**BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION**

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| In the Matter of the Petition of Qwest Corporation for Arbitration with Eschelon Telecom, Inc., Pursuant to 47 U.S.C. Section 252 of the Federal Telecommunications Act of 1996 | Docket No. UT-063061 |

# ESCHELON TELECOM OF WASHINGTON, INC.'S POST-HEARING BRIEF

July 20, 2007


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## TABLE OF CONTENTS



**ATTACHMENTS**

## TABLE OF AUTHORITIES[1]

**Page(s)**

*FCC Orders; Cases*



[1] Eschelon also prepared a list of full citations for authority it cited in its position statements in the Joint Disputed Issues Matrix (Exhibit 1 to Qwest's Petition). That list of citations is ***Appendix ii*** to the Qwest Petition (Aug. 9, 2006).

**Page(s)**

**Page(s)**



[2] The MN arbitrators' findings discussed in Eschelon's Brief were affirmed by the Minnesota Commission (PUC) in the MN Arbitration Order unless otherwise indicated in the Brief. See Eschelon Brief, p. 5, footnote (FN) 5.

[3] The Arbitrator's Report was actually issued on January 16, 2007 but is inadvertently dated 2006.

**Page(s)**

## I. INTRODUCTION

1. Eschelon Telecom of Washington, Inc. ("Eschelon"), 730 2nd Ave. South, Suite 900, Minneapolis, MN 55402, described the standard of review in its Response to the Petition (Sept. 1, 2006, pages 7-9) and the need for contractual certainty in the early sections of Mr. Starkey's testimony (Exh. Nos. 62, 67, and 71). Here, Eschelon will briefly summarize each issue by Subject Matter Number.[4] The language proposed by each party is set forth, by Issue Number, in the Joint Disputed Issues Matrix (April 27, 2007). ***Attachment 1*** to this Brief is a Testimony Map showing where discussion of each issue begins in the prefiled testimony.

2. Eschelon respectfully submits this Brief and requests relief pursuant to 47 U.S.C. §§ 251-252, 47 C.F.R. § 51, and WAC 480-07-630.

## II. ISSUES BY SUBJECT MATTER

### 1. Interval Changes: Issue 1-1 and subparts

3. Provisioning intervals are critical to Eschelon's ability to provide timely service to its customers on the date they expect service. An increase in the length of an interval means that Eschelon's customer will wait longer for service and, accordingly, is a matter of great significance to Eschelon and its customers.[5] Because of the importance of service intervals to service quality for Eschelon's customers, Eschelon has proposed that the current intervals be included into the ICA so that they cannot be changed unilaterally by Qwest. Although Eschelon's proposal reflects intervals today, Qwest claims intervals do not belong in the contract but should be posted in its web-based PCAT.[6] In its *Forfeiture Order*, however, the FCC held

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[4] The numbering of issues in this Brief corresponds to the Subject Matter Numbers found in the Issues by Subject Matter List. See Exhibit 1 to Eschelon's Response to Qwest's Petition; see also Starkey Exh. No. 68 (MS-5).

[5] Starkey Dir. Exh. No. 62, 80: 9-19 & footnote (FN) 125 on p. 86; see also Albersheim Dir. Exh. No. 1, 28:10-11. *Note that the three rounds of testimony submitted in this case for both parties will be referred to for the purposes of this Brief as Direct (Dir.), Rebuttal (Reb.) and Surrebuttal (Surreb.) testimony.*

[6] See, e.g, Qwest proposed ICA Section 7.4.7 ("Any changes to the Interconnection trunk intervals will be made through the Change Management Process (CMP) applicable to the PCAT. . . .").

that at "no point did we create a general 'web-posting exception' to section 252(a)."[7] Relegating these provisioning intervals to non-contractual sources would result in (1) no binding Qwest commitment to continue to provision service within the existing intervals, (2) no certainty for Eschelon to rely on provisioning intervals for its business planning because its ability to deliver timely services to customers could change at Qwest's will, and (3) no vehicle for Commission filing under Section 252(a). The Minnesota PUC recognized the importance of service intervals and rejected Qwest's CMP position, stating:

> Eschelon has provided convincing evidence that the CMP process does not always provide CLECs with adequate protection from Qwest making important unilateral changes in the terms and conditions of interconnection. Service intervals are critically important to CLECs, and Qwest has only shortened them in the last four years. Qwest has identified no compelling reason why inclusion of the current intervals in the ICA would harm the effectiveness of the CMP process or impair Qwest's ability to respond to industry changes.[8]

4. Under Eschelon's Section 1.7.2, interval changes would not be burdensome,[9] as they would be changed (lengthened, per alternative #1) via the same streamlined ICA amendment/advice letter process that was established for new products in the SGAT (Section 1.7.1).[10] Eschelon's proposal offers the Commission the opportunity to use its regulatory oversight in a manner that is consistent with the Commission's mission, yet streamlined. This is more efficient than Qwest's proposal that Eschelon file a complaint after Qwest has lengthened an interval for CLECs,[11] which may require the Commission to resolve the issue in an expedited basis as the interval change impacting customer service quality has already occurred.

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[7] *FCC Forfeiture Order* at ¶ 32.
[8] Denney Exh. No. 158 (DD-25), MN Arbitrators' Report, ¶22, *affirmed* in Denney Exh. No. 171 (DD-38), MN Arbitration Order, p. 22, ¶ 1. *The MN arbitrators' findings discussed in this Brief were affirmed by the MN PUC (see id.), unless otherwise indicated in this Brief.*
[9] Albersheim Dir., Exh. No. 1, 35:13-14.
[10] Starkey Reb., Exh. No. 67, 45:4 – 46:13; Starkey Surreb., Exh. No. 71, 94:14 – 95:9.
[11] Albersheim Reb., Exh. No. 18C, 34:7.

**2/3. Rate Application and Effective Date of Legally Binding Changes: Issues 2-3 and 2-4**

5. These issues concern how and when changes – either changes in Commission-approved rates or changes in law – will be implemented during the term of the ICA. For Issues 2-3 and 2-4 (which overlap), Eschelon's proposal includes a sentence from the SGAT, which provides that any amendment incorporating a change of law will take effect on the effective date of the change of law, unless ordered otherwise. Regarding rate application, under Eschelon's proposals, the issue of whether a rate will be subject to true-up is expressly reserved and, if the Commission order is silent, the rate is given prospective effect from the effective date of the order adopting or changing the rate. Although Qwest claims that its proposed language "avoids ambiguity" in cases when the Commission does not specify a true-up,[12] Qwest's language for Sections 2.2 and 22 *does not even mention* the term "true-up." If Qwest's goal is to avoid ambiguity about a true-up, language expressly referring to a true-up (*i.e*., Eschelon's proposal) is less ambiguous than language that does not even use the term (*i.e*. Qwest's proposal).

6. Regarding the effective date of legally binding changes, Eschelon also has an alternative proposal. Eschelon's alternative proposal clarifies that, when there is a change in law, either party may seek a different implementation schedule, but provides that, absent some other direction, an order changing the law will be implemented as of the order's effective date. Eschelon's alternative proposal also confirms that it is the duty of the parties to keep their ICA up to date. Eschelon's proposals will assure that the ICA properly reflects any order that changes the law, including any direction given in such an order regarding when the ordered change will be given effect.

7. Qwest's proposal is that, if an order that changes the law does not include a "specific implementation date" and one party to the ICA gives the other party notice of the order within 30

[12] Easton Reb., Exh. No. 43, 2:2-3.

days of the order's effective date, the change is to be implemented as of the effective date. When neither party gives notice, the change takes effect as of the effective date of an ICA *amendment* incorporating the change (*i.e.*, not the effective date of the order). Qwest's proposed language allows a party to, by not giving notice of a decision that changes the law adversely to that party, delay when that decision will take effect.

8. Qwest's proposal is further flawed by ambiguity, which creates the potential for future disputes. Qwest's language initially distinguishes between an order's "specific implementation date" and its "effective date."[13] Thus, Qwest's language leaves open for later the argument that, even though an order states an effective date (including stating it is "effective immediately"), that order does not state a specific implementation date (as Qwest previously argued in Arizona[14]). The Commission should not adopt a provision that may circumvent the Commission's authority to determine when its orders take effect.

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

9. Design changes are part and parcel of Qwest's obligation to provide nondiscriminatory access to UNEs under Section 251 of the Act and should be provided at TELRIC prices.[15] Eschelon's proposed language makes clear: 1) that Qwest must continue to provide design changes to Eschelon pursuant to the ICA and 2) that Qwest must provide design changes at TELRIC rates. The parties' current ICA, under which Qwest provided design changes for loops to Eschelon in Washington for years, does not describe any separate charges for loop design changes or CFA changes. Eschelon's compromise proposal would allow Qwest to charge cost-based rates for these design changes going forward. Eschelon has proposed interim rates,

[13] Qwest proposes, 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 change. Note that Qwest's language does *not* say, when an order does not include a specific implementation date, the *implementation* date will depend on a party giving notice.
[14] Denney Reb., Exh. No. 137, 12:17 – 14:8.
[15] 47 U.S.C. § 251(c)(3), cited in Denney Dir., Exh. No. 13, 30:3-6. See also Issue 9-31.

notwithstanding the lack of any evidence provided by Qwest to establish the cost of these types of design changes. Qwest would simply expand the application of the rate for UDIT design changes to other types of design changes while providing no cost basis for doing so.

10. Eschelon's interim proposal is particularly reasonable, given that Qwest provided loop design changes from 1999 until 2005 without a separate charge. Qwest now claims that the rates of $53.65 (manual) and $50.45 (mechanized) approved in Docket No. UT-003013 were intended to apply to UDIT and loops, even though it is undisputed that until October 1, 2005, Qwest charged these rates for UDIT design changes, but not for loops (including CFA changes),[16] and even though the language of Qwest's SGAT and the ICA describes the application of design changes to UDIT ***but not to loops***.[17] Thus, to accept Qwest's position, the Commission must also accept that Qwest obtained a design change rate that applies to both loops and UDITs but simply elected for years to apply that charge only to UDIT and forego payment for loops, a circumstance Qwest regards as an anathema.[18]

11. In light of the very different activities involved in performing UDIT design changes, it is not reasonable to think that the rates for all three would be the same. First, Qwest's proposal results in design change charges for loops and CFAs that exceed the installation charges for loops.[19] Such a result defies logic because a design change is a component of the installation, and should, therefore, not exceed the rate for the installation itself.[20] Second, the costs for design changes for UDIT versus loops are not similar, as loops and UDIT are different products that utilize different systems,[21] with UDIT being more complex – and higher cost – than loops.[22]

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[16] Joint Exh. No. 178 at Million, AZ TR.. Vol. 1, 142:7 – 145:1.
[17] Denney Dir., Exh. No. 130, 26:6-16; Denney Reb., Exh. No. 137, 15:15 – 18:2; Joint Exh. No. 180 at Stewart, CO TR., Vol. 1, 180:6-15.
[18] See Stewart Surreb., Exh. No. 61, 6:15.
[19] Denney Dir., Exh. No. 130, pp. 30-32.
[20] Denney Dir., Exh. No. 130, pp. 31-32.
[21] Denney Dir., Exh. No. 130, pp. 35-36 and FNs 14 and 15.

12. Similarly, CFA changes, and particularly the limited type of CFA change reflected in 9.2.3.8,[23] are lower cost than UDIT design changes. Qwest and Eschelon are already in contact and coordinating the cutover -- with Eschelon paying for this coordination -- and the Qwest technician is already standing at the frame.[24] Thus, it requires little, if any additional work to perform a "lift and lay" to switch CFAs.[25] The cost for this activity, to the extent not already recovered in recurring charges, would be minimal (reflecting a few seconds or minutes of the Qwest technician's time to perform the lift and lay to the new CFA), and certainly would not rise to the level of the UDIT design change charge.[26] Eschelon's proposals for Issues 4-5 and subparts reflect the notion that costs associated with design changes for loops and CFAs (if not already recovered in Qwest's recurring rates) are not comparable to the costs associated with UDIT design changes, and therefore, the same, expensive rate developed for design changes for UDIT should not also apply to loops and CFAs. The record supports a finding of no separate charge, consistent with Qwest's past conduct, unless and until a separate Commission approved rate is established for design changes for loops and CFAs. But, Eschelon has reasonably offered a compromise that would allow Qwest to cover its potential costs until the Commission reviews whether a separate charge is appropriate and, if so, in what amount.

**5. Discontinuation of Order Processing and Disconnection: Issue 5-6, 5-7 and 5-7(a)**

13. This issue concerns whether the ICA should provide for some form of Commission review before Qwest may discontinue processing Eschelon's service orders or disconnect Eschelon's

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[22] Denney Dir., Exh. No. 130, pp. 33-36; Qwest has admitted that UDIT is higher cost than loops by recognizing that LSRs – used for loops – have a higher level of electronic flow-through than ASRs – used for UDIT. Denney Dir., Exh. No. 130, pp. 35-36.

[23] The CFA change referred to in Eschelon's proposal (or a same day pair change), is limited to a 2/4 wire analog loop on the same day of a coordinated cut, during test and turn up, excluding batch hot cuts. See Denney Dir., Exh. No. 130, pp. 39-40 and FN 20.

[24] Denney Dir. Exh. No. 130, pp. 38-39.

[25] Denney Dir., Exh. No. 130, pp. 38-39.

[26] Denney Dir., Exh. No. 130, p. 39, lines 4-8.

circuits for alleged non-payment. The issue here is ***not*** whether Eschelon pays its bills on time, but rather, what processes should be contained in the contract to address what happens if bills are not paid in a timely manner.[27] Eschelon's proposed language contains appropriate processes. Eschelon's proposal for Issue 5-7 (Section 5.4.3) would allow Qwest to disconnect "any and all relevant services" for failure to pay undisputed amounts once Qwest has obtained Commission approval. And for Issue 5-7(a), Eschelon proposes language in Section 5.13.1 that requires a Party to apprise the Commission of a continuing payment default and obtain Commission approval before disconnecting services for untimely payment of undisputed amounts. With approval, a party may disconnect service for untimely payment under Eschelon's proposal.

14. It is undisputed that order discontinuation and disconnection would have very serious impacts on Eschelon and its customers.[28] If Qwest were to discontinue processing orders, Eschelon could not order new service or make changes to existing service.[29] For example, an Eschelon customer who requested blocking would be unable to receive it and an Eschelon customer who desired to remove services to no longer be charged for them could not do so, because Qwest would not process Eschelon orders on their behalf. If Eschelon's services were disconnected, Eschelon's customers could pick up the telephone one day to discover that they do not have dial tone.[30] This would not only be service-affecting but would also be potentially dangerous for Eschelon's customers as they would unexpectedly be left without emergency

[27] Denney Dir., Exh. No. 152, pp. 49-51. Eschelon provided substantial evidence showing that these issues are not as simple as Eschelon just paying its undisputed bills on time, as there are numerous reasons why Eschelon and Qwest may disagree about Eschelon's undisputed amounts. Denney Reb., Exh. No. 137, pp. 34-40; Denney, Exh. No. 139 (DD-8); Exh. No. 144 (DD-13); and Exh. No. 145 (DD-14). See also Exh. Nos. 140C (DD-9), 141C (DD-10), 142C (DD-11), 146C (DD-15), and 147C (DD-16) (Confidential Exhibits to Denney Reb., Exh. No. 137).
[28] Easton Reb., Exh. No. 43C, p. 8.
[29] Starkey Exh. No. 73 (MS-9) at Easton MN TR., Vol. 1, p. 115.
[30] Denney Dir., Exh. No. 130, p. 44, lines 5 – 8.

services.[31] Eschelon's proposed language would help assure that such drastic action is not taken unless it is warranted and that end user customers are protected from the potential for harm.

15. Qwest has presented testimony in an effort to show that Eschelon has a history of not paying its bills on time. Qwest's testimony ignores two facts. First, the closed language of Sections 5.4.2 and 5.4.3 allows Qwest to discontinue order processing and disconnect relevant services in cases when Eschelon does not timely pay its bills. Second, Eschelon has paid Qwest $4.7 million per month for the past year and Eschelon is a $55.9 million per year wholesale Qwest customer.[32] Although Qwest criticizes Eschelon as paying its bills more slowly than the industry average, Eschelon pays, on average, only a few days more slowly than Qwest, and that Eschelon's creditworthiness is rated more highly than is Qwest's.[33] Plainly, timeliness of payment is not the only, or even the best, indicator of whether a bill will ultimately be paid. To the extent that Qwest's concern is timeliness of payment, rather than the risk of nonpayment, that concern is addressed by agreed upon provisions regarding late payment charges.[34]

16. Eschelon's proposals for 5.4.2 and 5.4.3 adequately protect Qwest's interest in receiving payment. The evidence shows that whether an undisputed amount is past due is, itself, a subject on which there may be, and has been, disagreement.[35] Under Eschelon's proposal, when a disagreement occurs, the Commission, not Qwest, determines the merits. If Qwest is correct, and determining the undisputed past due amount is the simple task that Qwest represents it to be,[36] then Qwest should have little difficulty making its case to the Commission. If Eschelon is

[31] Denney Dir., Exh. No. 130, p. 44, lines 8 – 12.
[32] Denney Surreb., Exh. No. 152, pp. 55-56.
[33] Denney Surreb., Exh. No. 152, pp. 56-58.
[34] Starkey, Exh. No. 73 (MS-9) at Easton, MN TR., Vol. 1, p. 150.
[35] Denney Reb., Exh. No. 137, pp. 34-40.
[36] See, e.g., Easton Reb., Exh. No. 43C, pp. 7-8. In arguing that determining the undisputed amount owed by Eschelon is a simple matter, Mr. Easton refers to the process Qwest put through CMP for billing disputes. Easton Reb., Exh. No. 43C, 12:4-6. What this testimony overlooks (in addition to the problems with that Qwest process) is

correct, however, and the problem is murkier than Qwest would acknowledge, then Eschelon's chief competitor should not have the ability to unilaterally impose consequences that Qwest admits would be highly disruptive for Eschelon and its customers.

