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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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