Exhibit LBB-1RTC

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION, Petitioners, v. ADVANCED TELECOM GROUP, INC., et al, Respondents.	)	Docket No. UT-033011

RESPONSE TESTIMONY OF

LARRY BROTHERSON

ON BEHALF OF
QWEST CORPORATION

September 13, 2004

REDACTED VERSION
CONFIDENTIAL PER PROTECTIVE ORDER IN
WUTC DOCKET NO. UT-033011

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I. IDENTIFICATION OF WITNESS

Q: PLEASE STATE YOUR NAME, OCCUPATION AND BUSINESS ADDRESS.

A: My name is Larry B. Brotherson. I am employed by Qwest Corporation ("Qwest") as a director in the Wholesale Markets organization. My business address is 1801 California Street, Room 2350, Denver, Colorado, 80202.

Q: BRIEFLY OUTLINE YOUR EMPLOYMENT BACKGROUND.

A: In 1979, I joined Northwestern Bell Telephone Company. I have held several assignments within Northwestern Bell, and later within Qwest, primarily within the Law Department. Over the past 20 years, I have been a state regulatory attorney in Iowa, a general litigation attorney, and a commercial attorney supporting several organizations within Qwest. My responsibilities have included evaluating and advising the company on legal issues, drafting contracts, and addressing legal issues that arise in connection with specific products. With the passage of the Telecommunications Act of 1996 ("the Act"), I was assigned to be the attorney in support of the Interconnection Group. In that role, I was directly involved in working with competitive local exchange carriers ("CLECs") negotiating contract language implementing various sections of the Act, including the Act's reciprocal compensation provisions. In 1999, I assumed my current duties as director of wholesale advocacy.

My current responsibilities include coordinating the witnesses for all interconnection arbitrations and for hearings related to disputes over interconnection issues. Additionally, I work with various groups within the Wholesale Markets organization of Qwest to develop testimony addressing issues associated with interconnection services.

Q: WHAT IS YOUR EDUCATIONAL BACKGROUND?

A: I have two degrees: a Bachelor of Arts degree from Creighton University in 1970; and a Juris Doctorate degree from Creighton University in 1973.

Q: HAVE YOU PREVIOUSLY TESTIFIED IN WASHINGTON?

A: Yes. I have provided testimony in *Tel West Communications, LLC v. Qwest Corp.*, Dockets UT-013097 and UT-013086, and *In the Matter of Developing an Interpretive or Policy Statement relating to the use of Virtual NPA/NXX Calling Patterns*, Docket UT-021569. I believe there may be other dockets in which I have testified in Washington, but those are the two dockets that I have been able to determine with certainty.

II. PURPOSE OF TESTIMONY

Q: WHAT IS THE PURPOSE OF YOUR TESTIMONY?

A: I am providing testimony in response to the Complaint filed by the Commission Staff regarding Qwest's compliance with the interconnection agreement filing requirements set forth in the Telecommunications Act of 1996 ("the Act"), and codified at 47 U.S.C. § 252(e), and with Washington statutes regarding preferences and competitive advantages, codified at RCW 80.36.170, 80.36.180, and 80.35.186.

At the outset, let me say on behalf of Qwest that Qwest sincerely regrets the compliance concerns that have resulted in this case, and Qwest is committed to ensuring that they do not recur. My testimony seeks to provide some context to these issues.

In my testimony, I focus on the 52 agreements that the Staff identified as being subject to Section 252 in Exhibit A to the Complaint and the 25 Exhibit B agreements that the Staff identified in Exhibit B to the Complaint. Exhibit LBB-2 is a matrix listing those

agreements, briefly describing their terms, and summarizing Qwest's position on each of them. I explain why Qwest has or has not filed these agreements and whether the filing obligation under Section 252 was clear with regard to the subjects of these agreements at the time they were executed. I address the voluntary remedial steps that Qwest has taken since May 2002 ensuring that Qwest is in compliance with the Section 252 filing requirements for both new agreements and past agreements that have not terminated or expired. I also address the issue of penalties.

Specifically, my testimony addresses the following points with regard to the Exhibit A agreements:

There was no definitive standard for filing interconnection agreements at the time of the agreements in question, and Qwest did not have a formalized process for reviewing settlement contracts with wholesale customers to determine whether they were interconnection agreements. Qwest business people attempted to apply general concepts, without detailed analysis by experienced legal and regulatory personnel, in making filing judgments regarding the settlement contracts at issue.

Many of the settlement agreements identified by the Staff as at issue either do not involve Section 251(b) and (c) services, involve services outside of the State of Washington, or were only agreements to agree, and are therefore outside the scope of the FCC's filing standard, or were form agreements or escalation and dispute resolution agreements that were available to CLECs through Qwest's standard processes. In addition, most of the agreements at issue have been terminated or superseded, and therefore do not raise ongoing discrimination concerns.

With regard to the Exhibit B agreements, my testimony addresses the following points:

The FCC has interpreted Section 252(e) to permit settlements with backward-looking provisions without requiring that they be filed and made available for opt-in to CLECs. The Staff's position regarding the Exhibit B agreements is diametrically opposed to the FCC's interpretation of Section 252(e). Moreover, Washington's own state policy is to encourage settlement agreements as a means of resolving disputes. The Staff's position would turn that policy on its head. Finally, Washington law requires that the Staff show that the Exhibit B agreements created an *undue* preference or an *unreasonable* competitive advantage. The Staff's position is that any settlement agreement creates such a preference or competitive advantage, regardless of the facts of the particular dispute that is being settled. The Staff's position is contrary to a reasoned reading of the Washington statutes under which it has brought Counts Five, Six, and Seven.

The penalty calculations asserted by Staff did not take into consideration any of the factors pertinent to the Commission's assessment of the amount of any penalties, such as clarity of the operative standard, extent of harm, if any, to other CLECs or the market, efforts to remediate any alleged violations, and commitment and demonstrated actions to prevent any future violations. With respect to the issue of penalties, my testimony points out that the Staff did no fact-gathering to prove whether any of the agreements harmed any CLEC. Without such facts, the Staff has not proved that any of the agreements at issue harmed any CLEC, and the Staff has made no attempt to analyze the purported harm from each unfiled agreement in its testimony. My testimony reviews each agreement in detail to determine whether there was any discrimination, undue preference, or unreasonable competitive advantage. Because most of the provisions at issue were available in other agreements or as part of Qwest's

standard business practices, I conclude that the unfiled agreements did not create significant harm to the CLECs.

In addition, Qwest has implemented significant remedial measures to address any harm arising from the unfiled agreements and to ensure that it fulfills its obligation to file all interconnection agreements for approval, including the following:

Qwest identified all of the currently effective provisions pertaining to Section 251(b) and (c) services and filed them for Commission approval pursuant to Section 252 on August 22, 2002. While approval was pending, Qwest also has separately made them publicly available for CLECs to opt into on its wholesale website.

Qwest filed a petition for declaratory relief with the Federal Communications Commission in April 2002, requesting clarification of the filing standard for interconnection agreements. The FCC granted the petition in part and denied it in part in October 2002, agreeing to articulate a standard, and also agreeing with Qwest that settlement contracts with backward-looking consideration did not need to be filed. The FCC defined the standard for filing interconnection agreements for the first time, stating that all agreements that create ongoing obligations pertaining to Section 251(b) and (c) services must be filed. While Mr. Wilson resisted admitting this in his deposition, he ultimately relented and admitted that the filing standard was not clarified until the FCC issued its Declaratory Order on October 4, 2002.[1]

[1] *See* Deposition Transcript of Thomas L. Wilson ("Wilson Tr."), Vol. II, at 36:18 – 37:6, LBB-33. The excerpts from Mr. Wilson's deposition to which I cite in this testimony are attached as LBB-32, LBB-33, and LBB-34 to correspond respectively to citations to Vol. I, Vol. II, and Vol. III of Mr. Wilson's deposition.

Even prior to the FCC's declaration of the applicable standard, Qwest implemented a voluntary policy of filing all contracts with forward-looking provisions relating to Section 251(b) and (c) obligations in May 2002.

Also in May 2002, Qwest formed an internal committee consisting of experienced legal and regulatory personnel to implement this new policy by reviewing all new settlement contracts with wholesale customers.

Qwest has agreed to engage an independent consultant to audit and monitor its compliance with its Section 252 filing obligations.

Qwest leadership has brought an increased focus on regulatory compliance.

These factors (the good faith judgments made by Qwest, the lack of clarity in the filing standard at the time of the agreements in question, and the remedial actions taken by Qwest), as well as Staff's nominal settlements with numerous CLECs, counsel against the imposition of penalties greater than those already assessed against several CLECs.

I also provide evidence that, despite the fact that certain of the agreements at issue were not filed and approved by the Commission, Qwest has acted consistent with its non-discrimination obligation under the Act and Washington law, in that Qwest provided essentially the same services described in certain unfiled agreements to all CLECs.

III. SECTION 252'S FILING STANDARD

Q: **ARE YOU FAMILIAR WITH THE MEMORANDUM AND ORDER ISSUED BY THE FCC ON OCTOBER 4, 2002 REGARDING THE SCOPE OF THE MANDATORY FILING REQUIREMENT SET FORTH IN § 252(A)(1) OF THE ACT?**

A: I am. On April 23, 2002, Qwest petitioned the FCC for a declaratory ruling on the definition of what constitutes an "interconnection agreement" under Section 252(a)(1)'s filing requirement, because no court or commission had addressed that question previously. On October 4, 2002, the FCC granted Qwest's petition in part and denied it in part and issued a Memorandum Opinion and Order.[2] Importantly, the FCC granted Qwest's petition to the extent it requested the FCC to issue a definition, thereby substantially reducing the uncertainty that has existed previously in the absence of a definition.

The FCC defined "interconnection agreement" for purposes of the filing requirement as "an agreement that creates an *ongoing* obligation pertaining to" services provided pursuant to § 251(b) and (c) of the Telecommunications Act. The FCC Order then applied the new standard to certain categories of agreements, including (a) dispute resolution clauses and escalation provisions, both of which the FCC found were "interconnection agreements,"[3] (b) order and contract forms and agreements with bankrupt CLECs entered into at the direction of a court or trustee, both of which the FCC found were not "interconnection agreements,"[4] and (c) settlement agreements, which the FCC found are "interconnection agreements" if they "contai[n] an ongoing obligation relating to Section 251(b) or (c)," but need not be filed if they "simply provide for 'backward-looking consideration' (*e.g.*, the settlement of a dispute in consideration for a cash payment or the cancellation of an unpaid bill)."[5] The FCC

[2] Memorandum Opinion and Order, *Qwest Communications International, Inc. Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements under Section 252(a)(1)*, FCC 02-276, WC Docket No. 02-89 (released Oct. 4, 2002).

[3] *Id.*, ¶ 9.

[4] *Id*., ¶¶ 13-14.

[5] *Id*., ¶ 12.

"decline[d] to establish an exhaustive, all encompassing 'interconnection agreement' standard," and affirmatively recognized an important role for this Commission to further refine the standard regarding which ILEC-CLEC contracts should go through the 90-day prior approval process of Section 252.[6] The FCC has "encourage[d] state commissions to take action to provide further clarity to incumbent LECs and requesting carriers concerning which agreements should be filed for their approval."[7] Importantly, the FCC said that the filing standard is not without boundaries, stating: "We therefore disagree with the parties that advocate the filing of *all* agreements between an incumbent LEC and a requesting carrier. *See* Office of the New Mexico Attorney General and the Iowa Office of Consumer Advocate Comments at 5. Instead, we find that only those agreements that contain an ongoing obligation relating to section 251(b) or (c) must be filed under 252(a)(1)."[8]

Q: IN CONSIDERATION OF THE FCC ORDER DISCUSSED ABOVE, WHAT IS QWEST'S POSITION ON THE SECTION 252 FILING STANDARD THAT SHOULD BE APPLIED TO THE CLEC CONTRACTS IN THIS DOCKET?

A: It is Qwest's view this Commission should apply the standard from the FCC's October 4, 2002 Order and its noted exceptions to the contracts identified by the Staff.

It is important to note that the FCC did grant Qwest's petition to the extent it established a filing standard that had not been articulated previously, and which had been the subject of many different proposals. Thus, Qwest suggests that the past agreements that are the subject of this docket can be evaluated against the October 4,

6 *Id*., ¶ 10.

7 *Id*.

8 *Id*., n.26.

2002 standard, but, Qwest's conduct in either filing or not filing agreements must also be judged in light of the absence of a standard until the FCC granted Qwest's petition and issued a standard on October 4, 2002. Indeed, the application of the FCC standard to the contracts listed by the Staff shows that many of those did not have to be filed under Section 252(a) and (e), thereby showing that, prior to the FCC Order, there existed good faith and reasonable disagreements on the precise scope of the Section 252 filing requirement.

Q: DID THE STAFF APPLY THE FCC'S OCTOBER 4, 2002 ORDER IN ITS TESTIMONY?

A: No, the Staff does not appear to have applied the standard set forth in the FCC's October 4, 2002 Order to the agreements. Instead, the Staff appears to have applied a standard that Mr. Wilson articulated in his deposition as a "bottom line" standard: anything that affects a CLEC's bottom line is an interconnection agreement that must be filed.[9] Staff's standard is a much broader standard than the FCC set forth because it is not limited by 251(b) or (c) services, and it also is not limited by the essential component of the FCC standard that the agreement must *create* an *ongoing* obligation pertaining to those services.

[9] As Mr. Wilson testified in his deposition, there are four criteria in his test to determine whether an ILEC-CLEC contract is an interconnection agreement, each of which is related to the CLEC's business, rather than to a determination whether a service falls within Sections 251(b) or (c) of the Act.

> Q Okay. Now is it your view that if any of those four or so criterion we just ticked off after the break: the impact on the bottom line, impairment of the ability to compete, the necessity to the CLEC's business, or the impact on the ongoing business relationship, does the presence of any one of those features in an agreement or document independently make it an interconnection agreement in your view, sir?
>
> A We have bottom line impairment, ability to compete, and was the third one necessary?
>
> Q Necessity to the CLEC's business or impact on the ongoing business relationship. If any one of those four is present, does that make it an interconnection agreement in your view?
>
> A Without seeing a specific -- which I would prefer to do, yes.

Wilson Tr., Vol. II, at 49:24 – 50:14, LBB-33.

Q: HAS QWEST REVIEWED PREVIOUSLY UNFILED AGREEMENTS IN LIGHT OF THE FCC ORDER?

A: Yes, Qwest has reviewed each of the 77 contracts listed by the Staff in Exhibits A and B to written direct testimony of Thomas Wilson, under the FCC standard issued October 4, 2002.

Q: DO ANY OF THE AGREEMENTS AT ISSUE IN THIS DOCKET CONTAIN AN ONGOING OBLIGATION RELATING TO SECTION 251(B) OR (C)?

A: Some of them do. As I discuss in more detail below, Qwest filed all agreements that contain such provisions and are currently in effect for Commission approval pursuant to Section 252 in August 2002. Some other agreements "pertain to" services under Section 251(b) or (c) and may have at one time been "ongoing" in nature, but they no longer contain currently ongoing terms, because they have been terminated by the parties, or have been superseded by Commission orders or subsequent agreements. Other agreements listed by the Staff simply do not reflect services under Section 251, or were resolutions of historical disputes and not "ongoing" in any sense of the term.

Thus, for the purposes of evaluating Qwest's *current* compliance with the Section 252 filing requirement, all of the currently effective terms pertaining to Section 251(b) and (c) services have been filed for approval with the Washington Commission.

Q: WHY DID QWEST NOT FILE THESE PAST AGREEMENTS FOR STATE COMMISSION APPROVAL PURSUANT TO SECTION 252 UNTIL AUGUST 2002?

A: In short, Qwest did not think it was required to. As stated above, it is important to note that at the time these agreements were negotiated and executed, no court or regulatory

commission had articulated a filing standard under Section 252, and people within Qwest were operating under a general understanding that the filing standard was more narrow than the standard subsequently announced by the FCC. Qwest filed Interconnection Agreements and Amendments that were negotiated as a result of a CLEC's request to negotiate such an agreement and were based on Qwest's template interconnection agreement. The contracts that were not filed primarily came about through different processes. Most of the unfiled agreements were settlement agreements, and they resolved historical disputes as well as matters that were not clearly the subject of any filing obligation at that time.

In addition, at the time the settlement agreements were entered into, Qwest did not have formalized internal controls to ensure that all settlement agreements were reviewed to determine whether they contained terms and conditions of interconnection. Because the CLEC contracts at issue in this case were considered to be settlement agreements, they were not subjected to the same consideration as the interconnection agreements that were negotiated based upon the template agreements. Instead, Qwest business people treated the settlement agreements based on their general understanding of the filing requirements of the 1996 Act, rather than having experienced regulatory lawyers review the agreements with an eye specifically toward the Section 252 filing requirement.

Based on their general understandings, the Qwest business people did not think that settlement agreements that resolved disagreements between ILECs and CLECs over disputes arising in the past were interconnection agreements under Section 252, even if the dispute related to prior conduct pertaining to elements or services that are subject to Sections 251 and 252.

To some extent, the FCC Order is consistent with that understanding. For example, the FCC agreed with Qwest that a settlement agreement involving purely "backward-looking consideration," such as a cash payment, need not be filed.[10]

The FCC also recognized that there was a lack of clarity about whether dispute resolution and escalation provisions were outside the scope of Section 251(a)(1), and it clarified that "agreements addressing dispute resolution and escalation provisions relating to the obligations set forth in sections 251(b) and (c) are appropriately deemed interconnection agreements" and that the means of resolving disputes "regarding Section 251(b) and (c) obligations" must be "offered and provided on a nondiscriminatory basis if Congress' requirement that incumbent LECs behave in a discriminatory manner is to have any meaning."[11] At the same time, however, the FCC also found that dispute resolution and escalation provisions otherwise within the filing standard need *not* be filed if they are otherwise known and available to CLECs, such as being posted on an ILEC's website.[12] This shows that ILECs have a measure of flexibility as to how they make "ongoing obligations" regarding dispute resolution and escalation provisions available to CLECs as one considers the filing obligations of Section 252(a). It also suggests that the Commission must analyze the connection between the agreement and the enumerated dispute resolution and escalation obligations and determine whether a provision is available elsewhere before it can conclude that Qwest violated the Act by not filing a particular agreement. In addition, the question of whether or not an agreement was filed does not address the fact-

[10] FCC Order, ¶ 12.

[11] *Id.*, ¶ 9.

[12] *Id.*

dependent question of whether or not actual discrimination resulted from the agreement's not being available for opt-in, or whether other CLECs would have been eligible for opt-in under Section 252(i). Further, the FCC's delineation of the elements and exceptions to the section 252 filing requirement, unknown until the FCC issued October 2002 ruling, mitigates against the imposition of penalties for an alleged violation of an unknown standard.

I think it's important to note that Qwest has filed several hundred, indeed thousands, of interconnection agreements and amendments in its region since the passage of the Telecommunications Act. Qwest also has a Statement of Generally Available Terms on file in each state pursuant to Section 252(f). There are a relatively small number of agreements that, in retrospect and in light of the FCC Order, Qwest should have filed but did not. Of course, now that the standard has been clarified, Qwest certainly will comply and has complied with that standard over the last few years. And as discussed further below, Qwest has appointed specialized personnel to implement a formal review processes in order to best satisfy the Section 252 filing requirements for all future CLEC agreements.

IV. QWEST'S TEMPLATE INTERCONNECTION AGREEMENT

Q. WHAT IS THE PURPOSE OF THIS PORTION OF YOUR TESTIMONY?

A. My discussion of Qwest's former Template Interconnection Agreement and its current Statement of Generally Available Terms is for the purpose of demonstrating that at least some of the dispute resolution and escalation provisions at issue were generally available to all CLECs through these documents. As a result, under the FCC's standard, these provisions did not have to be filed, and any discriminatory effects of non-filing were minimal.

Q: WHAT IS THE TEMPLATE INTERCONNECTION AGREEMENT?

A: It was a document that CLECs and Qwest use as the basis for starting negotiations for an interconnection agreement. In most instances Qwest offered its template interconnection agreement as the starting point for negotiations. In some instances a large CLEC such as AT&T or WorldCom might have tendered its own template to commence the negotiating process.

Q: HOW LONG HAS QWEST MAINTAINED A TEMPLATE INTERCONNECTION AGREEMENT?

A: Qwest first created a template in 1996, shortly after the Telecommunications Act was passed, but it was much less detailed then. As new provisions were negotiated and as State and FCC decisions further clarified the Telecom Act the template was expanded. With the advent of the 271 process, the template interconnection agreement and the SGAT were merged into a single document.

Q: WHAT TYPES OF TERMS WERE INCORPORATED INTO THE TEMPLATE INTERCONNECTION AGREEMENT?

A: Many updates are driven by orders from state commissions and from court cases. For example, the first major update to the template was in July 1997, in response to decisions from the Eighth Circuit. Also, if Qwest negotiated a new term with one CLEC that represented a change in position, that new term would be added to the template, and there is some state-specific language in the template that reflects terms that have been arbitrated in various states. The template was also updated as Qwest began receiving feedback from the 271 workshops and Qwest orders from state commissions to incorporate terms into the SGAT. The primary driver for changes in the SGAT was the 271 process. As the workshops went on and as agreements were

made, terms were incorporated into the SGAT. State-specific orders were incorporated into the template, but sometimes only for the particular affected state. If a term was voluntarily negotiated, it is globally incorporated into the template.

Q: IF QWEST NEGOTIATED NEW LANGUAGE IN AN INTERCONNECTION AGREEMENT WITH A CLEC, WOULD THAT TERM BE ADDED TO THE TEMPLATE?

A: That term would either be added to the template or available through Qwest's routine negotiation process. Language changes negotiated to meet the request of a particular CLEC did not always become the "template" language. Qwest would still tender for negotiations its "standard" language. The agreement that contained the unique CLEC-requested language would, however, be filed with the Commission and available for opt-in under Section 252(i).

Q: WAS EVERY TERM IN THE TEMPLATE INTERCONNECTION AGREEMENT SUBJECT TO THE FILING REQUIREMENTS OF § 252 OF THE TELECOMMUNICATIONS ACT AS DEFINED IN THE FCC ORDER?

A: No. Qwest used the template agreement – and now the SGAT – as the starting point for negotiations with CLECs. However, ILECs enter into many contractual arrangements with CLECs, just as they do with other customers and vendors every day. Yet, as the FCC Order made clear, the Telecommunications Act does not require literally every provision of every ILEC-CLEC contract to be filed for PUC approval. First, the fact that a provision may be part of a document entitled "Interconnection Agreement" does not mean that it is within the filing standard under Section 252. That is, in addition to interconnection terms and conditions implicating Section 251 of the Act, the template agreement and the SGAT cover a wide variety of business matters, such as Qwest

voicemail, that are not Section 251(b) and (c) services and, therefore, are outside of the FCC's filing requirement.

Second, even if provisions pertain to Section 251(b) and (c) services, such as dispute resolution terms, the FCC stated that those terms do not need to be filed if they are otherwise known and available to CLECs, such as being posted on an ILEC's website (as Qwest's SGAT is). For example, the dispute resolution procedures in section 5.18 of the SGAT include business-to-business meetings between vice presidents or employees with decision-making authority, mediation of disputes, arbitration, and enforcement of the arbitrator's award. The template agreement in effect in April 2000 had similarly detailed dispute resolution provisions. The fact that the SGAT (and the former template agreement) is publicly available indicates that these terms are not subject to the filing requirements of Section 252. *See 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 Washington* ("SGAT") § 5.18, a true and correct copy of which is attached as Exhibit LBB-3. A true and correct copy of section (A)3.17 of the template interconnection agreement that was in place in April 2000 is marked as Exhibit LBB-4. Exhibits LBB-3 and LBB-4 were produced and maintained in the regular course of business.

Because these dispute resolution provisions were generally available through the template interconnection agreement, the SGAT, and Qwest's website, the escalation and dispute resolution provisions contained in the July 1, 2001 Qwest/Eschelon

Implementation Plan (an agreement identified by the Staff as 6A) did not need to be filed.[13]

V. COUNT TWO (47 U.S.C. § 252(E))

Q: WHAT IS QWEST'S POSITION REGARDING MR. WILSON'S TESTIMONY ON COUNT TWO OF THE COMPLAINT?

A: Qwest's position is that each agreement needs to be analyzed under the FCC's October 4, 2002 standard, not under the overly broad "bottom line" standard used in Staff's testimony. When that analysis is performed, it is clear that a number of the agreements either do not fall within the Section 252(e) filing standard, were available to CLECs in other forms, or were superseded or terminated by other agreements.

Q: DO ANY OF THE AGREEMENTS LISTED IN MR. WILSON'S TESTIMONY FALL OUTSIDE OF THE FILING REQUIREMENT SET OUT BY THE FCC IN ITS OCTOBER 4, 2002 ORDER?

A: Yes. In order to analyze the agreements at issue in this case, we must use the FCC's October 4, 2002 Order as the starting point. The FCC defined the filing requirement as being bounded by going forward obligations relating to Section 251(b) and (c) services.[14] Mr. Wilson appears to have used a broader standard in his analysis. For example, Mr. Wilson states that "It is my opinion that if a service, rate, term or condition is in the SGAT, and if it is in an agreement between a CLEC and Qwest, it should be filed as an interconnection agreement." (Direct Testimony of Thomas L. Wilson, at 17:10-12.) The SGAT is not necessarily coextensive with Section 251(b) and (c) services, however, and there are terms in the SGAT that Qwest has included in

[13] FCC Order, ¶ 9

[14] *Id.*

the past, such as Qwest Dex, that are not Section 251(b) and (c) services. This overinclusiveness may be one reason why Mr. Wilson included a number of agreements in his testimony that, in my opinion, are not within the filing requirement that the FCC has established.

Q: CAN YOU SUMMARIZE THE REASONS WHY THE AGREEMENTS THAT YOU DISCUSS DID NOT NEED TO BE FILED?

A: Yes. Although I will go through each agreement and discuss it specifically, I can list some general categories of agreements that did not need to be filed with the Commission under the FCC's October 4, 2002 filing standard. Here are the categories into which I have grouped these agreements:

- Agreements that do not relate to Section 251(b) and (c) services: These agreements are, by definition, outside of the filing requirement. The FCC limited the filing requirement to agreements relating to Section 251(b) and (c) services. If an agreement does not relate to Section 251(b) and (c) services, of course, it is not within the filing requirement.

