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**BEFORE THE ARIZONA CORPORATION COMMISSION**

COMMISSIONERS

MIKE GLEASON, Chairman  
WILLIAM A. MUNDELL  
JEFF HATCH-MILLER  
KRISTIN K. MAYES  
GARY PIERCE

Arizona Corporation Commission

**DOCKETED**

MAY 16 2008

DOCKETED BY nl

IN THE MATTER OF THE PETITION OF  
ESCHELON TELECOM, INC. FOR  
ARBITRATION WITH QWEST CORPORATION  
PURSUANT TO 47 USC SECTION 252(b) OF THE  
FEDERAL TELECOMMUNICATIONS ACT OF  
1996.

DOCKET NO. T-03406A-06-0572

DOCKET NO. T-01051B-06-0572

DECISION NO. 70356

**OPINION AND ORDER**

DATE OF ARBITRATION:

March 19 & 20, 2007

PLACE OF ARBITRATION:

Phoenix, Arizona

ARBITRATOR:

Jane L. Rodda

APPEARANCES:

Mr. Jason Topp and Mr. Norman Curtright, Qwest Corporation Legal Department; Mr. Philip Roselli, Kamlet, Shepard & Reichert, LLP, and Mr. John Devaney, Perkins Coie, LLP, on behalf of Qwest Corporation; and

Mr. Gregory Merz, Gray Plant Mooty, on behalf of Eschelon Telecom of Arizona.

**BY THE COMMISSION:**

**Procedural Background**

On September 8, 2006, Eschelon Telecom of Arizona, Inc. ("Eschelon") filed with the Arizona Corporation Commission ("Commission") a Petition for Arbitration of an interconnection agreement ("Petition") with Qwest Corporation ("Qwest") pursuant to A.A.C. R14-2-1505 and Section 252(b) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 ("the 1996 Act").

On October 3, 2006, Qwest filed its Response to the Petition.

By Procedural Order dated October 6, 2006, the Commission established procedural guidelines

1 and set the matter for arbitration, adopting the dates suggested by the parties. An Amended Procedural  
2 Order dated October 10, 2006, corrected a filing date in the October 6, 2006, Procedural Order.

3 On October 23, 2006, Qwest and Eschelon filed a Joint Motion to Amend the Procedural  
4 Schedule, seeking to extend the dates for filing testimony and for the arbitration due to the burden on  
5 witnesses who were testifying in six other states.

6 By Procedural Order dated October 30, 2006, the Commission granted the Joint Motion and set  
7 the arbitration to commence March 19, 2007.

8 On November 8, 2006, Qwest filed the Direct Testimony of Renee Albersheim, William  
9 Easton, Teresa Million, Robert Hubbard and Karen Stewart. On the same date, Eschelon filed the  
10 Direct Testimony of James Webber, Michael Starkey, Bonnie Johnson and Douglas Denney.

11 On February 9, 2007, Qwest filed the Rebuttal Testimony of Ms. Albersheim, Mr. Easton, Ms.  
12 Million, Mr. Curtis Ashton, Mr. Hubbard and Ms. Stewart. On the same date, Eschelon filed the  
13 Rebuttal Testimony of Ms. Johnson, Mr. Denney and Mr. Starkey.

14 On February 20, 2007, Eschelon filed a Notice of Errata, filing a corrected version of Ex MS-6  
15 to Mr. Starkey's Rebuttal Testimony.

16 On March 1, 2007, Qwest filed a Motion to Dismiss Rate Issues.

17 On March 2, 2007, Eschelon filed the Surrebuttal Testimony of Mr. Starkey, Ms. Johnson and  
18 Mr. Denney.

19 On March 2, 2007, Qwest filed the Surrebuttal Testimony of Ms. Albersheim, Mr. Easton, Ms.  
20 Million, Mr. Ashton, Mr. Hubbard and Mr. Stewart.

21 On March 12, 2007, Eschelon filed a Response to Qwest's Motion to Dismiss Rate Issues.

22 Oral argument on the Motion to Dismiss was heard in a telephonic procedural conference on  
23 March 14, 2007.

24 By Procedural Order dated March 14, 2007, the Motion to Dismiss was denied on procedural  
25 grounds, pending resolution of the issue in the final arbitration order.

26 The arbitration convened as scheduled on March 19, 2007, at the Commission's Phoenix  
27 offices. Following two days of arbitration, the matter was taken under advisement pending the  
28 submission of Closing Briefs.

1 On April 27, 2007, Qwest and Eschelon filed Closing Briefs.

2 On June 6, 2007, Eschelon filed, as supplemental authority, a copy of the Minnesota Public  
3 Utility Commission's Order Denying Reconsideration in the Qwest-Eschelon Minnesota arbitration  
4 (Docket No. P-5340, 421/IC-06-0768).<sup>1</sup>

5 On June 21, 2007, the parties filed a Joint Motion for Single Compliance Filing of the  
6 Interconnection Agreement And, If Granted, A Revised Schedule. In their Joint Motion the parties  
7 reported that they entered into a settlement agreement that would resolve the "wire center" issues  
8 (Issues Nos. 8-37 – 8-42 in the Joint Matrix of Issues). The settlement agreement was filed in Docket  
9 Nos. T-03632A-06-0091, T-03226A-06-0091, T-04202A-06-0091, T-03406-06-0091, T-03432A-06-  
10 0091, and T-01051B-06-0091, and is being considered by the Commission in those dockets.<sup>2</sup> If the  
11 settlement agreement is approved, the parties state that it would resolve all disputed language  
12 encompassed by Issues Nos. 9-37 through 9-42. The wire center Settlement Agreement contains  
13 language, which if approved, would be inserted into the Eschelon/Qwest ICA. The parties request that  
14 the Commission approve a single compliance filing of the ICA to implement both the Commission's  
15 order in this arbitration proceeding and the resolution of the wire center issues in Dockets Nos. T-  
16 03632A-06-0091 et al. If the Settlement Agreement is not approved in the wire center dockets, then  
17 the parties request a modification of the arbitration schedule to allow two rounds of supplemental  
18 testimony and a round of briefing for the open wire center issues.

19 On July 18, 2007, the parties filed a Joint Notice of Closure of Arbitration Issue 9-51 and  
20 Partial Closure of Arbitration Issue No. 22-90(f). Issue No. 9-51 is described as "Application of UDF-  
21 IOF Termination (Fixed) Rate Element." The parties agreed to language for Section 9.7.5.2.1 of their  
22 ICA to resolve this issue. Issue No. 22-90(f) concerns the nonrecurring rates for "ICDF Collocation"  
23 for DS1 circuits, per two legs, and for DS3 circuits, per two legs.<sup>3</sup> This issue is among those described  
24 as "Unapproved Rates". The parties partially closed this issue by agreeing upon the nonrecurring rate  
25 of \$75.83 for ICDF Collocation for DS1 circuits, per two legs, but have not agreed upon a

26 <sup>1</sup> The related Minnesota Arbitrator's Report was previously filed as Exhibit DD-25 to Mr. Denney's Surrebuttal Testimony  
27 (Ex E-16) and the Minnesota Commission's Order resolving Arbitration Issues was filed as Attachment 2 to Eschelon's  
Closing Brief.

28 <sup>2</sup> The Commission held a hearing on the wire center settlement agreement on October 30, 2007.

<sup>3</sup> A leg is a segment of a multipoint circuit that lies between any two of the points.

1 nonrecurring rate for ICDF Collocation for DS3 circuits per two legs, and that portion of the Issue No.  
2 22-90(f) remains in dispute.

3 On September 17, 2007, the parties filed a Joint Notice of Closure of Arbitration Issues No. 8-  
4 21, 8-21(a), 8-21(b), 8-21(c), 8-21(d), 8-21(e), and 8-219(f). The parties closed this issue by agreeing  
5 to language for Sections 8.2.1.29 –Power and 8.3.1.6 -48 Volt DC Power.

6 Because of the large number of issues to be resolved and the arbitration of those issues in  
7 multiple states, Eschelon and Qwest agreed to waive the nine month deadline for a final Commission  
8 order.

9 \* \* \* \* \*

10 Pursuant to Section 252(b)(4)(C) of the Act, the Commission hereby resolves the issues  
11 presented for arbitration.

12 **Discussion**

13 **Background**

14 Eschelon is a Minnesota corporation certificated by the Commission in Decision No. 62751  
15 (July 27, 2000) as a facilities-based competitive local exchange carrier (“CLEC”) to provide local and  
16 resold long distance telecommunications services. Qwest is an incumbent local exchange carrier  
17 (“ILEC”) in Arizona. Eschelon and Qwest entered into an interconnection agreement (“ICA”) which  
18 was approved by the Commission in Decision No. 62489 (April 28, 2000). The parties have agreed to  
19 operate under the terms and conditions of the existing ICA until replaced with a successor Agreement.  
20 The parties have attempted to negotiate, with some interruptions, a new ICA since 2000.

21 Many of the issues presented for arbitration revolve around Qwest’s advocacy of the Change  
22 Management Process (“CMP”) to address matters of process and procedures and Eschelon’s  
23 dissatisfaction or distrust with CMP and desire to have the parties’ rights and obligations established  
24 in their ICA. Qwest is concerned that Eschelon’s proposals would result in preferential treatment for  
25 Eschelon and would require Qwest to make changes to its procedures and systems to accommodate  
26 only one CLEC. Eschelon complains that the CMP is controlled by Qwest, can result in changed  
27 procedures that affect how Eschelon provides service to its end users and that Eschelon has a business  
28 need for contractual certainty. The impact of the CMP is discussed in connection with the individual

1 issues.

2 Unless otherwise stated, the issues presented for arbitration track the contract sections and  
3 proposed language as presented in the parties' "Arizona Disputed Issues List" updated on March 12,  
4 2007 ("Joint Matrix").

#### 5 Issues Presented for Arbitration

6 **Issue 1-1, 1-1(A), 1-1(B), 1-1(C), 1-1(D) and 1-1(E): Intervals - Should service intervals be**  
7 **specified in the ICA or should they be addressed in the Change Management Process ("CMP")?**

#### 8 Echelon's Position

9 Echelon states that service intervals determine how quickly Echelon will be able to provide  
10 service to its end user customer and are critically important to Echelon. Echelon wants the currently  
11 existing service intervals to be incorporated into the ICA so that Qwest cannot change them  
12 unilaterally. In response to Qwest's professed desire for flexibility, Echelon has proposed that as an  
13 alternative to having interval changes reflected in an amendment to the ICA, that Qwest be permitted  
14 to shorten intervals through the CMP and that an ICA amendment, and Commission approval, would  
15 only be required to lengthen intervals. Echelon asserts that lengthened intervals are exceedingly rare,  
16 but are of sufficient significance to Echelon's ability to provide service that such changes should not  
17 be made without Echelon's agreement or the Commission's approval. In addition, Echelon has  
18 proposed that when the parties are able to agree on interval changes, that agreement may be  
19 documented by a one-page advice letter rather than a more formal amendment, similar to the process  
20 used when the parties agree to add a new product to an ICA.

21 The Minnesota Commission adopted the Arbitrator's recommendation to adopt Echelon's  
22 proposed language for this issue. Echelon argues that if Qwest prefers uniformity, it should prefer  
23 using the same language and forms for the Arizona ICA as well.

#### 24 Qwest's Position

25 Qwest argues the record is undisputed that there have been no disputes that have arisen out of  
26 the CMP handling of this issue and that Echelon's fears that Qwest might improperly use the CMP to  
27 impose interval changes on CLECs is contrary to the history of the issue. Qwest states that it  
28

1 withdrew the one proposed interval change that was opposed by CLECs in the CMP,<sup>4</sup> and that Qwest's  
 2 witness testified that it would be unwise for Qwest to impose interval changes over the objection of  
 3 CLECs.<sup>5</sup>

4 Qwest asserts Eschelon's proposals would impose significant administrative burdens on Qwest  
 5 by either requiring interconnection agreement amendments or adoption letters with every CLEC in the  
 6 event of an interval change.<sup>6</sup> Qwest argues that no justification exists in this case that would warrant  
 7 imposing such burden.

### 8 Resolution

9 Intervals are essential terms of the products Eschelon orders from Qwest, and Eschelon relies  
 10 on provisioning intervals to be able to provide certainty to its end users. Qwest's witness testified that  
 11 if Eschelon succeeds in setting service intervals in stone in the ICA it would prevent the appropriate  
 12 management of service intervals in the CMP and preclude Qwest from responding to changes in the  
 13 industry, including requests for changes from CMP participants.<sup>7</sup> She claims this would subvert the  
 14 CMP process and prevent other CLECs from seeking changes to intervals without Eschelon's express  
 15 permission.<sup>8</sup> She stated that Qwest cannot support "one-off service intervals", and that to adopt  
 16 Eschelon's language would lead down the slippery slope of having multiple CLECs requesting  
 17 different service intervals.<sup>9</sup> Qwest admits, however, that in recent years intervals have overwhelmingly  
 18 been decreased.<sup>10</sup>

19 In light of the importance of certainty surrounding interval lengths, we do not find Qwest's  
 20 arguments and prediction of the demise of the effectiveness of the CMP persuasive. In the vast  
 21 majority of circumstances, technological changes will shorten intervals, and having current intervals  
 22 set in the contract will not hamper other CLECs from requesting interval changes in the CMP. The  
 23 intervals that would be incorporated into the Eschelon ICA are existing intervals. When there is

24 <sup>4</sup> Ex Q-1, Albersheim Direct at 42.

25 <sup>5</sup> Tr. at 88, lines 6-18.

26 <sup>6</sup> Ex Q-1, Albersheim Direct at 32-33.

27 <sup>7</sup> Id. at 41.

28 <sup>8</sup> Id.

<sup>9</sup> Id. at 42.

<sup>10</sup> Since Qwest's 271 proceedings, Qwest proposed shortening service intervals 39 times and proposed lengthening them only twice. Of the two proposed lengthened intervals, Qwest withdrew one because of CLEC concerns in the CMP and the one that was implemented received no comment or objection from CLECs. Ex Q-3, Albersheim Rebuttal at 34.

1 agreement that service intervals should be shortened, Eschelon has proposed a streamlined process that  
2 does not require an amendment of the ICA.

3 Consequently, we adopt Eschelon's Proposal No. 1 with respect to issue 1-1, as well as  
4 Eschelon's proposed language resolving issues 1-1(A) through (E).

5 **Issue 2-3: Effective Date of Rate Changes – How should the ICA address the application of rate  
6 changes when the rate order does not set forth a specific implementation date?**

7 **Eschelon's Position**

8 Eschelon proposes the following language be included in Section 2.2 concerning the  
9 application of rate changes:<sup>11</sup> "The rates in Exhibit A and when they apply are addressed in Section  
10 22." Eschelon believes that the ICA should be clear about the relationship between Section 2.2 and  
11 Section 22 regarding rate changes.

12 In Section 22.4.1.2 Eschelon proposes:

13 Each Party reserves its rights with respect to whether Interim Rates are  
14 subject to true-up. If, however, the Commission issues an order with  
15 respect to rates that is silent on the issue of a true-up, the rates shall be  
16 implemented and applied on a prospective basis from the effective date of  
17 the legally binding Commission decision as described in Section 2.2.

18 **Qwest's Position**

19 In its Brief, Qwest states that it agrees with Eschelon that language addressing the situation  
20 where rate orders do not contain a specific implementation date should be addressed in Section 22 of  
21 the ICA. Qwest proposes the following language for section 22.4.1.2:

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

26 Qwest believes that its language removes ambiguity regarding rate issues.

27 **Resolution**

28 Qwest does not appear to object to Eschelon's proposed language for Section 2.2 as it relates to  
the application of rate changes, agreeing that the issue is appropriately addressed in Section 22 of the  
ICA. Consequently, Eschelon's proposal for Section 2.2, addressing the issue of rates should be

<sup>11</sup> Joint Matrix at 6.

1 adopted and incorporated into the ICA.<sup>12</sup>

2 Some of the prices contained in Exhibit A to the ICA have not been approved by the  
3 Commission in a cost docket. Prices of products that have not yet been approved by the Commission  
4 are considered interim rates. Section 22.4 addresses the situation when the Commission has reviewed  
5 and changes the Interim Rate. The Parties' proposed language for Section 22.4.1.2 is not substantially  
6 different, as both provide that where a Commission order is silent as to the implementation of a rate,  
7 the rate shall be implemented on a prospective basis from the effective date of the Commission  
8 decision. Eschelon's proposed language includes an express recognition that Interim Rates may be  
9 subject to true-up. As such, we find it the more comprehensive approach and will adopt Eschelon's  
10 proposed language for Section 22.4.1.2.

#### 11 **Issue 2-4: Effective Date of Legally Binding Changes**

##### 12 **Eschelon's Position**

13 For changes in law other than rate changes, Eschelon proposes that such changes be  
14 implemented and applied prospectively as of the date that the order is effective, unless the  
15 Commission orders otherwise. Eschelon's first proposal is as follows:

16 Any amendment shall be deemed effective on the effective date of the  
17 legally binding change or modification of the Existing Rules for rates, and  
18 to the extent practicable for other terms and conditions, unless otherwise  
ordered.

19 Eschelon has an alternative proposal that states that when there is a change in law, the parties may  
20 seek a different implementation schedule, but that absent some other direction, an order changing the  
21 law will be implemented as of the order's effective date. This proposal also confirms the parties' duty  
22 to keep the ICA up to date.<sup>13</sup>

23 Eschelon objects to Qwest's proposal because Eschelon believes that under Qwest's approach,  
24 the effective date of a change in law would depend on whether one party provides the other with  
25 notice of the order that gives rise to the change. Under Qwest's proposal, if an order does not contain  
26 an implementation date, and one party gives the other party notice of the order within 30 days of the

27 \_\_\_\_\_  
28 <sup>12</sup> Joint Matrix at 6-9.

<sup>13</sup> Joint Matrix at 12-13.



1 order's effective date, the change is implemented as of the effective date. Where neither party gives  
 2 notice, the change takes effect as of the effective date of an ICA amendment incorporating the change.  
 3 Eschelon believes Qwest's proposal allows a party to "game the system" by intentionally not giving  
 4 notice of a change in law that adversely affects that party and thus delay implementation of the  
 5 change. Eschelon believes that because of its greater size and resources, Qwest would have a greater  
 6 ability to engage in such gamesmanship.

7 Eschelon argues Qwest's proposal is further flawed by ambiguity that could lead to future  
 8 disputes. Because it distinguishes between "implementation date" and "effective date", Eschelon  
 9 argues Qwest's proposal leaves open for later argument that even though an order states it has an  
 10 effective date or is "effective immediately" the order does not state a specific implementation date,  
 11 and thus would require notice. Eschelon believes such result would be "absurd."

#### 12 Qwest's Position

13 Qwest proposes that the parties be required to provide notice within 30 days of a legally  
 14 binding change if the party wants that change to be effective on the date of such an order.  
 15 Specifically, Qwest proposes:<sup>14</sup>

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

26 Qwest argues its proposal provides a significant incentive for parties to take action immediately if they  
 27 want to implement a change in law. Qwest states its proposal prevents the recurrence of a complaint  
 28 that Level 3 had brought a couple years ago in several states for an alleged change in law.

Qwest dismissed Eschelon's claim that it would be unfair to require Eschelon to keep track of  
 legal changes because it is smaller than Qwest. Qwest believes the record in this case demonstrates  
 that Eschelon has an extensive regulatory and legal staff that is unlikely to miss an Arizona decision

<sup>14</sup> Qwest's proposed language is reflected by underlined text.

1 affecting their interests.

2 **Resolution**

3 Qwest's proposed language appears to be the result of a specific experience concerning  
4 ambiguity between an implementation date and an effective date. However, Qwest's specific proposal  
5 could provide incentive to one party to delay notice and the implementation of an adverse change of  
6 law. In cases where a Commission order does not contain an implementation date, the easiest  
7 presumption is that the change in law should apply as of the effective date of the order, whether or not  
8 one of the parties has given notice to the other of the change. If there is a question as to the difference  
9 between an implementation and effective date, the parties should retain their right to challenge the  
10 presumption that absent directive, the implementation date and effective date are the same. Thus, we  
11 adopt the following language for section 2.2:

12 Any resulting amendment shall be deemed effective on the effective date  
13 of the legally binding change or modification of the Existing Rules or  
14 rates, and to the extent practicable for other terms and conditions, unless  
15 otherwise ordered. If an order is silent as to the implementation date, the  
16 change or modification shall be implemented on a prospective basis from  
the date the order is effective, either by operation of law, or as otherwise  
stated in the order, unless subsequently otherwise ordered by the  
Commission.

17 The addition of language "unless subsequently otherwise ordered by the Commission" is intended to  
18 allow the parties to bring an action before the Commission to clarify the implementation of a change  
19 of law order. This language incorporates some of the language Eschelon proposes in its alternative  
20 proposal.<sup>15</sup> We do not find that the remainder of Eschelon's alternative language that permits a party  
21 to seek a particular deadline or implementation date to be necessary or that it would assist ease of  
22 administration and interpretation of the provision.

23 **Issue 4-5 (a, b, c): Design Changes – What is the appropriate definition and charge for design changes?**

24 A design change is defined in Section 4.0 of the ICA as a change in circuit design after  
25 Engineering Review required by a CLEC supplemental request to change a service previously  
26 requested by the CLEC. The current ICA includes a charge of \$72.79 for design changes to unbundled  
27

28 <sup>15</sup> Joint Matrix at 13-14.

1 dedicated interoffice transport (“UDIT”). Qwest proposes to apply the same rate for design changes to  
 2 loops and CFA-2/4 Wire Loop Cutovers.<sup>16</sup> Eschelon proposes a \$30.00 design change rate for loops  
 3 and \$5.00 for CFA-2/4 Wire Loop Cutovers.<sup>17</sup> Eschelon proposes the following definition for the  
 4 CFA design change:

5 9.2.3.9 CFA Changes – 2/4 Wire Loop Cutovers. Connecting Facility  
 6 Assignment (CFA) changes for Coordinated Installation Options for 2-  
 7 Wire and 4-Wire analog (voice grade) Loops (excluding the Batch Hot  
 8 Cut Process) on the day of the cut, during test and turn up. When this  
 charge applies, the Design Change rate for Unbundled Loops does not  
 apply.

9 Qwest proposes the following language for Section 9.2.3.9:

10 9.2.3.9 Rates for CFA changes are set forth in Exhibit A (unless the need  
 11 for such change is caused by Qwest, in which case this rate does not  
 12 apply).

### 13 Eschelon’s Position

14 Eschelon asserts that design changes are part of Qwest’s obligation to provide  
 15 nondiscriminatory access to UNEs under Section 251 of the 1996 Act and should be provided at  
 16 TELRIC prices. The parties’ current ICA does not contain charges for loop design changes or CFA  
 17 changes. Eschelon wants the new ICA to be clear that Qwest must provide design changes for loops  
 18 and CFAs at TELRIC prices. Eschelon asserts that its proposed language for Sections 9.2.3.8, 9.2.3.9,  
 19 9.20.13.2 and 9.20.13.3<sup>18</sup> would allow Qwest to charge for these elements, and provides interim rates  
 20 for loop and CFA design changes. Eschelon objects to Qwest’s approach which Eschelon states  
 21 expands the application of the rate for UDIT design changes. Eschelon argues that the UDIT design  
 22 change rates were never intended to apply to loop and CFA design changes and that the cost of  
 23 providing the loop and CFA changes is less than the cost of UDIT changes.

24 Eschelon has proposed interim rates for design changes for loops as well as for CFA changes  
 25 under certain circumstances.<sup>19</sup> Eschelon states that Qwest provided loop design changes from 1999

26 <sup>16</sup> CFAs are Connecting Facility Assignments which identify a complete communications channel between two places.

27 <sup>17</sup> Joint Matrix at 16.

28 <sup>18</sup> Joint Matrix at 15-16.

<sup>19</sup> Eschelon’s proposal is limited to a 2/4 wire analog loop on the same day of a coordinated cut, during test and turn up, excluding batch hot cuts. Ex E-13 Denney Direct at 46-48.

1 until 2005 without a separate charge, but now asserts that the design charge rate of \$72.79 that was  
2 approved by the Commission as part of the Phase II cost order was intended to apply to both UDIT  
3 and loops. Eschelon claims Qwest takes this position even though both Qwest's Statement of  
4 Generally Available Terms ("SGAT") and the current ICA describe the charge as applicable to UDIT  
5 but not to loops. Eschelon argues that to accept Qwest's position that the rate applies to both, one  
6 would have to believe that Qwest obtained a design change rate that applies to both loops and UDITs  
7 but simply elected to apply that charge only to UDIT. Eschelon further argues that Qwest provided no  
8 evidence why it did not charge what it now claims was the approved rate for design changes.<sup>20</sup>  
9 Eschelon believes the more reasonable explanation is that Qwest did not charge the design change rate  
10 for loops because Qwest understood that the rate was intended to apply to UDIT and not loops.

11 Eschelon asserts that in light of the different activities involved in performing UDIT design  
12 changes, loop design changes and CFA changes, it is not reasonable to think the rates for all three  
13 activities would be the same. Eschelon claims loops and UDITs are different products that utilize  
14 different systems, with UDIT being more complex, and with a higher cost associated with design  
15 changes. According to Eschelon, Local Service Requests ("LSRs"), which are used for loops, have a  
16 higher level of electronic flow-through than Access Service Requests ("ASRs"), which are used in  
17 connection with UDIT. Similarly, Eschelon argues CFA changes, and particularly the limited type of  
18 CFA change reflected in Eschelon's language for Section 9.2.3.8 are lower cost than UDIT design  
19 changes because Qwest and Eschelon are already in contact and coordinating the cutover and the  
20 Qwest central office technician is already standing at the frame. Thus, Eschelon claims, there is little,  
21 if any, additional work required to perform a "lift and lay" to switch CFAs. The cost, Eschelon  
22 argues, of a few minutes of a technician's time, should be minimal, and not rise to the level of a UDIT  
23 design change charge.

24 Eschelon argues that unless and until the Commission approves a rate for design changes to  
25 loops and CFAs, Eschelon's proposed interim rates would reasonably allow Qwest to cover its costs.

26 . . .

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<sup>20</sup> Tr at 142-145.

1 **Qwest's Position**

2 Qwest states that when a CLEC submits an order for a facility or a service and then submits a  
3 change to that order, a Qwest engineer must review the change to determine if the facility or service  
4 should be provided in a manner different from that required by the CLEC's original order. Qwest  
5 explains that a design change could be a change of end user premises within the same serving wire  
6 center, the addition or deletion of optional features or functions, a change in the type of channel  
7 interface or the type of interface group, or the technical specification of a package. From Qwest's  
8 point of view, the heart of this dispute is that although Qwest incurs significant costs to perform design  
9 changes, Eschelon is proposing rates for certain of those changes that would recover only a fraction of  
10 Qwest's costs. Qwest argues Eschelon's proposed rates conflict with the approved rate of \$72.29 that  
11 the Commission established in Phase II of the Cost Docket, and violates Qwest's right of cost recovery  
12 established in Sections 252(c) and (d) of the 1996 Act. Qwest asserts that Eschelon is wrong when it  
13 states that neither the current ICA or Qwest's SGAT give Qwest the right to charge for loop and CFA  
14 design changes. According to Qwest, in Arizona the Commission established the design change  
15 charge of \$72.79, which applies not only to UDIT, but also to unbundled loops and CFA changes.

16 Qwest argues that Eschelon's proposed \$5.00 rate, and the assumptions underlying it, for a  
17 CFA change are flawed and should be rejected. Qwest states that after Eschelon submits a new  
18 connect service order, a Qwest engineer must connect the customer's loop to Eschelon's equipment  
19 collocated in a Qwest central office. To enable Qwest to perform this connection, Eschelon provides  
20 Qwest with a CFA on the interconnection distribution frame ("ICDF") in Qwest's central office, which  
21 Qwest explains means Eschelon tells Qwest where the Qwest engineer should connect the loop on the  
22 ICDF. Qwest states that sometimes the ICDF locations that Eschelon gives Qwest are incorrect and  
23 requires Eschelon to submit a new CFA and requires Qwest to redesign the order.

