 confidential. So that is why in a lot of these cases
22 why we have marked things as confidential.

23 ALJ RODDA: I can understand that. And since
24 we have Eschelon here, I think that is going to be
25 very helpful.

1 MR. WOLTERS: So from this point forward,
2 they are considered public documents, all the Eschelon
3 agreements contained on this list?

4 ALJ RODDA: It's my understanding, the
5 Eschelon agreements.

6 Any time you're ready.

7

8

CROSS-EXAMINATION

9

10 Q. (BY MS. SCOTT) Okay. Good afternoon,
11 Mr. Brotherson. My name is Maureen Scott, and I'm the
12 attorney for Staff.

13 Before I start, I just want to ask you that
14 if at any point I ask you any questions that you feel
15 would be more appropriately answered by another
16 witness that you just so state.

17 Do you have a copy of the direct testimony of
18 Staff's witness, Marta Kalleberg, in front of you?

19 A. I believe I have it here in my briefcase.

20 ALJ RODDA: Could we clear away, if some of
21 these RUCO binders aren't needed? Are you going
22 to --

23 MS. SCOTT: No, I won't use those.

24 MR. POZEFSKY: Your Honor, do you want me to
25 put them on the floor?

1 ALJ RODDA: I think if we just move them --

2 THE WITNESS: I have a copy of her direct
3 testimony, Ms. Scott.

4 Q. (BY MS. SCOTT) Okay. Do you have her
5 unredacted testimony?

6 A. It's marked confidential on the cover page --

7 Q. Okay.

8 A. -- so I'm assuming so, but maybe if there's a
9 page we get to that I don't have, you can help me
10 through it.

11 Q. Okay. My approach is going to be a little
12 different than Mr. Pozefsky's. What I've done is I've
13 gone through your direct and rebuttal testimony and
14 I've marked portions of your testimony in areas where
15 the Staff has questions regarding something that
16 you've said.

17 So I'd like to start out referring you to
18 your direct testimony on page 3, and at lines 15
19 through 17, you state that you focused on the 28
20 agreements that Staff identified as being subject to
21 the 252 requirement in the August 14th, 2002
22 Supplemental Staff Report, correct?

23 A. That's correct.

24 Q. Okay. And then, let me cross reference you
25 on this point to your rebuttal testimony, page 20.

1 A. Okay.

2 Q. I believe there might be some confusion on
3 how you've interpreted Staff's list of agreements that
4 should have been filed as interconnection agreements.
5 On page 20, at lines 18 through 21 of your rebuttal
6 testimony, you state that although both lists contain
7 28 agreements, there are a number of differences,
8 correct?

9 A. Yes.

10 Q. And then you state that Staff removed four
11 facility decommissioning agreements and several
12 settlement agreements, is that correct?

13 A. Yes.

14 Q. And that this indicates that there's a lack
15 of, there was a lack of clarity in the FCC's standard,
16 correct?

17 A. I think I said that Staff made the statement
18 that it revised its list in light of the October 4th
19 Order. I don't know as I would say that the Order
20 doesn't lay out a clarity of standard.

21 Q. Okay. Well, putting that aside, would you
22 please now turn to page 16 of Ms. Kalleberg's
23 testimony.

24 A. All right.

25 Q. And do you see Table 4 in the middle of that

1 page --

2 A. I do.

3 Q. -- agreements filed for Commission approval
4 in September of 2002?

5 A. I see that.

6 Q. And are there not four facility
7 decommissioning agreements listed on Table 4?

8 A. There are. Items 10 and 11, item 6, and
9 item 1.

10 Q. Okay. So is it clear to you that Staff did
11 not remove those as needing to be filed under Section
12 252 but merely set them apart in Table 4 because they
13 had already been filed by Qwest in September of 2002,
14 and subsequently approved by the Commission in
15 December of 2002?

16 A. It is now, if that's the Commission's
17 statement.

18 Q. Okay. So just to make sure that we are of
19 the same understanding then, if you look at Table 1 on
20 page 11 of Ms. Kalleberg's testimony, Table 1 lists 28
21 agreements that should have been filed for Commission
22 approval, correct?

23 A. Correct.

24 Q. And those together with the Table 4
25 agreements that had already been filed by Qwest comes

1 to a total of 42 agreements, correct?

2 A. 28 and 14 is 42. I'm assuming there's no
3 duplicates here, so yes.

4 Q. Okay.

5 A. Okay.

6 Q. Okay, turning to page 4 of your direct
7 testimony, I'm going to talk with you a little bit
8 about a subject that was discussed by Mr. Pozefsky
9 with you, and that is the method used by Qwest to
10 determine whether agreements should be subject to the
11 252(e) filing requirement. Is it correct, did I
12 understand your testimony correctly earlier that
13 attorneys were not involved initially in the
14 determination of whether something should be filed as
15 an interconnection agreement or amendment?

16 A. That would be correct. The general principle
17 I would say was that settlement agreements were not
18 generally filed, interconnection agreements were.
19 Attorneys were involved in reviewing at least some,
20 and I can't speak to all, but were certainly involved
21 in reviewing at least some settlement agreements to
22 assure they reflected the parties' understandings and
23 agreements, but would not, such a review would not
24 necessarily have been for all possible legal theories
25 or reasons, so I can't say that they reviewed it for

1 the filing requirement.

2 Q. Okay. Let me ask you a question then,
3 because in several of these settlement agreements, I
4 recall provisions that specifically stated that
5 portions of the agreement would be included in an
6 amendment to the parties' interconnection agreement.
7 Who was it that determined that that language should
8 go into the agreement?

9 A. I couldn't say who was involved in the
10 decision, but if that was part of the agreement with
11 the parties and it addressed something for an
12 interconnection agreement, they would have captured
13 that thought in the agreement and then would have been
14 obligated to follow through on whatever they committed
15 to in that agreement. And if that said they would
16 negotiate, excuse me, would incorporate something in
17 an interconnection agreement or file something in
18 conjunction with an interconnection agreement, they
19 would presumably do so because that was one of the
20 things that was negotiated and agreed to in the
21 settlement.

22 Q. Okay. So apparently, someone at Qwest was
23 determining or trying to determine whether portions of
24 the settlement agreements or business to business
25 arrangements had to be included in an amendment to the

1 parties' interconnection agreement, correct?

2 A. At least as for the ones you just described
3 where the parties agreed to negotiate an amendment or
4 file something as an amendment, that would be true.

5 Q. Just bear with me for one moment.

6 Let me go back for a moment to the tables of
7 agreements that are contained in Marta Kalleberg's
8 testimony.

9 A. Table 1, 2?

10 Q. Let's look at Table 1 initially. Do you have
11 that?

12 A. I'm not sure I do. I have -- is that one of
13 the redacted pages perhaps? I start with Table 2
14 on --

15 Q. This is on page 11.

16 A. Oh, it's just, 2 is ahead of 1. I'm sorry.

17 Q. Okay. On your exhibit LBB-1, I believe that
18 you went through Staff's initial list of 28 agreements
19 contained in Staff's Supplemental Report that Staff
20 believed fell under the definition of an
21 interconnection agreement, is that correct?

22 A. Yes.

23 Q. And in your table, going through each of
24 those agreements, you either agreed with Staff or
25 disagreed as to whether you felt the agreement

1 contained ongoing obligations pertaining to
2 Section 251, correct?

3 A. Yes.

4 Q. On Table 1 in Ms. Kalleberg's direct
5 testimony, now knowing that there are agreements in
6 this table that may not have been in the original list
7 of 28 that were a part of Staff's supplemental
8 testimony, can you offer any opinion as to whether you
9 agree or disagree that these would qualify as
10 interconnection agreements? Or let me make that more
11 specific. Those that were not included in the list
12 attached to Staff's Supplemental Report.

13 MR. SPIVACK: Your Honor, I'm sorry if this
14 is just me. I'm lost here. Are we talking about
15 Table 1 as compared to Exhibit G?

16 MS. SCOTT: Yes.

17 MR. SPIVACK: Okay. And you're asking
18 Mr. Brotherson whether he has reviewed Table 1 to
19 determine whether those agreements, whether he has any
20 agreement or disagreement on those agreements?

21 MS. SCOTT: Yes, yes.

22 MR. SPIVACK: Okay. Thank you.

23 THE WITNESS: I didn't structure it that way,
24 so I would have to go back. I think some of the
25 agreements on Table 1 are in my exhibit, but I'm not

1 sure I've got a one for one match because I based it
2 on a different table.

