ATTACHMENT C

BEFORE THE ARIZONA CORPORATION COMMISSION

WILLIAM A. MUNDELL
CHAIRMAN
JIM IRVIN
COMMISSIONER
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COMMISSIONER

IN THE MATTER OF QWEST	**)**	
CORPORATION'S COMPLIANCE	**)**	
WITH SECTION 252(e) OF THE	**)**	**Docket No. RT-00000F-02-0271**
TELECOMMUNICATIONS ACT	**)**	
OF 1996	**)**	
	)	

SUPPLEMENTAL STAFF REPORT AND RECOMMENDATION

August 14, 2002

I. Introduction

The purpose of this Supplemental Report and Recommendation is to summarize the responses received to Staff's recent data requests in the 252(e) proceeding and present Staff's analysis and recommendations for further proceedings regarding 252(e). Staff will address the responses received to its recent data requests in the 271 proceeding in a separate report to be filed at a later date.

II. Background

The investigation into Qwest's compliance with Section 252(e) of the 1996 Telecommunications Act ("1996 Act") was commenced by Procedural Order dated April 18, 2002. [1] Pursuant to the Procedural Order, Qwest was required to file a series of settlement agreements and business to business arrangements between itself and other carriers in this Docket for review due to allegations raised in a complaint proceeding in Minnesota that Qwest was not complying with Section 252(e) of the 1996 Act.

All parties were given an opportunity to review the underlying agreements and to file comments on the agreements and whether they fell within the filing obligations of telecommunications carriers under Section 252 of the 1996 Act. Comments were filed by Qwest, AT&T Communications of the Mountain States, Inc. ("AT&T") and TCG Phoenix ("TCG"), Time Warner Telecom of Arizona ("Time Warner') and the Residential Utility Consumer Office ("RUCO"). On June 7, 2002, the Arizona Corporation Commission ("ACC") Staff filed its Report and Recommendation on the issues raised. Staff's original findings and conclusions were based upon its review of the written contracts in its possession at the time and the comments that were filed by Qwest, AT&T, Time Warner and RUCO.

In most cases, the agreements that were not filed were labeled as billing settlement agreements which as their name suggests, attempted to settle disputes with certain carriers, or, letter agreements which contained individualized business to business arrangements with the carrier involved. There were also several collocation decommissioning agreements. In its original Report and Recommendation issued on June 7, 2002, Staff concluded that a broad interpretation of the term "interconnection agreement" as used in the 1996 Act was required in order to carry out the nondiscrimination provisions of the Act. Accordingly where a billing settlement agreement or letter agreement between Qwest and another carrier affected the terms of their original interconnection agreement in any way, Staff recommended that those agreements should be treated as "interconnection agreements" subject to Section 252(e)'s filing requirement.[2] Staff identified 25 agreements which contained terms and conditions relating to

[1] AT&T Communications of the Mountain States, Inc. ("AT&T") and TCG Phoenix ("TCG") filed a Motion in the Section 271 proceeding to reopen the record to determine whether Qwest had violated provisions of the 1996 Act in not filing certain agreements with the Commission for approval. A separate proceeding was commenced on Qwest's compliance with Section 252(e) at the request of Staff.

[2] On May 23, 2002, Qwest filed with the FCC a 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). It is anticipated that the FCC will rule on Qwest's Petition which should provide guidance on the issues of whether billing settlement

interconnection, wholesale services and network elements which Staff, therefore, believed were subject to Section 252(e)'s filing requirement. AT&T identified a total of 14 agreements which it believed qualified as interconnection agreements.

A Procedural Conference was held on June 19, 2002, to address a variety of issues including: 1) whether there were any material issues of fact, 2) whether additional discovery was required, 3) what the appropriate procedure was going forward, and 4) whether there should be a hearing, and if so what the scope of the hearing should be. As a result of the Procedural Conference, Staff issued further discovery in both the 252(e) and 271 proceedings. In the 252(e) proceeding, Staff asked for, inter alia, copies of any unfiled oral or written agreements with Qwest that affected the terms, conditions and rates for interconnection, wholesale services and unbundled network elements. Staff also sent similar data requests to Qwest. In the 271 proceeding, Staff asked whether any carrier believed it had been precluded from participating in that Docket as a result of any agreement with Qwest and whether the record was tainted as a result. Staff also sent data requests to its Test Administrator and Test Transaction Generator for their input on this issue with regard to the OSS test.