17. Nor is it a solution to say, as Qwest has said, that Eschelon would still have the ability to bring a dispute to the Commission after the fact, because the ability to dispute Qwest's action after it has occurred would not protect Eschelon and its customers from immediate harm.[37] While a dispute is pending, Eschelon's customers orders would not be processed and their services would be disconnected. Eschelon's proposals provide the Commission with an opportunity to weigh in on disputes related to the basis for invoking these remedies in an orderly manner *before* they are invoked instead of addressing them in a crisis mode or when it is too late.

**6/7. Deposits: Issues 5-8, 5-9, 5-11, 5-12, and 5-13**

18. These issues all concern the circumstances under which Qwest may demand a deposit to secure future payment. The amount of a potential deposit is substantial – up to two months' worth of charges – so there is good reason to limit the circumstances to those when a deposit is truly necessary. There are four deposit issues: 1) Whether the deposit should be triggered by Eschelon's failure to pay a "de minimus" or non-material amount; 2) What standard should be used for determining whether payment is "Repeatedly Delinquent," thus requiring a deposit; 3) Whether Eschelon should be required to pay a deposit within 30 days of a demand by Qwest in cases when Eschelon has challenged Qwest's deposit demand with the Commission; and 4) Whether Qwest should be permitted to require a deposit even if Eschelon has consistently paid its undisputed bills in a timely manner, based on an undefined "review" by Qwest.

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that the process that Mr. Easton describes is not part of Eschelon's ICA and does not apply to Eschelon. Denney Reb., Exh. No. 137, pp. 38-40.

[37] Denney Dir., Exh. No. 130, p. 57.

**a. Non–de minimus or Material amount (Issue 5-8)**

19. Eschelon has proposed that the deposit requirement may be triggered by the failure to pay an undisputed "non-de minimus" amount, reasoning that the failure to pay a de minimus amount does not reflect the sort of concern about future payment that should result in a multi-million dollar deposit. Qwest has not claimed that failure to pay a de minimus amount should trigger a deposit, but only that addition of this qualification is vague and unnecessary. Eschelon has proposed, as an alternative, that a deposit be triggered by failure to pay a "material" undisputed amount. The term material is used in closed language in numerous sections of the contract and, accordingly, can hardly be considered unreasonably vague.[38] If Qwest does not intend to demand a deposit based on Eschelon's nonpayment of a de minimus (or non-material) amount, it should not object to the Commission ordering the language that Eschelon has proposed.

**b. Repeatedly Delinquent (Issues 5-9 and 5-12)**

20. The parties have agreed that Qwest will be able to obtain a deposit if payment is "Repeatedly Delinquent," but disagree over how "Repeatedly Delinquent" should be defined. Eschelon has proposed that payment be considered "Repeatedly Delinquent" if made more than thirty days after the due date in three consecutive months. This "three consecutive month" standard is the same as is found in other ICAs to which Qwest is a party, including its ICA in Utah with McLeodUSA, and its ICA with an Eschelon subsidiary, ATI, in Washington.[39] The Minnesota Commission adopted the "three consecutive months" definition to resolve this issue in the Eschelon-Qwest Minnesota arbitration proceeding.[40]

[38] Denney Dir., Exh. No. 130, pp. 65-66.
[39] Denney Dir., Exh. No. 130, pp. 67-68.
[40] Denney Surreb., Exh. No. 158 (DD-25), MN Arbitrators' Report, ¶ 55. Alternatively, Eschelon proposes that "Repeatedly Delinquent" be defined as payment more than thirty days after the due date three or more times in a six month period. Finally, Eschelon has proposed a third alternative that, rather than using the term "Repeatedly Delinquent," would allow Qwest to seek Commission approval for a deposit if payment is more than 90 days late.

21. Qwest argues that its proposal is preferable because it provides Eschelon with "the proper incentive for timely payment."[41] As Qwest acknowledged in Minnesota, the ICA provisions regarding late payment charges are designed to provide the incentive for timely payment;[42] the deposit provisions are intended to protect against ultimate non-payment. As the Minnesota PUC found, Eschelon's language adequately protects Qwest against such a concern.[43]

**c. Commission review (Issue 5-11)**

22. Eschelon's proposal is that, if it disputes the deposit requirement, the deposit will be due as provided by any subsequent Commission order in connection with the dispute. Thus, when there is a genuine dispute about whether a deposit may be required, Eschelon would not be burdened by having to make a multi-million dollar deposit while the dispute is pending.[44] Qwest argues that, because the deposit requirement only applies to undisputed past due amounts, Commission oversight is unnecessary. However, as discussed above and as the evidence shows, Qwest's decision to declare an amount as "undisputed" does not mean that Eschelon does not dispute that amount. Commission involvement may well be necessary to determine whether an amount claimed by Qwest to be past due is, in fact, "undisputed."

**d. Review of Credit Standing Causing Deposit Demand: Issue 5-13**

23. Qwest's position on Issue 5-13 is particularly concerning, as it could render the criteria of Section 5.4.5 moot. Qwest agrees in Section 5.4.5 that it would only be allowed to seek a deposit when Eschelon seeks to resume service after disconnection or discontinuance of order processing for nonpayment or if Eschelon is Repeatedly Delinquent in payment of undisputed amounts. Qwest's Section 5.4.7 proposal, however, allows Qwest to "increase" the amount of an

[41] Easton Dir., Exh. No. 42, 18:7 and 19:1-2.
[42] Starkey Surreb , Exh. No. 73 (MS-9) at Easton, MN TR., Vol. 1, 150:1-13.
[43] Denney Exh. No. 158 (DD-25), MN Arbitrators' Report, ¶ 55.
[44] Denney Dir., Exh. No. 130, p. 69.

otherwise non-existent deposit ***from zero***, based on Qwest's "review" of Eschelon's "credit standing," even if Eschelon has consistently timely paid its bill in full and even if Qwest has never disconnected Eschelon's service or discontinued processing of Eschelon's orders. Qwest's proposal does not describe what its review might consist of or the information to be reviewed – or even require that the information be credible or verifiable.[45] Qwest claims that its proposal is necessary because "changed circumstances" may warrant a deposit.[46] Under Qwest's proposed language, however, Qwest's ability to demand a deposit based on its "review" is not limited to "changed circumstances."[47] The Minnesota Commission agreed with Eschelon: "Qwest's language is essentially without a standard, and it would permit Qwest to demand a deposit at any time based on its own judgment about the significance of what is in a credit report."[48]

24. Because of the potential for abuse inherent in Qwest's proposal, Eschelon has proposed that Section 5.4.7 either be deleted in its entirety or that any increase be limited to situations when the standard for requiring a deposit under Section 5.4.5 has already been met (thus prohibiting Qwest from imposing a new deposit by claiming it is "increasing" an amount from zero). This would at least retain Section 5.4.5 as a limit on Qwest's ability to impose a deposit, rather than allowing Qwest to use Section 5.4.7 to ignore the requirements of Section 5.4.5.

25. In resolving these issues related to deposits in the Minnesota arbitration, the Minnesota Commission steered a compromise course that balanced Qwest's need to be protected from the

[45] Starkey Surreb., Exh. No. 73 (MS-9) at Easton, MN TR., Vol. 1, 122:19 - 125:20.
[46] Starkey, Exh. No. 73 (MS-9) at Easton, MN TR., Vol. 1, p. 122. Qwest suggests that the ability to demand a deposit based on its "review" of Eschelon's "credit history" would provide Qwest with protection in the event that Eschelon filed for bankruptcy. As a matter of bankruptcy law, however, a payment to a creditor for an antecedent debt of the debtor that is made 90 days or less before a filing for bankruptcy is avoidable as a preference. 11 U.S.C. § 547(b). Such a deposit, to the extent made fewer than 90 days before bankruptcy, would likely not be available, as Qwest appears to assume, to be applied to receivables that might have accrued prior to the bankruptcy filing.
[47] Starkey, Exh. No. 73 (MS-9) at Easton, MN TR., Vol. 1, pp. 122-23.
[48] Denney, Exh. No. 158 (DD-25), MN Arbitrators' Report, ¶ 74.

risk of nonpayment against Eschelon's need to be protected from unnecessary and over-reaching demands for a deposit.[49] Thus, the Commission ordered:

- The adoption of Qwest's position with respect to whether the requirement to pay a deposit may be based on Eschelon's failure to pay a de minimus or non-material amount (Issue 5-8);[50]
- The adoption of Eschelon's position (three consecutive months) with respect to the definition of "Repeatedly Delinquent" (Issue 5-9);[51]
- The adoption of Qwest's position that no prior Commission approval should be required before Eschelon could be required to pay a deposit (Issues 5-11 and 5-12);[52]
- The adoption of Eschelon's position with respect to the increase of the amount of a deposit (permitting Qwest to increase a deposit requirement if one is already in place), but without Eschelon's proposal that Commission approval be required before any such increase (Issue 5-13).[53]

In addition, in Minnesota, agreed upon language requires Commission approval prior to any disconnection of service. Neither party sought reconsideration of the order on these issues.

**8. Copy of Non-Disclosure Agreement: Issue 5-16**

26. To confirm that its confidential information is being adequately protected, Eschelon has proposed language that would require Qwest to provide Eschelon with a copy of the executed nondisclosure agreements regarding access to Eschelon's confidential forecasting information. Qwest claims Eschelon's proposal imposes a burden. The burden is, in fact, minimal to nonexistent. The evidence shows that there is a Qwest employee who is responsible for securing signatures on nondisclosure agreements and maintaining the signed agreements in a file.[54] Accordingly, the burden that Qwest complains of is the burden associated with putting a copy of the agreement in an envelope and dropping the envelope in the mail.[55]

[49] Denney, Exh. No. 158 (DD-25), MN Arbitrators' Report, ¶ 50.
[50] Denney, Exh. No. 158 (DD-25), MN Arbitrators' Report, ¶ 50.
[51] Denney, Exh. No. 158 (DD-25), MN Arbitrators' Report, ¶ 55.
[52] Denney, Exh. No. 158 (DD-25), MN Arbitrators' Report, ¶¶ 62, 68.
[53] Denney, Exh. No. 158 (DD-25), MN Arbitrators' Report,, ¶ 74.
[54] Starkey, Exh. No. 73 (MS-9) at Easton, MN TR., Vol. 1, pp. 126-27.
[55] Starkey, Exh. No. 73 (MS-9) at Easton, MN TR., Vol. 1, pp. 126-27. Although Qwest identified "job churn" as a source of burden, it has provided no evidence of the frequency of employee turnover in the relevant positions. Starkey, Exh. No. 73 (MS-9) at Easton, MN TR., Vol. 1, pp. 126-127.

27. Qwest also claims that it is not necessary for it to provide Eschelon with copies of signed nondisclosure agreements because Qwest already mandates very strict procedures and because another part of the ICA, Section 18.3.1, already provides for audits regarding compliance with proprietary information requirements.[56] Section 18.3.1, however, provides only for limited audit rights regarding the review of documents "used in the Billing process." The nondisclosure agreements in Section 5.16.9.1 are not documents used in the billing process.[57]

**9. Transit Record Charge and Bill Validation: Issues 7-18 and 7-19**

28. When a call originates on the Eschelon network and then travels across the Qwest network to be terminated on the network of a third carrier, Qwest acts as the transit provider and bills Eschelon.[58] Issues 7-18 and 7-19 concern the information that Qwest must provide on a limited basis to allow Eschelon to verify Qwest's transit bills. Eschelon's Issue 7-18 proposal would require Qwest to provide Eschelon with sample records for specific offices no more frequently than once every six months, at no charge, to allow Eschelon to verify Qwest's transit bills.[59] As Qwest charges for records received regularly for use in billing other carriers, this language is needed to clarify that these periodic sample records are provided at no charge because they are being used instead to verify Qwest's bills. Eschelon's Issue 7-19 proposal does not require Qwest to provide information in any particular format (e.g., sample records), but instead specifies information that is needed to verify aspects of Qwest's bill. Because Qwest is billing based upon these factors, Qwest has the information available to bill Eschelon. Contrary to Qwest's claim, Eschelon's switch provides Eschelon with information regarding its originating portion of the call, but does not provide the information that Eschelon needs to reconcile the

[56] Easton Dir., Exh. No. 42, p. 25.
[57] Joint Exh. No. 181 at Easton, CO TR., Vol. II, 276:16 – 279:2.
[58] Denney Dir., Exh. No. 130, p. 80.
[59] See Denney, Exh. No. 158 (DD-25), MN Arbitrators' Report, ¶ 85.

information provided by its switch to Qwest's charges for transiting the traffic.[60] When the companies disagree, Qwest should provide the information upon which it relies to claim that the amount stated in its bill is legitimately due. Providing the information early pursuant to this contractual provision (instead of, for example, later discovery) may avoid proceedings before the Commission. The Minnesota PUC adopted Eschelon's position on these issues.[61]

**14. Nondiscriminatory Access to UNEs: Issue 9-31**

29. Under the Telecom Act, Qwest is required to provide "nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable and nondiscriminatory."[62] "Access" to a UNE refers to the means by which carriers "obtain an element's functionality" to provide service.[63] 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."[64] To give effect to these requirements, Eschelon has proposed language that confirms that "Access to Unbundled Network Elements includes moving, adding to, repairing or changing the UNE. . . "[65] Eschelon's proposal is the result of Qwest's actual attempts, without first seeking Commission approval, to apply non-cost-based, tariff rates to activities that are necessary for Eschelon to be able to obtain the functionality of network elements -- even when Qwest had long provided the

[60] Denney Reb., Exh. No. 137, p. 61; Denney Surreb., Exh. No. 152, pp. 72-73.
[61] Denney, Exh. No. 158 (DD-25), MN Arbitrators' Report, ¶ 85. Qwest said in its 1/26/07 Exceptions to the MN Arbitrators' Report (p. 8): "This Commission should reject the Arbitrators' ruling on Issues 7-18 and 7-19. . . ."
[62] 47 U.S.C. § 251(c)(3).
[63] Local Competition Order at ¶ 269; see also Starkey Dir., Exh. No. 62, pp. 135-138.
[64] Local Competition Order at ¶ 268.
[65] In its proposal number two, Eschelon offers to add: "and will be provided at TELRIC rates." See Joint Disputed Issues Matrix (4/27/07), p. 38. Under either proposal number one or two, TELRIC rates apply, because access to UNEs must be provided at TELRIC rates. See 47 U.S.C. § 251(c)(3) & § 252(d)(1)(A)(i). The latter proposal is simply more explicit and is a counter to Qwest's ambiguous phrase "at the applicable rates."

activities as part of providing the network element at cost-based rates.[66] As the Department of Commerce (DOC) observed in Minnesota, Eschelon's language provides Eschelon with reasonable assurance that it will continue to have available to it things that it has available now.[67]

30. Previously, Qwest has refused to perform activities if Eschelon did not agree to Qwest's revised terms, even when Qwest had previously provided the activity under the same ICA at no separate charge and even when a rate is approved by the Commission.[68] Qwest's proposed "compromise" (to perform the activities during the ICA term but only pursuant to its revised proposed language) actually represents an attempt to replace Eschelon's language with a provision that would give Qwest broad latitude to impose tariff rates on activities that are necessary for Eschelon to access UNEs. By describing "moving, adding to, repairing and changing" UNEs as "*Activities available for*" unbundled network elements rather than as "*access to*" UNEs, Qwest seeks to take these activities, which are essential to Eschelon's ability to obtain the functionality of UNEs, outside of the scope of Section 251(c)(3).[69] By adding that Qwest will perform these activities "at the applicable rate," Qwest seeks to disavow its obligations to provide access to UNEs at TELRIC-based rates.[70] Qwest points to other language contained in Section 9.1.2 that requires nondiscriminatory access to unbundled elements as sufficient to

[66] Starkey Dir., Exh. No. 62, pp. 133-134 (citing Qwest's announcement of the change to its negotiations "template" agreement on its website, *see* Process Notification PROS.08.31.06.F.04159.Amendments. ComlAgree.SGAT). Qwest added a retail tariff reference for the following rate elements: Additional Dispatch, Trouble Isolation Charge, Design Charge, Expedite Charge, Cancellation Charge, and Maintenance of Service Charge. See *id.* p. 133, lines 20-22. See also Stewart Reb., Exh. No. 59, p. 3; Starkey Reb., Exh. No. 67, pp. 85-86; Starkey Surreb., Exh. No. 71, pp. 128-129. *See also* Issue 4-5 (Design Changes) and 12-67 (Expedites).

