BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

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

I. INTRODUCTION AND SUMMARY

1 Qwest Corporation ("Qwest") submits this petition for reconsideration in response to the Commission's Final Order issued in this interconnection arbitration with Eschelon Telecom, Inc. ("Eschelon") on October 16, 2008. This petition is for the limited purpose of requesting that the Commission reconsider three discrete rulings relating to two issues addressed in the Final Order: (1) the ruling that Qwest must retain the same circuit identification number when it converts Eschelon's service from an unbundled network element ("UNE") provided under Section 251 of the Telecommunications Act of 1996 (the "Act") to a non-UNE service provided in most cases through an interstate, FCC tariff;[1] (2) the Commission's determination that the $25 conversion charge negotiated and adopted in the "Wire Center Proceeding" will permit Qwest to recover the significant costs imposed by the UNE conversion requirements

[1] This issue was identified as Issue No. 9-43 in the arbitration.

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adopted in the Final Order;[2] and (3) the ruling relating to the bills and customer service records ("CSRs") that Qwest's systems generate for point-to-point commingled EELs that would require Qwest to include information in the bills and CSRs that cross-references the UNE and the non-UNE component of each point-to-point commingled EEL.[3]

2 Qwest has historically made limited use of petitions for reconsideration in proceedings before this Commission. After careful consideration, Qwest has determined that the rulings described above have far-reaching, impermissible consequences and therefore meet the standard that governs petitions for reconsideration. This determination rests on two conclusions, both of which compel reversal or modification of the rulings at issue.

3 First, each ruling directly implicates the threshold jurisdictional question of the scope of a state commission's authority when serving as an arbitrator under Section 252 of the Act. Over the past three years, federal courts throughout the country have addressed this question and have ruled unanimously that state commissions are authorized only to set terms and conditions relating directly to the obligations imposed on ILECs and CLECs under Sections 251(b) and (c). In a decision that was issued after the parties filed petitions for review in this proceeding, the United States Court of Appeals for the Eighth Circuit became the most recent court – joining more than a dozen federal courts – to rule that state commissions acting as arbitrators may not impose terms and conditions for obligations that fall outside Sections 251(b) and (c).[4]

4 The Eighth Circuit's recent decision, along with those of the other federal courts around the country, establish with a high degree of certitude that the Commission has overstepped its limited arbitration authority by: (1) dictating the circuit identification number Qwest must use

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[2] The issue relating to the conversion charge is encompassed by Arbitration Issue Nos. 9-43 and 9-44.

[3] This issue was assigned Issue No. 9-58(c) in the arbitration.

[4] *Southwestern Bell Telephone v. Missouri Public Service Commission*, 530 F.3d 676 (8th Cir. 2008). The Eighth Circuit ruled that the Missouri Commission exceeded its authority in an interconnection arbitration conducted under Section 252 by imposing terms and conditions relating to the requirements of Section 271 of the Act

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for the non-251 services that CLECs convert to when the FCC removes UNEs from the network unbundling obligations of Section 251; (2) adopting a price (*i.e.*, $25.00) that Qwest must charge when it provides the non-251 service upon Eschelon's conversion from a UNE service; and (3) dictating the content of the bills and CSRs Qwest generates for the non-251 services that are used with commingled EELs. Each of these rulings involves an assertion authority over non-251 services, and the decisions of the Eighth Circuit and the other federal courts establish that the Commission's conduct is *ultra vires*. For example, in virtually all cases, CLECs use Qwest's *interstate* private line service when they convert from a Section 251 UNE service and when they purchase a commingled EEL. Not only is interstate private line a non-251 service that is outside the Commission's arbitration authority, it also is within the exclusive jurisdiction of the FCC because it is an interstate service. The Commission therefore has no authority to impose terms relating to the method by which Qwest provides this service, including no authority to dictate the content of Qwest's systems-specific circuit ID numbers and the information that Qwest includes in its bills. Likewise, while the Act permits the Commission to set prices, that authority is expressly limited to prices for Section 251 services and therefore does not authorize the Commission to impose a price for the provisioning and billing requirements the Final Order establishes for the non-251 services that Eschelon uses upon converting from UNE services.