III. Executive Summary

Part IV of this Memo discusses the additional discovery done by Staff since the June 19, 2002, Procedural Conference. The data responses indicate that of the 48 CLEC respondents, 5 believed that they may have unfiled interconnection agreements with Qwest. The five carriers included Cox, WorldCom, ELI, Allegiance and Eschelon. Four of these respondents, Cox, ELI, Allegiance and WorldCom, each indicated that they had entered into a recent amendment to their interconnection agreements with Qwest which had not yet been filed. None of the other CLECs believed that they had any unfiled interconnection agreements with Qwest, despite the fact that Staff had identified agreements between Qwest and other carriers as affecting interconnection, wholesale services and unbundled network elements. The CLEC respondents were split on the issue of whether they shared responsibility with Qwest under the Federal Act and State law to file interconnection agreements with the State commissions for approval.

The significant additional discovery has escalated concerns regarding the business to business relationship between Qwest and Eschelon, and to a lesser degree Qwest and McLeod. While the filings in this Docket raise questions and concerns as to the conduct of all three parties, of particular concern is Qwest's handling of the 271 proceeding, and its reasons for not filing certain agreements entered into with these two carriers with the Commission for approval.

Part V of this Memo contains a discussion of Staff's revised list of agreements which it believes fall under the filing obligations of Section 252(e) of the 1996 Act. The revised list of agreements is attached to the Report as Exhibit G.

Part VI of this Memo discusses Staff's recommendation for further proceedings in the 252(e) case. Because the issues raised in this Docket are interrelated to some degree with the 271 proceeding, Part VI of this Memo also addresses whether consolidation of the 271 docket is

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agreements and letter agreements which contain terms and conditions relating to interconnection, wholesale services and/or network elements are encompassed within 252(e)'s filing requirements.

appropriate. Part VI of this Memo also addresses a process for resolving issues relating to individual carrier opt-in rights and allegations that Qwest interfered with the 271 regulatory process before the Commission.

IV. Summary of Staff Discovery and Analysis

The data requests were sent to the 80 carriers including CLECs certificated to do business in Arizona, as well as to the parties to this proceeding and the 271 proceeding. See Exhibit A. A copy of the specific data requests sent by Staff to the CLECs in this docket are contained in Exhibit B to this report. Responses and follow up telephone calls show that 19 carriers to whom data requests were sent have gone out of business, been acquired by other data request addressees, or withdrawn their application for a CC&N leaving a balance of 61 operating companies which could respond. To date, Staff has received responses from 48 CLECs, an approximate 80% response rate. Staff has attempted to contact the 13 carriers which did not respond, to determine whether they are still in business. Staff's data requests to Qwest in this Docket and Qwest's responses are contained in Exhibit C.

Staff's first set of data requests to the CLECs asked whether the carrier was aware of any unfiled interconnection agreements between it and Qwest, and to provide copies of any such agreements. The carriers were also asked if there was any agreement that modified or amended the terms, conditions or rates of an interconnection agreement. Staff's second set of data requests to the CLECs inquired about whether the carrier had any oral agreements with Qwest that qualified as interconnection agreements or precluded participation in any Commission proceeding.

Of the 48 respondents, five, including Eschelon, ELI, Allegiance, WorldCom and Cox, acknowledged that there may be unfiled interconnection agreements with Qwest which should have been filed. As indicated above, of these five, ELI, Cox, Allegiance and WorldCom stated that they each had one amendment that had not been filed yet because it had just recently been executed.

