

proposed Settlement Agreement between Qwest and the Joint CLECs² that has been submitted with a request for approval in Docket No. UT-073035 on June 29, 2007.³ Attachment 1 to this Motion is a copy of Exhibit E. Attachment 2 to this Motion is a draft protective order. Because Exhibit E (in the form filed with the Commission) is a copy of the Minnesota protective order including the Minnesota caption, Attachment 2 varies from Attachment 1 in that state-identifying information has been provided in Attachment 2 to reflect that the order is applicable to Washington rather than Minnesota.⁴ While the proposed Settlement Agreement has not yet been approved, Qwest's actions with respect to a protective order, which are described below and which Qwest has claimed were taken pursuant to the proposed Settlement Agreement, have prompted the need to file this Motion at this time.

2 Eschelon requests that any existing applicable protective order in these

² "Joint CLECs" is a defined term in the proposed Settlement Agreement, which provides in the definitions (Section II) that "Joint CLECs" refers collectively to Covad Communications Company ("Covad"), Eschelon Telecom, Inc. ("Eschelon"), Integra Telecom Holdings, Inc. ("Integra"), McLeodUSA Telecommunications Services, Inc. ("McLeodUSA"), Onvoy, POPP.Com ("POPP"), US Link, Inc. d/b/a TDS Metrocom ("TDSM"), and XO Communications Services, Inc. ("XO")."

³ Qwest's filing on June 29, 2007 superseded and replaced the filing made by Qwest in Docket UT-053025 on June 22, 2007. Qwest styled its June 22nd filing requesting approval of the proposed Settlement Agreement as a joint filing, indicating Eschelon agreed with it, although Eschelon had not seen the June 22nd filing before Qwest filed it and, when Eschelon did receive a copy, did not agree with its contents. (In particular, Qwest's June 22nd filing contained an alleged joint request that was objectionable, for example, because it broadly asked to supersede any previous Commission order to the extent any part of a previous order is inconsistent with the proposed settlement, and did so without identifying the parts of the particular orders or the affected carriers, etc.). Eschelon offered Qwest an opportunity to correct, and Qwest filed the revised filing on June 29th. Although Qwest noted in its withdrawal letter that it would be changing dockets, it did not indicate in the letter that the joint filing would also be revised to delete the unilateral provisions that Eschelon had not consented be filed jointly. When Qwest filed it, however, Qwest had made the revisions.

⁴ The Joint CLECs provided a version of proposed Exhibit E that is not specific to Minnesota to Qwest on May 23, 2007 for use as Exhibit E. Qwest used the Minnesota version, with the Minnesota caption, instead of working from that document. For Attachment 2, Eschelon has taken the version of Exhibit E sent to Qwest on May 23rd and added Washington identifying information (caption, docket number, agency name.). If Qwest desired additional changes to make the document Washington specific, it did not respond (e.g., by redlining the May 23, 2007 Exhibit E) to request additional changes.

consolidated dockets (referred to collectively as the “Wire Center Docket”⁵), to the extent it is to continue or become a “standing” protective order, be modified to contain the language of Attachment 1 (with the state-identifying information from Attachment 2). Paragraph 15 of Order No. 1 provides that the “Commission may modify this Order on motion of a participant or on its own motion upon reasonable prior notice to the participants and an opportunity for hearing.”

3 Eschelon also seeks to clarify information in Orders 01 and 02 in Docket UT-073033 regarding whether Eschelon joined in Qwest’s June 22, 2007 request for a protective order based on the protective order in Docket No. UT-053025. Order 01 (with a service date of June 28, 2007) states in Paragraph 1: “Qwest Corporation and Covad Communications Company, Eschelon Telecom Inc., McLeodUSA Telecommunications Services, Inc. (Joint Competitive Local Exchange Carriers (CLECs)) request the Commission enter a protective order in this docket based on the protective order, Order 01, entered in Docket UT-053025.” The Amended Protective Order (Order 02) also states in the first paragraph that Order 01 was entered “on June 28, 2007, at the request” of Qwest and several CLECs, including Eschelon. As of June 28, 2007, Eschelon had made no request for a protective order based on the protective order, Order 01, entered in Docket UT-053025. Qwest filed its own petition for Commission approval of Qwest’s proposed 2007 additions to a Commission-approved wire center list,⁶ and

⁵ The proposed ICA language attached to the proposed Settlement Agreement (in Attachments B, C, and D) contains the following definition: “‘Wire Center Docket’ means Commission Docket No. UT-053025 entitled ‘In the Matter of the Investigation Concerning the Status of Competition and Impact of the FCC’s Triennial Review Remand Order on the Competitive Telecommunications Environment in Washington State,’ *and any successor or separate Commission docket in which Qwest files a request(s)* to add additional non-impaired wire center(s) to the Commission-Approved wire center list, and the Commission approves addition of wire center(s) to the list” (emphasis added).