5 Second, this petition also is compelled by the fact that the requirements the Commission has imposed for UNE conversions and point-to-point commingled EELs create a risk of service disruptions, harm to other CLECs, and financial harm to Qwest. As Qwest described in its testimony, the use of one circuit ID number for a UNE service and a different circuit ID number for a non-UNE private line service permits Qwest to identify whether a service is wholesale or retail and, in turn, to access the different systems that are used to perform repairs for these distinct services. Without information in the circuit ID numbers that identifies

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whether a service is wholesale or retail, Qwest will have to conduct time-consuming, manual inquiries that create the risk of delays in completing service repairs and resulting harm to CLECs and their customers. The Final Order does not acknowledge these and the other disruptive effects of using the same circuit ID number for different services and also does not address the problems Qwest experienced with its short-lived attempt to use the same circuit when it converted from tariffed services to UNE services. That approach proved to be disruptive and unworkable and, contrary to the conclusions in the Final Order, affirmatively demonstrates that Qwest must have separate circuit ID numbers for these distinct services.

6 The Commission's ruling that requires Qwest to cross-reference services on its bills and CSRs for point-to-point commingled EELs also will prejudice CLECs that are not parties to this arbitration. If permitted to stand, the requirement will force Qwest to perform changes to its billing systems that may exceed $1 million. The Change Management Process ("CMP") is designed to allow CLECs, acting as a collective group, to prioritize the changes Qwest makes to its operation support systems ("OSSs"). No other CLECs have requested the change imposed by the Commission's rulings and no CLECs have spoken about the change in this single arbitration between two parties. The ruling thus undermines a basic purpose of the CMP by effectively giving Eschelon unilateral authority to prioritize Qwest's expenditure of the limited resources that are available for OSSs.

7 Finally, through this petition, Qwest presents a proposed modification to the Commission's requirement of a single circuit ID for UNE conversions. As described below, a circuit identification number is comprised of a numerical and alphabetical prefix followed by a series of numbers: 15.HCFU.043644.NW. The prefix – "15.HCFU" – is what tells Qwest's systems and personnel whether a service is wholesale or retail. If the Commission permits Qwest to change just the prefix while keeping the rest of the circuit number the same, the retail nature of the converted services will be evident to Qwest's systems and personnel. At the same time,

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Eschelon will be able to continue to track the service based on the unchanged numerical component of the circuit ID. Accordingly, while the Commission should find that it is without jurisdiction to dictate the content of a circuit ID for a non-251 service, a decision by the Commission to nonetheless assert jurisdiction should result in the adoption of this alternative, less disruptive proposal.

II. DISCUSSION

A. The Commission should Reverse its Ruling that Requires Qwest to use the Same Circuit Identification Number upon Converting from a UNE to a Non-UNE Service.

1. The Commission does not have the authority to require Qwest to use a particular circuit identification number for a non-251 service.

8 The plain effect of the Commission's ruling is that it requires Qwest to provide a specific form of circuit identification numbers for services – usually tariffed private line services – that indisputably are not within the unbundling obligations of Section 251. Indeed, these services are at issue precisely because the FCC has eliminated certain UNEs from Section 251, thereby requiring CLECs to use non-251 services by self-provisioning them, obtaining them from another carrier, or obtaining them from Qwest. The jurisdictional question before the Commission, therefore, is whether in performing its duties as an arbitrator under Section 252, the Commission has the authority to impose a term and condition – in this case, a circuit ID requirement – for a service that Qwest does not provide pursuant to Section 251. The rulings of every federal court that has considered this question, as well as a prior ruling from this Commission, establish unequivocally that state commissions are without arbitration authority to impose terms for non-251 services.

