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 MICHAEL STARKEY

ON BEHALF OF ESCHELON TELECOM, INC.

APRIL 3, 2007

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I. INTRODUCTION

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

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

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

A. Yes.

II. OVERVIEW OF SURREBUTTAL TESTIMONY

Q. WHAT IS THE PURPOSE OF YOUR SURREBUTTAL TESTIMONY?

A. I will respond to the response testimony of Qwest Corporation. I have listed below the issues I address in my surrebuttal testimony and the corresponding Qwest witness who addresses that issue in his or her response testimony.

- Section III: Change Management Process/Interconnection Agreement/contractual certainty issues (Qwest witness Renee Albersheim[1] and Karen Stewart[2]).

[1] Responsive Testimony of Renee Albersheim on behalf of Qwest Corp., Washington Docket No. UT-063061; December 4, 2006 ("Albersheim Response").

[2] Responsive Testimony of Karen Stewart on behalf of Qwest Corp., Washington Docket No. UT-063061; December 4, 2006 ("Stewart Response").

- Section IV: Subject Matter 1 – Issue 1-1 and subparts (Ms. Albersheim).
- Section V: Subject Matter 11 – Issue 8-21 and subparts (Qwest witnesses Curtis Ashton[3] and Teresa Million[4]).
- Section VI: Subject Matter 14 – Issue 9-31 (Ms. Stewart).
- Section VII: Subject Matter 16 – Issues 9-33, 9-33(a) and 9-34 (Ms. Stewart).
- Section VIII: Subject Matter 18 – Issues 9-43 / 9-44 and subparts (Ms. Million).
- Section IX: Subject Matter 24 – Issue 9-55 (Ms. Stewart).
- Section X: Subject Matter 27 – Issue 9-61 and subparts (Ms. Stewart).

- Sections XI - XV: Subject Matters 29, 30, 31A, 32, 33, 34, 36, 42, 43 (Section 12 issues – some are closed) – Issues 12-64 through 12-87 (except Issue 12-67 and subparts) (Qwest witness Renee Albersheim). I am adopting the direct and rebuttal testimonies of Mr. Webber on all issues except Issue 12-67 and subparts (which is being adopted by Mr. Denney).

Q. DO YOU HAVE ANY EXHIBITS TO YOUR SURREBUTTAL TESTIMONY?

A. Yes. Exhibit MS-8, which consists of Minnesota Public Utilities Commission ("PUC") Orders dated July 30, 2003 and November 12, 2003 in Minnesota PUC

[3] Responsive Testimony of Curtis Ashton on behalf of Qwest Corp., Washington Docket No. UT-063061; December 4, 2006 ("Ashton Response"). Mr. Ashton adopted the direct testimony of Mr. Hubbard on this issue. *See* Ashton Response, p. 2, lines 12-14.

[4] Responsive Testimony of Teresa Million on behalf of Qwest Corp., Washington Docket No. UT-063061; December 4, 2006 ("Million Response").

Docket No. P-421/C-03-616 ("*MN 616 Docket*"). These orders are discussed in conjunction with Subject Matter 29 (Issue 12-64 and subparts). Exhibit MS-9 contains excerpts from the hearing in the Qwest-Eschelon arbitration in Minnesota. When Eschelon refers in its surrebuttal testimony to the Minnesota ICA arbitration transcript, the cited pages are contained in this exhibit.

III. CHANGE MANAGEMENT PROCESS, INTERCONNECTION AGREEMENT TERMS, AND THE NEED FOR CONTRACTUAL CERTAINTY

Q. HOW IS SECTION III OF YOUR TESTIMONY ORGANIZED?

A. I will first discuss Qwest's attacks on the factual record that Eschelon provided by way of five examples (each with its own chronology),[5] and then I will discuss Qwest's more general claims regarding the CMP, contractual certainty, and the FCC and WUTC decisions discussed in my direct testimony. Both Ms. Albersheim and Ms. Stewart address these issues.

Q. SINCE YOUR PREVIOUS TESTIMONY WAS FILED IN DECEMBER, HAS ANY COMMISSION RULED ON THE ISSUES IN A QWEST-ESCHELON ICA ARBITRATION, INCLUDING ISSUES RELATING TO CMP?

A. Yes. On March 6, 2007, the Minnesota Commission voted (4-0) to adopt in large part the recommended decision of the Administrative Law Judges ("ALJs" or

[5] *See* Exhibits BJJ-2, BJJ-3, BJJ-5, BJJ-7 and BJJ-9.

"Arbitrators"). A written order had not been issued as of the writing of this testimony. A copy of the Minnesota Arbitrators' Report is Exhibit DD-25 to the testimony of Mr. Denney.

Regarding CMP, in Minnesota the Administrative Law Judges ("ALJs") found (as upheld by the Minnesota commission) that:

> 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.[6]
>
> 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 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.[7] 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.[8]
>
> The CMP process by which Qwest reached its current position is not the controlling factor on whether emergency situations should

[6] *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"), ¶22; affirmed by a 4-0 vote of the Minnesota PUC on March 6, 2007.

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

[8] MN Arbitrators' Report, ¶22

create an exception to charging an additional fee for expedited ordering.[9]

The Administrative Law Judges agree with the Department that Qwest's opposition to including this language is overstated. It appears to be unlikely that the inclusion of this language will "freeze" CMP processes, create an administrative burden for Qwest, or cause Qwest to maintain separate systems, processes, and procedures for Eschelon versus other CLECs. The CMP document itself envisions that CMP processes may well differ from those in negotiated ICAs. Qwest has failed to show that maintaining the current level of information in the PSON will harm the CMP process or other CLECs or create a burden for Qwest. This language would not prevent Qwest from adding to the information made available to other CLECs, through the CMP, nor would it prevent Qwest from changing the format of the information. It does not appear that any systems modification would be necessary to comply with this provision. Eschelon credibly contends that this minimal amount of information is reasonable and necessary for it to accurately coordinate the provision of service to new customers. Eschelon's proposed language should be adopted.[10]

Qwest contends its language is appropriate because the provision at issue concerns "process detail" that is more appropriately addressed in the CMP. It repeats its arguments that including this provision in an ICA will "lock in" the language and preclude any discussion of it by other CLECs in the CMP.[11] . . . Eschelon's language would not require any changes to Qwest's current process or systems, and Qwest has failed to identify any credibly adverse effect on CLECs, itself, or the public interest if this language were incorporated into the ICA. The proposed language exactly reflects Qwest's current practice. The Administrative Law Judges recommend that Eschelon's language be adopted.[12]

Qwest would delete all of the disputed language. In the section concerning trouble report closure, it would simply reference the

[9] MN Arbitrators' Report, ¶219. Expedites, and the ALJs' further findings on expedites, are further discussed by Mr. Denney with respect to Issue 12-67 and subparts (Expedited Orders).

[10] MN Arbitrators' Report, ¶229. Issue 12-70 (PSONs) has since closed in all six states with Eschelon's language.

[11] MN Ex. 1 (MN Albersheim Direct) at 63-66; Ex. 2 (MN Albersheim Reply) at 50-51; Ex. 4 (MN Albersheim Surreply) at 30-32.

[12] MN Arbitrators' Report, ¶¶244 & 246. Issue 12-74 (Fatal Rejection Notices) has since closed in all six states with Eschelon's language.

> procedures available on its wholesale website. Qwest maintains inclusion of this language in Eschelon's ICA would "lock in" these processes, preclude future changes, and require Qwest to operate in one way for Eschelon and another way for all other CLECs.[13] . . . The disputed language exactly reflects Qwest's current practice. Inclusion of Eschelon's language in the ICA would not prohibit future changes, whether through the CMP or ICA amendment. Eschelon's language merely defines the minimum elements that make these resources useful to CLECs. Eschelon's language should be adopted for these issues.[14]

Although the ALJs' did not adopt Eschelon's language for Issue 12-64 (Root Cause Analysis and Acknowledgement of Mistakes) and Issue 12-71 – 12-73 (Jeopardies), Eschelon offered modified language to address the ALJs' concerns in its exceptions to the ALJs' report. The Minnesota Commission adopted Eschelon's language, as modified, for both of these issues. Eschelon has offered that modified language for resolution of these issues in all six states, as I discuss below with respect to these issues.

A. JEOPARDIES, DELAYED ORDERS, SPECIAL CONSTRUCTION (CRUNEC), SECRET TRRO PCAT, AND EXPEDITE EXAMPLES OF WHEN QWEST VACILLATES OR MANEUVERS AS TO CMP

Q. QWEST TESTIFIES THAT ESCHELON HAS PRESENTED A "MISLEADING PICTURE" OF SEVERAL EXAMPLES OF QWEST'S HANDLING OF ISSUES IN CMP.[15] DO YOU AGREE?

[13] MN Ex. 1 (MN Albersheim Direct) at 72-77; *id*. at 90-92; Ex. 2 (MN Albersheim Reply) at 56-57; *id*. at 59; Ex. 4 (MN Albersheim Surreply) at 35-39; *id*. at 41.

[14] MN Arbitrators' Report, ¶¶249 & 251. Issue 12-86 (Trouble Report Closure) has since closed in all six states with Eschelon's language.

[15] Albersheim Response, p. 20, line 22 – p. 21, line 2. *See also,* Albersheim Response, p. 6, lines 7-9 ["…the four examples presented by Eschelon have not been accurately represented…"]

A. No. The opposite is true, as my discussion of each example will show. Eschelon has presented an accurate picture of each example discussed in my testimony[16] and provided supporting documentation[17] to allow an independent review of the facts. To avoid voluminous filings of many exhibits, Eschelon has made efficient and proper use of summary information and excerpts, while providing sufficient information (including URLs to information on Qwest's own web page) to allow further review of the entire documents (many of which were prepared by Qwest) if desired. Despite these efforts by Eschelon to be thorough and fair in reasonably presenting a large number of facts, Qwest testifies:

> Eschelon has presented small pieces of the record for each of these topics, and chosen the pieces that seem on the surface to support Eschelon's position. I will present a more complete discussion of each topic…[18]

An examination of each example will show that Qwest presents even smaller pieces of the record (to the extent it attempts to support its assertions with evidence at all), and Qwest's version of events is inaccurate.[19] As in my direct

[16] Starkey Direct, pp. 46-78. *See also,* Johnson Direct.

[17] *See, e.g.*, Exhibits BJJ-2 (Delayed Order Chronology), BJJ-3 (Expedite Chronology), BJJ-4 (Expedite Facts Matrix), BJJ-5 (Jeopardy/FOC Chronology), BJJ-6 (Jeopardy/FOC Examples), BJJ-7 (Secret TRRO PCAT Chronology), BJJ-9 (CRUNEC Chronology), BJJ-10 (CRUNEC notice), and BJJ-11 (CRUNEC emails).

[18] Albersheim Response, p. 21, lines 5-7.

[19] Ms. Albersheim points to more than 1,000 product and process and system changes and claims that they demonstrate that the four examples provided by Eschelon "are not the general rule." (Albersheim Response, p. 4). I addressed Ms. Albersheim's argument at page 77 of my direct testimony. Though Qwest claims these are isolated incidents, the significance of these examples is that they occurred at all. If CMP was the disciplined process Qwest claims it is, these examples would not have occurred at all. These examples demonstrate that: Qwest has used the CMP to advantage itself relative to its own policy positions, there is potential for abuse in the future, and safeguards in the form of clear ICA terms are needed to protect against this abuse. Furthermore,

testimony, I will refer to the four primary examples as Jeopardies, Delayed Orders, CRUNEC, and Secret TRRO PCATs.[20] As Ms. Albersheim briefly responds to an example I provided with respect to Expedited Orders,[21] I will address those aspects of Expedited Orders as well.[22]

1. Jeopardies Example[23]

Q. MS. ALBERSHEIM CLAIMS THAT QWEST "NEVER" MADE A COMMITMENT TO DELIVER A NEW DUE DATE RESOLVING AN ORDER IN JEOPARDY THE DAY BEFORE THE NEW DUE DATE.[24] IS THAT TRUE?

A. No. Ms. Albersheim is wrong when she says that the "evidence presented by Eschelon regarding the applicable CMP Change Requests shows that Qwest never made such a commitment."[25] In my response below, I point directly to the evidence in the record where Qwest makes this commitment. Qwest both made a commitment to send an Firm Order Confirmation ("FOC") with the due date after a Qwest facility jeopardy and to do so at least the day before the due date.

Ms. Albersheim's data on the amount of changes in CMP does not include product and process changes that Qwest tries to implement outside of CMP. *See, e.g.,* Secret TRRO PCAT example.

[20] Starkey Direct, pp. 46-78.

[21] Albersheim Response, pp. 9-10.

[22] Regarding Issue 12-67 (Expedited Orders), please see below as well as the testimony of Mr. Denney.

[23] Starkey Direct, pp. 46-49; Webber Direct (adopted), pp. 111-130; and Exhibits BJJ-5 and BJJ-6.

[24] Albersheim Response, p. 21, lines 13-19; *id.* p. 27, line 7.

[25] Albersheim Response, p. 21, lines 17-19 and p. 27, line 7.

Eschelon submitted the evidence of this Qwest commitment with its direct testimony, so this evidence was in the record at the time that Ms. Albersheim made her statement to the contrary. In addition, I will explain how Qwest attempts to confuse the Commission by discussing two CMP change requests together – PC081403-1[26] and PC072303-1[27] – when change request PC072303-1 does not even relate to FOCs that follow a Qwest facility jeopardy.[28]

Q. DID QWEST COMMIT TO DELIVER A NEW DUE DATE RESOLVING AN ORDER IN JEOPARDY AND TO DO SO AT LEAST THE DAY BEFORE THE NEW DUE DATE?

A. Yes. On February 26, 2004, in CMP Qwest provided to Eschelon a response to an example in which Qwest, after a Qwest facility jeopardy, had not provided an FOC with a new due date the day before.[29] In its response, Qwest made the commitment in CMP that Ms. Albersheim suggests Qwest did not make. To confirm Qwest's process and ensure a mutual understanding of the facts, Eschelon specifically asked Qwest whether, under Qwest's process, "shouldn't we have received the releasing FOC ***the day before the order is due***?"[30] Qwest responded:

[26] Exhibit BJJ-5, p. 1; *See also,* Qwest Exhibit RA-23RT.

[27] Qwest Exhibit RA-22RT.

[28] Qwest Exhibit RA-22RT.

[29] Exhibit BJJ-5, p. 4 (2/26/04). The notice for the March 4, 2004 meeting was dated February 26, 2004. The enclosed materials (distributed with the notice on 2/26/04) are dated February 25, 2004. *See also,* Exhibit BJJ-40.

[30] Exhibit BJJ-5, p. 4 (2/26/04) (emphasis added); *see* Exhibit BJJ-40, p. 3.

<u>Yes</u> an FOC should have been sent prior to the Due Date.[31]

During the March 4, 2004 call to discuss these materials (including Eschelon's example and Qwest's response), Eschelon "confirmed that the CLEC should always receive the FOC before the due date."[32] Qwest "agreed, and confirmed that Qwest cannot expect the CLEC to be ready for the service if we haven't notified you."[33] With this commitment from Qwest, change request PC081403-1 was closed.[34]

A copy of the meeting materials provided on February 26, 2004 is attached to the surrebuttal testimony of Ms. Johnson as Exhibit BJJ-40.[35] A comparison of this document to the quotations in Exhibit BJJ-5 shows that Eschelon accurately and fairly described these events in the chronology provided with its direct testimony (Exhibit BJJ-5). Similarly, the copy of the Detail for Change Request PC081403-1, which Ms. Albersheim attaches to her testimony as Exhibit RA-23RT, establishes that Eschelon accurately quoted from that Change Request Detail in its chronology of this issue.[36]

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[31] Exhibit BJJ-5, p. 4 (2/26/04) (emphasis added); *see* Exhibit BJJ-40, p. 3.

[32] Exhibit BJJ-5, p. 4 (3/4/04); Qwest Exhibit RA-23RT, p. 5 (sixth paragraph after heading).

[33] Exhibit BJJ-5, p. 4 (3/4/04); Qwest Exhibit RA-23RT, p. 5 (sixth paragraph after heading).

[34] Exhibit BJJ-5, pp. 4-5 (7/21/04); Qwest Exhibit RA-23RT, p. 4. Qwest agreed that, after a Qwest facility jeopardy, if Qwest did not send an FOC with the new due date the day before, this should be treated as a "compliance issue." *See id*. In other words, Qwest's process is to provide the FOC the day before, and when it does not do so, it is out of compliance with its own process.

[35] For the March 4, 2004 ad hoc CMP meeting minutes, see Qwest Exhibit RA-23RT, pp. 5-6.

[36] *Compare* Qwest Exhibit RA-23RT *with* excerpts in Exhibit BJJ-5.

Q. QWEST TESTIFIED IT WOULD PRESENT "A MORE COMPLETE RECORD" FOR THIS TOPIC THAN DID ESCHELON.[37] DID QWEST DO SO?

A. No. Despite Ms. Albersheim's claim that she was making a "complete record of the activities that took place regarding the Change Requests in question,"[38] the February 25, 2004[39] meeting materials that contain key evidence of this Qwest commitment are notably absent from her testimony and its exhibits (even though Eschelon pointed Qwest directly to it in its Exhibit BJJ-5).[40] Ms. Albersheim attached Change Request PC081403-1 to her testimony (as Qwest Exhibit RA-23RT). Exhibit RA-23RT specifically refers to the March 4, 2004 ad hoc meeting discussed above,[41] but Ms. Albersheim omitted the materials provided by Qwest on February 26, 2004 for that ad hoc meeting from her exhibits. Key documentation of Qwest's commitment to send an FOC at least the day before the due date (which I quoted and cited above), however, is contained in that documentation omitted by Qwest. It is Ms. Albersheim that has presented small

[37] Albersheim Response, p. 21, line 19.

[38] Albersheim Response, p. 21, lines 19-20.

[39] Exhibit BJJ-5, p. 4 (2/26/04) refers to meeting materials dated 2/25/06. The correct date for this meeting material is 2/25/04.

[40] Exhibit BJJ-5, p. 4 (2/26/04). Eschelon explained in Exhibit BJJ-5 that Qwest's commitment is documented in written materials dated February 25, 2004 that were attached to the March 4, 2004 meeting notice relating to Change Request PC081403-1. *See id.* & BJJ-5 p. 4 (2/26/06 & 3/4/04).

[41] Qwest Exhibit RA-23RT, p. 3 ("3/4/04 – Held ad hoc meeting with CLECs").

pieces of the record and chosen the pieces that seem on the surface to support Qwest's position.[42]

Moreover, since then, Qwest has departed from its demand for a "complete record"[43] and instead attempted to narrowly define the Qwest documentation that reflects the commitments it made during the history of the jeopardy Change Requests as being limited to information in its Product Catalog ("PCAT").[44] When making this claim, Qwest has provided two CMP PCAT-related documents (a redline of the Provisioning and Installation PCAT and accompanying CMP announcement of these PCAT changes) in Arizona and Colorado, but once again not the February 25, 2004 meeting materials that contain key evidence of this Qwest commitment.[45] Ironically, Ms. Albersheim is now suggesting that the PCAT redline and accompanying CMP announcement are the complete results of

[42] Albersheim Response, p. 21 ["But in sum, Eschelon has presented small pieces of the record for each of these topics, and chosen the pieces that seem on the surface to support Eschelon's position."]

[43] Albersheim Response, p. 21, line 19.

[44] *See, e.g.*, Qwest-Eschelon CO ICA Arbitration, Albersheim CO Rebuttal, (Docket No. 06B-497T, March 26, 2007), p. 25, lines 4-16 ("**Q. Did Qwest provide documentation demonstrating the changes that were made as a result of the change request?** A. Yes. As discussed in the change request, attached as Exhibit RA-17, documentation changes were sent to the CLECs. The notice for these changes was sent on April 12, 2004, and is attached as exhibit RA-18. The version of the PCAT showing the redlined changes in process that was identified in that notice is attached as exhibit RA-19. Changes to the list of jeopardy codes made to indicate which jeopardy situations could impact the due date, which was also identified in the notice, is attached as exhibit RA-20. **Q. What is the significance of the documents that were sent to the CLECs?** A. These documents represent the result of change request PC081403-1. The redlines to these documents are the specific changes made as a result of the change request."). AZ Exhibit RA-19 is a redline of the Qwest Provisioning and Installation PCAT.

[45] *See id.*

the jeopardies Change Request,[46] but she did not even mention them in her testimony regarding jeopardies[47] or provide the redlined PCAT and accompanying CMP announcement with Qwest's rebuttal testimony (in which she said she was making a "complete record of the activities that took place regarding the Change Requests in question"[48]). Qwest's omission of these documents confirms that they did not have the significance at the time that Qwest has only very recently claimed they have. This is simply an argument created after the fact to attempt to down play the significance of Qwest's commitment, which Eschelon has shown was documented by Qwest in CMP minutes (despite Ms. Albersheim's claim that Qwest "never made such a commitment"[49]). Ms. Albersheim *did* provide the CMP meeting minutes with her testimony,[50] and the March 4, 2004 minutes "confirmed that the CLEC should always receive the FOC before the due date."[51] As indicated in Ms. Johnson's surrebuttal testimony

[46] *See id*. ("These documents represent the result of change request PC081403-1.").

[47] In her discussion of Jeopardy Procedures (pp. 21-27) and Issues 12-71 – 12-73 (pp. 57-60), Ms. Albersheim makes one mention of a PCAT. She refers to the Ordering PCAT. *See* Albersheim Response, p. 58, footnote 41. In those discussions, Ms. Albersheim does ***not*** mention the Provisioning and Installation PCAT or the redline of the Provisioning and Installation PCAT and its accompanying CMP announcement (the latter two of which Ms. Albersheim testified in Colorado "represent the result of change request PC081403-1," *see* Albersheim CO Rebuttal, p. 25, lines 4-16).

[48] Albersheim Response, p. 21, lines 19-20.

[49] Albersheim Response, p. 21, lines 18-19.

[50] Albersheim Response, p. 21, lines 19-21 & footnote 15 ("In order to present a more complete record of the activities that took place regarding the Change Requests in question, I have attached the actual Change Requests, ***which include the minutes from the Project Meetings***.") (emphasis added) (citing Exhibit RA-22RT CR PC072303-1; Exhibit RA-23RT CR PC081403-1 with ***no*** reference to any PCAT).

[51] Qwest Exhibit RA-23RT, p. 5 (sixth paragraph after heading).

(within the discussion of Category "B" in Exhibit BJJ-50), Qwest does not document ***in the PCAT*** all of its commitments or every aspect of its processes. When documented, commitments may also appear, for example, in the CMP meeting materials that Qwest is required to record and post on its web site,[52] as is the case with the above-quoted commitments.[53]

As further described by Ms. Johnson in her surrebuttal testimony (within the discussion of Category "B" in Exhibit BJJ-50), at the relevant time Qwest took the position in CMP that providing an FOC at least the day before the due date was an existing process (so it did not need to be documented through a PCAT change).[54] Additional external documentation via the PCAT, in addition to the internal documented process referenced by Qwest in its minutes, was not needed to demonstrate Qwest's commitment in this case, because Qwest documented its commitment to provide the FOC before the due date in written and posted CMP materials.[55] Qwest's later flat-out denial[56] of its documented commitment shows that it needs to be reflected in the interconnection agreement to ensure that Qwest

[52] *See* Exhibit BJJ-51.

[53] Exhibit BJJ-40, p. 3 (February 26, 2004 CMP materials prepared and distributed by Qwest) & Exhibit BJJ-5, p. 4 (3/4/04); *see also* Qwest Exhibit RA-23RT, p. 5 (sixth paragraph after heading).

[54] *See* Exhibit BJJ-40, p. 3 ("This example is non-compliance to a ***documented process.*** Yes an FOC should have been sent prior to the Due Date.") (emphasis added).

[55] Exhibit BJJ-40, p. 3 (February 26, 2004 CMP materials prepared and distributed by Qwest) & Exhibit BJJ-5, p. 4 (3/4/04); *see also* Qwest Exhibit RA-23RT, p. 5 (sixth paragraph after heading).

[56] Albersheim Response, p. 21, lines 18-19 ("Qwest never made such a commitment").

does not classify jeopardies in a manner that builds in a three-day delay (as discussed below regarding Issues 12-71 – 12-73).

Q. QWEST DISCUSSES TWO DIFFERENT CHANGE REQUESTS. DOES QWEST CLEARLY DISTINGUISH THEM?

A. No. Qwest introduces confusion by discussing two different change requests without explaining the facts relating to them or distinguishing clearly when Qwest is discussing which change request. The first change request (PC081403-1) is the subject of Eschelon's Jeopardy Classification and Firm Order Confirmations Chronology (Exhibit BJJ-5) and relates to situations involving Qwest facility jeopardies. I'll refer to this as the *Qwest Jeopardy Change Request*. In the *Qwest Jeopardy Change Request*, Eschelon requested "a reasonable time frame to prepare to accept the circuit."[57] Initially, Eschelon identified a minimum of 2 to 4 hours as a time frame for discussion.[58] As indicated above, however, Qwest later

[57] Exhibit BJJ-5, p. 2 (8/14/03); *see also* Exhibit RA-23 RT, p. 2. Eschelon was requesting not a delay but advance notice of delivery of a circuit so that Eschelon could be prepared to accept the circuit ***on time***.

[58] Exhibit RA-23 RT, p. 1 (8/26/03); Albersheim Response, p. 23, line 26 – p. 24, line 2. Eschelon was clear that this was a "minimum" only, and the request therefore included a longer time frame to prepare to accept the circuit. *See* Exhibit BJJ-5, p. 3 (12/8/03) ("4 hour minimum"); *see also* Exhibit RA-23 RT, p. 9 (12/8/03) ("4 hour minimum"). Note that Qwest, as part of its proposal, commits to no time frame (whether 4 hours or 24 hours). In fact, Qwest has recently denied that it must send an FOC at all in these situations, much less send them in advance. *See* Exhibit BJJ-5, pp. 15-16.

committed to a longer time frame (to provide the FOC the day before the due date), as that is Qwest's process.[59]

The other change request (PC072303-1) has nothing to do with Qwest facility jeopardies. It relates to situations in which there is no Qwest-caused jeopardy (of any kind, facility or otherwise).[60] The issue in this change request is whether Eschelon has until 5:00 p.m. to accept a circuit for basic installations on the due date or whether Qwest can declare an Eschelon-caused ("Customer Not Ready" or "CNR") jeopardy if it attempts to deliver the circuit earlier in the day and Eschelon is not ready at that time but is ready before 5:00 p.m. In these cases, Eschelon has received an FOC for the due date, but the question revolves around timing of delivery on that date. I will refer to this as the *Before 5:00 p.m. CNR Jeopardy Change Request*.[61] As a result of this change request, Qwest made "a back end system change" to "hold the CNR jeopardy notifications until 6 PM Mountain time."[62]

A comparison of the description of the change request in Exhibit RA-23RT (*Qwest Jeopardy Change Request*) and Exhibit RA-22RT (*Before 5:00 p.m. CNR*

[59] Exhibit BJJ-5, p. 4 (2/26/04) (quoted above); *see also* Exhibit BJJ-40 (2/26/04 minutes) & Qwest Exhibit RA-23 RT (3/4/04 minutes).

[60] Qwest Exhibit RA-22RT (PC072303-1).

[61] Qwest Exhibit RA-22RT (PC072303-1).

[62] Qwest Exhibit RA-22RT (PC072303-1), p. 6 (Qwest 9/9/03 Response).

Jeopardy Change Request) shows that Eschelon made different requests in each one. The titles alone demonstrate this:

> *Qwest Jeopardy Change Request* (PC081403-1): "Delayed Order process modified to allow the CLEC a designated time frame to respond to a released delayed order after Qwest sends an updated FOC."[63]
>
> *Before 5:00 p.m. CNR Jeopardy Change Request* (PC072303-1): "Customer Not Ready ("CNR") jeopardy notice should not be sent by Qwest to CLECs before 5 PM local time on the due date (for basic install)"[64]

Although there were "synergies"[65] because both change requests dealt to some extent with jeopardies, the resolution of one request did not replace the other. The change in the timing of jeopardies until 6 p.m. for situations when the due date was provided on an FOC as a result of the *Before 5:00 p.m. CNR Jeopardy Change Request* did not resolve the request for a reasonable time frame to prepare to accept the circuit in situations when Qwest failed to deliver a FOC after a facility jeopardy in the *Qwest Jeopardy Change Request*.

Q. QWEST SUGGESTS THAT ESCHELON'S POSITION AS DESCRIBED IN CMP MEETING MINUTES DIFFERS FROM ESCHELON'S POSITION AS DESCRIBED IN YOUR TESTIMONY.[66] IS THAT AN ACCURATE SUGGESTION?

[63] Exhibit RA-23RT (PC081403-1), p. 1

[64] Exhibit RA-22RT (PC072303-1), p. 1.

[65] Exhibit BJJ-5, p. 3 (10/15/03); Albersheim Response, p. 22, line 22.

[66] Albersheim Response, p. 23, lines 3-19.

A. No. Qwest quotes CMP meeting minutes stating that the reason Eschelon "wanted to close/leave open or update PC081403-1 is because PC072303-1 is meeting many of the needs."[67] Qwest claims that this is contrary to my testimony (see above) that "PC072303-1 'has nothing to do with Qwest facility jeopardies.'"[68] Note, however, that I did not say that *the two change requests* had nothing to do with one another. In fact, I explain above (as I have in other states) that "there were 'synergies'[69] because both change requests dealt to some extent with jeopardies." As explained in Exhibit BJJ-6 (footnote 6), there are different kinds of jeopardies. I specifically said that PC072303-1 "has nothing to do with ***Qwest facility jeopardies***" (see above; emphasis added). The word "Qwest" refers to a "Qwest-caused" jeopardy; and the word "facility" refers to the type of jeopardy sent when Qwest does not have available facilities to fulfill the order. As I explain in the very next sentence (as I have done in other states), therefore, the change request "relates to situations in which there is no Qwest-caused jeopardy (of any kind, facility or otherwise)."[70] The quoted language from the CMP minutes dealt with the above-mentioned synergies. My testimony describes

[67] Albersheim Response, p. 23, lines 15-17.

[68] Albersheim Response, p. 23, lines 3-5.

[69] Exhibit BJJ-5, p. 3 (10/15/03); Albersheim Response, p. 23, line 10.

[70] Exhibit BJJ-5, pp. 29-34; *see also* Qwest Exhibit RA-22RT (PC072303-1).

the differences in the change requests (see above) and the outstanding issues in this case, which *do* relate to Qwest facility jeopardies.[71]

Qwest also claims that the quoted language from the CMP minutes dealing with "synergies"[72] is contrary to my testimony (see above) that "'the resolution of one request did not replace the other.'"[73] As I describe above (as I have done in other states), although there were "synergies"[74] because both change requests dealt to some extent with jeopardies, the change in the timing of jeopardies until 6 p.m. for situations when the due date was provided on an FOC as a result of the *Before 5:00 p.m. CNR Jeopardy Change Request* did not resolve the request for a reasonable time frame to prepare to accept the circuit in situations when Qwest failed to deliver a FOC after a facility jeopardy in the *Qwest Jeopardy Change Request*.

Q. WAS THERE ANY COMPROMISE TO COMPLETE ONE OF THESE CHANGE REQUESTS INSTEAD OF THE OTHER?

A. No, although that seems to be the impression Qwest is attempting to create in its testimony. Qwest claims that it "proposed a compromise."[75] Instead of describing the alleged compromise, Qwest directly quotes from October 6, 2003,

[71] I discuss these issues below with respect to Subject Matter 33 (Issues 12-71 – 12-73, Jeopardies).

[72] Albersheim Response, pp. 22-23.

[73] Albersheim Response, p. 23, line 5.

[74] Exhibit BJJ-5, p. 3 (10/15/03); Albersheim Response, pp. 22-23.

[75] Albersheim Response, p. 24, line 6 and p. 27, lines 5-6.

CMP minutes that make no reference to a compromise.[76] The quote actually refutes Qwest's own claim. Qwest clearly refers in the quotation to two ***phases***, both of which will be completed, and ***not*** a compromise to complete one request and not the other.[77] Phase 1 is "changing the jep timeframe to 6 pm"[78] (*i.e.*, *Before 5:00 p.m. CNR Jeopardy Change Request,* PC072303-1), and Phase 2 is to "accommodate some time frames in between FOC and Jep"[79] (*i.e.*, *Qwest Jeopardy Change Request*, PC081403-1). The *Before 5:00 p.m. CNR Jeopardy Change Request* (PC072303-1; Phase 1) was completed on February 18, 2004, with the back end system change to hold the CNR jeopardy notifications until 6 p.m. Mountain time.[80] The *Qwest Jeopardy Change Request* (PC081403-1; Phase 2) was completed on July 21, 2004, with the commitment described above to send the FOC the day before the due date after a Qwest facility jeopardy.[81]

Q. QWEST TWICE REFERS TO "THE CHANGE REQUEST" OR "THE CR,"[82] THE FIRST TIME WHEN QWEST TESTIFIES THAT ESCHELON AGREED TO QWEST'S ALTERNATIVE PROPOSAL FOR

[76] Albersheim Response, p. 24, lines 8-24.

[77] Albersheim Response, p. 24, lines 15 and 20-21.

[78] Albersheim Response, p. 24, line 12.

[79] Albersheim Response, p. 24, lines 19-20.

[80] Exhibit RA-22RT (PC072303-1), p. 1 ("Completed 2/18/2004") & p. 6 (describing back end system change).

[81] Exhibit BJJ-5, p. 4 (7/21/04); *see also* Qwest Exhibit RA-23RT, p. 1 ("Completed 7/21/2004") and p. 4 (7/21/04).

[82] Albersheim Response, p. 24, line 27 and p. 25, line 6.

"THE CHANGE REQUEST." TO WHAT CHANGE REQUEST IS QWEST REFERRING?

A. Qwest does not say, but from the description it is apparent that Qwest is referring to the *Before 5:00 p.m. CNR Jeopardy Change Request*, (PC072303-1; Phase 1). For this change request, Eschelon proposed a process change to not send a CNR jeopardy notice before 5 p.m. and instead Qwest offered the alternative proposal of a systems solution – "back end system change" – to hold the CNR jeopardy notice until 6 p.m. Mountain time. Eschelon accepted that proposal, and the change request was completed on February 18, 2004.

Q. THE SECOND TIME THAT QWEST REFERS TO "THE CR" IS WHEN QWEST STATES THAT ESCHELON AGREED TO CLOSE "THE CR."[83] TO WHICH CHANGE REQUEST IS QWEST REFERRING?

A. Qwest does not say, but Qwest quotes from the July 21, 2004, CMP minutes for the *Qwest Jeopardy Change Request* (PC081403-1; Phase 2).[84] By referring to both change requests as "the Change Request" or "the CR," Qwest's testimony tends to suggest that there was some compromise with respect to the first change request (PC072303-1; Phase 1) that resolved the second change request (PC081403-1; Phase 2). This is not the case.

[83] Albersheim Response, p. 25, line 6.

[84] *Compare* Albersheim, p. 25, lines 3-6 *with* Exhibit RA-23RT, p. 4 and Exhibit BJJ-5, pp. 4-5 (7/21/04).

Q. WAS THERE ANY REASON FOR ESCHELON TO ESCALATE THE OUTCOME OF "THE CR,"[85] GO TO THE CMP OVERSIGHT COMMITTEE TO DISPUTE THE OUTCOME OF "THE CR,"[86] USE THE CMP DISPUTE PROCESS FOR "THIS CR,"[87] OR SUBMIT ANOTHER REQUEST[88] FOR EITHER OF THESE TWO CHANGE REQUESTS?

A. No. For both change requests, Qwest completed the change requests.[89] ***The problem is that Qwest is no longer honoring the CMP resolution of the Qwest Jeopardy Change Request*** (PC081403-1), as described in the attachment to Ms. Johnson's direct testimony.[90] It is frustrating, at best, for Eschelon to read sworn testimony by Qwest saying that Eschelon should submit a change request in CMP to obtain a result that it already achieved through CMP. Qwest has elected to disregard its own CMP resolution without following its own CMP processes to initiate a change in that resolution when Qwest desires a different outcome.

Q. MS. ALBERSHEIM TESTIFIES THAT ESCHELON HAS PORTRAYED QWEST AS "CHANGING ITS MIND" OR ACTING

[85] Albersheim Response, p. 25, line 20 – p. 26, line 1.

[86] Albersheim Response, p. 26, lines 7-9.

[87] Albersheim Response, p. 26, lines 11-13.

[88] Albersheim Response, p. 26, lines 15-17.

[89] As indicated above, *Before 5:00 p.m. CNR Jeopardy Change Request* (PC072303-1) was completed on February 18, 2004, with the back end system change to hold the CNR jeopardy notifications until 6 PM Mountain time. [Exhibit RA-22RT (PC072303-1), p. 1 ("Completed 2/18/2004") and p. 6 (describing back end system change)]. *Qwest Jeopardy Change Request* (PC081403-1) was completed on July 21, 2004, with the commitment described above to send the FOC the day before the due date after a Qwest facility jeopardy. [Exhibit BJJ-5, p. 4 (7/21/04); *see also* Exhibit RA-23RT, p. 1 ("Completed 7/21/2004") and p. 4 (7/21/04)].

[90] Exhibit BJJ-5, pp. 13-16.

"INCONSISTENTLY" WHEN "IN FACT" ESCHELON'S EXAMPLES ARE DEMONSTRATIVE OF "QWEST'S SIGNIFICANT EFFORTS TO BE RESPONSIVE TO ITS CLEC CUSTOMERS."[91] IS MS. ALBERSHEIM CORRECT?

A. No. Qwest's email dated September 1, 2005,[92] is evidence that Qwest has arbitrarily changed its policy and violated the result achieved through completion of the Qwest Jeopardy Change Request (PC081403-1). As this email shows, Qwest is not only denying that it must provide the FOC after a Qwest facility jeopardy the day before the due date, Qwest has actually denied that it must provide it at all. And, Qwest maintains it may still classify the jeopardy as CNR if a CLEC is not ready as a result of Qwest's failure to provide notice.[93] Whereas in February of 2004, Qwest confirmed in CMP that its process is to send an FOC "***prior to the Due Date***,"[94] Qwest later claimed that this is just a "goal"[95] and that there is no requirement in these situations to send an FOC at all. To confirm Qwest's new position and ensure that Eschelon was not misunderstanding it, Eschelon sent Qwest a scenario in which Qwest, after a facility jeopardy, sent no

[91] Albersheim Response, p. 21, lines 7-10.

[92] Exhibit BJJ-5, pp. 15-16 (9/1/05 email from Qwest CMP Process Manager).

[93] Qwest Exhibit RA-28RT; see also, Albersheim Response, p. 59, lines 20-21. Qwest refers to unspecified "order activity" as "eliminate[ing] the need for an FOC," s*ee id.*, despite the unqualified requirement of the SGAT and closed language in the proposed ICA (9.2.4.4.1) to provide an FOC after a Qwest facility jeopardy.

[94] Exhibit BJJ-5, p. 4 (2/26/04) (emphasis added); *See also,* Exhibit BJJ-40.

[95] Exhibit BJJ-5, p. 13 (8/29/05 email from CMP Process Manager) and Exhibit BJJ-5, p. 15 (9/1/05 email from CMP Process Manager).

FOC at all and yet Qwest classified the jeopardy as a Customer Not Ready (*i.e.*, Eschelon-caused) jeopardy.[96] Despite completion of *Qwest Jeopardy Change Request* (PC081403-1), Qwest's CMP Process Manager responded: "Your scenario is correct."[97]

In contrast, in CMP, Qwest "agreed, and confirmed that Qwest cannot expect the CLEC to be ready for the service if we haven't notified you."[98] Now, Qwest is expecting the CLEC to be ready for service even if Qwest has not notified the CLEC.[99] Qwest did not escalate in CMP, go to the CMP oversight committee, use the CMP dispute resolution process, or submit a Qwest-initiated CR to achieve this change. Qwest just arbitrarily changed its policy, despite all of Eschelon's efforts to work through CMP as requested by Qwest. Qwest then adds salt to the wound by claiming this arbitrary action is indicative of "Qwest's significant efforts to be responsive to its CLEC customers."[100] Clearly, the interconnection agreement needs to address this issue for Eschelon to obtain any consistent, reliable result upon which it can plan its business.

[96] Exhibit BJJ-5, p. 15 (9/1/05 Eschelon email).

[97] Exhibit BJJ-5, p. 15 (9/1/05 Qwest email).

[98] Exhibit BJJ-5, p. 4 (3/4/04); *See also*, Qwest Exhibit RA-22RT, p. 5.

[99] Exhibit BJJ-5, p. 15 (9/1/05 Qwest email).

[100] Albersheim Response, p. 21, lines 9-10; p. 6, lines 8-9; and p. 33, line 1. Similarly, in response to an email from Eschelon indicating that "this is not the process we discussed in CMP," Qwest responded: "Qwest will continue to strive to deliver service on the due date to meet our customers' expectations." *See* Exhibit BJJ-5, p. 16. This is hardly responsive to the need expressed by Eschelon.

2. Delayed Orders Example[101]

Q. QWEST TESTIFIED IT WOULD "PRESENT A MORE COMPLETE DISCUSSION" OF THIS TOPIC.[102] DID QWEST DO SO?

A. No. There is a fact notably absent from Qwest's testimony: the element of time. With respect to time, it would appear from reading Qwest's testimony[103] that little, if any, time passed between Qwest receiving Eschelon's proposal for option number two for held orders and Qwest's submission of its held order proposal in CMP. In fact, Eschelon provided its proposal for option two to Qwest on March 29, 2005,[104] and Qwest did not initiate any CMP activity with respect to this issue until June 1, 2006[105] – well over a year later. Although Qwest suggests that it was merely being responsive to Eschelon's proposal,[106] Qwest had more than a year to respond if Eschelon's proposal had been the motivating factor for the CMP activity.[107] Instead, Qwest did nothing until after Eschelon filed the first petition for arbitration in these arbitrations in Minnesota on May 26, 2006. Once

[101] Starkey Direct, pp. 49-54 and Exhibit BJJ-2.

[102] Albersheim Response, p. 21, line 7.

[103] Albersheim Response, pp. 27-28.

[104] Exhibit BJJ-2, p. 4 (3/29/05).

[105] Exhibit BJJ-2, p. 4 (June 1, 2006) (PROD.06.01.06.F.03973).

[106] Albersheim Response, p. 28, lines 2-3 ["…Qwest concluded that it could compromise by accepting Eschelon's second proposal so long as the change was managed in the CMP."]

[107] Qwest also claims that "…changes to processes, such as the held order process, have been managed in the CMP" and "Qwest made these facts clear, as well as its position that the CMP should continue to manage changes to the process, during its interconnection agreement negotiations with Eschelon." Albersheim Response, p. 27, lines 22-23 and p. 27, line 23 – p. 28, line 1. Unlike other provisions of the ICA for which Qwest refers to the CMP or the PCAT, however, Qwest's proposal for Issue 9-32 did not refer to either. Instead, Qwest proposed specific ICA language on this issue.

the choice of which of Eschelon's four alternative proposals should apply was before a state commission, Qwest quickly acted to make that choice for itself before the state commission had an opportunity to make it for Qwest.

Q. MS. ALBERSHEIM TESTIFIES THAT WHEN QWEST SUBMITTED ITS "CHANGE REQUEST" RELATED TO HELD ORDERS IN CMP, QWEST REPLACED THE WORD "AVAILABLE" IN ESCHELON'S PROPOSED LANGUAGE WITH "IN THE GROUND" SO THAT ESCHELON AND OTHER CLECS COULD CONSIDER THE EDIT.[108] DOES MS. ALBERSHEIM PROVIDE AN ACCURATE DESCRIPTION OF THESE EVENTS?

A. No. First, Qwest's request to modify the held orders policy in CMP was done through a Level 3 CMP *notice*[109] – not a "change request." Only Level 4 CMP changes are "change requests."[110] Moreover, contrary to Ms. Albersheim's testimony,[111] when Qwest submitted its Level 3 notice in CMP to propose the 90 day held order policy (June 2006), Qwest did ***not*** replace the word "available" with "in the ground."[112] Rather, Qwest proposed to change the "available" language with "in the ground" in ICA arbitrations with Eschelon (July 2006), but

[108] Albersheim Response, p. 28.

[109] *See, e.g.*, Exhibit BJJ-2, pp. 4-7 (6/1/06, 6/29/06 and 7/14/06).

[110] *See* Starkey Direct, p. 39.

[111] Albersheim Response, p. 28, lines 14-17.

[112] *See* Exhibit BJJ-2, pp. 4-5 (6/1/06). *See also*, Starkey Direct, p. 53, lines 17-20.

not in CMP.[113] It was not until several months later (October 11, 2006) that Qwest issued a Level 3 CMP notice[114] to change "available" to "in the ground" in its PCAT, which it later retracted.[115] Ms. Albersheim's insinuation that Qwest proposed to change "available" to "in the ground" when it changed its held order policy from 30 to 90 days is inaccurate and misleading.

The full history of this issue, from Qwest's initial use of CMP to implement a result very different from that requested by Eschelon (and initially trying to close the CR as completed even though it had been denied) to Qwest implementing a portion but not all of Eschelon's proposal in CMP (while claiming that CMP involvement was essential to its being able to modify its position), shows the amount of discretion Qwest has in CMP and the potential that exists for abuse of that discretion.

Q. MS. ALBERSHEIM CRITCIZES ESCHELON FOR WANTING FOUR OPTIONS CONSIDERED IN THE CMP.[116] WHY DID ESCHELON WANT ALL FOUR OPTIONS CONSIDERED IN CMP?

A. To do precisely what Qwest said it wanted to do: fully consider this issue in CMP and ensure that the industry is involved in creating and approving processes. In

[113] *See* Exhibit BJJ-2, p. 7 (7/25/06). *See also*, Starkey Direct, pp. 53-54.

[114] PROD.10.11.06.F.0437.UBL_Held_Order_for_90days.

[115] PROD.11.02.06.F.04306.Retract_UBL_90dy_hold

[116] Albersheim Response, p. 28.

its CMP comments, Eschelon explained its desire to discuss all four proposals in CMP as follows:

> If Qwest is serious about dealing with the issue of orders held for no local facilities in CMP, Eschelon believes that Qwest should provide the CLEC community the opportunity to have meaningful dialogue on this topic. Qwest said in the Minnesota arbitration that: "The entire purpose of CMP was to ensure that the industry (not just Qwest or one CLEC) is involved in creating and approving processes." If so, Qwest should include in its proposal, at least, the following 4 options to facilitate a full discussion with the CLEC community.[117]

In its Response to Eschelon's Arbitration Petition in Minnesota, Qwest said that it would agree to Eschelon's option two for the issue of delayed orders when facilities are unavailable, if the delayed order issue "…is fully considered and adopted through the CMP." When Qwest announced its change through CMP, Eschelon suggested doing that very thing – fully considering the issue in CMP by sharing all four options and opening up the issue for discussion with multiple CLECs. Instead, Qwest implemented its one-dimensional notice without regard for Eschelon's comment. Therefore, there was no full consideration of the issue, and it was fair for Eschelon to point out this discrepancy between the impression left by Qwest's Response and what actually transpired (and did not transpire) in CMP.

[117] Exhibit BJJ-2, p. 5 (6/7/06).

3. CRUNEC Example[118]

Q. QWEST CITES SOME PERCENTAGES TO SHOW THAT THE DRAMATIC SPIKE IN HELD ORDERS WAS ONLY FOR A "SPECIFIC TYPE OF HELD ORDERS" AND WAS "NOT REFLECTIVE OF HELD ORDERS OVER ALL."[119] DO THESE PERCENTAGES AFFECT YOUR ANALYSIS OF THIS ISSUE?

A. No. As I explained in my direct testimony, the third example (involving a change that Qwest implemented through CMP relating to special construction charges, which Qwest calls "CLEC Requested UNE Construction" or "CRUNEC") relates to "no-build situations" that exist when Qwest will not build for CLECs because it would likewise not build for itself for the normal charges assessed to its customers.[120] As is apparent from my discussion of this example in the context of these no-build situations, the data I cited in my direct testimony[121] related to this specific type of held order ("service inquiry" or "no-build" held orders). The fact that Qwest used the CMP notice to apply no-build held orders to situations in which it should not do so is what caused the spike. In other words, my numbers related only to a specific type of held order because that type of held order is ***the only type relevant to the discussion***. The held orders that spiked were the ones

[118] Starkey Direct, pp. 55-65; Exhibits BJJ-9, BJJ-10, BJJ-11.

[119] Albersheim Response, p. 30, lines 20-22.

[120] Starkey Direct, pp. 55-56.

[121] Starkey Direct, pp. 58-59.

for which Qwest started to demand charges and a lengthy process that would cause delay when none of those charges or that lengthy process applied previously.

Q. QWEST SUGGESTS THAT ITS CONDUCT IN ISSUING THIS NOTICE THROUGH CMP DID NOT CAUSE THE PROBLEMS FOR ESCHELON.[122] IS THAT ACCURATE?

A. No. The before and after effects of Qwest's one-word change to its PCAT speak for themselves. Before Qwest implemented this change in CMP, Eschelon did not have this problem, but afterwards it did. Similarly, Allegiance and Covad both submitted CMP comments indicated that they had "already" been negatively impacted by Qwest's implementation of this one-word change to Qwest's PCAT.[123] Twelve CLECs joined in opposing this change.[124] Only after the CLECs, including Eschelon, brought this issue to the attention of the Arizona Commission in the 271 proceeding did Qwest revoke it. Qwest's attempt to suggest the lack of a causal relationship is ineffective and contrary to the findings of the Arizona Commission.[125] Contrary to Qwest's suggestion that it was being

[122] Albersheim Response, p. 30, lines 7-11.

[123] CLEC Comments Received from Allegiance and Covad on July 26, 2003 (stating the companies have "***already been negatively impacted***") (emphasis added). *See* Exhibit BJJ-9, p. 3 citing http://www.qwest.com/wholesale/cnla/uploads/PROD%2E08%2E06%2E03%2EF%2E03494%2EDelayedResponseCRUNEC%2Edoc

[124] *See* Exhibit BJJ-9, pp. 3-4.

