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ORIGINAL

August 1, 2007

070552-TP

BY HAND DELIVERY
Ms. Ann Cole, Director
Commission Clerk and Administrative Services
Room 110, Easley Building
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, Florida 32399-0850

Dear Ms. Cole:

Enclosed for filing on behalf of MetroPCS Florida, LLC ("MetroPCS") are an original and 15 copies of MetroPCS' Petition and Complaint.

Please acknowledge receipt of this letter by stamping the extra copy of this letter "filed" and returning the same to me.

Thank you for your assistance with this filing.

Sincerely yours,

Floyd R. Self

FRS/amb
Enclosures

CMP ____
COM 5
CTR ____
ECR ____
GCL 3
OPC ____
RCA 1
SCR ____
SGA ____
SEC ____
OTH CLK. - 2cys.

Regional Center Office Park / 2618 Centennial Place / Tallahassee, Florida 32308
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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

ORIGINAL

Petition and Complaint of MetroPCS Florida, LLC against BellSouth Telecommunications, Inc. d/b/a AT&T Florida d/b/a AT&T Southeast, TDS Telecom d/b/a TDS Telecom/Quincy Telephone; Windstream Florida, Inc.; Northeast Florida Telephone Company d/b/a NEFCOM; GTC, Inc. d/b/a GT Com; Smart City Telecommunications, LLC d/b/a Smart City Telecom; ITS Telecommunications Systems, Inc.; and Frontier Communications of the South, LLC	)	Docket No. 070552-TP Filed: August 1, 2007

PETITION AND COMPLAINT
FOR EXPEDITED PROCEEDING OR, ALTERNATIVELY,
PETITION AND COMPLAINT OR
PETITION FOR DECLARATORY STATEMENT

MetroPCS Florida, LLC ("MetroPCS"), pursuant to Rules 25-22.0365, 28-106.104, 28-106-201, Florida Administrative Code, and Sections 120.565, 120.569, 120.57(1), 120.80(13)(d), 364.012, 364.07, 364.16, 364.161, 364.162, 364.27, and 364.285, Florida Statutes, hereby petitions the Florida Public Service Commission ("Commission") to enter an order requiring BellSouth Telecommunications, Inc. d/b/a AT&T Florida d/b/a AT&T Southeast ("AT&T"), TDS Telecom d/b/a TDS Telecom/Quincy Telephone ("Quincy"); Windstream Florida, Inc. ("Windstream"); Northeast Florida Telephone Company d/b/a NEFCOM ("NEFCOM"); GTC, Inc. d/b/a GT Com ("GT Com"); Smart City Telecommunications, LLC d/b/a Smart City Telecom ("Smart City"); ITS Telecommunications Systems, Inc. ("ITS"); and Frontier Communications of the South, LLC ("Frontier") (Quincy, Windstream, NEFCOM, GT Com, Smart City, ITS, and Frontier collectively referred to as the "Small LECs") to submit their agreements with AT&T for transit services provided by AT&T (the "Transit Agreements") to the Small LECs to the Commission for approval pursuant to 47 U.S.C. § 252(e)(1) and Sections 364.16, 364.161, and 364.162, Florida Statutes. In addition, the

Commission should impose penalties on AT&T and the Small LECs for their failure to submit such Transit Agreements for approval in a timely fashion pursuant to Section 364.285, Florida Statutes. MetroPCS requests that this Petition and Complaint be considered pursuant to the expedited hearing process in Rule 25-22.0365, F.A.C., or, in the alternative, as either a Petition or Complaint under Rule 28-106.104 or a petition for declaratory statement under Section 120.565, Florida Statutes, and Rule 28-105, F.A.C. In support of its Petition and Complaint, MetroPCS states as follows:

I. Background Information & Pleading Requirements

1. The petitioner in this matter is MetroPCS Florida, LLC, a Delaware Limited Liability Company, and the assignee of all of the Florida assets of MetroPCS California/Florida, Inc. MetroPCS is a Commercial Mobile Radio Service ("CMRS") provider licensed by the Federal Communications Commission to provide wireless communications services in certain basic trading areas ("BTAs") in Florida, including the Miami-Ft. Lauderdale and Tampa-St. Petersburg – Clearwater BTAs. Pursuant to Section 364.02(14)(c), Florida Statutes, MetroPCS is not a telecommunications company subject to the jurisdiction of this Commission.

2. MetroPCS's principal place of business is 8144 Walnut Hill Lane, Suite 800, Dallas, Texas 75231. Pleadings, orders, notices and other papers filed or served in this matter should be served upon:

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Three Ravinia Drive, Suite 1450
Atlanta, Georgia 30346

3. Respondent AT&T is a telecommunications company as defined by Section 364.02(14) (2006), and AT&T holds a certificate of public convenience and necessity from this Commission as a local exchange telecommunications company. Rule 25-4.003, F.A.C. In addition, for federal law purposes, AT&T is defined as an incumbent local exchange carrier ("ILEC"). 47 U.S.C. § 251(h).

4. This Commission's records indicate that the contact information for AT&T is as follows: 150 South Monroe Street, Suite 400, Tallahassee, FL 32301-1556. Copies have been served on AT&T pursuant to the attached certificate of service.

5. Respondent Quincy is a telecommunications company as defined by Section 364.02(14) (2006), and Quincy holds a certificate of public convenience and necessity from this Commission as a local exchange telecommunications company. Rule 25-4.003, F.A.C. In addition, for federal law purposes, Quincy is defined as an ILEC. 47 U.S.C. § 251(h).

6. This Commission's records indicate that the contact information for Quincy is as follows: 107 West Franklin Street, Quincy, FL 32351-2310. Copies have been served on Quincy pursuant to the attached certificate of service.

7. Respondent Windstream is a telecommunications company as defined by Section 364.02(14) (2006), and Windstream holds a certificate of public convenience and necessity from this Commission as a local exchange telecommunications company. Rule 25-4.003, F.A.C. In addition, for federal law purposes, Windstream is defined as an ILEC. 47 U.S.C. § 251(h).

8. This Commission's records indicate that the contact information for Windstream is as follows: 6867 Southpoint Drive, North, Suite 103, Jacksonville, FL 32216-8005. Copies have been served on Windstream pursuant to the attached certificate of service.

9. Respondent NEFCOM is a telecommunications company as defined by Section 364.02(14) (2006), and NEFCOM holds a certificate of public convenience and necessity from this Commission as a local exchange telecommunications company. Rule 25-4.003, F.A.C. In addition, for federal law purposes, NEFCOM is defined as an ILEC. 47 U.S.C. § 251(h).

10. This Commission's records indicate that the contact information for NEFCOM is as follows: 505 Plaza Circle, Suite 200, Orange Park, FL 32073-9409. Copies have been served on NEFCOM pursuant to the attached certificate of service.

11. Respondent GT Com is a telecommunications company as defined by Section 364.02(14) (2006), and GT Com holds a certificate of public convenience and necessity from this Commission as a local exchange telecommunications company. Rule 25-4.003, F.A.C. In addition, for federal law purposes, GT Com is defined as an ILEC. 47 U.S.C. § 251(h).

12. This Commission's records indicate that the contact information for GT Com is as follows: Post Office Box 220, Port St. Joe, FL 32457-0220. Copies have been served on GT Com pursuant to the attached certificate of service.

13. Respondent Smart City is a telecommunications company as defined by Section 364.02(14) (2006), and Smart City holds a certificate of public convenience and necessity from this Commission as a local exchange telecommunications company. Rule 25-4.003, F.A.C. In addition, for federal law purposes, Smart City is defined as an ILEC. 47 U.S.C. § 251(h).

14. This Commission's records indicate that the contact information for Smart City is as follows: Post Office Box 22555, Lake Buena Vista, FL 32830-2555. Copies have been served on Smart City pursuant to the attached certificate of service.

15. Respondent ITS is a telecommunications company as defined by Section 364.02(14) (2006), and ITS holds a certificate of public convenience and necessity from this Commission as a

local exchange telecommunications company. Rule 25-4.003, F.A.C. In addition, for federal law purposes, ITS is defined as an ILEC. 47 U.S.C. § 251(h).

16. This Commission's records indicate that the contact information for ITS is as follows: Post Office Box 277, Indiantown, FL 34956-0277. Copies have been served on ITS pursuant to the attached certificate of service.

17. Respondent Frontier is a telecommunications company as defined by Section 364.02(14) (2006), and Frontier holds a certificate of public convenience and necessity from this Commission as a local exchange telecommunications company. Rule 25-4.003, F.A.C. In addition, for federal law purposes, Frontier is defined as an incumbent local exchange carrier ("ILEC"). 47 U.S.C. § 251(h).

18. This Commission's records indicate that the contact information for Frontier is as follows: 300 Bland Street, Bluefield, WV 24701-3020. Copies have been served on Frontier pursuant to the attached certificate of service.

19. MetroPCS is an assignee of the MetroPCS California/Florida, Inc. interconnection agreement (the "MetroPCS Interconnection Agreement") with AT&T (then BellSouth Telecommunications, Inc.)[1] that was entered into pursuant to 47 U.S.C. § 252 and is deemed approved by operation of law pursuant to 47 U.S.C. § 252(e)(4).

20. Pursuant to the MetroPCS Interconnection Agreement, MetroPCS exchanges land-to-mobile and mobile-to-land traffic with AT&T and also uses AT&T's transit services to exchange local and EAS traffic with other carriers operating in Florida, including the Small LECs, other ILECs, competitive local exchange carriers ("CLECs), and CMRS providers.

[1] For consistency's sake, this Petition and Complaint has used "AT&T" to reflect the local exchange operations that were formerly BellSouth Telecommunications, Inc. operations even when the Petition and Complaint describes pre-merger events involving BellSouth. However, when quoting from the Commission's orders or other documents, this Petition and Complaint will use "BellSouth" if that is what the historical document reflects.

21. AT&T provides its transit service to MetroPCS when MetroPCS exchanges traffic with another carrier (the Small LECs, other ILECs, CLECs, or CMRS providers) when MetroPCS and that other carrier do not have a direct connection between their networks. In such a situation, the traffic exchange between MetroPCS and that other carrier would occur on an indirect basis, through the AT&T tandem to which both the respective networks of MetroPCS and that other carrier are separately connected. Connection to an AT&T tandem enables a caller to complete a call to another person even if the network of the calling party's carrier is not directly connected to the network of the called party. The transit services are paid for by the carrier originating the call. The transit services provided by AT&T to other carriers, including the Small LECs, are functionally the same as the transit services provided to MetroPCS.

22. Transit service is an efficient network architecture which promotes competition. Depending on the volumes of traffic exchanged between two carriers, the indirect delivery of traffic between two carriers that are each interconnected through the AT&T network provides an efficient and economical alternative to establishing expensive, underutilized dedicated direct interconnection facilities. In turn, the efficient and economical exchange of traffic fosters the very competition that enables providers to develop and deliver consumers innovative communications goods and services at the lowest prices.

23. When negotiating the MetroPCS Interconnection Agreement, MetroPCS and AT&T were unable to reach agreement concerning the rate for such transit service. On March 3, 2005, MetroPCS sought arbitration before this Commission of this and other unresolved issues in the parties' interconnection negotiation. *See* Docket No. 050160-TP.

24. In its response to the MetroPCS arbitration petition in Docket No. 050160-TP, AT&T expressly admitted "that the Commission has authority under the Act to determine the issues raised

in MetroPCS' Petition." Docket No. 050160-TP, Response ¶ 5 Mar. 28, 2005. AT&T also affirmatively stated that "Section 252 of the Act sets forth the standards pursuant to which the Commission must resolve the issues in this arbitration." Docket No. 050160-TP, Response ¶ 7. Nowhere in the Response did AT&T assert or suggest that any issue raised by MetroPCS in its arbitration petition, including the issue of the appropriate rate for AT&T's transit service, was not subject to arbitration or was not subject to the provisions of Sections 251 and 252 of the 1996 Act.

25. MetroPCS and AT&T ultimately resolved the issues raised in the MetroPCS arbitration petition including the rate to be charged for transit services. On September 26, 2005, MetroPCS dismissed its arbitration petition with prejudice, and on October 14, 2006, AT&T submitted the MetroPCS Interconnection Agreement, including the provisions dealing with transit services, to the Commission for approval pursuant to 47 U.S.C. § 252(e)(1). On January 19, 2006, without notice to MetroPCS, AT&T requested to withdraw the agreement, and the Commission closed the docket as of January 20, 2006. Because the MetroPCS Interconnection Agreement was submitted to the Commission for approval pursuant to 47 U.S.C. § 252(e)(1) and the Commission did not act to approve or reject the agreement within ninety (90) days after its submission, the agreement is deemed approved pursuant to 47 U.S.C. § 252(e)(4).

26. Since approximately February 14, 2007, MetroPCS and AT&T have been attempting to resolve a dispute concerning the rate payable by MetroPCS to AT&T for transit service pursuant to the MetroPCS Interconnection Agreement.

27. In the course of discussions related to that dispute, MetroPCS has asked AT&T to identify the rates for transit service in the Transit Agreements between AT&T and the Small LECs. AT&T has refused to provide such information.

28. MetroPCS has attempted to negotiate and resolve this issue with AT&T, but AT&T has refused to provide the requested information. AT&T has claimed that the Transit Agreements do not involve telecommunications services that are subject to the filing requirements of Florida and federal law. The parties are at an impasse on this issue.

29. MetroPCS believes that the subject of this Petition and Complaint, the resolution of a question of law, is uniquely suited to the expedited dispute resolution process of Rule 25-22.0365, F.A.C. Because the underlying dispute between the parties involves the resolution of a purely legal question, it is unnecessary for the parties to submit testimony or engage in discovery for the resolution of this question. As is more fully discussed below, the sole question is whether under applicable Florida and/or federal law AT&T and the Small LECs are required to file the Transit Agreements with this Commission and obtain the Commission's approval for them.

30. Alternatively, if the Commission determines that it is not appropriate to proceed on the basis of the expedited dispute resolution process of Rule 25-22.0365, then MetroPCS requests that the Commission proceed on the basis of a non-expedited petition and complaint or under the declaratory statement authority of Section 120.565, Florida Statutes.

II. Commission Jurisdiction

31. The Commission has the jurisdiction over the instant Petition and the relief being sought pursuant to 364.012, 364.07, 364.16, 364.161, 364.162, 364.27, and 364.285, Florida Statutes, and Sections 252(a)(1) and 252(e)(1) of the Telecommunications Act of 1996 (the 1996 Act).

III. Statement of the Facts

32. In Docket Nos. 050119 and 050125 ("Transit Proceeding"), this Commission resolved a multiparty dispute regarding transit services provided by AT&T (then BellSouth) to the Small LECs.

33. On April 21, 2006, shortly after the final hearing in the Transit Proceeding, but before the issuance of the final order, ALLTEL Florida, Inc. (now Windstream) withdrew as a party. In its Motion to Withdraw, ALLTEL stated that it was requesting leave to withdraw as a party "on grounds that ALLTEL has entered an agreement with BellSouth that resolves all of the issues in this docket between ALLTEL and BellSouth." Order No. PSC-06-0776-FOF-TP, at 7, n. 1 (Sept. 18, 2006).

34. There were numerous issues in this case, but one of the fundamental questions was whether transit services provided by AT&T to the Small LECs should be offered through a tariff or an agreement between AT&T and the Small LEC. The Commission, in Order No. PSC-06-0776-FOF-TP, issued September 18, 2006 ("*Transit Order*"), found the tariff "invalid under Florida law" and required the parties "to establish an interconnection agreement or transit agreement containing the rates, terms and conditions for use of BellSouth's transit service." *Transit Order*, at 19.

35. While there were various motions for clarification and reconsideration of the *Transit Order*, all such motions were ultimately withdrawn and the decisions reached in the *Transit Order* became final agency action. Order No. PSC-07-0050-FOF-TP, January 17, 2007. The remaining Small LEC parties specifically stated that they were withdrawing their request for clarification and reconsideration, "As a result of settlements reached with BellSouth Telecommunications, Inc. ("BellSouth") concerning rates, terms and conditions applicable to transit traffic."

36. On information and belief, AT&T and the Small LECs have entered into one or more agreements relating to transit services to be provided by AT&T. However, AT&T and the Small LECs have not filed these Transit Agreements with this Commission.

IV. Issues Presented, and Ultimate Statement of Position

37. The specific issue to be litigated in this matter is whether as a matter of Florida and federal law AT&T and the Small LECs are required to file the Transit Agreements with this Commission and whether such Transit Agreements must be approved by the Commission.

38. As is more fully discussed below, MetroPCS believes that the answer to both of these questions is yes. The ultimate relief being sought herein is an order of this Commission to require that the AT&T-Small LEC Transit Agreements be filed with this Commission for approval pursuant to 47 U.S.C. § 252(e)(1) and Sections 120.80(13)(d), 364.012, 364.16, 364.161, and 364.12, Florida Statutes. Based upon their failure to comply with the clear governing law, the Commission should impose penalties and sanctions upon AT&T and the Small LECs for their failure to file such agreements with the Commission in a timely fashion.

V. Count 1: Failure to File Transit Agreements as Required by Federal Law

39. Under 47 U.S.C. §§ 252(a)(1) and 252(e)(1), any interconnection agreement subject to 47 U.S.C. § 251(b) or (c) must be "submitted for approval to the State commission."[2] In *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)*,[3] the Federal Communications Commission ("FCC") ruled that any agreement entered into by an incumbent LEC "that creates an ongoing obligation pertaining to resale, number portability, dialing

[2] 47 U.S.C. § 252(e)(1).

[3] Memorandum Opinion and Order, 17 FCC Rcd. 19337 (released October 4, 2002) ("*Qwest Declaratory Ruling*").

parity, access to rights-of-way, reciprocal compensation, interconnection, unbundled network elements, or collocation is an interconnection agreement that must be filed."[4]

40. Pursuant to 47 U.S.C. § 251(c)(2), AT&T is obligated to provide, "for the facilities and equipment of any requesting telecommunications carrier, interconnection with [AT&T's] network . . . that is at least equal in quality to that provided by [AT&T] to itself or to any subsidiary, affiliate, or any other party to which [AT&T] provides interconnection . . . on rates, terms, and conditions that are just, reasonable, and nondiscriminatory . . . ."

41. AT&T's own interconnection to its network provides AT&T the ability to deliver traffic originated on its network to the networks of ILECs, CLECs, and CMRS carriers that are directly interconnected to AT&T's network.

42. Pursuant to 47 U.S.C. § 251(c)(2), AT&T is required to provide MetroPCS and other requesting carriers interconnection to AT&T's network that is "at least equal in quality to that provided by [AT&T] to itself." Because AT&T's own interconnection to AT&T's network provides the ability to deliver traffic originated on its network to the networks of other carriers that are directly interconnected to AT&T's network, AT&T is obligated by Section 251(c)(2) to provide MetroPCS and other requesting carriers interconnection to AT&T's network that permits them to deliver traffic originated on their networks to the networks of other carriers that are directly interconnected to AT&T's network.

43. AT&T's transit service is the method by which AT&T enables carriers who request interconnection to its network to deliver traffic originated on their networks to the networks of other carriers that are directly interconnected to AT&T's network.

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[4] *Qwest Declaratory Ruling,* 17 FCC Rcd. at ¶ 8 (emphasis omitted).

44. Because Section 251(c)(2) requires AT&T to provide requesting carriers interconnection to AT&T's network that permits them to deliver traffic originated on their networks to the networks of other carriers that are directly interconnected to AT&T's network and because AT&T's transit service is the method by which AT&T enables carriers who request interconnection to AT&T's network to deliver traffic originated on their networks to the networks of other carriers that are directly interconnected to AT&T's network, AT&T's transit service is subject to Section 251(c)(2).

45. Because AT&T's transit service is part of the interconnection that AT&T must provide to requesting carriers pursuant to 47 U.S.C. § 251(c)(2), an agreement containing ongoing obligations relating to that transit service is an interconnection agreement that 47 U.S.C. § 252(a)(1) requires to be submitted to the State commission for approval pursuant to 47 U.S.C. § 252(e)(1).

46. In Notice of Apparent Liability for Forfeiture, *In the Matter of Qwest Corporation Apparent Liability for Forfeiture,* File No. EB-03-IH-0263, 19 FCC Rcd. 5169 (FCC 04-57) (rel. March 12, 2004) ("*Qwest NAL*"), the FCC proposed to fine Qwest $9,000,000 for failing to file in a timely fashion thirty-four agreements with the Minnesota Public Utilities Commission ("PUC") and twelve agreements with the Arizona Corporation Commission pursuant to Section 252(e)(1). Qwest ultimately had filed the thirty-four agreements with the Minnesota PUC on March 25 and 26, 2003. Although Qwest contended before both the Minnesota PUC and the FCC that some or all of the agreements in question were not interconnection agreements, the Minnesota PUC found that ***all*** of the agreements with other carriers filed by Qwest on those dates were interconnection agreements in whole or in part that should have been filed previously pursuant to Section 252(e)(1).[5] The FCC

[5] *Qwest NAL* at ¶ 15.

agreed, rejecting Qwest's arguments that some or all of the filed agreements were not interconnection agreements covered by the *Qwest Declaratory Ruling*.[6]

47. One of the agreements that Qwest filed with the Minnesota PUC on March 26, 2003 is reproduced in Exhibit A hereto. In the *Qwest Declaratory Ruling*, the FCC had specifically ruled that "*only* those agreements that contain an ongoing obligation *relating to section 251(b) or (c)* must be filed under 252(a)(1)."[7] In holding that ***all*** of the agreements that Qwest filed at the Minnesota PUC on March 25 and 26, 2003 were interconnection agreements subject to the Section 252(a)(1) filing requirement, in the *Qwest NAL* the FCC necessarily held that the agreement in Exhibit A is an "agreement[] that contain[s] an ongoing obligation relating to Section 251(b) or (c)."[8]

48. The agreement reproduced in Exhibit A is a transit agreement. Numbered paragraph 1 of the agreement provides:

> USLink and InfoTel shall be allowed to utilize local tandem switching functionality and transport from and to U S WEST[9] end offices in the exchanges listed below (hereinafter "Requested Exchanges") to transport calls within the Requested Exchanges **and the exchanges included in Commission approved EAS calling areas for those exchanges**." [Emphasis added.]

49. Numbered paragraph 4 of the Qwest agreement reproduced in Exhibit A specifies the rates that apply when USLink and InfoTel "use [Qwest's] tandem switching functionality and transport ... to terminate local EAS traffic," specifically including charges for "tandem switching and appropriate portion of transport (billed at the common transport rate) **for calls to other carriers' end office(s) in that EAS,**" *i.e.,* transit calls. [Emphasis added].

50. Numbered paragraph 4 of the agreement reproduced in Exhibit A also provides:

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[6] *See generally,* Qwest NAL at ¶¶ 25-41.

[7] *Id.* n.26 (emphasis added). *See also, id.* at ¶ 12 ("[A] settlement agreement that contains an ongoing obligation relating to section 251(b) or (c) must be filed under section 252(a)(1).") Although the requirement of state commission approval is set forth in Section 252(e)(1), Section 252(a)(1) expressly requires that all voluntary interconnection agreements with ILECs be filed for such approval.

[8] *Qwest Declaratory Ruling,* 17 FCC Rcd. at ¶ 8 n.26.

[9] Qwest formerly was known as U S West.

> Further, USLink and InfoTel are responsible for negotiating interconnection agreements for traffic with a terminating provider **for traffic which terminates on that provider's network and only transits the U S WEST network.** [Emphasis added.]

51. The Minnesota PUC's order adopting the Minnesota Department of Commerce's recommendation that the agreement reproduced in Exhibit A is an interconnection agreement subject to the filing requirement of Sections 252(a)(1) and 252(e)(1) is reproduced in Exhibit B hereto.

52. The Minnesota PUC referred the issue of Qwest's late-filed interconnection agreements to an Administrative Law Judge for hearing. The ALJ's report finding that Qwest was required to file, *inter alia,* the agreement reproduced in Exhibit A is reproduced in Exhibit C hereto. *See* page 47. The Minnesota PUC adopted the ALJ's report in the order reproduced in Exhibit D hereto. The Minnesota PUC subsequently fined Qwest $2500 per day for each of the 961 days from the time that Qwest entered into the agreement reproduced in Exhibit A, for a total fine (for failing to file that agreement only) of $2,402,500. Order Assessing Penalties, *In the Matter of the Complaint of the Minnesota Department of Commerce Against Qwest Corporation Regarding Unfiled Agreements,* Docket No. P-421/C-02-197 (Minn. PUC February 28, 2003), at 4-6. (Reproduced in Exhibit E hereto.) The United States Court of Appeals for the Eighth Circuit upheld the imposition of the fine in *Qwest Corp. v. Minnesota PUC,* 427 F.3d 1061 (8th Cir. 2005). (Reproduced in Exhibit F hereto).

53. As Qwest did with USLink and InfoTel, AT&T has entered into agreements permitting the Small LECs to use AT&T's network to transit traffic to the networks of other carriers. As Qwest did, AT&T has failed to file such agreements with the Commission pursuant to Sections 252(a)(1) and 252(e)(1). As the Minnesota PUC did when it became aware of Qwest's failure to file its transit agreement with USLink and InfoTel, this Commission should impose appropriate penalties upon AT&T under Section 364.285 for its failure to comply with applicable law.

54. The Commission should also sanction the Small LECs under Section 364.285 for their failure to file their transit agreements with AT&T with this Commission for approval. "Incumbent LECs, including small incumbent LECs, are required to file with state commissions all interconnection agreements entered into with other carriers, including adjacent incumbent LECs."[10]

55. Accordingly, the Commission must order AT&T and the Small LECs to submit their Transit Agreements to the Commission for approval pursuant to Sections 252(a)(1) and 252(e)(1) and should fine AT&T and the Small LECs pursuant to Sections 120.80(13) and 364.285 for their failure to do so.

VI. Count 2: Failure to File Agreements as Required by State Law

56. Florida law well establishes its own, independent authority for this Commission's authority to require interconnection, for that interconnection to include the provisioning of transit services, and to require the filing and approval of any transit agreements between AT&T and the Small LECs. Indeed, as is discussed below, in the Transit Proceeding this Commission has already made the fundamental determination that transit services are an interconnection service and has already ordered AT&T and the Small LECs to enter into interconnection agreements for the provisioning of transit services. While the duty to file and obtain approval for such agreements before they take effect is clear from Florida law, the Commission should now expressly order that the Transit Agreements be filed and approved pursuant to Sections 364.16 and 364.162.

57. Unquestionably, this Commission has exclusive jurisdiction over both AT&T and the Small LECs in this matter. Section 364.01(1)-(2) and 364.02(8), Florida Statutes. This grant of exclusive authority includes express directives to this Commission "to ensure the availability of the

[10] *Local Competition First Report and Order* at ¶ 1437.

widest possible range of consumer choice in the provision of all telecommunications services" and to promote competition. Sections 364.02(4)(b) and (d). A key component to making competition and ultimately consumer choice a reality is the availability of interconnected telecommunications networks and the ability of all carriers to directly or indirectly connect their networks with all other networks.

58. In Section 364.16(1), the Legislature authorized this Commission to require the ILECs, such as AT&T and the Small LECs, to interconnect their networks:

> Whenever the commission finds that connections between any two or more local exchange telecommunications companies, whose lines form a continuous line of communication or could be made to do so by the construction and maintenance of suitable connections at common points, can reasonably be made and efficient service obtained, and that such connections are necessary, the commission may require such connections to be made, may require that telecommunications services be transferred, and may prescribe through lines and joint rates and charges to be made, used, observed, and in force in the future and fix the rates and charges by order to be served upon the company or companies affected.

The transit service AT&T provides to the Small LECs is unquestionably a connection "between any two or more local exchange telecommunications companies" and this connection constitutes "a continuous line of communication" by which calls are completed. Thus, under a plain reading of the statute, transit services are within the Commission's jurisdiction.

59. There is also a specific statutory duty for the negotiated or arbitrated agreements reflecting those interconnection arrangements, including transit agreements, to be filed. Section 364.16(3) sets forth the basic obligations of local carriers to interconnect and to do so in a nondiscriminatory manner:

> Each local exchange telecommunications company shall provide access to, and interconnection with, its telecommunications facilities to any other provider of local exchange telecommunications services requesting such access and interconnection at nondiscriminatory

> prices, rates, terms, and conditions established by the procedures set forth in s. 364.162.

The importance of the requirement that prices, rates, terms, and conditions are to be nondiscriminatory is carried forward by the cross-referenced duty in Section 364.162, Florida Statutes, to file any negotiated or arbitrated interconnection agreements with the Commission: "Whether set by negotiation or by the commission, interconnection and resale prices, rates, terms, and conditions shall be filed with the commission before their effective date." The purpose of such filing is clear – only through the filing and approval process can the Commission be assured that interconnection is truly being offered at just and reasonable rates in a nondiscriminatory manner.

60. While there is a specific duty by ILECs such as AT&T and the Small LECs to file their interconnection agreements with the Commission, there is also a general grant of statutory authority to the Commission to require the filing of interconnection or any other contracts upon its order:

> 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 facility or service by, or rates and charges over and upon, any such telecommunications facility.

Section 364.07(1), Florida Statutes. Thus, if there is any ambiguity about the meaning and effect of Section 364.16(3), then at a minimum the Commission possesses undisputed authority to require the filing of the Transit Agreements upon its order.

61. But there is no ambiguity regarding the filing obligations of AT&T and the Small LECs for the Transit Agreements as this Commission has already addressed the meaning and effect of these statutory provisions on transit traffic agreements. Last year, in consolidated Docket Nos. 050119 and 050125 ("Transit Proceeding"), this Commission resolved a dispute between AT&T (at

the time, BellSouth[11]) and the Small LECs regarding the transit services tariff that AT&T had filed.[12] AT&T filed the transit services tariff to establish default rates, terms, and conditions for ILECs that did not have a transit agreement with AT&T, which at the time was all of the Small LECs that are now respondents to this Petition and Complaint. The Small LECs petitioned the Commission in Docket No. 050119 to reject the tariff filing.

62. After a full evidentiary hearing and post-hearing briefs by the parties, which included various intervenors including MetroPCS, the Commission found that "[t]ransit service is clearly an interconnection arrangement under Section 364.16, Florida Statutes." *Transit Order*, at 17. Further, the Commission determined that "we have stand-alone authority under Section 364.16(1), Florida Statutes, to require parties to interconnect for the purpose of transiting." *Id.* On the basis of Sections 364.16 and 364.162, the Commission then ordered the Small LECs and AT&T that did not have a transit arrangement in place between themselves "to establish rates, terms, and conditions for transiting." *Transit Order*, at 18. It was on the basis of this directive that the remaining Small LEC parties negotiated one or more transit agreements which are the subject of the instant Petition and Complaint.

63. The importance of the obligation under Florida law to file and obtain approval for interconnection agreements, whether by negotiation or arbitration, is also well established in Commission precedent. In the original interconnection arbitration petitions filed with this Commission under Florida law, this Commission ruled that interconnection agreements must be filed. In Order No. PSC-96-0668-FOF-TP, at page 22 (Section V.) (Docket No. 950985-TP, May 20, 1996), the Commission said: "Section 364.162(2), Florida Statutes, states that whether set by negotiation or by the Commission, interconnection and resale prices, rates, terms, and conditions

[11] BellSouth was the ILEC party respondent in the Transit Proceeding as AT&T and BellSouth had not yet merged. The pre-merger AT&T was the petitioner against BellSouth in Docket No. 050125.

[12] The Transit Proceeding is also discussed at paragraphs 32 to 35 above.

shall be filed with the Commission before their effective date."[13] The Commission further explained that "Section 364.162(2), Florida Statutes, states that arrangements shall be filed before they can become effective."[14] *Id.* While this 1996 order concerned interconnection between a CLEC and an ILEC, the fundamental principles expressed by the Commission are not limited to CLEC-ILEC interconnection – Section 364.16 addresses interconnection and nondiscriminatory pricing principles that apply to any type of carrier interconnecting and exchanging traffic with another. Section 364.16(1)-(3). The Commission has specifically received petitions for arbitration invoking Sections 364.16, 364.161, and 364.162 or decided interconnection arbitrations or disputes pursuant to this state law authority. *See, e.g.* Order No. PSC-97-0462-FOF-TP (Docket No. 961346-TP, April 23, 1997); Order No. PSC-02-1096-FOF-TP (Docket No. 001305-TP, August 2, 2002); Order No. PSC-03-1082-FOF-TP (Docket No. 020919-TP, September 30, 2003); Order No. PSC-03-0048-FOF-TP (Docket No. 010795-TP, January 7, 2003).

64. With respect to arbitrating transit rates, in Docket No. 060767-TP, this Commission has heard an arbitration dispute between MCImetro Access and Embarq Florida that specifically included the establishment of a rate for transit traffic. While the hearing has been concluded and the parties have submitted post-hearing briefs, action on the outstanding transit rate issue is scheduled for a decision at the August 14, 2007, Agenda Conference.[15]

---

[13] The language referenced by the Commission in this 1996 order as being from Section 364.162(2) now appears in Section 364.162(1) (2006).

[14] *Id.* While in this Order the Commission determined that tariffs were an appropriate method by which the interconnection agreements could be filed, subsequent FCC and FPSC orders now prohibit filing the separate agreements as tariffs.

[15] MetroPCS notes that the Staff Recommendation states that "a rate almost 100% higher than TELRIC is a strained interpretation of 'just and reasonable' with respect to transit service." Docket No. 060767-TP, Staff Recommendation, at 24 (July 19, 2007). By comparison, AT&T contends that MetroPCS is required to pay transit rates that are over three times TELRIC, which is why it is important for the Transit Agreements to be filed.

65. Finally, the Legislature has provided this Commission with the statutory authority "to impose upon any entity subject to its jurisdiction under this chapter which is found to have refused to comply with or to have willfully violated any lawful rule or order of the commission or any provision of this chapter a penalty for each offense of not more than $25,000, which penalty shall be fixed, imposed, and collected by the commission." Section 364.285(1), Florida Statutes. Given the clear directive in the *Transit Order* to negotiate such interconnection transit agreements and the statutory obligations in Section 364.16 and 364.162 to file negotiated rates, the statutory perquisites for refusing to comply with the Commission's lawful order and statutes have been met. Moreover, that fact that AT&T has refused to make such rate available to MetroPCS on a nondiscriminatory basis reflects a clear intent to willfully refuse to comply meriting the full per day penalty for each day since such agreements were reached but not filed and certainly each day since MetroPCS has requested such information from AT&T.

