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April 13, 2007

Carole J. Washburn
Washington Utilities and Transportation
1300 South Evergreen Park Drive SW
P.O. Box 47520
Olympia, WA 98504

Via FedEx

Re: In the Matter of the Petition of Qwest Corporation for Arbitration with Eschelon, Inc. Pursuant to 47 U.S.C. § 252 of the Federal Telecommunications Act of 1996
Docket No. UT-063061

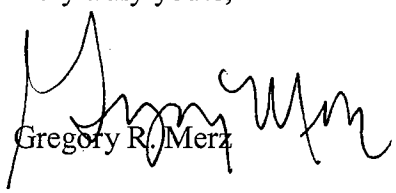
Dear Ms. Washburn:

Enclosed for filing please find the original and eight copies of Eschelon Telecom of Washington, Inc.'s Memorandum in Opposition to Qwest Corporation's Motion to Dismiss Issues Involving Proposed Rates, along with the Affidavit of Service.

By copy of this letter I am also serving the enclosed Memorandum via email on interested parties.

Please do not hesitate to call me if you have any questions.

Very truly yours,



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GRM/jlp

Enclosures

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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 **ESCHELON TELECOM OF WASHINGTON, INC.'S MEMORANDUM IN OPPOSITION TO QWEST CORPORATION'S MOTION TO DISMISS ISSUES INVOLVING PROPOSED RATES**

INTRODUCTION

Eschelon Telecom of Washington, Inc. ("Eschelon") respectfully submits this memorandum in opposition to the motion of Qwest Corporation ("Qwest") to dismiss certain issues regarding unapproved rates (Issues 22-90(a) through 22-90(f)). Qwest seeks to dismiss these issues, which concern the establishment of proposed interim rates for certain elements for which there are no Commission-approved rates, on the ground

that this arbitration proceeding is "not the appropriate forum" in which to address rate issues.[1]

First, Qwest's motion should be denied as untimely. This Commission's procedural rules require that a motion to dismiss be brought within twenty days of the pleading that is sought to be dismissed.[2] Qwest, however, rather than bringing its motion at the beginning of the case, as it did in the Minnesota proceeding, waited until the parties had filed all of their testimony addressing the issues that Qwest seeks to dismiss. To dismiss the case now, on the eve of hearing, after the parties have submitted their evidence, is contrary to the goal of efficiency, not in furtherance of that goal.

Qwest's argument is also contrary to the plain language of the federal Telecommunications Act, which expressly provides for issues regarding rates to be determined in arbitration proceedings.[3] Further, Qwest's motion overlooks the fact that both parties want interim rates – Qwest has proposed a set of interim rates and Eschelon has proposed different interim rates. Qwest, however, in seeking to dismiss the rate issues from this case, would foreclose Commission review of the Qwest-proposed rates and charge those unreviewed rates in the intervening period until the Commission has an opportunity to establish final rates. Eschelon, in contrast, seeks Commission review to establish interim rates that are reasonable.

Eschelon agrees that final rates should be determined in a generic cost case. The issue here, however, is what interim rates Qwest should be permitted to charge for elements for which there is no Commission-approved rate, until a final rate can be

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1 Qwest Motion to Dismiss at ¶ 2.
2 WAC § 480-07-380.
3 47 U.S.C. § 252(c).

determined. If the interim rate issue is not determined in this case, however, it will still need to be determined. The interim rate issues were presented for arbitration, the parties have already pre-filed their testimony on these issues and the evidentiary hearing is now less than a month away. These issues are, therefore, ripe for determination now, making this proceeding not only the most appropriate, but the most efficient, forum for their resolution.

Accordingly, Eschelon requests that the motion to dismiss be denied.

I. Qwest's Motion To Dismiss Should Be Denied As Untimely

The Commission's procedural rules require that a motion to dismiss be filed no later than the time a responsive pleading is served or within twenty days after the pleading sought to be dismissed is served, unless good cause is shown for delay.[4] Here, Qwest certainly could have filed its motion to dismiss at the outset of the case, as it did in Minnesota, where it filed a motion to dismiss five days after Eschelon filed its petition for arbitration. Instead, Qwest chose to wait to file its motion until after the parties had filed their testimony addressing the issues that Qwest now seeks to dismiss from the case. Qwest does not offer any explanation for this delay. Qwest's failure to file a timely motion or offer any good cause for that failure is sufficient reason to deny the motion.