9 Section 252(b)(4)(C), the provision that authorizes state commissions to serve as arbitrators, requires commissions to resolve open issues by imposing conditions "required to implement subsection [252](c)." In turn, § 252(c), which sets forth "standards for arbitration," expressly

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directs state commissions to resolve "open issues" by imposing "conditions [that] *meet the requirements of section 251*." Thus, the open issues that state commissions are authorized to resolve are only those relating to the duties imposed by Section 251. Congress neither directed nor authorized state commissions to resolve open issues unrelated to § 271. This conclusion is reinforced by Congress's explicit statement that in determining whether to approve an arbitrated agreement, state commissions may "only" consider whether the ICA complies with § 251 and the pricing standards in § 252.[5]

10 The courts that have analyzed the § 252 arbitration authority of state commissions have concluded that it does not extend to non-251 obligations.[6] As the Kentucky district court observed in the context of whether state commissions have authority to arbitrate terms and conditions relating to the obligations imposed by Section 271, "considering the explicit authority granted to state commissions under §§ 251 and 252, Congress could have easily included the same provisions in § 271, but did not."[7] Like the courts, the state commissions that have considered this issue have disclaimed power to arbitrate anything other than § 251 obligations. Indeed, in its arbitration decision in an arbitration between Qwest and Covad Communications Company, this Commission cited the limitations on arbitration authority set forth in Section 252 in ruling that it was without authority to arbitrate Section 271 obligations in a Section 252 arbitration.[8]

11 This conclusion is reinforced by the Eighth Circuit's recent decision in *Southwestern Bell Telephone*. In that case, the Missouri Commission had exercised its Section 252 arbitration authority by requiring Southwestern Bell to provide network elements under Section 271 to a

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[5] 47 U.S.C. § 252(e)(2)(B).

[6] *See, e.g., BellSouth Telecommunications, Inc. v. Georgia Pub. Service Comm'n,* slip op. at 12.

[7] *BellSouth Telecommunications v. Kentucky Public Service Commission*, 2007 WL 2736544 at *6

[8] *In the Matter of the Petition of Covad Communications Co. for Arbitration with Qwest Corporation*, Docket UT-043045, Order 06 at ¶¶ 46-49 (Feb. 9, 2005) ("Covad Arbitration Order").

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CLEC and to do so at regulated rates set by the Commission. Affirming the district court's reversal of the Missouri Commission's rulings, the Eighth Circuit ruled that the Commission acted without authority in discharging its obligations as an arbitrator.[9] The court found that state commissions have no authority to address the obligations in Section 271, consistent with the fact that the arbitration authority of state commissions is limited to resolving open issues relating only to the services contained in sections 251(b) and (c).

12 The jurisdictional analysis in the Commission's Final Order never addresses the language of the statute that grants arbitration authority to state commissions and does not attempt to distinguish the cases confirming that states cannot arbitrate non-251 issues. Instead, the Commission concludes it has authority because the FCC stated in the *TRRO* that ILECs and CLECs should implement the rulings in the *TRRO* through interconnection agreements and the negotiation process established by Section 251.[10] This conclusion is incorrect for two fundamental reasons.

13 First, it is well established that the authority of state commissions under the Act is limited to that which Congress has expressly granted through the Act's provisions.[11] It is Congress, not the FCC, which determines the authority of state commissions, including the authority of commissions to serve as arbitrators. This principle was made very clear when the D.C. Circuit reversed the FCC's *Triennial Review Order* on the ground that the FCC had acted improperly by attempting to sub-delegate its authority relating to Section 251 unbundling to state commissions. As the court stated, "while federal agency officials may subdelegate their decision-making authority to subordinates absent evidence of contrary congressional intent, they may not subdelegate to outside entities – private or sovereign – absent affirmative

[9] 530 F.3d at 683.

[10] Final Order at ¶ 68.

[11] *MCI Telecommunications Corp. v. Bell Atlantic-Pennsylvania*, 271 F.3d 491, 510 (3rd Cir. 2001) (States not permitted to regulate except by express leave of Congress).

