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. **ESCHELON TELECOM, INC.'S RESPONSE TO QWEST'S PETITION FOR ARBITRATION**

Eschelon Telecom, Inc., ("Eschelon") respectfully submits this response, pursuant to 47 U.S.C. § 252 and WAC 480-07-630, to the petition of Qwest Corporation ("Qwest") for arbitration of an interconnection agreement between Eschelon and Qwest.

Eschelon Telecom, Inc. is a competitive telecommunications company pursuant to RCW 80.36.320. Eschelon was authorized to provide interLATA, intraLATA and local exchange service in Washington pursuant to the order of the Commission dated May 26, 1999, in Docket No. UT-970538.[1]

Eschelon's address is:

Eschelon
730 2nd Avenue South, Suite 900
Minneapolis, MN 55402

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[1] The name change from "American Telephone Technology Inc." or "ATTI" to "Eschelon Telecom of Washington, Inc." became effective May 22, 2000, Docket No. UT-000718.

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II. THE PARTIES' NEGOTIATIONS AND THE PROPOSED INTERCONNECTION AGREEMENT ("ICA")

Through extensive negotiations,[2] the parties were able to resolve many issues.

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[2] The negotiations began in approximately 2001 but have not been continuous for the time period since approximately 2001. Since May of 2004, a representative of the Minnesota Department of Commerce (the Department) observed or participated in the sessions but did not to mediate. The multi-state negotiations went into hiatus on more than one occasion. For between six months and a year, negotiations were not held while Qwest worked on its multi-state arbitration template. Negotiations also lapsed due to TRO/TRRO developments. When negotiations were in session, the parties held numerous telephone conference calls, most frequently twice a week and lasting two hours per session. On a number of occasions, Qwest and Eschelon mutually agreed to extend the effective negotiation request dates to

The closed language does not represent the ideal of either side, but the parties did resolve those issues. Eschelon has compromised on an abundant number of issues to help gain that result.[3] The issues that remain are issues that are important to Eschelon's business and its ability to compete meaningfully. Many of the terms and conditions on which Eschelon seeks arbitration have a direct impact on Eschelon's Customers.

Qwest, in its characterization of the parties' negotiations, has tried to paint Eschelon as a recalcitrant that has needlessly proliferated the number of issues in this arbitration. Contrary to Qwest's claim, Eschelon has every incentive to resolve issues to the greatest extent possible without sacrificing its significant business interests or its ability to serve its Customers. Eschelon is a much smaller company than Qwest and arbitration is expensive and time-consuming process that only serves to take away resources that Eschelon would prefer to spend serving its Customers. In fact, as Qwest is well aware, the parties' have reached agreement on the overwhelming majority of the provisions contained in an ICA that, including exhibits, is over 500 pages long.

Furthermore, the nature of the parties' business relationship is such that issues arise on an almost daily basis and Eschelon has worked cooperatively with Qwest to

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continue negotiations with the objective of trying to resolve disputes when possible.

[3] While the number of resolved issues far surpasses the number of unresolved issues, there are unresolved issues. The number of unresolved issues is similar to the number of disputed issues in the initial AT&T and MCI state ICA arbitrations with Qwest. While the more recent Qwest-AT&T ICA arbitrations had fewer issues, that arbitration followed literally *years* of 271 multi-state workshops in which many more disputed issues were resolved with the aid of commission staff participation and recommendations, independent monitors or consultants, and multiple carriers. Eschelon has negotiated a contract with Qwest of similar length and breadth without the benefit of such staff and independent monitor recommendations to assist in resolving issues before they reached the Commission in arbitration. And, the more recent Qwest-AT&T arbitration ***preceded the TRO/TRRO***. In Washington, Verizon and CLECs arbitrated more than thirty issues with respect to a TRO/TRRO amendment only (without all the other terms under which the parties do business). Eschelon, a much smaller CLEC, has had to negotiate with Qwest over time through the various iterations of the TRO/TRRO rulings and attempt to resolve those issues and changes of law in negotiations, in addition to all of the other terms and conditions of interconnection in a full interconnection agreement (*i.e.*, not an amendment only).

resolve the vast majority of these day-to-day business issues as well. The Commission can reasonably infer that Eschelon – in winnowing from the large number of daily business issues the relatively few and specific issues that remain – has focused on those remaining issues because it has a compelling business need to do so. A Commission decision arbitrating specific ICA language on these issues is critical and will help to avoid future disputes.

The issues that Eschelon understands to be unresolved are described in the Disputed Issues Matrix that accompanies Qwest's Petition as Exhibit 1, and those issues are summarized in Exhibit 1 to this Response (the "Issues by Subject Matter List"), as described below with respect to the Disputed Issues. In addition, the unresolved issues are reflected in the proposed Interconnection Agreement that is attached as Eschelon Exhibit 2 to this Response.

Exhibit 2 to this Response is the Washington state-specific portion[4] of the proposed Interconnection Agreement that Qwest began using in the Qwest-Eschelon negotiations in June of 2001 and both parties have used throughout the course of negotiations since then.[5] In contrast, the proposed Interconnection Agreement that Qwest filed as Exhibit 2 to its Petition for Arbitration is a document that Eschelon had never

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[4] Although Qwest filed the arbitration petition in Washington, Eschelon prepared the Washington state-specific version of the proposed Interconnection Agreement based on the multi-state draft used throughout negotiations for use as an exhibit to the Petition and sent that draft to Qwest for its review on June 22, 2006.

[5] Qwest maintained document control of the proposed Interconnection Agreement in negotiations (although Eschelon offered on various occasions to maintain the document). Qwest sent a portion of the proposed Interconnection Agreement to Eschelon in this redlined format on June 21, 2001 and provided the entire proposed Interconnection Agreement to Eschelon in this redlined format on July 24, 2001. As the negotiations proceeded, Qwest updated the document in this Qwest-devised format and periodically provided updated versions to Eschelon in this format throughout the course of the negotiations since 2001. The base document for Exhibit 2 is the multi-state document that Qwest continues to update and periodically distribute to the negotiations team, with information specific to states other than Washington removed (as was done for the Minnesota arbitration filing on May 26, 2006).

seen until shortly before the filing when Qwest emailed it to Eschelon. The parties have never held a single negotiations session with respect to that Qwest-only document, and Eschelon cannot verify its content or accuracy. In order to confirm that Qwest's new document is accurate, Eschelon would have to compare it, line by line, with the document that the parties have been working with jointly since the beginning of their negotiations. It is unreasonable to place this burden on Eschelon, particularly when the document that Eschelon is submitting as Exhibit 2 to this response is one that both parties are familiar with. Because it is unknown whether Qwest's Exhibit 2 accurately reflects the proposals of the parties, Eschelon does not rely on it for any purpose.

Not only is the new format of the contract unfair to Eschelon, because of the burden that would be involved in verifying its contents, that format is also more difficult to use. The difference between the format of the two documents is that the document used throughout Qwest-Eschelon ICA negotiations (Eschelon Exhibit 2) contains highlighting (strikeouts and underlining) to indicate the differences in the positions of the parties,[6] whereas Qwest's new document (Qwest Exhibit 2) does not. In some cases, entire paragraphs are closed except for a word or sentence. Repeating both paragraphs to show each parties' position with no highlighting (as in Qwest's Exhibit 2) requires the reader to painstakingly compare them, word by word, to discover that small change. The redlining in Eschelon Exhibit 2 is intended to create efficiencies for all when identifying

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[6] The format of Eschelon Exhibit 2 is intended to help the reader readily distinguish between resolved (closed) and unresolved/disputed (open) issues. The resolved issues are shown in normal type (*i.e.*, black text --they are not redlined). The unresolved issues are shown using traditional redlining (in which proposed deletions are shown as strikeouts and proposed insertions are marked by underlining). Status lines (such as "OPEN – Eschelon proposed; Qwest does not agree") appear before unresolved language, to indicate which party is proposing the redlined modifications. The cover page to Eschelon Exhibit 2 contains an explanation as to format and an example as well.

the areas of dispute.[7] In Qwest's Exhibit 2, a word by word comparison of the entire paragraph must take place to identify a one-word or one-sentence difference in the parties' proposals. (Exhibit 3 contains examples of this format difference by comparing Sections 6.6.4 and 8.2.3.9 of the ICA.)

III. PROPOSED ARBITRATION SCHEDULE

Eschelon joins in the arbitration schedule proposed by Qwest.[8]

VI. DISPUTED ISSUES

A. Identification and Organization of Disputed Issues

The issues that Eschelon understands to be unresolved are addressed in the Proposed Interconnection Agreement (Exhibit 2 to this Petition), Exhibits A, C, and I to the Proposed Agreement (filed by Qwest with its Petition), and the joint Disputed Issues Matrix (Exhibit 1 to Qwest's Petition). Eschelon incorporates by reference in this Response the open issues and Eschelon's proposed language, positions, and cited legal authority with respect to those issues as set forth in the Disputed Issues Matrix (Exhibit 1 to Qwest's Petition, with Appendices i and ii) and Eschelon's Exhibit 2 to this Petition.

Exhibit 1 to this Response is a list of all of the open issues organized by topic (the "Issues by Subject Matter List"). The Issues by Subject Matter List is a roadmap to all of the open issues by Issue Number, ICA Section number, and grouping of issues by topic. The Issues by Subject Matter List follows the same grouping and issue numbering as found in the Disputed Issues Matrix, for ease of reference. In the Issues by Subject Matter List and the Disputed Issues Matrix, the issues are generally discussed in the order

[7] Exhibit A (Rates) to the proposed ICA has a slightly different format, because redlining is more difficult in Excel. In Exhibit A, Qwest's proposals are shown in red and Eschelon's proposals are shown in blue (with notes in the margin).

[8] See Qwest Petition at ¶ 13.

in which they appear in the proposed Interconnection Agreement ("ICA"). Generally, the first number of the Issue Number refers to the Section number of the ICA. For example, Issue 2-3 refers to contract language that appears in Section 2 of the ICA (entitled "Interpretation and Construction") and issue number three of the total open issues. There are 48 Subject Matter groupings identified on the Issues by Subject Matter List. These represent the topics covered by the open arbitration issues.

B. Standard of Review

This arbitration must be resolved by the standards established in Sections 251 and 252 of the Act and the rules adopted by the Federal Communications Commission ("FCC").[9] The Washington Commission has found that, under Section 252 of the Act, "state commissions are responsible for resolving any open issues between the parties, particularly 'each issue set forth in the petition and response, if any.'"[10] Section 252(c) of the Act requires a state commission resolving open issues through arbitration to:

> (1) ensure that such resolution and conditions meet the requirements of section 251 of this title, including the regulations prescribed by the [FCC] pursuant to section 251 of this title; [and]
>
> (2) establish any rates for interconnection, services, or network elements according to subsection (d) of this section . . .[11]

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[9] *See* 47 U.S.C. §§251 and 252; *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 13042 (1996) ("*First Report and Order*"); 47 C.F.R. § 51.5 *et seq.*

[10] Commission's Final Order Granting in Part, and Denying, in Part, Verizon's Petition for Review; Denying AT&T's Petition for Review; Affirming in Part, Arbitrator's Report and Decision, Order No. 18 (September 22, 2005) ["*Washington Order No. 18*"] at ¶¶ 53, 108, 113; *see also* ¶ 109 (concluding that the arbitrator properly resolved an issue because "CLECs raised the topic" in the arbitration).

[11] 47 U.S.C. §252(c).

The Commission may also, under its own state law authority, impose additional requirements pursuant to Section 252(e)(3) of the Act, as long as such requirements are consistent with the Act and the FCC's regulations.[12]

The Commission is required to make an affirmative determination that the rates, terms and conditions that it prescribes in the arbitration proceeding for interconnection are consistent with the requirements of Sections 251(b) and (c) and Section 252(d) of the Act.[13]

Section 251 of the Act provides the minimum standards for Qwest in negotiating and providing interconnection to CLECs, including Eschelon. Under the Act, Qwest must provide interconnection with CLECs that is at least equal in quality to that which Qwest provides to itself and "on rates, terms and conditions that are just, reasonable, and nondiscriminatory . . . ."[14] This Section further requires that Qwest provide nondiscriminatory access to UNEs at any technically feasible point, individually and in combinations, at cost-based rates.[15] Similarly, this Section requires that Qwest provide, at rates, terms and conditions that are just, reasonable and nondiscriminatory, for physical collocation of equipment necessary for interconnection or access to UNEs at Qwest's premises (except that Qwest may provide for virtual collocation if it can demonstrate to the Commission that physical location is not practical for technical reasons or because of space limitations).[16]

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12 47 U.S.C. §252(e); *Local Competition Order*, ¶¶ 233, 244.

13 47 U.S.C. § 252(d).

14 47 U.S.C. § 251(c)(2).

15 47 U.S.C. § 251(c)(3).

16 47 U.S.C. § 251(c)(6).

Section 252(d) of the Act sets forth the applicable pricing standards for interconnection, network elements, and resale at wholesale rates of ILEC retail services. Section 252(d) also sets the applicable pricing standard for transport and termination of traffic.[17] The FCC rules also recognize that the Commission may set rates in arbitration and therefore impose a duty to produce in negotiations cost data relevant to setting rates in arbitration.[18]

C. The Commission Has A Continuing Responsibility For Oversight Over The Terms And Condition Of Interconnection Between Qwest And CLECs

For approximately two-thirds of the issues presented, Qwest has proposed contract language and thus agrees with Eschelon that the Commission should arbitrate specific contract language to address those issues. For the remaining disputed issues, which concern primarily provisioning intervals or provisions of Section 12 of the ICA, Eschelon has proposed contract terms that describe the parties' respective obligations and Qwest has proposed that the term be eliminated altogether, often in favor of a reference to Qwest's Product Catalog ("PCAT") that Qwest maintains on its website. For these issues, Qwest offers no alternative language to describe its commitments; indeed, it offers no commitments at all. Thus, rather than including specific terms and conditions in an interconnection agreement over which the Commission exercises oversight, whose terms cannot be changed unless the contract is amended by either mutual agreement or arbitration, and which will be available for opt in by other CLECs, Qwest would relegate those terms to its PCAT and, in some cases, to its Change Management Process ("CMP").

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[17] 47 U.S.C. § 252 (d).

[18] *See* 47 C.F.R. § 51.301(c)(8)(iii).

For each provision that Eschelon advocates, Eschelon will present evidence of its business reasons for including the provision in the ICA. In many cases, those business reasons will relate directly to the service that Eschelon is able to provide to its Customers. Qwest's argument is that Eschelon's business needs are irrelevant because the specific provisions that Qwest has identified are somehow qualitatively different such that they are not appropriate to be included in an ICA. Thus, Qwest would have the Commission not consider the merits of Eschelon's proposals or the business purposes that those proposals are intended to address. Ultimately, in order to fulfill its responsibility to assure that the rates, terms and conditions of interconnection between Eschelon and Qwest are just, reasonable and nondiscriminatory, the Commission will need to evaluate the disputed provisions on their merits, rather than taking the short cut that Qwest urges.

1. Qwest's CMP and PCAT do not replace arbitrated interconnection agreements.

The Telecommunications Act requires that the Commission arbitrate interconnection agreements whose terms and conditions are tailored to their particular business needs. As the FCC has recognized, the Telecommunications Act vests the state commissions with broad authority in establishing terms and conditions of interconnection:

> We expect that the states will implement the general nondiscriminatory rules set forth herein by adopting, *inter alia*, specific rules determining the timing in which incumbent LECs must provision certain elements, *and any other specific conditions they deem necessary to provide new entrants, including small competitors, with a meaningful opportunity to compete in local exchange markets.*[19]

[19] *First Report and Order* at ¶ 310 (emphasis added); *see also US WEST Communications, Inc. v Hix*, 57 F. Supp. 2d 1112, 1119 (D. Colo. 1999).

The interconnection agreement that contains the negotiated and arbitrated rates, terms and conditions for interconnection, UNEs, and access to UNEs, is typically a lengthy, detailed document. The Telecommunications Act envisions that the interconnection agreement will be a "working document"[20] containing "many and complicated" terms.[21]

In the context of determining the types of agreements that are required under the Telecommunications Act to be filed with state commissions, Qwest attempted to reduce the interconnection agreement required by the Act to a glorified product and rate sheet. The FCC, however, expressly rejected Qwest's argument, stating:

> 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 service to which the charges apply. Considering the many and complicated terms of interconnection typically established between an incumbent and competitive LEC, we do not believe that section 252(a)(1) can be given the cramped reading that Qwest proposes.[22]

Thus, the FCC defined "interconnection agreement" broadly, to include any "agreement that creates an ongoing obligation pertaining to resale, number portability, dialing parity, access to rights-of-way, reciprocal compensation, interconnection, unbundled network elements, or collocation."[23] The FCC placed no arbitrary limitation on this definition for issues labeled as "process" issues. Further, the FCC emphasized the continuing role of

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[20] *TCG Milwaukee, Inc. v. Public Services Comm'n of Wisconsin*, 980 F. Supp. 952, 999 (W.D. Wisc. 1997); *US WEST Communications, Inc. v Hix*, 57 F. Supp. 2d 1112, 1119 (D. Colo. 1999).

[21] In the Matter of Qwest Communications International, Inc. Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements under Section 252(a)(1), 17 FCC Rcd 19337 at ¶ 8 (rel. October 4, 2002) ("Qwest Declaratory Ruling").

[22] Qwest Declaratory Ruling at ¶ 8.

[23] *Id.*; *see also In the Matter of Qwest Corporation Apparent Liability for Forfeiture*, FCC File No. EB-03-IH-0263, Notice of Apparent Liability for Forfeiture (rel. March 12, 2004) ("*Qwest Forfeiture Order*") at ¶ 11.

state commission review of interconnection agreements, observing that "unlike the terms of an SGAT, web-posted materials are not subject to state commission review, further undermining the congressionally established mechanisms of section 252(e)."[24] The FCC, which made this ruling more than a year after Qwest implemented its CMP procedures, specifically said there is no "web-posting exception" to Section 252.[25] Despite this regulatory regime and related history, Qwest argues that approximately one-third of the arbitration topics should be excluded from the publicly available interconnection agreement because terms should be standard (providing "uniformity" for "multiple CLECs") or because the topic may conveniently be labeled a "process" issue.

a. Qwest's "standardization" argument should be rejected.

Nothing in the Telecommunications Act requires that the terms and conditions of an interconnection agreement be identical for all CLECs. To the contrary, the purpose and structure of the Act reflect exactly the opposite: that an interconnection agreement should be tailored to accommodate the specific needs of the CLEC that is a party to it, in order to provide that CLEC with a "meaningful opportunity to compete."