In most cases, the agreements that were not filed were labeled as billing settlement agreements which as their name suggests, attempted to settle disputes with certain carriers, or, letter agreements which contained individualized business to business arrangements with the carrier involved. There were also several collocation decommissioning agreements. According to the responses, Eschelon, McLeod, WorldCom and ELI had the largest number of unfiled settlement agreements and letter agreements. Eschelon had a total of 17 unfiled billing settlement agreements, letter agreements and/or interconnection agreements. McLeod had 14 billing settlement agreements/letter agreements. WorldCom and its subsidiaries had 8 and ELI had 8 billing settlement agreements and/or letter agreements; and one recent amendment to its interconnection agreement.

Virtually all of the CLECs, even those with billing settlement agreements and letter agreements which Staff identified as "interconnection agreements", believed that all of their interconnection agreements had already been filed with the Commission for approval.[3] Several

[3] See Response of McLeod to Staff Data Requests. Exhibit D attached.

of the CLECs with unfiled billing settlement agreements and letter agreements expressly stated that they did not believe these agreements were interconnection agreements that had to be filed with the State commissions.[4] Several others stated that they did not believe that agreements which settled individualized disputes between two carriers had to be filed, even though they may impact arrangements for interconnection, wholesale service or unbundled network elements. They stated that only when the agreement settled a dispute that pertained to other industry members as well, did it have to be filed under Section 252(e) of the 1996 Act.[5] For instance, Covad stated that it did not believe that a facility decommissioning agreement had to be filed since it was carrier-specific.[6] In addition, one of the CLECs stated that it had filed anything that was labeled as an "interconnection agreement" or an "amendment to an interconnection agreement" and therefore believed that it had complied with its filing obligations in this regard.[7]

The data responses also revealed that two carriers had oral agreements with Qwest, Eschelon and McLeod. Qwest orally agreed with Eschelon that pricing levels for UNE-E would be competitive. In the case of McLeod, there was an oral agreement concerning additional product amounts to be purchased by Qwest under a written purchase agreement. With this agreement, there was also an oral agreement between Qwest and McLeod that McLeod would not oppose Qwest's 271 application as long as Qwest was in compliance with its agreements and all applicable statutes.

The CLEC respondents were split on the issue of whether they shared responsibility under the Federal Act or State rules for filing interconnection agreements with the State Commissions. Several indicated that they do not share a responsibility with Qwest to file the agreements with the State commission for approval because they do not possess sufficient information to know whether they should be filed or not.[8] These CLECs argue that only Qwest can determine when it is necessary to file an agreement because only Qwest possesses the superior knowledge to do so. They stated that in other words, Qwest knows when something is settling a CLEC specific complaint or whether the problem that is being settled is something on a broader scale that would require filing with the State commission.

Overall, Staff's additional discovery has allowed it to narrow the more serious issues down to Qwest's contracts and relationships with two carriers, Eschelon and McLeod. Eschelon and McLeod both offer a specialized type of service not offered by other carriers in Arizona and which Qwest does not yet make available as a standard product offering. The service is a form of UNE-P Centrex including additional AIN features and voicemail. Qwest stated that it did file with the Commission as required, amendments to its respective interconnection agreements with both carriers setting forth the terms and conditions for the specialized product offering. However, other settlement agreements and letter agreements between the two carriers and Qwest were not filed.

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[4] See Response of ELI to Staff Data Requests. Exhibit D attached.
[5] See Response of Eschelon to Staff Data Requests. Exhibit D attached.
[6] See Response of Covad to Staff Data Requests. Exhibit D attached.
[7] See Response of Covad to Staff Data Requests. Exhibit D attached.
[8] See Response of Eschelon to Staff Data Requests. Exhibit D attached.

The data responses also indicated that Qwest had both written and/or oral agreements with XO, Z-Tel (for 60 days only), Eschelon and McLeod wherein these CLECs agreed not to oppose Qwest's 271 application or participate in 271 proceedings.[9]

V. Agreements Subject to Section 252(e) Filing Obligations

In its original Staff Report and Recommendation issued on June 7, 2002, Staff identified 25 agreements that it believed should have been filed by Qwest pursuant to Section 252(e) of the 1996 Act. Staff indicated in its June 7, 2002, Report that its determination was based upon a broad interpretation of the provisions of the 1996 Act. In order to achieve the transparency of ILEC-CLEC dealings that Staff believes is necessary to carry out the nondiscrimination provisions of the Act, the term "interconnection agreement" as used in Section 252(e) must be defined broadly, in Staff's opinion, to include any contractual agreement or amendment which relates to or affects interconnection, wholesale services or network elements between an ILEC and another carrier in Arizona.

