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1                   ESCHELON TELECOM, INC., by GREGORY MERZ (via  
2                   bridge), Attorney at Law; Gray, Plant, Mooty, 500 IDF  
3                   Center, 80 South Eighth Street, Minneapolis, Minnesota  
4                   55402; telephone, (612) 632-3257.

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1 P R O C E E D I N G S

2 JUDGE CLARK: It's approximately 2:35 p.m.,  
3 September 15th, 2006, in the Commission's hearing room  
4 in Olympia, Washington. This is the time and the place  
5 set for a prehearing conference in the matter of the  
6 petition for arbitration of an interconnection  
7 agreement between Qwest Corporation and Eschelon  
8 Telecom, Incorporated, pursuant to 47 United States  
9 Code, Section 252(b), Patricia Clark, administrative  
10 law judge for the Commission presiding.

11 Notice of this prehearing conference was  
12 issued by Order No. 1 in this proceeding entered on  
13 August 30th, 2006. The purpose of this afternoon's  
14 prehearing conference is to establish a procedural  
15 schedule, identify issues, address discovery, and any  
16 other matters that will aid in the efficient and  
17 expeditious resolution of the issues in this  
18 proceeding.

19 At this time, I will take appearances on  
20 behalf of the parties. Appearing on behalf of Qwest?

21 MS. ANDERL: Thank you, Your Honor, Lisa  
22 Anderl, associate general counsel in-house with Qwest.  
23 My address is 1600 Seventh Avenue, Room 3206, Seattle,  
24 Washington, 98191. My phone is (206) 345-1574. My fax  
25 is (206) 343-4040, and my e-mail is

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1 lisa.anderl@qwest.com.

2 JUDGE CLARK: Is there anyone else who wishes  
3 to enter an appearance on behalf of Qwest?

4 MR. TOPP: Yes. This is Jason Topp. My  
5 address is 200 South Fifth Street, Suite 2200,  
6 Minneapolis, Minnesota, 55402; phone number, (612)  
7 672-8905. Fax number is (612) 672-8911; e-mail,  
8 jason.topp@qwest.com.

9 JUDGE CLARK: Appearing on behalf of  
10 Eschelon?

11 MR. KOPTA: Gregory J. Kopta with the law  
12 firm of Davis, Wright, Tremaine, LLP, on behalf of  
13 Eschelon Telecom of Washington. My address is 2600  
14 Century Square, 1501 Fourth Avenue, Seattle,  
15 Washington, 98101-1688; telephone, (206) 628-7692; fax,  
16 (206) 628-7699; e-mail, gregkopta@dw.com, and also  
17 appearing will be Mr. Merz. I will allow him to give  
18 his contact information.

19 MR. MERZ: Gregory Merz also appearing on  
20 behalf of Eschelon. I'm with the law firm of Gray,  
21 Plant, Mooty. Our address is 500 IDF Center, 80 South  
22 Eighth Street, Minneapolis, Minnesota, 55402. My  
23 telephone is (612) 632-3257. My fax is (612) 632-4257,  
24 and my e-mail address is gregory.merz@gpmlaw.com.

25 JUDGE CLARK: Thank you. I just want to run

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1 through quickly a couple of preliminary matters.  
2 First, I did receive an e-mail from both parties with a  
3 procedural schedule that you agreed upon. We will  
4 discuss that in a little bit further detail. I just  
5 want to confirm a couple of dates.

6 I note there is a schedule on Page 5 of the  
7 petition filed by Qwest, and there are a couple of  
8 items in that schedule that are not listed on the  
9 procedural schedule you e-mailed to me, and I want to  
10 make sure you don't want deadlines set in for those  
11 items.

12 We also need to talk about the issues in the  
13 proceeding. I note that there are ongoing arbitration  
14 proceedings in several other states, and I will be  
15 interested in knowing the status of those arbitrations  
16 in the other states, what stage those proceedings are  
17 when we get to that issue.

18 Then I want to talk about the joint statement  
19 of issues that is attached to the petition for  
20 arbitration in which I understand Eschelon joins, and  
21 finally, the form of the interconnection agreement to  
22 be used during the arbitration. Are there any  
23 additional preliminary matters that you want me to add  
24 to that list of discussion?

25 MS. ANDERL: I don't think for Qwest, Your

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1 Honor, unless Mr. Topp has anything.

