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**

SURREBUTTAL TESTIMONY OF DOUGLAS DENNEY

ON BEHALF OF ESCHELON TELECOM, INC.

APRIL 3, 2007

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I. INTRODUCTION

Q. PLEASE STATE YOUR NAME AND BUSINESS ADDRESS.

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

Q. ARE YOU THE SAME DOUGLAS DENNEY WHO FILED DIRECT TESTIMONY IN THIS PROCEEDING ON SEPTEMBER 29, 2006, AND REBUTTAL TESTIMONY ON DECEMBER 4, 2006?

A. Yes.

Q. WHAT IS THE PURPOSE OF YOUR SURREBUTTAL TESTIMONY?

A. The purpose of my Surrebuttal Testimony is to respond to the Response Testimony of the Qwest witnesses related to the issues I addressed in my Direct and Rebuttal Testimony. I also adopt Mr. Webber's direct and rebuttal testimony regarding expedites (Issues 12-67 and subparts).

Q. MS. STEWART TESTIFIED THAT ISSUE 9-39 IS CLOSED.[1] IS THE ENTIRE ISSUE CLOSED, AND DOES THE TESTIMONY ADDRESS ALL OF THE OPEN ISSUES IN THE ARBITRATION?

A. No. The portion of 9-39 relating to caps closed, but the remainder of Issue 9-39 (Wire Center List – Review of Wire Center List) remains open for resolution in this arbitration. The testimony of both companies to date omits discussion of

[1] Stewart Response, p. 22, lines 20-23.

certain issues that have been referred to as the "wire center" issues. They are Issue Numbers 9-37 – 9-42.[2] Eschelon provided revised language on these issues to Qwest on January 30, 2007 and January 31, 2007 and, as of writing this testimony, has not received acceptance or a counter-proposal to that ICA language from Qwest.

While Eschelon continues to hope that the companies can agree on interconnection agreement ("ICA") language to address these issues, if no agreement is reached, this arbitration and the later contract compliance filing need to address these issues, perhaps through later written testimony (if Qwest and the Commission would waive a hearing)[3] or through a further hearing to be scheduled for that purpose in this docket before the contract is finalized. In the recent Minnesota Qwest-Eschelon ICA arbitration, for example, the Administrative Law Judges ("ALJs") recommended: "If further proceedings in this matter are necessary at that time, the Commission could return the matter to OAH [Office of Administrative Hearings] for arbitration of any specific language issues that

[2] Issue 9-37 (Wire Center List); Issue 9-37(a) (Wire Center List – Additional Non-Impaired Wire Centers); Issue 9-37(b) (Wire Center List – Change in UNE Status); Issue 9-38 (Processing of High Capacity Loop and Transport Requests); Issue 9-39 (except caps) (Wire Center List – Review of Wire Center List); Issue 9-40 (NRCs for Conversion); Issue 9-41 (Length of Time Period); Issue 9-42 (Rate During Time Period).

[3] After the first wire center hearing in Utah, the companies agreed to waive the hearing in the wire center proceeding in Oregon. Copies of the wire center orders issued to date are attached as Exhibit DD-34 (Washington), Exhibit DD-35 (Utah), and Exhibit DD-36 (Oregon).

remain."[4] The Minnesota Commission further said at the hearing[5] that a single contract compliance filing addressing all of the contract language would be due 120 days after its written order is issued; if, however, the Minnesota wire center case is not completed 20 days before that date, the parties can obtain an extension for the contract compliance filing. The commission authorized its Executive Secretary to grant any extension. Issues 9-37 – 9-42 are more clearly being addressed in the Minnesota wire center case than in the Washington wire center case,[6] which Eschelon believes had a more limited scope and which the Commission recently filed a Notice of Intent to Close Docket (February 27, 2007). If the companies reach a multi-state settlement that includes ICA language for Washington, that language may be incorporated into the ICA before the compliance filing without arbitration of those issues.

If, however, language issues remain, arbitration of those issues in this proceeding will be needed before the contract can be finalized for approval. The companies

[4] See Exhibit DD-25, Minnesota Arbitrators' Report, In the Matter of the Petition of Eschelon Telecom Inc. for Arbitration of an Interconnection Agreement with Qwest Corporation Pursuant to 47 U.S. C. §252(b) of the Federal Telecommunications Act of 1996 ["Minnesota Qwest-Eschelon ICA Arbitration"], OAH No. 3-2500-17369-2; MPUC Docket No. P-5340,421/IC-06-768 (Jan. 16, 2006) ("MN Arbitrators' Report"), ¶3.

[5] A written order has not been issued regarding the Minnesota commission's adoption of the ALJs' report as of writing this testimony. I was present at the hearing.

[6] *Investigation concerning the status of competition and impact of the FCC's Triennial Review Remand Order on the competitive telecommunications environment in Washington State*, Docket No. UT-053025.

have been negotiating TRO/TRRO issues ***since 2003***,[7] and Issue 9-37 – 9-42 are the only open disputed issues for resolution in this arbitration that are not addressed in previous testimony from those extensive contract negotiations. Regarding these remaining issues, in other proceedings, the Commission has established an initial wire center list (whereas Qwest proposes to delete Eschelon references to a Commission approved list),[8] concluded that TELRIC rates apply to the conversion charge (whereas Qwest proposes to apply a tariff rate if the UNE is moved to a tariffed product),[9] and said that Qwest may not reject orders for high capacity UNEs when requested by a CLEC (whereas Qwest proposes to delete

[7] *E.g.*, Eschelon email to Qwest negotiating team dated April 14, 2004 stated: "Eschelon accepts Qwest's *proposal* to 'continue to negotiate' based on the TRO language that Qwest provided to Eschelon in December. Naturally, Eschelon expects Qwest to negotiate in good faith. Eschelon believes it would be bad faith, for example, for Qwest to wait until after receiving Eschelon's response to that language to withdraw it based on events to date, given your response below and given that Qwest has decided not to withdraw it after considering Eschelon's 3/24/04 email below for almost a month." Qwest provided its TRRO "Roadmap" proposal to Eschelon on May 12, 2005. I have been on the Eschelon negotiations team and participating in these negotiations since December 7, 2004 (my first day of work at Eschelon).

[8] *See* Exhibit DD-34; *Cf.*, *e.g.*, Qwest proposal for ICA Section 9.1.14.4.

[9] Arbitrator's Report and Decision, Order No. 17, Docket No. UT-043013 ("Verizon WA Arbitration"), July 8, 2005 ("Verizon WA ALJ Arbitration Order"), ¶429; *see also id*. ¶150 ("the Commission specifically provided that the parties address through the Section 252 process the transition away from provisioning elements on an unbundled basis") (affirmed in Order No. 18, dated Sept. 22, 2005). *Cf.*, e.g., Qwest proposed ICA Section 9.1.14.6.

Eschelon's language preventing such order rejection).[10] It seems that the companies should be able to work out language along these lines but, if not, any remaining language issues need to be arbitrated in this proceeding. Also, the Commission has not clearly established a process for future additions to the wire center list, and both companies have proposals in that regard if agreement is not reached. As discussed in Eschelon's Response to the Petition (quoted below), Eschelon did not expend extensive time and resources over a period of years to obtain a contract that does not resolve one of the most important legal rulings that occurred during that time period – the TRO/TRRO. The provisions in the ICA are inter-related and closed language assumes the open language will be resolved before the ICA is implemented. In fact, Eschelon cared for this by entering into an approved Bridge Agreement that specifically provides that the TRO/TRRO changes in law would be a part of the new ICA.[11] To the extent that Qwest

[10] Arbitrator's Report and Decision, In the Matter of the Petition of Level 3 Communications, LLC, For Arbitration Pursuant to Section 252(b) of the Communications Act of 1934, Docket No. UT-063006, Order No. 10 (March 12, 2007), ¶113) ("Qwest asserts that does not make sense for a CLEC to ask for access to a wire center that the Commission has found to be non-impaired. . . . As to Section 9.1.1.4, Level 3's proposed language is appropriate and should be included in the agreement. Qwest's language includes unnecessary language restating the non-impairment criteria of the TRRO. In Section 9.1.1.4.1, Level 3's language also more appropriately follows the FCC's requirements in the TRRO. An ILEC is obligated to provide the requested UNEs and then may pursue the dispute resolution process. While it may seem logical that a CLEC should not seek access to UNEs at a wire center that has been found to be non-impaired, the choice is the CLEC's to make and not the ILEC's.") (citations omitted). *Cf.*, *e.g.*, Qwest's proposal for ICA Section 9.1.13.4.

[11] The Commission has approved a Qwest-Eschelon "Bridge Agreement Until New Interconnection Agreements Are Approved" which provides: "the Parties elect to address the changes of law as part of their new ICAs for each state . . . and not as an amendment to the existing ICAs between Qwest and CLEC for each such state." *See* Exhibit DD-33 ("Bridge Agreement" executed Dec. 8, 2005); Order Approving Interconnection Agreement Amendment, Docket No. UT-990385 (Feb. 8, 2006). Some terms of the Bridge Agreement are also reflected in closed language in the proposed ICA (see, e.g., Section 9.1.14.3).

attempts to belatedly move these issues to another proceeding, or to an amendment to the ICA instead of part of the single ICA to be filed as a compliance contract and approved in this arbitration, that is contrary to Eschelon's understanding of the manner in which these issues should be handled. Eschelon properly raised these issues in this arbitration and continues to request resolution of these issues as part of this contract in this proceeding.[12]

The wire center issues are included in the Joint Disputed Issue Matrix that Qwest filed as Exhibit 1 to its Petition for Arbitration. Eschelon addressed these issues in its Response to the Petition (pages 98-99) on September 1, 2006:

> There is no agreement to defer, or stay, these issues outside of this proceeding so that Eschelon would expend the resources on years of negotiation and this entire arbitration only to receive an interconnection agreement that omitted these critical issues. Eschelon would then be left with Qwest either demanding an amendment as to issues already negotiated and raised in arbitration or, worse yet, with Qwest unilaterally imposing its unapproved, non-CMP "TRRO" PCAT terms upon Eschelon, leaving Eschelon to file individual complaints about the very issues that it has already raised in this arbitration. As indicated in Eschelon's position statements for these issues in the Disputed Issues Matrix (Exhibit 1 to Qwest's Arbitration Petition) (with emphasis added):[13] "Eschelon does not believe that this issue is currently an issue in the Washington wire center proceeding. Eschelon is willing to discuss deferment of this issue ***until later in this case***, however, if the Commission will address it in the wire center

[12] Section 252(b) of the Act authorizes the Commission to "resolve each issue set forth in [an arbitration] petition and the response, if any, by imposing appropriate conditions . . . ." *See* 47 U.S.C. § 252(b)(4)(c). *See* Order No. 18, Verizon WA Arbitration, ¶108.

[13] "Eschelon recognizes that which wire centers are currently non-impaired is an issue in the Washington proceeding. Eschelon believes that the other issues on this list are not being decided in that proceeding at this time."

proceeding, ***provided that the issue is either resolved before the statutory nine-month deadline or that deadline is extended***."[14] As stated, Eschelon is willing to defer filing of testimony and consideration of these issues until later in this proceeding. Absent a ruling in another proceeding before the Commission concludes this proceeding, however, Eschelon has presented these issues in its Response as required by Section 252 of the Act and asks the Commission to decide these critical issues and determine the appropriate language for the interconnection agreement on each of these issues. In the meantime, Qwest is protected because the parties have entered into an "Interim Bridge Agreement Until New Interconnection Agreements Are Approved" that addresses TRO/TRRO issues. The Commission has approved the Interim Bridge Agreement.[15]

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

A. My testimony is organized by subject matter number, in the same manner my Direct and Rebuttal Testimony are organized. Each subject matter heading may contain one or more disputed issues from the interconnection agreement. For each subject matter, I briefly summarize the issue.

Q. ARE THERE ANY EXHIBITS TO YOUR TESTIMONY?

A. Yes, my testimony has the following exhibits:

Exhibit DD-17 (updated) A chronology of Qwest's attempts to limit the number of CFA changes to one on the installation due date. This was updated to include the latest activities regarding Qwest's attempts.

[14] "In a July 31, 2006 email to Qwest, Eschelon said (with emphasis added): '***As Eschelon indicated in its WA matrix***, it is open to discussing deferment of these issues ***until later in the proceeding***. It appears unlikely that the upcoming ALJ order will address these issues. If the Commission and the other parties agree to address the issues in another docket, we are agreeable to deferring addressing them ***in this docket*** until then. You could explain the proposal in the petition.'"

[15] The Bridge Agreement provides, for example, for back billing. *See* Exhibit DD-33 §2.

Exhibit DD-21 Eschelon email sent on May 4, 2006 explaining its position on design changes and cost recovery.

Exhibit DD-22 A copy of a public version of Qwest's Design Change cost study in Washington.

Exhibit DD-23 (Confidential) Dun and Bradstreet Reports for Qwest and Eschelon. These reports show that, unlike Qwest, Eschelon poses no significant risk of default on its payments.

Exhibit DD-24 A motion by Cox Arizona Telecom requesting permanent rates be set for cross-connect/wire work demonstrating a demand for this product. This Exhibit also includes the relevant page from the Arizona SGAT Exhibit A, referenced in the Cox petition. (Issue 9-50).

Exhibit DD-25 Recommended decision of the Minnesota ALJs' in the recent Eschelon/Qwest arbitration. Adopted in large part[16] by the Minnesota Commission, by a 4-0 vote, at its March 6, 2007 meeting.

Exhibit DD-26 Section 9.3.3.8.3 from the 11/28/05 Multistate ICA draft.

Exhibit DD-27 A copy of what is available on Qwest's collocation available inventory website. See also

http://www.qwest.com/wholesale/collocation_space.html.

Exhibit DD-28 Excerpts from Direct Testimony of Robert F. Kennedy, Qwest Corporation in Docket No. UT-003013, Part D, November 7, 2001 on expedite charges.

Exhibit DD-29 Current and historical tariff pages from Qwest's tariff FCC #1 regarding expedites (FCC tariff documents includes Qwest's transmittal to the FCC explaining its change in the expedite rate).

Exhibit DD-30 Executive Summary from the Direct Testimony of Pamela Genung (in which Staff concludes that "Qwest did not adhere to the terms and conditions of the current Qwest-Eschelon Interconnection Agreement"), *In re. Complaint of Eschelon Telecom of Arizona, Inc. Against Qwest Corporation*, ACC Docket No. T-01051B-06-0257, T-03406A-06-0257 (Jan. 30, 2007) ["Arizona Complaint Docket"].

[16] The Minnesota Commission adopted modifications offered by Eschelon regarding Issue 12-64 (Root Cause Analysis and Acknowledgement of Mistakes) and Issue 12-71 – 12-73 (Jeopardies), as discussed by Mr. Starkey.

Exhibit DD-31 A chart regarding expedite capability for unbundled loops.

Exhibit DD-32 Documentation regarding Qwest's refusal to provide certain requested cost support.

Exhibit DD-33 Commission-approved Qwest-Eschelon "Bridge Agreement Until New Interconnection Agreements Are Approved."

Exhibit DD-34 Washington Commission Order 06 in docket UT-053025 regarding Qwest's designation of wire centers as non-impaired, or ineligible for access to high-capacity loops and transport by competitors. Documents related to this order, including the order are available at: http://www.wutc.wa.gov/rms2.nsf/vw2005OpenDocket/E015F404192DD32388257245007F4CEC

Exhibit DD-35 Utah Commission Orders dated November 3, 2006 and September 11, 2006 in docket 06-049-40, *In the Matter of the Investigation into Qwest Wire Center Data* addressing Qwest's wire center designations and a process for future additions to the wire center list. Documents related to this order, including the order are available at: http://www.psc.state.ut.us/telecom/Indexes/0604940Indx.htm

Exhibit DD-36 Oregon Commission Order dated March 20, 2007 in docket UM 1251, *In the Matter of COVAD COMMUNICATIONS COMPANY; ESCHELON TELECOM OF OREGON, INC.; INTEGRA TELECOM OF OREGON, INC.; MCLEODUSA TELECOMMUNICATIONS SERVICES, INC.; and XO COMMUNICATIONS SERVICES, INC. Request for Commission Approval of Non-Impairment Wire Center List*, addressing Qwest's wire center designations and a process for future additions to the wire center list. Documents related to this order, including the order are available at: http://apps.puc.state.or.us/edockets/docket.asp?DocketID=13173

Exhibit DD-37 Eschelon dispute resolution letters regarding expedited orders.

II. SUBJECT MATTER NOS. 2, 3 AND 4

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

Issue Nos. 2-3 and 2-4: ICA Sections 2.2 and 22.4.1.2

Q. PLEASE PROVIDE A BRIEF SUMMARY OF ISSUE NOS. 2-3 AND 2-4 AND EACH COMPANIES' PROPOSALS FOR THESE ISSUES.

A. Issue 2-3 (Application of Rates) and Issue 2-4 (Effective Date of Legally Binding Changes) relate to two open provisions in Section 2.2[17] of the ICA and one open provision in Section 22.4.1.2 of the ICA. There is some overlap in these issues, so I will discuss them together. Eschelon has one proposal for Issue 2-3 (see pages 6-7 of my direct testimony) and two alternate proposals for Issue 2-4 (the second of which has language in both Sections 2.2 and 22.4.1.2, see pages 13-14 of my direct testimony and pages 5-7 of my rebuttal testimony).

Issue 2-3 (the first open provision in Section 2.2 of the ICA) is specific to rates and concerns when Commission-ordered rate changes will take effect. Qwest has proposed language be included in Section 2.2 providing that rate changes will be given prospective effect unless otherwise ordered by the Commission. Qwest's proposed sentence is not in the Qwest SGAT. Eschelon proposes the following sentence from Section 2.2 of the SGAT remain unchanged: "Any amendment shall be deemed effective on the effective date of the legally binding change or

[17] Section 2.0 of the ICA is titled, "Interpretation and Construction."

modification of the Existing Rules for rates, and to the extent practicable for other terms and conditions, unless otherwise ordered." This language respects the authority of the relevant body to determine, at the time it issues an order changing rates, when that ruling will take effect. Eschelon has also offered to add the following sentence to address Qwest's stated concerns: "The rates in Exhibit A and when they apply are addressed in Section 22."[18] Section 22 is entitled "Pricing" and lays out the general principles applicable to pricing. *Agreed upon* language in Section 22.4.1.2 regarding interim rates already provides: "Such Commission-approved rates shall be effective as of the date required by a legally binding order of the Commission."

Issue 2-4 is similar to the previous issue in that it concerns when changes of law will take effect (but it is not limited to rates). The parties have agreed that the ICA "shall be amended to reflect such legally binding modification or change."[19]

For Issues 2-3 and 2-4, Eschelon's proposal includes the same above-quoted sentence from the SGAT, which provides that any amendment incorporating a change of law will take effect on the effective date of the change of law, unless ordered otherwise. Eschelon's proposal number one for Issue 2-4, therefore, is the same as Eschelon's proposal for Issue 2-3 (as the SGAT sentence deals with

[18] Eschelon has also indicated (on page 6, lines 20-21 of my rebuttal testimony) that it would agree to add the word "further" to this sentence to recognize that Section 22 (Pricing) is in addition to Section 2.2, as follows: "The rates in Exhibit A and when they apply are ***further*** addressed in Section 22."

[19] ICA, Section 2.2.

both rates, "and to the extent practicable," other terms and conditions). For Issue 2-4, Eschelon also has an alternate proposal (proposal number two) in response to Qwest's proposal to insert new language into Section 2.2 (discussed below).

Regarding Issue 2-4, Qwest proposes, when an order that changes the law "does not include a specific ***implementation*** date,"[20] the ***effective*** date of such a change will depend on whether one party gives the other notice of the change. Note that Qwest's language does *not* say, when an order does not include a specific implementation date, the *implementation* date will depend on a party giving notice. Qwest's proposed language creates a new presumption that, when this Commission or another regulatory body issues an order expressly stating that its ruling becomes "effective immediately," Qwest and other parties do ***not*** have to implement the order immediately – even if no party has requested a separate implementation date or a stay of the order – unless the Commission on its own also expressly identifies a separate, specific implementation date. When Qwest previously interpreted the term "effective immediately" in this manner in an Arizona cost matter in which Qwest did not seek a stay of the Commission's order, the Arizona Commission appeared to reject Qwest's interpretation, as I discussed in my direct testimony.[21] When one party gives the other party notice within thirty days of the effective date of the order, Qwest proposes that the

[20] See Qwest's proposed language.

[21] Denney Rebuttal, pp. 12-14 (discussing *Arizona Corporation Commission v. Qwest Corporation*, Docket No. T-01051B-02-0871, Complaint and Order to Show Cause ["AZ Show Cause Case"]).

amendment will be "deemed ***effective*** on the date of that order." When one party does not give notice, Qwest proposes that the ***effective date*** of the legal change will be – not the date ordered by the Commission if it has said that its order is effective immediately (or is effective immediately by operation of law) – but an effective date in the ICA amendment reflecting that change.

Eschelon's first proposal for Issue 2-4 is simply to strike Qwest's additions to Section 2.2 and use the above-quoted SGAT sentence. Eschelon's second, alternative proposal for Issue 2-4 is to add three provisions to Section 2.2 (shown in underlining on page 6 of my rebuttal testimony) to clean up the distinction that Qwest appears to desire between an "implementation" date and an "effective" date, as well as to add a sentence to Section 22.4.1.2 (shown in underlining on page 7 of my rebuttal testimony). The first provision of Eschelon's alternate proposal confirms that each party has an obligation to ensure the agreement is amended. Eschelon added this sentence in response to Qwest's allegations that, despite use of the word "shall" in the previous sentence, a party to the ICA could avoid or delay amending it when the law changes.[22] The second provision adds clarification as to the relationship between Section 2.2 and Section 22 (Pricing). Eschelon added this sentence in response to observations made by the witness for the Minnesota Department of Commerce in the Minnesota proceeding regarding the utility of distinguishing between changes to prices that had been previously

[22] Denney Rebuttal, p. 8.

approved by the Commission and changes to prices not previously approved.[23] The third provision recognizes that the effective date and implementation may (or may not) be different and establishes that the burden is on the companies (*i.e.*, not the Commission) to identify when they are different and, if a different date is desired, to request a date different from the effective date for implementation of a ruling. To address Qwest's stated concerns that a presumption is needed in cases when the order is silent on the issue, Eschelon's proposal provides, when the order is silent, the implementation date and effective date are the same, unless the Commission orders otherwise or, if allowed by the order, the parties to the ICA agree otherwise.[24]

Eschelon's second, alternative proposal for Issue 2-4 also includes addition of two sentences to Section 22.4.1.2. Section 22.4 is entitled "Interim Rates." Although agreed upon language in Section 22.4.1.2 already provides that interim rates "shall be effective as of the date required by a legally binding order of the Commission,"[25] Eschelon has proposed two sentences in response to Qwest's proposal which expressly state the companies reserve their rights with respect to a

[23] Denney Rebuttal, pp. 8-9. In the sentence which states "Rates in Exhibit A will reflect legally binding decision of the Commission," Qwest proposes to change "will reflect" to "include." Section 4.0 of the ICA defines "include" to mean "including but not limited to."

[24] Denney Rebuttal, p. 9.

[25] Because this closed language could refer to establishing either an earlier effective date (*i.e.*, a true-up) or a prospective date (*i.e.*, no true-up), Mr. Easton is incorrect when he states that "Section 22 is silent as to what is to occur when a Commission order does not specify a true-up of past billing." *See* Easton Rebuttal, p. 2. lines 13-14. This closed language in Section 22 expressly states that the order will set the applicable dates. In addition, Eschelon's alternate proposal for Issue 2-4 adds language in response to Qwest's complaint that more directly addresses the issue than the language

true-up. If an order is silent as to a true-up, Qwest gets the default provision it seeks (except for new products, which are addressed in Section 1.7.1.2), indicating rates will be applied and implemented on a prospective basis.

Q. REGARDING YOUR LAST POINT AS TO A TRUE-UP, MR. EASTON TESTIFIES THAT "ESCHELON'S PROPOSED LANGUAGE IS DEFICIENT IN THAT IT FAILS TO ADDRESS WHAT SHOULD BE DONE" WHEN "A COMMISSION ORDER DOES NOT SPECIFY A TRUE-UP REQUIREMENT."[26] IS THAT ACCURATE?

A. No. Qwest often ignores the language actually proposed by Eschelon; this is just one example. When Qwest makes a claim, each company's proposed language should be reviewed to determine whether the claim is valid. As I just discuss above, Eschelon's language not only specifies what happens when a Commission order does not specify a true-up requirement, it provides the "prospective" default Qwest is seeking. Specifically, as indicated on page 7 of my rebuttal testimony, Eschelon's proposed language states (with gray shading used to highlight the prospective basis true-up provision when a Commission order does not specify a true-up requirement):

> 22.4.1.2 If the Interim Rates are reviewed and changed by the Commission, the Parties shall incorporate the rates established by the Commission into this Agreement pursuant to Section 2.2 of this Agreement. Such Commission-approved rates shall be effective as of the date required by a legally binding order of the Commission.

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proposed by Qwest.

[26] Easton Response, p. 2, lines 2-6.

> Each Party reserves its rights with respect to whether Interim Rates are subject to true-up. If, however, the Commission issues an order with respect to rates that is silent on the issue of a true-up, the rates shall be implemented and applied on a prospective basis from the effective date of the legally binding Commission decision as described in Section 2.2.

Qwest also ignores the language of its own proposal. Ironically, although Mr. Easton claims that its proposed language "avoids ambiguity" in cases when the Commission does not specify a true-up requirement,[27] Qwest's proposed language for Sections 2.2 and 22 *does not even mention* the term "true-up." If Qwest's goal is to avoid ambiguity about a true-up, language expressly referring to a true-up (*i.e.*, Eschelon's proposed language) is less ambiguous than language that does not even use the term (*i.e*. Qwest's proposed language). Nonetheless, Mr. Easton goes on to testify that "Under Qwest's proposal, one looks first to the commission order to determine when a rate applies. If the commission order fails to address the issue, a rate change is applied prospectively."[28] In fact, the actual language of Qwest's proposal does the opposite. Under Qwest's proposal, one first looks to the presumption in the ICA (that changes in law "shall be applied on a prospective basis") and *then* consults the commission order ("unless otherwise ordered by the Commission."). Eschelon's above-quoted language better captures the sequence of events as described by Mr. Easton himself. Yet, even though Eschelon's

[27] Easton Response, p. 2, lines 2-3.

[28] Easton Response, p. 2, lines 21-23.

above-quoted proposal is provided in both my rebuttal testimony[29] and Mr. Easton's own response testimony,[30] he does not identify why the gray shaded language does not satisfy Qwest.

Qwest also ignores agreed upon language in the ICA. In Washington, *closed* language in Section 1.7.1.2 (mirroring the SGAT language) provides regarding new products under an interim advice letter: "The rates, and to the extent practicable, other terms and conditions contained in the final amendment will relate back to the date the Interim Advice Adoption Letter was executed." Qwest's suggestion that true-up requirements are not addressed adequately in the ICA without its proposed language is inaccurate. Eschelon has believed, based on the ICA language, that a Commission order would not be silent on the issue of a true-up in the case of new products. Given Qwest's claimed desire to avoid ambiguity, perhaps the last sentence of Section 22.4.1.2 should end with the clause "except for new products as described in Section 1.7.1.2."

Q. ARE QWEST AND ESCHELON IN GENERAL AGREEMENT REGARDING THE PRINCIPLES THAT SHOULD BE USED TO GOVERN PROPER CHANGE OF LAW LANGUAGE (ISSUE NO. 2-4)?

A. Yes. Mr. Easton and I agree that the "change of law language should: 1) provide the parties with clear guidance as to when a change of law will take effect; 2) not

[29] Denney Rebuttal, p. 7.

[30] Easton Response, p. 6, lines 25-29.

provide an opportunity for any party to delay the effect of a change of law; and 3) preserve the authority of the relevant regulatory body."[31] However, it is clear that despite Qwest's professed goals,[32] Qwest's language fails all three criteria.

Q. REGARDING THE FIRST CRITERION, DOES QWEST'S PROPOSED LANGUAGE PROVIDE CLEAR GUIDANCE AS TO WHEN A CHANGE OF LAW WILL TAKE EFFECT?

A. No. As discussed above, for example, one of the situations in which guidance is needed involves a true-up requirement, and only Eschelon's proposed language uses the term true-up and clearly indicates when a change in law will take effect if the Commission's order is silent on the issue.

Q. REGARDING THE SECOND CRITERION, DOES QWEST'S PROPOSED LANGUAGE LIMIT A PARTY'S ABILITY TO DELAY A CHANGE OF LAW?[33]

A. No. As discussed in my direct testimony (pp. 12-13) and rebuttal testimony (pp. 11-12), Qwest's language allows parties to attempt to avoid a change of law by remaining silent about changes that work against a party, in hopes that the party advantaged by the change of law fails to take notice. Given its greater resources, Qwest will more likely be a party in every proceeding impacting Qwest, while all CLECs (including smaller CLECs opting into this agreement) are less likely to be

[31] Easton Response, p. 3.

[32] Easton Response, p. 3.

a party to all of these same cases; hence, it is Qwest that will likely benefit from selective silence. If Qwest were truly concerned about avoiding delay, then it would accept Eschelon's alternative proposal, which clearly affirms that both parties have the obligation to amend the contract upon a change of law.[34]

Mr. Easton argues that Eschelon is sophisticated and shows a "great deal of awareness" and would likely know of any changes of law.[35] Qwest ignores that Eschelon is a small company compared to Qwest, and the resources available to Eschelon reflect that difference in size. In addition, if Qwest is confident in Eschelon's ability to take advantage of changes of law that benefit Eschelon, why would Qwest be opposed to Eschelon's language? The only answer can be that Qwest hopes to catch Eschelon or another, smaller carrier who happens to opt into Eschelon's ICA.[36]

Q. REGARDING THE THIRD CRITERION, DOES QWEST'S PROPOSED LANGUAGE IMPINGE UPON A REGULATORY BODY'S AUTHORITY?[37]

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[33] Easton Response, p. 3.

[34] See Eschelon's Second Alternative proposal, which is discussed in Denney Rebuttal, pp. 5-7.

[35] Easton Response, p. 5, lines 4-5.

[36] Qwest argues that the ability for CLECs to opt into other CLEC negotiated agreements is part of the reason Qwest has chosen to stop updating its SGATs. See Stewart Response, pp. 26-27.

[37] Easton Response, p. 3.

A. Yes.[38] Qwest's language establishes scenarios when Qwest could argue a Commission-ordered effective date is voided due to Eschelon's failure to notify Qwest[39] of the order, even in circumstances when Qwest was a party to the case causing the change of law (and even when Eschelon was *not* a party).[40] When Mr. Easton suggests that Qwest's language affects only the "implementation date,"[41] he again ignores Qwest's own proposal. Qwest's proposal states, when an order does not "include a specific implementation date" and neither party provides notice of the order to the other party, "the ***effective date*** of the legally binding change shall be the ***effective date of the amendment*** unless the Parties agree to a different date." Qwest's sentence dealing with cases of no notice does *not* use the term "implementation" date. Qwest's proposed language flies in the face of a regulatory body's authority because it means that, even though the Commission may order that its ruling be "effective immediately," the effective date "shall" be the date of the *amendment* – and ***not*** the date ordered by the

[38] See also Denney Direct, pp. 12-13.

[39] Note: Qwest's language would also apply in cases where Qwest fails to give notice to Eschelon, but this scenario is less likely.

[40] Easton Response, p. 5.

[41] Easton Response, p. 5.

Commission! Although Eschelon pointed this out to Qwest,[42] Qwest continues to propose a change, not to the implementation date, but to the "effective date of the legally binding change."

Even assuming these problems with Qwest's language were belatedly corrected, correcting it would be more helpful if the terms used are clear. Only Eschelon's proposal recognizes that there may (or may not) be two different dates (effective date and implementation date) and spells out what this means. Eschelon's language reflects the correct presumption. It provides that, if the order is silent, the effective date and the implementation date are the same. This places the burden on the appropriate party – the party wanting a separate implementation date – to speak up during a proceeding and request that date. Qwest's language has the opposite presumption: if the order is silent and neither party provides notice, the effective date and the implementation date are two different dates, with the parties and not the Commission setting the effective date. Qwest's proposal places the burden on the Commission to identify the need for a separate

42 For example, in an April 11, 2006 memo to Qwest regarding Section 2.2, Eschelon said: "Qwest also added a sentence about what happens "in the event" that neither party provides notice. If Qwest is a party to a proceeding and Eschelon is not and Qwest receives an adverse result, Qwest's language would allow Qwest to delay the effectiveness of that adverse ruling by simply not notifying Eschelon of the ruling. Is this really Qwest's position? Also, while the previous sentence includes the language "unless otherwise ordered," this sentence does not. If a Commission issues an order in a generic cost proceeding that has been properly noticed and the order states that it is effective immediately, does Qwest believe it can change the effective date of the order because neither party gave the other notice (even if one or both parties were party to the proceeding)? That is what Qwest's language says. Is this really Qwest's position?"

implementation date, even when the companies do not request a date or a stay of the Commission's order.

A good illustration of the problems with Qwest's language is the Arizona Commission's Decision No. 64922 in Phase II of the Arizona UNE Cost Docket T-00000A-0194.[43] Mr. Easton argues that the Show Cause proceeding that resulted from Qwest's failure to implement the Commission's order in the UNE Cost Docket "did not relate at all to the effective date of a cost docket order."[44] Mr. Easton misses the point, as the dispute was regarding the **implementation date** of a Commission order. Although Qwest' language contains no definition of these terms, Qwest in its Arizona arbitration testimony defined an effective date as "the date the order takes effect"[45] and implementation date as "the date on which the parties are obligated to act pursuant to the order."[46] Nowhere in Arizona Decision No. 64922 is a separate implementation date established, as the Commission expected the order to be implemented immediately.[47] In that case, Qwest suggested that it could therefore implement the order on a different

[43] See Denney Rebuttal, pp. 12-14.

[44] Easton Response, p. 3.

[45] Easton Arizona Rebuttal Testimony , p. 4.

[46] Easton Arizona Rebuttal Testimony, p. 4.

[47] At the open meeting, the Arizona Commission indicated that it believed it was reasonable to conclude that an order indicating that it was effective "immediately" means "fairly soon" *see* Transcript of 12/2/02 Special Open Meeting, AZ Show Cause Case, p. 9, lines 12-15, and that, in any event, "any definition of immediately is not five months later." *See id*., p. 10, lines 6-7.

schedule (five months to a year).[48] Qwest's proposed ICA language incorporates Qwest's approach in that case for orders without a separate, specific implementation date. Therefore, instead of simply delaying the date on which "Qwest would have its systems modified to reflect the new prices"[49] Qwest could also deny the effective date of the order to Eschelon, or any CLEC opting into Eschelon's interconnection agreement, if Eschelon (or the opting CLEC) failed to give notice to Qwest within 30 days of the Commission's order. Clearly Qwest's language, if in place during Arizona Decision No. 64922, would have circumvented the authority of the Commission.

