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

ESCHELON TELECOM OF WASHINGTON, INC. REPLY TO QWEST'S PETITION FOR REVIEW

May 12, 2008

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I. INTRODUCTION

1 Eschelon Telecom of Washington, Inc. ("Eschelon"), 730 2nd Ave. South, Suite 900, Minneapolis, MN 55402, submits this Reply to Qwest Corporation's ("Qwest's") Petition for Administrative Review ("Petition for Review") of the Arbitrator's Report and Decision, dated January 18, 2008 ("Arbitrator's Report"),[1] and requests relief pursuant to 47 U.S.C. §§ 251-252, 47 C.F.R. § 51, WAC 480-07-630, and WAC 480-07-640.

2 Eschelon opposes Qwest's petition seeking Commission rejection of the Arbitrator's findings. A Petition for Review "must address all legal and factual bases in support of the parties' respective arguments that the arbitrator's report and decision should, or should not, be modified."[2] Qwest, however, is asking the Commission to reject the Arbitrator's well-considered findings largely by repeating arguments that it advanced without success in the evidentiary proceedings and post-hearing briefs. The Commission should deny Qwest's request to reject the Arbitrator's findings regarding these issues.

II. DISCUSSION:

A. Design Changes: Issues 4-5 (Unbundled Loop Changes), 4-5(a) (Connecting Facility Assignment or "CFA" Changes) and 4-5(c) (Charges in Exhibit A)

1. Definition

3 A design change allows a CLEC, via a supplemental service request, to change a service previously requested without the delay and cost involved in canceling and re-submitting the request.[3] The Arbitrator found that, "if Eschelon does not have access to these functions, it cannot provide service to its customers without unanticipated delay."[4] With respect to Issue 4-

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1 All references to the Disputed Issues Matrix are to the Updated Disputed Issues Matrix dated August 23, 2007. (See footnote 199 to page 1 of Appendix A to the Arbitrator's Report.)

2 WAC 480-07-640 (2)(a)(ii).

3 Denney Dir. Exh. No. 130, 15:7-8.

4 Arbitrator's Report, p. 14, ¶36.

5 and subparts, the services at issue[5] are unbundled loop and connecting facility assignment ("CFA") changes for certain unbundled loops.[6] The "design change" is a change in circuit design after engineering review.[7] As the Arbitrator notes, Qwest admits that "'[E]ngineering review of modifications to pending orders is . . . an essential activity in Qwest's provisioning process . . . 'and that engineering review is required for both loop design changes and CFAs.'"[8]

2. Qwest's History of Not Charging

4 It is undisputed that, from 1999 until October 1, 2005, Qwest did not charge a separate charge for design changes for unbundled loops and CFA changes,[9] which was consistent with the language of both Qwest's SGAT and the parties' current ICA.[10] On September 1, 2005, however, Qwest sent an unexpected letter to CLECs stating Qwest intended to commence billing CLECs non-recurring charges for design changes for unbundled loops, beginning on October 1.[11] Qwest cited no change of law and did not seek a contract amendment or prior Commission approval before making this change. On October 1, 2005, Qwest unilaterally implemented this rate increase.[12]

5 The fact that Qwest had never before assessed separate charges for design changes for loops and was not pursuing recovery of design change costs via separate design change rates in UNE rate cases, suggests that Qwest already recovers these costs elsewhere and should therefore not

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[5] The rate for design changes for unbundled dedicated interoffice transport ("UDIT") is agreed upon. See Disputed Issues Matrix, p. 16 (Issue 4-5(c)).

[6] Eschelon's proposed language for Section 9.2.3.9 pertains to CFA changes for Coordinated Installation Options for 2-Wire and 4-Wire analog (voice grade) Loops (excluding the Batch Hot Cut process) on the day of cut, during test and turn up. See Disputed Issues Matrix, pp. 15-16 (Issue 4-5(a)). When Eschelon refers to design changes for CFA changes in this Reply, Eschelon refers only to this particular sub-set of CFA changes described in its proposed language.

[7] See agreed-upon definition of design change in ICA Section 4.0.

[8] Arbitrator's Report, p. 14, ¶36 (citing Qwest Stewart Exh. No. 57 at 9 & 12).

[9] Prior to October 1, 2005, Qwest applied the Design Change charge for unbundled dedicated interoffice transport ("UDIT") design changes, but not for loops (including CFA changes). See Joint Exh. No. 178 at Million, AZ TR Vol. 1, 142:11 – 145:1.

[10] Denney Exh. No. 130, 26:6-16. Denney Reb. Exh. No. 137, 17:13-15.

[11] Denney Exh. No. 131 (DD-1) (Qwest Sept. 1, 2005 letter).

[12] Denney Exh. No. 131 (DD-1).

recover them again in separate charges.[13] It is also contrary to Qwest's argument, repeated in its Petition for Review,[14] that the rate which the Commission approved in 2002 for design changes for UDITs also applies to unbundled loops, including CFA changes. If that were the case, logically Qwest would have implemented the charge for loops and CFA changes at the same time as it implemented the charge for UDITs, instead of waiting three years until October of 2005.[15]

3. Eschelon Proposal

6 Particularly given that for years Qwest did not charge a separate charge for design changes for loops and CFA changes, Eschelon reserved the right to argue that there should be no separate rate for design changes for loops and CFAs because these costs are already recovered in recurring rates.[16] Alternatively, if Qwest is allowed to charge a separate rate, Eschelon proposes language that would for the first time extend the definition of design changes to include such charges for loops, including CFA changes. Eschelon's alternative proposals for Issues 4-5 and subparts reflect the notion that costs associated with design changes for loops and CFAs (if not already recovered in Qwest's recurring rates) are not comparable to the costs associated with UDIT design changes, and therefore, the same high rate developed for design changes for UDIT should not also apply to loops and CFAs. Therefore, Eschelon proposed separate rates for design changes for: (1) UDITs, (2) unbundled loops, and (3) CFA changes.[17]

7 Although rates for these functions that are part and parcel of Qwest's obligation to provide nondiscriminatory access to UNEs under Section 251 must be consistent with TELRIC

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13 Denney Reb. Exh. No. 137, 16:4-8.
14 Qwest Petition for Review, pp. 3-4, ¶9.
15 See Joint Exh. No. 178 at Million, AZ TR Vol. 1, 142:11 – 145:1.
16 Denney Surreb. Exh. No. 71, 25: 10-15.
17 Exhibit A, Section 9.20.13; see Disputed Issues Matrix, p. 16.

principles,[18] until such time as a cost study can support cost-based rates for design charges for loops and CFA changes, Eschelon proposes interim rates.[19] The Arbitrator agreed with Eschelon's proposals, stating: "While Eschelon's proposed rates would not be acceptable for establishing a TELRIC rate, they are reasonable interim rates until such time as Qwest files for, and the Commission approves, permanent rates. Accordingly, the Arbitrator recommends approval of Eschelon's rates as interim rates for the CFA and loop design change rate elements."[20]

4. Appropriate Interim Rates Until Cost Docket Determination

8 In its Petition for Review, Qwest protests that the Arbitrator has wrongly recommended approval of Eschelon's interim rates largely because an interim rate is not TELRIC-compliant.[21] Qwest disputes the Arbitrator's findings that "there is no underlying cost data indicating that [Qwest's cost] study included costs for CFAs and loop design changes," claiming that the Arbitrator must have overlooked Qwest's testimony arguing the opposite view.[22] But the contrary evidence was properly before the Arbitrator. In other words, while Qwest may not like the Arbitrator's decision, Qwest has no basis to argue that the findings were made without regard to the record. Moreover, Qwest did not provide cost studies in this arbitration, "despite the explicit requirement that it do so."[23]

9 Based upon the Arbitrator's finding that Qwest had not produced cost data supporting permanent TELRIC rates for design charges for CFA and loops, Qwest could reasonably be

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18 Arbitrator's Report ¶36. 47 U.S.C. § 251(c)(3), cited in Denney Dir., Exh. No. 13, 30:3-6.
19 Denney Dir., Exh. No. 130, 24:3-10.
20 Arbitrator's Report , ¶38.
21 Qwest Petition for Review, p. 4, ¶ 10.
22 Arbitrator's Report, ¶ 37.
23 Arbitrator's Report, p. 50, ¶ 173.

required[24] to offer the services at $0.00 pending Qwest's production of a cost study, instead of Eschelon's interim rate, as Qwest must show that it rates are cost-based.[25]

10 Instead, while acknowledging that Eschelon's proposed interim rates would not be sufficiently supported for a full-fledged cost study, the Arbitrator found them "reasonable interim rates until such time as Qwest files for, and the Commission approves, permanent rates."[26] Contrary to Qwest's assertion, the Arbitrator's decision does not contradict TELRIC principles, but rather provides a practical interim solution to the problem presented by Qwest's failure to provide cost support, until Qwest initiates a cost proceeding to obtain Commission-approved permanent, TELRIC rates for these elements. This is consistent with FCC rules allowing state commissions to establish reasonable interim rates for elements, to be superseded once the state commission has completed review of a TELRIC-compliant cost study[27] and Commission precedent to establish reasonable interim rates, pending full review.[28]

11 Qwest's claims about the Arizona and Oregon ALJ recommendations and the UDIT cost study do not change this result and should be rejected.

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[24] The Arbitrator dismissed Qwest's argument that it should not be required to provide loop design changes at all. ("…the evidence demonstrates that CFAs and design change functions appear to be necessary functions of the provisioning process which Qwest is obligated to provide under Section 251(d)(2)(B) of the Act."). Arbitrator's Report, ¶ 36.

[25] Section 252(d)(1)(A)(i) of the federal Act.

[26] Arbitrator's Report, ¶ 38.

[27] See 47 CFR § 51.513.

[28] Order Modifying Arbitrator's Decision, Docket No. UT-960309 (Eff. July 25, 1997) ("The Commission stated that rates adopted in the pending arbitrations would be interim rates, pending the completion of the generic proceeding. Accordingly, the price proposals made in this arbitration have been reviewed with the goal of determining which offers a more reasonable interim rate, more closely based on what we believe to be accurately determined cost levels based on evidence specifically submitted in this docket, our recent prior actions regarding cost studies, and our expertise as regulators. The findings and conclusions with respect to price proposals and supporting information are made in this context and do not indicate Commission approval or rejection of cost and price proposals for purposes of the generic case"); US WEST Communs., Inc. v. MFS Intelenet, Inc., 193 F.3d 1112, 1118-1119 (9th Cir. Wash. 1999) ("The Commission adopted a two-stage process for fixing interconnection rates: interim rates were to be set by arbitration; permanent rates were to be determined in a generic price proceeding.").

a. Neither the Arizona Nor the Oregon ALJ recommended Qwest's proposal to use the UDIT rate as a permanent[29] rate for loops and CFA changes.

12 Design Change charges are not addressed in the Minnesota Qwest-Eschelon arbitration order,[30] because Minnesota already uses the approach proposed by Eschelon for unapproved rates (see Issue 22-90).[31] That approach is to not allow Qwest to charge unapproved rates for services that Qwest has previously provided at no charge, without prior Commission approval.[32] Regarding Arizona and Oregon, Qwest's Petition for Review contains the following description of the ALJs' recommendations:

> 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.[33] 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*."[34] 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.[35]

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[29] Qwest proposal is to use the same rate for all three services and to denote on Exhibit A that all three are approved rates (which is indicated with a note "E"), rather than indicating that they are interim rates. See Disputed Issues Matrix, p. 16, Issue 4-5(c).

[30] **Multi-State Arbitration Status**: As of the writing of this Reply, only the Minnesota Commission (which had the first hearing) has issued a final, written Qwest-Eschelon arbitration order. The MN ALJ Report is Eschelon Exh. No. 158, and the MN PUC order is Eschelon Exh. No. 171. Eschelon filed the MN Order Clarifying Arbitration Issues (related to the ICA compliance filing) as supplemental authority in this matter on 2/4/08. In Oregon, the Administrative Law Judge ("ALJ") has issued a recommended decision, but the commission has not yet ruled on those recommendations. Eschelon filed the Oregon ALJ Report as supplemental authority in this matter on 3/28/08. In Arizona, the commission voted to affirm the ALJ recommended opinion and order, with modifications, on May 6, 2008 but a written order has not issued. Qwest attached the Arizona ALJ Report to its Petition for Review. In the other two states (Colorado and Utah), the ALJs have not yet issued their recommendations.

[31] Therefore, the design change charge in Minnesota is $0.00. See footnote below.

[32] Oct. 2, 2002 Order in MN PUC Docket CI-01-1375; See Denney Dir. Exh. No. 130, pp. 181-182.

[33] AZ ALJ Report, pp. 14-15 (Feb. 22, 2008) (emphasis added) (copy attached to Qwest Petition for Review as "Attachment 1").

[34] OR ALJ Report, p. 21 (Or. March 26, 2008) (emphasis added). "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.*" Qwest Petition for Review, p. 5, footnote 7.

[35] Qwest Petition for Review, p. 5, ¶11.

13 Qwest suggests that it would be consistent with both ALJ Reports to order the parties to use the Commission approved permanent rate for all three types of design changes. That suggestion is inaccurate. Qwest states that the Arizona ALJ "ruled that the parties should use the TELRIC design charge 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,"[36] without mentioning that the Arizona ALJ specifically found that the design change rates for loops and CFA changes should be interim until reviewed in the next cost docket.[37] That is not the same as adopting Qwest's position, which is that the rate is approved so should be permanent.[38] In addition, the Arizona ALJ specifically found that "Eschelon does raise questions that could indicate that design change charges might be different for different products."[39]

14 In Oregon, the ALJ recommends ***rejecting*** Qwest's proposal to use the UDIT design change rate (which is unapproved in Oregon) for loops and CFA changes. The ALJ said: "Qwest's single design change rate is premised largely on its claim that design change costs are basically the same regardless of the type of design change that is provisioned. The lack of record evidence on this point is critical. If there are substantial disparities in the cost to provision different types of design changes, an averaged rate may be significantly greater or less than the actual cost of providing a particular design service. In that event, the Commission could conclude that the cost/price disparity contravenes the mandate in the Act to establish cost-based rates."[40] In short, it is Qwest's proposal that violates TELRIC principles, contrary to Qwest's claim here.[41]

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36 Qwest Petition for Review, p. 5, ¶11.
37 AZ ALJ Report, p. 15, lines 15-22.
38 See Disputed Issues Matrix, p. 16, Issue 4-5(c).
39 AZ ALJ Report, p. 15, lines 15-16.
40 OR ALJ Report, p. 20.
41 Qwest Petition for Review, p. 4, ¶10.