24 Qwest asserts that Eschelon's proposed \$5.00 charge is not supported by a cost study, or any  
25 other evidence, showing how the rate was derived. Qwest argues that a cost-based nonrecurring  
26 charge, like a design change charge, should be established by identifying the activities a carrier's  
27 personnel must perform, estimating the time required to perform the activities and applying an

28

1 appropriate labor rate to the activities and times.<sup>21</sup> Qwest asserts that the \$72.79 rate that was  
2 approved in Phase II of the Cost Docket was based on the average cost of performing a design change  
3 for all types of products, including loops and transport, and includes CFA changes. Qwest states that  
4 in the explanation in the “executive summary” of the study it indicates that the rate applies to all types  
5 of design changes and to CFAs, by reference to “type[s] of channel interface[s].” In addition, Qwest  
6 asserts the \$72.79 rate appears in the “Miscellaneous Charges” section of Exhibit A to the Arizona  
7 ICA and Qwest’s SGAT. Qwest claims that if the charge applied only to the transport or UDIT related  
8 design activities, it would be listed instead in the section of Exhibit A devoted to transport.<sup>22</sup>

9 Qwest argues there is no factual basis for Eschelon’s assumption that the presence of a Qwest  
10 technician in a central office during a coordinated cut-over reduces the costs of CFA changes. Qwest  
11 notes that the \$72.79 rate does not include any time of a central office technician, such that even if a  
12 coordinated cut-over reduced technician time on CFA changes, it would not reduce the rate. Qwest  
13 believes that Eschelon’s assumptions are unsupported by testimony from an engineer and is an over-  
14 simplified description of the activities required to perform CFA changes.<sup>23</sup>

15 Qwest argues that Eschelon’s proposed \$30.00 rate for loop design changes is flawed for many  
16 of the same reasons as the proposed \$5.00 CFA charge: i.e. there is no supporting cost study or  
17 evidence of the activities, times and costs associated with loop design changes. In addition, Qwest  
18 argues there is no basis for Eschelon’s claim that loop design changes are not in the TELRIC study  
19 that produced the \$72.79 rate. Qwest asserts the cost study is not limited to UDIT and includes loops  
20 because the study specifically refers to network facilities used with “end-user premises.” Qwest states  
21 that loops connect end-user premises to the network, unlike UDIT which is used to connect central  
22 offices and does not involve end-user premises. Thus, according to Qwest, if the cost study were  
23 limited to UDIT, it would not have referred to end-user premises.<sup>24</sup>

24 Qwest notes further that the transport section of Exhibit A includes multiple rates that apply  
25 only to transport, for example, “DS1 Transport Termination Fixed” and “DS1 Transport Facilities Per  
26

27 <sup>21</sup> Tr at 366-368.

<sup>22</sup> Ex Q-15 Million Rebuttal at 18-20.

<sup>23</sup> Ex Q-17 Stewart Direct at 10.

28 <sup>24</sup> Ex Q-16, Million Surrebuttal at 14-15.

1 Mile.” Qwest states that by contrast, rates listed in the “Miscellaneous Charges” section of Exhibit A  
 2 may apply in multiple circumstances or to more than one network element or activity. Qwest claims  
 3 Eschelon’s reading of Exhibit A to include a transport specific charge in the miscellaneous section is  
 4 illogical.

5 Qwest asserts there is no foundation for Eschelon’s claim that design changes to loops involve  
 6 less work than for UDIT changes. Qwest offered testimony that DS1 and DS3 unbundled loops on  
 7 fiber systems can require the same type or re-design work required for UDIT.<sup>25</sup>

### 8 Resolution

9 The evidence does not indicate that when it approved a design change charge of \$72.29, the  
 10 Commission intended that it apply only to UDIT, and not to loops or CFAs. Qwest provided evidence,  
 11 such as its location under “miscellaneous charges” and references to “customer premises,” that  
 12 indicates the charge was intended to apply to design changes for loops as well as transport.  
 13 Furthermore, Eschelon has failed to demonstrate that its proposed \$30 charge for loop design changes  
 14 and \$5 for CFA changes are cost-based and would permit Qwest to recover its costs. However,  
 15 Eschelon does raise questions that could indicate that design change charges might be different for  
 16 different products. While we do not have a sufficient record in this proceeding to set a different rate  
 17 for the design change charge for loops and CFAs, nor do we believe an arbitration is the best forum for  
 18 considering rate changes, we believe that the rates for design change charges for loops and CFAs  
 19 should be reviewed in the upcoming Phase III of the Qwest cost docket. Thus, we adopt Qwest’s  
 20 proposed language, except that we will order that a footnote be added that indicates that the design  
 21 change charge for loops and CFAs will be reviewed by the Commission in the Phase III of the cost  
 22 docket.

23 **Issues 5-6 & 5-7: Discontinuance of Order Processing & Disconnection (Sections 5.4.2, 5.4.3 &**  
**5.13.1) – What is the appropriate procedure for Qwest to discontinue processing orders and/or**  
**disconnect Eschelon for non-payment of bills?**

24 **Issues 5-8, 5-9, 5-11 and 5-13: When may Qwest demand a deposit to secure future payment?**

### 25 Eschelon’s Position

26 Eschelon’s proposed language for Section 5.4.2 states in relevant part:  
 27

28 <sup>25</sup> Ex Q-18, Stewart Rebuttal at 8.

1           5.4.2 With the Commission's approval, one Party may discontinue  
 2 processing orders for relevant services for the failure of the other Party to  
 3 make full payment, less any disputed amount as provided for in Section  
 21.8 of this Agreement, for the relevant services provided under this  
 Agreement within thirty (30) Days following the Payment Due Date.

4 As an alternative, Eschelon proposes:

5           5.4.2 One Party may discontinue processing orders for relevant services  
 6 for the failure of the other Party to make full payment, less any disputed  
 7 amount as provided for in Section 21.8 of this Agreement, for the relevant  
 8 services provided under this Agreement within thirty (30) Days following  
 9 the Payment Due Date. . . . If the billed Party asks the Commission to  
 10 prevent discontinuance of order processing and/or rejection of orders (e.g.,  
because delay in submitting dispute or making payment was reasonably  
justified due to inaccurate or incomplete Billing), the Billing Party will  
continue order processing while the proceedings are pending, unless the  
Commission orders otherwise . . .

11 Qwest objects to the underlined portions of Eschelon's proposals.

12           Eschelon's proposed language for Section 5.4.3, which addresses disconnection, contains  
 13 similar language concerning the role of Commission approval.<sup>26</sup>

14           Issues 5-8, 5-9 and 5-12, relate to Section 5.4.5 and address when a party may demand a  
 15 deposit as a consequence of non-payment. Issue 5-13 relates to Section 5.4.7, which specifies when a  
 16 party may seek an increase in the amount of a deposit. With respect to the disputed portions of  
 17 Sections 5.4.5 and 5.4.7, Eschelon proposed the following:

18           5.4.5 "Repeatedly Delinquent" means payment of any undisputed non de  
 19 minimus amount received more than thirty (30) Days after the Payment  
 20 Due Date, for three (3) consecutive months or more times during a twelve  
 21 (12) month period on the same Billing account number. . . . Required  
 22 deposits are due and payable within thirty (30) Days after demand and  
 23 conditions being met, unless the billed Party challenges the amount of the  
deposit or deposit requirement (e.g., because delay in submitting disputes  
or making payment was reasonably justified due to inaccurate or  
incomplete Billing) pursuant to Section 5.18. If such a Dispute is brought  
before the Commission, deposits are due and payable as of the date  
ordered by the Commission.

24           5.4.7 If a Party has received a deposit pursuant to Section 5.4.5 but the  
 25 amount of the deposit is less than the maximum deposit amount permitted  
 26 by Section 5.4.5, (The Billing Party may review the Other Party's credit  
 27 standing and increase the amount of deposit required, if approved by the  
Commission, but in no event will the maximum amount exceed the  
amount stated in Section 5.4.5. Section 5.4 is not intended to change the

28 <sup>26</sup> Joint Matrix at 19-22.



1 scope of any regulatory agency's or bankruptcy court's authority with  
2 regard to Qwest or CLECs.

3 Qwest opposes the underlined language and advocates the struck through language.

4 Eschelon believes the ICA should provide for some form of Commission review before Qwest  
5 may unilaterally discontinue processing service orders or disconnect Eschelon's circuits for "alleged  
6 non-payment." Eschelon asserts that it offered substantial evidence showing that there are numerous  
7 reasons why Eschelon and Qwest may disagree about Eschelon's undisputed amounts.<sup>27</sup> Eschelon  
8 believes that the detrimental effect on Eschelon's business if Qwest refuses to continue processing  
9 orders, or disconnects Eschelon, is undisputed, and argues that Commission review and approval  
10 before Qwest discontinues order processing, or disconnects Eschelon, would assure that drastic action  
11 is not taken unless warranted and end user customers are protected.

12 Eschelon explains that its first proposal for Section 5.4.2 provides that Qwest could only  
13 discontinue processing Eschelon's orders if it receives Commission approval. Eschelon's alternative  
14 proposal is that Qwest could proceed with discontinuing order processing unless Eschelon asks the  
15 Commission to take action to prevent that from happening. Eschelon's proposal for Section 5.4.3  
16 would allow Qwest to disconnect services for failure to pay undisputed amounts once Qwest has  
17 obtained Commission approval. Eschelon also proposed language in Section 5.13.1 that requires a  
18 party to apprise the Commission of a continuing payment default and obtain Commission approval  
19 before disconnecting services for untimely payment of undisputed amounts.

20 Eschelon argues that the evidence in this case shows that whether an undisputed amount is past  
21 due is itself a subject of disagreement.<sup>28</sup> Mr. Denny's testimony provides examples of circumstances  
22 where Qwest and Eschelon have disagreed on the amount of undisputed charges, including: Qwest  
23 unilaterally declaring a dispute "resolved"; Qwest notices of past due status not including detail by  
24 Billing Account number; amounts in past due notices not matching the billing detail; Qwest's failure  
25 to post payment in a timely manner; and billing mistakes, etc.<sup>29</sup> Eschelon asserts that under its  
26 proposal, when there is such a disagreement, it is the Commission, rather than Qwest, that determines  
27 the merits of that disagreement. Eschelon is concerned that Qwest's proposal gives Qwest, a

28 <sup>27</sup> Ex E-13, Denney Direct at 65-71.

<sup>28</sup> Ex E-13, Denny Direct at 64-71.

<sup>29</sup> Id. at 65-66.

1 competitor, the power to act unilaterally in imposing consequences that would be highly disruptive to  
2 Eschelon and its customers. Eschelon argues that discontinuation of order processing and  
3 disconnection are precisely the types of customer-impacting disputes that call for Commission review.  
4 Eschelon notes that under its second proposal for issue 5-6, Commission review would only be  
5 required when Eschelon disputes Qwest's action.

6 Eschelon asserts Qwest's proposal that would allow Eschelon to bring a complaint to the  
7 Commission after the fact would not protect Eschelon and its customers. Eschelon states that while  
8 the dispute is pending, Eschelon would be unable to place orders, its customers would be  
9 disconnected, and the damage would have already been done.

10 In addition, Eschelon argues that because the amount of a deposit can be substantial, up to two  
11 months' worth of charges, there is good reason to limit requiring a deposit to circumstances of real  
12 necessity. Eschelon believes there are four issues relating to deposits: 1) whether the deposit  
13 requirement should be triggered by Eschelon's failure to pay a "de minimus" or non-material amount;  
14 2) the standard that should be used for determining when payment is "repeatedly delinquent"; 3)  
15 whether Eschelon should be required to pay a deposit within 30 days of a demand by Qwest in cases  
16 when Eschelon has challenged Qwest's deposit demand with the Commission; and 4) whether Qwest  
17 should be permitted to require a deposit even if Eschelon has consistently paid its undisputed bills in a  
18 timely matter, based on an undefined "review" by Qwest.

19 Eschelon argues that its proposed use of the term "de minimus" would not increase disputes  
20 before the Commission, and has offered, as an alternative, the failure to pay a "material" undisputed  
21 amount. Because the term "material" is used elsewhere in the contract, Eschelon argues Qwest should  
22 not object to it as unreasonably vague. Eschelon notes that Qwest has expressed the intent not to  
23 demand a deposit based on the amount to pay a de minimus amount, but believes that such expression  
24 of intent offers little protection to Eschelon.

25 Eschelon argues that a CLEC making regular, substantial payments, even if payment is  
26 occasionally late, does not constitute a threat of non-payment warranting a deposit. Eschelon has  
27 proposed that payment be considered "repeatedly delinquent" if made more than 30 days after the due  
28 date in three consecutive months. Eschelon asserts that the three month standard is the same as found

1 in other ICAs in which Qwest is a party, and that the Minnesota commission adopted the “three  
2 consecutive months” definition in the recent arbitration in that state. Alternatively, Eschelon offers a  
3 definition of “repeatedly delinquent” as being more than 30 days late three or more times in a six  
4 month period, or that the billing party could demand a deposit if payment is more than 90 days late.  
5 Eschelon argues that late payment charges are designed to provide incentive for timely payment and  
6 the deposit provisions are intended to protect against ultimate non-payment. Eschelon argues that  
7 Qwest’s proposed language of three late payments in a twelve month period would require a deposit  
8 even though Eschelon regularly pays its bill and poses no risk to Qwest of nonpayment.

9 Eschelon states that its proposed language provides that if it disputes the deposit requirement,  
10 the deposit will be due as provided by any subsequent Commission order in connection with the  
11 dispute. Eschelon believes that this language assures that when there is a genuine dispute about  
12 whether a deposit may be required, Eschelon will not be burdened by having to make a potentially  
13 multi-million dollar deposit while the dispute is pending. Although the deposit requirement only  
14 applies to undisputed past due amounts, Eschelon fears that Qwest’s decision to label an amount as  
15 “undisputed” does not mean that Eschelon does not dispute that amount. Eschelon asserts that  
16 Commission involvement may be necessary in order to determine whether an amount claimed by  
17 Qwest to be past due is, in fact, “undisputed.”

18 Eschelon believes that Qwest’s position with respect to increasing deposits is egregious.  
19 Eschelon states that Qwest’s proposal for Section 5.4.7 would allow it to increase a deposit without the  
20 limitations of Section 5.4.5. According to Eschelon, under Qwest’s proposal for Section 5.4.7, Qwest  
21 could demand a deposit up to the maximum amount even if Eschelon has consistently paid its bill in  
22 full in a timely manner and even if Qwest has never disconnected processing Eschelon’s orders.  
23 Further, Eschelon complains that Qwest’s proposal does not describe what its review would entail.  
24 Eschelon states that because of the potential for abuse inherent in Qwest’s proposal, Eschelon  
25 proposes that Section 5.4.7 be deleted in its entirety. In the alternative, Eschelon proposes that  
26 increases in deposits should be limited to situations when the standard for requiring a deposit under  
27 Section 5.4.5 has already been met. Further, Eschelon argues that its proposal would retain Section  
28 5.4.5 as a limit on Qwest’s ability to impose a deposit.

1 **Qwest's Position**

2 Qwest asserts that its proposed language for these payment and billing issues merely continues  
3 the current practice as expressed in Qwest's Arizona SGAT and in Qwest's recently approved  
4 interconnection agreements with Covad and AT&T. Qwest asserts that its proposed language is a  
5 reasonable business precaution designed to encourage timely payment, and when timely payment is  
6 not made, they provide Qwest with the ability to limit its financial risk.

7 Qwest argues that Eschelon's proposals diminish Qwest's ability to collect its bills by requiring  
8 Qwest to wait for Commission review before demanding a deposit. Qwest objects to Eschelon's  
9 alleged attempts to "water down" its obligation to pay bills by limiting its obligations to pay an  
10 amount close to the amount billed (issue 5-8) and to re-define "repeatedly delinquent" such that it  
11 would only be obligated to pay its bills on time four months a year to avoid triggering a potential  
12 deposit requirement (issue 5-9). Likewise, Qwest complains that Eschelon would limit Qwest's ability  
13 to seek a deposit to only those situations where Eschelon is "repeatedly delinquent," and eliminate all  
14 other possibilities where a deposit would be appropriate (issue 5-13), and would require Qwest to seek  
15 Commission approval to demand a deposit (issue 5-11). Qwest argues that Eschelon's proposals could  
16 have serious adverse financial consequences for Qwest, and that the cumulative effect is to slow down  
17 and significantly impair Qwest's ability to collect valid, undisputed bills owed by Eschelon.

18 Qwest asserts that its experience in Minnesota, which requires commission approval before  
19 disconnection, shows that it can take months to get to hearing.<sup>30</sup> Qwest objects to the proposal that  
20 would require Qwest not only to go through a hearing to disconnect, but also to take less drastic steps  
21 such as discontinuing order processing and demanding a deposit. Moreover, Qwest asserts that  
22 Eschelon has not shown that Qwest has misused its authority to make collection efforts in the past.

23 **Resolution**

24 Disputes involving Section 5.4 of the ICA involve "undisputed" portions of late payments.  
25 Section 21.8 of the ICA provides a framework for disputed bills.

26 Section 5.4.2 provides the framework for when the Billing Party can discontinue order  
27

28 <sup>30</sup> Ex Q-8 Easton Surrebuttal at 10.

1 processing. Under Qwest's proposed language for Section 5.4.2, the Billing Party has the right to  
2 discontinue processing orders if the other party does not pay the undisputed amount of the bill within  
3 30 days of the payment due date. Further, the Billing Party is required to notify the other Party in  
4 writing and the Commission on a confidential basis at least ten business days prior to discontinuing the  
5 processing of orders for the relevant services. While the proposal is not unreasonable, as it appears to  
6 give sufficient time to allow the Billed Party to determine if the bill is disputed, Eschelon raises a  
7 concern that the discontinuance of order processing and disconnection can have a significant adverse  
8 effect on the end user. In addition, as proposed by Qwest, the remedies could be undertaken even if a  
9 very minor portion of the bill remained unpaid. Billing errors or misunderstandings are likely reasons  
10 why a small portion of a bill would remain unpaid, but not be identified as "disputed." Eschelon's  
11 alternative proposal for Section 5.4.2 is a reasonable compromise. Under this proposal, Commission  
12 intervention is not required to affect a discontinuance of order processing or to reject orders, but the  
13 Billed Party can seek Commission intervention to prevent such actions when late payment is  
14 reasonably justified. We do not believe it is beneficial to either party, or the public, to unnecessarily  
15 involve the Commission in relatively minor billing disputes. However, we are concerned that end  
16 users do not suffer unnecessarily on account of a billing dispute not of their making. Because the  
17 Billed Party can designate a bill as disputed, the added protections for the benefit of the end user  
18 afforded by Eschelon's alternative proposal, if not modified, would unreasonably burden the Billing  
19 Party or prevent it from collecting a legitimate past due account.

20 Section 5.4.3 and Section 5.13 address when and how the Billing Party may disconnect the  
21 Billed Party for failure to make full payment of an otherwise "undisputed" bill. Eschelon proposes  
22 inserting language into these sections that makes Commission approval a prerequisite to disconnecting  
23 service. Under Eschelon's proposal, Section 5.4.3 refers to the process of Section 5.13.1 for  
24 disconnecting service. We believe that these Sections should mirror the language we approve for  
25 Section 5.4.2 that gives the Billed Party the option to request that the Commission prevent  
26 disconnection, rather than require Commission pre-approval in all cases. Because of the nature of  
27 disconnection, we also believe the proposed notice language of Section 5.4.3 should be revised so that  
28 there is a meaningful opportunity before disconnection to request the Commission prevent

1 disconnection. Thus, we shall approve the following language for the relevant portions of Section  
2 5.4.3:

3 5.4.3 The Billing Party may disconnect any and all relevant services for  
4 failure by the billed Party to make full payment, . . . . The Billing Party  
5 will notify the billed Party at least ten (10) business days prior to  
6 disconnection of the unpaid service(s). If the billed Party asks the  
7 Commission to prevent disconnection of service(s) (e.g., because delay in  
8 submitting dispute or making payment was reasonably justified due to  
9 inaccurate or incomplete Billing), the Billing Party will not disconnect the  
10 relevant service(s) while the proceedings are pending, unless the  
11 Commission orders otherwise. In case of such disconnection all  
12 applicable undisputed charges, including termination charges, if any, shall  
13 become due. If the Billing Party does not disconnect the billed Party's  
14 service(s) on the date specified in the ten (10) business days notice, and  
15 the billed Party's noncompliance continues, nothing contained herein shall  
16 preclude the Billing Party's right to discontinue any or all relevant  
17 services of the non-complying Party after an additional at least ten (10)  
18 business days notice. For reconnection of the non-paid service to occur,  
19 the billed Party will be required to make full payment of all past and  
20 current undisputed charges under this Agreement for the relevant services

21 . . . .  
22  
23 With this addition, we do not find that Eschelon's proposed addition to the language for Section 5.13.1  
24 (regarding disputed amounts) is required. Our resolution requires the Billed Party to take the  
25 necessary steps to prevent the Billing Party from taking action with respect to remedies regarding  
26 undisputed amounts under these provisions, and does not accept Eschelon's proposal for Section  
27 5.13.1 that the Billing Party notify the Commission of the default or the requirement that Commission  
28 approval for disconnection is required in all circumstances.

1 The disputes concerning Section 5.4.5 (issues 5-8 and 5-9) involve the definition of "repeatedly  
2 delinquent" and affect how the parties will determine the other's credit status. Eschelon proposes to  
3 insert a "de minimus" standard and to define "repeatedly delinquent" as meaning payment of any  
4 undisputed non-de-minimus amount received more than thirty days after the due date, for three  
5 consecutive months. As an alternative, Eschelon offers the term "material" instead of "non-de  
6 minimus." According to Eschelon, Qwest has agreed to the use of the term "material" in other  
7 sections of the ICA. Qwest's proposed language does not refer to a "non-de minimus" amounts or to  
8 any other qualifier, and would consider "repeatedly delinquent as being more than 30 days past due  
9 three times during a 12 month period". Eschelon is concerned that Qwest could require a significant  
10 deposit if Eschelon is occasionally delinquent on small amounts. Eschelon notes that a two month

1 deposit for it could be \$5 million.<sup>31</sup> The imposition of a deposit for relatively minor past due  
2 payments could negatively impact competition. We find that Eschelon's second alternative proposal,  
3 which defines "repeatedly delinquent" as three or more times delinquent during a six-month period is a  
4 reasonable compromise.<sup>32</sup>

5 We believe that although not strictly defined, a word such as "material" can assist in the  
6 resolution of disputes when they are brought to the Commission, even if they do not prevent the  
7 dispute in the first instance, thus we will adopt Eschelon's proposal to insert "material" in Section  
8 5.4.5<sup>33</sup>.

9 Eschelon's third proposal requires Commission action to impose a deposit based on all relevant  
10 circumstances.<sup>34</sup> We do not adopt Eschelon's third alternative proposal, as we believe it may  
11 needlessly require Commission involvement in deposit disputes even where Eschelon would not  
12 otherwise oppose the deposit requirement.

13 Issue 5-11 concerns that portion of Section 5.4.5 that provides when deposits are due. Eschelon  
14 proposes that deposits would be due within 30 days after demand, unless the Billed Party disputes the  
15 deposit requirement with the Commission, and then the deposit would be due on the date ordered by  
16 the Commission.<sup>35</sup> The undisputed portion of Section 5.4.5 provides that a deposit can not exceed two  
17 months estimated monthly charges, and may be required when the Billed Party has been repeatedly  
18 delinquent or is being reconnected after discontinuance, and such deposits are due within 30 days of  
19 demand. Eschelon's proposed language for when deposits are due mirrors what we have found  
20 reasonable with respect to disconnection or rejection of processing. We find this approach is fair and  
21 reasonable for determining when deposits will be due and we will adopt Eschelon's proposed language  
22 for this issue.

23 Issue 5-12 also affects when a deposit required pursuant to Section 5.4.5 is due and payable. If  
24 a deposit is required by Eschelon's credit worthiness, as described in Section 5.4.5 Qwest should be  
25 able to protect its interests and demand a deposit due within 30 days and without seeking Commission

26 <sup>31</sup> Ex E-13, Denny Direct at 75.

27 <sup>32</sup> Joint Matrix at 25 (Eschelon Proposal #2).

28 <sup>33</sup> Ex E-13, Denney Direct at 80 (Eschelon Proposal #2)

<sup>34</sup> Joint Matrix at 27.

<sup>35</sup> Joint Matrix at 26.

1 intervention. Unless necessitated and supported by good cause, the Commission should not be  
 2 required to become involved in a routine business matter. Given our resolution of the meaning of  
 3 “repeatedly delinquent” above, we find Qwest’s proposal of 30 days to be reasonable and order that it  
 4 be adopted.

5 Thus, for the pertinent parts of Section 5.4.5 we adopt the following:

6 5.4.5 . . . If a Party . . . is Repeatedly Delinquent in making its payments. .  
 7 ., the Billing Party may require a deposit to be held as security for the  
 8 payment of charges before the orders from the billed Party will be  
 9 provisioned and completed or before reconnection of service. “Repeatedly  
 10 Delinquent” means payment of any undisputed . . . amount received more  
 11 than thirty (30) Days after the Payment Due Date, three (3) or more times  
 12 during a six (6) month period on the same Billing account number. . .  
 13 Required deposits are due and payable within thirty (30) Days after  
 14 demand and conditions being met, unless the billed Party challenges the  
 15 amount of the deposit requirement (e.g., because delay in submitting  
 16 disputes or making payment was reasonably justified due to inaccurate or  
 17 incomplete Billing) pursuant to Section 5.18. If such a Dispute is brought  
 18 before the Commission, deposits are due and payable as of the date  
 19 ordered by the Commission.

20 Issue 5-13 addresses when a deposit may be increased. Although on first blush Section 5.4.7  
 21 appears to address when an existing deposit may be increased, it could also be read to apply to  
 22 situations where the parties have an existing relationship, but have heretofore not required a deposit.  
 23 Eschelon proposes to add language to Section 5.4.7 that provides that a deposit that is less than the  
 24 maximum amount allowed may be increased if approved by the Commission.<sup>35</sup> Qwest proposed  
 25 language whereby the Billing Party could review the other’s credit standing and increase the amount  
 26 of the deposit required. The Minnesota arbitration order found that Qwest’s proposed Section 5.4.7  
 27 was without standard. If Qwest has already imposed a deposit pursuant to Section 5.4.5, or has not yet  
 28 required a deposit then it should be able to increase that deposit, or require a deposit, if there is a  
 change in circumstances that warrant such increase. Because of the potential adverse effect on a  
 competitor’s ability to do business, it should not be permitted to increase the deposit on a whim or  
 without good cause. The Billed Party may not have disputed the current deposit amount, but might  
 find a larger deposit to be unduly burdensome and unnecessary under the circumstances. Eschelon’s

<sup>35</sup> Joint Matrix at 29.



1 proposed language, for Section 5.4.7, however, requires Commission involvement, even in situations  
 2 where there is no dispute concerning the increased deposit. Neither would Eschelon's proposed  
 3 language allow Qwest to impose a deposit unless Eschelon were "Repeatedly Delinquent" because the  
 4 Parties have an existing relationship. It is not unheard of that an entity's financial condition may have  
 5 substantially and materially deteriorated such that payment of its bills may be in serious doubt, but the  
 6 entity not be "Repeatedly Delinquent" according to Section 5.4.5. We favor a provision that allows  
 7 the Billing Party to protect its ability to collect monies owed without unnecessary Commission  
 8 involvement, while protecting the Billed Party from an unreasonable and unjustified deposit increase.  
 9 Thus, we approve the following language for Section 5.4.7:

10           The Billing Party may review the other Party's credit standing and request  
 11           a deposit or increase the amount of deposit required if circumstances  
 12           warrant a reasonable belief that payment is in serious doubt, such as, but  
 13           not limited to, increased or greater delinquencies in undisputed amounts or  
 14           significant and material adverse changes appearing in the billed Party's  
 15           credit reports, such as Dun and Bradstreet, but in no event will the  
 16           maximum amount exceed the amount in Section 5.4.5. Unless the Billed  
 17           Party challenges the amount of the deposit or increase in deposit, by filing  
 18           a dispute with the Commission, the increased deposit shall be due as  
 19           provided in Section 5.4.5 concerning initial deposits. In any dispute filed  
 20           under this provision, the Billing Party shall bear the burden of proving the  
 21           reasonableness of the proposed deposit.

#### 22 **Issue 5-16: Nondisclosure Agreement**

##### 23 **Eschelon's Position**

24           Section 5.16.9.1 of the ICA requires employees with access to Eschelon's forecasting  
 25 information to execute a nondisclosure agreement. Eschelon proposes to add the following:

26           Qwest shall provide CLEC with a signed copy of each non-disclosure  
 27 agreement executed by Qwest personnel within ten (10) Days of  
 28 execution.

Eschelon claims that Qwest has not provided any detail or evidence that would support its claim that  
 the requirement would be a burden. Eschelon argues that the audit requirement of Section 18.3.1  
 provides only limited audit rights regarding the review of "books, records, and other documents used  
 in the Billing process" and that it is not clear it would allow an audit for the purpose of determining  
 whether Qwest had complied with the requirements of the contract relating to the internal disclosure of  
 Echelon's confidential information. Furthermore, Eschelon states the audit provision permits an audit

1 no more frequently than once every three years.

2 **Qwest's Position**

3 Qwest asserts that Eschelon's proposed language to provide a copy of the nondisclosure  
4 agreement within 10 days of execution places an unnecessary administrative burden on Qwest,  
5 particularly if the precedent of this section forces Qwest to have to provide every CLEC with copies of  
6 nondisclosure agreements. Qwest argues that Section 18.3.1 of the ICA, which allows either party to  
7 request an audit of the other party's compliance with the ICA's requirements concerning limitations on  
8 distribution, maintenance, and use of proprietary or other protected information, gives Eschelon  
9 adequate protection and recourse if it believes that Qwest has misused confidential information.<sup>36</sup>

10 **Resolution**

11 There is no evidence that Qwest is disregarding its obligations with respect to confidential  
12 information. However, we agree with Eschelon, the burden of sending a copy of an executed  
13 confidentiality agreement to the other party after it has been signed should not be overly burdensome.  
14 We do not find Qwest's generalized claim of burden persuasive, however, to accommodate  
15 administrative needs, additional time to return the executed agreement is reasonable. Consequently,  
16 we modify Eschelon's proposed language for Section 5.16.9.1 to increase the time to return the non-  
17 disclosure agreement to thirty days.