2 MR. TOPP: No.

3 MR. KOPTA: No, Your Honor.

4 JUDGE CLARK: First, I note from the petition  
5 for arbitration that there are a number of other states  
6 in which arbitration proceedings are pending, and I'm  
7 wondering if you can give me an update on those, the  
8 status of those.

9 MR. MERZ: I can speak to that. The  
10 Washington case is, actually, I believe the second case  
11 to be filed. The Minnesota case was filed back in the  
12 end of May. The case in Minnesota has been kind of  
13 proceeding along. We filed direct testimony in that  
14 case. In fact, we have rebuttal testimony due here, I  
15 believe, next week. A petition has also been filed in  
16 Arizona, and petitions are to be filed fairly  
17 imminently in Colorado and Oregon, and then next  
18 spring, a petition will be filed in Utah as well, but  
19 at least in terms of cases that have preceded,  
20 Minnesota is the furthest along and Washington would be  
21 the next furthest along.

22 JUDGE CLARK: With respect to the Minnesota  
23 case, I'm interested in the form of the ICA that the  
24 parties are using in that proceeding.

25 MR. MERZ: The form of the ICA in that case

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1 is the same as the form that Eschelon filed with its  
2 response to the petition, and that's the one that has  
3 the specific differences between the competing  
4 proposals red-lined or struck out. So it's easier, I  
5 think, to identify where the issues are.

6 JUDGE CLARK: All right. Ms. Anderl, are you  
7 amenable to using the same form of ICA in this  
8 proceeding?

9 MS. ANDERL: I would defer that question to  
10 Mr. Topp. I think the answer is yes, but I don't know  
11 for sure.

12 MR. TOPP: Yes. From our perspective, we are  
13 in agreement with whatever form is most useful for the  
14 Court. We have felt that the form that we have filed  
15 has traditionally been used in most arbitrations, and  
16 from our perspective, it's easier to follow along, but  
17 this is being provided entirely for your convenience,  
18 so it is up to you which form you prefer.

19 JUDGE CLARK: My most critical issue is that  
20 we are all working off the same document, and right  
21 now, that's not the case. I have one form of ICA  
22 attached to the petition for arbitration filed by  
23 Qwest, and I do have a second form of ICA filed by  
24 Eschelon, and my most important goal is that we be  
25 consistent in the form that we use, and I'm amenable to

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1 using either form that the parties are willing to agree  
2 to.

3 The Commission's regulations, WAC 480-07-635,  
4 I think it's (i), indicates a form that needs a form of  
5 ICA that should be submitted, and I'm not absolutely  
6 wedded to that so that the changes are in bold. We can  
7 be somewhat flexible on that form, but my critical form  
8 is that we work off the same one. If you are both  
9 willing to work off the form that is attached to the  
10 Eschelon response, then that will work for me.

11 MR. TOPP: Yes, that's fine for us.

12 JUDGE CLARK: The second issue I have is that  
13 I understand the parties have agreed to a joint  
14 statement of issues to be resolved in this proceeding,  
15 and that is the joint statement of issues attached to  
16 the Qwest petition for arbitration; is that correct?

17 MR. MERZ: Yes, Your Honor, that's correct.

18 JUDGE CLARK: That form of issue statement is  
19 very clear to me with the different colors and  
20 underlining, etcetera, clearly indicating what each  
21 party proposes as language and the position of each  
22 party, and I found that very clear and very helpful,  
23 but I think it would be helpful to have the parties  
24 separate the legal issues from the factual issues to be  
25 resolved.

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1           MR. TOPP:  So you would like us in the  
2 position statements to separate them out?

3           JUDGE CLARK:  Well, you can separate them in  
4 the position statement, or ideally, indicate somewhere  
5 on the issue statement itself, separate the legal  
6 issues from the factual issues.  Obviously, there is no  
7 need to take evidence on legal issues, and that will be  
8 a matter that we could appropriately address through  
9 briefing while we will be needing to establish some  
10 deadlines for the submission of testimony on the  
11 factual issues.

12           MS. ANDERL:  I don't know that we have ever  
13 been asked to do something exactly like this before.  
14 That doesn't mean we can't or won't.  I do know that  
15 the parties generally -- I think Mr. Kopta will agree  
16 with me on this, I hope -- kind of like to testify  
17 about legal issues, but to be totally candid, because  
18 it is through exploration of those issues, because some  
19 of our witnesses are attorneys, that I think the  
20 parties feel as though they are most able to  
21 crystallize their positions and explain them to Your  
22 Honor and the Commission, have some discussion of those  
23 on the record, and I will just put that out there for  
24 consideration.