Since that time, in response to its data requests, Staff has received several additional unfiled agreements. The list of all unfiled agreements is contained on Exhibit F hereto. In addition, Staff has gone over its original list again and found that several of the original agreements on the list should be deleted. In at least one or two cases they were specific to another state and did not pertain to Arizona. Staff's revised list of Category 1 agreements that it believes should be filed pursuant to Section 252(e) is contained in Exhibit G.[10] Exhibit H contains a brief description of each of these agreements. Using Staff's revised list, the base fine amount for Category 1 agreements is $84,000.00;[11] and the base fine amount for Category 2[12] agreements is $45,000.00.[13]

VI. Scope of Further Proceedings

A. <u>Scope of Further Proceedings</u>

Pursuant to the Commission's most recent Procedural Order, parties have ten days to comment on Staff's Reports and Recommendations, and on its revised list of contracts subject to the 252(e) filing requirements. Parties are also to comment on what they believe the scope of any evidentiary proceeding in this Docket should be and whether the Section 271 proceeding should be consolidated with this case. Staff discusses its recommendations on these issues below and why it believes that the approach it has outlined is appropriate.

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[9] See responses of Z-Tel, Eschelon and McLeod to Staff data requests. Exhibit E attached.

[10] The revised list of Category 2 agreements is also contained at Exhibit G attached.

[11] Category 1 agreements are those which Staff has determined are "interconnection agreements" subject to the 252(e) filing requirement.

[12] Category 2 agreements are those agreements which contained a provision not to oppose Qwest in various regulatory proceedings before the Commission. As discussed earlier, Staff is recommending that Qwest be given a formal opportunity to rebut the CLEC claims of interference, for those agreements which involved the 271 process.

[13] As discussed later in this report, Staff believes that the parties in their comments and responses to Staff's data requests have made an initial showing that Qwest acted in contempt of Commission rules of process and orders in interfering with the 271 regulatory process and that additional fines over and above the base amount already agreed to by Qwest and non-monetary penalties are appropriate.

1. 252(e) Proceeding

a. Scope of Hearing

1. Fines and Related Issues

This proceeding was commenced to examine Qwest's compliance with Section 252(e) of the Federal Act which provides in relevant part as follows:

> (1) APPROVAL REQUIRED.—Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission. A State commission to which an agreement is submitted shall approve or reject the agreement, with written findings as to any deficiencies.

Since then, parties have raised a myriad of other issues that are not related to Qwest's filing obligation under Section 252(e) of the Federal Act. Staff believes that further proceedings in the 252(e) case should be limited to the contracts that actually raise 252(e) issues.

As stated earlier, Staff agrees with the process outlined by AT&T, adopted by the Hearing Officer in the July 9, 2002 Procedural Order, where all parties will have 10 days to comment on Staff's revised list of "interconnection agreements". Based upon the comments submitted, Staff will review any additional agreements identified and determine whether its list should be revised to include them. Any disagreements which cannot be resolved regarding Staff's list could be considered in the hearing on the level of fines imposed.[14] In addition to disagreements of this nature, however, the scope of the 252(e) hearing should be limited to the issue of why Qwest did not file the agreements with the Commission for approval and additional fines if appropriate in some cases. The hearing would address additional fines since it is Staff's understanding that Qwest has agreed to Staff's base amount of fines for the Category 1 agreements, and is willing to waive its right to a hearing on the base amount of fines proposed by Staff. Staff believes that such a hearing should be held on an expedited basis, since parties will have had at least two months to do additional discovery by the time any ruling is issued.