First, the Act requires that the ILEC engage in negotiations with any CLEC that requests it and, when those negotiations do not result in a completed agreement, to participate in arbitration. The Act does not provide for negotiations and arbitration between the ILEC and the "CLEC community," generally. It does not provide for state commissions to conduct generic dockets in order to develop identical terms and conditions for all CLECs. The Act does not limit the ILEC's obligation to that of simply

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24 Qwest Forfeiture Order at ¶ 32.

25 *Qwest Forfeiture Order* at ¶ 32 (emphasis added).

filing a tariff that reflects terms and conditions of interconnection. Rather, it requires that the ILEC negotiate in good faith with each individual CLEC that requests such negotiations.

In the context of the requirement for in-region interLATA entry, the Act permits the incumbent to satisfy those requirement, in part, by making available a commission-approved "statement of the terms and conditions that the company generally offers to provide such access and interconnection" (commonly referred to as a "Statement of Generally Available Terms" or "SGAT").[26] Had Congress intended that the interconnection agreement be a "one size fits all" documents, it would have provided the SGAT as the sole means by which terms and conditions of interconnection would be made available by ILEC. That it did not do so shows that Congress recognized the need for individual CLECs to be able to enter into agreements that are specific to their particular competitive needs.

Although contrary to the position it has taken in this case, Qwest's advocacy before the FCC has recognized the need and appropriateness for specific, individualized interconnection agreements that are tailored to a CLEC's particular needs. On October 16, 2003, Qwest, in opposing the then current application of the FCC's "pick and choose" rule, filed extensive comments extolling the virtues of negotiated interconnection agreements and the importance of the "…dynamic, innovative interconnection negotiations intended by the Telecommunications Act of 1996."[27] Qwest recognized that: "ILECs and CLECs have a fundamental interest in making the interconnection process as

[26] 47 U.S.C. § 271(c)(1)(B).

[27] *Comments of Qwest Communications International Inc.*, CC Docket Nos. 01-338, 96-98, 98-147, October 16, 2003, page ii.

cooperative and open as possible, since both parties benefit from well-negotiated and mutually beneficial wholesale arrangements."[28] Even more specific to the point here, Qwest argued that:

> [T]he pick-and-choose rule restricts the ILEC's willingness to *tailor negotiations and contracts to the specific needs of CLECs and their business plans*. Further, the current rule does not realistically reflect the ordinary trade-offs and give-and-take that characterize free negotiations, in which an ILEC would ordinarily be willing to give up one term of a contract in order to get another.[29]

Finally, Qwest argued that, "The ability of carriers to negotiate binding agreements with each other was a cornerstone of the Act."[30]

The ICA similarly recognizes that interconnection agreements are not intended to be "one size fits all" and envisions that there will be differences between the terms and conditions contained in the ICA and the terms published in Qwest's PCAT. To that end, agreed upon language in the ICA provides:

> Unless otherwise specifically determined by the Commission, in cases of conflict between the Agreement and Qwest's Tariffs, PCAT, methods and procedures, technical publications, policies, product notifications or other Qwest documentation relating to Qwest's or CLEC's rights or obligations under this Agreement, then the rates, terms and conditions of this Agreement shall prevail.[31]

The ICA further provides that "*Qwest agrees that CLEC shall not be held to the requirements of the PCAT.*"[32]

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28 *Id.*, 3-4.

29 *Id.*, 4 [emphasis added]

30 *Id.*, 6.

31 ICA, Section 2.3. Similar language appears in the SGAT, Section 2.3.

32 ICA, Section 4 (definition of "Product Catalog"). This same language appears in the SGAT, Section 4.0.

The CMP document, too, makes room for substantive differences between changes implemented through CMP and the terms and conditions of CLEC interconnection agreements:

> 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 to such interconnection agreement. In addition, if changes implemented through this CMP do not necessarily present a direct conflict with a CLEC interconnection agreement, but would abridge or expand the rights of a party to such agreement, the rates, terms and conditions of such interconnection agreement shall prevail as between Qwest and the CLEC party to such agreement.[33]

These provisions of the ICA and the CMP document would be meaningless if the terms and conditions of interconnection are required to be "standardized," as Qwest claims. They would instead provide that, in cases, of conflict, CMP controls to maintain uniformity. Consistent with the absence of the latter language in these documents, the Washington Commission has twice rejected such claims of standardization and has found that asking for specific terms in an individual ICA is not a request for preferential treatment. The arbitrator in the recent Verizon arbitration case in Washington said:

> 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. The interconnection agreements are filed with the Commission and available for review. CLECs have opted into a number of agreements, including the agreement originally arbitrated by MCI.[34]

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[33] CMP Document Section 1.0

[34] 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."*

Similarly, the arbitrator made the following observation in the Qwest-Covad arbitration in Washington:

> While Qwest relies heavily on "consensus" reached in the Section 271 proceeding as a strong reason for retaining the 30-day period, that argument does not apply to an arbitration proceeding. Parties engage in arbitration to enter into an agreement tailored to the companies' needs, not to adopt a standard agreement. Covad is not bound to the 30 day payment period simply because it was a party to the SGAT negotiations and hearings.[35]

b. Qwest's "process" labeling argument should be rejected.

Qwest has also claimed that it "studiously avoids placing process – the manner in which something is accomplished – in interconnection agreements."[36] First, applying this standard, it is unclear what Qwest would contend should be the interconnection agreement, beyond descriptions of the products and rates. FCC, however, has unequivocally rejected the notion that the terms of an interconnection agreement are properly limited to a "schedule of itemized charges and associated descriptions of the service to which the charges apply."[37]

Second, the proposed ICA is replete with agreed upon language that describes the "manner in which something is accomplished" and could be described as a "process." In any event, to the extent that terms can be described as "processes" or "procedures," the

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35 Arbitrator's Report and Decision, *In The Matter Of The Petition For Arbitration Of Covad Communications Company, With Qwest Corporation, Pursuant To 47 U.S.C. Section 252(B) And The Triennial Review Order*, WUTC Docket No. UT-043045, Order No. 04, Nov. 2, 2004 ["WA Covad Arbitration Order"], at note 16 to ¶100. Although the Commission rejected Covad's 30-day proposal (which is not an issue in this case), it did so on other grounds.

36 Petition at ¶ 135.

37 See Qwest Declaratory Ruling at ¶ 8.

FCC has said that processes and procedures are appropriate content for interconnection agreements:

> Individual incumbent LEC and competitive LEC arrangements governing the ***process and procedures*** for obtaining access to an UNE to which a competitive LEC is entitled, are more appropriately addressed in the context of individual interconnection agreements pursuant to section 252 of the Act.[38]

Similarly, the Washington Commission has found it reasonable to include "'operational procedures to ensure customer service quality'" in an interconnection agreement.[39] There is no bright line between "interconnection agreement terms," on the one hand, and "processes," on the other that will take the decision out of the hands of the Commission. Labeling something as a "process" simply will not aid the Commission in determining whether a provision should be included in the interconnection agreement. Rather, the Commission must evaluate the disputed provisions on their merits and determine, with respect to each, whether those terms should be contained in the interconnection agreement, not based on some abstract and ambiguous standard, but based on the evidence concerning the specific business needs that those provisions are intended to address.

2. Inclusion of terms and conditions in an interconnection agreement is necessary to provide the certainty that Eschelon needs to be able to effectively compete.

The FCC has recognized the need for terms and conditions to be contained in interconnection agreements in order to provide CLECs with the certainty and reliability that they need to compete effectively. Thus, in rejecting Qwest's contention that information concerning its products that it posts on its website need not be contained in a

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38 TRRO ¶358 (emphasis added).

39 *Washington Order No. 18* at ¶61(quoting Order No. 17 at ¶ 416, quoting TRO ¶586); *see also* ¶¶60-64, 112.

publicly-filed interconnection agreement, the FCC stated that, "[A] 'web-posting exception' would render [Section 252(a)(1)] meaningless, *since CLECs could not rely on a website to contain all agreements on a permanent basis*."[40] While the interconnection agreement can be amended and therefore is not "permanent" in the sense that it is frozen in time, the FCC recognized that permanency is needed for the term of the contract when not amended. Including language in the interconnection agreement will minimize future disputes. The objectives of providing clarity and certainty and helping avoid future disputes are legitimate bases for determining that specific language should be included in an interconnection agreement. In the recent Verizon-CLEC arbitration in Washington, for example, the Commission pointed to the likelihood of reducing the opportunity for future disputes as a basis for including specific contract language in half (7 of the 14) of the issues specifically addressed by the Commission in its Order.[41]

Eschelon depends on the services that it receives from Qwest to be able to serve its Customers. To plan its business and compete effectively Eschelon, like any business, requires certainty and reliability in its relationship with its most significant vendor. When Qwest changes its process, this requires that Eschelon also change its process. Yet, if a term is contained in Qwest's PCAT but not the interconnection agreement, Qwest is free to change that term without Eschelon's consent; Eschelon will not have certainty or reliability. CMP permits Qwest to implement most changes, even changes that are universally opposed by CLECs, by simply posting a notice and waiting 31 days or less.

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40 *Qwest Forfeiture Order* at ¶ 32 (emphasis added).

41 *Washington Order No. 18* at ¶¶ 28, 31-32, 36, 42, 48, 58, 64; *see also* Conclusions of Law ¶¶ 102, 104,105, 106, 111, 112.

Eschelon is not seeking to force Qwest to make substantial changes in how it does business. Indeed, for the most part, the provisions that Eschelon has proposed and Qwest has opposed on the ground that they deal with issues that should be addressed in CMP, do not require Qwest to make any change at all. Rather, those proposals merely reflect Qwest's current practices, often as reflected in its PCAT. By including those provisions in the interconnection agreement, the Commission will be assuring that terms that Eschelon has come to rely on, and in some cases expended substantial resources helping to develop, will continue to be available.

Although evidence in this case will reveal weaknesses in CMP that underscore the inadequacy of CMP as a vehicle for providing certainty and reliability, Eschelon's case is not an attack on CMP. Eschelon emphasizes that the Commission need not find that CMP is "broken" or "bad" to rule in Eschelon's favor on any particular issue. Rather, it need only recognize, as both the Telecommunications Act and the CMP document itself recognize, that the terms and conditions of interconnection agreements may vary, depending on the particular needs of the parties to those agreements.

3. Inclusion of terms and conditions in an interconnection agreement permits appropriate Commission oversight and prevents discrimination.

Including a particular term in the ICA does not mean that that term can never be changed or that the ICA is inflexible. Agreed upon provisions of the ICA describe the process by which either party may seek an amendment of the ICA, first through negotiations and, if those negotiations are unsuccessful, by petitioning the Commission. Including these terms in the ICA means that flexibility will not be entirely one-sided and

that the burden will be on the party seeking a change to the status quo to justify that change.

Qwest accuses Eschelon of trying to "turn back the clock" by failing to recognize what it characterizes as "Congress' intent to move toward less regulation as competition in the local exchange market increases."[42] In fact, the Telecommunications Act, when it was adopted, carved out a specific role for state commissions to assure that the "rules of the game" are fair, just, and nondiscriminatory. Qwest discusses changes in the law that have taken place since the passage of the Telecommunications Act, particularly with respect to the identification of elements that ILECs must offer to CLECs on an unbundled basis. What has not changed, however, is the important role that state commissions play in arbitrating and enforcing interconnection agreements. The Act has not been repealed, and the state commission still plays that role. By requiring that terms and conditions of interconnection be included in an ICA, the Commission will be assuring that it continues to serve this important oversight function. In fact, the very changes in law upon which Qwest relies reaffirm that the Commission should perform this function.

Although the FCC may have allowed "less regulation" for elements that ILECs no longer must offer on an unbundled basis, those elements are not at issue in the interconnection agreement and are not a part of this arbitration. The reverse is also true. The FCC *denied* the ILECs' request for less regulation for elements that ILECs must continue to offer on an unbundled basis. Those elements are a part of this arbitration, and the FCC's rejection of the ILECs' request means that UNE terms belong in an interconnection agreement and remain subject to regulation and Commission oversight.

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[42] Qwest Petition at ¶ 31.

Qwest's argument for "less regulation" reveals its true intent to relegate issues to CMP because it allows Qwest to achieve less regulation (by avoiding regulation in the form of Commission oversight), and not because CMP is a superior means of dealing with these issues.

Nor is Eschelon trying to get a "special deal" that is not available to other CLECs. To the contrary, the Telecommunications Act's requirement that interconnection agreements be publicly filed is one of the Act's primary mechanisms for preventing discrimination. The Act not only requires that interconnection agreements be publicly filed and approved by the state commission, it entitles a CLEC to opt-in to an interconnection agreement entered into by another CLEC, providing:

> A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.[43]

In requiring that terms and conditions of interconnection be made available on an equal basis to all CLECs, Section 252(i) plays a critical role in assuring that the ILEC does not engage in discrimination. As the FCC has observed:

> Requiring all contracts to be filed also limits an incumbent LEC's ability to discriminate among carriers, for at least two reasons. First, requiring public filing of agreements enables carriers to have information about rates, terms, and conditions that an incumbent LEC makes available to others. Second, any interconnection, service or network element provided under an agreement approved by the sate commission under section 252 must be made available to any other requesting telecommunications carrier upon the

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[43] 47 U.S.C. § 252(i); *see also* 47 C.F.R. § 51.809.

> same terms and conditions, in accordance with section 252(i).[44]

Because the Act allows a CLEC to opt in to an interconnection agreement entered into by another CLEC, the terms of conditions of interconnection need not be identical for all CLECs; they merely must be equally available to all.[45]

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

> [I]ncumbent LECs have little incentive to facilitate the ability of new entrants, including small entities, to compete against them and, thus have little incentive to provision unbundled elements in a manner that would provide efficient competitors with a meaningful opportunity to compete. We are also cognizant of the fact that incumbent LECs have the incentive and the ability to engage in may kinds of discrimination. For example, incumbent LECs could potentially delay providing access to unbundled network elements, or they could provide them to new entrants at a degraded level of quality.[46]

Qwest's lack of incentive to voluntarily cooperate with Eschelon's efforts to compete against it make it all the more important that Eschelon's interconnection agreement contain binding commitments of sufficient specificity as to provide Eschelon with a meaningful opportunity to compete. Absent such commitments, there will be very little to prevent Qwest from making changes to the ways in which Eschelon is able to obtain

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[44] *Local Competition Order* at ¶ 167; *see also, id.* at ¶ 1321 (concluding that allowing a CLEC to opt in to an existing interconnection agreement on an expedited basis "furthers Congress's stated goals of opening up local markets to competition and permitting interconnection on just, reasonable, and nondiscriminatory terms . . . .")

[45] *See Washington ALJ Report*, at ¶79 (quoted above).

[46] First Report and Order at ¶ 307.

access to UNEs, to Eschelon's competitive disadvantage and to the disadvantage of Eschelon's Customers in Washington.

D. Disputed ICA Provisions

With this background in mind, Eschelon will now address the specific disputed issues that the parties have identified for arbitration.[47]

1. Interval Changes: Issues 1-1, 1-1(a), 1-1(b), 1-1(c), 1-1(d), 1-1(e)[48]

Issue 1-1 and the related sub-issues concern provisioning intervals. In each instance, Eschelon proposes language requiring that interval changes will be accomplished by amending the contract, using a streamlined amendment process (that is currently available for new products). Qwest takes the position that it should be free to change intervals through CMP, without first obtaining either CLEC agreement or Commission approval.

Intervals are particularly significant because they impact timing of Eschelon's delivery of service to its Customers. Changes in intervals critically impact the quality of service that Eschelon is able to offer its Customers and create other operational issues, particularly when the interval is lengthened. Lengthening of intervals forces a carrier to provide worse service to its Customers (who must wait longer for service) while also incurring costs and spending resources on adjusting internal systems and processes to adjust to the longer interval.

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[47] *See* Exhibit 1 to this Response (Issues by Subject Matter List) for a summary list of the issues, showing how they are organized. *See* Eschelon's position statements in the third column of Exhibit 1 to Qwest's Petition (Disputed Issues Matrix) for further information about Eschelon's position on each issue, along with a comparison of the language proposed by the parties in the other columns of the Disputed Issues Matrix.

[48] Qwest's Petition refers, incorrectly, to Issues 1-2, 1-2(a), 1-2(b), 1-2(c), and 1-2(d) (an old numbering scheme). As can be seen from the Disputed Issues Matrix, it no longer includes such issue numbers. Eschelon assumes that Qwest means to refer to Issues 1-1(a), 1-1(b), 1-1(c), 1-1(d), and 1-1(e).

The Washington Commission recognized the potentially harmful effects of lengthened provisioning intervals in the context of its review of Qwest's Section 271. In that case, Qwest proposed an interval for DS-1 loops that was longer than the interval that the Commission had established when it approved US WEST's merger with Qwest, and the Commission directed that the proposed interval be reduced to that the Commission had previously approved.[49] In the recent Verizon-CLEC arbitration in Washington, the Commission found it appropriate to include an interval in the interconnection agreement to protect both the ILEC and CLECs "from unnecessary delay and gamesmanship."[50]

Eschelon has made two alternative proposals with respect to interval changes. The first proposal is that, if Qwest lengthens an interval, the ICA must be amended (using the streamlined process), thus allowing the Commission the opportunity to exercise its oversight, to assure that the longer interval continues to be consistent with the public interest. Under this proposal, Qwest could make changes that shorten intervals through CMP, without amending the contract. Under Eschelon's second, it would be necessary to amend the ICA (also using the streamlined process) to either lengthen or shorten an interval.

Qwest makes much of the fact that, since it obtained 271 authority, all modifications that it has made to intervals have been to shorten the intervals.[51] Qwest will not commit to continuing that trend, however, for the next few years when, unlike in

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[49] Twentieth Supplemental Order; Initial Order (Workshop Four): Checklist Item No. 4; Emerging Services, General Terms and Conditions, Public Interest, Track A, and Section 272, *In the Matter of the Investigation Into U S WEST COMMUNICATIONS, INC.'s Compliance With Section 271 of the Telecommunications Act of 1996* and *In the Matter of U S WEST COMMUNICATIONS, INC.'s Statement of Generally Available Terms Pursuant to Section 252(f) of the Telecommunications Act of 1996*, Washington Docket Nos. UT-003022 and UT-003040 (November 14, 2001) ("*WA 271 Order*") at ¶ 125.

[50] Washington Order No. 18 at ¶¶ 70, 114.

[51] Qwest Petition at ¶ 137.

previous years, no 271 approvals are pending to incent Qwest to shorten intervals. Qwest further asserts that Eschelon is trying to "stop progress in its tracks,"[52] thereby implying that Eschelon's proposed language would prevent Qwest from shortening intervals. This is not the case. Both of Eschelon's proposals allow for use of an easy, streamlined process that is already in place under Section 1.7.1 of the SGAT. Eschelon's first of its two alternative proposals for Section 1.7.2 would require an amendment of the ICA using this process only for changes that result in *longer* intervals. Qwest has not explained how lengthening an interval, so that Washington Customers would wait longer for service, could be described as "progress." That Qwest will not agree to the first proposal shows that its true concern is not that it wants to preserve its ability to provide shorter intervals and that there is, in fact, another agenda at work.

