

**BEFORE THE  
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION**

**In the Matter of the Petition of Qwest  
Corporation for Arbitration with Eschelon  
Telecom, Inc. Pursuant to 47 U.S.C. Section  
252 of the Federal Telecommunications Act of  
1996**

**Docket No. UT-063061**

**EXHIBIT DD-32**

**TO THE**

**SURREBUTTAL TESTIMONY OF DOUGLAS DENNEY**

**ON BEHALF OF ESCHELON TELECOM, INC.**

**APRIL 3, 2007**

-----Original Message-----

From: Bastiampillai, Harisha [<mailto:Harisha.Bastiampillai@gwest.com>]

Sent: Tuesday, March 21, 2006 1:37 AM

To: Clauson, Karen L.; Hartl, Deborah; Denney, Douglas K.; Diamond, Paul; Goldberg, Tobe L.; Johnson, Bonnie J.; Kennedy, Robert.F; Markert, William D.; Olson, Joan M.; Salverda, Kathleen; diane.wells@state.mn.us; Zeller, Ginny A.

Subject: RE: Eschelon request for cost data



EschcoststudyRespo  
nse.doc

**Re: Qwest Cost Studies**

This response addresses Eschelon's request for additional cost studies beyond those Qwest has already produced. Qwest has already provided specific information as to why particular studies are not being produced. Despite these responses, Eschelon continues to belabor the issue and contend that Qwest is acting in bad faith. Eschelon, however, has provided no legal support for its contentions. In regard to Qwest's "duty" to provide cost studies for rates that have already been reviewed, and approved, by a state commission, Eschelon's position actually runs counter to approaches taken by numerous state commissions. By way of example:

- In a California arbitration, AT&T contended that a rate approved by the CA PUC in a generic cost proceeding was no longer TELRIC-compliant and therefore should be reevaluated in the arbitration. The CA PUC disagreed noting that it had established a process to address updating of rates via a generic cost docket, and that AT&T's position attempts to circumvent this process by seeking to update the rates in the context of an arbitration. The CA PUC said it preferred to "address the need to update cost studies in our generic proceeding where all interested parties can be represented, and not in the context of an arbitration between only two parties." Application by AT&T Communications of California, Inc., et al, (U 5002 C) for Arbitration of an Interconnection Agreement with Pacific Bell Telephone Company (U 1001 C) Pursuant to Section 252(b) of the Telecommunications Act of 1996, 2000 Cal. PUC LEXIS 564, 45-46 (Cal. PUC 2000)
- In Michigan, a CLEC attempted to re-litigate rates that the Commission established in a generic cost proceeding. The Arbitration Panel noted that an "a two-party arbitration is not an appropriate forum for setting rates that will affect all competitive local exchange carriers." The Panel found that the CLEC should abide by the rates set in the generic cost docket. In The Matter of Petition of Buytel Communications, Inc. For Arbitration Pursuant to Section 252(b) to Resolve Open Issues for an Interconnection Agreement with Ameritech Indiana, 2002 Ind. PUC LEXIS 277, 13-15 (Ind. PUC 2002)(citing Michigan proceeding).
- In another Michigan proceeding, an Arbitration Panel rejected Verizon Wireless' position that the underlying cost studies must be made a part of the record in the arbitration proceeding. The panel determined that the Commission may properly take official notice of cost studies that it has previously approved in a separate docket. In the matter of the petition of ACE TELEPHONE COMPANY, BARRY COUNTY TELEPHONE COMPANY, DEERFIELD FARMERS' TELEPHONE COMPANY, KALEVA TELEPHONE COMPANY, LENNON TELEPHONE COMPANY, OGDEN TELEPHONE COMPANY, PIGEON TELEPHONE COMPANY, the UPPER PENNINSULA TELEPHONE COMPANY, and WALDRON TELEPHONE COMPANY, for the arbitration of interconnection rates, terms, and conditions and related arrangements with VERIZON WIRELESS, pursuant to Section 252(b) of the federal Telecommunications Act of 1996; In the matter, on the Commission's own motion, to examine the total service long run incremental costs of the

MICHIGAN EXCHANGE CARRIERS ASSOCIATION COMPANIES, including ACE TELEPHONE COMPANY, BARRY COUNTY TELEPHONE COMPANY, DEERFIELD FARMERS' TELEPHONE COMPANY, KALEVA TELEPHONE COMPANY, LENNON TELEPHONE COMPANY, OGDEN TELEPHONE COMPANY, PIGEON TELEPHONE COMPANY, the UPPER PENNINSULA TELEPHONE COMPANY, and WALDRON TELEPHONE COMPANY, 2006 Mich. PSC LEXIS 51, 6-8 (Mich. PSC 2006)