Many of the additional 252(e) issues raised by RUCO at the Procedural Conference on June 19, 2002, have now been answered through additional discovery, or are more appropriately answered in a separate proceeding. RUCO's issues involved the existence of any oral agreements, the harm to competition and benefits to Qwest, terminated contracts, and a process for filing agreements on a going forward basis. In response to Staff data requests, Eschelon and McLeod reported that they each had oral agreements with Qwest. Assessment of the damages done to further competition as well as the benefit obtained by Qwest would be more appropriately examined in other proceedings, as discussed below. For instance, one of the benefits identified by RUCO was Qwest having obtained the benefit associated with

[14] Staff would expect all parties to act in good faith and review the individual agreements, identify legitimate differences in interpretation for discussion with Staff, and only if agreement could not be reached would the agreements be included in any 252(e) hearing.

nonparticipation by Eschelon in Qwest's 271 proceeding. Qwest has answered RUCO's fourth issue, i.e., what agreements were terminated. See Exhibit I. Finally, Staff in its original Report had already identified a process/procedure for use in the future by Qwest in identifying whether agreements should be filed or not, assuming a question arose. Staff proposed that a process be available for Qwest (and a CLEC) to file the agreement under seal for a Commission Staff determination as to whether the agreement qualifies as an interconnection agreement and hence is covered by the filing requirements of Section 252(e). Qwest has also committed to overfile agreements in the future to ensure that its 252(e) obligations are being fulfilled.

WorldCom's issues fall into one of the following three categories: 1) availability of the agreements for opt-in purposes, 2) the impact on the 271 process and the OSS test, and 3) whether Staff appropriately identified the agreements subject to the 252(e) filing obligations and whether the agreements were in fact discriminatory.

As discussed below, Staff believes that the availability of opt-in for any agreement should be determined at the time a carrier chooses to opt-in to the specific agreement and they are denied opt-in rights by Qwest. It would be difficult to make opt-in determinations, without knowing which carriers will attempt to exercise their opt-in rights and for which contracts. That determination should be made on a case by case basis at the time the agreements are publicly filed if a carrier chooses to opt-in to one of the agreements and is denied by Qwest. Opt-in may be appropriate in some cases, but not in others. It would be difficult to address this issue before a dispute arises which regard to the opt-in rights of a particular carrier.

WorldCom's second issue of whether the 271 case was adversely affected should be addressed in the context of the 271 proceeding. Staff will be addressing the issue of whether the 271 record was tainted as a result of the secret agreements in its 271 Report.

Finally, WorldCom's third issue is addressed by AT&T's suggestion which the Administrative Law Judge has already adopted to allow all parties to file comments on Staff's proposed list of "interconnection agreements". Such an approach will allow any disagreements to immediately come to light which Staff can then attempt to resolve with the parties.

2. Bifurcation of Non 252(e) Issues

a. Phase B to Address 252(i) Complaints On a Case by Case Basis, if Necessary

As already discussed, issues relating to a specific carrier's ability to opt-in to any of the unfiled agreements arise under Section 252(i) of the 1996 Act and should be addressed on a case by case basis as disputes arise. There is a separate body of law which governs these issues. Staff recommends a Phase B of this Docket be set up to address any complaints of carriers as a result of Qwest denying them opt-in rights for specific contracts. The complaints could be addressed on a case by case basis as they arose.

A good example of how opt-in rights may vary among carriers are the collocation decommissioning agreements that Staff has requested Qwest to publicly file. Covad noted in its

response to Staff data requests that its decommissioning agreement is specific to its own collocation arrangements and its costs associated with decommissioning are probably going to be much different than another carriers. See Exhibit D. The FCC has stated, inter alia, that Section 252(i) permits differential treatment based on the LEC's cost of serving a carrier.[15] Therefore, such agreements may not be available for opt-in by another carrier. Reciprocal compensation for ISP bound traffic is another example of an issue which prior to the FCC's most recent order, was dependent upon the intent of the parties when they negotiated their initial agreements.[16]

It is also possible that Qwest and a carrier may be able to work out an agreement that is more suitable to the specific costs and circumstances involved. Therefore, Staff believes that opt-in availability should be determined on a case by case basis, if necessary, once carriers elect to opt-in to certain of the agreements, and are denied by Qwest.

b. Interference with the 271 Regulatory Process

The other issues that should be addressed separately relate to the contracts containing clauses which precluded participation or a party's opposition in the 271 regulatory proceeding before the Commission.