25           MR. KOPTA:  Yes.  Fortunately, I agree with

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1 Ms. Anderl that that tends to be the case, and just to  
2 amplify on what she said, often times, there are  
3 matters of policy that are not really particularly  
4 matters of fact but are issues that a party wants to  
5 bring to the Commission's attention in terms of what  
6 makes the most sense from a policy perspective and  
7 again explore that through testimony as purely through  
8 briefing.

9 MS. ANDERL: Thanks, Greg. That helps to  
10 clarify what I was trying to say. Certainly, some of  
11 the legal issues are driven by policy considerations,  
12 and policy testimony on those things are, we hope,  
13 helpful.

14 JUDGE CLARK: I'm really not talking about  
15 policy determinations that the Commission might want to  
16 or need to make in this particular proceeding, but  
17 rather ones that appear to be pretty much legal issues.  
18 I don't know how to word that in a different manner.  
19 I'm looking through this 231-page joint statement of  
20 issues, and one is not jumping out at me at this  
21 particular moment, but perhaps you would like to just  
22 have a little bit more time to think about that and  
23 review some of these, but it did appear going through  
24 these that some of these really are issues that are not  
25 very conducive to the presentation of testimony but

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1 rather would be better served through a briefing  
2 document, but we can defer that.

3 MS. ANDERL: Thank you, Your Honor. We will  
4 make an endeavor to talk about that within each party  
5 and then across parties as well.

6 JUDGE CLARK: Right, and I would appreciate  
7 that. I think that would be helpful, and then perhaps  
8 we can convene, if necessary, a second prehearing  
9 conference to address this particular issue. Any  
10 further discussion on that particular issue?

11 MS. ANDERL: No, Your Honor.

12 MR. KOPTA: No, Your Honor.

13 JUDGE CLARK: The next thing I would like to  
14 approach, and this may not be something that will be  
15 very productive to do today if we don't have the  
16 separation of the legal and factual issues, but I would  
17 kind of like to go there anyway.

18 I understand I have the procedural schedule  
19 that was submitted to me in the e-mail, and what I  
20 would like to do is read that into the record and  
21 confirm with both parties that this is the procedural  
22 schedule you would like to use for the submission of  
23 testimony and exhibits and then ask you about a couple  
24 of the differences that are in the petition.

25 I have prefiled direct testimony and exhibits

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1 on September 29th; prefiled responsive testimony and  
2 exhibits on October 13th, 2006; prefiled rebuttal  
3 testimony and exhibits on October 27th, 2006. In the  
4 petition but not included in the e-mail is prefiled  
5 surrebuttal testimony. Do the parties feel a need for  
6 the submission of surrebuttal?

7 MR. TOPP: It sounded like you had three  
8 rounds of testimony, one September 29th, one October  
9 13th, and one on October 27th?

10 JUDGE CLARK: That is correct.

11 MR. TOPP: I think that's just a labeling  
12 issue. I think we are in agreement that three rounds  
13 of testimony is plenty.

14 MR. MERZ: That would be our position as  
15 well.

16 JUDGE CLARK: We also need a deadline for you  
17 to submit an e-mail to me with your estimated  
18 cross-examination times, your preferred order of  
19 witnesses, and a list of cross-examination exhibits,  
20 and for the submission of that, I think it would be  
21 appropriate to work backwards from the proposed dates  
22 for the evidentiary hearings, which I have as,  
23 according to the e-mail, November 28th, 29th, and 30th,  
24 as well as December 1, 4, 5, 6, 7, 8, and it would be  
25 helpful to have the estimated cross-examination times,

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1 preferred order of witnesses, and list of  
2 cross-examination exhibits at least a week before the  
3 hearing so that I can prepare those documents before we  
4 actually go to hearing.

5 I have my handy little calendar here, and of  
6 course, the week that immediately precedes that is the  
7 week of the Thanksgiving holiday, which makes it a  
8 short week. Is it the party's preference to move that  
9 deadline to the week of the 13th of November, or would  
10 you like to establish a deadline the week of the 20th  
11 of November?

