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

MICHAEL STARKEY

ON BEHALF OF ESCHELON TELECOM, INC.

DECEMBER 4, 2006

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I. INTRODUCTION

Q. PLEASE STATE YOUR NAME AND BUSINESS ADDRESS FOR THE RECORD.

A. My name is Michael Starkey. My business address is QSI Consulting, Inc., 243 Dardenne Farms Drive, Cottleville, Missouri 63304.

Q. ARE YOU THE SAME MICHAEL STARKEY WHO FILED DIRECT TESTIMONY IN THIS PROCEEDING ON SEPTEMBER 29, 2006?

A. Yes.

II. OVERVIEW OF REBUTTAL TESTIMONY

Q. WHAT IS THE PURPOSE OF YOUR REBUTTAL TESTIMONY?

A. I will respond to the direct testimony of Qwest. I have listed below the issues I address in my rebuttal testimony and the corresponding Qwest witness who addressed that issue in his or her direct testimony.

- Section III: Contractual Certainty – Interconnection Agreement/Change Management Process– Issues (Qwest witness Renee Albersheim[1]);

[1] Direct Testimony of Renee Albersheim on behalf of Qwest Corp., WUTC Docket No. UT-063061. September 29, 2006 ("Albersheim Direct").

- Section IV: Subject Matter 1 – Issue 1-1 and subparts (Qwest witness Renee Albersheim)
- Section V: Subject Matter 11 – Issue 8-21 and subparts (Qwest witnesses Robert Hubbard[2] and Teresa Million[3])
- Section VI: Subject Matter 12 – Issue 8-24 (this issue is closed)[4]
- Section VII: Subject Matter 14 – Issue 9-31 (Qwest witness Karen Stewart[5])
- Section VIII: Subject Matter 18 – Issues 9-43 / 9-44 and subparts (Qwest witness Teresa Million)
- Section IX: Subject Matter 19 – Issue 9-46 (this issue is closed)
- Section X: Subject Matter 24 – Issue 9-55 (Qwest witness Karen Stewart)
- Section XI: Subject Matter 27 – Issue 9-61 and subparts (Qwest witness Karen Stewart)

Q. HOW IS YOUR REBUTTAL TESTIMONY STRUCTURED?

A. Qwest's direct testimony includes a general discussion of the Change Management Process or CMP[6] as a basis for excluding terms from the interconnection agreement (which I respond to below in my discussion of the

[2] Direct Testimony of Robert Hubbard on behalf of Qwest Corp., WUTC Docket No. UT-063061. September 29, 2006 ("Hubbard Direct").

[3] Direct Testimony of Teresa Million on behalf of Qwest Corp., WUTC Docket No. UT-063061. September 29, 2006 ("Million Direct").

[4] I provide the closed language for Issue 8-24 below.

[5] Direct Testimony of Karen Stewart on behalf of Qwest Corp., WUTC Docket No. UT-063061. September 29, 2006 ("Stewart Direct").

[6] Albersheim Direct, pp. 3-28.

need for contractual certainty), as well as a discussion of the individual issues on the Issues by Subject Matter List[7] and Disputed Issues Matrix.[8] Even though a greater number of the topics (two-thirds) are not part of the contractual certainty/CMP discussion, I will again (as in my direct testimony) address the contractual certainty debate first, as it impacts multiple issues. Following the contractual certainty/CMP discussion, I will discuss individual issues by issue number. For the issues listed above, I provide a brief summary of the issue and the proposals of Eschelon and Qwest regarding that issue. I then address the arguments Qwest raised in its direct testimony regarding each of these issues, explain the flaws in Qwest's positions and then describe why Eschelon's ICA language should be adopted.[9]

Q. HAVE THE COMPANIES AGREED UPON LANGUAGE AND CLOSED ISSUES SINCE DIRECT TESTIMONY WAS FILED IN THIS PROCEEDING?

A. Yes. The parties have closed the following Issues:[10]

- Subject Matter 12 – Issue 8-24

[7] The Issues by Subject Matter List was filed as Exhibit 1 to Eschelon's Response to Qwest's Petition for Arbitration. I have provided an updated Issues by Subject Matter List reflecting the changes that have been made to the list as Exhibit MS-5 to this rebuttal testimony.

[8] The Disputed Issues Matrix was filed as Exhibit 1 to Qwest's Petition for Arbitration.

[9] For ease of reference, I have attached a list of Eschelon Direct and Rebuttal Exhibits as Exhibit MS-6.

[10] Issues 9-46 and 9-52 were closed at the time direct testimony was filed. See, Starkey Direct, p. 168 and Denney Direct, p. 113.

- Subject Matter 13 – Issue 8-29
- Subject Matter 16 – Issues 9-35 and 9-36
- Subject Matter 17 – Issues 9-39
- Subject Matter 23 – Issue 9-54 and 9-54(a)
- Subject Matter 28 – Issue 10-63
- Subject Matter 35 – Issues 12-75 and 12-75(a)
- Subject Matter 37 – Issue 12-77
- Subject Matter 38 – Issue 12-78
- Subject Matter 39 – Issues 12-80 and (a)-(c)
- Subject Matter 40 – Issue 12-81
- Subject Matter 46 – Issue 24-92
- Subject Matter 48 – Issue A-98

For each of these issues, the closed language is provided in Eschelon's rebuttal testimony. That these issues are now closed should not be interpreted as agreement with the arguments Qwest raised on these issues in its direct testimony.

III. QWEST DOES NOT DISPUTE THAT THE ICA CONTROLS OVER CMP; THEREFORE, ALL OF QWEST'S ARGUMENTS MUST BE BOTH MEASURED AGAINST THAT STANDARD, WHICH IS CAPTURED IN QWEST'S CMP DOCUMENT, AND CONSIDERED IN LIGHT OF QWEST'S SECTION 252 OBLIGATIONS AND THE NEED FOR CONTRACTUAL CERTAINTY.

Q. PLEASE PROVIDE A BRIEF SUMMARY OF EACH COMPANY'S POSITION AS IT RELATES TO THE NEED FOR CONTRACTUAL CERTAINTY.

A. For nearly one-third of the arbitration topics,[11] Eschelon and Qwest disagree as to whether the Eschelon-Qwest ICA should contain language detailing each company's responsibilities, or whether the Commission should simply "pass" on those issues, choosing instead to allow Qwest's CMP process to govern the ultimate terms and conditions rather than the certainty afforded by the ICA. It is Eschelon's position that language in the filed and approved ICA is critical so that Eschelon has certainty to plan and conduct its business. However, Eschelon's proposal is not without flexibility as Qwest's testimony indicates. When (or if) mutually agreeable modifications or changes in law occur, Qwest and Eschelon could simply amend the existing ICA. This process provides Eschelon the necessary certainty it requires, and also ensures that other CLECs can opt-in or negotiate similar terms consistent with Section 252 of the Act and Qwest's nondiscrimination obligation.[12] Qwest, on the other hand, proposes to exclude language on these issues from the ICA and relegate them to a forum in which it has much more control, and there is much less Commission oversight – *i.e.*, CMP.

[11] *See* Starkey Direct, p. 14, for this list of subject matters and see above for issues that have closed since direct testimony was filed.

[12] Although the FCC eliminated the pick-and-choose rule in favor of the all-or-nothing rule, when it did so, the FCC clearly stated that doing so did not limit the nondiscrimination provisions of the Act, which remain available to protect CLECs. *See* Section Report and Order, *In re. Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338 (Rel. July 13, 2004), at ¶¶20-23.

Q. YOU EXPLAINED IN YOUR DIRECT TESTIMONY THAT QWEST HAS CONFIRMED THE NEED FOR CERTAINTY IN THE ICA SO THAT PARTIES KNOW WHAT IS EXPECTED FROM THEM.[13] DID QWEST CONFIRM THIS POSITION IN ITS DIRECT TESTIMONY?

A. Yes. Qwest confirmed in its direct testimony that contractual certainty is important and is a valid basis for deciding to include terms in an interconnection agreement. Specifically, Qwest witness Ms. Stewart testified that "a critical goal of this arbitration should be establishing clarity concerning the parties' rights and obligations."[14] And perhaps most telling is Ms. Stewart's testimony that:

> a basic purpose of the ICA, as with any contract, is to give the parties certainty about their rights and obligations and to avoid or minimize future disputes about their rights and obligations.[15]

She added that "clear ICA language is necessary so that the parties ***know what is expected of them*** under the agreement and to avoid or minimize future disputes."[16] Further, she said that it is a "reasonable expectation" that a party's obligations "should be clearly defined and should not be subject to future interpretations" that a party "develops based on its needs and desires at a given

[13] Starkey Direct, pp. 14-16.

[14] Stewart Direct, p. 20, lines 6-8.

[15] Stewart Direct, p. 30, lines 14-16.

[16] Stewart Direct, p. 20, lines 6-9 (emphasis added); *see also* p. 20, lines 15 ("the goal of avoiding future disputes under the ICA").

time."[17] As I explained in my direct testimony, Eschelon likewise needs this contractual certainty (or what Ms. Stewart identifies as a "basic purpose of the ICA") and known set of rules, especially for issues that are likely to impact its core business operation and ultimately its ability to effectively service its customers. The Commission should set those rules in an ICA that is filed, approved and amended if changed. Unlike Qwest, Eschelon asks that the Commission provide that known set of rules for all of the open issues in the arbitration, and not just a subset hand-picked by Qwest.[18]

Q. PLEASE ELABORATE ON YOUR LAST POINT. WHY DO YOU SUGGEST THAT QWEST IS ASKING THE COMMISSION TO RULE ON ONLY A SUBSET OF THE ISSUES?

A. When an issue is to Qwest's advantage, Qwest welcomes, and often insists (*e.g.*, by requiring an ICA amendment),[19] on certainty in the ICA as to terms protecting Qwest's interests.[20] Yet, for a large number of issues for which Eschelon asks the Commission for a definitive decision, Qwest argues that the only decision that

[17] Stewart Direct, p. 20, lines 12-14. Qwest was specifically referring to itself as the party at the time. *See id*. Eschelon believes the statement applies to Qwest as well, such as Qwest's position that language should be subject to future interpretations that Qwest develops based on its needs and desires at a given time, through CMP (*see, e.g.*, CRUNEC example, Exhibit BJJ-9 & testing charge example, Exhibit BJJ-24, through disregarding CMP results (*see., e.g.*, the jeopardies example in Exhibit BJJ-5), and through non-CMP activities (*see, e.g.*, Qwest's recent collocation non-CMP notice discussed with respect to Issue 9-31, access to UNEs, and the non-CMP "TRRO" PCATs, discussed in Exhibit BJJ-7). See also, Exhibit BJJ-28 (list of Qwest non-CMP TRRO PCATs and URLs).

[18] Starkey Direct, p. 16.

[19] *See, e.g.*, Issue 12-67 (Expedites) & Exhibit BJJ-3; Starkey Direct, pp. 55-65 (CRUNEC example).

[20] *See, e.g.*, Issue 12-74 (Fatal Rejection Notices) in Webber Direct, p. 131-135.

should be made is a decision to punt the issue to CMP. While Qwest may naturally desire to protect its own interests by picking and choosing the issues it would like the Commission to decide, the Commission's decision should be based upon the merits of each company's proposed language. A decision that the decision should be made elsewhere (*i.e.*, CMP), is no decision at all, especially when one considers the distinct advantage Qwest enjoys in implementing or denying issues via CMP.

Q. HAS QWEST RECOGNIZED ESCHELON'S SIGNIFICANT KNOWLEDGE OF, AND EXPERIENCE IN, CMP WHICH SUPPORTS THE NOTION THAT ESCHELON'S CONCERNS ARE FOUNDED ON EXPERIENCE?

A. Yes. Qwest presented information in its testimony showing that Eschelon has been a very active participant in CMP, attending every meeting and taking part in change requests as well as the CMP Oversight Committee and the CMP Redesign process.[21] Eschelon is a carrier that can speak to Qwest's CMP process through first-hand experience (as also evidenced by the examples provided in my direct testimony and Ms. Johnson's direct testimony).[22] It is worth noting that it is exactly that experience which brought Eschelon to conclude that certain

[21] Albersheim Direct, pp. 23-25.

[22] Starkey Direct, pp. 46-78; *see also, e.g.*, Exhibits BJJ-5 & BJJ-6 (jeopardies), BJJ-2 (delayed/held orders), BJJ-9 & BJJ-10 & BJJ-11 (CRUNEC), BJJ-7 (Secret TRRO PCAT); *see also* additional examples in Exhibits BJJ-3 & BJJ-4.

provisions important to the day-to-day operation of its business must be contained in the ICA if Eschelon is to effectively serve its customers going forward.

Despite contrary claims by Qwest's witness,[23] including the relatively few terms and conditions sponsored by Eschelon for incorporation in the ICA via this arbitration will not eliminate the established CMP process or Eschelon's continued CMP participation.[24] This is demonstrated in part by the agreement of both Eschelon and Qwest to include the CMP Document as an exhibit to the ICA.[25] Like the CMP Document (Exhibit G) itself,[26] agreed upon language in the ICA dictates that when differences exist between the ICA and CMP, the ICA "shall prevail as between Qwest and CLEC."[27] While Eschelon has agreed to, and does actively, participate in CMP, its participation does not diminish its Section 252 rights to negotiate a meaningful ICA that dictates the terms and conditions by which it will do business with Qwest. Eschelon has, once again,[28]

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[23] Albersheim Direct, pp. 3 and 9.

[24] *See* Starkey Direct, pp. 23-24.

[25] ICA Exhibit G (closed language).

[26] Exhibit BJJ-1 (as well as Qwest Exhibit RA-1), §1.0 & §5.4; Starkey Direct, pp. 24-26.

[27] ICA Section 12.1.6.1.4; *see also* ICA Section 2.3.

[28] *See* discussion below regarding the Gap Analysis in CMP Redesign when Eschelon identified, as a gap, the need for CMP to account for differences in individual CLEC ICAs. *See also* Exhibit BJJ-1 (CMP Document), §1.0 & §5.4; *see also* discussion below of Exhibit BJJ-18 (CMP Redesign Meeting Minutes, January 22-24, 2002, Att. 9, Gap Analysis Issue #150) & Exhibit BJJ-19 (CMP Redesign Meeting Minutes, April 2-4, 2002, p. 15; Att. 6, pp. 167-168, closing action item #227 and Gap Analysis Issue #150). Meeting Minutes for CMP Redesign are also available on Qwest's website, *See*,

http://www.qwest.com/wholesale/downloads/2002/020225/1_CMP_Redesign_Final_Meeting_Minutes_Jan_22-24-02-22-02.doc (January 22-24, 2002) and

http://www.qwest.com/wholesale/downloads/2002/020715/CMP_RedesignMeetingMinutesApril2-4FINAL07-15-02.doc (April 2-4, 2002).

reserved the right to bring issues to ICA negotiation and arbitration as needed, notwithstanding use of CMP.

Q. MS. ALBERSHEIM ARGUES THAT ESCHELON IS ATTEMPTING TO SUBVERT THE CMP AND TO "TURN BACK THE CLOCK" IN SOME WAY TO RETURN US ALL TO THE DAYS BEFORE CMP. IS THAT TRUE?

A. Of course not. Eschelon is not attempting to eliminate,[29] undermine,[30] subvert,[31] or "turn back the clock"[32] on the CMP. Indeed, many of Eschelon's proposals simply reflect and preserve the work that has been achieved through the CMP process over a number of years.[33] For instance, the amount of time spent in CMP developing the Pending Service Order Notifications ("PSONs") (Issue 12-70) and Loss and Completion Reports (Issue 12-76) was longer than the term of the new ICA,[34] and Eschelon now seeks to "reflect these improvements" for these terms

[29] Albersheim Direct, p. 9, lines 14-15.

[30] Albersheim Direct, p. 30, lines 6-7; p. 99, lines 10-12.

[31] Albersheim Direct, p. 9, line 5; p. 26, lines 20-21; p. 27, lines 10-11; p. 36, line 22; p. 66, line 1; p. 69, lines 3-5; p. 73, lines 1-3; p. 79, lines 26-27; p. 86, lines 1-2; p. 87, lines 24-25; p. 90, lines 6-7.

[32] Albersheim, p. 28, lines 1-3. Regarding Ms. Albersheim's additional characterizations of Eschelon allegedly attempting to "freeze," "lock in," and set "in stone" the ICA terms (Albersheim Direct, p. 3, lines 3-5; p. 76, line 26; p. 77, lines 1-2; p. 77, lines 14-15; p. 9, lines 11-13; p. 27, lines 4-7; p. 89, lines 33-34; p. 36, lines 14-15; p. 65, lines 22-23; p. 72, lines 18-20; p. 79, lines 19-21; p. 85, lines 28-30; p. 87, lines 17-19; p. 90, line 1), please refer to the discussion in Mr. Webber's rebuttal testimony regarding Issue 12-76 (one of the many issues for which she makes the same claims).

[33] *See*, Starkey Direct, p. 30, lines 1-11.

[34] Webber Direct, p. 109, lines 2-3; p. 148, lines 12-16.

that "have proven effective for all."[35] In other words, rather than "turn back the clock" on CMP, Eschelon is in many ways attempting to ensure that Qwest cannot through future CMP activity, "turn back the clock" on progress already completed, at least throughout the term of this ICA. In this way, Eschelon can be assured that it is allowed to reap the benefits of the hard work it has invested in CMP to date. Plainly Eschelon has been an active participant in CMP[36] with a wealth of experience concerning both its benefits and limitations. The Commission can benefit from that experience as it considers the disputed issues in this case.

Q. YOU QUOTE QWEST'S REFERENCE TO INCLUDING "IMPROVEMENTS" MADE THROUGH CMP IN AN ICA. PLEASE EXPLAIN, AND INDICATE WHETHER QWEST IS ADVOCATING A BALANCED APPROACH IN THIS REGARD.

A. The difference between my use of Qwest's language above and Qwest's use of the same words[37] is that Qwest seeks to retain for itself alone the ability to decide when, whether, and to what extent to "reflect" processes, improvements, or other[38] changes in an ICA. Qwest seeks to deny the same opportunity to

[35] Albersheim Direct, p. 28, line 3.

[36] Albersheim Direct, pp. 23-25.

[37] Albersheim Direct, p. 27, line 25 – p. 28, line 1.

[38] This includes terms regarding changes of law that are not in Qwest's template agreement or amendments but do appear in its PCAT, though they have not even been through CMP. *See* Starkey Direct, pp. 65-73; Exhibit BJJ-7.

Eschelon, even in this arbitration, so its approach is not balanced. For example, in addition to advocating contractual certainty when convenient, Qwest witness Mr. Linse, in the companion Minnesota proceeding, testified in support of Qwest's proposed language for Issue 9-46 that it "is consistent with the PCAT."[39] Stated another way, it is OK to "reflect" PCAT language in the ICA[40] so long as Qwest is allowed to choose the language.[41] On the very next page of Mr. Linse's Minnesota testimony,[42] he opposes Eschelon's proposed language on another issue because it "attempts to inappropriately incorporate information from Qwest's product catalog ("PCAT") into the party's interconnection agreement."[43] This is just one example highlighting the fact that Qwest insists on picking and choosing the extent to which ICA language is appropriate or not, based upon how the argument furthers its specific objectives, not based upon some overarching commitment either to CMP or internal consistency.

[39] Linse Minnesota Direct Testimony, p. 8, lines 20-21.

[40] *See also* ICA Sections 12.1.3.2.5, 12.2.2, 12.2.2.2, 12.2.2.2.1, 12.2.2.2.2, 12.2.2.2.2.1, 12.2.3.1, 12.2.4.1.2.2, 12.2.4.1.8, 12.2.8.1, 12.3.5.1, 12.4.1.6 (was section 12.4.1.6.1 in 3/18/04 draft), 12.4.2.3, 12.4.3.1 (closed); *compare to* Exhibit BJJ-21 (annotated 3/18/04 draft of Section 12 indicating this language reflects PCAT language).

[41] Issue 9-46 is one of several issues that closed since the start of the Minnesota arbitration. A review of closed issues for which Qwest advocated use of CMP shows that Qwest is not applying a bright line test to decide whether issues belong in CMP or the ICA and these issues can be included in the contract if Qwest so desires. *See*, Exhibit BJJ-34 (Matrix of Closed Language and Associated CMP Activity, if Any).

[42] Linse Minnesota Direct Testimony, p. 9.

[43] Linse Minnesota Direct Testimony, p. 9, lines 17-19.

Q. SHOULD THE COMMISSION IGNORE QWEST'S PCAT IN THIS PROCEEDING?

A. No. Qwest's PCAT can be a useful tool in evaluating Qwest's stated concerns regarding Eschelon's proposed language. For example, when language similar (or identical) to that proposed by Eschelon is currently contained in Qwest's PCAT, the Commission must seriously question Qwest's claims that Eschelon's proposals (which are in actuality a reflection of the status quo) could force Qwest to incur substantial costs[44] to effectuate. Further, if Qwest makes unsupported assertions in its testimony regarding its current practices, the PCAT may assist in determining whether that claim is accurate.

Q. IS QWEST'S INCONSISTENT USE OF THE PCAT THE ONLY EXAMPLE OF QWEST SEEKING TO RETAIN FOR ITSELF ALONE THE ABILITY TO DECIDE WHEN, WHETHER, AND TO WHAT EXTENT TO REFLECT TERMS IN AN ICA?

[44] *See*, *e.g.*, Stewart Direct, p. 5, lines 3-11. In Qwest's position statements in the Disputed Issues Matrix for Issues 12-64, 12-70, 12-73, 12-74, 12-76, 12-81, and 12-86, Qwest claimed such costs, stating: "Further, implementing a unique process for Eschelon that Qwest does not follow for other CLECs would require Qwest to modify its systems or processes and would cause Qwest to incur costs it is entitled to recover under the Act."; *see* Webber Direct, pp. 23-46 (Issue 12-64); pp. 111-130 (Issue 12-71 - 12-73); pp. 131-135 (Issue 12-74); p. 143-150 (Issue 12-76); pp. 186-193 (Issue 12-86). Qwest makes absolutely no attempt to quantify these alleged costs. Qwest simply claims that it "could" incur costs due to Eschelon's proposals, indicating the absence of any serious analysis on Qwest's part to determine whether its claims are based in fact. In a nutshell, Qwest's claim about added costs due to Eschelon's proposals that could go un-recovered by Qwest is nothing more than conjecture.

A. No. Qwest refers to its own negotiation proposals (which Qwest offers in the form of a "template" proposed agreement or amendments) as "the ICA"[45] (rather than simply a Qwest proposal). In its "Introduction to Section 12 Issues,"[46] Qwest points out (erroneously)[47] that Qwest's "standard negotiations template"[48] was not used for the negotiation of Section 12, as though somehow this is a problem. Qwest attaches a draft of the so-called "rewrite"[49] of Section 12 as Qwest Exhibit RA-4. Generally, a company in negotiations does not come to the table and say "let's start with your language."[50] That Qwest finds it worth attaching a lengthy exhibit from 2004 and noting that Eschelon allegedly did not do so in this case (*i.e.*, start with Qwest's proposed language), however, suggests something about Qwest's entitlement mentality with respect to its template and its positions. Qwest even took the time to format the language proposals in its testimony differently from the proposed Qwest-Eschelon ICA (which the companies have negotiated from for years) and the Disputed Joint Issues Matrix, to reflect this suggestion by Qwest that its proposals are somehow the baseline (shown in black text) which Eschelon must justify changing (shown in underline/strikeout).

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[45] *See, e.g.*, Linse Direct, p. 19, line 17.

[46] Albersheim Direct, p. 39, lines 18-24.

[47] *See*, Johnson Rebuttal Testimony and Exhibit BJJ-21.

[48] Albersheim Direct, p. 39, lines 18-24.

[49] Albersheim Direct, p. 39, line 22.

[50] Ironically, however, that is in a sense what Eschelon had to do here, because it used a substantial amount of Qwest's template language, as well as language from Qwest's contract with AT&T.