2. Rate Application: Issue 2-3

This issue concerns when Commission-ordered rate changes will take effect. Qwest proposes adding the following sentence to agreed upon language in Section 2.2: "Rates in Exhibit A include legally binding decisions of the Commission and shall be applied on a prospective basis from the effective date of the legally binding Commission decision, unless otherwise ordered by the Commission." Eschelon opposes this addition to Section 2.2 because another section of the ICA, Section 22.0 ("Pricing"), already deals with the application of rates in Exhibit A and does so more thoroughly and clearly than Qwest's proposed single sentence here. Section 22.4.1.2, which the parties have agreed upon, states: "Such Commission-approved rates shall be effective as of the date required by a legally binding order of the Commission." Unlike Qwest's language, Section 22.0

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[52] Qwest Petition at ¶ 138.

does not attempt to pre-judge whether the rates will be applied on a prospective basis and leaves that issue to the discretion of the Commission to decide at the appropriate time. Adopting Eschelon's proposal provides the Commission more flexibility to decide the issue later at a time when, unlike in this arbitration, the Commission will have the relevant facts of the pending rate case before it from which to determine the appropriate effective date.

The Commission has, in other cases, determined that the circumstances warranted use of an interim rate that would be subject to true up when the final rate was determined.[53] The agreed upon language of Section 22.4.1.2 is consistent with the Commission's past practice, because it leaves it to the Commission to decide when a rate change will take effect. Qwest's new proposal in Section 2.2, in contrast, attempts to create an unnecessary default that rate changes will be applied prospectively. The potential inconsistency between Section 22.4.1.2 and Qwest's proposal for Section 2.2 creates an ambiguity that is likely to lead to additional litigation.

3. Effective Date of Legally Binding Changes: Issue 2-4

When a change in the law takes effect is a question that can have very significant financial and other consequences. Because of the potential for future disputes, it is important that ICA language on this issue: 1) provide the parties with clear guidance on when a change of law will take effect, so that they can plan accordingly; 2) not provide an opportunity for any party to delay the effect of a change in the law; 3) preserve the

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[53] *See* SGAT Sections 9.20.3.4, 9.21.3.5, 9.24.3.5 (all providing that these interim rates are subject to true-up). While these elements may no longer be available, the Commission found that a true-up was appropriate at that time when they were available. The Commission may or may not find a true-up appropriate for any particular rate element in the future. Eschelon's proposal (relying upon closed language in Section 22.0 and deleting Qwest's proposal in Section 2.2) best recognizes that Commission prerogative.

authority of the relevant regulatory body – i.e., the Commission, the FCC, Congress – to determine when changes in the law will be given effect.

Agreed upon language of Section 2.2 provides that, when a change of law occurs, the ICA "shall be amended to reflect such legally binding modification or change." Eschelon's proposal is that any such amendment "shall be deemed effective on the effective date" of the change in law, unless otherwise ordered.[54] This provision will assure that the ICA properly reflects any changes in the law, including when the ordered change shall be given effect.

Qwest proposes that when an order that changes the law "does not include a specific implementation date," the effective date of such a change will depend on whether one party gives the other notice of the order. When one party gives notice of the order within thirty days of the effective date of the order, Qwest proposes that the amendment of the ICA reflecting the change in the law will be "deemed effective on the date of that order." When one party does not give notice of the order within thirty days, Qwest proposes that the legal change will take effect on the effective date of the ICA amendment that reflects that change, unless the parties agree otherwise.

One problem with Qwest's proposal is its ambiguity. The proposal would govern what happens when an order "does not include a specific implementation date." Qwest's language also provides, however, that when a party gives notice of an order within thirty days, the legal change resulting from that order will take effect on "the effective date of that order." Qwest apparently takes the position that a "specific implementation date" of an order is something different from an order's effective date. Under Qwest's proposal, it

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[54] *See* same language in SGAT Section 2.2.

appears that an order that the Commission states is to be "effective immediately" would not be one that has a "specific implementation date" and would, therefore, be one that Eschelon would have to give Qwest notice of within thirty days for the order to actually have immediate effect.

Qwest's proposal is also deficient because it an opportunity for Qwest to delay the effect of a legal change that is not in its favor and because it intrudes on the province of the relevant regulatory authority to determine when the legal change will take effect.

4. Design Changes: Issues 4-5 and 4-5(a)-(c)

The issue here arises primarily from Qwest's attempt to impose the design change charge approved for UDITs to design changes for loops and changes to Connecting Facility Assignments ("CFA changes"). There is no cost support for extending the charge beyond the element for which it was developed -- UDITs. To the contrary, the evidence will show that the design change charge for UDITs is not a reasonable charge for changing the design of a loop or for making CFA changes.

a. Application of design change rates for unbundled loops

Historically, there has been no additional charge for design changes for unbundled loops (above and beyond the approved recurring and non-recurring loop charges), as the only rate for design changes applied only to design changes for transport. (*E.g.*, *compare* SGAT Section 9.2.4.1 (ordering for loops, with no design change language) *with* SGAT Section 9.6.4.1.4(c) (ordering for transport, with design change language).) Qwest nonetheless recently began to unilaterally charge CLECs for design changes for loops, without obtaining any ICA amendment or cost case ruling allowing it to do so. Eschelon opposes Qwest's attempt to expand the UDIT design change charge to loops without

amending the ICA, without obtaining Commission approval, and without providing any evidence that Qwest's cost of performing all design changes for loops is the same as for UDITs.

Qwest complains that Eschelon has not provided cost support for the interim rate that it has proposed for loop design changes. It is Qwest's burden to provide cost support for its claimed charges. If Qwest wishes to begin charging a design change charge for loops, it is incumbent on Qwest to show that its charge is cost-based.

b. Application of rates for changes to Connecting Facility Assignments ("CFA Changes")

Connecting Facility Assignment ("CFA") changes occur for analog loop hot cuts on the day of cut during test and turn up (excluding batch hot cuts). The CFA change involves a simple "lift and lay" activity by the Qwest central office technician who is already at the frame and in contact with the CLEC representative and the Qwest personnel coordinating the process. If a CFA cannot be used and a new CFA is assigned during a cutover, the costs of such a change are minimal because both parties' personnel are already participating in the loop cutover. In such situations, the Qwest central office ("CO") technician is already available and working on the cutover. It requires less additional work, and there is little if any extra time involved, to change pairs in such situations, as compared to circumstances requiring Design Changes when the CO technician must be separately dispatched, for example. Pair changes to install or repair service at no additional charge are part of a long-standing standard industry practice.

Qwest now proposes, however, to begin charging the same expensive rate for Design Changes for all CFA changes as it charges for Design Changes to UDITs, regardless of circumstance. Eschelon has proposed language that identifies certain CFA

changes to which the transport charge at a minimum should not apply. If any charge is allowed in this context, it should be cost-based and, therefore, minimal. The ICA should also specifically state that the separate Design Change rate does not apply when the CFA change charge applies, to avoid ambiguity and potential double recovery.

5. Discontinuation of Order Processing and Commission approval before disconnection of service: Issues 5-6 and 5-7 and subpart

Subjects 5 through 7 (Issues 5-6 through 5-13) relate to the "Payment and Deposit" provisions in Section 5.4 of the interconnection agreement. Issues 5-6 and 5-7 deal specifically with remedies for alleged non-payment that may affect service to unsuspecting Washington End User Customers. For both of these issues, Eschelon proposes that the interconnection agreement expressly recognize that Commission approval or oversight may be required before these types of remedies may be invoked.

a. Continuation of order processing pending either Commission approval or Commission proceeding: Issue 5-6

Section 5.4.2 allows Qwest to discontinue processing all orders "for the relevant services" if CLEC does not make "full payment" of undisputed amounts. If Qwest were to discontinue processing Eschelon's orders, this would be a very serious step that could have a significant negative effect on current and potential Eschelon Customers. For example, Washington Customers who are initiating or converting service may find themselves without service on the planned date of service.

Qwest has other remedies, such as late payment fees and dispute resolution, available to it. Before Qwest takes a step as serious and disruptive as discontinuance of order processing, the Commission should be involved on behalf of the public interest.

Therefore, Eschelon's first and preferred proposal is to require Commission approval before Qwest may discontinue order processing under these circumstances.

If the Commission declines to adopt Eschelon's proposal to require approval in every case in which Qwest seeks to discontinue order processing, the Commission should at least ensure that it will have an opportunity to act on the public's behalf to maintain the status quo when a party seeks Commission relief. To that end, Eschelon's second option allows the Commission this opportunity by providing that, if Commission intervention is sought, Qwest will continue order processing while the proceedings are pending, unless the Commission orders otherwise.

Qwest argues that its proposal that it be permitted to discontinue order processing when payment is delinquent by more than 30 days is the same timeframe as was adopted in the Qwest-Covad arbitration.[55] The issue here, however, is not the amount of time (30 versus 45 days) that must pass before Qwest avails itself of this extreme remedy, as in the Covad arbitration. Rather, the issue is whether Qwest should be permitted to take such a step without Commission involvement. The Commission did not address this issue in the Covad case, because it was not raised there.

Commission oversight on these matters is particularly important so that there is an independent arbiter of the facts and to ensure that the information relied upon to make these decisions is accurate. Eschelon and Qwest have had serious disagreements about billing information – including whether a dollar amount has been disputed – which means that Qwest could invoke these remedies based on information with which Eschelon disagrees. Although Eschelon could seek dispute resolution under the agreement,

[55] Qwest Petition at ¶ 44.

because this provision allows Qwest to discontinue processing Eschelon's orders on only ten days' notice, it would be difficult, if not impossible, for Eschelon to file a complaint, get on the Commission's schedule, and get a ruling, all within ten business days. In the meantime, if Eschelon is correct but no decision is possible in that timeframe, the End User Customers whose orders will not be processed suffer.

b. Commission approval before disconnection of service: Issues 5-7 and 5-7(a)[56]

This dispute concerns the circumstances under which Qwest may disconnect Eschelon's service, including service to its End User Customers, for alleged non-payment. The disconnection of service is an even more drastic measure than the discontinuation of order processing and the need for Commission oversight is correspondingly greater. Not only would Qwest's disconnection of Eschelon's service very seriously, if not fatally, harm Eschelon's business, it would be extremely disruptive, to say the least, for Eschelon's Customers, who would lose their telephone service as a result. Before Qwest disconnects service affecting potentially numerous Washington Customers, it should have the obligation to first seek to the permission of the Commission, in order to be sure that the interests of the public are adequately protected.

6. Deposits: Issues 5-8, 5-9, 5-11 and 5-12

Section 5.4.5 concerns the circumstances under which Qwest may demand that Eschelon provide a payment deposit. The amount of a potential deposit – up to two months' worth of charges – is substantial, particularly for a small company like Eschelon. It is, accordingly, important, that, if the ICA is to provide for payment of a deposit, it do

[56] Qwest's Petition characterizes Issue 5-7 as involving "Discontinuation of Order Processing." In fact, as reflected on the Disputed Issues Matrix, the disputed language giving rise to this issue concerns disconnection of service and not just discontinuation of order processing.

so only under circumstances in which there is a legitimate, realistic concern about future payment.

a. De Minimus Amount

Eschelon has proposed language that would limit application of the deposit requirement to situations when there is a failure to pay an undisputed "non-de minimus" amount. It is unreasonable that the deposit requirement should be triggered when, as a result of an error for example, a payment is off by a few dollars, particularly in light of the amount and complexity of Qwest's bills to Eschelon. A deposit should be required when there is a legitimate concern about a company's ability to pay future charges. Such a concern does not arise when the amount that is not paid is de minimus.[57]

b. Definition of "Repeatedly Delinquent"

The parties have agreed that a deposit may be required when payment is "Repeatedly Delinquent."[58] They disagree about how this standard should be defined.

Eschelon has offered two alternative definitions of "Repeatedly Delinquent." The first proposal is that payment be considered Repeatedly Delinquent when payment is received late in three consecutive months. Qwest uses this "three consecutive month" standard in other contracts, including contracts with some CLECs. This standard adequately protects Qwest's legitimate interests while reducing the likelihood that a deposit will be imposed when it should not be imposed. Eschelon's second option for the definition of "Repeatedly Delinquent" is the same as Qwest's definition, except that

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[57] Qwest has objected that the term "non de minimus" is vague. Although Eschelon disagrees, it would also accept "material" in place of "non de minimus" The term "material" is used in a number of agreed on provisions of the ICA and, accordingly, is a term with which Qwest is already sufficiently familiar.

[58] Eschelon also offers an alternative that does not rely upon this definition. *See* Issue 5-12 below.

Eschelon proposes six months instead of twelve months during a twelve-month period. Under either of Eschelon's proposed definitions, Qwest would be protected in circumstances when late payment might reasonably be viewed as creating a legitimate concern about ability to pay that would justify a deposit.

Qwest's proposal is that payment be considered "Repeatedly Delinquent" if received more than thirty days late for any three months in a twelve-month period. Qwest has argued that its definition was discussed in the 271 proceedings.[59] Those proceedings are not binding upon Eschelon in an interconnection agreement arbitration.[60] Under Qwest's proposal, if a CLEC were to pay a portion of the amount due late in months one and two, make timely payments in the full amount for nine consecutive months, and then pay a portion of the amount due late in month twelve, Qwest could demand a large security deposit. Such a scenario – with CLEC paying in full for nine consecutive months – does not provide any evidence of the financial stress that gives rise to a legitimate need for payment "security." Either of Eschelon's proposals provide a better balance of interests.

c. Disputes before Commission

The parties have agreed on language that provides that a required deposit will be due within thirty days of demand. Eschelon has proposed an exception for situations when the party on whom the demand is made challenges with the Commission either whether a deposit is required or the amount of the deposit. In such an instance, the

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[59] Qwest Petition at ¶ 49.

[60] WA Covad Arbitration Order, at note 16 to ¶100 ("Parties engage in arbitration to enter into an agreement tailored to the companies' needs, not to adopt a standard agreement. Covad is not bound . . . simply because it was a party to the SGAT negotiations and hearings.")

deposit would be due as ordered by the Commission. This exception gives effect to, and is consistent with, the parties' right to bring disputes to the Commission for resolution.[61]

d. Deposit requirement: Issue No. 5-12

Eschelon proposes a third option for determining when Qwest may demand a deposit. This third option does not hinge on the definition of Repeatedly Delinquent. Instead, this option provides an opportunity for the Commission to review a party's payment history and determine whether "all relevant circumstances warrant a deposit." This option provides the Commission with flexibility to determine contested deposit requirements on a case-by-case basis if and when such cases arise.

7. Review of credit standing: Issues 5-13[62]

Qwest has proposed a provision that would allow it to review Eschelon's credit standing and increase the amount of the deposit. Because this provision contains no criteria or standards defining when this provision may be invoked, Qwest could attempt to use it to effectively nullify the limitations set out in Section 5.4.5 on Qwest's ability to demand a deposit. Qwest's proposal does not describe the "credit history" that would be subject to review, the conditions that might justify such a review, or the circumstances that would warrant a modification. There is no limitation on ability to increase a deposit amount even when the Billed Party is current in its payments. Such an unlimited ability to demand an increase in the amount of a deposit would be an open invitation to arbitrary action.

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[61] *See* ICA Section 5.18.1.

[62] Qwest's Petition refers, erroneously, to Issue 5-14. As reflected in the Disputed Issues Matrix, there is no such disputed issue. Eschelon's two alternative proposals relating to review of credit standing are contained in Issue 5-13.

Qwest's proposal for this Section is also inconsistent with Section 5.4.5 in another way. Section 5.4.7, as proposed by Qwest, states that the amount of the deposit, when increased, may not exceed the maximum amount provided for under Section 5.4.5. That Section, however, provides no method for calculation of a maximum when the amount of a deposit is to be modified.

Qwest contends that the "triggering event" to be used for determining the amount of the deposit is the credit review itself.[63] This is not what Qwest's proposed language says, however. Qwest's proposal refers expressly to Section 5.4.5 as setting forth the method for determining the maximum amount of the deposit. Section 5.4.5 identifies two potential "triggering events": 1) the date of the request for reconnection of service or resumption of order processing, or 2) the date when the CLEC is Repeatedly Delinquent. Neither of these triggering events would apply in a situation in which Qwest's demand for an increased deposit is based on Qwest's review of Eschelon's "credit history." Accordingly, there would be no way to compute the amount of the deposit.

Because of its inconsistency with the general deposit requirement set out in Section 5.4.5, Eschelon recommends that Section 5.4.7 be deleted. The provision is unnecessary in any event. The only legitimate need to modify a deposit that has been identified is recalculation of the deposit based upon financial standing, and that is already covered in Section 5.4.6. Eschelon's other proposed option for this language is to modify it to require that any increase in the amount of the deposit be approved by the Commission.

[63] Petition at ¶ 52.

8. Copy of non-disclosure agreement: Issue 5-16

The parties agree that Qwest employees to whom Eschelon's forecasts and forecasting information are disclosed will be required to execute a nondisclosure agreement covering the information. Eschelon proposes that Qwest be required to provide copies of executed non-disclosure agreements. Eschelon's proposal to receive copies of executed non-disclosure agreements reflects the common practice in other contexts under which the parties exchange signature pages of confidentiality protective agreements so that a party will be aware of who is receiving its confidential information and will be in a position to raise objections if necessary. If Qwest does not provide Eschelon with copies of executed nondisclosure agreements, Eschelon will have insufficient information to object if sensitive information is provided to a Qwest employee not authorized by the ICA to receive it. Qwest has already agreed that employees will sign the agreement. Eschelon's proposal to require Qwest to provide a copy of that existing executed agreement imposes little, if any, burden on Qwest.

9. Transit record charge and bill validation: Issue 7-18 and 7-19

"Transit Traffic" is defined as any traffic that originates from one Telecommunications Carrier's network, transits another Telecommunications Carrier's network, and terminates to yet another Telecommunications Carrier's network[64] Qwest is a transit provider and bills Eschelon for transit for certain Eschelon originated calls. The bills that Qwest provides to Eschelon for Eschelon originated calls do not contain call record detail, but instead simply contain the number of transit minutes and the transit

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[64] *See* ICA, Section 4 - Definitions.

traffic rate. In order to validate the bills that Qwest provides, Eschelon requests, on a limited basis, call records that would allow for bill verification. Qwest apparently will agree to supply transit records, but only if the records are purchased by Eschelon. Eschelon should not be put in the position to have to pay Qwest additional charges in order to validate the invoices Qwest is sending to Eschelon.