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evidence of authority to do so." [12] There is no provision of the Act that gives the FCC the power to delegate arbitration authority to state commissions; Congress is the sole source of that state authority. Thus, the Commission erred in looking to statements from the FCC to determine the scope of its arbitration jurisdiction instead of relying on the language of Section 252 delineating that authority.

14 Second, the statements in the *TRRO* upon which the Commission relies do not purport to give states authority over non-251 services. The effect of the *TRRO* was to remove multiple UNEs from the unbundling obligations of Section 251, and the FCC recognized that ILECs and CLECs would amend their interconnection agreements to remove those obligations. To that end, the FCC stated in paragraph 233 of the TRRO that ILECs and CLECs "will implement the Commission's findings as directed by section 252 of the Act" and "must negotiate in good faith" for that purpose. In other words, ILECs and CLECs are required to take the steps necessary to remove the delisted UNEs from interconnection agreements and to implement the temporary rate scheme in the TRRO that was designed to ease the CLECs' transition away from the delisted UNEs.[13]

15 The Commission misinterprets these implementation directives as reflecting the FCC's intent to allow states to regulate the terms and conditions of Qwest's non-251 services that CLECs have chosen to use in place of the delisted UNEs. In so doing, the Commission has improperly turned an order designed to deregulate markets into a vehicle for expanding the reach of regulatory authority. This result, contrary to the Commission's conclusion, finds no support in the FCC's statement in the *TRRO* that the obligation of ILECs and CLECs to negotiate extends to "any rates, terms, and conditions necessary to implement our rule changes."[14] According to

[12] *USTA v. FCC*, 359 F.3d 554, 566 (D.C. Cir. 2004).

[13] *See, e.g., TRRO* at ¶ 145 (describing transitional rate plan for high capacity transport).

[14] *TRRO* at ¶ 233; *see* Final Order at ¶ 68.

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the Final Order, the FCC's use of "any" means that rates, terms, and conditions for the non-251 services CLECs use upon converting from UNEs are subject to the Section 251/252 negotiation and arbitration process. But the term "any" must be interpreted consistent with the deregulatory purpose of the *TRRO*. When interpreted in that context, the only logical conclusion is that the FCC was requiring ILECs and CLECs to negotiate and potentially arbitrate the rates, terms, and conditions necessary to remove UNEs from interconnection agreements and to implement the *TRRO's* transitional rate scheme.

16 Consistent with this interpretation, nowhere in the *TRRO* does the FCC state that commissions should use their arbitration authority to impose rates and terms for non-251 services. If the FCC had intended that radical (and unlawful) expansion of the authority of state commissions, it no doubt would have said so. Moreover, the FCC expressly limited the terms that ILECs and CLECs must negotiate (the terms subject to the Section 251/252 process) to those "necessary to implement our rule changes."[15] The "rule changes" resulting from the *TRRO* do not in any way address terms and rates for non-251 services and, instead, address only the legal framework for removing UNEs from Section 251 and establishing transitional rates for those delisted elements. Thus, the FCC's reference to "any" rates or terms relating to its "rule changes" does not include rates and terms for non-251 services.[16]

17 The Commission's error in ruling otherwise is demonstrated further by the fact that the services to which CLECs convert when high-capacity transport and loops are removed from Section 251 are almost always *interstate* private line services. It is beyond reasonable dispute that the Commission does not have any authority over interstate services.[17] Yet, the effect of the Commission's ruling would be to require Qwest to change how it provisions these tariffed

[15] *TRRO* at ¶ 233.

[16] 47 C.F.R. § 51.319.

[17] *In re Vonage Holdings Corp.,* 19 F.C.C.R. 22404 at ¶ 18 (2004) (FCC has exclusive jurisdiction under the Act to determine the policies and rules that govern interstate services).

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interstate services through the use of mandated circuit identification numbers. Accordingly, while the Commission should eliminate this requirement for all non-251 services that CLECs use after converting from UNEs, it should rule at a minimum that the requirement does not apply when CLECs convert to any of Qwest's interstate services.