3 MS. SCOTT: Well, if the witness would like
4 to look at this overnight and respond to this question
5 tomorrow, that would be fine with Staff.

6 ALJ RODDA: Are you planning on being here
7 tomorrow?

8 THE WITNESS: I will be here until I'm
9 released by the Commission.

10 ALJ RODDA: I mean, or we could take -- I
11 mean, is it something that would take a long time to
12 do or we could do it --

13 THE WITNESS: Well, I think a number of the
14 agreements that are on Table 1 are also on my
15 document, but my document was not tied to the original
16 Table 1. It was tied to the supplemental Table 1. So
17 my exhibit matched to the supplemental table, and the
18 question is does my exhibit, how do I feel in
19 comparing my exhibit to the original table. I'd have
20 to go through, clearly some of these are going to
21 match up, and I've already addressed those, but there
22 will be some on here I haven't addressed, I would
23 presume. And I don't know if just sitting here I can
24 answer that question without, by just looking at the
25 title of the document without knowing what it is and

1 what's in it. I would have to take the time to review
2 it.

3 ALJ RODDA: I guess what I'm asking, we're
4 due for a short break. We could take 15 minutes and
5 you can do that, but if you can't do it in 15 minutes,
6 then we should go on. I mean, we should do it some
7 other time or overnight.

8 THE WITNESS: I really don't think I can do
9 it in 15 minutes.

10 ALJ RODDA: Okay. That was the question.
11 Then maybe you can do that after the hearing.

12 MS. SCOTT: Okay. There is one other similar
13 question that I have for the witness, and I don't --

14 ALJ RODDA: Someone is writing down these
15 homework assignments, right?

16 MR. SPIVACK: Yes, we are.

17 Q. (BY MS. SCOTT) I don't think this will take
18 him as long. Staff also has a Table 3, Terminated
19 Agreements on page 13 of Ms. Kalleberg's testimony,
20 and Mr. Brotherson, I'd like you to verify my math.
21 If you look at Table 3, and again, if you want to do
22 this overnight, that's fine. If you look at Table 3,
23 it contains 23 agreements which means going back to
24 Table 1, and I've done a comparison of the agreements
25 on both tables, only 5 of those would be subject to

1 filing under Qwest's interpretation then, because all
2 of the others have been terminated.

3 ALJ RODDA: Is there a question?

4 MS. SCOTT: Yes, I just --

5 ALJ RODDA: Is that right or --

6 MS. SCOTT: Yes, I want him to just agree or
7 disagree with that.

8 THE WITNESS: I'm not sure what the 5 are you
9 feel should be filed, but certainly my testimony and
10 the FCC's decision talked about terminated agreements
11 did not require to be filed.

12 Q. (BY MS. SCOTT) Okay. Let me give you the
13 numbers of the 5 so we can just make sure we're in
14 agreement then: 1, 21, 22, 25, and 26.

15 A. Attachment 1?

16 Q. Of Table 1.

17 A. Could I have those numbers again?

18 Q. Yes, 1, 21, 22, 25, and 26.

19 A. Thank you.

20 Q. Okay. And Mr. Brotherson, you had a
21 conversation earlier with Mr. Pozefsky about Qwest's
22 template interconnection agreement, is that correct?

23 A. Yes.

24 Q. And I believe if I understood your testimony
25 correctly, you stated that the template

1 interconnection agreement that Qwest used for several
2 years was subsequently replaced by the Statement of
3 Generally Available Terms and Conditions, is that
4 correct?

5 A. That's correct.

6 Q. And when did Qwest begin negotiating its SGAT
7 in Arizona?

8 A. I can't answer that. I was part of the 271
9 negotiating team dealing with the BFR process and
10 general terms and conditions, but we were rather late
11 in the process. They had already, other teams had
12 already addressed interconnection and unbundled
13 elements, and I don't recall the dates they started.
14 But certainly it had been going on for some time.
15 Early 2002, perhaps. I suspect Mr. Dixon would know.
16 He was there with me.

17 Q. And do you know how many iterations of the
18 SGAT Qwest has gone through in Arizona?

19 A. I'm not sure what you mean by iterations, but
20 certainly we went through the document paragraph by
21 paragraph negotiating the language of a lot of the
22 different paragraphs in the document. So the
23 negotiating process resulted in a lot of changes in
24 the language, a lot of give and take back and forth.
25 I don't know if they were different reiterations or

1 not, but they were, certainly the end document was
2 something that the parties either agreed to or where
3 we didn't agree, the Commission resolved it for us.
4 But the negotiating process was, took many, many
5 months, and there were many meetings going over
6 paragraph language.

7 Q. And did those negotiations all take place
8 within the context of Qwest Section 271 workshops?

9 A. Yes. The SGAT, Standard Generally Available
10 Terms, was a provision in 271 that said, you know, an
11 ILEC in seeking 271 relief should have available a
12 Statement of Generally Available Terms and Conditions,
13 which was the purpose of going through the workshop
14 process.

15 Q. Okay.

16 Is it correct that you rely upon the
17 interconnection template and the Statement of
18 Generally Available Terms and Conditions in not filing
19 some of these agreements with the Commission?

20 A. I don't rely on those for a determination as
21 to whether or not the agreements should have been
22 filed, but I did talk about those agreements in the
23 sense that in a claim that a CLEC was somehow deprived
24 of the ability to take advantage of a particular
25 provision, if there was a similar provision in another

1 agreement available, I pointed that out. That was not
2 intended to address whether or not the first agreement
3 should have been filed, but only to go to the penalty
4 and discrimination issues.

5 Q. Okay. So going to page 10 of your testimony,
6 and I guess that's carried on onto page 11.

7 ALJ RODDA: You're referring to the direct,
8 right?

9 MS. SCOTT: Yes.

10 Q. (BY MS. SCOTT) In fact, I think the best
11 synopsis appears at lines 15 through 20 of your direct
12 testimony.

13 A. The section captioned Agreements with
14 Allegiance, A-l-l-e-g-i-a-n-c-e?

15 Q. No, this is page 11 of your direct testimony.

16 A. I'm sorry.

17 Q. Lines 15 through 20.

18 A. I have that.

19 Q. And there you discuss a template
20 interconnection agreement in the SGAT. You state,
21 "For the purposes of demonstrating that at least some
22 of the provisions at issue were generally available to
23 all CLECs through these documents," and then you go on
24 to state that as a result under the FCC's standards,
25 these provisions did not have to be filed and any

1 discriminatory effects of nonfiling were minimal.

2 A. Yes.

3 Q. But I believe you just said that just because
4 a provision is in the SGAT or the template
5 interconnection agreement or another party's
6 interconnection agreement doesn't mean that you
7 wouldn't have to file the agreement of another carrier
8 if it appeared in there, is that correct?

9 A. Well, I think what I said was that the
10 testimony was offered in response to the penalties and
11 to show that the impact on CLECs, the alleged
12 discrimination, would not have been there if there
13 were available provisions in another agreement that
14 was on file, let's say if a bill and keep agreement
15 wasn't filed but there was a bill and keep agreement
16 on file, then the bill and keep agreement would be
17 available for a CLEC to opt into.

18 As for a form agreement or a template
19 agreement, I think the FCC talked about that in their
20 Order. If it's a standard form, you know, I didn't
21 get into what's a standard form versus a contract
22 paragraph. I think the intent of my testimony was to
23 show that there were provisions available to these
24 people without maybe debating what the FCC meant by a
25 template form. And it was going more to the penalty

1 section.

2 Q. Okay. And all I'm trying to get at,
3 Mr. Brotherson, just so you're clear, is let's put the
4 discrimination --

5 A. All right.

6 Q. -- issue aside and the penalty issue aside.
7 What I am trying to understand is Qwest's
8 interpretation of its Section 252(e) filing
9 responsibilities today --

10 A. Yes.

11 Q. -- based upon the recent FCC Order.

12 A. And I would say those are spelled out in that
13 FCC Order, and that is the purpose of the committee,
14 to review to see if any of those agreements fall under
15 that language. They do talk about template and form
16 agreements that are on file for a CLEC and, you know,
17 or available on a Website and whether or not those
18 also have to be filed, but I'm really not here to
19 opine on what the FCC's, what I would do to determine
20 what's under the FCC guidelines. What I would do is I
21 would refer to the committee that Qwest has
22 established to review and determine the applicability.

