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1200 W. Washington Street
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VIA AIRBORNE EXPRESS

RE: In Re the Matter of Qwest Corporation's Compliance with Section 252(e)
Docket No. RT-00000F-02-0271

Dear Ms. Scott:

Enclosed is the Initial Brief of Eschelon Telecom of Arizona, Inc. in connection with the above-referenced matter.

Please feel free to contact me with any questions.

Sincerely,

Dennis D. Ahlers
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Arizona Corporation Commission
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Enclosure

cc: Service List

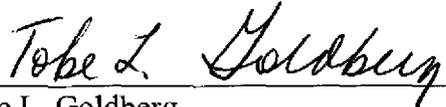
CERTIFICATE OF SERVICE

I certify that the original and 13 copies of the **Initial Brief of Eschelon Telecom of Arizona, Inc.** in Docket No. RT-00000F-02-0271, was sent by Airborne Express on April 30, 2003 to:

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A copy of the foregoing was also provided by U.S. Mail to the attached service list

Dated this 30th day of April, 2003.



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*AZ Docket No. RT-00000F-02-0271 (section 252 proceedings)

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In the Matter of Qwest Corporation's)
Compliance With Section 252(e) of the)
Telecommunications Act of 1996)

Docket No: RT-00000F-02-0271

INITIAL BRIEF OF ESCHELON TELECOM OF ARIZONA, INC.

INTRODUCTION

Eschelon Telecom of Arizona, Inc. ("Eschelon") respectfully submits its initial brief in this matter. Eschelon's participation in this matter has been limited because this is a proceeding about Qwest and Qwest's compliance with state and federal law. It is Eschelon's position that Eschelon is not subject to the imposition of penalties in this docket and that any order resulting from this proceeding should not include the imposition of penalties against Eschelon. This brief responds to the parties' recommendations regarding Eschelon and explains why those recommendations are unreasonable and misplaced in this matter.

Eschelon is not asserting that it should escape all consequences of its having been a party to unfiled agreements. Eschelon regrets its participation in the agreements and admits that, were

it able to do it over, it would have approached its difficulties with Qwest, and its relationship to the Commission, much differently. However, this proceeding is not the proper one to explore such issues as to Eschelon. Rather, this proceeding is an investigation of Qwest and a determination of what remedies should be imposed on Qwest.

As this discussion will demonstrate, Qwest bears the responsibility for the filing of any interconnection agreements and amendments, including the responsibility to have filed any of the unfiled agreements that are properly viewed as interconnection agreement amendments. Should there be a future proceeding about the actions of CLECs like Eschelon, McLeodUSA, and others that entered into such agreements, Eschelon would demonstrate the reasons for and consequences of its actions and the impact of any proposed remedies. This would not necessarily be to excuse Eschelon's actions, but as evidence for the Commission to consider making a decision about what, if any, consequences should be imposed upon Eschelon for its participation in the agreements.

I. ESCHELON'S EXPERIENCE IN ARIZONA

Eschelon began providing telecommunications service in this State with a competitive alternative to Qwest in 2000. See, Docket No. T-03406A-99-0742. Obviously, critical to Eschelon's entry into the market was the company's Interconnection Agreement with Qwest. This agreement was approved by the Commission on April 28, 2000, and filed by Qwest with this Commission for approval, as required by Section 252 of the Federal Telecommunications Act of 1996 ("Federal Telecommunications Act" or the "Act"), 47 U.S.C. § 252. Since the signing of that Interconnection Agreement, a myriad of issues has arisen between the companies, in certain circumstances requiring amendment of the Interconnection Agreement. In fact, Qwest and Eschelon have entered into and filed 15 interconnection agreement amendments, aside from the unfiled agreements at issue here.

Since 2000, Eschelon has fought hard to bring the benefits of competition to Arizona. Eschelon now serves approximately 4800 customers in the State with over 21,000 lines and has 39 employees. Eschelon has invested substantial resources in the State and has become one of the most significant competitors Qwest faces in this market. Of course, despite this success, Qwest continues to dominate the market, with over 50 times the annual revenues of Eschelon.