18 Finally, the Commission also lacks authority to impose the requirements at issue because the non-251 services Qwest offers for UNE conversions are provided pursuant to Section 271, a provision of the Act over which state commissions have no authority. To comply with the unbundling obligations in Section 271 – which are independent of those in Section 251 – Bell Operating Companies like Qwest must continue to provide access to high capacity transport and loops even after those elements have been removed from Section 251. Qwest satisfies this obligation by offering private line service, which is comprised of high capacity transport and loops. In *Southwestern Bell Telephone v. Missouri Public Service Commission*, the Eighth Circuit joined the many federal courts and state commissions that have found that the authority to implement and enforce requirements relating to network elements and services provided under Section 271 rests exclusively with the FCC.[18] This Commission reached the same conclusion in the Qwest-Eschelon arbitration, ruling that "we find that we have no authority under Section 271 to require Qwest to include Section 271 elements, or pricing for elements, in its interconnection agreement."[19] This absence of state authority to enforce or implement Section 271 further establishes that the Commission does not have jurisdiction to impose terms – such as the circuit ID requirement – relating to the way in which Qwest provisions the Section 271 elements contained in private line service.

[18] 530 F.3d at 683.

[19] Covad Arbitration Order at ¶ 45.

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2. The requirement of a single circuit ID number will adversely affect service, cause prejudice to other CLECs, and cause financial harm for Qwest.

19 As Qwest has explained in its testimony and prior briefs, separate circuit IDs are required for UNE and non-UNE products because of fundamental differences between these products. UNEs are classified as a highly regulated Section 251 service subject to the Act's requirement of cost-based prices upon the FCC's "TELRIC" ("total element long-run incremental cost") pricing methodology. By contrast, alternative service arrangements are not classified as UNEs and are provided through commercial contracts and tariffs at prices that are typically based upon the market.[20] These services also differ with respect to the customers to whom they are available. UNEs are only available for leasing by carriers the Commission has certified to provide service in their capacity as CLECs. By contrast, the alternative service arrangements that Qwest provides through tariffs are not limited to CLECs, as they are available to interexchange carriers and large business customers.[21]

20 Because UNEs and alternative service arrangements are governed by different regulatory regimes and are available to different categories of customers, Qwest has developed separate and distinct ordering, maintenance, and repair processes for these services. For example, Qwest's service quality obligations relating to ordering, maintenance, and repair of UNEs are governed by the "Performance Assurance Plan" ("PAP") that this Commission and other state commissions established in connection with Qwest's applications under Section 271 for entry into the long distance markets in its region. By contrast, for alternative services, different service quality obligations are set, in many cases, through the terms of commercial agreements and tariffs, and the PAP is inapplicable. At an even more basic, practical level, orders for UNEs are routed to a Qwest ordering center that is different from the ordering center that

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

[21] *Id.*

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handles, for example, orders for private line service. Similarly, the Qwest maintenance and repair centers that handle UNEs are different from those that handle private line service and other alternative service arrangements.[22]

21 These multiple differences between UNEs and alternative service arrangements require Qwest to "store" UNE circuits and private line circuits in different inventory systems. Maintaining separate inventories permits Qwest to route orders and repair submissions to the appropriate inventory systems and centers.[23]

22 Importantly, the differences between UNEs and alternative service arrangements that are described above are captured and reflected in circuit ID numbers. Qwest's OSSs rely on information reflected by the circuit ID numbers to determine (1) whether a circuit is a UNE or a private line; (2) the type of testing parameters that apply to the circuit; (3) the maintenance and repair center that is responsible for the circuit; and (4) the inventory database in which the circuit is stored.[24] Accordingly, when a CLEC converts from a UNE to a private line circuit, Qwest must change the circuit ID to move the circuit from the UNE product category to the private line or other alternative service category. Without a change in circuit IDs, Qwest's systems will not be able to determine which testing parameters apply to a circuit or which maintenance and repair center is responsible for performing services on a circuit that is experiencing trouble. *The end result will be a significant increase in manual activity, an increased risk of delays in Qwest's repair process, and a resulting risk of service disruptions for CLEC customers*.