Moreover, Eschelon will be prejudiced if the interim rate issues are dismissed from the case at this late date. If Qwest succeeds here in obtaining a deferment of issues already presented and ready for resolution to some unspecified later proceeding, Eschelon – after incurring all the expenses of litigating the issue here – under Section 22.6 of the ICA would have to make a separate request to the Commission for an interim rate, for

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[4] WAC § 480-07-380.

which Eschelon would have to re-file the same evidence that it already filed in this case. The Commission will still need to review the evidence and rule on the interim rate proposals at that time. Qwest's deferment proposal is the one that results in additional work, inefficiencies, and unnecessary delay.

II. The Establishment Of Interim Rates Is Properly Within The Scope Of This Interconnection Arbitration Proceeding

The appropriate scope of this proceeding is established by federal law. Section 252(b)(4)(c) of the Federal Telecommunications Act (the "Act") requires the Commission to resolve each issue set forth in the petition.[5] The Act expressly envisions that individual arbitration proceedings may involve rates issues. To that end, Section 252(c) requires that a state commission, "in resolving ***by arbitration***" any open issues and imposing conditions upon the parties to the agreement, "***shall establish any rates*** for interconnection, services or network elements according to subsection (d) of this section."[6] The FCC's rules also recognize that state commissions may set rates in arbitration proceedings and therefore impose a duty to produce in negotiations cost data relevant to setting rates in arbitration.[7] There would be no reason to require that this data be provided if rates were not proper subject for arbitration, and therefore the rule specifically refers to cost data relevant to setting rates "in arbitration."[8]

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[5] 47 U.S.C. § 252(b)(4)(c).

[6] 47 U.S.C. § 252(c) (emphasis added). Section 252(d) of the Act sets forth the applicable pricing standards for interconnection, network elements, and resale at wholesale rates of ILEC retail services. It states that rates shall be cost-based and nondiscriminatory. 47 U.S.C. § 252(d)(1)(A)(i) & (ii).

[7] 47 C.F.R. § 51.301(c)(8)(iii) ("If proven to the Commission, an appropriate state commission, or a court of competent jurisdiction, the following actions or practices, among others, violate the duty to negotiate in good faith: . . . (8) Refusing to provide information necessary to reach agreement. Such refusal includes, but is not limited to: . . . (ii) Refusal by an incumbent LEC to furnish ***cost data*** that would be relevant to ***setting rates*** if the parties were ***in arbitration***.") (emphasis added).

[8] *Id.*

It is not the case, as Qwest has claimed, that state commissions have "consistently recognized" that issues regarding interim rates are not appropriate for arbitration. Thus, the Indiana Commission relied on the requirements of the federal Act in rejecting a claim that a rate issue could only be determined in a generic cost proceeding and not an arbitration.[9] There, Ameritech argued, as Qwest argues here, that because rate issues impact multiple CLECs, such issues are not appropriate for determination in an arbitration proceeding. The Indiana Commission disagreed:

> The ruling here potentially impacts the relationship and the interconnection agreements of many if not all ILECs and CLECs. However, Ameritech overlooks the plain language and express intent of Section 252(c)(2) of TA-96 which holds that in resolving any open issues by arbitration, a State Commission shall "establish any rates for interconnection, services, or network elements . . . ."[10]

The Indiana Commission further observed:

> The establishment of rates is precisely the type of issue that the Arbitration provisions of TA-96 were promulgated to address. While generic proceedings such as that established in Cause No. 40611 can promote the competition and policy goals of TA-96 by permitting the full development and exploration of forward-looking costs, nothing in TA-96 or in the FCC's rules permits such a generic proceeding to limit a requesting carrier's right to petition a state commission to arbitrate such an unresolved issue.[11]

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[9] *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 (I.P.U.C. 2002).

[10] *In the Matter of Buytel*, 2002 Ind. PUC LEXIS 277 at *17-18.

