BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

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

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Jason D. Topp
Qwest Corporation
200 S. 5th St, 2200
Minneapolis, MN 55402

John Devaney
Perkins Coie
607 Fourteenth Street N.W.
Washington, DC 20005-2003

Lisa A. Anderl
Qwest Corporation
1600 7th Avenue, Ste 3206
Seattle, WA 98191

Counsel for Qwest Corporation

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TABLE OF CONTENTS

Page

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

TABLE OF CONTENTS
(continued)

Page

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

I. INTRODUCTION

1 Qwest Corporation ("Qwest") submits this post-hearing brief in support of its positions in this arbitration. There are several basic principles that underlie Qwest's proposals for its interconnection agreement ("ICA") with Eschelon Telecom, Inc. ("Eschelon").

2 First, Qwest's proposals are consistent with governing law established by this Commission and the FCC. For example, Qwest's proposals reflect prior rulings from this Commission relating to billings and collections, notices of network changes, the change management process ("CMP"), and rates for specific services that Qwest provides to Eschelon and other CLECs. Similarly, the ordering, billing, and provisioning processes that Qwest proposes are consistent with those that this Commission and the FCC approved in connection with Qwest's application to provide long distance service under the Telecommunications of 1996 ("the Act").

3 Second, Qwest's proposals reflect its obligation to provide Eschelon and other CLECs with nondiscriminatory access to UNEs and interconnection services. As an ILEC that provides wholesale services to hundreds of CLECs, Qwest's ICAs and operating procedures must have a level of uniformity that ensures nondiscriminatory treatment of all CLECs. While there may be room to meet unique business needs of a CLEC in an ICA, it is essential for purposes of nondiscrimination that Qwest's basic processes procedures be uniform from one CLEC to another. Qwest's proposals reflect this obligation, as well as the practical reality of providing services to hundreds of carriers.

4 Third, Qwest's proposals reflect the critical fact that after 11 years of operating under the 1996 Act, Qwest and CLECs have a large body of experience upon which to draw. This arbitration is not like those that took place shortly after the Act was passed when all parties were trying to find their way across the dramatically changed landscape that Congress

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

commanded. Instead, through business relationships that are now long-standing, countless arbitrations before this and other commissions, and the exhaustive consideration of UNE and interconnection processes in the Section 271 proceedings, a basic business framework between Qwest and CLECs has been established and is working quite well. Qwest's proposals reflect this large body of experience.

5 By contrast, Eschelon's proposals often seek treatment that would be preferential and would require costly changes in Qwest's procedures and systems. Notwithstanding its claim that it is not seeking to impose systems and process changes, Eschelon ignores the consensus that has emerged in the years since the Act was passed and is seeking to impose such changes. Further, Eschelon refuses at every turn to compensate Qwest for the very substantial costs that Eschelon's proposal would impose. It is not Qwest's position that procedures and processes established over the last decade are forever fixed and cannot be changed. To be sure, additional experience and improvements in technologies will continue to support change in the telecommunications industry. But ILECs must be compensated for such changes, which Eschelon consistently fails to acknowledge.

6 For these reasons and those discussed below, Qwest respectfully requests that the Commission adopt Qwest's language for each of the disputed issues.

II. DISPUTED ISSUES

Issues 1-1, 1-1(A), 1-1(B), 1-1(C), 1-1(D) and 1-1(E) – Intervals (Section 1.7.2 and Exhibits N and O; *See* (a) to (e) below for related issues in 7.4.7, Exhibits C and I and 9.23.9.4.3/24.4.4.3)

7 This issue boils down to one question – should intervals continue to be addressed in the CMP, as Qwest suggests, or should they be included in an ICA exhibit. While the disputed issue is fairly straightforward, its context is one of the fundamental disputes that exists in this

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1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

arbitration. Specifically, Qwest has attempted to create standardized processes for handling CLEC orders. Qwest initially pursued standardization as a method to obtain Section 271 approval and has since continued that effort because it has proven to be an efficient manner in which to serve CLECs and comply with the myriad regulatory obligations under which it operates.

8 In this arbitration, Eschelon has proposed many changes to Qwest processes. In this instance, Eschelon does not seek to change any Qwest intervals,[1] but it does seek to hamstring any potential changes to intervals in its ICA by having intervals placed as an exhibit to the agreement.

9 One would expect Eschelon to have presented evidence that the current approach has proven problematic. In fact, the record demonstrates the opposite. Since its creation, this issue has been handled in CMP.[2] There have been no disputes that have arisen through this process.[3] Moreover, in the improbable event Qwest were to abuse the process in the future, Commission rules permit Eschelon to bring an expedited complaint addressing such issues.[4]

10 Eschelon's proposals will impose significant administrative burdens on Qwest by either requiring ICA amendments or adoption letters with every CLEC in the event of an interval change.[5] There is no justification for imposing this burden and, accordingly Qwest's position should be adopted.

Issue 2-3: Effective Date of Rate Changes (Sections 2.2 and 22.4.1.2).

11 This issue addresses rate decisions that do not set forth a specific implementation date. Qwest has agreed with Eschelon's suggestion that such language appear in Section 22 of the

[1] Albersheim, TR. 165:9 – 25.
[2] Exh. No. 1, Albersheim Direct, 30:1 – 30:21.
[3] *See id*., 30.
[4] *See* WAC 480-07-650.
[5] Exh. No. 1, Albersheim Direct, 30:23 – 31.6.

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

agreement.[6] The language should read as follows:

> Rates in Exhibit A include legally binding decisions of the Commission and shall be applied on a prospective basis from the effective date of the legally binding Commission decision, unless otherwise ordered by the Commission.

Qwest's language removes any ambiguity regarding rate issues and should be adopted.

Issue 2-4: Effective Date of Legally Binding Changes (Section 2.2).

12 Qwest has proposed that the parties be required to provide notice within 30 days of a legally binding change if the party wants that change to be effective on the date of such an order:

> When a regulatory body or court issues an order causing a change in law and that order does not include a specific implementation date, a Party may provide notice to the other Party within thirty (30) Days of the effective date of that order and any resulting amendment shall be deemed effective on the effective date of the legally binding change or modification of the Existing Rules for rates, and to the extent practicable for other terms and conditions, unless otherwise ordered. In the event neither Party provides notice within thirty (30) Days, the effective date of the legally binding change shall be the effective date of the amendment unless the Parties agree to a different date. . . .

Eschelon objects to the underlined language.

13 Qwest opposes the many twists and turns associated with Eschelon's proposed language.[7] Qwest's proposal provides a significant incentive for parties to take action immediately if they want to quickly implement a change in law. Qwest's proposal prevents the possibility of a complaint similar to those brought by Level 3 in several states, in which Level 3 sought very significant financial payments for an alleged change in law that took place years ago.[8]

14 Eschelon's primary complaint about Qwest's proposal is that it is allegedly unfair to require Eschelon to keep track of legal changes, because Eschelon is smaller than Qwest.[9] This

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[6] Exh. No. 43C, Easton Responsive, 6:21 – 7:7.
[7] *See* Exh. No. 43C, Easton Responsive, 4:8 – 4:24.
[8] *See In the Matter of Level 3 Communications, LLC's Verified Complaint to Enforce Interconnection Agreement, Minnesota PUC Docket No. P-421/C-05-721.*
[9] Exh. No. 137, Denney Rebuttal, 11:7 – 12:9.

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

assertion is remarkable, given that the record in this case establishes that Eschelon pours tremendous resources into regulatory issues proceedings. It is difficult to imagine that, with its extensive regulatory and legal staff, Eschelon would miss a Washington decision that affected its interests. Furthermore, Eschelon does business in far fewer states than Qwest, making the need to track and notify much less burdensome. Quite telling is the fact that Eschelon has failed to identify a single historical example where it would have been adversely affected by Qwest's proposed language.

15 Eschelon is fully capable of protecting its interests associated with a change in law. Qwest's 30 day notice proposal protects against the very real possibility that clever lawyers will parse out past precedents, attempt to interpret them in a novel manner, and then attempt to send a bill to the other party to push a newly formed position.[10] Qwest's proposal is fair to both parties and allows businesses to make decisions based on their agreement without the risk that terms will change retroactively.

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

16 A "design change" is any CLEC-initiated change to an order that requires engineering review. When a CLEC has submitted an order for a service and then submits a change to that order, a Qwest engineer must review the change to determine if the facility or service should be provided in a manner different from that called for by the CLEC's original order. A design change could include, for example, a change of end-user premises within the same serving wire center, or the addition or deletion of optional features. This review of orders by engineers and other Qwest personnel requires time and imposes costs on Qwest.

17 The disputes relating to this issue have included the definition of design changes, the UNEs to which design change charges apply, and the appropriate rates for design changes.[11] The

[10] Exh. No. 43C, Easton Responsive, 4:8 – 4:24.
[11] Exh. No. 57, Stewart Direct, 7:8-15.

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

heart of these disputes is that although Qwest incurs significant costs to perform design changes for CLECs, Eschelon is proposing rates for certain design changes that would recover only a fraction of Qwest's costs. Eschelon's proposed rates conflict with the nonrecurring rates this Commission established for design changes and violate Qwest's right of cost recovery established by Sections 252(c) and (d) of the 1996 Act.

Issue 4-5.

18 This dispute originally involved two ICA sections, Sections 9.2.4.4.2 and 9.2.3.8. Qwest has agreed to Eschelon's proposed language for both of these sections, which should close Issue 4-5. However, in the rebuttal testimony of Mr. Denney, Eschelon raises an issue involving loop and CFA ("Connecting Facility Assignment") design change charges that is unrelated to the ICA being arbitrated in this proceeding. According to Mr. Denney, Qwest has charged Eschelon for loop and CFA design changes without having a right to do so in *existing* ICAs or in Qwest's Washington Statement of Generally Available Terms ("SGAT"). Based on this assertion, Mr. Denney argues that Qwest should be required to credit Eschelon and other CLECs for the loop and CFA charges it has previously assessed. However, this claim is plainly half-hearted, as Eschelon makes no attempt to quantify the amount of "credits" it is supposedly owed and offers no legal support for its obviously flawed position that it has standing in this arbitration of a *prospective* ICA to seek remedies for *past* events on behalf of itself and other *non-party* CLECs.

19 Eschelon also is wrong on the merits in claiming that existing ICAs and Qwest's Washington SGAT do not give Qwest the right to charge for loop and CFA design changes. Eschelon bases its assertion on Ms. Stewart's statement in the Minnesota arbitration that "neither Qwest's SGAT nor the parties' current ICA includes a design change charge for loops."[12] However, that statement was unique to Minnesota and accurately reflects the fact that there is

[12] Exh. 137, Denney Rebuttal, 17:13-15.

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

no design change rate in that state. That is not the case in Washington, as this Commission established design change charges of $53.65 for manual changes and $50.45 for mechanized changes in its 44th Supplemental Order in Part D of Docket No. UT-003013. These charges apply not only to unbundled dedicated interoffice transport ("UDIT"), but also to unbundled loops and CFA changes. Those rates are included in the "Miscellaneous Charges" section of Exhibit A to the existing Qwest-Eschelon Washington ICA and, accordingly, Qwest has a contractual right to collect the charges and to recover the costs it incurs to provide Eschelon and other CLECs with design changes.[13]

Issue 4-5(a).

20 This issue involves design changes that Qwest must perform when Eschelon submits an inaccurate or otherwise flawed CFA to Qwest in connection with attaching a network facility – a loop, for example – to a frame in a Qwest central office. When this occurs, Eschelon must submit a new CFA, which requires Qwest to "redesign" Eschelon's order. Issue 4-5(a) involves the relatively narrow issue of the charge that should apply when Qwest is required to perform a CFA change while Qwest and Eschelon are in the process of performing a "coordinated cut-over" of a "2/4 wire loop analog (voice grade) loop." Eschelon proposes a charge of $5.00 instead of the Commission's approved charges for design changes of $53.65 and $50.45, claiming that the presence of a Qwest engineer in the central office to perform the coordinated cut-over dramatically reduces the costs of the CFA change. As discussed below, this proposed rate and the assumptions underlying it are seriously flawed.

21 It is important to be clear about why Qwest is required to make CFA changes and to incur the costs they impose. CFA changes occur when a customer desires to obtain service from Eschelon instead of from Qwest or another carrier. After Eschelon submits a new connect service order, a Qwest engineer must connect the customer's loop to Eschelon's equipment

[13] Exh. No. 57, Stewart Direct, 16:1-10.

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

collocated in a Qwest central office. To enable Qwest to perform this connection on its behalf, Eschelon provides Qwest with a CFA on the interconnection distribution frame ("ICDF") in Qwest's central office. In other words, Eschelon identifies the specific place on the ICDF where the Qwest engineer should connect the loop. In some cases, the ICDF locations that Eschelon gives Qwest are incorrect, which requires Eschelon to submit a new CFA and, in turn, requires Qwest to redesign the order.[14]

22 For multiple reasons, Eschelon's proposed CFA rate of $5.00 is seriously flawed. First, Eschelon fails to provide a cost study or any other evidence showing how it derived the rate. Mr. Denney agrees that a cost-based nonrecurring charge, like a design change charge, should be established through a specific methodology that involves: (1) identifying the activities a carrier's personnel must perform, (2) estimating the time required to perform the activities, and (3) applying an appropriate labor rate to the activities and times.[15] Eschelon's $5.00 proposal does not come close to meeting this rate-setting standard that Mr. Denney endorsed, as there is no evidence in the record concerning activities, times, or labor rates associated with the rate. There is no meaningful evidence upon which the Commission could conclude that that the rate meets the Act's cost-based standard set forth in Section 252 (d)(1)(A).[16]

23 Second, in contrast to Eschelon's unsupported rate proposal, this Commission set the rates of $53.65 and $50.45 for all design changes using a cost-based study that utilized the FCC's prescribed "TELRIC" (total element long run incremental cost) pricing methodology. That

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[14] Exh. No. 57, Stewart Direct, 11:18 – 12:15.
[15] Exh. No. 181, Denney, CO TR. 421:25 – 424:3.
[16] There is no merit to Eschelon's assertion that CLECs have no obligation to submit cost studies in support of the rates they propose. This assertion ignores the basic requirement in Section 252(d)(1) that rates must be based on the cost of providing an interconnection service or UNE. Section 252(e)(2) prohibits state commissions from approving ICAs that do not comply with this requirement. Without a cost study or any other evidence to support Eschelon's proposed design change rates, the Commission has no basis for determining whether Eschelon's rates meet the Act's pricing requirement and, in turn, whether the ICA is lawful.