- The Indiana Utilities and Regulatory Commission determined that rates “can and should” occur in a proceeding separate from the pending arbitration. The IURC made this determination even though there were no approved rates for the services in question, and that it would need to use interim proxies until rates were determined in the cost proceeding. In the Matter of Sprint Communications Company L.P.'s Petition for Arbitration of Interconnection Rates, Terms, Conditions and Related Arrangements with GTE of the North, Inc., 1997 Ind. PUC LEXIS 9, 21-22 (Ind. PUC 1997)
- In a Kansas arbitration, the KS PUC found Covad’s attempt to revisit certain approved rates an attempt to “pick and choose those rates from the UNE Generic Cost Docket that it finds acceptable and challenge those it deems excessive.” The KS PUC noted that its Orders made it abundantly clear that only if an ICA required “a special or unique arrangement” would a deviation from its approved rates be warranted. The PUC held that the “fact that an agreement is negotiated separately with each individual carrier does not make or qualify that agreement as “special or unique.” In the Matter of Complaint By Ionex Communications, Inc., Against Southwestern Bell Telephone Company For Charging Improper Rates for Unbundled Network Elements , 2000 Kan. PUC LEXIS 1133, 118-121 (Kan. PUC 2000)
- In Ohio, the PUCO found that “the best manner in which to fully examine Ameritech's TELRIC studies was to do so in a proceeding dedicated solely to those issues.” In the Matter of the Review of Ameritech Ohio's Economic Costs for Interconnection, Unbundled Network Elements, and Reciprocal Compensation for Transport and Termination of Local Telecommunications Traffic, 1998 Ohio PUC LEXIS 748 (Ohio PUC 1998)
- In Oregon, the Arbitrator noted that the “Commission has consistently chosen to base rates set in arbitrations on its own cost study docket (UM 773) and its pricing dockets (UM 351 and UM 844).” The Arbitrator also observed that the “Commission has spent years working out a methodology for costing and pricing, and the dockets named above are the result of that work.” The Arbitrator found the methodology to be established and reviewable and so he declined to revisit or reevaluate the methodology. In the Matter of the Petition of AT&T Wireless Services, Inc., for Arbitration of Interconnection Rates, Terms, and Conditions Pursuant to the Telecommunications Act of 1996., 1997 Ore. PUC LEXIS 183, 35-36 (Ore. PUC 1997)
- In Washington, the WUTC adopted a cost methodology and established for each of the two ILECs, prices or price ranges based upon that methodology and the record in its case. It noted its “expectation that those prices or price ranges will be applied in future arbitrations, and that parties will reform their contracts to adopt the Commission-approved prices.” In the Matter of the Pricing

Proceeding for Interconnection, Unbundled Elements, Transport and Termination, and Resale; In the Matter of the Pricing Proceeding for Interconnection, Unbundled Elements, Transport and Termination, and Resale for U S WEST COMMUNICATIONS, INC.; In the Matter of the Pricing Proceeding for Interconnection, Unbundled Elements, Transport and Termination, and Resale for GTE NORTHWEST INCORPORATED, 1996 Wash. UTC LEXIS 41, 4-6 (Wash. UTC 1996)

- In Washington, the WUTC granted motions for a separate proceeding to review the cost study. It entered an order that noted, "[t]he cost studies that are being proposed are voluminous and complex and are not susceptible of thorough review in the time frames, or with the resources, available for arbitration." It granted the motion and agreed to institute a proceeding that transcends individual arbitrations, in which to review the USWC cost study. In the Matter of the Pricing Proceeding for Interconnection, Unbundled Elements, Transport and Termination, and Resale; In the Matter of the Pricing Proceeding for Interconnection, Unbundled Elements, Transport and Termination, and Resale for U S WEST COMMUNICATIONS, INC.; In the Matter of the Pricing Proceeding for Interconnection, Unbundled Elements, Transport and Termination, and Resale for GTE NORTHWEST INCORPORATED, 1997 Wash. UTC LEXIS 9 (Wash. UTC 1997)

This long litany of cases reflects the state commissions' reluctance, if not outright refusal, to revisit rates they have already reviewed and approved, particularly in the context of a two party arbitration. Qwest has produced cost studies pertaining to rates that the state commission(s) has not approved. Cost studies for approved rates, however, presents a much different situation. Carriers, commission staffs, and the Commissioners themselves devoted much time and effort to review and approve these rates. As gleaned from the remarks above, state commissions are disinclined to reevaluate approved rates in a two party arbitration. Thus, there is simply no reason for Qwest to produce cost studies for already reviewed and approved rates in our negotiations. If Eschelon can demonstrate legal support for its contention that Qwest does have such a duty, Qwest would consider the issue further. Eschelon's failure, however, to provide such legal support, and then file a bad faith action, would render it the bad faith actor in this proceeding.

