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 CORPORIATION'S PETITION FOR ADMINISTRATIVE REVIEW

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I. INTRODUCTION

1 Qwest Corporation ("Qwest") submits this Petition for Administrative Review of the Arbitrator's Report and Decision ("Arbitrator's Report") issued on January 18, 2008.

2 This proceeding involves an interconnection arbitration between Qwest and Eschelon Telecom, Inc., conducted pursuant to Section 252 of the Telecommunications Act of 1996 ("the Act"). After extensive negotiations that spanned multiple states within Qwest's region, Qwest and Eschelon were unable to resolve approximately 30 issues relating to the terms and conditions of the interconnection agreement ("ICA") that was the subject of their negotiations. Accordingly, on August 9, 2006, Qwest filed a petition for arbitration with the Commission, requesting resolution of the unresolved issues pursuant to the arbitration authority granted to state commissions in Section 252(b)(4).

3 As Qwest explained in its arbitration petition, many of the issues that the parties were unable to resolve through negotiations involved Eschelon's insistence upon terms and conditions that would have fundamentally altered how Qwest manages and operates its wholesale business. Since passage of the Act in 1996, Qwest has worked cooperatively with competitive local exchange carriers ("CLECs") in workshops and other proceedings to develop efficient and non-discriminatory processes for providing the wholesale services it is obligated to provide under Section 251. Qwest has invested large amounts of time and resources to implement those processes and now has many years of experience to show that they work. While Qwest regularly reviews and updates its provisioning processes as technology and methods improve, a decision to implement a change necessarily involves a cost-benefit analysis that weighs the need for change against the associated cost. In this case, Eschelon sought many changes to ordering, provisioning, billing, payment, and other aspects of wholesale service that were unnecessary and would have imposed significant uncompensated costs upon Qwest.

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4 While the Arbitrator's Report properly rejects a number of Eschelon's demands as unnecessary or not consistent with governing law, in many cases, the Report adopts the demands despite an absence of evidence or law demonstrating a legitimate need for them. Further, while most of the changes to Qwest's provisioning and other processes required by the order will require Qwest to invest significant amounts of money and other resources, the Report generally does not require Eschelon to compensate Qwest for these costs that Eschelon itself is directly causing. Under the cost recovery requirements established by Section 252 of the Act, Qwest has a statutory right to recover these costs.

5 In this Petition, Qwest has chosen to challenge only a limited number of the Arbitrator's rulings that are of concern. Specifically, Qwest is challenging: (1) rulings that would unnecessarily alter existing processes and practices, some of which were developed in cooperation with the CLEC community and that are proven to be efficient, effective, and fair; and/or (2) rulings that impose costly obligations but that do permit Qwest to receive appropriate compensation for those costs. This petition reflects the depth of Qwest's concern about the far-reaching negative and unnecessary effects that a number of the Arbitrator's rulings would have on its wholesale processes and operations.

6 For each of the rulings that it challenges, Qwest respectfully requests that the Commission reject the Arbitrator's recommendation. Further, if the Commission accepts any recommendations that will require Qwest to incur implementation costs, Qwest requests further that the Commission expressly rule that Qwest is permitted to recover from Eschelon the costs of implementation.

II. PETITION FOR ADMINISTRATIVE REVIEW

Issues 4-5(a) and (c): Change Facility Assignment Charge and Design Change Charge

7 A "design change" is any CLEC-initiated change to an order that requires Qwest engineers to

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perform a review of the modified order. 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.

8 In "Phase D" of the Washington wholesale cost docket conducted in Docket No. UT-003013, this Commission adopted cost-based rates for design changes that comply with the FCC's pricing methodology known as "TELRIC," or total element long run incremental cost. The Commission adopted two different non-recurring rates, one for design changes that Qwest performs manually and the other for "mechanized" design changes. The manual rate is $53.65 per design change, and the mechanized rate is $50.45 per design change. As Qwest witness, Terri Million, explained in this arbitration, these rates are based upon a cost study that calculates the costs for several different types of design changes and then develops an average rate for design activities. The study estimates the amount of time, on average, that Qwest must spend to perform the tasks required for design changes and the probability that the tasks will occur.[1]

9 The primary dispute relating to this issue arises because of Eschelon's refusal to accept the Commission-approved rates for design changes and its proposal to pay significantly lower rates that it failed to support with a cost study or any other evidence of the costs of design changes. Specifically, in contrast to the $50-plus rates the Commission adopted, Eschelon proposes to pay only $5.00 for design changes involving certain changes to "connection

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[1] Exh. No. 53, Million Rebuttal, 11:12-12:18.

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facility assignments" ("CFAs") and $30 for design changes relating to unbundled loops. Not only did Eschelon fail to provide any cost data to support these rates, it also did not make any attempt to identify all the tasks required for design changes or to estimate times and probabilities for those tasks – an exercise that is essential to developing any cost-based non-recurring rate.

10 Notwithstanding the absence of this evidence, the Arbitrator's Report recommends adoption of Eschelon's rates over the Commission-approved rates "until such time as Qwest files for, and the Commission approves, permanent rates."[2] The Arbitrator makes this recommendation despite finding that "*Eschelon's proposed rates would not be acceptable for establishing a TELRIC rate . . . .*"[3] This finding, which accurately reflects the complete lack of evidentiary support for Eschelon's rates, compels rejection of the Arbitrator's recommendation. It is a basic and long-established requirement of the Act that rates for wholesale services must comply with the TELRIC pricing methodology that the FCC established in its *Local Competition Order* issued in 1996.[4] The Arbitrator's statement that Eschelon's rates do not comply with TELRIC is an acknowledgement that the rates fail to comply with the Act's pricing requirements. Because the Commission is required as a matter of law to comply with those requirements, it should reject the Arbitrator's recommendation and adhere to the Commission-approved design change rates that have already been determined to be TELRIC-compliant.

11 The Arbitrator is not alone in recognizing that Eschelon's rates fail to comply with the Act's pricing requirements. In the recent decision issued by an administrative law judge in the Qwest-Eschelon arbitration in Arizona, the ALJ rejected the same rates that Eschelon proposes

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2 Arbitrator's Report at ¶ 37.

3 *Id.* at ¶ 38 (emphasis added).

4 First Report and Order, *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket Nos. 95-185, 96-98, FCC 96-325 at ¶¶ 672-73 (rel. Aug. 8, 1996).

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here on the ground that "*Eschelon has failed to demonstrate that its proposed $30 charge for loop design changes and $5 for CFA changes are cost-based and would permit Qwest to recover its costs*."[5] Instead of those unlawful rates, the ALJ ruled that the parties should use the TELRIC design change rate that the Arizona Commission had previously approved based upon the same cost study that this Commission relied upon in Phase D of the cost docket.[6] Similarly, the ALJ in the recently issued Oregon arbitration decision rejected Eschelon's proposed rates based upon the finding that "*Eschelon has not provided any meaningful evidence showing how it derived its proposed rates, and has not demonstrated that those rates will compensate Qwest for the costs incurred to perform design changes*."[7] Consistent with these rulings, and for the additional reasons described below, the Commission should order the parties to use the Commission-approved design rates adopted in Phase D.

Issues 4-5(a) and (c): Design Change Rates for Facility Assignment Charges and Unbundled Loops

12 A brief overview of CFA design changes should provide helpful context for this issue. 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 collocated in a Qwest central office. To enable Qwest to perform this connection on its behalf, Eschelon provides Qwest with a CFA location 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,

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5 *In the Matter of Petition of Eschelon for Arbitration with Qwest,* Docket Nos. T-03406A-06-0572, T-0105B-06-0572 Opinion and Order at 15 (Ariz. Commission Feb. 22, 2008) (emphasis added) ("Arizona Arbitration Order").(copy attached as "Attachment 1").

6 *Id.* at 14-15.