⁶ Regarding Qwest’s request for additions, see Eschelon’s separate filing of today in these consolidated dockets (Eschelon’s Objections Regarding Qwest’s Petition for Approval of 2007 Additions to Non-Impaired Wire Center List), which is incorporated by reference.

Qwest chose to reference the as yet unapproved Settlement Agreement in that petition. Qwest's petition was not a joint filing with the CLECs. Eschelon did not know that Qwest was filing its petitions regarding multiple additions to the lists and requesting protective orders in multiple states on June 22, 2007.⁷ Qwest chose to file its petitions regarding additions to the lists on the same date (June 22, 2007) as its initial (later withdrawn⁸) request for approval of the proposed Settlement Agreement, but did not coordinate with Eschelon regarding the June 22nd filing of its requests for a protective order. Any request in that petition should not be attributed to Eschelon. Although Qwest referred to the proposed Settlement Agreement in its petition, any suggestion that on June 22nd Qwest was seeking a protective order based on the protective order, Order 01, entered in Docket UT-053025 with Eschelon's knowledge or agreement is incorrect, and it is inconsistent with Paragraph VI(C) of the proposed Settlement Agreement relied upon by Qwest.

4 Paragraph VI(C) of the proposed Settlement Agreement provides:

At least five (5) days prior to filing new non-impairment or tier designations for Commission review, Qwest will request a protective order from the Commission to govern the handling of confidential information during the proceedings. Attached as Exhibit E to this Settlement Agreement, is a model protective order. The Parties agree to seek from the individual Commission's approval for a standing protective order based upon the attached model protective order that will apply in future proceedings. Where a Commission adopts a standing protective order, Qwest is not required to submit a request for a new protective order, and CLECs that have signed the protective order are not required to re-sign it for each new Qwest request. A Commission may modify a standing

⁷ See footnote below regarding Qwest notice NETW.06.22.07.2818.Add_Non_IM_Wire_Ctr (June 22, 2007).

⁸ See footnote 1 to Order 03 in Docket No. UT-073033; see also Qwest June 28, 2007 Withdrawal of *Joint Petition to Re-open Docket for Limited Purpose of Approving Settlement Agreement* in UT-053025.

protective order using its standard processes and procedures after Qwest has made its filing.

5 There is no provision in Paragraph VI(C) for Qwest to seek any protective order other than one based upon the attached model protective order. There is no provision, for example, that Qwest will seek *either* the model protective order *or* the order from an earlier or separate wire center docket (or any other protective order). The protective orders that were in place in existing or previous wire center dockets in each state were available to Qwest and the Joint CLECs when they entered into the multi-state proposed Settlement Agreement, and yet Paragraph VI(C) provides only that the parties to the proposed Settlement Agreement agree to seek a protective order based upon the model protective order attached as Exhibit E. Although there are other provisions in the proposed Settlement Agreement to jointly seek expedited rulings,⁹ Paragraph VI(C) contains no expedite provision. Particularly while the proposed Settlement Agreement is under review and when the provisions are implemented for the first time, if it is approved, taking the time to consider the model protective order as a standing protective order is warranted, and it should be adopted. Eschelon agreed to the other joint expedite request provisions with an understanding that the parties to the proposed Settlement Agreement would have sought a protective order based on Exhibit E before those provisions would come into play. Having one, consistent, known protective order in place across multiple states would assist in meeting expedited time frames.

