JOHN R. HAMMOND
DEPUTY ATTORNEY GENERAL
IDAHO PUBLIC UTILITIES COMMISSION
PO BOX 83720
BOISE, IDAHO 83720-0074
(208) 334-0357
IDAHO BAR NO. 5470

Street Address for Express Mail:
472 W WASHINGTON
BOISE ID 83702-5983

Attorney for the Commission Staff

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE APPLICATION OF QWEST CORPORATION AND MCLEODUSA TELECOMMUNICATIONS SERVICES, INC. FOR APPROVAL OF AN AMENDMENT TO AN INTERCONNECTION AGREEMENT FOR THE STATE OF IDAHO PURSUANT TO 47 U.S.C. § 252(e). (PRIOR CASE NO. QWE-T-00-7)	**CASE NO. QWE-T-02-17** **COMMENTS OF THE COMMISSION STAFF**
IN THE MATTER OF THE APPLICATION OF QWEST CORPORATION AND ESCHELON TELECOM, INC. FOR APPROVAL OF AN AMENDMENT TO AN INTERCONNECTION AGREEMENT FOR THE STATE OF IDAHO PURSUANT TO 47 U.S.C. § 252(e). (PRIOR CASE NO. QWE-T-00-13)	
IN THE MATTER OF THE APPLICATION OF QWEST CORPORATION AND COVAD COMMUNICATIONS COMPANY FOR APPROVAL OF AN AMENDMENT TO AN INTERCONNECTION AGREEMENT FOR THE STATE OF IDAHO PURSUANT TO 47 U.S.C. § 252(e). (PRIOR CASE NO. USW-T-99-3)	

COMES NOW the Staff of the Idaho Public Utilities Commission, by and through its Attorney of record, John R. Hammond, Deputy Attorney General, in response to Order No.

29128, the Amended Notice of Application, Notice of Modified Procedure, Notice of Intervention Deadline and Notice of Comment Deadlines in Case No. QWE-T-02-17 issued on October 4, 2002, submits the following comments.

BACKGROUND

On August 21, 2002, Qwest Corporation filed six negotiated agreements with the Commission that it had previously made with McLeodUSA Telecommunications Services, Inc. (three agreements), Eschelon Telecom, Inc. (one agreement) and Covad Communications Company (two agreements).[1] Qwest filed these agreements under the case numbers from previously approved interconnection agreements, *see* Case Nos. QWE-T-00-7, QWE-T-00-13 and USW-T-99-23.

Similar and identical unfiled agreements have been the subject of proceedings in several jurisdictions where the central issue has been whether Qwest has complied with requirements of the Telecommunications Act of 1996 in regards to the filing of interconnection agreements.[2] Recently, the Federal Communications Commission ("FCC") issued a decision on Qwest's Petition for Declaratory Ruling regarding its duty to file certain agreements under the Telecommunications Act of 1996. The FCC granted in part and denied in part Qwest's Petition. The FCC found that any agreement that creates an ongoing obligation regarding resale, number portability, dialing parity, access to rights-of-way, reciprocal compensation, interconnection, unbundled network elements or collocation is an interconnection agreement. *Qwest Petition for Declaratory Ruling*, 2002 WL 31204893, at 5, (F.C.C. 2002) The FCC also found that agreements that simply provided for "backward looking consideration" need not be filed. *Id.* at 6. The FCC further stated that it believed state commissions should be responsible for applying,

[1] Qwest entered these agreements with these Companies between April 19, 2000 and March 1, 2002.

[2] Filings have been made in Iowa, Minnesota and before the FCC.

in the first instance, the statutory interpretation it set forth to the terms and conditions of specific agreements.

Despite these proceedings, Qwest in its Applications claims that it has at all times operated in good faith in filing with the Commission pertinent interconnection agreements and amendments, and is committed to full compliance with the Act. Accordingly, Qwest contends that as a demonstration of its good faith, the Company is now broadly filing all contracts, agreements or letters of understanding between Qwest and CLECs that create obligations to meet the requirements of 47 USC 251(b) or (c) on a going forward basis. Qwest states that it believes its new filing policy goes well beyond the requirements of 47 USC 252(a) but will continue the policy until the FCC issues a decision that further defines the regulations of the Act. As previously discussed, that decision has now been issued by the FCC.

The Company also states that it has also reviewed older unfiled agreements and determined that some should now be filed as interconnection agreements so that their terms are available to other CLECs under 47 USC 252(i).[3]

After reviewing these Applications the Commission consolidated them into one proceeding, Case No. QWE-T-02-17. Subsequently, on September 19, 2002, Qwest submitted another amendment to its previous interconnection agreement with McLeodUSA in Case No. QWE-T-00-7. In Order No. 29128, the Commission decided to consider this amendment in this proceeding as well. In regard to the agreements that it has now filed, Qwest requests that the Commission approve them as soon as reasonably practicable.[4]

[3] Despite filing these older agreements now Qwest states it is concerned about its potential penalty liability for having not filed them in the past.