II. QWEST'S, NOT ESCHELON'S, BEHAVIOR IS THE SUBJECT OF THIS DOCKET.

From its inception, this case has been about Qwest's actions and what consequences should be imposed upon Qwest for those actions. A review of the Commission's approach to this matter demonstrates that the scope of this case is Qwest's behavior.

On April 8, 2002, the Staff of the Arizona Corporation Commission initiated this docket.

The docket was opened:

"for the purpose of conducting an inquiry into whether Qwest Corporation ("Qwest") has complied with Section 252(e) of the Telecommunications Act of 1996. In this docket the Commission will review whether Qwest should have filed certain agreements for Commission approval, and if so, whether any remedial action is appropriate."

Procedural Order, p.1, April 18, 2002(emphasis added). Accordingly, the docket was captioned:

In the Matter of Qwest_Corporation's Compliance with Section 252(e) of the Telecommunications Act of 1996.

On June 7, 2002, Staff issued its first Report and Recommendation in this docket. In its Report Staff analyzed the agreements and recommended the imposition of penalties on Qwest. No recommendations were made as to Eschelon.

On June 17, 2002, the Commission issued a Procedural Order, stating: "In this docket the Commission will review whether Qwest should have filed certain agreements for Commission approval, and if so, whether, and what, remedial action is appropriate."

On August 14, 2002, Staff issued its Supplemental Staff Report and Recommendations, in which Staff concluded that "the hearing on Qwest's compliance with Section 252(e) should be limited to why Qwest did not file the various agreements with the Commission for approval ..." Staff Supplemental Report, August 14, 2002, p. 11. Again, in Staff's Reply Comments on the Supplemental Report, Staff stated: "The purpose of the hearing is to address why Qwest did not file certain agreements with the Commission for approval." Staff's Reply To Comments of WorldCom, AT&T and RUCO on Its Supplemental Report, Sept. 4, 2002, p.5.

The Arizona Corporation Commission's November 7, 2002 Procedural Order (the "Order") established the scope of this hearing as follows:

The Section 252 issues concern whether Qwest violated its obligation to file certain agreements with this Commission and if it did, what remedies are appropriate. The scope of the hearing in the Section 252(e) proceeding will determine when Qwest should file agreements with CLECs for Commission approval, why Qwest failed to file certain agreements, whether Qwest knew or should have known the appropriate criteria at the time it failed to file the agreements, which agreement should be filed under the standard and whether Qwest should be subject to monetary and/or non-monetary penalties if it violated the standard. In addition, the Commission should determine if Qwest's conduct violated any other law, Commission Order or rule. (Emphasis added)

Order, p. 5, at 10-17. Procedural Order, Nov. 7, 2002, p.5.

Consistent with this statement, the Commission ordered a "hearing to determine if Qwest violated its obligation to file certain interconnection agreements with the Commission..."*Id.* at 6.

Consistent with this scope, Qwest was directed to file direct testimony and was allowed to file rebuttal testimony in response to Staff and intervenor testimony. Qwest has been and is the focus of this proceeding. There has been no order for an investigation of Eschelon, nor any notice that Eschelon's rights, privileges and property would be at risk in this proceeding. No order of the Commission or Administrative Law Judge ever alleged that Eschelon was the subject of this investigation or was in jeopardy of facing punishment as a result of this docket.

III. DESPITE THE SCOPE OF THE PROCEEDING, PARTY RECOMMENDATIONS INCLUDE SEVERE PENALTIES FOR ESCHELON.

Despite the explicit Commission statement limiting the scope of this proceeding to remedies against Qwest, both the Staff's and RUCO's testimony recommend punishment for Eschelon. For the Commission to adopt remedies in this proceeding that would punish Eschelon would violate due process under both state and federal law. Moreover, the particular consequences proposed by the parties, discriminatory rates, would violate the anti-discrimination and competitive entry provisions of the federal Telecommunications Act of 1996 and A.R.S. § 40-334.