15 Instead of either party's proposed rates, the ALJ in Oregon recommends alternative interim rates.[42] Significantly, this means that the ALJ rejected Qwest's position that Qwest's proposed rate should always be the interim rate, without review in an arbitration proceeding. It also means that the ALJ in Oregon agreed with Eschelon that three separate rates should be used for design changes, rather than the single rate proposed by Qwest.[43] It further confirms that use of an interim rate does not contradict TELRIC principles, but rather provides a practical interim solution to the problem presented by Qwest's failure to provide cost support.

16 Regarding CFA changes, the ALJ in Oregon was "persuaded by Eschelon's argument that the cost of performing a CFA change should not exceed the installation cost of the underlying loop facility."[44] In Washington, Eschelon likewise testified:

> A comparison of Qwest's design change charges to its installation charges across the Qwest region shows that Qwest accesses a design change charge that exceeds the charge for Coordinated Installation Without Cooperative Testing for Analog loops in Arizona, Colorado, Iowa, Idaho, Montana, Nebraska, North Dakota, Oregon, South Dakota, Utah, and Wyoming. The design change rates in Washington ($53.65 Manual; $50.45 Mechanized) exceed the installation charge for a 2/4 wire analog loop ($45.70 Installation Manual; $37.53 Installation Mechanized) and comes very close to the rate for Coordinated Installation Without Cooperative Testing ($59.81). This defies logic, as design change charges should be less than the installation charge for initially establishing the circuit. The fact that Qwest is charging more for design changes than for installation and the effect this has on Eschelon's cost to acquire customers (particularly with regard to loop and CFA design changes) demonstrates the need for Commission oversight for design changes.[45]

17 The Commission should adopt the Arbitrator's recommendation.

b. <u>Qwest's UDIT cost study</u>

18 Qwest argued that the rate approved by the Commission for *UDIT* design changes was intended to apply, as well, to design changes for *loops* and loop *CFA changes*.[46] Qwest itself

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42 OR ALJ Report, p. 21.
43 OR ALJ Report, p. 21.
44 OR ALJ Report, p. 21.
45 Denney Dir., Exh. No. 130, 30:16 – 31:10 (footnote omitted).
46 See, e.g., Million Reb. Exh. No. 52, pp. 14-15.

did not interpret its own cost studies in that manner, however, as evidenced by its not applying the rate in that way for a number of *years*.[47] In its Petition for Review, Qwest reiterated its argument.[48] Qwest presents no new argument, but again bases its claim upon the inclusion of the design change charge on Exhibit A to the SGAT as a "miscellaneous charge" and on references to "customer premises" and "channel interface" in the cost study "itself" for the UDIT design change rate.[49] These items do not support Qwest's position, which the Arbitrator properly rejected.[50] More telling facts (including the absence of any technician time, as discussed below) also undermine Qwest's claim that the UDIT rate applies to CFA changes.

19 First, regarding the inclusion of the design change charge in Exhibit A to the SGAT under the heading of "miscellaneous charge," it is not the case that the identification of a rate as a "miscellaneous charge" means that that rate can be charged to any UNE as Qwest sees fit.[51] To the contrary, the language of the ICA specifies how rates set out in Exhibit A are to be applied.[52] For example, in agreed upon language in Exhibit A of the proposed agreement, the miscellaneous charge Additional Engineering (9.20.1) applies to collocation, but has nothing to do with loops, while the miscellaneous charge Additional Labor Installation (9.20.2) applies to out of hours work for loops and UDIT rearrangements, but has nothing to do with collocation.[53]

20 Second, Qwest did not explain its use of "end-user premises," which Qwest described as a reference "in the cost study itself."[54] Actually, the reference to end user customer premises

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47 See Joint Exh. No. 178 at Million, AZ TR Vol. 1, 142:11 – 145:1.
48 Qwest Petition for Review, pp. 3-4, ¶9.
49 Qwest Petition for Review, pp. 7-8, ¶15.
50 Arbitrator's Report, p. 15, ¶¶37-38.
51 Denny Reb. Exh. No. 137, pp. 25-27.
52 Denny Reb. Exh. No. 137, 26: 19-20.
53 *Compare* SGAT Section 9.6.4.1.4(c) (dedicated transport) *with* SGAT Section 9.2.4 (loops).
54 Qwest Petition for Review, p. 7, ¶15.

appears – not in the actual cost study, itself – but in the study's executive summary.[55] Qwest's argument immediately raises the question of why Qwest is making an argument based on the executive summary alone at all. If it were the case that the cost study included costs for loop design changes, Qwest should be able to point to something – anything at all - in the cost study itself that shows that. Instead, Qwest relies on a snippet from the executive summary. If the cost study contained any information supportive of Qwest's position, Qwest need only have provided it.

21 Third, although Qwest refused to provide Eschelon a copy of the cost study,[56] Eschelon has provided the Commission with a public excerpt from a Washington Qwest cost study (both mechanized and manual) as Exhibit Number 155 and excerpts from a public version of Qwest's study filed in Oregon.[57] Qwest's design change cost studies show clearly that the rate does not average together costs for all design change products. For example, as shown in the Probability columns of the cost studies, the probability for all of the activities except one is shown as 100%.[58] If this cost study averaged together different activities for different design change products as Qwest claims, all of the probabilities would not be 100%. The fact that there is no averaging together of different activities or assumed probability that certain activities would occur for some design changes but not others, shows that this cost study is developed to apply to one product – UDIT. The Arbitrator correctly concluded that, "the

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55 Million Reb. Exh. No. 52, 15:15.

56 TR 174:14-20 & 175:7-21. Ms. Million of Qwest testified that, while she "might personally believe that is a reasonable request, it's the position of the company not to provide cost studies for approved rates that have already been the subject of litigation." *Id*.

57 Regarding the Oregon cost study, see Denney Dir., Exh. No. 130, pp. 33-35.

58 Note: Column "Prob#4" is shown as 0.7 to reflect 30% reduction to work time estimates ordered by the Commission. This has no bearing on the point that Qwest's cost study assumes that all of the activities shown occur in 100% of the design changes modeled in Qwest's cost study. See Denney Surreb. Exh. No. 152, 40 at footnote 98.

charge is based on a 100 percent probability that a design change is necessary although Qwest acknowledges that loop design changes may not be required in all cases."[59]

22 Fourth, information contained in Exhibit Number 155 (DD-22) shows that the design change charge was based on costs associated with ASRs (which are used for ordering UDIT) and not LSRs (which are used for ordering loops).[60] The design change cost study assumes the use of Qwest's ordering and billing systems for *transport* (EXACT/IABS), rather than the ordering and billing systems for UNE loops (IMA/CRIS).[61] Contrary to Qwest's claim that use of ASRs was merely a "simplifying assumption that had no appreciable affect on the estimated cost,"[62] Qwest has admitted that UDIT is higher cost than loops by recognizing that LSRs – used for loops – have a higher level of electronic flow-through than ASRs – used for UDIT.[63] Higher levels of electronic flow-through result in lower levels of manual work and lower costs.[64]

23 Fifth, the lack of relevance of Qwest's design change cost study to CFA changes is demonstrated by the executive summary of the study, which refers to an activity ("type of channel interface") that is not performed in connection with a CFA change.[65]

24 Finally, one admission by Qwest is particularly telling with respect to whether the cost study is limited to UDITs. Qwest has admitted that its design change cost study ***does not include any technician time***.[66] It is undisputed that CFA changes ***require technician time***.[67] This means

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59 Aribtrator's Report, p. 15, ¶37.
60 Denney Dir., Exh. No 130, pp. 33-35.
61 Denney Dir., Exh. No 130, pp. 33-35.
62 Qwest Petition for Review, p. 8, ¶17.
63 Denney Dir., Exh. No. 130, pp. 39-40 and FN 20.
64 Denney Dir., Exh. No. 130, 36:12-13.
65 Denney Surreb. Exh. No. 152, 42:4-12.
66 Stewart Exh. No. 61, 8:17-18 ("technician time is not included in the costs underlying the Washington rates for design changes"). See Qwest Petition for Review, p. 6, ¶13. Qwest attempts to convert this Qwest admission into a positive by claiming that it contradicts Eschelon's proposed rate. See id. Eschelon's proposed rate obviously accounts for technician time, as technicians are clearly involved in CFA changes. In contrast, though technicians are undeniably involved in CFA changes (see footnote below), Qwest's proposed rate based on the UDIT cost study obviously was not intended for CFA changes, as it does not include any technician time.

that Qwest's claim that the design change cost study considered in the cost docket in setting the rate for UDIT design changes also includes costs associated with loop design changes is not even arguably true with respect to CFA changes. The cost that is recovered by Eschelon's CFA change rate includes cost associated with having a Qwest technician, during a coordinated loop cutover, move the loop from a bad CFA to a working CFA. Yet, according to Qwest, its design change cost study does not include any technician time.[68] If this is true, it cannot also be the case that Qwest's design change cost study was designed to develop the costs for a CFA change.

25 In summary, Qwest's claim that the "primary dispute relating to this issue arises because of Eschelon's refusal to accept the Commission-approved rates for design changes"[69] ignores all of this evidence that the Commission-approved rate applies only to UDIT, whereas the rates at issue are for design changes for unbundled loops and CFA changes. The Arbitrator properly concluded: "In examining Qwest's cost study used to support the contention that UDIT design change charges apply to these services, there is no underlying cost data indicating that the cost study included costs for CFAs and loop design changes."[70] The Commission should adopt Eschelon's proposals for Issue 4-5 and subparts (Design Changes), as recommended by the Arbitrator.

B. Deposits: Issue 5-9 (Repeatedly Delinquent Definition)

26 The parties have agreed that Qwest will be able to obtain a deposit if payment is "Repeatedly Delinquent," but disagree over how "Repeatedly Delinquent" should be defined. Eschelon has

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[67] See, e.g., Stewart Exh. No. 57, pp. 16-17 ("Just one of the actions by the Central Office ***Technician*** is to physically move a jumper from the original CFA to the new one provided by the CLEC during a cutover. . . . The Central Office ***technician*** is also involved in the coordination. . . . Once the tester has coordinated these efforts the tester will have the ***CO tech*** run a jumper from the tie pair to the new CFA per the new design, i.e. the "lift and lay" portion of the effort.") (emphasis added).

[68] Stewart Exh. No. 61, 8:17-18.

[69] Qwest Petition for Review, p. 3, ¶9.

[70] Arbitrator's Report, p. 17, ¶ 37.

proposed that payment be considered "Repeatedly Delinquent" if (1) payment is made more than thirty days after the due date in three consecutive months, or (2) in the alternative, three or more times in a six-month period. The Arbitrator recommends adoption of Eschelon's second proposal to resolve this issue. The Arbitrator said: "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."[71] All four of the arbitrator decisions issued in the Qwest-Eschelon ICA arbitration proceedings to date have recommended adoption of Eschelon-proposed language for the definition of "Repeatedly Delinquent."[72]

27 Qwest alleges potential harm to Qwest and makes an unsupported assertion of a possible "disaster for Qwest,"[73] without recognizing any potential harm to Eschelon, which is a much smaller company.[74] In Minnesota, the arbitrators said:

> If incentive for timely payment is the concern, there are other remedies in the agreement that address this issue (*e.g.*, penalties for late payment). The term at issue is a demand to make a security deposit, which is a serious step that could jeopardize Eschelon's cash flow, depending on the amount of the deposit required. A remedy this dramatic should be reserved for more serious financial issues than late payment three times over the course of one year. Eschelon's proposal, to define the term as payment of overdue amounts for three consecutive months, would adequately protect both parties when there is a legitimate concern about future payment. Eschelon's language should be adopted.[75]

28 Despite the potential harm to Eschelon of this "dramatic"[76] remedy, Qwest threatens that, if Qwest's language is not adopted and the Arbitrator's recommended language applied, Qwest

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71 Arbitrator's Report, ¶55.

72 MN ALJ Report ¶55 (first proposal) (aff'd by MN PUC); AZ ALJ Report, p. 22, lines 21-23 (second proposal); OR ALJ Report, p. 27 (first proposal); WA ALJ Report, ¶55 (second proposal).

73 Qwest Petition for Review, ¶23.

74 Denney Dir., Exh. No. 130 p. 45, footnote 27 ("Eschelon's annual revenue is less than 2% of Qwest's annual revenue. Stated differently, Qwest earns more revenues by the first week of January than Eschelon earns all year. Qwest has around 40,000 employees compared to Eschelon's approximate 1,300 employees.").

75 MN ALJ Report ¶55 (first proposal) (aff'd by MN PUC), quoted in OR ALJ Report, pp. 26-27.

76 MN ALJ Report ¶55 (first proposal) (aff'd by MN PUC), quoted in OR ALJ Report, pp. 26-27.

would "likely" seek disconnection rather than "demanding a deposit."[77] Qwest's stated intent confirms the need for the modifications to the ICA language regarding disconnection requested by Eschelon in its Petition for Review (Issue 5-7) - to ensure that the protections relied upon by the Arbitrator are actually provided in each case of potential disconnection.[78]

29 Qwest also argues that its proposal — to require the payment of a deposit if an Eschelon payment is 30 or more days late three times in a twelve month period — is preferable because it provides Eschelon with "the proper incentive for timely payment."[79] As Qwest acknowledged in the Minnesota arbitration docket, however, the ICA provisions regarding late payment charges are designed to provide the incentive for timely payment;[80] the deposit provisions are instead intended to protect against ultimate non-payment. The ALJ in Oregon found that Eschelon's proposal "identifies the potential risk of nonpayment more accurately than Qwest's, which is more focused on preventing 'slow pay' situations."[81] Consistent with this characterization of Qwest's proposal, Qwest states that it provided testimony that Eschelon allegedly has a history of "late or slow payment" with Qwest.[82] This allegation, however, was hotly contested. Even assuming slow or late payment occurs, the late payment provisions of the ICA are readily available to Qwest to address any untimely payment.