[67] Starkey Surreb., Exh. No. 73 (MS-9) at Fagerlund (MN DOC), MN TR., Vol. 5, p. 34 ; see also Starkey Surreb., Exh. No. 71, pp. 128-130.

[68] See, e.g., Denney Surreb. Exh. No. 152, FNs 481 & 482 on pages 182-184. See also Issue 12-67 (Expedites) & Denney Exh. No. 164 (DD-31).

[69] See, e.g., Starkey Surreb. Exh. No. 73 (MS-9) at Stewart, MN TR., Vol. 2, 136: 6-8 ("we were agreeing those activities would be available to you. We were just disagreeing that they were available as part of you paying to access the UNE")].

[70] Starkey Surreb., Exh. No. 73 (MS-9) at Stewart, MN TR., Vol. 2, pp. 136-137.

address Eschelon's concern.[71] However, because Qwest refuses to acknowledge that "access to UNEs" includes "moving, adding to, repairing and changing" UNEs, this general prescription to provide nondiscriminatory access to UNEs is not enough.[72]

31. Qwest claimed Eschelon's proposal would require Qwest to provide Eschelon with a superior network and would prevent Qwest from recovering its costs.[73] This speculation is not based on Eschelon's language. There can be no claim here that "moving, adding to, repairing, and changing" UNEs would require Qwest to do something for Eschelon it does not do for itself.[74] Nothing in Eschelon's proposal would prevent Qwest from recovering its costs, particularly as the ICA expressly allows Qwest to recover its costs.[75] Qwest complained that "these activities are not included in the Washington recurring rates for UNEs"[76] without mentioning that they *are* included in Washington in the non-recurring rates (NRCs)[77] and that Eschelon agrees in the ICA to pay the Commission-approved NRCs for these activities.[78] Qwest later admitted at the

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[71] Stewart Reb., Exh. No. 59, pp. 10-12.
[72] See Denney Exh. No. 158 (DD-25), MN Arbitrators' Report, ¶¶130-134.
[73] Stewart Reb. Exh. No. 59 15:3-4 ("Eschelon's proposal could thus prevent Qwest from recovering its costs and would effectively require it to provide services for free."). Ms. Stewart then admitted at the hearing that Qwest is not aware of Eschelon ever taking the position that it would not pay Commission approved rates; that Eschelon has not taken the position that it should receive elements for which there is no Commission-approved rate without charge; and that Eschelon has proposed interim rates for these elements. See Stewart,TR. 194:17 – 195:17.
[74] See, e.g., ICA Section 9.1.2 (closed) ("Where Technically Feasible, the access and Unbundled Network Element provided by Qwest will be provided in "substantially the same time and manner" to that which Qwest provides to itself or to its Affiliates."); see also Denney Exh. No. 158 (DD-25), MN Arbitrators' Report, ¶¶130-134.
[75] ICA Section 5.1.2 (closed ), *discussed in* Starkey Reb. Exh No. 67, pp. 80-81.
[76] See Stewart Surreb.., Exh. No. 61, 14: 1-5 (specifically referring to maintenance of service including trouble isolation, additional dispatches, and cancellation of orders).
[77] Exhibit A §9.20.5 (maintenance of service), §9.20.11 (additional dispatch), §9.20.15 (cancellation charge), §9.20.16 (trouble isolation). Each of these NRCs has a note of either "B" or "E" in Exhibit A. Notes "B" and "E" refer to Commission-approved rates, and the corresponding note at the end of Exhibit A provides the docket number.
[78] See, e.g., agreed upon language in ICA Section 4.0 (definition of Maintenance of Service charge, referring to the charges set forth in Exhibit A) and ICA Sections 9.2.5.2, 9.2.5.2.1, 9.2.5.3, 9.6.4.1.5, 9.7.3.4, 9.21.3.3.1, 9.23.4.7.1.2, 9.24.3.3.1, 12.4.1.5, 12.4.1.5.1, 12.4.1.6, as well as the rates in Exhibit A noted above. Although Qwest speculates about arguments that other CLECs opting in to the agreement may make at a later date (see Stewart Surreb., Exh. No. 61, 14: 8-10), any CLEC opting in to the ICA would likewise be bound be these provisions requiring payment of these Commission-approved rates in Exhibit A for these activities. In contrast, despite the presence of Commission-approved rates in the ICAs in various states, Qwest at least temporarily took the negotiation position that it could declare the Commission had no jurisdiction so those rates would be inapplicable and retail tariff rates would apply. See, e.g., Starkey Dir., Exh. No. 62, pp. 133-134; Denney Exh. No. 158 (DD-25), MN Arbitrators' Report, ¶ 133. Qwest's actual conduct, therefore, prompted the need for greater specificity in

hearing that, to charge for an activity, Qwest must show that the cost of performing that activity is not already recovered in an existing rate.[79] When Qwest makes or has made that showing, Eschelon agrees to pay the approved rate (whether recurring or NRC).[80] Eschelon's language requires cost-based rates without specifying whether recovery is through recurring or non-recurring rates, because the Commission may allow recovery through one or both types of rates. For example, this Commission has provided for cost recovery for loop conditioning using two types (recurring rate for the loop and NRC for loop conditioning),[81] whereas the Oregon PUC did not adopt a separate NRC because it found that "loop conditioning and other similar outside plant rearrangement activities are included in the maintenance factors to develop monthly recurring UNE rates."[82] The structure of a rate to perform an activity (i.e., whether the cost is recovered explicitly, through an NRC, or implicitly through a recurring charge) is an issue that is separate from whether the activity must be performed at cost-based rates.[83] Eschelon's language for Section 9.1.2 addresses the latter question.

32. Although Qwest has argued that the phrase "moving, adding to, repairing, and changing" is unduly vague, this phrase is actually agreed upon.[84] The issue is not what these activities consist of, but whether Qwest is required to perform them pursuant to Section 251(c)(3) at cost-based

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Section 9.1.2 about access to UNEs being provided at TELRIC rates. If Qwest were to later obtain a different ruling, the change in law and pricing provisions of Sections 2.2 and 22 would apply. See Denney Exh. No. 158 (DD-25), MN Arbitrators' Report, ¶ 132 ("Unless and until the Commission or other authority determines to the contrary, these types of routine changes to UNEs should be provided at TELRIC rates.").

[79] Stewart, TR. 193:23 – 194:2.

[80] See ICA Sections 2.2 and 22; see also sections of Exhibit A cited in above FN.

[81] Exhibit A §§9.2.2.4 & 9.2.2.5.

[82] OR Cost Docket, Order No. 03-085, Docket No. UT 138/UT 139, pp. 14-15.

[83] See Denney Surreb., Exh. No. 152, pp. 28-30.

[84] See Joint Disputed Issues Matrix (filed by Qwest on April 27, 2007), pp. 35-36 (showing this phrase, including the examples, as closed and agreed upon language in the proposals of both companies).

rates. Apparently, Qwest has no difficulty deciphering what "moving, adding to, repairing, and changing" require it to do, so long as it can decide to charge a tariff rate to do those things.[85]

33. Although Qwest uses the same list of examples in its proposed language,[86] at the hearing, Qwest's counsel sought an exhaustive list of activities, in addition to the agreed upon examples, constituting access to UNEs.[87] However, even a brief review of Exhibit A to the ICA, and its long list of cost-based rates for UNEs and access to UNEs, shows why an exhaustive list is impractical. The general activities of moving, adding to, and changing UNEs may include many "sub-activities" and even "sub-sub-activities" that may be performed. One activity identified in Exhibit A will include these sub-activities. For example, Qwest provided a cost study for a single rate that identified twenty-five sub-activities.[88] If each sub-activity included in each cost study for each UNE rate in Exhibit A were separately identified, the total number of activities would quickly increase. The larger number of specified activities does not mean that each one is not part of accessing the UNE at cost-based rates. Rather than attempt to list every conceivable activity, sub-activity, and sub-sub-activity that Qwest might perform to provide Eschelon with access to UNEs, Eschelon proposed terms, "move," "add to," and "change," that are generally-accepted in the industry to describe Qwest's obligations in that regard. In contrast, because it does not include the activities within the definition of "access to" UNEs, Qwest's proposal would allow Qwest to claim that an activity that it has performed at a TELRIC rate as part of

[85] As the Minnesota ALJs observed, "Qwest's proposed language is in fact more ambiguous than Eschelon's, because it would leave unanswered the question whether routine changes in the provision of a UNE would be priced at TELRIC or at some other 'applicable rate.'" Denney Exh. No. 158, MN Arbitrators' Report, ¶¶ 130-132.
[86] "[D]esign changes, maintenance of service including trouble isolation, additional dispatches, and cancellation of orders." See Joint Disputed Issues Matrix (April 27, 2007), pp. 35-36.
[87] See also Stewart Surreb. Exh. No. 61, 14:5-8.
[88] See Denney Dir., Exh. No. 130, p. 34 (chart showing 25 activities for a single OR UDIT design change charge). Another example is the Oregon finding that "loop conditioning and other similar outside plant rearrangement activities are included in the maintenance factors to develop monthly recurring UNE rates." OR Cost Docket, pp. 14-15. If each outside plant rearrangement sub-activity were separately identified, the total number of activities would quickly increase.

providing a loop is a "new product" for which Eschelon must pay a higher non-cost-based rate. The approach taken by Eschelon's language is similar to that taken by the FCC with respect to routine network modernization, where the FCC did not exhaustively list all of the activities that an ILEC might be required to do for a CLEC, instead describing the ILEC's obligation to "perform those activities that incumbent LECs regularly undertake for their own customers."[89] Nor is such an exhaustive list necessary; Qwest ignores two significant limitations that Eschelon's language places on Qwest's obligation. First, the phrase "access to UNEs" is limited to activities that are performed for UNEs. Second, the phrase is limited to those activities that Qwest performs for itself, its affiliated entities, and its retail customers.[90]

34. The Minnesota Commission agreed with Eschelon on Issue 9-31 and found as follows:

> It is difficult to understand Qwest's position that Eschelon's language might require Qwest to provide access to an "as yet unbuilt, superior network" or that it might mean Qwest would be unable to charge at all for making such changes. It is a real stretch to find this kind of ambiguity in Eschelon's language. Qwest has pointed to nothing in the language that would require it to perform an activity that is obviously outside of its existing § 251 obligations.[91]

## 16. Network Maintenance and Modernization: Issues 9-33 and 9-34

### a. Adverse Effect on End User Customers (Issue 9-33)[92]

35. The companies have agreed in Section 9.1.9 that Qwest may modernize and maintain its network and that such activities may result in "minor changes to transmission parameters." Eschelon's proposals define "minor" in light of assertions by Qwest that even a change that causes a permanent outage for an Eschelon end user customer could be considered "minor."[93] Ironically, Qwest criticizes the use of the phrases "adversely affect" and "unacceptable changes"

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[89] TRO ¶ 632.
[90] ICA Section 9.1.2 (closed language); see Joint Exh. No. 181 at Starkey, CO TR., Vol. II, 350: 5-13.
[91] Denney Exh. No. 158 (DD-25), MN Arbitrators' Report, ¶¶ 130-132; see also *TRO* ¶ 639.
[92] Eschelon has proposed two alternatives for Issue 9-33. See Starkey Exh. No. 71, pp. 140-141; Joint Disputed Issues Matrix, pp. 40-43. This brief will focus on "Option #2."
[93] *See*, *e.g.*, Webber Dir., Exh. No. 172, 13: 4-9; Webber Reb., Exh. No. 176, pp. 13-18 (db loss example); *see also* Exh. No. 102 (BJJ-27) (db loss example documentation).

in Eschelon's alternate proposals on the ground that they are undefined, ignoring the fact that "minor" is also undefined and that Qwest has already unilaterally interpreted it in an improbable manner. Eschelon's alternative language, which was suggested by the Minnesota DOC, was adopted by the Minnesota PUC based on the ALJs' conclusion that that language "appears to balance the reasonable needs of both parties in an even-handed matter."[94] The ALJs said: "The reference to correcting transmission quality to 'an acceptable level' does not, as Qwest argues, make this language unacceptably vague. The language merely commits Qwest to taking action to restore transmission quality to that which existed before the network change."[95] Eschelon's proposal also uses language similar to that contained in other agreed upon ICA provisions, further undercutting Qwest's vagueness argument.[96]

36. Qwest opposed Eschelon's language on the ground that if "faced with a prohibition against changes that have an adverse effect and undefined consequences for violating prohibition, Qwest would have substantial risk whenever it made a network change."[97] However, Qwest's witness, Ms. Stewart, acknowledged that these concerns are not, in fact, based on Eschelon's language. Eschelon's proposals do not prohibit Qwest from making changes to its network and its alternative proposal defines a consequence if a network change causes an unacceptable change in transmission – that is, in the event of such an unacceptable change, Eschelon's language only requires Qwest to take necessary corrective action.[98] Qwest also claims that it will "maintain and

[94] Denney Exh. No. 158 (DD-25), MN Arbitrators' Report, ¶ 142, *aff'd* in Denney Exh. No. 171 (DD-38).
[95] Denney Exh. No. 158 (DD-25), MN Arbitrators' Report, ¶ 142.
[96] Qwest admits the fact that a term is undefined in the ICA has not prevented it from agreeing to other such language, such as (in Section 5.1.3) "service impacting," "non-service impacting" "interfere," "immediate threat," and "material." Stewart, TR. 198:1 – 202:24.
[97] Stewart Surreb., Exh. No. 61, p. 19.
[98] Joint Exh. No. 179, at Stewart, AZ TR. at Vol. 2, pp. 201-202.

update its network in a ***seamless*** manner for its millions of customers."[99] If that is true, Qwest should have no problem with putting this commitment in the ICA.

37. The FCC's rules recognize that industry standards, although obviously important, may not tell the whole story. Thus, the FCC's unbundling rule provides, in part, that, "An incumbent LEC shall not engineer the transmission capabilities of its network in a manner, or engage in any policy, practice, or procedure, that *disrupts or degrades access* to the local loop."[100] In adopting this rule, the FCC did not simply refer to industry standard; rather the rule focuses on the end that such standards are intended to advance – access to the local loop.

38. Eschelon's language addresses situations when a change results in a change to transmission parameters that, although meeting applicable standards, still has an adverse impact on the service that Eschelon is able to provide to its customer.[101] Eschelon's concern is based on actual experience. In particular, Eschelon presented evidence regarding Qwest's policy of, as a matter of course, adjusting the dB loss on circuits to a level that, although within industry standards, could result in customers receiving circuits that did not work.[102] That the dB loss is set within the standard range is of no consolation to those customers who can not use their telephones. Contrary to Qwest's claims, Eschelon's language would not prohibit such changes; but rather, if a change resulted in a problem, would require that Qwest set the circuit at a dB level within the industry standard range that would enable service to be provided. In other words, if a Qwest network activity causes a problem, the remedy is for Qwest to fix it.

[99] Stewart Dir., Exh. No. 57, 27: 4-5 (emphasis added).
[100] 47 C.F.R. § 51.319(a)(8) (emphasis added); see also Webber Reb. Exh. No. 176, pp. 10-11.
[101] Webber Reb., Exh. No. 176, pp. 3-5.
[102] Johnson, Exh. No. 102 (BJJ-27); Webber Reb., Exh. No. 176, pp. 13-18.

**b. Location of Changes (Issue 9-34)**

39. Section 9.1.9 also refers to obligations arising under the FCC's rules with respect to notice of network changes. 47 C.F.R. § 51.327 provides a list of items that a public notice must include. The rule is expressly a minimum list.[103] Part (a)(4) of § 51.327 states that the list must include "the location at which the changes will occur." The term "location," as used in this rule, must be considered in the context of 47 C.F.R. § 51.325(a), which states that the notice must address any network change that "will affect a competing service provider's performance or ability to provide service." Consistent with these rules, Eschelon has proposed language that would require that, when a change is specific to an end user customer, information regarding the location where a change will occur must include circuit identification and customer address information, to the extent such information is readily available. Such information is necessary for the notice to fulfill its intended purpose. Circuit identification is the generally accepted locator within the network and customer address information identifies particular customers. With this information, Eschelon cross references its records to determine which customers Qwest's change will affect, so that it can respond to and assist those customers as necessary.[104]

40. This requirement would not apply to the kinds of changes about which Qwest expresses concern – switch upgrades and dialing plans – because neither of these changes is specific to any particular end user.[105] Moreover, Eschelon proposed an alternative for Issue 9-34 to require circuit ID information for changes that are specific to an end user customer "if readily available."[106] Qwest has this information available to it for its customers and is, therefore, able to keep its customers informed regarding planned activities. As evidence that Qwest has this

[103] 47 C.F.R. § 51.329(a) ("Public notice of planned network changes must, at a minimum, include . . .").
[104] Webber Reb., Exh. No. 176, pp. 5-6 and Webber Dir., Exh. No. 172, pp. 15-16.
[105] Webber Reb., Exh. No. 176, p. 22; Starkey Surreb., Exh. No. 71, p. 156.
[106] Starkey Surreb., Exh. No. 71, pp. 140-141.

information readily available, Eschelon introduced Qwest's own form that contains precisely the type of information requested.[107] When Qwest has that information readily available for itself, it should provide the information to Eschelon. Eschelon, unlike end user customers, has to perform repairs and communicate with its customers, just as Qwest has to do so for itself and its customers. The prohibition on discrimination requires that Eschelon be provided with the same access to information so that Eschelon and its customers are not disadvantaged.[108]

41. Qwest's claim that Eschelon's 9.1.9 proposal is inconsistent with the Covad-Qwest arbitration order is disproven by the order itself, as well as closed ICA language. In the Covad-Qwest arbitration, the order concerned notices relating to copper retirement.[109] Section 9.1.9 provides: "This Section 9.1.9 does not address retirement of copper Loops or Subloops."