23 Q. Okay. Well, my problem with that is that I
24 don't have anyone from your committee here to answer
25 these questions, so I'm going to have to rely on your

1 responses as the witness for Qwest as to whether or
2 not you feel some of the agreements would fall under
3 that standard.

4 A. I'll do my best.

5 Q. Okay. I'd like to give you a few
6 hypotheticals, because I still am a little confused
7 given your testimony in places about the SGAT and
8 template interconnection agreement.

9 A. All right.

10 Q. Let me give you the first hypothetical.
11 Let's say that the general, some of the general terms
12 and conditions, I believe that's, was it Section 12,
13 Qwest's SGAT, let's say that those were included in an
14 interconnection agreement that was subsequently
15 entered into with Cox. Is it your position that you
16 would not actually have to include those in that
17 agreement because they're already contained in the
18 SGAT?

19 A. If those were the identical terms that were
20 already on file in the SGAT, then perhaps under a
21 reading of the FCC's Order, those would not need to be
22 filed again. But at the same time, I would suspect
23 that you would file the agreement in its entirety if
24 you were filing an interconnection agreement, and that
25 would include the general terms and conditions. They

1 would generally be filed, but a literal reading of
2 what the FCC Order said might lead you to assume that
3 it would not be necessary to file duplicate language.

4 Q. And so let's take another example. The
5 general terms and conditions may not have been the
6 best example. Let's say reciprocal compensation. You
7 enter into an interconnection agreement with WorldCom,
8 and you both agree to a reciprocal compensation
9 provision of the SGAT. Then it's your position under
10 a literal reading of the FCC's Order that you're not
11 required to put those into the interconnection
12 agreement because they appear in the SGAT?

13 A. You know, I, I wish I had a copy of that FCC
14 Order up here with me because --

15 Q. And I have one if you would like it.

16 A. That would be nice, because I think their
17 language is what it is, and rather than me paraphrase
18 what they said about it, I would just refer to that.

19 Q. In fact, if you have Ms. Kalleberg's
20 testimony, it's Exhibit S-2 that's attached.

21 A. Okay. I'm sure I have it.

22 ALJ RODDA: While you're looking for that,
23 let's take a ten-minute break. It's about that time.

24 (A recess ensued.)

25 ALJ RODDA: Okay. We're back on the record,

1 and I think I interrupted you, Ms. Scott. If you
2 could remind us where we were.

3 Q. (BY MS. SCOTT) Mr. Brotherson, we were
4 talking about template, your template interconnection
5 agreement and Qwest's Statement of Generally Available
6 Terms and Conditions, and I believe the last
7 hypothetical I posed to you was reciprocal
8 compensation. And assuming that the reciprocal
9 compensation provisions were contained in the SGAT and
10 ELI wanted those same provisions, by reading your
11 testimony here, it appears to me that your position is
12 since it's already contained in the generally, the
13 Statement of Generally Available Terms and Conditions,
14 you wouldn't really have to put it in your
15 interconnection agreement with them.

16 A. My testimony, and the purpose of my testimony
17 is to address the issues that are in this hearing
18 which is what was Qwest legally obligated to do, what
19 Qwest should have done back in 2001, let's say. It's
20 my understanding that the committee since last June,
21 even though language is also in the SGAT files, would
22 file it again. Even though there is a form agreement,
23 they'll simply refile the form agreement. So we're
24 filing the duplicate language in every case to be very
25 cautious and to take that issue off of the table. So

1 in responding to your hypothetical, I would say that
2 Qwest would file, even though it's in the SGAT
3 language, Qwest would file that language again with an
4 individual agreement with say a WorldCom.

5 However, as to the issue what should have
6 Qwest filed in 2001, let's say, I think the language
7 of the FCC Order is relevant for purposes of
8 determining penalties and for purposes of determining
9 whether or not CLECs were discriminated against if
10 other provisions provided the same thing.

11 Q. Okay. And could I ask you what language of
12 the FCC Order that you're relying upon?

13 A. I think there's -- and again, I think the
14 attorneys would want to probably brief the Order as
15 well in their briefs, both sides I suspect, but a
16 couple of different places where it came up.

17 Q. Well, let me refer you to paragraph 9 of the
18 FCC Order. Is that what you are relying on?

19 A. That would be one of them. "Unless this
20 information is generally available to carriers (e.g.,
21 made available on an incumbent LEC's wholesale
22 Website), we find that agreements addressing dispute
23 resolution and escalation provisions relating to the
24 obligations set forth in Sections 251(b) and (c) are
25 appropriately deemed interconnection agreements."

1 Q. And that language does specifically refer to
2 dispute resolution and escalation provisions, correct?

3 A. Yes, that paragraph deals with that issue.

4 Then also in paragraph 13, it states, "We
5 agree with Qwest that forms completed by carriers to
6 obtain service pursuant to terms and conditions set
7 forth in an interconnection agreement do not
8 constitute either an amendment to or the
9 interconnection agreement or a new interconnection
10 agreement that must be filed under 252(a)(1)." So
11 there could be, for example, documents that are
12 completed by CLECs to order services that would not be
13 considered part of the interconnection agreement.

14 Q. Okay. And Mr. Brotherson, I'm actually glad
15 you went to that paragraph, because you also discuss
16 that in your testimony, and I had a few questions
17 relating to that.

18 A. Okay.

19 Q. How does Qwest interpret order and contract
20 forms used by a competitive LEC to request service?

21 A. Well, as a general statement, and, of course,
22 we offer a lot of different types of services, but as
23 a general statement, we often need specific
24 information from the CLEC about what it is that they
25 actually want in order to provide them with the

1 service. And I can't think of an example off the top
2 of my head specifically, but let's say MF signaling,
3 if a CLEC decides they want MF signaling as opposed to
4 SF-7 signaling, we are going to need certain technical
5 information from that CLEC before we can respond and
6 say, "Okay, now we understand what it is you want and
7 we will provide it." So there, we ask certain
8 information of that CLEC that enables us to make a
9 decision to respond to their request.

10 Q. So the type of form or information you're
11 talking about there would be more CLEC specific, is
12 that correct?

13 A. I would say generally. There may be other
14 CLECs with the same needs, but it's to extract
15 information as a general rule that would enable us to
16 respond to whatever it is that the CLEC is asking for.

17 Q. Okay.

18 In Ms. Kalleberg's testimony, she stated at
19 one point that, and let me just find the names of
20 these agreements. I believe it was an operator
21 services agreement, and another agreement that you had
22 entered into with Allegiance, an Inter-Network Calling
23 Agreement, and I believe you took exception to
24 Ms. Kalleberg's findings that those should have been
25 filed as interconnection agreements relying on

1 paragraph 13, is that correct?

2 A. I think I took exception because those were
3 not 251(b) or (c) services, that the FCC had held that
4 operator services, for example, was a competitive
5 service that we were not providing that under 251(b)
6 but rather were providing it under another section.
7 And I think with the exception of one state, states
8 have concurred that operator services are competitive
9 service. So the fact that we would have entered into
10 an agreement for operator services, we would not have
11 necessarily filed if it was not a 251(b) or (c)
12 service.

13 Q. Isn't it correct, though, that your Statement
14 of Generally Available Terms and Conditions, the
15 13th Edition, contains provisions relating to
16 directory assistance and operator services?

17 A. It does. It is my belief that it does.

18 Q. And isn't it also correct that these services
19 fall under the dialing parity obligations that the
20 ILEC has under Section 251?

21 A. Well, the dialing parity obligations are
22 certainly a 251 obligation. In other words, no matter
23 who the CLEC or Qwest, whether it's Qwest or the CLEC,
24 if you punch zero, you're supposed to go to the
25 operator. Very few CLECs in fact buy operator

1 services from Qwest. So if you are a subscriber of
2 the CLEC service and you punch zero, you don't go to
3 Qwest's operator. You go to -- there are a number of
4 companies out of Texas that provide operator services.
5 The larger CLECs, AT&T, Sprint, WorldCom all provide
6 their own operator services.

7 If you bought operator services from Qwest,
8 that would not be a 251(b) or (c) service but a
9 competitive service. But we do have references in the
10 SGAT dealing with operator services for such issues as
11 dialing parity so that, for example, if you dial zero,
12 everybody gets to the operator, to whatever operator
13 service provider they contract with.