30 Qwest relies heavily on the fact that its language was in the SGAT for this particular issue and therefore should not be changed.[83] In contrast, when convenient, Qwest proposed changes to other SGAT language also developed in 271 workshops, such as for Issues 2-3 and 2-4.[84] In Oregon, the ALJ expressly rejected Qwest's argument, stating: "Although Qwest's language is

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77 Qwest Petition for Review, p. 11, ¶25.
78 Eschelon Petition for Review, pp. 5-7.
79 Easton Dir., Exh. No. 42, 18:7 and 19:1-2.
80 Starkey Surreb , Exh. No. 73 (MS-9) at Easton, MN TR., Vol. 1, 150:1-13.
81 OR ALJ Report, p. 27.
82 Qwest Petition for Review, p. 10, ¶23.
83 Qwest Petition for Review, pp. 9-10, ¶¶20-22.
84 See, e.g., Denney Surreb. Ex. No. 152, pp. 10-12.

currently included in the Oregon SGAT and Commission-approved ICAs, I am persuaded that Eschelon's proposal identifies more precisely the circumstances under which security deposits should be required."[85]

31 Although different from SGAT language, Eschelon's language is the same as is found in other ICAs to which Qwest is a party, including its ICA in Utah with McLeodUSA, and its ICA with an Eschelon subsidiary, ATI, in Washington.[86] Although in its Petition for Review Qwest repeats its claim that these agreements are outdated,[87] Qwest has admitted that some of these Qwest agreements containing Eschelon's language are still in effect.[88]

32 Eschelon pays Qwest approximately $55 million per year in all Eschelon states.[89] A steady Qwest customer such as Eschelon is logically most unlikely to simply stop paying for the essential services it purchases. Qwest has presented no evidence to show that it has ever failed to collect undisputed amounts due from Eschelon, or that its late payment charges at § 5.4.8 of the ICA have failed to keep it whole. As the Arbitrator found, Eschelon's language adequately protects Qwest and should be adopted.[90]

C. Transit Records: Issue 7-18 (Charges) and 7-19 (Bill Validation)

33 When a call originates on the Eschelon network and then travels across the Qwest network to be terminated on the network of a third carrier, Qwest acts as the transit provider and bills Eschelon.[91] Although Qwest refers to "this issue,"[92] there are two transit traffic record issues.[93] *First*, Issue 7-18 relates to charges for samples of existing category 11 records that Eschelon

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85 OR ALJ Report, p. 27.
86 Denney Dir., Exh. No. 130, pp. 67-68.
87 Qwest Petition for Review, p. 11, ¶24.
88 MN TR Vol. I, Easton, p. 121, lines 11-16, provided as part of Starkey Exh. No. 73 (MS-9).
89 Denney Surreb., Exh. No. 152, p. 55.
90 Arbitrator's Report at ¶ 55.
91 Denney Dir., Exh. No. 130, p. 80.
92 Qwest Petition for Review, p. 11, ¶ 26.
93 Disputed Issues Matrix, pp. 33-34 (Section 7.6.3.1, Issue 7-18 & Section 7.6.4, Issue 7-19).

requests – *not* for the purpose of billing other carriers – but for the purpose of verifying Qwest's bills to Eschelon. Eschelon's language in Section 7.6.3.1 limits the request for these existing category 11 sample records to once every six months, provided Qwest's billing is accurate. *Second*, Issue 7-19 relates to data needed to verify Qwest's transit bills to Eschelon. Under Section 7.6.4, Qwest must provide information on a request basis for the purpose of verifying Qwest's bills. So long as Qwest is not billing charges for which it has no basis, Qwest should be able to provide this information to Eschelon. Of the two separate paragraphs, only Section 7.6.3.1 (Issue 7-18) refers to mechanized records. The Arbitrator recommended approval of Eschelon's proposals, noting that, absent such data, Eschelon would be unable to dispute Qwest's transit charge billings under the ICA processes for such disputes.[94]

1. Charges for Limited Sample Category 11 Records Used for Bill Validation, Issue 7-18

34 Qwest protests that Eschelon asks Qwest to provide sample category 11 records without charge.[95] Eschelon's language makes clear that Qwest will provide Eschelon-originated transit records, on a limited basis, only for the purpose of bill verification.[96] Regarding bill verification, Eschelon's switch records information on calls originated by Eschelon's customers, but this is only half of the puzzle. In attempting to verify Qwest's bills for transit traffic, Eschelon needs to be able to reconcile the originating call information collected by Eschelon's switch with the call records Qwest used to generate its transit bill to Eschelon.[97] Without bill verification data, there is no way to verify Qwest's billing.[98] Eschelon should not be required to pay to verify the accuracy of Qwest's bills.

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94 Arbitrator's Report, ¶ 73.
95 Qwest Petition for Review, ¶ 28.
96 See Section 7.6.3.1. Denney Dir., Exh. No. 130, p. 83.
97 Denney Dir., Exh. No. 130, p. 82.
98 Denney Reb., Exh. No. 137, 61:8-13.

35 In Arizona, the ALJ found: "Producing these reports on a limited basis should not be overly burdensome . . . and we agree with Eschelon that it should be provided at no additional charge."[99] The ALJs in Minnesota also agreed with Eschelon and said that, "…it is hard to see why Qwest should not be required to provide sample records free of charge to Eschelon, once every six months, for the purpose of verifying Qwest's bills."[100] As a result, the ALJs concluded, that "Eschelon's language for Section 7.6.3.1 should be adopted."[101] The Minnesota commission affirmed, stating that "all parties recognized that Qwest should provide some data in support of its bills for Transit Traffic without charge."[102] The Commission should adopt the Arbitrator's recommendation here to use Eschelon's language for Section 7.6.3.1 (Issue 7-18).

2. Data Provided on Request Basis to Verify Qwest's Bills, Issue 7-19

36 Although Qwest tends to describe these issues in a confusing manner, as though the proposed language for Issue 7-19 is a sub-section of the paragraph in Issue 7-18, that is not the case.[103] As a plain reading of the proposed language shows, there is no requirement in Section 7.6.4 that the described information be added to any particular record or provided in any particular form. Separate Section 7.6.4 states that Qwest will provide the non-transit provider, upon request, bill validation detail, and it includes a list of information that may be needed to verify bills. For example, if the dispute relates to the number of minutes being billed, Section 7.6.4 requires Qwest (the transit provider) to provide to Eschelon (the non-transit provider) records showing the number of minutes being billed, if requested. If Qwest does not have or cannot access the number of minutes being billed, then logically Qwest could not bill for that number

99 AZ ALJ Report, p. 28, lines 12-14.
100 Denney Exh. No. 158 (DD-25), MN Arbitrators' Report, ¶ 85.
101 AZ ALJ Report, p. 28, line 15.
102 MN Order Clarifying Arbitration Issues, p. 6.
103 If it were, the language would be numbered 7.6.3.1.1.

of minutes. Qwest must be able to determine the number of minutes being billed if its bills are accurate, and when a billing question arises, Qwest should provide the means to verify this information to Eschelon.

37 Section 7.6.4 does ***not***, for example, require that any data be made a part of the category 11 or other mechanized records, nor does it require the data to be provided on an ongoing basis. Qwest seems to have succeeded in creating confusion on this point in Oregon, where the ALJ discusses Qwest allegedly being "forced to modify its software programming to produce the requested data."[104] Nothing in Section 7.6.4 requires this. It is a straightforward provision requiring Qwest, when it bills, to provide key data, when requested, needed to verify bills.[105] If information listed in Section 7.6.3.1 is part of the category 11 records, then Qwest may provide those records to verify the bill. If information listed in Section 7.6.3.1 is not part of the category 11 records, then Qwest may provide the information in whatever manner it keeps the information used to bill Eschelon. To address any apparent confusion,[106] Section 7.6.4 could be modified to further clarify the manner in which the language is intended to operate, as follows:

> 7.6.4 Qwest will provide the non-transit provider, upon request, bill validation detail, <u>which may be non-mechanized if not available in a mechanized form,</u> including but not limited to <u>(as needed to verify the information in bills)</u>: originating and terminating CLLI code, originating and terminating Operating Company Number, originating and terminating state jurisdiction, number of minutes being billed, rate elements being billed, and rates applied to each minute, <u>to the extent such data is available and verifies Qwest's bills to the non-transit provider for Transit Traffic</u>. <u>Qwest may provide the data as part of the sample records described in Section 7.6.3.1, or if the data is not</u>

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104 OR ALJ Report, p. 33, footnote 87.

105 See Disputed Issues Matrix, pp. 33-34.

106 In Arizona, after initially adopting Eschelon's proposed Section 7.6.4, the commission then deleted it largely due to apparent confusion, as it was deleted later in Minnesota. (The Parties eventually disagreed about the meaning of the MN ALJ Report as to Issue 7-19. When the MN PUC clarified its ruling, Eschelon promptly filed the 2/4/08 MN Order Clarifying Arbitration Issues as supplemental authority in this matter on 2/4/08.) Therefore, these proposed modifications are offered to address any confusion and focus on the reasons the Arbitrator here recommended Eschelon's language.

included in those records, in the manner in which Qwest routinely maintains the data for purposes of accurately billing the non-transit provider.

38 If billing detail is needed for bill validation, Qwest has an obligation to provide it when requested for the purpose of verifying Qwest's bills.[107] As bill validation is time consuming for Eschelon, Eschelon has no incentive to request information absent a legitimate need to verify the accuracy of Qwest's bills.

39 Qwest asserts that, at a minimum, the Commission should reject the Arbitrator's recommendation to adopt Eschelon's proposed Section 7.6.4 (Issue 7-19).[108] Qwest argues that this section, which identifies the types of data Qwest should provide when it is needed to verify a bill, "[i]mposes an additional significant burden on Qwest."[109] Qwest does not identify the additional burden in the context of verifying Qwest's own bill by providing data that Qwest uses to produce the bill to Eschelon to verify Qwest's bill is accurate. If Qwest is accurately billing Eschelon, presumably Qwest has a basis for doing so. As the Arizona ALJ said: "If Qwest is able to produce a summary bill, there must be call details that were used to produce that report, and Qwest should provide these call records to Eschelon so that Eschelon can verify its bills from Qwest."[110]

40 Qwest argues that the Commission should not require it to provide *any* transit records to verify Qwest's bills, asserting that "better, alternative means exist for getting the information Eschelon seeks."[111] Qwest provided as Exhibit Number 44 (Easton WRE-3) a copy of the type of information Qwest would provide with its bills and suggested that Eschelon can reconcile

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[107] Qwest is required to exchange this type of data for billing disputes under Section 21.8.4.3 of the ICA. See Denney Dir., Exh. No. 130, p. 81.

[108] Qwest Petition for Review, ¶ 27.

[109] Qwest Petition for Review, ¶ 27.

[110] AZ ALJ Report, p. 28, lines 1-3.

[111] Qwest Petition for Review, ¶ 28.

this data with information recorded in Eschelon's switch.[112] However, it is precisely the inability to reconcile this information that would cause Eschelon to seek bill detail from Qwest. It is not possible to compare Eschelon's originating switch records[113] with Qwest's invoice because Qwest's invoice is a summary bill and does not contain usage by call by ANI.[114] Qwest bills are summaries over a period of time – they do not even contain usage by date.[115] It is also not possible to use billing from terminating carriers[116] to validate Qwest's bills, as Eschelon is bill and keep with many carriers and thus these records are not provided to Eschelon.[117] Further, even if Eschelon were able to make such a comparison for some sample of records, Qwest does not suggest what to do when the two sources of data do not match. It is precisely these reasons why Eschelon seeks data, on a limited basis, to verify Qwest's bills.

41 The Arbitrator considered and rejected Qwest's argument that other information available to Eschelon rendered Qwest's transit bill validation information unnecessary. The Arbitrator said: "The best information to verify Qwest billings is Qwest's call record detail, not extrapolation based on third party data."[118]

42 With Eschelon's proposed language as modified, Qwest cannot reasonably argue that its provision of the information that Eschelon needs to verify billing is unduly burdensome, because the language confirms that Qwest is providing data to the extent it is available. If it is not available, a separate question may arise as to whether Qwest has any basis to bill Eschelon for amounts for which there is no ability to verify accuracy, but Section 7.6.4 does not require

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112 Easton Reb., Exh. No. 43, 19:7-11.
113 Easton Reb., Exh. No. 43, 19:10.
114 Denney Surreb., Exh. No. 152, 73:1. Agreed upon language in Section 4.0 (Definitions) states: "Automatic Number Identification" or "ANI" is the Billing telephone number associated with the access line from which a call originates. ANI and Calling Party Number (CPN) usually are the same number.
115 Denney Surreb., Exh. No. 152, 73:1-2.
116 Easton Reb., Exh. No. 43, 19:11-14.
117 Denney Surreb., Exh. No. 152, 73:3-5.
118 Arbitrator's Report, ¶ 73.

Qwest to provide unavailable data. Qwest cannot argue that the language would require it to develop new systems, because the language confirms the bill validation information may be non-mechanized. Eschelon's need for the bill validation records is recognized by the Arbitrator. The Commission should adopt the Arbitrator's recommendation, or in the alternative the modified language provided above, for Issue 7-19 relating to the data Qwest needs to provide Eschelon to verify the accuracy of bills.

D. Conversion of UNEs to non-UNEs: Issue 9-43 (Circuit ID) and 9-44 and subparts (Manner of Conversion – pricing change v. physical conversion)

43 A conversion occurs when an unbundled network element ("UNE") is converted to a non-UNE alternative arrangement, such as due to a finding of "non-impairment."[119] Eschelon proposes language that will provide needed direction regarding the conduct of such conversions. The FCC has recognized that conversion between wholesale services and UNEs is "…***largely a billing function*** [for which the FCC therefore expects] carriers ***to establish appropriate mechanisms*** to remit the correct payment after the conversion request." [120] The ALJ's report in Docket UT-043013,[121] states that "operational procedures" should be placed in the ICA, finding "…it is reasonable to include in the amendment a provision addressing '***operational procedures*** to ensure customer service quality is not affected by conversions.'"[122] Consistent with these rulings, Eschelon proposes a mechanism to perform the conversions as largely a billing function in its language for Issues 9-43 and 9-44.

1. Circuit ID Should Not Change, Issue 9-43

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119 Starkey Dir., Exh. 62, p. 142.

120 *TRO* at ¶ 588 (emphasis added).

121 Arbitrator's Report and Decision, Docket No. UT-043013, Order No. 17 (July 8, 2005), affirmed in relevant part in Order No. 18 (Sept. 22, 2005) ["UT-043013 ALJ Report"].

122 UT-043013 ALJ Report, p. 165, ¶ 416.

44 Eschelon's proposal for Issue 9-43 states that the circuit ID for the facility that is being converted will not change as a result of the conversion (as a billing function would not require a physical conversion). The evidence shows that, when Qwest first converted special access circuits (which are non-UNEs) to UNEs, ***circuit IDs did not change***.[123] Issue 9-43 deals with the reverse situation – *i.e.*, conversion of UNEs to special access. This demonstrates that there is no legitimate need for the circuit ID to change, and it is certainly feasible for it to remain the same. Qwest attempts to justify its changing the circuit ID of a facility upon conversion of a UNE to an alternative arrangement by arguing that the two are fundamentally different—subject to different regulatory schemes, available to different sets of customers, inventoried differently, etc.[124] Qwest's alleged dissimilarities do not overcome the simple fact that, after the conversion, Eschelon's ***customer is using exactly the same physical facility***.[125] The end user should be wholly unaware of the conversion of the facility that has actually taken place, as it is a pricing conversion – from cost-based UNE rates to special access prices. Qwest's list of before-and-after differences does not overcome the FCC's simple, clear statement that "converting between wholesale services and UNEs (or UNE combinations) is largely a billing function."[126] To prevent the risk of end user disconnection that is inherent in Qwest's choice of processing circuit ID changes through "disconnect" and "new" service orders,[127] Qwest should be required to maintain the circuit ID of the end user facilities.