7 *In the Matter of Petition of Eschelon for Arbitration with Qwest*, Arb 775, Arbitrator's Decision at 21 (Or. March 26, 2008) (emphasis added) ("Oregon Arbitration Order"). Eschelon filed a copy of the Oregon Arbitration Order in this docket on March 28, 2008. Oregon does not have a commission-approved design change rate, and the ALJ resolved this issue by recommending a loop design rate of $40.88 and a CFA rate equal to the rate for a loop installation. *Id.*

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which requires Eschelon to submit a new CFA and, in turn, requires Qwest to redesign the order.[8]

13 Issue 4-5(a) specifically concerns the rate Qwest is permitted to charge 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." In proposing the $5.00 charge described above, Eschelon claims 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. This claim is inaccurate. As an initial matter, the TELRIC cost study that the Commission used to establish design change rates does not include *any* time or costs for technician activities in a central office.[9] 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. 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, including, most significantly, an engineering review of the new order to determine if a different circuit design is needed and the submission and processing of the new CFA information in Qwest's operation support systems ("OSSs").[10] Because it assumes that the only activities required for CFA design changes are those performed by technicians in a central office, Eschelon's proposed $5.00 rate does not account for any of the engineering review and OSS activities Qwest must perform.

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8 Exh. No. 57, Stewart Direct, 11:18 – 12:15.

9 Exh. No. 53, Million Rebuttal, 16:1 – 17:14.

10 Exh. No. 57, Stewart Direct, 12:16 – 13:6.

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14 The loop-related design changes that are encompassed by Issue 4-5(c) involve activities that Qwest must perform when Eschelon or another CLEC submits an order for an unbundled loop and then modifies the order to make a correction or in response to a change in circumstances. For example, Qwest assigns loops based on addresses. If a CLEC modifies an order for a loop by providing a different address that was originally provided, a Qwest engineer must redesign the loop service by assigning a different loop than was initially assigned. In addition, a change in address may require a change in the type of facility provides, such as where the new location is served by fiber while the initial location was served by copper. This difference must be accounted for when an engineer redesigns in response to the modified order. Further, modified orders sometimes include new design parameters that were not in the original order, requiring further redesign activities by an engineer.[11]

15 In recommending Eschelon's non-TELRIC CFA and loop rates over the Commission-approved design change rates, the Arbitrator stated that the record does not include "underlying cost data indicating that" the design change cost study used in Phase D "included costs for CFAs and loop design changes."[12] However, this statement overlooks the testimony of Ms. Million establishing that the study calculated the costs of all types of design changes, including both CFA and loop design changes.[13] Ms. Million demonstrated that the references in the cost study itself to "end-user premises," optional features and functions, and "type of channel interface" are references that are specific to CFAs and loops. If the cost study had been limited to unbundled dedicated transport, there would have been no reason to include these references and elements in the study. Moreover, Qwest's testimony demonstrated that in the price list in the parties' existing interconnection agreement, the Commission-approved design rate charges

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11 *Id.* at 8:13 – 9:20.

12 Arbitrator's Report at ¶ 37.

13 Exh. No. 52, Million Responsive, 15:3-23.

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are listed in the "Miscellaneous Charges" section, not in the section that lists charges specific to transport.[14] If the charges were limited to transport, the parties would not have listed them in the Miscellaneous section. Thus, contrary to the ALJ's statement, there is information in the record clearly demonstrating that the cost study and the Commission-approved rates apply to CFAs and unbundled loops, not just transport.

16 Indeed, the Arizona ALJ cited this very information in concluding that Qwest's cost study and the Arizona design change rate applies to CFAs and loops, not just transport: "The evidence does not indicate that when it approved a design change charge of $72.29, the Commission intended that it apply only to UDIT, and not to loops or CFAs. Qwest provided evidence, such as its location under 'miscellaneous charges' and references to 'customer premises,' that indicates the charge was intended to apply to design changes for loops as well as transport."[15] Just as in that case, the evidence in this case shows that this Commission's design change charges apply to loops and CFAs.

17 There also is no merit to Eschelon's contention – not relied upon by the Arbitrator -- that the cost study must be limited to transport since CLECs order transport – as opposed to loops – through the "access service requests" ("ASRs") that are assumed in the study. As Ms. Million explained, the study uses ASRs not because it is limited to transport but, rather, because it relied upon a prior design change study involving access services that used ASRs. That original study was not limited to transport 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.[16]

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

[15] Arizona Arbitration Order at 15.

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

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18 In the end, this issue boils down to whether the Commission should (1) adhere to the design change charges it has found to be TELRIC-compliant where there is substantial evidence that the cost study upon which those charges is based includes CFAs and unbundled loops; or (2) impose rates that the Commission has never approved, that are not supported by a cost study or other cost data, that the Arbitrator agrees are not TELRIC-compliant, and that the arbitrators in the two other relevant proceedings have rejected as being inconsistent with the Act's requirement of cost-based rates. Clearly, only the first option is consistent with the requirement of rates that are cost-based and the separate requirement that agency decisions must be supported by substantial evidence. Further, if the Commission decides that these rates should be investigated further, it can direct that to occur in a future proceeding open to all interested parties, just as the Arizona and Oregon arbitrators have recommended. That approach is far superior to adopting, even on an interim basis, rates that do not comply with TELRIC.

19 For these reasons, the Commission should reject the Arbitrator's recommended $5.00 charge for CFA changes and $30 charge for loop changes and, instead, to adhere to the TELRIC-based design charge that the Commission considered and adopted in its prior wholesale cost proceeding.

Issue 5-9: Definition of Repeatedly Delinquent

20 In the arbitration, Qwest established the importance of collecting undisputed bills.[17] For the most part, the Arbitrator left Qwest with the tools it currently has in place to collect debts. With respect to collecting a deposit, however, the Arbitrator rejected a standard that exists in Qwest's Washington SGAT as well as in numerous Washington interconnection agreements.

21 On this issue, the parties agree that Qwest should have the right to demand a deposit when

[17] Exh No. 43C_, Easton Response, 7:10-8:5

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Eschelon is "repeatedly delinquent" in paying its bills. The dispute is over the definition of that term. Qwest proposed the definition that is included in its SGAT, and has been included in Washington interconnection agreements for years. Under that definition, a customer is repeatedly delinquent if it fails to pay undisputed bills three times within a 12-month period.

22 The Arbitrator rejected the Section 271 Workshop definition of "repeatedly delinquent" and instead adopted Eschelon's second proposal which prohibits Qwest from demanding a deposit unless Eschelon, or any other CLEC that adopts this agreement or negotiates a future agreement requesting these same proposed terms and conditions, fails to pay its bills for three out of six months. The Arbitrator explained her recommendation as follows: "The Arbitrator recommends approval of Eschelon's second proposal. Qwest failed to demonstrate that Eschelon's proposal is insufficient to protect its interests. The language is consistent with the language in ICAs with other CLECs."[18]

23 Qwest disagrees with the Arbitrator's reasoning. The record demonstrates that Eschelon's proposal is inadequate. In the event Eschelon was in poor financial health or employed a strategy of slow paying bills, Eschelon's proposals would be a disaster for Qwest. Eschelon testified it pays Qwest approximately $55 million per year (in all states).[19] Thus, each week of delay would cost Qwest over one million dollars.[20] Furthermore, Qwest provided testimony that "Eschelon has a history of late and slow payment with Qwest,[21]" indicating that deposit language for Eschelon should be more stringent than other CLECs rather than less stringent as the Arbitrator recommends.

24 The record demonstrates that other agreements with the Eschelon proposed language are out of

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18 Abitrator's Report, ¶ 55.

19 Exh. No. 17, Denney Surrebuttal, at 54.

20 Transcript, Vol. II, p. 282, line 16 – p. 283, line 5.

21 Exh. No. 43C, Easton Responsive Testimony at 7:15.

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date. The agreements cited by [Eschelon] are either very old agreements or are wireless/paging agreements. For example, the ATI agreement in Washington was approved in 1998, and the McLeodUSA agreement was signed in 2000. Qwest's agreements with wireline carriers have contained the 'repeatedly delinquent' language for several years. For wireless/paging carriers, Qwest has not experienced the same magnitude of non payment issues. Nonetheless, since early 2004, Qwest has been using the same deposit language being proposed here in all new contracts with wireless/paging carriers.[22]

25 In reviewing this recommendation, the Commission should keep in mind that the deposit right only is triggered for failure to pay undisputed bills.[23] A customer failing to make payments for undisputed bills 50% of the time is an extremely high standard – one that is so high that, if the situation arose, Qwest would likely be forced to seek disconnection rather than take the more intermediate and less drastic step of demanding a deposit. The Commission should reject the Arbitrator's language and adopt Qwest's proposed definition of "repeatedly delinquent."