[125] September 16, 2003, 271 Order, ACC Docket No. T-00000A-97-0238 (Decision No. 66242), ¶109 (quoted at Starkey Direct, pp. 62-63).

responsive to its CLEC customers,[126] Qwest denied Covad's objection in CMP[127] and only retracted its change later after the Arizona Commission became involved.[128]

Q. MS. ALBERSHEIM CLAIMS THAT THE "CONDITIONING" IN THE CONTEXT OF CRUNEC "BEARS NO RESEMBLANCE WHATSOEVER TO "CONDITIONING" LOOPS FOR DATA SERVICES,[129] AND THAT QWEST SUBMITTED THE LEVEL 3 CRUNEC NOTICE TO CLARIFY THIS POINT.[130] IS THERE ANY SUPPORT FOR MS. ALBERSHEIM'S CLAIMS?

A. No. First, Ms. Albersheim testifies: "As Qwest witness Mr. Hubbard explains, the description for CRUNEC in the PCAT contained the word 'conditioning.'"[131] However, Mr. Hubbard's testimony does not explain what Ms. Albersheim says it does. In fact, neither Mr. Hubbard's direct testimony, nor his response testimony contain the word "conditioning." The only place where CRUNEC is discussed in Mr. Hubbard's testimony is page 14 of his response testimony, and this discussion does not discuss conditioning or include the explanation referenced in

[126] Albersheim Response, p. 21, lines 7-10 ["I will demonstrate in each case that what Eschelon has portrayed as Qwest "changing its mind" or Qwest acting "inconsistently" is in fact Qwest's significant efforts to be responsive to its CLEC customers."]

[127] *See* Starkey Direct, pp. 57-58.

http://www.qwest.com/wholesale/downloads/2003/030521/CNL3_response_CRUNEC_V4.doc

[128] Exhibit BJJ-9, pp. 4-5 (9/16/03, 9/18/03).

[129] Albersheim Response, p. 29.

[130] Albersheim Response, p. 29, lines 5-16.

[131] Albersheim Response, p. 29, lines 7-8.

Ms. Albersheim's testimony. Mr. Hubbard simply defines the acronym CRUNEC, defines the term and provides the URL to Qwest's PCAT. To the extent that Mr. Hubbard's testimony is supposed to support Ms. Albersheim's claim about "conditioning" and the purpose of Qwest's Level 3 CRUNEC notice, it does not.

Moreover, despite Ms. Albersheim's claim that the Level 3 CRUNEC notice was "simply a clarification,"[132] the results of Qwest's notice[133] and the Arizona Commission's order on the notice[134] speak for themselves. The record shows that this notice did not just clarify, rather it had serious business-affecting consequences on Eschelon and other CLECs.

Q. IS MS. ALBERSHEIM'S CLAIM THAT "CONDITIONING" FOR CRUNEC IS SOMETHING COMPLETELY DIFFERENT THAN "CONDITIONING" LOOPS FOR DATA SERVICES SUPPORTED BY THE RECORD?

[132] Albersheim Response, p. 29, lines 14-16.

[133] Starkey Direct, pp. 58-59. *See also* CLEC Comments Received from Allegiance and Covad on July 26, 2003 (stating the companies have "***already been negatively impacted***") (emphasis added). *See* Exhibit BJJ-9 p. 3, citing http://www.qwest.com/wholesale/cnla/uploads/PROD%2E08%2E06%2E03%2EF%2E03494%2EDelayedResponseCRUNEC%2Edoc

[134] Starkey Direct, pp. 62-63. The Arizona Commission and Staff conditioned Checklist Items 2 and 4 of the Qwest Section 271 evaluation on Qwest's agreement to suspend the policy set forth in Qwest's Level 3 CRUNEC notice and provide refunds to CLECs.

A. No. Though Ms. Albersheim claims that my testimony reflects "confusion" on this point,[135] her attempt to distinguish between CRUNEC "conditioning" and loop "conditioning" is undermined by the record. As shown in the Arizona Commission's 271 Order in Docket No. T-00000A-97-0238, the Arizona Commission and its Staff were concerned about Qwest's policy related to "line conditioning" – not some other different type of activity related to "CRUNEC" conditioning. The pertinent language from the Commission's order is found at pages 62-63 of my direct testimony. The Commission's Order states: "Staff agrees with Eschelon with respect to the recently imposed c***onstruction charges on CLECs for line conditioning***. Staff is extremely concerned that Qwest would implement such a ***significant change*** through its CMP process without prior Commission approval."[136] By referring to Qwest's Level 3 CRUNEC notice as a "significant change," the Arizona Commission made clear that Ms. Albersheim's claim that it was a simple clarification is false. More importantly, by clearly referring to construction charges for "line conditioning," the order shows that Ms. Albersheim's attempt to distinguish between line conditioning and CRUNEC conditioning to support her claim that it was not Qwest's Level 3 CRUNEC notice that caused problems for Eschelon and other CLECs should be rejected.

[135] Albersheim Response, p. 29, lines 11-13.

[136] September 16, 2003 Order in the 271 Docket, ACC Docket No. T-00000A-97-0238 (Decision No. 66242) at ¶109 (emphasis added). The Commission also states: "Staff recommends that Qwest be ordered to immediately suspend its policy of assessing ***construction charges on CLECs for line conditioning and reconditioning***…" (emphasis added)

Q. MS. ALBERSHEIM MAKES MUCH OF THE FACT THAT ESCHELON DOES NOT USE THE CRUNEC PROCESS.[137] WHY IS IT THEN THAT ESCHELON WAS SO CONCERNED ABOUT QWEST'S CRUNEC NOTICE?

A. It is the effect of the notice that greatly concerned Eschelon. As I said in my direct testimony, almost immediately after the effective date of Qwest's unilateral email notification, Eschelon began experiencing a dramatic spike in the number of no-build held orders relative to DS1 loops ordered from Qwest.[138] Because Eschelon did not use the CRUNEC process, it did not expect changes in that process to affect its business. A CMP notice for a process never used by Eschelon should not have had such a business-affecting impact on Eschelon.

Q. QWEST STATES THAT ITS NOTICE WAS JUST A "CLARIFICATION" OF THE CRUNEC PROCESS AND SUGGESTS THAT THE BUSINESS IMPACT THEREFORE WAS THE RESULT, NOT OF A QWEST CHANGE IN PROCESS IMPLEMENTED THROUGH CMP, BUT OF AN EFFORT BY QWEST TO COMPLY WITH A PREVIOUSLY EXISTING PROCESS.[139] QWEST ADDS THAT YOUR DESCRIPTION OF THESE EVENTS "IS NOT COMPLETELY ACCURATE."[140] PLEASE RESPOND.

[137] Albersheim Response, p. 29, lines 2-3; p. 30, lines 11-12; and p. 4, lines 13-14.

[138] Starkey Direct, pp. 58-59.

[139] Albersheim Response, p. 29.

[140] Albersheim Response, p. 30, line 16.

A. I accurately described this Qwest position in my direct testimony, where I quoted Qwest's claim word-for-word.[141] I said: "Qwest said:

> Qwest has in the past not fully enforced our contractual right to collect on the charges incurred when completing DS1 level unbundled services. Charging is the specific change that has occurred.[142]

Qwest identifies no inaccuracy in my description of events. Qwest's claim that "[i]n error, Qwest's technicians had been constructing DS1 loops outside of process"[143] is no more persuasive now in this case than it was at that time and in the Arizona 271 proceeding. This was a clear, business-affecting and rate-impacting change that Qwest inappropriately attempted to implement through CMP but had to revoke as a result of the 271 proceedings. The Arizona Staff described it as a "significant change" and recommended "that Qwest be ordered to immediately suspend its policy."[144]

4. Secret TRRO PCAT Example[145]

Q. QWEST COMPLAINS ABOUT WHAT IT CALLS INFLAMMATORY LANGUAGE.[146] WHAT INFLAMMATORY LANGUAGE IS MS. ALBERSHEIM REFERRING TO?

[141] Starkey Direct, p. 59.

[142] Qwest (Teresa Taylor) email to Eschelon (July 3, 2003).

[143] Albersheim Response, p. 30, lines 14-15.

[144] Arizona 271 Order, ¶109.

[145] Starkey Direct, pp. 65-77; Exhibits BJJ-7, BJJ-33, and BJJ-25.

[146] Albersheim Response, p. 31, lines 12-13.

A. Ms. Albersheim apparently refers to my use of the term *secret* to refer to Qwest's password–protected TRRO PCATs.[147] She claims that there was nothing secret about them. According to Ms. Albersheim, Qwest issued its TRRO PCAT as password-protected (originally without providing the password until the CLEC blindly signed Qwest's form TRRO amendment) "to avoid the confusion of having the TRRO-related PCAT posted on the same website with the original PCAT."[148] Eschelon defined the first-ever password-protected PCATs as "secret" to clearly distinguish them "from generally available PCATs accessible without a password distributed through Qwest notice process."[149] Apparently, Qwest does not like it when the shoe is on the other foot. The reality is that Qwest could have included the password in its initial notice if its motivation had been as simple as to "avoid confusion," but Qwest chose not to do so. Until it distributed the password and, today, for those who are unfamiliar with the password process, the "TRRO" PCATs were and are secret. This term distinguishes them from the generally available PCATs.

Q. IS THE REASON PROVIDED BY MS. ALBERSHEIM'S FOR WHY QWEST PASSWORD PROTECTED ITS TRRO PCATS CONVINCING?

A. No. There are many different offerings in Qwest's PCAT on its website, some which apply to a CLEC and some which do not. There is no basis to believe that

[147] Starkey Direct, p. 70, footnote 110.

[148] Albersheim Response, p. 32, lines 12-13.

[149] Starkey Direct, p. 70, footnote 110. *See also,* Exhibit BJJ-7, p. 11, footnote 6.

Qwest's non-CMP TRO/TRRO PCAT would have caused any more confusion for carriers who had not signed TRRO amendments if they were not password-protected than any other offering in Qwest's PCAT that doesn't apply to a particular carrier. CLECs did not ask for these TRRO PCATs to be password-protected, nor did the CLECs give Qwest any reason to believe that they would have been confused if the TRRO PCAT was not password-protected. Though Ms. Albersheim testifies that "it is ridiculous to contemplate that Qwest would even attempt"[150] to keep the TRRO-related PCAT secret, Ms. Albersheim ignores the fact that, at that time, there were several CLECs who had not signed such agreements and were contesting the terms of the TRRO in various state proceedings.[151] Therefore, Qwest had a vested interest in keeping its unilateral implementation of the FCC's TRO/TRRO decisions secret from those who had not signed the amendments yet, so that these non-CMP PCATs (which proved to be premature and not reflective of the FCC's final rules) could not be used in the state dockets to show how Qwest was implementing the FCC's decisions.

[150] Albersheim Response, p. 32, lines 14-17.

[151] In the Minnesota arbitration between Eschelon and Qwest, Ms. Albersheim acknowledged this point as follows: "Qwest was aware that several CLECs had not signed such agreements and were contesting the terms of the TRRO in various state dockets." Albersheim Minnesota Rebuttal Testimony, p. 28, lines 13-15. Ms. Albersheim did not include this explanation in her testimony in the Washington arbitration proceeding.

Q. MS. ALBERSHEIM STATES THAT THE CHANGE REQUEST RELATED TO THE TRRO PCAT WAS REACTIVATED AT THE NOVEMBER CMP MEETING.[152] WOULD YOU LIKE TO COMMENT?

A. Yes. I discussed this issue at page 20 of my rebuttal testimony. Recently, Qwest again asked CLECs to identify and discuss legal issues in CMP relating to the FCC's TRO/TRRO orders.[153] CLECs indicated that Qwest's PCAT deals with legal issues (such as when a product is legally available under the FCC's rulings) that should be dealt with in ICAs and negotiation of those agreements. In response, Qwest agreed on a CMP ad hoc call to circulate to CLECs a redlined version of at least one non-CMP TRRO PCAT to show which issues it believed were "process" issues that should be dealt with in CMP and were not redundant of ICA or template ICA terms. At a later monthly CMP meeting, however, Qwest reneged on that commitment.[154] Since then, as indicated in the surrebuttal testimony of Ms. Johnson, Qwest told CLECs that Qwest was placing the Change Request in completed status (though all of it was not completed)[155] and was instead opening new, separate Change Requests for each of the remaining

[152] Albersheim Response, p. 33.

[153] See Exhibit BJJ-45.

[154] See Exhibit BJJ-45.

[155] Qwest indicated in its minutes for the meeting that it asked at the meeting if there were any objections to the closure of this Change Request, but the minutes are inaccurate in this respect because Qwest did not ask about objections. Qwest simply announced it was closing the Change Request.

products Qwest had previously included in the former single Change Request.[156] Based on this unilateral action by Qwest in disregard of Eschelon's repeated requests to negotiate these issues with respect to the ICA rather than placing UNE availability and other terms through CMP, Ms. Stewart testifies: "discussions are under way as to how best to review the various systems and process changes that occurred as a result of these FCC orders."[157] Apparently, Qwest is attempting to assure the Commission that it need do nothing here because there is another forum in which issues are being discussed. Although Qwest could have used its own CMP forum at any time (as in 2005 it said it would do, along with SGAT updates),[158] it chose to issue non-CMP notices[159] instead and is only choosing to

[156] Per the CMP document, the definition of development is: "Development – A product/process CR is updated to a Development status when Qwest's response requires development of a new or revised process. A systems CR is updated to Development status when development begins for the next OSS Interface Release." (*See BJJ-1 or http://www.qwest.com/wholesale/downloads/2007/070129/QwestWholesaleChangeManagementDocument_01_29_07.doc, at p. 55).*

[157] Stewart Response, p. 58, lines 13-14.

[158] Exhibit BJJ-45, 6/30/05 CMP meeting minutes, p. 11 ("Cindy B-Qwest said that this CR was opened as a way to communicate changes in the TRO/TRRO. She said that there are more changes coming & the CR is the means to share those changes. Cindy said that the CR was initially issued when the TRO came out and had changes. She said that we had to pull back some of the PCATs but will keep the CR open until we can finish CR. . . . She said that as SGAT language changes, we will have a comment period & that the States will engage you when decisions are made. Cindy also said that PCAT changes will be brought through CMP."). *See also* Exhibit BJJ-7, pp. 1 & 8 (chronology, quoting these minutes).

[159] Qwest has argued this was not a choice but the result of an agreement not to use CMP. Apparently to explain away its failure to use CMP as it had previously indicated it would do, Qwest claimed there was an agreement in CMP that PCAT changes specific to the TRRO are handled outside the scope of CMP. *See, e.g.*, BJJ-33; *see also* Starkey Direct, p. 71. As discussed below, Qwest repeatedly used this alleged agreement as a sword to prevent mutual development of processes (which Eschelon requested occur in ICA negotiations) based on an alleged inability to act because of that agreement. Note how quickly the "agreement" dissipated upon Qwest's self-interest in bringing the PCATs into CMP. Suddenly, the alleged obstacle that prevented discussion of these issues for years is no obstacle at all.

bring the issues to CMP now that Commission oversight in the arbitrations is imminent. Qwest should not be able to dodge review of the issues in that manner at this late date.

Qwest ignores the fact that when this issue was discussed in CMP (i.e., pre-arbitration), CLECs said the proper alternative to CMP was to handle TRRO changes in law through ICA negotiations that, if unsuccessful, would be decided by state commissions in ICA arbitrations.[160] CLECs including Eschelon maintained that Qwest should negotiate TRRO issues, including operational and conversion issues, in ICA negotiations,[161] as recommended by the FCC.[162] Eschelon continues to maintain that is the case.

Furthermore, Qwest has said over time that changes will be made in conjunction with SGAT updates. Qwest has taken this position in CMP, through its service management team, and in ICA negotiations. On June 30, 2005, Qwest committed in CMP:

> ***. . . as SGAT language changes, we will have a comment period*** and that the States will engage you when decisions are made. ***Cindy also said that PCAT changes will be brought through CMP.***[163]

[160] *See, e.g.*, Exhibit BJJ-7, p. 4 (11/17/04 CMP November monthly meeting minutes). *See* Qwest Exhibit RA-24RT, p. 7. A comparison of Qwest Exhibit RA-24RT to Exhibit BJJ-7 shows that Eschelon accurately and fairly quoted from the minutes reflected in RA-24RT.

[161] *See, e.g.*, Exhibit BJJ-7, p. 4 (11/17/04 CMP November monthly meeting minutes); Qwest Exhibit RA-24RT.

[162] *e.g.*, TRRO, ¶¶ 196 and 227.

[163] Exhibit BJJ-7, pp. 8-9 (6/30/05) (emphasis added); Qwest Exhibit RA-24RT, pp.7-8.

On March 29, 2006, Qwest service management similarly told Eschelon:

> As agreed to at CMP, the PCATs/Business Procedures associated specifically to TRRO are handled outside the scope of CMP ***until such time that there is an approved SGAT,*** which is why the change was noticed as a non-CMP document.[164]

On April 6, 2006, the Qwest ICA negotiations team similarly told Eschelon:

> From those discussions it was agreed that ***until such time that a SGAT is filed*** and the TRRO related issues were finalized that all of the TRRO processes and issues would be deferred from a CMP perspective.[165]

Q. DOES QWEST'S REBUTTAL TESTIMONY IN THIS PROCEEDING TELL A DIFFERENT STORY?

A. Yes. Despite these assurances over more than a year's time from every one of these groups within Qwest that Qwest would update the SGATs and deal with "TRRO" issues (including those that Eschelon was asking Qwest to negotiate under Section 252) in CMP as Qwest did so, Qwest testifies in this case that it had "***stopped updating its SGATs***."[166] Qwest added that, "Indeed, the SGATs have not been updated to incorporate changes in law since 2002 and are therefore

[164] Exhibit BJJ-7, p. 11; *see also* Exhibit BJJ-33 (full text) (emphasis added).

[165] Exhibit BJJ-7, p. 12 (4/6/06) (emphasis added). As the above quotation shows (*see also* full paragraph quoted at p. 12 of Exhibit BJJ-7), in April of 2006, Qwest was still promising to raise the separate, business impacting "processes and issues" with the Commission in association with SGAT filings. Qwest made the latter statement in response to Eschelon's Section 252 request to negotiate collocation and APOT issues (*see id*. & Exhibit BJJ-25). Yet, Qwest responded that it is "premature to initiate TRRO discussion at this time." *See* Exhibit BJJ-7, p. 12. Given that Eschelon asked to negotiate TRRO issues years ago (*see, e.g*., Exhibit BJJ-7, p. 4 (11/17/04); Qwest Exhibit RA-24RT, pp. 17-18) and also the APOT issue promptly when Qwest finally disclosed it (*see* Exhibit BJJ-25), the Commission should not allow Qwest to exclude these issues from this arbitration because Qwest has steadfastly refused to take up the issues in negotiations (or even CMP) in the intervening months and years. Eschelon has properly brought them to negotiation and before this Commission in arbitration. [*See* Subject Matters 18 (Conversions) and 26 (Commingled Arrangements).]

[166] Stewart Response, p. 26, lines 18-19.

outdated documents."[167] This raises a genuine question about Qwest's conduct in representing to Eschelon and other CLECs that it will deal with issues in conjunction with updating the SGAT when, according to Ms. Stewart's sworn testimony, Qwest had no intention at all of updating those SGATs.[168] If Ms. Stewart's testimony is true that Qwest stopped updating its SGATs in *200*2, then the possibilities are that the Qwest personnel making the above-quoted representations in CMP in June of *2005* were either aware of that decision and nonetheless told CLECs the SGATs would be updated or were unaware of that key piece of information and provided inaccurate information to CLECs. In either case, the information provided in CMP was unreliable. There is no evidence that sending issues to CMP now will result in more reliable information being obtained. It raises another question about the usefulness of handling these issues in CMP (as Qwest is claiming it is doing by first reactivating the Change Request and then opening new Change Requests related to TRRO issues now).

At a recent CMP meeting that Qwest held to discuss TRRO issues, for example, Eschelon provided a question in advance as to whether SGAT-related filings similar to a filing recently made (but later withdrawn) in Colorado to update a tariff relating to the SGAT would be made in other states. The Qwest representative indicated she was not sure, said the question did not fall within her

[167] Stewart Response, p. 26, lines 19-20.

[168] As I explained in my rebuttal testimony, Qwest also recently notified CLECs that Qwest was no longer making the SGATs available for CLEC opt in . Starkey Rebuttal, p. 18. *See also*, Exhibit BJJ-38.

area of responsibility, and said she would not assist Eschelon in identifying who at Qwest might know.[169] If Qwest's explanation for the mis-information in the earlier CMP meetings relating to the SGAT is that the Qwest CMP participants are not attorneys or informed about TRRO issues, then that is all the more reason not to refer TRRO-related issues to CMP.

When re-designing CMP, New Edge pointed out that CLEC CMP participants are generally operational business people, not attorneys who can address impacts on ICAs. Qwest replied that CLECs should not be concerned about this because: (1) this has been addressed with language in the CMP Document that states the ICA controls over CMP; and (2) "contractual issues, themselves, would not be addressed" in CMP.[170] Implementation of the TRO/TRRO is a legal and contractual[171] issue. As the above quotations illustrate, Qwest has consistently pushed out dealing with business-impacting issues that have resulted from the TRO/TRRO based on its promise to deal with them collaboratively when the time is right. At the same time, Qwest has been busily churning out business-

[169] Exhibit BJJ-45, p. 7 (2/6/07 CMP meeting minutes) ("Cindy Buckmaster-Qwest stated that did not fall into her area of responsibility and noted that the question is not for this call. Cindy stated that this call is for the discussion of TRRO PCATs ONLY. Karen Clausen-Eschelon asked if Cindy (Buckmaster-Qwest) was going to find out who would answer her question. Cindy Buckmaster-Qwest said no . . . . Cindy stated that she was not sure if there were filings in other states as that is not her decision or area of responsibility. Karen Clausen-Eschelon stated that she understood that Cindy (Buckmaster-Qwest) does not know the answer.").

[170] Transcript of 271CMP Workshop Number 6, Colorado Public Utilities Commission Docket Number 97I-198T (Aug. 22, 2001), pp. 291-292 (Andrew Crain of Qwest and Penny Bewick of New Edge); *see id*. p. 292, lines 14-15 (Mr. Crain) ("Contractual issues, themselves, would not be addressed in the Change Management Process.").

[171] *See, e.g.*, TRRO ¶196 & note 519 & ¶198.

affecting[172] secret (*i.e.*, password-protected) PCATs[173] that did not go through any collaborative process at all – not ICA negotiations (as requested by Eschelon and other CLECs),[174] not CMP (as promised by Qwest),[175] and not Commission proceedings (as also promised by Qwest).[176] Qwest has implemented its own "TRRO" view of the world through notifications that it is choosing *not to send through the CMP* notification or change request processes, while at the same time refusing to negotiate these issues under Section 252 on the grounds that *Eschelon* should take the issue to CMP.[177] Eschelon has exercised its Section 252 right to raise these issues in negotiation and arbitration. Qwest, as the party advocating they belong in CMP, has elected not to raise them there (or in any regulatory proceeding) during negotiations and before Eschelon incurred the expense of the ICA arbitrations. As such, Eschelon continues to maintain that this arbitration is the appropriate place to deal with the business impacting aspects of the TRO/TRRO.

Qwest has implemented its many TRRO PCATs[178] without scrutiny (through CMP or otherwise) and is now, remarkably, claiming that the "existing" processes

[172] Exhibit BJJ-25.

[173] *See, e.g.*, Exhibit BJJ-28.

[174] Exhibit BJJ-7, p. 4 (11/17/04 CMP November monthly meeting minutes); *see also,* Qwest Exhibit RA-24RT, pp. 17-18 and Exhibit BJJ-25.

[175] Exhibit BJJ-7, pp. 8-9 (6/30/05); *See also,* Qwest Exhibit RA-24RT, pp. 7-8.

[176] Exhibit BJJ-7, pp. 8-9 (6/30/05); *See also,* Qwest Exhibit RA-24RT, pp. 7-8.

[177] Exhibit BJJ-25; *See also,* Stewart Response, p. 60, lines 13-18 and p. 66, line 22 – p. 67, line 7.

[178] See, Exhibits BJJ-28 & BJJ-45.

are already in place and it will be too costly or time-consuming to change them (e.g., conversions, see Issues 9-43 and 9-44). However, Qwest should not have implemented them unilaterally in the first place. If it ultimately incurs costs in changing processes that it should not have put in place unilaterally and over Eschelon's objections, Qwest is the cost causer and should bear those alleged costs.

Q. MS. ALBERSHEIM DESCRIBES THESE EVENTS AS QWEST'S CONSIDERABLE ATTEMPTS TO BE RESPONSIVE TO ITS CLEC CUSTOMERS.[179] WHAT IS YOUR REACTION?

A. This testimony is telling as to Qwest's view of how it may treat its wholesale customers. In the face of clearly expressed desires by its customers to deal with these issues in pretty much any way other than the unilateral approach Qwest has taken, Qwest persists undeterred in its objectionable approach. Persisting in advancing the opposite of the CLECs' desired outcome is a unique interpretation of "responsiveness," and fully underscores Eschelon's insistence in this docket for contractual certainty. Eschelon is clearly not going to get a resolution through Qwest's customer service efforts, and therefore, needs the statutorily assigned oversight of the Commission to resolve these issues.

Q. MS. ALBERSHEIM CLAIMS THAT ESCHELON IN ITS EXAMPLES AND EXHIBITS IS TRYING TO FALSELY PAINT QWEST AS ACTING

[179] E.g., Albersheim Response, p. 33, lines 1-3.

INCONSISTENTLY IN CMP BY PRESENTING "SMALL PIECES OF THE RECORD."[180] IS MS. ALBERSHEIM CORRECT WITH REGARD TO THE SECRET TRRO PCAT EXAMPLE?

A. No. Ms. Albersheim's claim is incorrect as it relates to all of the examples I provide, but with regard to the secret TRRO PCAT example specifically, Exhibit BJJ-7 provides an accurate description of events, and the Qwest information that Ms. Albersheim omitted from her direct testimony but included in her rebuttal testimony only confirm the facts as presented in that chronology. Exhibit BJJ-7 contains quotations from documents that Ms. Albersheim attached as response Exhibit RA-24RT. A comparison of the excerpts in Exhibit BJJ-7 to Qwest's Exhibit shows that Eschelon Exhibit BJJ-7 accurately and fairly quotes that document, provides information (such as URLs) to allow easy access to those documents, and is more comprehensive than Qwest's exhibit, as it also includes additional information as well. And despite Ms. Albersheim's claim that Eschelon provided only "small pieces" of the record on this issue, Ms. Albersheim provides no examples of information omitted by Eschelon to support her claim.[181]

[180] Albersheim Response, p. 21, line 5.

[181] *See* Albersheim Response, pp. 31-33.

5. Expedited Order Example[182]

Q. MS. ALBERSHEIM CLAIMS THAT ITS PROPOSAL FOR EXPEDITED ORDERS "REFLECTS QWEST'S CURRENT PRACTICE"[183] WHICH IT HAS SAID WAS DEVELOPED "THROUGH THE CMP."[184] PLEASE RESPOND.

A. First, Ms. Albersheim's own testimony rebuts her "current practice" argument because she admits that Qwest's proposal *does not* reflect Qwest's current expedite service practice in Washington.[185] The terms Qwest offers to CLECs for expedites in Washington reflected the practice for CLEC unbundled loop orders in all 14 Qwest states ***prior to*** the Qwest CMP changes summarized in Exhibit DD-31 -- expedites are available at no additional charge when certain emergency-based conditions are met;[186] expedites are not available for an additional fee.[187] Although Qwest implemented changes in CMP over CLEC objection and in

[182] Starkey Direct, pp. 43 and 62-63; *see also*, Webber Direct (adopted), pp. 60-92 and Webber Rebuttal (adopted), pp. 48-67; Exhibit BJJ-3 and BJJ-4. I discuss CMP aspects of expedited orders. Issue 12-67 and subparts related to the ICA language and cost for expedited orders are discussed by Mr. Denney (who has adopted the portion of Mr. Webber's testimony related to Issue 12-67 and subparts).

[183] Albersheim Response, p. 42, line 12.

[184] Albersheim Response, p. 52, line 10.

[185] Albersheim Response, p. 42 lines 4-10 and lines 18-25.

[186] 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."

[187] 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."

violation[188] of existing contract terms[189] in other states, Qwest was unable to implement the CMP changes in Washington. Qwest has a UNE tariff in Washington that contains approved rates but Qwest did not obtain an approved rate for a separate fee (in addition to the approved loop installation non-recurring charges, "NRCs") in the amount it charges under its template amendment in other states ($200 per day advanced) for expedited orders.

Ms. Albersheim claims that in order for Qwest to offer fee-added expedites in Washington (which constitutes Qwest's proposal on Issue 12-67), Qwest would have to file a tariff in Washington, which is has not done.[190] Given that the approved ICA requires Qwest to offer expedite capability to Eschelon in Washington[191] and Qwest's UNE Washington tariff contains an ICB rate for expedites,[192] a more accurate statement is that, although Qwest is required to offer expedites in Washington, Qwest cannot charge an additional fee of $200 per day advanced, over and above the approved installation NRC, for expediting

[188] *See, e.g.*, Exhibit DD-30: Executive Summary from the Direct Testimony of Pamela Genung (in which AZ 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"].

[189] *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.").

[190] Albersheim Response, p. 42 lines 21-25,

[191] *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.").

[192] 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

unbundled loop orders in Washington without a tariff containing such a per day rate.

Second, Ms. Albersheim's references to Covad's Change Request and Qwest's offering of the fee-added expedite service to CLECs fails to mention that CLECs did not request the fee-added expedite process[193] to *replace* the emergency-based Expedites Requiring Approval process.[194] As discussed in Eschelon's testimony on expedites,[195] CLECs had certainty with the long-standing emergency-based Expedites Requiring Approval process (which had been available for loops since at least 2000).[196] CLECs sought – not to eliminate one process in favor of the other (as suggested by Qwest) but – to use *both* processes to expedite orders, including for unbundled loops (which are, per Qwest, "designed" facilities). At the time Qwest introduced its *fee-added* non-emergency expedite process in other states, it assured CLECs that the new fee-added process was *in addition* to the existing emergency-based expedite process. Qwest's statements are directly quoted on page 82 of Eschelon's direct testimony on expedites.

[193] While Covad, due to its business plan may order primarily "designed" products, Covad asked for an "Enhanced Expedite Process ***for Provisioning***," as the title of the Change Request reflects. *See* Exhibit BJJ-46, p. 5. Qwest was the company that said that it would accept the change request "***with the caveat*** that it will be looked at and implemented on a product by product basis. ***Qwest*** will continue to look at all of the individual products to determine if ***we*** will implement those changes." *See* Exhibit BJJ-46 at 14 (emphasis added) (p. 10 of 11 of CR; p. 14 of Exhibit).

[194] Albersheim Response, p. 42, lines 10-11.

[195] Mr. Denney adopts Mr. Webber's testimony on expedites.

[196] 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").

Qwest's apparent attempt to portray its Version 27 and 30 PCAT changes to remove unbundled loops from the emergency-based expedite process as a CLEC-desired change is inconsistent with the documented facts.[197] Despite Qwest's suggestions that these changes were associated with Covad's change request,[198] Qwest specifically put "not applicable" on its Version 27 and 30 notices in the space Qwest itself provides for listing any "Associated CR Number."[199] On notices for earlier Versions, issued before the Covad change request was completed, Qwest placed the Covad change request number in this category.[200] Therefore, CLECs knew that the earlier changes may be related to the Covad change request. Qwest had left the Covad change request open while it determined whether any other products would be added to the fee-added expedite process.[201] Once Qwest agreed to close/complete the Covad change request in July of 2005, CLECs had a reasonable expectation that there would be no additional changes to the products under each process. Versions 27 and 30 were Qwest-initiated changes, announced in October of 2005 by Level 3 Qwest notifications. They were *not* Level 4 change requests; they were not associated

[197] CLECs known to Eschelon who objected to the Qwest-initiated CMP changes to Versions 27 and/or 30 of Qwest's Expedites and Escalations Overview PCAT include Eschelon, McLeodUSA, PriorityOne, Integra, Velocity, AT&T, ELI, and VCI. *See* Exhibit BJJ-4, pp. 1-2. For a summary of Eschelon's actions in CMP, *see id.* and my discussion of Expedited Orders.

[198] *See, e.g.*, Albersheim Direct, p. 42, lines 8-11 ("expedites for designed and non-designed services under any and all circumstances for a per day charge…. The latter is a service offering that Covad requested through a Change Request in the CMP…").

[199] *See* Exhibit BJJ-47.

[200] *See, e.g., id.*

[201] *See* Exhibit BJJ-46, p. 15.

with the Covad change request; and they were opposed by Eschelon, as well as other CLECs.[202]

Q. QWEST THEN CLAIMS THAT QWEST DEVELOPED ITS CURRENT EXPEDITE PROCEDURES IN OTHER STATES BECAUSE OF ABUSE OF THE EMERGENCY CONDITIONS.[203] IS THAT WHAT QWEST SAID AT THE TIME?

A. No. Qwest now claims that, after the July 2004 implementation of the fee-added expedites in other states reflected in PCAT Version 11, Qwest "was seeing cases" of abuse.[204] Ms. Albersheim testifies that "CLECs were gaming the system and submitting spurious emergency expedite requests."[205] Qwest provided no detail or documentation in support of this new claim in testimony. In the Arizona Complaint Docket, Ms. Martain of Qwest claimed generally that CLECs tried to escalate expedite requests when they did not have an expedite amendment and the situation did not qualify for an expedite under the emergency-based expedites requiring approval process.[206] Qwest may have included Eschelon in that example because Qwest claimed that Eschelon needed an expedite amendment,

[202] *See* Exhibit BJJ-4, pp. 1-2 (CLECs listed in previous footnote).

[203] Albersheim Response, p. 52.

[204] Qwest (Ms. Martain – CMP Process Manager) Direct (July 13, 2006) (Arizona Complaint Docket), p. 24, lines 15-18.

[205] Albersheim Response, p. 52.

[206] Qwest (Ms. Martain – CMP Process Manager) Direct (July 13, 2006) (Arizona Complaint Docket), p. 24, line 31 – p. 25, line 3 ("CLECs trying to escalate expedite requests when they did not have an expedite amendment").

but Eschelon's position is that it does qualify for an expedite under its existing ICA (and Arizona Staff testified in that case[207] that Staff agreed).

Qwest makes the decision of whether to accept or deny an expedite request. If the conditions were not met in any examples, presumably Qwest would have denied the expedite requests because the conditions had not been met. After all, there is a list of conditions and Qwest requires the CLEC to provide support that it meets the conditions. If there had been a widespread problem of gaming the system with CLECs requesting emergency expedites under circumstances that did not meet the emergency conditions, it seems that Qwest would have identified that problem when announcing the changes that it now says are designed to address the problem. When Qwest announced its Versions 27 and 30 PCAT changes, however, Qwest made no mention of alleged abuse, gaming the system, or spurious requests. In its announcement of its Version 30 change – which removed expedite capability for unbundled loops from emergency-based expedites in other states – Qwest cited a legal reason ("parity") as the reason for this Qwest-initiated change.[208]

Q. MS. ALBERSHEIM SUGGESTS THAT ESCHELON DID NOT RAISE RELEVANT ISSUES IN THE CMP DURING THE IMPLEMENTATION OF EXPEDITE PROCESS CHANGES AND INSTEAD OPTED FOR

[207] *See* Exhibit DD-30 (Executive Summary from Staff Testimony).

[208] Exhibit BJJ-41, p. 26.

LITIGATION.[209] IS THAT TRUE?

A. No. Ms. Albersheim is wrong, as clearly demonstrated by the evidence submitted with Eschelon's direct testimony. As described in Eschelon's direct testimony,[210] Eschelon took several steps to raise relevant issues in CMP regarding expedited orders, including:

- Eschelon escalated Qwest's Version 27 Expedite PCAT changes in CMP, by joining McLeod's escalation.[211] Qwest later confirmed that "Eschelon did join the escalation,"[212] and it included Eschelon (along with several other CLECs) in Qwest's response to this escalation.[213] Qwest provided a binding response in CMP to this escalation.[214] The CMP Document provides for escalations, and participation in other CLEC's escalations[215] in Section 14.0.[216]

- Eschelon requested a CMP ad hoc meeting to discuss Qwest's Version 30 Expedite PCAT notice.[217] The CMP Document provides that a CLEC may request additional meetings in Section 3.0.[218] Eschelon participated in the call, and Qwest admits that "some CLECs expressed dissatisfaction on the ad-hoc call."[219]

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[209] Albersheim Response, pp. 9-10.

[210] Webber Direct (adopted), pp. 79-81.

[211] Exhibit BJJ-4, p. 1, #2 (#39 PROS.09.12.05.F.03242. Expedites_ Escalations_V27); *See also,* Exhibit BJJ-3, p. 12.

[212] Exhibit BJJ-4, p. 1, #3; *See also,* Exhibit BJJ-3, p. 12.

[213] Exhibit BJJ-4, p. 2, #4.

[214] Exhibit BJJ-4, p. 4, ##11-12.

[215] Exhibit BJJ-1, p. 99 (second bullet point).

[216] Exhibit BJJ-1, pp. 98-99.

[217] PROS.10.19.05.F.03380. ExpeditesEscalations V30. *See* Exhibit BJJ-4, p. 2, #5 and Exhibit BJJ-3, p. 12.

[218] Exhibit BJJ-1, p. 21.

[219] Qwest (Martain) Direct (July 13, 2006), p. 27, lines 3-4, in *In re: Complaint of Eschelon Telecom of Arizona, Inc. Against Qwest Corporation,* ACC Docket No. T-01051B-06-0257, T-03406A-06-0257 ["Arizona Complaint Docket"].

- Eschelon submitted comments on Qwest's Level 3 Version 30 Expedite PCAT notice.[220] The CMP Document provides that a CLEC may provide comments upon Level 3 notices in Section 5.4.4.[221] Eschelon's 11/3/05 CMP comments are posted on the Qwest CMP web page, and are quoted on pages 80-81 of Eschelon's direct testimony).[222]

- Eschelon escalated with Qwest pursuant to the dispute resolution provisions of the Qwest-Eschelon ICAs[223] and the CMP Document (§15.0).[224] Eschelon's dispute resolution letter expressly identified Qwest's Version 27 and Version 30 Expedite PCAT CMP changes as subject to the dispute in the subject line: "Joint McLeod-Eschelon Escalation #39 Re. P**ROS.09.12.05.F.03242.Expedites_Escalations_V27 – Denied by Qwest 11/4/05;** Eschelon 11/3/05 objections to PROS.10.19.05.F.03380.ExpeditesEscalationsV30."[225]

- Eschelon proposed Section 12.2.1.2 (expedite language) in ICA negotiations.[226]

- Eschelon filed a complaint with the Arizona state commission.[227]

As this last bullet point shows, Eschelon filed a complaint with a state commission to resolve the CMP and ICA dispute resolution for the issues

[220] PROS.10.19.05.F.03380. ExpeditesEscalations V30. *See* Exhibit BJJ-4, p. 3, #7 and Exhibit BJJ-3, p. 13.

[221] Exhibit BJJ-1, p. 41.

[222] *See* Webber Direct (adopted), pp. 80-81.

[223] An Eschelon March 21, 2006, escalation and request for dispute resolution letter to Qwest stated that Eschelon reserved its right to submit the dispute to all of the state commissions pursuant to the dispute resolution provisions of the ICAs, and an attachment to that letter included relevant ICA provisions from each state.

[224] Exhibit BJJ-1, p. 100; *See also,* Qwest Exhibit RA-2. Regarding CMP dispute resolution, *see* Starkey Rebuttal, pp. 32-36.

[225] Exhibit BJJ-3, p. 14.

[226] *See* Qwest April 6, 2006, ICA draft. Section 15.0 of the CMP Document, p. 100 (Exhibit BJJ-1) states: "This process does not limit any party's right to seek remedies in a regulatory or legal arena at any time." Section 252 negotiation and arbitration is one such regulatory or legal arena. *See* Starkey Direct, p. 45.

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

addressed in the complaint after taking a number of steps in CMP. Ms. Albersheim attempts to make it appear as if Eschelon took no action in CMP before taking the dispute to the state commission, which is simply not true. In any event, CMP Section 15.0 specifically provides that a complaint may be brought "at any time."[228] So, Eschelon's complaint is fully consistent with the CMP Document.

Despite all of the other steps taken by Eschelon in CMP, Qwest complains that Eschelon did not also seek postponement of the changes or Alternative Dispute Resolution.[229] I discussed postponement on pages 41-42 of my direct testimony and on pages 30-32 of my rebuttal testimony. Qwest ignores that testimony and instead describes postponement as a "powerful mechanism."[230] As I previously discussed, however, it is a weak mechanism because Qwest is the sole decision maker on a postponement request, which even if granted by Qwest may be as short as thirty days. Moreover, Qwest's continued opposition to Eschelon's position both in the ICA arbitrations in multiple states and the Arizona complaint case demonstrates the futility of re-circulating the issue in various CMP settings in which Qwest is the decision maker. Using those processes would have only delayed obtaining resolution of this issue. The CMP Document is clear that both

[228] Exhibit BJJ-1, Section 15.0, p. 100; *See also,* Exhibit RA-2.

[229] Albersheim Response, pp. 9-10.

[230] Albersheim Response, p. 9, line 22.

of those processes are optional,[231] and there was no requirement to pursue them before raising issues in negotiations or in the Arizona complaint case.[232]

In addition, if Qwest really desired dispute resolution, Qwest should have requested it. In the Arizona Complaint Docket, Arizona Commission Staff said "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."[233] In the particular rehabilitation center example described in that Complaint,[234] the Arizona Staff indicated that "Qwest should have expedited the request first and then followed up afterwards with the dispute resolution process."[235] Instead, Qwest refused to provide expedite capability under the existing ICA while the customer was out of service. Arizona Staff concluded that "Qwest did not adhere to the terms and conditions of the current Qwest-Eschelon Interconnection

[231] Exhibit BJJ-1, Section 5.5 (postponement), p. 45 and Section 15.0 (ADR), p. 100. Regarding postponement, see Starkey Rebuttal, pp. 31-32. Regarding ADR, *see id*. pp. 32-36.

[232] Eschelon's CMP comments represent another step that Eschelon took to raise relevant issues in CMP during the implementation of the expedite process changes. In response to Eschelon's CMP comments on the Covad change request, Eschelon obtained two commitments from Qwest (both reflected in the above quotation from Qwest's CMP Response): (1) implementation of the Covad CR would not result in replacement of the existing emergency-based option (*i.e*., "continue with the existing process that is in place"); and (2) resources would remain available to process expedite requests under the existing emergency-based option even with the addition of the optional fee-added alternative (*i.e*., "this will not impact resources"). To the extent that Qwest criticizes Eschelon for not seeking postponement or seeking Alternative Dispute Resolution with respect to Covad's change request (Albersheim Response, pp. 9-10), there was no reason to do so, because Qwest made these commitments to Eschelon and, therefore, there was no impact on the existing emergency-based option to challenge at that time.

[233] Staff Testimony, Arizona Complaint Docket, p. 36, line 21 – p. 37, line 2.

[234] Arizona Complaint, ¶¶22-41.

[235] Staff Testimony, Arizona Complaint Docket, p. 34, lines 19-20.

Agreement, which allows Eschelon the capability to expedite orders when Qwest denied this option without signing an amendment to the Agreement."[236] Clear expedite terms are needed in the new ICA to avoid a similar situation in the future.

Q. QWEST STATES THAT YOU OMIT "THE PRIMARY REASON FOR WHY THE HEARING WAS DELAYED" IN THE ARIZONA COMPLAINT DOCKET.[237] PLEASE RESPOND.

A. In my testimony, I pointed out that the ten-month time period required to obtain a hearing date in the Arizona Complaint Docket as a result of Eschelon's CMP dispute resolution efforts is a far cry from the 31-day time period in which Qwest can accomplish changes through Level 3 CMP notifications.[238] This is true regardless of the reason for the length of the time needed to process the case.[239] In the event that Qwest were to claim that ten months is an unusually long period of time and Eschelon may receive relief earlier in other dispute resolutions, I specifically quoted the representation of Qwest counsel that six months to hear a

[236] Staff Testimony, Arizona Complaint Docket, Executive Summary, Staff Conclusion No. 1.

[237] Albersheim Response, p. 10, lines 14-15.

[238] Starkey Direct, pp. 49-50. Similarly, when Eschelon wanted a change in the delayed order policy, completion of Eschelon's delayed order change request in CMP from submission to an unsatisfactory closure, took 469 days, whereas when Qwest wanted a change Qwest was able to implement it in CMP in only 43 days. *See* Exhibit BJJ-2.

[239] Qwest asserts that one of its attorneys on the case had a scheduling conflict with another case. *See* Albersheim Rebuttal, p. 10, lines 15-16. Surely Qwest is not suggesting that this is a one-time experience and no other scheduling conflicts will arise in any other case to cause delays in other dispute resolution proceedings. Qwest does not point to any complaint case that has been tried in less than the 31-day period available to Qwest for its own Level 3 CMP changes. In fact, Qwest's "rocket docket" comment (quoted below and at page 49 of my direct testimony) suggests that the opposite is more generally true.

single issue presented by a complaint was so short an amount of time that Qwest had not even heard of rocket dockets proceeding that fast.[240] The need to make that point is validated by Ms. Albersheim's rebuttal testimony in which Qwest does, in fact, try to suggest that "the scheduling of the hearing for the Arizona docket" may not be the "norm for complaint proceedings."[241] According to Qwest's own counsel, however, several months is like a rocket docket compared to the norm.[242] The time required for a CLEC to obtain a result through CMP dispute resolution (regardless of whether that time is the same or somewhat different from the time needed in the Arizona Complaint Docket) is much longer than the 31-day period in which Qwest can accomplish changes through Level 3 CMP notifications. I also referred to Qwest's expressed intent to conduct multiple depositions and other discovery in that case as an example of the expense and resources that a CLEC in dispute resolution will experience that Qwest does not with its quick and easy notification process.[243] These facts should be considered when weighing any Qwest suggestion that dispute resolution for CLECs is the best means to address every issue. This is particularly true because

[240] AZ Complaint Docket, Transcript, Procedural Conference (July 27, 2006), p. 18, lines 20-24 (Counsel for Qwest stated: "So the whole point is, we look at this scheduling question as one that is perplexing; that why is it that we are moving -- I mean I've been involved in rocket dockets. I've never seen a case that goes from beginning to end within this period of time that we've proposed in this case, and maybe there's cases here that I'm unaware of. None in my experience.")

[241] Albersheim Response, p. 10, line 14.

[242] AZ Complaint Docket, Transcript, Procedural Conference (July 27, 2006), p. 18, lines 20-24 (quoted above).

[243] Starkey Direct, p. 49, lines 14-16.

Qwest will "probably never"[244] be the party initiating CMP dispute resolution. As noted in the Arizona Staff testimony quoted above, Qwest certainly did not initiate other dispute resolution in the situation in the Arizona Complaint Docket, despite its own alleged conclusion that this should have been done.

Q. YOU REFER TO ESCHELON'S COMPLAINT RELATING TO EXPEDITED ORDERS AS A CMP DISPUTE RESOLUTION, BUT MS. ALBERSHEIM TESTIFIES THAT ONLY ONE CLEC (NOT ESCHELON) HAS "EVER" USED THE DISPUTE RESOLUTION PROCESS IN CMP.[245] PLEASE EXPLAIN.

A. Qwest's claim doesn't make sense. In the case of Eschelon's Complaint, as I discussed in my testimony above, Eschelon's dispute resolution letter expressly identified Qwest's Version 27 and Version 30 Expedite PCAT CMP changes as subject to the dispute resolution. Eschelon's Complaint is a CMP dispute resolution. The VCI matter that Qwest points to as the only CLEC use of the dispute resolution process "ever"[246] in CMP, was not handled pursuant to Section 15.0 ("Dispute Resolution Process") but rather Section 18.0 ("Oversight Review Process") of the CMP Document.[247] Although Qwest for some unidentified

[244] Exhibit BJJ-20 (October 2-3, 2001 CMP Redesign Meeting Minutes, Att. 4, p. 36, Action Item #86); Starkey Rebuttal, p. 33.

[245] Albersheim Response, p. 10, lines 18-20.

[246] Albersheim Response, p. 10, line 18.

[247] As the name "Oversight" suggests, Section 18.0 indicates that it applies to issues raised with "using this CMP." *See* Exhibit BJJ-1, p. 111 and Qwest Exhibit RA-2. Section 18.0 of the CMP Document not only provides that it is "optional," but also that: "It will not be used when one or

reason singles out the VCI matter, several other matters have also been handled through Section 18.0 ("Oversight Review Process") of the CMP Document.[248] Given the expense and time associated with the CMP dispute resolution process, I am not surprised that it has not experienced a lot of use, but data with respect to the number of dispute resolutions is meaningless if Qwest can simply choose not to count valid dispute resolutions or uses some criteria for counting dispute resolutions other than those in the CMP Document (Section 15.0) itself.

Q. MS. ALBERSHEIM ASSERTS THAT YOUR CLAIM THAT THERE ARE NO CLEC CMP NOTIFICATIONS IS "NOT ENTIRELY ACCURATE" BECAUSE THERE IS AN EXTERNAL DOCUMENTATION PROCESS.[249] DO YOU AGREE?

A. No. The CMP Document is very clear on this point. Only Qwest may implement changes by notification in CMP.[250] All CLEC proposed changes are submitted as change requests,[251] as I indicated in my direct testimony.[252] Qwest's attempt to

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more processes documented in this CMP are available to obtain the resolution the submitter desires." *Id.*

[248] *See, e.g.*, Exhibit BJJ-42 (List of CMP Oversight Committee Meeting Minutes Posted on the Qwest Wholesale Website). See also, Exhibit BJJ-51 contains an example of a recent Eschelon request for Oversight Committee review of Qwest's refusal to provide minutes or review of minutes for CMP meetings per the CMP Document as it committed to do in CMP Redesign. See also, Exhibit BJJ-52, which includes the Oversight Committee Meeting minutes for the Oversight Meetings held on 1/4/05 and 1/10/05.

[249] Albersheim Response, p. 11, lines 4-9.

[250] Exhibit BJJ-1, Section 5.4, pp. 36-43. These are described as "Qwest Originated" changes. *See id*. p. 36; *See also,* Exhibit RA-2.

[251] Exhibit BJJ-1, pp. 24-25.

[252] Starkey Direct, p. 37, lines 19-21.

portray the External Documentation process as a notification process through which CLECs may implement product and process changes by notice, like Qwest, flies in the face of the CMP Document.

