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BEFORE THE ARIZONA CORPORATION COMMISSION

IN THE MATTER OF QWEST)
CORPORATION'S COMPLIANCE WITH) DOCKET NO.
SECTION 252(e) OF THE) RT-00000F-02-0271
TELECOMMUNICATIONS ACT OF 1996.)

At: Phoenix, Arizona

Date: March 19, 2003

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By: CECELIA BROOKMAN, RPR
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1 BE IT REMEMBERED that the above-entitled and
2 numbered matter came on regularly to be heard before
3 the Arizona Corporation Commission, in Hearing Room 1
4 of said Commission, 1200 West Washington Street,
5 Phoenix, Arizona, commencing at 9:00 a.m. on the
6 19th day of March, 2003.

7

8

BEFORE: MIKE GLEASON, Commissioner

9

JANE L. RODDA, Administrative Law Judge

10

11 APPEARANCES:

12

For the Arizona Corporation Commission:

13

Ms. Maureen Scott
and Mr. Gary Horton
Legal Division
1200 West Washington Street
Phoenix, Arizona 85007-2927

14

15

16

17 For the applicant:

18

HOGAN & HARTSON, L.L.P.
By Mr Douglas R.M. Nazarian
111 South Calvert Street Suite 1600
Baltimore Maryland 21202

19

20

and

21

HOGAN & HARTSON, L.L.P.
By Mr. Peter S. Spivack
555 Thirteenth Street, NW
Washington, DC 20004

22

23

24

25

1 APPEARANCES:

2

For Residential Utility Consumer Office:

3

Mr. Daniel W. Pozefsky
Staff Attorney
1110 West Washington, Suite 220
Phoenix, Arizona 85007

6

For AT&T:

7

Mr. Richard S. Wolters
1875 Lawrence Street, Room 1575
Denver, Colorado 80202

8

10 For WorldCom:

11

Mr. Thomas F. Dixon
707 17th Street, Suite 3900
Denver, Colorado 80202

12

13

For Eschelon Telecom Corporation:

14

LEWIS AND ROCA LLP
By Mr. Thomas H. Campbell
and Mr. Michael Hallam
40 North Central Avenue
Phoenix, Arizona 85004-4429

15

16

17

18

19

20

21

CECELIA BROOKMAN, RPR
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Certificate No. 50154

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1 ALJ RODDA: I think we're ready to start
2 today in Docket 02-0271.

3 Just a little housekeeping matter, I thought
4 I sent out an e-mail that might have said this,
5 tomorrow there's a Securities open meeting scheduled
6 tomorrow at 10:00. We'll be starting at 1:00 tomorrow
7 afternoon or as soon as we can after the open meeting,
8 if the proceedings go long.

9 I think that's all I have.

10 MR. DIXON: Judge, just a question. If we
11 tried to start sooner, I'm trying to envision how we'd
12 all get the word.

13 ALJ RODDA: It won't be sooner than 1:00, but
14 if the open meeting goes later than 1:00 it will be as
15 soon as we can after 1:00.

16 MR. DIXON: I'm sorry, I misunderstood. I
17 thought maybe we might come in at 11:00. Okay.

18 ALJ RODDA: It might be over at 11:00, but I
19 won't know that ahead of time.

20 I guess today we're going to start with
21 Dr. Johnson.

22 MR. POZEFSKY: RUCO would call Dr. Ben
23 Johnson.

24
25

1 Honor, I have handed out a copy to everybody and
2 marked it as RUCO Exhibit No. 17.

3 Q. (BY MR. POZEFSKY) Dr. Johnson, could you
4 please summarize your testimony.

5 A. Yes. My testimony is primarily concerned
6 with appropriate remedies for the situation which is
7 the focus of this proceeding. I've recommended four
8 or five, depending on how you want to count them,
9 remedies.

10 The first remedy, which primarily relates to
11 the impact on the 271 process, is to establish a
12 two-part fund, with one part being available to assist
13 the Commission with implementation of the 1996 Telecom
14 Act, enforcement of the pro competitive provisions of
15 that act, and the second part providing funding for
16 competitive local exchange carriers and other parties
17 that are involved in enforcement of that act.

18 I'm proposing that the structure of that fund
19 be one providing a strong incentive to Qwest to
20 cooperate and minimize the amount of enforcement and
21 investigation that's needed by providing discretion to
22 the Commission as to both the duration of the fund, I
23 suggested that it range from five to seven years, and
24 the fund would end earlier if Qwest is cooperating and
25 we're achieving a smooth transition to competitive

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1 conditions. And also providing the Commission with
2 discretion on the magnitude of the funding in each
3 year.

4 And again, the idea being that the Commission
5 would adjust the level of funding based on actual
6 performance, the number of issues that arise, and the
7 extent which Qwest is trying to cooperate and to
8 proactively solve problems as opposed to resisting
9 change.

10 The second element of my recommendations for
11 remedy is to provide a temporary period of rebates or
12 credits for poor service quality or provisioning,
13 focused particularly on the process by which customers
14 are changed from Qwest to a competitor. And that
15 process of rebates or credits would be temporary and
16 would end once it would be replaced with a permanent
17 system of service quality standards and monitoring.

18 The third element is to provide a 10 percent
19 discount off the normal price or TELRIC based price
20 for unbundled network elements in a forward-looking or
21 future period of time, commencing at the end of this
22 proceeding and lasting for a minimum of three years,
23 and perhaps as long as five years.

24 And again, the reason for the range of time
25 is to provide the Commission with discretion in

1 monitoring Qwest's actual performance in implementing
2 the Telecom Act and opening their markets to
3 competition, and that the more aggressive Qwest is in
4 trying to help open markets and trying to implement
5 the intent of the act, the shorter the period in which
6 the discount would be in effect.

7 The fourth element is a remedy that I think
8 would offer benefits to the public generally, and that
9 would be to require additional investment by Qwest in
10 broadband network upgrading. That is something that
11 Qwest is engaged in already. All carriers around the
12 country, all local exchange carriers are doing this,
13 but simply require an acceleration of that process to
14 meet specific target dates. I've set those forth on
15 Page 40 of my testimony. There's a table of specific
16 target dates.

17 For example, by December 31st, 2005, all
18 central offices would be equipped to provide some form
19 of DSL service, and that may be a target, a state that
20 they would achieve on their own or it might not. But
21 the idea would be to require an aggressive program of
22 providing broadband, which will pay for itself in
23 large part through the sale of the broadband services,
24 but nevertheless offers benefits to the public.

25 The fifth recommendation -- I've been

1 speaking about Qwest up to this point. The fifth
2 recommendation is with respect to McLeod and Eschelon,
3 and I'm recommending that they be required to also
4 contribute to the two-part fund that I described
5 earlier in an amount that the Commission finds
6 appropriate, that I've recommended at a minimum
7 \$100,000 apiece. And further that they not be
8 eligible for receiving the temporary 10 percent
9 discount that I described earlier that would be in
10 effect for a three- to five-year period. Those would
11 be the two recommendations I would make specifically
12 with respect to McLeod and Eschelon.

13 That completes my summary.

14 Q. Thank you, Dr. Johnson.

15 As a matter of regulatory policy, if the law
16 is broken and no harm is done, should there be no
17 consequences?

18 A. No. I believe appropriate consequences are
19 necessary even if it were the case, and I'm not
20 conceding that it is, even if it were the case that no
21 harm were done, that there were no adverse impact of a
22 specific instance of breaking the law.

23 To explain why I see the situation that way,
24 let me suggest a reference to a somewhat different
25 context, a term that probably everyone in this room

1 has heard before, usually arises in the context of
2 debate about whether or not certain laws are
3 appropriate or whether penalties are appropriate, and
4 that's the concept of a so-called victimless crime.
5 And the point I want to make by drawing that analogy
6 is that with victimless crimes, typically the
7 government nevertheless makes it a crime even if there
8 is arguably no victim, and the penalties are often
9 very harsh even if there is no harm done to the
10 participants in the crime.

11 A good example, I think, certainly a strong
12 example where the consequences are very severe would
13 involve an importer of drugs into this country,
14 illegal drugs, who is selling to a major distributor.
15 Arguably, there's been no harm done, particularly in
16 that one instance, if they captured the drugs and took
17 them out of circulation.

18 But again, the concept of the victimless
19 crime, the general argument is that the two parties to
20 the crime, or the single party or as the case may be,
21 typically it would be multiple parties are willing
22 participants in that activity, and that no one has
23 been harmed, unlike, say, a burglary or a so-called
24 victim crime. And that when drugs are sold from one
25 party to another, arguably the seller and the buyer

1 are both happy to participate in that, and there is no
2 harm done, there is no victim.

3 But there is nevertheless a principle of law,
4 and a law was set up for good reason, and that broadly
5 speaking, even if in a particular instance, there are
6 only adults involved, there were no adverse
7 consequences, nevertheless, as a matter of enforced
8 society, we've concluded that it's appropriate to
9 prohibit that type of activity. And in order to
10 enforce that prohibition it becomes very important to
11 have appropriate consequences, ones that are severe
12 enough relative to the participants that participants
13 will be discouraged from engaging in that type of
14 activity in the future. And equally important, that
15 other participants or potential participants in
16 violations will also be discouraged.

17 I think you may recall in my testimony I drew
18 an analogy of going through a toll booth, and if the
19 consequence of failing to pay a \$1 toll as to when you
20 occasionally catch someone doing that, is to charge
21 someone the one dollar, then obviously we have a
22 problem because people will not be encouraged to
23 voluntarily pay the toll each time. And so it's not
24 unusual to have a penalty that is far larger than the
25 measurable impact of the failure to pay. A \$50 fine

1 for a \$1 toll would be not at all unusual.

2 So I think drawing it back to this case, even
3 if it were true, and I don't concede that it is, that
4 there's no harm done by these particular violations.
5 If the Commission concludes that there had been
6 violations, and if the Commission concludes those are
7 serious and significant violations, then there should
8 be serious and significant consequences or remedies.
9 And I believe the types of remedies I've recommended
10 are appropriate for this situation.

11 Q. Now, let's consider the situation where there
12 has been harm, but it's difficult to measure. How
13 would that affect your recommendation regarding the
14 consequences?

15 A. It helps explain, perhaps, the nature of the
16 remedies that I'm recommending, that I believe there
17 has been harm, but that harm is very difficult, if not
18 impossible to measure, and that we are in a situation
19 that is very distinct from, say, a contract dispute in
20 which there's been a breach of contract found, and the
21 rules are that the consequences limit it to the
22 measurable nonspeculative damages that can be proven
23 in court.

24 That is not the type of situation we're in
25 here. I believe we're dealing with a matter of public

1 policy and violation of policies that, by their very
2 nature, have impacts that are very difficult to
3 measure, if not impossible to measure, and involve
4 parties that are not participants in this proceeding,
5 and that may not even be identifiable. That's the
6 nature of it.

7 Somewhat analogous to the reasoning behind
8 why, for example, drugs are prohibited even if in some
9 situations there's no harm done to the individual
10 participants, because there's a broader harm to
11 society. It's impossible to identify all the,
12 arguably, victims. I would use that term. Some would
13 say that's not a fair term, but the consequences to
14 society are very hard to measure.

15 In this particular situation, I'll be very
16 specific. The types of harms that are potentially
17 taking place or have taken place, and are very
18 difficult to measure are to create, depending on how
19 you look at it, either prices that were too high, and
20 Qwest voluntarily was willing to charge lower prices
21 and in the natural course of events should have been
22 offering those lower prices if they were truly in
23 their self-interests, and therefore we were not
24 bringing in competitors, and not encouraging
25 competition to the same degree that would have

1 happened if Qwest had offered this on the standard
2 basis, filed with the Commission, and made it
3 available to all parties, or conversely, that they
4 were designed to favor -- and I think that's more the
5 nature from what I've read of the facts -- favor two
6 particular participants. But in so favoring those two
7 participants, what they've done is skewed the
8 competitive process against other either actual
9 participants or potential participants.

10 But it's very difficult, if not impossible,
11 to measure the effect of that skewing process, that
12 because two of the participants had a significant cost
13 advantage, let's put it they're paying for significant
14 amounts for these services they're renting, these
15 bottleneck services that the CLECs are dependent upon,
16 the other CLECs were either encouraged to not compete
17 as aggressively, they were not in a position to gain
18 market share and to participate as actively, or -- and
19 this is the clearest example -- they simply didn't
20 participate at all. They either did not come into
21 existence, there were firms, people, investors in the
22 Arizona market, who might have started up in this
23 business but for the conditions they were seeing, in
24 which McLeod and Eschelon specifically were
25 succeeding, others were not. It was a mixed picture,

1 and it did not look very profitable, or you had
2 participants in other states who chose not to come
3 into Qwest's territory or not to come into the Arizona
4 territory, again, because they were seeing a situation
5 in which it was not favorable to other competitors.

6 Now, the point is, I'm not really trying to
7 draw that much into the specifics, I'm trying to show
8 you that the logical harm that we see here is from
9 entities that never came into existence or entities
10 that have never entered the market, and thus it would
11 be logically impossible or certainly very difficult to
12 ever measure as a matter of quantification the
13 specific lack of competitive activity that took place
14 or the specific lack of changes in market share or
15 other cascading sorts of things that have happened in
16 the process. That's the very nature of the situation
17 that we need to stand back from those specifics and
18 look at what is a reasonable remedy given the total
19 circumstances.

20 MR. POZEFSKY: Thank you.

21 Your Honor, at this time I would move for the
22 admission of Dr. Johnson's testimony, and RUCO Exhibit
23 No. 17, the errata sheet.

24 ALJ RODDA: Did we identify his testimony?

25 MR. POZEFSKY: I'm sorry, it's RUCO Exhibit

1 No. 1, and it's actually all the testimony that RUCO
2 is presenting Mr. Deanhardt's, Ms. Diaz Cortez', and
3 Dr. Johnson, so at this point I would only move that
4 portion of Exhibit No. 1, Dr. Johnson's testimony, and
5 I can show --

6 ALJ RODDA: It sure would be easier if we had
7 three different exhibits for three different
8 witnesses.

9 THE WITNESS: How about 1A?

10 ALJ RODDA: Okay, 1A. That's Dr. Johnson and
11 the exhibits that go with Dr. Johnson's testimony.

12 Is there any objection to Dr. Johnson's
13 testimony or RUCO 1A?

14 MR. NAZARIAN: No objections to the testimony
15 or the scheme, Your Honor.

16 ALJ RODDA: Thank you. 1A, RUCO 1A is
17 admitted.

18 MR. POZEFSKY: Your Honor, at this point I
19 would tender Dr. Johnson for cross-examination. Thank
20 you.

21 ALJ RODDA: I'm sorry, and 17 was the errata,
22 so I presume no one has any objection to corrections.
23 We'll admit RUCO 17. Thank you.

24 I guess -- I think Qwest has the significant,
25 at least from my little sheet from the prehearing, I

1 think everyone else had minor cross. I'll ask Staff.

2 MS. SCOTT: Actually, I have one question for
3 you, Dr. Johnson, and it's based upon your summary
4 just a moment ago.

5

6

CROSS-EXAMINATION

7

8 Q. (BY MS. SCOTT) In addition to the CLECs
9 being harmed in this process, is it also -- isn't it
10 also very likely that the Arizona consumer was harmed
11 as well?

12 A. Yes, to the extent the competitive process
13 was damaged and distorted, and there certainly are
14 consequences for consumers that are adverse, and
15 similarly, to the extent the 271 process -- part of
16 the problem is how you look at it.

17 If Qwest recognized they had problems with
18 their operations support systems, and that rather than
19 simply making it financially attractive enough to
20 their largest users of that system to not complain
21 about the problems with that system, but instead had
22 devoted their efforts to fixing the system, and
23 thereby making the system smoother and more accurate
24 and more effective, capable of switching customers
25 quickly and so forth, if they had accomplished that

1 then the 271 process could have moved faster, been
2 less contentious, and ultimately interLATA competition
3 would have come to the consumer faster than it has.
4 Apparently it has not yet come to the consumer.

5 So that's another example of an indirect
6 consequence that I think is there from this failure to
7 file the agreements, and a failure to fix the things
8 that would have become apparent if the agreements had
9 been filed.

10 MS. SCOTT: Thank you.

11 ALJ RODDA: Mr. Dixon.

12 MR. DIXON: I have no questions on behalf of
13 Worldcom, thank you.

14 ALJ RODDA: Mr. Wolters.

15 MR. WOLTERS: No questions.

16 ALJ RODDA: Mr. Nazarian.

17 MR. NAZARIAN: Thank you, Your Honor. I know
18 from talking to Mr. Campbell yesterday that he has
19 some questions, and he has something else going on and
20 that he plans to come in after I'm done.

21 ALJ RODDA: I'm glad everyone knows, then.

22

23

CROSS-EXAMINATION

24

25 Q. (BY MR. NAZARIAN) Good morning, Dr. Johnson.

1 You're an economist; is that right?

2 A. Yes.

3 Q. You're not an attorney?

4 A. That's correct.

5 Q. You have not participated in the drafting
6 process for the 1996 Telecom Act; correct?

7 A. Yes.

8 Q. You have never served on any Congressional
9 staff related to that legislation; is that correct?

10 A. That's correct.

11 Q. Nonetheless, you opine in your report on
12 Congressional intent, don't you?

13 A. Maybe you could point me to the specific
14 passage you have in mind.

15 Q. Starting, for example, on Page 6, Line 20,
16 you have a heading importance of competition. On Line
17 22, your question is: In the previous section you
18 introduced Section 252(e) requirements of the '96
19 Telecom Act. Why did Congress adopt this and other
20 provisions? You answered that question; correct?

21 A. I don't think I dodged the question, but I
22 think I successfully avoided the concern you have,
23 that if you look at my answer I simply quoted the
24 FCC's answer. So it's the FCC that's doing the
25 interpretation of the legislative intent, at least in

1 that particular case.

2 Q. So it's fair to say, then, that your opinion
3 on the goals of the '96 act, and the environment that
4 act is intended to create tracks the FCC's
5 interpretation of the '96 act; correct?

6 A. I think I walk a fine line. There are
7 aspects of the act that I think quite appropriately my
8 opinion has a value and is useful to the Commission in
9 terms of what I think Congress was trying to
10 accomplish, why do I think competition is good.
11 That's the sort of thing an economist brings to the
12 room that is helpful, why would they have chosen to
13 create an act in competition.

14 As an economist looking at the act I can see
15 the compromises that were struck by legislation, and
16 how that compromising tends to consistently further
17 the goal of competition when given pressures from,
18 say, the cable TV industry and the telephone local
19 exchange industry, they solve those very vivid and
20 strong lobbying pressures by basically trying to
21 create a situation which the two industries would
22 compete with each other rather than protecting both
23 industries, they both gave them something of what they
24 wanted, but did it in a way that encourages
25 competition.

1 Q. But you agree, then, the fundamental purpose
2 is to create a competitive environment in the
3 telecommunications industry; correct?

4 A. Yes, or at least to try to.

5 Q. To try to evolve what had been a historical
6 regulated monopoly into a model of a competitive
7 market, at least along the lines Congress thought was
8 possible; correct?

9 A. Yes, they tried to solve the well understood
10 problems of the industry. The things that made it
11 difficult for competition, they tried to solve those
12 problems. For example, the bottleneck problem, they
13 tried to solve it by requiring rental of those
14 bottleneck elements.

15 Q. And to the extent, then, the implementation
16 of those goals requires that act to be interpreted and
17 applied, you're not disagreeing with the FCC's
18 interpretations of how competition is to be brought
19 about, are you?

20 A. I don't recall specifically disagreeing, but
21 in some cases, I do disagree. In some cases my
22 disagreement has turned out to be shared by courts
23 higher than the FCC. So I don't want to give you the
24 impression that I necessarily think the FCC has gotten
25 everything 100 percent right every step of the way.

1 Q. Whether you think they've gotten it right or
2 not, though, the FCC's interpretations are
3 controlling, are they not?

4 A. I'll accept them until one of the courts
5 above them tell them no, which is exactly what's our
6 current situation and what's happening right at the
7 moment. In certain cases their interpretations have
8 been rejected and remanded back to the FCC to get it
9 hopefully right the second time through.

10 Q. There's no interpretation of the FCC relating
11 to scope of competitive local exchange carriers'
12 opting rights under Section 251 that's been rejected
13 or returned by a court; correct?

14 A. That's true. I'm not aware of any litigation
15 that has gone to that question.

16 Q. So to the extent, then, the FCC has
17 interpreted CLECs' opting rights and the scope of
18 CLECs' opting rights, you don't have any basis on
19 which to conclude that the FCC's interpretation would
20 not be controlling here; right?

21 A. No disagreement comes to mind that I would be
22 loathe to answer in the affirmative to the way you
23 framed the question.

24 Q. You rely in your testimony, in a few
25 different places, on the FCC's first report and order

1 of August of 1996; correct?

2 A. Yes.

3 Q. You rely on it, starting on Page 6 and
4 trickling over onto Page 7. And specifically on
5 Page 3 of that order, in connection with defining the
6 principal goals of the telephony provisions of the '96
7 act; right?

8 A. Yes.

9 Q. Then you go on, on Page 8, when you answer
10 the question: How did Congress envision promoting
11 competition in local markets, you answer again by
12 reference to the first report and order, or in this
13 case Paragraph 12; correct?

14 A. That's the start of my answer, yes.

15 Q. Then you go on to talk about Section 251(c),
16 then you do in fact interpret Congressional intent
17 after that, don't you?

18 A. I'm not going to disagree. If you can find a
19 sentence where I've interpreted Congressional intent,
20 perhaps there is one here. But in general, I tried to
21 walk a fine line, talk about the economics of the act,
22 the logic of the act, the public policy implications
23 of the act, and where I could, I tried to leave the
24 interpretations, either the language of the act where
25 I felt it was self-evident or the FCC or some court's

1 interpretation. But there might be a sentence here or
2 there that, for the sake of ease of drafting, is my
3 own words.

4 Q. Your report, your testimony quotes
5 Paragraph 12 of the first report and order on Page 8,
6 from Lines 10 to 18, and specifically, the portion of
7 that paragraph that says the act contemplates three
8 paths of entry into the local market, the construction
9 of new networks, the use of unbundled elements of the
10 incumbent's network and resale. Do you see that?

11 A. Yes.

12 Q. And that provision of the first report and
13 order, and your reliance on it, means, does it not,
14 that there are certainly different ways that
15 competitive local exchange carriers can get into the
16 local telephone market; right?

17 A. There are ways that they're allowed to, yes.

18 Q. Right. They can adopt different business
19 models that adopt different strategies for how to
20 enter the market; correct?

21 A. Yes, provided you don't draw from my response
22 the implication that all business models are equally
23 viable or profitable and feasible.

24 Q. That may be. I certainly wasn't importing
25 your endorsement of any particular model, but it

1 certainly is possible, and the FCC certainly
2 contemplated that, for example, a CLEC could enter the
3 local market by building its own facilities rather
4 than renting unbundled network elements; right?

5 A. Yes.

6 Q. It could rent -- it could purchase unbundled
7 network elements, or it could buy resale services;
8 correct?

9 A. Yes.

10 Q. It could do some combination of those things
11 in different markets, depending on the circumstances;
12 correct?

13 A. Yes.

14 Q. And so it's fair to say, Dr. Johnson, is it
15 not, that all CLECs are not created equally or at
16 least you cannot presume they are, until you know how
17 each CLEC's gone about figuring about how to enter a
18 particular market, can you?

19 A. That is true.

20 Q. Are you aware, Dr. Johnson, that Arizona is
21 the second most competitive local telephone market in
22 the United States?

23 A. I'm not sure how you're measuring that. No,
24 I'm not aware of it.

25 Q. If you look at the proportion of local lines

1 owned by CLECs in Arizona and compare that to the
2 proportion of other states, do you dispute that
3 Arizona's CLEC presence compares favorably with other
4 states?

5 A. I'm willing to accept that it does compare
6 favorably with some other states, but to be more
7 specific than that, I prefer that you show me a
8 document or some specific statistic you have in mind,
9 or at least be more precise in how you're asking the
10 question.

11 Q. I don't mean to take us off on a big, long
12 analytical discussion of this. You don't have any --
13 Let's leave it this way: You don't have any basis to
14 dispute the fact that competition has succeeded in
15 Arizona, do you?

16 MR. POZEFSKY: Your Honor, I'm going to
17 object; it assumes facts not in evidence.

18 ALJ RODDA: You know, I can't remember -- I
19 remember someone talking about competitive lines or
20 calling Arizona one of the most competitive states,
21 but I don't remember who that was, nor do I remember
22 what documentation they had to support that statement,
23 so...

24 MR. NAZARIAN: That is fair. Let me go at it
25 this way, then, Your Honor because I don't want to

1 belabor it.

2 Q. (BY MR. NAZARIAN) You haven't performed any
3 analysis, Dr. Johnson, and you're not rendering any
4 opinions that relate to the extent of local
5 competition in Arizona, have you?

6 A. That's correct. I have not calculated market
7 share analysis, HHI analysis or some other sort of
8 analysis to see how far we've progressed towards
9 competition.

10 Q. You've performed no analysis that would allow
11 you to opine as to whether competition in Arizona is
12 more robust, say, before the summer and fall of 2000
13 as opposed to after the summer and fall of 2000, have
14 you?

15 A. I haven't specifically done any calculations
16 in that regard.

17 Q. Have you done any general sort of analysis in
18 that regard?

19 A. In general, the trend towards increased
20 competition has continued nationwide, and I would
21 expect Arizona's part of that overall trend.

22 Q. In addition, Dr. Johnson, to the different
23 ways in which CLECs can decide to enter the local
24 markets in terms of either facilities or
25 interconnection, it's true also that CLECs can vary

1 tremendously in the customers they target; correct?

2 A. Yes.

3 Q. Some CLECs' business models contemplate
4 residential customers, others contemplate business
5 customers; correct?

6 A. Yes.

7 Q. Some might contemplate a combination; right?

8 A. Yes.

9 Q. And some CLECs might only sell Internet
10 services or other broadband; correct?

11 A. Yes.

12 Q. So it's impossible then, Dr. Johnson, to
13 generalize about what sort of contractual or
14 interconnection terms might make sense for every
15 CLEC's business models, either in terms of the way
16 they're going to obtain services or the customers to
17 whom they're going to sell them; correct?

18 A. Give me the question, it's impossible to
19 generalize.

20 Q. Right. You can't make general assumptions,
21 can you, about --

22 A. There probably are some general assumptions
23 you can make, but you can't necessarily generalize.
24 It just depends on the issue.

25 Q. And in terms of determining whether --

1 putting aside for a moment opt-in rights -- whether a
2 particular CLEC would want, as a business matter, to
3 opt into any particular contract provision, you can't
4 just assume that a CLEC would want to opt in without
5 knowing how that CLEC has decided to obtain its
6 services, and to whom it seeks to sell them, can you?

7 A. I agree.

8 Q. And a CLEC's decision in a particular
9 instance to opt in or not to opt in to a contract
10 provision is a matter of that CLEC's business
11 judgment; correct?

12 A. Yes.

13 MR. NAZARIAN: Now, I'd like, if I could,
14 please, to mark as Qwest Exhibit 14 an excerpt of the
15 first report and order from the FCC. As Your Honor
16 and probably everybody knows, it's probably a thousand
17 page document which we've not reproduced in its
18 entirety, but I've reproduced the sections that
19 Dr. Johnson has quoted, Your Honor, and one other that
20 I'd like to share with him.

21 Q. (BY MR. NAZARIAN) Dr. Johnson, I take it
22 from the fact that you quoted the first report and
23 order in your testimony that you are at least
24 generally familiar with this rule; correct?

25 A. Yes. It's been quite a while, though, since

1 I read the document in its entirety.

2 Q. And it's a big, long ruling, isn't it?

3 A. Right.

4 Q. I wouldn't, of course, hold you to every last
5 thing in it, which is why I gave it to you.

6 Let me ask you this --

7 A. You say you gave it to me? Now I think I
8 have the excerpt.

9 Q. Dr. Johnson, does your testimony presume that
10 every CLEC has the right to opt into every provision
11 in every contract that's been approved by a
12 commission --

13 A. No.

14 Q. -- without regard to the related terms or
15 conditions that are attached to that provision?

16 A. No.

17 Q. You understand that a CLEC's right to opt in
18 to a particular contract term is a function of related
19 terms and conditions; correct?

20 A. Yes, that's appropriate.

21 Q. And in fact, the FCC has ruled as much in the
22 first report and order. Do you disagree?

23 A. I don't recall the exact provisions of the
24 FCC's ruling, and maybe that's part of what's in front
25 of me.

1 Q. It is indeed. Take a look, please, at the
2 last page of what's now been marked as Qwest
3 Exhibit 14.

4 A. In general, your description is consistent
5 with my recollection.

6 Q. On the last page of Exhibit 14 --

7 MR. NAZARIAN: Well, before I guess I examine
8 the witness on this, I guess, it's -- it is an FCC
9 order, I'm not sure I need to have it admitted as
10 evidence, but I'll offer it for the witness and I'll
11 ask that it be admitted, if for no other reason to see
12 if there are any objections. We'll take it from
13 there.

14 ALJ RODDA: Any objections to the first FCC
15 order excerpt?

16 MS. SCOTT: No.

17 MR. DIXON: No. Shall we ask that you
18 provide full copies to everyone?

19 MR. NAZARIAN: Be careful what you ask for.
20 I don't think we view this, Your Honor, on whether
21 it's actually admitted as evidence. I just want it to
22 be marked for purposes of the record, and as long as
23 there are no objections, I'll examine the witness.