Despite objecting to any Eschelon attempt to reflect improvements in ICA language, Qwest suggests that its template has resulted from Qwest exercising its judgment about which "improvements"[51] are best so that Qwest – knowing what is best for Eschelon – has "taken steps"[52] that should be reflected in "its contract language."[53] Specifically, Qwest states:

> It is true that there is process language contained in Qwest's interconnection agreements today. Like industry standards for systems and processes, Qwest' s contract language has evolved over time. Before the creation of the current CMP, many interconnection agreements were highly individualized. Through the extensive collaborations in the creation of the CMP, and the section 271 evaluations of Qwest's systems and processes, Qwest and the CLECs have created mechanisms to ensure that Qwest can provide the best service for CLECs. As a result, Qwest has taken steps to try to make its contract language reflect these improvements. While process language still exists, Eschelon should not be allowed to compound the problem and turn back the clock on the processes that have proven effective for all of Qwest's CLEC customers.[54]

This language suggests that a true collaborative effort is still going on that then finds its way into Qwest's template and will continue to do so throughout the term of the new ICA. That is not the case. The section 271 evaluations of Qwest's systems and processes ended with Qwest's 271 approvals,[55] the first of which was

[51] Albersheim Direct, p. 27, line 25 – p. 28, line 1.

[52] Albersheim Direct, p. 27, line 25.

[53] Albersheim Direct, p. 27, line 25 – p. 28, line 1.

[54] Albersheim Direct, pp. 27-28.

[55] In its *WA Covad Arbitration Order* (Order No. 4), the Washington commission specifically rejected Qwest's argument that practices that resulted from Qwest's Section 271 proceedings were required to be "uniform" in interconnection agreements that Qwest enters into with individual CLECs. It said: "While Qwest relies heavily on 'consensus' reached in the Section 271 proceeding . . . that

in December of 2002 and the last of which was in December of 2003. Before those approvals were granted, as indicated in the rebuttal testimony of Ms. Johnson,[56] Qwest at least held collaborative sessions and CMP CLEC Forums to discuss contract language changes with CLECs.[57] Qwest has not held a single similar CLEC Forum since then for this purpose.[58] Indeed, as discussed below, when Eschelon asked Qwest to use CMP to allow CLECs to have input into development of its new template and for Qwest to provide status information to CLECs about the template, Qwest flatly rejected the offer, indicating that "this is

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argument does not apply to an arbitration proceeding. Parties engage in arbitration to enter into an agreement tailored to the companies' needs, not to adopt a standard agreement." Order at ¶ 3-4. Regarding Qwest's claims about uniformity (Albersheim Direct, p. 3, lines 19 and 21; p. 28, line 12; *see also* Stewart Direct, p. 5, line 14; p. 121, line 18), *see* my direct testimony at pages 27-33.

[56] *See* June 16, 2003 Forum (http://www.qwest.com/wholesale/calendar/eventDetails/1,1456,86,00.html); Dec. 2003 CMP meeting minutes in which Eschelon asked when the next CLEC Forum would be (http://www.qwest.com/wholesale/downloads/2004/040116/CMPDistPkg01-21-04.pdf); Jan. 2003 CMP meeting minutes in which Qwest closed this action item without scheduling another CLEC Forum (http://www.qwest.com/wholesale/downloads/2004/040119/JanuaryCMPSysDistributionPackage.pdf).

[57] See, Exhibit BJJ-30, showing that Qwest did indeed discuss contract language in collaborative sessions and CLEC Forums before it received its 271 approvals. This exhibit shows that Qwest's own website describes the collaborative meetings to discuss the collocation terms as "CLEC Forums."

[58] Qwest held two identical telephone conference calls (whereas the CLEC Forums were in person) in the Summer of 2005 called "Qwest Wholesale Provisioning Forum." The notice for these conference calls states: "These calls are designed to convey information and insights related to the local service request provisioning process and the calls into the Qwest Call Handling Centers. They are intended for those who perform the work to assist them in their day to day work activities." In other words, these sessions were "how to" training sessions designed to "convey information" from Qwest to CLECs and were not the back and forth discussions that were supposed to be "collaborative" in the previous CLEC Forums. In short, these 2005 conference calls were just training sessions and not collaborative sessions. Perhaps this is why Qwest gave them a different name, recognizing that they were not "Forums" for discussions of CLEC issues. The only other more recent forums listed on the Qwest web page are inapplicable "wireless" forums.

not a CMP issue."[59] Further, to the extent that Qwest puts its proposals (*e.g.*, changes to the PCAT) through CMP, it largely does so through notices,[60] not collaboration, and even then Qwest alone selects which language to incorporate in its template and which to place only in its PCAT. Likewise, Qwest includes language in its template over the objection of CLECs to a change on the same issue in CMP,[61] and some proposals it does not put through CMP at all.[62] Simply put, Qwest alone is in charge of its template and the Commission should be aware that the template is not arrived at through collaboration with CLECs either in CMP or elsewhere.

Q. ARE THERE OTHER PROBLEMS WITH QWEST'S PROPOSAL TO PUNT CRITICAL ISSUES TO CMP?

A. Yes. Ms. Stewart admitted in her rebuttal testimony in Minnesota (at page 36) that "Qwest stopped updating its SGATs…and [SGATs] are therefore outdated documents." As I explained in my discussion of the Secret TRRO PCAT example, Qwest told CLECs that it was going to update its SGATs and address TRRO issues in CMP, but Qwest now admits that it has not updated its SGATs

[59] Exhibit BJJ-16 (Qwest Feb. 4, 2003 email).

[60] Starkey Direct, pp. 42-43.

[61] *See, e.g.*, Webber Direct, pp. 60-92 (Issue 12-67, Expedites) & Exhibits BJJ-3 & BJJ-4.

[62] *See, e.g.*, Starkey Direct, pp. 49-54 & Exhibit BJJ-2 (Qwest selectively putting 90 days but not "in the ground" language through CMP); *see also id.* pp. 65-77 & Exhibit BJJ-7 (Secret TRRO non-CMP PCAT notices); *see also* discussion regarding Issue 9-31 (access to UNEs).

since 2003[63] (before the TRRO was released) and has no intention to do so. Furthermore, Qwest recently issued a Level 1 CMP notice that informed CLECs that the SGATs will no longer be available effective November 16, 2006,[64] and Qwest has removed SGATs from its list of available agreements on its website and replaced them with Qwest's Negotiations Template Agreement (NTA),[65] which as discussed above, is being established without collaboration with CLECs and which contains Qwest's so-called "improvements." In other words, it is clear that Qwest is attempting to unilaterally establish its obligations related to the TRRO outside of CMP and outside the ICA, and will likely contend that it is too much work or too costly to change them later when Qwest's unilaterally-established terms and conditions are called into question.

Furthermore, I described above Qwest's "entitlement" mentality by which Qwest assumes that its negotiations template should be used as the baseline for negotiations, placing the burden on Eschelon to justify deviation from this template. Ms. Stewart explained that the "Template Agreement is based on the individual states' SGATs."[66] But if Qwest stopped updating its SGATs in 2003 as

[63] As discussed above, after Qwest received 271 approval, it has not held a single CLEC Forum for the purposes of discussing Qwest's template agreement.

[64] Process Notification PROS.11.15.06.F.04322.MultLangChangeforSGATs, dated 11/15/06, effective 11/16/06. This notice, along with Ms. Stewart's testimony from Minnesota showing that Qwest has no intention to update its SGATs is provided as Exhibit BJJ-38. This exhibit also contains information showing that Qwest has replaced on its websites SGATs with Negotiations Template Agreements and now provides SGATs for reference only (in PDF).

[65] The webpage that previously housed Qwest's SGATs (http://www.qwest.com/wholesale/clecs/sgatswireline.html), now contains Qwest's "Negotiations Template Agreement (NTA)" instead of SGATs.

[66] Stewart Minnesota Rebuttal, p. 36, lines 9-10.

Ms. Stewart explained in Minnesota, and the Template Agreement is based on these SGATs, then the Template Agreement, too, is an "outdated document." This provides even more reason to reject Qwest's notion that Eschelon should carry the burden to justify deviations from Qwest's Template Agreement.

Q. YOU MENTION ABOVE QWEST STATED THAT IT WOULD UPDATE ITS SGATS AND DEAL WITH TRO/TRRO ISSUES IN CMP, BUT DID NOT DO SO. DOES THIS UNDERSCORE ESCHELON'S CONCERN ABOUT PUNTING ISSUES TO CMP?

A. Yes. Now that Qwest has established 93 secret TRRO PCAT versions[67] outside of CMP (or negotiation) and without CLEC input, it recently indicated that it would take some (but not all) TRO/TRRO issues to CMP. On October 16, 2006, Qwest sent Eschelon a letter advising Eschelon of "a policy-related decision Qwest has reached" to take the issue discussed under Issue 9-58 in the arbitration to CMP "within the next two months"[68] (see, testimony of Mr. Denney for Issue 9-58).[69] Then, at the Minnesota hearing, Ms. Stewart testified that Qwest planned on taking all of the secret TRRO PCATs to CMP.[70] But, at the CMP Monthly

[67] *See,* Exhibit BJJ-28.

[68] Now that Eschelon has expended the money and resources to arbitration Issue 9-58, Qwest is attempting to pull the decision away from the Commission and belatedly decide for itself in CMP. If the result is unsatisfactory, Qwest would send Eschelon back to "square one" to expend more money and resources to litigate the issues again.

[69] Qwest's 10/16/06 letter and Eschelon's 10/17/06 response letter are attached to my testimony as Exhibit MS-7.

[70] Minnesota Transcript, Vol. III, p. 57, line 5- p. 58, line 4 (Oct. 18, 2006) (Ms. Stewart).

Meeting held on November 15, 2006, Qwest announced that it was bringing the TRO/TRRO CR (PC102704-1ES)[71] out of deferred status to address *some* (but not all) TRO/TRRO issues in CMP[72] and Qwest was unable to provide any additional information on which PCATs it intended to take to CMP at the following ad hoc call on this issue. Now that Qwest has unilaterally developed terms outside of ICA negotiations (despite requests by Eschelon and other CLECs),[73] CMP (despite promises by Qwest),[74] and Commission proceedings (also despite promises by Qwest),[75] it is considering these terms and conditions as Qwest's "existing" terms and conditions and will attempt to avoid modifications to the "existing" policies in CMP. Qwest has repeatedly flip-flopped on whether TRO/TRRO issues belong in CMP, and even if Qwest decides a issue does belong in CMP,[76] it will have likely already established an "existing" policy without any CLEC or Commission input, and force the CLEC to carry the burden to prove changes to that "existing" policy should be made. However, Qwest should not be establishing TRO/TRRO terms and conditions unilaterally in the first place, rather Qwest should be establishing those terms and conditions in

[71] *See*, Exhibit BJJ-7.

[72] Qwest stated that "TRRO issues that are being addressed by Qwest and CLECs in arbitrations of their ICAs or items being challenged by law will not immediately be processed through CMP." (11/15/06 CMP Monthly Meeting Minutes). However, as shown in Exhibit MS-7, Qwest has indicated its intention to take to CMP issues being addressed between Eschelon and Qwest in this arbitration under Issue 9-58.

[73] See, e.g., Exhibit BJJ-7, p. 4 (11/17/04 CMP November monthly meeting minutes).

[74] See, e.g., Exhibit BJJ-7, pp. 8-9 (6/30/05).

[75] Exhibit BJJ-7, pp. 8-9 (6/30/05).

[76] It remains unclear what issues Qwest will be submitting to CMP. Eschelon has inquired and is waiting for a response from Qwest.

negotiations/arbitrations, as CLECs have repeatedly requested and Qwest refused. The CLECs should not be forced in CMP (or elsewhere) to carry a Qwest-imposed burden of changing Qwest's "existing" terms and conditions – terms and conditions unilaterally established by Qwest.

Q. SHOULD EITHER CMP OR QWEST'S ICA TEMPLATE REPLACE INDIVIDUALIZED NEGOTIATIONS, CONTRACTS SPECIFIC TO INDIVIDUAL CLEC BUSINESS PLANS OR DECISIONS MADE BY THIS COMMISSION BASED UPON THE FACTS PRESENTED BY EACH COMPANY?

A. No. At pages 21-22 of my direct testimony I explained that the FCC rejected Qwest's claim that Qwest should be able to post terms on its website in lieu of an ICA, in part, because of the lack of Commission review and avoidance of Congressionally-mandated mechanisms of Section 252(e) of the Act. The FCC came to this conclusion approximately two years ***after*** the CMP was in place. The creation of the CMP did nothing to change the individualized nature of CLECs' business plans and did not change the Congressionally-mandated negotiation/arbitration process, which according to the FCC, should be detailed based on the individual needs of CLECs and available on a "permanent"[77] basis for the life of the contract (subject to ICA amendment).

[77] *FCC Forfeiture Order* at ¶ 32.

Nonetheless, Qwest attempts to intimate that its template is the predestined ICA with a mantle of authority, so Eschelon should not be deviating from Qwest's template and, if it does, should bear the burden of proving Qwest's template wrong.[78] The Act does not assign this burden to Eschelon or establish any presumption in Qwest's favor.

Q. SINCE THE MERE PRESENCE IN THE PCAT OR QWEST'S TEMPLATE DOES NOT INDICATE WHEN, WHETHER, AND TO WHAT EXTENT TO INCLUDE LANGUAGE IN AN ICA, WHAT FACTORS SHOULD THE COMMISSION CONSIDER?

A. I discussed these factors in my direct testimony in particular at pages 7-9 and 12-20. Also, as indicated above, Qwest in its direct testimony recognized the contractual certainty that I discussed as one of these factors, and many of the examples given throughout Eschelon's direct testimony and in its rebuttal testimony support the business and Customer-affecting issues that I raised as additional factors.

Q. QWEST ARGUES AGAINST INCLUDING "PROCESSES" IN AN ICA. DO YOU AGREE?

[78] *See* my discussion of Qwest's "entitlement mentality" above responding to Linse Direct, p. 19 (referring to Qwest's negotiations template as "the ICA") and Albersheim Direct, p. 39 (discussing Eschelon's "rewrite" of Qwest's negotiations template).

A. No. In Qwest's direct testimony, Qwest continues to argue against including "processes" in an interconnection agreement, however, Qwest has already agreed to do just that. Consistent with the FCC's definition of OSS,[79] closed language in ICA Section 12.1.1 states: "This Section describes Qwest's … ***manual processes***, that Qwest shall provide CLEC to support pre-ordering, ordering, provisioning, M&R, and billing."[80] This is not the first time Qwest has entered into an ICA containing processes either. The existing ICAs in Washington and Colorado specifically identify the attachment containing similar provisions as "Business Processes"[81] and "Business Process Requirements."[82] Attachments 5 and 6 to the existing Qwest-Eschelon ICA in Minnesota (which is an opt-in of the AT&T ICA) deal with Provisioning and Ordering and Maintenance terms and conditions. In other words, state commissions, including the Washington Commission, have previously recognized the need to address processes in interconnection agreements.

Although Qwest continues to argue against inclusion of processes in an ICA, its argument shifted somewhat in its direct testimony. Throughout the joint Disputed Issues Matrix, Qwest argued against inclusion of language that crossed

[79] In the Third Report and Order (at ¶ 425), the FCC said: "In the *Local Competition First Report and Order*, the Commission defined OSS as consisting of pre-ordering, ordering, provisioning, maintenance and repair, and billing ***functions*** supported by an incumbent LEC's databases and information. OSS includes the ***manual***, computerized, and automated systems, ***together with associated business processes*** and the up-to-date data maintained in those systems" (emphasis added).

[80] *Id*. (emphasis added); *see also* SGAT Section 12.1.1.

[81] CO Qwest-Eschelon ICA, Attachment 8.

[82] WA Qwest-Eschelon ICA, Attachment 5.

an allegedly bright line that it labeled processes and "PCAT-like process language" generally.[83] In its direct testimony, Qwest seems to recognize that there may be a spectrum or "gray area" in which processes may, or may not, be appropriate content for inclusion in an ICA. Specifically, Qwest said that interconnection agreements should not contain "***such*** product, process and systems operational ***specifics*** that these items cannot be managed via the CMP as intended."[84] In other words, Qwest argues there should not be too much detail. At pages 21-22 and 28 of my direct testimony I explained that the FCC and the Washington Commission have both found the need for detailed and often complicated ICAs, as "the devil is in the details." By addressing terms in the agreement, future potential disputes about those terms can be avoided.

Q. QWEST CLAIMS THAT EXCLUDING TERMS FROM THE ICA IN FAVOR OF CMP WAS "INTENDED."[85] DO YOU AGREE THAT THE CMP DOCUMENT AND ITS DEVELOPMENT REFLECT SUCH INTENT?

A. No. Qwest admits that the proceedings, meetings, and history of CMP culminated in creation of the CMP Document (Exhibit G to the ICA). Qwest specifically testified that, after the CMP Re-Design meetings, the "end result was the

[83] *See, e.g.*, Disputed Issues Matrix, Qwest position statement, Issue 1-1.

[84] Albersheim Direct, p. 9, lines 6-7. (emphasis added)

[85] Albersheim Direct, p. 9, line 7; *see also id.* p. 3, line 5 ("undermining" CMP); p. 9, line 14 (eliminate "purpose" of CMP).

Wholesale Change Management Process Document that governs CMP today."[86] The language of the CMP Document is very clear that interconnection agreement terms can conflict with activities in CMP and the PCAT and, when they do, the ICA governs:

> In cases of conflict between the changes implemented through this CMP and any CLEC interconnection agreement (whether based on the SGAT or not), the rates, terms and conditions of such interconnection agreement shall prevail as between Qwest and the CLEC party…

Ms. Albersheim quotes this very language from the Scope section of the CMP Document in her direct testimony,[87] and states that changes made via the CMP do not "trump"[88] provisions contained in individual CLEC interconnection agreements. She testifies, however, that "the converse ***should*** also be true."[89] Given the very clear directive in the CMP Document that ICAs govern in cases of conflict with CMP, the converse – *i.e.*, in cases of conflict between an ICA and the CMP, the CMP governs – cannot also be true. It would directly contradict the express provision found in the CMP Document (which is both Exhibit G to the ICA and is also posted on Qwest's website),[90] the SGAT,[91] and the ICA.[92]

[86] Albersheim Direct, p. 4, lines 18-20.

[87] Albersheim Direct, p. 8, lines 20-29.

[88] Albersheim Direct, p. 8, lines 16-19.

[89] Albersheim Direct, p. 9, lines 3-4 (emphasis added). Ms. Albersheim's use of "should" suggests that, while Qwest may believe the converse "should" be true, it recognizes that it is not, in fact, true.

[90] Exhibit BJJ-1 (CMP Document), §1.0; *see also* §5.4.

[91] SGAT, §2.3 & Exhibit G, §1.0 & §5.4.

[92] ICA §2.3 & Exhibit G, §1.0 & §5.4.

Simply put, there can be only one "trump," and consistent with the very foundation of CMP (*i.e.*, the CMP Document), that trump is the ICA.

Also, that the converse was not intended is shown by the CMP Redesign documentation leading to adoption of the scope language, quoted above. That documentation, which is attached to the testimony of Ms. Johnson,[93] indicates that the parties to the CMP Redesign identified gaps in Qwest's CMP that needed to be corrected to meet Qwest's obligation to provide CMP before obtaining 271 approval. Qwest created a "Gap Analysis" matrix listing these gaps and assigning them gap analysis numbers.[94] Eschelon identified, as a gap, the need for CMP to account for differences in individual CLEC ICAs. It appears as gap analysis number 150 in the posted CMP Redesign matrix:

> Qwest needs to establish and document a process to account for individual interconnection agreements ("ICAs") when implementing changes and using the Change Management Process ("CMP"). Qwest needs to ensure that ICAs are not unilaterally modified.

In Colorado, Qwest said:

> 'First of all, it has been addressed in these workshops by inserting language into the SGAT that indicated that the contract language controls over anything that could come out of the Change

[93] Exhibits BJJ-18 and BJJ-19. See also BJJ-30 showing that the CMP Redesign Meetings anticipated overlap between CMP and ICAs and that separate, individual terms can be established.

[94] Exhibits BJJ-18 (January 22-24, 2002 CMP Redesign Minutes) (Att. 9, excerpt from Gap Analysis matrix). Meeting Minutes available on Qwest's website, *see*,

http://www.qwest.com/wholesale/downloads/2002/020225/1_CMP_Redesign_Final_Meeting_Minutes_Jan_22-24-02-22-02.doc

> Management Process -- a contract is a contract, and I believe that's the same for any other ICA, as well.'[95]
>
> Qwest needs documented processes and checks and balances in place to ensure that Qwest can implement this concept and account for differences in ICAs (including ICAs not based on SGATs). The experience to date shows that Qwest's structure anticipates making global changes and steps need to be developed to account for individual differences before implementation.[96]

On April 4, 2002, Gap Analysis Issue #150 and related Action Item #227 (to "clarify SGAT language on CMP in sections 2.3.1 and 12.2.6, in addition, add language that states that CMP will not supersede and ICA") were closed in CMP Redesign because the above quoted language (from Section 1 of the CMP Document) was "inserted into the Scope section" of the CMP Document.[97] These documents show that, contrary to Qwest's claim,[98] the CMP was created in a manner to ensure that unwanted global (*i.e.*, uniform) changes would not be forced on CLECs, and that CLECs retained their Section 252 right to negotiate and arbitrate individual contracts with individual differences. Qwest obtained 271

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[95] Transcript of CMP Workshop Number 6, Colorado Public Utilities Commission Docket Number 97I-198T (Aug. 22, 2001), p. 292, lines 8-13 (Andrew Crain of Qwest).

[96] *Id.* Att. 9, pp. 99-100 (Gap Analysis issue #150) (footnote to CO 271 transcript in original).

[97] Exhibit BJJ-19 (April 2-4, 2002 CMP Redesign Minutes), p. 15; Att. 6 (Action Items Log, #227, pp. 167-168 & Att. 12). Meeting Minutes available on Qwest's website, *see*,

http://www.qwest.com/wholesale/downloads/2002/020715/CMP_RedesignMeetingMinutesApril2-4FINAL07-15-02.doc

[98] *i.e.*, Qwest's claim that the "entire purpose of CMP was to ensure that the industry (not just Qwest and one CLEC) is involved in creating and approving processes so that processes are uniform among all CLECs." This claim is repeated throughout Qwest's position statements in the joint Disputed Issues Matrix, See; e.g., Issue 1-1.

approvals after closing this "gap" by providing these assurances to CLECs, and Qwest should not be allowed to backslide on this commitment now.

Q. DOES THE CMP DOCUMENT'S PROVISION THAT INDIVIDUAL CONTRACTS WITH INDIVIDUAL DIFFERENCES CONTROL OVER CHANGES IN CMP "ELIMINATE THE PURPOSE AND EFFECTIVENESS OF THE CMP ALTOGETHER"[99]?

A. No, obviously not, since this provision is an integral part of CMP, as described above. Ms. Albersheim describes CMP as a method by which Qwest "communicates" various information to the CLEC community.[100] That is often the only way that CLECs receive important information from Qwest regarding Qwest's planned changes and policies. CLECs need to continue to receive that information. Eschelon and other CLECs also need a mechanism to comment on, or object to, proposed Qwest changes and to submit their own requests because Qwest changes are not only internal to Qwest but have an effect on Eschelon and how it may conduct business. Systems are used by both companies and they need to coordinate development and updating of those systems over time. Therefore, it is not accurate to suggest that an effective ICA process negates CMP or vice versa. Both CMP and the ICA negotiation, mediation and arbitration processes envisioned by Congress are meant to co-exist and will, by design, overlap.

[99] Albersheim Direct, p. 9, lines 14-15.

[100] See, e.g., Albersheim Direct, p. 12, line 20.

However, as the CMP Document recognizes, it is an ICA and its terms and conditions that must govern when terms conflict, and it remains the Commission's responsibility to choose binding contract language that best meets the obligations of the law and the underlying public policy for issues properly raised by one of the arbitrating parties. Again, simply deciding that an issue should be decided elsewhere in a forum controlled by Qwest (*i.e.*, CMP) will not result in a manageable ICA as envisioned by Section 252.

Q. WITH RESPECT TO THE SCOPE OF CMP, DOES QWEST RECOGNIZE THAT RATES AND THE APPLICATION OF RATES ARE OUTSIDE THE SCOPE OF CMP?