Issues 7-18 and 7-19: Application of Transit Record Charge and Transit Record Bill Validation Detail

26 This issue relates to whether Qwest should be required to provide Eschelon with billing records of transit traffic, without charge, for the purpose of allowing Eschelon to verify traffic charges assessed by Qwest. If so, what data should be included for bill verification? The Arbitrator adopted Eschelon's position requiring Qwest to provide the data and requiring all of the detail Eschelon requested in section 7.6.4 of the agreement. The Arbitrator reached the conclusion that compensation is not needed because "Qwest is already obligated to undertake the programming task of producing the requested records because the Minnesota Public Utilities Commission adopted Eschelon's proposal in the Eschelon/Qwest arbitration in that

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22 *Id*. at 15:5-15:11.

23 Exh. No. 43C, Easton Responsive Testimony at 7:23-25.

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state."[24]

27 In making her recommendation, the Arbitrator misstated the decision of the Minnesota Commission. On February 7, 2008, the Minnesota Commission issued an order clarifying its earlier order. In that decision, the Minnesota Commission agreed with Qwest and ruled that the language in 7.6.4 of the agreement should be deleted because it imposed an additional burden on Qwest.[25] At a minimum, this Commission should reverse the Arbitrator's recommendation and delete Eschelon's proposed section 7.6.4 from the agreement. It imposes an additional significant burden on Qwest.

28 Qwest also urges the Commission to delete Eschelon's proposed language requiring any transit records in this situation. The record establishes that better, alternative means exist for getting the information Eschelon seeks.[26] In the event Eschelon wants Qwest to create this new functionality, Eschelon should be required to pay for it.

Issues 9-43 and 9-44: Procedures for Converting Unbundled Network Elements ("UNEs") to Alternative Service Arrangements

29 This issue arises as an outgrowth of the FCC's rulings in the *Triennial Review Remand Order* ("TRRO") that removed network elements known as high capacity loops and high capacity transport from the list of unbundled network elements ("UNEs") that ILECs are required to provide under Section 251(c) of the Act. The FCC relieved the ILECs of the obligation to provide these elements as UNEs in wire centers that meet certain indicia of a competitive

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[24] Arbitrator's Report ¶ 74, citing Denney, Exh. No. 158 at 20-21 and *In the Matter of the Petition of Eschelon Telecom, Inc., for Arbitration of an Interconnection Agreement with Qwest Corporation Pursuant to 47 U.S.C. §252(b) of the Federal Telecommunications Act of 996,* MPUC No. P-5340,421/IC-06-768.

[25] *In the Matter of the Petition of Eschelon Telecom, Inc., for Arbitration of an Interconnection Agreement with Qwest Corporation Pursuant to 47 U.S.C. §252(b) of the Federal Telecommunications Act of 996,* MPUC No. P-5340,421/IC-06-768, Order Clarifying Arbitration Issues and Requiring Filed Interconnection Agreement, (February 7, 2008). Eschelon filed a copy of the Minnesota decision in this docket on February 4, 2008.

[26] *See* Easton Responsive Testimony, Ex. 43C, p. 18:9 – 20:11.

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market that are set forth in the *TRRO*.[27] Under the rulings in the *TRRO*, a CLEC that is leasing high capacity UNE transport or UNE loops in a wire center that is deemed "non-impaired" must convert from UNEs to an alternative service, such as tariffed private line service, if it desires to continue obtaining service from Qwest. Because the terms, conditions, and prices for UNE services are highly regulated under Sections 251 and 252 and are subject to different requirements than tariffed services, Qwest uses separate and distinct computerized ordering, inventory, and billing systems for these services. In addition, Qwest uses different processes to provision these services. The use of separate systems and processes allows Qwest to recognize and maintain the distinctions between, on the one hand, UNE products and, on the other hand, services provided through tariffs and commercial agreements.

30 The disputes that give rise to this issue result from Eschelon's demands that Qwest undertake very costly changes to its systems – operation support systems ("OSSs") – and provisioning procedures to eliminate important differences in how Qwest provides UNEs and how it provides tariffed services. Eschelon contends the changes are necessary to ensure that conversions from UNEs to alternative services do not disrupt service to its customers, and it therefore demands that with each conversion, Qwest must: (1) continue using the same circuit identification number ("circuit ID") for the alternative service that was assigned to the UNE (Section 9.1.15.2.3); (2) ensure that the conversion from a high capacity UNE to an alternative service is "in the manner of a price change on the existing records and not a physical conversion" (Section 9.1.15.3); (3) perform the "price change" for the alternative service through the use of an "adder" or "surcharge" that reflects not the rate for the alternative service, but "the difference between the previous UNE rate and the new rate for the analogous or alternative service arrangement (Section 9.1.15.3.1.1); (4) create a new Universal Service Ordering Code ("USOC") and assign the "adder" or "surcharge" rate to the USOC (Section

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[27] *Order on Remand, Review of the Section 251 Unbundling Obligations of ILECs*, 20 FCC Rcd 2533 (2005).

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9.1.15.3.1.1); and (5) use the same newly created USOC for other pricing aspects of the alternative service arrangement, such as "for the purpose of calculating volumes and discounts for a regional commitment plan" (Section 9.1.15.3.1.2).

31 There is no demonstration in the record that these changes – which are fundamental, far-reaching, and costly – are necessary. On the contrary, using its existing systems and processes, Qwest has carried out more than 500 conversions across its region and has *never received a complaint that a conversion caused service disruption for a CLEC's customer*.[28] Moreover, Eschelon does not claim that its customers have experienced any problems under Qwest's existing conversion processes.

32 Accordingly, in the three other decisions issued thus far in these arbitrations between Qwest and Eschelon, the Minnesota Commission and administrative law judges in Arizona and Oregon have refused to adopt Eschelon's demands. The ALJ in the Arizona arbitration concluded, for example, that "[w]e cannot adopt Eschelon's proposed language for Section 9.1.15," since the "*evidence indicates that in the conversions made to date, Qwest has made the conversion 'seamlessly' without disruption to the CLEC end user*."[29] The ALJ explained further that Qwest had demonstrated "a legitimate and reasonable reason" for changing circuit IDs in the conversion process and that Eschelon had not presented "concrete evidence of service quality issues" arising from the changes in circuit IDs.[30] Similarly, in the recent decision issued in the Oregon arbitration, the ALJ ruled that "[i]t would be unreasonable to adopt Eschelon's proposals to utilize a single circuit ID without a comprehensive analysis of the issue and a better understanding of the consequences resulting from that action."[31] The

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28 Exh. No. 51, Million Direct, at 15:14-24.

29 Arizona Arbitration Decision at 45 (emphasis added).

30 *Id.* at 45.

31 Oregon Arbitration Decision at 44.

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ALJ therefore rejected Eschelon's proposals while recommending that the Oregon Commission review Qwest's UNE conversion process in a separate proceeding.[32] This result was consistent with the approach taken by the Minnesota Commission, which also found that there was an insufficient record to evaluate Eschelon's proposals. On that basis, the Minnesota ALJ (and, in turn, the Minnesota Commission) refused to adopt Eschelon's proposals, while ordering further evaluation of Qwest's conversion process in a separate proceeding that would provide for input from other CLECs.[33]

33 Notwithstanding Eschelon's inability to demonstrate any need for the changes and the substantial costs they would impose on Qwest, the Arbitrator's Report adopts Eschelon's demands and related ICA language. It does so in a single four-sentence paragraph that neither discusses Qwest's objections nor evaluates the extensive testimony Qwest presented on these issues.[34] Instead of analysis and discussion of the evidentiary record, the Report provides only the following conclusory ruling:

> Qwest did not provide alternative language to consider and did not address this issue in the CMP where Qwest and CLEC's can jointly develop solutions. Eschelon's proposed language ensures that the conversion from UNEs to non-UNEs does not cause disruption for its business operations and potential harm to its end user customers. Qwest is compensated for conversion – related activities.[35]

34 In addition to disregarding Qwest's evidence demonstrating the need for separate ordering, provisioning, and billing processes for UNEs and tariffed services, this ruling rests the flawed findings or assumptions that: (1) Qwest's existing processes for UNE conversions have caused

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32 *Id.*

33 *In the Matter of Petition of Eschelon for Arbitration with Qwest*, MPUC No. P-5340,421/IC-06-768, Arbitrator's Report at ¶¶ 159-60 (Minn. Commission Jan. 16, 2006) (Attached hereto as "Attachment 2").