2. Conversion as a Price Change, Which is a Billing Function, Issue 9-44

45 Eschelon's proposal for Issue 9-44 establishes the manner of effecting the conversion (a re-pricing), while allowing Qwest the flexibility to use an efficient and familiar process for

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123 Starkey Dir., Exh. 62, p. 156:12-13.
124 Qwest Petition for Review, ¶¶ 40-43.
125 Starkey Dir., Exh. 62, at p. 151.
126 *TRO* at ¶ 588.
127 Starkey Dir., Exh. 62 at p. 155.

implementing the re-pricing of the converted facilities. Specifically, Sections 9.1.15.3.1 and 9.1.15.3.1.1 allow use of an adder or surcharge and a Universal Service Ordering Code ("USOC") in the manner Qwest used both for the conversion from unbundled UNE-P to Qwest's commercial non-UNE product, Qwest Platform Plus ("QPP") (now QLSP).[128] Qwest has already demonstrated its ability to implement this approach with its implementation of the QPP agreements. Under those agreements between Qwest and CLECs, QPP circuits are subject to annual rate increases.[129] Qwest does not physically convert the circuits to convert to the new rates.[130] Instead, Qwest re-prices the circuits by using an "adder" or "surcharge" for billing the difference between the previous rate and the new rate.[131] Eschelon's proposed language in Section 9.1.15.3.1 merely makes clear that Qwest may use this same approach for the conversions described in Section 9.1.15.

46 Qwest is unconvincing in its attempt to paint Eschelon's proposals for the manner of conversion in Issues 9-44(a)-(c) as micro-managing. The first proposed subsection creates the efficient process by which Qwest can perform the re-pricing upon conversion by means of an "adder" or "surcharge" reflecting the difference between the previous UNE rate and the new rate for the alternative service arrangement. The second and third allow Qwest to assign the adder or surcharge to a Universal Service Ordering Code ("USOC") for the re-pricing, which will remain the same for calculating volume discounts. Far from micro-management, these provisions are just the type of "opportunity to negotiate specific terms and conditions necessary

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128 Starkey Dir., Exh. 62, p. 163.

129 Starkey Dir., Exh. 62, 163:8-15 & pp. 163-164 ("The rate changes involved with QPP are significantly more complex than rate changes involved in converting UNE rates to analogous/alternative service rates. That is, QPP rates differ depending on whether the End User Customer is a residential or a business customer, and depend upon whether the CLEC has met certain volume quotas. Implementing such a re-pricing methodology should be easier to implement for conversion adders, which would not vary based on these factors.").

130 Starkey Dir., Exh. 62, 163:8-15 & pp. 163-164.

131 Starkey Dir., Exh. 62, 163:8-15 & pp. 163-164.

to translate our rules into the commercial environment" that the FCC contemplated in the *TRO.*[132]

a. Qwest, the Cost-Causer, is Compensated.

47 The substantial savings for both parties in not needing to physically convert circuits, and instead simply adding a surcharge to the bill to reflect the difference in price, are completely ignored by Qwest. Qwest protests too much about the alleged cost of the simple and familiar act of adding a surcharge to a bill. Certainly, Qwest provided no data in the record to support its cost claims.

48 The Arbitrator found that Qwest will be compensated for conversion-related activities by the non-recurring charge for the conversion.[133] Not only are the costs of re-pricing (by adding a surcharge to a bill) relatively minimal, but also Qwest is being over-compensated for the conversion.[134] The only arbitrator to rule on the merits of the non-recurring conversion charge in the wire center proceedings to date is the arbitrator in Colorado, who recommended based on the merits that the charge should be $0.00.[135] Also, in Arizona, the Staff had recommended $0.00.[136] Qwest is the cost causer, particularly as Qwest is not required to convert these circuits.[137] All of Qwest's arguments ignore that Qwest can avoid all costs by not asking for these circuits to be converted. If it desires circuit conversion, Qwest has made a determination that conversion is beneficial to Qwest. Qwest is the only party benefiting from the conversion. The impact of the conversion to Eschelon is to pay higher rates.

b. Eschelon's Proposal Best Ensures a Seamless Process for End User Customers.

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132 *TRO* at ¶ 700.

133 Arbitrator's Report, ¶91.

134 The wire center settlement non-recurring charge amount of $25.00, which is a compromise rate, applies as to the parties.

135 CO Decision No. R08-0164, CO Docket No. 06M-080T (Feb. 19, 2008), ¶114, p. 34.

136 AZ Docket Nos. T-03632A-06-0091 et. al., October 20, 2006, Executive Summary, point 7.

137 While the TRO allows Qwest to stop offering certain UNEs, it does not require Qwest to do so.

49 The FCC has been very clear that "[c]onverting between wholesale services and UNEs or UNE combinations should be a seamless process that does not affect the customer's perception of service quality."[138] In addition to the evidence in this case, logic dictates that adding a surcharge to a bill does not affect the end user's service, whereas physically converting the circuit carrying the end user's traffic presents that very real possibility. The Arbitrator pointed out that Eschelon's proposed language ensures that conversions will not disrupt its customers' business operations and potentially harm its end users.[139] In its Petition for Review, Qwest repeatedly argues that Eschelon has not yet experienced problems from conversions,[140] without once mentioning that the parties have a commission-approved Bridge agreement that, while allowing Qwest to later backbill, does not require conversion until after the effective date of the ICA,[141] which has not yet become effective.

c. Qwest's long-standing refusal to cooperatively develop conversion procedures with CLECs should not be rewarded with further delay.

i. Arbitration is the Proper Forum

50 Qwest also argues that the "proper forum" for these issues is not a forum involving "just one CLEC" but instead a setting "open to all CLECs."[142] Although Qwest suggests in its Petition for Review that the proper forum may be a "generic docket" before this Commission, Qwest argues on the very next page that this Commission has no jurisdiction over these issues,[143] as discussed below. It would be unjust for Eschelon to have expended the resources to exercise its Section 252 right to obtain a ruling from this Commission on these issues, only to have to

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138 *TRO* at ¶ 586.
139 *TRO* at ¶ 586.
140 See, e.g., Qwest Petition for Review, p. 21, ¶ 47.
141 Eschelon Response to Qwest Arbitration Petition, p. 99. The Commission approved the Bridge agreement between Qwest Corporation and Eschelon Telecom, Inc. on behalf of itself and its affiliates, which amends the existing ICA for TRO/TRRO issues, in Docket No. UT-990385.
142 Qwest Petition for Review, p. 16, ¶ 35.
143 Qwest Petition for Review, p. 16, ¶ 35 & p. 17, ¶ 39.

re-litigate the issues again in an entirely new docket, where Qwest may again claim that the Commission has no jurisdiction. The Commission has found that, under Section 252 of the Act, "state commissions are responsible for resolving any open issues between the parties, particularly 'each issue set forth in the petition and response, if any.'"[144] Issue 9-43 and 9-44 are open issues that were set forth in the petition and response and are properly decided in this proceeding.

51 Resolution here is particularly appropriate given that, before this proceeding commenced, Qwest refused to address these issues in other settings that were "open to all CLECs."[145] As the Arbitrator pointed out, while Qwest opposed Eschelon's ICA proposal for conversion procedure in its entirety, Qwest neither offered alternative language for the ICA nor addressed the issue in its Change Management Process ("CMP")[146] -- which *is* open to all CLECs. The evidence in the record rebuts Qwest's claim that it desires to involve multiple CLECs.[147] First, Eschelon asked Qwest to agree to coordination and participation of other CLECs in the ICA negotiations, but Qwest said no.[148] Second, Eschelon asked Qwest to use CMP to allow CLECs to have input into development of Qwest's negotiations template and for Qwest to provide status information to CLECs about the template, but Qwest also flatly rejected the offer.[149] Both of these offers show that Eschelon welcomed multiple CLEC participation and proactively attempted to open discussion of the issues to all CLECs. In contrast, despite

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144 Docket No. UT-043013, Order No. 18 at ¶¶ 53, 108, 113; *see also* ¶ 109 (concluding that the arbitrator properly resolved an issue because "CLECs raised the topic" in the arbitration).

145 Qwest Petition for Review, p. 16, ¶ 35.

146 Arbitrator's Report, ¶ 91.

147 Starkey Reb., Exh. No. 67, pp. 36-37.

148 *See*, *e.g*, Johnson Exh. No. 92 (BJJ-17) (Qwest-Eschelon letter exchange dated Sept. 23, 2003, Oct. 9, 2003, Oct. 17, 2003).

149 Johnson Exh. No. 91 BJJ-16 (Qwest Feb. 4, 2003 email).

Qwest's claims of concern about other CLECs,[150] Qwest would not agree to participation of other CLECs regardless of the context – negotiation, arbitration, or CMP.[151]

52 Instead, Qwest did an end-run around CMP, after Qwest had specifically told CLECs in CMP discussions that Qwest would negotiate ICAs with CLECs and that "no TRO/TRRO changes to its products and processes will be made across the board until such language is final."[152] Qwest then unilaterally developed and issued ***non***-CMP PCATs used to advise CLECs of Qwest's view of how its obligations regarding UNEs has changed due to the TRO/TRRO. These notices are password protected, and since they do not go through CMP, there is no opportunity for CLEC comment about the changes. Eschelon submitted extensive evidence in the record, including from Qwest-prepared CMP documentation, regarding this issue and Qwest's non-CMP TRO/TRRO unilaterally developed procedures.[153] Qwest issued one of these password-protected, non-CMP PCAT notices on 7/21/06[154] to announce a "procedure that is needed when you [CLECs] are converting UNE Services to Finished Services in Non-Impaired Central Offices as required by the TRRO." Or, in other words, Qwest announced that CLECs would need to go through a "procedure" to effectuate the same type of conversions that are the subject of Issues 9-42 and 9-43. Previously, Eschelon had proposed its language for

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150 As the FCC has observed: "Incumbent LECs have little incentive to facilitate the ability of new entrants, including small entities, to compete against them and, thus have little incentive to provision unbundled elements in a manner that would provide efficient competitors with a meaningful opportunity to compete. We are also cognizant of the fact that incumbent LECs have the incentive and the ability to engage in may kinds of discrimination. For example, incumbent LECs could potentially delay providing access to unbundled network elements, or they could provide them to new entrants at a degraded level of quality." *First Report and Order*, ¶ 307.

151 Starkey Reb., Exh. No. 67, pp. 36-37.

152 Starkey Dir., Exh. No. 62, 68:8-12, quoting Qwest June 30, 2005 CMP ad hoc meeting minutes.

153 See, e.g., Starkey Dir., Exh. No. 62, pp. 65-78 (Secret TRRO PCAT example); Starkey Surreb., Exh. No. 152, pp. 35-47; Johnson Exh. Nos. 103 (BJJ-28) & 121 (BJJ-45). For a chronology of events, see Exh. No. 81 (BJJ-7) (containing excerpts from Qwest-prepared CMP documentation).

154 Document No. PROS.07.21.06.F.04074.TRRO_Reclass_Termin_V1 (Qwest Wholesale Notification – not CMP notice), cited in Starkey Dir., Exh. No. 62, p. 143, footnote 160.

these issues in ICA negotiations with Qwest.[155] Qwest refused to negotiate them and therefore, as noted by the Arbitrator, provided no counter proposal. Qwest relied instead on its unilateral position, expressed again in its Petition for Review, that Section 251 does not apply to conversions, so the Commission has no jurisdiction over conversions.[156]

ii. Commission Jurisdiction Over the Transition

53 This Commission, however, had already made the opposite determination:

> Verizon's argument that disconnect or conversion charges are outside the scope of Section 251 and 252, and thus state commission review is rejected. As is discussed above concerning Issue No. 2, ***the Commission specifically provided that the parties address through the Section 252 process the transition away from provisioning elements on an unbundled basis that the FCC has determined are no longer required to be unbundled***. If demonstrated as appropriate, disconnection and conversion charges applicable to the transition may be included in the amendment.[157]

The operational procedure to "transition away" from UNEs *is* the manner of conversion, which is addressed in Issues 9-43 and 9-44, and it is subject to the Commission's jurisdiction and inclusion of in an interconnection agreement.

54 Despite this Commission determination, and despite Qwest's argument here that the transition away from UNEs should involve multiple CLECs, Qwest went ahead and implemented procedures developed by "just one"[158] party – Qwest. Problems with Qwest's unilateral procedure for conversions are described in the record.[159] Qwest implemented its many TRRO PCATs,[160] including for conversions, without scrutiny (through CMP or otherwise) and is claiming after-the-fact that the "existing" processes are already in place and it will be too costly or time-consuming to change them. However, Qwest should not have implemented

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155 Starkey Dir., Exh. No. 62, 146:4-6.
156 Qwest Petition for Review, ¶ ¶ 38-39
157 UT-043013 ALJ Report, ¶ 150, citing TRO, ¶¶ 700, 701;TRRO, ¶ 142 n.399, ¶ 198 n.524, ¶ 228 n.630, ¶ 233, affirmed in relevant part in Order 18 (emphasis added).
158 Qwest Petition for Review, p. 16, ¶35.
159 Starkey Dir., Exh. No. 62, pp. 144-147.
160 See Johnson Exh. Nos. 103 (BJJ-28) & 121 (BJJ-45).

them unilaterally and outside any Section 251/252 context in the first place. If Qwest ultimately incurs costs in changing processes that it should not have put in place unilaterally and over Eschelon's objections, Qwest is the cost causer and should bear those alleged costs.[161]

55 In its Petition for Review, Qwest offers a rehash of the arguments that it advanced before the Arbitrator without success. Qwest's assertion that the Commission lacks jurisdiction to determine the proper procedure for conversions should be rejected. Qwest attempts to remove the conversion issue from the Commission's purview by stating that UNEs, after conversion to alternative arrangements, are outside ICA parameters and therefore conversion is outside the Commission's jurisdiction. [162] The FCC has also made it clear, however, that the particulars of the UNE conversion process are under state commissions' authority. The FCC addressed conversions in the *TRO* in the abovementioned language requiring seamless, non-end user-affecting processes, and equating a conversion to a billing change. The FCC has also addressed conversions in its rules, among other things, forbidding LEC imposition of untariffed terminations charges, disconnect or reconnect fees, or charges associated with establishing a service for the first time when performing conversion.[163] And the FCC has determined that ICA negotiations will be the venue for the real-life commercial use of its rules fleshing out the Act: "…as contemplated in the Act, individual carriers will have the opportunity to negotiate specific terms and conditions necessary to translate our rules into the commercial environment, and to resolve disputes over any new contract language arising from differing interpretations of our rules."[164] Taken together, the FCC's pronouncements have made clear that UNE conversions are well within the scope of Commission jurisdiction over

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161 Starkey Surreb., Exh. No. 71, pp. 44-45.
162 Qwest Petition for Review, ¶ 39.
163 47 CFR § 51.31(c).
164 *TRO* at ¶ 700.