66. Accordingly, the Commission must order AT&T and the Small LECs to submit their Transit Agreements to the Commission for approval pursuant to Sections 364.16, 364.161, and 364.162, and should fine AT&T and the Small LECs under Section 364.285 for their failure to file and make available such rates.

VII. Other Decisions and Relevant Law

67. The imposition of a penalty against AT&T and the Small LECs would be consistent with the decisions of other state regulatory commissions when faced with similar facts. As discussed above, the Minnesota PUC determined that an agreement for transit services was an interconnection agreement that must be submitted for approval pursuant to 47 U.S.C. § 252(e)(1) in the order attached hereto as Exhibit B. In the order attached hereto as Exhibit E, the Minnesota PUC fined

Qwest $2,402,500 for failing to file that agreement pursuant to 47 U.S.C. sec. 252(e)(1), and in the decision attached hereto as Exhibit F, the United States Court of Appeals upheld that fine.

68. The Washington Utilities and Transportation Commission has found:

> **Both parties to an interconnection agreement** ... bear the responsibility for filing interconnection agreements with state commissions under subsections 252(a) and 252(e)(1) of the Telecommunications Act of 1996.[16] [Emphasis Added]

69. Other state commissions have also held that both parties to an interconnection agreement are subject to the obligation to submit the agreement for state commission approval. *See AT&T Corp. v. Qwest Corp.*, Order Making Tentative Findings, Giving Notice for Purposes of Civil Penalties, and Granting Opportunity to Request Hearing, Docket No. FCU-02-2 (Iowa Utilities Board May 29, 2002); *Joint CLEC Petition for ruling Relative to the Need for Public Review and Approval by the Commission of the April 3, 2004 Telecommunications Services Agreement Between SBC Texas and Sage Telecom*, Order No. 04, Docket No. 29644 (Public Utility Commission of Texas May 27, 2004).

70. The Washington Utilities and Transportation Commission has also found that both parties to an interconnection agreement are subject to penalties if they fail to file their agreement within a reasonable time. *Washington Utilities and Transportation Commission v. Advanced Telecom Group, et al.,* Docket No. UT-033011, Order Denying Covad's Petition for Review and Clarification of Order No. 05, Etc. (June 2, 2004).

71. On the basis of Section 364.285 and the precedents of the other state regulatory commissions this Commission should impose penalties on AT&T and the Small LECs to the full amount authorized by law.

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[16] *Washington Utilities and Transportation Commission v. Advanced Telecom Group, et al.,* Docket No. UT-033011, Order Granting Commission Staff's Motion for Partial Summary Determination, Etc. (February 12, 2004), at ¶ 158.

VIII. Conclusion

72. On the basis of the applicable rules and statutory requirements discussed above, the Commission has authority over the AT&T-ILEC transit agreements pursuant to Chapter 364, Florida Statutes, as well as the 1996 Act. Pursuant to this authority, AT&T and the Small LECs are required to file any and all such ILEC transit agreements with the Commission for its review and approval and AT&T is required to make such agreements, and the underlying rates, available to MetroPCS on a nondiscriminatory basis.

WHEREFORE, for the foregoing reasons, MetroPCS respectfully requests that the Commission:

a) Enter an order requiring AT&T and the Small LECs to file any and all of the AT&T-ILEC transit agreements with this Commission immediately;

b) Assess appropriate penalties under Section 364.285 upon AT&T and the Small LECs for their failure to file such AT&T-ILEC transit agreements in a timely fashion; and

c) Take such further action as the Commission deems necessary and appropriate.

Respectfully submitted this 1st day of August, 2007.

Floyd R. Self
Messer, Caparello & Self, P.A.
Phone: (850) 222-0720
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2618 Centennial Place
Tallahassee, FL 32308

and

Charles V. Gerkin, Jr.
Friend, Hudak & Harris, LLP
Phone: (770) 399-9500
Fax: (770) 234-5965
E-mail: cgerkin@fh2.com

Three Ravinia Drive, Suite 1450
Atlanta, Georgia 30346

Counsel for MetroPCS Florida, LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing have been served by Hand Delivery (*) and/or U. S. Mail this 1st day of August, 2007 upon the following:

Patrick Wiggins, Esq.*
Office of General Counsel
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

BellSouth Telecommunications, Inc. *
d/b/a AT&T Florida d/b/a AT&T Southeast
150 South Monroe Street, Suite 400
Tallahassee, FL 32301-1556

TDS Telecom
d/b/a TDS Telecom/Quincy Telephone
107 West Franklin Street
Quincy, FL 32351-2310

Windstream Florida, Inc.
6867 Southpoint Drive, North, Suite 103
Jacksonville, FL 32216-8005

Northeast Florida Telephone Company
d/b/a NEFCOM
505 Plaza Circle, Suite 200
Orange Park, FL 32073-9409

GTC, Inc. d/b/a GT Com
Post Office Box 220
Port St. Joe, FL 32457-0220

Smart City Telecommunications, LLC
d/b/a Smart City Telecom
Post Office Box 22555
Lake Buena Vista, FL 32830-2555

ITS Telecommunications Systems, Inc.
Post Office Box 277
Indiantown, FL 34956-0277

Frontier Communications of the South, LLC
300 Bland Street
Bluefield, WV 24701-3020

FLOYD R. SELF

Qwest Corporation
Law Department
200 South Fifth Street, Room 395
Minneapolis, MN 55402
(612) 672-8905-Phone
(612) 672-8911-Fax

Jason D. Topp
Attorney

(1)

ride the light
Qwest

March 26, 2003

Dr. Burl W. Haar
Executive Secretary
Minnesota Public Utilities Commission
121 7th Place East, Suite 350
St. Paul, MN 55101

P5643,421/IC-03-457

Re: In the Matter of the Application of Qwest Corporation for Approval of the Agreement as Amendment to the Interconnection Agreement with U.S. Link, Inc. and Integra Telecom of Minnesota, Inc. d/b/a Integra Telecom and InfoTel Communications

Dear Dr. Haar:

Pursuant to Section 252(e)(2) of the Telecommunications Act of 1996, Qwest hereby submits four copies of the negotiated Agreement dated July 14, 1999 between Qwest Corporation ("Qwest") and U.S. Link, Inc. ("U.S. Link") and Integra Telecom of Minnesota, Inc. d/b/a Integra Telecom and InfoTel Communications ("Integra") as an Amendment for filing with and approval by the Minnesota Public Utilities Commission ("Commission"). Qwest seeks approval of the bracketed language in the enclosed Agreement. This agreement was previously filed with Qwest's Conditional Application For Approval on March 1, 2002 in Docket No. P-421/C-02-197. In that filing, Qwest requested that the Commission:

(1) Determine whether a filing obligation exists under Section 252;
(2) If the answer to (1) is yes, determine whether the agreement is void;
(3) If the answer to (2) is no, determine whether the agreement is subject to pick and choose obligations.

In order to eliminate any doubt as to the status of this agreement, Qwest formally files it for approval under Section 252(e)(6). The Commission approved the underlying Interconnection Agreement between Qwest and U.S. Link on November 13, 1997 in Docket No. P-465, 421/M-97-1316 and the underlying Interconnection Agreement between Qwest and Integra October 9, 1997 in Docket No. P-5509, 421/M-97-1080.

EXHIBIT "A"

Qwest understands that the Commission in Docket No. P-421/C-02-197 is determining the treatment of the agreements identified in the Complaint, many of which have been terminated or superseded. The filings made today are supplemental to those proceedings.

Qwest is petitioning the Commission to approve the provisions identified in the attached Agreement such that, upon approval, they are formally available to other CLECs under Section 252(i). For the Commission's benefit, Qwest has bracketed those terms and provisions in the Agreement which Qwest believes relate to Section 251(b) or (c) services, and have not been terminated or superseded by agreement, Commission order, or otherwise, and are thus subject to filing and approval under Section 252.

Consistent with the FCC's Order of October 4, 2002, which articulated Section 252's filing standard, Qwest is not filing routine day-to-day paperwork, settlements of past disputes, stipulations or agreements executed in connection with federal bankruptcy proceedings, or orders for specific services. Qwest also has not filed contracts with CLECs arising out of bankruptcy proceedings, because such contracts relate to pre- and post-bankruptcy petition claims, adequate assurances agreements, avoidance of service interruptions and the like, and do not change the terms or conditions of the underlying interconnection agreement. In the event that a bankruptcy court finalizes an agreement that does create new obligations under Section 251, that agreement will be filed with the state commissions under Section 252(e).

Qwest has posted this agreement on the website it uses to provide notice to CLECs and announce the immediate availability to other CLECs in Minnesota of the interconnection-related terms and conditions. This will facilitate the ability of CLECs to request terms and conditions, subject to the Commission's decision approving the bracketed portion of the Agreement filed here.

The enclosed Agreement does not discriminate against non-party carriers. It is consistent with the public interest, convenience, and necessity. It is also consistent with applicable state law requirements, including Commission orders regarding interconnection issues.

Enclosed is a service list for this docket. Please contact me if you have any questions concerning the enclosed. Thank you for your assistance in this matter.

Very truly yours,

Jason D. Topp

JDT/bardm

Enclosures

cc: Service List

STATE OF MINNESOTA
BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

LeRoy Koppendrayer	Chair
Gregory Scott	Commissioner
Marshall Johnson	Commissioner
Phyllis Reha	Commissioner
Ellen Gavin	Commissioner

Re: In the Matter of the Application of Qwest Corporation for Approval of the Agreement as Amendment to the Interconnection Agreement with U.S. Link, Inc. and Integra Telecom of Minnesota, Inc. d/b/a Integra Telecom and InfoTel Communications

AFFIDAVIT OF SERVICE

STATE OF MINNESOTA)
) ss
COUNTY OF HENNEPIN)

Duane Scherr, being first duly sworn, deposes and says:

That on the 26th day of March, 2003, at the City of Minneapolis, State of Minnesota, he served the annexed filing on the party designated therein, by either delivery in person or mailing to them a copy thereof, enclosed in an envelope, postage prepaid, and by depositing same in the post office at Minneapolis, Minnesota, directed to said address or last known address.

Duane Scherr

Subscribed and sworn to me
this 26th day of March, 2003.

Notary Public

DIANNE M. BARTHEL
Notary Public
Minnesota
My Commission Expires Jan. 31, 2005

Qwest Service List

Dr. Burl W. Haar
Minnesota Public Utilities Commission
121 7th Place East, Suite 350
St. Paul, MN 55101

Linda Chavez
Minnesota Department of Commerce
85 7th Place East, Suite 500
St. Paul, MN 55101-2198

Jason Topp
Qwest Corporation
200 South Fifth Street, Room 395
Minneapolis, MN 55402

Qwest Corporation
Director - Interconnection Compliance
1801 California Street, Room 2410
Denver, CO 80202-1984

Karen Johnson
Corporate Regulatory Attorney
Integra Telecom, Inc.
19545 NW Von Neumann Drive, Suite 200
Beaverton, OR 97006-6902

Qwest Corporation
Attn: Jim Gallegos
Corporate Counsel, Interconnection
1801 California Street, 38th Floor
Denver, CO 80202

Becky Parker
Director of Marketing and Product Development
U.S. Link, Inc.
200 Second Street, P.O. Box 327
Pequot Lakes, MN 56472-0327

EXHIBIT

11

U S WEST Communications, Inc.
Wholesale Markets
130 South Fifth Street, Room 570
Minneapolis, MN 55402
Telephone (612) 663-7377

Patricia A. Kline
General Manager-Eastern Region

U S WEST
It's better here ®

July 14, 1999

Michael J. Bradley, Esq.
Moss & Barnett
90 South Seventh Street, Suite 4800
Minneapolis, Minnesota 55402-4129

Re: In the Matter of a Complaint and Request for Expedited Proceeding by USLink, Inc. and InfoTel Communications, LLC Against U S WEST Communications, Inc. Regarding Extended Area Service, MPUC Docket No. P421/C-99-724

Dear Mr. Bradley:

On June 4, 1999, USLink, Inc. ("USLink") and InfoTel Communications, LLC ("InfoTel") filed a complaint against U S WEST Communications, Inc. ("U S WEST") before the Minnesota Public Utilities Commission ("Commission"), which is assigned case number P421/C-99-724 (hereinafter "Complaint"). In the Complaint, USLink and InfoTel ("Complainants") sought the ability to use local tandem functionality at certain U S WEST end offices to transport calls to and from Extended Area Service ("EAS") calling areas. U S WEST and Complainants, by means of executing this letter, hereby resolve their disputes and USLink and InfoTel agree to withdraw the complaint under the following terms and conditions:

1. USLink and InfoTel shall be allowed to utilize local tandem switching functionality and transport from and to U S WEST end offices in the exchanges listed

USA
Proud Sponsor

below (hereinafter "Requested Exchanges") to transport calls within the Requested Exchanges and the exchanges included in Commission approved EAS calling areas for those exchanges. U S WEST will allow USLink and InfoTel to utilize the Requested Exchanges as local tandem switches:

A. Requested Exchanges:

Brainerd; (includes Nisswa remote)
Duluth;
Fargo (includes Moorehead/West Fargo);
Fergus Falls;
Grand Rapids;
Hibbing;
Little Falls;
Owattona
Rochester;
St. Cloud;
Wadena; and
Willmar.

2. In those Local Calling Areas in Minnesota where USLink and InfoTel operate and where U S WEST has an official Local Tandem, as listed in the Local Exchange Routing Guide ("LERG"), USLink and InfoTel may interconnect at the local tandem (including the Metropolitan EAS area).

3. USLink and InfoTel may request to utilize tandem switching functionality and transport to originate or terminate local traffic within the Requested Exchanges, or in other U S WEST end office exchanges. Except for the exchanges listed in paragraphs 1 and 2, such a request will not impose any obligation on U S WEST. Where U S Link and InfoTel make such a request, U S WEST may consider such requests on an individual case basis. U S WEST may request compensation for any costs imposed, including but not limited to up front recovery of any reconfiguration costs

and/or switch upgrades, resulting from USLink's or InfoTel's use of the Requested Exchanges listed in paragraph 1, or any additional requests, as local tandems. Under U S WEST's policy, U S WEST is not obligated to agree to such a request since U S WEST does not use its end offices for tandem office functionality for provision of local calling services to itself. It shall remain U S WEST's policy that competitive local exchange providers or commercial mobile radio service providers shall use only designated official local tandems identified in the LERG as local tandems where they exist, otherwise, such provider must direct connect to each end office in such local calling area. Under this policy, a provider may not designate a U S WEST end office as a local tandem where such switch is not identified in the LERG as a local tandem. If the parties are unable to reach agreement, they may resort to the Dispute Resolution provisions of the applicable Agreement for Local Wireline Network Interconnection and Service Resale ("Interconnection Agreement").

4. In those instances where USLink and InfoTel may use tandem switching functionality and transport in an end office to terminate local EAS traffic, they shall pay U S WEST the usage rate elements, established in the Interconnection Agreement, including: 1) local switching for calls completed within the requested exchange end office; 2) tandem switching, transport (billed at the common transport rate), and local switching for calls completed to another U S WEST end office in the same EAS; 3) tandem switching and appropriate portion of transport (billed at the common transport rate) for calls to other carriers' end office(s) in that EAS. Calls originated by U S WEST end users in the Local Calling Area which route through the requested exchange end offices to terminate to USLink or InfoTel are subject to reciprocal compensation.

Q110002

Likewise, calls originated by USLink or InfoTel end users which route through the requested exchange end offices to terminate to U S WEST are subject to reciprocal compensation. U S WEST reserves the right to assess USLink and InfoTel up front for any unforeseen costs, as noted in number 3 above, incurred by U S WEST. Should USLink or InfoTel dispute the propriety of such costs, the parties agree to negotiate the matter and may resort to the Dispute Resolution provisions of the applicable Interconnection Agreement. USLink and InfoTel also reserve the right to elect to provide their own EAS facilities and thereby avoid such charges. Further, USLink and InfoTel are responsible for negotiating interconnection agreements for traffic with a terminating provider for traffic which terminates on that provider's network and only transits the U S WEST network. U S WEST, USLink and InfoTel also agree that U S WEST is not responsible for the relationship between USLink and InfoTel and other terminating providers.

5. In no case will USLink or InfoTel originate or terminate InterLATA or IntraLATA toll traffic of any sort through a U S WEST end office dedicated for local or EAS traffic, regardless of whether an end office has tandem switching functionality. Further, the 512 ccs restriction found in the Interconnection Agreements in Attachment 3, Appendix A, Section, 2.4.4, shall also apply to the Requested Exchanges.

6. Based on the terms of this settlement, USLink, InfoTel, and U S WEST (the "Parties") agree that the Complaint will be withdrawn immediately and no further action by the Commission with regard to that complaint is requested. Because the Complaint involves a dispute under an interconnection agreement, the Parties agree that a voluntary resolution of the dispute does not require Commission approval.

However, the Parties agree to appear before the Commission to support approval of this agreement should the Commission so request.

7. Nothing contained herein, and no action taken by the Parties with regard to this agreement, shall be construed as an admission by any of these Parties as to liability regarding the matters herein, nor speculation as to the outcome had the matter been fully litigated before the Commission.

8. This agreement shall be construed in accordance with the laws of the State of Minnesota.

9. The Parties agree that until the Commission determines that paging, or Internet Service Provider traffic should be treated like local EAS traffic, the Parties retain the option of pursuing an appropriate remedy with respect to such traffic. Until such time as the Commission determines the appropriate compensation mechanism for paging and Internet Service Provider traffic, the parties may withhold payment for paging and Internet Service Provider traffic. The Commission, to date, has not determined Internet Service Provider traffic and paging traffic to be local traffic for purposes of reciprocal compensation. The party rendering the bill for reciprocal compensation will cooperate with the other party to make a good faith effort to identify paging traffic and ISP traffic.

10. This agreement is the entire agreement between the Parties regarding resolution of the Complaint. Prior oral and written agreements are superceded by the agreement herein and this agreement may be modified only if agreed to in writing, signed by the Parties to this complaint.

11. Should any provision of this agreement be deemed unenforceable, this agreement shall terminate in its entirety.

12. This agreement does not supercede any terms or conditions of the interconnection agreement between U S WEST, InfoTel and USLink. Issues and disputes not specifically addressed by this Agreement shall be resolved pursuant to the terms of the interconnection agreement among the Parties. This agreement shall terminate upon the termination of the current interconnection agreement among the parties (March 17, 2002).

By _____
Michael J. Bradley

Date: 7-14-99

MOSS & BARNETT
A Professional Association
4800 Norwest Center
90 South Seventh Street
Minneapolis, MN 55402-4129
Telephone: 612-347-0337

Attorneys on Behalf of
USLink Inc. and InfoTel Communications, LLC

By _____
Patricia A. Kline, General Manager-
Eastern Region

Date: 7-14-99

U S WEST Communications, Inc.
Wholesale Markets
150 South Fifth Street, Room 570
Minneapolis, MN 55402
Telephone: 612-663-7377

Q110005

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

LeRoy Koppendrayer	Chair
Gregory Scott	Commissioner
Marshall Johnson	Commissioner
Phyllis Reha	Commissioner
Ellen Gavin	Commissioner

Jason D. Topp
Qwest Corporation
Law Department
200 South Fifth Street, Room 395
Minneapolis, MN 55402

SERVICE DATE: JUN 12 2003

DOCKET NO. P-5643,421/IC-03-457

In the Matter of an Application for Approval of the March 26, 2003 Amendment to the Interconnection Agreement Between Integra Telecom of Minnesota, Inc. and Qwest Corporation (Originally Approved in Docket No. P-5509,421/M-97-1080); Incorporating the Ability to Use Local Tandem Functionality to Transport Calls to and from Extended Area Service (EAS) Calling Areas

The above entitled matter has been considered by the Commission and the following disposition made:

Approved, with the exceptions recommended by the Department of Commerce in its attached comments

This decision is issued by the Commission's consent calendar subcommittee, under a delegation of authority granted under Minn. Stat. § 216A.03, subd. 8 (a). Unless a party, a participant, or a Commissioner files an objection to this decision within ten days of receiving it, it will become the Order of the full Commission under Minn. Stat. § 216A.03, subd. 8 (b).

The Commission agrees with and adopts the recommendations of the Department of Commerce which are attached and hereby incorporated in the Order.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

(S E A L)

This document can be made available in alternative formats (i.e., large print or audio tape) by calling (651) 297-4596 (voice), (651) 297-1200 (TTY), or 1-800-627-3529 (TTY relay service).

EXHIBIT "B"

MINNESOTA
DEPARTMENT OF
COMMERCE

85 7th Place East, Suite 500
St. Paul, Minnesota 55101-2198
651.296.4026 FAX 651.297.1959 TTY 651.297.3067

May 19, 2003

Burl W. Haar
Executive Secretary
Minnesota Public Utilities Commission
121 7th Place East, Suite 350
St. Paul, Minnesota 55101-2147

RE: In the Matter of the Application for Approval of the Amendment to an Interconnection Between Integra Telecom of Minnesota, Inc. and Qwest Corporation
Docket No. P5643,421/IC-03-457

Dear Dr. Haar:

Interconnection agreements and amendments to interconnection agreements that are not arbitrated under §252 of the Federal Telecommunications Act of 1996 may be approved without hearing under Minn. Stat. § 216A.03, subd. 7. The Public Utilities Commission's (Commission) Order designating interconnection agreements and amendments to interconnection agreements as subject to a standing order was issued on August 25, 2000 in Docket No. P999/CI-00-634. The use of a standing order is to apply to filings submitted on or after September 1, 2000.

As required by the Commission's August 25, 2000 Order, the Department of Commerce has reviewed and analyzed the current filing. Attached is the Minnesota Department of Commerce's Checklist for processing amendments to interconnection agreements. The Checklist reflects the Department's analysis of the issues and language that the Commission has established to meet the requirements that interconnection agreements or amendments thereto not discriminate against third parties, harm the public interest or conflict with state law.

The amendment was filed on:

March 26, 2003

Topic of the amendment:

The ability to use local tandem functionality to transport calls to and from Extended Area Service (EAS) calling areas.

Interconnection Agreement amended:

Docket P5509,421/M-97-1080 on October 9, 1997

Wireless or Wireline:

Wireline

The Petition was filed by:

Jason D. Topp
Qwest Corporation
Law Department
200 South Fifth Street, Room 395
Minneapolis, Minnesota 55402

Conditions:

This agreement contains one or more bracketed provisions. The Department disagrees with Qwest's position that the bracketed provisions are 47 U.S.C. § 251(b) and (c) services, and are the only provisions that the Commission has authority to approve under 47 U.S.C. § 252(e). The Minnesota Commission reviews for approval interconnection agreements in their entirety. If, however, the Commission determines that portions of these negotiated agreements are discriminatory to non-parties or are otherwise against the public interest, the Commission has the authority to reject all or part of the agreements. The ability of any CLEC to opt into provisions contained in the document is governed by Sections 252(a), (e) and (i) of the Telecommunications Act.

The Department's analysis finds that the interconnection agreement complies with the Commission's requirements as indicated on the attached Checklist. The Department is submitting this memorandum recommending that the Commission **approve** the amendment to the interconnection agreement either at a Commission hearing or by way of the standing order process ordered on August 25, 2000.

Sincerely,

Bruce L. Linscheid

BRUCE L. LINSCHEID
FINANCIAL ANALYST

BLL/sm
Attachment

Companies: Integra Telecom of Minnesota, Inc. and Qwest Corporation
Docket No.: P5643,421/IC-03-457

CHECKLIST FOR PROCESSING AMENDMENTS TO INTERCONNECTION AGREEMENTS

ANALITICAL PROCEDURES

A. AMENDMENTS TO INTERCONNECTION AGREEMENTS

__x__ 1. Amendment modifies an approved interconnection agreement. (Identify docket and date of Order) P5509.421/M-97-1080 on October 9. 1997. CLEC merged with InfoTel Communications. Inc. in Docket No. P5509.5643/PA-99-1527 on December 27. 1999.

____ 2. Amendment addresses language required by the Commission to meet the requirements of 47 CFR 252(e)(2) and (3).

____ 3. The Parties have complied with the Commission's requirement for prior approval of an amendment to an interconnection agreement.[1] Qwest seeks prior approval of the bracketed language in this agreement on a going-forward basis. This agreement was previously not filed with the Commission. but it is now being submitted to comply with Section 252(a) filing requirements.

____ 4. Amendment addresses an issue on which the Commission has established its position.

__x__ 5. Amendment does not cover a topic on which the Commission has established a precedent.

__x__ a. Identify the topic: The ability to use local tandem functionality to transport calls to and from Extended Area Service (EAS) calling areas

__x__ b. Amendment does not threaten the public interest, discriminate against third parties or conflict with state law.

____ 1) Agree (explain).

__x__ 2) Disagree. See Checklist Item A.6.

__x__ 6. Other Comments.

This interconnection agreement amendment was executed on July 14, 1999. While Qwest previously submitted it to the Department as part of its investigation into Qwest's interconnection agreement filing practices in Docket No. P421/IC-02-197, it is only now being submitted for Commission approval. Although this agreement was not one of the

[1] In the Matter of the Application for Approval of the Agreement for Interconnection and Traffic Interchange between Cellular Mobil Systems of St. Cloud. Minnesota L.L.P. and U S WEST Communications. Inc., Docket No. P421/EM-97-437 at page 6.

suggest that Commission approval of this agreement is not necessary. The agreements selected by the Department were limited for the purposes of the contested case process in Docket No. P421/IC-02-197. It is the position of the Department that Qwest has always been obligated to file this agreement.

This agreement contains one or more bracketed provisions. The Department disagrees with Qwest's position that the bracketed provisions are 47 U.S.C. § 251(b) and (c) services, and are the only provisions that the Commission has authority to approve under 47 U.S.C. § 252(e). The Minnesota Commission reviews for approval interconnection agreements in their entirety. If, however, the Commission determines that portions of these negotiated agreements are discriminatory to non-parties or are otherwise against the public interest, the Commission has the authority to reject all or part of the agreements. The ability of any CLEC to opt into provisions contained in the document is governed by Sections 252(a), (e) and (i) of the Telecommunications Act.

Since the Department does not believe that this agreement contains any provisions that are discriminatory to non-parties or are otherwise against the public interest, the Department recommends that the Commission approve this agreement in its entirety.

B. *RECOMMENDATION OF THE DEPARTMENT*

__x__1. Accept the interconnection agreement/amendment.

Conditions: See Checklist Item A.6.

____2. Reject the interconnection agreement/amendment. (Not subject to the standing order.)

C-02-197

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
100 Washington Square, Suite 1700
100 Washington Avenue South
Minneapolis, Minnesota 55401-2138

September 20, 2002

Burl W. Haar, Executive Secretary
MN Public Utilities Commission
350 Metro Square Bldg.
121 Seventh Place E.
St. Paul, MN 55101

RE: In the Matter of the Complaint of the Minnesota Department of Commerce Against Qwest Corporation Regarding Unfiled Agreements;
OAH Docket No. 6-2500-14782-2

Dear Mr. Haar:

Enclosed herewith and served upon you by mail is the Administrative Law Judge's **Findings of Fact, Conclusions and Recommendation** in the above-entitled matter. Also enclosed is the official record. Our file in this matter is now being closed.

Sincerely,

Allan W. Klein

ALLAN W. KLEIN
Administrative Law Judge

Telephone: 612/341-7609

AWK:cr
Encl.

cc: All Parties on Attached Service List

EXHIBIT "C"

OFFICIAL SERVICE LIST
Unfiled Agreements Complaint
P-421/C02-197
6-2500-14782-2
As of April 22, 2002

Burl W. Haar (15) Executive Secretary MN Public Utilities Commission 121 E. 7th Place, Suite 350 St. Paul, MN 55101-2147	Steven H. Alpert Assistant Attorney General 525 Park Street, Suite 200 St. Paul, MN 55103-2106
Linda Chavez (4) Telephone Docketing Coordinator MN Dept. of Commerce 85 Seventh Place E., Suite 500 St. Paul, MN 55101-2198	Gregory Merz Gray, Plant, Mooty 3400 City Center 33 S. 6th Street Minneapolis, MN 55402-3796
Allan W. Klein Administrative Law Judge Suite 1700 100 Washington Avenue South Minneapolis MN 55401	Mary R. Crowson Assistant Attorney General 445 Minnesota Street, Suite 900 St. Paul, MN 55101-2127
Jason D. Topp Qwest Corporation 200 S. 5th Street, Room 395 Minneapolis, MN 55402	Steven H. Weigler AT&T 1875 Lawrence Street, Suite 1524 Denver, CO 80202
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Mark J. Ayotte Briggs and Morgan, P.A. 2200 First National Bank Bldg. 332 Minnesota Street St. Paul, MN 55101	Thomas M. Koutsky Z-Tel Communications, Inc. 1200 19th Street N.W., Suite 500 Washington, DC 20036
Joy Gullikson Onvoy, Inc. 3rd Floor, 10405 6th Ave. N. Plymouth, MN 55441	Leslie Lehr MCI WorldCom 638 Summit Avenue St. Paul, MN 55105
John F. Gibbs Robins, Kaplan, Miller & Ciresi 2800 LaSalle Plaza 800 LaSalle Ave. Minneapolis, MN 55402	

6-2500-14782-2
P-421/C-02-197

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE PUBLIC UTILITIES COMMISSION

In the Matter of the Complaint of the Minnesota Department of Commerce Against Qwest Corporation Regarding Unfiled Agreements	**FINDINGS OF FACT, CONCLUSIONS, RECOMMENDATION AND MEMORANDUM**

Hearings in this matter were held on April 29-May 2, 2002 and August 6, 2002, at St. Paul, Minnesota. The record closed on September 13, 2002, upon issuance of the final ruling on the contents of the record.

Qwest Corporation ("Qwest") was represented by Peter S. Spivack, Cynthia Mitchell and Douglas R. M. Nazarian, Hogan & Hartson, LLP, 555 Thirteenth Street, N.W., Washington, D.C. 20004-1109. Qwest Corporation was also represented by Jason D. Topp, 200 S. 5th Street, Room 395, Minneapolis, MN 55402.

The Minnesota Department of Commerce ("Department" or "DOC") was represented by Steven H. Alpert, Assistant Attorney General, 525 Park Street, Suite 200, St. Paul, MN 55103-2106.

AT&T Communications of the Midwest, Inc., TCG Minnesota, Inc., and AT&T Broadband Phone of Minnesota, Inc. (collectively "AT&T") was represented by Gary B. Witt and Steven H. Weigler, AT&T Law Department, 1875 Lawrence Street, Suite 1575, Denver, CO 80202.

Onvoy, Inc. was represented by Michael J. Hoff and Joy Gullikson, 1405 6th Avenue North, 3rd Floor, Plymouth, MN 55441.

WorldCom, Inc. was represented by Gregory R. Merz, Grey, Plant, Mooty, Mooty & Bennett, 3400 City Center, 33 South 6th Street, Minneapolis, MN 55402, and Lesley James Lehr, 638 Summit Avenue, St. Paul, MN 55101.

The Residential Utility and Small Business Division of the Office of Attorney General ("OAG") was represented by Mary R. Crowson, Assistant Attorney General, 445 Minnesota Street, Suite 900, St. Paul, MN 55101.

Time Warner Telecom of Minnesota was represented by John F. Gibbs and Rebecca M. Liethen, Robins, Kaplan, Miller & Ciresi, 2800 LaSalle Plaza, 800 LaSalle Avenue, Minneapolis, MN 55402.

Z-Tel Communications, Inc., a non-party participant, was represented by Mark J. Ayotte, Briggs and Morgan, 2200 First National Bank Bldg., 332 Minnesota Street, St. Paul, MN 55101.

The staff of the Minnesota Pubic Utilities commission ("Commission") was represented by Kevin O'Grady.

NOTICE

Notice is hereby given that pursuant to Minn. Stat. § 14.61, and the Rules of Practice of the Public Utilities Commission and the Office of Administrative Hearings, exceptions to this report, if any, by any party adversely affected must be filed within 10 days of the mailing date hereof and replies to exceptions within 10 days after that, or such other date as established by the Commission's Executive Secretary.

Questions regarding the filing of exceptions should be directed to Dr. Burl Haar, Executive Secretary, Minnesota Public Utilities Commission, Suite 350 Metro Square, 121 Seventh Place East, St. Paul, MN 55101. Exceptions must be specific and stated and numbered separately. Oral argument before a majority of the Commission will be permitted to all parties adversely affected by the Recommendation who request such argument. Such request must accompany the filed exceptions or reply, and an original and 14 copies of each document should be filed with the Commission.

The Minnesota Public Utilities Commission will make the final determination of the matter after the expiration of the period for filing exceptions as set forth above, or after oral argument, if such is requested and had in the matter.

Further notice is hereby given that the Commission may, at its own discretion, accept or reject the Administrative Law Judge's Recommendation and that said Recommendation has no legal effect unless expressly adopted by the Commission as its final order.

STATEMENT OF ISSUES

When the Commission referred this matter to the Office of Administrative Hearings on March 12, 2002, the Commission defined the following four issues to be addressed in the contested case hearing:

1. Whether the agreements or any portion thereof (including terminated agreements) needed to be filed with the Commission for review;

2. If the agreements needed to be filed, whether they were filed under other settings;

3. Whether there were any exculpatory reasons why the agreements were not filed; and

4. Recommendations as to whether disciplinary action/penalties are appropriate.

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

Statutory Framework – Jurisdiction and Authority

1. Minn. Stat. § 237.081 authorizes the Commission to investigate any matter relating to any telephone service.

2. Minn. Stat. § 237.09 prohibits discrimination in intrastate service.

3. Minn. Stat. § 237.121 prohibits unreasonable or discriminatory restrictions on resale.

4. Minn. Stat. § 237.16, subd. 5 grants the Commission authority to revoke or temporarily suspend a certificate of authority for intentional violation of the Commission's rules or orders, or intentional violation of any applicable state or federal law relating to the provision of telephone or telecommunications service.