**18. Conversions: Issues 9-43 and 9-44 and subparts**

42. In the TRO and TRRO, the FCC declared that it would be necessary to "convert" certain circuits from UNEs to "non-UNE" alternative arrangements.[110] The FCC declined to adopt rules setting out specific procedures for conversions, indicating that parties would negotiate and arbitrate in good faith to develop a process for the conversion of circuits.[111] The FCC directed that conversion should be a "seamless process that does not affect the customer's perception of service quality"[112] and described such conversions as "largely a billing function."[113] Because only CLECs are required to convert circuits from UNEs to non-UNEs, the FCC prohibited ILECs from imposing "wasteful and unnecessary charges, such as termination charges, re-connect and disconnect fees, or non-recurring charges associated with establishing a service for

[107] Webber Reb ., Exh. No. Ex. 176., pp. 24-26; Webber. Exh. No. 177 (JW-4).
[108] Starkey Surreb., Exh. No. 71, pp. 158-159.
[109] Starkey Surreb., Exh. No. 71, pp. 157-158.
[110] Starkey Dir., Exh. No. 62, pp. 142-143.
[111] TRO ¶ 585.
[112] TRO ¶ 586.
[113] TRO ¶ 588.

the first time" on the ground that such charges are inherently discriminatory.[114] Qwest acknowledges that a converted circuit uses the same physical facilities after the conversion as it did before and the conversion does not involve making any physical changes to the circuit.[115] Indeed, the process that Qwest claims it must undertake involves a purely paperwork "disconnection" and "re-connection" to convert a circuit, which involves exactly the kinds of activities for which the FCC has made clear CLECs cannot be charged.[116]

43. To give effect to the FCC's directives and to assure that Eschelon end user customers are not adversely affected by conversion of circuits from UNEs to non-UNE wholesale arrangements, Eschelon has proposed ICA language that: 1) provides that the circuit i.d will not change as a result of the conversion; and 2) provides for the conversion to be handled as a price change rather than a physical conversion.[117] Qwest has not proposed any alternative.

44. Rather than negotiate with Eschelon and other CLECs, Qwest has chosen to act on its own in erecting a Rube Goldberg-esque process that involves personnel in three different functional areas (including a "Designer" who doesn't design anything because there is nothing to design[118]), multiple databases and systems, orders to "disconnect" and "connect" service, and much "reviewing" and "confirming" and "assuring" and "verifying" and "validating," all to the end of changing what the UNE is called and how much it will cost the CLEC.[119] Qwest announced its terms through a series of password-protected PCATs that were developed and implemented

[114] TRO ¶ 587.
[115] Starkey Dir., Exh. No. 62, p. 151; Starkey Exh. No. 73 at Million, MN TR. at Vol. 2, 70:13-24 & 72:21-25.
[116] Million Dir., Exh. No. 51, p. 14, fn. 8.
[117] Starkey Dir., Exh. No. 62, pp. 154-167. Such a price change could be implemented through the use of an adder or surcharge to be applied to converted circuits, similar to the way that Qwest has implemented the price increases under its QPP agreements. Starkey Dir., Exh. No. 62, pp. 162-164.
[118] Starkey Surreb., Exh. No. 73 (MS-9) at Million, MN TR., Vol. 2, p. 78.
[119] Million Dir., Exh. No. 51, pp. 12-14.

outside of CMP, without CLEC input, and without the approval of any state commission.[120] Having created this unwieldy contraption, Qwest now argues that Eschelon should bear the costs associated with that process as well as the burden of the potential customer disruption that results from needlessly changing the circuit ID to convert the circuit.

45. Qwest acknowledges that this process would be unnecessary if Qwest did not, as part of the conversion, change the circuit ID.[121] Although Qwest asserts that the circuit ID "must" change to convert a circuit from a UNE to a non-UNE, this assertion is unsupported as a matter of law and fact. First, Qwest implies that the Commission should not be concerned about conversions because CLECs have a "choice" to use alternative arrangements in lieu of converting existing UNE circuits. The ability to convert a circuit from a UNE to a non-UNE, however, is a critical aspect of the FCC's transition plan when a facility that was formerly available as a UNE is, as a result of the TRRO, no longer available as a UNE.[122] Without the ability to convert, CLEC customers, and only CLEC customers, would face the disruption that would inevitably result from having to switch from an existing, working circuit provided by Qwest, to facilities provided by another carrier. Second, rather than attempting to show how its conversion process complies with the FCC's directive that such a process be "seamless," Qwest focuses on an obscure rule that addresses Uniform System of Accounts record-keeping.[123] As Qwest's quotation from this rule shows, the rule requires only that information be maintained in sufficient detail as to facilitate the reporting of required specific information; it says nothing about circuit IDs.[124]

[120] Starkey Dir., Exh. No. 62, pp. 65 – 78 (describing the process followed by Qwest in implementing the "secret" TRRO PCATs).
[121] Starkey, Exh. No. 73 (MS-9) at Million, MN TR., Vol. 2, p. 80.
[122] Starkey Reb., Exh. No. 67, pp. 101-102.
[123] Million Dir., Exh. No. 51, pp. 16-17; Starkey Reb. Exh. No. 67, p. 104.
[124] 47 C.F.R. § 32.12; see Million Dir., Exh. No. 51, p. 16.

46. Finally, it is undisputed that, when Qwest began converting special access circuits to UNEs, the circuit IDs did not change, thus demonstrating the feasibility of retaining the same circuit ID when a circuit is converted.[125] The conversion from a UNE to a non-UNE is the mirror image of that previous process,[126] and there is no more reason to change the circuit ID now than there was then. Qwest attempts to explain away this history with the claim that it discontinued this practice in April 2005 (at about the same time that Qwest was getting ready to implement its secret TRRO PCAT) because it was "experiencing difficulty in managing the large number of circuits" and "incurring a substantial amount of expense."[127] Qwest has failed, however, to provide any supporting evidence concerning these alleged "difficulties."

47. The Commission should weigh the lack of any demonstrable need to change the circuit ID against the very real potential for harm that such changes will involve. Because Qwest converts circuits by "disconnecting" the UNE and "connecting" the non-UNE, a simple typing error could result in a customer being placed out of service.[128] Further, if both Eschelon's and Qwest's systems are not timely and accurately updated to reflect the new circuit IDs, there will likely be problems identifying the correct circuit if a circuit requires repair or maintenance, because Qwest and Eschelon may not be using the same i.d. number to identify the circuit.[129] Adopting Eschelon's proposals with respect to circuit conversions will, thus, help to prevent service interruptions and promote quality service.

[125] Starkey Dir., Exh. No. 62, p. 156; Million Dir., Exh. No. 51, p. 18.
[126] Starkey Surreb., Exh. No. 73 (MS-9) at Million, MN TR., Vol. 2, p. 84.
[127] Million Dir., Exh. No. 51, 18:13; Starkey, Exh. No. 73 (MS-9) at Million, MN TR., Vol. 2, p. 86.
[128] Starkey Dir., Exh. No. 62, p. 155.
[129] Starkey Dir., Exh. No. 62, pp. 155-156.

## 22. Unbundled Customer Controlled Rearrangement Element (UCCRE) and Phase Out Process (Issue 9-53)

48. It is undisputed that, despite Qwest's recent claim that the TRRO eliminated UCCRE,[130] Qwest makes UCCRE available to other CLECs, under ICAs and its SGAT.[131] It is also undisputed that, unless Eschelon's proposal is included in the ICA, other CLECs who have these products in their contracts will be able to order them and Eschelon will not. Such a difference in treatment is precisely the sort of discrimination that the Telecom Act was intended to prevent.

49. When the FCC reversed the pick and choose rule, contrary to Qwest's claims,[132] it made clear that "existing state and federal safeguards against discriminatory behavior" were still in effect and remained "in place" to provide needed protection against discrimination.[133] Similarly unavailing is Qwest's suggestion that the Commission should ignore the SGAT because the SGAT is "outdated,"[134] when Qwest chose not to update the SGAT, despite representations to CLECs it would do so.[135] Nothing has relieved Qwest of the obligation to provide products under the SGAT and, if a CLEC sought to opt in, Qwest would be obligated to comply.

50. Qwest's claims there is no CLEC demand for this product and that it intends to discontinue offering it "on a going forward basis."[136] Qwest has not gone to the Commission, however, to request these rates and services be removed from existing ICAs. What this means is that UCCRE will continue to be available to those CLECs, such as AT&T and Covad, who already have them in their ICAs,[137] but will be unavailable to CLECs, such as Eschelon, who enter into

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[130] The TRRO did not remove Qwest's obligation to provide UCCRE. Denney Dir., Exh. No. 130, 117:1 – 118:17.
[131] Denney Dir., Exh. No. 130, pp. 111-113; Stewart Reb., Exh. No. 59, pp. 28-29; and Starkey, Exh. No. 73 (MS-9) at Stewart, MN TR., Vol. 2, p. 169.
[132] Stewart Reb., Exh. No. 59, pp. 26-28.
[133] Second Report and Order at ¶¶ 18, 20, 23 (July 8, 2004).
[134] Stewart Reb., Exh. No. 59, 26:20.
[135] Starkey Surreb., Exh. No. 71, 40:11 – 41:10 & FN 158 on page 39, quoting Qwest Exhibit RA-24RT, pp.7-8; Johnson, Exh. No 108 (BJJ-33) & Johnson, Exh. No. 81 (BJJ-7), pp. 11-12.
[136] Stewart Reb., Exh. No. 59, p. 23, line 18.
[137] Denney Dir,. Exh. No. 130, 111: 4-6.

new agreements. In response to the Minnesota DOC's suggestion that the ICA include a provision that allows for elements to be phased out (to address Qwest's stated desire to discontinue offering certain products such as this one),[138] Eschelon has offered three different alternatives (Options 2-4) that would allow Qwest to phase out products, subject to Commission approval, while still preventing discriminatory treatment.[139] Option 2 is based on the DOC's proposal; Option 3 contains more detail to address alleged concerns (such as the provision in Section 1.7.3.3 that Section 1.7.3 does not prevent another CLEC and Qwest from mutually agreeing to remove a product from an individual ICA, to address any concern that they might be prevented from doing so); and Option 4 contains less detail to address criticisms that Option 3 is now too detailed. Under any of these options, Qwest may avoid a phase out process by promptly amending ICAs to remove a product it ceases to offer. If the ICAs are amended, or a phase out process is used, Qwest will be able to cease offering a product for the reasons it has asserted, but cessation of the product will be accomplished in a nondiscriminatory manner.

**24. Loop-Transport Combinations - Terminology: Issue 9-55**

51. This issue, together with Issues 9-58 and 9-59, concerns how Loop-Transport Combinations including Commingled EELs will be addressed under the ICA. Issue 9-55 concerns, in particular, the nomenclature that is used to describe combinations of loop and transport. This issue takes on a larger significance in the context of Issues 9-58 and 9-59 (discussed below). The FCC, in the TRO, used the term "loop-transport combination"[140] as an umbrella term, as well as EELs,[141] Commingled EELs,[142] and high capacity EELs[143] when specifically discussing each

[138] See Denney, Exh. No. 158 (DD-25), MN Arbitrators' Report, ¶¶164-170.
[139] See Denney Reb., Exh. No. 137, pp. 80-85. Option 1 is a provision setting forth the terms of UCCRE (as in the AT&T ICA) and requiring Qwest to provide UCCRE without phasing it out.
[140] *See* TRO ¶¶ 25 & 575 (both using "loop-transport combinations").
[141] TRO ¶¶575, 576.
[142] TRO ¶¶584, 593, 595.
[143] TRO ¶¶593.

one. Likewise, Eschelon proposes language that uses the term "Loop-Transport Combination" as the FCC did,[144] in addition to the individual definitions of each term in ICA Section 9.23.4.[145] Qwest has not indicated that any one of these terms is used incorrectly in the ICA to refer to the wrong combination(s). Qwest objects to any use of the term "Loop-Transport Combination" on the ground that Eschelon is using that term to create a new "product." Qwest's ignores Eschelon's proposal, which expressly provides that "At least as of the Effective Date of this Agreement 'Loop-Transport Combination' is not the name of a particular product."[146] Eschelon's language further confirms that "If no component of the Loop-Transport Combination is a UNE, however, the Loop-Transport Combination is not addressed in this Agreement. The UNE components of any Loop-Transport Combination are governed by this Agreement and the other component(s) of any Loop-Transport Combination are governed by the terms of an alternative service arrangement, as further described in Section 24.1.2.1."[147] This language shows that Eschelon is not attempting to bring non-UNEs within the scope of the ICA.

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

52. The FCC, in its *Supplemental Order Clarification*,[148] established a framework of self-certification and auditing as the means for assuring compliance with local usage requirements applicable to UNEs.[149] In the TRO, the FCC again addressed this system of self-certification and auditing, citing the *Supplemental Order Clarification* for the proposition that "audits will not be routine practice, but will ***only*** be undertaken when the incumbent LEC has a concern that a

[144] Starkey Dir., Exh. No. 62, pp. 175-176. Consistent with this definition, Eschelon proposes *capitalizing* the term (as capitalization of a term indicates the term is defined in the ICA), and referring in the *headings to the UNE components* of Loop Transport Combinations to clarify, as stated in the definition, that the ICA does not govern the non-UNE portion. Many of the open provisions in the language relate to these issues of capitalization and heading terminology.
[145] Starkey Surreb., Exh. No. 71, 168: 1-17.
[146] ICA Section 9.23.4.
[147] ICA Section 9.23.4; Starkey Surreb., Exh. No. 71, pp. 171-172.
[148] Supplemental Order, 15 FCC Rcd 9587 (2000).
[149] TRO ¶ 620.

requesting carrier has not met the criteria for providing a significant amount of local service."[150] In order to give effect to this limitation, and to assure that audits do not become a "routine practice," Eschelon has proposed ICA language that would allow Qwest to perform such an audit when Qwest has a concern that Eschelon has not met the Service Eligibility Criteria.[151] Eschelon's proposal would also require Qwest to disclose to Eschelon the circuits that Qwest has identified, if any, that support Qwest's concern.

53. Qwest objects, however, even to these modest limitations, maintaining that it should have the rights to withhold circuit information when it has identified circuits and to conduct an audit, annually, as a matter of course, even if it has no reason to believe that Eschelon has failed to comply with the criteria. Qwest criticizes Eschelon's reliance on the *Supplemental Order Clarification,* arguing that the TRO superseded it. In fact, the FCC also relied on the *Supplemental Order Clarification* in its discussion in the TRO regarding determining compliance with the Service Eligibility Criteria. Rather than superseding the audit standard established in the *Supplemental Order Clarification*, the FCC expressly reaffirmed that standard.[152]

**26. Commingled Loop Transport Arrangements – Ordering, Circuit ID, Billing, Interval: Issues 9-58 (including subparts (a) through (e)) and 9-59**

54. Eschelon's proposal helps prevent Qwest from imposing burdensome and discriminatory conditions. Qwest's proposal would require operation of two functionally equivalent networks, one for UNEs and one for commingling - the very thing the FCC has sought to prevent. The dispute is whether Qwest may, consistent with the FCC's commingling order, erect operational barriers -- requiring separate orders, separate circuit IDs, separate bills, and sequential ordering

[150] TRO ¶ 621, quoting the *Supplemental Order* at n. 86 (emphasis added).
[151] Denney Dir., Exh. No. 130, pp. 129-130.
[152] TRO ¶ 622 "Although the bases and criteria for the service tests we impose in this Order differ from those of the *Supplemental Order Clarification,* we conclude that they share the basic principles of entitling requesting carriers unimpeded UNE access based on self-certification, subject to later verification *based upon cause,* are equally applicable."(emphasis added).

resulting in longer intervals for customers -- that make commingled EELs difficult or infeasible to use.[153] In the alternative, if Qwest may erect such barriers, the issue is whether Qwest must mitigate the effect of its barriers by relating for CLECs the portions of the circuit that Qwest has chosen to provide in that burdensome manner. If, when UNE-P was first developed, Qwest had been allowed to require separate orders and bills (forcing CLECs to attempt to relate the loop, switching, and transport elements because Qwest would not do so), query whether UNE-P would have ever served as the mechanism for getting into the market that it did, or whether Qwest would have been able to obtain 271 approval based in part on UNE-P.[154] Whether Commingled EELs will be a viable alternative, which Eschelon can actually order and use in the manner envisioned by the FCC, will depend on whether Qwest must provide the UNE component of that EEL in a manner that avoids operational barriers.

