

**BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION**

**In the Matter of the Petition of Qwest
Corporation for Arbitration with Eschelon
Telecom, Inc. Pursuant to 47 U.S.C. Section
252 of the Federal Telecommunications Act of
1996**

Docket No. UT-063061

REBUTTAL TESTIMONY OF

DOUGLAS DENNEY

ON BEHALF OF ESCHELON TELECOM, INC.

DECEMBER 4, 2006

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1 **I. INTRODUCTION**

2 **Q. PLEASE STATE YOUR NAME AND BUSINESS ADDRESS.**

3 A. My name is Douglas Denney. I work at 730 2nd Avenue South, Suite 900, in
4 Minneapolis, Minnesota.

5 **Q. BY WHOM ARE YOU EMPLOYED AND IN WHAT CAPACITY?**

6 A. I am employed by Eschelon Telecom, Inc., as Senior Manager of Costs and
7 Policy. My responsibilities include negotiating interconnection agreements,
8 monitoring, reviewing and analyzing the wholesale costs Eschelon pays to
9 carriers such as Qwest, and representing Eschelon in regulatory proceedings.

10 **Q. HAVE YOU PREVIOUSLY TESTIFIED IN THIS PROCEEDING?**

11 A. Yes. I filed Direct Testimony in this proceeding on September 29, 2006.

12 **Q. WHAT IS THE PURPOSE OF YOUR REBUTTAL TESTIMONY?**

13 A. The purpose of my Rebuttal Testimony is to respond to the Direct Testimony of
14 Qwest witnesses Robert Hubbard, Karen Stewart, Teresa Million, and William
15 Easton relating to the issues I addressed in my Direct Testimony.

16 **Q. DO YOU HAVE ANY CORRECTIONS TO MAKE TO YOUR DIRECT
17 TESTIMONY?**

18 A. No. However, a number of issues have closed and parties have updated their
19 proposal on other issues since the filing of my direct testimony on September 29,

1 2006. Where the language has closed or changed I will identify the updated
2 language with the corresponding subject matter / issue number in this testimony.

3 **Q. PLEASE DESCRIBE HOW THE REMAINDER OF YOUR TESTIMONY**
4 **IS ORGANIZED.**

5 A. My testimony is organized by subject matter number, in the same manner my
6 Direct Testimony is organized. Each subject matter heading may contain one or
7 more disputed issues from the interconnection agreement. For each subject
8 matter, I briefly summarize the issue. In addition, I summarize Qwest's position,
9 as put forth by its respective witness on the subject matter. I also explain the
10 flaws in Qwest's position.

11 **Q. ARE THERE ANY EXHIBITS TO YOUR TESTIMONY?**

12 A. Yes, my testimony has the following exhibits:

13 **Exhibit DD-7 (Confidential)** A string of emails between Eschelon and Qwest
14 showing that Qwest's past due records are not always accurate.

15 **Exhibit DD-8** Email string showing that Qwest threatens to disconnect
16 Eschelon's circuits and stop processing Eschelon's orders even when
17 Eschelon has already paid the bill Qwest claims is delinquent.

18 **Exhibit DD-9 (Confidential)** A string of emails between Eschelon and Qwest
19 demonstration that Qwest incorrectly classified amounts as past due.

20 **Exhibit DD-10 (Confidential)** An email from Qwest showing that sometimes
21 Eschelon's payment disputes fall into the "black hole."

22 **Exhibit DD-11 (Confidential)** An email string showing that Qwest sometimes
23 applies payments to incorrect accounts causing accounts to appear past
24 due when they are not.

1 **Exhibit DD-12** A demonstration that Qwest does not always follow its own
2 process and does not always properly send notification to appropriate
3 Eschelon personnel creating unnecessary disputes regarding balances.

4 **Exhibit DD-13** A copy of the CMP bill dispute resolution.

5 **Exhibit DD-14** An email from Eschelon to Qwest making clear that Eschelon
6 does not agree to the bill dispute resolution process developed over
7 Eschelon's objections in CMP and that, consistent with the CMP
8 document, Eschelon's contract will govern billing disputes.

9 **Exhibit DD-15 (Confidential)** A calculation of the discrepancies between Qwest
10 and Eschelon in the amount of disputed payments.

11 **Exhibit DD-16** August 31, 2006 Process Notice from Qwest Regarding Changes
12 to Qwest's Negotiations Template and Excerpts from MN Negotiations
13 Template Exhibit A

14 **Exhibit DD-17** A chronology of Qwest's attempts to limit the number of CFA
15 changes to one on the installation due date.

16 **Exhibit DD-18** A redlined comparison of the Washington SGAT and the Covad
17 ICA payment and deposit sections.

18 **Exhibit DD-19** Qwest's September 29, 2006 billing notice attempting to change
19 the rate application described in issue 8-20(a). This notice confirms that
20 Eschelon's language in section 8.2.10.4.3 is appropriate.

21 **Exhibit DD-20** Excerpts from Arizona Open Meeting transcript regarding
22 Qwest's failure to implement rates as ordered by the Arizona Commission.

23

24 **II. SUBJECT MATTER NOS. 2, 3 AND 4**

25 **SUBJECT MATTER NOS. 2. RATE APPLICATION & 3. EFFECTIVE DATE**
26 **OF LEGALLY BINDING CHANGES**

27 **Issue Nos. 2-3 and 2-4: ICA Section 2.2**

28 **Q. PLEASE PROVIDE A BRIEF SUMMARY OF ISSUE NOS. 2-3 AND 2-4.**

1 A. Issue 2-3 concerns when Commission-ordered rate changes will take effect.
2 Qwest has proposed language to be included in Section 2.2 that provides that rate
3 changes will be given prospective effect unless otherwise ordered by the
4 Commission. As I explained in my direct testimony, Eschelon objects to the
5 inclusion of Qwest's proposed language because the issue of when rate changes
6 will take effect is already dealt with in agreed upon language that is included in
7 Section 22.4.1.2.¹ That agreed upon language provides that "Such Commission-
8 approved rates shall be effective as of the date required by a legally binding order
9 of the Commission." In light of this agreed upon language, the provision
10 proposed by Qwest is not only unnecessary but has the potential to give rise to
11 future disputes.

12 Issue 2-4 is similar to the previous issue in that it concerns when changes in the
13 law will take effect. The parties have agreed that the ICA "shall be amended to
14 reflect such legally binding modification or change."² Eschelon has proposed that
15 an amendment incorporating a change in the law will take effect on the effective
16 date of the change in the law. Qwest proposes, in contrast, that when an order
17 that changes the law "does not include a specific implementation date," the
18 effective date of such a change will depend on whether one party gives the other
19 notice of the change. When one party gives the other party notice within thirty

¹ Direct Testimony of Douglas Denney on Behalf of Eschelon Telecom, Inc., ("*Denney Direct*"),
September 29, 2006, pages 6 - 8.

² ICA, Section 2.2.

1 days of the effective date of the order, Qwest proposes that the amendment will be
2 “deemed effective on the date of that order.” When one party does not give
3 notice, Qwest proposes that the legal change will take effect on the effective date
4 of the ICA amendment reflecting that change. As I note in my direct testimony,
5 Qwest’s proposal creates ambiguity because it appears to distinguish between an
6 order’s “specific implementation date” and its “effective date.”³ What Qwest
7 intends by distinguishing between these two terms is not clear. In addition,
8 Qwest’s proposal provides the ability to delay the effective date of a change in the
9 law by simply not giving notice to the other party of the order giving rise to the
10 change.⁴ Finally, Qwest’s proposal improperly intrudes on the authority of the
11 relevant regulatory body to determine when changes in the law will take effect.⁵

12 **Q. DOES ESCHELON HAVE AN ALTERNATIVE PROPOSAL FOR ITS**
13 **PROPOSALS IN ISSUE NOS. 2-3 AND 2-4?**

14 **A.** Yes. Eschelon’s second proposed alternative for Issues 2-3 and 2-4 is as follows:

15 2.2 The provisions in this Agreement are intended to be in
16 compliance with and based on the existing state of the law, rules,
17 regulations and interpretations thereof, including but not limited to
18 state rules, regulations, and laws, as of March 11, 2005 (the
19 Existing Rules). Nothing in this Agreement shall be deemed an
20 admission by Qwest or CLEC concerning the interpretation or
21 effect of the Existing Rules or an admission by Qwest or CLEC that
22 the Existing Rules should not be changed, vacated, dismissed,
23 stayed or modified. Nothing in this Agreement shall preclude or

³ *Denney Direct*, page 11.

⁴ *Denney Direct*, page 12.

⁵ *Denney Direct*, pages 12 - 13.

1 estop Qwest or CLEC from taking any position in any forum
2 concerning the proper interpretation or effect of the Existing Rules
3 or concerning whether the Existing Rules should be changed,
4 vacated, dismissed, stayed or modified. To the extent that the
5 Existing Rules are vacated, dismissed, stayed or materially changed
6 or modified, then this Agreement shall be amended to reflect such
7 legally binding modification or change of the Existing Rules. Each
8 Party has an obligation to ensure that the Agreement is amended
9 accordingly. Where the Parties fail to agree upon such an
10 amendment within sixty (60) Days after notification from a Party
11 seeking amendment due to a modification or change of the Existing
12 Rules or if any time during such sixty (60) Day period the Parties
13 shall have ceased to negotiate such new terms for a continuous
14 period of fifteen (15) Days, it shall be resolved in accordance with
15 the Dispute resolution provision of this Agreement. It is expressly
16 understood that this Agreement will be amended as set forth in this
17 Section 2.2, to reflect the outcome of generic proceedings by the
18 Commission for pricing, service standards, or other matters covered
19 by this Agreement, except where CLEC notifies Qwest in writing
20 that an amendment is not required. The rates in Exhibit A and
21 when they apply are further addressed in Section 22. Generally,
22 with respect to rates, this Section 2.2 addresses changes to rates that
23 have been previously approved by the Commission, and Section 22
24 (Pricing) also addresses rates that have not been previously
25 approved by the Commission (Unapproved Rates). Rates in Exhibit
26 A will reflect include legally binding decisions of the Commission.
27 Each Party reserves its rights with respect to the effective date of a
28 legally binding modification or change of the Existing Rules and, if
29 different, other dates for implementation or application of an order,
30 if any. If a Party desires a particular deadline or time period for
31 application or implementation of any aspect of a proposed order, the
32 Party may request under the Commission's regularly established
33 rules that the Commission establish a specific implementation date,
34 stay the order, or provide other such relief as applicable. If,
35 however, the Commission enters an order that is silent on the issue,
36 the order shall be implemented and applied on a prospective basis
37 from the date that the order is effective either by operation of law or
38 as otherwise stated in the order (such as "effective immediately" or
39 a specific date), unless subsequently otherwise ordered by the
40 Commission or, if allowed by the order, agreed upon by the Parties.
41 ~~When a regulatory body or court issues an order causing a change~~
42 ~~in law and that order does not include a specific implementation~~
43 ~~date, a Party may provide notice to the other Party within thirty (30)~~

1 ~~Days of the effective date of that order and any resulting.~~ While
2 any negotiation or Dispute resolution is pending for an amendment
3 pursuant to this Section 2.2 the Parties shall continue to perform
4 their obligations in accordance with the terms and conditions of this
5 Agreement. For purposes of this Section, "legally binding" means
6 that the legal ruling has not been stayed, no request for a stay is
7 pending, and any deadline for requesting a stay designated by
8 statute or regulation, has passed.
9

10 22.4.1.2 If the Interim Rates are reviewed and changed by the
11 Commission, the Parties shall incorporate the rates established by
12 the Commission into this Agreement pursuant to Section 2.2 of this
13 Agreement. Such Commission-approved rates shall be effective as
14 of the date required by a legally binding order of the Commission.
15 Each Party reserves its rights with respect to whether Interim Rates
16 are subject to true-up. If, however, the Commission issues an order
17 with respect to rates that is silent on the issue of a true-up, the rates
18 shall be implemented and applied on a prospective basis from the
19 effective date of the legally binding Commission decision as
20 described in Section 2.2.
21

22 **Q. HOW IS THIS ALTERNATIVE PROPOSAL DIFFERENT FROM**
23 **ESCHELON'S FIRST PROPOSAL?**

24 A. As a general matter, this alternative (proposal #2) is different from that Qwest-
25 AT&T language in three ways. First, this proposal affirms the parties' obligations
26 to keep their ICA up to date in an additional sentence. Second, this proposal
27 provides additional clarification regarding when rates changes will take effect.
28 Third, this proposal provides additional clarification regarding the effective date
29 of amendments to the ICA that are entered into to reflect legally binding changes
30 in the law.

1 **Q. PLEASE EXPLAIN ESCHELON’S REASONS FOR THE FIRST**
2 **DIFFERENCE THAT YOU’VE DESCRIBED.**

3 A. I previously discussed Eschelon’s concern that Qwest’s proposal provides a
4 means that would allow a party to delay the effect of an adverse change in the law
5 by not giving the other party notice of the order giving rise to the change.⁶ The
6 existing agreed upon language already provides that the Agreement “shall” be
7 amended to reflect a legally binding modification or change of the Existing Rules.
8 The additional sentence that Eschelon proposes (immediately after that closed
9 sentence) confirms that there will be no delay in doing so, by stating that “Each
10 Party has an obligation to ensure that the Agreement is amended accordingly.”

11 **Q. PLEASE EXPLAIN ESCHELON’S REASONS FOR THE SECOND**
12 **DIFFERENCE, WHICH CONCERNS WHEN RATE CHANGES WILL BE**
13 **GIVEN EFFECT.**

14 A. Testimony on behalf of the Minnesota Department of Commerce in the Minnesota
15 arbitration revealed the utility of distinguishing between changes to prices that
16 had been previously approved by the Commission and changes to prices not
17 previously approved. To address this issue, Eschelon’s alternative proposal
18 includes language specifying that Section 2.2 is intended to govern changes to
19 existing rates that have been previously approved and that Section 22 also
20 addresses rates that have not been previously approved. In addition, Eschelon’s

⁶ *Denney Direct*, page 12.

1 alternative proposal adds language to Section 22.4.1.2. Closed language in
2 Section 22.4.1.2 already states that the Commission will determine the effective
3 date of rates (*e.g.*, whether prospective or not) in an order of the Commission.
4 The Commission's order may or may not include a provision for a rate "true-up."
5 To expressly address the potential for interim rates to be subject to "true up,"
6 Eschelon's alternate language for Section 22.4.1.2 states that each Party reserves
7 its rights with respect to whether Interim Rates are subject to true-up. It also
8 provides that, if the Commission is silent on the issue of a true up, rates will be
9 implemented and applied prospectively from the date of the legally binding
10 Commission decision.

11 **Q. PLEASE DESCRIBE ESCHELON'S REASONS FOR THE THIRD**
12 **DIFFERENCE, WHICH CONCERNS THE EFFECTIVE DATE OF ICA**
13 **AMENDMENTS THAT REFLECT CHANGES OF LAW.**

14 A. Eschelon's proposed alternative permits a party to seek a particular time period
15 for application or implementation of an order that results in a legally binding
16 change in the law, including changes to previously-approved rates, and clarifies
17 that, if the order is silent on the issue of its implementation date, the order will be
18 implemented prospectively from the date the order becomes effective according to
19 the order's term or by operation of law. Thus, this language expressly confirms
20 that the "implementation date" of an order that is "effective immediately" is the
21 date of the order.

1 **Q. DOES QWEST HAVE LANGUAGE FOR ESCHELON'S ALTERNATIVE**
2 **PROPOSAL?**

3 A. Yes. Qwest's language for section 2.2 is the same for both Eschelon proposals.
4 However, Qwest has language for section 22.4.1.2 in response to Eschelon's
5 alternative proposal.⁷

6 22.4.1.2 If the Interim Rates are reviewed and changed by
7 the Commission, the Parties shall incorporate the rates established
8 by the Commission into this Agreement pursuant to Section 2.2 of
9 this Agreement. Such Commission-approved rates shall be
10 effective as of the date required by a legally binding order of the
11 Commission. ~~Each Party reserves its rights with respect to~~
12 ~~whether Interim Rates are subject to true up. If, however, the~~
13 ~~Commission issues an order with respect to rates that is silent on~~
14 ~~the issue of a true up, the rates shall be implemented and applied~~
15 ~~on a prospective basis from the effective date of the legally binding~~
16 ~~Commission decision as described in Section 2.2. Rates in Exhibit~~
17 ~~A include legally binding decisions of the Commission and shall~~
18 ~~be applied on a prospective basis from the effective date of the~~
19 ~~legally binding Commission decision, unless otherwise ordered by~~
20 ~~the Commission.~~

21

22 **Q. WHAT ARE THE PROBLEMS WITH QWEST'S PROPOSAL IN 22.4.1.2?**

23 A. By striking Eschelon's proposed language reserving each party's rights with
24 respect to a true up, Qwest appears to be attempting to limit Eschelon's ability in
25 argue in favor of, or at least create a strong presumption against, a true up of
26 interim rates. Eschelon's rights should not be limited in this regard. As was
27 shown in issues 22-90(a) – (f) Qwest's interim rate proposals ignore prior

⁷ Note that Eschelon's alternative proposal contained language for both sections 2.2 and 22.4.1.2.

1 Commission orders, lack cost support and are well above forward-looking
2 economic cost. The presumption against a true up, allows Qwest to gouge CLECs
3 on interim rates without risk that reasonable rates will be applied retroactively.
4 Eschelon's alternative proposal is close to Qwest's proposal in that if a
5 Commission is silent with respect to the effective date of rates, they will apply
6 prospectively, but Eschelon's language is explicit regarding each party's
7 opportunity to argue for, or against, a true up of rates.

8 **Q. DO YOU AGREE WITH MR. EASTON'S ASSERTION THAT**
9 **PROSPECTIVE APPLICATION OF RATES IS GENERALLY THE**
10 **MORE APPROPRIATE PROCESS?**⁸

11 A. Not necessarily. The argument that Mr. Easton makes about the need for
12 predictability in order to make informed business decisions is more appropriately
13 made to the Commission in the context of a particular rate issue, rather than in the
14 abstract. Commissions have recognized that there are circumstances when it is
15 appropriate for rates to be made subject to true-up. The contract should not create
16 a presumption to the contrary.

17 **Q. MR. EASTON STATES THAT QWEST'S PROPOSED LANGUAGE FOR**
18 **SECTION 2.2: (1) REMOVES THE INCENTIVE FOR EITHER PARTY**
19 **TO DELAY NEGOTIATIONS OF A CHANGE IN LAW; AND (2)**
20 **ELIMINATES THE POSSIBILITY, AND SUBSEQUENT SIGNIFICANT**

⁸ *Easton Direct*, page 3.

1 **FINANCIAL IMPACT, OF EITHER PARTY ATTEMPTING TO APPLY**
2 **CHANGE IN LAW RETROACTIVELY OVER A LONG PERIOD OF**
3 **TIME.⁹ DO YOU AGREE?**

4 A. No. This was addressed in my Direct Testimony on page 12. Under Qwest's
5 language Qwest would have the ability to ignore changes in law that Qwest does
6 not like, while embracing changes in law that work to Qwest's advantage.
7 Because Qwest has greater regulatory resources than Eschelon and is more likely
8 to know of all such changes, Qwest's language places Eschelon at a clear
9 disadvantage in implementing changes in law. Further, as described above, if
10 Qwest is truly concerned about incentives to delay changes in law, then it should
11 embrace Eschelon's alternative proposal placing the obligation on both parties to
12 amend the contract when there are changes in law.

13 **Q. DOES ESCHELON HAVE A CONCERN THAT, UNDER QWEST'S**
14 **PROPOSAL, AN ORDER THAT IS "EFFECTIVE IMMEDIATELY"**
15 **COULD BE CONSIDERED TO LACK A "SPECIFIC**
16 **IMPLEMENTATION DATE"?**

17 A. Yes, this was addressed in my direct testimony on pages 12 and 13. An example
18 of this concern is Qwest's conduct in an Arizona cost case where Qwest
19 considered the effective date of an order to be different from a specific
20 implementation date even though the order identified no separate date. In that

⁹ *Easton Direct*, page 6.

1 case, the Commission staff brought a complaint regarding Qwest's failure to
2 implement rate changes.¹⁰ Although the rate changes had been ordered by the
3 Commission to be "effective immediately" (*i.e.*, on June 12, 2002, the date of the
4 Order), and although Qwest had not sought a stay of the order despite a specific
5 inquiry from the Commission as to whether a stay would be sought, Qwest still
6 had not implemented the rates months later.¹¹ The Arizona Staff investigated¹²
7 and the matter came before the Arizona Commission on an order to show cause.
8 At the open meeting, the Commission indicated that it believed it was reasonable
9 to conclude that an order indicating that it was effective "immediately" means
10 "fairly soon"¹³ and that, in any event, "any definition of immediately is not five
11 months later."¹⁴ The Commission then asked Qwest to define immediately, and
12 Qwest responded:

13 I think *Qwest's definition of immediately is consistent with the*
14 *approach that has been taken in the implementation of orders*
15 *previously* by this Commission with respect to the 1986 record,
16 which was the last major order with wholesale rates. It took Qwest --

¹⁰ *Arizona Corporation Commission v. Qwest Corporation*, Docket No. T-01051B-02-0871, Decision 65450, Complaint and Order to Show Cause, December 12, 2002 ["AZ Show Cause Case"] (<http://images.edocket.azcc.gov/docketpdf/0000024588.pdf>).

¹¹ See Exhibit DD-20, Transcript of 12/2/02 Special Open Meeting, AZ Show Cause Case, p. 9, lines 4-11 & p. 10, lines 2-3.

¹² Staff said it believed that "Qwest intentionally delayed implementation" of the cost case order "until Qwest could complete rate changes in nine other states for which it had 271 applications pending at the federal level." See Exhibit DD-20, Transcript of 12/2/02 Special Open Meeting, AZ Show Cause Case, p. 5, lines 19-23.

¹³ See Exhibit DD-20, Transcript of 12/2/02 Special Open Meeting, AZ Show Cause Case, p. 9, lines 12-15.

¹⁴ See Exhibit DD-20, Transcript of 12/2/02 Special Open Meeting, AZ Show Cause Case, p. 10, lines 6-7.

1 and we have discussed this with Staff -- it took Qwest *about a year*
2 to implement those rates.¹⁵
3

4 Eschelon's proposed language would prevent a re-occurrence of such a situation,
5 by requiring a party that needs additional time to implement an order to raise that
6 issue with the Commission and obtain an implementation schedule, rather than
7 engaging in self-help after the fact and taking additional time, with no stay in
8 place, to implement the order on Qwest's own schedule.
9

10 **SUBJECT MATTER NO. 4. DESIGN CHANGES**

11 *Issue Nos. 4-5, 4-5(a), 4-5(b) and 4-5(c): ICA Sections 9.2.3.8, 9.2.3.9, 9.2.4.4.2,*
12 *9.6.3.6, 9.20.13 and Exhibit A*

13
14 **Q. PLEASE PROVIDE A BRIEF SUMMARY OF ISSUE 4-5 AND SUBPARTS**
15 **(DESIGN CHANGES).**

16 A. Issues 4-5, 4-5(a), 4-5(b) and 4-5(c) apply to design changes for loops, CFA
17 changes, unbundled dedicated interoffice transport ("UDIT") and charges for
18 design changes in Exhibit A, respectively.

19 **Q. QWEST CLAIMS THAT ESCHELON'S PROPOSALS ON DESIGN**
20 **CHANGES REFLECT AN EFFORT TO PREVENT QWEST FROM**
21 **RECOVERING ITS COSTS OR TO LIMIT QWEST'S ABILITY IN THIS**

¹⁵ See Exhibit DD-20, Transcript of 12/2/02 Special Open Meeting, AZ Show Cause Case, p. 10, line 25 – p. 11, line 8 (emphasis added).

1 **REGARD.¹⁶ IS THIS AN ACCURATE CHARACTERIZATION OF**
2 **ESCHELON’S PROPOSAL FOR ISSUES 4-5 AND SUBPARTS?**

3 A. No. Eschelon’s position statement, testimony and, most importantly, contract
4 language make very clear that Eschelon is not attempting to prevent or limit
5 Qwest from recovering its costs. Eschelon only wants to ensure that Qwest does
6 not double recover its costs or assess charges for design changes that in no way
7 reflect the underlying costs of performing the design change.¹⁷ That is why
8 Eschelon has proposed interim rates for loops and CFAs so that Qwest is allowed
9 to recover its costs for design changes unless and until Qwest seeks, and the
10 Commission approves, different rates. Eschelon’s proposal is imminently
11 reasonable, particularly given that there is no basis in the ICA or SGAT for design
12 change charges for loops¹⁸ and Qwest has not attempted to file for Commission
13 approval of a rate related to loops.