5. Minn. Stat. § 237.462 authorizes the Commission to assess monetary penalties for knowing and intentional violations of: (1) sections 237.09, 237.121, and 237.16; or (2) any duty of a telephone company imposed upon it by section 251, paragraph (a), (b), or (c) of the Telecommunications Act of 1996 that relates to service provided in the state. The statute goes on to set forth procedures and a list of considerations the Commission must consider when assessing a penalty.

6. Section 252(a) of the Telecommunications Act of 1996 addresses procedures for negotiating, arbitrating, and obtaining approval of interconnection agreements. With regard to voluntary negotiations, § 252(a)(1) provides that upon receiving a request for interconnection, services, or network elements pursuant to section 251 (which establishes a general duty to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers) an incumbent LEC may negotiate "a binding agreement" with the requesting carrier without regard to the standards set forth in subsections (b) and (c) of section 251. Section 252(a)(1) provides that the agreement shall include a detailed schedule of itemized charges "for interconnection and each service or network element included in the agreement." The agreement shall be submitted to the State commission for approval under § 252(e).[1] The state commission must approve or reject a negotiated agreement within 90 days of submission;[2] it may reject a negotiated agreement only if the agreement discriminates

[1] *See* 47 U.S.C. § 252(a)(1).
[2] *Id.* § 252(e)(4).

against other telecommunications carriers not a party to the agreement, or if the agreement is not consistent with the public interest, convenience, and necessity.[3]

7. With regard to arbitrated agreements, § 252(c) provides that the state commission shall ensure that the agreement meets the requirements of § 251; establishes rates for interconnection, services, or network elements pursuant to § 252(d); and provides a schedule for implementing the terms and conditions of the agreement. An arbitrated agreement shall be submitted to the state commission, which must approve or reject the agreement within 30 days.[4] The state commission may reject it if the agreement fails to meet the requirements of § 251 or the pricing standards of § 252(d).[5]

8. Once an agreement is approved, whether through negotiation or arbitration, a state commission shall make a copy of each approved agreement available for public inspection and copying.[6] In addition, any LEC shall make available any "interconnection, service, or network element provided under an agreement approved under this section" to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement (commonly referred to as "pick and choose").[7]

9. Section 251(b)(1) prohibits LECs from imposing unreasonable or discriminatory conditions on resale, and § 251(c)(2)(D) requires LECs to provide interconnection on rates, terms and conditions that are nondiscriminatory. Section 251(c)(3) requires ILECS to provide access to network elements on an unbundled basis on rates, terms and conditions that are nondiscriminatory.

10. Congress intended not only that state commissions safeguard the public from discriminatory agreements and those that are not in the public interest, but that state commissions become a repository for agreements from which CLECs can pick and choose terms favorable to their individual situations from agreements already approved, without going through expensive negotiations or arbitration proceedings. This "repository" function is the mechanism by which CLECs can be assured that they are obtaining nondiscriminatory treatment by the ILEC. In its First Report and Order, the FCC summarized the policy reasons for requiring that all interconnection agreements be filed, even those negotiated before passage of the 1996 Act:

> As a matter of policy, moreover, we believe that requiring filing of all interconnection agreements best promotes Congress's stated goals of opening up local markets to competition, and permitting interconnection on just, reasonable, and nondiscriminatory terms. State commissions should have the opportunity to review all agreements, including those that were negotiated before the new law was enacted, to ensure that such

[3] *Id.* § 252((e)(2).
[4] *Id.* § 252(e)(4).
[5] *Id.* § 252(e)(2).
[6] *Id.* § 252(h).
[7] *Id.* § 252(i).

agreements do not discriminate against third parties, and are not contrary to the public interest. In particular, preexisting agreements may include provisions that violate or are inconsistent with the procompetitive goals of the 1996 Act, and states may elect to reject such agreements under section 252(e)(2)(A). Requiring all contracts to be filed also limits an incumbent LEC's ability to discriminate among carriers, for at least two reasons. First, requiring public filing of agreements enables carriers to have information about rates, terms, and conditions that an incumbent LEC makes available to others. Second, any interconnection, service or network element provided under an agreement approved by the state commission under Section 252 must be made available to any other requesting telecommunications carrier upon the same terms and conditions, in accordance with Section 252(i).[8]

11. There are no exceptions to this rule. If the substance of an agreement makes the agreement an interconnection agreement, then it must be filed regardless of its title or how it was negotiated. An agreement to settle disputes, for example, can also be an interconnection agreement, as the Commission found in the MCIWorldCom Order discussed below. A "business-to-business" agreement can also be an interconnection agreement.

12. The unfiled agreements at issue in this case are negotiated, rather than arbitrated agreements. Section 252(a) permits negotiated agreements based on a request for "interconnection, services, or network elements" pursuant to section 251. The only express requirement of negotiated agreements is that they contain, at minimum, a detailed schedule of itemized charges "for interconnection and each service or network element" included in the agreement. The pick and choose provision similarly allows CLECs to adopt any term or condition relating to "interconnection, service, or network element" provided under an approved agreement. These sections of the statute, read together, clearly and unambiguously require that negotiated agreements concerning interconnection, services, or network elements and the rates therefor be filed for approval by the state commission. If the parties negotiate an amendment to an earlier, approved agreement, whether it is characterized as a contractual amendment or settlement of a dispute, the amendment should also be filed so that the Commission may perform its function of ensuring that, as amended, the agreements do not discriminate, are not contrary to the public interest, and are available to other telecommunications carriers under § 252(i).

13. The Commission independently reached the conclusion in two different dockets that all interconnection agreements and interconnection agreement amendments must be filed with the Commission under 47 U.S.C. §252. Qwest was a party to both dockets.

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[8] *Local Competition First Report and Order,* 11 FCC Rcd at 15499, ¶ 167. *See also id.* at ¶ 168: "[c]onversely, excluding certain agreements from public disclosure could have anticompetitive consequences."

14. Two years ago, in its "Order Approving Settlement" in Docket No. P-421/C-97-1348 (the "MCIWorldcom Order"), the Commission reviewed a settlement agreement (the "Minnesota Agreement") between Qwest and MCIWorldcom containing service quality guarantees related to provisioning different network elements. While MCIWorldcom argued that the attachment to the Minnesota Agreement setting out the guarantees amended its interconnection agreement, Qwest (then U S WEST) argued that the attachment merely constituted a side agreement, separate from the interconnection agreement. Qwest also argued that it would honor the agreement in any event; that other carriers were free to negotiate similar terms directly with Qwest; and that participation in the wholesale service quality docket was an obvious substitute for adopting the proposed settlement language.[9]

15. The Commission rejected Qwest's arguments and held that the Minnesota Agreement amended MCIWorldcom's interconnection agreement, thus making its terms available for pick and choose by other CLECs under § 252(i). The Commission found that an agreement that has "prospective application governing the quality of service" that an ILEC will offer a CLEC must be made available to other carriers under § 252(i). It held:

> The Commission is not persuaded [by USWC's arguments]. To open the local telecommunications market to competition, Congress directed incumbent local telephone companies to permit competitors to interconnect on reasonable terms. And, where terms are deemed reasonable for one party, they should be deemed reasonable for other parties as well. This principle is reflected in 47 U.S.C. § 252(i), as noted above. Furthermore, an incumbent telephone company must offer nondiscriminatory access to UNEs, 47 U.S.C. § 251(c)(3), and interconnection that is at least equal in quality to that provided to any other party, § 251(c)(2)(C). The terms of Attachment A have prospective application governing the quality of service that USWC will offer MCIW. Having found the terms of Attachment A reasonable, the Commission is compelled to ensure that other CLECs have the opportunity to receive USWC's service on an equal basis. § 252(e)(2)(B).
>
> Moreover, even if the Commission were not required to conclude that Attachment A amends the USWC/MCIW interconnection agreements, the Commission has ample reason to prefer that result. The self-executing nature of the agreement may promote administrative efficiency and avert future complaints. Both the Department and Eschelon note that making this agreement a part of MCIW's interconnection agreements – thus making it available to other CLECs – would spare other CLECs, government agencies, and USWC itself the expense of re-litigating this issue in the

[9] *In the Matter of a Complaint of MCImetro Access Transmission Services, Inc. Against U S WEST Communications, Inc. for Anticompetitive Conduct*, Docket P-421/C-97-1348, *Order Approving Settlement*, September 18, 2000, at 4-5 (the "MCIWorldcom Order").

> context of other interconnection agreements. That is no small consideration: The Department notes that the interconnection language that Attachment A is designed to effectuate is virtually identical to the language in the USWC/AT&T interconnection agreement; that interconnection agreement has been widely adopted by other CLECs.
>
> Of course, nothing in this decision will impair a CLEC's discretion to negotiate or arbitrate for different terms, this decision will merely make the Attachment A terms available for adoption.[10]

16. The second time the Commission addressed this issue arose in the context of a complaint brought by Dakota Telecom, Inc. ("DTI") against Qwest. DTI complained that Qwest (then U S WEST) violated its interconnection agreement with DTI by not completing calls between DTI's customers and exchanges that had Extended Area Service with Pipestone, Marshall, and Luverne.[11] The parties (and a number of intervenors) settled the action by entering into an agreement that was, in all material respects, the same as the USLink Agreement referred to in the Department's Amended Verified Complaint at Paragraphs 239 - 251. The Commission reviewed the agreement and held as follows:

> The Commission has analyzed the settlement terms and finds that they require Qwest to do things that the Company was not required to do under the existing interconnection agreement. For instance, in local calling areas not currently served by an official local tandem, the Settlement Agreement requires Qwest to provide CLECs with local transit service to allow CLECs to complete EAS calls to and from the exchanges included in Commission Approved EAS calling areas.
>
> As such, the Settlement Agreement amends the interconnection agreements between Qwest and the CLECs signing the settlement agreement. The parties' interconnection agreements, as amended by the settlement terms, will be available to any CLEC requesting a copy pursuant to Section 252(i) of the Federal Telecommunications Act.

17. The MCIWorldCom Order establishes that an agreement that has "prospective application governing quality of service" must be made available to other CLECs under § 252(i). Similarly, the DTI Order establishes the Commission's view that any agreement that amends the interconnection agreement between a CLEC and an ILEC is an interconnection agreement that must be made available to other CLECs

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[10] *Id.* at 5.

[11] *In the Matter of a Complaint by Dakota Telecom, Inc. Against Qwest Corporation*, Docket No. P-421/C-00-373, *Order Approving Settlement*, July 25, 2001, p. 1 (the "DTI Order").

under § 252(i). The only mechanism for making such agreements available under § 252(i) is to submit each for approval by the Commission under § 252(e).

18. There is no statutory definition for the term "interconnection agreement." Nonetheless, the Act, the FCC and the Commission have all given broad but clear guidance as to what an interconnection agreement is. In addition, industry practice since the passage of the Act has also helped define the term.

19. Several different definitions have been proposed in this hearing. The standard used by the Department (the "Department Proposed Standard") is "whether the provision created a concrete and specific legal obligation for Qwest to do something or refrain from doing something on a forward-looking basis to meet the requirements of §§ 251(b) and (c)."[12]

20. AT&T proposes a five step analysis, as follows:

1. The word "agreement" must be interpreted broadly to cover comprehensive interconnection agreements as well as agreements which cover only specific segments, fragments, or parts of the overall interconnection arrangement between carriers.

2. If the agreement has been negotiated between the incumbent and another carrier, and it relates to "interconnection with the local exchange carrier's network," then the agreement should be subject to commission approval, and filed pursuant to section 252(h).

3. Guidance on the question of whether a particular agreement relates to interconnection should be obtained initially from other, previously filed agreements. If the subject matter of the agreement in question is similar to that of a previously filed agreement, then the new agreement should be subject to commission approval, and filed pursuant to section 252(h).

4. Further guidance on the question of whether a particular agreement relates to interconnection should be obtained by asking whether and to what extent the terms and conditions of the agreement in question constitute or allow discrimination between and among CLECs, or provide an advantage to one CLEC at the expense or to the detriment of another.

[12] Ex. 200 at 9.

5. In the event the agreement is identical to a previously filed agreement, either in whole or in part, then the fact that the previously filed agreement remains open to public inspection does not eliminate or even diminish the obligation of the incumbent to seek approval for and file the second agreement.

21. OAG proposed "any binding agreement that includes any term of interconnection or the provisioning of services or network elements which in turn are used to provide telecommunications services to the public."

22. Other state utilities commissions have considered this question in their own investigations of some of the agreements at issue here. One, the Iowa Utilities Board, has reached the conclusion that an interconnection agreement is "a negotiated or arbitrated contractual arrangement between an ILEC and a CLEC that is binding; relates to interconnection, services, or network elements, pursuant to § 251, or defines or affects the prospective interconnection relationship between two LECs. This definition includes any agreement modifying or amending any part of an existing interconnection agreement."[13]

23. In its post-hearing memorandum, Qwest argues, "The 1996 Act requires the filing of only a detailed schedule of rates and a description of services" (the "Qwest Proposed Standard").[14] In its proposed findings, Qwest argues for limiting filings to "a detailed schedule of itemized charges for interconnection and each service or network element included in the agreement."[15]

24. In Section 4 of its Statement of Generally Available Terms and Conditions for Interconnection, Unbundled Network Elements, Ancillary Services, and Resale of Telecommunications Services Provided by Qwest Corporation in the State of Minnesota ("SGAT"), however, Qwest defines an interconnection agreement as "an agreement entered into between Qwest and CLEC for Interconnection, Unbundled Network Elements or other services as a result of negotiations, adoption and/or arbitration or a combination thereof pursuant to Section 252 of the Act."

25. The interconnection relationship between ILECs and CLECs can change over time (particularly based on technological changes). CLECs differ among themselves. The boundaries of what must be in an interconnection agreement must be fluid enough to recognize these differences, but they also must be fluid to reflect the underlying goals of the Act. They must allow flexibility in contractual relationships, while at the same time, preventing discrimination by ILECs.

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[13] Order Making Tentative Findings, Giving Notice for Purposes of Civil Penalties, and Granting Opportunity to Request Hearing In Re: AT&T Corporation v. Qwest Corporation, Docket No. FCU-02-02, May 29, 2002, at 8.
[14] Qwest Memorandum at 3.
[15] Qwest Proposed Findings at 36.

26. Qwest's proffered standard, which would leave most of the important details regarding interconnection and UNE access for unfiled side agreements, would leave it free to grant favoritism to its chosen CLECs over others, without the ability of any regulatory body to oversee its conduct.

27. As the Supreme Court recognized, the Commission cannot determine if Qwest is providing discriminatory rates unless it knows every service offered in exchange for that rate, which means the Commission must know the "details" that Qwest argues should be excluded from interconnection agreements.[16]

28. While the Department, AT&T, OAG, the Iowa Utilities Board, and Qwest's SGAT may have used different words, the bottom line is that all of the definitions being discussed in this litigation (other than that currently proffered by Qwest) are, at the core, the same.

29. To the extent that the parties have requested a specific definition of "interconnection agreement" for use on a going-forward basis, it should be defined as any contractual agreement or amendment thereto, whether negotiated or arbitrated, between an ILEC and any other telecommunications carrier, that concerns the rates, terms, or conditions for provision of interconnection, services, or network elements

Procedural History

30. In the summer of 2001, the Department began an investigation to determine if Qwest was engaged in anticompetitive conduct in Minnesota. As a part of that investigation the Department retained a consultant who reviewed more than 70 agreements between Qwest and CLECs. Out of those 70+ agreements, 11 were selected to serve as the basis of the Department's initial complaint.[17]

31. On February 14, 2002, the Department filed a complaint against Qwest, claiming Qwest violated state and federal law by not submitting for Commission approval the eleven agreements with competitive local exchange carriers ("CLEC"). On March 1, 2002, Qwest filed its answer to the complaint. On that same date, Qwest also filed a conditional Application for Approval of Certain Negotiated Agreement Provisions between Qwest and Advanced Telecommunications, Inc. (now Eschelon), Covad Communications Company, Small CLECs, McLeod USA, and US Link and Info Tel Communications, LLC.

32. On March 5, 2002, the Commission met and deliberated about the complaint and the joint (DOC and Qwest) request for an expedited proceeding. The Commission determined to refer the matter to the Office of Administrative Hearings for contested case proceedings, requesting that it be heard on an expedited time schedule

[16] *See American Telephone and Telegraph v. Central Office Telephone Company, Inc.*, 524 U.S. 214, 118 S.Ct. 1956 (1998).
[17] Tr. 1:18-20.

following the guidelines set forth in Minn. Stat. § 237.462, subd. 6. The Commission set forth the issues outlined above.

33. On March 19, 2002, the Department filed an amended complaint, and on April 11, 2002, Qwest filed an amended answer. An initial prehearing conference was held on March 20, and the first Prehearing Order was issued on April 3. That Order set the hearing to begin on April 29.

34. On April 29, 2002, the hearing did begin, and extended until May 2.

35. Later in the month of May, the parties were preparing for hearings in the so-called public interest docket.[18] Those hearings began on May 28 and continued into early June. As the parties were preparing for those hearings, however, a number of issues arose which reflected the interplay between this docket (the "unfiled agreements" docket) and the public interest docket. There were a number of motions and prehearing conferences to sort out what should be discussed in each docket. On May 20, 2002, the Department learned of another unfiled agreement that it had not previously been able to document. On May 21, the Department filed a motion in the public interest docket, seeking to delay a portion of that hearing while it could develop its evidence on the newly-discovered unfiled agreement. On May 22, a prehearing conference was held and the Administrative Law Judge ruled that the public interest hearing would go forward as scheduled on May 28, but that the Department could bring a motion to reopen the unfiled agreements docket to present the newly-discovered evidence. The Administrative Law Judge also informed the parties that the hearing record from this unfiled agreements docket, including any reopened portions, would become part of the hearing record in the public interest proceeding. On May 23, the Administrative Law Judge issued an Order memorializing the decisions on the various motions discussed on the previous day.[19] The next day, May 24, the Department moved to reopen the unfiled agreements docket to submit evidence with regard to the newly-discovered agreement. The motion was granted, and the parties proceeded with discovery. On June 14, 2002, the Department filed its Second Amended Complaint, adding the allegation that Qwest had entered into an oral agreement to provide McLeod USA with an 8% to 10% discount on all purchases made by McLeod from Qwest between October 2, 2000 and December 31, 2003.[20]

36. On June 4, a telephone conference was held concerning the scope and schedule of the reopened hearing. It was determined that the scope was limited solely to McLeod III, and that the hearing would be held on July 1. This date proved to be optimistic, as numerous discovery disputes arose between Qwest, the Department, and McLeod. The hearing date was moved to July 17, and then to August 6. The hearing did, in fact, occur on August 6, and was completed in one day. Initial briefs were filed on August 23, reply briefs on September 4, and proposed findings on September 11.

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[18] *In the Matter of a Commission Investigation into Qwest's Compliance with Section 271(d)(3)(C) of the Telecommunications Act of 1996 that the Requested Authorization Is Consistent with the Public Interest, Convenience and Necessity*; PUC Docket No. P-421/CI-01-1373; OAH Docket No. 6-2500-14488-2.

[19] 18th Prehearing Order, May 23, 2002.

[20] This will be referred to hereafter as McLeod III.

Analysis of the Individual Agreements

I. ESCHELON AGREEMENT I

37. On February 28, 2000 U S WEST Communications, Inc. ("U S WEST") and Advanced Telecommunications, Inc. ("ATI") entered into the Confidential / Trade Secret Stipulation Between ATI and U S WEST ("Eschelon Agreement I"). ATI is the predecessor in interest to Eschelon Telecom Inc. ("Eschelon"). U S WEST is the predecessor in interest to Qwest.[21]

38. Qwest did not submit Eschelon Agreement I to the Commission for approval under 47 U.S.C. § 252(e) until March 1, 2002, in response to the Department's complaint in this matter.

39. The specific terms set out in Paragraphs 7, 10-12 and 14 of Eschelon Agreement I do not appear in any approved interconnection agreement or amendment thereto between Qwest and Eschelon.[22]

Paragraph 7

40. Paragraph 7 of Eschelon Agreement I contains a provision by which "the parties agree that for settlement purposes that reciprocal compensation for terminating internet traffic shall be paid at the most favorable rates and terms contained in an agreement executed to date by U S WEST."[23]

41. 47 U.S.C. § 251(b)(5) requires local exchange carriers to establish reciprocal compensation arrangements for the transport and termination of telecommunications.

42. Paragraph 7 of Eschelon Agreement I obligated Qwest to pay reciprocal compensation for terminating internet traffic to Eschelon at the most favorable rates and terms contained in an agreement executed by U S WEST at the time it entered into Eschelon Agreement I.[24]

43. Paragraph 7 of the Eschelon Agreement establishes rates for interconnection. Accordingly, 47 U.S.C. §§ 252(a) and (e) required Qwest to file the terms in Paragraph 7 of Eschelon Agreement I with the Commission.

44. By failing to file Paragraph 7 of Eschelon Agreement I for approval by the Commission, Qwest violated 47 U.S.C. §§ 252(a) and (e).

[21] *See* Statement of Undisputed Facts (SUF) ¶ 2.
[22] SUF ¶¶ 6-9; Ex. 200 – WCD-12 (Qwest response to DOC 054-057 in the 197 Docket.
[23] SUF ¶12; Ex. 200 – WCD-1.
[24] Ex. 200 – WCD-1.

45. Qwest knowingly and intentionally violated 47 U.S.C. §§ 252(a) and (e) in that Qwest knew that those statutes required Paragraph 7 of Eschelon Agreement I to be filed with the Commission but intentionally did not make the required filing.

46. By failing to make this provision available to other CLECs, Qwest knowingly and intentionally discriminated against them in violation of 47 U.S.C. § 251.

Paragraph 10

47. Paragraph 10 of Eschelon Agreement I contains a provision by which "[w]ith respect to termination liability assessments (TLA) and while the Minnesota Commission continues to have an open docket on this issue, [U S WEST] agrees to continue to suspend such assessments in Minnesota when a [U S WEST] customer converts to an ATI customer on a resale basis and to credit ATI with any such TLA payments ATI has made in Minnesota."[25]

48. On October 13, 1998, following U S WEST's filing of tariff and price list revisions imposing termination charges on contract customers choosing to substitute a reseller for U S WEST as the provider of contract services, the Commission had rejected U S WEST's tariff and ordered U S WEST to seek approval before filing a new tariff.

49. U S WEST appealed the Commission's decision to the Minnesota Court of Appeals. On May 4, 1999 the Court of Appeals reversed and remanded the Commission's decision in the original complaint.[26] The Court rejected the Commission's finding that the original tariff language itself prohibited the application of TLAs in resale situations. The Court also found that the Commission had reasonably concluded that the purpose of the tariff was cost recovery, and the Court therefore remanded the case for specific findings on costs and other relevant factors.

50. On June 10, 1999, U S WEST entered into a stipulation with the Commission and agreed to file revised TLA provisions and dismiss its appeal. In return the Commission agreed to act on the new filing under an expedited proceeding and to either delegate a Commission subcommittee or a lead Commissioner to the filing.

51. U S WEST proposed imposing a TLA of 17.66% of the monthly contract rate for each month the customer did not take service directly (the same amount as a reseller's wholesale discount) from Qwest during the first year of the contract, with the rate dropping to 9% during the subsequent contract years.

52. The Commission ruled that Qwest did not meet the Commission's standards of support for the TLA charges and therefore the charges were not just and reasonable rates. The Commission also ruled that the TLA provisions unreasonably restricted resale under Minnesota law, and released an order on October 2, 2001 rejecting the tariff revisions.

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[25] SUF ¶ 15; Ex. 200 – WCD-1.

[26] *Info Tel Communications, LLC v. Minnesota Public Utilities Com'n*, 592 N.W. 2d 880 (Minn. App. 1999).

53. 47 U.S.C. § 251(c)(4) requires ILECs to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not carriers. It also imposes a duty on ILECs not to prohibit, and not to impose discriminatory terms and conditions on, the resale of such services.

54. Paragraph 10 of Eschelon Agreement 1 obligated Qwest to suspend the TLAs on a going forward basis and to credit Eschelon for TLA payments made by Eschelon in Minnesota prior to the date of Eschelon Agreement I. This enhanced Eschelon's ability to obtain and service customers.

55. 47 U.S.C. § 251(c)(4)(B) prohibits ILECs from imposing discriminatory terms and conditions on resale.

56. Paragraph 10 of Eschelon Agreement I relates to the rates paid by Eschelon to resell Qwest services. Accordingly, 47 U.S.C. §§ 252(a) and (e) required Qwest to file the terms in Paragraph 10 of Eschelon Agreement I with the Commission.

57. By failing to file Paragraph 10 of Eschelon Agreement I for approval by the Commission, Qwest violated 47 U.S.C. §§ 252(a) and (e).

58. Qwest knowingly and intentionally violated 47 U.S.C. §§ 252(a) and (e) in that Qwest knew that those statutes required Paragraph 10 of Eschelon Agreement I to be filed with the Commission but intentionally did not make the required filing.

59. By failing to make this provision available to other CLECs, Qwest knowingly and intentionally discriminated against them in violation of 47 U.S.C. § 251.

Paragraphs 11 and 12

60. Paragraphs 11 and 12 of Eschelon Agreement I contain a provision by which Qwest agreed to locate a Coach and a Service Delivery Coordinator on Eschelon's premises, and to dedicate a provisioning team to handle order processing for Eschelon.[27]

61. 47 U.S.C. § 251(c)(3) requires ILECs to provide to any requesting carrier for the provisioning of a telecommunications service, access to unbundled network elements on rates, terms and conditions that are non-discriminatory and meet the requirements of § 251 and § 252.

62. Paragraphs 11 and 12 of Eschelon Agreement I obligated Qwest to provide a dedicated provisioning team to work on-site at Eschelon and help Eschelon gain access to Qwest UNEs.

63. Paragraphs 11 and 12 of Eschelon Agreement I describe the services that Qwest will provide for rates set out in Eschelon Agreement II (see below). In *American Telephone and Telegraph v. Central Office Telephone Company, Inc.*, 524 U.S. 214,

[27] SUF ¶ 21.

118 S.Ct. 1956 (1998), the Supreme Court held that the term "rates" includes terms that involve the provisioning of services and billing. Accordingly, 47 U.S.C. §§ 252(a) and (e) required Qwest to file the terms in Paragraphs 11 and 12 of Eschelon Agreement I with the Commission.

64. By failing to file Paragraphs 11 and 12 of Eschelon Agreement I for approval by the Commission, Qwest violated 47 U.S.C. §§ 252(a) and (e).

65. Qwest knowingly and intentionally violated 47 U.S.C. §§ 252(a) and (e) in that Qwest knew that those statutes required Paragraphs 11 and 12 of Eschelon Agreement I to be filed with the Commission but intentionally did not make the required filing.

66. Qwest filed an Interconnection Agreement Amendment stating that "[f]or at least a one-year period, Eschelon agrees to pay Qwest for the services of a Qwest dedicated provisioning team to work on Eschelon's premises."[28] That filing was insufficient to satisfy Qwest's obligations under 47 U.S.C. § 252.

67. By failing to make this provision available to other CLECs, Qwest knowingly and intentionally discriminated against them in violation of 47 U.S.C. § 251.

Paragraph 14

68. Paragraph 14 of Eschelon Agreement I contains a provision by which the parties agreed to alternative dispute resolution procedures "in addition to the dispute resolution mechanism provided under the Interconnection Agreement."[29]

69. Paragraph 14 of Eschelon Amendment I expressly modified the terms of the interconnection agreement between Qwest and Eschelon. Under Commission precedent set in the WorldCom Order and the Dakota Telecom Order, Qwest had an obligation to file the provision with the Commission.

70. A term that defines how a CLEC and an ILEC will resolve disputes over interconnection is a term of interconnection. Similarly, a term that defines how a CLEC and an ILEC will resolve disputes over the provisioning of network elements is a term for providing access to those UNEs, and a term that defines how a CLEC and an ILEC will resolve disputes regarding services is a term for providing those services

71. 47 U.S.C. § 251 requires ILECs to provide interconnection, network elements and services on a non-discriminatory basis.

72. Paragraph 14 obligated Qwest to abide by the alternative dispute resolution procedures it describes when a dispute arises with Eschelon regarding interconnection, network elements or services.

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[28] Ex. 1.
[29] Ex. 200 – WCD-1.

73. Paragraph 14 of Eschelon Agreement I describes terms for provisioning interconnection and access to UNEs at the rates set forth in Eschelon's interconnection agreement with Qwest. The term "rates" includes terms that involve the provisioning of services and billing. Accordingly, 47 U.S.C. §§ 252(a) and (e) required Qwest to file the terms in Paragraph 14 of Eschelon Agreement I with the Commission.

74. By failing to file Paragraph 14 of Eschelon Agreement I for approval by the Commission, Qwest violated 47 U.S.C. §§ 252(a) and (e).

75. Qwest knowingly and intentionally violated 47 U.S.C. §§ 252(a) and (e) in that Qwest knew that those statutes required Paragraph 14 of Eschelon Agreement I to be filed with the Commission but intentionally did not make the required filing.

76. Qwest gave Eschelon certain rights through Paragraph 14 that CLECs could not obtain anywhere else. For example, Paragraph 14 permits written discovery and one oral deposition in any arbitration arising from a dispute under its provisions. Qwest's SGAT, however, permits no discovery "except for the exchange of documents deemed necessary by the Arbitrator to an understanding and determination of the dispute."[30] There is no approved interconnection agreement in Minnesota that gives any CLEC the same dispute resolution mechanism set forth in Paragraph 14.[31]

77. By failing to make this provision available to other CLECs, Qwest knowingly and intentionally discriminated against them in violation of 47 U.S.C. § 251.

ESCHELON AGREEMENT II

78. On July 21, 2000 Qwest and Eschelon entered into an agreement entitled Trial Agreement ("Eschelon Agreement II").[32]

79. Qwest did not submit Eschelon Agreement II to the Commission for approval under 47 U.S.C. § 252(e) until March 1, 2002, in response to the Department's complaint in this matter.

80. The specific terms set out in Eschelon Agreement II do not appear in any approved interconnection agreement or amendment thereto between Qwest and Eschelon.[33]

81. Eschelon Agreement II contains detailed provisions – including rates, roles and responsibilities – for creating and operating Qwest's on-site provisioning team at Eschelon.[34] Qwest provided no other CLEC in Minnesota with an on-site provisioning team.

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[30] SGAT § 5.18.3.2, Exhibit WCD-15.
[31] Ex. 200 – WCD-12 (Qwest's Response to DOC 060 in the 814 Docket).
[32] SUF ¶ 26.
[33] SUF ¶ 32; Ex. 200 – WCD-12 (Qwest response to DOC 059 in the 197 Docket).
[34] Ex. 200 – WCD-2.

82. 47 U.S.C. § 251(c)(3) requires ILECs to provide to any requesting carrier for the provisioning of a telecommunications service, access to unbundled network elements on rates, terms and conditions that are non-discriminatory and meet the requirements of § 251 and § 252.

83. Eschelon Agreement II obligated Qwest to provide a dedicated provisioning team to work on-site at Eschelon and help Eschelon gain access to Qwest UNEs.

84. Eschelon Agreement II describes in detail the services that Qwest will provide for the rate of $9,206 per month. The term "rates" includes terms that involve the provisioning of services and billing. Accordingly, 47 U.S.C. §§ 252(a) and (e) required Qwest to file the terms of Eschelon Agreement II with the Commission.

85. By failing to file Eschelon Agreement II for approval by the Commission, Qwest violated 47 U.S.C. §§ 252(a) and (e).

86. Qwest knowingly and intentionally violated 47 U.S.C. §§ 252(a) and (e) in that Qwest knew that those statutes required it to file Eschelon Agreement II with the Commission but intentionally did not make the required filing.

87. Qwest filed an Interconnection Agreement Amendment stating that "[f]or at least a one-year period, Eschelon agrees to pay Qwest for the services of a Qwest dedicated provisioning team to work on Eschelon's premises."[35] That filing was insufficient to satisfy Qwest's obligations under 47 U.S.C. § 252.

88. By failing to make this provision available to other CLECs, Qwest knowingly and intentionally discriminated against them in violation of 47 U.S.C. § 251.

II. ESCHELON AGREEMENT III

89. On November 15, 2000 Qwest and Eschelon entered into a letter agreement ("Eschelon Agreement III").[36]

90. Qwest terminated Eschelon Agreement III on March 1, 2002.[37]

91. Qwest did not submit Eschelon Agreement III to the Commission for approval under 47 U.S.C. § 252(e) until March 1, 2002, in response to the Department's complaint in this matter.[38]

92. The specific terms set out in Section 2 of Eschelon Agreement III do not appear in any approved interconnection agreement or amendment thereto between Qwest and Eschelon.[39]

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[35] Ex. 1.
[36] SUF ¶ 34.
[37] SUF ¶ 36.
[38] SUF ¶ 41.

93. The specific terms set out in Section 3 of Eschelon Agreement III do not appear in any interconnection agreement or amendment thereto between Qwest and Eschelon that the Commission has approved.[40]

94. [BEGIN TRADE SECRET] [END TRADE SECRET] The phrase concerning Interconnection Agreements does not appear in the final version of Eschelon III.

95. Trial Exhibits 227 and 228 establish that Qwest took affirmative action specifically for the purpose of keeping Eschelon Agreement III from being filed with the Commission.

Section 2

96. Section 2 of Eschelon Agreement III requires Qwest to participate in quarterly meetings with Eschelon, attended by executives from both companies at the vice-president or above level, to discuss business and interconnection issues

97. Section 2 of Eschelon Agreement III amended Eschelon's interconnection agreement with Qwest in the same way as Paragraph 14 of Eschelon Agreement I did. It created a new obligation for Qwest relating to interconnection and the provisioning of UNEs that did not exist in the Eschelon interconnection agreement.

98. A term that defines how a CLEC and an ILEC will work with each other on interconnection issues and address concerns regarding access to UNEs and other services is a term for providing interconnection, access to UNEs and/or telecommunications services.

99. 47 U.S.C. § 251 requires ILECs to provide interconnection, network elements and services on a non-discriminatory basis.