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

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

20 **Eschelon's Position**

21 When a call originates on the Eschelon network and then travels across the Qwest network to  
22 be terminated on the network of a third carrier, Qwest acts as the transit provider and bills Eschelon  
23 for that service. Eschelon's proposed language would require Qwest to provide Eschelon with sample  
24 records for specific offices no more frequently than once every six months, at no charge, in order to  
25 allow Eschelon to verify Qwest's transit bills. Eschelon states, that contrary to Qwest's claim,  
26 Eschelon's switch provides Eschelon with information regarding its originating portion of the call, but  
27 does not provide the information that Eschelon needs to reconcile the information provided by its

28 <sup>36</sup> Qwest Brief at 18.

1 switch to Qwest's charges for transiting the traffic.

2 Eschelon wants to include the following provisions:

3  
4 7.6.3.1 In order to verify Qwest's bills to CLEC for Transit Traffic the  
5 billed party may request sample 11-01-XX records for specified offices.  
6 These records will be provided by the transit provider in EMI mechanized  
7 format to the billed party at no charge, because the records will not be  
8 used to bill a Carrier. The billed party will limit requests for sample 11-  
9 01-XX data to a maximum of once every six months, provided that Billing  
10 is accurate.

11 7.6.4 Qwest will provide the non-transit provider, upon request, bill  
12 validation detail including but not limited to: originating and terminating  
13 CLLI code, originating and terminating Operating Company Number,  
14 originating and terminating state jurisdiction, number or minutes being  
15 billed, rate elements being billed, and rates applied to each minute.

### 11 Qwest's Position

12 Qwest opposes Eschelon's proposed language. Qwest states that in a complaint proceeding in  
13 Minnesota, Qwest negotiated a compromise solution for exchanging records when Qwest hands transit  
14 traffic to a terminating provider. Qwest states that in that preceding the parties recognized that the  
15 best source of information for determining the source of such calls was the originating switch. Qwest  
16 asserts that transit records are a poor substitute for such records because the purpose of a transit switch  
17 is to complete calls, with billing considerations being secondary. In this case, Qwest asserts, Eschelon  
18 is the originating provider, and its switch produces the best information with regard to traffic it sends  
19 to Qwest for termination with a third party. Qwest argues that requiring Qwest to provide Eschelon  
20 with detailed records and to do so without charge is unreasonable and an inefficient way to determine  
21 appropriate billing by Eschelon.

### 22 Resolution

23 Mr. Easton testified for Qwest that its monthly transit bills provide detail of transiting minutes  
24 by end office and provide the company code of the terminating carrier.<sup>37</sup> Mr. Easton claims that  
25 through a comparison with the recordings of its own switch, Eschelon can validate that Qwest  
26 transited these calls to the terminating carrier. In addition, he asserts that the terminating carrier is  
27

28 <sup>37</sup> Ex Q-6, Easton Rebuttal at 30.

1 billing Eschelon for termination, and Eschelon can compare the details of the termination bill with the  
2 Qwest transit bill to determine if there are inconsistencies. Mr. Easton states the Qwest category 11  
3 transit record product was designed to create records for terminating carriers, not originating carriers,  
4 and Qwest cannot without significant expense, provide category 11 records associated with the transit  
5 traffic originated by Eschelon. If the terminating party does not request the transit records, Qwest  
6 states that it does not create them. Moreover, Mr. Easton asserts, existing transit records do not  
7 contain all of the information Eschelon seeks.<sup>38</sup>

8 Eschelon's witness, Mr. Denny, testified that in order to validate the bills that Qwest provides  
9 to Eschelon as the originating carrier for transit traffic, Eschelon needs occasional access to a limited  
10 number of call records. Eschelon's proposed language would allow Eschelon to obtain these records  
11 for bill verification at no charge.<sup>39</sup> Mr. Denny testifies that Qwest is billing Eschelon for the transit  
12 traffic but is not providing call detail information necessary to justify the bills.<sup>40</sup> He asserts that to  
13 verify Qwest's bills, Eschelon needs to be able to reconcile the originating call information collected  
14 by Eschelon's switch with the call records Qwest used to generate its transit bill.<sup>41</sup> Mr. Denney  
15 argues that Eschelon should not be required to pay to receive details behind the bills Qwest provides to  
16 Eschelon, and further, that Eschelon's proposed language makes clear that Qwest will provide the  
17 records on a limited basis, only for the purpose of bill verification as part of the category 11 records.

18 Neither party directly and completely responds to all of the arguments of the other, and often  
19 the parties' testimony appears to talk past each other giving the impression there is either a  
20 misunderstanding or attempt to obfuscate the real issue. Eschelon does not respond to Qwest's claim  
21 that the existing records are designed for termination carriers and do not contain the information that  
22 Eschelon wants here, or that Qwest may have to incur substantial costs to provide the information.  
23 Qwest does not fully respond to Eschelon's claim that if it can generate a summary report why it  
24 cannot provide the underlying records. Based on this record it is impossible to accept either party's  
25 position.

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26  
27 <sup>38</sup> *Id.* at 30-31.

<sup>39</sup> Ex E-13, Denney Direct at 99.

<sup>40</sup> Ex E-15, Denney Rebuttal at 55.

28 <sup>41</sup> *Id.*

1 We find that if the information that Eschelon wants exists, then Qwest should provide it for  
2 those sample end offices so that Eschelon can verify its bills from Qwest. If Qwest is able to produce a  
3 summary bill, there must be call details that were used to produce that report, and Qwest should  
4 provide these call records to Eschelon so that Eschelon can verify its bills from Qwest. Qwest states  
5 that upon request, it provides record detail to terminating carriers. We cannot determine from the  
6 record before us whether the records similar to those provided to the terminating carriers for billing  
7 purposes would provide Eschelon with the information it wants, or whether Qwest's records provide  
8 all the information required under Eschelon's proposed Section 7.6.4. It is reasonable that if the  
9 information exists Qwest should provide it to Eschelon. If the individual call records do not contain  
10 the information Eschelon seeks, we are not requiring Qwest to provide more information than the  
11 records currently contain. Eschelon has not convinced us that the benefits it would receive from the  
12 requested information would justify the potential costs to Qwest of having to perform significant  
13 programming changes to provide additional information that it does not currently gather. Producing  
14 these reports on a limited basis should not be overly burdensome, however, and we agree with  
15 Eschelon that it should be provided at no additional charge.

16 Consequently, we adopt Eschelon's proposed language for Section 7.6.3.1. We find, however,  
17 that Eschelon's proposed Section 7.6.4 creates confusion as to what records Qwest must provide and  
18 we cannot reconcile it with our intent Qwest not have to provide more information than the records  
19 currently contain. Thus, we do not accept Eschelon's proposed Section 7.6.4.

20 **Issues 8-21 and 8-21(a)-(f): DC Power**

21 These issues involved how Qwest will charge Eschelon for provisioning power to Eschelon's  
22 collocation equipment. The parties resolved these issues subsequent to the arbitration and closing  
23 briefs by agreeing to language to be included in Sections 8.2.1.29 and 8.3.1.6 (and subparts) of the  
24 ICA. In their submitted language, the parties reserve the right to advocate for changes in the rates and  
25 the application of the rates in another Commission docket, such as a cost docket. The proposed  
26 settlement language is a reasonable resolution of the issues raised concerning DC Power, and will be  
27 adopted as part of this Order.

28 ...

1 **Issue 9-31: Access to Unbundled Network Elements**

2 **Eschelon's Position**

3 Eschelon states that under the 1996 Act, Qwest is required to provide "nondiscriminatory  
4 access to network elements on an unbundled basis at any technically feasible point on rates, terms and  
5 conditions that are just, reasonable and nondiscriminatory."<sup>42</sup> Access to an unbundled element "refers  
6 to the means by which requesting carriers obtain an element's functionality in order to provide a  
7 telecommunications service."<sup>43</sup> Eschelon proposes language that would confirm that "Access to  
8 Unbundled Network Elements includes moving, adding to, repairing or changing the UNE." Eschelon  
9 states it proposed this provision as a result of Qwest's attempts to apply non-cost-based tariff rates to  
10 activities that are necessary for Eschelon to be able to obtain the functionality of network elements.

11 Eschelon argues that Qwest's proposed language that would replace "Access to" with  
12 "Activities available for Unbundled Network Elements, includes moving, adding to, repairing and  
13 changing the UNE . . ." would take these activities outside the scope of Section 251(c)(3). Further, by  
14 adding language that Qwest will perform these activities "at the applicable rate," Eschelon asserts  
15 Qwest is disavowing its obligations to provide access to UNEs at TELRIC-based rates. Eschelon  
16 argues that despite other language in Section 9.1.2 of the ICA that requires non-discriminatory access  
17 to unbundled elements, Qwest's refusal to acknowledge that "access to UNEs" includes "moving,  
18 adding to, repairing and changing" UNEs indicates that the general prescriptive language is not  
19 sufficient.

20 **Qwest's Position**

21 Qwest argues that language in Section 9.1.2 of the ICA gives Eschelon nondiscriminatory  
22 access to unbundled network elements. Agreed language in Section 9.1.2 provides:

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

26 Qwest states Section 9.1.2 is explicit that the UNEs and access Eschelon receives will be equal to the

27 <sup>42</sup> 47 USC § 251(c)(3).

28 <sup>43</sup> *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 13042 (1996) ("*First Report and Order*") at ¶ 269.

1 UNEs and access Qwest provides to itself and its affiliates:

2           Where Technically Feasible, the access and Unbundled Network Element  
3           provided by Qwest will be provided in 'substantially the same time and  
4           manner' to that which Qwest provides to itself or to its Affiliates.

5 Further, Qwest states agreed language in Section 9.1.2 provides that Eschelon is entitled to the  
6 "routine network modifications" that Qwest provides to its own retail customers:

7           Qwest shall perform for [Eschelon] those Routine Network Modifications  
8           that Qwest performs for its own End User Customers. The requirement  
9           for Qwest to modify its network on a nondiscriminatory basis is not  
10          limited to copper loops and applies to all unbundled transmission  
11          facilities, including Dark Fiber Transport when available pursuant to  
12          Section 9.7.

13          Qwest states that given the extensive provisions in the ICA ensuring nondiscriminatory access  
14          to UNEs, Qwest is skeptical that nondiscrimination is the motive behind Eschelon's proposed  
15          language. Qwest is concerned that Eschelon's proposed language that the recurring monthly rate it  
16          pays for UNEs (e.g. \$9.05 for a Zone 1 unbundled loop) entitles it to all of the listed activities at no  
17          additional charge. Qwest also argues the terms "moving," "adding to" and "changing" are undefined  
18          and vague. Qwest asserts that the Eschelon witness who provided testimony in this area did not offer  
19          a definition of the terms, and was not willing to speculate about the activity potentially encompassed  
20          by the terms.<sup>44</sup> Qwest argues that if Eschelon's proposal is adopted, Qwest would be faced with the  
21          prospect of having to perform an unknown number of potential activities relating to Eschelon's use of  
22          UNEs without any additional compensation.<sup>45</sup>

23          Qwest proposes the following language, which Qwest asserts ensures that Qwest will perform  
24          the activities listed in Eschelon's proposal and recognizes and establishes that Eschelon may have to  
25          pay for those activities "at the applicable rate":

26                 Additional activities available for Unbundled Network Elements include  
27                 moving, adding to, repairing and changing the UNE (through, e.g. design  
28                 changes, maintenance of service including trouble isolation, additional  
29                 dispatches, and cancellation of orders) at the applicable rate.<sup>46</sup>

### 30 **Resolution**

31          The issues raised in this section are Eschelon's right of access to UNEs on a nondiscriminatory

32 <sup>44</sup> Tr at 268, line 25 to 269, line 16.

33 <sup>45</sup> Ex Q-17, Stewart Dir. at 16.

34 <sup>46</sup> Ex Q-18, Stewart Rebuttal, pp 16-17.

1 basis and, more contentiously, at what price. Eschelon is entitled to the functional equivalent of the  
 2 UNE at TELRIC rates. Qwest does not appear to disagree. Qwest is concerned that Eschelon's  
 3 proposed language would entitle Eschelon to request certain modifications to UNEs at no additional  
 4 charge for which Qwest would otherwise be entitled to additional compensation. Eschelon is  
 5 concerned that Qwest is going to charge tariffed rates, or non-cost based rates, for access to the UNE  
 6 which Eschelon is entitled to receive without additional charge.

7 We agree with Eschelon that access to UNEs can require Qwest to move, add to, repair or  
 8 change the UNE to provide access to a functionally equivalent network. However, we share some of  
 9 Qwest's concerns, as demonstrated by Eschelon's inability or unwillingness to define the terms, that  
 10 there is an element of ambiguity and vagueness to the proposed language. Eschelon asserts that the  
 11 language of ICA Section 5.1.6 offers Qwest comfort that it will be entitled to recover its costs, when  
 12 appropriate. Specifically, Section 5.1.6 provides "nothing in this Agreement shall prevent either Party  
 13 from seeking to recover the costs and expenses, if any, it may incur in (a) complying with and  
 14 implementing its obligations under this Agreement, the Act, and the rules, regulations and orders of  
 15 the FCC and the Commission . . . ."<sup>47</sup>

16 To some extent, the undisputed portion of Section 9.1.2 would appear to encompass Qwest's  
 17 obligation to provide access to UNEs. The undisputed portion of Section 9.1.2 provides as follows:

18 Qwest shall provide nondiscriminatory access to Unbundled Network  
 19 Elements on rates, terms and conditions that are non-discriminatory, just  
 20 and reasonable. The quality of an Unbundled Network Element Qwest  
 21 provides, as well as the access provided to that element . . . . Qwest shall  
 22 perform for CLEC those Routine Network Modifications that Qwest  
 23 performs for its own End User Customers. The requirement for Qwest to  
 24 modify its network on a nondiscriminatory basis is not limited to copper  
 25 loops and applies to all unbundled transmission facilities, including Dark  
 26 Fiber transport when available pursuant to Section 9.7. Where  
 27 Technically Feasible, the access and Unbundled Network Element  
 provided by Qwest will be provided in "substantially the same time and  
 manner" to that which Qwest provides to itself or to its Affiliates. In those  
 situations where Qwest does not provide access to Network Elements to  
 itself, Qwest will provide access in a manner that provides CLEC with a  
 meaningful opportunity to compete. For the period of time Qwest  
 provides access to CLEC to an Unbundled Network Element, CLEC shall  
 have exclusive use of the Network Element, except when the provisions

28 <sup>47</sup> Ex E-7, Starkey Rebuttal at 84.



1 herein indicate that a Network Element will be shared. Notwithstanding  
 2 the foregoing, Qwest shall provide access and UNEs at the service  
 3 performance levels set forth in Section 20. Notwithstanding specific  
 4 language in other sections of this Agreement, all provisions of this  
 Agreement regarding Unbundled Network Elements are subject to this  
 requirement. In addition, Qwest shall comply with all state wholesale  
 service quality requirements.

5 However, we find that access may require Qwest to move, add to, repair, and change the UNE  
 6 as it would for its own customers. In the *TRO*, the FCC stated:

7 . . . with the exception of constructing an altogether new local loop, we  
 8 find that requiring an incumbent LEC to modify an existing transmission  
 9 facility in the same manner it does so for its own customers provides  
 competitors access only to a functionally equivalent network, rather than  
 one of superior quality. Indeed, incumbent LECs routinely add a drop for  
 a second line without objection . . . . *TRO* ¶ 639.

10 In an attempt to balance Eschelon's concerns that access may require Qwest to move, add to, repair or  
 11 change a UNE at TELRIC prices, with Qwest's concerns that the terms can be vague and encompass  
 12 more than would otherwise be required to provide access, we adopt the following language in place of  
 13 the disputed sentence:

14 Access to Unbundled Network Elements includes moving, adding to,  
 15 repairing and changing the UNE (through, e.g. design changes,  
 16 maintenance of service including trouble isolation, additional dispatches  
 and cancellation of orders), in the same manner Qwest does for its own  
 End User Customers, itself or its affiliates.

17 We expect that if Qwest would otherwise be entitled to compensation for a "move," "addition,"  
 18 "repair," or "change," that is, the request would constitute more than Qwest is obligated to perform to  
 19 provide access to the UNE, Qwest would seek compensation pursuant to Section 5.1.6, as Eschelon  
 20 appears to acknowledge would be appropriate. If there is a dispute the Parties are free to pursue all  
 21 available dispute resolution procedures.

22 **Issues 9-33, 9-34, 9-35 and 9-36: network maintenance and modernization**

23 **Eschelon's Position**

24 **Issue 9-33**

25 The Parties agree that Qwest may need to make changes to, or modernize, its network, which  
 26 changes may result in "minor changes to transmission parameters." Eschelon states that it has  
 27 proposed language for ICA Section 9.1.9 that confirms that such changes will not adversely affect  
 28 service to end user customers. Eschelon proposed three alternatives in an attempt to address Qwest's

1 concerns. In the third alternative, which was adopted in the Minnesota proceeding, Eschelon  
2 proposes:

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

8 Thus, Eschelon explains if Qwest's changes cause unacceptable degradation to Eschelon's end user  
9 customer's voice or data service, Qwest would be required to assist Eschelon in identifying the  
10 problem and taking corrective action to restore service to an acceptable level of quality. Eschelon  
11 argues that its proposed language does not prohibit Qwest from making changes to its network and  
12 does not define a consequence if a network change causes an unacceptable change in the transmission  
13 of voice or data, but only requires that in the event of an unacceptable change, Qwest take necessary  
14 corrective action.

15 Eschelon notes that FCC rules do not rely totally on industry standards, but rather recognize  
16 that the goal is to provide access to the local loop. Thus, 47 CFR § 51.319(a)(8) provides, in part, that,  
17 "An incumbent LEC shall not engineer the transmission capabilities of its network in a manner, or  
18 engage in any policy, practice, or procedure, that disrupts or degrades access to the local loop."  
19 Eschelon states that its proposed language "is designed to address situations where a change might  
20 result in a change to transmission parameters that, although meeting applicable standards, might still  
21 have an adverse impact on the service that Eschelon is able to provide to its customer."<sup>48</sup> In its  
22 testimony, Eschelon recounted a situation where Qwest had adjusted its network within industry  
23 standards, but which caused Eschelon customers to receive circuits that did not work.<sup>49</sup> Eschelon  
24 asserts its proposed language would not prohibit such changes, but rather if the change resulted in a  
25 problem, would require Qwest to help remedy the problem.

#### 26 **Issue 9-34**

27 Section 9.1.9 also refers to obligations arising under the FCC's rules with respect to notice of  
28 network changes. Eschelon states that it has proposed language that would require that when a change

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<sup>48</sup> Eschelon Brief at 81.

<sup>49</sup> Ex E-9, Webber Direct at 16.

1 is specific to an end user customer, information regarding the location where a change will occur must  
 2 include circuit identification and customer address information. Eschelon asserts this language is  
 3 consistent with FCC rules which provide a list of items which a public notice concerning planned  
 4 network changes must include. Part (a)(4) of § 51.327 states that the list must include “the location at  
 5 which the changes will occur.” Further, Eschelon argues the term “location,” as used in the rule, must  
 6 be considered in the context of 47 CFR § 51.327 which states that the public notice must include  
 7 notice regarding any changes that “will affect a competing service provider’s performance or ability to  
 8 provide service.” Eschelon asserts with circuit ID and customer address information, Eschelon can  
 9 cross reference its records to determine which customers Qwest’s network change will affect, so that it  
 10 can provide those customers with information and assist them as necessary.

11 Eschelon refutes Qwest’s claims that Eschelon’s proposed language would be too burdensome,  
 12 by requiring it to “provide to Eschelon a list of every Eschelon customer address and circuit that is  
 13 used by Eschelon to serve its customers for an entire exchange and for each exchange which Qwest  
 14 plans to upgrade its switch software;” and that the burden would be even greater if Qwest were to  
 15 modify its dialing plan, because such modification would have a LATA-wide effect.<sup>50</sup> Eschelon  
 16 argues that its testimony makes clear that the requirement to provide circuit identification and  
 17 customer address information applies only to changes that are specific to an end user, and would not  
 18 apply to switch upgrades and dialing plans because neither of these is specific to any particular end  
 19 user. After the Minnesota proceeding, Eschelon proposed the following language concerning notice of  
 20 network changes:

21 . . . . Such notices will contain the location(s) at which the changes will  
 22 occur including, if the changes are specific to an End User Customer, the  
 23 circuit identification and End User Customer address information, and any  
 24 other information required by the applicable FCC rules.

25 Eschelon notes that in Section 9.2.1.2.3 of the ICA, concerning notices of copper retirement,  
 26 Qwest has agreed to language that notices will be posted on Qwest’s website and will provide direct  
 27 notice to Eschelon when any planned replacement of copper with fiber “when CLEC or its End User  
 28 Customers will be affected.” Eschelon argues this language shows that Qwest can distinguish between

<sup>50</sup> Ex Q-17, Stewart Direct at 31.

1 changes that will affect Eschelon's End User Customers and those that will not.

2 **Qwest's Position**

3 **Issue 9-33**

4 Qwest asserts it is essential for Qwest to have the ability to maintain and modernize its network  
5 without unnecessary interference and restriction. Qwest states it is inevitable that its maintenance and  
6 modernization of the network will sometimes have an effect on interconnected CLECs. Qwest notes  
7 that Congress and the FCC have recognized that as technologies evolve, an ILEC must be able to  
8 modify its network, and thus Section 251(c)(5) of the 1996 Act, and 47 CFR § 51.325 of FCC rules,  
9 implicitly authorize changes that may "affect the interoperability of . . . facilities and networks" and  
10 impose a notice requirement relating to these changes. Qwest asserts that through its proposed  
11 language, its intent is to preserve its ability to maintain and modernize its network without undue  
12 interference while ensuring that Eschelon continues to receive the UNE transmission quality to which  
13 it is entitled. Qwest asserts the agreed upon portion of Section 9.1.9 ensures that Eschelon will receive  
14 notice of network activities that is consistent with the FCC's rules relating to network changes. Thus,  
15 Qwest objects to Eschelon's proposed language.<sup>51</sup> In addition, Qwest notes that in Section 9.1.9.1 it  
16 has agreed that in the event of an emergency maintenance or modernization activity, it will notify  
17 Eschelon of the activity by e-mail within three business days of completing the activity, and that  
18 Qwest will provide its repair centers with information relating to the status of network emergencies  
19 relating to modernization and maintenance activities to the same extent Qwest provides such  
20 information for its own customers. Furthermore, in Section 9.1.9.1 Qwest agrees that it will not assess  
21 charges for dispatches that are required as a result of network emergencies arising from Qwest's  
22 network maintenance and modernization.

23 Qwest argues that Eschelon's proposed language is vague and unnecessary and would  
24 improperly expose Qwest to open-ended risk when it maintains and modernizes its network. Qwest  
25 states that its fundamental objection to Eschelon's "no adverse effect" proposal is that it is not tied to  
26 any industry standard and therefore would leave Qwest guessing as to whether a network change is  
27

28 <sup>51</sup> See Joint Matrix at 46-52, for full text of the provision.

1 permitted or prohibited. Qwest states the concept “adverse effect” is not defined in the ICA, and if  
2 allowed, would create a purely subjective notion that could block a network upgrade that Eschelon, or  
3 its end user, does not like.

4 Qwest argues that Eschelon’s language is flawed because it is so broad that it does not even  
5 reflect Eschelon’s intent. Qwest notes that Eschelon’s witness testified that the intent of the proposal is  
6 to avoid situations where a change would cause a service to “stop working,”<sup>52</sup> but that the use of  
7 “adverse effect” encompasses far more situations than where a service “stops working.”

8 Qwest argues that the ambiguity of Eschelon’s proposal could have a chilling effect on  
9 Qwest’s modernization of its network, as Qwest would perform network changes at the risk of  
10 violating the ICA. In addition, Qwest argues that Eschelon’s proposal improperly focuses on the  
11 service that Eschelon provides to its end user customers, while the proper focus should be on the  
12 service that Qwest provides to Eschelon. According to Qwest, it is this latter relationship which is  
13 governed by the American National Standards Institute (“ANSI”) and other industry standards.

14 Qwest argues that the alternative language adopted in the Minnesota proceeding, and which  
15 Eschelon promotes here, has similar flaws to the primary alternative. Specifically, Qwest argues  
16 references to “unacceptable changes” is vague as “unacceptable” is not defined or tied to any  
17 measurable industry standard. Similarly, the provision would require Qwest to restore transmission  
18 quality to “an acceptable level” but does not define “acceptable” or tie it to any industry standard.  
19 Thus, Qwest argues it would have no meaningful way to know whether a change to its network is  
20 permitted under the ICA, or what specific corrective steps to take in response.

21 **Issue 9-34**

22 Qwest states that it is committing to provide notices that meet the requirements of the FCC’s  
23 rule relating to notice of network changes as set forth in 47 CFR § 51.327. Qwest states that consistent  
24 with this rule, Qwest’s notices will include:

- 25 (1) The carrier’s name and address;
- 26 (2) The name and telephone number of a contact person who can supply  
27 additional information regarding the planned changes;

28 <sup>52</sup> TR at 327, line 19, to p. 328, line 1.

- 1 (3) The implementation date of the planned changes;
- 2 (4) The location(s) at which the changes will occur;
- 3 (5) A description of the type of changes planned (Information provided to
- 4 satisfy this requirement must include, as applicable, but is not limited
- 5 to, references to technical specifications, protocols, and standards
- 6 regarding transmission, signaling, routing, and facility assignment as
- 7 well as references to technical standards that would be applicable to
- 8 any new technologies or equipment, or that may otherwise affect
- 9 interconnection); and
- 10 (6) A description of the reasonably foreseeable impact of the planned
- 11 changes.

12 Qwest states there is no requirement in FCC Rule 51.327 or in any other FCC rule for ILECs to  
13 provide the additional information Eschelon seeks in notices of network changes. Qwest argues that  
14 Eschelon's proposal would improperly require Qwest to identify each and every Eschelon end user  
15 customer address and associated customer circuit(s) when it makes a network change. Qwest objects  
16 to having to provide this information regardless of whether the change would actually have a  
17 noticeable impact on either Eschelon or its end user customers. Qwest asserts it would impose a  
18 significant burden on it, since it does not have electronic access to this information and would  
19 therefore have to conduct extensive, time-consuming manual searches for each notice of a network  
20 change.

21 Qwest asserts that the magnitude of the burden is demonstrated by the example of Qwest's  
22 relatively common practice of upgrading software used with switches. Qwest states that although  
23 these upgrades typically do not have a noticeable effect on CLEC end user customers, Eschelon's  
24 proposed language would nevertheless require Qwest to provide the address and circuit ID for every  
25 Eschelon end user customer within the entire exchange in which an upgrade takes place. Qwest states  
26 the information would not serve any useful purpose, but would require Qwest to engage in time-  
27 consuming manual searches. Qwest states the burden on Qwest would be even greater for network  
28 changes involving modifications to dialing plans (i.e. number of digits dialed), since those changes  
typically span an entire LATA. Qwest argues that since Eschelon fails to define "End-User Customer  
specific", the provision could be interpreted as applying to any change that affects any End-User  
Customer. Qwest states that if Eschelon's intent is to limit its proposed notice requirement to network  
changes that take place at a specific identified customer premise, it should modify its language to

1 make that intent clear.

2 Qwest claims that with the information concerning the locations of network changes that  
3 Qwest routinely provides in its notices, Eschelon can readily identify its customers who may be  
4 affected by a network change and obtain their addresses and circuit IDs. Qwest believes that even  
5 Eschelon's final alternative, although an improvement, still improperly shifts the burden of  
6 determining circuit IDs from Eschelon to Qwest.

7 Finally, Qwest argues that the Eschelon proposal is inconsistent with the Commission's  
8 Decision in the Qwest-Covad arbitration concerning notices of network changes. Qwest states that in  
9 that arbitration, the Commission rejected Covad's demand that Qwest should provide CLEC customer  
10 addresses in notices relating to Qwest's retirement of copper loops.<sup>53</sup> Qwest argues its obligation is  
11 not to provide Eschelon with the addresses of its customers that could be affected by network changes,  
12 but to provide Eschelon with sufficient information about where a network change is taking place so  
13 that Eschelon, not Qwest, can identify the addresses of any of its customers that could be affected by  
14 the change.