14 **ISSUE 4-5**

15 **Q. MS. STEWART IMPLIES THAT ESCHELON’S INITIAL POSITION**
16 **WAS THAT QWEST SHOULD NOT BE ALLOWED TO RECOVER**
17 **COSTS FOR DESIGN CHANGES FOR LOOPS.¹⁹ IS THIS ACCURATE?**

¹⁶ *Stewart Direct*, p. 7, lines 13-15; p. 13, lines 9-12.

¹⁷ Performing design changes are part and parcel of Qwest’s obligation under Section 251/252 of the Act to provide nondiscriminatory access to UNEs and should, therefore, be cost-based. See, *Denney Direct*, pp. 29-30 and Mr. Starkey’s discussion of Issue 9-31.

¹⁸ See, *Denney Direct*, p. 26.

¹⁹ *Stewart Direct*, p. 8, lines 4-9 (“Initially, according to Eschelon, Qwest could not assess the design change charges in Exhibit A Miscellaneous Charges section to orders that CLECs submitted for

1 A. No. Eschelon has not changed its position on this issue, and has always
2 maintained that Qwest is entitled to recover its costs. However, Qwest simply
3 announced one day that it was going to begin charging for design changes for
4 loops, which it had never done before. The fact that Qwest had never before
5 assessed separate charges for design changes for loops and was not pursuing
6 recovery of design change costs via separate design change rates in UNE rate
7 cases, suggested to Eschelon that Qwest already recovers these costs elsewhere
8 and should therefore not recover them again in separate charges. Accordingly,
9 Eschelon objected to Qwest's unilateral determination to begin imposing design
10 change charges on loops without any basis for doing so in Eschelon's ICA or the
11 SGAT. This in no way was an attack on Qwest's right to recover its costs. Qwest
12 has admitted in sworn testimony that there is no basis in the SGAT or the ICA for
13 Qwest to assess design change charges for loops (nor was there when Qwest made
14 its unilateral announcement) and Qwest has made no attempt to develop a rate for
15 design changes for loops. Accordingly, it was (and still is) reasonable for
16 Eschelon to disagree with Qwest's decision in September of 2005 to unilaterally
17 begin assessing charges for an activity with no basis in the parties' contract and
18 want Qwest to substantiate costs related to these charges – the position Eschelon
19 has always held.

unbundled loops. However, in its most recent position statements, Eschelon does not appear to context the fact that design changes are sometimes necessary for orders relating to unbundled loops and it now appears that the dispute is more specific to what the rate should be..."

1 **Q. YOU MENTIONED ABOVE THAT QWEST ADMITTED IN SWORN**
2 **TESTIMONY THAT THERE WAS NO BASIS IN THE SGAT OR ICA**
3 **FOR QWEST TO ASSESS A DESIGN CHANGE CHARGE FOR LOOPS.**
4 **PLEASE ELABORATE.**

5 A. As indicated in my direct testimony,²⁰ on September 1, 2005, Qwest sent an
6 unexpected letter to CLECs stating that “Qwest will commence billing CLECs
7 non-recurring charges for design changes to Unbundled Loop circuits” beginning
8 on Oct. 1, 2005.²¹ In that notice, Qwest stated no basis for the charges, but
9 indicated that it would bill CLECs, including Eschelon, “at the rate found in the
10 miscellaneous elements of Exhibit A or the specific rate sheet in your
11 Interconnection agreement.”²² Qwest’s reference to the ICA in the letter
12 suggested, therefore, that Qwest was claiming it had some contractual right to bill
13 these rates. However, in the companion Minnesota arbitration proceeding, Ms.
14 Stewart testified that “Mr. Denney is correct in stating that neither Qwest's SGAT
15 nor the parties' current ICA includes a design change charge for loops.”²³ Based
16 on this admission (a clear contradiction with Qwest’s 9/1/05 letter), Qwest should
17 credit CLECs, including Eschelon, for the rates it has billed to date and not bill

²⁰ *Denney Direct*, pp. 19-21.

²¹ Exhibit DD-1, September 1, 2005 letter from Qwest with the subject line “Billing for design changes on Unbundled Loop.” Document No. PROS.09.01.05.F.03204.Design_Chgs_Unbundld_Loop.

²² See *id.*

²³ Rebuttal Testimony of Karen Stewart Minnesota PUC Docket P-5340, 421/IC06-768, September 22, 2006, pp. 6-7.

1 additional charges for design charges for loops (including CFA changes) unless
2 and until it obtains an ICA that allows it to charge for design changes.

3 **Q. QWEST HAS INDICATED THE POTENTIAL CLOSURE OF ISSUE 4-5**
4 **FOR LOOPS.²⁴ WOULD YOU LIKE TO RESPOND?**

5 A. Yes. Ms. Stewart testifies that “Qwest agrees to have the ICA make references in
6 section 9.2 that design change charges for loops are contained in Exhibit A.
7 Qwest believes that the narrow issue of referencing that design change charges for
8 unbundled loops are contained in Exhibit A in section 9.2 can be settled between
9 the parties, once specific language is confirmed.”²⁵ However, Ms. Stewart does
10 not say whether Qwest agrees to Eschelon’s proposed language for Issue 4-5,
11 which references in Section 9.2 of the ICA design change charge in Exhibit A.²⁶
12 Based on Ms. Stewart’s testimony, I believe that Issue 4-5 can be closed with
13 Eschelon’s language.

14 In addition, even if/when this issue closes, the key issue still remains as to
15 whether Qwest already recovers design change costs for loops elsewhere, and if
16 not, the appropriate rate that should apply for design changes for loops. Qwest
17 has not shown that these costs are not recovered via other rates (at least with
18 respect to loops and CFAs), nor has Qwest provided any cost support for the
19 charges it would assess for these design changes.

²⁴ *Stewart Direct*, p. 11, lines 7-16.

²⁵ *Stewart Direct*, p. 11.

1 **ISSUE 4-5(a)**

2 **Q. DOES MS. STEWART MISCHARACTERIZE ESCHELON’S PROPOSAL**
3 **WITH REGARD TO ISSUE 4-5(A) “CFA CHANGE”?**

4 A. Yes. Ms. Stewart incorrectly states that Eschelon’s proposal would “prohibit
5 Qwest from assessing a design change charge for “connecting facility assignment
6 (‘CFA’) changes that occur when Qwest and Eschelon install facilities through
7 coordinated installations.”²⁷ To the contrary, Eschelon’s language does in fact
8 allow Qwest to assess a CFA design change charge in these circumstances.
9 Eschelon’s language for 4-5(a) is found in Section 9.2.3.9 – a subsection of 9.2.3
10 (Unbundled Loop Rate Elements). Section 9.2.3 is a list of rate elements for
11 unbundled loops that are set forth in Exhibit A to the ICA, and 9.2.3.9 (CFA
12 Change – 2/4 Wire Loop Cutovers) is the ninth rate element on this list. And as
13 shown in Eschelon’s proposed language for Issue 4-5(c), Eschelon is proposing an
14 interim rate of \$5.00 to be included in Exhibit A for these same day pair changes
15 until the Commission approves a different rate. Furthermore, Eschelon’s
16 language in 9.2.3.9 states that “When this charge applies, the Design Change rate
17 for Unbundled Loops does not apply.” “This charge” referred to in Eschelon’s
18 language is the “CFA Change – 2/4 Wire Loop Cutover” Charge found in Exhibit
19 A mentioned above under Eschelon’s proposal. Given that Eschelon’s proposal
20 identifies a specific charge to apply to CFA changes during a coordinated cut in

²⁶ See, *Denney Direct*, pp. 22-23.

²⁷ *Stewart Direct*, p. 12, lines 2-4. See also, p. 13, lines 19-20.

1 the ICA and includes a specific rate for that rate element in Exhibit A (interim
2 rate of \$5.00), Eschelon's proposal obviously would not prohibit Qwest from
3 assessing a charge in these instances as Ms. Stewart claims.

4 In a similar vein, Ms. Stewart claims that Eschelon's proposal assumes that
5 "Qwest incurs no costs for CFA changes made in conjunction with coordinated
6 installations."²⁸ This is not Eschelon's position, as evidenced by Eschelon's
7 testimony, position statements and ICA language. Eschelon is being entirely
8 reasonable in its proposal for design changes; Eschelon wants the ICA to be clear
9 on Qwest's obligation to perform design changes so that Qwest cannot stop
10 providing them or substantially alter the rates, terms and conditions without ICA
11 amendment, and Eschelon wants the rates to be cost-based.

12 **Q. MS. STEWART DISCUSSES THE NEED TO "RE-REVIEW THE**
13 **SERVICE ORDER" AND "UPDATE DOWNSTREAM OPERATION**
14 **SUPPORT SYSTEMS" DURING A CFA DESIGN CHANGE AT THE**
15 **TIME OF A COORDINATED CUT.²⁹ WHAT IS THE PURPOSE OF THIS**
16 **TESTIMONY?**

17 A. Ms. Stewart is attempting to build upon her incorrect notion that Eschelon's
18 language would prevent Qwest from assessing a charge for this type of CFA
19 design change by referring to costs that would purportedly go un-recovered if

²⁸ *Stewart Direct*, p. 12, lines 16-19. See also, *Stewart Direct*, p. 12, lines 11-15.

²⁹ *Stewart Direct*, pages 12-13.

1 Qwest were not allowed to assess a charge in these instances. However, Ms.
2 Stewart's notion is incorrect, as under Eschelon's proposal Qwest has the
3 opportunity to charge an interim rate and to substantiate its costs regarding these
4 design changes at the Commission in order to obtain Commission approval for a
5 different rate.

6 In addition, Eschelon is already separately paying for coordination during these
7 coordinated cuts, and this coordination should cover the types of activities that
8 Ms. Stewart mentions (*i.e.*, re-review the service order and update downstream
9 OSS). The actual design change work of the central office technician to perform
10 a CFA design change in this scenario would take a matter of seconds or minutes.³⁰
11 A few minutes of the central office technician's time should not amount to a
12 charge of \$53.65, which is Qwest's proposed rate.³¹

13 **Q. QWEST CLAIMS THAT YOU HAVE NOT ACCURATELY DESCRIBED**
14 **THE WORK REQUIRED FOR CFAS AND THE COSTS ASSOCIATED**
15 **WITH THEM.³² WOULD YOU LIKE TO RESPOND?**

16 A. Yes. Ms. Stewart claims that Eschelon improperly focuses on only one step of the
17 CFA change (*i.e.*, the lift & lay) and ignores the involvement of other departments
18 required to accomplish the CFA change.³³ Ms. Stewart points to other activities

³⁰ *Denney Direct*, pp. 28 and 38.

³¹ *Stewart Direct*, p. 10, line 13.

³² *Stewart Direct*, p. 16 -17.

³³ *Stewart Direct*, p. 16, lines 11-16.

1 involved: testing personnel needed to coordinate this effort³⁴ (*i.e.*, coordination
2 with the Central Office technician to confirm the new CFA is viable,³⁵ provision
3 of the CFA information to the Service Delivery Coordinator to supplement the
4 order,³⁶ confirmation with the CLEC testing personnel that the circuit is
5 operational³⁷) and a Designer to redesign of the circuit with the new CFA.³⁸

6 Ms. Stewart is wrong, however, to suggest that I have ignored these activities
7 involved in a CFA change. I explained in my direct testimony at page 39 that the
8 Qwest CLEC Coordination Center (QCCC) coordinates the cutover with both the
9 Qwest central office technician and Eschelon personnel in much the same way
10 that Ms. Stewart describes. And I also explained that this is part of the
11 coordinated installation – which Eschelon pays for separately. Because Eschelon
12 separately pays for the coordination activities and because Eschelon’s language
13 for 9.2.3.9 limits the CFA change option to coordinated installations, none of the
14 activities that Ms. Stewart claims I ignore should factor in to the appropriate rate
15 for a CFA design change because they are already being recovered elsewhere.
16 Allowing Qwest to recover costs related to the above-mentioned activities through
17 the coordinated installation rate as well as through the CFA design change charge
18 would amount to double-recovery.

³⁴ *Stewart Direct*, p. 16, lines 16-17.

³⁵ *Stewart Direct*, p. 16, lines 18-19.

³⁶ *Stewart Direct*, p. 16, lines 19-20.

³⁷ *Stewart Direct*, p. 17, lines 2-3.

1 **Q. DOES QWEST ATTEMPT TO MAKE A CFA CHANGE APPEAR MORE**
2 **COMPLEX THAN IT ACTUALLY IS?**

3 A. Yes. Ms. Stewart refers to “engineering” work³⁹ and the need to “redesign the
4 circuit with the new CFA.”⁴⁰ This testimony may lead the reader to believe that
5 engineers are involved in designing a new circuit from scratch. This is not the
6 case. Because parties (*i.e.*, CLEC personnel, QCCC and central office technician)
7 are in communication with each other during the coordinated cut, the effort
8 involved to make a CFA change during the cut is minor. The “engineering” to
9 which Ms. Stewart refers really amounts to a records change for Qwest. More
10 importantly, the costs for a CFA change during test and turn up are what they are,
11 but clearly they are not so similar to the cost of a design change for UDIT that the
12 same rate should apply, and that is the key to the proper resolution of Issue 4-5.
13 That is, any rate for a CFA change (or any design change, for that matter) should
14 be cost-based and should not allow double-recovery.

15 **Q. QWEST CLAIMS THAT IT IS “ESCHELON’S SUBMISSION OF**
16 **INCORRECT CFAS THAT CAUSES THE COSTS” RELATED TO CFA**
17 **CHANGES.⁴¹ SHOULD THE REASON FOR THE CFA CHANGE BE**
18 **CONSIDERED WHEN DETERMINING THE APPROPRIATE RATE?**

³⁸ *Stewart Direct*, p. 16, lines 20-21.

³⁹ *Stewart Direct*, p. 12, line 20.

⁴⁰ *Stewart Direct*, p. 16, lines 20-21.

⁴¹ *Stewart Direct*, p. 13, line 16.

1 A. Yes. Eschelon should not have to pay for CFA changes when the cause of the
2 CFA change is due to Qwest. What is troubling by Ms. Stewart's statement is
3 that she appears to be saying that Eschelon should be punished for alleged bad
4 record-keeping by paying a rate for a CFA change that is much greater than the
5 underlying costs.⁴² This suggestion is inappropriate and should be rejected. The
6 Commission should instead stay focused on the parties' proposals and the merits
7 of each one, and conclude that Eschelon's proposal, which provides Qwest the
8 opportunity to recover its costs, is the best option.

9 **Q. QWEST INSINUATES THAT ESCHELON HAS A QUALITY CONTROL**
10 **PROBLEM WITH REGARD TO CFA INVENTORYING.⁴³ IS THIS**
11 **TRUE?**

12 A. No. Again, Qwest raises a red herring, as this issue is irrelevant to determining
13 the proper rate to apply to CFA design changes. Nevertheless, the Commission
14 should be aware of the fact that Eschelon does indeed have a quality control
15 process (or "CFA Validation" process) to ensure that the CFA information in its
16 systems is accurate so that multiple CFA changes can be minimized. If a bad
17 CFA is discovered during the conversion process, Eschelon will block the use of
18 that CFA until it can be confirmed working or is repaired. In addition, Eschelon

⁴² Qwest has also attempted to punish CLECs by issuing a CMP notice restricting access to these CFA changes such that Qwest only accepts one CFA change at the time of cut. Though Qwest later retracted the CMP notice (See, PROS.10.20.06.F.04281.Retract_CFA_P&I_OvrwV91), Qwest issued an internal notice (MCC notice) telling its personal to limit CFA changes, but "remain flexible," at the time of cut. See *Denney Direct*, p. 18 and Exhibit DD-17. Exhibit DD-17 contains a chronology of Qwest's notices regarding its attempts to limit the availability of CFA changes.

1 periodically undertakes a CFA audit clean up project. During this project
2 Eschelon reconciles differences in the CFA status by reviewing CFA records. If
3 the status of a CFA can not be determined through a review of the records, then
4 an Eschelon Central Office technician visits the collocation to determine the
5 appropriate status of the CFA.

6 **ISSUE 4-5(B)**

7 **Q. QWEST HAS INDICATED ITS AGREEMENT WITH ESCHELON'S**
8 **PROPOSAL FOR UDIT (ISSUE 4-5(B)).⁴⁴ DOES THIS CLOSE ISSUE 4-**
9 **5(B)?**

10 A. Yes, as indicated in my direct testimony on page 40, this issue is closed.

11 **ISSUE 4-5(c)**

12 **Q. MS. STEWART STATES THAT THE ORIGINAL EXHIBIT A IN**
13 **WASHINGTON CONTAINED DESIGN CHANGE CHARGES IN THE**
14 **MISCELLANEOUS CHARGES SECTION AND, THEREFORE, IT**
15 **APPLIES TO ALL UNES – NOT JUST TRANSPORT.⁴⁵ WOULD YOU**
16 **LIKE TO RESPOND?**

17 A. Yes. Ms. Stewart's testimony that the Commission-approved rate for design
18 change applies to all UNEs is not supported by the Commission orders in WUTC

⁴³ *Stewart Direct*, p. 17, lines 12-17.

⁴⁴ *Stewart Direct*, p. 14, lines 11-16.

⁴⁵ *Stewart Direct*, p. 10, lines 14-16. See also, *Stewart Direct*, p. 11, lines 3-6 and p. 15, lines 2-4; p. 16, lines 4-10.

1 Docket UT-003013 Part D, Qwest's testimony in that docket, or the structure of
2 the SGAT. Consider the following passage from Ms. Stewart's direct testimony
3 at page 15:

4 "Qwest *believes* that the design change charges were placed in
5 Exhibit A in the Miscellaneous Charges section because they apply
6 potentially to all UNEs, and not just specifically to transport."
7 (emphasis added)

8 This is only Qwest's *belief* because it cannot point to anything in the
9 Commission's orders in UT-003013 that supports its position. See 41st
10 Supplemental Order in UT-003013 (initial order), Part D (10/11/02), p. 53 and
11 44th Supplemental Order in UT-003013 (final order), Part D (12/20/02), pp. 28-
12 29. These orders do not state that the design change charge applies to all UNEs.

13 Furthermore, at the time the Commission approved the rate, the only mention of a
14 design change charge was found in the ordering section for transport. Therefore,
15 for the associated rate in Exhibit A to make any sense, it would apply only to
16 transport. It makes no sense for a rate element listed in the SGAT only for
17 transport to also apply to loops, but that is what Qwest argues. The fact that
18 Qwest placed the design change charge in the Miscellaneous section of Exhibit A
19 should have no bearing on the element or elements to which it applies. The
20 SGAT describes the rates found in Exhibit A and how they should be applied, and
21 the relevant point is that Qwest's SGAT to which the Exhibit A is associated,
22 references the design change charge only with respect to transport. One would
23 have to ignore the SGAT and the description of the design change charge

1 contained therein to claim that the design change charge should apply to all
2 UNEs.

3 **Q. IS APPLYING THE DESIGN CHANGE CHARGE TO ALL UNES**
4 **CONSISTENT WITH HOW THE COST STUDY WAS CONSTRUCTED,**
5 **AS MS. STEWART CLAIMS?**

6 A. No. Though Ms. Stewart states that it is her “understanding”⁴⁶ that the cost study
7 is designed to apply to all UNEs,⁴⁷ she provides no cost information to support
8 this claim. Moreover, I demonstrated in my direct testimony that her
9 understanding is incorrect. I showed that the cost study for Qwest’s design
10 change charge is designed based on ASRs (specific to transport) instead of LSRs
11 (specific to loops), and is based on transport-specific systems and processes,
12 which are more manually-intensive and complex.⁴⁸ In sum, Qwest’s cost
13 development for its design change charges is transport-specific and the only
14 language found in the SGAT that mentions such a charge is in the UDIT section,
15 and nothing in the SGAT suggests that it should apply to UNEs other than
16 Transport. This shows that Qwest’s attempt to apply this same, expensive⁴⁹ rate
17 to all UNEs is inappropriate and should be rejected.

⁴⁶ *Stewart Direct*, p. 10, line 16 and p. 16, line 6.

⁴⁷ *Stewart Direct*, p. 10, lines 16-17.

⁴⁸ *Denney Direct*, pp. 32-36.

⁴⁹ *Denney Direct*, p. 31. The Design change charge in Washington exceeds the installation rate for a UNE loop. It defies logic for the design change charge to exceed the installation rate. *Denney Direct*, p. 31.

1 **Q. MS. STEWART STATES THAT ESCHELON HAS NOT PROVIDED**
2 **COST STUDIES TO SUPPORT PROPOSED RATES FOR DESIGN**
3 **CHANGES.⁵⁰ IS IT ESCHELON’S RESPONSIBILITY TO SUBMIT COST**
4 **STUDIES?**

5 A. No. The FCC rules require ILECs – not CLECs – to file cost studies to
6 substantiate cost-based rates for UNEs. 47 CFR § 51.505 (e) states:

7 e) *Cost study requirements.* An incumbent LEC must prove to the
8 state commission that the rates for each element it offers do not
9 exceed the forward-looking economic cost per unit of providing
10 the element, using a cost study that complies with the methodology
11 set forth in this section and §51.511.⁵¹
12

13 The FCC also explains in the Local Competition Order (¶ 680) that:

14 ...[I]ncumbent LECs have greater access to the cost information
15 necessary to calculate the incremental cost of the unbundled
16 elements of the network. Given this asymmetric access to cost
17 data, we find that incumbent LECs must prove to the state
18 commission the nature and magnitude of any forward-looking cost
19 that it seeks to recover in the prices of interconnection and
20 unbundled network elements.
21

22 These passages are clear in requiring Qwest to prove that its rates for UNEs
23 comply with applicable standards by submitting and cost studies. Nothing in the

⁵⁰ *Stewart Direct*, p. 15, lines 24-28.

⁵¹ 47 CFR §51.511 “Forward-looking economic cost per unit” requires UNE rates to be calculated on total demand. [“the forward-looking economic cost per unit of an element equals the forward-looking economic cost of the element, as defined in §51.505, divided by a reasonable projection of the sum of the total number of units of the element that the incumbent LEC is likely to provide to requesting telecommunications carriers and the total number of units of the element that the incumbent LEC is likely to use in offering its own services, during a reasonable measuring period.”]

1 FCC's rules or orders require CLECs to file cost studies to prove the ILEC's
2 charges. Qwest has made no attempt to substantiate the costs related to design
3 changes for loops or CFAs, as required by the FCC's rules, and its attempts to
4 shift this obligation to Eschelon is completely inappropriate. Furthermore, Qwest
5 recently changed its PCAT via a non-CMP notice to apply tariff rates to design
6 changes (and other activities)⁵² and has testified that Qwest's opinion is that
7 design changes are not provided pursuant to Section 251.⁵³ Therefore, unless the
8 Commission adopts Eschelon's proposal and establishes an interim rate for design
9 changes for loops and CFAs (as described in Section 9.2.3.9) until Qwest files
10 cost studies and substantiates different rates, Qwest will never prove its costs
11 related to these activities and will move forward with its agenda to apply tariff
12 changes for design changes.

13 **III. PAYMENT AND DEPOSITS (SUBJECT MATTERS NOS. 5, 6 AND 7)**

14 **SUBJECT MATTER NOS. 5, 6 & 7. DISCONTINUATION OF ORDER**
15 **PROCESSING, DISCONNECTION, DEPOSITS AND REVIEW OF CREDIT**
16 **STANDING**

17 **Issue Nos. 5-6, 5-5, 5-7(a) 5-8, 5-9, 5-11, 5-12 and 5-13: ICA Sections 5.4.2,**
18 **5.4.5 and 5.4.7**

19 **Q. PLEASE PROVIDE A BRIEF SUMMARY OF THE PAYMENT AND**
20 **DEPOSIT ISSUES (ISSUES 5-6, 5-7, 5-7(A), 5-8, 5-9, 5-11, 5-12 AND 5-13).**

⁵² See, *Denney Direct*, pp. 15-17. Qwest's August 31, 2006 non-CMP notice (Process Notification PROS.08.31.06.F.04159.Amendments.ComlAgree.SGAT) is attached as Exhibit DD-16.

⁵³ *Stewart Direct*, p. 21.