100. Section 2 of Eschelon Agreement III obligated Qwest to provide senior executives to meet with Eschelon on a quarterly basis to discuss interconnection, access to UNEs and services.

101. Section 2 of Eschelon Agreement III describes terms for provisioning interconnection and access to UNEs at the rates set forth in Eschelon's interconnection agreement with Qwest. The term "rates" includes terms that involve the provisioning of services and billing. Accordingly, 47 U.S.C. §§ 252(a) and (e) required Qwest to file the terms in Section 2 of Eschelon Agreement III with the Commission.

102. By failing to file Section 2 of Eschelon Agreement III for approval by the Commission, Qwest violated 47 U.S.C. §§ 252(a) and (e).

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[39] Ex. 200 – WCD-12 (Qwest response to DOC 061 in the 197 Docket).
[40] Ex. 200 – WCD-12 (Qwest response to DOC 062 in the 197 Docket).

103. Qwest knowingly and intentionally violated 47 U.S.C. §§ 252(a) and (e) in that Qwest knew that those statutes required Section 2 of Eschelon Agreement III to be filed with the Commission but intentionally did not make the required filing.

104. The Act requires Qwest not to discriminate when providing interconnection, access to network elements and services. Qwest gave Eschelon certain rights through Section 2 of Eschelon Agreement III that CLECs could not obtain anywhere else. There is no approved interconnection agreement in Minnesota that requires Qwest to provide any CLEC with the same level of access to Qwest senior executives on a quarterly basis.[41]

105. By failing to make this provision available to other CLECs, Qwest knowingly and intentionally discriminated against them in violation of 47 U.S.C. § 251.

106. Section 1.3 of the Eighth Amendment to Eschelon Interconnection Agreement states that "[t]he Parties wish to establish a business-to-business relationship and have agreed that they will attempt to resolve all differences or issues that may arise under the Agreements or this Amendment under an escalation process to be established between the parties." This is not a sufficient filing to satisfy 47 U.S.C. § 252 with respect to Section 2 of Eschelon Agreement III.

Section 3

107. Section 3 of Eschelon Agreement III committed Qwest to respond to a six-level escalation process for resolving interconnection disputes. It also committed Qwest's ultimate decision maker, its CEO, to address disputes that reached the third level of the escalation procedures. Finally, it contains a provision by which Eschelon and Qwest agreed to waive primary jurisdiction in any state utility or service commission and to waive tariff limitations on damages or other limitations on reasonably foreseeable damages.

108. Level 1 of the escalation process requires Qwest to make Vice Presidents available to discuss Eschelon's interconnection issues. Level 2 involves Senior Vice Presidents. Level 3 involves CEOs. Level 4 is arbitration. Level 5 is a return to CEOs, and Level 6 is litigation in state or federal courts. Levels 1, 2, 3 and 5 are assigned 10 business days for completion. Level 4 allows either party to request expedited arbitration to be completed within 90 days.

109. In addition, Section 3 provides that if a dispute reaches Level 6, "the parties waive (a) primary jurisdiction in any state utility or service commission; and (b) any tariff limitations on damages or other limitation on actual damages, to the extent such damages are reasonably foreseeable and acknowledging each party's duty to mitigate damages."

110. 47 U.S.C. § 251 requires ILECs to provide interconnection, network elements and services on a non-discriminatory basis.

[41] Ex. 200 – WCD-13 (Qwest's Response to DOC 062 in the 814 Docket).

111. Section 3 obligated Qwest to participate in a well-defined set of escalation procedures for resolving problems arising under its interconnection agreement with Eschelon. Section 3 expressly says that it applies to all business disputes between Qwest and Eschelon, "including but not limited to, their Interconnection Agreements and Amendments." Terms and conditions for resolving disputes regarding interconnection and the provisioning of network elements are terms and conditions for providing those things to CLECs.

112. Section 3 of Eschelon Agreement III describes terms for provisioning interconnection and access to UNEs at the rates set forth in Eschelon's interconnection agreement with Qwest. The term "rates" includes terms that involve the provisioning of services and billing. Accordingly, 47 U.S.C. §§ 252(a) and (e) required Qwest to file the terms in Section 3 of Eschelon Agreement III with the Commission.

113. By failing to file Section 3 of Eschelon Agreement III for approval by the Commission, Qwest violated 47 U.S.C. §§ 252(a) and (e).

114. Qwest knowingly and intentionally violated 47 U.S.C. §§ 252(a) and (e) in that Qwest knew that those statutes required Section 3 of Eschelon Agreement III to be filed with the Commission but intentionally did not make the required filing.

115. The Act requires Qwest not to discriminate when providing interconnection, access to network elements and services. Qwest gave Eschelon certain rights through Section 3 of Eschelon Agreement III that CLECs could not obtain anywhere else. There is no approved interconnection agreement in Minnesota that requires Qwest to provide any CLEC with the same escalation process and/or waivers on jurisdiction and damage waivers.[42]

116. The escalation procedures made available to CLECs generally, as cited by Qwest witness Dana Filip[43] begin with the Service Delivery Coordinator and end at the Senior Director / Vice President level.[44] The six-level procedures in Eschelon Agreement III, in contrast, start at the Vice President level. Accordingly, Section 3 of Eschelon Agreement III allows Eschelon to start the escalation process where, according to Qwest's testimony, the process for every other CLEC ends.

117. By failing to make this provision available to other CLECs, Qwest knowingly and intentionally discriminated against them in violation of 47 U.S.C. § 251.

118. Section 1.3 of the Eighth Amendment to Eschelon Interconnection Agreement states that "[t]he Parties wish to establish a business-to-business relationship and have agreed that they will attempt to resolve all differences or issues that may arise under the Agreements or this Amendment under an escalation process to be established between the parties." This is not a sufficient filing to satisfy 47 U.S.C. § 252 with respect to Section 3 of Eschelon Agreement III.

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[42] Ex. 200 – WCD-13 (Qwest's Responses to DOC 063 and DOC 064 in the 814 Docket).
[43] Ex. 74, 10–11
[44] Ex. 7 at 2.

III. ESCHELON AGREEMENT IV

119. On November 15, 2000, Qwest and Eschelon entered into an agreement titled Confidential Amendment to Confidential / Trade Secret Stipulation ("Eschelon Agreement IV").[45]

120. Qwest terminated Eschelon Agreement IV on March 1, 2002.

121. Qwest did not submit Eschelon Agreement IV to the Commission for approval under 47 U.S.C. § 252(e) until March 1, 2002, in response to the Department's complaint in this matter.

122. The specific terms set out in Paragraph 3 of Eschelon Agreement IV do not appear in any approved interconnection agreement or amendment thereto between Qwest and Eschelon.[46]

123. The specific terms set out in Paragraph 2 of Eschelon Agreement IV do not appear in any approved interconnection agreement or amendment thereto between Qwest and Eschelon.[47]

Paragraph 3

124. In Paragraph 3 of Eschelon Agreement IV, Qwest agreed to provide Eschelon with a 10% discount on all of the "aggregate billed charges for all purchases made by Eschelon from Qwest from November 15, 2000 through December 31, 2005."

125. The discount applied to all purchases made by Eschelon from Qwest, including but not limited to switched access fees and Eschelon's purchases of interconnection, UNEs, tariffed services, and other telecommunications services covered by the Act.

126. The "consulting" arrangement described in Paragraph 3 of Eschelon Agreement IV was a sham designed to conceal the discount that Qwest agreed to provide Eschelon. The purported payment outlined in Paragraph 3 for the alleged consulting services had no rational relationship to the services to be provided by Eschelon. Instead, Qwest agreed to pay Eschelon "an amount that is ten percent (10%) of the aggregate billed charges for all purchases made by Eschelon from Qwest from November 15, 2000 through December 31, 2005" regardless of the quantity or quality of work done by Eschelon.

127. Exhibits 479J and 480J show Qwest offering the discount to Eschelon prior to the parties entering into Eschelon Agreement IV

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[45] SUF ¶ 46.
[46] Ex. 200 – WCD-12 (Qwest response to DOC 064 in the 197 Docket).
[47] Ex. 200 – WCD-12 (Qwest response to DOC 065 in the 197 Docket).

128. Exhibit 226 shows Richard Smith, Eschelon's President and Chief Operating Officer, confirming the existence of the discount agreement and suggesting to Qwest a mechanism for masking Eschelon's discount. It was sent to Qwest on November 5, 2000 – ten days before the date the parties executed Eschelon Agreement IV.

129. There is no evidence that, prior to November 5, 2000, Qwest ever considered hiring Eschelon to provide it with consulting services. There is no evidence that, prior to November 15, 2000, Qwest performed any analysis to determine whether it needed consulting services from Eschelon or, if it did, what services it might need. There is no evidence that, prior to November 15, 2000, Qwest made any effort to find the type of "consulting" services described in Eschelon Agreement III from any vendor. There is no evidence that, prior to November 15, 2000, Eschelon was in the consulting business or that providing consulting services to LECs is a part of Eschelon's business.

130. Trial Exhibit 229 shows that the list of purported Eschelon "consulting" teams that Qwest provided to the Department in response to discovery requests was actually a list of teams intended to work on the implementation plan described in Eschelon Agreement III.

131. Paragraph 3 of Eschelon Agreement IV amended Eschelon's interconnection agreement with Qwest by changing the rates set out in the interconnection agreement for interconnection, network elements and services.

132. Under the Commission's MCIWorldcom Order, Paragraph 3 of Eschelon Agreement IV must be filed with the Commission for approval under 47 U.S.C. § 252(e) and availability under § 252(i).

133. 47 U.S.C. § 251 requires Qwest to provide interconnection, network elements and services at rates that are non-discriminatory.

134. Section 252 requires public filing of interconnection agreements to ensure that ILECs do not discriminate through the use of unfiled agreements. § 252(i) puts every similarly situated CLEC on a level playing field in terms of its relationship with Qwest, but the statutory mechanism works only if Qwest's agreements related to pricing and other issues are actually filed with the Commission. The easiest way that an ILEC can discriminate between CLECs is by adjusting its pricing to favor one CLEC over another.

135. Paragraph 3 of Eschelon Agreement IV obligated Qwest to provide Eschelon with a 10% discount on every purchase Eschelon made or makes from Qwest between November 15, 2000 and December 31, 2005. That discount changed all of the prices in Eschelon's interconnection agreement, including those set by the Commission in lengthy cost docket proceedings.

136. Paragraph 3 of Eschelon Agreement IV modifies the rates set forth in Eschelon's interconnection agreement with Qwest. Accordingly, 47 U.S.C. §§ 252(a)

and (e) required Qwest to file the terms in Paragraph 3 of Eschelon Agreement IV with the Commission.

137. By failing to file Paragraph 3 of Eschelon Agreement IV for approval by the Commission, Qwest violated 47 U.S.C. §§ 252(a) and (e).

138. Qwest knowingly and intentionally violated 47 U.S.C. §§ 252(a) and (e) in that Qwest knew that those statutes required Paragraph 3 of Eschelon Agreement IV to be filed with the Commission but intentionally did not make the required filing.

139. The Act requires Qwest not to provide discriminatory rates for interconnection, access to network elements and services. In Paragraph 3 of Eschelon Agreement IV, Qwest provided Eschelon with a discount that CLECs could not obtain anywhere else. There is no approved interconnection agreement in Minnesota that requires Qwest to provide any CLEC with the same discount.[48]

140. By failing to make this provision available to other CLECs, Qwest knowingly and intentionally discriminated against them in violation of 47 U.S.C. § 251.

141. The testimony of Qwest witness Judy Rixe regarding the "consulting" agreement between Qwest and Eschelon is not credible. On May 1, 2002, Ms. Rixe testified "Well, number 1, we don't offer discounts."[49] Her testimony is directly contradicted, however, by Qwest-drafted discount offers she possessed that Qwest produced to the Department only after Ms. Rixe had been cross-examined.[50]

142. On the other hand, Sarah Padula of Popp Communications testified credibly that she had asked Qwest to see the deals with Eschelon and McLeod and was only given partial information. Her company had called a meeting with Qwest and asked why Eschelon and McLeod would have signed such a deal because what she was seeing didn't make economic sense. She was told that there were actually underlying deals that she was unable to see--confidential customer information that she couldn't have. When she asked if she could get a similar deal, Qwest said no. Her company continued to pursue asking because they were losing customers--customers who were telling them that McLeod or Eschelon or Qwest could provide the service that Popp could not. Popp asked again in May of 2001, and again was told that the company could not have those provisions, so Popp never got to see the deals.[51]

Paragraph 2

143. Paragraph 2 of Eschelon Agreement IV contains a provision by which Qwest agreed: "For any month (or partial month), from November 1, 2000 until the mechanized process is in place, during which Qwest fails to provide accurate daily usage information for Eschelon's use in billing switched access, Qwest will credit

[48] Ex. 200 – WCD-13 (Qwest's Response to DOC 067(f) in the 814 Docket).
[49] Tr. 3:192.
[50] Exs. 479J, 480J.
[51] Tr. 3:10–11.

Eschelon $13.00 (or pro-rata portion thereof) per platform line per month as long as Eschelon has provided the WTN information to Qwest."

144. 47 U.S.C. § 251 requires Qwest to provide interconnection, network elements and services at rates that are non-discriminatory.

145. Paragraph 2 of Eschelon Agreement IV obligated Qwest to provide Eschelon with a $13.00 (or pro-rata portion thereof) per platform line per month credit when Qwest fails to provide accurate daily usage information to Eschelon. That credit reduced the cost to Eschelon of UNE-platform lines it ordered from Qwest. UNE-Platform lines are UNEs under 47 U.S.C. § 251.

146. Paragraph 2 of Eschelon Agreement IV modifies the rates set forth in Eschelon's interconnection agreement (and amendments) with Qwest. Accordingly, 47 U.S.C. §§ 252(a) and (e) required Qwest to file the terms in Paragraph 2 of Eschelon Agreement IV with the Commission.

147. By failing to file Paragraph 2 of Eschelon Agreement IV for approval by the Commission, Qwest violated 47 U.S.C. §§ 252(a) and (e).

148. Qwest knowingly and intentionally violated 47 U.S.C. §§ 252(a) and (e) in that Qwest knew that those statutes required Paragraph 2 of Eschelon Agreement IV to be filed with the Commission but intentionally did not make the required filing.

149. The Act requires Qwest not to provide discriminatory rates for interconnection, access to network elements and services. In Paragraph 2 of Eschelon Agreement IV, Qwest provided Eschelon with a rate credit that CLECs could not obtain anywhere else. There is no approved interconnection agreement in Minnesota that requires Qwest to provide any CLEC with the same credit.[52]

150. By failing to make this provision available to CLECs other than Eschelon, Qwest knowingly and intentionally discriminated against them in violation of 47 U.S.C. §251.

IV. ESCHELON AGREEMENT V

151. On July 3, 2001 Qwest and Eschelon entered into a letter agreement modifying and amending Eschelon Agreement IV ("Eschelon Agreement V").[53]

152. Qwest did not submit Eschelon Agreement V to the Commission for approval under 47 U.S.C. § 252(e) until March 1, 2002, in response to the Department's complaint in this matter.

153. Qwest terminated Eschelon Agreement V on March 1, 2002.

[52] Ex. 200 – WCD-13 (Qwest's Response to DOC 066 in the 814 Docket).
[53] SUF ¶ 56.

154. The specific terms set out in the third paragraph of Eschelon Agreement V do not appear in any approved interconnection agreement or amendment thereto between Qwest and Eschelon.[54]

155. The specific terms set out in the fifth paragraph of Eschelon Agreement V do not appear in any approved interconnection agreement or amendment thereto between Qwest and Eschelon.[55]

156. The third paragraph of Eschelon Agreement V contains a provision by which Qwest agreed to increase the $13 per line per month pro rata credit methodology for switched access payments found in Eschelon Agreement IV to $16 per line per month on an interim basis. The findings above regarding Paragraph 2 of Eschelon Agreement IV are therefore applicable to the $16 per line per month credit as well.

157. The fifth paragraph of Eschelon Agreement V contains a provision by which Qwest agrees to pay Eschelon $2 per month per line for Qwest intraLATA toll traffic that terminates to customers served by Eschelon's switch. The payment is a proxy for the amount Eschelon could actually bill Qwest for the termination of intraLATA toll traffic terminating on Eschelon's switch because Qwest either does not, will not, or cannot track such traffic.

158. The reason for the $2 payment is Qwest's failure to provide Eschelon with reliable information that would identify the intraLATA toll calls that terminate on the Eschelon switch. Qwest is the sole source of this information, because only it knows where the calls it passes on for termination on the Eschelon switch actually originate.

159. The $2 payment is in lieu of Qwest providing Eschelon with accurate usage information related to the interconnection of the Eschelon and Qwest networks. Accordingly, the $2 payment is a term of interconnection between Qwest and Eschelon that modifies their interconnection agreement.

160. Qwest's obligation to make a payment to CLECs for terminating intraLATA toll traffic on their networks is typically the subject of an interconnection agreement. Section 7.2.2.3.3 of Qwest's SGAT in Minnesota states, "In the case of Exchange Access (IntraLATA Toll) traffic where Qwest is the designated IntraLATA Toll provider for existing LECs, Qwest will be responsible for payment of appropriate usage rates." SGAT Section 7.2.2.3 generally addresses the issue of intraLATA toll traffic between and among CLECs and ILECs.

161. 47 U.S.C. § 251 requires Qwest to provide interconnection, network elements and services on rates and terms that are non-discriminatory.

162. Paragraph 5 of Eschelon Agreement V obligated Qwest to provide Eschelon with a $2 per month per line for Qwest intraLATA toll traffic that terminates to customers served by Eschelon's switch.

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[54] SUF ¶ 64; Ex. 200 – WCD-12 (Qwest response to DOC 067 in the 197 Docket).
[55] SUF ¶ 65; Ex. 200 – WCD-12 (Qwest response to DOC 068 in the 197 Docket).

163. Paragraph 5 of Eschelon Agreement V modifies the rates Eschelon pays Qwest for interconnection by providing a payment to Eschelon in lieu of providing accurate billing information. Accordingly, 47 U.S.C. §§ 252(a) and (e) required Qwest to file the terms in Paragraph 5 of Eschelon Agreement V with the Commission.

164. By failing to file Paragraph 5 of Eschelon Agreement V for approval by the Commission, Qwest violated 47 U.S.C. §§ 252(a) and (e).

165. Qwest knowingly and intentionally violated 47 U.S.C. §§ 252(a) and (e) in that Qwest knew that those statutes required Paragraph 5 of Eschelon Agreement V to be filed with the Commission but intentionally did not make the required filing.

166. The Act requires Qwest not to provide discriminatory rates for interconnection, access to network elements and services. In Paragraph 5 of Eschelon Agreement V, Qwest provided Eschelon with a payment that similarly-situated CLECs could not obtain anywhere else. There is no approved interconnection agreement in Minnesota that requires Qwest to provide any CLEC with the same credit.[56]

167. By failing to make this provision available to other CLECs, Qwest knowingly and intentionally discriminated against them in violation of 47 U.S.C. § 251.

[56] Ex. 200 – WCD-13 (Qwest's Response to DOC 068 in the 814 Docket).

V. ESCHELON AGREEMENT VI

168. On July 31, 2001 Qwest and Eschelon entered into an agreement titled the Implementation Plan ("Eschelon Agreement VI").

169. Qwest did not submit Eschelon Agreement VI to the Commission for approval under 47 U.S.C. §252(e).

170. With the exception of the formula for calculation of local usage charges in Attachment 3, Qwest terminated Eschelon Agreement VI on March 1, 2002.

171. The specific terms set out in Paragraphs 2.1 through 2.1.3 of Eschelon Agreement VI do not appear in any approved interconnection agreement or amendment thereto between Qwest and Eschelon.[57]

172. The specific terms set out in Paragraph 2.2 and Attachment 2 of Eschelon Agreement VI do not appear in any approved interconnection agreement or amendment thereto between Qwest and Eschelon.[58]

173. The specific terms set out in Paragraph 2.3 of Eschelon Agreement VI do not appear in any approved interconnection agreement or amendment thereto between Qwest and Eschelon.[59]

174. The specific terms set out in Paragraph 3.1 and Attachment 3 of Eschelon Agreement VI do not appear in any approved interconnection agreement or amendment thereto between Qwest and Eschelon.[60]

175. The specific terms set out in Paragraphs 4 through 4.3 of Eschelon Agreement VI do not appear in any approved interconnection agreement or amendment thereto between Qwest and Eschelon.[61]

176. The specific terms set out in Paragraph 8 of Eschelon Agreement VI do not appear in any approved interconnection agreement or amendment thereto between Qwest and Eschelon.[62]

Paragraphs 2.1 through 2.1.3

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

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[57] Ex. 200 – WCD-12 (Qwest response to DOC 070 in the 197 Docket).
[58] Ex. 200 – WCD-12 (Qwest response to DOC 071 in the 197 Docket).
[59] Ex. 200 – WCD-12 (Qwest response to DOC 072 in the 197 Docket).
[60] Ex. 200 – WCD-12 (Qwest response to DOC 073 in the 197 Docket).
[61] Ex. 200 – WCD-12 (Qwest response to DOC 074 in the 197 Docket).
[62] Ex. 200 – WCD-12 (Qwest response to DOC 075 in the 197 Docket).

178. Paragraphs 2.1 through 2.1.3 require Qwest to provide a service management team for Qwest and defines the role of that team. For example, paragraph 2.1.1 requires the service management team to meet weekly with Eschelon to identify and resolve service-related issues.

179. These paragraphs relate directly to how Qwest will provide interconnection, unbundled network elements and telecommunication services to Qwest. They obligate Qwest to provide a specific team to interface with Eschelon on a regular basis regarding interconnection issues.

180. 47 U.S.C. §251 requires ILECs to provide interconnection, network elements and services on a non-discriminatory basis.

181. Paragraphs 2.1 through 2.1.3 obligate Qwest to create a service management team for Eschelon to do the things described in those paragraphs.

182. Paragraphs 2.1 through 2.1.3 of Eschelon Agreement VI describe the services that Eschelon will receive for the rates set out in its interconnection agreement with Qwest. The term "rates" includes terms that involve the provisioning of services and billing. Accordingly, 47 U.S.C. §§252(a) and (e) required Qwest to file the terms in Paragraphs 2.1 through 2.1.3 of Eschelon Agreement VI with the Commission.

183. By failing to file Paragraphs 2.1 through 2.1.3 of Eschelon Agreement VI for approval by the Commission, Qwest violated 47 U.S.C. §§252(a) and (e).

184. Qwest knowingly and intentionally violated 47 U.S.C. §§252(a) and (e) in that Qwest knew that those statutes required Paragraphs 2.1 through 2.1.3 of Eschelon Agreement VI to be filed with the Commission but intentionally did not make the required filing.

185. The Act requires Qwest not to provide discriminatory terms for interconnection, access to network elements and services. In Paragraphs 2.1 through 2.1.3 of Eschelon Agreement VI, Qwest provided Eschelon with an enforceable agreement to provide the specified services to Eschelon. There is no approved interconnection agreement in Minnesota that requires Qwest to provide any CLEC with the same services.[63]

186. Qwest has not established that the service account teams it creates as "standard operating procedure" have the same obligations to their respective CLECs as are set out in Paragraphs 2.1 through 2.1.3 of Eschelon Agreement VI. Even if Qwest had established that this were true, the commitment to Eschelon is binding, whereas Qwest can change its "standard operating procedures" internally, without requiring consent from the CLECs those procedures affect.

[63] Ex. 200 – WCD-13 (Qwest's Response to DOC 086 in the 814 Docket).

187. By failing to make Paragraphs 2.1 through 2.1.3 of Eschelon Agreement VI available to other CLECs, Qwest knowingly and intentionally discriminated against them in violation of 47 U.S.C. §251.

Paragraph 2.2 and Attachment 2

188. Paragraph 2 to Eschelon Agreement VI requires Qwest to provide Eschelon with agreed-upon escalation procedures for day-to-day provisioning issues. Those procedures are described in Attachment 2. These escalation procedures are different than those found in Eschelon Agreement III.

189. The escalation procedures described in Paragraph 2 and Attachment 2 relate directly to how Qwest provisions network elements to Eschelon. The "contacts" described in Attachment 2 at the Des Moines Service Center, for example, are broken out by product type (Private Line, LIS). The "Functions" section for a Tier 1 escalation includes "ASR Order Status", "Questions on Due Dates", "FOC Questions/Resends of FOC's", and "Assisting with ASR Prep." All of these functions relate directly to UNE provisioning

190. Paragraph 2 and Attachment 2 obligate Qwest to take actions related directly to its obligations to provide non-discriminatory interconnection and access to network elements under §251(c).

191. 47 U.S.C. §251 requires ILECs to provide interconnection, network elements and services on a non-discriminatory basis.

192. Paragraph 2 and Attachment 2 of Eschelon Agreement VI describe the services that Eschelon will receive for the rates set out in its interconnection agreement with Qwest. The term "rates" includes terms that involve the provisioning of services and billing. Accordingly, 47 U.S.C. §§252(a) and (e) required Qwest to file the terms in Paragraph 2 and Attachment 2 of Eschelon Agreement VI with the Commission.

193. By failing to file Paragraph 2 and Attachment 2 of Eschelon Agreement VI for approval by the Commission, Qwest violated 47 U.S.C. §§252(a) and (e).

194. The language set out in Paragraph 1.3 of the Eighth Amendment to Eschelon's interconnection agreement with Qwest simply calls for the parties to agree on business processes and is not sufficient to satisfy Qwest's obligations under 47 U.S.C. §§252 or 251. The language in the Eighth Amendment does not disclose the specific commitment set out in Paragraph 2 and Attachment 2 of Eschelon Agreement VI.

195. In Section 9.4 of Attachment 5 to their interconnection agreement, Qwest and Eschelon say that the parties will agree to escalation procedures and contacts.[64] This also is not sufficient to meet Qwest's obligations under 47 U.S.C. §§ 252 and 251 with respect to Paragraph 2 and Attachment 2 of Eschelon Agreement VI. The terms in Eschelon Agreement VI impose specific obligations on Qwest that are not found in the

[64] Ex. 11.

interconnection agreement. The parties themselves felt that their agreement on escalation procedures was significant enough to put into a new, binding, written agreement. If the parties felt the need to enter into a separate written agreement, it is clear they did not believe Section 9.4 of Attachment 5 to the interconnection agreement embodied the same agreement as Paragraph 2 and Attachment 2 of Eschelon Agreement VI.

196. Qwest knowingly and intentionally violated 47 U.S.C. §§252(a) and (e) in that Qwest knew that those statutes required Paragraph 2 and Attachment 2 of Eschelon Agreement VI to be filed with the Commission but intentionally did not make the required filing.

197. The Act requires Qwest not to provide discriminatory terms for interconnection, access to network elements and services. In Paragraph 2 and Attachment 2 of Eschelon Agreement VI, Qwest provided Eschelon with an enforceable agreement to provide the specified escalation procedures to Eschelon. There is no approved interconnection agreement in Minnesota that requires Qwest to provide any CLEC with the same services.[65]

198. By failing to make Paragraph 2 and Attachment 2 of Eschelon Agreement VI available to other CLECs as a contract term, Qwest knowingly and intentionally discriminated against them in violation of 47 U.S.C. §251.

Paragraph 2.3

199. Paragraph 2.3 requires Qwest to make Dana Filip (and/or her designee or successor) available for quarterly meetings to discuss Eschelon service issues. Dana Filip is a Senior Vice President at Qwest.[66] The express purpose of the quarterly meetings with Dana Fillip is to "review the status of Eschelon's service-related issues", so these meetings directly and expressly relate to Qwest providing interconnection and access to network elements. Even though Ms. Filip and other senior executives at Qwest have met with other CLECs, the commitment to Eschelon is binding, whereas Qwest can change its standard operating procedures without requiring consent from other CLECs.

200. Paragraph 2.3 obligated Qwest to make a Senior Vice President at Qwest available quarterly to discuss service related issues with Eschelon. This agreement related directly to Qwest's obligations to provide non-discriminatory interconnection and access to network elements under §251(c).

201. 47 U.S.C. §251 requires ILECs to provide interconnection, network elements and services on a non-discriminatory basis.

202. Paragraph 2.3 of Eschelon Agreement VI describes services that Eschelon will receive for the rates set out in its interconnection agreement with Qwest. The term "rates" includes terms that involve the provisioning of services and billing.

[65] Ex. 200 – WCD-13 (Qwest's Response to DOC 087 in the 814 Docket).
[66] Ex. 200 – WCD-13 (Qwest's response to DOC 089 in the 814 Docket).

Accordingly, 47 U.S.C. §§252(a) and (e) required Qwest to file the terms in Paragraph 2.3 of Eschelon Agreement VI with the Commission.

203. By failing to file Paragraph 2.3 of Eschelon Agreement VI for approval by the Commission, Qwest violated 47 U.S.C. §§252(a) and (e).

204. The language set out in Paragraph 1.3 of the Eighth Amendment to Eschelon's interconnection agreement with Qwest simply calls for the parties to agree on business processes and is not sufficient to satisfy Qwest's obligations under 47 U.S.C. §§252 or 251. The language in the Eighth Amendment does not disclose the specific commitment set out in Paragraph 2.3 of Eschelon Agreement VI.

205. Qwest knowingly and intentionally violated 47 U.S.C. §§252(a) and (e) in that Qwest knew that those statutes required Paragraph 2.3 of Eschelon Agreement VI to be filed with the Commission but intentionally did not make the required filing.

206. The Act requires Qwest not to provide discriminatory terms for interconnection, access to network elements and services. In Paragraph 2.3 of Eschelon Agreement VI, Qwest provided Eschelon with an enforceable agreement to make its most senior executives available to Eschelon. There is no approved interconnection agreement in Minnesota that requires Qwest to provide any CLEC with the same services.[67]

207. By failing to make the terms in Paragraph 2.3 of Eschelon Agreement VI available to other CLECs in an interconnection agreement, Qwest knowingly and intentionally discriminated against them in violation of 47 U.S.C. §251.

Paragraph 3.1 and Attachment 3

208. Paragraph 3.1 and Attachment 3 set out a detailed methodology for calculating local usage charges associated with UNE-P switching on Eschelon's interLATA and intraLATA toll traffic. In short, they describe the way that Qwest will calculate some of the rates associated with UNE-P for Eschelon.

209. 47 U.S.C. §251(c) requires ILECs to offer for access to unbundled network elements at rates that are non-discriminatory.

210. Paragraph 3.1 and Attachment 3 obligated Qwest to calculate local usage charges for UNE-P to Eschelon in accord with the formula set out in Attachment 3. This established the rate that Eschelon paid Qwest for access to UNE-P.

211. Paragraph 3.1 and Attachment 3 of the Eschelon Agreement VI relate to the rates paid by Eschelon to obtain access to Qwest UNEs. Accordingly, 47 U.S.C. §§252(a) and (e) required Qwest to file the terms in Paragraph 3.1 and Attachment 3 of Eschelon Agreement VI with the Commission.

[67] Ex. 200 – WCD-13 (Qwest's Response to DOC 090 in the 814 Docket).

212. By failing to file Paragraph 3.1 and Attachment 3 of Eschelon Agreement VI for approval by the Commission, Qwest violated 47 U.S.C. §§252(a) and (e).

213. Qwest knowingly and intentionally violated 47 U.S.C. §§252(a) and (e) in that Qwest knew that those statutes required Paragraph 3.1 and Attachment 3 of Eschelon Agreement VI to be filed with the Commission but intentionally did not make the required filing.

214. The Act requires Qwest not to provide discriminatory rates for access to network elements. In Paragraph 3 and Attachment 3.1 of Eschelon Agreement VI, Qwest provided Eschelon with an enforceable agreement to provide Eschelon with access to UNE-P at the rates specified in those provisions. There is no approved interconnection agreement in Minnesota that requires Qwest to provide any CLEC with the same rates.[68]

215. By failing to make this provision available to other CLECs, Qwest knowingly and intentionally discriminated against them in violation of 47 U.S.C. §251.

Paragraphs 4 through 4.3

216. Paragraphs 4 through 4.3 of Eschelon Agreement VI require Qwest to track and report performance measures designed to monitor Qwest's level of service to Eschelon. They also require Qwest to participate in monthly working meetings to review and discuss the measurements, and quarterly executive meetings to review results and set improvement priorities. Paragraph 4.3 requires Qwest to work with Eschelon to develop an action plan to improve service. In sum, these provisions relate directly to how Qwest will provide interconnection and access to network elements to Eschelon.

217. Paragraphs 4 through 4.3 obligated Qwest to track performance measures, meet with Eschelon to discuss those measures and work with Eschelon to develop an action plan to improve service quality. This agreement related directly to Qwest's obligations to provide non-discriminatory interconnection and access to network elements under §251(c).

218. 47 U.S.C. §251 requires ILECs to provide interconnection, network elements and services on a non-discriminatory basis.

219. Paragraphs 4 through 4.3 of Eschelon Agreement VI describe services that Eschelon will receive for the rates set out in its interconnection agreement with Qwest. The term "rates" includes terms that involve the provisioning of services and billing. Accordingly, 47 U.S.C. §§252(a) and (e) required Qwest to file the terms in Paragraphs 4 through 4.3 of Eschelon Agreement VI with the Commission.

220. By failing to file Paragraphs 4 through 4.3 of Eschelon Agreement VI for approval by the Commission, Qwest violated 47 U.S.C. §§252(a) and (e).

[68] Ex. 200 – WCD-13 (Qwest's Response to DOC 091 in the 814 Docket).

221. Qwest knowingly and intentionally violated 47 U.S.C. §§252(a) and (e) in that Qwest knew that those statutes required Paragraphs 4 through 4.3 of Eschelon Agreement VI to be filed with the Commission but intentionally did not make the required filing.

222. The Act requires Qwest not to provide discriminatory terms for interconnection, access to network elements and services. In Paragraphs 4 through 4.3 of Eschelon Agreement VI, Qwest provided Eschelon with an enforceable agreement to monitor and make service changes based on performance metrics. There is no approved interconnection agreement in Minnesota that requires Qwest to provide any CLEC with the same services.[69]

223. By failing to make the terms in Paragraphs 4 through 4.3 of Eschelon Agreement VI available to other CLECs, Qwest knowingly and intentionally discriminated against them in violation of 47 U.S.C. §251.