- Agreements to agree at a later date: Several of the agreements listed in the Complaint involve agreements between Qwest and a CLEC to negotiate and agree at a later date. An agreement to later negotiate an agreement does not itself constitute a contract, let alone an interconnection agreement amendment, because it does not itself create a binding, ongoing obligation detailing the terms and conditions for provisioning a section 251 service.

A. Agreements that Do Not Relate to Section 251(b) and (c) Services

Q: ARE THERE ANY AGREEMENTS THAT DO NOT RELATE TO SECTION 251(B) AND (C) SERVICES THAT ARE STILL AT ISSUE IN THIS CASE?

A: Yes. As I discuss above, the FCC limited the filing requirement to agreements that create ongoing obligations pertaining to Section 251(b) and (c) services. There are many agreements between ILECs and CLECs that do not relate to local services. The Commission recognized this principle when it dismissed the following agreements in Order No. 5: XO 38A, a December 31, 2001 Confidential Billing Settlement Agreement with QCC that addresses out-of-region issues with QCC, Qwest's unregulated subsidiary; and XO 39A, a December 31, 2001 XO Confidential Billing Settlement Agreement with QCC that addresses out-of-region issues. The Commission also recognized this principle in Order No. 8, when it dismissed ELI 49A, a July 19, 2001 ELI Binding Letter Agreement with QCC that addresses out-of-region issues, and in Order No. 9, when it dismissed MCI 31A, a November 18, 1999 agreement between MCI WorldCom, Inc. and U S WEST Communications, Inc., because "Staff reports that the agreement is a one-time settlement of disputes under U S WEST's interstate tariff FCC No. 05, and that no local interconnection services were involved. Staff also reports that none of the interstate services obligated U S WEST under section 251 of the Act to provide access to unbundled network elements or other obligations under section 251 of the Act."

Q: WHICH EXHIBIT A AGREEMENTS LISTED IN MR. WILSON'S TESTIMONY FALL OUTSIDE OF THE FCC'S FILING REQUIREMENT BECAUSE THEY DO NOT CREATE FORWARD-LOOKING OBLIGATIONS TO PROVIDE SECTION 251(B) AND (C) SERVICES?

A: There are two remaining Exhibit A agreements that Mr. Wilson covers in his testimony that do not relate to Section 251(b) and (c) services and, therefore, did not have to be filed with the Commission. Those agreements are the following:

Eschelon 17A is an unsigned letter dated November 14, 2000 from Judy Rixe, the Senior Account Manager at Qwest, to Rick Smith, the President and Chief Operating Officer at Eschelon. In this letter, Ms. Rixe states that she will be responsible for developing an implementation plan with Eschelon, with the objective "to give some structure as to how our companies do business together and how we will work as business partners to arrive at mutually satisfying business solutions." How that objective will be achieved, other than listing nine very general areas that the implementation plan will cover, is not specified by this letter.[15] There are no going-forward 251(b) or (c) obligations set out in this letter; indeed, it appears to be nothing more than an introductory letter from Eschelon's account representative. Indeed, the Staff moved to dismiss Eschelon 17A in a motion filed with the Commission on August 11, 2004.

Eschelon 20A is a brief, one-paragraph letter dated August 1, 2001 from Mr. Smith at Eschelon to Audrey McKenney, Senior Vice President for Wholesale Markets at Qwest.[16] In this letter, Mr. Smith states that Eschelon agrees not to bill Qwest for "(1) reciprocal compensation for functions performed in terminating local/Extended Area Service ('EAS') and internet-bound traffic originated by the end-user of one Party

[15] TLW-70 lists this letter as having terms relating to daily usage information, ordering process, installation intervals, dedicated provisioning team, implementation process/plan, and escalation procedures, apparently because of the listing of these areas without any additional details in the letter.

[16] TLW-70 lists this one-paragraph letter as containing terms relating to DEOT , EICT, LIS, Mileage, MUX, UNE-DS1, UNE-DS-3, and rates despite the fact that it is not an agreement.

and delivered to the other Party for termination to that Party's end users; and (2) LIS trunking services . . . for two-way trunks between Eschelon and Qwest" for the time period prior to January 1, 2001. This letter does not fit within the FCC's filing standard because it is not a going-forward agreement. Instead, this agreement relates to Eschelon's forbearance from billing for services that it provided to Qwest in the past, that is, prior to January 1, 2001. In addition, there does not appear to be any arrangement that a CLEC could opt into here – it is Eschelon's unilateral commitment not to bill Qwest for certain services. Indeed, the Staff moved to dismiss Eschelon 20A in a motion filed with the Commission on August 11, 2004.

B. Agreements to Negotiate an Agreement at a Later Date

Q: DO AGREEMENTS TO AGREE AT A LATER DATE HAVE TO BE FILED WITH AND APPROVED BY THE COMMISSION IN THIS STATE?

A: No, where the parties state that their intentions are to negotiate an agreement at a later date, the initial agreement is an expression of their future intentions that does not have to be filed with and approved by this Commission.[17] Under basic principles of contract law, an agreement to agree is not a contract. *See Keystone Land & Dvlp. Co. v. Xerox Corp.*, 2004 Wash. LEXIS 537 (Wash. July 22, 2004), at *5 ("An agreement to agree is an agreement to something which requires a further meeting of the minds of the parties and without which it would not be complete. [citation omitted] Agreements to agree are unenforceable in Washington."); *Sandeman v. Sayres*, 50 Wa.2d 539, 541-42, 314

[17] Mr. Wilson agreed with this proposition in his deposition:

> Q So is it fair to say then that before there can be an interconnection agreement that needs to be filed under 252, there has to actually be an agreement, a meeting of the minds of some sort?
>
> MR. SWANSON: Objection to the extent it calls for a legal conclusion.
>
> A THE WITNESS: Yes.

Wilson Tr., Vol. II, at 139:2-8, LBB-33.

P.2d 428 (1957) ("An agreement for an agreement, or in other words, an agreement to do something which requires a further meeting of the minds of the parties and without which it would not be complete is unenforcible.").

Several agreements that were originally at issue in the Complaint have been dismissed on this basis already. On September 4, 2003, the Staff filed a motion to dismiss the allegations against Allegiance Telecom, Inc. ("Allegiance") because the Allegiance agreement was not an interconnection agreement.[18] The Allegiance agreement (13A) settled a dispute between Qwest and Allegiance and included a one time payment of retrospective consideration to settle the dispute, as well as an agreement to file an interconnection amendment to address the disputed issue. The amendment was subsequently filed. In recognition of the fact that the agreement did not create any new going forward obligations, but was rather an agreement to agree, Staff apparently concluded (correctly) that this agreement was not an interconnection agreement. The Commission implicitly recognized the principle when it dismissed Allegiance 13A and Eschelon 24A, a February 22, 2002 agreement in principle between Qwest and Eschelon that was memorialized in an agreement dated March 1, 2002 (Eschelon 12A), in Order No. 5.[19]

Q: WHICH AGREEMENTS LISTED IN MR. WILSON'S TESTIMONY FALL OUTSIDE OF THE FCC'S FILING REQUIREMENT BECAUSE THEY ARE MERELY AGREEMENTS TO AGREE?

[18] Motion to Dismiss Allegiance Telecom, Inc. and to Amend Exhibit B of Complaint to Include the Allegiance Agreement, *WUTC v. ATG, et. al,* Docket No. UT-033011 (Sept. 4, 2003).

[19] The Staff agreed that Eschelon 24A did "not create an ongoing obligation pertaining to resale, number portability, dialing parity, access to rights-of-way, reciprocal compensation, interconnection, unbundled network elements, or collocation," and therefore did not need to be filed. Commission Staff's Response to Motions to Dismiss or Motions for Summary Determination, *WUTC v. ATG Group, et al.*, Docket No. UT-033011 (Dec. 12, 2003).

A: Both Eschelon 17A, which I also discuss above, and Eschelon 23A, an April 2, 2001 Confidential Second Amendment to Confidential/Trade Secret Stipulation, are agreements to execute an implementation plan at some point in the future, but do not themselves create any obligations regarding 251(b) or (c) services.[20] Indeed, the Staff moved to dismiss Eschelon 17A and Eschelon 23A in a motion filed with the Commission on August 11, 2004. The implementation plan was ultimately entered into on July 31, 2001. As a result, these two agreements do not fit within the filing requirement.

Additionally, McLeod 41A is only an agreement to agree. This document is an April 25, 2000 letter from John Kelley, President of Qwest Wholesale Markets, to Blake Fisher, Group Vice President and Chief Planning Development Officer at McLeodUSA, that "documents the proposed settlement terms discussed by the parties over the last several days" and was expressly contingent on a number of actions being taken during the following three days. This proposal letter was replaced in its entirety by a settlement agreement executed by Qwest and McLeod three days later on April 28, 2000. The superseding settlement agreement is included in the Staff's Complaint as McLeod 8A. Because McLeod 41A was a proposal letter and not a binding agreement, it is not within the filing requirement. On August 20, 2004, the Staff moved to dismiss McLeod 41A because it now realizes that McLeod 41A is not an interconnection agreement.

[20] Eschelon 23A also includes an agreement to settle a past dispute without any forward-looking obligations. This portion of the agreement does not create a filing obligation because it does not create forward-looking obligations with respect to 251(b) or (c) services.

C. Summary of Testimony About Remaining Exhibit A Agreements

Q: WHAT ABOUT THE OTHER EXHIBIT A AGREEMENTS AT ISSUE IN THIS CASE?

A: In the remainder of this section, I review the other Exhibit A agreements at issue in this case and analyze whether the specific provisions were available to CLECs in other filed agreements or through Qwest's standard business processes. The agreements fall into the following general categories:

- Escalation and Dispute Resolution Agreements: A number of the agreements at issue involve escalation and dispute resolution terms. My testimony discusses how it was unclear at the time whether these types of agreements had to be filed, and also how there was no discrimination or harm resulting from the failure to file these agreements because the substance of the provisions were available to all CLECs through other agreements or through Qwest's standard business procedures.

- Form Agreements: Several of the agreements at issue are form agreements for facilities decommissioning. At the time that these agreements were executed, existing law was not clear that form agreements for Section 251(b) and (c) services had to be filed. My testimony reviews the lack of discrimination or harm resulting from the failure to file these agreements because the identical forms were available to all CLECs through Qwest's website.

- Service Level Agreements: One of the agreements at issue is a Service Level Agreement with Covad. My testimony relates that this agreement was provided to the Staff in May 2000 for its review and that it was not kept confidential. My testimony also shows how there was no discrimination or harm resulting from the

failure to file this agreement because the service level benchmarks that it set forth became the standards for all CLECs, not just Covad, and therefore all CLECs got the same level of service that was provided in the agreement.

- Reciprocal Compensation Agreements: Many of the agreements at issue involve reciprocal compensation. At the time that Qwest entered into these agreements, there was considerable debate about the status of reciprocal compensation for terminating Internet traffic, and Qwest believed that such agreements involved interstate terms that were not subject to state regulation. My testimony discusses the lack of discrimination or harm resulting from the failure to file these agreements because rates that were equal to or better than the rates set forth in these agreements were available to all CLECs at the time in publicly filed and approved interconnection agreements in Washington.

- Remaining Agreements: The remainder of my testimony in this section reviews the McLeod and Eschelon agreements, as well as a few additional agreements that do not fit in any particular category. My testimony shows how the substance of the terms of these agreements were available to CLECs in other filed agreements or through Qwest's business processes, and how there was no discrimination or harm from the failure to file these agreements.

D. Escalation and Dispute Resolution Agreements

Q: WHAT IS QWEST'S POSITION REGARDING THE ESCALATION AND DISPUTE RESOLUTION PROVISIONS IN THE COMPLAINT?

A: As I discuss above, the FCC determined that it was necessary to address escalation and dispute resolution agreements specifically in its October 4, 2002 Order. I believe that the FCC felt the need to do so because there was a lack of clarity under the law existing

at the time about whether such agreements related to Section 251(b) and (c) services. In addition, as I discuss above, the FCC also stated that such agreements did not have to be filed if they were made available to CLECs through some other means, such as being posted on the ILEC's website. As I will explain below, the escalation and dispute resolution procedures at issue in the agreements identified in the Complaint have been available to all CLECs as part of Qwest's business processes, and the agreements themselves have been posted on Qwest's website since September 2002 and available for any CLEC to opt into.

Q: TO WHICH ESCALATION AND DISPUTE RESOLUTION PROVISIONS IN THE COMPLAINT ARE YOU REFERRING IN THIS PORTION OF YOUR TESTIMONY?

A: I am referring to Eschelon 3A, a November 15, 2000 Confidential Agreement re: Escalation Procedures and Business Solutions (which I discuss later in my testimony); McLeod 9A, an October 26, 2000 Confidential Letter Agreement re: Escalation Procedures and Business Solutions; FairPoint 30A, a September 4, 2001 Confidential Billing Settlement Agreement; MCI WorldCom 33A, a June 29, 2001 Business Escalation Agreement; and XO 40A, a December 31, 2001 Confidential Billing Settlement Agreement.

Q. ARE YOU FAMILIAR WITH THE ESCALATION PROCEDURES DETAILED IN THESE AGREEMENTS?

A. Yes.

Q: CAN YOU BRIEFLY DESCRIBE THEM?

A: Yes. Escalation procedures are outlined in all of Qwest's interconnection agreements with CLECs. MCLeod 9A, FairPoint 30A, MCI WorldCom 33A, and XO 40A had the following terms:

McLeod 9A: This agreement established that the parties would engage in quarterly executive meetings to address unresolved business issues and/or disputes between them. It also outlined a six-level escalation procedure for resolving disputes. No other CLEC has sought to opt into these provisions since they were posted on Qwest's website in September 2002. Qwest filed this agreement with the Commission on August 22, 2002, *see* LBB-5, and the Commission approved it by Order dated September 25, 2002. *See In the Matter of the Request for Approval of Negotiated Agreement Under the Telecommunications Act of 1996 Between McLeodUSA Telecommunications Services, Inc. and Qwest Corporation*, Order Approving Negotiated Eighth Amended Agreement Consisting of a Settlement Agreement, Docket No. UT-993007 (9/25/02), LBB-6. In its Order, the Commission specifically found that "The Amended Agreement does not discriminate against any other telecommunications carrier," and that "The Amended Agreement will facilitate local exchange competition in the state of Washington by enabling McLeodUSA to expand its presence in the local exchange market and increase customer choices for local exchange services."

FairPoint 30A: This agreement primarily settled an historical dispute for retrospective consideration. In order to avoid such future disputes the parties agreed to implement a four-level dispute escalation procedure. No other CLEC has sought to opt into this escalation procedure since it was posted on Qwest's website in September 2002. Qwest filed this agreement with the Commission on August 22, 2002, *see* LBB-7, and the Commission approved it by Order dated October 23, 2002. *See In the Matter of the*

Request for Approval of Negotiated Agreement Under the Telecommunications Act of 1996 Between Fairpoint Communications Solutions Corp. and Qwest Corporation, Order Approving Negotiated Seventh Amended Agreement Consisting of a Settlement Agreement, Docket No. UT-990343 (10/23/02). In its Order, the Commission specifically found that "The Amended Agreement does not discriminate against any other telecommunications carrier," and that "The Amended Agreement will facilitate local exchange competition in the state of Washington by increasing customer choices for local exchange services." FairPoint and the Commission Staff agreed to settle the allegations regarding FairPoint 30A on May 4, 2004 for $1,000.

MCI WorldCom 33A: In this agreement the parties agreed to implement a dispute resolution plan that included quarterly meetings among executives, and a three-level escalation procedure. No other CLEC has sought to opt into this escalation procedure since it was been posted on Qwest's website in September 2002. Qwest filed this agreement with the Commission on August 22, 2002, *see* LBB-8, and the Commission approved the agreement on October 9, 2002. *See In the Matter of the Request for Approval of Negotiated Agreement Under the Telecommunications Act of 1996 Between MCI WorldCom Communications, Inc. and Qwest Corporation*, Order Approving Negotiated Sixth Amended Agreement Consisting of a Settlement Agreement, Docket No. UT-960323 (10/9/02).

XO 40A: This agreement primarily settled an historical dispute for retrospective consideration. In order to avoid such future disputes the parties agreed to implement a four-level dispute escalation procedure (very similar to the procedure in FairPoint 30A). No other CLEC has sought to opt into this escalation procedure since it was posted on Qwest's website in September 2002. Qwest filed this agreement with the

Commission on August 22, 2002, *see* LBB-9, and the Commission approved it by Order dated October 9, 2002. *See In the Matter of the Request for Approval of Negotiated Agreement Under the Telecommunications Act of 1996 Between XO Washington, Inc. and Qwest Corporation,* Order Approving Negotiated Seventh Amended Agreement Consisting of a Settlement Agreement, Docket No. UT-96035 (10/9/02). In its Order, the Commission specifically found that "The Amended Agreement does not discriminate against any other telecommunications carrier," and that "The Amended Agreement will facilitate local exchange competition in the state of Washington by enabling XO to expand its presence in the local exchange market and increase customer choices for local exchange services." On July 30, 2004, XO and the Commission Staff agreed to settle the allegations regarding this agreement and another agreement, XO 36A, for $2,000. On August 10, 2004, the Commission approved this settlement agreement in Order No. 10.

Q. WHY DID QWEST AGREE TO THESE ESCALATION PROCEDURES?

A. Qwest's intent in entering into the escalation procedures was to improve Qwest's business-to-business relationship with these companies, in the belief that if Qwest and the CLEC could discuss problems, they could resolve them within the particular corporate structures of both companies without resorting to litigation.

Q. DO YOU KNOW IF QWEST PROVIDES ESCALATION PROCEDURES FOR ITS OTHER WHOLESALE CUSTOMERS?

A. Yes. Qwest allows disputes to be escalated for any CLEC, because it is more efficient and cost effective for Qwest and its CLEC customer to resolve historical disputes short of administrative complaints or litigation. This is a core function of the service

management team. Escalation procedures and associated contact names and numbers can be found on the Wholesale web site.

Q. IS THERE A DOCUMENT EXPLAINING THESE PROCESSES?

A. Yes. Exhibit LBB-10, Expedites & Escalations Overview – V14.0, can be located at web address http://www.qwest.com/wholesale/clecs/exescover.html, and which first became available on the Qwest's website on January 25, 2001 as version V3.0. LBB-10 was produced and maintained by Qwest in the regular course of business.

Q. HOW DO THESE ESCALATION PROCEDURES TYPICALLY WORK?

A. If normal processes fail to resolve a service concern, a customer will initiate a call to their service manager, who evaluates the situation based on facts provided by the customer. The service manager will use internal resources to identify a resolution to the customer trouble.

Q. IF A SERVICE MANAGER IS UNABLE TO RESOLVE A PARTICULAR SERVICE ISSUE, WHAT HAPPENS NEXT?

A. The wholesale customer may escalate its complaint to a senior service manager, service director, senior service director, and then to a vice president (as set forth in LBB-10, Expedites & Escalations Overview – V14.0, which can be found on Qwest's website at http://www.qwest.com/wholesale/clecs/exescover.html, and which first became available on the Qwest's website on January 25, 2001 as version V3.0, and in Qwest's SGAT for the State of Washington, § 5.18.2).

Qwest also provides a Customer Contact Information Tool ("CCIT"), which can be found on Qwest's website at http://www.qwest.com/wholesale/ccdb/. This web site requires customers to input customer name and its Access Carrier Name Abbreviation

("ACNA") and then responds with specific names and contact numbers for the escalation process.

Q. HOW SUCCESSFUL HAS QWEST BEEN USING THESE PROCESSES?

A. Qwest has found that this escalation process resolves virtually all service issues with all CLECs.

Q: ARE THE ESCALATION PROCEDURES IN THE ESCHELON, MCLEOD, FAIRPOINT, AND MCI AGREEMENTS DIFFERENT FROM THE ESCALATION PROCEDURES YOU JUST DESCRIBED?

A. Yes, they are more extensive. The escalation procedures in the subject agreements memorialize what occurs if the vice presidents cannot solve a problem. These escalation procedures memorialize what occurs if the vice presidents cannot solve a problem.

Q. BY VIRTUE OF THIS PROVISION, ARE ESCHELON, MCLEOD, FAIRPOINT, AND MCI BEING TREATED MORE FAVORABLY THAN OTHER CLEC CUSTOMERS?

A. No; it is standard industry practice that a problem would be escalated up through the reporting chain. As a business reality, if a problem cannot be resolved to the customer's satisfaction they escalate the matter to more senior employees to solve the problem. Other Qwest leaders are willing to get involved in issue resolution if it cannot be done successfully in the line operating organization. In practice this happens very rarely.

Q. ARE YOU FAMILIAR WITH THE SECTIONS OF MCLEOD 9A AND ESCHELON 3A THAT PROVIDE FOR QUARTERLY EXECUTIVE MEETINGS?

A. Yes.

Q. DO QWEST VICE PRESIDENTS ATTEND MEETINGS WITH OTHER WHOLESALE CUSTOMERS BESIDES MCLEOD AND ESCHELON?

A. Yes. Qwest's senior vice president for wholesale service often attends quarterly meetings with wholesale customers. The leadership of the Wholesale Service Delivery Department often shared responsibility for covering customer meetings. Here, these meetings began to decline as open issues were addressed and resolved.

E. Form Agreements

Q: DO ANY OF THE AGREEMENTS AT ISSUE IN THE COMPLAINT INVOLVE FORM AGREEMENTS THAT WERE LATER FILED WITH THE COMMISSION?

A: Yes, four of the Exhibit A agreements that were posted on Qwest's website and available for opt-in as of September 2002 were facilities decommissioning agreements.[21] These agreements do not address interconnection offerings directly, but rather outline the terms by which particular collocations sites will be decommissioned

[21] The applicability of section 252 to facility decommissioning agreements is very much in dispute. For example, AT&T has stated the following in responses to discovery in proceedings in Colorado:

> AT&T believes that the decommissioning of specific collocations does not fall within the Commission's definition of an interconnection agreement, provided that the general terms and conditions relating to decommissioning of all locations have already been filed and are available to other carriers on a nondiscriminatory basis.

See AT&T's Responses to Staff's First Set of Data Requests to CLECs, *In the Matter of the Investigation into Unfiled Agreements Executed by Qwest Corporation*, Public Utilities Commission of the State of Colorado, Docket 02I-572T, attached as LBB-37. Given that AT&T has historically been adverse to Qwest in regulatory proceedings, this statement deserves some weight and bears on the fairness of imposing fines for the failure to file any of the decommissioning agreements.

and removed. Decommissioning was conducted according to a standard form agreement that was substantially similar for any decommissioning, regardless of the CLEC. In fact, the only substantive difference between the agreements is whether the CLECs elected to accept reimbursement in cash or as a credit. As a result, no CLEC has sought to opt into any of the decommissioning agreements in Exhibit A that were posted on Qwest's website. A comparison of the four agreements at issue demonstrates that the basic terms of all decommissioning agreements were the same:

AT&T 14A (AT&T Corp. Facility Decommissioning Reimbursement Agreement, December 27, 2001): In this agreement Qwest agreed to: a) waive charges and fees associated with decommissioning the site(s) (¶ 1); b) to reimburse AT&T for any nonrecurring charges already made for the decommissioning or recurring charges attributable to the site after the decommissioning request was received (¶ 2); and c) release and waive any claims against AT&T (¶ 3b). AT&T agreed to: a) release and waive any claims against Qwest (¶ 3a); b) remove its equipment within 30 days from the agreement's effective date (¶ 3c); c) allow Qwest to remove and store AT&T's equipment at AT&T's expense if the 30-day deadline was not met; and d) receive the return of the equipment within forty-five days of payment of the expenses (¶ 3d). Qwest filed this agreement with the Commission on August 21, 2002, *see* LBB-11, and the Commission approved it by Order dated September 25, 2002. *See In the Matter of the Request for Approval of Negotiated Agreement Under the Telecommunications Act of 1996 Between AT&T Communications of the Pacific Northwest, Inc. and Qwest Corporation*, Order Approving Negotiated Fifth Amended Agreement Consisting of a Settlement Agreement, Docket No. UT-960309 (9/25/02). In its Order, the Commission specifically found that "The Amended Agreement does not discriminate

against any other telecommunications carrier," and that "The Amended Agreement will facilitate local exchange competition in the state of Washington by enabling AT&T to expand its presence in the local exchange market and increase customer choices for local exchange services."

Covad 16A (Covad Communications Company Facility Decommissioning Agreement, January 3, 2002): In this agreement Qwest agreed to: a) waive charges and fees associated with decommissioning the site(s) (¶ 1); b) to reimburse Covad for any nonrecurring charges already made for the decommissioning or recurring charges attributable to the site after the decommissioning request was received (¶ 2); and c) release and waive any claims against Covad (¶ 3a). Covad agreed to: a) release and waive any claims against Qwest (¶ 3a); b) remove its equipment within 30 days from the agreement's effective date (¶ 3b); c) allow Qwest to remove and store Covad's equipment at Covad's expense if the 30-day deadline was not met; and d) receive the return of the equipment within forty-five days of payment of the expenses (¶ 3c).

Integra 25A (Integra Telecom Facility Decommissioning Agreement, November 20, 2001): In this agreement Qwest agreed to: a) waive charges and fees associated with decommissioning the site(s) (¶ 1); b) to reimburse Integra for any nonrecurring charges already made for the decommissioning or recurring charges attributable to the site after the decommissioning request was received (¶ 2); and c) release and waive any claims against Integra (¶ 3d). Integra agreed to: a) release and waive any claims against Qwest (¶ 3a); b) remove its equipment within 30 days from the agreement's effective date (¶ 3b); c) allow Qwest to remove and store Integra's equipment at Integra's expense if the 30-day deadline was not met; and d) receive the return of the equipment within forty-five days of payment of the expenses (¶ 3c). As Integra pointed out in its motion for

summary disposition, "The Agreement represents a standard form with terms that are posted on Qwest's web site and available to all competitive local exchange carriers ("CLECs") similarly situated to Integra. A form agreement containing all of the terms, definitions, conditions and pricing of the CMDS [Centralized Message Data System] Agreement that Integra and Qwest entered into can be found on Qwest's web site at: http://www.qwest.com/wholesale/downloads/2003/030701/CMDSAmendment6-20-03.doc." *See* Integra Telecom Of Washington, Inc.'s Motion for Summary Disposition, at 3, filed on November 7, 2003 in this matter.