From: Clauson, Karen L.  
Sent: Tuesday, March 21, 2006 8:40 AM  
To: 'Bastiampillai, Harisha'; Hartl, Deborah; Denney, Douglas K.;  
Diamond, Paul; Goldberg, Tobe L.; Johnson, Bonnie J.; Kennedy,  
Robert.F; Markert, William D.; Olson, Joan M.; Salverda, Kathleen;  
diane.wells@state.mn.us; Zeller, Ginny A.  
Subject: RE: Eschelon request for cost data

Harisha:

Your statement that Eschelon did not provide support for its position is not accurate. The cases that you cite are not on point relative to the reasons stated by Eschelon for its need for the particular cost study requested with respect to Eschelon's proposed language for the first paragraph of Section 9.2.2.9.

Eschelon had hoped that, by obtaining at least one such cost study, this issue could have been resolved. Eschelon has taken a very reasonable position, asking for a cost study for only one approved rate, and has done so not to challenge that rate but to further discussion of Eschelon's proposed language. Eschelon even reduced its request to start with just one state, in response to Qwest's comments. We are disappointed that Qwest is taking such a contentious approach to a reasonable request that, if honored, may resolve or narrow this issue.

Eschelon reserves the right to argue in arbitration that the Commission should preclude Qwest from presenting evidence based on its cost studies that it refused to provide here and rule in Eschelon's favor based on Qwest's failure to provide the requested cost data.

**From:** Clauson, Karen L.  
**Sent:** Monday, December 05, 2005 4:27 PM  
**To:** 'Salverda, Kathleen'; Christensen, Larry; Bastiampillai, Harisha; Adams, Michael; Sullivan, Mary; Hartl, Deborah; Diamond, Paul; Houston, Neil; Kennedy, Robert.F  
**Cc:** Denney, Douglas K.; Olson, Joan M.; Goldberg, Tobe L.; Zeller, Ginny A.; Johnson, Bonnie J.; Markert, William D.; 'Diane Wells'  
**Subject:** Exhibit As for AZ, OR, UT & updated Exhibit matrix  
**Attachments:** Exhibit A (AZ, OR, UT).xls; Changes to Exhibit A (AZ, OR, UT).doc; ExhibitIssuesDec0505.doc

Qwest:

On November 14, 2005, Eschelon asked Qwest to provide Qwest's proposed Exhibit A for Arizona, Oregon, and Utah. We have not yet received those Exhibits As. Since the clock is ticking, we needed to proceed. Therefore, Eschelon went ahead and redlined Qwest's SGAT Exhibit As for Arizona, Oregon, and Utah to show Eschelon's proposals for Exhibit A for those states. Those redlines are enclosed (in an Excel document with tabs for the three states) and are OPEN for Qwest to review. To be sure we are working off the same page, please work from the enclosed Excel document when providing Qwest's reply.

Also enclosed is a Word document detailing the changes to Qwest's SGAT Exhibit A for AZ, OR, and UT. This is similar to the document that Eschelon sent to Qwest on November 15, 2005 for CO, MN, and WA.

For any rate with which Qwest disagrees in any of the states of AZ, CO, MN, OR, UT and/or WA, please provide Qwest's cost study(ies) for such rate(s).

The enclosed documents contain Eschelon's negotiation proposals based on Qwest's proposed or Commission approved rates. Eschelon reserves the right to propose different rates if the rates are litigated in arbitrations or cost cases.

In the document (entitled "ICA LANGUAGE -- CONSISTENCY WITH EXHIBIT A") that Eschelon provided to Qwest on November 8, 2005, Eschelon asked a number of questions, including requests for citations to Exhibit A. If the responses to those questions differ for AZ, OR, and/or UT, please respond as to the latter states as well, including citations to the AZ, OR, and/or UT Exhibit A provision(s).

Also enclosed is the Exhibit A matrix sent to Qwest on November 15, 2005, updated to include the information in this email.