55. In the TRO, the FCC eliminated its previous restrictions on commingling, permitting requesting carriers to commingle UNEs and combinations of UNEs with other wholesale facilities and services obtained from Qwest pursuant to any method other than unbundling and requiring incumbents "to perform the necessary functions to effectuate such commingling upon request."[155] In lifting the restriction, the FCC found that the restriction placed CLECs at a competitive disadvantage and constituted "an unjust and unreasonable practice."[156] Commingling has become a particularly important competitive option for CLECs in light of the FCC's limitations on the ILECs' unbundling obligations in the TRRO. Thus, if UNE transport is no longer available as the result of a finding of "non-impairment," commingling of an unbundled loop with private line transport may be the means to provide service to a customer that Eschelon

[153] See, generally, Denney Dir., Exh. No. 130, pp. 133-149.
[154] See, e.g., FCC 9-state 271 Order, ¶5 (indicating that Qwest estimated CLECs had 52,346 UNE-P lines in Washington) & ¶¶8 & 31-32.
[155] TRO ¶ 579.
[156] TRO ¶ 581 (FNs omitted).

could previously have served with an EEL.[157] There is no functional difference between a UNE EEL and a Commingled EEL; the facilities are the same, the function is the same, and the customer's experience should be the same.[158] The only difference is the price, because, for an EEL, both the loop and transport portions of the circuit are available at TELRIC-based rates, while, for a Commingled EEL, the UNE portion of the circuit is still available at a TELRIC-based rate but the non-UNE portion is subject to a higher, tariffed rate.[159]

56. Qwest's argument, similar to its argument with respect to conversions, is that Qwest's desire to preserve its alleged "existing process" outweighs the needs of Eschelon and its customers. In evaluating Qwest's claims regarding its "existing process," it is important to keep in mind that Eschelon's proposal with respect to point-to-point Commingled EELs is the same as Qwest's current process for provisioning, maintaining and repairing point-to-point UNE EELs.[160] If either party's proposal reflects the existing process, it is Eschelon's proposal. Qwest did not seek to change that process, or develop a new one, through CMP. Although Qwest now contends that this issue should be addressed through CMP, so that other CLECs can have input, what Qwest characterizes as its "existing process" was not developed in CMP, nor did any CLEC have input.[161] Now, faced with the possibility of Commission review, Qwest urges that the Commission to defer belatedly to CMP, where Qwest decides whether to implement any change. As with conversions, Qwest would have the Commission reward its go-it-alone strategy by according Qwest's resulting unilateral procedures some sort of special, protected status.

57. Qwest insists that it "must" assign different circuit IDs to, and bill separately for, the UNE and non-UNE parts of a Commingled EEL and that to require a single circuit ID and BAN would

[157] Denney Dir., Exh. No. 130, pp. 133-134, fn. 86.
[158] Denney Dir., Exh. No. 130, pp. 143-144.
[159] Denney Dir., Exh. No. 130, pp. 145-146. See also Starkey Exh. No. 73 at Stewart, MN TR., Vol. 2, p. 181.
[160] Denney Dir., Exh. No. 130, pp. 142-145 & p. 147; see also Denney Surreb., Exh. No. 152, p. 100, lines 5-6.
[161] Starkey, Exh. No. 73 (MS-9) at Stewart, MN TR., Vol. 2, p. 181-82.

cause Qwest to incur substantial expense. For reasons discussed in Eschelon's testimony on these issues (as well as regarding Issues 9-43 & 9-44), Eschelon disagrees. However, Eschelon also offers an alternative to help alleviate the problems in two particularly customer-affecting areas – billing and repairs – where Qwest's position will most greatly diminish the utility of Commingled EELs.[162] With respect to billing, Eschelon proposes that Qwest relate the separate components of Commingled EELs on bills, so that Eschelon will be able to at least determine which separately identified circuits are combined to make up a completed circuit (so, for example, bills do not continue for one portion of a circuit but not the other when both should stop). In connection with repairs, Eschelon proposes that it be permitted to submit multiple circuit IDs associated with a single Commingled EEL and that Qwest would assess a "no trouble found" charge only if no trouble is found on both the UNE and non-UNE portions of the circuit.[163] This alternative would be more efficient and eliminate the delay resulting from having to submit separate, sequential trouble reports. The loop and private line portions of a Commingled EEL make up a completed circuit, and Qwest established no technical reason why Qwest could not test both parts at the same time, as it currently does for UNE EELs.

**27. Multiplexing (Loop-Mux Combinations): Issues 9-61 and subparts[164]**

58. The issue presented is whether Qwest is required to provide unbundled access to multiplexing ("muxing") at TELRIC rates when Eschelon requests muxing with an unbundled loop. Qwest currently provides an unbundled product, which it has named "Loop Mux Combination," consisting of an unbundled loop with multiplexing equipment attached, pursuant to Commission-approved TELRIC rates. Eschelon's proposal is only that Qwest continue to

[162] Denney Dir., Exh. No. 130, pp. 160-163.
[163] Denney Dir., Exh. No. 130, p. 162.
[164] Eschelon's proposal on these issue as set forth in the Joint Disputed Issues Matrix contained certain errors that should be corrected as follows: (1) ICA Section 9.23.2 (p. 79, 4/27/07 & p. 129 8/9/06): The word "and" following "Loop Mux Combinations" should be deleted; and (2) ICA Section 9.23.9.3.2.2 (p. 82, 4/27/07 & p. 133 8/9/06): "28 channels" should be "24 channels."

provide this product as it has been.[165] Even though the Commission has approved a TELRIC-based rate, Qwest contends that it has provided this product only "voluntarily" and that it should be permitted to discontinue providing it. Qwest's position is contrary to law.[166]

59. The FCC's rules require that, in providing access to an unbundled network element, the ILEC must provide all of the features, functions and capabilities of the element.[167] In the TRO, the FCC included multiplexing among the features, functions, and capabilities included as part of the loop.[168] Further, the FCC's rules provide that deploying a multiplexer or reconfiguring a multiplexer is included as part of the ILEC's obligations to perform "routine network modifications" both with respect to the provisioning of unbundled loops and unbundled transport.[169]

60. Qwest argues that multiplexing is not a feature, function or capability of a loop because a loop can function without multiplexing.[170] Qwest also argues that the FCC rules that Eschelon has relied on are inapplicable because those rules are referring to "an entirely different type of multiplexing than is at issue here."[171] Qwest does not offer any legal support for either of these assertions and, in fact, they are legally incorrect.

61. Qwest has asserted that multiplexing is a feature, function or capability of unbundled transport.[172] However, because transport can also function independently of multiplexing, this testimony is inconsistent with Qwest's purported test for determining whether multiplexing is a

[165] Starkey Dir., Exh. No. 62, p. 195.
[166] To the extent Qwest seeks to discontinue offering any product, it should first be required to obtain Commission approval, for the reasons discussed in connection with Eschelon's "phase out" proposal (see Issue 9-53).
[167] 47 C.F.R. § 51.307(c); see also 47 C.F.R. § 51.319(a).
[168] TRO ¶ 214; see also TRO ¶ 635.
[169] See 47 C.F.R. §§ 51.319(a)(7) and 51.319(e)(4); see also Starkey Surreb., Exh. No. 71, pp. 188-189.
[170] Stewart Reb., Exh. No. 59, p. 81.
[171] Stewart Reb., Exh. No. 59, p. 82, lines 18-19.
[172] Stewart Reb., Exh. No. 59, p. 78; Starkey, Exh No. 73 (MS-9) at Stewart, MN TR., Vol. 2, p. 186-87.

feature, function, or capability of the loop.[173] Qwest fails to offer any rationale for distinguishing between unbundled loop and transport in this regard. Further, there are a number of other things – such as repeaters and load coils – that are not required for a loop to function but are clearly features, functions, or capabilities of the loop.[174] Similarly unsupported is Qwest's claim that the FCC rules cited by Eschelon are inapplicable. Qwest has identified no language in either those rules or any FCC order that would support a conclusion that the multiplexing referred to in those rules is "entirely different" from the multiplexing that is at issue here.

62. Qwest argued that Eschelon's language is contrary to the FCC decision in the Verizon Virginia Arbitration Order.[175] As the Minnesota Commission found, however, the Verizon Virginia Arbitration Order did not address muxing as a UNE when provided as part of a loop mux combination.[176] The Minnesota Commission further found that, given that Qwest had previously provided multiplexing as a UNE when provided in conjunction with a UNE loop, it should continue to do so unless and until it receives permission to withdraw that product.[177]

**29. Root Cause Analysis and Acknowledgement of Mistakes: Issues 12-64 and subparts**

63. In its role as a wholesale provider (vendor) to Eschelon, Qwest performs activities, such as installing and repairing loops, on Eschelon's behalf. Qwest's role is unique in this respect, as Eschelon does not perform installation and repair activities on a wholesale basis on Qwest's behalf.[178] If Qwest makes an error in the course of these activities that impacts Eschelon's customer, that customer may attribute fault to Eschelon. Qwest may even tell Eschelon's customer that Eschelon caused the error, even though Qwest caused the service impacting error. In the Minnesota 616 case, for example, Qwest gained a more than $460,000 per year customer

[173] Starkey Surreb., Exh. No. 71, pp. 187-188.
[174] 47 C.F.R. § 51.319(a); see also Starkey Surreb., Exh. No. 71, pp. 187-188.
[175] Stewart Dir., Exh. No. 57, p. 115, citing VA Arbitration Order.
[176] Denney, Exh. No. 158 (DD-25), ¶ 196 (FNs omitted, quoting VA Arbitration Order at ¶¶ 490].
[177] Denney, Exh. No. 158 (DD-25), Minnesota Arbitrators' Report, ¶ 199.
[178] Webber Reb., Exh. No. 176, pp. 42-43.

as a result of a Qwest error that Qwest, when dealing with Eschelon's customer, blamed on Eschelon.[179] In any case, Qwest should acknowledge its mistake in a form allowing Eschelon to pass the acknowledgement to its customer, if necessary, so that Eschelon does not lose its customers and suffer harm to its reputation in the marketplace due to a Qwest wholesale error.

64. Root cause analyses are necessary to the correct attribution of mistakes and for attempting to avoid similar mistakes in the future. Qwest testified it routinely provides Eschelon with root cause analysis.[180] Indeed, providing root cause analysis in many areas is a defined part of the Qwest's Service Manager's role.[181] In the Minnesota 616 case, the Minnesota PUC ordered Qwest to create procedures for acknowledging Qwest mistakes that affect CLEC's customers.[182] A requirement to perform a root cause analysis, when necessary to establish which carrier caused an error, is implicit in this requirement. In other words, "to acknowledge a mistake, Qwest has to determine that one was made and why."[183] Since then, the Minnesota PUC adopted Eschelon's language for Issue 12-64 (including option #2 for Section 12.1.4.1).[184] In rejecting Qwest's argument that Eschelon's language is beyond the scope of the earlier ruling, the Minnesota PUC stated: "The Commission's concern for the anticompetitive consequences of service quality lapses has never been so narrow as Qwest's language would suggest."[185]

65. Eschelon's proposed language is limited to "mistakes" that create a "service impacting condition" that Eschelon may raise after following the "usual procedures" to correct that

[179] Starkey, Exh. No. 72 (MS-8), p. 7 of 14. See Webber Dir., Exh. No. 172, pp. 25-26.
[180] Albersheim Reb., Exh. No. 18C, 41:6-7. See also Johnson, Exh. No. 82 (BJJ-8) (examples). Regarding Qwest's recent refusal to provide root cause analyses, however, see Webber Reb., Exh. No. 176, pp. 87-88 & 90 & Starkey Surreb., Exh. No. 71, FN 740 on p. 225 (illustrating a need for Eschelon's proposed language for Issue 12-64).
[181] Johnson, Exh. No. 119 (BJJ-43), p. 2 (last paragraph). This is Qwest documentation posted on its website.
[182] Exh. No. 72 (MS-8), MN 616 Order, p. 14 of 14.
[183] Denney, Exh. No. 158 (DD-25), MN Arbitrators' Report, ¶208.
[184] Denney, Exh. No. 171 (DD-38), MN Arbitration Order, p. 23, ¶4 (Topic 27).
[185] Denney, Exh. No. 171 (DD-38), MN Arbitration Order, p. 15.

condition.[186] It specifically provides that Qwest will only provide an acknowledgement of mistake when the root cause investigation "results in agreement that Qwest erred." Nonetheless, Qwest testifies "Eschelon could demand a root cause analysis from Qwest for any reason at any time, and as many times as it wants, and Qwest would have to comply."[187] Qwest also testifies the language "gives Eschelon unfettered leeway to demand a root cause analysis even when it is readily apparent that a problem has not been caused by Qwest."[188] Other provisions in the ICA, however, guard against this alleged problem. For example, Qwest's usual procedures require Eschelon to isolate trouble and provide the test results showing the trouble is in Qwest's network (not caused by Eschelon) before reporting a trouble, or Qwest will not even open a trouble ticket.[189] Interpreting the closed language in the ICA together to give effect to all of its provisions shows that Qwest is protected against demands when it is apparent that Qwest has not caused a problem. These protections are in addition to the practical protections that would inhibit a CLEC from wasting its resources on frivolous demands. Those CLEC resources include first performing its own root cause to determine the issue is not a CLEC issue[190] and researching, gathering and providing the examples that Qwest requires before Qwest will perform root cause analysis.[191] The amount of CLEC time and resources required to isolate and provide evidence to Qwest of errors made by Qwest while acting as CLEC's vendor may be extensive, as shown by the jeopardies example.[192]

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[186] *See* Proposed ICA Sections 12.1.4 & 12.1.4.1.
[187] Albersheim Dir., Exh. No. 1, 46:5-7. Qwest also testifies, incorrectly, that the scope of Eschelon's language includes "all possible circumstances." *Id*. 46:5.
[188] Albersheim Reb., Exh. No. 18C, 40:24 – 41:1.
[189] *See*, *e.g*., Albersheim, Exh. No. 17 (RA-17), p. 10 ("Test Results Before Submitting a Trouble Report"); *see also* Proposed ICA Section 12.4.1.3 (closed).
[190] Joint Exh. No. 181 at Johnson, CO TR., Vol. II, 403: 22 – 404:1]. *See* last sentence of Section 12.1.4.1.
[191] Johnson Surreb., Exh. No. 119 (BJJ-43), p. 2.
[192] *See*, *e.g*., Johnson Reb., Exh. No. 90, pp. 19-20. *See also* Johnson Surreb., Exh. No. 111 (BJJ-36) & Johnson, Exh. No. 126 (BJJ-50).

66. The need for Eschelon's proposed language arises from the fact that Qwest, as an owner of essential facilities, uniquely performs activities on Eschelon's behalf, such as installation or repair of loops.[193] Federal law requires, for example, "that when a CLEC leases a UNE, the ILEC remains obligated to maintain, repair, or replace it."[194] When Qwest performs these activities on Eschelon's behalf and makes mistakes when doing so, Qwest should root cause the errors and, when confirmed to be a Qwest error, acknowledge the mistake if requested to do so.