Qwest filed this agreement with the Commission on August 22, 2002, *see* LBB-12, and the Commission approved it by Order dated October 9, 2002. *See In the Matter of the Request for Approval of Negotiated Agreement Under the Telecommunications Act of 1996 Between Integra Telecom of Washington, Inc. and Qwest Corporation*, Order Approving Negotiated Eleventh Amended Agreement Consisting of a Settlement Agreement, Docket No. UT-980380 (10/9/02). In its Order, the Commission specifically found that "The Amended Agreement does not discriminate against any other telecommunications carrier," and that "The Amended Agreement will facilitate local exchange competition in the state of Washington by enabling Integra to expand its presence in the local exchange market and increase customer choices for local exchange services." On August 11, 2004, the Staff and Integra agreed to settle the allegations regarding this agreement for $1,000. The Commission approved this settlement on August 13, 2004 by Order No. 11.

MCI WorldCom 35A (MCI WorldCom Network Services, Inc. Facility Decommissioning Settlement Agreement, December 27, 2001): In this agreement, Qwest agreed to: a) waive charges and fees associated with decommissioning the site(s)

(¶ 1); b) to reimburse MCI WorldCom for any nonrecurring charges already made for the decommissioning or recurring charges attributable to the site after the decommissioning request was received (¶ 2); and c) release and waive any claims against MCI WorldCom. MCI WorldCom agreed to: a) release and waive any claims against Qwest (¶ 3a); b) remove its equipment within 30 days from the agreement's effective date (¶ 3b); c) allow Qwest to remove and store MCI WorldCom's equipment at MCI WorldCom's expense if the 30-day deadline was not met; and d) receive the return of the equipment within forty-five days of payment of the expenses (¶ 3d). Qwest filed this agreement with the Commission on August 22, 2002, *see* LBB-13, and the Commission approved it by Order dated September 25, 2002. *See In the Matter of the Request for Approval of Negotiated Agreement Under the Telecommunications Act of 1996 Between MCI WorldCom Communications, Inc. and Qwest Corporation*, Order Approving Negotiated Sixth Amended Agreement Consisting of a Settlement Agreement, Docket No. UT-960323 (9/25/02). In its Order, the Commission specifically found that "The Amended Agreement does not discriminate against any other telecommunications carrier," and that "The Amended Agreement will facilitate local exchange competition in the state of Washington by enabling MCI to expand its presence in the local exchange market and increase customer choices for local exchange services."

Q: HAS ANY OF THESE AGREEMENTS BEEN DISMISSED FROM THE COMPLAINT?

A: Yes. On November 5, 2003, Staff filed a motion to dismiss AT&T 14A, the facilities decommissioning agreement between AT&T and Qwest because the terms and conditions of the agreement were contained in an interconnection agreement filed with

the Commission on January 31, 2002.[22] The Commission dismissed AT&T 14A in Order No. 5.[23]

Q: DID QWEST FILE ANY OF THE OTHER FACILITIES DECOMMISSIONING AGREEMENTS WITH THE COMMISSION FOR APPROVAL?

A: Yes, Qwest also filed interconnection amendments containing the terms and conditions of the remaining three facilities decommissioning agreements. Covad 16A was filed for approval on August 21, 2002, and the Commission approved the agreement on September 25, 2002. *See In the Matter of the Request for Approval of Negotiated Agreement Under the Telecommunications Act of 1996 Between Covad Communications Company and Qwest Corporation*, Order Approving Negotiated Fourth Amended Agreement Consisting of a Settlement Agreement, Docket No. UT-980312 (9/25/02). Integra 25A was filed for approval on March 7, 2002 as part of an interconnection amendment for collocation cancellation and decommissioning, and the Commission approved the amendment on March 28, 2002. MCI WorldCom 35A was filed for approval on August 21, 2002, and the Commission approved the agreement on October 9, 2002. *See In the Matter of the Request for Approval of Negotiated Agreement Under the Telecommunications Act of 1996 Between MCI WorldCom Communications, Inc. and Qwest Corporation*, Order Approving Negotiated Sixth Amended Agreement Consisting of a Settlement Agreement, Docket No. UT-960323 (10/9/02). In each of its Orders, the Commission specifically found that "The Amended Agreement does not discriminate against any other telecommunications carrier," and that "The Amended Agreement will facilitate local exchange competition

[22] See Motion to Dismiss Allegations Related to December 27, 2001 Agreement between AT&T and Qwest, *WUTC v. ATG, et al.*, Docket No. UT-033011 (filed on November 5, 2003).

[23] See Order No. 5, *WUTC v. ATG, et al.*, Docket No. UT-033011 (Feb. 12, 2004).

in the state of Washington by enabling [CLEC] to expand its presence in the local exchange market and increase customer choices for local exchange services." In any event, no CLEC has requested to opt into this provision since it was filed with the Commission almost two years ago.

Q: ARE ANY OF THE OTHER AGREEMENTS AT ISSUE IN THE COMPLAINT FORM AGREEMENTS THAT HAVE BEEN FILED WITH STATE COMMISSIONS?

A: Yes. SBC 10A is a June 1, 2000 Letter Agreement that attaches Qwest's form Line Sharing Agreement. In Mr. Wilson's July 29, 2004 corrected testimony, he states that "10A* provides for an amendment to the conditions for Qwest provision of line exchange." (Corrected Direct Testimony of Thomas L. Wilson, at 36:1-7.) Although it is not clear from his testimony, Mr. Wilson is apparently either referring to Qwest's agreement to process SBC service orders for purposes of establishing and testing SBC's network for interconnection prior to state commission of an interconnection agreement (a standard process when a carrier plans to offer service in a state), or to an unsigned interconnection agreement amendment and attached line exchange (or line sharing) agreement that are attached to a June 1, 2000 letter agreement between SBC and U S WEST. I understand that SBC believes that the line sharing agreement that is attached to SBC 10A was never signed by the parties and was erroneously attached by Qwest to SBC 10A, and therefore SBC 10A does not constitute an "agreement" within the terms of Section 252. Moreover, the line sharing form (unexecuted) is Qwest's "permanent line sharing agreement," and has been filed for state commission approval where executed. As a result, it should not have been included in the Complaint. On August

20, 2004, the Staff moved to dismiss SBC 10A because it now realizes that SBC 10A is not an interconnection agreement.

F. Service Level Agreements

Q: HAVE YOU REVIEWED COVAD 7A, THE SERVICE LEVEL AGREEMENT BETWEEN COVAD AND QWEST?

A: Yes, I have. Qwest filed this agreement with the Commission on August 21, 2002, *see* LBB-14, and the Commission approved it by Order dated September 25, 2002. *See In the Matter of the Request for Approval of Negotiated Agreement Under the Telecommunications Act of 1996 Between Covad Communications Company and Qwest Corporation*, Order Approving Negotiated Fourth Amended Agreement Consisting of a Settlement Agreement, Docket No. UT-980312 (9/25/02). In its Order, the Commission specifically found that "The Amended Agreement does not discriminate against any other telecommunications carrier," and that "The Amended Agreement will facilitate local exchange competition in the state of Washington by enabling Covad to expand its presence in the local exchange market and increase customer choices for local exchange services." On July 30, 2004, Covad and the Commission Staff agreed to settle the allegations regarding this agreement and one other, Covad 16A, for $2,000. On August 10, 2004, the Commission approved this settlement agreement in Order No. 10.

Q: WAS COVAD 7A PROVIDED TO THE COMMISSION BEFORE IT WAS FILED?

A: Yes. Lisa Anderl at Qwest provided Covad 7A to the Staff on May 2, 2000, and Qwest withdrew any confidentiality claims by letter dated May 16, 2000. A true and complete copy of these letters is attached to my testimony as Exhibit LBB-15. Although Covad

7A was not technically filed with the Commission at that time, the letter was provided to the Staff for its information.

Q. PLEASE IDENTIFY THE PROVISIONS OF COVAD 7A YOU WILL BE DISCUSSING.

A. Section 1 addressed Firm Order Confirmations (FOCS) within 48 hours for POTS services, and 72 hours for xDSL, ISDN, and DS1 and above services. This means that Qwest will communicate within 48 Hours to Covad a future date when POTS facilities will be available, and will within 72 hours communicate to Covad a future date when facilities for xDSL and DS1 or above will be available. This section does not mean that Qwest will provide the actual facilities within a 48 or 72-hour timeframe.

In Section 2, Qwest provides Covad with unbundled loop service not requiring loop conditioning consistent with Qwest's published Standard Interval Guide, as of March 31, 2000, at least 90% of the time. Qwest will provide Covad with line sharing service at least 90% of the time within the interval set forth in any line sharing agreement between Covad and Qwest.

In Section 3, Qwest will reduce the incidence of failure on new Covad circuits to less than 10% failure within the first 30 calendar days.

In section 4, for those service requests held due to line conditioning, Qwest will provide Covad the option of paying for the line conditioning at the appropriate rate approved by the relevant State Commissions, which Qwest will complete in 24 days or less 90% of the time.

Q. WERE YOU INVOLVED IN THE IMPLEMENTATION OF COVAD 7A?

A. Not personally. The actual implementation of Covad 7A was done by Qwest's Network Services Department.

Q. GENERALLY, DID THE IMPLEMENTATION OF COVAD 7A RESULT IN A DIFFERENT LEVEL OF SERVICE PROVIDED TO COVAD AS COMPARED TO THE LEVELS PROVIDED TO OTHER CLECS FOR THE SAME SERVICES IN WASHINGTON?

A. No. From an ordering and processing perspective, it would be practically impossible to have different standards for each CLEC. There are over 1000 employees in the Network division and in order to manage the service process procedure there must be an operational baseline. The most efficient way to operate the business is to process orders based on first-in first-out and on complete parity.

Q. ARE YOU FAMILIAR WITH THE SERVICE GOALS IN SECTION 1 OF COVAD 7A WHICH STATES THAT QWEST WILL PROVIDE 90% OF COVAD'S FOC DATES WITHIN 48 HOURS OF RECEIPT OF PROPERLY COMPLETED REQUESTS FOR POTS SERVICES AND 72 HOURS OF RECEIPT OF PROPERLY COMPLETED REQUESTS FOR DSL CAPABLE, ISDN CAPABLE AND DS1 CAPABLE UNBUNDLED LOOP SERVICES?

A. Yes.

Q. WHAT WAS THE SOURCE FOR FOC INTERVALS FOR UNBUNDLED LOOP SERVICES?

A. The original FOC standard interval as agreed to by the ROC TAG, or Test Advisory Group, was 24 hours for all unbundled loops, which included POTS, DSL, ISDN, and DS1 and above facilities. Also, in Colorado, the Regional Oversite Committee (ROC),

along with the CLECS and Qwest's predecessor, U S WEST, developed a 72-hour FOC trial for DSL, ISDN and DS1 and above services. The ROC record was subsequently brought into the Washington record on August 28, 2001.

Q. WAS THE 72-HOUR FOC "OPTION" AVAILABLE TO CLECS GENERALLY?

A. Yes. As part of the ROC and TAG processes, beginning in 2000 any CLEC knew of and could ask for the "option" to be added to its interconnection agreement for DSL and higher services. Also, Qwest and Sprint filed with the Washington Commission an amendment to their interconnection agreement that contains a 72-hour FOC process for xDSL-I, ISDN, ADSL and DS1 unbundled loops. The Washington Commission approved this Sprint amendment on March 28, 2001. Thus, in addition to the ability of CLECs to request the 72 hour process as a result of the ROC and TAG proceedings, the 72 hour process was available through the filed and approved Sprint interconnection amendment pursuant to Section 252(i).

Q. COULD QWEST HAVE APPLIED THE 72-HOUR FOC PROCESS TO ALL CLECS?

A. No. As previously mentioned the ROC TAG established a 24-hour FOC requirement for all unbundled loops. This was the measurement Qwest was required to abide by, unless a CLEC requested the 72-hour FOC.

Q. IS THE 72-HOUR FOC FOR DSL, ISDN, AND HIGH CAPACITY LOOPS DESCRIBED IN ANY OTHER QWEST DOCUMENT?

A. Yes, it is described in the Wholesale Website http://www.qwest.com/wholesale/clecs/provisioning.html. The 72-hour FOC was introduced in 2000. However, effective March 2002, it became the standard practice

for all CLECs' xDSL and DS-1 Loops in all 14 states. The permanent change to a 72-hour FOC became effective for all CLECs after the ROC TAG approved the Performance Indicator Description ("PID") change.

Q. ARE YOU FAMILIAR WITH THE NOTIFICATION PROVISION IN SECTION 1 OF COVAD 7A?

A. Yes.

Q. PLEASE EXPLAIN THIS NOTIFICATION PROVISION.

A. To determine if facilities were available through internal databases, the standard process was to work the order and provide that information to the FOC issuance group. The process also provides for dispatching a technician on all orders uniformly without differentiating among the CLEC that placed the order.

Q. ARE THERE ANY DOCUMENTS THAT REFLECT THE NOTIFICATION PROCESS?

A. Yes. Marked as Exhibit LBB-16C, and submitted as a confidential Exhibit, is a true and correct copy of Qwest Process Bulletin PB00126-6 which was produced and maintained in the normal course of business. Exhibit LBB-16C provides a description of the Pre-Survey Process.

Q. WHO CREATED EXHIBIT LBB-16C?

A. LBB-16C was authored by a Qwest Process Specialist. The Specialist also coordinated and received feedback from other Process Specialists and Subject Matter Experts within the Qwest organization.

Q. WHICH SECTION OF THIS DOCUMENT DESCRIBES THE PROCESS REGARDING NOTIFICATIONS?

A. Section 6.0.

Q. WAS ANY CLEC GIVEN PREFERENTAIL NOTIFICATION TREATMENT FOR FACILITIES AVAILABILITY?

A: No.

Q. ARE YOU FAMILIAR WITH SECTION 2 OF COVAD 7A CONCERNING THE EXPECTATION THAT QWEST PROVIDE UNBUNDLED LOOP SERVICE THAT DOES NOT REQUIRE LINE CONDITIONING AT LEAST 90% OF THE TIME AND LINE SHARING SERVICE AT LEAST 90% OF THE TIME?

A. Yes.

Q. DOES ANY CLEC RECEIVE ANY SPECIAL TREATMENT IN REGARD TO UNBUNDLED LOOP SERVICE WHICH DOES NOT REQUIRE LINE CONDITIONING?

A. No. As per the agreement, "U S West will provide Covad with unbundled loop service that does not require loop conditioning consistent with U S West's published Standard Interval Guide." Section 2 merely memorialized Qwest's already existing internal service goals for line conditioning. Covad received no preferential treatment under these processes. All CLECs were under the same service goal commitment.

Q. WHAT DOCUMENTS WOULD ILLUSTRATE THAT QWEST PROVIDED UNBUNDLED LOOP SERVICE, FOR LOOPS, THAT DO NOT REQUIRE LINE CONDITIONING, IN A NON-DISCRIMINATORY MANNER FOR ALL OF ITS CLEC CUSTOMERS?

A. Marked as Exhibit LBB-17C, attached as a confidential Exhibit, is a true and complete copy of a summary chart, "Provisioning Commitments Met" which was produced and maintained by Qwest in the normal course of business. This chart reflects and measures the percent of orders completed on or before the customer's requested due date. Exhibit LBB-17C shows conclusively that Qwest used the same processes and treated all CLECs the same.

Q. ON WHAT DATA IS THIS SUMMARY BASED?

A. This summary is derived from internal systems that track all orders completed on or before the customers' requested due date.

Q. ARE THESE RECORDS VOLUMINOUS?

A. Yes.

Q. DOES ANY CLEC RECEIVE ANY SPECIAL TREATMENT IN REGARD TO LINE SHARING SERVICE?

A. No.

Q. WHAT DOCUMENTS WOULD ILLUSTRATE THAT QWEST PROVIDED NONDISCRIMINATORY LINE SHARING SERVICE FOR ALL OF ITS CLEC CUSTOMERS?

A. Marked as Exhibit LBB-18C, attached as a confidential Exhibit, is a true and complete copy of a summary chart "Line Sharing Orders Provisioned on Time" which was produced and maintained by Qwest in the normal course of business. This chart is based on PID OP-3, which evaluates the extent to which Qwest installs services for customers by the scheduled due date. Exhibit LBB-18C shows that Qwest provides the same service goal to all CLECs.

Q. ON WHAT DATA IS THIS SUMMARY BASED?

A. The summary is based on the total number of line sharing orders worked in the state of Washington and correlated in Qwest's systems database.

Q. ARE THESE RECORDS VOLUMINOUS?

A. Yes.

Q. ARE YOU FAMILIAR WITH SECTION 3 OF COVAD 7A REGARDING THE GOAL OF LESS THAN A 10% FAILURE RATE FOR ALL NEW CIRCUITS?

A. Yes.

Q. DID COVAD 7A GIVE RISE TO A PROCESS FOR PROVISIONING NEW CIRCUITS THAT WAS APPLIED EQUALLY TO ALL CLECS?

A. Yes. A "failure" is an order that has a subsequent repair ticket within 30 days of the install date. Qwest was achieving a failure rate for all new circuits that was less, and therefore of higher service quality, than the 10% stated in Covad 7A. Qwest's goal is to ensure a failure rate of less than 10% for all new circuits. This target applies for all CLECs.

Q. ARE THERE ANY DOCUMENTS THAT SUPPORT YOUR STATEMENT THAT ALL CLECS ARE PROVIDED THE SAME SERVICE?

A. Yes. Marked as Exhibit LBB-19C, attached as a confidential Exhibit, is a true and complete copy of a summary chart entitled "30 Day I Reports" which was produced and maintained by Qwest in the normal course of business. As you can see, Exhibit LBB-19C identifies monthly results for failure rate, and shows that Qwest exceeded its internal goal of achieving a failure rate that is less than the 10% stated in Covad 7A.

Q. WHAT DATA IS THIS CHART BASED ON?

A. The data is based on the failure reports called in within 30 days of installation.

Q. ARE THESE RECORDS VOLUMINOUS?

A. Yes.

Q. WHAT DOES THIS SUMMARY CHART SHOW?

A. It clearly shows that all of our CLEC customers were experiencing failure rates well below 10%, the standard set forth in Section 3 of Covad 7A.

Q. ARE YOU FAMILIAR WITH SECTION 4 OF THE COVAD AGREEMENT REGARDING THE COMPLETION OF LINE CONDITIONING WITHIN 24 DAYS 90% OF THE TIME?

A. Yes.

Q. WHAT IS LINE CONDITIONING?

A. Line conditioning is the removal of load coils and bridge taps that allow the loop to provide xDSL services.

Q. PRIOR TO COVAD 7A, WHAT WAS QWEST'S PERFORMANCE FOR LINE CONDITIONING IN 2000?

A. U S WEST/Qwest was typically completing line conditioning in more than 24 days for all CLECs.

Q. WAS THE SERVICE LEVEL FOR LINE CONDITIONING RAISED FOR ALL CLECS AS A RESULT OF COVAD 7A?

A. Yes, Qwest's internal procedures for completing line conditioning are such that requests for line conditioning from all CLECs follow the same process and intervals.

This uniform process made it practically impossible for Qwest to single out any individual customer for faster service. Thus, all CLEC requests for line conditioning followed the same processes and intervals specified in Covad 7A.

Q. WAS THIS 24 DAY SERVICE GOAL EVER CHANGED?

A. Yes, it was changed to 15 days**.**

Q. WAS THE SERVICE INTERVAL CHANGED FOR ALL CLECS?

A. Yes. As stated above, the uniform processes resulted in standard intervals applicable to all CLEC's. Thus, all CLECs, including Covad, receive line conditioning within 15 days.

Q. ARE THERE ANY INTERNAL DOCUMENTS WHICH DESCRIBE QWEST'S INTERNAL PROCESS AS IT RELATES TO LINE CONDITIONING?

A. Yes; marked as Exhibit LBB-20C, attached as a confidential Exhibit, is the Bridge Tap & Load Coil Removal – Wholesale process which was produced and maintained by Qwest in the normal course of business.

Q. WHEN WAS THIS INTERNAL PROCESS INITIATED?

A. The process was generated in July of 2000.

Q: WHAT DOCUMENTS WOULD SHOW THAT THIS PROCESS WAS APPLIED IN A NONDISCRIMINATORY BASIS?

A. Marked as Exhibit LBB-21C, attached as a Confidential Exhibit, is a true and complete copy of a summary chart entitled "15 Day Provisioning Interval" which was produced and maintained by Qwest in the normal course of business.

Q. ON WHAT DATA IS THIS SUMMARY BASED?

A. This summary is based on the number of line conditioning orders completed within 15 days requiring facilities work.

Q. ARE THESE RECORDS VOLUMINOUS?

A. Yes.

Q. WHAT DOES THE CHART DEMONSTRATE?

A. It demonstrates that all of Qwest's CLEC customers were treated equally with regard to meeting the 15-day line conditioning standard.

Q. WHAT IS YOUR CONCLUSION BASED UPON THE EVIDENCE ADDRESSED IN YOUR TESTIMONY?

A. Because of Qwest's processes that require uniform application of service levels to all CLECs, and because of the ability of CLECs to obtain certain service levels, such as the FOCs, through their knowledge of the TAG and ROC proceedings, as well as from the filed and approved Sprint interconnection agreement, the service levels provided to Covad under the SLA were also provided to all other CLECs in Washington. And, the data referenced in my testimony show empirically and conclusively that all CLECs received the same levels of service. There was no discrimination to Washington CLECs resulting from Covad 7A.

G. Reciprocal Compensation

Q. WHAT IS THE PURPOSE OF YOUR TESTIMONY REGARDING AGREEMENTS RELATED TO RECIPROCAL COMPENSATION?

A. The purpose of my testimony regarding agreements related to reciprocal compensation is to show how the status of FCC orders governing reciprocal compensation at the time supported Qwest's conduct that provisions relating to reciprocal compensation did not

have to be filed under Section 252. Moreover, my testimony also shows that, without regard to the filing issue, the terms of those agreements demonstrate that the CLEC-parties to such agreement actually received lower compensation for ISP traffic, and that other CLECs had rates available to them higher than those contained in the subject provisions – meaning that the other CLECs were not harmed at all by the non-filing of these contracts.

Q: WHY DID QWEST NOT FILE AGREEMENTS RELATED TO RECIPROCAL COMPENSATION?

A: Qwest and other ILECs have long contended that they were not obligated under Section 251 of the Telecommunications Act to pay reciprocal compensation for terminating Internet-bound traffic. That belief was fully supported by FCC decisions that pre-dated the CLEC agreements that are at issue in this docket. In 1999, 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). As Mr. Wilson acknowledges when discussing Eschelon 1A, "At the time the agreement was negotiated, Internet bound traffic was considered to be interstate in nature." (Direct Testimony of Thomas L. Wilson, 22:15-17.)

Because the federal trend was toward treating Internet-bound traffic as interstate calls not subject to reciprocal compensation, the CLEC agreements at issue here reflect compromises 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 these terms with the Commission. Qwest's good faith understanding of the proper treatment and jurisdictional governance of such traffic was also supported by the FCC decision in April of 2001, in which the FCC ruled that such traffic is not subject to the reciprocal compensation obligations of Section 251(b)(5), and therefore not a 251(b) or (c) service subject to the filing obligations under Section 252 and the October 4 FCC Order.

Moreover, Qwest filed bill and keep amendments with McLeod and Eschelon in Washington. These amendments applied bill and keep to local traffic and, for clarification, to Internet-rated traffic as well. *See* Second Amendment to the Interconnection Agreement between McLeodUSA and Qwest Corporation, attached as Exhibit LBB-23 and Fourth Amendment to the Interconnection Agreement between Eschelon Telecom of Washington, Inc. and Qwest Corporation, attached as Exhibit LBB-24. Exhibits LBB-23 and LBB-24 were produced and maintained in the regular course of business. In each of its Orders approving these interconnection amendments, the Commission specifically found that "The Amended Agreement does not discriminate against any other telecommunications carrier," and that "The Amended Agreement will facilitate local exchange competition in the state of Washington by enabling [McLeod and Eschelon] to expand its presence in the local exchange market and increase customer choices for local exchange services." *See In the Matter of the Request for Approval of Negotiated Agreement Under the Telecommunications Act of 1996 Between McLeod Telecommunications Services, Inc. and Qwest Corporation*, Order Approving Negotiated Second Amended Agreement for Interconnection and Resale Services, Docket No. UT-993007 (1/29/01); *In the Matter of the Request for*

Approval of Negotiated Agreement Under the Telecommunications Act of 1996 Between Eschelon Telecom of Washington, Inc. and Qwest Corporation, Order Approving Negotiated Fourth Amended Agreement for Interconnection and Resale Services, Docket No. UT-990385 (1/24/01).

i. Eschelon 1A -- Confidential/Trade Secret Stipulation with ATI

Q: ARE YOU FAMILIAR WITH THE TERM RELATED TO RECIPROCAL COMPENSATION IN ESCHELON 1A, THE FEBRUARY 28, 2000 *CONFIDENTIAL/TRADE SECRET STIPULATION* BETWEEN ATI AND U S WEST?

A: I have reviewed that agreement. ¶ 7 states in part, "the parties agree 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 USWC."

Q: DID ESCHELON BILL QWEST FOR RECIPROCAL COMPENSATION AT ANY POINT FROM FEBRUARY 28, 2000 THROUGH THE PRESENT?

A: No. 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. The November 15, 2000 agreement was filed as an Interconnection Agreement Amendment with the Commission and approved on January 24, 2001. *See* ¶ 1.2 of Exhibit LBB-24; *In the Matter of the Request for Approval of Negotiated Agreement Under the Telecommunications Act of 1996 Between Eschelon Telecom of Washington, Inc. and Qwest Corporation*, Order Approving Negotiated Fourth Amended Agreement for Interconnection and Resale Services, Docket No. UT-990385 (1/24/01). Prior to that bill and keep agreement,

Eschelon did not bill Qwest for any traffic in Washington. Thus, the ATI agreement dated February 28, 2000 did not result in any reciprocal compensation payments for Internet traffic from Qwest to Eschelon, and the parties' subsequent resolution of this issue in November of 2000 produced a filed and approved interconnection amendment that any CLEC could opt into if it wished. In any event, every CLEC had the right to opt into section 251 reciprocal compensation rates from any interconnection agreement. Thus, Qwest's statement that it will provide "the most favorable rates and terms contained in an agreement executed to date by USWC" did not grant Eschelon anything that other CLECs did not already have.

ii. McLeod 8A – April 28, 2000 Confidential Billing Settlement Agreement with McLeod and McLeod 41A – April 25, 2000 Confidential Letter Settlement Document

Q: ARE YOU FAMILIAR WITH THE PROVISION RELATED TO RECIPROCAL COMPENSATION IN MCLEOD 8A, THE APRIL 28, 2000 CONFIDENTIAL BILLING SETTLEMENT AGREEMENT WITH MCLEOD?