24 ALJ RODDA: It's marked and I'm admitting it
25 so I can check it off on my list.

1 MR. NAZARIAN: Thank you.

2 Q. (BY MR. NAZARIAN) Take a look, Dr. Johnson,
3 on the last page of Exhibit 14, Paragraph No. 1315 of
4 the first report and order. Do you see that?

5 A. Yes, I had just gotten to that. It gives an
6 example of a five-year and a three-year, a good
7 example.

8 Q. This paragraph deals specifically with the
9 question, does it not, of whether a CLEC can opt into
10 portions of an agreement without also opting into the
11 corresponding -- to corresponding related terms;
12 correct?

13 A. I'm sorry, say that again.

14 Q. This paragraph deals with the question of
15 whether a CLEC can opt into one provision of an
16 agreement, of somebody else's agreement with an ILEC,
17 without also opting at the same time into
18 corresponding related terms; correct?

19 A. Right. It deals with the idea that, for
20 example, if you had a 50-page agreement can you opt
21 into one sentence out of that 50-page agreement, and
22 pick another sentence out of a 30-page agreement, and
23 somehow create your own agreement, and the answer is
24 no.

25 Q. And the FCC's first report and order contains

1 a specific example in this paragraph, doesn't it?

2 A. Yes.

3 Q. If you go six lines down into the paragraph,
4 there's a sentence that begins: Instead, we conclude
5 that the, quote, same terms and conditions, close
6 quote, that an incumbent LEC may insist upon shall
7 relate solely to the individual interconnection
8 service or element being requested under
9 Section 252(i). For instance, where an incumbent LEC
10 and a new entrant have agreed upon a rate contained in
11 a five-year agreement, Section 251(i) does not
12 necessarily entitle a third party to receive the same
13 rate for a three-year commitment. Do you see that?

14 A. Yes.

15 Q. Similarly, that one carrier has negotiated a
16 volume discount on loops does not automatically
17 entitle a third party to obtain the same rate for a
18 smaller amount of loops. Do you see that sentence?

19 A. Yes.

20 Q. So you agree, Dr. Johnson, that if a
21 discount, assuming it existed, were conditioned on a
22 CLEC's agreement to volume and term commitments,
23 another CLEC's right to opt into that same discount
24 would be contingent on the second CLEC's agreement to
25 the same volume and term commitments; correct?

1 contemplating is that there could be an arbitration
2 process in which another CLEC came forward and said
3 look, I don't operate in 13 states the way McLeod
4 does, but I'm willing to commit to you that within the
5 states I do operate, I'm going to buy a lot of your
6 services, and I'm going to get a volume that's
7 analogous to theirs except I'm only in certain states.
8 And therefore, I want a sliding scale volume
9 commitment analogous to McLeod's volume, and that's a
10 reasonable request. And if you were to refuse it, and
11 it went on arbitration, the Commission might say no,
12 you're required to accept that, because the Commission
13 would be allowed to interpret the volume requirements
14 in a way that is reasonable to you, and reasonable to
15 the public interest.

16 So again, I think -- the implication there is
17 there is some discretion on the part of the arbitrator
18 in resolving precisely how much picking and choosing
19 is allowed.

20 Q. But it's fair to say, though, that you can't
21 presume that a CLEC could come in and cherry pick the
22 discount without any sort of volume commitment at all?

23 A. I think that would be fair. If there were
24 none whatsoever, I think it would be extremely
25 unlikely that the Commission would say that you have

1 the right to do that.

2 Q. To the extent there is some wiggle room or
3 discretion on the part of the Commission to determine
4 whether a CLEC would have to opt in word for word or
5 on some other analogous basis, you would agree, would
6 you not, that that's a case-by-case question, isn't
7 it?

8 A. Yes, which in turn goes to the heart of why
9 all agreements are supposed to be filed, and yet we're
10 trying to walk a line here that we are encouraging
11 voluntary agreements rather than requiring the
12 Commission, through a tariffing process, to mandate
13 every detail of wholesale provisioning. So to have
14 multiple agreements to encourage multiple agreements,
15 there has to be some room for variation amongst the
16 agreements, and that's why you don't go to the extreme
17 case of pick and choose.

18 Q. And a CLEC's right to opt in, either word for
19 word or on analogous terms, ultimately is something
20 that either has to be worked out or the Commission has
21 to decide, you can't presume it; right?

22 A. If we were in a situation in which the
23 agreements were filed and then it became a question of
24 whether or not a position -- whether you had the right
25 to opt into an agreement, for example, then that's

1 exactly the process that would go on.

2 But similarly, and this is something to keep
3 in mind, another benefit of having them filed is if
4 there were an arbitration between another CLEC and
5 Qwest concerning a breakdown in negotiations, and that
6 CLEC came forward and says all I'm asking for is
7 something analogous to what they've given McLeod, but
8 it's changed and different in these subtle ways
9 because of my difference in circumstances, and they're
10 being unreasonable in denying me that, they should be
11 willing to do it, and I'm asking you, as a commission,
12 to reject their position and accept mine, the
13 Commission would have the discretion of doing that and
14 saying yes, 10 percent discount is reasonable, this is
15 an analogous situation.

16 So I agree with you that it would, in
17 practice, if you had filed the agreements the way it
18 would work, would allow the Commission, in its
19 discretion, to interpret these subtleties, but it also
20 has a chilling effect on certain anticompetitive
21 behavior. The very fact that the agreements are filed
22 tends to create a climate that's conducive to
23 arbitration, and conducive to making similar
24 reasonable concessions to other competitive carriers.

25 Q. But a CLEC who comes in and wants to modify

1 the terms in a filed agreement, and opt into something
2 else, analogous as you say, might not persuade a
3 commission that it has the right to do that?

4 A. That's correct.

5 Q. Okay. You understand, Dr. Johnson, that
6 UNE-Star as contained in the McLeod and Eschelon
7 agreements is different from standard UNE-P; correct?

8 A. Yes.

9 Q. It's a different product, contains different
10 features; correct?

11 A. Yes, there were some differences.

12 Q. And so a CLEC who -- let's say that one of
13 these agreements issued between McLeod and Eschelon
14 and Qwest had been filed. You're not opining that a
15 CLEC who is on UNE-P could come in and say I want the
16 discount that's contained in an agreement relating to
17 UNE-Star, and I want that discount applied to my UNE-P
18 arrangement; right?

19 A. I'm not making that contention, although
20 that's conceivable someone could make that argument,
21 and it's conceivable that they would have gotten in
22 favor of a hearing.

23 Maybe a better analogy would be, say that I
24 have a customer that's on Centrex right now, and I
25 want him to switch over to my service, and I want to

1 use UNE-P as a transitional mechanism to serve them
2 for the first couple of years until I build up enough
3 customers, put in my own switch, and Qwest is
4 insisting upon these huge cancellation fees and
5 connection fees, and yet there's really no cost to
6 them of doing this, it's just a matter of changing the
7 method of billing, I've become the one that's acting
8 as the carrier.

9 And the Commission, in trying to decide
10 whether those -- that insistence upon this massive
11 one-time payment at the time of switching the customer
12 is reasonable or not very well might also look and say
13 well, we have this McLeod agreement in which there was
14 a rebate of essentially the entire millions of dollars
15 in an analogous situation.

16 So it might well tip the scales and say in
17 that particular case, a matter of a waiver in effect
18 of connection fees at the time of switching an
19 existing customer, and leaving them on the existing
20 switch, whether that will be a reasonable thing to
21 impose, that to me will be a better analogy of where
22 taking one aspect of the McLeod agreement, even though
23 it was not necessarily UNE-Star, but is so closely
24 analogous of this question of do you have the right to
25 impose massive fees when there's really no cost

1 involved, it's just a change in billing.

2 Q. Well, you've created your own hypothetical
3 and I'd like you to stick with mine.

4 If a CLEC utilizes UNE-P, and has been a --
5 has purchased UNE-P services from Qwest, and sees a
6 filed agreement related to UNE-Star that contains a
7 discount, you are not contending that the UNE-P CLEC
8 can come in and say I now want the UNE-Star discount;
9 correct?

10 A. I would not -- they can ask for it, but I
11 wouldn't necessarily recommend that it be granted. If
12 you're asking me put myself in the role of advising
13 the Commission or testifying on behalf of Staff in an
14 arbitration, and there was this question of should you
15 be automatically or should you, in that particular set
16 of facts, get the 10 percent discount, you haven't
17 told me enough to know for sure, but I wouldn't
18 automatically say, definitely say yes, sure, they
19 ought to be entitled to the discount. There might be
20 factual differences between that CLEC situation and
21 the UNE-Star situation that would legitimately support
22 the difference in pricing.

23 Q. But you can't presume that a CLEC that uses a
24 different platform can automatically opt into the
25 other platform's discount?

1 A. Again, it would depend in part on how
2 different are the platforms. If the differences are
3 extremely inconsequential and have little or no
4 effect, that would be different than if the
5 differences are quite serious. And I have not studied
6 the difference between UNE-Star and UNE-P sufficiently
7 to really opine as to how serious the differences are.
8 My impression is there's a lot of overlap.

9 Q. But you haven't attempted in any way to
10 quantify the actual impact on McLeod or Eschelon's
11 wholesale costs, for example, compared to UNE-P
12 customers?

13 A. That's correct, I have not quantified the
14 difference.

15 Q. And you haven't done any analysis of retail
16 prices to Arizona consumers charged by McLeod or
17 Eschelon versus other CLECs during the time this
18 alleged discount was in place; correct?

19 A. That's correct.

20 Q. And you've done no analysis of McLeod or
21 Eschelon's profit margins compared to other CLECs in
22 this time period; correct?

23 A. That's correct. And none of those missing
24 analyses would be necessary in developing the
25 recommendations that I put in.

1 Q. We'll get to that. But you also haven't
2 undertaken any analysis of whether other CLECs' costs
3 were higher or profits lower during this time frame as
4 a result of these discounts that McLeod and Eschelon
5 supposedly received, have you?

6 A. That's correct.

7 Q. Now, you testified during your summary,
8 Dr. Johnson, that you thought the harm to a CLEC would
9 be difficult or impossible to measure in this case; is
10 that right?

11 A. I think it would be difficult or impossible
12 to capture and measure all of the harms that result
13 from failing to file agreements.

14 Q. Let's focus for a second on the harms that
15 CLECs might have suffered as a result of the failure
16 to file agreements. We can talk about the other more
17 ethereal ones in a minute.

18 It certainly is possible to figure out
19 whether a particular CLEC suffered harm from a lost
20 opt-in opportunity; correct?

21 A. I'm not sure what you have in mind, so I
22 don't know if that's true or not.

23 Q. Well, in the first instance, for example, you
24 could look at the universe of Arizona CLECs in, let's
25 say, November of 2000, and you could look at the

1 agreements that supposedly were not filed, and you
2 could undertake an analysis of whether any of those
3 CLECs could possibly have opted into those agreements;
4 right?

5 A. While you could look at that, that would
6 certainly not be sufficient.

7 Q. But you could do that as a way, in the first
8 instance, of determining whether CLEC opt-in
9 opportunities had been lost; right?

10 A. I really am struggling with the whole notion.
11 I mean as I was trying to make clear, disentangling
12 this situation is very difficult.

13 It is -- the first thing, you'd have to step
14 back and say well, would the agreements after being
15 filed, have been accepted as filed, or would they have
16 struck certain provisions? And what is it they're
17 opting into? Are they opting into the version that
18 Qwest filed or are they opting into something
19 different that the Commission might have imposed.

20 For example, is it with or without a
21 provision that says you're not going to participate in
22 regulatory proceedings and help the Commission with
23 regard to 271. Maybe they would have just struck the
24 entire agreement on that basis.

25 But assuming the agreement was moved forward,

1 then would they look at the volume discounts and say
2 this is unreasonable because it only works for a
3 carrier like McLeod that's in many states, and that
4 potentially is vying from Qwest's interLATA operations
5 in other parts of the country or whatever, and they
6 might have looked at that situation and said that's
7 contrary to the public interest to calculate a volume
8 discount based on total volumes on a multistate
9 region. And therefore, they might have then gone back
10 to the drawing board and resubmitted a new agreement
11 with totally different terms and conditions.

12 So what is it we're measuring is very hard to
13 know, because once it wasn't submitted, you didn't
14 have that process and many other processes such as
15 instead of a pure opt-in, using this as an analogy or
16 example or benchmark, in an arbitration over another
17 agreement, and I think that's perhaps the more
18 realistic example of how the filing of these
19 agreements, even if they had been accepted, could have
20 affected other CLECs that are so small that they would
21 not have qualified for these very large CLECs'
22 volumes.

23 Q. If the Commission rejects the agreement then
24 it's easy, nobody can opt into it; right?

25 A. Your calculation is easy, but you certainly

1 haven't finished calculating the consequences, what
2 would have happened.

3 Q. You're adding issues and I'm trying to go one
4 at a time here. If the Commission rejects the
5 agreement, then nobody can opt into it at all;
6 correct?

7 A. That's correct.

8 Q. If the Commission accepts the agreement, and
9 certainly RUCO's theory is that the Commission would
10 have accepted, at least for purposes of calculating
11 damages, there's an assumption here, is there not,
12 that something would have been available for CLECs to
13 opt into, otherwise we wouldn't be having any of this
14 conversation; right?

15 A. I think you misunderstand, because I think
16 it's my testimony that presents RUCO's position with
17 regard to remedies, I don't think we used the term
18 damages. And I think I can articulate for you if you
19 ask what is our rationale behind our remedies, and our
20 remedies are not analogous to a contract dispute in
21 which you're measuring damage, nor is it really even
22 analogous to an antitrust dispute once you started the
23 damages and are in trouble. It is perhaps more
24 analogous, if you wanted to, analogous to a different
25 type of proceeding to a dispute in which, say, the

1 person has died, they had very little income, and
2 therefore, the value of their life was minimal, and
3 thus the actual economic damages are very small and
4 almost irrelevant.

5 And the entire issue is the punitive damages
6 deposit would send a message to an industry to not
7 behave this way in the future. And those punitive
8 damages may have no relationship to the economic
9 damages. The economic damages might have been
10 \$50,000, punitive damages might have been \$32 million,
11 and the 32 million might have been calculated as
12 1 percent the net worth of the company or some other
13 way of calculating. If we're drawing analogies, I
14 don't think damage is at the core of our
15 recommendations.

16 Q. But I'm not attempting to draw analogies, I'm
17 asking specific questions, okay?

18 A CLEC that is entirely facilities-based
19 would not have any business reason to opt into a
20 10 percent discount on UNE-Star, would it?

21 A. It doesn't fit very well. I can't imagine
22 why they would, unless --

23 Q. Right. So you could look in on November of
24 2000 at the universe of CLECs in Arizona, and you
25 could say these facilities-based CLECs don't have any

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1 interest of opting into a discount UNE-Star because
2 they don't utilize UNE-Star or UNE-P or anything like
3 it; right?

4 A. Right, conceivably.

5 Q. And you haven't undertaken any sort of
6 analysis?

7 A. Conceivably they might have been interested
8 in some part of the switched access. They say I'm not
9 going to look at that UNE-Star access, but I like that
10 UNE-Star access. I haven't looked at particularly Cox
11 Cable or something like that, that might have been
12 able to save a lot of money by opting into the
13 agreement and buying intrastate access at a 10 percent
14 discount, I don't know that it would have been
15 sufficiently feasible that they could have opted in.

16 Q. Neither you nor anybody else at RUCO has
17 attempted to look at the universe of CLECs and
18 analyzed which, if any, would have been interested
19 just from a pure business model perspective in opting
20 in; right?

21 A. That's correct.

22 Q. And then nobody from RUCO and certainly not
23 you has made any effort to determine whether any of
24 the CLECs in Arizona at the time could have opted into
25 volume or term commitments that went along with the

1 discount; correct?

2 A. That's correct.

3 Q. So the harm from the lost opt-in opportunity
4 that you described to the CLECs in your testimony
5 assumes that everyone would have the opportunity to
6 opt in even though you've not performed that analysis;
7 correct?

8 A. I don't think so. Could you point me to a
9 specific provision in my testimony that you're
10 referring to?

11 Q. There's not a sentence that says that.

12 A. Is there a page or is there a series of pages
13 that implicitly say that?

14 Q. No. I'm just looking at the lack of any
15 distinction among CLECs.

16 A. I don't think you're describing or
17 characterizing my testimony accurately, so it's one of
18 these situations where it's not really feasible to say
19 yes or no to your question.

20 Again, I was not trying to digress too much,
21 but I really think you're misinterpreting the entire
22 thrust of our testimony. The testimony shows that the
23 provisions in question are important from a public
24 interest point of view, and that there are adverse
25 consequences to the public of allowing this sort of

1 behavior, and that's why the behavior is prohibited.
2 And it's important consequences.

3 But we have not suggested that it's
4 particularly significant to this proceeding to try to
5 trace and disentangle specific impacts on specific
6 carriers. This is not a cause of action by a carrier
7 requesting a retroactive discount or requesting some
8 sort of contract dispute in which they're going
9 forward and saying you've been unfair to me, you said
10 you were going to treat me fairly and you haven't, or
11 on some such cause of action where they calculated
12 would they have opted in and what would be the savings
13 they would have achieved become significant in the
14 analysis.

15 Q. Despite what you just described about your
16 theory of remedies here, you are nonetheless
17 recommending that the Commission require Qwest to give
18 a 10 percent across-the-board UNE-P discount to all
19 CLECs in Arizona; right?

20 A. What I've suggested is that in lieu of a
21 financial fine as a type of penalty, I want to make
22 that clear, that the -- as part of the set of remedies
23 that we're recommending, because we're not
24 recommending a financial penalty in the form of paying
25 a fine, that there be a discount offered on a

1 forward-looking basis for a period of time, similar to
2 the duration of the McLeod and Eschelon contracts, and
3 that being 10 percent discount.

4 But it is not crafted as being the same as
5 trying to calculate what discount might have been
6 available in the past. First of all, the UNE rates in
7 general have come down, so taking 10 percent of a much
8 smaller number. Second of all, it's broader in that
9 it would provide some encouragement to competition
10 across the board that anybody who was buying UNEs
11 would get some benefit. And yet it's also narrower in
12 that we're not offering a 10 percent discount to
13 access, for example, nor are we requiring you provide
14 the 10 percent discount to Qwest's interstate long
15 haul provision or other things that you sell.

16 So again, I think there's many differences;
17 what is similar is the number 10.

18 Q. But again, without having performed any
19 analysis of harm to individual CLECs, you are
20 recommending that every Arizona CLEC get a 10 percent
21 discount off UNE-P; correct?

22 A. Because -- yes.

23 Q. That's a yes or no question.

24 A. Yes.

25 Q. You understand, Dr. Johnson, that RUCO had

1 the opportunity to conduct discovery in this case;
2 right?

3 A. Yes.

4 Q. That they served something in excess of 20
5 different sets of information demands on Qwest for the
6 five to ten business day turnaround?

7 A. That I don't know.

8 Q. You don't dispute that, though?

9 A. I have no reason to dispute it.

10 MR. POZEFSKY: Your Honor, the witness
11 answered he doesn't know.

12 THE WITNESS: I just don't know. Either
13 counsel can either agree or disagree if it's
14 important.

15 MR. POZEFSKY: We would concede we've offered
16 over 20 sets of data requests, that's correct.

17 Q. (BY MR. NAZARIAN) The point is RUCO could
18 have obtained for you any information you either
19 needed or wanted about CLECs' business models.

20 RUCO could have obtained for you,
21 Dr. Johnson, any information that you would have
22 needed about CLECs' business models, wholesale and
23 resale pricing, revenue, you name it, that would have
24 allowed you as an economist to determine the harm to
25 any individual CLEC; correct?

1 A. No, I seriously doubt that. Again, the
2 simple analogy would be if you have an entity that
3 hasn't come into existence because the competitive
4 conditions weren't favorable enough, how would RUCO
5 even know who to serve the discovery on? Or if you
6 have an entity out of state that didn't enter the
7 Arizona market because McLeod was too strong and they
8 didn't feel like they could compete against McLeod,
9 under what theory of rights would they have to go to
10 somebody who's operating over here, somewhere else,
11 and say we want to have details of your business
12 models and any memos you might have that are
13 evaluating whether or not to enter the Arizona market.

14 Your question was so overly broad.
15 Certainly, within those documents that Qwest has in
16 its possession I would assume we could have asked for
17 them, and could have received them, but I don't think
18 it would solve the puzzle from the perspective that
19 you're trying to impose on me or the Commission as
20 opposed to how they look in this case. It just
21 doesn't go to the roots of the problem.

22 Q. RUCO can know, it is known and knowable what
23 CLECs were certified to do business in Arizona in
24 November of 2000; correct?

25 A. Yes.

1 Q. And you don't have any reason to doubt that
2 RUCO could serve information requests or requests on
3 those CLECs to determine their business models, their
4 purchases, their wholesale and retail pricing, their
5 revenue, anything like that they would need?

6 A. If they had needed to do that, they could
7 have tried. They might have chosen not to, they might
8 have felt that the adverse impact on small operations
9 to require them to hire attorneys and to engage in
10 discovery and to go through their documents and turn
11 over extremely sensitive business plans, it would not
12 be in the public interest to pursue that type of
13 discovery, but if they felt they had to because that
14 was the only way to calculate a remedy, then they
15 might have chosen to do that.

16 Again, I never got any direction from them
17 that they believed that the proper way to calculate
18 the remedy here required that sort of fact finding.
19 And certainly from my perspective, I didn't see that
20 as necessary.

21 Q. Well, did RUCO determine the right way to
22 think through the remedies, or did you?

23 A. Ultimately, the Commission is the one that
24 has to decide, and that's obviously the nature of this
25 dispute we're having this morning, but in the

1 instance --

2 Q. You're the one that wrote the testimony. For
3 the purposes of your testimony, who decided how to
4 think through the proper approach to remedy, RUCO or
5 you?

6 A. I did.

7 Q. So to the extent RUCO then didn't conduct
8 discovery or obtain information about actual
9 circumstances and harm to CLECs, they did not do that
10 because you told them it wasn't necessary; correct?

11 MR. POZEFSKY: Your Honor, I'm going to
12 object; we're getting into work product information
13 here.

14 MR. NAZARIAN: There's no work product
15 privilege with an expert, Your Honor.

16 MR. POZEFSKY: There's also some
17 attorney-client information here.

18 MR. NAZARIAN: There's no attorney-client
19 privilege with an expert.

20 MR. POZEFSKY: I concede that. I'll withdraw
21 my objection.

22 ALJ RODDA: Good, because I lost track of
23 your question.

24 Go ahead.

25 Q. (BY MR. NAZARIAN) The point is, Dr. Johnson,

1 it wasn't that RUCO decided that these issues weren't
2 important, your theory of damages in this case is that
3 it's not important to measure the harm, the actual
4 harm to CLECs; correct?

5 A. I don't agree with the way you state it. I
6 don't think you're fairly characterizing my previous
7 response. If you would go back and look at it
8 closely, I think you would see that I was trying to
9 show that RUCO did not direct me to view the remedy
10 problem from a particular perspective. None of the
11 attorneys at RUCO said to me that given our legal
12 theory of the case, this is the proper way to do it,
13 or there are certain parameters or certain limitations
14 or boundaries on my analysis. So I just disclose that
15 for your benefit.

16 Then beyond that, I said now the way I looked
17 at it, I did not perceive that it was particularly
18 useful or necessary to engage in the kind of exercise
19 you're describing, and therefore, I did not pursue the
20 fact finding or hypothesizing that could have taken
21 place.

22 Q. Let's move on, Dr. Johnson, to your proposal
23 regarding the two-part litigation fund. That is your
24 proposal, right, not RUCO's?

25 A. I think they're all RUCO's proposals because

1 they hired me, and now it's an admission against, in
2 effect, when they hired an expert and he put forward
3 recommendations, they're RUCO's, as well as the fact
4 they were reviewed before they were submitted. As far
5 as I know they are acceptable, they did not ask me to
6 change them or remove any remedies.

7 Q. I didn't mean to suggest anything untoward.
8 I understand RUCO is embracing and sponsoring your
9 testimony. I'm just asking more in terms of whose
10 idea it was in the first place, yours or RUCO's?

11 A. It was mine.

12 Q. Has any state commission adopted a litigation
13 fund like that, like you propose?

14 A. Not specifically, but I would not claim it
15 was without any precedent. There are some states in
16 which there are provisions, either under the
17 regulations of the Commission or under statute, to
18 reimburse litigation costs of participants in the
19 regulatory process.

20 Q. So that's a legislative regulatory
21 determination?

22 A. As it would be here.

23 Q. Well, it would be here a remedy, as you put
24 it, in a contested administrative hearing; correct?

25 A. Right.

1 significance of litigation costs. For a company the
2 size of Qwest, and the stakes in terms of trying to
3 protect a 90 percent market share, the impact to you
4 of dragging out negotiations and failing to ever reach
5 agreement and appealing and doing all sorts of
6 litigation activity, which is certainly your right, is
7 an impact that's measured against the size of your
8 corporation, and the size of the stakes, your
9 90 percent share of the market.

10 When you contrast that with a potentially
11 equally sized litigation cost of the other participant
12 and he's measuring against his revenues which may
13 currently be zero if he is a new entrant trying to get
14 into the market, or even his projected revenues a few
15 years down the road, which may represent say one-half
16 of 1 percent of the Arizona market, so you have 200
17 times more room to spend, in effect, a dollar to you
18 is equivalent to \$200 to them. That is the nature of
19 the situation. Nothing was done to rectify that in
20 setting up the law. That's the nature of the
21 situation.

22 If you set up a funding mechanism like this,
23 it tends to rebalance to some degree, but it does not
24 go overboard, in my view, because it does not
25 reimburse the very significant internal costs of the

1 CLEC or the entity. Their internal salaries, the cost
2 of having their CEO involved in the negotiations or
3 supervising the litigation, all those costs would
4 continue to be a burden on that carrier.

5 So to the extent they can successfully
6 negotiate, they would still have just as much
7 incentive to do that as Qwest does. All it really
8 does is change the dynamics of the potential outcome
9 of litigation to the breakdown of negotiations, in
10 that rather than seeing those as enormously expensive,
11 they see them as possibly ruinously expensive if they
12 litigate and lose.

13 Q. It negates the cooperating entity's leverage,
14 doesn't it?

15 A. Or diminishes the negotiating leverage.
16 Either way, it changes the process.

17 Q. It alters the process of market forces by
18 adjusting leverage; correct?

19 A. If you want to describe it that way.

20 Q. There's not a single state commission that
21 has created a fund that requires an ILEC to fund
22 litigation by CLECs against itself, is there?

23 A. I'm not aware of any.

24 Q. Dr. Johnson, none of the agreements at issue
25 in this case required Qwest to pay CLECs for poor

1 service quality, did they?

2 A. Not that I recall.

3 Q. None of the agreements at issue in this case
4 relate in any way to broadband deployment, do they?

5 A. They might indirectly relate, but not
6 directly.

7 Q. There's no allegation in this case that
8 Qwest's failure to file any of the agreements that are
9 actually at issue here harm the expansion of broadband
10 deployment in Arizona or anywhere else; correct?

11 A. I have not made any such allegation. The
12 broadband element of our remedies is a mechanism for
13 providing benefit to the public generally in a way
14 that I believe has relatively minimal or relatively
15 small impact on Qwest, and I think it's an appropriate
16 element because of the fact that some benefit to the
17 public should be provided, some compensation to the
18 public generally should be provided, and I think that
19 is an appropriate way of doing it.

20 Q. You acknowledge at Page 39 of your testimony
21 that if market forces were allowed to operate in
22 Arizona, the broadband deployment that you propose
23 likely would not happen; correct?

24 A. At least some of it, yes. Obviously, some
25 deployment is occurring and will occur regardless. So

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1 to the extent it speeds up that deployment and
2 enhances that deployment, there's a benefit to the
3 public.

4 Q. So again, your proposed remedy for a
5 violation of the Telecommunications Act that RUCO
6 alleges constitutes anticompetitive behavior on the
7 part of Qwest is to order Qwest to deploy broadband in
8 a fashion inconsistent with market forces; correct?

9 A. I wouldn't describe it that way. What will
10 tend to happen --

11 Q. But am I wrong? Again, you might describe it
12 differently, but is my statement incorrect?

13 A. Yes, I think it's incorrect. I would not
14 agree to phrasing it that way. If somebody on my
15 Staff had suggested putting those words in my mouth, I
16 would have struck it, so that's not a fair way to
17 describe what we're talking about.

18 What we're talking about is that if you
19 relied exclusively on normal market forces, broadband
20 would tend to deploy at a certain pace and would tend
21 to start in urban areas and work out from those, and
22 it will be slow in coming to rural areas. And some
23 rural areas that end up not having either cable
24 deployment or ILEC deployment may not get any landline
25 based broadband any time in the near future, in the

1 next 10 years. That's not particularly in the public
2 interest.

3 As a way of helping the public generally by
4 speeding up that process, and requiring a broader
5 deployment, this mechanism benefits the public. But
6 it does not do so in a way that is inconsistent with,
7 it simply supplements, would be a better way of
8 phrasing it, supplements the normal market forces by
9 further encouraging service in rural areas. In much
10 the same way that the requirement to have nationwide
11 toll prices, uniform toll prices supplement or
12 modifies normal market forces, because otherwise you
13 might have low prices in urban areas, high prices in
14 rural.