1 A. Issue 5-6 relates to whether Commission approval should be obtained before
2 Qwest may discontinue processing Eschelon's orders based on allegations of
3 Eschelon's failure to make timely payment (as proposed by Eschelon), or whether
4 Qwest should be permitted to act unilaterally to discontinue order processing
5 when it alleges failure to pay (as Qwest proposes). Issue 5-7 and subpart address
6 whether Qwest should obtain Commission approval before being allowed to
7 disconnect Eschelon's customers' circuits (as proposed by Eschelon), or whether
8 Qwest can take this serious step unilaterally.

9 Issues 5-8 and 5-9 address the definition of "Repeatedly Delinquent" which is a
10 key term in determining if and when Qwest can require Eschelon to make a
11 deposit. Issue 5-8 relates to whether an amount must be "non de minimus" for
12 that amount to be used in determining whether payment has been Repeatedly
13 Delinquent, as Eschelon proposes, or whether payment may be considered
14 Repeatedly Delinquent based on any late undisputed amount, no matter how small
15 that amount is, as proposed by Qwest. Issue 5-9 relates to whether Repeatedly
16 Delinquent payment should be defined as late payments in three consecutive
17 months (Eschelon's proposal)⁵⁴ or late payments in three or more months in a 12
18 month period (Qwest's proposal).

19 Issue 5-11 addresses whether a party should be able to seek Commission relief
20 once the other party demands a deposit. Eschelon's proposal would require

⁵⁴ Eschelon has an alternative proposal for Issue 5-9 that would define repeatedly delinquent as three

1 payment of a deposit within 30 days unless one party challenges the deposit
2 amount at the Commission, in which case the deposit payment due date would be
3 ordered by the Commission. Qwest proposes that a party should pay the deposit
4 within 30 days with no vehicle to challenge this deposit amount at the
5 Commission before making the payment.

6 Eschelon's proposal for Issue 5-12 takes a different approach: instead of relying
7 on the definition of Repeatedly Delinquent as the trigger for a deposit
8 requirement, this proposal would allow the Commission to make this
9 determination based on all relevant circumstances. Qwest does not have an
10 alternative proposal under Issue 5-12.

11 Issue 5-13 relates to whether a separate provision is needed that would allow one
12 party to unilaterally review the other party's credit standing and increase the
13 deposit amount (or, according to Qwest, establish a new deposit requirement)
14 based on this review, as Qwest proposes, or whether deposit requirements are
15 sufficiently addressed elsewhere in the contract, as Eschelon proposes.⁵⁵

16 Mr. Easton states "Qwest is entitled to timely payment for service rendered and to
17 take remedial action *if the risk of nonpayment is apparent.*"⁵⁶ (Emphasis added).

late payments in a six month period.

⁵⁵ Eschelon has an alternative proposal for Issue 5-13 that would allow the review Qwest seeks but would require Commission approval.

⁵⁶ *Easton Direct*, page 9.

1 AT&T clearly summarized the need for Commission oversight in the following
2 paragraph:

3 AT&T has from time to time insisted on provisions in its contracts
4 with customers that require security deposits and other provisions
5 that protect against default. The critical difference is that, if the
6 customer is not satisfied with the terms AT&T offers or the deposit
7 that AT&T requires, the customer can seek to obtain services from
8 another provider. The customer of a dominant LEC, by contrast,
9 generally has no such choices – which is why the FCC has always
10 recognized the need for prescription in this context that minimizes
11 dominant ILEC abuse of security deposit, advance payment and
12 termination requirements.⁵⁷
13

14 **ISSUES 5-6 and 5-7**

15 **Q. QWEST CHARACTERIZES ISSUES 5-6 AND 5-7 AS ORDINARY**
16 **PAYMENT ISSUES.⁵⁸ IS THIS AN ACCURATE CHARACTERIZATION?**

17 **A.** No. Mr. Easton downplays the importance of the disagreements under Issues 5-6
18 and 5-7. Mr. Easton testifies: “Qwest does not believe that it is appropriate to
19 involve the Commission in normal business processes, or that the Commission
20 should desire to become involved in every payment issue.”⁵⁹ However, Issues 5-6
21 and 5-7 address situations in which Qwest may unilaterally discontinue
22 processing Eschelon’s orders or disconnect Eschelon customers even when the

⁵⁷ Comments of AT&T Communications of the Midwest, Inc. In the Matter of the Nebraska Public Service Commission on its own motion, seeking to investigate the impact of telecommunications carrier bankruptcies Application No. PI – 62/C-2777/NUSF-29, September 6, 2002. FN 1.

⁵⁸ See, e.g., *Easton Direct*, p. 10-11.

⁵⁹ *Easton Direct*, p. 10, line 22 – p. 11, line 1.

1 basis for doing so is disputed, which is much more serious than a typical payment
2 issue. As I explained in my direct testimony,⁶⁰ Eschelon and Qwest have had
3 disputes concerning the accuracy of Qwest's bills, the timeliness of Qwest's
4 recognition of Eschelon's payments, Qwest's handling of Eschelon payments and
5 Qwest's calculation of disputed amounts. Qwest has threatened, and continues to
6 threaten, to disconnect Eschelon's services and stop processing Eschelon's orders
7 based on an amount Qwest alleges Eschelon owes on a combined six state region
8 without providing sufficient detail to verify this amount – and all the while,
9 Eschelon believes it is current with Qwest. These facts show that Eschelon's
10 concern about Issues 5-6 and 5-7 is real and warranted, and that Commission
11 involvement should be preserved to address any significant disagreements before
12 Qwest ceases accepting Eschelon's orders and begins disconnecting Eschelon's
13 customers.

14 **Q. COULDN'T ESCHELON "SIMPLY PAY ITS BILL"⁶¹ FOR UNDISPUTED**
15 **AMOUNTS IT OWES QWEST AND AVOID QWEST DISCONNECTING**
16 **CUSTOMERS OR DISRUPTING ORDER PROCESSING?**

17 **A.** If it were that easy, this would not be an issue. Though Mr. Easton insinuates that
18 this problem is solely within Eschelon's control because Eschelon only need to
19 pay all undisputed amounts to avoid the harm caused by Qwest invoking these

⁶⁰ See Confidential Exhibit DD-3.

⁶¹ *Easton Direct*, p. 17, line 11. See also, *Easton Direct*, p. 10, lines 8-9 ["it is Eschelon's obligation to pay its undisputed bills in a timely fashion."]

1 actions,⁶² Qwest is wrong. There are a number of reasons that are not in
2 Eschelon's control that could cause Eschelon and Qwest to have very different
3 views about amounts that are disputed and undisputed. However, under Qwest's
4 proposal, Qwest could ignore these reasons as well as Eschelon's disagreement
5 with Qwest's view of Eschelon's payment status and invoke these actions. That is
6 why Commission involvement should be preserved.

7 **Q. PLEASE ELABORATE ON THE REASONS WHY ESCHELON AND**
8 **QWEST MAY OFTEN DISAGREE ABOUT THE AMOUNT OF**
9 **ESCHELON'S UNDISPUTED AMOUNTS DUE QWEST.**

10 A. There are several reasons that Eschelon and Qwest could disagree on the amount
11 of undisputed charges. I will briefly describe some of these reasons below:⁶³

- 12 • Qwest takes it upon itself to simply declare disputes to be "resolved" even when
13 no agreement has been reached and Qwest has taken no action to bring the matter
14 to dispute resolution. This has led to Qwest understating what Eschelon has put
15 in dispute. I explain this reason in more detail below.
- 16 • Qwest's notices of past due status do not always include detail by Billing Account
17 Number (BAN) or by state for that matter, of what Qwest considers past due.
18 Qwest historically has only identified a lump sum amount without providing any
19 detail. *See* Confidential Exhibit DD-3, pp. 12 and 15.
- 20 • Even when Qwest does provide detail on what it claims to be past due, that detail
21 sometimes does not match up with the amount Qwest is claiming as past due.
22 Case in point: Qwest provided detail on August 29, 2006 about a letter it sent on
23 August 11th concerning an amount Qwest claimed was overdue on August 1st.
24 The detail provided on August 29th did not match up with the amount Qwest
25 claimed in its August 11th correspondence. I have provided an email string
26
27

⁶² Qwest states in its position statements on these issues that "If a bill is undisputed, Eschelon should pay it." *See*, Issues 5-7, 5-7(a), 5-8, 5-9, 5-11 and 5-12.

⁶³ *See* Confidential Exhibit DD-3.

1 between Eschelon and Qwest describing this problem and supporting
2 documentation as Exhibit DD-7.

- 3
- 4 • Qwest does not always post Eschelon's payment in a timely manner, and counts
5 payments that Qwest has already received as past due. I have attached Exhibit
6 DD-8, an email exchange between Qwest and Eschelon, that typifies this problem.
7 This exhibit shows that Qwest sent a letter to Eschelon on 10/24/06 claiming that
8 Eschelon had outstanding undisputed amounts due Qwest in Oregon, and
9 threatening to stop processing orders and disconnect Eschelon's circuits if this
10 payment was not made in full by 10/27/06 (three days later). However, Exhibit
11 DD-8 shows that Eschelon had already paid the amount Qwest was claiming was
12 overdue on 10/16/06 – one week before it was due and over a week before
13 Qwest's letter was sent to Eschelon threatening disconnection. Despite
14 Eschelon's request for Qwest to "review your internal process to determine why
15 payments are not applied in a timely manner," Qwest simply informed Eschelon
16 that its payment had been posted and the account was current (with no
17 explanation of why Qwest threatened such drastic measures when Eschelon was
18 actually current with Qwest).
 - 19
 - 20 • Qwest also includes in its past due amounts payments that are not even due yet.
21 Exhibit DD-9 is an instance of Qwest claiming that an account was past due in
22 September when in fact payment was not due until October 10.
 - 23
 - 24 • Instead of providing billing refunds owed to carriers, Qwest, by its own admission
25 in a July 5, 2006 letter (see Confidential Exhibit DD-3, pp. 20-21), applies these
26 refunds to any amounts that Qwest determines are past due (which may include
27 amounts that Eschelon disputes). This causes Qwest's aging to be inaccurate and
28 a discrepancy between what Eschelon shows as disputed and what Qwest shows
29 as disputed.
 - 30
 - 31 • Disputes that are submitted by Eschelon are sometimes not responded to by
32 Qwest, and sometimes Qwest loses them. Qwest recently referred to this as the
33 "black hole." See Exhibit DD-10.
 - 34
 - 35 • Qwest routinely denies Eschelon's disputes for multiple months until such time
36 when Qwest later recognizes the disputes and either records them or ignores them.
37 For example, in December 2005, Eschelon disputed DSL rates that Qwest had
38 applied to the November 2005 invoice. Qwest denied the dispute, but corrected
39 the rates on the February 2006 invoice. However, Qwest did not go back to
40 correct this mistake on the November 2005 invoice (or any invoices in between),
41 when the mistake was first identified and disputed.
 - 42

- 1 • Qwest incorrectly applies Eschelon's payments. Eschelon provides a check stub
2 and the invoice remittance with each payment that contains the amounts and
3 BANs to which the check should be applied. At times, Qwest posts some
4 payments to the wrong account or posts the wrong amount to the proper account.
5 Qwest apparently applies payments to disputes that have been "resolved" from
6 Qwest's perspective, but not Eschelon's. It is Eschelon's position that Qwest
7 should apply payments to the invoice being paid, not simply to any open balance.
8 I have provided as Exhibit DD-11 an email exchange between Eschelon and
9 Qwest that discusses these misapplied payments.
- 10
- 11 • Qwest's payment processing center doesn't effectively communicate with the
12 billing representatives with whom Eschelon interacts regarding billing disputes.
13 Or, in other words, Qwest's "left hand" does not always know what its "right
14 hand" is doing. As a result, Qwest has asked that Eschelon send its remittance
15 information to both of these two separate groups. See, Confidential Exhibit DD-
16 3, Qwest's July 5, 2006 letter (page 2) from Mary Dobesh (Qwest) to Bill Markert
17 (Eschelon).
- 18
- 19 • Qwest's employee turnover in the department that processes Eschelon's billing
20 disputes can cause disputes to get lost or not addressed by the new employees.
21 This also means that Eschelon may work with Qwest personnel to resolve a
22 billing dispute for quite some time, only to have to start all over when new Qwest
23 personnel are assigned that are unfamiliar with the dispute's history. See, Exhibit
24 DD-10, p. 1.⁶⁴
- 25
- 26 • Qwest's billing department may not update its information about where to send
27 Eschelon invoices/correspondences (information that is updated by Eschelon in
28 the CLEC Questionnaire), which can lead to invoices being paid late, or balances
29 being addressed later because the proper Eschelon employees have not been
30 notified in a timely manner. I have attached an email sent from Eschelon to
31 Qwest on this issue as Exhibit DD-12.
- 32

33 **Q. IN YOUR ANSWER ABOVE EXPLAINING WHY ESCHELON AND**
34 **QWEST OFTEN DISAGREE ABOUT DISPUTED AMOUNTS, YOU**

⁶⁴ Email to Eschelon from Qwest (Mary Dobesh, 9/13/06): "I will make sure we look into this and do the research needed to find out what happened. *Again, I am not sure what happened in the past*, but I want to assure you that we will work with you to make sure these issues do not fall in a big black hole. I will be in touch." (emphasis added)

1 **MENTION THAT QWEST DETERMINES THAT DISPUTES ARE**
2 **“RESOLVED” EVEN WHEN NO AGREEMENT HAS BEEN REACHED.**
3 **PLEASE EXPLAIN.**

4 A. First, Qwest’s use of the word “resolved” in connection with payment disputes is
5 a misnomer because, in fact, no agreement has necessarily been reached between
6 Qwest and Eschelon. What “resolved” means to Qwest is that Qwest believes that
7 the dispute should be resolved in Qwest’s favor and the disputed charges be paid
8 by Eschelon. Then, when Qwest labels the dispute “resolved,” even if Eschelon
9 still disputes the charges, Qwest does not recognize the dispute any longer and
10 removes this amount from its systems that track disputed charges and adds it to
11 the overdue category.

12 I have provided as Exhibit DD-13 a flow diagram of the Qwest billing Dispute
13 Resolution process Qwest developed in CMP. This flow diagram shows that once
14 Qwest has received a billing dispute and confirms that it has received the
15 information Qwest requires, Qwest will “resolve” (or possibly “status”) the
16 dispute within 28 calendar days. As I mention above, “resolve” means that Qwest
17 can reject the dispute and re-label the amount as past due. Once Qwest has
18 “resolved” the dispute, the flow diagram shows that if the CLEC does not agree,
19 the *CLEC* must invoke the escalation process to pursue the dispute further.

1 **Q. DOES QWEST’S PROCESS FOR “RESOLVING” BILLING DISPUTES**
2 **APPLY TO ESCHELON AND DID ESCHELON ASSIST QWEST IN ITS**
3 **DEVELOPMENT?**

4 A. No. I have attached Exhibit DD-14 which is an email exchange between
5 Eschelon and Qwest on this CMP billing dispute process, as well as Eschelon’s
6 Comments to the Qwest Change Request (“CR”) that introduced the new billing
7 dispute process. Eschelon’s 4/6/05 email to Qwest states in part: “Although
8 Qwest has developed its own processes for billing through CMP, CMP is both not
9 a part of these ICAs and, even were it to apply, the CMP document specifically
10 provides that the ICA controls. There is no requirement in our ICAs to use the
11 process you describe.” This excerpt, as well as Eschelon’s comments on Qwest’s
12 CR, show very clearly that Eschelon did not develop this process with Qwest, nor
13 does the process even apply to Eschelon.

14 **Q. ARE YOU SAYING THAT QWEST’S PROCESS OF “RESOLVING”**
15 **BILLING DISPUTES IS NOT CONTAINED IN THE CURRENT**
16 **ESCHELON/QWEST ICA?**

17 A. Yes, the ICA contains a much different billing dispute process than the one Qwest
18 developed in CMP. Attachment 7, Section 14 of the parties’ ICA addresses
19 billing disputes, and allows Qwest to pursue bill disputes under the current ICA.
20 Attachment 7, Section 14.1.4 of the current ICA provides that if a bill dispute is
21 not resolved in 150 days *Qwest* can take it to dispute resolution. Importantly, this

1 section states that “closure of a specific billing period will occur by joint
2 agreement of the Parties whereby the Parties agree that such billing period is
3 closed to any further analysis and financial transactions...” However, instead of
4 following these procedures from the ICA, Qwest instead follows the procedure it
5 established in CMP. By using the CMP billing dispute process instead of the
6 process in the ICA, Qwest supplants the “joint agreement” needed to close a
7 billing dispute in the ICA with its unilateral judgment to “resolve” the issue.
8 Also, Qwest attempts to make the collections process self-executing by
9 “resolving” the issue in Qwest’s favor and forcing the CLEC to invoke escalation
10 if it disagrees with Qwest’s decision – instead of Qwest escalating the dispute if it
11 disagrees with the CLEC (as would be allowed under the ICA).⁶⁵ Thus, Qwest’s
12 approach is the opposite of the typical billing and collections process and the
13 opposite of the process provided for under the ICA: Qwest pushes onto Eschelon,
14 as the party disputing the bill, the burden of proving that the money isn’t owed.
15 Qwest wants Eschelon to prove that it does not owe money to Qwest, when in
16 fact, once Eschelon disputes an amount, it should be Qwest’s responsibility to
17 escalate the dispute. Since Qwest takes it upon itself to decide what is in dispute,
18 Qwest’s proposed ICA language would enable it to declare what amount it

⁶⁵ Therefore, Mr. Easton is simply wrong when he claims that “Placing the burden on Qwest to file for Commission action...is unreasonable...” (*Easton Direct*, p. 10, lines 5-8. The parties’ ICA calls for Qwest to escalate the payment dispute if Qwest disagrees with Eschelon and does *not* impose the burden on Eschelon to escalate if it does not agree with Qwest’s “resolution” to the problem (as Qwest’s CMP billing dispute procedure does).

1 considers disputed and require Eschelon to pay the remaining amount (even if
2 Eschelon disagrees) or face dire consequences.

3 **Q. HAS QWEST’S APPROACH TO “RESOLVING” BILLING DISPUTES**
4 **CAUSED THE PARTIES TO DISAGREE ABOUT DISPUTED**
5 **AMOUNTS?**

6 A. Yes. Exhibit DD-15 is a spreadsheet that shows the significant discrepancy
7 between Eschelon’s calculations of disputed amounts and what Qwest believes is
8 disputed. These discrepancies are caused by the reasons listed above, including
9 Qwest’s procedure for “resolving” billing disputes – a procedure that does not
10 even apply to Eschelon under the parties’ ICA.

11 **Q. QWEST OBSERVES THAT “QWEST IS THE ONLY PARTY THAT IS**
12 **PROCESSING ORDERS UNDER THE ICA” SO SECTION 5.4.2**
13 **“RESTRICTS ONLY QWEST’S ABILITY TO DISCONTINUE**
14 **PROCESSING ESCHELON’S ORDERS IF ESCHELON FAILS TO**
15 **PAY.”⁶⁶ IS THIS OBSERVATION MEANINGFUL?**

16 A. Yes, but this point actually supports Eschelon’s position. Mr. Easton is correct
17 that Qwest is the party processing orders under the ICA, and this means that
18 Eschelon is the only party that could have its ability to conduct business disrupted
19 by the other party. Thus, if Qwest is wrong and there is no payment due, but it

⁶⁶ *Easton Direct*, p. 9, lines 28-31.

1 discontinues processing orders or disconnects customers anyway, Eschelon's
2 entire business is disrupted for no reason.

3 On the other hand, the risk to Qwest under Eschelon's language, assuming there is
4 an outstanding undisputed amount, is that it may receive its payment after the 30
5 day due date – a risk that is addressed in the Agreement through late-payment
6 charges and interest charges. Therefore, the risks of service disruption facing
7 Eschelon under this scenario are much more serious than the potential risk of late
8 payment facing Qwest. I agree that Qwest should have the ability under the ICA
9 to take these remedial actions *under appropriate circumstances*, but, particularly
10 in light of the extreme consequences of such a step for Eschelon and its
11 Customers, it is critical that there be Commission oversight, especially when there
12 are disagreements about outstanding amounts.

13 **Q. QWEST CLAIMS THAT REQUIRING COMMISSION APPROVAL FOR**
14 **QWEST TO BE ABLE TO DISCONTINUE PROCESSING ESCHELON'S**
15 **ORDERS WOULD ALLOW ESCHELON TO CONTINUE TO INCUR**
16 **DEBT WHILE COMMISSION ACTION IS PENDING.⁶⁷ DOES QWEST'S**
17 **CONCERN MAKE SENSE?**

18 A. No. Because Eschelon would incur costs to dispute that amount at the
19 Commission and Eschelon would still end up having to pay the charges
20 (potentially with interest and late fees) in the event that the Commission ruled in

⁶⁷ *Easton Direct*, p. 10, lines 5-9.

1 favor of Qwest, Eschelon has a disincentive to mount additional outstanding
2 charges that it has no reason to dispute. Section 5.4.1 of the ICA states when
3 undisputed amounts are due, and this language is closed. Eschelon is not
4 attempting to circumvent its obligation to pay its undisputed bills, rather the
5 parties do not always agree with Eschelon regarding the amounts that are in
6 dispute.

7 **Q. MR. EASTON STATES THAT ESCHELON'S ALTERNATIVE**
8 **PROPOSAL FOR ISSUE 5-6 IS "EQUALLY INEQUITABLE" AS ITS**
9 **PRIMARY PROPOSAL.⁶⁸ IS MR. EASTON'S CRITICISM OF**
10 **ESCHELON'S ALTERNATIVE PROPOSAL WARRANTED?**

11 A. No. Mr. Easton implies that Eschelon's alternative proposal lowers the bar for
12 Eschelon so that "the simple act of its 'asking' the Commission" (instead of
13 Commission approval, as in the first proposal) would prevent Qwest from taking
14 remedial actions. Mr. Easton misses the point of Eschelon's proposals.
15 Eschelon's proposals are designed to ensure that, where a dispute exists, Qwest
16 obtains Commission approval *before* taking the serious step of disconnecting
17 customers or rejecting orders. Eschelon's first proposal is to require Qwest to
18 seek the Commission's approval before taking these drastic steps. If that is not
19 accepted, Eschelon's second proposal is designed to assure that the Commission
20 does not have to make a decision on the issue in "crisis mode," with Qwest's

⁶⁸ *Easton Direct*, p. 10, line 11.

1 action either imminent (note that Qwest's proposal requires that it give only ten
2 days' advance notice of its discontinuance of order processing) or perhaps having
3 already taken place. Whether Qwest is required to seek prior Commission
4 approval or Eschelon has the ability to stay Qwest from acting pending the
5 determination of the dispute that it brings to the Commission, both parties would
6 be required to prove their case to the Commission, with the Commission serving
7 as an independent arbiter of the facts.

8 **Q. MR. EASTON CLAIMS THAT ESCHELON'S PROPOSAL IS**
9 **UNNECESSARY BECAUSE ESCHELON CAN PURSUE DISPUTE**
10 **RESOLUTION.⁶⁹ HAVE YOU ALREADY ADDRESSED THIS ISSUE?**

11 A. Yes. I addressed this issue at page 57 of my direct testimony. Dispute resolution
12 may eventually resolve the issue, but it is unlikely such action will occur before
13 serious damage is done to Eschelon and its end user customers.

14 **ISSUE 5-8**

15 **Q. FOR ISSUE 5-8, MR. EASTON CLAIMS THAT ESCHELON'S**
16 **INCLUSION OF THE TERM "NON DE MINIMUS" IS VAGUE AND**
17 **WOULD LEAD TO DISPUTES BETWEEN THE PARTIES.⁷⁰ IS HE**
18 **CORRECT?**

⁶⁹ *Easton Direct*, p. 10, lines 1-3.

⁷⁰ *Easton Direct*, p. 16, line 31 – p. 17, line 1.

1 A. No. I addressed this issue at pages 64 - 66 of my direct testimony. There is no
2 reason to believe that the inclusion of this term will cause any more disputes than
3 inclusion of the term “material,” which Qwest agrees to include in the ICA
4 numerous times.⁷¹ As indicated in my direct testimony, Eschelon is willing to use
5 the word “material” in place of “non de minimus.”