A. Yes, at least to some degree. Qwest admits that CMP does not "manage" rate changes and states that "Rate management is product specific and not a CMP activity."[101] As indicated in my direct testimony,[102] rates and the application of rates are outside the scope of Qwest's CMP. However, the Commission must be aware that certain terms and conditions that Qwest insists should be decided in CMP (rather than in an ICA) have the affect of changing rates, applying rates in situations when the recurring rate already covers the activity (*i.e.*, double recovery), or at a minimum, requiring CLECs to pay rates that they may not have been required to pay in the past. Eschelon opposes those types of CMP changes

[101] Albersheim Direct, p. 8, line 13.

[102] Starkey Direct, p. 59, line 19, p. 60, line 1.

even though Qwest may call them something other than a rate change. One example is the CRUNEC example I discussed in my direct testimony.[103]

Q. IN ADDITION TO DISCUSSING THE SCOPE OF CMP, QWEST DESCRIBES THE VOTING, POSTPONEMENT, AND DISPUTE RESOLUTION PROVISIONS OF THE CMP DOCUMENT. WILL YOU COMMENT ON THESE PROVISIONS?

A. Yes, I'll address voting first. Ms. Albersheim indicates that voting procedures are described in Section 17 of the CMP Document.[104] She does not, however, describe when voting in CMP occurs and, more importantly, when it does not. As I explained in my direct testimony, there is some ranking for systems changes and voting on issues of CMP procedure. However, for product and process changes (which are different from "systems" changes), Qwest does not need any kind of vote on adoption of, or consent to, its notification or change "request" before implementing it, provided that Qwest follows the applicable time periods.[105] In other words, Qwest is able to, and does, deny a CLEC product and process change request without a vote. Further, Qwest can, and does, implement its own sponsored product and process changes without the need for a vote. I mention

[103] Starkey Direct, pp. 55-65; *see also* Exhibit BJJ-9.

[104] Albersheim Direct, p. 25, line 25 – p. 26, line 1; *see also* p. 16, lines 19-21 (referring to a vote on the procedure of changing the disposition and not the substance of the underlying request); p. 25, lines 21-23 (referring to a vote on the procedure of making an exception request and not the substance of the underlying request).

[105] Starkey Direct, pp. 34, lines 11-13.

that here because without this background, the reader may get an inaccurate impression from Qwest's testimony about the significance of CMP's voting procedures which states: "Key to this section is the provision that every carrier (including Qwest) has one vote in the CMP."[106] Rather than being "key" to the issues in this case which would almost without exception entail no vote,[107] voting is insignificant due to Qwest's inherent ability in CMP to deny these types of proposals without a vote.

Q. DOES THE CMP DOCUMENT PROVIDE A CLEC WITH THE ABILITY TO REQUEST POSTPONEMENT OF A CHANGE WITH WHICH IT DISAGREES?

A. Yes, Ms. Albersheim discusses those provisions in her direct testimony.[108] The option to seek a postponement, however, offers very little protection to CLECs.

Q. WHY DO YOU SAY THAT?

A. First, the decision of whether to grant a CLEC's request for postponement of a change is left solely up to Qwest.[109] Second, even if Qwest grants a

[106] Albersheim Direct, p. 25, line 26 – p. 26, line 1.

[107] Changes, if any, related to Eschelon's proposals would largely be identified as product or process, not system, changes in CMP and, for any issue that Qwest would claim requires system changes, Eschelon is not requesting any change to the status quo that would require a change.

[108] Albersheim Direct, pp. 16-19.

[109] *See* Starkey Direct, p. 41, lines 14-15. See also, Sections 5.5.3.2 and 5.5.3.3 of the Qwest CMP Document (Exhibit BJJ-1).

postponement, that postponement may be for as few as thirty days.[110] This means that, if a CLEC needs to prevent a change from going into effect, it may have only thirty days in which to bring a complaint in each state in which Qwest intends to make the change and secure at least a preliminary ruling preventing Qwest from going forward with the change. It is for this reason that the CMP postponement criteria makes it very likely that important issues can come before the Commission in "crisis mode" in which a CLEC is asking the Commission, on a very short timetable, to prohibit Qwest from making a change that will adversely impact the CLEC's business. In these types of situations, given the leeway for a modest postponement window, it is likely that the Commission will be called upon to decide these types of issues on very limited record development.

Q. QWEST REFERS NUMEROUS TIMES TO THE CMP'S DISPUTE RESOLUTION PROCESS.[111] PLEASE DESCRIBE THE DISPUTE RESOLUTION PROCESS IN THE CMP.

A. The dispute resolution process of the CMP Document sets forth certain terms that a CLEC may pursue if the CLEC "does not agree with Qwest's reply or a CR [change request] is rejected."[112] Although the CMP Document provides that

[110] Qwest CMP Document (Exhibit BJJ-1), Section 5.5.3.2.

[111] Albersheim Direct, pp. 12, 16, 20-21, 24-25, and 31.

[112] Exhibit BJJ-20 (October 2-3, 2001 CMP Redesign Meeting Minutes, Att. 4, p. 34, Action Item #72). Meeting Minutes available on Qwest's website, *see*,

http://www.qwest.com/wholesale/downloads/2001/011114/CMP_Redesign_Meeting_October_2_3_Final_Minutes.doc

Qwest may also use the dispute resolution procedures, such a circumstance will "probably never"[113] occur because Qwest determines whether notifications are implemented and change requests are completed or denied.[114] In other words, since Qwest can unilaterally choose what it will, and will not, implement within CMP, it seems unlikely that Qwest would ever need to dispute its own decision. As I described in my direct testimony, this type of circumstance has an important impact on Qwest's willingness to "negotiate" any disputed changes, and also on the cost of bringing litigation that are necessarily borne by the CLEC. There is also an escalation process, but it is not a prerequisite to dispute resolution.[115]

Q. PLEASE EXPLAIN YOUR LAST POINT MORE FULLY.

A. The dispute resolution process of the CMP Document (Section 15) states that: "In the event that an impasse issue develops, **a party** may pursue the dispute resolution processes set forth below" (emphasis added). Those dispute resolution processes include the following:[116] (i) "Qwest or **any CLEC** may suggest that the

[113] When asked in CMP why Qwest would ever invoke the dispute resolution process, Qwest could not "think of anything" but wanted to "leave it in anyway." Exhibit BJJ-20 (October 2-3, 2001 CMP Redesign Meeting Minutes, Att. 4, p. 36, Action Item #86). The issue was closed with the notation to "keep in mind that Qwest will probably never use it." *Id*.

[114] For system changes, although there is ranking, Qwest determines the amount of resources that it will devote, which ultimately limits the number or size of changes that can be made.

[115] Exhibit BJJ-20 (October 2-3, 2001 CMP Redesign Meeting Minutes, Att. 4, pp. 35-36, Action Item #83). Meeting Minutes available on Qwest's website, *see*,

http://www.qwest.com/wholesale/downloads/2001/011114/CMP_Redesign_Meeting_October_2_3_Final_Minutes.doc

[116] Section 15 (Dispute Resolution) also sets forth the process for identifying a dispute in CMP and the format and content of these notices, and timeframes.

issue be resolved through an Alternative Dispute Resolution (ADR) process, such as arbitration or mediation using the American Arbitration Association (AAA) or other rules." (emphasis added); (2) "Without the necessity for a prior ADR Process, Qwest or **any CLEC** may submit the issue, following the commission's established procedures, with the appropriate regulatory agency requesting resolution of the dispute. This provision is not intended to change the scope of any regulatory agency's authority with regard to Qwest or the CLECs." Importantly, the dispute resolution process includes this express provision: "This process does not limit any party's right to seek remedies in a regulatory or legal arena at any time." Therefore, the term "may" in the earlier provision is clearly permissive, and a CLEC may choose not to use the CMP Document's dispute resolution procedures and may seek other remedies, including, but not limited to, raising issues through Section 252 arbitration. That is the forum Eschelon has chosen for these various topics and its choice is fully consistent with CMP.

The dispute resolution process of the CMP Document expressly allows for an individual CLEC to file for resolution of a CMP impasse issue at the state commission, and does not limit any party from seeking commission relief at any time.

Q. QWEST ACKNOWLEDGES THAT THE CMP DISPUTE RESOLUTION PROCESS ALLOWS FOR CMP ISSUES TO BE ADDRESSED IN AN ARBITRATION AT THE STATE COMMISSION, BUT CLAIMS THAT

THE ARBITRATION SHOULD INVOLVE ALL CLEC PARTICIPANTS FROM CMP.[117] IS THIS CORRECT?

A. No. As explained in my direct testimony at pages 44-45, both the dispute resolution process of CMP and the typical state commission complaint case allow for a single CLEC to dispute an issue with Qwest, as well as CLECs to intervene in, or jointly bring, disputes against Qwest. Further, an ICA is necessarily an agreement between two parties, in this case Qwest and Eschelon, and established Commission procedures govern arbitration of ICA issues. So, despite Qwest's unsubstantiated assertion that it is "not appropriate"[118] to raise a CMP dispute in an arbitration between two parties, the CMP Document expressly recognizes the right of a single CLEC to pursue remedies in any appropriate forum, including with the Commission, at any appropriate time. Qwest's new appeal for multiple-party arbitrations is just a re-hashing of Qwest's argument that CMP must be used so as to ensure homogenous terms and conditions among carriers – an argument the FCC and state commissions have already refuted. Further, even the existing CMP documentation does not support Qwest's assertions as to the proper method of dealing with these types of disputes. The highlighted (bolded) language in the Q&A above shows that the CMP dispute resolution process refers to Qwest and one CLEC (in the singular) pursuing remedies. There is no basis for Qwest's

[117] Albersheim Direct, p. 26, lines 10-15.

[118] Albersheim Direct, p. 26, lines 6-10.

statement that disagreements should[119] be addressed at the state commission only in proceedings involving all CLEC CMP participants.[120] In any event, in this arbitration, for most of the open issues, there is no CMP dispute as Eschelon is simply seeking to preserve work already completed in CMP.[121]

Q. MS. STEWART ACCUSES ESCHELON OF IGNORING THE CMP AND SUGGESTS THAT QWEST WOULD PREFER TO PROVIDE "THE OPPORTUNITY FOR INPUT FROM ALL INTERESTED CARRIERS WHO WOULD BE AFFECTED BY THE CHANGES."[122] IS THERE ANY EVIDENCE TO SUGGEST THAT QWEST'S CLAIM IS LESS THAN GENUINE?

A. Yes.[123] Qwest soundly rejected two opportunities for input from all interested carriers in this very negotiation and arbitration as well as in CMP. First, Eschelon asked Qwest to agree to coordination and participation of other CLECs in these ICA negotiations, but Qwest said no.[124] Second, Eschelon asked Qwest to use CMP to allow CLECs to have input into development of its new template and for

[119] Albersheim Direct, p. 26, lines 11. Once again, Ms. Albersheim's use of "should" suggests that, while Qwest may claim that a multiple CLEC arbitration "should" be permitted, it recognizes that it is not, in fact, required.

[120] In addition, all CLEC CMP participants may not be certified in a particular state, may not be affected by an issue, or may not have the resources to pursue regulatory relief.

[121] *See*, Starkey Direct, p. 30, lines 1-11.

[122] Stewart Direct, p. 5, lines 1-2.

[123] As indicated by the preceding discussion of the CMP Document's scope and dispute resolution provisions, Qwest is the party ignoring the CMP Document's express requirements.

[124] *See*, *e.g*, Exhibit BJJ-17 (Qwest-Eschelon letter exchange dated Sept. 23, 2003, Oct. 9, 2003, Oct. 17, 2003).

Qwest to provide status information to CLECs about the template, but Qwest also flatly rejected the offer, indicating that "this is not a CMP issue."[125] Both of these offers show that Eschelon welcomed multiple CLEC participation. In contrast, despite Qwest's many claims of concern about other CLECs,[126] Qwest would not agree to participation of other CLECs regardless of the context – negotiation, arbitration, or CMP.

Q. QWEST TESTIFIES THAT NO CHANGE REQUESTS DEVELOPED THROUGH CMP CONFLICTED WITH INTERCONNECTION AGREEMENTS.[127] DO YOU AGREE WITH QWEST'S SUGGESTION?

A. No. Significantly, Qwest did not testify that no Qwest *notification* has conflicted with interconnection agreements and that is an important distinction. As indicated in my direct testimony, a vast majority of Qwest-initiated product and process CMP changes are accomplished through Level 0-3 email notifications,[128] and it is telling that Qwest carefully limited its testimony to change requests. All requests

[125] Exhibit BJJ-16 (Qwest Feb. 4, 2003 email).

[126] The Commission should be extremely skeptical of Qwest' s implication that it is acting out of a desire to somehow "protect" other CLECs. As the FCC has observed:

> Incumbent LECs have little incentive to facilitate the ability of new entrants, including small entities, to compete against them and, thus have little incentive to provision unbundled elements in a manner that would provide efficient competitors with a meaningful opportunity to compete. We are also cognizant of the fact that incumbent LECs have the incentive and the ability to engage in may kinds of discrimination. For example, incumbent LECs could potentially delay providing access to unbundled network elements, or they could provide them to new entrants at a degraded level of quality. *First Report and Order*, ¶ 307.

[127] Albersheim Direct, p. 22, line 25 – p. 23, line 3.

[128] Starkey Direct, pp. 42-43.

by CLECs are change requests, as only Qwest can implement changes by email notifications in CMP. Naturally, a CLEC is unlikely to submit a change request that conflicts with its own ICA. Likewise, if Qwest believes that a product and process change request conflicts with an ICA, it has the capability in CMP to deny that request. Therefore, completed CLEC change requests are unlikely to result in conflicts with ICAs.

To the extent Qwest is suggesting that its own CMP activity, including its many notifications, has not resulted in conflicts with interconnection agreements, Eschelon disagrees. In the CRUNEC example in my direct testimony, Qwest created a conflict with CLEC ICAs by issuing a CMP notification containing a one-word change that was very business-affecting.[129] Issue 12-67 (expedites), which is discussed in the direct testimony of Mr. Webber,[130] is another example. Given that Eschelon has a pending complaint against Qwest for breach of contract and discrimination related to expedites,[131] it is pretty obvious that Qwest is not taking into account the perspective of CLECs[132] when making this unsupported suggestion.

[129] Starkey Direct, pp. 55-65; Exhibit BJJ-9.

[130] Webber Direct, pp. 60-92.

[131] Complaint, *In re. Complaint of Eschelon Telecom of Arizona, Inc. Against Qwest Corporation*, ACC Docket No. T-01051B-06-0257, T-03406A-06-0257 (April 14, 2006) ["Arizona Complaint Docket"].

[132] *See, e.g.*, Exhibit BJJ-4, p. 3, row 10 (Integra's CMP comments).

Q. MS. ALBERSHEIM STATES THAT QWEST CANNOT ACT ARBITRARILY "AT ALL"[133] IN THE CMP. WOULD YOU LIKE TO RESPOND?

A. The question is not whether Qwest can act "arbitrarily," the more pertinent question is whether Qwest can act in support of its own self interest at the expense of the CLECs. The answer to that question is "yes."

Q. BUT MS. ALBERSHEIM CLAIMS THAT CLECS CAN PREVENT QWEST FROM "UNILATERALLY MAKING CHANGES VIA THE CMP" AND PROVIDES DATA PURPORTING TO SHOW THAT QWEST WITHDREW 99 CHANGE REQUESTS EITHER BECAUSE CLECS VOCALLY OPPOSED THE CHANGES OR BECAUSE, IN THE CASE OF SYSTEMS REQUESTS, THEY WERE GIVEN SUCH A LOW PRIORITY.[134] IS MS. ALBERSHEIM'S TESTIMONY ON THIS POINT MISLEADING?

A. Yes. Ms. Albersheim claims that Qwest has withdrawn 99 change requests for one of two reasons: (1) CLECs have vocally opposed the changes, or (2) in the case of a systems change, the request was given a low priority. Given that Ms. Albersheim admits that the systems CRs were not withdrawn due to CLEC objection, what she is claiming is that all of the product and process CRs that

[133] Albersheim Direct, p. 25, lines 6-7.

[134] Albersheim Direct, p. 22, lines 15-23.

were withdrawn by Qwest were withdrawn because CLECs vocally opposed them. Ms. Johnson provides Exhibit BJJ-37, which shows that between 2001 and September 2006, Qwest withdrew 14 of the total 114 Qwest product and process CRs. Importantly, this exhibit shows that, contrary to Ms. Albersheim's claim, none of these CRs were withdrawn solely because of CLEC objection.[135] And though Ms. Albersheim's testimony may leave the impression that 25% of Qwest's changes (99 CRs out of a total 397 CRs) were withdrawn because of CLEC opposition in CMP, even under Qwest's misguided logic, this would only apply to the 14 product and process CRs that were withdrawn since 2001 – or 3.5% of total CRs. Ms. Albersheim's claim that Qwest has withdrawn CRs – all of the product and process CRs that have been withdrawn – because of CLEC opposition is not supported by the facts.

In any event, there is nothing in the CMP Document that requires Qwest to withdraw a notice or change request due to CLEC opposition (verbal or written), so despite Qwest's claims, CLEC opposition cannot prevent Qwest from unilaterally pursuing its own interests in CMP. Further, the examples I provided in my Direct Testimony show that when the issue is in Qwest's interest, it will

[135] See, Exhibit BJJ-37, columns entitled "Did Qwest Withdraw the CR Due to CLEC Objection?" and "CR Information on Reason for Withdraw." These columns show that none of the 14 product and process CRs in question were withdrawn because of CLEC opposition. For CR entries 7/22/04 and 3/6/06, it was jointly decided among Qwest and CLECs to withdraw them for good reason – not solely because CLECs objected. Qwest withdrew the 7/22/04 CR because Covad prevailed on the issue in an arbitration case and as explained in Exhibit BJJ-37, Qwest withdrew the 3/6/06 CR because CLEC volume was very small and because it was pointed out that the change conflicted with Qwest's SGAT. Though CLECs objected to these two CRs, Qwest agreed to withdraw them because CLECs provided a valid reason for withdrawal, so Qwest should not have introduced the CRs in the first place. Qwest's withdrawal of these change requests is not evidence of voluntary responsiveness to CLEC business concerns, as Ms. Albersheim insinuates.

implement changes despite vociferous CLEC objections – and that is the problem. Ms. Albersheim's statistics do nothing to refute the fact that Qwest has the ability within CMP to implement important changes despite CLEC objections, and that is why the certainty of an arbitrated ICA is so important. Ms. Albersheim points to a "number of procedures detailed in the CMP Document that prevent Qwest from acting arbitrarily in the CMP."[136] However, those procedures only go so far. Because of the extent of Qwest's control over CMP and Qwest's potential ability to adversely affect a CLECs' business,[137] Qwest can choose to follow those procedures or not, despite its earlier commitment to adhere to them. The jeopardies situation described in my direct testimony[138] is an excellent example of this. Despite all of Eschelon's efforts in CMP, and Qwest's completion of the change request, Qwest has elected to disregard the terms developed in CMP.[139] Ms. Albersheim also points to the dispute resolution provisions of the CMP document,[140] but they apply only to disputes and impasse issues. In the jeopardies example, there is no impasse issue in CMP because on paper Qwest completed the change request and agreed with Eschelon.

[136] Albersheim Direct, p. 25, lines 7-8.

[137] Almost immediately after the effective date of Qwest's unilateral email notification implementing a one-word PCAT change in the CRUNEC example discussed in my direct testimony (p. 55), Eschelon began experiencing a dramatic spike in the number of held orders relative to DS1 loops ordered from Qwest. Qwest's position as the monopoly provider of facilities ordered under the ICA places it in a position of control.

[138] Starkey Direct, pp. 46-49; *see also* Exhibit BJJ-5.

[139] *See id.*

[140] Albersheim Direct, p. 25, lines 17-19.

The bottom line is this: when a party expends the substantial resources necessary to bring issues properly before the Commission under Section 252, nothing in the CMP Document allows CMP to prevent resolution of the substantive issues in arbitration. Eschelon has identified specific contract language about important business and Customer-affecting issues that comports with existing law and underlying public policy. Despite Qwest's arguments to the contrary, it is the Commission in this forum, and not Qwest via CMP, which should make the final decision as to which language should govern the relationship between the parties through the term of the ICA.

IV. SUBJECT MATTER NO. 1. INTERVAL CHANGES AND PLACEMENT

Issue No. 1-1 and subparts: ICA Sections 1.7.2; 7.4.7, Exhibit C (Group 2.0 & Group 9.0), Exhibit I (Section 3), Exhibit N, Exhibit O

Q. PLEASE PROVIDE A BRIEF SUMMARY OF ISSUE 1-1 AND SUBPARTS RELATING TO INTERVALS.

A. Issue 1-1 and subparts deals with whether service intervals should be in the ICA and changed (lengthened) via a streamlined ICA amendment, as proposed by Eschelon, or whether intervals should be excluded from the ICA and instead governed and changed by non-contractual sources, as proposed by Qwest.[141]

[141] The contract language is found, by Issue number, in the Disputed Issues Matrix.

Q. WHAT REASON DOES QWEST PROVIDE TO SUPPORT ITS CONTENTION THAT ITS PROPOSAL ON ISSUE 1-1 AND SUBPARTS IS SUPERIOR TO ESCHELON'S?

A. Qwest rests its proposal for Issues 1-1 and subparts largely on its view that requiring intervals to be included in the ICA and changed via ICA amendment gives Eschelon control over service interval management, and takes it away from CMP.[142] Qwest expresses this concern about both Eschelon's primary proposal – *i.e.*, ICA amendments required for lengthening service intervals only – as well as Eschelon's alternative proposal – *i.e.*, ICA amendments required for all service interval changes.[143]

Q. IS THE ASSUMPTION THAT INTERVALS ARE MEANT TO BE WITHIN CMP'S CONTROL CORRECT?

A. No. The CMP Document states that it governs changes to intervals "in Qwest's Service Interval Guide ("SIG")."[144] Significantly, it does not refer to intervals in a party's interconnection agreement, because the ICA controls when those intervals change.[145] In a puzzling piece of testimony, Ms. Albersheim testifies that "Qwest's Service Interval Guide" is "attached to the proposed contract as

[142] Albersheim Direct, p. 30, lines 3-5; p. 30, lines 18-21; p. 38, lines 16-18; with respect to Qwest's CMP argument generally, see above discussion.

[143] Albersheim Direct, p. 30, lines 14-17.

[144] Exhibit BJJ-1 (CMP Document) at Section 5.4.5 (increases to SIG intervals; Level 4 change); *see also* Section 5.4.3 (decreases to SIG intervals; Level 2 change).

[145] Exhibit BJJ-1 (CMP Document) at Sections 1.0 & 5.4; *see also* ICA/CMP discussion above.

Exhibit C."[146] Exhibit C (Service Interval Tables) is ***not*** the SIG. Qwest and Eschelon are at impasse on Issue 1-1(e) because Eschelon believes the interval should appear in Exhibit C and be part of the ICA and, as stated in its position statement in the joint Disputed Issues Matrix for Issue 1-1(e), Qwest's position is: "For the reasons stated above, intervals belong in the Service Interval Guide (SIG)." With this position statement, Qwest recognizes that Exhibit C and the SIG are distinct.[147] Exhibit C contains contractual terms. The SIG, which contains intervals for additional products and services that Eschelon did not request be included in its ICA, is a web posting of intervals for Qwest's offerings.

Q. WOULD ESCHELON'S PROPOSAL INAPPROPRIATELY TAKE CONTROL OVER SERVICE INTERVAL MANAGEMENT AS QWEST CLAIMS?

A. No. First of all, the intervals proposed by Eschelon are the same intervals that are in place today, and Eschelon has proposed no changes to those intervals. Eschelon is not attempting to take control over the intervals, which are already established. Rather, Eschelon is attempting to provide certainty with respect to these intervals over the life of the ICA based on existing intervals, while at the

[146] Albersheim Direct, p. 28, lines 8-9.

[147] Ms. Stewart contradicts Ms. Albersheim on this point, where she testifies: "the proper placement of service intervals should be in the Qwest Service Interval Guide and not in Exhibit C." (Stewart Direct, p. 117, lines 10-12).

same time allowing those intervals to be amended via a simple, streamlined ICA amendment.