Paragraph 8

224. Paragraph 8 of Eschelon Agreement VI contains a provision by which Qwest agreed to take commercially reasonable efforts to ensure that service provided to Eschelon's customers was not adversely affected during the process of converting Eschelon's customers to the UNE-P platform. Under Paragraph 8 Qwest also agreed to provide notice to Eschelon before changes relating to the conversion are made, plan the conversion jointly with Eschelon, and use a phased approach to converting customers over time on an agreed upon schedule.

225. Paragraph 8 obligated Qwest to make efforts related directly to Qwest's obligations to provide non-discriminatory interconnection and access to network elements under §251(c).

226. 47 U.S.C. §251(c)(3) requires ILECs to provide to any requesting carrier for the provisioning of a telecommunications service, access to unbundled network elements on rates, terms and conditions that are non-discriminatory and meet the requirements of §251 and §252.

227. Paragraph 8 of Eschelon Agreement VI describes services that Eschelon will receive for the rates set out for UNE-P in its interconnection agreement with Qwest. The term "rates" includes terms that involve the provisioning of services and billing. Accordingly, 47 U.S.C. §§252(a) and (e) required Qwest to file the terms in Paragraph 8 of Eschelon Agreement VI with the Commission.

228. By failing to file Paragraph 8 of Eschelon Agreement VI for approval by the Commission, Qwest violated 47 U.S.C. §§252(a) and (e).

229. Qwest knowingly and intentionally violated 47 U.S.C. §§252(a) and (e) in that Qwest knew that those statutes required Paragraph 8 of Eschelon Agreement VI to be filed with the Commission but intentionally did not make the required filing.

[69] Ex. 200 – WCD-13 (Qwest's Responses to DOC 092 and DOC 094 in the 814 Docket).

230. The Act requires Qwest not to provide discriminatory terms for interconnection, access to network elements and services. In Paragraph 8 of Eschelon Agreement VI, Qwest provided Eschelon with an enforceable agreement requiring Qwest to make specific efforts to work with Eschelon in provisioning UNE-P lines. There is no approved interconnection agreement in Minnesota that requires Qwest to provide any CLEC with the same services.[70]

231. By failing to make the terms in Paragraph 8 of Eschelon Agreement VI available to other CLECs, Qwest knowingly and intentionally discriminated against them in violation of 47 U.S.C. §251.

VI. COVAD AGREEMENT

232. On April 19, 2000 Covad Communications Company and U S WEST entered into the U S WEST Service Level Agreement with Covad Communications Company (the "Covad Agreement").[71]

233. Qwest did not submit the Covad Agreement to the Commission for approval under 47 U.S.C. § 252(e) until March 1, 2002, in response to the Department's complaint in this matter.

234. The specific terms set out in Sections 1-4 of the Covad Agreement do not appear in any approved interconnection agreement or amendment thereto between Qwest and Covad.[72]

Section 1

235. Section 1 of the Covad Agreement contains provisions by which Qwest agrees to provide "90% of Covad's Firm Order Confirmation (FOC) dates within 48 hours of receipt of properly completed service requests for POTS unbundled loop services" and to notify Covad of "any facility shortages for DSL capable, ISDN capable and DS1 capable services within the same 48 hour period." Qwest also agrees to provide "90% of Covad's FOC dates within 72 hours of receipt of properly completed service requests" for "DSL capable, ISDN capable and DS1 capable unbundled loop services" and, as part of that 72-hour FOC process, to "dispatch a technician to verify the existence of suitable facilities."[73]

236. The FOC relates to the ILEC's obligation to provide access to network elements under 47 U.S.C. § 251(c)(3).

237. Section 1 of the Covad agreement obligated Qwest to meet the FOC intervals and service quality metrics described above. Qwest agreed to do these things to help it meet its obligations under 47 U.S.C. § 251.

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[70] Ex. 200 – WCD-13 (Qwest's Response to DOC 097 in the 814 Docket).
[71] SUF ¶ 80.
[72] SUF ¶ 86; Ex. 200 –WCD-12 (Qwest's response to DOC 77-80 in the 197 Docket).
[73] SUF ¶ 90.

238. Section 1 of the Covad Agreement describes terms for provisioning interconnection and access to UNEs at the rates set forth in Covad's interconnection agreement with Qwest. The term "rates" includes terms that involve the provisioning of services and billing. Accordingly, 47 U.S.C. §§ 252(a) and (e) required Qwest to file the terms in Section 1 of the Covad Agreement with the Commission.

239. By failing to file Section 1 of the Covad Agreement for approval by the Commission, Qwest violated 47 U.S.C. §§ 252(a) and (e).

240. Qwest knowingly and intentionally violated 47 U.S.C. §§ 252(a) and (e) in that Qwest knew that those statutes required Section 1 of the Covad Agreement to be filed with the Commission but intentionally did not make the required filing.

241. The Act requires Qwest not to discriminate when providing interconnection, access to network elements and services. Qwest gave Covad certain rights through Section 1 of the Covad Agreement that CLECs could not obtain anywhere else. There is no approved interconnection agreement in Minnesota that requires Qwest to provide any CLEC with the same provisions as those set out in Section 1 of the Covad Agreement.[74]

242. By failing to make this provision available to other CLECs, Qwest knowingly and intentionally discriminated against them in violation of 47 U.S.C. § 251.

Section 2

243. Section 2 sets out a performance standard for Qwest's delivery of loops to Covad. It requires Qwest, when facilities are available and loop conditioning is not required, to provide Covad with unbundled loop service that is consistent with Qwest's Service Interval Guide (SIG) dated March 31, 2000 at least 90% of the time. It also required Qwest to provide Covad with line sharing service at any interval agreed to in a line sharing amendment at least 90% of the time.[75]

244. An agreement that requires Qwest to meet a particular standard in its delivery of unbundled loops is a term of providing access to network elements under 47 U.S.C. § 251(c)(3).

245. Section 2 of the Covad agreement obligated Qwest to meet the provisioning deadline in its SIG 90% of the time. Qwest's obligation helped it meet its obligations under 47 U.S.C. § 251.

246. Section 2 of The Covad Agreement describes terms for provisioning interconnection and access to UNEs at the rates set forth in Covad's interconnection agreement with Qwest. The term "rates" includes terms that involve the provisioning of services and billing. Accordingly, 47 U.S.C. §§ 252(a) and (e) required Qwest to file the terms in Section 2 of the Covad Agreement with the Commission.

[74] Ex. 200 – WCD-13 (Qwest's Responses to DOC 044 through DOC 047 in the 814 Docket).
[75] SUF ¶ 91.

247. By failing to file Section 2 of the Covad Agreement for approval by the Commission, Qwest violated 47 U.S.C. §§ 252(a) and (e).

248. Qwest knowingly and intentionally violated 47 U.S.C. §§ 252(a) and (e) in that Qwest knew that those statutes required Section 2 of the Covad Agreement to be filed with the Commission but intentionally did not make the required filing.

249. The Act requires Qwest not to discriminate when providing interconnection, access to network elements and services. Qwest gave Covad certain rights through Section 2 of the Covad Agreement that CLECs could not obtain anywhere else. There is no approved interconnection agreement in Minnesota that requires Qwest to provide any CLEC with the same provisions as those set out in Section 2 of the Covad Agreement

250. By failing to make this provision available to other CLECs, Qwest knowingly and intentionally discriminated against them in violation of 47 U.S.C. § 251.

Section 3

251. In Section 3 of the Covad Agreement Qwest agrees to reduce the incidence of failure on new Covad circuits to less than 10% within the first 30 calendar days.[76]

252. An agreement that requires Qwest to meet a particular standard in its delivery of unbundled loops is a term of providing access to network elements under 47 U.S.C. § 251(c)(3).

253. Section 3 of the Covad agreement obligated Qwest to reduce the incidence of post-delivery loop failure to less than 10% of the time. Qwest's commitment in Section 3 helped it meet its obligations under 47 U.S.C. § 251.

254. Section 3 of The Covad Agreement describes terms for provisioning interconnection and access to UNEs at the rates set forth in Covad's interconnection agreement with Qwest. the term "rates" includes terms that involve the provisioning of services and billing. Accordingly, 47 U.S.C. §§ 252(a) and (e) required Qwest to file the terms in Section 3 of the Covad Agreement with the Commission.

255. By failing to file Section 3 of the Covad Agreement for approval by the Commission, Qwest violated 47 U.S.C. §§ 252(a) and (e).

256. Qwest knowingly and intentionally violated 47 U.S.C. §§ 252(a) and (e) in that Qwest knew that those statutes required Section 3 of the Covad Agreement to be filed with the Commission but intentionally did not make the required filing.

257. The Act requires Qwest not to discriminate when providing interconnection, access to network elements and services. Qwest gave Covad certain rights through Section 3 of the Covad Agreement that CLECs could not obtain

[76] SUF ¶ 92.

anywhere else. There is no approved interconnection agreement in Minnesota that requires Qwest to provide any CLEC with the same provisions as those set out in Section 3 of the Covad Agreement.[77]

258. By failing to make this provision available to those other CLECs, Qwest knowingly and intentionally discriminated against them in violation of 47 U.S.C. § 251.

Section 4

259. Section 4 of the Covad Agreement provides that for service requests held due to line conditioning, U S WEST will "provide Covad the option of paying for the line conditioning at the appropriate rate approved by the relevant State Commissions, which U S WEST will complete in 24 days or less 90% of the time." Section 4 of the Covad Agreement also contains notification provisions, service requirements and service levels applicable when an "end user customer is served by digital loop carrier or off pair gain.[78]

260. An agreement that requires Qwest to meet a particular standard in its delivery of unbundled loops is a term of providing access to network elements under 47 U.S.C. § 251(c)(3).

261. Section 4 of the Covad agreement obligated Qwest to condition unbundled loops it delivered to Covad within certain operational and time parameters. Qwest's commitment in Section 4 helped it meet its obligations under 47 U.S.C. § 251.

262. Section 4 of the Covad Agreement describes terms for provisioning interconnection and access to UNEs at the rates set forth in Covad's interconnection agreement with Qwest. The term "rates" includes terms that involve the provisioning of services and billing. Accordingly, 47 U.S.C. §§ 252(a) and (e) required Qwest to file the terms in Section 4 of the Covad Agreement with the Commission.

263. By failing to file Section 4 of the Covad Agreement for approval by the Commission, Qwest violated 47 U.S.C. §§ 252(a) and (e).

264. Qwest knowingly and intentionally violated 47 U.S.C. §§ 252(a) and (e) in that Qwest knew that those statutes required Section 4 of the Covad Agreement to be filed with the Commission but intentionally did not make the required filing.

265. The Act requires Qwest not to discriminate when providing interconnection, access to network elements and services. Qwest gave Covad certain rights through Section 4 of the Covad Agreement that CLECs could not obtain anywhere else. There is no approved interconnection agreement in Minnesota that requires Qwest to provide any CLEC with the same provisions as those set out in Section 4 of the Covad Agreement.[79]

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[77] Ex. 200 – WCD-13 (Qwest's Response to DOC 048 in the 814 Docket).
[78] SUF ¶ 93.
[79] Ex. 200 – WCD-13 (Qwest's Response to DOC 048 in the 814 Docket).

266. By failing to make this provision available to other CLECs, Qwest knowingly and intentionally discriminated against them in violation of 47 U.S.C. § 251.

267. At the time of the execution of the Covad Agreement, U S WEST/Qwest was typically completing line conditioning in more than 24 days for all CLECs.[80]

VII. SMALL CLEC AGREEMENT

270. On April 28, 2000, U S WEST and 10 rural competitive local exchange carriers (the "Small CLECs") entered into the Confidential Stipulation Between Small CLECs and U S WEST.[81]

271. Qwest did not submit the entire Small CLEC Agreement to the Commission for approval under 47 U.S.C. §252(e) until March 1, 2002, in response to the Department's complaint in this matter.

272. The version of the Small CLEC Agreement submitted to the Commission in Docket No. P3009, 30052, 5096, 421, 3017/PA-99-1192 did not contain Paragraph 3.[82]

273. The specific terms set out in Paragraph 3 of the Small CLEC Agreement did not appear in any approved interconnection agreement or amendment thereto between Qwest and the Small CLECs prior to the opening of this docket.

274. Paragraph 3 states in part: "Subject to the closure of the Merger, effective March 17, 2002, and subject to technical feasibility, U S WEST will permit all Small CLECs operating in Minnesota the ability to adopt the terms of any effective interconnection agreements that were voluntarily negotiated and entered into by U S WEST and CLECs in any other state in U S WEST's operating territory, subject to the following conditions:

> This provision does not apply to terms that were ever reached as the result of an arbitrated decision or any other decision in a contested case action, unless the terms which the CLEC seeks to adopt are present in interconnection agreements in a minimum of four states in U S WEST's territory . . . :
>
> The provisions in paragraph 3 3.a, 3.b., and 3.c. shall remain confidential between U S WEST and the Small CLECs and shall be implemented through an interconnection agreement amendment to be filed and effective on March 17, 2002, and which will expire on December 31, 2003. The requirements of confidentiality expire on March 17, 2002.[83]

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[80] Direct Testimony of Kathleen Lucero, Ex. 63 at p. 13.
[81] SUF ¶ 94.
[82] Ex. 200 – WCD-14.
[83] SUF ¶ 101.

275. Qwest and the Small CLECs intentionally filed a misleading settlement document with the ALJ and the Commission that did not include the pick-and-choose provision cited in the Complaint or disclose that it even existed.[84]

276. Counsel for the Small CLECs did tell the Commission that his client had "filed two settled items with the Commission, but also have a confidential agreement on another item."[85] Even though it was represented at this hearing, Qwest did nothing to expand on this to inform the Commission what was contained in the confidential agreement.

277. Because of the Small CLEC Agreement, the Small CLEC parties to the agreement did not have to waste resources negotiating for terms with Qwest that they could opt into through Paragraph 3. Non-party CLECs did not have the same options. Moreover, having advance knowledge of the opt-in provision gave the CLEC parties to the agreement long-range planning options that other CLECs did not have.

278. The agreement itself establishes that Qwest knew the terms of the agreement had to be filed with the Commission. Paragraph 3 of the agreement expressly provides that it will be implemented by filing the agreement with the Commission on March 17, 2002.[86]

279. Qwest knew that the agreement had to be included as part of an interconnection agreement but wanted to keep its existence confidential for as long as possible to preclude other CLECs from taking advantage of it.

280. By failing to file Paragraph 3 of Small CLEC Agreement for approval by the Commission, Qwest violated 47 U.S.C. §§252(a) and (e).

281. Qwest knowingly and intentionally violated 47 U.S.C. §§252(a) and (e) in that Qwest knew that those statutes required Paragraph 3 of Small CLEC Agreement to be filed with the Commission but intentionally did not make the required filing.

282. By failing to make this provision available to other CLECs, Qwest knowingly and intentionally discriminated against them in violation of 47 U.S.C. §251.

VIII. MCLEOD AGREEMENT I

283. On April 28, 2000 Qwest and McLeod entered into the Confidential Billing Settlement Agreement ("McLeod Agreement I").[87]

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[84] See Exhibit 200 – WCD-14.
[85] See Transcript of Proceedings at 151-153, In the Matter of the Merger of the Parent Corporation of Qwest Communications Corporation, LCI International Telecom Corp., USLD Communications, Inc., Phoenix Network, Inc., and U S West Communications, Inc., MPUC Docket No. P-3009, 3052,6096,421,3017/PA-99-1192 (April 25, 2000).
[86] Ex. 200 – WCD 8, ¶ 3.
[87] SUF ¶ 102.

284. Qwest did not submit McLeod Agreement I to the Commission for approval under 47 U.S.C. § 252(e) until March 1, 2002, in response to the Department's complaint in this matter.

285. The specific terms set out in Paragraph 2.d of McLeod Agreement I do not appear in any approved interconnection agreement or amendment thereto between Qwest and McLeodUSA.[88]

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

287. The agreement goes on to provide that any rates set by state commissions will be applied prospectively, and not retroactively. Paragraph 2.d affected rates for interconnection and UNEs, one of the core components of interconnection agreements.

288. Qwest agreed to do these things to help it meet its obligations to provide interconnection and access to network elements under 47 U.S.C. § 251.

289. Paragraph 2.d obligated Qwest to charge the rates in McLeodUSA's interconnection agreement and not require a true up. By failing to file Paragraph 2.d of McLeod Agreement I for approval by the Commission, Qwest violated 47 U.S.C. §§ 252(a) and (e).

290. Qwest knowingly and intentionally violated 47 U.S.C. §§ 252(a) and (e) in that Qwest knew that those statutes required Paragraph 2.d of McLeod Agreement I to be filed with the Commission but intentionally did not make the required filing.

291. By failing to make this provision available to other CLECs, Qwest knowingly and intentionally discriminated against them in violation of 47 U.S.C. § 251.

IX. MCLEOD AGREEMENT II

292. On October 26, 2000 Qwest and McLeod entered into the Confidential Agreement Re: Escalation Procedures and Business Solutions ("McLeod Agreement II").[89]

293. Qwest did not submit McLeod Agreement II to the Commission for approval under 47 U.S.C. § 252(e) until March 1, 2002, in response to the Department's complaint in this matter.

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[88] SUF ¶ 109.
[89] SUF ¶ 111.

294. Sections 2 and 3 of McLeod Agreement II provide for quarterly executive meetings and a six-level escalation process.

295. The specific terms set out in Sections 2 and 3 of McLeod Agreement II do not appear in any approved interconnection agreement or amendment thereto between Qwest and McLeodUSA.[90]

Section 2

296. Section 2 of McLeod Agreement II created an obligation in Qwest to have senior executives meet with McLeodUSA on a quarterly basis. It is substantially the same in wording and scope to Section 2 of Eschelon Agreement III. It amended McLeod's interconnection agreement with Qwest in that it created a new obligation for Qwest relating to interconnection and the provisioning of UNEs that did not exist in the McLeod interconnection agreement.

297. As with Section 2 of Eschelon Agreement III, set out above, a term that defines how a CLEC and an ILEC will work with each other on interconnection issues and address concerns regarding access to UNEs and other services is a term for providing interconnection, access to UNEs and/or telecommunications services.

298. 47 U.S.C. § 251 requires ILECs to provide interconnection, network elements and services on a non-discriminatory basis.

299. Section 2 of McLeod Agreement II I obligated Qwest to provide senior executives to meet with McLeod on a regular basis to discuss interconnection, access to UNEs and services.

300. Section 2 of McLeod Agreement II describes terms for provisioning interconnection and access to UNEs at the rates set forth in Eschelon's interconnection agreement with Qwest. The term "rates" includes terms that involve the provisioning of services and billing. Accordingly, 47 U.S.C. §§ 252(a) and (e) required Qwest to file the terms in Section 2 of McLeod Agreement II with the Commission.

301. By failing to file Section 2 of McLeod Agreement II for approval by the Commission, Qwest violated 47 U.S.C. §§ 252(a) and (e).

302. Qwest knowingly and intentionally violated 47 U.S.C. §§ 252(a) and (e) in that Qwest knew that those statutes required Section 2 of McLeod Agreement II to be filed with the Commission but intentionally did not make the required filing.

303. The Act requires Qwest not to discriminate when providing interconnection, access to network elements and services. Qwest gave McLeod certain rights through Section 2 of McLeod Agreement II that CLECs could not obtain anywhere else. There is no approved interconnection agreement in Minnesota that requires

[90] SUF ¶ 118 and ¶ 119.

Qwest to provide any CLEC with the same level of access to Qwest senior executives on a quarterly basis.[91]

304. By failing to make this provision available to other CLECs, Qwest knowingly and intentionally discriminated against them in violation of 47 U.S.C. § 251.

305. The Eighth Amendment to McLeod Interconnection Agreement states that "[t]he Parties wish to establish a business-to-business relationship and have agreed that they will attempt to resolve all differences or issues that may arise under the Agreements or this Amendment under an escalation process to be established between the parties." This is not a sufficient filing to satisfy 47 U.S.C. § 252 with respect to Section 2 of McLeod Agreement II.

Section 3

306. As with Eschelon III, set out above, Section 3 of McLeod Agreement II committed Qwest to respond to a multi-level escalation process for resolving interconnection disputes. It also committed Qwest's ultimate decision maker, its CEO, to address disputes that reached the third level of the escalation procedures. It also contains a provision by which McLeod and Qwest agreed to waive primary jurisdiction in any state utility or service commission and to waive tariff limitations on damages or other limitation on reasonably foreseeable damages.

307. 47 U.S.C. § 251 requires ILECs to provide interconnection, network elements and services on a non-discriminatory basis.

308. Section 3 obligated Qwest to participate in a well-defined set of escalation procedures for resolving problems arising under its interconnection agreement with McLeod. Section 3 expressly says that it applies to all business disputes between Qwest and McLeod, including but not limited to, their Interconnection Agreements and Amendments. Terms and conditions for resolving disputes regarding interconnection and the provisioning of network elements are terms and conditions for providing those things to the CLECs. Section 3 of McLeod Agreement II describes terms for provisioning interconnection and access to UNEs at the rates set forth in Eschelon's interconnection agreement with Qwest. The term "rates" includes terms that involve the provisioning of services and billing. Accordingly, 47 U.S.C. §§ 252(a) and (e) required Qwest to file the terms in Section 3 of McLeod Agreement II with the Commission.

310. By failing to file Section 3 of McLeod Agreement II for approval by the Commission, Qwest violated 47 U.S.C. §§ 252(a) and (e).

311. Qwest knowingly and intentionally violated 47 U.S.C. §§ 252(a) and (e) in that Qwest knew that those statutes required Section 3 of McLeod Agreement II to be filed with the Commission but intentionally did not make the required filing.

[91] Ex. 200 – WCD-13 (Qwest's Response to DOC 062 in the 814 Docket).

312. The Act requires Qwest not to discriminate when providing interconnection, access to network elements and services. Qwest gave McLeod certain rights through Section 3 of McLeod Agreement II that other CLECs could not obtain anywhere else. There is no approved interconnection agreement in Minnesota that requires Qwest to provide any CLEC with the same escalation process and/or waivers on jurisdiction and damage waivers.[92]

313. By failing to make this provision available to other CLECs, Qwest knowingly and intentionally discriminated against them in violation of 47 U.S.C. § 251.

314. The escalation procedures made available to CLECs generally, as cited by Qwest witness Dana Filip,[93] begin with the Service Delivery Coordinator and end at the Senior Director / Vice President level.[94] The multi-level procedures in McLeod Agreement II, in contrast, start at the Vice President level. Accordingly, Section 3 of McLeod Agreement II allows McLeod to start the escalation process where, according to Qwest's testimony, the process for every other CLEC ends.

315. The Eighth Amendment to McLeod Interconnection Agreement states that "[t]he Parties wish to establish a business-to-business relationship and have agreed that they will attempt to resolve all differences or issues that may arise under the Agreements or this Amendment under an escalation process to be established between the parties." This is not a sufficient filing to satisfy 47 U.S.C. § 252 with respect to Section 3 of McLeod Agreement II.

X. MCLEOD AGREEMENT III

316. On or about October 26, 2000, Qwest and McLeodUSA entered into an oral agreement whereby Qwest would provide discounts to McLeodUSA for all purchases made by McLeodUSA from Qwest ("McLeod Agreement III").

317. Blake O. Fisher testified as to the negotiation and execution of the discount agreement both in his affidavit dated June 12, 2002,[95] and again at his deposition taken by Qwest on June 27, 2002.[96]

318. The discount ranged from 6.5% to 10% depending on the volume of purchases made by McLeodUSA from Qwest over the course of a year, but the discount is only available to McLeodUSA if it meets minimum purchase volume commitments from Qwest.

319. The discount applied both to McLeodUSA's purchase of unbundled network elements ("UNEs") under the Act as well as to its payments for switched

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[92] Ex. 200 – WCD-13 (Qwest's Responses to DOC 063 and DOC 064 in the 814 Docket).
[93] Ex. 74 AT 10 – 11.
[94] Ex. 7 at 2.
[95] Ex. 402J, Deposition Exhibit 3, ¶¶ 2, 18 – 20.
[96] Ex. 402J at 33–35; 37– 40; 43.

access, wholesale long distance and tariffed retail services (which are not covered under the Act). And, the discount applied to all purchases made by McLeodUSA both within Qwest's 14-state ILEC territory and outside of that region.

320. Mr. Fisher's testimony is credible and supported by the documentary evidence in this case.

321. The existence of the discount agreement is also confirmed by the course of conduct engaged in by the parties after October 26, 2000. Specifically, the affidavit testimony of Lori Deutmeyer confirms that Qwest calculated "preferred vendor payments" to McLeodUSA by multiplying the dollar amount of McLeodUSA purchases from Qwest in a given time period by a 10% discount factor.[97] Ms. Deutmeyer's testimony is credible and supported by the documentary evidence in this case.

322. The discount schedule agreed to by Qwest and McLeodUSA is set out in Exhibit 427J and Exhibit 3 to Mr. Fisher's Affidavit.[98]

323. Mr. Fisher asked Greg Casey and Audrey McKenney from Qwest to put the discount agreement in writing, but they would not do so.[99] Mr. Casey and Ms. McKenney were concerned that other CLECs might feel entitled to the same discount if the agreement were written and made public.[100]

324. When Mr. Fisher expressed concern over the enforceability of the oral agreement for the discount, Qwest suggested that it would enter into its own take-or-pay agreement to purchase products from McLeod.[101] The amount of the Qwest take-or-pay commitment was calculated by applying an 8% discount factor to a projected amount of purchases by McLeod from Qwest.[102]

325. The October 26, 2000 written agreement by Qwest to purchase "products" from McLeodUSA was merely a mechanism for securing some portion of the discount Qwest agreed to pay.[103]

326. Prior to October 26, 2000, Qwest offered discounts of various amounts to McLeodUSA. The amount of the discounts offered varied based on the dollar amount of purchases that McLeodUSA would make from Qwest.[104] Qwest made presentations to McLeodUSA that included discussions of the discounts being offered.[105]

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[97] Ex. 401J, ¶¶ 2-12.
[98] Ex. 440J.
[99] Ex. 402J, 58:6 – 59:9.
[100] *Id.* at 59.
[101] Fisher Affidavit ¶¶ 22-23.
[102] *Id.* at ¶ 23.
[103] Ex. 404J; Ex. 402J, 37 – 40.
[104] Exs. 417J, 420J, 421J, 423J, 424J, 425J, 426J and 427J: Fisher Affidavit, Exhibits 2 (created jointly with McLeodUSA) and 3.
[105] Exs. 416J, 417J.

327. Qwest also created documents during the course of its negotiations with McLeodUSA that show Qwest considering the financial impact of the various discount offers it made to McLeodUSA.[106]

328. McLeodUSA responded to Qwest's discount proposals with proposals of its own.[107]

329. Between October 26, 2000 and the beginning of 2002, Qwest calculated and paid amounts due to McLeodUSA under the terms of the discount agreement described by Mr. Fisher.[108]

330. During that same time period, both McLeodUSA and Qwest referred to the discount in communications exchanged between them.[109]

331. In the spring of 2001, McLeodUSA and Qwest entered into new negotiations. One issue discussed in those negotiations was the possibility of increasing the discount level that the parties had agreed to in October, 2000, by adding a new tier for increased McLeodUSA purchase amounts.[110]

332. In the summer of 2001, Qwest and McLeodUSA entered into negotiations to reduce the cost of ISDN/PRI circuits to McLeodUSA. As part of those discussions, Qwest sent documents to McLeodUSA expressly stating that the October 26, 2000 discount would not apply to further reduce the prices being offered by Qwest to McLeodUSA.[111] Qwest further circulated e-mails internally discussing how to accommodate the discount agreement in the ISDN/PRI proposal Qwest was preparing for McLeodUSA.[112]

333. The documents refer to the discount variously as a "discount", a "refund", a "preferred vendor payment" and a "credit", among other things. Regardless of what the payment is called, Qwest agreed to and did make payments to McLeodUSA that reduced the rates McLeodUSA paid for UNEs, wholesale telecommunications services, interconnection services, tariffed services, retail services, access charges and every other product and service purchased by McLeodUSA from Qwest.

334. There is no evidence of any communication between Qwest and McLeodUSA occurring between October 26, 2000 and the date the Department filed its initial complaint in this docket (February 14, 2002) in which Qwest tells McLeodUSA that there is no discount agreement.

335. There is no evidence of any communication within Qwest occurring between October 26, 2000 and the date the Department filed its initial complaint in this

[106] Exs. 414J, 423J, 426J, 428J.
[107] Exs. 415J, 419J, 422J and 464J; Fisher Affidavit Exhibit 2 (created jointly with Qwest).
[108] Exs. 401J (Exhibits 1-5), 407J, 408J, 409J, 410J, 411J, 412J, 413J and 458J.
[109] Exs. 432J, 433J, 434J, 436J, 437J, 439J, 440J, 442J and 459J.
[110] Exs. 436J, 437J, 439J, 440J.
[111] Ex. 442J.
[112] Exs. 441J, 443J, 444J.

docket (February 14, 2002) informing anyone at Qwest that there is no discount agreement with McLeodUSA.

336. The testimony of Audrey McKenney that Qwest did not enter into a discount agreement with McLeodUSA is not credible. Ms. McKenney would not directly answer questions from the Department or the Court asking whether Qwest had ever offered McLeodUSA a discount.[113] In addition, the substantial majority of the documents in evidence were created contemporaneously with the events at issue and directly contradict Ms. McKenney's testimony. Finally, Ms. McKenney offered Eschelon financial incentives to (a) withhold information from regulators that may be relevant to Qwest's Section 271 applications, and (b) covertly assist Qwest in manipulating various regulatory proceedings.[114] There is a real question about her respect for the regulatory process.

337. 47 U.S.C. § 251 requires Qwest to provide interconnection, network elements and services at rates that are non-discriminatory.

338. McLeod Agreement III obligated Qwest to provide McLeodUSA with a discount of between 6.5% and 10% on every purchase McLeodUSA made or makes from Qwest between October 2, 2000 and December 31, 2003, so long as McLeodUSA meets certain minimum purchase commitments. That discount changed all of the prices in McLeodUSA's interconnection agreement, including those set by the Commission in lengthy cost docket proceedings.

339. 47 U.S.C. §§ 252(a) and (e) required Qwest to reduce the terms of McLeod Agreement III to writing and file McLeod Agreement III with the Commission.

340. McLeod Agreement III modifies the rates set forth in McLeodUSA's interconnection agreement with Qwest. Accordingly, 47 U.S.C. §§ 252(a) and (e) required Qwest to file McLeod Agreement III with the Commission.

341. By failing to file McLeod Agreement III for approval by the Commission, Qwest violated 47 U.S.C. §§ 252(a) and (e).

342. Qwest knowingly and intentionally violated 47 U.S.C. §§ 252(a) and (e) in that Qwest knew that those statutes required McLeod Agreement III to be filed with the Commission but intentionally did not make the required filing.

343. The Act requires Qwest not to provide discriminatory rates for interconnection, access to network elements and services. In McLeod Agreement III, Qwest provided McLeodUSA with a discount that CLECs could not obtain anywhere else. There is no approved interconnection agreement in Minnesota that requires Qwest to provide any CLEC with the same discount.

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[113] Tr. 5:114–118.
[114] Ex. 240A.

344. By failing to make this provision available to other CLECs, Qwest knowingly and intentionally discriminated against them in violation of 47 U.S.C. § 251.

345. As of February, 2002, McLeodUSA had received more than [BEGIN TRADE SECRET] [END TRADE SECRET] in discount payments from Qwest.[115]

XI. THE USLINK AGREEMENT

348. On July 14, 1999, U S WEST entered into an agreement with USLink, Inc. and InfoTel Communications, LLC (the "USLink Agreement").[116]

349. Qwest did not submit the USLink Agreement to the Commission for approval under 47 U.S.C. §252(e) until march 1, 2002, in response to the Department's complaint in this matter.

350. Under the USLink Agreement, Qwest agreed to provide tandem switching functionality for the Brainerd, Duluth, Fargo, Fergus Falls, Grand Rapids, Hibbing, Little Falls, Owattona, Rochester, St. Cloud, Wadena, and Willmar Qwest end offices ("USLink Agreement End Offices").[117]

351. The Commission has already ruled, in the DTI Order, that language nearly identical to that found in the USLink Agreement had to be filed with the Commission and made available to other CLECs under 47 U.S.C. §252(i). [118]

352. By failing to file US Link Agreement for approval by the Commission, Qwest violated 47 U.S.C. §§252(a) and (e).

353. Qwest knowingly and intentionally violated 47 U.S.C. §§252(a) and (e) in that Qwest knew that those statutes required US Link Agreement to be filed with the Commission but intentionally did not make the required filing.

354. By failing to make this provision available to those other CLECs, Qwest knowingly and intentionally discriminated against them in violation of 47 U.S.C. §251.

Public Interest Implications

355. There is overlap between this unfiled agreements proceeding and the public interest portion of Qwest's Section 271 proceeding pending before this Commission. A number of parties in the public interest proceeding argued that the Commission ought to consider Qwest's behavior in connection with the unfiled

[115] Ex. 401J, ¶¶ 9 –11.
[116] SUF ¶ 121.
[117] SUF ¶ 127.

[118] In the Matter of a Complaint by Dakota Telecom, Inc. Against Qwest Corporation, Docket No. P-421/C-00-373, *Order Approving Settlement*, July 25, 2001, (the "DTI Order").

agreements when it determines whether there were any unusual circumstances that would affect the Commission's recommendation to the FCC concerning Qwest's application for long-distance authority. In his report in the public interest case, this Administrative Law Judge stated that he would address the public interest issues arising from these unfiled agreements in his report in the unfiled agreements case.

356. There are five different pubic interest implications arising from the unfiled agreements. First, Qwest's attempt to subvert the "pick and choose" provisions of the Act by not filing the agreements; second, Qwest's attempts to prohibit CLECs from participating in the 271 proceedings; third, Qwest's attempts to prohibit CLECs from participating in the Qwest/US West merger proceeding; fourth, Qwest's attempt to prevent disclosure of negative performance information in the 271 proceeding; and, fifth, Qwest's attempt to have a CLEC become an advocate for Qwest in various commission proceedings whenever Qwest requested it. Each of these will be dealt with separately.