6 **Q. MR. EASTON CHARACTERIZES ESCHELON’S REASONING FOR**
7 **INCLUDING THE TERM NON DE MINIMUS AS “UNFOUNDED.”⁷²**
8 **PLEASE RESPOND.**

9 A. Mr. Easton states that it is not “Qwest’s practice” to invoke collections actions
10 based on insignificant amounts, nor has Eschelon claimed that Qwest has ever
11 done so.⁷³ That being the case, Qwest should have no problem memorializing
12 that in the ICA by including the term “non de minimus.” Though Mr. Easton
13 claims that it is not Qwest’s “practice,” nothing would stop Qwest from changing
14 its practice to invoke collections actions over de minimus amounts except the ICA
15 language Eschelon proposes. Contrary to Mr. Easton’s suggestion, Eschelon does
16 not need to provide a specific example for its proposal to be adopted, and the fact
17 that Qwest will not agree to Eschelon’s proposal raises concerns.

⁷¹ See ICA Sections, 2.1, 2.2, 5.1.3.1, 5.4.6, 5.6.2, 5.8.4, 5.13.1, 7.2.2.9.6, 8.2.1.29.2.2, 8.2.1.29.1, 8.4.1.2, 9.23.4.3.1.3.2, 9.23.4.3.1.3.4, 9.23.4.3.3.1.3.5, 9.23.4.3.1.4, 9.23.4.3.1.5, 10.6.2.5.1, 10.8.2.18, and 11.13.

⁷² *Easton Direct*, p. 17, line 3.

⁷³ *Easton Direct*, p. 17, lines 3-6.

1 Mr. Easton goes on to state that it is not “financially wise or feasible, to take
2 collection action for ‘a few dollars.’”⁷⁴ However, as a competitor of Eschelon as
3 well as a provider of essential, bottleneck inputs to Eschelon’s business, Qwest
4 has the incentive to take collection action – *e.g.*, discontinue processing
5 Eschelon’s orders, disconnect Eschelon’s circuits and demand deposits – in the
6 greatest number of circumstances as possible because these actions make it
7 increasingly difficult for Eschelon to compete with Qwest. Therefore, unless
8 there is specific language included in the ICA that speaks to “non de minimus”
9 amounts, nothing would stop Qwest from following this incentive and invoking
10 collections action for a few dollars.

11 **Q. MR. EASTON TESTIFIES THAT ESCHELON’S PAYMENT HISTORY**
12 **DOES NOT REFLECT DE MINIMUS AMOUNTS OF UNDISPUTED**
13 **CHARGES.⁷⁵ IS IT ESCHELON’S POSITION THAT THE AMOUNT**
14 **QUOTED BY MR. EASTON IS DE MINIMUS?**

15 A. No. It is not Eschelon’s position that \$3 million is a de minimus amount, as Mr.
16 Easton suggests, nor does Eschelon agree that the undisputed amounts that Qwest
17 quotes are accurate.

18 **ISSUE 5-9**

⁷⁴ *Easton Direct*, p. 17, line 17.

⁷⁵ *Easton Direct*, p. 17, lines 13-18.

1 **Q. MR. EASTON CLAIMS THAT ESCHELON’S PROPOSAL FOR ISSUE 5-**
2 **9 (REGARDING REPEATEDLY DELINQUENT) “FAILS TO PROVIDE**
3 **THE PROPER INCENTIVE FOR TIMELY PAYMENT.”⁷⁶ DID MR.**
4 **EASTON SUPPORT THIS STATEMENT WITH ANY DATA OR REAL**
5 **WORLD EXAMPLES?**

6 A. No. Mr. Easton’s support for this statement is his observation that Eschelon
7 would not be “Repeatedly Delinquent” under Eschelon’s proposal if it paid
8 undisputed amounts late for two months, then made a timely payment in month 3,
9 and then made untimely payments in months 4 and 5.⁷⁷ However, as I explained
10 in my direct testimony,⁷⁸ Qwest already has ICAs/service agreements with
11 CLECs and other carriers that contain the three consecutive month standard
12 proposed by Eschelon, and Qwest has not provided a single example of this
13 standard failing to provide the proper incentive for timely payment by those
14 companies.

15 More important, the intent of the definition of Repeatedly Delinquent is not meant
16 as an incentive for timely payment, but instead to provide an indication of a
17 company that poses a risk to Qwest of being unable to pay its bills. The
18 consequences of being defined Repeatedly Delinquent is the imposition of a
19 payment deposit. As Mr. Easton acknowledged at the hearing in the Minnesota

⁷⁶ *Easton Direct*, p. 18, line 7. Mr. Easton expresses the same concerns for both of Eschelon’s alternatives under Issue 5-9 (see *Easton Direct*, p. 19, lines 1-4. I will address them together.

⁷⁷ *Easton Direct*, p. 18, lines 8-10.

1 arbitration, the ICA provisions regarding late payment charges, section 5.4.8, are
2 designed to provide the incentive for timely payment;⁷⁹ the deposit provisions,
3 section 5.4.5, are intended to protect against ultimate non-payment.

4 In addition, Mr. Easton has not shown that Qwest's standard of three months in a
5 twelve month period would provide a better incentive for timely payment or more
6 reasonably protects Qwest from non-payment than the three consecutive month
7 standard. As I explained in my direct testimony (page 67), Qwest's proposal
8 would result in Eschelon's payments being deemed "Repeatedly Delinquent" if
9 Eschelon paid a portion, even a de minimus portion, late for two months and
10 made timely payments for 9 consecutive months and then missed an additional
11 month. A carrier making timely payment in 9 consecutive months out of ten
12 months does not constitute a legitimate risk about future payment or provide
13 evidence of the financial stress that warrants a security deposit.

14 **Q. MR. EASTON TESTIFIES THAT "ESCHELON CAN PROVIDE NO**
15 **LEGITIMATE ARGUMENT TO CHANGE THIS LANGUAGE OTHER**
16 **THAN TO GIVE ITSELF ADDITIONAL AND UNWARRANTED**
17 **BUSINESS ADVANTAGE."⁸⁰ IS THIS TRUE?**

18 A. No. I explained at pages 67-68 (and Exhibit DD-4) of my direct testimony that
19 the "3 consecutive month" standard proposed by Eschelon is used by Qwest in its

⁷⁸ *Denney Direct*, pp. 67-68. Exhibit DD-4.

⁷⁹ MN Qwest/Eschelon Arbitration, 1 Transcript at p. 150, lines 1-13 (testimony of William Easton).

1 ICAs/service agreements with numerous CLECs and wireless service providers.
2 Therefore, one reason to adopt Eschelon’s proposal is to avoid giving those other
3 CLECs the “additional and unwarranted business advantage” over Eschelon that
4 is inherent in Qwest’s proposal – *i.e.*, to hold Eschelon to a higher “3 months in a
5 12 month period” standard, while Eschelon’s competitors are held to the “3
6 consecutive month” standard.

7 **Q. MR. EASTON CHARACTERIZES ESCHELON’S PROPOSAL AS**
8 **ATTEMPTING TO “CHANGE” THE LANGUAGE AGREED TO IN THE**
9 **SECTION 271 WORKSHOPS “TO GIVE ITSELF ADDITIONAL AND**
10 **UNWARRANTED BUSINESS ADVANTAGE.”⁸¹ IS THIS A FAIR**
11 **CHARACTERIZATION OF ESCHELON’S PROPOSAL?**

12 A. No. Mr. Easton assumes that any differences between SGAT language and ICA
13 language should be rejected, and that the ICA should not deviate from the SGAT.
14 This is not the case. When language can be improved upon in an ICA, it certainly
15 should be, even if it differs from other sources, and the Washington Commission
16 has improved upon SGAT language in prior arbitrations. For example, Covad
17 arbitrated various payment and deposit issues in Washington to seek
18 improvements to the language. The Section 5 that was ultimately adopted for the
19 Covad/Qwest ICA differed in various respects from Qwest’s Washington SGAT.
20 I have provided as Exhibit DD-18 a red-lined comparison of the Washington

⁸⁰ *Easton Direct*, p. 18, lines 12-14.

1 SGAT Payment and Deposit section to the one taken from Covad's ICA with
2 Qwest in Washington. This exhibit shows the Washington SGAT as a baseline
3 document with the differences in the Covad/Qwest ICA shown in
4 underlined/strikeout text. Most relevant to this issue, Section 5.4.5 of this exhibit
5 (page 4) shows that the SGAT defines Repeatedly Delinquent as *any* payment
6 made 30 days or more after the payment due date, while Covad's ICA defines
7 Repeatedly Delinquent as any *undisputed* payment made 30 days after the
8 payment due date. This is just one of a number of differences shown in Exhibit
9 DD-18 (see, e.g., addition of "backbill" language in Section 5.4.1.1). What this
10 exhibit shows is that it is not problematic for various terms or conditions in
11 Section 5 to differ in a CLEC's ICA from what has been included in the past in
12 the SGAT.

13 **ISSUE 5-11**

14 **Q. WHAT IS QWEST'S CONCERN WITH ESCHELON'S PROPOSAL**
15 **UNDER ISSUE 5-11?**

16 A. Mr. Easton states that Eschelon can invoke the dispute resolution process if it
17 disagrees with a deposit amount, so a second opportunity to do so is unnecessary
18 and inequitable.⁸² However, in my direct testimony,⁸³ I explained that the dispute
19 resolution process may not be capable of providing Eschelon with the relief it

⁸¹ *Easton Direct*, p. 18, lines 11-14. See also, *Easton Direct*, pp. 15 and 23.

⁸² *Easton Direct*, p. 19, line 23.

⁸³ *Denney Direct*, pp. 56-57.

1 seeks in time to avoid the damage that could be done if Eschelon is required to
2 pay a deposit. Under Qwest's proposal, Eschelon could be required to pay a
3 deposit on thirty days' notice. If the ICA does not provide a mechanism that stays
4 that requirement if Eschelon seeks Commission review, Eschelon would need to
5 file its complaint with the Commission, get on the Commission's agenda, and
6 obtain an order granting at least interim relief, all within thirty days, and the
7 Commission would, again, be faced with having to deal with an issue in "crisis
8 mode." Therefore, contrary to Mr. Easton's claim, Eschelon's language is
9 necessary. Furthermore, providing an opportunity for Eschelon to seek
10 Commission relief when it disagrees with Qwest's actions in these regards is
11 imminently fair, since Eschelon is the party who is at risk of having its orders
12 rejected, its customers disconnected, or having to pay a deposit.

13 **ISSUE 5-12**

14 **Q. UNDER ISSUE 5-12, QWEST STATES THAT ESCHELON'S PROPOSAL**
15 **WOULD RESULT IN THE COMMISSION MICRO-MANAGING THE**
16 **PARTIES' RELATIONSHIP AND PROHIBIT QWEST FROM**
17 **UTILIZING REASONABLE BUSINESS PRACTICES.⁸⁴ IS THIS A FAIR**
18 **CHARACTERIZATION OF ESCHELON'S PROPOSAL?**

19 **A.** No. I disagree with Mr. Easton's contention that Commission involvement in
20 significant disagreements between an ILEC provider of wholesale services and a

⁸⁴ *Easton Direct*, p. 21, lines 7 – 9.

1 CLEC purchaser of those wholesale services constitutes micro-managing. Indeed,
2 state PUCs are charged with acting as an independent decision-maker when
3 disputes arise between an ILEC and a CLEC concerning the parties' performance
4 of their respective obligations under an ICA. Eschelon's proposal would not
5 prevent Qwest from employing reasonable business practices, rather it would
6 simply require Qwest – if it wishes to take the extraordinary step of requiring
7 Eschelon to make a payment deposit of as much as \$5 million – to first have its
8 actions approved by the Commission. It is commonplace for state commissions to
9 review an ILEC's business practices as they relate to their CLEC wholesale
10 customers. And if Qwest's attempt to collect a deposit from Eschelon is
11 reasonable based on relevant circumstances, then the Commission will approve
12 Qwest's deposit requirement.

13 **Q. MR. EASTON TESTIFIES THAT THE CONCERN UNDER ISSUE 5-12 IS**
14 **REAL FOR QWEST.⁸⁵ WOULD YOU LIKE TO RESPOND?**

15 A. Yes. Mr. Easton states that Qwest has “found it necessary on numerous occasions
16 to take action to limit its exposure when a CLEC struggles,” but he provides no
17 support to back his claim, nor does he show that the provisions in Eschelon's
18 proposal for the Payment and Deposits issues would not be sufficient to protect
19 Qwest should such a circumstance arise. And given that Eschelon's proposal
20 would allow Qwest to demand a deposit for when a legitimate concern about

⁸⁵ *Easton Direct*, p. 21.

1 future ability to pay exists – subject to Commission approval when disagreements
2 exist about Eschelon’s payment status – Mr. Easton’s claim that Eschelon’s
3 proposal would not protect Qwest is not supported by the ICA language. Though
4 Mr. Easton complains that Eschelon’s proposal would force Qwest to incur
5 additional debt while the Commission determines whether Qwest’s actions are
6 justified, the fact of the matter is that if Qwest is correct, it would receive
7 payment (albeit potentially later than if Qwest was able to act unilaterally).
8 However, if Qwest’s proposal is adopted, Eschelon would be put in a position
9 where it would be forced to either pay the total amount of charges that Qwest
10 demands – even if Eschelon disagrees with Qwest’s view of Eschelon’s payment
11 status – or be forced to pay a substantial deposit. Again, Qwest’s concern boils
12 down to the timing of payment it will receive, while Eschelon’s concern is
13 whether Eschelon will be able to continue to serve its customers. The
14 disagreement between Eschelon and Qwest evident in Confidential Exhibit DD-3
15 shows that Eschelon’s concern is real.

16 **ISSUE 5-13**

17 **Q. MR. EASTON TESTIFIES THAT QWEST’S PROPOSAL FOR ISSUE 5-13**
18 **ALLOWS QWEST TO “REVIEW A CREDIT REPORT AND INCREASE**
19 **DEPOSIT REQUIREMENTS.”⁸⁶ IS MR. EASTON’S TESTIMONY**
20 **MISLEADING?**

⁸⁶ *Easton Direct*, p. 7, lines 5-6. See also, p. 22, lines 15-16.

1 A. Yes. It is important to note that when Mr. Easton testifies that Qwest would be
2 able to “review a credit report” as support for increasing a deposit under its
3 proposed Section 5.4.7, that is not the only information that Qwest could review
4 as support for this action. In fact, under Qwest’s proposal for Issue 5-13, the
5 options are almost limitless for Qwest in this regard. During negotiations on this
6 issue, Qwest indicated that, under this provision, it could simply read something
7 in the newspaper that caused it concern and demand a deposit increase based
8 solely on that information. This lack of standards or objectivity greatly concerns
9 Eschelon, especially when other sections of the ICA already provide Qwest with
10 sufficient ability to establish and increase deposits from its customers (See,
11 Sections 5.4.5 and 5.4.6).

12 Mr. Easton’s testimony is also misleading in stating that its proposal for Issue 5-
13 13 applies to “increases” in the amount of a deposit. This would suggest that
14 Qwest has already demanded a deposit from Eschelon and 5.4.7 would apply to
15 increasing that amount. However, Qwest is actually interpreting this as allowing
16 Qwest to demand an entirely new deposit (*i.e.*, an “increase” from \$0) –
17 something that is already addressed in 5.4.5. To this end, Eschelon has revised its
18 Option #2 for Issue 5-13.⁸⁷

19 5.4.7 If a Party has received a deposit pursuant to Section 5.4.5
20 but the amount of the deposit is less than the maximum deposit
21 amount permitted by Section 5.4.5, the Billing Party may review

⁸⁷ Eschelon’s Option #1 is for 5.4.7 to be intentionally omitted.

1 the other Party's credit standing and increase the amount of deposit
2 required, if approved by the Commission, but in no event will the
3 maximum amount exceed the amount stated in Section 5.4.5.
4 Section 5.4 is not intended to change the scope of any regulatory
5 agency's or bankruptcy court's authority with regard to Qwest or
6 CLECs.

7 Eschelon's modified Option #2 makes clear that 5.4.7 applies to an increase in an
8 existing deposit established under 5.4.5, rather than a second opportunity for
9 Qwest to demand a deposit based on a complete lack of standards or criteria.
10 Eschelon's modified Option #2 (like its original Option #2) would require
11 Commission approval for a change in deposit amount under 5.4.7 in order to
12 ensure that the credit review conducted and the information relied upon justifies
13 the increase in deposit. And because Qwest has indicated that 5.4.7 is needed
14 because of the frequency of CLEC financial troubles and bankruptcies,
15 Eschelon's Option #2 makes clear that 5.4.7 does not affect any regulatory
16 agency's or bankruptcy court's authority in this regard.

17 **Q. QWEST CLAIMS THAT ITS PROPOSAL FOR ISSUE 5-13 TO REVIEW**
18 **ESCHELON'S CREDIT STANDING AND INCREASE THE DEPOSIT**
19 **AMOUNT OR ESTABLISH A NEW DEPOSIT REQUIREMENT IS A**
20 **"REASONABLE AND CUSTOMARY BUSINESS PRACTICE."⁸⁸ WOULD**
21 **YOU LIKE TO RESPOND?**

22 A. Yes. Section 5.4.5 permits Qwest to require a deposit on certain conditions. That
23 provision should be adequate to meet Qwest's business needs. In light of the

⁸⁸ *Easton Direct*, p. 22, line 17.

1 remedies that Qwest already has available to it, Section 5.4.7 is unnecessary and
2 that is the reason why Eschelon's first proposal on this issue is that the Section be
3 left intentionally blank. However, assuming that the Commission determines that
4 the ICA should contain some provision that allows Qwest to increase the amount
5 of a payment deposit, I disagree that Qwest should be able to make this
6 determination unilaterally without any objective, quantifiable criteria or
7 procedure. There is no way for Eschelon to know if the actions that Qwest is
8 taking are "reasonable" because Qwest's decision making under its proposal for
9 Issue 5-13 is not subject to any standard. In other words, there is no limit on the
10 circumstances under which Qwest could demand an increased deposit, which
11 would render the limitations provided for under Section 5.4.5 meaningless. In
12 fact, Eschelon's credit standing would not even need to change for Qwest to
13 invoke Section 5.4.7 and demand a deposit or deposit increase. Providing this
14 type of control to an ILEC over its CLEC competitors – to tie its competitors
15 financial resources up in potentially frivolous deposits – is not "customary" from
16 a public policy perspective.

17 It is more "reasonable and customary" for the Commission to have a say in these
18 issues between ILEC and CLEC – which is what is called for in Eschelon's
19 proposal. Though Qwest claims that the need for it to act unilaterally is "acute"
20 due to the "frequency of telecommunications carriers declaring bankruptcy or

1 simply shutting their doors,”⁸⁹ again, Qwest provides no information supporting
2 the acuteness of this problem or the frequency of these occurrences. Furthermore,
3 Qwest provides no reason why its ability to demand deposits under 5.4.5 does not
4 already sufficiently protect Qwest’s interest.

5 In addition, as a matter of bankruptcy law, a payment to a creditor for an
6 antecedent debt of the debtor that is made 90 days or less before a filing for
7 bankruptcy is avoidable as a preference.⁹⁰ Such a deposit, to the extent made
8 fewer than 90 days before bankruptcy, would likely not be available, as Qwest
9 appears to assume.

10 **Q. MR. EASTON ATTEMPTS TO CLARIFY QWEST’S POSITION ON**
11 **ISSUE 5-13 BY STATING THAT QWEST’S UNILATERAL CREDIT**
12 **REVIEW IS THE “TRIGGERING EVENT.”⁹¹ DOES THIS SATISFY THE**
13 **CONCERN THAT YOU EXPRESSED IN YOUR DIRECT TESTIMONY**
14 **REGARDING THE LACK OF A TRIGGERING EVENT IN SECTION**
15 **5.4.7?**

16 A. No. Under Qwest’s proposal for Section 5.4.7, the maximum amount of the
17 deposit may not “exceed the amount stated in Section 5.4.5.” The maximum
18 under Section 5.4.5 is determined based on the average two month period from
19 the date of either of two specific, objective, verifiable events: (1) date of the

⁸⁹ *Easton Direct*, p. 22, lines 21-24.

⁹⁰ 11 U.S.C. § 547(b).

1 request for reconnection of services or resumption of order processing and (2) the
2 date CLEC is repeatedly delinquent. Therefore, based on the known dates of
3 these triggering events, Eschelon can calculate the potential maximum deposit to
4 which Qwest is entitled under Section 5.4.5 and ensure that Qwest is not
5 exceeding the maximum. Qwest asserts that its decision to review Eschelon's
6 "credit history" is yet another "triggering event" that can be used to determine the
7 amount of the maximum. This concept is nowhere to be found in Qwest's
8 proposed contract language, however.

9 Furthermore, Eschelon has no control over and no knowledge of the date on
10 which Qwest decided to conduct its unilateral credit review. Qwest could simply
11 select a date at a time in which Eschelon's monthly charges are the highest so that
12 the deposit is as high as possible (that is, if the deposit required under Qwest's
13 language for Section 5.4.7 is even capped by Section 5.4.5⁹²). This type of
14 gamesmanship would not be allowed under the triggering events found in Section
15 5.4.5 because the dates are objective and known by all parties.

⁹¹ *Easton Direct*, p. 22, lines 19-21.

⁹² *See Denney Direct*, page 73 - 74.

1 **IV. SUBJECT MATTER NOS. 8 – 10, 11 partial, 13, 17, 20 – 23, 25, 26, 28, AND**
2 **44 – 48**

3 **SUBJECT MATTER NO. 8. COPY OF NON-DISCLOSURE AGREEMENT**

4 **Issue No. 5-16: ICA Section 5.16.9.1**

5 **Q. PLEASE SUMMARIZE THIS ISSUE.**

6 A. Qwest has agreed that Qwest employees to whom Eschelon’s forecasts and
7 forecasting information are disclosed will be required to execute a nondisclosure
8 agreement covering the information. Eschelon’s proposed language would
9 require Qwest to provide Eschelon with a signed copy of each non-disclosure
10 agreement within ten days of execution. Qwest proposes to delete Eschelon’s
11 proposed language.

12 **Q. WHAT ISSUES DID QWEST RAISE RELATED TO THIS ISSUE?**

13 A. Qwest objects to Eschelon’s proposal because it “places an unnecessary
14 administrative burden on Qwest”⁹³ and that, “in addition to the stringent
15 requirements set forth in section 5.16.19.1, under section 18, Eschelon has further
16 protection and recourse if it believes that Qwest has misused confidential
17 information.”⁹⁴

18 **Q. IS IT BURDENSOME TO PROVIDE SIGNED COPIES OF PROTECTIVE**
19 **AGREEMENTS?**

⁹³ *Easton Direct*, page 24.

⁹⁴ *Easton Direct*, page 25.

1 A. No. As addressed in my direct testimony, providing copies of signed protective
2 agreements is common practice and can not reasonably be considered a burden.⁹⁵
3 Mr. Easton described the burden as the effort Qwest would have to undertake to
4 put a copy of the agreement in an envelope and dropping the envelope in the
5 mail.⁹⁶

6 **Q. IS ESCHELON PROTECTED UNDER SECTION 18 OF THE ICA?**

7 A. No. Qwest refers to section 18.3.1, stating that it allows Eschelon to audit
8 Qwest's compliance with this interconnection agreement. Section 18.3.1 reads in
9 its entirety [emphasis added]:

10 18.3.1 Either Party may request an Audit of the other Party's
11 compliance with this Agreement's measures and requirements
12 applicable to limitations on the distribution, maintenance, and use
13 of proprietary or other protected information that the requesting
14 Party has provided to the other. Those *Audits shall not take place*
15 *more frequently than once in every three (3) years unless cause is*
16 *shown* to support a specifically requested audit that would
17 otherwise violate this frequency restriction. *Examinations will not*
18 *be permitted in connection with investigating or testing such*
19 *compliance.* Other provisions of this Section that are not
20 inconsistent herewith shall apply, except that in the case of audits,
21 the Party to be audited may also request the use of an independent
22 auditor.

23 The most obvious potential cause of non-compliance with the Agreement
24 regarding the handling of Eschelon's forecast would be the signatories of the

⁹⁵ Denney Direct, page 76 – 79.

⁹⁶ Minnesota Qwest/Eschelon Arbitration, 1 Transcript at 126-27 (testimony of William Easton).

1 protective agreement.⁹⁷ This is precisely the type of information that should be
2 made available to Eschelon to ensure the proper handling of forecasted data.

3

4 **SUBJECT MATTER NO. 9. TRANSIT RECORD CHARGE AND BILL**
5 **VALIDATION**

6 **Issues Nos. 7-18 and 7-19: ICA Sections 7.6.3.1 and 7.6.4**

7 **Q. PLEASE SUMMARIZE THIS ISSUE.**

8 A. In order to validate the bills that Qwest provides, Eschelon needs occasional
9 access to a limited number of call records that would allow for bill verification.
10 Eschelon's language allows for Eschelon to obtain these records from Qwest for
11 the purpose of bill verification.