**31. Expedited Orders: Issues 12-67 and subparts**

67. It is undisputed that Qwest provides expedites to itself and its retail customers.[195] Regarding a sub-set of Qwest retail customers ( who receive "designed" services), Ms. Albersheim provided conflicting testimony that clearly demonstrates that need for certainty *in the contract* regarding the terms upon which expedites will be made available. Ms. Albersheim testified: "In Washington, Qwest ***does not offer expedites for retail designed services***, as Qwest ***does not have an approved tariff*** for this offering. Qwest will be filing a tariff soon to offer expedites for designed services to its retail customers. This tariff will offer expedites at the same $200 per day rate that Qwest charges in all other states for designed service expedites."[196] Again, at the hearing, Ms. Albersheim testified: "we ***don't have a retail tariff*** that allows us to offer the design service expedites to our retail customers."[197] Qwest Washington retail tariff pages allowing Qwest to offer expedites to its retail customers for designed services, however, are *in the record*. With Mr. Webber's direct testimony, Eschelon provided those pages in Exhibit JW-3 (Exh. No. 175). This exhibit contains pages with expedite terms from Qwest's Washington retail

[193] Webber Reb., Exh. No. 176, pp. 42-43.
[194] Denney, Exh. No. 158 (DD-25), MN Arbitrators' Report) ¶132.
[195] Joint Exh. No. 178, at Albersheim, AZ TR., Vol. I, 58: 19-21 ("Q. Now, you would agree with me that Qwest provides itself with expedites; correct? A. Yes."); Exh. No. 175 (JW-3) (tariff pages), pp. 3 & 5. *See also* Albersheim AZ Direct (11/8/06), p. 61, lines 15-16 (". . . Qwest offers expedites today to its retail customers. . ."), cited in Denney Surreb., Exh. No. 152, FN 274 on p. 108.
[196] Albersheim Dir., Exh. No. 1, 57: 6-11 (emphasis added) (Sept. 29, 2006).
[197] Albersheim, TR. 150: 10-12 (emphasis added).

tariffs for private line and access service, which per Qwest are *designed services*.[198] About this very exhibit, Ms. Albersheim provided the following surrebuttal testimony (inconsistent with her above-quoted direct testimony): "Q. Mr. Webber also cites the Washington Access Service tariff. What does that tariff provide? A. It makes ***very clear*** that ***charges apply to expedites***."[199] Qwest refers to this as an "approved tariff provision."[200] The Qwest retail Private Line (i.e., per Qwest "designed") tariff likewise makes very clear that Qwest offers expedites and that charges apply. It states:

> If a customer desires that service be provided on an earlier date than that which as been established for the order, the customer may request that service be provided on an expedited basis. If the Company agrees to provide the service on an expedited basis, an Expedite Charge will apply.[201]

68. As discussed below, the tariff separately provides certain exceptions to charging when Qwest provides retail designed services expedites.[202]

69. This evidence clearly demonstrates that Qwest does offer expedites for a fee to retail designed services customers in Washington. The inevitable conclusion, therefore, is that it is discriminatory to refuse to offer expedites for a fee to its CLEC designed services customers. Qwest, however, admits it does not offer expedites for designed services for a fee at all to CLECs in Washington.[203] Qwest attempts to escape this clear discrimination issue by

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[198] It is undisputed that Qwest considers both private line and access services to be designed services (e.g., not POTS services). See, e.g, Albersheim Reb., Exh. No. 18C, 45:25 – 46: 1 ("Examples of retail designed services are private lines (DS1, DS3, etc.)"); Albersheim Exh. No. 9 (expedite PCAT), p. 4 (identifying private line and certain other services available under the tariffs for resale as "Designed Products"); Million Surreb., Exh. No. 53, 14:1-14 (stating Qwest position that "design" charges apply to "access services, including switched and special access").
[199] Albersheim Reb., Exh. No. 18C, 47: 26-28.
[200] Albersheim Reb., Exh. No. 18C, 48: 10.
[201] Webber Exh. No. 175 (JW-3), Section 4.1.4(A) on page 3.
[202] Webber Exh. No. 175 (JW-3), p. 1; Denney Surreb., Exh. No. 152, FN 275 on p. 108, quoting Qwest (Martain) Direct (8/26/06), AZ Complaint Docket, p. 40, lines 4-10.
[203] Albersheim Exh. No. 9, p. 3 (expedite PCAT) (fee-added "Pre-Approved" expedites are "available in ***all states except Washington*** for the products below when your ICA contains language for expedites with an associated per day expedite charge.") (emphasis added). See also Denney Surreb., Exh. No. 152, 117: 5-8 ("The ICB rate appears in the Qwest UNE tariff in Washington, yet Qwest will not expedite an unbundled loop order in Washington under the existing interconnection agreement when the emergency conditions are not met even when a CLEC is willing to pay an ICB rate based on costs.") (FNs/citations omitted).

conveniently denying that it offers expedites to retail designed services customers -- contrary to the terms of its own tariffs. Although Qwest has claimed since September that it plans to change its tariffs "soon,"[204] the existing tariffs are in place currently and provide for expedited service for designed services. Expedited service, therefore, should also be available to Eschelon for designed services in Washington.

70. Moreover, even if a potential unfiled future tariff were controlling, Qwest has not said that it is changing its retail tariff to *eliminate* expedites for designed services. Instead, Qwest's above-quoted testimony clearly shows Qwest intends to continue to offer expedites for retail designed services. What will change? The *rate*. What Ms.Albersheim did not state on the stand is that there *is* a Qwest tariff providing for expedites for retail designed services in Washington, but Qwest no longer likes its *rate*. The existing tariff explicitly provides that the expedite charge will in no event "exceed 50% of the total nonrecurring chargers associated with the order."[205] This provision is consistent with one of the points of comparison used by Eschelon to support its interim rate proposal – the installation charge.[206] Consistent with this comparison, in its tariff, Qwest implicitly recognizes that a reasonable charge to expedite an installation would not exceed the charge for all of the work performed in the entire installation; in fact, it would be no more than half.[207] Although Qwest admits that it offers expedites differently in Washington than other states,[208] Qwest obscures that the key difference with respect to fee-added expedites is that in other states Qwest offers them for CLEC UNE customers (if they sign a Qwest contract amendment) at the same rate as in the retail tariff ($200 per day), whereas in Washington, Qwest

[204] Albersheim Dir., Exh. No. 1, 57:8-9.
[205] Webber, Exh. No. 175 (JW-3), p. 3, Section 4.1.4(C)(4).
[206] Denney Surreb., Exh. No. 152, 132:12-16 ("An additional expedite charge that approaches or even exceeds the amount of the charge for all of the activities for an entire installation of a facility should more than amply compensate Qwest for performing the installation activities more quickly.").
[207] See also Denney Surreb., Exh. No. 152, pp. 135-136 [quoting Exh. No. 162 (DD-29), Qwest's Tariff F.C.C. #1, Original Page 5-25].
[208] Albersheim Surreb., Exh. No. 29, 22: 13-15.

does not offer them to CLEC UNE customers (even if they sign a Qwest contract amendment) at the same rate as in the Qwest retail tariff (which is capped at half the installation charge).[209] In Washington, Qwest does not provide expedites for a fee to CLEC UNE customers at all.[210]

71. In her surrebuttal testimony, Ms. Albersheim admitted: "The Washington tariff for retail designed services has ***not yet been changed*** to reflect the new process[211] that offers expedites for designed services under all circumstances when resources are available ***for $200 per day***."[212] A rate of $200 per day expedited would greatly exceed the charge for all of the activities for an entire installation.[213] Ms. Albersheim's admission follows immediately after this testimony: "Qwest is diligent about ensuring that it not discriminate against its customers."[214] Once again, Qwest is erroneously equating providing a wholesale service *at the same price* as a retail service with nondiscrimination (suggesting that providing it at a lower price would be a superior service). Whether a service is "superior" must be determined with respect to the quality of the

[209] Cf. Albersheim Reb., Exh. No. 18C, 42: 14-16 ("In all of the states in it is 14-state region, Qwest offers expedites to CLECs on the same terms and conditions as it offers them to its retail customers.").
[210] See also Johnson Exh. No. 122 (BJJ-46) (Qwest CMP Response), p. 42, Row 6.
[211] (Note this footnote was not in original quotation above.) Regarding the alleged "new process" announced by Qwest in CMP, Qwest implemented it in the other states over the objection of CLECs, including Eschelon. See, e.g., Starkey Surreb., Exh. No. 71, 53:2 – 55:6; Johnson Exh. No. 77 (BJJ-3), pp. 12-15; Johnson Exh. No. 78 (BJJ-4), pp. 1-5. Ms. Johnson was personally involved in objecting to these changes. See, e.g., Johnson Exh. No. 78 (BJJ-4), p. 2, Row 4; see also Johnson Dir., Exh. No. 74, 1:15-16. Ms. Albersheim testified that she was not involved in changes made in CMP regarding expedites. Albersheim, TR. 144:24 – 147:16.
[212] Albersheim Surreb., Exh. No. 29, 22: 16-18 (emphasis added). Regarding ***resource availability*** (*see id*. line 18), Ms. Albersheim's testimony contradicts both Qwest's PCAT and documented Qwest statements made in CMP regarding expedites. Qwest's PCAT provides that the emergency-based Expedites Requiring Approval (at no additional fee) *are* subject to resource availability (Exh. No. 9, p. 2), but the fee-added Pre-Approved Expedites are *not* (*id*., pp. 3-5). In CMP, Qwest confirmed when it initially implemented a fee-added Pre-Approved Expedites process (which was optional at that time – Johnson Exh. No. 78 (BJJ-4), p. 9, row 22) that, *because CLECs were paying for the expedites*, the fee-added expedites would not otherwise "impact resources" (*Id*., p. 9, row 23). Ms. Albersheim's testimony also highlights one of the problems with relegating issues to CMP or the PCAT, as Qwest may simply deny or re-interpret documented CMP and PCAT provisions later. The terms need to be documented in an enforceable ICA that is subject to Commission approval and oversight. In addition, this testimony undermines Qwest's argument for a $200 per day charge. If resources are readily available, what is Qwest charging for? See Denney Surreb., Exh. No. 152, 129:16 – 130:3.
[213] Denney Surreb., Exh. No. 152, 132: 8-10 & FN 355.
[214] Albersheim Surreb., Exh. No. 29, 22: 15-16.

service, not its price.[215] The FCC rules require that service provided by the incumbent be at least equal in *quality* to the service it provides to itself and its retail customers.[216] Qwest acknowledges, if expedites are not a "superior service," then cost-based pricing is appropriate.[217] As Mr. Denney testified:

> In order to more fully ascertain the extent to which a service should be considered a superior service and, if so, how it should be priced, one threshold question to be addressed is whether Qwest provides the service to itself for its own retail customers, ***separate from the question of price***. If so, the analysis in this case moves to another question, which addresses what the price should be. It is incorrect to equate not providing a wholesale service *at the same price* as a retail service with superior service, because it confuses these concepts and inappropriately collapsed the two questions into one.[218]

72. Because the evidence establishes that Qwest offers expedites to itself and its retail customers (including designed services customers), the two over-arching expedite questions are: (1) At what rate should expedites be provided to a Qwest wholesale customer (whether TELRIC), at least on an interim basis? and (2) Should the circumstances under which Qwest provides exception(s) to charging an additional fee be nondiscriminatory? Ms. Albersheim's testimony focuses on the second of these two questions (and particularly on the first of Eschelon's two proposals regarding any exception). In other words, she is focusing on the exception rather than the general rule. Eschelon asks the Commission to adopt its language for all of the subparts to Issue 12-67,[219] so the language in the ICA will properly set forth the terms upon which expedites are available at an interim rate set by the Commission.

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[215] See NewSouth & Verizon Delaware discussed in Denney Surreb. Exh. No. 152, 125:1-12; Exh. No. 171, p. 18.
[216] 47 C.F.R. § 51.311 (nondiscriminatory access to unbundled network elements).
[217] Starkey, Exh. No. 73 (MS-9) at Million, MN TR. Vol. 2, pp. 94-9.
[218] Denney Surreb., Exh. No. 152, 109:17 – 110:7 (FN not repeated here) (emphasis added).
[219] The remaining subparts are discussed in Eschelon's testimony by subpart. See, e.g., Webber Dir., Exh. No. 172, pp. 63-64 & 78-85; Denney Surreb., Exh. No. 152, FN 415 on p. 153.

### a. Additional charge for expedited service

73. Eschelon proposes to pay a separate cost-based charge to expedite orders[220] in addition to the installation charge.[221] Qwest proposes a future retail rate[222] and Eschelon proposes a wholesale rate.[223] Qwest admits that the $200 per day rate that it proposes to charge is not cost based,[224] and expressly denies that the rate should be cost based.[225] Eschelon's proposal, in contrast, is interim specifically to allow establishment of a cost based rate.[226] Eschelon has provided evidence, including points of comparison (such as the installation charge example discussed above), showing that its proposal for an interim rate is reasonable.[227] In the Arizona Complaint Docket, the Arizona staff concluded that the rate for expedites should be considered as part of a cost docket.[228] Similarly, the Minnesota PUC ordered that expedites be charged at cost-based rates and adopted Eschelon's $100 per order rate as an interim rate.[229]

74. The ability to expedite UNE orders is integral to a company's ability to gain "access to a UNE" and therefore, such access must be provided at TELRIC-based rates.[230] Eschelon's position that expedite charges associated with UNE orders should be based on costs follows directly from the application of rule §51.313(b).[231] Qwest does not charge itself a non cost

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[220] Proposed ICA Section 12.2.1.2.2 (Eschelon proposed language).
[221] Proposed ICA Section 12.2.1.2.3 (Eschelon proposed language).
[222] Webber Dir., Exh. No. 172, p. 70. See Albersheim Dir., Exh. No. 1, p. 57. Although Qwest admitted that it has not yet changed its tariff to a $200 per day rate, Ms. Albersheim testified at times as though the per day rate were already in place. See, e.g., Albersheim Dir., Exh. No. 1, 21:12-17. In the absence of a revised retail tariff, Qwest argues that the UNE tariff's ICB rate should be interpreted in every case as $200 per day. *Id*. 60: 2-4 ("It is Qwest's position that the appropriate ICB rate is $200.00 per day consistent with Qwest's its practices in other states."). As indicated above, Qwest does not currently provide expedites for a fee to CLECs, even at the ICB rate (whether $200 per day or otherwise) in Washington (despite its tariffs). Denney Surreb., Exh. No. 152, FN 301 on page 117.
[223] Denney Surreb., Exh. No. 152, pp. 126-128.
[224] Albersheim Dir., Exh. No. 1, p. 60, lines 2-10.
[225] Albersheim Dir., Exh. No. 1, p. 60, lines 4-6.
[226] Denney Surreb., Exh. No. 152 (.), p. 130. Exhibit A, FN 1. Interim Rates are addressed in ICA Section 22.
[227] See, e.g., Denney Surreb., Exh. No. 152, pp. 131-134 and pp. 134-136.
[228] Denney, Exh. No. 163 (DD-30).
[229] Denney Surreb., Exh. No. 171 (DD-38), pp. 18-19.
[230] Webber Dir., Exh. No. 172, pp. 89-91. *See also* discussion of Issue 9-31.
[231] Webber Reb., Exh. No. 176., pp. 26 and 61-62 (quoting §51.313(b)). See also. Denney Surreb., Exh. No. 152, pp. 111 and 140. *See also* FCC First Report and Order ¶218 ("Therefore, we reject for purposes of section 251, our

based, market rate to expedite orders for its retail customers. Rather, it only incurs the cost of expediting such orders. By proposing to charge Eschelon a non cost based rate price that is higher than Qwest's own expedite costs, Qwest would impose upon Eschelon terms that are less favorable than terms faced by Qwest in expediting its own orders. By charging Eschelon a price that exceeds the cost of expedite, Qwest can "profit" on the difference between the retail price of an expedite and Qwest's cost associated with expedites. This advantage is very similar to an advantage that Qwest would have if it charged above-cost rates for UNE loops and other UNE elements – a situation that the unbundling rules and TELRIC pricing are designed to avoid.[232] The Minnesota ALJs, as affirmed by the Minnesota PUC, found: "When Eschelon requests an expedite, it will be for accessing a UNE. Under 47 U.S.C. §§ 51.307 and 51.313, it must be provided under Section 251 of the Act and, thus, at TELRIC rates."[233] The Minnesota Commission adopted the recommendation of the ALJs and further found that "the cost Qwest bears to provide expedited access to UNEs for its retail customers is simply the cost of expediting the service. This is also the cost that CLECs should bear to expedite access for their customers."[234] A flat rate of $100 per order should be adopted on an interim basis.

**b. Exceptions to charging for expedites**

75. Regarding exceptions to charging that fee, Eschelon's first proposal for Issue 12-67(a) regarding Section 12.2.1.2.1 incorporates the same emergency-based expedite conditions[235] that

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historical interpretation of "nondiscriminatory," which we interpreted to mean a comparison between what the incumbent LEC provided other parties in a regulated monopoly environment. We believe that the term "nondiscriminatory," as used throughout section 251, applies to the terms and conditions an incumbent LEC imposes on third parties *as well as on itself*.") (emphasis added).

[232] Denney Surreb., Exh. No. 152, pp. 140-141.

[233] Denney Surreb., Exh. No. 158 (DD-25), MN Arbitrators' Report, ¶ 221.

[234] Denney Surreb., Exh. No. 171 (DD-38), p. 18.

[235] Albersheim Dir., Exh. No. 1, 57:15-16. A minor difference appears in criteria (f) ("Disconnect in error when one of the other conditions on this list is present or is caused by the disconnect in error") but it is consistent with Qwest's practice under the emergency-based Expedites Requiring Approval process. *See* Webber Dir., Exh. No. 172, p. 70; *see also* Johnson, Exh. No. 77 (BJJ-3), pp. 9-10.

Qwest admits are currently available to Qwest's other CLEC UNE (i.e., per Qwest "designed") customers in Washington.[236] Eschelon's second proposal for exceptions to charging omits the itemized list of conditions and instead articulates a standard that Qwest will grant and process CLEC's expedite request, and expedite charges are not applicable, if Qwest does not apply expedite charges to its retail customers, such as when certain emergency conditions (*e.g.*, fire or flood) are met and the applicable condition is met with respect to CLEC's request for an expedited order. Eschelon's proposals are consistent with Qwest's current practice for when Qwest provides expedites at no additional charge in Washington. Qwest's proposal, in contrast, allows no exceptions in emergency-type situations to charging an additional fee for expediting orders for "designed" products for Eschelon, even though it provides such exceptions today to other UNE CLECs and Qwest retail designed service customers.

