BEFORE THE
STATE OF MINNESOTA
PUBLIC UTILITIES COMMISSION

Gregory Scott	**Chair**
Edward A. Garvey	**Commissioner**
R. Marshall Johnson	**Commissioner**
LeRoy Koppendrayer	**Commissioner**
Phyllis Reha	**Commissioner**

In the Matter of the Complaint of the Minnesota Department of Commerce Against Qwest Corporation	**Docket No. P-421/C-02-197**

QWEST CORPORATION'S VERIFIED ANSWER TO THE COMPLAINT OF THE MINNESOTA DEPARTMENT OF COMMERCE

Joinder in Request for Expedited Proceeding

INTRODUCTION

Qwest Corporation ("Qwest") files this Verified Answer before the Minnesota Public Utilities Commission (the "Commission") to the Complaint of the Minnesota Department of Commerce (the "Department"). This matter involves the substantive legal question of whether Section 252 of the Telecommunications Act of 1996 ("the Act") required portions of certain agreements between Qwest and competitive local exchange carriers ("CLECs") to be filed with and approved by the Commission.

Procedural Matters

Qwest joins the Department in its request for expedited proceedings in this case. Qwest has at all times operated in good faith, and in compliance with applicable law, with respect to its obligations under Section 252. We take strong exception to the Department's mischaracterization of our contracts with CLECs, and its pejorative implications of "secret agreements." It is in our interest, and that of our CLEC customers and the public, to resolve this matter promptly. To facilitate that process, Qwest is making the contract sections challenged by the Department available for public review.[1]/ Some of those provisions are no longer in effect. In the case of those that are active, we have filed their provisions as conditional amendments to relevant interconnection agreements. Qwest strongly believes that, upon full review of the agreements and surrounding facts, the Commission will agree that Section 252 does not require these provisions to be filed. However, should the Commission rule otherwise, it will be in a position to approve these as interconnection agreement amendments.

[1] Qwest has notified the affected CLEC customers that, notwithstanding their expectation of confidentiality, in many instances, we are making this disclosure to facilitate Commission review of the legal challenges asserted by the Department.

That said, we are filing a separate opposition to the Department's request for temporary relief. As explained in that pleading, the Department fails to establish any of the criteria for such relief. Furthermore, issuance of the requested temporary relief would adversely prejudge the outcome of this proceeding before it has started. It threatens the rights of both Qwest and our CLEC customers whose contracts the Department unfairly attacks.

Legal and Factual Issues

Qwest takes its obligations under the Act very seriously. At all times it is willing to enter into good faith negotiations with CLECs on business issues of interest and concern to them. Indeed, stripped of its misleading and overheated rhetoric, the Department's Complaint confirms that Qwest is willing to negotiate with and accommodate the concerns of the full range of its wholesale customers, large and small, whether they purchase services for resale, individual UNEs, the UNE-Platform, or innovative combinations of UNEs. Qwest thus has endeavored to comply with not only the letter but also the spirit of the Act, which encourages ILECs and CLECs to work together to address business matters as much as possible through informal negotiations, instead of through formal litigation or arbitration proceedings.

Qwest recognizes that sometimes its negotiations with CLECs will result in new interconnection terms and conditions implicating Section 251 of the Act, in which case they should be filed with the Commission. However, other times the negotiations may resolve past disputes, or result in agreements that do not create filing obligations under Section 252.

As set forth in more detail below, Qwest submits that the agreement provisions raised in the Complaint did not need to be filed with and approved by the Commission. Those provisions fall into four general categories -- none of which require filing under Section 252:

- ***Agreements that define business-to-business administrative procedures at a granular level.*** The Department has challenged Qwest's decision not to file business process terms that go well beyond the level of detail that Section 252 of the Act requires to be filed in an interconnection agreement. For example, Qwest has committed to CLEC-specific escalation procedures for dispute resolution, or actions to address CLEC-specific business issues regarding their use of UNEs. Qwest has agreed to meetings and similar administrative processes to review business questions and concerns. As discussed below, Qwest, like any vendor, tailors its implementation processes to meet the varying needs of its CLEC customers. But it is simply incorrect to suggest that all this administrative detail must be spelled out in an interconnection agreement filed with and approved by the Commission.
- ***Agreements to settle disputes.*** In other cases the Department is complaining that Qwest did not file provisions of agreements that settled ongoing disputes between the parties. These matters typically relate to differences between Qwest and a CLEC over their respective past performance under an Interconnection Agreement, or billing disputes between them. The parties have managed to reach settlement without troubling this Commission or otherwise proceeding through formal hearings. Contrary to the Department's apparent view, Section 252 does not require that such settlements be filed as interconnection agreements and approved by the Commission.
- ***Agreements implementing Commission orders.*** In at least one case, the Department complains about provisions where Qwest is simply stating that it will comply with the Commission's orders pending further proceedings.
- ***Agreements on matters outside the scope of Sections 251 and 252.*** Finally, some of the Department's complaints go to agreements that have nothing to do with Section 251, and

therefore do not implicate Section 252 at all. For example, the Department cites one provision dealing with the carrier access rates that the CLEC charges Qwest for terminating Qwest's intraLATA toll service. In another case Qwest is buying non-telecommunications services from the CLEC.

The Department also alleges that Qwest has unlawfully discriminated against other CLECs insofar as it entered into these agreements. This is wrong. Qwest has provided all CLECs with the same basic rates, terms and conditions of interconnection, as required by Section 251. The Department is distorting the scope of the Telecommunications Act when it tries to suggest that variations in business-to-business administrative processes constitute unlawful discrimination. As discussed below, Qwest has met its obligations under Section 251 on a materially equal basis, leaving room for the inevitable differences among its wholesale customers with respect to administrative process. Similarly, Qwest does not violate Section 251 non-discrimination provisions when it settles disputes with a CLEC on terms satisfactory to the parties, allowing the CLEC and Qwest to avoid the uncertainties and delays of litigation. Nor does Qwest violate Section 251 when it enters into agreements on matters that do not concern that statute.

Reading the Department's Complaint in the most charitable light, there is evidently a serious disagreement between Qwest and the Department on a basic legal issue: where the line is drawn between the minimum terms and conditions that, as a matter of law, *must* be filed under Section 252, and those additional terms that an ILEC *may* voluntarily include in an interconnection agreement (or not). In the case of the agreements cited by the Department, Qwest has drawn that filing line in good faith based on two considerations: (a) its interpretation of the Telecommunications Act's requirements, and (b) the preferences of Qwest and its

customers to treat proprietary business matters confidentially. In that regard, it is worth noting that Qwest sometimes chooses to include more detail on a subject in its Statement of General Terms and Conditions, going beyond the minimum detail required by Section 252 on a voluntary basis. Similarly, some CLECs are more sensitive than others about disclosing contract provisions beyond the minimum detail that must be filed and approved under Section 252. But that does not mean that Qwest has waived its right to limit its filing in a particular case to only what Section 252 demands, particularly in circumstances where a customer requests confidentiality.

Indeed, CLEC concerns regarding proprietary information are understandable; business contracts are routinely kept confidential, and both wholesale and retail telecommunications customers frequently request confidential treatment of the terms of their arrangements. There is no basis for the Department's pejorative attempt to suggest something is wrong with this normal business practice. The Department labels these "Secret Agreements" as if they were somehow sinister. However, nothing could be further from the truth, and Qwest has nothing to hide.

To avoid any doubt, Qwest is filing the provisions identified by the Department, and asking the Commission to review the good faith line-drawing decisions that we have made in deciding to what extent our agreements with CLECs need be filed. Qwest strongly believes that it made correct determinations on this point, and indeed, that many of the provisions cited by the Department are very far outside the scope of Section 252.

Should the Commission nevertheless find that filing of one or more of the specified agreements was required by Section 252 of the Act, Qwest believes that there are substantial mitigating factors that make the imposition of penalties inappropriate, including, but not limited to, the fact that: (i) Qwest had a good faith belief that the agreements did not need to be filed;

(ii) there has been no discrimination against other carriers; (iii) substantially similar terms were available in publicly filed interconnection agreements, on Qwest's website, or in Qwest's template agreements; and (iv) there has been no harm to the public. To the extent that the Commission determines that a provision should have been filed, Qwest acknowledges that the provision by definition stands unapproved and effectively void *ab initio*, with potentially serious consequences in all states in which Qwest operates. Qwest will work to make the CLECs whole if they have operated under void agreements. Again, however, Qwest submits that it drew the Section 252 filing line in the proper place, and that no violation should be found.

JURISDICTION

1. The Telecommunications Act of 1996 authorizes the Commission to review and approve interconnection agreements filed pursuant to Section 252(e) to the extent that filing of interconnection terms is required pursuant to Section 252(a)(1), but not to determine whether they must be filed. 47 U.S.C. § 252(a)(1) and (e). As set forth below, Qwest specifically reserves its right to challenge the Commission's jurisdiction to interpret, enforce, or order the filing of an interconnection agreement.

SCOPE OF REVIEW

2. The Commission's scope of review of any agreement negotiated between an ILEC and a CLEC is limited. The Commission "shall approve or reject" an agreement submitted for its review on the grounds set forth in Section 252(e) of the Act. 47 U.S.C. § 252(e). The Commission does not have the authority to interpret or enforce an interconnection agreement. BellSouth Telecommunications, Inc. v. MCImetro Access Transmission Services, Inc., 2002 WL 27099 (11th Cir. Jan. 10, 2002).

(a) Similarly, Qwest submits that the question of whether a contractual obligation of an ILEC to a CLEC falls within the scope of Section 252(a)(1) has national implications, and is not a question for state commissions in the first instance. ILECs and CLECs routinely negotiate agreements covering multiple states, and it is important that there be a uniform view across the country as to when such agreements need to be filed in one or more states under Section 252, and when they do not.

(b) The scope of Section 252 filing requirements exceeds state commission jurisdiction for two reasons. First, to the extent that a particular state requires public disclosure of such agreements through an overbroad interpretation of Section 252, it deters parties from reaching private agreements in other states. Indeed, the Department's Complaint here can have just such an adverse impact on the incentives and ability of Qwest and CLECs to resolve matters privately affecting their operations outside Minnesota. They may be less willing to agree on detailed administrative processes, settle disputes, or even make agreements with nothing to do with interconnection. This, of course, runs directly counter to the Telecommunications Act's preference for private negotiation of business matters among ILECs and CLECs.