Q. DOES ESCHELON'S ALTERNATIVE PROPOSAL FOR ISSUE 2-4 SIMPLY DELAY DISPUTES FOR ANOTHER DAY?[50]

A. No. Eschelon's alternative proposal for issue 2-4 simply states that, if a party wishes that an implementation date of an order regarding a legally binding modification or change to existing rules is something other than the effective date of that order, then the party should obtain a ruling from the Commission to that effect. Eschelon's alternative would avoid future disputes such as occurred in the Arizona UNE cost case[51] by clarifying that it is a party's obligation, rather than a party's discretion, to implement a legally binding modification or change to

[48] *See* Transcript of 12/2/02 Special Open Meeting, AZ Show Cause Case, p. 10, line 25 – p. 11, line 8 (emphasis added) (quoted on page 13 of my rebuttal testimony).

[49] Easton Response, p. 4, lines 2-3.

[50] Easton Response, p. 6, lines 15-17.

[51] *See* Denney Rebuttal, pp. 12-14.

existing rules consistent with the effective date of the order causing the modification or change, unless otherwise ordered by the Commission.

Q. MR. EASTON OFFERS CLARIFYING LANGUAGE FOR SECTION 22 AT PAGES 6-7 OF HIS RESPONSE TESTMONY. IS THIS LANGUAGE ACCEPTABLE TO ESCHELON?

A. No. I address the shortcomings of this language at pages 10-11 of my rebuttal testimony.

SUBJECT MATTER NO. 4. DESIGN CHANGES

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

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

A. Issues 4-5, 4-5(a) and 4-5(c) apply to design changes for loops [issue 4-5], CFA changes [issue 4-5(a)], and their respective charges [issue 4-5(c)] in Exhibit A. Eschelon's language makes clear that Qwest will continue to provide design changes and CFA changes for loops and that if any charges apply they reflect cost-based rates.

Q. MS. STEWART STATES THAT, BECAUSE QWEST AGREES TO ESCHELON'S PROPOSED LANGUAGE IN ICA SECTIONS 9.2.3.8 AND 9.2.4.4.2, ISSUE 4-5 IS CLOSED.[52] IS THIS ISSUE CLOSED?

A. No. Issue 4-5 establishes language in the contract regarding Qwest's ability to charge for design changes for loops. Issue 4-5(c) determines the interim rate that would apply to such design changes. Issue 4-5 can not be separated from issue 4-5(c). Otherwise, the contract would establish Qwest's ability to charge for design changes for loops, without establishing an appropriate rate for such charges,[53] and the result would be Qwest's unilateral implementation of rates for design changes for loops.[54] Eschelon has made clear for many months now that it reserves the right to argue that there should be no separate rate for design changes for loops and CFAs because these costs are already recovered in recurring rates. Eschelon's proposed language is subject to that contingency (*i.e.*, Eschelon does not agree to language stating that Qwest may charge Eschelon without also assuring in the ICA that the charge will be a cost-based rate). The language cannot be closed, therefore, until the cost issue is addressed. Exhibit DD-21

[52] Stewart Response, p. 2.

[53] A similar linkage occurs with issue 4-5(a) and 4-5(c). 4-5(a) establishes when Qwest can charge for CFA changes and 4-5(c) establishes the appropriate rate.

[54] In my Rebuttal Testimony, p. 18, I indicated that I believed 4-5 could be closed with Eschelon's language. To be clear, this assumes the establishment of appropriate cost-based rates for Design Changes for Loops and CFA changes for 2/4 wire loop cutovers. As discussed below, Qwest has not agreed to establish cost based rates for Design Changes for Loops and CFA changes for 2/4 wire loop cutovers. Eschelon does not agree to establish and document in the ICA Qwest's right to charge for these items for which it previously did not charge, without ensuring that the rates Eschelon pays are cost based.

shows that Eschelon made this position clear to Qwest in writing as early as May 4, 2006, though Eschelon made its position clear to Qwest in negotiations prior to that time.[55] It is important to consider Eschelon's proposals for Issues 4-5 and subparts together so that the ICA is clear as to if and when Eschelon would pay separate non-recurring rates for these design changes and what these rates would be. If the Commission were to find, for example, that any costs to Qwest were already included in the recurring rate, it would be inappropriate to include the proposed language stating that Qwest could also charge a non-recurring rate.

As stated in my rebuttal testimony, page 18, Qwest has not shown that the costs related to design changes for loops and CFAs are not already recovered in recurring rate, and Qwest should be required to make such a showing before its allowed to assess on Eschelon separate charges for design changes for loops and same day pair changes. Therefore, there are three open issues for resolution: (1) whether Qwest may charge a separate charge for design changes for unbundled loops even though Qwest has not done so in the past (ICA Section 9.2.3.8; Issue 4-5); (2) if so, whether Qwest may charge the same rate that it charges to perform design changes for UDITs or all loops to perform design changes associated with certain Connecting Facility Assignment ("CFA") changes that are relatively common, require very little time, and can be performed on the day of cut during the loop installation process when Eschelon is already paying for coordination

[55] *See also*, Denney Direct, pp. 26-27.

(ICA Section 9.2.3.9; Issue 4-5(a)); and (3) what is the appropriate rate (Exhibit A Section 9.20.13; Issue 4-5(c)). Specifically with respect to the rate, if Qwest may charge separately for design changes for unbundled loops: (a) what rate Qwest may charge for design changes for loops; (b) what rate Qwest may charge for certain CFA changes; and (c) whether the rates identified by the Commission in this arbitration should be Interim Rates.

Q. MS. STEWART DISAGREES WITH YOUR TESTIMONY THAT THERE IS NO BASIS FOR DESIGN CHANGE CHARGES FOR LOOPS IN THE SGAT OR ICA.[56] HAS SHE IN THE PAST AGREED WITH YOU ON THIS POINT?

A. Yes. I addressed this issue at pages 17-18 of my rebuttal testimony. Ms. Stewart's testimony in Washington differs from her testimony in Minnesota, where she agreed that there was no basis for this charge in the SGAT or ICA. Compare Ms. Stewart's testimony in her Washington Response Testimony (at page7) to her testimony on the same issue in Minnesota:

> **Washington**
>
> "Mr. Denney **is not correct** in stating that neither Qwest's SGAT nor the parties' current ICA includes a design change charge for loops…even if the parties' current ICA and the SGAT did not contain these charges, that would not prevent Qwest from recovering the costs it incurs to provide these changes for Eschelon's benefit." (Stewart Washington Response Testimony, p. 7, December 4, 2006, emphasis added)

[56] Stewart Response, p. 7.

Minnesota

> "Mr. Denney **is correct** in stating that neither Qwest's SGAT nor the parties' current ICA includes a design change charge for loops. However, **that fact** should not prevent Qwest from recovering the costs it incurs to provide these changes for Eschelon's benefit." (Stewart Minnesota Rebuttal Testimony, pp. 6-7, September 22, 2006, emphasis added).

Despite testifying in Minnesota that it was a "fact" that there was no basis in the SGAT or ICA for design change charges for loops, Ms. Stewart changed her tune in Washington and now disagrees with something she called a "fact" a few months ago in sworn testimony.

To Ms. Stewart's point that the absence of this basis should not prevent Qwest from recovering its costs, once again,[57] Eschelon's proposal would not prevent Qwest from recovering its costs. Eschelon's proposal would simply require Qwest to substantiate the cost-based charges for design changes for loops and CFAs – charges that Qwest did not assess before its 9/1/05 letter and costs that could be recovered in other rates.

Q. MS. STEWART STATES THAT THE "REAL DISPUTE" IS "WHETHER ESCHELON WILL AGREE TO RATES THAT COMPENSATE QWEST FOR THE COSTS IT INCURS TO PERFORM" DESIGN CHANGES.[58] IS THIS THE "REAL DISPUTE?"

[57] *See, e.g.,* Denney Rebuttal, pp. 19-20.

[58] Stewart Response, p. 2, line 24 – p. 3, line 2. *See also,* Stewart Response, p. 5, line 25 – p. 6, line 1 ["…would improperly prevent Qwest from recovering the costs it incurs for CFA changes."];

A. No. The fact that Eschelon has agreed to compensate Qwest for design changes (either because Qwest is already recovering design change costs in existing rates or because Qwest establishes cost-based rates for design changes) cannot be disputed. This is clear in Eschelon's direct testimony,[59] rebuttal testimony,[60] and most importantly, the ICA language.[61] Eschelon has also agreed to language in Section 5.1.6 of the ICA which states that "Nothing in this Agreement shall prevent either Party from seeking to recover costs…"

Ms. Stewart points to my testimony at the Minnesota hearing as "the basis for [her] concern that Eschelon's proposal may be designed to prevent Qwest from recovering the costs"[62] of design changes and other UNE-related activities. However, Ms. Stewart misses the point of my testimony in Minnesota. I explained that separate non-recurring charges for design changes and other UNE-related activities may not be appropriate because "Qwest is compensated"[63] in the existing rates for UNEs. As I explained, cost and maintenance factors were

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Stewart Response, p. 5, lines 6-7 ["…not be fully compensated for the costs it incurs to perform the work."]; and Hubbard Direct, p. 1 ["Eschelon's efforts to prevent Qwest from recovering the costs Qwest incurs when it performs design changes."]

[59] Denney Direct, p. 23 ("Qwest can assess a cost-based rate for design changes.") and Denney Direct, p. 15 ("Eschelon needs a ruling that provides certainty that Qwest will continue to provide changes at cost-based rates.").

[60] Denney Rebuttal, p. 15. ("Eschelon's position statement, testimony and, most importantly, contract language make very clear that Eschelon is not attempting to prevent or limit Qwest from recovering its costs.") *See also*, Denney Rebuttal, p. 19 ("Eschelon's language does in fact allow Qwest to assess a CFA design change charge in these circumstances.").

[61] Denney Direct, pp. 22-23.

[62] Stewart Response, p. 15, lines 8-11.

[63] Minnesota Hearing Transcript, V. 4, p. 204, line 22.

applied to Qwest's existing recurring rates to recover costs related to network operations, doing repairs, maintaining the network, and moving circuits.[64] It would be inappropriate for Qwest to recover these costs in its recurring rates (through the application of these cost and maintenance factors) and recover them again in separate non-recurring charges,[65] particularly given that charges for these activities should be TELRIC based (as I also explained in my Minnesota testimony).[66]

Q. WHAT *IS* THE REAL DISPUTE?

A. The real dispute is whether Qwest already recovers design change costs in other rates, and if not, whether Qwest should be allowed to apply the same charge for UDIT design changes to design changes for loops and CFAs, and the appropriate rate that should apply for design changes. To the extent that Qwest shows that these costs are not recovered elsewhere, those rates should be non-discriminatory, cost-based TELRIC rates.

Q. MS. STEWART CLAIMS THAT "QWEST IS NOT SEEKING IN THIS PROCEEDING TO IMPOSE TARIFFED DESIGN CHANGE CHARGES ON ESCHELON."[67] WOULD YOU LIKE TO COMMENT?

[64] Minnesota Hearing Transcript, V. 4, p. 207.

[65] *See, e.g.*, Denney Direct, p. 27, line 17.

[66] Minnesota Hearing Transcript, V. 4, p. 206, lines 18-21.

[67] Stewart Response, p. 13, lines 5-6.

A. Yes. As discussed in my direct testimony on pages 15-17, Qwest previously indicated its intent to apply tariff rates to design changes. Qwest should commit that Qwest will not seek to impose tariffed design change charges on Eschelon in another proceeding after this proceeding is complete. Eschelon has expended the time and resources to negotiate and arbitrate the issue in this arbitration.[68] Qwest should not be able to avoid this issue simply by agreeing today and raising the issue tomorrow after this case has concluded.[69]

Similarly, Ms. Stewart testifies: "…Qwest does not ***intend*** to begin charging Eschelon a tariffed rate."[70] Ms. Stewart is careful to leave Qwest's options open by referring to Qwest's current "intent." As the four examples I describe in my direct testimony show, Qwest's intent today may not be what Qwest actually does. Qwest's September 2005 letter that informed CLECs that it would begin assessing design change charges for loops, despite the absence of support for the charge in the SGAT and ICAs, was an unexpected and substantial change in Qwest's charges for design changes, and was done without seeking ICA amendments. This shows that Qwest's representations that it will not assess tariff charges for design changes without clear ICA language prohibiting such a policy cannot be relied upon.

[68] *See, e.g.*, Starkey Direct, p. 134.

[69] Ms. Stewart testified in Minnesota that "Qwest will raise that issue in a separate proceeding that permits all interested parties – not just Qwest and Eschelon – to present their views on the subject." (Stewart Minnesota Rebuttal Testimony, p. 6, lines 12-14).

[70] Stewart Response, p. 3, line 10 (emphasis added).

Furthermore, as explained by Mr. Starkey under Issue 9-31, Qwest's recent attempt at crafting language related to design changes and other UNE-related activities is an attempt at stripping these activities from Section 251 of the Act so that Qwest can apply rates that are not TELRIC-based. Why would Qwest object to recognizing design changes and other UNE-related activities as "access" to UNEs in the ICA if Qwest did not intend to apply non-TELRIC, tariff rates for them? And why would Qwest issue its 8/31/06 non-CMP notice modifying its Negotiations Template indicating that tariff charges will apply to design changes and other UNE-related activities if Qwest did not intend to apply tariff rates to them? This is further supported by Ms. Stewart's claim that design changes and other UNE-related activities are not governed by Section 251 of the Act.[71] In light of these facts, Eschelon simply cannot rely on Ms. Stewart's view of Qwest's current intent related to charges for design changes. Her explanation of Qwest's intent does not square with the facts.

Q. MS. STEWART STATES THAT YOUR ASSERTION THAT THERE IS A RISK THAT QWEST WILL STOP PROVIDING DESIGN CHANGES IS NOT CORRECT.[72] IS THIS RISK SUPPORTED BY PAST EXPERIENCE?

[71] *See, e.g.*, Stewart Response, p. 3, lines 8-10 (" …Qwest believes that design changes are not a service required under Section 251 of the Act and therefore are not governed by the Act's cost-based pricing requirement…").

[72] Stewart Response, p. 2.

A. Yes. There have been cases in which an ICA contains express language regarding a product or service and Qwest has still refused to provide it. For instance, Mr. Starkey explains that despite clear language in the ICA entitling Eschelon to expedites for UNE loops, Qwest denies its obligation in this regard in other states.[73] And, despite clear language entitling CLECs to UNE Combinations in the early ICAs, Qwest initially refused to provide UNE-P under the ICAs, forcing Eschelon to get orders from the state commissions in Minnesota and Arizona before Qwest would provide it.

Furthermore, if Qwest is able to remove these activities from Qwest's obligation to provide nondiscriminatory "access" to UNEs and charge non-cost based tariff rates[74] and restrict access,[75] Qwest will still put Eschelon at a competitive disadvantage although Qwest is making these functions "available."

Q. MS. STEWART TESTIFIES THAT "THERE IS NO BASIS FOR" YOUR ASSUMPTION THAT THE COSTS FOR DESIGN CHANGES FOR LOOPS ARE LESS THAN THOSE FOR UDIT DESIGN CHANGES.[76] IS HER TESTIMONY CORRECT?

[73] Qwest denies that the following contract provision (which is the same in Washington) entitles Eschelon to receive expedites for UNE loops in Arizona: Qwest "shall provide CO-PROVIDER the capability to expedite a service order…" See Exhibit BJJ-3, p. 4, footnote 9; *See also*, Eschelon's discussion of Issue 12-67.

[74] Denney Direct, pp. 15-17; Exhibit DD-16.

[75] Denney Direct, pp. 17-18; Exhibit DD-17 (Updated). I have provided with my surrebuttal testimony an updated version of Exhibit DD-17 (originally provided as a rebuttal exhibit), which reflects more recent activity on this issue.

[76] Stewart Response, p. 6, lines 18-23.

A. No.[77] I have provided a basis for why the design change charge for loops, to the extent they are not recovered in other rates, should be less than the design change charge for UDIT. *See* Denney Direct, pp. 30-36. This information was available to Ms. Stewart when she claimed that I provided "no basis" for Eschelon's position. I have shown that, to the extent, if any, that separate charges for design changes for loops and CFAs are proper, a number of other factors support the use of lower rates than the rate which applies to UDIT.[78]

Q. DOES QWEST'S PROPOSAL TO CHARGE THE SAME RATE FOR UDIT DESIGN CHANGES AS FOR DESIGN CHANGES FOR LOOPS AND CFAS CONFLICT WITH ANOTHER QWEST RATE PROPOSAL?

A. Yes. Qwest's claim that the costs for all design changes – whether UDIT, loop or CFA – should be the same[79] conflicts with Qwest's misguided rate proposal for conversions (*see*, Issue 9-43/9-44). Qwest is seeking a conversion charge for transport that is more than three times the rate it is seeking for loop conversions,

[77] Ms. Stewart also claims that Qwest "has agreed to include in the ICA the definition of 'design change' that Eschelon itself has proposed." (Stewart Response, p. 2, lines 23-24). This is not entirely accurate. Both Eschelon and Qwest proposed definitions, and the final definition has components of both parties' language.

[78] Denney Direct, pp. 30-32, explaining that design changes should not exceed the installation rate because design changes are component(s) of installation. *See also*, Denney Direct, pp. 34-35, explaining that the design change cost study Qwest relies upon assumes processing and billing systems associated with transport services (EXACT and IABS), not loop systems (IMA and CRIS); Denney Direct pp. 32-35, explaining that the work involved with transport is typically more complex than that involved in loops; and Denney Direct, pp. 36-39, explaining that the time and work involved in a CFA change during test and turn-up is minimal because the Qwest technician is already standing at the frame and is coordinating the cutover with Qwest testing personnel and Eschelon personnel.

[79] *See, e.g.*, Hubbard Response, p. 4.

which shows that Qwest believes that work related to transport is more complex, more manually-intensive, and higher cost than that for loops.[80] However, when it comes to design changes, Qwest argues that they should be the same. Qwest's reasoning on both conversions and design changes is flawed; Qwest certainly cannot have it both ways.

Q. QWEST CLAIMS THAT YOUR TESTIMONY "FAILS TO ACCOUNT FOR THE RE-DESIGN WORK THAT MAY BE REQUIRED BECAUSE OF THE USE OF FIBER MUXING EQUIPMENT."[81] DOES THIS SUPPORT QWEST'S POSITION?

A. No. Qwest's lone example regarding the use of muxing equipment shows the danger in relying on Qwest's conjecture about costs, rather than requiring Qwest to file cost studies to support its claim that the costs of design changes for loops and CFA (to the extent that they are not already recovered) are sufficiently similar to design changes for UDIT that applying the same rate for all is appropriate. Ms. Stewart provides no detail about this example, and she admits that use of fiber muxing equipment "may be required,"[82] which also means that it may *not* be required. Ms. Stewart's testimony is too speculative to establish one rate for all different types of design changes, when there has been considerable information provided showing that the costs are not similar.

[80] As Mr. Starkey explains under Issues 9-43 and 9-44 (Conversions), Qwest's rate proposal for conversions should be rejected.

Furthermore, while Qwest argues that Ms. Stewart's lone example regarding muxing equipment "may" apply to loops, Qwest cannot even speculate that it always applies to the CFA changes that are subject to Eschelon's section 9.2.3.9 (Issue 4-5(a)). Fiber muxing equipment is not used in these same day pair changes. Given that Qwest's testimony suggests that use of fiber muxing equipment is part of the basis for Qwest's proposal to apply the same rate to all design changes, Qwest's example is additional information supporting the notion that Qwest's rate is inappropriate for CFA changes.

Q. QWEST CLAIMS THAT YOU HAVE NOT ACCURATELY DESCRIBED THE WORK REQUIRED FOR CFAS AND THE COSTS ASSOCIATED WITH THEM.[83] WOULD YOU LIKE TO RESPOND?

A. Yes. Qwest made the same argument in its direct testimony, and I responded to this argument at pages 21-22 of my rebuttal testimony. Like Ms. Stewart's direct testimony,[84] Mr. Hubbard's response testimony claims that my testimony focuses on only one step of the CFA change – the lift and lay – and that "the bulk of the effort to accomplish the actual physical move precedes this final step."[85] And like Ms. Stewart, Mr. Hubbard claims that I ignore other steps in the process.[86] As I

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[81] Stewart Response, p. 7, lines 3-4.

[82] Stewart Response, p. 7, line 4.

[83] Hubbard Response, p. 2 and Stewart Response, p. 5.

[84] Stewart Direct, pp. 16-17.

[85] Hubbard Response, p. 2, lines 15-16.

[86] Hubbard Response, pp. 2-3.

explained in my rebuttal testimony (pages 21-22), Qwest is wrong because Eschelon is paying for coordination of the cut separately, which will cover the activities that Qwest claims I ignore.[87] Since Eschelon's language limits the CFA change option to coordinated installations, none of the activities that Mr. Hubbard claims I ignore should factor in to the appropriate rate for a CFA design change.

Q. DOES MR. HUBBARD ECHO ANY ADDITIONAL ARGUMENTS IN HIS RESPONSE TESTIMONY THAT MS. STEWART RAISED IN HER DIRECT TESTIMONY?

A. Yes. Like Ms. Stewart's direct testimony, Mr. Hubbard refers to "engineering" work[88] and the need to "redesign the circuit with the new CFA."[89] I already address these arguments at page 23 of my rebuttal testimony, where I explained that the effort involved to make a CFA change during a coordinated cut is minor, and the "engineering" to which Mr. Hubbard and Ms. Stewart refer[90] actually amounts to a records change for Qwest.

[87] Denney Direct, p. 38, line 17 – p. 39, line 1 ("Eschelon is paying for coordination, or for Qwest's central office technician to remain in contact with personnel in Qwest's test center so that the technician has real time access to information during the cutover."). *See also,* Denney Direct, p. 39, fn 21 ("Eschelon pays for the coordination of this cut (or the involvement of QCCC) separately.") and *Denney Rebuttal*, p. 21, lines 6-8 ("Eschelon is already separately paying for coordination during these coordinated cuts, and this coordination should cover the types of activities that Ms. Stewart mentions…")

[88] Hubbard Response, p. 4, line 1. *See also,* Stewart Direct, p. 12.

[89] Hubbard Response, p. 3, lines 3-4. *See also,* Stewart Direct, p. 16.

[90] Hubbard Response, p. 4, line 1. *See also,* Stewart Direct, p. 12.

Q. QWEST CLAIMS THAT MULTIPLE CFA CHANGES ARE ESCHELON'S FAULT AND "NO FAULT OF QWEST."[91] IS THIS TRUE?

A. No. I addressed this issue at pages 23-25 of my rebuttal testimony. Not all CFA changes are Eschelon's "fault." In some cases, the need for a CFA change is brought about by Qwest's failure to properly disconnect an order. An example of this scenario is: Customer A wants to disconnect Eschelon's service, so Eschelon processes the disconnect order in Eschelon's system and sends a disconnect order to Qwest to be processed. Customer B subsequently wants to become an Eschelon customer, and Eschelon assigns Customer B to the CFA which Customer A previously used – which is now vacant in Eschelon's systems. However, if Qwest has not processed the disconnect order, the CFA shows up as occupied in Qwest's systems, necessitating a CFA change at the time of the coordinated cut. If Qwest fails to remove wiring associated with the disconnect, the CFA may show available in both the Eschelon and Qwest systems, but appear unavailable when Qwest attempts the wiring for customer B. In these instances, the reason that a CFA change is needed (*i.e.*, Qwest has not properly processed the disconnect order) is under Qwest's control – not Eschelon's. I also explained at pages 23-25 of my rebuttal testimony that "fault" is irrelevant to the correct rate that should apply, and that, contrary to Qwest's insinuation, Eschelon does have a quality control program in place for CFA inventory.

[91] Hubbard Response, p. 4.

Q. MS. STEWART COMPLAINS THAT YOU DID NOT PROVIDE A COST STUDY FOR THE INTERM RATES THAT ESCHELON PROPOSES. HAVE YOU ALREADY ADDRESSED THIS ISSUE?

A. Yes, I addressed this issue at pages 28 and 29 of my rebuttal testimony, where I explained that it is Qwest's – not Eschelon's – obligation to provide cost support for the charges that Qwest will assess on Eschelon. Furthermore, Eschelon's proposed rates for design change charges for loops and CFAs on the day of the cut are interim rates,[92] until such time that the Commission reviews and sets appropriate rates. Therefore, Ms. Stewart's criticism about the lack of a cost study is misplaced.

Q. MS. MILLION DISAGREES THAT THE DESIGN CHANGE CHARGE WAS DEVELOPED SPECIFICALLY FOR UDIT, AND CLAIMS THAT THE COST STUDY CALCULATES THE AVERAGE COST FOR ALL DESIGN CHANGE PRODUCTS.[93] DID MS. MILLION PROVIDE ANY COST SUPPORT INFORMATION TO SUPPORT HER CLAIM?

A. No. Ms. Million provided no cost support, though I provided excerpts from a Qwest cost study showing its design change charge was constructed based on UDIT systems and ASRs (which are used for UDIT) instead of LSRs (used for loops).[94] Although Qwest should be able to point to specific information in its

[92] *See*, Eschelon's position statement for Issue 4-5(c) in the Disputed Issues Matrix.

[93] Million Response, p. 15. *See also*, Stewart Response, p. 9.

[94] Denney Direct, pp. 33-35.

cost study, rather than a study's Executive Summary[95] which is unrelated to the actual cost calculations, to support Qwest's claim that the design change charge was developed for all design change charge products – but it has not. Further, as explained above in response to Qwest's only example (fiber mux) for why the cost of design changes for transport **may** be the same as design changes for loops, it is certain that this rate was not intended to apply to CFA changes.

Q. IS MS. MILLION'S CLAIM THAT THE DESIGN CHANGE RATE WAS BASED ON AN AVERAGE FOR ALL DESIGN CHANGE PRODUCTS[96] SUPPORTED BY QWEST'S COST STUDY FOR DESIGN CHANGES?

A. No, and perhaps this is why Ms. Million does not rely on the Qwest cost study to substantiate her claim. I have provided a public excerpt from a Qwest cost study for the design change charge (both mechanized and manual) as Exhibit DD-22.[97] Qwest's design change cost studies show clearly that the rate for design change charge does not average together costs for all design change products. For example, as shown in the Probability columns of the cost studies, the probability for all of the activities except one is shown as 100%.[98] If this cost study averaged together different activities for different design change products as Qwest claims,

[95] Million Response, p. 15.

[96] Million Response, p. 15.

[97] Qwest's compliance filing is available on the WUTC website at the following URL: http://www.wutc.wa.gov/rms2.nsf/vw2005OpenDocket/251CD2218395F40D88256CBD00801679

[98] Note: Column "Prob#4" is shown as 0.7 to reflect 30% reduction to work time estimates ordered by the Commission. This has no bearing on my point that Qwest's cost study assumes that all of the activities shown occur in 100% of the design changes modeled in Qwest's cost study.

all of the probabilities would not be 100%. The fact that there is no averaging together of different activities or assumed probability that certain activities would occur for some design changes but not others, shows that this cost study is developed to apply to one product – UDIT. Furthermore, this cost study shows that ordering processes and systems related to UDIT, such as ASRs and EXACT, are assumed to be used 100% of the time and there is no probability assumption for the use of loop related ordering processes or systems such as LSRs or IMA (*See* Denney Direct, pp. 33-36). If this cost study averaged UDIT design change costs together with loop design change costs, as Qwest claim, it would have to include assumptions for loops – but it does not.[99]

Q. IF MS. MILLION IGNORES THE COST STUDY SHOWING THAT THE DESIGN CHANGE CHARGE WAS DEVELOPED FOR UDIT ONLY, ON WHAT DOES SHE RELY FOR HER CLAIM THAT THE COST STUDY AVERAGES TOGETHER COSTS FOR ALL DESIGN CHANGE PRODUCTS?

A. She relies on the description of the rate element in the Executive Summary of Qwest's compliance filing, which refers to "end user premises" and "channel interface," and claims that this terminology supports the application of this charge

[99] The UDIT system EXACT is assumed to be used for 100% of design changes and ASRs are assumed to be used for 100% of design changes (whether they are for new trunk groups (75%) or trunk group augments (25%)).

to loops and CFAs.[100] First of all, Ms. Million's claim does not comport with the cost study information explained above, showing that the design change charge was developed specifically to apply to UDIT and not loops or CFAs. Second, contrary to Ms. Million's testimony, the description of the rate element in the Executive Summary (and the use of the phrase "type of channel interface") does not specifically contemplate situations involving the CFA changes (or same day pair changes) discussed under Issue 4-5. A change to the type of channel interface means a change to the NC/NCI code, which a same day pair change does not require (a same day pair change does not require a redesign of the circuit, rather the circuit is terminated to a different slot, and the circuit ID may or may not change). Therefore, Qwest's own compliance filing shows that the rate does not apply to CFA changes discussed in Section 9.2.3.9 of the ICA.

Q. MS. MILLION DISAGREES WITH YOUR SUGGESTION THAT IT IS NECESSARY TO DEVELOP SEPARATE RATES FOR DESIGN CHANGES FOR LOOPS AND CFAS.[101] WOULD YOU LIKE TO RESPOND?

A. Yes. Ms. Million implies that Eschelon's proposal would require Qwest to develop a rate to accommodate "every possible nuance of every possible way that every possible product might be provisioned by Qwest for the CLECs."[102] Ms.

[100] Million Response, p. 15.

[101] Million Response, p. 16.

[102] Million Response, p. 16, lines 3-4.

Million's claim is misleading and exaggerated. Eschelon's position is simple: if Qwest is not already recovering the costs of design changes for loops and CFAs (something for which Qwest did not previously assess an additional charge prior to its unilateral September 2005 notification), it should be required to show that the costs for these are sufficiently similar to that of UDIT before being allowed to charge that rate. If Qwest is able to make this showing, then it would be allowed to charge the same rate for each. However, I have shown that the costs for design changes for loops and CFAs are ***not*** similar to that of design changes for UDIT, and therefore, a proper cost-based rate should reflect the costs for that activity – otherwise the rate developed will not reflect the underlying costs for loops and CFAs (charges that a CLEC will face more frequently than the UDIT design change charge).

Though Ms. Million's testimony about "every possible nuance" and "every possible 'flavor'" is exaggerated, the fact of the matter is that the Commission has required separate TELRIC-based charges for many different "nuances" or "flavors" of a particular product. For example, the Commission has required Qwest to provide separate rates for various types (or "flavors") of loops (*e.g.*, analog and digital; 2 wire and 4 wire; etc.). Likewise, Qwest has developed separate non-recurring installation charges for loops of various types (e.g., 2 wire, DS1 and DS3). Qwest has even proposed different non-recurring charges for conversions for loops versus UDIT, which shows that even Qwest understands

that when costs for products are not the same, separate rates should be established based on the underlying costs for each.[103] Following Ms. Million's argument, Qwest could develop just one rate element to apply to all loops or installation of all loops. However, the reason for different cost based rates for different products is that the underlying costs for each of the products is different, and therefore, applying a rate to a product that has no relationship to its underlying cost violates the cost-based pricing principles required by the Act.

Q. QWEST RECENTLY ARGUED IN THE ARIZONA ARBITRATION THAT "THE FACT THAT QWEST MAY NOT HAVE CHARGED A CLEC THE COMMISSION APPROVED RATE FOR CERTAIN TYPES OF DESIGN CHANGES DOES NOT MEAN THAT THE COSTS FOR THOSE DESIGN CHANGES WERE NOT INCLUDED IN THE COST STUDY AND THE RESULTING RATE."[104]

A. CLECs make business plans and decisions based upon the costs they face. Qwest has a responsibility during a UNE cost case to clearly identify how the rates it proposes will be applied. Qwest should not be allowed to creatively apply a Commission approved rate to new applications three years after the rate was

[103] As discussed by Mr. Starkey in relation to Issues 9-43 and 9-44, Eschelon opposes Qwest's rate proposal for conversions.

[104] Million Arizona Rebuttal, p. 19. See also Stewart Arizona Rebuttal, p. 9. Similarly, Ms. Stewart testifies in her response testimony in this proceeding that "if Qwest has not previously assessed a charge to recover those costs in every instance that it could have, that does not preclude Qwest from recovering its costs on a going-forward basis." (Stewart Response, pp. 7-8).

ordered. If Qwest believes a Commission ordered rate applies to a certain product or service, but for some reason Qwest decides not to implement that rate, then Qwest should make it clear in both Exhibit A and CLEC's contracts regarding the application of the rate. Qwest has done this in the past for other rate elements, therefore it is difficult to believe that Qwest simply failed to make these clarifications for design change charges. For example, the Exhibit A, to the Eschelon/Qwest ICA in this case contains the following footnotes, which are not in dispute in this arbitration:[105]

> Footnote 14: Qwest can't currently bill the existing rate structure. Customers will be billed the lowest Bridge Tap Removal rate for either Cable Unloading or Bridge Tap Removal.
>
> Footnote 15: Effective 8/1/03 Qwest will no longer charge for Channel Regeneration for both recurring and nonrecurring charges. Contract amendments to remove the charge is not required. Qwest reserves the right to revert back to the contractual rate only after appropriate notice is given. Future regulatory ruling and/or events may be subject to the conditions described under "Change in Law Provisions" of the SGAT (Section 2.2) or the applicable interconnection agreement.

Q. QWEST, IN THE ARIZONA ARBITRATION, TOOK ISSUE WITH THE COMPARISON IN YOUR TESTIMONY OF DESIGN CHANGE CHARGES TO LOOP INSTALLATION CHARGES.[106] WHAT WAS THE PURPOSE OF YOUR COMPARISON IN YOUR REBUTTAL

[105] These examples are from the Exhibit A filed with the petition for arbitration, but are not unique to Eschelon and nor are the examples exhaustive regarding Qwest's use of footnotes to clarify when charges will apply.

[106] See pages 30-31 of my direct testimony for this comparison.

TESTIMONY OF THE DESIGN CHANGE CHARGE TO THE LOOP INSTALLATION CHARGES?

A. As stated in my direct testimony at page 31, "because the design change is one component (or a subset of components) of installation, the work (and cost) involved in performing a design change will be less than the work (and cost) of performing the installation." Ms. Million, in Arizona, is critical of my comparison of the design change charge to the 2/4 wire loop installation charge, claiming that the comparison should have been made to all installations rather than just to the installation for the 2/4 wire loop.[107] It is important to note that Ms. Million did not take issue in Arizona with the fact that the work, and thus, cost for the design change is a subset of the work and cost of an installation, which was the point of my original statement.

III. PAYMENT AND DEPOSITS (SUBJECT MATTER NOS. 5, 6 AND 7)

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

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

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

[107] Million Arizona Rebuttal Testimony, p. 21.

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

Issues 5-8 and 5-9 address the definition of "Repeatedly Delinquent" which is a key term in determining if and when Qwest can require Eschelon to make a deposit. Issue 5-8 relates to whether an amount must be "non de minimus" for that amount to be used in determining whether payment has been Repeatedly Delinquent, as Eschelon proposes, or whether payment may be considered Repeatedly Delinquent based on any late undisputed amount, no matter how small that amount is, as proposed by Qwest. Issue 5-9 relates to whether Repeatedly Delinquent payment should be defined as late payments in three consecutive months (Eschelon's proposal)[108] or late payments in three or more months in a 12 month period (Qwest's proposal).