[11] *Id.* at *20. Qwest's motion does not mention the *Buytel* decision, which the Indiana Commission issued in 2002, but rather, cites an earlier, 1997, decision, *In the Matter of the Sprint Communications Company L.P.'s Petition for Arbitration of Interconnection Rates, Terms, Conditions, and Related Agreements with GTE of the North, Inc.*, 1997 Ind. PUC LEXIS 9 (I.P.U.C. 1997) (cited in Qwest's Motion to Dimiss at ¶ 12, fn. 5. Even in that case, however, the Indiana Commission adopted "interim proxy" rates that would be in place until final rates could be determined in a cost case. *Id.* at *21-22. That case does not hold, as Qwest would have this Commission hold, that the ILEC should be permitted to charge interim rates that have not been approved.

Similarly, the Minnesota Commission has implicitly rejected Qwest's argument. The Minnesota Commission recently approved the Administrative Law Judges' (ALJs') ruling setting an interim rate for expedited orders (Issue 12-67) in the Minnesota Qwest-Eschelon arbitration proceeding.[12] Qwest made a similar motion on the eve of the hearing in Arizona and the ALJ denied that motion.

The interim rate issues on which Qwest seeks dismissal are issues that were raised in the petition for arbitration and Eschelon's response.[13] Eschelon has filed testimony in support of its proposed interim rates.[14] As a matter of federal law, these issues fall within the appropriate scope of this arbitration. As indicated in the testimony of the Minnesota Department of Commerce Staff:

> [M]y understanding is that any issue that has been negotiated by the parties may be brought to the state commission for arbitration. For example, I am aware of a case, *U S West Communications, Inc. versus Minnesota Public Utilities Commission*, [55] F. Supp. 2d 968, 985 (Dist. Minn. 1999), in which the court found that the list of interconnection obligations contained in 47 U.S.C. § 251(b) and (c) does not set forth a comprehensive listing of what parties ***may*** negotiate, and if ***any*** issues are unresolved by negotiation, they are proper items for arbitration. . . . the court held that:
>
> > The only limitations placed upon any individual issue addressed by a state commission during arbitration are that the issue must be: (1) an open issue and (2) that resolution of the issue does not violate or conflict with §251.[15]

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[12] *See* Arbitrators' Report, *In the Matter of the Petition of Eschelon Telecom Inc. for Arbitration of an Interconnection Agreement with Qwest Corporation Pursuant to 47 U.S. C. §252(b) of the Federal Telecommunications Act of 1996* ["Minnesota Qwest-Eschelon ICA Arbitration"], OAH No. 3-2500-17369-2; MPUC Docket No. P-5340,421/IC-06-768 (Jan. 16, 2006) ("MN Arbitrators' Report"), ¶ 222; affirmed by a 4-0 vote of the Minnesota PUC on March 6, 2007. A copy of the MPUC's order is attached as Surrebuttal Testimony of Douglas Denney, Ex. DD-25.

[13] *See* Qwest Corporation's Petition for Arbitration, Washington Disputed Issues List, pp. 206-211. (Note that Issues A-93, A-93(a), A-93(b), A-93(c), A-93(d), and A-95 on the Disputed Issues List have been renumbered as Issues 22-90(a) through 22-90(f)). *See also* Eschelon's Response to Qwest's Petition for Arbitration at p. 94-95.

[14] Direct Testimony of Douglas Denney at 187-194; Rebuttal Testimony of Douglas Denney at 110-119; Surrebuttal Testimony of Douglas Denney at 157-186.

[15] Minnesota Qwest-Eschelon ICA Arbitration, Staff (Ms. Doherty) Reply Testimony, p. 9, line 4 – p. 10, line 6 (citing *US West Communications v. Minnesota Public Utilities Commission,* 55 F. Supp 2d 968, 985-86 (D. Minn. 1999)).

Qwest appears to recognize the relevance of issues of costs and rates in proceedings to establish a new interconnection agreement. Specifically, Qwest's witness, Mr. Easton, has testified that, "For carriers who are negotiating an amendment or a new agreement, as part of the negotiations process, the cost support will be provided if requested."[16] This statement is consistent with the requirement under federal law that cost data relevant to setting rates be provided in connection with interconnection negotiations.[17] Although giving lip service to this legal obligation, Qwest would then foreclose any Commission review of this information by claiming that rates and cost issues are beyond the scope of arbitration proceedings, despite express language in the same federal rule referring specifically to arbitration.[18]

III. Qwest Is Not Permitted to Unilaterally Impose Non-Cost Based UNE Rates

Qwest seeks to have the rate issues presented in this case deferred to some later, unspecified generic cost proceeding.[19] In short, now that Qwest has provided little or no cost support in this record for the rates it proposes in Exhibit A – despite every opportunity to do so – it wants a second bite at the apple even before the issues are heard in this case. In the meantime, Qwest believes that Eschelon should pay Qwest's unsupported wish list of rates for a period of time that Qwest's own witness has acknowledged will likely be indefinite.[20]

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16 Responsive Testimony of William Easton at p. 23, lines 16-17.