14 Q. If Qwest subsequently entered into an
15 interconnection amendment with a CLEC that had opted
16 into the SGAT and that amendment changed the operator
17 services provisions of the SGAT, would Qwest be
18 required to file that under Section 252(e)?

19 A. Again, I guess that's one that I would be
20 more than happy to hand off to the committee. If, for
21 example, we had a pricing increase, if operator
22 services were not part of the Schedule A
23 interconnection prices but were competitively priced,
24 they may or may not file the competitive aspects of
25 it. I can't venture off the top of my head an opinion

1 as to that. But as a general rule, if there are
2 changes to the SGAT, and it's something that's in the
3 interconnection agreement, we're filing all
4 interconnection agreements, so it would be on file.

5 I'm not trying to be evasive, but, I mean,
6 there's a difference in the question of does the FCC
7 require it versus has Qwest taken it upon itself to
8 file all of these agreements. We are filing all of
9 the interconnection agreements, we're filing all of
10 the form contract language, if you will, and we have
11 been doing so since June, even if it's duplicative.
12 But in saying that, I don't want to deprive my
13 lawyers, if you will, of the ability to cite to the
14 FCC's Order to make whatever arguments they make
15 concerning a legal obligation to do so. So would we
16 file it? In all probability, yes, we would.

17 Q. Okay. Just so you understand, my concern is
18 not with interconnection agreements per se. It's with
19 settlement agreements that Qwest enters into in the
20 future with carriers, and if Qwest does not feel it's
21 legally compelled to place a provision in an
22 interconnection agreement, I think our concern would
23 be that you would have it in a settlement agreement
24 and simply would not file it with the Commission as
25 part of an amendment to an interconnection agreement.

1 A. I appreciate that, and I guess my response
2 would be first, we've established a formal process to
3 avoid problems in the future, and I think that's going
4 to minimize the number of these issues. I think also
5 we have agreed to a proposal I think from Staff to
6 accept an independent auditor, and so there would also
7 be an additional opportunity for this Commission to
8 review what activities the committee is doing and
9 whether or not in their opinion it's complying with
10 the guidelines that the FCC laid down for what is an
11 ongoing term dealing with interconnection.

12 Q. And this internal committee will be reviewing
13 all settlement agreements in the future?

14 A. Yes.

15 Q. And will the Commission be made aware of what
16 is contained in the settlement agreements that are
17 filed with Qwest, or entered into by Qwest? I'm
18 sorry.

19 A. Well, certainly anything that is determined
20 to fall under the FCC standard will be filed. That's
21 number one. The committee has agreed to an
22 independent auditor, so you've got a second party.
23 But if a settlement is entered into with a company
24 over say a billing and collections contract for toll,
25 that would, I'm assuming, be the kind of thing that

1 the committee would look at, say this is not an
2 interconnection term or condition under 251(b) and
3 (c), and would not file. Those, therefore, would not
4 typically be brought to the Commission's attention,
5 but that is the purpose of the independent auditor is
6 to make sure they're making the right decisions.

7 Q. Okay. A follow-up question, and I don't mean
8 to get into the, a real hypothetical realm here that
9 it's difficult for you to answer these questions, but
10 yet I am concerned about your interpretation of
11 portions of the FCC Order. And if this is reflective
12 of your committee's interpretation, then I am
13 concerned about all of the agreements being filed with
14 this Commission as we believe are necessary. What
15 about interpretational differences? Staff may
16 interpret or the Commission may interpret these
17 provisions in this FCC Order much differently than you
18 do. How will those interpretational differences be
19 reflected in your committee's determinations?

20 A. You know, I really can't answer that. I
21 think our intent is to assure the Commission that
22 we're doing this right. I think Qwest is more than
23 happy to sit down with Staff and work out a process,
24 you know, work out the process with the independent
25 auditor that gives Staff the kind of assurances they

1 wanted, but I'm not sure I can respond to your
2 question other than to say the committee is being
3 overly broad, they're filing all of the agreements,
4 even the forms, form agreements or SGAT language, and
5 they've agreed to an independent auditor to look over
6 their shoulder to assure the Staff that they're doing
7 it right. If there is something additional that the
8 Staff thinks is necessary, we would be happy to talk
9 to you about it because our intent is to make you feel
10 comfortable that we are doing it right and our intent
11 is to do it right.

12 Q. Okay.

13 On a related issue, you stated at one portion
14 of your testimony, and if you can't recall it, I will
15 locate it for you, that because of this internal
16 committee that Qwest has established, there, you did
17 not feel that there would be a problem with oral
18 agreements in the future. How will this internal
19 committee's review prevent Qwest business units from
20 entering into oral agreements with CLECs in the
21 future?

22 A. I think that the agreements are going to be
23 reviewed, filed. To the extent that I guess you can't
24 guarantee everything, but to the extent that anyone
25 were to do something outside of that written

1 agreement, it would not be with the consent of or the
2 permission of the corporation. And in fact, I think
3 the corporation, I think people would have a clear
4 message that the company would not permit that kind of
5 activity. And that would be the assurance.

6 Can I tell you that there will never be an
7 individual employee that strays from a policy? I
8 guess I can't. I can only tell you that the
9 corporation will set in motion and set in place the
10 necessary steps to make sure that employees are
11 disciplined and that the activities are taken
12 seriously.

13 Q. Okay.

14 Are those, are prohibitions of this nature
15 currently contained in Qwest's Code of Conduct?

16 A. There -- I think I have a copy of the Code of
17 Conduct.

18 Q. I believe it's LBB-32-32.

19 A. Yes.

20 Q. Clearly there are references to ethical
21 practices, compliance with company guidelines,
22 nondiscrimination obligations with respect to our CLEC
23 customers. I don't know if there is a verbatim
24 reference to oral agreements or verbatim reference to
25 don't embezzle money or something. I don't know if

1 they've gone down a checklist of forbidden activities.
2 But I think the Code of Conduct and the thrust and
3 intent of the document would say if we file a written
4 agreement and someone within the company does not
5 abide by the terms of that agreement that it could
6 result in actions taken against them up to and
7 including dismissal. Is there a checklist in the Code
8 of Conduct regarding the filing of interconnection
9 agreements and amendments and when that's necessary?

10 A. No, and I'm not sure that the Code of Conduct
11 would be the place to address that. The typical -- I
12 mean, my support person, you could put it in the Code
13 of Conduct, but my support person is not going to know
14 whether or not something is or is not covered under an
15 FCC Order or appropriately filed. You simply talk
16 about the general principles that an employee is
17 expected to operate under, answers as to, you know,
18 whether or not a particular agreement is a 251(b) or
19 (c) type of contract is more appropriately left to the
20 operation of the company rather than trying to build
21 some kind of a standard into a Code of Conduct.

22 Q. Is there any prohibition in Qwest's Code of
23 Conduct which would prohibit the type of broad
24 nonparticipation clauses that were contained in
25 several agreements in this case?

1 A. No, there's not, although I think with
2 respect to the nonparticipation clauses, our intent
3 there was we had parties that said, "We're not happy
4 with your service. You need to fix it," and we were
5 striving to. We did not want them to intervene and
6 say that our service was bad. We wanted to fix it,
7 and we entered into an agreement that says, "If we fix
8 this service, will that make you happy and not result
9 in you complaining against us."

10 And, you know, I'm not sure that's a bad
11 thing. You know, we have customers come to us and say
12 your collocation process takes too long or this or
13 that is not right, and, you know, we're going to sit
14 down with our customer and we're going to say, "Yes,
15 we're going to try to fix that." And it may come up
16 in conjunction with certain types of hearings. Maybe
17 it's a cost docket, and we've got CLECs that are
18 saying we think this is, this kind of a service is
19 just too high priced.

20 If we think we can sit down with our
21 customers and work out a way to price something out
22 that will make them happy, you know, I'm not sure we
23 would, we would want to do that. I mean, I'm not sure
24 we would want to discourage that. So I think that's a
25 little different kind of a question than someone doing

1 an oral agreement in violation of what the
2 corporation's officers have signed as a written
3 agreement and position of the company.

4 Q. Well, and to be fair, and maybe you didn't
5 understand my question regarding the broad
6 nonparticipation clauses. I believe what you referred
7 to a moment ago was much different than a
8 nonparticipation clause drafted very broadly to
9 preclude future participation in a proceeding. And
10 isn't it true in those cases that you may resolve a
11 certain issue with a CLEC on day 1, but on day 20,
12 another issue may arise with the CLEC, and it's unfair
13 not to allow the CLEC to participate with respect to
14 the issue that arose on day 20?