15 **Resolution**

16 We believe that if a network change causes an Eschelon end user to suffer loss of service or  
17 impairment in the quality of service, it is reasonable that Qwest should assist Eschelon in determining  
18 a resolution. Because Qwest would be responsible for making the network modifications, Qwest  
19 would likely have the best information on the cause of a problem and how to rectify it. The evidence  
20 presented in the arbitration indicates that while network modifications may cause problems for  
21 Eschelon end users, the number of instances has not been substantial. Consequently, we will adopt  
22 Eschelon's alternative proposal, with some modification in an attempt to address Qwest's concerns  
23 concerning ambiguity. We acknowledge that the language does not eliminate the potential for future  
24 disputes, but fairness dictates that Qwest assist in restoring an end user's functionality in the event a  
25 network modification caused a degradation of service. Thus, we adopt the following language for  
26 Section 9.1.9 in resolution of Issue 9-33:

27  
28 <sup>53</sup> See Decision No. 68440 at 11 (February 2, 2006).

1  
2 If such changes result in the CLEC's End User Customer experiencing a  
3 degradation in the transmission quality of voice or data, such that CLEC's  
4 End User Customer loses functionality or suffers material impairment,  
5 Qwest will assist the CLEC in determining the source and will take the  
6 necessary corrective action to restore the transmission quality to an  
7 acceptable level if it was caused by the network changes.

8 With respect to Issue 9-34 regarding providing notice of network changes, we find that  
9 Qwest's proposed notices of network changes would provide sufficient information to Eschelon to  
10 allow Eschelon to determine the address and circuit ID of Eschelon's affected end users. Qwest may  
11 or may not have easy access to the information Eschelon seeks, but we find Eschelon's proposal would  
12 unnecessarily, and without good reason, shift responsibility from Eschelon to Qwest.

13 **Issues 9-37 – 9-42: Unimpaired Wire Centers**

14 On June 14, 2007, in Docket Nos. T-03632A-06-0091, T-03226A-06-0091, T-04202A-06-  
15 0091, T-03406-06-0091, T-03432A-06-0091, and T-01051B-06-0091, Qwest and Eschelon, along  
16 with several other CLECs, filed a proposed settlement agreement that would resolve issues related to  
17 the designation of Qwest wire centers as unimpaired. The Commission held a hearing on the  
18 settlement agreement on October 30, 2007. In the settlement agreement, Qwest and Eschelon agree on  
19 contract language which if approved by the Commission, would be incorporated in the ICA that is the  
20 subject of this arbitration. In the current docket, Qwest and Eschelon propose that if the settlement  
21 agreement is approved, that the Commission approve a single compliance filing of the ICA to  
22 implement both the Commission's order in this arbitration proceeding and the resolution of the wire  
23 center issues. If the settlement agreement is not approved in the wire center dockets, then Qwest and  
24 Eschelon request a modification of the arbitration schedule to allow two rounds of supplemental  
25 testimony and a round of briefing for the open wire center issues.

26 The parties' proposal is reasonable. The settlement agreement presents a resolution of the wire  
27 center issues for a number of larger CLECs and it makes sense to have a universal resolution of those  
28 issues. If the wire center settlement is approved, it is appropriate to include the relevant language in  
Eschelon's ICA with Qwest. If the settlement agreement is not approved, then the current arbitration  
would need to be re-opened for additional testimony and argument in order to resolve the issues  
related to wire centers that had been raised in the Petition. In any case, for a complete ICA, it would



1 be most efficient for the parties to make only one compliance filing, which would include whatever  
2 language is ultimately approved concerning wire centers.

3 **Issue 9-43: UNE Conversions and Circuit ID**

4 **Eschelon's Position**

5 Eschelon proposes, and Qwest opposes, the following language for Section 9.1.15.2 and 9.1.15.3:

6  
7 9.1.15.2.3 The circuit identification ("circuit ID") will not change.  
After the conversion, the Qwest alternative service arrangement will have  
8 the same circuit ID as formerly assigned to the high capacity UNE.

9 9.1.15.3 If Qwest converts a facility to an analogous or alternative  
service arrangement pursuant to Section 9.1.15, the conversion will be in  
10 the manner of a price change on the existing records and not a physical  
conversion. Qwest will re-price the facility by application of a new rate.

11 9.1.15.3.1 Qwest may perform the re-pricing through use of an  
"adder" or "surcharge" used for Billing the difference between the  
12 previous UNE rate and the new rate for the analogous or alternative  
service arrangement, much as Qwest currently does to take advantage of  
13 the annual price increases in its commercial Qwest Platform Plus product.

14 9.1.15.3.1.1 Qwest may add a new Universal Service Ordering Code  
("USOC") for this purpose and assign the "adder" or "surcharge" rate to  
15 that USOC.

16 9.1.15.3.1.2 For any facility converted to an analogous or alternative  
service arrangement pursuant to Section 9.1.15.3, Qwest will either use the  
17 same USOC or the USOB will be deemed to be the same as the USOC for  
the analogous or alternative service arrangement for pricing purposes,  
18 such as for the purpose of calculating volumes and discounts for a regional  
commitment plan.

19  
20 Eschelon objects to Qwest's position, that in converting a UNE to a non-UNE, it must change  
21 the circuit ID. Eschelon argues there is no legal or engineering need to change the ID in the  
conversion and that Qwest has needlessly created a complex and cumbersome process that is contrary  
22 to FCC policy.

23  
24 By way of background, in the Triennial Review Order ("*TRO*")<sup>54</sup> and Triennial Review  
Remand Order ("*TRRO*")<sup>55</sup>, the FCC declared that circuits that were formerly available as UNEs are

26 <sup>54</sup> *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16878 (2003),  
aff'd in part and rev'd and vacated in part, *United States Telecom Association v FCC*, 359 F.3d 554 (D.C. Cir. 2004) (USTA  
27 II).

28 <sup>55</sup> *In the Matter of Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of  
Incumbent Local Exchange Carriers*, (Order on Remand) FCC 04-290 (WC Docket No. 04-313 and CO Docket No. 01-  
338 released February 4, 2005).

1 no longer UNEs, and thus, it is necessary to “convert” those circuits from UNEs to non-UNEs. The  
 2 FCC has not adopted rules that provide a specific process for conversions, but Eschelon states the FCC  
 3 envisioned a process under which the parties would negotiate in good faith to develop a process for  
 4 converting circuits.<sup>56</sup> Eschelon states that the FCC provided guidance on the issue, directing that  
 5 conversion should be a “seamless process that does not affect the customer’s perception of service  
 6 quality”,<sup>57</sup> and described conversions as “largely a billing function.”<sup>58</sup> To prevent discriminatory  
 7 practices, the FCC has prohibited ILECs from imposing “wasteful and unnecessary charges, such as  
 8 termination charges, re-connect and disconnect fees, or non-recurring charges associated with  
 9 establishing a service for the first time.”<sup>59</sup>

10 Eschelon asserts that Qwest acknowledges that the circuit uses the same physical facilities after  
 11 conversion as before, and that the conversion does not involve making any physical changes to the  
 12 circuit. Eschelon claims the process that Qwest undertakes to convert a circuit involves a purely  
 13 paperwork “disconnection” and “re-connection,” which involves exactly the kinds of activities for  
 14 which the FCC has made clear CLECs cannot be charged.

15 Eschelon states that in order to give effect to the FCC’s directives concerning conversions and  
 16 to assure that Eschelon end users are not adversely affected by the conversion, Eschelon has proposed  
 17 language that: 1) provides that the circuit ID will not change as a result of the conversion; and 2)  
 18 provides for the conversions to be handled as a price change rather than a physical conversion.

19 Eschelon complains that Qwest has created a process for conversion that involves personnel in  
 20 three different functional areas, multiple databases and systems, orders to “disconnect” and “connect”  
 21 service and that requires “reviewing” and “confirming” and “assuring” and “verifying” and  
 22 “validating.” Eschelon states that Qwest created its process outside the CMP, without CLEC input and  
 23 without the approval of any state commission. Eschelon asserts that Qwest acknowledges that its  
 24 elaborate process would not be necessary if Qwest did not change the circuit ID as part of the  
 25 conversion. Eschelon claims the “need” to change the circuit ID is not supported as a matter of law or

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26  
 27 <sup>56</sup> See *TRO* ¶585.

<sup>57</sup> *Id.* at ¶586.

<sup>58</sup> *Id.* at ¶588.

<sup>59</sup> *Id.* at ¶587.

1 fact. Eschelon asserts that it is undisputed that when Qwest began converting special access circuits to  
2 UNEs, the circuit IDs did not change. Eschelon argues that Qwest's claims that it abandoned the  
3 practice because it was "experiencing difficulty in managing the large number of circuits" and  
4 "incurring a substantial amount of expense," is not supported with detail or evidence of the alleged  
5 "difficulties." Eschelon argues the Commission must weigh the lack of demonstrable need to change  
6 the circuit ID against the real potential for harm that such changes cause. Eschelon states that a simple  
7 typing error could result in a customer being placed out of service, and if both Eschelon's and Qwest's  
8 systems are not timely and accurately updated to reflect the new circuit IDs there will likely be  
9 problems identifying the correct circuit if it would need repair or maintenance. Thus, Eschelon argues,  
10 its proposal will prevent service interruptions and promote quality of service.

#### 11 **Qwest's Position**

12 In the *TRRO*, the FCC established that in wire centers in which CLECs are not "impaired," as  
13 defined in Section 251, Qwest is no longer required to provide access to DS1 or DS3 UNE loops, or  
14 DS1 or DS3 inter-office transport. Qwest argues that to the extent that Qwest incurs costs to facilitate  
15 the CLEC's conversion from a UNE to a private line service, Qwest should be entitled to assess an  
16 appropriate charge. Qwest proposes to charge Eschelon \$40.32 for converting UNE loops to private  
17 line circuits and \$126.14 for converting unbundled dedicated interoffice transport ("UDIT") to private  
18 line circuits based on the rates contained in other CLECs' ICAs.

19 Qwest argues that contrary to Eschelon's claims, the conversion of a UNE to a special private  
20 line circuit requires a variety of steps to assure that data for the converted circuit is accurately recorded  
21 in the appropriate systems. Qwest asserts that the conversion to private line facilities is not analogous  
22 to the conversion from UNE-P to Qwest Platform Plus ("QPP") as Eschelon suggests. Qwest notes  
23 that DS1s and DS3s are only being converted to private line services in the wire centers that have been  
24 determined to be non-impaired, and that in all other wire centers, DS1s and DS3s will continue to be  
25 classified as UNEs. In the case of UNE-P, the loop portion of the product remains a UNE in all wire  
26 centers, while the switching and shared transport components of UNE-P are no longer UNEs. When  
27 Qwest was no longer required to provide UNE-P, Qwest created a new product, QPP, in order to  
28 replace UNE-P. Qwest states QPP is billed differently through the assignment of USOCs without

1 consideration for other system centers. Unlike with DS1s and DS3s, there is no circuit ID associated  
2 with the loop with the UNE-P or QPP services. As part of UNE-P, the QPP elements were already  
3 being billed out of the Customer Record Information System ("CRIS") billing system, and thus a  
4 change in USOC was all that was necessary to effectuate new rates. The way in which Qwest tracks  
5 the loop for purposes of repair and maintenance does not change as a result of the conversion from  
6 UNE-P to QPP. Thus, Qwest argues, Eschelon's comparison is not meaningful.<sup>60</sup>

7 Qwest asserts, however, that in the case of DS1 and DS3 UNEs, the character of the product  
8 offering changes after conversion and both products (UNE and private line) are identified by circuit  
9 IDs. DS1s and DS3s are available as UNEs at TELRIC rates only to CLECs, in wire centers that  
10 continue to be identified as "impaired". In order to charge a rate for the DS1 and DS3 services in the  
11 non-impaired wire centers at something other than TELRIC, as Qwest is entitled to do under the  
12 FCC's *TRRO* decision, Qwest states that it must re-classify them as something other than UNEs. In  
13 converting the UNE product to a tariffed private line product, Qwest states that it must change the  
14 circuit ID in order to properly track the differently-classified products in the appropriate systems.  
15 Qwest asserts that because of the change in the nature of the circuits from UNE products to private  
16 line services, and because these circuits are billed, inventoried and maintained differently in Qwest's  
17 systems, Qwest must process them as an "order-out" and an "order-in" and thus change the circuit  
18 identifiers to move them from one product category to another. According to Qwest, the products are  
19 distinguishable from each other, by price and classification, as well as by the customers to whom they  
20 are available and by the different ordering, maintenance and repair processes they employ. Qwest  
21 explains that circuit IDs identify, among other things, whether a circuit is a UNE or private line, what  
22 type of testing parameters apply, and which maintenance and repair center is responsible for that  
23 circuit.<sup>61</sup>

24 Qwest asserts that the use of appropriate and distinct circuit IDs for UNEs and tariffed products  
25 is essential for Qwest to comply with the FCC rules that require carriers to maintain accurate records  
26  
27

28 <sup>60</sup> Ex Q-14 Million Direct at 22-23.

<sup>61</sup> Ex Q-16, Million Surrebuttal at 10-11.

1 that track inventories of circuits.<sup>62</sup> Qwest states it must be able to distinguish for purposes of tracking  
 2 and reporting its UNE products separately from its other products, and it does this through the use of  
 3 circuit IDs and other appropriate codes. Qwest argues it is able to maintain, track and service all of its  
 4 customers better and more efficiently if it is able to identify accurately the types of services and  
 5 facilities it is providing to these respective categories of customers.

6 **Resolution**

7 Eschelon argues that because the physical facility does not change during a conversion from a  
 8 non-UNE to a UNE, there is no reason for the circuit ID to change. Qwest states, however, that the  
 9 circuit ID identifies the type of facility, and is important in tracking inventories and complying with  
 10 Qwest's reporting obligations. Because DS1s and DS3s can be UNEs in those wire centers that are  
 11 considered to be "impaired," Qwest needs to change the circuit ID to distinguish the UNEs from the  
 12 non-UNEs from what is essentially the same type of facility.

13 It is uncertain how many conversions will occur in the future. As wire centers are determined  
 14 to be "unimpaired" CLECs will be making the decision on how they will continue to provide service  
 15 to their end customers in those wire centers. Qwest stated that in over 500 conversions to private line  
 16 services, it is not aware of any complaints from CLECs that their customers' service was disrupted by  
 17 the conversion process.<sup>63</sup> Eschelon cites the potential dangers from changing the circuit IDs,<sup>64</sup> but  
 18 does not claim that Eschelon end users have actually suffered from the conversion process or change  
 19 in circuit ID to date. Without more concrete evidence of service quality issues arising from the change  
 20 in circuit IDs, we find that Eschelon has not demonstrated that Qwest's process for conversion is  
 21 unreasonably burdensome.

22 We find that Qwest has demonstrated a legitimate and reasonable reason to change the circuit  
 23 ID during conversion from a UNE to a non-UNE. We do not have a sufficient record in this case to  
 24 evaluate the reasonableness of Eschelon's approach to employ an "adder." Such pricing decision is

25 <sup>62</sup> According to Qwest, the circuit ID is an alpha/numeric identifier whose sequence of letters and numbers define the  
 26 characteristics of a particular circuit and which indicates attributes of the circuit, such as the LATA and jurisdiction, as well  
 27 as the type of circuit, service code and service modifiers. The circuit ID contains a serial number for the circuit to ensure  
 28 that no duplication occurs, and an identifier for the region in which the circuit is physically located. Ex Q14, Million Direct  
 at 15, n.5.

<sup>63</sup> Ex Q-14, Million Direct at 18.

<sup>64</sup> Ex E-6, Starkey Direct at 159.

1 best made in a separate rate docket.

2 We cannot adopt Eschelon's proposed language for Section 9.1.15. The evidence indicates  
3 that in the conversions made to date, Qwest has made the conversion "seamlessly" without disruption  
4 to the CLEC end user. Because Qwest does not make conversions affecting its own customers, the  
5 fact that it charges for the conversion does not of itself, indicate impermissible discrimination.

6 **Issue 9-51: Unbundled Dark Fiber (UDF) Termination Rate**

7 On July 18, 2007, the parties notified the Commission that they had resolved Issue No. 9-51  
8 and partially resolved Issue 22-90(f) (concerning rates). We accept their consensually negotiated  
9 language in resolution of this issue. The remaining unresolved issue concerning the nonrecurring  
10 charge for the ICDF Collocation for DS3 circuits, per two legs is addressed as part of Issue No. 22-  
11 90(f).

12 **Issue 9-53: Unbundled Customer Controlled Rearrangement Elements ("UCCRE")**

13 **Eschelon's Position**

14 Eschelon makes several alternative proposals affecting Qwest's offering of UCCRE and the  
15 procedure for Qwest to phase out offering a product:<sup>65</sup>

16 **9.9 Unbundled Customer Controlled Rearrangement Element**  
17 **(UCCRE)**

18 9.9.1 If Qwest provides or offers to provide UCCRE to any other  
19 CLEC during the term of this Agreement, Qwest will notify CLEC  
20 and offer CLEC an amendment to this Agreement that allows  
CLEC, at its option, to request UCCRE on nondiscriminatory  
terms and conditions.

21 **Proposal # 2:**

22 1.7.3 Phase out process. If Qwest desires to phase-out the  
23 provision of an element, service or functionality included in this  
24 agreement, it must first obtain an Order from the Commission  
25 approving its process for withdrawing the element, service or  
26 functionality. Obtaining such an Order will not be necessary if  
27 Qwest (1) promptly phases-out an element, service or functionality  
28 from the agreements of all CLECs in [insert applicable state]  
within a three-month period when the FCC has ordered that the  
element, service or functionality does not have to be ordered, or (2)  
follows a phase-out process ordered by the FCC.

<sup>65</sup> Underlined text is Eschelon-proposed language. Regular text is agreed language.

**Option # 1 for 9.3.3.8.3:**

9.3.3.8.3 If CLEC elects to move its service to the new minimum point of entry, CLEC will perform its own cross-connect. Qwest has previously performed this service, and will either obtain a phase-out order (pursuant to Section 1.7.3) from the Commission within four months of the effective date of this Agreement or perform this service if CLEC requests.

**Option # 2 for 9.3.3.8.3:**

9.3.3.8.3 If CLEC elects to move its service to the new minimum point of entry, CLEC may either perform its own cross-connect or request that Qwest perform the cross-connect. If Qwest performs the cross-connect appropriate time and material charges are applicable.

9.9.1 Qwest shall provide Unbundled Customer Controlled Rearrangement Element (UCCRE) to CLEC in a non-discriminatory manner according to the terms and conditions of Section 9.9 and subparts of the SGAT, unless Qwest obtains a phase-out order (pursuant to Section 1.7.3) from the Commission within four months from the effective date of this Agreement.

**Proposal # 3:**

1.7.3 If Qwest desires to phase out or otherwise cease offering on a wholesale basis (without first individually amending every interconnection agreement containing that term and updating the SGAT) an Interconnection service, access to Unbundled Network Elements (UNEs) Ancillary Services or Telecommunications Services available for resale, Qwest must request and obtain Commission approval, after CLEC and other potentially affected carriers are afforded reasonable notice and opportunity to be heard in a generic Commission proceeding. For example, if a product is generally available per the terms of the SGAT and is contained in the ICA's of other CLECs (but not CLEC), before refusing to make that product available to CLEC on the same terms on the basis that Qwest intends to cease offering the product (such as due to lack of demand), Qwest must either (1) amend the ICAs of those other CLECs and update the SGAT to remove the product; or (2) obtain Commission approval to cease offering the product on a wholesale basis. This provision is intended to help facilitate nondiscrimination by ensuring that Qwest cannot refuse to offer a product on the same terms to CLEC while that product is still contained in the ICAs of the CLECs or in the SGAT.

1.7.3.1 If the basis for Qwest's request is that Qwest is no longer required to provide the product or service pursuant to a legally binding modification or change of the Existing Rules, in the cases of conflict, the pertinent legal ruling and the terms of Section 2.2 of this Agreement govern notwithstanding anything in this Section 1.7.3.

1.7.3.2 This Section 1.7.3 is not intended to change the scope of any regulatory agency's authority with regard to Qwest or CLECs.

1 1.7.3.3 This Section 1.7.3 relates to the cessation of a product or  
 2 service offering on a wholesale basis as described in Section 1.7.3  
 3 (referred to as a “phase out” or as “cease offering”). Nothing in  
 4 this Section 1.7.3 prevents another CLEC and Qwest from  
mutually agreeing to remove a product from an individual ICA to  
which CLEC is not a party.

5 1.7.3.4 Before Qwest submits a request to phase out or cease  
 6 offering a product or service (as those terms are used in this  
 7 Section 1.7.3) pursuant to this Section 1.7.3, and while a request  
pursuant to the Section 1.7.3 is pending before the Commission,  
Qwest must continue to offer the product or service, unless the  
Commission orders otherwise.

8 1.7.3.4.1 If the Commission orders that Qwest need not offer  
 9 the product or service while the proceeding is pending, the  
 10 Commission may place such restrictions on that order as allowed  
 11 by its rules and authority, including a condition that if Qwest later  
 12 offers the product or service to any CLEC, it must then inform  
 13 CLECs of the availability of the product or service and offer it to  
 14 other CLECs on the same terms and conditions. If those terms and  
conditions are in this Agreement (but were not in effect due to the  
Commission order that Qwest need not offer the product or service  
while the proceeding is pending), once Qwest offers those to any  
other CLEC, Qwest must offer those terms to CLEC pursuant to  
those terms in this Agreement without amendment as well.

15 1.7.3.5 If the Commission approves the phase out or other  
 16 cessation of a product or service offering that is contained in this  
 17 Agreement, the product or service will no longer be available per  
 18 the terms of the Commission’s order without the need for an  
amendment to this Agreement, unless the Commission orders  
otherwise or the Parties agree to amend this Agreement. Qwest  
will amend its SGAT consistent with the Commission’s ruling,  
unless the Commission orders otherwise.

19 9.9.1 Qwest shall provide Unbundled Customer Controlled  
 20 Rearrangement Element (UCCRE) to CLEC in a non-  
 21 discriminatory manner according to the terms and conditions of  
 22 Section 9.9 and subparts of the SGAT, unless Qwest obtains an  
order from the Commission that it need not offer UCCRE to  
CLECs, such as an order pursuant to Section 1.7.3 of this  
Agreement.

23 **Proposal # 4:**

24 1.7.3 If Qwest desires to phase out or otherwise cease offering a  
 25 product, service, element, or functionality on a wholesale basis that  
 26 it has previously made available pursuant to Section 251 of the  
 27 Act. Qwest must first obtain an order from the Commission  
adopting a process for doing so. Once that process is in place  
Qwest may use that process as ordered by the Commission.

28 1.7.3.1 Unless and until a process is approved by the Commission  
as described in Section 1.7.3, Qwest must continue to offer such



1 products, services, elements, or functionalities on a  
 2 nondiscriminatory basis, such that Qwest may not refuse to make  
 3 an offering available to CLEC on the same terms as it is available  
 4 to other CLECs through their ICAs or the SGAT on the grounds  
 5 that Qwest, although it has not yet amended those arrangements,  
 6 indicates that it intends to cease offering that product (such as due  
 7 to the lack of demand). If the Commission does not adopt a  
 8 process as described in Section 1.7.3 or Qwest chooses not to use  
 9 that process, Qwest may cease a wholesale offering by promptly  
 10 amending all ICAs containing that offering to remove it.

11 Qwest shall provide Unbundled Customer Controlled  
 12 Rearrangement Element (UCCRE) in a non-discriminatory manner  
 13 according to the following terms and conditions.

### 14 **9.9.1 Description**

15 9.9.1.1 Unbundled Customer Controlled Rearrangement Element  
 16 (UCCRE) provides the means by which CLEC controls the  
 17 configuration of Unbundled Network Elements (UNEs) or  
 18 ancillary services on a near real time basis through a digital cross  
 19 connect device. UCCRE utilizes the Digital Cross-Connect  
 20 System (DCS). UCCRE is available in Qwest Wire Centers that  
 21 contain a DCS and such DCS is UCCRE compatible.

### 22 **9.9.2 Terms and Conditions**

23 9.9.2.1 DCS ports are DS1 And DS3 and Virtual Ports (Virtual  
 24 Ports are for connecting one end user to another). The DCS Port is  
 25 connected to the Demarcation Point using tie cables via the  
 26 appropriate DSX crossconnect panel. The DSX panel services  
 27 both as a "Design-To" point and a network interface at the DCS.  
 28 CLEC is responsible for designing to the "Design-To" point.  
CLEC may connect the UCCRE ports to its elements or CLEC  
designated equipment. If CLEC desires DS0 Port functionality,  
CLEC will order a DS1 UCCRE Port and provide its own  
multiplexer (or DS1 UDIT multiplexers) and connect them  
together. This combination will form the equivalent of 24 DS0-  
level ports.

9.9.2.2 The reconfiguration of the service is accomplished at the  
DS0 signal level. Reconfiguration of these services can be  
accomplished through two methods: Dial Up or Attendant Access.

9.9.2.2.1 Dial up Access. Qwest will provide access to mutually  
agreed upon UCCRE points in those offices where UCCRE is  
available. Qwest will provide and engineer this service in the same  
manner that it is currently provided to Qwest's End User  
Customers.

9.9.2.2.2 Attendant Access. When CLEC requests Qwest to make  
changes on its behalf, an attendant access charge will apply per  
transaction.

### **9.9.3 Rate elements**

9.9.3.1 Recurring rate elements include

9.9.3.1.1 DS1 Port;  
9.9.3.1.2 DS3 Port;  
9.9.3.1.3 Dial Up Access; and  
9.9.3.1.4 Attendant Access.  
9.9.3.2 Nonrecurring rate elements include:  
9.9.3.2.1 DS1 Port;  
9.9.3.2.2 DS3 Port; and  
9.9.3.2.3 Virtual Ports

#### **9.9.4 Ordering Process**

9.9.4.1 Ordering processes and installation intervals are specified in Exhibit C of this Agreement and are the same as specified in the UNE-UDIT Section. UCCRE is ordered via the ASR process.

9.9.4.2 UCCRE is ordered with the Basic Installation option. Qwest will begin the work activity on the negotiated Due Date and notify CLEC when the work activity is complete. Test results performed by Qwest are not provided to CLEC.

Eschelon argues that pursuant to its proposal, if there truly is no demand for a product, and withdrawal of the product is legitimate for that or other reasons, Qwest will have an opportunity to withdraw the product pursuant to Section 1.7.3. Eschelon argues that it is impermissible discrimination for Qwest to withdraw a product for one CLEC while still making it available to other CLECs.

Eschelon states that it is undisputed that Qwest makes UCCRE available to other CLECs, both pursuant to ICAs and to its SGAT. Eschelon asserts that its proposal only requires Qwest to make products available to it on the same terms and conditions as it makes those products available to other CLECs. According to Eschelon, if these provisions are not included in the ICA, other CLECs who have these products in their contracts will be able to order them and Eschelon will not; Eschelon argues such different treatment is precisely the sort of discrimination the 1996 Act was intended to prevent. Eschelon argues that when the FCC reversed the "pick and choose rule," it made clear that existing state and federal safeguards against discriminatory behavior would remain in effect. Furthermore, Eschelon argues, Qwest is obligated to provide the products and services pursuant to the terms of its SGAT, and even if Qwest claims the SGAT is "out dated," Qwest must provide products and services under the terms of the SGAT if a CLEC opts into the SGAT.

Eschelon claims that Qwest has expressed an intent to discontinue offering UCCRE on a

1 going-forward basis.<sup>66</sup> Eschelon states this would mean they would remain available to those CLECs  
2 that already have them in their ICAs, but would be unavailable to CLECs, such as Eschelon, with new  
3 ICAs. Eschelon has offered three different alternatives which it states would allow Qwest to phase out  
4 products, subject to Commission approval, while preventing Qwest making them available to some  
5 CLECs, but not others.

6 Eschelon explains that its first phase-out proposal permits Qwest to seek Commission approval  
7 for a process to phase out a particular product, and does not require Qwest to use a specific phase-out  
8 process, and further provides that this process is not necessary if Qwest promptly phases-out the  
9 product from all CLEC ICAs in the state within a 3 month timeframe of an FCC order affecting the  
10 product, or follows a phase-out process ordered by the FCC. (See Proposal #2)<sup>67</sup>

11 Eschelon's second phase-out proposal (Proposal # 3) would require Qwest to obtain  
12 Commission approval in a generic proceeding in which CLECs are provided with notice and a  
13 reasonable opportunity to be heard, prior to phasing out a product. Eschelon asserts that this proposal  
14 would allow the Commission the opportunity to consider all of the relevant factors. The scope of this  
15 proposal excludes the elimination of elements that are no longer required to be offered as a result of a  
16 change in law, which are to be governed by the ICA's change of law provision.

17 Eschelon asserts that its third phase-out provision (proposal # 4) offers Qwest more flexibility,  
18 by permitting Qwest to seek Commission approval for a process to phase-out a particular product "on  
19 a wholesale basis that it previously made available pursuant to Section 251 of the Act. . . ." This  
20 proposal allows Qwest to cease a wholesale offering by promptly amending all ICAs containing the  
21 offering, but makes clear that unless and until a phase-out is approved by the Commission (or Qwest  
22 promptly amends all ICAs containing the product), Qwest must make that product available on a  
23 nondiscriminatory basis. Eschelon states this proposal does not bind Qwest to follow any particular  
24 process, but places the burden on Qwest to propose and obtain Commission approval of a process if it  
25 wishes to phase-out a product.