34 Arbitrator's Report at ¶ 91.

35 *Id*.

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disruption for Eschelon and its customers and that changes are therefore needed; and (2) Qwest is already compensated for these "conversion-related activities." As demonstrated below, neither finding or assumption is correct.

35 For these reasons and those discussed below, the Commission should reject the Arbitrator's rulings relating to Issues 9-43, 9-44, and 9-44(a)-(c) and should permit Qwest to continue using separate systems and processes for UNEs and tariffed services. Alternatively, the Commission should resolve this issue, consistent with the rulings in the Minnesota and Oregon arbitrations, by rejecting Eschelon's proposals but directing that issues relating to UNE conversions be addressed in a separate, generic docket in which all Washington CLECs may participate and provide input. There are multiple Washington CLECs that have an interest in the processes that Qwest follows to convert UNEs to tariffed services. If the Commission determines that changes to these processes should be considered, the proper forum for doing so is not a single arbitration involving just one CLEC, but a generic docket open to all CLECs. A generic docket, unlike this arbitration, will permit the development of a full and detailed record relating to these issues based upon input from all parties that have an interest in them. Finally, if the Commission adopts the ALJ's rulings – which it should not – the Commission's order should require Eschelon to compensate Qwest for the costs associated with implementing the changes to Qwest's systems and processes.

36 In the discussion that follows, Qwest addresses each of the requirements imposed by the Arbitrator's Report and demonstrates the significant disruption to Qwest's operations that would result from the requirements.

Circuit Identification Numbers (Issue 9-43)

37 Of the issues raised by Eschelon's demands relating to UNE's conversions, among the most important to Qwest is the demand that Qwest use the same circuit ID for alternative service

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arrangements that it used for the high capacity UNEs being converted. The disruption and costs this would impose are substantial.

38 Before turning to the specific discussion of circuit IDs, it is necessary to address a fundamental jurisdictional issue relating to this issue. Section 252(b)(4)(C), the provision of the Act that authorizes state commissions to serve as arbitrators, limits the arbitration authority of state commissions to imposing terms and conditions that are necessary to implement the requirements of Section 251. Specifically, that section requires commissions to resolve open issues by imposing conditions "required to implement subsection [252](c)." In turn, subsection 252(c), which sets forth "standards for arbitration," expressly directs state commissions to resolve "open issues" by imposing "conditions [that] *meet the requirements of section 251*." Thus, the open issues that state commissions are authorized to resolve are only those relating to the duties imposed by Section 251.

39 Based on this jurisdictional analysis, courts have ruled repeatedly that the arbitration authority of state commissions is limited to imposing terms and conditions relating to the duties set forth in Section 251.[36] Among those duties is the obligation in Section 251(c)(3) for an ILEC to provide CLECs with leased access to the UNEs that the FCC has specifically included within that section. However, the UNE conversions at issue here involve network elements that the FCC specifically removed from Section 251(c)(3) – high capacity loops and transport – in the *Triennial Review Remand Order* and the conversion from use of those elements to alternative tariffed services such as private line service. It is indisputable that Section 251 does not apply to these tariffed, non-UNE services. Accordingly, since these services are not within Section 251, the Commission does not have jurisdiction in this arbitration to impose terms and

[36] *Qwest v. Public Utilities Comm'n of Colorado*, 479 F.3d 1184, 1195-96 (10th Cir. 2007); *MCI Telecommunications Corp. v. BellSouth Telecommunications,* 298 F.3d 1269, 1274 (11th Cir. 2002); *BellSouth Telecommunications, Inc. v. Georgia Pub. Service Comm'n*, No. 1:06-CV-00162-CC, slip op. at 12 (N.D. Ga. Jan. 3, 2008); *BellSouth Telecomms., Inc. v. Kentucky Pub. Serv. Comm'n*, No. 06-65-KKC, 2007 WL 2736544 at *6 (E.D. Ky. Sept. 18, 2007); *Qwest Corporation v. Arizona Corporation Commission*, 496 F.Supp.2d 1069, 1077 (D. Ariz. 2008).

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conditions relating to them. This absence of jurisdiction precludes the Commission from imposing Eschelon's proposals relating to circuit IDs and the methods and processes by which Qwest provides service upon converting from UNEs to tariffed services. For this reason alone, the Commission must reject the Arbitrator's recommended rulings relating to Issues 9-43 and 9-44.

40 On the merits, as Qwest established through the testimony of Terri Million, high capacity UNEs are different from services that CLECs purchase through tariffs and commercial agreements in several fundamental respects. Most fundamentally, they are classified and priced under distinct regulatory schemes. UNEs are classified as a highly regulated Section 251 service subject to the Act's requirement of cost-based prices upon the FCC's "TELRIC" ("total element long-run incremental cost") pricing methodology. By contrast, alternative service arrangements are not classified as UNEs and are provided through commercial contracts and tariffs at prices that are typically based upon the market.[37]

41 These services also differ with respect to the customers to whom they are available. UNEs are only available for leasing by carriers the commission has certified to provide service in their capacity as "competitive local exchange carriers," as that term is defined in the Act. By contrast, the alternative service arrangements that Qwest provides through tariffs are not limited to CLECs, as they are available to interexchange carriers and large business customers.[38]

42 Because UNEs and alternative service arrangements are governed by different regulatory regimes and are available to different categories of customers, Qwest has developed separate and distinct ordering, maintenance, and repair processes for these services. For example,

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[37] Exh. No. 51, Million Direct, 14:17-15:24.

[38] *Id.*

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Qwest's service quality obligations relating to ordering, maintenance, and repair of UNEs are governed by the "Performance Assurance Plan" ("PAP") that this Commission and other state commission's established in connection with Qwest's applications under Section 271 for entry into the long distance markets in its region. By contrast, for alternative services, different service quality obligations are set, in many cases, through the terms of commercial agreements and tariffs, and the PAP is inapplicable. At an even more basic, practical level, orders for UNEs are routed to a Qwest ordering center that is different from the ordering center that handles, for example, orders for private line service. Similarly, the Qwest maintenance and repair centers that handle UNEs are different from those that handle private line service and other alternative service arrangements.[39]

43 These multiple differences between UNEs and alternative service arrangements require Qwest to "store" UNE circuits and private line circuits in different inventory systems. Maintaining separate inventories permits Qwest to route orders and repair submissions to the appropriate inventory systems and centers.[40]

44 It is against this background -- which was established through Ms. Million's testimony but is not discussed in the Arbitration Report -- that Eschelon's demand for a single circuit ID number for the both the UNE and the alternative service must be examined. Importantly, the differences between UNEs and alternative service arrangements that are described above are captured and reflected in circuit ID numbers. Qwest's OSSs rely on information reflected by the circuit ID numbers to determine (1) whether a circuit is a UNE or a private line; (2) the type of testing parameters that apply to the circuit; (3) the maintenance and repair center that is responsible for the circuit; and (4) the inventory database in which the circuit is stored.[41]

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[39] *Id.* at 14:17-18:2.

[40] *Id.*

[41] *Id.* at 15:1-12.