15 A. I would suspect that is unfair. I would
16 suspect the CLEC would generally take a position that
17 that's not what they signed up for and be there anyway
18 from my experience with CLECs. But I think it would
19 also be very difficult to turn around and say, "Well
20 then, let's write a Code of Conduct that says broad
21 language is not good, narrow language is good in terms
22 of a general policy for employees to operate," because
23 I'm not sure they're going to be in a position to make
24 that decision anyway.

25 I just, I'm not saying that your, the

1 underlying proposals are improper or wrong. In fact,
2 they make good sense, and it's the company's intention
3 to enforce filing requirements, to, you know, honor
4 its agreements, to discipline companies, or employees
5 that don't comply with those agreements. But that's a
6 different question than saying should that kind of
7 language be written into the Code of Conduct
8 specifically addressing specific events. And to that
9 end, I think the general over, the general tone of the
10 Code of Conduct is appropriate.

11 Q. Let me ask you just a few additional
12 questions regarding your Code of Conduct which is
13 LBB-32. Mr. Brotherson, does that Code of Conduct
14 contain provisions which only govern Qwest's
15 relationships with the CLECs, or does it contain other
16 provisions as well?

17 A. It's a broad, high level Code of Conduct. It
18 talks about sexual harassment and consequences to an
19 employee if they violate that kind of a Code of
20 Conduct. It talks about discrimination, it talks
21 about things like character. When you get down to the
22 level of specifics, there's other training that
23 employees go through within the company. We have
24 annual training about treating customer information as
25 proprietary. We have, for retail accounts, for

1 into their interconnection agreement. No single
2 document addresses it all.

3 Q. Okay. I have one more question for you under
4 Code of Conduct. Are you aware of other states which
5 have developed or are in the process of developing
6 Codes of Conduct to govern the RBOC's relationship
7 with the CLECs in the state?

8 A. No, I'm not. That doesn't mean it isn't out
9 there. I'm just not aware of it.

10 Q. So you're not aware of proceedings in
11 Pennsylvania or Indiana?

12 A. No, I'm not aware of those.

13 Q. Okay. And I had one, not to belabor the
14 point, but I had one or two other questions I wanted
15 to ask you about a template agreement. And I want to
16 just use one of the examples that Ms. Kalleberg had in
17 her testimony. Let's take the operator services
18 agreement. While Qwest may use a template to
19 provision operator services, is it true that you could
20 vary the terms and conditions of a template agreement
21 if so required?

22 A. I'm not sure what you mean by varied. It is
23 true that we would sit down with a CLEC, and if they,
24 and we would negotiate in good faith. If they wanted
25 a little different language than what is in the

1 template, if both sides can agree to that language, if
2 we don't feel it's something that we can't live with
3 and it's something that they want, then we would
4 probably negotiate language that was different than
5 the language in the template. And depending upon the
6 CLEC, having been through the workshops, there's
7 oftentimes a lot of wordsmithing that seems to say the
8 same thing, but everybody has a different view as to
9 how it ought to be said. But we, you know, we would
10 not necessarily change the template because one
11 particular CLEC wanted it reworded, but that agreement
12 would be filed.

13 Q. But you would change the template for that
14 specific CLEC, correct?

15 A. We would.

16 Q. Okay.

17 A. In fact, we, since the SGAT was filed, we've
18 had a number of CLECs that have sat down to negotiate
19 new interconnection agreements because the old
20 interconnection agreements had expired, and it's not
21 been a take it or leave it, here's the SGAT. It's
22 been we mail them the SGAT and then they send us back
23 a red line.

24 Q. And if you look at the agreements that
25 Ms. Kalleberg discussed in her testimony, again, the

1 Commission, is that correct?

2 A. At that time, yes, that's correct.

3 Q. And so, and your SGAT and your Website does
4 not contain a six-level escalation process, does it?

5 A. The Website contains levels of escalation,
6 but I don't believe it's a six level. Actually,
7 Ms. Crandall would be a better witness to address the
8 process, because she's directly in the line of
9 escalation.

10 Q. And it is Qwest's position that all
11 agreements in the future that contain escalation and
12 dispute resolution provisions relating to Section 251
13 services would have to be filed, correct?

14 A. Correct.

15 Q. Okay.

16 Mr. Brotherson, the next portion of your
17 testimony, pages 14 through page 22, addresses
18 reciprocal compensation, correct?

19 A. Correct.

20 Q. And is it your position that the settlement
21 agreements that contain provisions governing
22 reciprocal compensation between Qwest and ISP
23 terminated traffic did not have to be filed with the
24 Commission for approval?

25 A. I think in some instances I talk about

1 provisions that were already on file. In addition to
2 that, I think I cite the FCC's decision that these are
3 not local interconnection services, 251(b) and (c)
4 services but rather are interstate services, and
5 therefore, they didn't fall under the Telecom Act,
6 although that issue has been disputed by, or was in
7 dispute and could have gone either way up until at
8 least the FCC's ISP order.

9 Q. And the FCC's ISP order, which one is it that
10 you're referring to, Mr. Brotherson?

11 A. That's the one that came out, I think it was
12 April '99 or April 2000. This is 2002, February.
13 April 2001, I guess it was.

14 Q. You reference in your testimony another FCC
15 Order dated February 26, 1999, correct?

16 A. Yes, I did.

17 Q. And you rely upon that in support of your
18 position that such terms or provisions would not have
19 to be filed with the state Commission because the FCC
20 indicated that such traffic was interstate in nature,
21 correct?

22 A. Yes. I think my testimony more specifically
23 tries to address the atmosphere at the time and
24 whether or not in viewing Qwest's actions with respect
25 to not filing those agreements that the fact that the

1 FCC and Qwest for that matter had taken the position
2 in the FCC that this was an interstate service and not
3 part of local interconnection was a factor for this
4 Commission to consider when determining whether or not
5 Qwest was improper in not filing those agreements. I
6 believe that the committee has filed anything dealing
7 with recip. comp that's come its way since.

8 Q. Based upon the 2000 Order?

9 A. Well, yes, because I believe that talks
10 about, there's a three-year phaseout for recip. comp
11 for those CLECs that were receiving recip. comp.

12 Q. Do you have a copy of the February 26, 1999
13 FCC Order in front of you?

14 A. I do not.

15 Q. I have an extra copy of that Order, and I
16 would like you to turn to page 7. And could you
17 please look at paragraph 25, and I'd like you to read,
18 let's see, one, two, three, four, five, six, seven
19 lines down, "As we observed" --

20 A. I have it.

21 Q. -- through footnote 81, or up until footnote
22 81.

23 A. "As we observed in the local competition
24 Order, state Commission authority over interconnection
25 agreements pursuant to Section 252 extends to both

1 interstate and intrastate matters, citing footnote 80.
2 Thus, the mere fact that ISB bound traffic is largely
3 interstate does not necessarily remove it from the
4 Section 251/252 negotiation and arbitration process,
5 citing footnote 81."

6 Q. Okay. Thank you.

7 On page 16 of your testimony --

8 A. Yes.

9 Q. -- you refer to a Confidential Trade Secret
10 Stipulation with ATI, and that agreement provided that
11 the parties agree for settlement purposes that
12 reciprocal compensation for terminating Internet
13 traffic shall be paid at the most favorable rates and
14 terms contained in an agreement executed to date by
15 U S WEST?

16 A. Yes.

17 Q. Do you know offhand what other agreement
18 would have been implicated by this provision? In
19 other words, which agreement of U S WEST contained the
20 most favorable terms and conditions?

21 A. The rates paid under that provision were the
22 rates ordered by the Arizona Commission as the highest
23 rates permitted by law.

24 Q. And one or two other general questions on
25 reciprocal compensation. Under the FCC's 1999 Order,

1 did that recognize that there might be differences
2 between interconnection agreements with respect to how
3 that traffic was to be treated?

4 A. I'm not sure I understand the question. I
5 apologize.

6 Q. Did the order recognize that Qwest might have
7 in some situations intended that that be treated as
8 local traffic and subject to reciprocal compensation
9 and in other instances that it might have negotiated a
10 contract that would have been exactly the opposite?