## 26 Qwest's Position

27  
28 <sup>66</sup> Ex Q-18, Stewart Rebuttal at 29-30.

<sup>67</sup> Eschelon notes that the Minnesota Commission adopted this approach to the issue.

1 Qwest asserts that Eschelon's demand that Qwest make UCCRE available is improper because  
2 the FCC has removed from its unbundling rules the requirement that ILECS provide digital cross-  
3 connects for UCCRE. Qwest explains that UCCRE was the product Qwest developed to meet the  
4 former FCC requirement for ILECs to provide a means by which a CLEC could control the  
5 configurations of UNEs and ancillary services through the use of a digital cross-connect device.  
6 Qwest states that although it made UCCRE available to CLECs, there has never been any CLEC  
7 demand for this product, no CLEC has ever ordered it or otherwise suggested a need for it. Qwest  
8 states that because the FCC removed UCCRE from its rules, and given the absence of demand for it,  
9 Qwest has decided to discontinue offering this product on a going-forward basis. Accordingly, Qwest  
10 states that it opposes Eschelon's language that would require Qwest to notify Eschelon if it offers to  
11 provide UCCRE to any other CLEC and make UCCRE available to Eschelon on nondiscriminatory  
12 terms and conditions.

13 Qwest believes that Eschelon's language is premised on the mistaken claim that the FCC did  
14 not intend to eliminate UCCRE from its unbundling rules. Qwest asserts that it is clear that the FCC  
15 deliberately eliminated UCCRE from its unbundling rules. Qwest also argues that there is nothing in  
16 the *TRO* or *TRRO* suggesting that an ILEC must seek approval from a state commission before  
17 discontinuing the UNEs and services that the FCC eliminated from Section 251. Qwest states that on  
18 the contrary, the FCC made clear in the *TRRO* that its changes in unbundling requirements are to be  
19 implemented through the interconnection negotiation process, not by seeking approval of the changes  
20 from state commissions.<sup>68</sup>

21 Qwest argues that if the FCC determines that there is no longer a competitive need for ILECs  
22 to offer a product or service, ILECs have no legal obligation to continue offering the product or  
23 service in new ICAs. Qwest states that under Eschelon's "discrimination" argument, Qwest would be  
24 denied the benefits from these changes in the law for indefinite periods of time because old ICAs do  
25 not include the new legal requirements. Thus, Qwest argues it would be forced to enter into new ICAs  
26 that reflect old law and competitive conditions that no longer exist, and such approach would not be

27 \_\_\_\_\_  
28 <sup>68</sup> Citing ¶ 233 of the *TRRO*: "the incumbent LEC and competitive LEC must negotiate in good faith regarding any rates, terms, and conditions necessary to implement our rule changes."

1 consistent with sound public policy and law.

2 Further, Qwest argues that in the event that it provides UCCRE to another CLEC on a single  
3 isolated basis, Qwest cannot reasonably be expected to notify Eschelon that the product has been  
4 offered, as Qwest has no processes or systems in place that would permit it to comply with that type of  
5 notification requirement. On the other hand, Qwest asserts, if it agreed to include UCCRE in another  
6 CLEC's ICA, Eschelon would have notice of that through Qwest's public filing of the ICA or  
7 amendment with the Commission.

8 With respect to Eschelon's second alternative proposal, Qwest argues it goes far beyond cross-  
9 connection to create a mandatory process for Qwest to follow when it desires to discontinue offering a  
10 product. Qwest asserts that all of Eschelon's proposed alternatives are legally flawed and should be  
11 rejected. First, Qwest argues, it appears the proposals attempt to regulate Qwest's relationship with  
12 other CLECs through Eschelon's ICA, as the "generic proceeding" could be triggered by Qwest's  
13 decision to stop offering a product to any CLEC, not just Eschelon. Second, Qwest argues it is not  
14 appropriate for one CLEC and ILEC to adopt a broad, generic process that would apply to all local  
15 exchange carriers in Arizona. Third, Qwest asserts it is neither logical nor efficient to require a time-  
16 consuming, resource-intensive generic proceeding in response to Qwest's attempt to withdraw offering  
17 products for which there is no foreseeable demand. Fourth, Qwest argues Eschelon's proposal violates  
18 the requirement in Section 252 that ILECs and CLECs must negotiate proposed ICA provision for 135  
19 days before submitting them to arbitration. In this case, Qwest states that Eschelon did not present its  
20 proposal until after filing its arbitration petition, which according to the plain language of Section  
21 252(b) (the provision that governs arbitration authority of state commissions), indicates that the  
22 proposal is not an "open issue" subject to arbitration. Finally, Qwest argues that Eschelon's new and  
23 alternative proposal would improperly require Qwest to update its SGAT to reflect the results of any  
24 generic product withdrawal proceeding. Qwest claims that Qwest and CLECs typically do not rely  
25 any longer on Qwest's SGAT, as CLECs have multiple other options available to them, including  
26 other ICAs to opt into and Qwest's multi-state "Template Agreement." Qwest states that because of  
27 the effectiveness and utility of the Template Agreement, Qwest stopped updating its SGAT in 2003.

28 Qwest argues its proposed language for Section 9.3.3.8.3.1 provides assurance that Eschelon

1 will be able to obtain access to UCCRE cross-connects in the unlikely event Qwest makes this service  
 2 available to other CLECs in future ICAs. According to the Joint Matrix (p. 58), Qwest proposed the  
 3 following language for Section 9.3.3.8.3.1:

4 If during the term of this agreement a new negotiated ICA or negotiated  
 5 amendment has been approved by the Commission that contains the option  
 6 for Qwest to perform cross connect jumper work for intrabuilding cable, at  
 7 CLEC's request, Qwest will offer CLEC an amendment to this agreement  
 which will include all the associated rates, terms and conditions as it  
 negotiated.<sup>69</sup>

### 8 **Resolution**

9 We find that Eschelon's proposed alternatives go far beyond the issue of whether Qwest should  
 10 be required to make UCCRE available to Eschelon, and raise issues that are best resolved in a generic  
 11 docket rather than in an ICA that only affects two parties. Given the nature of the product, its removal  
 12 from the FCC's requirement that it be unbundled, and the lack of demand, we find that Qwest's  
 13 proposed language for Section 9.3.3.8.3.1 offers a reasonable solution to Eschelon's concerns of  
 14 potential discrimination. Qwest's proposed language for Section 9.3.3.8.3.1 does not appear to  
 15 conflict with the parties' agreed language for Section 9.3.3.8.3, and should be adopted.

16 Our adoption of Qwest's position with respect to this issue does not relieve it of its obligation  
 17 to update its SGAT or seek its withdrawal.

### 18 **Issue 9-55 : Loop Transport Combination**<sup>70</sup>

#### 19 **Eschelon's Position**

#### 20 **Issue 9-55**

21 Eschelon states that its proposed language uses the term "Loop-Transport Combination" as the  
 22 FCC did, in the *TRO* to identify EELs<sup>71</sup>, Commingled EELs and high capacity EELs. Eschelon

23 <sup>69</sup> Qwest offered this language in connection with Issue 9-50, which issue the parties were able to resolve consensually.  
 24 With respect to issue 9-50, the parties agreed to the following language as Section 9.3.3.8.3:

25 If CLEC elects to move its service to the new minimum point of entry, CLEC may either  
 26 perform its own cross-connect or request that Qwest perform the cross-connect. If Qwest  
 27 performs the cross-connect appropriate time and material charges are applicable.

28 <sup>70</sup> Issues 9-55, 9-58 and 9-59 are related, and concern the combination of loop and transport where one part of the  
 combination is a UNE and the other part is a non-UNE. Issue 9-55 concerns, in particular, the nomenclature used to  
 describe the combination of loops and transport. Issues 9-58 and 9-59 concern the terms that apply to commingled  
 arrangements.

<sup>71</sup> Enhanced Extended Link. An EEL is a combination of unbundled loop, switching and dedicated transport.

1 proposes the following language:

2 9.23.4 Loop-Transport Combinations: Enhanced Extended Links (EELs),  
 3 Commingled EELs, and High Capacity EELs

4 Loop-Transport Combinations – For purposes of this Agreement, “Loop-  
 5 Transport Combination” is a Loop in combination, or Commingled, with a  
 6 Dedicated Transport facility or service (with or without multiplexing  
 7 capabilities), together with any facilities, equipment, or functions  
 8 necessary to combine those facilities. At least as of the Effective Date of  
 9 this Agreement “Loop-Transport Combination” is not the name of a  
 10 particular Qwest product. “Loop-Transport Combination” includes  
 11 Enhanced Extended Links (“EELs”) Commingled EELs, and High  
 12 Capacity EELs. If no component of the Loop-Transport Combination is a  
 13 UNE, however, the Loop-Transport Combination is not addressed in this  
 14 Agreement. The UNE components of any Loop-Transport Combination  
 15 are governed by this Agreement and the other component(s) of any Loop-  
 16 Transport Combinations are governed by the terms of an alternative  
 17 service arrangement, as further described in Section 24.1.2.1.

18 Eschelon asserts that its proposed language is designed to preserve the Commission’s jurisdiction over  
 19 the UNE portion of such combinations, while Qwest’s proposal would effectively allow the tariffed  
 20 terms applicable to the non-UNE to determine the terms and conditions under which the UNE is  
 21 available. Eschelon claims that it is using the term “Loop-Transport Combinations” as an umbrella  
 22 term that includes EELs, Commingled EELs and high capacity EELs, as the FCC did in its *TRO*.  
 23 Eschelon states that Loop-Transport Combinations promote competition by giving the CLEC the  
 24 ability to provide service to end users who are served out of wire centers in which the CLEC is not  
 25 collocated. Using a combination loop and transport, Eschelon explains, extends the loop from the end  
 26 user’s location to a wire center where the CLEC is collocated.

27 Eschelon states that Qwest is objecting to the term “Loop-Transport Combination” on the  
 28 grounds that Eschelon is using the term to create a new “product.” However, Eschelon states that its  
 29 proposed language is clear that the term is not a new product, and that if there is no UNE component,  
 30 the Loop-Transport Combination is not governed by the ICA.

31 **Qwest’s Position**

32 Qwest states that there are important distinctions between UNE combinations which are  
 33 combinations of unbundled network elements, and commingled arrangements, which are comprised of  
 34 a UNE connected or attached to a tariffed service (e.g. a special access service). Qwest asserts that

1 Eschelon's proposed use of the term "loop-transport combination" to refer to both UNE combinations  
2 and commingled arrangements clouds the critical distinction between the products.

3 Qwest states that it offers three distinct products that are combinations of loops and transport:  
4 (1) enhanced extended loops ("EELS"), (2) commingled EELs, and (3) high capacity EELs. Qwest  
5 states that each of these products is different from the others and has its unique pricing and  
6 provisioning requirements. Qwest argues that Eschelon's use of the generic term "loop transport  
7 combination" in reference to all three products creates a significant risk that Eschelon could attempt to  
8 apply terms and rates to all the products that should apply to only one product. Qwest states that its  
9 proposed language for Section 9.23.4 preserves the distinct labels and terms that apply to these  
10 products. Qwest proposes the following:

11 9.23.4 Enhanced Extended Links ("EELs"), Commingled EELs, and High  
12 Capacity EELs

13 When a UNE circuit is commingled with a non-UNE circuit, the rates,  
14 terms and conditions of the ICA will apply to the UNE circuit (including  
15 the Commission jurisdiction) and the non-UNE circuit will be governed by  
16 the rates, terms and conditions of the appropriate Tariff.

17 Qwest argues that its approach is consistent with the clear statements of the FCC and other state  
18 commissions that the UNE component of a commingled product should be governed by UNE terms  
19 and the tariffed component by tariffed terms or a price list. Qwest argues that Eschelon's approach  
20 creates a risk of applying improper terms to these products.

21 Moreover, Qwest asserts, Eschelon's proposal that commingled arrangements be ordered  
22 through a single local service request ("LSR") and billed through the billing system that Qwest uses  
23 for UNEs (the "CRIS" system) is a direct attempt by Eschelon to have the Commission force Qwest to  
24 change its special access and private line service order process and billing arrangements. Qwest  
25 asserts that the tariffed products and Section 251 UNE products have their own established ordering,  
26 provisioning and billing systems and methods; and the FCC did not require combined processes,  
27 systems and methods for the distinct components of commingled arrangements when it eliminated the  
28 restriction on commingling. Qwest argues that nowhere in the *TRO* or *TRRO* does the FCC require  
ILECs to modify the rates, terms and conditions of their special access and private lines services,  
beyond removing any commingling with UNE restrictions.



1 Qwest argues its proposed language is a clear and straightforward manner for addressing  
2 Eschelon's concerns without creating undue confusion in Section 9.23 of the ICA.

3 **Resolution**

4 Both parties argue that the other party's approach would create the risk that improper terms  
5 would be applied to these products and services. Our review of the proposed language leads us to  
6 conclude that Eschelon's proposal creates more ambiguity than that proposed by Qwest. We do not  
7 find that Qwest's proposed language improperly attempts to limit or restrict Commission jurisdiction  
8 over the UNE portion of a product. Consequently, we will adopt Qwest's proposed language for  
9 Section 9.23.4., and agree with Qwest that the term "Loop-Transport Combination" as proposed by  
10 Eschelon, should be deleted from Section 9.23.4.4 and 9.23.4.4.1 (Additional Terms for EELs),  
11 9.23.4.5 and 9.23.4.5.4 (Ordering Process for EELs) and 9.23.4.6 (Rate Elements for EELS).

12 **Issue 9-56 and 9-56(a): Service Eligibility Criteria - Audits**

13 Eschelon asserts that its proposed language would allow Qwest to perform an audit for  
14 assuring compliance with local usage requirements applicable to the UNEs when it has a concern that  
15 Eschelon has not met the Service Eligibility Criteria. Eschelon's proposed language would require  
16 Qwest to disclose to Eschelon the circuits that Qwest has identified, if any, that support Qwest's  
17 concern. Eschelon's proposed language follows<sup>72</sup>:

18  
19 9.23.4.3.1.1 After CLEC has obtained High Capacity EELs in  
20 accordance with Section 9.23.4.1.2, Qwest may conduct a Service  
21 Eligibility Audit to ascertain whether those High Capacity EELs comply  
22 with the Service Eligibility Criteria set forth in Section 9.23.4.1.2, when  
23 Qwest has a concern that CLEC has not met the Service Eligibility  
24 Criteria.

25 9.23.4.3.1.1.1 The written notice shall include the cause upon which  
26 Qwest has a concern that CLEC has not met the Service Eligibility  
27 Criteria. Upon request, Qwest shall provide to CLEC a list of circuits that  
28 Qwest has identified as of that date, if any, for which Qwest alleges non-  
compliance or which otherwise supports Qwest's concern.

25 Eschelon states that in its *Supplemental Order Clarification*<sup>73</sup>, the FCC established a framework of  
26 self-certification and auditing as the means for assuring compliance with local usage requirements

27 <sup>72</sup> Language proposed by Eschelon, and opposed by Qwest is underlined.

28 <sup>73</sup> *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98,  
Supplemental Order Clarification, 15 FCC Rcd 9587 (2000) aff'd sub. nom. *CompTel v. FCC*, 309 F.3d 3 (D.C. Cir. 2002).

1 applicable to UNEs. In the *TRO*, the FCC cited the *Supplemental Order Clarification* for the  
 2 proposition that “audits will not be routine practice, but will only be undertaken when the incumbent  
 3 ILEC has a concern that a requesting carrier has not met the criteria for providing a significant amount  
 4 of local service.”<sup>74</sup> Eschelon argues that the *TRO* reaffirmed the standard established in the  
 5 *Supplemental Order Clarification*, stating, “Although the bases and criteria for the service tests we  
 6 impose in this Order differ from those of the *Supplemental Order Clarification*, we conclude that they  
 7 share the basic principles of entitling requesting carriers unimpeded UNE access based on self-  
 8 certification, subject to later verification *based upon cause*, are equally applicable.”<sup>75</sup>

9 Eschelon argues that its proposed limitations are modest and fully consistent with the FCC’s  
 10 direction that such audits should be undertaken only when the ILEC has a concern that the requesting  
 11 carrier has not met the relevant criteria. Eschelon states that a list of suspected non-complying circuits  
 12 is not required, but is only required if Qwest has the information available.

### 13 **Qwest’s Position**

14 Qwest objects to Eschelon’s proposed language. Qwest argues that Eschelon is relying on a  
 15 flawed reading of the *TRO* when it argues that Qwest is entitled to conduct audits only for cause.  
 16 Qwest asserts that in the *TRO*, the FCC established service eligibility criteria for high-capacity EELs  
 17 that are designed to ensure access to these facilities for bona fide providers of “qualifying services”  
 18 while also protecting against the potential for “gaming” by providers. Qwest states that by “gaming”  
 19 the FCC was referring to the practice of providers of obtaining access to UNE facilities even though  
 20 the services they provide do not qualify for use with UNEs. Qwest asserts that in ¶ 626 of the *TRO*, an  
 21 ILEC is permitted to “obtain and pay for an independent auditor to audit, on an annual basis,  
 22 compliance with the qualifying service eligibility criteria.” Qwest states further, that if the auditor  
 23 determines that the CLEC is not in compliance, the CLEC must make true-up payments, convert non-  
 24 complying circuits to the appropriate service, and may have to pay the costs of the independent  
 25 auditor. Further, if the auditor concludes that the CLEC is complying with the criteria, the ILEC must  
 26 reimburse the CLEC for the costs associated with the audit. According to Qwest, the FCC states that

27 \_\_\_\_\_  
 28 <sup>74</sup> *TRO* ¶ 621, quoting the *Supplemental Order Clarification* at n. 86.

<sup>75</sup> *TRO* ¶ 622 (emphasis added).

1 the intent of the reimbursement requirement is to eliminate potentially abusive or unfounded audits.<sup>76</sup>

2 Qwest states that in agreed portions of the ICA, the parties have set out the rules relating to  
3 service eligibility.<sup>77</sup> Qwest notes these provisions include a commitment by Qwest to reimburse  
4 Eschelon for the costs of an audit that results in a finding that Eschelon is complying with the service  
5 eligibility criteria, thus, the ICA includes the reimbursement scheme that the FCC adopted as  
6 protection against abusive audits. Qwest argues that therefore there is no practical or legal basis for  
7 Eschelon's "cause" proposal.

8 Qwest argues that Eschelon's proposal interferes with and weakens Qwest's audit rights  
9 granted in the *TRO*. Qwest states that Eschelon is relying on the *Supplemental Order Clarification*  
10 which was superseded by the *TRO*. Furthermore, Qwest argues, footnote 1898 of the *TRO*  
11 summarizes the audit rights and makes no mention of a "for cause" requirement.

## 12 Resolution

13 We concur with Qwest, and do not adopt Eschelon's proposed language. The *TRO* provides  
14 the most current direction concerning audit rights and does not impose a "for cause" requirement.  
15 Language agreed upon in Section 9.23.4.3.1.3.5 of the ICA already protects Eschelon from abusive  
16 audits, by requiring Qwest to reimburse Eschelon for the costs of the audit in the event the audit report  
17 confirms that Eschelon is in compliance with the service eligibility criteria.

## 18 Issues 9-58 & 9-59: Commingled EELs/Arrangements

### 19 Eschelon's Position

20 Eschelon's proposed language for the ICA sections affected by issues 9-58 and 9-59 is as  
21 follows<sup>78</sup>:

22 9.23.4.5.1 CLEC will submit orders for Loop Transport EELs  
Combinations using the LSR process. Submission of LSRs is described in  
23 Section 12.

24 9.23.4.5.1.1 If any component of the Loop-Transport Combination is  
not a UNE (i.e. not a component to which UNE pricing applies), CLEC  
will indicate on the LSR that the component is not a UNE (e.g., an  
alternate service such as special access). CLEC will indicate this  
information in the Remarks section of the LSR, unless the Parties agree

27 <sup>76</sup> *TRO* ¶ 628.

<sup>77</sup> See ICA Section 9.23.4.3.1.3.5.

28 <sup>78</sup> Underlined text indicates Eschelon's proposed language to which Qwest objects. Lined out text is language that Qwest proposes and to which Echelon objects. Plain text is agreed language.

1 otherwise.

2 9.23.4.5.4 One (1) LSR is required when CLEC orders Point-to-Point  
3 EELs, and Point to-Point commingled EELs. For such Point-to-Point  
4 Loop-Transport Combinations, Qwest will assign a single circuit  
5 identification (ID) number for such combination. Qwest may require two  
6 (2) service requests when CLEC orders Multiplexed EELs-Loop-Transport  
7 Combinations (which are not Point-to-Point) and EEL loops (as part of a  
8 multiplexed EEL). Regarding Commingling see Section 24.

9 Eschelon's proposed alternative if single circuit ID is rejected:

10 9.23.4.7 Maintenance and Repair for UNE Component of Point-to-Point  
11 commingled EELs.

12 9.23.4.7.1 When CLEC reports a trouble through any of the means  
13 described in Section 12.4.2.2, so long as Qwest provides more than one  
14 circuit ID per Commingled EEL, CLEC may provide all both circuit IDs  
15 associated with the Commingled EEL in a single trouble report (i.e.,  
16 Qwest shall not require CLEC to submit separate and/or consecutive  
17 trouble reports for the different circuit IDs associated with the single  
18 Commingled EEL). If CLEC is using CEMR to submit the trouble report,  
19 for example, the CLEC may will first report one circuit ID (the circuit it  
20 believes has the trouble) and include the other circuit ID in the remarks  
21 section (unless the Parties agree to a different method), Qwest will  
22 communicate a single trouble report tracking number (i.e., the "ticket"  
23 number) (described in Section 12.1.3.3.1.1) for the Commingled EEL to  
24 CLEC at the time the trouble is reported. Should a second repair ticket be  
25 required for the circuit in the remarks section, Qwest will contact CLEC  
26 and they will mutually agree who will open the second repair ticket.)

27 9.23.4.7.1.1 If any circuit ID is missing from any Customer Service  
28 Record associated with the Commingled EEL, Qwest will provide the  
29 circuit ID information to CLEC at the time CLEC submits the trouble  
30 report.

31 9.23.4.7.1.2 Qwest, may charge a single Maintenance of Service or  
32 Trouble Isolation Charge (sometimes referred to as "No Trouble Found"  
33 charge) only if Qwest dispatches and no trouble is found on both either  
34 circuits associated with the Commingled EEL. If CLEC may charge  
35 Qwest pursuant to Section 12.2.1.8, CLEC may also charge only a single  
36 charge for both circuits associated with the Commingled EEL.

37 For Sections 9.23.4.6.6 Qwest proposes:

38 9.23.4.6.6 For Commingling see Section 24.

39 Eschelon proposes:

40 9.23.4.6.6 For each Point-to-Point Loop-Transport Combination (see  
41 Section 9.23.4.5.4), all chargeable rate elements for such combinations  
42 will appear on the same Billing Account Number (BAN).

1 If single BAN is rejected, Eschelon proposes the following alternative:

2  
3 9.23.4.6.6 For each Point-to-Point Commingled EEL (see Section  
4 9.23.4.5.4), so long as Qwest does not provide all chargeable rate elements  
5 for such EEL on the same Billing Account Number (BAN), Qwest will  
6 identify and relate the components of the Commingled EEL on the bills  
7 and the Customer Service Records. Unless the Parties agree in writing  
8 upon a different method(s), Qwest will relate the components of the  
9 Commingled EEL by taking at least the following steps:

10  
11 9.23.4.6.6.1 Qwest will provide, on each Connectivity Bill each month,  
12 the circuit identification ("circuit ID") for the non-UNE component of the  
13 Commingled EEL in the sub-account for the related UNE component of  
14 that Commingled EEL;

15  
16 9.23.4.6.6.2 Qwest will assign a separate account type to Commingled  
17 EELs so that Commingled EELs appear on an account separate from other  
18 services (such as special access/private line);

19  
20 9.23.4.6.6.3 Each month, Qwest will provide the summary BAN and  
21 sub-account number for the UNE component of the Commingled EEL in a  
22 field (e.g. the Reference Billing Account Number, or RBAN, field) of the  
23 bill for the non-UNE component; and

24  
25 9.23.4.6.6.4 For each Commingled EEL, Qwest will provide on all  
26 associated Customer Service Records the circuit ID for the UNE  
27 component; the RBAN for the non-UNE component; and the circuit ID for  
28 the non-UNE component.

Finally, for issues 9-58(d) and 9.58(e), affecting Sections 9.1.1.1.1, 9.1.1.1.2, 9.23.4.4.3.1, 24.3.2,  
and 9.1.1.1.1 Eschelon proposes the following, all of which Qwest objects to:

9.1.1.1.1 Commingled EELs are addressed in Section 9.23. For any  
other Commingled arrangement, the following terms apply, in addition to  
the general terms described in Section 24;

9.1.1.1.1.2 When a UNE or UNE Combination is connected or  
attached with a non-UNE wholesale service, unless it is not Technically  
Feasible or the Parties agree otherwise, CLEC may order the arrangement  
on a single service request; if a circuit ID is required, there will be a single  
circuit ID; and all chargeable rate elements for the Commingled service  
will appear on the same BAN. If ordering on a single identifier, and  
including all chargeable rate elements on the same BAN is not Technically  
Feasible, Qwest will identify and relate the elements of the arrangement  
on the bill and include in the Customer Service Record for each  
component a cross reference to the other component, with its billing  
number, unless the Parties agree otherwise.

9.23.4.4.3.1 When any component of the Loop-Transport Combination  
is not a UNE, the service interval for the combination will be the longer  
interval of the two facilities being Commingled. See Section 24.1.2.1.

1           24.3.2 See Section 9.23.4.4.3.1 regarding intervals for Commingled  
2           EELs.

3           9.1.1.1.1.1 When a UNE and another service are Commingled, the service  
4           interval of the Commingled arrangement will be the longer interval of the  
5           two facilities being Commingled.

6           Eschelon states that commingling of UNEs with services offered pursuant to a tariff has  
7           become an important competitive option for CLECs since the FCC limited the ILECs' unbundling  
8           obligations in the *TRRO*. Eschelon states that if UNE transport is not available because a wire center  
9           has been found to be "non-impaired," commingling unbundled loops with private line transport may  
10          be the most cost-effective option for Eschelon to provide service to a customer that could previously  
11          have been served by an EEL. Eschelon claims there is no functional difference between a UNE EEL  
12          and a Commingled EEL, except for the price. For a Commingled EEL, the UNE portion of the circuit  
13          is available at TELRIC-based rates, but the non-UNE portion is subject to a higher tariffed rate.

14          Eschelon states that it has proposed language that would prevent Qwest from subjecting  
15          Commingled EELs to burdensome and discriminatory conditions. Eschelon would have point-to-point  
16          Loop Transport Combinations, including Commingled EELs, to be ordered on a single service request,  
17          to be identified by a single circuit ID, to be billed on the same Billing Account Number ("BAN"), and  
18          to be repaired pursuant to a single trouble ticket. Eschelon asserts that Qwest's proposal would  
19          impose operational burdens on Eschelon and impede the effective use of UNEs.

20          Eschelon argues its proposal would avoid the delay that it claims will inevitably result from  
21          Qwest requiring that Eschelon order the UNE and non-UNE portion of a Commingled EEL separately.  
22          Eschelon states that because the interval for a loop is shorter than the interval for private line transport,  
23          the two parts of the circuit will not be delivered at the same time. In addition, if one part of the  
24          circuits is held for lack of facilities, Eschelon would pay recurring charges for a partial circuit that it  
25          cannot use. Eschelon claims that a single identifier for both the loop and private line transport portion  
26          of the Commingled EEL will enable both Qwest and Eschelon to track and manage facilities and  
27          minimize errors that may have an adverse effect on end user customers. In addition, Eschelon argues  
28          that billing loop and transport portions of Commingled EELs separately will complicate Eschelon's

1 review and reconciliation of bills. Eschelon states that it would not receive a report for disconnected  
2 tariffed services, as it receives for UNEs, which means that Eschelon could continue to be billed and  
3 pay, for the private line portion of a disconnected circuit. Eschelon proposes that if the loop and  
4 private transport portions of the circuit must be delivered separately, the interval for delivery should be  
5 the longer of the two, rather than the combination of the two intervals. Eschelon asserts that its  
6 proposal reflects how Qwest currently provisions EELs.

7 Eschelon objects to Qwest's process for repair of EELs, which Eschelon states is also  
8 sequential. Eschelon states that if it experiences trouble with a commingled EEL, it must first submit  
9 either the UNE or non-UNE portion, and only if Qwest does not find trouble on the special access  
10 portion can Eschelon open a repair ticket on the other portion. Eschelon argues that Qwest' sequential  
11 process will delay repairs. Eschelon also objects to Qwest's proposal that the issues raised by Eschelon  
12 concerning Commingled EELs be addressed in the CMP.