17 47 C.F.R. § 51.301(c)(8)(iii) (quoted in above footnote).

18 *Id.*

19 Qwest Corporation's Motion to Dismiss at ¶ 3.

20 *See* Rebuttal Testimony of Karen Stewart, at p. 6, lines 16-17, "In addition, while Mr. Denney describes the rate as 'interim,' the rate likely would remain in effect for an indefinite period. There is no assurance that the rate would last only for a limited period, as Mr. Denney suggests." If this is accurate, then it is accurate for Qwest's interim rate proposals as well.

Very often, in cost cases, Qwest does not obtain commission approval, with no modification, of Qwest's "going-in" position for its desired rate. Commissions often approve something less than any one party's wish list of desired rates. Certainly, commissions generally do not order rates that are *greater than* Qwest's own proposed rates (making Qwest's proposals the highest possible rates to be imposed). In Section 22.6 and subparts of the proposed interconnection agreement (Issue 22-90), Eschelon proposes a process for ensuring that Qwest's "going-in" positions or "wish-list" rates are not unilaterally implemented and then remain in effect indefinitely with no action by Qwest to support the rates to the Commission or obtain Commission approval of those rates. Thus, Eschelon's proposed language for Sections 22.6.1 and 22.6.1.1 is as follows:[21]

> 22.6.1 Qwest shall obtain Commission approval before charging for a UNE or process that it previously offered without charge. If Qwest offers a new Section 251 product or service or one that was previously offered with a charge for which a price/rate has not been approved by the Commission in a TELRIC Cost Docket ("Unapproved rate"), Qwest shall develop a TELRIC cost-based rate and submit that rate and related cost support to the Commission for review within sixty (60) Days of the later of (1) the Effective Date of this Agreement, or (2) Qwest offering the rate to CLEC, unless the Parties agree in writing upon a negotiated rate (in which case Qwest shall file the negotiated rate with the Commission within 60 Days). Except for negotiated rates, Qwest will provide a copy of the related cost support to CLEC (subject to an applicable protective agreement, if the information is confidential) upon request or as otherwise ordered by the Commission. If the Parties do not agree upon a negotiated rate and the Commission does not establish an Interim Rate for a new product or service or one that was previously offered under Section 251 with an Unapproved Rate, CLEC may order, and Qwest shall provision, such product or service using such Qwest proposed rate until the Commission orders a rate. In such cases, the Qwest proposed rate (including during the aforementioned sixty (60) Day period) shall be an Interim Rate under this Agreement.

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[21] Language proposed by Eschelon that Qwest has not agreed to is indicated by underlining.

22.6.1.1 For a UNE or process that Qwest previously offered without charge, the rates in Exhibit A do not apply until Qwest obtains Commission approval or the Parties agree to a negotiated rate. If the Parties do not agree on a negotiated rate, the Commission does not establish an Interim rate, and Qwest does not submit a proposed rate and related cost support to the Commission within the time period described in Section 22.6.1 for a new product or service or one that was previously offered under Section 251 with an Unapproved Rate, the Unapproved rate(s) in Exhibit A do not apply. Qwest must provision such products and services pursuant to the terms of this Agreement, at no additional charge, until Qwest submits the rate and related cost support to the Commission for approval.

The language that Eschelon has proposed allows for Commission establishment of interim rates before or after Qwest files cost support with the Commission.[22]

As discussed by Mr. Denney, Eschelon's proposed language follows a commission decision in Minnesota.[23] Minnesota is currently the only Qwest state in which Exhibit A contains no rates for certain items for which Qwest has neither obtained a Commission-approved rate or filed cost support and complied with that process and yet Qwest must provide the product under the terms of the interconnection agreement. In the other states (including Colorado), Qwest currently may force its wish list rates upon CLECs by refusing to provide the product at all if CLECs do not sign an amendment

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[22] Qwest appears to be attempting to interpret the language in a manner that limits establishment of interim rates to a cost proceeding after Qwest files its cost support, but that is not what the language (including the portion agreed upon by Qwest) provides. *See* 22.6.1.1 (including a scenario under which Qwest has *not* filed cost support but the Commission *has* set interim rates, so the Commission-established interim rates – and not Qwest's proposed rates – apply).