6 In supporting the model protective order in Arizona (a state in which Qwest requested only Exhibit E for use as the protective order as outlined in Paragraph VI(C)), Qwest's counsel recently summarized Qwest's multi-state agreement

⁹ See proposed Settlement Agreement ¶¶VI(F)(2)(a)&(b) & VI(F)(3)(a).

regarding the protective order and the need for multi-state use of the model protective order as follows:

In the settlement agreement between Qwest and the Joint CLECs, the parties agreed upon a form of protective order which the parties seek to have used in front of the various state commissions for future submissions Qwest, when we filed our application for approval of the 2007 additions, asked the Commission to please issue a protective order based upon that form of order, and it was attached to our filing that we made on June 22. In defense of the protective order that we're proposing, *it's one which Qwest and the Joint CLECs have considered*. And it, I think, *is a matter of significant efficiency for those parties to have the same protective order be used in multiple jurisdictions, and it's economic in that it relieves us of the need to deal with separate protective orders with the nuances that each might have, varying from state to state.*¹⁰

- 7 Nothing in Paragraph VI(C), or the remainder of the proposed Settlement Agreement, envisions a scenario in which Qwest would also unilaterally seek different protective orders that vary by state and furthermore request Commission action on an expedited basis.
- 8 On June 22, 2007, Qwest filed its individual petition regarding additions to the list in Docket UT-073033. On page 1 of its petition, Qwest stated (with emphasis added): “*pursuant to the . . . settlement agreement* filed for approval in Docket No. UT-053025, Qwest requests that the Commission issue *on an expedited basis* a protective order based on *either Order No. 1 in Docket No. UT-053025 or* the model protective order attached hereto as Attachment A.” An example of a difference between the two orders is that the model protective order contains a small company provision (in paragraph 4) while Order No. 1 in Docket No. UT-

¹⁰ Transcript of Procedural Conference, “In the Matter of the Application of DIECA Communications DBA Covad Communications Company, Eschelon Telecom of Arizona, Inc., McLeodUSA Telecommunications Services, Inc., Mountain Telecommunications, Inc., XO Communications Services, Inc. and Qwest Corporation Request for Commission Process to Address Key UNE Issues Arising from Triennial Review Remand Order, Including Approval of Qwest Wire Center Lists. (AZ Wire Centers),” Arizona Docket Nos. T-03632A-06-0091; T-03267A-06-0091; T-04302A-06-0091; T-03406A-06-0091; T-03432A-06-0091; and T-01051B-06-0091 (July 19, 2007), p. 17, lines 7-24 (emphasis added).

053035 does not. Qwest cited no specific provision providing that Qwest could seek a different protective order as an alternative, and there is no such provision in the proposed Settlement Agreement. Qwest nonetheless also made this type of contingent request in Colorado.¹¹

9 In Oregon, Qwest’s request was not initially a contingent request. On June 22, 2007, Qwest requested only the model protective order (attaching Exhibit E) and recognized that “Qwest and the Joint CLECs in docket UM 1251 negotiated and agreed to this protective order”¹² In a letter dated June 25, 2007, Qwest said:

The parties agreed in the settlement agreement that Qwest would seek the prompt issuance of a protective order ‘based on’ that Minnesota protective order, and thus Qwest did so. *However*, in the event the Commission prefers to use a protective order that it has previously used, such as for example, the modified protective order in Docket 1251 (which involved similar issues), Qwest hereby submits a Word version of a draft protective order that is based on the modified protective order that the Commission adopted in docket UM 1251 (Order No. 06-141).¹³

While the proposed Settlement Agreement recognizes that the Commission on its own may modify a standing protective order, nothing in the proposed Settlement Agreement envisions a Commission modification made at the behest of a party to the proposed Settlement Agreement, with the party arguing against itself by seeking a different protective agreement other than the one it said it would seek based upon Exhibit E.

10 Eschelon fully recognizes that the proposed Settlement Agreement has not yet

¹¹ In Arizona and Minnesota, Qwest cited Paragraph VI(C) of the proposed Settlement Agreement and asked the Commission’s to enter an order based on the model protective order (attaching Exhibit E). See the discussion above, citing an Arizona transcript.

¹² Qwest Corporation’s Petition for Commission Approval of 2007 Additions to Non-Impaired Wire Center List and Motion for Expedited Issuance of Protective Order, UM 1326 (June 22, 2007).