12 **Q. WHAT ISSUES DID QWEST RAISE RELATED TO THIS ISSUE?**

13 A. Again, the issues raised by Qwest miss the point of the disagreement surrounding
14 this language. Qwest cites an agreement negotiated in connection with the
15 resolution of a complaint proceeding in Minnesota that the "best source of
16 information for determining the source of such calls was the originating switch."⁹⁸
17 Qwest also states that "[r]equiring Qwest to provide Eschelon with detailed

⁹⁷ See also *Denney Direct*, page 78.

⁹⁸ *Easton Direct*, page 26.

1 records of information it already has and to do so without charge is an
2 unreasonable and inefficient way to determine appropriate *billing by Eschelon*.⁹⁹

3 **Q. WHY ARE QWEST'S ARGUMENTS OFF THE MARK?**

4 A. First, it is crucial to understand that Qwest bills Eschelon for transit, when an
5 Eschelon originated call transits the Qwest network and terminates to a third party
6 carrier. Eschelon's language has nothing to do with **Eschelon's** billing, but
7 relates to Eschelon's ability to validate the bills it receives from **Qwest**.¹⁰⁰
8 Eschelon agrees that its switch records information on calls originated by
9 Eschelon's customers, but this is only half of the puzzle. In attempting to verify
10 Qwest's bills for transit traffic, Eschelon needs to be able to reconcile the
11 originating call information collected by Eschelon's switch with the call records
12 Qwest used to generate its transit bill to Eschelon.¹⁰¹ Without Qwest's call record
13 data, there is no way to verify Qwest's billing.

14 Finally, Qwest protests that Eschelon asks Qwest to provide this data without
15 charge.¹⁰² However, Eschelon should not be required to pay in order to receive
16 the details behind the bills Qwest provides to Eschelon. Further, Eschelon's
17 language makes clear that Qwest will provide Eschelon-originated transit records,

⁹⁹ *Easton Direct*, page 26 [emphasis added].

¹⁰⁰ *See Denney Direct*, page 80.

¹⁰¹ *See Denney Direct*, page 82.

¹⁰² As stated in my direct testimony, Eschelon believes that Qwest is required to exchange this type of data under Section 21.8.4.3 of this Interconnection Agreement. *See Denney Direct*, page 81.

1 on a limited basis, only for the purpose of bill verification as part of the category
2 11 records.¹⁰³

3

4 **SUBJECT MATTER NO. 10. COLLOCATION AVAILABLE INVENTORY**

5 **Issue Nos. 8-20 and 8-20(a): ICA Sections 8.1.1.10.1.1.1 and 8.2.10.4.3**

6 **Q. PLEASE SUMMARIZE THIS ISSUE.**

7 A. When a collocation site is no longer being used by a CLEC and that site is
8 returned to Qwest, the site is then posted on Qwest's website as inventory that is
9 available for purchase by other CLECs. The first disputed issue (8-20) is whether
10 a quote that has already been prepared for a collocation site should be posted on
11 Qwest's website. Eschelon proposes that prices be posted to aid Eschelon in its
12 purchasing decisions.

13 The second issue is related to special sites and concerns language that Qwest
14 proposes to insert into section 8.2.10.4.3, which is inconsistent with the paragraph
15 as a whole, is not contained in other CLECs' interconnection agreements, is
16 inconsistent with Qwest's historical practice and would potentially increase the
17 cost to Eschelon of obtaining a quote for a collocation special site.

18 **Issue 8-20**

¹⁰³ See *Denney Direct*, page 83.

1 **Q. HAS ESCHELON UPDATED ITS LANGUAGE PROPOSAL WITH**
2 **RESPECT TO ISSUE 8-20?**

3 A. Yes. Eschelon has inserted the parenthetical (with the carriers name redacted)
4 into Eschelon's proposed language. The whole paragraph of section
5 8.1.1.10.1.1.1 is repeated below, with the new language in bold:

6 8.1.1.10.1.1.1 Notwithstanding any other provision of this
7 Agreement, if Qwest prepares a Quote Preparation Fee for a posted
8 Collocation site and for any reason the posted Collocation site is
9 returned to Qwest inventory, Qwest will post the quoted price from
10 the Quote Preparation Fee quote **(with the carrier's name**
11 **redacted)** on the inventory list for that site and, for future requests
12 for that site, will waive the Quote Preparation Fee, as the quote has
13 already been prepared, unless Qwest establishes a change in
14 circumstance affecting the quoted price.

15

16 The parenthetical was added in order to address a concern raised by Qwest
17 regarding CLEC proprietary information contained on the quote. Since
18 collocation quotes for returned collocation sites contain the cost of a collocation
19 already in place, plus any requested changes to this site, the only proprietary
20 information contained on the quote would be the name of the CLEC requesting
21 the quote.

22 **Q. WHAT ISSUES DID QWEST RAISE RELATED TO ISSUE 8-20 IN ITS**
23 **DIRECT TESTIMONY?**

24 A. Qwest argues that Qwest should not be required to post previous price quotes
25 because: (1) Available Inventory quotes prepared for a different CLEC would be

1 of no use to Eschelon; (2) requests to change Qwest's processes should be
2 handled through CMP and not in an arbitration proceeding involving a single
3 CLEC;¹⁰⁴ (3) Qwest has no legal obligation to provide previous price quotes;¹⁰⁵
4 and (4) Eschelon "has far better information than would be provided by a
5 previous quote for the site."¹⁰⁶

6 **Q. COULD PREVIOUSLY PREPARED PRICE QUOTES BE OF USE TO**
7 **ESCHELON?**

8 A. Yes. Mr. Hubbard argues that CLECs almost never order an existing collocation
9 "as is" and that CLECs almost always order augments to the existing sites. If this
10 is the case the language in the ICA, Section 8.2.10.3.3, already states that if CLEC
11 requests modifications to the Qwest posted site, the ICA terms relating to
12 Augments will apply. The issue in dispute, however, is not the price information
13 associated with Augments. The issue in dispute is the price information
14 associated with the "reusable and reimbursable elements" that are left in place. If
15 the information is available, then there is no reason Qwest cannot provide such
16 information for review.

17 **Q. WOULD THIS ISSUE BE BETTER ADDRESSED THROUGH CMP?**

¹⁰⁴ Direct Testimony of Robert J. Hubbard on behalf of Qwest Corporation, ("*Hubbard Direct*")
September, 29, 2006, pages 5 – 6.

¹⁰⁵ *See Hubbard*, pages 12 - 13.

¹⁰⁶ *See Hubbard*, page 10 - 11.

1 A. Qwest's mystical demarcation between the interconnection agreement and CMP is
2 not relevant. The necessity of dealing with disputed issues related to this
3 interconnection agreement while parties are currently before this Commission is
4 discussed in detail in the Direct and Rebuttal Testimony of Mr. Starkey.

5 **Q. DOES QWEST HAVE AN OBLIGATION TO OFFER “USED”**
6 **COLLOCATION SPACE ON A NON-DISCRIMINATORY BASIS AT**
7 **JUST AND REASONABLE RATES?**

8 A. Yes, section 251(c)(6) of the Act requires Qwest to “provide, on rates, terms and
9 conditions that are just, reasonable, and nondiscriminatory, for physical
10 collocation of equipment necessary for interconnection or access to unbundled
11 network elements.” The Act does not state that physical collocation is “new” or
12 “used.” It simply states that rates for collocation must be just and reasonable.
13 Eschelon’s proposal meets that criterion of establishing just and reasonable rates
14 for QPFs for previously used Collocations. Eschelon’s position is that it should
15 not be required to pay QPFs for a previously used collocation space if Qwest has
16 already previously prepared the quote and recovered those costs from another
17 carrier. Further, the posting of quotes that Qwest has already created for the
18 purpose of offering collocation sites to another carrier ensures that these sites are
19 offered on a non-discriminatory basis.

20 **Q. DOES ESCHELON NEED A PRIOR QUOTE TO DETERMINE WHAT IT**
21 **WILL PAY?**

1 A. Yes. A prior quote would be useful in determining the price Eschelon would pay.
2 Mr. Hubbard suggests that a prior quote would not be useful to Eschelon, because
3 only Eschelon knows the number and types of circuit terminations it will order.¹⁰⁷
4 If it is as easy as Mr. Hubbard claims for Eschelon to determine the price, this
5 raises the question of why Qwest is charging more than \$4,000 for the quote
6 preparation fee for a collocation site that is already built, and to prepare a quote
7 that Eschelon could calculate on its own.

8 Further, if, according to Qwest, the likelihood of Eschelon ordering a site “as is”
9 is remote, then this provision in the language would not come into play.
10 Eschelon’s proposed language, furthermore, provides an exception to the waiver
11 policy in the event “Qwest establishes a change in circumstance affecting the
12 quoted price.” This provision does not require Qwest to go to any particular
13 effort to prepare a quote. Rather, Eschelon’s proposal is reasonable because it
14 only requires Qwest to post pricing information that it has already available to it
15 as a result of having previously prepared a quote. Further, because Qwest has
16 already charged a QPF for the preparation of the original quote, the requirement
17 that Qwest waive the fee for subsequent quotes reasonably prevents Qwest from
18 receiving double recovery.

19 Mr. Hubbard seems to imply that since Eschelon is already receiving a 50%
20 discounted price for non-recurring collocation charges, that it should not object to

¹⁰⁷ See *Hubbard Direct*, page 11.

1 paying full price for a previously prepared quote fee.¹⁰⁸ However, the 50%
2 discount on non-recurring charges is not relevant to the issue at hand. It should
3 also be noted that the 50% discount is off of the non-recurring costs for which
4 Qwest has already received 100% payment from the previous owner of the cage.
5 If anything, the fact that Qwest offers sites it has already been fully compensated
6 for at 50% suggests that Eschelon should not be paying the full price for a
7 previously prepared quote for which Qwest has already been compensated.

8 **Issue 8-20(a)**

9 **Q. PLEASE BRIEFLY SUMMARIZE THIS ISSUE RELATING TO**
10 **COLLOCATION “SPECIAL SITES.”**

11 A. Qwest offers Collocation sites returned through Chapter 7 bankruptcy or
12 abandonment, known as "Special Sites." These sites are offered with equipment,
13 racks, cages, DC power, grounding and terminations and are posted on Qwest's
14 Available Inventory website. The dispute arises in ICA Section 8.2.10.4.3
15 because Qwest proposes a QPF for augments instead of the special site
16 assessment fee “if CLEC requests an augment application.”¹⁰⁹ As I testified in my
17 Direct Testimony, this language is inconsistent with other, closed, provisions in
18 this paragraph, as the special site assessment fee already includes “any requested

¹⁰⁸ *Hubbard Direct*, pages 7, 8 and 10.

¹⁰⁹ Presumably, Qwest means to say an augment, and not an “augment application”, as there is not a several thousand dollar fee for requesting an application form.

1 modifications.” It is also inconsistent with the way Qwest has historically
2 charged for special sites.

3 **Q. WHAT ISSUES DID QWEST RAISE RELATED TO THE FEES FOR**
4 **“SPECIAL SITES” FOR ISSUE 8-20(A)?**

5 A. Qwest argues that it will not recover its quote preparation costs for augments if
6 Eschelon’s proposal is adopted.¹¹⁰ Qwest also claims that this issue should not be
7 part of the arbitration, but part of the pending cost docket.¹¹¹

8 **Q. HOW DO YOU RESPOND?**

9 A. As I previously noted in my Direct Testimony,¹¹² ICA Section 8.2.10.4.3 states
10 that Qwest will provide a quote based on the site inventory and “any requested
11 modifications to the site.” That Section goes on to state that the “CLEC will be
12 charged a special site assessment fee for work performed up to the point of
13 expiration or non-acceptance of the quote.” Thus, Eschelon is being charged “a
14 special site assessment fee for work performed up to the point of expiration or
15 non-acceptance of the quote” and the special site assessment fee already includes
16 “any requested modifications.” This language very clearly addresses the issue of
17 cost recovery for preparing the quote “based on the site inventory and any
18 *requested modifications to the site.*” (Emphasis added).

¹¹⁰ *Hubbard Direct*, page 16.

¹¹¹ *Hubbard Direct*, page 17.

¹¹² *See Denney Direct*, page 90.

1 Qwest argues that an “arbitration proceeding is not the appropriate forum to
2 consider cost-based challenges and cost-based evidence.”¹¹³ I disagree with this
3 statement, but this particular issue is not a dispute regarding Qwest’s cost studies.
4 It is Qwest, not Eschelon, that is attempting to change this language and the
5 historical application of this rate. Qwest acknowledged Eschelon’s interpretation
6 of the language in 8.2.10.4.3 when it sent a notice on a September 29, 2006 billing
7 notification. In this notice, attached to this testimony as DD-19, Qwest states that
8 “Qwest has been charging the Special Site Assessment Fee on all AI Special Site
9 requests, whether they were purchased with or without an augment.” Qwest sent
10 this notice in an attempt to “correct” the historical application of this rate going
11 forward and begin charging the higher rate it now argues is necessary to cover
12 augments. Qwest argues that this arbitration is not the place to address this rate
13 application, but apparently believes that it can unilaterally change the application
14 of this rate through CMP. Eschelon does not agree that Qwest’s notice is the
15 proper forum to reinterpret rate application and interconnection agreement
16 language, but Qwest’s notice clearly confirms that Eschelon’s reading of
17 8.2.10.4.3 is accurate.

¹¹³ *Hubbard Direct*, page 17.

1

2 **SUBJECT MATTER NO. 11. POWER – QPF AND DC POWER RESTORATION**
3 **CHARGE¹¹⁴**

4 **Issue Nos. 8-22 and 8-23: ICA Sections 8.3.9.1.3, 8.3.9.2.3, and 8.3.9.2.1**

5 **Q. HAS ISSUE 8-23 CLOSED?**

6 A. Yes. Issue 8-23 has closed with the following language:

7 8.3.9.2.1 DC Power Restoration With Reservation. CLEC will be
8 charged the DC Power Reduction/Restoration Charge.

9 Because 8-23 is closed and parties agree that for DC Power Restoration With
10 Reservation the CLEC will be charged the DC Power Reduction/Restoration
11 Charge, section 8.13.2.2 of Exhibit A should be updated to clarify that the ICB
12 rate applies to the case of DC Power Restoration Without Reservation. Eschelon
13 proposes that the title of 8.13.2.2 in Exhibit A read:

14 Power Restoration Without Reservation, applies to Primary &
15 Secondary Feed

16

17 **Q. PLEASE PROVIDE A BRIEF SUMMARY OF ISSUE 8-22.**

18 A. Eschelon disagrees with Qwest's proposal to assess a Quote Preparation Fee
19 ("QPF") for Power Reduction and Power Restoration offerings. Eschelon has
20 agreed to ICB pricing and QPF in the case of Power Restoration *without*
21 Reservation.

¹¹⁴ Other Power issues (8-21) are being address in the testimony of Mr. Starkey.

1 **Q. QWEST STATES THAT IT IS UNCLEAR WHETHER ESCHELON**
2 **DISAGREES WITH THE QPF FOR BOTH POWER REDUCTION AND**
3 **POWER RESTORATION, OR JUST POWER RESTORATION.¹¹⁵**
4 **WOULD YOU LIKE TO RESPOND?**

5 A. Yes. For DC Power Reduction, there is no reason to pay both a QPF and a non-
6 recurring charge. The non-recurring charge contains the cost to perform the DC
7 Power Reduction. There is no reason why additional planning and engineering
8 work would be necessary, unless additional work is required outside the scope of
9 the NRC, as in the case of moves between the power board and the BDFB. ICA
10 section 8.3.9.3 allows for a QPF in this instance. There are two types of power
11 reduction: power reduction with reservation and power reduction without
12 reservation. In the case of power reduction with reservation Eschelon would pay
13 Qwest in order to reserve its right to power. In this instance, the cost to restore
14 power (DC Power Restoration with Reservation) should be no more than the cost
15 to reduce power¹¹⁶ and no additional QPF NRC would apply. The case of DC
16 Power Restoration without reservation is currently priced on an ICB basis (section
17 8.3.9.2.2 of the ICA). Eschelon agrees that a QPF would be appropriate to
18 prepare the quote to restore DC Power in the case where Eschelon was not paying
19 Qwest a monthly fee to reserve power.

¹¹⁵ *Hubbard Direct*, page 36. *See also Million Direct*, p. 7, lines 11-14.

¹¹⁶ Qwest agrees that the cost to restore power should be no more than the cost to reduce power, as evident in the closed language in Issue 8-23.

1 **Q. MR. HUBBARD STATES THAT FOR BOTH POWER RESTORATION**
2 **AND POWER REDUCTION, QWEST IS ENTITLED TO RECOVER THE**
3 **COSTS OF PERFORMING A FEASIBILITY STUDY AND PRODUCING**
4 **A QUOTE FOR THE CLEC’S REQUEST.¹¹⁷ DOES MR. HUBBARD’S**
5 **TESTIMONY CAST THIS ISSUE IN THE PROPER LIGHT?**

6 A. No. Mr. Hubbard implies that Eschelon desires to deprive Qwest of its right to
7 recover its costs – this is not Eschelon’s position, nor is it my testimony. Rather,
8 as I explained in my direct testimony,¹¹⁸ the activities Qwest claims create costs
9 that are covered by the QPF charges for Power Reduction and Restoration have
10 already been performed by Qwest and paid for by Eschelon; performing these
11 activities again is unnecessary and recovering these costs again constitutes
12 double-recovery.

13 **Q. MS. MILLION TESTIFIES THAT THERE IS NO OVERLAP BETWEEN**
14 **THE COSTS RECOVERED BY THE POWER REDUCTION NRC AND**
15 **THE POWER REDUCTION QPF, AND QWEST IS ENTITLED TO**
16 **RECOVER BOTH.¹¹⁹ WOULD YOU LIKE TO RESPOND?**

17 A. Yes. I disagree that a second non-recurring charge is necessary in the case that a
18 CLEC is already paying a non-recurring charge for Power Reduction. Qwest
19 describes the work in Power Reduction as “changing fuse value at BDFB” and

¹¹⁷ *Hubbard Direct*, p. 36, lines 11-13; p. 37, lines 9-11. *See also Million Direct*, p. 7, lines 14-17.

¹¹⁸ *Denney Direct*, pages 96-98.

¹¹⁹ *Million Direct*, p. 8, lines 4-5.

1 “changing breaker at power plant.”¹²⁰ For this activity, Qwest wants to charge
2 Eschelon from between \$675.98 and \$1,179.67 depending on amperage (Exhibit
3 A Section 8.13). Qwest wants to charge another NRC of \$840.24 for the QPF to
4 change the fuse value or breaker. So, following Ms. Million’s claim to its logical
5 conclusion, a CLEC should pay up to \$2,019.91 for the act of a Qwest technician
6 swapping out a fuse at the fuse panel (assuming that Qwest actually changes
7 fuses).

8 Ms. Million attempts to make the work for Power Reduction sound more
9 complicated than it actually is when she states that Power Reduction involves
10 work to “remove/reduce...the power feeds for a CLEC in the central office.”¹²¹
11 Power Reduction involves a change to a fuse or breaker, and based on Qwest’s
12 own Power Reduction Amendment, “no cabling work [is] required” when fuses
13 are changed.¹²² The only time cabling work is involved is when the reduction
14 request includes moving from the Power Board to the BDFB. In these cases,
15 Eschelon has agreed to pay an ICB charge (Exhibit A, Section 8.13.1.5). Ms.
16 Million attempts to confuse two concepts: (1) Power Reduction, which involves
17 swapping out a fuse or breaker and does not involve cabling work, and (2)
18 Location changes, which do involve power cabling changes. Since Power

¹²⁰ Page 6 of Qwest’s Draft Power Reduction Amendment, available at:

<http://www.qwest.com/wholesale/downloads/2003/030701/DCPowerReduction6-20-03.doc>

¹²¹ *Million Direct*, p. 7, lines 24-25.

¹²² Page 6 of Qwest’s Draft Power Reduction Amendment, available at:

<http://www.qwest.com/wholesale/downloads/2003/030701/DCPowerReduction6-20-03.doc>

1 Reduction does not involve cabling work (at least when Location changes are not
2 performed), it does not involve the engineering/planning costs that Qwest wants
3 to recover by assessing a QPF for Power Reduction. Again, when this
4 engineering and planning work may be involved (in the case of location changes
5 from the Power Board to the BDFB or Power Restoration without Reservation),
6 Eschelon has agreed to compensate Qwest for those costs.

7 **Q. QWEST CLAIMS THAT BESIDES THE ISSUE OF COST RECOVERY,**
8 **THE QPF WOULD PREVENT CLECS FROM ABUSING THE QUOTE**
9 **PROCESS AND RELYING ON QWEST TO DO THEIR BUSINESS**
10 **PLANNING FOR THEM.¹²³ IS THIS A LEGITIMATE REASON FOR**
11 **REQUIRING A QPF?**

12 A. No. Ms. Million's testimony exposes the folly in requiring a QPF for Power
13 Reduction. Ms. Million testifies that "Establishing a separate QPF charge allows
14 Qwest to recover its costs for planning and engineering a CLEC request
15 regardless of *whether or not* the CLEC decided to have Qwest complete the work
16 once it receives the quote."¹²⁴ However, since Qwest assesses a non-ICB flat
17 non-recurring charge for Power Reduction, the CLEC already knows what the
18 "quote" for Power Reduction will be – *i.e.*, the "quote" for the Power Reduction
19 activity is the non-recurring Power Reduction charge. A QPF may be reasonable
20 in a situation in which ICB pricing applies (as in the case of Location changes or

¹²³ *Million Direct*, pp. 8-9.

1 Power Restoration without Reservation) because the CLEC does not know what
2 the total charge would be for the work Qwest will perform. In the instance of ICB
3 charges, a QPF would provide the CLEC with an indication of what the ICB
4 charge would be for the work and allow the CLEC to decide whether to proceed
5 with the work. However, in the case of a known rate for an activity (*e.g.* Power
6 Reduction, Power Restoration with Reservation), the CLEC already knows what
7 that charge will be and no quote is needed. Accordingly, a QPF only makes sense
8 within the context of ICB rates, which does not apply to Power Reduction (or
9 Power Restoration with Reservation based on Qwest's agreement under Issue 8-
10 23).

11 In addition, I disagree with Ms. Million's premise that Eschelon would use Qwest
12 resources to conduct Eschelon's business planning and that a separate charge is
13 needed to penalize CLECs who "are abusing the quote process." She provides no
14 evidence to suggest that this has actually happened, and there would not be any
15 need for a CLEC to want Qwest to do its business planning given that the CLEC
16 already knows what the charge will be.

17 **Q. WOULD YOU LIKE TO RESPOND TO QWEST'S POINT THAT THIS**
18 **ISSUE IS BETTER ADDRESSED IN A COST DOCKET, RATHER THAN**
19 **AN ARBITRATION INVOLVING ONE CLEC?**¹²⁵

¹²⁴ *Million Direct*, p. 8, lines 13-15. (emphasis in original)

¹²⁵ *Hubbard Direct*, p. 37, lines 12-16. *See also Million Direct*, p. 9, lines 6-11.

1 A. Yes. Even if the QPF is addressed in a cost docket, those costs will not be
2 decided until some time in the future. The cost docket does not resolve what rates
3 will be charged by Qwest through this ICA, pending the completion of a future
4 cost case. It should be incumbent upon Qwest to first substantiate the charges it
5 will assess on Eschelon before being allowed to charge them, and Qwest has not
6 done so.

7

8 **SUBJECT MATTER NO. 13. OPTIONED CONTIGUOUS SPACE**

9 **Issue No. 8-29: ICA Sections 8.4.1.8.7.3**

10 **Q. HAS THIS ISSUE CLOSED?**

11 A. Yes. This issue has closed with the following language:

12 8.4.1.8.7.3 Where contiguous space has been Optioned, Qwest
13 will make its best effort to notify CLEC if Qwest, its Affiliates or
14 CLECs require the use of CLEC's contiguous space. Upon
15 notification, CLEC will have seven (7) Days to indicate its intent
16 to submit a Collocation application or Collocation Reservation.
17 CLEC may choose to terminate the contiguous space Option or
18 continue without the contiguous provision.