357. Non-discrimination by ILECs is a bedrock principle of the Act. The filing of interconnection agreements, and the pick and choose requirements of Section 252, give life to that principle. By not filing the 12 agreements discussed above, Qwest knowingly prevented other CLECs from picking and choosing their provisions. This demonstrates a hostility to the non-discrimination concept that raises serious questions about how Qwest will cooperate with local competition efforts in the future.

358. Qwest responds that it has taken a number of steps after the existence of these unfiled agreements came to light. Qwest promptly terminated some of the agreements in March 2002, but it did make available for public review the remaining agreements. Qwest filed them as "conditional" amendments to existing interconnection agreements, meaning that if the Commission finds that the agreements should have been filed, then the Commission can treat them as having been filed by Qwest. While they are not available for pick and choose at this time, they are at least available for review by other CLECs, who could try to use them as a basis for negotiations.

359. Qwest has adopted a new internal review procedure to review all negotiations, potential agreement terms, and documentation to determine whether or not they constitute an agreement that must be filed. In addition, Qwest has agreed to "overfile" by filing "all contracts, agreements or letters of understanding between Qwest and CLECs that create obligations to meet the requirements of Section 251(b) or (c) on a going forward basis."[119]

360. On April 23, 2002, Qwest filed a Petition for Declaratory Ruling with the FCC, seeking a declaratory ruling as to which types of agreements must be filed, and which need not be filed.[120]

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[119] Letter from R. Steven Davis to Mark Oberlander, May 13, 2002, attached as Exhibit D to Qwest's Post-Hearing Memorandum.
[120] *Id.*, at Ex. C.

361. With respect to the pubic interest implications of Qwest's obtaining agreements from CLECs not to participate in Section 271 proceedings, Eschelon Agreement III provides, in pertinent part:

> "During development of the [implementation] plan, and thereafter, if an agreed upon plan is in place by April 30, 2001, Eschelon agrees to not oppose Qwest's efforts regarding Section 271 approval or to file any complaints before any regulatory body concerning issues arising out of the parties' interconnection agreements. Both before and after April 30, 2001, Eschelon reserves the right, after notice to Qwest, to participate in regulatory cost proceedings or dockets regarding the establishment of rates. Notwithstanding any other provision of this agreement, if no plan is agreed upon by April 30, 2001, the parties will have all remedies available at law and equity in any forum."

This agreement was entered into on November 15, 2000, which was the starting date for the 10% discount which Qwest agreed to give Eschelon on purchases made from that date forward.

362. With respect to McLeod, Blake O. Fischer, who was McLeod's lead negotiator, stated under oath as follows:

> Another component to completing the transaction that gave McLeodUSA access to UNE-M and the purchase volume pricing [discount] was McLeodUSA's agreement to remain neutral regarding Qwest's Section 271 application. Qwest made it clear to me that for Qwest to enter into the UNE-M and volume pricing arrangement, McLeodUSA had to agree to remain neutral on Qwest's Section 271 applications. McLeod USA agreed to remain neutral provided Qwest complied with all of our agreements and with all applicable statutes and regulations.[121]

363. There are five other agreements whereby a CLEC agrees to withdraw opposition to the Qwest/US West merger. They are: (1) Eschelon I; (2) Covad; (3) McLeod I; (4) McLeod II; and (5) Small CLECs. These agreements have been described more fully above. In each of them, the CLEC received something of benefit in exchange for agreeing not to oppose the merger.

364. Going back into the year 2000, Qwest and Eschelon had disagreed about switched access minutes of use. Eschelon believed that Qwest was underreporting access minutes. In an attempt to resolve this dispute, Audrey McKenney of Qwest sent a letter to Richard Smith of Eschelon on July 3, 2001, confirming that the two had agreed to perform an audit. Since November of 2000, Qwest had been paying Eschelon the difference between $13.00 per line per month and the amount that

[121] Affidavit of Blake O. Fisher dated June 12, 2002, in the record of this proceeding as Ex. 473J, attachment WCD-13.

Eschelon was able to bill IXC's for switched access based on the Qwest data. After January 1, 2001, Qwest had been paying the difference between $16.00 per line per month and the amount that Eschelon was able to bill IXC's based on the Qwest data. Eschelon had also been complaining about access records for Qwest's intraLATA toll traffic terminating customers served by an Eschelon switch. In the July 3, 2001, letter, McKenney agreed that Qwest would pay Eschelon $2.00 per line per month for such traffic. Qwest did pay both amounts for the months of July, August and September of 2001, but then quit paying. On October 30, 2001, McKenney sent a proposed Confidential Purchase Agreement to Eschelon. This agreement was signed by McKenney, with a space for Eschelon to sign. Along with it was a Confidential Billing Settlement Agreement, of the same date, also signed by McKenney. It includes an agreement by Eschelon to deliver to Qwest "all reports, work papers, or other documents related to the audit process described in that [July 3, 2001] letter." The matter of destroying the audit report on Qwest's access record adequacy was also discussed in an email from Eschelon's Jeff Oxley to Richard Corbetta on October 22, 2001.

365. The October 30, 2001 proposed Confidential Purchase Agreement signed by McKenney but not by Eschelon contains the following language:

> As part of the services described herein, it is anticipated that the parties will exchange confidential and proprietary information. Specifically, it is anticipated that Qwest shall provide confidential and proprietary, and sensitive information to Eschelon. Accordingly, as a material element of this PA, unless otherwise requested by Qwest or an affiliate, and out of an abundance of caution that Eschelon not misuse (intentionally or by mistake) such information, Eschelon agrees, during the term of this PA, to refrain from initiating or participating in any proceeding (regulatory, judicial, arbitration, or legislative) where Qwest's interests may be implicated, including but not limited to, formal and informal proceedings relating to Qwest's or its affiliates' efforts to obtain relief pursuant to Section 271 of the Telecommunications Act of 1996, including but not limited to, change management process workshops, performance indicator/assurance dockets and cost dockets. Notwithstanding the foregoing, since Eschelon will help Qwest with, including but not limited to, its business process, products and operations, Eschelon shall, when requested by Qwest file supporting testimony/pleadings/comments and testify whenever requested by Qwest in a manner suitable to Qwest (substantively). In addition, upon request by Qwest, Eschelon will withdraw or dismiss existing proceedings.[122]

[122] According to a January 2, 2002 letter from Richard Smith (Eschelon) to Gordon Martin (Qwest), Ms. McKenney later told Mr. Smith that she did not have the authority to make the October 30, 2001 agreements. Ex. 237.

367. On October 8, 2001, Suzy Beesley, on behalf of Richard Smith at Eschelon, sent an email to Dana Filip and Audrey McKenney, both of Qwest, attempting to show how Eschelon had assisted Qwest over the prior two years. Among other benefits, Mr. Smith notes "Eschelon has not made its report card of Qwest's performance available to other carriers or to state commissions or the FCC. These report cards document unsatisfactory performance by Qwest in a number of categories from missed installations to major network outages." Mr. Smith goes on to note "Eschelon has not disclosed any problems it has experienced with Qwest's access of billing records or with Qwest's general billings for UNEs and UNE-E lines." The letter points out that Eschelon has covertly assisted Qwest in dockets in which Eschelon would otherwise have been considered an adverse party. For example, Mr. Smith writes, "In the [sic] Minnesota, Eschelon has helped Qwest in wholesale service quality proceedings by working to reduce differences between CLEC proposed quality measures and Qwest proposed measures and by pointing out defects in Qwest testimony in advance of cross-examination of Qwest witnesses."

PENALTIES

368. The Commission has specifically requested that the ALJ recommend only whether penalties should be assessed. As discussed more fully in the Memorandum, this case gives the Commission the opportunity to fashion a creative remedy. However, the Commission must determine the appropriate penalties based upon the factors in §237.462 and the other applicable statutes. These factors require a few more Findings in order to give the Commission a full view of the considerations listed in the statute.

369. The evidence shows that Qwest gained several significant advantages for itself in exchange for its promises to the CLEC parties to the unfiled agreements. The most significant of these advantages was the promise Qwest extracted from Eschelon and McLeodUSA - two of Qwest's largest wholesale customers - to "remain neutral" during the consideration of Qwest's §271 applications by state and federal regulators.[123]

370. With respect to Eschelon, Qwest had substantial service-related problems that apparently have not been addressed in a number of Minnesota dockets because of this neutrality agreement.[124]

371. Qwest secured guaranteed revenue streams of $150,000,000 from Eschelon and [BEGIN TRADE SECRET] [END TRADE SECRET] from McLeodUSA as part of its discount agreements.[125] By entering into the discount agreement with McLeodUSA, Qwest also secured McLeodUSA's commitment not to take its telecommunications traffic off of Qwest's network.[126]

372. By concealing both discount agreements and keeping them unavailable to other CLECs, Qwest benefited by saving several millions of dollars in Minnesota alone.

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[123] Ex. 200 - WCD-3 and Fisher Affidavit, ¶ 24.
[124] Exs. 235, 236, 237, 239, 240.
[125] Ex. 200 - WCD-4 and Fisher Affidavit, ¶17.
[126] *See* Fisher Affidavit ¶¶ 8 - 17; Ex. 402J at 62-63.

373. Qwest knowingly and intentionally violated §47 U.S.C. §§252 and 251. It intentionally structured agreements to prevent their disclosure as filed interconnection agreements.

374. The testimony in this case from CLECs that were actually harmed by Qwest not making the unfiled agreement terms available to them demonstrates the harm caused by Qwest's intentional conduct to both customers and competitors. It is impossible to calculate the damages to CLECs that have not been able to opt into the agreements, but it is certain that damages would amount to several million dollars for Minnesota alone.

375. Because none of the provisions cited in the Complaint have yet been made available to other CLECs for pick and choose, the harm continues. Qwest's conduct generally harms competition and the growth of CLECs in Minnesota.

376. The Commission should also consider the quid pro quo that Qwest received from its conduct, including the elimination of CLEC participation in regulatory proceedings addressing the public interest, and the damage that caused to the furtherance of competition in Minnesota.

377. Qwest has a history of past violations. In that regard, Qwest tried to avoid its §252 obligations in both the MCIWorldcom docket and the DTI docket. In addition, the Commission recently found that Qwest has engaged in a pattern of anticompetitive behavior in *In the Matter of the Complaint of AT&T Communications of the Midwest Against Qwest Corporation*, Docket No. P-421/C-01-391.

378. Qwest has committed 25 individual violations by failing to file, as required, 25 distinct provisions (found in 12 separate agreements) for interconnection, access to UNEs and/or access to services.

379. The economic benefits gained by Qwest are, at a minimum: (a) the withdrawal of CLECs from the consideration of the Qwest / U S WEST merger; (b) a $150,000,000 purchase commitment from Eschelon; (c) the [BEGIN TRADE SECRET] [END TRADE SECRET] purchase commitment from McLeodUSA; (d) the agreement by McLeodUSA to keep its telecommunications traffic on the Qwest network; (e) the millions of dollars Qwest saved by not making the purchase volume discounts it agreed to with McLeodUSA and Eschelon available to other CLECs, and (f) agreements by two of Qwest's largest wholesale customers (Eschelon and McLeodUSA) to not participate in the consideration of whether Qwest should receive interLATA long distance authority under 47 U.S.C. §271.

380. Qwest has not taken meaningful corrective action to remedy the harm caused by failing to file the specific agreements cited in the complaint. Qwest does intend to seek Commission consideration of a subset of the provisions complained about here, but if and only if the Commission first determines that it must.

381. The fact that Qwest has cancelled some of the Eschelon agreements in an attempt to keep from making them publicly available should be considered as a factor.

382. The seventh statutory factor for consideration is the annual revenue and assets of the company committing the violations, including the assets and revenue of any affiliates that have 50 percent of more common ownership or that own more than 50 percent of the company. According to Qwest's website, Qwest Communications International, Inc., Qwest Corporation's parent, reported annual revenues of over $20 billion and assets of over $74 billion for the year 2001.

383. Qwest has the financial ability to pay any fine assessed by the Commission. The company, including any affiliates that have 50 percent or more common ownership or that own more than 50 percent of the company, has $20 billion in revenue. Ms. McKenney, Qwest's own witness, pointed out in her testimony how insignificant an amount of money [BEGIN TRADE SECRET] [END TRADE SECRET] was to Qwest given its annual expenditures of [BEGIN TRADE SECRET] [END TRADE SECRET] paid to other carriers for network expenses alone.[127]

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Administrative Law Judge and the Commission have jurisdiction in the matter under 47 U.S.C. §§ 251 and 252, and Minn. Stat. §§ 14.50, 237.02, 237.081, 237.16, and 237.462.

2. The Department has demonstrated by a preponderance of the evidence that Qwest has violated the provisions of 47 U.S.C. § 251, as more particularly set out in the Findings of Fact above.

3. The Department has demonstrated by a preponderance of the evidence that Qwest has violated the provisions of 47 U.S.C. § 252, as more particularly set out in the Findings of Fact above.

4. The Department has demonstrated by a preponderance of the evidence that each of Qwest's violations of 47 U.S.C. § 251, were knowing and intentional.

5. The Department has demonstrated by a preponderance of the evidence that each of Qwest's violations of 47 U.S.C. § 252, were knowing and intentional.

6. The Department has demonstrated by a preponderance of the evidence that a penalty is justified under Minn. Stat. § 237.462, subds. 2 and 3. The Commission is not limited, however, to a monetary penalty. Subdivision 9 of that statute explicitly allows the Commission to use other enforcement provisions available to it for these same violations.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

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[127] Tr. 5:117-118.

RECOMMENDATION

IT IS RESPECTFULLY RECOMMENDED that the Commission take action against Qwest for its activities as detailed above.

Dated this 20th day of September 2002

Allan W. Klein

ALLAN W. KLEIN
Administrative Law Judge

Reported: Court Reported, Shaddix & Assoc.

MEMORANDUM

This unfiled agreements case, when coupled with the Qwest 271 case, presents a unique opportunity for the Commission to be creative in fashioning a remedy that will operate in the best interests of Minnesota ratepayers and telephone users in the future. It is very similar to a situation which occurred in the early 1990s when NSP sought authority to store its spent fuel in dry casks at Prairie Island. That case, which was ultimately resolved by the legislature, ended with a creative solution involving not only permission for NSP to use the dry casks, but also the windpower, biomass, and resource planning mandates that are still very much in operation today. This case, linked as it is with the 271 application, gives the Commission the same kind of chance to forge a creative solution that can benefit the State for years to come.

The Administrative Law Judge does not have any "total package" solutions to suggest to the Commission. Instead, he hopes the parties will be able to offer suggestions to the Commission and that ultimately the Commission is able to create a meaningful package that will benefit local competition in the long term throughout Minnesota.

A.W.K.

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
ADMINISTRATIVE LAW SECTION
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MINNEAPOLIS, MINNESOTA 55401

CERTIFICATE OF SERVICE

Case Title:	OAH Docket No.:
In the Matter of the Complaint of the Minnesota Department of Commerce Against Qwest Corporation Regarding Unfiled Agreements	6-2500-14782-2

Cindy Ringdahl, certifies that on the 20th day of September, 2002, she served a true and correct copy of the attached FINDINGS OF FACT, CONCLUSIONS AND RECOMMENDATION; by placing it in the United States mail with postage prepaid, addressed to the following individuals:

All Parties on Attached Official Service List

OFFICIAL SERVICE LIST
Unfiled Agreements Complaint
P-421/C02-197
6-2500-14782-2
As of April 22, 2002

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BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Gregory Scott	Chair
Marshall Johnson	Commissioner
LeRoy Koppendrayer	Commissioner
Phyllis A. Reha	Commissioner

In the Matter of the Complaint of the Minnesota Department of Commerce Against Qwest Corporation Regarding Unfiled Agreements

ISSUE DATE: November 1, 2002

DOCKET NO. P-421/C-02-197

ORDER ADOPTING ALJ'S REPORT AND ESTABLISHING COMMENT PERIOD REGARDING REMEDIES

PROCEDURAL HISTORY

On February 14, 2002, the Commission received a complaint against Qwest filed by the Minnesota Department of Commerce (the Department) pursuant to Minn. Stat. § 237.462. The complaint alleged that Qwest, in neglecting to make public and seek Commission approval for eleven interconnection agreements with various competitive local exchange companies (CLECs), has acted in a discriminatory and anti-competitive manner.

On March 12, 2002, the Commission issued a NOTICE AND ORDER FOR HEARING referring the matter to the Office of Administrative Hearings (OAH) for a contested case proceeding. The Commission determined that the issues to be addressed by an Administrative Law Judge (ALJ) were as follows:

1) whether the agreements, or any portion thereof, needed to be filed with the Commission for review;

2) whether they were filed under other settings;

3) whether there were any exculpatory reasons why they were not filed; and

4) whether disciplinary action/penalties are appropriate.

Administrative Law Judge (ALJ) Allan W. Klein was assigned to the case.

On April 29, 2002, hearings regarding the eleven agreements commenced and were completed on May 2, 2002.

On May 24, 2002, the Department petitioned the ALJ to reopen the record to admit evidence regarding an alleged, newly discovered, oral, twelfth agreement. The ALJ granted the Department's request.

EXHIBIT "D"

On August 6, 2002, the ALJ heard arguments regarding the twelfth agreement.

On September 20, 2002, the ALJ submitted his *Findings of Fact, Conclusions, Recommendation and Memorandum* (ALJ Report) to the Commission.

On September 30, 2002, Qwest filed exceptions to the ALJ Report.

On October 4, 2002, the Federal Communications Commission (FCC) issued its Memorandum Opinion and Order in *Qwest Communications International Inc. Petition for Declaratory Ruling on the Scope and Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements Under Section 252(a)(1)* (WC Docket No. 02-89, October 4, 2002). The FCC stated in ¶ 8:

> [W]e find that an agreement that creates an *ongoing* obligation pertaining to resale, number portability, dialing parity, access to rights-of-way, reciprocal compensation, interconnection, unbundled network elements, or collocation is an interconnection agreement that must be filed pursuant to section 252(a)(1). [emphasis in original].

On October 8, 2002, Commission staff requested comments from parties regarding the impact of the FCC's Memorandum Opinion and Order on the current proceeding.

On October 10, 2002, replies to Qwest's exceptions were filed by AT&T.

On October 11, 2002, replies to Qwest's exceptions were filed by the Department.

On October 16, 2002, the following parties filed comments regarding the impact of the FCC's October 4, 2002 Memorandum Opinion and Order on the current proceeding: Qwest, the Department, and AT&T.

The Commission met to consider this matter on October 21, 2002.

FINDINGS AND CONCLUSIONS

I. SUMMARY OF COMMISSION ACTION

In this Order the Commission adopts the ALJ's report in its entirety, including the ALJ's findings that Qwest knowingly and intentionally violated federal law for each of 26 interconnection terms or groupings of terms.

The Commission also finds, based on the same findings of fact, that Qwest knowingly and intentionally violated Minn. Stat. § 237.09, Minn. Stat.§ 237.121, subd. 5, and Minn. Stat. § 237. 60, subd. 3.

Finally, the Commission adopts the ALJ's recommendation that the Commission take action against Qwest for its activities detailed in the ALJ's report.[1] To prepare to decide what form that action should take, the Commission will schedule input from the parties regarding what the precise remedies (monetary and/or non-monetary) should be in this matter.

II. ALJ'S REPORT

The ALJ concluded that :

- The Department has demonstrated by a preponderance of the evidence that Qwest has violated the provisions of 47 U.S.C. § 251, as more particularly set out in the Findings of Fact.
- The Department has demonstrated by a preponderance of the evidence that Qwest has violated the provisions of 47 U.S.C. § 252, as more particularly set out in the Findings of Fact.
- The Department has demonstrated by a preponderance of the evidence that each of Qwest's violations of 47 U.S.C. § 251 were knowing and intentional.
- The Department has demonstrated by a preponderance of the evidence that each of Qwest's violations of 47 U.S.C. § 252 were knowing and intentional.
- The Department has demonstrated by a preponderance of the evidence that a penalty is justified under Minn. Stat. § 237.462, subdivisions 2 and 3. The Commission is not limited, however, to a monetary penalty. Subdivision 9 of that statute explicitly allows the Commission to use other enforcement provisions available to it for these same violations.

Based on these conclusions, the ALJ recommended that the Commission take action against Qwest for its activities detailed in his Report.

III. QWEST'S EXCEPTIONS TO THE ALJ'S REPORT

Qwest objected to the ALJ's Report, arguing the following.

- The ALJ Report is fundamentally flawed because it applies a nonexistent standard and ignores the weight of the evidence in recommending that the Commission impose penalties against Qwest.
- The standard proposed, defining which terms must be filed for approval, is so broad and indefinite that it is impossible to apply.
- There is no evidence in the record that Qwest knowingly and intentionally did not file agreements under § 252.

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[1] ALJ Report, page 54.

- The record is replete with unrebutted evidence of non-discrimination, which the ALJ Report improperly disregards.

- The ALJ Report erred in finding that penalties should be assessed. There is no evidence in the record that Qwest saved anything by not filing; that CLECs sustained any harm; that there are any past violations; that Qwest did not take corrective action; that Qwest structured the agreements to avoid disclosure; or that Qwest's revenues, assets, and ability to pay support penalties.

IV. COMMISSION ANALYSIS OF THE ALJ'S REPORT

A. Knowing and Intentional Failure to File Interconnection Agreements

The ALJ analyzed eleven written agreements between Qwest and various CLECs that Qwest had not filed with the Commission for approval before the Department brought its complaint and one oral agreement between Qwest and McLeodUSA that Qwest has never reduced to writing and submitted to the Commission for approval.

Contrary to Qwest's assertion in this matter, the type of agreements that are required to be filed under 47 U.S.C. §§ 251(a) and (e) was clear at the time Qwest chose not to file these agreements, based on the plain language of the federal law. Qwest's argument that its employees did not file these agreements because they were confused or had a good faith different view regarding the meaning of the law and their responsibilities under the law is not supported in the record and, in light of the plain language of the law, is not credible.[2]

Accordingly, the Commission agrees with the ALJ that Qwest knowingly and intentionally violated 47 U.S.C. §§ 252(a) and (e) because Qwest knew that the referenced statutes required the Company to file these agreements with the Commission and the Company intentionally did not make the required filing.[3]

---

[2] As the ALJ found, a common understanding of what must be filed (interconnection agreements) and what constitutes an interconnection agreement is shared by the Department, AT&T, the Residential and Small Business Utilities Division of the Office of the Attorney General (RUD-OAG), the Iowa Utilities Board and even reflected in Qwest's own SGAT (Section 4). ALJ Report, Finding of Fact #28. The validity and accessibility of this understanding is further confirmed by the FCC's October 4, 2002 Memorandum Opinion and Order in which the FCC articulated a filing standard virtually identical to the standard stated by the ALJ, stating that its articulated standard "flows directly from the statute." Memorandum Opinion and Order, Paragraph 10.

[3] See ALJ's Report, Finding Nos. 45, 58, 65, 75, 86, 103, 114, 138, 148, 165, 184, 196, 205, 213, 221, 229, 240, 248, 256, 264, 281, 290, 302, 311, 342, and 353.

B. Discrimination

47 U.S.C. § 251 (b) (1) prohibits local exchange companies (LECs) such as Qwest from imposing unreasonable or discriminatory conditions on resale, and § 251 (c) (2) (D) requires LECS to provide interconnection on rates, terms and conditions that are nondiscriminatory. Section 251 (c) (3) requires incumbent LECs to provide access to network elements on an unbundled basis on rates, terms, and conditions that are nondiscriminatory.

In each of the twelve interconnection agreements cited by the Department, Qwest provided terms, conditions, or rates to certain CLECs that were better than the terms, rates and conditions that it made available to the other CLECs and, in fact, it kept those better terms, conditions, and rates a secret from the other CLECs. In so doing, Qwest unquestionably treated those select CLECs better than the other CLECs. In short, Qwest discriminated against the other CLECs in violation of Section 251.

Furthermore, there is no question that Qwest knew that it was extending special terms to the select CLECs and that it was keeping these terms secret from CLECs in general. Accordingly, the Commission agrees with the ALJ that Qwest's discrimination in violation of 47 U.S.C. § 251 was knowing and intentional.[4]

Qwest argued that before a violation of discrimination under 47 U.S.C. § 251 can be found, the Commission must find that the secretly offered term, rate or condition was something that particular CLECs desired and qualified for and that the unavailability of that term, rate, and condition injured particular CLECs. Qwest's argument is a diversion. Clearly, Section 251 is not simply a remedial provision for individual CLECs, but an important regulatory tool to assure a level playing field between competing local service providers. The extent of monetary harm caused to particular CLECs is a relevant factor to be shown and considered in determining monetary penalties and non-monetary remedies in a subsequent phase of this proceeding.[5] But as a foundation for simply finding violation of the anti-discrimination provisions of Section 251, the particularized findings of monetary harm that Qwest would require are unnecessary.

In short, with respect to violation of the anti-discrimination provisions of Section 251, the question is simply: did Qwest offer preferential interconnection-related treatment to some CLECs? The Commission finds that Qwest did, and this is discrimination under Section 251.
And with respect to "knowing and intentional," the question is: did Qwest know that it was offering preferential treatment to some CLECs and intend to give that preferential treatment? The Commission finds that it did know it was offering preferential treatment and intended to offer preferential treatment, which makes its action knowing and intentional. Accordingly, the Commission agrees with the ALJ's findings that Qwest knowingly and intentionally violated 47 U.S.C. § 251.

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[4] See ALJ's Report, Finding Nos. 46, 59, 67, 77, 88, 105, 117, 140, 150, 167, 187, 198, 207, 215, 223, 231, 242, 250, 258, 266, 282, 291, 304, 313, 344, and 354.

[5] Harm to customers or competitors is specifically listed by Minn. Stat. § 237.462 as a factor to consider in determining the amount of penalty to be imposed, not whether a penalty should be imposed.

V. VIOLATION OF STATE STATUTES

The record compiled by the ALJ also supports finding that Qwest has violated state laws in at least three respects.

Minn. Stat. § 237.09 and § 237.60, subd. 3 prohibit discrimination in the provision of intrastate service. As discussed above, Qwest has provided preferential treatment to some CLECs and has done so knowingly and intentionally, in violation of federal law. The discriminatory actions cited, therefore, also knowingly and intentionally violate the above-cited Minnesota statutes because the discriminatory activity is the same and the local service affected is clearly intrastate service.

Minn. Stat § 237.121, subd. 5 prohibits a telephone company from imposing "unreasonable or discriminatory restrictions on the resale of its services." It is an unreasonable restriction on resale to withhold favorable terms offered to competitors.

The Commission notes that these findings of knowing and intentional violations of these state statutes trigger possible imposition of administrative monetary penalties under Minn. Stat. § 237.462 and non-monetary remedies pursuant to Minn. Stat. § 237.462, subd. 9.

VI. REMEDIES PHASE OF THE PROCEEDING

Based on the findings and conclusions of the ALJ's Report and the findings and conclusions herein, the Commission will proceed to consider what remedies appropriately address the situation.[6] The Remedies Phase will include consideration of 1) penalties for violation of state and federal law pursuant to Minn. Stat. § 237.462 and 2) non-monetary corrective measures which derive from other Commission authority or 3) those which the Commission must refer to the Attorney General or other appropriate authorities for pursuit.

The Commission will invite remedies proposals from all parties and provide each party opportunity to comment upon each others' proposals.

Parties should analyze their proposals and evaluate the proposals of others with reference to the factors set forth in Minn Stat. § 237.462, subd. 2(b) and Minn. Stat. § 237.462, subd. 9. Among the issues that parties may wish to address in the course of their comments are the following:

1. Quantification of monetary harm done to specific CLECs by the activity found in the ALJ's Report (and confirmed in this Order) to have taken place.

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[6] This Order adopts the ALJ's Report in its entirety. In the Remedies Phase which follows this Order, therefore, no part of the ALJ's Report will be subject to revisiting and no issue addressed in that Report will be subject to relitigation or reargument. The Report's findings and conclusions may be utilized as bricks to help construct any argument for or against any remedies proposal.

2. Quantification of monetary benefit accruing to the benefitted CLECs and Qwest by this activity.

3. A rationale, including the mathematical calculation (number of violation days times a dollar amount for each violation day), for any monetary penalty proposed.

4. Public interest analysis (pluses and minuses) of various non-monetary remedies, including structural separation and revocation of Qwest's certificate of authority.

5. Whether any information in this docket is properly classified as trade secret or whether the entire record in this matter should be available to the public.

6. Proposed treatment of the interconnection agreements that have been subject to this proceeding that have not been terminated.

Parties' comments will be provided by briefs and supporting affidavits pursuant to the following schedule, which Qwest proposed and to which other parties agreed:

November 8	parties submit opening briefs and supporting affidavits
November 15	parties submit reply briefs and supporting affidavits

VII. ROLE OF THE BENEFITTED CLECS

This docket has focused, properly, on Qwest, the central player in the undisclosed interconnection agreements episode. As the incumbent local exchange company (ILEC) in this matter, Qwest holds a unique economic position and certainly bears direct and obvious responsibility under the cited federal and state statutes. The Commission is also concerned, however, about the role of certain CLECs that have participated in and benefitted from the illegal Qwest activity documented in this record. The Commission welcomes the Department's expressed commitment to examine the role of these CLECs and bring these matters forward for Commission consideration in due course and as warranted.

ORDER

1. The Commission adopts the Administrative Law Judge's Report in its entirety, including its findings that Qwest has knowingly and intentionally violated federal laws regarding the interconnection agreement provisions cited therein. A copy of the ALJ's Report is incorporated by reference.

2. The Commission finds that Qwest has also knowingly and intentionally violated state laws as enumerated above at page 6 of this Order.

3. The Commission initiates the Remedies Phase of this proceeding by establishing a comment period, as discussed above at pages 6 and 7 of this Order.

4. The schedule for the Remedies Phase is as follows:

November 8	parties shall submit opening briefs and supporting affidavits
November 15	parties shall submit reply briefs and supporting affidavits
November 19	Commission hearing

5. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

(S E A L)

This document can be made available in alternative formats (i.e., large print or audio tape) by calling (651) 297-4596 (voice), (651) 297-1200 (TTY), or 1-800-627-3529 (TTY relay service).

STATE OF MINNESOTA)
)SS
COUNTY OF RAMSEY)

AFFIDAVIT OF SERVICE

I, Margie DeLaHunt, being first duly sworn, deposes and says:

That on the 1st day of November, 2002 she served the attached

ORDER ADOPTING ALJ'S REPORT AND ESTABLISHING COMMENT PERIOD REGARDING REMEDIES.

MNPUC Docket Number: P-421/C-02-197

XX By depositing in the United States Mail at the City of St. Paul, a true and correct copy thereof, properly enveloped with postage prepaid

XX By personal service

XX By inter-office mail

to all persons at the addresses indicated below or on the attached list:

Commissioners
Carol Casebolt
Peter Brown
Eric Witte
Ann Pollack
Jessie Schmoker
Mary Swoboda
Mark Oberlander
AG
Kevin O'Grady
Legislative Reference Library
Linda Chavez - DOC
Julia Anderson - DPS/AG
Curt Nelson - RUD/AG

Margie DeLaHunt

Subscribed and sworn to before me,

a notary public, this 1 day of November, 2002.

Robin J Benson
Notary Public

ROBIN J BENSON
NOTARY PUBLIC - MINNESOTA
MY COMMISSION EXPIRES
JANUARY 31,2005

In the Matter of the Complaint of the
Minnesota Department of Commerce
Against Qwest Corporation Regarding
1 Service List

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In the Matter of the Complaint of the
Minnesota Department of Commerce
Against Qwest Corporation Regarding
1 Service List

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BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

LeRoy Koppendrayer	Chair
Ellen Gavin	Commissioner
Marshall Johnson	Commissioner
Phyllis A. Reha	Commissioner
Gregory Scott	Commissioner

In the Matter of the Complaint of the Minnesota Department of Commerce Against Qwest Corporation Regarding Unfiled Agreements

ISSUE DATE: February 28, 2003

DOCKET NO. P-421/C-02-197

ORDER ASSESSING PENALTIES

PROCEDURAL HISTORY

On February 14, 2002, the Commission received a complaint against Qwest Corporation (Qwest) filed by the Minnesota Department of Commerce (the Department) pursuant to Minn. Stat. 237.462. The complaint alleged that Qwest, in neglecting to make public and seek Commission approval for eleven interconnection agreements with various competitive local exchange carriers (CLECs), has acted in a discriminatory and anti-competitive manner. The complaint was ultimately amended to include a twelfth agreement.

On March 12, 2002, the Commission in its NOTICE AND ORDER FOR HEARING referred the matter to the Office of Administrative Hearings for a contested case proceeding.

On September 20, 2002, Administrative Law Judge (ALJ) Allan W. Klein submitted his Findings of Fact, Conclusions, Recommendation and Memorandum (ALJ Report) to the Commission.

On November 1, 2002, the Commission issued its ORDER ADOPTING ALJ'S REPORT AND ESTABLISHING COMMENT PERIOD REGARDING REMEDIES. The Commission found that Qwest knowingly and intentionally violated federal and state law and established a comment period to address possible remedies.

On November 19, 2002, the Commission met to consider possible remedies.

On December 18, 2002, the Commission issued its ORDER REQUIRING PLAN AND AUTHORIZING COMMENTS wherein the Commission ordered Qwest to file proposed plans with respect to remedies which would further competition in Minnesota.

EXHIBIT "E"

On December 19, 2002, Qwest filed its proposed remedies. Responses to Qwest's proposal were filed by numerous parties:

Minnesota Department of Commerce	Minnesota Department of Administration
Northwestern Bell/ US West Retiree Association	Suburban Rate Authority
Minnesota Municipal Utilities Association	Minnesota Office of the Attorney General - Residential and Small Business Utilities Division (RUD-OAG)
CLEC Coalition[1]	AT&T
MCI WorldCom	Time Warner Telecom
Wholesale Service Quality Coalition[2]	Onvoy

The Commission also received comments from a number of Minnesota businesses and communities. These comments are part of the record available to the Commission and to any member of the public wishing to review them.