[108] Eschelon has an alternative proposal for Issue 5-9 that would define repeatedly delinquent as three late payments in a six month period.

Issue 5-11 addresses whether a party should be able to seek Commission relief once the other party demands a deposit. Eschelon's proposal would require payment of a deposit within 30 days unless one party challenges the deposit amount at the Commission, in which case the deposit payment due date would be ordered by the Commission. Qwest proposes that a party should pay the deposit within 30 days with no vehicle to challenge this deposit amount at the Commission before making the payment.

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

Issue 5-13 relates to whether a separate provision is needed that would allow one party to unilaterally review the other party's credit standing and increase the deposit amount (or, according to Qwest, establish a new deposit requirement) based on this review, as Qwest proposes, or whether deposit requirements are sufficiently addressed elsewhere in the contract, as Eschelon proposes.[109]

Q. MR. EASTON SEEMS SURPRISED THAT ESCHELON SPENDS 30 PAGES DISCUSSING THE DISPUTES REGARDING THE CONTRACT

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

LANGUAGE AND DOES NOT DISCUSS WHETHER ESCHELON SHOULD PAY ITS BILLS ON TIME.[110] CAN YOU EXPLAIN?

A. Yes, Eschelon's testimony discusses the contract language proposals and the implications of the companies' proposals because it is the contract language that has brought the parties to these arbitration disputes. Mr. Easton states, "Eschelon devotes over 30 pages to criticizing Qwest's proposed payment and deposit language, but devotes no space to explaining why Eschelon should not pay its bills on time."[111] The contract language regarding when bills are due and Eschelon's obligations to pay its bills **is not in dispute**.[112]

Q. MR. EASTON STATES THAT "ESCHELON NEED ONLY PAY ITS *UNDISPUTED* BILLS IN A TIMELY MANNER TO AVOID CONSEQUENCES SUCH AS THE DISCONTINUANCE OF TAKING ORDERS OR DESPOSIT REQUIREMENTS"[113] AND THAT THE ABILITY TO AVOID THESE CONSEQUENCES LIES "SOLELY" WITH ESCHELON.[114] IS MR. EASTON CORRECT?

[110] Easton Response, p. 7.

[111] Easton Response, p. 7.

[112] See sections 5.4.1, 5.4.2, 5.4.3, 5.4.5 and 5.4.8.

[113] Easton Response, pp. 7 and 16.

[114] Easton Response, p. 7. Mr. Easton also implies that all Eschelon has to do is dispute amounts that it believes are inappropriate to avoid consequences. Easton Response, p. 7. However, even if Eschelon disputes charges and Qwest disagrees, Qwest can simply "resolve" the dispute and force Eschelon to escalate the dispute or Qwest will reclassify the amount as "late." This is especially egregious given that this is not the billing dispute process set forth in the Qwest/Eschelon ICA.

A. No. If it were that simple this would not be an issue. I showed in my rebuttal testimony (see pages 34-36) that there are many reasons why the information on which Qwest bases these decisions may be inaccurate. These reasons include: (1) Qwest declaring disputes as "resolved" when no agreement has been reached and Qwest has taken no action to bring the matter to dispute resolution,[115] (2) Qwest not posting Eschelon's payments in a timely manner,[116] (3) Qwest claiming as past due amounts, payments that are not due yet,[117] and (4) Qwest not updating information about where to send Eschelon's invoices/correspondence[118] - just to name a few. Contrary to Mr. Easton's claim, even if Eschelon paid all undisputed amounts, these problems, individually or in combination, could lead Qwest to believe Eschelon is past due and invoke remedies. In addition, these examples show that the ability to avoid these consequences is not solely in Eschelon's control.

Case in point: in the case of Exhibit DD-8, Qwest sent Eschelon a letter on 10/24/06 claiming that Eschelon had outstanding undisputed amounts and threatened to stop processing Eschelon's orders and disconnect Eschelon's circuits within three days if Qwest's demands were not met. However, Eschelon had already paid the amount Qwest was claiming was overdue a week before

[115] Denney Rebuttal, pp. 34, 37; Exhibit DD-3.

[116] Denney Rebuttal, p. 35, lines 4-18; Exhibit DD-8.

[117] Denney Rebuttal, p. 36, lines 1-9; Exhibit DD-11.

[118] Denney Rebuttal, p. 36, lines 26-31; Exhibit DD-12.

Qwest sent its letter. If Eschelon had not taken steps to show Qwest this mistake very quickly (Qwest threatened to take action in 3 days), Qwest could have stopped processing Eschelon's orders and disconnected circuits based on incorrect information. Qwest's mistake of not posting Eschelon's payment, which led to Qwest's letter threatening disconnection, was not in Eschelon's control.[119] Mr. Easton's testimony ignores the reality that Eschelon could pay all undisputed charges, but if Qwest disagrees (because Qwest incorrectly posted a payment as late, for example), Qwest could invoke remedies based on flawed information and Eschelon and its customers would face dire consequences through no fault of Eschelon's.[120]

Q. MR. EASTON DISAGREES THAT COMMISSION OVERSIGHT IS NEEDED TO PROTECT ESCHELON AND ITS END USER CUSTOMERS.[121] WOULD YOU LIKE TO RESPOND?

[119] Though Eschelon asked Qwest to examine its process to see why this mistake occurred, Qwest simply responded that the payment had been posted and the account was current – without any explanation of why the problem occurred.

[120] Mr. Easton testifies at page 8 of his response testimony that Qwest cannot unjustifiably disconnect circuits or stop processing Eschelon's orders because "Qwest will only disconnect service or discontinue order processing based on the fact that Eschelon has not paid for services that Qwest has previously provided under the terms of the contract." The problem with Mr. Easton's reasoning is that he calls Qwest's view of Eschelon's payment status a "fact," when it is not a fact and can oftentimes be incorrect. *See, e.g.*, Denney Rebuttal, p. 36 and Exhibit DD-11. When Qwest's view of Eschelon's payment status is incorrect, Eschelon runs the risk of Qwest unjustifiably disconnecting its circuits or refusing to process Eschelon's orders as demonstrated by Exhibit DD-11. Qwest has indicated that it reserves the right to disconnect Eschelon's circuits and stop processing Eschelon's orders without further notice. Exhibit DD-3 (confidential), p. 2, letter from Kathie Makie (Qwest) to Christopher Gilbert (Eschelon), dated 4/20/06.

[121] Easton Response, p. 15.

A. Yes. On the one hand Qwest objects to Commission oversight in what it calls standard and reasonable business practices,[122] but on the other hand suggests that if Eschelon has a problem with the actions taken by Qwest "there is no doubt that Eschelon would protect its interest through appropriate action before this Commission."[123] Qwest's proposals provide Qwest with the unilateral right to disrupt Eschelon's end user customers by failing to process orders or to disrupt Eschelon's business by demanding a deposit, but limits Eschelon's ability to dispute Qwest's actions. As discussed in my direct testimony at pages 57 and 68 and my rebuttal testimony at pages 33 and 42, the dispute resolution process would likely be too slow to avoid irreparable harm as a result of Qwest's actions. End user customers in Washington are best served if these issues are handled up front, rather than in crisis mode, before the Commission.

SUBJECT MATTER NO. 5. DISCONTINUATION OF ORDER PROCESSING AND DISCONNECTION

Issue Nos. 5-6, 5-7, and 5-7(a): ICA Sections 5.4.2, 5.4.3, 5.1.13.1

Q. ISSUES 5-6 AND 5-7 RELATE TO QWEST'S ABILITY TO DISCONNECT ESCHELON'S CIRCUITS AND DISCONTINUE PROCESSING ESCHELON'S ORDERS FOR LATE PAYMENT OF UNDISPUTED CHARGES. WHY IS IT IMPORTANT FOR THE COMMISSION TO

[122] Easton Response, p. 15, line 11.

[123] Easton Arizona Rebuttal Testimony, p. 16.

RESOLVE ANY DISPUTE ABOUT ESCHELON'S PAYMENT STATUS BEFORE QWEST TAKES THESE ACTIONS?

A. Because the determination of undisputed amounts is not always clear. I have explained that there are a number of reasons why the disputed amounts that Qwest calculates and the disputed amounts that Eschelon calculates can differ. Therefore, it is crucial that, when a disagreement exists about payment status, the information relied upon for these remedies is accurate, reliable, and reviewed by the Commission before the remedy is invoked.[124] Eschelon's proposal does not limit Qwest's ability to protect its financial interests when a legitimate concern about the future ability to pay exists, it only includes the Commission in the equation before Qwest is able to take the serious step[125] of disconnecting Eschelon's circuits, for example. If Qwest can disconnect Eschelon's circuits or stop processing Eschelon's orders without Commission approval, even if Eschelon later demonstrates to the Commission that Qwest's actions were not justified, the damage to Eschelon and its End User Customers will have already been done. That is why it is important for the Commission to review these disagreements *before* Qwest takes action.

[124] *See*, Denney Direct, p. 57.

[125] Mr. Easton agrees at page 8 of his response testimony that discontinuing the processing of orders is a very serious step. It is puzzling why, if Mr. Easton agrees that this is a very serious step, why the Commission should not have the ability to ensure that information is accurate and substantiated before the serious step is taken.

Q. MR. EASTON'S TESTIMONY SUGGESTS THAT ESCHELON'S PROPOSAL PROVIDES NO PROTECTION FOR QWEST IN THE EVENT OF A LEGITIMATE CONCERN ABOUT ESCHELON'S FUTURE ABILITY TO PAY. IS THIS TRUE?

A. No. Eschelon's proposal provides for the same protections as Qwest's proposal, the difference being that Eschelon's proposal is designed to ensure that these remedies are invoked with Commission approval. Eschelon's language protects both Qwest and Eschelon by protecting Qwest against legitimate concerns about future ability to pay, while at the same time protecting Eschelon from having its order processing stopped, circuits disconnected, or paying a substantial deposit based on inaccurate information regarding undisputed amounts. Under Eschelon's proposal, if Qwest is correct about Eschelon's payment status, then Eschelon will pay a deposit (either because Eschelon agrees or because the Commission agrees with Qwest's assessment). In contrast, Qwest's language, by allowing Qwest to take action without Commission approval, protects only Qwest and puts Eschelon at a distinct competitive disadvantage of having its ability to conduct business dictated by Qwest's view of Eschelon's payment status – which has been shown in the past to be incorrect.

Q. DOES MR. EASTON'S RESPONSE TESTIMONY SHOW THAT QWEST AND ESCHELON CAN DISAGREE ABOUT DISPUTED AMOUNTS?

A. Yes. Mr. Easton acknowledges this in his response testimony at page 9 when he discusses the recent Qwest threat to stop processing Eschelon orders and disconnect Eschelon circuits. As he points out, Eschelon claimed that $932,000 was in dispute, while Qwest's records showed less than half that amount in pending dispute status. Therefore, according to Mr. Easton's own testimony, what Eschelon and Qwest consider to be disputed amounts can differ. Eschelon also did not agree with Qwest about the amount of undisputed payments that were past due.

Q. IS ESCHELON A SIGNIFICANT PAYMENT RISK TO QWEST?

A. No. Mr. Easton claims that Eschelon ignores payment due dates, pays less than it owes and misuses the dispute process to avoid timely payment.[126] He also claims that Eschelon pays its bills later than other CLECs.[127] Mr. Easton fails to acknowledge that Eschelon is a regular payer of large sums of money to Qwest. On average, Eschelon paid $4.7M per month to Qwest for the twelve month period September 2005 through August 2006. Eschelon is a $55.9M a year wholesale customer of Qwest. This is not indicative of a company that is a payment risk to Qwest because it does not pay its bills. When there is a dispute, Eschelon will withhold disputed amounts, but this does not mean that Eschelon "pays less than it owes" as Mr. Easton claims. Rather it shows that Eschelon sometimes disagrees with the amount Qwest claims Eschelon owes – which is

[126] Easton Response, p. 9, lines 9-11.

Eschelon's right under its ICA, and is not really surprising given the amount of services purchased and amounts of money that are involved. I also disagree with Mr. Easton's assertion that Eschelon misuses the dispute process to avoid timely payment. Mr. Easton does not provide any examples or other evidence in support of his claims, nor am I aware of any instances of Eschelon misusing the billing dispute process. It is actually Qwest who abuses the billing dispute process by ignoring the process set forth in Eschelon's ICA with Qwest and using a process that Qwest developed through CMP. The CMP billing dispute process Qwest imposes on Eschelon results in Qwest forcing Eschelon to escalate disputes if it disagrees with Qwest's assessment, and allows Qwest to call disputes "resolved" when Eschelon does not agree – problems that can lead to Eschelon and Qwest disagreeing on Eschelon's disputed amounts, and increase risk that Qwest will invoke serious remedies when there is no basis for doing so.[128]

Furthermore, information from Dun and Bradstreet (D&B) indicates that both Qwest and Eschelon pay more slowly than the industry average. While Eschelon pays somewhat more slowly that Qwest, Eschelon's creditworthiness is rated higher than Qwest's. Therefore, Mr. Easton's comparison of Eschelon's payment

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[127] Easton Response, p. 9, lines 11-15 and p. 7.

[128] Mr. Easton testifies: "As to the amounts in dispute, through the Change Management Process Qwest and the CLECs, including Eschelon, have developed a formal disputes process to insure that disputes are formally identified and resolved." Easton Response, p. 12, lines 4-6. I explained at pages 38-40 of my rebuttal testimony that Mr. Easton is wrong. *See also,* Exhibit DD-14. The billing dispute process developed in CMP is not the same process as in Eschelon's ICA and Qwest's CMP billing dispute process labels disputes as "resolved" even when Eschelon may disagree.

interval to other CLECs does not demonstrate that Eschelon is a risk for future payment. But even if, assuming *arguendo,* Mr. Easton were correct that Eschelon pays later than other CLECs and constitutes a legitimate payment risk, Qwest would be protected in this situation under Eschelon's proposal.

Q. PLEASE DESCRIBE MORE FULLY THE DUN AND BRADSTREET INFORMATION YOU REFER TO ABOVE.

A. The D&B Commercial Credit Scoring Report shows that Qwest also pays later than the industry average.[129] That information shows that Eschelon pays 14 days later than the industry average and Qwest pays 10 days later than the industry average (a difference of 4 days). However, Eschelon actually has a better commercial credit score rating than does Qwest – with Eschelon scoring a "fair" rating and Qwest scoring a "significant risk"[130] rating. The bottom line is that the evidence shows Eschelon poses no credit risk to Qwest.

Finally, Qwest's nonspecific references to risk based on credit scores supports the need for standards if credit scores are cited as a means to demand further deposits under Issue 5-13. To the extent that the Commission accepts the use of credit

[129] *See,* Exhibit DD-23. This exhibit contains D&B reports for Qwest and Eschelon as well as an overview of the D&B Commercial Credit Score, including an explanation of how these scores are calculated and the data included in the scores.

[130] D&B Credit Score Class ranges from 0-5, with Qwest scoring a 4 "significant risk." The credit score classes are as follows: 1=low risk; 2=moderate risk; 3=average risk; 4=significant risk; 5=high risk.

report data for such a purpose, an acceptable credit score should be conversely used to determine that a deposit is *not* necessary or can be decreased.

Q. YOU DISCUSS ABOVE THE POTENTIAL FOR ESCHELON AND QWEST TO DISAGREE ABOUT DISPUTED AMOUNTS. DO THE PARTIES CURRENTLY AGREE ABOUT THE AMOUNT OF DISPUTED CHARGES?

A. No. Qwest continues to claim that Eschelon is in default[131] (which, according to Qwest, means that Qwest can stop processing Eschelon's orders or disconnect Eschelon's circuits without further notice). Eschelon believes that it is current with Qwest.[132]

Q. MR. EASTON CLAIMS THAT SINCE QWEST'S RECENT THREAT TO ESCHELON RESULTED IN ESCHELON PAYING A SUBSTANTIAL AMOUNT OF MONEY TO QWEST, THIS SHOWS THAT QWEST'S PROPOSAL WORKS.[133] DO YOU AGREE?

A. No. Nothing has really been resolved. Because Qwest continues to claim that Eschelon is in default, Eschelon is still at risk of Qwest refusing (without further notice) to process its orders or disconnect Eschelon's circuits. Neither Qwest's threat nor its proposed language does anything to address the problems explained

[131] Easton Response, p. 11, lines 8-9.

[132] By current I mean that Eschelon does not have undisputed amounts due Qwest more than 30 days past the payment due date.

[133] Easton Response, p. 10.

above that leads to disagreements about disputed amounts. This is precisely why Eschelon's proposal would involve the Commission when significant disagreements arise to make sure that the information relied upon for making these determinations is accurate and substantiated.

Q. DID ESCHELON AND QWEST, THROUGH THE CHANGE MANAGEMENT PROCESS, DEVELOP A FORMAL PROCESS REGARDING PAYMENT DISPUTES?[134]

A. No. This was documented in my rebuttal testimony on page 38 and Exhibit DD-14.

SUBJECT MATTER NO. 6. DEPOSITS

Issue Nos. 5-8, 5-9, 5-11 and 5-12: ICA Section 5.4.5

Q. MR. EASTON STATES THAT THERE IS NO WAY THAT QWEST COULD DEMAND A DEPOSIT WHEN THERE IS NO LEGITIMATE CONCERN ABOUT ESCHELON'S ABILITY TO PAY.[135] DO YOU AGREE WITH MR. EASTON?

A. No. Mr. Easton states that since Qwest's deposit requirements are triggered by a history of delinquent payment, deposits would only be triggered when a history of delinquent payment raises a legitimate concern about a company's risk of

[134] Easton Response, p. 12.

nonpayment.[136] Mr. Easton's reasoning is somewhat circular. The disagreement under Issue 5-8 addresses what constitutes "Repeatedly Delinquent" – which is the key term used to determine whether a deposit is justified. Mr. Easton's testimony simply assumes that Qwest's proposed definition of "Repeatedly Delinquent" is the correct one, and so any collection action taken under Qwest's proposed definition is appropriate and justified. This is not the case. Though Qwest appears to agree that a de minimus amount should not trigger a deposit requirement, it will not agree to recognize this in the ICA. If Qwest later changed its mind and decided to demand a deposit on a de minimus amount, Qwest's proposal would allow for it.

In addition, Repeatedly Delinquent is defined in terms of *undisputed* charges paid more than 30 days after the payment due date. Given that there are significant disagreements about what those undisputed amounts are, Qwest could claim that Eschelon is Repeatedly Delinquent based on Qwest's view of Eschelon's payment status even when Eschelon disagrees with Qwest and has made timely payment to Qwest.

Q. HOW DOES MR. EASTON RESPOND TO THE INFORMATION IN YOUR TESTIMONY SHOWING THAT THE INTERCONNECTION / SERVICE AGREEMENTS OF OTHER CARRIERS WITH QWEST

[135] Easton Response, p. 12.

[136] Easton Response, p. 12, lines 13-17.

CONTAIN THE SAME "3 CONSECUTIVE MONTH" STANDARD ESCHELON PROPOSES?[137]

A. Mr. Easton states that the "agreements cited by Mr. Denney are either very old agreements or are wireless/paging agreements."[138] Mr. Easton's attempt to downplay this issue is not convincing. Mr. Easton never says that the "3 consecutive month standard" in these agreements is insufficient to protect its interests,[139] nor does Mr. Easton address the discrimination that occurs when it forces Eschelon to take less favorable terms than are provided to other carriers.

Q. UNDER ISSUES 5-11 AND 5-12, MR. EASTON DISAGREES THAT COMMISSION OVERSIGHT IS NEEDED.[140] **WOULD YOU LIKE TO RESPOND?**

A. Yes. I have explained above why the Commission's independent evaluation of the facts regarding the imposition of a deposit is needed in these circumstances.[141] Mr. Easton's claim that Qwest would not invoke deposit requirements if Eschelon pays timely[142] is not supported by the examples I provided above showing that Qwest threatened action based on amounts Eschelon paid *early*. Further, Mr.

[137] See, Denney Direct, pp. 67-68.

[138] Easton Response, p. 14, lines 23-24.

[139] Though Mr. Easton claims that Qwest has not experienced the same magnitude of non payment issues related to wireless/paging carriers as CLECs, he provides no evidence to support this claim. Easton Response, p. 15, lines 2-3.

[140] Easton Response, p. 15.

[141] *See also*, Denney Direct, pp. 47-50 and Denney Rebuttal, pp. 34-38.

[142] Easton Response, p. 15, lines 14-15 ["There is no need for Qwest to invoke the deposit requirements if Eschelon pays undisputed amounts in a timely manner."]

Easton's claim gives Eschelon little comfort given that Qwest could interpret its proposal for Issue 5-13 (Section 5.4.7) to allow Qwest to demand a deposit even when Eschelon is current with Qwest.[143]

Q. YOU PROVIDED AT PAGES 34-36 OF YOUR REBUTTALTESTMONY A NUMBER OF REASONS WHY ESCHELON AND QWEST HAVE DISAGREED ABOUT ESCHELON'S UNDISPUTED AMOUNTS. HAS MR. EASTON RESPONDED TO THESE EXAMPLES?

A. Mr. Easton briefly responded to some of these examples in the Arizona arbitration proceeding.[144] What Mr. Easton's response to these examples shows is that: disputes indeed exist regarding the amounts owed that are in dispute. As a result it should be clear that, despite Mr. Easton's statement that "Eschelon need only pay its ***undisputed*** bills in a timely manner to avoid consequences such as the discontinuance of taking orders or becoming subject to deposit requirements,"[145] the issue is not that simple. Further, a careful reading of Mr. Easton's response to these examples showed that the examples I raised in my rebuttal testimony are legitimate and lead to disputes regarding payments due:

- Mr. Easton admits that it declares disputes "resolved" despite CLEC disagreement, but claims this is not unilateral because the CLEC can escalate Qwest's conclusion.[146] Further, Qwest concludes that the use of Qwest's CMP billing dispute resolution process "would go a long way towards reducing

[143] Denney Rebuttal, p. 53.

[144] Easton Arizona Rebuttal Testimony, pp. 18-22.

[145] Easton Response, p. 10.

[146] Easton Arizona Rebuttal Testimony, p. 18.

misunderstandings between the parties."[147] Another way of saying this is that Qwest believes billing disputes would disappear if Eschelon would simply drop its dispute when Qwest does not agree. This is precisely the problem I illustrated in my previous testimony.

- Mr. Easton does not deny that some of Qwest's notices of past due status did not include BAN detail.[148]

- Mr. Easton also does not deny that BAN detail did not always match with the amount Qwest was claiming to be past due.[149]

- Mr. Easton admits that Qwest does not always post payments in a timely manner, but criticizes Eschelon's example because it was in relation to "out of region services, not local services purchased under the interconnection agreement."[150]

- Mr. Easton admits that Qwest included amounts that were not past due in its past due totals.[151]

- Mr. Easton admits that Qwest applies billing refunds owed to carriers to amounts Qwest determines are past due, which could include amounts in dispute.[152]

- Mr. Easton does not deny that disputes may fall into the "black hole" but states that the particular email as part of DD-7 with the "black hole" reference was not a case of Qwest ignoring an Eschelon dispute.[153]

- Mr. Easton disagrees that the DSL Rate adjustment was improperly applied.[154]

- Mr. Easton does not deny that payments are misapplied, but blames Eschelon for poor communication.[155]

[147] Easton Arizona Rebuttal, p. 18.

[148] Easton Arizona Rebuttal, p. 19.

[149] Easton Arizona Rebuttal, p. 19.

[150] Easton Arizona Rebuttal, p. 19.

[151] Easton Arizona Rebuttal, p. 20.

[152] Easton Arizona Rebuttal, p. 20.

[153] Easton Arizona Rebuttal, p. 21.

[154] Easton Arizona Rebuttal, p. 21.

[155] Easton Arizona Rebuttal, p. 21. Note that Mr. Easton did not provide any details supporting his claim blaming Eschelon.

- Mr. Easton does not deny there is confusion between Qwest's payment center and collections group, but blames Eschelon for failing to send copies of its remittance letter to both groups.[156]

- Mr. Easton does not deny or address in Arizona the final two issues raised in my rebuttal testimony regarding Qwest employee turnover resulting in lost disputes and Qwest's failing to update information about where to send invoices.[157]

Q. DO THE EXAMPLES ABOVE RELATE TO HOW LONG IT TAKES ESCHELON TO PAY ITS BILLS?

A. No. In fact the length of time allowed under the contract for a carrier to pay its bills is not in dispute.[158] In Arizona, Mr. Easton misrepresented the purpose of these billing dispute examples provided in my rebuttal testimony. Mr. Easton implied that the examples were related to Qwest's complaints about the length of time it takes Eschelon to pay its bills.[159] My rebuttal testimony clearly states regarding the list above, "There are several reasons that Eschelon and Qwest could disagree on the amount of undisputed charges."[160] Disagreements about the amount of undisputed charges are directly relevant to Eschelon's proposed language regarding payment and deposits and the necessity of the language proposed by Eschelon, including the need for Commission oversight before extreme measures such as stopping of order processing is taken.

[156] Easton Arizona Rebuttal, p. 22.

[157] Denney Rebuttal, p. 36.

[158] See sections 5.4.1, 5.4.2, 5.4.3, 5.4.5 and 5.4.8 of the Interconnection Agreement.

SUBJECT MATTER NO. 7. REVIEW OF CREDIT STANDING

Issue No. 5-13: ICA Section 5.4.7

Q. MR. EASTON CLAIMS THAT QWEST NEEDS TO BE ABLE TO INCREASE DEPOSITS UNDER SECTION 5.4.7 BECAUSE "CIRCUMSTANCES CAN CHANGE OVER THE COURSE OF THE PARTIES' BUSINESS RELATIONSHIP."[161] WILL THE ICA HANDLE CHANGES IN CIRCUMSTANCES AS THEY RELATE TO DEPOSITS ABSENT QWEST'S PROPOSED SECTION 5.4.7?

A. Yes. Section 5.4.5 allows Qwest to demand a deposit if the other party is doing business with Qwest for the first time and has not established satisfactory credit with Qwest *or* if the other party is Repeatedly Delinquent *or* if the other party is reconnected after a disconnection or discontinuation of order processing. Therefore, not only can Qwest demand a deposit under 5.4.5 if a party is doing business with Qwest for the first time, but it also allows Qwest to demand a new deposit if circumstances change. For example, if a party that previously paid its bills on time became Repeatedly Delinquent, as defined in 5.4.5, Qwest could demand a new deposit. Section 5.4.6 also allows an existing deposit requirement to be recalculated based on a "material change in financial standing." Therefore,

[159] Easton Arizona Rebuttal Testimony, pp. 22-23. Mr. Easton relates the examples in my rebuttal testimony (the same examples I provided in Arizona) and Qwest's billing process to the length of time Eschelon pays its bills.

[160] Denney Rebuttal, p. 34.

[161] Easton Response, p. 15, line 22.

the ICA already accomplishes (in closed language) Qwest's stated purpose for Section 5.4.7 – to allow a change in deposit to reflect a change in circumstances.[162]

Q. MR. EASTON CLAIMS THAT THE "DATE OF THE CREDIT REVIEW" IS THE TRIGGERING EVENT IN 5.4.7.[163] WHAT IS YOUR RESPONSE?

A. I addressed this argument at pages 56-57 of my rebuttal testimony. Simply put, Mr. Easton is reading language into the ICA that does not exist. The "date of credit review" is not one of the triggering events listed under Section 5.4.5. Therefore, if Qwest's Section 5.4.7 is adopted, Qwest may attempt to interpret 5.4.7 so that the deposit cap established under Section 5.4.5 does not apply.[164] Further, Qwest's Section 5.4.7 places no criteria around what a credit review entails (like Section 5.4.5 does), nor does Qwest indicate what part of a credit review would trigger an increase in the deposit. This lack of detail in Section 5.4.7 is troublesome and provides Qwest the ability to unilaterally require a deposit or deposit increase without regard to the language in Section 5.4.5.

Q. DOES QWEST'S LANGUAGE IN 5.4.7 EFFECTIVELY NULLIFY THE DEPOSIT LANGUAGE IN 5.4.5?

A. Yes. Mr. Easton disagrees with this statement from my direct testimony on page 73 arguing that Qwest's language in 5.4.7 "is actually complementary to the

[162] *See*, Denney Direct, p. 73.

[163] Easton Response, p. 16, lines 10-11.

language in section 5.4.5…"[165] However, this is precisely the problem with Qwest's language in section 5.4.7. Qwest views this language as a second bite at the apple, an additional opportunity to impose a payment deposit upon Eschelon regardless of the language in section 5.4.5. Section 5.4.5 contains strict standards and specific circumstances under which a deposit would be required. Qwest's section 5.4.7 language nullifies this because it acts on its own and provides Qwest with unilateral authority to impose a payment deposit.[166] Qwest's language in section 5.4.7 contains no standards, measures, or triggering events that would warrant a payment deposit. Under Qwest's language this undefined review does not need to turn up one real cause for concern in order for Qwest to be able to invoke a payment deposit. This is what I was referring to when I noted Qwest's language in section 5.4.7 nullifies the language in section 5.4.5.

Q. QWEST DEFENDS ITS PAYMENT AND DEPOSIT PROPOSALS BY STATING THAT SIMILAR LANGUAGE TO QWEST'S PROPOSALS RESIDES IN THE WASHINGTON SGAT AND THE AT&T AND COVAD ICAS.[167] DOES THIS MEAN THAT ESCHELON'S PROPOSALS SHOULD BE REJECTED, AS MR. EASTON IMPLIES?

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[164] Denney Direct, pp. 72-74 and Denney Rebuttal, p. 55.

[165] Easton Response, p. 15.

[166] See Denney Direct, pp. 72-75.

[167] *See, e.g.*, Easton Response, p. 8, lines 1-3; p. 9, lines 1-3; p. 14, lines 20-21; and p. 16, lines 1-3.

A. No. Just because language is contained in an agreement elsewhere does not mean that language cannot be improved upon, and the Covad ICA, to which Mr. Easton refers, is a prime example. I addressed this Qwest argument at pages 48-49 of my rebuttal testimony and in Exhibit DD-18.

Q. MR. EASTON STATES THAT QWEST IS OPPOSED TO ESCHELON'S ALTERNATIVE LANGUAGE FOR SECTION 5.4.7.[168] WHAT REASONS DOES MR. EASTON PROVIDE FOR QWEST'S DISAGREEMENT?

A. Qwest disagrees with the alternative language because it involves the Commission and because it makes clear that Section 5.4.7 applies to increasing the amount of an existing deposit and does not allow the establishment of a new deposit.[169] According to Mr. Easton, this undermines the purpose of Section 5.4.7, which is to reflect a change in circumstances.

Q. DO YOU AGREE?

A. No. I have explained in detail why the Commission should be involved when disagreements exist about Eschelon's payment status before these remedies are invoked and will not repeat those arguments here. Regarding Mr. Easton's second claim about Eschelon's alternative language – it undermines the purpose of Section 5.4.7 – I have demonstrated that Qwest's stated purpose of Section 5.4.7 is already accounted for in Sections 5.4.5 and 5.4.6 of the ICA.

[168] Easton Response, pp. 16-17.

[169] Easton Response, p. 16.

IV. SUBJECT MATTER NOS. 8 – 10, 11 partial, 20, 22, 22A, 25 AND 26

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

Issue No. 5-16: ICA Section 5.16.9.1

Q. PLEASE SUMMARIZE THIS ISSUE.

A. Qwest has agreed that Qwest employees to whom Eschelon's forecasts and forecasting information are disclosed will be required to execute a nondisclosure agreement covering the information. Eschelon's proposed language would require Qwest to provide Eschelon with a signed copy of each non-disclosure agreement within ten days of execution. Qwest objects to having to provide copies of signed non-disclosure agreements.

Q. DOES MR. EASTON'S RESPONSE TESTIMONY ON ISSUE 5-16 LARGELY CONSIST OF ARGUMENTS YOU HAVE ALREADY ADDRESSED IN PREVIOUS TESTIMONY?

A. Yes. Mr. Easton implies that Eschelon is protected because "the Qwest language mandates strict procedures for the handling of CLEC forecasted information."[170] Mr. Easton also states that Eschelon is protected via section 18 of the agreement because it can audit Qwest if it believes the information is being misused.[171] I address these arguments and explain why Eschelon's simple proposal that Qwest provide copies of signed nondisclosure agreements is preferable in my direct

[170] Easton Response, p. 18, lines 4-5.

[171] Easton Response, p. 18, lines 5-11.

testimony, pages 76-79 and rebuttal testimony, pages 58-60.

Q. MR. EASTON OBJECTS TO YOUR COMPARISON (AT PAGES 78 AND 79 OF YOUR DIRECT TESTIMONY) OF THE NONDISCLOSURE AGREEMENT REQUIRED UNDER ISSUE 5-16 TO THE NONDISCLOSURE AGREEMENT IN THIS PROCEEDING. WOULD YOU LIKE TO RESPOND?

A. Yes. Notwithstanding Mr. Easton's disagreement with me on this point, the point of providing copies of executed nondisclosure agreements – both in this proceeding and in Eschelon's proposed language for Issue 5-16 – is to keep track of who has access to confidential information for the purposes of adequately protecting that information. And Mr. Easton's testimony on this point demonstrates that Eschelon's proposal is needed.

I explained in my previous testimony Eschelon's language is needed because the information at issue is highly sensitive to Eschelon[172] and that, absent Eschelon's proposal, Eschelon will have insufficient information to object if sensitive information is provided to a Qwest employee not authorized to receive it, which means that Eschelon will have no way to confirm that its confidential information is being adequately protected.[173] Mr. Easton testifies that, unlike the instant proceeding, the companies' business relationship is ongoing, and during that

[172] Denney Direct, p. 76, lines 16-18.

[173] Denney Direct, p. 78, lines7-11.

ongoing relationship "employees change jobs and new employees take their place," and a requirement to provide agreements "on a continual basis to Eschelon…creates an administrative burden for Qwest."[174] The fact that Mr. Easton acknowledges that Qwest employees who have access to Eschelon confidential information will be changing during the companies' business relationship only substantiates Eschelon's concern that it have sufficient information to determine which Qwest employees have access to Eschelon's confidential information. Unless Qwest provides copies of the executed nondisclosure agreements to Eschelon, Eschelon has no ability to determine which, or even how many, Qwest employees have access to this competitively sensitive information as Qwest's employees change. I already addressed Qwest's assertion that Eschelon's proposal is an administrative burden at pages 78 of my direct testimony and pages 58-59 of my rebuttal testimony.

SUBJECT MATTER NO. 9. TRANSIT RECORD CHARGE AND BILL VALIDATION

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

Q. PLEASE SUMMARIZE THIS ISSUE.

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

[174] Easton Response, p. 18.

of bill verification. The ALJs in the Minnesota arbitration proceeding agreed with Eschelon on this point and said that, "…it is hard to see why Qwest should not be required to provide sample records free of charge to Eschelon, once every six months, for the purpose of verifying Qwest's bills."[175] As a result, the ALJs concluded, that "Eschelon's language for Section 7.6.3.1 should be adopted"[176] – a ruling that was affirmed by the Minnesota PUC by a 4-0 vote at its March 6, 2007 meeting.