The data responses indicate that Qwest had written and/or oral agreements with four carriers, XO, Z-Tel (for 60 days only), Eschelon and McLeod, wherein these CLECs agreed that they would not oppose Qwest's 271 application. However, only one carrier in its comments or responses to Staff's data requests, Eschelon alleged any ongoing issues with Qwest because of its inability to participate in the 271 proceeding.[17] Staff has already conducted a workshop to address Eschelon's issues. McLeod also participated in this workshop, as well as AT&T, Covad and WorldCom.[18] Staff will be addressing the issues raised in a separate report.

Nonetheless, these contracts also raise concerns from a public policy perspective with regard to the 271 investigation. The 271 proceeding is conducted by State commissions in order to determine whether Qwest should be allowed into the interLATA interexechange market in Arizona. Under Federal law, Qwest must meet a myriad of requirements and conditions in order to receive the FCC's approval to offer interLATA service. The State Commission conducts what is a lengthy in-depth proceeding, in Arizona a proceeding that has taken 3 years to process to-date, so that the Commission can adequately perform its consultative role with the FCC under

[15] First Report and Order at para. 1317.

[16] See, In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 and Inter-Carrier Compensation for ISP-Bound Traffic, Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68 (Rel. Feb. 26, 1999).

[17] McLeod stated at the workshop, however, that it would have raised certain issues sooner in the 271 proceeding, but for its agreement with Qwest not to oppose Qwest's application.

[18] It is paramount that Qwest immediately take proactive measures to improve its business to business relationships with Eschelon and McLeod. Staff saw evidence of some improvement in the relationships at the recent 271 workshop in Arizona. Staff hopes that this will provide the basis for further improvements in the relationships and open the door to more active discussion and agreement between Qwest and these two CLECs.

Federal law. For this reason, interference with the Commission's processes in the 271 case, in particular, raises serious public policy concerns.

Given the responses to Staff's data requests and the comments filed in the 271 proceeding, Staff believes that an initial showing has been made that Qwest interfered with the 271 proceeding before the Commission and that the Commission's processes and the ability of two carriers to present their issues to the Commission were adversely impacted. Based upon the additional information received since its original report, Staff believes that additional fines over and above the base amount for Category 2 contracts, as well as non-monetary penalties are appropriate.

Staff believes that a sub-docket to the 271 Docket should be opened and all parties responses to Staff data requests and their comments on this issue should automatically become part of the record. A 10 day deadline should be established for additional written comment by involved CLECs. It should then be incumbent upon Qwest to demonstrate in formal written comments filed with the Commission, why it should not be held in contempt of Commission rules of process and orders for: 1) including provisions in agreements that prevented opposition to its 271 application at the Commission, 2) effectively precluding the participation of two parties at various stages of the Section 271 proceeding, and, 3) precluding parties from filing complaints with the Commission on these issues. Qwest should have 10 days to respond to the CLEC filings. Upon review of the CLEC comments and Qwest's formal response, Staff will recommend what amount of additional fines are appropriate in addition to the base fines already agreed to by Qwest. Qwest should be given the opportunity for a hearing on any additional fines imposed.[19]

3. The Section 271 Proceeding Should Be Completed Independently of the Section 252(e) Proceeding and Other Proceedings Identified Above

While both Dockets have some issues in common, Staff believes that the process set out above is a more appropriate way of addressing the issues than consolidation of both Dockets. Staff recognizes that an argument can be made that confidential unfiled agreements implicate Qwest's compliance with Checklist Item 2, or the provision of UNEs on a nondiscriminatory basis. However, the data responses do indicate confusion on the part of the CLECs as well as to whether billing settlement agreements or letter agreements are "interconnection agreements" and need to be filed with the State commission for approval. While Staff has chosen a broad interpretation, the FCC has not yet ruled on this issue, and there is always the possibility that its interpretation may differ from Staff's interpretation. Nonetheless, pending an eventual ruling by the FCC, Staff believes that the broad interpretation is the most appropriate approach and would certainly resolve any potential discrimination issues to the extent they exist on a going forward basis.