Q. WHY DO YOU CLAIM THAT THE AMENDMENT WOULD BE STREAMLINED WHEN QWEST CLAIMS IT IS CUMBERSOME AND WILL REQUIRE MICRO MANAGEMENT[148] BY THE COMMISSION?

A. Eschelon proposes to use, for lengthening intervals, the identical streamlined vehicle that is in place today for new products under Section 1.7.1 of the SGAT and other approved interconnection agreements. This makes use of simple advice adoption letters.[149] The advice adoption letters under Section 1.7.2 of the proposed ICA are not forms merely of Eschelon's creation but rather reflect minor edits of the existing advice adoption letters used for new products under Section 1.7.1 of the SGAT.[150] The body of Exhibit N (like the first paragraph of Exhibit

[148] Albersheim Direct, p. 30, lines 19 and 25.

[149] Eschelon and Qwest agree that Advice Adoption Letters identified as Exhibits L and M (also SGAT exhibits) should be used for new products. Both Exhibits are attached to the proposed ICA, with closed language that is the same as the language of these same exhibits to the SGAT. Eschelon proposes that Advice Adoption Letters identified as Exhibits N and O should be used for intervals, which are nearly identical to Exhibits L and M in format and substance (though they apply to intervals instead of products) and would be used to amend the ICA in the same way. Because an interval is simply a time period as opposed to a new product (which would have a description and other requirements), language from Exhibits L and M referring to other requirements on Qwest's web site has been omitted from Exhibits N and O. (Because the interval, unlike all of the terms associated with a new product, is repeated in the Advice Adoption Letter, the interval-related exhibits do not need the additional language about terms found in the website but not the letter. The interval is in the letter.).

[150] Compare closed Exhibits L (Advice Adoption Letter) and M (Interim Advice Adoption Letter) that apply to new products to Eschelon-proposed Exhibits N (Interval Advice Adoption Letter) and O (Interval Interim Advice Adoption Letter) that apply to new intervals. differences between the agreed-to Advice Adoption Letters and the Eschelon-proposed Advice Adoption Letters is that Eschelon's proposed Advice Adoption Letters use the term "new interval for product/service" instead of the term "new product" (with a few additional textual changes to refer to intervals instead

L) is four lines long. Exhibit O (like Exhibit M) is a one page letter. These are not complex or entirely new forms or procedures.

If a CLEC is prepared to accept Qwest's terms, the CLEC signs the letter (in the form attached to the ICA) and sends the letter to the Commission for approval. There are also interim terms for when the parties do not agree to all the terms (as in Section 1.7.1.2 for new products). This "letter" that is also available for new products under the SGAT, is not cumbersome and does not require micro management. It is designed to be easier than administering other ICA agreements or amendments that come before the Commission for approval. The presence of the virtually identical agreed-to amendment for new products in the SGAT also demonstrates that this is not unique to Eschelon's proposal, as Qwest claims. Qwest routinely manages other ICA amendments and may manage these in the same way.

Q. WHAT IF QWEST WANTS TO LENGTHEN ONE OF THESE INTERVALS IN THE SIG? WOULD IT BE PREVENTED FROM DOING SO?

A. No. Qwest has the opportunity to propose a lengthened SIG interval via the CMP process, and if it chooses, also seek a change to that interval in Eschelon's ICA via an advice letter amendment to the ICA. Qwest's view of the interplay

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of "rates, terms and conditions" for a new product). The agreed-to Advice Adoption Letters also require the rates, terms and conditions related to the new product be attached to the Letter, whereas the Eschelon-proposed Letter would refer to the new interval in the body of the Letter.

between CMP/SIG and ICAs is incorrect. For the reasons I discussed above with respect to the scope of the CMP, Qwest has it backwards. Qwest claims that terms and conditions established in CMP/SIG should govern the ICA, when the CMP Document recognizes individual ICA differences and states that they govern.

Q. IF THE COMMISSION ADOPTS ESCHELON'S PROPOSAL AND INCLUDES EXISTING SERVICE INTERVALS IN THE ICA, DOES THIS MEAN THAT QWEST'S SERVICE INTERVALS ARE SET IN STONE?[151]

A. No. Eschelon's primary proposal would allow intervals to be shortened without ICA amendment, which means that based on past experience, a vast majority (if not all) interval changes could be modified without ICA amendment. The only way an amendment would be necessary is if Qwest departs from past practice and pursues lengthened intervals – something that it has not done before and a strategy that could harm Eschelon and its customers who rely on those intervals. The fact that Qwest will not agree to Eschelon's language suggests to me that it may attempt to pursue such a strategy if the Commission adopts Qwest's proposal.

[151] Albersheim Direct, p. 36, lines 14-15 ("…all of these changes are Eschelon's attempt to set current intervals in stone in its contract…")

Q. QWEST POINTS TO REQUESTS MADE BY A NUMBER OF CLECS TO CHANGE EXISTING SERVICE INTERVALS.[152] DOES THIS OBSERVATION SUPPORT QWEST'S PROPOSAL ON ISSUE 1-1?

A. No, Qwest's observation supports Eschelon's proposal. Ms. Albersheim points to interval change requests ("CRs") submitted in CMP by AT&T, Eschelon, Comcast, Covad and Qwest, presumably to support the point made in her previous Q&A that Eschelon's language would somehow prevent other CLECs from requesting changes to Qwest's intervals. All of the CLEC-requested changes, however, were to shorten intervals, which are allowed under Eschelon's proposal without an ICA amendment.[153] And, again, Qwest could pursue a lengthened interval in CMP independent of the interval in Eschelon's contract or could negotiate with Eschelon to include a similar lengthened interval in the ICA. Therefore, contrary to Qwest's assertion, Eschelon's language would not prevent CLECs from requesting interval changes via CMP or somehow set existing intervals "in stone." Only Qwest may unilaterally prevent CLECs from obtaining interval changes via CMP. For example, of those CLEC change requests referred to by Ms. Albersheim, Qwest denied seven of them.[154]

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[152] Albersheim Direct, p. 37, lines 1-9.

[153] Qwest witness Albersheim testifies that "Eschelon states that it is willing to change its language so that it will allow changes that decrease intervals." (Albersheim, p. 37, lines 11-13). This mischaracterizes Eschelon's position. Eschelon's primary proposal would require an interconnection agreement amendment for lengthening intervals but not shortened intervals, and no change to Eschelon's proposal is necessary to allow changes for decreased intervals as Qwest states. *See* Disputed Issues Matrix for Issue 1-1 and subparts.

[154] Following are the URLs for the seven (7) CLEC change requests asking for reductions to provisioning and repair intervals that Qwest denied:

Q. QWEST DISCUSSES THE NEED FOR "FLEXIBILITY"[155] IN LENGTHENING SERVICE INTERVALS WITHOUT ICA AMENDMENT. WOULD YOU LIKE TO RESPOND?

A. Yes. Ms. Albersheim testifies that a decreased (or shortened) interval for one product could result in an increased (or lengthened) interval for another product, as Qwest diverts resources from the former product to the latter.[156] According to Qwest, it "needs the flexibility to be able to respond to such industry changes in this way via the CMP."[157] However, the data does not support Qwest's assertion. There have been many shortened intervals implemented through CMP, and according to Qwest's own testimony, there have been no lengthened intervals. If Qwest actually needed the flexibility that it claims it does to lengthen intervals in response to shortened intervals, the data should show lengthened intervals corresponding to at least some of these shortened intervals – but that is not the case.

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http://www.qwest.com/wholesale/cmp/archive/CR_PC110303-1.htm;
http://www.qwest.com/wholesale/cmp/archive/CR_5608142.htm;
http://www.qwest.com/wholesale/cmp/archive/CR_PC010705-1.htm;
http://www.qwest.com/wholesale/cmp/archive/CR_PC072604-1.htm;
http://www.qwest.com/wholesale/cmp/archive/CR_PC012703-1.htm;
http://www.qwest.com/wholesale/cmp/archive/CR_5371475.htm;
http://www.qwest.com/wholesale/cmp/archive/CR_PC031804-1.htm

[155] Albersheim Direct, p. 38, lines 2-3.

[156] Albersheim Direct, p. 37, line 21 – p. 38, line 2.

[157] Albersheim Direct, p. 38, lines 2-3.

Qwest further suggests that changes to ILEC obligations like the ones that occurred in the TRO and TRRO "could"[158] result in the tradeoff between shortened and lengthened intervals explained above, but Qwest then goes on to admit that "these changes have not resulted in the service interval trade-off…"[159] These so-called examples do not support Qwest's point at all. When changes in law such as TRO/TRRO occur, a contract amendment is needed anyway. Qwest's choice of the TRO and TRRO as an example of when CMP might be used is particularly off base, given that Qwest is attempting to implement its TRO/TRRO changes unilaterally without using its own CMP.[160]

Q. QWEST CHARACTERIZES ESCHELON'S PROPOSAL TO REQUIRE AMENDMENTS FOR LENGTHENING OF INTERVALS (AND NOT FOR SHORTENED INTERVALS) AS "AN ATTEMPT TO APPEASE QWEST."[161] COULD YOU PLEASE COMMENT ON THIS STATEMENT?

A. What Ms. Albersheim appears to describe with the pejorative characterization of "appeasement" would be more accurately described as "an attempt by Eschelon to respond to Qwest's stated concerns," which is, of course, the entire point of good

[158] Albersheim Direct, p. 38, line 6.

[159] Albersheim Direct, p. 38, lines 13-14.

[160] *See* Starkey Direct, pp. 165-177 (Secret TRRO PCAT example). *See also* Exhibit BJJ-7 (Secret TRRO PCAT Chronology).

[161] Albersheim Direct, p. 30, lines 12-14.

faith negotiations. That being said, I do find it telling that Eschelon's proposal apparently does not "appease" Qwest, considering that Qwest testifies that it has not increased intervals in the past, has expressed no plans to do so in the future, and has provided no compelling information indicating the need to do so. Again, Qwest's position appears to be driven primarily by its litigation strategy regarding the topics that are appropriately addressed in an ICA, rather than based on any legitimate concern.

Q. MS. ALBERSHEIM CLAIMS THAT ESCHELON IS NOT OPPOSED TO THE USE OF CMP WHEN IT BENEFITS ESCHELON.[162] IS MS. ALBERSHEIM'S CHARACTERIZATION OF ESCHELON'S PROPOSAL ACCURATE?

A. No. Ms. Albersheim insinuates that Eschelon would garner some special benefit from there being a provision in the ICA requiring Commission approval for lengthened intervals, but not for shortened intervals. This is not the case and the two situations are not comparable. Ms. Albersheim ignores one key piece of information: if a CLEC submits a request for a shortened interval in CMP, Qwest could ultimately reject it, forcing the CLEC to drop its request or pursue dispute resolution.[163] But if Qwest submits a change request to lengthen an interval in CMP – an action that is likely to trigger CLEC disagreement – Qwest can

[162] Albersheim Direct, p. 32, lines 14-16.

[163] Qwest can also submit a notice for a shortened interval, but certainly would not pursue it if Qwest thought that its competitors would garner a competitive advantage.

implement that change over CLEC objections. CLECs do not have the same luxury as Qwest does when it comes to implementing changes in CMP – *i.e.*, the ability to implement a change over the objections of others. Eschelon is seeking approval of its language that allows shortened intervals in CMP without Commission approval not to advantage Eschelon, but because there would be agreement among CLECs and Qwest for this change (unlike a lengthened interval), and therefore, no need for Commission approval.

Q. DOES ESCHELON'S PROPOSAL #2 UNDERMINE ITS PROPOSAL #1, AS MS. ALBERSHEIM CLAIMS?[164]

A. No. Ms. Albersheim suggests that because Eschelon's Proposal #2 would require Commission approval for shortened intervals as well as longer intervals that this somehow undermines its Proposal #1 (which requires Commission approval only for lengthened intervals). However, she provides no specifics about this criticism. I find it telling that Ms. Albersheim would criticize Eschelon's proposal #2 even though it allays Qwest's concern about Eschelon's Proposal #1 being one-sided.[165]

Q. DOES MS. ALBERSHEIM MAKE OTHER ASSERTIONS THAT ARE NOT SUPPORTED?

[164] Albersheim Direct, p. 32, lines 18-22.

[165] Albersheim Direct, p. 32, line 5.

A. Yes. Ms. Albersheim claims that Qwest needs the flexibility to increase intervals without Commission approval because:

> [T]he telecommunications industry in general and technology in particular, change rapidly. There are times when Qwest and CLECs should be able to flexibly and efficiently move forward with changes to service intervals.[166]

First, there have unarguably been substantial changes in the telecommunications industry and technology in general in past years, but Qwest has to date never found the need to increase service intervals. There is no reason to believe (and Ms. Albersheim does not provide a reason) that the changes to the industry and technology that will occur in the future would trigger the need for the ability for Qwest to impose longer intervals on CLECs without Commission approval, when improvements in technology and systems should herald reduced intervals based upon increased efficiencies.

For the most part, I agree with Ms. Albersheim's statement that there are times that Qwest and CLECs should be able to flexibly and efficiently move forward with changes to service intervals. Those times are when there is agreement between the parties about the change, and I have shown that this has happened 39 times since 2002 (all reductions), but no times at which increased intervals were needed.[167] If disagreement will result (as in the case of increased

[166] Albersheim Direct, p. 32, line 25 – p. 33, line 2.

[167] Starkey Direct, p. 90.

intervals, as Ms. Albersheim has acknowledged[168]), particularly when the change can have anticompetitive effects, it is not "efficient" to require the parties to negotiate/arbitrate an ICA, have Qwest lengthen an interval in CMP, potentially follow the dispute resolution process of CMP, only to later come to the Commission for resolution. It would be more efficient to require Commission approval in the first instance for lengthening intervals.

Q. DOES MS. ALBERSHEIM MAKE ANY MORE UNSUPPORTED ASSERTIONS REGARDING ESCHELON'S PROPOSAL?

A. Yes. Ms. Albersheim also makes the unsupported assertion that Qwest's service quality would be "hamstrung"[169] by requiring Commission approval for lengthened intervals. Not only is this assertion unsupported (*i.e.*, Ms. Albersheim does not describe how it would be hamstrung), it also doesn't make sense. The result of a lengthened provisioning interval of the variety discussed in Issue 1-1 is that Eschelon and its customers wait longer for service. Accordingly, it would be Eschelon's – not Qwest's – service quality that would be "hamstrung" if Qwest's proposal is adopted. Even if there was a concern about Qwest's service quality, Qwest could make that case to the state commission when it requests the lengthened interval.

[168] Ms. Albersheim testified in Minnesota: "It is likely that there will be disputes any time Qwest attempts to lengthen an interval." (Albersheim Minnesota Rebuttal in Minnesota Docket P-5340, 421/IC-06-768, September 22, 2006, p. 35, lines 6-7).

[169] Albersheim Direct, p. 33, lines 5-7.

V. SUBJECT MATTER NO. 11: POWER

Issue No. 8-21 and subparts: ICA Sections 8.2.1.29.2.1; 8.2.1.29.2.2; 8.3.1.6; 8.3.1.6.1; and 8.3.1.6.2 and subparts

Q. PLEASE PROVIDE A BRIEF SUMMARY OF ISSUE 8-21 AND SUBPARTS.

A. Issue 8-21 and subparts all relate to DC power Eschelon purchases from Qwest to electrify equipment in Eschelon's collocation arrangements. Eschelon purchases DC power through two separate rate elements, *i.e.*, a rate for the equipment that turns AC [Alternating Current] into DC [Direct Current] – power plant – and rates meant to compensate Qwest for the AC power it purchases from the electric utility for conversion to DC power (usage). The debate stems from the fact that Eschelon believes it should pay charges associated with both rate elements, based upon the amount of power it actually uses (via Qwest's power measuring offering) while Qwest believes only the "usage" element should be measured, with the "power plant" element being fixed based upon the size of the feeder cables Eschelon uses to electrify its collocation.

Q. MR. HUBBARD TESTIFIES THAT ESCHELON ORDERS A CERTAIN AMOUNT OF POWER PLANT AND AS SUCH, ESCHELON SHOULD BE

REQUIRED TO PAY FOR IT REGARDLESS OF HOW MUCH POWER THEY USE.[170] IS HE RIGHT?

A. No. A key point in this disagreement relates to Qwest's erroneous claim that when a CLEC orders power cables (*e.g.*, 180 amp power cables), the CLEC is simultaneously placing an order for 180 amps of power plant capacity. Though Mr. Hubbard attempts time and again in his testimony to tie the power feeder cable order to an order for power plant capacity,[171] he fails to cite any documentation or any authority at all that supports his point. And as I explained in my direct testimony,[172] Qwest's own technical documentation dictating the manner by which it engineers power cables and power plant capacity belie Mr. Hubbard's testimony. Yet, it is this claim that serves as the fundamental premise for Qwest's position that applying the Power Plant rate element on a measured basis would allow a CLEC to pay for less power plant capacity than it ordered.

The bottom line is this: CLECs do not order power plant capacity from Qwest. Instead, CLECs order power feeder cables from Qwest, who then purportedly engineers its power plant facilities based upon those feeder cable orders. Unfortunately, the available evidence shows that Qwest attributes a far larger portion of the cost of its power plant facilities to CLECs than it does to itself for the same level of power usage, resulting in a highly discriminatory rate

[170] Hubbard Direct, p. 23, lines 6-11.

[171] Hubbard Direct, p. 19, line 13; p. 20, lines 13-14; p. 29, line 3; p. 29, lines 8-9.

[172] Starkey Direct, pp. 110-115.

structure. This causes CLECs to pay for substantially more of Qwest's power plant investment relative to their power usage, than does Qwest.

Q. PLEASE EXPLAIN WHY MR. HUBBARD IS WRONG WHEN HE CLAIMS THAT A POWER CABLE ORDER IS EQUIVALENT TO AN ORDER FOR POWER PLANT CAPACITY.

A. Qwest's collocation application asks CLECs for their requested *power cable size* – there is no place on the Qwest collocation application that asks the CLEC for their requested *power plant capacity*, nor does Qwest inform CLECs that it equates the power cable order with an order for power plant capacity.

In addition, Mr. Hubbard fails to provide any Qwest documentation which supports his contention, even though Qwest has a plethora of technical documentation describing in detail the manner by which it engineers its power plant facilities, including detailed descriptions of how it sizes those facilities and the information it uses. Nowhere within that documentation do Qwest's actual power engineers equate a CLEC order for power feeder cables with an order for power plant capacity.

Q. PLEASE RECAP WHY THE SIZING OF POWER PLANT IS IMPORTANT TO ISSUE 8-21.

A. The issue of how the shared central office power plant is sized by Qwest is relevant to Issue 8-21 because Qwest is attempting to assess a charge to recover

the investment in that power plant based on the size of the CLEC power cables. However, all information points to Qwest actually sizing (or investing in) power plant based on the peak *usage* of the power plant.[173] Given that the size of power cables are sized larger (by design) than the peak usage that will be carried by the power cables, Qwest's attempt to charge for power plant based on the size of the power cable, but size power plant based on usage, results in Qwest overcharging Eschelon for power plant as well as Qwest discriminating against Eschelon. Qwest discriminates against Eschelon by forcing Eschelon to pay more for power to serve its customers than Qwest "pays" to serve its customers.[174]

Q. MR. HUBBARD DISCUSSES THE AMOUNT OF POWER PLANT CAPACITY "QWEST MAKES AVAILABLE FOR THE CLEC'S USE."[175] DOES QWEST NEED TO KNOW HOW MUCH POWER PLANT CAPACITY TO MAKE AVAILABLE SPECIFICALLY FOR ESCHELON'S USE, OR FOR THAT MATTER, THE SPECIFIC USE OF ANY CLEC?

A. No, and that's why Qwest's claim that CLECs order power plant capacity makes little sense. The power plant in a Qwest central office is a shared resource among all power users in that central office, and is sized to accommodate the aggregate demand of all power users in the office. To be more precise, Qwest's engineering

[173] Starkey Direct, pp. 110-115.

[174] Starkey Direct, p. 97 and p. 115, lines 3-14.

[175] Hubbard Direct, p. 23, lines 6-7.

documents describe the process by which Qwest uses the peak usage at the "busy hour" for all users in the office as the yardstick by which it measures its need for power plant capacity. Accordingly, Qwest does not need to know the individual usage amounts for Eschelon or other CLECs; rather, it observes the aggregate usage for the entire central office (including Qwest's power usage) at the busy hour and sizes to this amount. See pages 110-112 of my direct testimony for additional detail on how Qwest sizes power plant.

Furthermore, assuming for the sake of argument that Qwest does need to know how much power plant capacity to make available for an individual CLEC's use, the information Qwest would need to know to size its power plant in accordance with its own Technical Publications and in a nondiscriminatory fashion would be the CLEC's List 1 drain. Qwest has ample opportunity to request List 1 drain information from the CLEC if it needed it. For example, Qwest could ask for the CLEC's List 1 drain requirement on its collocation application form – but it does not. Qwest also recently issued a non CMP notice (FORE.11.20.06.B.002090.Qtr_Collo_Fore_2006)[176] which requests CLECs to submit quarterly forecasts to Qwest for interconnection products CLECs purchase from Qwest,[177] and this includes forecasting collocation power. Qwest's collocation Forecasting Form[178] asks CLECs to provide Qwest "the number of

[176] http://www.qwest.com/wholesale/cnla/uploads/FORE.11.20.06.B.002090.Qtr_Collo_Fore_2006.doc ; announcement date: 11/20/06, effective date: 12/29/06.

[177] http://www.uswest.com/wholesale/guides/forecasting.html

[178] http://www.uswest.com/wholesale/downloads/2006/060301/Collocation_Forecasting_Form.xls

Amps for Power required by the CLEC for each quarter," but because Qwest requires this data to be reported in increments of 20 amps (an increment far too large to gauge power plant capacity used by the CLEC), Qwest is apparently asking for the CLEC's power cable size (in amps).[179] However, the way in which Qwest asks for this appears to be worded so as to be specifically ambiguous. This would be a prime opportunity for Qwest, if it needs the information (*i.e.*, CLEC's forecasted energy usage), to ask CLECs for List 1 drain requirements – but again, Qwest chooses not to. Qwest could also simply pick up the phone and call the CLEC if it had any questions about the CLEC's needs for power. Though Qwest claims that it does not have the information it needs to size power plant the same for CLECs as it does itself, I have shown that Qwest, if it needed additional information, has various avenues available to it to obtain that information. Qwest chooses not to obtain that information from CLECs and chooses instead to claim ignorance about the CLEC power usage and treat CLECs differently than Qwest treats itself – allowing it to assess rates wherein CLECs pay for substantially more of the power plant investment than they use, effectively giving Qwest a free ride.

Q. MR. HUBBARD NEVERTHELESS CLAIMS THAT QWEST ASSUMES THE POWER CABLE ORDER IS AN ORDER FOR POWER PLANT CAPACITY AND THEREAFTER MAKES THIS AMOUNT OF POWER

[179] Eschelon is seeking clarification from Qwest on this point.

PLANT CAPACITY AVAILABLE FOR THE CLEC'S USE.[180] IS THIS TRUE?

A. No, and I'm surprised that Mr. Hubbard would make such a claim given that similar testimony he filed in an Iowa proceeding was shown to be wrong. In Iowa Docket FCU-06-20, Mr. Hubbard claimed, as he does here, that Qwest makes the amount of power plant capacity available to CLECs that is reflected in their order for power cables, and that Qwest "definitely" builds power plant capacity in response to a CLEC power cable order of 175 amps or greater.[181] However, on cross examination, Mr. Hubbard's claim was shown to be incorrect. I have provided an excerpt from Mr. Hubbard's cross examination in the Iowa proceeding below:[182]

> Q. I think that gets us through all seven jobs listed on the front page of [Mr. Hubbard's Exhibit] RJH-3, Mr. Hubbard, and we have identified one of those that your exhibits show involve the additional – addition of capacity in response to a [CLEC] job, correct, that being Mason City 522?
> A. That [CLEC] was mentioned, yes, but they were serving collocation.
> Q. And, again, [Mr. Hubbard's Exhibit] RJH-1 lists 54 [CLEC] collocations, correct?
> A. Correct.
> Q. Seventeen of which involve cable sized for 175 amps or more, correct?
> A. Correct.