Q. MR. EASTON CLAIMS ESCHELON HAS ALL THE INFORMATION IT NEEDS TO VALIDATE QWEST'S TRANSIT BILLING.[177] IS THIS CORRECT?

A. No. Mr. Easton provides as Attachment WRE-3 a copy of the type of information Qwest would provide to Eschelon with its bills and suggests that Eschelon can reconcile this data with information recorded in Eschelon's switch.[178] However, it is precisely the inability to reconcile this information that would cause Eschelon to seek detailed call records from Qwest. It is not possible to compare Eschelon's originating switch records[179] with Qwest's invoice because Qwest's invoice is a

[175] MN Arbitrators' Report, ¶ 85, affirmed by a 4-0 vote of the Minnesota PUC on March 6, 2007 (written order not yet issued). A copy of the MN Arbitrators' Report is provided as Exhibit DD-25.

[176] See, Exhibit DD-25, MN Arbitrators' Report, ¶ 85, affirmed by a 4-0 vote of the Minnesota PUC on March 6, 2007 (written order not yet issued).

[177] Easton Response, p. 19. Note Mr. Easton also offers to explain to Eschelon "how billing validation can be accomplished." (Easton Response, p. 20, line 2). Eschelon knows how to validate its bills and the language Eschelon proposes in this section is designed for that purpose.

[178] Easton Response, p. 19, lines 7-11.

[179] Easton Response, p. 19, line 10.

summary bill and does not contain usage by call by ANI. Qwest bills are summaries over a period of time – they do not even contain usage by date. It is also not possible to use billing from terminating carriers[180] to validate Qwest's bills, as Eschelon is bill and keep with many carriers and thus these records are not provided to Eschelon. Further, even if Eschelon were able to make such a comparison for some sample of records, Mr. Easton does not suggest what to do when the two sources of data do not match. It is precisely these reasons why Eschelon seeks data, on a limited basis, in order to verify Qwest's bills.

Q. MR. EASTON CLAIMS THAT QWEST'S SYSTEMS WOULD REQUIRE A "SIGNIFICANT AMOUNT OF ADDITIONAL PROGRAMMING"[181] IN ORDER TO PROVIDE ESCHELON WITH THESE RECORDS. IS THIS ACCURATE?

A. No. Qwest must already have the ability to generate call records in order to produce the bills it sends to Eschelon, otherwise how would it be able to generate summary bills. It makes no sense that Qwest can not provide the background data used to produce those summary bills. Further, Eschelon is able to provide IXCs both originating and terminating call records when they request background data in order to validate their bills.

[180] Easton Response, p. 19, lines 11-14.

[181] Easton Response, p. 19, line 20.

Q. MR. EASTON STATES THAT "QWEST HAS OFFERED TO WORK WITH ESCHELON TO PROVIDE SOME SAMPLE CHECKING OF SELECTED END OFFICES."[182] HOW DO YOU RESPOND?

A. This is precisely the point of Eschelon's proposed language. Eschelon's language would require Qwest to provide "sample 11-01-XX records for specified offices."[183] In addition, Eschelon's language limits this request to a maximum of once every six months, provided that Qwest's billing is accurate."[184] Qwest's unwillingness to put its offer to work with Eschelon in writing is a concern.

SUBJECT MATTER NO. 10. COLLOCATION AVAILABLE INVENTORY

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

Q. PLEASE SUMMARIZE THIS ISSUE.

A. When a collocation site is no longer being used by a CLEC and that site is returned to Qwest, the site is then posted on Qwest's website as inventory that is available for purchase by other CLECs.[185] The first disputed issue (8-20) is whether a quote that has already been prepared for a collocation site should be

[182] Easton Response, p. 20, lines 2-3.

[183] See Eschelon proposed language for 7.6.3.1.

[184] See Eschelon proposed language for 7.6.3.1.

[185] See: http://www.qwest.com/wholesale/collocation_space.html for a list of Qwest's posted sites. The Washington contents of this website are attached to this testimony as Exhibit DD-27. Note that Qwest has recently added a column to the Excel worksheet containing the posted sites to indicate whether a prior quote exists.

posted on Qwest's website. Eschelon proposes that prices be posted to aid Eschelon in its purchasing decisions.

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

Issue No. 8-20

Q. WHAT ARGUMENTS DOES QWEST RAISE IN ITS REBUTTAL TESTIMONY REGARDING POSTING OF PRICES FOR COLLOCATION AVAILABLE INVENTORY?

A. Mr. Hubbard makes five arguments as to why Qwest should not have to provide a previously prepared quote for the collocation available inventory site: (1) "posting prior quotes will provide no information to Eschelon that it does not already possess";[186] (2) Eschelon's language accounting for a change in circumstance affecting price is unclear;[187] (3) Qwest would still incur cost "to plan, engineer and administer the requested work,"[188] in circumstances where Eschelon would agree to use a previously provided quote; (4) Eschelon should

[186] Hubbard Response, p. 6, lines 1-3.

[187] Hubbard Response, p. 6, lines 7-9.

[188] Hubbard Response, p. 6, lines 11-13.

have taken this issue through CMP;[189] (5) the proper place to challenge the Quote Preparation Fee ("QPF") is in a cost case, not in the arbitration.[190]

Q. PLEASE RESPOND TO MR. HUBBARD'S ARGUMENTS.

A. I have addressed points (1) through (4) in my direct and rebuttal testimony[191] and thus will only briefly touch upon these issues here. Generally, Qwest's arguments do not make sense and are contradictory. On the one hand Qwest argues that a quote would be "meaningless" to Eschelon[192] because Eschelon is already in possession of the information it needs, while on the other hand Qwest claims it needs to be compensated for this quote[193] – a quote that, according to Qwest, Eschelon can easily calculate, a quote that Qwest has already prepared and for which it has already been compensated. Qwest claims that it would need to do new work to "plan, engineer and administer the requested work,"[194] but fails to explain why this work would be unique if Eschelon is using an already existing quote. As noted, Qwest argues that an existing quote is meaningless, while at the same time arguing this issue should go through CMP as other carriers could be impacted or might object to having a previously prepared quote with CLEC name

[189] Hubbard Response, p. 6, lines 13-15 and p. 12, lines 4-5.

[190] Hubbard Response, p. 6, lines 15-21.

[191] Regarding (1) see Denney Direct, pp. 83-84 and Denney Rebuttal pp. 64 and 65-67. Regarding (2) see Denney Direct p. 88. Regarding (3) see Denney Direct p. 87 and Denney Rebuttal pp. 65-67. Regarding (4) see Denney Rebuttal, pp. 63-65.

[192] Hubbard Response, p. 6, line 4.

[193] Hubbard Response, p. 7.

[194] Hubbard Response, p. 6, lines 12-13. See also Million Response, pp. 16-17.

redacted made available to other carriers.[195] If the quote contains meaningless information that is simple for Eschelon to figure out, why would any CLEC object to its being posted? In fact, even though the quote contains useful information, no CLEC would object to the quote being provided, as the CLEC identity would be redacted and no competitively sensitive information is provided in the quote. No CMP process is necessary.

Q. PLEASE EXPLAIN ESCHELON'S LANGUAGE REGARDING "A CHANGE IN CIRCUMSTANCE AFFECTING THE QUOTED PRICE" THAT WOULD EXEMPT QWEST FROM HAVING TO POST A PREVIOUSLY GENERATED QUOTE.[196]

A. This language was included to alleviate Qwest's concerns restated by Mr. Hubbard that "Eschelon's quote will assuredly be different than the prior quote,"[197] and "Never once… has a second CLEC ordered an Available Inventory site provisioned identical to how a previous CLEC might have ordered that site."[198]

A change in circumstance would be anything affecting the quoted price. This would include the case where a CLEC ordered a different configuration or, as a result of a cost case, the prices of elements contained in the quote have changed.

[195] Hubbard Response, p. 6, lines 13-15; p. 11, lines 24-25; and p. 12, lines 4-7.

[196] See Eschelon proposed language for 8.1.1.10.1.1.1.

[197] Hubbard Response, p. 7, lines 10-11.

[198] Hubbard Response, pp. 7-8.

There is nothing vague about this language. Further, there is no reason to put a time limit on the prior quote as Mr. Hubbard suggests,[199] because events that would impact the quote, such as a cost case, dictate when the quote is no longer useful.

Q. WOULD THE ISSUE OF WHETHER ESCHELON SHOULD PAY QWEST FOR A QUOTE THAT IT HAS ALREADY PREPARED AND ALREADY BEEN COMPENSATED FOR BE BETTER LEFT TO A COST CASE?[200]

A. No. Eschelon does not dispute the current Quote Preparation Fee being used for available inventory. Eschelon's objection is simply to paying Qwest for something that Qwest has already been compensated for.[201]

Q. DID THE MINNESOTA PUC ADOPT ESCHELON'S LANGUAGE FOR ISSUE 8-20?

A. Yes. The ALJs in the Minnesota arbitration proceeding found as follows regarding Issue 8-20:

> Prior price quotes may be useful to CLECs in making efficient decisions about collocation space. Eschelon's language is reasonable in that it would permit Qwest to charge another Planning and Engineering Fee if the circumstances have changed since the prior quote was prepared. Qwest's language would make it more difficult for CLECs to obtain the prior quotes, would allow

[199] Hubbard Response, p. 11 and 12.

[200] Hubbard Response, p. 6 and Million Response, p. 17.

[201] See also Denney Direct, Rebuttal and Surrebuttal Testimony regarding issue 22-90 regarding why it is appropriate to consider rates and rate application in this arbitration.

> Qwest to use its own judgment about what information should be redacted from the prior quotes, and would permit Qwest to charge another Planning and Engineering Fee unless the "same quoted price" is given for the subsequent quote. The Administrative Law Judges recommend that Eschelon's proposed language be used because the information would be easier to access and evaluate. If there is a cost associated with posting this information on Qwest's website, Qwest should be permitted to submit a cost study in the *UNE Cost Case*.[202]

The Minnesota Commission approved the ALJs ruling on this issue in the Minnesota Qwest-Eschelon arbitration proceeding.[203] Notably, the Minnesota Commission rejected the same arguments Qwest raises here regarding Eschelon's proposal for Issue 8-20.

Issue No. 8-20(a)

Q. DID QWEST WITNESS HUBBARD RAISE ANY NEW ARGUMENTS IN HIS REBUTTAL TESTIMONY RELATED TO THESE ISSUES TO WHICH YOU WOULD LIKE TO RESPOND?

A. No. Mr. Hubbard argues that Eschelon is reading the closed language in 8.2.10.4.3 wrong.[204] I explained in my direct testimony that Eschelon's reading of this language is consistent with how Qwest has historically read this language and applied rates.[205] Further, the ALJs in the Minnesota arbitration proceeding

[202] MN Arbitrators' Report, ¶ 93, affirmed by a 4-0 vote of the Minnesota PUC on March 6, 2007 (written order not yet issued).

[203] Affirmed by a 4-0 vote of the Minnesota PUC on March 6, 2007.

[204] Hubbard Response, pp. 13-14.

[205] Denney Rebuttal, p. 69 and Exhibit DD-19.

found, as affirmed by the Minnesota Commission, that "Eschelon's interpretation of this language is correct…"[206]

SUBJECT MATTER NO. 11. POWER – QPF AND DC POWER RESTORATION CHARGE[207]

Issue No. 8-22: ICA Sections 8.3.9.1.3 and 8.3.9.2.3

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

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

Q. MS. MILLION TESTIFIES[208] THAT THERE IS "NO OVERLAP" BETWEEN THE COSTS RECOVERED BY THE POWER REDUCTION NRC AND THE QPF, AND THAT QWEST IS ENTITLED TO RECOVER BOTH.[209] HAVE YOU ALREADY ADDRESSED THIS QWEST ARGUMENT?

[206] MN Arbitrators' Report, ¶ 103, affirmed by a 4-0 vote of the Minnesota PUC on March 6, 2007 (written order not yet issued).

[207] Mr. Starkey addresses other power issues (Issues 8-21 and subparts) in his testimony.

[208] Ms. Million states that this issue should be addressed in a cost docket. Million Response, p. 18. I addressed this issue at pages 75-76 of my rebuttal testimony.

[209] Million Response, p. 18, lines 5-6. *See also,* Ashton Response, pp. 14-15.

A. Yes. Ms. Million made the same claim in her direct testimony[210] and I responded to this claim at pages 72-74 of my rebuttal testimony. As I explained, Qwest's own description says that Power Reduction involves "changing fuse value at BDFB" and "changing breaker at power plant."[211] For this simple activity for which there is a known (*i.e.*, not ICB) NRC, Qwest wants to charge Eschelon the Power Reduction NRC,[212] which ranges from between $675.98 and $1,179.67 depending on amperage (Exhibit A Section 8.13.1.2), as well as another QPF of $840.24 (Exhibit A Section 8.13.1.1) for "planning and engineering"[213] the change in fuse value or breaker, for a total of up to $2,019.91[214] for Qwest to swap out a fuse or breaker. This total charge, on its face, is unreasonable for the minimal work involved in changing a fuse or breaker. Moreover, the Quote Preparation Fee does not make sense within the context of a known rate element for an activity. In other words, why would a "quote" need to be prepared for changing a fuse value or breaker when Qwest and the CLEC already knows what the charge for that activity is? The fact that there is a rate means that Qwest already knows what activities are involved and the associated cost, and therefore, no activities (or costs) would be necessary to prepare a quote. So, the QPF-

[210] Million Direct, p. 8.

[211] Denney Rebuttal, pp. 72-73.

[212] The parties disagree on the rate that will apply, but both parties agree that a specific non-ICB rate element should apply for Power Reduction and Power Restoration with Reservation.

[213] Million Response, p. 17, lines 22-23.

[214] Note that these rate elements are in dispute and the numbers reflected here are Qwest proposals. See issue 22-90(f).

related activities Qwest claims goes into the Quote Preparation Fee should not exist when a quote does not need to be prepared.[215]

Q. MS. MILLION STATES THAT YOU ACKNOWLEDGE THE APPLICABILITY OF SUCH A CHARGE IF "ADDITIONAL WORK IS REQUIRED OUTSIDE THE SCOPE OF THE NRC."[216] DOES THIS MEAN THAT A QPF IS APPROPRIATE IN THE CASE OF POWER REDUCTION OR POWER RESTORATION WITH RESERVATION?

A. No. Ms. Million misconstrued my testimony. My testimony referred to cabling work, not work related to preparing a quote for Power Reduction. As explained above, the QPF does not make sense within the context of Power Reduction with Reservation or Power Restoration with Reservation because there is already a known rate, and therefore, neither a quote, nor the costs that go with preparing that quote are appropriate. The "additional work" I referred to in my testimony was cabling work in the case of a Location Change from the Power Board to the BDFB (*see* Exhibit A, Sections 8.13.1.5 and 8.13.2.3).[217] Qwest's Power Reduction Amendment states that when fuses are changed, "no cabling work [is]

[215] Ms. Million states that the Power Reduction charge does not recover costs to "evaluate, plan and manage a CLEC's request for power reduction." Million Response, p. 18, lines 3-4. Ms. Million does not quantify any costs that would not be recovered by the Power Reduction charge. If ICB-charges applied so that Qwest needed to prepare a quote of the charges that the CLEC would incur (like in the case of Power Restoration without Reservation), then a Quote Preparation Fee may be appropriate because Qwest would presumably need to "evaluate, plan and manage" the request for which it does not have a specific rate element. However, a specific non-ICB rate element does apply in the cases of Power Reduction and Power Restoration with Reservation, so it is not appropriate to apply a QPF in these instances.

[216] Million Response, p. 18.

required,"[218] which means that the work associated with cabling changes is not involved in Power Reduction NRC. And I explained that when this cabling work is needed, Eschelon has agreed to compensate Qwest for these "planning and engineering" costs.[219]

Q. MR. ASHTON STATES THAT THE "BOTTOM LINE IS THAT QWEST DOES INCUR COSTS THAT ARE RECOVERED BY THE QPF, THAT RATE HAS BEEN APPROVED BY THE COMMISSION, AND QWEST IS ENTITLED TO THEREFORE CHARGE THAT QPF."[220] IS MR. ASHTON'S TESTIMONY ACCURATE?

A. No. I have responded above and in my previous testimony to Qwest's claim that it incurs costs recovered by the QPF that do not overlap the NRCs for Power Reduction and Power Restoration with Reservation. To Mr. Ashton's claim that the Commission has approved a QPF rate for Power Reduction and Power Restoration with Reservation, Mr. Ashton is wrong. The Commission did not order a QPF for Power Reduction or Power Restoration with Reservation. Rather, the Commission approved a QPF for other collocation elements such as Caged, Cageless and Virtual collocation, and these QPFs have nothing to do with the Qwest-proposed QPF for Power Reduction/Reservation. The QPF for power

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[217] *See*, Denney Direct, p. 98. *See also*, Denney Rebuttal, p. 71, lines 7-9.

[218] Page 6 of Qwest's Draft Power Reduction Amendment, available at: http://www.qwest.com/wholesale/downloads/2003/030701/DCPowerReduction6-20-03.doc

[219] Denney Rebuttal, pp. 71 and 73-74.

reduction / restoration (see 8.13.1.1 and 8.13.2.1 of Exhibit A) was not approved by the Commission and Qwest's proposed unapproved rates are being disputed as part of issue 22-90(f).

Q. IS THIS ISSUE MORE APPROPRIATE FOR A COST DOCKET?[221]

A. No. I address this issue on pages 75-76 of my rebuttal testimony.

SUBJECT MATTER NO. 20. SUBLOOPS – QWEST CROSS CONNECT/WIRE WORK AND SUBJECT MATTER NO. 22, UNBUNDLED CUSTOMER CONTROLLED REARRANGEMENT ELEMENT ("UCCRE")

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

Q. PLEASE SUMMARIZE THIS ISSUE.

A. These issues deal with the circumstances under which Qwest can cease to offer to CLECs products and services that it has previously offered and that have been approved by the Commission. The two products that prompted Eschelon's proposals are Qwest's performance of cross-connects for CLECs on intrabuilding cable subloops (Issue No. 9-50) and Unbundled Customer Controlled Rearrangement Element ("UCCRE") (Issue 9-53), because Qwest will not offer them to Eschelon even though these products continue to be offered to other CLECs through Qwest's SGAT and ICA with other CLECs. Eschelon's proposed language would require that the rates and services approved by this Commission

[220] Ashton Response, pp. 14-15.

related to Qwest performing cross-connect work for CLECs in the sub-loop and UCCRE be available to Eschelon so long as they are available to other CLECs.[222] In addition, as an alternative, Eschelon has proposed to make a product phase-out process available to Qwest when Qwest desires to cease offering products but does not want to individually obtain ICA amendments from every CLEC. Both proposals address the problem of Qwest offering a product to some CLECs but not others and the need for nondiscriminatory treatment.

Q. HAS ESCHELON UPDATED ITS LANGUAGE PROPOSALS DEALING WITH THESE ISSUES SINCE YOUR REBUTTAL TESTIMONY WAS FILED?

A. Yes. Proposal number one remains unchanged. This proposal specifically requires Qwest to make cross-connects on intrabuilding cable subloops and UCCRE available to Eschelon as long as Qwest is making it available to other CLECs.[223] For Issues 9-50 and 9-53, Eschelon's proposal number one appears in Sections 9.3.3.8 and 9.9.1. Eschelon's alternate proposals three through four also contain language (a phase out process) in Section 1.7.3.[224] Eschelon's proposal #2 is contained below.[225]

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[221] Million Response, p. 18.

[222] See Denney Direct, pages 110 and 114.

[223] See Denney Rebuttal, p. 80.

[224] *See* Denney Rebuttal, pp. 82-85.

[225] Section 1.7.3 for proposal #2 was updated. Section 9.9 and 9.9.1 remain unchanged. The two options for 9.3.3.8.3 is new to proposal #2.

Proposal #2

1.7.3 Phase out process. If Qwest desires to phase-out the provision of an element, service or functionality included in this agreement, it must first obtain an Order from the Commission approving its process for withdrawing the element, service or functionality. Obtaining such a Order will not be necessary if Qwest (1) promptly phases-out an element, service or functionality from the agreements of all CLECs in Washington within a three-month time period when the FCC has ordered that the element, service or functionality does not have to be ordered, or (2) follows a phase-out process ordered by the FCC.

9.9 Unbundled Customer Controlled Rearrangement Element (UCCRE)

9.9.1 Qwest shall provide Unbundled Customer Controlled Rearrangement Element (UCCRE) to CLEC in a non-discriminatory manner according to the terms and conditions of Section 9.9 and subparts of the SGAT, unless Qwest obtains a phase-out order (pursuant to Section 1.7.3) from the Commission within four months from the effective date of this Agreement.

(Option 1 for 9.3.3.8.3)

9.3.3.8.3 If CLEC elects to move its service to the new minimum point of entry, CLEC will perform its own cross-connect. Qwest has previously performed this service, and will either obtain a phase-out order (pursuant to Section 1.7.3) from the Commission within four months of the effective date of this Agreement or perform this service if CLEC requests.

(Option 2 for 9.3.3.8.3)

9.3.3.8.3 If CLEC elects to move its service to the new minimum point of entry, CLEC may either perform its own cross-connect or request that Qwest perform the cross-

connect. If Qwest performs the cross-connect appropriate time and material charges are applicable.[226]

Proposal #3 and #4 do not change from how they were listed in my rebuttal testimony on pages 82-85, except that the two options for 9.3.3.8.3 (shown above) are offered.

Q. WHAT PROMPTED ESCHELON'S UPDATED PROPOSAL #2 AND THE TWO OPTIONS FOR SECTION 9.3.3.8.3?

A. The Minnesota Department of Commerce proposed the language shown above as Eschelon proposal #2 for resolution of Issues 9-50 and 9-53 in the Minnesota Qwest-Eschelon ICA arbitration, and the ALJs in Minnesota recommended adoption of that language. The ALJs said that the Department's "recommendations efficiently balance the concerns of both parties and would permit any interested CLEC to provide comment to the Commission if it had concerns about the elimination of a particular element, service, or functionality."[227] The Minnesota Commission recently approved the ALJs' ruling on these issues in the Minnesota Qwest-Eschelon arbitration proceeding.[228]

[226] This is the approved Qwest-AT&T ICA language that Qwest had previously agreed to and closed with Eschelon. See, e.g., Qwest multi-state draft (11/28/05) (showing as closed language). The relevant pages are attached to this testimony as Exhibit DD-26.

[227] MN Arbitrators' Report, ¶ 168, affirmed by a 4-0 vote of the Minnesota PUC on March 6, 2007 (written order not yet issued).

[228] MN Arbitrators' Report, affirmed by a 4-0 vote of the Minnesota PUC on March 6, 2007 (written order not yet issued).

Eschelon is willing to accept the Department's language for all six states to resolve this issue.

Q. DOES QWEST AGREE THAT A PHASE OUT PROCEEDING WOULD BE A REASONABLE APPROACH WHEN QWEST WISHES TO DISCONTINUE A PRODUCT?

A. This is unclear. As an initial matter, because the alternative language proposal provided above was offered by Eschelon after the rebuttal testimony was filed in Washington, Qwest has not yet responded to Eschelon's above alternative in this case. However, Qwest did respond to this alternative in its rebuttal testimony in the Eschelon-Qwest Arizona arbitration proceeding, filed on February 9, 2007. In the Arizona proceeding, Ms. Stewart objected to Eschelon's phase out proposal, stating, "The proper forum in which to consider an issue with this type of far-reaching effect is one in which all interested CLECs local exchange carriers (sic) can provide input concerning the necessity and contours of such a process. If the Commission were to adopt such a process, the proper method for doing so would be through a generic order that applies to all carriers, not through a single arbitration and ICA between Qwest and Eschelon."[229] From Ms. Stewart's Arizona testimony, it appears that Qwest agrees that a "generic order" applicable to all carriers would be appropriate before Qwest discontinues a product. The Eschelon Section 1.7.3 proposal based on the Minnesota Department of

[229] Stewart Arizona Rebuttal Testimony, p. 36.

Commerce approach (Proposal #4) responds to this concern. Under Proposal number four, any phase out process would be adopted by the Commission through a generic order. It specifically requires Qwest to "obtain an order from the Commission adopting a process" before the process would be applicable under the ICA. Eschelon Proposal number four provides that, until a process is adopted, the normal rules governing amendment of agreements apply. If Qwest opposes a process, under Proposal number four, it need not obtain one. If it does not, it must continue to offer products on a nondiscriminatory basis as described in Section 1.7.3.1 of Proposal number four.

Q. WOULD ESCHELON'S PHASE OUT PROPOSAL "REQUIRE A TIME-CONSUMING, RESOURCE-INTENSIVE GENERIC DOCKET RELATING TO PRODUCT WITHDRAWALS IN RESPONSE TO QWEST'S ATTEMPT TO STOP OFFERING PRODUCTS THAT NO CLEC IS ORDERING AND FOR WHICH THERE IS NO FORESEEABLE DEMAND?"[230]

A. No. It would make no sense for CLECs to spend the time and resources to argue for products for which they have no use. However, it is important that Qwest not be allowed to be the unilateral decision maker regarding the products and services which Qwest no longer is required to offer.

[230] Stewart Arizona Rebuttal Testimony, p. 36.

Also, as I indicated in my previous response, under Eschelon Proposal number four, any phase out process would be developed in a proceeding before the Commission. Therefore, during that proceeding, any concerns by Qwest along these lines could be addressed.

Q. IS CROSS CONNECT/WIRE WORK SIMPLY A VOLUNTARY OFFER BY QWEST AND SHOULD QWEST BE ALLOWED TO END ITS VOLUNTARY OFFER TO ESCHELON, BUT NOT OTHER CLECS?[231]

A. No. This issue was discussed in my rebuttal testimony at page 89.[232]

Q. MS. STEWART TESTIFIES THAT QWEST'S LANGUAGE REGARDING CROSS-CONNECTS IS CONSISTENT WITH STANDARD INDUSTRY PRACTICE.[233] DO YOU AGREE?

A. Ms. Stewart does make this assertion, but she provides no evidence of the existence of such an industry practice, beyond her bare assertion, nor am I aware of such a practice. To the contrary, I believe that industry practice is that regulatory oversight is generally required for the withdrawal of a product or service.

[231] Stewart Response, p. 23.

[232] Ms. Stewart is wrong when she claims at page 23 of her response testimony that "Eschelon apparently does not dispute that Qwest has no legal obligation to provide the service." As explained at pages 111-112 of my direct testimony, not providing this service to Eschelon when it is made available to other CLECs amounts to discrimination. Also, explained at pages 117-118 of my rebuttal testimony, the FCC did not remove Qwest's obligation to provide UCCRE.

[233] Stewart Response, pp. 24-25.

Further, the example provided by Ms. Stewart regarding "grandparenting" (see, Stewart Response, pp. 24-25) is contrary to Ms. Stewart's claim regarding the "industry practice." This was discussed in my rebuttal testimony on pages 89-90.

Q. MS. STEWART TESTIFIES THAT THERE IS NO DEMAND FOR THE SERVICES SUBJECT TO THIS DISPUTE.[234] SHOULDN'T DEMAND BE TAKEN INTO ACCOUNT?

A. As I stated in my Direct Testimony, the issue, for purposes of applying the prohibition under federal and state law against discrimination, is not whether there is "demand" for a product or service, but rather, whether Qwest makes the product or service available to other CLECs.[235] Qwest does not dispute that it does, in fact, make both cross connects and UCCRE available to CLECs, both under its SGAT and under ICAs.

Ms. Stewart testifies that there "has never been any CLEC demand for this service since Qwest began offering it, and there is no indication that this lack of demand will change in the future."[236] However, in a recent filing in Arizona Cox Telecom asked the Commission to established permanent rates non-recurring rates for the cross connect / wire work rate element.[237]

[234] Stewart Response, pp. 23-24.

[235] Denney Direct, pp. 112-113.

[236] Stewart Response, p. 23.

[237] See, Exhibit DD-24. Cox Arizona Telecom's motion to Commence Phase III of the Qwest UNE Pricing Docket, In the Matter of Investigation Into USWest Communications, Inc.'s Compliance

Furthermore, if Qwest were permitted to unilaterally withdraw a product based on nothing more than its assertion that there is "no demand" for the product, Eschelon would, without Commission review, have little or no means for challenging such an assertion. "Lack of demand" may or may not be a factor that the Commission will wish to take into account, but Qwest should be required to make its case to the Commission, rather than engaging in self help and proceeding without Commission oversight.

Q. HOW DO YOU RESPOND TO MS. STEWART'S TESTIMONY THAT QWEST IS NO LONGER UPDATING ITS SGAT AND AS A RESULT THE SGAT IS OUT OF DATE?[238]

A. This issue was addressed by Mr. Starkey at pages 17 and 18 of his rebuttal testimony.

Q. MS. STEWART CITES AN ORDER ISSUED IN 2004, IN WHICH THE FCC ESTABLISHED THAT UNDER THE OPT-IN PROVISION IN SECTION 252(i), A CLEC CAN ONLY OPT INTO AN ENTIRE ICA OR SGAT, NOT JUST INDIVIDUAL PROVISIONS.[239] HOW DO YOU RESPOND?

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with certain Wholesale Pricing Requirements for Unbundled Network Elements and Resale Discounts, Docket No. T-00000A-00-0194, February 27, 2007, ¶ 2.

[238] Stewart Response, p. 26.

[239] Stewart Response, p. 27.

A. First, Eschelon is not seeking to opt in to an ICA; it is negotiating and arbitrating one. Second, in adopting the all-or-nothing rule, the FCC clearly stated that doing so did not limit the nondiscrimination provisions of the Act, which continue to protect CLECs.[240] Finally, Qwest should find Eschelon's proposed language acceptable because Qwest has that language in its SGAT and other CLEC ICAs. It is interesting that, on the one hand, Qwest points to the SGAT as the basis for its own template, but on the other, Eschelon is not supposed to be able to point out when the SGAT or other CLEC ICAs are the basis of its language.

Q. DOES ESCHELON AGREE WITH QWEST THAT THE FCC ELIMINATED QWEST'S OBLIGATION TO PROVIDE UCCRE?[241]

A. No. This was discussed in my direct testimony on pages 117-118 and my rebuttal testimony on page 89.

Q. QWEST CLAIMS THAT ESCHELON CAN STILL OBTAIN THE UCCRE PRODUCT THROUGH ITS TARIFFED COMMAND-A-LINK PRODUCT.[242] DOES THIS ALLEVIATE ESCHELON'S CONCERNS?

A. No. The fact Qwest offers a product that Eschelon purchases through its tariffs as well as at cost based rates does not remove from Qwest the obligation to provide

[240] See, e.g., Starkey Rebuttal, note 12 on page 5: "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.

[241] Stewart Response, pp. 31-33.

[242] Stewart Response, p. 34.

the product at TELRIC rates, nor does it offer protection to Eschelon if it chooses to utilize this product. First, Qwest's tariffed products are often priced significantly above cost. Second, the FCC in the TRRO specifically determined that an ILEC's offer of a product to CLECs through its special access tariffs was not a basis for removal of a product as a UNE.[243]

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

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

Q. DID QWEST ADDRESS THIS ISSUE IN ITS DIRECT OR RESPONSE TESTIMONY?

A. No.

SUBJECT MATTER NO. 25. SERVICE ELIGIBILITY CRITERIA

Issue Nos. 9-56 and 9-56(a): ICA Sections 9.23.4.3.1.1 and 9.23.4.3.1.1.1.1

Q. PLEASE SUMMARIZE THIS ISSUE.

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

[243] See *TRRO* ¶46 where the FCC states: "We find that statutory concerns, administrability concerns, and concerns about an anticompetitive price squeeze, preclude a rule that forecloses UNE access upon a finding by the Commission that carriers are potentially able to compete using special access or other tariffed alternatives. We also find that a competitor's current use of special access does not, on its own, demonstrate that that carrier is not impaired without access to UNEs."

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

Q. MS. STEWART CLAIMS YOU IGNORE THE "FCC'S RULINGS IN THE *TRO* RELATING TO AUDIT RIGHTS."[244] IS THIS CORRECT?

A. No. As I testified in my Direct and Rebuttal Testimony, in the *TRO* the FCC stated that its auditing procedures were comparable to those it established in a previous order. The FCC took specific note of the requirements of that order and directed carriers to develop the details regarding auditing in their interconnection agreements.[245] Despite Ms. Stewart's repeated claim that the FCC did not impose a "cause" requirement,[246] I explained in my direct and rebuttal testimonies that Ms. Stewart is wrong.[247]

Q. MS. STEWART ARGUES QWEST IS REQUIRED TO REIMBURSE CLECS IN CERTAIN INSTANCES FOR AUDIT COSTS PURSUANT TO

[244] Stewart Response, p. 47.

[245] Denney Direct, pages 130-131; Denney Rebuttal, pp. 94-95. On page 47 of her response testimony, Ms. Stewart claims that I ignore footnote 1898 of the TRO, but this is not the case. Paragraph 621 of the TRO lists the Commission findings regarding audit requirements in its *Supplemental Order Clarification* to convert tariffed loop-transport combinations to UNE rates. A clear reading of this paragraph and footnote 1898 demonstrates that the conditions set forth in footnote 1898 were principles in addition that audits only be taken when the ILEC has a concern that CLEC has not met the relevant criteria for conversion.

[246] Stewart Response, p. 45, lines 14-15 and lines 20-21; p. 46, lines 5-6 and line 11.

[247] Denney Direct, p. 131 and Denney Rebuttal, pp. 94-95.

ICA SECTION 9.23.4.3.1.3.5.[248] DOES THIS ALLEVIATE ESCHELON'S CONCERNS REGARDING AUDITS WITHOUT CAUSE?

A. No. Although Ms. Stewart is correct that ICA Section 9.23.4.3.1.3.5 requires Qwest to reimburse Eschelon in the event the Independent Auditor finds Eschelon complied in material respects with the Service Eligibility Criteria, that provision doesn't necessarily reimburse Eschelon for its indirect costs and lost opportunity costs.[249] Every time Eschelon is required to redirect an employee from one activity to another, that employee is unable to work on the business task to which he or she was originally assigned. While Eschelon may be able to recoup the cost of the employee's time spent working on the audit, the work the employee should have been doing has gone undone. Thus, the audit imposes a very real opportunity cost on Eschelon. The opportunity cost to Eschelon of the employee working on unnecessary audit activities is the cost of the next best alternative, which is the foregone benefit that the employee would have generated for Eschelon had the employee been able to work on his or her assigned tasks.

SUBJECT MATTER NO. 26. COMMINGLED EELS/ARRANGEMENTS

Issue Nos. 9-58, 9-58(a), 9-58(b), 9-58(d), 9-58(e) and 9-59: ICA Sections 9.23.4.5.1, 9.23.4.5.1.1, 9.23.4.5.4, 9.23.4.6.6 (and subparts), 9.1.1.1.1, 9.1.1.1.1.2, and 9.23.4.7

[248] Stewart Response, pp. 47-48.

[249] An opportunity cost is the value of the best foregone alternative use of the resources employed. In this case, the opportunity costs are the value of the work the employee could have been doing if the employee had not been diverted to work on the audit.