Eschelon urges the Commission to reject those portions of RUCO's and Staff's testimony recommending remedies to be imposed against Eschelon in this docket.¹ If, based on this record, the Commission determines that it wants to pursue penalties against Eschelon, a separate proceeding should be opened.

a. RUCO and Staff's Proposal To Exclude Eschelon from Future Discounts Available to its Competitors Would Unjustly Penalize Eschelon.

While Staff and RUCO were at times reluctant to characterize their recommendations about Eschelon as penalties, its clear that the intent and affect of their recommendations is to penalize Eschelon (and McLeodUSA), as well as Qwest. These proposals go far beyond simply allowing other CLECs to have the benefits of the unfiled agreements, a proposal with which Eschelon does not disagree. These proposals would directly and substantially harm Eschelon, with the purpose and effect of penalizing Eschelon.

Specifically, the recommendation of Staff and RUCO would prohibit Eschelon (and McLeodUSA) from receiving a credit totaling 10% of its purchases of Section 251 (b) or (c)

¹ The Minnesota Commission originally decided to impose remedies on Eschelon and McLeod. Order Assessing Penalties, MPUC Docket P-421/CI-02, February 28, 2003. However, upon reconsideration, the Minnesota Public

services and intrastate access for from 18 months (Staff) to five years (RUCO) following the date of the decision in this matter. Staff Exhibit ST-2. at pp. 91-92. RUCO Exhibit R-1A at p. 22, lines 16-18. This credit would be available to all other CLECs except Eschelon and McLeodUSA, even those CLECs that had unfiled agreements of their own.

Should Eschelon have a properly-noticed hearing on proposed remedies to be imposed on it, Eschelon would be prepared to prove that, based upon current purchases, and not taking into account potential growth, disqualifying it from this credit would be estimated to cost Eschelon between \$600,000 and \$2,000,000. Thus, adoption of this proposal would constitute a huge penalty on Eschelon that would exceed that imposed on Qwest, on a comparative basis. See, Eschelon Telecom of Arizona, Inc.'s Prehearing Statement, March 14, 2003.

This proposal is clearly intended to punish Eschelon. RUCO witness Johnson testified:

"I felt some adverse consequence needed to occur for Eschelon and McLeod to send a signal to CLECs that if you encounter a gray area, no matter how much pressure you might be under from your dominant supplier to comply, if you are very concerned that this might cross the line, you need to resist rather than just cave in. So I viewed it as a question of there needed to be some adverse consequences for those carriers..."

Tr. Vol. III. P. 552: 18-25-p.553: 1-4.²

Staff Witness Kalleberg, testified that excluding Eschelon from the future discount was also a penalty. Tr. Vol. IV, p. 927: 12-20. She testified that these nonmonetary penalties were in part an attempt to "craft remedies that are going to have a deterrent effect..." *Id.* p. 872:13-25.

Despite their intent to punish Eschelon, and the scope of the recommendation, the parties admittedly did not thoroughly evaluate the affect of their recommendations on Eschelon. This is not particularly surprising since the parties were focusing on the activities and remedies for

Utilities Commission changed its mind and decided not to penalize Eschelon and McLeod. This took place at a Commission meeting on April 8, 2003. No order has been issued to date.

² Reference to the transcript are by volume, page number and line number.

Qwest. Thus Staff admitted that the remedy may exceed the benefits of the agreements that Eschelon actually received. Tr. Vol. IV, p. 873: 4-9. Staff's witness admitted that she did not look at the costs incurred by Eschelon under the contracts, nor did she not examine the value of consulting services provided under the agreements. *Id.* at 871. Staff did not analyze what impact its recommendation would have on Eschelon in the market, *Id.* p. 874:2-13; did not examine whether the impact on Eschelon and McLeod was proportional to the benefits received by each, *Id.* pp. 877:9-18; did not analyze what part of the settlement terminating the agreements was for the release of claims against Qwest; *Id.* p. 878; and has not done any projection of the amount of the forward-looking credit, *Id.* p. 926:19-25, p. 927:1-20.