[180] Hubbard Direct, p. 23, lines 6-9.

[181] Rebuttal Testimony of Robert Hubbard, Iowa Utilities Board Docket No. FCU-06-20, page 8, lines 12-14. ["When McLeod submits orders asking for large amounts of power such as 425 amps, 300 amps, 225 amps, or even 175 amps, this will definitely trigger a power plant capacity growth job."]

[182] Iowa Utilities Board Docket No. FCU-06-20, transcript, pages 621 – 622.

> Q. And in fact that Mason City plant would have to be replaced anyway because it was 30 years old, manufacturer discontinued, and no parts were available, correct?
> A. Well, the growth rate that was required caused it to be replaced. Just because it was manufacturer discontinued, if the equipment was still operating normally and in good shape and didn't need to grow, then it may not have been replaced at that time.

As the above excerpt of Mr. Hubbard's cross examination shows, out of the 54 CLEC collocations examined in Iowa, the CLEC had, for 17 of those locations, ordered power cables of 175 amps or larger (up to 425 amp power cables in some cases). Yet, even via Mr. Hubbard's own admission, Qwest augmented existing power plant capacity to meet only seven of those orders,[183] and even then, Mr. Hubbard was forced to admit under cross-examination that six of these jobs did not even relate to the CLEC's order, and the seventh power plant job was related to old, antiquated equipment that lacked replacement parts. In other words, Qwest had not, in Iowa (nor does it in Washington or anywhere else), used the CLEC's power feeder order to size its power plant capacity. It is for this reason that Mr. Hubbard is unable to find any Qwest technical documentation that supports his contention (indeed, all such documentation contradicts his contention – *see* my direct testimony pages 110-115).

[183] The fact that Qwest only claimed seven jobs were related to CLEC's power cable orders, despite the CLEC having seventeen collocations with power cables of 175 amps or greater exposes as false Qwest's claim that a power cable order of 175 amps or greater would "definitely" trigger a power plant growth job.

Q. YOU HAVE SHOWN THAT QWEST DOES NOT BUILD POWER PLANT CAPACITY TO MEET CLEC POWER CABLE ORDERS. CAN QWEST APPORTION SET AMOUNTS OF POWER CAPACITY TO CLECS AS MR. HUBBARD CLAIMS?[184]

A. No. Power plant is a shared resource between all power users, and Qwest cannot, and does not, dedicate or partition a certain allotment of power plant capacity to any user. Rather, power plant is sized to the peak drain of all equipment in the central office and all power users draw power from that shared resource as needed. At most times, power plant capacity in the amount of any individual CLEC power cable will be available to the CLEC simply because the power plant is built for the peak usage of the entire central office at the busy hour, and at times other than the busy hour, spare power plant capacity representing the total capacity minus average usage load is available to any power user, including Qwest. Accordingly, the cost of that spare capacity must be shared equally by all power users. Unfortunately, under the approach advocated by Mr. Hubbard, the CLECs end up paying for far more of the spare capacity than does Qwest (because CLECs pay for the maximum amount their feeder cables would theoretically accommodate, while Qwest "pays" only for the remainder). This is exactly the type of discriminatory treatment the Telecommunications Act and

[184] Hubbard Direct, p. 23, lines 8-9 ("Qwest will design the power plant to ensure that the ordered amount of power…is available to Eschelon."); p. 23, lines 6-7 ("this is also the amount of power plant capacity that Qwest makes available for the CLEC's use.")

FCC rules were attempting to prohibit, and it is this same discriminatory treatment that Eschelon's proposed language is attempting to address.

Q. YOU STATE THAT QWEST'S POWER PLANT RATE APPLICATION IS DISCRIMINATORY. PLEASE ELABORATE.

A. According to Qwest, it sizes power plant for CLEC equipment differently than the way it sizes power plant for itself.[185] However, this different treatment is prohibited by the parties' ICA as well as Section 251 of the Act. Qwest is obligated to (in agreed ICA language) provide Eschelon nondiscriminatory treatment in the provisioning of central office power. Section 8.2.1.1 of the ICA states:

> 8.2.1.1 Qwest shall provide Collocation on rates, terms and conditions that are just, reasonable and non-discriminatory. In addition, Qwest shall provide Collocation in accordance with all applicable federal and State laws.

Therefore, Qwest's different treatment of Eschelon with regard to power plant sizing (which leads to Qwest overcharging Eschelon for power plant) is prohibited conduct under language in the parties' ICA that has already been agreed upon.

[185] Qwest has indicated that it sizes power plant for itself based on the List 1 drain for its equipment, but sizes power plant based on a higher List 2 drain for CLEC equipment. This is discriminatory on its face. And in the companion Minnesota arbitration proceeding, Mr. Hubbard testified that it sizes power plant for CLEC equipment based on List 2 drain ***plus*** List 1 drain for CLEC equipment.

Furthermore, though I am not an attorney, it is my understanding that the FCC has established that the prohibition against discrimination that appears throughout § 251 of the Act is *unqualified and absolute.* Unlike § 202 of the Act, § 251 does not qualify the term "nondiscriminatory" with the words "undue" or "unjust and unreasonable."

> By comparison [with section 202], section 251(c)(2) creates a duty for incumbent LECs "to provide . . . any requesting telecommunications carrier, interconnection with a LEC's network on rates, terms, and conditions that are just, reasonable, and nondiscriminatory." The nondiscrimination requirement in section 251(c)(2) is not qualified by the "unjust or unreasonable" language of section 202(a). We therefore conclude that Congress did not intend that the term "nondiscriminatory" in the 1996 Act be synonymous with "unjust and unreasonable discrimination" used in the 1934 Act, but rather, intended a more stringent standard.[186]

Therefore, the nondiscriminatory provisions of Section 251 of the Act do not allow for "justified discrimination."[187]

[186] See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, FCC 96-325, First Report and Order, 11 FCC Rcd.15499 ¶ 217 (1996) ("Local Competition Order").

[187] Qwest will undoubtedly argue in its rebuttal testimony (as it has elsewhere) that it must size power plant for CLECs differently because Qwest does not have the List 1 drain information for CLECs to size power plant for CLECs the same way it sizes power plant for itself. In other words, Qwest will attempt to argue that its discriminatory treatment of CLECs is justified. This is not the case. Qwest does indeed have List 1 drain information that it could use for at least some CLEC equipment, Qwest can estimate the CLEC List 1 drain if needed, and if it needed more information to properly size power plant, Qwest would only need to ask for that information on the collocation application. There is no reason for Qwest to size power plant for CLECs based on the size of their power cables in any event. Nonetheless, the obligations imposed on ILECs by Congress under Section 251 of the Act prohibit Qwest's discriminatory treatment in the provisioning of central office power plant.

Q. MR. HUBBARD STATES "FOR ANY PARTICULAR POWER USER, THE QUESTION IS WHETHER THERE IS SUFFICIENT CAPACITY IN THE POWER PLANT AVAILABLE TO CONVERT AND DELIVER THE ELECTRIC CURRENT ITS TELECOMMUNICATIONS EQUIPMENT WILL CONSUME."[188] IS THIS THE RELEVANT QUESTION?

A. No. The relevant question to be asked when sizing power plant should not focus on "any particular power user" as Mr. Hubbard claims. Rather, the pertinent question (consistent with the direction of Qwest's Technical Publications on the matter)[189] is whether there is sufficient power plant capacity to deliver the current demanded by ***all*** power users – not just one power user. By focusing only on one power user, Mr. Hubbard attempts to make it appear as if Qwest must size its power plant to accommodate Eschelon in isolation. This is not the way power plant is sized according to Qwest's Technical Publications. Qwest sizes power plant to accommodate the peak usage of all users in the central office, and Eschelon's peak usage is just one small component of that aggregate total.

Q. MR. HUBBARD TESTIFIES THAT POWER PLANT IS A FIXED INVESTMENT AND "IS NOT AMENABLE TO 'MEASUREMENT.'"[190] WOULD YOU LIKE TO RESPOND?

[188] Hubbard Direct, p. 23, lines 18-21.

[189] *See* Starkey Direct, pp. 110-115.

[190] Hubbard Direct, p. 23, lines 24-25; p. 29, lines 16-17.

A. Yes. Though I am afraid Mr. Hubbard's argument in this regard is largely an issue of semantics, the fact of the matter is that he is wrong. Under the Total Element Long Run Incremental Cost (TELRIC) pricing principles, assets that are shared among users and have a finite capacity (like power plant facilities), are often recovered via measured usage rates (*e.g.*, a local switching machine). Mr. Hubbard tries to suggest that because the power plant itself (*i.e.*, the facilities)[191] is not actually "consumed," it should not be based upon a measure of its usage. He misses the point. While the actual facilities might be of a fixed capacity, the finite capacity available is consumed such that if one user (*e.g.*, Qwest) is using it, another cannot. Therefore, when more DC power usage is required from the power plant in a central office, the power plant facilities and, in turn, investment in the office must be augmented to accommodate it. That increase in investment is directly incremental to the increase in usage. Therefore, by definition and consistent with incremental costing standards, investment in power plant facilities is incremental to power usage and should be recovered based upon the relative usage of that capacity by various carriers. Eschelon's proposal to recover power plant investments based upon a measured usage rate is perfectly consistent with this requirement, and this is how Qwest structured its cost study for the power plant rate.

[191] *See* Hubbard Direct, p. 23, line 16 ("durable pieces of equipment.")

Q. PLEASE ELABORATE ON YOUR POINT THAT QWEST DEVELOPS ITS POWER PLANT RATE BASED ON USAGE.

A. Based on my experience analyzing Qwest's cost studies on Power Plant rate elements (including the Washington-specific cost study), Qwest calculates Power Plant rates using the following simplified equation:

$$\frac{\text{Power Plant Investment}}{\text{Power Usage}} = \text{Investment per Amp} \times \text{Cost Factors} = \text{Rate per Amp}$$

Note that Qwest calculates the "Rate per Amp" for Power Plant by dividing the total power plant investment by power usage – not by some measure of CLEC power feeder cable size (these are the terms Qwest uses in its cost study, *i.e.*, "usage"). To further illustrate this point, the table below is excerpted directly from Qwest's Washington-specific cost study at tab E.1.4 entitled "Power Equipment":

	A	B	C	D	E
1	**POWER EQUIPMENT**				
2	**Investment**				
3				Version 1.0 Created 2/11/00, 1:55:25 PM	
4	**Equipment**			Washington	
5	DC Plant	$325,565			
6	Engine/Alternators	$81,999			
7	Commercial AC	$40,835			
8	Total	$448,399			
9					
10	DC Power Usage	1000			
11	Equipment Cost Per Amp	**$448.40**			

This tab shows that Qwest developed its "per amp" power plant rate by dividing the total power plant investment (line 8) by "DC Power Usage" (line 10) to derive the investment per amp.

Q. WHY IS THIS IMPORTANT?

A. Fundamental cost study construction principles require rates to be assessed consistent with the manner in which they are developed, with the overarching objective being the ultimate recovery of total investment. This requires that the application of the rates must be consistent with the manner by which total investment, in the cost study, is ultimately divided into "chargeable units." In this way, the total investment can be recovered in full through selling the anticipated number of "chargeable units." Therefore:

> **If** the Power Plant investment is divided by DC power <u>*usage*</u> to derive a per amp Power Plant cost, and if Qwest is to recover the total Power Plant cost (no more, no less), **then** Qwest must apply the resulting Power Plant rate to the amount of power *usage* it produces (and ultimately sells or uses itself).

In the case of Qwest's cost study, this can be expressed as a common mathematical corollary as follows: A = (A/B) * B. By substituting A with *Power Plant Investment* and B with *DC Power Usage (in Amps)*, you quickly see that if you originally divide the power plant investment by *DC Power Usage (in Amps)* to arrive at a per Amp cost, *i.e.*, B, you must also multiply the cost-based rate times the number of Amps *used* so as to recover your intended investment – *i.e.*, A (described mathematically below):

$$\frac{\text{Power Plant Investment}}{\text{DC Power Usage (in Amps)}} \times \text{DC Power Usage (in Amps)} = \text{Power Plant Investment}$$

By developing a Power Plant rate based on usage, and applying that rate based on a higher power cable order, Qwest would recover more from CLECs than the original total investment (*i.e.*, Qwest would double-recover its power plant costs).

Q. QWEST COMPLAINS THAT ESCHELON WANTS TO BE BILLED ON DAY TO DAY USAGE, WHILE QWEST SIZES POWER PLANT ON

BUSY HOUR USAGE, AND THESE ARE TWO TOTALLY DIFFERENT THINGS.[192] PLEASE RESPOND.

A. Qwest's claims are exaggerated. Mr. Hubbard states that Eschelon would be measured on random power measurements throughout the year, and would not be billed on the busy day busy hour (the manner in which power plant is sized). This appears to be an admission that Qwest sizes power plant for CLECs based on peak usage, and if so, then Qwest agrees with me on this point. However, Qwest has the flexibility to measure Eschelon's usage and bill according to that measurement at times when Eschelon's usage is at its greatest. Qwest is fully knowledgeable about the busy day busy hour for each central office, and if it so chooses, it can measure Eschelon's usage at that time.[193]

Q. MR. HUBBARD MENTIONS THE POWER REDUCTION OFFERING AND STATES THAT ESCHELON CAN USE THIS OFFERING TO REDUCE THE AMOUNT OF POWER AVAILABLE TO IT "IF IT

[192] Million Direct, p. 5.

[193] Though the ICA calls for Qwest to measure power on a semi-annual basis and the busy hour busy day only occurs once per year, Qwest could measure the power at the peak times during those time periods (*e.g.*, Mother's Day in the first half of the year, and Christmas Day in the second half of the year). And though CLEC's can request Qwest to take a power measurement, Qwest can select the time of the measurement over a 30 day period after the request, so it can pick a time at which Qwest believes that Eschelon's power draw will be at its greatest (and there's a possibility that it could result in the CLEC paying more for power). Furthermore, through my work with other CLECs on collocation power issues, I have examined time series data for power measurements taken by Qwest and have determined that they do not vary by large degrees from measurement to measurement.

DETERMINES THAT IT DOES NOT REQUIRE AS MUCH POWER AS ORIGINALLY ANTICIPATED."[194] DO YOU AGREE?

A. No. Mr. Hubbard misses the point. First, as I have explained, power cables are sized differently than power plant capacity, so an order for power cables is not an indicator of how much power Eschelon anticipates on drawing. In addition, CLECs are required by manufacturer's recommendations and safety standards to size power cables to handle larger amounts of power than the user will actually draw. Therefore, contrary to Mr. Hubbard's assertion, Eschelon was not anticipating drawing the full amount of power that its power cables could carry when it ordered them. More to the point, Qwest's Power Reduction offering addresses the ability of changing fuses at the BDFB, changing breakers at the power plant, or potentially re-engineering smaller power cables aimed at re-engineering a CLEC's power *distribution* infrastructure. I illustrate and explain the various components of the central office power system at pages 104-106 of my direct testimony. As I explain there, power plant (*e.g.*, rectifiers) and power distribution (*e.g.*, power cables) are two separate components of the central office power system, and as explained at pages 113-115 of my direct testimony are sized in two different ways –with power plant being sized based on List 1 drain (or the peak usage of the central office at the busy hour) and power distribution being sized based on a larger List 2 drain (or a "worst case scenario" power drain).[195]

[194] Hubbard Direct, p. 24, line 12; p. 25, lines 6-8.

[195] I described List 1 drain and List 2 drain in my direct testimony. *See* Starkey Direct, pp. 112-115.

Q. YOU EXPLAIN ABOVE THAT QWEST'S POWER REDUCTION OFFERING CONCERNS RESIZING DC POWER *DISTRIBUTION* INFRASTRUCTURE. DOESN'T THE DISAGREEMENT UNDER ISSUE 8-21 ADDRESS QWEST'S RATES RELATED TO POWER *PLANT* – NOT DISTRIBUTION?

A. Yes, and this underscores the inapplicability of the Power Reduction Amendment to this issue. That is, Qwest is apparently attempting to resolve an issue concerning its billing of DC power ***plant*** charges through a process (and a costly one at that) for the CLEC to resize its DC power ***distribution*** infrastructure. DC power distribution capacity (which is sized on List 2 drain) and DC power plant capacity (which is sized on a lower List 1 drain) are engineered, for good reason, based upon different standards, an important point that Qwest's Power Reduction offering ignores, resulting in CLEC's continuing (even under the Power Reduction Offering) to pay for more power than they actually use.

Q. UNDER ISSUE 8-21(A), MR. HUBBARD ARGUES THAT EVEN THOUGH ESCHELON'S POWER DRAW WILL BE ZERO UNTIL EQUIPMENT IS COLLOCATED, QWEST HAS MADE POWER PLANT CAPACITY AVAILABLE FOR ESCHELON AND ESCHELON SHOULD

PAY FOR IT.[196] DOES THIS TESTIMONY EXPOSE A PROBLEM WITH QWEST'S POSITION ON THIS ISSUE?

A. Yes. First of all, as I explain above, Qwest does not specifically make available to CLECs power plant capacity in the amount equal to their power cables despite Mr. Hubbard's unsupported assertions to the contrary. Qwest does not build power plant capacity to match power cable orders, nor does Qwest have the ability to dedicate a certain portion of its power plant capacity to any individual power user. Despite these facts, Qwest proposes under Issue 8-21(a) to start charging the CLEC for power plant based on the size of its power cable *before the CLEC has even drawn one amp of power, or has the ability to do so* through collocated equipment. If we assume that a CLEC orders a 180 amp power cable, Qwest would begin charging the CLEC $1,681.20 per month (180 x $9.34) simply because the order was placed. Yet, power plant investment is not incremental to power cable orders, so Qwest has not made any additional investment in its power plant nor is any of the existing investment being used by Eschelon such that others lack access to it. Rather, Qwest would be observing the load of the entire central office on the power plant, and once a CLEC collocates its equipment and begins drawing power, that usage would be part of the aggregate usage in the central office that Qwest would observe as part of its determination of appropriate power plant size. The CLEC's actual usage would likely fall well below the level of the capacity of the power cable it ordered and

[196] Hubbard Direct, p. 26.

likewise, it is highly unlikely that the CLEC's power usage will require additional investment in power plant on the part of Qwest.

Q. MR. HUBBARD TESTIFIES THAT QWEST WOULD CONSIDER ESCHELON'S PROPOSAL IF IT PRESENTED ITS LANGUAGE IN CMP AND AGREED THAT MEASUREMENT APPLIES ONLY TO USAGE – AND NOT POWER PLANT.[197] IS THIS TESTIMONY USEFUL?

A. No. Obviously, the crux of this issue is whether the power plant rate should be assessed on a measured use basis – and it is Eschelon's position that it should be. Any proposal without this component included would miss the mark. Further, Qwest has already shown that it will not agree to Eschelon's proposal to refrain from assessing power plant charges until equipment is collocated – based on its misguided claim that it makes power plant capacity available to CLECs regardless if equipment is collocated or not. There is absolutely no reason to believe that Qwest would change its position in CMP. Furthermore, the application of a rate – the heart of this dispute – is not within the scope of CMP[198] and this appears to be another area in which Qwest vacillates with respect to its opinion of what should, and should not, be the primary purview of CMP.

[197] Hubbard Direct, pp. 28-29.

[198] Please refer to my discussion of rates and the application of rates in the discussion of CMP.

Q. QWEST CLAIMS THAT THE DISAGREEMENTS UNDER ISSUE 8-21 ARE BETTER ADDRESSED IN A COST PROCEEDING WHERE ALL INTERESTED PARTIES CAN BE REPRESENTED.[199] WOULD YOU LIKE TO COMMENT?

A. Yes. I find it ironic that Qwest would make such a claim given that Qwest originally established its power rates (usage and power plant) in a Commission cost docket, then changed the application of one of those rates – usage – outside of Commission cost proceedings through an ICA amendment.[200] Qwest believes it is acceptable for Qwest to change the application of rate elements outside of Commission cost dockets when it serves Qwest's purposes, but adamantly opposes such a move when it does not serve Qwest's purpose.[201] Furthermore, this issue has been negotiated by the parties and properly brought to the Commission for resolution in this arbitration and should be decided on its merits here. I have provided ample information showing that Qwest's application forces Eschelon to pay more for power than does Qwest, and Qwest's admission that it

[199] Million Direct, pp. 3 and 5.

[200] Starkey Direct, pp. 106-107.

[201] Ms. Million testifies that the "problem with Eschelon's position is that it ignores the fact that the *rate* for an element and its *application* on a unitized basis result in the amount of TELRIC cost recovery awarded to Qwest by a Commission." (Million Direct, p. 4, lines 13-15). Ms. Million goes on to provide an analogy of a gas station owner charging per gallon versus per vehicle. Eschelon does not ignore the relationship between the rate and its application and the importance of this to proper cost recovery, and I actually agree with Ms. Million that the way the rate is developed is important to its application. That is why in my rebuttal testimony, I explain that Qwest developed its cost study for the power plant rate based on *usage* – the same way that Eschelon wants Qwest to apply the power plant rate. There is nothing in the development of Qwest's power plant rate to suggest that it is based on CLEC power cable orders, as Qwest wants to apply the rate. To Ms. Million's gas station analogy, what Qwest is attempting to do with regard to its Power Plant rate is charge Eschelon "per gallon" and charge itself "per vehicle" (Million Direct, p. 4, lines 16-18) so that Eschelon is forced to pay more for power.

sizes power plant differently for CLECs than it does for itself (which results in higher power charges for Eschelon) should be sufficient evidence to find Qwest's rate application discriminatory.

VI. SUBJECT MATTER NO. 12: NEBS STANDARDS

Issue No. 8-24: ICA Section 8.2.3.9

Q. HAS ISSUE 8-24 CLOSED SINCE DIRECT TESTIMONY WAS FILED IN THIS PROCEEDING?

A. Yes. This issue was closed based on Eschelon's proposed language for Section 8.2.3.9 and a slight modification to Section 8.2.3.10. This language is shown below, with the agreed-to modification in Section 8.2.3.10 shaded in gray:

> 8.2.3.9 Qwest will determine and notify CLEC, in the manner described below, within ten (10) Days of CLEC submitting its Collocation application if Qwest believes CLEC's listed equipment does not comply with NEBS Level 1 safety standards or is in violation of any Applicable Laws or regulations, all equally applicable to Qwest. If CLEC disagrees, CLEC may respond with the basis for its position within ten (10) Days of receipt of such notice from Qwest. If, during installation, Qwest determines CLEC activities or equipment other than those listed in the Collocation application do not comply with the NEBS Level 1 safety standards listed in this Section or are in violation of any Applicable Laws or regulations all equally applied to Qwest, Qwest has the right to stop all installation work related to the activities or equipment at issue until the situation is remedied or CLEC demonstrates that Qwest's determination was incorrect…
>
> 8.2.3.10 This section 8.2.3.10 applies as set forth herein, notwithstanding anything that may be to the contrary in Section 8.2.3.9. All equipment

> placed will be subject to random safety audits conducted by Qwest. Qwest will not enter CLEC's caged Collocation space or access CLEC's cageless Collocation equipment as part of a random safety audit. These audits will determine whether the equipment meets the NEBS Level 1 safety standards required by this Agreement. CLEC will be notified of the results of this audit. . . .

VII. SUBJECT MATTER NO. 14: NONDISCRIMINATORY ACCESS TO UNES

Issue No. 9-31: ICA Section 9.1.2

Q. PLEASE PROVIDE A BRIEF SUMMARY OF ISSUE 9-31 (NONDISCRIMINATORY ACCESS TO UNES).

A. If Eschelon is unable to obtain access to UNEs on reasonable terms and conditions and at cost based rates, Eschelon will be competitively disadvantaged vis-à-vis Qwest. Eschelon proposes that the ICA language expressly state that "access to" UNEs includes "moving, adding to, repairing, and changing"[202] UNEs. Qwest makes four arguments against Eschelon's proposed language: (1) the closed ICA language fully captures Qwest's legal obligations so no additional language is needed to ensure nondiscriminatory access to UNEs;[203] (2) nondiscriminatory access to UNEs does not include moving, adding to, repairing, and changing UNEs, because these are part of a yet unbuilt superior network, and therefore TELRIC rates do not apply;[204] (3) Eschelon seeks to impose obligations

[202] Proposed ICA Section 9.1.2 (closed language); Starkey Direct, p. 134.