¹³ Qwest June 25, 2007 Letter Regarding “Draft Protective Order based on Protective Order in docket UM 1251,” p. 1 (emphasis added) (copy of cover letter provided as Attachment 4 to this Motion).

been approved. Qwest, in contrast, specifically represented that it filed its request “pursuant to the . . . settlement agreement,” while at the same time it did not act pursuant to the terms of Paragraph VI(C) of the proposed Settlement Agreement. In addition to referring to Exhibit E as a basis for the request, Paragraph VI(C) states that “the parties” (plural) will seek the standing protective order, but Qwest did not make its June 22, 2007 request for a protective order jointly with Eschelon or seek Eschelon’s participation in any prior attempts to discuss or seek that protective order.¹⁴ Qwest presumably knew in advance that it intended to file multiple requests for additions to the lists on June 22, 2007 and could have involved Eschelon earlier to allow the companies to jointly seek an order and to allow more time for consideration of the request.¹⁵

11 On June 28, 2007, the Commission entered its Protective Order, Order 01. Order 01 refers to Qwest’s request for a protective order based on the protective order entered in Docket UT-053025,¹⁶ but does not refer to the model order that is the subject of Paragraph VI(C) of the proposed Settlement Agreement.

12 On June 28, 2007, Eschelon contacted Qwest by email to ask why Qwest had proceeded in this manner and, referencing Paragraph VI(C) of the proposed

¹⁴ On the afternoon of June 22, 2007 (the date of Qwest’s filing of its petition regarding additions), Qwest sent an email notice to CLECs stating (in the future tense) that it “will file petitions” in seven states for wire centers identified in the notice and “will also request a protective order.” See NETW.06.22.07.2818.Add_Non_IM_Wire_Ctr (June 22, 2007).

¹⁵ Since Qwest did not adhere to the provisions of Paragraph VI(C) in the proposed agreement upon which it relied anyway, Qwest could have made a request for the protective order much earlier to allow opportunity for comment, with or without reference to a potential settlement agreement. If Qwest wanted to follow its provisions, the proposed Settlement Agreement provides that the request for a protective order must be made “at least” five days before filing the petition, so it clearly provides Qwest may file a request for a protective order farther in advance in anticipation of a filing.

¹⁶ As indicated in paragraph 3 above, the request is attributed to Qwest and CLECs, including Eschelon, but Qwest made this request, not Eschelon.

Settlement Agreement, to ask Qwest if Qwest would seek a protective order based only on the model protective order. Eschelon said, for example: “If litigation could be avoided by substituting the model protective order per paragraph VI(c), we would appreciate it.”¹⁷ In addition, Eschelon reserved its rights, stating: “we reserve our right to ask for a revised protective order based on the model protective order, though we do not believe that should be our obligation since the agreement was to seek the model up-front.” Eschelon has at no time since then withdrawn its reservation of rights.

13 Qwest did not agree to request only the model protective order, but Qwest still wanted to expedite matters. Two provisions of the Washington protective order, in particular, were affecting Qwest’s data production at that time. Though the proposed Settlement Agreement has not yet been approved, Eschelon did not delay. Having already established its position that the model protective order should be sought, Eschelon agreed to seek at that time two modifications to Order 01, to help move things along in the meantime. A July 3, 2007 motion to modify the protective order identified and requested those two modifications. Qwest did not, as part of that motion, ask Eschelon to surrender its reservation of rights and did not seek any modification to Paragraph VI(C) of the proposed Settlement Agreement. On July 5, 2007, the Commission entered Order 02, Amended Protective Order. Qwest did not provide all of the data it indicates supports its Washington filing until July 11, 2007.

¹⁷ Had Qwest requested only the model protective order initially (when Qwest claimed it was acting pursuant to the proposed Settlement Agreement, and making the request would not have required a separate filing because Qwest was filing a petition with the Commission anyway), Eschelon would not have had to expend the additional time and resources of filing this separate motion (in several states), and there would have been more administrative efficiency because the Commission would not have had to address multiple requests regarding the protective order.

14 The language of Paragraph VI(C) of the proposed Settlement Agreement has not changed and continues to refer to a “standing” protective order based on the model protective order (Exhibit E). Qwest has already filed requests in multiple states to obtain additional non-impaired wire center designations, irrespective of any rulings on approval of the proposed Settlement Agreement. A consistent standing protective order will facilitate exchange of information in multiple states.

15 For these reasons, Eschelon requests a standing protective order containing the language of Attachment 1 (with the state-identifying information from Attachment 2).

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