15 Q. That's a regulatory legislative judgment;
16 correct?

17 A. Yes. If this were adopted it would be a
18 regulatory judgment to adopt it.

19 Q. It would be a ruling in a contested
20 administrative hearing; correct?

21 A. Yes.

22 Q. And you're proposing as a remedy a broadband
23 deployment scheme that requires Qwest to implement
24 broadband services in a fashion different than would
25 occur under your understanding of normal market

1 forces; correct?

2 A. To the extent Qwest does not plan on
3 deploying as fast as the schedule I've set forward,
4 then it would speed up to that schedule. But I don't
5 know how much speeding up would take place.

6 Q. Dr. Johnson, you don't contend that CLECs
7 have any sort of obligation to participate in 271
8 proceedings, do you?

9 A. No. And they generally cannot afford to.

10 ALJ RODDA: Mr. Nazarian, is it okay if we
11 take --

12 MR. NAZARIAN: I'm very close, Your Honor, if
13 that's all right.

14 ALJ RODDA: That's fine.

15 Q. (BY MR. NAZARIAN) Whether a CLEC decides to
16 participate in a 271 proceeding is a matter of the
17 CLEC's business judgment; correct?

18 A. And what it can afford to do. It would look
19 at whether there was any likely impact on them, and
20 there probably is, and would weigh that against what
21 it would cost them. And in many cases in my
22 impression across the country CLECs do not participate
23 because it's too costly to do so.

24 Q. The CLEC satisfied with Qwest service to it
25 has no reason to oppose Qwest's 271 application, does

1 it?

2 A. No. But it would have an incentive to assist
3 Qwest by writing letters and doing other simple steps
4 to assure the Commission is very happy with the
5 service, and very pleased with it, because it
6 obviously builds its vendor relations with a company
7 extremely important to the business, its primary
8 business. To the extent it's happy it would be more
9 than willing to allow Qwest to use its name and make
10 the commissions aware of it, Again for the simple
11 logic that it's such an important vendor.

12 What typically would happen, of course, it's
13 maybe happy with some parts of the process and unhappy
14 with other parts; it's a mixed bag. Therefore, they
15 sit quietly and they can't afford to complain about
16 the things they don't like, and the things they do
17 like they have no strong incentive to only talk about
18 those, so they do not participate one way or the
19 other.

20 Q. A CLEC that can't otherwise afford to
21 participate in 271 but that can enter into an
22 agreement with Qwest where it gets something in
23 exchange for an agreement not to participate is better
24 off with that agreement, isn't it?

25 A. Can you say that again? In other words,

1 if --

2 Q. I'll walk through it more carefully.

3 Assume your hypothetical that -- or your
4 statement that most CLECs can't afford under any
5 circumstances to participate in 271 because it's too
6 costly, and pick a CLEC that fits that model. If that
7 CLEC can't otherwise afford to participate, but goes
8 to Qwest and says if you'll agree to do X, Y, and Z
9 for me I'll agree not to participate in 271, that CLEC
10 is better off for the agreement, isn't it?

11 MR. POZEFSKY: Your Honor, I would object at
12 this point. I would request that some more foundation
13 be laid to that. I mean, if you're just talking of
14 one term, the 271, we don't know, that assumes facts,
15 all the other terms, which we don't even know what the
16 other terms are that they're giving up in exchange for
17 it to be considered, so they have some foundational
18 issues at issue. If all things are being the same
19 then that's okay.

20 ALJ RODDA: I'm going to overrule the
21 objection. You can answer.

22 THE WITNESS: Let me hear the question again.

23 Q. (BY MR. NAZARIAN) Assuming a CLEC who fits
24 your description of most CLECs, that under normal
25 circumstances it couldn't afford to participate in 271

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1 proceedings regardless of its level of satisfaction
2 with the ILEC's service performance, assume that CLEC
3 goes to Qwest and says I will agree not to participate
4 in 271 if you give me X -- it doesn't matter what X
5 is -- that CLEC is better off for the agreement;
6 correct?

7 A. If it weren't of credible ethics, and if it
8 weren't of concern, it weren't concerned about the
9 Commission as a matter of pure logic I would agree
10 with you.

11 But when I hear that if I were to put myself
12 in the shoes of the CLEC I have two concerns. Number
13 one, is this legal. Would I agree not to participate
14 in a regulatory process and stay out in term for quid
15 pro quo? Maybe I can, but it doesn't smell right so I
16 would be loathe to do it. But X is pretty big.
17 Everybody has a price when it starts getting tempted
18 when this was gray.

19 The second concern is when the Commission
20 finds out, I may not be able to afford to send a lot
21 of lobbyists over, I may not be able to afford to
22 participate in formal proceedings, but I'm going to
23 have customers that call and complain, and when my
24 person has to talk to someone on the Staff and try to
25 explain look, that really wasn't slamming, it was an

1 honest mistake, please don't fine me, please don't
2 bring me into court, et cetera, I've got that ongoing
3 relationship with the Commission, however small it may
4 seem relative to the Commission's operations, but for
5 the CLEC that's an important relationship.

6 What is the possibility I'm damaging that if
7 the Commission perceives me as, in return for a
8 payment, making their job harder, which is the way
9 they might perceive that?

10 So there's a difference between saying look,
11 I just can't afford to help you out on 271 versus
12 Qwest paid me to stay out. There's a big difference,
13 and I think the CLEC might see that.

14 So I cannot agree with your original
15 statement, because it implied no matter how small the
16 X, the CLEC would be tempted to do that, I don't think
17 they would be tempted. I think those concerns would
18 outweigh the X short of some very large compensation,
19 then I guess it would depend on the ethics of the CLEC
20 and their perception of the relative risks.

21 Q. But the Commission truly can't compel CLECs
22 to participate in 271 over their fundamental business
23 judgment; correct?

24 A. That's correct. Well, I don't know. Maybe
25 the Commission has arrived to automatically make

1 people intervenors, I don't know what rights they
2 have. But my impression is they typically would not
3 even if they had the latent right to do so.

4 MR. NAZARIAN: Let me have just one minute,
5 Your Honor.

6 (Brief pause.)

7 MR. NAZARIAN: Your Honor, let's take a short
8 break, if we could.

9 ALJ RODDA: Okay.

10 (A recess ensued.)

11 ALJ RODDA: We're back on the record.

12 Did you have anything further, Mr. Nazarian?

13 MR. NAZARIAN: Just a couple questions, Your
14 Honor.

15 Q. (BY MR. NAZARIAN) Dr. Johnson, I'd just like
16 to clarify, if I could, your proposed remedy of a
17 10 percent discount against UNE rates going forward.

18 As you propose it, that discount would be
19 afforded to all CLECs regardless of whether they were
20 at all similarly situated to Eschelon or McLeod;
21 correct?

22 A. Well, if they're buying UNEs, to some degree
23 they are similarly situated, but beyond that, the main
24 qualification is that they would not be Eschelon and
25 McLeod.

1 Q. And your proposed remedy does not contemplate
2 any analysis of the CLECs' ability to opt into the
3 McLeod or Eschelon discounts at issue here as a
4 prerequisite for the discount; correct?

5 A. That's correct. And keep in mind that it is,
6 on the one hand it's broader, in that it's not limited
7 to those who could have opted in, but on the other
8 hand it's narrower in that it's only limited to the
9 UNEs. The discount isn't nearly as generous as what
10 they would achieve if they actually opted in, because
11 if they opted in they'd get a discount on access,
12 they'd get a discount on interstate access, they'd get
13 a discount on purchases between Chicago and Miami.
14 For a carrier like AT&T or Worldcom, the 10 percent
15 could be a very, very large number, if they opted in
16 because they buy things from Qwest all over the
17 country, and it's a lot of money at stake.

18 So in many ways, this very narrow remedy of
19 10 percent UNEs is much smaller than what they might
20 qualify for if they had opted in.

21 Q. And your proposed remedy, Dr. Johnson, would
22 not require the CLECs to satisfy any of the related
23 terms contained in the McLeod or Eschelon agreements
24 at issue here; correct?

25 A. I don't know which terms you have in mind.

1 Q. Well, it wouldn't require any sort of volume
2 or term commitments from the CLECs taking advantage of
3 the discount you propose; correct?

4 A. That's correct. And it's different than
5 viewing a situation from the point of view of trying
6 to reconstruct the world and say how much money would
7 a particular carrier have benefited, and in that kind
8 of a calculation, the opt-in and to what extent would
9 they be allowed to opt in is the path you're
10 describing. It's just simply a different process than
11 the one I've recommend.

12 Q. Right. There wouldn't be any opt-in or not
13 question, it would be automatic on the terms you
14 propose; correct?

15 A. Yes. And again, the logic is because that
16 discount would advance competition, will encourage
17 competition, it makes competition more financially
18 possible for carriers when they pay a lower rate on
19 their UNEs.

20 Q. Dr. Johnson, when you came up with your
21 proposed set of remedies, did you undertake any
22 analysis of the Commission's remedy authority in this
23 case?

24 A. I am not sure what you mean by analysis.

25 Q. Did you in any way attempt to determine what

1 the range of the Commission's authority to impose
2 remedies in this case would be, and then calibrate in
3 any way your proposed remedies to fit that?

4 A. Yes.

5 Q. What were the assumptions or the
6 determinations you made with regard to the
7 Commission's remedy authority?

8 A. I'm not sure you would say there were
9 assumptions. I inquired and was provided with some
10 statutes or other documents, and I came away from that
11 with an impression, but I don't know that I can say
12 there was an assumption.

13 Q. What was the impression to which you came
14 after reviewing the statute about the extent of the
15 Commission's authority to impose remedies in this
16 case?

17 A. The impression was that this was a case of
18 first impressions, should we say. I'm not sure that's
19 the right legal term. But in any event, that it was
20 plowing new ground, and that there was considerable
21 ambiguity and uncertainty as to the full range, and
22 that at one end of the continuum, the remedies might
23 be very severe, and at the other end of the continuum,
24 it was conceivable that the Commission would not --
25 that the law that had been broken, there were not

1 adequate remedies.

2 Q. What statutes, Dr. Johnson, did you review in
3 this regard?

4 A. I don't recall the specifics. I recall
5 looking briefly into the federal and state legal
6 situation, and came away with the impression that it
7 was ambiguous, there were no clear guidelines to work
8 with.

9 Q. Was the set of statutes you were provided --
10 let me start again.

11 Was the set of statutes you reviewed provided
12 to you by RUCO?

13 A. At least in part. As far as the -- we did
14 some internal research, and then we asked RUCO and
15 they provided us with some additional materials. And
16 I'm not really sure how much someone on my staff,
17 Mr. Nesmith found on his own, and how much we relied
18 on RUCO to supplement that or provide us with copies.

19 Q. At least to some extent, your staff
20 identified the statutes governing the Commission's
21 remedy authority?

22 A. Again, you're pushing this way past where it
23 needs to go. You asked me did I do any investigation.
24 Yes, I looked into it a little bit.

25 But certainly, the real issue you're raising

1 is one that RUCO's attorneys will address, I assume.
2 In the legal phase, the briefing phase, there will be
3 that, and I haven't asked them and they haven't
4 provided me with like a legal memorandum stating their
5 opinion as to the statutes.

6 Q. But just so we're clear, then, as you sit
7 here, you can't recount for the court what statutes
8 you reviewed; correct?

9 A. I don't have the numbers memorized.

10 Q. Do you recall whether any of them related to
11 a finding of contempt?

12 A. I think that's one of the ambiguities, that
13 the concepts like whether there was an artifice or a
14 scheme, whether there's contempt, there's other sorts
15 of concepts that would ultimately determine the range
16 of consequences.

17 Similarly, the Commission's discretion, I
18 mean, if it were to retroactively impose these terms
19 and conditions while removing or deleting certain
20 provisions, if the Commission, for example, were to
21 conclude the proper remedy was to refund to all
22 carriers operating in Arizona 10 percent of their
23 purchases, provided they met certain minimum standards
24 such as a certain minimum purchasing nationwide from
25 Qwest, maybe the dollars would all flow to AT&T and

1 Worldcom, and maybe, too, they'd qualify, but the
2 dollars might be far greater than anything we're
3 talking about.

4 So there are all these ambiguities as to what
5 the potential consequences were. And I asked RUCO was
6 there any hard and fast guidelines they wanted me to
7 work with, and they said no, that they would prefer
8 that I develop an independent judgment or what I
9 thought was appropriate, given an assumption that the
10 Commission had adequate authority, whatever that was.
11 They then reviewed my proposals, they were obviously
12 not draconian and they felt were reasonable or within
13 the range of discretion, or at least that was my
14 impression from the fact they accepted my
15 recommendations and agreed to submit them to the
16 Commission.

17 Q. One last question, Dr. Johnson. Aside from
18 the fact that a CLEC might not be able to afford to
19 participate in 271 proceedings, there certainly are
20 other reasons why a CLEC might decide in its business
21 judgment not to participate in 271; correct?

22 A. Yes.

23 MR. NAZARIAN: I have nothing further. Thank
24 you.

25 ALJ RODDA: Thank you, Mr. Nazarian.

1 Mr. Campbell.

2 MR. CAMPBELL: Thank you.

3

4

CROSS-EXAMINATION

5

6 Q. (BY MR. CAMPBELL) Good morning Dr. Johnson.
7 My name is Tom Campbell, and I'm here on behalf of
8 Eschelon Telecom this morning.

9 A. Good morning.

10 Q. My understanding is that the focus of your
11 testimony is remedies; is that correct?

12 A. Yes.

13 Q. And in preparing for your testimony and --
14 preparing for your testimony, did you review the
15 Qwest/Eschelon contracts that are the subject of this
16 proceeding?

17 A. To a limited degree, but I did not perform a
18 detailed analysis of that because other witnesses for
19 RUCO were handling that, and it wasn't necessary to
20 study them in great detail.

21 Q. But you read them or something like that; is
22 that fair?

23 A. I looked at portions of them, yes.

24 Q. The first remedy or one of the remedies that
25 you recommend is that all CLECs other than Eschelon

1 and McLeod will receive a 10 percent discount for
2 somewhere between three to five years on UNE prices;
3 is that correct?

4 A. Yes.

5 Q. Why did you exclude Eschelon?

6 A. Because they had already received a very
7 substantial payment from Qwest and had -- were a party
8 to the failure to file, so -- let me stand back for a
9 minute.

10 It's analogous to a question if you have
11 joint and several liability, there's two defendants
12 and maybe one of them has deep pockets and one is
13 mostly guilty but the other one is partially guilty
14 and has shallower pockets, depending on the law they
15 may both equally be liable or they may not be.

16 In my view, I had the discretion to craft
17 different levels of remedy or penalties or adverse
18 consequences for the participants, and I felt that
19 some adverse consequence needed to occur for Eschelon
20 and McLeod to send a signal to CLECs that if you
21 encounter a gray area, no matter how much pressure you
22 might be under from your dominant supplier to comply,
23 if you are very concerned that this might cross the
24 line, you need to resist rather than just cave in.

25 So I viewed it as a question of there needed

1 to be some adverse consequences for those carriers,
2 they should not be as severe for Qwest because I
3 recognize the dynamic between a dominant carrier and a
4 smaller carrier, and thus believe that the remedies
5 should not be equal.

6 Q. So is it fair to say, then, that one of the
7 reasons that you excluded Eschelon is to penalize
8 Eschelon for its behavior in this circumstance?

9 A. Yes, as well as the fact that they had
10 already gotten some benefits from the arrangement,
11 just as Qwest got some benefits.

12 Q. You would agree that if they were to share in
13 the discount for five years they probably would get
14 more discounts than they received today? Let me
15 strike that.

16 Do you understand that they only collected a
17 discount for 16 months?

18 A. Yes.

19 Q. In assessing this penalty against Eschelon,
20 did you analyze what impact this might have on
21 Eschelon's business?

22 A. Putting them at somewhat of a disadvantage in
23 that they would not be receiving the 10 percent and
24 their competitors would be?

25 Q. Yes.

1 A. Yes, I was very aware of that.

2 Q. But quantify that.

3 A. It's a 10 percent difference on a very
4 important cost of doing business, but again, in terms
5 of matching up the benefit they've already received
6 for 16 months, versus the benefit they're foregoing in
7 the future, there are two things you need to keep in
8 mind.

9 One, the rates to which the 10 percent
10 discount going forward would apply are generally
11 lower, because of a recent proceeding which the
12 Commission lowered the UNE rates, so you can't simply
13 compare 16 months to 36 months, for example.

14 And number two, Eschelon received a benefit
15 against a broader array of purchases, including
16 access.

17 Q. My question really goes to the detail of your
18 analysis. I understand the concept what you just laid
19 out. For instance, did you study whether having to
20 forego this discount while its competitors get the
21 discount would cause Eschelon to have to lay anybody
22 off? Did you study that?

23 A. I might choose to, but I don't think they
24 would have to given the relative magnitudes.

25 Q. My question is: Did you study it as part of

1 this proceeding?

2 A. I didn't specifically try to look at their
3 employee structure or look at that question in
4 particular. But by the same token, I did look at
5 trying to find appropriate middle ground where we
6 didn't -- weren't so draconian against either Qwest or
7 Eschelon that ultimately, the public would be harmed.
8 In the case of Eschelon, you would prefer a remedy
9 that doesn't push them out of the market entirely.

10 Q. But did you do an actual study to determine
11 if this would push them out of the market?

12 A. No.

13 Q. Did you do an actual study to determine
14 whether this remedy would cause them -- would hurt the
15 quality of their service? And my question is limited.
16 Did you study that piece?

17 A. Because of the word study I'm inclined to
18 agree with you, but again, I don't want you to get the
19 impression I didn't think about those questions. I
20 did think about it, and that's one reason why I
21 settled upon the particular mix that I did. Knowing
22 10 percent was a relatively moderate number, and
23 knowing we were applying it to a relatively finite
24 group of services, I felt that it was not too
25 draconian.

1 much of those payments were to forego questionable
2 claims for fees that they were claiming were
3 applicable, but might not be, and were not going to be
4 in the future under the agreement, and how much was
5 applicable to prior problems, I haven't parsed that
6 out in detail.

7 Q. Thank you.

8 You were aware, at the time Eschelon entered
9 into these contracts, that they were having service
10 problems or service disputes with Qwest?

11 A. Yes.

12 Q. Do you happen to know whether Qwest's service
13 to Eschelon improved as a result of these contracts?
14 Is that within your analysis?

15 A. It may have improved somewhat, but certainly
16 the problems did not go away completely.

17 Q. Do you happen to know if Eschelon gained any
18 customers as a result of these contracts? Did you try
19 to quantify that in your analysis?

20 A. I had the impression that they -- I would
21 anticipate that they would have gained some customers
22 as a result of these more favorable arrangements, but
23 I haven't quantified that, and I'm not sure it's
24 quantifiable.

25 Q. And you don't -- you couldn't name a specific

1 customer that they gained?

2 A. Right.

3 Q. Could you name a specific customer that they
4 held onto as a result of these contracts?

5 A. It would be the same answer.

6 Q. Thank you.

7 Let me change topics a little bit. Would you
8 agree with me that one factor to consider in assessing
9 a penalty against a company would be the size of that
10 company?

11 A. Yes.

12 Q. And would you agree with me that another
13 factor to be considered would be the extent the
14 company benefited from the behavior that the
15 Commission may deem wrongful?

16 A. Yes.

17 Q. Are you recommending in this proceeding that
18 the penalty to Eschelon and McLeod be the same?

19 A. They're analogous, but it wouldn't be the
20 same to the extent you describe, as part of the
21 penalty, a lack of the right to participate in the
22 temporary forward-looking discount. They would
23 naturally get a lesser, the smaller of two carriers
24 would forego a lesser discount or dollar amount.

25 And similarly, I've indicated that there

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1 should be a payment into the fund, and I've left to
2 the Commission's discretion the magnitude of that
3 payment by the two carriers, and that certainly the
4 Commission could take into account the relative size
5 of the carriers or any other ameliorating factors that
6 came to its attention.

7 Q. So it might be necessary to do so some kind
8 of analysis of Eschelon versus McLeod to craft an
9 appropriate penalty; is that a fair statement?

10 A. It would not be unreasonable to do that.

11 Q. Another penalty or remedy you assess against
12 Eschelon is for them to pay a minimum of \$100,000
13 contribution or fine to, into this litigation fund; is
14 that correct?

15 A. I'm not sure about the word another, because
16 I just alluded to it, but one of the remedies, and in
17 addition to the failure to get the 10 percent.

18 Q. Fair enough. Why?

19 A. Because I think it is something that they can
20 appropriately do. They can afford to do it, and I
21 think it's a reasonable consequence that to encourage
22 a rebalancing, partial rebalancing of the power
23 between Qwest as the incumbent and the new entrants,
24 the fund is a good idea. Having them participate in
25 it seems reasonable because it's consistent with the

1 view that McLeod, and Eschelon admittedly to a lesser
2 degree, are also guilty of failing to inform the
3 Commission of these agreements.

4 Q. So it's fair to say that this recommendation
5 is in the form of the sense of penalty against
6 Eschelon for their behavior in this proceeding?

7 A. The behavior that is the subject of this
8 proceeding, not behavior in this specific proceeding.

9 Q. But it would be fair to say this is a penalty
10 for that behavior?

11 A. Yes, if you want to characterize it penalty,
12 or you could use another term. Call it a consequence.

13 Q. Or punishment or whatever?

14 A. Or a consequence might be a better word to
15 use, because I'm not sure, maybe penalty or punishment
16 both have sort of words of art that may imply
17 something a little different than I view.

18 Q. Do you suspect it would be whether you're
19 paying it or receiving it?

20 A. Perhaps. Perhaps that contribution to try
21 and rectify the situation, and to try to send a signal
22 to other carriers: A, don't engage in this kind of
23 behavior; and B, you know, it would be better to work
24 within the law, work with the Commission to try to
25 resolve problems.

1 be free to bring forward in the brief or whatever, and
2 try to show whether you think it ought to be held down
3 to that minimum rather than some greater amount. Bear
4 in mind I suggested it's at the Commission's
5 discretion to set that range. I just suggested it as
6 a floor. It was necessary to have a large enough
7 number that it didn't appear to be just a slap on the
8 wrist.

9 MR. CAMPBELL: Thank you, Dr. Johnson. I
10 have no further questions.

11 ALJ RODDA: Thank you, Mr. Campbell.

12

13

EXAMINATION

14

15 Q. (BY ALJ RODDA) Dr. Johnson, I just have a
16 couple questions, and the first references Page 32 of
17 your testimony. On that page you're discussing, I
18 guess, a Qwest plan that's confusing me. There's a
19 little indent there. The proposed remedies include
20 the following: A credit against future purchases in
21 the amount of 10 percent of CLEC purchases under any
22 interconnection agreement or SGAT during the time
23 period from January 1, 2001 through June 30th of 2002.

24 I'm presuming, since you quoted this, that
25 you're familiar with what Qwest proposed in that

1 proceeding?

2 A. Yes, in general terms I am.

3 Q. I guess what confuses me is credit against
4 future purchases, then the time frame is in the past.
5 Does that mean -- I don't know what that means. Does
6 that mean interconnection agreements that were entered
7 into during that time -- I mean, do you know what that
8 means?

9 A. I don't know, and since I wasn't crafting my
10 recommendation precisely to their language, it was
11 certainly a moot issue.

12 There were some aspects of what they had done
13 that were similar to what I was doing, and I wanted to
14 reference their willingness to do that as a point of
15 reference, saying look, this is somewhat like theirs
16 in certain ways, it's different in other ways. The
17 time frames, for instance, are different. And there
18 is an ambiguity there, and the words future, then
19 there's the word time frame, it's conceivable that
20 could be interpreted as for some indefinite period
21 into the future the 10 percent will apply, but only
22 applies to those things that would be applicable under
23 agreements that were in effect during that time
24 period. And to the extent that agreement continued
25 for some five-year period or whatever, it would last

1 the full five years, I wasn't sure.

2 I took it to be more narrow and say there's
3 an 18-month period. I don't understand why they're
4 using the word future, other than it's future relative
5 to some even earlier time period that one could look
6 at. So I'm not sure.

7 Q. But for your plan, you go on to talk about
8 how you didn't think the 18 months was an adequate
9 amount of time. But did you have -- would your plan,
10 would your recommendation apply to all interconnection
11 agreements existing as of a certain date going forward
12 for three years or what is --

13 A. I visualize a simpler concept, which was that
14 there be a three-year minimum, maximum five years, the
15 Commission would decide towards the end of the three
16 years whether to extend it on a month-to-month or
17 other basis. The Commission might decide against
18 three years, three- to five-year period at the
19 Commission's discretion. The period would start
20 shortly after the outcome of this proceeding. End of
21 this proceeding, the Commission would decide the time
22 period.

23 Throughout that time period, the 10 percent
24 is available, and it would not be limited to those
25 CLECs that were in operation at the beginning of the

1 time period. If someone entered in the market during
2 the course of the three-year period they would get,
3 say, 12 months of that period, whatever remained after
4 they entered the market.

5 Q. So all existing agreements and any new
6 agreements are entered into during that period?

7 A. Yes. And to the extent agreements are being
8 negotiated going forward, obviously the parties to
9 those agreements would need to consciously deal with
10 this 10 percent issue and have a provision in there
11 that says the numbers presented here are before any
12 10 percent discount and may still be applicable under
13 this particular ruling.

14 It would be understood by both parties this
15 is the gross number before application of the
16 discount. Or conversely, they could quote a net
17 figure and say this number will change at the
18 expiration of that time period, whenever it is,
19 unquote.

20 Q. Is there a difference, I imagine -- what
21 would the different effect be on CLECs and on
22 competition if any recommended credit or discount or
23 whatever you want to call it was applied proactively
24 versus retroactively, just pick a date?

25 A. Very significant differences. I'll try to

1 tick through them. The first and the one that you
2 probably were focusing on, so I wanted to make sure I
3 get it first, there's a difference in terms of the
4 incentive structure for opening up the market. A
5 retroactive payment or a payment calculated based on
6 activity in the past does not provide as much
7 incentive for competition in the future. It
8 effectively is, helps the financial strength of those
9 who receive the checks, but it does not signal to them
10 any particular reason to cut prices or to invest in
11 marketing or to do any other competitive activity.

12 Whereas a temporary discount going forward
13 tells carriers that to get the maximum possible amount
14 of this benefit, it is a flexible number depending on
15 how active they are in Arizona. And by, for example,
16 more aggressively marketing in Arizona, they will sign
17 up more customers, they will get more of a discount.

18 They, of course, need to keep in mind that it
19 will eventually expire. So they also have an
20 incentive to try to provide high quality service and
21 do other things that will help maintain the loyalty of
22 those customers after the expiration, at which time
23 either the marketing will go away or the rates will go
24 up or whatever adjustments they make in reaction to
25 this carrot. It's a temporary time period of three to

1 five years, whereas going backwards, there is no
2 significant incentive. It is simply a strengthening
3 of their financial position.

4 The most vivid way of seeing that is to also
5 allude to another very important difference, which is
6 if you're going backwards you're helping carriers that
7 are bankrupt, you're helping the creditors of those
8 bankrupt entities or entities that may not be bankrupt
9 but have exited the market, you're helping carriers
10 based on the level of activity that they engaged in in
11 Arizona during the defined time period. And that's a
12 very important consequence of difference.

13 It's a matter of perspective. If we were
14 talking about damages in the sense of a contract
15 dispute, that latter perspective would be appropriate,
16 and it's appropriate that the creditors receive the
17 money. But if we're talking about trying to send a
18 signal to the CLEC in general that this type of
19 behavior isn't appropriate and not tolerated, and if
20 you're trying to enhance the situation, enhance the
21 situation by putting out a carrot for continuing
22 carriers and new carriers in the market. It's the
23 more appropriate remedy, and that's why I believe a
24 forward-looking remedy is better than a backward one,
25 even if the dollar amounts were the same.

1 Q. And then later in your testimony one of your
2 recommendations is that Qwest deploy broadband in all
3 of its central offices by a certain date; right?

4 A. Yes.

5 Q. Do you know what Qwest would have to do to
6 meet your target date?

7 A. Well, there's a series of target dates. The
8 first target date is to equip the central offices.
9 That is not a tremendously expensive effort for a
10 company of its size. It essentially involves
11 installing electronic equipment at the central office
12 that is capable of interfacing with other electronic
13 equipment at a customer's premise. It doesn't include
14 installation of customer's premise. It's only the
15 portion in the central office that could be done with
16 less than a single equipment bay with a very modest
17 amount of electronics, they could now say it's
18 available. Unless someone signs up and starts handing
19 over the revenues no further investment would be need.

20 Once they installed it, it's available, they
21 would have the natural incentive to start advertising,
22 and its confident customers would start signing up,
23 then the next step would be installing in the
24 customer's premise.

25 There's also in my recommendation a

1 shortening of copper loop length. That is just
2 requiring them to follow through what I believe to be
3 a reasonable timetable, a plan that is already in
4 effect, and when they obtain more rapid depreciation
5 of their copper cable they made it very clear they
6 were trying to push fiber closer to the customer. All
7 this requires is that they follow through that with
8 effort and in fact do it.

9 But that is -- to the extent they end up
10 putting some copper, it wouldn't really remove the
11 copper, but they put some fiber in faster than their
12 current budgets provide, then there will be the cost
13 of installing that additional fiber to bring it within
14 18,000 feet of every customer by 2007, and within
15 12,000 feet by the end of 2008.

16 Q. Do you know how many, currently how many
17 central offices are equipped with fiber?

18 A. I have not researched that specifically. I
19 would assume it's less than 100 percent, but I would
20 assume it's a large number, and I don't know.