[203] Stewart Direct, p. 18, line 17 – p. 19, line 4; *id.* p. 19, lines 15-17; *id*. p. 22, lines 6-8.

[204] Stewart Direct, p. 19, lines 5-6; *id*. p. 20, lines 18-21; *id*. p. 21, lines 13-15.

without agreeing to compensate Qwest;[205] and (4) Eschelon's proposal is vague and undefined.[206] None of these claims has merit.

First, Qwest has made it clear that it does not view these functions as related to "access" to UNEs under Section 251 of the Act and argues that cost based rates do not apply to them.[207] However, Qwest is mistaken in that regard. Nonetheless, because Qwest disagrees that these functions are governed by Section 251, specific contract language is needed to make that obligation[208] clear, or Qwest will unilaterally impose its judgment (resulting in less UNE "access" and higher tariff rates).[209] The fact that Qwest refuses to acknowledge that "access to UNEs" includes "moving, adding to, repairing and changing" UNEs shows that the general prescription to provide nondiscriminatory access to UNEs is not enough.

Second, Eschelon's proposal, on its face, refutes Qwest's assertion that Eschelon is seeking to require Qwest to provide a "superior" network. Eschelon's language requires only "non-discriminatory access," meaning that Qwest will provide Eschelon with the same access that it provides to itself and its retail customers. For instance, Qwest obviously performs maintenance of service for all

[205] Stewart Direct, p. 19, lines 9-10; *id*. p. 21, lines 12-13; *id.* p. 21, lines 16-20.

[206] Stewart Direct, p. 19, line 7; *id.* p. 20, lines 10-11; *id*. p. 21, lines 1-11; *id*. p. 22, line 9.

[207] *See e.g.*, Stewart Direct, p. 21, lines 12-15.

[208] As discussed in my direct testimony (at pages 135-138) and in the discussion below, Qwest is required to provide nondiscriminatory access to the UNEs themselves as well as to the means of obtaining the UNEs, repairing the UNEs, and modifying the UNEs.

[209] *See* Stewart Direct, p. 21, lines 12-15.

customers – one of the listed activities in Eschelon's language – and must provide it for UNEs on a nondiscriminatory basis. Qwest also cancels orders when requested – another listed activity in Eschelon's language – and there is no basis for Qwest to claim that it need not do this for Eschelon's UNEs. There is no legitimate claim here that "moving, adding to, repairing, and changing" UNEs would require Qwest to do something for Eschelon that it does not do for itself.

Third, Qwest states that Eschelon, through its proposed language in Section 9.1.2, is attempting to obtain modifications to UNEs "without paying for them,"[210] which would "clearly violate Qwest's legal right to recover the costs it incurs to provide access to UNEs and interconnection."[211] Qwest's concern is unfounded, and indeed, Qwest does not explain why Eschelon's proposal contains this implication but other language in the same paragraph that is agreed upon and closed – which Qwest itself relies upon[212] - does not. Qwest's argument is simply contrary to the manner in which the contract is organized. In the ICA overall, general terms and conditions are laid out first and then rate elements are discussed in separate sections, with the prices appearing in Exhibit A. Qwest's concern is already addressed in the general Terms and Conditions section (Section 5) of the ICA. Specifically, Section 5.1.6 of the ICA provides in closed language: "Nothing in this Agreement shall prevent either Party from seeking to recover the costs and expenses, if any, it may incur in (a) complying with and implementing

[210] Stewart Direct, p. 21, line 13; *see also id*. p. 21, lines 16-18.

[211] Stewart Direct, p. 21, lines 18-19.

[212] Stewart Direct, pp.18-19.

its obligations under this Agreement, the Act, and the rules, regulations and orders of the FCC and the Commission. . . ." When Section 5.1.6 is read together with the remainder of the contract,[213] including Eschelon's proposed language for Section 9.1.2, there is no reasonable inference that Qwest will not recover its costs. However, the Commission should be aware that the crux of the issue is whether Qwest will be allowed to recover the costs it incurs (*i.e*., Eschelon's proposal), or whether Qwest will be allowed to assess higher, non cost-based rates for more and more of the standard activities required to provide UNEs and/or finished services. In other words, Eschelon is not trying to get something for free, rather it is simply trying to assure that it pays cost based rates while being provided nondiscriminatory treatment with respect to the activities Qwest regularly undertakes in servicing its own customers.

Finally, Qwest is left with its argument that Eschelon's proposed phrase "moving, adding to, repairing, and changing"[214] is vague and undefined.[215] Qwest's argument ignores the fact that *this very language appears in Qwest's own proposal as well*.[216] The companies have agreed to identical language for the

[213] In addition, if the rates are approved, they are reflected in Exhibit A or will be pursuant to Section 2.2 when approved. If the rates are unapproved, Section 22.6 provides a mechanism for Qwest to recover its costs. If Qwest seeks a right to charge a non-cost based rate in some other proceeding and prevails, then the change in law provisions of the ICA will apply.

[214] Proposed ICA Section 9.1.2 (closed language); Starkey Direct, p. 134.

[215] Stewart Direct, p. 19, line 7; *id.* p. 20, lines 10-11; *id*. p. 21, lines 1-11; *id*. p. 22, line 9.

[216] As I indicated in my direct testimony (on page 135), Qwest has proposed the following language: ("Additional activities for ~~Access to~~ Unbundled Network Elements includes moving, adding to, repairing and changing the UNE (through e.g., design changes, maintenance of service including trouble isolation, additional dispatches, and cancellation of orders) at the applicable rate."). *See* E-mail of Qwest negotiations team (K. Salverda) to Eschelon negotiations team (Sept. 22, 2006) (p. 1

phrase "moving, adding to, repairing, and changing."[217] Qwest does not explain how the same phrase can be vague and undefined when proposed by Eschelon but not when proposed by Qwest. Apparently, Qwest has no difficulty deciphering what "moving, adding to, repairing, and changing" require it to do, so long as it can charge a tariffed or other non-TELRIC based rate to do those things.

Given that the phrase moving, adding to, repairing, and changing is actually agreed upon between the companies, the issue is not what these activities consist of, but whether Qwest is required to perform them pursuant to Section 251(c)(3) at cost-based rates. With respect to this issue, Qwest said it supports the use of "clear ICA language so that the parties know what is expected of them under the agreement and to avoid or minimize future disputes."[218] Eschelon asks the Commission to address this issue so that the companies have a clear decision on whether Qwest can charge non-TELRIC prices for these functions, which Qwest has previously provided at TELRIC rates.

Q. IS MS. STEWART'S "SUPERIOR NETWORK" ARGUMENT CORRECT?

A. No. The FCC analyzed this "superior network" issue in its *TRO* Order. The FCC found that incumbent LECs can be required to modify their facilities "to the

of enclosure); Qwest (Ms. Stewart) Minnesota Rebuttal, p. 15, lines 1-5 (Sept. 22, 2006); Qwest Multi-State ICA Draft (showing Qwest's multi-state proposal for all six states, including Washington, for Section 9.1.2 (Nov. 6, 2006), p. 180).

[217] *See id*.

[218] Stewart Direct, p. 20, lines 8-9.

extent necessary to accommodate interconnection or access to network elements," but cannot be required "to *alter substantially* their networks in order to provide *superior* quality interconnection and unbundled access."[219] Ms. Stewart contends that Eschelon's language, specifically the reference to "adding to" and "changing" the UNE, could be read to require Qwest to alter substantially its network and build a superior network. This claim does not square with the FCC's discussion on the matter. The FCC has determined that "adding to" and "changing UNEs" are activities that do not render the modification a substantial alteration or constitute the provision of a superior un-built network. See, *TRO,* ¶¶ 634 and 635. The FCC also stated:

> Verizon contends that the Commission cannot require incumbent LECs to *add* capacity or circuits, including constructing and modifying loops by adding electronics, where these facilities do not already exist. That is, Verizon argues that these modifications are not necessary to provide access to existing UNEs, they are the "creation of *new or improved U*NEs" that would unlawfully force an incumbent LEC to provide superior quality access. In particular, Verizon claims that the Commission is barred from requiring incumbent LECs to build a new loop, place new line cards or electronics on a circuit, and provide line conditioning, because these are all "substantial alterations to an ILEC's existing network." We disagree and, with the exception of constructing an altogether new local loop, we find that requiring an incumbent LEC to modify an existing transmission facility in the same manner it does so for its own customers provides competitors access only to a functionally equivalent network, rather than one of superior quality. Indeed, incumbent LECs routinely add a drop for a second line without objection…[220]

[219] *TRO*, ¶ 34 (emphasis in original).

[220] *TRO*, ¶ 639.

There is nothing in Eschelon's language that would require Qwest to build an altogether new loop for Eschelon. Rather, Eschelon's language simply requires Qwest to provide a "functionally equivalent network," as required by the FCC.

Q. YOU MENTIONED A TARIFFED RATE. DOES QWEST CLAIM THAT IT MAY APPLY NON-TELRIC RATES, INCLUDING TARIFF RATES, TO SERVICES NECESSARY FOR ACCESS TO UNES?

A. Yes. Qwest confirms[221] its position that these services are not UNEs (*i.e.*, "not within Section 251 of the Act")[222] and that "TELRIC rates do not apply,"[223] so Qwest believes it may apply tariff and other non-TELRIC rates. This position was further memorialized in Qwest's non–CMP notice issued on 8/31/06 (PROS.08.31.06.F.04159.Amendments.ComlAgree.SGAT), in which Qwest added a tariff reference for the following rate elements: Additional Dispatch, Trouble Isolation Charge, Design Change Charge, Expedite Charge, Cancellation Charge, and Maintenance of Service Charge.[224] Since these are the same charges

[221] Starkey Direct, pp. 133-134; *see also, e.g.*, Exhibit BJJ-3, chronology, p.11 [quoting Qwest's 11/18/05 response indicating that Qwest claims expedites are not a UNE (*i.e.*, "Qwest does not sell Unbundled Loops to its end user customers. . . . so it is not appropriate to make a comparison to retail in this situation.")].

[222] Stewart Direct, p. 21, lines 14-15.

[223] Stewart Direct, p. 21, line 15.

[224] Process Notification PROS.08.31.06.F.04159.Amendments.ComlAgree.SGAT. I discussed this non-CMP notice at pages 133-134 of my direct testimony.

in Eschelon's language for Issue 9-31,[225] Qwest's plan to charge tariff rates with regard to these UNE related activities is crystal clear.

By asking the Commission to reject Eschelon's proposed language, Qwest is attempting to avoid altogether a determination of the issue of what constitutes nondiscriminatory access to UNEs in this arbitration under the Commission's jurisdiction, while at the same time maintaining its tariff rate position outside of arbitration (and outside of CMP). Qwest has already started to charge CLECs for design changes for unbundled loops when it previously did not do so under the ICA,[226] even though it has admitted that it has no basis in the ICA (or even the SGAT) to charge CLECs.[227] Although Qwest currently does not appear to be charging a tariffed rate for these design changes for loops, Qwest's negotiating template indicates Qwest "uses rates from Qwest's Tariff FCC No. 1 Section 5," clearly opening the door for non-TELRIC rates related to these activities.[228] This suggests Qwest plans to bill a tariffed rate. Similarly, in states other than Washington, and applying one of the same legal theories as it asserts in this arbitration and through its new negotiations template, Qwest has already eliminated the availability of expedites for loop orders under the existing Qwest-Eschelon ICA in 13 states by denying expedites of UNE orders under that ICA to

[225] Starkey Direct, p. 134, lines 10-13.

[226] Denney Direct, pp. 19-20 & Exhibit DD-1.

[227] Stewart Minnesota Rebuttal, p. 6, lines 27-28 ("Mr. Denney is correct in stating that neither Qwest's SGAT nor the parties' current ICA includes a design change charge for loops.") (Sept. 22, 2006).

[228] Exhibit DD-16 at Exhibit A, p. 13, § 9.20.13.

Eschelon despite: (1) the presence of expedite language in the existing approved ICA,[229] (2) years of Qwest having provided expedited UNE loop orders to Eschelon under the ICA,[230] and (3) the absence of any change in that same ICA language allowing Qwest to stop providing this service.[231] In other words, Qwest has substantially altered the manner by which it provides access to the UNE in question in those states without having made any change in the ICA terms or having requested any commission review or approval of that change. That is why language specifically addressing this issue is so important in this ICA – so as to answer the issue and avoid future disputes.

It seems clear that Additional Dispatches, Trouble Isolation, Design Changes, Cancellations, and Maintenance of Service are next on the agenda, if this Commission does not expressly rule otherwise. As important as the capability to expedite loop orders is to the ability to compete meaningfully, the elimination by Qwest of these other services under the ICA would effectively eliminate any useful purpose of the UNE and threaten the ability of a CLEC to conduct business. If Qwest is successful in excluding Eschelon's proposed language from Section 9.1.2 and if Qwest deploys the same strategy as it has for expedites in other states, it will stop providing these other services to Eschelon

[229] *See, e.g.*, Qwest-Eschelon Washington ICA, Att. 5 §§ 2.4, 7.4.2 & 9.1-9.3; Part A, §9.2.

[230] *See* Exhibit BJJ-3, p. 8 (citing PON MN510386TIFAC, completed on July 6, 2005).

[231] *See* discussion of expedites (Issue 12-67) in Webber Direct, pp. 60-92, as well as in his rebuttal testimony.

under the ICA (Section 251), even though these services have also long been available as part of access to UNEs.

Although there is other language in the ICA addressing availability of these services that logic would dictate means that Qwest must continue to provide them, the same is true of expedited orders for loops. In Arizona, for example, despite the clarity of the ICA's intent to allow Eschelon to order expedites for UNE loops, Qwest denies[232] that the following contract provision entitles Eschelon to receive expedites for UNE loops: Qwest "shall provide CO-PROVIDER the capability to expedite a service order."[233] Qwest has indicated that it will charge non-UNE rates to undertake such an expedite, even though the expedite is specifically undertaken when accessing a UNE loop, and currently denies orders for expedites on loop orders to any CLEC that will not pay that tariff rate.[234] Therefore, Eschelon takes little comfort that equally clear provisions in the contract relating to the other services would stop Qwest from following through with its plans to alter its access to those UNEs. Qwest's position illustrates that describing each of these services in other sections of the ICA is insufficient to protect their availability pursuant to this Commission's jurisdiction without express language in Section 9.1.2 making clear that they are part of nondiscriminatory access to UNEs.

[232] Qwest Answer in Arizona Complaint Docket.

[233] AZ Qwest-Eschelon ICA, Att. 5, §3.2.2.13 (Exhibit BJJ-3, p. 4, footnote 9); *see* Issue 12-67 in Mr. Webber's direct and rebuttal testimony.

[234] *See* Issue 12-67 in Mr. Webber's direct and rebuttal testimony.

Q. HOW DOES QWEST'S NOTICE REGARDING CHANGES TO ITS NEGOTIATIONS TEMPLATE IMPACT ESCHELON'S ICA WITH QWEST?

A. It would be extremely unfair and harmful to Eschelon's business to come to the conclusion of this arbitration having obtained an approved ICA that contains language relating to Additional Dispatches, Trouble Isolation, Design Changes, Cancellations, Expedites, and Maintenance of Service (and other terms for which Qwest has not yet deployed this strategy but later decides to do so), only to find that Qwest will not make those services available pursuant to the Commission-approved ICA without an amendment containing rates based on Qwest's tariff (*i.e.*, as Qwest has done with expedites for loops in other states).

Qwest will have then accomplished to effectively change its nondiscrimination obligations under the Act, undermine the work done to ensure nondiscriminatory access to UNEs in the 271 review proceedings,[235] and increase its competitors' costs – all without negotiating or arbitrating its tariff rate proposal – let alone the rates themselves. Eschelon therefore proposes language in Section 9.1.2 relating to nondiscriminatory access to UNEs that places the issue squarely

[235] Although since the 271 proceedings the FCC, in the TRO/TRRO, may have allowed less regulation for elements that ILECs no longer must offer on an unbundled basis, the reverse is also true. The FCC denied the ILECs' request for less regulation for elements that ILECs must continue to offer on an unbundled basis through filed and approved ICAs. The FCC's rejection of the ILECs' request means that UNE terms (including provisioning of UNEs "in a way that would make them useful" pursuant to the First Report and Order at ¶268) belong in an ICA and remain subject to regulation and Commission oversight.

before the Commission. While Eschelon strongly opposes Qwest's intentions to assess non-UNE rates for these types of services that clearly fall within Qwest's non-discriminatory obligations regarding access to UNEs, Eschelon objects as well to the manner by which Qwest is attempting to effectuate such a change (*i.e.*, through silence in this proceeding and unilateral efforts elsewhere). If Qwest intends to charge Eschelon non-TELRIC rates to access UNEs via these, or other, means (*e.g.*, Additional Dispatches, Trouble Isolation, Design Changes, Cancellations, Expedites, and Maintenance of Service), then it must request and gain approval from the Commission to do so, and terms and conditions to that effect must be included in the parties' ICA. The Commission should not accept Qwest's invitation to simply reject Eschelon's proposed language in this regard, leaving the issue unresolved for Qwest to later implement unilaterally using ambiguity in the language as its crutch.

Q. QWEST TESTIFIES THAT "CONSISTENT WITH APPLICABLE LEGAL REQUIREMENTS" QWEST WILL PROVIDE NONDISCRIMINATORY ACCESS TO UNES.[236] ARE YOU AWARE OF ANY RECENT EXAMPLE TO THE CONTRARY?

A. Yes. However, before I describe specific examples, it is important to note that an ICA is meant to include specific terms and conditions, not only overarching promises regarding Qwest's intentions. Eschelon's language puts meaning to

[236] Stewart Direct, p. 18.

Qwest's promise. Leaving for another day the issue of whether these particular terms are required by the non-discriminatory treatment Qwest promises (*i.e.*, Qwest's position), will definitely lead to future disputes and problems. Given that Eschelon has expended the necessary resources to arbitrate this dispute in this proceeding, the issue should be resolved here.

Q. ARE QWEST'S PROMISES AND ITS ACTIONS TWO DIFFERENT THINGS?

A. Yes. I explained in my direct testimony at pages 131-132 that Qwest issued a Level 3 CMP change that restricted the verbal CFA changes (or same day pair changes) to one change on the due date. (PROS.09.11.06.F.04161.P_&_I_Overview_V91, effective October 26, 2006). With this notice, Qwest was creating a fallback position for itself, outside of the Commission's scrutiny in this arbitration, in the event Qwest does not prevail on its proposals for Issue 4-5 (and subparts). That is, Qwest's notice showed that if Qwest did not get the rate it wants (or apparently even if it does), it would simply stop providing, or severely restrict, the service (in this instance, same day pair changes). For same day pair changes, Qwest and Eschelon are already in contact and coordinating the cutover, and the Qwest central office technician is already ***standing at the frame***.[237] The Qwest central office technician simply removes the

[237] Denney Direct, p. 38.

jumper from the bad CFA and reattaches to the new CFA.[238] In these situations, the Qwest CO technician is already available and working on the cutover, and it requires little, if any, additional time to switch CFAs.[239] Despite these facts, Qwest's notice indicated that Qwest planned on making life difficult for CLECs by requiring the Qwest central office technician who is already standing at the frame (while Qwest is being paid for coordination)[240] to refuse to take any "further action" that day, requiring CLECs to submit a supplemental order for a later due date, requiring the CLEC's Customer to experience a delay while waiting for that later due date, and imposing "additional charges" on CLECs, including Eschelon – charges to pay Qwest for sending the technician back to the frame to complete what he/she could have completed with very little effort during the original dispatch.[241]

While Qwest later retracted this CMP notice,[242] on October 26, 2006, Qwest issued an internal notification (MCC) that it distributed to CLECs which again limits CFA changes to one per circuit on the day of the cut, but directs Qwest testers to use their "best judgment to determine if it is reasonable to expect the next CFA change to resolve the issue" and if Qwest's tester decides that this expectation is not reasonable, the "CFA change should be refused and the CLEC

[238] *Id.*

[239] *Id*

[240] *Id*

[241] *See* PROS.09.11.06.F.04161.P_&_I_Overview_V91.

[242] Qwest filed a notice on 10/20/06 (PROS.10.20.06.F.04281.Retract_CFA_P&I_OvrvwV91) to retract PROS.09.11.06.F.04161.P_&_I_Overview_v91.

should be pointed to the supplemental process." Qwest's 10/26/06 document also states that "If Qwest receives frequent attempts from a CLEC to verbally request numerous changes on DD before a good CFA is found, the Tester should post a Customer Jeopardy to the order and contact the CLEC's Service Manager to inform them of the situation." Qwest claims (incorrectly) that it has always been Qwest's intent to limit CFA changes to one per circuit on the day to the cut, and that this MCC notice only reiterates the current practice. Eschelon has asked Qwest to retract this MCC notice, explaining that this is a change in process and should be issued as a Level 4 CMP change request, and that limiting CFA changes on the day of the cut to one per circuit was not Qwest's intent and that Qwest has been performing multiple CFA changes for four years.[243] The intent to apply to multiple CFA changes is evident on the face of the change request. It provides examples to illustrate the request, and one of those examples includes multiple changes to one CFA. Nevertheless, Qwest's actions with regard to its CFA change notices is further proof that Qwest's promises regarding nondiscriminatory access to UNEs and its actions are two different things and that the Commission should remedy this situation by making Qwest's obligations clear in the contract under Issue 9-31.

[243] Mr. Denney provides a CFA Change Chronology as Exhibit DD-17. This exhibit includes Qwest's CFA change notices and Eschelon's request for Qwest to retract its 10/26/06 notice.

Q. HOW DO YOU RESPOND TO QWEST'S CLAIM THAT ESCHELON SEEKS TO IMPOSE OBLIGATIONS WITHOUT AGREEING TO COMPENSATE QWEST?

A. As I mentioned in my summary of this issue, the ICA contains provisions that allow Qwest to recover its costs. I also explained in my direct testimony that these are activities necessary for nondiscriminatory access to UNEs and are, therefore, governed by Section 251 and should be priced at TELRIC.[244] Qwest has not provided any indication that it does not provide these same activities for its own retail customers, and as explained above, these activities simply provide Eschelon with a functionally equivalent network. If Qwest were able to price these activities at rates that exceed their underlying costs, Qwest would undermine the FCC's requirement to provide access to UNEs on terms, rates and conditions that are nondiscriminatory. Finally, regarding Qwest's claim that Eschelon is attempting to avoid paying Qwest, one only need to examine Eschelon's position on Issue 4-5 (Design Changes for UNE loops) – one of the "activities" in question – to understand that Eschelon is not attempting to avoid compensating Qwest for these activities. Ms. Stewart is simply attempting to raise a "red herring" issue in arguing that Eschelon is trying to get something for nothing. Eschelon has more than demonstrated its willingness to pay cost-based rates.

[244] Starkey Direct, pp. 129 and 136.

Q. QWEST ALLEGES THAT ESCHELON'S PROPOSAL IS VAGUE AND UNDEFINED. PLEASE DESCRIBE QWEST'S PROFESSED CONCERNS.

A. Qwest complains that Eschelon's language is "broad," "undefined" and "vague,"[245] which leads to two problems: First, Qwest argues that by including a non-exhaustive list of UNE-related activities, the language could lead to future disputes. Second, according to Qwest, Eschelon seeks to use vague terms to circumvent the *TRO*. Both claims are invalid, and I discuss them separately below.

Q. DO YOU TAKE ISSUE WITH QWEST'SCLAIM THAT THE LIST OF EXAMPLES SHOULD BE EXHAUSTIVE?

A. Yes. Contrary to Qwest's claim, Eschelon's language is very specific about the activities covered by Eschelon's language. Eschelon's language spells out categories of activities that are necessary for access to UNEs ["moving, adding to, repairing and changing the UNE"] and then goes on to provide a list of specific examples of these activities ["design changes, maintenance of serving including trouble isolation, additional dispatches, and cancellation of orders"]. This list of examples should address concerns about Eschelon's language being overly broad or vague, but it appears that the "e.g.," concerns Qwest because it indicates that

[245] Stewart Direct, p. 21, lines 6-15. *See also* Stewart Direct p. 22, lines 9-10; p. 19, lines 6-10 (where Ms. Stewart states that Eschelon's proposal is "open-ended," "undefined" and "far-reaching.")

the list is non-exhaustive. Curiously, Qwest does not object to "e.g." being used dozens of other times in the ICA to refer to a non-exhaustive list, and there is no reason that the inclusion of "e.g." in Eschelon's 9.1.2 would lead to any more disputes than use of the same mechanism in other parts of the contract. The examples provide clarifying information as to the meaning of the language.