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

study employs the very methodology Mr. Denney advocates. As Ms. Million explained, the study and the resulting Commission-ordered rates are based on the average cost of performing a design change for all types of products (*i.e.*, loops and transport) and include CFA changes.[17]

24 Third, there is no factual foundation for Eschelon's assumption that the presence of a Qwest technician in a central office during a coordinated cut-over reduces the costs of CFA changes. As an initial matter, the TELRIC cost study that the Commission used to establish this rate does not include *any* time or costs for technician activities in a central office.[18] Accordingly, even if Eschelon were correct in claiming that coordinated cut-overs reduce the time technicians must spend on CFA changes, that would not support reducing the rates ordered by the Commission. In all events, Eschelon's factual assumption, which is unsupported by any testimony from an engineer, is based on an inaccurate and over-simplified description of the activities required to perform CFA changes.[19] The activity involving a Qwest central office technician's disconnection of a jumper from one CFA on a frame and reconnection of the jumper to another CFA on a frame is only one of the actions required for a CFA design change. Multiple other activities must be performed to carry out CFAs properly, as described in Ms. Stewart's testimony.[20]

25 For these reasons, the Commission should reject Eschelon's proposed charge of $5.00 for CFA changes.

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[17] Exh. No. 53, Million Rebuttal, 11:20 – 13:1.
[18] Exh. No. 53, Million Rebuttal, 16:1 – 17:14.
[19] Because technician time is not included in the Commission's rates for design changes, there is no relevance to Mr. Denney's extensive testimony that the "lift and lay" process by which a technician removes a loop from one location on a frame and reconnects it to another location is simpler than Qwest represents. Moreover, as Qwest engineer, Jeff Hubbard, explains in his rebuttal testimony, Mr. Denney's non-engineering view of what a technician must do to change CFAs in a central office is highly simplistic and inaccurate. Exh. No. 48, Hubbard Responsive, 2:7 – 3:6.
[20] Exh. No. 57, Stewart Direct, 12:16 – 13:6.

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

Issue 4-5(b).

26 This issue is settled.

Issue 4-5(c).

27 This issue arises from Eschelon's contention that the Commission's established rates for design changes do not apply to design changes involving unbundled loops and applies only to design changes involving UDIT. In place of the Commission-ordered charges for design changes, Eschelon proposes a design change for loops of $30.00.

28 As with its proposed CFA charge, Eschelon has not provided a cost study or other cost-related support for its proposed $30.00 rate for loops. Again, despite Mr. Denney's recognition that nonrecurring charges should be based on cost studies that identify time-specific tasks and labor rates, Eschelon has failed to provide any evidence of the activities, times, and costs that it claims are associated with design changes involving loops. This failure of evidence precludes any serious consideration of the proposal, as the Commission has no basis upon which to determine whether the $30.00 rate is cost-based and consistent with TELRIC.

29 There also is no basis for Eschelon's claim that loop design changes are not in the TELRIC study upon which the Commission's established design change rates are based. As discussed above, the Commission's rates are based on the average cost of performing a design change for multiple products, including loops, UDIT, and CFAs. That the study is not limited to UDIT and includes loops is confirmed by the fact that the study specifically refers to network facilities used with "end-user premises." Loops connect end-user premises to the network, unlike UDIT which is used to connect central offices and does not involve end-user premises. If the cost study the Commission used to set the rates of $53.65 and $50.45 for all design changes were limited to UDIT, there would not be a reference in it to end-user premises.[21]

[21] Exh. No. 53, Million Rebuttal, 11:20 – 12:18.

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

30 Eschelon also argues that the cost study must be limited to UDIT since CLECs order UDIT – as opposed to loops – through the "access service requests" ("ASRs") that are assumed in the study. As Ms. Million explained, however, the study uses ASRs not because it is limited to UDIT but, rather, because it relied upon a prior design change study involving access services that used ASRs. Indeed, that original study was not limited to UDIT design changes even though it assumed the use of ASRs. Qwest's use of ASRs in that was a simplifying assumption that had no appreciable affect on the estimated cost of loop-related design changes.[22]

31 As discussed above in connection with the charge for CFAs, the listing of the design change rate in the "Miscellaneous Charges" section of the ICA instead of in the transport section confirms that the charge is not limited to UDIT. Eschelon assumes illogically that the parties included a transport-specific charge in a section of the ICA pricing exhibit that is not specific to transport and that applies to multiple elements, services, and activities.

32 In what amounts to a collateral attack mounted several years after the Commission adopted the design change rates in Docket No. UT-003013, Eschelon also argues, in effect, that the Commission should have set a separate rate for loop-related design changes because those changes are less costly than UDIT design changes. This argument ignores the fact that the rates the Commission adopted are an *average* rate for multiple types of design changes. The assumption behind the rate is that CLECs will order several types of design changes and that an averaged rate will ensure that CLECs pay an appropriate amount and that Qwest will recover its costs. In the case of unbundled loops, there is no basis for Eschelon's assumption that loop-related design changes involve less work and fewer costs than UDIT design changes. As Ms. Stewart explained, DS1 and DS3 unbundled loops on fiber systems can require the same type of re-design work that is required for UDIT, using similar fiber muxing

[22] Exh. No. 53, Million Rebuttal, 13:22 – 14:25.

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

equipment.[23]

33 Accordingly, the Commission should reject Eschelon's attempt to limit application of the Commission's existing design change charges and should reject Eschelon's proposed design rates for CFA and loop changes.

Collection Issues

Issue 5-6:	**Discontinuation of Order Processing (Section 5.4.2).**
Issue 5-8:	**De Minimus Amount (Section 5.4.5).**
Issues 5-9, 5-10:	**Definition of Repeatedly Delinquent (Section 5.4.5).**
Issue 5-11:	**Disputes Before Commission (Section 5.4.5).**
Issue 5-12:	**Deposit Requirement (Section 5.4.5).**
Issues 5-13, 5-14:	**Review of Credit Standing (Section 5.4.7).**

34 These issues concern payment and billing. Qwest's proposed language is nothing new. It is part of Qwest's Washington SGAT and its recently-approved ICA with Covad and AT&T.[24] Qwest witness, William Easton, explains that Qwest's proposed language was developed as a part of the 271 workshop process.[25] Mr. Easton summed up Qwest's position on these issues in his testimony: "The payment and deposit language Qwest is proposing is simply a reasonable business precaution designed to encourage timely payment and, when it does not occur, provide the ability for Qwest to limit its financial risk."[26]

35 Eschelon's proposals do precisely the opposite. Eschelon seeks to decrease Qwest's ability to collect its bills by requiring Qwest to clear hurdles such as waiting for Commission review before discontinuing order processing (Issues 5-6) or demanding a deposit. (Issue 5-13) Eschelon seeks to water down its obligation to pay bills by seeking to pay not to the amount of the bill, but rather an amount that is close to the amount billed. (Issue 5-8.) Even then,

[23] Exh. No. 59, Stewart Responsive, 6:18 – 7:6.
[24] Exh. No. 43C, Easton Responsive, 7:10 – 8:5.
[25] *Id.,* 14:22 – 15:5.
[26] *Id.*, 7:25 – 8:3.

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1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

Eschelon seeks to further dilute that obligation by redefining "repeatedly delinquent" in such a manner that Eschelon would only be obligated to pay its bills on time four months a year to avoid triggering a potential deposit requirement. (Issue 5-9.)

36 Eschelon does not stop there. It proposes limiting Qwest's ability to seek a deposit further by attempting to limit that right to only situations where Eschelon is "repeatedly delinquent," thereby eliminating all other possibilities where a deposit would be appropriate (Issue 5-13.) Even in that situation, Eschelon seeks to require Qwest to either seek Commission approval or await a Commission decision before demanding a deposit. (Issue 5-11.)

37 The cumulative effect of these proposals is to slow down and significantly impair Qwest's ability to collect valid, undisputed bills owed by Eschelon. In the event Eschelon were in poor financial health or employed a strategy of paying bills slowly, Eschelon's proposals would have severe financial implications for Qwest. Eschelon testified it pays Qwest approximately $55 million per year.[27] Thus, each week of delay would cost Qwest over one million dollars.

38 This Commission rejected similar attempts to water down collection terms in the Covad Arbitration.[28] The Commission urged Covad to address these issues through the "escalation and dispute resolution processes of the Change Management Process." [29] In *Covad*, the arbitrator rejected Covad's argument that it should have 45 days to pay certain bills because it would unnecessarily delay payment of undisputed amounts. [30] The arbitrator also rejected Covad's proposed extension of the time for Qwest to stop processing orders based on non-payment. Concluding that Covad's concerns "did not outweigh the possible financial risk to

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[27] Exh. No. 152, Denney Surrebuttal, 55:15 – 55:16.
[28] *In the Matter of Petition for Arbitration of Covad Communications Company,* Docket No., *UT-043045,Final Order Affirming, in Part, Arbitrator's Report and Decision; Granting, in Part, Covad's Petition for Review, Order No. 06 at 45-51 (February 9, 2005).*
[29] *Id.,* p. 49.
[30] *Id.,* p. 48.

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

Qwest". (*Id.* p. 50.) Thus, the Commission adopted the same language Qwest proposes in this proceeding. (*Id.*, ¶ 147).

39 Qwest has experience with similar proceedings in Minnesota, which requires commission approval before disconnection. Recent Minnesota Commission proceedings involving requests to disconnect have taken months to get to hearing.[31] Eschelon's proposals would require Qwest not only go through a hearing to disconnect, but also go to the Commission to take less drastic steps to collect bills discontinue order processing, and demand a deposit.

40 Given the serious ramifications of Eschelon's proposed language, one would expect that evidence would demonstrate that Qwest has misused its authority to make collection efforts in the past. But the record is devoid of such evidence.

Issue 5-16: Non-disclosure Agreement (Section 5.16.9.1).

41 This section concerns the disclosure of CLEC individual forecasts and forecasting information. The parties' agreed language it mandates very strict procedures for Qwest to follow. Qwest may disclose the information only to legal personnel, if a legal issue arises, and to a CLEC's wholesale account managers, wholesale LIS and Collocation product managers, network and growth planning personnel "responsible for preparing or responding to such forecasts or forecasting information." The provision expressly prohibits disclosure to retail marketing, sales or strategic planning personnel, and requires Qwest employees to execute nondisclosure agreements ("NDA").

42 Eschelon demands a change to this provision to require Qwest to provide Eschelon with copies of employees' nondisclosure agreements within 10 days of execution. This demand places an unnecessary administrative burden on Qwest, particularly if the precedent set here forces Qwest to have to provide every CLEC with copies of NDAs. Already, Qwest bears

[31] Exh. No. 45C, Easton Rebuttal, 10:4 – 10:16.

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

the burden of ensuring that forecasts and forecasting information are handled properly and securely.

43 Section 18.3.1 of the ICA provides that "either party can request an audit of the other party's compliance with the Agreement's measures and requirements applicable to limitations on distribution, maintenance, and use of proprietary or other protected information that the requesting party has provided to the other." In addition to the stringent requirements set forth in section 5.16.9.1, under section 18, Eschelon has adequate protection and recourse if it believes that Qwest has misused confidential information.

Issue 7-18: Application of Transit Record Charge (Section 7.6.3.1).

Issue 7-19: Transit Record Bill Validation Detail (Section 7.6.4).

44 In these sections, Eschelon seeks to obtain transit records from Qwest in order to validate bills that Qwest sends to Eschelon that are based on data provided by Eschelon. In a recent complaint proceeding in Minnesota, Qwest negotiated a compromise solution to exchanging records when Qwest hands transit traffic to a terminating provider. In that proceeding, all parties recognized that the best source of information for determining the source of such calls is the originating switch. Transit records are a poor substitute for such records because the purpose of a transit switch is to complete calls, with billing considerations being secondary. Nonetheless, because the terminating provider does not necessarily know the identity of the originating company, an extensive records exchange is one way to identify and track down originators of traffic that are improperly routing calls.

45 This issue presents the opposite situation. This issue arises in the context of Eschelon as the originating provider. Eschelon's switch produces the best information with regard to traffic it sends to Qwest for termination with a third party. Qwest does not have a method for providing Eschelon with the records it seeks.[32] Requiring Qwest to provide Eschelon with

[32] Exh. No 43C, Easton Responsive 19:24 – 20:5.

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

detailed records and to do so without charge is an unreasonable and inefficient way to determine appropriate billing by Eschelon. Accordingly, the Commission should reject Eschelon's language.

SECTION 9 ISSUES

Issue 9-31: Access to Unbundled Network Elements (Section 9.1.2).