[4] Qwest realizes that its decision to file these agreements now does not bind the Commission in respect to questions regarding the Company's past compliance with the Act. Likewise, Qwest states that it reserves its right to demonstrate that these Agreements need not have been filed in the event of an enforcement action.

STAFF ANALYSIS

The Covad Agreements: The first is titled *Service Level Agreement*, and is dated April 19, 2000. This agreement states that Qwest will make improvements to its provisioning service performance on unbundled loops in order to reach, within a reasonable time certain service quality standards in relation to Covad. The service quality standards related to: 1) Covad's firm order confirmation dates; 2) services intervals; 3) new service failures; and 4) facility problems. The agreement also provides that based on Qwest's commitment to meeting the service performance standards, Covad would withdraw its opposition to the Qwest –US WEST merger proceedings that were underway at that time in six states.[5]

The second is titled *Facility Decommissioning Agreement*, and is dated January 3, 2002. This agreement states that pursuant to an interconnection agreement Covad had purchased certain facilities from Qwest and now wished to return them. The agreement settles disputes between Covad and Qwest regarding the rates, terms and conditions for the return and decommissioning of these facilities Covad had leased from Qwest. The agreement provides that in return for resolution of all disputes, Qwest would decommission these facilities and waive all fees and charges associated with them. It also provided that Qwest would either credit or reimburse Covad for certain charges relating to decommissioning. The agreement also specifies timeframes and other terms for actions of both Qwest and Covad in the decommissioning of these specified facilities. Finally, the agreement also contains a confidentiality clause.

[5] The Iowa Utilities Board has ruled that "no serious argument that performance standards of this nature are not properly considered a part of an interconnection agreement, as they are a necessary part of defining the interconnection services that Qwest is agreeing to provide." *AT&T Corporation v. Qwest Corporation,* Docket No. FCU-02-2, 2002 WL 1448728 (Iowa U.B. 2002).

The Eschelon Agreement: This agreement is titled *Settlement Agreement*, and is dated March 1, 2002. This agreement defined several disputes between Qwest and Eschelon. Each party to the agreement released their claims against one another and Qwest further provided a payment, using credit, to Eschelon as part of settling all disputes of both parties through February 28, 2002. This agreement also terminates 8 separate agreements which had previously been executed between Eschelon and Qwest, which have not been filed with the Commission. The terms and process for terminating the previous agreements, particularly relating to the transition from the UNE-E product (an Eschelon specific version of UNE-P) to the generic UNE-P product, are also specified.

The McLeod Agreements: The first agreement is titled Confidential Billing Settlement Agreement, dated April 28, 2000. This agreement states that disputes between Qwest and McLeod arose in a number of states under both interconnection agreements and tariffs regarding several billing issues. To resolve these disputes, including McLeod's opposition to the Qwest US WEST merger and a pending FCC complaint McLeod filed against US WEST, the parties entered this agreement. The agreement provides for Qwest to pay McLeod two sums as part of the resolution of the disputes between them. Further, the agreement contains terms for some disputed items.

The agreement established going-forward rates that McLeod would pay US WEST for subscriber list information, and changes the going forward rates for reciprocal compensation to bill and keep. The agreement further established that, following closure of the US WEST-Qwest merger, all interim rates, other than reciprocal compensation, would be treated as final and any final commission orders entered in any of the 14 US WEST states through April 30, 2000, would be applied to McLeod on a prospective basis only. This agreement also contains a clause that states the parties will keep the substance of this agreement strictly confidential.

The second agreement is a letter agreement dated October 26, 2000, titled *Confidential Agreement*, with the subject of the letter identified as *Re: Escalation Procedures and business solutions*. This agreement provides commitment to develop an implementation plan for new interconnection agreements, identifies a process, including quarterly executive meetings, whereby the parties shall develop business to business procedures and resolve business issues and disputes. The agreement also specifies escalation procedures for resolving disputes.

The third McLeod agreement is titled Confidential Settlement Agreement, and is dated May 1, 2000. This agreement resolves a complaint McLeod had filed with the Colorado PUC. McLeod agreed to dismiss the complaint with prejudice, in consideration of a lump sum payment from Qwest. In addition, the parties agreed upon going forward conditions regarding service quality and facility availability parity. This agreement also contains a clause that states the parties will keep the substance of this agreement strictly confidential.

The final McLeod document, the amendment submitted on September 19, 2002, is titled Interconnection Agreement Amendment and was executed September 19, 2002. This amendment, which was filed in a timely manner, includes Qwest's notification that the existing interconnection agreement (which has previously been approved by the Commission) would be terminated, effective December 31, 2003. The amendment also specifies the prices to be charged for any UNE-M product that McLeod has not converted to UNE-P or other type of service by December 31, 2003. Staff has no objections to this amendment and recommends the Commission approve it.