13 If the Commission rejects Eschelon's proposal to require Commingled EELs to be identified  
14 with a single circuit ID and billed on a single BAN, Eschelon offers an alternative that it believes  
15 would help alleviate the problems in the areas of billing and repairs. With respect to billing, Eschelon  
16 proposes that Qwest relate the separate components of Commingled EELs on bills so that Eschelon  
17 will be able to determine which separately identified circuits are combined to make up a completed  
18 circuit. With respect to repairs, Eschelon proposes that it be permitted to submit multiple circuit IDs  
19 associated with a single Commingled EEL and that Qwest assess a "no trouble found" charge only if  
20 no trouble is found on both the UNE and non-UNE portions of the circuit. Eschelon states that this  
21 alternative would eliminate the delay resulting from having to submit separate, sequential trouble  
22 reports and would also reduce Eschelon's expenses. Eschelon argues that because the loop and private  
23 line portions of a Commingled EEL make up a completed circuit, there is no technical reason why  
24 Qwest could not investigate both parts at the same time.

### 25 **Qwest's Position**

26 Qwest states that when a CLEC orders either an EEL loop or EEL transport commingled with a  
27 private line transport circuit or a channel termination circuit, it is necessary to order, provision and bill  
28 each circuit out of the appropriate Qwest service order systems and to follow the established processes

1 Qwest has for these products. Qwest asserts that Eschelon's proposal would require Qwest to  
2 substantially modify its Operation Support Systems ("OSS") and provisioning processes to provide  
3 commingled EELs as though they are a single, unified element instead of a combination of two distinct  
4 circuits. Qwest argues the effect would require process changes beyond Arizona and would involve a  
5 tremendous cost and thousands of hours of work.

6 Qwest argues too that Eschelon is not proposing to compensate Qwest for the substantial costs  
7 Eschelon's proposals would impose, even though it is established that ILECs have a statutory right  
8 under the 1996 Act to recover the costs they incur to modify their systems to accommodate CLEC  
9 orders for wholesale services. Furthermore, Qwest states, Eschelon's proposed changes would affect  
10 all Arizona CLECs, all of whom, Qwest asserts, have been ordering commingled services without any  
11 difficulty using Qwest's existing systems and processes. Qwest argues other CLECs should not have  
12 the costs caused by significant Qwest OSS changes imposed on them as a result of a single arbitration  
13 between two carriers.

14 Qwest notes that the FCC did not eliminate the fundamental distinctions between the nature  
15 and provisioning of the UNE components and tariffed components of commingled arrangements, and  
16 did not require ILECs to eliminate the distinct processes and methods associated with each component  
17 of a commingled facility. Qwest states that there is nothing unusual in the telecommunications  
18 industry about carriers being required to submit more than one order and to use more than one circuit  
19 ID.

20 Qwest asserts that Eschelon's proposal fails to recognize that there are sound reasons for and  
21 benefits from the current processes and systems that Qwest uses to process UNE orders and for  
22 tariffed services. Qwest states that using a circuit ID assigned to a UNE for a tariffed service may  
23 result in a mis-identification of the service and lead to billing and other errors. In addition, according  
24 to Qwest, if a single LSR and single circuit ID were utilized, Qwest's systems could not recognize  
25 what part of the hybrid circuit had an installation and/or repair issue and thus Qwest could not know if  
26 specific performance indicator measurements and potential payments applied. Qwest claims that  
27 without separate bills or BANs for the distinct products that comprise commingled arrangements,  
28 billing errors would be inevitable. Furthermore, Qwest states the shortcomings of Eschelon's proposal



1 are complicated by the fact that Qwest's provisioning of UNEs is subject to specific performance  
2 indicator measurements and potential payments.

3 Qwest states that Eschelon's alternative proposal to use the "Remarks" section of the LSR to  
4 indicate that the two specific circuits are connected does not fix the shortcomings of the proposal.  
5 Qwest states that its systems do not retain, much less read, the remarks section of the original LSR.  
6 Qwest believes that Eschelon's claims that it would not be able to compete without the adoption of its  
7 proposals relating to commingled arrangements are overstated. Qwest notes that commingled  
8 arrangements are used for transport between "non-impaired" wire centers, which means there is likely  
9 little impact on Eschelon in Arizona.

10 Qwest believes that Eschelon's proposals are more appropriately raised in the CMP rather than  
11 in an ICA. Qwest states that the CMP is designed to address the type of provisioning and process  
12 issues Eschelon is raising.

13 With respect to issue 9-59, Eschelon's alternative proposal for repairs of commingled  
14 arrangements, Qwest asserts that Eschelon's alternate proposal would require Qwest to make  
15 significant modifications to the systems and processes it uses for repairing the individual circuits that  
16 are included in commingled EELS. Again, Qwest notes that Eschelon is not offering to compensate  
17 Qwest for the costs of those modifications. Qwest objects to Eschelon's proposal to submit a single  
18 trouble report for a commingled EEL arrangement. Qwest argues there are legitimate and necessary  
19 reasons why a CLEC may be required to submit two trouble reports for a commingled EEL.

20 Qwest states that it has agreed to make changes to its repair process for commingled EELs to  
21 address Eschelon's concerns. Specifically, Qwest states it has agreed to modify its process for repairs  
22 as follows: (1) CLEC would do isolation testing to Qwest's network and provide test results across  
23 both circuits before opening a trouble ticket (charges for Qwest performing testing on behalf of CLEC  
24 are found in Exhibit A); (2) CLEC submits a repair ticket on the specific commingled circuit that it has  
25 reason to believe contains the failure; (3) CLEC will reference the circuit ID in the remarks field of the  
26 circuit that is linked to the one suspected to have the failure; (4) Qwest would process the ticket on the  
27 component suspected to have the failure and if trouble is found, would make the repair and close the  
28 ticket; if the suspected circuit was clear, but Qwest finds trouble on the linked portion of the

1 commingled circuit, Qwest would close the repair ticket on the clear circuit and communicate with the  
2 CLEC what was found, no maintenance or service charges would apply since the trouble was isolated  
3 in the Qwest network, the Qwest technician would contact the CLEC and they would mutually agree  
4 upon which company would open the second repair ticket; (5) according to Qwest, no time delay  
5 occurs regardless of which entity opens the second ticket, Qwest states it would already be using the  
6 testing information gained from the first ticket to begin the repair process for the second ticket; and (6)  
7 the repair clock for quality service measurements would start and end with the opening and closing of  
8 the ticket associated with the specific circuit.

9 Qwest states that the advantage of its proposal is that it addresses Eschelon's concerns without  
10 requiring the substantial system modifications and associated costs that Eschelon's proposal would  
11 require. Furthermore, Qwest states, it recognizes that there may be circumstances when a second  
12 trouble ticket is necessary. Qwest states the intent of its proposal is to eliminate the need in most  
13 circumstances for Eschelon to open two repair tickets instead of one for commingled arrangements.

14 Qwest objects to Eschelon's proposal that would require Qwest to add the circuit ID of the  
15 Commingled EEL to the trouble ticket if it was missing from the Customer Service Record because of  
16 the ambiguity Qwest finds in the context in which Eschelon believes this could occur. In addition,  
17 Qwest states, if Eschelon does not indicate the additional circuit IDs it believes may be experiencing  
18 trouble, it would not be appropriate for Qwest to "assume" the identity of the circuits and add them to  
19 the trouble report.

20 Qwest believes that Eschelon's proposed use of the term "No Trouble Found" in Section  
21 9.23.4.7.1.2 could result in ambiguity and disputes as the term is not defined in the ICA. Qwest states  
22 that its commitment to the potential for only a single charge for Maintenance of Service or Trouble  
23 Isolation is clearly conveyed in Qwest's proposed language. Qwest also opposes a reference to Section  
24 12.4.1.8, since that section is in dispute between the parties.

#### 25 **Resolution**

26 Eschelon's proposals for ordering (Issue No. 9-58), circuit IDs (Issue No. 9-58(a)), and billing  
27 (Issue No. 9-58(b)) related to commingled EELs would require substantial changes to Qwest's  
28 processes, which would result in undetermined, but potentially substantial costs for Qwest. It would

1 also appear to affect all other CLECs requesting the same services from Qwest. Changes to these  
2 processes are better addressed in the CMP, or similar forum, or in a generic docket. Consequently, we  
3 adopt Qwest's proposed language for issues 9-58, 9-58(a) and 9-58(b). Our approval, however, does  
4 not preclude either party from requesting that the Commission address these issues in a separate  
5 docket.

6 In its Exceptions to the Recommended Opinion and Order, filed March 7, 2008, Eschelon  
7 proposed alternative language concerning billing in the event Qwest's position is accepted rejecting a  
8 single BAN (Issue No. 9-58(c)).<sup>79</sup> Eschelon proposes the following for Section 9.23.4.6.7.1:

9 For Commingled EELs, if Qwest relates the components of the  
10 Commingled EEL for itself, Qwest will relate the components of  
11 the Commingled EEL for CLEC for billing purposes, including bill  
12 validation. If Qwest separately tracks the special access  
13 component of EELs for other special access products for itself,  
14 Qwest will use that information to assist in relating the components  
15 of the Commingled EEL for CLEC for billing and bill validation  
16 purposes. The Parties will work together to address billing issues  
17 to prevent adverse impacts to the End User Customer. For  
18 Commingling See Section 24.

19 We find Eschelon's revised alternative language to be reasonable. It does not require Qwest to  
20 provide information that it does not already provide for its own use, and having identifying  
21 components on bills provides Eschelon with important information used to validate and verify its bills.  
22 Consequently, we adopt Eschelon's proposal for Section 9.23.4.6.7.1 as set forth above

23 Qwest's proposed procedures for repairs (Issue No.9-59) appears to take steps that address  
24 Eschelon's concerns concerning multiple repair tickets and delay, however, Qwest's proposed contract  
25 language does not appear to incorporate its repair procedure. We direct the parties to negotiate and  
26 submit with their compliance filing, language that incorporates Qwest's repair proposal. If the parties  
27 are unable to agree on language, we will re-open the arbitration to address this issue. We adopt  
28 Qwest's proposal for the repair process because it seems the most efficient given existing operation  
systems, however, we have some reservation that it is not as streamlined as it might be. We do not  
have sufficient information in this docket to make a determination if it is the optimal approach. To the

<sup>79</sup> Eschelon's Exceptions to Recommended Opinion and Order, Attachment 3, filed March 7, 2008.

1 extent Eschelon continues to have concerns about unnecessary delays, it should raise these concerns in  
2 the CMP, or continue to negotiate a better system with Qwest.<sup>80</sup>

3 **Issue 9-61: Multiplexing (Loop-Mux Combinations)**

4 **Eschelon's Position**

5 Eschelon is asking for Loop-Mux Combinations (i.e. multiplexing or "Loop Mux  
6 Combination" or "LMC") at TELRIC rates when Eschelon requests muxing with an unbundled loop.<sup>81</sup>  
7 Eschelon states that Qwest currently provides an unbundled product, named "Loop Mux  
8 Combinations," pursuant to Commission-approved TELRIC rates. Eschelon objects to Qwest's desire  
9 to discontinue providing this product, and wants Qwest to continue to provide it as it has in the past.

10 Eschelon argues that the FCC's rules require that in providing access to an unbundled network  
11 element, the ILEC must provide all of the features, functions and capabilities of the element.<sup>82</sup> In the  
12 *TRO*, Eschelon states, the FCC included multiplexing among the features, functions, and capabilities  
13 included as part of the loop. Eschelon cites to paragraph 214 of the *TRO* in which the FCC provides:  
14 "At its most basic level, a local loop that serves the mass market consists of a transmission medium,  
15 which almost always includes copper wires of various gauges. The loop may include additional  
16 components (e.g., load coils, bridge taps, repeaters, multiplexing equipment) that are usually intended  
17 to facilitate the provision of narrowband voice services."

18 Eschelon notes that Qwest claims that multiplexing is a function, feature or capability of  
19 unbundled transport, and not the loop because the loop can function without multiplexing. Eschelon  
20 argues that transport can also function independently of multiplexing and Qwest fails to offer any  
21 rationale for distinguishing between unbundled loop and transport. Eschelon also notes that there are a  
22 number of other things, such as repeaters and load coils, which are not required for a loop to function,  
23

24 <sup>80</sup> In its Exceptions to the Recommended Opinion and Order filed on March 7, 2008, Eschelon proposed language for  
25 Section 9.23.4.7, Maintenance and Repair for UNE Component of Commingled EELs. Although Qwest has not responded  
26 to Eschelon's proposal in this proceeding, the proffered language appears to be a reasonable effort and good starting point to  
27 devise specific contract language. If the parties remain unable to negotiate final contract language concerning repair and  
28 maintenance of commingled EELs, as part of their compliance filing, they should request final resolution of this issue.

<sup>81</sup> A multiplexer is electronic equipment which allows two or more signals to pass over one communications circuit.

<sup>82</sup> 47 CFR §51.307(c) ("an incumbent LEC shall provide a requesting telecommunications carrier access to an unbundled  
network element, along with all of the network element's features, functions, and capabilities in a manner that allows the  
requesting telecommunications carrier to provide any telecommunications service that can be offered by means of that  
network element.")

1 but are clearly features, functions and capabilities of the loop.

2 Eschelon asserts that Qwest has not identified any language in the FCC rules or any FCC order  
3 that supports a conclusion that the Rules cited by Eschelon do not apply in the current case, or that the  
4 multiplexing referred to in those rules is "entirely different" from the multiplexing at issue here.

5 Eschelon notes further that the Minnesota Commission found that given that Qwest had  
6 previously provided multiplexing as a UNE when provided in conjunction with a UNE loop, it should  
7 continue to do so unless and until it receives permission to withdraw that product.

8 **Qwest's Position**

9 Qwest asserts that because a loop-mux combination involves the connecting or linking of a  
10 UNE provided under Section 251 (i.e. an unbundled loop) with a non-UNE tariffed facility (i.e. a DS1  
11 or DS3 private line or special access service), it is a commingled arrangement within the definition of  
12 "commingling" set forth in the *TRO*. Paragraph 579 of the *TRO* provides: "By commingling, we  
13 mean the connecting, attaching, or otherwise linking of a UNE, or a UNE combination, to one or more  
14 facilities or services that a requesting carrier has obtained at wholesale from an incumbent LEC  
15 pursuant to any method other than unbundling under section 251(c)(3) of the Act, or the combining of  
16 a UNE or UNE combination with one or more such wholesale services." Qwest claims that until the  
17 FCC made commingling available in the *TRO*, CLECs had no readily available mechanism for  
18 "handing off" UNE loops to their collocation spaces to connect the loops to the higher bandwidth  
19 facilities. Thus, Qwest states it voluntarily provided LMCs to CLECs. However, Qwest continues,  
20 when commingling became available under the *TRO*, CLECs no longer need access to the LMC  
21 offering to hand off loops to larger transport facilities because commingling permits CLECs to  
22 terminate unbundled loops directly to the special access transport facilities they obtain from Qwest.

23 Qwest argues there is no legal basis for assigning UNE attributes to LMC when it is used with  
24 commingled arrangements. Rather, Qwest argues, the FCC has found that: (1) multiplexing used with  
25 commingled arrangements is a tariffed product, and (2) multiplexing is not a stand-alone UNE. At  
26 paragraph 583, the *TRO* provides in part:

27 We find that commingling does not constitute the creation of a new UNE  
28 for which an impairment analysis is required. Instead, commingling  
allows a competitive LEC to connect or attach a UNE or UNE

1 combination with an interstate access service, such as a high-capacity  
 2 multiplexing or transport services. Because commingling will not enable  
 3 a competitive LEC to obtain reduced or discounted prices or tariffed  
 4 special access services because we are not requiring ratcheting, our  
 5 general impairment analysis for individual UNEs is adequate.

6 Qwest claims this portion of the *TRO* states clearly that the multiplexing used with commingling is “an  
 7 interstate access service”, which contradicts Eschelon’s claim that multiplexing used with  
 8 commingling is nothing more than a feature or function of the UNE loop. Qwest asserts its  
 9 multiplexing is a separate “access service”, and the FCC is unambiguous that when a CLEC obtains an  
 10 access service like multiplexing for use with commingling, it is not entitled to “reduced or discounted  
 11 prices on [the] tariffed special access services.” Qwest argues that Echelon is thus required to pay the  
 12 full tariffed rate for multiplexing used with commingling and is not entitled to a UNE rate or any other  
 13 discounted rate.

14 Qwest also relies on the FCC’s holding in the *Verizon-Virginia Arbitration Order*,<sup>83</sup> when the  
 15 FCC rejected WorldCom’s proposed language that would have established multiplexing as an  
 16 independent network element, because the FCC had never ruled that the multiplexing is such an  
 17 element. Qwest argues the only network elements that the ILECs are required to provide as UNEs at  
 18 TELRIC rates are those for which the FCC has made a fact-based finding of competitive impairment  
 19 pursuant to Section 251(d)(2)(B). Furthermore, Qwest states that in addition to FCC  
 20 pronouncements, state commissions have consistently ruled that tariffed rates govern the multiplexing  
 21 component of commingled arrangements. Qwest cites decisions of the South Carolina, Florida, North  
 22 Carolina, Alabama, and Mississippi commissions.<sup>84</sup>

23 Qwest also disputes Eschelon’s claim that multiplexing is a feature or function of the

24 <sup>83</sup> *In the Matter of Petition of WorldCom, Inc., et al, for Preemption of the Jurisdiction of the Virginia State Corporation  
 Commission Regarding Interconnection Disputes with Verizon-Virginia and for Arbitration*, CC Docket Nos. 00-218, 249,  
 251, 17 FCC Rcd. 27,039 at ¶ 494 (FCC Wireline Competition Bureau July 17, 2002) (“*Verizon Virginia Arbitration  
 Order*”).

26 <sup>84</sup> *Re BellSouth Telecommunications, Inc.*, Docket No. 2004-316-C, Order No. 2006-136, 2006 WL 2388163 (S.C.P.S.C  
 Mar. 10, 2006); *Petition to Establish Generic Docket to Consider Amendment to Interconnection Agreements Resulting  
 from Changes in Law, by BellSouth Telecommunications, Inc.*, 041269-TP, 2006-WL 1085095 (Fla. P.S.C. Apr. 17, 2006);  
 27 *Re BellSouth Telecommunications, Inc.*, Docket No. P-55, Sub 1549, 2006 WL 2360893 (N.C.U.C. July 10, 2006); *Re  
 Momentum Telecom, Inc.*, Docket No. 29543, 2006 WL 1752312 at \*31 (Ala. P.S.C. Apr 20, 2006); and *Re Consider  
 Change-of-Law to Existing Interconnection Agreements*, Docket No. 2005-AD-1139, 2005 WL 4673626 (Miss. P.S.C. Dec.  
 28 2, 2005).

1 unbundled loop. Qwest states FCC Rule 51.319(a)(1) defines the local loop as “a transmission facility  
2 between a distribution frame (or its equivalent) in an incumbent LEC central office and the loop  
3 demarcation point at an end-user customer premise.” The rule also provides that a loop “includes all  
4 features, functions, and capabilities of such transmission facility.” Qwest argues that to qualify as a  
5 feature or function of the loop, a piece of equipment must be located with or as part of the  
6 “transmission facility” that runs between a distribution frame or equivalent frame and a customer’s  
7 premise. Qwest asserts the multiplexing equipment used to commingle a UNE loop and tariffed  
8 transport is not so located, and thus is not part of the loop transmission facility. Qwest asserts that  
9 DS1 loops function regardless of whether there is multiplexing on the loop. Qwest asserts further that  
10 the FCC holdings cited by Eschelon involve a different type of multiplexing than is at issue in this  
11 case. According to Qwest, in those instances cited by Eschelon, the FCC is being clear that to the  
12 extent any type of multiplexing (such as digital loop carrier systems) between the end user premises  
13 and the MDF in the central office is required, the ILEC must “de-mux” the loop so it can be handed  
14 off to the CLEC in the central office. By contrast, Qwest states, the multiplexing in dispute in this  
15 case is transport multiplexing that takes place not between a customer’s premises and the MDF, but  
16 after a fully functional loop has been provided to the CLEC.

17 **Resolution**

18 It appears that there is no dispute that multiplexing is a feature of UNE transport. In the  
19 *Verizon Virginia Arbitration Order* the FCC’s Wireline Bureau, the arbitrator in that proceeding, held  
20 that multiplexing is a feature of UNE dedicated transport, but is not a separate UNE.<sup>85</sup> Qwest agrees  
21 that when multiplexing is provided with DS1 and DS3 transport that meets the *TRRO* impairment  
22 criteria, it is a UNE and will be provided at TELRIC rates.<sup>86</sup> Qwest argues, however, that because  
23 multiplexing is not a UNE, and because the FCC has allowed commingling of UNEs and non-UNEs  
24 under the *TRO*, CLECs no longer need access to multiplexing at TELRIC rates. Eschelon states it is  
25 not seeking multiplexing as a stand alone UNE<sup>87</sup>, but as an optional feature or function of the  
26 unbundled loop.

27 <sup>85</sup> *Verizon Virginia Arbitration Order* at ¶ 500.

28 <sup>86</sup> Ex Q-18 Stewart Rebuttal at 92.

<sup>87</sup> Ex E-7, Starkey Rebuttal at 149.

1 Loop MUX combinations are available under Qwest's SGAT and the Commission approved a  
2 cost-based rate for the loop MUX combination as part of Phase II of the Cost Docket.<sup>88</sup> Qwest has  
3 argued that there has been a change of law regarding this product. Eschelon disputes Qwest's  
4 interpretation of the FCC's orders. Because Qwest currently offers this product at TELRIC rates  
5 through its SGAT, and perhaps through other individual ICAs, we do not believe that it is appropriate  
6 to change that pricing in this arbitration. Rather, if Qwest seeks to modify the pricing of this product it  
7 should make such application in a generic docket. Thus, we adopt Eschelon's position and maintain  
8 the status quo concerning the terms of availability of the loop MUX combination.

9 **Issue 12-64: Root Cause Analysis and Acknowledgement of Mistakes**

10 **Eschelon's Position**

11 Eschelon proposes language in Sections 12.1.4 and its subparts that would allow Eschelon to  
12 make a written request for root cause analysis and/or acknowledgement of a mistake. Eschelon states  
13 it depends on Qwest for Eschelon to provide service to its own customers, and a Qwest mistake could  
14 result in disruption of service to Eschelon's customers. Thus, if Qwest makes an error that impacts an  
15 Eschelon customer, Eschelon wants, after following the usual procedures to restore service, to be able  
16 to request a root cause analysis to help prevent a reoccurrence of the event and/or an  
17 acknowledgement of the Qwest error that Eschelon can use in communications with Eschelon's  
18 customer. Qwest opposes Eschelon's proposed language and would leave this proposed ICA section  
19 blank. In the Minnesota arbitration, Eschelon reports that Qwest agreed to all of Eschelon's proposed  
20 language for this section, except for one phrase—i.e. that would have this provision apply to “a  
21 mistake relating to products and services provided under this Agreement.” Consequently, in  
22 Minnesota, Eschelon proposed to replace the disputed phrase with: “mistake(s) in processing  
23 wholesale orders, including pre-order, ordering, provisioning, maintenance and repair, and billing”.  
24 Ultimately, the Minnesota commission adopted this alternative approach. Eschelon asserts that despite  
25 agreement in Minnesota to most of Eschelon's proposed language, which is identical to that proposed  
26 in the Arizona ICA, Qwest opposes both alternatives in Arizona.

27  
28 <sup>88</sup> See Qwest SGAT Exhibit A §9.23.6.



1 Eschelon argues that Qwest is not being consistent when it opposes Eschelon's proposal to  
2 address this issue in the ICA based on the benefits of uniformity and using the CMP process, when it  
3 agreed to the language in Minnesota. Eschelon asserts that agreed-upon language in other sections of  
4 the ICA and interpreting the ICA as a whole to give effect to all of its provisions shows that requests  
5 for root cause analyses are not unfettered and that Qwest is protected from demands when it is readily  
6 apparent that a problem has not been caused by Qwest.

7 Eschelon asserts that contract silence provides no contractual certainty or rules to follow to  
8 avoid disputes. Eschelon complains that Qwest's current approach, as reflected in its Account  
9 Manager PCAT, the test for when a CLEC may request root cause analysis for repair issues from its  
10 account manager is whether there is "an unusual repair event." Eschelon argues this terminology is  
11 vague as to what constitutes "unusual" and gives Qwest "unfettered leeway" to deny a request for root  
12 cause analysis. In addition, Eschelon complains that because Qwest's proposed root cause terms are in  
13 the PCAT and not in the ICA, Qwest reserves the right to change or remove those terms during the  
14 term of the ICA without amending it, which deprives Eschelon of contractual certainty.

#### 15 Qwest's Position

16 Qwest's post-hearing brief does not address issue 12-64 specifically. Qwest asserts, however,  
17 that for every single Section 12 issue in dispute Eschelon is suggesting a change in Qwest's existing  
18 process. Qwest argues that because of the advantages associated with applying consistent existing  
19 processes on all CLECs, Eschelon should be required to demonstrate a compelling need for making  
20 such changes.

21 Qwest asserts the evidence is extensive that the CMP is an effective vehicle for managing  
22 Qwest's processes. Qwest claims that Eschelon has raised four cherry-picked examples of its  
23 complaints with the CMP to represent and exemplify the operation of the CMP, and has ignored the  
24 vast majority of instances when the CMP approved and implemented Change Requests from CLECs.  
25 Qwest asserts further that pursuant to the CMP Document, which governs the operation of the CMP,  
26 CLECs have ample options for recourse in the event Qwest proposes a change, or rejects a proposed  
27 change, contrary to the wishes of one or more CLECs. Qwest notes such recourse includes filing  
28 comments, escalating a disputed issue, seeking postponement of a change until the dispute can be

1 resolved through other mechanisms, requesting arbitration, participating in good faith dispute  
2 resolution, and filing a complaint with a state commission.

### 3 Resolution

4 This proposed ICA provision arises as result of a complaint that Eschelon filed in Minnesota  
5 after a Qwest error in processing an LSR affected an Eschelon customer. The Minnesota commission  
6 adopted Eschelon's proposed language because it found that it is not vague or burdensome and is more  
7 consistent with that commission's previous order in the complaint proceeding. The record in Arizona  
8 does not demonstrate that the request for root cause analysis and acknowledgement of mistake has  
9 ever been a problem for the parties. Qwest's witness testified that Eschelon has never requested an  
10 acknowledgement letter of mistake from Qwest for a customer.<sup>89</sup>

11 The adoption of the provision in Minnesota is the result of a specific history of the issue in that  
12 state, and Qwest testified did not require the change of any processes. There appears to be a forum for  
13 Eschelon to request root cause analyses in the PACT. Absent a greater demonstration that there will  
14 be a benefit that outweighs the costs of the provision, we do not find it necessary to include this  
15 provision in the ICA at this time. Consequently, we adopt Qwest's position concerning issue No. 12-  
16 64.

### 17 **Issue 12-67: Expedited Orders**

#### 18 Eschelon's Position

19 Eschelon argues that Qwest must provide it with the ability to expedite UNE orders at a  
20 TELRIC price. Eschelon's position is based on its argument that access to expedites is fundamental to  
21 its access to the UNE, and on the argument that Qwest must provide Eschelon with the same quality of  
22 service as it provides to itself. Eschelon proposed language that allows Eschelon to expedite UNE  
23 orders for a \$100 interim rate.<sup>90</sup> Eschelon makes two proposals concerning expedites<sup>91</sup>:

24 12.2.1.2 Expedites. CLEC may request a Due Date earlier than the  
25 applicable Due Date interval for that product or service. Requests for  
26 expedites can be made either prior to, or after, submitting CLEC's service  
request.

27 <sup>89</sup> Ex Q-4, Albersheim Surrebuttal at 17.

<sup>90</sup> Eschelon's proposal is a flat \$100 fee regardless of the number days expedited.

28 <sup>91</sup> Agreed language is in plain text. Eschelon's proposed language is underlined. Qwest's proposed language to which Eschelon objects is in strikethrough text.

## 1 Proposal #1:

2 12.2.1.2.1 Notwithstanding any other provision of this Agreement, for  
 3 all products and services under this Agreement (except for Collocation  
 4 pursuant to Section 8), Qwest will grant and process CLEC's expedite  
 5 request, and expedite charges are not applicable, if one or more of the  
 6 following conditions are met:

- 7 a) Fire;  
 8 b) Flood;  
 9 c) Medical emergency;  
 10 d) National emergency;  
 11 e) Conditions when the End User Customer is completely out of service  
 12 (primary line);  
 13 f) Disconnect in error when one of the other conditions on this list is  
 14 present or is caused by the disconnect in error;  
 15 g) Requested service necessary for CLEC End User Customer's grand  
 16 opening event delayed for facilities or equipment reasons with a future  
 17 Ready For Service (RFS) date;  
 18 h) Delayed orders with a future RFS date that meet any of the above  
 19 described conditions;  
 20 i) National Security;  
 21 j) Business Classes of Service unable to dial 911 due to previous order  
 22 activity; or  
 23 k) Business Classes of Service where hunting, call forwarding or voice  
 24 mail features are not working correctly due to previous order activity  
 25 where the End User Customer's business is being critically affected.