(c) Second, to the extent that an agreement should have been filed under Section 252 but was not, that agreement is void and unenforceable. As the court held in GTE Northwest Inc. v. Hamilton, 971 F. Supp. 1350, 1353 (D. Oregon 1997), "[a] binding final agreement will not exist until after the Commission reviews and approves the agreement signed and submitted" by the ILEC and the CLEC. This principle, analogous to the filed rate doctrine in tariff law, raises the stakes for where the line is drawn for the mandatory minimum filing requirement under Section 252. For example, if the Commission agrees with the Department that one or more of the provisions at issue here must have been filed under Section 252 but was not, the effect would

be to render that provision void *ab initio* at least in Minnesota, with potentially serious consequences in all other states where the agreement -- rightly or wrongly -- also was not filed.

(d) In short, Qwest does not concede that the Commission has jurisdiction to decide the legal question of when an agreement must be filed under Section 252 and when it does not, and Qwest reserves all rights on this point.

RESPONSE TO ALLEGATIONS

The Confidential Agreements

3. Before addressing the specific agreements that the Department alleges should have been filed, Qwest will respond to a general claim of the Department that runs throughout its Complaint. The Department repeatedly quotes the confidentiality provisions of the agreements discussed in the Complaint, and repeatedly asserts that "Qwest included a confidentiality clause that, in many cases, precluded access to the Secret Agreements by other CLECs, the Department, or this Commission to the Secret Agreements." (Complaint ¶ 21.)

(a) First of all, this statement is factually incorrect. Where confidentiality terms were included, the agreements provide for disclosure "pursuant to a lawful Order compelling such disclosure" or when "compelled to do so by law." Qwest has advised Eschelon, McLeod, and the Small CLECs that, in view of the Department's Complaint, it intends to publicly disclose the provisions cited by the Department in the filing form discussed above, and they do not object to doing so. Covad has previously taken the position that its agreement with Qwest is not confidential, and there is no confidentiality provision in the USLink/InfoTel Agreement.

(b) Second, the Department's innuendo is off the mark. As discussed above, confidentiality provisions are routine elements of business contracts, including contracts for telecommunications services. Qwest takes very seriously its obligation to respect the

confidentiality of its dealings with its customers, whether wholesale or retail. Qwest does not suggest, however, that any customer has a legitimate expectation of confidentiality for a term of an agreement that falls within Sections 251 or 252.

(c) Third, a proper interpretation of Section 252 leaves broad room to protect proprietary business terms while serving the intent of the Telecommunications Act. The situations cited by the Department here are cases in point. For example, many of the Department's claims involve situations in which Qwest actually filed an interconnection agreement amendment describing a provision, albeit just not with the level of detail that the Department alleges is required. In other words, the agreements were not "secret" -- Qwest and the CLEC simply refrained from detailing all of the administrative processes of their business-to-business relationship. But Qwest had no obligation under Section 252 to file all the specific administrative provisions that the parties negotiated, and no violation exists.

4. Similarly, the Department is wrong in so far as it challenges the parties' efforts to keep settlement terms confidential. Settlement agreements are routinely made confidential. As the courts of Minnesota have recognized, public policy encourages settlement of disputed claims without litigation. Minneapolis Star & Tribune Co. v. Schumacher, 392 N.W.2d 197, 205 (Minn. 1986). Disclosure of the arrangements made between parties involved in disputes may very well circumvent that policy. Id. In order to encourage the resolution of disputes by private agreements, adjudicatory bodies should take measures to ensure that the agreements reached between parties do in fact remain private. Id. Nothing in Sections 251 or 252 is inconsistent with this strong public policy; there was no reason for Qwest and the CLECs not to make their settlement agreements confidential, and no reason they had to be publicly filed with the Commission.

5. Finally, the Department points to agreements that do not concern matters arising under Section 251 in the first place. It goes without saying that there is nothing wrong with the parties making such sensitive business agreements confidential, and they certainly do not raise issues under Section 252.

6. At a minimum, Qwest submits that it had a good faith basis for treating these agreements as confidential. Administrative details, such as whether a dispute resolution term has a six-level escalation process before litigation, or a five-level process, are matters properly left to be worked out informally by the parties, and not within the scope of administrative review under Section 252. Both the public and other carriers are better served by permitting Qwest and CLECs to agree on processes for the implementation of specific terms, rather than requiring the Commission to review, consider, and approve each implementation detail that Qwest undertakes or to which the parties agree that Qwest shall undertake. Indeed, the Department apparently has not given much thought to the avalanche of filings that it seeks to import into Section 252. Such a process would be highly unworkable, and would discourage the kind of cooperation that the Act is intended to promote. Indeed, requiring such details to be filed, reviewed, and approved by the Commission would create an enormous impediment to routine business operations, and would have the effect of chilling communications with wholesale customers. Moreover, such an interpretation of Section 252 would create an enormous amount of work for the Commission, making it effectively impracticable for it to review and approve every new detail of the business relationships between ILECs and CLECs. Such a scheme is neither pro-competitive nor pro-consumer by any stretch of the imagination.

RESPONSE TO SPECIFIC FACTUAL ALLEGATIONS

THE ESCHELON AGREEMENTS

A. The UNE Star Platform

7. Eschelon and McLeodUSA are the only two CLECs that operate in Minnesota that have selected an unbundled network element platform called UNE Star (also known as "UNE-E" when provided to Eschelon, and "UNE-M" when provided to McLeodUSA). Qwest provided this platform because, among other things, these wholesale customers wanted to receive a weighted average rate for UNE-P elements for their business customers, and flat-rate tiered pricing for certain interconnection usage elements, and were willing to pay for these selected features at the rates negotiated in interconnection agreements subsequently approved by this Commission.

8. Qwest offered the UNE Star platform to CLECs at a price and on terms that reflected the costs associated with developing, implementing, and providing the platform. Qwest also required CLECs wishing to purchase the UNE Star platform to make total and annual minimum purchase commitments over a multi-year minimum term; it imposed a significant penalty if the CLEC did not meet those minimum commitments; it required "bill and keep" for reciprocal compensation, including Internet-bound traffic ("ISP traffic"); it required a one-time, lump sum conversion charge to convert the embedded base; it restricted the offering to business customers; and it required updated forecasts by the CLECs for purposes of adjusting price points to be in alignment with ordered rates.

9. Eschelon agreed to purchase the UNE Star platform by an agreement dated November 15, 2000. In this agreement, Eschelon agreed to purchase a minimum of $150,000,000 in Qwest telecommunications products over five years, to pay Qwest $10,000,000

to convert to the UNE Star platform, to purchase a minimum of 50,000 business access lines from Qwest in each of the five calendar years of the agreement, to provide forecasted data, and to move to a bill and keep arrangement for local traffic and ISP traffic, and to move to a bill and keep arrangement for local traffic, including internet-bound traffic. See Interconnection Agreement Amendment Terms, §§ 2.1, 2.2, 2.3 (Exhibit 1.). This agreement was filed with the Commission as an Interconnection Agreement Amendment on December 6, 2000, and the Commission approved the filing on January 26, 2001.

Eschelon Agreement I

10. Paragraphs 30 through 57 of the Complaint relate to the February 28, 2000 *Confidential/Trade Secret Stipulation Between ATI and U S WEST* ("Eschelon Agreement I").

A. Reciprocal Compensation

11. The Complaint quotes paragraph 7 of Eschelon Agreement I, which contains a provision by which "the parties agree that for settlement purposes that reciprocal compensation for terminating internet traffic shall be paid at the most favorable rates and terms contained in an agreement executed to date by [Qwest's predecessor, U S WEST]."

12. Qwest and other ILECs have long contended that they are not obligated to pay reciprocal compensation for terminating Internet-bound traffic.

(a) At the time the Eschelon Agreement I was made, the FCC had concluded that Internet-bound traffic was jurisdictionally interstate, but that state commissions could determine (1) whether *pre-existing* interconnection agreements contemplated reciprocal compensation for such traffic, as well as (2) whether *future* interconnection agreements going forward should provide for compensation for such traffic. Intercarrier Compensation for ISP-Bound Traffic, 14 FCC Rcd 3689 (1999), remanded sub nom. Bell Atlantic Tel. Cos. v. FCC,

206 F.3d 1 (D.C. Cir. Mar. 24, 2000). While the Minnesota Commission had determined that certain specified *pre-existing* agreements contemplated reciprocal compensation for Internet-bound traffic, see U S WEST Communications Inc., Docket No. P-421, M-99-529, 1999 WL 1455079 (Minn. PUC, Aug. 17, 1999), the Commission had never addressed whether future interconnection agreements should provide for such compensation for such interstate traffic. Thus, the federal treatment of reciprocal compensation on a going forward basis was certainly in doubt for both Eschelon and Qwest.

(b) Because the federal trend was toward treating Internet-bound traffic as interstate calls not subject to reciprocal compensation, there was a compromise by both parties of their individual positions on reciprocal compensation. At a minimum, Qwest acted in good faith in interpreting this unresolved area of the law as not requiring it to file this term of Eschelon Agreement I with the Commission.

(c) Moreover, even if the law had been clear (although it was not) that agreements concerning compensation for Internet-bound traffic had to be filed as interconnection agreements, the provision at issue in the Eschelon I agreement clearly did not have to be filed because it did not provide any specific terms and conditions for the treatment of that traffic. By agreeing to give Eschelon compensation "at the most favorable rates and terms contained in an agreement executed to date," Qwest did no more than assure Eschelon that it would comply with Section 252(i) of the Act, as it would have been obligated to do in any case (assuming that the subject of the agreement was properly the subject of interconnection agreements under Sections 251 and 252). Eschelon – and all other CLECs – would already have been entitled to this same assurance, so this provision of the agreement adds nothing.