19

20 8.2.6.1.2 CLEC shall own such structure, subject to a reasonable
21 ground space lease. If CLEC terminates its Adjacent Collocation
22 space, Qwest shall have the right of first refusal to such structure
23 under terms to be mutually agreed upon by the Parties. Qwest will
24 exercise its rights within seven (7) Days of receiving notice of
25 termination. In the event Qwest declines to take the structure or
26 terms cannot be agreed upon, CLEC may transfer such structure to
27 another CLEC for use for Interconnection and or access to UNEs.
28 Transfer to another CLEC shall be subject to Qwest's approval,
29 which approval shall not be unreasonably withheld. If no transfer
30 of ownership occurs, CLEC is responsible for removal of the

1 structure and returning the property to its original condition.
2

3 **SUBJECT MATTER NO. 17. CAPS – DATA RELATING TO CAPS**

4 **Issue No. 9-39: ICA Section 9.1.13.4.1.2**

5 **Q. HAS THIS ISSUE CLOSED?**

6 A. Yes. This issue has closed, with respect to the provisions cited below,¹²⁶ with the
7 following language:

8 9.1.13.4.1.2.2 For Caps:

9 9.1.13.4.1.2.2.1 With respect to disputes regarding the caps
10 described in Sections 9.2 and 9.6.2.3, data that allows CLEC to
11 identify all CLEC circuits relating to the applicable Route or
12 Building [including if available circuit identification (ID),
13 installation purchase order number (PON), Local Service Request
14 identification (LSR ID), Customer Name/Service Name,
15 installation date, and service address including location (LOC)
16 information (except any of the above, if it requires a significant
17 manual search), or such other information to which the Parties
18 agree]. In the event of such a dispute, CLEC will also provide
19 Qwest the data upon which it relies for its position that CLEC may
20 access the UNE.

21 9.1.13.4.1.2.2.2 Notwithstanding anything in this Section 9.1.13.4
22 that may be to the contrary, to the extent that Qwest challenges
23 access to any UNE(s) on the basis that CLEC's access to or use of
24 UNEs exceeds the caps described in Sections 9.2 or 9.6.2.3
25 because CLEC has ordered more than ten UNE DS1 Loops or
26 more than the applicable number of DS3 Loop circuits or UDIT
27 circuits in excess of the applicable cap on a single LSR (or a set of
28 LSRs submitted at the same time for the same address for which
29 CLEC populates the related PON field to indicate the LSRs are
30 related), Eschelon does not object to Qwest rejecting that single

¹²⁶ Parties have agreed that portions of 9-39 dealing with the non-impaired wire center case are not being dealt with in this round of testimony.

1 LSR (or the set of LSRs that meets the preceding description) on
2 that basis. The means by which Qwest will implement rejection of
3 such orders is addressed in Section 9.1.13. Except as provided in
4 this Section 9.1.13.4.1.2.2.2, in all other situations when Qwest
5 challenges access to any UNE(s) on the basis that CLEC's access
6 to or use of UNEs exceeds the caps described in Sections 9.2 or
7 9.6.2.3, Qwest must immediately process the request and
8 subsequently proceed with the challenge as described in Section
9 9.1.13.4.1.
10

11 **Q. HAS ESCHELON'S POSITION CHANGED REGARDING WHETHER**
12 **QWEST SHOULD BE ABLE TO REJECT ESCHELON'S ORDERS?**

13 A. No. Eschelon agreed to this language in order to close this proposal. The
14 situation described in 9.1.13.4.1.2.2.2 is an isolated situation that is unlikely to
15 occur for a small company such as Eschelon. Regarding Eschelon's position
16 generally that Qwest must first provision the UNE order and then dispute, see
17 Eschelon's comments in the Washington docket on the TRRO impact on
18 competition.¹²⁷
19

¹²⁷ Commission on its own motion to open an investigation regarding the status of competition and analysis of the impact of FCC's Triennial Review Remand Order (TRRO) on the Competitive environment, presentation of Eschelon in Docket UT-053025, February 7, 2006, page 6. Available at: <http://www.wutc.wa.gov/rms2.nsf/177d98baa5918c7388256a550064a61e/cc22e55294fea4618825711500772945!OpenDocument>.

1 **SUBJECT MATTER NO. 20, SUBLOOPS – QWEST CROSS CONNECT/WIRE**
2 **WORK AND SUBJECT MATTER NO. 22, UNBUNDLED CUSTOMER**
3 **CONTROLLED REARRANGEMENT ELEMENT (“UCCRE”)**

4 *Issue Nos. 9-50 and 9-53: ICA Sections 1.7.3, 9.3.3.8.3, 9.3.3.8.3.1, 9.9 and*
5 *9.9.1*

6 **Q. PLEASE SUMMARIZE THIS ISSUE.**

7 A. This issue broadly deals with the circumstances under which Qwest can cease to
8 offer products and services to CLECs that it has previously offered and that have
9 been approved by the Commission. Specifically Issue No. 9-50 deals with
10 Qwest’s performance of cross-connects for CLECs on intrabuilding cable
11 subloops. Eschelon’s proposed language would require that the rates and services
12 approved by this Commission related to Qwest performing cross-connect work for
13 CLECs in the sub-loop be available to Eschelon so long as they are available to
14 other CLECs.¹²⁸ Issue 9-53, which is similar to Issue 9-50, deals with the rates
15 and services approved by this Commission related to Unbundled Customer
16 Controlled Rearrangement Element (“UCCRE”). Eschelon’s language would
17 require this product be available to Eschelon so long as it is available to other
18 CLECs.¹²⁹

19 **Q. DOES ESCHELON HAVE ALTERNATIVE PROPOSED LANGUAGE**
20 **DEALING WITH THESE ISSUES?**

¹²⁸ See *Denney Direct*, pages 109 – 113.

¹²⁹ See *Denney Direct*, pages 114 – 119.

1 A. Yes. Eschelon now has four alternative language proposals for these issues. All
2 four proposals are included below:

3 **Proposal #1**

4
5 **Issue 9-50**

6
7 9.3.3.8.3.1 If Qwest performs or offers to perform the cross-
8 connect for any other CLEC during the term of this Agreement,
9 Qwest will notify CLEC and offer CLEC an amendment to this
10 Agreement that allows CLEC, at its option, to request that Qwest
11 run the jumper for Intrabuilding cable in MTEs on
12 nondiscriminatory terms and conditions.

13
14 **Issue 9-53**

15
16 9.9 Unbundled Customer Controlled Rearrangement Element
17 (UCCRE)

18 9.9.1 If Qwest provides or offers to provide UCCRE to any other
19 CLEC during the term of this Agreement, Qwest will notify CLEC
20 and offer CLEC an amendment to this Agreement that allows
21 CLEC, at its option, to request UCCRE on nondiscriminatory
22 terms and conditions.

23
24 **Proposal #2**

25 1.7.3 If Qwest desires to phase out or otherwise cease offering on
26 a wholesale basis to any Competitive Local Exchange Carriers an
27 Interconnection service, access to Unbundled Network Elements
28 (UNEs), additional Ancillary Services or Telecommunications
29 Services available for resale which is contained in the Statement of
30 Generally Available Terms (SGAT) or this Agreement, Qwest
31 must request and obtain Commission approval, after CLEC and
32 other potentially affected carriers are afforded reasonable notice
33 and opportunity to be heard in a generic Commission proceeding.
34 If the basis for Qwest's request is that Qwest is no longer required
35 to provide the product or service pursuant to a legally binding
36 modification or change of the Existing Rules, in the cases of
37 conflict, the pertinent legal ruling and the terms of Section 2.2 of
38 this Agreement govern notwithstanding anything in this Section

1 1.7.3. This provision is not intended to change the scope of any
2 regulatory agency's authority with regard to Qwest or CLECs.
3

4 1.7.3.1 Before Qwest submits a request to cease offering a
5 product or service pursuant to this Section 1.7.3, and while
6 a request pursuant to this Section 1.7.3 is pending before
7 the Commission, Qwest must continue to offer the product
8 or service to CLEC, unless the Commission orders
9 otherwise.
10

11 1.7.3.1.1 If the Commission orders that Qwest need
12 not offer the product or service while the
13 proceeding is pending, the Commission may place
14 such restrictions on that order as allowed by its
15 rules and authority, including a condition that if
16 Qwest later offers the product or service to any
17 CLEC, it must then inform CLECs of the
18 availability of the product or service and offer it to
19 other CLECs on the same terms and conditions. If
20 those terms and conditions are in this Agreement
21 (but were not in effect due to the Commission order
22 that Qwest need not offer the product or service
23 while the proceeding is pending), once Qwest offers
24 those terms to any other CLEC, Qwest must offer
25 those terms to CLEC pursuant to those terms in this
26 Agreement without amendment as well.
27

28 1.7.3.2 If the Commission approves the phase out or other
29 cessation of a product or service offering, the Agreement
30 will be amended as set forth in Section 2.2 to reflect the
31 outcome of the generic proceedings by the Commission,
32 except where CLEC notifies Qwest in writing that an
33 amendment is not required. Qwest will also amend its
34 SGAT consistent with the Commission's ruling, unless the
35 Commission orders otherwise.
36

37 **9.9 Unbundled Customer Controlled Rearrangement Element**
38 **(UCCRE)**
39

40 9.9.1 Qwest shall provide Unbundled Customer Controlled
41 Rearrangement Element (UCCRE) to CLEC in a non-
42 discriminatory manner according to the terms and conditions of
43 Section 9.9 and subparts of the Arizona SGAT, unless Qwest

1 obtains an order from the Commission that it need not offer
2 UCCRE to CLECs, such as an order pursuant to Section 1.7.3 of
3 this Agreement.

4
5 9.3.3.8.3 If CLEC elects to move its service to the new
6 minimum point of entry, CLEC may either perform its own cross-
7 connect or request that Qwest perform the cross-connect. If Qwest
8 performs the cross-connect appropriate time and material charges
9 are applicable.¹³⁰

10 **Proposal #3**

11 1.7.3 If Qwest desires to phase out or otherwise cease offering on
12 a wholesale basis (without first individually amending every
13 interconnection agreement containing that term and updating the
14 SGAT) an Interconnection service, access to Unbundled Network
15 Elements (UNEs), Ancillary Services or Telecommunications
16 Services available for resale, Qwest must request and obtain
17 Commission approval, after CLEC and other potentially affected
18 carriers are afforded reasonable notice and opportunity to be heard
19 in a generic Commission proceeding. For example, if a product is
20 generally available per the terms of the SGAT and is contained in
21 the ICAs of other CLECs (but not CLEC), before refusing to make
22 that product available to CLEC on the same terms on the basis that
23 Qwest intends to cease offering the product (such as due to lack of
24 demand), Qwest must either (1) amend the ICAs of those other
25 CLECs and update the SGAT to remove the product; or (2) obtain
26 Commission approval to cease offering the product on a wholesale
27 basis. This provision is intended to help facilitate
28 nondiscrimination by ensuring that Qwest cannot refuse to offer a
29 product on the same terms to CLEC while that product is still
30 contained in the ICAs of other CLECs or in the SGAT.

31
32 1.7.3.1 If the basis for Qwest's request is that Qwest is no
33 longer required to provide the product or service pursuant
34 to a legally binding modification or change of the Existing
35 Rules, in the cases of conflict, the pertinent legal ruling and
36 the terms of Section 2.2 of this Agreement govern
37 notwithstanding anything in this Section 1.7.3.
38

¹³⁰ This is the approved Qwest-AT&T ICA language that Qwest had previously agreed to and closed with Eschelon. See, e.g., Qwest multi-state draft (11/28/05) (showing as closed language). The relevant pages are attached to this testimony as Exhibit DD-15.

1 1.7.3.2 This Section 1.7.3 is not intended to change the
2 scope of any regulatory agency's authority with regard to
3 Qwest or CLECs.

4
5 1.7.3.3 This Section 1.7.3 relates to the cessation of a
6 product or service offering on a wholesale basis as
7 described in Section 1.7.3 (referred to as a “phase out” or
8 as “cease offering”). Nothing in this Section 1.7.3 prevents
9 another CLEC and Qwest from mutually agreeing to
10 remove a product from an individual ICA to which CLEC
11 is not a party.

12
13 1.7.3.4 Before Qwest submits a request to phase out or
14 cease offering a product or service (as those terms are used
15 in this Section 1.7.3) pursuant to this Section 1.7.3, and
16 while a request pursuant to this Section 1.7.3 is pending
17 before the Commission, Qwest must continue to offer the
18 product or service, unless the Commission orders
19 otherwise.

20
21 1.7.3.4.1 If the Commission orders that Qwest need
22 not offer the product or service while the
23 proceeding is pending, the Commission may place
24 such restrictions on that order as allowed by its
25 rules and authority, including a condition that if
26 Qwest later offers the product or service to any
27 CLEC, it must then inform CLECs of the
28 availability of the product or service and offer it to
29 other CLECs on the same terms and conditions. If
30 those terms and conditions are in this Agreement
31 (but were not in effect due to the Commission order
32 that Qwest need not offer the product or service
33 while the proceeding is pending), once Qwest offers
34 those terms to any other CLEC, Qwest must offer
35 those terms to CLEC pursuant to those terms in this
36 Agreement without amendment as well.

37
38 1.7.3.5 If the Commission approves the phase out or other
39 cessation of a product or service offering that is contained
40 in this Agreement, the product or service will no longer be
41 available per the terms of the Commission’s order without
42 the need for an amendment to this Agreement, unless the
43 Commission orders otherwise or the Parties agree to amend

1 this Agreement. Qwest will amend its SGAT consistent
2 with the Commission's ruling, unless the Commission
3 orders otherwise.

4
5 **For 9.9, 9.1.9 & 9.3.3.8.3: Same language as for Eschelon proposal #2**
6 **(language repeated below)**

7 **9.9 Unbundled Customer Controlled Rearrangement Element**
8 **(UCCRE)**

9
10 9.9.1 Qwest shall provide Unbundled Customer Controlled
11 Rearrangement Element (UCCRE) to CLEC in a non-
12 discriminatory manner according to the terms and conditions of
13 Section 9.9 and subparts of the Arizona SGAT, unless Qwest
14 obtains an order from the Commission that it need not offer
15 UCCRE to CLECs, such as an order pursuant to Section 1.7.3 of
16 this Agreement.

17
18 9.3.3.8.3 If CLEC elects to move its service to the new
19 minimum point of entry, CLEC may either perform its own cross-
20 connect or request that Qwest perform the cross-connect. If Qwest
21 performs the cross-connect appropriate time and material charges
22 are applicable.

23 **Proposal #4**

24 1.7.3 If Qwest desires to phase out or otherwise cease offering a
25 product, service, element, or functionality on a wholesale basis that
26 it has previously made available pursuant to Section 251 of the
27 Act, Qwest must first obtain an order from the Commission
28 adopting a process for doing so. Once that process in place, Qwest
29 may use that process as ordered by the Commission.

30
31 1.7.3.1 Unless and until a process is approved by the
32 Commission as described in Section 1.7.3, Qwest must
33 continue to offer such products, services, elements, or
34 functionalities on a nondiscriminatory basis, such that
35 Qwest may not refuse to make an offering available to
36 CLEC on the same terms as it is available to other CLECs
37 through their ICAs or the SGAT on the grounds that Qwest
38 , although it has not yet amended those agreements,
39 indicates that it intends to cease offering that product (such
40 as due to lack of demand). If the Commission does not
41 adopt a process as described in Section 1.7.3 or Qwest

1 chooses not to use that process, Qwest may cease a
2 wholesale offering by promptly amending all ICAs
3 containing that offering to remove it.
4

5 **For 9.9 & 9.1.9: As part of Proposal #4, Eschelon proposes that the language**
6 **of the SGAT for Section 9.9 and 9.9.1 and subparts be included in the Qwest-**
7 **Eschelon ICA, subject to Qwest being able to remove it through the process**
8 **described in Section 1.7.3.**
9

10 **For 9.3.3.8.3: As part of Proposal #4, Eschelon proposes the same language**
11 **for Section 9.3.3.8.3 as for Eschelon proposal #2, subject to Qwest being able**
12 **to remove it through the process described in Section 1.7.3. (language**
13 **repeated below)**

14 9.3.3.8.3 If CLEC elects to move its service to the new
15 minimum point of entry, CLEC may either perform its own cross-
16 connect or request that Qwest perform the cross-connect. If Qwest
17 performs the cross-connect appropriate time and material charges
18 are applicable.

19
20 **Q. WHAT IS QWEST'S PROPOSAL ON THIS ISSUE?**

21 **A.** Qwest's proposal remains unchanged. Qwest proposes the following language for
22 issue 9-50:

23 9.3.3.8.3.1 If during the term of this agreement a new negotiated
24 ICA or negotiated amendment has been approved by the
25 Commission that contains the option for Qwest to perform cross
26 connect jumper work for intrabuilding cable, at CLEC's request,
27 Qwest will offer CLEC an amendment to this agreement which
28 will include all the associated rates, terms and conditions as it
29 negotiated.
30

31 Qwest proposes the deletion of all other language proposed by Eschelon.

32 **Q. PLEASE EXPLAIN ESCHELON'S FOUR PROPOSALS.**

1 A. This issue presents a straight-forward application of the prohibition against
2 discrimination.¹³¹ Qwest currently offers to other CLECs an option under which
3 Qwest performs this work and, when it does so, charges the Commission-
4 approved rate for the services provided. Specifically, Qwest makes this option
5 available to both AT&T and Covad pursuant to those carriers' ICAs that were
6 approved by this Commission. When the FCC reversed the pick-and-choose rule,
7 it made clear that "existing state and federal safeguards against discriminatory
8 behavior" were still in effect and remained "in place" to provide needed
9 protection against discrimination.¹³² Therefore, Qwest cannot, consistent with its
10 obligation to not discriminate, offer such a UNE term under its ICAs with other
11 carriers but refuse to make that term available under its agreement with Eschelon.

12 Qwest has opposed Eschelon's proposed contract language regarding Qwest's
13 obligation to provide cross connect/wire work and UCCRE primarily on the
14 ground that there is no CLEC demand for these products and that Qwest,
15 therefore, is discontinuing offering them on a "going forward basis."¹³³ The
16 Minnesota Department of Commerce witness Dr. Fagerlund recommended that
17 the ICA include language that would enable Qwest to "phase out" elements that
18 are either no longer required or not needed. In response to Dr. Fagerlund's

¹³¹ See 47 U.S.C. § 251(c)(3) (duty of local exchange carrier to nondiscriminatory access to network elements on an unbundled basis).

¹³² ["Second Report and Order"] Second Report and Order, In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338 (July 8, 2004) ¶¶ 18, 20 23.

¹³³ See Issue No. Nos. 9-50 and 9-52, Qwest's position in the Issues Matrix.

1 recommendation, Eschelon has proposed new language (Eschelon proposal #2)
2 that would allow Qwest to phase out elements, subject to Commission review.

3 To address the concerns and recommendations of the Minnesota Department of
4 Commerce, Eschelon drafted and proposed “phase out” language that it believes
5 is similar to the proposal described by Dr. Fagerlund. Eschelon proposed placing
6 the language in Section 1.7, because this section already deals with ICA
7 amendments. As Section 1.7.1, in a sense, deals with the “phasing in” of new
8 products, Section 1.7.3 seemed like a logical place to place language relating to
9 the “phasing out” of products.

10 Eschelon’s Proposal #3 is offered to alleviate concerns raised by Qwest during
11 cross examination on this issue in the Minnesota arbitration. Eschelon’s Proposal
12 #3 clarifies that its proposal is intended to govern the operation of this
13 interconnection agreement and does not interfere with the negotiations of other
14 CLECs. An example has been added to assist in identifying the situation being
15 addressed.

16 Eschelon’s Proposal #4 is an alternative approach in which allows Qwest to
17 propose for Commission review and adoption a process for the phase out or
18 withdrawal of a product or service. Unless and until the Commission approves
19 such a process and it is followed by Qwest, Qwest must either amend all its ICAs
20 individually to eliminate the offering or offer the products and services on a
21 nondiscriminatory basis.

1 All three of Eschelon's phase out proposals attempt to remedy the current
2 situation in which Qwest is holding out products and services as being generally
3 available through its SGATs, and Qwest is obligated to provide them to other
4 CLECs under their ICAs, but Qwest will not offer these products and services to
5 Eschelon.

6 **Q. WHAT ISSUES DID QWEST RAISE RELATED TO THESE ISSUES?**

7 A. Qwest objects to Eschelon's language based on several arguments, including: (1)
8 although Qwest provided cross-connects and UCCRE to CLECs in the past, it has
9 no legal obligation to provide them;¹³⁴ (2) there is no demand for cross-connects
10 or UCCRE from CLECs, including Eschelon;¹³⁵ (3) "grandfathering" services is a
11 common industry practice and does not amount to discrimination;¹³⁶ (4) Qwest
12 has no processes or systems in place that would permit it to provide notification to
13 Eschelon in the event Qwest offers the service to another CLEC;¹³⁷ and (5) ICAs
14 are publicly filed and Eschelon can review them for itself to determine whether
15 Qwest is offering the service to other CLECs.¹³⁸

¹³⁴ *Stewart Direct*, pages 46 & 52.

¹³⁵ *Stewart Direct*, pages 46 & 52.

¹³⁶ *Stewart Direct*, page 48 - 50.

¹³⁷ *Stewart Direct*, page 50.

¹³⁸ *Stewart Direct*, page 50.

1 **Q. IS CROSS CONNECTS/WIRE WORK SIMPLY A VOLUNTARY OFFER**
2 **BY QWEST AND SHOULD QWEST BE ALLOWED TO END ITS**
3 **VOLUNTARY OFFER TO ESCHELON, BUT NOT OTHER CLECS?**

4 A. No. Qwest has sought Commission approval for the rates for this product across
5 Qwest's region. This product is included in Qwest's SGAT in Washington and
6 Qwest should not be allowed to remove itself from UNE obligations simply by
7 declaring today that its historical product offerings were voluntary. If Qwest
8 proposes changes in product it has historically made available to CLECs, Qwest
9 should go to the Commission, rather than to each CLEC. In addition, the current
10 demand for this product is irrelevant to Qwest's obligations to provide this
11 product and as long as Qwest makes this product available to other CLECs,
12 Eschelon should have the opportunity to avail itself of this product.¹³⁹

13 **Q. DOES QWEST HAVE AN OBLIGATION TO PROVIDE UCCRE TO**
14 **ESCHELON?**

15 A. Yes. I address this issue in my Direct Testimony at pages 117 - 118. Further, as
16 with cross connects/wire work this product is included in Qwest's Washington
17 SGAT and Qwest makes this product available to other carriers today.

18 **Q. IS GRANDPARENTING COMMON INDUSTRY PRACTICE, AS**
19 **DESCRIBED BY MS. STEWART?**

¹³⁹ See Denney Direct, page 112 – 113.

1 A. No. Qwest seeks to “grandparent” these services without regulatory approval.
2 This is not common practice. In fact, the example provided by Ms. Stewart
3 regarding “grandparenting” is contrary to Ms. Stewart’s claim regarding the
4 “industry practice.” To illustrate her grandfathering argument, Ms. Stewart uses
5 the elimination of the high frequency portion of the loop ("HFPL") as an example
6 where pre-TRO rates were longer available for CLECs that did not have
7 "grandfathered" line sharing arrangements. This example actually shows that
8 regulatory approval was needed before the ILEC could grandparent that service.
9 Qwest can seek that regulatory approval under Eschelon’s proposed Section 1.7.3
10 or, if there is a change of law, the ICA will be amended pursuant to Section 2.2.
11 In the TRO, rather than allowing the ILEC to eliminate HFPL CLEC-by-CLEC,
12 allowing the ILEC to withdraw the product from some ICAs but not others, as the
13 ILEC saw fit, the FCC ordered a transition plan including a specific
14 grandparenting rule. In contrast, under Qwest’s proposed language, Qwest could
15 eliminate services from Eschelon’s ICA with a provision that Eschelon can only
16 order that service if Qwest offers it to another CLEC in a newly negotiated
17 agreement. The next day, Qwest could provide the same product to another
18 carrier under the existing SGAT or an existing (i.e., not newly negotiated) ICA,
19 and Eschelon would be precluded from receiving the same service on a
20 nondiscriminatory basis.

1 **Q. IS ESCHELON REQUESTING THAT QWEST PROVIDE NOTICE TO**
2 **ESCHELON EACH TIME QWEST OFFERS THE SERVICE TO**
3 **ANOTHER CLEC?**

4 A. No. Qwest currently offers this product to other CLECs today and will likely
5 continue to do so at the completion of this interconnection agreement. Eschelon's
6 language provides that Qwest must allow Eschelon to obtain this product on
7 nondiscriminatory terms and does not require Qwest to provide notice each time it
8 offers this product to another CLEC. In addition, Qwest regularly provides notice
9 to CLECs through its notification process and places optional contract
10 amendments on its web site. There is no reason Qwest cannot continue to do this
11 going forward.