## 14 Proposal # 2:

15 12.2.1.2.1 Notwithstanding any other provision of this Agreement, for  
 16 all products and services under this Agreement (except for Collocation  
 17 pursuant to Section 8), Qwest will grant and process CLEC's expedite  
 18 request, and expedite charges are not applicable, if Qwest does not apply  
 19 expedite charges to its retail Customers, such as when certain conditions  
 20 (e.g., fire or flood) are met and the applicable condition is met with respect  
 21 to CLEC's request for an expedited order.

22 12.2.1.2.2 If none of the conditions described in Section 12.2.1.2.1 are  
 23 met, Qwest will grant and process CLEC's expedite request, but the  
 24 expedite charges in Exhibit A will apply, unless the need for the expedite  
 25 is caused by Qwest.

26 12.2.1.2.3 Nothing in this Section 12.2.1.2 alters whether a non-  
 27 recurring installation charge in Exhibit A applies to the CLEC order  
 28 pursuant to the terms of the applicable section of this Agreement. The  
expedite charge, if applicable, is separate from the installation charge.

29 9.1.12.1 For expedites, see Section 12.2.1.2.

30 9.23.4.5.5 For expedited orders, see section 12.2.1.2.

31 7.3.5.2 Expedite request for Interconnection LIS trunk orders are  
 32 allowed. Expedites are requests for intervals that are shorter than the  
 33 interval defined in Qwest's Service Interval Guide (SIG) or Individual  
 34 Case Basis (ICB) Due Dates; Expedite charges as identified in Exhibit A  
 35 apply per order for every day that the Due Date interval is shortened,

1 based on the standard interval in the SIG or based on ICB criteria for Due  
2 Dates.

3 7.3.5.2.1 CLEC will request an expedite for Interconnection LIS trunks,  
4 including an expedited Due Date; on an the Access Service Request  
5 (ASR).

6 7.3.5.2.2 the request for expedite will be allowed only when the request  
7 meets the criteria outlined in Section 12.2.1.2.2 the Pre-Approved  
8 Expedite Process in Qwest's Product Catalog for expedite charges at  
9 Qwest's wholesale web site.

10 **OPTION 2 – Replace all of Section 7.3.5.2 with the following:**

11 7.3.5.2 For expedites, see Section 12.2.1.2

12 For Exhibit A

13 9.20.1.14 Expedite Charge \$100<sup>1,5</sup>

14 Qwest's Exhibit A to the ICA, the rate sheet, states that expedites will be provided on an  
15 Individual Cost Basis ("ICB"), but Qwest plans to charge a rate of \$200 per day to expedite UNE  
16 orders.<sup>92</sup>

17 Eschelon asserts that expediting UNE orders is integral to its ability to gain "access to a UNE"  
18 and thus, should be provided at cost-based TELRIC rates. Eschelon notes that Qwest does not claim  
19 the \$200 per day charge is cost based.<sup>93</sup> Eschelon acknowledges that Qwest is not required to charge  
20 TELRIC rates for "superior services." Eschelon argues, however, that expedites are not a "superior  
21 service" which would allow Qwest to charge market-based rates. Eschelon asserts that because  
22 Qwest offers expedited service to its retail customers in the regular course of its business, providing  
23 Eschelon with the same capability is not requiring Qwest to provide a "superior" service. Eschelon  
24 cites a North Carolina commission decision, which when it faced this same issue, rejected BellSouth's  
25 arguments and found: "the Commission also believes that expediting service to customers is simply  
26 one method by which BellSouth can provide access to UNEs and that since BellSouth offers service  
27 expedites to its retail customers, it must provide service expedites at TELRIC rates pursuant to Section  
28 251 and Rule 51.311(b)."

Secondly, Eschelon argues that Qwest does not charge itself a market rate to expedite orders  
for its retail customers. Rather, according to Eschelon, Qwest only incurs the cost of expediting such

<sup>92</sup> Ex Q-1 Albersheim Direct at 64.

<sup>93</sup> Ex Q-1 Albersheim Direct at 64; Ex Q-15 Denney Rebuttal at 97-98.

1 orders. Eschelon argues that to charge Eschelon a non-cost based fee for expedites would violate Rule  
 2 § 51.313 because such non-cost based rate would be less favorable than the charge Qwest faces in  
 3 expediting its own orders.<sup>94</sup> Eschelon claims that by charging Eschelon a wholesale expedite price  
 4 that exceeds the cost of expediting, Qwest is gaining an unfair advantage because it profits from the  
 5 difference between the retail price of an expedite and the cost associated with expedites.

6 Qwest's proposed language allows no exceptions to paying an expedite fee in emergency-type  
 7 situations for expediting unbundled loops and other "designed" products. Eschelon has proposed two  
 8 alternatives for addressing when an expedite would be available under "emergency" conditions for no  
 9 additional charge. Eschelon notes that Qwest does not charge an additional expedite fee in every case  
 10 when providing designed services for its retail customers. In its retail tariff, Qwest makes exceptions  
 11 to charging an additional expedite fee for "Reestablishment of Service Following Fire, Flood or Other  
 12 Occurrence." Eschelon states that prior to January 3, 2006, Qwest provided expedited orders to retail  
 13 and CLEC customers, for products and services, including loops, when Qwest pre-approves them as  
 14 meeting certain emergency-based conditions. Following a Qwest policy that became effective January  
 15 3, 2006, CLECs cannot receive expedites in Arizona for UNE services without an amendment to their  
 16 ICA.

17 Even if there is no retail analogue for DS0 loops, as Qwest claims, Eschelon argues that Qwest  
 18 may not discriminate. Eschelon states the FCC has developed two alternative tests to determine if a  
 19 Bell Operating Company ("BOC") is offering interconnection and access to network elements on a  
 20 nondiscriminatory basis:

21 First, for those functions the BOC provides to competing carriers that are  
 22 analogous to the functions a BOC provides to itself in connection with its  
 23 own retail service offerings, the BOC must provide access to competing  
 24 carriers in "substantially the same time and manner" as it provides to  
 itself. Thus, where a retail analogue exists, a BOC must provide access  
 that is equal to (i.e. substantially the same as) the level of access that the  
 BOC provides itself, its customers, or its affiliates, in terms of quality,

25 <sup>94</sup> 47 CFR § 51.313 provides: (a) the terms and conditions pursuant to which an incumbent LEC provides access to  
 unbundled network elements shall be offered equally to all requesting telecommunications carriers.

26 (b) where applicable, the terms and conditions pursuant to which an incumbent LEC offers to provide access to unbundled  
 network elements, including but not limited to, the time within which the incumbent LEC provisions such access to  
 27 unbundled network elements, shall, at a minimum, be no less favorable to the requesting carrier than the terms and  
 conditions under which the incumbent LEC provides such elements to itself.

28 (c) An incumbent LEC must provide a carrier purchasing access to unbundled network elements with the pre-ordering,  
 ordering, provisioning, maintenance and repair, and billing functions of the incumbent LEC's operations support systems.

1 accuracy, and timeliness. For those functions that have no retail analogue,  
 2 the BOC must demonstrate that the access it provides to competing  
 carriers would offer an efficient carrier a "meaningful opportunity to  
 compete."<sup>95</sup>

3 Eschelon asserts that the FCC has made clear the lack of retail analogue does not mean a more  
 4 lenient nondiscrimination obligation, but rather has stated "we do not view the 'meaningful  
 5 opportunity to compete' standard to be a weaker test than the 'substantially the same time and manner'  
 6 standard."<sup>96</sup> Rather, Eschelon asserts, the meaningful opportunity to compete standard is "intended to  
 7 be a proxy for whether access is being provided in substantially the same time and a manner and [is],  
 8 thus, nondiscriminatory."<sup>97</sup> Eschelon states its proposal number two for Section 12.2.1.2.1 articulates  
 9 this nondiscriminatory standard in the ICA, requiring Qwest to provide an exception to charging only  
 10 under the same conditions for which it provides exceptions for its retail customers.

### 11 Qwest's Position

12 Qwest asserts that Eschelon's proposed language would provide it with special, discriminatory  
 13 provisioning for expedites for both non-design and design services.<sup>98</sup> According to Qwest,  
 14 Eschelon's position is wrong because there is a meaningful difference between a design service  
 15 (unbundled loops) and non-design service (POTS-type services), expedites are not a UNE, but rather a  
 16 superior service that is not required to be provided at TELRIC rates. Qwest asserts that it provisions  
 17 expedites for its retail customers in exactly the same way it provisions them for CLECs.

18 Qwest states that currently customers of non-design services (POTS), CLECs and retail  
 19 customers alike, can obtain an expedited due date under certain, limited emergency circumstances at

21 <sup>95</sup> *In the Matter of the Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications  
 Act To Provide In-Region, InterLATA Service in the State of New York* memorandum Opinion and Order, FCC 99-404, CC  
 Docket No. 99-295, rel. December 22, 1999, ¶44.

22 <sup>96</sup> *Id.* at ¶45.

23 <sup>97</sup> *Id.*

24 <sup>98</sup> Qwest categorizes services based on whether they are "design" services or "non-design" services as follows:

	<u>Design</u>	<u>Non-design</u>
25 Wholesale	e.g. Unbundled Loops (DS0, DS1, DS3, etc)	e.g. QPP, Resale POTS
26 Retail	e.g. Private Lines (DS1, DS3, etc.)	e.g. Retail POTS

1 no charge. For design services (unbundled loops and private line circuits), Qwest states that CLECs  
2 and Qwest's retail customers can both obtain an expedited due date for any reason as long as they pay  
3 a \$200 per day charge. Thus, Qwest asserts, it offers expedites to CLECs on the same terms and  
4 conditions as it offers the service to its retail customers.

5 Qwest claims that Eschelon is comparing the expedite terms that apply to unbundled loops in  
6 the wholesale design category, to the expedite terms that apply to retail POTS, in the retail non-design  
7 category. Qwest argues that because these two categories of services – non-design and design—are  
8 substantially different in the amount and nature of work required, Qwest's processes for ordering and  
9 provisioning differ substantially. Qwest argues that Eschelon's argument that it is unfair to use one  
10 provisioning process for unbundled loops, and a separate provisioning process for POTS services is  
11 flawed because both FCC and state commissions have recognized and acknowledged the distinctions  
12 between POTS-type services and unbundled loops through the approval of performance standards; the  
13 work required to provision a private line is more complex and time consuming than that required for a  
14 POTS circuit; and Qwest uses private line circuits to do the exact same thing as Eschelon. Qwest cites  
15 numerous commission decisions from other states that find that the provision of an unbundled loop is  
16 equivalent to the provision of a design service and that unbundled loops are not analogues to retail  
17 non-design services.

18 Qwest asserts that Eschelon's proposal is an attempt to create an entirely new process for  
19 expedites just for Eschelon. Qwest asserts that Eschelon's proposed language expands Qwest's  
20 current list of emergency conditions, which apply to expedites for free for non-design services only,  
21 and applies the list to all services. Such attempt, Qwest argues would give Eschelon special treatment  
22 and service superior to that received by all of Qwest's retail customers and all other CLECs. Qwest  
23 notes that both federal and state law require Qwest not to discriminate between purchasers.<sup>99</sup> Qwest  
24 states that many CLECs across Qwest's region have adopted the unbundled loops expedite terms that  
25 Qwest and the CLECs developed in the CMP.

26 Qwest states that its current process for expediting unbundled loops provides Eschelon with a  
27

28 <sup>99</sup> 51 CFR §§ 51.311(a), 313(a).

1 meaningful opportunity to compete. Qwest asserts that Eschelon has not provided any authority that  
2 holds that the failure to provide expedited due dates for free violates this standard. Indeed, Qwest  
3 asserts that rather the law is plain that Qwest provides CLECs a meaningful opportunity to compete by  
4 virtue of the fact it satisfies Commission-approved performance measures. Qwest believes that it is  
5 important to note that Eschelon can expedite orders for high capacity loops on terms that are superior  
6 to what Qwest provides to itself. Qwest's standard provision interval for DS1 and DS3 private lines is  
7 9 days, while CLECs can obtain a DS1 capable loop in 5 days and a DS3 capable loop in 7 days.  
8 Thus, Qwest states, if a wholesale customer wants a DS1 loop delivered in one day, it will have to  
9 expedite 5 days for a cost of \$1,000 (\$200 per day for 5 days). If the same customer orders a DS1  
10 private line (the retail analogue) and wants the line delivered in one day, the order will have to be  
11 expedited 9 days, for a cost of \$1,800.

12 Qwest also argues that the 1996 Act does not require Qwest to provide expedited due dates.  
13 Qwest cites a Kentucky commission decision that held that although standard provisioning intervals  
14 for service are required pursuant to Section 251, and the incumbent should provide nondiscriminatory  
15 access to expedited service, expedited service is not a Section 251 obligation.<sup>100</sup>

16 Qwest argues that incumbents are not required to provide superior service as part of their  
17 obligation under the 1996 Act. Qwest cites to a recent decision by the Florida commission that  
18 recognizes this point:

19  
20 It is clear there is no obligation imposed or implied in Rule 51.311(b) that  
21 an incumbent render services to a CLEC superior in quality to those  
22 provided to a retail customer requesting similar services. So long as rates  
23 are identical for all requesting parties, CLEC and retail alike, parity exists  
24 in the provisioning structure for service expedites, and there is not conflict  
25 with Rule 51.311(b). We reiterate that current regulations do not compel  
26 an ILEC to provide CLECs with access superior in quality to that supplied  
27 to its own retail customers.<sup>101</sup>

28 Qwest states that the Florida commission approved BellSouth's expedite fee of \$200 per day for  
CLECs because BellSouth charged the same fee to its retail customers to expedite similar retail

<sup>100</sup> In re Joint Petition for Arbitration of Newsouth Communications Corp., 2006 Ky, PUC LEXIS 159 at Issue 86 (Ky. PUC March 14, 2006).

<sup>101</sup> In re Joint Petition by New South et al., 2005 Fla. PUC LEXIS 634 \*150, Order No. PSC-05-0975-FOF-TP (Fla. PSC Oct. 11, 2005).



1 services.

2 Qwest states it offers retail design customers and CLECs ordering design services, the option  
3 of requesting an expedite for any reason, subject to a charge of \$200 per day. Qwest explains it  
4 established the \$200 per day charge based on total service long run incremental cost ("TSLRIC"), as  
5 opposed to TELRIC. Qwest asserts that TELRIC pricing applies only to UNEs, and not to superior  
6 services, such as expedites.

7 Qwest argues that an arbitration is not the proper forum for determining the appropriate charge  
8 for an expedite.

9 In addition to its legal arguments, Qwest claims that common sense dictates that expedites are  
10 superior service. First, Qwest claims commission have approved service intervals and have  
11 determined that if Qwest meets them, then CLECs have a meaningful opportunity to compete.  
12 Second, Qwest claims, if expedites are classified as UNEs and Qwest is compelled to provide them  
13 under a TELRIC standard and/or at a charge even remotely similar to Eschelon's proposed charge,  
14 then it is likely that CLECs will request expedites for virtually every order. Qwest argues this would  
15 render service intervals meaningless and Qwest's limited resources will be taxed to their limit and  
16 Qwest will not be able to provide all the expedites required which in turn could jeopardize customer  
17 service in emergency situations.

18 **Resolution**

19 Eschelon argues that expedites are one means of providing access to a UNE, and thus must be  
20 provided at TELRIC rates. Qwest argues that expedited delivery is a superior service for which it is  
21 entitled to charge a market rate. Other state commissions that have addressed this issue are split.  
22 Kentucky and Florida have sided with the ILEC, finding that there is no obligation to provide  
23 expedites at TELRIC rates. The North Carolina commission determined that the ILEC must provide  
24 expedites on a cost-based TELRIC rate. The Minnesota commission found that whether expedites are  
25 superior services is irrelevant, as are the charges Qwest assesses its retail customers. The Minnesota  
26 commission found that because Qwest provides expedited services to itself, and the cost to itself is  
27 merely the cost of expediting the service, Qwest's cost to expedite is also the cost that Qwest should  
28 charge CLECs to expedite service because Qwest is not permitted to discriminate. Minnesota adopted

1 Eschelon's proposed \$100 flat rate charge as an interim rate pending an investigation into an  
2 appropriate cost in a pending cost proceeding.

3 We find that generally Qwest meets its obligation to provide access to the UNE by  
4 provisioning the service within the approved service intervals. The service intervals were set in order  
5 to provide CLECs with a meaningful opportunity to compete. We find no convincing authority for us  
6 to conclude that expedites are required to provide access to the UNE and have to be provided at  
7 TELRIC rates. By definition expedites are "superior" to regular service intervals. Providing an  
8 expedite for any reason at a nominal fee would in essence eliminate the approved service interval as an  
9 effective measure of Qwest's performance. Under Eschelon's proposal, which allows expedites at a  
10 nominal fee, Qwest has legitimate concern that CLECs would routinely request expedites, which could  
11 tax resources and affect Qwest's ability to provide service.

12 Even if Qwest is not required to provide expedites as a UNE, Qwest may not discriminate  
13 against Eschelon and must provide expedited service to Eschelon on the same terms and conditions as  
14 Qwest provides the service to itself and its own retail customers. Qwest provides expedites for any  
15 reason for design services at \$200 a day or at no additional charge for non-design services if certain  
16 emergency conditions are met. Qwest distinguishes between design and non-design services to justify  
17 not providing expedites to Eschelon in an emergency at a cost-based rate. We do not dispute here that  
18 there may be technical differences between unbundled loops (design) and retail POTS (non-design),  
19 but we do not find that the distinctions between the services are material when determining whether  
20 Eschelon has access to the loop and a meaningful opportunity to compete. If a Qwest customer is able  
21 to receive expedited service in a defined emergency (fire, flood, national emergency, etc.) without  
22 having a \$200 per day charge, then Eschelon should be entitled to receive the same level and quality of  
23 service. The fact that Eschelon uses an unbundled loop to provide the service to its customer is not a  
24 meaningful distinction. For this reason, we adopt Eschelon's proposal no. 2, except that we do not  
25 adopt that portion of Eschelon's proposal that adopts a \$100 flat rate fee. Pursuant to our procedures  
26 for establishing rates, we will continue to approve the ICB rate, as an Interim Rate subject to true-up  
27 after our review of this rate in Phase III of the Cost Docket.

28

1 **Issue 12-71; 12-72; 12-73: Jeopardy Notices**

2 **Eschelon's Position**

3 Qwest sends a jeopardy notice to inform a CLEC when a due date is in jeopardy of being  
4 missed. When a jeopardy is classified as a CLEC-caused ("customer not ready" or "CNR") jeopardy  
5 for "designed" facilities, the CLEC is required to supplement its order by requesting a new due date  
6 that is at least three days after the date of the supplemental order. A jeopardy that is classified as  
7 Qwest-caused ("Qwest jeopardy") does not require the CLEC to supplement the due date and does not  
8 build in the three day delay. Eschelon is concerned that when a jeopardy has been classified as CNR  
9 but the jeopardy is in fact caused by Qwest failing to send a Firm Order Confirmation ("FOC") to  
10 Eschelon, there will be a three day delay in delivering the circuit to Eschelon. Eschelon states this can  
11 occur when an initial jeopardy notice is issued because Qwest does not have facilities to fill the order  
12 and then fails to issue a timely FOC to let Eschelon know that it is ready to deliver. Eschelon asserts  
13 that if it does not have advance notice of delivery, it may be unable to accept delivery if/when Qwest  
14 attempts delivery. Eschelon states that Qwest has, and states it will, classify jeopardies as CNR  
15 despite its failure to send an FOC. Thus, Eschelon proposes language in the ICA that requires Qwest  
16 to send a FOC with the due date at least a day in advance of delivery after a Qwest jeopardy. In  
17 contrast, Qwest's proposed language refers to the procedures for jeopardies as set forth in  
18 documentation available on its wholesale website.<sup>102</sup>

19 Eschelon states that its proposed language merely reflects Qwest's current processes.  
20 According to Eschelon, Qwest is claiming five reasons why Eschelon's proposed language should not  
21 be accepted: (1) process details do not belong in the ICA so the issue should be returned to CMP; (2)  
22 Eschelon's proposal forces extra time into the process and causes delay; (3) the phrase "at least the day  
23 before" is not documented in the PCAT, so it may be disregarded; (4) regardless of the type of  
24 jeopardy, CLECs should disregard the jeopardy notice and always take steps to accept a circuit even  
25 when Qwest has notified it that Qwest has a facility problem but does not send a FOC to indicate the  
26 facility problem has been cleared; and (5) the FOC notices are a formality that can be ignored in favor

27  
28 <sup>102</sup> Joint Matrix at 106.

1 of potential informal communications.

2 Eschelon asserts its proposal reflects Qwest's current processes, so there is no change to take to  
3 CMP. Eschelon believes the history of the jeopardy issue in CMP is long and tortuous and that Qwest  
4 made commitments in CMP that it now denies, which shows that the CMP has not offered an adequate  
5 forum to address Eschelon's concerns with this issue.<sup>103</sup> Eschelon states that it did use CMP to  
6 attempt to address this issue and believed that it had been addressed, but that Qwest would not comply  
7 with the process that it had agreed to in CMP and denied that there had been an agreement.

8 Eschelon argues that its proposal provides for advance notice before the due date to help ensure  
9 timely delivery of the circuit on the due date, and that its language for Section 12.2.7.2.4.4.1 provides  
10 that, even when Qwest provides no FOC, Eschelon "will nonetheless use its best efforts to accept the  
11 service" when delivered, and that if needed, the companies will attempt to set a new appointment time  
12 "on the same day."

13 Eschelon asserts there is no evidence that all Qwest procedures are documented in the PCAT or  
14 that they must be contained in the PCAT to be applied by Qwest. Rather, Eschelon argues, the  
15 evidence shows that when Qwest believes it is to its advantage to do so Qwest relies on processes  
16 documented in CMP materials, internal processes, or even undocumented processes, regardless of  
17 whether they are also in the PCAT.<sup>104</sup> Eschelon claims that for a time Qwest recognized its  
18 commitment in CMP to provide the FOC the day before and treated its own failure to do so as non-  
19 compliance with its process, but changed its position without going back to CMP. Eschelon states that  
20 it relied on Qwest's statements and documentation when the change request was closed in CMP,  
21 subject to review of Qwest's compliance with this process.<sup>105</sup> Eschelon provides examples of apparent  
22 conflicts between Qwest's statements and CMP documentation which Eschelon asserts, argue for clear  
23 language of the parties' obligations to be incorporated in the ICA.<sup>106</sup>

24 Eschelon asserts that Qwest's suggestion at the hearing, that the CLEC should disregard a

25 <sup>103</sup> Eschelon compares Qwest CMP minutes ("Eschelon confirmed that the CLEC should always receive the FOC before the  
26 due date. Qwest agreed) in Ex E-10 Johnson Dir, with Qwest denial ("Qwest never made such a commitment") in Ex Q-2  
Albersheim Rebuttal at 21.

27 <sup>104</sup> Eschelon cites examples in Ex Q-2 Albersheim Rebuttal at 21 and 22 and 24; Ex E-11, Johnson Rebuttal at BJJ-35; Ex  
E-8 at 45; Ex E-10 Johnson Direct at BJJ-5 at 36.

28 <sup>105</sup> Ex E-10 Johnson Direct at BJJ-5 at 20.

<sup>106</sup> See Eschelon Brief at 162-168.

1 jeopardy notice and always take steps to prepare to accept a circuit is contrary to what Qwest has  
2 documented in its PCAT. Eschelon believes this highlights the problem of relying on the PCAT which  
3 Qwest controls and can deny and reinterpret, rather than relying on contract language.

4 Finally, Eschelon asserts that providing a FOC after a Qwest facility jeopardy has cleared is  
5 not a mere formality, but is a contractual requirement of Section 9.2.4.4.1, and is also part of Qwest's  
6 SGAT, as well as in Qwest's proposed template interconnection agreement. Eschelon argues that it  
7 does not have a meaningful opportunity to compete if it must make inefficient use of resources  
8 because Qwest wants to substitute informal technician or other communications instead of  
9 mechanisms that were reviewed as part of the Section 271 process.

#### 10 Qwest's Position

11 Qwest asserts that Eschelon's proposal will not speed up service to customers. Rather, Qwest  
12 argues the record demonstrates that Qwest and Eschelon have worked well together to deliver service  
13 either on the due date or as quickly as possible after a jeopardy has been cleared. Qwest cites statistics  
14 indicating that 76 percent of the time where Eschelon received no FOC after a jeopardy, Qwest  
15 delivered, and Eschelon accepted, service on the due date.

16 Qwest also argues that Eschelon's proposed language has a significant impact on Qwest's  
17 Performance Assurance Plan. According to Qwest, if a Qwest technician classifies an order as a  
18 Qwest jeopardy, it counts as a missed commitment, even though Qwest was ready and able to deliver  
19 the circuit, but if the technician classifies the order as customer not ready, it is excluded from the  
20 calculation.

21 In addition, Qwest asserts that Eschelon usually knows that an order is coming without an  
22 FOC. Qwest's witness testified that informal communication allows Eschelon to accept a circuit most  
23 of the time.<sup>107</sup> Qwest states that the evidence demonstrates that the technicians working to deliver  
24 circuits communicate with each other in order to complete the job, and that Eschelon's insistence on  
25 an FOC is an attempt to take advantage of form over substance in order to gain advantageous PAP  
26 treatment. Qwest argues such treatment should be rejected.

27  
28 

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<sup>107</sup> TR at 68-74.

**Resolution**

Eschelon's proposed language reflects Qwest's current procedures for rescheduling circuit deliveries after a jeopardy notice is issued, except that Qwest claims current procedures do not require the FOC to issue one day in advance of the new delivery date. Eschelon is concerned that it not be assigned a CNR jeopardy when the original cause of the delay was a Qwest caused issue. In addition, Eschelon is concerned that the CMP is a Qwest controlled process and can result in changes to the process being made over Eschelon's objection. Qwest argues that having one set of procedures for Eschelon, and any CLECs opting in to the Eschelon ICA, and one for every other CLEC is not efficient. Further, Qwest argues that Eschelon's requirement that the FOC issue a day before the rescheduled delivery date adds at least a day's delay when such delay might not be necessary.

Eschelon proposed the following language for Section 12.2.7.2.4.4:

12.2.7.2.4.4 A jeopardy caused by Qwest will be classified as a Qwest jeopardy, and a jeopardy caused by CLEC will be classified as Customer Not Ready (CNR). Except as set forth in Section 12.2.7.2.4.4.1, nothing in this Section 12.2.7.2.4.4 modifies the Performance Indicator Definition (PIDs) set forth in Exhibit B and Appendices A and B to Exhibit K of this Agreement.

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

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

Eschelon's proposed language does not require Qwest to issue the FOC at least a day in

1 advance of rescheduled delivery, and it provides that Eschelon will use its best efforts to accept  
2 delivery even if an FOC is not issued. However, under this language if Qwest does not issue the FOC  
3 at least a day in advance, then it can not characterize the failure to deliver as a CNR jeopardy. We  
4 believe this is fair. The premise is that there has been a Qwest jeopardy. Eschelon should not be  
5 required to commit resources to accept delivery after being notified that Qwest might not be able to  
6 deliver the service as expected.

7 By incorporating the process in the ICA, any new processes developed in CMP that are  
8 contrary to the contract language will not take effect automatically. However, we believe Eschelon's  
9 proposed language is fair and reasonable and will not undermine the benefits of the CMP. CMP will  
10 continue to operate and any new processes developed and agreed to in CMP related to this topic can be  
11 adopted in ICA amendments, just as they are with any topic.

12 As stated above, we do not believe that Eschelon's proposed language will result in delay, but  
13 to the extent it could, we expect that Eschelon has performed an adequate analysis of the effects of its  
14 language on its own operations.

15 Consequently, we adopt Eschelon's proposed language for this issue.

16 **Issue 12-87: Controlled Production**

17 **Eschelon's Position**

18 Controlled production testing consists of controlled submission of real CLEC product orders to  
19 a new or updated interface. The test is intended to verify that the data between Qwest and the CLEC is  
20 exchanged according to the industry standard. Eschelon states that it needs certainty in the contract  
21 language that controlled production testing will continue to be necessary for a new implementation  
22 effort and unnecessary for re-certification. A new implementation effort involves transactions that the  
23 CLEC does not yet have in production. Re-certification is defined in the ICA as "the process by which  
24 CLECs demonstrate the ability to generate correct functional transactions for enhancements not  
25 previously certified."

26 The parties propose the following language concerning controlled production:  
27  
28

1 Eschelon Proposal

Qwest Proposal

2 Proposal # 1:

3 12.6.9.4 Controlled Production – Qwest and  
 4 CLEC will perform controlled production. The  
 5 controlled production process is designed to  
 6 validate the ability of CLEC to transmit EDI data  
 7 that completely meets X12 (or mutually agreed  
 8 upon substitute) standards definitions and  
 9 complies with all Qwest business rules.  
 10 Controlled production of actual CLEC production  
 11 request to the Qwest production environment  
 12 Qwest treats these pre-order queries and orders as  
 13 production pre-order and order transactions.  
 14 Qwest and CLEC use controlled results to  
 15 determine operational readiness. Controlled  
 16 production requires the use of valid account and  
 17 order data. All certification orders are considered  
 18 to be live orders and will be provisioned.  
 19 Controlled production is not required for  
 20 recertification, unless the Parties agree otherwise.  
 21 Recertification does not include new  
 22 implementations such as new products and/or  
 23 activity types.