13. Eschelon billed Qwest for reciprocal compensation under Eschelon's Interconnection Contract for Minutes of Use ("MOU") for usage for months of March through November 2000. Because Eschelon and Qwest modified the existing Interconnection contract reciprocal compensation term and terminated the February 28, 2000 term for Internet related traffic on November 15, 2000, Qwest only paid for usage through September 30, 2000. See Interconnection Agreement Amendment Terms, §§ 1.2, 2.5, 3.5 (Exhibit 1). Effective October 1, 2000, Eschelon and Qwest began operating under a "bill and keep" arrangement in which neither party billed each other for local and ISP traffic going forward. See Interconnection Agreement Amendment Terms, § 1.2 (Exhibit 1). This new agreement was filed with the Commission.

14. The rates that Qwest paid to Eschelon for MOUs billed by Eschelon were the local switching and tandem transmission rates that were the final ordered rates from the Commission associated with the Minnesota Generic Cost Docket Proceedings. The MOUs billed by Eschelon were not split between voice or ISP traffic.

15. The rates in effect for reciprocal compensation between ATI, now known as Eschelon, and U S WEST relating to terminating Internet traffic, as of February 29, 2000, were based on the rates that were already contained in the interconnection agreement that was filed by the parties and previously approved and on file with the Commission. Eschelon bills to Qwest reflected at rate $0.0058, a combination of multiple interim rate elements. Those rates, which were subsequently approved as final rates by this Commission, were the basis for compensation for usage for the period through September 30, 2000. The interconnection agreement between Cady Telemanagement, Inc. and U S WEST was filed on August 20, 1999, and approved by the Commission on October 4, 1999.

16. Qwest had a good faith belief that this term of the agreement did not need to be filed as an interconnection agreement amendment for the reasons discussed above. In any event, this agreement was a settlement of disputed claims. By entering into this settlement agreement with Eschelon, Qwest did not discriminate against other carriers because Qwest paid Commission-approved rates.

B. Termination Liability Assessments

17. The Complaint quotes paragraph 10 of Eschelon Agreement I, which contains a provision by which "[w]ith respect to termination liability assessments (TLA) and while the Minnesota Commission continues to have an open the docket on this issue, [U S WEST] agrees to continue to suspend such assessments in Minnesota when a [U S WEST] customer converts to an ATI customer on a resale basis and to credit ATI with any such TLA payments ATI has made in Minnesota."

18. On October 13, 1998, following U S WEST's filing of tariff and price list revisions imposing termination charges on contract customers choosing to substitute a reseller for U S WEST as the provider of contract services, the Commission ordered U S WEST to stay all TLAs, pending a final PUC order (the "Interim TLA Stay Order"). Order Rejecting Tariff/Price List Revisions, Clarifying Practical Effect of Filing, and Staying Implementation of Future Tariff/Price List Revisions, docket No. P-421/EM-98-769 (Oct. 13, 1998).

19. Eschelon and U S WEST disputed the applicability of the Interim TLA Stay Order. In order to resolve this dispute, U S WEST agreed to suspend TLAs pending a final Commission order.

20. Because the Commission had not issued a final order on TLAs, but instead had only stayed their imposition, U S WEST sought to preserve its right to seek payment of TLAs

from Eschelon. When the Commission issued a final order disapproving Qwest's TLAs on July 24, 2001, no further action was required. See Order Rejecting Tariff/Price List Revisions, docket No. P-421-AM-00-1165 (October 2, 1998).

21. Qwest had a good faith belief that this term of the agreement did not need to be filed as an interconnection agreement amendment for two reasons. First, the agreement concerns the imposition of TLAs on retail customers who choose to shift their service from Qwest to Eschelon. The terms of retail services that Qwest provides to end users are not properly the subject of filed interconnection agreements under Section 251 and 252. Second, the agreement involved nothing more than a promise to comply with a Commission order in the manner interpreted by Eschelon. Therefore, by definition, it did not result in any discrimination.

C. Coach and Service Delivery Coordinator

22. The Complaint quotes paragraphs 11 and 12 of Eschelon Agreement I, which contains a provision by which Qwest agreed to locate a Coach and a Service Delivery Coordinator on Eschelon's premises, and to dedicate a provisioning team to handle order processing.

23. Qwest does not believe that such a provision is properly the subject of an interconnection agreement amendment. While Qwest may have a general obligation to make available certain provisioning processes and arrangements through interconnection agreements on a non-discriminatory basis, that does not apply to the very specific implementation details that, by their nature, can apply only to Qwest's arrangements for a single CLEC. Consistent with this good faith understanding, Qwest filed an Interconnection Agreement Amendment stating that "[f]or at least a one-year period, Eschelon agrees to pay Qwest for the services of a Qwest dedicated provisioning team to work on Eschelon's premises." See Interconnection Agreement

Amendment Terms, §§ 2.10 (Exhibit 1.) This provision allowed other CLECs to opt into the dedicated provisioning team term if they chose. Qwest fully satisfied its obligation under Section 252 in this manner.

24. The specific arrangements between Qwest and Eschelon are simply one example of the steps that Qwest takes to assist CLECs with Operations Support Systems ("OSS") matters. By way of background, at the time that Qwest and Eschelon entered into the operating arrangement regarding the Coach, the Service Delivery Coordinator, and the dedicated provisioning team, Eschelon's orders were rapidly increasing each month. A high proportion of these orders were rejected, either because Eschelon's personnel did not enter the correct keystrokes in the order forms or because Qwest's personnel were erroneously rejecting correct order forms. Qwest and Eschelon were spending an inordinate amount of time resolving orders that were rejected by Qwest's IMA systems, and Eschelon could not convert wholesale customers that it had won onto its network. As a result, Eschelon and Qwest determined that the most efficient and prudent manner in which to handle this issue was to locate Qwest personnel from its Minneapolis office at Eschelon's Minneapolis offices to resolve order issues. See Total Eschelon LSR's Received and Rejected by Month for Year 2000 (Exhibit 2).

25. The Coach and the Service Delivery Coordinator worked with two service managers to comprise the provisioning team at Qwest assigned to Eschelon. As reflected in the Interconnection Agreement Amendment quoted in the Complaint, Eschelon agreed to pay Qwest for the services of the Coach and the Service Delivery Coordinator at the rate of $9,206 per month. (Exhibit 1, § 2.10; Complaint ¶ 64.) Eschelon has continued to pay for the salary, benefits, and overhead of these personnel, and Qwest has continued to provide the Coach and Service Delivery Coordinator. Both parties have found that the business arrangement improves

services to Eschelon's retail customers, including retail customers in Minnesota, and allows Eschelon and Qwest to resolve problems up front.

26. Qwest has dedicated provisioning teams for other wholesale customers where their order volume justifies it. Where CLECs have smaller order volumes, Qwest service personnel handle multiple CLECs. However, Qwest provides qualitatively the same services to all CLECs, and the level of service that Qwest provides to other CLECs does not differ regardless of whether they are handled by a dedicated provisioning team or a single service representative.

27. Qwest does extensive performance tracking as part of the process of its seeking entry into the long distance market. This service tracking involves monitoring nearly 800 different service metrics for all CLECs. These service metrics show that Qwest's service has improved continually for all CLECs since it merged with U S WEST in 2000. See Final January 2002 Key Metrics, (Exhibit 3); Qwest Wholesale Markets, Service Delivery Results December 2001, (Exhibit 4). In short, Qwest routinely takes both general and individualized steps to assist its wholesale customers with their ordering and service provisioning activities. There is no requirement under Section 252 of the Act that Qwest set forth all of the details of these activities in a filed interconnection agreement.

D. Dispute Resolution

28. The Complaint quotes paragraph 14 of Eschelon Agreement I, which contains a provision by which the parties agreed to alternative dispute resolution procedures. The Department contends that the October 1, 2001 *Statement of Generally Available Terms and Conditions for Interconnection, Unbundled Network Elements, Ancillary Services and Resale of Telecommunications Services Provided by Qwest Corporation in the State of Minnesota*

("SGAT") does not contain all of the terms and conditions found in Eschelon Agreement I. The Department concedes that the SGAT contains extensive dispute resolution procedures. These procedures include business-to-business meetings between vice presidents or employees with decisionmaking authority, mediation of disputes, arbitration, and enforcement of the arbitrator's award. See SGAT § 5.18 (Exhibit 5). The template agreement in effect in April 2000 had similarly detailed dispute resolution provisions. See U S WEST Template Local Interconnection Agreement § (A)3.17 (Exhibit 6). However, the fact that the SGAT and the template agreement voluntarily contain discussion of this topic does not constitute a concession that such detail is required by Section 252. Qwest provides generic information to expedite negotiations on these points. However, Section 252 does not require Qwest to file carrier-specific details.

29. Dispute resolution provisions are integrally connected to how Qwest and individual CLECs manage their business-to-business relationship with one another. Because CLECs vary in size, service sensitivity, and problem-solving approaches, Qwest has found it impracticable to make such procedures and arrangements "generic."

30. As a policy matter, Qwest and CLECs should be encouraged to work out such matters, rather than clogging administrative and court the dockets with historical disputes that could be resolved through other means.

31. Qwest attempts to provide for alternative dispute resolution for all CLECs because it is more efficient and cost effective for the parties to resolve historical disputes short of administrative complaints or litigation. Qwest does not believe that the different details of the alternative dispute resolution procedures are within the scope of matters required to be filed under Section 252 of the Act. Qwest also denies that the dispute resolution arrangements with Eschelon constitute unlawful discrimination in violation of the Act.

Eschelon Agreement II

32. Paragraphs 58 through 71 of the Complaint relate to the July 21, 2000 *Trial Agreement* ("Eschelon Agreement II").

A. Dedicated Provisioning Team

33. The Complaint discusses Eschelon Agreement II, which contains provisions by which Eschelon and Qwest agreed to a trial of the dedicated provisioning team. See Complaint paragraphs 64-71.

34. Qwest incorporates by reference its responses regarding Eschelon Agreement I above. As reflected in those paragraphs, Qwest has determined that Eschelon's order volume and rejected order rate make a dedicated provisioning team an efficient and cost-effective business solution. Consistent with this good faith understanding, Qwest filed an Interconnection Agreement Amendment stating that "[f]or at least a one-year period, Eschelon agrees to pay Qwest for the services of a Qwest dedicated provisioning team to work on Eschelon's premises." See Interconnection Agreement Amendment Terms, §§ 2.10 (Exhibit 1). This provision allowed other CLECs to opt into to the dedicated provisioning team term if they chose. (Of course, the price of the provisioning team would depend on the cost to Qwest of meeting the specific CLEC's needs, including the number of personnel and the geographic location where the team would be asked to locate.)