12 MR. MERZ: If you get it the week of the  
13 20th, is that going to meet your needs?

14 JUDGE CLARK: Yes. If I can get it a week  
15 before the hearing, no later than the 21st, that will  
16 meet my needs.

17 MS. ANDERL: I just recommend that we choose  
18 that as the date then, and if some people are gone that  
19 week, we will just get it done early and have it ready  
20 for you.

21 JUDGE CLARK: So we are going to establish  
22 November 21st as the deadline for that, and you also  
23 need a deadline to distribute to other parties and the  
24 Commission paper copies of your cross-examination  
25 exhibits, and I would suggest that be the same date,

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1 November 21st.

2 MR. MERZ: That sounds fine to me.

3 JUDGE CLARK: Ms. Anderl?

4 MS. ANDERL: Yes.

5 JUDGE CLARK: Then the next deadline I would  
6 like to establish is a deadline for briefing following  
7 the hearing. Do the parties have any idea on how long  
8 it would take you to prepare, and I'm looking at  
9 simultaneous initial briefs.

10 MS. ANDERL: Typically, Your Honor, I think  
11 the parties look to have the transcript for at least a  
12 couple of weeks before the briefs are filed, and under  
13 the normal schedule, the last volume of the transcript  
14 wouldn't be available until December 22nd. I need  
15 Mr. Topp to speak up here too because I don't know how  
16 all these things play in with the other states, but I  
17 think we would be looking at something, with the  
18 Christmas holidays, in maybe the third week of January.

19 JUDGE CLARK: The third week of January is  
20 the 15th. Mr. Topp?

21 MR. TOPP: Yes, that does seem appropriate.

22 MR. MERZ: What I would suggest is the 19th  
23 of January. We've got surrebuttal testimony that,  
24 assuming the schedule the parties are going to propose  
25 goes through in Arizona, that will be due the week of

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1 the 12th, so it's going to be a fairly hectic time all  
2 the way around, but if we could get at least a week  
3 between those two dates, that would be helpful.

4 JUDGE CLARK: Is that acceptable, Mr. Topp?

5 MR. TOPP: Yes.

6 JUDGE CLARK: Then deadline for simultaneous  
7 responsive briefs.

8 MS. ANDERL: My calendar doesn't go that far.

9 JUDGE CLARK: Mine does, and so I can  
10 hopefully help you with dates if you can give me an  
11 approximate time frame on how long you will need to  
12 review the initial briefs before you would be prepared  
13 to address responsive briefs.

14 MS. ANDERL: I recommend that we need at  
15 least two, and possibly three weeks. I just don't  
16 know, so it would be either February 2nd or 9th.

17 MR. MERZ: Our hearing in Arizona, again  
18 these schedules are not set in stone at this point, but  
19 if the hearing the parties proposed goes through on the  
20 dates we propose, we will just be finishing up with  
21 that on February 2nd, so if it could be either the 9th  
22 or the 16th, that would probably be the best.

23 JUDGE CLARK: Why don't we make it the 16th  
24 of February, and then, of course, that brings me to the  
25 date which is nearest and dearest in my heart, and that

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1 is establishing a deadline for the arbitrator's report  
2 and order and taking a look at the number of issues  
3 that need to be resolved in this proceeding.

4 I understand that the parties have waived the  
5 nine-month period that the Commission would ordinarily  
6 need to conduct this arbitration, and I think taking a  
7 look at the number of issues that that is probably a  
8 good course, and I think I'm going to need probably 90  
9 days from the last briefing to prepare that report and  
10 order. Does that present a problem for anyone?

11 MR. MERZ: No, Your Honor.

12 MR. TOPP: No, Your Honor.

13 MS. ANDERL: Everyone said no, Your Honor.

14 JUDGE CLARK: So we would be looking at May  
15 16th, 2007, if my math is right, for the arbitrator's  
16 report and order, and then a deadline for petitions for  
17 review of that report and order. Does anyone have an  
18 opinion on how much time we need to prepare petitions?

19 MS. ANDERL: 20 to 30 days, 20 days? Is that  
20 enough? I'm imagining that this will be a long report  
21 and order. Just kind of getting through it and  
22 formulating a petition and making a decision about  
23 which issues to petition on, maybe 30 days would make  
24 more sense. Again, Jason, I'm going to ask you how  
25 comfortable you are with a longer period of time or

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1 push for the shorter.