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45 Accordingly, when a CLEC converts from a UNE to a private line circuit, Qwest must change the circuit ID to move the circuit from the UNE product category to the private line or other alternative service category. Doing so ensures that Eschelon and other CLECs will receive the proper support for testing, maintenance, and repairs. Qwest accomplishes the change in circuit IDs through an "order-in" and "order-out" process involving submission of a private line order and elimination of the UNE circuit. Specifically, a CLEC submits an order for a "new connect" to a private line service. In turn, for internal purposes, Qwest must generate two orders of its own, one to disconnect the UNE and the other to establish the new private line service. The need for two orders arises because the conversion requires moving the CLEC's circuit from the Qwest billing system used for UNEs – the "CRIS" system – to the billing system used for private line services – the "IABs" system.[42]

46 If adopted, the Arbitration Report's requirement of a single circuit ID would create a significant dilemma for Qwest. The dilemma arises from the fact that Qwest will be providing high capacity circuits as UNEs in wire centers where impairment still exists and as private line or alternative service in wire centers where there is no impairment. It is essential for Qwest's systems to recognize which of these two different services a circuit is associated with, since the systems must be able to identify the appropriate inventory database, testing parameters, repair centers, pricing information, and other information specific to the circuit. Without a change in circuit IDs when a UNE is converted to an alternative service, Qwest's systems will not have the information needed to identify the service for which a circuit is being used.

47 The Arbitration Report fails to analyze -- or even acknowledge -- any of the evidence described above and, as noted earlier, concludes without explanation that "Eschelon's proposed language ensures that the conversion from UNEs to non-UNEs does not cause disruption for

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42 *Id.*

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its business operations and potential harm to its end users customers."[43] However, as the Arizona ALJ cited in her ruling on this issue – and as is also established by the record in this case -- Qwest has performed hundreds of UNE conversions and has never received a complaint that the service of a CLEC was disrupted.[44] Given the significant costs and changes to Qwest's systems and processes that would be required by Eschelon's proposal, there should be substantial evidence in the record demonstrating that Eschelon has experienced problems caused by Qwest's use of two circuit IDs. Because that evidence does not exist, there is not a legitimate basis for adopting the proposal.

48 The Arbitrator's finding that Qwest will be compensated for the costs of converting to using a single circuit ID also is factually inaccurate and not supported by any evidence. The Arbitrator apparently bases this conclusion on the fact that Qwest and Washington CLECs "agreed to a $25 conversion charge in Docket UT-073035."[45] However, that charge, which is negotiated and not based upon a cost study, is entirely unrelated to the cost Qwest would incur if it were required to begin using the same circuit ID for UNE conversions. It does not provide Qwest with any recovery of those costs. Instead, the negotiated charge of $25 relates solely to the costs Qwest incurs to receive and process the orders CLECs submit to convert from UNEs to alternative services.

49 The Arbitrator's Report therefore does not permit Qwest to recover the costs of moving to the use of one circuit ID. It is of course fundamental that an ILEC must be permitted to recover the costs it incurs to provide interconnection, including the costs of changes to OSSs and related processes.[46] Accordingly, if the Commission adopts the Arbitrator's recommendation --

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43 Arbitrator's Report at ¶ 91.

44 Arizona Arbitration Order at 44.

45 Arbitrator's Report at ¶ 90.

46 *See* Section 252(d)(l). *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

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which it should not -- it should order the parties to include language in the ICA requiring Eschelon to compensate Qwest for the costs of converting to the use of a single circuit ID.

50 The Arbitrator's observation that "Qwest did not provide alternative language to consider"[47] also provides no basis for imposing the requirement. It is entirely logical that Qwest did not propose alternative language, because Qwest's position is that the status quo should not be altered -- that it should continue using different circuit IDs for UNEs and alternative services. Qwest's position is supported by the absence of evidence demonstrating a need for a single circuit ID; its decision not to propose alternative language in this circumstance should not be used against it.[48]

51 Because it has no evidence that Qwest's use of different circuit IDs has caused any disruptions in service, Eschelon bases its demand for a single circuit ID upon hypothetical scenarios that have never occurred. For example, Eschelon hypothesizes that in the process of changing circuit IDs, a Qwest employee could inadvertently commit a typing error and send a "disconnect" order that would disrupt service to an Eschelon customer.[49] Similarly, Eschelon states that if records are not updated to reflect a new circuit ID, "problems are likely to arise in the areas of maintenance and repair."[50] Eschelon then asserts that "[a]ll of this" can be avoided by adopting its demand for a single circuit ID.[51] The logical question in response to this argument is "all of what?" Indeed, Eschelon's purely hypothetical concerns have never

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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.").

47 Arbitrator's Report at ¶ 91.

48 The Arbitrator's reference to the fact that Qwest "did not address this issue in the CMP [Change Management Process] where Qwest and CLECs can jointly develop solutions" also is not a proper basis upon which to impose the requirement of a single circuit ID or any of the other UNE conversion requirements the order imposes. The processes that govern Qwest's provisioning of non-UNE services are not within the purview of the CMP.

49 Starkey Direct at 155.

50 *Id.*

51 *Id.* at 156.

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actually materialized and there is no "all of this" that needs to be avoided. The indisputable fact is that Qwest's existing conversions process has functioned seamlessly, as evidenced by the complete absence of any CLEC complaints.

52 Eschelon also attempts to justify its demand with the assertion that changing circuit IDs upon converting UNEs to alternative services will cause it to incur costs. However, Eschelon never identifies the costs it allegedly would incur, apart from vaguely claiming it will have to modify its systems and records. It is entirely implausible that a change in circuit IDs for the limited number of circuits Eschelon must convert will require modifications to systems or impose significant record-keeping costs. Eschelon's only task would be to record the new circuit ID number in its records. Even if this had to be done manually, the costs it would impose would be minimal and would pale in comparison to the system-wide changes Qwest would be required to implement.

53 In support of its demand, Eschelon suggests inaccurately that conversions from UNEs to private line facilities are essentially no different from the systems conversions required for conversions from the unbundled network element platform ("UNE-P") to Qwest Platform Plus™ (“QPP”). 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. Further, 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

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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.[52]

54 Eschelon also argues that the use of a single circuit ID is supported by the fact that Qwest formerly permitted the use of a single circuit ID when CLECs converted from private line services to UNEs. However, that experience only confirms the need for a new circuit ID upon conversion from a UNE to an alternative service. As Ms. Million explained, Qwest was forced to end the use of single circuit IDs for these conversions in 2005 because the absence of product-specific IDs created significant problems in managing the products.[53]

55 In sum, the ruling that requires the use of a single circuit ID for UNE conversions is not supported by any demonstrated need for a change in Qwest's existing practice of using separate circuit IDs. By contrast, Qwest has demonstrated that using separate circuit IDs is essential to the effective management and administration of the wholesale products it provides to Eschelon and the many other CLECs that purchase services from Qwest in Washington and across the region.

Issues Relating to "Manner of Conversion" (Issues 9-44(a)-(c)).

56 Issues 9-44(a)-(c) involve Eschelon's attempt to micro-manage how Qwest converts UNE circuits to alternative service arrangements and how Qwest determines and assesses charges for the converted circuits. Through its proposed ICA language, Eschelon attempts to establish that the conversion from a high capacity UNE to an alternative service is "in the manner of a price change on the existing records and not a physical conversion" (Section 9.1.15.3). Proceeding from the erroneous assumption that conversions require nothing more than a price

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52 Exh. No. 51, Million Direct, 19:24-20:15.

53 *Id.* at 18:4-24.

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change in Qwest's records, Eschelon demands that the change in price for the alternative service be assessed through the use of an "adder" or "surcharge" that reflects not the rate for the alternative service, but "the difference between the previous UNE rate and the new rate for the analogous or alternative service arrangement" (Section 9.1.15.3.1.1). And, Eschelon requests that Qwest be required to invest thousands of dollars to create a new Universal Service Ordering Codes ("USOC") that would be used to implement the "adder" or "surcharge" rates for the alternative service arrangement. (Sections 9.1.15.3.1.1 and 9.1.15.3.1.2).