A: The provision regarding reciprocal compensation provides merely that the parties agree "to immediately amend their existing interconnection agreements to revert to a bill and keep arrangement for local and internet-related traffic, and to incorporate such a bill and keep arrangement into any future agreements."

Q: DID THE PARTIES FILE A "BILL AND KEEP" AMENDMENT IN WASHINGTON?

A: Yes. The parties agreed to a bill and keep arrangement effective on March 1, 2000 through December 31, 2002, as reflected in the filed and approved interconnection agreement amendment attached as Exhibit LBB-22. This interconnection agreement amendment was filed with the Commission on September 26, 2000 and approved by it

on December 13, 2000. *See In the Matter of the Request for Approval of Negotiated Agreement Under the Telecommunications Act of 1996 Between McLeod Telecommunications Services, Inc. and Qwest Corporation*, Order Approving Negotiated First Amended Agreement for Interconnection and Resale Services, Docket No. UT-993007 (12/13/00).

Q: DID QWEST EVER PAY MCLEOD FOR MINUTES OF USE IN WASHINGTON?

A: No. Qwest and McLeod did not start billing for local reciprocal compensation traffic in Washington until October 26, 2000, by which time they had already agreed to the bill and keep arrangement.

Q: DID OTHER CLECS AGREE TO ENTER INTO A BILL AND KEEP ARRANGEMENT?

A: Most did not. Most other CLECs did not agree to stop billing for reciprocal compensation for terminating Internet traffic and accept a bill and keep agreement. The cost of reciprocal compensation payments to CLECs was steadily growing during this time period. In 2000, Qwest paid a total of approximately $23,994,720 to CLECs in the State of Washington for reciprocal compensation for terminating Internet traffic (for a monthly average of approximately $1,995,393); in November 2000 alone, the total was approximately $2,254,919. As a result, Qwest would have readily agreed to such terms.

Q: DID QWEST FILE MCLEOD 8A WITH THE COMMISSION AS PART OF ITS REMEDIAL FILING?

A: Yes. Qwest filed this agreement with the Commission on August 22, 2002, *see* LBB-6, and the Commission approved it by Order dated September 25, 2002. *See In the Matter of the Request for Approval of Negotiated Agreement Under the Telecommunications Act of 1996 Between McLeodUSA Telecommunications Services, Inc. and Qwest Corporation*, Order Approving Negotiated Eighth Amended Agreement Consisting of a Settlement Agreement, Docket No. UT-993007 (9/25/02). In its Order, the Commission specifically found that "The Amended Agreement does not discriminate against any other telecommunications carrier," and that "The Amended Agreement will facilitate local exchange competition in the state of Washington by enabling Global to expand its presence in the local exchange market and increase customer choices for local exchange services."

Q: ARE YOU FAMILIAR WITH THE PROVISION RELATED TO RECIPROCAL COMPENSATION IN MCLEOD 41A, THE APRIL 25 2000 CONFIDENTIAL LETTER SETTLEMENT DOCUMENT WITH MCLEOD?

A: Yes. As I discuss above, McLeod 41A is settlement in principle that was later memorialized in McLeod 8A. The provision regarding reciprocal compensation is identical in both documents; it provides that the parties agree "to immediately amend their existing interconnection agreements to revert to a bill and keep arrangement for local and internet-related traffic, and to incorporate such a bill and keep arrangement into any future agreements."

iii. ATG 27A – June 30, 2000 Confidential Settlement Agreement with ATG

Q: ARE YOU FAMILIAR WITH THE TERMS RELATED TO RECIPROCAL COMPENSATION IN ATG 27A, THE JUNE 30, 2000 CONFIDENTIAL SETTLEMENT AGREEMENT WITH ATG?

A: I am. Qwest agreed to pay ATG rates of $0.001 per minute of use for Internet-bound traffic.

Q: HOW DO THE RATES AVAILABLE IN PUBLICLY FILED AND APPROVED INTERCONNECTION AGREEMENTS COMPARE TO THE RATES CONTAINED IN THIS AGREEMENT WITH ATG?

A: Under the terms of this agreement, Qwest paid ATG less than the rates were available under Section V of the publicly filed and approved MFS Interconnection Agreement that Qwest filed with the Commission, and that the Commission approved on January 7, 1997. *See* Negotiated First Amendment to the Wireline Interconnection Agreement between Advanced Telecom Group, Inc. and U S WEST Communications, Inc., attached as LBB-36, approved in Order Approving Negotiated First Amended Agreement for Interconnection and Resale Services, *In the Matter of the Request for Approval of Negotiated Agreement under the Telecommunications Act of 1996 between Advanced Telecom Group, Inc. and U S WEST Communications, Inc.*, Docket No. UT-980390 (3/22/00). Under this interconnection agreement amendment, the end office rate was $0.003141, and the tandem rate was $0.005416.

In addition, under the Eighth Revision of Qwest's SGAT for the State of Washington, dated June 25, 2002, CLECs have the following rates available to them:

> 7.3.6.2.3 Rate Caps -- ISP-bound traffic exchanged between Qwest and CLEC will be billed in accordance with a state Commission-ordered compensation rate, or as follows, whichever is lowest:
>
> 7.3.6.2.3.1 Reserved for Future Use.

7.3.6.2.3.2 $.001 per MOU for eighteen (18) months from December 14, 2001 through June 13, 2003.

Thus, without regard to whether this contract should or should not have been filed under Section 252, CLECs had available to them rates that were equal to or higher than those reflected in the ATG agreement and could not have been harmed as the result of non-filing.[24]

iv. ELI 28A – December 30, 1999 ELI Confidential Billing Settlement Agreement and Release, and ELI 29A – June 12, 2000 Amendment No. 1 to December 30, 1999 ELI Confidential Billing Settlement Agreement and Release

Q: ARE YOU FAMILIAR WITH THE TERMS RELATED TO RECIPROCAL COMPENSATION IN ELI 28A, THE DECEMBER 30, 1999 ELI CONFIDENTIAL BILLING SETTLEMENT AGREEMENT AND RELEASE, AND ELI 29A, THE JUNE 12, 2000 AMENDMENT NO. 1 TO DECEMBER 30, 1999 ELI CONFIDENTIAL BILLING SETTLEMENT AGREEMENT AND RELEASE?

A: I am. Qwest agreed to pay ELI rates of

[REDACTION BEGINS

[redacted].

[24] TLW-70 also lists ATG 27A as having terms relating to Centrex agreements. Under section 1 of this agreement, Qwest agreed to help ATG compare existing retail Centrex costs with potential wholesale Centrex costs in Washington, and convert ATG to wholesale Centrex effective May 1, 2000. This agreement permitted ATG to convert to wholesale Centrex under the interconnection agreements as of an effective date even if it took Qwest longer to work all of billing changes. Qwest has always worked with carriers to convert large blocks of Centrex customers in a seamless transition and routinely negotiates the conversion process as it did with ATG in this agreement.

[redacted].

REDACTION ENDS]

Amendment No. 1 to that agreement adjusted the relative use factors and provided that an interim rate of

[REDACTION BEGINS

[redacted]

REDACTION ENDS]

Q: HOW DO THE RATES AVAILABLE IN PUBLICLY FILED AND APPROVED INTERCONNECTION AGREEMENTS COMPARE TO THE RATES CONTAINED IN THIS AGREEMENT WITH ELI?

A: Under the terms of this agreement, Qwest paid ELI less than the rates were available under Section V of the publicly filed and approved MFS Interconnection Agreement that Qwest filed with the Commission, and that the Commission approved on January 7, 1997. *See* Negotiated First Amendment to the Wireline Interconnection Agreement between Advanced Telecom Group, Inc. and U S WEST Communications, Inc., attached as LBB-36, approved in Order Approving Negotiated First Amended

Agreement for Interconnection and Resale Services, *In the Matter of the Request for Approval of Negotiated Agreement under the Telecommunications Act of 1996 between Advanced Telecom Group, Inc. and U S WEST Communications, Inc.*, Docket No. UT-980390 (3/22/00). Under this interconnection agreement amendment, the end office rate was $0.003141, and the tandem rate was $0.005416. These rates are higher than the rates contained in the ELI Agreement. In fact, the agreement expressly acknowledges that the parties agreed to be compensated "at below-listed rates" as part of "the comprehensive settlement of their Existing Disputes." In addition, as I discussed above, under the Eighth Revision of Qwest's SGAT for the State of Washington, dated June 25, 2002, CLECs have a rate of $.001 per MOU for the eighteen (18) months from December 14, 2001 through June 13, 2003, or the Commission-ordered rate, whichever is lowest, available to them. Thus, without regard to whether this contract should or should not have been filed under Section 252, CLECs had available to them rates that were equal to or higher than those reflected in the ELI agreement and could not have been harmed as the result of its non-filing.

Q: ARE ELI 28A, THE DECEMBER 30, 1999 ELI CONFIDENTIAL BILLING SETTLEMENT AGREEMENT AND RELEASE, OR ELI 29A, THE JUNE 12, 2000 AMENDMENT NO. 1 TO DECEMBER 30, 1999 ELI CONFIDENTIAL BILLING SETTLEMENT AGREEMENT AND RELEASE STILL IN EFFECT?

A: No. The Confidential Billing Settlement Agreement and Release dated December 30, 1999 with ELI terminated by its own terms on December 31, 2001. In addition, this agreement was also superseded by ELI 23B, the Confidential Billing Settlement Agreement between the parties dated April 26, 2002, and the parties' Interconnection Agreement dated June 6, 2002 and submitted to the Commission for approval pursuant

to Section 252. Exhibit LBB-25 is a true and correct copy of the portion of the Interconnection Agreement between Qwest Corporation and Electric Lightwave, Inc. for the State of Washington dealing with reciprocal compensation. Exhibit LBB-25 was produced and maintained in the regular course of business. ELI and the Commission Staff settled the allegations regarding ELI 28A and 29A and one other ELI agreement, ELI 48A, on June 4, 2004 for $3,000. The Commission approved this settlement on July 15, 2004.

v. MCI 32A – December 1, 2000 Brooks Fiber Confidential Billing Settlement Agreement

Q: ARE YOU FAMILIAR WITH MCI 32A, THE DECEMBER 1, 2000 BROOKS FIBER CONFIDENTIAL BILLING SETTLEMENT AGREEMENT?

A: Yes. There is one paragraph in this agreement that discusses reciprocal compensation in Washington.[25] *See* MCI 32A, ¶ 2(C). This paragraph states that, "[f]or the state of Washington, the reciprocal compensation charges, for traffic delivered to WorldCom by Qwest under the [Brooks Fiber Communications] interconnection agreement, will be calculated using the local interconnection rates, specifically the end office elements," contingent on the conversion from the existing bill and keep arrangement. *See* MCI 32A,¶ 2(C). In other words, the parties agreed to use the interconnection rates available to all CLECs in Washington. The fact that the parties were agreeing to use the interconnection rates established in Washington shows that this agreement only provided what all other CLECs had available to them. On July 26, 2004, Staff and

[25] TLW-70 also lists MCI WorldCom 32A as having terms relating to measurement factors. This agreement resulted from a dispute that Qwest and WorldCom had regarding WorldCom's bills, and the parties agreed to settle the dispute by developing factors for the purpose of segregating non-IXC related traffic delivered by Qwest to WorldCom into three categories of Local, IntraLATA, and all other noncompensible traffic. MCI WorldCom, ¶ 2(A). The Local category is the only piece that relates to a Section 251(b) or (c) service. Under this agreement, Qwest and WorldCom agreed to use Qwest's CROSS7 data for the Local category, as all carriers do. As a result, there was no harm from this agreement to any other carrier.

MCI settled the allegations regarding MCI 32A and three other agreements, MCI 33A, 34A, and 35A, for $6,000. The Commission approved the settlement agreement on July 30, 2004 in Order No. 9.

vi. MCI WorldCom 34A – June 29, 2001 Confidential Billing Settlement Agreement

Q: ARE YOU FAMILIAR WITH THE PROVISIONS OF MCI WORLDCOM 34A, THE MCI WORLDCOM NETWORK SERVICES, INC. CONFIDENTIAL BILLING SETTLEMENT AGREEMENT DATED JUNE 29, 2001 THAT RELATE TO RECIPROCAL COMPENSATION?

A: Yes. The terms related to reciprocal compensation in ¶ 5 are included in the interconnection agreement amendments filed in Washington on September 17, 2001, and approved by the Commission by Order dated November 29, 2001. *See In the Matter of the Request for Approval of Negotiated Agreement Under the Telecommunications Act of 1996 Between MCIMetro Access Transmission Services, LLC and Qwest Corporation*, Order Approving Negotiated Fourth Amended Agreement Amending Certain Reciprocal Compensation Terms and Adding Provisions for LIS Trunk Forecasts, Docket No. UT-960310 (11/29/01).

vii. XO 40A – December 31, 2001 Confidential Billing Settlement Agreement

Q: ARE YOU FAMILIAR WITH THE PROVISION RELATED TO RECIPROCAL COMPENSATION IN XO 40A, DECEMBER 31, 2001 CONFIDENTIAL BILLING SETTLEMENT AGREEMENT?

A: Yes. That provision provided that, as to Washington,

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[redacted]

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Q: HOW DO THE RATES AVAILABLE IN PUBLICLY FILED AND APPROVED INTERCONNECTION AGREEMENTS COMPARE TO THE RATES CONTAINED IN THIS AGREEMENT WITH XO?

A: Under the terms of this agreement, Qwest paid XO less than the rates were available under Section V of the publicly filed and approved MFS Interconnection Agreement that Qwest filed with the Commission, and that the Commission approved on January 7, 1997. *See* Negotiated First Amendment to the Wireline Interconnection Agreement between Advanced Telecom Group, Inc. and U S WEST Communications, Inc., attached as LBB-36, approved in Order Approving Negotiated First Amended Agreement for Interconnection and Resale Services, *In the Matter of the Request for Approval of Negotiated Agreement under the Telecommunications Act of 1996 between Advanced Telecom Group, Inc. and U S WEST Communications, Inc.*, Docket No. UT-980390 (3/22/00). Under this interconnection agreement amendment, the end office rate was $0.003141, and the tandem rate was $0.005416. In addition, as I discussed above, under the Eighth Revision of Qwest's SGAT for the State of Washington, dated June 25, 2002, CLECs have a rate of $.001 per MOU for the eighteen (18) months from December 14, 2001 through June 13, 2003, or the Commission-ordered rate, whichever is lowest, available to them. Thus, without regard to whether this contract should or

should not have been filed under Section 252, CLECs had available to them rates that were equal to or higher than those reflected in the XO agreement and could not have been harmed as the result of its non-filing.

On July 30, 2004, XO and the Commission Staff agreed to settle the allegations regarding this agreement and another agreement, XO 36A, for $2,000. On August 10, 2004, the Commission approved this settlement agreement in Order No. 10.

H. Eschelon Agreements – Eschelon 1A, 2A, 4A, 5A, 6A, 12A, 18A, 19A, and 21A

Q: ARE YOU FAMILIAR WITH THE TERMS OF THE AGREEMENTS BETWEEN ESCHELON AND QWEST?

A: Yes, I am. For the convenience of the Commission, I have chosen to address a number of the Eschelon agreements at one time in my testimony. There are a number of points that I would like to bring to the Commission's attention about these agreements, including when they were superseded by other agreements, if they were terminated, and how certain of the provisions were available to CLECs through filed interconnection agreement amendments.

i. Eschelon 1A – February 28, 2000 Stipulation between ATI and U S WEST

Q: ARE YOU FAMILIAR WITH THE TERMS OF ESCHELON 1A, THE FEBRUARY 28, 2000 STIPULATION BETWEEN ATI AND U S WEST?

A: Yes. ¶ 2 to ¶ 6 discuss service performance measures for Minnesota and other states in which Eschelon (then ATI) operated. Thus, for states other than Minnesota, these paragraphs state that Qwest and Eschelon will use certain service performance measurements, and that "as soon as reasonably practicable, the Parties shall negotiate mutually acceptable minimum standards" for assessing Qwest's performance. If

Qwest's service fell below these mutually agreed upon standards, the two companies agree to meet to determine how to improve performance. As a result, these paragraphs really set forth an agreement to agree on these issues because no minimum standards are set for Washington and no determination of how to improve performance is set forth. As discussed further below, Qwest provides the same level of service to all CLECs.

¶ 7 relates to reciprocal compensation, and I have previously discussed the rates set forth in the agreement in my testimony. This term was superseded by a bill and keep amendment filed with Commission December 18, 2000, which approved it on January 24, 2001. *See In the Matter of the Request for Approval of Negotiated Agreement Under the Telecommunications Act of 1996 Between Eschelon Telecom of Washington, Inc. and Qwest Corporation,* Order Approving Negotiated Fourth Amended Agreement for Interconnection and Resale Services, Docket No. UT-990385 (1/24/01).

¶ 10 relates to the suspension of termination liability assessments ("TLAs"). This issue was limited to Minnesota and was superseded by an Order from the Minnesota Commission relating to TLAs.

¶¶ 11-12 relate to a dedicated provisioning team. These terms were superseded by Eschelon 2A, the May 21 2000 Trial Agreement, which itself was terminated by parties on June 15, 2002.

¶ 14 contains a dispute resolution clause. This term was superseded by the escalation process letter dated November 15, 2000, which itself was terminated by Eschelon 12A, the Settlement Agreement executed on March 3, 2002 (at ¶ 3(b)(3)).

Q. HOW DOES QWEST HANDLE SERVICE FOR ITS WHOLESALE CUSTOMERS?

A. Qwest routinely takes both general and individualized steps to assist its wholesale customers with their ordering and service provisioning activities. Qwest has dedicated service management for some wholesale customers where their order volume requires one or more persons to serve the customer's orders. Where CLECs have smaller order volumes, Qwest service personnel handle multiple CLECs. The level of service that Qwest provides to its CLEC customers, and the expertise of the personnel handling the account, does not differ regardless of whether they are handled by a dedicated provisioning team or a single service representative.

Q. WHAT DO SERVICE MANAGEMENT TEAMS DO?

A. The service management teams perform the following roles:

- Serve as the focal point for all service issues and proactive management for account relationship including escalations;
- Manage service reporting and generate scorecards;
- Help customers with interconnection contract amendments;
- Support collaborative root cause on specific problem areas to drive customer specific improvement; and
- Manage the broader relationship with customers, including operational, service, process, product, and contract issues and concerns.

Q. WHO IS ON A SERVICE MANAGEMENT TEAM?

A. A number of employees assigned by customer accounts. The reporting structure includes a service director, senior service manager and a service manager. Customers can easily access their service management team contact information through Qwest's website http://www.qwest.com/wholesale/ccdb.

Q. WHAT FUNCTIONS DO SERVICE MANAGERS PERFORM?

A. As reflected on Qwest's website, the service manager is the primary contact for the customer. The service manager, in turn, has contact with the Qwest departments that are responsible for the actual ordering and delivery of products. As a result, service managers are available to address immediate concerns and craft the best resolution for the customer. The service managers also provide the primary mechanism for the resolution of service issues with wholesale customers when normal processes fail to resolve an escalation to a customer's satisfaction. *See* http://www.qwest.com/wholesale/clecs/accountmanagers.html.

Q. DOES EVERY QWEST WHOLESALE CUSTOMER HAVE A SERVICE MANAGEMENT TEAM?

A. Yes. Qwest has service management teams for all its wholesale customers that communicate when necessary to respond to questions and service issues. These teams facilitate service meetings that discuss service performance specific to individual customers.

Q: ARE YOU FAMILIAR WITH THE PROVISIONS REGARDING THE ON-SITE TEAM INCLUDED IN THE CONFIDENTIAL TRADE SECRET STIPULATION BETWEEN ATI AND US WEST DATED FEBRUARY 28, 2000?

A: Yes. That provisioning team was comprised of a Coach (now titled Service Manager) and Service Delivery Coordinator who worked on site at Eschelon's premises. These employees collected information on day-to-day order activity, conducted root cause analyses, and identified trends for improvement. They also recommended training and process improvements, as necessary.

Q: DID THE SERVICE MANAGER AND SERVICE DELIVERY COORDINATOR PROCESS ORDERS?

A. No. Eschelon's orders are processed like every other CLEC's, i.e., on a first-in-first-out basis.

Q: DOES EVERY CLEC HAVE AN ASSIGNED SERVICE MANAGER?

A. Yes, as I said above, all CLEC customers have assigned service managers, although the manager may or may not be dedicated to only one customer. If customer volume justifies it, Qwest will dedicate a service management team to one customer. For instance, McLeod, AT&T, Sprint, WorldCom and Global Crossing are CLEC customers that have dedicated service management teams. The Qwest employees on all these teams perform the exact same functions as the Service Manager and Service Delivery Coordinator at Eschelon.

Q: TO YOUR KNOWLEDGE WAS THE TRIAL OF AN ON-SITE TEAM INCLUDED IN A FILED INTERCONNECTION AGREEMENT?

A: Yes. Marked as LBB-24 and attached to this testimony is a true and complete copy of the Interconnection Agreement Amendment terms, §§ 2.10, which was filed in Washington and approved by the Commission on January 24, 2001. *See In the Matter of the Request for Approval of Negotiated Agreement Under the Telecommunications*

Act of 1996 Between Eschelon Telecom of Washington, Inc. and Qwest Corporation, Order Approving Negotiated Fourth Amended Agreement for Interconnection and Resale Services, Docket No. UT-990385 (1/24/01). LBB-24 was produced and maintained by Qwest in the regular course of business.

Q: DID ESCHELON HAVE TO PAY FOR ITS ON-SITE TEAM?

A: Yes; pursuant to its interconnection agreement, Eschelon agreed to pay (and in fact did pay) $9,206 per month for the services of the on-site service manager.

Q: HAS ANY CLEC REQUESTED AN ON-SITE PROVISIONING TEAM SINCE THE AMENDMENT WAS APPROVED BY AND ON FILE WITH A STATE COMMISSION?

A: No. Despite the filed, approved, and publicly-available Interconnection Agreement Amendment in Washington, no CLEC customer has requested an on-site team.

Q: BECAUSE ESCHELON HAD AN ON-SITE TEAM, WERE ITS SERVICE PROBLEMS RESOLVED DIFFERENTLY THAN THOSE OF OTHER CUSTOMERS?

A: No. Qwest uses the same root cause analysis to solve all wholesale customer service issues. Service management holds regular meetings with customers to identify areas of improvement or operational issues that need resolution. Qwest uses these same processes to identify root causes and trends and to recommend action plans or identify initiatives already in place to improve service.

Q: DOES QWEST PROVIDE THE SAME LEVEL OF SERVICE TO ALL ITS WHOLESALE CUSTOMERS?

A. Yes. By employing the same processes for all of its wholesale customers, Qwest provides the same level of service to all CLECs, wherever their service team might physically be located.

Q. IS AN ON-SITE TEAM CURRENTLY WORKING AT ESCHELON'S OFFICES?

A. As of June 10, 2002, Eschelon migrated back to a service management team located at Qwest.

Q. HOW CAN YOU DEMONSTRATE EMPRICALLY THAT ALL CLECS ARE GIVEN THE SAME LEVEL OF SERVICE MANAGEMENT?

A. Through the monthly performance tracking reported to all CLECs monthly by our Regulatory Reporting team. Measures are tracked for each CLEC and at an aggregate company level. Beyond this reporting, the service teams often develop a streamlined view of a selected set of key metrics for an individual customer report card. These are created for the purpose of managing/tracking individual CLEC service performance and service improvement plans.

Q. HOW DOES QWEST TRACK PERFORMANCE?

A. Qwest does extensive performance tracking. This service tracking involves monitoring nearly 800 different service metrics for all CLECs. PIDs, or Performance Indicator Definitions, define the way that data is captured and results are calculated. They are the underlying metrics that make up the state specific Performance Assurance Plans (PAPs).

Q. WHAT HAS THE SERVICE TRACKING SHOWN?

A. These Service Metrics show that Qwest's service has improved continually for all CLECs since it merged with U S WEST in 2000 and is currently performing at

significantly higher levels demonstrating that Qwest's local service markets are open for competition by CLECs.

Q. WHAT PROCESSES DOES QWEST PROVIDE TO ITS WHOLESALE CUSTOMERS?

A. Qwest provides product, process, Operations Support Systems ("OSS"), and change management information electronically to wholesale customers through its website. The Qwest Interconnect OSS Electronic Access can be located at web address http://www.qwest.com/wholesale/clecs/electronicaccess.html. Marked as Exhibit LBB-29 is a true and complete copy of the OSS change management information located at this web address. Exhibit LBB-29 was produced and maintained by Qwest in the regular course of business.

Q. DO THESE PROCESSES VARY BY CUSTOMER?

A. Generally speaking, the processes are standard across customers with common interface. Customers have varying degrees of automation in their own business and the associated interface with Qwest. These types of interfaces by definition imply slightly different operational processes.

ii. Eschelon 2A – May 21, 2000 Eschelon Trial Agreement

Q: ARE YOU FAMILIAR WITH THE TERMS OF ESCHELON 2A, THE MAY 21, 2000 ESCHELON TRIAL AGREEMENT?

A: Yes. An amendment disclosing the on-site dedicated provisioning was approved by the Commission on January 24, 2001. *See In the Matter of the Request for Approval of Negotiated Agreement Under the Telecommunications Act of 1996 Between Eschelon Telecom of Washington, Inc. and Qwest Corporation*, Order Approving Negotiated

Fourth Amended Agreement for Interconnection and Resale Services, Docket No. UT-990385 (1/24/01). Under that amendment, Eschelon agreed to pay $9,206 per month for the services of a dedicated provisioning team to be located on its premises in Minneapolis, Minnesota.

Qwest made this provision available for opt-in without any related terms in August 2002. No CLEC has sought to opt in to it since then.