35. Despite the filed Interconnection Agreement Amendment, no other CLEC has requested an on-site dedicated provisioning team. Qwest provides the same service level to other CLECs, regardless of whether they have a dedicated provisioning team or work with a service manager. As discussed above, Qwest tracks an extensive number of service metrics for all of its wholesale customers, and those service metrics demonstrate the high levels of service that Qwest

provides to all of its wholesale customers. See Final January 2002 Key Metrics [Excel spreadsheet], (Exhibit 3); Qwest Wholesale Markets, Service Delivery Results December 2001 [PowerPoint], (Exhibit 4).

36. Qwest had a good faith belief that this operating arrangement did not need to be filed as an interconnection agreement amendment because it was already the subject of an amendment, and because it relates to the detailed implementation of a business-to-business relationship between Eschelon and Qwest. By entering into this arrangement with Eschelon, Qwest did not discriminate against other carriers.

Eschelon Agreement III

37. Paragraphs 72 through 91 of the Complaint relate to the November 15, 2000 *Escalation Procedures and Business Solutions Letter* between Eschelon and Qwest ("Eschelon Agreement III").

A. Escalation Procedures

38. The Complaint quotes Sections 2 and 3 of Eschelon Agreement III, which provide for quarterly executive meetings and a six-level escalation process.

39. As the Department concedes, section 1.3 of the Interconnection Agreement Amendment 8 states that "[t]he Parties wish to establish a business-to-business relationship and have agreed that they will attempt to resolve all differences or issues that may arise under the Agreements or this Amendment under an escalation process to be established between the parties." See Interconnection Agreement Amendment Terms, § 1.3 (Exhibit 1.)

40. Qwest's intent in entering into the escalation procedure with Eschelon was to improve Qwest's business-to-business relationship with Eschelon, in the belief that if the two

companies could discuss problems, they could resolve them without resorting to the regulatory process.

41. The specific details of escalation procedures are integrally connected to how Qwest and a CLEC manage their specific business-to-business relationship with one another. Because CLECs vary in size, service sensitivity, and problem-solving approaches, Qwest has found it impracticable to make such procedures and arrangements "generic."

42. As a policy matter, Qwest and CLECs should be encouraged to work out such matters, rather than clogging administrative and court dockets with historical disputes that could be resolved through business-to-business meetings.

43. Qwest attempts to provide for formal or informal escalation procedures for all CLECs because it is more efficient and cost effective for Qwest and the CLEC to resolve historical disputes short of administrative complaints or litigation. Qwest does not believe that the particular details of the escalation procedures are matters arising under Section 251 of the Act that must be filed with the Commission under Section 252.

44. Qwest had a good faith belief that this operating arrangement did not need to be filed as an interconnection agreement amendment because it was already the subject of an amendment, and because it relates to the detailed implementation of a business-to-business relationship between Eschelon and Qwest. By entering into this agreement with Eschelon, Qwest did not discriminate against other carriers.

B. Waiver of Primary Jurisdiction and Waiver of Tariff Limitation on Damages

45. The Complaint quotes section 3 of Eschelon Agreement III, by which Eschelon and Qwest agreed to waive primary jurisdiction in any state utility or service commission and to waive tariff limitations on damages or other limitation on reasonably foreseeable damages.

46. The specific details of escalation and dispute resolution procedures are integrally connected to how Qwest and a CLEC manage their business-to-business relationship with one another. Because CLECs vary in size, service sensitivity, and problem-solving approaches, Qwest has found it impracticable to make such procedures and arrangements "generic." In this case, the parties agreed to a dispute resolution process designed to minimize the likelihood and incentive for either party to pursue disputes in court, and instead encouraged them to follow the substitute process of private dispute resolution and arbitration. As part of that process, the parties defined the terms of "Level 6" dispute resolution – court litigation – which was the highest form of dispute resolution and one that the parties expected and intended to avoid. The waiver of primary jurisdiction and damages limitations created an additional incentive for the parties to resolve their differences short of "Level 6" litigation.

47. Qwest does not believe that the particular details of the escalation and dispute resolution procedures agreed to with Eschelon are matters arising under Section 251 of the Act that must be filed with the Commission under Section 252. In any event, no dispute between Eschelon and Qwest has gone to "Level 6," so the provision has never been invoked.

Eschelon Agreement IV

48. Paragraphs 92 through 114 of the Complaint relate to the November 15, 2000 *Confidential Amendment to Confidential/Trade Secret Stipulation* ("Eschelon Agreement IV").

A. Consulting and Network-Related Services Agreement

49. The Complaint quotes paragraph 3 of Eschelon Agreement IV, which contains a provision by which Eschelon agreed to provide Qwest with consulting services and network-related services. Specifically, paragraph 3 obligates Eschelon to provide Qwest with "consulting and network-related services, including, but not limited to processes and procedures relating to

wholesale service quality for local exchange services." Eschelon Agreement IV, ¶ 3. The consulting services include advice on improving processes for "loop cutover and conversions, repair, billing, and other items" and "all lines of business and local market entry used by Eschelon." Eschelon Agreement IV, ¶ 3. The network-related services included telecommunications services that Qwest would acquire from Eschelon. As the Department notes, the compensation for the services was set at "ten percent (10%) of the aggregate billed charges for all purchases made by Eschelon from Qwest" over a five-year term. Eschelon Agreement IV, ¶ 3. The Department contends that paragraph 3 "has either the intended or unintended effect of disguising Qwest's agreement to provide Eschelon with rates for unbundled network elements, telecommunications products and/or services that are below the Commission-approved rates Qwest provides to other CLECs." (Complaint ¶ 107.)

50. This is incorrect. Eschelon and Qwest entered into the consulting and network-related services agreement with the good faith belief that Eschelon could provide bona fide services of considerable value to Qwest. Eschelon held itself out as an experienced CLEC that could help Qwest better understand and serve the needs of CLECs in the wholesale market and could help Qwest develop processes, would be buying a sufficient amount of new services and be expanding in new areas that would give them the expertise to advise Qwest, provide extensive market research and industry analysis, and provide regulatory advice and support, thus allowing Qwest an expedient way to improve its service and operational performance in this market, with the corollary effect of expediting its satisfaction of the requirements of section 271 for entry into the long distance markets – a matter of considerable significance and value to Qwest. In addition, Eschelon offered to provide assistance to Qwest insofar as the company planned to expand its own out-of-region CLEC business, an area where Eschelon had access to industry

expertise and experience. Eschelon indicated that, in providing these services, it would address business issues with Qwest through the dispute resolution processes discussed above, and not through intervention in regulatory proceedings.

51. In developing a measure of the value of the consulting services and network-related services that Qwest would agree to purchase from Eschelon, Qwest determined that $15 million would be a fair amount over the five-year contract period, especially in light of the ultimate value to Qwest of the expected Eschelon contributions. Eschelon expected to be growing its services and expanding in new areas, giving it the expertise to advise Qwest and offer new network-related services. However, the value of the future Eschelon services was seen as depending on whether Eschelon over or under-achieved its goals of expanding its scope and position in the telecommunications marketplace. It was estimated that $15 million would be equivalent to approximately 10% of the then-projected purchases by Eschelon from Qwest under their purchase agreement, but the parties agreed to make the ultimate payment for services float based on whether, and how much, Eschelon achieved its growth and increased its experience over the term, thereby ensuring adequate value to Qwest for the purchases it was agreeing to make.

52. When the parties entered into the consulting and network-related services agreement, Eschelon and Qwest had been spending a considerable amount of time, effort, and expense attempting to resolve Qwest's difficulties in coordinating unbundled loop conversions for service to Eschelon's retail customers. Eschelon had prior experience in working with other CLEC companies on the East Coast in unbundled loop conversion. When the parties began implementing the consulting and network-related services agreement, Qwest realized that Eschelon's expertise in unbundled loop conversion could provide significant assistance to Qwest,

while reducing service cutoffs to Eschelon's and other CLEC's retail customers. Qwest also believed that Eschelon could provide assistance with collocation and DSL services.

53. To facilitate the exchange of ideas on unbundled loop conversion, Eschelon and Qwest established an unbundled loop conversion setup team. The team met weekly in person or by telephone to discuss specific orders for loop conversion, evaluate the week's performance, and analyze the problems that occurred. These meetings still occur biweekly and have resulted in changes to Qwest's internal processes that provide benefits to all wholesale customers. For example, through these meetings, Qwest determined that the logs completed by its testers were insufficiently detailed to track what happened to each order from the time it was received to the time it was fulfilled. Qwest now keeps detailed logs that assist in its determination where resources are being applied and whether they are being used to maximum benefit. Other examples of changes that occurred as a result of Eschelon's assistance include testing for a dial tone forty-eight hours before Qwest switched a customer from itself to Eschelon, rather than Qwest's prior practice of cutting a loop and taking a customer down, at times for days. See Attached Sampling of Unbundled Loop Conversion documents (Exhibit 7).

54. Eschelon also provided advice and assistance regarding Qwest's wholesale DSL service from approximately January through June 2001. In January 2001, Qwest's primary experience was with retail DSL, rather than the wholesale DSL service that Eschelon was purchasing for resale to its own retail customers. At the time, Eschelon desired to be one of Qwest's first DSL wholesale customers, and Qwest did not have an order process for wholesale DSL. During the January through June time period, representatives from Eschelon and Qwest met every day by telephone or in person for three months, and with less frequency thereafter. Eschelon provided advice and assistance regarding loop conversion for DSL with separate teams

that focused on order fulfillment, provisioning, installation, test and turn up, and repair. The order fulfillment team was the largest team, involving as many as twenty people from Eschelon alone, and it met once or twice a week, ultimately developing flow charts for order processing that continue to be used by Qwest at the present time. See Attached Sampling of DSL Documents (Exhibit 8). The wholesale experiences gained from Qwest's work with Eschelon allowed Qwest to offer a DSL product to other wholesale customers in the emerging market division.

55. Qwest paid Eschelon a total of $2,540,016 under the terms of the consulting services and network-related services agreement, for services rendered through September 30, 2001. Qwest has not made any payments under the consulting and network-related services agreement to Eschelon since November 9, 2001.