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

76. Eschelon's jeopardies language is well grounded in the record, including Qwest admissions. The key facts are largely undisputed. Qwest agrees, with the exception of one phrase ("at least the day before"), Eschelon's proposed language for Issues 12-71, 12-72, and 12-73 reflect Qwest's current process.[237] In ***Attachment 2*** to this Brief, Eschelon provides extensive and precise citations to, and quotations of, the record in this case to support every sentence and every phrase (including "at least the day before") of Eschelon's proposed jeopardies language. The

[236] Albersheim Dir., Exh. No. 1, 57:15-16 ("Eschelon's language is excerpted almost word-for-word from the section of the Expedite PCAT titled 'Expedites Requiring Approval'"). Albersheim Exh. No. 9, p. 3 (expedites PCAT) (the emergency-based "Expedites Requiring Approval section of this procedure does not apply to any of the products listed below (***unless you are ordering services in the state of WA***)") (emphasis added). The products listed below are per Qwest designed services. *See id.* p. 4.

[237] Albersheim Surreb., Exh. No. 29, p. 29:8-10 (indicating only that "the day before" is allegedly not part of the Qwest process); Starkey, Exh. No. 73 (MS-9) at Albersheim, MN Tr., Vol. 1, 37:16-23.

Minnesota PUC adopted Eschelon's language (including proposal #2 for Issue 12-71[238] and the phrase "at least the day before")[239] and denied Qwest's motion for reconsideration.[240]

77. Qwest sends a jeopardy notice to inform a CLEC that a due date is in jeopardy of being missed.[241] A Qwest facility jeopardy is a Qwest-caused (a "Qwest") jeopardy relating to facilities in the Qwest network (such as lack of facilities, bad pairs, etc.). The evidence shows that Qwest "differentiates" categories of jeopardies and provides different direction to CLECs as to whether to prepare to accept the circuit/service depending on the nature of the jeopardy notice received.[242] For one category of jeopardies that is not the subject of Eschelon's language, Qwest tells CLECs to "disregard" the jeopardy notice (meaning to keep working and plan to prepare to accept delivery as though CLEC had not received a jeopardy notice).[243] For the category of jeopardies covered by Eschelon's language,[244] however, the PCAT does *not* indicate that the jeopardy notice should be disregarded and instead provides Qwest "will advise" CLEC of the new due date "when the jeopardy condition has been resolved."[245] If Qwest clears the Qwest facility jeopardy, Qwest's witness admitted the FOC is "the agreed upon process by which Qwest" will advise Eschelon "of the due date for a circuit."[246] To provide excellent service to its customers, Eschelon needs this opportunity to plan its resources, make arrangements for

[238] Eschelon's proposal #2 for Issues 12-71 provides that nothing in the entire Section 12.2.7.2.4.4 modifies the Performance Indicator Definitions (PIDs). Qwest provided no evidence that the PIDs or PAP provide any different result. See Attachment 2 to this Brief. Qwest testified that the PIDs currently require Qwest "to differentiate between Qwest caused and CLEC/customer caused delays." Albersheim Dir., Exh. No. 1, 70:18-19. Qwest, consistent with the PIDs and PAP, has agreed that "a CNR jeopardy should be assigned appropriately." Starkey, Exh. No. 73 (MS-9) at Albersheim, MN TR. Vol. 1, p. 94.
[239] Denney, Exh. No. 171 (DD-38), MN Arbitration Order, pp. 23-24, ¶6 (Topic 31).
[240] Order Denying Reconsideration, MN PUC Docket No. P-5340,421/IC-06-768 (June 4, 2007).
[241] Webber, Exh. No. 176, pp. 76-79.
[242] Albersheim Exh. No, RA-11 (Provisioning PCAT), p. 11 (quoted in Johnson Surreb., Exh. No. 114, 21:6-16 & Attachment 2 to this Brief). See Johnson Surreb., Exh. No. 114, 20:9 – 21:22.
[243] *See id*.
[244] Webber Dir., Exh. No. 172, 115:7 – 116:2. Further information about the type of jeopardy dealt with in Eschelon's proposed language for this issue is provided in FNs 4, 5, and 6 to Exh. No. 126 (BJJ-50), and is summarized with respect to the applicable Eschelon language in Attachment 2.
[245] Albersheim Exh. No, RA-11 (Provisioning PCAT), p. 11 (quoted in Attachment 2).
[246] Starkey, Exh. No. 73 at Albersheim MN TR. Vol. 1 38: 17-19. *See also* ICA/SGAT Section 9.2.4.4.1.

customer premise access, and set customer expectations – just as Qwest allows itself an opportunity to do these things for itself.[247]

78. When a jeopardy is classified as a CLEC-caused (Customer Not Ready - CNR) jeopardy for "designed" facilities (which, per Qwest, include loop orders), the CLEC is required to supplement its order by requesting a new due date that is at least ***three days after*** the date of the supplemental order.[248] A Qwest jeopardy properly classified as caused by Qwest does not require a supplement and does not build in this three day delay.[249] Qwest's witness has testified that, when Qwest attributes a missed due date to Eschelon by classifying the jeopardy as CNR, Qwest requires Eschelon to supplement its request for a later due date and this "***almost always***" results in a delay longer than the normal interval.[250]

79. Eschelon's proposals for Issues 12-71 (Section 12.2.7.2.4.4) and Issue 12-73 (Section 12.2.7.2.4.4.2) reflect a proposition that, but for Qwest's inconsistent statements and conduct,[251] would seem self-evident: A jeopardy caused by Qwest will be classified as a Qwest jeopardy, and a jeopardy caused by CLEC will be classified as caused by CLEC (CNR). Qwest conceded that there are no imaginable circumstances under which a CLEC might seek a different result.[252] Eschelon's proposal for Issue 12-72 (Section 12.2.7.2.4.4.1) in particular reflects Eschelon's

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[247] The three-day interval described above allows Qwest three days to take these types of steps. See also Starkey Surreb., Exh. No. 71, 217:4 – 218:18 (quoting Albersheim AZ Rebuttal).

[248] Starkey, Exh. No. 73 (MS-9) at Albersheim, MN Tr. Vol. 1, 36:20 – 37:2. While Qwest admits that the interval it requires is three days, Qwest may quibble with the description of this as a requirement, claiming Qwest may attempt to deliver the circuit earlier than three days. There is no guarantee, however, that the timeframe will be shorter. See Starkey Surreb., Exh. No. 71, p. 217. No supplemental order would be required, however, if Qwest sent an FOC after the facility jeopardy cleared and Eschelon accepted the circuit. In other words, Qwest is forcing Eschelon to request a later date (on a supplemental order) to correct Qwest's failure to send an FOC and then, if it delivers late but less than the three days late, it is telling Eschelon that it ought to be grateful that the delay was not even longer (the entire three-day supplemental order period or more). See Webber, Exh. No. 176, p. 86. A delay that is faster than an even longer delay is still slower than delivery on the requested due date. In other words, service delivery is still untimely, even if delivered earlier than an otherwise longer delay.

[249] Starkey Surreb., Exh. No. 71, pp. 222-227.

[250] Starkey, Exh. No. 73 (MS-9) at Albersheim, MN TR. Vol. I 43:8-17 (emphasis added).

[251] See, e.g., Webber Reb., Exh. No. 176, 89:3-25; Starkey Surreb., Exh. No. 71, 23:5 – 24:15.

[252] Joint Exh. No. 178 at Albersheim, AZ TR., pp. 64-65. See specific quotations in Attachment 2 to this Brief.

experience with one particular recurring fact pattern, when Qwest incorrectly classifies Qwest-caused jeopardies as CNR (Eschelon-caused) jeopardies.[253] The recurring fact pattern dealt with in Issue 12-72 has occurred when Qwest provides an initial jeopardy notice indicating that the due date will be missed because there are no facilities to fill the order and then, when facilities become available, Qwest fails to provide an FOC or a timely FOC to let Eschelon know that it is ready to deliver.[254]

80. To illustrate this pattern, Eschelon provided a number of examples in Exhibit Number 126 (BJJ-50).[255] Ms. Johnson testified that Eschelon has provided detail relating to jeopardies under her direction[256] to Qwest on an approximately *weekly* basis *since at least August of 2004* as part of Eschelon's obtaining root cause of this important issue.[257] Despite this, at the hearing, Qwest spent a significant amount of its time on jeopardies with Ms. Johnson establishing simply that 4 of the 22 examples that Eschelon used to illustrate this problem were Washington examples.[258] Qwest provided no evidence that, in the examples that Eschelon has been routinely providing to Qwest on a weekly basis since at least 2004, there were not also Washington examples. Instead, Qwest pointed out that, in a different exhibit where Eschelon provided a greater number of examples (Exh. No. 117 – BJJ-41), the exhibit illustrated situations in which Eschelon succeeded (by scrambling and nonetheless accepting delivery) in overcoming Qwest's failure to provide an FOC.[259] Qwest provided no analysis of its own of the additional examples provided on a weekly basis for years. In fact, the evidence shows Qwest has recently refused to root cause those

[253] Webber Dir., Exh. No. 172, 112:11 – 113:6 & 115:1 – 116:2.
[254] Webber, Exh. No. 172, pp. 119-121.
[255] For a description of Exh. No. 126 (BJJ-50), see Johnson Surreb., Exh. No. 114, 16:12 – 30:17.
[256] Johnson Reb., Exh. No. 90, 20:1; Johnson Dir., Exh. No. 74, 1:6-20.
[257] Johnson Reb., Exh. No. 90, 20:1-11. Despite Qwest's apparent efforts to suggest that this issue is insignificant, Qwest provided no reason why Eschelon would expend resources researching and providing these examples weekly over time if it were not an important, customer-affecting issue.
[258] Johnson, TR. 253:7 – 256:24.
[259] Johnson, TR. 256:24 – 257:6. See Eschelon's discussion of Exh. No. 117 (BJJ-41) at Johnson Surreb., Exh. No. 114, 7:12 – 9:2; Starkey Surreb., Exh. No. 71, 221:3 – 222:12.

examples,[260] so Qwest is choosing not to make itself aware of additional details provided by Eschelon. If Qwest argues that the number of examples of the recurring fact pattern in 12-72 is small, then Qwest cannot show a burden or downside resulting from adoption of Eschelon's language. If Qwest argues that Eschelon can often compensate for Qwest's failure by accepting delivery, then Qwest need look no further than Eschelon's language. Section 12.2.7.2.4.4.1 provides, when Eschelon can accept service despite Qwest's failure to provide an FOC or a timely FOC: "CLEC will ***nonetheless use its best efforts to accept*** the service." This language expressly commits the parties to continue to use best efforts to accept service, despite Qwest's failure to provide an FOC or a timely FOC, so that these results achieved through Eschelon's ability to compensate for Qwest's breach of duty will continue.[261] Qwest's proposal, in contrast, would make no commitment on behalf of Qwest to continue in this manner.

81. As indicated above, the only phrase in Eschelon's proposed language that Qwest denies in arbitration is its current practice is the phrase "at least the day before."[262] Qwest confirmed in written CMP materials on February 26, 2004 and during a March 4, 2004 CMP call that this is Qwest's process.[263] In the CMP meeting, Qwest and CLECs (including Ms. Johnson) addressed

[260] Exh. No. 111 (BJJ-36), described in Johnson Reb., Exh. No. 90, 19:6 – 21:2. Qwest may attempt to explain its refusal to continue to review and root cause these examples by indicating that it disagrees as to the examples involving untimely FOCs (an FOC is provided but not the day before). That argument does not explain why Qwest refuses to review and root cause the examples involving other jeopardy non compliance examples, including no FOC, which Eschelon continues to provide and which Qwest continues to refuse to review. It is also inconsistent with the stated reason provided by Qwest at the time ("due to resources"). See Exh. No. 111, p. 1. If Qwest would root cause and correct any problems, resources could be saved. Qwest has admitted that root cause analysis may help "prevent a reoccurrence of the event." Albersheim Reb., Exh. No. 27 at RA-27RT, p. 3 (6th bullet).

[261] Therefore, Qwest's claim that Eschelon's proposal "forces extra time" into the process (Albersheim Reb. Exh. No. 18C 58: 23-24) is erroneous, as there is no requirement in Eschelon's language to delay delivery until after an FOC is sent (despite the contractual requirement to send one). Starkey Surreb., Exh. No. 71, 215:5 – 216:8. If Qwest fails to meet its contractual commitment to provide an FOC, Eschelon will nonetheless attempt to accept delivery without delay, because of the importance Eschelon places on timely delivery of service to its customers. *Id*. If the obstacles are too great because of Qwest's failure to provide proper timely notice to Eschelon of service delivery, and Eschelon cannot accept delivery at the time, Qwest should not classify this as a CLEC (CNR) jeopardy

[262] Albersheim Surreb., Exh. No. 29, 29:8-10.

[263] Starkey Surreb., Exh. No. 71, 231:7 – 232-9, quoting February 26, 2004 CMP materials (Exh. No. 116, p. 3) and March 4, 2004 CMP ad hoc call minutes (Exh. No. 23, p. 5).

the recurring fact pattern later described in Eschelon's proposal for Issue 12-72, and Qwest's CMP representative committed that in these situations the CLEC should "*always* receive the FOC before the due date."[264] When Ms. Albersheim (who was not present in CMP) nonetheless testified "Qwest never made such a commitment,"[265] she did not explain how these commitments were documented by Qwest in CMP minutes and why "always" does not mean "always." For the first time, in the hearing in this matter, Ms. Albersheim testified: "In this example as it turns out the jeopardy cleared two days earlier. It is the internal process of Qwest to send the FOC as soon as the jeopardy clears. That was not done in this case, so it was a violation of our internal documented process."[266] She said the Qwest CMP response states that an FOC should have been sent prior to the due date "because the jeopardy cleared prior to the due date."[267]

82. Ms. Albersheim attempts to make a distinction, but it is a distinction without a difference. Both companies agree that Qwest did not comply with the jeopardies process in this example.[268] Eschelon has described the non-compliance as *not sending the FOC the day before the new due date*. Qwest now characterizes it as not sending the FOC as soon as the jeopardy cleared, the end result of which is that Qwest *did not send the FOC the day before the new due date*. Qwest admits the non-compliance is on Qwest's side.

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[264] Albersheim Exh. No. 23, p. 5 (March 4, 2004 CMP ad hoc call minutes prepared by Qwest). The minutes list the attendees as including Ms. Johnson but not Ms. Albersheim. *See id*. Ms. Albersheim testified that she was not involved in change requests relating to jeopardies. Albersheim, TR. 152:19 – 152:25.

[265] Albersheim Surreb., Exh. No. 29, 29:16.

[266] Albersheim, TR. 162: 9-14. Although Qwest attempted to attribute some significance to the fact that is said the phrase the "day before" was not in the PCAT (see, e.g., Albersheim Exh. Nos. 30-32 and accompanying testimony), there was no change in this process to document as a result of CMP activity – as Qwest confirmed in CMP that this was already its process. It was its process before the jeopardies CR and after the jeopardy CR (i.e., there was no new change to document in the PCAT). Through her testimony, Ms. Albersheim confirms that Qwest has internally documented processes that do not appear in the PCAT, and yet they are Qwest's process. See id. & Albersheim, TR. 133:16 – 136:24. She also confirmed that, when Qwest changes its internal processes, Qwest may not change the PCAT. Albersheim, TR. 140:2 – 143:21.

[267] Albersheim, TR. 162: 15-18.

[268] Eschelon will assume, for the purposes of discussion only, that Ms. Albersheim is correct that in this particular example the jeopardy cleared two days earlier but Qwest neglected to send the FOC (rather than, as happens in other situations, Qwest clears the jeopardy later), although Qwest provided no documentation to support this claim.

83. Qwest's new arbitration position is inconsistent with Qwest personnel's statements prior to arbitration. After the jeopardies Change Request closed subject to compliance issues, Qwest continued to recognize that Qwest's process was to send an FOC before the due date (*i.e.*, a "timely" FOC) and treated Qwest failure to do so in particular cases as non-compliance with its process.[269] For example, Qwest told Eschelon at that time that, in five examples for which Qwest said "a FOC was not sent ***timely prior*** *to the due date*," Qwest provided coaching.[270] Qwest's use of "timely" before "prior to" the due date shows that Qwest also understood that a "timely" FOC is one delivered "prior to" the due date.[271] For these five examples, unlike Qwest's recent arbitration position, Qwest explained that the jeopardy was cleared in an untimely manner.[272] The jeopardy was cleared too late for Qwest to send a timely FOC, which Qwest admitted should have been sent "prior to the due date."[273] Both the untimely clearing of the jeopardy and the untimely FOC were on Qwest's side (i.e., not caused by Eschelon).