46 Qwest recognizes that the Act imposes an obligation to provide Eschelon with nondiscriminatory access to UNEs, and, therefore, it has committed in the ICA to provide nondiscriminatory access through multiple agreed provisions. These provisions provide several layers of protection for Eschelon, beginning with the following language in Section 9.1.2 that broadly requires Qwest to provide nondiscriminatory access:

> Qwest shall provide nondiscriminatory access to Unbundled Network Elements on rates, terms and conditions that are nondiscriminatory, just and reasonable. The quality of an Unbundled Network element Qwest provides, as well as the access provided to that element, will be equal between all carriers requesting access to that element.

Significantly, this language requires more than just nondiscriminatory "access;" it also requires Qwest to provide Eschelon with UNEs that are equal in "quality" to those Qwest provides to other CLECs. Qwest takes its nondiscrimination obligations a step further with Eschelon by making it explicit through agreed language in Section 9.1.2 that the UNEs and access Eschelon receives will be equal to the UNEs and access Qwest provides to itself and its affiliates. In addition, in circumstances where Qwest does not provide access to UNEs to itself, agreed language in Section 9.1.2 assures Eschelon that the access to UNEs it receives will provide it with "a meaningful opportunity to compete."[33] Qwest also establishes through additional agreed language in Section 9.1.2 that Eschelon is entitled to the "routine network modifications" that Qwest provides to its own retail customers.

47 The dispute encompassed by Issue 9-31 should be considered with these multiple non-

[33] Exh. No. 59, Stewart Responsive, 10:19 – 11:14.

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1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

discrimination provisions in mind, since the dispute is grounded in Eschelon's claim that the ICA fails to ensure that Eschelon will receive nondiscriminatory access to UNEs. Eschelon aggress and that such access can only be ensured by adding the following disputed language to Section 9.1.2:

> Access to Unbundled Network Elements includes moving, adding to, repairing and changing the UNE (through, e.g., design changes, maintenance of service including trouble isolation, additional dispatches, and cancellation of orders).

48 Given the extensive provisions in the ICA ensuring nondiscriminatory access to UNEs, Qwest has been skeptical that nondiscrimination is the motive behind Eschelon's proposed language. Qwest's concern is that by using the term "access" to UNEs and providing a long list of activities—moving, adding to, repairing, changing, design changes, maintenance of service, trouble isolation, additional dispatches, and cancellation of orders—Eschelon will contend that the recurring monthly rate it pays for UNEs entitles it to all of these activities at no additional charge.[34] Adding to this concern is the obvious vagueness of the undefined terms "moving," "adding to," and "changing." Mr. Starkey confirmed the legitimacy of Qwest's concerns when he testified that these terms encompass "literally thousands of activities," including activities that "may change over time."[35]

49 With thousands of unknown activities encompassed by these terms, it is not possible to conclude, as Eschelon asserts, that every activity will be within the requirements of Section 251 and hence governed by cost-based TELRIC rates. But that is the effect of Eschelon's proposed language, since the language would not permit Qwest to charge anything but a cost-based rate for these thousands of activities. By contrast, Qwest's proposal that these activities will be provided at the "applicable rate" recognizes that while many of the activities will be governed by a cost-based rate, some may fall outside Section 251 and may be

[34] Exh. No. 57, Stewart Direct, 13:25 – 15:7.
[35] Exh. No. 181, Starkey, CO TR. 347:9 – 349:23.

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1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

governed by a non-TELRIC rate.

50 The hearings in the Qwest-Eschelon arbitrations have confirmed Qwest's skepticism, as Eschelon has broadly asserted – without pointing to specific provisions of cost studies – that existing monthly recurring rates include all of the costs of the countless and even unidentifiable activities potentially encompassed by Eschelon's language. Thus, the real purpose of Eschelon's proposal is not to add a cumulative guarantee against nondiscrimination but, instead, to obtain the activities listed in its proposal by paying few, if any, charges.[36]

51 For these reasons, Eschelon's proposed addition to Section 9.1.2 should be rejected, and the Commission should adopt Qwest proposed language for that section. Qwest's language ensures that Qwest will perform the activities listed in Eschelon's proposal, thereby directly responding to Eschelon's purported concern that Qwest will refuse to perform them. In addition, while the language still includes the undefined terms that are a concern for Qwest, it at least recognizes and establishes that Eschelon may have to pay for those activities "at the applicable rate," which could be a rate different from the monthly recurring rate for a UNE or a tariffed rate.

Issues 9-33, 9-34, 9-35, and 9-36: Network Maintenance and Modernization (Sections 9.1.9, 9.1.9.1).

52 These issues involve ICA terms relating to activities Qwest undertakes to maintain and modernize its network. It is essential that Qwest have the ability to both maintain and modernize its telecommunications network without unnecessary interference and restriction. Washington consumers deserve—and Qwest strives to provide—the latest state-of-the art telecommunications technologies, which is consistent with a basic purpose of the Act.

53 It is inevitable that an ILEC's maintenance and modernization of its network will sometimes

[36] Exh. No. 59, Stewart Responsive, 15:8-23.

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

have effects on interconnected carriers. Because most changes involving maintenance and modernization are designed to improve service, the effects on other carriers resulting from these activities generally should be positive. Congress and the FCC have recognized that as technologies evolve, an ILEC must have the right to modify its network and that such modifications may affect carriers that rely on the ILEC's network. *See* 47 U.S.C. § 251(c)(5); 47 C.F.R. § 51.325.

54 Qwest's proposed ICA language is intended to preserve Qwest's ability to maintain and modernize its network without undue interference while also ensuring that Eschelon continues to receive the UNE transmission quality to which it is entitled. In addition, Qwest's proposal ensures that Eschelon will receive notice of these network activities that is consistent with the FCC's rules. Thus, in the agreed provisions of Section 9.1.9 and 9.1.9.1, Qwest commits that in maintaining and modernizing its Washington network, it will: (1) ensure that its activities "result in UNE transmission parameters that are within transmission limits of the UNE ordered by [Eschelon];" and (2) provide Eschelon "advance notice of network changes pursuant to applicable FCC rules," including notice containing "the location(s) at which the changes will occur, and any other information required by applicable FCC rules."[37]

55 Qwest has also agreed in Section 9.1.9.1 that in the event of an emergency activity, it will notify Eschelon of the activity by e-mail within three business days of completion. Agreed language in Section 9.1.9.1 also establishes that Qwest will provide its repair centers with information relating to the status of network emergencies relating to modernization and maintenance activities.[38]

56 Taken as a whole, these provisions ensure that Qwest's modernization and maintenance

[37] Exh. No. 57, Stewart Direct, 24:27 – 25:10.
[38] Exh. No. 57, Stewart Direct, 24:24 – 25:21.

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1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

activities will not improperly interfere with Eschelon's operations, while still protecting Qwest's vital right to engage in those activities. As discussed below, the additional provisions that Eschelon proposes are vague and superfluous and expose Qwest to open-ended risk when modernizing and maintaining its network.

Issue 9-33: The Commission Should Reject Eschelon's Proposed Prohibition On Network Changes That Have An Undefined "Adverse Effect" On End-Users.

57 This issue involves Eschelon's proposed language for Section 9.1.9 that would prohibit Qwest from making a change to its network if the change would "adversely affect service to any End User Customers." This proposal is flawed and should be rejected.

58 Qwest's network is a complex aggregation of network facilities and technologies that Qwest regularly updates to ensure that its customers have state-of-the-art service. Qwest maintains and modernizes its network based on the requirements in industry standards (*e.g.*, ANSI standards). Qwest's fundamental objection to Eschelon's "no adverse effect" proposal is that it is not tied to any industry standard and therefore effectively would leave Qwest guessing as to whether a network change is permitted. The concept of "adverse effect" is not defined anywhere in the ICA and therefore would create a purely subjective standard that Eschelon could invoke to block a network upgrade it does not like. For this reason, in the Minnesota arbitration, the Commission rejected the use of this term.[39]

59 In addition to failing to define "adverse effect," Eschelon's proposal fails to (1) provide any metric for measuring whether there is an adverse effect; (2) set forth a process for determining whether there has been an adverse effect, including who will determine if such an effect has occurred; or (3) define the consequences of a network change resulting in an adverse effect, including whether such a change could result in penalties or fines.[40]

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[39] *In the Matter of the Petition of Eschelon Telecom, Inc., for Arbitration of an Interconnection Agreement with Qwest Corporation,* MPUC No. P-5340, 421/IC-06-78, Arbitrators' Report at ¶¶ 140, 142 (Jan. 16, 2007) ("*Minnesota Arbitration Order*").

[40] Exh. No. 181, Starkey, CO TR. 297:24 – 300:25.

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1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

60 The problem with this ambiguity is that it could have a chilling effect on Qwest's network activities. Specifically, with the presence of the undefined term "adverse affect" in the ICA, Qwest would be required to perform network changes at the risk of being in violation of the ICA through application of an uncertain, malleable concept.

61 Eschelon's proposal also improperly focuses on the service Eschelon provides to its end-user customers, assuming incorrectly that the service for which quality is to be measured is that which Eschelon provides to its customers. The proper focus for this ICA between Qwest and Eschelon is the quality of the services that Qwest provides to Eschelon, not the quality of the services Eschelon provides to its customers. That is what industry standards measure for ILEC-CLEC interconnection relationships. Eschelon—not Qwest—has final control over the quality of that service.[41]

62 In the alternative, Eschelon proposes the following language:

> Such changes may result in minor changes to transmission parameters. If such changes result in the CLEC's End User Customer experiencing unacceptable changes in the transmission of voice or data, Qwest will assist the CLEC in determining the source and will take the necessary corrective action to restore the transmission quality to an acceptable level if it was caused by the network changes.

63 The reference to "unacceptable changes" is as vague as Eschelon's "no adverse affect" language. Eschelon does not define "unacceptable" or tie the term to any measurable industry standard. In addition, while the proposal would require Qwest to restore transmission quality to "an acceptable level," Eschelon does not define what is "acceptable" or tie this term to any industry standard. As a result, Qwest would have no meaningful way of knowing, first, whether a change to its network is permitted under the ICA or, second, what specific corrective steps to take in response to an impermissible change.

64 In sum, the parties' agreed language protects Eschelon against the remote possibility that

[41] Exh. No. 57, Stewart Direct, 28:4 – 29:4.

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

Qwest's network activities could prevent Eschelon from providing service that meets industry standards, while protecting Qwest's right to engage in those activities. Eschelon's vague proposals should be rejected.

Issue 9-34: Notices Of Network Changes.

65 This issue involves the information Qwest will include in the notices that inform Eschelon of changes to Qwest's network resulting from maintenance and modernization. Qwest is committing to provide notices that meet the requirements of the FCC's notice rule relating to network changes by including: (1) the carriers' name and address; (2) the name and telephone number of a contact person who can supply additional information regarding the planned changes; (3) the implementation date of the planned changes; (4) the location(s) at which the changes will occur; (5) a technical description of the type of changes planned; and (6) a description of the reasonably foreseeable impact of the planned changes. *See* 47 C.F.R. § 51.327.

66 Eschelon is demanding that Qwest's notices include circuit identification numbers and customer addresses when network changes are "End User Customer specific." There is no requirement in FCC Rule 51.327 or in any other FCC rule for ILECs to provide this information. The proposal improperly requires Qwest to identify each Eschelon customer address and associated customer circuit(s) when Qwest makes a network change. Qwest would be required to provide this information regardless whether the change would actually have a noticeable impact on either Eschelon or its customers. This would impose a significant burden, since Qwest does not have electronic access to this information and would have to conduct time-consuming manual searches. By contrast, Eschelon has electronic access to this information.[42]

67 The magnitude of the potential burden on Qwest is demonstrated by the example of Qwest's

[42] Exh. No. 181, Starkey, CO TR. 402:4-18.

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

relatively common practice of upgrading software used with switches. When Qwest performs these upgrades, it provides notice to carriers consistent with the FCC's rule governing notices of network changes. Although these upgrades typically do not have any noticeable effect on CLEC end user customers, Eschelon's proposed language would nevertheless require Qwest to provide the address and circuit ID for every Eschelon end user customer within the entire exchange in which an upgrade takes place.[43]

68 Eschelon asserts that its language is not intended to have such a broad effect, since the language limits the requirement to provide circuit identifications and customer addresses to changes that are "End-User Customer specific."[44] However, Eschelon fails to define the term "End-User Customer specific," leaving the provision open to the interpretation that Qwest must provide circuit identifications and customer addresses for any change that affects any "End-User Customer."

69 Eschelon also presents the following alternative proposal:

> Such notices will contain the location(s) at which the changes will occur including, if the changes are specific to an End User Customer, the circuit identification, if readily available."

While this alternative proposal is an improvement on Eschelon's original proposal, it still improperly attempts to shift the burden of determining circuit IDs from Eschelon to Qwest.

70 Finally, Eschelon's proposal is inconsistent with the Commission's decision in the Qwest-Covad arbitration concerning the notices of network changes Qwest is required to provide. In that arbitration, the Commission specifically rejected Covad's demand that Qwest should be required to provide CLEC customer addresses and other information in notices relating to Qwest's retirement of copper loops, ruling that an express commitment set forth in the ICA for Qwest to comply with the FCC's notice rule provided assurance of proper and adequate

[43] Exh. No. 57, Stewart Direct, 32:18 – 33:20.
[44] Eschelon's use of the term "End-User Customer" in connection with Qwest's notices of network changes is improper, since the defined term includes customers of carriers other than Eschelon.

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

notice of a network change.[45] The same reasoning applies here.

Issues 9-37 to 9-42: Wire Center Issues.