21 Q. Do you know what the impact of your
22 recommendation is on Qwest's current budget? Do you
23 know what they're currently planning versus what they
24 would have to speed up?

25 A. They are spending a considerable amount on

1 upgrading their network and employing fiber. By far
2 the more important of the two components is the
3 acceleration of fiber. And I would assume, perhaps
4 wrongly, but I would assume that if this was an
5 unreasonably aggressive target, they would have told
6 us that in their rebuttal and they would have pointed
7 out how costly it was. I might have changed my
8 position.

9 But that's a long way of saying no, I haven't
10 specifically checked to see the pace they're at. And
11 certainly, there would be some flexibility on RUCO's
12 part to spread this timely out another year or two if
13 it turned out to be unreasonable. I don't believe it
14 is, but I have not investigated it in detail.

15 Q. And I think one of your final recommendations
16 is that the Commission adopt a rule that defines
17 interconnection agreement?

18 A. Yes, to help clarify the situation and avoid
19 ambiguities in the future.

20 Q. And did you have a proposed definition, or
21 was it just the cover?

22 A. The notion would be you would have a separate
23 rulemaking proceeding. You would announce at the end
24 of this proceeding part of what you're going to
25 clarify, you're going to go through the proper steps,

1 and at that time RUCO would put forward its
2 recommendation for language.

3 ALJ RODDA: That's all the questions I have.
4 Thank you. Mr. Pozefsky might have some more.

5 MR. POZEFSKY: I have no redirect, Your
6 Honor.

7 ALJ RODDA: I guess you're right, you are
8 excused.

9 MS. SCOTT: Jane, actually, I have a few.

10 ALJ RODDA: Did you?

11 I'm sorry, come back.

12

13 FURTHER CROSS-EXAMINATION

14

15 Q. (BY MS. SCOTT) Hi, Dr. Johnson, I have a few
16 questions for you on redirect here, recross or however
17 you phrase it, call it.

18 You had a lengthy discussion with the Qwest
19 counsel regarding opt-in; is that correct?

20 A. Yes.

21 Q. Isn't one of the problems in this case that
22 many of these contracts between Qwest and Eschelon and
23 Qwest and McLeod were never made public so that other
24 carriers had a chance to opt into these agreements?

25 A. Yes. And another problem is they were

1 all, the terms or conditions; correct?

2 A. Yes.

3 Q. And because some of these contracts affected
4 the prices paid for services falling under Sections
5 251 and 252 of the act, these should have been filed
6 and made public to other CLECs; correct?

7 MR. NAZARIAN: Your Honor, he's testified in
8 response to Mr. Campbell's questions that he only
9 glanced at the contracts and he's not here to opine on
10 whether they should have been filed or not. I think
11 it's an inappropriate question for this witness.

12 ALJ RODDA: I'm sorry, Ms. Scott, I was
13 thinking of something else. I didn't actually hear
14 the question.

15 MS. SCOTT: It's not necessary for him to
16 answer this question if he considers it more of a
17 legal issue.

18 THE WITNESS: I think it's really more of a
19 different RUCO witness would be the appropriate one to
20 ask.

21 Q. (BY MS. SCOTT) That's fine.

22 Because the contracts were never made public
23 for other carriers to review and determine whether
24 they would like to opt into them, we really don't know
25 how many other CLECs would have opted into these

1 contracts, do we?

2 A. That's correct.

3 Q. And we will never know that, will we?

4 A. That's correct.

5 Q. And isn't it possible -- first of all, let me
6 ask you about the volume discounts in these cases.

7 The volume discounts or the discount was tied
8 to the level of products purchased; correct?

9 A. From Qwest, yes.

10 Q. But the discount wasn't in fact tied to a
11 particular product, was it, such as UNE-Star or UNE-M?

12 MR. NAZARIAN: Excuse me, Your Honor. Are we
13 talking about a specific agreement now, or in general?
14 Because the contracts are obviously very different, as
15 the testimony shows.

16 MS. SCOTT: That's a good point.

17 Q. (BY MS. SCOTT) Let's use the November 15th,
18 2000 contract between Eschelon and Qwest as the
19 example here.

20 A. Again, I'm not the best witness to probe the
21 subtleties of the contract, but if you're asking me my
22 understanding of the contract with respect to how the
23 discount is applied, my understanding, the discount
24 wasn't tied to a single set of products or products
25 such as UNE-Star, but was applicable to everything

1 they purchased, including, for example, long haul
2 services that might apply between Arizona and Denver,
3 or elsewhere. Or in future, they got 271 authority,
4 or other sorts of purchases such as access, mentioning
5 that's a very valuable one.

6 I have not looked at the contracts. Say if
7 Cox Cable tried to opt into this, and said actually
8 we're not going to buy the UNE-Star other than the
9 bare minimum the contract might require. What we
10 wanted to do is get access, we need access, and we'd
11 like to pay 10 percent less. Maybe Cox Cable's
12 dollars will be big enough and Cox will be big enough
13 to qualify, particularly if the Commission could
14 change the dollar volume or change the structure of it
15 to be less discriminatory. So it's a very difficult
16 to go the route they're implying because of the
17 opt-in. The opt-in is distorted by the lack of public
18 disclosure and review by the Commission.

19 Q. Is it conceivable in your opinion that if
20 other carriers had been aware of this volume discount
21 that they may have increased their activity levels to
22 qualify for it in Arizona?

23 A. It's certainly a possibility. In particular,
24 the ability to get a 10 percent discount on access as
25 well as a 10 percent discount on, say, Phoenix to New

1 York would obviously, you would be looking at the
2 economics of total purchases and you'd say well, who
3 am I using right now to haul traffic from Phoenix to
4 New York or New York to Miami or wherever it might be,
5 and, well, Qwest is extremely competitive with
6 Worldcom and Global Crossing and other folks who do
7 that, and a penny one way or the other doesn't make
8 much difference who I use. I happen to be using
9 Global Crossing, maybe I should switch to Qwest
10 because I get this big discount on access I need and
11 am paying for in a state like Arizona.

12 Q. So it is conceivable, in your opinion, that
13 carriers may have increased their activity level in
14 Arizona had they been aware of the volume discount?

15 A. Yes. Which is one of the problems with the
16 retroactive approach, because you're simply freezing
17 in time the volume and activities that did take place,
18 and calculating things based on that, whereas arguably
19 the really relevant volumes are those that would have
20 occurred under some other scenario.

21 Q. Is it also conceivable, in your opinion, that
22 because of the higher UNE rates in effect at that
23 time, that had other carriers been aware of the
24 discount, that they maybe would have entered into the
25 market in Arizona, where before they had made a

1 decision not to?

2 A. Yes, absolutely. The focusing on UNE rates
3 in particular, UNE rates were relatively high at that
4 point, and it was not very attractive to enter the
5 market using UNEs, certainly not as attractive as it
6 is today.

7 Certainly the 10 percent alone would skew
8 things, but you also -- it's really more than a
9 10 percent discount, in effect, because you're also
10 getting a discount on access, which everyone pays and
11 passes through to their customers. So arguably the
12 net effect is equivalent to a 20 or 30 percent
13 discount, a much bigger discount, whatever it might
14 be.

15 Again, that might have tipped the scales.
16 Someone might say I'm considering going to California.
17 There's a lot of competition in Arizona but the
18 margins are better. Arizona looks attractive to me
19 but the margins are tight. If they had seen 10 to 20,
20 30 percent difference in the margin they might have
21 entered this state.

22 Q. Dr. Johnson, there was also quite a bit of
23 discussion, and has been throughout the course of this
24 proceeding, about the Commission, had it looked at
25 these contracts when they had been filed, there's

1 speculation that they may have rejected them; is that
2 correct?

3 A. It's certainly a possibility. I don't know
4 if there's speculation, but it's certainly a
5 possibility that either in whole or in part. And more
6 likely our comment is they would have rejected the
7 more discriminatory aspects of them, while allowing
8 the remaining portions.

9 Q. But the simple fact of the matter is that the
10 Commission never had the opportunity to review these
11 contracts when they were entered into; isn't that
12 correct?

13 A. Yes.

14 Q. And so these contracts remained in effect for
15 considerable lengths of time; correct?

16 A. Yes.

17 Q. And were secret and unknown to other carriers
18 or the Commission?

19 A. Again, I'm not the best witness to probe into
20 that, but that's my understanding.

21 Q. Another area that you discussed with Qwest
22 counsel had to do with the impact of the
23 nonparticipation clauses; correct?

24 A. Yes.

25 Q. And I believe you engaged in a discussion

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1 with the Qwest counsel that there may have been some
2 benefits that the CLEC obtained by entering into these
3 nonparticipation clauses; is that correct?

4 A. Well, I think there were benefits entering
5 into the contracts. That particular clause seemed to
6 me to be a benefit to Qwest. I don't really see a
7 benefit to the CLEC.

8 Q. How would it have benefited Qwest?

9 MR. NAZARIAN: Your Honor, she's asking the
10 witness, RUCO's witness, to speculate about what might
11 have been a benefit to Qwest under circumstances that
12 are not even defined in a hypothetical. I think it's
13 an inappropriate question and I object to it.

14 MS. SCOTT: I'll withdraw the question.

15 Q. (BY MS. SCOTT) You indicated that you did
16 not feel that the contract benefited the CLEC. Why
17 not?

18 A. The CLECs having smooth provisioning that's
19 accurate is very, very important, and potentially,
20 having that is more important than the particular
21 price they're paying. Obviously at some price, the
22 price is so high they can't afford to be in business
23 either.

24 But it doesn't matter how low the price gets.
25 If the service you're providing your customer is lousy

1 because you're not getting a smooth interface with
2 Qwest or because Qwest is dropping circuits and
3 there's no dial tone at the time of a cutover, or the
4 features are coming and going, lines that were
5 supposed to be equipped with some exotic feature
6 suddenly didn't have that feature anymore and the
7 customer is aggravated, that aggravation is extremely
8 costly to the CLEC.

9 So being able to rectify that situation is of
10 extreme importance to them, and the only ways they can
11 get it rectified is either having Qwest solve the
12 problem because they complained and asked for it, or
13 by getting the Commission to pressure them into doing
14 it. And the only real pressure point that exists
15 under this system of regulation is the Commission, and
16 the primary pressure point within the Commission is
17 the 271 process.

18 While that is pending, and they're eager to
19 get into the interLATA business, they have a much
20 stronger incentive to actually fix the problems and
21 get the software working properly, and train the
22 personnel properly and do all the difficult things
23 that have to be done than they will have after that
24 approval or they'll have any other time period.

25 So from a CLEC's point of view, being able to

1 get better service is extremely important. If you
2 could sever that and keep the option of either
3 complaining and saying look, I know you're preferred,
4 we've got this arrangement, sort of a joint venture,
5 everything is fine but the service is still bad,
6 you've got some people who aren't doing what they need
7 to do and I've got a customer screaming at me, fix it
8 and fix it fast. Being able to do that and have some
9 credible backup to it, what's the consequence if they
10 don't fix it? There's not much. You've got a
11 long-term contract, you've got a take or pay, you
12 promise to use them whether the service is good or
13 not, so what's the leverage left?

14 The main leverage they would have is to
15 participate in a 271 proceeding, if nothing else,
16 write a letter articulating their concerns or to
17 quietly call Staff counsel and chat on the phone about
18 their concerns and say why don't you ask them about
19 this or that.

20 So promising to stay out of that process is
21 pretty much something that helped Qwest, and I really
22 don't see how it could have helped the CLEC.

23 Q. I have one other question for you, then.
24 Isn't it also correct that this is an ongoing process
25 between Qwest and the CLEC such that Qwest may resolve

1 certain issues for the CLEC, but then two months
2 later, new problems, knew issues may arise, and the
3 CLEC also needs those to be resolved?

4 A. Yes.

5 Q. And if it can't participate in a process,
6 then it's at the mercy of Qwest, is it not?

7 A. In general it is at the mercy of Qwest. The
8 process that is available as a balance to that is the
9 arbitration process, and the flaw in the arbitration
10 process is that it's costly to arbitrate, and the cost
11 of that looms large. If you've got a series of little
12 nagging things that are causing difficulties, to fix
13 each one costs you \$5,000, \$10,000, \$20,000 whatever
14 the number is, to hire an attorney, to file a
15 complaint, go to an arbitrator, in some cases it's
16 even a lot more than that. It just outweighs -- it's
17 not like you get your money back if you're successful
18 and they fix it; all you have is the thing is now
19 fixed, then something else comes up.

20 So it's an inherent problem in the structure
21 of the Telecom Act. There's a lot of great things in
22 that act that was well thought out in general, but
23 it's a weakness in the act, and 271 is a temporary
24 pressure point that tends to create a stronger
25 incentive for Qwest to fix problems, but it's only a

1 temporary fix.

2 And really, the standard they have to meet is
3 they've opened up the market. The standards say they
4 have to provide high quality service. That is an
5 issue for the Commission under its authority to impose
6 and to require, and -- the reason I'm elaborating on
7 that is because I do have the recommendation about a
8 fund, and I think it's a good element in the remedies
9 for the temporary solution because it potentially
10 creates a much stronger incentive and a balancing of
11 power between the CLECs and Qwest where they have a
12 stronger incentive to fix the problems in the first
13 place because they know otherwise there will be a lot
14 of things surfacing at the Commission that otherwise
15 don't need to surface, if they just fix them in the
16 first place.

17 MS. SCOTT: Thank you.

18 ALJ RODDA: Do you have any recross or
19 whatever it is based on --

20 MR. NAZARIAN: No, Your Honor. I guess if I
21 could retroactively impose for the record an objection
22 to the witness' speculation about the CLEC industry in
23 which the CLECs' order would not want, like, need or
24 do, which I think is far outside the scope of his
25 testimony.

1 ALJ RODDA: Okay.

2 MR. NAZARIAN: If I can have that objection
3 applied to Ms. Scott's line of questioning in that
4 regard for the record, I have nothing further.

5 ALJ RODDA: I'll note your objection and
6 we'll apply it.

7

8

FURTHER EXAMINATION

9

10 Q. (BY ALJ RODDA) I'm glad you're still here,
11 though, because I forgot to ask one of my little
12 sticky note questions, and that had to do with your
13 recommendation about the rebates or credits for poor
14 service quality.

15 A. Yes.

16 Q. I'm not sure exactly what you're
17 recommending. Is it that you want the path to go into
18 effect now or -- I didn't note any specific credits or
19 rebates that you were recommending.

20 A. I'm simply saying to the extent there is not
21 a mechanism in place, a permanent mechanism isn't in
22 place, if there's a gap in time while it's being
23 appealed or otherwise not yet in effect, during that
24 time period I'm recommending that a credit be
25 automatically applied. All the CLEC would have to do

1 unsatisfactory service.

2 ALJ RODDA: Thank you.

3 (The witness was excused.)

4 ALJ RODDA: Convenient lunch break for a
5 change. Let's come back at 1:45 -- wait, 1:15.

6 Sorry.

7 (The lunch recess ensued from 11:51 a.m., to
8 1:26 p.m.)

9 ALJ RODDA: Let's go back on the record.
10 And Mr. Deanhardt; right?

11 (Clay Deanhardt was duly sworn.)

12 ALJ RODDA: Mr. Pozefsky.

13 MR. POZEFSKY: Thank you.

14

15 CLAY DEANHARDT,
16 called as a witness, having been previously duly sworn
17 by the Certified Court Reporter to speak the truth and
18 nothing but the truth, was examined and testified as
19 follows:

20

21 DIRECT EXAMINATION

22

23 Q. (BY MR. POZEFSKY) Good afternoon,
24 Mr. Deanhardt. Will you state your name for the
25 record, please.

1 A. Clay Deanhardt.

2 Q. What's your current occupation,
3 Mr. Deanhardt?

4 A. I'm a regulatory and business consultant. I
5 operate my own business out of my home.

6 Q. And you have been retained by RUCO in this
7 matter; is that correct?

8 A. Yes, I have.

9 Q. And you have submitted some testimony in this
10 matter; is that correct?

11 A. Yes, I have.

12 Q. Up at your desk I refer you to RUCO's
13 Exhibit 1B, and it should be a copy of your testimony.
14 Have you had an opportunity to look at that?

15 A. Yes, I have.

16 Q. And does that look to be a true and complete
17 copy of your testimony.

18 A. Yes, it does.

19 Q. At this time is there anything that you'd
20 like to add or any corrections you'd like to make to
21 that testimony?

22 A. I do need to, unfortunately, make some minor
23 corrections.

24 If Your Honor would like, would you like me
25 to mark them in the record copy as I go through this?

1 ALJ RODDA: Yes, that would be great.

2 THE WITNESS: The first one is on Page 20, on
3 Line 4, we need to insert, before RUCO, insert "to
4 MDOC," all caps, and produced to RUCO and then after
5 the word "RUCO" change "to" to "by Qwest." As a
6 result, this sentence now reads: Qwest confirmed this
7 in its response to a data request. I'm sorry, it
8 should be just issued "by MDOC" not "to MDOC," by
9 MDOC, and produced to RUCO by Qwest, which is attached
10 as Exhibit CD-5 to my testimony. That was a Minnesota
11 Department of Commerce data request that we attached,
12 not a RUCO request. So I was just fixing that.

13 The second error is on Page 23, Line 2. The
14 reference to CD-12 should be CD-13.

15 Next, on Page 27, Line 3, beginning with the
16 quotation the word "revenue" is incorrect. That word
17 should be "pricing." So strike "revenue" and
18 substitute the word "pricing."

19 Page 40, Line 14, there's an off, an O-f-f,
20 there that should be an of, an o-f. So instead of
21 commitment off revenue, it should be commitment of
22 revenue. So just strike the F.

23 Then finally, on Page 55 there's a reference
24 in Line 3 to Exhibit CD-58. The wrong document got
25 attached as Exhibit CD-58. What was attached as

1 Exhibit CD-58 was the document that is, I believe,
2 unfiled Agreement No. 4 on the Commission Staff list.
3 What it should have been was the interconnection
4 agreement amendment filed by Eschelon.

5 There are copies of that amendment already in
6 the record, or that will be in the record as
7 Exhibit LBB-5 to Mr. Brotherson's testimony, and
8 Exhibit MDC-4A to Ms. Cortez's testimony, so I don't
9 know that we're going to provide a substitute copy
10 there. They're already there. But the Exhibit CD-58
11 in my testimony was the wrong document.

12 Q. Are those all the corrections and additions?

13 A. Yes, they are.

14 Q. Can you please summarize your testimony.

15 A. Yes. Let me just move some of these things.

16 MR. SPIVACK: Your Honor, just a procedural
17 point. I'm not sure when Mr. Pozefsky is going to
18 move Mr. Deanhardt's testimony into evidence, but what
19 I'd like to do is just note for the record our
20 objection as we stated in our motion, Your Honor,
21 we'll just renew it to the extent we need to for the
22 sake of the record.

23 ALJ RODDA: Okay, great.

24 MR. SPIVACK: I assume same ruling?

25 ALJ RODDA: Same ruling, yes. I can cut this

1 short, though; right? No.

2 THE WITNESS: In November of 2001, I began an
3 investigation into a group of unfiled agreements on
4 behalf of the Minnesota Department of Commerce. In
5 July, 2002, Arizona, RUCO asked me to assist in their
6 investigation into a similar set of agreements.
7 They're many of the same ones that I had looked into
8 in Minnesota.

9 They asked me to specifically or to more
10 specifically focus on the set of agreements between
11 Qwest and McLeod and Qwest and Eschelon, and to look
12 at the applicability of Arizona Statutes 13-2311 and
13 13-2310 to the facts that I had and the documents that
14 I had uncovered as part of my investigation. And also
15 to explain to RUCO and to the Commission, based on my
16 experience in the industry, to the extent I can, the
17 meaning behind the documents and the context in which
18 these various documents and agreements were reached.

19 My testimony focuses primarily on those
20 agreements, the McLeodUSA agreement, and the Eschelon
21 agreement with Qwest, and to summarize the conclusions
22 that I reached, having looked at the evidence, and I
23 should say that RUCO obtained, as I understand it,
24 over the course of discovery, the same, everything
25 that was produced in the Minnesota proceeding was also

1 produced to RUCO in this proceeding, and so I looked
2 at pretty much everything that, as I understand it,
3 Qwest has produced to RUCO here.

4 My conclusions were that Qwest and McLeod and
5 Qwest and Eschelon entered into interconnection
6 agreements that they did not file with the Arizona
7 Commission in addition to interconnection agreements
8 that they did file with the Arizona Commission, that
9 these were part of a larger group, in this case, two
10 different groups of agreements that centered around
11 the product that has been referred to as UNE-Star.

12 Chief among these unfiled agreements were
13 agreements for discounts on all purchases made by
14 Eschelon or McLeod from Qwest. These agreements
15 contained what I call, refer to as 271 stand-down
16 provisions, provisions whereby McLeod and Eschelon
17 agreed to no longer participate in pending 271
18 proceedings.

19 They also contained as part of the group a
20 set of escalation procedures that were more business,
21 what I call business escalation procedures as opposed
22 to day-to-day operational escalation procedures.

23 McLeod and Eschelon did file interconnection
24 agreement amendments in Arizona, and they were filed
25 in fact by McLeod and by Eschelon rather than by

1 Qwest, but they did not disclose the existence of the
2 discounts or the other agreements that were part of
3 the whole package that went along with those
4 interconnection agreements. And as a result, I
5 believe that each of the elements, that there is
6 evidence in the documents in the records here for each
7 of the elements under Arizona statutes 13-231, or
8 2311, rather, and 13-2310.

9 I think it's helpful in understanding how I
10 reached these conclusions, and what it means to
11 understand the background of what was going on during
12 this time period when these agreements were entered
13 into, and a little bit more about the agreements,
14 because some of the conversations I heard this morning
15 with Dr. Johnson, I think the scope of at least the
16 discount agreement is a little bit hazy, and so I want
17 to address that for a minute.

18 As I talk about in my testimony, in the year
19 2000, there was a confluence of several events that
20 led to these sets of agreements, and those included
21 the merger of Qwest and what was formerly U S WEST,
22 the pending 271 proceedings obviously, in every state,
23 including Arizona. The fact that it became more clear
24 that UNE-P or UNE combinations were going to be
25 required, that ILECs were going to be required to

1 provide access to UNE-P and to UNE combinations, and
2 there was -- that's what was going on generally in the
3 telecom world.

4 Specifically, you had two companies here,
5 McLeod and Eschelon, who were dealing to a large
6 extent by reselling Qwest Centrex services, and the
7 resale discount as a business proposition is something
8 that is significantly less than being able to provide
9 service over wholesale unbundled network elements or
10 UNEs.

11 So what Qwest or what McLeod and Eschelon
12 wanted to do was to move their resold Centrex
13 customers to a UNE-P type platform. And from a
14 business perspective, that move has several benefits.
15 First and foremost, as I just said, it reduces those
16 costs, it reduces the cost of having to, the costs
17 that they have to pay to Qwest for the same facility.

18 Second, it allows both McLeod and Eschelon to
19 actually stop paying access fees if they had to for
20 calls that were terminated on those lines that they
21 now have as UNE-P lines, but more importantly, to be
22 able to collect access fees from other carriers they
23 got to terminate calls on those lines. So in addition
24 to reducing costs, the conversion to a UNE-P type
25 product also creates a new revenue stream. So this

1 was important to McLeod and Eschelon.

2 In contrast, what we see from some of the
3 testimony from Mr. Fisher, and some of the documents
4 that were exchanged between McLeod and Qwest in
5 particular, is that Qwest recognized the value of
6 keeping Eschelon on their -- in this case McLeod, I
7 should say, on their network. And that is McLeod said
8 to Qwest, if we can't get these prices reduced then
9 we're going to have to take our customers off switch,
10 take them off of Qwest's network. And Qwest
11 recognized that there's a value to being able to sell
12 portions of their network even if they're not getting
13 full price, that's better than getting zero for the
14 same portion. So there was an incentive on Qwest's
15 side to keep McLeod on their network for as long as
16 they could. So that was another dynamic that was
17 going on in the negotiation of these agreements.

18 What Mr. Fisher says in my interview with him
19 and his various testimonies is that when they went
20 back to Qwest and said okay, the prices that you have
21 for this new UNE product are too high, that they began
22 to talk about this discount idea.

23 And I think it's important to understand,
24 though, that this discount isn't a discount that says
25 you have to buy -- you have to take or pay X millions

1 of dollars in UNE-Star or this UNE-P product, and if
2 you do that you get the discount. The discount says
3 if you buy X millions of dollars in total services
4 from Qwest, then the discount applies. So if McLeod
5 is buying \$2 million of UNE-Star, and \$40 million of
6 other UNEs, collocation and other expenses, and
7 \$40 million is all it takes to get the discount, then
8 they get the discount. So there was an implication, I
9 think earlier today, that it's tied to UNE-Star. It's
10 not tied that tightly to UNE-Star.

11 On the other side, the discount, by the same
12 token, is on all products and services sold by Qwest
13 to either McLeod or Eschelon across the 14-state
14 territory, and even outside the 14-state territory. I
15 think the example Dr. Johnson used was if McLeod
16 purchased from Qwest transport, back haul transport
17 from, say, Chicago to Miami, somewhere outside of
18 Qwest's territory, that that would also be affected by
19 the 10 percent discount. They would get 10 percent
20 off of every dollar that's spent for that transport.
21 And under the terms of the agreement, as they were
22 described by Mr. Fisher and under the terms of the
23 Eschelon agreement as they were written, that's
24 correct.

25 So that's by way of background. Just to

1 quickly describe what I found -- all of this is gone
2 through in detail in my testimony.

3 I base my conclusion that there is a -- that
4 there was an agreement for discount with McLeod, and
5 that discount ranged from 6.5 percent up to 10 percent
6 based on several things. First and foremost, the fact
7 that Blake Fisher, who was a former senior
8 vice-president at McLeod, Dave Conn, who was and is an
9 attorney for McLeod, and Stacey Stewart, who is still
10 a McLeod employee, and Lori Deutmeyer all testified
11 and told me even before they testified -- actually,
12 they didn't all testify, Dave Conn and Stacey Stewart
13 did not testify, but they all told me that such an
14 agreement existed and that there was in fact a
15 discount.

16 In addition, the investigation that I
17 undertook found documents that up here fill up about
18 three binders that all point to the existence of the
19 discount agreement either with McLeod or with
20 Eschelon.

21 In the case of McLeod, there were
22 substantially more documents because it was an oral
23 agreement. We found a lot of documents referring to
24 it, and those documents really fall into three
25 categories: Documents that were created before the

1 negotiation and during the negotiation; documents that
2 were created post negotiation that refer to the
3 discount, and are described either internally to Qwest
4 employees or actually calculations of the discount
5 amount; and the third category, what I called a new
6 deal documents, documents where Qwest was
7 contemplating doing additional deals with McLeod and
8 in those deals, they expressly considered the impact
9 of the 10 percent discount, one -- excuse me, the
10 terms of the new deal.

11 I have put together a chart, which is on
12 Pages 24 and 25 of my testimony, where it breaks down
13 into these categories and even some smaller
14 categories, and that table correlates for each
15 category I describe in that table the corollary
16 exhibits to my testimony that stand for the
17 proposition from which I drew the conclusion that's on
18 the left-hand side of my table. In addition, I
19 discuss those documents quite thoroughly in Pages 26
20 through 46 of my testimony with respect to McLeod.

21 It's also important in understanding this,
22 though, to understand what I didn't find, which is the
23 justification for this from Qwest to date has been
24 that there is a second take or pay agreement where
25 Qwest was going to purchase goods and services from

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1 McLeod. What we never found and which we did ask for
2 were any documents that suggested that Qwest ever went
3 through the business processes I would expect to see
4 to determine that it actually needed to make purchases
5 from McLeod.

6 And by that what I mean is when you start,
7 when you enter into a contract to buy millions of
8 dollars worth of services or goods from a company, you
9 generally are going to sit down and figure out do I
10 actually need them. And in the context in particular
11 of a telecommunications company, you're going to sit
12 down with your networking people and you're going to
13 say do we need access to, do we need access to this
14 network facility. Do we need to buy long haul fiber
15 to get from A to B. Do we need to get a private-line
16 service from this company in this town. And you're
17 going to make your decisions on purchasing from them
18 based on those needs that you have to meet your own
19 customer demand.

20 At no point did we ever see documents
21 showing, and at no point has anybody ever said that
22 Qwest actually went through the process of figuring
23 out that it needed to buy anything from McLeod.
24 Certainly nothing to the scope of the discount amounts
25 that they might be able to receive, given that those

1 were directly related to the amount that McLeod spent
2 as opposed to being any kind of set figure for any set
3 capped figure, set at a specific amount.

4 With respect to Eschelon, the agreement,
5 instead of being oral, was actually written, but it
6 was hidden in a consulting services agreement that is
7 part of the agreement, the unfiled agreement that
8 Staff has identified, I believe, as Agreement 4. And
9 I reached the conclusion that that agreement was
10 actually a sham agreement that was intended to hide
11 the existence of the discount agreement. The reasons
12 that I reached that conclusion are in my testimony.

13 In short, the most compelling reason is that
14 there is absolutely no tie between the amount that
15 would be paid to Eschelon and the amount of work that
16 Eschelon might do to get that money.

17 The way that the agreement is set up, if
18 Eschelon didn't buy \$150 million worth of services
19 from Qwest, then they would have gotten nothing for
20 their time, even if they spent 40,000 hours working
21 for Qwest. By contrast, if Eschelon spent \$500
22 million in money with Qwest and got a \$50 million
23 refund, but spent two hours consulting, they'd get
24 \$50 million for that two hours of consulting, and that
25 just kind of obviously doesn't work.