ICA arbitrations. The Commission should adopt the Arbitrator's recommendations for Issues 9-44 and 9-44 and subparts, in this proceeding.

E. Commingling: Issue 9-58(c) (Billing for Commingled EELs) and Issue 9-58(d) (Ordering, Billing, and Circuit ID for Other Commingled Arrangements)[165]

56 Commingling is the connecting of a UNE or UNE Combination with other wholesale facilities and services obtained from Qwest.[166] A Commingled EEL is an example of a commingled arrangement. A Commingled EEL may be a combination of a UNE loop with *special access* transport (whereas a UNE EEL would be a combination of UNE loop with *UNE* transport). In the TRO, the FCC eliminated its previous restrictions on commingling, permitting requesting carriers to commingle UNEs and combinations of UNEs with other wholesale facilities and services obtained from Qwest pursuant to any method other than unbundling and requiring incumbents "to perform the necessary functions to effectuate such commingling upon request."[167] In lifting the restriction, the FCC found that the restriction placed CLECs at a competitive disadvantage and constituted "an unjust and unreasonable practice."[168] Commingling has become a particularly important competitive option for CLECs in light of the FCC's limitations on the ILECs' unbundling obligations in the TRRO. As the FCC has upheld a CLEC's right to purchase UNE combinations and commingled arrangements,[169] Eschelon should not be forced to migrate to yet a higher priced product (Qwest's special access/private line) because Qwest makes the use of commingling so difficult that the only alternative is to exit from the market or purchase the arrangement at a yet higher price, solely from Qwest's

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165 Qwest refers to 9-58(b) and (c) on p. 27 and 9-58(d) on p. 31. Given that Qwest refers to billing and other commingling arrangements, and the Arbitrator recommends adoption of Eschelon's proposals in Issues 9-58(c) and 9-58(d), it appears the latter two are the issues for which Qwest seeks review.

166 See agreed upon language in ICA Section 24.1.1.1.

167 TRO ¶ 579.

168 TRO ¶ 581 (FNs omitted).

169 Denney Dir., Exh. No. 130, 143:13-14.

special access tariff.[170] Whether commingling will be a workable alternative, which Eschelon can actually order and use in the manner envisioned by the FCC, will depend on whether Qwest must provide the UNE component of that arrangement in a manner that avoids operational barriers. Operational barriers are another restriction on commingling that may constitute an unjust and unreasonable practice.

57 The commingling dispute therefore is whether Qwest may, consistent with the FCC's commingling order, erect operational barriers -- requiring separate orders, separate circuit IDs, and separate bills -- that make commingled arrangements difficult or infeasible to use.[171] If, when UNE-P was first developed, Qwest had been allowed to require separate orders and bills (forcing CLECs to separately order and then attempt to relate the loop, switching, and transport elements because Qwest would not do so), query whether UNE-P would have ever served as the mechanism for getting into the market that it did, or whether Qwest would have been able to obtain 271 approval based in part on UNE-P.[172] In the alternative, if Qwest may erect such barriers, the issue is whether Qwest must mitigate the effect of its barriers by relating for CLECs the components that Qwest has chosen to provide in that burdensome manner. The viability of commingling in Washington, therefore, is at the heart of Issues 9-58 and subparts.

1. The Arbitrator's Recommended Balance of the Parties' Interests.

58 The Arbitrator struck a balance to achieve a workable commingling solution by rejecting Eschelon's preferred proposal (requiring a single order, single circuit ID, and single bill for commingled arrangements, as with a UNE EEL today[173]) and recommending adoption of

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170 Denney Dir., Exh. No. 130, pp. 145-146.

171 See, generally, Denney Dir., Exh. No. 130, pp. 133-149.

172 See, e.g., FCC 9-state 271 Order, ¶5 (indicating that Qwest estimated CLECs had 52,346 UNE-P lines in Washington) & ¶¶8 & 31-32.

173 Issues 9-58, 9-58(a), 9-58(b).

Qwest's language[174] along with Eschelon's alternate language (requiring separate components to be identified and related), which Eschelon offered should Qwest's position on 9-58 be adopted.[175] With respect to billing, Eschelon's alternative proposal is that Qwest relate the separate components of Commingled arrangements on bills, so that Eschelon will be able to at least determine which separately identified circuits are combined to make up a completed service (so, for example, bills do not continue for one portion of a service but not the other when both should stop). The alternative proposal represents a significant compromise by Eschelon. Using two or more circuit IDs for one end-to-end commingled arrangement, which then need to be related somehow for every operational and billing purpose, is a far cry from the single order, single circuit ID, single bill approach that is available to serve end users today with UNE EELs, but Qwest will not permit for commingled EELs, though only the price is different.[176] Under the Arbitrator's recommended language taken together, Qwest may require separate ordering, circuit IDs, and billing for the UNE and the non-UNE that comprise a commingled arrangement, but Qwest must then identify and relate the separate components on the bill. The Commission should reject Qwest's proposal to disturb that balance by deleting the ICA language regarding relating the components for billing[177] and allowing Qwest to use

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174 Issue 9-58, Arbitrator's Report, ¶ 110. See also Issue 9-55, *id*. ¶ 101.

175 Issues 9-58(c)-(d) & 9-59. Arbitrator's Report, ¶¶ 118, 122, 114.

176 Denney Exh. No. 130, 145:13-18.

177 Qwest's proposal for Issue 9-58(c) is to delete all of Eschelon's proposed language and replace it with a cross-reference to the commingling general terms in Section 24 (even though Section 24.3.1 on Commingled EELs contains a cross reference back to Section 9.23.4). See Disputed Issues Matrix, pp. 72-74. Qwest's proposal for Issue 9-59(d) is to delete all of Eschelon's proposed language. Id. at 74-75. Qwest confuses the issue when it states, on page 31, ¶71 of its Petition for Review, that the Commission should reject Eschelon's language and "adopt Qwest's proposed Section 9.23.4.5." The Arbitrator recommended Qwest's language for Section 9.23.4.5 in Issue 9-55 and for Section 9.23.4.5.1 in Issue 9-58. See Arbitrator's Report, ¶¶101 & 110. Eschelon's alternative language in Sections 9-58(c) & (d) was proposed in the event that Qwest's language was adopted for those issues, and the Arbitrator properly recommended adoption of Eschelon's language to balance the parties' interests.

procedures it developed unilaterally and outside the context of Section 252 over Eschelon's objection.[178]

59 Qwest's argument, similar to its argument with respect to conversions, is that Qwest's desire to preserve its alleged "existing process" outweighs the needs of Eschelon and its customers. In evaluating Qwest's claims regarding its "existing process," it is important to keep in mind that Eschelon's first proposal with respect to point-to-point Commingled EELs is the same as Qwest's current process for provisioning, maintaining and repairing point-to-point UNE EELs.[179] If either party's proposal reflects the existing process, it is Eschelon's first proposal. Qwest did not seek to change that process, or develop a new one, through CMP. If the Arbitrator's recommendation on Issue 9-58 is adopted, Qwest will have succeeded in unilaterally implementing a different process outside of CMP. Now, by recommending Eschelon's alternate proposal, the Arbitrator is mitigating problems with those unilaterally developed terms by ensuring that at least the separate components will be related on the bill. Although Qwest now contends that the problems with its go-it-alone terms should be addressed through CMP, Qwest previously refused to develop what it characterizes as its "existing process" in CMP, over CLEC objection.[180] This disputed issue is part of this arbitration as a result of Qwest previously having denied all other avenues for resolution. Now, faced with Commission involvement, Qwest urges further delay by asking the Commission to defer it belatedly to CMP, where Qwest decides whether to implement any change.[181] After weighing

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[178] See Issues 9-43 & 9-44. See also Johnson Exh. No. 103 (BJJ-28) (identifying 93 versions of Qwest's PCAT updated using non-CMP Qwest-only TRO/TRRO PCAT notices, including the Commingling and UNE Combinations PCAT – see #11 on the list).

[179] Denney Dir., Exh. No. 130, pp. 142-145, 147; see also Denney Surreb., Exh. No. 152, 100: 5-6.

[180] Starkey, Exh. No. 73 (MS-9) at Stewart, MN TR., Vol. 2, p. 181-82. See also Johnson, Exh. No. 81 (BJJ-7) (chronology containing excerpts from Qwest-prepared CMP documentation).

[181] Regarding CMP, see Starkey, Exh. No. 62, pp. 12-80 & Starkey, Exh. No. 71, pp. 3-87.

both parties' evidence on CMP, the arbitrators in Minnesota and Oregon had this to say about CMP:

> Eschelon has provided convincing evidence that the CMP process does not always provide CLECs with adequate protection from Qwest making important unilateral changes in the terms and conditions of interconnection.[182]
>
> I also agree with [the Minnesota arbitrators'] conclusion that 'any negotiated issue that relates to a term and condition of interconnection may properly be included in an ICA, subject to a balancing of the parties' interests and a determination of what is reasonable, nondiscriminatory and in the public interest.' For these reasons, the disputed process-related issues should not necessarily be confined to the CMP as proposed by Qwest. Instead, each issue must be evaluated on its merits to determine if it is more appropriately included in the parties' ICA.[183]

60 Issue 9-58(c), per the Arbitrator's recommendations, deals specifically with Commingled EELs. In addition, the definition in the ICA of commingling as a combination of a UNE with any other wholesale facilities and services obtained from Qwest means that other types of commingled arrangements, in addition to EELs, may be ordered per the ICA. The need to avoid operational barriers also applies to other commingled arrangements, which are addressed in Issue 9-59.

2. Billing for Commingled EELs, Issue 9-58(c)

61 When billing Eschelon for a UNE EEL, Qwest bills the UNE EEL as a single facility on one billing account number (BAN).[184] Bill review and reconciliation will be challenging at best, and unmanageable at worst, if Qwest implements its proposal to bill the two components of the Commingled EEL separately (Issue 9-58). In the absence of a single circuit ID, or relating the segments of the commingled EEL or other arrangement on the bills (as proposed by Eschelon in its alternative proposals), Eschelon will not know whether a particular UNE is a part of a

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182 MN ALJ Report, ¶22; affirmed MN PUC.
183 OR ALJ Report, p. 7 (footnote omitted).
184 See, generally, Denney Dir., Exh. No. 130, pp.152-153.

commingled arrangement. Thus, Eschelon will have to review every line item on its UNE bill to attempt to determine whether that UNE is part of a Commingled arrangement. Given the volume of Eschelon's UNE inventory, this kind of undertaking is simply not feasible. Similarly, while Eschelon can track loss and completion reports to ensure accurate billing for disconnected UNEs, no loss and completion reports are provided for tariffed services such as special access.[185] Without some indication that the UNE and non-UNE segments of a Commingled EEL are related, a loop may be disconnected and Eschelon could conceivably continue to pay for the non-UNE segment for no reason at all. Thus, relating the UNE and non-UNE segments on the bill will help allow Eschelon to avoid these serious problems, and it makes sense since they are combined together to make up the Commingled EEL.

62 The Arbitrator agreed and found that, "absent some information on the bill separately identifying the components, it will be onerous for Eschelon to track and verify the elements."[186] The Arbitrator concluded that requiring Qwest to identify and relate the EEL components on bills properly balances both parties' interests: those of Qwest in ensuring that UNE and special access EEL elements are billed at the appropriate rate; and those of Eschelon in ensuring that it is paying no more than the appropriate billing rate.[187]

63 Although Qwest goes on at length regarding the "extraordinary burden" that would be associated with adoption of the Arbitrator's recommendation, the only record evidence it offers in support of this concept is a reference to its professed inability to generate bills from its UNE billing system that includes billing information stored in the tariffed services billing services, or vice versa.[188] But Qwest does not explain how it could *not* obtain the necessary billing

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185 Denney Dir., Exh. No. 130, p. 152:19-22.
186 Arbitrator's Report, ¶ 118.
187 Arbitrator's Report, ¶ 118.
188 Qwest Petition for Review, ¶ 65.

information for each of the components of the Commingled EEL, since it is certainly able to do so when they are separate services. Qwest furthermore undeniably already has the systems in place for the loop and transport combination of UNE EELs to do much more than is required under Eschelon's language — that is, allow a CLEC to place one order, obtain one circuit ID and receive one bill.[189] At the same time, Qwest is quick to suggest that Eschelon, which without question does *not* have the ability to access the information from Qwest's systems, "could readily track the related components of commingled arrangements by maintaining a simple spreadsheet that lists the circuit IDs associated with each arrangement."[190] Qwest has failed to provide support for its assertion that it cannot readily and reasonably provide the information to identify and relate the components of Commingled EELs on bills.

64 In light of the regulatory regime under which CLECs will not infrequently be required to order Commingled EELs when UNE EELs are no longer available, such arrangements must remain meaningful alternatives for CLECs. They will not fulfill this role if Qwest is allowed to diminish their usefulness by providing bills for the commingled components that are unrelated and extremely difficult to review and verify.[191] Eschelon's language helps ensure that this will not happen, while allowing, as the Arbitrator found, a balance of the parties' interests.

3. Other Commingled Arrangements, Issue 9-58(d)

65 Issue 9-58(d) refers to commingled arrangements other than Commingled EELs. Qwest asserts that these arrangements "do not exist today."[192] Qwest's statement flies in the face of the FCC's ruling on commingling[193] and agreed upon language in the ICA regarding Eschelon's

189 Denney Dir., Exh. No. 130, p. 142.
190 Qwest Petition for Review at ¶ 68.
191 Denney Dir., Exh. 130, p. 97.
192 Qwest Petition for Review, ¶ 72.
193 TRO ¶ 579.

right *today* to any of these commingled arrangements.[194] It also reveals Qwest's mindset – if Qwest has chosen not to formalize procedures for a product to which CLECs are clearly legally entitled, per Qwest, it does not exist at all. This reinforces the need for the recommended language for Issue 9-58(d). The language at Issue 9-58(d) establishes necessary guidelines for the ordering, maintenance and billing operational mechanism for non-EEL Commingled arrangements. The guidelines will help avoid the very situation confronted in the case of Commingled EELs – where Qwest unilaterally develops terms without heed to such guidelines and then claims it would be too expensive to make changes. The proposed language combines both alternative approaches Eschelon developed for Issues 9-58 and 9-59. The language first provides that a CLEC may order the arrangement on a single order with a single circuit ID, and that the CLEC will be billed on the same BAN. This approach provides the most protection for end user customers. In the alternative, however, if such a process is technically unfeasible or the parties agree otherwise, Qwest is required to identify and relate the elements of the arrangement on the bill and Customer Service Records.[195] The alternative anticipates that the initial approach may not work in the case of every other type of commingled arrangement, and provides an alternate mechanism in those cases.