2 JUDGE CLARK: That's ordinarily 30 days.

3 MR. TOPP: I would suggest we go with 30  
4 days.

5 MS. ANDERL: That's fine.

6 JUDGE CLARK: So that would make it June 18th  
7 because the 16th falls on a weekend. June 18th, 2007,  
8 and then we need a deadline for the submission of a  
9 proposed interconnection agreement. Another 30?

10 MR. TOPP: Is this a proposed interconnection  
11 agreement?

12 MS. ANDERL: That would be one that complied  
13 with the arbitrator's report and decision, and then if  
14 it's modified by the Commission, then there would be a  
15 second complying ICA, but on the basis that the parties  
16 at least need to figure out what they need to do to  
17 comply with the ALJ's report, we usually file a  
18 complying one based on the arbitrator's decision.

19 JUDGE CLARK: Thank you, Ms. Anderl.

20 MS. ANDERL: And I think it does take the  
21 parties a chunk of time to agree on how to implement  
22 the arbitrator's report or crystallize areas of  
23 disagreement, so I think if we did have another 30  
24 days, that would probably be helpful.

25 JUDGE CLARK: Is that acceptable, Mr. Topp?

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1 MR. MERZ: Yes. Are you talking about  
2 another 30 days, Ms. Anderl, past June 18th?

3 MS. ANDERL: Yes, because the first 30 days  
4 is really consumed with deciding what to challenge, and  
5 then the next 30 days, you can focus on how to use all  
6 of your challenges and how do you implement this  
7 report.

8 MR. MERZ: That sounds fine.

9 JUDGE CLARK: I would like to go ahead and  
10 schedule oral argument before the commissioners as  
11 well.

12 JUDGE RENDAHL: This is Judge Rendahl. I  
13 think you might also want to include their answers to  
14 the petitions on the same day as you file the proposed  
15 interconnection agreement. The Commission's rules in  
16 WAC 480-07-640 allow for that, the answers to be filed,  
17 and at the same time the answers are filed that the  
18 proposed interconnection agreement is filed. So just  
19 so it's clear, you do have the opportunity to respond  
20 to a petition.

21 JUDGE CLARK: Thank you, Judge Rendahl. Is  
22 that clear to everyone?

23 MS. ANDERL: Yes.

24 JUDGE CLARK: So the deadline of July 18th  
25 would be not only to submit a proposed interconnection

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1 agreement in accordance with the arbitrator's report  
2 and order, but that would also be the opportunity to  
3 submit an answer to a petition for review of the  
4 arbitrator's report and order.

5 I would like to also establish a deadline, a  
6 date. This is one that definitely has to be somewhat  
7 contingent; although, I think this far in advance we  
8 should be relatively safe, but we need to understand  
9 that this will need to work around the commissioners'  
10 schedule, and I would like to set a date for oral  
11 argument before the commissioners. I'm asking you to  
12 go pretty far in the future on this, so if we are not  
13 prepared to do that today, we can do that at a later  
14 time.

15 MS. ANDERL: Your Honor, I think we could  
16 pull a day out of a hat if you want to, but I think  
17 it's unlikely in the extreme that it will be the date  
18 the argument actually happens.

19 JUDGE CLARK: I think that's fair, and as I  
20 said, I understand we are getting pretty far into the  
21 future, and we will just make that to be set to be  
22 determined at a future time.

23 Is there anything further that we need to  
24 address in terms of a procedural schedule?

25 MR. KOPTA: This is for a clarification. On

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1 those deadlines that require a filing, perhaps other  
2 than cross-exhibits, but I'm not necessarily sure we  
3 want to accept that, can we say that all those dates  
4 are electronic filing dates with service dates with the  
5 Commission with hard copy to follow by overnight  
6 delivery for the next day?

7 JUDGE CLARK: Yes. We can invoke that rule  
8 so that you are permitted to submit things  
9 electronically with an original to follow on the next  
10 business day. On that note, if I can just interject at  
11 this point, I will need to have you submit an original  
12 plus eight copies of any documents for the paper  
13 submission, and that's for the internal distribution of  
14 documents.

15 MR. KOPTA: Thank you, Your Honor.

16 JUDGE CLARK: The other matter we need to  
17 address is the Commission's order does require the  
18 parties to cooperate regarding discovery, and do the  
19 parties feel the need to invoke the Commission's  
20 discovery rules in this particular arbitration?