Ms. Albersheim's assertion also mischaracterizes the External Documentation process. As Eschelon said in its change request when requesting this process, Eschelon requested this process because "although Qwest has existing internal processes, Qwest has not documented many of those processes for CLECs."[253] Nonetheless, Qwest's process is to require CLECs to find information in Qwest's website, PCAT, or technical publications before they approach the Qwest service manager with requests for information.[254] In its change request, Eschelon pointed out that, "without adequate documentation, when the process breaks down, CLECs are forced to spend unnecessary time and resources debating with Qwest representatives about the process itself, when those challenges could be avoided by simply pointing to mutually accessible documentation that clearly states the process for all involved. Instead, unnecessary escalations waste CLEC and Qwest resources."[255]

[253] Qwest Exhibit RA-21RT, p. 1.

[254] Exhibit BJJ-43 (Qwest Service Center and Manager Roles in Relation to CMP) (6/6/02), p. 1 (first bullet point: "Requests for Information").

[255] Exhibit RA-21RT, p. 1.

Qwest documents processes for itself.[256] Until recently, Qwest provided access to its methods and procedures (with confidential information redacted) to Eschelon and other CLECs, so they had access to those procedures to allow a nondiscriminatory opportunity to use those procedures and train their employees on them (as well as to confirm that the procedures were applied in a nondiscriminatory manner). Qwest had said that, in order "to comply with the Telecommunications act of 1996 Qwest developed a redaction process which allows CLEC's access to the retail product methods and procedures contained in InfoBuddy that are available for Resale. That information is formatted into a WEB based application known as Resale Product Database ("RPD"). The redaction process removes only the proprietary information found in InfoBuddy that Qwest is not mandated via the Act to provide to CLEC's."[257] Recently, however, Qwest has "retired" RPD over Eschelon's objection, so that this information will no longer be available to CLECs.[258] Therefore, other clear and accessible documentation is even more important now than before.

The External Documentation process is a mechanism for CLECs to identify and request corrections in Qwest's documentation that Qwest should have corrected

[256] "Shon Higer-Qwest stated that Qwest does have a lot of procedures in place i.e. PCATs, business procedures, LSOG, and that they do get updated ***like Retail's do***." (emphasis added), from http://www.qwest.com/wholesale/cmp/archive/CR_SCR062105-01.htm; *See also* Exhibit BJJ-44 (Qwest 6/27/01 email).

[257] Exhibit BJJ-44 (6/27/01 Qwest Senior Service Manager email).

[258] Exhibit BJJ-44 (RPD Retirement notice, effective 4/29/06, and Eschelon objection).

itself.[259] It shifts the burden to CLECs to clean up Qwest's documentation. This is accomplished through a request placed to Qwest and not a general notification by a CLEC. This is very different from Qwest's ability to implement product and process changes by notice after waiting an applicable time period and then going forward with the change. And, like many other changes in CMP, only Qwest has the ability to deny an External Documentation request.[260]

B. CMP SCOPE AND QWEST'S CLAIM THAT IT CANNOT ACT ARBITRARILY IN CMP

Q. BEFORE ADDRESSING THE MERITS OF MS. ALBERSHEIM'S RESPONSE TESTIMONY ON THE RELATIONSHIP BETWEEN THE ICA AND CMP AND THE NEED FOR CONTRACTUAL CERTAINTY, DO YOU HAVE ANY GENERAL COMMENTS ABOUT HER TESTIMONY ON THIS ISSUE?

A. Yes. Numerous times throughout Ms. Albersheim's response testimony, she refers to Eschelon's proposals as "Eschelon's proposed CMP-related language."[261] Ms. Albersheim's repeated use of this phrase is an attempt to use semantics to make it appear as if Eschelon has CMP-related proposals. To be

[259] Exhibit BJJ-1, p. 22, Section 3.3 and p. 18, Section 2.4.4; *See also*, Exhibit RA-2.

[260] "You will be notified within 14 business days whether your request is accepted or denied." *See* file://corp/dfs/Team/Legal/Clauson/ArbitrationQwestICA/Minnesota/SurrebuttalLMNDRAFTS/307,14, Slide 14 (CLEC External Documentation Request Process Guide, September 2005, V4.0). *See* Albersheim Response, p. 11, lines 9-11 (indicating that Qwest has denied almost one-third of Eschelon's external documentation requests).

[261] *See, e.g.*, Albersheim Response, p. 4, line 15; p. 12, lines 23-25; p. 13, lines 10-11; p. 14, line 13; p. 15, line 24; p. 16, line 25; and p. 27, line 4. *See also* Albersheim Response, p. 5, lines 3-4; p. 5, line 19 ("CMP related issues.")

clear: Eschelon does not have "CMP-related language" proposals. What Ms. Albersheim is apparently referring to is Eschelon's proposals on the issues for which Qwest wants to omit from the ICA and rely exclusively on the CMP.[262] For these issues, Eschelon's proposals are not "CMP-related." Rather, a more accurate description of them would be "ICA-related" because they provide the contractual certainty that is the purpose of ICAs. It is only Qwest's proposals for these issues that can be accurately characterized as "CMP-related" because, rather than clearly spelling out terms and conditions in the ICA, they are silent or point to the CMP, Qwest's PCAT, Qwest's Standard Interval Guide ("SIG") on its website, or Qwest's discretion.[263]

Q. MS. ALBERSHEIM CLAIMS IN HER RESPONSE TESTIMONY THAT THE PURPOSE OF CMP IS TO CENTRALIZE PROCESSES AND PROCEDURES AND MAKE THEM UNIFORM ACROSS CLECS.[264] IS QWEST'S RESPONSE TESTIMONY CONSISTENT ON THIS POINT?

[262] Issue 1-1 (Interval Changes and Placement), Issue 12-64 (Root Cause & Acknowledgement of Mistakes), Issues 12-71 – 12-73 (Jeopardies), Issue 12-67 (Expedited Orders), Issue 12-87 (Controlled Production). There are less than one-third of total issues that now fall into this category because additional issues have closed since my direct testimony was filed. This list of issues is found at page 14 of my direct testimony.

[263] *See, e.g.*, Qwest's proposal for 1-1(a) and 1-1(e). Compare to Eschelon's proposals for the same issues. Starkey Direct, pp. 83-86. Regarding Issue 12-87 (Controlled Production), Qwest does not even rely upon CMP. As discussed below with respect to this issue, Qwest is violating a previously agreed upon requirement to bring its IMA implementation guidelines through CMP. Instead, Qwest wants the ICA to be silent on the issue addressed by Eschelon's proposal (which reflects Qwest's current practice), leaving it entirely to Qwest's discretion to change course. Regarding Issue 12-64 (Root Cause Analysis and Acknowledgement of Mistakes), Qwest did not submit processes ordered by the Minnesota Commission to CMP despite its own claims about CMP, as discussed below regarding Issue 12-64.

[264] *See e.g.*, Albersheim Response, pp. 13 & 15.

A. No. Ms. Albersheim once again discusses the ability of the CMP to "centralize" processes and systems[265] to ensure uniformity.[266] Ms. Albersheim argues that even though older ICAs contained specific terms, Qwest has "worked hard to eliminate" those specific terms processes and procedures from interconnection agreements.[267] She again claims that adopting Eschelon's proposals would be tantamount to "turning back the clock"[268] on Qwest's hard work in this regard.[269] In contrast, Qwest witness Ms. Stewart tells the exact opposite story from the one told by Ms. Albersheim. Ms. Stewart tells it this way:

> Moreover, due to the FCC's elimination of the "pick-and choose" rule and its move to the "all-or-nothing" rule, as discussed below, CLECs are much less likely to opt into a standard SGAT when ICAs have become increasingly more tailored to CLECs. This tailoring has increased as CLECs have shaped their businesses to have a specialized focus, which is often necessary to survive in today's highly competitive telecommunications market.[270]

Ms. Stewart's statement that CLEC ICAs have become increasingly tailored to the CLEC's specialized business is in direct conflict with Ms. Albersheim's testimony which states that Qwest has "worked hard to eliminate" these

[265] *See e.g.*, Albersheim Response, p. 13, lines 10-13.

[266] *See e.g.*, Albersheim Response, p. 15, lines 5-7 and p. 70, lines 6-9.

[267] Albersheim Response, p. 16, lines 21-25.

[268] Albersheim Response, p. 17, line 1.

[269] I have explained why Ms. Albersheim is wrong when she contends that the purpose of CMP is to implement uniform processes and procedures for all CLECs as well as why Eschelon is not attempting to "turn back the clock." See Starkey Rebuttal, pp. 10-11.

[270] Stewart Response, p. 26, line 23 – p. 27, line 5. Ms. Stewart also testifies at page 29 of her response testimony that "it is essential that the disputed issues in this arbitration be resolved on their merits and based on the law as it exists today."

specialized terms from CLEC ICAs.[271] Moreover, Ms. Stewart states that tailoring ICAs to meet the specialized needs of CLECs is often necessary for CLEC survival in the competitive telecommunications marketplace, but Ms. Albersheim is asking that any terms tailored to meet Eschelon's specialized focus be omitted from the ICA. Based on Ms. Stewart's response testimony, it appears that Ms. Albersheim's testimony, and the Qwest's positions which she supports, would have the effect of making it more difficult for Eschelon to survive in today's telecommunications marketplace. After all, Ms. Albersheim testifies that Qwest has "worked hard to eliminate"[272] the very thing that Ms. Stewart testifies is necessary to survival in today's telecommunications marketplace – *i.e.*, individualized ICAs.

Q. DESPITE MS. ALBERSHEIM'S TESTIMONY ATTACKING SPECIALIZED ICAS, HAS SHE PREVIOUSLY TESTIFIED IN SUPPORT

[271] Albersheim Response, p. 16. It is also directly contradictory to Ms. Albersheim's claim that "Before the creation of the current CMP, many interconnection agreements were highly individualized. Through the extensive collaborations in the creation of the CMP, and the section 271 evaluations of Qwest's systems and processes, Qwest and the CLECs have created mechanisms to ensure that Qwest can provide the best service for CLECs. As a result, Qwest has taken steps to try to make its contract language reflect these improvements. While process language still exists, Eschelon should not be allowed to compound the problem and turn back the clock on the processes that have proven effective for all of Qwest's CLEC customers." (Albersheim Direct, pp. 27-28) What Ms. Albersheim refers to as compounding a problem, Ms. Stewart refers to as necessary for survival in the telecommunications market.

[272] *See also* Albersheim Response p. 16 ["Qwest undertook significant efforts over the last four years to negotiate with Eschelon and to reach agreement on disputed ICA language. In the spirit of these negotiations, Qwest compromised when it could and tried hard to avoid including too much process and procedure in the ICA."] Ms. Stewart testifies that there has been increasingly tailored ICAs since the FCC's All Or Nothing Rule, which was issued in mid-2004 – the same time frame that, according to Ms. Albersheim, Qwest was engaging in negotiations with the goal of not including too much process and procedure detail in the ICAs.

OF SPECIALIZED TERMS IN ICAS WITH CLECS?

A. Yes. In her rebuttal testimony in the Minnesota arbitration proceeding, Albersheim testified "of course Qwest supports unique negotiated agreements with CLECs."[273] Ms. Albersheim's testimony from Minnesota stands in stark contrast to the position Ms. Albersheim expressed in her testimony here,[274] as well as Qwest's position in this case on these issues that uniformity should rule.[275] Additionally, as I explained in my direct testimony, Eschelon is not attempting to defeat uniform processes.[276] The vast majority of the contract language proposed by Eschelon matched Qwest's current practices, including language describing the same terms in the PCAT.

Q. MS. ALBERSHEIM CLAIMS THAT UNIFORM PROCESSES ARE NEEDED SO THAT IT CAN TRAIN ITS EMPLOYEES ON ONE SET OF PROCESSES AND HAS RESULTED IN A HIGHER QUALITY OF SERVICE,[277] AND THAT "UNIQUE",[278] "ONE-OFF"[279] PROCESSES UNDERMINES THESE OBJECTIVES. DOES MS. ALBERSHEIM'S CLAIM HOLD UP TO SCRUTINY?

[273] Albersheim Minnesota Rebuttal Testimony, p. 14. Ms. Albersheim left this testimony out of her direct and response testimonies in Washington.

[274] *See e.g.*, Albersheim Direct, p. 36, lines 19-23 and Albersheim Response, p. 5.

[275] *See* Starkey Direct, p. 14 for a list of issues for which Qwest would like to deal with in CMP rather than have specific contract language in the ICA. Some of these issues have since closed.

[276] Starkey Direct, p. 30.

[277] Albersheim Response, pp. 14-15.

[278] Albersheim Response, p. 5, line 11.

[279] *See, e.g.*, Albersheim Response, p. 13, line 17.

A. No. ICAs are not uniform among CLECs today and have not been in the past, so therefore, it is not uniform processes that has led to the service quality that Qwest characterizes as "outstanding."[280] Exhibit BJJ-39 shows some of the differences between the Eschelon ICA and Covad ICA. Ms. Johnson also describes more differences between the ICAs of various CLECs in her surrebuttal testimony. If Ms. Albersheim's claim was true that terms needed to be uniform in order for Qwest to provide the level of service quality it provides today, then CLEC ICAs would need to be uniform today. But they are not.

Ms. Albersheim also claims that uniform processes helps ensure that CLECs are treated in a nondiscriminatory manner.[281] However, as shown at page 28 of my direct testimony, the Washington Commission has already rejection the notion that different ICA terms amounted to discrimination. ["The fact that there are differences in change of law provisions among various agreements is not discriminatory: It reflects the variations in negotiation and arbitration of terms in interconnection agreements…"][282]

Q. MS. ALBERSHEIM CLAIMS THAT "UNIFORM PROCESSES AND PROCEDURES" ARE SUPPORTED BY THE CMP SCOPE CLAUSE. IS

[280] Albersheim Response, p. 14, line 18.

[281] Albersheim Response, p. 14, lines 12-14.

[282] Washington State Utilities and Transportation Commission, Docket UT-043013, Order No. 17 *Arbitrator's Report and Decision* dated July 8, 2005 at ¶79, ["*Washington ALJ Report"*], *affirmed in relevant part in "Washington Order No. 18.*"

SHE CORRECT?

A. No. At page 15 of her response testimony, Ms. Albersheim quotes Section 1.0 of the CMP as follows:

> CMP provides a means to address changes that support of affect pre-ordering, ordering/provisioning, maintenance/repair and billing capabilities and associated documentation and production support issues for local services…provided by…CLECs to their end users. The CMP is applicable to Qwest's 14-state in-region serving territory.

This language does not support Ms. Albersheim's notion that the purpose of CMP was to make processes and procedures uniform among all CLECs. First, as pointed out by the Minnesota Department of Commerce ("DOC") staff,[283] the language says that "CMP provides *a* means to address changes…", the language does not say that CMP is *the only* means to address changes. Section 1.0 of the CMP Document (Exhibit BJJ-1) specifically provides:

> In cases of conflict between the changes implemented through this CMP and any CLEC interconnection agreement (whether based on the Qwest SGAT or not), the rates, terms and conditions of such interconnection agreement shall prevail as between Qwest and the CLEC party…[284]

Second, Eschelon Exhibit BJJ-34 shows that Qwest has agreed to language in the ICA that differs from what is in Qwest's PCAT, without CMP activity. One example is Issue 8-24, which is found at pages 2-3 of Exhibit BJJ-34. Qwest

[283] Qwest-Eschelon MN ICA Arbitration, Reply Testimony of Minnesota DOC witness Ms. Doherty (Sept. 22, 2006), p. 10, lines 13-16 ("Q. Does inclusion of a process/product/procedure in CMP preclude that process/product/procedure from being defined in an ICA between two parties? A. No, it does not. It is important to note that in defining the scope of CMP, Qwest's CMP document states that "CMP provides a means to address changes" to OSS interfaces.").

[284] Section 1.0 of BJJ-1; *see* Starkey Response, pp. 25-28.

agreed to close this issue based on Eschelon's proposal – a proposal that Qwest testified would be a "change in existing Qwest process" and a change "that will impact all CLECs,"[285] and a proposal that was different from Qwest's PCAT. Notably, Qwest closed this language without any CMP activity. This undercuts Ms. Albersheim's notion that uniformity is the overarching goal, and generic ICAs relying upon detailed processes discussed in CMP are required for the sake of efficiency.

Q. DOES QWEST'S RESPONSE TESTIMONY BRING TO LIGHT ANY ADDITIONAL PROBLEMS WITH QWEST'S PROPOSAL TO PUNT CRITICAL ISSUES TO CMP?

A. Yes. Ms. Stewart admits on page 26 of her response testimony that "Qwest stopped updating its SGATs…and [SGATs] are therefore outdated documents." As I explained in my discussion of the Secret TRRO PCAT example, Qwest told CLECs that it was going to update its SGATs and address TRRO issues in CMP, but Qwest now admits that it has not updated its SGATs since 2002 (before the TRRO was released) and has no intention to do so. And as I explained in my rebuttal testimony (page 18), Qwest recently issued a Level 1 CMP notice that informed CLECs that Qwest was no longer making SGATs available for CLEC opt in.[286] Qwest unilaterally established these obligations related to the TRRO, and even assuming it now brings some of these issues to CMP, Qwest will

[285] Exhibit BJJ-34, page 2, citing Hubbard Washington Direct Testimony, p. 45, lines 15-18.

[286] *See* Exhibit BJJ-38.

undoubtedly treat them as "existing processes" and contend that it is too much work or too costly to change them.

Furthermore, I described in my rebuttal testimony Qwest's "entitlement" mentality when it comes to its negotiations template,[287] in which it assumes that its negotiations template should be used as the baseline for negotiations, placing the burden on Eschelon to justify deviation from this template. Ms. Stewart explains that the "Template Agreement is based on the individual states' SGATs."[288] But if Qwest stopped updating its SGATs in 2002 as Ms. Stewart explains, and the Template Agreement is based on these SGATs, then the Template Agreement, too, is an "outdated document." This provides even more reason to reject Qwest's notion that Eschelon should carry the burden to justify deviations from Qwest's Template Agreement.[289]

Q. MS. ALBERSHEIM CRITICIZES YOUR USE OF THE TERM "NOTICE AND GO" WHEN DESCRIBING QWEST'S CMP NOTICES. ARE HER CRITICISMS WARRANTED?

A. No. Ms. Albersheim simply ignores the meaning of Notice and Go I discussed in my testimony, establishes her own definition, and then criticizes me for not subscribing to her definition.

[287] Starkey Rebuttal, pp. 14 and 18-19.

[288] Stewart Response, p. 26, lines 14-15.

[289] Starkey Rebuttal, p. 14.

Q. PLEASE ELABORATE.

A. I discussed Qwest's "Notice and Go" ability in CMP at page 42 of my direct testimony as follows: "if Qwest wants to make a change, it simply notices CLECs, solicits and then may deny their requests for modifications, and implements its proposed change in as little as 31 days after initial notice." Therefore, the "go" in the "notice and go" allows Qwest to implement its proposed change once the notice period is over (which is 31 days for a Level 3 Notice).[290] No vote is taken regarding the change[291] and Qwest can reject (or "respectfully decline")[292] objections from CLECs and implement the change.[293]

Ms. Albersheim states that my description is not accurate and that only Level 0 and Level 1 notices can be "notice and go."[294] She equates notice and go with "effective immediately," whereas I defined it for purposes of my testimony as to "go" after the applicable notice period. Ms. Albersheim states notices that give CLECs an opportunity to comment or object cannot be "notice and go." However, she fails to realize that the comments and objections are ineffectual if Qwest disagrees because it can implement its changes even over unanimous

[290] Starkey Direct, p. 42, lines 18-19.

[291] I describe the two narrow circumstances that may trigger a vote in CMP at page 41 of my direct testimony. No votes are taken on whether Qwest product or process notices or CRs may be implemented.

[292] *See e.g.*, discussion of CRUNEC example, Starkey Direct, p. 57. line 16. *See also* Exhibits BJJ-9 and BJJ-10.

[293] Starkey Direct, p. 62.

[294] Albersheim Response, p. 7, lines 9-17. *See also,* Albersheim Response, pp. 29-30, claiming that Qwest's 2003 CRUNEC cannot be accurately characterized as "notice and go."

CLEC opposition.[295] I suppose there can be various definitions or uses of "notice and go," but the real issue here is the ability of Qwest to move forward (*i.e.*, "go") with its changes after issuing a notice of the change, regardless of the comments or objections it may receive from CLECs.[296]

Q. MS. ALBERSHEIM TAKES ISSUE WITH YOUR EXPLANATION THAT CMP PROVIDES NO REAL ABILITY TO KEEP QWEST FROM MAKING CHANGES QWEST WANTS TO MAKE IN CMP.[297] WOULD YOU LIKE TO RESPOND?

A. Yes. Though Ms. Albersheim points to a number of provisions by which a CLEC can pursue a disagreement with CLEC,[298] the bottom line is that Qwest has the ability in CMP to overrule CLEC disagreement and go forward with the Qwest change. If a CLEC asks Qwest to postpone a change, Qwest can reject the request.[299] If a CLEC files comments expressing disagreement with Qwest's change, Qwest can deny the comments.[300] If a CLEC raises an issue in CMP

[295] *See* Starkey Direct, p. 62. *See also*, CMP Document (Exhibit BJJ-1), Section 5.4. For example, in the CRUNEC example, the twelve active CLECs all unanimously objected, and Qwest moved forward anyway, until the Arizona Commission became involved. Exhibit BJJ-9, pp. 3-4.

[296] This is why Ms. Albersheim's claim that the CMP allows CLECs to "prevent" Qwest changes is false (*see, e.g.*, Albersheim Response, p. 6, lines 3-6; p. 7, lines 19-21; and p. 8, lines 15-16). Qwest would only change/postpone/withdraw a notice or CR in CMP if it wants to, and a CLEC cannot force Qwest's hand.

[297] Albersheim Response, pp. 6-7. *See also* Albersheim Response, pp. 9-10 and p. 5, lines 21-24.

[298] Albersheim Response, p. 6, lines 18-20.

[299] Starkey Direct, p. 41, line 13 – p. 42, line 2. Exhibit BJJ-1 (CMP Document), Section 5.5.3.3.

[300] Starkey Direct, p. 34, line 14. *See*, CRUNEC example.

Oversight Committee meetings, Qwest can reject it.[301] The CRUNEC example shows that Qwest moved forward with a serious, business-affecting change against the unanimous escalation and opposition of CLECs in CMP, and only changed its tune once a state commission weighed in and conditioned a favorable 271 recommendation on Qwest reverting back to its prior CRUNEC policy.

Q. MS. ALBERSHEIM CLAIMS THAT OUT OF THE 436 CHANGE REQUESTS MADE BY QWEST IN CMP, IT WITHDREW 97 OF THOSE BECAUSE OF VOCAL OPPOSITION BY CLECS OR BECAUSE, IN THE CASE OF SYSTEM CHANGES, THEY WERE GIVEN SUCH A LOW PRIORITY BY CLECS.[302] HAVE YOU ALREADY ADDRESSED THIS CLAIM?

A. Yes. This issue was addressed at pages 39-42 of my rebuttal testimony and in Exhibit BJJ-37. This information shows that Ms. Albersheim is wrong. Qwest only withdraws changes in CMP if it wants to, and there is nothing in the CMP Document that requires Qwest to withdraw changes because of CLEC opposition. Indeed, there is not even a vote taken on Qwest proposed product and process changes in CMP.[303]

Q. MS. ALBERSHEIM POINTS TO A LEVEL 1 NOTICE IT ISSUED ON

[301] Starkey Direct, pp. 67-68, footnote 103. CLECs argued that changes to UNE availability should be addressed in negotiation/arbitration and not in CMP.

[302] Albersheim Response, p. 6, line 22 – p. 7, line 1.

[303] Starkey Direct, p. 34, lines 11-13.

SEPTEMBER 27, 2006, REGARDING MAINTENANCE AND REPAIR DOCUMENTATION, AND STATES THAT QWEST RETRACTED THE NOTICE AND WITHDREW THE DOCUMENTATION CHANGES BASED ON CLECS' CONCERNS.[304] DOES THIS EXAMPLE SHOW THAT CLECS CAN "PREVENT" QWEST PROPOSED CHANGES AS MS. ALBERSHEIM CLAIMS?[305]

A. No. Though Qwest withdrew the Level 1 notice (PROS.09.27.06.F.04212.Dispatch_and_M&R_Overview), it reissued the same change with essentially the same language as a Level 3 notice in PROS.12.01.06.F.04363.Tagging_of_Circuits. Ms. Albersheim, while claiming elsewhere to complete the record, conveniently omits this fact from her response testimony. Ms. Albersheim also ignores the fact that Qwest's Level 3 notice is inconsistent with representations Qwest made at the 10/10/06 CLEC AdHoc Meeting scheduled to discuss Qwest's 9/27/06 Level 1 notice. For example, Qwest clearly said at the 10/10/06 meeting that it would obtain CLEC input and schedule an AdHoc Meeting on the reissued notice. However, Qwest initially reissued the Level 3 notice without seeking CLEC input. Ms. Johnson provides Exhibit BJJ-48 that consists of meeting minutes, CMP notices, comments and emails related to this issue.[306] Eschelon's comments describe the differences

[304] Albersheim Response, pp. 7-8.

[305] Albersheim Response, p. 7, lines 19-23.

[306] Exhibit BJJ-48 consists of: 10/10/06 Ad Hoc Meeting Minutes, 12/1/06 Qwest Level 3 CMP notice, 12/15/06 Eschelon comments on Qwest Level 3 Notice, 12/19/06 Qwest notice, 1/9/07 Qwest email,

between what Qwest said at the 10/10/06 AdHoc meeting, and what Qwest actually did. This exhibit also shows that there are internal inconsistencies in the PCATs associated with Qwest's Level 3 notice, and that the PCAT changes differ markedly from what Qwest described as Qwest's existing process at the 10/10/06 AdHoc meeting.[307] Given that Qwest is attempting to move forward with this change against strenuous objection from multiple CLECs shows that CLECs cannot "prevent" Qwest from making these changes in CMP. While Qwest has since agreed to submit a Level 4 change request regarding tagging at the demarcation point, this is not evidence that CLECs may "prevent" Qwest from making changes. For Qwest-initiated changes (including Level 4 – change requests), after Qwest abides by the time frames in the CMP document, it may implement changes over CLEC objection (as it did in the CRUNEC example).[308]

Q. DOES THE COMMISSION HAVE TO FIND THAT "THE CMP ISN'T WORKING" TO ADOPT ESCHELON'S LANGUAGE ON THE ISSUES?[309]

1/16/07 Eschelon response, January CMP Meeting Distribution Package (tagging excerpt), notice of February Ad Hoc meeting.

[307] Qwest issued PROS.12.19.06.F.04415.QwestDelayedResp-TaggingC indicating that its response to CLECs comments on its Level 3 notice, scheduled for 12/31/06, would be delayed.

[308] Although Section 5.3.1 of the CMP Document (Exhibit BJJ-1) provides that "the CR will be closed when CLECs determine that no further action is required for that CR," Section 5.3 applies only to CLEC-initiated change requests. In addition, under Section 5.3, Qwest first has an opportunity to deny the CLEC-initiated change request, so the language of 5.3.1 only applies to those CLEC-initiated change requests that Qwest does not deny and chooses to implement. Section 5.4 applies to Qwest-initiated changes, and it does not contain language similar to the quoted language from Section 5.3.1.

[309] Albersheim Response, p. 4, line 19 – p. 5, line 4. *See also*, Albersheim Response, p. 33, lines 1-2.

A. No.[310] In many instances Eschelon is relying upon the established CMP rules for its position.[311] None of its positions is inconsistent with the scope of CMP.[312] As I indicated in my direct testimony,[313] although CMP has weaknesses that become self-evident when describing CMP procedures and providing examples of how Qwest has used CMP,[314] the Commission does not have to find that CMP is "bad" or "broken" to determine any of the disputed issues in Eschelon's favor. Likewise, the Commission need not determine that an ICA superseded CMP – the parties to CMP, including Qwest, have already agreed that is the case. The issue is whether when a CLEC like Eschelon believes a particular process or policy is important enough to its business to arbitrate that issue on its own merits, does this issue warrant inclusion in the contract, and if so, whether Eschelon's or Qwest's proposed language better fits the bill.

Q. QWEST CLAIMS THAT ADOPTING ESCHELON'S PROPOSALS

[310] Starkey Direct, p. 79.

[311] *See, e.g.*, Starkey Rebuttal, pp. 24-28.

[312] *See id.*

[313] Starkey Direct, p. 79.

[314] Ms. Albersheim disagrees with my testimony at page 78 of my direct where I liken Qwest's conduct to playing cards with a big brother who "makes up the rules of the game as he goes along." Albersheim Response, p. 11. She then goes on to explain that Qwest cannot unilaterally change the CMP Document (or "make up the rules of the game"). Ms. Albersheim missed the point of my testimony. I was referring to Qwest's conduct in CMP that is demonstrated in the four examples I provided in my direct testimony – examples showing that Qwest determines whether or not to address issues in CMP, and oftentimes changes its mind on this point along the way. ["As these examples show…] I was not referring to Qwest's ability to modify the CMP Document. ["it is the Commission who should set the 'rules' by establishing interconnection agreement terms and conditions that must be filed, approved, and amended if changed."] *See also,* Starkey Direct, p. 17 ["The Commission should set the 'rules' by establishing interconnection agreement terms and conditions…"] As I mentioned at page 41 of my direct testimony, changes to the CMP Document is only 1 of 2 examples of when voting in the CMP occurs.

WOULD GIVE ESCHELON "VETO POWER IN THE CMP."[315] IS THIS TRUE?

A. No. Ms. Albersheim's claims are not supported by the CMP Document.[316] A term or condition in Eschelon's ICA does not affect the ability of Qwest or another CLEC to pursue in CMP a change request (for CLECs and Qwest Level 4 changes) or notices (for Qwest changes Level 0-3). Again, Ms. Albersheim's claim is directly in conflict with Ms. Stewart's argument (as discussed above) and the history of the Scope of the CMP.[317] Qwest is the company with the veto power, as demonstrated by Qwest's implementation of its Version 30 PCAT change to the expedite process in other states over CLEC objection[318] and its implementation of the disruptive CRUNEC change over CLEC objection.[319] The CMP Document expressly recognizes that conflicts will occur and, when they do, the ICA should have veto power.[320] It also says the Commission is the ultimate decision maker, not Qwest.[321] Qwest is the party seeking the veto power – over the Commission's role per the CMP Document and Section 252.

Q. MS. ALBERSHEIM STATES THAT QWEST HAS NOT PROPOSED A

[315] Albersheim Response, p. 55, line 10.

[316] *See* Starkey Direct, p. 24, citing the CMP Document scope provision (Exhibit BJJ-1).

[317] *See.* Exhibit BJJ-1 (CMP Document), Section 1.0.

[318] See my discussion of the Expedited Orders example.

[319] See my discussion of the CRUNEC example.

[320] Section 1.0 of Exhibit BJJ-1 (quoted above).

[321] Exhibit BJJ-1 (CMP Document, §15.0, last bullet point and following sentence).

LITMUS TEST OR BRIGHT LINE RULE FOR WHAT SHOULD OR SHOULD NOT BE INCLUDED IN THE ICA, AND THAT YOU ARE WRONG TO SUGGEST THAT THE LACK OF A LITMUS TEST IS A FLAW IN QWEST'S REASONING.[322] WOULD YOU LIKE TO RESPOND?

A. Yes, I'm afraid that Ms. Albersheim misunderstood the point I was making. My point is that Qwest's position on these issues rests on the assumption that an issue is either inherently a "CMP issue" or a "contractual issue – and for that position to be valid, there must be some way to make the determination of whether an issue is a CMP issue or a contractual issue.[323] The purpose of my testimony was to show that despite claiming that an issue inherently belongs in either CMP or the ICA, Qwest provided no test for making this determination (and the "tests" Qwest had proposed in the past have been rejected by the FCC). As a result, Qwest would be free to make that call based on what suits its objectives at that particular time.

The purpose of my testimony was not to criticize Qwest for not having a litmus test; it was to point out the inconsistency in Qwest acting as though there was one when there is not. Because ICAs and CMP co-exist, with the ability for terms in ICAs to vary from what is in CMP, there does not need to be a test to determine whether issues belong in CMP versus ICA. As the Arizona Staff said in the Arizona Complaint Docket, "changes made through the CMP may affect some,

[322] Albersheim Response, p. 16, lines 13-21. *See also*, Albersheim Response, p. 17, lines 13-15.

[323] *See*, Starkey Direct, p. 16.

but not all, CLECs depending on the terms of their Interconnection Agreements."[324] What is important is whether parties have negotiated issues and taken steps pursuant to Section 251/252 to seek Commission resolution of these issues. When this occurs, the Commission should decide the issues on their merits and adopt an ICA with clear terms, rather than leaving those issues up to future changes or interpretations by either of the parties. There is no dispute that these issues have been negotiated in this case, and therefore these issues are properly before the Commission for resolution of contract language.

C. THE FCC AND WUTC ORDERS ARE ON POINT

Q. MS. ALBERSHEIM TAKES ISSUE WITH THE FCC ORDERS YOU REFERENCE IN YOUR DIRECT TESTIMONY[325] THAT YOU SAY SUPPORT ESCHELON'S POSITION. WHAT IS MS. ALBERSHEIM'S PRIMARY COMPLAINT?

A. Ms. Albersheim claims that because the *Declaratory Ruling* and *Forfeiture Order* do not expressly reference Qwest's CMP process, they "do not speak to the issues Mr. Starkey claims."[326] Ms. Albersheim is wrong. The purpose of my testimony in this regard is to show that the FCC has rejected Qwest's proposals for determining whether provisions should be excluded from an ICA. As I discussed at pages 17-18 of my direct testimony, Qwest has stated that provisions should be

[324] Arizona Staff Testimony, Arizona Complaint Docket, p. 10, lines 3-4.

[325] Starkey Direct, pp. 20-22.

[326] Albersheim Response, p. 17, lines 17-18.

excluded from an ICA if (a) the label Qwest puts on the provision is "process" or "procedure"[327] or (b) if the provision affects all CLECs[328] – or in other words, Qwest proposes to limit the ICA to a schedule of itemized charges and associated description of the services to which the charges apply. The FCC orders I point to – the *Declaratory Ruling* and *Forfeiture Order* – show that Qwest's view of what should be excluded from an ICA is wrong. Though Ms. Albersheim focuses on these orders not expressly referencing Qwest's CMP process,[329] they did not need to because they speak to Qwest's narrow view of the scope of an ICA (the same view Qwest is taking in this proceeding) – and reject that view. Not to mention that the *Forfeiture Order* was issued two years after Qwest's CMP was implemented, when the FCC was fully aware of the CMP's existence.[330] Obviously, if the FCC has rejected Qwest's view of what should be *excluded* from an ICA, that means that those provisions are to be *included* in an ICA when negotiated/arbitrated – it does not mean that the FCC meant for these to be addressed in CMP (although the FCC did not specifically say that).

For example, the FCC's *Declaratory Ruling* states: "***We therefore disagree with Qwest that the content of interconnection agreements should be limited to the schedule of itemized charges and associated descriptions of the services to***

[327] Starkey Direct, p. 17. *See also* Eschelon's discussion of Issue 12-64.

[328] Starkey Direct, p. 18.

[329] Albersheim Response, p. 17, lines 21-23.

[330] Starkey Direct, p. 22.

which those charges apply." In contrast, Ms. Albersheim has testified that "It is Qwest's position that business procedures do not belong in this agreement…"[331] The FCC said that the ICAs should not be limited only to rates and descriptions of services, which can only mean that the FCC envisioned that business process and procedures describing the manner by which CLECs will access those services should be included in ICAs, contrary to Ms. Albersheim's assertions.

Q. MS. ALBERSHEIM STATES THAT THE FCC ADOPTED LANGUAGE JUST EIGHT WEEKS BEFORE THE DECLARATORY RULING THAT PROVIDED FOR CERTAIN MATTERS TO BE ADDRESSED THROUGH CHANGE MANAGEMENT PROCESS.[332] MS. ALBERSHEIM CLAIMS THAT THE FCC WOULDN'T HOBBLE AN FCC APPROVED PROCESS AFTER ADVOCATING ITS USE WEEKS EARLIER.[333] IS MS. ALBERSHEIM'S TESTIMONY ON THIS POINT MISLEADING?

A. Yes, very much so. First, the decision to which Ms. Albersheim points is not an Order adopted by the FCC, rather it is a decision of the Wireline Competition Bureau who was called upon to decide issues in the stead of the state commission. Accordingly, this decision has no more bearing on Washington than any other state commission order. In contrast, the *Declaratory Ruling* I cite in my testimony is an order voted on by the FCC. Ms. Albersheim's attempt to make it

[331] Albersheim Minnesota Rebuttal Testimony, p. 12, lines 20-21.

[332] Albersheim Response, p. 18.

[333] Albersheim Response, p. 18, lines 5-8.

appear as if my position rests on an assumption that the FCC issued two contradictory orders within weeks of each other is simply not true. The authority to which Ms. Albersheim cites is not an FCC order.

Ms. Albersheim also takes out of context the mention of the Change Management process in the WCB's decision. The Change Management Process discussed in the WCB's decision is the Verizon – not Qwest – Change Management Process, so this decision does not even apply to Qwest, and Ms. Albersheim provides no indication that the Qwest CMP process is comparable to Verizon's. Perhaps more importantly, the WCB included a reference to Verizon's Change Management Process in the ICA at the request of the CLEC (AT&T),[334] not the ILEC, as Qwest is doing here. The WCB therefore was not addressing a situation in which the ILEC was attempting to point to the CMP process instead of addressing provisions in the ICA, as Qwest is proposing in this proceeding. These two situations are not comparable.

Moreover, the ICA adopted by the WCB in the decision to which Ms. Albersheim refers contained the very business processes and procedures that Qwest is attempting to exclude here. For instance, the WCB's decision adopted specific provisioning intervals to be included in ICAs,[335] the very thing that Qwest

[334] Verizon Virginia Arbitration Order, ¶ 343.

[335] *See e.g.*, Verizon Virginia Arbitration Order, ¶406 ["We adopt AT&T's proposed section 1.3.4. Verizon does not dispute AT&T's statement that the parties reached agreement on a 45-day augmentation interval. Verizon's language is similar to AT&T's, except that Verizon would use the collocation intervals set forth in its applicable tariff. Given the choice of language that specifies an

opposes under Issues 1-1 and subparts. Therefore, the WCB decision Ms. Albersheim relies on actually undermines Qwest's proposals in this case.

Q. IS MS. ALBERSHEIM'S CRITICISMS OF YOUR RELIANCE ON THE *FORFEITURE ORDER* ALSO MISPLACED?

A. Yes. In the *Forfeiture Order*, the FCC rejected Qwest's notion that it could simply post its service offering information on its website in lieu of Section 252 Agreements because it would render Section 252 ICAs meaningless and provide no certainty to CLECs.[336] This is precisely what Qwest is attempting to do by omitting critical terms and conditions from the ICA and defer to the CMP/PCAT/SIG that Qwest maintains on its website – i.e., undermine the certainty of contractual language in favor of a "process" (CMP) controlled by Qwest. In its *Forfeiture Order*,[337] the FCC expressly rejected Qwest's claim that the *Declaratory Ruling* authorized posting of information regarding service offerings on a website ***in lieu of*** an agreement filed with, and approved by, state commissions.

exact interval to which the parties have already agreed or language referencing intervals set forth in a tariff that may not be in effect at the time this Order is issued, we select the former because it is more specific."]

[336] Starkey Direct, p. 22.

[337] Notice of Apparent Liability for Forfeiture, *In the Matter of Qwest Corporation Apparent Liability for Forfeiture*, FCC File No. EB-03-IH-0263 (March 11, 2004) ("*FCC Forfeiture Order*").

Q. MS. ALBERSHEIM ALSO TAKES ISSUE WITH YOUR INTERPRETATION OF TWO WASHINGTON COMMISSION ORDERS. WOULD YOU LIKE TO RESPOND?

A. Yes. First, with respect to the *Washington ALJ Report* in Docket UT-043013,[338] Ms. Albersheim claims that it is not on point because it does not mention the CMP.[339] This is the same argument that Qwest made about the FCC orders. For the reasons above, Ms. Albersheim's argument is unconvincing. Ms. Albersheim also states that the change of law provision, which was at issue in the *Washington ALJ Report,* is fundamentally different than the "operational network-related CMP issues."[340] However, Ms. Albersheim ignores the fact that the Commission, in the same order, ruled that "operational procedures" should be placed in the ICA. ["…it is reasonable to include in the amendment a provision addressing '***operational procedures*** to ensure customer service quality is not affected by conversions.'"][341] And to Qwest's proposal for uniformity in ICAs, the Commission said, "Although it is understandable why Verizon seeks to have consistent terms in all of its interconnection agreements, it is not necessary or required for arbitrated agreements to include the same terms."[342]

With regard to the Washington Commission's order in the Covad Arbitration

[338] *See* appendix ii to the Joint Issues Matrix for full citation.

[339] Albersheim Response, p. 19, line 1.

[340] Albersheim Response, p. 19, lines 8-10 and p. 19, lines 1-3.

[341] *Washington ALJ Report,* p. 165, ¶ 416.

[342] *Washington ALJ Report,* p. 29, ¶ 78.

(UT-043045), Ms. Albersheim claims that it actually supports Qwest's position that the purpose of CMP is to make processes and procedures uniform across CLECs.[343] However, Ms. Albersheim ignores the fact that the passage she quotes states that Covad chose to pursue the issue in CMP.[344] The fact that a CLEC chose to take an issue to CMP is something much different than whether language should be excluded from an ICA (against the CLEC's objection) so that the CLEC is forced to take the issue to CMP. Ms. Albersheim's claim that the Commission "drew distinctions between processes and procedures appropriately addressed through the CMP versus through specific language in an ICA"[345] is misleading. The Commission expressly states that "Parties engage in arbitration to enter into an agreement tailored to the companies' needs, not to adopt a standard agreement." Therefore, the Commission acknowledged that ICAs should be tailored to the needs of individual CLECs even when a CLEC chooses to take a certain issue to CMP. It did not rule that issues should be relegated to CMP when the issue has been negotiated and the CLEC seeks specific terms in the ICA. In any event, the Commission was very clear in the *WA ALJ Report* in UT-043013 when it stated that "it is reasonable to include in the amendment a provision addressing '***operational procedures'"*** – and this statement was made after the Commission's order in the Covad Arbitration (UT-043045).

[343] Albersheim Response, p. 19, line 18.

[344] *See* Albersheim Response, p. 19, lines 19-22.

[345] Albersheim Response, p. 20, lines 5-7.

Finally, I disagree with Ms. Albersheim's characterization of my response to Qwest's position, as an "attack on Qwest's advocacy upholding the CMP."[346] Ms. Albersheim's testimony presupposes that CMP was designed to make processes and procedures uniform among CLECs – which is incorrect. CMP was specifically designed to accommodate differences between CMP and ICAs negotiated/arbitrated between Qwest and CLECs,[347] so that ICAs could be tailored to the individual needs of CLECs.[348] This shows that, contrary to Ms. Albersheim, it is Eschelon's position that is "upholding the CMP."[349]

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

Issue No. 1-1 and subparts: ICA Sections 1.7.2; 7.4.7, 9.23.9.4.3, Exhibit C (Group 2.0 & Group 9.0), Exhibit I (Section 3), Exhibit N, Exhibit O

Q. ARE MOST OF MS. ALBERSHEIM'S RESPONSE ARGUMENTS ALREADY ADDRESSED IN YOUR PREVIOUS TESTIMONY?

[346] Albersheim Response, p. 18, line 14.

[347] *See,* Section 1.0 of the CMP Document, Exhibit BJJ-1; *See also,* Starkey Direct, p. 24; Exhibit BJJ-18; Exhibit BJJ-19; and Exhibit BJJ-20.

[348] *See* Starkey Direct, pp. 30-31, citing Qwest's comments on the FCC's "Pick and Choose" Rule. *See also,* Stewart Response, p. 27 ["tailoring has increased as CLECs have shaped their businesses to have a specialized focus, which is often necessary to survive in today's highly competitive telecommunications market."]

[349] Albersheim Response, p. 18, line 14.

A. Yes.[350] In the interest of brevity, I will not repeat those arguments but will identify where that issue has been addressed elsewhere in my testimony.[351] I would, however, like to specifically address one point I made previously in my testimony that Ms. Albersheim raises again in her rebuttal testimony. Ms. Albersheim takes issue with my testimony that Qwest could make unilateral changes to provisioning intervals if its proposal on Issues 1-1 and subparts is adopted,[352] and claims that there is no opportunity in any non-contractual sources

[350] Ms. Albersheim claims that there is no opportunity in any non-contractual sources such as CMP/PCAT/SIG for Qwest to unilaterally change service intervals. (Albersheim Response, p. 33). I discussed in my direct testimony that the real issue here is whether Qwest can implement changes (in this instance, changes to intervals) over CLEC comments and objections in CMP and put those changed intervals in the SIG. And Qwest can (*See*, Starkey Direct, pp. 42-43; CRUNEC example at Starkey Direct, pp. 55-65; Exhibits BJJ-9, BJJ-10 and BJJ-11). Ms. Albersheim seems to believe that Qwest cannot take "unilateral" actions because CMP provides the opportunity for comment, request for postponement, and escalation for some of these changes (at least for Level 4 change requests, which increased intervals are - *See* Starkey Direct, pp. 42-43 for discussion of Qwest's "Notice and Go" ability for most changes). But the point is that Qwest can implement these changes over CLEC objections once the comment/response timeframes have expired or the comments or requests for postponement have been rejected by Qwest – *i.e.*, the ability of "unilateral" actions I discuss.

[351] Like in her direct testimony, Ms. Albersheim claims that Eschelon's goal is to "freeze" specific provisions in place. (Albersheim Response, pp. 5, 13, 14 and 36). *See* Mr. Webber's discussion of Issue 12-76 (adopted). *See also* Starkey Rebuttal, pp. 10-11. Ms. Albersheim also claims that the amendment process proposed by Eschelon is a special process for Eschelon (Albersheim Response, p. 35). I explained the reasons showing that this is not a special process for Eschelon's proposal (Starkey Direct, p. 92).

[352] I discussed in my direct testimony that the real issue here is whether Qwest can implement changes (in this instance, changes to intervals) over CLEC comments and objections in CMP and put those changed intervals in the SIG. And Qwest can (*See*, Starkey Direct, pp. 47-48; CRUNEC example at Starkey Direct, pp. 59-69; Exhibits BJJ-9, BJJ-10 and BJJ-11). Ms. Albersheim seems to believe that Qwest cannot take "unilateral" actions because CMP provides the opportunity for comment, request for postponement, and escalation for some of these changes (at least for Level 4 change requests, which increased intervals are - *See* Starkey Direct, pp. 47-48 for discussion of Qwest's "Notice and Go" ability for most changes). But the point is that Qwest can implement these changes over CLEC objections once the comment/response timeframes have expired or the comments or requests for postponement have been rejected by Qwest – *i.e.*, the ability of "unilateral" actions I discuss.

for Qwest to make unilateral changes to intervals.[353] It bears noting that this same issue was examined in Minnesota and the Administrative Law Judges ("ALJs") ruled in favor of Eschelon on Issues 1-1 and subparts (as upheld by the Minnesota Commission), finding that:

> 22. 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. Service intervals are critically important to CLECs, and Qwest has only shortened them in the last four years. Qwest has identified no compelling reason why inclusion of the current intervals in the ICA would harm the effectiveness of the CMP process or impair Qwest's ability to respond to industry changes. The Administrative Law Judges recommend that Eschelon's first proposal for Issue 1-1 be adopted and that its language for Issues 1-1(a)-(e) also be adopted.[354]

The ALJs in Minnesota agreed with Eschelon that Qwest can make unilateral changes, and that adopting Eschelon's proposal (the same proposal Eschelon has offered in this proceeding for Issues 1-1 and subparts) would not harm the effectiveness of CMP or Qwest's ability to respond to industry changes. The Minnesota Commission approved the ALJs' ruling in the Minnesota Qwest-Eschelon arbitration proceeding.[355]

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[353] Albersheim Response, p. 33.

[354] *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"), ¶22; affirmed by a 4-0 vote of the Minnesota PUC on March 6, 2007.

[355] MN Arbitrators' Report affirmed on this issue by a 4-0 vote of the Minnesota PUC on March 6, 2007.

Q. DID THE MINNESOTA ARBITRATORS' REPORT MAKE OTHER CONCLUSIONS THAT BEAR ON ISSUE 1-1?

A. Yes. As discussed in my direct[356] and rebuttal[357] testimonies, I explained that the CMP Document's scope provision recognizes potential differences in terms between ICAs and CMP, and says that when these differences arise, the ICAs rule. As explained at pages 24-28 of my rebuttal testimony, Qwest recognizes this scope provision, but argues that including terms in ICAs that are different from the CMP would "subvert"[358] or "undermine"[359] the CMP. The ALJs in the Minnesota arbitration proceeding (as upheld by the Minnesota Commission) found that Qwest is wrong:

> 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 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. 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.[360]

[356] Starkey Direct, pp. 25-27.

[357] Starkey Rebuttal, pp. 26-30. *See also* Exhibits BJJ-18 and BJJ-19.

[358] *See, e.g.,* Albersheim Direct, p. 10, lines 1-2.

[359] *See, e.g.,* Albersheim Direct, p. 34, line 25.

[360] MN Arbitrators' Report, ¶ 21, affirmed on this issue by a 4-0 vote of the Minnesota PUC on March 6, 2007.

Given that ICA and CMP terms can "coexist, conflict, or potentially overlap," there is no basis for Qwest's position that intervals should be excluded from the ICA because they are also addressed in CMP. The same goes for the other issues that Qwest recommends excluding from the ICA and relegating to CMP (*see, e.g.*, Section 12 issues).

Q. MS. ALBERSHEIM CLAIMS THAT ESCHELON IGNORES THE "REALITY" THAT "TELECOMMUNICATIONS IS A DYNAMIC INDUSTRY IN WHICH TECHNOLOGICAL ADVANCEMENTS ARE MADE VIRTUALLY ON A DAILY BASIS."[361] IS THIS "REALITY" SUPPORT FOR QWEST'S PROPOSAL TO LENGTHEN INTERVALS WITHOUT COMMISSION APPROVAL?

A. No. Ms. Albersheim made the same claim in her direct testimony,[362] and I addressed this claim at pages 53-54 of my rebuttal testimony. Ms. Albersheim goes on to state that "these processes and procedures are more efficiently addressed through CMP."[363] However, in cases in which disagreement will result (as in the case of increased intervals, as Ms. Albersheim has acknowledged),[364] it is not "efficient" to require the parties to negotiate/arbitrate an ICA, have Qwest

[361] Albersheim Response, p. 36, lines 4-6.

[362] Albersheim Direct, pp. 32-33.