11 A. Well, Qwest never took the position that ISP
12 traffic was local in any of its negotiations, although
13 we had in some states contracts interpreted against us
14 where the Commissions ruled that we did not clearly
15 exclude it as interstate traffic, and therefore, it
16 was included in the minutes for recip. comp. But
17 Qwest never took the position that ISP traffic was
18 local traffic in any agreement, and consistently took
19 the position it was interstate traffic.

20 Q. So you never took the position that you would
21 have to, or that you would pay reciprocal compensation
22 on this traffic?

23 A. Well, before the FCC ruled in 2000, CLECs
24 were -- I mean, we're talking a multi-million dollar
25 issue here. I think in Arizona it's about 15 million

1 annually.

2 Before the FCC's Order came down in 2000,
3 both sides were pretty adamant. And obviously, with
4 the money involved, some CLECs said, "We're going to
5 win. This is local, and we're going to collect from
6 you X million dollars." We would take the position,
7 "No, the FCC is going to rule this is interstate and
8 you're not going to get any call termination on this
9 and you're not going to get zero, you're going to get
10 zero." And in some instances, both parties
11 negotiated a settlement agreement that said, "Well,
12 we'll settle this by locking in something less than
13 the full amount." A CLEC may say, "I'll take less
14 than the full amount," and Qwest would say, "To
15 guarantee without knowing what the outcome of the FCC
16 Order is going to be that we won't be exposed to the
17 full amount, we also would enter into that settlement
18 agreement."

19 So I think there were settlement agreements
20 prior to the FCC's ruling that the parties looked at.
21 Since the FCC ruling, it's not been an issue because
22 the FCC has said it is interstate to our favor, but
23 also given the CLECs a three-year phaseout to their
24 favor. So settlement discussions are over.

25 Q. Right. But it is correct at the time some of

1 these agreements were entered into, settlement
2 discussions were ongoing, correct?

3 A. Yes.

4 Q. And given as you said that this was a very
5 controversial issue, there was a lot of money at
6 stake, CLECs probably would have liked to have seen
7 the provision in the settlement agreement relating to
8 reciprocal compensation, correct?

9 A. Well, in terms of knowing what our bottom
10 line negotiating number was, I suspect that's true,
11 but we were attempting to negotiate individually with
12 each CLEC. Each CLEC had a different negotiating
13 strategy. Some CLECs, the ISP traffic was a very
14 small piece of their business case, and when you were
15 negotiating with a CLEC like that, it was pretty easy
16 to come to some kind of agreement. There were other
17 CLECs that their whole business case was built around
18 marketing to ISP traffic and generating ISP recip.
19 comp, and that was a totally different negotiating
20 strategy.

21 So the numbers that we would have arrived at
22 in settlement would have been different depending on
23 the particular instance, and we would not have shared
24 with one what we settled with on the other.

25 Q. Even if those provisions related to rates to

1 be charged in the future as part of the settlement?

2 A. Well, you know, certainly going forward, this
3 is the, I mean, this is the issue in front of this
4 Commission, and certainly going forward, those kinds
5 of provisions would be formally reviewed by a process
6 at the committee. I think at the time, if Qwest's
7 position was viewed as correct that this was not local
8 traffic but Internet traffic and was not covered by
9 local interconnection, then there was certainly a very
10 credible argument on Qwest's part that it was not
11 local interconnection under the Telecom Act. But they
12 will be filed in the future in the event there are any
13 future negotiations around this issue, which is highly
14 unlikely.

15 Q. Okay. And let's see, the next part of your
16 direct testimony relates to several other agreements
17 that you entered into with Eschelon and other
18 carriers. Just bear with me a minute as I go through
19 this. Some of these questions I've already asked you.

20 Does Qwest's SGAT contain provisions on
21 subscriber list information and the rates charged to
22 CLECs for that?

23 A. I believe the SGAT provides that we will make
24 subscriber list information available. I don't
25 believe it's in the cost docket as a TELRIC-priced

1 item. I think, there again, that's one of those
2 issues as to whether or not it falls under the Telecom
3 Act that requires TELRIC pricing or it's a competitive
4 service that requires market-based pricing. So I
5 think it's in the SGAT, but I'm not sure how it's
6 treated in the cost docket.

7 Q. And since it's in the SGAT, if Qwest makes a
8 revision to those provisions in the future, Qwest
9 intends to file an amendment to the interconnection
10 agreement?

11 A. I started to say yes, and then I hesitated.
12 Would Qwest make an amendment to what interconnection
13 agreement?

14 Q. Well, let's say --

15 A. You mean to the SGAT?

16 Q. -- that AT&T opts into the SGAT which
17 contains general information regarding subscriber
18 list. You and AT&T subsequently agree to amend that
19 and provide for different subscriber lists, terms and
20 conditions and rates. Would you file that amendment
21 with the Commission?

22 A. You're asking me what the committee is going
23 to decide because actually I'm not the person that's
24 going to decide that. I know that, you know, my first
25 inclination was to say yes, but if it's not a

1 provision under 271, I don't know. My expectation
2 would be yes, but I'm reluctant to speak for the
3 committee on each of these questions as we come down.
4 I would think that as part of the SGAT it would be,
5 yes.

6 Q. Can I ask, did a member of the committee, I
7 believe you said there were six or seven members to
8 this committee. Did a member of the committee and in
9 particular the legal representative on the committee
10 review your testimony before it was docketed?

11 A. Yes, Mr. Lundy did.

12 Q. Okay. And Mr. Brotherson, I'm jumping over
13 to page 38.

14 A. Of direct?

15 Q. We're almost done with your direct testimony,
16 yes.

17 Page 38, the first question and answer,
18 you're not saying there, are you, that if you had
19 filed a provision or an interconnection agreement in
20 another state other than Arizona that you wouldn't
21 have to, that the CLEC could rely upon that agreement
22 and Qwest and you wouldn't have to file another
23 agreement in Arizona?

24 A. No. No.

25 Q. Okay.

1 A. Not at all. I think the first half of the
2 statement says in addition to be filing, it being
3 filed and approved in Arizona, it was filed in other
4 states. I think that was only, again, to show that it
5 was generally known, not to imply that a Minnesota
6 filing counts for Arizona.

7 Q. Okay. And I'm going to look quickly at your
8 rebuttal testimony. As I'm going through this, I
9 would just note that I've asked you some of the
10 questions in your rebuttal testimony already, so if
11 you just bear with me a minute.

12 Can I refer you to page 8 of your rebuttal
13 testimony.

14 A. I have it.

15 Q. Okay. And here, you're discussing terminated
16 agreements, correct?

17 A. Yes.

18 Q. And the impact of those. And it's your
19 position that the terminated provisions or terminated
20 agreements do not contain any provisions relating to
21 ongoing obligations of Qwest under Section 251 and
22 252, correct?

23 A. Correct.

24 Q. And it's also your position that therefore,
25 there would be no ongoing discrimination problems,

1 correct?

2 A. Correct. I think the FCC said that as well
3 in their Order.

4 Q. Okay. But it is certainly possible, isn't
5 it, that while those agreements were effective, they
6 could have contained provisions which discriminated
7 against other CLECs?

8 A. It's possible, and that, part of my testimony
9 was to go through agreement by agreement and talk
10 about what other provisions were available or not
11 available or filed or not filed, and yes, it's
12 possible.

13 Q. On page 9 of your rebuttal testimony, you
14 refer to a statement by Ms. Kalleberg that the
15 escalation procedures letter from Qwest to Eschelon
16 dated 11-15 does not require nonparticipation,
17 correct?

18 A. Yes. I said that. I'm trying to find where
19 I said that in the testimony, but yes, I said that.

20 Q. Okay. And Ms. Kalleberg's statement actually
21 referred to the cost docket, did it not?

22 A. Could you refer me to the line where I said
23 that? I don't --

24 Q. That's lines 1 through 3 of your testimony on
25 page 9 of your rebuttal.

1 A. I see that. I'm not sure where I -- oh, it's
2 on the other page. Okay, I've read that. What's the
3 question again? I apologize.

4 Q. Okay. Does not require nonparticipation,
5 Ms. Kalleberg's reference was to the cost docket, not
6 the 271 proceeding, correct?

7 A. If that's true, then I mischaracterized it in
8 this sentence.

9 Q. Okay. And if you would like to refer to her
10 testimony just to verify that --

11 A. I'm sure it is, or you wouldn't have asked
12 me. But if there's a cite you want me to refer to for
13 the record, I'd be happy to.