71 On June 21, 2007, the Administrative Law Judge granted the parties' Joint Motion for Single Compliance Filing of the Interconnection Agreement and vacated the schedule for filing supplemental testimony and conducting a hearing on Arbitration Issue Nos. 9-37 to 9-42 ("the wire center issues"). The order defers consideration of these issues until the Commission rules upon the wire center settlement agreement that Qwest and a group of CLECs have submitted for Commission approval in Docket No. UT-073035. Consistent with the ALJ's order, Qwest is not addressing the wire center issues in this brief.

Issues 9-43 and 44: UNE Conversion Charges And Circuit Identification Numbers Relating To UNE Conversions (Section 9.1.15 Subparts).

Conversion Charges for UNE Conversions

72 This issue involves Qwest's right to assess a charge for converting UNEs to alternative facilities and thereby recovering the costs it incurs for this work. In the wire center settlement agreement submitted in Docket No. UT-073035, Qwest and the joint CLECs have agreed to a conversion charge of $25.00 "for each facility converted from a UNE to an alternative service or product . . . ." In view of that agreement, Qwest is not addressing Issue 9-43 in this brief, since approval of the settlement agreement will render the issue moot.

Circuit IDs Relating to UNE Conversions

73 The *TRRO* establishes that in wire centers in which CLECs are not "impaired" under the definition of that term in Section 251, Qwest is no longer required to provide access to high capacity loops and transport.[46] In that circumstance, CLECs that have been using UNE loops or transport are required to convert the UNEs to an alternative non-UNE service. This issue

[45] *In the Matter of Petition for Arbitration of Covad Communications Company with Qwest Corporation*, Docket No. UT-043045, Order No. 06 at 5-7 (Feb. 9, 2005).
[46] *TRRO*, at ¶ 5 ("Executive Summary").

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

arises because of Eschelon's demand that upon converting to an alternative service, it should be permitted to use the same circuit ID number for the alternative service that it used for the UNE. This demand ignores the basic differences between the processes Qwest must use to provision UNEs and those it must use for non-UNE services. The demand also fails to recognize that circuit IDs contain product-specific information that is essential to the provisioning process, which is why a UNE circuit ID cannot be used for a non-UNE alternative service. Further, Eschelon's demand would impose substantial costs on Qwest, which Eschelon is not willing to reimburse.

74 The fundamental reason for these conversions is that the product is changing from a wholesale UNE purchased only by a CLEC through an ICA to a service purchased by CLECs, other interconnecting companies and Qwest's retail customers through tariffs or contracts. These two products are clearly distinguishable from each other, not only by price and classification, but also by the customers to whom they are available and by the different ordering, maintenance and repair processes used for them. Because of this change in the nature of these circuits from UNE products to private line services, and because these circuits are billed, inventoried and maintained differently in Qwest's systems, Qwest must process them as an "order-out" and an "order-in," and thus change the circuit IDs to move them from one product category to the other. Within Qwest's systems – including the Trunk Inventory Record Keeping System ("TIRKS") database and the Work Force Administration ("WFA") system – circuit IDs disclose (1) whether a circuit is a UNE or a private line, (2) the type of testing parameters that apply, and (3) the maintenance and repair center that is responsible for the circuit.[47]

75 Because of this information that is disclosed by a circuit ID, changing the circuit ID upon a conversion ensures that Eschelon will receive proper support for testing, maintenance and

[47] Exh. No. 51, Million Direct, 14:17 – 15:12.

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1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

repairs from the appropriate Qwest centers. UNEs and private line circuits are ordered, maintained and repaired differently and out of different centers and systems, and unique circuit IDs for these different products are needed to route order and repair submissions for these facilities to the appropriate systems and centers.[48]

76 Qwest is able to maintain, track and service all of its customers, including CLECs and their end-user customers, better and more efficiently if it is able to identify accurately the types of services and facilities it is providing to these respective categories of customers. It would be highly inefficient for Qwest to make changes to its operation support systems, processes and tracking mechanisms – such as circuit IDs – to accommodate each new regulatory change regarding how it offers services.[49]

77 In support of its demand for the use of the same circuit ID upon a conversion, Eschelon suggests inaccurately that conversions from UNEs to private line facilities are essentially no different from the systems conversions required for conversions from UNE-P to Qwest Platform Plus™ ("QPP"). However, the circumstances associated with the change of DS1 and DS3 products from UNEs to private lines are very different from those associated with the change from UNE-P to QPP. In the case of DS1s and DS3s, the circuits are only changing from UNEs to Qwest's existing private line services in the wire centers that have been determined to be non-impaired; in all other wire centers, DS1s and DS3s will continue to be classified as UNEs. In the case of UNE-P, the loop portion of the product remains a UNE in all wire centers, while the switching and shared transport components of UNE-P are no longer classified as UNEs. Qwest did not have an existing product that combined both UNE and non-UNE components available to CLECs. Therefore, when it was no longer required to provide UNE-P, Qwest voluntarily created a new product (*i.e.*, QPP) in order to

[48] Exh. No. 51, Million Direct, 16:28 – 17:4.
[49] Exh. No. 51, Million Direct, 17:13-19.

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

replace UNE-P.[50]

78 In addition, because of the nature of Qwest's QPP product, the loop portion of the product is identified by the telephone number for purposes of billing, maintenance and repair, not by a circuit ID. Therefore, because the telephone number does not change, and nothing about the character, form or function of the loop changes whether it is part of UNE-P or QPP, no conversion of the UNE loop occurs. In addition, QPP can be billed differently through the assignment of new universal service order codes ("USOCs") without consideration for other systems or centers. Eschelon argues that Qwest has accomplished the transition from UNE-P to QPP not by changing circuit IDs, but by merely re-pricing the service. However, unlike DS1s and DS3s, there is no circuit ID associated with the loop in the case of a finished service such as UNE-P or QPP. Furthermore, as part of UNE-P, the QPP elements were already being billed out of the CRIS billing system, and thus a change in USOCs was all that was necessary to effectuate new rates. Clearly, the way in which Qwest tracks the loop for purposes of repair and maintenance does not change as a result of the conversion from UNE-P to QPP. For these reasons, Eschelon's comparison is not meaningful.[51]

79 In the case of DS1 and DS3 UNEs, the character of the product offering is changing, and both products (UNE and private line) are identified by circuit IDs. DS1s and DS3s are available as UNEs at TELRIC rates only to CLECs. Thus, in wire centers that continue to be identified as "impaired" going forward, Qwest must still offer those products as UNEs. In order to charge a rate for the DS1 and DS3 services in the non-impaired wire centers at something other than TELRIC, as Qwest is entitled to do under the FCC's *TRRO* decision, Qwest must re-classify them as something other than UNEs. In the case of UNE-P, Qwest was not converting a UNE product to an existing tariffed offering because, as explained above, QPP did not previously exist. In the case of DS1s and DS3s, however, Qwest has a

[50] Exh. No. 51, Million Direct, 19:8-22.
[51] Exh. No. 51, Million Direct, 19:24-20:15.

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

product offering that is a tariffed equivalent to its UNE offering. Thus, in converting the UNE product to a tariffed private line product, Qwest must change the circuit ID in order to properly track these differently-classified products in the appropriate systems.[52]

80 The use of distinct circuit identification numbers for UNEs and tariffed products also is essential for Qwest to comply with the FCC rules that require carriers to maintain accurate records that track inventories of circuits. *See*, 47 C.F.R. § 32.12(b) and (c). Qwest accomplishes this through the use of circuit IDs and other appropriate codes, depending on the systems affected by the requirement.[53]

81 For these reasons, the Commission should confirm Qwest's right to use a separate circuit ID for the alternative facilities that are used following a conversion.

Issue 9-51: Unbundled Dark Fiber Termination Rate (Section 9.7.5.2.1).

The parties have resolved this issue.

Issue 9-53: Access to UCCRE (Section 9.9).

82 This issue arises from Eschelon's initial request that Qwest make available in Section 9.9 of the ICA a product referred to as "Unbundled Customer Controlled Rearrangement Element" ("UCCRE"). Eschelon's demand is improper, since the FCC has removed from its network unbundling rules the former requirement for ILECs to provide digital cross-connects for UCCRE.[54]

83 Although Qwest developed and made UCCRE available to CLECs, there has never been any CLEC demand for this product. No CLEC has ever ordered it or otherwise suggested a need for it. Because the FCC has removed UCCRE from its rules and given the absence of demand for it, Qwest has decided to discontinue offering this product on a going-forward

[52] Exh. No. 51, Million Direct, 20:17-21:5.
[53] Exh. No. 51, Million Direct, 16:1-27.
[54] *See* and compare former 47 C.F.R. § 51.319(d)(2)(iv) and current 47 C.F.R. § 51.319(d)(2).

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

basis.[55] Accordingly, Qwest opposes Eschelon's request to include the following language relating to the product in the ICA:

> 9.9.1 If Qwest provides or offers to provide UCCRE to any other CLEC during the term of this Agreement, Qwest will notify CLEC and offer CLEC an amendment to this Agreement that allows CLEC, at its option, to request UCCRE on nondiscriminatory terms and conditions.

84 Eschelon's proposal rests in part on its inaccurate claim that the FCC did not intend to eliminate UCCRE from its unbundling rules, even though it is undisputed that UCCRE was once in those rules but is no longer there. First, if there were any merit to the argument that the FCC's unbundling rules should not be implemented as they are written but should instead be implemented as a party believes they were intended, the rules would be completely malleable and uncertain. Second, there is no basis for Eschelon's conclusion that the FCC did not intend to eliminate access to digital cross-connect systems in its post-*TRO* rules. If that were the case, the FCC would have corrected its alleged oversight through an errata or some other corrective measure. It has not done so.

85 Eschelon suggests that the requirement in FCC Rule 51.305(a)(2)(iv) for ILECs to provide interconnection at "central office cross-connect points" implicitly imposes a requirement to provide access to cross-connect systems. However, that rule does not even mention an obligation to provide access to cross-connect systems. If the FCC had intended to continue requiring ILECs to provide access to UCCRE, it would not have deleted the rule requiring that access in reliance on a different rule that does not mention access to cross-connect systems.

86 There also is nothing in the *TRO* or the *TRRO* suggesting that ILECs must seek approval from a state commission before discontinuing the UNEs and services the FCC eliminated from Section 251 in those orders. On the contrary, the FCC made it clear in the *TRRO* that

[55] Exh. No. 57, Stewart Direct, 52:1-5.

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

its changes in unbundling requirements are to be implemented through the interconnection negotiation process, not by seeking approval of the changes from state commissions. Thus, the FCC states at paragraph 233 of the *TRRO* that "the incumbent LEC and competitive LEC must negotiate in good faith regarding any rates, terms, and conditions necessary to implement our rule changes."

87 If the FCC determines that there is no longer a competitive need for ILECs to offer a product or a service, ILECs have no legal obligation to continue offering the product or service in new ICAs. Under Eschelon's "discrimination" argument, which is premised on the fact that UCCRE is still included in some older ICAs, Qwest would be denied the benefits from these changes in the law for indefinite periods of time because old ICAs do not include the new legal requirements. The result would be that Qwest would be forced to enter into new ICAs that reflect old law and competitive conditions that no longer exist. That approach is not consistent with sound public policy and law, as it would fail to give effect to the FCC's determinations based on competitive conditions.

88 Further, in the highly unlikely event that Qwest provides UCCRE to another CLEC on a single, isolated basis, Qwest cannot reasonably be expected to notify Eschelon that the product has been offered. Qwest has no processes or systems in place that would permit it to comply with that type of notification requirement. On the other hand, in Eschelon would receive notice through Qwest's public filing of the ICA or amendment with the Commission.[56]

89 Eschelon's second, alternative proposal in response to this narrow issue is far-reaching and goes way beyond cross-connects to create a mandatory process for Qwest to follow when it desires to discontinue offering a product, even if there is no legal obligation to offer the product and no demand for it. This proposal is set forth in Eschelon's multiple alternative

[56] Exh. No. 57, Stewart Direct, 53:1-11.

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

versions of its proposed Section 1.7.3 and sub-parts. Under proposal "number 2," if Qwest desires to "phase-out the provision of an element, service or functionality," it must obtain approval from the Commission unless the element, service, of functionality is promptly removed from the ICAs of all CLECs following an order from the FCC or unless Qwest follows a phase-out process ordered by the FCC. Eschelon's proposal "numbers 3 and 4" are extremely lengthy and thus not susceptible to summary here, but they are based on the same concept that Qwest should not be permitted to stop offering products for which there is neither a legal obligation nor demand without obtaining Commission approval. These proposals are legally flawed and should be rejected.

90 First, one or more of the proposals appears to attempt improperly to regulate through the Qwest-Eschelon ICA Qwest's relationships with other CLECs. Specifically, the "generic proceeding" required under the proposal apparently could be triggered by Qwest's decision to stop offering a wholesale product or service to "any" CLEC, not just Eschelon. Eschelon of course offers no longer authority for the insupportable proposition that it can regulate Qwest's relationships with other CLECs.

91 Second, it would not be appropriate in an interconnection arbitration between one CLEC and one ILEC to adopt and include in an ICA a broad, generic process that would apply to all local exchange carriers in Washington. The proper forum in which to consider an issue with this type of far-reaching effect is one in which all interested Washington carriers can provide input concerning the necessity and contours of such a process.

92 Third, it would be neither logical nor efficient to require a time-consuming, generic docket relating to product withdrawals in response to Qwest's attempt to stop offering products that no CLEC is ordering and for which there is no foreseeable demand. The fact that there is no demand at all for a product, such as the cross-connect offering, and no legal obligation to provide it should provide a sufficient basis for Qwest to stop offering the

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

product.