66 The Arbitrator recommended adoption of Eschelon's proposed language for this issue. In doing so, the Arbitrator said that the recommended language is "consistent with the approach adopted in Issue 9-58(c)."[196] While Qwest argues that this ruling is an "inadvertent error,"[197] the Arbitrator's ruling is very consistent, not only with 9-58(c) but also with all of 9-58 and subparts and Issue 9-59, which together address the operational issues associated with

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194 See Section 24 (Commingling) of the ICA. See also Section 17.0 (Bona Fide Request).
195 Disputed Issues Matrix, pp. 74-75.
196 Arbitrator's Report, ¶122.
197 Qwest Petition for Review, ¶75.

commingled arrangements. Qwest's primary argument against these provisions, with respect to Commingled EELs, is that Qwest has already established an existing process that does not use a single order, single circuit ID, and single bill, so it would allegedly be costly and burdensome to change the process now. Given that Qwest has not yet developed any process for other Commingled arrangements, those arguments disappear. Instead, the end user customer's needs should be paramount in developing other Commingled arrangements, and the first approach best protects them. Consistent with the Arbitrator's ruling on Issue 9-58(c), if for any reason it is technically infeasible to use that approach (as the Arbitrator found on Commingled EELs), then the alternative approach of identifying and relating the elements will be used.

67 Qwest's proposal to completely delete the language for Issue 9-58(d) and remain silent in the ICA on this important issue[198] is, in contrast, completely inconsistent with the Arbitrator's recommendation. Consistent with this Commission's ruling on the scope of arbitration,[199] the Arbitrator found that operational procedures regarding this issue should be placed in the ICA[200] and specifically recommends "adoption of Eschelon's proposal."[201]

68 Without adoption of this recommendation, it is clear from Qwest's Petition for Review, that the parties will be back before the Commission each time Eschelon attempts to exercise its existing right to order any commingling arrangement other than Commingled EELs. According to Qwest, the parties should be required to negotiate and arbitrate an ICA amendment each time Qwest "begins offering the product" -- and then ***only "if*** Qwest ultimately offers a commingled

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198 Qwest Petition for Review, ¶78; Disputed Issues Matrix, pp. 74-75.

199 The Commission has found that, under Section 252 of the Act, "state commissions are responsible for resolving any open issues between the parties, particularly 'each issue set forth in the petition and response, if any.'" Docket No. UT-043013, Order No. 18 at ¶¶ 53, 108, 109 113.

200 See UT-043013 ALJ Report, p. 165, ¶ 416.

201 Arbitrator's Report, ¶122.

arrangement."[202] Qwest is *already* offering other commingled arrangements in Section 24 of the ICA (which establishes the applicable pricing[203]), as it is required to do per the TRO. Qwest makes clear in its Petition for Review, however, that it is only a right on paper that Eschelon will have no ability to exercise without further disputes, if this Commission does not explicitly address the issue in ICA language. For example, even though Eschelon had a clear right to UNE Combinations under its existing agreement (including the price for each component of the combination), Qwest took the position that an unnecessary amendment was required before it would allow Eschelon to order UNE-P (a recognized UNE Combination).[204] Eschelon had to prevail in litigation with Qwest, with the associated expense and delays, before Qwest allowed Eschelon to order UNE-P per the ICA.[205] The recommended language will help avoid such disputes.

69 Qwest's argument ignores that the ICA is specifically structured to avoid the result advocated by Qwest here -- amending the ICA in the case of each request for an arrangement that Qwest has not yet developed as a "product." When the general right to a product or service is set forth in the Agreement but Qwest has received no other requests for it, Section 17 of the ICA provides a mechanism that CLEC may use to make a Bona Fide Request ("BFR") to address issues, if any, related to actually ordering the service to which Eschelon is legally entitled. The guidelines established in Issue 9-58(d) are needed to establish parameters for the development of operational procedures to avoid disputes during this process. Eschelon has already expended the resources to exercise its Section 252 right to establish those parameters in the ICA, and should not be required to re-litigate them with each request.

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202 Qwest Petition for Review, ¶ 76 (emphasis added).
203 See agreed upon language in 24.1.2.1; see also in Sections 9.23.4 (Issue 9-55).
204 Denney Hrg. Ex. 152, 33:5-8 & pp. 183-184, footnote 482.
205 Denney Hrg. Ex. 152, 33:5-8 & pp. 183-184, footnote 482.

70 Qwest does not explain how it could be more efficient or fruitful for CLECs, regulatory staffs, or end users to require an amendment process to address these issues each time a request for another commingled arrangement is pending, rather than to address the parameters for commingled arrangements now, after the parties have thoroughly litigated the issue in an orderly manner, without the urgency of a pending request necessitating expedited consideration.

71 The Commission should adopt the Arbitrator's recommendation to use Eschelon's proposed language for Issue 9-59(d).

F. Expedited Orders: Issues 12-67 and subparts

72 An expedited order, or an "expedite," is an order for which Qwest provides service more quickly than it otherwise would under the normal provisioning interval.[206] It is undisputed that Qwest provides expedites to itself and its retail customers.[207] As the Minnesota ALJs recognized, expedites are "necessary for Eschelon to respond to the unusual needs of customers and to compete effectively."[208] Expedites that are provided for an explicit separate charge are referred to as "fee-added expedites" or, in Qwest's Product Catalog ("PCAT"), as "Pre-Approved Expedites."

73 All four of the arbitrator decisions issued in the Qwest-Eschelon ICA arbitration proceedings to date have recommended adoption of Eschelon-proposed language for Issue 12-67.[209] Although

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206 Denney Dir., Exh. 152, Exh. No. 152, 107-108.

207 *See*, *e.g.*, Albersheim Rebuttal, p. 42, lines 14-16 ("In all of the states in it is 14-state region, Qwest offers expedites to CLECs on the same terms and conditions as it offers them to its retail customers."); Qwest Petition for Review, p. 35, ¶82 (referring to "the expedites service that Qwest provides to its own retail customers"); AZ Qwest-Eschelon ICA Arbitration, Hearing Transcript, Docket No. T-03406A-06-0572, Vol. 1, p. 58, lines 19-21 ("Q. Now, you would agree with me that Qwest provides itself with expedites; correct? A. Yes.").

208 Exh. No. 158, DD-25, MN Arbitrators' Report, ¶ 215.

209 WA Arbitrator Report, ¶¶146-147 (first proposal, $100); OR ALJ Report, pp. 64-67 (fourth proposal, $100); MN ALJ Report ¶221 (aff'd by MN PUC in Order Clarifying Issues, p. 13) (Eschelon proposal, except

the language in the Arizona ALJ Report (Attachment 1 to Qwest's Petition for Review) was unclear on this issue, the Hearing Division issued amendments to its language (on page 83 of the report) to clarify that the Arizona ALJ recommended Eschelon's expedite language. The Arizona commission voted to approve the amended recommended order adopting Eschelon's language on May 6, 2008 (but a written order has not yet issued).

74 In Washington, the Arbitrator recommended Eschelon's language and proposed interim rate.[210] The language addresses fee-added expedites in Section 12.2.1.2.2 and provides the interim expedite charge in Section 9.20.14 of Exhibit A. In its Petition for Review, Qwest proposes to delete this language and the rate.[211] Expedites that are provided at no additional charge over and above the installation charge[212] are referred to as "emergency-based expedites" or, in Qwest's PCAT, as "Expedites Requiring Approval" (because Qwest requires pre-approval to confirm that the emergency based conditions are met). The Arbitrator's recommended language lists the emergency conditions in Section 12.2.1.2.1 and subparts. Qwest proposes to modify the emergency conditions by deleting a condition relating to service disconnected in error which, if not restored on an expedited basis, may leave the end user customer without working service for a longer period of time.[213] Qwest's proposed modifications should be rejected.

1. Fee-added Expedites (a/k/a "Pre-Approved Expedites")

12.2.1.2.1, which is intentionally left blank, $100); AZ ALJ Report, as modified by Commission vote, p. 83 (second proposal, with ACC approved ICB rate - interim and subject to true-up).

210 WA Arbitrator Report, ¶¶146-147 (first proposal, $100).

211 Qwest Petition for Review, ¶86, p. 37 (showing proposed deletion of Section 12.2.1.2.2) & p. 38.

212 Although Qwest refers to emergency-based expedites as expedited service that it provides "for free" (see, e.g., Qwest Petition for Review, p. 35, ¶82), the costs of expediting an order may be recovered in another rate (such as the installation charge). Therefore, the fact that an expedite is provided at no additional charge does not mean that the expedite is free.

213 Qwest Petition for Review, ¶86, p. 37 (showing proposed deletion of subpart (f) of Section 12.2.1.2.1).

75 Regarding the general rule that expedites are provided for an explicit separate charge, the Arbitrator recommends Eschelon's proposed language and interim rate.[214] Similarly, the Minnesota PUC adopted Eschelon's language,[215] ordered that expedites be charged at cost-based rates, and adopted Eschelon's $100 per order interim rate.[216] The ALJ in the Qwest-Eschelon ICA arbitration in Oregon also recommended this result.[217] In its Petition for Review, Qwest claims that it does not offer expedites for a fee to its retail customers at this time in Washington.[218] Similarly, Qwest's witness testified in this matter: "In Washington, Qwest ***does not offer expedites for retail designed services***, as Qwest ***does not have an approved tariff*** for this offering. Qwest will be filing a tariff soon to offer expedites for designed services to its retail customers. This tariff will offer expedites at the same $200 per day rate that Qwest charges in all other states for designed service expedites."[219] Again, at the hearing, Ms. Albersheim testified: "we ***don't have a retail tariff*** that ***allows us to offer*** the design service expedites to our retail customers."[220]

76 Qwest's Washington retail tariff pages allowing Qwest to offer expedites to its retail customers for designed services, however, are ***in the record***. Eschelon provided those pages in Exhibit JW-3 (Exh. No. 175). This exhibit contains pages with expedite terms from Qwest's Washington retail tariffs for private line and access service, which per Qwest are designed services.[221] About this very exhibit, Ms. Albersheim of Qwest provided the following

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214 Arbitrator's Report, pp. 42-42, ¶¶146-147.

215 MN PUC Order Clarifying Arbitration Issues (Feb. 4, 2008), pp. 12-13.

216 Denney Surreb., Exh. No. 171 (DD-38) (MN PUC Order Resolving Arbitration Issues), pp. 18-19.

217 OR ALJ Report, pp. 65-67. .

218 Qwest Petition for Review, p. 36, ¶84; *see also id*. p. 35, ¶80 (point #2).

219 Albersheim Dir., Qwest Exh. No. 1, 57: 6-11 (emphasis added) (Sept. 29, 2006).

220 Albersheim, TR. 150: 10-12 (emphasis added).

221 It is undisputed that Qwest considers both private line and access services to be designed services (e.g., not POTS services). See, e.g, Albersheim Reb., Exh. No. 18C, 45:25 – 46: 1 ("Examples of retail designed services are private lines (DS1, DS3, etc.)"); Albersheim Exh. No. 9 (expedite PCAT), p. 4 (identifying private line and certain other services available under the tariffs for resale as "Designed Products"); Million Surreb., Exh.

surrebuttal testimony (inconsistent with her above-quoted direct testimony): "Q. Mr. Webber also cites the Washington Access Service tariff. What does that tariff provide? A. It makes ***very clear*** that ***charges apply to expedites***."[222] Qwest refers to this as an "approved tariff provision."[223] The Qwest retail Private Line (i.e., per Qwest, "designed") tariff likewise makes very clear that Qwest offers expedites and that charges apply.[224] As discussed below, the tariff separately provides certain exceptions to charging when Qwest provides retail designed services expedites.[225]

77 This evidence clearly demonstrates that Qwest does offer expedites for a fee to retail designed services customers in Washington. The inevitable conclusion, therefore, is that it is discriminatory to refuse to offer expedites for a fee to its CLEC designed services customers. Qwest, however, admits that it refuses to provide expedites for designed services for a fee at all for CLECs in Washington.[226] Although Qwest laments that the Arbitrator's recommendation "ignores significant differences between Eschelon's proposed language and Qwest's current practices,"[227] Qwest's practice is inappropriate. Qwest is denying expedites for a fee to CLECs while offering them to itself and its retail customers.

No. 53, 14:1-14 (stating Qwest position that "design" charges apply to "access services, including switched and special access").

222 Albersheim Reb., Exh. No. 18C, 47: 26-28.

223 Albersheim Reb., Exh. No. 18C, 48: 10.

224 Webber Exh. No. 175 (JW-3), Section 4.1.4(A) on page 3 ("If a customer desires that service be provided on an earlier date than that which as been established for the order, the customer may request that service be provided on an expedited basis. If the Company agrees to provide the service on an expedited basis, an Expedite Charge will apply").

225 Webber Exh. No. 175 (JW-3), p. 1; Denney Surreb., Exh. No. 152, FN 275 on p. 108, quoting Qwest (Martain) Direct (8/26/06), AZ Complaint Docket, p. 40, lines 4-10.

226 Qwest Petition for Review, p. 36, ¶84 ("or other CLECs"); *see also id*. p. 35, ¶80 (point #2) ("or CLEC customers"). See also Albersheim Exh. No. 9, p. 3 (expedite PCAT) (fee-added "Pre-Approved" expedites are "available in ***all states except Washington*** for the products below when your ICA contains language for expedites with an associated per day expedite charge.") (emphasis added). See also Denney Surreb., Exh. No. 152, 117: 5-8 ("The ICB rate appears in the Qwest UNE tariff in Washington, yet Qwest will not expedite an unbundled loop order in Washington under the existing interconnection agreement when the emergency conditions are not met even when a CLEC is willing to pay an ICB rate based on costs.") (FNs/citations omitted).

227 Qwest Petition for Review, p. 35, ¶81.

78 Qwest attempts to escape the clear discrimination issue by conveniently denying that it offers expedites to retail designed services customers -- contrary to the terms of its own tariffs. Although Qwest has claimed since September of 2006 that it plans to change its tariffs "soon,"[228] the existing tariffs are in place currently and provide for expedited service for designed services. Expedited service, therefore, should also be available to Eschelon for designed services in Washington. Other CLECs will have the ability to opt-in to Eschelon's ICA to obtain fee-added expedites in Washington as well.[229]

79 Moreover, even if a potential unfiled future tariff were controlling, Qwest has not said that it is changing its retail tariff to ***eliminate*** expedites for designed services. Instead, Qwest's above-quoted testimony clearly shows Qwest intends to continue to offer expedites for retail designed services. What will change? The *rate*. What Ms.Albersheim did not state on the stand is that there *is* a Qwest tariff providing for expedites for retail designed services in Washington, but Qwest no longer likes its *rate*. The existing tariff explicitly provides that the expedite charge will in no event "exceed 50% of the total nonrecurring chargers associated with the order."[230] This provision is consistent with one of the points of comparison used by Eschelon to support its interim rate proposal – the installation charge.[231] Consistent with this comparison, in its tariff, Qwest implicitly recognizes that a reasonable charge to expedite an installation would not exceed the charge for all of the work performed in the entire installation; in fact, it would be no more than half.[232] Although Qwest admits that it offers expedites differently in

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228 Albersheim Dir., Exh. No. 1, 57:8-9 (Sept. 29, 2006).