The Commission met on February 4, 2003 to consider this matter.

FINDINGS AND CONCLUSIONS

I. INTRODUCTION

In its November 1, 2002 Order in this matter, the Commission adopted the ALJ's report in its entirety, including the Administrative Law Judge's (ALJ's) findings that Qwest knowingly and intentionally violated federal law for each of 26 interconnection terms or groupings of terms. Order at page 3.

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[1] **CLEC Coalition:** This coalition comprises the following 12 CLECs: Ace Telephone, Hickory Tech, HomeTown Solutions, Hutchinson Telecommunications, Mainstreet Communications, NorthStar Access, Otter Tail Telecom, Paul Bunyan Rural Telephone Cooperative, Tekstar Communications, Unitel Communications, US Link, and 702 Communications.

[2] **Wholesale Service Quality Coalition (WSQ Coalition):** This coalition is distinct from the CLEC Coalition, although some parties are members of both coalitions. The WSQ Coalition consists of 13 parties: the Department of Commerce, AT&T, Covad, Eschelon, Global Crossing, McLeodUSA, New Edge Networks, Onvoy, WorldCom, Encore, NorthStar Access, US Link, and Time Warner.

The Commission also found, based on the same findings of fact, that Qwest knowingly and intentionally violated Minn. Stat. § 237.09, Minn. Stat. § 237.121, subd. 5, and Minn. Stat. § 237. 60, subd. 3. Order at page 6.

The Commission also adopted the ALJ's finding that the Department has demonstrated by a preponderance of the evidence that a penalty is justified under Minn. Stat. § 237.462, subdivisions 2 and 3. Order at page 7.

Moving to a Penalty Phase in succeeding months, the Commission has received and considered recommendations and comments from the parties regarding the size and nature of the penalties and has conducted two hearings to receive parties' comments. In this Order, the Commission sets forth its Penalty Phase decision and rationale.

An Order assessing penalties under Minn. Stat. § 237.462, such as the current Order, includes

(1) a concise statement of the facts alleged to constitute a violation;
(2) a reference to the section of the statute, rule, or order that has been violated;
(3) a statement of the amount of the administrative penalty to be imposed and the factors upon which the penalty is based; and
(4) a statement of the person's right to review of the order. Minn. Stat. § 237.462.

II. QWEST'S VIOLATIONS

A. Failure to File: Violation of 47 U.S.C. § 252(a) and (e)

47 U.S.C. § 252(a) and (e) required Qwest to file interconnection agreements with the Commission. The ALJ found and the record shows that Qwest made eleven written agreements with various CLECs that Qwest had not filed with the Commission for approval before the Department brought its complaint and one oral agreement between Qwest and McLeodUSA (McLeod) that Qwest has never reduced to writing and submitted to the Commission for approval. By failing to file these agreements, Qwest violated 47 U.S.C. § 252(a) and (e).

B. Discriminatory Conditions on Resale: Violation of 47 U.S.C. § 251(b)(1)

47 U.S.C § 251(b)(1) prohibits local exchange companies (LECs) such as Qwest from imposing unreasonable or discriminatory conditions on resale and 47 U.S.C. § 251(c)(2)(D) requires LECs to provide interconnection on rates, terms and conditions that are nondiscriminatory. In addition, 47 U.S.C. § 251(c)(3) requires incumbent LECs such as Qwest to provide access to network elements on an unbundled basis on rates, terms, and conditions that are nondiscriminatory.

The ALJ found and the record shows that in each of the twelve interconnection agreements cited by the Department, Qwest provided terms, conditions, or rates to certain CLECs that were better than

the terms, rates and conditions that it made available to the other CLECs and, in fact, kept those better terms, conditions, and rates a secret from the other CLECs. In so doing, Qwest unquestionably treated those select CLECs better than the other CLECs, thereby discriminating against them in violation of the cited provisions of Section 251.

C. Violation of State Anti-Discrimination Statutes

As the Commission found in its November 1, 2002 Order adopting the ALJ's Report, Minn. Stat. § 237.09 and § 237.60, subd. 3 prohibit discrimination in the provision of intrastate service and Minn. Stat § 237.121, subd. 5 prohibits a telephone company from imposing "unreasonable or discriminatory restrictions on the resale of its services." The ALJ found and the record supports the Commission's finding that Qwest has provided preferential treatment to some CLECs in violation of federal law. The discriminatory actions cited also violate the above-cited Minnesota statutes because the discriminatory activity is the same (providing preferential treatment to some CLECs) and the local service affected is clearly intrastate service. Qwest's activity withholding from most CLECs the favorable terms offered to others also violates the "unreasonable restriction on resale" provision of Minn. Stat § 237.121, subd. 5. See Order at page 6.

III. AMOUNT OF PENALTY IMPOSED

The Commission has reviewed the record, including the filings of the parties specifically on penalty issues, in light of the factors that Minn. Stat. § 237.462, subd. 2 directs it to consider in setting penalty amounts. Having completed this review, the Commission will assess a penalty of $10,000 per day for two of the unfiled agreements that had the greatest anti-competitive and discriminatory negative impact (Eschelon IV and McLeod III) and $2,500 per day for the remaining 10 unfiled agreements for a total of $25.95 million.[3]

The distinction in penalty levels for the various agreements is justified because while failure to file all the agreements was serious and warrants a significant penalty, as discussion of the statutory factors applicable to all the agreements shows, failure to file the Eschelon IV and McLeod III agreements disadvantaged the other CLECs on a much larger scale. Therefore, Qwest's knowing and intentional failure to file these two agreements warrants the highest per day penalty allowed. Distinguishing characteristics of these two agreements are set forth below.

Eschelon IV - Qwest agreed to provide Eschelon with a 10 percent discount on all the aggregate billed charges for all purchases made by Eschelon from Qwest from November 15, 2000 through

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[3] Total violation days for Eschelon IV and McLeod III were 1,165, as delineated below, times $10,000 per violation day equals $11,650,000. Total violation days for the remaining agreements was 5,722, as delineated below, times $2,500 per violation day equals $14,305,000. Total penalty for all 12 agreements, therefore, is $25,955,000.

December 31, 2005. In addition, a "consulting" arrangement contained in the agreement was a sham designed to conceal the discount that Qwest agreed to provide Eschelon. See ALJ's Report, Findings 124-130, pages 21-22.

McLeod III - Qwest entered an oral agreement with McLeod to provide discounts ranging from 6.5-10 percent depending on the volume of McLeod's purchases over the course of the year. The discount applied to McLeod's purchases of unbundled network elements (UNEs), payments for switched access, wholesale long distance and tariffed retail services. Testimony of a Qwest witness continuing to deny the existence of the discount agreement was found not credible. See ALJ's Report, Findings 316-345, pages 43-47.

In these agreements, Qwest provided discriminatory monetary advantages to these two CLECs far surpassing the advantages conferred by the other agreements (and, conversely, disadvantaged the other CLECs that much more deeply).

The violation day count for each agreement and calculation of the total penalty for all 12 agreements are as follows:

1. $10,000 per violation day for the most egregious behavior, the Eschelon IV and McLeod III unfiled agreements, and $2,500 per day for each of the remaining 10 unfiled agreements.[4] The Eschelon IV and McLeod III unfiled agreements involve the most serious violations by far. While all the unfiled agreements are patently discriminatory on their face and violated laws intended to protect fledgling competitors and competition in the local telephone industry and the ratepayers who are to benefit from that competition, the Eschelon IV and McLeod III violations warrant the maximum penalty allowable under the law because by giving selected CLECs such a significant price edge over their competitors (the 10% discount), they had the potential to cause the most serious damage to competition. The intentional violations connected to the 10 other unfiled agreements are also serious and damaging, but to a lesser extent. The Commission concludes that they warrant a substantial but lesser penalty amount: $2,500 per violation day.

2. For the Eschelon IV and McLeod III unfiled agreements, the violation days began on the day each was made (11/15/00 and 10/26/00, respectively) and ran until 3/1/02 and 9/20/02, 471 days and 694 days, respectively, for a total of 1,165 violation days.

[4] Some of the agreements contained multiple violations, but the Commission will accept Qwest's suggestion and assess the penalty for each agreement that was not filed rather than for each violation contained therein.

Name of Agreement	Start Date[5]	End Date	Number of Violation Days
1. Eschelon IV	11/15/00	03/01/02[6]	471
2. McLeod III (oral agreement)	10/26/00	09/20/02[7]	694
TOTAL			1,165

3. For the remaining 10 unfiled agreements, the 5,722 violation days attributable to these agreements are calculated as follows:

Name of Agreement	Start Date	End Date	Number of Violation Days
1. Eschelon I	02/28/00	03/01/02	732
2. Eschelon II	07/21/00	03/01/02	588
3. Eschelon III	11/15/00	03/01/02	471
4. Eschelon V	07/03/01	03/01/02	241
5. Eschelon VI	07/31/01	03/01/02	213
6. Covad	04/19/00	03/01/02	681
7. Small CLECs	04/28/00	03/01/02	672
8. McLeod I	04/28/00	03/01/02	672
9. McLeod II	10/26/00	03/01/02	491
10. US Link/ InfoTel	07/14/99	03/01/02	961
TOTAL			5,722

[5] The Start Dates used in these calculations are the dates found by the ALJ as part of his Report and Recommendations. No party has challenged the Start Dates found by the ALJ for the 11 written agreements.

[6] The End Date March 1, 2001 is the date that Qwest, following the Department's complaint that Qwset had failed to file certain interconnection agreements as required by law, filed selected portions of 11 written but theretofore unfiled agreements.

[7] The End Date September 20, 2002 is the date that the Administrative Law Judge issued his Report and Recommendations in this matter, finding (among other things) the existence of this oral agreement between Qwest and McLeod.

III. STATUTORY FACTORS CONSIDERED

The penalty amount set forth in the preceding section is based upon consideration of the factors set forth in Minn. Stat. § 237.462, subdivision 3. The Commission's consideration of these factors follows.

Factor 1: Wilfulness or intent of the violation

The degree of Qwest's wilfulness and intent to violate the cited anti-competitive laws was quite high. The record indicates that Qwest's activities were not isolated, spur-of-the-moment decisions by entry-level personnel but were taken in a calculating and deliberate manner by experienced, high-ranking Qwest officials. Qwest has defended these actions as being the result of confusion over what the law required. This defense has no merit.[8]

Contrary to Qwest's assertion in this matter, the type of agreements that are required to be filed under 47 U.S.C. §§ 251(a) and (e) was clear at the time Qwest chose not to file these agreements, based on the plain language of the federal law. Qwest's argument that its employees did not file these agreements because they were confused or had a good faith different view regarding the meaning of the law and their responsibilities under the law is not supported in the record and, in light of the plain language of the law, is not credible.[9]

In these circumstances, it is unmistakable that Qwest knowingly and intentionally violated 47 U.S.C. §§ 252(a) and (e) because Qwest knew that the referenced statutes required the Company to file these agreements with the Commission and the Company intentionally did not make the required filing.[10] Likewise, there is no question that Qwest knew that it was extending special

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[8] See ALJ Report in which he reviewed the ways Qwest was unmistakably on notice of the requirement to file these agreements (Finding Nos. 6-28) and concluded, with respect to each unfiled agreement, that Qwest acted knowingly and intentionally in failing to file these interconnection agreements and in discriminating against the unfavored CLECs. See ALJ Findings cited in footnotes 10 and 11.

[9] As the ALJ found, a common understanding of what must be filed (interconnection agreements) and what constitutes an interconnection agreement is shared by the Department, AT&T, the Residential and Small Business Utilities Division of the Office of the Attorney General (RUD-OAG), the Iowa Utilities Board and even reflected in Qwest's own SGAT (Section 4). ALJ Report, Finding of Fact #28. The validity and accessibility of this understanding is further confirmed by the FCC's October 4, 2002 Memorandum Opinion and Order in which the FCC articulated a filing standard virtually identical to the standard stated by the ALJ, stating that its articulated standard "flows directly from the statute." Memorandum Opinion and Order, Paragraph 10. See WC Docket No. 02-89.

[10] See ALJ's Report, Finding Nos. 45, 58, 65, 75, 86, 103, 114, 138, 148, 165, 184, 196, 205, 213, 221, 229, 240, 248, 256, 264, 281, 290, 302, 311, 342, and 353.

terms to the select CLECs and that it was keeping these terms secret from CLECs in general.[11] These discriminatory actions were taken with the clear intention to favoring some CLECs at the expense of other CLECs, reflecting a high degree of intentionality on the part of Qwest.

Factor 2. The gravity of the violations

State and federal telecommunications law has undertaken to promote competition in the local telephone market. Central to the fair development of competition in the local telephone market is the legal requirement (state and federal) that the terms and conditions that the incumbent carrier (Qwest) makes available to any local telephone provider will be made available across-the-board to all local service providers. Qwest's making secret deals with selected CLECs strikes to the heart of the government's determination to protect developing local competition.

In addition, some of Qwest's secret deals that violated state and federal law also sought to subvert the regulatory process by buying the silence of certain CLECs on matters before the Commission (US West merger with Qwest and Qwest's 271 application) and the FCC (Qwest's 271 application).[12] A relevant issue in both the merger and Qwest's 271 application is whether Qwest

[11] See ALJ's Report, Finding Nos. 46, 59, 67, 77, 88, 105, 117, 140, 150, 167, 187, 198, 207, 215, 223, 231, 242, 250, 258, 266, 282, 291, 304, 313, 344, and 354.

[12] Eschelon I, Paragraph 16 - Eschelon agrees not to oppose Qwest merger; Eschelon III, 2nd Paragraph of Section 1 - Eschelon agrees not to oppose Qwest's efforts to obtain 271 authority; Covad (last paragraph) - Covad agrees to withdraw opposition to Qwest merger; Small CLECs, Paragraph 3 of the Recitals - 10 CLECs agree not to oppose merger and to encourage expeditious processing and review; McLeod I, Paragraph 1, page 2 - McLeodUSA agrees to withdraw opposition to Qwest merger; and McLeod III (oral agreement) - McLeodUSA agrees not to oppose Qwest's efforts to obtain 271 authority. See ALJ Report, Finding Nos. 361-363.

has fairly and adequately opened the Minnesota telephone market to competitors.[13] Qwest's unfiled agreements with Eschelon, McLeod, Covad, and 10 Small CLECs sought to secure the silence of those companies, thereby skewing the regulatory record. The gravity of Qwest's actions in so doing can be likened to bribing potential witnesses not to report what they saw to an administrative body.[14]

While Qwest's activity buying silence injured the regulatory process in general and is reprehensible as such, the relevant consideration for this proceeding (penalty assessment) is that it also directly harmed the unfavored CLECs in an anti-competitive and discriminatory manner. Qwest removed valuable sources of input regarding actual commercial usage and issues that major CLECs were dealing with at the time. It is reasonable to assume, as Qwest apparently believed, that McLeod and Eschelon's information would have generally hurt Qwest's position and helped the CLECs' position. By keeping relevant information from regulators, Qwest sought to skew the process in its favor, all to the detriment of the unfavored CLECs who, due to Qwest's actions, would not be receiving the benefits of proper regulatory process.

Furthermore, CLECs have been harmed monetarily and customers have been harmed by Qwest impeding fair competition in this manner. The direct and inevitable result of such anti-competitive behavior is that customers have been deprived of the benefit of a market place fairly and freely open

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[13] The Telecommunications Act of 1996 authorizes a Bell Operating Company (BOC) such as Qwest to enter in-region interLATA and interstate telecommunications services (the long distance telecommunications market) upon compliance with certain provisions of 47 U.S.C. §271. Section 271 requires the Federal Communications Commission (FCC) to make certain findings before approving a BOC application, including the following: 1) the BOC has fully satisfied each competitive checklist item contained in §271(c)(2)(B); 2) the BOC's requested authorization will be carried out in accordance with the requirements of §272; and 3) the BOC's entry is consistent with the public interest, convenience, and necessity.

As part of its 271 application, Qwest must make state-specific evidentiary showings and separately identify each state's relevant performance data. The Commission has the responsibility under §271(d)(2)(B) to advise the FCC whether Qwest meets the fourteen point competitive checklist. The FCC has asked the state commissions to fully develop a factual record regarding the BOC's compliance with the requirements of section 271 and the status of local competition. The Commission has several current dockets assessing Qwest's 271 application, including Docket Nos. P-421/CI-01-1370 (the six non-OSS competitive checklist items); P-421/CI-01-1371 (the eight OSS competitive checklist items); and P-412/CI-01-1373 (public interest, convenience and necessity considerations).

[14] Of particular note, Qwest's purchase of neutrality from Eschelon and McLeod in the 271 process sought to eliminate any relevant information and insights throughout 271 related proceedings from two of Qwest's largest competitors on issues that Eschelon and McLeod could be reasonably expected to have relevant information and views, including the Regional Oversight Committee-Operational Support Systems (ROC-OSS) test and final report and the OSS-related Commission Docket No. P-421/CI-01-1371.

to competition. While this harm may not be quantified in terms of dollars and cents, the first fruits of competition (lower prices and wider choices) were undoubtedly impacted by Qwest's anti-competitive and discriminatory behavior.

- **Example of the impact on price:** CLECs not getting the 10% discount obviously could not offer their products at a price reflecting that discount. They were, therefore, at a competitive disadvantage vis a vis the favored CLECs. This discriminatory treatment hurt both the unfavored CLECs and their customers.

- **Example of impact on choice:** CLECs not receiving the 10% discount were inhibited from expanding their local marketing efforts and potentially discouraged from entering the Minnesota local market, thereby reducing customer choice.

Finally, the gravity of the violation is judged as much by what it intended to accomplish as by quantifying the monetary harm. In this case, the Commission concludes that Qwest intended to disadvantage certain CLECs, its competitors, through illegal means. That is a grave matter.

Factor 3: *History of Past Violations*

This is not the first time that the Commission has had to fine Qwest for knowingly and intentionally thwarting competition in the Minnesota local market. In Docket No. P-421/C-01-391, the Commission found that Qwest knowingly and intentionally violated its obligation to act in good faith under its interconnection agreement with AT&T by

> a) creating a specious position to support its refusal to conduct AT&T's UNE-P test, when that refusal was actually based on Qwest's retail business interests;
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> b) imposing its position regarding its testing obligations upon AT&T, whether specious or correct, without informing AT&T, by delaying AT&T's opportunity to challenge that position, by concealing its true intent to allow only certification testing, and by attempting to avoid and by delaying the UNE-P test by engaging AT&T in long and unnecessarily difficult negotiations over UNE-P testing that Qwest never intended to allow...; and
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> c) sending the letter of August 29, 2001, to AT&T making false and misleading statements.[15]

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[15] See *In the Matter of the Complaint of AT&T Communications of the Midwest, Inc. Against Qwest Corporation*, Docket No. P-421/C-01-391,ORDER ASSESSING PENALTIES (June 18, 2002), page 9.

The specific laws Qwest violated regarding AT&T are not the ones involved in this case, but the effect and intent of Qwest's knowing and intentional actions (to benefit itself, to disadvantage its competitors, and to harm competition) is a common thread, and the harm resulting to competitors, to the competitive market, and to consumers is similar.

Also similar in both cases, the Commission found that Qwest's actions were not, as Qwest asserted, simply mistaken interpretations of its obligations. In the AT&T complaint docket, the Commission stated at page 10 of its ORDER ASSESSING PENALTIES:

> Qwest's determination that it could refuse to engage in the cooperative testing requested by AT&T unless it was satisfied that AT&T was using that testing for market entry was **not simply a mistaken interpretation** of its obligation under the Interconnection Agreement. It was not supported by the terms of the Interconnection Agreement but was a position developed and used by Qwest to prevent AT&T from developing data that AT&T could use to present to regulatory officials in opposition to Qwest's 271 applications. [Footnote omitted.] The Commission recognizes that this was a further example of bad faith on Qwest's part.

Elsewhere in the ORDER ASSESSING PENALTIES, the Commission stated:

> Qwest acted unilaterally to delay the testing AT&T requested and eventually determined not to do the testing at all, offering only to do its standard testing. Qwest, as the monopoly power making the decision to proceed in this manner was acting not only to delay AT&T's entry into the market but was effectively keeping AT&T out of the market by dictating what testing was appropriate for AT&T and giving no heed to AT&T's stated testing needs. This was clearly not an appropriate role for Qwest. Not only did it impact AT&T but it also impacted any other CLEC that wanted information that Qwest deemed was not necessary for it to have.
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> The Commission also notes its concern that Qwest made unilateral decisions without asking the Commission for guidance or assistance. Qwest clearly did not want the Commission involved. It made its own determination of what it was required to provide AT&T without involving the Commission. At one point in the negotiations, AT&T requested that Qwest come to the Commission for a tariff waiver. Qwest refused to ask for such a waiver and subsequently asserted the tariff as a reason for not providing the residential lines AT&T requested. The ALJ found that this reason was "bogus" because Qwest was fully aware of the regulatory process and knew that it was possible to get the waiver. Rather than seeking Commission guidance, Qwest was dictating what could and could not be done by a CLEC to enter the market. This is not acceptable.

In assessing a penalty against Qwest in the amount of $7,500 per violation day, the Commission justified not levying the maximum amount authorized by statute ($10,000/day) as follows:

> ...the Commission will not assess the maximum penalty in this instance, recognizing that Qwest did ultimately cooperate in the testing, thereby mitigating the harm done.[16] However the Commission finds that the serious nature of this occurrence, combined with the harm to consumers and considering the serious effect Qwest's behavior could have on competition, compel the Commission to assess a penalty designed to have an impact on Qwest. For these reasons, the Commission will assess Qwest a penalty of $7,500 per day for the period beginning January 12, 2001 through May 11, 2001.

Given the gravity of the current violations and their similarity to the previous violations found in the AT&T Complaint, the other items identified for consideration under the "History of Past Violations" heading (number of previous violations found, the response of Qwest to the previous violation identified, and the short time elapsed since the last violation) cast comparatively little light.

Factor 4: The Number of Violations

In 12 separate unfiled interconnection agreements, Qwest committed 26 individual violations by failing to file, as required, 26 distinct provisions regarding interconnection and access to unbundled network elements (UNEs).

The significant duration of each agreement (the intended duration of the most damaging secret agreement was five years and 6 weeks) indicates Qwest's intention to advantage favored CLECs and disadvantage the non-favored CLECs for a significant period of time.

Likewise, the number of violations and several repeat violations with the same favored CLEC within a relatively short period of time also suggests that these anti-competitive and discriminatory practices were not aberrations but represented a concerted portion of Qwest strategy.

Finally, the number of violations of this sort (unfiled agreements disadvantaging competitors to Qwest's advantage) appears not to have been limited by Qwest's internal moral compass. Instead, it appears that these violations would have continued and multiplied if Qwest had not been apprehended in this activity and brought to light by the Department. These considerations auger for a significant penalty.

Factor 5: the Economic Benefit Gained by the Person Committing the Violation

Qwest gained several significant advantages for itself from its promises to the CLEC parties to the unfiled agreements. The most significant of these advantages was the promise Qwest obtained from

[16] Note that in this case by contrast, Qwest has never agreed to offer CLECs the same deals it gave Eschelon and McLeod.

Eschelon and McLeod USA, two of Qwest's largest wholesale customers, to remain neutral (silent) during the consideration of Qwest's Section 271 applications by state and federal regulators.[17]

Qwest undoubtedly benefitted monetarily from the portions of the unfiled agreements that secured silence from certain CLECs regarding Qwest's 271 petition. First: Qwest did not have to deal with objections and complaints from Eschelon and McLeod, two of the largest CLECs in Minnesota, in the context of its 271 petition. This immediately saved Qwest legal and administrative expenses that defending against those objections would entail. Moreover, Qwest clearly believed that purchasing the silence of Eschelon and McLeod enhanced Qwest's chances of a favorable outcome for its 271 petition. While the exact value to Qwest of a successful 271 petition (revenues to be achieved upon re-entry in the long distance market in Minnesota and its 14-state region) has not been established in this docket, there can be no question that its monetary value to Qwest is considerable, given the substantial resources Qwest has invested in that project in Minnesota and elsewhere in its 14-state region.

Qwest benefitted monetarily from the neutrality portions of the unfiled agreement in not having to address in a number of Minnesota dockets the substantial service-related problems experienced by Eschelon. ALJ Finding No. 370, page 51.

Qwest secured guaranteed revenue streams of $150,000,000 from Eschelon and a significant sum from McLeod as part of its unfiled discount agreements. By entering into the unfiled discount argument with McLeod, Qwest also secured McLeod's commitment not to remove its telecommunications traffic from Qwest's network. ALJ's Finding No. 317, page 51.

By concealing both discount agreements and keeping them unavailable to other CLECs, Qwest benefitted by saving several million dollars in Minnesota alone. ALJ Finding No. 372, page 51.

Factor 6: Corrective Actions Taken or Planned

The Commission believes that what has been most damaged by Qwest's anti-competitive behavior is the competitive environment in Minnesota and more concretely, Minnesota CLECs.

The ALJ concluded:

> Qwest has not taken meaningful corrective action to remedy the harm caused by failing to file the specific agreements cited in the complaint. Qwest does intend to seek Commission consideration of a subset of the provisions complained about here, but only if the Commission first determines that it must. ALJ Report, Paragraph 380, page 52.

Following its adoption of the ALJ's Report, the Commission has given Qwest two opportunities in the Penalty Phase of this proceeding to propose corrective actions (penalties). The actions proposed to be taken by Qwest in its Penalty Phase filings fail to address the identified harms and their root.

[17] See ALJ's Report, Paragraph 369, page 51.

Moreover, Qwest's proposals fail to take responsibility for its anti-competitive and discriminatory behavior and may, as the following analysis shows, actually serve to retard, rather than restore, competition in Minnesota. The components of Qwest's proposed penalty package are evaluated as follows.

1. Opt-in

Qwest proposed to allow CLECs to opt-in to 21 of the 26 initially unfiled provisions, waiving the procedures that require Commission approval. For the remaining five provisions, Qwest states that it will make these provisions available for opt-in to any Minnesota CLEC that has the same disputes and has not reached alternative resolution. Qwest's proposal was not the same as the terms in the agreements that included both interstate and intrastate services and which covered all states in Qwest's region for both interstate and intrastate services. While Qwest's proposal has some value, making the 26 provisions available is clearly preferable to Qwest's proposal, as part of a restitutional remedy. See discussion below.

2. Ten Percent Discount/Credit

Qwest proposed to give CLECs credit against future purchases of an amount equal to 10% of their purchases of Section 251(b) or (c) items in Minnesota under any interconnection agreement or Statement of General Available Terms (SGAT) during the time period from January 1, 2001 through June 30, 2002. Qwest stated that Eschelon and McLeod would not be eligible for this credit.

Qwest's proposal would restore some of the detriment caused to CLECs and therefore contribute to undoing the anti-competitive effects of its actions. However, it is also similar to agreeing to put back some but not all of the candy taken from the grocery store and as such cannot be considered a penalty.

3. Wholesale Service Quality Standards

As part of this Penalties Phase, Qwest proposed wholesale service quality standards that are inferior to certain aspects of the Minnesota Performance Assurance Plan (MPAP) adopted by the Commission on November 26, 2002 in Docket No. P-421/AM-01-1376. In addition, Qwest's proposed standards are inferior to standards developed by the Department and a coalition of CLECs and now currently before the Commission for adoption in the Wholesale Service Quality Standards proceeding. Docket No. P-421/AM-00-849. Adoption of the lower standards proposed by Qwest in this Penalty Phase would conflict with the Commission's MPAP decision and improperly preempt a decision soon to be made on the record established in the Wholesale Service Quality Docket.

4. Minnesota Liaison

Qwest proposed to make a designated executive available to Minnesota CLECs to serve as a liaison if the normal reporting hierarchy is not successful in resolving disputes. Since most interconnection agreements currently have an escalation process, Qwest's proposal has value beyond current practices only if the liaison is granted authority to make decisions and resolve the complaint in a

timely manner. It would be time-consuming to track the success of this proposal, whose effectiveness would only be shown by a fact-intensive analysis over a long period of time. In these circumstances, the proposal has marginal value as a penalty or to restore/enhance the competitive market place.

5. Review Committee and Independent Auditor

Qwest announced a number of changes to its internal decision-making procedures to ensure future compliance with all the legal requirements at issue in this proceeding. Qwest suggested that a new "filing standard" will help, that these mistakes were made due to inexperience, and that this will not happen once "experienced regulatory and legal personnel" are involved, and that restructuring the Wholesale Business Development Department is key to this not happening again.

Any changes Qwest needs to ensure that it complies with the law would be a benefit to Qwest and can hardly be viewed as a penalty. Moreover, reporting these changes as necessary to comply with the law simply continues Qwest's unfounded defense that its failure to file the agreements in question was the result of confusion or ambiguity about what the law required. Emphasizing these changes continues Qwest's pattern of denial regarding the knowing and intentional violations of the law found by the ALJ and the Commission in this matter.[18]

6. Voicemail to CLECs

Qwest proposed to provide CLECs the opportunity to purchase voicemail at retail prices from Qwest for use in conjunction with the CLEC's UNE-P functions for the next three years. The benefit to CLECs over the status quo is limited since existing law arguably requires the provision of voicemail to CLECs at retail prices. In addition, Qwest's proposal is limited to three years.

While Qwest's proposal may reduce the barriers to competition for the three-year period, the three-year limit places the CLEC in the awkward position of marketing a product to customers when it will be unable to continue to provide the service in a relatively short time. Customers of CLECs may well feel that they have been subject to "bait and switch" tactics once they learn that the CLECs cannot continue the voicemail service after three years. In addition, CLEC customers who have grown accustomed to having voicemail from the CLEC over the three year period will experience diminished service from the CLEC when voicemail is no longer available through the CLEC and will be ripe for recruitment by Qwest.

Finally, Qwest has acknowledged that its proposal will result in additional revenue to Qwest. Therefore, it cannot be viewed as a penalty.

7. Promise to Add 100 Jobs in Minnesota

Due to commitments Qwest made in the Stipulation and Agreement approved by the Commission in

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[18] See Commission discussion of the knowing and intentional nature of Qwest's violations, above at page 4.

the Qwest merger[19], Qwest already has an outstanding commitment to add 300 new jobs in Minnesota. Compliance with that commitment has not been verified. As part of its Penalty Phase package, Qwest proposed to add an additional 100 jobs in Minnesota (50 in Duluth and 50 elsewhere). At the November 19, 2002 hearing on this matter, Qwest clarified that the 50 jobs in Duluth are jobs Qwest was planning to eliminate.

In the face of employment trends in the telephone industry, realization of the job commitments is doubtful at best. The realities of enforcing Qwest's employment pledges aside, Qwest's promise to retain 50 jobs in Duluth and add 50 jobs elsewhere in Minnesota is not logically related to undoing past discrimination and anti-competitive violations or ensuring against such illegal activity in the future. Any benefits actually realized from such a proposal (benefits to the particular workers and the communities affected) do not relate to the harms caused by Qwest's anti-competitive and discriminatory actions. They do not restore damaged CLECs or advance the competitive market in Minnesota. Provision of 100 jobs would not increase the ability of competitors to compete. Instead, the Company's gesture aimed at generating good will among its employees will increase Qwest's ability to compete. This may be a wise business decision by Qwest but it certainly is not a penalty.

8. Expanded DSL Offerings

Qwest proposed to offer DSL to twelve rural exchanges of its choosing. Qwest valued its proposal to expand digital subscriber loop service (DSL) deployment at $5 million.

The Commission favors expansion of DSL deployment to enable residential and business customers in rural exchanges to have high speed internet access. However, there are downsides to Qwest's proposal that mitigate its benefit.

First, one of the targeted exchanges (Waseca) already has DSL provided by a CLEC; at least two of the exchanges (Luverne and Albert Lea) have a CLEC competitor for high speed internet access; and all of the exchanges identified in Qwest's proposal (except Pine City) have high speed internet access available through the local cable company. The current availability of an adequate high speed internet product and consideration for the investments made by CLECs and cable operators in Minnesota diminishes the incremental value of Qwest's DSL deployment proposal.

In addition and more fundamentally, however, the record does not indicate that this or similar deployment would not have occurred anyway, regardless of the penalty phase of this proceeding. It has not been established, for example, that such deployment is not cost effective for the Company.

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[19] On June 28, 2000, the Commission issued its ORDER ACCEPTING SETTLEMENT AGREEMENT AND APPROVING MERGER SUBJECT TO CONDITIONS in Docket No. P-3009, 3052, 5096, 421, 3017/PA-99-1192. In that Order, the Commission approved the Stipulation and Agreement regarding the merger of the parent corporations of US West, LCI International Telecom Corp., USLD Communicating, Inc., Phoenix Network, Inc., and US West Communications, Inc.

Instead, it clearly will leave the Company in a better position to compete in the locations where deployment occurs, in response to competitive challenges in those exchanges.

Once again, therefore, it appears that Qwest's proposal to deploy DSL does not relate to mitigating or remediating the harms to CLECs or to the competitive market caused by the Company's anti-competitive and discriminatory behavior but may well exacerbate those harms.

9. Privacy Product to Senior Citizens

Qwest proposed to provide its "No Solicitation" product free of charge for three years to both Qwest subscribers and CLEC subscribers that are 65 and older. The product plays a taped message at the beginning of every phone call directing solicitors to add the called number to the do-not-call list and to hang up the phone.

Several factors decrease the value of this product. Minnesota law has established a do-not-call list on which subscribers of any age can be listed for free. Telemarketers who place calls to persons on the state's do-not-call list are subject to penalties set forth in the statute. Other advantages of the state's do-not-call list over Qwest's "No Solicitation" product are: 1) the state's method does not subject all callers to the "No Solicitation" product's taped message; and 2) subscribers need not disclose their age to obtain for free the protection of the state's do-not-call list.

In addition, as a switch-based functionality, the product will only be available to those CLECs that use Qwest to perform their switching function. The product will not be available to customers of CLECs that are facility-based providers and CLECs that purchase UNEs but use their own switching. Thus, to the extent that the No Solicitation product has value, Qwest providing the product at no cost to Qwest end-use customers and customers of CLECs that use Qwest's switching functionality will disadvantage CLECs that provide their own switching. Generally speaking, measures adopted to repair damage to CLECs and the competitiveness of the market place should not favor some CLECs over others. Prejudice against CLECs who do not use Qwest's switching functionality is not warranted.