Further, an exhaustive list is unnecessary and opens the door to Qwest arguing that other services that are routinely provided today as part of access to UNEs need not be provided because they are not on the list. Importantly, the FCC when defining Qwest's obligations regarding non-discriminatory access specifically refused to prepare an exhaustive list of all such activities such an obligation would entail.[246] The fact that Eschelon identifies a few specific examples here, while maintaining the overarching principle of non-discriminatory treatment, is perfectly consistent with the FCC's approach in this regard.

That all said, the real problem with trying to identify every particular activity that might fall within Qwest's obligation to provide non-discriminatory access is that Eschelon cannot predict where Qwest might try to shirk this responsibility in the future. Prior to having witnessed Qwest's actions regarding loop design changes and expedites, Eschelon would not have anticipated that Qwest would suddenly claim that either design changes for loops or expedites, which Qwest had routinely provided as part of access to UNEs under the existing ICA, were not UNEs but instead, subject to non-cost based rates. If it had to

[246] *TRO*, ¶ 634.

compile an exhaustive list beforehand, Eschelon would not have known to include these services. Similarly, Eschelon cannot anticipate what Qwest may be planning next. Instead, as demonstrated by the FCC on this point, the language should set forth the rule, with examples to help clarify the rule.

Q. DO YOU ALSO TAKE ISSUE WITH QWEST'S CLAIM THAT ESCHELON SEEKS TO USE ALLEGELDY VAGUE LANGUAGE TO CIRCUMVENT THE TRO?

A. Yes. Qwest alleges that, by using the term "add to," Eschelon is seeking to include "digging a trench"[247] and installing "new cables and wires" to "violate the TRO."[248] Like Qwest's claim that Eschelon seeks to impose obligations without agreeing to compensate Qwest, Qwest's claim that Eschelon seeks to violate the *TRO* is shown to be false by the closed language in the contract itself. Qwest cites paragraph 632 of the TRO to support its claim.[249] A simple comparison of the language of paragraph 632 of the *TRO* with closed ICA language shows that Qwest's allegations about Eschelon's motives and the meaning of Section 9.1.2 are completely unfounded:

Paragraph 632 of the TRO:[250]

[247] Stewart Direct, p. 22, lines 1-3.

[248] Stewart Direct, p. 21, lines 7-11

[249] Stewart Direct, p. 21, line 7.

[250] *See also* TRO ¶636 ("We do not find, however, that incumbent LECs are required to trench or place new cables for a requesting carrier.").

> "By 'routine network modifications' we mean that incumbent LECs must perform those activities that incumbent LECs regularly undertake for their own customers. Routine modifications, however, do not include the construction of new wires (i.e., installation of new or buried cable) for a requesting carrier."
>
> **ICA Section 4.0, Definition of "Routine Network Modification(s)"**: "'Routine Network Modification(s)' means those activities of the type that Qwest regularly undertakes for its own End User Customers. Routine Network Modifications include . . . attachment of electronics (***except for*** building a Loop from scratch ***by trenching*** or pulling cable). . . . Routine Network Modifications ***do not include the installation of new aerial or new buried cable for CLEC.***"[251]

Qwest is well aware of this ICA provision, which Eschelon and Qwest agreed upon and closed some time ago, after the FCC issued the *TRO*. Yet, Qwest affirmatively represents to the Commission that there "is no restriction in [Eschelon's] proposed language that would prohibit this type of demand even though the demand would violate the *TRO*,"[252] without mentioning that there *is* such a restriction *in the ICA*, and Eschelon has agreed to it.

Q. IF QWEST'S STATED CONCERNS ABOUT ESCHELON DEMANDING THE CONSTRUCTION OF NEW CABLES OR THE DIGGING OF TRENCHES ARE ALREADY ADDRESSED BY AGREED UPON LANGUAGE, WHAT, IN YOUR OPINION, IS THE ACTUAL REASON QWEST IS SO OPPOSED TO ESCHELON'S PROPOSED LANGUAGE?

[251] Proposed ICA Section 4.0 (definition of Routine Network Modification(s)) (closed language) (emphasis added).

[252] Stewart Direct, p. 21, lines 9-11.

A. Qwest wants the contract language to be as vague as possible on this point because Qwest wants the ability, after this arbitration is over and an ICA is signed, to continue to scale back existing UNE activities based solely on its discretion. It is for this reason that Qwest is stretching for any reason to oppose Eschelon's proposed language without being obvious that it wants no language at all. However, Eschelon's language should not be rejected for a false reason. Even if the Commission ultimately decides that Qwest somehow has the ability to severely restrict activities it undertakes for UNEs (*i.e.*, the same activities it undertakes to support its retail services), then a specific and determinative decision should be made on that issue and the ICA should specifically reflect that decision. The Commission must reject Qwest's invitation to simply reject Eschelon's proposed language without adding any additional specificity. Qwest's arguments completely ignore the entire structure, content, and context of the ICA so as to read Eschelon's proposal for Section 9.1.2 in isolation and find that it means something it does not.

Contrary to Qwest's assertions that Eschelon's request is "not clear,"[253] Eschelon has been very up-front that it is seeking to continue to receive these functions as part of access to UNEs at cost-based rates, just as it has received them as part of access to UNEs under the existing ICA.[254]

[253] *See, e.g,* Stewart Direct, p. 21, lines 15-16.

[254] Regarding design changes, please refer to Mr. Denney's discussion of Issue 4-5.

Q. IS QWEST'S COUNTER LANGUAGE[255] FOR ISSUE 9-31 ACCEPTABLE TO ESCHELON?

A. No. The language Qwest proposed, which states that Qwest will make the abovementioned functions "available" for UNEs instead of as "access" to UNEs, is not a serious attempt to resolve this issue.[256] Qwest knows that Eschelon's concern is related to nondiscriminatory access to UNEs, and as a result, knows that striking the word "access" in favor of "available" misses the point. Qwest's proposed alternative actually represents an attempt to effectively eliminate Eschelon's language altogether. By describing "moving, adding to, repairing and changing" UNEs as "Activities available for Unbundled Network elements" rather than as "access to" UNEs, Qwest would take these activities, which are essential to Eschelon's ability to obtain the functionality of UNEs, outside of the scope of Section 251(c)(3).

Qwest complicates matters by stating in its proposed language that it will make these functions available "at the applicable rate," which raises the immediate question: "What applicable rate?" Again, one of Eschelon's major

[255] As indicated above, Qwest proposes the following alternative language: ("Additional activities for ~~Access to~~ Unbundled Network Elements includes moving, adding to, repairing and changing the UNE (through e.g., design changes, maintenance of service including trouble isolation, additional dispatches, and cancellation of orders) at the applicable rate."). See E-mail of Qwest negotiations team (K. Salverda) to Eschelon negotiations team (Sept. 22, 2006) (p. 1of enclosure); Qwest (Ms. Stewart) Minnesota Rebuttal, p. 15, lines 1-5 (Sept. 22, 2006); Qwest Multi-State ICA Draft (showing Qwest's multi-state proposal for all six states, including Washington, for Section 9.1.2 (Nov. 6, 2006)).

[256] Qwest did not update its Washington direct testimony from the Minnesota version to include its September 22, 2006 proposal for Section 9.1.2. After filing its Washington direct testimony on September 29, 2006, however, Qwest again provided its proposal to Eschelon, indicating that it was a multi-state proposal. Qwest Multi-State ICA Draft (showing Qwest's multi-state proposal for all six states, including Washington, for Section 9.1.2 (Nov. 6, 2006)).

concerns is that because these functions are necessary for access to UNEs, they should be available to Eschelon at cost-based rates.[257] Eschelon's proposed language ensures that the "applicable" rate is a cost based rate, but Qwest's counter-proposal does not dictate that result. Qwest fully understands that it is irrelevant whether these functions are theoretically "available" if the "applicable rate" is set at such a high level as to make them uneconomic (or give Qwest a competitive advantage). Qwest's "applicable rate" language is a thinly-veiled attempt to impose tariff rates to these functions consistent with both Qwest's 8/31/06 non-CMP notice[258] and Qwest's stated position that these functions are not governed by Section 251 of the Act.[259] As a result, this language does not address Eschelon's concerns, but instead, further highlights the fact that Qwest has every intention, absent the adoption of Eschelon's proposed language, to begin assessing much higher tariffed rates for multiple activities it has, in the past, provided in support of UNEs at cost-based rates.

VIII. SUBJECT MATTER NO. 18. CONVERSIONS

Issue Nos. 9-43 and 9-44 and subparts: ICA Sections 9.1.15.2.3; 9.1.15.3 and subparts; 9.1.15.3.1; 9.1.15.3.1.1; 9.1.15.3.1.2

[257] If the Commission considers adopting Qwest's language in any form, the Commission should add "Commission-approved TELRIC cost-based" before "rates" in Qwest's proposal.

[258] PROS.08.31.06.F.04159.Amendments.ComlAgree.SGAT. *See* Starkey Direct, pp. 133-134.

[259] Stewart Direct, p. 21.

Q. **PLEASE PROVIDE A BRIEF SUMMARY OF THE CONVERSIONS ISSUES 9-43 AND 9-44 AND SUBPARTS.**

A. These issues relate to the conversions of UNE facilities to analogous or alternative service arrangements due to a finding of non-impairment – an activity that the Washington Commission has found to be within the scope of Section 251/252 of the Act.[260] Issue 9-43 addresses whether Qwest should be allowed to change the circuit identification information assigned to the facility providing Eschelon's UNE service when converting that facility to a non-UNE analogous or alternative service arrangement. Issue 9-44 addresses whether conversions should be achieved through a billing change (*i.e.*, application of a new rate) and not a network change (*i.e.*, switching the customer to a new facility) to avoid customer disruption and unnecessary work for both parties. Issues 9-44(a) through 9-44(c) describes an option that would be available to Qwest in order to implement the billing change that takes place during a conversion.

Q. MS. MILLION STATES THAT CLECS HAVE A CHOICE OTHER THAN TO CONVERT THEIR UNE CIRCUITS TO QWEST PRIVATE LINE SERVICES.[261] HOW IS THE EXISTENCE OF SUCH A CHOICE RELEVANT TO THE DISCUSSION OF CONVERSIONS?

[260] See, Starkey Direct, p. 151, lines 1-2, citing Washington ALJ Report (Order No. 17 in Verizon/CLEC arbitration), ¶ 150.

[261] Million Direct, p. 10.

A. It isn't relevant at all. The ability to convert a circuit from a UNE to a non-UNE is a critical aspect of the FCC's transition plan when a facility that was formerly available as a UNE, as a result of the TRRO, no longer is. In the TRO, the FCC stated that such conversions should be accomplished seamlessly, in order to avoid customer disruption and minimize any anticompetitive impact. Ms. Million's suggestion that Eschelon has a choice, rather than converting its existing UNE circuits, of obtaining the necessary facilities from a source other than Qwest, really offers no choice at all.

Q. MS. MILLION TESTIFIES THAT QWEST INCURS COSTS TO PERFORM CONVERSIONS AND SHOULD BE ALLOWED TO ASSESS A CHARGE FOR THESE CONVERSIONS.[262] PLEASE RESPOND.

A. Ms. Million's testimony exposes a fundamental flaw in Qwest's position on conversions and a flaw in Qwest's proposals for Issues 9-43 and 9-44 to omit any conversion language from the ICA: Qwest ignores the FCC's rules and orders.

Q. PLEASE ELABORATE.

A. I addressed the FCC's rules and orders on this topic at pages 152-153, 158 and 160-162 of my direct testimony, citing *e.g.*, 47 CFR §51.316 and TRO, ¶¶ 586-588. I will not repeat the entirety of those rules and explanatory text here, but to recap:

[262] Million Rebuttal, p. 9.

- The FCC requires conversions to be a "seamless process that does not affect the customer's perception of service quality."[263]
- The FCC expects conversions to be largely a billing function, noting that one way to effectuate a conversion is to establish a mechanism providing that any pricing changes start the next billing cycle following the conversion request.[264]
- The FCC prohibited ILECs from imposing conversion charges on CLECs because "incumbent LECs are never required to perform a conversion in order to continue serving their own customers…"[265]

The FCC's rules and orders make clear that Ms. Million is incorrect. First, the FCC explains that conversions should be largely a billing change that can be effectuated in a "seamless" fashion to the End User Customer and in an "expeditious manner."[266] This means that the costs Ms. Million claims Qwest incurs is related to work that should not be performed for conversions under the FCC's rules and orders – but work that Qwest is attempting to require outside the

[263] 47 CFR § 51.316(b). *See also TRO*, ¶ 586.

[264] *TRO*, ¶ 588. The fact that the FCC mentioned the ability for billing changes to take place by the start of the next billing cycle following the conversion request is significant because Qwest's original non-CMP APOTS notice contained a 45 day conversion interval. *See* Starkey Direct, p. 145, line 4. This supports the notion that the process that Qwest is attempting to impose through non-CMP, non-ICA means is not what the FCC was expecting when it established its conversion rules.

[265] 47 CFR § 51.316(c). *TRO*, ¶ 587.

[266] When addressing conversions in ¶ 588 of the *TRO*, the FCC focused on minimizing the risk of incorrect payment because it found that a conversion is "largely a billing function." Therefore, the FCC concluded that a conversion (or the act of applying a different rate to the same facility) "should be performed in an expeditious manner."

ICA or CMP, nonetheless. Second, the FCC's rules find that conversion charges are discriminatory. So, Ms. Million's claim that Qwest should be allowed to assess conversion charges flies in the face of the FCC's rules and orders.

Q. DOES MS. MILLION EVER ADDRESS THESE FCC RULES AND ORDERS RELATING TO CONVERSIONS IN HER REBUTTAL TESTIMONY?

A. No. She completely ignores them, and instead dedicates 12 pages of testimony attempting to collaterally attack them. I find it telling that Ms. Million would cite to a relatively obscure rule addressing the Uniform System of Accounts records (Part 32.12)[267] to attempt to support the notion that Qwest should be able to change circuit IDs when performing conversions, but has failed to even mention the rules and orders that apply directly to the issue in dispute under Issues 9-43 and 9-44 – *i.e.*, conversions.

Q. MS. MILLION TESTIFIES ABOUT THE QWEST PERSONNEL AND WORK INVOLVED IN CONVERSIONS.[268] IS THIS ANOTHER EXAMPLE OF QWEST IGNORING THE FCC RULES AND ORDERS ON CONVERSIONS?

[267] Million Direct, p. 16.

[268] Million Direct, pp. 12-14.

A. Yes. Though Ms. Million does describe some billing functions in her testimony,[269] she also describes activities that are not seamless and are much more involved than what the FCC requires. For instance, Ms. Million describes a situation in which the Designer is to review the order to make sure that "no physical changes to the circuit are needed."[270] Ms. Million chooses her words wisely by not affirmatively stating that physical changes will be needed, but if the Designer is to make sure that physical changes are *not* needed, obviously Qwest believes that such changes *will be* needed in some instances under its proposed process. And Qwest confirms in its Petition for Arbitration that it intends to require physical changes for conversions by stating that, "conversions from UNEs to tariffed services can involve physical activities" and "Eschelon's proposal assumes incorrectly that Qwest can perform these conversions without engaging in any physical activity."[271] However, "physical changes" are not billing functions, and making physical changes leads to increased risk of service disruption to the End User Customer. This would not be a seamless conversion, as required by the FCC.[272] My concern about Ms. Million's testimony in this regard is only heightened by a mention of reviewing the circuit inventory in the TIRKS database to "ensure accuracy and database integrity."[273] Again, while Ms.

[269] Recall that the FCC stated that conversions are largely a billing function. *TRO*, ¶588.

[270] Million Direct, p. 13, lines 12-13.

[271] Qwest Petition, ¶ 101.

[272] Starkey Direct, pp. 152-153. TRO, ¶¶586 & 588.

[273] Million Direct, p. 13, lines 13-15.

Million chooses her words wisely so as not to admit that Qwest intends to physically move the CLEC's End User Customer from one circuit to another during the conversion, she certainly suggests as much by discussing a review of circuit availability. The CLEC's End User Customer is already on a circuit that is available, so there is no reason for Qwest to be checking for circuit availability. This is perhaps why Ms. Million discusses the potential for a "service interruption for the CLEC's end-user customer"[274] in relation to this work. Again, this would not be a seamless conversion, as required by the FCC and indicates strongly that Qwest is envisioning a process whereby converting circuits actually means ordering new circuits wherein the CLEC is placed, potentially, on different facilities than they currently use.

In a confusing piece of testimony, Ms. Million explains that "to ensure that the conversion process is transparent to the CLEC and its customers' services, Qwest interjects a number of manual activities into the process…"[275] This testimony is interesting for two reasons. First, it shows that it is Qwest who is interjecting this manual work into conversions rather than this work being required to accomplish a conversion consistent with the FCC rules. Second, these manual activities should not be necessary for something that should largely amount to a records change in Qwest's systems. It appears to me that the manual

[274] Million Direct, p. 14, line 2. Ms. Million again chooses her words wisely by stating that this work is done to "ensure that there is no service interruption for the CLEC's end-user customer." However, if Qwest needs to confirm that Eschelon's end user customers will not have their service interrupted, that means that service interruption may occur in some instances. There is no reason for a billing change to interrupt service to Eschelon's End User Customers.

[275] Million Direct, p. 15, lines 14-16.

work that Ms. Million discusses is work created by Qwest related to Qwest making physical changes during the conversion – physical changes that Eschelon does not want Qwest to make. After all, if the End User Customer is on the same facility after the conversion as it was before the conversion, what manual work should be involved other than keystrokes to change the rate applied to that facility?

Q. ARE THERE OTHER EXAMPLES OF QWEST IGNORING THE FCC'S REQUIREMENTS?

A. Yes. As mentioned above, Ms. Million claims (incorrectly) that Qwest should be allowed to assess conversion charges. Qwest proposes to charge Eschelon $36.86 for UNE loop conversions and $126.01 for UNE transport conversions.[276] According to the FCC, these charges are discriminatory and should be rejected. Furthermore, these charges are apparently tariff rates[277] that are not TELRIC-based. As mentioned above, the Washington Commission has already determined that conversions from UNEs to alternative/analogous services is within the scope of Section 251/252 of the Act.

What Ms. Million's testimony illustrates is that Qwest envisions dictating a physical, network-impacting conversion process whereby existing Eschelon circuits will be cancelled and new circuits ordered and provisioned, all in an effort

[276] Million Direct, p. 19, lines 1-6.

[277] Million Direct, p. 14, lines 11-13.

simply to effectuate a different price. If so, Qwest has essentially ignored the FCC's requirement for seamless, expeditious conversions that amount to largely a billing change and the Commission must intervene.

Q. MS. MILLION SUGGESTS THAT QWEST "MUST"[278] CHANGE THE CIRCUIT IDS DURING CONVERSION TO, AMONG OTHER THINGS, COMPLY WITH FCC RULES AND AVOID SPENDING MORE MONEY.[279] DO YOU AGREE?

A. No. Ms. Million's own admission[280] that Qwest has already performed conversions without changing circuit IDs, shows that her claim that Qwest "must" change circuit IDs is false. Obviously, this is not in violation of the FCC's rules if Qwest agreed to do it in the past. Furthermore, Ms. Million's claim of additional costs needs to be viewed in light of Qwest's proposal. Though Qwest wants to remain silent on this issue in the ICA, it wants to push through a manually-intensive conversion procedure (APOT) in a non-CMP, non-ICA notice that imposes substantial additional work and expense on both Qwest and CLEC, increases the risk of service disruption, and freezes ordering activity for the CLEC[281] – and to top it all off, Qwest wants to charge the CLECs for it.[282] And if

[278] Million Direct, p. 13, line 5.

[279] Million Direct, pp. 16-17.

[280] Million Direct, p. 18.

[281] Starkey Direct, p. 145, lines 7-11.

[282] For a discussion of Qwest's APOT non-CMP notice (PROS.07.21.06.F.04074.TRRO_Reclass_Termin_V1), *see* Starkey Direct, pp. 143-148; Exhibits

Qwest would not have pursued terms and conditions unilaterally that did not comply with FCC's requirements in the first place, the costs Ms. Million bemoans that are involved in changing those terms so that they do comply with the FCC's rules and orders, would not have arisen.[283] When put in proper context, it becomes clear that the costs to which Ms. Million refers, are costs Qwest has generated itself by attempting to impose in the first instance, without agreement from the CLECs or state commissions, a process that does not comply with the FCC's requirements.

Q. ARE THERE OTHER PROBLEMS WITH QWEST'S PROPOSAL?

BJJ-7, BJJ-25 and BJJ-28. *See also* Starkey Rebuttal, pp. 65-78 for a discussion of the Secret TRRO PCAT example. Note: Ms. Million also refers to more than 500 conversions that were performed with a circuit ID change and that she is not aware of any complaints from CLECs. (Million Direct, p. 15, lines 18-19). However, these conversions have not been implemented using the APOT procedure that Qwest recently announced in its non-CMP notice. Based on the problems with Qwest's APOT procedure, there is a greater likelihood of disruption and complaints. Furthermore, Qwest has to date refused to negotiate the APOT procedure (see, Starkey Direct, pp. 147-148, and Exhibit BJJ-25 (Email from Kathleen Salverda (Qwest), dated 9/6/06).

[283] For example, on October 16, 2006, Qwest sent Eschelon a letter advising Eschelon of "a policy-related decision Qwest has reached" to take the issue discussion under Issue 9-58 in this arbitration to CMP "within the next two months" (see, testimony of Mr. Denney for Issue 9-58). Qwest's 10/16/06 letter and Eschelon's 10/17/06 response letter are attached to my testimony as Exhibit MS-7. It seems that, now that Qwest has unilaterally developed processes outside of ICA negotiations (despite requests by Eschelon and other CLECs, *see* e.g., Exhibit BJJ-7, p. 4 (11/17/04 CMP November monthly meeting minutes)), CMP (despite promises by Qwest, see, e.g., Exhibit BJJ-7, pp. 8-9 (6/30/05)), and Commission proceedings (also despite promises by Qwest, *see* Exhibit BJJ-7, pp. 8-9 (6/30/05)), it is considering this process as Qwest's "existing" process and will attempt to avoid modifications to this "existing" process in CMP. What Qwest is apparently trying to do is get all of its TRRO PCATs implemented without scrutiny (through CMP or otherwise) and then later claim that the processes are already in place and it will be too costly or time-consuming to change them. However, Qwest should not be implementing them unilaterally in the first place. If it ultimately incurs costs in changing processes that it should not have put in place unilaterally and over Eschelon's objections, Qwest is the cost causer and should bear those alleged costs. Qwest has implemented no fewer than 93 non-CMP TRRO PCAT versions. *See*, Exhibit BJJ-28 (list of Qwest non-CMP TRRO PCATs.)

A. Yes. Qwest defines conversions in terms of circuit ID changes, and then claims that it "must" change circuit IDs when performing conversions. For example, Ms. Million claims that re-pricing QPP is different than a conversion[284] because there is no circuit ID change involved in re-pricing QPP, and therefore "no conversion of the UNE loop occurs."[285] This appears to be a case of the "tail wagging the dog." Qwest has arbitrarily established a self-serving definition of conversions that "must" include circuit ID changes (despite evidence showing that these changes are not required to perform a conversion), and therefore, Qwest has created a conversion procedure (outside negotiation/arbitration and CMP) that is manually-intensive, risky, and costly to the CLEC. Instead, Qwest's conversion procedure should adhere to the FCC's rules and orders to be seamless and largely a billing change, which it will not be if Qwest's non-ICA, non-CMP conversion procedure is imposed on Eschelon. That is why it is critical to establish the terms and conditions for conversions in this arbitration, rather than omitting those terms and conditions from the ICA and inviting future dispute.