57 In response to these demands, Qwest objected that Eschelon should not be permitted through the arbitration process to micro-manage how Qwest provides tariffed service arrangements that are not within the obligations of Section 251 of the Act and therefore are not within the arbitration jurisdiction of states. Qwest further demonstrated that the premise for Eschelon's demands – that UNE conversions involve nothing more than a price change – is inaccurate and that each of the demands was therefore based on flawed assumptions concerning how Qwest performs conversions and assesses charges for the alternative services that are put in place through the conversions. Qwest also emphasized that the changes Eschelon was seeking would impose significant systems and process-related costs for which Qwest must be compensated.

58 The Arbitrator's Report does not include any analysis specific to these issues. Instead, the Report recommends adoption of all of Eschelon's conversion-related proposals based on the broad statement that the proposals will ensure that the conversions will "not cause disruption for [Eschelon's] business operations and potential harm to its end user customers."[54] The Commission should reject this recommendation and should not permit the proposed intrusion on Qwest's management of tariffed services that are not subject to regulation in the Section 252 arbitration process.

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[54] Arbitrator's Report at ¶ 91.

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59 As an initial matter, for the reasons discussed above, the Commission is without jurisdiction to impose terms and conditions relating to the manner in which Qwest issues charges for the alternative, non-251 services that are the subject of these demands by Eschelon. Because Qwest is not providing these services under Section 251, they are outside the Section 251 arbitration authority of the Commission.

60 Moreover, on the merits, Eschelon's assertion that the conversion of a UNE circuit is nothing more than a billing change is inaccurate. In fact, as Ms. Million described in her testimony, these conversions involve significant activity within three different functional areas of Qwest's ordering and provisioning organizations. The personnel within these three functional areas involved with a conversion are: (1) the Service Delivery Coordinator ("SDC"), (2) the Designer and (3) the Service Delivery Implementer. Within each of these three job functions, there are a variety of steps that Qwest must undertake to assure itself that the data for the converted circuit is accurately recorded in the appropriate systems. First, a service delivery coordinator ("SDC") must review and confirm the data in the order for the new service to ensure the data are accurately transferred into two service orders required to change billing from Qwest's CRIS billing system to the IABS billing system. In addition, the SDC must change the circuit ID to reflect the fact that the circuit will now be recognized as a private line rather than a UNE circuit once the order is complete. Second, a "designer" must review and validate the circuit design to determine if any physical changes to the circuit are necessary. The designer also reviews the availability of circuits in the inventory that Qwest maintains through its Trunk Integrated Record Keeping System ("TIRKS") database. Third, a "service delivery implementer" has overall responsibility provisioning the new order for the alternative service. The implementer verifies the accuracy of the necessary "record-in" and "record-out" orders that must be processed to complete the conversions.[55]

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[55] Exh. No. 51, Million Direct, at 11:4 – 12:10.

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61 As this discussion demonstrates, the underlying premise for Eschelon's demands relating to this issue – that conversions essentially involve little more than the flick of a switch to move to a different billing scheme – is inaccurate. Moreover, even if Eschelon's demands had a proper foundation and were warranted, which they are not, Qwest would be entitled to recover all the costs necessary to implement the demands, including the costs of creating the USOCs that Eschelon is requesting. As discussed above, it is well-established that ILECs must be allowed to recover the costs they incur to modify their billing and other OSS systems to accommodate CLECs. Accordingly, if the Commission adopts the Arbitrator's recommended rulings relating to these issues, it should also rule, consistent with the cost recovery provisions in Section 252, that Qwest is entitled to recover the costs of implementing Eschelon's demands.

Issues 9-58(b):and (c): Billing for Commingled Arrangements

62 A commingled arrangement is a UNE that is connected or attached to a tariffed service (*e.g.*, a special access service). In the most common case, a commingled arrangement is comprised of a UNE loop that is attached to a tariffed transport service, such as a private line service. There are important distinctions between commingled arrangements and UNE combinations, which are combinations of unbundled network elements – for example, a UNE loop combined with UNE transport.. 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. Similarly, the same regulatory distinctions apply to the UNE component of a commingled arrangement, while the tariffed component of such an arrangement is not subject to 251 regulation. Issue 9-58 and the related sub-issues arise because of Eschelon's attempt to cloud the critical distinctions between these components of a commingled arrangement. Specifically, Eschelon sought to require Qwest to substantially change its ordering process for commingled arrangements to treat these arrangements as though they are a single, unified element instead of a combination of two distinct circuits with distinctly different ordering, provisioning, and

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billing requirements. Thus, it sought (1) to be permitted to submit one order for a commingled arrangement instead of separate orders for the UNE component and the tariffed component; (2) to require Qwest to use the same circuit ID for both components even though, as described above, Qwest must have separate and distinct circuit IDs for UNEs and tariffed products; and (3) to receive one bill for the commingled arrangement instead of two separate bills for the UNE and tariffed component. These demands would require Qwest to substantially modify its OSSs and ordering, provisioning, and billing processes not just in Washington, but in other states in Qwest's region since Qwest's systems and processes are used in multiple states. The costs of the changes would be substantial.[56]

63 In addition to imposing far-reaching, expensive changes, Eschelon's proposals would improperly eliminate some of the essential distinctions between commingled arrangements and UNE combinations that have been recognized by the FCC and other state commissions. 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.[57]

64 In the Arbitration Report, the Arbitrator properly rejected several of Eschelon's proposals, including those relating to the submission of a single order, the use of a single circuit ID, and the issuance of a single bill for commingled arrangements. However, in ruling on Issue 9-58(b), while the Arbitrator did not require Qwest to provide a single bill for commingled arrangements, she recommended adoption of Eschelon's alternative proposal that requires

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

[57] For example, the FCC and state commissions have recognized that because of the different regulatory status of UNEs and tariffed services, different pricing requirements apply to the UNE component of a commingled arrangement than apply to the tariffed component. *See TRO*, at ¶ ¶ 582, 1796 and 1800; *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 Interconnection Agreements*, Docket No. 2005-AD-139, Order, 2005 WL 4673626, *12 (Miss. P.S.C. Dec. 2, 2005).

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Qwest "to identify and relate the components of the commingled EELs on the bills and customer service records."[58] If adopted, this requirement would force Qwest to make very significant and costly changes to its electronic billing systems.

65 The extraordinary burden imposed by this recommended ruling arises from the fact that Qwest uses one electronic billing system to generate bills for UNEs, the CRIS system, an entirely separate billing system, the IABs system, to generate bills and customer service records ("CSRs") for the tariffed services that are used with commingled arrangements. The CRIS billing system and the IABs billing systems are not interlinked and do not communicate or "talk" to each other. It therefore is not possible for a bill or a CSR generated from one system to flow into the other system. As a result, Qwest cannot generate bills or CSRs from CRIS that include billing information stored in IABs relating to the tariffed component of a commingled arrangement; nor is it possible for Qwest to generate bills or CSRs from IABs that include information stored in CRIS relating to the UNE component of a commingled arrangement.[59]

66 Because CRIS and IABs are separate and distinct and do not communicate with each other, compliance with the Arbitrator's recommendation would require Qwest to dramatically redesign these systems to interlink them and permit communications. The redesigning would Qwest to, at a minimum: (1) modify its systems and processes to include on bills for the UNE portion of a commingled EELs, the circuit ID of the non-UNE component; (2) create an entirely separate account type within its billing systems for commingled EELs; (3) modify its systems and processes to include on bills for the non-UNE circuit of commingled EELs "the summary BAN and sub-account number for the UNE component;" and (4) modify its systems and processes to include on all customer service records for commingled EELs "the circuit ID for the UNE circuit; the RBAN for the non-UNE component; and the circuit ID for the non-

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[58] Arbitrator's Report at ¶ 118.

[59] *See, e.g.,* Exh. No. 57, Stewart Direct at 79:1-17, 97:1-15.

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UNE circuit."[60]

67 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.[61] Further, the changes Eschelon is seeking would affect all CLECs in Washington that obtain commingled arrangements, even though the CLECs have been obtaining commingled 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.[62]

68 In imposing this requirement, the Arbitration Report states that absent information on bills that separately identifies the components, "it will be onerous for Eschelon to track and verify the elements."[63] No evidence is cited in support of this ruling, and, in fact, Eschelon could readily track the related components of commingled arrangements by maintaining a simple spreadsheet that lasts the circuit IDs associated with each arrangement. The minimal burden this would impose pales in comparison to the thousands of hours and the large expenditures

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60 *Id.*

61 *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.").