Thanks,



Exhibit A (AZ, OR,  
UT).xls (73...



Changes to Exhibit  
A (AZ, OR, ...



ExhibitIssuesDec05  
05.doc (36 K...

Karen L. Clauson  
Senior Director of Interconnection/Sr. Attorney  
Eschelon Telecom, Inc.  
730 2nd Ave. South, Suite 900  
Minneapolis, MN 55402  
Phone: 612-436-6026  
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**CONFIDENTIALITY AGREEMENT  
For  
MULTIPLE QWEST COST STUDIES**

This Confidentiality Agreement ("Agreement"), effective March 16, 2004, is made by and between Qwest Corporation ("Qwest"), a Colorado corporation, and its Affiliates, having its principal place of business at 1801 California Street, Suite 2410, Denver, Colorado, 80202, and Eschelon Telecom, Inc. ("Other Party"), a Delaware corporation, and its Affiliates, having its principal place of business at 730 2<sup>nd</sup> Avenue South, Minneapolis, Minnesota, 55402.

For purposes of this Agreement, "Affiliate" means any entity which, directly or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with Qwest or Other Party.

1. Qwest and Other Party are negotiating new Interconnection Agreements, including offerings for Collocation Available Inventory and Transfer of Responsibility. There are no agreements between the Parties making confidential their negotiations. To date, Other Party asked Qwest to provide cost studies for the rates set forth in Qwest's Collocation Available Inventory and Transfer of Responsibility proposals, and may, during the course of negotiations, request additional cost studies pursuant to this Agreement. This Agreement is made in order for Other Party, in the course of those otherwise non-confidential negotiations, to receive from Qwest that certain costing and business information ("Confidential Information" as defined below) related to the development of costs for Qwest's offerings for Collocation Available Inventory and Transfer of Responsibility as required by the Telecommunications Act of 1996 ("Act") and applicable regulations under terms that will protect the confidential and proprietary nature of such Confidential Information. If Other Party asks Qwest to provide additional cost studies for other rates proposed by Qwest, this Agreement will govern the confidentiality of such additional cost studies, provided that Qwest designates the information as Confidential (as provided in paragraph 2 of this Agreement).

2. As used herein, "Confidential Information" shall mean any and all proprietary or non-public costing, technical or business information, relating to the cost studies identified in paragraph 1 of this Agreement, including third party information, that is designated in writing (at the time or within twenty-four (24) hours of disclosure) as confidential and is furnished or disclosed in whatever tangible form or medium, orally, or by any other means by Qwest to Other Party including, but not limited to, product/service specifications, prototypes, computer programs, models, drawings, marketing plans, financial data, costing information, and personnel statistics. When practical, each page of written Confidential information shall contain confidential notices or legends. If not practical, Qwest may designate confidentiality in a reasonable manner such as a description of the Confidential material in a cover letter or e-mail.

3. This Agreement shall expire five (5) years from the effective date stated above. Notwithstanding the termination of this Agreement, Other Party agrees to treat such Confidential Information as confidential for a period of five (5) years from the date of receipt of same unless the Parties agree otherwise in writing. In handling the Confidential Information, Other Party agrees: (a) not to copy such Confidential Information unless specifically authorized; (b) not to make disclosure of any such Confidential Information to any person, corporation or entity,



except employees and subcontractors of Other Party to whom disclosure is necessary for the purposes set forth above; and (c) to appropriately notify such employees and subcontractors that the disclosure is made in confidence and shall be kept in confidence according to the terms of this Agreement. Other Party shall exercise at least the same degree of care used to restrict disclosure of its own information of like importance, and at a minimum shall exercise at least reasonable care.

4. Other Party agrees that, in the event permission is granted by Qwest to copy Confidential Information, or that copying is otherwise permitted hereunder, each such copy shall contain and state the same confidential or proprietary notices or legends, if any, which appear on the original. Nothing herein shall be construed as granting to Other Party any right or license under any copyrights, trademarks, inventions, patents or other form of intellectual property now or hereafter owned, created or controlled by Qwest.

5. Upon termination of this Agreement for any reason or upon request of Qwest, all documented Confidential Information, together with any copies of same as may be authorized herein, shall be returned to Qwest or destroyed upon Qwest's request.