1 In addition, there is evidence that's cited
2 in my testimony that Eschelon and Qwest first agreed
3 to the discount, then came up with a consulting plan
4 as a way to keep other CLECs from being able to opt
5 into it. And again, there's a lack of what you would
6 expect to find. There is a lack of records that
7 reflect anybody ever tracked the amount of time or the
8 work that Eschelon was doing to justify any kind of a
9 consulting payment, let alone one of the magnitude
10 that could have happened.

11 And then finally, my testimony, I walk
12 through, with respect to each of Eschelon and McLeod,
13 the elements of the statute that RUCO asked me to look
14 at and describe for the Commission, and Your Honor,
15 the documents that I found and the other evidence that
16 I found that seems to support the existence of each
17 element.

18 Q. Mr. Deanhardt, will you please summarize the
19 documents which show that the parties worked together
20 to keep the terms undisclosed.

21 A. There are -- I have to break this up,
22 obviously, between McLeod and Eschelon. With respect
23 to McLeod, there are some documents, but it's more the
24 testimony that Mr. Fisher gave both in his written
25 testimony in Minnesota, but also in his deposition,

1 that there was in fact an oral agreement, and that
2 they in fact agreed to keep it undisclosed.

3 There is also, agreed with Qwest, and at
4 Qwest's request -- try saying Qwest's request 10 times
5 fast. At Qwest's request keep that undisclosed.

6 There's also an e-mail attached to
7 Mr. Fisher's affidavit, I think it's Exhibit 3 to the
8 affidavit, that discusses the fact that it was going
9 to be undisclosed.

10 In addition, there is a draft of the
11 agreement that was written by -- drafted by Randy
12 Rings, who was an attorney for Qwest, that
13 specifically refers to putting, that is fashioned --

14 MR. SPIVACK: Excuse me, Your Honor. I
15 believe you said Randy Rings was an attorney for
16 Qwest.

17 THE WITNESS: I'm sorry, McLeod. I thought
18 that you were going to stop me that this a
19 confidential document I thought had been disclosed.

20 MR. SPIVACK: No. I wanted to make sure that
21 the record was clear about who Randy Rings was.

22 THE WITNESS: Yes, I apologize. Randy Rings
23 was an attorney for McLeod.

24 And the document which is attached as an
25 exhibit to my testimony, I don't remember which one,

1 fashions itself at the beginning as an interconnection
2 agreement amendment and refers to -- refers in it to a
3 potential side agreement to deal with the discount.

4 In the end, several of the terms that were in
5 that interconnection agreement -- in that draft, which
6 was an interconnection agreement amendment, ended up
7 being agreements that were not filed with the
8 Commission, including the side discount agreement
9 which remained oral.

10 So part of the evidence is simply the fact
11 that there isn't such an agreement in some cases, the
12 absence of evidence. They lived up to the agreement
13 that was described orally by Mr. Fisher, and that was
14 described in the e-mail that's attached to his
15 affidavit.

16 With respect to Eschelon, there are exhibits
17 in my testimony that show Mr. Smith, who was I believe
18 the president of Eschelon at the time, negotiating the
19 agreement with Qwest and actually proposing a method
20 by which the 10 percent discount could be structured
21 so that other CLECs could not opt into it.

22 That e-mail and letter predated the agreement
23 which then was written down. In the, quote,
24 consulting agreement, there is a postdated e-mail
25 where Mr. Smith is informing other people inside of

1 Eschelon which agreements are public and which
2 agreements are to be kept confidential. Both of these
3 were attached to my testimony.

4 In addition, there is an e-mail exchange
5 between Ms. Clauson at Eschelon, and Ms. Korneffel at
6 Qwest -- that's K-o-r-n-e-f-f-e-l -- where an early
7 draft of a document was changed in such a way as to
8 make it potentially less likely to be found to be an
9 interconnection agreement at the suggestion of
10 Ms. Clauson.

11 Then there are also letters from Mr. Smith to
12 Qwest that are, in my testimony where he refers
13 specifically to, apparently Eschelon felt that Qwest
14 wasn't really living up to its end of the deal on a
15 lot of the service issues, and Mr. Smith wrote a
16 letter that explained to Qwest all of the things that
17 Eschelon had done in terms of not producing various
18 kinds of information to the commissions, and in terms
19 of keeping these agreements confidential, in exchange
20 for Qwest's promise of better service and the
21 discount.

22 Q. Please explain how the process, how the
23 parties misrepresented their agreement to the
24 Commission.

25 A. As I said earlier, both parties in this case,

1 McLeod and Eschelon, both filed interconnection
2 agreements, amendments with the Commission. It's, I
3 believe, the fourth amendment to the Arizona
4 interconnection agreement for McLeod, and the seventh
5 amendment for Eschelon, that both of which sprang
6 directly from these kind of complex transactions that
7 have all these multiple agreements. Both of which
8 contain some of the terms found in some of those
9 agreements, but they didn't contain all of the terms.

10 So in other words, they did not tell the
11 Commission or any of the other CLECs all of the terms
12 that were included in these UNE-Star, UNE-P deals.
13 The terms that they omitted, I've said it once
14 already, but the 271 term, the discount, the
15 escalation procedures, and also as Ms. Cortez
16 identifies, there were exchanges of money that
17 happened between Qwest and McLeod, and Qwest and
18 Eschelon, that made disclosures in the agreement or
19 disclosures in the publicly filed interconnection
20 agreement materially wrong in that there is, in the
21 Eschelon agreement, there is a requirement that
22 \$10 million be paid by Eschelon to McLeod -- or I'm
23 sorry, by Eschelon to Qwest. At the same time, Qwest
24 entered into an agreement to basically give that
25 \$10 million back to Eschelon. They didn't disclose

1 that part. The net ends up being zero but the
2 Commission didn't know that, neither did the CLEC.

3 With respect to McLeod, there was a
4 disclosure of a \$43 million, 43.5, I believe payment
5 to Qwest in the ICA. Again, in the undisclosed
6 agreements, there were payments back to McLeod of 33,
7 I don't remember the exact number. The delta is
8 11 million. There ends up being only a payment of
9 \$11 million from McLeod to Qwest, which is still
10 significant, but is certainly far less than the
11 43 million that was disclosed in the interconnection
12 agreement.

13 Q. Please explain the benefits to each of the
14 parties by their agreement.

15 A. Well, the benefits to the CLECs are fairly
16 clear. The CLECs got to move to this UNE-Star
17 platform, that part was disclosed, and keep their --
18 without having to go through the process of converting
19 all other Centrex lines to nonCentrex and UNE-P lines,
20 which would have been operationally a difficult
21 process, because then you would have had to physically
22 move lines, and that creates, this is the whole
23 problem with hot spots. I mean, this creates issues
24 about customer service downtime, how well it could be
25 done, how long it takes, the cost. So they avoided

1 all of those problems by having this UNE-Star product.

2 The other benefit to them was because of this
3 UNE-Star product, they had access to a number of
4 features that other CLECs, other UNE-P lines didn't
5 necessarily have. Again, though, that part was
6 disclosed. Behind the scenes, they got the benefit of
7 obviously receiving back a lot of the money that
8 supposedly was being paid to Qwest. That's one.

9 Two, they got the benefit of the 10 percent
10 variable, in the case of McLeod, discount that no one
11 else knew about, and that particularly in today's
12 tough economic times for telecommunications companies
13 is not an insignificant amount. In fact, in the case
14 of McLeod, I don't know if the number is still
15 confidential or not.

16 MR. SPIVACK: I believe that it is. We
17 should probably treat it as such, since McLeod is not
18 here.

19 THE WITNESS: Then I won't say it. The
20 number is in my testimony and it's big.

21 Talking about the CLECs. The other benefit
22 was the escalation procedures letter that's part of
23 this transaction, in any event.

24 And I think it's important to understand the
25 significance of this. I have never seen, other than

1 here, a case where an ILEC entered into an enforceable
2 written agreement that allows a CLEC to get the ILEC's
3 CEO involved in resolving disputes. That's huge. I
4 mean, to be able to say I got an agreement that I can
5 enforce and get to the top to get you to pay attention
6 to my problem is something that informally, certainly
7 it's done, and people call up and, you know, the
8 telecommunications industry is fairly small, so people
9 know people, they make calls, but I've never seen an
10 enforceable agreement that says the CEO has to pay
11 attention to this, and particularly for a smaller
12 CLEC. That could be an enormous benefit.

13 The other piece of those escalation
14 agreements that's important is in the Level 6 piece,
15 there are waivers of tariff limitations on damages,
16 for example jurisdictional waivers, issues like that,
17 that were a significant benefit to or could have been
18 a significant benefit to Eschelon and McLeod.

19 In terms of the benefit to Qwest, there again
20 were several things. One, and the most obvious one,
21 was to eliminate some opposition to its 271 process.

22 And to understand the significance of that,
23 there's actually specific evidence of that benefit.
24 If you look at the letter that I referred to earlier
25 from Mr. Smith -- let me see if I can find that

1 exhibit number here.

2 MR. SPIVACK: Your Honor, I wonder if, while
3 Mr. Deanhardt is looking, if I could inquire as to the
4 remaining length of this summary. I thought we were
5 talking about a 10-minute summary; I think we're over
6 a half an hour at this point.

7 ALJ RODDA: I think we're beyond summary.

8 MR. POZEFSKY: Your Honor, I remember I did
9 recall mentioning this, that given the nature of his
10 testimony, I thought that it would benefit the
11 Commission to allow me a little leeway if I'm going
12 beyond, especially since we've alleged some criminal
13 activity. I thought that to the extent there were any
14 gaps or any explanations that would need to be made,
15 that's what we're doing.

16 ALJ RODDA: I think it's helpful to have this
17 discussion, but I'm just curious.

18 MR. POZEFSKY: I have perhaps one more
19 question that would be somewhat, involve a summary,
20 then three or four small questions about some of the
21 things that had been said which wouldn't involve much.

22 ALJ RODDA: That's fine, except the length of
23 the answer, it depends how long.

24 MR. SPIVACK: I was going to say it's not the
25 question, it's always the length of the answer.

1 THE WITNESS: I'm trying.

2 ALJ RODDA: Just don't speed up talking any
3 faster.

4 THE WITNESS: I've already told her she can
5 throw things at me.

6 ALJ RODDA: She will, too.

7 THE WITNESS: The exhibit I'm referring to is
8 CD-72. And in CD-72, there's a long list of things
9 that Eschelon believes Qwest has done inappropriately,
10 information that it has not provided to commissions by
11 including information about Qwest's service quality
12 that had they been involved in the 271 process, one
13 would have expected that they would have brought those
14 things to the attention of the Commission.

15 The one that strikes my mind most closely is
16 there was an audit of certain Qwest performance that
17 Eschelon performed that nobody in the 271 processes
18 knew about until this investigation, uncovered the
19 existence of that audit after that so Qwest got that
20 benefit.

21 The other benefit that they received is they
22 received the benefit of keeping Eschelon and McLeod on
23 its network for a longer period of time which, as I
24 said before, had some financial benefit because even
25 getting wholesale rates for your network is better

1 than getting zero and having your network go unused.

2 The other benefit, they received a specific
3 benefit not so much from the deal, but from keeping
4 the deal confidential in that they were not subject to
5 other CLECs trying to opt into the arrangement and
6 thereby increasing the cost to Qwest of doing
7 business. In other words, the number of CLECs that
8 may have tried to opt into the 10 percent discount,
9 but did not know about it by concealing it, Qwest
10 received of the benefit of never having to deal with
11 those CLECs, and never having to give that discount.

12 That's it. Except I would say that it's
13 hard, given the kind of company that Qwest was before
14 it purchased U S WEST, in that Qwest had all of this
15 long-distance fiber and equipment in the ground that
16 it could not use within the 14-state territory after
17 it purchased Qwest, the benefit of being able to move
18 more quickly through the 271 process, although I guess
19 it didn't really come to pass.

20 ALJ RODDA: You said purchase Qwest. Do you
21 mean U S WEST?

22 THE WITNESS: When Qwest purchased U S WEST,
23 the benefit of being able to move through the 271
24 process more quickly, which is what they were trying
25 to do at the time, can't be understated. That's a

1 huge amount of unused equipment that they're
2 generating no revenue for that they want to generate
3 revenue for.

4 Q. (BY MR. POZEFSKY) Can you please explain how
5 the parties knew that their conduct would result in
6 the Commission and other CLECs not being made aware of
7 the true nature of their agreement?

8 A. Well, I think it's pretty clear that when a
9 document is not made publicly available, that other
10 people aren't going to become aware of it, and they
11 obviously knew when they agreed to keep it
12 confidential that that would be the result.

13 I think, though, that you also see that in
14 the e-mail from Ms. Clauson that I referred to
15 earlier, which is CD-69, and you see that in
16 Mr. Smith's letter as well on behalf of Eschelon
17 talking about all of the things that weren't
18 disclosed.

19 Also, as I said in my testimony, there's the
20 question of did they know it had to be filed, and you
21 know, particularly with respect to the discount
22 agreement, even under the very narrow standard that
23 Qwest proposed to the FCC, which dealt directly with
24 rates of interconnection, there just is no argument
25 that you don't file a discount agreement. I mean, you

1 are directly affecting the rates. You're reducing the
2 rate that would be paid for UNEs by 10 percent, or in
3 the case of McLeod, a floating number across the
4 board.

5 So even under their own narrow definition,
6 not even the one that's in the SGAT, they had to know
7 that these were agreements that had to be filed.

8 Q. Are you aware of any other carrier that
9 inquired into the volume discounts with Qwest in 2000?

10 A. The one carrier of which I'm specifically
11 aware is Popp Communications, and there's an affidavit
12 attached to my testimony from Sarah Padula that
13 describes their inquiry. They were interested in
14 figuring out how it was that Eschelon was providing
15 services that they could not, and when they were given
16 the interconnection agreement, the interconnection
17 agreement amendment that described UNE-Star, they
18 realized that financially, it didn't make sense, and
19 so they asked how it could be done. They were told
20 there were other agreements that were part of the deal
21 but that those were confidential and wouldn't be
22 disclosed to them.

23 Q. Just two more questions, Mr. Deanhardt.

24 Earlier today there was a question asked
25 about broadband deployment provisions and service

1 quality issues being covered in the agreements.

2 You were here this morning. Did you hear
3 that question?

4 A. Yes, I did.

5 Q. Can you explain whether or not broadband
6 deployment provisions to service quality issues were
7 covered at all in any of the Eschelon and McLeod
8 agreements?

9 A. In the Eschelon agreements, yes, on service
10 quality, not so much on the broadband, but I should
11 say, I haven't looked at, reviewed all of the
12 agreements that Commission Staff have cited, all of
13 the 96 agreements here. But even in the ones I have,
14 there are several that deal with service quality, and
15 with payments for service quality.

16 The agreement, there was an agreement between
17 Eschelon and Qwest whereby Qwest agrees to make
18 payments to Eschelon or credits to Eschelon for
19 Qwest's inability to provide accurate daily usage file
20 information.

21 That is a service quality credit because it's
22 Qwest's inability to provide a service that should be
23 there. They make a payment or in this case a credit
24 to Qwest, or I'm sorry, to Eschelon.

25 There are also several of the settlement

1 agreements that refer directly to the settlement being
2 at, you know, in part for service addressing service
3 quality issues.

4 On the broadband side, I think you have to
5 look at the Covad SLA, service level agreement. There
6 is no agreement that says okay, Qwest is going to go
7 out and deploy broadband. But the issue is I think is
8 there an agreement that might have encouraged
9 broadband deployment.

10 The Covad SLA at the time contained a number
11 of operational provisions that Covad was interested in
12 having, because at the time I was with Covad, I'm
13 going to say we, but it was -- it needed, in order to
14 be able to provide better service to its customers,
15 and that was really a problem across Qwest's
16 territory, at the time U S WEST's territory, much more
17 than it was with other ILECs.

18 Had those provisions been available to other
19 CLECs, there is admittedly the possibility, but the
20 possibility that those CLECs may have expanded more
21 quickly and provided more service in Arizona.

22 Specifically, I'm thinking of companies like
23 New Edge Networks, which were targeting not just urban
24 centers like Phoenix and Tucson, but going outside
25 that into tier 2 and even tier 3 cities, those cities

1 that aren't your major urban centers, and providing
2 service.

3 Had those service terms from Qwest or at the
4 time U S WEST been available to them, they may have
5 expanded their footprint more quickly. So it's not
6 quite saying Qwest is going to go out and deploy
7 broadband, but it is an agreement that could affect
8 broadband deployment by CLECs.

9 Q. Finally, can you give us specific examples of
10 how 271 is affected by the partnerships?

11 A. I think actually I addressed that a minute
12 ago when I was talking about the Eschelon agreements.

13 In Mr. Smith's letter he details a number of
14 ways that Eschelon did not contest or provide
15 information that may have affected the questions
16 around U S WEST's 271 process, and they're set out in
17 his letter so I'm not really going to go through them.

18 In addition, I have to say I don't know for
19 Arizona, but I do know at least in the 13-state ROC
20 process, McLeod was a fairly active participant in the
21 ROC OSS test construction, and you know, after this
22 was not.

23 MR. POZEFSKY: Your Honor, at this time I
24 would move for the admission of Exhibit 1B,
25 Mr. Deanhardt's testimony.

1 ALJ RODDA: Any objection to 1B, RUCO 1B?

2 MR. SPIVACK: I'll just restate my objection
3 or refer my objection.

4 ALJ RODDA: Refer earlier Qwest's objection,
5 it's admitted.

6 MR. POZEFSKY: Your Honor, at this time we
7 would tender Mr. Deanhardt for cross-examination.
8 Thank you.

9 ALJ RODDA: Mr. Horton or Ms. Scott.

10 MS. SCOTT: Yes, I do have some.

11

12 CROSS-EXAMINATION

13

14 Q. (BY MS. SCOTT) Good afternoon,
15 Mr. Deanhardt. My name is Maureen Scott, and I'm one
16 of the attorneys for the Commission Staff in this
17 case.

18 And just to give you an idea, my
19 cross-examination is really broken into three parts.
20 The first part I want to talk to you a little bit is
21 Ms. Kalleberg's testimony, and other agreements
22 contained with Staff recommendations.

23 The next part of my cross, I want to walk
24 through your testimony. I have a few pages marked,
25 and I want to ask you a few questions with respect to

1 what you said.

2 And the third part of my cross is about a few
3 things that were put into the record yesterday in an
4 attempt to get a better understanding or put those in
5 context.

6 While it sounds like this may take a lot of
7 time, it won't.

8 ALJ RODDA: It does sound that way.

9 MS. SCOTT: No.

10 Q. (BY MS. SCOTT) As you stated earlier, your
11 testimony and your objective here was to focus on the
12 Eschelon and McLeod agreements; is that correct?

13 A. Yes.

14 Q. And in your testimony you also discuss a
15 Covad agreement; correct?

16 A. Yes.

17 Q. And you're probably aware that there were
18 almost 100 unfiled agreements put into the record in
19 this case; correct?

20 A. Yes. If it's this list that I've seen, yes.

21 Q. And your testimony doesn't focus or address
22 the rest of these agreements; is that correct?

23 A. Yes.

24 Q. If you have read the Staff's testimony,
25 you're probably aware that Staff identified

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1 approximately 28 agreements in addition to the 14
2 already filed by Qwest that Staff believes should have
3 been subject to the 252(e) filing requirement; is that
4 correct?

5 A. I have to say that I skimmed Staff's
6 testimony, so I haven't read it in detail, but that
7 sounds correct, yes.

8 Q. And the fact that you didn't address these
9 other agreements in your testimony doesn't mean that
10 you disagree with Staff's findings on those
11 agreements, does it?

12 A. I don't agree or disagree. I haven't
13 reviewed them.

14 Q. Moving along to Part 2.

15 If you could turn to Page 10 of your
16 testimony. And I want to refer you to Lines 15
17 through 21, and I'm working from the confidential
18 version of your testimony, but what I have marked is
19 not bracketed as being confidential.

20 The lines, actually more specifically Lines
21 19 through 21. But to put this in context, you're
22 talking about the types of agreements that would have
23 to be or should be filed under 252(e); correct?

24 A. Yes.

25 Q. And you make an observation or statement that

1 state law, in other words, that the Commission has
2 that authority, which is an issue I know nothing
3 about, then I would say yeah.

4 I don't think there's anything in the FCC's
5 rulings that limits the ability of the Commission to
6 do its own work in regulating companies and regulating
7 these agreements. In fact, there's language in the
8 first report and order, the local competition order,
9 you know, to the contrary to that.

10 Q. Okay, and isn't it correct that it wouldn't
11 only be if the Commission had authority, independent
12 authority under state law, but certainly its authority
13 under the federal act would allow it to do this as
14 well, as well as the language contained in the
15 declaratory order; correct?

16 A. I have to say I don't know. I don't know if
17 the federal act gives the state the authority to
18 require more of a filing. It certainly gives it the
19 authority, in reviewing filings, to refuse to approve
20 them because the filings are not in the public
21 interest.

22 And in that context, I know in fact Arizona
23 has, because it did it with Covad, and Minnesota's
24 done it and other states, required additional terms be
25 included in them. I have seen that, but I don't think

1 I know the answer to your specific question.

2 Q. I'm going to ask this question a little
3 differently, and then we'll move on.

4 Certainly it gives the Commission, the state
5 commissions, the authority to interpret, in the first
6 instance, whether the agreements that come before them
7 or whether certain agreements should be filed with
8 them; correct?

9 A. Yes.

10 Q. And looking at Pages 48 through 49 of your
11 testimony, in your opinion, the pricing discount given
12 by these agreements between Qwest and McLeod and Qwest
13 and Eschelon would certainly fall within the filing
14 requirements of Section 252(e); correct?

15 A. Yes.

16 Q. Moving on to the last part of my cross at
17 this point. Mr. Deanhardt, in your opinion, what is
18 the importance of something stated in a contract or
19 interconnection agreement versus not having something
20 in a contract or agreement?

21 A. Enforceability is the key benefit. If
22 something simply doesn't, as a matter of course, or --
23 I'll use a specific example from this case. There are
24 the operational escalation procedures that were
25 attached as I think Attachment 2 to the Eschelon

1 implementation plan, which is I believe Agreement
2 No. 18 in the Staff's list of unfiled agreements.

3 Those are, as opposed to the escalation
4 procedures that I was talking about earlier that deal
5 with business issues and get you to the CEO, these are
6 day-to-day, what I call day-to-day operational
7 escalation procedures.

8 In other words, I've got a loop I can't get
9 installed. I use this process that's on that
10 attachment to escalate, no problem, with Qwest, and
11 try and get that particular problem resolved. That
12 one, as I understand it, those procedures were posted
13 at some point on the Qwest website, and I know that
14 I've seen versions of those procedures that were
15 handed out to other CLECs as saying these are the
16 procedures.

17 The difference is if Qwest wants to then
18 change those procedures, since Qwest unilaterally
19 implemented them, Qwest can unilaterally change them.
20 There's nothing that binds them to have those
21 procedures available to the CLECs.

22 If I have a contract, though, an agreement
23 with Qwest that says that Qwest must do this, if it
24 tries to change it, it's got to come to me first. And
25 if I don't agree or if it changes it unilaterally,

1 then I can go to a commission and try -- or another
2 arbitrator or court of law, and try to get that
3 agreement enforced. So there's real value to having
4 that.

5 The other thing is any time an agreement is
6 written and is in a contract, there is a certain sense
7 of definiteness to it, and when things -- when things
8 aren't written down, there is less of a sense of
9 definiteness to them. So there's always a benefit
10 when you have an agreement of reducing it to writing,
11 and having a signature on it.

12 Q. You also state in your testimony that you had
13 worked as a senior counsel for Covad Communications
14 from January, 1999 through September of 2000; correct?

15 A. Yes.

16 Q. In your capacity as senior counsel for Covad,
17 I believe you stated you were responsible for Covad's
18 legal relationship with Qwest; correct?

19 A. At the time U S WEST.

20 Q. And you worked with them on a daily basis; is
21 that correct?

22 A. Yes.

23 Q. On what issues?

24 A. Well, on interconnection issues. I mean,
25 this is why I drew the distinction, because at the

1 time Qwest and U S WEST were obviously two different
2 companies, very different companies. Qwest was a CLEC
3 and U S WEST was the ILEC.

4 My job was to work with U S WEST on
5 interconnection issues, on regulatory issues, on
6 business issues, on trying to get -- one thing that's
7 helpful to understand, particularly in the context of
8 smaller CLECs, which at the time Covad was, is because
9 of the way the act works, there is somewhat of a
10 blurry line between legal and business.

11 In negotiating an interconnection agreement,
12 for example, you are trying to, or enforcing it, you
13 are trying to execute what you need to do in order to
14 be in business, and you are dealing with what your
15 business side needs, and you're often engaged in, you
16 know, what could be seen more as business negotiations
17 than pure legal negotiations. So, for example, when
18 we did line sharing, I sat down and negotiated how
19 operationally and functionally it would work. In any
20 other industry, lawyers are probably not going to do
21 that. In this industry, it's a bit different.

22 But I mean my relationship with U S WEST
23 ranged from regulatory forums down to implementing
24 specific provisions, down to negotiating terms for
25 line sharing and other issues all the way to

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1 escalating even loop orders, calling someone and say
2 we're having a real problem getting these kinds of
3 loops installed, how do we get this fixed. So that
4 even on an operational level, I dealt with U S WEST.

5 Q. Going back to your experience with Covad, is
6 it true that Covad experienced service problems with
7 Qwest also?

8 A. Yes.

9 MR. SPIVACK: Excuse me. I think to make
10 sure the record is correct, I think we should refer to
11 U S WEST, since that's the company with whom
12 Mr. Deanhardt was dealing.

13 ALJ RODDA: Okay.

14 MS. SCOTT: Okay, I will refer to U S WEST.

15 Q. (BY MS. SCOTT) And did Covad have teams that
16 worked with Qwest to try to resolve any of the service
17 problems that it was having with Qwest?

18 A. At various times.

19 ALJ RODDA: Or U S WEST.

20 MS. SCOTT: U S WEST, I am sorry. This is
21 going to be hard.

22 ALJ RODDA: It's been a long time since we've
23 had to use U S WEST.

24 THE WITNESS: I've had the other problem from
25 way too long. I'm hesitating only because of the

1 routines. There really were -- it may help to
2 explain. There were really maybe two kinds of teams.
3 There certainly were a group of us that dealt with
4 Qwest at a higher level, so we would deal, once you
5 can't get a loop installed enough times, it would
6 bubble to us, and we as a group would deal with some
7 of the Qwest more senior people as a group. And so to
8 some extent, that was a team of people that did that.

9 But then you would have specific problems
10 where you might put together a team to work on the
11 problem. There's a reference in my testimony to
12 trying to work through a problem providing what they
13 call IDSL, which is DSL that goes through a digital
14 loop carrier, DLC, over an ISDN card. And we had a
15 specific team of engineers that worked with U S WEST
16 to solve that problem.

17 So at various times you would have teams turn
18 and fall apart to address various issues. You could
19 always have a group of us, if you want to call it a
20 team, that dealt with U S WEST on a macro basis.

21 Q. (BY MS. SCOTT) And in your opinion, did that
22 team that you were a part of, did that assist in
23 approving Qwest's processes?

24 A. Each of the teams I described in particular,
25 the more specific teams, like the engineering team,

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1 the answer would be yes. Some specific examples, the
2 engineering team that solved the ISDN problem, that
3 problem was solved not just for us, but for every
4 other CLEC that wanted to provide DSL across those
5 kinds of lines. When we figured out a better way to
6 provision a particular kind of service, that solution
7 would be a solution that would be implemented for
8 other CLECs.

9 When we did line sharing, which was a big
10 team that did that, that obviously was something that
11 actually had meaning until a couple of weeks ago, and
12 that helped all of the other CLECs that wanted to use
13 line sharing.

14 Q. And this was also a benefit to Covad, wasn't
15 it, in that it resolved a lot of very important
16 service issues or problems that you might have been
17 having at the time?

18 A. A tremendous benefit. As I said in my
19 testimony, the business a CLEC has with an ILEC is
20 interconnection. We're not making our money off of
21 trying to consult for Qwest or solve its problems.
22 We're trying to solve the problems that we would need
23 to be able to serve our customers. And that's the
24 bottom line, because that's the way you're going to
25 make your money.

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1 Covad wasn't created to be KPMG. It was
2 created to provide service to end-users. And so
3 anything we did was always with the goal of creating
4 better service quality to us, and even to other CLECs,
5 which we had no problem with because we figured we
6 could beat them in an open market, and ultimately to
7 our customers.

8 Q. So Covad, is it a correct statement, then,
9 that Covad was willing to invest considerable time and
10 resources into working with Qwest because it could
11 provide a better product to its end-user customer?

12 A. Covad did generally, and I did specifically.

13 MS. SCOTT: I don't have any more questions
14 at this time, thank you.

15 ALJ RODDA: Mr. Dixon.

16 MR. DIXON: Yes, I do, just a couple.

17

18 CROSS-EXAMINATION

19

20 Q. (BY MR. DIXON) Mr. Deanhardt, I looked at
21 Page 3 of your testimony, and in particular I'm
22 focusing on Lines 12 through about 18.

23 You generally describe your work for the
24 Minnesota Department of Commerce there; am I correct?

25 A. Yes.

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1 Q. As part of your role in that capacity, did
2 you have reason to review pleadings or files in the
3 docket that was being investigated by the Minnesota
4 Commission for which you were employed?