[363] Albersheim Response, p. 36, lines 6-7.

[364] Ms. Albersheim: "Over all that time, and over all 41 service interval changes, there were only two that might have raised CLEC objections and might have caused CLECs to involve the Commission…" Albersheim Response, p. 34, lines 19-21. Ms. Albersheim also testified in the Minnesota arbitration proceeding that, "It is likely that there will be disputes any time Qwest attempts to lengthen an interval." (Albersheim Minnesota Rebuttal Testimony, p. 35, lines 6-7).

lengthen an interval in CMP, potentially follow the dispute resolution process of CMP, only to later come to the Commission for resolution. It would be more efficient to require Commission approval in the first instance for lengthening intervals, as Eschelon proposes. In addition, as explained above, the ALJs in the Minnesota arbitration case found, and the Minnesota Commission affirmed, that Eschelon's proposal would not harm Qwest's ability to respond to industry changes or harm the effectiveness of CMP.[365]

Q. MS. ALBERSHEIM DISAGREES WITH YOUR TESTIMONY REGARDING COMMISSION INVOLVEMENT.[366] PLEASE RESPOND.

A. Ms. Albersheim criticizes my statement that "the Commission would have no opportunity to make these determinations if Qwest has its way."[367] She states that this is not the case because a CLEC can file a complaint with the Commission if it disagrees with Qwest's lengthened interval. The "determinations" I was discussing in that part of my direct testimony are determinations about whether a lengthened interval provided Eschelon with a "meaningful opportunity to compete" (for elements with no retail analogue) or is in "substantially the same manner as Qwest provides itself" (for elements with a retail analogue). Though Ms. Albersheim is correct that a CLEC can pursue later dispute resolution at the state commission, what she fails to mention is that in my testimony, I explained

[365] MN Arbitrators' Report, ¶ 22, affirmed by a 4-0 vote of the Minnesota PUC on March 6, 2007.

[366] Albersheim Response, p. 34.

[367] *See* Starkey Direct, p. 88, lines 6-7.

that with Qwest's proposal, Qwest would be able to implement an increase to an interval in CMP before Eschelon can obtain a decision on Qwest's action from the state commission.[368] As a result, the Commission would have no opportunity to make these determinations before Qwest's lengthened interval would take effect. This would cause Eschelon to make changes to adapt to this longer interval before it can receive a decision from the state commission, and even if the Commission ultimately agrees with Eschelon, Eschelon would have already incurred the expense to change to the longer interval, and would incur more expense to change back to the shorter interval following the Commission's decision. All the while, Eschelon's customers are forced to wait longer for service. This would also result in the Commission being asked to resolve this issue in "crisis mode." That is a key difference in Eschelon's proposal: it allows the Commission to make these determinations *before* an increase to an interval takes effect.

Q. MS. ALBERSHEIM CRITICIZES YOUR REFERENCE TO THE DECISIONS OF THE WASHINGTON AND MINNESOTA COMMISSIONS THAT REJECTED PREVIOUS QWEST ATTEMPTS TO LENGTHEN INTERVALS. SHE POINTS TO THE CHANGES TO INTERVALS QWEST HAS PROPOSED SINCE THE 271 PROCEEDINGS AS SUPPORT FOR HER CLAIM THAT THE WASHINGTON AND

[368] Starkey Direct, p. 87.

MINNESOTA ORDERS SHOULD HAVE NO BEARING HERE.[369] WOULD YOU LIKE TO RESPOND?

A. Yes. I'm not quite sure what point Ms. Albersheim is making here, but if her point is that Qwest has not pursued lengthened intervals in CMP since the CMP was approved, that makes no difference. Qwest could change its strategy to pursue longer intervals at any time in CMP, and based on its testimony and position on Issue 1-1, that is a very likely scenario.

Nonetheless, the point of my references to the state commission orders was to show that this and other commissions have already found the need to exert their authority with regard to Qwest's attempts to lengthen intervals, and that the Washington Commission's authority in this regard should be preserved so that it can decide before the interval change takes effect and customers are harmed, as Eschelon's proposal provides.

Q. QWEST COMPLAINS THAT ESCHELON'S PROPOSAL REQUIRES QWEST TO "USE SPECIFIC FORMS" WHICH IS AN "ADMINISTRATIVE BURDEN FOR QWEST THAT COULD RESULT IN ONE SPECIAL PROCESS FOR ESCHELON (AND OPT-INS) AND ANOTHER PROCESS FOR OTHER CLECS."[370] PLEASE RESPOND.

[369] Albersheim Response, pp. 34-35.

[370] Albersheim Response, p. 35, lines 12-15.

A. I address these forms and Qwest's burdensomeness argument on pages 46-47 of my Response testimony. Eschelon proposes to use, for lengthening intervals, the identical streamlined vehicle that is in place today for new products under Section 1.7.1 of the SGAT and other approved interconnection agreements, making use of simple advice adoption letters. I address Qwest's claims about unique or one-off processes in Section III of this testimony. If Qwest's statements about its preference for uniformity [371] are valid, however, it should prefer using the same language and forms for the Washington ICA as it already must use for lengthening of intervals under the Minnesota order.[372]

Q. MS. ALBERSHEIM REFERS TO TWO INTERVAL INCREASES AND 39 SHORTENED INTERVALS SINCE THE 271 PROCEEDINGS.[373] WITH REGARD TO THE TWO LENGTHENED INTERVALS, MS. ALBERSHEIM SAYS THAT YOU FAILED TO MENTION THAT ONE OF THEM WAS WITHDRAWN IN PART BECAUSE OF CLEC CONCERNS AND THE OTHER ONE RECEIVED NO CLEC COMMENT OR OBJECTION.[374] IS MS. ALBERSHEIM'S CRITICISM WARRANTED?

[371] *See, e.g.*, Albersheim Response, p. 3, lines 18-22.

[372] MN Arbitrators' Report ¶22 (Exhibit DD-25).

[373] Albersheim Response, p. 34.

[374] Albersheim Response, p. 34, line 22 - p. 35, line 1.

A. No. I find it ironic that Ms. Albersheim would criticize my testimony for failing to mention certain details regarding these two lengthened intervals when Ms. Albersheim completely failed to mention them at all in her direct testimony. In fact, Ms. Albersheim represented in her direct testimony that Qwest had never to date increased intervals.[375] Ms. Albersheim changes her tune in her response testimony to create a concern where none exists (or at least did not exist for Qwest when Ms. Albersheim testified in her direct testimony that Qwest had only shortened intervals, so far). Nonetheless, to the extent that Ms. Albersheim is attempting to create the impression that Eschelon's proposal is not needed because interval increases may not trigger CLEC objection, this is a false impression and is not consistent with Ms. Albersheim's prior testimony, where she stated that "it is likely that there will be disputes any time Qwest attempts to lengthen an interval."[376] Ms. Albersheim also claims that Qwest withdrew one of these proposed increases "in part because of CLEC concerns,"[377] but this claim is not supported by Ms. Albersheim's Exhibit RA-25RT. Nowhere on Exhibit RA-25RT does it say that a CLEC objected to this CR, nor does it say that Qwest withdrew the CR because of CLEC objection.

[375] Albersheim Direct, pp. 37-38 ("so far, Qwest has only decreased intervals.") *See also,* Albersheim Direct, p. 30, lines 10-12.

[376] *See,* Albersheim Minnesota Rebuttal Testimony, Docket P-5340, 421/IC-06-768, September 22, 2006, p. 35, lines 6-7.

[377] Albersheim Response, p. 34, lines 22-23.

V. SUBJECT MATTER NO. 11: POWER

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

Q. DO ISSUES 8-21 AND SUBPARTS RELATE TO ESCHELON RECEIVING NONDISCRIMINATORY ACCESS TO COLLOCATION POWER?

A. Yes. Qwest has testified to sizing power plant for Eschelon (and other CLECs') equipment differently than it sizes power plant for Qwest's own equipment. Unfortunately for Eschelon, this results in Qwest charging Eschelon for power plant that the CLEC never uses – and could never use based on the size of the power cables serving the Eschelon collocation – and provides a cost advantage for Qwest, who, under Qwest's proposal, would "pay" less than Eschelon pays for the very same power plant. It is clear from Qwest's testimony that it charges CLECs for power plant based on the size of their power cables – which must, by engineering standards, be sized based on List 2 drain (or the "worst case" scenario drain). It is also clear from Qwest's testimony that it sizes power plant for its own equipment based on a lower List 1 drain, which means, at most, Qwest "pays" for power plant at List 1 drain. The fact that List 2 drain (the basis for Qwest's charges on Eschelon) is higher, in most cases significantly higher, than List 1 drain (the maximum amount Qwest would "pay" for power plant) means that Eschelon would pay more for power plant than does Qwest under Qwest's

proposal. This is *prima facie* discrimination, and this discrimination is not permitted under ICA and Act.[378]

Q. PLEASE EXPLAIN THIS POINT FURTHER.

A. It is Eschelon's position that when power is measured, the power plant rate should be assessed on that measured usage, similar to how Qwest would bill the usage charge. Qwest, on the other hand, proposes to continue to bill the power plant rate based on the size of the CLEC's power cable even when the CLEC's power is measured. Eschelon also proposes language that would commence charging for power once equipment is collocated and begins to draw power, while Qwest proposes language that would allow it to commence charging for power before Eschelon's equipment is collocated and before Eschelon even has the ability to draw power. In both cases, Eschelon's proposals are aimed at establishing processes by which it pays for the power and power facilities it actually uses (as Qwest's internal processes ensure for Qwest's own use), rather than processes that ensure it will always pay more than Qwest does for the same amount of power.

Q. MR. ASHTON SUBMITTED RESPONSIVE TESTIMONY PURPORTING TO SHOW HOW QWEST SIZES POWER PLANT IN ITS CENTRAL OFFICES.[379] PLEASE RECAP WHY THE SIZING OF POWER PLANT IS IMPORTANT TO ISSUE 8-21.

[378] Starkey Rebuttal, pp. 64-65.

[379] *See, e.g.*, Ashton Response, pp. 3 and 9.

A. Qwest is attempting to assess a charge to recover the investment in the central office power plant based on the size of the CLEC power cables. However, all information points to Qwest actually sizing (or investing in) power plant based on the peak *usage* of the power plant – i.e., the entire facilities as shared by both CLECs and Qwest.[380] Qwest's attempt to charge for power plant based on the size of the power cable, yet initially size and build its power plant based on total peak usage, results in Qwest overcharging Eschelon for power plant as well as Qwest discriminating against Eschelon by forcing Eschelon to pay more for power to serve its customers than Qwest pays to serve its customers. This results from the fact that Eschelon's cables, based on sound engineering and safety reasons, will always be larger than any amount of power it will actually use. Indeed, it is this exact engineering truism that drives Qwest NOT to build the capacity available in its power plant equipment based on this standard – *i.e.*, List 2 drain. To do so would significantly "over" engineer the facility with the result being wasted capital investment (or on the part of Eschelon when it is assessed power plant rates in this fashion – overcharges).

Q. DOES MR. ASHTON'S RESPONSIVE TESTIMONY EXPOSE A MAJOR FLAW IN QWEST'S POSITION ON THIS ISSUE?

A. Yes. Mr. Ashton describes his view of how Qwest sizes power plant as follows:

> Qwest designs and engineers power plant capacity sufficient to meet the total busy hour load of all equipment in the central office,

[380] Starkey Direct, pp. 110-113.

> plus all CLEC ordered amounts of power, plus the anticipated busy hour drain of expected future Qwest equipment additions. Qwest compares the sum of these three factors against the power plant capacity currently installed in the central office, and ensures that the power plant capacity installed remains greater than the sum of these three factors.[381]

What Mr. Ashton is saying is that Qwest sizes power plant based on:

- the List 1 drain[382] of Qwest's equipment (and the expected increase in Qwest L1 drain over a planning horizon),

plus

- the List 1 drain of CLEC's equipment,

plus

- the List 2 drain of CLEC's equipment.[383]

This is an obvious admission that Qwest sizes power plant differently for Qwest (List 1 drain) than it does Eschelon (List 1 drain + List 2 drain) – and, consequently, charges CLECs for a far larger portion of its power plant investment than CLECs will ever use.[384] Mr. Ashton makes this admission

[381] Ashton Response, p. 9, lines 4-9. *See also* Ashton Response, pp. 9-10 ("…busy hour load (which Mr. Starkey refers to as "peak drain" in his testimony) is only one of several variables that influences power plant investment. Projected future deployment of Qwest equipment and the power ordered by CLECs are also part of the power plant investment equation. Accordingly, the amount of power *ordered* by the CLEC is also a factor driving power plant investment.")

[382] List 1 drain is explained at page 112 of my direct testimony.

[383] List 2 drain is explained at pages 114-115 of my direct testimony. Qwest assumes that the power cable ordered by the CLEC represents the List 2 drain of CLEC equipment.

[384] *See also*, Ashton Response, p. 3, lines 17-20. ("Mr. Starkey states that Qwest designs a Central Office power plant based on List 1 drain – the current that the equipment will draw when fully carded on the busiest hour of the busiest day of the year – and that is correct for Qwest equipment.") What Mr. Ashton is saying is that it sizes power plant for Qwest based on peak operating draw

because it is the only way that Qwest's application of the power plant rate based on the size of the CLEC's power cables would match up with its claimed engineering practices regarding power plant. In other words, Qwest claims that it sizes power plant based on the size of the CLEC power cable order so that Qwest can charge CLEC that amount for power plant. Unfortunately, Mr. Ashton's admission is directly inconsistent with Qwest's Technical Publications that direct Qwest engineers to size power plant based on the List 1 drain (or peak usage) of all equipment in the central office – regardless of the equipment's owner. Mr. Ashton's testimony appears to be an "after the fact" rationalization meant to support Qwest's existing collocation power rate structure – even though his rationalization highlights the discriminatory nature of Qwest's current practice.

Q. WHY WOULD MR. ASHTON CONSTRUCT A RATIONALIZATION THAT CONFLICTS WITH THE ENTIRETY OF QWEST'S INTERNAL ENGINEERING DOCUMENTATION DESCRIBING THE PROPER MANNER TO ENGINEER POWER PLANT, WHEN THAT RATIONALIZATION FURTHER HIGHLIGHTS THE DISCRIMINATION INHERENT IN QWEST'S PROPOSED RATE STRUCTURE?

A. Qwest places Mr. Ashton between the proverbial "rock and a hard place." If he concedes that power plant is sized based on the peak usage of all equipment in the

under normal conditions, but sizes power plant for CLECs based on peak operating draw under worst case scenario.

central office – both Qwest and CLEC – as Qwest's Technical Publications require, there would be no basis for assessing the power plant charge based on the size of the CLEC power cable order, and Qwest's position on Issue 8-21 would be exposed as fatally flawed. However, by blatantly disregarding Qwest's engineering documentation in an attempt to avoid this problem – by claiming that Qwest sizes power plant for CLECs consistent with the manner it assesses power plant charges on CLECs – Mr. Ashton is forced to admit that Qwest discriminates against Eschelon by requiring Eschelon to fund a larger proportion of Qwest's power plant when compared to Qwest, relative to Eschelon's usage. The only logical conclusion from this bevy of contractions put forward by Mr. Ashton is that the position he is trying to defend – i.e., the integrity of charging Eschelon power plant rates based upon the size of its power cables – is seriously flawed.

Q. MR. ASHTON CRITICIZES YOUR TESTIMONY, CLAIMING THAT BUSY HOUR LOAD "IS ONLY ONE OF SEVERAL VARIABLES THAT INFLUENCES POWER PLANT INVESTMENT."[385] WOULD YOU LIKE TO RESPOND?

A. Yes. Mr. Ashton's testimony only exposes the weakness in Qwest's claim that it sizes power plant based on the size of CLEC power cable orders. I explained in my direct testimony at pages 110-111 the process Qwest uses to size power plant, which was taken directly from one of the technical publications Qwest uses to

[385] Ashton Response, p. 9, lines 23-25.

size power plant (Bellcore Technical Document 790-100-652 and other Qwest Technical Publications). Bellcore Document 790-100-652, at page 5-5, specifically lists the variables that do influence power plant sizing and investment. These variables include "initial busy hour drain" and "drain increase during forecast period,"[386] just as my testimony describes.[387] However, what does not show up on this list as "influencing factors" to power plant sizing is power cable order/size or List 2 drain. Contrary to Mr. Ashton's claim, these influencing factors do not include the "power *ordered* by CLECs."[388] So, it is Mr. Ashton who makes "a flawed leap in logic"[389] when he departs dramatically from Qwest's own engineering documents in claiming that Qwest sizes power plant based on the size of the CLEC power cable order. Since Qwest does not – and by its own Technical Publications, should not – size power plant for CLEC equipment based on the size of the CLEC power cable, there is no basis for Qwest to assess the power plant rate based on Eschelon's power cable size when power is measured.

[386] There are three other influencing factors on this list: (1) AC input, (2) circuit voltage limits, and (3) grounding requirements.

[387] As I testified at page p. 112, line 5 of my direct testimony, power plant is sized based on "forecasted peak usage."

[388] Ashton Response, p. 9, line 25 – p. 10, line 1. Qwest repeatedly refers to CLEC "power orders" or "ordered amounts" of power in its response testimony (*see, e.g.*, Ashton Response, p. 3, lines 16-17; p. 3, line 22; p. 4, line 6; p. 9, line 25; p. 10, line 1; p. 10, line 2; p. 11, line 11; p. 11, line 25), which as I explain at pages 55-57 of my rebuttal testimony, is actually the terms Qwest coined for the CLEC power cable order. CLECs do not order power plant capacity from Qwest. Qwest attempts to confuse this issue further in its response testimony by referring to generic terms such as power "requirement" and "power needs" in describing how Qwest designs a power plant (Ashton Response, p. 3, lines 9 and 11).

[389] *See* Ashton Response, p. 9, lines 18-19. ("Qwest's power plant investment is not 'driven by usage,' and Mr. Starkey makes a flawed leap in logic in the conclusion he draws in that regard.")

Q. MR. ASHTON TESTIFIES AT PAGE 4 OF HIS RESPONSE TESTIMONY THAT "QWEST CAN DETERMINE THE PEAK LOAD OR USAGE OF ALL THE TELECOMMUNICATIONS EQUIPMENT IN A CENTRAL OFFICE, BUT THIS WILL NOT ALLOW QWEST TO DETERMINE THE DISCRETE LIST 1 DRAIN FOR A GIVEN CLEC'S EQUIPMENT." IS IT NECESSARY FOR QWEST TO DETERMINE THE DISCRETE LIST 1 DRAIN FOR A GIVEN CLEC FOR QWEST TO BE ABLE TO SIZE POWER PLANT FOR CLECS LIKE IT DOES ITSELF?

A. No. I explained why Mr. Ashton is wrong on this point at pages 58-60 of my rebuttal testimony. Mr. Ashton acknowledges that Qwest is able to determine the peak usage of all telecommunications equipment in the central office, which as explained in Qwest's own Technical Publications, is the appropriate standard to use for sizing power plant for a central office.[390] This means that Qwest should size power plant based on the peak usage of the central office at the busy hour, and charge all users in the central office for power plant based on their pro rata share of the total usage. Given that central office power plant is sized to accommodate the peak usage of all telecommunications equipment in the office (both CLEC and Qwest) at the busy hour, there is no need for Qwest to build in more power plant for CLECs, as Mr. Ashton claims Qwest does – or worse yet, for Qwest to charge Eschelon for that unnecessary power plant.

[390] Starkey Direct, pp. 112-114, citing Qwest Technical Publications.

Qwest creates the impression that Qwest must build in additional power plant capacity for CLECs because CLECs could add additional equipment/cards/etc. and increase their power draw faster than Qwest could add power plant capacity. Qwest's concern is misplaced. Not only do CLECs provide Qwest advance notice of equipment it will place in their collocations as well as the expected number of circuits served by this equipment in their collocation applications, but it is highly likely that any increase in power draw for Eschelon would result in a comparable decrease in power draw for another carrier. That is, because oftentimes a customer "won" by Eschelon is a customer "lost" by another carrier in the central office, and because the power plant serves all carriers in a particular central office, the power draw increase for Eschelon on that power plant will be cancelled out by the power draw decrease from the other carrier, resulting in no impact on the shared power plant capacity needed to serve that office. This shows that Qwest's claim that it needs to know the discrete List 1 drain for a particular CLEC in order to size power plant for CLECs the same way Qwest sizes power plant for its own use is not accurate. Rather, the peak drain at the busy hour is the relevant information for properly sizing power plant, and Mr. Ashton acknowledges that Qwest has this information. However, even if Qwest would need the discrete List 1 drain for individual CLECs to properly size power plant, contrary to Mr. Ashton, Qwest can obtain this information.[391]

[391] Starkey Rebuttal, pp. 59-60 and footnote 187, explaining ways Qwest could obtain a CLEC's list 1 drain or estimate the List 1 drain. Mr. Ashton claims that estimating List 1 drain for CLECs is

Q. MR. ASHTON TESTIFIES THAT EVEN IF QWEST HAD ESCHELON'S LIST 1 DRAIN, THIS NUMBER WOULD BE IRRELEVANT.[392] WOULD YOU LIKE TO RESPOND?

A. Yes. Qwest is arguing both sides of the issue. Qwest creates the impression that it needs to know Eschelon's List 1 drain in order for Qwest to size the power plant in a nondiscriminatory fashion, because according to Qwest, Qwest has no idea about Eschelon's potential power draw. But when I show that Qwest does in fact have the List 1 drain information Qwest alleges it needs (or can easily obtain that information), Qwest argues that a CLEC's List 1 drain information is irrelevant. Qwest cannot have it both ways. I actually agree with Mr. Ashton that a particular CLEC's List 1 drain is irrelevant for sizing power plant for the central office (because it is sized based on the aggregate peak drain of all equipment in the central office at the busy hour), and if that is the case, then Qwest unarguably has all the information it needs to properly size power plant for CLECs the same way it does for itself.

"dangerous" (Ashton Response, p. 5, line 6), but this procedure is expressly discussed in Qwest Technical Publication 77368 ("A rough estimate of List 1 drain is 30-40% of the List 2 drain"), which was authored by Mr. Ashton. Surely, Mr. Ashton would not write dangerous processes into Qwest's Technical Publications. Power plant is sized to accommodate the peak usage of all telecommunications equipment in the central office at the busy hour, so Mr. Ashton's concern about insufficient power plant capacity is accounted for in the methodology for sizing power plant. I would also add that Mr. Ashton never answers the question posed at page 5 of his response testimony. The question is: "Can Qwest estimate the combined List 1 drain of Eschelon's collocated equipment?", but Mr. Ashton never says "yes" or "no." To the extent that Qwest needs this information, the answer is yes.

[392] Ashton Response, p. 5.

Mr. Ashton also argues that there is no reason for Qwest to acquire a CLEC's list 1 drain because the power plant rate is not based on List 1 drain, but this undermines Qwest's proposal because the cost study does not develop the power plant rate element based on any measure of CLEC power cable capacity by which Qwest proposes to apply the power plant rate.

Q. MR. ASHTON STATES THAT EXHIBIT CA-2 SHOWS THAT ESCHELON IS ATTEMPTING TO PAY FOR LESS POWER PLANT THAN QWEST ACTUALLY MAKES AVAILABLE TO ESCHELON.[393] IS THIS WHAT MR. ASHTON'S EXHIBIT CA-2 SHOWS?

A. No. Exhibit CA-2 is flawed for a number of reasons. First, Mr. Ashton claims that Exhibit CA-2 is demonstrative of Eschelon's "ordered" and "usage" amounts. However, what Exhibit CA-2 actually shows is the power usage requirements of a central office as a whole. List 2 drain of a central office (both CLEC and Qwest equipment) – or the capacity of power cables – will always be greater than List 1 drain, and List 1 drain will always be greater on a central office wide basis than measured usage (at all times other than the busy hour). Therefore, if Mr. Ashton's concern about Eschelon paying less for power plant than Qwest makes available was legitimate, this would hold true for the entire central office as a whole (including Qwest) – not just Eschelon. Second, the labeling of Exhibit CA-2 is misleading. As I explained in my rebuttal testimony (pages 56-57), CLECs

[393] Ashton Response, pp. 11-12.

do not order power plant capacity, rather they order power cables. However, Exhibit CA-2 attempts to obscure this fact by referring to a "100 amp order." However, this order would be an order for power cables, which is not a factor in sizing power plant capacity[394] (as Mr. Ashton apparently acknowledges by labeling List 1 "engineered" capacity), nor should it be an indication to Qwest of how much power plant capacity a CLEC will need. Though Mr. Ashton claims that "Qwest does in fact make the ordered capacity available,"[395] this, too, is misleading. Obviously at any time other than the busy hour, there will be free power plant capacity available to any carrier in the central office – not just Eschelon. Therefore, Qwest's insinuation that any free power plant capacity is available exclusively for Eschelon's is false because Qwest, Eschelon, or any other carrier could draw upon that free capacity when it is available. This exposes another problem with Exhibit CA-2: by characterizing this as an Eschelon-specific scenario, Qwest makes it appear as if the spare capacity (represented by the difference between measured usage and List 1 drain) is available exclusively to Eschelon. However, this spare capacity could be used by Qwest or other carriers. It is exactly because spare capacity on the power plant can be used by any central office user, that it should be factored in when engineering the size of the plant – *i.e.*, no rational engineer would build a power plant that always had substantial additional capacity based on the irrational notion that some portion of

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

[395] Ashton Response, p. 11, lines 22-23.

the spare capacity can be guaranteed to an individual user. Yet, that is what Mr. Ashton is asking the Commission to believe Qwest does with CA-2 – even though he is contradicted by every Qwest engineering document that speaks to these issues. The end result is that despite the fact that spare power plant capacity is available for Qwest's use or any other carriers' use, Qwest wants Eschelon to pick up the tab for it.

Q. LET'S ASSUME FOR THE SAKE OF ARGUMENT THAT QWEST VIOLATES ITS TECHNICAL PUBLICATIONS AND ACTUALLY DOES SIZE POWER PLANT FOR CLEC EQUIPMENT DIFFERENTLY THAN IT SIZES POWER PLANT FOR QWEST'S OWN EQUIPMENT, AS MR. ASHTON DESCRIBES. IS QWEST'S ATTEMPT TO SUPPORT THIS DIFFERENT TREATMENT CONVINCING?

A. No. However, before I address the flaws in Mr. Ashton's reasoning, I should reiterate the point I made at pages 64-65 of my rebuttal testimony that Qwest is prohibited from treating Eschelon differently than itself for power per the ICA and the Act. Therefore, no reason Qwest can provide can justify Qwest treating Eschelon differently than itself when sizing power plant, as it has admitted in this case. In other words, the FCC does not leave room for "reasonable discrimination;" rather, it requires a strict non-discrimination.

Q. WHY DOES MR. ASHTON CLAIM THAT IT MUST TREAT CLECS DIFFERENTLY THAN QWEST IN THE PROVISIONING OF POWER PLANT?

A. One reason that Mr. Ashton provides is that "Qwest does not know, cannot know, and cannot reasonably forecast the draw that CLEC equipment will take, so Qwest uses the ordered amount to size the power plant capacity made available to CLECs."[396] There are a number of problems with this reason. First, Mr. Ashton again erroneously claims that CLECs order power plant capacity. This is not the case.[397] Second, since power plant is a shared resource of the central office,[398] Qwest does not and cannot make available certain amounts of power plant capacity to Eschelon.[399] Furthermore, Mr. Ashton's claim that Qwest must size power plant based on the size of the CLEC power cable because Qwest has no idea what to expect in terms of the CLEC's power draw[400] is false. Qwest has a list of the CLEC's equipment from the collocation application (vendor, model number, etc.) and knows the CLECs expected number of circuits. In addition, Qwest uses some of the same equipment that CLECs do, and in these instances, knows what the List 1 drain is for this equipment. And if for some reason Qwest does not have access to the list 1 drain for CLEC equipment, Qwest has a specific

[396] Ashton Response, p. 3, lines 21-23.

[397] Starkey Rebuttal, p. 57.

[398] Starkey Direct, p. 106, lines 3-5.

[399] Starkey Rebuttal, pp. 63-64.

[400] Ashton Response, p. 4, lines 3-4. *See also,* Ashton Response, p. 13, lines 11-12.

procedure to estimate List 1 drain.[401] And, Qwest's experience in designing power plant and measuring CLEC power usage should be a strong indicator that CLECs don't use the full List 2 power of their power cables. Qwest knows full well that CLECs are required to size power cables at the higher List 2 drain pursuant to manufacturer's recommendations and safety reasons, and have no intention to "max out" those cables.[402] Finally, if Qwest needed any additional information from the CLEC to size power plant properly, Qwest controls the application process by which CLECs request collocation services, and it could easily ask for whatever information it needed to properly gauge CLEC usage – rather than blindly relying on the power cable order which it knows is an inaccurate way to gauge power plant consumption.[403]

[401] Qwest Technical Publication #77368 ("A rough estimate of List 1 drain is 30-40% of the List 2 drain."). List 1 drain is estimated at approximately 30-40% of List 2 drain. Therefore, if Qwest does not have access to List 1 drain for Eschelon, it could estimate that List 1 drain by assuming 30-40% of the size (in amperage) of Eschelon's power cables (which Qwest assumes is Eschelon's List 2 drain). Since Qwest has a specific procedure to estimate List 1 drain when information is not available from the vendor or through experience in using the equipment, Mr. Ashton's claim that sizing power plant for CLECs like it does for itself would force Qwest to "guess at what power the CLEC may draw over that feed" is incorrect (Ashton Response, p. 4). Qwest would not need to guess because there is a specific engineering procedure for developing a reliable (albeit "rough") estimate of List 1 drain.

[402] Mr. Ashton complains that Eschelon doesn't tell Qwest what its anticipated usage will be, and since according to Mr. Ashton, Eschelon cannot forecast its usage, Qwest cannot forecast it either. (Ashton Response, p. 4, lines 1-4). Mr. Ashton fails to mention, however, that Qwest never asks the CLEC for its anticipated usage. All Qwest would have to do is ask the CLEC for its List 1 drain on the collocation application and then Qwest would unarguably have the information it says it needs to size power plant for CLECs in the same manner it uses to size for Qwest equipment. Nonetheless, Qwest sizes power plant based on the aggregate usage of the entire central office, so the individual power draw of a CLEC is not needed for this exercise and that's likely why Qwest does not ask for it. *See*, Starkey Rebuttal, pp. 58-60.

[403] Starkey Rebuttal, pp. 59-60.

This information seriously undercuts Mr. Ashton's notion that "the only reasonable amperage to include in power plant planning for CLECs is the ordered amount" because it is "the only number that Qwest has to plan to."[404] Qwest has a substantial amount of additional information for the purposes of sizing power plant for CLECs, and if Qwest needed a different "number" to properly size power plant, then it should simply ask for it.

Q. DOES MR. ASHTON PROVIDE ANOTHER REASON WHY QWEST MUST ALLEGEDLY TREAT ESCHELON DIFFERENT THAN ITSELF WHEN SIZING POWER PLANT?

A. Yes.[405] Mr. Ashton says that "a good example of a situation in which the ordered amount of power could be required would be if Qwest had a complete power failure within a central office, and the batteries fully discharged."[406] Mr. Ashton reasons that when power is restored to this central office, CLECs and Qwest may draw something close to their List 2 drain when re-starting their equipment.[407] Qwest claims that since a CLEC may require List 2 drain power at re-start, it is

[404] Ashton Response, p. 4, lines 5-7.

[405] Mr. Ashton also claims that the power plant rate should not be assessed based on usage because power plant equipment is not consumed, power plant is a fixed investment, and power plant is not amenable to measurement. *See* Ashton Response, pp. 7-8. I addressed these issues at pages 66-67 of my rebuttal testimony.

[406] Ashton Response, p. 6, lines 19-21.

[407] Ashton Response, p. 7, lines 2-5.

reasonable for Qwest to engineer the power plant to the size of the CLEC power cable.[408]

Q. IS THIS A "GOOD EXAMPLE" AS MR. ASHTON CLAIMS?

A. No. First, I find it interesting that Mr. Ashton would characterize this as a "good" example, while failing to explain that this is the *only* example of a situation that Qwest can dream up in which Qwest would need to provide CLECs the List 2 drain amount of power associated with the size of their power cables at the same time – and even then, Qwest can provide no example of this "List 2 event" ever happening. Further, the hypothetical "List 2 Event" that Mr. Ashton creates should never happen if Qwest is properly monitoring the draw on its power plant. For Qwest's scenario to happen, the following would have to occur:

- Qwest assumes the central office completely loses power: this should not happen (especially in central offices in which CLECs are collocated) because Qwest is required to have backup generation on site to power equipment if it loses AC power from the utility.[409] Indeed, Qwest charges CLECs in its power plant rate costs associated with diesel generator backup. Therefore, Qwest will not lose power to the central office so long as Qwest continues to

[408] Though Mr. Ashton acknowledges that both Qwest and CLECs would both draw an amount of power approaching or reaching the maximum power draw of the equipment, or List 2 drain (Ashton Response, p. 7, lines 2-5), Qwest admittedly does not size power plant at List 2 drain for Qwest equipment. If Qwest actually needed to size power plant for CLEC equipment at List 2 drain because the CLEC may need to draw that amount of power, Qwest would also need to size power plant at List 2 drain for Qwest equipment (based on Mr. Ashton's admission that Qwest may also need this amount of power in Mr. Ashton's hypothetical List 2 drain event).

[409] Backup AC generation is described at pages 104-105 of my direct testimony.

pour diesel fuel into the backup generator and Mr. Ashton's singular example will not occur.[410]

- Qwest assumes all CLECs would require List 2 drain amount of power simultaneously once power is restored to the central office: this would not happen. First of all, Qwest assumes that every CLEC in the central office is using its collocation to maximum capacity – *i.e.*, bays are entirely full and equipment fully carded. This is highly unlikely. However, even if all CLECs were using their collocation to the maximum capacity and Qwest lost power to the central office and had to restart, Qwest would monitor re-start so that power surges do not occur. One way Qwest would prevent the List 2 drain event that Mr. Hubbard describes is by pulling fuses in the central office[411] so that not all equipment starts up simultaneously.[412]
- Qwest assumes it has some obligation to provide the full List 2 drain amount of power to CLECs under this "List 2 Event": the List 2 event that Mr. Ashton describes is something that could, if at all, take place only during a major catastrophe, or what is referred to as a "force majuere." Qwest would

[410] Mr. Ashton testifies that "For a time, a diesel engine would be supplying additional backup power for the batteries. If the engine cannot be refueled, the batteries would become the sole source of power." (Ashton Response, p. 6, lines 22-24). However, Mr. Ashton never explains why Qwest could not refuel its backup generator or why the backup generator would only operate "for a time."

[411] Technical Document 790-100-654RG, p. 14, describes "pulling the discharge fuses" as a procedure for starting to charge batteries from low voltage resulting from complete battery discharge, and explains that it "has no harmful consequences."

[412] Mr. Ashton makes the unsupported assertion that Qwest somehow makes power available to CLECs at restart "ahead of even Qwest's own switch." (Ashton Response, p. 7, lines 6-7). This is not the case. Qwest has no ability to parse out power plant capacity to any user or users, and that capacity is available indiscriminately to all users (both CLECs and Qwest).

certainly invoke the force majuere clause of the ICA (Section 5.7) if it was unable to provide power during the hypothetical "List 2 Event" Mr. Ashton describes, and a subsequent disagreement with a CLEC arose regarding Qwest's inability to provide that power. So even if all of the stars aligned to bring about Mr. Ashton's List 2 Event example – something that has never happened to Qwest – Qwest has built in protection in the ICA from a CLEC claiming breach of contract if Qwest did not provide full List 2 power.

Q. LET'S ASSUME FOR THE SAKE OF ARGUMENT THAT MR. ASHTON'S "LIST 2 DRAIN EVENT" DID COME TO PASS AND ASSUME FURTHER THAT CLECS DO NEED THE FULL LIST 2 DRAIN ASSOCIATED WITH THEIR POWER CABLES AT RE-START. WOULD THIS SUPPORT MR. ASHTON'S EXPLANATION OF HOW QWEST SIZES POWER PLANT?

A. No. Mr. Ashton testifies that Qwest sizes power plant capacity by using the following equation: List 1 drain of Qwest equipment + List 1 drain of CLEC equipment + List 2 drain of CLEC equipment. If a central office did actually lose power and CLECs needed List 2 drain at re-start, according to Mr. Ashton's own testimony, Qwest would still have spare power plant capacity in the amount of CLEC List 1 drain. Therefore, even under Qwest's view of power plant sizing, Eschelon is being forced to pay for power plant capacity that it could never use.

Q. MS. MILLION STATES THAT NOTHING IN THE FCC'S TELRIC RULES REQUIRES QWEST TO ADD TO ITS EXISTING POWER PLANT TO ACCOMMODATE CLEC DEMAND FOR CAPACITY.[413] IS IT YOUR TESTMONY THAT QWEST MUST ADD POWER PLANT CAPACITY IN ORDER TO CHARGE FOR IT?

A. No,[414] and Ms. Million provides no cite where I made this claim in my testimony. Nonetheless, Ms. Million misses the point.[415] TELRIC (which is the basis for collocation power rates) calculates rates based on total demand (or the "total" in Total Element Long Run Incremental Cost). A properly constructed TELRIC cost study will calculate the total investment for a UNE and then divide that number by total demand to calculate chargeable units. This results in an average cost for an element and accounts for total investment and total demand. In this way, TELRIC accounts for the total investment Qwest makes to serve total demand and assumes away the short run marginal cost concerns Ms. Million raises.

[413] Million Response, p. 5.

[414] Ms. Million also testifies that the "problem with Eschelon's position is that it ignores the fact that the rate for an element and its application on a unitized basis result in the amount of TELRIC cost recovery awarded to Qwest by a Commission." (Million Response, p. 3, lines 5-8). Eschelon does not ignore the relationship between the rate and its application and the importance of this to proper cost recovery, and I actually agree with Ms. Million that the way the rate is developed is important to its application. That is why in my rebuttal testimony, *see* Starkey Rebuttal, pp. 68-70, I explained that Qwest developed its cost study for the power plant rate based on *usage* – the same way that Eschelon wants Qwest to apply the power plant rate. There is nothing in the development of Qwest's power plant rate to suggest that it is based on CLEC power cable orders, as Qwest wants to apply the rate.

[415] Ms. Million also claims that Qwest "sometimes" does add power plant capacity based on CLEC orders (Million Response, p. 5, line 11). However, I showed at pages 60-62 of my rebuttal testimony that Qwest's claims about augmenting power plant based on CLEC orders for power cables are false.

Q. QWEST CLAIMS THAT THE DISAGREEMENTS UNDER ISSUE 8-21 ARE BETTER ADDRESSED IN A COST PROCEEDING WHERE ALL INTERESTED PARTIES CAN BE REPRESENTED.[416] HAVE YOU ALREADY ADDRESSED THIS POINT?

A. Yes. I addressed this issue at pages 76-77 of my rebuttal testimony and will not repeat those arguments here.[417]

Q. QWEST COMPLAINS THAT ESCHELON WANTS TO BE BILLED ON DAY TO DAY USAGE, WHILE QWEST SIZES POWER PLANT ON BUSY HOUR USAGE, AND THESE ARE TWO TOTALLY DIFFERENT THINGS.[418] WOULD YOU LIKE TO RESPOND?

A. Yes, I addressed this issue at pages 70-71 of my rebuttal testimony and explained that Qwest's concern is exaggerated. Qwest is fully knowledgeable about the busy day busy hour for each central office, and if it so chooses, it can measure Eschelon's usage at that time. Though Mr. Hubbard refers to these measurements as "random," they would really only be random if Qwest wants them to be

[416] Ashton Response, p. 3, lines 1-3. *See also*, Million Response, pp. 2-3.

[417] At pages 8-9 of his response testimony, Mr. Ashton discusses my testimony about the Qwest DC Power Measuring Amendment and states that "I'm not sure what point Mr. Starkey is making, though, in this regard. Does Qwest offer the option to pay for power usage on a measured basis? Yes, it does." (Ashton Response, p. 8, lines 17-19). The point I was making in my testimony (Starkey Direct, pp. 106-107) is that Qwest originally assessed both power charges – usage and power plant – on the size of the CLEC power cable, and changed the application of one of these rate elements (usage) to be applied on measured usage, and now claims that it is unreasonable to assume that both rate elements should be assessed on measured usage. If Qwest applied both power rate elements in the same manner before the change, it is logical that the change should apply to both rate elements so that they will be applied on the same basis after the change.

[418] Ashton Response, pp. 6 and 10.

random.[419] For instance, Mr. Ashton shows three hypothetical power measurements on which a CLEC could be billed (47 amps, 25 amps and 32 amps), and claims that "NONE of these numbers are any part of the equation that drives Qwest power plant augment decisions."[420] This is not entirely true. If the 47 amp measurement represents the CLEC's usage at the busy hour, then it would be part of the power plant sizing equation (along with the aggregate busy hour usage of the other power users in the central office).[421]

Mr. Ashton goes on to claim that if the CLEC had ordered a 100 amp power cable, it is this 100 amps that would be part of the equation. Mr. Ashton is wrong. Since this 100 amps associated with the power cable (which is based on List 2 drain by engineering requirements) has no relationship to the peak usage that a CLEC draws over that cable (List 1 drain), this 100 amps would not drive power

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

[420] Ashton Response, p. 11, lines 8-11. *See also*, Ashton Response, p. 11, lines 2-3 ("A specific CLEC's discrete and randomly measured usage throughout the year is never a factor in planning power plant investment.") I agree with Mr. Ashton that a specific CLEC's usage is not a factor in planning power plant investment, rather it is the aggregate peak usage of the entire central office (Qwest and all CLECs) at the busy hour that is relevant. That is why Qwest does not need to know Eschelon's individual power usage in order to size power plant for Eschelon's equipment in a nondiscriminatory manner.

[421] It would represent the CLEC's portion of the aggregate peak usage at the busy hour used to size power plant in the central office.

plant investment and would not be "part of the equation."[422] It is telling that Mr. Ashton never claims that a CLEC's busy hour usage would ever reach anywhere close to the List 2 drain capacity of its power cables, but Qwest wants to charge Eschelon for power plant as if Eschelon draws that amount every month.

Q. QWEST CLAIMS THAT "IT IS UP TO ESCHELON TO MANAGE ITS POWER REQUIREMENTS" THROUGH THE POWER REDUCTION AND POWER MEASUREMENT OPTIONS.[423] DOES THIS MEAN THAT QWEST SHOULD NOT APPLY THE POWER PLANT RATE ON MEASURED USAGE?

A. No. Qwest's Power Reduction offering addresses the ability of changing fuses at the BDFB, changing breakers at the power plant, or potentially re-engineering smaller power cables aimed at re-engineering a CLEC's power *distribution* infrastructure. Power *distribution* is a different component than power *plant*, and the two are sized differently – power distribution is sized at List 2 drain and power plant is sized at a lower List 1 drain. Therefore, the Power Reduction offering is irrelevant to the proper application of the power plant rate.

Q. QWEST POINTS TO DECISIONS IN WASHINGTON AND UTAH RELATED TO A MCLEODUSA COMPLAINT AGAINT QWEST AS

[422] As explained above, Qwest's own technical documents belie Mr. Ashton's claim and do not list power cables or List 2 drain as influencing factors for power plant sizing.

[423] Ashton Response, p. 13, lines 18-19.

SUPPORT FOR QWEST'S POSITION ON ISSUE 8-21.[424] WOULD YOU LIKE TO RESPOND?

A. Yes. First, The Washington and Utah decisions Qwest references are based on a McLeodUSA/Qwest ICA amendment and specific agreed upon language between those two parties that does not apply to Eschelon and Qwest.

In addition, the decision in the McLeodUSA Washington complaint case does not reject the notion of discrimination as Mr. Ashton claims. The Washington decision states: "Although it may be possible for the Commission to require Qwest to implement a nondiscriminatory rate for DC power, the record in this case does not provide a sufficient basis for such a determination."[425] This decision goes on to explain that the scope of that particular complaint case between McLeodUSA and Qwest focused on the intent of those companies at the time they entered into an ICA amendment that does not apply to Eschelon and Qwest.[426]

Furthermore, Qwest fails altogether to mention the Iowa decision in the McLeodUSA complaint against Qwest, which is currently on reconsideration before the Iowa Board, which found that "The available evidence indicates a valid concern exists regarding possible discrimination, but the record has not been fully

[424] Ashton Response, pp. 13-14 and Million Response, p. 3.

[425] Exhibit CA-3, p. 22.

[426] Id.

developed on this issue."[427] The Iowa Board also found that "it is clear that Qwest treats CLECs differently in this respect" as it relates to assigning power plant costs, and found that "[m]oreover, Qwest admits that it assigns Power Plant costs to itself based on List 1 drain (which approximates its actual use), but charges CLECs based on the amount of power ordered (which approximates List 2 Drain)."[428] The Board went on to state that, "the Board is concerned about Qwest's practices in this respect" and suggested that this issue be revisited in an appropriate docket (such as an arbitration proceeding) in which the Board can order relief.[429]

Finally, Qwest will, in its surrebuttal testimony (like it has in other state arbitration proceedings), likely point to the MN Arbitrators' Report as further support for Qwest's position on Issue 8-21. The Commission should be aware that contrary to Qwest's claims in other states, the Minnesota decision did not reject the notion that Qwest discriminates in its application of the power plant rate. In fact, the Minnesota Arbitrators' Report finds that "it is theoretically possible that the current pricing scheme results in a discriminatory rate or over-recovers capacity costs from CLECs," but finds that the evidence provided was not sufficient to draw this conclusion, so it concludes that these issues should be

[427] Iowa Utilities Board, Final Order in Docket No. FCU-06-20, issued 7/27/06, p. 14.

[428] *Id.*

[429] Id., p. 15.

dealt with in a UNE cost case.[430] It is possible that Qwest's application of the power plant rate based on the size of CLEC's cable could indeed be found to be discriminatory in a future Minnesota UNE cost case.

Q. A COMMON THEME IN QWEST'S REFERENCES TO THE DECISIONS IN THIS AND OTHER STATES IS THE NOTION THAT THERE IS A LACK OF BASIS FOR A FINDING THAT QWEST'S APPLICATION OF THE POWER PLANT RATE BASED ON THE SIZE OF CLEC POWER CABLE ORDERS IS DISCRIMINATORY. PLEASE SUMMARIZE WHY QWEST'S POWER PLANT RATE APPLICATION IS DISCRIMINATORY TO ESCHELON.

A. The problem is relatively basic. As the Iowa Board's Order indicates, Qwest has admitted to assigning power plant costs to itself based on List 1 drain and assigning power plant costs to CLECs based on List 2 drain. List 2 drain (which represents a "worst case scenario" load) is higher than List 1 drain (which is based on normal operating load). Therefore, what Qwest is doing is assigning higher power plant costs on CLECs (List 2 drain) than it is assigning to itself (List 1 drain). For example, let's assume that both Qwest's and Eschelon's List 1 drain is 100 amps and their List 2 drains (or the size of their power cables) is 200 amps. Further assume that the TELRIC rate for power plant is $10.75 (Exhibit A, Section 8.1.4). Under this hypothetical scenario, Qwest would assign $1,075

[430] MN Arbitrators' Report, ¶ 108, affirmed by a 4-0 vote of the Minnesota PUC on March 6, 2007.

($10.75 times 100 amps) in power plant costs to itself, but would assign $2,150 ($10.75 times 200 amps) in power plant costs to Eschelon. This is despite the fact that in this example both Qwest and Eschelon have identical power and load characteristics (List 1 drain and List 2 drain). If we change the example to assume that Qwest's List 1 drain increases to 150 amps, Qwest would assign $1,612.50 ($10.75 times 150 amps) in power plant costs to itself (less than to Eschelon), even though Qwest is consuming more power plant capacity than is Eschelon. This is discrimination prohibited by the Act and the companies' ICA.[431]

Q. BUT QWEST CLAIMS THAT IT MAKES THE FULL 200 AMPS OF POWER PLANT CAPACITY AVAILABLE TO ESCHELON BASED ON ITS POWER CABLE ORDER. DOES THIS HAVE ANY BEARING ON THE DISCRIMINATION EXAMPLE YOU PROVIDE ABOVE?

A. No, because Qwest does not invest in power plant based on CLEC orders for power cables. As the Iowa Utilities Board found, "Typically, an order for power from an individual CLEC does not require additional investment in power plant facilities. Instead, it is the total power consumption by Qwest and all CLECs that would trigger the need for additional power plant facilities."[432] Because Qwest's investments in power plant facilities are not incremental to CLEC orders for power cables, there is no basis for Qwest assigning costs to CLECs as if it does,

[431] See, Starkey Rebuttal, pp. 64-65.

[432] IUB Order, pp. 13-14.

which is what assigning power plant costs to CLECs based on List 2 drain does. Further, as the Iowa Board found, "power plant facilities are not dedicated to individual companies, but are common to all those within a central office. This includes Qwest and all CLECs collocating in that office."[433] Therefore, even if Qwest did invest in power plant based on the size of a CLEC power cable order (which would violate its own Technical Publications), the excess power plant capacity that Qwest would be building into its central office power plant would be available for the use of any company in the central office (Qwest and all CLECs). Despite this power plant capacity being equally available for Qwest's and Eschelon's (and other collocators') use, Qwest is attempting to make Eschelon pay for it.

Q. MS. MILLION STATES THAT THE WASHINGTON DECISION IN THE MCLEODUSA COMPLAINT CASE FOUND THAT QWEST'S POWER PLANT COST STUDY IS NOT BASED ON USAGE.[434] WOULD YOU LIKE TO RESPOND?

A. Yes. As shown at page 69 of my rebuttal testimony, Qwest's cost study divides the total power plant investment by "DC power usage" to calculate chargeable units of power plant. Though Ms. Million acknowledges the appearance of "usage" in the cost study,[435] she essentially claims that it was a bad choice of

[433] IUB Order, p. 13.

[434] Million Response, p. 4.

[435] Million Response, p. 4, lines 6-9.

words on Qwest's part when developing the cost study. Qwest's hindsight aside, it is undisputable that no measure of "power order" or "power cable" is used to develop Qwest's power plant rate (which is the basis for Qwest's proposed application of the power plant rate). Qwest simply stating that its use of the term "usage" in the cost study is something different than electrical usage does not explain why it is more appropriate then for Qwest to apply the power plant rate based on the size of the CLEC power cable order.