Qwest argues that Eschelon should obtain the necessary information from its own switch, rather than seeking it from Qwest.[65] Although Eschelon does record certain information at its switch, those records only tell Eschelon who was called and that the call was handed off to Qwest. Eschelon can only infer from our records whether Qwest is acting as a transit provider. Discrepancies between Eschelon's records and the bills Eschelon receives from Qwest are one reason Eschelon might request records from Qwest for bill verification.

10. Collocation Available Inventory: Issue 8-20

a. Posting of prices

When a collocation site is no longer being used by a CLEC and that site is returned to Qwest, the site is then posted on Qwest's website as available inventory that is available for purchase by other CLECs. In this way, Qwest offers essentially "used" collocations, which it refers to as "collocation available inventory." When making a "new" versus "used" purchase decision, a buyer considers several factors, but price is almost always a key factor, yet Qwest's listings of its "used" collocation sites include no price or even an estimate. Eschelon has proposed language providing that, when Qwest prepares a quote and charges a QPF in connection with that quote, for a posted

[65] Qwest Petition at ¶ 57.

Collocation site and the site is subsequently returned to Qwest inventory, Qwest will post the quoted price from the QPF and will waive the QPF for future quote requests.

This provision does not require Qwest to prepare a quote. Rather, Eschelon's proposal is reasonable because it only requires Qwest to post pricing information that it has already available to it as a result of having previously prepared a quote. Further, because Qwest has already charged for the preparation of the quote, the requirement that Qwest waive the fee for subsequent quotes reasonably prevents Qwest from receiving double recovery.

Qwest argues that the Commission should reject Eschelon's proposal because CLECs "almost never" order Available Inventory sites "as is."[66] This argument misses the point. Section 8.2.10.3.3 states that, if CLEC requests modifications to the Qwest posted site, the ICA terms relating to Augments will apply. If a CLEC was not identical to the Qwest posting, Qwest would treat it as an Augment. Therefore, any claim by Qwest that it cannot post the quote because CLECs do not order identical configurations is inconsistent with this closed language.

Qwest also argues that because it has no obligation under the Telecommunications Act to make its available inventory of used collocation sites available, the Commission is not permitted to place any conditions on how it offers that product.[67] Qwest is wrong. Section 251(c)(6) of the Act requires Qwest to "provide, on rates, terms and conditions that are just, reasonable, and nondiscriminatory, for physical collocation of equipment necessary for interconnection or access to unbundled network

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[66] Qwest Petition at ¶ 62.

[67] Qwest Petition at ¶ 61.

elements." The Act does not state that physical collocation is "new" or "used." It simply states that rates for collocation must be just and reasonable. Eschelon's proposal meets that criteria of establishing just and reasonable rates for QPFs for previously used Collocations. Eschelon's position is that it should not be required to pay QPFs for a previously used collocation space if Qwest has already previously recovered those costs from another carrier. Further, the posting of quotes that Qwest has already created for the purpose of offering collocation sites to another carrier helps ensure that these sites are offered on a non-discriminatory basis.

b. Space augments

Agreed upon language in Section 8.2.10.4.3 provides that Qwest will verify whether a collocation site posted on Qwest's available inventory site is still available for acquisition by conducting a feasibility study. If the site is available, a site survey will be arranged and, upon completion of the survey, "Qwest will prepare a quote based on the site inventory ***and any requested modifications*** to the site" (emphasis added). The agreed upon portion of that Section also states that "CLEC will be charged a special site assessment fee for work performed up to the point of expiration or non-acceptance of the quote." Qwest proposes to introduce a new sentence that states that Qwest may charge the higher augment fee instead of the special site assessment fee "if CLEC requests an augment application."[68] The special site assessment fee, however, already includes "any requested modifications." Qwest's proposal is inconsistent with the ICA's language and is not cost based and should, for those reasons, be rejected.

[68] Presumably, Qwest means to say an augment, and not an application, as there is not a several thousand dollar fee for requesting a form application.

11. Power: Issues 8-21, 8-21(a) - (d), 8-22 and 8-23

a. Power measurement

The central difference between Qwest and Eschelon's proposals on this power issue is whether measured usage is adjusted based on actual usage readings for both power charges (called "power plant" and "power") or only the latter charge. Qwest proposes to use the term "power usage" to support its position that there are two charges, but only one of them is adjusted based on usage readings.[69]

Section 252(d) mandates that rates be based on costs. When power is measured, actual usage reflects costs and should be used for cost-based charges. Qwest's proposal results in discriminatory treatment, with Qwest paying less for power than CLECs.

The other open issue in this section relates to commencement of usage charges. *See* Issue 8-21(a). Eschelon's proposal is that, once the CLEC's equipment is in place, it will notify Qwest so that Qwest can measure, and charge based on, actual usage. Qwest's proposal would require the CLEC to have its equipment in place before making a request for measured power usage. Qwest's proposal appears designed to prevent CLECs from requesting power measurement before installing equipment (so that the measure is zero) and then afterward installing equipment and obtaining up to six months of zero usage charges. Eschelon agrees that should not occur. Eschelon's proposal also accounts, however, for another unfair situation. Until power is measured, Qwest charges based on amount ordered. If Eschelon is not using the power ordered (such as due to a vendor delay in installing equipment), it should be able to obtain measurement and not pay for

[69] This issue is discussed in complaints by McLeod against Qwest in several states (*see* Washington Docket No. UT-063013). If the same issue will be resolved in those complaints in a manner sufficient to indicate the appropriate ICA language for use here before the conclusion of this arbitration, Eschelon is willing to discuss a separate schedule for addressing this issue that would allow the parties to account for resolution of that matter in the language of the ICA. Qwest does not agree.

power not used. Eschelon's language treats both situations fairly. Qwest's language protects Qwest but does not account for Eschelon's concern.

b. DC Power Quote Preparation Fee ("QPF")

When Eschelon has paid Qwest to reserve power, there should be no Quote Preparation Fee ("QPF"). Eschelon has paid Qwest a monthly charge for the reservation, so Qwest should not be altering that which was reserved. It should stand ready for Eschelon's use, because that is what Eschelon is paying for. Qwest's QPF is redundant and represents double recovery.

c DC Power Restoration Charge

Charges should not be ICB when Eschelon has paid to reserve power. The activities for restoring power should be similar to the activities for reducing power.

12. NEBS Standards: Issue 8-24

The majority of this section deals with situations in which Qwest claims that CLEC activities or equipment involved in a collocation installation do not comply with applicable safety standards or are in violation of applicable laws or regulations. In such a case, Qwest has an extreme remedy available: it can stop all installation work related to the activities or equipment at issue until the situation is remedied or Eschelon demonstrates that Qwest was mistaken. Eschelon has agreed to these provisions as necessary safety measures to protect personnel and property during installations.

Eschelon does not, however, believe that Qwest should be able to cease work on implementing a collocation installation if it learns in the **application process** that Eschelon contemplates installing equipment that Qwest claims is sub-standard. Eschelon proposes language requiring that Qwest notify Eschelon in writing in such an instance

and begin a dialog regarding the equipment as necessary. Qwest should not be permitted to wait until the Eschelon is incurring the expense of installing the equipment identified earlier in Eschelon's collocation application to notify Eschelon of its objections.

13. Optioned Contiguous Space: Issue 8-29

The parties dispute how much time Eschelon should have to decide to exercise an option on collocation space. Qwest currently proposes 72 hours, though as discussed below it has indicated that it may change its proposal in September. CLECs pay Qwest charges for the space option. The option should be meaningful. Accordingly, Eschelon proposes that it have seven calendar days to decide whether to exercise an option (ICA Section 8.4.1.8.7.3) and has indicated that Qwest should also have seven calendar days in corresponding situations (ICA Section 8.2.6.1.2). Under Qwest's proposal, if Qwest provides notice on a Friday, this means that Eschelon will have only one business day to make a decision.

Qwest seems to have recognized that the seven-day period is more appropriate, but it has recently taken the position that it cannot offer to change language for an individual interconnection agreement to seven days without first distributing a notification in CMP to that effect and also waiting for that notification to become effective, because it says the term would affect multiple CLECs. Since then, Qwest has distributed a CMP notice with an effective date in late September, after which Qwest says it will close this issue in negotiations. Qwest's insistence that this particular negotiation issue be noticed through CMP is inconsistent with the history of this contract language and is an example of how Qwest uses CMP as a means to an end when convenient for Qwest. As a case in point, the Utah SGAT dated October 31, 2002 states that CLEC will

have seventy-two (72) hours to indicate its intent to submit a Collocation Application or Collocation Reservation. However, Qwest agreed to the following language in Utah in the Covad ICA: "***Upon notification, CLEC will have ten (10) calendar days*** to indicate its intent to submit a Collocation Application or Collocation Reservation."[70] Qwest did not send a CMP notification announcing a change in its position before agreeing to a different timeframe in its individual interconnection agreement with Covad. Only now, after Qwest has developed its arbitration position – repeated often throughout the Disputed Issues Matrix, that "Processes that affect all CLECs should be addressed through CMP, not through an arbitration involving a single CLEC" – has Qwest engineered its CMP practices to conform to its litigation strategy. Qwest's claims about the operation of CMP and need for issues to be handled in CMP should be evaluated in light of such tactics and what they say about the amount of discretion and potential for abuse presented by CMP when used as a substitute for interconnection agreement terms.

14. Nondiscriminatory Access to UNEs: Issue 9-31

Very recently, Qwest revealed a new agenda to charge tariff rates for activities that have been performed at TELRIC rates pursuant to Qwest's Section 251 obligations to provide access to UNEs. Because Qwest did not raise this issue in the cost case or ICA negotiations before Eschelon filed its first arbitration petition,[71] Eschelon only learned of it later through Qwest's new rate proposals, in which Qwest referred to the

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[70] *See* Qwest/Covad ICA (June 7, 2005), http://www.psc.utah.gov/telecom/04docs/04227702/Arbitrated Intercon Agreement 8-05.doc (emphasis added). When Qwest entered into this agreement with Covad in June of 2005 with a 10-day time period, Eschelon's proposal for the same ICA provision was also 10 days, but Qwest refused in negotiations to agree to 10 days for Eschelon. *See* Qwest-prepared multi-state Qwest-Eschelon ICA draft dated July 12, 2005 (showing Eschelon's proposal of 10 days and indicating Qwest "cannot agree"). Qwest's new CMP barrier is not real and is simply part of its strategy to achieve "less regulation" by moving issues to a forum without meaningful Commission oversight.

[71] Eschelon filed its petition for arbitration with Qwest in Minnesota on May 26, 2006. Eschelon and Qwest will arbitrate an interconnection agreement in six states (AZ, CO, MN, OR, UT, WA).

tariff instead of Commission approved rates for certain elements. According to Qwest, application of TELRIC rates is limited to the enumerated list of UNEs; if not named on that list (such as "loops"), it is not a UNE for which TELRIC rates apply. Qwest described items that are not enumerated as UNEs, for example, as including trouble isolation charges, expedites, design changes, *etc*., even when these activities are performed on UNE orders. Despite all of the work that was done in the 271 proceedings relating to nondiscriminatory access to UNEs, now that Qwest has its interLATA authority, Qwest wants to charge its tariff rate for these activities, even when the Commission has previously approved a TELRIC rate. According to Qwest, the Commission does not have jurisdiction to determine such "non-UNE" rates.

Although Qwest's position on this issue is something of a moving target, just this week Qwest has confirmed its intent to attempt to avoid Commission oversight of TELRIC rates in favor of imposing its own tariff rates. On August 31, 2006, Qwest announced that is will post a new "template" interconnection agreement on its website on September 1, 2006.[72] In its announcement, Qwest described changes it is making to the template agreement that represents its offer to CLECs in interconnection agreement negotiations. Specifically, Qwest said that it has added a reference to Qwest's tariff to the following rate elements in Exhibit A: Additional Dispatch, Trouble Isolation Charge, Design Charge, Expedite Charge, Cancellation Charge, and Maintenance of Service charge.[73] Qwest previously made such changes to Exhibit A in negotiations with Eschelon (before changing back to its current position). By changing its position in the

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[72] PROS.08.31.06.F.04159.Amendments.ComlAgree.SGAT, see M:\Documents and Settings\karenc\Local Settings\Temporary Internet Files\OLK1\ContactMailAttach.htm.

[73] See *id*.

arbitrations with Eschelon while maintaining its tariff position outside of arbitration, Qwest seeks to avoid a Commission ruling on these issues. The absence of a Commission ruling gives Qwest the type of flexibility without close scrutiny that it seeks through its CMP advocacy. Given Qwest's expansive view of CMP, without a Commission ruling in this case, there is little to protect Eschelon from Qwest unilaterally imposing its tariff position (particularly because Qwest claims the Commission does not have jurisdiction), after extensive time and resources have been expended on this arbitration. Therefore, Eschelon proposes language in Section 9.1.2, relating to nondiscriminatory access to UNEs, that places the issue squarely before the Commission. A ruling is truly needed to minimize future disputes.

Qwest's position is contrary to the law. Qwest must provide not only the UNE but also meaningful access to the UNE. The FCC found that the requirement to provide "access to UNEs" must be read broadly, concluding that the Act requires that UNEs "be provisioned in a way that would make them useful" and "[t]he ability of other carriers to obtain access to a network element for some period of time does not relieve the incumbent LEC of the duty to maintain, repair, or replace the unbundled network element."[74] The FCC's rules regarding access to unbundled elements prescribe that an ILEC must provide a carrier purchasing UNEs not only the physical facility, but also all the capabilities of providing service, such as add/move/change, provisioning and maintenance and repair. Section 51.307(c) provides: "An incumbent LEC shall provide a requesting telecommunications carrier access to an unbundled network element, along with all of the unbundled network element's features, functions, and capabilities, in a

[74] First Report and Order at ¶268.

manner that allows the requesting telecommunications carrier to provide any telecommunications service that can be offered by means of that network element." Eschelon's proposed language reflects these obligations and needs to be added to the ICA to avoid disputes in light of Qwest's expressed intention to unilaterally require payment of tariff rates, even when the Commission has approved TELRIC rates.

Eschelon made its proposal in direct response to Qwest's assertion that certain miscellaneous activities that are necessary for Eschelon to have nondiscriminatory access to UNEs are "not UNEs" subject to the requirements of Section 251. Qwest objects that Eschelon is trying to require Qwest to provide a "yet unbuilt superior network" and that Eschelon is trying to obtain modifications to UNEs without paying for them. This is not Eschelon's intent, nor is it what Eschelon's proposed language requires. Eschelon seeks to confirm Qwest's obligation to provide access to UNEs on nondiscriminatory, just and reasonable terms under Section 251, as it has throughout the term of its existing interconnection agreement. Eschelon has no objection to paying Qwest cost-based rates for activities necessary to provide access to UNEs. What it objects to is Qwest's attempt to read access to UNEs out of the ICA and out of Section 251 by providing those activities that are part and parcel of such access not under the terms of the ICA, but under the terms of its access tariff.

16. Network Maintenance And Modernization: Issues 9-33, 9-34, 9-35, and 9-36

a. Affect on End User Customers

The parties have agreed that Qwest may make necessary modifications and changes to UNEs in its network on an as needed basis and that such changes "may result

in minor changes to transmission parameters."[75] Eschelon has proposed language that clarifies that Qwest may not disrupt or disable a CLEC's previously reliable, working circuit in the name of "modernization." Eschelon's proposed clarification does not arise from an idle concern; Qwest takes the position that a network modification may be considered "minor" even if the change results in a service outage. The Customer whose previously working service is permanently disabled would hardly describe this as modernization with a minor impact, however.

b. Location at which changes occur

The second issue in Section 9.1.9 relates to the FCC's requirement that ILECs provide CLECs advance notice of network changes. Eschelon has proposed language that would require Qwest, ***only*** in those circumstances when modifications and changes to the UNEs in its network addressed in a Qwest notice are "End User Customer specific," to include circuit identification and customer address, as part of any notice of network changes. If the changes are specific to an Eschelon End User Customer, there is no reason why Qwest should not provide this information so that Eschelon may have sufficient information to assist its Customer. Qwest contends, incorrectly, that Eschelon would impose an obligation that goes beyond what the FCC requires.

In 47 C.F.R. § 51.327, the FCC provides a list of items that a public notice of network changes must include. The rule states that the list is a minimum and is not all-inclusive. Part (a)(4) of § 51.327 states that the list must include "the location at which the changes will occur." The term "location" must be considered in the context of 47 C.F.R. § 51.325(a), which states that the public notice must include notice regarding any

[75] *See* proposed ICA Section 9.1.9; *see* SGAT Section 9.1.9.

network change that “will affect a competing service provider's performance or ability to provide service.”

Eschelon’s proposal is consistent with these rules. It provides that, *if* the network changes are Customer-specific, Qwest will provide the information necessary to provide the location of the Customers for whom Eschelon’s performance will be affected. That necessary information is circuit identification and customer addresses. The former is the generally accepted locator within the network and the latter is the locator within the CLEC’s list of customers. Without this information, the notice will not fulfill the intended purpose.

c. Emergencies

The third issue relating to network modification concerns how Qwest will communicate information so Eschelon will be able to assist its End User Customers in resolving the resulting service issue. Under the repair process, Eschelon contacts Qwest’s repair department for status updates, which Eschelon then passes on to its End Users. If the Qwest repair department has not made the connection between the Qwest maintenance or modernization activity and Eschelon’s Customer’s outage but other Qwest representatives are aware of it, valuable time will be lost in restoring service. Eschelon’s proposed language is reasonably limited to situations when the Qwest personnel conducting the activities are aware of the emergency so they can convey it to Qwest repair.

d. Charges

No charges apply to the dispatches undertaken by Qwest as a result of emergencies caused by Qwest’s network maintenance and “modernization” activities.

This is logical because Qwest should not be allowed to charge Eschelon to repair an emergency Customer disruption that Qwest caused when doing that work. Eschelon moved some language relating to emergencies from 9.1.9 to Section 9.1.9.1 and expanded upon it for the reasons described above. Placement of the language dealing with emergencies does not change the reason why Qwest cannot charge Eschelon for these dispatches. Whether emergencies are addressed in Section 9.1.9 or in a separate section, Qwest caused the emergency doing work of its own and cannot charge Eschelon for any related dispatch to repair the service back to where it was before Qwest caused the problem. Particularly given Qwest's opposition which suggest that Qwest may attempt to charge Eschelon for Qwest-caused outages, the ICA needs to clearly reflect this.

17. Caps – Data relating to caps: Issue 9-39

Section 9.1.13 sets out the procedure for self-certification when Eschelon orders high capacity loops and transport UNEs. If Qwest disputes that certification, or a dispute otherwise arises, Eschelon's proposed language provides a mechanism for attempting to resolve that dispute. That mechanism requires Qwest to provide to CLEC information needed to resolve the dispute. For example, in the wire center proceedings, the parties have been able to resolve issues after Qwest provided data to CLEC that were not resolved without that data. Qwest would need to gather the data in any event to bring its dispute to the Commission. The process proposed by Eschelon is efficient and will reduce the likelihood of disputes before the Commission.