62 Exh. No. 59,Stewart Responsive, at 57:19-58:3.

63 Arbitration Report at ¶ 118.

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Qwest would have to incur to redesign its billing systems.

69 The Arbitrator's recommendation also violates the long-established principle that an ILEC like Qwest is not required to provide access to an "as yet unbuilt superior network."[64] In that regard, the FCC and state commissions have repeatedly refused to impose on ILECs an obligation to provide a level of service that would violate this basic principle of the Act.[65]

70 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.

71 For these reasons, the Commission should reject the Arbitrator's recommended ruling on this issue and 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.

Issues 9-58(d): "Other Commingled Arrangements"

72 The dispute covered by Issue 9-58(d) arises from Eschelon's attempt to impose future obligations on Qwest for so-called "other commingled arrangements" that do not exist today. As described above, Qwest currently offers commingled arrangements that are comprised of a UNE loop circuit connected to a tariffed private line circuit. Issues 9-58(a)-(c) involved Eschelon's attempt to eliminate the distinctions between the UNE component and the tariffed component of the arrangements through the use of one order, one bill, and one circuit ID. Issue 9-58(d) involves Eschelon's attempt to impose these same requirements for so-called "other commingled arrangements," which are unidentified commingled arrangements that

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64 *Iowa Utilities Board v. Federal Communications Commission*, 120 F.3d 753, 813 (8th Cir. 1997).

65 *See Local Competition Order*, 11 FCC Rcd at 15722 at ¶ 451; *Re McLeodUSA Telecommunications Services, Inc.*, Case No. U-13124, 2002 WL 217702, at *10-13 (Mich. P.S.C., Jan. 22, 2002) (declining to require an ILEC to improve its customer service records for the benefit of a CLEC); *Re AT&T Communications of the Mountain States, Inc.*, Docket Nos. 72000-TF-96-95, 70000-TF-96-319, 1999 WL 561629, *at 13-14 (Wyo. P.S.C. Mar. 22, 1999) (declining to require an ILEC to revise its "direct measures of quality" reports because to do so would require it "to provide a level of service it currently does not provide to itself").

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Qwest does not offer today and may never offer.

73 In the Arbitration Report, the Arbitrator adopted Eschelon's proposal for this issue, which would require Qwest to provide these unidentified "other arrangements" – should they ever exist – based upon the submission of one order, the use of one circuit ID, and one bill.[66] The ruling imposes these requirements to the extent they are "technically feasible" and if the parties are unable to agree on different ordering, provisioning, and billing processes. The explanation the Arbitrator offers for this ruling is that the requirements the ruling imposes are consistent with those adopted in the Arbitrator's ruling relating to Issue 9-58(c): "the processes for ordering, billing, and repair of other commingled arrangements are consistent with the approach adopted in Issue 9-58(c), if technically feasible and the parties do not agree otherwise."[67] Contrary to this statement, however, the requirements the Arbitrator imposed in her recommended ruling for Issue 9-58(c) are fundamentally different from those imposed by her recommended ruling for Issue 9-58(d), creating an irreconcilable inconsistency between the two rulings. The Commission should correct this inconsistency by rejecting the Arbitrator's ruling for Issue 9-58(d).

74 As described above, in resolving the other sub-issues encompassed by Issue 9-58, the Arbitrator properly rejected Eschelon's proposals for use of a single order, the use of a single circuit ID, and the issuance of a single bill for Qwest's *existing* commingled products. However, in resolving Issue 9-58(d), the Arbitrator inexplicably imposed for *non-existing* "other commingled arrangements" the very same requirements that she rejected for existing commingled products to the extent those requirements are technically feasible. This unexplained result is illogical; if there is no basis for imposing these requirements for existing products, surely there can be no basis for imposing them for future products that Eschelon has

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66 Arbitrator's Report at ¶ 122.

67 *Id.* at ¶122.

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not even identified. Indeed, since these unidentified products are limited to commingled arrangements, the concerns about the need for separate orders, circuit IDs, and bills for the UNE and tariffed components of existing commingled arrangements apply with equal force.

75 Qwest suspects that the Arbitrator's ruling on this issue may be an inadvertent error. By referring to an approach "consistent with the approach adopted in Issue 9-58(c)," the Arbitrator likely intended to impose only the requirement that Qwest refer to the UNE and tariffed components on bills and CSRs and did not intend to require a single order, one circuit IDs, and a single bill for other commingled arrangements. That is the only conclusion that would make her rulings on these issues consistent. For the reasons discussed above in connection with Issue 9-58(b), the Commission should reject the requirement for Qwest to refer to both components on bills for other commingled arrangements. And, if the Commission does not reject that requirement, it should at a minimum clarify that there is no requirement to use a single order, one circuit IDs, and a single bill for other commingled arrangements.

76 An additional flaw with the Arbitrator's recommended ruling relating to Issue 9-58(d) is that there is neither a factual nor a legal basis for establishing terms and conditions for products that are unidentified and do not currently exist. The ordering, provisioning, and billing requirements for products are dictated by the nature of the products and the regulatory laws that govern them. Therefore, any attempt to create such requirements for unidentified, non-existent "other commingled arrangements" is necessarily speculative and arbitrary. If Qwest ultimately offers a commingled arrangement that does not exist today, the proper approach would be for Qwest and Eschelon to enter into an ICA amendment when Qwest begins offering the product. Under that approach, the ordering, provisioning, and billing requirements could be tailored to the product instead of being based upon the futuristic void that exists today.

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77 Finally, rejection of the Arbitrator's recommended ruling relating to this issue is supported by her ruling relating to Issue 9-55. That issue involved Eschelon's proposed use of the term "Loop Transport Combination" as an umbrella term that would be used to refer to three distinct products – extended enhanced loops ("EELs"), commingled EELs, and high capacity EELs. Qwest argued that use of that term would improperly eliminate the distinctions between these products, resulting in terms and conditions that would not be specifically tailored to the distinct characteristics of each product. The Arbitrator agreed with Qwest, rejecting use of "Loop-Transport Combinations" on the ground that the term "may cause unnecessary dispute regarding which rates, terms, and conditions apply" to Qwest's different product offerings.[68] The underlying rationale of this ruling is that products have distinct characteristics that dictate the terms and conditions that apply to them. The same rationale applies to Issue 9-58(d). Any future commingled products that Qwest offers will have distinct characteristics, and terms and conditions should be established only when those characteristics are known.

78 For these reasons, the Commission should reject the Arbitrator's recommended ruling relating to Issue 9-58(d).

Issues 12-67 and 12-67(a) – (g): Expedited Orders

79 These disputes relate to situations where Eschelon seeks to have a service provided prior to the time interval Qwest normally offers for a particular service. Disputed issues associated with Expedites included: (1) Placement of the language in the agreement; (2) Whether all terms and conditions for expedites should be set forth in the agreement or be handled in Qwest change management process ("CMP") documents; (3) Whether Eschelon's proposed language expanded the situations in which Eschelon received expedites for free beyond those situations which Qwest offers expedites to its retail customers; and (4) Whether Eschelon should be

[68] Arbitrator's Report at ¶ 101.

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entitled to obtain expedites for a fee in situations where Qwest does not offer expedites to its retail customers.

80 The Arbitrator ruled in favor of Eschelon on all of these issues. Qwest does not take exception to the arbitrator's recommendation that language be inserted in Section 12 of the contract. Qwest, does, however, ask that the commission reject the Arbitrator's proposed language in that section because (1) it allows Eschelon to receive expedites for free in situations that Qwest customers and other CLECs do not get them and (2) it allows Eschelon to pay a fee to obtain expedites when Qwest does not offer fee based expedites to its retail or CLEC customers at this time. In each case, Qwest offers proposed language that does track its current processes.

81 In reaching its decision adopting Eschelon's language the Arbitrator concluded that its order "most closely approximate[s]the manner in which Qwest currently treats these events in Washington."[69] That conclusion ignores significant differences between Eschelon's proposed language and Qwest's current practices.