In general, both Staff witness Kalleberg and RUCO witness Johnson testified that neither analyzed what financial or competitive impact this recommendation would have on Eschelon. *Id.* p. 874:2-13; Tr. Vol. III, p. 554:17 – p. 557:14.

Likewise, RUCO witness Diaz-Cortez testified on cross-examination that she did not examine the costs that Eschelon incurred in implementing the contract, did not attempt to place a value on the consulting services provided by Eschelon, did not investigate the claims that Eschelon settled as part of the agreement, *Id.* p.775: 8 and had no criticism of Eschelon's accounting practices. Tr. Vol. IV, p.777, lines 9-16. In fact she testified that many of these issues were not part of her analysis. *Id.* p. 780:21 – 781:4.

The parties' rather cavalier attitude toward the scope and consequences of this substantial penalty on Eschelon points out the inappropriateness of imposing penalties on parties who were not the subject and focus of the investigation. This further makes the point that the effect, magnitude and appropriateness of any penalty on Eschelon is not a matter that has been thoroughly explored in this proceeding.

RUCO also proposed that Eschelon should pay no less than \$100,000 into a fund to facilitate arbitrations. RUCO Exhibit R-1A at p. 48, lines 10-14. This is clearly a penalty imposed on Eschelon for its involvement in the agreements. RUCO has given no explanation for the amount or the legal basis for such a penalty. Tr. Vol. III, p. 562:5-563:8. Imposition of such a penalty in this docket is not justified by the record, is without statutory support and violates Eschelon's due process rights.

b. Eschelon Does Not Object to Being Excluded From Discounts for Past Periods.

Staff also recommends that Eschelon be prohibited from collecting the cash payments given to its competitors totaling 10% of the purchases of Section 251(b) or (c) services and intrastate access from Qwest in Arizona during the time period January 1, 2001 through June 30, 2002, a period of 18 months. Staff Exhibit ST-1 (Kalleberg Direct), pp. 90-91. While Eschelon understands and does not oppose Staff's desire to give Eschelon and McLeod's competitors financial benefits equal to those Eschelon and McLeod received, it should be recognized that the recommendations concerning 10% discounts for past purchases in themselves provide a large benefit to other CLECs that exceed the benefit that Eschelon obtained from the agreements. In effect, this retroactive discount to other carriers, without the costs, already imposes a negative consequence upon Eschelon. Nevertheless, despite the due process concerns expressed below, Eschelon does not object to this recommendation.

The 10% discount proposal appears to be predicated upon the assumption that the UNE-Star agreement that was associated with the unfiled agreements was fairly priced without any discount, and that the discount represents, in toto, an undue advantage denied to other competitors. However, the economics of the unfiled agreements can only be understood when considered in tandem with the filed UNE-Star amendment. Eschelon incurred substantial costs

in implementing, billing and converting from UNE-Star to UNE-P. Since the proposed remedies would not require competitors to buy UNE-Star, this remedy gives Eschelon's competitors much greater an advantage than Eschelon ever received.

The Commission should also note that as a part of the Agreements Eschelon incurred substantial costs and had to waive any and all existing claims against Qwest arising out of disputes concerning service credits, CABS, UNE-E line and UNE-E Non-Recurring Charge credits and disputes concerning claims of anti-competitive conduct and unfair competition.³ Other CLECs will not be required to incur those costs nor give up equivalent claims, nor to purchase UNE-Star to obtain the 10% discount. Again, Staff admitted that it did not examine the costs incurred by Eschelon in conjunction with these contracts nor the value of the claims given up in making its recommendation. Tr. Vol. IV. p. 871: 10-18, p. 877: 2 - 878:1-25.

Furthermore, Eschelon was subject to the agreements from November 15, 2000, to March 1, 2002, a period of 15 and 1/2 months, rather than 18 months and not close to five years. Furthermore, Qwest actually stopped providing the credit after only eleven months. Staff acknowledged those facts but choose to provide the agreement to other CLECs for the longer period of time. TR. Vol. IV. p. 923:3-25-p.924:1-10. Staff's witness referred to this proposal as a "nonmonetary penalty." *Id.* p. 924:5-10.