18. Conversion: Issues 9-43, 9-44, and 9-44(a) – (c)[76]

A conversion happens when a circuit that was formerly available as a UNE must be converted to a non-UNE alternative arrangement, as the result of a finding of "non-impairment." The Washington Commission has found that this transition away from UNEs is within the scope of Sections 251 and 252 of the Act.[77] Similarly, the FCC found that "as contemplated in 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."[78] Such a "conversion" involves only changing the rate charged for the facility and, in the vast majority of circumstances, the CLEC and its End User Customer will use the same facility that was used before the conversion. These conversions are required solely for purposes of implementing a regulatory construct and have nothing to do with improving or otherwise managing the Customer's service – in essence, the conversion is intended to re-label what was before a UNE, something different.

The FCC addressed the issue of conversions in the Triennial Review Order (TRO)[79] and found that conversions should be seamless from the End User's perspective and should involve only billing changes from Qwest's perspective. At paragraph 586 of the TRO, the FCC explained the seamlessness of conversions:

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[76] Qwest does not specifically address these issues in the body of its Petition. However, as reflected on the Disputed Issues Matrix, they are issues of dispute between the parties that must be determined in this arbitration.

[77] Washington ALJ Report (Order No. 17 in Verizon-CLEC arbitration), at ¶150.

[78] TRO, pp. 14-15.

[79] The TRO addressed conversions from UNEs to wholesale services and from wholesale services to UNEs.

> Converting between wholesale services and UNEs or UNE combinations should be a seamless process that does not affect the customer's perception of service quality.

The FCC codified the requirement that conversions should be seamless from the perspective of the CLEC's End User in 47 CFR §51.316(a) as follows:

> (b) An incumbent LEC shall perform any conversion from a wholesale service or group of wholesale services to an unbundled network element or combination of unbundled network elements without adversely affecting the service quality perceived by the requesting telecommunications carrier's end-user customer.

Consistent with the FCC's direction to minimize Customer disruption, Eschelon has proposed language regarding conversions that would require such conversions to be handled as the billing changes that they are. Thus, Qwest would not change the circuit ID and would bill for the circuit under the alternative arrangement though the use of a billing "adder" or "surcharge." Such re-pricing is technically feasible and is similar to the way that Qwest handled pricing changes in its Qwest Platform Plus agreements.

Eschelon's proposed language would also provide that a conversion would not result in a change to the circuit ID The changing of a circuit ID when a circuit is converted from a UNE to an alternative arrangement is not only unnecessary, it creates the potential for Eschelon and its Customers to experience disruption. If, as part of that conversion, Qwest changes the circuit ID for the circuit that is already in place and working well for the Customer, additional service and billing problems may occur at a later date. For example, if six months after the conversion, the End User calls Eschelon with a repair but the circuit ID is incorrect as a result of conversion activity, Eschelon may not even be able to open a ticket with Qwest because Qwest requires a correct circuit ID to open a ticket. When a ticket is opened, the repair will be delayed and require

additional resources to resolve. All of this can be avoided. If Eschelon's re-pricing proposal is adopted, the circuit IDs will not change, and the risk of such problems arising will be eliminated.

19. Interfering bridged tap: Issue 9-46

Section 9.2.2.9.6 sets forth performance parameters that Qwest is required to meet with respect to loops that it provides under the ICA. For certain types of loops, one such performance parameter is that there not be "Interfering Bridged Tap" on the loop. Eschelon has proposed language that defines "Interfering Bridged Tap" logically to include any Bridged Tap that "would interfere with proper performance" of the loop. The remainder of this Section then goes on to describe proper performance. Qwest has rejected this language in favor of more narrowly defining Interfering Bridged Tap to Bridged Tap "that would cause loss at the End-User Customer location to exceed the amount of loss allowable by the ANSI Standards."

The length of bridge tap on any given loop can have an adverse, and variable, effect on performance of the loop with regard to DSL, depending on the type of DSL the loop might be intended to support. That is why the FCC has, in numerous orders, required ILECs to remove bridged tap and other devices that interfere with high-speed services, like DSL, at the request of CLECs. Often, the label of "acceptable" interference is dependent on the physical characteristics of the loop as well as the high-speed technology in question. For this reason, Eschelon's proposal properly ties the need to remove bridged tap to "proper performance" of high speed technology that Eschelon may choose to employ.

20. Subloops - Cross Connect/Wire Work by Qwest: Issue 9-50

In response to Qwest's claim that it is discontinuing, "on a going forward basis," providing cross-connects for CLECs, Eschelon modified its proposal on this issue to require only that, if Qwest performs or offers to perform this service for another CLEC during the ICA's term, it will notify Eschelon and offer to amend the agreement to provide this service on the same terms and conditions as provided to the other CLEC. This issue presents a straight-forward application of the prohibition against discrimination and Qwest's assertion that it has "no legal obligation" to perform cross-connects for Eschelon is contrary to that prohibition.[80] Although Qwest states that it intends to discontinue this offering on a "going forward basis," it remains that other CLECs have this service available under the SGAT and their current ICAs, including ICAs that were recently approved by the Commission between Qwest and AT&T and between Qwest and Covad. Qwest cannot, consistent with its obligation to not discriminate, offer such a UNE term under its ICAs with other carriers but refuse to make that term available under its agreement with Eschelon.

21. Access to 911 Databases: Issue 9-52[81]

Pursuant to the FCC's unbundling rules, as amended pursuant to the TRO, ILECs are required to provide nondiscriminatory access to call-related databases, including 911 and E911 databases.[82] In order to address Qwest's objection that it may not be required to provide unbundled access to 911 and E911 databases beyond that required under the FCC's unbundling rules, Eschelon's proposed language cross-references the applicable

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

[81] For Issue 9-51, *see* Subject Matter 22A below.

[82] *See* 47 C.F.R. § 51.319(f).

rule, 47 C.F.R. § 51.319, and makes clear that Qwest is required to provide unbundled access only to the extent required under that rule and the Act.

To the extent that Qwest continues to argue that 911/E911 databases are only available as part of unbundled local switching, the FCC expressly rejected that argument in the TRO. On page 12 of the TRO, the FCC said (with emphasis added): "When a carrier utilizes its own switches, *with the exception of 911 and E911 databases*, incumbent LECs are not required to offer unbundled access to call-related databases."[83] After the TRRO, the FCC issued its VoIP E-911 Order,[84] and again reiterated this point. In paragraph 38, the FCC said: "We note that the Commission currently requires LECs to provide access to 911 databases and interconnection to 911 facilities to all telecommunications carriers, pursuant to sections 251(a) and (c) and section 271(c)(2)(B)(vii) of the Act."

22. Unbundled Customer Controlled Rearrangement Element ("UCCRE"): Issue 9-53

Unbundled Customer Controlled Rearrangement Element ("UCCRE"), when available, enables Eschelon to control the configuration of UNEs or ancillary services on a Near Real Time basis through a digital cross connect device. Qwest argues that, because the FCC omitted a reference to "digital cross-connect systems" when it re-wrote the unbundling rule, it is not obligated to provide UCCRE as a UNE. Qwest is wrong for two reasons: (1) Qwest misinterprets the FCC's unbundling rule; and (2) aside from the FCC's identification of the network elements that must be unbundled pursuant to Section

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83 *See also* TRO ¶ 557.

84 *In the Matter of IP-Enabled Services and E911 Requirements for IP-Enabled Service Providers*, WC Docket Nos. 04-36 and 05-196, First Report and Order and Notice of Proposed Rulemaking (rel. June 3, 2005); *see also id.* fn. 128.

251, the prohibition on discrimination requires that Qwest provide Eschelon with UCCRE as a UNE, as it does other CLECs. Qwest's claim that other CLECs do not order this element is insufficient so long as other CLECs continue to have that element available to them. UCCRE remains generally available to other CLECs through Qwest's SGAT.

22A. Issue 9-51: Application of UDF-IOF termination (fixed) rate element (Section 9.7.5.2.1.a)

This issue concerns how the recurring rate for UDF-IOF terminations will apply. Eschelon has proposed two alternatives. The first alternative mirrors the language from Qwest's SGAT, so it is difficult to understand why this alternative is not acceptable to Qwest. Qwest, however, has proposed the addition of a phrase, providing that the rate applies "per cross-connect provided on the facility." The rate for this element will not change and it is unclear how Qwest believes that the addition of this phrase impacts the application of the rate. In order to address what Eschelon believes Qwest may be getting at with this phrase, Eschelon's second proposal includes language that clarifies that the rate applies to each of the end points of the facility.

23. Different UNE combinations: Issue 9-54 and 9-54(a)[85]

This dispute concerns the terms and conditions under which Qwest will make UNE Combinations available. Eschelon's proposal for the disputed sentence in Section 9.23.2 is identical to language in the Qwest-AT&T ICA approved by this Commission. Eschelon is also willing, as another option, to use the corresponding sentence from the Washington SGAT in this provision: ". . . Qwest will provision UNE combinations pursuant to the terms of this Agreement without requiring an amendment to this

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[85] For issues relating to Loop-Mux Combinations, see below at Issue 9-61.

Agreement, provided that all UNEs making up the UNE Combination are contained this Agreement. . . ."[86] In either case, Eschelon's proposal establishes that, if the individual elements to be combined are addressed in the ICA, Qwest must combine them without claiming an amendment is needed.

Qwest, in contrast, seeks to limit its obligation to provide UNE Combinations under the Agreement to those circumstances when "all individual UNE rates, terms and conditions included in the UNE Combination are contained in the Agreement." Qwest's proposal opens a potentially significant loophole that makes it possible for Qwest to insist on slightly different or additional terms, even though all of the elements making up the UNE Combination are in ICA. It would take little imagination to devise some allegedly new term that requires an amendment. Doing so leaves the CLEC with the alternative of either signing the unnecessary amendment or expending resources on an action before the Commission.

The second issue relating to UNE Combinations concerns the rate to be charged for such Combinations. As required by Section 9.23.2, Qwest must provision UNE Combinations when the elements making up that combination are contained in the ICA. The rates for each element are set forth in Exhibit A. Eschelon's proposal confirms that Qwest will not charge a recurring rate that is greater than the total of the recurring rates in Exhibit A for the combination. The need for this provision is particularly great given Qwest's position with respect to Section 9.23.2, as it causes concern that Qwest seeks to create such a rate and require CLECs to sign an amendment containing the new Qwest

[86] Washington SGAT § 9.23.2.

rate before CLECs can combine UNEs in their existing ICAs, even when each element already has a rate in Exhibit A.

24. Loop-Transport Combinations: Issue 9-55

The crux of the issue presented by these disputed sections is how Loop-Transport Combinations will be treated under the ICA, particularly if they involve commingling (*i.e.*, combining a UNE with a non-UNE). Qwest is attempting to position commingling so that, if any part of such a Combination is not a UNE, then the non-UNE's terms can dictate how the UNE is ordered, provisioned, and repaired. The Commission should retain its jurisdiction over the UNE component of Loop-Transport Combinations (including the UNE in a Commingled EEL) and ensure that terms that affect the UNE are included in the filed and approved ICA.

In Section 9.23.4, Eschelon has proposed a definition of "Loop-Transport Combination" which mirrors the way that the FCC has used that term, to define any combination of loop and transport.[87] The use of this defined term is efficient from a drafting perspective because it provides an umbrella that includes three of the types of Loop-Transport Combinations that are specifically addressed in the ICA currently – EELs, Commingled EELs, and High Capacity EELs – thus avoiding having to repeat all three terms throughout the document. Further, this proposed definition makes clear that only the UNE components of a Loop-Transport Combination are subject to the ICA. It also expressly states that, if no component is a UNE, the combination is not governed by the ICA, to eliminate any suggestion that the terminology is some kind of attempt to

[87] *See* TRO ¶¶ 25 & 575 (both using "loop-transport combinations"); *see also* TRO ¶ 599 ("We apply the service eligibility requirements on a circuit-by-circuit bases, so each DS1 EEL (*or combination of* DS1 loop with DS3 transport) must satisfy the service eligibility criteria."])(emphasis added).

govern non-UNEs in the ICA. Eschelon's proposed language also expressly recognizes that there is not currently a Qwest product called "Loop-Transport Combination." In other words, Eschelon has addressed each of Qwest's objections to these provisions in contract language, showing that Eschelon stands by its commitment that it is not attempting to do any of the objectionable things that Qwest has alleged may result from use of this accurate terminology.

25. Service Eligibility Criteria – Audits: Issues 9-56 and 9-56(a)

Qwest and Eschelon agree that Qwest shall have the right to conduct an audit to determine Eschelon's compliance with the Service Eligibility Criteria applicable to High Capacity EELs. Two issues remain to be resolved with respect to such audits. First, is Qwest entitled to conduct an audit "without cause"? Second, should Qwest be required to provide Eschelon with known information supporting its audit request?

Eschelon's proposal would allow Qwest to perform an audit when it has a concern that Eschelon has not met the Service Eligibility Criteria. Qwest has rejected this very modest limitation on its audit rights, in effect insisting that it should be able to conduct an audit without cause. The FCC held, however, that "audits will not be routine practice, but will **only** be undertaken when the incumbent LEC has a concern that a requesting carrier has not met the criteria for providing a significant amount of local exchange service."[88] Before Eschelon is put to the work and expense that an audit necessarily entails, Qwest should be required to have at least some reason to believe that there may be noncompliance that will be uncovered by an audit. Otherwise, the audit process

[88] *See* TRO at ¶621 (citing *Supplemental Order* 15 FCC Rcd. 9587, 9603-04, n. 86 (emphasis added); *see also Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Supplemental Order Clarification (2000), *aff'd sub nom. CompTel v. FCC*, 309 F.3d 3 (D.C. Cir. 2002).

becomes not a reasonable measure for assuring compliance, but rather, the very sort of "routine practice" that the FCC precluded. Eschelon's proposed language allows Qwest to fully protect its interest in verifying compliance with the Service Eligibility Criteria while protecting Eschelon from undue burden without cause.

Eschelon also proposes that Qwest be required to describe its concern regarding Eschelon's compliance with the Service Eligibility Criteria and that Qwest be required to identify any non-complying circuits that it has identified. Eschelon's proposal would require Qwest to provide information that may allow Eschelon to respond to Qwest's articulated concerns and further early resolution.

Eschelon's notice proposal is not burdensome. Qwest knows the reason for its concern and must merely state it. In addition, the language states only that Qwest will provide, upon request, a list of allegedly non-complying circuits "if any" only if Qwest has identified such circuits "as of that date." If Qwest has a list of non-complying circuits, there is no reason for it to not provide that information to facilitate root cause analysis and allow CLEC to respond fully. If Qwest does not have such a list, the language places no burden on Qwest to create one.

26. Commingled EELs/arrangements: Issues 9-58, 9-58(a)-(e), and 9-59[89]

a. Ordering, billing and circuit ID for Commingled Arrangements

Eschelon proposes use of a single LSR, single circuit ID, and single bill for point-to-point Commingled EELs, just as Qwest provides a single LSR, single circuit ID, and single bill for point-to-point UNE EELs today. This proposal is based on the fact that a

[89] Qwest's Petition refers to "Issue No. 57: Intervals for Commingled Arrangements." As reflected on the Disputed Issues Matrix, intervals for Commingled Arrangements are actually addressed as Issue No. 58(e).

commingled EEL is nothing more than a point-to-point circuit with multiple segments. As such, it is a network facility that Qwest has been provisioning, maintaining and repairing for decades, whether in the form of a special access circuit, an EEL or, now, a commingled EEL. Thus, there is absolutely nothing new about a commingled EEL from a technical, network, provisioning or maintenance standpoint. Therefore, the terms based upon well-established history proposed by Eschelon should be acceptable to Qwest.

Instead, desiring to drive as much wholesale commingled EEL traffic to its exorbitantly priced retail tariff products as possible, Qwest proposes fundamental operational changes that ensure both a terrible End User Customer experience and the complete inability of any CLEC to actually and successfully use the commingled EEL product. In other words, Qwest's proposal is reminiscent of Qwest's initial proposals when UNE-P was first introduced when Qwest also tried to make ordering and provisioning of UNE-P so difficult as to render it useless. Qwest's proposed operational changes will delay provisioning of commingled EELs, interfere with proper testing of the commingled circuit, and unnecessarily complicate billing. Since these changes are unnecessary to accomplish Qwest's stated purposes, and their ultimate impact and effect is transparently anti-competitive, Qwest's proposed language for these provisions should be rejected.

Alternatively, if the Commission does not accept Eschelon's proposal with respect to ordering commingled EELs on a single order form, billing such arrangements on a single bill, and assigning commingled circuits a single circuit ID, Eschelon requests that Qwest be required to relate the non-UNE and UNE portions of the commingled arrangement so that Eschelon can easily identify the facilities that are combined. Absent

an identified relationship between the UNE and non-UNE segments of an EEL, no CLEC can feasibly use a commingled EEL. This would not be an acceptable implementation of the FCC's mandate to eliminate restrictions on commingling.

b. Intervals for Commingled Arrangements

For commingled arrangements, including Commingled EELs, Eschelon proposes that the interval be the longer interval of the two facilities being commingled. Although Qwest's proposal, on its face, appears to be similar, Eschelon's proposal allows the Commission to retain full jurisdiction over the UNE while Qwest's proposal allows factors outside the approved ICA to change the operation of the UNE terms, in contradiction to the ICA. For example, Qwest's language in Section 9.23.4.5.4 appears to allow a CLEC to order a UNE loop and tariffed transport on separate service requests on the same day and then, pursuant to Section 24.3.2, calculate the interval. If that were true, the result would be the same as under Eschelon's proposed language and the longer interval would be the latest date for installation of the two services. That, in fact, is not how the interval will be determined. That is because Qwest, through its PCAT, requires the UNE and the non-UNE parts of the circuit to be ordered consecutively, which lengthens the total time required (i.e., the latest date for installation of the two services is pushed out).

c. Maintenance and Repair for UNE Component of Commingled EELs

Unlike Eschelon, Qwest does not propose repair language for the UNE component of commingled EELs. Qwest proposes deletion of Eschelon's language. This, combined with the fact that Qwest leaves the UNE repair language unchanged, could suggest that repairs for the UNE component of the EEL will remain unchanged.

Information that Qwest has posted on its website, without obtaining Commission approval or even using CMP, tells a different story.