12.6.9.4 Controlled Production – Qwest and  
 CLEC will perform controlled production. The  
 controlled production process is designed to  
 validate the ability of CLEC to transmit EDI data  
 that completely meets X12 (or mutually agreed  
 upon substitute) standards definitions and  
 complies with all Qwest business rules.  
 Controlled production of actual CLEC production  
 request to the Qwest production environment  
 Qwest treats these pre-order queries and orders as  
 production pre-order and order transactions.  
 Qwest and CLEC use controlled results to  
 determine operational readiness. Controlled  
 production requires the use of valid account and  
 order data. All certification orders are considered  
 to be live orders and will be provisioned.  
Controlled production is not required for features  
 or products that the CLEC does not plan on  
 ordering. Recertification does not include new  
 implementations such as new products and/or  
 activity types.

13 Proposal #2:

14 12.6.9.4 Controlled Production – Qwest and  
 15 CLEC will perform controlled production for  
 16 new implementations, such as new products, and  
 17 as otherwise mutually agreed by the Parties. The  
 18 controlled production process is designed to  
 19 validate the ability of CLEC to transmit EDI data  
 20 that completely meets X12 (or mutually agreed  
 21 upon substitute) standards definitions and  
 22 complies with all Qwest business rules.  
 23 Controlled production of actual CLEC production  
 24 request to the Qwest production environment  
 25 Qwest treats these pre-order queries and orders as  
 26 production pre-order and order transactions.  
 27 Qwest and CLEC use controlled results to  
 28 determine operational readiness. Controlled  
 production requires the use of valid account and  
 order data. All certification orders are considered  
 to be live orders and will be provisioned.

24 Eschelon asserts that it supports necessary testing and nothing in its proposal is inconsistent  
 25 with the use of controlled production when applicable, Eschelon claims that its proposal simply  
 26 reflects the status today, and provides that testing will be appropriate for the type of change being  
 27 made (with re-certification requiring less testing than an initial certification). Eschelon states that its  
 28



1 business need is to avoid costly and/or time consuming controlled production testing that is  
2 unnecessary.

3 **Qwest's Position**

4 Qwest believes that it needs to be able to determine the extent of controlled production testing  
5 that is necessary when a CLEC must obtain recertification for access to Qwest's systems. Qwest is  
6 concerned that Eschelon's proposed language would allow Eschelon to veto certain decisions made by  
7 Qwest.

8 Qwest asserts that although Eschelon expresses concern that Qwest's position may result in  
9 unnecessary controlled production testing, and consequently expense, Eschelon has failed to identify a  
10 single situation in the last ten years in which Qwest has made an improper demand for controlled  
11 production testing. Qwest argues that any theoretical harm to Eschelon does not compare to the risks  
12 faced by Qwest to its OSS. Qwest asserts that a problem with Eschelon's interface could affect the  
13 entire industry in Qwest's region as opposed to simply Eschelon. Qwest states that if it requires  
14 unnecessary controlled production it would incur significant expense, thus, it believes it has a  
15 substantial incentive to keep testing costs down. Qwest argues that systems are constantly evolving,  
16 requiring that new testing decisions be made with new updates to the system, and that Qwest is in the  
17 best position to determine whether testing is appropriate.

18 **Resolution**

19 The disagreement with regard to controlled production does not seem to be based on problems  
20 or abuses encountered in the parties' past dealings, but rather with the concern by Eschelon that Qwest  
21 may require unnecessary testing, and by Qwest that Eschelon will not participate in necessary testing.  
22 We believe that both parties have significant incentive to engage in testing when required and not to  
23 require excessive testing. On balance, we find that Qwest is in the best position to judge when testing  
24 is necessary and the extent of that testing. Qwest's proposed language does not require Eschelon to  
25 engage in controlled production for products or features it does not plan to use. Consequently, we  
26 adopt Qwest's proposed language.

27 ...

28 ...

1 **Issue 21-87A: Information Service**2 **Eschelon's Position**3 The parties' proposed language for Section 21.10 as follows:  
45 **Eschelon's Proposal:**6 ~~Qwest does not now and will not during the term~~  
7 ~~of this Agreement offers 976 services in the state~~  
8 ~~of Arizona. If 976 service is provided by another~~  
9 ~~Carrier in Arizona, nothing in this Agreement~~  
obligates either Party to bill and collect any  
Information Service provider (976) charges from  
their respective End User Customers.5 **Qwest's Proposal:**6 Qwest does not now and will not during the term  
7 of this Agreement offers 976 services in the state  
8 of Arizona. If 976 service is provided by another  
9 Carrier in Arizona, nothing in this Agreement  
obligates either Party to bill and collect any  
Information Service provider (976) charges from  
their respective End User Customers.10 This issue relates to caller-paid information services typically provided by Information  
11 Providers, allowing a caller, by dialing a 976 telephone number, to receive information such as  
12 weather or stock market reports for a charge. Eschelon argues that its proposal is designed to provide  
13 contractual certainty.14 Eschelon states that in negotiations, Qwest indicated that the Arizona Commission has made a  
15 state-specific ruling on this issue, but that Qwest's proposed contract language is the same in Arizona  
16 as for other states. Eschelon states that if the Arizona Commission has entered an order regarding  
17 Qwest's offering of 976 services, Eschelon does not object to including that language in the ICA, but  
18 that Qwest provided no details about a state-specific ruling.19 **Qwest's Position**

20 Qwest did not address this issue in testimony or its Closing Brief.

21 **Resolution**22 Qwest has not addressed this issue at all in this proceeding. We are not aware of a specific  
23 controlling order from this Commission on this issue. However, if Qwest does not provide 976  
24 service, it would not be appropriate to include contract language to the contrary. Based on the  
25 understanding that Qwest does not provide this service, we adopt Qwest's proposed language.26 **Issues 22-88, 22-88(a) and 22-89: Rates for Services**27 The Parties proposed the following language concerning rates:  
28

1 Eschelon's Position:	Qwest's Position:
2 22.1.1 The rates in exhibit A apply to the services 3 provided by <del>Qwest to CLEC</del> pursuant to this 4 Agreement.	22.1.1 The rates in exhibit A apply to the services provided by Qwest to CLEC pursuant to this Agreement.
4 <del>Qwest's</del> Arizona Access Tariff	<u>Qwest's</u> Arizona Access Tariff
5 <u>22.4.1.3 Nothing in this Agreement shall waive</u> 6 <u>any right of either party to request a cost</u> 7 <u>proceeding at the Commission to establish a</u> 8 <u>Commission-approved rate to replace an Interim</u> 9 <u>Rate.</u>	22.3.1.3 Intentionally Left Blank

8  
9 **Eschelon's Position**

10 Eschelon argues that Qwest's proposed language will result in confusion. Eschelon asserts that  
11 the ICA provides that Qwest may purchase certain services from Eschelon, including transiting and  
12 exchange of traffic, trouble isolation, managed cuts and installation of interconnection trunks.  
13 Eschelon states that because the agreed-upon language refers to Exhibit A as setting forth the rates that  
14 Eschelon charges Qwest for the services Eschelon provides, the language in Section 22.1.1 that limits  
15 Exhibit A to rates provided by Qwest and referring to Qwest's Arizona Access Services Tariff is  
16 reasonable. Eschelon argues that otherwise the language is inaccurate and potentially confusing.

17 **Qwest's Position**

18 Qwest does not address these issues in its Closing Brief.

19 **Resolution**

20 According to Eschelon, Qwest agreed to the Eschelon-proposed language for Section 22.4.1.3  
21 in the Minnesota proceeding. Absent Qwest argument to the contrary, we find Eschelon's proposed  
22 language for Section 22.1.1 and 22.4.1.3 and Exhibit A- Section 7.11 to be reasonable and adopt it.

23 **Issue 22-90: Interim Rate Procedures & Unapproved Rates**

24 **Eschelon's Position**

25 Eschelon states that its proposed language defines "Unapproved Rate" governed by Sections  
26 22.6.1 and 22.6.1.1 to mean a "new Section 251 product or service or one that was previously offered  
27 with a charge for which a price/rate has not been approved by the Commission in a TELRIC Cost  
28 Docket." Further, it asserts its proposed language provides a mechanism for setting interim rates, and

1 places the burden on Qwest to support the rates that it proposes to charge. Eschelon states that despite  
2 Qwest not having provided cost support, Eschelon is proposing interim rates for those unapproved  
3 elements, and has not proposed that those elements be provided "free." Eschelon states that its  
4 proposed rates are interim, that it only offers these rates as reasonable interim rates until such time as  
5 the Commission fully reviews and sets appropriate rates. Eschelon states that it needs to have interim  
6 rates in Exhibit A because without rates in Exhibit A, Qwest will refuse to provide the product.

7 Eschelon states that when Qwest offers a Section 251 product for which there is no  
8 Commission-approved rate, a rate for the product needs to be established, first as an interim rate, and  
9 then, after review, made permanent. Eschelon proposes that if Qwest offers a Section 251 product for  
10 which there is no Commission-approved rate, the interim rates could be a rate established by the  
11 Commission, or a rate negotiated between the two companies. Eschelon's proposed language  
12 provides that if the companies have not agreed upon a rate, Qwest will develop a TELRIC study in  
13 support of its proposed rate and submit it to the Commission for review. Further, Eschelon proposes  
14 that Qwest provide a copy of the cost support filed with the Commission to Eschelon upon request,  
15 and that until the Commission orders an interim or permanent rate, Eschelon would use the Qwest-  
16 proposed rate to order the product.

17 Eschelon explains that its proposed language for this issue follows a commission decision in a  
18 Minnesota Section 271 case. The Minnesota commission specified that Qwest cannot charge a rate for  
19 a Section 251 product for which there is no Minnesota-approved, cost-based rate without petitioning  
20 for the Minnesota commission's approval of the rate. Eschelon believes that upon request Qwest  
21 should provide Eschelon with any supporting cost study Qwest files with the Commission so that  
22 Eschelon would not have to incur the expense of intervening in a cost case to gain access to the cost  
23 filing when review of the cost study may indicate that intervention would not be necessary.

24 For Section 22.6.1.1 Eschelon proposes to address a situation not covered by Section 22.6.1. If  
25 (1) Eschelon and Qwest have not agreed upon a negotiated rate; (2) the Commission has not  
26 established a rate; and (3) Qwest does not submit a proposed rate and cost support to the Commission  
27 within the specified time frame, the unapproved rates do not apply, and Qwest must provision the  
28 product in question free of charge. Eschelon asserts that its proposal ensures that Qwest cannot extend

1 a period by which it imposed unapproved rates by not filing cost support with the Commission and  
2 requesting approval of the rates.

3 Eschelon proposes that Section 22.4.1.1 which addresses interim rates, cross references Section  
4 22.6, the mechanism that addresses the mechanism for setting interim rates.

5 Issues 22-90(c) through 22-90(l) contain specific rate proposals for products for which the  
6 Commission has not approved rates. Eschelon's and Qwest's proposed interim rates for the specific  
7 services at issue follow:

8 Service	Eschelon:	Qwest:
9 7.9.4 .1 Mechanized Transit Records	\$0.001578	\$0.002827
10 7.9.4.2 Mechanized Access Records	\$0.001578	\$0.001827
11 8.7.1.2 Fiber Flat Charge, Per Request	\$1,178.59	\$1,975.68
12 8.7.2.4 Fiber, per Request	\$54.93	\$130.65
13 8.8.3 DS1 Circuit, per Two Legs <sup>108</sup>	\$75.83	\$75.83
14 8.8.4 DS3 Circuit, per Two Legs	\$329.00	\$1,304.51
15 8.13.1.1 Quote preparation Fee (QPF) , per Office	\$441.00 NRC	\$914.07 NRC
16 8.13.1.2 Power Reduction <u>Restoration</u> , per Feed Set <sup>109</sup>		
17 8.13.1.2 Power Reduction, with or without Reservation, per Feed Set <sup>110</sup>		
18 8.13.1.2.1 Less than 60 Amps	\$348.00 NRC	\$735.38 NRC
19 8.13.1.2.2 Equal to 60 Amps	\$348.00 NRC	\$1,025.79 NRC
20 8.13.1.2.3 Greater than 60 Amps	\$587.00 NRC	\$1,283.33 NRC
21 8.13.1.3 Power Off, per Feed Set, per Secondary Feed	\$68.92 NRC	\$947.35 NRC
22 8.13.1.4 Power Maintenance Charge (Reservation Chare), per Fuse Set	\$37.00 REC	\$50.04 REC
23 8.13.2 Power Restoration		
24 8.13.2.1 Quote Preparation Fee (QPF), per Office	\$441.00 NRC	\$914.07 NRC
25 8.15.2.1 Special Site Assessment Fee	\$529.00 NRC	\$1,058.00 NRC

27 <sup>108</sup> Resolved consensually by the parties pursuant to Joint Notice filed July 18, 2007. Price reflects agreed-to charge.

28 <sup>109</sup> Eschelon proposed language

<sup>110</sup> Qwest proposed language

1	8.15.2.2 Network Systems Assessment Fee	\$831.50 NRC	\$1,663.00 NRC
2	Private Line/Special Access UDIT Conversion	\$54.21	\$126.14
3	9.23.7.7.1 DS0	\$108.59	\$135.44
4	9.23.7.7.2 High Capacity	\$123.41	\$153.74
5	Transfer of Responsibility	\$64.21	\$128.42
6	10.7.12 Innerduct Occupancy Fee, per Foot, per Year	\$0.18	\$0.36
7	10.7.12.1 Microduct Occupancy Fee, per Microduct, per Foot, per Year	\$0.3345	\$0.4659
8	Eschelon Proposed language:		
9	9.2.2.5.1 Unbundled Loop Grooming (2-Wires) FN A <sup>111</sup>		
10	9.2.2.5.2 Unbundled Loop Grooming (4-Wire) FN A		
11	Qwest Proposed Language:		
12	9.2.2.5.1 Unbundled Loop Grooming (2-Wire) FN A, 5 <sup>112</sup>		
13	9.2.2.5.2 Unbundled Loop Grooming (4-Wire) FN A, 5		

14 Eschelon argues that Qwest is incorrect in claiming specific rates should not be addressed in an  
15 arbitration. Eschelon asserts that Section 252(b)(4)(c) of the 1996 Act requires the Commission to  
16 resolve each issue set forth in the petition. Eschelon states that Section 252(c) requires that a state  
17 commission "in resolving by arbitration" any open issues and imposing conditions upon the parties to  
18 the agreement, "shall establish any rates for interconnection, services or network elements according  
19 to subsection (d) of this section."<sup>113</sup> Eschelon also relies on the FCC rules which it asserts recognize  
20 that state commissions may set rates in arbitration proceedings and impose a duty to produce cost data  
21 relevant to setting rates in negotiations.

22 Eschelon states that the difference between its and Qwest's proposal for rates for services for  
23 which there has not been a Commission decision, is that Qwest wants its rates to go into effect without  
24 any Commission scrutiny, while Eschelon seeks Commission review to assure that the rates Qwest  
25

26 <sup>111</sup> Footnote A provides: "Cost Docket T-00000A-00-0194 Phase II Oder No. 64922 Effective 6/12/02."

27 <sup>112</sup> Proposed footnotes A and 5 provide: "Rates for this element will be proposed in Arizona Cost Docket Phase III and may  
not reflect what will be proposed in Phase III. There may be additional elements designated for Phase III beyond what were  
reflected here."

28 <sup>113</sup> Section 252(d) sets forth the applicable pricing standards for interconnection, network elements and resale at wholesale  
rates of ILEC retail services and provides that rates shall be cost-based and nondiscriminatory.

1 charges are not excessive. Eschelon argues that to adopt Qwest's position and defer consideration of  
2 the rate issues in essence allows Qwest to charge its proposed rates, which rates, Eschelon believes it  
3 has shown to be in excess of its costs.

4 Eschelon argues that Qwest has provided no support for its proposed rates. Eschelon argues  
5 that it has presented evidence that its proposed rates are closer to the cost-based, nondiscriminatory  
6 standard that is supported by prior Commission decisions. Eschelon argues that Qwest should not be  
7 permitted, as a result of proposing interim rates, to ignore the Commission's previous cost decisions  
8 especially when it is deferring Commission review to those proposed rates to some time in the future.

9 With respect to the issue of unbundled loop grooming, Eschelon asserts that because grooming  
10 rates were set in the UNE Cost Docket, and there is no evidence that these rates would be reviewed in  
11 Phase III of that docket, Eschelon objects to including a footnote in this Exhibit A that would give the  
12 impression that these rates are to be reviewed in Phase III. Eschelon asserts there is no basis for  
13 Qwest's proposed footnote 5.

#### 14 Qwest's Position

15 Qwest asserts that rates for new services or products have historically been handled in cost  
16 dockets where all parties have the opportunity to participate and the result is binding on all parties in  
17 the state. Qwest notes that there have been two cost dockets in Arizona for the purpose of determining  
18 UNE rates. In the second, or Phase II, the Commission decided that:

19  
20 to the extent that issues are not addressed by the Decision, such issues are  
21 deferred to Phase III of this proceeding . . . . For new services proposed by  
22 Qwest with a new rate that has not been reviewed and approved by the  
23 Commission, the interim rate shall be no more than the rate Qwest has  
24 proposed. Such 'interim' rates shall be subject to a 'true-up' and refund  
25 once permanent rates are established in Phase III. Decision No. 64922 at  
26 81:1-9 and 84:20-22.

27 Qwest argues the Commission's approach makes sense because resolving these issues in isolated  
28 interconnection arbitration proceedings could lead to inconsistent results and unnecessary repetition of  
litigation. In addition, Qwest argues that the complexity of cost issues does not lend itself to  
resolution in an arbitration context.

Qwest objects to Eschelon's proposed language that would require that Qwest obtain approval

1 before charging for a UNE or process that it previously offered without charge. First, Qwest asserts  
2 that Eschelon's proposed language appears to apply beyond TELRIC priced unbundled network  
3 elements and it raises the potential that Eschelon would argue it is entitled to services for free.

4 Qwest views Eschelon's proposal that Qwest provide cost support to Eschelon as unnecessary  
5 and more appropriately handled in the Commission procedural rules instead of in an interconnection  
6 agreement. Qwest notes that the Minnesota commission rejected this proposal as unnecessary.

7 Qwest argues that resolving the specific rates Eschelon proposes would require resolution of  
8 issues that are normally addressed in cost dockets. Qwest disagrees with Eschelon's proposed  
9 adjustments for inputs that were ordered in prior Arizona cost cases. Qwest argues that absent a  
10 detailed review of Qwest's proposed costs for those elements and Eschelon's adjustments, it is  
11 impossible to determine whether or not those adjustments are warranted based on past decisions.  
12 Qwest asserts that for other rates, Eschelon proposed averaging ordered rates from certain states in  
13 Qwest operates, but does not include states that have higher rates for the relevant elements. In other  
14 instances, Qwest asserts Eschelon took Qwest's rate and cut it in half. Finally, Qwest disputes  
15 Eschelon's claim that in some instances it did not provide Eschelon with cost studies.

16 Qwest asserts that this case contains little information to allow the Commission to resolve the  
17 rate issues.

18 **Resolution:**

19 In normal circumstances arbitrations are not an appropriate forum for determining specific rate  
20 elements because the time frame for resolving an arbitration is usually not sufficient to allow for the  
21 required inquiry into and analysis of rate elements, and the inefficiencies associated with resolving a  
22 rate element that would only apply to one CLEC. For these reasons, the Commission has heretofore  
23 allowed Qwest to propose an interim rate for new elements until the Commission is able to examine  
24 and approve a rate in a cost docket. Eschelon's proposal to not allow Qwest to charge for a new  
25 element until Commission approved rates are determined would be a change in our procedure.  
26 Because it is important to have uniform rates for all services and CLECs, we do not believe it is in the  
27 public interest to alter our current procedure as the result of an arbitration proceeding that affects only  
28 two parties. Likewise, an arbitration is not the best forum for modifying rates that had been previously



1 approved. Eschelon proposes changes to these rates. Qwest disputes some of Eschelon's claims and  
 2 we do not have sufficient evidence to find that Qwest has improperly applied approved rates.  
 3 Consequently, for all of the above reasons, we adopt Qwest's proposed language for this issue.

4 We do not believe that Qwest should be permitted to charge unapproved rates indefinitely.  
 5 Unapproved rates are interim and subject to refund, but if we do not conduct the next phase of the cost  
 6 docket, the parties lose the intended protections of the interim status. Thus, we will direct Staff to take  
 7 appropriate steps to commence Phase III of the cost docket, which should include, among other things,  
 8 a review of all of the rates elements at issue in this proceeding.

9 \* \* \* \* \*

10 Having considered the entire record herein and being fully advised in the premises, the  
 11 Commission finds, concludes, and orders that:

12 ...

### 13 FINDINGS OF FACT

14 1. On September 8, 2006, Eschelon filed with the Commission a Petition for Arbitration  
 15 of an interconnection agreement with Qwest pursuant to A.A.C. R14-2-1505 and Section 252(b) of the  
 16 1996 Act.

17 2. On October 3, 2006, Qwest filed its Response to the Petition.

18 3. By Procedural Orders dated October 6, 2006, and October 10, 2006, the Commission  
 19 established procedural guidelines and set the matter for arbitration.

20 4. On October 23, 2006, Qwest and Eschelon filed a Joint Motion to Amend the  
 21 Procedural Schedule.

22 5. By Procedural Order dated October 30, 2006, the Commission granted the Joint Motion  
 23 and set the arbitration to commence March 19, 2007.

24 6. On November 8, 2006, Qwest filed the Direct Testimony of Renee Albersheim,  
 25 William Easton, Teresa Million, Robert Hubbard and Karen Stewart. On the same date, Eschelon filed  
 26 the Direct Testimony of James Webber, Michael Starkey, Bonnie Johnson and Douglas Denney.

27 7. On February 9, 2007, Qwest filed the Rebuttal Testimony of Ms. Albersheim, Mr.  
 28 Easton, Ms. Million, Mr. Curtis Ashton, Mr. Hubbard and Ms. Stewart. On the same date, Eschelon

1 filed the Rebuttal Testimony of Ms. Johnson, Mr. Denney and Mr. Starkey.

2 8. On February 20, 2007, Eschelon filed a Notice of Errata, filing a corrected version of  
3 Ex MS-6 to Mr. Starkey's Rebuttal Testimony.

4 9. On March 1, 2007, Qwest filed a Motion to Dismiss Rate Issues.

5 10. On March 2, 2007, Eschelon filed the Surrebuttal Testimony of Mr. Starkey, Ms.  
6 Johnson and Mr. Denney. On the same date, Qwest filed the Surrebuttal Testimony of Ms.  
7 Albersheim, Mr. Easton, Ms. Million, Mr. Ashton, Mr. Hubbard and Mr. Stewart.

8 11. On March 12, 2007, Eschelon filed a Response to Qwest's Motion to Dismiss Rate  
9 Issues.

10 12. Oral argument on the Motion to Dismiss was heard in a telephonic procedural  
11 conference on March 14, 2007.

12 13. By Procedural Order dated March 14, 2007, the Motion to Dismiss was denied.

13 14. The arbitration convened as scheduled on March 19, 2007, at the Commission's  
14 Phoenix offices. Following two days of arbitration, the matter was taken under advisement pending  
15 the submission of Closing Briefs.

16 15. On April 27, 2007, Qwest and Eschelon filed Closing Briefs.

17 16. On June 6, 2007, Eschelon filed, as supplemental authority, a copy of the Minnesota  
18 Public Utility Commission's Order Denying Reconsideration in the Qwest-Eschelon Minnesota  
19 arbitration (Docket No, P-5340, 421/IC-06-0768).

20 17. On July 18, 2007, the parties filed a Joint Notice of Closure of Arbitration Issue 9-51  
21 and Partial Closure of Arbitration Issue No. 22-90(f). Issue No. 9-51 is described as "Application of  
22 UDF-IOF Termination (Fixed) Rate Element." The parties agreed to language in Section 9.7.5.2.1 of  
23 their ICA to resolve this issue. Issue No. 22-90(f) concerns the nonrecurring rates for "ICDF  
24 Collocation" for DS1 circuits, per two legs, and for DS3 circuits, per two legs. This issue is among  
25 those described as "Unapproved Rates" as "Matrix Issue No. 45." The parties partially closed this  
26 issue by agreeing upon the nonrecurring rate of \$75.83 for ICDF Collocation for DS1 circuits, per two  
27 legs, but have not agreed upon a nonrecurring rate for ICDF Collocation for DS3 circuits per two legs,  
28 and that portion of the Issue No. 22-90(f) remains in dispute.

1 18. On September 17, 2007, the parties filed a Joint Notice of Closure of Arbitration Issues  
2 No. 8-21, 8-21(a), 8-21(b), 8-21(c), 8-21(d), 8-21(e), and 8-219(f). The parties closed this issue by  
3 agreeing to language for Sections 8.2.1.29 –Power and 8.3.1.6 -48 Volt DC Power.

4 19. The Commission has analyzed the issues presented by the parties and has resolved the  
5 issues as set forth in the Discussion portion of this Order in accordance with the 1996 Act.

6 20. The Commission hereby adopts the Discussion and incorporates the parties' positions  
7 and the Commission's resolution of the issues herein.

8 21. Pursuant to A.A.C. R14-2-1506(A), the parties will be ordered to prepare and sign an  
9 interconnection agreement incorporating the issues as resolved by the Commission, for review by the  
10 Commission pursuant to the Act, as directed herein.

#### 11 CONCLUSIONS OF LAW

12 1. Eschelon is a public service corporation within the meaning of Article XV of the  
13 Arizona Constitution.

14 2. Eschelon is a telecommunications carrier within the meaning of 47 U.S.C. § 252.

15 3. Qwest is a public service corporation within the meaning of Article XV of the Arizona  
16 Constitution.

17 4. Qwest is an ILEC within the meaning of 47 U.S.C. § 252.

18 5. The Commission has jurisdiction over Eschelon and Qwest and of the subject matter  
19 of the Petition.

20 6. The Commission's resolution of the issues pending herein is just and reasonable,  
21 meets the requirements of the 1996 Act and regulations prescribed by the FCC pursuant to the Act, is  
22 consistent with the best interests of the parties, and is in the public interest.

#### 23 ORDER

24 IT IS THEREFORE ORDERED that the Commission hereby adopts and incorporates as its  
25 Order the resolution of the issues contained in the above Discussion.

26 IT IS FURTHER ORDERED that Eschelon Telecom of Arizona, Inc. and Qwest Corporation  
27 shall prepare and sign an interconnection agreement incorporating the terms of the Commission's  
28 resolutions.

1           IT IS FURTHER ORDERED that the signed interconnection agreement shall be submitted to  
2 the Commission for its review within thirty days of the date of the Commission issues a final Order  
3 approving the Settlement Agreement in Docket Nos. T-03632A-06-0091 et al., or such other  
4 resolution to the wire center issues to which Eschelon Telecom of Arizona, Inc. and Qwest  
5 Corporation can both agree, or thirty days of the effective date of this Decision whichever is later. In  
6 the event no settlement, or mutually agreeable resolution of the wire center issues is reached in  
7 Dockets Nos. T-03632A-06-0091 et al., this arbitration docket shall be reopened to resolve issues 8-  
8 37 through 8-42.

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1 IT IS FURTHER ORDERED that the rates for specific products or elements raised in  
2 connection with issues 4-5 (loop and CFA design changes), 9-43 (UNE conversions), 12-67  
3 (expedites ICB rate), and 22-90 (rates) herein, shall be addressed in Phase III of the Cost Docket.

4 IT IS FURTHER ORDERED that this Decision shall become effective immediately.

5 BY ORDER OF THE ARIZONA CORPORATION COMMISSION.

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CHAIRMAN

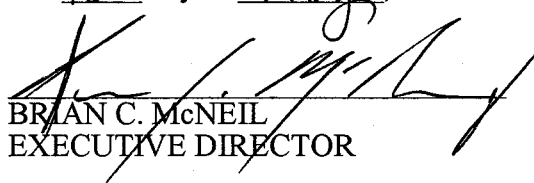
  
COMMISSIONER

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COMMISSIONER

  
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COMMISSIONER

13  
14 IN WITNESS WHEREOF, I, BRIAN C. McNEIL, Executive  
15 Director of the Arizona Corporation Commission, have  
16 hereunto set my hand and caused the official seal of the  
17 Commission to be affixed at the Capitol, in the City of Phoenix,  
18 this 16<sup>th</sup> day of May, 2008.

  
BRIAN C. McNEIL  
EXECUTIVE DIRECTOR

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21 DISSENT \_\_\_\_\_

22  
23 DISSENT \_\_\_\_\_

24  
25 JR::DAP

1 SERVICE LIST FOR: ESCHELON TELECOM, INC/ QWEST  
CORPORATION

2 DOCKET NOS.: T-03406A-06-0572 and T-01051B-06-0572

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