Despite the limitations of Staff's analysis, and its punitive aspects, and despite Eschelon's due process concerns, Eschelon does not object to its proposal for backward looking remedies. Eschelon can not, however, agree to the other remedies proposed by Staff and RUCO.

³ See, Settlement Agreement, March 1, 2002, Section 2(a).

IV. IMPOSITION OF THE PROPOSED PENALTIES ON ESCHELON WOULD CONSTITUTE A VIOLATION OF ESCHELON'S DUE PROCESS RIGHTS AND WOULD BE CONTRARY TO STATE AND FEDERAL LAW.

Excluding Eschelon from future discounts on wholesale services from Qwest that would be available to all other CLECs is discriminatory, anti-competitive and contrary to the Telecommunications Act of 1996 and A.R.S. § 40-334. In addition, to impose such a penalty in this proceeding would also be a violation of due process and the Administrative Procedure Act, A.R.S. § 41-1001, et. seq.

Arizona law makes clear that a person aggrieved by the actions of a governmental agency is entitled to due process. *McGee v. Arizona State Board of Pardons and Paroles*, 92 Ariz.317, 376 P.2d 779 (1962). Arizona law also requires that any party affected by a contested case must receive reasonable notice, including a short and plain statement of the matters asserted against that party. ARS § 41-1061. The courts have stated that findings of the Commission must be based exclusively on matters officially noticed. *Western Gillette, Inc. v. Arizona Corporation Commission*, 121 Ariz. 541, 592 P2d 375,377, January 30, 1979 (rehearing denied). Failure to notify a party of the charges or violations can constitute a denial of due process. *Sulger v. Arizona Corporation Commission*, 423 P.2d 145, Ariz.App. 1967.

a. Requiring Qwest to Provide a Discount to All Competitors Except Eschelon is Contrary to the Telecommunications Act and State Law.

Under the remedies proposed, Eschelon could find itself purchasing UNEs and wholesale services from Qwest at a higher rate than all but one of its competitors for a period of up to five years in the future. Nothing in the Telecommunications Act or state law allows for the imposition of discriminatory rates on one or two competitors. Certainly that can not be done in a proceeding where the competitors are not the subject of the investigation.

Under the Act, Qwest has the duty to provide all CLECs with interconnection, resale and unbundled network elements "on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of this section (251) and section 252." 47 U.S.C. 251(a),(b) and (c). The Act requires that state commission determinations on the rates for interconnection and network elements be based on cost and be nondiscriminatory. 47 U.S.C. 252(d). Nothing in the Act or state law allows the Commission to set aside these requirements.

The very purpose of this docket is to determine whether Qwest violated the Act by, among other things, providing discriminatory rates and terms. Eschelon certainly agrees that to the extent such discrimination has occurred in the past the Commission can require Qwest to rectify that discrimination by providing those same benefits to other carriers for an equivalent time period. However, the Commission is not justified in creating an entirely new set of discriminatory rates for a future period.

This remedy also violates Section 253 of the Act. Section 253(a) provides that a state may impose a requirement that "may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." Section 253(b) provides that any actions by the state must be imposed "on a competitively neutral basis..." Excluding Eschelon for eligibility for a discount available to its competitors would not meet the conditions outlined in Section 253 of the Act.

Finally, A.R.S. § 40-334 prohibits Qwest from charging discriminatory rates or otherwise subjecting Eschelon to "any prejudice or disadvantage." Excluding Eschelon from future discounts would clearly violate this statute.

In summary, the penalties proposed to be imposed on Eschelon by Staff and RUCO are unreasonable and are not consistent with the Act or state law.

V. THE COMMISSION SHOULD CONSIDER MITIGATING FACTORS IN IMPOSING CONSEQUENCES ON ESCHELON.

If Eschelon were to have a hearing on possible penalties, it would show to the Commission the circumstances surrounding its involvement in the unfiled agreements and the factors which would tend to mitigate the degree that it should be punished for its role in such agreements.⁴ That is rightfully an issue for another proceeding. However, should the Commission proceed to consider remedies against Eschelon on the current record there are several mitigating factors that the Commission should consider in considering recommendations as to Eschelon.

a. Qwest Dictated The Handling Of These Agreements.