Currently, for UNE EELs, CLEC opens a trouble report and Qwest assigns a trouble ticket number.[90] When CLEC opens the ticket, the clock starts running under the PIDs for mean time to repair.[91] For Commingled EELs, however, Qwest requires CLECs to use a different process that adds delay for CLEC Customers while building in protection against PID payments for Qwest. Like the consecutive placement of orders required for commingled arrangements, this is also a consecutive process, with special access first. When a CLEC Customer served by a commingled EEL experiences a service affecting problem, Qwest requires the CLEC to first submit an Assist Ticket (AT) on the special access portion of the EEL, even though the trouble may be on the loop portion of the circuit. An AT does not start the clock running under the PIDs for mean time to repair. Only if Qwest does not find trouble on the special access portion of the EEL will Qwest will contact the CLEC and ask the CLEC to open a repair ticket on the loop portion of the EEL.

The Customer is out of service the entire time and does not know or care whether the trouble is in one circuit or the other. The Customer just wants it repaired. This process will certainly delay repair time for the Customer's service when the trouble is in the loop, but that additional delay will not affect Qwest's PID performance under the ICA.[92]

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90 *See* ICA Section 12.1.3.3.3.1.1.

91 *See* ICA Exhibit B (MR-5).

92 *See* ICA Exhibits B & K.

If Eschelon opens trouble tickets on both circuits (UNE and non-UNE), this increases the likelihood of incurring additional charges because Qwest is choosing to treat them as multiple circuits instead of one point-to-point circuit (with one circuit ID). Finding trouble on both circuits of a commingled EEL at the same time is likely rare. Much more likely is that the trouble is on one circuit or the other, but the parties do not know which one. If Eschelon simultaneously opens a ticket on both circuits (assuming Qwest accepts them) to avoid delay, Qwest will code one ticket as no trouble found (NTF) in every case in which the trouble is on one of the two circuits. Qwest charges the CLEC maintenance of service charges on tickets that Qwest codes as NTF. Eschelon has to do more work to open and track more tickets, while paying Qwest more charges.

27. Multiplexing (Loop-Mux Combinations): Issues 9-61 and 9-61(a) – (c)

Qwest has offered unbundled multiplexing in three ways: as part of a multiplexed EEL, as part of a Loop-Mux Combination, and as a stand alone UNE. The Commission has set TELRIC rates for unbundled multiplexing and the UNE rates established for loops and transport include the cost of multiplexing where appropriate. Multiplexing is a "feature, function, or capability" associated with both unbundled loops and transport and, pursuant to the FCC's unbundling rules, Eschelon is entitled to use that feature, function, or capability.[93] In addition, the definition of "Routine Network Modification" (to which the parties have agreed) states that this term means "activities of the type that Qwest undertakes for its own End User Customers" and expressly includes "deploying a new multiplexer or reconfiguring an existing multiplexer."[94] In this arbitration, however,

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93 *See* 47 C.F.R. § 51.307(c).

94 *See also* 47 C.F.R. § 51.319(a)(7).

Qwest claims that it need not provide multiplexing at the TELRIC rates established by this Commission.

Although Eschelon disagrees, Eschelon's position in this arbitration only requires Qwest to provide multiplexing at UNE rates when the loops and/or transport connected to the multiplexer are UNEs. This would include providing multiplexing at UNE rates in connection with multiplexed EELs (*i.e.*, a combination of loop and transport where the loop and transport components have different bandwidths and multiplexing is necessary to connect the facilities) and also as part of a Loop-Mux Combination when unbundled loops are connected to the multiplexer and the multiplexer is connected to Eschelon's collocation, with no transport provided.

Qwest's contention that it is not required to provide unbundled multiplexing in connection with Loop-Mux Combinations is apparently based on the *Virginia Arbitration Order*.[95] Qwest's reliance on that decision is misplaced, however. First, Qwest's argument ignores the procedural posture of the *Virginia Arbitration Order*. The decision was the result of an arbitration by the FCC's Common Carrier Bureau, acting in the stead of the Virginia state utilities commission, pursuant to 47 U.S.C. § 252(e)(5), where the state commission did not carry out its responsibilities. Accordingly, the decision is no more binding on this Commission than would be the decision of any other state commission.

Second, Qwest ignores the very limited scope of the Common Carrier Bureau's decision on this issue. As the Bureau noted, WorldCom withdrew its claim that it was

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[95] Memorandum and Order, In re Petition of WorldCom, Inc., Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia Corporation Commission Regarding Interconnection Disputes With Verizon Virginia Inc., and for Expedited Arbitration, CC Docket No. 00-28, 17 FCC Rcd 27039 (2002).

entitled to "Loop Concentrator/Multiplexer" as a network element.[96] Accordingly, the Bureau did not need to reach the substantive issue presented here. Furthermore, the Bureau specifically emphasized that its decision should not be interpreted as an endorsement of the Verizon position regarding the availability of unbundled multiplexing associated with Loop-Mux Combinations: "We emphasize that our adoption of Verizon's proposed contract language on this issue *should not* be interpreted as an endorsement of Verizon's substantive positions expressed in this proceeding regarding its multiplexing obligations under applicable law."[97] Thus, the *Virginia Arbitration Order* cannot, by its plain terms, be read as limiting the ILEC's obligations to provide unbundled multiplexing.

Loop-Mux Combination refers to the combination of a loop and multiplexing equipment. Regardless of whether Qwest must provide unbundled multiplexing, the UNE Loop is a component of the Loop-Mux Combination. Therefore, it is appropriate that 9.23.2, which sets forth general terms and conditions for UNE Combinations, include Loop-Mux Combinations.

28. Microduct rate: Issue 10-63[98]

Qwest provides CLECs access to available ducts/conduits for the purpose of placing telecommunications facilities. Duct/conduit are leased for copper facilities only, while an innerduct is leased for the purpose of placing fiber. As an alternative to leasing microduct from Qwest, CLECs can place innerducts in an empty duct/conduit. Agreed upon language in 10.8.1.2.3 provides: "The term microduct means a smaller version of

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96 Virginia Arbitration Order at ¶487.

97 *Id.* at ¶ 490 (emphasis added).

98 Qwest appears to have omitted Issue 10-63 from the body of its Petition. The Disputed Issues Matrix, however, identifies this as a disputed issue.

innerduct. Four (4) microducts can be placed within a one and one-fourth (1 ¼)-inch innerduct."

In Qwest's microduct cost study, Qwest allocates some of the cost of the innerduct to the microduct cost. Qwest uses a 50% capacity factor in its microduct cost study. Eschelon proposes this same allocation be used when assigning innerduct cost to CLECs placing their own microduct. In order for a CLEC to place its own microduct, there must be space available in the innerduct. This means that Qwest has spare capacity that is not being used. Qwest's proposal to charge for the entire innerduct amounts to over recovery. Even though the capacity of an innerduct is equivalent to four (4) microducts, Eschelon proposes that when Eschelon places microduct inside an innerduct, Eschelon pay half of the cost of the innerduct. This amounts to a 50% capacity factor.

29. Root cause analysis and acknowledgement of mistakes: Issues 12-64 and 12-64(a) – (b)

Eschelon has proposed that it be entitled to obtain from Qwest a root cause analysis and/or acknowledgement of a Qwest mistake that impacts an Eschelon Customer. Eschelon's proposal tracks a commission decision by the Minnesota Commission.[99] In Minnesota, Qwest agrees to the majority of this language, and only sub-issues are being arbitrated. Therefore, at least the majority of these terms will be implemented in Minnesota and thus could also be implemented in Washington. Qwest, however, would like the parties' ICA in all states other than Minnesota to be silent regarding the entire investigative/ acknowledgement issue. Qwest can point to no state-specific reason why the terms should vary by state, so that Customers in Minnesota may

[99] Order Finding Service Inadequate and Requiring Compliance Filing, *In the Matter of a Request by Eschelon Telecom for an Investigation Regarding Customer Conversion by Qwest and Regulatory Procedures,* Docket No. P-421/C-03-616, (July 30, 2003).

receive these explanations, but not Washington Customers.

As the Minnesota Commission recognized, without a requirement for Qwest to acknowledge mistakes, Eschelon is unable to assign a Qwest error to the correct company --making it likely that the End User Customer will ascribe the resulting service defect to Eschelon as the Customer's immediate provider. Nearly all CLEC Customers are hard-won from Qwest, the dominant monopoly provider of 100 years. If such a Customer believes that Eschelon's actions have caused a service disruption, the Customer is very likely to return to its former provider. If the error was really caused by Qwest, the lack of attribution is another barrier to Eschelon's meaningful opportunity to compete.

The ability to request a root cause analysis will enable Eschelon (and Qwest) to identify the cause of mistakes and will help avoid similar mistakes in the future. Qwest complains that Eschelon is attempting to "dictate" Qwest's investigation of errors, the implication being that whether Qwest performs such an investigation is none of Eschelon's business. Of course, it is Eschelon's business because repeat or systemic problems in Qwest's provisioning of wholesale services to Eschelon adversely affects Eschelon and Eschelon's Customers each time they occur.

30. Communications with Customers: Issues 12-65 and 12-66

a. Repair

Although there is agreed upon language in the ICA that prohibits parties from making disparaging remarks about one another, that language is in the context of telephone "calls." When a Qwest technician is at the premises of an Eschelon Customer on behalf of Eschelon, there is an opportunity for the technician to talk to the Customer in person and not by telephone. Eschelon is required to test and isolate trouble to Qwest's

network before submitting a trouble report. (*See* Section 12.4.1.1.) Therefore, generally the Qwest technician will be at the premises because of a potential Qwest network problem. The Customer will associate the problem, however, with its provider, Eschelon. This is a particularly inopportune time for a Qwest technician to make disparaging comments about Eschelon or to make favorable comments about Qwest's products.

Eschelon's proposed language closes gaps in the existing language to ensure that the Qwest technician does not make disparaging comments outside of calls (*e.g.*, in person) and that the Qwest technician not only does not discuss CLEC's products but also does not discuss Qwest products while working on CLEC's behalf. If it is part of Qwest's practices to allow Qwest's technicians to engage in such behavior, there is no legitimate reason why Qwest should object to this language.

b. Winbacks

Eschelon has proposed language that prohibits Qwest from using Qwest-caused service problems as an opportunity to attempt to "win back" the Customer. Rewarding Qwest with a marketing opportunity when its actions or inactions cause an Eschelon Customer to contact Qwest regarding a service issue would create a perverse incentive for the company to induce such opportunities, or at least to be lax in guarding against them. If Qwest does not intend to engage in such improper winback activity, it should be agreeable to such language.

With respect to both Issues 12-65 and 12-66, Qwest argues that the language proposed by Eschelon impermissibly restrains Qwest in its exercise of its First Amendment rights. This argument was rejected in *US WEST Communications, Inc. v.*

Hix.[100] In that case, the ILEC, US West argued that its First Amendment rights were violated by an ICA provision requiring that US West remain silent about its own services when it communicated with CLEC Customers on behalf of the CLEC.[101] The court rejected the argument, finding that the provision satisfied the Supreme Court's test for lawful restraint of commercial speech and went no further than necessary to achieve the goal of the Telecommunications Act.[102]

31. Expedited orders: Issues 12-67 and 12-67(a) – (g):

An expedited order, or an "expedite," is an order for which Qwest provides service more quickly than it otherwise would under the regular interval. For example, if the interval for a particular UNE is five days, Qwest can expedite the order for that UNE by providing it in less than five days. Under certain circumstances, an Eschelon Customer may need service by a certain date, such as the date of the grand opening of its business or some other important event, or may need service restored following a disaster, such as a fire or flood that might require the Customer to have to move to different offices on short notice. Eschelon's language proposal related to expedited orders reflects the terms offered by Qwest today in Washington for expedites in these types of "emergency" situations ("the emergency-based Expedites Requiring Approval process"). Of the 14 Qwest states, Washington is the only state in which Qwest continues to offer those terms at this time, because Qwest has discontinued the practice in the other states, over CLEC objection. Washington is also the only state in which Qwest offers no expedite capability at all for UNE loops when these "emergency" conditions are not

100 57 F.Supp.2d 1112 (D. Colo. 1999).

101 57 F.Supp.2d at 1114.

102 57 F.Supp.2d at 1115.

present, even when a CLEC is willing to sign an expensive Qwest amendment containing a $200 per day advanced rate, which Qwest offers in the other states (the "fee-added Pre-Approval Expedite" process). These facts are not apparent from the current approved Qwest-Eschelon interconnection agreement, which would provide Eschelon expedite capability in all of these circumstances, if Qwest adhered to those terms.[103] Nor are these facts apparent from Qwest's wholesale tariff in Washington. That tariff provides for an ICB rate, does not itemize all of Qwest's recognized "emergency" conditions, and does not state that, despite the presence of expedite terms and an ICB rate, Qwest will not expedite UNE loop orders at all in some circumstances.[104]

Instead, the only method of determining these facts – which affect Eschelon's business, the charges it pays, and delivery of service to its Customers – is to ignore the approved interconnection agreement and the Qwest tariff and consult Qwest's PCAT. Only there does Qwest state the terms and conditions upon which it actually offers expedites in Washington today.[105] Qwest's proposal is to continue that confusing situation going forward, while allowing Qwest the flexibility to change those terms and

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[103] *See* Qwest-Eschelon approved Washington Interconnection Agreement, Attachment 5, provides, *e.g.*: "3.2.2.13 Expedites: U S WEST shall provide CO-PROVIDER the capability to expedite a service order. Within two (2) business hours after a request from COPROVIDER for an expedited order, U S WEST shall notify CO-PROVIDER of U S WEST's confirmation to complete, or not complete, the order within the expedited interval." Qwest's position is that the Commission has approved an ICB rate for expedites (*see* Exhibit A, Section 9.20.14 – Qwest does not use footnote 1, which would indicate an unapproved rate). Qwest's basis for not providing expedites despite this ICA language, therefore, is not that there is no approved rate (as it may argue in other states).

[104] *See* WN U-42 Interconnect Service Tariff Sections 3.1 & 4.1; WN-U44 Access Service Tariff, Section 5.2.

[105] In its PCAT, "Qwest currently has the following two statements addressing the state of Washington: 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). -- The Pre-Approved expedite process is available in all states except Washington for the products listed below when your ICA contains language for expedites with an associated per day expedite charge." *See* Qwest Nov. 18, 2005 Response to Covad CMP comments at http://www.qwest.com/wholesale/downloads/2005/051118/PROS.11.18.05.F.03492.FNL_Exp-EscalationsV30Qwest%20Response.doc.

conditions through its PCAT without Commission oversight. To assure that Eschelon continues to have available a means of obtaining expedited service in a manner that meets its business needs and the needs of its Customers, and to avoid the potential for future disputes regarding the terms and conditions applicable to expedited service, Eschelon asks that the Commission adopt Eschelon's proposed expedite provisions.

a. Emergencies

Qwest must provide access to UNEs on nondiscriminatory terms for all CLECs (facility-based and non-facility based), as well as for Qwest itself.[106] Qwest, including its predecessor USWC, historically provided expedites for no additional charge when certain "emergency" conditions were met. Qwest recovered its costs through Commission approved charges, because, when providing expedited service, Qwest performs the same work (as the work included in the installation NRC), but just performs that work earlier. Therefore, the expedites are not "free" but are included in those costs. Upon information and belief, Qwest continues to do so for its own retail Customers. Qwest also continues to grant expedite requests at no additional charge in the emergency situations to CLECs that use exclusively Qwest facilities via QPP or resale without amendment of their ICAs. In contrast, when a facilities-based CLEC such as Eschelon uses a loop to provide the same functionality and service as a Qwest retail Customer or a CLEC ordering resale voice or QPP, Qwest now refuses to grant expedite requests at no additional charge in the Emergency situations in states other than Washington. Qwest's refusal to agree to Eschelon's language in Washington that captures these "emergency" conditions suggests that Qwest may intend to change course in Washington as well. Qwest has claimed that

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[106] *See* 47 C.F.R. 51.313.

it may change course because there is no "retail analogue" for loops. As discussed with respect to intervals (see Section 1.7.2 above), however, the FCC stated specifically that the test for a "meaningful opportunity to compete" when there is no retail analogue is no less rigorous than the test when there is one.[107]

Eschelon's language proposals for Section 12.2.1.2 and subparts reflect the terms offered by Qwest today in Washington (and previously in its other states as well). Stating those terms in the ICA will provide certainty to the parties as to when orders may be expedited and at what rate.

b. Fee-Added Charges for "non-emergency" expedites

If the "emergency" conditions described in Section 12.2.1.2.1 are not met, Eschelon offers to voluntarily pay additional charges for expedites, even though Qwest has established no cost-based rate to expedite orders. Eschelon and Qwest do not agree as to that rate. Qwest's proposal for a charge for expediting orders has varied over time and by state. At times, Qwest has proposed language in Exhibit A that states "$200 per day advanced" (which is the rate in its tariff and in its template ICA amendment that Qwest currently requires CLECs to sign in many cases before it will provide expedited treatment for orders – regardless of other expedite language in the CLEC's current ICA). At other times, Qwest has proposed a reference to its federal tariff for this rate (instead of inserting the dollar amount in Exhibit A), claiming that state commissions do not have jurisdiction to decide a rate because expediting a UNE order is "not a UNE" and therefore the UNE standard does not apply. At this time, in this case, Qwest is proposing

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[107] Memorandum Opinion and Order, In the Matter of the Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York, FCC 99-404, CC Docket No. 99-295 (rel. December 22, 1999) ("NY 271 Order").

"ICB" in Exhibit A for Washington. Because Qwest has a known policy of charging a standard $200 per day advanced for expedited loop orders for all loop orders in other states (*i.e.*, not varying rates depending on the facts in individual cases), however, the Commission should examine whether Qwest is using the "ICB" designation as a means to impose its own unapproved rate.

Qwest's proposed ICB rate must be viewed in the context of the language of the ICA. The proposed ICA contains a definition of "ICB" that includes long intervals that are inconsistent with the need to expedite orders, but Qwest has not proposed any language to address an expedite situation. For example, Section 2.1 of Exhibit I to the proposed ICA provides in agreed upon language: "For those products and services identified in the SGAT that contain a provision for ICB rates, Qwest will provide CLEC with a written quote of the ICB rate within twenty (20) business days unless a specific interval for providing the quote is either contained in the SGAT or this Exhibit." Qwest has shown no need to prepare a quote in these situations, and certainly 20 days is an unacceptable amount of time. A loop order generally has a five-day interval, and when requesting an expedite, Eschelon is seeking to shorten it to less than five days. Qwest's PCAT currently states that Qwest will charge for expedites on a per day basis. Given Qwest's position on CMP issues, Qwest may at some point combine its Exhibit A proposal of an ICB rate with its PCAT language to charge Eschelon a per day rate in Washington, if the issue is not settled by ICA language adopted in this arbitration. Qwest is demanding (over Eschelon's objection) a $200 per day advanced in other states before it will process expedited orders for UNE loops (even when the "emergency" conditions are met).