Staff finds that each of the six late filed agreements (excluding the September 19, 2002 amendment) contain terms relating to § 251(b) and/or (c), and that these terms impose an ongoing obligation upon the parties. Therefore, Staff finds the filing and consideration of these agreements in accordance with § 252(a)(1) to be appropriate.

In regards to the Commission's responsibilities to review these agreements in accordance with the provisions of the federal Telecommunications Act of 1996, 47 U.S.C. § 252(e)(1), the Commission may reject an agreement adopted by negotiations only if it finds that the agreement: (1) discriminates against telecommunications carrier not a party to the agreement; or (2) implementation of the agreement is not consistent with the public interest, convenience and necessity. 47 U.S.C. § 252(e)(2)(A).

Staff has reviewed these agreements, and finds the majority of the terms to be nondiscriminatory and in the public interest. In general, Staff believes the terms of these agreements may enhance the ability of other competitors to compete in the marketplace and thus would be in the public interest.

However, some of the terms of these agreements if they continued to be applicable, would not be in the public interest. For example, the confidentiality clauses contained in these agreements are clearly contrary to the intent of § 252(a)(1) and the pick and choose provisions of § 252(i). The redacted versions of these agreements are now public, and therefore these clauses are no longer applicable to these specific agreements. Thus, it would not be in the public interest for CLECs to be able to include a confidentiality clause in any subsequently negotiated interconnection agreement. Staff recommends the Commission condition any approval of these six late-filed agreements upon a notice that the confidentiality clauses are not part of that approval.

Similarly, some of the agreements contain terms that required the CLEC to withdraw its opposition to certain Qwest proceedings. Staff believes that restricting CLEC participation was not in the public interest to the extent that these CLECs may have presented arguments beneficial to those proceedings. Staff recommends that language of this type not be approved as part of

these six agreements. Furthermore, language such as this should not be contained in any going forward agreement adopted by other CLECs through the Act is pick and choose provisions.

Based on these recommendations Staff recommends the Commission approve these six agreements in accordance with 47 U.S.C. § 252(e)(1). Staff also recommends that the Commission approve the September 19, 2002 amendment.

Despite Staff's recommendation it must note that the filing of these agreements has raised a number of other issues. Each of these agreements was implemented long before the Company's filing in this case. In addition, at least one of these agreements refers to previous agreements that have yet to be filed with the Commission. Thus, Staff believes there may be questions about whether Qwest failed to timely file these six agreements and others in violation of the requirements of the Telecommunications Act of 1996. Staff believes the Commission at some point may wish to investigate these issues in a new case. In this case, Staff believes the Commission should make clear that approval of these six agreements shall not foreclose consideration of Qwest's compliance with the filing requirements of the Act should a new case be opened arise.

As indicated above, other agreements exist that may be subject to the filing requirements of § 252(a)(1). Thus, Staff recommends that Qwest be required to review any and all agreements it may have executed with competitive carriers that had terms that went in effect after the effective date of § 252(a)(1) and that the Commission direct the Company to file any of these agreements that falls within the scope of the FCC's recent decision.

STAFF RECOMMENDATION

Staff recommends the approval of the six late filed agreements and the subsequent amendment, subject to the conditions identified above. Staff also recommends that the Commission approve the September 19, 2002 amendment.

Staff recommends the approval the Commission consider whether to investigate in this proceeding or in a new case whether Qwest has violated the interconnection agreement filing requirements in the Act.

Respectfully submitted this 25 day of October 2002.

John R. Hammond
Deputy Attorney General

Technical Staff: Wayne Hart

JH:WH:i:umisc/comments/qwet02.17jhwh

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT I HAVE THIS 25TH DAY OF OCTOBER 2002, SERVED THE FOREGOING **COMMENTS OF THE COMMISSION STAFF,** IN CASE NO. QWE-T-02-17, BY MAILING A COPY THEREOF, POSTAGE PREPAID, TO THE FOLLOWING:

MARY S HOBSON
STOEL RIVES LLP
SUITE 1900
101 S CAPITOL BLVD
BOISE ID 83702

LAURAINE HARDING
SENIOR MANAGER
INTERCONNECT NEGOTIATION
McLEODUSA
6400 C ST SW, BOX 3177
CEDAR RAPIDS IA 52406

DENNIS AHLERS
SENIOR ATTORNEY
ESCHELON TELECOM INC
730 SECOND AVE S
SUITE 1200
MINNEAPOLIS MN 55402

BRAD SONNENBERG
COVAD COMMUNICATIONS CO
3420 CENTRAL EXPRESSWAY
SANTA CLARA CA 95051

SECRETARY