14 Q. Page 31, lines 3 through 7.

15 A. Yes, I see that now.

16 Q. Okay. And in the latter part of your
17 rebuttal testimony, you reference a lot of agreements
18 that were entered into by Qwest and not filed with the
19 Commission, and you talk about why the agreements did
20 not discriminate against a CLEC, correct?

21 A. Correct.

22 Q. And is it correct that Ms. Filip also talked
23 about these same agreements and why they were not
24 discriminatory toward a CLEC?

25 A. I can't say which ones that she specifically

1 referred to in her testimony, but I think we probably
2 addressed them from a different perspective, I in
3 terms of what was available in other agreements or in
4 the SGAT, her in terms of the actual management of the
5 business office, how we were treating CLECs and how
6 changes are implemented in the systems.

7 Q. Okay. And you indicate that you talk about
8 it with respect to other agreements in the SGAT. Is
9 it correct that while the SGAT may contain provisions
10 that would now make those agreements possibly
11 nondiscriminatory in nature that at the time they were
12 entered into the SGAT provision may not have existed?

13 A. Well, we had filed -- and perhaps we're
14 talking semantics here. We had filed an earlier SGAT
15 agreement as far back I think as mid- to late 2000.
16 It was certainly not one that was approved by the
17 Commission as an outgrowth from all of the workshops,
18 but it was nevertheless terms that, that Qwest had,
19 you know, held out as agreements that it was willing
20 to enter into. That may not qualify as an SGAT under
21 Commission-approved document.

22 Q. And it is possible, is it not, that some of
23 these agreements were entered into before the SGAT
24 provisions were drafted and finalized?

25 A. It's possible, and that's why I attempted to

1 go agreement by agreement in my testimony, because
2 when you start making, when you start having
3 discussions about these agreements say this or the
4 agreements do that, you almost have to look at each
5 individual agreement. Was it to decommission a
6 collocation which is one kind of an issue, was it to
7 order operator services, and is that a 251(b) product
8 which is another kind of issue, or was it something
9 that was in an already existing or filed contract
10 which is another kind of issue. And that's not to say
11 all of those apply to all contracts, but rather each
12 contract almost takes a separate analysis as to its
13 impacts, and I've tried to address that contract by
14 contract in the testimony.

15 Q. Okay. Then let me pose another question to
16 you which I'm concerned that you did not consider when
17 you looked at each of these agreements, and that is
18 would you agree with me that when Qwest drafts a
19 settlement or an amendment to an interconnection
20 agreement that many times, the provisions of that
21 settlement or amendment may be interrelated and
22 that -- I'll stop there.

23 A. I don't know about many times, but I would I
24 guess say that's a possibility, yes.

25 Q. In other words, a possibility is that the

1 amendment or the settlement agreement is a package
2 that was negotiated by the parties?

3 A. Well, if we're talking about in retrospect to
4 the agreements that are the basis of this hearing,
5 clearly there are agreements that while many of the
6 provisions are what I would call a traditional dispute
7 settlement of a feud between a CLEC and an ILEC,
8 nevertheless there are other provisions in that
9 agreement that could be construed as ongoing, and
10 we've talked about those and filed those.

11 Q. But many times, the provisions as a whole are
12 a package and certain provisions are quid pro quo for
13 another provision or other provisions, correct?

14 A. Yes, I think when you negotiate a settlement
15 in totality, it's very hard to weight each paragraph
16 in terms of its impact short of just carving it out.
17 And even if you carve it out or it's not
18 contemporaneous in time, if you settle a billing
19 dispute and months later you settle another dispute,
20 there will always be inferences or could always be
21 inferences drawn. You just have to operate under the
22 appropriate guidelines and deal with it.

23 Q. And isn't it Qwest's position that with
24 respect to the opt-in requirements of the Act, that a
25 carrier cannot just opt into one provision, but that

1 there may be several provisions relating to the same
2 issue that Qwest would insist the carrier opt into all
3 of those provisions in the agreement rather than just
4 an isolated provision?

5 A. Yes. I would say it's not just Qwest's
6 position, but I believe certainly it's Qwest's
7 position that you can't take half of the loaf, or you
8 can't take the benefit of the bargain without taking
9 the other piece that goes with it.

10 For example, in the McLeod and Eschelon
11 agreements, and I'll use those as an example, the
12 UNE-Star product was an average loop price. McLeod
13 and Eschelon both, their target market was what I will
14 call small biz, and that meant that they would find
15 customers even out into the smaller communities with
16 different loop costs than in the metro areas if you
17 have deaveraged loops. Other CLECs might only market
18 in the metro area where there's very low-priced loops.

19 Let's say the average loop, and I'm not
20 familiar with the Arizona cost docket or that familiar
21 with it to know what the average loop cost was in
22 Arizona, but let's say the average loop cost is \$14,
23 but on a deaveraged basis in the metro area, they're
24 \$8. Certainly someone would, a CLEC may say, "You
25 know, I'd like a ten percent discount, but I don't

1 want it on the \$14 loop price. I'd like it on my \$8
2 loop price."

3 My testimony is not that there was a
4 ten percent discount, but nevertheless, you know, for
5 someone to say, "I would have taken that deal," you
6 have to say, "You mean you would have taken the
7 average loop price that those companies that market
8 across a number of sized communities would have taken
9 as part of this deal?" And there, everybody's voice
10 kind of lowers. So I think you do have to look at the
11 related provisions when you're analyzing the
12 appropriate provisions and the impact of a provision.

13 Q. But in the case that you just referred to,
14 isn't it correct that one of the problems here was
15 that the CLECs didn't have all the related provisions
16 filed publicly so that they could make a determination
17 as to whether they wanted to opt in or not?

18 A. I agree with that statement.

19 Q. And isn't it also correct that it's difficult
20 for purposes of these agreements to take a provision
21 in isolation and say that because it was in a Cox
22 interconnection agreement, no CLECs were discriminated
23 against because these agreements weren't filed
24 publicly when in fact the agreements may contain much
25 different terms and conditions which Qwest would

1 require the CLEC to opt into in both cases?

2 A. Well, to the extent that they contain much
3 different terms, that's a true statement, yes.

4 Q. And to the extent that you discuss
5 Ms. Filip's testimony and why she believes that
6 nonfiling of the agreements did not result in
7 discrimination, we can ask those questions to
8 Ms. Filip directly, correct?

9 A. Most definitely.

10 Q. Just, I'm picking up a few additional
11 questions here. I've gone through your rebuttal.
12 These are a few questions just to get clarification,
13 and then I will be finished.

14 With respect to the agreements that are
15 terminated and which you state now are not subject to
16 the filing requirement because they don't contain
17 ongoing terms or obligations for 251 services, you
18 agree, however, before the agreement was terminated
19 that if they contain those provisions, they would be
20 subject to the filing requirement?

21 A. Yes. I mean, the hearing is going to
22 determine if in fact they did require, they were
23 required to be filed, but if in fact the determination
24 now is that they were required to be filed, then they
25 should have been filed.

1 MS. SCOTT: Okay. I don't have any further
2 questions.

3 ALJ RODDA: Okay. Thank you, Ms. Scott.
4 Mr. Wolters.

5 MR. WOLTERS: Just a few.
6

7 CROSS-EXAMINATION
8

9 Q. (BY MR. WOLTERS) Mr. Brotherson, were you
10 involved in the negotiations of any of the unfiled
11 agreements contained in the Joint Exhibit 1?

12 A. No.

13 Q. Were you involved in the implementation of
14 any of the unfiled agreements contained in Joint
15 Exhibit 1?

16 A. No.

17 Q. Did you participate in the Qwest review of
18 the unfiled agreements to determine if any of them
19 should have been filed with the Commission?

20 A. No.

21 Q. Did you write your first draft of your
22 testimony?

23 A. Not in, no, not in its entirety. I wrote
24 certain provisions of other provisions were prepared
25 as a draft, yes.

1 Q. Who prepared your first draft, the portions
2 that you didn't prepare?

3 A. Counsel.

4 Q. Okay. Now, what did you review to determine
5 that the representations in the testimony that you did
6 not prepare were accurate?

7 A. I reviewed the agreements. In fact, I spent
8 a lot of time going kind of line by line, this
9 agreement was filed on this date. There's a lot of,
10 you know, different dates and documents to keep track
11 of, and I spent a lot of time just cross-referencing
12 each agreement to the agreement itself and then back
13 to filing dates. I had different people in my
14 organization that work for me look up what was the
15 date of the Arizona cost docket, what was the date
16 that the AT&T agreement was filed in Arizona, what was
17 the date of the such and such. So it was basically
18 just validating and confirming information.