56. Qwest had a good faith belief that this provision did not need to be filed as an interconnection agreement amendment because it related to bona fide consulting and network-related services to be provided by Eschelon to Qwest, rather than a term of interconnection. By entering into this agreement with Eschelon, Qwest did not discriminate against other carriers because Eschelon was uniquely situated to provide these services, and in any event, purchases for consulting and network-related services are not regulated under the Telecommunications Act. Qwest specifically denies the Department's allegation in paragraph 105 that the consulting services provided by Eschelon "require work no different than the work that any CLEC would do to improve Qwest's provisioning of services to it, if given the opportunity."

57. Qwest has now determined that, because the vehicle to determine the annual payment under the consulting and network-related services agreement applies to "all purchases," it was drafted too broadly, and confusingly references tariffed and other services. Qwest

continues to believe that it is not unlawful to pay for consulting services on the basis of the measure set forth in the Agreement, and that the services it received and/or anticipated to receive from Eschelon justified the payments that have been made. However, Qwest also recognizes that the Agreement could be read as an unfiled agreement that is in violation of the filed rate doctrine and Section 252, in which case the Agreement would be void and unenforceable *ab initio*. See Maislin Industries, U.S., Inc. v. Primary Steel, Inc., 110 S. Ct. 2759, 2766 (1990) ("The legal rights of shipper as against carrier in respect to a rate are measured by the published tariff. Unless and until suspended or set aside, this rate is made, for all purposes, the legal rate, as between carrier and shipper. The rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier. . . . This stringent rule prevails, because otherwise the paramount purpose of Congress – prevention of unjust discrimination – might be defeated." (quoting Keogh v. Chicago & Northwestern R. Co., 260 U.S. 156, 163 (1922))). Qwest has ceased paying Eschelon for consulting and network-related services based on all purchases. The consulting and network-related services agreement has been terminated as of March 1, 2002. In the event that the Commission finds that the consulting and network-related services agreement was unlawful, that agreement will be unwound, and Qwest will compensate Eschelon for the consulting services received to date on another basis.

B. Pro Rata Credit for Switched Access Dispute

58. The Complaint quotes paragraph 3 of Eschelon Agreement IV, which contains a provision by which Qwest agreed to credit Eschelon $13 (or a pro rata portion thereof) “For any month (or partial month), from November 1,2000 until the mechanized process is in place, during which Qwest fails to provide accurate daily usage information for Eschelon’s use in billing switched access, Qwest will credit Eschelon $13.00 (or pro-rata portion thereof) per

platform line per month as long as Eschelon has provided the WTN information to Qwest." The Department misconstrues this provision as a "rate refund," rather than a proactive billing settlement approach pertaining to the accuracy of Qwest's switched access data under the manual work-around process for UNE Star until a mechanized process is in place. As described below in more detail, the credit methodology gave Eschelon, on an interim basis, the difference between $13 per line per month and the average carrier access charges that Eschelon collected based on the usage data received from Qwest.

59. The pro rata credit for the switched access billing dispute came about because of the unique, new UNE Star platform. Wholesale customers that are on Qwest's UNE-P platform receive Daily Usage Files ("DUFs") through a mechanized process that provides them with switched access minutes in industry-standard EMI format. Because the UNE Star platform was developed as result of the negotiated interconnection agreement amendments, both parties were working on billing processes for switched access. Qwest believed that by the end of November 2000 it would have a process in place to provide accurate daily usage information for Eschelon's use in billing switched access. In addition, Qwest anticipated that a mechanized process under the UNE Star platform would be available by March 2001. As a result, Eschelon was situated uniquely on the UNE Star platform vis a vis other wholesale customers on the UNE-P platform.

60. Qwest provided to Eschelon what it believed was accurate switched access records for usage beginning in October 2000. Eschelon became of the opinion that the switched access usage data provided by Qwest showed less usage than Eschelon expected, and hence resulted in lower access billing by Eschelon at its access rates, and lower access revenues. Eschelon did sampling from its own switches, and argued that in its view, based on the industry average of access minutes per line, Eschelon felt that it was not receiving accurate switched

access data from Qwest. In February 2001, Eschelon notified Qwest that it was retaining Price Waterhouse Coopers to conduct an audit and test call trial for daily usage of switched access records under the UNE Star Platform. In addition, Eschelon also notified Qwest that it intended to enforce the interim billing settlement provision in the agreement related to the $13 per UNE Star line credit methodology.

61. Qwest continued to, and still does today, believe it is providing Eschelon accurate switched access records. However, Qwest and Eschelon wanted to avoid complaints and find business solutions to their problems. As reaffirmed in Eschelon Agreement V, as an interim measure, Qwest would pay the difference between the interim amount of $13 per line (subsequently increased to $16) and the amount that Eschelon was able to bill interexchange carriers for switched access, subject true-up based on the final resolution of the disputed issue.

62. In March 2001, Qwest made available to Eschelon a mechanized process, which Eschelon declined to utilize. Additionally, in July 2001, to resolve the dispute, Qwest agreed to a joint audit with Eschelon to review the switched access data that Qwest was providing under the manual process for UNE Star. Again, as an interim measure subject to true-up, Qwest would pay the difference between the interim amount of $13 (subsequently increased to $16) per line and the amount that Eschelon was able to bill interexchange carriers for switched access. In July 2001, Qwest engaged its auditors, Arthur Anderson, who later concluded that Qwest was providing accurate switched access records. Qwest stopped making the interim adjustments at the interim amount of $16 per UNE Star line, effective with July 2001 usage and notified Eschelon that a true-up may be necessary to Qwest.

63. Qwest had a good faith belief that this proactive dispute resolution mechanism was unique to Eschelon, and thus did not need to be filed as an interconnection agreement

amendment because it involved the settlement of a bona fide dispute between Eschelon and Qwest. By entering into this agreement with Eschelon, Qwest did not discriminate against other carriers. To the extent that this arrangement should have been filed and approved under Section 252 but was not, it was void and would need to be unwound.

Eschelon Agreement V

64. Paragraphs 115 through 126 of the Complaint relate to the *Status of Switched Access Minute Reporting Letter* dated July 3, 2001 ("Eschelon Agreement V").

A. Interim Increase in Pro Rata Credit Methodology for Switched Access Dispute

65. The Complaint discusses a provision of Eschelon Agreement V, which contains a provision by which Qwest agreed to increase the $13 per line per month pro rata credit methodology for switched access payments to $16 per line per month on an interim basis.

66. As described above, following the interim agreement to the $13 per line per month pro rata credit methodology in Eschelon Agreement IV, Eschelon continued to dispute the accuracy of Qwest's switched access data. Eschelon complained that it was earning less than this amount from its own switched access bills to interexchange carriers due to inaccuracies in the switched access minutes of use per line it received from Qwest. Eschelon was also raising other service quality disputes.

67. As described above, to avoid complaints and to find business solutions to the dispute, Qwest agreed to a joint audit and increased the interim dispute resolution methodology to $16 per line per month (subject to final true-up). Qwest anticipated that the audit process would take approximately 60 days to close. Under the provisions of Eschelon Agreement V, Qwest had the right to true-up the switched access payments after the completion of the audit.

68. Eschelon and Qwest each retained its own auditors to conduct the switched access audit. Eschelon and Qwest have not been able to close the audit because they have disagreed over the methodology and validity of each other's auditors' findings.

69. Qwest gave Eschelon the proportionate pro rata credit based on the $16 per line per month target for the period January 2001 through June 2001 usage. (Eschelon's September 2001 invoice reflected June switched access minutes.)

70. As discussed above, Eschelon's purchase of the UNE Star platform made it uniquely situated because it did not receive DUFs. Instead, it relied on Qwest provision of the switched access records through a manual process. In addition, the dispute referred to above remains unresolved, and Eschelon insists on continued use of the manual process even though a mechanized process has been available since March 2001. In another effort to resolve and prevent future disputes, in November 2001, Qwest proactively started sending DUF under the mechanized process, which is the same process followed under UNE-P. To date and to Qwest's knowledge, Eschelon has not utilized the mechanized process.

71. Qwest had a good faith belief that this interim billing dispute methodology did not need to be filed as an interconnection agreement amendment because it related to the settlement of a bona fide dispute between Eschelon and Qwest regarding the provisioning of switched access billing information. By entering into this agreement with Eschelon, Qwest did not discriminate against other carriers. No other carrier was similarly situated – *i.e*., purchasing UNE Star service and disputing its switched access usage feeds.

B. Dispute Regarding Eschelon Access Charges

72. The Verified Complaint quotes a paragraph of Eschelon Agreement IV by which Qwest agreed to pay Eschelon $2 per line per month for Qwest's intraLATA toll traffic

terminating to customers served by an Eschelon switch, subject to true up, until Eschelon and Qwest resolve the issue.

73. Eschelon and Qwest had a bona fide dispute over what Qwest owed to Eschelon for access charges for intraLATA toll traffic. Qwest believed that Eschelon's terminating access rates were unreasonable insofar as they substantially exceeded Qwest's own terminating access rates. On information and belief, Qwest believes that other interexchange service providers have challenged the levels of Eschelon's access rates. In addition, Qwest believed that it had been overbilled by almost 43 million minutes of use, at Eschelon's intrastate switched access rates, for the period January 2001 through June 30, 2001. Eschelon did not respond to Qwest dispute inquiries, thus Qwest had not made any payments for that period of time. In an email from William Markert of Eschelon, dated January 15, 2002, Eschelon acknowledged that Qwest should ignore the invoices received to date as the traffic may be local, as opposed to toll, and that Qwest should not be receiving additional invoices. For the period January through December 2001, Qwest believes it was overbilled by approximate 95 million minutes of use at the intrastate switched access rate. Eschelon and Qwest agreed to an interim amount of $2 per line per month until final resolution of the dispute.