84. These examples show that the reason Qwest fails to send an FOC prior to the due date may vary. **Regardless of the reason Qwest did not comply with its commitment to always send the FOC before the due date, two facts remain constant: (1) the non-compliance is on Qwest's side; and (2) as a result of Qwest's non-compliance, Eschelon does not receive proper notice to allow it to prepare to accept service delivery**. Qwest's conduct places Eschelon is in the same bind whether Qwest did not comply with its commitment to always send

[269] See, e.g., Johnson, Exh. No. 79 (BJJ-5), pp. 4-6.
[270] Johnson, Exh. No. 111 (BJJ-36) (Qwest service manager email dated Aug. 25, 2004) (emphasis added); *id*. p. 3 ("Five of the LSRs in the spreadsheet are where a ***FOC was not sent timely prior to the due date*** . . . . Qwest will continue to monitor this") (emphasis added); *id*. ("5 were due to the issue described above with resolving the facility really late in the process; 5 of those will be addressed through coaching").
[271] *See id*. p. 7.
[272] Qwest's service manager said that the Qwest non-compliance (which she referred to as a "breakdown") in these five examples was not in the delayed order process itself (*e.g.*, a jeopardy was cleared but a timely FOC prior to the due date was not sent) but the failure to send a timely FOC was caused by Qwest "resolving the facility issue late in the process and still attempting to meet the customers due date." *See id.*
[273] *See id*. p. 7.

the FOC before the due date because it failed to clear the jeopardy in a timely manner or it cleared the jeopardy in a timely manner but failed to send a timely FOC. Qwest committed to always send the FOC the day before the new due date. As reflected in Eschelon's proposal for Issue 12-72, when Qwest fails to do so for any reason on its side, Qwest may attempt service delivery, but it is unreasonable to designate a failed delivery due to Qwest's non-compliance on its side as an Eschelon-caused (CNR) jeopardy.

85. Qwest admitted that, under its current process, if the CLEC does not have adequate notice that the circuit is being delivered (with the agreed upon process for adequate notice consisting of an FOC), then it is ***"not appropriate"*** for Qwest to assign a CNR (CLEC-caused) jeopardy.[274] Nonetheless, Qwest claimed late in the proceeding that a "CNR" classification is not linked to Qwest's failure to send an FOC.[275] In support of this claim, Qwest provides an example with six steps.[276] Nowhere in the six steps, however, is there mention of any jeopardy (much less a Qwest facility jeopardy) ***before*** the requested due date – even though a Qwest facility jeopardy is the subject of Section 12.2.7.2.4.4.1 (Issue 12-72). In Qwest's example, Qwest provides a *timely FOC* and the only issue is that Eschelon is not ready "and, as a result, Qwest cannot deliver the service."[277] This ignores the language and purpose of Eschelon's proposal – which specifically deals with situations in which the FOC is untimely (or not provided at all). Although Qwest would like to dismiss its contractual commitment to provide an FOC as a formality, the FCC described the "BOC's ability to return ***timely status notices*** such as ***firm order confirmation***, reject, ***jeopardy***, and service order completion notices" as "***relevant and probative*** for analyzing

[274] Starkey, Exh. No. 73 (MS-9) at Albersheim, MN TR., Vol. 1, 94:4-11 (emphasis added)].
[275] Albersheim Surreb., Exh. No. 29, p. 36, line 3 – p. 37, line 2.
[276] See id.
[277] Albersheim Surreb., Exh. No. 29, p. 36 (second and third points in example).

a BOC's ability to provide access to its ordering functions ***in a nondiscriminatory manner."***[278] Ms. Albersheim has not cited any authority to support her suggestion that a timely FOC has gone from "relevant and probative" in determining nondiscrimination to a mere "formality."[279] Eschelon does not have a meaningful opportunity to compete if it must make inefficient use of resources because Qwest is now willing to substitute informal technician or other communications[280] instead of the mechanisms that were reviewed as part of the 271 process.

**43. Controlled Production: Issue 12-87**

86. Eschelon needs certainty in the contract language that *controlled production testing* will continue to be necessary for a *new implementation* effort and unnecessary for *re-certification.*[281] Under Eschelon's proposal, along with other closed language in the ICA, testing will be conducted for both new implementations and recertifications.[282] Under both of Eschelon's proposals,[283] Eschelon would indeed participate in controlled production testing with new releases such as IMA Release 20.0 (i.e., "new implementations"). Qwest's counter proposal

[278] FCC 9-state 271 Order, WC Docket No. 02-314, Dec. No. 02-332 (12/23/02), ¶85 (emphasis added).
[279] Joint Exh. No. 178 at Albersheim, AZ TR., Vol. 1, 8:8-9.
[280] Johnson Surreb., Exh. No. 114, 21:23 – 25:7. Qwest admitted that communication with the technician(s) "was the case" in only "some" of these examples. [Starkey, Exh. No. 73 (MS-9) at Albersheim MN TR. Vol. I, 96: 8-10.] The Qwest technician notes show that when communication was "happening between Qwest and the CLEC technicians" [*Id*. at Albersheim MN TR. Vol. I, 94: 19-20], it was associated with attempted delivery of the circuit and was not for the purpose of advance notice (to allow Eschelon time to schedule resources and arrange any customer premise access in advance of delivery). This is clear on the face of the technician notes provided by Qwest. For example, Qwest technicians' notes expressly state that the purpose of the noted communications was to "test" or to "turn up" the circuit/service. [*See, e.g*., Exh. No. 126 (BJJ-50) (Qwest technician notes in column entitled "Qwest Review") at p. 4, Row 3 ("Contacted Eschelon to attempt to turn up the circuit"); pp. 6-7, Row 5 ("Contacted [ER] at Eschelon at 16:58 he said he would test and call back. [ER] called back at 17:23 can't see signal. Problem originally thought to be on CLEC side. 4/15 found trbl to be in Qwest wiring"); p. 14, Row 13 ("referred order to CLEC to test"); p. 19, Row 20 ("called [ER] at Eschelon, talked to [ER] advised ready to test and accept").] If Qwest is calling about test and turn up, it is part of attempted service delivery. Qwest's Provisioning PCAT discusses communications that occur at the time of delivery. *See* Albersheim, Exh. No.11, p. 20 ("Delivering UNE, Resale, and Interconnection Services"). That technicians may need to communicate at the time of delivery does not obviate the separate need for notice *in advance* through the proper channels/departments to schedule resources, including the availability of those very technicians who may be needed for the test and turn up communications and activities that are part of delivering the service.
[281] Starkey Surreb., Exh. No. 71, 233:6 – 235:13.
[282] *See* closed language in Proposed ICA Sections 12.6.1 through 12.6.9.10.
[283] Webber Dir., Exh. No. 172, p. 196; Webber Reb., Exh. No. 176, pp. 108-109.

covers only a subset of the recertifications for which Qwest currently does not require controlled production.[284] Controlled production is not required currently for recertification (regardless of whether the CLEC intends or does not intend to order the products/features). This lesser alternative does not fully capture Qwest's current process or Eschelon's business need.

87. Although Qwest has more recently denied that Eschelon's language captures Qwest's current process,[285] that claim is not supported by the record.[286] Qwest suggests that requiring controlled production for Release 20.0 is the equivalent of now requiring controlled production for recertifications, whereas it was not required in the past. That is not the case. Nothing changed under Release 20.0 with respect to whether controlled production is required for recertifications, because Release 20.0 was a new implementation, not a recertification.[287] In Minnesota, the PUC adopted Eschelon's first proposal and the ALJs' finding that there "is no evidence that Eschelon has or would opt out of recertification testing for any improper purpose."[288] Qwest argues that only it can decide whether controlled production is necessary. Qwest, however, has decided and Eschelon's language does nothing more than incorporate that decision. Under Eschelon's proposal, the testing, like that done today, will be appropriate for the type of change being made. Eschelon's business need is to avoid costly and/or time consuming controlled production testing that is unnecessary because, for recertifications, the transaction has previously been in production and is simply being enhanced.

**44. Rates for Services: Issues 22-88, 22-88(a), and 22-88(b)**

88. Agreed upon language reflects that Qwest may purchase certain services from Eschelon, including transiting and exchange of traffic, trouble isolation, managed cuts and installation of

[284] Starkey Surreb., Exh. No. 71, pp. 236-237.
[285] Mr. Starkey discusses Qwest's reversal of position on pages 241-243 of Exh. No. 71.
[286] *Id*., pp. 208-209, pp. 237-241.
[287] Starkey Surreb., Exh. No. 71, pp. 241-244; Albersheim Surreb., Exh. No. 29, p. 42.
[288] See Starkey, Exh. No. 158 (DD-25), MN Arbitrators' Report, ¶ 258; see also id. ¶255.

interconnection trunks.[289] The parties dispute whether Exhibit A to the ICA, which contains the rates for products and services provided under the ICA, should, as Qwest proposes, refer only to the rates that Qwest charges or whether it should, as Eschelon proposes, reflect the fact that the ICA authorizes Eschelon to charge Qwest for certain services that it provides to Qwest.[290] Because agreed upon language refers to Exhibit A as setting forth the rates that Eschelon charges Qwest for the services it provides, Eschelon proposes striking from Section 22.1.1 language that limits Exhibit A to rates provided by Qwest to CLEC and also proposes striking from Exhibit A, Section 7.11, a reference that limits tariffed charges to Qwest's Washington Access Services Tariff. The ICA language refers to Exhibit A as setting forth the rates that the CLEC will charge.[291] To limit Exhibit A to Qwest's charges is inaccurate and potentially confusing.[292] The Minnesota ALJs, as affirmed by the Minnesota Commission, recommended adoption of Eschelon's language Issues 22-88 and 22-88(a)[293] and found that "Qwest, however, has pointed to no downside of using Eschelon's language, except to say that it is not necessary. Eschelon is correct that its language would make the contract internally more consistent.."[294] Eschelon also proposes, under Issue 22-88(b), to spell out in the contract that each company has a right to request a cost proceeding at the Commission to establish a permanent rate in replacement of an interim rate.[295] Qwest has agreed to Eschelon's language for Issue 22-89 in Minnesota, and has provided no reason why this language is appropriate in Minnesota, but not in Washington.

[289] Denney Reb., Exh. No. 137, pp. 107-108.
[290] Denney Dir., Exh. No. 130, pp. 167-177.
[291] Denney Dir., Exh. No. 130, pp. 170-174.
[292] "Eschelon is correct that its language would make the contract internally more consistent. The Administrative Law Judges recommend adoption of Eschelon's proposed language." See Denney, Exh. No. 158 (DD-25), ¶ 267.
[293] Qwest agreed to Eschelon's language in Minnesota, but has not agreed to this language in Washington.
[294] Denney Surreb., Exh. No. 158 (DD-25), ¶ 267.
[295] Denney Dir., Exh. No. 130, p. 178, lines 11-13.

## 45. Unapproved Rates: Issues 22-90 and (a) – (f)

### a. Process for Obtaining Approval of Unapproved Rates (Issue 22-90 and 22-90(a))

89. When Qwest offers a section 251 product for which there is no Commission-approved rate, a rate (first, an interim rate and then, a permanent rate) needs to be established. In Issue 22-90, Eschelon proposes the process for establishing rates for which Commission-approved rates do not exist. Under Eschelon's proposed Section 22.6.1, if Qwest offers a Section 251 product for which there is no Commission-approved rate, the interim rate could be a rate established by the Commission, or a rate negotiated between the two companies. If the two companies have not agreed on a negotiated rate, Qwest will develop a TELRIC study in support of its proposed rate and submit it to the Commission for review within a certain time frame. If the two companies agree on a negotiated rate, Qwest will file this rate with the Commission within 60 days. Further, Eschelon proposes that Qwest provide a copy of its filed cost to Eschelon upon request. Finally, if the companies have not negotiated a rate, and until the Commission orders an interim or permanent rate, Eschelon would use Qwest-proposed rate to order the product.

90. Eschelon's proposed language on Issue 22-90 follows a decision in a Minnesota 271 case where the Minnesota Commission specified that Qwest cannot charge a rate for a section 251 product for which there is no Minnesota Commission-approved, cost-based rate without petitioning for the Minnesota Commission's approval of the rate. Specifically, the Minnesota Commission's order establishing this prerequisite required Qwest to file its proposed rate and cost support with the Minnesota Commission within a prescribed timeframe triggered by the effective date of the ICA or the offering of the rate.[296] Eschelon's proposal in Issue 22-90 for Qwest to make available to Eschelon its supporting cost study filed with the Commission upon

[296] Denney Dir., Exh. No. 130, p. 181, citing MN 271 Cost Order.

request is necessary to avoid Eschelon being put in a Catch 22 – having to intervene in a cost case (and expend the money and resources to intervene) in order to see the cost filing, but needing the cost filing to determine whether to intervene.[297]

91. For Issue 22-90(a) (Section 22.6.1.1), Eschelon's proposal addresses a situation not covered by Section 22.6.1 (Issue 22-90): If (1) Eschelon and Qwest have not agreed upon a negotiated rate, (2) the Commission has not established a rate and (3) Qwest does not submit a proposed rate and cost support to the Commission within the specified time frame, the unapproved rates do not apply, and Qwest can not charge until it meets the conditions above. Eschelon's proposal for Issue 22-90(a) clarifies the consequence if Qwest does not timely comply with the procedure for offering a currently Unapproved Rate. Eschelon's proposal for Section 22.6.1.1 thus ensures that Qwest cannot extend a period by which it imposes unapproved rates by not filing cost support with the Commission and requesting approval of the rates.[298]

**b. Interim rate proposals**

92. Issues 22-90(b) through 22-90(f) contain specific rate proposals for products for which the Commission has not approved rates.[299] Both parties have proposed interim rates for these issues, but Qwest also takes the inconsistent position that rates should not be addressed in this proceeding, but rather, should be deferred to a later generic cost case.

93. The Commission's role here is to evaluate the evidence presented by the parties and determine which of the parties' proposed interim rates most closely approximates the TELRIC standard. The Washington Commission explained the relationship between generic cost proceedings and arbitration proceedings as follows:

[297] Denney Dir., Exh. No. 130, p. 185.
[298] Denney Dir., Exh. No. 130, p. 181.
[299] Denney Dir., Exh. No. 130, p. 182.

> The Commission stated that rates adopted in the pending arbitrations would be interim rates, pending the completion of the generic proceeding. Accordingly, the price proposals made in this arbitration have been reviewed with the goal of determining which offers a more reasonable interim rate, more closely based on what we believe to be accurately determined cost levels based on the evidence specifically submitted in this docket, our recent prior actions regarding cost studies, and our expertise as regulators.[300]

94. Qwest has provided the Commission with no support for its proposed rates. Eschelon, in contrast, proposes interim rates that it believes are closer to the "cost-based, just, reasonable and non-discriminatory" standard than the interim rates proposed by Qwest[301] and are more consistent with prior Commission decisions,[302] and has presented evidence to support those proposed rates. The justification for Eschelon's proposed interim rates are explained at pages 188-192 of Exh. No. 130 (Denney Direct) and Exh. No. 136 (DD-6), and includes updates to make cost inputs consistent with prior Commission orders (e.g., 22-90(e)),[303] updates to reflect the lack of cost support or detail provided by Qwest,[304] updates to recognize the fact that Qwest's proposed rates are rarely approved as TELRIC compliant without the Commission's corrections to the cost studies that support the rates (e.g., 22-90(d) and 22-90(e)),[305] and updates to correct for internal inconsistencies in Qwest's proposal.[306]

95. Qwest, in response to adjustments made by Mr. Denney to make Qwest's proposed rates more consistent with this Commission's prior orders, takes the position that "Qwest is not obligated when it calculates costs for new elements subsequent to a Commission decision in a

[300] TCG Arbitration, at *5 (W.U.T.C. 1997).
[301] Denney Dir., Exh. No. 130, p. 182.
[302] Denney Dir., Exh. No. 130, p. 191.
[303] Denney Dir., Exh. No. 130, p. 189; Denney, Exh. No. 136 (DD-6).
[304] Ms. Million testified that Qwest has provided all of the cost studies it has, and that Qwest no longer has cost studies for some of the rates it has proposed. Million, TR. 179:2 – 180:13.
[305] Denney Dir., Exh. No. 130, p. 190.
[306] Denney Dir., Exh. No. 130, p. 190. See, e.g., Million, TR. 188:2 – 188:22 & Million Cross, Exh. No. 54 (both showing that the power reduction rate in the Qwest-AT&T agreement is the same as the rate proposed by Eschelon and yet Qwest opposes the rate).

cost docket to rigidly follow the inputs ordered in that docket."[307] Yet Qwest should not be permitted, as a result of proposing interim rates, to simply ignore this Commission's previous cost decisions, particularly when it seeks, at the same time, to defer Commission review of those proposed rates to some indefinite time in the future. Further, to the extent Qwest may contend that the adjustments that Mr. Denney has made do not accurately reflect the Commission's prior orders, one option available to the Commission is to order Qwest to make a compliance filing of its cost studies incorporating the Commission's previously ordered inputs.

## III. CONCLUSION

96. Based upon the evidence in this proceeding and the discussion above, Eschelon requests that the Commission order the inclusion in the parties' ICA of the contract language proposed by Eschelon on each of the issues remaining in dispute.

Dated: July 20, 2007

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[307] Million Reb., Exh. No. 52, p. 20, lines 19-21.