5 A. I've reviewed most of them, yes.

6 Q. I want to refer specifically to a pleading
7 filed in Minnesota by Qwest on or about November 8th
8 of 2000. November 8th, 2002, entitled Qwest
9 Corporation's opening brief re, meaning regarding,
10 colon, penalties. And it states specifically: Qwest
11 respectfully submits its opening brief regarding the
12 appropriate penalties and remedial actions in this
13 docket, referring to the Minnesota docket.

14 Are you generally familiar with that
15 pleading?

16 A. I did read it, yes.

17 Q. It's about 122 pages of material.

18 A. I should maybe rephrase. I remember reading
19 most of it.

20 Q. Do you happen to recall in that pleading,
21 Qwest made any proposals in response to the Minnesota
22 Commission's invitation for creative remedies to
23 benefit consumers in competition?

24 A. Qwest made several proposals. I don't know
25 that I can remember all of them, but I certainly

1 remember some of them.

2 Q. Would it help if you had a copy of the brief
3 in front of you responding to the question concerning
4 what was proposed by Qwest in that brief?

5 A. It might, or maybe if I tell you what I
6 remember, that's enough.

7 Q. Why don't you describe, if you recall, the
8 remedies proposed by Qwest in the brief I'm referring
9 to, to the Minnesota Commission.

10 A. The ones that I remember, generally, there
11 was one proposal where Qwest would employ a certain
12 number of people, I think it was 100, and agreed to
13 keep them employed for a certain period of time, which
14 I don't remember. These would be theoretically new
15 hires in what Qwest characterized as a shrinking
16 employment market.

17 Another was that Qwest would deploy broadband
18 facilities on an accelerated rate in certain specified
19 locations in Minnesota. And I don't remember what
20 those locations were, but they were identified in the
21 pleading.

22 Another was that Qwest would provide the
23 10 percent discount in some form. I think this is the
24 pleading where they proposed that they would provide
25 the 10 percent discount in some form to CLECs. It was

1 not the full scope of the discount that was agreed to
2 by McLeod and Eschelon, it was a smaller scope. I
3 think it related only to UNEs, for example, and
4 probably -- I think it was only in Minnesota, and it
5 required CLECs, if I recall correctly, to, as part of
6 getting the discount, to waive any rights they might
7 have had to otherwise sue Qwest for damages that might
8 have resulted from the agreements.

9 And then there was --

10 Q. Let me interrupt you just for a minute.
11 Since you seem to be saying you're not sure, and since
12 I have the stipulation here, I would be willing to
13 have you read the proposal in the record. That way we
14 won't have it misstated from your memory. It appears
15 you cannot remember precisely the six proposals that
16 Qwest made.

17 A. That would probably be correct, if you're
18 looking at it and I'm missing things.

19 Q. And I'm not trying to argue with you. My
20 point is I want to get the record accurate, I don't
21 want to have you guessing.

22 And since I have it here I would ask that he
23 be permitted to read the six proposals from the Qwest
24 stipulation into the record.

25 MR. SPIVACK: Your Honor, I guess I make a

1 relevance objection. Relevance for one, since this is
2 not the Minnesota proceeding, it's a different
3 proceeding, and that proposal was made specifically
4 for the purpose of resolving that proceeding, a
5 suggestion Qwest came forward with.

6 And second, certainly that was Qwest's
7 position in Minnesota, it's represented in the
8 proceedings. Having Mr. Deanhardt read it into the
9 record serves no purpose. We'll certainly conclude
10 that that was Qwest's position in the Minnesota
11 proceeding.

12 ALJ RODDA: I'm going to overrule your
13 objection. We'll see how relevant it is.

14 MR. DIXON: Just so it's clear, Qwest has
15 obviously challenged the nature of the remedies posed
16 by the parties.

17 ALJ RODDA: That is why it's specifically
18 relevant to Arizona.

19 MR. DIXON: If I may approach the witness,
20 Your Honor, I have the document on my computer.

21 MR. SPIVACK: Can we have the computer
22 verified.

23 MR. DIXON: Yes. Can I approach the witness
24 with this?

25 Thank you, I will go to the attorneys so they

1 at least can see it.

2 Q. (BY MR. DIXON) Just so it's clear for the
3 record, I am referring to Page 3 of the brief to which
4 I made reference. And it is not numbered by lines,
5 but it's at the bottom of Page 3, and if you would
6 just read, beginning at the line that says substantial
7 additional investment in Minnesota for the public. If
8 you read the following, what I call bullets
9 thereafter.

10 A. Certainly. The first bullet reads: Qwest
11 will add 100 jobs in Minnesota, (50 in Duluth, 50
12 elsewhere) at an average salary of \$50,000, plus
13 benefits.

14 Q. What I wanted to clarify there, there's no
15 reference for any period of time, am I correct, in
16 that statement? You said for a duration?

17 A. There's not, but I mean to be frank, I
18 remember at some point there is a reference, and it
19 may be elsewhere in the -- at the hearings to it being
20 for a period of time. So it doesn't say so here, but
21 I'm reasonably sure that there was a time
22 qualification, if not put on here, then later in the
23 proceeding.

24 The second bullet is: Qwest will provide a
25 free privacy product to protect Minnesota senior

1 Then there's another bullet point. Next
2 bullet point is: To qualify for the credit, the CLEC
3 would agree to sign a release of any claim against
4 Qwest and its affiliates related to Qwest operations
5 in Minnesota arising from or related to the violations
6 found by the Commission here and the agreements
7 associated with those violations, including any claim
8 arising under any provision of federal or state law,
9 including without limitation, 47 U.S.C. 251(b),
10 251(c), and 252(i), and Minnesota Statute Sections
11 237.09, 237.121, subdivision 5, and 237.60,
12 subdivision 3.

13 And then the final bullet point: Because the
14 Commission has found them to be the beneficiaries of a
15 10 percent discount, McLeod and Eschelon would not be
16 eligible for credit. There's another footnote that
17 reads: This offer would expire as an option that
18 CLECs could accept 90 days after release of the
19 Commission's order concluding the penalty phase of
20 this proceeding.

21 Q. Thank you.

22 Just to be fair, I would ask you to read one
23 other line into the record, because it would appear to
24 me to be a condition Qwest imposed on these creative
25 remedies. So would you read this sentence, the

1 sentence immediately above the bullet, because at
2 least to me it appears to be a condition, and I don't
3 want it to be mislead that it would be voluntary.

4 A. Certainly. This is something that I know
5 Qwest was discussing as a condition. The sentence
6 reads: If the Commission agrees not to order fines or
7 other remedies for past violations, Qwest would be
8 willing to take the following steps in addition to
9 those discussed above, then there's the list.

10 If I recall correctly, this refers to the
11 steps discussed above. I believe those were the sets
12 of new policies and procedures about reviewing
13 interconnection agreements that I believe
14 Mr. Brotherson testified to in this proceeding.

15 MR. DIXON: Thank you. I have nothing
16 further of this witness.

17 When it's time for him to be cross-examined,
18 you're welcome to use my computer.

19 MR. SPIVACK: Thank you.

20 THE WITNESS: And correct me about
21 Mr. Brotherson saying the same thing here, but I think
22 that's right.

23 ALJ RODDA: Mr. Wolters.

24 MR. WOLTERS: I have just a couple questions.

25

1 CROSS-EXAMINATION

2

3 Q. (BY MR. WOLTERS) Mr. Deanhardt, will you
4 turn to Page 59 of your testimony, please. There's a
5 sentence that begins: In fact, the work that Eschelon
6 did with Qwest is almost identical to the work done by
7 the CLECs that worked to implement line sharing for
8 the first time in the United States.

9 When you reference the CLECs there, do you
10 include Covad in that description?

11 A. Primarily Covad, yes, I do.

12 Q. Then the next sentence says: No company was
13 paid for that work. And I assume you say no company
14 was paid for that work, you include Covad?

15 A. Yes.

16 MR. WOLTERS: Thank you. I have no further
17 questions.

18 ALJ RODDA: Mr. Campbell.

19 MR. CAMPBELL: Thank you.

20

21 CROSS-EXAMINATION

22

23 Q. (BY MR. CAMPBELL) Mr. Deanhardt, my name is
24 Tom Campbell, as you know. Today here I'm
25 representing Eschelon in this proceeding.

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1 I want to start by talking with you about the
2 Minnesota proceeding. As I understand it, you were
3 retained by the Minnesota PUC and their unfiled
4 agreements proceeding?

5 A. The Department of Commerce.

6 Q. Do they play a role of Staff, or what's the
7 Department of Commerce?

8 A. Actually I'm not as familiar with the role of
9 Staff here. The Department of Commerce is -- it's not
10 quite RUCO either. They have the role of
11 representing -- it is consumers, but it's all sorts of
12 consumers, not just the small business and residential
13 consumers in Minnesota, and they play -- they have an
14 investigatory role. They don't have any regulatory
15 power. The PUC has its own staff, but their staff is
16 more in an advisory capacity. They don't -- their
17 Staff does, can and will occasionally ask questions,
18 but they don't really generally get involved in
19 proceedings at the level that it appears that
20 Ms. Scott and the Staff here are.

21 Q. So would it be right to say the Department of
22 Commerce has an investigatory role?

23 A. That's one of its roles. It used to be the
24 public service commission, then it was rolled into the
25 Department of Commerce a couple years ago during the

1 Ventura administration, and it has an investigatory
2 role. The Department of Commerce itself does a lot of
3 other things, but the telecommunications division does
4 investigations. They also help consumers who have a
5 problem, get that resolved with Qwest.

6 Q. Did they then hire you to help with their
7 investigation of the unfiled agreements matter?

8 A. Yes.

9 Q. Did they hire you pretty early on in that
10 process?

11 A. Well, they hired me in November of 2001. I
12 don't know how early that was in their process.

13 Q. What I was trying to get at, I assume they
14 were hiring you to conduct a thorough, impartial,
15 objective investigation. Would that be a fair
16 statement?

17 A. Yes.

18 Q. I'm contrasting that, they hadn't already
19 reached a conclusion, they didn't hire you to then put
20 together testimony to support their conclusion?

21 A. No. They hired me and they asked me to take
22 a look at the agreements they found and to tell them,
23 to explain to them the meaning of some of the
24 agreements because they don't understand them, not
25 having worked in the industry, to tell them whether or

1 not I thought that those agreements would be part,
2 should have been filed and why or why not. And then,
3 you know, the thing is that the investigation started
4 by looking at the agreements. It then grew because of
5 what we found in the agreements.

6 I think it's also important to point out that
7 the investigation was, and the complaint that came out
8 of the investigation was into conduct, into Qwest's
9 conduct, so there was not a separate investigation
10 into McLeod or Eschelon's conduct.

11 Q. And I take it this investigation and your
12 findings and your work there have also served as a
13 substantial basis for your testimony in this case; is
14 that correct?

15 A. Yes.

16 Q. Tell me what you did for that investigation.
17 I think you mentioned earlier you reviewed documents?

18 A. I reviewed documents, I conducted interviews.
19 I helped to determine what documents to ask for. So
20 in other words, I said okay, I've seen this, I need to
21 know X, Y, or Z, so please see if you can find that
22 out for me.

23 To be specific, I reviewed at least 100 or
24 so, something maybe less than 100 agreements.

25 I reviewed, I assisted in the drafting of, in

1 Mr. Oxley?

2 A. I had several conversations with Mr. Oxley.
3 There was at least one lunch that I remember having
4 with him early on.

5 Q. After you were retained by Minnesota?

6 A. Yes, when I was in Minnesota, so definitely
7 after I was retained.

8 Q. Was it a formal interview where you said you
9 were interviewing for the Minnesota Department of
10 Commerce, or was it just a social lunch?

11 A. I'd say it was probably a little bit of both.
12 I mean certainly there were questions and discussions
13 being had that were substantive, but it was done over
14 lunch, and it was also social. I mean, Mr. -- I know
15 Mr. Oxley from before, and he's a business friend and
16 he's certainly friends with people at the commission
17 because he used to be at the AG's office.

18 Q. In addition to that lunch, what other
19 conversations did you have with Mr. Oxley?

20 A. He participated in some of the telephone
21 calls, where it was a more formal discussion. There's
22 one in particular I'm thinking of that focused more
23 on, that focused quite a bit on 271 issues, and some
24 of these operational unfiled agreements issues that I
25 believe Ms. Clauson led, and where Lynne Powers was on

1 the phone, some other Eschelon people who I don't
2 remember. Jeff was -- my recollection is Jeff was a
3 part of that call, or Mr. Oxley, rather, was a part of
4 that call.

5 Q. And --

6 A. I guess from everything, I guess I've also
7 talked to him at various times during the proceedings,
8 where we saw him.

9 Q. After the proceedings formally started?

10 A. After the proceedings started, at various
11 commission meetings.

12 Q. On this conference call, did you say
13 Ms. Clauson was kind of leading the conference call?

14 A. Yes.

15 Q. Who else was in the conference call in
16 addition to the Eschelon representatives and yourself?

17 A. Eschelon, myself, other people from the
18 department, and other consultants working on the 271
19 issues. Mr. Mendoza, who was the head of the
20 telecommunications division at the time.

21 Q. Did you say in the 271 proceeding or in the
22 unfiled agreements proceeding?

23 A. We were discussing both. I don't know. I
24 don't remember who actually set it up.

25 Q. And at that time did you ask them questions

1 about the unfiled agreements and their involvement in
2 negotiations with Qwest?

3 A. I think we discussed, on that call I think we
4 discussed more the issues around UNE-Star and the
5 service quality problems that they continued to have
6 with Qwest, and their understanding of the agreements
7 as they related to UNE-Star. If you're talking about
8 specifically the discount, I don't believe the
9 discount came up in that conversation.

10 Q. Did you ever talk with them about the
11 consulting arrangement?

12 A. Yes, both formally and informally. There
13 were discovery requests and documents produced by
14 Eschelon that related to that issue, and --

15 Q. I'm talking about outside the formal
16 discovery process. You said you interviewed people,
17 and I was asking the interviewing component of your
18 work in Minnesota.

19 A. Right. There was not the same kind of
20 interviews that I did with the McLeod people, and I'm
21 just trying to recall if -- because at this point,
22 there are things that I have learned that it is
23 difficult to remember whether I learned them first
24 from talking with Mr. Oxley or from looking at the
25 documents first. But I remember conversations about

1 them.

2 For example, there is, I guess, the letter
3 that I understand came up in this proceeding yesterday
4 or at some point about Eschelon's feelings about how
5 Qwest treated the consulting agreement as a sham.
6 That's something that I also discussed or that was
7 expressed to me by Mr. Oxley before he ever wrote that
8 letter.

9 Q. In your testimony you don't refer to those
10 particular interviews, though, with the Eschelon
11 folks, do you? I didn't see it anywhere in your
12 testimony. Is it anywhere in your testimony?

13 A. That's correct.

14 Q. All the attachments to your testimony, are
15 there any notes from those interviews?

16 A. No. And I don't know if there are any that
17 aren't attached either.

18 Q. You mean you don't know if there are any
19 notes at all; is that what you're saying?

20 A. Yeah. I actually -- I mean, certainly, some
21 of the conversations with Jeff, with Mr. Oxley, were
22 conversations, and I don't recall if I took notes at
23 the big call that we had with Ms. Powers or
24 Ms. Clauson or not.

25 Q. But I just wanted to make sure I didn't

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1 misunderstand something. There's nothing in your
2 testimony or exhibits that memorializes or discusses
3 those interviews with the Eschelon folks; is that
4 correct?

5 A. Did we -- I believe that's correct. There
6 was an affidavit from Ms. Powers in Minnesota, but I
7 don't think that's in this record.

8 MR. CAMPBELL: I have no further questions.

9 ALJ RODDA: Do you have something, Mr. Dixon?

10 MR. DIXON: I am just waiting for a break.
11 I'm smiling because I know there's a break coming.

12 ALJ RODDA: Let's take a break.

13 (A recess ensued.)

14 ALJ RODDA: We're back on the record in the
15 case at hand.

16 And Mr. Spivack, is this your witness?

17 MR. SPIVACK: It is, thank you, Your Honor.

18

19 CROSS-EXAMINATION

20

21 Q. (BY MR. SPIVACK) Good afternoon,

22 Mr. Deanhardt.

23 A. Good afternoon.

24 Q. Mr. Deanhardt, I'm not sure if it was in your
25 summary or cross-examination from the other parties,

1 but let me ask you some questions about some things
2 you said earlier today.

3 You said that -- you talked a little bit
4 about the Covad service level agreement?

5 A. Yes.

6 Q. And how that might have encouraged broadband
7 development or broadband deployment; correct?

8 A. Yes.

9 Q. And that had the service level agreement been
10 available, there was a possibility that CLECs might
11 have expanded to Arizona; correct?

12 A. Or might have expanded their footprint in
13 Arizona, yes.

14 Q. So either more service or coming to Arizona
15 to provide service; correct?

16 A. Yes.

17 Q. Have you done any investigation of that at
18 all?

19 A. No. I am just basing my -- it's a
20 consideration from a business perspective, what does
21 it take to do business. That's one of the things it
22 takes to do business.

23 Q. So in our world I guess that's what we call
24 an assumption; correct?

25 A. That's the reason I used the words you're

1 emphasizing, like "might."

2 Q. Did you do any investigation involving any
3 CLECs in Arizona?

4 A. Some of the CLECs that I talked to in
5 Minnesota that you know about, for example, New Edge,
6 also operate in Arizona. I did not do any additional
7 work with Arizona specific CLECs.

8 Q. For those CLECs that you talked to in
9 Minnesota who may operate here in Arizona, did you ask
10 them about Arizona issues?

11 A. I didn't ask them specifically if anything
12 would have helped them to do more business or better
13 business in Arizona. Some of the issues, for example
14 the discount agreement touches all of the states, and
15 they discuss that, so it's not -- what I discussed
16 with them wasn't state specific to begin with.

17 Q. And when you talked to New Edge, did you ask
18 them about broadband deployment in Arizona?

19 A. I did not, no.

20 Q. The Covad service level agreement was made
21 public in Washington; correct? I mean in part as a
22 result or maybe wholly as a result of your insistence;
23 correct?

24 A. It was made public in Washington because the
25 Washington Attorney General's office asked for it.

1 Q. And you provided it to them; correct?

2 A. Yes, we did.

3 Q. And that was one of the conditions you had
4 made to John Kelley, then with U S WEST or Qwest,
5 about that service level agreement; correct?

6 A. That's right.

7 Q. Have you done any analysis about whether the
8 availability of the Covad service level agreement, the
9 public availability of it in Washington, had any
10 effect on broadband development there?

11 A. In Washington, no. I know that some of the
12 terms -- there were similar terms that appeared in
13 some interconnection agreements that Qwest produced in
14 Minnesota. I don't know for sure that that was a
15 result of the disclosure in Washington or not. They
16 weren't the exact terms. They were some of the terms.

17 But I haven't specifically analyzed the
18 business case, if that's what you're asking about,
19 whether broadband deployment increased in Washington
20 or not, based on the disclosure of that agreement.

21 Q. That is what I'm asking. Thank you for your
22 answer.

23 Is there any testimony that you rely on that
24 relates at all to the market in Arizona, specifically
25 the market in Arizona?

1 A. I guess -- no. I guess the only reason I
2 hesitate is because there are these issues that affect
3 you wherever you are, so in other words, these
4 agreements weren't Arizona specific or Minnesota
5 specific, they were Qwest region, but there's nothing
6 that I relied on that focused specifically on
7 questions about the Arizona market.

8 Q. I'm wondering if you could turn now to
9 Exhibit CD-1, which is a copy of your resume. Do you
10 have that?

11 A. I'm sorry. Yes, I do.

12 Q. Thank you.

13 Is that a true and complete copy of your
14 resume?

15 A. It should be.

16 Q. Is it accurate and up to date, in your
17 opinion?

18 A. Yes.

19 Q. And I realize it's a resume, so there may not
20 be things that are discussed on there, but does that,
21 was that your best, to summarize the work you've done
22 in each of these various positions listed?

23 A. It's a summary of the work that I've done at
24 these positions listed that I would use if I was
25 trying to get a job from somewhere. It's not

1 necessarily a summary of all of the work that I've
2 done, so I would draw that distinction. But yes, it's
3 a fair summary of that.

4 For example, particularly when you get down
5 to some of the older jobs certainly I went into far
6 less detail there than what I actually did.

7 Q. I understand and accept that representation.

8 Let me ask you, are you a member of the
9 Arizona Bar?

10 A. I am not, no.

11 Q. Have you ever practiced law here in Arizona,
12 I presume?

13 A. I have been before the Commission, and so I
14 have been before the Commission here in Arizona, but I
15 have not practiced law I think in the sense that you
16 mean it.

17 Q. So you participated in regulatory proceedings
18 here?

19 A. Yes.

20 Q. And that's been the limit of your experience
21 in Arizona?

22 A. Yes.

23 Q. Do you have any specialized expertise or
24 knowledge of Arizona law?

25 A. No.

1 Q. Have you ever been a criminal defense lawyer
2 or a prosecutor?

3 A. I have -- I haven't been a D.A. or U.S.A.,
4 those kinds of things. I have prosecuted civil cases
5 for the analogous civil statute for criminal fraud, in
6 particular the one that I'm thinking of is a big case
7 in California for a construction firm in the prison
8 industry.

9 Q. So that was a civil cause of action, not a
10 criminal cause of action; correct?

11 A. Yes.

12 Q. And it wasn't here in Arizona; correct?

13 A. No.

14 Q. In your testimony you give some
15 interpretations of Arizona law, specifically the two
16 statutes you referenced I believe were 2310, and 2311;
17 correct?

18 A. I would phrase it slightly different. What
19 I've tried to do and what I was asked to do was to
20 look at the statutes and at this case, and I was
21 provided by RUCO, and to determine whether the facts,
22 the evidence that I had adduced during the
23 investigation fit within the various elements that I
24 laid out in my testimony. If that's interpretation,
25 then that's what I've done.

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1 Q. Is that something that Mr. Pozefsky asked you
2 to do?

3 A. Yes.

4 Q. And was that Mr. Pozefsky's idea or your
5 idea?

6 A. I was asked by RUCO to look at the statutes
7 and see if the facts fit the statutes.

8 Q. Then you attempted to do so and testified
9 accordingly?

10 A. Yes. I mean, just to be clear, I was asked
11 whether the facts fit the statute; I wasn't asked
12 whether to make the facts fit the statute. I told
13 Mr. Pozefsky early on if I didn't agree the facts fit,
14 that would be what I would say.

15 Q. You're not an expert in Arizona criminal law;
16 correct?

17 A. I am not.

18 Q. You're not an expert in civil law?

19 A. No.

20 Q. You have no experience defending or
21 prosecuting cases under criminal statutes; correct?

22 A. That's correct.

23 Q. A little bit more about your background and
24 in experience, and I will ask for everyone's, for
25 mercy on everyone to do this somewhat quickly, and

1 going through the work that you've done, as listed on
2 your resume.

3 First of all, are there any jobs that aren't
4 listed here of a professional nature, after law
5 school, say?

6 A. I don't think so. I mean, as I said in my
7 testimony, I currently have a contract with AT&T that
8 isn't mentioned on this resume, but other than kind of
9 the specific work that I otherwise mentioned in my
10 testimony, there's nothing.

11 Q. Since you mentioned that, with regard to the
12 work that you're doing for AT&T, in what capacity did
13 AT&T hire you?

14 A. I'm working with them as a lawyer, helping
15 specifically on UNE cost cases in California.

16 Q. And is that a lawyer for AT&T?

17 A. Yes.

18 Q. So you're employed by them?

19 A. I have a -- I still have my company. I have
20 a contract with AT&T in the same way that I have a
21 contract with RUCO.

22 Q. But your specific work that you're doing is
23 as an advocate, if you will, for AT&T?

24 A. In California, yes.

25 Q. As the first you list Dinkelspiel, Donovan

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1 and Reder. You state that your practice, and this was
2 back in 1992, included telecommunications law and
3 general commercial litigation and securities
4 litigation; correct?

5 A. Yes.

6 Q. And that obviously was before the
7 Telecommunications Act of 1996; correct?

8 A. Yes.

9 Q. I'll ask the question, let you answer, I
10 suppose.

11 A. Yes.

12 Q. How much of your practice in that year at
13 Dinkelspiel, Donovan and Reder included
14 telecommunications law?

15 A. As a percentage, I -- it's hard to remember.
16 Blind guessing, 10 percent, maybe a little bit more
17 than that.

18 Q. In between, when you left Dinkelspiel,
19 Donovan and Reder in September of 1993, and when you
20 started at Covad in January of 1999, did you practice
21 telecommunications law at all?

22 A. I don't believe so, no.

23 Q. You don't believe so?

24 A. I just was trying to remember if I carried
25 anything over from Dinkelspiel to Brown & Wood. I

1 don't think that I did.

2 Q. Were you involved in any businesses involving
3 telecommunications in between the time you left
4 Dinkelspiel, Donovan and Reder and when you started at
5 Covad?

6 A. Not in the sense that I think you mean the
7 question, no.

8 Q. And then after you left Covad, were you
9 involved, up until you started your consulting firm,
10 in any aspect of telecommunications law or business?

11 A. Well, the software that we were creating in
12 Epidemic Networks was a personal communications
13 software which required -- it was an Internet based
14 application, which is all part of telecommunications
15 nowadays.

16 Q. In the broadest sense, I guess?

17 A. You know, in the sense that, frankly, all of
18 the companies are taking it now. I mean, just look at
19 the last triennial review order. But having said
20 that, probably not in the sense that you mean, that I
21 didn't work with a CLEC, I wasn't building out
22 infrastructure.

23 Q. Thank you for answering my next question.

24 So is it fair to say that in terms of your
25 business experience, it's limited to your time at

1 Covad? Your business experience with a firm providing
2 telecommunications services?

3 A. Yes.

4 Q. And is it fair to say that your legal
5 experience, your in-house legal experience again with
6 the telecommunications firm, as you have narrowed the
7 definition, is limited to Covad as well?

8 A. In-house, yes.

9 Q. And since October, 2001, you've been -- you
10 started at a consulting firm?

11 A. Yes. It's a more like a dba. I have no
12 aspirations of becoming KPMG.

13 Q. Certainly, I hope not, or Arthur Andersen.

14 A. Certainly not.

15 Q. In terms of the work you've done at Deanhardt
16 Consulting, how much of that has involved, in terms,
17 if you can give us a rough percentage, the unfiled
18 agreements proceedings and 271 proceedings in
19 Minnesota?

20 A. Probably, at this point, 70 percent.

21 Q. And what was the other 30 percent?

22 A. Well, it's the work that I'm doing now for
23 AT&T, in the cross case, which has been pretty
24 substantial, since whenever I started out, which I
25 guess was November. And I've done some additional

1 start-up type consulting on business plans and things
2 like that. Typical kind of work and see what happens
3 kind of work.

4 Q. What about for RUCO in this docket, can you
5 give us a rough percentage of the time that you spent?

6 A. Surprisingly, I thought you might ask me that
7 question.

8 Q. And I'm sure you came prepared.

9 A. In 2002, my billings to RUCO were right at
10 1 percent of my total income for the year, very few
11 hours. This year, I anticipate that they will be at
12 something less than 5 percent. Again, very few hours.

13 Q. When you were working at Covad, just for the
14 purposes of my edification, I have some familiarity,
15 but what was Covad's business?

16 A. Primarily DSL. I mean, it positioned itself
17 as a broadband company, and certainly, I think that
18 there were glimmers at looking at other types of
19 broadband technologies, but Covad was a CLEC that was
20 providing DSL services.

21 Q. Did Covad provide any services on a resale
22 platform?

23 A. No.

24 Q. How about on a UNE-P platform?

25 A. No. At the time I was at Covad UNE-P was

1 still up in the air. No, they don't do voice
2 services, they do DSL.

3 Q. When you say at the time you were with Covad
4 UNE-P was still up in the air, what do you mean?

5 A. There was quite a long time where the ILECs
6 were continuing to contest whether or not they had to
7 do UNE-P combinations. And even though this was a big
8 issue with Worldcom and with AT&T, with what was in
9 their contracts, and what was legally required, so at
10 that time, you know, it was not, UNE-P wasn't the kind
11 of ubiquitous and low cost platform that people cast
12 it, I suspect.

13 Q. Did you have any experience with UNE-P while
14 you were at Covad?

15 A. Yes. I mean in the various proceedings that
16 I was involved in where UNE-P was discussed and dealt
17 with, so I mean I didn't push for UNE-P as a Covad
18 product, but I participated in various regulatory
19 issues where it was discussed, and I understood what
20 it was and what it was intended to be, yes.

21 Q. So by that you mean that you attended
22 hearings where other parties who were interested in
23 UNE-P were essentially giving their advocacy?

24 A. Primarily, yes. Also, as you know, there are
25 discussions and learning and things like that that go

1 on outside of the context of hearings. But yeah, they
2 would all be in the context or around hearings and
3 people that I would see there.

4 Q. That may not be a fair assumption for me.

5 In terms of your experience in negotiating
6 interconnection agreements, do you have experience
7 actually negotiating interconnection agreements? I
8 noticed in your testimony you stated that you
9 participated in negotiations. Could you tell us what
10 that means?

11 A. I guess you can take out -- I mean, it
12 generally takes a team to negotiate interconnection
13 agreements, so I kind of never try to take credit
14 where credit is not due. So I participated in teams
15 that negotiated various interconnection agreements,
16 including the blind sharing, interconnection sharing
17 amendment, actually, the interconnection agreements
18 with SBC, I -- or some of SBC's affiliates, like
19 Southwestern Bell, Pacific, at the time, Pacific Bell.