93 Fourth, Eschelon's proposal violates the requirement in Section 252 that ILECs and CLECs must negotiate proposed ICA provisions for 135 days before submitting them to arbitration before a state commission. By imposing this negotiation requirement, the Act is designed to facilitate voluntary agreements between ILECs and CLECs and to limit the number of disputed issues that a state commission must decide. In this regard, Section 252(b)(4) limits the arbitration authority of state commissions to the open or disputed issues that remain after at least 135 of negotiations and that are set forth in the petition for arbitration and any response to the petition. Here, Eschelon raised the issue without going through a negotiation process with Qwest.[57] Accordingly, the proposal is not an "open issue" subject to arbitration.

94 For these reasons, the Commission should reject each of Eschelon's proposals. The Commission should adopt Qwest's proposed language for Section 9.3.3.8.3.1, as that language provides assurance that Eschelon will be able to obtain access to UCCRE cross-connects in the unlikely event Qwest makes this service available to other CLECs in future ICAs.

Issue 9-55: Combinations Of Loops And Transport (Sections 9.23.4, 9.23.4.4, 9.23.4.4.1, 9.23.4.5, 9.23.4.5.4 & 9.23.4.6).

95 There are important distinctions between UNE combinations, which are combinations of unbundled network elements, and commingled arrangements, which are comprised of a UNE connected or attached to a tariffed service (*e.g.*, a special access service). As elements mandated under Section 251 of the Act, UNEs are priced and provisioned under a regulatory scheme that does not apply to tariffed services. Issue 9-55 arises because of Eschelon's attempt to cloud the critical distinctions between UNE combinations and commingled arrangements by insisting upon use of the broad term, "loop-transport combinations," to refer

[57] Exh. No. 61, Stewart Rebuttal, 26:24-28:9.

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1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

to both products. It is undisputed that Qwest does not have a product called "loop transport combinations." Instead, Qwest offers three distinct products that are comprised of combinations of loops and transport: (1) enhanced extended loops ("EELs"), (2) commingled EELs, and (3) high capacity EELs.[58]

96 Each of these products is different from the other and has its own unique pricing and provisioning requirements. Use of the generic term "loop transport combination" in reference to all three products therefore creates a significant risk that Eschelon could attempt to apply terms and rates to all the products that should apply to only one of the products. To avoid and the confusion and potential improper application of rates and terms that could result from Eschelon's "umbrella" term, Qwest's proposed Section 9.23.4 preserves the distinct labels and terms that apply to these three products. This approach is consistent with the clear statements from the FCC and other state commissions that the UNE component of a commingled product should be governed by UNE terms and the tariffed component by tariffed terms or a price list. The FCC reinforced this point several times in the *TRO*:

> Thus, our rules permit incumbent LECs to assess the rates for UNEs (or UNE combinations) commingled with tariffed access services on an element-by-element and a service-by-service basis. This ensures that competitive LECs do not obtain an unfair discount off the prices for wholesale services, while at the same time ensuring that competitive LECs do not pay twice for a single facility. (Internal citations omitted). *TRO*, at ¶ 582. *See also TRO* at ¶ 1796 and 1800.

97 State commissions have similarly repeatedly ruled that rates for the UNE component of a commingled arrangement are governed by UNE rates, while the tariffed portion of the arrangement is governed by tariffed rates.[59]

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[58] Exh. No. 57, Stewart Direct, 65:14-20.

[59] *See, e.g.*, *Re Momentum Telecom, Inc.*, Docket 29543, Final Order, 2006 WL 1752312, *31 (Ala. P.S.C. Apr. 20, 2006); *In re: Petition to Establish Generic Docket to Consider Amendments to Interconnection Agreements*, 041269-TP, PSC-06-0299-FOF-TP, Second Order on Generic Proceeding, 2006 WL 1085095 (Fla. P.S.C. Apr. 17, 2006); *Re MCImetro Access Transmission Services*, LLC, Cause No. 42893-INT-01, Order, 2006 WL 521649, *25 (Ind. U.R.C. Jan. 11, 2006); *Re Verizon New England, Inc. dba Verizon Massachusetts*, D.T.E. 04-33, Arbitration Order, 2005 WL 1712200, *65 (Mass. D.T.E. July 14, 2005); *Re Consider Change-of-Law to Existing*

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

98 The net result of Eschelon's proposal to use the same label for products that are fundamentally different is that it creates a risk of applying improper terms to these products. Precisely to avoid this type of confusion, the Minnesota Commission rejected Eschelon's proposed use of "loop-transport combinations."[60] Indeed, any confusion that could result in UNE terms being applied to non-Section 251 services would be improper because ICAs must, as a matter of law, be limited to terms and conditions relating to the services and elements required by Sections 251(b) and (c). Thus, in *DIECA Communications, Inc. v. Florida Public Service Commission*,[61] a Florida district court recently affirmed the Florida Commission's determination that its arbitration authority under the Act is limited to imposing conditions that implement the requirements of Section 251.[62] Special access and private line circuits are not within Section 251 and are therefore governed by tariffs, not ICAs.

99 Moreover, Eschelon's demands that commingled arrangements be put in place or ordered through a single local service request ("LSR") and be billed through the billing system that Qwest uses for UNEs (the "CRIS" system) is a direct attempt by Eschelon to have this Commission force Qwest to change its special access and private line service order process and billing arrangements. In eliminating the pre-existing restriction on commingling in the *TRO*, the FCC modified its rules to permit CLECs to commingle UNEs and combinations of UNEs with services (*e.g.*, switched, special access and private line services offered pursuant to tariff) that a requesting carrier has obtained at wholesale from an ILEC pursuant to any method other than unbundling under section 251(c) (3) of the Act. However, wholesale services such as switched and special access services have always been separate and distinct products from those UNE products provided to CLECs under the terms and conditions of their Section 252 ICAs. Each of these products, whether the product is tariffed or a Section

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Interconnection Agreements, Docket No. 2005-AD-139, Order, 2005 WL 4673626, *12 (Miss. P.S.C. Dec. 2, 2005).

[60] Minnesota Arbitration Order at ¶ 166.

[61] Case No. 4:06cv72-RH/WCS, slip op. (N.D. Fla. Sept. 12, 2006).

[62] *Id*. at 10 (quoting 47 U.S.C. § 252(c)(1)) (emphasis added by Judge Hinkle).

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1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

251 UNE, has its own established ordering, provisioning, and billing systems and methods. The FCC did not require combined processes, systems, and methods for the distinct components of commingled arrangements when it eliminated the restriction on commingling. Nowhere in the *TRO* or *TRRO* does the FCC require ILECs to modify the rates, terms and conditions of their special access and private lines services, beyond removing any commingling with UNE restrictions.[63]

100 If Eschelon's real objective is to eliminate the possibility of having tariffed terms apply to UNEs, as it has asserted, it should agree to the following language that Qwest has proposed to settle Issue 9-55:

> When a UNE circuit is commingled with a non-UNE circuit, the rates, terms and conditions of the ICA will apply to the UNE circuit (including Commission jurisdiction) and the non-UNE circuit will be governed by the rates, terms and conditions of the appropriate Tariff.[64]

101 Qwest would agree to insert this language both in section 9.23 and in the Eschelon proposed Section 24 Commingling section of the ICA. This is a clear and straightforward manner for addressing Eschelon's concerns without creating undue confusion in Section 9.23 of the ICA.

102 For these reasons, the term "loop-transport combination" should be deleted from each product section of the ICA. The sections from which this term should be excluded include Sections 9.23.4 (general terms and conditions for EELs), 9.23.4.4. and 9.23.4.4.1 (Additional Terms for EELs), 9.23.4.5 and 9.23.4.5.4 (Ordering Process for EELs), and 9.23.4.6 (Rate Elements for EELs).[65]

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[63] Exh. No. 57, Stewart Direct, 69:16 – 70:24.

[64] Tariff as used in the ICA is a defined term that refers to Qwest interstate Tariffs and state tariffs, price lists and price schedules.

[65] Eschelon claims that the FCC has used "loop-transport combination" in the same manner Eschelon is proposing to use the term here. However, paragraphs 575 and 576 of the *TRO* discuss "UNE combinations," which means a combination that is made up of a UNE loop and UNE Transport. Neither of these cites refers to combinations of UNEs and non-UNEs. The other references Eschelon relies on—paragraphs 584 and 593 of the *TRO*—actually support Qwest's language. Paragraph 584 notes that combinations of UNE and private line combinations are clearly identified as "commingled" loop transport combinations, and paragraph 593 further defines such

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

Issue 9-56 and 9-56(a): Service Eligibility Criteria Audits (Sections 9.23.4.3.1.1 & 9.23.4.3.1.1.1.1).

103 These issues involve disputes relating to the audits Qwest is permitted to conduct, as contemplated by FCC rules, to determine whether Eschelon is complying with the FCC's service eligibility criteria that apply to orders for high capacity EELs. The parties agree such audits are permitted. However, the dispute encompassed by Issue 9-56 concerns whether Qwest should be allowed to conduct audits without cause, as Eschelon relies on a plainly flawed reading of the *TRO* in contending that it need not submit to an audit unless Qwest demonstrates cause to believe that Eschelon is violating the eligibility criteria. The errors in this reading were recently confirmed by the Minnesota Commission, which rejected Eschelon's "cause" proposal.[66] Issue 9-56(a) involves the information Qwest must provide to Eschelon in requesting an audit, including whether the notice of an audit must set forth a cause for the audit.

104 In the *TRO*, the FCC established service eligibility criteria for high-capacity EELs that are designed to ensure access to these facilities for bona fide providers of "qualifying services" while also protecting against the potential for "gaming" by providers. By "gaming," the FCC was referring to the practice of providers that obtain access to UNE facilities even though the services they provide do not qualify for use with UNEs.[67]

105 As described in paragraph 626 of the *TRO*, an ILEC is permitted to "obtain and pay for an independent auditor to audit, on an annual basis, compliance with the qualifying service eligibility criteria." If the auditor determines that the CLEC is not in compliance, the CLEC must make true-up payments, convert non-complying circuits to the appropriate service, and

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arrangements as a "commingled EEL." Commingled EEL is the Qwest name for UNE and private line loop-transport combinations. In sum, none of the FCC references identified by Eschelon supports using "loop transport combination" as an umbrella term to cover Qwest's three unique loop-transport UNE combination and commingled product offerings.

[66] *Minnesota Arbitration Order* at ¶ 185.
[67] Exh. No. 57, Stewart Direct, 73:1-18.

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1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

may have to pay the costs of the independent auditor. If the auditor concludes that the CLEC is complying with the criteria, the ILEC must reimburse the CLEC for the costs associated with the audit. As described by the FCC in paragraph 628, the intent of this reimbursement requirement for ILECs is to "eliminate the potential for abusive or unfounded audits."

106 In agreed provisions of the ICA, Qwest and Eschelon have incorporated these rules relating to service eligibility audits into the ICA. *See* ICA Section 9.23.4.3.1.3.5. These agreed provisions include a commitment by Qwest to reimburse Eschelon for the costs of an audit that results in a finding that Eschelon is complying with the service eligibility criteria. *See* Section 9.23.4.3.1.3.5. Thus, the reimbursement scheme the FCC adopted as protection against abusive audits is in the ICA. There is therefore no practical need and no legal basis for Eschelon's "cause" proposal.

107 There is no support in the *TRO* or FCC rules for Eschelon's proposal that would limit Qwest's rights to conduct an audit to only when Qwest states it has "cause." If the FCC had intended to limit audits to situations where there is demonstrable cause, it would have said so. It did not and, instead, established a compensation and reimbursement scheme that provides CLECs with incentives to comply with the service eligibility criteria and ILECs with incentives not to conduct wasteful audits.[68]

108 Eschelon relies on a partial quote of paragraph 621 of the *TRO* where the FCC quotes a prior order in which it said that audits "will not be routine practice" and will be undertaken only when the ILEC has a concern about compliance with the service eligibility criteria. The first problem with Eschelon's presentation of this quote is that the statement is from an FCC order—the *Supplemental Order Clarification*—that was superseded by the *TRO*'s pronouncements relating to service eligibility requirements and ILEC audit rights. The second problem with Eschelon's reliance on this quote is the failure to discuss the footnote—

[68] Exh. No. 59, Stewart Responsive, 46:8-22.

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

footnote 1898 from the *TRO*—that follows the paragraph from which the quote is taken. In that paragraph, the FCC summarizes the audit rights it established in the *Supplemental Order Clarification* and does not mention a "for cause" requirement.

109 Accordingly, as the Minnesota Commission found, there is no legal support for Eschelon's proposal, and it should be rejected.

Issue 9-58 (a,b,c,d,e): Ordering, Billing, And Circuit ID Numbers For Commingled Arrangements (Sections 9.23.4.5.1, 9.23.4.5.1.1, 9.23.4.5.4, 9.23.4.7, 9.23.4.6.6, 9.1.1.1.1, 9.1.1.1.1.2).

110 Issue 9-58 and the related sub-issues (a,b,c,d,e) involve process-related disputes relating to commingled arrangements. When a CLEC orders either an EEL loop or EEL transport commingled with a private line transport circuit or a channel termination circuit, it is necessary to order, provision and bill each circuit out of the appropriate Qwest service order systems and to follow the established processes Qwest has for these products. For example, when a CLEC orders an EEL Loop commingled with a private line transport circuit, the design of Qwest's systems and processes requires that the CLEC order the EEL loop by submitting a (LSR). Qwest bills the CLEC for this network element through its "CRIS" system. By contrast, the design of Qwest's systems and processes requires that the CLEC order the private line transport circuit by submitting an (ASR), and Qwest bills the CLEC for this circuit through a different billing system referred to as the "IABS system." Each circuit is separate and is assigned its own circuit identification number (circuit ID). Moreover, the EEL loop is provided pursuant to terms that are specific to that facility, and the private line transport circuit is provided based on specifically defined terms and conditions set forth in tariffs.[69]

111 This dispute arises because of Eschelon's demands that Qwest substantially modify its OSSs

[69] Exh. No. 57, Stewart Direct, 78:20-79:17.