The Commission needs to provide clear language in the ICA to avoid the same situation in Washington. Qwest's PCAT states: "Requesting an expedite follows one of two processes, depending on the product being requested. If the request being expedited is for a product contained in the "Pre-Approved Expedites" section below, your ICA must contain language supporting expedited requests with a "per day" expedite rate. If the request being expedited is for a product that is not on the defined list, then the expedited request follows the process defined in the "Expedites Requiring Approval" section below."[108] Qwest has provided no cost support for a per day rate, whether that rate is charged at a specified dollar amount or on an ICB basis.

Expedited treatment of UNE orders is obtained for purposes of accessing that UNE and, as such, are subject to the FCC's TELRIC rules when determining charges for those rates. This conclusion follows directly from the FCC's language regarding "access to unbundled elements" reflected in 47 CFR §51.307 and 51.313. In ¶268 of its *First Report and Order*, the FCC similarly found that the requirement to provide "access" to UNEs must be read broadly, concluding that the Act requires that UNEs "be provisioned in a way that would make them useful." As evident from these citations, an unbundled network element includes not only the physical facility, but also all the capabilities of providing service, such as provisioning and maintenance and repair. (*See also* Issue 9-31 above.) As accurately summarized by the North Carolina commission in a recent BellSouth proceeding, "[t]he Commission also believes that expediting service to Customers is simply one method by which BellSouth can provide access to UNEs and that, since BellSouth offers service expedites to its retail Customers, it must provide

[108] *See* http://www.qwest.com/wholesale/clecs/exescover.html

service expedites at TELRIC rates pursuant to Section 251 of the Act and Rule 51.311(b)."[109] (*See NC Access to UNEs*, p. 47.) Based on this reasoning, the North Carolina Commission affirmed its initial decision that BellSouth must provide service expedites at TELRIC-compliant rates.

It seems highly unlikely that Qwest's per day PCAT fee has any recognizable relationship to underlying costs that may be incurred by Qwest to expedite an order. Under an expedite request, Qwest performs the same work it would undertake under generally applicable service date intervals, with the main difference being that this work is performed earlier. Clearly, the simple fact that the work is performed earlier does not necessarily mean that it costs more to undertake the very same activities. The only cost that Qwest *may* incur would be the cost of processing the expedite order – which is likely to be relatively small. For example, Qwest's SGAT in some states contains a commission-approved rate that may be considered a proxy, or at least a ballpark estimate, of the likely additional costs (over and above the applicable NRC, if any) that Qwest would incur for processing an expedite order. This rate is the charge for Date Change of $9.59 (manual) and $6.40 (mechanized) per date change. (*See*, *e.g.*, SGAT Section 9.20.12.) It is not clear that an expedite request causes Qwest to incur any increased cost beyond those already accounted for in its existing NRCs for the normal provisioning interval. In such circumstances, an expedite fee of, for example, $200 per day advanced (which could be as high as $1,000 to shorten a normal service date interval of 5 days) would be duplicative of its existing NRCs and as such, wholly inappropriate given the FCC's pricing rules and previous decisions of this Commission. 47 CFR § 51.507

[109] *Re NewSouth Communications Corp.*, 2006 WL 707683 at *47 (N.C.U.C. February 8, 2006).

requires that "[e]lement rates shall be structured consistently with the manner in which the costs of providing the elements are incurred." The only likely cost of performing a job five days earlier than the standard interval is the cost of processing of the expedite order. This cost is a per-order, not per-day cost. Because it is hard to imagine circumstances that would drive costs of an expedite request to be per-day-based, Qwest's unilateral decision to implement a per-day rate structure through its PCAT indicates that this rate is not cost-based.

The Commission should establish a cost-based rate at the appropriate time and, if not set in this arbitration, set an interim rate here until that rate is set. Eschelon has proposed for an interim rate a one-time charge of $100 (which is as much or more to expedite an order than to ***install*** a loop, even in states with higher NRCs), subject to the exceptions for emergency conditions that Qwest had routinely applied at no additional charge in past years in other states and still applies in the state of Washington.

Eschelon reserves its right to a cost-based rate if litigated in a cost case and thus proposes its rate as an Interim Rate.

31A. Supplemental Orders: Issue 12-68[110]

As indicated in agreed upon language in Section 12.2.3.1, supplements add to or change an already existing, previously submitted LSR or ASR. In other words, the order is still in the pipeline when CLEC submits its supplemental request. Qwest does not charge a separate charge for submitting such supplements, as they are part of the routine process for ordering products from Qwest. Eschelon's proposals both accurately state there is no charge and require no change by Qwest. If Qwest seeks at some point to

[110] This issue is not addressed in the body of Qwest's Petition, but it is identified on the Disputed Issues Matrix.

begin charging separately for submitting supplements, Qwest would need to either negotiate a rate or obtain an ordered rate from the Commission. In either case, the Agreement would be modified to reflect that rate. Until then, specifically stating in the Agreement that there is no charge will avoid later disputes and promote administrative efficiency.

32. Pending Service Order Notifications ("PSON"): Issue 12-70

Eschelon uses the currently available Pending Service Order Notifications (PSONs) to identify ***Qwest errors*** in the processing of Eschelon's orders before and on the due date. Although Qwest quality control is not Eschelon's job, the alternative is to find out about the error the hard way – when the Eschelon End User Customer complains before or on the due date that its service is down or not what the Customer ordered, due to a Qwest error. When CLEC submits an LSR to Qwest, Qwest creates (either manually or electronically) internal service orders to implement the LSR. There may be multiple Qwest service orders per each LSR. If the information in a Qwest service order differs from the information on the LSR (*e.g.*, due to a typo in a manually typed service order), the End User Customer's service may be harmed because Qwest will deliver a service different from what ordered or possibly even disconnect the service in error per the erroneous Qwest service order.

To attempt to reduce the frequency of service affecting problems on the due date resulting from Qwest service order errors, Eschelon requested that Qwest provide information from the Service and Equipment (S&E) section of the Qwest service order to CLECs before the due date, so that CLECs could compare them to obtain corrections before the due date. After four years, the result of this request is that Qwest now

provides a Pending Service Order Notification ("PSON") to CLECs about an hour after the FOC is received. The PSON provides service order detail (*e.g.*, features/USOCs from the S & E section and address and listing detail from the listings section of the Qwest service order) to requesting CLECs. Although resource-intensive to do so, Eschelon strives to compare the information for accuracy. As long as Qwest provides the S&E and listings information from the Qwest service orders on the PSONs, Eschelon can compare the PSONs to the LSRs to ensure that Qwest will deliver the service requested (*e.g.*, 900 blocking).

Eschelon relies heavily on the S&E and listings sections of the PSON in particular. If Qwest alters the PSON to eliminate detail contained in the S&E and listing sections, the useful purpose that the PSONs currently serve would be defeated. An error in the bill section is a billing problem for Eschelon, but it generally does not impact the End User Customer for that LSR. Errors in the S&E and listings section, however, are much more likely to be Customer affecting.

The key difference between Qwest's proposed language and Eschelon's proposed language is that Qwest will not commit to continue to provide "at least the data in the service order's Service and Equipment (S&E) and listings sections." Eschelon's proposal does not require any change by Qwest. If Qwest seeks to change the PSONs to eliminate data from the S&E and listings sections, it may do so by amending the ICA.

33. Jeopardies: Issues 12-71, 12-72 and 12-73

A "jeopardy" is a situation in which Qwest is in danger of failing to meet the Due Dates of an order; as such, jeopardies directly impact the quality of the service that Eschelon is able to provide to its Customers. Jeopardies are categorized based on which

company has caused the jeopardy. Which company must take action to remedy the jeopardy, whether performance measures are met and, in some cases, whether non-recurring charges are due may depend on which company is at fault.

Because of the importance of correctly categorizing jeopardies, Eschelon has proposed certain contract provisions that are designed to assure that jeopardies are correctly categorized. Thus, Eschelon has proposed that a jeopardy caused by Qwest will be classified as a Qwest jeopardy and a jeopardy caused by the CLEC will be classified as a Customer Not Ready ("CNR") jeopardy. (Issue 12-71.) Another provision requires Qwest to reclassify jeopardies that it has incorrectly classified as CNR jeopardies. (Issue 12-73.)

Eschelon has also proposed language to address one scenario in particular that leads to unfair and Customer affecting results if Qwest incorrectly characterizes a jeopardy as a CLEC (CNR) jeopardy rather than a Qwest jeopardy. This occurs when, after CLEC submits its LSR, Qwest sends a Qwest jeopardy notice to CLEC. The jeopardy notice may indicate, for example, that there is a Qwest facility issue. After sending that notice, Qwest clears the Qwest jeopardy (such as by locating available facilities). Qwest, however, does not inform Eschelon that the jeopardy has been cleared and is no longer an obstacle to delivering the facilities. Eschelon, however, because it has received no notice from Qwest, has no reason to expect delivery and it has not planned resources or Customer access for a delivery that it has no reason to expect.

Despite Qwest's failure to inform Eschelon earlier that Qwest cleared the jeopardy and its failure to provide a due date, Eschelon's proposal states that Eschelon will still use its best efforts to accept the service. Thus, any further disruption or delay in

service is a direct product of Qwest's jeopardy action or inaction and subsequent failure to send a FOC, not of the Eschelon's unwillingness to mitigate the consequences. If the obstacles are too great because of Qwest's conduct and Eschelon cannot accept delivery at the time, Qwest should not classify the consequences of Qwest's conduct as an Eschelon (CNR) jeopardy.

If a jeopardy is classified as a CNR, the due date will get pushed out by at least three days, even though Eschelon may be ready to accept delivery earlier, such as the next day. Also, if it is a CNR, Qwest benefits under the PIDs because, even if Qwest has missed the due date due to a Qwest jeopardy, Qwest is off the hook because it is now classified as a CNR. Placing a jeopardy into CNR category erases any prior history of the situation, even if Qwest had previously caused a jeopardy situation for an installation.

Under the circumstances described above, it is Qwest's conduct, in not notifying Eschelon that the jeopardy has been cleared, that has prevented Eschelon from being able to accept delivery. This is truly a Qwest jeopardy and should be classified as such.

Qwest proposes to exclude all of Eschelon's language in Section 12.2.7.2.4.4 and subparts from the ICA and replace it with a reference to its unfiled PCAT. The classification of jeopardies as being a "Qwest jeopardy" or a CNR and the consequences of such classification are appropriate subject matters for an ICA. For example, agreed upon language in Sections 9.2.2.9.3 and 9.2.2.9.4 deals with whether a jeopardy is a "Qwest jeopardy" and what happens if it is. Like Eschelon's proposed language here, those closed provisions provide that, if it is a Qwest jeopardy, "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."

34. Fatal Rejection Notices: Issue 12-74

Issue 12-74 relates to "Fatal Errors," which are situations when Qwest does not have the data necessary to process an Eschelon order. In valid Fatal Reject situations, Qwest sends Eschelon a "Fatal Rejection Notice" that describes the action Eschelon requested, the problem encountered, and what Eschelon must do next to remedy the situation. In some cases, however, Qwest's rejection of the order is in error (because, for example, Eschelon did provide the data necessary to process its order).

Eschelon's proposal provides that, if Qwest knows that it has rejected a CLEC order in error, Qwest will resume processing the order without requiring a supplemental order. This provision is reasonable because, but for the Qwest error in rejecting the order, Qwest would have continued processing CLEC's initial order and no supplemental order would have been necessary. Eschelon's proposal requires no change by Qwest, as this describes Qwest's practice today.

Qwest and Eschelon agree that the ICA should list Fatal Rejection Notices as a type of order status notice that Qwest should provide on a nondiscriminatory basis. (See 12.2.7.2.6.) Qwest was also willing to insert language obligating Eschelon - for the term of the ICA unless amended - to resubmitting service requests when an order contains a Fatal CLEC error (*i.e.*, an error that prevents further order processing). (See agreed upon language in Section 12.2.7.2.6.1.) Thus, when it is an Eschelon error, Qwest agrees that the subject matter and level of detail are appropriate for inclusion in an interconnection agreement. (*See id.*) However, Qwest claims the topic of its own obligations on the exact same subject matter does not belong in the ICA but should only be dealt with in the PCAT. Eschelon's proposal in Section 12.2.7.2.6.2 fairly and reasonably deals with the

reverse situation, at the same level of detail, when the Fatal Rejection is the result of a Qwest error. In contrast, Qwest does not explain how one half of the equation is suitable ICA material and the flip-side, which would similarly obligate Qwest, is not.

35. Tag at demarcation point: Issues 12-75 and 12-75(a)

The Demarcation Point is the hand-off point between Qwest and Eschelon. If either company cannot find that hand-off point when it comes time to install or repair facilities at the Demarcation Point, it is a problem. The installation or repair will either not occur or be delayed and the End User Customer's service may be impacted or delayed as a result. Finding the Demarcation Point is not always easy. For business Customers in a multi-tenant environment, for example, there could be hundreds of possible locations. If Eschelon is not provided with the correct location, Eschelon is unlikely to find it. Therefore, when needed, Qwest provides CLECs with identifying information about the Demarcation Point's location (*e.g*, binding post information). Qwest also generally "tags" the Demarcation Point, meaning that Qwest physically marks it with identifying information (such as telephone number or circuit ID).

Because of the importance of knowing the location of the Demarcation Point, Eschelon's proposed language outlines these terms and conditions. Eschelon's proposal requires no change by Qwest, as Qwest does this today. Qwest proposes to exclude these terms from the ICA and replace all of Eschelon's ICA proposal with a reference to its web-based PCAT.

36. Loss and Completion Reports: Issues 12-76 and 12-76(a)

Loss and Completion Reports are daily reports that Qwest provides to notify Eschelon when an End User Customer changes to a different local service provider (a

"loss") and when activity other than losses (such as changes to service) occur on an account ("completions"). A primary problem with these reports historically was that the reports did not provide CLECs with the intended ability to identify which Customers have left the CLEC for another carrier. This was a significant issue that could adversely affect the CLEC's reputation, uncollectible revenues and the End User Customer's service. For example, if Eschelon is not aware that a Customer has left (a "loss"), Eschelon continues to bill the End User Customer. The End User Customer would likely not understand why Eschelon would not know that the Customer has left. The End User Customer may get upset, which reduces Eschelon's chances of successful collection of the legitimate charges due from the End User Customer. Loss and completion reports need to include sufficient accurate information to avoid such problems.

Over the course of approximately three years, Eschelon and other CLECs invested a significant amount of time into improving these reports. The resources devoted by Eschelon and other CLECs to this effort were substantial, but the investment was warranted because of the significant impact of the problems on both CLECs and their Customers. The end result was better reporting that benefits not only CLECs but also Qwest. Qwest will not receive escalation calls, for example, due to problems that used to arise from inadequate reports. Eschelon's proposed language captures the work that carriers have done over a lengthy period of time so that these benefits are not lost. Eschelon's proposal does not require any change to Qwest's current practices.

Including Eschelon's proposed language in the ICA does not mean the reports cannot be changed, because the agreement can be amended. But, it does mean Qwest cannot unravel this work unilaterally to Eschelon's detriment, after Eschelon has

expended significant time and resources on this issue.

37. Testing charges: Issue 12-77

Section 12.4.1.5 concerns charges to be assessed when Qwest performs trouble isolation with Eschelon. Pair Gain equipment (*i.e.*, electronics that enable multiple signals to be carried simultaneously on a single physical circuit) generally cannot be tested through. Therefore, Eschelon has proposed language that stands for the unremarkable proposition that when a circuit cannot be tested, because of the presence of Pair Gain or other similar equipment, Qwest will not charge for testing. Qwest has proposed that, rather than prohibiting Qwest from imposing "any" testing charges for Pair Gain circuits, this Section should prohibit only "optional" testing charges, suggesting that Qwest believes that there are some, albeit undisclosed and unexplained, charges that might apply.

Contrary to Qwest's position, if a circuit cannot be tested, then Qwest should not charge for testing the circuit. Qwest's language leaves the door open for imposition of unwarranted charges.

38. Definition of Trouble Report: Issues 12-78

The definition of trouble report in Section 12.4.1.7 affects application of charges that are associated with Repeat Troubles (charges that CLECs impose on Qwest) in Section 12.4.1.8. Eschelon's proposed definition of Trouble Report is consistent with use of the term in the ICA.[111] Eschelon's proposal requires no change by Qwest, as it reflects how troubles are reported to Qwest today. Qwest's proposal artificially excludes from its definitions certain troubles. Therefore, under Qwest's proposed definition, some

[111] *See*, *e.g.*, 12.1.3.3 & 12.1.3.3.3.1.1.

recurring troubles would not be counted as Repeat Troubles for purposes of Section 12.4.1.8 and thus Qwest would not incur charges associated with those troubles. For example, if CLEC reports a trouble within 24 hours of the due date and then submits another trouble report four days later, Qwest will not consider the second report as a Repeat Trouble when the first report was tracked in the provisioning system and Qwest's repair system shows only one (the second) report of trouble. Some of the most critical service-affecting errors, from the End User Customer's perspective, however, are those that occur on or shortly after the day of cut – when the Customer is switching carriers and determining whether the switch is satisfactory. Because Qwest's proposed language only includes trouble reports tracked in Qwest's repair systems, these early repair troubles that are so important to the Customer are omitted. This is a double problem for Eschelon, whose End User Customer has been harmed by a Qwest-caused trouble, and now Qwest will not include the trouble for purposes of determining when Eschelon may charge Qwest for dispatches for repeat troubles caused by Qwest.

Qwest's proposed definition in the ICA suffers from the same flaw that Eschelon uncovered and brought to the regulators several years ago – its being limited to repair trouble reports rather than including all trouble reports (provisioning and repair). Eschelon first raised these issues in the Arizona 271 case and then in FCC 271 proceedings. Arizona conducted an audit in which the auditor confirmed that Qwest was not adequately capturing errors in its PID data due to this problem.[112] The Minnesota Commission later pointed out that Qwest has acknowledged that the affected PID "does

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[112] *See, e.g., CGE&Y Report*, pp. 39-40.

not capture all reported troubles."[113] The CGE&Y auditor's findings showed that Qwest excluded trouble reports from results based on which internal department or system handled them, instead of whether a trouble affected the End User customer's service. Qwest is again attempting to define trouble reports by the system in which it is tracked, rather than upon a meaningful definition of the term in the context in which it is being used.