[23] Denney Direct, pp. 181-182. October 2, 2002 Order in MN PUC Docket CI-01-1375 ("MN 271 Cost" Docket). Specifically, "Summary of the Commission's findings and conclusions" contains the following provisions on pp. A-6 and A-7: **"Price Under Development:** Qwest shall obtain Commission approval before charging for a UNE or process that it has previously offered without charge. Qwest may negotiate an interim price for a UNE and service not previously offered in Minnesota provided that Qwest file a permanent price, and related cost support, with the Commission within 60 days of offering the UNE or service. ALJ Report p. 64. ....**New UNE Price:** When offering a new UNE, Qwest shall file a cost-based price, together with an adequate description of the UNE's application, for Commission review within 60 days of offering. Qwest may charge a negotiated rate immediately if part of an approved interconnection agreement (ICA), provided the ICA is filed for Commission review within 60 days."

containing its unapproved rates.[24] The result in Minnesota is the appropriate result when Qwest has both not met its burden to show that its rates meet the cost-based standard and not taken reasonable steps to obtain interim or permanent rates from the Commission. Although Eschelon is proposing the Minnesota process (with the same results) in Washington and other states, Qwest is proposing a watered-down version that omits the key pieces of the Minnesota process that limit Qwest's ability to charge unsupported, unapproved rates. Qwest seeks to avoid Commission review of its proposed interim rates to guarantee itself the ability to charge its unapproved wish list rates as long as possible under that watered-down version, if adopted.

Qwest's agreement to "submit to the Commission a TELRIC rate and cost support" within a specified timeframe[25] provides Eschelon with little protection if Qwest takes the position, as it has, that, pending a final Commission determination, Eschelon must pay the rate that Qwest has demanded. Qwest claims that it is requesting dismissal so that the interim rate issues can be addressed pursuant to "agreed upon" provisions of the parties' ICA.[26] In fact, Eschelon and Qwest have ***not*** agreed on a process for determining rates. Eschelon has proposed language to be included in the ICA, which Qwest has not agreed to, providing that "Qwest shall obtain Commission approval before charging for a UNE process that it previously offered without charge" and that "For a UNE or process that Qwest previously offered without charge, the rates in Exhibit A do

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[24] *See, e.g.*, Direct Testimony of Pamela Genung, *In re. Complaint of Eschelon Telecom of Arizona, Inc. Against Qwest Corporation*, ACC Docket No. T-01051B-06-0257, T-03406A-06-0257 (Jan. 30, 2007) ("Staff Expedite Testimony"), p. 34, lines 10-11 ("CLECs should not be forced into signing" Qwest's expedite amendment with Qwest's $200 per day rate). Arizona Staff added that "since CLEC interconnection agreements are voluntarily negotiated or arbitrated," Qwest could have taken the issue to arbitration under the Qwest-Eschelon ICA, "rather than trying to force Eschelon into signing an amendment." *Id.* p. 36, line 21 – p. 37, line 2.

[25] Qwest's Motion to Dismiss at ¶ 18.

[26] Qwest's Motion to Dismiss at ¶ 2.

not apply until Qwest obtains Commission approval or the Parties agree to a negotiated rate."[27] These are open, disputed issues in this case. The language further provides that, when the parties are unable to agree on a negotiated rate, the Commission, not Qwest, will establish the interim rate. The portion of Section 22.6 to which Qwest ***has*** agreed specifically contemplates that Commission establishment of interim rates may occur ***before*** Qwest files its cost support[28] – *i.e.*, in a forum outside of a cost proceeding commenced with the filing of Qwest's cost support. This arbitration is such a forum.