As RUCO witness Ben Johnson states in his testimony "ILECs often have such substantial market power that, if unchecked, they can basically bully CLECs into accepting terms and conditions that are contrary to the best interests of the CLEC, and contrary to the public interest." RUCO Exhibit R-1A, p. 14, lines 7-18. Johnson further testifies that Qwest used its monopoly power "to force certain CLECs into agreements they would otherwise not have entered into..." *Id.* at p. 17, lines 4-7. Similarly, in this case, Qwest imposed certain demands on Eschelon at a time when Eschelon faced the problems of poor service by a sole supplier (*i.e.* Qwest) and was struggling to establish itself in the market. *See*, Staff Ex. S-7, Deposition of Richard A. Smith, p.136, lines 13-22; Staff Ex. S-13; and Staff Ex. S-8, Affidavit of F. Lynne Powers.

The agreements at issue were not filed with this Commission for one simple reason – Qwest's insistence that they be handled in this manner. As Eschelon's President and Chief Operating Officer, Richard Smith, has stated:

It is clear that Qwest wanted to keep the agreements confidential, that was something I knew they wanted to do, but I'm not sure of all the motivations behind why they wanted to do it. But clearly from my perspective, if I didn't keep the agreements confidential, then I'd have no agreements. Qwest wouldn't have honored any of the pricing issues, the escalation issues, the service issues, and so on.⁵

Staff Exhibit ST- 57 at p. 136. At the same time, Eschelon was encouraging Qwest to file these agreements, doing so on a number of occasions. *Id.* p. 140. But ultimately, Qwest left Eschelon with a simple choice - - either keep the agreement confidential or have no agreement.

Apparently, other CLECs encountered similar demands by Qwest and understandably came to the same conclusion as Eschelon, moving ahead with the agreements. For example, RUCO witness Clay Deanhardt has described an unfiled agreement between Qwest and Covad. Mr. Deanhardt, served for a time as Senior Counsel for Covad and was "responsible for Covad's interconnection relationship with Qwest." RUCO Exhibit R-1B, p. 4:12-18. In his testimony Mr. Deanhardt explained that Qwest insisted on not submitting an agreement with Covad to the Arizona Commission for approval. Covad agreed to this treatment, despite Mr. Deanhardt's testimony that he believed the agreement to be an interconnection agreement requiring filing for approval. *Id.* p. 69:11-22. Mr. Deanhardt explained Covad's failure to "force" Qwest to file the agreement in this way:

I cannot and do not speak for Covad. In my own mind, it was clear that Qwest would not enter into the agreement if Covad demanded that it be filed. Qwest, however, was Covad's sole and monopoly supplier of collocation, loops, and other network elements necessary for Covad to provide service to its customers. Qwest's service in providing those elements to Covad was absolutely awful, and the Covad Agreement was a way to try to improve that service. Improving service was critical to Covad's viability at the time.

Id. p. 70:6-12 (emphasis added).

⁴ Eschelon takes issue with many of the allegations made by RUCO witness Deanhardt as pointed out in Staff Ex. S-13. Eschelon would contest their allegations should a proceeding about Eschelon's actions take place.

Demanding confidentiality, or, at minimum, demanding that agreements not be filed with regulatory commissions was Qwest's *quid pro quo* for entering into agreements with any number of CLECs. Perhaps the best evidence of this comes from the Colorado Public Utilities Commission, which has now required the filing of over 40 agreements between Qwest and more than a dozen of its competitors.⁶ Obviously, any number of other competitors struggling to enter the marketplace faced the same choice as that faced by Eschelon and came to the same conclusion. If CLECs wanted to remain viable, Qwest simply left them no choice but to acquiesce to Qwest's demand that their agreements not be filed for regulatory approval.

b. Qwest Has A History Of Entering Into "Confidential" Agreements With Its Competitors.