This agreement, including all provisions regarding an on-site provisioning team and ordering issues, terminated by its own terms on May 1, 2001. However, the agreement was subsequently extended by the parties and ultimately terminated on June 15, 2002.

iii. Eschelon 4A – November 15, 2000 Confidential Amendment to Confidential/Trade Secret Stipulation

Q: ARE YOU FAMILIAR WITH THE TERMS OF ESCHELON 4A, THE NOVEMBER 15, 2000 CONFIDENTIAL AMENDMENT TO CONFIDENTIAL/ TRADE SECRET STIPULATION?

A: Yes. This agreement was one of several with Eschelon and McLeod that established an unbundled network element platform known internally to Qwest as UNE-Star.

Q: COULD YOU PLEASE DESCRIBE THE UNE-STAR PLATFORM?

A: UNE-Star is a term that applies to several unbundled network element products that provide customers with a platform of a combination of various services that, when bundled together, resemble business basic exchange service, including Centrex-type services. UNE-Star is a type of what is known as "UNE-P" products. Eschelon and McLeod are two CLECs that purchase variations of UNE-Star, which is also sometimes referred to as "UNE-E" when provided to Eschelon, and "UNE-M" when provided to McLeod. Qwest provided these products because, among other things, these wholesale

customers desired a state-wide, weighted average rate for UNE-P loop elements for their business customers, and flat-rated tiered pricing for certain interconnection usage elements, and were willing to pay for features.

Q: DID QWEST FILE THE UNE-STAR RATES, TERMS AND CONDITIONS WITH THE STATE COMMISSIONS?

A: Yes. These rates were negotiated and filed as amendments to Eschelon's and McLeod's existing interconnection agreements and were subsequently approved by this Commission, as well as all other state commissions where Eschelon and McLeod may be doing business. *See* Exhibits LBB-23 and LBB-24.

As reflected in these amendments, because the UNE-Star products entailed significant development and implementation costs, Qwest required CLECs wishing to purchase the UNE-Star products to make total and annual minimum purchase commitments over a multi-year minimum term. Other requirements included imposing a significant penalty if the CLEC did not meet those minimum commitments; "bill and keep" for reciprocal compensation, including Internet-bound traffic ("ISP traffic"); a one-time, lump sum conversion charge to convert the embedded base; and restricting the offering to business customers. Lastly, Qwest requested the CLECs to provide an ongoing, updated, geographic end-user customer volume and loop distribution forecast for purposes of adjusting price points. *See* Exhibits LBB-23 and LBB-24.

Eschelon, unique among CLECs, received switched access billing information via a process by which Qwest extracted switched access minutes manually from DUF files, rather than the mechanized process available to every other CLEC. Because Eschelon contended that this process created inaccuracies in its switched access minutes, Qwest

agreed to a pro rata per line per month credit until, importantly, the mechanized process was put in place, which Qwest anticipated being in place by the first quarter of 2001. Once Eschelon received the information through the same mechanized process as other CLECs did, the per line credits would cease. In order to qualify for the credit, however, Eschelon had to provide working telephone numbers. This particular agreement, including terms related to DUF issues and a consulting arrangement, was terminated by the March 1, 2002 Settlement Agreement (at ¶ 3(b)(5)).

iv. Eschelon 5A – July 3, 2001 Letter Agreement re: Status of Switched Access Minute Reporting

Q: ARE YOU FAMILIAR WITH THE TERMS OF ESCHELON 5A, THE JULY 3, 2001 LETTER AGREEMENT RE: STATUS OF SWITCHED ACCESS MINUTE REPORTING?

A: Yes. This agreement, page 2, amends the 2nd paragraph of Eschelon 4A, the November 15, 2000 Confidential Amendment to Confidential/Trade Secret Stipulation to increase the payment to compensate Eschelon for the possible inaccuracy of the switched access minutes that Qwest extracted from DUF files by a manual process, rather than the mechanized process available to every other CLEC. In retrospect of the FCC Order, this provision may fall within the subsequently articulated filing standard – but it would have applied to no other CLEC.[26]

Qwest believes that the provisions on page 2 relating to Qwest payments to Eschelon for Eschelon's termination of toll traffic does not pertain to Section 251(b) or (c)

[26] Mr. Wilson agreed with this point in his deposition:

Q So if a CLEC seeking to opt in to this paragraph already received daily usage files prepared by a mechanized process, the $13 credit would not apply, correct?

A That's right because by definition they wouldn't be getting UNE-E.

Wilson Tr., Vol. II, at 122:15-19, LBB-33.

services and thus is not an interconnection agreement amendment under the FCC and Commission standards. In any event, this agreement was terminated by the March 1, 2002 Settlement Agreement (at ¶ 3(b)(7)).

v. Eschelon 6A – July 31, 2001 Implementation Plan

Q: ARE YOU FAMILIAR WITH THE TERMS OF ESCHELON 6A, THE JULY 31, 2001 IMPLEMENTATION PLAN?

A: Yes. With the exception of Attachment 3, this agreement was terminated by the March 1, 2002 Settlement Agreement (at ¶ 3(b)(8)). Attachment 3, which I understand to set forth the standard methodology by which Qwest calculated UNE-P switching on interLATA and intraLATA toll traffic for CLECs, was filed with the Commission on May 15, 2002, and it was approved by the Commission on July 10, 2002. *See In the Matter of the Request for Approval of Negotiated Agreement Under the Telecommunications Act of 1996 Between Eschelon Telecom Of Washington, Inc. and Qwest Corporation,* Order Approving Negotiated Tenth Amended Agreement Adding Provisions for Calculating Local Usage Charges for Unbundled Network Element-Eschelon (UNE-E) Switching on InterLATA and IntraLATA Toll Traffic, Docket No. UT-990385 (7/10/02). In its Order, the Commission specifically found that "The Amended Agreement does not discriminate against any other telecommunications carrier," and that "The Amended Agreement will facilitate local exchange competition in the state of Washington by enabling Eschelon to expand its presence in the local exchange market and increase customer choices for local exchange services."

Q: CAN YOU DESCRIBE WHAT ATTACHMENT 2 IS?

A: Attachment 2 is a standard chart used by Qwest with all of its wholesale customers. The three components include escalation procedures for order provisioning, unbundled

loop cuts and repair and maintenance. The order provisioning escalation chart was developed by the Wholesale Markets Customer Service Operation in January 2001, by key Service Center and Service Management personnel. That team devised a generic standard chart and then each Service Manager responsible for a customer modifies the chart to include the pertinent information for Center and Service Management that apply to the particular customer. As I discussed above, these processes are set out in Exhibit LBB-10, Expedites & Escalations Overview – V14.0, which first became available on the Qwest's website on January 25, 2001 as version V3.0.

Q: HOW DOES THE ESCHELON CHART DIFFER FROM OTHER CLECS' ESCALATION CHARTS?

A: The only change that Qwest made to the chart for Eschelon 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.

Q. ARE YOU FAMILIAR WITH THE SECTIONS 2.3 AND 2.5 OF QWEST/ESCHELON IMPLEMENTATION PLAN DATED JULY 31, 2001 REGARDING QUARTERLY MEETINGS BETWEEN DANA FILIP CRANDALL, WHO AT THE TIME WAS QWEST'S SENIOR VICE PRESIDENT FOR GLOBAL SERVICE DELIVERY, AND RICK SMITH OF ESCHELON?

A. Yes.

Q. HOW OFTEN DID MS. CRANDALL MEET WITH MR. SMITH?

A. She had three or four meetings with Mr. Smith. These forums were used to define service metrics most important to the customer. Once Eschelon and Qwest formalized

their relationship and established a scorecard, the meetings were discontinued and these types of discussions were moved to the operations and service level.

Q. DOES MS. CRANDALL ATTEND MEETINGS WITH OTHER WHOLESALE CUSTOMERS BESIDES ESCHELON?

A. Yes. She often attended quarterly meetings with wholesale customers. The leadership of the Wholesale Service Delivery Department often shared responsibility for covering customer meetings.

vi. Eschelon 12A – March 1, 2002 Settlement Agreement

Q: ARE YOU FAMILIAR WITH THE TERMS OF ESCHELON 12A, THE MARCH 3, 2002 SETTLEMENT AGREEMENT?

A: Yes. By its express terms, this agreement settled historical disputes between the Eschelon and Qwest. This agreement was provided to the Commission on August 22, 2002. *See* LBB-26.

¶ 3(a) contains the consideration for the settlement.

¶ 3(b) terminated pre-existing agreements as discussed elsewhere in my testimony.

¶ 3(c) contains an agreement to file an amendment to Eschelon's interconnection agreement relating to an unbundled network element platform called UNE-E, which had been previously described in an interconnection agreement amendment filed and approved by the Commission on January 24, 2001. *See In the Matter of the Request for Approval of Negotiated Agreement Under the Telecommunications Act of 1996 Between Eschelon Telecom of Washington, Inc. and Qwest Corporation*, Order Approving Negotiated Fourth Amended Agreement for Interconnection and Resale Services, Docket No. UT-990385 (1/24/01). The amendment described in ¶ 3(c) was

filed by Qwest with the Commission on May 15, 2002, *see* LBB-28, and approved by the Washington Commission on July 10, 2002. In its Order, the Commission specifically found that "The Amended Agreement does not discriminate against any other telecommunications carrier," and that "The Amended Agreement will facilitate local exchange competition in the state of Washington by enabling Eschelon to expand its presence in the local exchange market and increase customer choices for local exchange services."

¶ 3(d) was terminated upon transition to a mechanized process for providing Daily Usage Feed ("DUF") files to permit Eschelon to bill switched access to IXCs, which I understand was fully completed by May 2002.

¶¶ 3(e) and 3(f) contain the only terms in the agreement that, arguably, are going-forward terms relating to 251(b) or (c) services, and there is a real question whether these paragraphs needed to be filed pursuant to Section 252. ¶ 3(e) states that Qwest would make the UNE-E platform and business processes available to Eschelon through the current term of its interconnection agreement, which other CLECs had available to them through the publicly filed interconnection agreement. ¶ 3(f) is actually more akin to an agreement to agree because it commits Eschelon and Qwest to forming a joint team that will develop a mutually acceptable plan to convert existing UNE-E lines to UNE-P lines, but this paragraph does not actually spell out how that conversion would be accomplished. Despite the fact that there was a substantial question about whether these terms even needed to be filed, Qwest decided to act conservatively and file them for approval. As a result, these provisions were filed with the Commission as part of a broad, remedial filing on August 21, 2002, *see* LBB-26, and approved by the Commission by Order dated September 25, 2002. *See In the Matter of the Request for*

Approval of Negotiated Agreement Under the Telecommunications Act of 1996 Between Eschelon Telecom of Washington, Inc. and Qwest Corporation, Order Approving Negotiated Eleventh Amended Agreement Consisting of a Settlement Agreement, Docket No. UT-990385 (9/25/02). In its Order, the Commission specifically found that "The Amended Agreement does not discriminate against any other telecommunications carrier," and that "The Amended Agreement will facilitate local exchange competition in the state of Washington by enabling Eschelon to expand its presence in the local exchange market and increase customer choices for local exchange services."

¶ 3(g) concerns a transition to a mechanized billing process, which I understand was fully performed and completed by May 2002.

Finally, ¶ 3(h) (Eschelon's withdrawal of its escalation request) is not a going forward term.

vii. Eschelon 18A – November 15, 2000 Letter Agreement re: Features

Q: ARE YOU FAMILIAR WITH THE TERMS OF ESCHELON 18A, THE NOVEMBER 15, 2000 LETTER AGREEMENT RE: FEATURES?

A: Yes. It is unclear whether this letter agreement falls within the FCC's subsequently articulated definition of an interconnection agreement. On one hand, the letter simply referenced rates that have already been filed and approved for features, and did not establish new obligations or rates (as stated in the second sentence of the first paragraph).[27] On the other hand, the third sentence of the second paragraph referenced

[27] Indeed, because the Staff concluded that this agreement was not an interconnection agreement, the Staff moved to dismiss Eschelon 18A in a motion filed with the Commission on August 11, 2004.

treatment of features where rates might by approved in the future, thereby arguably falling within the FCC's standard. This letter attached a features matrix that includes the corresponding USOCs and pricing, where pricing had been filed and approved with the various State commissions, including this Commission. Where such pricing had been established, Eschelon paid the same rates for features as all other CLECs. Where such rates had not yet been established, the features were included in the flat based rate that Eschelon paid for the unbundled network element platform that it purchased from Qwest. This platform was filed with and approved by the Commission on January 24, 2001. *See In the Matter of the Request for Approval of Negotiated Agreement Under the Telecommunications Act of 1996 Between Eschelon Telecom of Washington, Inc. and Qwest Corporation,* Order Approving Negotiated Fourth Amended Agreement for Interconnection and Resale Services, Docket No. UT-990385 (1/24/01). As soon as rates were filed and approved for such features, Eschelon paid the established rates for features not included in the description provided in the filed interconnection agreement amendment. This letter was terminated by the March 1, 2002 Settlement Agreement (at ¶ 3(d)) and the completion of the transfer to a mechanized process.

viii. Eschelon 19A -- November 15, 2000 Letter re: Daily Usage Information

Q: ARE YOU FAMILIAR WITH THE TERMS OF ESCHELON 19A, THE NOVEMBER 15, 2000 LETTER RE: DAILY USAGE INFORMATION?

A: Yes. Eschelon 18A relates to the manual process used by Qwest to extract switched access minutes from the DUF files to enable Eschelon to bill switched access minutes to IXCs. It is related to Eschelon 4A, but it does not add any material terms to that agreement and instead restates Eschelon's need to provide working telephone number information to Qwest in order for Qwest to extract information from the DUF files.

ix. Eschelon 21A – November 15, 2000 Confidential Purchase Agreement

Q: ARE YOU FAMILIAR WITH THE TERMS OF ESCHELON 21A, THE NOVEMBER 15, 2000 CONFIDENTIAL PURCHASE AGREEMENT?

A: Yes. This writing evidences a volume purchase agreement and contains no provisions setting rates, terms or conditions for Section 251(b) or (c) obligations. Thus, Eschelon 21A is not an interconnection agreement because it does not contain forward-looking obligations pertaining to Section 251(b) and (c) services. This agreement was terminated by Eschelon 12A, the March 1, 2002 Settlement Agreement (¶ 3(b)(4)).

I. McLeod Agreements – McLeod 8A, 42A, 44A, 45A, 46A

Q: ARE YOU FAMILIAR WITH THE TERMS OF THE AGREEMENTS BETWEEN MCLEOD AND QWEST?

A: Yes, I am. For the convenience of the Commission, I have chosen to address a number of the McLeod agreements at one time in my testimony. There are a number of points that I would like to bring to the Commission's attention about these agreements, including when they were superseded by other agreements, if they were terminated, and how certain of the provisions were available to CLECs through filed interconnection agreement amendments.

i. McLeod 8A – April 28, 2000 Confidential Billing Settlement Agreement

Q: ARE YOU FAMILIAR WITH THE TERMS OF MCLEOD 8A, THE APRIL 28, 2000 CONFIDENTIAL BILLING SETTLEMENT AGREEMENT?

A: Yes. Qwest filed this agreement with the Commission on August 22, 2002, *see* LBB-5, and the Commission approved it by Order dated September 25, 2002. *See In the Matter of the Request for Approval of Negotiated Agreement Under the Telecommunications Act of 1996 Between McLeodUSA Telecommunications Services, Inc. and Qwest*

Corporation, Order Approving Negotiated Eighth Amended Agreement Consisting of a Settlement Agreement, Docket No. UT-993007 (9/25/02), LBB-6. In its Order, the Commission specifically found that "The Amended Agreement does not discriminate against any other telecommunications carrier," and that "The Amended Agreement will facilitate local exchange competition in the state of Washington by enabling McLeodUSA to expand its presence in the local exchange market and increase customer choices for local exchange services."

¶¶ 1 and 2(a) resolve past disputes regarding merger proceedings, an FCC complaint relating to subscriber list information charges, and Centrex service agreements. These provisions resolve past disputes, and the subject matters of these issues do not relate to services provided under Section 251(b) or (c).

¶ 2(b) addresses two matters. First it says that the disputed amounts incurred up to March 31, 2000 are resolved and released, and McLeod will dismiss its complaint pending before the FCC regarding subscriber line charges. Second, this paragraph says that, on a going forward basis, McLeod will pay the subscriber list information rates as stated in this paragraph, *or* such other final rates as may be established by any cost docket proceedings or rates that the parties may negotiate. Although appearing to be a "going-forward" term, this provision does not fall within the filing requirement for two reasons. First, subscriber list information rates are provided pursuant to Section 222(e) of the Act, not Section 251, and this paragraph simply re-states the same rates listed in the FCC's order addressing subscriber list information under Section 222(e). Second, the express language of the provision requires the parties to use the rates set for each state through cost setting proceedings; thus the state commissions' settings of these rates apply and supersede the specific rates stated in this provision.

¶ 2(c) provides that the parties will amend their existing interconnection agreements to change their reciprocal compensation terms from a usage-based system to a "bill and keep" arrangement for local and internet-related traffic. The parties in fact amended their interconnection agreement as stated in this paragraph through an amendment filed with the Commission pursuant to Section 252(e) and approved on December 13, 2000. *See In the Matter of the Request for Approval of Negotiated Agreement Under the Telecommunications Act of 1996 Between McLeod Telecommunications Services, Inc. and Qwest Corporation,* Order Approving Negotiated First Amended Agreement for Interconnection and Resale Services, Docket No. UT-993007 (12/13/00). Thus, ¶ 2(c) has been superseded and does not represent an ongoing obligation. The remainder of this paragraph addresses contingencies related to the closure, or non-closure, of the Qwest/U S WEST merger. However, the merger has closed, and thus these remaining provisions do not obligate the parties today.

Qwest identified and bracketed ¶ 2(d), which relates to reciprocal compensation, for review and approval by the Commission, except for the language referencing April 30, 2000. I have previously addressed this paragraph in my testimony above regarding reciprocal compensation.

The final substantive paragraph is 2(e), and it addresses Centrex Service Agreements, a retail offering, not a wholesale service provided under Section 251.

ii. McLeod 42A – May 1, 2000 Confidential Settlement Agreement

Q: ARE YOU FAMILIAR WITH THE TERMS OF MCLEOD 42A, THE MAY 1, 2000 CONFIDENTIAL SETTLEMENT AGREEMENT?

A: Yes. Qwest provided this agreement to the Commission as part of its remedial filing on August 22, 2002. This agreement was intended to settle a complaint that McLeod had filed before the Colorado Commission regarding resold Centrex services. As part of the settlement agreement, McLeod and Qwest agreed on a dispute resolution method for McLeod's concerns over facility availability parity where McLeod had placed an order for resold Centrex services. Although the agreement provided for shifting of attorney's fees and administrative costs regarding the identification of facility availability parity unless such an identification was deemed frivolous, the remainder of the process for such identification was substantially the same as that provided to other CLECs. In any event, no CLEC has requested to opt into this provision since it was filed with the Commission almost two years ago. Qwest filed this agreement with the Commission on August 22, 2002, *see* LBB-5, and the Commission approved it by Order dated September 25, 2002.[28] *See In the Matter of the Request for Approval of Negotiated Agreement Under the Telecommunications Act of 1996 Between McLeodUSA Telecommunications Services, Inc. and Qwest Corporation*, Order Approving Negotiated Eighth Amended Agreement Consisting of a Settlement Agreement, Docket No. UT-993007 (9/25/02), LBB-6. In its Order, the Commission specifically found that "The Amended Agreement does not discriminate against any other telecommunications carrier," and that "The Amended Agreement will facilitate local exchange competition in the state of Washington by enabling McLeodUSA to expand its presence in the local exchange market and increase customer choices for

[28/] Qwest's remedial filing of this agreement shows how broad a standard Qwest applied, reflecting its intent to ensure compliance. On its face, this agreement reflects a settlement of a Colorado dispute, but because it could possibly be interpreted as applying beyond Colorado, Qwest made it part of its remedial filings in other states. Qwest should not be penalized for such an over-filing.

local exchange services." On August 20, 2004, the Staff moved to dismiss McLeod 42A because it now realizes that McLeod 42A is not an interconnection agreement.

iii. McLeod 44A – October 26, 2000 Purchase Agreement

Q: ARE YOU FAMILIAR WITH THE TERMS OF MCLEOD 44A, THE OCTOBER 26, 2000 PURCHASE AGREEMENT?

A: Yes. This agreement is a volume purchase agreement in which McLeod agrees to purchase a total and annual amount of telecommunications services from Qwest. Volume purchase commitments do not reflect new terms and conditions related to Section 251 services; thus, this agreement by itself is not an interconnection agreement amendment under the subsequently articulated FCC standard. This agreement was terminated by the parties on September 16, 2002.

iv. McLeod 45A – October 26, 2000 Purchase Agreement

Q: ARE YOU FAMILIAR WITH THE TERMS OF MCLEOD 45A, THE OCTOBER 26, 2000 PURCHASE AGREEMENT?

A: Yes. This agreement is a volume purchase agreement in which Qwest agrees to purchase a total and annual amount of telecommunications services from McLeod. Volume purchase commitments do not reflect new terms and conditions related to Section 251 services; thus, this agreement by itself is not an interconnection agreement amendment under the subsequently articulated FCC standard. This agreement was terminated by the parties on September 16, 2002.

v. McLeod 46A – October 26, 2000 Confidential Amendment to Confidential Billing Settlement Agreement

Q: ARE YOU FAMILIAR WITH THE TERMS OF MCLEOD 46A, THE OCTOBER 26, 2000 CONFIDENTIAL AMENDMENT TO CONFIDENTIAL BILLING SETTLEMENT AGREEMENT?

A: Yes. ¶¶ 1 and 2 settle an historical dispute between McLeod and Qwest regarding whether Qwest had an obligation to provide service through unbundled network elements, rather than through the resale of finished services. McLeod 46A amends the backward-looking consideration contained in McLeod 20B, the September 29, 2000 Confidential Amendment to Confidential Billing Settlement Agreement. Because this agreement is a settlement agreement with solely retrospective consideration, and does not create forward-looking obligations relating to section 251 services, it is not required to be filed under the standard articulated in the FCC's October 4, 2002 Order. On August 20, 2004, the Staff moved to dismiss McLeod 46A because it now realizes that McLeod 46A is not an interconnection agreement.

J. Remaining Exhibit A Agreements

i. AT&T 26A

Q: ARE YOU FAMILIAR WITH THE PROVISIONS OF AT&T 26A, THE AT&T CONFIDENTIAL BILLING SETTLEMENT AGREEMENT AND RELEASE DATED MARCH 13, 2000?

A: Yes. As Mr. Hydock states in his testimony on behalf of AT&T, the parties did not perceive at the time that these terms were required to be filed for approval pursuant to Section 252. (Direct Testimony of Michael Hydock, at 8-9.) This agreement was designed to address issues that arose at the operational level, primarily in the measurement and billing for traffic, and resolve them between the parties.

In retrospect under the October 4, 2002 FCC Order, this agreement may contain some terms that are within the filing standard, such as terms addressing billing for toll and limited portions of local traffic transiting the access tandem. However, all Section 251

terms have either expired or been superseded. On September 2, 2004, Staff and AT&T agreed to settle all allegations regarding this agreement for $1,000.

ii. MCI WorldCom 34A – June 29, 2001 Confidential Billing Settlement Agreement

Q: ARE YOU FAMILIAR WITH THE PROVISIONS OF MCI WORLDCOM 34A, THE MCI WORLDCOM NETWORK SERVICES, INC. CONFIDENTIAL BILLING SETTLEMENT AGREEMENT DATED JUNE 29, 2001?

A: Yes. ¶ 1 is a settlement of an historical dispute.

¶ 2 relates to unbundled network element combinations and has been superseded by an interconnection agreement amendment filed with the Washington Commission on October 12, 2001, and approved by the Commission on October 31, 2001. *See In the Matter of the Request for Approval of Negotiated Agreement Under the Telecommunications Act of 1996 Between MCMetro Access Transmission Services, LLC and Qwest Corporation*, Order Approving Negotiated Third Amended Agreement Adding Provisions for Unbundled Network Elements Combinations, Docket No. UT-960310 (10/31/01).

¶ 3 is a settlement of historical dispute and pending litigation.

¶ 4 is also a settlement of an historical dispute with only backward-looking consideration

As discussed above, the terms related to reciprocal compensation in ¶ 5 are included in the interconnection agreement amendments filed in Washington on September 17, 2001, and approved by the Commission by Order dated November 29, 2001. *See In the Matter of the Request for Approval of Negotiated Agreement Under the*

Telecommunications Act of 1996 Between MCIMetro Access Transmission Services, LLC and Qwest Corporation, Order Approving Negotiated Fourth Amended Agreement Amending Certain Reciprocal Compensation Terms and Adding Provisions for LIS Trunk Forecasts, Docket No. UT-960310 (11/29/01).

¶ 6 is a settlement of historical dispute regarding the PIC process for resolving slamming claims.

As part of this settlement agreement, the parties agreed to negotiate a billing dispute resolution process. This agreement did not itself establish such a process, but was an agreement to agree in the future. The parties also agreed to a 50% Relative Usage Factor ("RUF") for LIS two-way direct trunk transport. The paragraph explicitly included an agreement that the parties would file an interconnection amendment to implement this 50% RUF agreement. The portions of ¶ 7 reflecting going forward terms for the calculation of a relative use factor have been filed with the applicable states. The remainder of ¶ 7 either involved the settlement of historical disputes or the carrier-specific percentage, which would not be applicable to other carriers because that percentage is based upon carrier-specific usage.

¶ 8 is only an agreement to negotiate a dispute resolution process, and it was filed in Washington on August 22, 2002. In addition, MCI WorldCom 33A, the business escalation agreement also dated June 29, 2001, which was also filed in Washington, reflects a dispute resolution process discussed in this ¶ 8.

iii. Nextlink 36A – May 12, 2000 Nextlink Confidential Billing Settlement Agreement

Q: ARE YOU FAMILIAR WITH THE PROVISION RELATED TO COLLOCATION RATES IN NEXTLINK 36A, THE MAY 12, 2000 NEXTLINK CONFIDENTIAL BILLING SETTLEMENT AGREEMENT?