12 **Q. WHY SHOULD ESCHELON'S LANGUAGE BE APPROVED?**

13 A. Eschelon's proposal is a reasonable compromise to deal with Qwest's claims that
14 it no longer plans to offer this product in the future even though Qwest offers this
15 product in the present. Rather than dispute the availability and Qwest's obligation
16 to provide a product that Eschelon currently does not use, Eschelon's language
17 simply provides that as long as Qwest makes this product available to other
18 CLECs, Eschelon will have the option to amend its interconnection agreement to
19 use this product. In addition, Eschelon is willing to create a process where-by
20 Qwest could seek to remove its obligation to provide this product to Eschelon. If

1 Qwest's obligations are removed in the future, then Qwest is under no obligation
2 to offer an amendment for this product to Eschelon.

3

4 **SUBJECT MATTER NO. 22A. APPLICATION OF UDF-IOF TERMINATION**
5 **(FIXED) RATE ELEMENT**

6 **Issue No. 9-51: ICA Section 9.7.5.2.1.a**

7 **Q. DID QWEST ADDRESS THIS ISSUE IN ITS DIRECT TESTIMONY?**

8 A. No.

9

10 **SUBJECT MATTER NO. 23. DIFFERENT UNE COMBINATIONS**

11 **Issue Nos. 9-54 and 9-54(a): ICA Sections 9.23.2 (1 of 2 issues) and 9.23.5.1.3**

12 **Q. DID ANY PART OF THE LANGUAGE IN ISSUE NO. 9-54 CLOSE?**

13 A. Yes. The shaded portion of the language below has closed. However, the
14 underlined language remains in dispute and is discussed in the testimony of Mr.
15 Starkey as part of Subject Matter No. 27. MULTIPLEXING (LOOP-MUX
16 COMBINATIONS) – ISSUE NO. 9-61 and 9-61(a)-(c).

17 9.23.2 UNE Combinations are available in, but not limited to, the
18 following products: EELs (subject to the limitations set forth
19 below) and Loop Mux Combinations. If CLEC desires access to a
20 different UNE Combination, CLEC may request access through
21 the Special Request Process set forth in this Agreement. Qwest
22 will provision UNE combinations pursuant to the terms of this
23 Agreement without requiring an amendment to this Agreement,

1 provided that all UNEs making up the UNE Combination are
2 contained in this Agreement. If Qwest develops additional UNE
3 Combination products, CLEC can order such products without
4 using the Special Request Process, but CLEC may need to submit a
5 questionnaire pursuant to Section 3.2.2.

6 The dispute regarding the use of the term “Loop Mux Combinations” is address in
7 connection with Subject Matter No. 27, which is discussed in Mr. Starkey’s
8 testimony.

9 **Q. HAS ISSUE 9-54(A) CLOSED?**

10 A. Yes. This issue has closed with the following language:

11 9.23.5.1.3 If CLEC elects to use the SR process to obtain
12 access to a different UNE Combination, the recurring rates for the
13 UNE Combination will be no greater than the total of the recurring
14 rates in Exhibit A in that combination, unless Qwest negotiates
15 with CLEC that the particular SR request would require different
16 recurring rates. Any disputes regarding different rates other than
17 in Exhibit A would follow the dispute resolution process outlined
18 in Section 5.18. While any such rate dispute is pending, Qwest
19 shall make the different UNE Combination available at recurring
20 rates for the UNE Combination that are no greater than the total of
21 the recurring rates in Exhibit A in that combination, and those
22 recurring rates will be Interim Rates.

23

24 **SUBJECT MATTER NO. 25. SERVICE ELIGIBILITY CRITERIA**

25 **Issue Nos. 9-56 and 9-56(a): ICA Sections 9.23.4.3.1.1 and 9.23.4.3.1.1.1**

26 **Q. PLEASE SUMMARIZE THIS ISSUE.**

27 A. Qwest is required by the FCC to have cause before conducting an audit regarding
28 CLEC compliance with service eligibility requirements. Eschelon’s proposed

1 language memorializes this requirement and requires Qwest to provide
2 information to Eschelon that Qwest used to support its cause for review.

3 **Q. WHAT ISSUES DID QWEST RAISE RELATED TO THIS ISSUE?**

4 A. Qwest objects to Eschelon's proposed language that Qwest provide support for
5 cause before conducting an audit because: (1) Qwest claims there is no language
6 in the TRO or FCC rules requiring Qwest to have cause before conducting an
7 audit; and (2) Eschelon's proposal interferes with and weakens the audit rights
8 Qwest granted in the TRO.¹⁴⁰

9 **Q. DO THE FCC RULES SUPPORT ESCHELON'S PROPOSAL THAT**
10 **QWEST SHOULD HAVE CAUSE BEFORE CONDUCTING A SERVICE**
11 **ELIGIBILITY AUDIT?**

12 A. Yes, as I testified in my Direct Testimony¹⁴¹ Eschelon's language is supported by
13 the FCC in the TRO. The FCC stated that the auditing procedures it was adopting
14 were "comparable to those established in the *Supplemental Order Clarification*
15 for our service eligibility criteria..."¹⁴² The FCC specifically noted that these
16 criteria held that:

17 ...audits will not be routine practice, but will **only** be undertaken
18 when the incumbent LEC has a concern that a requesting carrier

¹⁴⁰ *Stewart Direct*, pages 75.

¹⁴¹ *See Denney Direct*, page 130 - 132.

¹⁴² *TRO* at ¶ 622.

1 has not met the criteria for providing a significant amount of local
2 exchange service.¹⁴³

3 Further, the FCC recognized, “that the details surrounding the implementation of
4 these audits may be specific to related provisions of interconnection agreements
5 or to the facts of a particular audit, and that the states are in a better position to
6 address that implementation.”¹⁴⁴

7 Eschelon’s language is therefore not only reasonable, but consistent with the
8 FCC’s findings in the *TRO*. It only makes sense that Qwest should be required to
9 have at least some reason to believe that there may be noncompliance that will be
10 uncovered by an audit. Otherwise, the audit process becomes a potential tool for
11 bullying rather than a measure for assuring compliance.

12 **Q. DOES ESCHELON’S PROPOSAL INTERFERE WITH AND WEAKEN**
13 **QWEST’S AUDIT RIGHTS UNDER THE TRO?**

14 A. No. Eschelon’s proposal is consistent with the TRO and merely provides that
15 Qwest have a concern that Eschelon has not met the service eligibility
16 requirements and that Qwest share this concern with Eschelon upon notice of an
17 audit. Additionally, Eschelon’s language requires Qwest to share information, if
18 it has any, about any circuits where Qwest believes there is non-compliance.

¹⁴³ *TRO* at ¶ 621, citing *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Supplemental Order Clarification (2000), at ¶¶ 28-33 (emphasis added), *aff’d sub nom. CompTel v. FCC*, 309 F.3d 3 (D.C. Cir. 2002).

¹⁴⁴ *TRO*, at ¶ 625.

1 Eschelon's language is not only reasonable, but may facilitate the resolution of
2 any concerns by initiating dialog through the exchange of information.

3
4

SUBJECT MATTER NO. 26. COMMINGLED EELS/ARRANGEMENTS

5 *Issue Nos. 9-58, 9-58(a), 9-58(b), 9-58(d), 9-58(e) and 9-59: ICA Sections*
6 *9.23.4.5.1, 9.23.4.5.1.1, 9.23.4.5.4, 9.23.4.6.6 (and subparts), 9.1.1.1.1,*
7 *9.1.1.1.2, and 9.23.4.7*

8 **Q. PLEASE SUMMARIZE THESE ISSUES.**

9 A. Qwest attempts to add an operational glue charge in order for Eschelon to
10 purchase a point-to-point commingled EEL. Unlike UNE EELs and the special
11 access equivalent to a UNE EEL, for commingled EELs Qwest proposals will
12 delay installation of commingled EELs, lengthen the repair intervals for these
13 circuits and make bill verification difficult. Qwest accomplishes this task by
14 requiring separate orders, separate trouble tickets and separate bills for each
15 component of the commingled EEL. Qwest's proposal not only diminishes the
16 usefulness of commingled EELs, but impacts the terms and conditions of the
17 UNE component of the commingled circuit.

18 A point-to-point Commingled EEL should be a useful and meaningful alternative
19 for the circumstances when a UNE EEL is no longer available. Because a
20 Commingled EEL is functionally equivalent to a UNE EEL, a Commingled EEL
21 should be put together (ordering, tracking, repair and billing) in a manner similar
22 to a UNE EEL. Eschelon's language accomplishes this task, while Qwest's

1 language allows Qwest to diminish the usefulness of the commingled EEL by
2 delaying provisioning and repair. In addition, Qwest's language allows Qwest to
3 provide bills for the components of the commingled EEL that are not related in
4 any way and thus extremely difficult to review and verify.

5 **Q. WHAT ISSUES DID QWEST RAISE RELATED TO THIS ISSUE?**

6 A. Qwest raises a number of generic arguments that Qwest repeats throughout its
7 testimony on this issue. Qwest argues that: (1) that Eschelon is seeking to have
8 Qwest's special access and private line circuit's terms and conditions be governed
9 by the ICA ;¹⁴⁵ (2) Eschelon should have taken this issue through CMP,¹⁴⁶ though
10 Qwest's testimony indicates it would have denied Eschelon's request; (3) other
11 CLECs are already using the commingled EELs differently than the way that
12 Eschelon has proposed;¹⁴⁷ (4) Qwest is not required by law to modify its systems
13 and Eschelon's proposal would require Qwest to modify its systems at significant
14 costs;¹⁴⁸ (5) Qwest would have problems generating proper bills if Eschelon's
15 proposals were implemented;¹⁴⁹ and 6) other types of transport-loop combinations
16 require multiple orders and circuit ids.¹⁵⁰

¹⁴⁵ See *Stewart Direct*, page 80.

¹⁴⁶ See *Stewart Direct*, page 88.

¹⁴⁷ See *Stewart Direct*, pages 97 - 98.

¹⁴⁸ *Stewart Direct*, pages 79 – 80, 87, 89, 90, 95, 98, 100, 101, 103, and 111.

¹⁴⁹ See *Stewart Direct*, pages 79, 90, and 94.

¹⁵⁰ *Stewart Direct*, page 81 - 82.

1 **Q. IS ESCHELON ATTEMPTING TO ALTER THE TERMS AND**
2 **CONDITIONS OF QWEST'S SPECIAL ACCESS CIRCUITS THROUGH**
3 **ITS LANGUAGE PROPOSALS?**

4 A. No. The purpose of this proceeding is to determine the terms and conditions that
5 apply to UNEs. It is Qwest that is attempting to modify the terms and conditions
6 that apply to the UNE component of commingled EELs. Qwest would
7 accomplish this goal by delaying installation and lengthening the process for
8 repairs. Eschelon's proposal does not seek to alter the terms and conditions of the
9 non-UNE component of the commingled EEL, but instead insures that the
10 commingled facility is sufficiently described such that it can be practically used
11 by Eschelon.

12 Ms. Stewart states that "Eschelon's demands that commingled arrangements be
13 put in place with a single LSR and be billed in CRIS is a direct attempt by
14 Eschelon to have the Commission (via an ICA arbitration) force Qwest to change
15 its special access and private line service order process and billing
16 arrangements."¹⁵¹ The intent of Eschelon's language is to allow Eschelon to place
17 a single order and receive a single bill for commingled EELs. Eschelon's
18 language is not intended to dictate the process that Qwest uses. Eschelon is
19 willing to change "LSR" to "Service Order" in 9.23.4.5.1 and 9.23.4.5.4, which
20 should clarify Eschelon's language and address Qwest's concern.

¹⁵¹ *Stewart Direct*, page 69 – 70.

1 **Q. WOULD THE TERMS AND CONDITIONS, SUCH AS ORDERING,**
2 **MAINTENANCE AND BILLING, RELATED TO LOOP-TRANSPORT**
3 **COMBINATIONS BE BETTER ADDRESSED IN CMP, RATHER THAN**
4 **THIS ARBITRATION?**

5 A. No. It is surprising that Qwest would make this claim since Qwest has stated that
6 this issue is currently not appropriate for CMP.¹⁵² Qwest's proposal to leave key
7 terms of the contract until some undefined later date¹⁵³ is unreasonable, especially
8 since parties are already before the Commission and Qwest is indicating that
9 Eschelon's proposals will be rejected in CMP. This issue is addressed in detail in
10 the testimony of Mr. Starkey. Mr. Starkey summarizes the need to address these
11 issues in the Interconnection Agreement rather than CMP.

12 [S]afeguards are needed to protect against the capability that
13 Qwest has to wield CMP as a shield and sword. Section 252
14 affords these safeguards through arbitrated interconnection
15 agreement terms. Eschelon has exercised its right to bring certain
16 terms and conditions to the Commission for review and to obtain a
17 dispositive decision. By dispositive, I mean a decision that meets
18 Eschelon's business need for certainty to plan its business and
19 remain competitive and also helps avoid disputes in the future by
20 providing clear terms on important issues. Relegating those issues
21 to CMP, rather than decide each issue on the merits of the disputed
22 contract language, would not meet that need.¹⁵⁴
23

¹⁵² See email Communications between Eschelon and Qwest attached to the Rebuttal Testimony of Ms. Johnson, BJJ-33.

¹⁵³ Note, there is no agreement to address these issues at a later date in CMP while Qwest unilaterally implements changes in the meantime. See *Starkey Direct*, pages 67 – 68; see also BJJ-7.

¹⁵⁴ *Starkey Direct*, page 77 - 78.

1 **Q. SHOULD THE COMMISSION CONSIDER WHETHER OR NOT OTHER**
2 **CLECS ARE CURRENTLY PURCHASING COMMINGLED EELS**
3 **UNDER QWEST’S ONEROUS TERMS IN DECIDING WHETHER TO**
4 **ADDRESS THIS ISSUE IN ESCHELON’S CONTRACT?**

5 A. No. The fact that other CLECs may have signed Qwest’s contract amendments or
6 have begun purchasing commingled EELs under terms dictated by Qwest is not
7 evidence or justification for imposing those terms, without question, on all
8 CLECs. Other CLECs decisions not to litigate onerous terms should not waive
9 Eschelon’s rights to raise these issues in its contract negotiations and have the
10 Commission decide these issues on the merits of the proposals. In any event,
11 Qwest provided no evidence to support its unverified suggestion about the alleged
12 success of other CLECs in purchasing commingled EELs. There is nothing in the
13 record to show that the problems Eschelon describes are not being and will not be
14 experienced by those CLECs.

15 **Q. DOES ESCHELON’S PROPOSAL REQUIRE QWEST TO MODIFY ITS**
16 **SYSTEMS?**

17 A. No. As stated in my direct testimony, Eschelon’s proposals simply “align the
18 ordering, tracking and repair and billing provisions of a UNE EEL and a
19 Commingled EEL.”¹⁵⁵ Further, “Eschelon is not asking Qwest to modify systems

¹⁵⁵ *Denney Direct*, page 134.

1 and incur costs...”¹⁵⁶ Qwest already has the systems in place for the Loop-
2 Transport Combination UNE EELs such that a CLEC can place one order, obtain
3 one circuit ID and receive one bill,¹⁵⁷ Qwest need not alter its systems for the
4 Loop-Transport Combination Commingled EELs.

5 Qwest has not explained why it can not do for Commingled EELs what it already
6 does for UNE EELs, other than to make sweeping statements about significant
7 systems changes and the high cost to implement these changes.

8 **Q. SHOULD QWEST HAVE PROBLEMS GENERATING PROPER BILLS**
9 **IF ESCHELON’S PROPOSAL IS IMPLEMENTED?**

10 A. There is no reason why Qwest should not be able to implement the price increases
11 associated with commingled EELs.¹⁵⁸ As addressed in my direct testimony,
12 Qwest provides a single bill for UNE EELs today. Qwest claims that if a non-
13 UNE circuit is mis-identified as a UNE circuit then billing errors could occur.¹⁵⁹
14 However, what Qwest fails to recognize is that in most cases, the necessity of a
15 commingled EEL is driven by the fact that a UNE component of a UNE EEL is
16 no longer available due to a finding of “non-impairment.” All high capacity UNE
17 loops may no longer be available in a wire center, or high capacity UNE transport
18 no longer available between two Qwest offices. Because the UNE component of

¹⁵⁶ *Denney Direct*, page 142.

¹⁵⁷ *See Denney Direct*, page 142.

¹⁵⁸ *See Denney Direct*, page 155.

¹⁵⁹ *Stewart Direct*, page 90.

1 the Loop-Transport combination is no longer available, there will not be two rates
2 for that component. There will only the single non-UNE rate, and thus no reason
3 for Qwest to become confused. Qwest's claims of billing complexity due to
4 multiple rates for the same element are especially incredible given Qwest's UNE-
5 P substitute products, Qwest Platform Plus ("QPP") and Qwest's Local Services
6 Platform products ("QLSP"). QPP circuits are subject to annual rate increases
7 and the rate changes involved with QPP are significantly more complex than the
8 rate change involved in changing from UNE rates to private line rates. Besides
9 changing each year, QPP rates differ depending upon whether the end-user
10 customer is a residential or a business customer and upon whether the CLEC has
11 met certain volume quotas. Qwest's new QLSP contains twelve different switch
12 port rates, for the same switch port in a single state, depending on whether the end
13 user customer is residence or business and the CLEC's year over year volume
14 changes.

15 Qwest further states that, because a UNE Loop is ordered via LSRs and billed
16 through CRIS and non-UNE transport is ordered via ASRs and billed through
17 IABS, the circuits must be kept separate.¹⁶⁰ This claim ignores a number of facts.
18 First, it is Qwest who insisted on separate billing systems, over the protest of
19 AT&T and MCI in the initial arbitrations.¹⁶¹ Second, while UNE Loops are

¹⁶⁰ *Stewart Direct*, page 79.

¹⁶¹ *See, e.g., In the Matter of the Petition for Arbitration of an Interconnection Agreement Between MCIMetro Access Transmission Services, Inc. and US WEST Communications, Inc. Pursuant to 47 USC Section 252*, Arbitrator's Report and Decision, Docket No. UT-960310, December 23, 1996,

1 ordered via LSRs and UNE transport is ordered via ASRs, UNE EELs (a
2 combination of UNE Loop and UNE Transport) are ordered on a single order
3 using an LSR and the bill contains both the UNE Loop and UNE Transport on a
4 single bill.

5 **Q. DOES QWEST ADMIT THAT ITS PROPOSAL WILL DELAY THE**
6 **INSTALLATION OF COMMINGLED EELS?**

7 A. Yes. Qwest argues that it “must install the tariffed circuit and the UNE circuit
8 separately from each other. In addition, the service orders for each circuit must be
9 complete before Qwest can install either circuit.”¹⁶² Qwest states that it must be
10 allowed to “add these intervals together to determine the total time required for
11 installation of commingled EELs.”¹⁶³ As addressed in my direct testimony,
12 Qwest’s proposal is problematic not only because it delays installation, but also
13 because it makes it impossible for the CLEC to calculate installation intervals for
14 this product and thus the CLEC cannot communicate effectively with its end user
15 customer regarding projected service readiness.¹⁶⁴

page 58.

¹⁶² *Stewart Direct*, page 102.

¹⁶³ *Stewart Direct*, page 102.

¹⁶⁴ *Denney Direct*, pages 159 -161.

1 **Q. DOES QWEST'S MODIFIED REPAIR PROCESS¹⁶⁵ ADDRESS**
2 **ESCHELON'S CONCERNS RELATED TO DELAY IN THE REPAIR OF**
3 **TROUBLED CIRCUITS?**

4 A. No, Qwest's proposed language still does not address the underlying concerns
5 related to the repair process that I identify and discuss in my Direct Testimony.¹⁶⁶

6 While Qwest acknowledges that no charges should apply in repair situations
7 where the trouble is found to be in Qwest's network, Qwest's proposal still
8 requires sequential, rather than parallel, repair processes, which could cause an
9 overall delay in repairing service to the end user customer. Qwest's newly
10 proposed language also does not address the issue that Qwest would avoid
11 performance requirements as a result of its sequential delay process.¹⁶⁷ Therefore,
12 Eschelon does not support Qwest's new language.

13 Under Eschelon's alternative proposal in issue 9-59 allows for Eschelon to open a
14 single trouble report for both of the circuits associated with a commingled EEL.¹⁶⁸

15 **Q. HAS QWEST PROPOSED ADDRESSING THIS ISSUE THROUGH CMP?**

16 A. Qwest's unilateral implementation of processes relating to TRO/TRRO issues is
17 discussed by Mr. Starkey.¹⁶⁹ As Mr. Starkey explains, Qwest has chosen to adopt

¹⁶⁵ *Stewart Direct*, page 105 - 108.

¹⁶⁶ *Denney Direct*, page 160 - 163.

¹⁶⁷ *Denney Direct*, page 160.

¹⁶⁸ *See Denney Direct*, page 161 - 164.

¹⁶⁹ *Starkey Direct*, page 65-78.

1 those policies, including policies relating to commingling, outside of CMP and
2 without CLEC input. However, on the day that the hearing in the Minnesota
3 arbitration commenced, Qwest changed its position, as reflected in a letter that it
4 sent to Eschelon in which it stated its intention to address some (but not all) of the
5 TRO/TRRO issues in CMP. Since then, however, Qwest has stated that CMP will
6 not address issues that are presently the subject of pending arbitrations or legal
7 proceedings. It is now unclear what issues Qwest will be submitting to CMP.
8 What is clear, however, is that CLECs, including Eschelon, have made repeated
9 requests to Qwest to negotiate regarding the terms and conditions that would
10 govern the TRO/TRRO issues and Qwest consistently refused.

11 **Q. PLEASE SUMMARIZE THESE ISSUES.**

12 A. Commingled EELs should be a useful and meaningful alternative to UNE EELs.
13 Because a Commingled EEL is functionally equivalent to a UNE EEL, a
14 Commingled EEL should be put together (ordering, tracking, repair and billing) in
15 a manner similar to a UNE EEL. Eschelon's language accomplishes this task,
16 while Qwest's language allows Qwest to diminish the usefulness of a commingled
17 EEL by delaying provisioning and repair. In addition, Qwest's language allows
18 Qwest to provide bills for the components of the commingled EEL that are not
19 related in any way and thus extremely difficult to review and verify. Eschelon's
20 language should be adopted for these issues.

1

2 **SUBJECT MATTER NO. 28. MICRODUCT RATE**

3 **Issue No. 10-63: ICA Section 10.8.2.29**

4 **Q. HAS THIS ISSUE CLOSED?**

5 A. Yes, this issue has closed with the following language:

6 10.8.2.29 In cities where Qwest has not deployed microduct and
7 CLEC wishes to use this technology, CLEC must lease an
8 innerduct at one-half (1/2) of the rate for innerduct in Exhibit A per
9 microduct placed within the innerduct. In these locations CLEC
10 will be required to furnish and place the microduct. At the
11 conclusion of the lease, CLEC and Qwest will make a joint
12 decision whether or not CLEC will be required to remove CLEC's
13 microduct from the innerduct.

14

15 **SUBJECT MATTER NO. 44. RATES FOR SERVICES**

16 **Issues 22-88, 22-88(a) and 22-88(b): ICA Sections 22.1.1, 22.4.1.3 and Exhibit**
17 **A, Section 7.11.**

18 **Q. PLEASE SUMMARIZE ISSUE 22-88 AND ITS SUBPARTS.**

19 A. Issues 22-88 and 22-88(a) deal with the language characterizing rates contained in
20 Exhibit A.¹⁷⁰ Eschelon proposes that rates in Exhibit A be referred to in general
21 terms, as "rates for services," without specifying the provider of services. Qwest
22 proposes that rates in Exhibit A be referred to as Qwest's rates. As I explained in
23 my direct testimony, a number of rates contained in Exhibit A apply to Eschelon's

¹⁷⁰ Issue 22-88 deals with the general references to rates in Exhibit A, while Issue 22-88(a) deals with a specific line item in Exhibit A describing rates for IntraLATA toll traffic.

1 charges to Qwest.¹⁷¹ Therefore, the ICA and its Exhibit A should not inaccurately
2 confine rates to “Qwest rates” or misleadingly refer solely to “Qwest tariffs,” as
3 proposed by Qwest. Eschelon’s proposal for Issue 22-88(b) complements the
4 already agreed-upon portions of the ICA¹⁷² that set a process for establishment of
5 interim rates. Eschelon’s proposal for Issue 22-88(b) clarifies that each company
6 has a right to request a cost proceeding at the Commission to set permanent rates.