20 And the thing that I can't recall
21 specifically is if there were other amendments to the
22 Qwest or U S WEST interconnection agreement that we
23 did. It seems to me that there were, because I
24 remember having to do various filings, but I can't
25 remember specifically.

1 Q. Did you have a broad plate of
2 responsibilities at Covad?

3 A. Very broad.

4 Q. And I think you may have even described
5 yourself once in another proceeding as a Jack of all
6 trades at Covad?

7 A. As I said earlier, in response to one of
8 Ms. Scott's questions, you kind of have to be in a
9 CLEC environment, yes.

10 Q. Just with regard to your legal duties at
11 Covad, do those include things other than
12 interconnection agreements?

13 A. Yes. I also did some HR legal work. I did
14 legal work with ISPs who were our customers.

15 I'm sure that I prepared various press
16 releases and things for securities purposes and things
17 like that.

18 And I can't remember the full cornucopia, but
19 I did quite a bit of things at various times other
20 than strictly dealing with interconnection agreements.

21 Q. Have you written any articles that have been
22 published on interconnection agreements or
23 compliance -- well, I'll just stop at that.
24 Interconnection agreements?

25 A. No.

1 they are now.

2 Q. And were companies expanding rapidly and
3 adding capacity rapidly?

4 A. Yes.

5 Q. And would that include companies like McLeod
6 and Eschelon?

7 A. I don't specifically know about McLeod and
8 Eschelon. I would assume so.

9 Q. Are you aware that McLeod had purchased a
10 company called Split Rock Communications?

11 A. There are several companies that are
12 referenced in the documents that I saw including Split
13 Rock that they purchased during that time.

14 Q. Let me ask you about the agreements that you
15 testified about.

16 You testified, I believe, at Page 6 of your
17 testimony, if you want to refer to Page 6, Lines 12
18 through 21.

19 A. Yes, I'm there.

20 Q. That's part of your summary about the McLeod
21 agreement; correct?

22 A. Page 6, Lines 12 through 21?

23 Q. I'm sorry, I'm looking at Page 12. Let me go
24 to Page 6.

25 You state at Lines 15 through 18 that both

1 Eschelon and McLeod committed not to oppose Qwest's
2 Section 271 application exchange for, among other
3 things, a discount of up to 10 percent on every
4 purchase made by Eschelon and McLeod from Qwest;
5 right?

6 A. Yes.

7 Q. So is that testimony your opinion, based on
8 the documents that you reviewed, the other work that
9 you've done, is that the agreement not to participate
10 or not to oppose was in exchange for the 10 percent
11 discount?

12 A. I would say to be fair, in part for the
13 10 percent discount, yes.

14 Q. There were other terms that might have gone
15 along with it?

16 A. Yes. I mean, there are -- discussions of
17 kind of this large set of agreements, but yes, they
18 were in part from the 10 percent discount.

19 Q. And were either McLeod or Eschelon obligated
20 to participate in the 271 proceedings, do you recall?

21 A. No.

22 Q. With the McLeod agreement, the specific terms
23 of that as Mr. Fisher told you, were that McLeod
24 agreed not to oppose Qwest's 271 application, provided
25 that Qwest complied with all agreements and all

1 applicable statutes and regulations; correct?

2 A. That sounds like what he said, yes.

3 Q. As a matter of fact, it's in an affidavit
4 that you drafted for him; correct?

5 A. That I made the initial draft, yes.

6 Q. And that he reviewed, and I think you said
7 that he made minor changes to; correct?

8 A. I think in the end, yes, and I probably
9 characterized it as such.

10 Q. And the nonopposition or nonparticipation
11 agreements, if you know what I'm referring to --

12 A. I do.

13 Q. -- don't appear in the same documents as the
14 discount agreements; is that correct?

15 A. Well, in the case of McLeod, both are oral so
16 there isn't a document. In the case of Eschelon, the
17 nonparticipation agreement is not in the same document
18 as the 10 percent discount.

19 Q. Okay. Let's take Eschelon. Despite the fact
20 that they're not in the same document, you believe,
21 based on your investigation, that those terms are
22 related?

23 A. Yes.

24 Q. So you have to go -- you have to read the
25 documents together; is that correct?

1 A. Yes. I would say in fact you have to read
2 all of those November 15th agreements together to get
3 a sense of the transaction.

4 Q. And that's because you believe, based on your
5 investigation, that all of those agreements with
6 Eschelon are interrelated; correct?

7 A. Yes.

8 Q. And that includes the confidential amendment
9 to the confidential trade secret stipulation as one of
10 them; correct?

11 A. If you're talking about the one dated
12 11-15-00, yes. The reason I say that is there are a
13 lot of these agreements that have almost identical
14 titles.

15 Q. Right. These are all dated November 15th,
16 2000, and we're talking about the same agreement.

17 There's also a confidential purchase
18 agreement between Eschelon and Qwest?

19 A. Yes.

20 Q. And the seventh amendment to the
21 interconnection agreement between Eschelon and Qwest?

22 A. Yes.

23 Q. And there's a confidential escalation
24 procedures agreement also dated November 15th --

25 A. Yes.

1 Q. And if you look at that paragraph, that
2 paragraph in part talks about a \$13 payment per line
3 per month that is made to -- or a credit, excuse me,
4 that Qwest will credit to Eschelon for platform line
5 per month as long as Eschelon has provided the WTN
6 information to Qwest; correct?

7 A. Yes. This is the agreement I was referring
8 to earlier when I was talking about agreements that
9 dealt with service quality.

10 Q. And it was your testimony I think that that
11 agreement dealt with DUF files. Am I stating your
12 testimony correctly?

13 A. Right, the daily usage files.

14 Q. This agreement talks about a process that's
15 in place before the DUF files are used, did it not?

16 A. It talks about -- I think technically we're
17 on the same page. Let me try. What it talks about is
18 producing daily usage information, which is what a DUF
19 file contains. It talks about having a manual process
20 because a mechanized process was not in place.

21 Q. This is actually before a DUF file would be
22 in process before a mechanized process?

23 A. Before a mechanized process I think people
24 refer to them as DUF, whether it's in a computer form
25 or not, that's the reason that I used the phrase

1 before. Sorry.

2 Q. Maybe if we used manual versus mechanized.
3 This actually refers to a manual process?

4 A. This actually refers to a time when a manual
5 process was in place, yes.

6 Q. And it talks about the Eschelon actually
7 providing the WTN information to Qwest as part of this
8 agreement; correct?

9 A. Yes.

10 Q. Part of this particular paragraph.

11 And the WTN information is working telephone
12 number?

13 A. Yes.

14 Q. I think I've learned.

15 And this paragraph also has a purchase
16 requirement at the beginning of approximately
17 \$15 million, it seems, of services and products
18 between October 1, 2000, and September 30th, 2001;
19 correct?

20 A. Yes. This is part of why I say all these
21 agreements are unrelated. This comes from the
22 confidential parts agreement.

23 Q. I think that this agreement says, what this
24 agreement relates to is the inability that Eschelon
25 was facing to bill for switched access for IXCs;

1 correct?

2 A. On the Star/UNE-P platform, yes.

3 Q. And if Eschelon in fact billed, collected for
4 switched access, then the \$13 credit would not have
5 been provided under this agreement; correct?

6 A. No, that's not correct. I'm assuming that in
7 fact Eschelon did bill some for switched access. As a
8 matter of fact, I think they said that they have. The
9 issue is the providing of accurate daily usage
10 information. So the question wasn't being able to
11 bill all, it was the delta.

12 Q. It was being able to bill using a mechanized
13 process; correct?

14 A. No. Mechanized billing is a specific term of
15 art.

16 It was being able to get the information
17 necessary to be able to bill Eschelon's -- the IXCs
18 for access. Not Eschelon's, but the IXCs for access.
19 So in other words, Eschelon is using a UNE-Star, UNE-P
20 line. They need information from Qwest that tells
21 them what long-distance calls terminated at the end of
22 that line, and who carried those long-distance calls,
23 whether it's AT&T or MCI or Sprint or whomever.

24 That usage information is then provided to
25 Eschelon, who then bills the IXC for access. The

1 issue was that the -- the issue was the accuracy of
2 that information so that Eschelon could form accurate
3 bills to send to the IXCs and collect the revenue.

4 Q. Well, the issue here talks about, I mean,
5 this credit is provided under the terms of this
6 agreement until the mechanized process is in place;
7 correct?

8 A. That's what it says, yes.

9 Q. So once the mechanized process is in place,
10 then Eschelon is not entitled to this credit under the
11 terms of this paragraph?

12 A. There was ultimately some dispute over the,
13 whether or not a mechanized process was in place,
14 whether or not it was adequate. So under the express
15 terms of the agreement, yes. In fact, what happened
16 is a bit different than what's in the express terms of
17 the agreement.

18 Q. I'm asking about the terms of this particular
19 agreement.

20 A. That's why I said.

21 Q. Would you agree that is what this agreement
22 says?

23 A. Yes.

24 Q. So under the terms of this agreement, a CLEC
25 that could bill or that had a mechanized process in

1 wanted to choose it, would have gone through the
2 252(i) process; correct?

3 A. More than likely. I mean, based on the way
4 the industry was working at the time, and still does,
5 what I imagine would have happened is this, the CLEC
6 would have come to Qwest and said I'm not getting
7 accurate usage files, I want the same credit. Qwest
8 would have said you've got a mechanized process, oh,
9 and by the way, you're getting UNE-P, not UNE-Star,
10 no. Then the CLEC would have said do you really mean
11 no? And Qwest would have said yes. Then there would
12 have probably been an arbitration about it. And the
13 Commission would have had the ultimate decision over
14 whether 252(i) allowed them to opt into the provision
15 or not.

16 Q. So part of the analysis would have been what
17 provisions are related to this term, what other
18 considerations might be appropriate for the Commission
19 to weigh determining whether or not there were opt-in
20 rights; correct?

21 A. Yes, in the first instance as well. It's
22 less likely with a provision that's this technically
23 specific, but there is the possibility the Commission
24 would have looked at it and had someone on their Staff
25 that said you know, it's against the public interest

1 to have the specific, this specific be that tailored.
2 I do think in all realism it's far less likely that it
3 would have happened on the front end, but it certainly
4 could have. I almost guarantee you it would have
5 happened on the back end, if other CLECs who were
6 getting access information, saw this provision.

7 Q. Turning a moment to McLeod, I think the way
8 you've described in your testimony that there were six
9 written and two oral agreements?

10 A. That sounds right.

11 Q. And those describe the terms of the
12 transaction with McLeod; correct?

13 A. That sounds right, yes.

14 Q. And all of those agreements were
15 interrelated; correct?

16 A. Yes.

17 Q. And to truly understand the McLeod
18 transaction, you have to look at all eight of those
19 agreements; correct?

20 A. I think that you do, yes.

21 Q. And those include, if I can go through them
22 with you, just to list them.

23 A. Do you remember where I listed them, if I
24 listed them in this testimony?

25 Q. I think you did. Let's see if I can find it.

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1 A. The only reason is because it's hard to
2 always remember.

3 Q. I think you refer to them at Page 14,
4 beginning at Line 14 of your testimony.

5 A. Right. Yes.

6 Q. So one of those agreements was an
7 interconnection agreement amendment that you referred
8 to earlier in your testimony, the fourth amendment
9 that was filed in Arizona; correct?

10 A. Yes.

11 Q. And another was the purchase agreement, the
12 written purchase agreement where McLeod agreed to
13 purchase from Qwest?

14 A. Yes.

15 Q. And then there was the Qwest purchase
16 agreement where Qwest agreed to purchase from McLeod?

17 A. Yes.

18 Q. Then there was an amendment to the
19 confidential billing settlement agreement and two
20 settlement agreements. Do you recall those?

21 A. That sounds right.

22 Q. Okay. Then there was the oral discount
23 agreement that you have referred to in Mr. Fisher's
24 testimony; correct?

25 A. Yes.

1 Q. And then the oral agreement not to oppose
2 Qwest's 271 application that we discussed earlier;
3 correct?

4 A. Yes. And just because I don't remember which
5 agreement is -- it's in one of those agreements -- if
6 I recall correctly contains the escalation provision
7 that we discussed, but I don't remember which one, so
8 yes.

9 Q. I think it was in October. They were all
10 dated October 26th, 2000.

11 A. Actually, weren't a couple of them dated
12 after that? Because when they went back and changed,
13 there was a \$5 million swap after the initial
14 \$38 million dollar swap that I think is included in
15 that transaction, but I don't remember if they're
16 included in those agreements that you identify or not.

17 Q. Unfortunately I can't testify, so I can't
18 answer your question.

19 A. That's why I'm saying, without sitting and
20 looking at all the agreements, I can't remember if
21 those terms are included in these or not.

22 Q. And I think you, as you state in Page 14,
23 Line 15, the key component of those agreements was the
24 creation of a new product called UNE-Star; correct?

25 A. Yes.

1 Q. And that's a flat rated UNE platform product;
2 correct?

3 A. Yes.

4 Q. And it provides for statewide, deaveraged
5 pricing; is that correct?

6 A. I believe. Well, I tend to think of
7 deaveraged as being within the zones. It really
8 provided for statewide average pricing. I mean one
9 price throughout the state as opposed to deaveraged
10 pricing, which is a different price for each zone.

11 Q. That was the question I was trying to ask,
12 and I appreciate your distinct answer. Those pricing
13 provisions as well as other pricing provisions were
14 set forth in that interconnection agreement amendment,
15 fourth amendment that was filed here in Arizona;
16 correct?

17 A. The flat rate pricing for the UNE-Star
18 product was in the interconnection agreement; yes.

19 Q. And that interconnection agreement amendment
20 also contained a list of the features that would go
21 along with that platform; correct?

22 A. Yes.

23 Q. At Page 62 of your testimony, Lines 10
24 through 12, you go through a comparison of the
25 Eschelon implied agreements.

1 A. I think you said Lines 10 through 12. It's
2 actually much more than that because of the
3 comparison, yes.

4 Q. My numbers are fluctuating again. I think it
5 starts at Page 52.

6 A. Yes.

7 Q. And at Lines 10 through 12, which is where I
8 wanted to direct you, you said that in both cases the
9 parties entered into a series of interrelated
10 agreements, including take or pay agreements with the
11 purchase volume commitments; correct?

12 A. Yes.

13 Q. So those agreements were agreements to
14 purchase from Qwest a certain volume of
15 telecommunications services; correct?

16 A. Yes.

17 Q. And they also had term commitments, that is,
18 they were over a certain period of time; correct?

19 A. Yes. Which is, by the way, the only way a
20 take or pay agreement would work.

21 Q. Referring to the oral discount agreement that
22 you talk about with McLeod, it's your opinion based on
23 what you've seen, that that discount agreement
24 actually had different tiers; correct?

25 A. Yes.

1 Q. And those tiers were, in fact, based on
2 volumes of purchases; correct?

3 A. Yes.

4 Q. So it was 6 and a half percent that McLeod
5 purchased 178 million to 188 million for services in
6 2001; correct?

7 A. That sounds right. I would have to look at a
8 document to make sure, but that sounds right.

9 Q. Let me refer you to CD-33, then. If you'll
10 look at the third page when you get to CD-33.

11 A. Right. You said 178 to 188, 6 and a half
12 percent, yes, that's correct.

13 Q. And then for the next year, 189 to
14 198 million, it was 8 percent; correct?

15 A. Actually, to 199 it was 8 percent, yes.

16 Q. Right. I guess it's a little -- so anything
17 over 199, then it's 10 percent; correct?

18 A. I'm sorry, I was reading across instead of
19 down. You were right. The first one in the first
20 year, it changes after that, but in the first year,
21 8 percent up to 198, then apparently 199, or over
22 10 percent, yes.

23 Q. Then as you point out for the second and
24 third years, the amount goes up?

25 A. The minimum goes up, and the point at which

1 the 10 percent applies goes up as well, yes.

2 Q. And just so we can state that for the record,
3 over 199 million for the second year would get you an
4 8 percent reduction over 200. 199 million for 2003
5 would also be an 8 percent reduction; correct?

6 A. Yes.

7 Q. And over 250 million would be a 10 percent
8 reduction; correct?

9 A. Yes.

10 Q. And it's your testimony that these were the
11 terms that Mr. Fisher believed related to this oral
12 discount agreement; correct?

13 A. Yes.

14 Q. Let me ask you something. CD-2 contains the
15 FCC's October 4th, 2002 order?

16 A. Yes.

17 Q. And that sets out a standard for filing
18 interconnection agreements; correct?

19 A. Yes.

20 Q. And that standard in that October 4th, 2002
21 order, that was the first time the FCC had set out
22 that standard; correct?

23 A. It's the first time they set it in this way.
24 As I said in my testimony, I think that the previous
25 rulings from the FCC and the act itself made clear

1 what the standard was. I think, based on things that
2 Qwest ordered, understood that. But this is the first
3 time that I'm aware of that it was articulated in a
4 specific format in the way that it was in this
5 document.

6 Q. So the FCC had never, you'd agree with me the
7 FCC never expressly stated the test in this way?

8 A. I would agree with that statement, yes.

9 Q. And you referred to some things that Qwest
10 said?

11 A. I'm sorry. Someone sneezed so I missed
12 your --

13 Q. When you were answering the question, you
14 were referring to some things that Qwest said --

15 A. Yes.

16 Q. -- led you to believe that Qwest understood
17 the definition as well before the October 4th order;
18 is that correct?

19 A. Yes.

20 Q. Were you referring to the portion of your
21 testimony that talks about Qwest's SGAT definition?

22 A. Yes.

23 Q. And is that at Page 9, Lines 10 through 14 of
24 your testimony?

25 A. Yes.

1 Q. And that defines an interconnection agreement
2 as an agreement entered into between Qwest and a CLEC
3 for interconnection unbundled network elements or
4 other services as a result of negotiations, adoption,
5 or a combination thereof, pursuant to Section 252 of
6 the act; correct?

7 A. Yes.

8 Q. And your testimony is that that definition is
9 entirely consistent with the FCC's definition?

10 A. Yes. And I guess by that I mean it doesn't
11 track word for word, but it's essentially the same. I
12 mean, there's an understanding that if it deals with
13 interconnection, if it deals with UNEs, that it's an
14 interconnection agreement which is basically all that
15 the FCC said.

16 Q. Although the FCC gave a test for determining
17 whether deals with interconnection should be filed as
18 an interconnection; correct?

19 A. It gave a definition. It then said that it's
20 not going to opine on every situation, which implies
21 that it's not a test that necessarily is -- it gave a
22 definition. I don't know that I would describe it as
23 a test, let's put it that way.

24 Q. Does the definition in the SGAT, as you said,
25 it's not the same as the FCC's definition; correct?

1 A. It's not identical wording, that's what I
2 said, but that's correct.

3 Q. And it doesn't discuss 251(b) or (c)
4 services; correct? There's no reference?

5 A. It doesn't refer to them as 251(b) or (c)
6 services. It refers to interconnection and UNEs,
7 which are 251(b) and (c) services.

8 Q. Okay. And it doesn't talk about
9 forward-looking obligations, does it, specifically?

10 A. This one does not, no.

11 Q. Does the SGAT definition state what the term
12 interconnection means?

13 A. This doesn't. I don't actually remember if
14 interconnection is defined in the SGAT or not. I
15 think I recall seeing early versions where
16 interconnection as opposed to interconnection
17 agreement was defined, but I don't recall if the SGAT
18 separately defines interconnection or not.

19 I know the agreements that I have seen that
20 Covad, for example, entered into with U S WEST did
21 have at least general descriptions of what
22 interconnections were as opposed to UNEs. You kind of
23 have to have it.

24 Q. But those are general descriptions; correct?
25 They don't obviously define every instance or every

1 agreement per the case?

2 A. I think that's right. As I said, I just
3 don't recall if the SGAT has a separate definition of
4 interconnection or not.

5 Q. Does that definition say anything about
6 escalation agreements?

7 A. Does it say an escalation agreement is an
8 interconnection agreement? No.

9 Q. Same question as to dispute resolution term.

10 A. It does not say that it's an interconnection
11 agreement either. It doesn't say it's not either.

12 Q. You note that Qwest filed a petition with the
13 FCC to try to narrow the definition of interconnection
14 agreement to avoid prosecution, it states for conduct
15 it knew to be illegal at the next portion of your
16 testimony; correct?

17 A. Yes.

18 Q. Are you suggesting that Qwest could not seek
19 clarification of an issue before the FCC?

20 A. I never suggested it wasn't its right to do
21 it. I just suggested what I think the motive was.

22 Q. So you're ascribing some advocacy to that;
23 correct?

24 A. I'm ascribing some advocacy on Qwest's part,
25 you mean?

1 Q. Yes.

2 A. Yes, I do.

3 Q. Isn't it also true that by seeking a ruling
4 from the FCC, the result of that would be some
5 definition of general application; correct?

6 A. Potentially, yes. I mean, at the time that
7 you filed the petition or that anyone files a
8 petition, a ruling could come out as general
9 applicability, yes.

10 Q. And one did; correct?

11 A. Yes.

12 Q. And that was something that Qwest asked for;
13 correct?

14 A. Yes. Unfortunately, for them it's not the
15 one that they asked for, but it's the one they asked
16 the UDC to do.

17 Q. That's an interesting editorial comment.

18 A. Sorry.

19 Q. That's fine. We're having a conversation
20 here so I'll ask you a question. The Minnesota
21 Department of Commerce did not seek a declaratory
22 relief petition seeking definition; correct?

23 A. No.

24 Q. And it certainly was Qwest's right to do
25 that; correct?

1 A. As I said before, it was clearly within its
2 rights to do what it did.

3 Q. And you're not obviously suggesting that
4 there should not be a national standard; correct?

5 A. No, I'm not. What I am suggesting is it's
6 not entirely clear to me that there wasn't before
7 that. It certainly wasn't articulated in this way,
8 but no, I'm not suggesting it's inappropriate to have
9 a national standard.

10 Q. In that proceeding in which, the declaratory
11 relief proceeding in which Qwest sought that ruling,
12 other parties participated; correct?

13 A. Yes.

14 Q. Including AT&T, one of your clients; correct?

15 A. Currently. I want to make sure that there's
16 no implication that at the time I was doing anything
17 with AT&T, because I was not.

18 Q. I don't mean to imply that. Your current
19 client.

20 A. Yes, AT&T did file a response to the
21 petition.

22 Q. As did a number of other parties, including
23 the New Mexico State Attorney General's Office;
24 correct?

25 A. That sounds right. I read all of them, but

1 it's been a while. New Mexico I think filed one, a
2 couple of other state commissions, I believe, and
3 several other parties.

4 Q. And there were lots of different definitions
5 proposed; correct?

6 A. We're going to have a bit of a debate here.
7 Yes, there were different definitions proposed, I
8 think that with some exceptions, and because I know
9 what the FCC says, I know where we were going, which
10 includes some of the things that AT&T and New Mexico
11 were advocating for, that went, I think, beyond what
12 the FCC thought, and beyond, by the way, the standard
13 articulated by the Minnesota Department of Commerce.
14 The underlying theme of the definitions that were put
15 out there were essentially the same.

16 Q. And you mentioned AT&T's offering of a
17 standard that was broader than that adopted by the
18 FCC; correct?

19 A. The FCC thought it was. I believe I
20 commented on that specifically.

21 Q. And you were not suggesting there was
22 anything improper about AT&T trying to get a broad
23 definition that would assist it in the state
24 regulatory proceedings; correct?

25 A. No.

1 Q. You testified I think in your summary, and
2 also in your testimony, that there's, in your opinion,
3 there's very little that ILECs and CLECs do that is
4 not interconnection in obtaining access to UNEs and/or
5 services; correct?

6 A. That's correct. Let me qualify that slightly
7 in this context, because Qwest is a somewhat different
8 beast.

9 But in the context of ILEC and CLEC, that's
10 correct. I say that Qwest is somewhat of a different
11 beast because it has out-of-region services as well,
12 so there may be deals again. There is, for example, a
13 Covad agreement with Qwest pre U S WEST that has
14 nothing to do with interconnection. But that's
15 because Qwest is kind of a special company.

16 Q. And so why don't we limit it to in-region
17 services.

18 A. Sure. And to the idea that it's an ILEC and
19 we're talking about local services, local exchange.

20 Q. So there are things that would not be
21 interconnection, if they're out-of-region services,
22 for example?

23 A. Yes. Well, possibly, there could actually be
24 interconnections, they likely would not be UNE.
25 Definitely you could have out-of-region

1 interconnection because that's just connecting
2 networks. It would be very unlikely to have
3 out-of-region UNEs.

4 Q. What about when an ILEC purchases services
5 from a CLEC?

6 A. Interconnection is certainly a possibility.
7 UNE's, far less likely.

8 Q. Let me ask you some questions about some
9 things that you didn't include in your testimony.
10 There are facts that you're aware of that were not
11 included or commented upon in your testimony about
12 these agreements; correct?

13 A. Probably. I'm sure you're going to point out
14 some, but...

15 MR. POZEFSKY: Your Honor, I would just, I'd
16 object not to the substance, but to the form, if
17 there's some foundation to ask him. If there's facts
18 in a vacuum how is he supposed to know?

19 ALJ RODDA: I think that he'll help us out.

20 MR. SPIVACK: He seems to agree there are
21 some.

22 THE WITNESS: I looked at a lot of
23 information, I'm sure that in writing about it. I
24 didn't write it all down. I did not, for example,
25 state Qwest's case then try to refute it.

1 payments to McLeod under that agreement as an expense;
2 correct?

3 A. Not initially, no. Initially they were
4 booked as a reduction of revenue, and then it was
5 eventually changed to be booked as an expense,
6 according to the documents that were produced, yes.

7 Q. You're correct. And that change was made
8 approximately a month after the payments which were
9 made; correct?

10 A. That, actually, I don't remember.

11 Q. But it was before any of these proceedings
12 started; correct?

13 A. Again, I think so. But...

14 Q. You have no information to dispute that?

15 A. No.

16 Q. Now, as to the documents in the agreements
17 that you're discussing in your testimony, obviously
18 you didn't work at Eschelon during any of this time
19 period; correct?

20 A. I did not.

21 Q. You didn't work at McLeod during any of this
22 time period; correct?

23 A. I did not.

24 Q. You didn't work at Qwest during any of this
25 time period; correct?

1 A. I was in their offices a lot, but I never
2 worked there.

3 Q. You may have felt like you worked there?

4 A. There were times.

5 Q. You weren't an employee of Qwest?

6 A. I was not.

7 Q. And you didn't draft any of the exhibits, the
8 documents as opposed to testimony and affidavits that
9 are attached to your testimony discussed in it;
10 correct?

11 A. I did not.

12 Q. And you weren't a sender or recipient or
13 copied on those documents originally; correct?

14 A. I did not. Let me back up. The one
15 exception to that, that's correct if you're talking
16 about McLeod and Eschelon. There is the Covad
17 agreement, which I don't think I attached, which I
18 refer to. That was something that, as my testimony
19 said, I did receive a fax copy of.

20 Q. Other than that one agreement?

21 A. That's -- then we're correct, yes.

22 Q. You testified at Page 57, Lines 6 through 11,
23 about the consulting agreement between Eschelon and
24 Qwest; correct?

25 A. Well, specifically -- it is about the

1 consulting agreement. Specifically here I'm talking
2 about Qwest following up on the idea that Mr. Smith
3 expressed in his e-mail.

4 Q. And it's your opinion that the consulting
5 agreement was not a real consulting agreement; is that
6 correct?

7 A. Yes.

8 Q. And you used the word sham. That's your
9 opinion; correct?

10 A. Yes.

11 Q. If the agreement between Qwest and Eschelon
12 were not a sham consulting agreement, would it be
13 within the Section 252(e) filing requirement?

14 A. I actually think that that would depend on
15 whether it's tied to other provisions that are -- in
16 other words, as a completely stand-alone agreement for
17 Qwest to receive services from a CLEC, my answer will
18 be no. As an agreement that was entered into as part
19 of a transaction that included other interconnection
20 terms, in other words, there were quid pro quo either
21 way, I think that the answer could be yes. You would
22 have to look at the totality of the circumstances to
23 determine whether it's part of the deal. In other
24 words, whether it's a term or condition that relates
25 to everything else.

1 opinions based on this case; correct?

2 A. The specific factual scenario. But as I
3 said, if it was a completely stand-alone agreement
4 that had no relationship to UNEs or anything else, in
5 this context, then I think the answer is no, there's
6 nothing in 251 or 252 that says that such an agreement
7 would have to be filed. But this is different because
8 of the facts.

9 Q. So in other words, one has to accept the
10 facts as found by you for the agreement to have been
11 within a filing requirement; correct?

12 A. I don't know. One has to make their own -- I
13 mean the Commission has to make the ultimate
14 determination.

15 Q. I'm asking for your opinion.

16 A. In my opinion, it had to be filed because it
17 was tied to everything else. I think the documents
18 clearly show that, as I said, specifically there are
19 terms from that very agreement that do in fact appear
20 in the interconnection agreement. So it's clear that
21 those two agreements are tied together in fundamental
22 ways, so the fact that those agreements are tied
23 together I don't really consider opinion.

24 I've got the \$10 million in one agreement, it
25 reappears over here in the interconnection agreement.

1 How much they're tied together is something that
2 someone else would have to decide. In my opinion,
3 they're tied together well enough that that opinion
4 should have been filed.