74. This agreement cannot be the basis for any claim against Qwest. First, it relates to access service provided by Eschelon to Qwest, and not to a service or element provided by Qwest to Eschelon. Section 252 does not require the filing of terms and conditions of services provided by CLECs such as Eschelon. Moreover, the Commission does not materially regulate Eschelon's access rates. In addition, the FCC has made it very clear that interstate and intrastate access charges, respectively, are subject to the federal and state regulatory regimes that predate the enactment of the Telecommunications Act of 1996, and that access charges are not subject to

the provisions of Sections 251 and 252. *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, ¶¶ 176, 1033-35 (1996), *aff'd in pertinent part sub nom.* Competitive Telecommunications Ass'n v. FCC, 117 F.3d 1068 (8th Cir. 1997); *subsequent history omitted*. Therefore, agreements concerning the payment of access charges cannot be filed as interconnection agreements.

Eschelon Agreement VI

75. Paragraphs 127 through 159 of the Complaint relate to the July 31, 2001 *Implementation Plan* ("Eschelon Agreement VI").

A. Service Management Team Meetings and Activities

76. The Complaint quotes paragraphs 2.1 through 2.1.3 of Eschelon Agreement VI, which contain a provision by which Qwest agreed to establish a service account team for Eschelon, set weekly meetings for that team, facilitate other meetings with subject matter experts, and provide Eschelon with policy and process change information electronically.

77. Qwest has service management teams for its other wholesale customers that meet monthly or on an as-needed basis to discuss service performance. Service managers are also available to address immediate concerns and current service issues. The service management teams facilitate meetings with other subject matter experts. Qwest provides product, process, Operations Support Systems ("OSS"), and change management information electronically to wholesale customers through its website. See Qwest Interconnect OSS Electronic Access, located at web address http://www.qwest.com/wholesale/clecs/electronicaccess.html (Exhibit 9). Qwest provides qualitatively the same services to all CLECs, and the level of service that Qwest provides to CLECs does not differ regardless of whether they are handled by a dedicated provisioning team or a single service representative. Qwest has a strong interest in resolving its

customers' service concerns before they escalate into an informal or formal complaint to the Commission.

78. Qwest had a good faith belief that this operating arrangement did not need to be filed as an interconnection agreement amendment because it was already the subject of an amendment and because it relates to the detailed implementation of a business-to-business relationship between Eschelon and Qwest. By entering into this agreement with Eschelon, Qwest did not discriminate against other carriers.

B. Escalation Chart

79. The Complaint refers to Attachment 2 to Eschelon Agreement VI, which is an escalation chart for service issues.

80. Attachment 2 to Eschelon Agreement VI is a standard chart used by Qwest with all of its wholesale customers. The only change that Qwest made to the chart was to insert Eschelon's name in place of another company's on the chart, and to insert the specific Qwest personnel who service the Eschelon account in the corresponding portions of the chart. See Escalation Charts (Exhibit 10).

C. Quarterly Executive Meetings

81. The Complaint quotes paragraph 2.3 of Eschelon Agreement VI, which contains a provision by which Eschelon and Qwest agree to have quarterly meetings between Dana Filip, a Senior Vice President at Qwest, and Richard Smith, President and Chief Operating Officer of Eschelon.

82. Filip and Smith had three or four quarterly meetings. Once Eschelon and Qwest had formalized their relationship and established a service scorecard, Filip and Smith agreed to discontinue their meetings and move them to the operations and service level.

83. The Qwest Wholesale Service Management team, along with a designated group of Eschelon Operational Management, form a working committee that meet on a monthly basis to address priority issues related to the delivery of service. This group also brings in ad hoc members, as appropriate, when additional subject matter expertise is required.

84. As reflected on Qwest's website, service managers provide the primary mechanism for the resolution of service issues with wholesale customers. Should a service manager be unable to resolve the service issue, the wholesale customer may escalate its complaint to a senior service manager, service director, senior service director, and then to a vice president. See Expedites & Escalations Overview - V3.0, located at web address http://www.qwest.com/wholesale/clecs/exescover.html ("Service Manager: Involved only after normal processes fail to resolve the escalation to your satisfaction. Evaluates the situation based on commitments managing associated resolution activities.") (Exhibit 11). Qwest has found that this escalation process resolves virtually all service issues with CLECs, including Eschelon.

85. As a senior vice president for wholesale service, Filip often attends quarterly meetings with wholesale customers, even absent a contractual agreement to do so. Her involvement depends on a variety of factors committed to business judgment and circumstances, including the order volume and service sensitivity of the particular customer.

86. Qwest had a good faith belief that this operating arrangement did not need to be filed as an interconnection agreement amendment because it relates to the detailed implementation of a business-to-business relationship between Eschelon and Qwest. By entering into this agreement with Eschelon, Qwest did not discriminate against other carriers.

D. Calculation of Local Usage Charges

87. The Complaint quotes paragraph 3.1 of the Eschelon Agreement VI, which contains a provision by which Eschelon and Qwest agreed to calculate local usage charges associated with UNE-P local switching on Eschelon's interLATA and intraLATA toll traffic, as agreed to in the Commission approved interconnection amendment 3.2, Section III B, under the procedures set forth in Attachment 3 to Eschelon Agreement VI.

88. Qwest had developed a mechanized process for billing local switching on switched access minutes for all carriers on the UNE-P platform. Because UNE Star was intended to be billed like UNE-P for local switching, Qwest and Eschelon created the calculation of local usage charges set forth in Attachment 3. The formula utilized the same local switching rate elements assessed for all UNE-P customers.

E. Meetings to Track Service Performance Measurements

89. The Complaint quotes paragraph 4 of Eschelon Agreement VI, which contains a provision by which Eschelon and Qwest agreed to track and report performance measurements of Qwest's performance, to hold monthly and quarterly meetings to review and trend the measurements, and to develop a joint action plan to achieve service excellence.

90. Qwest and Eschelon report on a monthly basis performance related to the provisioning, installation and maintenance of telecommunications services. Qwest provides to Eschelon Performance Indicator Definitions ("PID") data on a monthly basis. Eschelon provides to Qwest a similar performance report. The performance measures reported include New Service Installation Quality (OP-5), Installation Commitments Met (OP-3), Coordinated Hot Cut Interval (OP-7), Held Order Data (OP-6, OP-13), Jeopardy Notice Data (PO-9) and Repair Performance Data (MR-3,MR-5).

91. Part of the exchange includes investigation of Installation and Maintenance orders reported by Eschelon to Qwest that fail to meet the standards. Qwest investigates those orders reporting Root Cause back to Eschelon.

92. Qwest provides PID measures to all of its wholesale customers. At the customer's request, Qwest will develop scorecards to track and focus on particular PID measures of importance to the wholesale customer. This monitoring activity does not give Eschelon more rights or remedies than any other wholesale customer. See Final January 2002 Key Metrics, (Exhibit 3); Qwest Wholesale Markets, Service Delivery Results December 2001, (Exhibit 4).

93. As reflected above, Qwest routinely meets on a regular basis, whether monthly, quarterly, or as needed, with wholesale customers to discuss service issues. Qwest does not provide any different level of service to particular wholesale customers, and it sets service goals to be accomplished for all wholesale customers.

94. Qwest had a good faith belief that this operating arrangement did not need to be filed as an interconnection agreement amendment because it was already the subject of an amendment and because it relates to the detailed implementation of a business-to-business relationship between Eschelon and Qwest. By entering into this agreement with Eschelon, Qwest did not discriminate against other carriers.

F. Commercially Reasonable Efforts to Work on UNE-P Conversions

95. The Complaint quotes paragraph 8 of Eschelon Agreement VI, which contains a provision by which Qwest agreed to take commercially reasonable efforts to ensure that service provided to Eschelon's customers was not adversely affected during the process of converting Eschelon's customers to the UNE-P platform.

96. Qwest takes commercially reasonable steps with all of its wholesale customers to ensure that their end-users do not face service disruptions during conversions from one platform to another. Qwest's commitment to Eschelon in Eschelon Agreement VI represents no different standard or promise than Qwest provides to any other wholesale customer.

97. Qwest had a good faith belief that this operating arrangement did not need to be filed as an interconnection agreement amendment because it relates to the detailed implementation of a business-to-business relationship between Eschelon and Qwest. By entering into this agreement with Eschelon, Qwest did not discriminate against other carriers.

The Covad Agreement

98. Paragraphs 160 through 195 of the Complaint relate to the April 19, 2000 *U S WEST Service Level Agreement with Covad Communications Company* (the "Covad Agreement"). The Department contends that various service level goals agreed to by the parties constitute an agreement to provide access to unbundled network elements on specified terms and conditions, and therefore should have been filed as an interconnection agreement amendment. This is incorrect because those goals were consistent with Qwest's corporate service goals for all of its wholesale customers.

99. Prior to the formation of the Covad Agreement, Covad had expressed dissatisfaction regarding the measures U S WEST used to report its service quality to Covad. As a result, Covad and U S WEST sought to clarify Covad's expectations regarding U S WEST's service levels and the measures U S WEST would use when reporting its service performance to Covad.

100. In light of this history, Qwest has consistently treated the Covad Agreement as simply an articulation of Covad's desires and expectations for Qwest's service levels rather than an obligation for Qwest to attain particular standards.

101. As such, Qwest does not believe that the Covad Agreement must be filed as an interconnection agreement because Qwest did not provide a different level of service to any customer.

A. FOC Dates

102. The Complaint quotes section 1 of the Covad Agreement, which contains provisions by which U S WEST agrees to provide "90% of Covad's Firm Order Confirmation (FOC) dates within 48 hours of receipt of properly completed service requests for POTS unbundled loop services" and to notify Covad of "any facility shortages for DSL capable, ISDN capable and DS1 capable services within the same 48 hour period." U S WEST also agrees to provide "90% of Covad's FOC dates within 72 hours of receipt of properly completed service requests" for "DSL capable, ISDN capable and DS1 capable unbundled loop services" and, as part of that 72-hour FOC process, to "dispatch a technician to verify the existence of suitable facilities."

103. Qwest has not treated Covad's service requests any differently than those of other CLECs. In fact, Qwest's process for entering orders into the Qwest Service Order Processor and generating FOC dates operates on a "first in, first out" basis and is not capable of singling out any individual account for preferential treatment or advancing orders from any one customer in the queue for processing.

104. Moreover, the FOC targets contained in the Covad Agreement were actually less stringent than Qwest's own internal standards. Qwest's internal target at that time– for *all*

CLECs – for the types of services addressed in section 1 of the Covad Agreement was to provide 90% of FOC dates within 24 hours. See Qwest Communications Service Interval Guide for Resale and Interconnection Services. Accordingly, Qwest did not need to, nor did it, alter any of its processes or procedures for issuing FOC dates as a result of the agreement.