Q. QWEST REFERENCES THE WASHINGTON MCLEODUSA/QWEST COMPLAINT DECISION AS SUPPORT FOR QWEST'S POSITION THAT THIS ISSUE IS BETTER ADDRESSED IN A UNE COST CASE.[436] IS QWEST'S COMPARISON OF THE COMPLAINT CASE TO THIS ARBITRATION CASE APPROPRIATE?

A. No. Qwest's reference to the Washington McLeodUSA/Qwest complaint case is misplaced. The fact that the Washington McLeodUSA/Qwest case was a complaint case and this case is an arbitration case is an important factor in the Washington decision. The Washington decision states: "Within the scope if this docket, the Commission may only determine the intent of the parties with regard to the DC power measuring amendment. A cost docket, or similar cost review, is the forum for judging the adequacy of rates and rate structures for CLEC access to

[436] Million Response, p. 3.

ILEC networks."[437] Notably, the decision referenced "a cost docket, or similar cost review" as the appropriate forum for addressing this issue. This arbitration is a "similar cost review" and is, therefore, an appropriate forum for addressing these issues according to the Washington complaint decision.

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

Issue No. 9-31: ICA Section 9.1.2

Q. WHAT IS AT STAKE UNDER ISSUE 9-31?

A. Just as the title of this Subject Matter indicates, nondiscriminatory access to UNEs is at issue. Qwest disagrees with Eschelon's language in 9.1.2 that states that "Access to Unbundled Network Elements includes moving, adding to, repairing and changing the UNE (through *e.g.*, design changes, maintenance of service including trouble isolation, additional dispatches, and cancellation of orders)." Yet, Qwest never denies that it provides these functions for its retail customers and has provided these functions for UNEs in the past. Qwest points to no authority – other than Qwest's own opinion – to support the notion that something has changed that would free Qwest from the obligations of providing these functions for UNEs on a nondiscriminatory basis and at cost-based rates. For example, what if Qwest repaired the facilities that its retail customers use, but restricted this access for Eschelon's UNE facilities (or demanded such high

[437] Exhibit CA-3, p. 22.

charges for the repairs that the repairs are cost prohibitive)? Would this give Eschelon a reasonable opportunity to compete with Qwest? Obviously not, but Qwest makes no commitment that this scenario could not become a reality. And Qwest's attempts to remove these functions from the nondiscriminatory access requirements of Section 251 of the Act, such as Qwest's attempt to apply tariff rates to these functions, has been done outside of ICA negotiations/arbitrations and outside of CMP. With this context, it is not surprising that Eschelon is not willing to accept Qwest's "trust us" attitude with respect to providing nondiscriminatory access to UNEs, as displayed in Qwest's response testimony.[438] Qwest has made it clear that, though the functions listed in Section 9.1.2 are performed for UNEs and are functions that Qwest normally provides for itself or its retail customers, Qwest believes that they are not subject to the nondiscriminatory provisions of Section 251 and, therefore, are not subject to cost-based pricing rules.[439] Qwest is wrong, and the Commission should reject Qwest's misguided view by adopting Eschelon's proposal for Issue 9-31 and preserve nondiscriminatory access to UNEs.

Q. WHAT ARE QWEST'S PRIMARY CRITICISMS OF ESCHELON'S POSITION ON ISSUE 9-31?

[438] Ms. Stewart testifies that Qwest will provide nondiscriminatory "access" to UNEs, but will not agree to language that memorializes that commitment in the ICA by identifying certain functions that Qwest has provided for UNEs and provides for itself or its retail customers.

[439] Stewart Response, p. 3.

A. Qwest contends that Eschelon is attempting to "impermissibly expand the access Qwest provides to UNEs beyond the requirements imposed by governing law."[440] Qwest also claims that Eschelon is attempting to keep Qwest from recovering its costs for UNE-related functions.[441]

Q. IS ANY OF THIS TRUE?

A. No. I explained at pages 135-138 of my direct testimony and 96-97 of my rebuttal testimony how Eschelon's proposals are consistent with Qwest's existing obligation under governing law. For brevity, I will not repeat those arguments here. I would like to add, however, that Qwest's claim of Eschelon attempting to expand Qwest's obligations with regard to UNE access rings hollow when one considers that Qwest has provided these functions in the past for CLECs, and Eschelon is only asking for certainty that Qwest will continue to provide them in the future (unless the ICA is amended).[442] This need for certainty is illustrated by

[440] Stewart Response, p. 10, lines 3-4. *See also,* Stewart Response, p. 14, lines 9-10 ("going beyond the routine network modifications"); p. 13, lines 17-19 ("violates the long-established rule that an ILEC is only required to provide access to its existing network, not access to 'a yet unbuilt superior one.") I addressed Qwest's "superior network" argument in my rebuttal testimony at pages 79 and 82-84. I also addressed Ms. Stewart's claim that the terms "add to" and "changing the UNE" are vague and could require Qwest to build new facilities. *See* Starkey Rebuttal, pp. 81-82 and 96-97. Ms. Stewart, at page 13, lines 13-14 of her response testimony, states that Eschelon's proposal "would potentially obligate" Qwest to provide Eschelon access it doesn't provide to other CLECs or Qwest retail customers, but she makes no attempt to support this claim. The word "potentially" is important because this means that Ms. Stewart can provide no concrete examples of Eschelon's language going beyond the FCC's requirements despite four specific functions listed in Eschelon's language.

[441] Stewart Response, pp. 14-15.

[442] Ms. Stewart claims that Eschelon's language is not necessary to ensure nondiscriminatory access to UNEs. Stewart Response, p. 10. Yet, Qwest has made it very clear that it does not view these functions as related to "access" to UNEs under Section 251 of the Act. *See e.g.*, Stewart Response, p. 3, lines 8-9. If Qwest disagrees that these functions are governed by Section 251, then obviously

Qwest's non-CMP announcement changing the Exhibit As to Qwest's Negotiations Templates to impose tariff rates for the functions listed in Section 9.1.2. This need for certainty is also demonstrated by Qwest's continued effort to restrict access to design changes.[443]

With regard to Qwest's claims regarding cost recovery, I have already addressed this in my rebuttal testimony at page 93.[444] The truth is that nothing in Eschelon's language in 9.1.2 keeps Qwest from recovering its costs. Indeed Eschelon is proposing language under Issue 4-5[445] (some of which has been agreed to by Qwest and closed) that expressly allows Qwest to assess a charge for design changes so long as Qwest is not recovering these costs elsewhere and the rates are

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language is needed to make that obligation clear, or Qwest will impose its misguided judgment (resulting in less "access" and higher, non-cost based rates). Ms. Stewart points to other language in the ICA that speaks to Qwest's obligations to provide access to UNEs, and I do not dispute that other sections may discuss Qwest's obligations in this regard, but Eschelon's proposed language in 9.1.2 makes clear that these activities are required as part of Qwest's obligation to provide nondiscriminatory "access" to UNEs at cost-based rates. Based on Qwest's view of these activities, just because they are mentioned in the ICA, does not mean that Qwest will provide (or continue to provide) nondiscriminatory access to them, which is why Eschelon's Section 9.1.2 is crucial. Eschelon has identified a business need and proposed language to address that need, and like the other sections of the ICA referenced by Ms. Stewart, that language is designed to spell out Qwest's obligations regarding access to UNEs.

[443] *See, e.g.,* Exhibit DD-17 to the rebuttal testimony of Douglas Denney, which is a chronology of Qwest's efforts to limit CFA design changes on the due date to one per circuit. Exhibit DD-17 has been updated to include more recent activities regarding Qwest's attempts.

[444] Ms. Stewart references Mr. Denney's testimony at the Minnesota hearing as support for Qwest's concern that Eschelon's proposal may be designed to prevent Qwest from recovering the costs of the activities listed in Section 9.1.2 (Stewart Response, p. 15). I addressed Qwest's stated concern about cost recovery at page 93 of my rebuttal testimony. Mr. Denney addresses Ms. Stewart's claims regarding his testimony in Minnesota in his testimony on design changes (Issue 4-5 and subparts).

[445] Issue 4-5 is discussed in the testimony of Mr. Denney.

cost-based – this proposal is imminently reasonable.[446] Simply put, no reasonable reading of Eschelon's language leads to the conclusions that Ms. Stewart draws.

Q. DID THE MINNESOTA COMMISSION IN THE MINNESOTA ARBITRATION PROCEEDING DISAGREE WITH QWEST ON THESE POINTS – I.E., THAT ESCHELON'S LANGUAGE IMPERMISSABLY EXPANDS QWEST'S OBLIGATIONS AND WOULD KEEP QWEST FROM RECOVERING ITS COSTS FOR THESE ACTIVITIES?

A. Yes. The Minnesota ALJs found, as affirmed by the Minnesota Commission, as follows:

> It is difficult to understand Qwest's position that Eschelon's language might require Qwest to provide access to an "as yet unbuilt, superior network" or that it might mean Qwest would be unable to charge at all for making such changes. It is a real stretch to find this kind of ambiguity in Eschelon's language. Qwest has pointed to nothing in the language that would require it to perform an activity that is obviously outside of its existing § 251 obligations.[447]
>
> Qwest's proposed language is in fact more ambiguous than Eschelon's, because it would leave unanswered the question whether routine changes in the provision of a UNE would be priced at TELRIC or at some other "applicable rate."[448]

[446] Qwest cannot convincingly argue that it should be allowed to assess separate charges for design changes if it recovers those costs in other rates, nor should Qwest be allowed to be unjustly enriched by charging rates that exceed costs for functions related to Section 251 UNEs.

[447] MN Arbitrators' Report, ¶130 (Exhibit DD-25).

[448] MN Arbitrators' Report, ¶131 (Exhibit DD-25).

> Federal law requires that when a CLEC leases a UNE, the ILEC remains obligated to maintain, repair, or replace it.[449] Unless and until the Commission or other authority determines to the contrary, these types of routine changes to UNEs should be provided at TELRIC rates. Eschelon's language should be adopted for this section.[450]

The Minnesota Commission adopted the ALJs' recommendation.[451]

Q. QWEST PROVIDES ALTERNATIVE LANGUAGE IN ITS RESPONSE TESTIMONY FOR ISSUE 9-31.[452] IS THIS LANGUAGE ACCEPTABLE TO ESCHELON?

A. No. I addressed the shortcomings of Qwest's alternative language at pages 99-100 of my rebuttal testimony. I will point out that Qwest's counter-proposal contains the very same language ("moving, adding to, repairing and changing the UNE (through *e.g.*, design changes, maintenance of service including trouble isolation, additional dispatches, and cancellation of orders)")[453] that Qwest criticizes in Eschelon's proposal as being vague and undefined.[454]

[449] 47 C.F.R. § 51.309(c); see also *TRO* ¶ 639 (requiring a LEC to modify an existing transmission facility, in the same manner it does for its own customers, provides competitors access only to a functionally equivalent network, rather than one of superior quality).

[450] MN Arbitrators' Report, ¶132 (Exhibit DD-25).

[451] MN Arbitrators' Report, ¶ 130, affirmed by a 4-0 vote of the Minnesota PUC on March 6, 2007.

[452] Stewart Response, p. 15 ("Additional activities for ~~Access to~~ Unbundled Network Elements includes moving, adding to, repairing and changing the UNE (through e.g., design changes, maintenance of service including trouble isolation, additional dispatches, and cancellation of orders) at the applicable rate.")

[453] Stewart Response, p. 15, lines 2-5.

[454] Stewart Response, p. 15, line 22.

Q. MS. STEWART TAKES ISSUE WITH TWO EXAMPLES[455] YOU PROVIDED IN YOUR TESTIMONY TO DEMONSTRATE WHY CONTRACT LANGUAGE IS NEEDED TO ENSURE NONDISCRIMINATORY ACCESS TO UNES.[456] PLEASE COMMENT.

A. With regard to the first example, Ms. Stewart notes that Qwest withdrew its December 2005 CMP notice that would have barred UNEs from being used to serve another CLEC, IXC or other telecommunications provider, and is not imposing this limitation.[457] She also notes Qwest has not attempted to impose this limitation on Eschelon. Ms. Stewart misses the point. Whether or not Qwest ultimately withdrew this particular notice or not, this example shows that absent clear and unambiguous language in the ICA about what nondiscriminatory access is, Qwest can and will attempt to make this determination for itself through CMP after the arbitration is over – at a time that is convenient for Qwest. This example also shows that Qwest has no problem pursuing changes in CMP even when that change conflicts with the terms and conditions of an ICA, which seriously undercuts Qwest's claim that terms and conditions in an ICA prevents Qwest and other CMP participants from pursuing different terms and conditions in CMP. And though Qwest withdrew this particular notice, nothing prevents Qwest from pursuing this change or a similar change at a later date in CMP.

[455] Ms. Stewart focuses on two examples, but I actually provided three examples in my testimony. In addition to the two examples to which Ms. Stewart responds, I also provided an example of Qwest attempting to restrict access to CFA design changes. *See* Starkey Direct, pp. 131-132.

[456] Stewart Response, pp. 12-13.

[457] Stewart Response, p. 12.

Ms. Stewart also takes issue with the example I provided regarding Qwest's non-CMP notice indicating that Qwest will assess tariff charges for the activities listed in Section 9.1.2.[458] Ms. Stewart claims that "Qwest is not seeking in this proceeding to impose tariffed design change charges on Eschelon."[459]

Q. WHAT IS YOUR RESPONSE TO MS. STEWART'S CRITICISM OF YOUR SECOND EXAMPLE?

A. Ms. Stewart's testimony suggests that Qwest intends to impose tariff charges for design changes *after* this arbitration has concluded, as Ms. Stewart has admitted.[460] Qwest has made it very clear that it does not consider these activities to be required by Section 251 of the Act, and therefore, Qwest does not believe that they are required to be cost based.[461] There is no reason to believe that Qwest will continue to offer these activities at cost-based rates in the future when it believes that cost-based rates are not required. This makes it all that much more important for the Commission to adopt Eschelon's language in 9.1.2 and make clear that these functions are required for nondiscriminatory access to UNEs. Otherwise, Eschelon will get all the way through this arbitration, only to have Qwest impose tariff rates for these functions after the conclusion of this

[458] *See* Starkey Direct, p. 133-134. *See also*, Starkey Rebuttal, pp. 84-87.

[459] Stewart Response, p. 13.

[460] Ms. Stewart testified as follows at page 6 of her Minnesota Rebuttal testimony: "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."

[461] *See e.g.*, Stewart Response, p. 3, lines 8-10.

proceeding, which is sure to trigger future disputes.[462] If Qwest in the future seeks and obtains the ruling it desires, the agreement already provides a mechanism for Qwest to obtain an amendment pursuant to that change in law.[463] Furthermore, design changes is only one of a number of activities in Section 9.1.2, and though Ms. Stewart has testified that it is not seeking to apply tariff charges to *design changes* "in this proceeding," she does make this same claim with regard to the other activities in Section 9.1.2 (*e.g.*, trouble isolation, additional dispatches, cancellation of orders). However, all of these activities should be cost-based because they are activities related to providing nondiscriminatory access to UNEs pursuant to Section 251 of the Act.

VII. SUBJECT MATTER NO. 16. NETWORK MAINTENANCE AND MODERNIZATION

Issue Nos. 9-33, 9-33(a), and 9-34: ICA Sections 9.1.9 and 9.1.9.1[464]

Q. HAVE CHANGES OCCURRED REGARDING ISSUES 9-33 – 9-34 SINCE THE FILING OF RESPONSIVE TESTIMONY IN DECEMBER?

A. Yes. The issues involved with Network Maintenance and Modernization are addressed in Eschelon's Direct and Rebuttal Testimony.[465] Since then, Eschelon has further modified its proposed language (as described below) to again attempt

[462] Starkey Rebuttal, pp. 84-87.

[463] *See* ICA Section 2.2.

[464] Issues 9-35 and 9-36 are now closed.

[465] *See* Webber Direct (adopted), pp. 5-23 and Webber Rebuttal (adopted), pp. 2-27.

to address Qwest's stated concerns to resolve these issues, and the Minnesota commission has ruled on these issues. On March 6, 2007, the Minnesota commission voted (4-0) to affirm the Arbitrators' Report, with two exceptions[466] in which the commission instead adopted Eschelon's modified language. Regarding Issues 9-33 – 9-34, the Minnesota commission adopted a combination of language proposed by Eschelon and by the Minnesota Department of Commerce ("DOC"). Eschelon has offered the modified language for Section 9.1.9 recommended by the ALJs and adopted by the Minnesota commission to Qwest for all six states, including Washington. Eschelon has also further modified its initial proposal as another alternative to address Qwest's stated concerns.

While the language proposed to resolve these issues has changed, the issues remain as follows: (1) whether minor changes in transmission parameters include changes that adversely affect Eschelon's End User Customer's service (or are unacceptable changes, as proposed by the Minnesota DOC) on more than a temporary or emergency basis [Issue 9-33]; (2) whether copper retirement provisions that are agreed upon and closed should be contradicted or undermined by Qwest's new reading of Section 9.1.9 [Issue 9-33(a)]; and (3) whether, in situations when Qwest makes changes that are specific to an Eschelon End User

[466] The Minnesota commission adopted (by 4-0 votes) Eschelon's modified language for the single remaining open phrase in Issue 12-64 (Root Cause & Acknowledgement of Mistakes) and for Issues 12-71 – 12-73 (Jeopardies), as discussed below with respect to these issues. A written order had not been issued by the Minnesota commission as of the writing of this testimony.

Customer, Qwest should include the circuit identification and Eschelon End User Customer address information in the notice [Issue 9-34].

Regarding Issue 9-33, the ICA should make clear that the SGAT term "minor" actually means minor by providing that "minor changes to transmission parameters" should not adversely affect service to Eschelon's End User Customers. The customer's service worked before Qwest makes a minor change, and it should work after Qwest makes a minor change. "Minor changes" should not degrade or disrupt a customer's service on an ongoing basis. Qwest's suggestion in negotiations that "minor changes" may include ongoing service disruption,[467] combined with Qwest's continued refusal to agree to Eschelon's language or the Minnesota Department of Commerce's alternative language, however, indicates that specific language in the ICA is needed on this point to avoid future disputes. Eschelon's proposal for Issue 9-33 is reasonable and is not an attempt to hold Qwest to a zero outage standard when making changes in its network. Eschelon's proposed language specifically states that there may be "a reasonably anticipated temporary service interruption" when "needed to perform the work," and it also recognizes that emergencies may occur and addresses restoration of service in those situations. Qwest has identified only two situations when Qwest claims that it may legitimately disrupt the customer's service with more than minor changes to transmission parameters in non-temporary or non-

[467] *See, e.g.*, Webber Rebuttal (adopted), p. 13, line 16 – p. 14, line 2).

emergency situations: (1) copper retirement;[468] and (2) a single situation in which a CLEC intends to use a loop outside of the parameters of the loop ordered by CLEC.[469] Eschelon's proposed language takes care of both. First, copper retirement is already addressed in closed language. Eschelon's proposed language specifically states that the closed provisions – including those previously identified by Ms. Stewart[470] - are not addressed in Section 9.1.9. Second, closed language in Section 9.1.9 already states that "Network maintenance and modernization activities will result in UNE transmission parameters that are within transmission limits of the UNE ordered by CLEC." Ms. Stewart's example contradicts this language, to which Qwest has agreed, because it assumes that the transmission limits will be outside of the UNE ordered by CLEC. Qwest is protected from improper use of UNEs by this language, as well as other contract provisions defining the UNEs.[471]

Regarding Issue 9-33(a), as discussed above, Eschelon's language most clearly

[468] Qwest's proposed language for Section 9.1.9.

[469] Stewart Direct, pp. 29-30; *see id*. p. 30, line 1 ("If the CLEC had ordered the proper loop").

[470] Qwest-Eschelon AZ ICA Arbitration, Ms. Stewart AZ Rebuttal (Docket Nos. T-03406A-06-0572, T-01051B-06-0572, Feb. 9, 2007), p. 25, lines 7-16 (**"Q. WHAT IS THE SUBSTANTIVE DIFFERENCE BETWEEN THE PARTIES' PROPOSALS?** A. Eschelon's proposal creates the inaccurate impression that the retirement of copper loops is addressed only in Section 9.2.1.2.3. Qwest agrees this is the primary reference; however, the terms and conditions relating to copper retirements (and/or replacements) are not set forth just in that section, but also are addressed in Sections 9.2.1.2.2 (and subparts), 9.2.1.2.2.3 and 9.2.2.3. These additional sections, which Eschelon's reference fails to address, also set forth terms and conditions relating to the retirement or replacement of copper loops.").

[471] *See*, *e.g.*, ICA Section 9.2.2.2 (Analog (voice grade) Unbundled Loops are available as a two-wire or four-wire voice grade, point-to-point configuration "suitable for local exchange type services").

describes the relationship between Section 9.1.9 and copper retirement.[472]

Regarding Issue 9-34, when Qwest makes changes that are specific to an Eschelon End User Customer, Qwest should provide sufficient information to inform Eschelon where the changes will occur so that Eschelon may better assist Eschelon customers in Washington adversely affected by Qwest network changes. This is particularly true when the information is readily available, as provided in the approved Minnesota language that Eschelon has offered in Washington as well. The ALJs in the Minnesota arbitration proceeding found (as upheld by the Minnesota Commission) that "if this information is readily available, Qwest should provide it," and Eschelon has shown that Qwest provides the information Eschelon is requesting to itself[473] – so this Commission should likewise find that Qwest should provide this information to Eschelon. The Commission should adopt Eschelon's proposals for Issues 9-33, 9-33(a), and 9-34.

Q. YOU INDICATED THAT ESCHELON HAS PROPOSED ADDITIONAL COMPROMISE LANGUAGE TO QWEST TO CLOSE ISSUES 9-33 - 9-34 SINCE REBUTTAL TESTMONY WAS FILED IN THIS PROCEEDING. PLEASE DESCRIBE THE MODIFIED LANGUAGE.

A. Eschelon has offered the following language to Qwest:

[472] *See also* MN Arbitrators Report ¶147.

[473] *See, e.g.*, Exhibit JW-4.

Eschelon proposal #1 (with related changes in Sections 9.2.2.3 and 9.2.2.3.3)

9.1.9 In order to maintain and modernize the network properly, Qwest may make necessary modifications and changes to the UNEs in its network on an as needed basis. Such changes may result in minor changes to transmission parameters but the changes to transmission parameters will not adversely affect service to any CLEC End User Customers (other than a reasonably anticipated temporary service interruption, if any, needed to perform the work). (In addition, in the event of emergency, see Section 9.1.9.1).[474] This Section 9.1.9 does not address retirement of copper Loops or Subloops, which are addressed in Sections 9.2.1.2.2 (and subparts), 9.2.1.2.2.3, 9.2.1.2.3, and 9.2.3.3.3.[475] ~~Because the retirement of copper loops may involve more than just minor changes to transmission parameters, terms and conditions relating to such retirements are set forth in Section 9.2.~~ Network maintenance and modernization activities will result in UNE transmission parameters that are within transmission limits of the UNE ordered by CLEC. Qwest shall provide CLEC advance notice of network changes pursuant to applicable FCC rules, including changes that will affect (i) CLEC's performance or ability to provide service (ii) network Interoperability or (iii) the manner in which Customer Premises equipment is attached to the public network. Changes that affect network Interoperability include changes to local dialing from seven (7) to ten (10) digit, area code splits, and new area code implementation. FCC rules are contained in CFR Part 51 and 52. Such notices will contain the location(s) at which the changes will occur including, if the changes are specific to a CLEC End User Customer, the circuit identification and CLEC End User Customer address information, and any other information required by applicable FCC rules. Qwest provides such disclosures on an Internet web site.

> 9.2.2.3 Digital Capable Loops – DS1 and DS3 Capable Loops, Basic Rate (BRI) ISDN Capable Loops, 2/4 Wire Non-Loaded Loops, ADSL Compatible Loops and xDSL-I Capable Loops. Unbundled digital Loops are transmission paths capable of carrying specifically formatted and line coded digital signals. Unbundled digital Loops may be provided using a variety of transmission technologies including, but not limited to, metallic

[474] Eschelon also continues to offer in the alternative: "but will not adversely affect service to any End User Customers. (In the event of emergency, however, see Section 9.1.9.1)."

[475] Eschelon also continues to offer in the alternative: "This Section 9.1.9 does not address retirement of copper Loops or Subloops (as that phrase is defined in Section 9.2.1.2.3). *See* Section 9.2.1.2.3."

wire, metallic wire based Digital Loop Carrier, and fiber optic fed digital carrier systems. Qwest will provision digital Loops in a non-discriminatory manner, using the same facilities assignment processes that Qwest uses for itself to provide the requisite service. Qwest will not re-designate working distribution facilities as interoffice facilities (and vice versa) either for a CLEC or itself. ~~Qwest may re-designate fully retired facilities for itself as well as CLEC.~~ Digital Loops may use a single or multiple transmission technologies. Direct Current continuity does not apply to digital capable Loops. If conditioning is required, then CLEC may be charged for such conditioning as set forth in Exhibit A, if it authorized Qwest to perform such conditioning.

9.2.2.3.3 Qwest may re-designate fully retired facilities for itself as well as CLEC.

Eschelon proposal #2 (Based on the DOC language adopted in MN)

9.1.9 In order to maintain and modernize the network properly, Qwest may make necessary modifications and changes to the UNEs in its network on an as needed basis. Such changes may result in minor changes to transmission parameters. If such changes result in the CLEC's End User Customer experiencing unacceptable changes in the transmission of voice or data, Qwest will assist the CLEC in determining the source and will take the necessary corrective action to restore the transmission quality to an acceptable level if it was caused by the network changes. This Section 9.1.9 does not address retirement of copper Loops or Subloops (as that phrase is defined in Section 9.2.1.2.3). *See* Section 9.2.1.2.3.[476] ~~Because the retirement of copper loops may involve more than just minor changes to transmission parameters, terms and conditions relating to such retirements are set forth in Section 9.2.~~ Network maintenance and modernization activities will result in UNE transmission parameters that are within transmission limits of the UNE ordered by CLEC. Qwest shall provide CLEC advance notice of network changes pursuant to applicable FCC rules, including changes that will affect (i) CLEC's performance or ability to provide service (ii) network Interoperability or (iii) the manner in which Customer Premises equipment is attached to the public network. Changes that affect network Interoperability include changes to local dialing from seven (7) to ten (10) digit, area code splits, and new area code implementation. FCC rules are contained in CFR Part 51 and 52. Such notices will contain the location(s) at which the changes will occur

[476] Eschelon also offers in the alternative (with the associated changes to 9.2.2.3 and 9.2.2.3.3 shown above): "This Section 9.1.9 does not address retirement of copper Loops or Subloops, which are addressed in Sections 9.2.1.2.2 (and subparts), 9.2.1.2.2.3, 9.2.1.2.3, and 9.2.3.3.3."

> including, if the changes are specific to an End User Customer,[477] circuit identification, if readily available, and any other information required by applicable FCC rules. Qwest provides such disclosures on an Internet web site.

Eschelon continues to offer the first alternative in its earlier form (see footnotes to proposed language), but has also made modifications to respond to Qwest's stated concerns. Regarding Issue 9-33, although Eschelon has consistently indicated that its proposed language refers to changes to transmission parameters (which are supposed to be "minor"), Qwest continues to argue that it is not limited to changes to transmission parameters.[478] To be even more clear, Eschelon inserted "the changes to transmission parameters" before "will not adversely affect." Regarding Issue 9-33(a), Qwest has expressed a preference for including a list of sections that address copper retirement, rather than a reference to use of the term in the ICA as defined in Section 9.2.1.2.3.[479] Therefore, Eschelon has added ICA section numbers identified by Ms. Stewart.[480] Because one of those Sections (9.2.2.3) is much broader than copper retirement, Eschelon has proposed moving the sentence from Section 9.2.2.3 that refers to "retired facilities" to its own subpart (9.2.2.3.3), so the cross reference will refer to a section dealing with copper retirement consistent with the meaning and intent of the sentence.

[477] Note: Eschelon will accept "End User Customer" or "CLEC End User Customer" here.

[478] *See, e.g.*, Stewart Response, p. 18, lines 3-4 ("whether a ***network activity*** had an 'adverse effect' on an Eschelon customer") (emphasis added).

[479] Stewart Arizona Rebuttal, p. 25, lines 7-16 (quoted in footnotes below).

[480] *See id.*

Regarding Issue 9-34, Qwest has indicated that the definition of End User Customer in the ICA is broader than Eschelon's customer, so Eschelon has inserted "CLEC" to refer to Eschelon[481] before "End User Customer" to reflect the intent it has consistently communicated to Qwest in negotiations and arbitration that the proposal relates to Eschelon's End User Customer. Eschelon has also inserted "CLEC" before "End User Customer" with respect to Issue 9-33.

The second alternative contains language proposed by the DOC staff, recommended by the ALJs, and adopted by the commission in the Minnesota arbitration. Although Qwest has to date not agreed to the Minnesota language, Eschelon is willing to accept the alternative adopted in Minnesota in all six states to resolve these issues.

Issue 9-33

Q. IT APPEARS THAT QWEST'S PRIMARY COMPLAINT[482] ABOUT ESCHELON'S PROPOSAL ON ISSUE 9-33 IS THAT THE TERM

[481] ICA Section 1.2.

[482] Qwest also claims that Eschelon's language inappropriately focuses on the service quality experienced by Eschelon's End User Customers. Stewart Response, p. 18, lines 10-15. Eschelon addressed his issue at page 14 of its direct testimony and page 12 of its rebuttal testimony on this issue (see Webber Direct and Rebuttal (adopted)). I explained that the FCC rules contain the very same focus as contained in Eschelon's proposal (*i.e.*, "service quality perceived by the requesting telecommunications carrier's end-user customer.") Webber Rebuttal (adopted), p. 11, citing 47 CFR § 51.316(b) (conversion of unbundled network elements and services). The language adopted in Minnesota and offered here also refers to changes that result "in the CLEC's End User Customer experiencing unacceptable changes in the transmission of voice or data"). Changes in formerly working service that are unacceptable to Eschelon's customer are generally unacceptable to Eschelon. To the extent that Qwest criticizes the DOC language adopted in Minnesota because it is unclear to whom it must be unacceptable, Eschelon has no objection to adding "to CLEC" after "unacceptable" in proposal #2 [as has been done in closed language in Section 9.21.2.1.5 ("unacceptable to CLEC")].

"ADVERSELY AFFECT" IS VAGUE AND NOT TIED TO INDUSTRY STANDARDS.[483] IS QWEST'S REASONING FLAWED?

A. Yes. Ms. Stewart claims that there is no legitimate need for Eschelon's "adversely affect" language because Qwest has already agreed that the changes would be "minor" as well as within industry standards.[484] Because of this, Qwest states that Eschelon should have no concern about whether Qwest's maintenance and modernization activities would adversely affect Eschelon's customers.[485] However, if there was no concern in this regard, then Qwest should have no problem with agreeing to either Eschelon's language or the Minnesota language ("unacceptable changes in the transmission of voice or data"). Qwest appears to agree with my point[486] that "minor" changes in transmission parameters should not adversely affect customers whose service is working fine.[487] And that being the case, Qwest should have no objection to making that point clear in the ICA. Qwest's objection to Eschelon's language suggests that Qwest believes that "minor" changes can adversely affect Eschelon's End User Customers. Qwest's argument that Eschelon should find assurance in this language[488] is circular, because it assumes that the companies agree on which changes are "minor" when

[483] Stewart Response, pp. 17-18 and 20.

[484] Stewart Response, p. 18.

[485] *See id*.

[486] Webber Rebuttal (adopted), p. 9, lines 5-8.

[487] *See* Stewart Response, p. 17, lines 14-16.

[488] Stewart Response, p. 17, lines 4-18.

Qwest's opposition to Eschelon's language suggests that non-temporary, non-emergency customer-impacting changes to formerly working service is "minor." Although Qwest claims that Eschelon's language will lead to disputes, Qwest's language is more likely to do so based on the known disagreement of the companies. Rather than build a known dispute into the contract, the Commission should adopt additional language providing that non-temporary, non-emergency customer-impacting transmission parameter changes to working service are not a minor. Qwest claims that Eschelon's proposal "could have the undesirable effect of discouraging Qwest from carrying out network maintenance and modernization activities."[489] Labeling an unacceptable customer-impacting change to otherwise working service as "network maintenance and modernization" should not make that change acceptable or something to be encouraged. Eschelon's proposal for Section 9.1.9 encourages proper network maintenance and modernization, allows for minor changes to transmission parameters and even temporary service interruption, and "merely commits Qwest to taking action to restore transmission quality to that which existed before the network change."[490]

Eschelon is not arguing against the use of industry standards, and in fact, under Eschelon's proposal industry standards would be met.[491] Eschelon's language would require the circuit to both be within industry standards and, when it is, also

[489] Stewart Response, p. 18, lines 7-9.

[490] MN Arbitrators' Report ¶142.

[491] *See, e.g.,* closed Section 23 of the ICA ("Network Standards"). *See also,* ICA Sections 9.2.2.1, 9.2.6, 9.5.2, 9.6.4.5, 12.2.7.2 ("industry standard").

to work.[492] Again, Issue 9-33 addresses customers that have working service and should not have that working service interrupted through Qwest's network maintenance and modernization activities that change transmission parameters – activities that are by Qwest's own admission supposed to be "minor."

Q. MS. STEWART REFERS TO THE "HYPOTHETICAL" AND "EXAGGERATED"[493] NATURE OF YOUR CONCERNS RELATED TO QWEST PUTTING ESCHELON'S CUSTOMERS OUT OF SERVICE DURING MAINTENANCE OR MODERNIZATION ACTIVITIES. WOULD YOU LIKE TO RESPOND?

A. Yes. Ms. Stewart does not state that Qwest has never put Eschelon's customers out of service, rather she states that I did not identify any examples of this occurring and that she was personally not aware of any examples. In Ms. Stewart's testimony, she poses the following question: "Has Qwest ever put an Eschelon customer out of service because of network maintenance or modernization activities?"[494] However, she never answers this question with a "yes" or "no." Notably, Qwest has not claimed that it has never put Eschelon's

[492] *See* dB level example, Webber Rebuttal, pp. 13-17; Exhibit BJJ-27. In that example, Qwest argued that it met its obligations if the customer was ***taken out of service*** if the change in transmission standards was somewhere within a range allowed by industry standards, even if the customer's service would have ***worked*** had Qwest used another setting also within the range allowed by industry standards. *See* Webber Rebuttal, pp. 14-15. Regardless of whether any particular outage occurred from modernization activities in that particular example, Qwest revealed a problem with its interpretation of this language in that situation.

[493] Stewart Response, p. 16, line 24 – p. 17, line 2.

[494] Stewart Response, p. 16, lines 19-21.

(or other CLECs') customers out of service with its network maintenance and modernization activities, and the dB loss example[495] shows that if Qwest has not already done so, the potential for Qwest doing so exists. The dB loss example also shows that it may be very difficult for Eschelon to determine whether it is Qwest's maintenance and modernization activities that cause service problems for its customers.[496] Eschelon's proposal is needed to make sure that any such adverse effect does not happen going forward.

Q. MS. STEWART CHARACTERIZES YOUR DESCRIPTION OF THE DB LOSS EXAMPLE AS "VAGUE"[497] AND CLAIMS THAT THIS SINGLE EXAMPLE "HARDLY JUSTIFIES THE CONCLUSION THAT

[495] Webber Rebuttal (adopted), pp. 13-17; Exhibit BJJ-27. Although Qwest may attempt to claim this example is limited to installation and not modernization activities, Qwest's own email shows this is not the case. *See* Email from Qwest – Senior Attorney (Joan Peterson) to Eschelon (including Ms. Johnson) dated 10/12/04. Exhibit BJJ-27, p. 1. Though the particular problems Eschelon brought to Qwest's attention at that time arose during installation, in the course of investigating the cause of this problem, Qwest revealed its *maintenance and modernization policy* to proactively reset dB level at a default of -7.5 during repairs. Qwest's admission in this email (which is quoted at page 15 of Webber Responsive Testimony) shows that Qwest instructed its technicians that, whenever performing work needed for repairs, they should also reset the dB level at -7.5 (not as part of a needed repair but rather as part of its modernization activities to move to a different default setting). It stands to reason, however, that if Eschelon had to obtain an adjustment in the dB level during installation to obtain an operational circuit, that a later action to return the dBs back to the former level during those modernization efforts would likely once again cause the circuit to become non-operational. Because Qwest provided no advance notice to Eschelon of the instruction that Qwest provided to its technicians in this regard, however, Eschelon would not have known, when troubles or repeat troubles occurred, that changes made per this instruction had been the cause.

[496] Qwest only revealed its new policy related to dB settings after Eschelon brought examples of service problems to Qwest's attention.

[497] Stewart Response, p. 19, lines 6-8.

COMPLIANCE WITH INDUSTRY STANDARDS IS IRRELEVANT…"[498]

WOULD YOU LIKE TO RESPOND?

A. Yes. Ms. Stewart's testimony is inaccurate and misleading. With respect to Ms. Stewart's claim that my description of the dB loss example is "vague," one only needs to review my description of the dB loss example[499] and the supporting documentation Eschelon provided as Exhibit BJJ-27 to the rebuttal testimony of Ms. Johnson (and the description of this exhibit in Ms. Johnson's testimony),[500] to understand that there is no substance to Ms. Stewart's complaint. For instance, Eschelon dedicated about five pages of rebuttal testimony to describing this example (*see* Webber Rebuttal, pp. 13-17), where Eschelon: (1) explained the Eschelon business issue behind the dB loss example,[501] (2) provided background information on the example,[502] (3) described the applicable standard,[503] (4) explained the source of the problem,[504] (5) explained how Eschelon learned of Qwest's network maintenance and modernization policy to reset dB settings,[505] (6) quoted directly from a Qwest email for the source of the network maintenance

[498] Stewart Response, p. 19, lines 18-20. *See also*, Stewart Response, p. 19, lines 8-12 ("According to Mr. Webber, the fact that the circuits allegedly were non-working even though they met industry standards for db loss demonstrates that industry standards are of limited utility in measuring performance. This claim ignores the long-standing importance of industry standards for establishing performance and quality expectations and for measuring performance.")

[499] *See* Webber Rebuttal (adopted), pp. 13-17.

[500] Johnson Rebuttal, pp. 12-13.

[501] Webber Rebuttal (adopted), p. 13, lines 8-11.

[502] Webber Rebuttal (adopted), pp. 14-15.

[503] Webber Rebuttal (adopted), p. 14, line 7 and footnote 13.

[504] Webber Rebuttal (adopted), p. 14, line 8 – p. 15, line 2 and p. 16.

[505] Webber Rebuttal (adopted), p. 15.

and modernization policy,[506] and (7) explained why the dB loss example supports Eschelon's proposal.[507] In addition, Eschelon provided a ten page exhibit (Exhibit BJJ-27) consisting of emails and a letter between Qwest and Eschelon addressing the dB loss problem. These are accurate and correct copies of the correspondence, and they show that the description and quotes related to the dB loss example in my testimony are accurate. Furthermore, Eschelon provided the facts of this example to Qwest in ICA negotiations. I don't know what else Eschelon could have provided to clear this issue up for Ms. Stewart, and she does not point to any information that Eschelon omitted from its testimony and exhibits related to the dB loss example. The bottom line is that this example shows that Qwest will defend a non-working circuit as being acceptable, within transmission limits, and meeting the ICA, even when the circuit does not work – when another setting also within industry standard would both meet the standard and work.

Q. DID YOU CONCLUDE THAT COMPLIANCE WITH INDUSTRY STANDARDS IS "IRRELEVANT" OR OF "LIMITED UTILITY," AS MS. STEWART CLAIMS?[508]

A. No. My conclusion is that Qwest should provide circuits to Eschelon that are both within industry standards ***and*** work,[509] and the ICA should recognize this

[506] Webber Rebuttal (adopted), p. 15, lines 18-19, citing Qwest email to Eschelon 10/21/04, Exhibit BJJ-27, p. 1.

[507] Webber Rebuttal (adopted), p. 17.

[508] Stewart Response, p. 19, lines 10 and 19.

point. Obviously, industry standards are important – primarily because they result in working service to customers – and Eschelon is neither attempting to ignore those standards,[510] nor asking Qwest to provide service outside of those standards.[511]

In any event, in the dB loss example, the applicable industry standard was a range of between -16.5 and 0,[512] not a specific number (-7.5, for example) – because service will work somewhere within that range, but, based on certain factors, may not work at all points within that range.[513] It was Qwest's network maintenance and modernization policy[514] that pegged the number at -7.5 to move "the network over time to a default setting of -7.5."[515] However, the -7.5 default selected by Qwest is not the industry standard, and it results in loops not working in some instances. Therefore, it was Qwest who was ignoring the industry standard range through its network maintenance and modernization policy.

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[509] Webber Rebuttal (adopted), p. 17 and p. 18, lines 2-7. It is irrelevant to Eschelon's End User Customer if Qwest is providing circuits within an industry standard *range* if that Customer's service does not also work. *See also*, Webber Direct (adopted), p. 14, lines 2-5. The point is that the circuit should both meet industry standards and work.

[510] *See, e.g.*, closed Section 23 of the ICA ("Network Standards"). *See also*, ICA Sections 9.2.2.1, 9.2.6, 9.5.2, 9.6.4.5, 12.2.7.2 ("industry standard").

[511] Webber Rebuttal (adopted), pp. 17-18.

[512] Webber Rebuttal (adopted), p. 14, footnote 13.

[513] Webber Rebuttal (adopted), p. 17, lines 13-17.

[514] I addressed Ms. Stewart's claim that this is an installation issue and not a network maintenance and modernization issue (Stewart Response, p. 19, lines 12-14) at page 16, lines 14-20 of my rebuttal testimony.

[515] *See* Webber Rebuttal (adopted), p. 15, lines 18-19, citing Qwest email to Eschelon 10/21/04, Exhibit BJJ-27, p. 1.

Q. YOU EXPLAIN ABOVE THAT ESCHELON OFFERED QWEST ALTERNATIVE LANGUAGE BASED ON THE MINNESOTA ARBITRATION RULING. HAS QWEST HAD THE OPPORTUNITY TO CONSIDER THIS ALTERNATIVE?

A. Yes. Eschelon provided proposed language based on the Minnesota DOC's proposals to Qwest on January 25, 2007. The DOC's language is reflected in Eschelon's proposal #2 (as described above).[516] Because the alternatives were offered after rebuttal testimony was filed in this case in December, Qwest has not had the opportunity to weigh in on these options in testimony in the Washington arbitration. However, Qwest did explain its position on Eschelon's alternative proposal in its testimony in the Arizona arbitration. Qwest raised no argument that would justify rejecting the Minnesota language in Washington.

Q. YOU STATE THAT ESCHELON'S PROPOSAL #2 IS BASED ON THE DEPARTMENT OF COMMERCE'S RECOMMENDATION IN MINNESOTA – A RECOMMENDATION THAT MS. STEWART CHARACTERIZED IN HER ARIZONA REBUTTAL TESTIMONY AS "VAGUE" AND "OVER REACHING."[517] WHAT DID THE MINNESOTA COMMISSION CONCLUDE ABOUT THIS RECOMMENDATION IN THE MINNESOTA ARBITRATION PROCEEDING?

[516] In addition, very recently, Eschelon has offered revisions to its proposal #1 (as shown above) based on claims made by Qwest in the Arizona arbitration.

[517] Stewart Arizona Rebuttal, p. 22, lines 19 & 28.

A. The Minnesota ALJs (as upheld by the Minnesota Commission) adopted this language for Issue 9-33 and rejected the concerns Qwest raised about the language – the same concerns Ms. Stewart raised in her rebuttal testimony in Arizona (and may raise in her surrebuttal testimony in this case). The Minnesota Arbitrators' Report states (at paragraph 142) that, "The Department's recommended language should be adopted. It appears to balance the reasonable needs of both parties in an even-handed manner." And to Ms. Stewart's claim that the reference to the word "unacceptable" is vague and not tied to industry standards,[518] the Minnesota Arbitrators' Report states, "The reference to correcting transmission quality to 'an acceptable level' does not, as Qwest argues, make this language unacceptably vague. The language merely commits Qwest to taking action to restore transmission quality to that which existed before the network change."[519] Qwest has proposed no substitute for either "adversely affect" or "unacceptable changes" that it would accept. It simply criticizes the terms as being undefined, even though many terms in the contract[520] – including these same words[521] – are used in the contract without separate definitions. It is

[518] Stewart Arizona Rebuttal, p. 22.

[519] MN Arbitrators' Report, ¶ 142, affirmed by a 4-0 vote of the Minnesota PUC on March 6, 2007.

[520] *See, e.g.*, closed language in ICA Section 9.2.2.1 ("Unbundled Loops shall be provisioned in accordance with Exhibit C and the performance metrics set forth in Section 20 and with a ***minimum of service disruption***") (emphasis added).

[521] *See* closed language in ICA Section 9.21.2.1.5 ("If CLEC requests conditioning and such conditioning significantly degrades the voice services on the Loop to the point that it is ***unacceptable*** to CLEC, CLEC shall pay the conditioning rate set forth in Exhibit A to recondition the Loop.") (emphasis added); ICA Section 10.2.4.2 ("Qwest queries shall not ***adversely affect*** the quality of service to CLEC's Customers or End User Customers as compared to the service Qwest provides its own Customers and End User Customers") (emphasis added).

easier to advocate silence than offer a workable solution. Silence, however, does nothing to address the business need to ensure Washington customers continue receiving working service within industry standards. The ICA needs to articulate a standard on this issue and, if a dispute later occurs with respect to the meaning of that standard, the dispute resolution provisions of the ICA are available to obtain further definition, just as they are available for other terms used in the contract without separate definitions. Eschelon has offered several ways to resolve these issues but nothing, not even a solution acceptable to the DOC staff, ALJs, and commission in Minnesota, satisfies Qwest.

Issue 9-33(a)

Q. DOES QWEST ADDRESS ISSUE 9-33(A) IN ITS REBUTTAL TESTMONY?

A. No. Eschelon's proposed language for Issue 9-33(a) is shown at page 109 of my rebuttal testimony.

Q. WHAT HAS QWEST SAID ABOUT ESCHELON'S PROPOSAL FOR ISSUE 9-33(A) IN OTHER STATES?

A. In Arizona, Ms. Stewart claimed that Eschelon's proposal "creates the inaccurate impression that the retirement of copper loops is addressed only in Section 9.2.1.2.3."[522]

Q. WOULD YOU LIKE TO RESPOND?

[522] Stewart Arizona Rebuttal, p. 25, lines 9-10 and lines 20-22.

A. Yes. One of Eschelon's proposals for Issue 9-33(a) in Section 9.1.9 states: "This Section 9.1.9 does not address retirement of copper Loops or Subloops (as that phrase is defined in Section 9.2.1.2.3) *See* Section 9.2.1.2.3."[523] This language simply makes clear that 9.1.9 does not address copper retirement. Contrary to Ms. Stewart's Arizona testimony, Eschelon's language for 9.1.9 says nothing about the scope of the ICA that applies to copper retirement, and only references 9.2.1.2.3 to point the reader to the ***definition*** of copper retirement. It does not claim to be an exhaustive list of ICA sections dealing with copper retirement. It specifically refers to how retirement "is defined" in Section 9.2.1.2.3. Other ICA sections discussing retirement as that term is defined in Section 9.2.1.2.3 therefore also fall within this cross reference. Simply put, no reasonable reading of this language would leave the impression that Ms. Stewart has described as indicating "that the retirement of copper loops is addressed only in Section 9.2.1.2.3."[524]

It is ironic that Ms. Stewart would criticize Eschelon's language for 9-33(a) for attempting to govern copper retirement because the purpose of Eschelon's language for 9-33(a) is to make clear that 9.1.9 excludes copper retirement. It is Qwest who is proposing language that leaves the inaccurate and ambiguous impression that 9.1.9 addresses copper retirement.[525] Notably, out of all the sections of the ICA that Ms. Stewart has previously claimed apply to copper

[523] This language is noted in a footnote above. While Eschelon has a more recent proposal, it continues to offer this language as well.

[524] Stewart Arizona Rebuttal, p. 25, lines 9-10 and lines 20-22.

[525] Starkey Rebuttal, pp. 121-122.

retirement,[526] she did not reference Section 9.1.9. Yet, Qwest opposes Eschelon's language making clear that 9.1.9 does not address copper retirement in favor of language that could be interpreted as if it does. Nonetheless, in an attempt to resolve this issue and in response to Qwest's criticism that certain additional sections of the ICA should also be cited in Section 9.1.9, Eschelon has also offered language that lists the ICA language identified by Ms. Stewart.[527] It states: "This Section 9.1.9 does not address retirement of copper Loops or Subloops, which are addressed in Sections 9.2.1.2.2 (and subparts), 9.2.1.2.2.3, 9.2.1.2.3, and 9.2.3.3.3."

Either of Eschelon's language proposals for Issue 9-33(a) are clearer and would better avoid future disputes. Given that Qwest advocates use of standardized processes, use of the Minnesota-ordered alternative in the other five states would provide Qwest with the standardization it claims it desires.[528]

Q. DID THE MINNESOTA COMMISSION IN THE MINNESOTA ARBITRATION REJECT QWEST'S CLAIM THAT ITS PROPOSAL IS

[526] Stewart Arizona Rebuttal, p. 25, lines 7-16. Ms. Stewart testified in Arizona: "**Q. WHAT IS THE SUBSTANTIVE DIFFERENCE BETWEEN THE PARTIES' PROPOSALS?** A. Eschelon's proposal creates the inaccurate impression that the retirement of copper loops is addressed only in Section 9.2.1.2.3. Qwest agrees this is the primary reference; however, the terms and conditions relating to copper retirements (and/or replacements) are not set forth just in that section, but also are addressed in Sections 9.2.1.2.2 (and subparts), 9.2.1.2.2.3 and 9.2.2.3. These additional sections, which Eschelon's reference fails to address, also set forth terms and conditions relating to the retirement or replacement of copper loops." Ms. Stewart misses the point. Eschelon's language is not meant to address copper retirement. Indeed, just the opposite is true – Eschelon's language makes clear that 9.1.9 does *not* address copper retirement.

[527] Stewart Arizona Rebuttal, p. 25, lines 7-16 (quoted in above footnote).

[528] *See, e.g.*, Albersheim Rebuttal, p. 69, lines 12-13.

CLEARER?