Q. PLEASE SUMMARIZE THESE ISSUES.

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

A point-to-point Commingled EEL should be a useful and meaningful alternative for the circumstances when a UNE EEL is no longer available. Because a Commingled EEL is functionally equivalent to a UNE EEL, a Commingled EEL should be put together (ordering, tracking, repair and billing) in a manner similar to a UNE EEL. Eschelon's language accomplishes this task, while Qwest's language allows Qwest to diminish the usefulness of the commingled EEL by delaying provisioning and repair. In addition, Qwest's language allows Qwest to provide bills for the components of the commingled EEL that are not related in any way and thus extremely difficult to review and verify. I address these issues, along with many of the points raised by Qwest in my direct testimony on pages 133-163 and in my rebuttal testimony on pages 96-105.

Q. WHAT GENERAL CRITICISMS DOES QWEST RAISE WITH RESPECT TO ESCHELON'S PROPOSALS RELATED TO COMMINGLED EELS/ARRANGEMENTS?

A. Qwest raises three general criticisms of Eschelon's language proposals. First, Qwest complains that this issue should be raised through CMP, not through Eschelon's arbitration.[250] Second, Qwest claims the costs to make all of Eschelon's changes would be prohibitive and Eschelon is not willing to compensate Qwest to make these changes.[251] Third, Qwest argues that Eschelon is attempting to impact the terms of Qwest's special access products.[252]

Q. IS CMP THE PROPER FORUM FOR THIS ISSUE?[253]

A. No. The issue of why it is inappropriate to send these issues to CMP is discussed in the testimony of Mr. Starkey. Mr. Starkey's surrebuttal testimony specifically addresses Qwest's secret PCAT and Qwest's attempt to implement provisions of the TRO/TRRO conditions outside the scope of CMP. It should also be noted that the provisions in these sections of the ICA have nothing at all to do with the wire center dockets, the completion of which Ms. Stewart claims Qwest is awaiting.[254] Even more problematic is Qwest's claim that Eschelon's disputes should be ignored because other CLECs are operating under Qwest's unilaterally

[250] Stewart Response, pp. 56-57, 60; and 66-67.

[251] Stewart Response, pp. 50; 56-57, 64-66, and 68-69.

[252] Stewart Response, pp. 49-51, 70, and 71.

[253] Stewart Response, pp. 56-57; 60; and 66-67. See also Denney Rebuttal pp. 99 and 104-105.

implemented current procedures.[255] In essence, what Qwest is arguing is: (1) commingled EEL issues should be handled through CMP; (2) Qwest will not submit the issues to CMP, claiming it is waiting for the outcome of the unrelated non-impaired wire center proceedings;[256] (3) in the meantime, CLECs should use the Qwest non-CMP process; and (4) Qwest concludes that there is no reason for dispute regarding ICA language for commingled EELs / arrangements, because CLECs are already using the non-CMP Qwest process.[257] Qwest's circular logic should be rejected, as further addressed in the testimony of Mr. Starkey.

Q. QWEST CLAIMS THAT THE PROVISIONS PROPOSED BY ESCHELON WOULD CAUSE QWEST TO INCUR SIGNIFICANT COST AND SHOULD THEREFORE BE REJECTED.[258] WHAT IS YOUR RESPONSE?[259]

A. First, it is important to understand that today Qwest allows CLECs to order UNE EELs on one order, issue trouble reports for the entire circuit, and receive billing for the two components on a single bill. This is also the case for the special access equivalent of a UNE EEL. Thus, Qwest's claim that it is prohibitively expensive to implement Eschelon's proposals is difficult to believe. Qwest

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[254] Stewart Response, p. 58.

[255] Steward Response, pp. 57-58.

[256] Ms. Stewart now claims that these issues are being dealt with in CMP (Stewart Response, p. 58), but at this point in time Qwest has not presented any CRs associated with this PCATs.

[257] Stewart Response, p. 56.

[258] See Stewart Response, pp. 53-54, 56, 64-66, and68.

attempts to verify this expense by claiming that the UNE and non-UNE circuits must be separated in all practical respects, or else mass confusion will result. Qwest claims it will have trouble provisioning, repairing and billing for these circuits if they are combined any way other than the physical combination required by the FCC. The fact that Qwest combines loop and transport circuits on a regular basis demonstrates that Qwest's fears are unfounded. Qwest uses the threat of unsubstantiated extraordinary expense in an attempt to stop CLECs from making practical requests for the ordering, maintenance and billing of combinations of circuits that Qwest is legally required to provide.

Q. IS ESCHELON ATTEMPTING TO ALTER THE TERMS AND CONDITIONS OF QWEST'S SPECIAL ACCESS CIRCUITS THROUGH ITS LANGUAGE PROPOSALS?[260]

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

[259] See also Denney Direct, pp. 146-147, 151-152, 153 and Denney Rebuttal, pp. 100-101.

[260] Stewart Response, pp. 49-51, 70 and 71. See also Denney Rebuttal, . 98.

Q. DOES QWEST HAVE A LEGITIMATE NEED TO USE DIFFERENT AND SEPARATE PROVISIONING INTERVALS FOR THE UNE AND NON-UNE CIRCUIT OF A COMMINGLED EEL?[261]

A. No. Qwest is currently able to provision a UNE EEL under a single provisioning interval. Thus, Ms. Stewart's claim that "it is essential for Qwest to use and preserve different provisioning intervals"[262] is not accurate. Further, Ms. Stewart argues that "it is hard to believe that a 48-hour delay 'diminishes the usefulness of the commingled arrangement' and makes it 'inferior' to the extent implied by Mr. Denney."[263] Contrary to Ms. Stewart's claim, provisioning intervals are important and allowing Qwest to delay the provisioning interval to CLECs for two to three days is inappropriate and improper.

Q. MS. STEWART SUGGESTS THAT YOU EXAGGERATE IN YOUR DIRECT TESTIMONY REGARDING THE CHOICE OF HAVING TO EXIT THE MARKET FOR COMMINGLED EELS OR SWITCH TO HIGHER PRICED SPECIAL ACCESS LINES.[264] HOW DO YOU RESPOND?

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[261] Stewart Response, p. 70.

[262] Stewart Response, p. 70.

[263] Stewart Response, p. 71. Note that Ms. Stewart takes issue with the 72 hour delay I mention in my Direct Testimony claiming the delay would only be 48 hours. The provisioning interval for an unbundled DS1 loop is 72 hours. The provisioning internal for a DS1 point to point UNE EEL is 48 hours. Since, in the example given, Eschelon would be combining an unbundled DS1 loop with non-UNE transport, I used the 72 hour provisioning interval for the loop. Regardless whether it is a two or three day delay, the delay is still significant.

[264] Stewart Response, pp. 52 and 71.

A. Eschelon, as other CLECs certainly would do, evaluates the costs before selling services to its customers. Eschelon cannot ignore the price it pays or any diminished product functionality of the circuits it leases from Qwest. As the price that Eschelon pays for each circuit increases, Eschelon's willingness to offer products to end users using these circuits diminishes. This is not a hypothetical threat, but an economic reality. Currently Eschelon sells products to end users by purchasing unbundled network elements from Qwest and attaching these elements to the Eschelon network. In some situations Eschelon also uses UNE EELs to serve end user customers. Eschelon does not use UNE EELs in every market where they could be used, as the conditions in each market dictate the practicality of using EELs to serve customers in that market. The use of non-UNE components to serve end user customers is even more limited and requires evaluation on a case by case basis. There should be no doubt that decrease in usability or increase in the cost of facilities that Eschelon leases from Qwest will impact Eschelon's participation in certain markets in Washington.

Q. AT PAGE 64, MS STEWART STATES THAT ESCHELON'S PROPOSAL FOR A SINGLE BILLING ACCOUNT NUMBER ("BAN") POTENTIALLY BECOMES A FORM OF "RATE RATCHETING" THAT QWEST IS EXPLICITLY NOT REQUIRED TO DO FOR CLECS AS PART OF THE *TRO*. HOW DO YOU RESPOND?

A. This is in no way ratcheting. Ratcheting is when the rates for UNE and special access services are blended based on proportional use. Eschelon is not proposing blended or ratcheted rates for Commingled EELs and its proposals would not result in ratcheting or blended rates, contrary to Ms. Stewart's testimony. A single BAN would simply contain the appropriate charges for the commingled facilities on a single bill. Eschelon's proposal does not impact the rates it would pay for either UNEs or special access circuits.

Q. ARE TWO UNIQUE CIRCUIT IDS NECESSARY FOR POINT-TO-POINT COMMINGLED EELS?[265]

A. No. Qwest currently uses a single circuit ID for point-to-point UNE EELs and point-to-point special access circuits and is able to provision, bill and document service quality for these circuits. There is no reason why Qwest can not use a single circuit ID for point-to-point commingled EELs. This is discussed in detail in my direct testimony on pages 149-152.

Q. DO MULTIPLEXED EELS HAVE MULTIPLE CIRCUIT IDS ASSOCIATED WITH THE MULTIPLEXED EEL ARRANGEMENT?

A. Yes. Ms. Stewart concludes that because Eschelon has not suggested "that Qwest commingle two separate facilities of different bandwidth/capacity into one order, one bill, and one circuit ID," she fails to see how a point-to-point commingled

[265] Stewart Response, pp. 60-62.

EEL "provisioned with two service orders and managing two circuit IDs is so beyond the capability of Eschelon…"[266]

First, Ms. Stewart admits that this type of multiplexed arrangement is treated the same whether it is UNE, private line, or commingled arrangement. As a result we do not have a case where Qwest has made a commingled arrangement more difficult to use than its UNE or special access alternatives as is the case with a point-to-point commingled EEL.

Second, because there are multiple customers involved in a multiplexed arrangement, multiple circuit IDs help to identify specific customer's circuit in this arrangement. For example, in the case where a repair is necessary, the CLEC is generally able to determine whether the problem is on the loop or interoffice part of the multiplexed arrangement based on whether the trouble impacts a single customer (then it is likely the loop) or multiple customers (then it is likely interoffice). There is no way to make this determination with point-to-point EEL.

Q. WOULD QWEST'S PROPOSAL FOR ISSUE 9-59 SOLVE THE PROBLEM OF DELAY FOR THE REPAIR OF A COMMINGLED EEL?

A. No. Ms. Stewart claims that I misrepresent Qwest's proposal and that there is no basis for my claim that Qwest's proposal would delay the repair of a commingled

[266] Stewart Response, p. 52.

EEL,[267] but then contradicts herself a few sentences later. Ms. Stewart explains that if Eschelon guesses correctly whether the UNE or non-UNE portion of the circuit has problems, "Eschelon will not have any need to submit a second repair ticket."[268] If Eschelon guesses wrong, "only then will it become necessary for Eschelon to submit a second trouble ticket."[269] It is the submission of the second repair ticket that provides for the delay. Ms. Stewart states Qwest will "immediately begin the repair process for the second ticket and thereby avoid delay."[270] However, the fact that an extra step was introduced into the repair process can not help but introduce delay to the repair of the circuit.

Q. MS. STEWART STATES THAT "WITHOUT SEPARATE BANS FOR THE DISTINCT PRODUCTS THAT COMPRISE COMMINGLED ARRANGEMENTS, BILLING ERRORS WOULD BE INEVITABLE."[271] DO YOU AGREE?

A. No. This was discussed in my rebuttal testimony on pages 101-103.

Q. DO YOU AGREE WITH MS. STEWART'S STATEMENT THAT, IF ESCHELON'S PROPOSALS ARE NOT REJECTED BY THE COMMISSION, THEN AT A MINIMUM "THE COMMISSION WOULD

[267] Stewart Response, pp. 72-74.

[268] Stewart Response, p. 74.

[269] Stewart Response, p. 74.

[270] Stewart Response, p. 74.

[271] Stewart Response, p. 64.

NEED TO EXCLUDE SUCH HYBRID PRODUCTS FROM THE WASHINGTON UNE-SPECIFIC PERFORMANCE INDICATOR MEASUREMENTS."[272]

A. No. The UNE components of commingled arrangements should continue to be subject to the Washington Performance Assurance Plan ("PAP"). The PAP provides incentives for Qwest for on time provisioning, timely repair and accurate billing for products and services purchased by CLECs from Qwest. Allowing Qwest to circumvent the PAP for UNEs simply because they are part of a commingled arrangement further undermines the value of the commingled EEL. Ms. Stewart is inappropriately arguing against language that Qwest has already agreed upon in the ICA. Closed language in Section 24.1.2.1 specifically states that the performance measurements and remedies apply to the UNE component(s) of any Commingled arrangement:

> 24.1.2.1 . . . 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.

[272] Stewart Response, p. 55.

V. EXPEDITED ORDERS

SUBJECT MATTER NO. 31. EXPEDITED ORDERS

Issues Nos. 12-67 and 12-67(a)-(g)

Q. DO BOTH YOU AND MR. STARKEY ADDRESS ASPECTS OF SUBJECT MATTER 31 IN ESCHELON'S SURREBUTTAL TESTIMONY?

A. Yes. In the first section of his surrebuttal testimony, Mr. Starkey addresses expedited orders, in the context of Qwest's actions in CMP.[273] As indicated by Mr. Starkey, while it is necessary to respond to Qwest's testimony on this point, the CMP background (and Qwest's claims about its changes to the PCAT that are allegedly based on the differences between "designed" and "non-designed" facilities) is less pertinent if the Commission adopts Eschelon's new alternative proposal – Proposal # 2 for Section 12.2.1.2.1 (which addresses when Qwest makes exception(s) to charging an additional fee for expedites). This is Issue 12-67(a)). I provide the language of Eschelon's new alternative proposal for Section 12.2.1.2.1 (Issue 12-67(a)) and discuss exception(s) to charging an additional fee below.

Q. PLEASE PROVIDE A BRIEF SUMMARY OF ISSUE 12-67 AND ITS SUBPARTS.

A. An expedited order, or an "expedite," is an order for which Qwest delivers service more quickly than it otherwise would under the normal service provisioning

interval. It is undisputed that for itself Qwest provides expedites to its retail customers.[274] It is also undisputed that Qwest does not charge its retail customers an additional expedite fee in all cases; rather, Qwest provides exceptions to charging an additional fee for expedites under certain conditions.[275] The two over-arching questions regarding expedited orders for resolution in this arbitration are

> (1) **Interim Wholesale Rate**: At what rate should expedites be provided to a Qwest wholesale customer (*i.e.* Eschelon), at least on an interim basis until a cost-based permanent rate is set? and
>
> (2) **Exceptions to Charging for Expedites**: Should the circumstances under which Qwest provides exception(s) to charging an additional fee for expedites be nondiscriminatory?

Resolution of the two over-arching questions – the wholesale rates and exceptions to charging expedite fees – is driven by the fact that the ability to expedite UNE orders is integral to a company's ability to gain "access to a UNE,"[276] and

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[273] *See also* Exhibits BJJ-3, BJJ-46 and BJJ-49.

[274] *See, e.g.*, Albersheim Arizona Direct (11/8/06), p. 61, lines 15-16 (". . . Qwest offers expedites today to its retail customers. . ."); *See*, *also*, Albersheim Rebuttal, p. 42, lines 14-16 ("In all of the states in it is 14-state region, Qwest offers expedites to CLECs on the same terms and conditions as it offers them to its retail customers.")

[275] Qwest (Ms. Martain) Direct (Aug. 28, 2006), Arizona Complaint Docket, p. 40, lines 4-10 ("The tariff then goes on to state that if the end user elects to move service to a temporary location (either within the same building, or a different building) that non-recurring charges would apply. This would include the non recurring charge to expedite a design service. However, when the customer moves its service, via a service order, back to the original premise location, if it meets the criteria as outlined in 3.2.2.d included below, the non-recurring charges would be ***waived*** (***including the expedite fee***)" (emphasis added)). *See*, *also*., JW-3 (Qwest retail tariff pages), pp. 1 & 2 ("Nonrecurring Charges Do Not Apply" "Charges do not apply for the reestablishment of service following a fire, flood or other occurrence attributed to an Act of God. . . .").

[276] Webber Direct (adopted), pp. 89-91; *see also* Starkey Direct, pp. 128-141, particularly pp. 135-138.

therefore such access must be provided on nondiscriminatory terms and at cost-based rates.[277]

The third over-arching question regarding expedited orders is whether the resolution of these terms belongs in the interconnection agreement ("ICA") or in Qwest's CMP. This question is dealt with by Mr. Starkey in the first section of his testimony. He discusses, in particular, that the governing term of the CMP Document (Exhibits RA-1 and BJJ-1 at § 1.0) anticipates that terms in individual ICAs may vary and may conflict with CMP and that, when they do, the ICA controls.

I. WHOLESALE ACCESS TO UNES AT COST-BASED RATES

Q. PLEASE RESPOND TO QWEST'S OBJECTIONS TO A COST-BASED RATE.[278]

A. The key to Qwest's objection to cost based rates is the incorrect assumption that expedites comprise "superior" services.[279] It is based on this assumption that Ms. Million concludes that expedites are not subject to Section 252 of the Telecommunications Act and, therefore, are not required to be provided at cost-based rates.[280] In order to more fully ascertain the extent to which a service

[277] 47 U.S.C. §252(d); 47 C.F.R. §§51.311 & 51.313.

[278] Million Rebuttal, p. 27.

[279] See, *e.g.*, Million Rebuttal, pp. 27-30.

[280] Million Rebuttal pp. 25-27.

should be considered a superior service and, if so, how it should be priced, one threshold question to be addressed is whether Qwest provides the service to itself for its own retail customers, separate from the question of price. If so, the analysis in this case moves to another question, which addresses what the price should be. It is incorrect to equate not providing a wholesale service *at the same price* as a retail service with superior service, because it confuses these concepts and inappropriately collapsed the two questions into one.[281]

Qwest admits for itself it provides expedites to its retail customers.[282] So, we move to the question of price. As to the wholesale price to be charged, it should be based on economic cost because Qwest faces its own costs in providing expedites of orders. Qwest does not explicitly or implicitly charge itself a non cost based, *market rate* in order to expedite orders for its retail customers. Rather, it *only incurs the cost* of expediting such orders. By proposing to charge Eschelon a non cost based rate that is higher than Qwest's own expedite costs,

[281] At the hearing in the Minnesota arbitration proceeding, Ms. Albersheim admitted that the fact that there's a difference in price between two services does not mean that the lower priced service is a superior service for purposes of determining whether that service is a UNE. *In the Matter of the Petition of Eschelon Telecom, Inc. for Arbitration with Qwest Corporation, Pursuant to 47 U.S.C. Section 252 of the Federal Telecommunications Act of 1996*, Minnesota Public Utilities Commission Docket No. P-5340, 421/IC-06-768, Hearing Transcript, Vol. 1 at page 26, lines 14-18.

[282] *See, e.g.*, Albersheim Arizona Direct (11/8/06), p. 61, lines 15-16 (". . . Qwest offers expedites today to its retail customers. . ."); *See, also*, Albersheim Rebuttal, p. 42, lines 14-16 ("In all of the states in it is 14-state region, Qwest offers expedites to CLECs on the same terms and conditions as it offers them to its retail customers.")

Qwest proposes to violate its nondiscrimination obligation[283] because this price constitutes terms that are less favorable than terms faced by Qwest in expediting its own orders (*i.e.*, the term that Qwest offers "to itself").[284]

Q. ON WHAT BASIS DOES MS. MILLION ASSERT THAT EXPEDITES REPRESENT A "SUPERIOR SERVICE" THAT IS NOT SUBJECT TO SECTION 252?

A. The basis for this claim is not clear because nowhere in her testimony does Ms. Million define the concept of "superior service." Ms. Million appears to be claiming that expedited service is a "superior service" because it allows the customer to receive service more quickly than would otherwise be the case.[285] In other words, Ms. Million seems to argue that expedited service is "superior" to service provided under the regular interval. If this is, in fact, the basis of Qwest's position, it is incorrect.

Ms. Million cites the Eighth Circuit's decision in the *Iowa Utilities Board* case[286] for the proposition that nondiscriminatory access does not require the incumbent

[283] *See* §51.313. *See also* FCC First Report and Order ¶218 ("Therefore, we reject for purposes of section 251, our historical interpretation of "nondiscriminatory," which we interpreted to mean a comparison between what the incumbent LEC provided other parties in a regulated monopoly environment. We believe that the term "nondiscriminatory," as used throughout section 251, applies to the terms and conditions an incumbent LEC imposes on third parties *as well as on itself*.") (emphasis added).

[284] *See id.* & §51.313(b) (nondiscriminatory terms for the provision of UNEs shall be no less favorable to CLEC than the terms that the ILEC provides "to itself").

[285] See Million Rebuttal p. 27. ("[T]he service of expediting an order is a superior service that allows a CLEC to circumvent the standard installation intervals provided for UNEs...")

to provide superior service.[287] While Ms. Million parrots the phrase "superior service," she overlooks that, in discussing what constituted superior service, the Eighth Circuit found that the Act does not require an incumbent to provide service that is superior *to what the incumbent provides itself* in connection with providing service to its retail customers.[288] Thus, if Qwest provides a particular service – such as expedites – to its retail customers, and therefore to itself, as a matter of course, then that service is not "superior."

Significantly, Ms. Million does *not* argue that expedites are a superior service because Qwest does not expedite orders for its own retail customers. Similarly, Ms. Million does *not* argue that expedites comprise a superior service because customers other than Eschelon (for example, other CLECs or retail customers) cannot request that orders be expedited. Qwest cannot deny that it expedites orders for designed services for other CLECs in Washington[289] and for its own

[286] *Iowa Utilities Board v. FCC*, 120 F.3d 753 (8th Cir. 1997), *aff'd in part, rev'd in part*, 525 U.S. 366 (1999) ("*Iowa Utilities Board*").

[287] Million Rebuttal, p. 25-26.

[288] *Iowa Utilities Board*, 120 F.3d at 812 ("Another source of disagreement between the petitioners and the FCC arises over the Agency's decision to require incumbent LECs to provide interconnection, unbundled network elements, and access to such elements at levels of quality that are superior to levels at which the incumbent LECs provide these services to themselves.")

[289] Qwest Exhibit RA-6 (PCAT *Expedites and Escalations Overview*): ("The Expedites Requiring Approval section of this procedure does not apply to any of the products listed below (***unless you are ordering services in the state of WA***)).

retail customers.[290] Expedited orders are provided to a variety of Qwest's customers and therefore, they do not comprise a superior service.

Further, if the ability to expedite UNE installation, for example, is available as *an option*, it does not mean that such expedited access to UNEs should not be subject to cost-based regulation. As pointed out in Eschelon's Rebuttal testimony,[291] Qwest offers *options* for a number of products that constitute access to UNEs, including three forms of UNE loop installation – Basic Installation, Basic Installation with Performance Testing, and Coordinated Installation with Cooperative Testing,[292] and Overtime and ***Premium*** Labor.[293] To the best of my knowledge, Qwest has not argued these options or "premium" access to these products should be subject to a different pricing standard than those standards which are applicable to "basic" access or level of service because these options constitute "superior service."

Finally, that Qwest proposes to provide expedites under an amendment to Eschelon's ICA in other states, rather than pursuant to a commercial agreement,

[290] *See*, *e.g.*, Albersheim Arizona Direct (11/8/06), p. 61, lines 15-16 (". . . Qwest offers expedites today to its retail customers. . ."); *See*, *also*, Albersheim Rebuttal, p. 42, lines 14-16 ("In all of the states in it is 14-state region, Qwest offers expedites to CLECs on the same terms and conditions as it offers them to its retail customers.")

[291] Webber Rebuttal (adopted), pp. 63-64.

[292] See ICA Exhibit A, Section 9.2.4. As seen from the notes in Exhibit A, these rates for installation are based on the Commission's cost docket, UT-003013, Parts B and D.

[293] ICA Exhibit A, Section 9.20.2. The note to this rate says that it is based on the Commission's cost docket, UT-003013, Part D.

demonstrates that Qwest, itself, recognizes that expedites fall within the scope of Section 252.

Q. COULD QWEST BE CLAIMING THAT EXPEDITED SERVICE IS "SUPERIOR" BECAUSE IT "COSTS LESS" THAN A RETAIL EXPEDITE?

A. Ms. Albersheim has stated that, because the "standard interval" for a DS1 Capable Loop (a UNE service) is 5 days and the provisioning interval for a DS1 private line (an access service) is 9 days, the expedite for the loop "costs less" than for the private line, even though the rate is $200 per day for both customers under Qwest's template agreement, because the private line customer would pay more than the UNE customer to have the service delivered in one day.[294] Based on this, Ms. Albersheim asserts that "Eschelon receives superior service."[295] This argument is incorrect.

As discussed above, it is incorrect to equate not providing a wholesale service *at the same price* as a retail service with superior service, because it confuses these

[294] Albersheim Rebuttal, p. 50.

[295] Albersheim Response, p. 50 lines 20-22 ("Eschelon receives superior service under these circumstances in other states, and this may be true in Washington as well sometime in the near future after Qwest makes its tariff filing.").

concepts and inappropriately collapsed the two questions into one.[296] Although here Qwest takes the position that private line service is the retail analogue of an unbundled DS1 Capable Loop,[297] Qwest presumably would not claim it is appropriate to charge the same price for the unbundled loop as for the retail service.

Further, Ms. Albersheim incorrectly compares UNE Loop service with Private Line Access services. The later provides network access to long-distance services, as well as local services *in the markets with sufficient facilities-based competition*,[298] and is regulated based on a different set of standards than access to UNE markets (network elements *in impaired markets*). The TRRO confirmed the need for a different pricing standard in the markets for UNEs than the pricing standard used in the access markets. This fact is captured in the following citation from the FCC TRRO:

> Here, upon further consideration, we determine that in the local exchange market, the availability of a tariffed alternative should not foreclose unbundled access to a corresponding network element, even where a carrier could, in theory, use that tariffed offering to enter a market.[299]

[296] At the hearing in the Minnesota arbitration proceeding, Ms. Albersheim admitted that the fact that there's a difference in price between two services does not mean that the lower priced service is a superior service for purposes of determining whether that service is a UNE. *In the Matter of the Petition of Eschelon Telecom, Inc. for Arbitration with Qwest Corporation, Pursuant to 47 U.S.C. Section 252 of the Federal Telecommunications Act of 1996*, Minnesota Public Utilities Commission Docket No. P-5340, 421/IC-06-768, Hearing Transcript, Vol. 1 at page 26, lines 14-18.

[297] Albersheim Response, p. 50, line 18.

[298] See *e.g.* TRRO ¶¶ 142 and 195.

[299] *TRRO*, ¶ 48.

> Thus, Congress's enactment of section 251(c)(3), and the associated cost-based pricing standard in section 252(d)(1), at a time when special access services were already available to carriers in the local exchange market indicates that UNEs were intended as an *alternative* to these services, available **at alternative pricing**.[300]

Q. WAS IT ALWAYS QWEST'S POSITION THAT NON COST BASED RATES APPLY AND EXPEDITE CHARGES REQUIRE NO COMMISSION APPROVAL?

A. No. Historically Qwest has treated expedites as a rate element subject to cost based pricing. Expedites were provided for unbundled loop orders for six years as part of the Section 251 interconnection agreement between Eschelon and Qwest in other states and are still provided in Washington under the existing agreement when the emergency conditions are met.[301] In 2001, Qwest confirmed that expedites were a part of accessing UNEs when Qwest asked the Commission to establish an Individual Case Basis ("ICB") rate for expedites. Specifically, Qwest introduced this charge in the direct testimony of Qwest witness Robert F. Kennedy under section titled "Unbundled Network Elements ("UNEs")).[302]

[300] *TRRO*, ¶ 51 (italicized font is original to the source; bold font added for emphasis).

[301] Webber Direct (Adopted), p. 61.

[302] Before the Washington Utilities and Transportation Commission, In the Matter of the Continued Costing and Pricing of Unbundled Network Elements, Transport, Terminations and Resale, Docket No. UT-003013, Part D ("Part D UNE Cost Docket"), Direct Testimony of Robert F. Kennedy ("Kennedy Direct"), Qwest Corporation, November 7, 2001, pp. 13 and 26. See also Exhibit DD-28 (pages from Kennedy Direct).

Expedites is listed in Mr. Kennedy's testimony as within the category of unbundled network elements, which means that Qwest understood they were subject to cost-based (*i.e.* TELRIC) pricing. Mr. Kennedy notes that, "Qwest proposes to charge for Expedites and Cancellations on an ICB."[303]

The ICB rate appears in the Qwest UNE tariff in Washington,[304] yet Qwest will not expedite an unbundled loop order in Washington under the existing interconnection agreement[305] when the emergency conditions are not met[306] even when a CLEC is willing to pay an ICB rate based on costs.[307] Specific language and an interim rate should be included in the proposed interconnection agreement

[303] Part D *UNE Cost Docket, Kennedy Direct*, p. 26. See also Exhibit DD-28.

[304] Section 3.1, Access to Unbundled Network Elements, WN U-42 Interconnection Services Washington, Section 3, Effective June 26, 2003, Original Sheet 14.13 (page 46 of PDF) at http://tariffs.qwest.com:8000/idc/groups/public/documents/tariff/wa_i_t_s003p001.pdf#Page=1&PageMode=bookmarks

[305] *See* Qwest-Eschelon existing approved WA ICA, Att. 5, Section 3.2.2.13 ("Expedites: U S WEST shall provide CO-PROVIDER the capability to expedite a service order.").

[306] Exhibit BJJ-46 (Qwest expedite PCAT), p. 47 ("The Pre-Approved expedite process is available in ***all states except Washington*** for the products below when your ICA contains language for expedites with an associated per day expedite charge.") (emphasis added). Qwest refers to the fee-added expedites as "Pre-Approved Expedites."

[307] *See, e.g.*, Exhibit DD-37 [showing Eschelon offered to pay cost-based approved rates, including on a case-by-case (i.e., ICB) basis, as stated on page 2 of Eschelon's April 3, 2006 letter: "The charges Eschelon will pay includes the installation charge for the order requesting the expedite. Installation charges cover the costs of the work activities to process the order. (In an expedite situation, the same work activities take place; they simply occur earlier.) Although the installation charges generally also include the cost of a dispatch, if Qwest dispatches a technician to complete an expedite, Eschelon will also pay the dispatch charge. (When the dispatch cost is included in the installation charge, this is a double recovery by Qwest.) If Qwest spends additional time due to the expedite itself, Eschelon will also pay the half hourly labor rate (which in Arizona is the same rate whether billed as repair or additional labor, other) for that time. Payment of these charges is provided for under the current interconnection agreements, and no amendment is necessary."]. Although the example in this quotation referred to Arizona, the dispute resolution letters covered several states, including Washington, and citations from the Washington ICA were included with the letters. *See* Exhibit DD-37; *see also* BJJ-3 (expedite chronology, p. 15 in bottom corner).

to ensure expedited ordering will be provided for unbundled loops on nondiscriminatory terms and at cost-based rates.

Q. DID ANY OTHER COMMISSIONS MAKE ANY RULING WITH RESPECT TO QWEST EXPEDITE CHARGES?

A. Yes. First, during 2001 Qwest made a similar filing in Arizona cost docket, introducing an expedite rate under "UNE" section of its testimony and proposing an ICB charge.[308] The Arizona Commission in its order in the UNE Cost Docket found that "Qwest is directed to develop cost studies for all services offered in this docket on an ICB price basis in Phase III. Qwest should make every effort to develop reasonable cost-based prices for such services even if it has little or no experience actually provisioning the services."[309] Because Qwest "offered in this docket on an ICB price basis" the provision of expedites, expedite charges are subject to this order. Indeed, in its current Arizona SGAT (dated February 10, 2005), Qwest lists footnote five next to the Expedite rate element.[310] Footnote five reads: "Rates for this element will be proposed in Arizona Cost Docket Phase III and may not reflect what will be proposed in Phase III. There may be

[308] Before the Arizona Corporation Commission, In the Matter of Investigation into Qwest Corporation's Compliance with Certain Wholesale Pricing Requirements for Unbundled Network Elements and Resale Discounts, Docket No. T-00000A-00-0194 Phase II ("Arizona Phase II UNE Cost Docket"), Direct Testimony of Robert F. Kennedy ("Kennedy Direct"), Qwest Corporation, March 15, 2001, p. 47.

[309] *Arizona Phase II UNE Cost Docket*, Phase II Opinion and Order, Decision No. 64922, June 12, 2002, p. 75.

[310] Qwest's Arizona SGAT is available at its website. See page 12, section 9.20.14 for the Expedite rate element. http://www.qwest.com/about/policy/sgats/SGATSdocs/arizona/AZ_14th_Rev_3rd_Amend_Exh_A_

additional elements designated for Phase III beyond what are reflected here."[311] Inclusion of this footnote indicates Qwest recognized that expedite charges are subject to the Arizona Commission order. Qwest has never sought permission from the Arizona Commission to remove expedites from the list of UNE rate elements, nor has the Arizona Commission issued an order removing expedites. Therefore, cost-based rates for Expedites are still required by the Arizona Commission's order (in addition to Section 252(d)(1)(A)(i) of the federal Act). In addition, Arizona Staff testimony in the ongoing Arizona Eschelon Complaint Case further verifies that expedites should be subject to cost-based pricing. Specifically, Arizona Staff Conclusion Number Seven[312] states that the rate(s) for expedites be considered as part of the next cost docket.[313]

Second, recently, in the Minnesota Qwest- Eschelon ICA Arbitration, the Minnesota Commission ruled that expedites on CLEC UNE orders constitute access to UNEs and therefore, their prices should be cost-based.[314]

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[311] Qwest's Arizona SGAT, page 16, note 5.

[312] Arizona Staff conclusions are summarized in the Direct Testimony of Pamela Genung, *In re. Complaint of Eschelon Telecom of Arizona, Inc. Against Qwest Corporation*, ACC Docket No. T-01051B-06-0257, T-03406A-06-0257 (Jan. 30, 2007) ("Arizona Staff Expedite Testimony") at Executive Summary. This Executive Summary is attached to this testimony as Exhibit DD-30.

[313] Arizona Staff Expedite Testimony, Executive Summary, Staff Conclusion No. 7.

[314] *See* Arbitrators' Report, *In the Matter of the Petition of Eschelon Telecom Inc. for Arbitration of an Interconnection Agreement with Qwest Corporation Pursuant to 47 U.S. C. §252(b) of the Federal Telecommunications Act of 1996* ["Minnesota Qwest-Eschelon ICA Arbitration"], OAH No. 3-2500-17369-2; MPUC Docket No. P-5340,421/IC-06-768 (Jan. 16, 2006) ("MN Arbitrators' Report"), ¶¶ 222; affirmed by a 4-0 vote of the Minnesota PUC on March 6, 2007 (written order not yet issued).