105. The Department contends that section 2.4 of Qwest's interconnection agreement with Eschelon and section 1.3.4 of Qwest's interconnection agreement with FirstCom contain a lesser commitment by Qwest regarding meeting FOC interval standards. On the contrary, the Eschelon and FirstCom agreements provide for "FOCs . . . to CLECs within a reasonable time, *no later than* 48 hours after receipt of complete and accurate orders." (emphasis added) Whereas the Covad Agreement limited any obligation by Qwest to 90% of orders, there is no similar limitation in the Eschelon or FirstCom interconnection agreements, yet the 48-hour time interval remains the same. Any CLEC could choose to opt into the 48-hour FOC provision through the Eschelon and FirstCom agreements. Regardless, Qwest has one process for issuing FOCs and that process applies to all CLECs.

106. The Department also contends that Covad received preferential treatment due to the notification provision in section 1. However, Qwest's standard internal procedures – applicable to all CLECs – required notification of facilities problems for Unbundled 2W Analog, DSL, ISDN, and DS1 capable services within the period for issuing a FOC. Covad was not treated any differently than other CLECs under Qwest's internal procedures.

107. The Department also asserts that Section 1, Part C, ¶ 6 of the Fourth Amendment to Qwest's interconnection agreement with New Edge Networks contains a lesser commitment by Qwest regarding dispatching a technician to verify the existence of suitable facilities prior to issuing a FOC date.

108. However, any difference between the Covad Agreement and the New Edge Networks agreement is illusory. Qwest's standard procedure is to dispatch a technician to verify the existence of suitable facilities for DSL capable, ISDN capable and DS1 capable unbundled loop services, regardless of whether Qwest has been requested to do so by a CLEC.

109. Qwest had a good faith belief that this operating arrangement did not need to be filed as an interconnection agreement amendment because it relates to the detailed implementation of a business-to-business relationship between Covad and Qwest. Moreover, this operating arrangement is already subject to an interconnection agreement amendment with a more stringent term. By entering into this arrangement with Covad, Qwest did not discriminate against other carriers because it provides the same level of service to all CLECs.

B. Loop Conditioning and Line Sharing

110. The Complaint quotes section 2 of the Covad Agreement, which contains provisions by which U S WEST agrees to provide Covad with "unbundled loop service that does not require loop conditioning . . . at least 90% of the time" and "line sharing service (access to the high-frequency spectrum network element) at least 90% of the time within the interval set forth in any line sharing agreement between Covad and U S WEST."

111. Section 2 merely memorialized Qwest's standard internal procedure regarding loop conditioning and line sharing service goals. Covad received no preferential treatment under these processes.

112. Qwest had a good faith belief that this operating arrangement did not need to be filed as an interconnection agreement amendment because it simply memorialized points for discussion in the course of routine business-to-business relations. By entering into this

arrangement with Covad, Qwest did not discriminate against other carriers because it provides the same level of service to all CLECs.

C. Incidence of Failure

113. The Complaint quotes section 3 of the Covad Agreement, whereby U S WEST agrees to "reduce the incidence of failure on new Covad circuits to less than 10% failure within the first 30 calendar days."

114. Qwest's internal target, both now and at the time the Covad Agreement was executed, is to ensure a less than 10% failure rate for all new circuits. This target applies for all CLECs, including Covad.

115. Qwest had a good faith belief that this operating arrangement did not need to be filed as an interconnection agreement amendment because it simply memorialized points for discussion in the course of routine business-to-business relations. By entering into this arrangement with Covad, Qwest did not discriminate against other carriers because it provides the same level of service to all CLECs.

D. Line Conditioning

116. The Complaint quotes section 4 of the Covad Agreement, which provides that for service requests held due to line conditioning, U S WEST will "provide Covad the option of paying for the line conditioning at the appropriate rate approved by the relevant State Commissions, which U S WEST will complete in 24 days or less 90% of the time." Section 4 of the Covad Agreement also contains notification provisions and service level goals applicable when an "end user customer is served by digital loop carrier or off pair gain."

117. At the time of the execution of the Covad Agreement, U S WEST/Qwest was typically completing line conditioning in more than 24 days for all CLECs. The Covad

Agreement memorializes the expectation that U S WEST/Qwest would improve its service in this regard for all CLECs.

118. Qwest's internal procedures for completing line conditioning are such that all requests follow the same process and intervals so that Qwest could not single out any individual customer for faster service. Accordingly, Covad received no preferential treatment under this provision.

119. The notification procedures and the time line related to line and station transfers contained in Section 4 of the Covad Agreement is a statement of Qwest's internal standards that were applied to all CLECs.

120. Qwest had a good faith belief that this operating arrangement did not need to be filed as an interconnection agreement amendment because it simply memorialized points for discussion in the course of routine business-to-business relations. By entering into this arrangement with Covad, Qwest did not discriminate against other carriers because it provides the same levels of service for all CLECs.

The Small CLEC Agreement

121. Paragraphs 196 through 205 of the Complaint relate to the April 18, 2000 *Confidential Stipulation Between Small CLECs and U S WEST* (the "Small CLEC Agreement"). The Department contends that the opt-in provisions of the Small CLEC Agreement were an interconnection agreement amendment that should have been filed by Qwest under section 251.

122. The Complaint quotes paragraph 3 of the Small CLEC Agreement, which contains a provision by which, subject to certain conditions and limitations, "U S WEST will permit all Small CLECs operating in Minnesota the ability to adopt the terms of any effective

interconnection agreements that were voluntarily negotiated and entered into by U S WEST and CLECs in any other state in U S WEST's operating territory."

123. Qwest does not believe that such a provision is properly the subject of an interconnection agreement amendment. An agreement to make available in Minnesota various provisions of interconnection agreements voluntarily negotiated in other states is not itself a term and condition of interconnection. It is at most only an agreement to enter into an agreement if and when Qwest is asked for one.

124. Furthermore, this "opt-in" provision has not led to discrimination as to "any interconnection, service, or network element." Qwest maintains a "template" interconnection agreement that was updated to incorporate terms of voluntarily negotiated interconnection agreements between Qwest and CLECs in any of the fourteen states in which Qwest operates – *i.e*., the same terms that the Small CLECs could request here.

125. In addition, if, pursuant to the Small CLEC Agreement, one of the Small CLECs opted into a provision of an agreement voluntarily negotiated in another state, that adoption of a new term would be required to be filed as an interconnection agreement or amendment. The filing of the new interconnection agreement or amendment with the Minnesota PUC would make the term available to all CLECs in Minnesota in that fashion. In all of these circumstances, it is clear that Qwest did not violate Section 252 of the Act when it decided that the Small CLEC Agreement did not need to be filed.

THE MCLEODUSA AGREEMENTS

126. Paragraphs 206 through 238 of the Complaint relate to two agreements between McLeodUSA, Inc. ("McLeod") and Qwest, respectively, the April 28, 2000 *Confidential Billing Settlement Agreement* ("McLeod Agreement I"), and the October 26, 2000 *Confidential Agreement Re: Escalation Procedures and Business Solutions* ("McLeod Agreement II").

McLeod Agreement I

127. The Complaint quotes paragraph 2.d of McLeod Agreement I, which contains a provision by which McLeod and Qwest agreed to apply all final Commission orders setting rates prospectively from April 30, 2000, not to bill each other for any true-ups associated with final commission orders that affected interim prices, and to release claims for such true-ups.

128. At the time that McLeod and Qwest entered into McLeod Agreement I, McLeod and Qwest were disputing the timing of the effective date of the Commission's oral order on January 11, 2000 reducing the resale discount from 21.5% to 17.66%. McLeod and Qwest had a bona fide business dispute about whether the reduction of the resale discount applied retroactively. Qwest contended that the Commission's resale discount rate applied retroactively to the date of McLeod's Interconnection Agreement with Qwest. McLeod contended that the resale discount rate applied prospectively only from the date of the oral Commission order. To resolve the historical billing dispute, both parties agreed that the new discount applied prospectively as of April 30, 2000. However, other carriers buying resold services in Minnesota had the reduced discount rate become effective February 8, 2000, not April 30, 2000, and thus McLeod did not receive favorable treatment. Schedule 1 of the Interconnection Contract has been modified to reflect that rates are effective when ordered by the Commission.

129. In consideration for Qwest's agreeing to apply the final Commission resale discount rate prospectively, McLeod agreed to withdraw from intervening in the Minnesota proceeding for the approval of the merger between Qwest and U S WEST. In addition, McLeod and Qwest entered into a "bill and keep" agreement in which neither billed each other for reciprocal compensation for local and internet-related traffic going forward. Because McLeod billed Qwest for approximately 2.5 billion MOUs in 1999, and because McLeod had increased its MOUs approximately 200%, 1999 over 1998, McLeod's reciprocal compensation for local and internet-related traffic represented a cost in the tens of millions of dollars to Qwest that would be eliminated through the bill and keep arrangement. Qwest believed that this settlement provided significant benefits to it and was consistent with its business and legal position that reciprocal compensation was not appropriate for Internet-bound traffic.

130. Qwest and other ILECs have long contended that they were not obligated to pay reciprocal compensation for terminating Internet-bound traffic.

(a) At the time McLeod Agreement I was made, the FCC had concluded that Internet-bound traffic was interstate, and that state commissions could determine (1) whether *pre-existing* interconnection agreements contemplated reciprocal compensation for such traffic, as well as (2) whether *future* interconnection agreements going forward should provide for compensation for such traffic. Intercarrier Compensation for ISP-Bound Traffic, 14 FCC Rcd 3689 (1999), remanded sub nom. Bell Atlantic Tel. Cos. v. FCC, 206 F.3d 1 (D.C. Cir. Mar. 24, 2000). While the Minnesota Commission had determined that certain specified *pre-existing* agreements contemplated reciprocal compensation for Internet-bound traffic, see U S WEST Communications Inc., Docket No. P-421, M-99-529, 1999 WL 1455079 (Minn. PUC, Aug. 17, 1999), the Commission had never addressed whether future interconnection agreements should

provide for such compensation for such interstate traffic. Thus, the federal treatment of reciprocal compensation on a going forward basis was certainly in doubt for both McLeod and Qwest.