A. Yes. The Minnesota Arbitrators' Report (as upheld by the Minnesota Commission) states:

> Because the parties previously agreed to language that takes retirement of copper loops and subloops entirely out of Section 9.1.9, and because Qwest's proposed language might be read to take it out of Section 9.1.9 only if such retirements involve more than minor changes to transmission parameters, ***the Administrative Law Judges recommend use of Eschelon's language to eliminate any ambiguity***.[529]

Issue 9-34

Q. MS. STEWART STATES THAT "LOCATION" REFERRED TO BY THE FCC IN RULE 51.327 MEANS THE PLACE IN THE NETWORK WHERE THE CHANGE WILL TAKE PLACE RATHER THAN THE CUSTOMER'S PREMISES.[530] DO YOU READ RULE 51.327 THE SAME WAY?

A. No. There are at least two points to be made here. First of all, Eschelon's language only requires Circuit ID (and, for proposal #1, customer address information) when the change is "specific to a CLEC End User Customer." As a result, the location at which the change takes place should identify the location of the Eschelon End User Customer to be affected. If a change is not specific to an Eschelon End User Customer, as in the case of a dialing plan change for example,

[529] MN Arbitrators' Report, ¶147 (emphasis added), affirmed by a 4-0 vote of the Minnesota PUC on March 6, 2007.

[530] Stewart Response, p. 20.

the circuit ID and customer address information would not be needed to determine the "location" at which the changes are taking place, and would not be required under Eschelon's proposal. Ms. Stewart has also previously raised the issue of an area code split which, as Eschelon already explained, is a red herring and not a change "specific to an Eschelon End User Customer" that would be covered under Issue 9-34.[531] Ms. Stewart ignores that Eschelon's requirement would only apply in narrow circumstances. As with the terms "adversely affect" and "unacceptable changes" in Issue 9-33, Qwest merely advocates silence (*i.e.*, deletion) instead of offering any constructive alternative language in lieu of "specific to an Eschelon End User Customer" to address the business need in Issue 9-34. Eschelon's previous proposal did not include this phrase, but Eschelon offered specifically in response to Qwest's claim that the request for circuit ID information was otherwise overbroad and burdensome. Eschelon then again modified its proposal to offer in its proposal #2 the DOC's further narrowing of the language by deleting the reference to customer address and inserting "if readily available" in this clause. Eschelon's modest proposal should be adopted to help ensure that Eschelon customers in Washington with working service that may be adversely impacted by a Qwest network change may have their service restored as quickly as possible because Eschelon will have the information necessary to identify the cause of the problem to get it corrected.

[531] Webber Rebuttal (adopted), pp. 22-23.

Second, FCC Rule 51.327 is not meant to be all-inclusive ("Public notice of planned network changes must, at a minimum, include…").[532] As indicated by the Minnesota ALJs: "The FCC rules do not set out 'maximum' requirements that cannot be surpassed."[533] Therefore, just because Rule 51.327 does not expressly say that change notices that are specific to an End User Customer must include Circuit ID and customer address information, this does not mean that Qwest should not provide it. The FCC obviously included the words "at a minimum" for the reason of supplementing the information to be required for these notices. And I have already shown that requiring this information in these narrow circumstances gives meaning to the FCC's rules.[534] So, contrary to Ms. Stewart's suggestion,[535] I am not reading anything into the FCC's rule that is not there.

Q. MS. STEWART NOTES THAT THE COMMISSION HAS FOUND QWEST'S NOTICES TO COMPLY WITH THE FCC'S RULES IN A RECENT COVAD ARBITRATION.[536] SHOULD THAT RULING GUIDE THE COMMISSION'S DECISION ON ISSUE 9-34?

A. No, that decision applies to copper retirement situations, and copper retirement has been carved out of Eschelon's proposal and is addressed elsewhere in the

[532] Webber Direct (adopted), p. 15.

[533] MN Arbitrators Report ¶153.

[534] Webber Direct (adopted), pp. 15-16.

[535] Stewart Response, p. 20, lines 15-20. *See also*, Stewart Response, p. 21, lines 23-25.

[536] Stewart Response, p. 21, lines 1-11.

ICA. *See* Section 9.2.1.2.3.[537]

In addition, as I explained at pages 23-26 of my rebuttal testimony, Qwest provides the requested information to itself (as demonstrated by Exhibit JW-4), and should, therefore, provide it to Eschelon. It is readily available. Qwest does not explain whether the Commission had this information in the record in the Covad case.[538] In any event, the Commission's decision in the Covad case relates to copper retirement, which is not addressed under Issue 9-34 and is addressed in another section of the ICA.

Q. MS. STEWART CLAIMS THAT ESCHELON'S PROPOSAL WOULD "FORCE QWEST TO RESEARCH THIS INFORMATION – WHICH WOULD HAVE TO BE DONE MANUALLY…"[539] IS MS. STEWART'S CLAIM SUPPORTED BY THE RECORD?

A. No. I provided Exhibit JW-4 to my rebuttal testimony, which shows that Qwest already collects this information (both circuit ID and customer address information) for CLEC circuits that are impacted by network changes. This means that Eschelon's proposal would not require any work of Qwest because Qwest is already collecting the information. Qwest would only need to share this

[537] *See* Eschelon's discussion of Issue 9-33(a), Webber Rebuttal, pp. 6 and 20-21.

[538] As indicated in Exhibit JW-4, Eschelon only received this information because Qwest provided it in error. Exhibit JW-4, p. 3.

[539] Stewart Response, p. 22, lines 4-5.

information with Eschelon – as it did (apparently in error)[540] in the case of Exhibit JW-4.[541] The Minnesota Arbitrators' Report (as upheld by the Minnesota Commission) found that "if this information is readily available, Qwest should provide it."[542] Exhibit JW-4 shows that this information is readily available to Qwest, so Qwest should provide it to Eschelon. Eschelon's proposal #2, based on the language adopted in Minnesota, specifically provides that Qwest will provide "circuit identification, if readily available."[543] Although Qwest may argue that Eschelon's proposal shifts the burden of determining circuit IDs from Eschelon to Qwest,[544] the language in Eschelon proposal #2 indicates, this information would be provided "if readily available." If the information is readily available, as Exhibit JW-4 indicates, then there is no burden being imposed on Qwest – rather it's a matter of passing this information along to Eschelon.

[540] Exhibit JW-4, p. 3.

[541] Webber Rebuttal, p. 26, citing Section 251 of the Act and 47 CFR § 51.313(b).

[542] MN Arbitrators' Report, ¶ 153, affirmed by a 4-0 vote of the Minnesota PUC on March 6, 2007.

[543] The term "readily available" is another term that Qwest has criticized as being undefined, but it is already used in closed language in the ICA without separate definition. *See* ICA Section 12.4.0 ("This number shall give access to the location where records are normally located and where current status reports on any trouble reports are ***readily available***.") (emphasis added).

[544] *See* Stewart Arizona Rebuttal, p. 28, lines 12-14.

VIII. SUBJECT MATTER NO. 18. CONVERSIONS

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

Q. ISSUES 9-43 AND 9-44 AND SUBPARTS RELATE TO CONVERSIONS FROM UNES TO ALTERNATIVE/ANALOGOUS SERVICES DUE TO A FINDING OF NON-IMPAIRMENT. SHOULD THESE CONVERSIONS INVOLVE PHYSICAL WORK THAT COULD NEGATIVELY AFFECT ESCHELON'S BUSINESS AND END USER CUSTOMERS?

A. No. According to the FCC's rules and orders, conversions should be "seamless" to the End User Customer, should amount to largely a billing function, and should, therefore, not negatively affect Eschelon's business or the service quality perceived by Eschelon's End User Customers.[545] However, Qwest ignores the FCC's decisions on conversions, and instead asks the Commission to exclude language from the ICA on conversions so that Qwest can impose its onerous and potentially service-affecting APOT "procedure" for conversions that Qwest developed unilaterally outside of negotiation/arbitration and outside of CMP. Qwest's non-proposal should be rejected.

Rather, the ICA language should preserve the FCC's conclusions regarding conversions, and should ensure that service quality to Eschelon's End User Customers is not disrupted – especially since a "conversion" should be a simple

[545] TRO ¶¶586, 588. The FCC found that conversions "should be a ***seamless*** process that does not alter the customer's perception of service quality" and that conversions are 'largely a billing function." *Id*. (emphasis added).

records change and Qwest's customers do not face any risk associated with conversions. Eschelon's proposal for Issues 9-43 and 9-44 and subparts accomplishes this objective by keeping circuit IDs assigned to the facility the same during conversions (Issue 9-43) and identifying a conversion as a billing records change, just as the FCC has referred to it (Issues 9-44 and subparts). In addition to discussing these issues in my previous testimony,[546] I also discuss aspects of this issue in the Secret TRRO PCAT example.

Q. MS. MILLION TESTIFIES THAT CONTRARY TO YOUR CLAIM AT PAGE 161 OF YOUR DIRECT TESTIMONY, QWEST INCURS COSTS TO PERFORM CONVERSIONS AND SHOULD BE ALLOWED TO

[546] Starkey Direct, pp. 142-167; Starkey Rebuttal, pp. 100-111. Ms. Million testifies that the repricing for QPP is different than repricing facilities that were UNEs prior to a conversion. Million Response, pp. 12-14. I addressed this argument at page 110 of my rebuttal testimony. The fact of the matter is that in the QPP scenario, Qwest is no longer required to provide UNE-P at TELRIC rates and has effectuated this regulatory change through a price change via USOCs to bill the difference between the UNE rates associated with UNE-P to new non-UNE rates associated with QPP. This is the same thing that is occurring in a conversion – that is, if Qwest is no longer required to provide a UNE loop at TELRIC rates (because of a finding of non-impairment), a price change must be effectuated to change from the UNE rates associated with the UNE loop to non-UNE rates associated with the alternative/analogous service. According to Ms. Million's account, Qwest chose to "voluntarily" create a new product QPP in order to effectuate the regulatory change associated with UNE-P, which allowed these price changes to take place via USOCs. This "voluntary" decision was made without any FCC rules or orders requiring Qwest to create the QPP product. However, when it comes to conversions, Qwest ignores clear FCC rules and orders requiring conversions to be effectuated via price changes, and instead of working with CLECs to convert circuits found to be non-impaired (as Qwest claims it did in the case of UNE-P/QPP) in a seamless fashion, attempts to make conversions manually-intensive and costly. Even if Qwest experienced difficulty in the past keeping circuit IDs the same during conversions (Million Response, p. 10), this does not justify Qwest ignoring the FCC's rules and orders that require conversions to be performed in a seamless manner via largely a billing change. The fact that Qwest has effectuated price changes for QPP via USOCs and the fact that Qwest actually performed conversions in the past without changing circuit IDs shows that Qwest can, in fact, convert circuits without changing circuit IDs, but has simply chosen not to, opting instead to unilaterally create a conversion "procedure" outside of ICA negotiation/arbitration and outside of CMP that does not comply with the FCC's rules.

ASSESS A TARIFF RATE FOR THESE CONVERSIONS.[547] PLEASE RESPOND.

A. Ms. Million points to the word "untariffed" in FCC rule 51.316(c) and suggests that this means that the FCC concluded that ILECs can assess a "tariffed" conversion NRC. Ms. Million's claim is misguided for a number of reasons. First, Ms. Million is misreading the FCC's rule. FCC Rule 51.316(c) states in its entirety:

> c) Except as agreed to by the parties, an incumbent LEC shall not impose any untariffed termination charges, or any disconnect fees, re-connect fees, or charges associated with establishing a service for the first time, in connection with any conversion between a wholesale service or group of wholesale services and an unbundled network element or combination of unbundled network elements.

As this language shows, the FCC prohibits ILECs from assessing "any untariffed termination charges" as well as <u>any</u> – not just untariffed – disconnect and reconnect fees or any other charges associated with establishing service for the first time. Ms. Million's testimony makes it appear as if the FCC allowed conversion charges so long as they were tariffed. However, what the FCC actually did was prohibit all conversion charges, *except for* tariffed termination charges. The FCC explained at paragraph 587 of the *TRO* that this exception applies to tariffed early termination charges. The FCC found that CLECs cannot dissolve a long-term contract it entered into to receive discounted prices for access services and avoid the tariffed early termination charges by converting

[547] Million Response, p. 12.

access circuits to UNEs.[548] Other than this limited exception – which does not even apply to Issues 9-43 and 9-44[549] – the FCC prohibits the ILEC from charging CLECs for conversions because "incumbent LECs are never required to perform a conversion in order to continue serving their own customers" and that these charges "are inconsistent with an incumbent LEC's duty to provide nondiscriminatory access to UNEs and UNE combinations on just, reasonable, and nondiscriminatory rates, terms and conditions."[550]

Second, if the FCC's order says what Ms. Million claims it says (which it does not), Qwest would be seeking to assess a tariff charge for conversions. However, Qwest is not seeking to apply a tariff charge to conversions, rather Qwest's proposed conversion charge is "based on the rates contained in other CLECs' ICAs."[551] In other words, even if Ms. Million's interpretation of the FCC's rule were correct and Qwest were allowed to charge for conversions via a tariff charge, this is not Qwest's proposal.

Finally, Qwest is envisioning a different and much more manually-intensive "conversion" than what the FCC requires in its rules and orders, and then claims that Eschelon is attempting to keep Qwest from recovering its costs for this

[548] *TRO*, ¶ 587.

[549] The conversions discussed under Issues 9-43 and 9-44 involve conversions from UNEs to alternative/analogous services (e.g., access product), not from access products to UNEs. Therefore, the issue of tariffed early termination charges associated with Qwest's access products does not apply here.

[550] *TRO*, ¶ 587.

[551] Million Direct, p. 19, lines 5-6.

additional work. However, if Qwest simply performs conversions as the FCC requires, Qwest would not be performing this additional work or incurring these additional costs.[552] The answer is to remain true to the conversion process in the FCC's rules and order.

Q. MS. MILLION STATES THAT "THE PROCESS QWEST HAS ESTABLISHED FOR CONVERTING UNE CIRCUITS TO PRIVATE LINES IS SPECIFICALLY DESIGNED TO *ENSURE* THAT THE CONVERSION IS TRANSPARENT TO BOTH THE END-USER CUSTOMER AND THE CLEC…"[553] AND THAT "THIS PARTICULAR PROCESS COMES WITH A COST."[554] DO YOU HAVE CONCERNS WITH HER TESTIMONY ON THIS POINT?

A. Yes. It is important to point out that Ms. Million acknowledges that the process she is referring to for conversions (*i.e.*, the APOTs procedure)[555] was established by Qwest – and as a result, neither CLECs nor the Commission had any input into establishing this process. In fact, Qwest refused to negotiate this issue with

[552] Furthermore, as discussed in Mr. Denney's surrebuttal testimony under Issue 22-90 and subparts, Qwest's claim that the rate for conversions is high because it is driven by the cost of the circuit ID change (Million Response, p. 20) is without merit, and Qwest's access tariff states that a change in circuit ID is an administrative change that will be made without charge to the customer.

[553] Million Response, p. 7.

[554] Million Response, p. 7.

[555] Starkey Direct, pp. 143-148.

Eschelon, instead telling Eschelon that this should be addressed in CMP despite the fact that Qwest was not using CMP to establish the process.[556]

In addition, Ms. Million's claim that Qwest established a conversion procedure – one that by Ms. Million's own admission "interjects manual processes" and "comes with a cost" – so that conversions would be transparent to CLECs and their customers does not make sense.[557] Interjecting manual processes and increasing costs for conversions (not to mention the "freeze" on the facilities required by Qwest's APOT procedure)[558] is not indicative of an attempt to make conversions transparent, as Ms. Million claims and as the FCC's rules require. Then, Ms. Million adds insult to injury by claiming that the conversion procedure unilaterally established by Qwest "comes with a cost." Following Ms. Million's reasoning, Qwest should be allowed to set the rules regarding conversions (despite FCC rules to the contrary) and then CLECs should be required to fork over a blank check to cover the costs that Qwest imposes on CLECs through this procedure. However the Washington Commission has found that conversions are

[556] Starkey Direct, p. 147, citing email from Kathleen Salverda (Qwest), dated 9/6/06. Qwest's refusal to negotiate this issue flies in the face of the FCC's *TRO*, which states that "as contemplated by the Act, individual carriers will have the opportunity to negotiate specific terms and conditions necessary to translate our rules into the commercial environment, and to resolve disputes over any new contract language arising from differing interpretations of our rules." Starkey Direct, p. 151, citing *TRO*, pp. 14-15.

[557] I responded to Ms. Million's claim that Qwest has performed 500 conversions without complaints at pages 108-109, footnote 282 of my rebuttal testimony. I also responded to Ms. Million's testimony about the *TRRO* transition period (Million Response, p. 11) at pages 111-112 of my rebuttal testimony.

[558] Starkey Direct, p. 145.

within the scope of Sections 251/252,[559] and the FCC has already established the ground rules for conversions and conversion charges, and this authority does not grant Qwest the latitude it is seeking to develop conversion procedures on its own and charge CLECs for them.

Furthermore, Qwest's attempt to exclude conversion language from the ICA and establish conversion processes unilaterally is contrary to the Washington Commission's finding in the *Washington ALJ Report*, which states: "Given the FCC's decisions concerning conversions, the interconnection agreements should be amended to address the conversion of wholesale services to UNEs and UNE combinations and the reverse, and should include processes and procedures governing conversions…Further, it is not acceptable that terms and conditions in an interconnection agreement be subject to change solely at Verizon's discretion when change of law provisions in the agreement would otherwise govern."[560]

Q. MS. MILLION STATES THAT CONVERSIONS SHOULD BE ADDRESSED IN A SEPARATE PROCEEDING, SUCH AS PHASE II OF DOCKET NO. UT-053025.[561] WOULD YOU LIKE TO COMMENT?

A. Yes. I find it ironic that Ms. Million would now advocate that the Commission punt this issue to another Commission docket when it is Qwest who has developed a conversion "procedure" on its own outside of a Commission docket

[559] Starkey Direct, pp. 150-151, citing Washington ALJ Report, ¶ 150.

[560] *WA ALJ Report*, ¶¶ 287 and 291.

[561] Million Response, p. 6.

and outside of CMP, a procedure that Qwest is now calling its "existing product"[562] for conversions. This is also inconsistent with Qwest's prior statement that this is "best managed through CMP."[563] Now that Qwest has developed this "existing product" without input from the Commission or CLECs, and Eschelon has expended the money and resources to arbitrate the issue in this case, Qwest now appears willing to address conversions in a Commission proceeding (just not this Commission proceeding), and will undoubtedly argue that any changes to this "existing product" will cause costs and be too time-consuming.

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

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

Q. PLEASE SUMMARIZE ISSUE 9-55 RELATING TO LOOP TRANSPORT COMBINATIONS.

A. At least one component of a Loop Transport Combination is a UNE, and as a result, Loop Transport Combinations should be referenced in Section 9 of the ICA (UNEs). This is important so that the ICA recognizes that the UNE component of the Loop Transport Combination is governed by the ICA (and Section 9 of the ICA) even when that UNE is commingled with a non-UNE component. At the

[562] Million Response, p. 8, line 19. *See*, Starkey Rebuttal, p. 109, footnote 283.

[563] Starkey Direct, p. 147, citing email from Kathleen Salverda (Qwest), dated 9/6/06.

same time, the ICA is very clear about how non-UNE components of a Loop Transport combination are to be treated. To this end, Eschelon proposes to define the term Loop-Transport Combinations in the ICA and refer to Loop Transport Combinations in Section 9 (UNEs). This proposed umbrella definition is in addition to the individual definitions also included in Section 9.23.4 of the ICA, in closed language,[564] for "EEL," "Commingled EEL," and "High Capacity EEL." Eschelon's agreement to, and use of, these individual terms in the ICA shows that Ms. Stewart's claim that Eschelon is attempting to "eliminate the distinctions between the product offerings and commingled arrangement"[565] is untrue. Eschelon has committed to those distinctions in the ICA itself.

In Eschelon's proposal, the umbrella term is used when the different combinations are referenced collectively, and the individual terms are used when a specific type of Loop Transport Combination is intended. Just as the FCC has used these individual terms when referring to a specific combination and the umbrella term when referring to more than one, therefore, so does Eschelon in its language.[566] Qwest has not indicated that any one of these terms is used incorrectly in the ICA to refer to the wrong combination.[567] Instead, Qwest proposes to exclude these

[564] The only open issue in these definitions is the capitalization of Loop Transport Combination. As Eschelon's proposal contains a definition for Loop Transport Combination in Section 9.23.4, the term would then be capitalized in later references.

[565] Stewart Response, p. 38, lines 7-8.

[566] See TRO ¶¶575 & 576.

[567] If, for example, Qwest had indicated that the collective term was used in a particular situation when one of the individual terms was intended, the companies could have negotiated that issue to

references from the ICA and limit references in Section 9 to only one type of Loop Transport Combinations – EELs. A problem with Qwest's less clear proposal is that it raises the question of how UNEs in a commingled Loop Transport Combination are to be treated and leaves the door open for Qwest to subject these UNEs to terms and conditions of its tariffs. At some point, the products need to be discussed together, to know how each one operates and is differentiated from the other, and Eschelon's proposal does that in the most clear and efficient manner.

Another problem with Qwest's proposal is that it simply does not reflect the manner in which closed language in the ICA is already organized. The Service Eligibility Criteria in Section 9 ("UNEs"), for example, apply to both UNE EELs and Commingled EELs.[568] Qwest's claim that Section 9 cannot contain commingling terms because commingling is addressed in Section 24[569] simply does not reflect the organization of the contract. Just as Sections 2.0 ("Interpretation and Construction") and Section 5.0 ("Terms and Conditions") contain general terms about issues that are later addressed in more detail in other sections of the ICA, Section 24 ("Commingling") contains general commingling terms, while specific provisions in other parts of the contract address specific

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determine if they agree that the terminology is correct. Qwest has not identified any such mis-application of the collective term.

[568] Closed language in ICA Section 9.23.4.1 ("Service Eligibility for High Capacity EELs") and 9.23.4 (definition of "High Capacity EEL" to include "either EEL or Commingled EEL").

[569] Stewart Response, p. 37, lines 19-21.

commingling issues. Efficiencies were gained by placing commingling general terms together in one section, rather than repeating terms in different places in the ICA, but Section 24 does not eliminate the need to sometimes address commingling within the discussion of UNEs, as Section 9.23.4.1 shows. The companies changed the title of Section 9.23 from the former SGAT title ("Unbundled Network Elements Combinations (UNE Combinations)" to "Combinations" – in closed language – to reflect that Section 9.23 contains both UNE Combinations and other combinations (such as the loop and transport combination in a commingled EEL in Section 9.23.4.1). Although the different combinations are addressed together, however, Eschelon's proposed language makes clear that this does not subject non-UNE components of a commingled arrangement to the terms of the Agreement:

> Loop-Transport Combination – For purposes of this Agreement, "Loop-Transport Combination" is a Loop in combination, or Commingled, with a Dedicated Transport facility or service (with or without multiplexing capabilities), together with any facilities, equipment, or functions necessary to combine those facilities. At least as of the Effective Date of this Agreement "Loop-Transport Combination" is not the name of a particular Qwest product. "Loop-Transport Combination" includes Enhanced Extended Links ("EELs"), Commingled EELs, and High Capacity EELs. If no component of the Loop-transport Combination is a UNE, however, the Loop-Transport Combination is not addressed in this Agreement. The UNE components of any Loop-Transport Combinations are governed by this Agreement and the other component(s) of any Loop-Transport Combinations are governed by the terms of an alternative service arrangement, as further described in Section 24.1.2.1.

Q. HAS ESCHELON PROPOSED ALTERNATIVE LANGUAGE FOR ISSUE 9-55 SINCE YOUR REBUTTAL TESTIMONY WAS FILED?

A. Yes. As described at pages 117-118 of my rebuttal testimony, Eschelon had proposed to include a cross reference to Section 24.1.2.1 in its proposed language for Section 9.23.4 to make clear that Eschelon is not attempting to govern non-UNEs by the ICA. Though Eschelon believes that this cross reference to Section 24.1.2.1 is clear on the matter, Eschelon has modified its language to expressly add the phrase "and the other component(s) of any Loop-Transport Combinations are governed by the terms and conditions of an alternative service arrangement," before "as further described in Section 24.1.2.1." In Minnesota, the ALJs observed that, without this modification, Eschelon's language could "permit the inference that if any part of a combination *is* a UNE, the entire combination could be covered by the ICA."[570] As clearly shown by Section 24.1.2.1, this is not Eschelon's intent. Therefore, to avoid any unintended inference, Eschelon has also proposed to modify its proposal to reiterate in Section 9 that Eschelon is not attempting to cover the entire combination in the ICA. I'll repeat Eschelon's alternative proposal here (with new language shaded in gray) to highlight the revised language:

OPEN - Eschelon proposed - Qwest does not agree

Loop-Transport Combination – For purposes of this Agreement, "Loop-Transport Combination" is a Loop in combination, or

[570] MN Arbitrators' Report ¶ 176 (Exhibit DD-25).

> Commingled, with a Dedicated Transport facility or service (with or without multiplexing capabilities), together with any facilities, equipment, or functions necessary to combine those facilities. At least as of the Effective Date of this Agreement "Loop-Transport Combination" is not the name of a particular Qwest product. "Loop-Transport Combination" includes Enhanced Extended Links ("EELs"), Commingled EELs, and High Capacity EELs. If no component of the Loop-transport Combination is a UNE, however, the Loop-Transport Combination is not addressed in this Agreement. The UNE components of any Loop-Transport Combinations are governed by this Agreement and the other component(s) of any Loop-Transport Combinations are governed by the terms of an alternative service arrangement, as further described in Section 24.1.2.1.[571]

Q. QWEST CLAIMS[572] THAT CONFUSION WOULD RESULT BY DEFINING THE TERM "LOOP-TRANSPORT" TO INCLUDE THREE

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

[572] Qwest also makes numerous claims in its rebuttal testimony to which I have already responded and will not repeat my arguments here: (1) Stewart Response, p. 38, lines 6-7 ("Eschelon is attempting to either create a product offering that does not exist, or eliminate the distinctions between the product offerings…") I addressed these issues at pages 113-115 of my rebuttal testimony, *See also* page 174 of my direct testimony; (2) Stewart Response, p. 43 ("none of the FCC references identified by Mr. Starkey supports Eschelon's proposal…") I explained at pages 174-175 of my direct testimony that the FCC uses the term "Loop-Transport" to refer to the three products that are included in Eschelon's definition of "Loop-Transport." Regarding Ms. Stewart's claim that Eschelon's definition is inconsistent with the way the FCC used it because the FCC qualified some of the references to loop-transport by including the term "commingled," Ms. Stewart recognizes the fact that the definition proposed by Eschelon makes clear that one type of loop transport is a commingled loop-transport (Stewart Response, p. 38, lines 2-4). Ms. Stewart attempts to gloss over the fact that the FCC identified a commingled Loop-Transport combination as a type of Loop-Transport combination – just as Eschelon's proposed definition does; (3) Stewart Response p. 44 ("Qwest has developed and implemented separate and distinct systems, procedures and provisioning intervals for EELs, UNEs and tariffed private line services…"). I addressed this issue at pages 118-119 of my rebuttal testimony.

OFFERINGS.[573] IS QWEST'S PURPORTED CONCERN ABOUT CONFUSION WARRANTED?

A. No. Though Ms. Stewart refers to "confusion" no fewer than six[574] times in her responsive testimony as it relates to Eschelon's proposal for Issue 9-55, she provides no substance to back up these claims. The closest that Ms. Stewart comes to identifying any confusion that would allegedly reign is her focus on the last portion of Eschelon's language for 9.23.4, which according to Ms. Stewart, is an attempt by Eschelon to govern non-UNEs in Section 9 of the ICA.[575] However, Ms. Stewart quotes the wrong language for Eschelon's proposed Section 9.23.4. To address the very concern Ms. Stewart raises in her response testimony, Eschelon added the language described above that clearly addresses how non-UNE portions of a commingled Loop Transport combination are to be treated. The language in Section 24.1.2.1 makes clear that non-UNE components of any commingled arrangement are "governed by the terms of the alternative service arrangement…" Even without Eschelon's added clarification in 9.23.4, Qwest's concern that Eschelon's language would govern non-UNEs in Section 9 would be moot because 24.1.2.1 explains precisely how non-UNEs in a commingled arrangement are to be treated. But now that Eschelon added the

[573] *See, e.g.*, Stewart Response, p. 38, lines 10-12.

[574] Stewart Response, p. 38, line 11; p. 39, line 21; p. 39, line 23; p. 40, line 4; p. 42, line 25; and p. 43, line 16.

[575] Stewart Response, p. 40, lines 23-29.

clarifying language in Section 9.23.4, Qwest cannot convincingly argue that Eschelon's language for 9.23.4 would govern non-UNEs in Section 9 of the ICA.

In addition, Ms. Stewart is reading too much into Eschelon's language. Note that Ms. Stewart testifies that Eschelon's language *implies* that non-UNE components would be governed by the ICA.[576] She must use the word "implies" because that is not what Eschelon's language actually *says*. Eschelon's language in 9.23.4 says three things about components of a Loop Transport Combination: (1) if no component is a UNE, the ICA does not govern the combination, (2) UNE components of a Loop-Transport combination are governed by the ICA, and (3) further clarification is provided in 24.1.2.1, which explains that non-UNE components are governed by the alternative service arrangement, and not the ICA. Nowhere in 9.23.4 does it say that the ICA governs non-UNE components, nor does Eschelon's proposed language, reasonably read, imply that is the case – especially with the added clarifying language referencing Section 24.1.2.1. As a result, there is no basis for Ms. Stewart's concerns about having the entire commingled arrangement (not just the UNE circuit) governed by the ICA, nor is there any basis for Ms. Stewart's claim that Eschelon's proposal "goes way beyond, and is not consistent with the Eschelon stated objectives…"[577] According to Ms. Stewart, Eschelon's stated objective is to ensure that only the

[576] Stewart Response, p. 40, line 26.

[577] Stewart Response, p. 39, lines 3-4.

UNE components of the Loop Transport Combination are subject to the ICA,[578] and that is precisely what Eschelon's language for Section 9.23.4 does.

Q. MS. STEWART EXPRESSES CONCERNS ABOUT "HAVING THE ENTIRE COMMINGLED ARRANGEMENT (NOT JUST THE UNE CIRCUIT) GOVERNED BY THE ICA UNDER ESCHELON'S LOOP TRANSPORT UMBRELLA TERM."[579] ARE MS. STEWART'S CONCERNS WARRANTED?

A. No. As I explain above, Eschelon's proposal clearly distinguishes between UNE and non-UNE components of a Loop Transport Combination and there is nothing in Eschelon's language that could be read as an attempt to govern non-UNEs by Section 9 (UNEs) of the ICA. Eschelon's clarifying language in Section 9.23.4 clearly states that non-UNEs in a commingled arrangement are dealt with in Section 24.1.2.1, which expressly states in closed language that the non-UNE component is "governed by the terms of the alternative service arrangement pursuant to which that component is offered (e.g., Qwest's applicable Tariffs, price lists, catalogs, or commercial agreements)." Given that Eschelon's proposal

[578] Stewart Response, p. 38, lines 20-22.

[579] Stewart Response, pp. 40-41.

would not govern non-UNEs by the ICA, the concerns that Ms. Stewart raises[580] are actually non-issues.[581]

Ms. Stewart's claims are inconsistent, once again, with the existing organization of the ICA. Another umbrella term that is already used in the ICA is the term "UNE Combinations." Ms. Stewart does not claim to be confused about this closed language, even though the umbrella term refers to more than one UNE combination, and Qwest claims that it currently offers only one UNE Combination product.[582] Despite Qwest's claim, the umbrella term UNE Combination was not eliminated from the ICA and replaced with a section on EELs. There are entire sections of the ICA containing closed language and dealing with the umbrella term UNE Combinations.[583] If another product offering involving a combination of UNEs becomes available, or if Qwest changes the name of the current product, the agreement does not need to be amended to add general terms that are already in the contract because that possibility is contemplated.[584] The same should be true for combinations of loop and transport.

[580] Stewart Response, p. 41.

[581] Mr. Denney addresses Ms. Stewart's claims regarding a single LSR and CRIS billing in his testimony. *See* Denney Rebuttal, pp. 98 and 102-103.

[582] Stewart Direct, p. 117, lines 12-13 ("currently the only UNE Combination in the ICA is EELs").

[583] *See, e.g.*, 9.32.1 ("UNE Combinations General Terms"), 9.23.2 ("UNE Combinations Description and General Terms")

[584] *See, e.g.*, ICA Section 9.23.2.

Q. MS. STEWART STATES THAT YOU HAVE PROVIDED NO SUPPORT FOR YOUR CLAIM THAT QWEST HAS ATTEMPTED TO HAVE ACCESS TO UNES DICTATED BY ITS ACCESS TARIFFS.[585] IS THIS TRUE?

A. No. I provided examples of this at page 118 of my rebuttal testimony. One example is Qwest's attempt to apply tariff rates to activities related to nondiscriminatory access to UNEs.[586] Another example is Mr. Denney's discussion of intervals for commingled arrangements under Issue 9-58(e).[587] I also provided an example of Qwest attempting to subject UNEs to other non-ICA, non-CMP terms and conditions, as in the case of Qwest's non-CMP notice related to the APOT procedure for conversions.[588]

Q. MS. STEWART TAKES ISSUE WITH YOUR REFERENCES TO THE TERM "LOOP TRANSPORT COMBINATIONS" IN THE FCC'S *TRO*.[589] WOULD YOU LIKE TO RESPOND?

A. Yes, I will address each of Ms. Stewart's criticisms, but before I do, it is important to reiterate the purpose of my testimony to which Ms. Stewart responds. The purpose of my testimony (at pages 174-175 of my direct) was to show that

[585] Stewart Response, p. 42.

[586] *See* Starkey Direct, pp. 133-134 and Starkey Rebuttal, pp. 84 and 100. *See also*, Denney Direct, pp. 16-17 and Exhibit DD-16.

[587] Denney Direct, pp. 156-159.

[588] Starkey Rebuttal, p. 118, lines 8-11 and pp. 103 (footnote 264) and 108-109. *See also,* Starkey Direct, pp. 144-147.

[589] Stewart Response, p. 43.

Eschelon's language for Issue 9-55 (specifically Section 9.23.4) uses the term "Loop Transport Combinations" in the same way as the FCC uses the term. Ms. Stewart testified in her direct that Eschelon's proposal was troubling given that Eschelon's definition of Loop Transport includes commingled arrangements, but the references to the FCC order in my testimony shows that Eschelon's definition is consistent with the way the FCC uses the term.[590] I now turn to Ms. Stewart's criticisms.

First, she states that references to both paragraphs 575 and 576 of the *TRO* discuss UNE combinations, so "neither of these cites discusses combinations between UNEs and Non-UNEs."[591] Ms. Stewart misses the point. References to these paragraphs were provided to show that the FCC has referred to a UNE combination of loop and transport as a "Loop Transport Combination," just as Eschelon's language for Section 9.23.4 does ("Loop Transport Combination includes Enhanced Extended Links ("EELs")…"). Contrary to Ms. Stewart, I make no "leap" to "thrust a new loop transport definition upon Qwest,"[592] rather, the FCC refers to combinations between UNE transport and UNE loops as a Loop Transport Combination, and so does Eschelon's Section 9.23.4.[593]

[590] Starkey Rebuttal, p. 114.

[591] Stewart Response, p. 43, lines 2-4.

[592] Stewart Response, p. 43, lines 4-7.

[593] *See* Starkey Direct, p. 174.

Second, Ms. Stewart claims that the references to paragraphs 584, 593 and 594 of the *TRO* support Qwest's position because they refer to "*commingled* Loop Transport combinations."[594] Again, Ms. Stewart misses the point: paragraphs 584 and 593 of the *TRO* show that the FCC has referred to commingled arrangements as "loop transport combinations," just as Eschelon's language for 9.23.4 does ("Loop Transport Combinations include…Commingled EELs…").

To sum up, Eschelon's language for 9.23.4 defines a Loop Transport Combination to include: (1) EELs, (2) Commingled EELs, and (3) High Capacity EELs, and the FCC has used the same term to refer to all three.[595] Eschelon has also agreed upon individual definitions for each of these terms, also in Section 9.23.4, to be used when referring to a specific combination rather than loop transport combinations collectively.

Q. MS. STEWART PROPOSES ALTERNATIVE LANGUAGE FOR ISSUE 9-55.[596] IS THIS LANGUAGE ACCEPTABLE TO ESCHELON TO RESOLVE THIS ISSUE?

A. No. Qwest's language for the one paragraph of Section 9.23.4[597] states that the, "non-UNE circuit will be governed by the rates, terms and conditions of the

[594] Emphasis added.

[595] Starkey Direct, p. 175.

[596] Stewart Response, p. 39.

[597] Eschelon's proposal includes use and capitalization of the term Loop Transport Combination in other sections beyond this one paragraph, as shown in the ICA draft.

appropriate Tariff." But, the non-UNE circuit could be governed by a section 271 price, a commercial agreement, etc. It will not necessarily be a tariff.[598] In addition, as mentioned above, the parties have already agreed to language in Section 24.1.2.1, which is not limited to Qwest's tariffs, but also recognizes other alternative arrangements. Section 24.1.2.1 not only makes Qwest's proposed alternative language unnecessary, but Section 24.1.2.1 is also more accurate.

In Minnesota, Qwest agreed to repeat a portion of the language of Section 24.1.2.1 in Section 9.23.4, which would address the issue of "appropriate Tariff" versus other possible arrangements, if Qwest were to offer that in other states as well. It would not, however, address the other issues covered by the remainder of Eschelon's proposed language. If that concept (using the language instead of cross referencing it) were incorporated in Eschelon's proposed language, it would appear as follows (which would be acceptable to Eschelon), with the revised language shown in gray shading:

> Loop-Transport Combination – For purposes of this Agreement, "Loop-Transport Combination" is a Loop in combination, or Commingled, with a Dedicated Transport facility or service (with or without multiplexing capabilities), together with any facilities, equipment, or functions necessary to combine those facilities. At least as of the Effective Date of this Agreement "Loop-Transport Combination" is not the name of a particular Qwest product.

[598] Footnote 10 at page 39 of Ms. Stewart's response testimony states, "Tariff as used in the ICA is a defined term that refers to Qwest interstate Tariffs and state tariffs, price lists and price schedules." Ms. Stewart's testimony is misleading. Tariff is a defined term in the ICA not limited to Qwest's tariffs and price lists. See Section 4 ["Tariff refers to the applicable tariffs, price lists, and price schedules that have been approved or are otherwise in effect pursuant to applicable rules and laws, *whether the Tariff is a Qwest retail Tariff or a CLEC Tariff*."] (emphasis added)

> "Loop-Transport Combination" includes Enhanced Extended Links ("EELs"), Commingled EELs, and High Capacity EELs. If no component of the Loop-transport Combination is a UNE, however, the Loop-Transport Combination is not addressed in this Agreement. The UNE component(s) of any Commingled arrangement is governed by the applicable terms of this Agreement. The other component(s) of any Commingled arrangement is governed by the terms of the alternative service arrangement pursuant to which that component is offered (e.g., Qwest's applicable Tariffs, price lists, catalogs, or commercial agreements).

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

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

Q. SUBJECT MATTER 27 (ISSUES 9-61 AND SUBPARTS) ADDRESSES LOOP MUX COMBINATIONS ("LMC"). PLEASE BRIEFLY SUMMARIZE.

A. There is no dispute that the loop component of a LMC is a Section 251 UNE. So, regardless of how multiplexing is treated,[599] the LMC should be included in Section 9 of the ICA,[600] which is Eschelon's proposal for Issue 9-61. Eschelon's proposal is based on the language of Section 9.23.8 entitled "Loop Mux Combination (LMC)" within Section 9.23 entitled "Unbundled Network Elements Combinations (UNE Combinations)" in the Qwest-AT&T interconnection

[599] Eschelon's position is that multiplexing should be provided at TELRIC-based rates in two specific scenarios when it is combined with a Section 251 UNE. Qwest's position is that multiplexing should be obtained pursuant to Qwest's tariff.

[600] Qwest claims that the proper location is Section 24. *See* Stewart Response, p. 83, line 11.

agreement that was approved by this Commission and later used in negotiations as one source of language for the proposed contract.[601] Eschelon agreed upon the same placement in the contract within Section 9 as used by Qwest and AT&T. In the Qwest-AT&T approved ICA, just as in Eschelon's proposed language, the description of the Loop Mux UNE Combination states that it is a combination of an unbundled loop with a multiplexer and collocation located within the same Qwest Wire Center.[602] In response to Qwest's stated concerns, Eschelon agreed to additional language in the description expressly stating that the loop is combined with a multiplexed facility "with no interoffice transport."[603]

Under Issue 9-61(a), the LMC should be defined as a UNE combination in the proposed ICA instead of a commingled arrangement, just as Qwest previously defined it as a UNE combination in its ICA with AT&T. Qwest has previously provided multiplexing in three ways: (1) as part of a multiplexed EEL, (2) as part of a Loop-Mux Combination, and (3) as a stand alone UNE.[604] All Eschelon is asking for is Qwest to provide multiplexing in two distinct scenarios in combination with Section 251 UNEs.[605] Despite misdirection from Qwest as to stand alone UNEs,[606] Eschelon's language does not request them or require Qwest

[601] Exhibit BJJ-16, p. 1 (2/4/03 email) (quoted in Johnson Rebuttal, p. 8, footnote 8).

[602] Qwest-AT&T ICA §9.23.8.1.1.

[603] Proposed ICA Section 9.23.9.1.1 (closed language).

[604] Starkey Direct, p. 192.

[605] One of these scenarios is agreed upon (the EEL), and the other is the Loop Mux Combination.

[606] *See, e.g.*, Stewart Response, p. 75, line 16.

to provide them. The Commission should not allow Qwest to severely restrict access to multiplexing in this arbitration, especially when this restriction is not based in the FCC rules or orders. To this end, intervals and rates for LMC should be included in the ICA and changed via ICA amendment under Issues 9-61(b) and 9-61(c).

Q. DO YOU HAVE ANY GENERAL RESPONSE TO QWEST'S RESPONSE TESTIMONY ON ISSUE 9-61?

A. Yes. First, when evaluating Qwest's arguments regarding Issue 9-61, it is important to note both what Issue 9-61 does address and what it does not. Starting with the latter first, Issue 9-61 does ***not*** deal with transport. Qwest's arguments based on transport are red herrings.[607] Eschelon's proposed definition of Loop-Mux Combination does not include transport.[608] This is a combination of unbundled loop and multiplexing that ***terminates at a collocation***. The companies have agreed to the following language (with emphasis added):

> 24.2.1.1 A multiplexed facility will be ordered and billed at the rate in Exhibit A if all circuits entering the multiplexer are UNEs ***or the UNE Combination terminates at a Collocation, as described in Section 9.23***. In all other situations when CLEC orders multiplexing with a UNE (e.g., CLEC orders a UNE Loop in combination with Qwest special access transport), the multiplexed facility will be ordered and billed pursuant to the applicable Tariff.

[607] See, e.g., Stewart Response, p. 78.

[608] See, e.g., closed language in Section 9.23.9.1.2, stating: "There is no interoffice transport between the multiplexer and CLEC's Collocation."

As this closed language demonstrates, Eschelon has also already agreed that when it "orders a UNE Loops in combination with Qwest special access transport," the "applicable Tariff" rate will apply. Multiplexing in combination with transport is a closed issue and is ***not*** the subject of Issue 9-61.

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

Q. DO YOU HAVE OTHER OBSERVATIONS IN RESPONSE TO QWEST'S RESPONSE TESTIMONY ON ISSUE 9-61?

A. Yes. As discussed above in the summary of this issue, one of the disagreements under Issue 9-61(a) is whether the LMC should be defined in the ICA as an UNE combination or whether it should be defined as a Commingled arrangement. The crux of this difference in opinion is whether the multiplexing component of the

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

Q. PLEASE ELABORATE.

A. In the very first Q&A in Ms. Stewart's response testimony on this issue, she testifies: "Accordingly, a CLEC ***must*** order the multiplexed facility used for LMCs through the applicable tariff."[609] Ms. Stewart repeats this mantra several more times in her response testimony on Issue 9-61, testifying that, "LMC is comprised of an unbundled loop…combined with a DS1 or DS3 multiplexed facility…that a CLEC obtains from a tariff."[610] Ms. Stewart couches her response testimony as if Qwest's position on this issue is fact; but it is not a fact, and the companies are asking the Commission to resolve that very issue under Issue 9-61(a).

[609] Stewart Response, p. 75, lines 20-21. (emphasis added)

[610] Stewart Response, p. 75, lines 12-15. *See also*, Stewart Response p. 83, lines 15-16 ("Because an LMC is a combination of a UNE and a tariffed multiplexed service, it is not a UNE combination…")

Q. IS A GOOD PORTION OF MS. STEWART'S RESPONSE TESTMONY ON ISSUES 9-61 AND SUBPARTS SPENT REHASHING ISSUES YOU HAVE ALREADY ADDRESSED IN YOUR TESTIMONY?[611]

A. Yes. Ms. Stewart's primary response argument is that Eschelon is seeking access to multiplexing as a "stand alone UNE."[612] I addressed this claim at pages 121-122 of my rebuttal testimony. It appears that Ms. Stewart believes that the more she says this (no fewer than 13 times in her response testimony alone), the more likely the Commission is to believe this misdirection. It is not true, however, and Eschelon's proposed ICA language makes that clear.

Q. MS. STEWART CLAIMS THAT MULTIPLEXING IS A FEATURE OR FUNCTION OF UDIT,[613] BUT NOT LOOPS. IS SHE CORRECT?

A. Ms. Stewart is only partly correct. I agree with Ms. Stewart that multiplexing is a feature or function of UDIT and should be provided at TELRIC rates in these instances.[614] However, I disagree with the notion that multiplexing is not a feature or function of loops.[615]

[611] Ms. Stewart cites to the Verizon-Virginia arbitration decision (Stewart Response, p. 81). I addressed this issue at pages 122-124 of my rebuttal testimony.

[612] Stewart Response, p. 75, line 16; p. 76, line 5; p. 77, lines 13-14; p. 79, line 4; p. 79, line 11; p. 81, lines 11-12; p. 81, lines 15-16; p. 81, line 17; p. 82, line 9; p. 83, lines 5-6; p. 83, line 8; p. 83, line 20; and p. 83, line 23.

[613] Stewart Response, p. 78.

[614] Stewart Response, p. 82.

[615] Starkey Direct, pp. 189-192.

Ms. Stewart argues that since loops can function independently of multiplexing, then multiplexing is not a feature/function of the loop.[616] Ms. Stewart describes her proposed test for determining whether multiplexing is a feature of function of a UNE as follows:

> central office based multiplexing is not required for a UNE loop facility to function. If the functioning of a DS1 loop, for example, was dependent upon multiplexing, there might be a factual argument that multiplexing is a feature or function of the loop. But since a DS1 loop functions regardless whether there is multiplexing used with the loop, multiplexing cannot reasonably be viewed as a "feature, function, or capability" of the loop. In addition, the multiplexing function is provided through equipment that is physically separate from and independent of UNE loops.[617]

Ms. Stewart's test does not make sense and does not support Qwest's proposal to provide multiplexing as a feature or function of UDIT, but not UNE loops. First, there are a whole host of items that are features or functions of the loop on which the loop is not *dependent*. For instance, repeaters and load coils are features and functions of the loop, but a properly functioning loop is not always dependent on the existence of these features or functions, and when the loop is used for data service, they are oftentimes removed altogether from the loop during loop conditioning. Contrary to Ms. Stewart's claim, the loop does not have to be dependent on the item in question for it to be a feature or function of the loop. Second, transport is not "dependent" on multiplexing either, but Ms. Stewart

[616] Stewart Response, p. 81, lines 2-10.

[617] Stewart Response, p. 81, lines 2-9.

agrees that multiplexing is a feature or function of UNE transport.[618] For instance, a CLEC could combine a DS1 UNE transport with a DS1 UNE loop, and this would not require multiplexing.

Q. MS. STEWART ARGUES THAT YOUR RELIANCE ON FCC AUTHORITY IS MISPLACED BECAUSE THE CITES YOU POINT TO ARE TALKING ABOUT A DIFFERENT TYPE OF MULTIPLEXING THAN WHAT IS DISCUSSED IN ISSUE 9-61.[619] WOULD YOU LIKE TO RESPOND?

A. Yes. At pages 191 and 192 of my direct testimony I discussed the routine network modifications rules and pointed out that these rules include deploying a new multiplexer and reconfiguring existing multiplexers for loops as part of the nondiscriminatory obligations of the ILEC. 47 CFR § 51.319(a)(7). Ms. Stewart claims that the FCC "is being clear"[620] that the multiplexing being discussed under this rule is different from the multiplexing discussed under Issue 9-61. I disagree with Ms. Stewart's narrow view of the FCC's rules.

If the routine network modifications rule for loops under § 51.319(a)(7) is compared to the routine network modifications rule for transport under § 51.319(e)(4), they are nearly identical. Like the rule applying to loops, the transport rule states that routine network modifications include "deploying a new

[618] Stewart Response, p. 82.

[619] Stewart Response, pp. 82-83.

[620] Stewart Response, p. 82, lines 21-22.

multiplexer or reconfiguring an existing multiplexer." There is no distinction in the routine network modification rules between different types of multiplexing – though the FCC could have easily written one into the rule. The FCC could have made such a distinction if it so desired given that it did make the loop rule specific to loops and the transport rule specific to transport.[621] What this means is that the FCC crafted a specific rule to apply to loops versus transport, rather than simply "cutting and pasting" the same routine network modification rule for each UNE, and the FCC could have written a multiplexing distinction into the rule at that time – but didn't. Therefore, the distinction that Ms. Stewart makes regarding multiplexing is not grounded in the FCC's rules.

Q. ARE THERE OTHER REASONS WHY MS. STEWART'S CLAIM THAT MULTIPLEXING IS A FEATURE OR FUNCTION OF UNE TRANSPORT BUT NOT UNE LOOPS IS UNCONVINCING?

A. Yes. At page 82 of her response testimony, Ms. Stewart states that Qwest agrees that when multiplexing is used to connect a UNE transport and UNE loop, then it should be provided at TELRIC.[622] In support of this position Ms. Stewart states: "because multiplexing is not a feature or function of the UNE loop, multiplexing used to commingle UNE loops with tariffed private line transport (as opposed to

[621] For instance, the only differences between the loop and transport rules (besides referring to loops versus transport) is that the transport rule does not include mention of "adding a smart jack", "adding a line card", or attaching electronics/equipment for DS1 loop as routine network modifications – all of which are included in the loop rule.

[622] Stewart Response, p. 82, lines 3-5.