21 MS. ANDERL: Yes, Your Honor.

22 JUDGE CLARK: Mr. Topp?

23 MS. ANDERL: Yes for Qwest.

24 JUDGE CLARK: And Eschelon?

25 MR. MERZ: I think it's likely there will be

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1 discovery, yes.

2 JUDGE CLARK: Then I'm going to invoke the  
3 Commission's discovery rules, and that discovery will  
4 be conducted in accordance with WAC 480-07-400 through  
5 425, and of course, those rules set out response times,  
6 etcetera. Do the parties feel a need for a protective  
7 order in this proceeding?

8 MS. ANDERL: On behalf of Qwest, yes, Your  
9 Honor.

10 JUDGE CLARK: Eschelon?

11 MR. MERZ: Yes, I'm certain we will need a  
12 protective order.

13 JUDGE CLARK: Will the Commission's standard  
14 protective order be appropriate in this arbitration?

15 MS. ANDERL: Your Honor, if the question is  
16 do we anticipate the exchange of information that would  
17 be designated as highly confidential or do we need that  
18 special level of protection, I am not aware of in a  
19 case like this where there are just the two parties we  
20 have anything that needs that special designation on  
21 Qwest's side and would recommend that we would just ask  
22 for a supplemental protective order if we found some  
23 highly confidential information.

24 JUDGE CLARK: Is that acceptable to Eschelon?

25 MR. MERZ: It is.

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1           JUDGE CLARK: That was the question, whether  
2 you wanted the standard order or an order that would  
3 govern the transmission of highly confidential  
4 material, and a separate protective order will be  
5 entered in this proceeding addressing that particular  
6 topic.

7           Are there any other matters that we need to  
8 address at this afternoon's prehearing conference?

9           MS. ANDERL: There is something, Your Honor,  
10 and I don't know if we are prepared with it today, but  
11 for purposes of the Commission's electronic service  
12 list, we may have more people than just Mr. Topp and  
13 myself we would like added to that. Assuming we copy  
14 Eschelon on any communications of that nature, may we  
15 just send you an e-mail listing other attorneys or  
16 in-house personnel we would like included on the  
17 Commission's external distribution list?

18           JUDGE CLARK: Yes, and if you could transmit  
19 that to me via e-mail, we will set up a courtesy list,  
20 for lack of a better term, for that distribution of  
21 information. You don't need to do that today, and it  
22 looks like probably sometime in the relatively near  
23 future you are going to want to do that given the  
24 deadline for the submission of prefiled direct  
25 testimony and exhibits, which is in only a couple of

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1 weeks, but it isn't necessary to do that today, and we  
2 will draw up a separate list for that. Is there  
3 anything further that we need to address?

4 MR. KOPTA: I just want to clarify something  
5 and make sure. Generally because Qwest is the  
6 petitioner in this instance, the assumption might be  
7 that Qwest would file direct and reply and Eschelon  
8 would only file responsive testimony, but my  
9 understanding is that parties' anticipation is that  
10 each of them would be filing in all three rounds.

11 MS. ANDERL: Yes, Mr. Kopta, you are correct.  
12 That's Qwest's belief as well.

13 MR. KOPTA: I just wanted to make sure that  
14 that was clear on the record that that was the  
15 anticipation of the parties.

16 JUDGE CLARK: Thank you, and that was my  
17 anticipation as well. In the procedural schedule that  
18 I read you, there is no designation of party associated  
19 with any of these dates, but rather just the item, as  
20 in prefiled direct testimony, so that was my  
21 understanding as well.

22 MR. KOPTA: Thank you.

23 JUDGE CLARK: Anything further?

24 MS. ANDERL: Not for Qwest, Your Honor.

25 MR. MERZ: Nothing from Eschelon's

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1 perspective, Your Honor.

2 JUDGE CLARK: Then the substance of the  
3 prehearing will be memorialized in a prehearing  
4 conference order that I will issue hopefully the  
5 beginning of next week. I think it's unlikely to get  
6 that out today given the hour of the prehearing  
7 conference.

8 I will also be issuing a protective order,  
9 and that will be the standard form of order rather than  
10 one governing the use of highly confidential material.  
11 If there is nothing further to be addressed on this  
12 record, we are adjourned.

13 (Prehearing conference concluded at 3:13 p.m.)

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