Q. PLEASE DESCRIBE THE MINNESOTA DECISION REGARDING EXPEDITED ORDERS.

A. The ALJs' Recommended Decision, which the Minnesota Commission upheld with some exceptions (such as the exceptions are related to Issues 12-64 and 12-71-12-73) is attached to my testimony as Exhibit DD-25. The ALJs' agreed with Eschelon with respect to: (1) the role of the Qwest Change Management Process ("CMP"); (2) expedites being an integral part of access to UNEs (i.e., *not* a superior service); and (3) cost-based rates.[315] The ALJs rejected Qwest's retail tariff rate ($200 per day advanced) proposal and recommended adoption of Eschelon's positions regarding an interim rate and TELRIC pricing.[316]

First, regarding Qwest's expedite-related activities in CMP, the ALJs found that the "CMP process by which Qwest reached its current position is not the controlling factor on whether emergency situations should create an exception to charging an additional fee for expedited ordering."[317] More generally regarding CMP, the ALJs made a separate finding regarding CMP that:

> The CMP document itself provides that in cases of conflict between changes implemented through the CMP and any CLEC ICA, the rates, terms and conditions of the ICA shall prevail. In addition, if changes implemented through CMP do not necessarily

[315] Arbitrators' Report, *In the Matter of the Petition of Eschelon Telecom, Inc., for Arbitration of an Interconnection Agreement with Qwest Corporation Pursuant to 47 U.S.C. §252(b) of the Federal Telecommunications Act of 1996*, MN OAH 3-2500-17369-2; MPUC No. P-5340,421/IC-06-768 (Jan. 16, 2006) [MN Arbitrators' Report"], at ¶¶ 21-22 & 219-222.

[316] MN Arbitrators' Report, at ¶¶ 221-222.

[317] MN Arbitrators' Report, at ¶ 219.

> present a direct conflict with an ICA but would abridge or expand the rights of a party, the rates, terms, and conditions of the ICA shall prevail.[318] Clearly, the CMP process would permit the provisions of an ICA and the CMP to coexist, conflict, or potentially overlap. The Administrative Law Judges agree with the Department's analysis that any negotiated issue that relates to a term and condition of interconnection may properly be included in an ICA, subject to a balancing of the parties' interests and a determination of what is reasonable, non-discriminatory, and in the public interest. ***Eschelon has provided convincing evidence that the CMP process does not always provide CLECs with adequate protection from Qwest making important unilateral changes in the terms and conditions of interconnection***.[319]

Second, regarding access to UNEs, the ALJs specifically found: "When Eschelon requests an expedite, it will be for accessing a UNE. Under 47 U.S.C. §§ 51.307 and 51.313, it must be provided under Section 251 of the Act and, thus, at TELRIC rates."[320]

Finally, regarding cost-based rates, the ALJs rejected Qwest's $200 per day retail tariff rate proposal and said "as to pricing, Eschelon's position should be adopted."[321] The ALJs noted that historically in Minnesota TELRIC rates have been substantially less than Qwest's tariffed rates for similar services, and they

[318] [MN] Ex. 1 (Albersheim Direct) at RA-1, part 1.0, page 15.

[319] MN Arbitrators' Report, at ¶¶ 21-22 (footnote in original; emphasis added).

[320] MN Arbitrators' Report, at ¶221.

[321] MN Arbitrators' Report, at ¶¶ 221-222.

found that "Eschelon's proposal for an interim rate of $100 is appropriate."[322] The ALJs agreed with Eschelon that a TELRIC study should be done.[323]

The ALJs disagreed with Eschelon on one point. For purposes of the new ICA going forward, the ALJs found "it appears" the circumstances under which Qwest offers exceptions to charging an additional fee for expedites (under emergency conditions) is not discriminatory.[324] The ALJs found "on this point, Qwest's position and language should be adopted."[325] In response, Eschelon has offered in its Exception on this one point to the ALJs' Report (and to Qwest) alternative modified ICA language (which I introduce below as Eschelon's Proposal # 2 for Issue 12-67(a)). This language states that if Qwest does provide exceptions to charging an additional fee for expedites for its retail customers, it will likewise provide those exceptions for CLECs when the same conditions are met. As I said above, the Minnesota Commission upheld the ALJs' recommendation on this issue.

Although the ALJs in Minnesota suggested that an expedite for a non-designed service may be more involved than an expedite for a designed service,[326] the evidence in this case shows that Qwest continues offering in Washington (and had

[322] MN Arbitrators' Report, at ¶ 222.

[323] MN Arbitrators' Report, at ¶ 222.

[324] MN Arbitrators' Report, at ¶ 219.

[325] MN Arbitrators' Report, at ¶ 220.

[326] MN Arbitrators' Report, at ¶ 220.

been offering in other states) emergency-based expedites for both designed and non-designed facilities for many years, and the "complexity" of design facilities had not been an issue for all these years. Further, when discussing costs associated with an expedite, Ms. Million names cost of working the order into an existing provisioning schedule, coordination of activities among the several Qwest's departments and communication with the customer regarding the status of the order.[327] Ms. Million's description of these costs does not suggest that expedites for design services would be more complex than expedites for non-design services. Finally, Qwest does not explain how these complexities can possibly justify a rate difference between $0 and $200 per day. As I discuss above, the ALJs agreed (as upheld by the Minnesota Commission) with Eschelon on the latter point and rejected Qwest's $200 per day proposed rate.

Q. BOTH THE MINNESOTA ALJS' AND THE ARIZONA STAFF DID NOT SUPPORT A FINDING OF DISCRIMINATION REGARDING THE CIRCUMSTANCES UNDER WHICH QWEST CURRENTLY OFFERS EXCEPTIONS TO CHARGING AN ADDITIONAL EXPEDITE FEE UNDER EMERGENCY CONDITIONS.[328] DO THESE CONCLUSIONS

[327] Million Rebuttal, p. 28.

[328] See MN Arbitrators' Report, at ¶ 219 and Staff Testimony, p. 32, line 21. Staff concludes that there is no retail analogue for expedites of loop installations. *Id*. p. 32, lines 21-23. When there is no retail analogue, "no retail analogue" does not mean "no discrimination." An analysis must be made of whether the access the ILEC provides to CLECs offers a meaningful opportunity to compete. *See* Bell Atlantic NY 271 Order at ¶ 44. In any event, Qwest has now admitted that there *is* a retail analogue for DS1 and DS3 loops. *See* Albersheim Rebuttal , p. 45.

IMPACT WHETHER OR NOT EXPEDITES SHOULD BE PROVIDED AT COST-BASED RATES?

A. No. Though Eschelon disagrees with the conclusion of the Minnesota ALJs' and the Arizona Staff with respect to discrimination,[329] both the Minnesota ALJs' and the Arizona Staff support the conclusion that expedites should be provided at cost-based rates.[330] As for the issue of not having a separate charge for emergency conditions, please refer to my discussion below (Section II) regarding exceptions to charging a separate expedite fee.

Q. MS. MILLION REFERENCES A DECISION OF THE FLORIDA COMMISSION IN SUPPORT FOR HER ARGUMENT THAT THE EXPEDITE CHARGES ASSOCIATED WITH UNE ORDERS SHOULD NOT BE COST-BASED.[331] IS THIS CITATION PERSUASIVE?

[329] Ms. Albersheim indicates that it is now Qwest's position that private line service is the retail analogue of an unbundled DS1 Capable Loop (Albersheim Response, p. 50, line 18), but remains that "there is no retail analog for the provisioning of unbundled DS0 loops." (Albersheim Response, p. 46, lines 19-20). Regardless of whether a service is designed or non-designed or whether it has a retail analogue or not, Qwest must provision the service on terms that are just, reasonable, and nondiscriminatory. *See* Memorandum Opinion and Order, *In the Matter of the Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York*, FCC 99-404, CC Docket No. 99-295, rel. December 22, 1999, ¶ 44 (citations omitted) ["NY 271 Order"]. The FCC's test in the NY 271 Order for the provision of UNEs is that they must be provisioned on terms that are just, reasonable, and nondiscriminatory -- in "substantially the same time and manner" for an element with a retail analogue and offering a "meaningful opportunity to compete" when no retail analogue. *See id*. The FCC stated specifically that the latter retail analogue test is no less rigorous than the first. *See id*. ¶ 55.

[330] See MN Arbitrators' Report, at ¶ 221 and Staff Testimony, Executive Summary, Staff Conclusion No. 7.

[331] Million Rebuttal, pp. 25-26.

A. No. Contrary to the Eighth Circuit's superior service analysis, the Florida Commission failed to consider the nature of the service that the incumbent provided *to itself*. The correct analysis of that issue is that reflected in the decision of the North Carolina Commission in the *NewSouth* case,[332] which is discussed in my (adopted) Direct Testimony.[333] In that case, the North Carolina commission rejected BellSouth's arguments and affirmed its conclusion that expedited service is subject to the nondiscrimination obligations of Section 251, stating, "The Commission also believes that expediting service to customers is simply one method by which BellSouth can provide access to UNEs and that, since BellSouth offers service expedites to its retail customers, it must provide service expedites at TELRIC rates pursuant to Section 251 and Rule 51.311(b)."[334]

Q. MS. MILLION DESCRIBES TELRIC AND TSLRIC COSTING METHODS.[335] DOES HER DESCRIPTION SUPPORT QWEST'S POSITION WITH RESPECT TO THE APPROPRIATE WHOLESALE RATE FOR EXPEDITES?

[332] *Re NewSouth Communications Corp.*, 2006 WL 707683 (N.C.U.C. February 8, 2006).

[333] Webber Direct Testimony (adopted) at p. 90-91.

[334] *Re NewSouth Communications Corp.*, 2006 WL 707683 (N.C.U.C. February 8, 2006). at *47; *see also Re Verizon Delaware , Inc*., 2002 WL 31521484 at *12 (Del. Pub. Serv. Comm'n 2002) (requiring cost-based rate for expedited CLEC service orders).

[335] Million Rebuttal, pp. 23-24.

A. No. Ms. Million admitted that Qwest's proposal for the expedite charge is not based on cost.[336] Accordingly, if the Commission rejects Qwest's argument that expedites are a superior service, then there is no dispute that Qwest's non-cost based expedite charge is inappropriate.

Q. MS. MILLION ARGUES THAT EXPEDITE CHARGES FOR UNE ORDERS SHOULD BE BASED ON A PRICE THAT A "MARKET CAN BEAR."[337] PLEASE EXPLAIN WHY HER ARGUMENT IS FLAWED.

A. First, Ms. Million neglects to mention that the market in question is the wholesale market for provisioning essential bottleneck facilities such as the UNE loop, *to which Qwest is a dominant (if not sole) provider*. Eschelon cannot simply go to another wholesale provider to get a better price. The FCC described this situation as follows:

> Congress recognized that, because of the incumbent LEC's incentives and superior bargaining power, its negotiations with new entrants over the terms of such agreements would be quite different from typical commercial negotiations. As distinct from bilateral commercial negotiation, the new entrant comes to the table with little or nothing the incumbent LEC needs or wants. The statute addresses this problem by creating an arbitration proceeding in which the new entrant may assert certain rights, including that the incumbent's prices for unbundled network elements must be "just, reasonable and nondiscriminatory."[338]

Ms. Million fails to acknowledge that the dominant provider in the wholesale market (Qwest) also competes with Eschelon and other CLECs in retail markets.

[336] Million Rebuttal, p. 28.

[337] Million Rebuttal, p. 28.

The dominant provider has the ability and incentives to use its "superior bargaining power"[339] in its wholesale markets to gain advantage in retail markets. This very combination is what constitutes the economic barriers to meaningful competition that the Telecommunications Act and federal unbundling rules were developed to remedy.

Second, Ms. Million's argument that the price should be set at a level the market can bear is meaningless: Ms. Million overlooks basic economic theory which is, generally speaking, as the price of a good or service goes up, the quantity goes down, and at some point the quantity of demand will drop to zero. Ms. Million's suggestion (that the "value" of expedite should be determined based on the price that the market can bear) does not result in the maximum *total* value of expedites. Note that the basic economic theory[340] says that there exists a certain price level that maximizes the total value for the product *for the producer* (Qwest); and there also exist *another, **lower*** price level that maximizes the total value of the product *for society* (which includes Qwest, Eschelon, other CLECs and End User Customers). The first level is the price resulting from an unregulated monopoly market; the second price is the price resulting from a competitive market. It is this basic economic theory that has been at the heart of governmental regulation of local telecommunications markets both before and after the

[338] Local Competition Order, ¶15.

[339] Local Competition Order, ¶15.

Telecommunications Act.[341] Now Ms. Million is suggesting to dismiss this regulation and the economic theory behind it, and instead, let the dominant provider dictate its price for expedites. As is evident from the following citation, the TRRO confirmed that the ILECs' dominance in the provisioning of essential bottleneck facilities continues to be a reason for price regulation in UNE markets.

> It would be unreasonable to conclude that Congress created a structure to incent entry into the local exchange market, only to have that structure undermined, and possibly supplanted in its entirety, by services priced by, and largely within the control of, incumbent LECs.[342]

Q. IN SUPPORT OF HER CLAIM THAT EXPEDITED ORDERS FOR UNES SHOULD NOT BE COST BASED, MS. MILLION MENTIONS THAT THE FCC EXCLUDED CERTAIN NETWORK ELEMENTS FROM THE UNBUNDLING REQUIREMENTS.[343] PLEASE RESPOND.

A. Ms. Million's argument is counter to Qwest's claim that expedite charges offered to Eschelon for UNEs need not be cost based. Indeed, she says that the FCC's list of Section 251 elements is limited to those elements and services that are

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[340] Virtually any microeconomic textbook covers this topic. See for example, B.E. Binger and E. Hoffman *Microeconomics with Calculus*, Scott, Foresman and Company, 1985, pp. 377-386.

[341] The Local Competition Order (at ¶ 740) elaborates on the issue of pricing in competitive and non-competitive markets as follows: "Just compensation is not, however, intended to permit recovery of monopoly rents. The just and reasonable rate standard of TELRIC plus a reasonable allocation of the joint and common costs of providing network elements that we are adopting attempts to replicate, with respect to bottleneck monopoly elements, the rates that would be charged in a competitive market, and, we believe, is entirely consistent with the just compensation standard." (footnotes omitted).

[342] *TRRO*, ¶ 48.

[343] Million Rebuttal, p. 27.

necessary for a CLEC to compete with the ILEC "on an equal footing."[344] She states that as part of its TRRO, the FCC excluded from this list unbundled switching, shared transport and the UNE-Platform. This comment only confirms the products *that remain* on the FCC list of elements – including unbundled loops -- are necessary for a CLEC to compete with the ILEC "on an equal footing."[345] As such, non discriminatory access to those elements remains critical, and Qwest's proposal is contrary to the FCC's continuing requirement that CLECs remain able to avail themselves of these elements as required.

Q. MS. MILLION CLAIMS THAT THE ABILITY TO EXPEDITE ORDERS HAS VALUE BECAUSE IT ALLOWS ESCHELON TO "LEAPFROG" OVER OTHER CUSTOMERS.[346] DOES THIS ARGUMENT JUSTIFY A NON-COST BASED EXPEDITE FEE?

A. No. Ms. Million neglects to recognize that as a wholesale provider and competitor to CLECs in retail markets, Qwest faces a different expedite "fee" than the fee it proposes to charge Eschelon. This fee is Qwest's internal cost of expediting the order. Because Qwest proposes to charge Eschelon an expedite fee that is not based on costs, Qwest's proposal allows Qwest to "leapfrog" ahead of CLECs on unfair and discriminatory terms by using its unique position as a provider of essential facilities.

[344] Million Rebuttal, p. 27.

[345] Million Rebuttal, p. 27.

In addition, Qwest provides expedites when the emergency conditions are met only if resources are available.[347] If resources are available, there is no one to "leap" over.

Q. IS ESCHELON'S $100 PER EXPEDITE PROPOSAL COST BASED?

A. Eschelon believes its proposed interim rate exceeds costs. Eschelon offers the rate on an interim basis as a compromise in the arbitrations until a cost-based rate is established. Eschelon's arbitration proposed charge is expressly an interim rate. It affords Qwest the opportunity to obtain a higher permanent rate, if Qwest can provide a TELRIC study to support that rate. If Qwest can present a cost study that supports a per-day charge, then it will be permitted to assess such a charge. To date, however, Qwest has provided no cost study and thus made no effort to prove that it incurs additional costs when providing expedites that are not recovered in the installation charge and the $100 interim additional expedite fee. Eschelon has been straightforward in presenting this as a compromise offer and therefore no adverse inference is warranted. Eschelon is truly interested in establishing a cost-based rate. If the Commission decides to subject the rate to a true-up, then a cost based rate will apply from the time the interim rate is established.

[346] Million Rebuttal, p. 29.

Q. PLEASE RESPOND TO QWEST'S POSITION REGARDING THE AMOUNT OF ITS PROPOSED EXPEDITE CHARGE.

A. According to Exhibit A,[348] Qwest's proposal, which was submitted without cost data, is to charge an Individual Case Basis ("ICB") rate for expedites.[349] In Qwest's direct testimony, Ms. Albersheim discloses that "It is Qwest's position that the appropriate ICB rate is $200 per day."[350] In her response testimony, Ms. Albersheim added: "This issue has a bearing on the current dispute in Washington because Qwest's intent is to offer designed service expedites for $200 per day in Washington for all customers in the near future."[351] Ms. Albersheim does not explain how an ICB rate can in every case be a per day rate.

Q. WHICH EXPEDITE CHARGE PROPOSAL IS MORE REASONABLE?

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[347] *See, e.g.*, Exhibit BJJ-46 (Qwest expedites PCAT), p. 46 ("For Designed Services, the Network organization is contacted to determine resource availability for the Central Office and Outside Technicians as well as for the Testers that work with you to accept the service.") & p. 48 ("Qwest will review your expedited request for resource availability. In some cases, we may contact you to advise resources for expedite are not available or offer an alternate date").

[348] *See* ICA Exhibit A, §9.20.14 (in which Qwest cites footnote "E," which is defined as "Docket UT-003013, Part D"). Qwest argues that Eschelon must pay Qwest consistent with the terms of the applicable wholesale tariff, and that the tariff authorizes Individual Case Basis ("ICB") charges. *Petition for Arbitration* (see p. 50 at ¶¶ 143-144). Qwest's position statement refers to Qwest's Washington Tariff WN U-42 "Interconnection Service," which lists a charge for expedite as ICB. Qwest's Washington Tariff WN U-42 section 3.1 p. 14.13.

[349] Eschelon pointed out some practical problems with Qwest's ICB rate proposal in its direct testimony. Webber Direct (adopted), pp. 85-87.

[350] Albersheim Direct, p. 50, lines 2-3.

[351] Albersheim Response, p. 45, lines 12-15.

A. Eschelon's interim proposal for a flat per order charge is more reasonable. It is a per order charge; not a per day charge.[352] Because the only additional cost that Qwest *may* incur to expedite an order involves the cost of processing the expedite order, this cost will not vary based on the number of days by which service is sought to be expedited.[353] Accordingly, a per day charge is inappropriate.[354]

The reasonableness of Eschelon's proposed $100 per order charge is also shown by comparison of that charge with other rates that the Commission has established. Eschelon's proposed interim expedite rate, for example, is similar to the Commission-approved rate – $104.82 – for basic installation of a DS1 capable loop.[355] Qwest has acknowledged that expediting service does not require any additional provisioning activities; it merely involves performing the same provisioning activities more quickly than would otherwise be the case.[356] An additional expedite charge that approaches or even exceeds the amount of the charge for all of the activities for an entire installation of a facility should more than amply compensate Qwest for performing the installation activities more quickly.

[352] On page 28 of her Rebuttal Testimony Ms. Million refers to Eschelon's interim rate proposal as $100 per day. Eschelon's proposal is $100 per order.

[353] Webber Direct (adopted), p. 89.

[354] Webber Direct (adopted), pp. 89.

[355] If Eschelon expedited a loop order by 5 days, Qwest proposes to charge Eschelon $1,000 ($200 X 5 days). Eschelon's $100 per order charge is also closer than Qwest's proposed rate to the Commission-approved rate – $340.47 – for *Coordinated* Installation with *Cooperative Testing* for installation of a DS1 capable loop, Qwest's most expensive installation option for DS1 loops.

[356] Exhibit MS-6, MN ICA Arbitration Transcript, Vol. 2,p. 97, line 18-p, 98, line 22.

Another point of comparison is the rate for "express service" – which essentially is an expedite service offered to residential customers and defined as provisioning of access line dial tone prior to the standard installation service date. Under its express service offering in Arizona and Colorado, for example, Qwest offers same-day installation for $22 flat (per order) fee.[357]

Another example of the reasonableness of Eschelon's proposed $100 per order charge is a comparison with the rate that Qwest charges for a Due Date change. The rate in Washington for a Due Date change is $9.59 if manual and $6.40 if mechanized.[358] More recently, Qwest has proposed a higher rate for a Due Date change in the Minnesota UNE cost case. Expediting an order changes the date to an earlier date. Qwest's proposed Due Date Change in Minnesota appears to apply when the date is changed to a later date – "any time a customer requests a Due Date Change after Qwest has assigned/dispatched a technician on the original due date."[359] For these types of date changes, Qwest is proposing a per order (*i.e.*, *not* per day) non-recurring charge of $91.32, which is listed as the ***additional dispatch*** charge.[360] In other words, in Minnesota, Qwest is proposing a per order

[357] See, for example, Qwest Colorado Services Catalog No. 1, Original Sheet 8 Effective 12-09-05.

[358] SGAT §9.20.12.

[359] *In the Matter of Qwest Corporation's Application for Commission Review of TELRIC Rates Pursuant to 47 U.S.C. § 251*, Minnesota PUC Docket No. P-421/AM-06-713, OAH Docket No. 3-2500-17511-2 ["*MN UNE Cost Case*"], Attachment 3 Summary of Costs and Attachment 4 Element Description, December 21, 2006, at §§9.20.12 (Qwest proposed element description for §9.20.11).

[360] *MN UNE Cost Case*, Attachment 3 Summary of Costs and Attachment 4 Element Description, December 21, 2006, at §§9.20.12 (Date Change – states "see 9.20.11") & 9.20.11 (Additional Dispatch, per Order $91.32).

charge for due date changes that is ***lower*** than Eschelon's proposed per order $100 interim charge for expediting the due date. Thus, in order to move the due date for a loop order up by five days, Qwest proposes that it be permitted to charge $1000.00 (in addition to the regularly applicable installation charge), although to move the due date for a loop order out, Qwest proposes that it be permitted to charge an additional $91.32, regardless of the number of days that the due date is being moved.

Qwest has provided no evidence at all that expediting an order would require an additional dispatch. To the contrary, Qwest has expressly admitted that expediting service does not require *any* additional provisioning activities.[361] Even assuming that expedites involve some non-provisioning "front office" type activities,[362] there is no evidence to suggest that the cost of those activities exceed not only the Commission's approved rate for basic installation of a DS1 capable loop but also Qwest's own recently proposed Due Date charge in the amount of an Additional Dispatch, when no additional dispatch is required for expedites.

Q. IS THERE OTHER EVIDENCE THAT A REASONABLE EXPEDITE CHARGE WOULD NOT EXCEED THE COST OF INSTALLATION OF THE LOOP?

[361] Exhibit MS-6, MN ICA Arbitration Transcript (Qwest witness Terry Million), Vol. 2, p. 97, line 18-p, 98, line 22; *id*. p. 98, lines 16-17.

[362] Minnesota Hearing Transcript (Million) at Vol. 2, p, 98, lines 15-16.

A. Yes. On July 16, 2004, Qwest increased its expedite charge in its federal special access tariff to reflect a new $200 per day charge.[363] Before July 31, 2004, Qwest's charges for expedited orders better reflected the relationship between installation and the expedite charge – the same method used currently in Qwest's access tariffs in Washington.[364] At that time, Qwest's tariff read, "The Expedited Order Charge is based on the extent to which the Access Order has been processed at the time the Company agrees to the expedited Service Date."[365] Further, the tariff stated, "***but in no event shall the charge exceed fifty percent (50%) of the total nonrecurring charges*** associated with the Access Order."[366] As indicated above, an additional expedite charge that approaches or even exceeds the amount of the charge for all of the activities for an entire installation of a facility should more than amply compensate Qwest for performing the installation activities more quickly. With its former Federal tariff provision (and its current Washington tariff provision), Qwest implicitly recognized that a reasonable charge to expedite an installation would not exceed the charge for all

[363] Exhibit DD-29, Qwest's Tariff FCC #1, section 5.2.2.D, 1st Revised Page 5-25. This is also available on the Qwest website at: http://tariffs.qwest.com:8000/idc/groups/public/documents/tariff/fcc1_s005p021.pdf#Page=1&PageMode=bookmarks. In the state of Washington Qwest continues to use the method for calculation the expedite fee replaced at the federal level with the $200 charge (See Exhibit JW-3 to Webber Direct).

[364] Webber Direct (adopted), pp. 87-88 and Exhibit JW-3 (tariff pages).

[365] Exhibit DD-29, Qwest's Tariff F.C.C. #1, Original Page 5-25. This is also available on the FCC website at: http://svartifoss2.fcc.gov/cgi-bin/ws.exe/prod/ccb/etfs/bin/binary_out.pl?69762

[366] Exhibit DD-29, Qwest's Tariff F.C.C. #1, Original Page 5-25. This is also available on the FCC website at: http://svartifoss2.fcc.gov/cgi-bin/ws.exe/prod/ccb/etfs/bin/binary_out.pl?69762 (emphasis added).

of the work performed in the entire installation; in fact, it would be no more than half. The non-recurring charge for the installation of a DS1 channel termination, the private line equivalent of a loop, was $313.25,[367] suggesting that the charge for expediting installation of this line would be capped at half of this amount, or $156.63.

Q. MS. MILLION MENTIONS A QWEST TSLRIC STUDY RELATED TO EXPEDITE CHARGES.[368] HAS QWEST PROVIDED THIS STUDY?

A. No. Qwest has not provided this study in the negotiations or this arbitration even though Eschelon requested cost support from Qwest.[369] A Qwest's filing with the FCC, Transmittal No. 202, supporting the change in the interstate tariff expedite rate, contained a cost study with a rate of $133.57.[370] This cost study, available for download from the FCC website, is the same as a proprietary cost study filed by Ms. Million in the Arizona expedite complaint case. The only difference is the

[367] Exhibit DD-29, Qwest's Tariff F.C.C. #1, 1st Revised Page 7-346. This is also available on the FCC website at: http://svartifoss2.fcc.gov/cgi-bin/ws.exe/prod/ccb/etfs/bin/binary_out.pl?69765

[368] Million Rebuttal, p. 28.

[369] See, e.g., Exhibit DD-32.

[370] Exhibit DD-29, p. 16 (Qwest Transmittal No. 202, Description and Justification Qwest Expedite Order Charge, available at: http://svartifoss2.fcc.gov/cgi-bin/ws.exe/prod/ccb/etfs/bin/binary_out.pl?70394). It is interesting to note that Qwest states that "This change is being made at the request of customers who want a simpler and easier method to expedite their orders and calculate the cost of that expedite" (paragraph 1). Apparently, Qwest is representing that its retail customers would prefer to pay a higher, but certain rate of $200 per day, rather than a rate that would be calculated according to the then-existing method, under which the expedite rate was capped at half of the NRCs associated with the access order. The same filing lists NRCs for channel terminations as $313.25 (p 17 of Exhibit DD-29), from which it follows that the total expedite charge may be between $0 and $156.63 (half of #313.25). Qwest's CLEC customer (Covad), in contrast, was simply trying to get expedites at all when the emergency conditions were not met, as before that time Qwest would not provide them to CLECs for non-emergencies at any price. *See* Exhibit BJJ-3 p. 6.

cost factors applied. Ms. Million reports a rate of $123.08.[371] The expedite cost study includes two hours of unexplained coordination time, which accounts for over half of the cost result. In addition, the costs include activities such as order processing for retail services, which should not be included in wholesale costs. These studies also include activities that would already be captured in the loop installation NRC such as monitoring and logging service order completion, and testing.

Q. HAS QWEST ACKNOWLEDGED THAT A PER DAY CHARGE DOES NOT REFLECT QWEST'S COSTS?

A. Yes. In the Minnesota ICA arbitration proceeding between Eschelon and Qwest, Ms. Million testified as follows:

> Q. Are there activities that Qwest does when it expedites that it doesn't do when it delivers a loop on the normal regular interval?
>
> A. There are not activities that are different, but the activities performed on different days than they would normally be done.
>
> Q. You do the same thing; you just do it faster?
>
> A. That's correct.[372]

[371] Ms. Million Direct Testimony in the Arizona Expedite Complaint Case, p. 6, line 21.

[372] See, e.g., *In the Matter of the Petition of Eschelon Telecom, Inc. for Arbitration with Qwest Corporation, Pursuant to 47 U.S.C. Section 252 of the Federal Telecommunications Act of 1996*, Minnesota Public Utilities Commission Docket No. P-5340, 421/IC-06-768, Hearing Transcript, Vol. 2, p. 97, lines 18-25.

Q. MS. MILLION PROVIDES AN EXAMPLE OF CONCERT-GOERS WHO TYPICALLY PAY PREMIUM CHARGES FOR SEATS IN THE FRONT.[373] DOES MS. MILLION'S EXAMPLE JUSTIFY QWEST'S NON-COST BASED RATES?

A. No. The telecommunications industry is not akin to a rock concert. Ms. Million's example only underscores that a dominant provider (a music star or Qwest) with market power, when non-price regulated, can charge rates in excess of cost. Although both industries have dominant providers, they differ with respect to the importance of services they provide and the manner in which they are regulated. The importance of telecommunications services is demonstrated by the long history of its regulation and is captured in the very first provision of the Communications Act of 1934:

> **SEC. 1. [47 U.S.C. 151] PURPOSES OF ACT, CREATION OF FEDERAL COMMUNICATIONS COMMISSION.** For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as *to make available, so far as possible, to all the people of the United States,* without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nationwide, and world-wide wire and radio communication service with *adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication,* and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is hereby created a commission to be known as the "Federal

[373] Million Rebuttal, pp. 28-30.

> Communications Commission," which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this Act.[374]

Q. MS. MILLION SUGGESTS THAT THE CHOICE TO EXPEDITE SHOULD BE BASED ON THE "PERCEIVED VALUE TO THEIR BUSINESS."[375] IS "VALUE OF SERVICE" APPROPRIATE PRICING FOR WHOLESALE SERVICES?

A. No. UNE rates are required to be based, not on the "value of service," but on economic cost. This is for good reason, as the rates are meant to allow competitors to have access to similar cost structures as the ILEC. Imagine if Qwest were allowed to charge the "value of service" for all wholesale products and services offered. The "value of service" to the CLEC is essentially the amount that it can charge its end-user customers for the service. In essence, "value of service" pricing extracts any profit available to the CLEC and redistributes that profit to the wholesale provider (i.e. Qwest). It is no wonder that Qwest would prefer to charge this way for all wholesale services. It is also obvious why Congress and the FCC mandated a different pricing standard, namely, economic costs, as meaningful competition would not exist with UNEs priced according to the "value of service."

[374] Emphasis added.

[375] *Million Rebuttal,* p. 30. The complete sentence reads: "Each CLEC makes the choice to pay the fee or not on the basis of the perceived value to their business to expedite orders."

Q. IN SUPPORT OF QWEST'S EXPEDITE CHARGE PROPOSAL MS. ALBERSHEIM STATES THAT IT OFFERS EXPEDITES TO CLECS UNDER THE SAME TERMS AND CONDITIONS AS IT OFFERS TO ITS RETAIL CUSTOMERS.[376] IS IT PROPER TO COMPARE CHARGES IMPOSED BY QWEST ON *CLECS* WITH EXPEDITE CHARGES IMPOSED BY QWEST ON ITS *RETAIL* CUSTOMERS?

A. No. Ms. Albersheim's contention that "Eschelon can obtain orders for high capacity loops expedited by Qwest at rates, terms and conditions that are superior to what Qwest provides to itself"[377] is based on a false comparison between a retail price and a wholesale price. As discussed above, the relevant comparison, for purposes of determining whether charges are discriminatory, is between the charges faced by CLECs and the expedite charges *Qwest* incurs when it expedites service to one of its retail customers (i.e., what Qwest charges "*itself*").[378] I discussed the appropriate comparison and the FCC rules and orders in my direct and response testimony (which I adopted) and will no repeat that discussion

[376] Albersheim Rebuttal, p. 49 lines 9-10.

[377] Albersheim Rebuttal, p. 50.

[378] *See* §51.313(b) (nondiscriminatory terms for the provision of UNEs shall be no less favorable to CLEC than the terms that the ILEC provides "to itself"); *see also* FCC First Report and Order ¶218 ("Therefore, we reject for purposes of section 251, our historical interpretation of "nondiscriminatory," which we interpreted to mean a comparison between what the incumbent LEC provided other parties in a regulated monopoly environment. We believe that the term "nondiscriminatory," as used throughout section 251, applies to the terms and conditions an incumbent LEC imposes on third parties *as well as on itself*.") (emphasis added).

here.[379] UNEs are a wholesale product, and the expedite rate for UNE orders should be cost-based, and not set based on retail tariff offerings.

Q. MS. ALBERSHEIM DENIES THAT QWEST PROVIDED ESCHELON WITH AN EXCEPTION TO CHARGING A SEPARATE FEE FOR EXPEDITES AND THEN SUDDENLY CHANGED ITS MIND AND STARTED CHARGING ESCHELON AND OTHER CLECS FOR THIS SERVICE.[380] IS SHE CORRECT?

A. No. Mr. Starkey addresses Qwest's conduct with respect to expedites in CMP, including the Qwest-initiated changes implemented by Qwest through Versions 27 and 30 of its PCAT, in the first section of his testimony.[381] In addition, Arizona Staff Conclusion from the Eschelon Complaint Case further verifies that Qwest provided Eschelon expedites for all products and services, including unbundled loops, under Eschelon's current contract for a period of almost six years.[382] Specifically, Arizona Staff Conclusion[383] Number One states that:

[379] Webber (adopted) Direct, pp. 61-63; Webber (adopted) Response, pp. 90-91.

[380] Albersheim Rebuttal, p. 52.

[381] *See also* Exhibits BJJ-3, BJJ-4, BJJ-26, BJJ-46.

[382] Exhibit DD-30 (Staff Executive Summary). *See also* Qwest (Ms. Novak) Direct (July 13, 2006) (Arizona Complaint Docket), p. 5, lines 5-12 & lines 21-22 (Qwest "uniformly followed the process in existence at the time for expediting orders for unbundled loops"); *see also* Answer (May 12, 2006) (Arizona Complaint Docket), Page 9, ¶ 14, Lines 24-25 ("Qwest previously expedited orders for unbundled loops on an expedited basis for Eschelon"). For a detail discussion of the CMP issues as they relate to expedites see also the testimony of Mr. Starkey, Webber Direct (adopted), pp. 71-73, and Webber Rebuttal (adopted), pp. 52-57.

> Qwest did not adhere to the terms and conditions of the current Qwest-Eschelon Interconnection Agreement, which allows Eschelon the capability to expedite orders when Qwest denied this option without signing an amendment to the Agreement. Qwest should continue to support the same Expedite Process that has been used in the past for all products and services (including unbundled loops) if the order meets any of the Emergency criteria or conditions or where the customer's safety may be an issue if the Expedite is not processed. No additional charge should be applied beyond the standard installation charge.[384]

Q. MS. ALBERSHEIM STATES THAT CERTAIN WASHINGTON TARIFF SECTIONS REFERENCED IN MR. WEBBER'S DIRECT TESTIMONY [ADOPTED] ARE IRRELEVANT.[385] DO YOU AGREE?