A: Yes. At the time of this agreement, collocation rates were in dispute in Washington before the Commission. In order to address this issue with Nextlink, Qwest and Nextlink, agreed to a flat $80,000 in nonrecurring charges per collocation site, and the parties agree to true up the collocation charges to the Commission-ordered collocation rates when those rates became effective. In effect, Qwest and Nextlink agreed to a collocation charge that would be no different than the rates ordered by the Commission when it issued its final order in the matter.

iv. ELI 48A – July 19, 2001 Binding Letter Agreement

Q: ARE YOU FAMILIAR WITH THE TERMS OF ELI 48A, THE JULY 19, 2001 BINDING LETTER AGREEMENT?

A: Yes. ¶¶ 1 and 3 are the settlement of an historical dispute with only backward-looking consideration.

¶¶ 4 and 5 largely relate to the payment by Qwest to ELI for termination of intraLATA toll traffic, which is not a Section 251 service. Qwest denies that the remaining sentences of ¶¶ 4 and 5 create a Section 252 obligation on the part of Qwest because the language is an agreement to negotiate and therefore does not appear to create a Section 251 obligation.

¶ 6 does not create a Section 251 obligation but relates to the withdrawal of an FCC complaint and the agreement to negotiate.

¶ 7 is an escalation process, which was superseded by an escalation process in the June 6, 2002 Local Interconnection Agreement between Qwest and ELI filed with this Commission on June 21, 2002.

Finally, the terms of this agreement were incorporated and superseded by ELI 23B, the April 26, 2002 Confidential Billing Settlement Agreement. ELI and the Commission Staff settled the allegations regarding ELI 48A and two other ELI agreements, ELI 28A and 29A, on June 4, 2004 for $3,000. The Commission approved this settlement on July 15, 2004.

v. Global Crossing 52A – September 18, 2000 Settlement Agreement and Release

Q: ARE YOU FAMILIAR WITH THE TERMS OF GLOBAL CROSSING 52A, THE SEPTEMBER 18, 2000 SETTLEMENT AGREEMENT AND RELEASE?

A: Yes. The provisions of the *Settlement Agreement and Release* dated September 18, 2000 with Global Crossing reflecting terms and conditions of UNE combinations in Washington were superseded by an interconnection agreement amendment filed with the Commission on November 13, 2000, and approved by it on November 29, 2000. *See In the Matter of the Request for Approval of Negotiated Agreement Under the Telecommunications Act of 1996 Between Global Crossing Local Services, Inc. and Qwest Corporation*, Order Approving Negotiated Third Amended Agreement for Interconnection and Resale Services, Docket No. UT-970368 (11/29/00). In approving this interconnection agreement, the Commission specifically found that "The Amended Agreement does not discriminate against any other telecommunications carrier," and that "The Amended Agreement will facilitate local exchange competition in the state of Washington by enabling Global to expand its presence in the local exchange market and increase customer choices for local exchange services." On August 3, 2004,

Global Crossing and the Staff agreed to settle the allegations regarding Global Crossing 52A and one other Global Crossing agreement, 47A, for $2,000. On August 10, 2004, the Commission approved this settlement agreement in Order No. 10.

K. Exhibit B Agreements

Q: ARE THE EXHIBIT B AGREEMENTS INCLUDED IN THE SECOND AND THIRD CAUSES OF ACTION?

A: Although the allegations in the Complaint create some confusion about whether the Staff was seeking penalties in Counts Two and Three for the Exhibit B agreements, the Staff's testimony and Mr. Wilson's deposition made it clear that the Staff is not contending that the Exhibit B agreements had to be filed under Section 252(e), and therefore the Staff is not seeking penalties for the Exhibit B agreements in Counts Two or Three.[29] Because the Staff made this concession, Qwest will not address the Exhibit B agreements under Counts Two or Three. I discuss the Exhibit B agreements instead later in my testimony under the sections relating to Counts Five, Six, and Seven.

L. Timeliness

Q: WHAT IS QWEST'S POSITION REGARDING WHEN INTERCONNECTION AGREEMENTS MUST BE FILED UNDER SECTION 252(E)?

A: Mr. Wilson discusses his opinion that interconnection agreements must be filed in a timely manner, and that 30 days is timely under the Interpretive and Policy Statement

[29] *See* Exhibit TLW-72; *see also* Wilson Tr., Vol. III, at 92:7-16, LBB-34:

> Q First of all, the Staff is not alleging that any of the agreements listed in Exhibit B are interconnection agreements that needed to be filed, correct?
>
> A Correct.
>
> Q Does that also mean then that Staff does not consider the Exhibit B agreements to create ongoing obligations under section 251(b) or (c)?
>
> MR. SWANSON: Objection to the extent it calls for a legal conclusion.
>
> A THE WITNESS: The answer is yes.

adopted on June 28, 1996 in Docket No. UT-960269 by the Commission. I do not believe that the issue was as clear as Mr. Wilson suggests prior to the Commission's recent adoption of WAC 480-07-640.

One of the basic requisites of procedural fairness is that laws and regulations provide enough guidance for regulated entities to have a clear understanding of what is required of them. Prior to the Commission's adoption of a 30-day filing requirement in WAC 480-07-640 effective on January 1, 2004 – four months after the Complaint opening this docket was filed – there was no statute or rule that established a standard for the timeliness of the filing of an interconnection agreement.

Section 252(e) does not require filing within any particular time, and the FCC has not promulgated a regulation that establishes a filing deadline, so "untimely" filing under Section 252(e) does not constitute a separate claim under federal law. Nor was there a standard under Washington law for when agreements had to be filed. Under RCW 80.36.150,[30] the Commission was instructed to adopt rules that provided for the filing of the essential terms and conditions of every contract for service. The Commission never adopted binding rules, but instead issued its non-binding Interpretive and Policy Statement. The Interpretive and Policy Statement does not have the force and effect of law, however, and cannot be the basis for assessing penalties on a per day basis. *See* RCW 34.05.230(1) ("An agency is encouraged to advise the public of its current

[30] RCW 80.36.150 provides, in pertinent part,

> Every telecommunications company shall file with the commission, as and when required by it, a copy of any contract, agreement or arrangement in writing with any other telecommunications company, or with any other corporation, association or person relating in any way to the construction, maintenance or use of a telecommunications line or service by, or rates and charges over and upon, any such telecommunications line. The commission shall adopt rules that provide for the filing by telecommunications companies on the public record of the essential terms and conditions of every contract for service.

opinions, approaches, and likely courses of action by means of interpretive or policy statements. Current interpretive and policy statements are advisory only.").

This lack of a filing standard is more than a hypothetical concern. Mr. Wilson calculates approximately 188,000 days in which Qwest was allegedly in violation of the filing requirements under the causes of action in the Complaint – or a potential penalty of $188,000,000 if a penalty of $1000 per day were assessed,[31] as Mr. Wilson suggests.[32] The only way to reach that number of days in violation, however, is if the Commission retroactively sets a filing deadline of 30 days – an action that would raise troubling concerns and constitutional issues about the retroactive application of the timeliness rule.

VI. COUNT THREE (47 U.S.C. § 252(I))

Q: COUNT THREE OF THE COMPLAINT SEEKS PENALTIES BASED ON THE UNAVAILABILITY OF THE AGREEMENTS FOR OPT IN BECAUSE THEY WERE NOT FILED. WHAT IS QWEST'S POSITION REGARDING THIS CAUSE OF ACTION?

A: Qwest does not believe that this cause of action is appropriate as a separate and independent cause of action that can be the basis for separate penalties. There is no basis under federal or state law for seeking separate penalties for asserted violations of Section 252(e), for nonfiling, and Section 252(i), for unavailability for opt in, because

[31] As an aside, Qwest's position is that the Commission's fining authority is limited to $100 per day without filing an action in superior court. *See* RCW 80.04.400 ("Actions to recover penalties under this title shall be brought in the name of the state of Washington in the superior court of Thurston county, or in the superior court of any county in or through which such public service company may do business.*"). See generally* RCW 80.04.380 – 80.04.405.

[32] Although Mr. Wilson claimed not to be recommending any penalty in his testimony, when questioned about this issue in his deposition, he stated that, if asked, he would recommend the maximum penalty, which he believed to be $1000 per day.

the latter flows inevitably from the former – if an agreement was not filed, it will not be available for opt in.

Moreover, even if Count Three did state a separate cause of action, the availability and deliverability of the terms at issue should provide a defense to such a claim. As I have pointed out at length in this testimony, most of the terms at issue were available to CLECs through other filed agreements, Qwest's website, or Qwest's standard business processes. As a result, there is no basis for a claim that the terms were not available to other CLECs.

Q: ARE THERE OTHER REASONS THAT THE COMMISSION SHOULD NOT CONSIDER SEPARATE PENALTIES UNDER SECTION 252(I)?

A: Yes. Whatever the filing requirement, CLECs' rights to opt into an interconnection agreement are governed by Section 252(i) of the Act. On July 8, 2004, the FCC did away with the pick and choose rule, and CLECs must now take all of the provisions of an interconnection agreement or none of them.

Even at the time of the agreements in question, the opt-in process under Section 252(i) was not automatic – just because a CLEC selected a filed provision for opt-in did not mean that the CLEC would receive that provision. The FCC orders and rules implementing Section 252 imposed both substantive and procedural constraints on the opt-in process. As Mr. Wilson repeatedly acknowledged in his deposition[33], CLECs could not use Section 252(i) to strip individual provisions in an interconnection agreement out of context and thereby avoid the related terms and conditions on which

[33] *See, e.g.,* Wilson Tr., Vol. II, at 87:3-6 ("I think that what you are doing is describing essentially that CLECs can't opt in to something unless they are willing to take the related terms and conditions, and I have already agreed to that."), LBB-33.

that provision was premised.[34] When a CLEC invoked its "pick and choose" rights, it had to "accept all terms that [the ILEC] can prove are 'legitimately related' to the desired term."[35] The requirement that a CLEC must accept all related terms was particularly true with regard to volume and term commitments, which define the scale of the relationship in a deregulated environment.[36] However, this limitation was not confined to pricing provisions; the FCC rules were clear that CLECs had to agree to accept "the same terms and conditions, *in addition to rates*, as those provided in the agreement"[37] if they wished to opt in. For that reason, opt-in did not ordinarily proceed automatically in every case: if a CLEC refused to accept the terms and conditions that were legitimately related to the desired provision, the ILEC was permitted to seek adjudication under the relevant state process.[38]

In other words, even if provisions of the unfiled agreements at issue in this case had originally been filed, opt-in by other CLECs would have been considered on a case-by-case basis, and in no case would the CLEC have been entitled to ignore related provisions of the agreements. In addition, Section 252(i) does not require making agreement terms available within any particular time, so "untimely" compliance does not constitute a separate claim, as Mr. Wilson asserts.

Mr. Wilson agreed with this construction of Section 252(i) during his deposition.

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[34] *See, e.g., Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, 16139 ¶ 1315 (1996) ("*Local Competition Order*").

[35] *Southwestern Bell Tel. Co.*, 221 F.3d at 818 (citing *Iowa Utils. Bd.*, 525 U.S. at 396).

[36] *Cf. Local Competition Order* at 16139 ¶ 1315 (specifically mentioning volume and term purchase commitments as acceptable related terms a CLEC may have to accept as part of the 252(i) process).

[37] 47 C.F.R. § 51.809(a) (emphasis added). This provision was upheld in *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 396 (1999).

[38] *Local Competition Order* ¶ 1321.

Q. So prior to a week and a half ago, your understanding was that if a CLEC wanted to opt in to something that had been made available, the CLEC would have to agree to accept the terms related to the provision that they wanted to opt in to right?

A. Yes.

Q. And there could be some dispute about what the range of related terms was?

A. That's right. That's why our rules and policies have included the provision that when a CLEC tries to opt in to an agreement, they have to notify the ILEC that they want to opt in to it, and then the ILEC has 15 days to object to it and bring it down here for a decision to implement that kind of issue.

Q. So it is not correct to say that a CLEC can just cherry pick individual terms out of agreements without considering what related terms and conditions may go along with those terms, right?

A. I will go along with that generally speaking. You know, I mean, we have to be careful, but like you just said there might be a dispute about what is related, but generally speaking I would agree with you.

Q. And in fact you can't get a whole lot more specific than the level we just discussed without actually looking at an agreement and seeing the provision at issue and what else is in that agreement, correct?

A. Right.

Q. And in fact in listening to your answers to questions from Eschelon earlier today, it seemed to me what you were saying is you don't even just look at the one agreement in certain context, but in fact you may have to look at a series of agreements, right?

A. That's entirely possible. You have to take them in context. And I was looking at the series that were all signed the same day in Minneapolis. I envision a group of people sitting around the table and doing that. You know, I just envision a lot of winking going along perhaps.

> Q. But putting aside whatever winking happened or didn't, if the series of agreements signed in November plus or minus 2000, between Qwest and Eschelon had been filed and approved, now we are in the realm of a hypothetical, but as I understand what you were saying earlier today and what you are saying now, that whole series of agreements would have to be considered collectively in order to understand the business relationship between Qwest and Eschelon, and thus what terms were or were not related to a particular provision someone would want to opt in to from those agreements?
>
> A. I think that the parties probably would have insisted on that, and would have framed their filing accordingly to make sure that happened.[39]

Q: WHY IS THE ANALYSIS OF WHETHER A CLEC COULD HAVE OPTED IN TO AN UNFILED AGREEMENT IMPORTANT IN THIS CASE?

A: As the FCC has stated: "section 252(i) mandates that the availability of publicly-filed agreements be limited to carriers willing to accept the same terms and conditions as the carrier who negotiated the original agreement with the incumbent LEC."[40] "For instance, where an incumbent LEC and a new entrant have agreed upon a rate contained in a five-year agreement, section 252(i) does not necessarily entitle a third party to receive the same rate for a three-year commitment. Similarly, that one carrier negotiated a volume discount on loops did not automatically entitle a third party to obtain the same rate for a smaller amount of loops."[41] This limitation was not confined to pricing provisions; the FCC rules were clear at the time of these agreements that CLECs must agree to accept "the same terms and conditions, *in addition to rates*, as those provided in the agreement" if they wish to opt in.[42] If the CLEC could not meet

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39 Wilson Tr., Vol. I, at 194:6-196:7, LBB-32.

40 *See id.* at 16140.

41 *See id*. at 16139 ¶ 1315.

42 *See* 47 C.F.R. § 51.809(a) (emphasis added). The Supreme Court has explicitly upheld this aspect of the FCC's See id. at 16139 ¶ 1315.

these other terms and conditions, the CLEC had no right under Section 252(i) to opt into the pricing term in isolation.

Qwest believes that many, if not all, of the agreements at issue in this case had related terms and conditions. If no CLECs could have met those related terms and conditions, then there was no harm from the failure to file them – and there should be no basis for assessing penalties. Moreover, if only a few CLECs could have met those related terms and conditions, the harm from the failure to file such agreements was similarly mitigated, and penalties should be commensurately reduced as well.

Mr. Wilson, however, undertakes no such analysis in his testimony. He simply stated at his deposition that the Commission should impose the maximum penalties, which he believes to be $1000 per day, against each carrier for each agreement.[43] Qwest is faced with an analytical vacuum on this issue. Without the benefit of such an analysis – and without giving Qwest the opportunity to respond to it, there is no basis for assessing penalties under Count Three of the Complaint.

VII. COUNT FIVE (RCW 80.36.170)

Q: WHAT IS QWEST'S POSITION WITH REGARD TO COUNT FIVE OF THE COMPLAINT?

A: Count Five of the Complaint charges a violation of RCW 80.36.170. Under RCW 80.36.170, "No telecommunications company shall make or give any undue or unreasonable preference or advantage to any person, corporation or locality, or subject

42 *See* 47 C.F.R. § 51.809interpretation of Section 252(i). *See AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 396 (1999).

43 *See, e.g.*, Wilson Tr., Vol. I, at 23:24 – 24:9, LBB-32; Vol. II, at 5:18 – 6:6, LBB-33; Vol. III, at 143:6-15, LBB-34.

any particular person, corporation or locality to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

As I have noted throughout my testimony on these agreements, many of the provisions were available to other CLECs through filed interconnection agreements, Qwest's website, or through Qwest's standard processes. As a result, there is a substantial question for most of these agreements about whether there was any preference or advantage, let alone an undue or unreasonable one.

Moreover, RCW 80.36.170 does not prohibit preferences or advantages to any company; instead, it precludes only "undue or unreasonable" preferences or advantages. Although neither "undue" nor "unreasonable" is defined by this statute,[44] much of the analysis that I have done in this testimony regarding each of the agreement's provisions under Count Two can be applied here. Indeed, the availability of the terms, as I have pointed out in this testimony, is quite relevant to a finding that the agreements were not "undue or unreasonable."

In addition, the issue of related terms is bound up in what constitutes an "undue or unreasonable" preference. If one CLEC were able to commit to purchase a significant volume of telecommunications services, for example, there might be cost advantages that could merit a reduction in price to that CLEC – thereby making a price concession neither "undue" nor "unreasonable." Because the Staff did not do such an analysis, however, there is insufficient information for the Commission to determine that any of the provisions in the Exhibit A agreements were undue or unreasonable, or that any

[44] As Mr. Shooshan discusses, Mr. Wilson's analysis essentially reads the terms "undue and unreasonable" out of the statute. *See, e.g.,* Shooshan Testimony, at 29-30.

other CLEC was similarly situated and could or would have been able to opt in to those agreements. And Mr. Wilson's assumption that all preferences are "undue" and "unreasonable" does not square with industry reality or common sense – particularly given his recognition that "there are more than 31 flavors of CLECs."[45]

Q: WHAT ABOUT THE EXHIBIT B AGREEMENTS?

A: The Staff's testimony about the Exhibit B agreements merely states a series of conclusions about the state law counts, rather than undertaking any analysis. Mr. Wilson does not articulate any standard for how to determine when the preference under any of the Exhibit B agreements – which consists simply of the payment of settlement amounts – is a preference, or is undue or unreasonable under RCW 80.36.170; instead, he simply states that the agreements grant undue or unreasonable preferences because he speculates that there must be CLECs that wanted to settle the same disputes on the same terms but were denied that opportunity by Qwest – even though he concedes that he has no evidence that any such CLEC or lost opportunity exists and that Staff performed no such analysis to determine if any such CLEC or lost opportunity exists. In essence, the Staff has sought to impose the burden on Qwest to prove that it did not discriminate or grant an undue or unreasonable preference or advantage.

As to all of the Exhibit B agreements, imposing penalties under state law, as sought in the Fifth, Sixth, and Seventh causes of action are inconsistent with the FCC's ruling that settlement agreements with solely retrospective consideration need not be filed.

[45] *See* Wilson Tr., Vol. I, at 191:14-20 ("Particularly because my understanding of the CLEC industry is that there is more than 31 flavors of CLECs, and it's been made clear to me many times that, you know, one CLEC has a different business plan from another, and so CLEC "X" might find collocation to be incredibly important, and CLEC "Y" might think that features are where it's at for them."), LBB-32.

Although the FCC in its declaratory judgment gave "general guidance" it explicitly held that only agreements that create ongoing 251(b) or (c) obligations needed to be filed and made available to other CLECs, and that settlement agreements with solely retrospective consideration need not be filed.[46] Because the FCC is the primary regulatory authority charged with interpreting the Telecommunications Act, imposing penalties for settlement agreements with solely retrospective consideration would directly conflict with the FCC declaratory judgment ruling and be preempted.

There are strong public policy reasons for this result as well. Not only are settlement agreements standard business practice in the telecommunications industry – as well as all other industries – they are encouraged by the stated public policy of Washington. "The express public policy of the state is to encourage settlement. The law 'strongly favors' settlement."[47] In fact, Washington courts have rejected particular interpretations of the law that would have any effect of discouraging settlement of disputes.[48]

Settlement agreements are, by necessity, tailored to the particular disputes and negotiating positions of the parties. By requiring that Qwest affirmatively afford other CLECs the opportunity to settle substantially similar disputes on "identical" terms based on settlement agreements that two parties have hammered out regarding their particular dispute is not only impractical, it is unworkable and penalizes Qwest for resolving a dispute consistent with the strong public policy *encouraging* settlements.

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[46] *FCC Order* at ¶ 13.

[47] *See State v. Noah*, 9 P.3d 858, 871 (Wash. Ct. App. 2000) (citations omitted). *See also Seafirst Ctr. Ltd. v. Erickson*, 127 Wash. 2d 355, 364 (1995) (noting that the law strongly encourages settlement).

[48] *See City of Seattle v. Blume*, 134 Wash. 2d 243, 258 (1997) (rejecting an interpretation of the "independent business judgment rule" that would discourage settlements because it would be "contrary to the express public policy of this state which strongly encourages settlement.").

Moreover, Mr. Wilson's testimony that these agreements grant an unreasonable preference under state law cannot be a correct interpretation of state law. Under that theory, no settlements could be permitted because every settlement depends on the facts and circumstances of the disputes, and one CLEC might be able to marshal its arguments better than another CLEC. The Telecommunications Act requires that no preferences be given for 251(b) and (c) services, but the FCC expressly permits parties to settle disputes privately.

Mr. Wilson's testimony is inconsistent with the Commission's practice. Even in a context where the Commission must be notified of settlements – where the settlement resolves disputes that are the subject of a formal complaint before the Commission[49] – the Commission's rules do not condition approval upon whether the settlement in question provides any undue preference or discrimination to non-parties. In *New Edge Network, Inc. v. US WEST Communications, Inc.*, the Commission granted a motion to dismiss the proceeding because the settlement agreement "adequately addressed and resolved" the issues pending in the complaint.[50] Notable are the actions the Commission did not take in determining whether to grant dismissal pursuant to the settlement agreement: the Commission did not approve or adopt the settlement; it did not investigate whether there were other similarly situated CLECs and/or whether the terms of the settlement would be acceptable to those CLECs; and it did not give notice

[49] *See* WAC 480-07-730, et seq.

[50] Fourth Supplemental Order Granting Joint Motion for Dismissal of Complaint, Docket No. UT-000141 at 3, ¶ 13 (Aug. 15, 2000).

of the settlement to the industry at large and/or accept comments from other CLECs on the settlement.[51]

The Commission's approach in considering settlement agreements in the above cases is consistent with the decisions of the FCC that have recognized that the individualized nature of dispute settlement precludes concluding that settlements *per se* have discriminatory effect. For example, even in much more highly regulated areas where services are provided according to filed tariffs and no private negotiations of terms or rates is allowed, the FCC historically has recognized that settlement of individual disputes does not constitute discrimination under that tariffed service.[52]

Q: ARE THERE EXHIBIT B AGREEMENTS THAT DO NOT RELATE TO SECTION 251(B) AND (C) SERVICES AND THEREFORE DO NOT HAVE TO BE MADE AVAILABLE TO OTHER CLECS?

A: Yes, there are. In addition to historical settlement agreements, the Staff has included agreements on Exhibit B that do not relate to Section 251(b) or (c) services. Imposing

[51] *See also Tel West Communications, LLC v. Qwest Corp.*, Ninth Supplemental Order: Dismissing Claims With Prejudice, Docket UT-013097 (December 17, 2002) (dismissing complaint under similar circumstances without approving settlement, investigating existence of similarly situated CLECs, and noticing industry of settlement). In *Tel West*, the Commission was considering a proposed settlement of a complaint that had been brought before the Commission under WAC 480-09-530. The parties had reached an agreement to resolve the remaining claims in the complaint, which "present[ed] the Commission with an issue of first impression, in particular, how the Commission should respond to a proposed settlement of all remaining claims that has been negotiated and stipulated to by the parties." *Id.* 4 ¶ 12. Deciding it did not need to approve the entire settlement agreement, the Commission relied on the 1996 Act's emphasis on principles of competition instead of principles of regulation to "conclude that we need not approve and adopt this settlement agreement in the same manner as we might in a fully regulated setting." *Id.* at 4,¶ 15. The Commission continued, noting "It is essential in *this kind of situation*, however, that parties provide access to their entire agreement so that we may review it for elements that might be unlawful or improper." *Id.* (emphasis added). The present case is not the "kind of situation" at issue in *Tel West* because the settlement agreements at issue here did not settle formal complaints pending before the Commission. Thus the extra Commission review for unlawful or improper elements is not called for. As explained above, if a party wishes to subject settlement agreements with solely retrospective consideration to further scrutiny by bringing a complaint based upon those agreements, that party must allege more than the mere existence of the settlement agreements.

[52] *See Allnet Communications Servs., Inc. v. Illinois Bell Tel. Co.*, 8 FCC Rc'd 3030, 3037, ¶¶ 32-33 & n.78 (1993) (rejecting the contention that an award of damages to a customer, or a carrier's payment to a customer in settlement of a dispute, constitutes a violation of the non-discrimination duty under a tariffed service).

penalties on Exhibit B agreements that do not relate to Section 251(b) or (c) services would similarly be inconsistent with the FCC's October 4, 2002 Order because there is no requirement that such agreements be made available to other CLECs.

Q: WHICH EXHIBIT B AGREEMENTS LISTED IN MR. WILSON'S TESTIMONY FALL OUTSIDE OF THE OPT-IN RULES BECAUSE THEY DO NOT RELATE TO SECTION 251(B) AND (C) SERVICES?

A: There are a number of Exhibit B agreements that Mr. Wilson covers in his testimony that do not relate to Section 251(b) and (c) services and, therefore, did not have to be made available to other CLECs. Those agreements include the following:

WorldCom 5B is an unsigned Confidentiality Agreement dated April 2, 3001 that was "made in order for each Party to receive from the other certain technical and business information ('Confidential Information' as defined below) related to 'business-to-business' negotiations . . . under terms that will protect the confidential and proprietary nature of such Confidential Information." This agreement is a general confidentiality agreement of the type that is standard when two parties seek to exchange confidential business information to aid in their negotiations and wish to protect the confidentiality of that information. It does not "create ongoing obligations" relating to Section 251(b) and (c) services; indeed, the only way in which the agreement relates to Section 251(b) and (c) services is that some of the information that the parties agree to exchange in a confidential manner involves 251(b) and (c) services, but the only "ongoing obligation" is confidentiality, not the provision of any such services.

Another Exhibit B agreement that does not pertain to Section 251(b) and (c) services is AT&T 11B. This agreement is an April 24, 2000 agreement between AT&T and U S

WEST, and Qwest in which the parties agreed to settle disputes by each agreeing to forgo certain lobbying/regulatory positions: U S WEST and Qwest agree not to initiate any "open access" activities for cable television services, and AT&T agrees to withdraw its opposition to Qwest's merger with U S WEST. This agreement does not affect ongoing 251(b) or (c) obligations and therefore is outside the filing requirement. On September 2, 2004, Staff entered into a settlement agreement with AT&T that states "[f]or the purposes of this Settlement Agreement only and in the interest of settling the dispute between the Parties, Staff admits that [AT&T 11B] is not an Interconnection Agreement under current WUTC rules and orders subjecting AT&T to any filing requirements."