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

and provisioning processes to provide commingled EELs as though they are a single, unified element instead of a combination of two distinct circuits with distinct characteristics and provisioning requirements. Eschelon's demands would require very substantial changes to Qwest's systems and processes not just in Washington, but in other states in Qwest's region since Qwest's systems and processes are used in multiple states and the costs of the changes would therefore be very substantial.[70]

112 In addition to the fact that Qwest has no obligation to make these changes, Eschelon is not proposing to compensate Qwest for the substantial costs they would impose, even though it has long been established that ILECs have a statutory right under the Act to recover the costs they incur to modify their systems to accommodate CLEC orders for wholesale services.[71] Although Eschelon is seeking to require Qwest to substantially change its ordering process (one order instead of two), its provisioning process (one circuit ID instead of two), and its billing process and systems (one bill instead of two), Mr. Denney makes the extraordinary claim that Eschelon's demands would not require any "systems changes" or cause Qwest to incur any costs.[72] Anyone who has familiarity with ordering, provisioning, and billing processes in the telecommunications industry would know the fallacy of Mr. Denney's claim. The changes Eschelon seeks to impose cannot be implemented without costly feasibility studies and process and system changes.

113 Further, the changes Eschelon is seeking would affect all CLECs in Washington that obtain commingled arrangements, even though the CLECs have been obtaining commingled

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[70] Exh. No. 57, Stewart Direct, 79:18-80:3.

[71] *See Verizon Pennsylvania v. Pennsylvania Public Utility Commission*, 380 F.Supp.2d 627, 655 (E.D. Pa. 2005) ("While the FCC regulations dictate that incumbents must cooperate with competitors and provide them with access to OSS based on the cost of provision, it does not follow, as MCI seems to suggest, that such access must be completely subsidized by incumbents."); *AT&T Communications, Inc. v. BellSouth Communications, Inc.*, 20 F.Supp.2d 1097, 1104 (E.D. Ky. 1998) ("Because the electronic interfaces will only benefit the CLECs, the ILECs, like BellSouth, should not have to subsidize them.").

[72] Exh. 137, Denney Rebuttal, 100:15 - 101:7.

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1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

products from Qwest without any difficulty using Qwest's existing systems and processes. Those CLECs would be required to compensate Qwest for cost recovery associated with such far-reaching OSS changes. These other CLECs should not have the significant Qwest OSS changes (and internal operational changes) and the resulting compensation obligations imposed upon them in a single arbitration between two carriers in which they are not participating and will not be heard.

114 As discussed above, when it eliminated the prior restriction on commingling in the *TRO*, the FCC did not eliminate the fundamental distinctions between the nature and provisioning of the UNE components and tariffed components of commingled arrangements. On the contrary, the FCC and state commissions have held that those distinctions are to be preserved, as demonstrated by the multiple rulings from the FCC and state commissions establishing that the UNE component and tariffed component of commingled arrangements are governed by different pricing schemes.

115 There also is nothing unusual in the telecommunications industry about carriers being required to submit more than one order and to use more than one circuit ID for products. Numerous UNEs, access and private line network arrangements require CLECs to place more than one order and to use more than one circuit ID. Even Eschelon acknowledges with its language in Section 9.23.4.5.4 that multiplexed facilities require at least two service orders and multiple circuits IDs.[73]

116 Turning to the specifics of Eschelon's proposals for ICA Sections 9.23.4.5.1, 9.23.4.5.1.1 and 9.23.4.5.4, Eschelon is seeking to require far-reaching changes to accommodate its improper "Loop-Transport Combination" product. Under its proposal, Qwest would be required to (1) create an entirely new and unique hybrid service, (2) combine a tariffed service and a UNE into one circuit, (3) permit Eschelon to submit one order for this hybrid service, and (4) issue

[73] Exh. No. 57, Stewart Direct, 81:14-82:2.

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

just one bill, not two, even though the product would be comprised of separate elements. In addition to the flaws in this proposal described above, the proposal fails to recognize that there are sound reasons for and benefits from the current processes and systems that Qwest uses to process UNE orders, on the one hand, and orders for tariffed services, on the other.[74]

117 For example, as discussed above, circuit IDs include product-specific information that Qwest relies upon for proper processing, monitoring of performance indicator measurements and billing of products. Using a circuit ID assigned to a UNE for a tariffed service may result in mis-identification of the service and lead to billing and other errors. Further, if a single LSR and single circuit ID were utilized, Qwest's systems could not recognize, for example, what part of the hybrid circuit had an installation and/or repair issue and thus Qwest could not know if specific performance indicator measurements and potential payments applied. Likewise, Eschelon's demand that Qwest use a single bill for the elements comprising its proposed "Loop-Transport Combination" product fails to recognize that bills or "BANs" contain essential product-specific information that affects the proper billing for products. Without separate "BANs" for the distinct products that comprise commingled arrangements, billing errors would be inevitable.[75]

118 Adding to the shortcomings of Eschelon's proposal is the fact that Qwest's provisioning of UNEs is subject to specific performance indicator measurements ("PIDs") and potential payments. Special access and private line arrangements are not subject to the same performance indicator measurements and potential payments. If Qwest were required to create the type of hybrid product Eschelon is seeking—a mix of both the UNE circuit and private line facilities—the existing PIDs and related payment provisions could not apply.[76]

119 Eschelon's alternative LSR-related proposal also does not fix the shortcomings of its

[74] Exh. No. 57, Stewart Direct, 82:21-83:21.
[75] Exh. No. 57, Stewart Direct, 94:17-95:4.
[76] Exh. No. 57, Stewart Direct, 89:20-90:2.

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

proposal. Eschelon proposes using the "remarks" section of the LSR to indicate that the two specific circuits of a commingled arrangement are connected with each other. While the remarks section could be used to convey information at the time of ordering or repair, once the initial activity has been completed, Qwest's systems do not retain, much less read, the remarks section of the original LSR.[77] Therefore, this is not a sustainable "fix" and is yet another overly simplistic approach that cannot be implemented in the current Qwest OSS.

120 Finally, while Eschelon's proposals relating to these issues are flawed, it bears emphasis that they are properly raised not here, but in the CMP. CMP allows CLECs collectively to prioritize what changes should be made to OSS related systems. Because CLECs have agreed that certain legal issues relating to implementation of the *TRRO* must still be resolved, the CMP change request ("CR") intended to complete *TRRO*-related systems work had been deferred pending completion of the *TRRO* wire center dockets in Qwest's states. However, Qwest has recently announced its intent to re-activate the CR and to have the *TRO* and *TRRO*-related systems changes to be reviewed and addressed in CMP.[78]

121 For these reasons, the Commission should adopt Qwest's proposed Section 9.23.4.5, which sets forth the process Qwest has been using successfully to provide other CLECs with commingled arrangements. The Commission should reject Eschelon's proposed language in its proposed sections 9.23.4.5.1, 9.23.4.5.1.1, and 9.23.4.5.4.

Issue 9-59: Eschelon's Alternate Proposal For Repairs Involving Commingled Arrangements (Section 9.23.4.7).

122 This issue also involves commingled EELs. If the Commission rejects Eschelon's demand relating to a single circuit ID for commingled EELs, as it should, Eschelon is proposing alternative language in its proposed Section 9.23.4.7 and sub-parts. Eschelon's proposal would require Qwest to make significant modifications to the systems and processes it uses

[77] Exh. No. 57, Stewart Direct, 85:4-12.
[78] Exh. No. 59, Stewart Responsive, 58:5-15.

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

for carrying out repairs associated with the individual circuits that are included in commingled EELs and, again, Eschelon is not offering to compensate for the costs of those modifications.[79]

123 Because of the length of Eschelon's proposed language, Qwest will not quote the proposal here. Most important, Eschelon is seeking that in the event of a "trouble" associated with a commingled EEL arrangement, it be permitted to submit just a single trouble report instead of a report for each circuit that comprises the commingled EEL. However, there are very legitimate and necessary reasons why a CLEC may be required to submit two trouble reports for commingled EELs, and, accordingly, Qwest opposes Eschelon's proposal. In fact, Qwest repair processes for commingled arrangements are consistent with the repair practices of SBC as noted in Exhibit KAS-1 to Ms. Stewart's direct testimony.[80]

124 In the interest of compromise, Qwest has agreed to modify its process for repairs involving commingled EELs in the manner summarized below when Qwest is providing all of the network elements. However, given the complexities and various repair problems that can occur with these facilities, it may be necessary that a second repair ticket be opened and therefore Qwest cannot agree that there will never be a second repair ticket. The significant modifications to which Qwest has agreed are described in Ms. Stewart's testimony.[81]

125 The advantage of Qwest's proposal is that it addresses Eschelon's concerns regarding Qwest's repair process without requiring the substantial systems modifications and associated costs that Eschelon's proposal would require. Further, Qwest's proposal realistically recognizes that there may be limited circumstances in which a second trouble ticket is necessary.[82]

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[79] Exh. No. 57, Stewart Direct, 103:12-19.
[80] Exh. No. 57, Stewart Direct, 104:34-105:5.
[81] Exh. No. 57, Stewart Direct, 105:9-108:3.
[82] Exh. No. 57, Stewart Direct, 112:5-13.

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1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

126 An additional shortcoming of Eschelon's proposed Section 9.23.4.7.1.1 is that it appears to require Qwest to add the circuit ID of the Commingled EEL to the trouble ticket if it was missing from the customer service record. Qwest is uncertain about the context in which Eschelon believes this could occur and, given this significant ambiguity, cannot agree to the proposal. In addition, if Eschelon does not indicate the additional circuit IDs it believes may be experiencing trouble, it would not be appropriate for Qwest to "assume" the identity of the circuits and to start adding circuit IDs to the trouble report.[83]

127 With respect to Section 9.23.4.7.1.2, "No Trouble Found" is not a defined term in the ICA and therefore likely would result in ambiguity and disputes in implementing the ICA. Moreover, Qwest's commitment to the potential for only a single charge for maintenance of service or trouble isolation is clearly conveyed through Qwest's proposed language. Finally, Section 12.4.1.8 remains in dispute between the parties, and, therefore, Qwest opposes a reference to that section in Section 9.23.4.7.1.2.[84]

128 It is also critical that Qwest maintain accurate repair history detail on each circuit. These various obligations require submission of a trouble report specific to the circuit where trouble was actually found. However, with appropriate trouble isolation testing, the CLEC will generally know which circuit is experiencing trouble. Accordingly, CLECs should be able to routinely submit their trouble tickets with accurate listings of the circuit IDs. If this does not occur, the repair process will not be delayed. Further, if no trouble is found on the circuit identified in the trouble ticket, Qwest will also test the commingled circuit identified in the remarks section of the ticket.[85]

129 For these reasons, the Commission should adopt Qwest's proposed compromise language for Section 9.23.4.7 and sub-parts.

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[83] Exh. No. 57, Stewart Direct, 110:11-20.
[84] Exh. No. 57, Stewart Direct, 110:21-111:2.
[85] Exh. No. 57, Stewart Direct, 111:3-14.

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

Issue 9-61 (a,b,c): Loop-Mux Combinations (Sections 9.23.2, 9.23.4.4.3, 9.23.6.2, 9.23.9). ***Loop-Mux Combinations are not a UNE.***

130 The disputes encompassed by Issue 9-61 and the related sub-issues involve a commingled arrangement referred to as a "loop-mux combination," or "LMC." LMC is comprised of an unbundled loop, as defined in Section 9.2 the ICA (referred to in this Section as an LMC Loop), combined with a DS1 or DS3 multiplexed facility (with no interoffice transport) that a CLEC obtains from a tariff. A multiplexer is electronic equipment which allows two or more signals to pass over a single circuit. When used with LMC, multiplexing allows the traffic from several individual loops to be carried over a single, higher bandwidth facility. Because LMC involves the connecting or linking of a UNE provided under Section 251 (*i.e.,* an unbundled loop) with a non-UNE tariffed facility (*i.e.,* a tariffed DS1 or DS3 private line or special access service), it is a commingled arrangement within the definition of "commingling" set forth in the *TRO*. *See TRO* at ¶ 579.[86]

131 Until the FCC made commingling available in the *TRO*, CLECs had no readily available mechanism for "handing off" UNE loops to their collocation spaces to connect the loops to the higher bandwidth transport facilities. To address this situation, Qwest voluntarily provided LMC to CLECs, thereby allowing CLECs to connect or hand off their loops to those transport facilities. With commingling becoming available after the *TRO*, CLECs no longer need access to Qwest's voluntary LMC offering in order to hand off loops to the larger transport facilities terminated in their collocation spaces. Commingling permits CLECs to terminate unbundled loops directly on the special access transport facilities they obtain from Qwest. By being able to purchase commingled arrangements—UNE loops commingled with special access or private line tariffed service, for example—CLECs now have a legally mandated mechanism available to them through which ILECs provide

[86] Exh. No. 57, Stewart Direct, 112:15-113:10.