229 Section 252(i) of the federal Act.

230 Webber, Exh. No. 175 (JW-3), p. 3, Section 4.1.4(C)(4).

231 Denney Surreb., Exh. No. 152, 132:12-16 ("An additional expedite charge that approaches or even exceeds the amount of the charge for all of the activities for an entire installation of a facility should more than amply compensate Qwest for performing the installation activities more quickly.").

232 See also Denney Surreb., Exh. No. 152, pp. 135-136 [quoting Exh. No. 162 (DD-29), Qwest's Tariff F.C.C. #1, Original Page 5-25].

Washington than other states,[233] Qwest obscures that the key difference with respect to fee-added expedites is that in other states Qwest offers them for CLEC UNE customers (if they sign a Qwest contract amendment) at the same rate as in the retail tariff ($200 per day), whereas in Washington, Qwest does not offer them to CLEC UNE customers (even if they sign a Qwest contract amendment) at the same rate as in the Qwest retail tariff (which is capped at half the installation charge).[234] In Washington, Qwest does not provide expedites for a fee to CLEC UNE customers at all.[235]

80 In her surrebuttal testimony, Ms. Albersheim admitted: "The Washington tariff for retail designed services has ***not yet been changed*** to reflect the new process that offers expedites for designed services under all circumstances when resources are available ***for $200 per day***."[236] Qwest's proposed rate of $200 per day expedited would greatly exceed the charge for all of the activities for an entire installation.[237] Qwest's admission follows immediately after this testimony: "Qwest is diligent about ensuring that it not discriminate against its customers."[238] Qwest is erroneously equating providing a wholesale service ***at the same price*** as a retail service with nondiscrimination (suggesting that providing it at a lower price would be a superior service).[239] Whether a service is "superior" must be determined with respect to the quality of the service, not its price.[240] The FCC rules require that service provided by the incumbent be at least equal in *quality* to the service it provides to itself and its retail

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233 Albersheim Surreb., Exh. No. 29, 22: 13-15.

234 Cf. Albersheim Reb., Exh. No. 18C, 42: 14-16 ("In all of the states in it is 14-state region, Qwest offers expedites to CLECs on the same terms and conditions as it offers them to its retail customers.").

235 See also Johnson Exh. No. 122 (BJJ-46) (Qwest CMP Response), p. 42, Row 6.

236 Albersheim Surreb., Exh. No. 29, 22: 16-18 (emphasis added).

237 Denney Surreb., Exh. No. 152, 132: 8-10 & FN 355.

238 Albersheim Surreb., Exh. No. 29, 22: 15-16.

239 Denney Surreb., Exh. No. 152, 109:17 – 110:7 (FN not repeated here) (emphasis added).

240 NewSouth & Verizon Delaware, see Denney Surreb. Exh. No. 152, 125:1-12; Exh. No. 171, p. 18.

customers.[241] Qwest acknowledges, if expedites are not a "superior service," then cost-based pricing is appropriate.[242] As the Minnesota commission said:

> Qwest argues that it refrains from discriminating in the provision of expedited access to CLECs. In support of this argument, Qwest invites the Commission to compare the price Qwest charges CLECs at wholesale to the $200 retail price it charges its own customers at retail. But the law bars Qwest from discriminating in the wholesale market specifically - that is, from imposing different terms and conditions for expedited service on different telecommunications carriers, including itself. Qwest must provide UNEs to CLECs on the same terms and conditions that it provides them to its own retail operations, regardless of what it charges its retail customers. And the cost Qwest bears to provide expedited access to UNEs for its retail customers is simply the cost of expediting the service. This is also the cost that CLECs should bear to expedite access for their customers.[243]

81 The evidence establishes that Qwest offers fee-added expedites to itself and its retail customers (including designed services customers). To ensure non-discrimination, the Arbitrator's recommended language and wholesale interim rate should be adopted.

2. Emergency-Based Expedites (a/k/a "Expedites Requiring Approval")

82 Regarding exceptions to charging an additional fee, Qwest complains that the Arbitrator's recommended language is too broad because (a) it "expands the list of products" for which expedites are available at no additional charge to include unbundled loops (which Qwest refers to as "design services");[244] and (b) it applies the "disconnect in error" emergency condition to CLECs, as well as Qwest, instead of Qwest's proposal to apply it only to Qwest.[245]

a. Design services are already on the product list.

83 Qwest's PCAT specifically provides that emergency-based expedites are available for design services in Washington. Before a list of products that includes unbundled loops, the PCAT states that the "Expedites Requiring Approval section of this procedure does not apply to any

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241 7 C.F.R. § 51.311 (nondiscriminatory access to unbundled network elements).
242 Starkey, Exh. No. 73 (MS-9) at Million, MN TR. Vol. 2, pp. 94-9.
243 Denney Surreb., Exh. No. 171 (DD-38) (MN PUC Order Resolving Arbitration Issues), p. 18.
244 Qwest Petition for Review, p. 35, ¶82.
245 Qwest Petition for Review, pp. 35-36, ¶83.

of the products listed below (***unless you are ordering services in the state of WA***)") (emphasis added).[246] Unbundled loops (as well as other products on the PCAT list) are designed services, according to Qwest.[247] Eschelon provided specific examples of emergency-based expedites that Qwest provided at no additional charge to Eschelon *for unbundled loops* in Washington,[248] which disprove Qwest's recent claim that emergency based expedites apply "for non-design services only."[249] The Arbitrator's recommended language does not expand the list of products to which emergency-based expedites apply.

b. Restoration of a customer's service disconnected in error is already a recognized emergency condition.

84 The Arbitrator's recommended language for Section 12.2.1.2.1 and subparts incorporates the very same list of emergency-based expedite conditions[250] that are posted on Qwest's web-based PCAT,[251] with one exception. Subpart (f) to Section 12.2.1.2.1 recognizes that Qwest's practice under the emergency-based Expedites Requiring Approval process is broader than the wording of its PCAT with respect to disconnects in error.[252] Qwest's PCAT language lists under the item (f) condition "Disconnect in error by Qwest." The Arbitrator's recommended language is: "Disconnect in error when one of the other conditions on this list is present or is caused by the disconnect in error."

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246 Albersheim Exh. No. 9, p. 3 (Qwest PCAT on Expedites).

247 Albersheim Exh. No. 1, 54:25.

248 Johnson Exh. No. 101, BJJ-26, at pp. 3-4.

249 Qwest Petition for Review, p. 35, ¶82.

250 Albersheim Dir., Exh. No. 1, 57:15-16.

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

252 *See* Webber Dir., Exh. No. 172, p. 70; *see also* Johnson, Exh. No. 77 (BJJ-3), pp. 9-10.

85 Qwest appears to suggest that subsection (f) is a novel approach not taken in the past.[253] Qwest is incorrect. Qwest grants expedites for conditions when CLEC's end user customer is completely out of service (primary line) due to a CLEC disconnect in error.[254] Eschelon provided specific examples of when Qwest had done so per its existing process.[255] After all, CLEC is the carrier, just as Qwest is the carrier when Qwest disconnects in error. In both cases, the circumstances are different from an error caused by the end user customer. Restoration of service to the end user customer should be the priority. In CMP, Qwest proposed to add to this condition a limiting qualifier that said: "Does not include disconnects in error," which would begin to exclude CLEC-caused disconnects in error from the emergency conditions.[256] Eschelon objected in CMP, and Qwest retracted this notice and did not re-issue it at all (at any Level).[257] Therefore, the emergency condition is still in place and was not modified to exclude CLEC-caused disconnects in error from the emergency conditions.[258] Qwest is incorrect when it stated that "Qwest is obligated to pay for [CLEC] mistake."[259] Eschelon *pays the installation NRC* to restore service after a CLEC disconnect in error (unlike a Qwest retail customer which receives a waiver of that charge).[260] A CLEC has no incentive to abuse this exception, as it would mean paying the NRC to restore service and, more importantly, taking down the CLEC's own customer – which is more costly than an expedite fee. The Arbitrator's recommended proposal should be adopted.

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253 *See also* Albersheim Reb. Hrg. Exh.18, 51:14-19.

254 Johnson Hrg. Exh. 77, BJJ-3, at pp. 10-11; Denney Hrg. Exh. 152, 148 at footnote 403.

255 *See*, *e.g.*, CAZ5016941TIH (5/11/04); Z467137RAK (1/10/05), cited in Johnson Hrg. Exh. 77, BJJ-3, at pp. 10-11.

256 Johnson Hrg. Exh. 77, BJJ-3, at pp. 10-11; Denney Hrg. Exh. 152, 148 at footnote 403.

257 Johnson Hrg. Exh. 77, BJJ-3, at pp. 10-11; Denney Hrg. Exh. 152, 148 at footnote 403.

258 *See also* Johnson Hrg. Exh. 101, BJJ-26, p. 1, fourth & fifth examples – showing Qwest's practice of providing expedites for loop orders at no additional fee for CLEC disconnects in error, before Qwest in other states unilaterally changed the process that had been available for more than six years.

259 Albersheim Rebuttal, Hrg. Ex. 18, 51: 9-10.

260 Denney Hrg. Exh. 152, 148 at footnote 403.

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

86 The Arbitrator's recommendation to adopt Eschelon's proposed language for these issues[261] is well founded. Every sentence and phrase of Eschelon's proposed language is supported by the record, including Qwest documentation and admissions, as shown in greater detail in Attachment 2 to Eschelon's Post-Hearing Brief.[262] In the four Qwest-Eschelon ICA arbitrations to date, the two commissions that have ruled on the ALJs' recommendations (Minnesota and Arizona) adopted,[263] and the other two arbitrators (Washington and Oregon) recommend,[264] Eschelon-proposed language, including the phrase "at least the day before," which Qwest challenges in its Petition for Review.[265]

87 Qwest asks the Commission to delete this key phrase from the recommended language on two grounds: (1) Qwest "never" committed to such a standard, so it does not reflect Qwest's "current processes" and the Arbitrator "was incorrect when she concluded 'Eschelon's language reflects terms developed through CMP'"[266]; and (2) the timing of a Firm Order Commitment ("FOC") is "irrelevant to whether a service Qwest delivered is classified" as Eschelon-caused ("Customer Not Ready" or "CNR").[267] In brief, Qwest's own documentation and the ICA show that these statements are inaccurate:

- Regarding #1 – Qwest's commitment to the day-before standard is documented, along with evidence that the standard is Qwest's current process developed in CMP, in Qwest-prepared CMP minutes, on its web site:[268]

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[261] Arbitrator's Report, ¶152.

[262] The Jeopardies issue, including the particular scenario addressed by the proposed language is summarized in Eschelon's Post Hearing Brief, pp. 46-54. See also Johnson Exh. Nos. 79-80, 97, 110-111, 116-117, 126; Webber Reb., Exh. No. 176, pp. 76-106; Starkey Surreb., Exh. No. 71, pp. 214-233.

[263] MN Order Resolving Arbitration Issues, Exh. No. 171 (DD-38), pp. 23-24 (Topic 31); AZ ALJ Report, pp. 86-88 (ACC voted to approve, as modified, retaining the phrase at least the day before).

[264] OR ALJ Report, pp. 69-71 (including second proposal for 12-71); WA ALJ Report, ¶152.

[265] Qwest Petition for Review, pp. 38-39, ¶89.

[266] Qwest Petition for Review, p. 38, ¶¶88-89, quoting Arbitrator's Report, p. 44, ¶152.

[267] Qwest Petition for Review, p. 38, ¶88.

[268] Johnson Surreb., Exh. No. 114, 26:12 – 27:3. Ms. Johnson, Eschelon's representative in these CMP meetings, testified that she "relied upon Qwest's statements and its documentation, including its documentation of

Action #1: As you can see receiving the FOC releasing the order on the day the order is due does not provide sufficient time for Eschelon to accept the circuit. Is this a compliance issue, ***shouldn't we have received the releasing FOC the day before the order is due***? In this example, should we have received the releasing FOC on 1-27-04?
Response *#1* ***This example is non-compliance to a documented process. Yes an FOC should have been sent prior to the Due Date.***" [269]

"Bonnie confirmed that the ***CLEC should <u>always</u> receive the FOC <u>before</u> the due date***. ***Phyllis agreed,*** and confirmed that Qwest cannot expect the CLEC to be ready for the service if we haven't notified you." [270]

- <u>Regarding #2</u> – As noted above, in CMP, Qwest confirmed "Qwest cannot expect the CLEC to be ready for the service if we haven't ***notified*** you"[271] (and if the CLEC is not ready, Qwest assigns "CNR'). The record shows that the agreed upon method of notice is the FOC:

"Q. The contract requires the FOC; correct?
A. The PCAT requires the FOC. Your contract proposal requires the FOC.[272]
Q. And Qwest's current process is to provide the FOC?
A. That is the process."[273]

"Q The FOC is the agreed upon process by which Qwest informs Eschelon of the due date for a circuit?
A Yes."[274]
. . .
"Q And you would agree that that's not proper, if the CLEC hasn't received an FOC in adequate time to be able to act on it; correct?
A According to procedure, yes.
Q That's Qwest's procedure?
A Yes."[275]

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these Qwest commitments, when the change request was closed subject to review of Qwest compliance with this process." *Id*. 27:4-6.

[269] Johnson Exh. No. 116, (February 26, 2004 CMP materials prepared and distributed by Qwest) (emphasis added).

[270] Albersheim Exh. No. 23, p. 5, sixth paragraph (quoting Qwest CMP minutes) (emphasis added).

[271] Exh. No. 23, p. 5 (emphasis added).

[272] In making this response, Ms. Albersheim ignores that other language in the proposed contract, which is closed and agreed upon, requires the FOC. See Section 9.2.4.4.1 (quoted below).

[273] Albersheim, Exh. No. 178, AZ TR. 70:13-18.

[274] Albersheim, Exh. No.73, MN TR. 38:17-19; cited at Starkey, Exh. No. 71, p. 231. *See also Albersheim*, Exh. No. 180, CO TR. Vol. I, 71:20-25 ("formal notice").

[275] Albersheim, Exh. No.73, MN TR. Vol. 1, 95:19-24; cited Johnson ,Exh. No. 114, 24:note 44. ICA Section 9.2.4.4.1 provides: ". . . If Qwest must make changes to the commitment date, Qwest will promptly issue a Qwest Jeopardy notification to CLEC that will clearly state the reason for the change in commitment date. ***Qwest will also submit a new Firm Order Confirmation that will clearly identify the new Due Date***." (emphasis added).