From a 271 perspective, there is also the issue of whether the record has been tainted by the unfiled agreements, some of which contained clauses which prohibited carriers from

[19] It is Staff's understanding that Qwest has already agreed to Staff's base fine amount for the Category 2 agreements and that Qwest is willing to waive its right to a hearing on the base fine amount proposed by Staff.

opposing Qwest's 271 application. The additional 271 workshop held on July 30-31, 2002 was designed to specifically address this concern. Staff will address the concerns and issues raised by Eschelon and McLeod in the workshop, and any impact on the 271 record, in a separate Report.

The Section 271 proceeding has been conducted for the last three years through a comprehensive workshop process. The workshop process has worked very well; and it is the norm as far as 271 proceedings go nationwide. The workshop process was agreed to by all parties, in lieu of evidentiary hearings. It has been very effective in building consensus among all of the parties and reaching agreed upon resolutions of many issues.

Attempting to resolve 271 issues in a consolidated proceeding with Section 252(e) filing issues would confuse the records of both proceedings unnecessarily. Consolidation would also make resolution of the issues more complex. It may also lead to adjudication of issues which had been resolved through agreed upon forums, i.e., checklist workshops, TAG meetings, and OSS workshops over a three year period which would be unnecessary. Further, consolidation of this issue with the entire 271 proceeding would be quite unwieldy. How one would define the scope of an evidentiary hearing in such a consolidated proceeding is not clear. In addition, the potential for confusion or mistakes is significant.[20]

As already discussed, the July workshops in the 271 proceeding addressed those issues raised by parties who believed that they were precluded from raising issues during the course of that case because of an agreement with Qwest. This workshop was productive in understanding and addressing both Eschelon's and McLeod's issues. In addition to this workshop, Staff believes that allowing for additional comment in the public interest phase of the 271 proceeding is also appropriate.

VII. Conclusion

Staff continues to believe that the hearing on Qwest's compliance with Section 252(e) should be limited to why Qwest did not file the various agreements with the Commission for approval and whether additional fines may be appropriate for any agreements, over and above the base amount already proposed by Staff. Section 252(i) opt-in determinations should be made on a case by case basis if necessary as they arise in a new Phase B of this Docket, if a dispute arises as to a particular carrier's opt-in rights to a specific contract.

Because of the nature of the 271 process, issues relating to allegations that Qwest interfered with the 271 regulatory process raise serious public policy concerns. A sub-docket to the 271 Docket should be opened to address the allegations that Qwest interfered with the 271 regulatory process. Given the responses to Staff's data requests and the comments filed in the 271 proceeding, Staff believes that an initial showing has been made by some CLECs that Qwest interfered with the 271 proceeding before the Commission, and that the Commission's processes and the ability of two carriers to present their issues to the Commission were adversely impacted.

[20] See also DOJ Evaluation of Qwest 5-State Application at p. 3: "However, it is not apparent that the remedy for such prior violations, if any, lies in these proceedings rather than in effective enforcement through dockets in which such matters are directly under investigation."

As a result, Staff believes that additional fines and non-monetary penalties are appropriate. Those comments and data responses should automatically become part of the record in the new sub-docket. The involved carriers should have the opportunity to submit additional written comments within 10 days of the opening of the sub-docket. It should then be incumbent upon Qwest to demonstrate, through a formal written filing why it should not be held in contempt of Commission rules of process and orders for including provisions in its agreements with carriers which precluded them from opposing Qwest's 271 application before the Commission, and for effectively precluding parties from participating in various stages of that Docket or filing complaints with the Commission involving these issues. The Staff will consider the comments submitted and Qwest's formal filing in recommending what additional fines are appropriate. Non-monetary penalties should include, at a minimum, a formal plan for Qwest to improve its business to business relationships with Eschelon and McLeod, including the establishment of processes for improving and maintaining sound business to business relationships with all carriers.

Finally, the Section 271 proceeding should be completed independently of the Section 252(e) proceeding and other proceedings identified.