5 Q. Then it would have to go through the 252(i)
6 process for determining what the related terms are;
7 correct?

8 A. If a CLEC wanted to opt into it, yes.

9 Q. You testify, I think at paragraph -- Lines 17
10 through 21 at Page 59 about the implementation teams.

11 A. Yes.

12 Q. And it's your belief that the implementation
13 teams were the same as the consulting teams; is that
14 correct?

15 A. What I'm referring to here is that we have
16 two different documents, both of which have the same
17 teams. One of which was created, one of which calls
18 it an implementation team or teams for executing the
19 implementation plan, which is referred to in, for the
20 first time in the agreement marked by Staff as
21 Agreement 3.

22 Then when it was produced to the Department
23 of Commerce, the version that the Department of
24 Commerce originally got, suddenly it was called an
25 implementation and consulting team.

1 There was a difference between the original
2 implementation and what it was called after discovery
3 request, and that's what I'm talking about in this
4 testimony.

5 Q. Is it the fact that the name changed that
6 leads you to this belief?

7 A. It would depend on the belief that you're
8 talking about. But the fact of the name change is
9 what leads me to believe that this was originally,
10 that these teams were originally contemplated as part
11 of the implementation plan, the implementation team
12 that is discussed in the Exhibit 3 that, or what Staff
13 marked as Agreement 3 that's then later more fleshed
14 out in what Staff has described as Exhibit 16 that was
15 part of the process of getting to the Agreement
16 No. 16.

17 Q. But are you saying that the consulting teams
18 could not be the same as the implementation teams?

19 A. To be frank, I guess I'm saying that it's
20 awfully darned convenient.

21 Consulting teams could be the same as
22 implementation teams, you know, if that was the case,
23 but it just -- it's kind of too convenient that
24 suddenly after discovery they're called consulting
25 teams, and before discovery they're not.

RECORDED

1 Q. Let me ask you to look at Paragraph 3 of the
2 confidential amendment to the confidential trade
3 secret stipulation.

4 A. This is the one that describes the
5 consulting?

6 Q. It does, yes.

7 A. We're back on 62 sub 6?

8 Q. 62-6.

9 A. Paragraph 3?

10 Q. Paragraph 3.

11 A. I am there.

12 Q. Do you see that there's a description of the
13 consulting network related services in that paragraph?

14 A. Yes, there is an including but not limited to
15 clause.

16 Q. And the including but not limited to clause
17 includes loop cutover and conversion, repair, billing
18 and other items; correct?

19 A. Yes.

20 Q. And those are actually some of the names of
21 the implementation teams; correct?

22 A. If I recall correctly, yes. I know it's in
23 here, but yes.

24 Q. Now, you're not suggesting, of course, that
25 Qwest couldn't retain a consultant on wholesale

1 issues; correct?

2 A. No, I'm not.

3 Q. Or that Qwest could not pay a consultant to
4 wholesale issues; correct?

5 A. No, I'm not.

6 Q. Or that there could be some payment term that
7 is tracked to the purchase of other services; correct?

8 A. That one is closer. And the reason is
9 because it would depend on the context of what other
10 services you were talking about. That was too fast, I
11 apologize. That's because it would depend on what
12 other services you're talking about.

13 The problem here -- not problem. The issue
14 here is that Eschelon, as I said before, Eschelon
15 could do 50,000 hours of work, only spend \$149 million
16 and get paid zero for its work. It could spend two
17 hours of work and spend \$500 million and get paid
18 \$50 million for that two hours. There clearly has to
19 be some kind of rational relationship there. Would it
20 be illegal for Qwest to enter an agreement that was
21 that crazy? No, not that I am aware of.

22 Q. I think I heard a different term from the
23 peanut gallery.

24 A. I was searching for one that was as
25 nonpejorative as possible. Crazy was as good as I

1 could get. You know, I don't think it would be
2 illegal.

3 Is it?

4 Q. Let me ask you something. Is it your
5 testimony that the value of the consulting services
6 depends on a number of hours that it provided?

7 A. Not necessarily. But that's certainly one
8 way that consulting services are typically measured.

9 Q. Another way is development of new products;
10 correct?

11 A. No. Well, I mean I guess I have to ask you
12 what you mean. When you say --

13 Q. Well, if a consultant develops a new product
14 for a company, that product ends up having a
15 significant amount of sales, I mean, are you saying
16 that you can only value that consultant's services if
17 you're paying him \$100 an hour and it takes him five
18 hours at \$500?

19 A. When you're talking about economic value up
20 front you decide one of two things. You either decide
21 you're going to get paid by the hour or you're going
22 to have some kind of fee that is rationally related to
23 what you're talking about.

24 In your case we talked about developing a
25 product. For example, you may have a fee that relates

1 to, say, a percentage of sales or you may look at the
2 projected sales and say okay, you know, or cost
3 savings is another, we're going to save a million
4 dollars in cost, and if we do you're going to pay me
5 \$10,000 or 100,000, something like that. But it's
6 tied to the value.

7 Here, there isn't even what you're
8 describing. There is no tying of the work done to the
9 value contributed in terms of products that other
10 people might buy. The only tie was to how much money
11 Eschelon spent.

12 Q. But you're not saying, correct, that there
13 were no services provided under that consulting
14 agreement?

15 A. Actually, I guess even from Eschelon's
16 perspective, that's subject to debate. I know that
17 there were discussions. I've seen the documents. I
18 mean, I can't remember if they're in this testimony or
19 not. But in Minnesota I held them up, and they were
20 about a grand total of that thick. That being about a
21 half an inch. And there were things that were done,
22 and I don't dispute that there were things that were
23 done.

24 I know that not all the teams that are in the
25 implementation plan apparently did anything. I know

1 that there were no records kept of time that was
2 spent, anything like that. But there apparently was
3 some work done, and I don't dispute that.

4 Q. You gave an estimation of the amount of
5 documents that were entered into evidence, I think in
6 the Minnesota proceedings related to consulting;
7 correct? Eschelon actually produced a lot more;
8 correct?

9 A. That I'm not sure about. The documents that
10 were entered into evidence, we asked Qwest who was the
11 purchaser of the services, to produce all the
12 documents that they had that related to the services
13 that Eschelon provided. And that was my, you know,
14 half-inch stack of documents for all of the services
15 that Qwest had paid the amount of money that may still
16 be confidential before.

17 I don't actually recall -- Eschelon produced
18 a lot of other documents, but I don't recall them
19 being documents that related to the consulting
20 services.

21 Q. You don't recall because you don't recall the
22 documents?

23 A. No. I recall that we had stacks of documents
24 from Eschelon, most of them dealing with the 271
25 issues, the daily usage files issues, things like

1 that, and the problems they were having with Qwest on
2 an ongoing basis.

3 What I don't recall was Eschelon providing
4 documents that showed the work that it was doing for,
5 supposedly doing for Qwest as part of this consulting
6 arrangement.

7 Q. So --

8 A. I take it back. There clearly were some,
9 because I got the implementation plan document, the
10 one that's called implementation plan as opposed to
11 consulting purposes, but I don't think we ever -- I
12 don't think they were ever asked specifically for
13 those documents, so if they do exist they were
14 probably in the big box of stuff that they sent that
15 was the universal documents.

16 Q. Would your opinion change if you saw a more
17 significant number, quantity of documents?

18 A. Actually, no. The fundamental reason why is
19 the other thing I will say in my testimony, this is
20 work that every other CLEC does, and has done, and
21 begs to do on a regular basis for free. I mean, this
22 is work that -- my job as a CLEC is to provide the
23 best service I can to my customer. The only way I can
24 do that in the current telecommunications environment
25 is to get Qwest to provide good service to me.

1 Anything I can do to help you, Qwest, provide better
2 service to me, even if it helps other CLECs, that's a
3 wonderful thing, I want that to happen, because my
4 money, my ultimate life's blood isn't going to depend
5 on whether or not I get a consulting contract with
6 Qwest, but whether or not I get money from my
7 consumers, whether or not I can serve my consumers,
8 and grow my market share.

9 So at the end of the day, examples I gave
10 earlier to Ms. Scott, CLECs do the kind of work that's
11 described in this, quote, consulting arrangement on a
12 regular basis.

13 The other big dispute that was going on in
14 Minnesota was AT&T's efforts to get Qwest to test
15 UNE-P so that they could try and fix the UNE-P
16 process. That was a big issue up there. CLECs beg to
17 do this stuff and they aren't allowed. It's just kind
18 of strange that suddenly Qwest decided to pay for
19 consulting services for a CLEC to provide those kinds
20 of services.

21 Q. Well, I'm wondering what the basis for your
22 statements are, because you described that your work
23 in a CLEC was essentially limited to 20 months, and it
24 was with one CLEC, Covad, and as you described, you
25 had many different responsibilities, so is that what

1 you're basing your statements on?

2 A. I'm basing my statement on work that we
3 actually did. We did -- I cite the example of line
4 share. There's the example of engineering teams I was
5 talking about with Ms. Scott. There are any number of
6 meetings we had with Qwest to try to figure out how to
7 fix their processes. There are meetings where we sat
8 down with Qwest and begged them to let us come in and
9 try and help them fix their process. I should take
10 that back, at this point U S WEST, begged U S WEST to
11 allow them to come in and help fix their processes.
12 We were told no, we don't really want to try to look
13 at that or how it works. I'm talking about
14 discussions.

15 My comment on this is also based on
16 discussions with other CLECs who have done the same
17 thing. You hear about --

18 Q. Did you reference any of those in your
19 testimony?

20 A. I did not, no. This is my general experience
21 that I'm testifying about at this point. The AT&T
22 example, for example, in Minnesota, I didn't reference
23 in my testimony, but is something that Qwest
24 vigorously litigated in Minnesota, so it's a pretty
25 clear example.

1 But yeah, in general, I mean, I'm expressing
2 an opinion based on the work that I did, and while I
3 was at Covad.

4 Q. Okay. So it's, again, I mean, your opinion
5 is based on that time period and it's based on your
6 experience at Covad; correct?

7 A. And the other things that I just mentioned,
8 yes.

9 Q. And it's also limited by that; correct?

10 A. Yes.

11 Q. In your testimony in Minnesota, you testified
12 that there was no evidence to suggest that Qwest ever
13 really wanted or used the consulting services
14 described by the consulting agreement. Do you recall
15 that testimony?

16 A. Not specifically, but it sounds like
17 something I might say.

18 Q. Is that in your testimony in this docket?

19 A. I don't remember if I said that or not.

20 Q. I couldn't find it, and I'm wondering if you
21 took that out because you can no longer say that under
22 oath.

23 A. Was it in my written testimony or something
24 that you asked me?

25 Q. It was in your written testimony.

1 A. Then I don't know why it got taken out.
2 Until you just mentioned it, I didn't realize that
3 there was a difference.

4 MR. SPIVACK: Your Honor, can I have a moment
5 to consult?

6 ALJ RODDA: Yes, please.

7 (Brief pause.)

8 ALJ RODDA: Let's take a short recess, like
9 five to seven minutes.

10 MR. SPIVACK: I'm hoping, for Mr. Deanhardt's
11 sake, that we could finish with him today.

12 ALJ RODDA: That's fine, but to do that we
13 still need to take a break.

14 (A recess ensued.)

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

16 Did you have any additional questions?

17 MR. SPIVACK: I don't, Your Honor, thank you.
18 I'll conclude.

19 ALJ RODDA: I guess it's me, then. And I
20 don't have a lot. And most of it's just for my
21 ability to understand what you're talking about, what
22 you're saying.

23

24

25

1 Q. Are they with Qwest now?

2 A. They are not. Audrey was, Ms. McKenney was
3 when the Minnesota proceedings began and is no longer.
4 Mr. Casey left before the Minnesota proceeding began.

5 Q. Mr. Fisher of the Fisher affidavits, he's
6 with who?

7 A. He's with McLeod. He was again, I believe, a
8 vice-president and he was -- he left McLeod shortly
9 before we, before the Minnesota proceeding. Actually,
10 not before it began, but before the McLeod issues came
11 up.

12 Q. Karen Clauson?

13 A. She is with Eschelon. I believe she has a
14 director title now. She basically is responsible, as
15 I understand it, she's responsible for interconnection
16 relationships with carriers, and I believe she's also
17 in the legal department.

18 Q. So she's a lawyer?

19 A. She is a lawyer, yes, but I don't know that
20 her title has her functioning as a lawyer right now or
21 not.

22 Q. Was she a lawyer at the time of the events?

23 A. I guess I can't say. I don't know if she was
24 functioning as an attorney or not. I know she's been
25 a lawyer, but I don't know if she was acting as legal

1 counsel or not.

2 Q. Then Ibarra?

3 A. Arturo Ibarra. He reports to Ms. McKenney
4 and he's on the finance side of wholesale.

5 Ms. McKenney, before stepping up in the new
6 Qwest, was the VP of finance for wholesale in the old
7 U S WEST, and so that was kind of her background, was
8 on the finance side. Arturo reported to her.

9 His role in this was, you know, he was
10 apparently present at some of the negotiations, and
11 has for the McLeod agreement, and was one of the
12 people sending negotiation documents back and forth in
13 the last weekend where they did the deal, and then
14 subsequently he was, he helped to monitor the amount
15 of the payments that were being made at least to
16 McLeod over another, named Anthony Washington, who
17 reported to him.

18 Q. And Mr. Washington was another name. So are
19 Ibarra and Washington still with Qwest, if you know?

20 A. To my knowledge Mr. Ibarra is. I don't have
21 any knowledge with respect to Mr. Washington.

22 Q. How about, I'll probably get this name wrong,
23 Balvanz?

24 A. Jim Balvanz. He was CFO, I believe. He was
25 in finance. I believe he was CFO for McLeod. He now

1 has a coffee shop in Iowa.

2 Q. Good for him.

3 I think you pronounce this name Deutmeyer?

4 A. Lori Deutmeyer. Ms. Deutmeyer was in the
5 finance side of McLeod. She was responsible for
6 monitoring the payments that Qwest made to McLeod, and
7 I think she also, I think her larger job she was also
8 responsible for some of the billing issues back and
9 forth. But she's at the kind of the finance
10 administration side. She was not involved in the
11 negotiation of the agreements. She was, what she
12 testifies about and was involved in, was the
13 subsequent payments and the process for getting those.

14 Q. And then I guess Steven Gray, he was McLeod?

15 A. I've actually forgotten Steven Gray.

16 Q. I wrote it down.

17 A. Randy Rings is McLeod. Are you thinking of
18 Steven Davis? I don't think he's mentioned in my
19 testimony, though.

20 Q. If you don't recall, I got all these names
21 from your testimony.

22 A. That's okay, I lost one, then.

23 Q. Lynne Powers?

24 A. Lynne Powers is with Eschelon. I actually
25 don't know what her title is. My dealings with

1 Ms. Powers, as I was explaining to Mr. Campbell, dealt
2 with issues of Qwest's relationship with Eschelon on
3 an operational basis.

4 Q. Is she still with Eschelon?

5 A. To my knowledge, yes.

6 Q. And then Richard Smith?

7 A. He was, is I believe still, I believe the
8 title is president -- it's on the documents in here --
9 of Eschelon. And he did the negotiations with Qwest
10 on the agreements that are at issue.

11 Q. And he's still with the company?

12 A. To my knowledge, yes.

13 Q. Early in your testimony you tell the
14 Commission to look at the statute, the 13-2311 and
15 13-2312, I mean 10, and then I guess near the end of
16 your testimony you refer to it again.

17 Is it RUCO's position through you that you
18 want the Commission, you think the Commission should
19 find Qwest in violation of this criminal statute, or
20 you want us to just look at it?

21 I know you have an objection.

22 MR. SPIVACK: Certain due process issues
23 might be an issue there.

24 Q. (BY ALJ RODDA) Why do you want us to look at
25 the statute?

1 A. Let me try to answer that this way. All I
2 was really asked to do was to look at the agreements
3 and the facts, and figure out or see whether the
4 statute would apply. So I don't know, ultimately know
5 RUCO's legal position on this.

6 But I don't think that they're asking that
7 the Commission find a criminal violation in terms of
8 something that could then be used to throw Qwest in
9 the slammer. I think that it's, there probably are
10 other issues, but again, I'm -- I would wait and see
11 what Mr. Pozefsky puts in the legal briefs.

12 Q. I will do that.

13 MR. POZEFSKY: Your Honor, would it help you
14 maybe thinking about some other questions if I just
15 briefly explain what we're asking without arguing any
16 point of it, just explain?

17 ALJ RODDA: No, that's okay, you can do that
18 later.

19 MR. POZEFSKY: Okay.

20 ALJ RODDA: It's in his testimony, and he
21 made it clear that you asked him to review it.

22 Q. (BY ALJ RODDA) Since you're so familiar, I
23 just have to ask this question. With the Minnesota
24 proceedings, I believe, and maybe I'm incorrect, but I
25 believe this Commission found out about that these

1 agreements, this became an issue in Arizona because
2 Minnesota started a proceeding.

3 But be that as it may, what brought these
4 unfiled agreements to light, if you know?

5 A. There was another proceeding. I believe it's
6 from a Dakota Telecom proceeding well before my
7 involvement in any of this, where they were trying to
8 settle the proceeding and the department was involved
9 in the settlement discussions, and one of the -- they
10 reached a conclusion in a settlement where the -- and
11 the way that they reached it was one of the attorneys
12 that was involved in the negotiations said well, why
13 don't you just give me for these clients what you've
14 already given to these clients in this other agreement
15 that I have. And everybody said ah, what agreement?

16 And it became clear at that time that there
17 was at least one agreement that -- and this, by the
18 way, had to do with tandem switching, so what would be
19 considered a local tandem, and so it became clear at
20 that point that there were at least some agreements
21 that dealt with something that people considered to be
22 interconnection issues that nobody knew about.

23 So at that point, the Department of Commerce
24 opened an investigation docket. They have different
25 kinds of dockets they can open. They opened an

1 investigatory docket and started sending Qwest data
2 requests for all the agreements they had companies
3 operating in Minnesota that they had never seen. Once
4 they got those, that's when they asked me to look at
5 them, and then ultimately, there was a complaint
6 brought by the Department of Commerce against Qwest in
7 front of the public utilities commission in Minnesota,
8 and I think that's when it became publicly known and
9 other states started picking up on what was going on.

10 Q. Are you familiar, just with your general
11 knowledge of this issue, are you familiar with any
12 other ILECs that have similar issues with settlement
13 agreements or reciprocal -- agreements similar to the
14 ones that Qwest has argued here that haven't been
15 filed?

16 A. I've said this before, but not in this
17 proceeding, I've never heard of this anywhere else.
18 I've never heard of, when I was at Covad or since I've
19 been gone from Covad, or since we started this
20 process, I've never heard of this kind of issue being
21 an issue for any ILEC other than Qwest. I've never
22 heard of these kinds of agreements being made, you
23 know, the -- when the Covad agreement happened and
24 that whole situation occurred, at that point I
25 couldn't believe what we were being asked to do, and

1 I've never heard of it.

2 I think it's indicative of something that the
3 only ILEC that filed anything in the SEC proceeding
4 other than Qwest was Verizon. And Verizon's, the only
5 reason for their filing wasn't to dispute the
6 standard, except to the extent that they were saying
7 that what AT&T proposed and what the New Mexico
8 Commission proposed were too broad.

9 It's always been my feeling that this never
10 should have been a hard question. Everybody
11 understood what an interconnection agreement was, and
12 as I said, I've never heard of another ILEC having
13 this issue.

14 ALJ RODDA: I don't have anything further.
15 Mr. Pozefsky.

16 MR. POZEFSKY: I just have a few questions,
17 if I may, Your Honor.

18

19 REDIRECT EXAMINATION

20

21 Q. (BY MR. POZEFSKY) You were asked a few
22 questions on cross that I'd like to go over with you.

23 You indicated that you believed that the
24 ultimate November 15, 2000 agreements that Qwest had
25 with Eschelon were all related. You didn't really

1 have an opportunity to explain why. Why do you
2 believe that?

3 A. Well, in part, as I said, they -- there's
4 several reasons. One is they're all entered at the
5 same time. That's kind of a big hit. They
6 inter-refer to each other. The agreement that has the
7 consulting agreement contains terms which are, it
8 refers to the purchase agreement, and it contains
9 terms which are included in the interconnection
10 agreement, and some that are not.

11 There is also, specifically with respect to
12 Eschelon, there is an exhibit to my testimony that's
13 an e-mail, I believe, or memo from Mr. Smith that
14 lumps all of the agreements together and actually
15 talks about which one is confidential and which one is
16 not. So there are clear indications from that point
17 that they were together.

18 Similarly with McLeod, the agreements again
19 refer to each other, refer back and forth to each
20 other, and were all negotiated concurrently and were
21 discussed by Mr. Fisher as being all part of the same
22 transaction.

23 Q. You were asked a question regarding one of
24 your exhibits, CD-62, RUCO 6, deposition 6 exhibit in
25 that confidential amendment to confidential trade

1 secret stipulation, specifically with regard to the
2 second section, 13, daily usage information issue.

3 Wasn't that one of the terms that the
4 Minnesota Commission determined was discriminatory?

5 A. Yes, I believe it is.

6 Q. Another exhibit that I'd like to refer you to
7 is Exhibit CD-33, which the Qwest counsel questioned
8 you on, and that is the resale settlement impact
9 summary for McLeod exhibit.

10 A. Yes.

11 Q. Just some foundational questions on that.
12 First of all, what is that exhibit?

13 A. Well, it's a document that was provided to
14 us -- well, it was provided to the Department of
15 Commerce and later to RUCO, that as I described in my
16 testimony, is a post agreement document. That is it
17 was, appears to have been created after the October
18 agreements were entered into. You can in part tell
19 that by the date on the bottom of the document, the
20 footer. And it discusses the impacts of the McLeod
21 agreement on Qwest's business and what it means to
22 have to give the discount, what McLeod's commitment
23 was. It describes the McLeod agreement.

24 Q. Were there other offers and counteroffers
25 sent between Qwest and McLeod prior to the oral

1 agreements that are also in your testimony?

2 A. Yes, there are. Since you said other, let me
3 clarify. This was not an offer document. This is a
4 post agreement document.

5 There is a document in here, which is the
6 Page 3, the one that Mr. Spivack was specifically
7 asking about, that is a final version of a document
8 that was created by Qwest, and passed -- my testimony
9 discusses this -- passed back and forth as part of a
10 counterproposal. There are several versions of it
11 with different numbers of it with them even in my
12 testimony that ultimately result in this
13 representation in the final agreement.

14 Q. Couldn't Qwest's filing for the declaratory
15 ruling also have been covered for its
16 misinterpretation?

17 MR. SPIVACK: Objection; calls for
18 speculation. I don't think he's got any foundation to
19 testify what Qwest's intent was in pursuing its legal
20 remedies.

21 ALJ RODDA: I'll sustain that.

22 Q. (BY MR. POZEFSKY) Did you mention something
23 in your testimony regarding your opinion as to why
24 Qwest made that motion for the declaratory ruling?

25 A. I did, and Mr. Spivack and I discussed it

1 earlier as well.

2 Q. Is there anything else you want to say about
3 that?

4 A. I don't think so.

5 Q. Let's assume for the sake of argument that
6 the consulting arrangement was actually legitimate.
7 Didn't there come a time when even Eschelon called it
8 a sham?

9 A. As I discussed earlier with Mr. Campbell,
10 Mr. Oxley had said to me, and I believe put in a
11 letter that as I understand it may have been used as
12 an exhibit yesterday or the day before, that Eschelon
13 came to believe that Qwest did not consider the
14 consulting agreement to be a real consulting agreement
15 either.

16 So yes, I believe there was a time when at
17 least Mr. Oxley and Eschelon came to believe that
18 Qwest considered the agreement a sham. I don't
19 believe that Eschelon has ever said that it considered
20 it a sham, at least not publicly.

21 Q. And you said part of your basis for that is a
22 conversation you had with Mr. Oxley?

23 A. We're now, we're starting to border on
24 talking about old history, but yeah, I believe -- I do
25 believe that I recall Jeff telling me that even before

1 he wrote the letter to, I believe he directed to the
2 Minnesota Commission but even before he wrote the
3 letter that I believe that's something he said to me.

4 Q. All I wanted to know is do you recall when
5 that conversation was?

6 A. No, I do not.

7 MR. POZEFSKY: Your Honor, at this time I
8 move for the admission, if I haven't before, the
9 public version of Mr. Deanhardt's testimony that's
10 RUCO Exhibit No. 15. We've admitted his private
11 version.

12 MR. SPIVACK: Same objection.

13 ALJ RODDA: Same ruling.

14 MR. POZEFSKY: And I make the same request
15 with regard to Mr. Johnson's testimony I believe
16 that's also part of the public version.

17 MR. POZEFSKY: I think we marked it as 1A.

18 ALJ RODDA: Johnson 1A is admitted. We only
19 have one version of Johnson?

20 MR. POZEFSKY: There's only one.

21 ALJ RODDA: 1A has already been admitted.
22 Now 1B was already admitted, so now 15 will be
23 admitted.

24 MR. POZEFSKY: That's fine, Your Honor, as
25 long as it gets in.

1 Thank you. Nothing further.

2 ALJ RODDA: Ms. Scott.

3 MS. SCOTT: Judge Rodda, I just have a few
4 questions on recross.

5

6

RECROSS-EXAMINATION

7

8 Q. (BY MS. SCOTT) Mr. Deanhardt, you had a
9 discussion with Qwest's counsel regarding the FCC
10 declaratory ruling and the definition of an
11 interconnection agreement; correct?

12 A. Yes.

13 Q. And is it your understanding that an
14 interconnection agreement and contracts in general
15 contain forward-looking provisions?

16 A. Well, okay, contracts in general. I think
17 contracts can be forward or backward.

18 Q. Interconnection agreement?

19 A. Yes.

20 Q. And even if, in this instance, the consulting
21 arrangement provided for in the November 15th, 2000
22 agreement between Eschelon and Qwest happened to be
23 legitimate, isn't it correct that whenever there is a
24 discount to the prices for 251(b) or (c) services,
25 that that must be filed with the state commission?

1 A. I would say yes. Anything that deals with a
2 rate for providing UNEs or interconnection, 251(b) or
3 (c) services, it strikes me that's the most
4 fundamental thing that has to be filed, and would even
5 have to be filed under the more narrow definition that
6 Qwest proposed in the FCC proceeding.

7 Q. And in your experience at Covad, the work
8 that you did to assist Qwest in developing its line
9 sharing processes and procedures to fulfill its duties
10 under the Telecom Act, in your opinion, is that
11 different than the term that's used in the industry
12 product development?

13 A. Yes. I mean product development is more of a
14 specific term of art. What we did probably falls
15 under one aspect of product development, which is
16 trying to figure out how to put the product together
17 and do it.

18 But there are other aspects of kind of real
19 product development which would include, for example
20 marketing studies, a bunch of things that weren't done
21 in the context of line sharing. But certainly what we
22 did for line sharing and other things that Covad did
23 with Qwest would fall under the part of product
24 development that's actually putting together the
25 pieces of the product.

1 Q. And wouldn't it also be correct to say, then,
2 that it would be the part of product development at
3 least with respect to with the CLEC, and the role of
4 other CLECs in this same type of role that it had not
5 historically been compensated for?

6 A. Yes, I would definitely agree with that.

7 Q. Then you also had a discourse with Qwest's
8 counsel about the Covad SLA; correct?

9 A. Yes.

10 Q. In your work at Covad, were you familiar with
11 Qwest's standard interval guide?

12 A. Yes.

13 Q. And can you explain what that guide was?

14 A. It was essentially a Qwest document that said
15 here's how long it's going to take us to do X, Y, and
16 Z related to provisioning UNEs.

17 Q. Was that a commitment on Qwest's part?

18 A. It falls in the category of what we were
19 discussing earlier. It was something that Qwest did
20 that Qwest could change when Qwest wanted to. So it
21 wasn't a -- it wasn't a contractual commitment except
22 that I believe the interconnection agreements said for
23 your intervals look to the SIG, but it was something
24 that Qwest could change. So, you know, it is a
25 commitment, but it's not an irrevocable or binding

1 commitment.

2 Q. So it wasn't a commitment to the extent that,
3 including a provision in an interconnection agreement
4 actually establishing an interval to the extent that
5 would have been correct?

6 A. That's correct.

7 MS. SCOTT: I have no further questions.

8 ALJ RODDA: Did you have anything further?

9 MR. SPIVACK: I think so.

10

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REXCROSS-EXAMINATION

12

13 Q. (BY MR. SPIVACK) Mr. Oxley is Eschelon's
14 general counsel; correct?

15 A. I believe that's correct, yes.

16 Q. So he's Eschelon's chief advocate; correct?

17 A. I guess, yes. Actually, I would suggest
18 that's probably the CEO's role. He's probably their
19 chief legal advocate, yes.

20 Q. He's the chief legal advocate, we agree on
21 that; correct?

22 A. Yes.

23 Q. Ms. Scott asked you about how interconnection
24 agreements generally contain forward-looking
25 provisions. Do you recall that question and you agree

1 agreement.

2 MR. SPIVACK: May I consult for one moment?

3 ALJ RODDA: Yes.

4 (Brief pause.)

5 MR. SPIVACK: Thank you, Your Honor.

6 ALJ RODDA: Anything further?

7 MR. POZEFSKY: Nothing further, Your Honor.

8 ALJ RODDA: Thank you, Mr. Deanhardt.

9 (The witness was excused.)

10 ALJ RODDA: So that concludes today, and
11 tomorrow we're not going to start till 1:00, so you
12 all get to sleep in for your hard work.

13 (The hearing recessed at 5:19 p.m.)

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