A. No. These tariff references demonstrate that Eschelon's proposed list of emergency conditions in its Proposal # 1 for Section 12.2.1.2.1 (Issue 12-67(a)) is not Eschelon's invention, but a list actually compiled by Qwest.[386] Qwest has admitted that it does not charge an expedite charge in such circumstances in some

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[383] Arizona Staff summarizes seven conclusions in the Executive Summary to the Direct Testimony of Pamela Genung, *In re. Complaint of Eschelon Telecom of Arizona, Inc. Against Qwest Corporation*, ACC Docket No. T-01051B-06-0257, T-03406A-06-0257 (Jan. 30, 2007) ("Staff Expedite Testimony") at Executive Summary. This Executive Summary is attached to this testimony as Exhibit DD-30.

[384] Arizona Staff Testimony, Executive Summary, Staff Conclusion No. 1 (Exhibit DD-30).

[385] Albersheim Rebuttal, p. 47-48. She is referring to section 3.2.2 from Qwest's Private Line Transport Services Tariff WN U-41and section 2,4,5 of Qwest's Access Services Tariff WN U-44.

[386] Qwest admits it waives an expedite fee in some cases under its retail tariff. *See* Qwest (Ms. Martain, CMP Process Manager) Direct, Arizona Complaint Docket, p. 40, lines 4-10 ("The tariff then goes on to state that if the end user elects to move service to a temporary location (either within the same building, or a different building) that non-recurring charges would apply. This would include the non recurring charge to expedite a design service. However, when the customer moves its service, via a service order, back to the original premise location, if it meets the criteria as outlined in 3.2.2.d included below, the non-recurring charges would be ***waived*** (***including the expedite fee***)" (emphasis added)).

cases.[387] The fact that *today* Qwest claims it does not apply this list to design services in states other than Washington does not make Eschelon's proposal less valid, because Qwest had applied this list to design services in the past,[388] and continues to apply this list to design services in Washington.[389]

Those particular tariff pages are less pertinent to Eschelon's more recent alternate Proposal # 2 for Section 12.2.1.2.1 (Issue 12-67(a)),[390] which does not include a list of emergency conditions, as discussed below.

Q. MS. ALBERSHEIM CLAIMS THAT ESCHELON IS REALLY SEEKING SPECIAL TREATMENT, GIVING IT A COMPETITIVE ADVANTAGE OVER QWEST AND ALL OTHER CLECS.[391] IS THAT THE CASE?

[387] Qwest (Ms. Martain) Direct (Aug. 28, 2006), Arizona Complaint Docket, p. 40, lines 4-10 ("The tariff then goes on to state that if the end user elects to move service to a temporary location (either within the same building, or a different building) that non-recurring charges would apply. This would include the non recurring charge to expedite a design service. However, when the customer moves its service, via a service order, back to the original premise location, if it meets the criteria as outlined in 3.2.2.d included below, the non-recurring charges would be ***waived*** (***including the expedite fee***)" (emphasis added)).

[388] See Webber Direct (adopted) pp. 61-63 and Exhibit BJJ-3 to Johnson's Direct (chronology of Qwest's changes to the expedite process). Qwest (Ms. Novak) Direct (July 13, 2006) (Arizona Complaint Docket), p. 5, lines 5-12 & lines 21-22 (Qwest "uniformly followed the process in existence at the time for expediting orders for unbundled loops"); *see also* Answer (May 12, 2006) (Arizona Complaint Docket), Page 9, ¶ 14, Lines 24-25 ("Qwest previously expedited orders for unbundled loops on an expedited basis for Eschelon").

[389] The current version of Qwest's PCAT *Expedites and Escalations Overview* (part of Exhibit BJJ-46) states that "The Expedites Requiring Approval [emergency-based expedites] section of this procedure does not apply to any of the products listed below (unless you are ordering services in the state of WA)."

[390] This language is introduced above.

[391] Albersheim Rebuttal, p. 49.

A. No. Ms. Albersheim seems to believe that Eschelon's desire for cost-based pricing for expedites would somehow preclude any other CLEC from making the same arguments and seeking the same rates. Cost-based pricing for expedites would put Eschelon on equal footing with Qwest when it comes to providing expedites to its end-user customers, because under cost-based pricing both Qwest and Eschelon would face the same economic signals (cost) with regard to expedites.

Further, CLECs in Washington would be able to opt into Eschelon's ICA. To conclude that Eschelon is somehow inappropriately carving itself an Eschelon-only exemption is contrary to the principles of Section 252(i) of the Act, which are discussed in more detail by Mr. Starkey.[392]

Q. MS. ALBERSHEIM SUGGESTS THAT ONCE QWEST INTRODUCES ITS FEE-ADDED EXPEDITE SERVICE IN WASHINGTON, AND IF THE COMMISSION APPROVES ESCHELON'S $100 INTERIM EXPEDITE RATE PROPOSAL, "ESCHELON WOULD BE ABLE TO PROVIDE SERVICE TO END USER CUSTOMERS ON AN EXPEDITED BASIS MORE CHEAPLY THAN ANY OTHER CARRIER, INCLUDING QWEST."[393] PLEASE RESPOND.

[392] *See, e.g,* Starkey Direct, pp. 32-33.

[393] Albersheim Rebuttal, p. 50 lines 1-3.

A. First, as I already discussed above, it is Qwest who is able to provide expedited service to its retail customers "more cheaply than any other carrier"[394] because when expediting its own retail orders, Qwest "pays" *cost of expedite*, rather than a retail $200 expedite rate it charges other carriers. Qwest has not shown in this case that its cost would be greater than Eschelon's proposed (an interim) expedite rate of $100. Because for a permanent rate Eschelon advocates a cost-based rate for expedite services, Qwest would not be "paying" more than Eschelon's advocated rate. Second, Ms. Albersheim's argument is based on a hypothetical future situation in which (a) Qwest introduces the fee-added expedite process in Washington, and (b) the Commission approves Qwest's proposed fee. There are change of law provisions in the contract is Qwest succeeds in obtaining an approved cost-based rate or a ruling that cost-based rates are not required.

II. EXCEPTIONS TO CHARGING AN ADDITIONAL EXPEDITE FEE

Q. DOES ESCHELON HAVE AN ADDITIONAL PROPOSAL REGARDING WHEN AN EXCEPTION SHOULD BE MADE TO CHARGING AN ADDITIONAL EXPEDITE FEE?

A. Yes. Eschelon's proposed ICA language for Issue 12-67 and all of its subparts is set forth in Eschelon's Direct and Rebuttal Testimony.[395] Situations under which an exception to charging an expedite fee will be made (*i.e.*, when an expedite will

[394] Albersheim Rebuttal, p. 50 lines 2-3.

be provided at no additional fee over and above the installation charge when certain emergency-based conditions are met)[396] are addressed in Eschelon's proposal for Section 12.2.1.2.1 and Qwest's proposal for Sections 7.3.5.2.2 and 9.1.12.1.2. This is Issue 12-67(a). Qwest's ICA proposal allows no exception to charging an additional expedite fee for unbundled loops and certain other products.[397] This is true even though Qwest provides exceptions for its retail customers[398] and, in Washington, for its other CLEC customers for unbundled loops (per Qwest, "designed" facilities).

As discussed in direct testimony, Qwest does not charge an additional expedite fee in every case. Qwest makes certain exceptions -- providing expedites at no additional charge at least for certain products when emergency-conditions are met

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[395] Webber Direct (adopted), pp. 65, 68, 75, 77, 82, 84-85 and Webber Rebuttal (adopted), pp. 65-66.

[396] Although Qwest sometimes refers to this as obtaining expedites for "free" (see, e.g., Albersheim Response, p. 43, line 22), customers pay a non-recurring charge ("NRC") to install the loop, which in the case of an expedited order is simply installed earlier. Therefore, it is more accurate to refer to a separate, express NRC for expediting the order as an additional fee. Qwest has provided no cost study in negotiations or this arbitration to show that it does not recover any costs for performing the work earlier in the NRC or recurring charges.

[397] Qwest's language in sections 7.3.5.2.2 and 9.1.12.1.2 provides that expedites will be allowed "only" when the request meets the criteria for fee-added "Pre-Approved" Expedites. As discussed in Webber Direct (adopted) p. 80, Qwest's proposal to reference PCAT's "Pre-Approved" process conflicts with PCAT's Washington-specific provision, which states that only the emergency-based (rather than Pre-Approved) expedite process is available in Washington. Albersheim Rebuttal, p. 42 confirms that only the emergency-based (rather than Pre-Approved) expedite process is available in Washington..

[398] *See* Qwest (Ms. Martain) Direct (Aug. 28, 2006), Arizona Complaint Docket, p. 40, lines 4-10 (quoted in above footnote); *See*, *also*., JW-3 (Qwest retail tariff pages),; *see also*, *e.g.*, Qwest's PCAT, *Expedites and Escalations Overview* available at http://www.qwest.com/wholesale/clecs/exescover.html ("The Expedites Requiring Approval section of this procedure does not apply to any of the products listed below (***unless you are ordering services in the state of WA***)).

and resources are available.[399] Qwest now refers to this emergency-based process as its "Expedites Requiring Approval" process.[400] In its retail tariff, Qwest refers to exceptions to charging an additional non-recurring fee for expedites as "Reestablishment of Service Following Fire, Flood, or Other Occurrence" – "Nonrecurring Charges Do Not Apply."[401] Although Qwest cannot deny that it makes exceptions to charging an expedite fee,[402] Qwest disputes when and for what products it makes an exception. Eschelon has recently offered an alternative ICA proposal to simplify this debate.

In Eschelon's first language proposal for Issue 12-67(a), Eschelon lists in the ICA the conditions under which Qwest has historically provided an exception to

[399] Webber Direct (adopted), pp. 69-70.

[400] Qwest Exhibit RA-6 (PCAT *Expedites and Escalations Overview*): ("The Expedites Requiring Approval section of this procedure does not apply to any of the products listed below (***unless you are ordering services in the state of WA***)).

[401] Exhibit JW-3 (Qwest tariff pages), pp. 1 and 2 ("Nonrecurring Charges Do Not Apply" "Charges do not apply for the reestablishment of service following a fire, flood or other occurrence attributed to an Act of God. . . .").

[402] Qwest (Ms. Martain) Direct (Aug. 28, 2006), Arizona Complaint Docket, p. 40, lines 4-10 ("The tariff then goes on to state that if the end user elects to move service to a temporary location (either within the same building, or a different building) that non-recurring charges would apply. This would include the non recurring charge to expedite a design service. However, when the customer moves its service, via a service order, back to the original premise location, if it meets the criteria as outlined in 3.2.2.d included below, the non-recurring charges would be ***waived*** (***including the expedite fee***)" (emphasis added).

charging a separate expedite fee.[403] When these conditions are met, CLECs continue to pay the non-recurring installation charge,[404] but Qwest does not also charge an additional expedite fee on top of that charge.

In its alternative language proposal for Section 12.2.1.2.1 (which has no subparts), Eschelon offers to simply state that expedite charges are not applicable if Qwest does not apply expedite charges to its retail customers, such as when certain conditions (*e.g.*, fire or flood) are met. Associated with both proposals, Eschelon offers additional ICA language to confirm that the expedite charge is separate

[403] Webber Direct (adopted), p. 68. Ms. Albersheim suggests that subsection (f) of Eschelon's proposal regarding disconnects in error is a novel approach not taken in the past. *See* Albersheim Rebuttal, p. 51, lines 14-19. She is incorrect. Exhibit BJJ-3 to the Direct Testimony of Ms. Johnson specifically discusses Qwest's attempt to remove this condition from the list of emergency conditions historically listed in Qwest's *Expedite* PCAT on pp. 9-10: "In fact, under this process, Qwest grants expedites for conditions when CLEC's end user customer is completely out of service (primary line) due to a CLEC disconnect in error. (*See, e.g.*, CAZ5016941TIH (5/11/04); Z467137RAK (1/10/05.) After all, CLEC is the carrier, just as Qwest is the carrier when Qwest disconnects in error. In both cases, the circumstances are different from an error caused by the end user customer. Qwest retracted this notice and did not re-issue it at all (at any Level). Therefore, the Original conditions are still in place and were not modified to exclude CLEC-caused disconnects in error from the emergency conditions." (*See also* Exhibit BJJ-26, p. 1, fourth & fifth examples – showing Qwest's practice of providing expedites for loop orders at no additional fee for CLEC disconnects in error, before Qwest unilaterally changed the process that had been available for more than six years.) Ms. Albersheim is also incorrect when she states that "Qwest is obligated to pay for [CLEC] mistake" (Albersheim Rebuttal, p. 51, lines 9-10). Eschelon *pays the installation NRC* to restore service after a CLEC disconnect in error (unlike a Qwest retail customer which receives a waiver of that charge). A CLEC has no incentive to abuse this exception, as it would mean paying the NRC to restore service and, more importantly, taking down the CLEC's own customer – which is more costly than an expedite fee.

[404] *I*n contrast, Qwest per its retail tariff *waives* the NRC charge for its retail customers. (*See* Exhibit JW-3, Qwest retail tariff pages.)

from, and does not alter the applicability of, any applicable installation charge.[405]

Eschelon's alternative proposal for Issue 12-76(a) provides:

> 12.2.1.2.1 Notwithstanding any other provision of this Agreement, for all products and services under this Agreement (except for Collocation pursuant to Section 8), Qwest will grant and process CLEC's expedite request, and expedite charges are not applicable, if Qwest does not apply expedite charges to its retail Customers, such as when certain conditions (*e.g.*, fire or flood) are met and the applicable condition is met with respect to CLEC's request for an expedited order.

In Washington, Qwest admits that it provides an exception to charging an expedite fee to other CLECs for unbundled loops,[406] so there is particularly no reason not to adopt Eschelon's first proposal listing the conditions under which it does so in Washington. If Qwest later succeeds in obtaining a change in law in Washington, it may amend the contract per its change in law provisions. If for any reason the first proposal is not adopted, however, Eschelon's alternative proposal states that if Qwest does provide exceptions to charging an additional fee for expedites for its retail customers (as Qwest currently does, for example, "if a customer needs to restore service at the original location when it is re-entering the

[405] Although the latter provisions have long been part of Eschelon's proposal (*see* ICA Sections 12.2.1.2.2 & 12.2.1.2.3, quoted at Webber Direct, adopted, pp. 75 and 77), Qwest omits them from its description of Eschelon's proposal. *See* Albersheim Direct, pp. 53-54.

[406] Exhibit BJJ-46 (Qwest expedite PCAT), p. 47 ("The Expedites Requiring Approval section of this procedure does not apply to any of the products listed below (***unless you are ordering services in the state of WA"***)) (emphasis added). Qwest refers to the emergency-based expedites as "Expedites Requiring Approval."

original facility, after a fire, flood or Act of God disaster"),[407] it will likewise provide those exceptions for CLECs when the same conditions are met. The approach reflected in Eschelon's first proposal (which lists the conditions) is preferable in that it offers more certainty as to the conditions under which exceptions to charging a separate fee will be made. If the Commission finds that some of all of these conditions are inapplicable (or does not reach that issue), however, Eschelon's second proposal at least articulates a nondiscrimination standard. It also limits future disputes at least to the extent that the companies agree Qwest does not apply expedite charges for its retail customers.[408]

Q. IS ESCHELON'S PROPOSAL TO ALLOW NONDISCRIMINATORY EXCEPTIONS TO CHARGING AN ADDITIONAL EXPEDITE FEE IN CERTAIN EMERGENCY SITUATIONS CONSISTENT WITH ESCHELON'S POSITION THAT RATES FOR EXPEDITES SHOULD BE COST-BASED?

A. Yes. As discussed, Eschelon continues to pay the installation NRC separate from the expedite fee,[409] unlike a Qwest retail customer which also receives a waiver of

[407] *See* Qwest (Ms. Martain) Direct (Aug. 28, 2006), Arizona Complaint Docket, p. 39, lines 27-28; *see id*. p. 40, lines 4-10 ("The tariff then goes on to state that if the end user elects to move service to a temporary location (either within the same building, or a different building) that non-recurring charges would apply. This would include the non recurring charge to expedite a design service. However, when the customer moves its service, via a service order, back to the original premise location, if it meets the criteria as outlined in 3.2.2.d included below, the non-recurring charges would be ***waived*** (***including the expedite fee***)" (emphasis added)).

[408] *See id*.

[409] Eschelon proposed ICA Sections 12.2.1.2.2 & 12.2.1.2.3.

that installation charge.[410] In addition, Qwest provides expedites when the identified emergency conditions are met ("Expedites Requiring Approval") only if resources are available.[411] Regarding Expedites Requiring Approval (but not fee-added Pre-Approved Expedites), Qwest's PCAT states:

> Qwest will review your expedited request for resource availability. In some cases, we may contact you to advise resources for expedite are not available or offer an alternate date.[412]

Qwest incurs no cost to add resources for expediting an order when the emergency conditions are met. If resources are not available, Qwest simply denies the request.[413] Further, Eschelon's Proposal # 2 for issue 12-67(a) provides that "Qwest will grant and process CLEC's expedite request, and expedite charges are not applicable, if Qwest does not apply expedite charges to its retail Customers, such as when certain conditions are met (*e.g.*, fire or flood) and the applicable condition is met with respect to CLEC's request for an expedited order."[414] This provision would require Qwest to offer the emergency conditions to Eschelon only to the extent that Qwest does not apply expedite

[410] *See* Qwest (Ms. Martain) Direct (Aug. 28, 2006), Arizona Complaint Docket, p. 39, lines 27-28; *see id*. p. 40, lines 4-10 ("the ***non-recurring charges would be waived*** (including the expedite fee)" (emphasis added); *see also* Exhibit JW-3 (Qwest retail tariff pages).

[411] *See, e.g.*, Exhibit BJJ-46 (Qwest expedites PCAT), p. 46 ("For Designed Services, the Network organization is contacted to determine resource availability for the Central Office and Outside Technicians as well as for the Testers that work with you to accept the service.").

[412] *See* Exhibit BJJ-46, p. 48 (current Qwest Escalations and Expedites PCAT, discussing emergency-based Expedites Requiring Approval).

[413] *See id.*

[414] See Eschelon proposal # 2 for 12.2.1.2.1 of the ICA.

charges to its own customers, providing protection against discrimination while addressing Qwest's stated concerns about its offering few if any exceptions to charging for expedites for its retail customers.

III. OTHER EXPEDITE ISSUES

Q. OTHER THAN THE INTERIM RATE AND EXCEPTIONS TO CHARGING THAT RATE, ARE THERE OTHER EXPEDITE ISSUES TO BE DECIDED?

A. Although deciding those two issues will resolve the bulk of the dispute regarding expedites, Eschelon asks the Commission to adopt its language for all of the subparts to Issue 12-67. The remaining issues are discussed in previous testimony (by subpart within Eschelon's previous testimony regarding Issue 12-67), which will not be repeated here. They include placement of the language regarding expedited ordering [centralized in Section 12.2 ("Pre-Ordering, Ordering, and Provisioning") as proposed by Eschelon or decentralized in Sections 7 ("Interconnection") and 9 ("UNEs") as proposed by Qwest]; appropriate language for Section 7 if anything other than a cross reference to Section 12 is included

(Issue 12-67(f), Eschelon's alternate proposal),[415] and ensuring the ICA language is accurate (such as Qwest's erroneous statement in Sections 7.3.5.2.1 and 9.1.12.1.1 that CLEC must make the request for an expedite on the LSR or ASR when ordering, when a CLEC may not learn of the need to expedite the order until after it is submitted, and Qwest's current process recognizes this by allowing CLECs to call for an expedite after the LSR or ASR is submitted,[416] see, e.g., Issue 12-67(d)). The CMP aspects of expedited ordering are discussed by Mr. Starkey.

VI. SUBJECT MATTER NOS. 44, 45 AND 47

SUBJECT MATTER NO. 44. RATES FOR SERVICES

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

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

[415] Ms. Albersheim object to use of the word "Interconnection" instead of "LIS" in the language for Section 7.3.5.2. (Albersheim Response, p. 44.) She fails to point out that the word "Interconnection" is used in the approved Qwest-AT&T ICA, which was used in part as the basis for negotiations. Eschelon's rebuttal testimony (Webber Rebuttal (adopted), pp. 66-67) explained that "LIS" is Qwest's product name for interconnection service (which is the industry generic term, and as such, is more appropriate in the contract than a company product name). Ms. Albersheim claims that Eschelon's proposal broadens the provision to apply to all types of Interconnection trunks, as opposed to just Local Interconnection trunks. However, Ms. Albersheim does not name these "other" types of interconnection trunks, to which the provision is not intended to apply in Ms. Albersheim's view. Examination of the agreed-upon language of the ICA shows that the ICA uses the terms "Interconnection" and "Local Interconnection Service" to denote the same set of services. This conclusion is evident from the introductory closed language of ICA Section 7.1.1 ("Interconnection"). In other words, Eschelon's proposal to use the industry-wide term "Interconnection," rather than Qwest's product name "LIS," correctly describes the scope of the provision in section 7.3.5.2.

A. Issues 22-88 and 22-88(a) deal with the language characterizing rates contained in Exhibit A.[417] Eschelon proposes that rates in Exhibit A be referred to in general terms, as "rates for services," without specifying the provider of services. Qwest proposes that rates in Exhibit A be referred to as Qwest's rates. As I explained in my direct testimony, a number of rates contained in Exhibit A apply to Eschelon's charges to Qwest.[418] Therefore, the ICA and its Exhibit A should not inaccurately confine rates to "Qwest rates" or misleadingly refer solely to "Qwest tariffs," as proposed by Qwest. Eschelon's proposal for Issue 22-88(b) complements the already agreed-upon portions of the ICA[419] that set a process for establishment of interim rates. Eschelon's proposal for Issue 22-89 clarifies that each company has a right to request a cost proceeding at the Commission to set permanent rates.

Issue 22-88

Q. MR. EASTON ARGUES THAT THE AGREED UPON ICA LANGUAGE MAKES IT CLEAR WHAT RATES ESCHELON MAY CHARGE QWEST.[420] DO YOU AGREE?

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[416] *See* Exhibit BJJ-46, p. 46 (showing Qwest's process provides that a CLEC may "either" submit a request with the expedited due date or submit the request with a due date interval from the ICA and then call Qwest).

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

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

[419] Section 22.6.1.

[420] Easton Rebuttal, pp. 20-21.

A. No. I have addressed this argument in my rebuttal testimony.[421] I can only add that Mr. Easton's claim that the ICA alone (without Exhibit A) specifies rates that Eschelon may charge is contrary to the facts at his disposal: Mr. Easton acknowledges reviewing[422] the four pages of my direct testimony[423] with citations from the ICA language that reference Exhibit A as a source of rates that CLECs may charge. Each one of these citations refers to rates (or parameters identifying rates[424]) that are located in Exhibit A. Below I reproduce the list of these rates and parameters:

7.3.3.1	Trunk Installation NRC
7.3.3.2	Trunk Rearrangement NRC
7.3.7.1	Assumed Mileage For Local Transit And ISP-Bound Transit Tandem Switching And Tandem Transmission Rates
7.3.7.2	Assumed Mileage For IntraLATA Toll Transit Tandem Switching And Tandem Transmission Rates
7.6.3	Transit Record Charges
8.2.3.10	Labor Charges For Audits
9.2.5.2	Trouble Isolation Charge
10.2.5.5.4	Rate For Managed Cuts
21.14.1.2	Daily Usage Files Records Charge

Without Exhibit A, the above listed rates – rates that Eschelon would charge Qwest – are not specified.

[421] Denney Rebuttal, pp. 107-108.

[422] Easton Rebuttal, p. 20.

[423] Denney Direct, pp. 170-173.

Q. MR. EASTON CLAIMS THAT BECAUSE THE SUBSET OF SERVICES FOR WHICH ESCHELON MAY CHARGE QWEST IS SMALL, THERE IS NO NEED TO ACKNOWLEDGE THE FACT THAT ESCHELON WILL CHARGE QWEST SOME OF THE RATES IN EXHIBIT A.[425] PLEASE RESPOND.

A. Mr. Easton's logic simply does not apply to a contract. He might as well argue that because Eschelon purchases some UNE services from Qwest infrequently, there is no need to include rates for those services in the ICA.

Issue 22-88(a)

Q. REGARDING ISSUE 22-88(A), MR. EASTON CLAIMS THAT A REFERENCE TO QWEST'S TARIFF UNDER THE RATES FOR MUTUALLY EXCHANGED INTRALATA TOLL TRAFFIC IS ACCEPTABLE BECAUSE IT DID NOT CONFUSE AT&T.[426] PLEASE RESPOND.

A. Eschelon should not be held captive to the ICA language of other carriers, especially if the ICAs of other carriers contain ambiguity. Eschelon is not AT&T. Eschelon differs significantly from AT&T in its business model and business

[424] Such a parameter is the assumed mileage that determines the applicable rate for mileage-sensitive rates.

[425] Easton Rebuttal, p. 20.

[426] Easton Rebuttal, p. 21.

needs, its position in telecommunications markets, the extent of its litigation resources and its negotiating power.

Q. MR. EASTON CLAIMS THAT SIMILAR LANGUAGE WAS REJECTED BY THE ALJ IN THE AT&T/QWEST ARBITRATION.[427] IS THIS CORRECT?

A. No. This was discussed in detail in my rebuttal testimony at pages 109 – 110.

SUBJECT MATTER NO. 45. UNAPPROVED RATES

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

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

A. Issue 22-90 concerns Qwest's filing with the Commission for the approval of previously unapproved rates for section 251 products. As I explained in my direct testimony, the cost support information is necessary in order for Eschelon to make a decision on whether to intervene in the case.[428] Although providing to Eschelon of the already filed cost support would require minimal effort on the part of Qwest, Qwest does not agree to this proposal.

[427] Easton Rebuttal, p. 21.

[428] Denney Direct, pp. 184-185.

As discussed in my direct testimony, this language is intended to reflect a decision by the Minnesota Commission in the 271 case setting UNE rates.[429] Eschelon's updated proposal[430] also includes language that was added to confirm that the contract requirements regarding obtaining approval of unapproved rates are the same as those ordered in the Minnesota 271 case.

Minnesota is currently the only Qwest state where Exhibit A contains no rates for certain items for which Qwest has neither obtained a Commission-approved rate, nor filed cost support and complied with that process, and yet Qwest must provide the product under the terms of the interconnection agreement. In the other states (including Washington), Qwest currently may force its wish list rates upon CLECs by refusing to provide the product at all if CLECs do not sign an amendment containing its unapproved rates.[431] The result in Minnesota is the appropriate result because Qwest has both not met its burden to show that its rates comply with the cost-based standard and not taken reasonable steps to obtain interim or permanent rates from the Commission.

[429] Denney Direct p.181.

[430] Denney Rebuttal, pp. 111-112. Note that when presenting Eschelon's updated proposal it his Rebuttal testimony, Qwest's witness Mr. Easton fails to indicate the disputed text.

[431] For example, see my discussion of emergency-based expedites (Issue 12-67) and Exhibit DD-30, Direct Testimony of Pamela Genung, *In re. Complaint of Eschelon Telecom of Arizona, Inc. Against Qwest Corporation*, ACC Docket No. T-01051B-06-0257, T-03406A-06-0257 (Jan. 30, 2007) ("Staff Expedite Testimony") at Executive Summary ("CLECs should not be forced into signing" Qwest's expedite amendment with Qwest's $200 per day rate. Staff Testimony, p. 34, lines 10-11. Staff added that "since CLEC interconnection agreements are voluntarily negotiated or arbitrated," Qwest could have taken the issue to arbitration under the Qwest-Eschelon ICA, "rather than trying to force Eschelon into signing an amendment." *Id*. p. 36, line 21 – p. 37, line 2.).

Although Eschelon is proposing the Minnesota process (with the same results) in Washington and other states, Qwest is proposing a watered-down version that omits the key pieces of the Minnesota process – pieces that prevent Qwest from charging unsupported, unapproved rates. Qwest seeks to avoid establishment of interim rates to guarantee itself the ability to charge its unapproved wish list rates as long as possible under that watered-down version, if adopted. Eschelon has proposed language to be included in the ICA, which Qwest has not agreed to, providing that "Qwest shall obtain Commission approval before charging for a UNE process that it previously offered without charge" and that "[f]or a UNE or process that Qwest previously offered without charge, the rates in Exhibit A do not apply until Qwest obtains Commission approval or the Parties agree to a negotiated rate."[432] The language further provides that, when the companies are unable to agree on a negotiated rate, the Commission, not Qwest, may establish the interim rate. The portion of Section 22.6 to which Qwest ***has*** agreed specifically contemplates that Commission establishment of interim rates may occur ***before*** Qwest files its cost support[433] – *i.e.*, in a forum outside of a cost proceeding commenced with the filing of Qwest's cost support. This arbitration is such a forum.

[432] Rebuttal Testimony of Douglas Denney, p. 121, lines 8-9. Proposed ICA Section 22.6.1 (Issue 22-90).

[433] Proposed ICA Section 22.6.1.1 (text that it not underlined).

What Eschelon's proposed language would not permit is what Qwest is seeking to do here: Simply impose rates that have not been agreed to, and that the Commission has not reviewed. Rather than addressing interim rates in this arbitration, Qwest's solution is to unilaterally impose excessive, non-cost based rates on Eschelon. Thus, Qwest's position is that the arbitrated interconnection agreement should incorporate rates that have not been agreed to by Eschelon or approved by the Commission. Specifically, Qwest is proposing rates that are based on inputs that are inconsistent with the Commission-ordered inputs and rates for which Qwest has provided either no cost support or cost support that is insufficiently detailed. Qwest should bear the burden to prove its costs. Qwest's language proposal for Issue 22-90 would effectively reverse that burden by requiring Eschelon to pay Qwest's demanded rates for a potentially long period of time based on no evidence in this record and no Commission scrutiny in the meantime.

Q. WHAT ARGUMENTS DOES QWEST MAKE IN ITS REBUTTAL TESTIMONY AGAINST ESCHELON'S PROPOSAL ON ISSUE 22-90 AND 22-90(A)?

A. Mr. Easton makes three arguments against Eschelon's proposal for 22-90. First, he argues that Eschelon's language creates "the opportunity to delay or eliminate compensation for services Qwest provides in the time period prior to the

Commission making a decision regarding the new rate."[434] Second, he argues that "Eschelon's language appears to apply to pricing beyond Section 251 products and services."[435] Third, he claims that Eschelon has no business need to request a notice and cost studies even when the rates "will not impact them."[436]

Q. REGARDING MR. EASTON'S FIRST ARGUMENT, WOULD ESCHELON'S PROPOSAL "DELAY OR ELIMINATE COMPENSATION FOR SERVICES QWEST PROVIDES?"[437]

A. No. The language in section 22.6.1 covers two types of rates. The first is for new products or services. The second is for a UNE or process that Qwest previously offered without a unique charge.

For new products and services, Qwest needs only to file cost support with the Commission within 60 days after offering the product or service. After this filing, there are three possibilities: Qwest and Eschelon could negotiate a rate; the Commission could order an alternative interim rate; or if nothing happens then Qwest would be able to charge its proposed interim rate. In all three scenarios, Qwest is compensated for the new product or service. The only instance in which Qwest would not be compensated is when it fails to provide cost support for the product or service. In the latter case, there is no evidence that Qwest should be

[434] Easton Rebuttal, p. 22.

[435] Easton Rebuttal, p. 22.

[436] Easton Rebuttal, p. 23.

[437] Easton Rebuttal, p. 22.

compensated, because Qwest has filed no cost support (showing, for example, that Qwest is not already recovering the claimed costs in recurring charges). Therefore, it is solely within Qwest's control to determine whether it is compensated. Qwest has agreed with this part of the process (to file cost support of its rates with the Commission), as reflected in closed language in 22.6.1 and 22.6.1.1. Mr. Easton states that this agreed-upon language "strikes an appropriate balance between Eschelon's reasonable need to have Qwest's rates reviewed and Qwest's need to be compensated for services it provides."[438] As discussed in my summary above, the part of the process to which Qwest does not agree is also needed to ensure that Qwest is not being *over compensated*.

Q. WILL QWEST BE COMPENSATED FOR A "UNE OR PROCESS THAT QWEST PREVIOUSLY OFFERED WITHOUT CHARGE?"[439]

A. Yes. Whether or not a UNE or process has an *explicit separate rate* does not determine whether Qwest is being compensated. Costs can be recovered through explicit, separate charges, or *implicitly*, in other rate elements. A common example of implicit charges is network maintenance. The cost models include factors that assign network maintenance expense to other rate elements, such as recurring rates for UNE loops. When Qwest performs network maintenance on a loop leased by a CLEC, Qwest does not charge the CLEC a separate rate each

[438] Easton Rebuttal, p. 22.

[439] From Section 22.6.1 of the ICA.

time Qwest is called to work on that loop. The CLEC pays for network maintenance as part of the recurring rate element for the loop.

When there is a cost case, either explicit rates are established, or the costs for activities Qwest's performs are added to other rates, typically through various cost factors. When explicit rates are established for a UNE-related process or activity for which cost was previously recovered implicitly, specific efforts are undertaken to ensure that the costs are removed from cost factors and thus, not double recovered through other rates.

Therefore, if Qwest decided to restructure its existing rates to introduce explicit rate elements for UNE-related processes and activities that were previously recovered through other rates, Eschelon has a direct business need to review Qwest's rate support to make sure costs are not double-recovered. Because new products and services, by definition, were not included in the cost facts used to set other rates, Qwest could not already be recovering costs for new products and services in existing rates. This is why Eschelon's proposal explicitly names both situations – new products and services, as well as a UNE or process Qwest previously provided.

It would be inappropriate to allow Qwest to charge for every UNE or process it currently performs unless Qwest can demonstrate that it is not already recovering these costs through other rates. Otherwise Qwest would never have the incentive

to have a UNE cost case. If Qwest can create new rates at will for existing UNEs and processes and force CLECs to pay these rates, Qwest would have no incentive to have rates approved by the Commission.

Q. MR. EASTON RAISES THREE SCENARIOS WHERE HE BELIEVES ESCHELON WOULD RECEIVE SERVICES FOR FREE. ARE HIS CONCERNS VALID?

A. No. For clarity, I am reproducing Mr. Easton's three scenarios:

> Eschelon's first sentence also raises the potential for arguments that Eschelon is entitled to Qwest services for free. Such situations could arise (1) when Qwest has an approved rate, but has been unable to bill; (2) where Qwest seeks to restructure rates for existing products, giving rise to an argument that Qwest is not charging for something that it previously provided for free, or (3) where there is disagreement about the application of a previous rate.[440]

Regarding the first scenario under which Qwest is unable to bill a rate, Qwest already has a process in place to address this scenario. Specifically, Qwest uses the footnotes in Exhibit A to identify those products for which there is a Commission approved rate, and Qwest is currently not charging. Examples from Washington are listed below:

> Footnote 14: Qwest can't currently bill the existing rate structure. Customers will be billed the lowest Bridge Tap Removal rate for either Cable Unloading or Bridge Tap Removal.

[440] Easton Rebuttal, p. 23.