Another such agreement is MCI WorldCom 13B. This agreement is a June 29, 2001 Settlement Agreement between MCI WorldCom Network Services, Inc. and Qwest, and as it states, the agreement settles disputes that have arisen between the parties regarding services and facilities provided under state and federal tariffs. In addition to being a settlement agreement with solely retrospective consideration, this agreement concerns dial access services (Central Office Based Remote Access), a retail service not subject to Section 251 obligations. As a result, this agreement is outside the filing requirement.

There are several agreements listed in the Complaint that are take or pay agreements in which Qwest agrees to purchase a minimum amount of telecommunications services from a CLEC, or vice versa, within a specified period of time. Such agreements are common in industry and provide the parties with an assurance that there will be a minimum revenue stream for a set time period, but they do not establish rates or set forth how services will be provided. One such take or pay agreement is XO 15B, a

December 31, 2001 agreement between Qwest Services Corporation and XO. Because this agreement relates to mutual volume purchase agreements and does not pertain to Section 251(b) or (c) services or rates, it does not fall within the FCC's filing standard.

Another agreement that does not create Section 251(b) or (c) obligations is Z-Tel 16B. In this May 18, 2001 Memorandum of Understanding, Qwest and Z-Tel agreed to a litigation stand-down for 60 days so that the parties could negotiate interconnection agreements in the States of Idaho, Iowa, Montana, Nebraska, New Mexico, North Dakota, South Dakota, and Wyoming. This agreement creates no Section 251(b) or (c) obligations; indeed, the only material term of the agreement is establishing a 60-day time period in which the parties could attempt to negotiate interconnection agreements in States other than Washington without being distracted by pursuing litigation against each other. This is another example of Qwest and another carrier actually furthering the public interest by de-escalating the litigation actions of the two companies and instead agreeing to attempt to reconcile their disputes through negotiation.

Q: DO ANY OF THE EXHIBIT B AGREEMENT LISTED IN MR. WILSON'S TESTIMONY RELATE TO SERVICES PROVIDED OUTSIDE OF THE STATE OF WASHINGTON?

A: McLeod 21B, a February 12, 2001 McLeodUSA Confidential Agreement to Provide Directory Assistance and Database Entry Services, by its terms only applies in certain Minnesota communities. As a result, it has no application to the State of Washington and cannot create an undue or unreasonable preference in Washington.

Q: WHY NOT?

A: As a legal matter, each State's commission only possesses the authority to oversee and regulate interconnection agreements as they affect interconnection services in its state. *See BMW v. Gore*, 517 U.S. 559, 572 (1996) ("[f]ollowing from principles of state sovereignty and comity, a state may not impose economic sanctions on violators of its laws with the intent of altering the violator's lawful conduct in other states"). This principle is inherent in the structure of the Telecommunications Act, which entrusts each state to regulate local phone services within its territory. This principle also flows from the Dormant Commerce Clause of the United States Constitution, in which no State can make a law that impedes commerce among the States.

There are practical reasons for this rule as well. In those instances where Qwest and a CLEC choose to tailor their interconnection agreements to suit the unique local market conditions in a particular State and limit the agreement to the service in that State, no other State should attempt to infringe upon their ability to do so by requiring Qwest (or the CLEC) to file such agreements and possibly making those agreements available in that other State via pick-and-choose. There is nothing in the Act that indicates any terms of interconnection agreements must be standardized throughout an ILEC's region. The Staff conceded this point in its response to Qwest's motion to dismiss, and the Commission recognized this principle when it dismissed McLeod 43A, a September 18, 2000 McLeodUSA Letter Agreement Re: Bill and Keep that only applies in Minnesota, in Order No. 5.

Q: WHAT IS YOUR RESPONSE TO MR. WILSON'S DISCUSSION OF THE ESCHELON PROVISIONING TEAM IN COUNT FIVE?

A: Mr. Wilson focuses much of his discussion about Count Five on the provisioning team terms set out in Eschelon agreements 1A, 2A, 4A, and 17A. (Direct Testimony of

Thomas L. Wilson, at 80-84.) As I have discussed above, the Eschelon provisioning team was filed publicly with the Commission. On January 24, 2001, the Commission approved the interconnection agreement amendment, and expressly found that "The Amended Agreement does not discriminate against any other telecommunications carrier." *See In the Matter of the Request for Approval of Negotiated Agreement Under the Telecommunications Act of 1996 Between Eschelon Telecom of Washington, Inc. and Qwest Corporation,* Order Approving Negotiated Fourth Amended Agreement for Interconnection and Resale Services, Docket No. UT-990385 (1/24/01). Because the Eschelon provisioning team was filed publicly as an interconnection agreement amendment, no penalties should be assessed. Indeed, as an indication of the lack of harm from this provision, no CLEC sought to opt into it despite its public availability. Indeed, I am unaware that any CLEC has even requested information about it.

Q: DID QWEST FILE ANY OF THE OTHER AGREEMENTS AT ISSUE IN THIS CASE?

A: Yes. As discussed throughout my testimony, Qwest and/or the CLECs filed a number of the agreements at issue in this case either at the time of their execution or as part of the August 2002 remedial filing. For each, the Commission approved the interconnection agreement amendment, and expressly found that "The Amended Agreement does not discriminate against any other telecommunications carrier." Because of the express findings of a lack of discrimination, no penalties should be assessed as to these agreements under any of the state law counts.

VIII. COUNT SIX (RCW 80.36.180)

Q: WHAT IS QWEST'S POSITION WITH REGARD TO COUNT SIX OF THE COMPLAINT?

A: Count Six of the Complaint charges a violation of RCW 80.36.180. Under RCW 80.36.180, "No telecommunications company shall, directly or indirectly, or by any special rate, rebate, drawback or other device or method, unduly or unreasonably charge, demand, collect or receive from any person or corporation a greater or less compensation for any service rendered or to be rendered with respect to communication by telecommunications or in connection therewith, except as authorized in this title or Title 81 RCW than it charges, demands, collects or receives from any other person or corporation for doing a like and contemporaneous service with respect to communication by telecommunications under the same or substantially the same circumstances and conditions." Mr. Wilson then recites the settlement payments in a number of Exhibit A agreements. Mr. Wilson opines that these settlement payments have an effect on rates, but he provides no evidence to support that statement.

Mr. Wilson's theory appears to be that any settlement payment has an effect on rates and is therefore in violation of RCW 80.36.180. This theory, however, is contrary to the FCC's express statement that settlement agreements with retrospective consideration are not interconnection agreements.

Moreover, Mr. Wilson does not show that the settlement payments are in any way connected to future rates, nor does he show that the settlement payments are not in fact bona fide payments to settle disputes. In my opinion, Mr. Wilson's theory misconstrues RCW 80.36.180 and would essentially eviscerate any carrier's ability to settle a dispute with another carrier or any other type of customer because any settlement payment would have an effect on rates. In addition, Mr. Wilson's theory would require that Qwest make a search to determine whether there are any other similarly situated CLECs, provide notice to them of the settlement and provide them

with the opportunity to enter into the same settlement, and then, if that CLEC refuses the settlement terms, Qwest must either litigate that refusal before the Commission or offer better terms to that CLEC and then offer those better terms to the original settling CLEC. Moreover, Mr. Wilson's theory would expose Qwest to penalties if it errs in its judgment on which CLECs are similarly situated.[53] In my view, this theory would produce untenable results.

Another flaw in Mr. Wilson's analysis is that RCW 80.36.180 only prohibits a carrier from charging another carrier "unduly or unreasonably" more than it charges another carrier. Again, these terms would seem to require, at a minimum, a review of whether settlement payments made under the agreements were in any way undue or unreasonable given the nature of the disputes between the settling parties. Because the Staff did not perform such an analysis,[54] the Staff has failed to carry its burden. Thus, there is no basis on which the Commission can impose penalties under Count Six.

IX. COUNT SEVEN (RCW 80.36.186)

Q: WHAT IS QWEST'S POSITION WITH REGARD TO COUNT SEVEN OF THE COMPLAINT?

[53] *See* Wilson Tr., Vol. III, at 113:2 – 116:9; 121:14 – 123:11, LBB-34.

[54] *See, e.g.*, Wilson Tr., Vol. III, at 114:23 – 116:9, LBB-34:

> Q Did you ever do -- make any attempt to determine what competitive impact the filing of these agreements -- the nonfiling of these agreements had on the competitive market in Washington?
>
> A No.
>
> * * * *
>
> Q So really you are basically assuming that there was some competitive harm as the result of the nonfiling of these agreements, but you can't specify what that is?
>
> A That's right.
>
> * * * *
>
> Q You don't have to agree with this, but isn't it possible that in fact there was no competitive harm as a result of the nonfiling of these agreements?
>
> A I don't know.

A: Count Seven of the Complaint charges a violation of RCW 80.36.186. Under RCW 80.36.186, "Notwithstanding any other provision of this chapter, no telecommunications company providing noncompetitive services shall, as to the pricing of or access to noncompetitive services, make or grant any undue or unreasonable preference or advantage to itself or to any other person providing telecommunications service, nor subject any telecommunications company to any undue or unreasonable prejudice or competitive disadvantage." RCW 80.36.186 thus prohibits an "undue or unreasonable" prejudice or "undue or unreasonable" competitive disadvantage in pricing or access to noncompetitive services.

Mr. Wilson's testimony fails to show that there was any prejudice or competitive disadvantage, let alone an undue or unreasonable one, in each of the agreements that he analyzes. Undue or unreasonable, like Section 252(i), requires an analysis of each carrier's ability to satisfy related terms. Thus, discounts may be related to volume and term commitments that other carriers could not meet.[55] Similarly, take or pay agreements may relate to a carrier's ability to sell services to Qwest. "Undue or unreasonable" also requires an analysis of each agreement and comparison to what other carriers had available to them, and the agreements' effects on telecommunications services *in Washington*. Because Mr. Wilson does not provide this type of analysis in

[55] Mr. Wilson agreed with this point in his deposition:

> Q Do you think, Mr. Wilson, that the $150 million purchase agreement contained in this 21A is related to the terms of the other agreements?
>
> A Yes.
>
> Q And so somebody wanting to opt in to the other agreements would also have to agree to make the $150 million purchase commitment, right?
>
> A Yes.

Wilson Tr., Vol. II, at 105:16-23, LBB-33. *See also* Wilson Tr., Vol. II, at 86:21 – 87:15, LBB-33.

his testimony, there is no basis on which the Commission can assess penalties on Count Seven.

In fact, if one does an agreement-by-agreement analysis, it becomes clear that there were few, if any, "undue or unreasonable" preferences granted. I have listed some of the summary points that are relevant for this consideration for Count Seven, as well as for Counts Five and Six, for each of the Exhibit A agreements in the Complaint.

Eschelon 1A

Reciprocal compensation terms were interstate at the time, and not subject to regulation by the Commission.

The dedicated provisioning team was a publicly filed term.

The service and performance measures were restricted to Minnesota.

Eschelon 2A

The dedicated provisioning team was publicly filed.

Eschelon 3A

Eschelon never used the escalation procedure set out in the agreement.

All CLECs had the same access to Qwest account managers and service delivery teams.

Eschelon 4A

The dedicated provisioning team was publicly filed.

Eschelon 5A

The DUF credits were expressly based on Eschelon being the only carrier for whom Qwest extracted switched access minutes from DUF files by a manual process, while every other carrier was on a mechanized process.[56]

Eschelon 6A

Mr. Wilson does not articulate how this agreement gave Eschelon an undue preference or competitive advantage.

Covad 7A

As discussed above, the Covad standards became Qwest's standards for all CLECs. As a result, no CLEC got a preference or competitive advantage – in fact, Covad benefited all CLECs. Qwest filed this agreement with the Commission on August 21, 2002, *see* LBB-14, and the Commission approved it by Order dated September 25, 2002. *See In the Matter of the Request for Approval of Negotiated Agreement Under the Telecommunications Act of 1996 Between Covad Communications Company and Qwest Corporation,* Order Approving Negotiated Fourth Amended Agreement Consisting of a Settlement Agreement, Docket No. UT-980312 (9/25/02). In its Order, the Commission specifically found that "The Amended Agreement does not discriminate against any other telecommunications carrier," and that "The Amended Agreement will facilitate local exchange competition in the state of Washington by

[56] As Mr. Wilson acknowledged, another carrier that did received the DUF files on a mechanized basis, "by definition" would not be purchasing the same product as Eschelon. Wilson Tr., Vol. II, at 122:15-19, LBB-33.

enabling Covad to expand its presence in the local exchange market and increase customer choices for local exchange services."

McLeod 8A

Reciprocal compensation was an interstate service at the time, not regulated by the Commission. Qwest filed this agreement with the Commission on August 22, 2002, *see* LBB-5, and the Commission approved it by Order dated September 25, 2002. *See In the Matter of the Request for Approval of Negotiated Agreement Under the Telecommunications Act of 1996 Between McLeodUSA Telecommunications Services, Inc. and Qwest Corporation*, Order Approving Negotiated Eighth Amended Agreement Consisting of a Settlement Agreement, Docket No. UT-993007 (9/25/02), LBB-6. In its Order, the Commission specifically found that "The Amended Agreement does not discriminate against any other telecommunications carrier," and that "The Amended Agreement will facilitate local exchange competition in the state of Washington by enabling McLeodUSA to expand its presence in the local exchange market and increase customer choices for local exchange services."

McLeod 9A

McLeod never used the escalation procedures. All CLECs had access to the same escalation procedure. Qwest filed this agreement with the Commission on August 22, 2002, *see* LBB-5, and the Commission approved it by Order dated September 25, 2002. *See In the Matter of the Request for Approval of Negotiated Agreement Under the Telecommunications Act of 1996 Between McLeodUSA Telecommunications Services, Inc. and Qwest Corporation*, Order Approving Negotiated Eighth Amended Agreement Consisting of a Settlement Agreement, Docket No. UT-993007 (9/25/02), LBB-6. In

its Order, the Commission specifically found that "The Amended Agreement does not discriminate against any other telecommunications carrier," and that "The Amended Agreement will facilitate local exchange competition in the state of Washington by enabling McLeodUSA to expand its presence in the local exchange market and increase customer choices for local exchange services."

SBC 10A

The line sharing form (unexecuted) is Qwest's "permanent line sharing agreement," and has been filed for state commission approval where executed. There was no undue preference here because in the first instance there was no agreement or granting of a preference by the existence of a unexecuted, draft contract, and secondly every carrier had access to this same agreement through the executed ones that were filed. On August 20, 2004, the Staff moved to dismiss SBC 10A because it now realizes that SBC 10A is not an interconnection agreement.

Eschelon 12A

¶ 3(c) contains an agreement to file an amendment to Eschelon's interconnection agreement relating to UNE-E. This amendment was approved by the Washington Commission on 7/10/02.

¶ 3(d) was terminated upon transition to a mechanized process, which has been fully completed.

¶¶ 3(e) and 3(f) contain the only going-forward terms in the agreement. These provisions were filed with the Commission as part of a broad, remedial filing on August 22, 2002, *see* LBB-26, and the Commission approved them on September 25,

2002. *See In the Matter of the Request for Approval of Negotiated Agreement Under the Telecommunications Act of 1996 Between Eschelon Telecom of Washington, Inc. and Qwest Corporation*, Order Approving Negotiated Eleventh Amended Agreement Consisting of a Settlement Agreement, Docket No. UT-990385 (9/25/02).

¶ 3(g) concerns a transition to a mechanized billing process, which has been fully performed and completed. The other CLECs already had the mechanized billing process.

Finally, ¶ 3(h) (Eschelon's withdrawal of its escalation request) does not provide a competitive advantage.

Covad 16A

This agreement is a standardized form agreement, identical versions of which were available to all CLECs. There simply was no preference or competitive advantage, let alone an undue or unreasonable one. Qwest filed this agreement with the Commission, and the Commission approved this agreement by Order dated September 25, 2002. *See In the Matter of the Request for Approval of Negotiated Agreement Under the Telecommunications Act of 1996 Between Covad Communications Company and Qwest Corporation*, Order Approving Negotiated Fourth Amended Agreement Consisting of a Settlement Agreement, Docket No. UT-980312 (9/25/02). On July 30, 2004, Covad and the Commission Staff agreed to settle the allegations regarding this agreement and Covad 7A for $2,000. On August 10, 2004, the Commission approved this settlement agreement in Order No. 10.

Eschelon 17A

This letter is simply an introductory letter from the Qwest account manager for Eschelon that discusses the implementation plan. By itself, it gives no preference or undue advantage to Eschelon. Indeed, the Staff moved to dismiss Eschelon 17A in a motion filed with the Commission on August 11, 2004.

Eschelon 18A

This letter addressed the features that are part of the UNE-E platform, which was filed and approved by the Washington Commission on January 24, 2001. *See In the Matter of the Request for Approval of Negotiated Agreement Under the Telecommunications Act of 1996 Between Eschelon Telecom of Washington, Inc. and Qwest Corporation*, Order Approving Negotiated Fourth Amended Agreement for Interconnection and Resale Services, Docket No. UT-990385 (1/24/01). All CLECs had access to this platform, and it was not secret or preferential at all. Indeed, the Staff moved to dismiss Eschelon 18A in a motion filed with the Commission on August 11, 2004.

Eschelon 19A

There was no preference here because Eschelon was on a manual, rather than a mechanized, process. All other CLECs had the mechanized process in place.

Eschelon 20A

This letter does not "grant" anything, including a preference or a competitive advantage. Indeed, the Staff moved to dismiss Eschelon 20A in a motion filed with the Commission on August 11, 2004.

Eschelon 21A

This is a take or pay agreement that requires Eschelon to purchase services from Qwest or pay a penalty. That does not give Eschelon a preference or a competitive advantage – rather, it puts Eschelon in the position of guaranteeing its purchases to Qwest.

Mr. Wilson states that "Eschelon enjoys by virtue of this agreement unique rates that are negotiated individually with Qwest to be equal to the result of a formula based upon Eschelon's successful performance in the market competing for customers." (Wilson Testimony, 116:13-15) As he acknowledges, however, there are no rates specified in this agreement. As a result, this agreement gives Eschelon no rate preference whatsoever.

Eschelon 23A

Wilson states that the dispute resolution process gives Eschelon a preference, but he does not say how. However, Eschelon never used this dispute resolution process, and as I discussed above, every CLEC had access to essentially the same dispute resolution process. Indeed, the Staff moved to dismiss Eschelon 23A in a motion filed with the Commission on August 11, 2004.

Integra 25A

This agreement is a standardized form agreement, identical versions of which were available to all CLECs. There is no preference or competitive advantage given to Integra at all. Qwest filed this agreement with the Commission on August 22, 2002, *see* LBB-12, and the Commission approved it by Order dated October 9, 2002. *See In the Matter of the Request for Approval of Negotiated Agreement Under the Telecommunications Act of 1996 Between Integra Telecom of Washington, Inc. and*

Qwest Corporation, Order Approving Negotiated Eleventh Amended Agreement Consisting of a Settlement Agreement, Docket No. UT-980380 (10/9/02). In its Order, the Commission specifically found that "The Amended Agreement does not discriminate against any other telecommunications carrier," and that "The Amended Agreement will facilitate local exchange competition in the state of Washington by enabling Integra to expand its presence in the local exchange market and increase customer choices for local exchange services." On August 11, 2004, the Staff and Integra agreed to settle the allegations regarding this agreement for $1,000. The Commission approved this settlement on August 13, 2004 by Order No. 11.

AT&T 26A

Mr. Wilson does not discuss how this agreement provided preferential terms to AT&T. On September 2, 2004, Staff and AT&T agreed to settle all allegations regarding this agreement for $1,000.

Reciprocal Compensation Agreements

These have been addressed above, and the rates were not preferential.

These agreements include:

ATG 27A – 6/30/00 Confidential Settlement Agreement

ELI 28A – 1/3/00 Confidential Billing Settlement Agreement

ELI 29A – 6/12/00 Amendment No. 1 to the Confidential Billing Settlement Agreement and Release

MCI WorldCom/Brooks Fiber 32A – 12/17/00 Confidential Billing Settlement Agreement

MCI WorldCom 34A – 6/29/01 Confidential Billing Settlement Agreement

McLeod 41A – 4/25/00 Confidential Letter Settlement Document. On August 20, 2004, the Staff moved to dismiss McLeod 41A because it now realizes that McLeod 41A is not an interconnection agreement.

McLeod 42A – 5/1/00 Confidential Settlement Agreement. On August 20, 2004, the Staff moved to dismiss McLeod 42A because it now realizes that McLeod 42A is not an interconnection agreement.

FairPoint 30A

MCI WorldCom 32A

This agreement resulted from a dispute that Qwest and WorldCom had regarding WorldCom's bills, and the parties agreed to settle the dispute by developing factors for the purpose of segregating non-IXC related traffic delivered by Qwest to WorldCom into three categories of Local, IntraLATA, and all other noncompensible traffic. MCI WorldCom, ¶ 2(A). The Local category is the only piece that relates to a Section 251(b) or (c) service. Under this agreement, Qwest and WorldCom agreed to use Qwest's CROSS7 data for the Local category, as all carriers do. As a result, there was no preference or competitive advantage provided to MCI WorldCom under this agreement.

MCI WorldCom 33A

These escalation procedures were available to all CLECs, as I discuss above. This agreement has been posted on Qwest's website since September 2002, and Qwest filed this agreement with the Commission on August 22, 2002. *See* LBB-8.

MCI 35A

This facility decommissioning agreement is a standardized form available to all CLECs. As a result, there is no preference or competitive advantage. Qwest filed this agreement with the Commission on August 21, 2002, *see* LBB-13, and the Commission approved it by Order dated October 9, 2002. *See In the Matter of the Request for Approval of Negotiated Agreement Under the Telecommunications Act of 1996 Between MCI WorldCom Communications, Inc. and Qwest Corporation*, Order Approving Negotiated Sixth Amended Agreement Consisting of a Settlement Agreement, Docket No. UT-960323 (10/9/02). In its Order, the Commission specifically found that "The Amended Agreement does not discriminate against any other telecommunications carrier," and that "The Amended Agreement will facilitate local exchange competition in the state of Washington by enabling MCI to expand its presence in the local exchange market and increase customer choices for local exchange services."

XO 36A

Mr. Wilson states that this agreement gave XO "preferential access to and pricing of noncompetitive collocation facilities," (119:3-4), but he does not say how he knows that.

The second part of ¶ 4 addresses collocation terms for the state of Washington, and such terms were superseded by collocation orders and rates established by the Commission (Docket UT-003013 Part A Order (13th Supplemental Order), Jan. 31, 2001). On July 30, 2004, XO and the Commission Staff agreed to settle the allegations regarding this agreement and XO 40A for $2,000. On August 10, 2004, the Commission approved this settlement agreement in Order No. 10.

XO 40A

These escalation procedures were available to all CLECs, as I discuss above. Qwest filed this agreement with the Commission on August 22, 2002, *see* LBB-9, and the Commission approved it by Order dated September 25, 2002. *See In the Matter of the Request for Approval of Negotiated Agreement Under the Telecommunications Act of 1996 Between XO Washington, Inc. and Qwest Corporation*, Order Approving Negotiated Seventh Amended Agreement Consisting of a Settlement Agreement, Docket No. UT-960356 (9/25/02). In its Order, the Commission specifically found that "The Amended Agreement does not discriminate against any other telecommunications carrier," and that "The Amended Agreement will facilitate local exchange competition in the state of Washington by enabling XO to expand its presence in the local exchange market and increase customer choices for local exchange services." On July 30, 2004, XO and the Commission Staff agreed to settle the allegations regarding this agreement XO 36A for $2,000. On August 10, 2004, the Commission approved this settlement agreement in Order No. 10.

McLeod 44A and 45A

Mr. Wilson says that these are preferential purchase agreements, but he does not say how. These agreements were mutual commitments by McLeod and Qwest to purchase services from each other. A purchase agreement by itself does not constitute a preference.

McLeod 46A

This is an historical settlement. It does not give an undue or unreasonable preference or competitive disadvantage. On August 20, 2004, the Staff moved to dismiss McLeod 46A because it now realizes that McLeod 46A is not an interconnection agreement.

Global Crossing 47A

Wilson says that this gives Global Crossing preferential terms for access to UNE-P or EELs, but does not say how this is so. (120:1-2) All this agreement says is that Qwest will bill Global Crossing at the appropriate resale or other rate until each line is converted to UNE-P, when Qwest will charge the appropriate UNE-P rate. Qwest filed Global Crossing 47A with the Commission on August 22, 2002, *see* LBB-27, and the Commission approved the agreement by Order dated October 9, 2002. *See In the Matter of the Request for Approval of Negotiated Agreement Under the Telecommunications Act of 1996 Between Global Crossing Local Services, Inc. and Qwest Corporation*, Order Approving Negotiated Sixth Amended Agreement Consisting of a Settlement Agreement, Docket No. UT-970368 (10/9/02). In approving Global Crossing 47A, the Commission specifically found that "The Amended Agreement does not discriminate against any other telecommunications carrier," and that "The Amended Agreement will facilitate local exchange competition in the state of Washington by enabling Global to expand its presence in the local exchange market

and increase customer choices for local exchange services." On August 3, 2004, Global Crossing and the Staff agreed to settle the allegations regarding Global Crossing 47A and one other Global Crossing agreement, 52A, for $2,000. On August 10, 2004, the Commission approved this settlement agreement in Order No. 10.

ELI 48A

These escalation procedures were available to all CLECs, as I have discussed above. ELI and the Commission Staff settled the allegations regarding ELI 48A and two other ELI agreements, ELI 28A and 29A, on June 4, 2004 for $3,000. The Commission approved this settlement on July 15, 2004.

Global Crossing 52A

Mr. Wilson does not say how these are preferential terms for UNE-P conversion. The agreement simply states that Qwest and Global Crossing will work in good faith on UNE-P conversion, and that will agree on appropriate implementation schedules. As I state above, on August 3, 2004, Global Crossing and the Staff agreed to settle the allegations regarding Global Crossing 52A and Global Crossing 47A for $2,000. On August 10, 2004, the Commission approved this settlement agreement in Order No. 10.