Finally, like many of the proposed "penalty" components previously addressed, offering the "No Solicitation" product free to seniors does not relate to restoring injured CLECs or to enhancing the injured competitive market. Also, like the employment promises and the proposed DSL deployment to select rural communities, the free "No Solicitation" offer to seniors appears intended to generate goodwill for Qwest in this matter rather than to provide a reasonable penalty for its illegal activity.

In sum: Based on the foregoing analysis, Qwest's proposed penalties provide for greater benefits to Qwest than to its CLEC competitors, Minnesota consumers, or the Minnesota telecommunications marketplace.

Factor 7: Annual Revenue and Assets of the Company Committing the Violation

Qwest Communications International, Inc., Qwest's parent, has publicly reported annual revenues of over $230 billion and assets of over $74 billion for the year 2001. See ALJ Report, Finding #382,

page 53. Given these resources, the penalty assessed in this Order will not impact the Company unreasonably.

Factor 8: Financial Ability of the Company to Pay the Penalty

The ALJ noted that Qwest, including any affiliates that have 50 percent or more common ownership or that own more than 50 percent of the company, has $20 billion in annual revenue. The ALJ found that Qwest has the financial ability to pay any fine assessed by the Commission. The ALJ cited Qwest's witness Audrey McKinney as supporting that conclusion. ALJ Report, Finding #383, page 53.

The Department observed that while Qwest has had some difficult financial times in the past for its total operations, there has been no indication that Qwest's Minnesota operations have been anything but financially successful. The Department noted that Qwest's choice to operate under an Alternative Form of Regulation (AFOR) was based on the incentive to retain revenues beyond what it would be allowed under rate of return regulation. And although Qwest's AFOR Plan protects consumers of basic service from price increases over the five-year term of the plan, the Department noted that the AFOR plan does not prevent Qwest from increasing the rates for services in the remaining two categories of services: flexibly priced and non-price regulated services. Since its AFOR was adopted, Qwest has increased the rates for various services classified as flexibly priced and non-price regulated services.

Some indication about Qwest's financial ability in the penalty phase context can be gained from the monetary valuation the Company has put on the value of its own penalty proposals. While Qwest characterized the exact dollar valuation of its proposed remedies as a trade secret, suffice to say that it is a figure substantially larger that the penalty amount assessed against Qwest in this matter.

Factor 9: Other Factors - Deterrent Effect

The Commission believes it is desirable to motivate Qwest to desist in the future from anti-competitive behavior. Many parties have identified the problem as being Qwest's view of (hence treatment of) wholesale customers as competitors to eliminate rather than as customers to serve. They have suggested that the goal must be to reform Qwest's approach, to lead it from the anti-competitive behavior identified in this and related dockets and to build a competitive environment which motivates Qwest to begin treating wholesale customers as customers rather than competitors. In that context, the Commission believes that a proper consideration in determining the size of a monetary penalty is that it be large enough to motivate abandonment of anti-competitive behavior by indicating the seriousness with which the Commission views such behavior. In addition to being consistent with the factors previously addressed, the fine must be appropriately sized 1) to clearly indicate what Qwest can expect next time if it does not abandon its anti-competitive and discriminating behaviors and 2) hence, to deter such behavior.

IV. APPROPRIATE CORRECTIVE ACTIONS TO BE TAKEN BY QWEST

The Commission believes that what has been most damaged by Qwest's discriminatory and anti-competitive behavior is the competitive environment in Minnesota and more concretely, Minnesota CLECs and their customers. As shown above, Qwest's proposals fail to take responsibility for its anti-competitive behavior and would further retard, rather than restore, competition in Minnesota. And while the penalty amount discussed above is warranted under the statutory considerations to punish serious knowing and intentional activity and to deter future activity of that kind, it does not directly address the key harms to competition in Minnesota identified by the Commission.

Appropriate Corrective Action for Discriminatory Acts

Local competitors and local competition that have been unquestionably harmed by Qwest's anti-competitive and discriminatory actions must be restored to the greatest extent feasible. While the Commission cannot turn back the clock and let competition proceed as it would have absent this anti-competitive activity, the Commission can take realistic steps in that direction as part of the Commission's authority to remediate the effects of Qwest's discrimination.[20]

Specifically, appropriate remediation requires three things.

First, Qwest must make the 26 provisions in the unfiled agreements identified in this case available to the CLECs.

Second, Qwest must allow the CLECs to experience (for a two-year period, November 15, 2000 to November 15, 2002) the savings they would have experienced, had the unfiled agreements been filed and, hence, available for them. This reasonable restoration period will strengthen them financially, allowing them to compete more vigorously. Since the money in question (money over and above the price the CLEC would have paid if it had the benefit of the best of the unfiled agreements) is money that the CLECs have already paid to Qwest, the CLECs who have overpaid due to Qwest's illegal act should receive that amount from Qwest in cash or as a credit toward future purchases, whichever the CLEC chooses.

Third, Qwest should allow CLECs to purchase services from Qwest at the same price that would have been available to them under their choice of the unfiled agreements for a 24-month period, beginning with the date of this Order.

The second and third requirements cover a 48 month period altogether, which is reasonable, given that the length of the most favorable of the unfiled agreements (hence the length of the agreements that the CLECs would have chosen) was 5 years and 6 weeks. Had these agreements been filed (made public) as the law required, other CLECs would have been able to adopt them for the same time period.

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[20] Minnesota's anti-discrimination statutes, Minn. Stat. §§ 237.09, 237.60, subd. 3, and 237.121, subd. 5.

There are two exceptions to the second and third requirements. Two CLECs, Eschelon and McLeod, were the beneficiaries of the two most favorable unfiled agreements. They participated in and benefitted from Qwest's illegal activity and were prepared to do so for the full length of their agreement. Moreover, when the Department brought these agreements to light and Qwest terminated their agreements, they received substantial buy-out payments from Qwest.

In these circumstances, these two CLECs have already received the discount benefits applicable to their purchases between November 15, 2000 and November 15, 2002 and should not be allowed to experience discounts on future purchases (during the 2-year period available to other CLECs under this Order) until they (McLeod and Eschelon) purchase services from Qwest for which the discount amounts (not available to them but computed in a tracker account) equal the amount of the contract termination payments received from Qwest.

V. OPPORTUNITY TO STAY PENALTY

Finally, the Commission's authority to order the foregoing three-steps to remedy Qwest's discriminatory action is clear. In addition, the monetary penalty assessed is appropriate based on the factors discussed in this Order. Nevertheless, practical public policy considerations incline the Commission to believe that the significant and warranted fine assessed in this Order should be coupled with the possibility of avoiding it if Qwest agrees to take and does take the appropriate three-step corrective (market-remediative) actions previously identified. This opportunity is provided to Qwest based on the Commission's preference for an outcome to this matter that restores the local competitive market in Minnesota most directly and efficiently.

VI. RIGHT TO REVIEW

A penalty imposed under Minn. Stat. § 237.462 shall not be payable sooner than 31 days after the Commission issues its final order assessing the penalty. The person subject to the penalty may appeal the Commission's penalty order under sections Minn. Stat. §§ 14.63 to 14.68. If the person does appeal the Commission's penalty order, the penalty shall not be payable until either all appeals have been exhausted or the person withdraws the appeal. Minn. Stat. § 237.462, subd. 5.

ORDER

1. Qwest shall pay a penalty of $25,955,000, calculated at the rate of $10,000 per penalty day for the Eschelon IV and McLeod III unfiled agreements, and at the rate of $2,500 per penalty day for the 10 other unfiled agreements.

2. Qwest shall make all 26 provisions of the unfiled agreements at issue in this matter available to the CLECs for the length of time they were offered to the CLEC signatory to the unfiled provision in question. That is, each CLEC will be able to determine which of the 26 provisions it wants to be part of its interconnection agreement with Qwest. Provided, however that Eschelon and McLeod's adoption of the discount provisions is subject to Order Paragraph 6 below.

3a. Qwest shall give, either in cash or by credit at the CLEC's choice, the equivalent of a 10% discount on all Minnesota products and services that the CLEC purchased from Qwest between November 15, 2000 and November 15, 2002. Services covered are those stated in Eschelon IV, Paragraph 3: all purchases made by Eschelon from Qwest, including but not limited to switched access fees and purchases of interconnection, UNEs , tariffed services, and other telecommunications services covered by the Act. This is the equivalent of giving them the benefit of the Eschelon IV price for a 24 month period starting on November 15, the day the Eschelon IV agreement became effective.

3b. Qwest shall also give, in cash or by credit against future purchases at the affected CLEC's choice, $2 per access line purchased during the time Eschelon V, paragraph 5 was in effect. This is the equivalent of giving them the benefit of Eschelon V, paragraph 5.

3c. For each month that Qwest did not provide accurate daily usage information to a CLEC (other than Eschelon) during the time that Eschelon IV, paragraph 2 was in effect, Qwest shall give that CLEC a $13 credit for each platform line ordered by the CLEC during that time period. This is the equivalent of giving them the benefit of Eschelon IV, paragraph 2.

3d. For each month that Qwest did not provide accurate daily usage information to a CLEC (other than Eschelon) during the time that Eschelon V, paragraph 3 was in effect, Qwest shall give that CLEC a $16 credit for each platform line ordered by the CLEC during that time period. This is the equivalent of giving them the benefit of Eschelon V, paragraph 3.

4. Qwest shall give a 10% discount on all Qwest products and services provided in Minnesota to each Minnesota CLEC during a 24-month period commencing on the date of this Order. This is the equivalent of giving them the benefit of Eschelon IV, paragraph 5 except that the services for which the 10% discount is available under this Order is limited to services in Minnesota.

5. The monetary penalty assessed in Order Paragraph 1 above will be stayed if Qwest undertakes to comply with Order Paragraphs 2, 3a-d, and 4. The penalty shall be permanently stayed upon completed compliance with Order Paragraphs 2, 3a-d, and 4.

6. Eschelon and McLeod shall not be eligible for payments or credits under Order Paragraphs 3a-d. And, in view of contract termination amounts received from Qwest as compensation for the value of their terminated agreements, they shall be ineligible for the 10% discount under Order Paragraph 4 until they have purchased from Qwest services whose 10% discounts (if given) equal the amount of any such payments.

7. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

(S E A L)

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STATE OF MINNESOTA)
)SS
COUNTY OF RAMSEY)

AFFIDAVIT OF SERVICE

I, Margie DeLaHunt, being first duly sworn, deposes and says:

That on the 28th day of February, 2003 she served the attached

ORDER ASSESSING PENALTIES.

MNPUC Docket Number: P-421/C-02-197

XX By depositing in the United States Mail at the City of St. Paul, a true and correct copy thereof, properly enveloped with postage prepaid

XX By personal service

XX By inter-office mail

to all persons at the addresses indicated below or on the attached list:

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Peter Brown
Ann Pollack
Eric Witte
Mark Oberlander
AG
Kevin O'Grady
Mary Swoboda
Jessie Schmoker
Linda Chavez - DOC
Julia Anderson - OAG
Curt Nelson - OAG

Margie DeLaHunt

Subscribed and sworn to before me,

a notary public, this 28 day of

February, 2003

Robin J Benson
Notary Public

ROBIN J BENSON
NOTARY PUBLIC - MINNESOTA
MY COMMISSION EXPIRES
JANUARY 31,2005

In the Matter of the Complaint of the
Minnesota Department of Commerce
Against Qwest Corporation Regarding
1 Service List

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In the Matter of the Complaint of the
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In the Matter of the Complaint of the
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1 Service List

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United States Court of Appeals
FOR THE EIGHTH CIRCUIT

Nos. 04-3368, 04-3408, and 04-3510

Qwest Corporation, a Colorado corporation, Plaintiff-Appellee/ Cross-Appellant, v. The Minnesota Public Utilities Commission; R. Marshall Johnson, in his official capacity as a member of the Minnesota Public Utilities Commission; Leroy Koppendrayer, in his official capacity as a member of the Minnesota Public Utilities Commission; Phyllis Reha, in her official capacity as a member of the Minnesota Public Utilities Commission; Gregory Scott, in his official capacity as a member of the Minnesota Public Utilities Commission; Defendants-Appellants/ Cross-Appellees, CLEC Coalition; AT&T Communications of the Midwest, Inc., Intervenors Below-Appellants/ Cross-Appellees.	*	Appeals from the United States District Court for the District of Minnesota.

EXHIBIT "F"

Submitted: September 12, 2005
Filed: November 1, 2005

Before RILEY, LAY, and FAGG, Circuit Judges.

LAY, Circuit Judge.

Minnesota Public Utilities Commission and Intervenors CLEC Coalition and AT&T Communications of the Midwest, Inc. (collectively, "MPUC" or "Commission") appeal the district court's[1] decision that MPUC lacks the authority under Minnesota law to order Qwest Corporation ("Qwest") to comply with restitution for competitive local exchange carriers that were not parties to unfiled interconnection agreements. Qwest cross-appeals, challenging the decision affirming the Liability Order and Penalty Orders' $25.95 million penalty. We conclude that MPUC lacks the authority to order restitution under Minnesota law. However, we find that MPUC properly ordered the $25.95 million penalty. Therefore, we affirm.

I.

MPUC issued a liability order and two penalty orders against Qwest for alleged violations of the 1996 Telecommunications Act ("Act"). The Act was intended to create competition between carriers in local telecommunication service markets, which had been traditionally dominated by a single monopoly carrier. Incumbent local exchange carriers ("ILECs"), such as Qwest, own the network infrastructure necessary to provide local telephone service. The Act allows competitive local exchange carriers ("CLECs") to access this infrastructure by entering into agreements with an ILEC. Interconnection agreements ("ICAs") between an ILEC and CLECs

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[1]The Honorable Ann D. Montgomery, United States District Judge for the District of Minnesota.

must be submitted to the MPUC for approval. 47 U.S.C. § 252(a), (e). The terms of these ICAs must be made available to other CLECs that are not parties to the original agreement. See id. § 252(i). Non-party CLECs can then opt in and incorporate the provisions of the original agreement in their entirety into their own ICAs. 47 C.F.R. § 51.809(a).

On February 14, 2002, the Minnesota Department of Commerce filed a complaint against Qwest alleging that Qwest had formed secret ICAs with CLECs that were not properly submitted to MPUC. The complaint asserted that Qwest's failure to disclose discriminated against other non-party CLECs because these CLECs were not given access to the terms contained in the secret ICAs. On March 12, 2002, the Commission referred the case for contested case proceedings before an administrative law judge ("ALJ").

On November 1, 2002, MPUC issued a liability order adopting the ALJ's findings that Qwest knowingly and intentionally violated §§ 251 and 252 of the Act by failing to file twelve ICAs. The unfiled ICAs included six agreements with Eschelon Telecom, Inc., three with McLeodUSA Telecommunications Service, Inc., and one each with Covad Communications Company, USLink, Inc., and a group of ten smaller CLECs. MPUC found that Qwest "knowingly and intentionally" violated both federal and state law by failing to file the twelve ICAs, thereby creating discriminatory conditions on resale and infringing state anti-discrimination statutes. The MPUC imposed a $25.95 million penalty against Qwest and granted restitutional relief for the injured CLECs based upon its interpretation of state statutes.

Qwest brought suit in district court, challenging the liability order and the penalty order. The district court vacated the order for restitutional relief, holding that MPUC lacked either the express or implied authority under Minnesota law to grant

restitution. However, the district court upheld the $25.95 million penalty, finding that it was valid under Minn. Stat. § 237.462.

Title 47 U.S.C. § 252(e)(6) provides for federal court review of state commission decisions. Our sister circuits have held that federal courts review state commission orders under the Act de novo. Mich. Bell Tel. Co. v. MFS Intelenet of Mich., Inc., 339 F.3d 428, 433 (6th Cir. 2003); S.W. Bell Tel. Co. v. Apple, 309 F.3d 713, 717 (10th Cir. 2002); MCI Telecomm. Corp. v. Bell Atlantic Pa., 271 F.3d 491, 517 (3d Cir. 2001); S.W. Bell Tel. Co. v. Pub. Util. Comm'n, 208 F.3d 475, 482 (5th Cir. 2000); GTE S., Inc. v. Morrison, 199 F.3d 733, 742 (4th Cir. 1999). Here, we adopt that standard. This court has supplemental jurisdiction over state law claims under 28 U.S.C. § 1367. Although the arbitrary and capricious standard applies when reviewing a state commission's findings of fact, Mich. Bell, 339 F.3d at 433; S.W. Bell, 208 F.3d at 482; US West Communications, Inc. v. Hamilton, 224 F.3d 1049, 1052 (9th Cir. 2000), whether an agency acts within its statutory authority is a question of law to be reviewed de novo. In re Qwest's Wholesale Serv. Quality Standards, 702 N.W.2d 246, 259 (Minn. 2005) (hereinafter "Qwest's Wholesale").

II.

MPUC asserts that it has statutory authority to order restitution under Minn. Stat. §§ 237.081, 237.461, 237.462, and 237.763. MPUC, "being a creature of statute, has only those powers given to it by the legislature." Peoples Natural Gas Co. v. Minnesota Pub. Util. Comm'n, 369 N.W.2d 530, 534 (Minn. 1985) (internal quotation omitted). MPUC may not impose restitutional remedies absent express or implied statutory authority. A review of the statutory language and applicable Minnesota case law shows that MPUC has neither. Nothing in the statutory language expressly grants MPUC the authority to order restitution. Moreover, Minnesota case law supports the

conclusion that we should not find implied statutory authority to order restitution, absent a clear grant of authority by the legislature.

MPUC argues that it has express authority to order restitutional relief under Minn. Stat. § 237.081, which authorizes MPUC to "make an order respecting [an unreasonable, insufficient, or unjustly discriminatory] . . . act, omission, practice, or service that is just and reasonable" and to "establish just and reasonable rates and prices." Minn. Stat. § 237.081, subd. 4. MPUC also claims the authority to order restitution is encompassed within Minn. Stat. §§ 237.461 and 237.462.[2] Section 237.461 is a competitive enforcement statute that permits MPUC to seek criminal prosecution, recover civil penalties, compel performance, or take "other appropriate action." Minn. Stat. § 237.461, subd. 1. Section 237.462 is also an enforcement statute which states that "[t]he imposition of administrative penalties in accordance with this section is in addition to all other remedies available under statutory or common law. The payment of a penalty does not preclude the use of other enforcement provisions . . . ." Minn. Stat. § 237.462, subd. 9. MPUC asserts that this statutory framework supports a finding that MPUC possesses the express or implied authority to order restitution in this case.

While we agree that these statutes give MPUC broad statutory authority to regulate the telecommunications market in Minnesota, none of them vest MPUC with the express authority to order remedial relief. We therefore agree with the district court that because none of these statutes expressly refer to remedial/restitutional relief,

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[2]MPUC also relies upon Minn. Stat. § 237.763, which discusses exemptions for alternative regulation plans but retains MPUC's authority under § 237.081 "to issue appropriate orders." Minn. Stat. § 237.763. Other than referring to § 237.081, this statute gives MPUC no additional support for its assertion of authority and we find it to be inapplicable.

the relevant inquiry is whether MPUC has the implied authority to order restitution. We conclude that no such authority exists.

In Peoples Natural Gas, the Minnesota Supreme Court observed that, "[w]hile express statutory authority need not be given a cramped reading, any enlargement of express powers by implication must be fairly drawn and fairly evident from the agency objectives and powers expressly given by the legislature." 369 N.W.2d at 534. The Minnesota court then held that MPUC lacked the implied authority under Minn. Stat. §§ 216B.03 and 216B.08 to order a public utility to refund revenues collected from its customers in violation of a MPUC order, rejecting MPUC's argument that the Commission's duty to assure rates that are "just and reasonable" vested MPUC with the authority to order a refund. Id. at 534-36.

In holding that MPUC lacked this authority, the Minnesota Supreme Court observed that "[i]t is of some significance that the legislature has not seen fit expressly to grant refund powers to the Commission, although it could have done so and in one instance has at least recognized its use." Id. The court was reluctant to interpret the statute as providing implied authority of this kind because "this is not the kind of agency authority that can or should be implied in the absence of more explicit legislative action. It is not enough that the power to order refunds would be useful to the Commission as an enforcement measure." Id. at 535.

The same holds true in this case. MPUC attempts to distinguish Peoples Natural Gas by asserting that the statutory framework has changed significantly since this decision. However, MPUC claims authority under statutory language that is quite similar to that construed by the Minnesota Supreme Court in Peoples Natural Gas. Given the Minnesota court's reluctance to infer authority to grant refund powers in Peoples Natural Gas, we conclude the power to make orders or set rates that are "just and reasonable" or to take "appropriate" action is not a grant of authority to order

restitution. The Minnesota legislature has had twenty years to respond to Peoples Natural Gas, yet "the legislature has not seen fit expressly to grant [restitution] powers to the Commission." Peoples Natural Gas, 369 N.W.2d at 534.

Moreover, in In re New Ulm Telecom, Inc., 399 N.W.2d 111 (Minn. Ct. App. 1987), a Minnesota Court of Appeals panel applied Peoples Natural Gas to uphold a Commission decision that it lacked the authority under § 237.081, subd. 4, to estop a utility from providing service absent a finding of inadequate service under § 237.16, subd. 5. Id. at 122.[3] The court noted that merely because a statute has "references to the words 'fair,' 'just,' and 'reasonable,' nothing in the statutory scheme suggests that the Commission may act as a court of equity." Id. As discussed above, the same is true in this case. The statutory language is too vague to support a conclusion that MPUC has the implied authority to order restitution.

We are also not convinced by MPUC's argument that In re Minnegasco, 565 N.W.2d 706 (Minn. 1997) and the unpublished In re the Members of MIPA, No. C0-97-606, 1997 WL 793132 (Minn. Ct. App. Dec. 30, 1997) support its assertion that the Commission had implied authority to order restitution in this case. In Minnegasco, the Minnesota Supreme Court held that MPUC had the implied authority under Minn.

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[3]MPUC and the Intervenors object to the district court's reliance on New Ulm. MPUC attempts to distinguish New Ulm on the grounds that there was a statutory violation in the present case, and therefore an equitable remedy under § 237.081 is appropriate. However, we do not read New Ulm to stand for the proposition that § 237.081 authorizes equitable remedies whenever a statutory violation has occurred. A violation of § 237.16, subd. 5, itself justifies the suspension or revocation of an offending utility's license. Minn. Stat. § 237.16, subd. 5. Therefore, the New Ulm court was merely stating that, absent a violation of § 237.16, subd. 5, preventing a utility from providing service would not be appropriate. In re New Ulm, 399 N.W.2d at 122. The district court correctly read New Ulm to hold that § 237.081 does not grant MPUC the authority to impose equitable remedies.

Stat. chapter 216B to order a recoupment remedy to compensate a utility for losses resulting from an error made by MPUC. Minnegasco, 565 N.W.2d at 713. The Minnesota Court of Appeals relied upon and broadened the scope of Minnegasco in its unpublished MIPA opinion, where it held that MPUC had the implied authority to order refunds under Minn. Stat. § 237.081. MIPA, 1997 WL 793132, at *3.

However, these cases do not support MPUC's position. Minnegasco does not provide MPUC with the broad authority to grant equitable relief. Rather, Minnegasco has a limited holding that MPUC has the implied authority to order a recoupment remedy to correct *its own mistake*. Minnegasco, 565 N.W.2d at 711-13. Furthermore, the court in Minnegasco was interpreting "statutory ambiguity" as to whether a utility could get retroactive relief after a judicial decision striking down a MPUC order. Id. at 711-12. In this case, we have no statutory ambiguity because there is a complete absence of statutory language supporting MPUC's position. "We have no ambiguous language to construe, unless perhaps the ambiguity of silence. Consequently, we must look at the necessity and logic of the situation." Peoples Natural Gas, 369 N.W.2d at 534. As for MIPA, as an unpublished order, it is not controlling.[4] See Minn. Stat. § 80A.08, subd. 3; see also Vlahos v. R&I Constr. of Bloomington, Inc., 676 N.W.2d 672, 676 n.3 (Minn. 2004) (discouraging reliance on unpublished opinions as authority).

Moreover, a recent opinion by the Minnesota Supreme Court clearly supports the conclusion that MPUC lacks the authority it asserts in this case. In Qwest's Wholesale, supra, the court held that MPUC does not have the express or implied authority under Minnesota state law to order self-executing penalties. Qwest's Wholesale, 702 N.W.2d at 262. "Historically, we have been reluctant to find implied

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[4]Furthermore, the MIPA decision fails to adequately address how Minnegasco's limited holding can be expanded to assert refund authority.

statutory authority in the context of the MPUC's remedial power. As a general rule, we resolve any doubt about the existence of an agency's authority against the exercise of such authority." Id. at 259 (citations omitted).

In Qwest's Wholesale, like the present case, MPUC relied in part upon its express authority to ensure "just and reasonable rates" under Minn. Stat. § 237.081, subd. 4, and Minnegasco to support its assertion of implied authority. Id. at 260-61. The court rejected these arguments, relying upon Peoples Natural Gas and distinguishing Minnegasco. Specifically, the Minnesota court observed:

> [W]e must look closely at the statutory scheme created by the legislature. Doing so, we see no language from which the authority for the MPUC to impose the self-executing payments can be fairly drawn. *The problem we face is that, if nothing more than a broad grant of authority were needed to show that implied authority could be fairly drawn from the statutory scheme, the implied authority would be present in all cases in which the agency had a broad grant of authority.* We declined to adopt such a sweeping rule in Peoples Natural Gas. In that case, noting that we had "no ambiguous language to construe, unless perhaps the ambiguity of silence," we indicated that "we must look at the necessity and logic of the situation." As in Peoples Natural Gas, we think it significant here that the legislature did not expressly provide for remedial authority with respect to wholesale service quality standards even though it could have done so . . . . We also think it significant that the legislature has expressly provided the MPUC the authority to issue administrative penalties for violation of certain MPUC rules and orders.

Id. at 261 (emphasis added) (internal citations omitted).

The court distinguished Minnegasco on several grounds. Most importantly for our purposes, the statutory language at issue in Qwest's Wholesale was not ambiguous. Rather, it was silent. Therefore, the court found that the statutory framework in Qwest's Wholesale was closer to Peoples Natural Gas than Minnegasco. Id. As discussed above, the same is true here. MPUC asserts authority under statutory language that is not ambiguous, but rather fails to address any power to order restitution or remedial measures at all.[5]

We therefore hold that MPUC lacks the statutory authority to order restitution and the restitutional remedies in the Penalty Orders are invalid.[6]

III.

We now turn to Qwest's objections to the $25.95 million penalty imposed by MPUC. Qwest makes three arguments challenging the legality of the $25.95 million penalty: (1) that MPUC violated Minnesota law by failing to follow the requisite statutory factors; (2) that the penalty violated the fair notice doctrine because there was no standard for filing ICAs at the time of the relevant agreements; and (3) that the penalty violates the Excessive Fines Clause. As discussed below, we conclude that each of these arguments must fail.

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[5]In addition, the court distinguished Minnegasco on the grounds that it involved the correction of an unlawful MPUC order. See Qwest's Wholesale, 702 N.W.2d at 261-62. This supports our conclusion that the holding of Minnegasco is limited to correcting MPUC error and does not sustain MPUC's assertion of implied power to order restitution in this case.

[6]Because we affirm the district court on this issue, we decline to address Qwest's other arguments in opposition to the order for restitution.

A. State Statutory Factors

MPUC has the authority to order monetary penalties for violation of the Act under Minn. Stat. § 237.462. Section 237.462, subd. 2, sets out nine factors that the MPUC must consider in setting the penalty amount: (1) the willfulness or intent of the violation; (2) the gravity of the violation, including the harm to customers or competitors; (3) the history of past violations; (4) the number of violations; (5) the economic benefit gained by the person committing the violation; (6) any corrective action taken or planned by the person committing the violation; (7) the annual revenue and assets of the company committing the violation; (8) the financial ability of the company to pay the penalty; and (9) other factors that justice may require. See Minn. Stat. § 237.462, subd. 2.

Qwest argues that MPUC did not calculate the penalty amount in accordance with these statutory factors. Rather, Qwest's position is that MPUC crafted the large penalty to coerce Qwest to agree to the restitution in return for a suspension of the penalty. Qwest contends that the discussion of the statutory factors in the Penalty Orders is merely an attempt by MPUC to justify the penalty amount after it had already been arbitrarily set.

We agree that the transcripts of MPUC hearings do suggest that MPUC intended the penalty to act in part as an incentive for Qwest to comply with the restitutional remedies. However, this motivation does not necessarily make the penalty improper. Our only concern is whether MPUC properly considered the statutory factors as required by law, and whether MPUC's findings are arbitrary and capricious. If the penalty amount is justified by MPUC's consideration of the statutory factors, we need not delve into any further analysis regarding motivation.

MPUC extensively analyzed the § 237.462 statutory factors in the Penalty Orders. The written orders show a considered analysis of both the facts and the statutory framework. There was sufficient evidence to support the Commission's findings that Qwest willfully violated both federal and state law, thereby impeding fair competition in Minnesota and profiting in the process. The Commission's actions were not arbitrary and capricious. We therefore conclude that the district court correctly held that the MPUC Penalty Order of $25.95 million dollars does not violate state law.

B. Fair Notice Doctrine

Qwest also argues that the penalty violates the fair notice doctrine. Under the fair notice doctrine, "application of a rule may be successfully challenged if it does not give fair warning that the allegedly violative conduct was prohibited." United States v. Chrysler Corp., 158 F.3d 1350, 1355 (D.C. Cir. 1998). The Act does not expressly define "interconnection agreement," and Qwest claims there was no standard for filing ICAs at the time the agreements at issue were created. Therefore, Qwest argues it did not know which agreements should have been filed under 47 U.S.C. § 252.

This argument fails for several reasons, all pointing to the conclusion that Qwest had ample notice that it was required to file the agreements at issue with MPUC for approval. First, Qwest admits that it had fair notice that the agreements containing favorable rates were subject to the filing requirement, yet it failed to file these agreements with MPUC. Failure to comply with *known* standards does nothing to bolster Qwest's argument that it lacked notice.

As for the filing requirements of which Qwest claims ignorance, there are several sources that provide notice as to the breadth of "interconnection agreements." Section 271(c)(2) has an extensive "competitive checklist" that specifies what ILECs must include in ICAs in order to receive authority to provide interLATA long distance service. See 47 U.S.C. § 271(c)(2). As part of this checklist, § 271(c)(2) references § 251(c), which requires ILECs to provide CLECs with interconnection and unbundled access, "on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with . . . section 252 of this title." See 47 U.S.C. § 251(c)(2)-(c)(3). In addition, the Federal Communications Commission has broadly interpreted the Act's filing requirement to include any agreements concerning rates, terms, and conditions an ILEC makes available to other CLECs. See In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 F.C.C.R. 15,499 ¶ 167 (1996).

Moreover, Qwest's own broad definition of "interconnection agreement" in its Statement of Generally Available Terms suggests that Qwest's arguments about the above sources' failure to explicitly define which "business-to-business arrangements" constitute terms of interconnection are without merit. Terms regarding dispute resolution, escalation, on-site support, and quarterly meetings have a commonsense relevance to interconnection and unbundled access. As noted by the United States Supreme Court (albeit in the context of the filed-rate doctrine), "[r]ates . . . do not exist in isolation. They have meaning only when one knows the services to which they are attached." American Tel. & Tel. Co. v. Cent. Office Tel., Inc., 524 U.S. 214, 223 (1998). The same is true here. Qwest had ample knowledge that the above terms were relevant to the value of its services to CLECs and should have been filed with MPUC. Therefore, the fair notice doctrine does not apply.

C. Excessive Fines Clause

Finally, Qwest argues that the penalty violates the Excessive Fines Clause of the Eighth Amendment. See U.S. Const. amend. VIII, cl. 2. The Eighth Amendment's prohibition of excessive fines applies to the states through the Due Process Clause of the Fourteenth Amendment. Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 433-34 (2001). A penalty violates the Excessive Fines Clause if it is "grossly disproportional" to the gravity of the offense. See United States v. Bajakajian, 524 U.S. 321, 334 (1998). Two considerations in the "grossly disproportional" analysis are legislative intent and the gravity of the offense relative to the fine. Id. at 336-37.

The Minnesota legislature empowered MPUC with several ways to penalize ILECs that fail to comply with the reporting requirements. See, e.g., Minn. Stat. §§ 237.462, subd. 2; 237.16, subd. 5. Relevant to our current discussion, under § 237.462 MPUC may impose a penalty of up to $10,000 a day per violation. Minn. Stat. § 237.462, subd. 2. MPUC imposed a penalty of $10,000 per day for two of the most egregious violations, and $2,500 per day for the other ten. These amounts are well within the statutory limits and are consistent with the general statutory scheme.

The penalty amount is also not excessive in light of the gravity of the harm caused by Qwest's failure to file. Millions of dollars are at stake in ICAs. Qwest's failure to file these agreements violated both federal and state law. This failure affected the state regulatory body, the competitive environment in Minnesota, and CLECs that were not parties to these agreements. Therefore, the penalty is not grossly disproportional to the harm caused by Qwest's actions.

Qwest's attempt to frame its infractions as mere "filing offenses" under Bajakajian fails. In Bajakajian, the offense was solely a failure to report the transportation of money outside the United States, with no relation to other illegal

activities, and the defendant was not a money launderer, drug trafficker, or tax evader, the type of individual the statute was designed to punish. Bajakajian, 524 U.S. at 337-38. Furthermore, the defendant's failure to provide information only affected the United States, and in a relatively minimal way. Id. at 339. In the present case, Qwest's failure to report affected the rights of many CLECs operating in Minnesota, and MPUC ordered the penalty under a statute expressly designed to address the present situation. Given the millions at stake in the telecommunications industry and the legislative decision to punish anti-competitive behavior, the penalty in this case is not in violation of the Excessive Fines Clause.

IV.

For the foregoing reasons, we affirm the decision of the district court.