7 **Q. WHAT ARGUMENTS DOES QWEST MAKE AGAINST ESCHELON’S**
8 **PROPOSAL IN ITS DIRECT TESTIMONY?**

9 A. Mr. Easton claims that Qwest does not purchase any services from Eschelon, and
10 therefore, that rates in Exhibit A apply only to Qwest’s services.¹⁷³ The various
11 citations to agreed-upon contract language that I refer to in my direct testimony¹⁷⁴
12 demonstrate that Mr. Easton is simply incorrect: Qwest does potentially buy
13 services from Eschelon, including those related to transit and exchange of traffic,
14 trouble isolation, managed cuts, and installation of interconnection trunks. Many
15 of these rates are set at the levels specified in Exhibit A. Mr. Easton is also wrong
16 when he claims that Exhibit A need not refer to charges from Eschelon to Qwest
17 because they are “spelled out specifically in the ICA.”¹⁷⁵ The citations to the ICA

¹⁷¹ See numerous citations from the agreed-upon language of the ICA contained in Denney Direct, pp. 170-173.

¹⁷² Section 22.6.1.

¹⁷³ *Easton Direct*, page 28 lines 5-10.

¹⁷⁴ *Denney Direct*, pages 170 - 173 and 175 - 177.

¹⁷⁵ *Easton Direct*, page 28 lines 7-8.

1 in my direct testimony show that, without Exhibit A, it is often impossible to
2 identify rates that Eschelon would charge. For example, the following provision
3 is clearly insufficient – *unless Exhibit A is used as the source of Eschelon’s rates*
4 –to determine what rate Eschelon would charge Qwest:

5 **8.2.3 General Terms--Caged and Cageless Physical Collocation**

6 8.2.3.10 ...If, pursuant to the random audit, Qwest does not
7 demonstrate non-compliance, *Qwest shall pay CLEC using the*
8 *rates in Exhibit A for Additional Labor Other, for CLEC time*
9 *spent, if any, as a result of Qwest’s audit...*

10

11 **Q. REGARDING ISSUE 12-80(A) “RATES FOR INTRA-LATA TOLL**
12 **TRAFFIC,” MR. EASTON CLAIMS THAT A REFERENCE TO QWEST’S**
13 **ACCESS TARIFF (RATHER THAN SIMPLY TO WASHINGTON**
14 **ACCESS TARIFF) IS APPROPRIATE BECAUSE THE CONTRACT**
15 **ALREADY SPELLS OUT WHEN ESCHELON’S ACCESS RATES**
16 **APPLY. PLEASE RESPOND.**

17 A. As I explained above, Exhibit A contains rates charged by both Qwest and
18 Eschelon. Therefore, referring to rates for the mutual exchange of intraLATA toll
19 traffic in Exhibit A as “Qwest’s rates” is misleading. As I explained in my direct
20 testimony,¹⁷⁶ comparison of the agreed-upon *contract language* and *Qwest’s*
21 *proposed language for Exhibit A* creates confusion and unnecessary ambiguity:
22 On the one hand, the contract spells out a situation in which the *CLEC charges*

1 Qwest for intraLATA toll. On the other hand, under Qwest’s proposal, Exhibit A
2 would say that rates for intraLATA toll traffic are to be found only in Qwest’s
3 Access Tariff. Qwest’s proposed language could lead to the mistaken conclusion
4 that a CLEC must charge access rates out of Qwest’s, rather than the CLEC’s
5 own, access tariff.

6 **Q. REGARDING ISSUE 12-88(B), HAS THE COMMISSION ALREADY**
7 **DETERMINED THAT SUCH LANGUAGE IS UNNECESSARY?**

8 A. No. Mr. Easton argues that Eschelon’s proposed language is unnecessary on the
9 grounds that the Commission found unnecessary similar language proposed in
10 AT&T/Qwest ICA arbitration.¹⁷⁷ The flaw in Mr. Easton’s argument is that he
11 cited the finding is the AT&T/Qwest case¹⁷⁸ in a vacuum, despite the fact that the
12 proposed language, which uses a clause “nothing in this Agreement,” is
13 contingent on the content of the specific ICA (Eschelon/Qwest ICA, not
14 AT&T/Qwest ICA). A comparison of Section 22 “Pricing” of both ICAs shows
15 that AT&T/Qwest ICA does not contain Sub-section 22.6 “Unapproved Rates.”¹⁷⁹
16 As I explained in my direct testimony, Issue 12-88(b) is closely linked to the
17 agreed-upon language of Section 22.6.1, which sets procedures for establishing
18 interim rates.

¹⁷⁶ Denney Direct, page 177.

¹⁷⁷ Easton Direct, p. 29.

¹⁷⁸ Docket No. UT-033035.

¹⁷⁹ See Qwest’s January 20, 2004 filing of the ICA in Docket No. UT-033035.

1 Specifically, the arbitrator in the AT&T/Qwest arbitration reasoned that AT&T's
2 proposal for Section 22.4.1.3 (the language similar to Eschelon's proposal for
3 Issue 12-88(b)) is unnecessary to preserve AT&T's ability "to ask for
4 Commission determination of *disputed* matters."¹⁸⁰

5 What is troubling is that Qwest is arguing that this arbitration is not the proper
6 forum to deal with disputes in rates.¹⁸¹ At this same time Qwest is proposes to
7 strike language that would allow specifically allow Eschelon to raise disputes
8 with regard to cost. In negotiations Qwest told Eschelon that only Qwest could
9 bring a cost case to the Commission. As a result, Eschelon's language is clearly
10 necessary.

11

12 **SUBJECT MATTER NO. 45. UNAPPROVED RATES**

13 *Issue No. 22-90 and Subparts: ICA Section 22.6 and Exhibit A Sections 8.1.1.2; 8.8.1;*
14 *8.8.4; 8.15.2.1; 8.15.2.2; 10.7.10; 10.7.12.1; 12.3; 9.2.8; 9.23.6.5; 9.23.7.6; 9.6.12;*
15 *9.23.6.8.1; 9.23.6.8.2; 9.23.7.7.1; 9.23.7.7.2; 8.13 and Subparts.*

16 **Q. PLEASE PROVIDE A BRIEF SUMMARY OF ISSUE 22-90 AND ITS**
17 **SUBPARTS.**

18 A. Issue 22-90 concerns Qwest's filing with the Commission for the approval of
19 previously unapproved rates for section 251 products. Eschelon's proposal was

¹⁸⁰ Arbitrator's Report in Docket No. UT-033035 dated December 1, 2003. This language is cited in Easton Direct on p. 29, lines 13-17 (emphasis added).

¹⁸¹ See *Million Direct*, page 3, *Easton Direct*, page 30, *Hubbard Direct*, page 37 and 48, and *Stewart*

1 updated since the filing of my direct testimony. Eschelon changed its proposed
2 language in section 22.6.1 of the ICA. Eschelon's modified proposal (which is
3 more narrow, in certain respects, compared to its original proposal captured in my
4 direct testimony) is as follows:

5 [Issue 22-90]

6 22.6.1 Qwest shall obtain Commission approval before charging
7 for a UNE or process that it previously offered without charge. If
8 Qwest offers a new Section 251 product or service or one that was
9 previously offered with a charge for which a price/rate has not
10 been approved by the Commission in a TELRIC Cost Docket
11 ("Unapproved rate"), Qwest shall develop a TELRIC cost-based
12 rate and submit that rate and related cost support to the
13 Commission for review within sixty (60) Days of the later of (1)
14 the Effective Date of this Agreement, or (2) Qwest offering the rate
15 to CLEC, unless the Parties agree in writing upon a negotiated rate
16 (in which case Qwest shall file the negotiated rate with the
17 Commission within 60 Days). Except for negotiated rates, Qwest
18 will provide a copy of the related cost support to CLEC (subject to
19 an applicable protective agreement, if the information is
20 confidential) upon request or as otherwise ordered by the
21 Commission. If the Parties do not agree upon a negotiated rate and
22 the Commission does not establish an Interim Rate for a new
23 product or service or one that was previously offered under Section
24 251 with an Unapproved Rate, CLEC may order, and Qwest shall
25 provision, such product or service using such Qwest proposed rate
26 until the Commission orders a rate. In such cases, the Qwest
27 proposed rate (including during the aforementioned sixty (60) Day
28 period) shall be an Interim Rate under this Agreement.

29 [Issue 22-90(a)]

30 22.6.1.1 For a UNE or process that Qwest previously offered
31 without charge, the rates in Exhibit A do not apply until Qwest
32 obtains Commission approval or the Parties agree to a negotiated
33 rate. If the Parties do not agree on a negotiated rate, the
34 Commission does not establish an Interim rate, and Qwest does not

1 submit a proposed rate and related cost support to the Commission
2 within the time period described in Section 22.6.1 for a new
3 product or service or one that was previously offered under Section
4 251 with an Unapproved Rate, the Unapproved rate(s) in Exhibit A
5 do not apply. Qwest must provision ~~the~~ such products and services
6 pursuant to the terms of this Agreement, at no additional charge,
7 until Qwest submits the rate and related cost support to the
8 Commission for approval.

9 Eschelon's updated proposal is similar to its original proposal in that in the event
10 of Qwest's cost case filing Qwest should provide, if Eschelon requests, the cost
11 support information, but removes a separate obligation on Qwest to provide notice
12 to Eschelon that it has filed a cost case. As I explained in my direct testimony,
13 the cost support information is necessary in order for Eschelon to make a decision
14 on whether to intervene in the case.¹⁸² Although provision to Eschelon of the
15 already filed cost support would require minimal effort on the part of Qwest,
16 Qwest does not agree to this proposal.

17 As discussed in my direct testimony, this language is intended to a decision by the
18 Minnesota Commission in the 271 case setting UNE rates.¹⁸³ Eschelon's updated
19 proposal also includes language that was added to confirm that the contract
20 requirements regarding obtaining approval of unapproved rates is the same as that
21 ordered in the Minnesota 271 case.

22 Note that Eschelon provided its updated proposal on November 21, 2006, after the
23 filing of the Washington direct testimony. Qwest's direct testimony does not

¹⁸² *Denney Direct*, pages 184-185.

¹⁸³ *Denney Direct* at p. 181, line 10-p. 181, line 8.

1 address this new proposal. Qwest has indicated since then that it does not agree to
2 this language.

3 **Q. IS ESCHELON PROPOSING THAT THE COMMISSION HAVE A FULL**
4 **COST CASE TO SET PERMANENT RATES IN THIS COST DOCKET?**

5 A. No. As explained in my direct testimony, there are a number of rates in Exhibit A
6 for which Qwest either lacks cost support, or has proposed rates that are in
7 violation of prior Commission orders. Eschelon's proposals for Issues 22-90(a)
8 through 22-90 (f) would establish **interim rates** for products and services for
9 which Qwest's cost support was particularly inadequate. Eschelon's rate proposal
10 is based (where available) on its corrections to Qwest's cost studies to include the
11 Commission-approved cost inputs. The rates proposed by Eschelon in 22-90(a) –
12 22-90(f) would be considered interim rates only. Permanent rates would be
13 established by the Commission in a cost case. Eschelon's rate proposal, as well as
14 Eschelon's acceptance of a large number of Qwest-proposed rates, does not mean
15 that Eschelon considers these rates, which are interim rates, to be cost-based, just,
16 reasonable and non-discriminatory. As explained in Eschelon's proposed
17 language for Issue 22-88(b) discussed above, Eschelon reserves the right to
18 request a cost case with the Commission to replace interim rates with permanent
19 rates.

20 Ms. Million is off base when she states, "It would be presumptuous of Eschelon to
21 believe its views represent the views of all other CLECs doing business in

1 Washington.”¹⁸⁴ As explained above, Eschelon is not seeking to establish
2 permanent rates in this arbitration. Further, Qwest’s statement leads one to
3 wonder if Qwest believes that CLECs are better served paying rates that are above
4 cost and have not been approved by the Commission. Eschelon’s proposed
5 interim rates are less than or equal to Qwest’s proposed interim rates. If the
6 Commission were to adopt these interim rates in this docket and Qwest were to
7 make these interim rates available to other CLECs in Washington, certainly no
8 CLEC would complain that it had to pay less money to Qwest.

9 **Q. HAVE THERE BEEN UPDATES TO EXHIBIT A SINCE IT WAS FILED**
10 **WITH THE COMMISSION AS PART OF QWEST’S PETITION ON**
11 **AUGUST 9, 2006?**

12 A. Yes. The table below highlights the changes in Exhibit A. There are four areas in
13 Exhibit A that were updated. While disputes continue regarding certain rate
14 elements in Exhibit A, there is no dispute that the updates listed below should be
15 reflected in Exhibit A. The shading below is used only to distinguish the four
16 areas that were updated.

¹⁸⁴ *Million Direct*, page 3.

WUTC Docket No. UT-063061
 Eschelon Telecom, Inc.
 Rebuttal Testimony of Douglas Denney
 December 4, 2006

	Recurring	Recurring, per Mile	Non- Recurring	REC	REC per Mile	NRC	Description of Changes
8.8.4 DS3 Circuit, per Two Legs	\$9.92		\$1199.14 \$599.57	1		1	Qwest proposes \$1199.14 Eschelon proposes \$599.57.
8.13.1.2 Power Reduction, with or without Reservation, per Feed Set							
8.13.2.2 Power Restoration, applies to Primary & Secondary Feed							
8.13.2.2.1 Power Restoration with Reservation							
Less Than 60 Amps			\$675.98 \$346.00			1	Qwest proposes \$675.98. Eschelon proposes \$346.00
8.13.2.2.1.1							
Equal To 60 Amps			\$942.94 \$346.00			1	Qwest proposes \$942.94. Eschelon proposes \$346.00
8.13.2.2.1.2							
Greater Than 60 Amps			\$1179.67 \$587.00			1	Qwest proposes \$1179.67. Eschelon proposes \$587.00
8.13.2.2.1.3							
8.13.2.2.2 Power Restoration without Reservation				ICB		3	
9.2.1.2 2-Wire Voice Grade Loop when Ordered with Port							
9.2.1.2.1 Zone 1	\$11.07			F			
9.2.1.2.2 Zone 2	\$13.44			F			
9.2.1.2.3 Zone 3	\$16.73			F			
9.2.1.2.4 Zone 4	\$28.04			F			
9.2.1.2.5 Zone 5	\$67.58			F			
9.2.2.2 2-Wire Nonloaded Loop when Ordered with Port							
9.2.2.2.1 Zone 1	\$11.07			F			
9.2.2.2.2 Zone 2	\$13.44			F			
9.2.2.2.3 Zone 3	\$16.73			F			
9.2.2.2.4 Zone 4	\$28.04			F			
9.2.2.2.5 Zone 5	\$67.58			F			
9.23.7.8 EEL Transport							
9.23.7.8.1 DS0 (Recurring Fixed & per Mile) (uses rates from 9.6.1)						+++++	
9.23.7.8.1.1 Over 0 to 8 Miles	\$16.59	\$0.10		A	A		
9.23.7.8.1.2 Over 8 to 25 Miles	\$16.59	\$0.07		A	A		
9.23.7.8.1.3 Over 25 to 50 Miles	\$16.58	\$0.07		A	A		
9.23.7.8.1.4 Over 50 Miles	\$16.59	\$0.14		A	A		
9.23.7.8.2 DS1 (Recurring Fixed & per Mile) (uses rates from 9.6.2)						+++++	
9.23.7.8.2.1 Over 0 to 8 Miles	\$33.12	\$0.51		A	A		
9.23.7.8.2.2 Over 8 to 25 Miles	\$33.12	\$0.65		A	A		
9.23.7.8.2.3 Over 25 to 50 Miles	\$33.13	\$2.30		A	A		
9.23.7.8.2.4 Over 50 Miles	\$33.13	\$2.70		A	A		
9.23.7.8.3 DS3 (Recurring Fixed & per Mile) (uses rates from 9.6.3)						+++++	
9.23.7.8.3.1 Over 0 to 8 Miles	\$224.72	\$10.60		A	A		
9.23.7.8.3.2 Over 8 to 25 Miles	\$225.41	\$11.55		A	A		
9.23.7.8.3.3 Over 25 to 50 Miles	\$231.08	\$30.34		A	A		
9.23.7.8.3.4 Over 50 Miles	\$233.13	\$34.70		A	A		
+++++ The nonrecurring charges for The EEL transport element are included in The EEL Loop and/or Multiplexed EEL nonrecurring charges. Therefore there is no additional nonrecurring charge for The EEL Transport. When an EEL transport circuit is commingled with a Private Line Channel Termination circuit, The nonrecurring charge for The commingled EEL will be The EEL Loop NRC.							

1

2

3 **Q. PLEASE DESCRIBE THE FOUR UPDATES MADE TO EXHIBIT A.**

4 A. The first change is to section 8.8.4, issue 22-90(b). Eschelon updated its proposed
 5 interim rate from \$329 to \$599.57. Eschelon's proposal is half of the Qwest
 6 proposed rate. Qwest did not provide any cost support for its rate proposal.
 7 Qwest did not file a cost study for this rate element. Eschelon previously

1 proposed \$329 using the NRC from section 21.1 of Qwest's FCC Tariff #1 (DS3
2 EICT NRC) as a proxy for this rate element.¹⁸⁵ Based upon continued review of
3 this rate element, which would be facilitated if Qwest provided cost support,
4 Eschelon no longer believes that the rate contained in Qwest's FCC Tariff #1 is
5 directly comparable to this product. Therefore, consistent with other interim rate
6 elements for which Qwest did not provide any cost support, Eschelon proposes
7 half of the Qwest proposed rate as the interim rate.

8 The second change was to sections 8.13.1.2 and 8.13.2.2, part of the dispute in
9 issue 22-90(f) and issue 8-23. As described previously, the contract language for
10 issue 8-23 has closed. This section provides that for DC Power Restoration with
11 Reservation the NRCs for DC Power Reduction will apply. Section 8.13.2.2 and
12 subparts were updated to reflect this agreement, though disagreement continues
13 regarding the rates. As a result of the update to 8.13.2.2, the title of 8.13.1.2 was
14 closed using Qwest's proposed title.

15 The third change was to sections 9.2.1.2 and 9.2.2.2, including subparts. These
16 rate elements reflect the Commission approved rates for cases where CLEC
17 orders an unbundled loop in conjunction with a Qwest switch port. These rate
18 elements were inadvertently removed because unbundled switching is no longer
19 part of this agreement. However, for the Qwest replacement UNE-P products, the
20 unbundled loop is ordered from the existing interconnection agreements and thus

¹⁸⁵ See *Denney Direct*, Exhibit DD-6.

1 the loop costs associated with loops ordered in conjunction with unbundled ports
2 should have remained.

3 The fourth change involves section 9.23.7.8 of Exhibit A, issue A-98. As
4 described in my direct testimony,¹⁸⁶ this issue has closed. The changes to Exhibit
5 A reflect this closure.

6 **Q. WHAT ARGUMENTS DOES QWEST MAKE IN ITS DIRECT**
7 **TESTIMONY AGAINST ESCHELON'S PROPOSAL ON ISSUE 22-90?**

8 A. Mr. Easton makes one argument. He claims that Eschelon's language is
9 unnecessary because CLECs "do not need a separate notice to be aware of a
10 *proposed rate* when it already *would be included in an interconnection*
11 *agreement.*"¹⁸⁷ This argument is puzzling and alarming: a *proposed* rate would
12 not automatically be contained in an interconnection agreement, unless all notices
13 and processes were simply absent.

14 **Q. WHAT ARGUMENTS DOES QWEST MAKE IN ITS DIRECT**
15 **TESTIMONY AGAINST ESCHELON'S PROPOSAL ON ISSUES 22-90(A)**
16 **THROUGH 22-90(F)?**

17 A. Mr. Easton, who lists these issues as Issues A-93, A-93(a), A-93(b), A-93(c) and
18 A-95, makes one vague argument that "[t]he merits of interim treatment of
19 unapproved rates should be treated a part of that process and not as a part of this

¹⁸⁶ *Denney Direct*, pages 200 – 201.

¹⁸⁷ *Easton Direct*, page 30 (emphasis added).

1 arbitration.”¹⁸⁸ By “that process” Mr. Easton means the filing process for
2 unapproved TERC rates agreed-upon in Section 22.6.1.¹⁸⁹ Note that the
3 agreed-upon language in Section 22.6.1 allows the interim (unapproved) rate to be
4 set at the level *negotiated* by Eschelon and Qwest. Mr. Easton suggests that
5 during negotiations about the rates Eschelon should not question the levels and
6 “merits” of rates proposed by Qwest, and instead should accept the rates *dictated*
7 by Qwest, no matter how unreasonable Qwest’s rate proposal may be.¹⁹⁰ In
8 essence, through Mr. Easton’s arguments Qwest is *refusing to negotiate* rates.
9 Qwest’s position is unreasonable, especially in light of the fact that Qwest has not
10 filed with the Commission for these rates, so no docket is currently open for the
11 Commission to review these rates, and therefore, the only way for Eschelon to
12 obtain these products right now is through negotiations about the rates.

13 Further, Mr. Easton’s claim that the “merits” of Qwest-proposed rates should not
14 be addressed in the ICA negotiations goes against the federal rules regarding the
15 ILEC’s duty to negotiate (CFR §51.301). Specifically, CFR §51.301 states that
16 the cost data should be provided as part of negotiations regarding rates. Below I
17 reproduce the relevant portions of CFR §51.301:

18 (a) An incumbent LEC shall negotiate in good faith the terms and
19 conditions of agreements to fulfill the duties established by
20 sections 251 (b) and (c) of the Act.

¹⁸⁸ *Easton Direct*, p. 30 - 31.

¹⁸⁹ *Easton Direct*, page 30 - 31.

¹⁹⁰ Mr. Easton is rephrasing Qwest’s argument that I have addressed in my direct testimony on pp. 192-193.

1
2 (c) If proven to the Commission, an appropriate state commission,
3 or a court of competent jurisdiction, the following actions or
4 practices, among others, violate the duty to negotiate in good faith:

5 ...
6 (8) Refusing to provide information necessary to reach
7 agreement. Such refusal includes, but is not limited to:

8
9 (ii) *Refusal by an incumbent LEC to furnish cost*
10 *data that would be relevant to setting rates if the*
11 *parties were in arbitration.*¹⁹¹

12
13 Clearly, by requiring that an ILEC negotiating in good faith should provide the
14 cost data for its negotiated rates, the rules imply that the “merits” of rates will be
15 considered during negotiations and arbitration.

16
17 **SUBJECT MATTER NO. 46. INTERCONNECTION ENTRANCE FACILITY**

18 *Issue No. 24-92: Section 24.1.2.2*

19 **Q. HAS THIS ISSUE CLOSED?**

20 A. Yes, this issue has closed and section 24.1.2.2 has been deleted.

21
22 **SUBJECT MATTER NO. 47. REMOTE COLLOCATION – ISSUE A-94 AND A-**
23 **94(A)**

24 *Issue Nos. A-94 and A-94(a): ICA, Exhibit A, Sections 8.6.1.3.1.1 and*
25 *8.6.1.3.1.2*

26 **Q. DID QWEST ADDRESS THIS ISSUE IN ITS DIRECT TESTIMONY?**

1 A. No.

2

3 **SUBJECT MATTER NO. 48. EEL TRANSPORT, NRC**

4 **Issue No. A-98: ICA, Exhibit A, Sections 9.23.7.8.1, 9.23.7.8.2 and 9.23.7.8.3**

5 **Q. IS THIS ISSUE CLOSED?**

6 A. Yes. As indicated in my direct testimony,¹⁹² this issue has closed and the
7 following footnote will be added to the appropriate rates in Exhibit A to clarify
8 that there are no additional charges associated with the installation and
9 disconnection of the transport portion of the EEL.

10 +++++ The nonrecurring charges for the EEL transport element
11 are included in the EEL Loop and/or Multiplexed EEL
12 nonrecurring charges. Therefore there is no additional nonrecurring
13 charge for the EEL Transport. When an EEL transport circuit is
14 commingled with a Private Line Channel Termination circuit, the
15 nonrecurring charge for the commingled EEL will be the EEL
16 Loop NRC.

17

18 **V. CONCLUSION**

19 **Q. DOES THIS CONCLUDE YOUR TESTIMONY?**

20 A. Yes.

¹⁹¹ CFR §51.301 (emphasis added).

¹⁹² *Denney Direct*, pages 200 – 201.