(b) Because the federal trend was toward treating Internet-bound traffic as interstate calls not subject to reciprocal compensation, there was a compromise by both parties of their individual positions on reciprocal compensation. At a minimum, Qwest acted in good faith in interpreting this unresolved area of the law as not requiring it to file this term of McLeod Agreement I with the Commission.

(c) Moreover, even if the law had been clear (although it was not) that agreements concerning compensation for Internet-bound traffic had to be filed as interconnection agreements, the provision at issue in McLeod I agreement clearly did not have to be filed because it did not provide any specific terms and conditions for the treatment of that traffic.

131. With the exception of McLeod and several other carriers, most other CLECs did not agree to stop billing for reciprocal compensation for terminating internet traffic and accept a bill and keep agreement. Because the cost of reciprocal compensation payments to CLECs is currently approximately $15,000,000 annually to Qwest, Qwest would have readily agreed to such terms.

132. Qwest filed the bill and keep amendment with the Commission on October 17, 2001, and the Commission approved the amendment on November 21, 2001. Given the recent FCC decision, Qwest had a good faith belief that the prospective application of final Commission reciprocal compensation rates did not need to be filed as an interconnection agreement amendment because it related to the settlement of a bona fide business dispute between McLeod and Qwest. By entering into this agreement with McLeod, Qwest did not

discriminate against other carriers. No other CLEC could possibly have suffered any material detriment from the non-filing of this agreement because bill-and-keep arrangements for Internet-bound traffic are virtually always less advantageous to CLECs than arrangements providing for compensation to be paid.

McLeod Agreement II

A. Quarterly Executive Meetings and Escalation Process

133. The Complaint quotes Sections 2 and 3 of McLeod Agreement II, which provide for quarterly executive meetings and a six-level escalation process, provisions that are almost identical to the Eschelon procedures.

134. As the Department concedes, section 1.3 of the Interconnection Agreement Amendment 8 states that "[t]he Parties wish to establish a business-to-business relationship and have agreed that they will attempt to resolve all differences or issues that may arise under the Agreements or this Amendment under an escalation process to be established between the parties." See Interconnection Agreement Amendment Terms, § 1.3 (Exhibit 1.)

135. Qwest wished to improve its business-to-business relationship with McLeod in the belief that if the two companies could discuss problems, they could resolve them without resorting to the administrative process.

136. The specific details of escalation procedures are integrally connected to how Qwest and a CLEC manage their business-to-business relationship with one another. Because CLECs vary in size, service sensitivity, and problem-solving approaches, Qwest has found it impracticable to make such procedures and arrangements "generic."

137. As a policy matter, Qwest and CLECs should be encouraged to work out such matters, rather than clogging administrative and court dockets with historical disputes that could be resolved through business-to-business meetings.

138. Qwest attempts to provide for formal or informal escalation procedures for all CLECs because it is more efficient and cost effective for Qwest and CLECs to resolve historical disputes short of administrative complaints or litigation. Qwest submits that the specific dispute resolution procedures here do not fall into the category of Section 251 interconnection rates, terms and conditions that must be filed under Section 252.

139. In any event, Qwest had a good faith belief that this operating arrangement did not need to be filed as an Interconnection Agreement Amendment because it was already the subject of an amendment and because it relates to the detailed implementation of a business-to-business relationship between McLeod and Qwest. By entering into this arrangement with McLeod, Qwest did not discriminate against other carriers.

B. Waiver of Primary Jurisdiction and Tariff Limitation on Damages

140. The Complaint quotes section 3 of McLeod Agreement II, by which McLeod and Qwest agreed to waive primary jurisdiction of any state utility or service commission and to waive tariff limitations on damages or other limitation on reasonably foreseeable damages.

141. The specific details of escalation and dispute resolution procedures are integrally connected to how Qwest and a CLEC manage their business-to-business relationship with one another. Because CLECs vary in size, service sensitivity, and problem-solving approaches, Qwest has found it impracticable to make such procedures and arrangements "generic." In this case, the parties agreed to a dispute resolution process designed to minimize the likelihood and incentive for either party to pursue disputes in court, and instead encouraged them to follow the

substitute process of private dispute resolution and arbitration. As part of that process, the parties defined the terms of "Level 6" dispute resolution -- court litigation -- which was the highest form of dispute resolution and one that the parties expected and intended to avoid. The waiver of primary jurisdiction and damages limitations created an additional incentive for the parties to resolve their differences short of "Level 6" litigation.

142. Qwest does not believe that the particular details of the escalation and dispute resolution procedures agreed to with McLeod are matters arising under Section 251 of the Act that must be filed with the Commission under Section 252. In any event, no dispute between McLeod and Qwest has gone to "Level 6," so the provision has never been invoked.

The USLink/InfoTel Agreement

A. Tandem Switching Functionality

143. Paragraphs 239 through 251 relate to the July 14, 1999 Agreement with USLink, Inc., and InfoTel Communications, LLC (the "USLink Agreement"). Under the USLink Agreement, Qwest agreed to provide tandem switching functionality for certain enumerated Qwest end offices to settle a dispute with USLink and InfoTel in which they contended that doing so was required under the Interconnection Agreement between them and Qwest.

144. In or about September 1999, Qwest attempted to list the end offices for which it was providing tandem switching functionality to USLink and InfoTel in the Local Exchange Routing Guide (the "LERG"), where the availability of this functionality would be noticed to all CLECs. All of the relevant end offices were listed by October 1, 1999.

145. Dakota Telecom, Inc. ("DTI") made a request for tandem switching functionality and filed a complaint with the Commission on March 29, 2000. By order dated April 18, 2000,

the Commission ordered Qwest to provide tandem switching functionality for the enumerated end offices to DTI.

146. Following the Commission's April 18, 2000 order, a large number of other CLECs intervened in the proceeding, including Hutchinson Telecommunications, Inc., Crystal Communications Inc., Minnesota Independent Coalition, Frontier Communications of Minnesota, Inc., Media One Telecommunications Corp. of Minnesota, Inc., Ace Telephone Association, Hometown Solutions LLC, Hutchinson Telephone Company, Integra Telecom of Minnesota, Inc., Mainstreet Communications, LLC, Northstar Access, LLC, Onvoy, Otter Tail Telecom, LLC, Paul Bunyan Rural Telephone Company, Tekstar Communications, Inc., U.S. Link, Inc., VAL-ED Joint Venture, LLP, and WETEC LLC (the "Settling CLECs").

147. Qwest signed a settlement agreement with the Settling CLECs on October 19, 2000, by which Qwest agreed to amend the Interconnection Agreement to provide all CLECs with access to the enumerated end offices and, with respect to other local calling areas, Qwest agreed to provide the service to a requesting CLEC from a point of interconnection located at one wire center per EAS area designated by the CLEC.

148. Qwest now provides a single point of interconnection per LATA for CLECs called "Single Point of Presence." See Single Point of Presence (SPOP) in the Local Access and Transport Area (LATA) for Interconnection Trunking (Exhibit 12).

149. SPOP provides a significant economic benefit to CLECs, and it has significantly reduced the importance of tandem switching functionality.

150. In short, Qwest's decision not to file the USLink Agreement was not part of a "secret deal" to sidestep Section 252. Qwest implemented the Agreement by extending its terms to all CLECs through updates to the LERG. Those updates provided other CLECs with public

notice of the availability of the tandem switching functionality at the designated end offices. And subsequently Qwest took other actions to expand the tandem functionality and interconnection options available to CLECs. In these circumstances, the Department is misunderstanding the facts when it suggests that Qwest has violated Section 252.

JOINDER IN REQUEST FOR EXPEDITED PROCEEDINGS

151. Qwest joins in the Department's request for an expedited proceeding pursuant to Minn. Stat. § 237.462 for an expedited proceeding. Qwest agrees that the public interest would be best served by promptly addressing the issues of law raised by the Complaint: whether the terms of the agreements in question must be filed and approved by the Commission.

MITIGATING FACTORS AND OPPOSITION TO REQUEST FOR PENALTIES

152. Even assuming arguendo that Qwest could be found to violate Section 252 for failing to file one or more of these contract provisions, neither the law nor the facts support the Department's request for the maximum penalties. In making its request for penalties, the Department can cite only two of the nine factors listed in Minn. Stat. § 237.462. Moreover, contrary to the Department's position, there are substantial mitigating factors.

153. As discussed in the preceding paragraphs, Qwest had a good faith belief that the provisions of the agreements cited in the Complaint did not need to be filed as interconnection agreement amendments.

154. Qwest does not believe that the provisions of the agreements cited in the Complaint caused any demonstrable harm to customers or competitors; to the contrary, Qwest proactively addressed their market needs on materially equivalent terms.

155. As discussed in the preceding paragraphs, there are significant legal and factual defenses to the alleged violations. At the very least, there is considerable ambiguity in the law as to whether such agreements should be filed with and approved by state commissions.

156. Qwest does not believe that it obtained any wrongful economic benefit from the provisions of the agreements cited in the Complaint.

157. Qwest is prepared to take remedial steps as necessary and appropriate to prevent any future allegations of wrongful conduct.

158. Qwest respectfully suggests that, to the extent that the Commission finds that certain provisions of the agreements should have been filed, these mitigating factors and such other factors as justice may require, eliminate the need for any penalty assessment in this case.

Respectfully submitted,

Dated: March 1, 2002

QWEST CORPORATION

Jason D. Topp, Esq.
200 South Fifth Street, Room 395
Minneapolis, Minnesota 55402

Phone: (612) 672-8905
Fax: (612) 672-8911

Peter A. Rohrbach, Esq.
Peter S. Spivack, Esq.
Martha Russo, Esq.
Hogan & Hartson, LLP
555 13th Street, N.W.
Washington, DC 20004-1109
Phone: (202) 637-5600
Fax: (202) 637-5910

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this __ day of March 2002, a true and correct copy of Qwest's Answer was served, by U.S. mail and hand delivery, on:

QWEST CORPORATION

_____

Jason D. Topp
200 South Fifth Street, Room 395
Minneapolis, Minnesota 55402

Phone: (612) 672-8905
Fax: (612) 672-8911