UNE transport) is stand-alone multiplexing…"[623] Ms. Stewart entirely misses the point: what is being addressed under Issue 9-61 is Loop Mux Combination, or an arrangement in which multiplexing connects a UNE loop directly to a CLEC's collocation – ***without transport***. Therefore, Ms. Stewart's comparison to a commingled EEL is misplaced.

Furthermore, Qwest agrees that multiplexing should be provided at TELRIC rates when transport provided at TELRIC rates is connected to loops provided at TELRIC rates. Qwest should, therefore, also agree that multiplexing should be provided at TELRIC rates when collocation provided at TELRIC rates is connected to Loops provided at TELRIC rates (which is what LMC is). The fact that Qwest does not agree in this instance exposes an inconsistency in Qwest's position.

Q. MS. STEWART ARGUES THAT SINCE THE FCC'S *TRO* LIFTED THE COMMINGLING RESTRICTION, QWEST WILL STOP PROVIDING LOOP MUX COMBINATIONS AS IT HAS IN THE PAST.[624] DID THE *TRO* SAY ANYTHING ABOUT A QUID PRO QUO ASSOCIATED WITH COMMMINGLING OR THAT LIFTING THE COMMINGLING RESTRICTION RELIEVED THE ILECS OF THEIR OBLIGATION TO

[623] Stewart Response, p. 82, lines 7-9.

[624] Stewart Response, pp. 78-79.

PROVIDE MULTIPLEXING AS THEY HAVE PREVIOUSLY PROVIDED IT?

A. No, and Ms. Stewart provides no support for this insinuation. Ms. Stewart's support for her claim that Qwest was acting "voluntarily" in providing Loop Mux Combinations is not grounded in any FCC order or rules. Rather, she cites to the Wireline Competition Bureau's decision in the Verizon-Virginia Arbitration as support, and I have explained that Ms. Stewart's reliance on this decision is misplaced.[625]

Ms. Stewart also claims that the FCC's reference to multiplexing as an "interstate access service" in paragraph 583 of the *TRO* "refutes any claim by Eschelon [sic] that it is entitled to multiplexing at UNE rates, terms, and conditions when it obtains multiplexing for use with commingled arrangements."[626] However, multiplexing, like loops and transport, are available both within the context of Section 251 of the Act (as part of the ILEC's obligation to provide nondiscriminatory access to UNEs) as well as interstate access tariffs (which are not governed by Section 251 of the Act). And contrary to Ms. Stewart's claim, just because a facility or function is available as an "interstate access service" does not mean that it cannot also be available under the Act and the FCC's rules for UNEs/interconnection, as evidenced by the fact that both loops and transport also are available within both contexts. Indeed, the same sentence in paragraph

[625] Starkey Rebuttal, pp. 122-124.

[626] Stewart Response, p. 80, lines 3-5.

583 of the *TRO* also referred to transport as an "interstate access service," but transport is unarguably available also within the context of Section 251 of the Act.

Q. MS. STEWART CLAIMS THAT QWEST VOLUNTARILY PROVIDED LMC.[627] PLEASE RESPOND.

A. Eschelon does not agree that Qwest is voluntarily providing LMC. As I mentioned above, the basis for Ms. Stewart's claim that Qwest voluntarily provided Loop Mux Combinations appears to be the Wireline Competition Bureau's Verizon Virginia arbitration decision,[628] and I have shown that Ms. Stewart's reliance on this decision is misplaced.[629] In fact, the Minnesota Arbitrators' Report (as upheld by the Minnesota Commission), when addressing Issue 9-61, also disagrees with Qwest and funds that in the Verizon Virginia Arbitration Order, "the FCC declined to address the issue of whether multiplexing can also be a feature, function, or capability of a UNE loop in the circumstances at issue here."[630] The Minnesota Commission adopted the following recommendation by the ALJs:

> Qwest agrees that it must offer multiplexing at UNE rates when it connects two UNEs, or when it is a feature, function, or capability

[627] Stewart Response, p. 78.

[628] Stewart Response, p. 78, lines 12-14.

[629] Starkey Rebuttal, pp. 122-124.

[630] MN Arbitrators' Report, ¶196, affirmed by a 4-0 vote of the Minnesota PUC on March 6, 2007. And to Ms. Stewart's point that the FCC found in the TRO that multiplexing is an interstate access service, the MN Arbitrators' Report (as upheld by the Minnesota Commission) finds that, "neither the Verizon Virginia Arbitration Order nor the TRO expressly addresses the question whether multiplexing must be offered at UNE rates under this circumstance." MN Arbitrators' Report, ¶198, affirmed by a 4-0 vote of the Minnesota PUC on March 6, 2007.

> of UNE transport. Given that Qwest has previously provided multiplexing as a UNE when it is provided in conjunction with a UNE loop, as well as when it is provided in conjunction with UNE transport, the Administrative Law Judges agree with the Department's recommendations that Eschelon's language be adopted in the ICA. If Qwest wishes to withdraw or limit multiplexing in the manner it proposes here, it should file a petition with the Commission to obtain permission to modify all ICAs that currently provide for UNE pricing of the multiplexing of a UNE loop into non-UNE transport within a central office.[631]

In Washington, the Commission set TELRIC rates for multiplexing. If Qwest wishes to withdraw or limit multiplexing at TELRIC rates over CLEC objection, it should obtain Commission permission before doing so.

XI. SUBJECT MATTER NO 29. ROOT CAUSE ANALYSIS AND ACKNOWLEDGEMENT OF MISTAKES

Issues Nos. 12-64, 12-64(a) and 12-64(b): ICA Section 12.1.4

Q. HAS ESCHELON OFFERED AN ALTERNATIVE PROPOSAL REGARDING THIS ISSUE?

A. Yes. Eschelon has provided an alternative proposal for Section 12.1.4.1 regarding the single phrase on this issue that remained open in Minnesota at the time when the Minnesota Commission ruled on this case.[632] Although in Washington Qwest *opposes **all*** of Eschelon's proposed language for Issue 12-64,[633] Qwest had[634]

[631] MN Arbitrators' Report ¶199 (Exhibit DD-25).

[632] At its March 6, 2007 meeting the Minnesota PUC ruled, by a 4-0 vote, to adopt Eschelon's proposal # 2 discussed below.

[633] Albersheim Response, p. 37, lines 3-5.

agreed in Minnesota to all of Eschelon's proposed language (which is the same in both states), ***except one phrase*** ("a mistake relating to products and services provided under this Agreement."). Eschelon's alternate proposal regarding that one open phrase is as follows, with the single phrase that remained open in Minnesota shaded in gray:

Eschelon proposal #2

> 12.1.4.1 CLEC may make a written request to its Qwest Service Manager for root cause analysis and/or acknowledgement of mistake(s) in processing wholesale orders, including pre-order, ordering, provisioning, maintenance and repair, and billing. The written request should include the following information, when applicable and available: Purchase Order Number (PON), Service Order Number, billing telephone number, a description of the End User Customer impact and the ticket number associated with the repair of the impacting condition. It is expected that CLEC has followed usual procedures to correct a service impacting condition.

Although the ALJs' did not adopt Eschelon's previous language for this phrase in Issue 12-64, Eschelon offered this modified language to address the ALJs' concerns in its exceptions to the ALJs' report. The Minnesota Commission adopted Eschelon's above-quoted language for this issue. Eschelon offers this modified language in all six states.

Q. PLEASE EXPLAIN ESCHELON'S PROPOSAL # 2.

[634] There were several open provisions regarding Issue 12-64 going in to the Minnesota arbitration (as shown in the Washington direct testimony of Ms. Albersheim at pages 42-44). Additional issues closed so the remaining language that was left in dispute in Minnesota was the one phrase ("a mistake relating to products and services provided under this Agreement"). The Minnesota PUC adopted a different sentence ("mistake(s) in processing wholesale orders, including pre-order, ordering, provisioning, maintenance and repair, and billing"), which reflects Eschelon's proposal #2, discussed below.

A. The shaded phrase in Eschelon's Proposal # 2, which constitutes the difference from Eschelon's Proposal # 1, describes the type of mistakes subject to this provision of the contract. In the Minnesota Qwest-Eschelon ICA arbitration on this issue, the ALJs recommended the adoption of Eschelon's proposed phrase: "a mistake relating to products and services provided under this Agreement." The ALJs specifically found that Eschelon's language is consistent with the record and in the public interest.[635] As an alternative for the Commission, the ALJs also noted that the Commission could modify the recommended language to use the phrase "mistake[s] in processing wholesale orders."[636] The latter alternative, however, is likely to lead to future disputes because the companies already disagree on the meaning of that phrase.

Qwest claims that mistakes in processing wholesale orders are limited to mistakes "in processing an LSR/ASR."[637] Under Qwest's interpretation of this phrase, if an Eschelon customer experiences a Qwest-caused service outage, Qwest would provide an acknowledgment of its mistake only if Qwest erred in processing an LSR/ASR (such as a typo on the Qwest service order) but not if Qwest erred later in the process (such as if Qwest errs and disconnects the wrong line during a repair and unexpectedly takes down Eschelon's customer's service). The Eschelon end user customer, however, is equally unhappy about the service

[635] MN Arbitrators' Report, ¶208 (last sentence).

[636] MN Arbitrators' Report, ¶208.

[637] Qwest's proposed language for Section 12.1.4.1 in Minnesota, as cited in Albersheim Washington Direct, pp. 41-42. See also Albersheim Response, p. 37 lines 13-25 and p. 38 lines 1-5.

outage regardless of which kind of Qwest mistake caused the outage. There is no practical reason to provide a letter acknowledging Qwest's mistake in one situation but not the other. Therefore, Eschelon believes the phrase "processing wholesale orders" has a broader meaning than that suggested by Qwest. The Minnesota Department of Commerce also defined the Minnesota Commission's earlier language ("processing wholesale orders") more broadly than does Qwest in testimony:

> It is my opinion that the Commission's language is intended to encompass errors which may occur throughout the end-to-end order provisioning process, not just those which may occur during the typing or processing of an LSR/ASR. I therefore believe that Eschelon's broader terminology is more consistent with the plain language as well as with the spirit of the Commission's Order than is that proposed by Qwest.[638]

If the phrase "processing wholesale orders" is used instead of Eschelon's first proposal, Eschelon recommends adding language to capture this "end-to-end" concept. Therefore, Eschelon's alternate proposal for this section uses the phrase: "mistake(s) in processing wholesale orders, including pre-order, ordering, provisioning, maintenance and repair, and billing."

Q. MS. ALBERSHEIM ARGUES AT PAGE 36 OF HER RESPONSE TESTIMONY THAT QWEST DOES NOT CONTRADICT ITS OWN ADVOCACY BY OPPOSING ALLEGEDLY UNIQUE PROCEDURES

[638] Minnesota Department (Doherty) Reply Testimony, p. 19, lines 6-10. Although the Department also noted that, in the alternative the phrase "wholesale order processing" could be used, *see id*., p. 19, lines 10-12, that alternative was provided with a different interpretation of that phrase than the one proffered by Qwest.

FOR OTHER TERMS OF THE ICA WHILE SUPPORTING A UNIQUE PROCEDURE FOR ACKNOWLEDGEMENTS OF MISTAKES IN MINNESOTA ONLY. PLEASE COMMENT.

A. A simple comparison of Qwest's previous testimony about the disadvantages of alleged unique "one-off" processes[639] with Qwest's current testimony about the disadvantages of uniformity[640] demonstrates the contradiction in Qwest's own advocacy. Ms. Albersheim claims that the Minnesota procedures affect only one CLEC.[641] As I discuss in more detail below, however, the procedures ordered by the Minnesota Commission apply on their face to CLECs generally, and not only

[639] *See*, *e.g.*, Albersheim Response, p. 5, lines 10-16 ("Eschelon seeks to expand Qwest's obligations and create ***one-off, unique processes*** for CMP-related ICA issues in dispute: service intervals, jeopardy notices, and expedited orders. Eschelon's approach to these issues … has a ***dire effect*** on the CMP . . . ") (emphasis added). [Ms. Albersheim has testified that Qwest believes its proposal of a Minnesota-only provision for Issue 12-64 is a "one-off" process. Qwest-Eschelon ICA MN Arbitration, Vol. I, p. 15, line 17 – p. 16, line 3 (Albersheim).] *See also* Qwest-Eschelon ICA MN Arbitration, Qwest (Mr. Linse) MN Direct, p. 12, lines 12-19 ("Even if Eschelon were to agree that its language constitutes a standing request to tag whenever necessary, this would still represent a significant 'one-off' from Qwest's existing process. Eschelon's proposed language would create a unique process that would apply only to Eschelon and other CLECs that may opt into Eschelon's agreement. Qwest's technicians on service calls would be unreasonably burdened with the responsibility of understanding this one-off process and keeping straight for which CLECs it applied. This would create significant administrative and logistical difficulties.") (Issue 12-75, now closed).

[640] *See* Albersheim Response, pp. 36-37. Qwest attempts to distinguish Issue 12-64 because it "was not necessary for Qwest to undertake systems changes" (Albersheim Response, p. 36, lines 19-20), but it was also not necessary for Qwest to undertake system changes for the now closed Issue 12-75 (tag at the demarcation point) (see previous footnote). *See* Qwest-Eschelon ICA MN Arbitration, Transcript, Vol. I, p. 104, line 10 – p. 105, line 11 (quoted below) (where Ms. Albersheim lists the issues in Section 12 that "anticipate systems change requests" and does not include tag at the demarcation point (Issue 12-75)). If the real reason for Qwest's objection were opposition to "one-off" terms, Qwest could have simply made the acknowledgement of mistakes terms available to all CLECs in CMP (as it says it is currently doing for tag at the demarcation point, Issue 12-75). As previously discussed, however, Qwest has chosen not to deal with this particular subject which is unfavorable to Qwest in CMP. *See* Webber Rebuttal (adopted), pp. 38-40.

[641] Albersheim Response, p. 36, lines 18-19.

Eschelon.[642] Ms. Albersheim also argues, without providing any cost support, that following unique procedures in 14 states would drive changes in processes and additional costs "exponentially."[643] Eschelon does not maintain interconnection agreements with Qwest in all 14 states. Additionally, Eschelon has not even sought unique processes in those states where it currently operates. Rather, for all of its operating states, it has sought the same process, much of which Qwest generally now claims it already provides CLECs.[644] Ms. Albersheim's suggestion that, if it must implement the Minnesota procedures in other states as well, there would be a "systems" burden that "multiplies exponentially"[645] is equally unconvincing and unsupported by any evidence. In fact, when asked to identify which issues in Section 12 would involve any systems changes at all, Ms. Albersheim did not identify acknowledgement of mistakes and root cause analysis (Issue 12-64).[646] As the plain language of

[642] *See also* Webber Rebuttal (adopted), p. 39 and footnote 71; Exhibit MS-8 (MN 616 Orders, 7/31/03 and 11/12/03).

[643] Albersheim Response, p. 36 lines 21-24

[644] See Albersheim Response, pp. 39-41 where Ms. Albersheim generally claims that Qwest provides root cause analyses upon request. *See also* Exhibit BJJ-43 (Qwest Service Center and Manager Roles in Relation to CMP), p. 2 (Qwest description of its Service Managers' role, which states: "Qwest will conduct a root cause analysis of the examples of the problem, and provide its analysis to the reporting CLEC in a timely manner.")

[645] Albersheim Response, p. 36, lines 23-24.

[646] Qwest-Eschelon ICA MN Arbitration, Transcript, Vol. I, p. 104, line 21 – p. 105, line 11 (Oct. 16, 2006) (Judge Sheehy Questions and Ms. Albersheim Answers) ("Q Are there any of these issues that you've talked about that are more clearly OSS issues in your view than others? A If you mean issues that anticipate systems change requests? Q Yes. A Well, the systems notices that included the PSON and the fatal reject notices, loss and completion reports, potentially the trouble reports issued because that involves a system that was created for those. Q Trouble report or trouble report closure? Are they different? A. I believe it was the trouble report closure. And the controlled production OSS testing is very definitely an OSS issue. . . .").

Eschelon's proposal for this issue shows,[647] this is not a systems issue. The language provides for a written request to the Qwest service manager, who then responds to the request, much like any other request for the Qwest service manager.[648]

Q. MS. ALBERSHEIM CLAIMS THAT ESCHELON'S PROPOSAL, WHICH IS NOT LIMITED TO ERRORS IN PROCESSING LSRs, INAPPROPRIATELY EXPANDS THE SCOPE OF QWEST'S OBLIGATIONS UNDER THE MINNESOTA COMMISSION'S ORDER IN DOCKET NO. P-421/C-03-616.[649] PLEASE RESPOND.

A. There is no reason that an ICA provision that will apply on a going forward basis needs to be limited to the scope of the single example in that case. Nonetheless, regarding the scope of that action, as Mr. Webber, whose testimony on this issue I adopt, explained in his direct and rebuttal testimonies, there should be no arbitrary limitation to the context in which the customer-affecting error occurs before Qwest should acknowledge such errors or analyze the errors such that they can be avoided, or minimized, on a going-forward basis.[650] Ms. Albersheim testifies that Eschelon's language expands the scope in two ways (1) by not limiting the

[647] Proposed ICA Section 12.1.4 and subparts.

[648] *See* Exhibit BJJ-43 (Qwest Service Center and Manager Roles in Relation to CMP) (listing the kinds of inquiries, including requests for root cause analysis, to which the Qwest Service Manager provides responses).

[649] Albersheim Response, p. 37.

[650] *See, e.g.*, Webber Direct (adopted), pp. 35-36; Webber Rebuttal (adopted), p. 45.

provisions to the processing of LSRs; and (2) by providing for root cause analysis.[651]

Regarding the first of these claims, see my above responses. As I show above, in the Minnesota arbitration proceeding, the Department of Commerce's witness on this very issue, Ms. Doherty, indicated that Eschelon's contract proposal, which is the same in Minnesota as it is here, better captures both the plain language and the spirit of the Commission's order in Docket No. P-421/C-03-616[652] than does Qwest's proposal on this point. Since then, the Minnesota commission has itself adopted broader language (Eschelon's alternative proposal, shown above) than proposed by Qwest. Surely the Minnesota commission knows the scope of its own ruling better than Qwest.

Regarding the second of these claims, the Minnesota ALJs rejected Qwest's argument. They found, consistent with the evidence presented by Eschelon,[653] that "to acknowledge a mistake, Qwest has to determine that one was made and why."[654] Overall, they found that Eschelon's language "is more consistent with the Commission's Order."[655] Regardless of whether it exceeds the scope of one order in one case, Eschelon's proposed language best serves the public interest,

[651] Albersheim Response, p. 37, lines 8-11.

[652] Doherty Rebuttal Testimony in MN Docket No. P-5340, 421/IC-06-768, p. 19, lines 8-10.

[653] Webber Direct (adopted), p. 37.

[654] MN Arbitrators' Report, ¶208.

[655] MN Arbitrators' Report, ¶208.

for the reasons provided in all of Eschelon's testimony on this issue.

Q. REGARDING SECTION 12.1.4.2.1, MS. ALBERSHEIM CLAIMS THAT ESCHELON'S PROPOSED LANGUAGE, WHICH USES THE WORD "SUFFICIENT" CREATES "AMBIGUITY."[656] PLEASE RESPOND.

A. Ms. Albersheim refers to a requirement that the acknowledgement letter include "a recap of sufficient pertinent information to identify the issue."[657] Qwest has agreed to this language, including the term "sufficient," in Minnesota. Under Qwest's proposal in Minnesota discussed in Ms. Albersheim's Washington testimony, this phrase would be truncated to "a recap of pertinent information." Clearly, it is Qwest's proposal that introduces vague requirements because it does not require that the provided information is adequate (sufficient) to understand the issue. Without the word "sufficient," Qwest could arguably be allowed to withhold the necessary information without which the acknowledgement letter would not serve its intended purpose.

Q. REGARDING SECTION 12.1.4.2.5, MS. ALBERSHEIM ARGUES THAT ESCHELON'S PROPOSAL THAT THE ACKNOWLEDGEMENT LETTERS BE PROVIDED ON A NON CONFIDENTIAL BASIS COULD FORCE QWEST TO PUBLICLY REVEAL SENSITIVE AND

[656] Albersheim Response, p. 38.

[657] Eschelon Proposed ICA language, Section 12.1.4.2.1.

PROTECTED INFORMATION SUCH AS CPNI.[658] PLEASE COMMENT.

A. Qwest is required to provide this information in Minnesota on a non-confidential basis and yet Qwest has provided no evidence that in Minnesota it has been forced to publicly reveal sensitive and protected confidential information. The only basis Qwest provides for this allegation is that "the phrase 'will be provided on a non-confidential basis,' could give Eschelon the right to claim that Qwest must provide all data associated with a root cause analysis in its letter to the end-user customer."[659] Qwest arrives at this far-fetched conclusion by omitting the noun in the cited sentence (*i.e.*, the "thing" to be provided on a non-confidential basis). Eschelon's proposed language in Section 12.1.4.2.5 specifically states that "The ***acknowledgment response*** described in Section 12.1.4.2.3 and provided by the Qwest Service Manager to CLEC" is what must be provided on a "non-confidential" basis. There is no mention of root cause analysis in either Sections 12.1.4.2.3 or 12.1.24.2.5. The first sentences of both Sections 12.1.4.1 and 12.1.4.2 refer to requests for "root cause analysis and/or acknowledgement" – identifying them as two separate things. There is no basis for this Qwest claim. It is based on a sentence fragment and, when the entire sentence is provided, the claim disappears.

Q. QWEST STATES THAT ESCHELON HAS ARGUED THAT QWEST SHOULD HAVE SUBMITTED THE ACKNOWLEDGEMENT OF

[658] Albersheim Response, p. 38.

[659] Albersheim Response, p. 38, lines 17-20.

MISTAKES ISSUE TO CMP.[660] IS THAT AN ACCURATE DESCRIPTION OF ESCHELON'S POSITION?

A. No. Qwest cites page 50 of Mr. Webber's direct testimony[661] (which I have adopted). Ms. Albersheim's page reference is in error because on that page, Eschelon addresses a different subject with relation to another set of issues (12-65 and 12-66), which are now closed. The only manner in which Eschelon's direct testimony on Issue 12-64 references CMP is not to discuss Eschelon's own position, but the "inconsistent conduct" of Qwest.[662] Similarly, Mr. Webber's Rebuttal testimony explains that Qwest has argued both that this issue should be dealt with in CMP and that it should not.[663] In the Joint Disputed Issues Matrix, Qwest's position statement says "this issue involves processes that affect all CLECs… should be addressed through CMP…would require Qwest to modify its systems or processes…"[664] while Ms. Albersheim says that this issue should not be addressed in CMP because "[t]his process is not one that requires Qwest to alter its procedures overall, nor does it apply to all CLECs."[665] As Eschelon indicated in its rebuttal testimony, Eschelon is not advocating use of CMP procedures, as it has consistently maintained that this issue should be addressed in

[660] Albersheim Response, p. 38 line 23 and p. 39, lines 1-3.

[661] Albersheim Response, p. 38 line 23 and p. 39, lines 1-3.

[662] Webber Direct (adopted), p. 33, line 17.

[663] Webber Rebuttal (adopted), pp. 37-40.

[664] Exhibit 1 to Arbitration Petition (Joint Disputed Issues Matrix), Qwest Position Statement, pp. 140-141.

[665] Albersheim Response, p. 39 lines 9-11.

the interconnection agreement.[666] In contrast, Qwest has been inconsistent at best, and this inconsistency should be taken into account when evaluating Qwest's claims.

Q. WHEN ARGUING THAT THIS IS NOT A CMP ISSUE, MS. ALBERSHEIM DESCRIBES THE MINNESOTA RULING AS A "SETTLEMENT"[667] OF A CASE APPLICABLE TO "ONE CLEC."[668] IS QWEST'S CHARACTERIZATION OF THE MINNESOTA ORDER AS A "SETTLEMENT" ACCURATE?

A. No. Qwest is attempting to explain why Qwest did not use CMP, despite its statements about CMP in its position statement.[669] In her direct testimony, Ms. Albersheim described the *MN 616 Case* order as a "decision" by the Commission.[670] The word "settlement" did not appear in the direct testimony of Ms. Albersheim. Section 4.1 of the CMP Document contains procedures applicable to regulatory changes requests.[671] Now, in her response, testimony, Ms. Albersheim has started to describe the decisions of the Minnesota

[666] Webber Rebuttal (adopted), p. 38, lines 15-16 and p. 39 line 1.

[667] Albersheim Response, p. 37, line 18, p. 39 line 6 & p. 40, line 13.

[668] Albersheim Response, p. 36, line 19; *see also id*. p. 39, line 6 ("The settlement was between Qwest and Eschelon.").

[669] Exhibit 1 to Arbitration Petition (Joint Disputed Issues Matrix), Qwest Position Statement, p. 140-141.

[670] *See* Albersheim Direct, p. 44, lines 16-17.

[671] Webber Rebuttal (adopted), p. 38 (quoting Section 4.1 in footnote 68). The CMP Document outlines procedures for voluntarily initiating a change request, if a regulatory change request is not required. *Id*.

Commission erroneously as a "settlement."[672] By portraying the ruling as a voluntary settlement, Qwest may argue that the Commission-ordered requirements did not fall within the CMP's definition of a regulatory change, because Section 4.1 of the CMP Document (Ex. RA-2) provides that regulatory changes "are not voluntary." The requirements, however, were not voluntary. In the *MN 616 Case*, the Commission ruled that "Qwest failed to provide adequate service at several key points in the customer transfer process and that these inadequacies reflect system failures that must be addressed."[673] The Minnesota Commission made this ruling based on documented facts and not a settlement.[674] The Minnesota Commission exercised its "general authority to require telephone companies to provide adequate service" without a contested case *not* because of a settlement but because the Commission found there were insufficient disputed facts to require a contested case hearing before making its findings.[675] In the Minnesota arbitration, the ALJs said that the "Commission ***ordered*** Qwest to make a compliance filing"[676] and, with respect to the compliance filing, said that Qwest "made three compliance filings, eventually agreeing, in response to ***increasingly specific direction from the Commission***, to implement

[672] Albersheim Response, p. 37, line 18, p. 39 line 6 & p. 40, line 13.

[673] Exhibit MS- 8 [Order, *MN 616 Case* (July 30, 2003), p. 5].

[674] *See, e.g., id.*, p. 3 ("Interpretations aside, the following facts are not disputed.") (quoting Qwest email to Eschelon customer).

[675] *Id.*

[676] MN Arbitrators' Report, ¶206.

procedures."[677] At the Minnesota arbitration hearing, Ms. Albersheim, who is an attorney,[678] acknowledged that, in fact, the result of the *MN 616 Case* was not a settlement, but a Commission Order.[679]

Q. WHEN ARGUING THAT THIS IS NOT A CMP ISSUE, MS. ALBERSHEIM ALSO ARGUES THAT THE MINNESOTA-ORDERED PROCEDURES DO NOT "APPLY TO ALL CLECS."[680] PLEASE RESPOND.

A. The Minnesota Commission's orders in the MN 616 Case clearly apply to all CLECs and not only Eschelon. The Minnesota Commission found that Qwest had "failed to adopt operational procedures to promptly acknowledge and take responsibility for mistakes in processing wholesale orders."[681] The order did not say "Eschelon orders." The Minnesota Commission also found that "[p]roviding adequate wholesale service includes taking responsibility when the wholesale provider's actions harm customers who could reasonably conclude that ***a competing carrier*** was at fault. Without this kind of accountability and

[677] MN Arbitrators' Report, ¶207 (emphasis added).

[678] Albersheim Direct, p. 2, lines 3-5.

[679] MN Transcript, Vol. 1, p. 15, lines 10-16 (testimony of Ms. Albersheim).

[680] Albersheim Response, p. 39, lines 10-11.

[681] Exhibit MS-8 [Order, *MN 616 Case* (Nov. 13, 2003) p. 8].

transparency, retail competition cannot thrive."[682] The order did not say that the customer would blame "Eschelon."

Similarly, in its later order finding Qwest's compliance filing inadequate, the Minnesota Commission's fourteen ordering paragraphs (a-n) regarding the required contents of Qwest's next compliance filing included, for example, the following items that referred to "all" Qwest wholesale orders and CLECs generally (not only Eschelon):

(f) Procedures for extending the error acknowledgment procedures set forth in part (e) to ***all*** Qwest errors in processing wholesale orders.[683]

(i) Procedures for providing the acknowledgement to the ***competitive local exchange carrier***, who in turn may provide it to the end user customer, to prevent improper contacts with the other carrier's customer.[684]

(j) Procedures for preventing use of a confidentiality designation in acknowledgements, to ensure that the ***competitive local exchange carrier*** can provide the acknowledgment to its end user customer.[685]

(k) Procedures for making the acknowledgement process readily accessible to competitive local exchange ***carriers***, including procedures for identifying clearly the person(s) to whom requests for acknowledgments should be directed.[686]

[682] Exhibit MS-8 [Order, *MN 616 Case* (Nov. 13, 2003) 8] (emphasis added).

[683] Exhibit MS- 8 [Order, *MN 616 Case* (Nov. 13, 2003) p. 4] (emphasis added).

[684] Exhibit MS-8 [Order, *MN 616 Case* (Nov. 13, 2003) p. 4] (emphasis added).

[685] Exhibit MS-8 [Order, *MN 616 Case* (Nov. 13, 2003) p. 4] (emphasis added).

[686] Exhibit MS-8 [Order, *MN 616 Case* (Nov. 13, 2003) p. 4] (emphasis added). With respect to ordering paragraph (k), Qwest committed to comply with this Commission requirement by providing "external documentation" regarding requests for acknowledgements. *See* Exhibit RA-6 [Qwest Compliance Filing (Dec. 15, 2003), p. 5]; *See* Proposed ICA Section 12.1.4.2.6 (closed language in Minnesota). Qwest provided no evidence that Qwest posted this requirement regarding acknowledgment of mistakes on its website.

(l) Procedures for ensuring that persons designated to provide acknowledgements have been appropriately trained and have the authority to provide acknowledgements.[687]

Qwest's required compliance filing reflecting this same use of references to "all" Qwest wholesale orders and CLECs generally (not only Eschelon).[688] Despite these Commission-ordered requirements that are clearly not limited to Eschelon and its own earlier filing stating that this issue "involves processes that affect all CLECs, not just Eschelon,"[689] Qwest supports its choice not to use CMP by stating: "This process is not one that requires Qwest to alter its procedures overall, nor does it apply to all CLECs."[690] This is results-oriented conduct. It is not a process affecting all CLECs, because Qwest did not want to use CMP, so it says it is not one. Qwest's own inconsistency on this issue demonstrates that

[687] Exhibit MS-8 [Order, *MN 616 Case* (Nov. 13, 2003) p. 5]. Regarding ordering paragraph (l) on training, Qwest represented that "Service managers will be provided direction for responding to **all** requests for acknowledgments." Exhibit RA-6 [Qwest Compliance Filing (Dec. 15, 2003), p. 5] (emphasis added). Qwest did not limit this commitment to service managers on Eschelon's account. *See id.*

[688] Exhibit RA-6 [Qwest Compliance Filing (Dec. 15, 2003), pp. 3-5]. RA-2, p. 19 (§2.4.4) (Regarding the topics covered by items (k) and (l), the Qwest CMP Document provides: "When Qwest commits to make a change pursuant to CMP, Qwest will review and revise internal and external documentation, as needed, to ensure that the change is appropriately reflected. Qwest will conduct training to communicate the changes to all appropriate Qwest personnel so that they are made aware of relevant changes. If Sections 5.0, 7.0, 8.0 or 9.0 require notification of the change, such notification will be provided in accordance with that section and will include references to external Qwest documentation that will be modified to reflect the change, if applicable. All of the forgoing activities will take place by the implementation date of the change.").

[689] Exhibit 1 to Arbitration Petition (Joint Disputed Issues Matrix), Qwest Position Statement, p. 140 (Qwest position statement said: "Further, this issue involves processes that affect all CLECs, not just Eschelon.. . . Processes that affect all CLECs should be addressed through CMP, not through an arbitration involving a single CLEC.").

[690] Albersheim Response, p. 39, lines 9-11.

Qwest's approach to CMP is one of convenience and does not offer Eschelon any certainty upon which Eschelon may plan its business.[691]

Q. MS. ALBERSHEIM STATES THAT IT IS NOTEWORTHY THAT, SINCE THE MINNESOTA CASE, ESCHELON HAS NEVER ASKED QWEST FOR AN ACKNOWLEDGEMENT LETTER.[692] PLEASE RESPOND.

A. This comment exposes the weaknesses of arguments made in Ms. Albersheim's direct testimony, in which she claimed that Eschelon's proposal imposes a burden on Qwest,[693] and in her response testimony in which she claims that the burden would "multipl[y] exponentially"[694] if the Minnesota procedures are adopted in other states. Also, after previously testifying under oath that other CLECs have not expressed an interest in root cause analyses,[695] Ms. Albersheim now testifies that "CLECs can and do ask for root cause analyses,"[696] which Qwest service managers "routinely grant,"[697] and that CLECs already have a mechanism for requesting root cause analyses.[698] The fact that a mechanism is already in place

[691] Webber Rebuttal (adopted), p. 40.

[692] Albersheim Response, p. 39, lines 11-13.

[693] Albersheim Direct, p. 46.

[694] Albersheim Response, p. 36, line 24.

[695] Qwest-Eschelon ICA MN Arbitration, Albersheim MN Direct, p. 40, lines 19-23 ("Q. HAS THE CLEC COMMUNITY AS A WHOLE EXPRESSED A NEED FOR ROOT CAUSE ANALYSIS? A. No. Anecdotal evidence from Qwest's account managers indicates that the only CLEC that has expressed a desire for root cause analysis is Eschelon. Again, this is an indication that this issue does not need to go to the CMP.").

[696] Albersheim Response p. 41, lines 5-6.

[697] Albersheim Response, p. 41, line 6.

[698] Albersheim Response, p. 39, lines 19-23; *see also id*. p. 40, lines 14-19.

for all states also contradicts Ms. Albersheim's burdensomeness argument. Her own testimony on these points indicates there is no undue burden.

Q. AT PAGES 40-41 OF HER RESPONSE TESTIMONY, MS. ALBERSHEIM NOTES THAT QWEST HAS TAKEN STEPS TO MINIMIZE ERRORS IN PROVISIONING, AND THAT THE PIDS MEASURE HOW WELL QWEST PERFORMS IN TERMS OF PROCESSING LSRS. GIVEN THESE STATEMENTS, WHY DOESN'T ESCHELON SIMPLY WITHDRAW ITS PROPOSALS REGARDING THE ACKNOWLEDGEMENT OF MISTAKES AND ROOT CAUSE ANALYSES?

A. Eschelon's direct testimony explains that performance measures do not measure all instances of Qwest's inadequate service, and I won't repeat those arguments here.[699] I note, however, that simply because some performance is measured does not mean that issues will not arise on a going-forward basis as they have in the past. And, if Qwest is not required by ICA language to acknowledge mistakes and/or provide root cause analyses pursuant to enforceable contract provisions, Eschelon may well be stuck without a realistic way to insure that Qwest will acknowledge mistakes and/or provide root cause analyses when circumstances warrant either or both. Ms. Albersheim points out[700] that Qwest took steps to improve handling of wholesale orders in response to the Minnesota 616 Order.

[699] *See, e.g.*, Webber Direct (adopted), pp. 40-41.

[700] Albersheim Response, pp. 39-40.

However, this fact did not prevent the ALJs in the Minnesota arbitration from recommending rejection of Qwest's ICA proposal[701] – a recommendation that was adopted by the Minnesota Commission.[702]

Q. MS. ALBERSHEIM SUGGESTS THAT QWEST ALREADY HAS A PROCESS THROUGH WHICH IT IS WILLING TO PROVIDE ROOT CAUSE ANALYSIS ON REPAIR MISTAKES, AND THEREFORE, THERE IS NO NEED TO INCLUDE THIS LANGUAGE IN THE ICA.[703] PLEASE RESPOND.

A. Ms. Albersheim refers to Qwest's PCAT, which does not constitute a binding contract, and therefore, cannot be treated as a commitment and certainly cannot be viewed as a reasonable replacement for contractual language. Ms. Albersheim fails to explain why Qwest does not agree to commit to root cause analysis of Qwest mistakes[704] in the ICA. If, indeed, Qwest is making a commitment to Eschelon in this regard, it should agree to put the commitment into the ICA.

Q. AT PAGES 40-41 OF HER RESPONSE TESTIMONY, MS. ALBERSHEIM INDICATES THAT ESCHELON'S CONTRACT PROPOSAL PROVIDES ESCHELON "UNFETTERED LEEWAY" TO DEMAND A ROOT CAUSE

[701] MN Arbitrators' Report, ¶208.

[702] The Minnesota PUC, by a vote of 4-0, adopted the ALJs' recommendation at its 3/6/07 meeting.

[703] Albersheim Response, p. 40 lines 14-19 and p. 40, lines 19-23.

[704] In fact, Qwest's own documented process for providing root cause analysis is not limited to repair. *See* Exhibit BJJ-43 (Qwest Service Center and Manager Roles in Relation to CMP) (last paragraph).

ANALYSIS EVEN WHEN IT IS READILY APPARENT THAT A PROBLEM HAS NOT BEEN CAUSED BY QWEST. IS IT LIKELY THAT ESCHELON WOULD SEEK SUCH ANALYSES SIMPLY FOR ENTERTAINMENT'S SAKE?

A. No. Why would Eschelon spend its time and resources preparing requests for root cause analyses only to have Qwest point back to Eschelon's error when Eschelon knows full well that its processes and procedures failed (*i.e.*, it is *readily apparent* that the problem is Eschelon's)? Moreover, should Qwest ever feel as though it is being asked to perform root cause analyses when it is readily apparent that Qwest is not the culprit, it could pursue dispute resolution under the closed language in Section 5 of the ICA. Indeed, Qwest would prefer to maintain all the "discretion" – and "protection" – "as to when it is appropriate for the company to undertake a root cause analysis" while denying Eschelon any and all discretion or protection.[705] The Commission should adopt Eschelon's proposed language with respect to acknowledgement of mistakes and root cause analyses.

XII. SUBJECT MATTER NO. 31. EXPEDITED ORDERS

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

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

[705] *See* Albersheim Response, p. 41, lines 7-9.

A. Yes. Mr. Denney addresses Issue 12-67 and subparts in his surrebuttal testimony. Mr. Denney addresses Eschelon's proposed language and proposed interim rate and the basis for Eschelon's Issue 12-67 proposals,[706] including discussion of both the Arizona Staff's and the Minnesota Administrative Law Judges' recommendations in support of a cost-based rate for expedites.[707]

In the first section of this surrebuttal testimony, I also address expedited orders, in the context of Qwest's actions in CMP.[708] 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[709]) is less pertinent if Eschelon's proposal # 2 – Eschelon's proposal previously offered to Qwest and introduced in Mr. Denney's Surrebuttal testimony – is adopted for Issue 12-67(a) regarding Section 12.2.1.2.1. Section 12.2.1.2.1 addresses situations in which Qwest makes

[706] Regarding nondiscriminatory access to unbundled network elements, *see also* Mr. Starkey's discussion of Subject Matter 15 (Issue 9-31).

[707] Exhibit DD-30, p. 2, Staff Conclusion No. 7 ("Staff recommends that . . . the rate(s) for expedites be considered as part of the next cost docket."); MN Arbitrators' Report (attached to the testimony of Mr. Denney as Exhibit DD-25), ¶221 ("As to pricing, Eschelon's position should be adopted. When Eschelon requests an expedite, it will be for accessing a UNE. Under 47 C.F.R. §§51.307 and 51.313, it must be provided under Section 251 and the Act and, thus, at TELRIC rates.").

[708] *See also* Exhibits BJJ-49 (Update to BJJ-26: Examples of Expedite Requests Approved by Qwest for unbundled loop orders) and BJJ-47 (Annotated pages from Qwest Process Notifications). Note that at page 87 footnotes 226 and 228 of Mr. Webber's rebuttal testimony (which I am adopting), there are two references to Exhibit BJJ-26 which should be corrected to refer to Exhibit BJJ-36 instead.

[709] Albersheim Response, p. 44 lines 21-26 and p. 45 lines-15. Note Ms. Albersheim' suggestion that although expedites in Washington do not currently distinguish between designed and non-designed services, "Qwest's intent is to offer designed service expedites for $200 per day in Washington… in the near future." (Id., lines 13-15).

exception(s) to charging an additional fee for expedites. Eschelon's proposal # 2 states 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 emergency conditions (*e.g.*, fire or flood) are met and the applicable condition is met with respect to CLEC's request for an expedited order. If the purpose of Qwest's CMP-related and "designed services" testimony is to show that any one or more of the conditions identified in Eschelon's proposal number one for Section 12.2.1.2.1 should not be included in the contract for unbundled loops because it is not discriminatory to charge Eschelon for expedites (*i.e.*, create no exception to charging) as it charges its own retail customers and itself, then this purpose does not apply to Eschelon's proposal # 2 (which contains no list of conditions). If Qwest offers an exception to charging a separate expedite fee either at the commencement of the term of the ICA or during its term, Eschelon's proposal # 2 simply provides that Qwest must offer that exception to Eschelon, as well when the same emergency conditions are met. The issue then becomes "what rate applies if there is no exception to charging for retail or wholesale customers?" Mr. Denney discusses that issue, and the need for cost-based rates, in his surrebuttal testimony.

XIII. SUBJECT MATTER NO. 33. JEOPARDIES

Issues Nos. 12-71 through 12-73: ICA Section 12.2.7.2.4.4 and subparts

Q. DO YOU ALSO DISCUSS JEOPARDIES IN ANOTHER SECTION OF

YOUR TESTIMONY?

A. Yes. Please refer to the "Jeopardies Example" in the first section of my surrebuttal testimony, regarding CMP and the need for contractual certainty, for a discussion of Qwest's claims regarding jeopardies in the context of CMP.

Q. QWEST INDICATES THAT ESCHELON'S PROPOSAL WOULD "FORCE EXTRA TIME INTO THE PROCESS" THAT COULD GUARANTEE A DUE DATE IS MISSED.[710] IS THAT AN ACCURATE DESCRIPTION?

A. No. Eschelon's proposal provides for ***advance*** notice to ensure ***timely*** delivery of the circuit.[711] Timely delivery of service to the customer is of the utmost importance to Eschelon.[712] Delays are more likely to occur when Qwest provides an untimely Firm Order Confirmation ("FOC") or no FOC after a Qwest facility jeopardy,[713] because a proper FOC allows Eschelon to be prepared to accept the

[710] Albersheim Response, p. 58, lines 23-24.

[711] *See, e.g*, Webber Direct (adopted), p. 112 ("Timely delivery of the Firm Order Confirmation (FOC) after a Qwest jeopardy is at the heart of this scenario.").

[712] Webber Rebuttal (adopted), pp. 79 and 86. *See also* Webber Direct (adopted), p. 117, lines 2-3: "Perhaps the ***most important consequence*** of being assigned fault is the ***effect on the due date*** for providing service." (emphasis added); *see also id*. p. 121, lines 18-20 ("Eschelon will attempt to overcome these obstacles ***because delivery of service to its Customer is of the utmost importance to Eschelon***.") (emphasis added); *see also id*. pp. 118 and 120.

[713] The term "Qwest facility jeopardy" refers generally to a Qwest-caused issue or potential issue that places delivery of the requested facility on the due date at risk (i.e., in 'jeopardy") due to an issue relating to facilities in the Qwest network (such as lack of facilities, bad pairs, etc.). Further information about the type of jeopardy dealt with in Eschelon's proposed language for this issue is provided in footnotes 4, 5, and 6 to Exhibit BJJ-35 of Ms. Johnson's Rebuttal Testimony (Update to Jeopardy examples) and Exhibit BJJ-50 (Update to BJJ-35). In particular, see the discussion of "K jeps" in footnote 6.

circuit on time.[714] If Qwest provides an untimely FOC or no FOC after a Qwest facility jeopardy, the problem is compounded when Qwest classifies the resulting delay as Eschelon-caused (Customer Not Ready or "CNR"). As previously discussed, this pushes out the due date at least three days.[715] When Qwest provides an untimely FOC or no FOC after a facility jeopardy, it should be a Qwest jeopardy because Qwest failed to provide any notice or sufficient notice to allow Eschelon to obtain any needed access to the customer premises and prepare to accept the circuit.

Providing an FOC after a Qwest facility jeopardy has cleared is not a mere formality;[716] it is a contractual requirement (see Section 9.2.4.4.1) and practical necessity. Ms. Albersheim has admitted that sending an FOC in these situations serves the important practical purpose of allowing a CLEC to be prepared to accept the circuit by, for example, scheduling personnel and arranging access to the customer premises.[717] In fact, Ms. Albersheim has testified that, if the CLEC

[714] Exhibit MS-9, MN ICA Arbitration Transcript, Vol. 1, p. 37, line 20 – p. 38, line 6 (Ms. Albersheim) (Q So you agree with me that Qwest's current practice is to provide the CLEC with an FOC after a Qwest facilities jeopardy has been cleared; is that right? A Yes. Q And the reason for that is you want to let the CLEC know that the CLEC should be expecting to receive the circuit, right? A Yes. Q And the CLEC needs to have personnel available and it needs to also perhaps make arrangements with the customer to have the premises available; right? A Yes.").

[715] *See* Webber Direct (adopted), p. 117; Webber Rebuttal (adopted), pp. 85-86. When a jeopardy is classified as a CLEC-caused (CNR) jeopardy for unbundled loop orders, the CLEC is required to supplement its order by requesting a new due date that is at least ***three days after*** the date of the supplemental order. Exhibit MS-9, MN ICA Arbitration Transcript (testimony of Renee Albersheim, Vol. 1, p. 36, line 20 – p. 37, line 2).

[716] Ms. Albersheim testified in Arizona it is a formality. *See* Albersheim AZ Rebuttal, p. 63, line 16.

[717] Exhibit MS-9, MN ICA Arbitration Transcript, Vol. 1, p. 37, line 20 – p. 38, line 6 (Ms. Albersheim) (Q So you agree with me that Qwest's current practice is to provide the CLEC with an

does not have adequate notice that the circuit is being delivered (with the agreed upon process for adequate notice consisting of an FOC), then it is ***"not appropriate"*** for Qwest to assign a CLEC-caused (CNR) jeopardy.[718]

Q. HAS QWEST RECOGNIZED THE IMPORTANCE OF NOTICE AND THE NEED FOR PREPARATION TIME FOR ITSELF?

A. Yes. When discussing the three-day interval required by Qwest[719] to reschedule the due date after Qwest has unexpectedly attempted to deliver a circuit but despite best efforts cannot do so, Ms. Albersheim has previously testified that the interval gives Qwest the notice that it needs to be prepared. Ms. Albersheim indicated that the three-day interval "is necessary to ensure that Qwest ***technicians can be made*** available to provision a designed circuit to the CLEC. Qwest must have ***flexibility to manage the technicians work assignments*** in order to ensure that other CLECs and other Qwest ***customers are not negatively impacted*** by the need to send a technician back to the CLEC a second time because the CLEC was not ready to receive the circuit on the original due

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FOC after a Qwest facilities jeopardy has been cleared; is that right? A Yes. Q And the reason for that is you want to let the CLEC know that the CLEC should be expecting to receive the circuit, right? A Yes. Q And the CLEC needs to have personnel available and it needs to also perhaps make arrangements with the customer to have the premises available; right? A Yes.").

[718] Exhibit MS-9, MN ICA Arbitration Transcript, Vol. 1, p. 94, lines 4-11 (testimony of Renee Albersheim) (emphasis added; footnote added).

[719] While Qwest does not deny that the normal interval is three days, Ms. Albersheim quibbles with the description of this as a requirement and states that Qwest may attempt to deliver the circuit earlier than three days. *See* Albersheim AZ Rebuttal, p. 62, lines 5-9 ("Qwest does not always take three days to do so"). There is no guarantee, however, that the timeframe will be shorter. Because three days is Qwest's "standard" interval, Qwest may apply in each case. Certainly Eschelon must anticipate that likely possibility.

date."[720] Ms. Albersheim has not explained why it is legitimate for Qwest to require a three-day interval so Qwest may be prepared but it is allegedly unreasonable for Eschelon to ask for notice the day before so that Eschelon may likewise prepare. After all, Eschelon also has to make technicians available, manage technicians work assignments, and coordinate with customers (including obtaining customer premise access).[721]

In the above quote, Ms. Albersheim referred to sending a technician back a second time without recognizing that most likely (and perhaps only) reason that a Qwest technician would have to go back a second time is because the technician had no customer premise access. Again, the purpose of the FOC is provide notice to Eschelon so that Eschelon may, for example, ***arrange customer premise access***. If, by not providing an FOC or providing one on very short notice, Qwest causes a situation that prevents Eschelon from having time to arrange customer premise access, Qwest seeks to give itself the time to prepare that it denied Eschelon (which caused the problem). Ms. Albersheim stated that the "CLEC was not ready to receive the circuit"[722] without recognizing that its failure to provide the opportunity to prepare that it ensures itself caused the CLEC to be not ready. Therefore, a "CNR" classification is inappropriate.

Q. QWEST STATES THAT IT USES BEST EFFORTS TO MEET THE DUE

[720] Albersheim AZ Rebuttal, p. 61, line 19 – 62, p. 5 (emphasis added).

[721] *See, e.g.*, Webber Direct (adopted), pp. 122-123.

[722] Albersheim AZ Rebuttal, p. 62, lines 4-5.

DATE WHILE ESCHELON PROPOSES TO FORCE EXTRA TIME INTO THE PROCESS[723] BY REQUIRING "AN ABSOLUTE REQUIREMENT" OF RECEIPT OF THE NEW FOC BEFORE THE DUE DATE.[724] MS. ALBERSHEIM ALSO CLAIMS THAT ESCHELON'S PROPOSED PHRASE "THE DAY BEFORE" ALTERS THE TIMING OF NOTICES.[725] IS MS. ALBERSHEIM'S TESTIMONY ON THESE POINTS MISLEADING?

A. Absolutely. Eschelon is ***not*** proposing that, in any circumstance (with or without an FOC), Qwest cannot attempt to deliver the circuit or that Qwest must wait to deliver the FOC before attempting delivery. This is self-evident from the language of Eschelon's proposal (see below). Eschelon wants Qwest to use best efforts to deliver the circuit on the due date, just as Eschelon uses best efforts to accept the circuit on the due date,[726] and Eschelon's language therefore ***requires*** best efforts. Given Qwest's claims, the language of Eschelon's proposed language for Issue 12-72 – showing Eschelon has committed to use best efforts – bears repeating:

Issue 12-72 (with emphasis added):

> 12.2.7.2.4.4.1 There are several types of jeopardies. Two of these types are: (1) CLEC or CLEC End User Customer is not ready or service order is not accepted by the CLEC (when Qwest has tested

[723] Albersheim Response, p. 58.