Eschelon is seeking reciprocity. If Qwest contends that Qwest may not charge Eschelon for dispatches for troubles on or after the due date until the troubles can be tracked in Qwest's repair systems (which Qwest may refer to as "installation" troubles), Eschelon offers an alternative proposal for Issues 12-80(b) and 12-80(c) that provides that Qwest will not charge Eschelon in these situations. If Qwest objects to that language (indicating it does in fact charge dispatch charges for these repairs), its objection further confirms the exclusionary aspect of its proposal. With respect to Qwest's proposed definition generally, because Qwest's language limits trouble reports to those tracked in specified Qwest systems, the proposal would allow Qwest in the future to simply choose to track troubles in another system (which it chooses to call something other than a "repair" system) to omit more trouble reports from the definition and avoid associated charges – charges that CLECs impose on Qwest.

39. Charges for repeats: Issues 12-80 and 12-80(a) – (c)

Issues 12-80 and subparts concern repeat troubles on Qwest's network that cause Eschelon to dispatch Eschelon's technician due to a Qwest-caused trouble. A repeat

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113 *In the Matter of a Commission Investigation into Qwest's Compliance with Section 271(c)(2)(B) of the Telecommunications Act of 1996; Checklist Items 1,2,4,5,6,11,13, and 14*, Docket No. P-421/CI-01-1371, ALJ's Recommended Order at ¶ 276 (Jan. 24, 2003).

trouble occurs when Qwest does not indicate it has found trouble on the initial report and a later trouble report shows that the trouble was in Qwest's network (*i.e.*, Qwest should have fixed it the first time). Eschelon's technician is dispatched because Qwest tells Eschelon that the trouble is not in Qwest's network when, in fact, it is.

Qwest charges Eschelon *every time* when Qwest dispatches a technician and the trouble is not in Qwest's network. In a reciprocal arrangement, Eschelon may also bill Qwest for dispatching an Eschelon technician when the trouble is in Qwest's network, per the language in this Section. Actually, the arrangement is not completely reciprocal, because Eschelon cannot charge Qwest under this language in a situation for which Qwest charges Eschelon. Qwest charges Eschelon not only for a repeat trouble but also, if Qwest dispatches a technician, for the dispatch for the initial trouble. If Eschelon dispatches a technician for trouble isolation and Qwest fixes it the first time (*i.e.*, there is no repeat trouble), Eschelon does not get to charge at all. This is the aspect of the arrangement that is not reciprocal. Despite this inequity, Eschelon is agreeing to this arrangement, provided that Eschelon is allowed to charge on fair terms for repeat troubles.

Both Qwest and Eschelon have the capability in many cases to test remotely, and when they are able to conduct remote testing, they may not dispatch a technician for trouble isolation. Eschelon proposes to use the same standard for test results as is applied to Qwest. That standard is set forth in Section 12.4.1.1, and Eschelon's language specifically cross references that standard. Section 12.4.1.1 on its face applies to "either party." In contrast, Qwest applies the Section 12.4.1.1 standard to itself but proposes a unique, onerous standard when Eschelon conducts remote testing.

When Eschelon conducts remote testing, Qwest's proposal states for Issue 12-80(a) that Eschelon must provide test results meeting a novel "conclusive" circuit specific standard. Testing is needed when uncertainty exists as to cause of a problem and tests are conducted to determine that cause. Eschelon does not know whether Qwest will attempt to distinguish between test results that it claims are probative, for example, versus conclusive. The uniqueness of this standard is not just a problem because the standard is undefined. It is also a problem because Qwest's proposal requires Eschelon to meet this higher standard for test results for the initial trouble, only if there is a repeat trouble – a fact that Eschelon will not know when conducting trouble isolation on the initial trouble.

Under Qwest's proposal, Qwest determines whether Eschelon has provided "conclusive" test results for the initial trouble so that Eschelon may charge when it dispatches on the repeat trouble. In any case for which Qwest unilaterally declares that the test results are not conclusive, Qwest can prevent Eschelon from charging Qwest for a repeat trouble. Any time that Qwest declares test results are not "conclusive," Qwest's proposed language allows Eschelon to charge Qwest only when there is a repeat dispatch (as opposed to repeat trouble). This eliminates charging for repeat troubles when Eschelon performed remote testing on the initial trouble, simply because Qwest says that testing in its opinion was not conclusive for some reason. In these situations, Qwest wants at least one free dispatch, even though Eschelon's End User Customer is out of service or otherwise in need of repair and that repair has been delayed because Qwest did not fix the trouble in its network the first time. Qwest does not give Eschelon one free dispatch. Eschelon needs cost-based rates based on clear terms that do not contain this imbalance.

40. Test parameters: Issues 12-81

The issue presented is, in the event of a conflict between generally-accepted industry standards and Qwest's own testing parameters, which should prevail? Industry standards reflect the consensus of the industry as a whole, rather than the practices of any particular company and, unlike Qwest's technical publications, cannot be changed unilaterally by any one company. Furthermore, the scope of this provision is narrow: It concerns routine testing, not equipment or other items that may be unique to Qwest. In connection with a function as basic as routine testing, it is reasonable for industry standards to take precedence over Qwest's own, company-specific practices. Finally, Eschelon's proposal would not prevent Qwest from using its own testing parameters, as reflected in its technical publications, so long as those parameters are consistent with industry standards. Qwest is not the only ILEC with which Eschelon does business. Eschelon needs to be able to work in multiple-carrier settings without changing testing parameters in each case.

41. Intentionally Left Blank

42. Trouble Report Closure: Issue 12-86

Eschelon has proposed a section on "Trouble Report Closure" in Section 12.4, which is "Maintenance and Repair." Trouble Report Closure is the next logical step in the process that is described in Sections 12.4.1 (testing), 12.4.2 (trouble reports and status), and 12.4.3 (resolving trouble reports). These sections describe the terms and conditions for opening a trouble report through resolving it. Maintenance and Repair is incomplete without stating how the trouble ticket that is opened under Section 12.4.2 is then closed.

Trouble report closure terms are important. First and foremost, Eschelon uses the disposition codes to update its End User Customers on the status and closure of the trouble reported by that Customer. In addition, Eschelon relies on the trouble report closure terms when verifying the accuracy of Qwest's repair bills and providing its own Customers with timely and accurate bills. Eschelon's proposal requires no change by Qwest, as Qwest already employs the terms outlined in this Section.

Qwest's current practices include making available the web-based tool that is referred to in Eschelon's proposal. When Qwest provides repair services to its retail Customers, Qwest provides a statement of time and materials and applicable charges to the Customer at the time the work is completed. Formerly, however, when Qwest provided repair services to its CLEC wholesale customers, it did not provide a similar statement to the CLEC. Eschelon pointed out in the Arizona 271 proceeding that it could not obtain an invoice of applicable repair charges at the time repair work was completed, but rather had to wait until Qwest sent the monthly wholesale invoices. This placed Eschelon at a disadvantage in that it was not able to dispute such charges on a real time basis. The Arizona staff agreed with Eschelon and said that "this is a very important issue" that "needs to be resolved.[114] The staff indicated it did not need to take further steps, however, because Qwest indicated it was already working on a solution with CLECs. The Maintenance and Repair Invoice Tool described in Section 12.4.4.3 resulted largely from this effort.

Qwest proposes to exclude these terms from the interconnection agreement and

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[114] Staff's Final Report and Recommendation on July 30 – 31, 2002 Supplemental Workshop, *In The Matter Of Qwest Communication, Inc.'s Section 271 Application*, ACC Docket No. T-00000A-97-0238, (Report Two) (June 20, 2003) at ¶ 86.

replace all of Eschelon's ICA proposal with a reference to its web-based PCAT. Given that Eschelon has already litigated this issue with Qwest and spent almost two years on helping to develop the web-based invoice tool, the ability to access time and material statement information using that tool should be available with at least the current functionality for the term of the ICA, unless amended. If Qwest decreases that functionality or eliminates the tool, however, Eschelon will be back to square one, where it was before the 271 proceedings. Qwest should not be allowed to back-slide in this manner.

43. Controlled Production Testing: Issue 12-87

It is necessary to include Eschelon's proposed language in the ICA because, without it, the broader language in the remainder of the paragraph may suggest that controlled production is required for recertification, when it is not. The first sentence, for example, broadly states: "Qwest and CLEC will perform controlled production." That is not always the case, and the ICA should be clear on this point when outlining the terms of controlled production. Eschelon's proposal reflects Qwest's current practice and, accordingly, requires no change by Qwest.

44. Rates for services: Issues 22-88 and 22-88(a)

a. Application of Exhibit A

Although the majority of rates in the ICA refer to Qwest's charges to Eschelon for services and facilities, some of the rates apply to Eschelon's charges to Qwest. *See*, *e.g.*, Sections 7.3.7.1 and 7.3.7.2 (charges for local, ISP-bound and intraLATA toll transit traffic); 9.2.5.2 and 9.2.5.2.1 (trouble isolation); and 10.2.5.5.4 and 10.2.5.5.5 (Qwest Requested LNP Managed Cuts). Notwithstanding that fact, Qwest proposes language

that would limit the applicability of the rates in Exhibit A to Qwest's charges to Eschelon. Eschelon proposes striking language proposed by Qwest that would purport to limit the applicability of Exhibit A to Qwest's charges because that language is unnecessary and inaccurate.

b. Commission approval for interim rates

Eschelon has proposed language, which Qwest has objected to, that preserves the right of either company to request that the Commission commence a cost case to replace an interim rate with a Commission-approved rate. This issue is linked to the Issue 22-90 regarding Eschelon's proposal for Section 22.6, which sets forth terms under which either company may seek Commission approval for an interim rate. The opportunity to obtain Commission-approved rates is necessary to ensure that rates are fair and reasonable.

45. Unapproved rates: Issue 22-90 and subparts (a)-(f)[115]

Often, in cost cases, Qwest does not obtain approval of Qwest's "going-in" position for its desired rate. Commissions often approved something less than any one party's wish list of desired rates. In Section 22.6 and subparts, Eschelon proposes a process for ensuring that Qwest's "going-in" positions or "wish-list" rates are not unilaterally implemented and then remain in effect indefinitely with no action by Qwest to support the rates to the Commission or obtain Commission approval of those rates. Eschelon's proposal tracks a commission decision in Minnesota in the 271 Cost Docket.[116] Without these procedures, Qwest can extend the period by which it imposes

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[115] Issues A-93, A-93(a), A-93(b), A-93(c), A-93(d), and A-95 on the Disputed Issues Matrix have been renumberes as Issues 22-90(a) through (f).

[116] Order Setting Prices and Establishing Procedural Schedule, In the Matter of the Commission's Review and Investigation of Qwest's Unbundled Network Element (UNE) Prices, Docket No. P-421/CI-01-1375 (October 2, 2002).

unapproved rates by not filing cost support with the Commission and requesting approval of the rates. Although Qwest has accepted most of this language in Minnesota and Washington, the open issues make it apparent that Qwest is attempting to fit its current tariff filing process in Washington into the Eschelon proposed Minnesota-model. The Commission should recognize the benefits of the Minnesota ruling that can also be achieved in Washington and reject Qwest's limiting proposals.

Eschelon's proposal clarifies that, when Qwest offers a Section 251 product or service for which a price/rate has not been approved by the Commission in a TELRIC Cost Docket ("Unapproved rate"), and Qwest develops a cost-based rate and submits that rate and related cost support to the Commission for review, Qwest will notify Eschelon. Eschelon's language states that Qwest will provide Eschelon with notice of its filing and proposed rate and, upon request, will provide Eschelon with a copy of the related cost support for its proposed rates. Closed language in this Section provides that Qwest must submit cost support with its proposed rates when filing with the Commission. Closed language also provides that the parties may agree upon a rate. To negotiate a rate with Qwest and to know whether it objects to a rate filed with the Commission, Eschelon needs access to the cost support to assist in making these determinations. Eschelon's request to receive notice and, upon request, cost support is narrow and reasonable.

a. Unapproved Rates – Interim Rate Proposals - Exhibit A

The Commission has not approved rates for many rate elements for which Qwest proposes rates in Exhibit A. Therefore, an interim rate is needed. Eschelon has accepted the majority of Qwest's proposed rates on an interim basis, even though Qwest's "going in" positions are often high. However, for certain rates for which there is no approved

rate and for which Qwest has provided no cost support, Eschelon has proposed alternative rates that it believes more closely reflect Qwest's costs. In many cases, Eschelon has proposed Qwest's own rates from the Qwest ICA negotiations template, which Qwest has offered to all CLECs for a period of time. When Qwest proposes a rate in a cost case and that rate is actively challenged, the rate often goes down from Qwest's initial request to the rate the Commission ultimately approves. Although Eschelon believes that the rates Qwest proposes in its negotiations template are similarly high, Eschelon offers to pay certain rates from Qwest's negotiations template, on an interim basis. Qwest has refused to accept its own negotiations template rates, however. For the first time, on August 1, 2006, Qwest provided Eschelon with its current proposal for new rates that are even higher than those in Qwest's negotiations template. Eschelon objects to these unapproved significant rate increases. Such unapproved rate increases to unapproved rates should not be implemented when Qwest's own negotiations template rates, which Qwest has made available to other CLECs, are available on an interim basis.

46. Interconnection Entrance Facility: Issue 24-92

Qwest proposes language in the Commingling section of the ICA, in Section 24.1.2.2, that Qwest says is necessary to put restrictions on *interconnection* of UNEs through Entrance Facilities and Mid-Span Meets. The issues that Qwest attempts to address in the Commingling section of the ICA are more completely and more appropriately dealt with in the Interconnection section of the ICA (Section 7). Sections 7.1.2.1 and 7.1.2.5 of the ICA contain language that has been agreed to between the parties as it addresses the FCC's rulings on this issue. The sections in Section 7 fully address interconnection through Entrance Facilities and Mid-Span Meets. Thus, Section

24.1.2.2 is, at best, redundant and, at worst, creates potential ambiguities that could give rise to future disputes. When the FCC ruled on this issue, its discussion was not in the Commingling section of the FCC's order. By requesting language in both the Interconnection and the Commingling sections of the ICA, Qwest appears to be laying the groundwork for future disputes in which it will claim that the additional language in the Commingling section has some new, separate meaning. This is an interconnection issue that, as a matter of overall structure of the contract, is more appropriately dealt with in Section 7, which contains terms relating to interconnection, than in Section 24, which contains terms relating to commingling.

47. Remote Collocation: Issue A-94 and A-94(a)

i. Power usage

There is currently a provision that applies to less than 60 amps of power and a provision that applies to more than 60 amps, but no provision that covers 60 amps. Eschelon has proposed language that the rate for less than 60 amps applies to power less than or equal to 60 amps.

ii. Power Greater than 60 Amps

The rate proposed by Eschelon is the Commission approved rate that is available to other carriers under their ICAs. Eschelon is entitled to receive the same rate.

48. EEL Transport, Nonrecurring: Issue A-95

Eschelon's intent is to clarify and confirm that there are no additional charges associated with the installation and disconnection of the transport portion of the EEL. Qwest is proposing to change the terminology in its Exhibits A across its region from "EEL-Install" to "EEL Loop-Install." Because of the change in language, Eschelon is

concerned that Qwest could attempt to collect two non-recurring charges associated with the installation of the EEL, when only one should apply. The only non-recurring charge (NRC) that should apply to the EEL is the EEL Loop Install, which recovers the cost of connecting the Loop to the Transport in order to make up the EEL. There are no other NRCs that apply to the installation of the EEL Transport. Qwest currently only charges one NRC and this should be clarified in Exhibit A.

E. Potentially Deferred Issues: Issues 9-37 and subparts and 9-38 through 9-42

At the end of the Disputed Issues Matrix (Exhibit 1 to Qwest's Petition), both parties state their positions with respect to additional issues, which are described as "potentially" stayed issues. These issues are to be decided in this arbitration. For these issues, however, Qwest and Eschelon have agreed to discuss with the Commission whether testimony and consideration of these issues should be delayed until later in this arbitration proceeding, if the Commission will address them in the meantime in another proceeding. If not, these issues will be addressed along with the other issues. (*See* Disputed Issues Matrix, Eschelon's position statements, for a summary of Eschelon's position with respect to each of these issues.)

Qwest does not appear to address the bulk of Issues 9-37 through 9-42 in its Petition. With respect to one of these issues (9-39), Qwest states in paragraph 94 of its Petition that: "The parties have agreed that with minor exceptions, issues relating to non-impairment determinations based on the criteria in the TRRO may be stayed if the Commission includes those issues in pending Docket No. UT-053025, In the Matter of the Investigation Concerning the Status of Competition and Impact of the FCC's Triennial Review Remand Order on the Competitive Telecommunications Environment

in Washington State ("Wire Center Proceeding")." If Qwest intends this statement to apply to issues other than the issue being address in that proceeding (which wire centers are impaired), it not an entirely accurate statement. There is no agreement to defer, or stay, these issues outside of this proceeding so that Eschelon would expend the resources on years of negotiation and this entire arbitration only to receive an interconnection agreement that omitted these critical issues. Eschelon would then be left with Qwest either demanding an amendment as to issues already negotiated and raised in arbitration or, worse yet, with Qwest unilaterally imposing its unapproved, non-CMP "TRRO" PCAT terms upon Eschelon, leaving Eschelon to file individual complaints about the very issues that it has already raised in this arbitration. As indicated in Eschelon's position statements for these issues in the Disputed Issues Matrix (Exhibit 1 to Qwest's Arbitration Petition) (with emphasis added):[117] "Eschelon does not believe that this issue is currently an issue in the Washington wire center proceeding. Eschelon is willing to discuss deferment of this issue ***until later in this case***, however, if the Commission will address it in the wire center proceeding, ***provided that the issue is either resolved before the statutory nine-month deadline or that deadline is extended***."[118] As stated, Eschelon is willing to defer filing of testimony and consideration of these issues until later in this proceeding. Absent a ruling in another proceeding before the Commission concludes this proceeding, however, Eschelon has presented these issues in its Response as required by

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

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

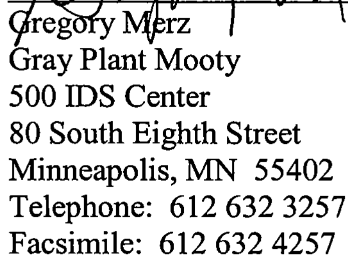
Section 252 of the Act and asks the Commission to decide these critical issues and determine the appropriate language for the interconnection agreement on each of these issues. In the meantime, Qwest is protected because the parties have entered into an "Interim Bridge Agreement Until New Interconnection Agreements Are Approved" that addresses TRO/TRRO issues. The Commission has approved the Interim Bridge Agreement.

REQUEST FOR RELIEF

Eschelon requests that the Commission arbitrate the unresolved issues between Eschelon and Qwest in accordance with Sections 251 and 252 of the Telecommunications Act of 1996. Eschelon further requests that the Commission issue an order approving an interconnection agreement which includes all of the terms agreed to during negotiations and, on all disputed points, which incorporates and adopts the specific resolutions proposed by Eschelon.

Respectfully submitted this 1st day of September, 2006

On behalf of Eschelon Telecom, Inc.

By: 

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