88 A jeopardy notice is a notice that Qwest sends to inform a CLEC that a due date is in jeopardy of being missed.[276] Whether Qwest classifies a jeopardy as Qwest-caused (a "Qwest jeopardy") or Eschelon-caused ("Customer Not Ready" or "CNR") may affect whether service to Eschelon's customer is delayed. When a jeopardy is classified as a CLEC-caused (CNR) jeopardy for "designed" facilities including unbundled loop orders, the CLEC is required to supplement its order by requesting a new due date that is at least ***three days after*** the date of the supplemental order.[277] A Qwest jeopardy properly classified as caused by Qwest does not require the CLEC to supplement the due date and does not build in this three day delay.[278] In contrast, an erroneous classification of a missed due date as caused by CLEC, when in fact the delay was due to Qwest's failure to provide an FOC or a timely FOC, will build in this required request for a three-day delay.[279] Timely delivery of service to the customer is of the utmost importance to Eschelon. Therefore, Eschelon's proposals for Issues 12-71 – 12-73 require proper handling of jeopardies to help ensure timely delivery of service.

89 That "four words" that Qwest seeks to delete (i.e., the phrase "at least the day" before)[280] provides a designated time frame for Qwest to provide timely notice to Eschelon as to when Qwest will be delivering service in the particular scenario addressed by the Jeopardies language (when Qwest has insufficient facilities or a problem with the facilities). Eschelon needs to plan and schedule resources for Qwest delivery of a circuit that Eschelon will use to serve its end users. Therefore, in CMP, Eschelon requested a designated *time frame* to allow

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276 Webber, Exh. No. 176, pp. 76-79.
277 Starkey, Exh. No. 73, at Albersheim, MN Tr. Vol. 1, 36:20 – 37:2.
278 Starkey Surreb., Exh. No. 71, 222-227.
279 Starkey, Exh. No. 73, at Albersheim, MN TR. Vol. I 43:8-17 (emphasis added).
280 Qwest Petition for Review, p. 38, ¶89.

Eschelon a reasonable amount of time to prepare to accept a circuit/service.[281] The Arbitrator found Eschelon should receive the time frame by recommending Eschelon's language.[282]

90 To illustrate the Jeopardies problem, Eschelon provided an example in which Qwest failed to provide timely notice and instead notified Eschelon only ***nine minutes*** before showing up to deliver a circuit.[283] This deprived Eschelon of a reasonable amount of time to prepare to accept it, and caused a delay. The Arbitrator's recommended resolution would help ensure timely notice to avoid customer-affecting delays. A proposal to modify the Arbitrator's recommended resolution by deleting the time frame, however, would ensure that Qwest could provide untimely notice, including literally only ***minutes*** before circuit delivery, with no consequence to Qwest, while increasing the possibility of delay for Eschelon and its End User Customers. The phrase Qwest proposes to delete goes to the crux of the dispute, as this example demonstrates.

91 In its Petition for Review, Qwest suggested that the arbitrator was "incorrect" when she concluded 'Eschelon's language reflects terms developed in CMP.'"[284] Both the arbitrators in Oregon and Arizona reached the same conclusion as the arbitrator here:

> Eschelon has presented substantial evidence demonstrating that Qwest has already committed in the CMP to provide the FOC one day in advance of the service delivery.[285] Qwest's refusal to acknowledge its CMP commitment, in its past practice

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[281] Albersheim Exh. No.23, 1: (Change Request PC081403-1 – title, description of change and expected deliverable in CMP quoted below with respect to Qwest's third claim); *see also* Albersheim Exh. No.23, 5:sixth paragraph, (Qwest CMP minutes state: "Bonnie [Eschelon] confirmed that the CLEC should ***always*** receive the FOC ***before the due date***. Phyllis [Qwest] agreed . . .") (emphasis added); *see also* Johnson Exh. No. 116 (February 26, 2004 CMP materials prepared and distributed by Qwest).

[282] Arbitrator's Report, pp. 43-44 ¶ 152.

[283] Johnson Exh. No. 126, 12 (Row 11).

[284] Qwest's Petition for Review, p. 38 ¶ 88.

[285] Footnote 207 to this quote on p. 71 of the OR ALJ Report states: "Qwest denies that it made a commitment to provide a FOC the day before and states that the parties agreed to a different compromise arrangement. Qwest/18, Albersheim/46-49. The weight of the evidence, however, supports Eschelon's position on this issue. See Eschelon/43; Eschelon/110; Eschelon/111; Eschelon/113; See also, Eschelon Brief at 139-143, 156-162, 169-173."

> of improperly assigning CNRs,[286] and the need to ensure adequate notice in the future all substantiate Eschelon's position that jeopardy language must be included in the ICA to provide the requisite level of business certainty.[287]
>
> By incorporating the process in the ICA, any new processes developed in CMP that are contrary to the contract language will not take effect automatically. However, we believe Eschelon's proposed language is fair and reasonable and will not undermine the benefits of the CMP.[288]

92 By claiming that the day-before standard is not Qwest's current process, Qwest is really saying that it is out of compliance with the process developed in CMP. This confirms the need to include the terms in the ICA, as the ALJ in Oregon pointed out.

93 Regarding Qwest's claim that the timing of the FOC is "irrelevant" to a CNR classification and its position that the day-before standard is not part of the process, the ALJ in Oregon said: "It is not possible to reconcile this outcome with the purpose of the FOC, which is to provide Eschelon with ***advance notice*** so that it has a ***reasonable amount*** of time to prepare to accept a circuit."[289]

94 In its Petition for Review, Qwest said: "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."[290] The reason that Eschelon is unable to accept the circuit, however, is that Qwest did not provide adequate notice via a timely FOC. If Eschelon is nonetheless able to scramble and accept

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[286] Footnote 208 to this quote on p. 71 of the OR ALJ Report states: "Eschelon provided several examples where Qwest provided no FOC at all, yet claimed that it was appropriate to classify the missed due date as an Eschelon-caused CNR. Eschelon/115; Eschelon Brief at 161. See also Qwest/18, Albersheim/55."

[287] Footnote 209 to this quote on p. 71 of the OR ALJ Report states: "Qwest acknowledges that contractual obligations should be clearly defined. Eschelon/1, Starkey/ Testimony of Qwest Witness Karen Stewart, MN Arb Tr. , p. 13); Eschelon Brief at 161."

[288] AZ ALJ Report, p. 87, lines 24-26 (ACC voted to adopt).

[289] OR ALJ Report, p. 70 (last paragraph) (emphasis in original for "advance notice"; other emphasis added).

[290] Qwest's Petition for Review, p. 38 ¶ 87. (Emphasis added)

service, despite Qwest's failure to provide adequate notice, per Eschelon's proposed language (without modification), Qwest meets its commitment (i.e., it does not count as a miss) – even when no FOC at all is provided in violation of the contract. Qwest said in its Post-Hearing Brief that 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. . . ."[291] If, however, due to Qwest's failure to provide adequate notice, Eschelon is unable to accept deliver, this should count as a miss. The commission in Minnesota concluded that "where Eschelon had no role in causing Qwets to issue an initial jeopardy notice, and had no role in delaying Qwest's issuance of a subsequent FOC until less that a day before the deadline, the Commission cannot find merit in holding Eschelon responsible when the deadline is missed."[292] The Commission should adopt the Arbitrator's recommendation, without modification, as to Issues 12-71, 12-72, and 12-73 (Jeopardies).

H. Controlled Production: Issue 12-87

1. Definition of Terms and Description of Status Quo

95 With both new implementations and updates to existing systems, tests are conducted to ensure the interface systems are working properly. *Controlled production* is one of these tests. It involves controlled submission of CLEC's real product orders to the new or updated interface to verify that the data exchanged between Qwest and CLEC is done according to the industry standard.[293] A *new implementation* effort involves transactions that CLEC does not yet have in production within the current version of the electronic interface.[294] *Re-certification* is the process by which CLECs demonstrate the ability to generate correct functional transactions for

[291] Qwest Post-Hearing Brief, p. 56, ¶162.
[292] Exh. No. 171, MN Order Resolving Arbitration Issues, p. 21.
[293] Arbitrator's Report, p. 45, ¶157, citing Webber, Exh. No. 176 at 108. See also Starkey Surreb., Exh. No. 71, 233:8-15.
[294] Webber Exh. No. 176, p. 107 at footnote 293.

updates to the existing interface systems.[295] Under Eschelon's proposal, testing will be conducted for both new implementations and recertifications.[296] Eschelon needs certainty in the contract language that the particular *type of testing* addressed in this section of the ICA (controlled production testing), consistent with current practice, will continue to be necessary for a *new implementation* effort and unnecessary for *re-certification*.[297] Eschelon's business need is to avoid costly and time consuming testing that is unnecessary because, for recertifications, the transaction has previously been in production and is simply being enhanced.

96 Controlled production is not required currently for recertification, ***regardless of whether the CLEC intends or does not intend to order the products/features***.[298] Eschelon provided the following example in the record:

> For example, Eschelon was already certified and in production for Facility Based Directory Listings ("FBDL") when Release 19.0 was issued and included two additional fields for the existing FBDL product, so Eschelon did not have to do controlled production testing when Eschelon re-certified its functionality for FBDL for Release 19.0. The fact that controlled production was not required does ***not*** mean the two additional fields were not tested. The two fields were tested using progression testing in the Stand Alone Test Environment (SATE) (*see* closed language in proposed ICA Section 12.6.9.2). Eschelon's proposed language for Issue 12-87 is, on its face, specific to one type of testing (controlled production) and does not affect the other testing to which Eschelon has agreed. Although this example occurred with Release 19.0, Qwest's own documentation for Release 20.0 provides that the same terms apply. *See* Qwest's *XML Implementation Guidelines – for Interconnect Mediated Access*, Version 20, p. 42.[299]

97 In this example, even if CLEC intends to use the functions (the two additional fields), controlled production testing is not required. Because the two fields were added as part of recertification, controlled production testing is not required.

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[295] See agreed upon (closed) language in Section 12.6.4 of the proposed ICA, discussed in Webber Dir., Exh. No. 172, 195:5-9.

[296] See agreed upon language in Proposed ICA Sections 12.6.1 through 12.6.9.10.

[297] Starkey Surreb., Exh. No. 71, 233:6 – 235:13.

[298] Starkey Surreb. Exh. No. 71, 237:2-4.

[299] Starkey Surreb., Exh. No. 71, 235 at footnote 766.

98 Qwest admits that it has not required controlled production testing for re-certification. Specifically, Qwest's testimony states:

> **Q. ADDRESSING THE SECOND ISSUE, IS ESCHELON'S LANGUAGE ACCURATE WITH REGARD TO RECERTIFICATION?**
> A. Yes.[300]

99 In its Petition for Review, Qwest seems to suggest that Eschelon's proposed language is contrary to language regarding recertification in the CMP Document.[301] The language in Qwest's CMP Document has not changed.[302] If it had the meaning Qwest now appears to suggest it has, that would mean Qwest was in violation of the CMP Document for the entire time that Qwest admits no controlled production testing was required for re-certification.[303]

100 The Arbitrator here recommends use of Eschelon's proposed language (using proposal #2).[304] Under the Arbitrator's recommended proposal, the testing, like that done today, will be appropriate for the type of change being made, and unnecessary costs will not be imposed upon Eschelon.

2. Qwest's New Proposal in Response to the Arbitrator's Recommended Language Would Alter the Status Quo.

101 Instead of the Eschelon language recommended by the Arbitrator which reflects the status quo, Qwest has proposed two lesser alternatives for ICA language (one in arbitration[305] and an alternative proposal made more recently in its Petition for Review[306]), neither of which fully captures Qwest's current process. Qwest's earlier proposal (stating that controlled production

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300 Albersheim Dir., Exh. No. 1, 98:1-3.

301 Qwest Petition for Review, p. 39, ¶90 (quoting Qwest CMP Document).

302 In its Petition for Review, Qwest cites the CMP Document submitted with Qwest's direct testimony in Sept. of 2006 (Albersheim Exh. No. 2, also known as RA-1). The above-quoted testimony indicating that Eschelon's language is accurate with regard to recertification is from Qwest's same direct testimony in September of 2006 (Ms. Albersheim Direct). See Albersheim Dir., Exh. No. 1, 98:1-3.

303 Albersheim Dir., Exh. No. 1, 98:1-3.

304 Arbitrator's Report, p. 45, ¶157.

305 Disputed Issues Matrix, pp. 104-105 (Issue 12-87).

306 Qwest Petition for Review, p. 40, ¶91.

is not required for features or products that the CLEC does not plan on ordering) covered only a subset for which Qwest currently does not require controlled production,[307] as discussed earlier regarding the FBDL example.

102 Qwest's new proposal is similar but contains an additional flaw. As compared to Qwest's current practice, Qwest's new proposal is in error when it states that "CLEC must undertake any required controlled production before using such functionality." As the above FBDL example shows, currently CLEC need not undertake controlled production testing before using functionality added in recertification.

103 Qwest's proposed language fails to distinguish between new implementations and recertification. In its new proposal,[308] Qwest proposes striking the sentence indicating that controlled production is not required for recertification, but then proposes leaving in the last sentence which explains that recertification does not include new implementations. Without distinguishing between the two situations, however, the purpose of the last sentence is at best unclear (making it more likely to lead to disputes), in addition to the language being inconsistent with current practice. The Arbitrator's recommendation for Issue 12-87 should be adopted.[309]

III. CONCLUSION

104 Based upon the evidence in this proceeding and the discussion above, Eschelon respectfully requests that the Commission adopt the recommendations of the Arbitrator for each of the issues that are the subject of Qwest's Petition for Review. Qwest concludes its Petition for

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307 Starkey Surreb., Exh. No. 71, pp. 236-237.

308 Qwest Petition for Review, p. 40, ¶91.

309 If, however, Qwest's proposal were to be used, the distinction between new implementations and recertification would need to be made clear in the language, such as by replacing the end of Qwest's proposed paragraph (after "will be provisioned.") with the following language: " For new implementations, such as new products, 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, controlled production testing is not required, unless the Parties agree otherwise."

Review with a vague but sweeping request for cost recovery,[310] though Qwest chose to submit no cost studies in this case,[311] despite the explicit requirement that it do so.[312] The Commission should decline Qwest's request to write Qwest a blank check. Using the pricing mechanisms in the interconnection agreement and the Commission procedures regarding cost proceedings, Qwest has the ability to seek cost recovery, should Qwest find that it has unrecovered costs and should Qwest, in that context, heed the direction to file cost studies.

May 12, 2008

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310 Qwest Petition for Review, pp. 40-41, ¶93.

311 Million TR 174:18-20 ("Q. Qwest has not filed any cost studies in this case, correct? A. That's correct.").

312 Arbitrator's Report, p. 50, ¶ 173.