What Eschelon's proposed language would not permit is what Qwest is seeking to do here: simply impose rates that have not been agreed to and that the Commission has not reviewed. As discussed, Eschelon's proposal is intended to incorporate into the ICA the process that was ordered by the Minnesota Commission in connection with the Minnesota 271 case. Qwest has not agreed to Eschelon's proposal regarding unapproved rates. Rather than addressing interim rates in this arbitration, Qwest's solution is to unilaterally impose excessive, non-cost based rates on Eschelon. Thus, the result of Qwest's position, if accepted, would be to incorporate into the arbitrated ICA rates that have not been agreed to by Eschelon or approved by the Commission, which rates include rates that were developed using inputs that are inconsistent with inputs that have been ordered by the Commission and rates for which Qwest has provided either no cost support or cost support that is insufficiently detailed.[29] The burden is on Qwest to prove its costs,[30] yet Qwest would effectively reverse that burden by requiring Eschelon to pay

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[27] *See* Rebuttal Testimony of Douglas Denney, p. 111-112. Proposed ICA Section 22.6.1 (Issue 22-90).

[28] Proposed ICA Section 22.6.1.1 (black text).

[29] *See* Direct Testimony of Douglas Denney, pp. 189-192.

[30] *See* 47 C.F.R. § 51.505(e) ("An incumbent LEC must prove to the state commission that the rates for each element it offers do not exceed the forward looking economic cost per unit of providing the

Qwest's demanded rates for a potentially long period of time based on no evidence in this record and no Commission scrutiny in the meantime.

Qwest's position is particularly problematic in light of its refusal to agree to language proposed by Eschelon confirming that neither party waives its rights to Qwest a cost proceeding to establish a Commission-approved rate to replace an interim rate.[31] Thus, on the one hand, Qwest takes the position that rates are only appropriately considered in a cost case and, on the other hand, Qwest will not agree to clearly recognize Eschelon's right to request a cost case.

IV. Eschelon's Interim Rates Proposal Assumes That Permanent Rates Will Be Established Following Full Commission Review In A Cost Case

The rate disputes in this case concern what Qwest will be permitted to charge for elements that do not have Commission-approved rates before final rates have been established for those elements. What is not clear from Qwest's motion is that both Qwest and Eschelon have proposed interim rates. The issue presented by Qwest's motion is whether the Commission should have an opportunity to review the interim rates, as Eschelon has proposed, or whether Qwest should be permitted to set rates as it sees fit and charge those rates until the conclusion of a later cost case.

Eschelon does not intend that this arbitration proceeding will take the place of a cost case. Rather, Eschelon's proposed rates are expressly interim in nature, to be

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element, using a cost study methodology that complies with the methodology set forth in this section and § 51.511."); First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers, CC Docket Nos.* 96-98, 95-185, 11 FCC Rcd 15499 (1996) ("Local Competition Order") at ¶ 680 ("Given the asymmetric access to cost data, we find that incumbent LECs must provide to the state commission the nature and magnitude of any forward-looking cost that it seeks to recover in the prices of interconnection and unbundled network elements.")

[31] *See* Direct Testimony of Douglas Denney at pp. 178-179.

replaced by final rates that will be established in a cost case, in which all CLECs would have an opportunity to participate. During the interim period, the interim rates will be available for opt-in by other CLECs under Section 252(i) of the Act.

This Commission has held that the establishment of interim rates is appropriate in an arbitration proceeding. Thus, the Commission explained the relationship between generic cost proceedings and arbitration proceedings as follows:

> The Commission stated that rates adopted in the pending arbitrations would be interim rates, pending the completion of the generic proceeding. Accordingly, the price proposals made in this arbitration have been reviewed with the goal of determining which offers a more reasonable interim rate, more closely based on what we believe to be accurately determined cost levels based on the evidence specifically submitted in this docket, our recent prior actions regarding cost studies, and our expertise as regulators.[32]

Similarly here, the Commission has the evidence before it from which to make such a determination. Qwest has offered no reason to believe that the ALJ and the Commission will be unable to weigh the evidence presented by the parties in light of past decisions and the regulatory expertise and determine which offers a more reasonable interim rate.