19 Q. Okay. Now, what did you rely on or review to
20 determine the reasons why Qwest did not file the
21 agreements?

22 A. The written documents, the FCC Order which is
23 after the decisions, the general principles with
24 respect to settlement agreements having been involved
25 in settlement agreements myself and I guess not

1 considering them as something that's normally filed.
2 And the people involved in this operation were within
3 the same organization that I work in. Dan Hult is my
4 boss, Audrey McKinney was my boss's boss. Just
5 general knowledge of the people that I worked with.

6 Q. Okay. Did you review any internal Qwest
7 memorandum that specifically addressed the issue of
8 the filing of the agreements?

9 A. No, not that I can recall, although I tried
10 to review all of the interrogatories and document
11 productions. But, you know, a lot of them, if they
12 didn't relate to my testimony, I kind of flipped
13 through them.

14 Q. Let's go to page 13 of your direct testimony,
15 lines 13 through 15.

16 A. Page 15 did you say?

17 Q. Page 13, lines 13 through 15. There's a
18 statement there that says, "Yet as the FCC Order made
19 clear the Telecommunications Act does not require
20 literally every provision of every ILEC-CLEC contract
21 to be filed for PUC approval." Do you see that
22 sentence?

23 A. Yes.

24 Q. Now, during current negotiations for
25 interconnection agreements for interconnection resale

1 and UNEs, is Qwest intending to put any provisions
2 inside agreements that it does not believe need to be
3 filed, or will all the provisions that Qwest is
4 negotiating with CLECs be contained in the
5 interconnection agreement? Do you understand my
6 question?

7 A. Yes, I understand your question. All of the
8 interconnection agreements would be filed. I mean,
9 if all the -- I mean, this gets back to inferences
10 that are drawn. But, I mean, all of the
11 interconnection agreements are going to be filed. If
12 AT&T also says, you know, "We want to talk to you
13 about a listing in the Yellow Pages," we normally
14 refer the CLECs to Dex. They negotiate the Yellow
15 Page listings, not us. You know, there could be a
16 Yellow Page listings agreement at the same time we
17 have a listing agreement, but those are not side
18 agreements. Those are agreements for other services.

19 Q. Let's exclude Dex, because it is my
20 understanding that Qwest has sold Dex. But let's
21 assume a company comes in and is negotiating for an
22 interconnection agreement and has a list of 15 terms
23 hypothetically, and Qwest says that Term 14 literally
24 isn't a provision that needs to be filed with the PUC.
25 Would Qwest ask that a separate agreement be made for

1 that one provision?

2 A. Again, it's difficult for a hypothetical, but
3 I think if a CLEC came to us and said, "We want to
4 incorporate a billing and collections agreement for
5 toll services into our interconnection agreement," we
6 would respond by saying billing and collection for
7 toll services is not an interconnection service
8 covered under an interconnection agreement. We have a
9 billing and collection agreement with AT&T, we have
10 one with MCI. We do their billing and collections for
11 them, although it is being phased out. But we do have
12 billing and collections for them, but we wouldn't
13 incorporate that or roll that into an interconnection
14 agreement just because they approached us about it. I
15 think you would have the interconnection agreement
16 deal with interconnection.

17 MR. WOLTERS: That's all I have. Thank you.

18 ALJ RODDA: Okay.

19 Mr. Dixon, are you still there?

20 MR. DIXON: I certainly am, Your Honor.

21 Thank you. WorldCom has no questions for

22 Mr. Brotherson.

23 Also, with your permission, I'm going to drop
24 off the line. I do have a conflict, and I'm going to
25 have to leave.

1 ALJ RODDA: Okay. Bye. See you tomorrow.

2 MR. DIXON: Thank you, and I will see you
3 when I get there tomorrow.

4 MR. CAMPBELL: Your Honor, Eschelon has just
5 a few questions for this witness.

6 ALJ RODDA: Okay.

7 Mr. Doherty, are you still there?

8 Thank you, Mr. Campbell. Go ahead.

9 Does anyone mind -- you're coming back
10 tomorrow anyway, right? You have some homework to do?

11 THE WITNESS: Yes, ma'am.

12 ALJ RODDA: Would you do your redirect in the
13 morning?

14 MR. SPIVACK: That would be fine. Thank you.

15 ALJ RODDA: Or any of my questions. Then I
16 can maybe cut them down.

17

18 CROSS-EXAMINATION

19

20 Q. (BY MR. AHLERS) Mr. Brotherson, my name is
21 Dennis Ahlers. I am senior counsel with Eschelon. I
22 just have a few questions.

23 Is it correct that the committee you talked
24 about that reviews agreements only becomes involved
25 once the agreement has been agreed to by both the

1 parties?

2 A. My understanding is it's a review process.
3 They're not going to be negotiating agreements.
4 They're going to be reviewing agreements to determine
5 if it's appropriate to file them with the Commissions.

6 Q. All right. And do you have any idea how long
7 the process takes to review the agreements?

8 A. I think when we initially set up a formal
9 process to strengthen the way we approach this, and
10 there was, there was, I'll call it a backlog, but
11 there was certainly a block that they had to go
12 through. I think once they have gotten to this point,
13 I think it's not very long at all, because I think
14 they only see a few settlement agreements each week
15 involving sometimes minor issues.

16 Q. And when Qwest makes a determination or when
17 the committee makes a determination that an agreement
18 need not be filed, is that communicated to the CLEC in
19 some way?

20 A. I don't know.

21 Q. All right. And do you know what Qwest's
22 position is on whether the CLEC can go ahead and file
23 the agreement, whether or not, no matter what decision
24 is made by the committee?

25 A. You know, I couldn't answer that either,

1 other than to say that if the parties agree to
2 confidentiality, I think both sides would expect that
3 confidentiality be honored except for any legal
4 requirements for filing.

5 Q. And if an agreement, if there was an
6 agreement as to confidentiality, would that
7 necessarily mean that an agreement could not be filed
8 as an interconnection agreement?

9 A. You know, again, I'm not, I don't want to be
10 giving legal opinions, especially in front of my
11 counsel. But the, you know, the, I would think if
12 it's required to be filed under the Telecom Act, it's
13 got to be filed. Now, does that mean they have to go
14 back and redo the confidentiality language? I don't
15 know. Maybe so, but you've got to file what you've
16 got to file.

17 Q. And one last question, you had testified
18 about Qwest wanting to have nonparticipation clauses
19 in certain cases. Why is Qwest interested in not
20 having CLECs participate?

21 A. I don't believe, if I used that kind of a
22 term, I probably shouldn't have. But if we've got a
23 CLEC that is, if we've got a customer that's got a
24 problem, and they're saying they're going to take that
25 problem to the Commission, we want to do our best to

1 take care of that and avoid that kind of bad
2 publicity, exposure, what have you. So we generally
3 try and see what it will take to solve their problem
4 and not have them show up and say we're not good
5 people.

6 Q. Would it be fair to say you prefer to have
7 less opposition?

8 A. It would be fair on say we prefer to have
9 happy customers.

10 MR. AHLERS: Thank you. I have nothing
11 further.

12 ALJ RODDA: Okay. Then we'll conclude for
13 today, and we'll finish up with this witness first
14 thing in the morning. I'll see if I have any
15 questions left, and do the redirect and any recross.

16 MR. WOLTERS: 9:00 a.m. in the morning?

17 ALJ RODDA: Yes, 9:00 a.m. in the morning.

18 MR. POZEFSKY: Your Honor, can we leave our
19 stuff in the room overnight?

20 ALJ RODDA: It will be locked.

21 (The hearing recessed at 5:04 p.m.)

22

23

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25

1 STATE OF ARIZONA)
 2) ss.
 3 COUNTY OF MARICOPA)
 4
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7 I, DAWNA J. BOSWELL, Certified Court
 8 Reporter No. 50326 for the State of Arizona, do hereby
 9 certify that the foregoing printed pages constitute a
 10 full, true and accurate transcript of the proceedings
 11 had in the foregoing matter, all done to the best of
 12 my skill and ability.

13
 14 WITNESS my hand this 2nd day of April, 2003.

15 *Dawna J. Boswell*
 16 _____
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 18 Certified Court Reporter
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