[724] Albersheim Response, p. 59, lines 8-9.

[725] Albersheim Response, p. 57, line 21.

[726] *See, e.g.*, Webber Direct (adopted), p. 121 & Exhibit BJJ-41 (Examples: No FOC After Qwest Facility Jeopardy yet Eschelon Accepts Circuit).

> the service to meet all testing requirements.); and (2) End User Customer access was not provided. For these two types of jeopardies, Qwest will not characterize a jeopardy as CNR or send a CNR jeopardy to CLEC if a Qwest jeopardy exists, ***Qwest attempts to deliver the service***, and Qwest has not sent an FOC notice to CLEC after the Qwest jeopardy occurs but at least the day before Qwest attempts to deliver the service. ***CLEC will nonetheless use its best efforts to accept the service.*** If needed, the Parties will attempt to set a new appointment time on the same day and, if unable to do so, Qwest will issue a Qwest Jeopardy notice and a FOC with a new Due Date.

Eschelon's proposed language clearly states that, even when Qwest falls down and does not provide an FOC or provides an untimely FOC, Eschelon "will nonetheless use its best efforts to accept the service."[727] The proposal is fully consistent with Qwest's testimony that "if a jeopardy situation can be resolved on the original due date, all parties should try to ensure that it is."[728] The difference is that Eschelon's language ensures that when, despite best efforts the circuit cannot be delivered, Qwest does not benefit by blaming Eschelon for its failure to provide proper notice through an erroneous classification of the jeopardy. ***More importantly***, Eschelon's language ensures that the end user customer will not experience avoidable delay due to Qwest's failure to provide proper notice, because the language requires the companies to "attempt to set a new appointment time ***on the same day***." As discussed above, if Qwest erroneously classifies the

[727] Eschelon Proposed ICA Section 12.2.7.2.4.4.1.

[728] Albersheim Response, p. 58, lines 21-22.

jeopardy as Eschelon-caused (CNR), the appointment is necessarily ***three days*** out for unbundled loop orders,[729] instead of the same day.

To demonstrate Eschelon's commitment on this point, Eschelon provides Exhibit BJJ-41 comprising a list of more than one hundred examples when, despite the lack of proper notice (i.e., no FOC after a Qwest facility jeopardy), Eschelon uses best efforts to accept the circuit and is successful in doing so when Qwest unexpectedly attempts to deliver service. These are examples of the situations covered by Eschelon's proposed language, in which:

- Qwest sends a facility jeopardy indicating Eschelon should do nothing unless Qwest advises Eschelon that the jeopardy condition has been resolved.
- Qwest fails to send any FOC with a due date after the facility jeopardy (which would have advised Eschelon that the jeopardy condition had been resolved and when to expect delivery, if it had been sent).[730]
- Qwest unexpectedly attempts to deliver service anyway.

Eschelon's devotion to ensuring the best interests of the End User Customer is evident from these examples: A comparison of the data in the column labeled 'Eschelon Requested Due Date' to the data in the column 'Completion Date,'

[729] *See* Webber Direct (adopted), p. 117; Webber Rebuttal (adopted), p. 79. When a jeopardy is classified as a CLEC-caused (CNR) jeopardy for unbundled loop orders, the CLEC is required to supplement its order by requesting a new due date that is at least ***three days after*** the date of the supplemental order. Exhibit MS-9, MN ICA Arbitration Transcript (testimony of Renee Albersheim), Vol. 1, p. 36, line 20 – p. 37, line 2.

[730] *See* ICA Section 9.2.4.4.1: ". . . If Qwest must make changes to the commitment date, Qwest will promptly issue a Qwest Jeopardy notification to CLEC that will clearly state the reason for the change in commitment date. Qwest will also ***submit a new Firm Order Confirmation*** that will clearly identify the new Due Date." (emphasis added). This language is not only closed in the proposed ICA, but also it appears in the SGAT and Qwest's own negotiations template.

shows that in the vast majority of these examples, the service was delivered on Eschelon's original due date. In other words, these examples illustrate the point made under Eschelon's language: That Eschelon would either accept delivery using best efforts or have an opportunity to schedule a new appointment on the ***same day***. Under Qwest's approach (which is apparent from its Exhibit RA-28RT, which I discuss below), if despite best efforts the companies are not able to complete delivery, Qwest will assign a CNR jeopardy, and the unbundled loop order will be delayed ***three days***.[731]

Eschelon has committed in its proposed contractual language to continuing to use best efforts in this manner. When, through no fault of its own, it cannot accept the circuit due to Qwest's failure to provide the required advance notice, however, Qwest should not be allowed to force an unnecessary three-day delay.

Q. MS. ALBERSHEIM DISCUSSES THE PERFORMANCE INDICATOR DEFINITIONS ("PIDS") ON PAGES 59-60 OF HER RESPONSE TESTIMONY. ARE THE PID RESULTS THE MOST IMPORTANT CONSEQUENCE OF QWEST'S FAILURE TO SEND AN FOC AFTER A QWEST FACILITY JEOPARDY HAS CLEARED?

[731] *See* Webber Direct (adopted), p. 117; Starkey Rebuttal, p. 79. When a jeopardy is classified as a CLEC-caused (CNR) jeopardy for unbundled loop orders, the CLEC is required to supplement its order by requesting a new due date that is at least ***three days after*** the date of the supplemental order. Exhibit MS-9, MN ICA Arbitration Transcript (testimony of Renee Albersheim), Vol. 1, p. 36, line 20 – p. 37, line 2.

A. No. As I said above and in previous testimony, timely delivery of service to the customer is of the utmost importance to Eschelon.[732] The most significant consequence of a CNR jeopardy is that the CLEC must submit an order to supplement the due date, which may have the effect of delaying the due date for at least three days for loops, which means that the CLEC's customer will have to wait for service.[733] *A jeopardy properly classified as caused by Qwest does not require the CLEC to supplement the due date and does not build in this three day delay*. For this reason, it is very important that jeopardies that are, in fact, Qwest's fault not be incorrectly classified as Eschelon-caused (CNR) jeopardies. In its proposed language, Eschelon reasonably proposes to accept fault when it causes a jeopardy situation and asks Qwest to do the same. Eschelon's customers should not be penalized because Qwest has made a mistake.

Qwest's proposal is that the ICA exclude any language on this issue, and instead refer only to information posted on Qwest's website. Accordingly, Qwest's language on this important customer-affecting issue states, in its entirety: "Specific procedures are contained in Qwest's documentation, available on Qwest's wholesale web site." Qwest's opposition to Eschelon's proposal is despite its own admission that, except for a single phrase, the statements made in

[732] Webber Rebuttal (adopted), pp. 79 and 86. *See also* Webber Direct (adopted), p. 117, lines 2-3: "Perhaps the ***most important consequence*** of being assigned fault is the ***effect on the due date*** for providing service." (emphasis added)); *see also id*. p. 121, lines 18-20 ("Eschelon will attempt to overcome these obstacles ***because delivery of service to its Customer is of the utmost importance to Eschelon***.") (emphasis added); *see also id*. pp. 118 and 120.

[733] *See* MN Arbitration Transcript, Vol. I p. 36, line 20 – p. 37, line 2.

Eschelon's proposed language for Issues 12-71 through 12-73 reflect Qwest's current practice.[734]

In Minnesota, the ALJs said that Eschelon's goal appeared to be primarily one of jeopardy classification for purposes of application of the PIDs.[735] This is an incorrect understanding of Eschelon's goal, caused by Qwest's efforts in muddying the issue with testimony that focused on the PIDs.[736] While Eschelon therefore responded to that testimony, the PIDs are not the main issue. In fact, this issue is, first and foremost, a customer service issue. When Eschelon clarified this in its exceptions to the ALJs' report and modified its language accordingly, the Minnesota commission adopted Eschelon's language, as modified, for Issues 12-71 – 12-73. Eschelon has offered its modified language (which is set forth below) for resolution of these issues in all six states.

Eschelon's chief concern is not whether Qwest properly bears the financial consequences under the PIDs for its errors, but rather, with customer service. Qwest admits that, following a CNR jeopardy, Qwest requires that the CLEC

[734] Albersheim Response, p. 57 lines 16-23. See also Minnesota Transcript, Vol. 1, p. 37, lines 16-23 (Ms. Albersheim). Qwest claims that Eschelon's proposed phrase "at least the day before" is not part of Qwest's current process. *See id*. p. 37, lines 11-19. Other than that phrase, however, Qwest admits that the remainder of Eschelon's proposed language reflects Qwest's current process. *See id*. p. 37, lines 16-23.

[735] MN Arbitrators' Report, ¶¶237-38. Note that the Minnesota ALJs recommendations on Issues 12-71 through 12-73 were overturned by the Minnesota Commission, which adopted, by a 4-0 vote at its 3/6/07 meeting, Eschelon's proposed language on all three issues, including Eschelon's proposal #1 on Issue 12-71 (March 6, 2007 MN PUC Meeting).

[736] *See, e.g.*, Albersheim Direct, pp. 79-80.

submit a supplemental order.[737] Because Qwest requires a CLEC to request a minimum of three days from the date of the supplemental order to the new due date per its normal interval,[738] this means that the customer's order may be delayed by at least three days. Therefore, Eschelon's language deals with the impact on provisioning of circuits, and the resulting delays in provisioning, when Qwest erroneously classifies jeopardies.

In Minnesota, the ALJs noted that "Qwest already agreed in the ICA to provide a new FOC after the jeopardy notice, regardless of which party caused the jeopardy, which is what Eschelon says it needs in order to ensure it has resources available to accept service after a jeopardy notice."[739] This is only partially correct. Eschelon needs to receive an FOC *in sufficient time in advance* of the new due date so that it is prepared to accept delivery. As discussed in Eschelon's rebuttal testimony, Qwest often fails to provide Eschelon sufficient time. Specifically, Ms. Johnson's testimony includes examples where Qwest provided an FOC *nine minutes before* attempting to deliver the circuit, and attempted delivery with *no FOC at all.*[740] In none of these instances could Eschelon be reasonably

[737] *See, e.g.*, Minnesota Transcript, Vol. 1 (Ms. Albersheim, p. 36, line 20 – p. 37, line 2).

[738] *See id.*

[739] MN Arbitrators' Report, ¶237. Note that the Minnesota PUC, by a 4-0 vote at its 3/6/07 meeting, overturned the ALJ's recommendations on Issues 12-71 through 12-73, and ruled to adopt Eschelon's proposal.

[740] Johnson Rebuttal, pp. 17-18 and BJJ-35. Qwest is continuing to refuse to review and respond to the additional examples that Eschelon continues to provide to Qwest. *See* Webber Response (adopted), pp. 87-88 & 90. Qwest's refusal is contrary to the documented role of the Qwest CMP Service Manager's Role, which includes providing root cause analysis when CLEC provides examples. *See* Exhibit BJJ-43.

considered to have received adequate notice, yet each instance was categorized by Qwest as an Eschelon-caused (CNR) jeopardy.

The examples provided by Eschelon show that Eschelon's main goal is to avoid the customer-affecting delays caused by Qwest's erroneous classification of Qwest-caused jeopardies as Eschelon-caused jeopardies. Although there is an unfair result under the PIDs when Qwest erroneously classifies a Qwest-caused jeopardy as an Eschelon-caused jeopardy,[741] that is not the main issue, nor does it require a change in the PIDs to resolve. The ALJs' statement in Minnesota that changes or refinements in the way jeopardies are classified under the PIDs may be addressed "through a process outside of an individual ICAs,"[742] however, seems to suggest a misimpression that the PIDs themselves need to be changed. That is not the case. Qwest admits that the existing PIDs "specifically differentiate

[741] *See* Webber Direct (adopted), pp. 128-130. Although Ms. Albersheim focuses on the PO-5 PID (Albersheim Response, p. 60), a more important PID for this purpose is the installation commitments met PID (OP-3). OP-3 has an exclusion for "due dates missed for standard categories of customer and non-Qwest reasons" including "no access to customer premises" etc. *See* ICA Exhibit B, p. 34 (OP-3); *see also* Webber Direct (adopted), p. 118, note 126. These are "Customer Not Ready" reasons. All of the twenty-two examples in Exhibit BJJ-50 are situations in which Qwest classified the jeopardy as CNR. In Exhibits RA-28RT and BJJ-50 , for Row Numbers 2, 6, 20, and 21, Qwest admits in Qwest's technician notes that Qwest missed the original due date for a Qwest reason, which resulted in a Qwest facility jeopardy. In the absence of a later CNR jeopardy, these examples should be included in OP-3 because Qwest did not meet the installation commitment. Because Qwest assigned a CNR jeopardy (which Eschelon maintains is erroneous), Qwest may argue that the exclusion quoted above in OP-3 allows Qwest to exclude these missed due dates for purposes of OP-3.

[742] MN ALJs' Report, ¶238. Note that the Minnesota ALJs recommendations on Issues 12-71 through 12-73 were overturned by the Minnesota Commission, by a 4-0 vote at its 3/6/07 meeting, which adopted Eschelon's proposed language on all three issues, including Eschelon's proposal #1 on Issue 12-71.

between Qwest caused and CLEC/Customer caused delays."[743] Eschelon's language deals with the impact on provisioning of the circuit, and the resulting delays in provisioning, when Qwest erroneously differentiates them. Eschelon's language is needed to appropriately define this situation as a Qwest-caused jeopardy to avoid this customer-impacting result.

Q. DID ESCHELON OFFER AN ALTERNATIVE PROPOSAL TO CLARIFY THAT ESCHELON IS NOT ATTEMPTING TO ADDRESS A "PID" ISSUE THROUGH THE ICA?

A. Yes. Eschelon has offered the following addition to its proposed language on this issue (Proposal # 2 for Issues 12-71 (ICA section 12.2.7.2.4.4)) to demonstrate that Eschelon is not attempting to modify the PIDs through its proposed language relating to jeopardies. The new language is indicated by shading:

> 12.2.7.2.4.4 A jeopardy caused by Qwest will be classified as a Qwest jeopardy, and a jeopardy caused by CLEC will be classified as Customer Not Ready (CNR). Nothing in this Section 12.2.7.2.4.4 modifies the Performance Indicator Definitions (PIDs) set forth in Exhibit B and Appendices A and B to Exhibit K of this Agreement.
>
> > 12.2.7.2.4.4.1 There are several types of jeopardies. Two of these types are: (1) CLEC or CLEC End User Customer is not ready or service order is not accepted by the CLEC (when Qwest has tested the service to meet all testing requirements.); and (2) End User Customer access was not provided. For these two types of jeopardies, Qwest will not characterize a jeopardy as CNR or send a CNR jeopardy to CLEC if a Qwest jeopardy exists, Qwest attempts to deliver the service, and Qwest has not sent an FOC notice to CLEC after the Qwest jeopardy occurs but at least the day before Qwest attempts to deliver the service. CLEC will

[743] Albersheim Direct, p. 69.

> nonetheless use its best efforts to accept the service. If needed, the Parties will attempt to set a new appointment time on the same day and, if unable to do so, Qwest will issue a Qwest Jeopardy notice and a FOC with a new Due Date.
>
> 12.2.7.2.4.4.2 If CLEC establishes to Qwest that a jeopardy was not caused by CLEC, Qwest will correct the erroneous CNR classification and treat the jeopardy as a Qwest jeopardy.

Q. WHAT LANGUAGE DID THE MINNESOTA COMMISSION ADOPT ON ISSUES 12-71 THROUGH 12-73 IN THE MINNESOTA ARBITRATION?

A. At its March 6, 2007 Meeting, the Minnesota Commission adopted all of the above-quoted Eschelon's proposed language on Issues 12-71, 12-72 and 12-73.

Q. QWEST INDICATES THAT IT ANALYZED ESCHELON'S EXAMPLES IN EXHIBIT BJJ-6 AND HAS PROVIDED QWEST'S REVIEW OF THAT DATA IN EXHIBIT RA-28RT.[744] HAS ESCHELON REVIEWED RA-28RT AND, IF SO, WHAT DOES IT SHOW?

A. Ms. Johnson's surrebuttal testimony and Exhibit BJJ-50 contain a review of Qwest's Exhibit RA-28RT to Ms. Albersheim's testimony in this proceeding. In addition, in her rebuttal testimony Ms. Johnson presented her review of the similar Qwest's exhibit (Exhibit RA-30) in the Minnesota proceeding, and added

[744] Albersheim Response, p. 59. Note that this page contains footnote 42 in which Ms. Albersheim makes a reference to her Exhibit RA-27. This reference is likely an error as Ms. Albersheim's testimony in Washington does not include exhibit RA-27. Instead, Ms. Albersheim's analysis of BJJ-6 is contained in her rebuttal exhibit RA-28RT.

responsive data in Exhibit BJJ-35 to her rebuttal testimony.[745] Please refer to Ms. Johnson's discussion on pages 16-30 of her surrebuttal testimony.

Qwest's Exhibit RA-28RT confirms that, even in situations when Qwest sends *no FOC* at all after a Qwest facility jeopardy was cleared but before delivery or attempted delivery, Qwest will attribute fault to Eschelon by assigning an Eschelon-caused (CNR) jeopardy code – even when Eschelon's sole reason for being unprepared was Qwest's failure to provide the FOC.[746] Although Ms. Albersheim sometimes gives lip service to the general principles represented in Eschelon's proposed language,[747] the facts in her own exhibit show that the result is exactly as feared, and previously experienced, by Eschelon.[748] Qwest will classify a jeopardy as CNR when it should not do so. Qwest Exhibit RA-28RT is proof of this. Qwest's analysis of this data and willingness to attribute these jeopardies to Eschelon clearly demonstrates the need for this contract language not only to clarify the working relationship between the carriers, but to better protect the interests of Eschelon's end user customers.

[745] *See* also Johnson Rebuttal, p.15-19.

[746] *See* Exhibit BJJ-50 and Ms. Johnson's discussion of this exhibit in her surrebuttal testimony.

[747] *See*, *e.g.*, Exhibit MS-9, MN ICA Arbitration Transcript, Vol., 1, p. 94, lines 511 (Ms. Albersheim) ("A We don't disagree with the notion that a CNR jeopardy should be assigned appropriately. Q And if the CLEC doesn't have adequate notice that the circuit being delivered, adequate notice consisting of an FOC, then you would agree that a CNR jeopardy is not appropriate; correct? A Yes.").

[748] *See* Exhibit BJJ-50, Category "A" and "Category B" and Ms. Johnson's discussion of this exhibit in her surrebuttal testimony.

Q. MS. ALBERSHEIM STATES THAT "THE RECORD SHOWS THAT QWEST DID NOT PROVIDE AN FOC BECAUSE OTHER ORDER ACTIVITY BY ESCHELON OR BY QWEST ELIMINATED THE NEED FOR AN FOC."[749] PLEASE RESPOND.

A. The single piece of evidence in the record identified by Ms. Albersheim for this claim is her Exhibit RA-28RT.[750] She does not identify the order activity, either in her testimony or her Exhibit RA-28RT. As discussed by Ms. Johnson in her surrebuttal testimony, Exhibit RA-28RT does not support her claim. There is no order activity that eliminates the need for Qwest to meet the *requirement* (under Qwest's template ICA, the SGAT, the proposed contract, and its own process)[751] to send an FOC after a Qwest facility jeopardy has cleared. There is no exception to that requirement for unspecified order activity.

Ms. Albersheim is either using the term "order activity" loosely (to refer to informal communications), or she has changed her story. In the Minnesota arbitration proceeding, Ms. Albersheim testified that, despite the absence of an FOC, the CLEC may have some notice before circuit delivery due to the

[749] Albersheim Response, p. 59, lines 19-21.

[750] Albersheim Response, p. 59, footnote 42.

[751] See ICA Section 9.2.4.4.1: ". . . If Qwest must make changes to the commitment date, Qwest will promptly issue a Qwest Jeopardy notification to CLEC that will clearly state the reason for the change in commitment date. Qwest will also ***submit a new Firm Order Confirmation*** that will clearly identify the new Due Date." (emphasis added). This language is not only closed in the proposed ICA, but also it appears in the SGAT and Qwest's own negotiations template. & Qwest Exhibit RA-11.

possibility that informal technician communications may have taken place.[752] Qwest has admitted, however, that such informal communication, even if it occurs, is not the agreed upon process by which Qwest informs Eschelon of the due date for circuit delivery.[753] The agreed upon process is the FOC.[754] Ms. Johnson further discusses the problems with Qwest going outside of that agreed upon process.

Q. DOES THE PHRASE "AT LEAST THE DAY BEFORE" AS CONTAINED WITHIN ESCHELON'S PROPOSAL[755] ALTER WHETHER ESCHELON'S PROPOSAL REFLECTS QWEST'S CURRENT PROCESS?

A. No. I discuss this in my earlier testimony regarding the "Jeopardies Example" with respect to the CMP and the need for contractual certainty, and the facts are described in Exhibit BJJ-5 to the direct testimony of Ms. Johnson. Qwest confirmed this process in CMP in written materials on February 26, 2004 and during a March 4, 2004 CMP call, as follows:

> Action #1: As you can see receiving the FOC releasing the order on the day the order is due does not provide sufficient time for Eschelon to accept the circuit. Is this a compliance issue, ***shouldn't we have received the releasing FOC the***

[752] Ms. Albersheim speculated that it is possible that "communication was happening between Qwest and the CLEC technicians." MN Tr. Vol. I, p. 94, lines 19-20 (Ms. Albersheim).

[753] *Id*. p. 38, lines 13-19.

[754] Exhibit MS-9, MN ICA Arbitration Transcript, Vol. 1, p. 38, lines 17-19 (Ms. Albersheim); *see also id.* p. 37, line 20 – p. 38, line 6.

[755] Eschelon will accept either "at least a day before" or "at least the day before."

> ***day before the order is due***? In this example, should we have received the releasing FOC on 1-27-04?
> Response *#1* ***This example is non-compliance to a documented process. Yes an FOC should have been sent prior to the Due Date.***" [756]
>
> "Bonnie confirmed that the CLEC should always receive the FOC before the due date. ***Phyllis agreed, and confirmed that Qwest cannot expect the CLEC to be ready for the service if we haven't notified you.***" [757]

Despite these documented terms, which are also discussed on pages 26-28 of the surrebuttal testimony of Ms. Johnson (who was present when Qwest made these statements), Qwest now denies that its process is to provide the FOC at least the day before the due date.[758] Qwest has committed to no timeframe whatsoever for sending an FOC to provide advance notice. In fact, Qwest unreasonably defends its attempted circuit delivery (when customer premise access was required) with *only nine minutes*[759] advance notice as adequate. Therefore, language is needed in the interconnection agreement to address this issue. Eschelon's language reasonably relies upon the above-quoted Qwest commitment for its proposed time period ("the day before"). Once again, even if Qwest fails to send an FOC within

[756] Exhibit BJJ-5, p. 37 (February 26, 2004 CMP materials).

[757] Exhibit BJJ-5, p. 21 (March 4, 2004 CMP ad hoc call minutes).

[758] Exhibit MS-9, MN ICA Arbitration Transcript, Vol. 1, p. 37, lines 16-23 (testimony of Renee Albersheim). Qwest claims that Eschelon's proposed phrase "at least the day before" is not part of Qwest's current process. *See id*. p. 37, lines 11-19. Other than that phrase, however, Qwest admits that the remainder of Eschelon's proposed language reflects Qwest's current process. *See id*. p. 37, lines 16-23.

[759] Exhibit BJJ-50 , Row Number 11.

this time period or at all, Qwest may still – under Eschelon's proposed language – deliver the circuit, and Eschelon will use best efforts to accept it.

XIV. SUBJECT MATTER NO. ISSUE 43. CONTROLLED PRODUCTION

Issue No. 12-87: ICA Section 12.6.9.4

Q. PLEASE PROVIDE A BRIEF SUMMARY OF ISSUE 12-87.

A. Eschelon needs certainty in the contract language that *controlled production testing*, consistent with current practice, will continue to be necessary for a *new implementation* effort and unnecessary for *re-certification.*[760] With both new implementations and updates to existing systems, Qwest conducts a series of tests to make sure the interface systems are working properly. *Controlled production* is one of these tests. It involves controlled submission of CLEC's real product orders to the new or updated interface to verify that the data exchange between Qwest and CLEC is done according to the industry standard. A *new implementation* effort involves transactions that CLEC does not yet have in production within the current version of the electronic interface such as

[760] Eschelon Direct regarding Issue 12-87, pp. 194-195.

Interconnect Mediated Access ("IMA") interface.[761] Under both of Eschelon's proposals for Issue 12-87,[762] Eschelon would participate in controlled production testing with new releases such as IMA Release 20.0 (*i.e.*, "new implementations").[763]

Re-certification is the process by which CLECs demonstrate the ability to generate correct functional transactions for *updates* to the existing interface systems, rather than implementation of new systems.[764] Qwest's current terms allow a CLEC to forego controlled production for recertification, including as an example, if the CLEC does not plan to use the new functionality of the updated existing system.[765] This principle accurately reflects that, if Eschelon does not

[761] "At the time a CLEC migrates to a new release, any transaction(s) that the CLEC does not yet have in production using a current IMA EDI version is considered to be a new implementation effort." *See* Qwest's *EDI Implementation Guidelines – for Interconnect Mediated Access*, Version 19.2, p. 48 ("Recertification is the process by which CLECs demonstrate the ability to correctly generate and accept transactions that were updated for the new release."), available at http://www.qwest.com/wholesale/downloads/2006/060425/IMA_EDI_Implementation_Guidelines_19_2_042406.pdf; *see also* Qwest's *XML Implementation Guidelines – for Interconnect Mediated Access*, Version 20, p. 41 (same sentence, except that the acronym "EDI" is omitted after "IMA"); available at http://www.qwest.com/wholesale/downloads/2006/061030/IMA_XML_Implementation_Guidelines_20_0__10_30_06.pdf

[762] Both of Eschelon's proposals are shown below.

[763] Ms. Albersheim has admitted that Release 20.0 is a "new implementation" (*i.e.*, the term used in Eschelon's proposed language). *See* Albersheim Response, p. 67, lines 8-11. See also, Qwest-Eschelon ICA MN Arbitration, Albersheim MN Surrebuttal, p. 43, lines 13-15 ("The underlying architecture of IMA Release 20 .0 is changing from EDI to XML. This is such a significant change that Qwest is treating this as a new implementation").

[764] Eschelon Direct regarding Issue 12-87, p. 195, citing the closed language in the proposed ICA.

[765] Qwest's *EDI Implementation Guidelines – for Interconnect Mediated Access*, Version 19.2, pp. 48 and 50, quoted in Eschelon Direct regarding Issue 12-87, p. 197. The IMA Release 20.0 (to which Eschelon may move in approximately April of 2007) contains similar provisions on pp. 41-42 (http://www.qwest.com/wholesale/downloads/2006/061030/IMA_XML_Implementation_Guidelines_20_0__10_30_06.pdf).

plan to use the new functionality, it should not have to expend resources on unnecessary controlled production. Eschelon proposes that this be captured in the ICA language. If Eschelon has been certified (so this is not a "new implementation"), Qwest does not require controlled production for recertification.[766] Insertion of Eschelon's language in the ICA is particularly important because without it, the broader language of the remainder of the paragraph in Section 12.6.9.4 may suggest that controlled production is required for re-certification, when it is not.[767] Although this principle will not change during the ICA term, Qwest is attempting to reserve the right to impose the costs of unnecessary controlled production on Eschelon by changing those terms with no corresponding change in the ICA. Qwest has admitted that Eschelon's proposal accurately reflects the status quo,[768] yet Qwest does not agree to either of Eschelon's proposals for this issue.

Q. HAS QWEST MODIFIED ITS PROPOSAL REGARDING ISSUE 12-87?

[766] For example, Eschelon was already certified and in production for Facility Based Directory Listings ("FBDL") when Release 19.0 was issued and included two additional fields for the existing FBDL product, so Eschelon did not have to do controlled production testing when Eschelon re-certified its functionality for FBDL for Release 19.0. The fact that controlled production was not required does ***not*** mean the two additional fields were not tested. The two fields were tested using progression testing in the Stand Alone Test Environment (SATE) (*see* closed language in proposed ICA Section 12.6.9.2). Eschelon's proposed language for Issue 12-87 is, on its face, specific to one type of testing (controlled production) and does not affect the other testing to which Eschelon has agreed. Although this example occurred with Release 19.0, Qwest's own documentation for Release 20.0 provides that the same terms apply. *See* Qwest's *XML Implementation Guidelines – for Interconnect Mediated Access*, Version 20, p. 42.

[767] Eschelon Direct regarding Issue 12-87, p. 196. The first sentence of Section 12.6.9.4 broadly states: "Qwest and CLEC will perform controlled production."

[768] This issue is discussed in more detail below. *See also* MN Arbitrators' Report, ¶255 (quoted below).

A. Yes. Qwest previously proposed omitting Eschelon's proposed modifications. Qwest now offers the following counter proposal:

> 12.6.9.4 Controlled Production – Qwest and CLEC will perform controlled production. The controlled production process is designed to validate the ability of CLEC to transmit EDI data that completely meets X12 (or mutually agreed upon substitute) standards definitions and complies with all Qwest business rules. Controlled production consists of the controlled submission of actual CLEC production requests to the Qwest production environment. Qwest treats these pre-order queries and orders as production pre-order and order transactions. Qwest and CLEC use controlled production results to determine operational readiness. Controlled production requires the use of valid account and order data. All certification orders are considered to be live orders and will be provisioned. Controlled production is not required <u>for features or products that the CLEC does not plan on ordering</u>. Recertification does not include new implementations such as new products and/or activity types.

Q. PLEASE RESPOND TO QWEST'S COUNTER PROPOSAL.

A. In Minnesota, as in Washington, Eschelon offered two proposals on the issue of Controlled Production. The ALJs in the Minnesota Qwest-Eschelon ICA arbitration found that there is "no evidence that Eschelon has or would opt out of recertification testing for any improper purpose" and said that they "recommend adoption of Eschelon's first proposal"[769] – a recommendation adopted by the Minnesota PUC in its ruling on this issue.[770] The ALJs also indicated that the Commission could adopt the above language, which Qwest later offered as a counter proposal. The Minnesota PUC rejected Qwest's counterproposal. This

[769] MN Arbitrators' Report, ¶258 (first sentence).

[770] The MN Arbitrators' Report was affirmed by a 4-0 vote of the Minnesota PUC on March 6, 2007.

counterproposal covers only a subset of the recertifications for which Qwest currently does not require controlled production. Controlled production is not required currently for recertification (regardless of whether the CLEC intends or does not intend to order the products/features). There is no need to adopt this lesser alternative, which does not fully capture Qwest's current process. As pointed out by the ALJs in Minnesota:

> Qwest agrees that Eschelon's language accurately depicts its current practice, which does not require CLEC's to recertify if they have successfully completed testing of a previous release.[771]

Qwest wants to maintain the flexibility to unilaterally change its practices, claiming that it should not be locked into the current practices.[772] When Qwest made a similar argument with respect to Issue 12-74 (now closed), the ALJs in Minnesota rejected it, saying: "Eschelon's language would not require any changes to Qwest's current process or systems, and Qwest has failed to identify any credibly adverse effect on CLECs, itself, or the public interest if this language were incorporated into the ICA. The proposed language exactly reflects Qwest's current practice." The same is true for controlled production.

Q. MS. ALBERSHEIM'S RESPONSE TESTIMONY SEEMS PREDICATED ON THE NOTION THAT ESCHELON HAS PROPOSED THAT IT BE ALLEVIATED FROM ANY CONTROLLED PRODUCTION TESTING –

[771] MN Arbitrators' Report, ¶255, affirmed by a 4-0 vote of the Minnesota PUC on March 6, 2007.

[772] Minnesota ICA Arbitration Hearing Ex. 1 (Albersheim Dir.) at p. 9, line 4; *see also id*. p. 28, lines 14-23.

EVEN WHERE NEW RELEASES ARE CONCERNED. IS THAT ACCURATE?

A. No, it is not. Under both of Eschelon's proposals,[773] Eschelon would indeed participate in controlled production testing with new releases such as IMA Release 20.0 (*i.e.*, "new implementations").[774] Because this is evident from the plain language of Eschelon's proposals, I will repeat the pertinent proposed language here:

> **Eschelon Proposal #1**
> 12.6.9.4 Controlled Production – Qwest and CLEC will perform controlled production. . . . . Controlled production is not required for recertification, unless the Parties agree otherwise. Recertification does not include new implementations such as new products and/or activity types.
>
> **Eschelon Proposal #2**
> 12.6.9.4 Controlled Production – Qwest and CLEC will perform controlled production for new implementations, such as new products, and as otherwise mutually agreed by the Parties. . . .

Note that, contrary to suggestions in Qwest's testimony, Eschelon's proposals do not relieve Eschelon from either recertification testing[775] or controlled production testing.[776] Under Eschelon's proposal, along with other closed language in the ICA, testing will be conducted for both new implementations (controlled

[773] Webber Direct (adopted), p. 196 and Webber Rebuttal (adopted), pp. 108-109.

[774] *See* Albersheim Response, p. 67, lines 8-11("The underlying architecture of IMA Release 20 .0 is changing from EDI to XML. This is such a significant change that Qwest is treating this as a new implementation…"). Ms. Albersheim has admitted that Release 20.0 is a "new implementation" (*i.e.*, the term used in Eschelon's proposed language). *See id*.

[775] Webber Direct (adopted), pp. 195-196 (citing closed ICA language requiring recertification testing).

[776] Closed portion of 12.6.9.4 ("Qwest and CLEC will perform controlled production.") (quoted above).

production)[777] and recertifications (recertification testing).[778] Eschelon's proposal simply reflects Qwest's current practice.[779]

Q. MS. ALBERSHEIM TESTIFIES THAT, IN SUPPORT OF ITS TESTIMONY ESCHELON "CITES PROVISIONS OF THE EDI IMPLEMENTATION GUIDELINES FOR IMA RELEASE 19.2. THE PROVISIONS OF THAT IMPLEMENTATION GUIDELINE HAS NO BEARING ON IMA RELEASE 20.0."[780] PLEASE RESPOND.

A. Both releases contain language indicating that Eschelon's proposal reflects Qwest's current practice of not requiring controlled production for enhancements to the existing system releases (as opposed to new implementations)– whether the company is using Release 19.2 or 20.0.[781]

Below I reproduce the analogous provisions in the two releases of the IMA. Qwest's implementation guidelines for the IMA release that Eschelon uses today

[777] Closed portion of 12.6.9.4 ("Qwest and CLEC will perform controlled production.") (quoted above).

[778] *See, e.g.*, Sections 12.6.4, 12.6.9.8, and 12.6.9.9 of the proposed ICA (closed language).

[779] Qwest's *EDI Implementation Guidelines – for Interconnect Mediated Access*, Version 19.2, pp. 48 and 50, quoted in Eschelon Direct regarding Issue 12-87, pp. 172-173. The IMA Release 20.0 (to which Eschelon may move in approximately April of 2007) contains similar provisions on pp. 41-42 (http://www.qwest.com/wholesale/downloads/2006/061030/IMA_XML_Implementation_Guidelines_20_0___10_30_06.pdf). Note that this fact that Eschelon's proposal reflects current practice was also confirmed by Qwest in the Minnesota arbitration. See MN PUC Docket No. P-5340, 421/IC-06-768, Direct Testimony of Renee Albersheim, p. 99 lines 24-26.

[780] Albersheim Response, p. 67, lines 11-13.

[781] Eschelon's Rebuttal testimony also referenced analogous provision for Release 20.0: See Webber Rebuttal (adopted), p. 106 footnote 295 and p. 109 footnote 302. Note that at the time of filing Eschelon's Rebuttal testimony, Eschelon estimated the date by which it may move to the IMA Release 20.0 as February 2007. Currently this date is estimated as April 2007.

(IMA 19.2 release) states:

> In some releases, existing transactions are updated with significant additions that add business rules and/or large map changes. If the CLEC intends to use the new functionality, they will be required to perform a new product implementation of this transaction. This will entail Progression Testing and Controlled Production submittal of scenarios that reflect the new functionality. *CLECs not intending to use the new functionality will be allowed to recertify existing functionality that is still available in the new release.*[782]
>
> CLECs will be reminded in writing of their need to migrate to a new release prior to the next release being implemented. *For migration, the CLEC will follow the same process as an initial implementation except that Controlled Production is not required on any EDI transaction that successfully completed Controlled Production testing in a prior release.* Any product not successfully tested in Controlled Production in a prior release will not be migrated under this exemption.[783]

Similarly, the IMA Release 20.0 (to which Eschelon may move in approximately April of 2007) states:

> At the time a CLEC migrates to a new release, any transaction(s) that the CLEC does not yet have in production using a current IMA version is considered to be a new implementation effort. These transactions must be implemented using all Phases of the implementation lifecycle as defined in this document. In some releases, existing transactions are updated with significant additions that add business rules and/or large schema changes. *If the CLEC intends to continue use of the product, they will be required to perform a new product implementation of this transaction*. This will entail Progression Testing and Controlled

[782] Qwest's *EDI Implementation Guidelines – for Interconnect Mediated Access*, Version 19.2 available at http://www.qwest.com/wholesale/downloads/2006/060425/IMA_EDI_Implementation_Guidelines_19_2_042406.pdf, p. 48 (emphasis added). Note that Qwest does not submit its EDI Guidelines to the CMP process, making inclusion in the ICA all the more necessary.

[783] Qwest's *EDI Implementation Guidelines – for Interconnect Mediated Access*, Version 19.2, p. 50 (emphasis added).

> Production submittal of scenarios that reflect the new functionality.[784]
>
> CLECs will be reminded in writing of their need to migrate to a new release prior to the next release being implemented. *For migration, the CLEC will follow the same process as an initial implementation except that Controlled Production is not required on any XML transaction that successfully completed Controlled Production testing in a prior release.* Any product not successfully tested in Controlled Production in a prior release will not be migrated under this exemption.[785]

Eschelon discussed why, if this is Qwest's current practice, it needs to be addressed in the ICA in Eschelon's previous testimony on this issue.[786]

Q. MS. ALBERSHEIM TESTIFIES THAT ESCHELON'S PROPOSED LANGUAGE DOES *NOT* REFLECT QWEST'S CURRENT PRACTICE.[787] HAS QWEST CHANGED ITS POSITION ON THIS ISSUE?

A. Yes. In this proceeding, in her direct testimony, Ms. Albersheim testified as follows:

> Q. ADDRESSING THE SECOND ISSUE, IS ESCHELON'S LANGUAGE ACCURATE WITH REGARD TO RECERTIFICATION?[788]

[784] Qwest's *XML Implementation Guidelines – for Interconnect Mediated Access*, Version 20, p. 41 (emphasis added); available at http://www.qwest.com/wholesale/downloads/2006/061030/IMA_XML_Implementation_Guidelines_20_0___10_30_06.pdf

[785] Qwest's *XML Implementation Guidelines – for Interconnect Mediated Access*, Version 20, p. 42 (emphasis added); available at http://www.qwest.com/wholesale/downloads/2006/061030/IMA_XML_Implementation_Guidelines_20_0___10_30_06.pdf

[786] Webber Direct (adopted), pp. 197-198.

[787] Albersheim Response, p. 64, lines 1-4.

[788] Albersheim Direct, p. 92, lines 1-3. See also, Arizona Qwest-Eschelon ICA Arbitration, Albersheim AZ Direct (Nov. 8, 2006), p. 92, lines 20-22; and Minnesota Qwest-Eschelon ICA Arbitration,

A. Yes.

Q. IF ESCHELON'S LANGUAGE IS ACCURATE, WHY DOES QWEST OBJECT TO THE ADDITION OF THIS LANGUAGE IN THE CONTRACT?

A. While the language may be accurate today, it may not be accurate tomorrow.[789]

However, in her response testimony, Ms. Albersheim claims that Eschelon's language is accurate for a prior release, but not IMA Release IMA 20.0.[790] Qwest's documentation for Release 20.0, however, was readily available at the time she previously testified that Eschelon's language is accurate with regard to recertification.[791] Also, the circumstances regarding Release 20.0 production have not changed since Ms. Albersheim's previous testimony in August (Minnesota), September (Washington), and November (Arizona) of 2006 in other states. No CLEC was in production with Qwest on Release 20.0 then, and no CLEC is in production with Qwest on Release 20.0 now. Eschelon will be the

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Albersheim MN Direct (Aug. 25, 2006), p. 99, lines 24-26 ("Q Addressing the second issue, is Eschelon's language accurate with regard to recertification? A. Yes."). In Colorado, Ms. Albersheim changed her answer to this identical question from "Yes" to "No, not always." Albersheim Colorado Direct, p. 75, lines 4-6. *See also* MN Arbitrators' Report, ¶255.

[789] Albersheim Direct, pp. 92-93.

[790] Albersheim Response, p. 64.

[791] *See, e.g.*, Exhibits BJJ-14 and BJJ-15 (Release 20.0 related notices dated September 15, 2006). As indicated in the above footnote, Ms. Albersheim's previous testimony on this point was dated November, September and August of 2006. Qwest has been working on Release 20.0 since at least its CMP request in December of 2005 (*see* http://www.qwest.com/wholesale/cmp/cr/CR_SCR121305-01.htm). The XML Implementation Guidelines document and the XML Information Guide for Release 20.0 were published in July of 2006. *See, e.g.*, http://www.qwest.com/wholesale/ima/edi/index.html; http://www.qwest.com/wholesale/downloads/2006/060706/XML_Info_Guide_070706l.pdf; http://www.qwest.com/wholesale/downloads/2007/070209/IMAXMLImplementationGuidelines20-02-05-07-b.doc.

first, or one of the first, CLECs to be in production with Qwest on Release 20.0, and that will not take place until approximately next month.[792] No change in circumstance explains Qwest's reversal in position.

Ms. Albersheim is wrong when she states that Eschelon's language is not accurate for the current release, IMA 20.0.[793] The fact obscured by Ms. Albersheim is that Eschelon's language regarding controlled production not being required for *recertification* is *inapplicable* to Release 20.0 because, as she has admitted,[794] Release 20.0 is a *new implementation*. Unlike Release 19.0, Release 20.0 introduces a new application-to-application interface (XML instead of EDI) and does not enhance existing application functionality (EDI to EDI; or XML to XML) for products that have already been certified on the same application-to-application interface. Eschelon's proposed language (both alternate versions, shown above) expressly provides that controlled production testing *will* be performed for new implementations, such as Release 20.0. This is an example of Qwest ignoring the language actually being proposed. Eschelon's language is accurate for Release 20.0. Under either of Eschelon's proposals, Qwest and Eschelon will perform controlled production testing for Release 20.0, because it is

[792] Eschelon previously estimated that this move may occur in approximately February of 2007 [*see* Webber (adopted) Direct, pp. 109, 111 and 114], but since then the projected date has changed to April of 2007 or after.

[793] *See*, above quotes from Qwest's documentation from both Versions 19.0 and 20.0.

[794] Ms. Albersheim has admitted that Release 20.0 is a "new implementation" (*i.e.*, the term used in Eschelon's proposed language). See, Albersheim Response, p. 67, lines 8-11. ("The underlying architecture of IMA Release 20.0 is changing from EDI to XML. This is such a significant change that Qwest is treating this as a new implementation…") *See* also Qwest-Eschelon ICA MN Arbitration, Albersheim MN Surrebuttal, p. 43, lines 13-15.

a new implementation. After successful testing, Eschelon will be certified on XML. If, during the term of the interconnection agreement, a later XML release involves recertification (such as the additions to Facility Based Directory Listings made in Release 19.0 in the example provided above),[795] other types of testing will occur under the ICA but controlled production testing will not be required then, just as it is not required now for recertification.

Q. DOES QWEST RAISE ANY OTHER NEW ISSUES REGARDING ISSUE 12-87 IN ITS RESPONSE TESTIMONY?

A. No. Given that Ms. Albersheim's response testimony does not appear to raise any other new issues and is predicated on the notion that Eschelon has proposed to be relieved of all obligations pertaining to controlled production testing – even for new releases – which is incorrect, I will not repeat that discussion here.

XV. CLOSED SECTION 12 ISSUES: SUBJECT MATTERS 30, 31A, 32, 34, 36 AND 42 (ISSUES 12-65, 12-66, 12-68, 12-70, 12-74, 12-76 AND SUBPART, AND 12-86)

Q. HAVE ANY OF THE SECTION 12 ISSUES CLOSED SINCE ESCHELON'S FILING OF ITS REBUTTAL TESTIMONY?

A. Yes. Six subject matters have been closed since the filing of Eschelon's Rebuttal testimony. Below is the closed language for each closed Subject Matter:

[795] *See* footnote above (to first Q&A under Issue 12-87).

SUBJECT MATTER NO. 30. COMMUNICATIONS WITH CUSTOMERS

Issue Nos. 12-65 (ICA Section 12.1.5.4.7) & 12-66 (ICA Section 12.1.5.5)

Issue 12-65

12.1.5.4.7 The Qwest technician will limit any communication with CLEC End User Customer to that necessary to gain access to premises and perform the work. Specifically, the Qwest technician will not initiate any discussion regarding Qwest's products and services with CLEC End User Customer and will not make disparaging remarks about CLEC and will refer any CLEC End User Customer questions other than those related to the Qwest technician's gaining access to the premises and performing the work to CLEC. If the Qwest Technician has questions or concerns other than those necessary to gain access to premises and perform the work, the Qwest technician will discuss with CLEC and not CLEC End User Customer. Notwithstanding the foregoing, if a CLEC End User Customer initiates a discussion with the Qwest technician about Qwest's products or services and requests such information, nothing in this Agreement prohibits the Qwest technician from referring the CLEC End User Customer to the applicable Qwest retail office and providing the telephone number and/or web site address for that office to the CLEC End User Customer.

Issue 12-66

12.1.5.5 Notwithstanding any other provision of this Agreement, when a CLEC End User Customer experiences an outage or other service affecting condition or Billing problem due to a known Qwest error or action, Qwest shall not use the situation (including any misdirected call) as a win back opportunity or otherwise to initiate discussion of its products and services with CLEC's End User Customer.

SUBJECT MATTER NO. 31A. SUPPLEMENTAL ORDERS

Issue No. 12-68 (ICA Section 12.2.3.2)

12.2.3.2 There is no charge for CLEC submitting a supplement or cancelling or re-submitting a service request. Nothing in this provision is intended to prohibit Qwest from billing OSS-related costs pursuant to Section 12.7 of this Agreement or non-recurring or recurring charges for products or services applicable pursuant to other provisions of this Agreement.

SUBJECT MATTER NO. 32. PENDING SERVICE ORDER NOTIFICATIONS ("PSONs")

Issue No. 12-70: ICA Section 12.2.7.2.3

12.2.7.2.3 Pending Service Order Notification. When Qwest issues or changes the Qwest service orders associated with the CLEC LSR, Qwest will issue a Pending Service Order Notification (PSON) to CLEC. Through the PSON, Qwest supplies CLEC with information that appears on the Qwest service order, providing at least the data in the service order's Service and Equipment (S&E) and listings sections that Qwest provided to requesting CLECs as of IMA Release 13.0.

SUBJECT MATTER NO. 34. FATAL REJECTION NOTICES

Issue No. 12-74: ICA Sections 12.2.7.2.6.1 and 12.2.7.2.6.2

12.2.7.2.6 Fatal Rejection Notices

12.2.7.2.6.1 If CLEC submits an LSR or ASR that contains a Fatal Error and receives a Fatal Reject notice, CLEC will need to resubmit the LSR or ASR to obtain processing of the service request, except as provided in Section 12.2.7.2.6.2.

12.2.7.2.6.2 If Qwest rejects a service request in error, Qwest will resume processing the service request as soon as Qwest knows of the error. At CLEC's direction, Qwest will place the service request back into normal processing, without requiring a supplemental order from CLEC and will issue a subsequent FOC to CLEC.

SUBJECT MATTER NO. 36. LOSS AND COMPLETION REPORTS

Issues Nos. 12-76 and 12-76(a): ICA Sections 12.3.7.1.1, 12.3.7.1.2

12.3.7.1.1 The daily loss report will contain a list of accounts that have had lines disconnected because of a change in the End User Customer's local service provider. Qwest will issue a loss report when a service order Due Dated for the previous business day, is completed or canceled in Qwest's service order processor (SOP). The losses on the report will be for the previous day's activity. This report will include detailed information consistent with OBF guidelines, but no less than the BTN, service order

number, PON, service name and address, the WTN the activity took place on and date the service order completed (the date the change was completed). Individual reports will be provided for at least the following list of products:

a) Resale; and

b) Unbundled Loop.

12.3.7.1.2 Completion Report provides CLEC with a daily report. This report is used to advise CLEC that the order(s) for the previous day's activity for the service(s) requested is complete. This includes service orders Qwest generates without an LSR (for example, records correction work, PIC or Maintenance and Repair charges). This report will include detailed information consistent with OBF guidelines, but no less than the BTN, service order number, PON, service name and address, the WTN the activity took place on and date the service order completed (the date the change was completed). Individual reports will be provided for Resale and Unbundled Loop.

SUBJECT MATTER NO. 42. TROUBLE REPORT CLOSURE

Issue No. 12-86: ICA Sections 12.4.4.1; 12.4.4.2; 12.4.4.3

12.4.4 Trouble Report Closure

12.4.4.1 When Qwest closes a trouble report, Qwest will assign a code accurately identifying the reason or cause for service problems and the action taken (i.e., a "disposition code").

12.4.4.2 Qwest will notify CLEC of the disposition code upon request. For Maintenance and Repair trouble reports, the disposition code and any remarks will also be available through electronic interface (e.g., Customer Electronic Maintenance and Repair (CEMR)). CLEC closed trouble reports will be available to CLEC via the history function in the electronic interface (e.g., CEMR).

12.4.4.3 Qwest will provide a web based tool (currently known as Maintenance and Repair Invoice Tool) that allows CLEC to access electronic copies of Qwest repair invoice information. The repair invoice information will include the time and material information that Qwest provides to its retail End User Customers on their time and material invoices. Qwest, through this tool, will

provide access to at least the telephone number or circuit identification, CLEC ticket number, Qwest ticket number, End User Customer Address, End User Customer Name, USOC, Quantity, Start Date, End Date, Disposition Code, and any related remarks (comments by repair technician). Such invoice information will be available to CLEC within two (2) business days of ticket closure for POTS services and sixteen (16) business days for non-POTS services. Invoice information will be retained and available to CLEC via this tool for at least twelve (12) months.

Q. DOES THIS CONCLUDE YOUR TESTIMONY?

A. Yes.