Qwest's unfiled agreements with Eschelon are far from unique. As this Commission and other commissions have learned, Qwest entered into "confidential" or "unfiled" agreements with a number of other competitors, including McLeod, Covad, and other small CLECs. Staff concluded that Qwest entered into 28 unfiled agreements with ten different CLECs in the state of Arizona. Staff Exhibit ST-2, p. 11. In fact, Qwest's practice of entering into agreements with its competitors, failing to file those agreements, and gaining its competitors' silence in proceedings Qwest viewed as critical to Qwest's interests began with Qwest's entrance onto the scene as an incumbent local exchange carrier ("ILEC"). A key part of Qwest's strategy for gaining state commission approvals of its merger with US West was to enter into confidential settlements with its competitors.⁷ Given Qwest's history, Eschelon reasonably assumed that any number of other CLECs could have had agreements with Qwest similar to the Eschelon Agreements. Further,

⁵ *In the Matter of Qwest Corporation's Compliance with Section 252(e) of the Telecommunications Act of 1996*, Arizona Corporation Commission Docket No. RT-00000F-02-0271, Smith Deposition, October 26, 2002, Tr. p. 136 ("*Smith Transcript.*")

⁶ Colorado Public Utilities Commission Docket No. 02I-572T, Decision No. C02-1214, Appendix 2.

⁷ *See, e.g.*, Minnesota Public Utilities Commission Docket No. P-3009, 3052, 5096, 421, 3017/PA-99-1192, Order Accepting Settlement Agreements and Approving Merger Subject to Conditions, June 28, 2000, pp. 1-2.

Qwest openly and publicly alerted its regulators and its competitors that “confidential” agreements would become standard operating procedure when trying to do business with Qwest.

c. Eschelon Has Fully Cooperated With Regulators Regarding These Unfiled Agreements.

Eschelon has made every effort to fully cooperate with Arizona state regulatory agencies regarding these unfiled agreements. Eschelon produced witnesses for deposition who provided extensive testimony regarding the agreements. Eschelon responded fully to discovery, including the production of hundreds of pages of documents. Further, Eschelon has submitted multiple and substantial written filings to the Commission detailing its experiences with Qwest under these agreements.

As these efforts demonstrate, Eschelon has taken every reasonable step to cooperate with regulators regarding any concerns raised by the unfiled Agreements.

d. Neither the Act nor State Law Required Eschelon to File the Agreements.

Under the Federal Telecommunications Act, any obligation to file the unfiled Agreements with this Commission for approval rested squarely with Qwest.⁸ Nothing in the Act or in state law requires CLECs to unilaterally file such agreements. The Act requires that interconnection agreements “be submitted for approval” to state commissions.⁹ The obligation to submit agreements for approval must be read in the context of the unique obligations imposed on incumbent local exchange carriers (“ILECs”).¹⁰ Such reading demonstrates that the ILEC alone bears the responsibility of filing agreements for approval. This is consistent both with FCC pronouncements concerning the Act and, most importantly, with the fundamental public policy underlying the entirety of the Act.

⁸ For purposes of this brief, Eschelon will not argue whether or not the Unfiled Agreements constitute “interconnection agreements” as that term is contemplated in the Act but will assume that filing was required.

⁹ 47 U.S.C. § 252.

In discussing voluntary negotiations, the Act specifically focuses on the duties of an ILEC, once it has received a request for interconnection, services, or network elements pursuant to § 251.¹¹ This linkage between sections 251 and 252 makes clear that the obligation for filing interconnection agreements resides with an incumbent such as Qwest. Even Qwest recognizes this point, having declared that “Qwest recognizes that an ILEC’s non-compliance with its special regulatory obligations is a serious matter.”¹² Under the Act, it is the incumbents, not CLECs, who hold the obligation of filing interconnection agreements with the state commissions.

The FCC has not explicitly addressed the issue of a CLEC’s obligation, if any, to file interconnection agreements with state commissions. Rather, the FCC has often used general language such as referring to the requirement that all contracts “be filed,” without specifying the filing party.¹³ However, in its First Report and Order, the FCC included a discussion regarding the ability of CLECs to gain access to the facilities of an incumbent LEC that is instructive.