Cases cited by Qwest concern attempts to change rates or rate-setting methodologies that have been previously ***approved*** by the state commission. Thus, in *Application of AT&T Communications of California, Inc., for Arbitration of an Interconnection Agreement with Pacific Bell Telephone Company Pursuant to Section*

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[32] *In the Matter of the Petition for Arbitration of an Interconnection Agreement Between TCG Seattle and U S WEST Communications, Inc., Pursuant to 47 U.S.C. § 252*, 1997 Wash. UTC LEXIS 9 at *5 (W.U.T.C. 1997); *see also In the Matter of the Petition of Ace Telephone Company*, 2006 Mich. PSC LEXIS 51 at *12 (M.P.S.C. 2006) (adopting interim rates for reciprocal compensation, pending approval of new rates in a separate proceeding); *see also In the Matter of the Sprint Communications Company L.P.'s Petition for Arbitration of Interconnection Rates, Terms, Conditions, and Related Agreements with GTE of the North, Inc.*, 1997 Ind. PUC LEXIS 9 at *21-22 (I.P.U.C. 1997) (establishing "interim proxy" rates in arbitration to be subject to true up upon the completion of a cost case).

252(d) of the Telecommunications Act of 1996, a case relied on by Qwest, the state commission rejected the CLEC's request to update existing rates in context of arbitration proceeding.[33] Similarly, the Oregon commission rejected a pricing proposal by U S WEST made in the context of an ICA arbitration that reflected a departure from Commission-established cost methodology[34] and the Kansas commission rejected an effort to negotiate rates different from those approved in prior generic cost proceeding.[35]

These cases are distinguishable from the situation presented here, in which Eschelon is seeking to establish interim rates for elements for which there is no Commission approved rate and Qwest is seeking to impose, without Commission approval, rates that it has not proven accurately reflect Qwest's costs. Qwest does not deny that its proposed rates fail to incorporate Commission-approved inputs, as discussed by Eschelon's witness, Mr. Denney.[36] Rather, Qwest takes the position that it is not bound by the Commission's prior cost order when proposing new rates. To that end, Qwest's witness, Ms. Million asserts, "Qwest is not obligated when it calculates costs for new elements subsequent to a Commission decision in a cost docket to rigidly follow the inputs ordered in that docket. . . . The mere passage of time between a Commission decision in one docket and the presentation of new costs and elements in a another docket, not to mention other factors such as the changing competitive environment, provides a sufficient reason for taking a fresh look at cost study inputs rather than

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33 2000 Cal. LEXIS 564 at *46 (C.P.U.C. 2000).

34 *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 at *35-36 (O.P.U.C. 1997).

35 *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 *119 (K.C.C. 2000)

36 *See* Direct Testimony of Douglas Denney at pp. 185-196, Exhibit DD-6.

automatically applying previous decision to new information."[37] Thus, it is Qwest, not Eschelon that is attempting to vary Commission-approved costing methodologies outside the context of a cost case. If Qwest has its way, it will be able to indefinitely delay Commission review of the rates that are produced by those unapproved inputs.

V. Dismissal Will Not Advance The Goal Of Efficiency -- The Efficient Course Is To Proceed To Resolve The Interim Rate Issues, Which Are Ripe For Determination In This Case

As discussed above, the interim rate issues are identified in the petition and response as disputed issues for arbitration in this case. The parties have now completed the filing of three rounds of testimony and have had an opportunity to present, and have presented, their evidence on these issues.

There is no requirement in ICA Section 22.6 (including the portions of that language agreed upon by Qwest) requiring that the Commission establish the *interim* rate in any kind of generic or multi-party proceeding. If Qwest succeeds here in obtaining a deferment of issues already presented and ready for resolution, Eschelon – after incurring all the expenses of litigating the issue here – under Section 22.6 would have to make a separate request to the Commission for an interim rate, for which Eschelon would have to re-file the same evidence that it already filed in this case. The Commission will still need to review the evidence and rule on the interim rate proposals at that time. Qwest's deferment proposal is the one that results in additional work, inefficiencies, and unnecessary delay. Qwest could have brought its motion to dismiss early in the case, as it did in Minnesota, if it truly believed that these issues should not be decided here. However, because Qwest waited until now, when the parties have submitted their

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[37] Responsive Testimony of Teresa Million, pp. 20-21.

testimony and are on the eve of hearing, Qwest's motion is contrary to the goal of efficiency, not in furtherance of that goal. The Commission should not allow Qwest to put off for another, unspecified day what is already properly submitted to and pending before the Commission today.

Qwest's eleventh hour motion, if granted, would provide Qwest with an unfair strategic advantage. Qwest should not be permitted to game the system by waiting until after it has seen the relative strength of Eschelon's case on these issues before seeking dismissal. Allowing Qwest this opportunity would effectively give to Qwest a "do over" on those issues where its case is particularly weak, by allowing it to retry in a later docket the issues that it tried poorly here.