[284] Million Direct, pp. 19-21. Though Ms. Million criticizes the comparison of QPP to conversions, it should be noted that Eschelon has offered language that would allow Qwest as an option to perform conversions similar to how it re-prices for QPP. If there is another means by which this can be accomplished that meets the requirements of the ICA language and FCC requirements, Qwest can use that process. [Eschelon's proposed language for 9-44(a) states: Qwest ***may*** perform the re-pricing through use of an "adder" or "surcharge" used for Billing the difference between the previous UNE rate and the new rate for the analogous or alternative service arrangement…] emphasis added

[285] Million Direct, p. 20, line 3.

Q. MS. MILLION MENTIONS THE TRRO TRANSITION PERIOD EXPIRING AND IMPLIES THAT THIS MEANS THAT QWEST DOES NOT HAVE TO PROVIDE CONVERSIONS AS A BILLING CHANGE.[286] WOULD YOU LIKE TO RESPOND?

A. Yes. I'm not sure what point Ms. Million is attempting to make. Ms. Million poses the question: "Is Eschelon correct that Qwest's conversion of UNEs to private line circuits should be a billing change only?" Her answer points out the following:

- the *TRRO*'s transition period for UNEs has expired;[287]
- for non-impaired wire centers, Qwest is no longer required to provide UNE loops and transport at TELRIC prices;[288]
- Qwest must convert from UNEs to private line services to apply non-TELRIC rates as permitted;[289] and
- if Qwest was not able to convert circuits, the TRRO would be given no meaning.[290]

However, Ms. Million does not explain why this reasoning leads her to conclude that conversions are more involved than billing changes. I do not take issue with the reason why conversions are necessary, I do, however, take issue with Qwest's

[286] Million Direct, pp. 11-12.

[287] Million Direct, p. 11, lines 6-12.

[288] Million Direct, p. 11, lines 12-15.

[289] Million Direct, p. 11, line 18- p. 12, line 1.

[290] Million Direct, p. 12, lines 2-4.

plan for accomplishing those conversions. In addition, if expiration of the transition period in the TRRO has any bearing, as Ms. Million seems to suggest, the Commission should be aware that Eschelon and Qwest operate under a "bridge agreement" that has extended this transition period pending a new ICA. Accordingly, not only is Ms. Million's point in this regard confusing, but it is irrelevant to the situation that exists between Qwest and Eschelon – the only two parties in this proceeding.

IX. SUBJECT MATTER NO. 19. INTERFERING BRIDGE TAP

Issue No. 9-46: ICA Section 9.2.2.9.6

This issue is closed. I provide the closed language at page 168 of my direct testimony.

X. SUBJECT MATTER NO. 24. LOOP-TRANSPORT COMBINATIONS

Issue No. 9-55: ICA Sections 9.23.4; 9.23.4.4; 9.23.4.4.1; 9.23.4.5; 9.23.4.6; 9.23.4.5.4

Q. PLEASE PROVIDE A BRIEF SUMMARY OF ISSUE 9-55.

A. Eschelon proposes to include in Section 9.23 the term "Loop-Transport Combinations" to collectively refer to the various types of combinations involving a loop and transport and to expressly provide in the ICA that the UNE piece of the

Loop-Transport Combination should continue to be governed by the ICA. This language is needed to ensure that Qwest cannot position one type of Loop-Transport combination, in particular – a commingled EEL – so the terms governing the non-UNE will dictate how the UNE portion of the combination is ordered, provisioned, and repaired. In his testimony regarding Issue 9-58 and Issue 9-59, Mr. Denney describes how ordering and repair of UNEs are impacted by Qwest's non-ICA, non-CMP PCAT terms. Qwest proposes deletion of Eschelon's language.

Q. IS ESCHELON ATTEMPTING TO CREATE A NEW LOOP TRANSPORT PRODUCT AS MS. STEWART INSINUATES?[291]

A. No. Contrary to Ms. Stewart's assertion, Eschelon's proposal does not create a new loop transport product. I explained in my direct testimony (see pages 174-175) that Eschelon uses the term "loop transport combination" precisely how the FCC uses it – to refer to a group of offerings that combine loop and transport facilities, including commingled EELs.[292] Eschelon's definition makes clear that the term Loop Transport Combination is not a Qwest product offering, but collectively refers to a group of offerings that Qwest is already required to provide. To address Qwest's concern, Eschelon's proposal for ICA Section

[291] Stewart Direct, p. 72, lines 3-4.

[292] Ms. Stewart acknowledges this point at page 100 lines 4-5 of her testimony ["The FCC uses the term 'loop-transport' to describe varieties of EELs…"] One of the EELs described by the FCC is a commingled EEL.

9.23.4 expressly provides: "At least as of the Effective Date of this Agreement, "Loop-Transport Combination" is not the name of a particular Qwest product. "Loop-Transport Combination" includes Enhanced Extended Links ("EELs"), Commingled EELs, and High Capacity EELs." This language alone should be sufficient for rejecting Qwest's complaint.

Q. DOES QWEST HAVE OTHER CONCERNS ABOUT ESCHELON'S PROPOSAL FOR ISSUE 9-55?

A. Qwest claims that Eschelon's language is an attempt to eliminate the distinctions between UNE combinations and commingled arrangements so that the non-UNE components of a commingled arrangement are governed by the ICA.[293]

Q. IS QWEST'S CONCERN LEGITIMATE?

A. No. Ms. Stewart testifies that "Eschelon's proposal is particularly troubling given that Eschelon's definition of Loop-Transport Combination includes commingled arrangements where UNE and non-UNE circuits are combined."[294] But there is no basis to find Eschelon's definition troubling because the FCC uses the term Loop Transport Combination to refer to a commingled arrangement as well. See, page 175 of my direct testimony, citing ¶¶ 584, 593 and 594 of the *TRO*. And Eschelon's definition makes clear that non-UNE components are not to be

[293] Stewart Direct, p. 66, lines 17-19; pp. 69-70.

[294] Stewart Direct, p. 66, lines 13-15.

governed by the ICA as UNEs. Further, nothing in Eschelon's language suggests that the non-UNE piece of the commingled arrangement would be governed by the ICA, and in fact, Eschelon included language in its proposal that should easily dispel this claim. To address Qwest's concern, Eschelon's proposal for ICA Section 9.23.4 expressly provides: "If no component of the Loop-Transport Combination is a UNE, however, the Loop-Transport Combination is not addressed in this Agreement. The UNE components of any Loop-Transport Combinations are governed by this Agreement."[295] Eschelon's language does not subject the non-UNE piece of a commingled Loop-Transport combination to the ICA, rather Eschelon's concern is that the UNE piece of the Loop Transport should continue to be governed by the ICA – as is required by the FCC. Eschelon's concern is valid, as illustrated by the impact of Qwest's non-ICA, non-CMP PCAT terms on ordering and repair that is discussed in Mr. Denney's testimony.[296]

Q. GIVEN THAT THERE IS NOT A SENTENCE IN 9.23.4 THAT EXPRESSLY SAYS THAT WHEN A UNE IS COMMINGLED WITH A NON-UNE THAT THE NON-UNE IS NOT GOVERNED BY THE ICA, DOESN'T THIS IMPLY THAT THE NON-UNE COMPONENT IN THIS ARRANGEMENT WOULD BE GOVERNED BY THE ICA?

[295] Starkey Direct, p. 176.

[296] Mr. Denney addresses Ms. Stewart's claims regarding LSR and CRIS. See Stewart Direct, p. 69, line 26 – p. 70, line 2.

A. No, not unless you ignore other language in the ICA. When Ms. Stewart claims that the language in 9.23.4 implies an attempt by Eschelon to govern non-UNE components via the ICA, she ignores agreed language in 24.1.2.1 – language that Ms. Stewart identifies at page 71 of her rebuttal testimony – that would make clear that the non-UNE portion of the commingled arrangement is governed by the alternative arrangement by which that non-UNE component is offered. Therefore, Ms. Stewart's narrow focus on only one section of the ICA in isolation leads her to the wrong conclusion.

Q. WOULDN'T IT BE CLEARER IF ESCHELON'S LANGUAGE IN 9.23.4 CONTAINED A SENTENCE STATING THAT THE NON-UNE COMPONENT OF A LOOP-TRANSPORT COMBINATION IS NOT GOVERNED BY THE ICA?

A. Not necessarily.[297] The way that Eschelon's language is structured is appropriate according to the structure of the ICA. Section 9 addresses UNEs, and Eschelon's language for Section 9.23.4 focuses on how the UNE portion of the Loop-Transport combination should be treated. Section 24 addresses Commingling and the language in 24.1.2.1 addresses how the non-UNE component of a Loop-Transport combination should be treated. Given that Eschelon is not attempting to govern non-UNEs by the ICA, it does not object to language in 9.23.4 stating

[297] *See* Eschelon's alternative proposal below, specifically cross referencing Section 24.1.2.1 to address this issue.

as much (see Eschelon's alternative proposal below), but this addition is really unnecessary given the language in Section 24.1.2.1 of the ICA. Eschelon's current proposal reflects the distinction between Section 9 (UNEs) and Section 24 (Commingling) of the ICA.

Q. HAS ESCHELON OFFERED LANGUAGE TO ADDRESS QWEST'S CONCERNS ABOUT GOVERNING NON-UNES BY THE ICA?

A. Yes. Though Eschelon continues to believe that its original language proposal is clear on this matter, it has proposed to Qwest language that would reference Section 24.1.2.1 in Section 9.23.4 to make clear that Eschelon is not attempting to govern non-UNEs through the ICA. Qwest rejected Eschelon's proposal with no explanation. Eschelon's alternative proposal is as follows (with new language shaded in gray):

OPEN - Eschelon proposed - Qwest does not agree

Loop-Transport Combination –For purposes of this Agreement, "Loop-Transport Combination" is a Loop in combination, or Commingled, with a Dedicated Transport facility or service (with or without multiplexing capabilities), together with any facilities, equipment, or functions necessary to combine those facilities. At least as of the Effective Date of this Agreement "Loop-Transport Combination" is not the name of a particular Qwest product. "Loop-Transport Combination" includes Enhanced Extended Links ("EELs"), Commingled EELs, and High Capacity EELs. If no component of the Loop-transport Combination is a UNE, however, the Loop-Transport Combination is not addressed in this Agreement. The UNE components of any Loop-Transport

Combinations are governed by this Agreement, as further described in Section 24.1.2.1.[298]

Q. HAS QWEST ATTEMPTED TO GOVERN UNES WITH NON-UNE SOURCES, SUCH AS TARIFFS?

A. Yes. Mr. Denney discusses examples of this under Issues 9-58 and 9-59,[299] and as I discuss under Issue 9-31, Qwest is attempting to do just that by applying tariff rates to design changes and other UNE related activities. In addition, as I explain under Issues 9-43 and 9-44 and the Secret TRRO PCAT example, Qwest is attempting to subject UNEs to non-ICA sources by requiring the APOT procedure for conversions, which affects UNEs but was issued as a non-CMP notice.

Q. IS MS. STEWART'S TESTIMONY ON "COSTLY MODIFICATIONS" AT PAGE 72 OF HER TESTIMONY RELEVANT?

A. No. Ms. Stewart testifies that Qwest "is under no legal requirement to implement costly modifications to provide Eschelon's proposed 'loop-transport' product." However, as shown by Eschelon's express language and as explained above, Eschelon is not proposing a new Loop-Transport product – rather Eschelon's

[298] Section 24.1.2.1 provides (in closed language): "The UNE component(s) of any Commingled arrangement is governed by the applicable terms of this Agreement. The other component(s) of any Commingled arrangement is governed by the terms of the alternative service arrangement pursuant to which that component is offered (e.g., Qwest's applicable Tariffs, price lists, catalogs, or commercial agreements). Performance measurements and/or remedies under this Agreement apply only to the UNE component(s) of any Commingled arrangement. Qwest is not relieved from those measurements and remedies by virtue of the fact that the UNE is part of a Commingled arrangement."

[299] Issues 9-58 and 9-59 are addressed in the testimony of Mr. Denney. *See* Denney Direct, pp. 133-163.

language simply defines this term to collectively refer to Loop-Transport Combinations that Qwest is already required to provide. Therefore, no modifications would be necessary. Once again, Ms. Stewart is simply falling on a tired, and erroneous argument, that somehow Eschelon is trying to get something for nothing. The "distinct systems, procedures and provisioning intervals for EELs, UNEs and tariffed services" referred to by Ms. Stewart[300] that exist today would continue to be used and would not change simply because the term Loop-Transport is defined in the ICA.

Q. QWEST CLAIMS THAT CONFUSION WOULD RESULT BY DEFINING THE TERM "LOOP-TRANSPORT" TO INCLUDE THREE OFFERINGS.[301] IS QWEST'S PURPORTED CONCERN ABOUT CONFUSION WARRANTED?

A. No. Ms. Stewart provides no substance to back up these claims. The closest that Ms. Stewart comes to identifying any confusion that would allegedly reign is her focus on the last portion of Eschelon's language that states "If no component of the Loop-transport Combination is a UNE, however, the Loop-Transport Combination is not addressed in this Agreement. The UNE components of any Loop-Transport Combinations are governed by this Agreement." It is noteworthy that the "confusion" that Ms. Stewart complains about is not related to the fact

[300] Stewart Direct, p. 72, lines 1-2.

[301] Stewart Direct, p. 71, lines 15-17.

that Eschelon's definition for Loop-Transport identifies three distinct products, but is instead directed at the descriptive language explaining how the various components of the Loop-Transport combination will be treated – *i.e.*, governed by the ICA or not. Recall this was the initial concern raised by Qwest that Eschelon was willing to alleviate with alternative language, yet Qwest refused. Nonetheless, the alternative language offered above should allay this concern. Therefore, Ms. Stewart does not support her claim that Qwest's alleged confusion stems from the definition of Loop-Transport Combination identifying EELs, Commingled EELs, and High Capacity EELs.[302] Instead, it appears her "confusion" is actually a restatement of her original concern, *i.e.*, the extent to which non-UNEs will be governed by the ICA given Eschelon's proposed language – an issue already addressed in agreed upon language and further addressed by Eschelon's alternative language on this issue.

XI. SUBJECT MATTER NO. 27: MULTIPLEXING (LOOP-MUX COMBINATIONS)

Issue No. 9-61 and subparts: ICA Sections 9.23.9 and subparts; 24.4 and subparts; 9.23.2; 9.23.4.4.3; 9.23.6.2; 9.23.9.4.3; 9.23.4.4.3; 9.23.6.2; Exhibit C; 24.4.4.3; Exhibit A; Section 9.23.6.6 and subparts

Q. PLEASE PROVIDE A BRIEF SUMMARY OF ISSUE 9-61 AND SUBPARTS.

[302] *e.g.*, Stewart Direct, p. 71, lines 15-17.

A. Issue 9-61 addresses whether the Loop Mux Combination ("LMC") should be included in Section 9 of the ICA as a UNE combination (Eschelon proposes that it should be, and Qwest disagrees); Issue 9-61(a) addresses the proper definition of an LMC, either as a UNE combination (as proposed by Eschelon) or a commingling arrangement (as proposed by Qwest); Issue 9-61(b) addresses whether service intervals for LMCs should be included in the ICA and changed via ICA amendment (as proposed by Eschelon) or excluded from the ICA and established via CMP (as proposed by Qwest); and Issue 9-61(c) addresses whether rates for LMC Multiplexing should be included in the ICA (as proposed by Eschelon) or excluded from the ICA (as proposed by Qwest).

Q. DOES QWEST CAST THE DISAGREEMENT FOR ISSUE 9-61 IN THE PROPER LIGHT?

A. No. The overarching disagreement between Eschelon and Qwest on Issue 9-61 and subparts revolves around Qwest's obligation to provide access to multiplexing. Qwest repeatedly states that Eschelon's language would require Qwest to provide multiplexing as a "stand alone" UNE and that Qwest is under no obligation to do so.[303] This is inaccurate and misleading. Eschelon's proposal would not require Qwest to provide multiplexing as a "stand alone" UNE. Rather, as explained at pages 192-193 of my direct testimony, Eschelon's

[303] Stewart Direct, p. 113, line 1; p. 113, lines 14-16; p. 114, line 16 – p. 115, line 2; p. 116, lines 19-20; p. 116, lines 22-24; p. 119, lines 1-3; p. 119, line 12.

proposed language would require that access to multiplexing be provided as a "feature, function and capability" of the loop in two distinct scenarios – a multiplexed EEL and a Loop Mux Combination – both of which involve providing access to multiplexing in conjunction with a UNE loop (*i.e.*, not on a stand alone UNE basis). Eschelon's position is supported by the nondiscriminatory provisions of the Act, the FCC's rules and orders, the agreed to ICA language on routine network modifications, and past practice.[304]

Q. MS. STEWART CLAIMS THAT MULTIPLEXING IS NOT A FEATURE OR FUNCTION OF THE LOOP.[305] IS SHE CORRECT?

A. No. My direct testimony at pages 189-192 explains why Ms. Stewart is incorrect on this point.

Q. MS. STEWART POINTS TO THE FCC'S WIRELINE COMPETITION BUREAU'S ("WCB") DECISION IN THE VERIZON VIRGINIA ARBITRATION AS ALLEGED SUPPORT FOR QWEST'S POSITION.[306] IS QWEST'S RELIANCE ON THIS DECISION MISPLACED?

A. Yes. First, Qwest's argument ignores the procedural posture of the Virginia Arbitration Order. This decision was the result of an arbitration of the FCC's Common Carrier Bureau, acting in the stead of the Virginia state commission, in

[304] *See* Starkey Direct, pp. 189-192.

[305] Stewart Direct, p. 119, line 2.

[306] Stewart Direct, p. 115.

which the state commission did not carry out its responsibilities. Accordingly, this decision is no more binding on the Washington Commission than any other state commission decision. Second, the Bureau emphasized that its decision should not be interpreted as an endorsement of the Verizon position regarding the availability of unbundled multiplexing associated with Loop-Mux combinations ["We emphasize that our adoption of Verizon's proposed contract language on this issue should not be interpreted as an endorsement of Verizon's substantive positions expressed in this proceeding regarding its multiplexing obligations under applicable law."][307]

Q. IS THERE ANY OTHER REASON WHY QWEST'S RELIANCE ON THE BUREAU'S DECISION IS MISPLACED?

A. Yes. Importantly, this decision actually undermines Qwest's position on this issue. Ms. Stewart points out that this decision declined to require multiplexing as a stand alone UNE, however, this point is moot because Eschelon is not seeking multiplexing as a stand alone UNE. What Ms. Stewart fails to recognize is that the decision does require multiplexing to be provided as a feature and function of a UNE (in that case, UNE transport) in the same manner that Eschelon is requesting it here. This undermines her claim that multiplexing is not a feature or function of the UNE loop.[308] The WCB stated as follows:

[307] Virginia Arbitration Order, ¶ 490.

[308] Stewart Direct, p. 119, line 2.

> We agree with WorldCom that Verizon must provide multiplexing "together with dedicated transport" and "Contrary to Verizon's argument…, the modified WorldCom language we adopt correctly states that DCS and multiplexing are features of UNE dedicated transport, but does not establish multiplexing equipment as a separate UNE. Therefore, it is irrelevant that the Commission has not performed "necessary" or "impair" analysis for multiplexers. Rather, the multiplexer is a feature, function, or capability of dedicated transport, for which the Commission has performed the requisite analysis."[309]

I explained at pages 189-192 of my direct testimony that the FCC has made clear that multiplexing is also a feature or function of a UNE loop.

Q. MS. STEWART ALSO CLAIMS THAT CLECS HAVE THE ABILITY TO PROVIDE THEIR OWN MULTIPLEXING WITHIN THEIR COLLOCATION SPACES.[310] SHOULD THIS FACTOR INTO THE COMMISSION'S DECISION ON ISSUE 9-61?

A. No. The ability for a carrier to self provision a facility is a determination that must be made when conducting a "necessary" and "impair" analysis for UNE unbundling. *See* 47 CFR § 51.317. Since Eschelon is not seeking access to multiplexing as a stand alone UNE, this determination need not be made. As noted by the WCB in the above excerpt, the lack of a necessary and impair analysis for multiplexing – which would include an examination of a CLEC's ability to self provision multiplexing – is relevant only when the FCC evaluates a

[309] Verizon Virginia Order, ¶¶ 499-500.

[310] Stewart Direct, p. 115, lines 13-16.

given facility or feature as a stand alone UNE. This is not the case in Eschelon's proposal.

Q. WHAT SUPPORT DOES MS. STEWART PROVIDE TO BACK HER STATEMENT THAT "MULTIPLEXING IS NOT A FEATURE OR FUNCTION OF THE LOOP"?[311]

A. Though this is, in my opinion, the most important aspect of this issue, Ms. Stewart does not provide any support for her statement. She does not cite to any FCC rules or order that supports her claim and she does not attempt to address the numerous sources to which I cite in my direct testimony that supports the notion that multiplexing is a feature or function of a UNE loop. Further, she provides no physical description of the network or any other technical support for her position. I suspect that Ms. Stewart may attempt to address these sources in her rebuttal testimony, but I find it telling that Ms. Stewart would make the claim that Eschelon's proposal would require Qwest to provide access to multiplexing on a stand alone UNE basis no fewer than six times in her testimony – a claim which is simply not true – but would only dedicate one short phrase (*i.e.*, ten words) to the issue of multiplexing as a feature and function of a UNE loop.[312]

[311] Stewart Direct, p. 119, line 2.

[312] *See,* Stewart Direct, p. 119, lines 2-3 ["Multiplexing is not a feature or function of the loop…"]

Q. HAVE YOU ALREADY ADDRESSED THE POINTS MS. STEWART RAISES ABOUT INTERVALS AND RATES FOR LMC MULTIPLEXING?[313]

A. Yes. The benefits of including intervals in the ICA are explained under Issue 1-1 and with regard to the "product specific dispute"[314] mentioned by Ms. Stewart, I have explained why the LMC is properly viewed as a UNE combination. Regarding Ms. Stewart's claim that tariff rates should apply to multiplexing because multiplexing is not a UNE, I have explained that multiplexing is a feature and function of the UNE loop that should, like the UNE loop itself, be priced at TELRIC when used in that capacity.

Q. DO YOU HAVE ANY ADDITIONAL OBSERVATIONS ABOUT MS. STEWART'S REBUTTAL TESTIMONY ON ISSUE 9-61?

A. Yes. The crux of this disagreement is whether the multiplexing component of the LMC should be provided at TELRIC rates when combined with a UNE loop (if defined as an UNE combination), or whether multiplexing should be purchased from Qwest's tariff at tariff rates (if defined as a Commingled Arrangement). Despite the parties' asking the Commission to resolve this issue in this proceeding, Qwest makes it appear as if this question has already been answered in favor of Qwest.

[313] Stewart Direct, pp. 117-119.

[314] Stewart Direct, p. 117, line 9.

In the very first Q&A in Ms. Stewart's testimony on this issue, she testifies: "Accordingly, a CLEC ***must*** order the multiplexed facility used for LMCs through the applicable tariff."[315] Ms. Stewart repeats this mantra several more times in her rebuttal testimony on Issue 9-61, claiming that, "LMC is comprised of an unbundled loop…combined with a DS1 or DS3 multiplexed facility…that a CLEC obtains from a tariff."[316] Ms. Stewart couches her rebuttal testimony as if Qwest's position on multiplexing is fact, but it is not a fact, and the treatment of multiplexing is at issue in this arbitration for the Commission to decide. That Qwest has provided multiplexing in three other ways (*i.e.*, (1) as part of a multiplexed EEL, (2) as part of a Loop-Mux Combination, and (3) as a stand alone UNE), shows that Ms. Stewart is wrong when she claims that a CLEC "must" obtain multiplexing from a tariff.

Q. DOES THIS CONCLUDE YOUR REBUTTAL TESTIMONY?

A. Yes.

[315] Stewart Direct, p. 113, lines 5-6.

[316] Stewart Direct, p. 112, lines 18-21 (emphasis added). See also, Stewart Direct, p. 114, line 8 ("Because an LMC is a combination of a UNE and a tariffed multiplexing service, it is not a UNE combination.")