6. Regardless of any designation of Confidentiality pursuant to paragraph 2 of this Agreement, the obligations imposed by this Agreement shall not apply to any information that: (a) is already in the possession of, is known to, or is independently developed by Other Party; or (b) is or becomes publicly available through no fault of Other Party; or (c) is obtained by Other Party from a third person without breach by such third person of an obligation of confidence with respect to the Confidential Information disclosed; or (d) is disclosed without restriction by Qwest; or (e) is required to be disclosed pursuant to the lawful order of a government agency or disclosure is required by operation of law. If Other Party receives any administrative or court request, subpoena or order commanding disclosure of Qwest's Confidential Information, Other Party shall immediately notify Qwest in writing, unless prohibited by law from doing so.

7. This Agreement shall not preclude either Party from exercising its rights to seek mediation or arbitration in accordance with Dispute Resolution provisions of the parties' Interconnection Agreement with respect to the subject matter of the Confidential Information provided hereunder; however, in the event of such mediations, arbitrations, or appeal from such proceedings, the Parties agree to request the tribunal to maintain the confidential and proprietary nature of Confidential Information as defined in this Agreement. Any claim, controversy or dispute between the Parties shall be resolved in accordance with Dispute Resolution provisions of the parties' Interconnection Agreement.

8. Except for the obligations of use and confidentiality imposed herein, no obligation of any kind is assumed or implied against either Party by virtue of Qwest's provision of the Confidential Information. Each Party further acknowledges that this Agreement and any meetings and communications of the Parties relating to the same subject matter, including the exchange of Confidential Information, shall not: (a) constitute an offer, request, or contract with the other to engage in any research, development or other work; (b) constitute an offer, request or contract involving a buyer-seller relationship, joint venture, teaming or partnership relationship between the Parties; or (c) impair or restrict either Party's right to make, procure or market any products or services, now or in the future, which may be similar to or competitive with those offered by the disclosing Party, or which are the subject matter of this Agreement, so long as that Party's obligations of confidentiality under this Agreement are not breached. The Parties shall pay their

own fees and expenses incurred in preparation for, or as a result of, this Agreement or the Parties' meetings and communications.

9. Neither Party shall assign, sublet, or transfer any interest in this Agreement without the prior written consent of the other party, which consent shall not be unreasonably withheld; provided, however, that Qwest may assign and transfer this Agreement to any parent, subsidiary, successor, affiliated company or other business entity without the prior written consent of Other Party.

10. Other Party shall adhere to the U.S. Export Administration Laws and Regulations and shall not export or re-export any Confidential Information, technical data, or products received from Qwest, or any direct product of such Confidential Information or technical data, to any person or company who is a legal resident of or is controlled by a legal resident of any proscribed country listed in Section 779.4(f) of the U.S. Export Administration Regulations (as the same may be amended from time to time), unless properly authorized by the U.S. Government. This requirement is not limited by the time period stated in this Agreement.

11. This Agreement, together with any and all incorporated exhibits, constitutes the entire Agreement between the Parties with respect to the subject matter of this Agreement. No provision of this Agreement shall be deemed waived, amended or modified by either Party, unless such waiver, amendment or modification is made in writing and signed by both Parties. There are not any previous Agreements between the Parties relating to the subject matter of this Agreement.

12. This Agreement is the joint work product of the Parties, has been negotiated by the Parties and their respective counsel and shall be interpreted fairly in accordance with its terms. In the event of any ambiguities, no inferences shall be drawn against either Party.

13. Any notice to be given pursuant to this Agreement by either Party to the other shall be in writing and shall be deemed given when sent either by mail to the address listed below or by facsimile with a confirmation copy sent by mail.

14. Notwithstanding anything to the contrary, neither Qwest nor Other Party may make any disclosure to any other person or any public announcement or press release regarding this Agreement or any relation between Other Party and Qwest, without the prior written consent, for Qwest, of the Qwest Senior Vice-President of Corporate Communications or for Other Party, the General Counsel of Other Party. Either Qwest or Other Party shall have the right to terminate this Agreement between the Parties if the other Party violates this provision.

IN WITNESS WHEREOF, the Parties have caused their duly authorized representatives to sign this Agreement as of the date first stated above.

**Other Party**

J. Oxley  
Authorized Signature

J. Jeffery Oxley  
Printed Name

Executive Vice President/General Counsel  
Title

3/17/04  
Date

**Qwest Corporation**

Linda Miles  
Authorized Signature

Linda Miles  
Printed Name

Interconnect Negotiator  
Title

March 19, 2004  
Date

**Address for Notices:**

J. Jeffery Oxley  
Executive Vice President and General Counsel  
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612-436-6792 (Fax)  
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