Qwest incorrectly characterizes Eschelon's witness, Mr. Denney, as having made "arbitrary determinations that Qwest's cost study inputs are improper or are not appropriately documented."[38] In fact, Mr. Denney provides a full explanation of the rationale and bases for Eschelon's proposed interim rates.[39] As Mr. Denney notes, Qwest provided no cost study for many of the rates that are at issue here. For these rates there can be no genuine dispute that Qwest's "cost study inputs" are not appropriately documented; indeed, they are not documented at all. Absent cost support, the Commission would be justified in setting a rate of zero for these elements unless and until Qwest can carry its burden. For other elements, Qwest provided a cost study that was performed for another state and for still others the cost study that Qwest provided

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[38] Qwest Motion to Dismiss at ¶ 9.

[39] A chart describing the bases for each of Eschelon's interim rate proposals may be found at page 189 of Mr. Denney's Direct Testimony. Further explanation is provided at pages 189 through 192 of that testimony. Exhibit DD-6 provides a detailed description of the modifications that Mr. Denney made to the Qwest cost studies to produce Eschelon's proposed interim rate.

included inputs that are inconsistent with previous orders of the Commission.[40] For each of these elements Eschelon has proposed an interim rate based on the best information available.

That said, Qwest is certainly free to argue that Eschelon's proposed interim rates are "arbitrary" and to attempt to support such an argument with evidence. Qwest has had ample opportunity in three rounds of testimony to present evidence to rebut Eschelon's analysis. Qwest will have a further opportunity to cross examine Mr. Denney on these issues. Qwest's motion offers no basis to conclude that the ALJ and the Commission will be unable to evaluate the evidence presented and determine an appropriate interim rate that is most in keeping with the requirement that the prices that Qwest charges for Section 252 elements and products be based on costs.

Finally, Qwest greatly exaggerates the administrative challenges associated with the evidentiary proceedings in this case. In the Minnesota arbitration case, the evidentiary hearing concluded in less than four and one-half days, with the last partial day devoted to examination of witnesses testifying on behalf of the Minnesota Department of Commerce. The hearing in the Arizona arbitration proceedings lasted less than two days. The Colorado hearing is scheduled to begin on April 17 and the parties have agreed that that hearing in this case is likely to be concluded in two to three days. It is reasonable to expect that the hearing in this case will take a similar amount of time, if not less time. Since the arbitration petition was filed, a large number of issues have been settled and the parties have indicated that they believe the evidentiary hearing can be

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[40] *See* Direct Testimony of Douglas Denney at p. 189.

completed in three days or fewer. There is no reason to believe that the case, as presented, including the interim rate issues, is in any sense unmanageable.

CONCLUSION

For the foregoing reasons, Eschelon respectfully requests that Qwest's motion to dismiss rate issues be denied. Eschelon's proposed interim rates are properly raised in Eschelon's arbitration petition and are appropriately determined in this proceeding.

Dated: April 13, 2007

GRAY, PLANT, MOOTY, MOOTY
& BENNETT, P.A.

By: _____

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AFFIDAVIT OF SERVICE BY MAIL

STATE OF MINNESOTA)
) ss
COUNTY OF HENNEPIN)

Joyce Pedersen, being first duly sworn, deposes and says on oath that on the 13th day of April, 2007, she served the attached:

Eschelon Telecom of Washington, Inc.'s Memorandum in Opposition to Qwest Corporation's Motion to Dismiss Issues Involving Proposed Rates

Re: In the Matter of the Petition of Qwest Corporation for Arbitration with Eschelon, Inc. Pursuant to 47 U.S.C. § 252 of the Federal Telecommunications Act of 1996
Docket No. UT-063061

upon the following:

Lisa A. Anderl
Associate General Counsel
Qwest Services Corporation
1600 17th Avenue
Room 3206
Seattle, WA 98191

by arranging for the deposit of a true and correct copy thereof in a sealed envelope duly addressed to the above, postage prepaid, in the United States mails at Minneapolis, Minnesota.

Joyce Pedersen

Subscribed and sworn to before me this
13th day of April, 2007.

Notary Public

LISA H OSTMAN
Notary Public
Minnesota
My Commission Expires January 31, 2010

GP:2090972 v1