X. REMEDIAL ACTIONS

Q: PLEASE DESCRIBE QWEST'S INTERNAL PROCESSES AND PROCEDURES FOR DETERMINING WHETHER A CONTRACT IS SUBJECT TO SECTION 252.

A: Qwest has always tried to act diligently to ensure compliance with its obligations under the Act. However, when issues were raised in 2002 regarding Qwest's compliance with Section 252 in connection with certain CLEC contracts, Qwest took several steps

to formalize internal controls to ensure future Section 252 compliance. For one, at a time when the applicable standard was subject to many different interpretations and proposals, Qwest voluntarily announced and implemented a standard that Qwest understood accommodated most of the concerns stated by various state agencies in Qwest's region. Specifically, on May 10, Steve Davis, Qwest's Senior Vice President for Policy and Law, sent a letter to the Washington Commission, in addition to Qwest's other in-region state commissions, in which Qwest committed to "file all contracts, agreements or letters of understanding between Qwest Corporation and CLECs that create obligations to meet the requirements of Section 251(b) or (c) on a going forward basis." A true and correct copy of that letter is attached as Exhibit LBB-30 (the "Davis letter"). Exhibit LBB-30 was produced and maintained in the regular course of business. Prior to the FCC's October 4, 2002 Order, Qwest acted in accordance with that commitment and applied the standard in the Davis letter broadly to encompass all new contractual matters pertaining to going forward obligations regarding 251(b) or (c) services. Following the issuance of the FCC's Order, Qwest applied that standard to new agreements. Qwest is confident that all new contracts entered into with a CLEC since May of 2002 that meet these standards have been filed with the respective state commissions. Furthermore, this company policy substantively parallels the new standard and exceptions announced in the recent FCC Order; thus, Qwest has been in compliance with what eventually became the FCC standard since May of 2002.

Q: HAS QWEST MADE OTHER REMEDIAL ACTIONS RELATED TO SECTION 252 COMPLIANCE?

A: Yes. First, as I discussed previously Qwest filed a Petition for Declaratory Ruling with the FCC requesting the establishment of a definition as to which contractual

arrangements with CLECs required filing with and approval by state commissions under Section 252. Also, in addition to adopting the filing standard for all wholesale contracts in May, Qwest instituted an internal review process to ensure compliance with that standard and Qwest's Section 252 obligations. Under this review process, Qwest has created a committee, composed of a member of Qwest's Compliance Group, a lawyer from the Regulatory Law Department, a representative from Qwest's Public Policy Department knowledgeable about wholesale matters, a lawyer from Wholesale/Commercial Law, an employee from Network Regulatory, employees from Wholesale, and an employee from Wholesale Service Delivery, to review wholesale settlement contracts. The committee meets regularly once a week, as well as on an as-needed basis, and it is now a permanent part of Qwest's structure. The committee has reviewed all wholesale settlement contracts into which Qwest has entered with in-region CLECs since the committee's inception. Any provision that contains forward-looking terms pertaining to Section 251(b) or (c) services has been put into an interconnection agreement amendment and filed with the state commissions.

Also, as discussed above, in August 2002, Qwest reviewed all previously unfiled contracts with CLECs in Washington and filed all currently effective provisions insofar as those provisions involved ongoing obligations related to Section 251(b) or (c). Qwest filed all relevant agreements for approval pursuant to Section 252 with the Washington Commission on August 21 and 22, 2002. Specifically, Qwest asked the Commission to approve the agreements such that, to the extent any active provisions of such agreements relate to Section 251(b) or (c), they are formally available to other CLECs under Section 252(i). I am not aware that any CLEC has requested to opt in to

any of the agreements that Qwest filed in August 2002, and the Staff has stated that it also is not aware of any such requests.[57]

In addition to filing the agreements, Qwest also posted them on its website. In the August – September 2002 time frame, the Federal Communications Commission ("FCC") had not yet issued its Declaratory Ruling outlining the scope of the interconnection agreement filing requirement contained in 47 U.S.C. § 252. As a result, it was unclear whether certain agreements Qwest had entered with CLECs had to be filed under 47 U.S.C. § 252. Out of an abundance of caution and in order to eliminate any concerns, Qwest decided to make those agreements generally available for opt-in.

As a result, in September 2002, Qwest made available for opt-in certain agreements it had previously entered with CLECs. Qwest posted these agreements on its wholesale website and noticed CLECs that they could opt into any agreement on the website and obtain the provisions of an agreement in any state in which the agreement was in effect according to the procedures set forth in 47 U.S.C. § 252(i).

Among the agreements posted by Qwest were fifteen agreements that had effect in Washington. This includes thirteen agreements the Commission Staff has identified as Exhibit A agreements in the Complaint and two agreements identified as Exhibit B agreements in the Complaint.

[57] *See* Washington Utilities and Transportation Staff Response to Qwest Data Requests Nos. 123-187, *Washington Utilities and Transportation Commission v. Advanced Telecom Group, et al.*, Docket UT-033011 (July 19, 2004), attached as LBB-35.

Five of the Exhibit A agreements that were posted on Qwest's website and available for opt-in were primarily concerned with settling historic disputes in exchange for retrospective consideration. The only going-forward provisions in effect for each agreement are described below:

McLeod 8A – McLeodUSA, Inc. Confidential Billing Settlement Agreement, April 28, 2000. This agreement settled various historical billing disputes. The only going-forward provision in the agreement was an agreement to treat any interim rates, excluding reciprocal compensation rates, as final, such that the parties would not engage in a true-up in response to any final state commission orders on rates. No other CLEC has sought to opt into this provision.

SBC 10A – SBC Telecom Inc. Settlement Letter Agreement, June 1, 2000. As part of the dispute settlement, Qwest agreed to make available to SBC the terms of any interconnection amendments with other parties that resulted from a settlement agreement between Qwest and the other party related to the Qwest/US WEST merger. No other CLEC has sought to opt into this provision.

Eschelon 12A – Eschelon Telecom, Inc. Settlement Agreement, March 3, 2002. By this agreement, Qwest agreed to provide UNE-E offering to Eschelon according to existing terms of the parties' interconnection agreement. The parties also agreed to form a joint team that would formulate a plan for converting UNE-E lines to UNE-P lines (UNE-E and UNE-P are variations on the product and service offerings for Unbundled Network Elements). No CLEC has sought to opt into these provisions.

McLeod 42A – McLeodUSA Telecommunications Services, Inc. Confidential Settlement Agreement, May 1, 2000. In this agreement Qwest agreed to provide

McLeod with services for resale that were equal in quality to services provided to others. McLeod agreed it would provide Qwest with accurate end-user information, and that if it failed to do so the agreement would not apply. The parties also agreed to a process to investigate and determine if McLeod in fact was receiving facility availability parity. No other CLEC has sought to opt into these provisions.

Global Crossing 47A – Global Crossing Local Services, Inc. Confidential Billing Settlement Agreement, July 17, 2001. In addition to settling an historical dispute for backward-looking consideration, the parties agreed to particular interim billing measures on a going-forward basis while lines were being converted from resale to UNE-P or EEL. No other CLEC has sought to opt into these provisions.

Four of the Exhibit A – AT&T 14A, Covad 16A, Integra 25A, and MCI WorldCom 35A – agreements that were posted on Qwest's website and available for opt-in were facilities decommissioning agreements. These agreements do not address interconnection offerings directly, but rather outline the terms by which particular collocations sites will be decommissioned and removed. Decommissioning was conducted according to a standard form agreement that was substantially similar for any decommissioning, regardless of the CLEC. In fact, the only substantive difference between the agreements is whether the CLECs elected to accept reimbursement in cash or as a credit. As a result, no CLEC has sought to opt into any of the decommissioning agreements in Exhibit A that were posted on Qwest's website. As I discuss above, a comparison of the four agreements at issue demonstrates that the basic terms of all decommissioning agreements were the same.

Four of the Exhibit A agreements that were posted on Qwest's website and available for opt-in outlined particular escalation procedures. Escalation procedures are outlined in all of Qwest's interconnection agreements with CLECs. The four agreements at issue had the following terms:

McLeod 9A – McLeodUSA, Inc. Confidential Agreement Re: Escalation Procedures and Business Solutions, October 21, 2000. This agreement established that the parties would engage in quarterly executive meetings to address unresolved business issues and/or disputes between them. It also outlined a six-level escalation procedure for resolving disputes. No other CLEC has sought to opt into these provisions.

FairPoint 30A – FairPoint Communications Solutions Corp. Confidential Billing Settlement Agreement, September 4, 2001. This agreement primarily settled an historical dispute for retrospective consideration. In order to avoid such future disputes the parties agreed to implement a four-level dispute escalation procedure. No other CLEC has sought to opt into this escalation procedure.

MCI WorldCom 33A – MCI WorldCom Network Services, Inc. Business Escalation Agreement, June 29, 2001. In this agreement the parties agreed to implement a dispute resolution plan that included quarterly meetings among executives, and a three-level escalation procedure. No other CLEC has sought to opt into this escalation procedure.

MCI WorldCom 34A – MCI WorldCom Network Services, Inc. Confidential Billing Settlement Agreement, June 29, 2001. As part of this settlement

agreement the parties agreed to negotiate a billing dispute resolution process. This agreement did not itself establish such a process, but was an agreement to agree in the future. The parties also agreed to a 50% Relative Usage Factor ("RUF") for LIS two-way direct trunk transport. The paragraph explicitly included an agreement that the parties would file an interconnection amendment to implement this 50% RUF agreement. No other CLEC has sought to opt into this agreement. Qwest filed an interconnection amendment regarding the RUF with the Commission on October 16, 2002, and the Commission approved it by Order dated November 15, 2002.

XO 40A – XO Communications, Inc. (*et. al*) Confidential Billing Settlement Agreement, December 31, 2001. This agreement primarily settled an historical dispute for retrospective consideration. In order to avoid such future disputes the parties agreed to implement a four-level dispute escalation procedure (very similar to the procedure in Agreement 30 of Exhibit A). No other CLEC has sought to opt into this escalation procedure.

One of the Exhibit B agreements identified by the Complaint was also posted on Qwest's website. Again, while this agreement primarily concerned settlements of historical disputes for backward-looking consideration, it contained some terms that arguably created ongoing obligations. Out of an abundance of caution, when it decided to post certain agreements on its website and make them available for opt-in, Qwest included this agreement. As explained below, the agreement did not create any ongoing obligations inconsistent with Qwest's filed interconnection offerings:

Ernest 6B – Ernest Communications, Inc. Confidential Settlement Agreement and Release, September 17, 2001. This agreement resolved a dispute over providing services to pay phone lines. As part of the settlement, Qwest agreed to accept orders for payphone lines according to the UNE-P PAL product offering. The agreement did not change the terms of the UNE-P PAL offering as filed. Thus, the agreement did not create any ongoing obligations that were inconsistent with Qwest's filed offerings. In exchange, Ernest agreed to certain restrictions on furnishing payphone services. No other CLEC has sought to opt into this provision. Qwest filed this agreement with the Commission on August 22, 2002, *see* LBB-31, and the Commission approved it by Order dated October 9, 2002. *See In the Matter of the Request for Approval of Negotiated Agreement Under the Telecommunications Act of 1996 Between Ernest Communications, Inc. and Qwest Corporation*, Order Approving Negotiated Third Amended Agreement Consisting of a Settlement Agreement, Docket No. UT-980396 (10/9/02). In its Order, the Commission specifically found that "The Amended Agreement does not discriminate against any other telecommunications carrier," and that "The Amended Agreement will facilitate local exchange competition in the state of Washington by enabling McLeodUSA to expand its presence in the local exchange market and increase customer choices for local exchange services."

From September 2002 to the present, no CLEC has opted into any of the fifteen Washington agreements that Qwest posted on its website.

From September 2002 to the present, to my knowledge, no CLEC has expressed any interest to Qwest in opting into any of the fifteen Washington agreements that Qwest posted on its website.

As I noted above, the standard Qwest used in September 2002 to determine which provisions of previously unfiled contracts to file and to make available on its website was whether the provisions create on-going obligations that relate to Section 251(b) or (c) and have not been terminated or superseded by agreement, commission order, or otherwise. This standard encompasses the definition of "interconnection agreement" subsequently articulated in the FCC Order. Therefore, all Qwest agreements with CLECs meeting the FCC's standard either have been submitted to the Commission for approval pursuant to Section 252 or have been terminated or superseded.

Q: HAS QWEST MADE ANY PERSONNEL CHANGES?

A: Yes. Qwest has implemented personnel and departmental changes that further ensure that Qwest will satisfy its filing obligations in the future. Qwest has restructured its Wholesale Business Development department and shifted that department's responsibilities elsewhere, including Wholesale Service Delivery. Qwest's chief executive officer, Richard Notebaert, has directed all Qwest employees to ensure that their conduct is completely compliant with all regulatory requirements, and he has assured all Qwest employees that he will take swift and decisive employment action, including termination, in response to any instances of noncompliance.

Q: HAS QWEST REQUIRED ITS EMPLOYEES TO TAKE TRAINING ON COMPLIANCE WITH SECTIONS 251 AND 252?

A: Yes. Qwest has required every employee in the company who could be involved in any manner with CLEC agreements to complete a computer-based training program on compliance with Sections 251 and 252. This training is an integral part of Qwest's compliance training.

Q: HAS QWEST TERMINATED ANY OF THE UNFILED AGREEMENTS?

A: Yes. As a remedial measure and in response to allegations of discrimination, Qwest terminated several of the agreements at issue in this proceeding. In particular, Qwest and Eschelon cancelled several of their agreements in a settlement agreement executed in March 2002. In addition, Qwest and McLeod cancelled their October 26, 2000 Purchase Agreements and any amendments to those agreements on September 16, 2002.

XI. PENALTIES

Q: WHAT DO YOU UNDERSTAND THE STAFF'S POSITION ON PENALTIES TO BE?

A: In Mr. Wilson's testimony, he states that the Staff is not taking a position on penalties. However, in his deposition, Mr. Wilson testified that, if asked by the Commission, he would recommend that the Commission impose the maximum penalty on each carrier for each day that each agreement was not filed with the Commission.[58] The Staff also takes the position that the maximum penalty that the Commission can impose is $1000 per day.[59] As a result, because Mr. Wilson has calculated that there are a total of 188,000 penalty days for all of the agreements, the Staff's position would result in a staggering penalty of $188 million on Qwest. Needless to say, Qwest has strong

[58] *See, e.g.*, Wilson Tr., Vol. I, at 23:24 – 24:9, LBB-32; Vol. II, at 5:18 – 6:6, LBB-33; Vol. III, at 143:6-15, LBB-34.

[59] *Id.*

disagreements with both the Staff's calculation and its position that the Commission should impose the maximum penalties.

Q: WHAT FLAWS DOES QWEST SEE IN THE STAFF'S POSITION ON PENALTIES?

A: There are several that Qwest sees. First, as a legal matter, Qwest disagrees that the maximum applicable penalty is $1000 per day. As I discussed above, the maximum penalty that the Commission can impose without filing a complaint in superior court is $100 per day under RCW 80.04.405.

Second, Qwest disagrees with the Staff's analysis of the penalty days that are at issue. The Staff's analysis fails to account for the fact that the substantive terms of many of the agreements were available to CLECs through other agreements that had been filed or through Qwest's standard business processes. In addition, for many of the agreements, the Staff's analysis does not establish the correct dates when the agreements were superseded, terminated, or filed. In contrast, my testimony undertakes this analysis for each agreement, and my analysis is summarized in the chart attached as LBB-2 to my testimony for the Commission's convenience. As LBB-2 shows, performing the proper analysis results in a significantly smaller number of penalty days.

In addition, the Staff's penalty day analysis counts separate penalty days for each of Counts Two, Three, Five, Six, and Seven. Aside from possible legal challenges that are more appropriately addressed in briefing, Qwest believes that imposing separate per day penalties for each Count is unfair and unwarranted. The conduct alleged in each of the Counts flows from the same conduct and, to the extent that there was any harm to

other carriers, the discrimination, harm, undue preference, or unreasonable competitive advantage is the same.

Third, completely lacking from the Staff's analysis is any attempt to evaluate the harm from the failure to file each agreement or any recognition that the filing standard was not clear until the FCC's Declaratory Order was issued in October 2002. Thus, despite stating that the Staff would recommend the maximum penalty per day for each and every agreement "if asked," the Staff concedes that it has neither gathered any evidence that failure to file the agreements at issue here caused any harm nor attempted to analyze whether any CLEC could have opted into the agreements at issue if they were filed. Instead, the Staff has only done a superficial review of whether the agreements at issue contained terms of interconnection and should have been filed – a review that itself is deeply flawed, as I have pointed out in my testimony – and then would reflexively suggest maximum, redundant penalties for each agreement.

Q: WHAT FACTORS SHOULD THE COMMISSION EVALUATE IN DETERMINING WHETHER TO IMPOSE PENALTIES ON QWEST AND HOW MUCH THOSE PENALTIES SHOULD BE?

A: In Qwest's view, there are a number of very significant factors that are relevant to the Commission's determination whether to impose penalties and, if so, how much those penalties should be. Mr. Shooshan addresses the framework that the Commission has articulated for penalty cases in his testimony. In addition to Mr. Shooshan's testimony, Qwest would like to suggest that the Commission consider the following factors:

Lack of clarity in the filing standard: In determining the penalty, the Commission should consider the fact that, at the time of the agreements at issue, no court or

regulatory body had set out the filing standard under Section 252(e) for interconnection agreements.[60] Many of the agreements at issue, such as the escalation and dispute resolution agreements, contained provisions that did not directly involve terms and conditions of interconnection and, therefore, the filing obligation for which was not clear. Indeed, the filing standard is still developing, as is evidenced by the Staff's inclusion of agreements that are not within the filing standard even today, such as agreements to agree and agreements relating to non-251(b) or (c) services. Imposing maximum, redundant penalties for these types of agreements would violate principles of fair notice and due process.

Lack of harm or discrimination: In determining how much of a penalty to impose, the Commission should consider whether the provisions were available to CLECs in other ways, and whether CLECs were in fact harmed by the failure to file a particular agreement. As I have done throughout my testimony, this determination requires that each agreement be considered on its own merits. Imposing the maximum penalty for Qwest's failure to file a form decommissioning agreement that was identical in all respects to the form agreement posted on Qwest's website, for example, not only is unfair, it makes no sense. Some of the considerations relevant to the issue of harm or discrimination (and to lack of harm or discrimination) are the following:

- **Non-251(b) or (c) services (Eschelon 17A, Eschelon 20A, WorldCom 15B, AT&T 11B, MCI WorldCom 13B, XO 15B, Z-Tel 16B):** Some of the agreements at issue do not pertain to Section 251(b) or (c) services.

[60] *See* Wilson Tr., Vol. II, at 36:18 – 37:6, LBB-33. *See also* MCI's Motion to Dismiss or for Summary Determination, *WUTC v. ATG, et al*, Docket UT-033011, at ¶ 15 (Nov. 7, 2003) ("[T]here is no explicit statutory definition for the term 'interconnection agreement' in the federal Act. Nor is there one in Washington statute or rule.").

Because these agreements are not within the FCC's filing standard, they are not the proper subject of penalties.

- **Agreements to agree (Eschelon 17A, Eschelon 23A, McLeod 41A):** Some of the agreements are only agreements to agree, and therefore are not binding contracts under Washington law. These agreements are not the proper subject of penalties because there is no filing obligation.

- **Escalation and dispute resolution agreements (Eschelon 3A, McLeod 9A, FairPoint 30A, MCI WorldCom 33A, XO 40A):** Many of the agreements at issue contain escalation and dispute resolution terms. Because these terms were available to CLECs through other filed agreements, through Qwest's template interconnection agreement and its SGAT, and through Qwest's standard business processes, CLECs were not harmed by the failure to file these agreements. No undue preference or unreasonable competitive advantage was conferred because the provisions were available to other CLECs. As a result, no or only *de minimis* penalties should be imposed for the failure to file these agreements.

- **Form agreements(Covad 16A, Integra 25A, MCI WorldCom 35A):** Some of the agreements at issue are form decommissioning agreements that are identical to the agreements posted on Qwest's website and available to every CLEC. No undue preference or unreasonable competitive advantage was conferred because the provisions were available to other CLECs. No harm resulted from the failure to file these agreements, and no or only *de minimis* penalties should be imposed for the failure to file these agreements.

- **Service level agreement (Covad 7A):** One of the agreements at issue is a service level agreement that was provided to the Staff in May 2000 shortly after it was executed. Qwest provided the same service levels set forth in the service level agreement to all CLECs. No undue preference or unreasonable competitive advantage was conferred because the provisions were available to other CLECs. No harm resulted from the failure to file this agreement, and no or only *de minimis* penalties should be imposed for the failure to file these agreements.

- **Reciprocal compensation agreements (Eschelon 1A, Eschelon 20A, McLeod 8A, ATG 27A, ELI 28A, ELI 29A, MCI WorldCom 32A, MCI WorldCom 34A, XO 40A):** Many of the agreements at issue contain reciprocal compensation terms. At the time of these agreements, reciprocal compensation for terminating Internet traffic was considered to be interstate and therefore not subject to state regulation. Moreover, the same or better rates were available to all CLECs under Commission-ordered rates. No undue preference or unreasonable competitive advantage was conferred because the provisions were available to other CLECs. No harm resulted from the failure to file these agreements, and no or only *de minimis* penalties should be imposed for the failure to file these agreements.

- **Agreements that do not apply to Washington (MCI World Com 21B):** One of the agreements at issue does not apply to the State of Washington. No penalties should be imposed for the failure to make this agreement available to other CLECs.

- **Opt-in requirements (Eschelon and McLeod agreements):** Many of the agreements at issue contained related terms, and there has been no showing by the Staff that other CLECs would have been able to opt-in to those terms under the pick and choose requirements in effect at the time. As a result, the Staff has failed to prove that any harm resulted from the failure to file these agreements, and no or only *de minimis* penalties should be imposed for the failure to file these agreements.

Conflict with federal law: Virtually all of the agreements listed in Exhibit B are settlement agreements with solely retrospective consideration. The Staff takes the position that these agreements should have been "made available to other CLECs." In addition to the practical problems that the Staff's position would create, such as how to make the terms of a settlement that resolves particular disputes with a particular CLEC available to other CLECs, the Staff's position is inconsistent and in conflict with federal law. The FCC's October 4, 2002 Order states quite clearly that settlements with retrospective consideration are not required to be filed and made available to other CLECs through the opt-in process. The Staff's position cannot be reconciled with federal law and would be preempted as a legal matter. Moreover, even if the Commission were to adopt the Staff's position, it should not impose penalties on carriers for their failure to foresee that the Commission would require them to act inconsistent with federal law.

Conflict with state policy: The Staff's position on the Exhibit B agreements is also inconsistent and in conflict with settled state law policy on settlement agreements. Washington policy strongly favors the private settlement of disputes, and the Staff's position on the Exhibit B agreements would eviscerate that policy by making it

impossible for Qwest to settle a dispute with a particular carrier without making that settlement available to all other CLECs. Even if the Commission were to adopt the Staff's position, it should not impose penalties on Qwest for its failure to foresee that the Commission would require them to act inconsistent with settled state policy.

Parity with settlements in this docket: The Staff has stated repeatedly that all of the violations by each of the carriers should be treated the same for penalty purposes.[61] The Staff has entered into a number of settlements with CLECs in this docket that the Staff has stated impose appropriate penalties. In every settlement to date (several of which have already received the Commission's approval) save two, the Staff has agreed to *per agreement* penalties rather than per day penalties, and the maximum per agreement penalty to which the Staff has agreed is $1500. In the two exceptions, the Staff has agreed to a $25,000 penalty with Eschelon for nine agreements and to a $25,000 penalty with McLeod for four agreements. Because both Qwest and the CLECs share responsibility for filing the agreements and because the CLECs were the beneficiaries of any alleged discrimination, and based on Mr. Wilson's repeated statements that penalties should be imposed equally on both parties to the agreements, any penalties that the Commission imposes on Qwest should have some parity with the penalties that

[61] Mr. Wilson said that all violations should be treated equally, regardless of whether committed by an ILEC or a CLEC, at numerous points in his deposition. For example, he testified as follows:

> Q I asked more broadly than that and was going to drill down to that.
>
> A I'm thinking about that right now, and to me the question is, is a violation of 252(e) something that needs to be the same penalty assessment for a CLEC as for an ILEC. And generally speaking, I believe Staff considers the correct response to be that it's the same violation.
>
> Q And so they should be penalized equally?
>
> A (Witness nods head affirmatively.)
>
> MR. LUNDY: Do we have an answer?
>
> THE WITNESS: Yes. My answer is yes.

Wilson Tr., Vol. II, at 101:6-16, LBB-33.

the CLECs have paid. Moreover, even if the settlements are considered on a per day basis, the per day penalties are far below the maximum $1000 per day that the Staff asserts is available, and even far below the maximum $100 per day that Qwest contends is available. In other words, on a per day basis, the maximum penalty to which the Staff has agreed is $7.28 per day, or approximately seven-tenths of one percent of the maximum per day penalty under Staff's theory.[62]

Qwest's extensive remedial actions: Another very important consideration for the Commission is the remedial actions taken by Qwest. Qwest sincerely regrets the compliance problems that are at issue in this case, and it is committed to ensuring that they do not recur. As I discuss above, Qwest took a number of very significant remedial actions with this commitment in mind when the unfiled agreements issue came to light. These included (1) applying a broad filing standard to all new agreements as of May 2002; (2) establishing a cross-departmental committee to review all new agreements under the appropriate legal standard for filing; (3) filing agreements still in ef in August 2002 with the Commission for approval; (4) agreeing to an independent monitor to review Qwest's compliance with Section 252(e) for three years; (5) training employees on Section 252(e) compliance; and (6) communicating a renewed commitment to regulatory compliance at the highest levels of the company. These remedial actions show that Qwest is focused on full compliance with Section 252(e) and that it will remain so in the future, and that a penalty is not necessary to deter Qwest from the conduct at issue in this case.

Q: DOES THIS CONCLUDE YOUR TESTIMONY?

[62] For MCI WorldCom 35A, MCI paid a $1,500 penalty. By the Staff's count, that agreement was 216 days late. When converted to a per day basis, the penalty amount results in a $7.28 per day penalty.

1 A: Yes it does.