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
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multiplexing in conjunction with higher bandwidth tariffed services to connect UNE loops.[87]

132 While this dispute involves several issues, they are all linked by the overarching fact that Eschelon is seeking to require Qwest to continue providing its voluntary LMC offering at UNE rates, terms, and conditions even though commingling is available under the ICA and LMC is therefore no longer necessary to connect UNE loops with tariffed transport facilities. Eschelon seeks to have LMC treated as a stand-alone UNE in the ICA and to be governed by UNE rates and service intervals that apply only to UNEs. There is no legal basis for assigning UNE attributes to LMC when it is used with commingled arrangements. On the contrary, the FCC has made it clear that (1) the multiplexing used with commingled arrangements is a tariffed product, and (2) multiplexing is not a stand-alone UNE.[88]

133 In ruling that ILECs are required to provide commingled arrangements, the FCC explained that commingling allows a CLEC to attach a UNE to an "interstate access service." Significantly, in providing an example of a tariffed "interstate access service" to which a CLEC may attach a UNE, the FCC specifically referred to multiplexing: "Instead, commingling allows a competitive LEC to connect or attach a UNE or UNE combination with an interstate access service, ***such as high-capacity multiplexing*** or transport services."[89] In the very next sentence, the FCC emphasized that "***commingling will not enable a competitive LEC to obtain reduced or discounted prices on tariffed special access services*** . . . ."

134 This portion of the *TRO* directly refutes any claim by Eschelon that it is entitled to multiplexing at UNE rates, terms, and conditions when it obtains multiplexing for use with commingled arrangements. First, the FCC states very clearly that the multiplexing used with commingling is "an interstate access service." Second, the FCC states unambiguously that

[87] Exh. No. 59, Stewart Responsive, 78:1-4.
[88] Exh. No. 59, Stewart Responsive, 78:16-80:19.
[89] *TRO* at ¶ 583.

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1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

when a CLEC obtains an access service like multiplexing for use with commingling, it is not entitled to "reduced or discounted prices on [the] tariffed special access services." In other words, Eschelon is required to pay the full tariffed rate for multiplexing used with commingling and is not entitled to a UNE rate or any other discounted rate.

135 Consistent with this ruling, in the decision of the FCC's Wireline Competition Bureau in the *Verizon-Virginia Arbitration*, paragraph 491, the Bureau rejected WorldCom's proposed language that would have established multiplexing as an independent network element, stating that the FCC has never ruled that multiplexing is such an element:

> "We thus reject WorldCom's proposed contract language because it defines the 'Loop Concentrator/Multiplexer' as a network element, which the Commission has never done."[90]

136 Indeed, the only network elements that that ILECs are required to provide as UNEs at TELRIC rates are those for which the FCC has made fact-based findings of competitive impairment pursuant to Section 251(d)(2)(B). The FCC has never made a finding of impairment for multiplexing and indisputably has not found that multiplexing is a UNE.

137 In addition to these pronouncements by the FCC, state commissions have consistently ruled that tariffed rates, not UNE rates, govern the multiplexing component of commingled arrangements. For example, in *Re BellSouth Telecommunications, Inc.*, Docket No. 2004-316-C, Order No. 2006-136, 2006 WL 2388163 (S.C.P.S.C. Mar. 10, 2006), the South Carolina Commission approved the following ICA language:

> When multiplexing equipment is attached to a commingled circuit, the multiplexing equipment will be billed from the same agreement or tariff as the higher bandwidth circuit. Central Office Channel Interfaces (COCI) will be billed from the same agreement or tariff as the lower bandwidth circuit." *Id*. at *33.

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[90] *In the Matter of Petition of WorldCom, Inc., et al., for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon-Virginia and for Arbitration*, CC Docket Nos. 00-218, 249, 251, 17 FCC Rcd. 27,039 at ¶ 494 (FCC Wireline Competition Bureau, July 17, 2002).

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1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

138 The Florida Commission reached the same conclusion in, 041269-TP, 2006 WL 1085095 (Fla. P.S.C. Apr. 17, 2006), where it concluded that the multiplexing rate in a commingled circuit should be based on the higher bandwidth circuit."[91]

139 There also is no merit to Eschelon's back-up position that multiplexing is a feature or function of the unbundled loop and, hence, is governed by UNE rates, terms, and conditions. FCC Rule 51.319(a)(1) defines the local loop as "a transmission facility between a distribution frame (or its equivalent) in an incumbent LEC central office and the loop demarcation point at an end-user customer premise." The rule provides further that the loop "includes all features, functions, and capabilities of such transmission facility." In other words, to qualify as a feature or function of the loop, a piece of equipment must be located with or a part of the "transmission facility" that runs between a distribution frame or equivalent frame and a customer's premise. The multiplexing equipment used to commingle a UNE loop and tariffed transport is *not* located between a distribution frame or equivalent frame and a customer premise. Instead, it is located on the transport or central office side of a frame in a central office and thus is not part of the loop transmission facility. For this additional reason, multiplexing cannot reasonably be viewed as a "feature, function, or capability" of the loop.[92]

140 The statements from the FCC that Mr. Starkey cites in support of Eschelon's contention that multiplexing is a feature or function of the loop involve an entirely different type of multiplexing than is at issue here. In this application, the FCC is being clear that to the extent any type of multiplexing (such as digital loop carrier systems, which are often viewed

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[91] *See also Re BellSouth Telecommunications, Inc.*, Docket No. P-55, Sub 1549, 2006 WL 2360893 (N.C.U.C. July 10, 2006); *Re Momentum Telecom, Inc.*, Docket No. 29543, 2006 WL 1752312 at *31 (Ala. P.S.C. Apr. 20, 2006) ("When multiplexing equipment is attached to a commingled arrangement, the multiplexing equipment will be billed from the same agreement or tariff as the higher bandwidth circuit."); *Re Consider Change-of-Law to Existing Interconnection Agreements*, Docket No. 2005-AD-1139, 2005 WL 4673626 (Miss. P.S.C. Dec. 2, 2005) (Same).

[92] Exh. No. 59, Stewart Responsive, 82:13-83-3.

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1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

as a form of multiplexing) between the end user premises and the MDF in the central office is required, the ILEC must "de-mux" the loop so it can be handed off to the CLEC in the central office. By contrast, the multiplexing that is in dispute between Qwest and Eschelon is transport multiplexing that takes place not between a customer's premises and the MDF, but after a fully functional loop has been provided to the CLEC.[93]

Because LMC is not a UNE or a feature or function of the unbundled loop, Eschelon's proposals must be rejected.

141 The analysis set forth above demonstrating that the LMC is not a UNE or a feature or function of the loop dictates the outcome of each of the disputed issues within Issue 9-61.

142 First, with respect to the location of LMC terms and conditions within the ICA (Issue 9-61), the fact that LMC is not a UNE requires setting forth the terms relating to this offering in Section 24, which addresses commingling, not in Section 9.23, which addresses UNE combinations.[94]

143 Second, Eschelon's demand that Qwest provide LMC at UNE rates and terms (Issue 9-61(a)) instead of as a tariffed facility is directly contrary to the FCC's unequivocal statements in the *TRO*, cited above, that the multiplexing used with commingling is a tariffed "access service" for which CLECs must pay full tariffed rates. It also is contrary to the ruling in the *Virginia Verizon Arbitration* in which the FCC Bureau rejected the claim that multiplexing is a stand-alone UNE.[95]

144 Third, with respect to the service intervals that apply to LMC (Issue 9-61(b)), since LMC is not a UNE combination and is a commingled service, the proper placement of service intervals should be in the Qwest Service Interval Guide and not in Exhibit C. The Service Interval Guide specifically sets forth the intervals for commingled arrangements. By

[93] *Id.*
[94] Exh. No. 59, Stewart Responsive, 82:13-83-3.
[95] *Id.*

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Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

contrast, Exhibit C addresses service intervals only for UNEs.[96]

145 Fourth, because LMC is not a UNE combination, the rates for LMC should not be included in the UNE Combination section of Exhibit A, as Eschelon is proposing (Issue 9-61(c)). There is no legal basis for Eschelon to apply UNE-based rates in Exhibit A to this non-UNE product. The appropriate rates are those set forth in the applicable tariff for multiplexed facilities.[97]

146 Finally, it is important to emphasize that contrary to its suggestions, Eschelon will still have access to multiplexing if its proposals relating to this issue are rejected. Qwest agrees that if Eschelon requests a UNE combination comprised of a UNE loop combined with UNE transport, Qwest will provide multiplexing at TELRIC rates. Further, Eschelon can obtain multiplexing through Qwest's tariffed offering of this product and also can self-provision multiplexing in its own collocation space.[98]

SECTION 12 AND RELATED ISSUES

Section 12 Issues

CMP-Related Provisions for Which Eschelon Seeks to Expand or Change Qwest's Current Practices

147 In analyzing the parties respective positions on whether to adopt language proposed by Eschelon or to defer to the change management process, the Commission should keep in mind that, in every case where this dispute arises, Eschelon is also seeking to change Qwest's existing procedures. Because of the importance of consistent procedures between CLECs, Eschelon should be required to make a compelling showing of need prior to this commission accepting any proposals that change Qwest's existing processes. As was discussed earlier, Eschelon failed to make such a showing for changes to intervals. (Issue 1-1 and subparts).

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[96] *Id.*
[97] *Id.*
[98] Exh. No. 57, Stewart Direct, 115:13-16.

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1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

Eschelon similarly fails for Acknowledgment of Mistakes, Expedites and Jeopardies.

Issue 12-64: Acknowledgment of Mistakes.

148 This issue has to do with whether processes in Minnesota relating to mistakes in processing Eschelon orders should be exported to Washington. The proper focus is whether the process proposed by Eschelon is necessary at all. The testimony of Qwest witness Renee Albersheim[99] established that Qwest already has processes in place to address Eschelon's concerns and Eschelon's proposed language could have the effect of changing those existing processes.[100] Eschelon witness Bonnie Johnson acknowledges the extent to which investigation into mistakes are available.[101] Qwest considers Eschelon's proposed language as simply unnecessary. It should be rejected.

Expedites

Issues 12-67 and 12-67(a) – (g); Sections 12.2.1.2 and subparts; 7.3.5. and subparts; 9.1.12.1 and subparts; 9.23.4.5.6; and Exhibit A, section 9.20.14.

149 One of the basic disputes between the parties has to do with the location of expedites language. Eschelon would like language to appear in Section 12 of the contract. Qwest would like it to appear in sections 7 and 9 instead. While at first blush, this dispute would appear unimportant, it reflects a fundamental difference between the parties. Qwest believes that a distinction should exist between designed and nondesigned services and that a compensated expedite, if it should be available at all, should only be available to designed products (i.e. products contained in sections 7 and 9). Qwest's language placement accommodates this approach and will make the transition to provide a compensated expedite product a more straightforward process than using section 12, which could apply to all

[99] Exh. No. 1, Albersheim Direct, 47:1 – 47:18; Exh. No. 18C, Albersheim Responsive, 39:19 – 40:19; and Exh. No. 29, Albersheim Rebuttal, 16:22 – 17:15.
[100] Exh. No. 18C, Albersheim Rebuttal, 18:7 – 18:15.
[101] Exh. 74, Johnson Direct, Exh. No. BJJ-8.

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1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

products.[102] Having contract language specifically associated with the different product offerings makes sense.

Eschelon's Language is Inconsistent with the Act

150 Eschelon's language would also require Qwest to provide Eschelon with a superior service in violation of the Act. Under the Act, Qwest is required to provide Eschelon with service that is at parity with what Qwest provides retail customers. 47 U.S.C. § 251(c)(3). As discussed above, in the event that no retail analogue exists for the service, Qwest is required to provide service at a level which provides the CLEC with a meaningful opportunity to compete.

151 Eschelon's proposed expedited service goes beyond these requirements. For example, the Kentucky Commission recently ruled:

> The Joint Petitioners contend that expedited service is part and parcel of UNE provisioning. The Commission disagrees. Standard provisioning intervals for service are required pursuant to Section 251. BellSouth should also provide nondiscriminatory access to expedited service, but expedited service is not a Section 251 obligation.[103]

152 Section 251(c)(3) requires that access to UNEs be nondiscriminatory. Initially, the FCC's *First Report and Order* interpreted this as requiring ILECs to provide "superior" service. The Eighth Circuit struck this language down as a violation of the 1996 Act and the United States Supreme Court has never disturbed that portion of the Eighth Circuit's decision. *See e.g., Iowa Utilities Board v*. AT&T, 120 F.3d 753, 812-13 (8th Cir. 1997), *aff'd in part and rev'd in part*, 525 U.S. 366, 397 (1999). A recent decision by the Florida Commission recognizes this point:

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[102] Exh. No. 18C, Albersheim Responsive, 42:1 – 42:16.

[103] *In re Joint Petition for Arbitration of Newsouth Communications Corp.*, 2006 Ky. PUC LEXIS 159 at Issue 86 (Ky. PUC March 14, 2006).

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

> It is clear there is no obligation imposed or implied in Rule 51.311(b) that an incumbent render services to a CLEC superior in quality to those provided to a retail customer ***requesting similar services***. *So long as rates are identical for all requesting parties, CLEC and retail alike, parity exists in the provisioning structure for service expedites*, and there is no conflict with Rule 51.311(b). We reiterate that current regulations do not compel an ILEC to provide CLECs with access superior in quality to that supplied to its own retail customers.

In re Joint Petition by NewSouth et al., 2005 Fla. PUC LEXIS 634 *150, Order No. PSC-05-0975-FOF-TP (Fla. PSC Oct. 11, 2005) (emphasis added). This case approved BellSouth's expedite fee of $200 per day for CLECs because BellSouth charged the same fee to its retail customers to expedite similar retail services. *Id*. at *150-151. That is exactly what Qwest is doing here.