There, the FCC noted that:

Section 252 governs procedures for the negotiation, arbitration, and approval of certain agreements between incumbent LECs and telecommunications carriers.¹⁴

After discussing the pertinent provisions of Section 252, and certain provisions of Section 251 cited in that section, the FCC stated that “Section 252 does not impose any obligations on utilities other than incumbent LECs, and does not grant rights to entities that are not telecommunications providers.”¹⁵ While the FCC was specifically addressing the issue of access

¹⁰ See, e.g., 47 U.S.C. § 251(c).

¹¹ 47 U.S.C. § 252(a)(1).

¹² *Qwest’s Opening Brief Regarding Penalties*, Minnesota Public Utilities Commission Docket No. P-421/C1-02-197, November 8, 2002, p. 5 (emphasis added).

¹³ See, e.g., Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, cc Docket No. 96-98, *First Report and Order*, 11 FCC Rcd 15499 (1996), ¶ 167. (“*First Report and Order*”).

¹⁴ *First Report and Order*, ¶ 1227.

¹⁵ *Id.*, ¶ 1230.

to facilities in this discussion, its statement that Section 252 places obligations on no entities other than ILECs is consistent with the both the language and spirit of the Act.¹⁶

Finally, throughout its First Report and Order, and indeed in subsequent proceedings, the FCC recognized that Congress has specifically designed the Act to address the ILECs' superior bargaining power and the ILECs' incentives (or lack thereof) in dealing with competitive carriers.¹⁷ The FCC noted that "as distinct from bilateral commercial negotiation, the new entrant comes to the table with little or nothing the incumbent needs or wants."¹⁸ At the same time, the new entrant is entirely dependent on the ILEC for the services required in order to enter the market. Given this, the FCC has appropriately focused on the obligations of the incumbents under the Act and has thus far declined to extend significant regulatory obligations, such as the filing of interconnection agreements, to CLECs.

Eschelon respectfully urges the Commission to hold that, to the extent that any legal requirements were not complied with, it was Qwest that caused any violations, not Eschelon. The rules do not place on Eschelon the duty of unilaterally filing these agreements and Eschelon should not therefore be taken to task for its failure to take such action.

Finally, given the state of the law and the circumstances Eschelon found itself in, any failure by Eschelon to file these agreements certainly did not constitute a knowing and intentional violation on the part of Eschelon. Moreover, as discussed above, Eschelon has fully cooperated with state regulators throughout the proceedings analyzing these unfiled Agreements. Further regulatory action against any entity other than Qwest is simply unwarranted and counterproductive to the overarching goal of encouraging competition.

¹⁶ Further, Eschelon is not aware of any state regulatory agency in which it operates that has found CLECs to have a duty under the Act to unilaterally file interconnection agreements.

¹⁷ See, e.g., *First Report and Order*, ¶ 15.

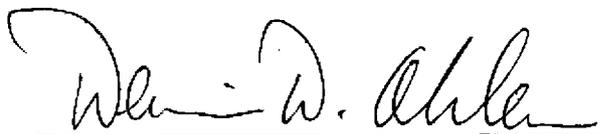
¹⁸ *Id.*

CONCLUSION

In conclusion, Eschelon regrets its involvement with the unfiled agreements and apologizes to the Commission and the parties for its participation in them. Eschelon has cooperated with Staff and RUCO in their investigation of this matter. Eschelon is not taking the position that it should suffer no consequences for its role in the agreements. However, this case is not the proper forum for a discussion and decision on the role of Eschelon and the consequences of its actions. Eschelon urges the Commission to limit this case to the actions of and remedies to be applied to Qwest, consistent with the Commission's previous statements of the scope of this matter. To the extent that the Commission wishes to apply remedies to Eschelon, we ask that you consider the arguments above and our unique circumstances. Under the proposal by Staff for retrospective discounts, Eschelon's competitors will receive all of the benefits and none of the costs of the unfiled agreements. This will give Eschelon's competitors a significant edge in the near future. However, Eschelon does accept that consequence.

Respectfully submitted,

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