82 Contrary to the expedites service that Qwest provides to its own retail customers and to all other CLECs alike, Eschelon proposes that the Commission in this arbitration approve language for the parties' ICA that provides it with expanded rights to expedites at no charge.[70] First, it expands the list of products for which free expedites will be available. Eschelon's language does not distinguish between non-design services (such as resold 1FR residential service) and design services (such as unbundled 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 for ***all*** services.

83 Furthermore, Eschelon made a modification to Qwest's current process that could have the

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69 Arbitrator's Report at ¶ 147.

70 *See* Albersheim, TR. 143:22 – 144:23 and 166:7 – 167:11.

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effect of forcing Qwest to provide expedited services for free when Eschelon erroneously cancels an order. Calling it 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)).

84 Finally, Eschelon asks that the commission require Qwest to provide expedites to Eschelon for a fee when Qwest does not do so no for its retail customers or other CLECs.[71]

85 By asking the Commission to adopt its proposed expedites language, Eschelon is asking the Commission to order discriminatory 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.

86 Qwest urges the commission to issue an order treating Eschelon in the same manner as other CLECs. Recognizing and respecting the arbitrator's recommendation that contract language address the issue, Qwest proposes the following language to make Eschelon's contract consistent with other providers:

EXPEDITES

12.2.1.2 Expedites. CLEC may request a Due Date earlier than the

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[71] Exh No. 18C, Albersheim Responsive, 42:1 – 43:9.

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applicable Due Date interval for that product or service. Requests for expedites can be made either prior to, or after, submitting CLEC's service request.

12.2.1.2.1 Notwithstanding any other provision of this Agreement, for all products and services under this Agreement (except for Collocation pursuant to Section 8), Qwest will grant and process CLEC's expedite request, and expedite charges are not applicable, if one or more of the following conditions are met:

a) Fire;

b) Flood;

c) Medical emergency;

d) National emergency;

e) Conditions when the End User Customer is completely out of service (primary line);

~~f) Disconnect in error when one of the other conditions on this list is present or is caused by the disconnect in error;~~ Disconnect in error by Qwest;

g) Requested service necessary for CLEC End User Customer's grand opening event delayed for facilities or equipment reasons with a future Ready For Service (RFS) date;

h) Delayed orders with a future RFS date that meet any of the above described conditions;

i) National Security;

j) Business Classes of Service unable to dial 911 due to previous order activity; or

k) Business Classes of Service where hunting, call forwarding or voice mail features are not working correctly due to previous order activity where the End User Customer's business is being critically affected.

~~12.2.1.2.2 If none of the conditions described in Section 12.2.1.2.1 are met, Qwest will grant and process CLEC's expedite request, but the expedite charges in Exhibit A will apply, unless the need for the expedite is caused by Qwest.~~

12.2.1.2.3 Nothing in this Section 12.2.1.2 alters whether a nonrecurring installation charge in Exhibit A applies to the CLEC order pursuant to the terms of the applicable section of this Agreement. The expedite charge, if applicable, is separate from the installation charge.

9.1.12.1 For expedites, see Section 12.2.1.2.

9.23.4.5.6 For expedited orders, see Section 12.2.1.2.

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7.3.5.2 Expedite requests for LIS Interconnection trunk orders are allowed only on an exception basis with executive approval within the same timeframes as provided for other designed services. When expedites are approved, expedite charges will apply to LIS Interconnection trunk orders based on rates, terms and conditions described in Exhibit A.

9.20.14 ~~Expedite Charge $100 1, 5~~

Issues 12-71 to 12-73: Jeopardy Notices, Jeopardy Classification; and Jeopardy Correction

87 This issue relates to situations where Qwest issues a jeopardy notice to Eschelon, fixes the problem and attempts to deliver the circuit on time. In the arbitration, Qwest and Eschelon disputed whether contract language should address the issue at all. As a part of its case, Qwest also criticized Eschelon's proposed language as being inconsistent with Qwest's current processes. In particular, Eschelon's proposed language requires that Qwest record the order as a missed commitment, and therefore a miss for service quality performance recording purposes, if Qwest fails to deliver a firm order confirmation ("FOC") at least a day before it attempts to deliver service and Eschelon is unable to accept the circuit.

88 Qwest respectfully suggests that the arbitrator was incorrect when she concluded "Eschelon's language reflects terms developed through the CMP." In fact, under the CMP, the timing of an FOC is irrelevant to whether a service Qwest delivered is classified as "customer not ready." Qwest never committed to such a standard.[72]

89 Qwest suggests that the commission alter the arbitrator's recommendation to reflect Qwest's current processes. Such a change requires deletion of four words from the arbitrator's recommendation:

JEOPARDIES

[72] 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.*)

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12.2.7.2.4.4 A jeopardy caused by Qwest will be classified as a Qwest jeopardy, and a jeopardy caused by CLEC will be classified as Customer Not Ready (CNR). Nothing in this Section 12.2.7.2.4.4 modifies the Performance Indicator Definitions (PIDs) set forth in Exhibit B and Attachments 1, 2 and 3 to Exhibit K of this Agreement.

12.2.7.2.4.4.1 There are several types of jeopardies. Two of these types are: (1) CLEC or CLEC End User Customer is not ready or service order is not accepted by the CLEC (when Qwest has tested the service to meet all testing requirements.); and (2) End User Customer access was not provided. For these two types of jeopardies, Qwest will not characterize a jeopardy as CNR or send a CNR jeopardy to CLEC if a Qwest jeopardy exists, Qwest attempts to deliver the service, and Qwest has not sent an FOC notice to CLEC after the Qwest jeopardy occurs but ~~at least the day~~ before Qwest attempts to deliver the service. CLEC will nonetheless use its best efforts to accept the service. If needed, the Parties will attempt to set a new appointment time on the same day and, if unable to do so, Qwest will issue a Qwest Jeopardy notice and a FOC with a new Due Date.

12.2.7.2.4.4.2 If CLEC establishes to Qwest that a jeopardy was not caused by CLEC, Qwest will correct the erroneous CNR classification and treat the jeopardy as a Qwest jeopardy.

Issue 12-87: Controlled Production

90 This issue, which appears at 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.[73]

[73] *See* Exh. No. 1, Albersheim Direct, Exhibit RA-1, CMP Document, Chapter 11, page 87 (emphasis added).

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91 Qwest's primary concern is that Eschelon not have access to OSS functions if it has elected not to participate in controlled production testing. The ALJ shared this concern and justified use of Eschelon's first proposed language on the grounds that it prohibited Eschelon from such access. Eschelon's proposed language appears to go beyond that interpretation and, in the highlighted language below, give Eschelon a "veto" right over controlled production testing requirements. Qwest has proposed modified language in green that more accurately captures the arbitrator's intent:

> 12.6.9.4 Controlled Production – Qwest and CLEC will perform controlled production. The controlled production process is designed to validate the ability of CLEC to transmit EDI data that completely meets X12 (or mutually agreed upon substitute) standards definitions and complies with all Qwest business rules. Controlled production consists of the controlled submission of actual CLEC production requests to the Qwest production environment. Qwest treats these pre-order queries and orders as production pre-order and order transactions. Qwest and CLEC use controlled production results to determine operational readiness. Controlled production requires the use of valid account and order data. All certification orders are considered to be live orders and will be provisioned. Controlled production is not **required for functions CLEC does not use but the CLEC must undertake any required controlled production before using such functionality**. ~~for recertification is not required, unless the Parties agree otherwise~~. Recertification does not include new implementations such as new products and/or activity types.

92 Qwest respectfully requests that the Commission prevent the type of dispute that could arise using Eschelon's language and effectuate the arbitrator's intent by ordering the modified language proposed above.

III. CONCLUSION

93 Qwest respectfully requests that the Commission reject the Arbitrator's recommendation as to each disputed issue discussed in this Petition. Further, if the Commission accepts any recommendations that will require Qwest to incur implementation costs, Qwest requests further that the Commission expressly rule that Qwest is permitted to recover from Eschelon

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the costs of implementation.

DATED this _____ day of April, 2008.

QWEST

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