153 Eschelon attempts to overcome this abundance of authority by citing to a decision of the North Carolina Commission. *In Re NewSouth Communications Corp. et al.,* 2006 WL 707683 *47 (N.C.U.C. Feb. 8, 2006).[104] That Commission determined, among other conclusions, some of which Qwest disagrees with, that Section 251 requires BellSouth to expedite orders to CLECs on the same terms and conditions as it expedites orders for its retail customers. Qwest more than satisfies this standard. As noted above, Qwest does expedite orders for CLECs using the exact same processes and procedures as it does for its similarly situated retail customers. For unbundled loops, Eschelon can obtain shorter provisioning intervals than the ones Qwest provides for its own retail customers. This means that Eschelon can expedite the exact same circuit for a customer at a lower price than Qwest can. Thus, Eschelon actually obtains superior service.

154 Contrary to the expedites service that Qwest provides to its own retail customers and to all other CLECs alike, Eschelon asks the Commission in this arbitration to approve language for the parties' ICA that provides it with expanded rights to expedites at no charge.[105] Calling it

[104] Exh. No. 172, Webber Direct, 90:21 – 91:4.
[105] *See* Albersheim, TR. 143:22 – 144:23 and 166:7 – 167:11.

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Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

a "minor difference", Eschelon added subsection (f) to the list: "Disconnect in error when one of the other conditions on this list is present or is caused by the disconnect in error". (Issues Matrix, Issue 12-67(a). In addition, Eschelon seeks to require Qwest to provide expedites to Eschelon for a fee even though Qwest does not offer such expedites to its retail customers.[106]

155 What Eschelon attempts to do in the parties' ICA with regard to expedites is to create an entirely new process just for Eschelon. Eschelon's language does not distinguish between non-design services (POTS, like QPP) and design services (unbundled loops, like analog DS0 loops). Eschelon takes Qwest's current list of emergency conditions, which apply to expedites for free for non-design services only, and attempts to persuade the Commission to adopt the list, plus subsection (f), for ***all*** services. In doing so, Eschelon seeks special treatment and service superior to that received by all of Qwest's retail customers and all other CLECs.[107]

156 By asking the Commission to adopt its proposed expedites language, Eschelon is asking the Commission to require discriminating treatment. As Eschelon recognizes, federal and state law require that Qwest not discriminate between purchasers. 51 CFR §§ 51.311(a), 313(a)). Agreed terms in the parties' ICA likewise mandate nondiscrimination between carriers purchasing from Qwest: ICA at § 1.3. Thus, the parties' ICA requires Qwest to treat all CLECs the same. That is exactly what Qwest is doing. Scores of CLECs across Qwest's region and in Washington have adopted the unbundled loops expedite terms that Qwest and the CLECs developed in the CMP. However, Eschelon is asking this Commission to endorse a process for expediting orders for unbundled loops that is superior to the process used by every other CLEC in Washington. The Commission should reject Eschelon's attempt to obtain special treatment and adopt the language proposed by Qwest for expedites.

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[106] Exh No. 18C, Albersheim Responsive, 42:1 – 43:9.
[107] *See* Albersheim, TR. 149:25 – 150:7 and 166:11 – 167:11.

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Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

157 Eschelon asserts that it is necessary for the Commission to adopt specific terms regarding expedites in its ICA to "provide Eschelon with a meaningful opportunity to compete".[108] Noticeably absent from Eschelon's testimony is any case that holds that the failure to provide expedited due dates for free somehow violates this standard. Indeed, the law clearly supports Qwest on this subject. In Washington, the Commission approved performance metrics for the ordering and provisioning of unbundled loops. The law is plain that Qwest provides CLECs a meaningful opportunity to compete by virtue of the fact that it satisfies these Commission-approved performance measures.[109]

Issues 12-71; 12-72; 12-73: Jeopardy Notices.

158 These issues relates to whether Qwest may properly characterize its failure to deliver as "customer not ready" when (1) Qwest has previously issued certain jeopardy notices on the order, (2) Qwest has cleared the jeopardy but has not sent a firm order confirmation and (3) Eschelon was unable to accept the order. Qwest proposed that any changes to these classifications be handled pursuant to its change management process. Eschelon proposed specific contract language addressing these issues and proposed modifying Qwest's current processes to prohibit Qwest from classifying an order as "customer not ready" in this particular circumstance.

159 Eschelon's proposal would impose a significant burden on Qwest. It would require Qwest to implement new processes for Eschelon. Such an approach would be costly, complicated and

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[108] Exh. No. 172, Webber Direct, 60:21 – 61:4.

[109] *See e.g., In re Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region*, InterLATA Service in the State of New York, 15 FCC Rcd 3953 ¶ 8 (Rel. Dec. 22, 1999); *In re Application by SBC Communications Inc., et al.*, Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide *In-Region, InterLATA Services In Texas,* 15 FCC Rcd 18354, 18361-18362 ¶ 13 n.33 (FCC Rel. June 30, 2000); *In re Application by Verizon New England Inc. et al.*, for Authorization to Provide *In-Region, InterLATA Services In Maine*, 17 FCC Rcd 11659 ¶ 7 (FCC Rel. June 19, 2002); *Re U. S. WEST Communications, Inc*., 2002 WL 1378630, ¶ 7 (Ariz. Corp. Comm. May 21, 2002).

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

potentially could lead to provisioning errors.[110]

160 In order to impose such a burden, this Commission should expect that Eschelon would have many examples of situations where it has been unable to provide service to customers due to the failure to receive a firm order confirmation. The record demonstrates precisely the opposite. Eschelon has identified over a hundred instances in which it has been able to provide service despite not receiving an FOC.[111] Eschelon's jeopardies proposal causes big hassles, but solves no problem.

161 Eschelon asserts two advantages to its proposed change.[112] First, it suggests that its proposed language will provide "advance notice to ensure timely delivery of the circuit."[113] Second, Eschelon suggests that its proposed changes will not alter Qwest's performance assurance plan and will more accurately allocate fault when Qwest technicians classify a jeopardy in this situation.[114] The record demonstrates that both of Eschelon's claimed benefits are illusions.

162 Mr. Starkey claims that without an advance FOC, Eschelon often is unable to accept a circuit.[115] The record reveals overwhelmingly that both Qwest and Eschelon work very hard to deliver service either on the due date or as quickly as possible after a jeopardy has been cleared, and the record establishes quite clearly that Eschelon's proposal will not speed up service to customers. Two exhibits demonstrate this point. Exhibit RA-27 to Ms. Albersheim's Response testimony, Ex. 18C, shows the communication that took place

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[110] Exh. No. 18C, Albersheim Responsive, 57:25 – 59:21.
[111] Johnson, TR. 256:12-23.
[112] Eschelon has claimed that it is implementing Qwest's existing process, or at least a process Qwest committed to perform. Qwest has testified that Eschelon's proposed language does not reflect Qwest's practices (Exh. 29, Albersheim Rebuttal, 29:8 – 29:14) and that the record does not reflect Qwest committing to such a process in CMP. (*Id.*)
[113] Exh. No. 71, Starkey Surrebuttal, 215:9 – 215:10.
[114] *Id.*, 220:16 – 220:19 and 222:1 – 222:12.
[115] Exh. No. 71, Starkey Surrebuttal, 215:11 – 216:8.

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1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

between Qwest and Eschelon technicians in jeopardy situations.[116] These records demonstrate extensive efforts to resolve issues quickly. In nearly every single instance, Qwest delivered service before the supplemented due date.

163 Exhibit BJJ-41 to Ms. Johnson's Direct testimony, Ex. 117, provides additional evidence in support of this point. It shows over a hundred examples of situations where Eschelon received no FOC. In 76% of these examples, Qwest delivered and Eschelon accepted service on the due date. In several other instances, Eschelon accepted service before the due date.[117] Eschelon's own evidence establishes that, despite Qwest's ability to classify orders as customer not ready under its current process, Qwest delivers service as quickly as possible. Eschelon's language change will not improve service to Eschelon customers.

164 Eschelon has attempted to dispel the well-founded impression that it is attempting to alter the applicability of performance indicator definitions by proposing the following alternative language:

> Nothing in this Section 12.2.7.2.4.4 modifies the Performance Indicator Definitions (PIDs) set forth in Exhibit B and Appendices A and B to Exhibit K of this Agreement.

165 Eschelon is technically correct that its proposal has no impact on the performance indicator definitions; it nonetheless has a very significant impact on Qwest's Performance Assurance Plan. Specifically, if a Qwest technician classifies an order as a Qwest jeopardy, it counts as a missed commitment, even though Qwest was ready and able to deliver the circuit. If, by contrast, the Qwest technician classifies the order as customer not ready, it is excluded from the calculation entirely. Eschelon's proposal, however, changes the application of those definitions. Such a change should happen as a part of PID management, rather than as a part of an interconnection agreement.

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[116] Four exhibits relate to one set of data: Exh. No. 126, Exh. No. 80, Exh. No. 110 and Exh. No. 28.
[117] Exh.No. 117

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Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

166 Eschelon claims in its testimony does not have notice that service will be delivered absent an FOC. Ms. Albersheim testified that an FOC is not the "sole notice function" for providing notice that a circuit will be delivered.[118] In fact, informal communication also allows Eschelon to accept a circuit most of the time.

167 Exhibits BJJ-19 to Ms. Johnson's direct testimony, Ex. 22, and RA-27 to Ms. Albersheim's Answer Testimony, Ex. 18C, confirm Ms. Albersheim's testimony. Collectively, they provide over 117 examples of orders that Eschelon was able to accept without an FOC. These exhibits demonstrate that the technicians working to deliver circuits communicate with each other in order to complete the job. Eschelon's insistence on an FOC is an attempt to take advantage of form [namely getting a document to them] over substance [delivering the service] in order to gain advantageous PAP treatment. Such treatment should be rejected for the purpose of classifying fault for failure to deliver a circuit.

Issue 12-87: Controlled Production Testing (Section 12.6.9.4).

168 At root, this issue, which is Issue 12-87 and Section 12.6.9.4 of the ICA, concerns whether Eschelon has the option under the parties' ICA to choose not to perform controlled production testing after Qwest modifies or installs upgrades in its Operations Support System ("OSS"). The CMP Document provides for certification testing as follows:

> New Releases of the application-to-application interface may require re-certification of some or all business scenarios. ***A determination as to the need for re-certification will be made by the Qwest coordinator in conjunction with the Release Manager of each Release. Notification of the need for re-certification will be provided to CLEC as the new Release is implemented.*** The suite of re-certification test scenarios will be provided to CLECs with the Final Technical Specifications. If CLEC is certifying multiple products or services, CLEC has the option of certifying those products or services serially or in parallel, if technically feasible.[119]

[118] Exh. No. 29, Albersheim Rebuttal, 35:3 – 35:32.
[119] *See* Exh. No. 1, Albersheim Direct, Exhibit RA-1, CMP Document, Chapter 11, page 87 (emphasis added).

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

There is no question in this provision regarding who determines the need for re-certification: Qwest.

169 This approach makes sense. Qwest's OSS serve not only Eschelon, but also all other CLECs, other wholesale customers and retail operations.[120] The risks associated with a failure of that system are substantial and go far beyond Eschelon. Furthermore, Eschelon's fear of unnecessary controlled production testing is unfounded. Eschelon has not presented a single example of unnecessary controlled production testing in its testimony. Such unnecessary testing is unlikely. Qwest makes decisions regarding testing levels on a release basis and does not make different decisions for different CLECs.[121] Qwest will face far greater costs associated with controlled production testing than would Eschelon, because Qwest would be testing not only with Eschelon but also with other customers.[122]

170 Because Qwest's OSS serves such a crucial role in the transactions between Qwest and all CLECs and in Qwest's provision of wholesale services, Qwest respectfully asks the Commission to adopt its proposed language for the parties' ICA.

RATE ISSUES

Issue 22-88: Rate Filing Procedure (Section 22.6.1).

171 This issue relates to the procedure for filing new rates that have not been approved by the Commission. Qwest agreed to Eschelon's proposed language from negotiations and Eschelon added a clause requiring Qwest to serve Eschelon with notice and/or cost studies when Qwest makes such a filing.

172 Qwest views Eschelon's addition unnecessary and more appropriately handled in Commission procedural rules instead of an interconnection agreement. Procedural options

[120] Exh. No. 1, Albersheim Direct, 91:10 – 91:19.
[121] Exh. No. 18C, Albersheim Responsive, 64:18 – 65:2.
[122] *Id.,* 66.24 – 67:3.

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

exist to give Eschelon the ability to participate and respond to any such filing. Accordingly, Qwest respectfully requests that the Commission order Qwest's proposed language.

Issues 22-90 (a) – (f) (Exhibit A, Sections 8.1.1.2; 8.8.1; 8.15.2.1; 8.15.2.2; 10.7.10; 10.7.12.1; 12.3; 9.2.8; 9.23.6.5; 9.23.7.6; 9.6.1.2; 9.23.6.8.1; 9.23.6.8.2; 9.23.7.7.1, 9.23.7.7.2, 8.13.1.1; 8.13.1.2.1; 8.13.1.2.2; 8.13.1.2.3; 8.13.1.3; 8.13.1.4; and 8.13.2.1).

173 The interconnection agreement that is being arbitrated in this case contains a number of rates for items that have not been addressed in cost dockets in Washington. For the purpose of determining interim rates for the purposes of this arbitration, Qwest relies on the testimony and information it provided in connection with the hearing.

CONCLUSION

174 For the reasons stated here and in Qwest's testimony, the Commission should adopt Qwest's proposed ICA language for each of the disputed provisions.

Respectfully submitted this 20th day of July, 2007.

QWEST CORPORATION

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Lisa A. Anderl, WSBA #13236
Adam L. Sherr, WSBA #25291
1600 7th Avenue, Room 3206
Seattle, WA 98191
Phone: (206) 398-2500