> Footnote 15: Effective 8/1/03 Qwest will no longer charge for Channel Regeneration for both recurring and nonrecurring charges. Contract amendments to remove the charge is not required. Qwest reserves the right to revert back to the contractual rate only after appropriate notice is given. Future regulatory ruling and/or events may be subject to the conditions described under "Change in Law Provisions" of the SGAT (Section 2.2) or the applicable interconnection agreement.

The use of footnotes clearly identifies where Qwest is currently not charging, but reserving its rights to charge a rate. These footnotes make it clear to both Eschelon and Qwest that Qwest may charge the rates in Exhibit A at some point in the future.

The second scenario listed by Mr. Easton involves a restructuring of rates. As I explained above, just because a product is offered without an explicit charge does not mean that Qwest is currently not recovering the costs associated with this product. Rather, it means that costs for this product are recovered implicitly through other rates. Therefore, rate restructuring to introduce an explicit rate raises the possibility of double-recovery. Unless agreed to by Eschelon or ordered by the Commission, Qwest should not be able to restructure rates that are contained in this contract. The fact that Mr. Easton is insisting that such a unilateral restructure would be allowed under Qwest's proposed language in this contract, further amplifies the need for the rate certainty that is established through Eschelon's proposals.

The third scenario – a disagreement regarding rate application of a "previous rate"[441] – simply should not occur and should not be a concern of Section 22.6.1, which deals with new products, products which were previously ordered without a charge and unapproved rates for UNE products. *When* the Commission establishes rates in a cost case (or similarly, for negotiated rates, *when* the parties agree to a negotiated rate), it should be clearly identified how the rates will be applied. Qwest should not be able to implement creative rate application, as it has done with design changes, years after the Commission issues an order. Qwest should make clear *at the time* of its cost filing how the rates it proposes will apply. If Qwest is unable to implement a rate when it is ordered, then it should clearly identify this fact *at the time the rate is ordered* so that there will be no rate surprises, and thus disputes, years down the road.

Qwest is essentially asking for a blank check from the Commission in order to apply rates when Qwest sees fit and how Qwest sees fit, without approval or oversight of the Commission. Qwest bears the burden of proof with respect to the rates it charges and Qwest should not be allowed to shift this burden to CLECs by virtue of ignoring Commission oversight of its UNE rates.

[441] Easton Rebuttal, p. 23.

Q. REGARDING MR. EASTON'S SECOND ARGUMENT, DOES ESCHELON'S PROPOSAL GO "BEYOND SECTION 251 PRODUCTS AND SERVICES?"[442]

A. No. By focusing on one sentence in Eschelon's proposal in isolation, Mr. Easton misconstrues the language. Mr. Easton focuses on the first sentence of Section 22.6.1, which states: "Qwest shall obtain Commission approval before charging for a UNE or process that it previously offered without a charge." Mr. Easton apparently believes that because the language says "UNE *or process,*" that Eschelon's language would reach beyond rates for UNEs and services required by Section 251 of the Act. This is not the case, and Eschelon's language makes this point clear. For instance, the very next sentence refers to "Section 251 product or service" developed "in a TELRIC Cost Docket." This language makes clear that Eschelon is not attempting to broaden the application of this language to "pricing beyond Section 251 products and services."[443] The "process" referred to in Eschelon's language refers to UNE related functions such as design changes (Issue 4-5) and other UNE related activities (*see* Eschelon's language for Section 9.1.2 under Issue 9-31). This point raises the relationship between Issues 22-90, 4-5 and subparts and 9-31.

Q. PLEASE ELABORATE ON THE RELATIONSHIP BETWEEN ISSUES 22-90, 4-5 AND SUBPARTS AND 9-31.

[442] Easton Rebuttal, p. 22.

A. Mr. Easton's claim that Eschelon's language for Issue 22-90 would go beyond Section 251 products and services is really an extension of Qwest's argument that expedites, design changes and other UNE related activities are not Section 251 services.[444] Since Qwest wants to limit the application of Section 251 only to the enumerated list of UNEs in the FCC's rules, it objects to recognizing UNE related processes in the first sentence of Section 22.6.1. Design changes is one of the activities in the closed portion of the language in Section 9.1.2 (Issue 9-31) which Eschelon's proposal describes as examples of "Access to" UNEs and Qwest's proposal describes as examples of "Activities Available for" UNEs. The difference between the companies' proposals for Issue 9-31 revolves largely around whether the rate will be cost-based. If the rate is to be cost-based, as proposed by Eschelon, the timing of when Qwest may charge the rate in situations for which it has not previously separately charged for the same activity is a subject of Section 22.6 (Issue 22-90). As discussed below, until recently, Qwest did not charge CLECs separately for design changes for unbundled loops (including CFA changes). Of the six Qwest states in which Eschelon historically does business, the only state in which Qwest did not unilaterally start charging Eschelon for design changes for loops was Minnesota. Eschelon's proposal for Section 22.6 reflects the Minnesota process (under which Qwest must obtain Commission approval before charging when it previously did not charge). If

[443] Easton Rebuttal, p. 22.

[444] See issues 12-67 (expedites) and 9-31 (access to UNEs).

Eschelon's proposal for Issue 22-90 had been in place, Qwest would have needed to obtain Commission approval before charging for design changes for loops in Washington as well, instead of simply sending a letter to Eschelon. Particularly given that one day Qwest just started charging for design changes for loops with no approval or change in the ICA in Washington – even though it has admitted there is no design change charge for loops in the current Commission-approved Qwest-Eschelon ICA (or the SGAT)[445] – the Commission needs to require Qwest to obtain Commission approval before imposing such charges.

Q. DO YOU HAVE ANY ADDITIONAL COMMENTS ON MR. EASTON'S CLAIM THAT ESCHELON'S LANGUAGE RAISES THE POTENTIAL THAT ESCHELON IS ENTITLED TO QWEST SERVICES FOR FREE?[446]

A. Mr. Easton ignores Eschelon's language that would allow Qwest, upon Commission approval of the ICA, to assess interim rates. *See,* Issues 22-90(a) though (f) and Issue 4-5(c). Therefore, for the time period for which Mr. Easton expresses concern about Eschelon receiving services for free – the "time period prior to the Commission making a decision regarding the new rate"[447] – Eschelon's proposal allows for interim rates. Nothing in Eschelon's proposals for Issues 22-90, 4-5 or 9-31 would prevent Qwest from coming to the Commission

[445] In the Minnesota arbitration proceeding, Qwest witness Karen Stewart testified that "Mr. Denney is correct in stating that neither Qwest's SGAT nor the parties' current ICA includes a design change charge for loops." Stewart Minnesota Rebuttal, p. 6, lines 27-28 (9/22/06).

[446] Easton Rebuttal, p. 23.

[447] Easton Rebuttal, p. 22.

to propose different rates for design changes and substantiate its costs. Furthermore, Eschelon's language allows the parties to negotiate a rate and also states that Qwest's proposed rate will be used as an interim rate until the Commission establishes a rate in cases where the parties do not negotiate a rate and the Commission does not establish an interim rate. This shows that in no cases will Eschelon be receiving services from Qwest for free, even during the time period before the Commission establishes a TELRIC-based rate.

Q. DOES QWEST'S TESTIMONY SUGGEST THAT QWEST MISSES THE POINT OF THE ROLE OF INTERIM RATES IN ESCHELON'S PROPOSAL?

A. Yes. For instance, Ms. Million responds to my concern that Qwest's proposed rates do not reflect prior Commission decisions by stating that Qwest is not obligated to remain consistent with prior Commission decisions when calculating costs for new elements and provides an example purporting to show why it is inappropriate to apply prior Commission decisions to Qwest's newly calculated rates.[448] Ms. Million states that this is the "main reason Qwest believes that the appropriate place to review detailed inputs in cost studies is in a cost proceeding instead of this arbitration."[449] Ms. Million ignores that the input adjustments I made to reflect prior Commission orders are for *interim* rates under Issues 22-90 and subparts (not for future permanent rates, which would be the subject of the

[448] Million Rebuttal, pp. 21.

next cost proceeding). Given that the inputs I used are the most recent inputs approved by the Commission, it is appropriate for interim rates to reflect these inputs until such time when the Commission determines that a different input is appropriate. Qwest has the opportunity to seek a different input when the Commission reviews that rate to establish a permanent cost-based rate.

Q. REGARDING MR. EASTON THIRD ARGUMENT, HOW DO YOU RESPOND TO MR. EASTON'S CLAIM THAT IT IS NOT CLEAR TO HIM WHAT ESCHELON'S BUSINESS NEED IS BEHIND ITS PROPOSAL THAT QWEST PROVIDE A COPY OF ITS COST SUPPORT WHEN IT SUBMITS A RATE FILING?[450]

A. First, Mr. Easton claims that Eschelon's proposal would require Qwest to "provide notice and cost support" to Eschelon.[451] This statement is incorrect. Eschelon's proposed language does not include a "notice" requirement and therefore, Qwest's concerns about a "notice" requirement are not warranted.

Second, Mr. Easton claims that Eschelon does not need access to Qwest's cost support for a heretofore unapproved rate because it would not apply to carriers who already have a rate specified in their ICA, and carriers who are in an ICA negotiation process will obtain the cost support as part of that process.[452] This

[449] Million Rebuttal, p. 21.

[450] Easton Rebuttal, p. 23.

[451] Easton Rebuttal, p. 23.

[452] Easton Rebuttal, p. 23.

statement is also incorrect. Contrary to Mr. Easton's suggestion that Qwest would provide cost support to carriers negotiating an amendment or a new agreement, Qwest refuses to negotiate rates and provide their cost support in this arbitration and instead insists that "the appropriate place to review detailed inputs in cost studies is in a cost proceeding instead of this arbitration."[453]

Mr. Easton fails to acknowledge that Eschelon has a need in many cases to analyze the justification behind Qwest rates that may arguably be included in the ICA. Eschelon may need to understand options and availability of products and rates. And Qwest has a history of carving out options and activities that had been considered part and parcel of products already provided for and paid for under the ICA, renaming them as a new "product," and charging a new, additional rate for it. Further, Qwest may try to argue that because other carriers accepted a rate Eschelon should also accept that rate.[454]

Eschelon has a clear business need to have available the tools – *i.e.*, cost studies – necessary to analyze new rates introduced by its wholesale provider.

Q. MR. EASTON CLAIMS THAT, BASED UPON THE TIMING OF PAST COST DOCKETS, ESCHELON'S CONCERN ABOUT NOT HAVING SUFFICIENT TIME TO REVIEW COST STUDIES BEFORE FILING

[453] Million Rebuttal, p. 21. See also Id., p. 23 lines 14-15.

[454] See Issue 12-67 regarding Expedites.

TESTIMONY IS NOT REALISTIC.[455] PLEASE RESPOND.

A. This may not be a concern for Qwest who has considerably more resources than does Eschelon to dedicate to its cost studies, but for Eschelon, this concern is real. Being a much smaller company than Qwest, Eschelon does not have personnel dedicated solely to cost cases. Eschelon has only one person who reviews cost studies.[456] That person also has other responsibilities, such as participation in negotiations, providing expert witness testimony in this arbitration and arbitrations in other states, wire center cases, performance assurance plan dockets and other proceedings, as well as activities associated with support of Eschelon's daily business operations. Further, the complexity of these cost studies should be considered in relation to the time for review. In a recent cost filing in Minnesota, the CLEC participants in the case (Eschelon, the Department of Commerce and Onvoy) looked at Qwest's models and had over 200 preliminary questions regarding these studies and Qwest held multiple days of workshops to discuss the cost studies. This demonstrates the complexity and time associated with a review of cost studies.

Q. MS. MILLION STATES THAT QWEST DID NOT PROVIDE A COST STUDY FOR DAILY USAGE RECORD FILE ("DUF") BECAUSE

[455] Easton Rebuttal, p. 24.

[456] I perform this role for Eschelon.

"ESCHELON NEVER SPECIFICALLY REQUESTED A COST STUDY FOR DAILY USAGE RECORD FILE."[457] PLEASE RESPOND.

A. First, as shown in my Direct testimony,[458] Ms. Million is addressing only one rate out of six for which Qwest failed to provide a cost study. Second, by referring to a *specific* e-mail, Ms. Million fails to acknowledge that Eschelon has requested from Qwest cost studies supporting Qwest's rate proposal *on multiple occasions.*

Even though the DUF rate was *erroneously* unmarked in that file, Qwest was fully aware of the purpose of that request (to provide cost studies for the unsupported proposed rates) and DUF was clearly marked as a rate that had not been approved by the Commission. Ms. Million is using this technicality (an oversight in an attachment) to explain why cost studies for DUF rates were not provided, but fails to explain why cost studies for other five elements were not provided either despite Eschelon's specific request to do so. Third, Qwest continues to fail to provide the missing cost studies despite this being raised as an issue in Eschelon's direct testimony. Clearly, if it *were* Qwest's intent to provide the requested cost studies, it *would have* done so after reviewing Eschelon's direct testimony where the absence of the cost study for DUF rate (and five other rates) was pointed out.

Q. MS. MILLION STATES THAT IT WAS "DISINGENUOUS" NOT TO INCLUDE COMMISSION-APPROVED RATES FOR ALL STATES IN

[457] Million Rebuttal, p. 19.

[458] Denney Direct, p. 189, table.

THE AVERAGE CALCULATION YOU PERFORMED TO CALCULATE AN INTERIM DAILY USAGE FILE RECORD ("DUF") RATE.[459] IS SHE CORRECT?

A. No. First, I averaged rates for Commission-approved rate elements in states where Eschelon is negotiating ICAs. These are the six largest Qwest states and reflect most of Eschelon's serving territory.[460] Qwest does not provide any reason why the average should include rates for states in which Eschelon is not negotiating an ICA,[461] and apparently seeks only to ensure that Eschelon's interim rates are as high as possible. Ms. Million lists seven states with Commission approved rates where Eschelon is not negotiating an ICA.[462] However, Ms. Million fails to acknowledge that DUF rates *in each* of these states are *lower than Qwest's proposal* in these contract negotiations, and that in three out of the seven states commission-approved rates are *lower than Eschelon's proposal*.[463] In addition, rates in smaller Qwest states often do not get the same level of scrutiny as those in larger states where multiple CLECs participate in the cost cases establishing those rates.

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[459] Million Rebuttal, p. 19.

[460] Eschelon also operates in California, Montana, and Nevada. Eschelon recently acquired a CLEC doing business in Montana. See Denney Direct, p. 2.

[461] *See* Million Rebuttal, p. 19. ["While I understand that Eschelon is neither operating nor negotiating ICAs in all of those states, it seems that if Mr. Denney wants to propose a rate for DUF based on an average of commission-approved rates, he should have included those states in his calculation. To do otherwise is disingenuous."] Ms. Million never explains why Eschelon "should have included those states" in the calculation or why limiting the average to states in which Eschelon is negotiating an ICA is "disingenuous."

[462] Million Rebuttal, p. 19 lines 20-21.

Q. MS. MILLION STATES THAT IT IS "DIFFICULT TO UNDERSTAND HOW MR. DENNEY COULD HAVE INCORPORATED QWEST'S UPDATED INPUTS AND STILL DEVELOP A RATE NEARLY $10 LESS THAN QWEST'S PROPOSED RATE"[464] FOR ELEMENT *PRIVATE LINE TO UNBUNDLED LOOP CONVERSION*. PLEASE RESPOND.

A. First, it is evident from Ms. Million's wording that she is not relying on any actual analysis, but is rather making general speculative statements. The changes made to each of Qwest's cost studies are detailed in Exhibit DD-6, which Ms. Million apparently ignored. Second, Ms. Million complains that my adjustments reduced Qwest's cost estimates by $10. However, the $10 reduction should be compared to Qwest's rate proposal of $36.86. Ms. Million offers no evidence that this type of correction is unreasonable based upon a comparison of Qwest proposed rates to Commission ordered rates. Third, it is the high rate in Qwest's proposal that warrants an adjustment. Ms. Million claims that cost for *private line to UNE conversions* is high because it is driven by the cost of the circuit ID change.[465] However, Qwest's own access tariff suggests that cost for the change in circuit IDs may not be high. Specifically, its interstate access private line tariff provides that a change in customer circuit ID is an administrative change that will be made

[463] These states are Idaho, New Mexico and North Dakota.

[464] Million Rebuttal, p. 20.

[465] Million Rebuttal, p. 20: "Qwest's costs are considerably higher in its current cost studies based on the change in circuit IDs[.]"

without charge to the customer.[466] In other words, Ms. Million's claim that the rate for *private line to UNE conversions* is high because it is driven by the cost of the circuit ID change is without merit, and Qwest's proposal for this rate element is unreasonably high when compared to its actual private line access tariff offering.

Q. MS. MILLION CLAIMS THAT QWEST HAS PROVIDED COST STUDIES FOR THREE RATE ELEMENTS FOR WHICH YOU INDICATED THAT COST STUDIES WERE NOT PROVIDED.[467] SPECIFICALLY, MS. MILLION CLAIMS THAT TWO STUDIES WERE PROVIDED ON MARCH 16, 2006, AND ANOTHER STUDY – ON AUGUST 18, 2006. PLEASE RESPOND.

A. First, regarding the two studies that Qwest allegedly provided on March 16, 2006, I have reviewed my records, and to the best of my knowledge, I did not receive these cost studies, nor am I aware of such studies being provided to anyone at Eschelon. Note that Qwest has not provided any evidence of communications with Eschelon on March 16, 2006 (such as copies of the cover letter or e-mail with which cost studies would be provided). Neither did Qwest provide a copy of

[466] Qwest Tariff FCC No. 1 "Access Service," section 7 "Private Line Transport Service," pp. 7-22 and 7-23: "Administrative changes will be made without charge(s) to the customer. Administrative changes are as follows: …. • Change of customer circuit identification…."

[467] Million Rebuttal, p. 20. These rate elements are ICDF Collocation (Exhibit A Section 8.8.4), Transfer of Responsibility (Exhibit A Section 10.7.10) and Microduct Occupancy (Exhibit A Section 10.7.12.1).

the cost studies in question after March 16, 2006 – which would be a logical course of action if miscommunications were indeed at issue.

Second, regarding the third "study" (for rate element *ICDF Collocation for DS3)* that, according to Ms. Million, was provided on August 18, 2006:[468] I did receive an e-mail from Qwest on this date containing a spreadsheet *listing* of ICDF collocation *rates* (not costs*)* in Qwest's 14 states. This spreadsheet is not a cost study, but simply a list of rates (just like Exhibit A is another (more comprehensive) list of Qwest's rates). Being simply a rate list, the spreadsheet is appropriately titled "Exhibit A. ICDF 14 State Summary." The spreadsheet provided on August 18, 2006 does not contain any support for how rates were calculated.

Q. DOES ESCHELON PROPOSE THAT THE COMMISSION SET PERMANENT RATES FOR DISPUTED RATE ELEMENTS IN THIS DOCKET?

A. No. Ms. Million discusses "Eschelon's proposed rates,"[469] and the fact that the Commission does not have "the opportunity to conduct a detailed analysis of the underlying studies,"[470] but ignores the fact that Eschelon's proposed rates are actually *interim* rates. Accordingly, Eschelon made a number of modifications to bring Qwest's proposed interim rates in line with what the Commission has

[468] Section 8.8.4 of Exhibit A. Ms. Million discusses it on p. 20.

[469] Million Rebuttal, p. 21.

ordered historically. These changes are documented in detail in Exhibit DD-6 to my direct testimony. That way, the interim rates Eschelon pays Qwest would reflect Commission-ordered inputs until Qwest files for approval of permanent rates with different inputs (to take the place of the interim rates) and the Commission changes those inputs.

In contrast, Qwest proposes to charge CLECs rates that reflect Qwest's view of its costs (which is more often than not significantly higher than the costs approved by the Commission when reviewed) for an indefinite period of time. Qwest's proposed rates ignore past Commission orders and are out of line with rates across Qwest's region. Furthermore, it is correct that the Commission does not have "the opportunity to conduct a detailed analysis of the underlying studies."[471] However, this is not only because interim, rather than permanent rates are in question, but also because Qwest failed to provide cost studies for certain rates. Accordingly, Qwest's rates are inappropriate for interim rates.

Ms. Million states that "Qwest is not obligated when it calculates costs for new elements subsequent to a Commission decision in a cost docket to rigidly follow the inputs ordered in that docket."[472] What she is effectively saying is that Qwest should be allowed to ignore prior Commission orders when establishing interim rates, until such time that the Commission reconfirms or alters its prior

[470] Million Rebuttal, p. 23.

[471] Million Rebuttal, p. 23.

decisions.[473] I agree with Ms. Million that when Qwest files a cost case Qwest may make arguments different from what the Commission has ordered. However, we are talking about interim rates – rates that Qwest proposes to charge until such time that a Commission has a cost case to determine permanent rates – and it is appropriate for these rates to reflect prior Commission decisions. Otherwise, Qwest would never have an incentive to have a cost case and when it does have a cost case, Qwest would have no incentive to have all of the rates it proposes to charge CLECs reviewed by the Commission. Qwest is essentially looking for the right to charge its proposed rates, of which many lack cost support, to CLECs indefinitely.

Q. MS. MILLION ARGUES AGAINST YOUR USE OF COMMISSION-APPROVED OVERHEAD FACTORS ON THE GROUNDS THAT CLECS CHALLENGED THESE FACTORS IN PART D OF DOCKET UT-003013, AND THAT AS A RESULT, THE COMMISSION INDICATED THAT OVERHEAD FACTORS WOULD BE RE-ADDRESSED IN A SUBSEQUENT DOCKET.[474] PLEASE RESPOND.

A. First, Ms. Million neglects to mention that the CLECs' argued that the challenged overhead factors were *too high*. Second, the Commission found that CLECs

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[472] Million Rebuttal, p. 20.

[473] Ms. Million also claims that the Commission's prior decisions on inputs were specific to the rate elements they reviewed. (Million Rebuttal, p. 20.) However, most of the changes I made to Qwest's interim rates were based on generic decisions by the Commission that applied to all of Qwest's rate elements and were not cost study specific.

presented insufficient evidence for the Commission to modify its previous decision.[475] In other words, *had* the Commission found CLECs' challenge persuasive and reviewed these overhead cost factors in Part D of Docket No. UT-003013, these factors would likely go down (making my overhead adjustments to Qwest's proposed studies conservative). Third, Ms. Million mentions that subsequently, Qwest filed new overhead cost studies in Docket No. UT-023003, but neglects to mention the reason why "new factors were never established"[476] in that docket. The new overhead factors were not established in that docket because the Qwest rate issues (other than loop deaveraging) were removed from this docket.[477]

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[474] Million Rebuttal, p. 22

[475] See *In the Matter of the Continued Costing and Pricing of Unbundled Network Elements, Transport, and Termination*. Docket No. UT-003013 *Forty-First Supplemental Order; Part D Initial Order; Establishing Nonrecurring and Recurring Rates for UNEs* (service date October 11, 2002) at pp. 25-26: "79 ***Decision:*** WorldCom alleges that Qwest's cost factors are inflated because Qwest includes inappropriate cost elements, the factors are applied on a compounding basis, the factors fail to account for merger savings, and more recent data results in lower estimates. The arguments proffered by WorldCom are not compelling. First, WorldCom failed to show that Qwest's cost factors have been calculated in a manner that is inconsistent with previous Commission Orders. Second, the evidence proffered by Qwest indicates that neither the compounding nor merger savings arguments offered by WorldCom result in overstated cost factors. *Third -- and most importantly -- the evidence cited by Commission Staff indicates that when the cost factors are recalculated using more recent expense data the difference is negligible.* For these reasons, WorldCom's proposal is rejected. Qwest's proposal that the Commission approve the use of the existing cost factors is reasonable because there is *insufficient evidence in this proceeding for the Commission to modify its previous decision*. Qwest's proposal that the Commission revisit this issue in Docket No. UT-023003 is sensible in light of the other elements and factors to be considered in that proceeding, and also is approved." (footnotes omitted; emphasis added).

[476] Million Rebuttal, p. 22.

[477] See *In the Matter of the Review of: Unbundled Loop and Switching Rates; the Deaveraged Zone Rate Structure; and Unbundled Network Elements, Transport, and Termination (Recurring Rates)* Docket No. UT-023003 *Seventeenth Supplemental Order* and Docket No. UT-033034 *Order No. 2 Granting Motion to Remove Qwest Issues from Cost Dockets, without Qualification; Approving Revised Schedule of Proceedings* (service date November 25, 2003).

Q. MS. MILLION IS CRITICAL OF YOUR PROPOSAL TO CUT CERTAIN QWEST INTERIM RATES IN HALF[478] PLEASE RESPOND.

A. Ms. Million fails to point out that the only cases where I cut Qwest's rate elements in half were instances where Qwest **failed to provide** any cost support for its proposed rates.[479] Ms. Million apparently believes that having no cost study at all is TELRIC compliant, while criticizing the lack of a cost study is not. This makes no sense. If it is inappropriate for Eschelon to cut in half Qwest's proposed rates where Qwest failed to provide cost support, then the only appropriate action would be for this Commission to reject Qwest's rates that Qwest cannot support, and set these rates to zero, until such time that Qwest provides cost support.

Q. DO YOU HAVE ANY FURTHER COMMENTS REGARDING QWEST'S INSISTENCE THAT MERITS OF QWEST'S PROPOSED INTERIM RATES SHOULD NOT BE ADDRESSED IN THE ICA NEGOTIATIONS?[480]

A. Yes. Qwest has refused to negotiate on its interim rates and instead offers Eschelon take it or leave it proposals[481] with regarding to rate element availability

[478] Million Rebuttal, p. 23.

[479] Qwest did not provide any cost support for the following rate elements in Exhibit A: 8.8.4 (NRC), 8.15.2.1 (NRC), 8.15.2.2 (NRC), 10.7.10 (NRC), 10.7.12 (RC) and 12.3 (RC). See Denney Direct, p. 189 (table) and Denney Rebuttal, p. 115 explaining that for four out of these six rates Qwest's proposal was cut in half.

[480] Million Rebuttal, pp. 2 and 23.

[481] For example, in August, Qwest's service manager told Eschelon's business personnel – on the

and their associated rates.[482] For example, this January in Arizona Eschelon had

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business day before the due date – that, if Eschelon did not sign Qwest's unilateral template Out of Hours EELs amendment by 2:00 mountain time that day, Qwest would not process the orders the next day. Eschelon was forced by this Qwest take it or leave it proposal to sign the agreement under protest to avoid disruption to the service of Washington customers. (See "Out of Hours Installation for EEL Amendment to the Interconnection Agreement," executed by Eschelon August 7, 2006 "under protest.") Qwest forced the amendment upon Eschelon, even though Eschelon's existing Washington interconnection agreement expressly required Qwest to provide out of hours installation for EELs and (as shown by the footnotes to the amendment) the rates in the amendment are approved and therefore already applied under the existing amendment. *See* Eschelon Aug. 7, 2006 Email (on which I was copied) to Qwest (including its service manager, interconnection agreement director, lead ICA negotiator, and attorney) quoting the ICA language: "Eschelon continues to object to Qwest's position for the reasons previously stated. Once again, Qwest is requiring Eschelon to sign an unnecessary amendment, when the current ICA already obligates Qwest to provide the requested service (see., e.g., ICA language copied below). Given that there is no time to file and receive a ruling on a complaint, etc., before we need this service, Eschelon will sign the amendments, under protest, to meet this need. Mr. Oxley will sign these today. Please send us executed versions upon receipt.

Eschelon-Qwest Oregon ICA, Amendment 4: "16. Out of Hours Coordinated Installation 16.1 For purposes of this Section, ILEC's normal business hours are 7:00a.m to 7:00 p.m. Monday through Friday. Out of hours are only 7:00 p.m. to 10:00 p.m., local time, Monday through Friday and 8:00 a.m. to 12:00 p.m., local time, Saturday. CLEC shall request Unbundled Loop installation within the normal business hours by submitting a Local Service Request (LSR). 16.2 Out of hours installations permit a CLEC to select a coordinated installation outside of ILEC's normal business hours. For planning purposes, CLEC shall provide ILEC with a forecast of out of hours coordinated installations at least two weeks prior to a CLEC placing an order in a particular state. Forecasts should include the anticipated coordinated installation appointment times and volumes to be installed out of hours. 16.3 CLEC shall request out of hours coordinated installations by submitting a Local Service Request (LSR) and designating the desired appointment time outside of the normal business hours. In the Remarks section of the LSR, CLEC must specify an Out of Hours coordinated installation. 16.4 The date and time for the coordinated installation may need to be negotiated between ILEC and CLEC because of system downtime, switch upgrades, switch maintenance, and the possibility of other CLECs requesting the same appointment times in the same switch (switch contention). Because of the up-front coordination and appointment time negotiation efforts, Firm Order Confirmation (FOC) of the coordinated installation will require additional time. In the event that this situation would occur, ILEC will negotiate with CLEC to provide the FOC within a reasonable time frame. 16.5 ILEC will provide FOCs (Firm Order Commitments) to CLECs within a reasonable time, no later than 48 hours after receipt of complete and accurate orders. The FOC assumes that there is sufficient network capacity to meet the request in the standard interval. The FOC interval for all other complex orders will be within a reasonable time, no later than 8 business days from receipt of complete and accurate orders. The FOC for ICB orders will reflect an ICB FOC date. 16.6 CLEC will incur additional charges for out of hours coordinated installations. These charges will be the overtime rates. Refer to Exhibit A for these charges."

[482] More generally, Qwest sometimes indicates that it will require a contract amendment when in fact it does not or should not. For example, Eschelon has a right to order UNE Combinations under its existing agreement but Qwest nonetheless told Eschelon that it would not accept orders for UNE Combinations (specifically, UNE-P) anywhere in its territory (including Washinton), except Minnesota, without a contract amendment. The Arizona commission held a workshop on 271 issues

to enter into an amendment to its current agreement containing Qwest's proposed rate before Qwest would provide CLEC-to-CLEC cross connects, even though Eschelon proposed to Qwest rates for this element that are consistent with the Commission's prior order. Eschelon's interim rate proposals (unlike Qwest's proposed rates) incorporate the Commission's cost factors.[483] Qwest has rejected Eschelon's proposed rates indicating that it would not negotiate any changes to its unapproved rate proposals in Exhibit A. Similar events have occurred in Washington with respect to amendments to Eschelon's current ICA.

Similarly, Qwest has consistently refused to negotiate a wholesale interim rate for expediting orders (as discussed regarding Issue 12-67 and subparts). In an Eschelon complaint case against Qwest under the existing ICA, Staff in Arizona concluded that "CLECs should not be forced into signing" the expedite

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at which Eschelon raised this issue. *See* "Eschelon's Comments Addressing UNE Combinations," *In the Matter of U S West Communications, Inc.'s Compliance with §271 of the Communications Act of 1996*, AZ Docket No. T-00000A-97-0238 (Sept. 21, 2000), pp. 4-9. It later processed UNE-P orders without a contract amendment in Arizona after Eschelon raised the issue with a state commission. In another example, Qwest suddenly stopped processing Eschelon's orders in Arizona for unbundled loops, telling Eschelon that Qwest required a contract amendment for coordinated installation options before Qwest would process any more orders. [*E.g.*, Email from Qwest (Cindy Buckmaster) to Eschelon (including Bonnie Johnson) (Feb. 28, 2001) ("I have advised your Account Manager – Judy Rixe, that you will need an amendment to permanently add these options to your profile.").] The existing Arizona Qwest-Eschelon ICA contains the same language in Arizona as in Washington: ("For Customer conversions requiring coordinated cut-over activities, U S WEST and CO-PROVIDER will agree on a scheduled conversion time(s), which will be a designated two-hour time period within a designated date. ***Unless expedited***, U S WEST and CO-PROVIDER shall schedule the cut-over window at least forty-eight (48) hours in advance, and as part of the scheduling, U S WEST shall estimate for CO-PROVIDER the duration of any service interruption that the cut-over might cause. The cut-over time will be defined as a thirty (30) minute window within which both the CO-PROVIDER and U S WEST personnel will make telephone contact to complete the cut-over." Qwest-Eschelon ICA, Att. 5, §3.2.2.5 (emphasis added). Only after Eschelon escalated did Qwest re-start processing these loop orders, without a contract amendment.

amendment.[484] The Staff added that "since CLEC interconnection agreements are voluntarily negotiated or arbitrated," Qwest "rather than trying to force Eschelon into signing an amendment," could have taken the issue to arbitration under the Qwest-Eschelon ICA.[485]

Qwest's refusal to negotiate interim charges for unapproved rates combined with Qwest's arguments in issue 22-88(b) that Eschelon can not initiate or even request a cost case before this Commission[486] places Qwest in a position where-by Qwest can indefinitely charge above cost based rates to CLECs for products and services where the Commission has not ordered a rate. At the same time Qwest seeks to remove from Commission jurisdiction oversight regarding rates that the Commission has previously approved.[487]

Further, Qwest's claim that the merits of Qwest-proposed rates should not be addressed in the ICA negations[488] goes against the federal rules regarding the ILEC's duty to negotiate (CFR §51.301). Specifically, CFR §51.301 states that the cost data should be provided as part of negotiations regarding rates. Below I

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[483] See Exhibit DD-6 for a list of adjustments to Qwest's proposed rates.

[484] Direct Testimony of Pamela Genung, *In re. Complaint of Eschelon Telecom of Arizona, Inc. Against Qwest Corporation*, ACC Docket No. T-01051B-06-0257, T-03406A-06-0257 (Jan. 30, 2007) ["Arizona Complaint Docket"], p. 34, lines 10-11.

[485] Direct Testimony of Pamela Genung, *In re. Complaint of Eschelon Telecom of Arizona, Inc. Against Qwest Corporation*, ACC Docket No. T-01051B-06-0257, T-03406A-06-0257 (Jan. 30, 2007) ["Arizona Complaint Docket"], p. 36, line 21 – p. 37, line 2.

[486] Denney Rebuttal, p. 110 lines 8-9.

[487] *See* Issues 9-31, 9-50, 9-53 and 9-54.

[488] Million Rebuttal, pp. 2 and 23.

reproduce the relevant portions of CFR §51.301:

> (a) An incumbent LEC shall negotiate in good faith the terms and conditions of agreements to fulfill the duties established by sections 251 (b) and (c) of the Act.
> ….
> (c) If proven to the Commission, an appropriate state commission, or a court of competent jurisdiction, the following actions or practices, among others, violate the duty to negotiate in good faith:
> …
> (8) Refusing to provide information necessary to reach agreement. Such refusal includes, but is not limited to:
> ….
> (ii) *Refusal by an incumbent LEC to furnish cost data that would be relevant to setting rates if the parties were in arbitration.* [489]

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

SUBJECT MATTER NO. 47. REMOTE COLLOCATION – ISSUE A-94 AND A-94(A)

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

Q. DID QWEST ADDRESS THIS ISSUE IN ITS DIRECT OR RESPONSE TESTMONY?

A. No.

[489] CFR §51.301 (emphasis added).

VII. CONCLUSION

Q. WHAT ARE YOUR RECOMMENDATIONS TO THE WASHINGTON COMMISSION?

A. I recommend that the Commission adopt Eschelon's proposed Interconnection Agreement language as described in this testimony.

Q. DOES THIS CONCLUDE YOUR TESTIMONY?

A. Yes.