23 In requiring Qwest to use the same circuit ID for the UNE and the converted non-UNE circuit, the Final Order relies in substantial part on the conclusion that in the past, Qwest successfully

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

[23] *Id.*

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

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converted special access circuits to UNEs without changing the circuit ID.[25] According to the Commission, Qwest's success in this regard demonstrates that it should be able to use the same circuit ID when converting from UNEs to non-251 services. However, this conclusion is incorrect, as it fails to recognize testimony establishing that Qwest's attempt to use the same circuit ID for conversions from special access service to UNEs proved unworkable and had to be stopped after a short period.

24 Qwest explained during the hearing that it used the same circuit ID with special access to UNE conversions for a brief period only for embedded circuits ordered before April 2005. However, it ran into significant problems in attempting to manage these circuits because of the absence of unique circuit IDs and therefore had to end the practice after only a short time.[26] The problems Qwest experienced included difficulties in determining the testing parameters that applied to individual circuits and identifying which maintenance and repair was responsible for addressing troubles on circuits. These determinations could be carried only manually, which created risks if delays in performing maintenance and repairs for CLECs. These risks of service disruptions, along with the imposition of extensive manual-intensive tasks, caused Qwest to discontinue the practice of using the same circuit IDs for UNE and non-UNE circuits. Thus, contrary to the conclusion in the Final Order, Qwest's experience does not establish that using the same circuit ID will result in better service for Eschelon and its customers. On the contrary, the evidence demonstrates that preventing Qwest from using different circuit IDs will create risks of degradations in service.

25 The Commission's ruling relating to circuit IDs is also based an additional erroneous factual finding – that the use of different circuit IDs creates significant risks of problems relating to

[25] Final Order at ¶ 83.

[26] Ex. TKM-1T (Million Direct) at 18:4-24.

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disconnections and reconnections of circuits.[27] This finding is based on the Commission's determination that changing the circuit ID involves "'disconnecting' the UNE and 'reconnecting' the non-UNE product."[28] However, the process of changing circuit IDs does not involve any physical disconnection and reconnection of the actual physical circuit. Qwest does use an "order-out" and "order-in" process to move the circuits from its internal UNE systems to its systems for non-UNEs, but that process does not involve any physical changes – such as disconnects and reconnects – to the circuits. The Commission's finding relating to the risks of disconnects and reconnects resulting from changing circuit IDs thus appears to be based upon an incorrect understanding of the process follows.

26 The absence of risk relating to this process is demonstrated by Qwest's testimony establishing that in 2006 alone, Qwest converted nearly 1500 UNE circuits to non-UNE products without experiencing any problems.[29] These conversions were entirely transparent and seamless for the CLECs and their customers whose circuits were converted. And, from a customer service perspective, the conversions permitted Qwest to track and manage the circuits by their specific product categories, enabling Qwest to determine, for example, the circuit-specific testing parameters and the identity of the repair and maintenance centers responsible for each circuit. Given the lack of any evidence demonstrating that the use of different circuit IDs has caused service problems for Eschelon or any other CLEC, Qwest does not understand why the Commission would choose to change a process that is working smoothly and thereby impose upon Qwest extremely costly and resource-intensive requirements.

27 In sum, the factual justifications the Commission relied upon to impose this requirement do not support the requirement. Over the past several years, Qwest has successfully converted

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[27] Final Order at ¶ 85.

[28] *Id.*

[29] Million Rebuttal at 10.

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thousands of UNE circuits that have included a change in circuit IDs. Qwest should be permitted to continue that practice and should not be required to implement unitary circuit IDs that, in the end, could lead to service disruptions.

3. Alternatively, the Commission should permit Qwest to change just the alphabetical prefix of circuit IDs while leaving the remainder of the ID unchanged.

28 As described above, a typical circuit ID for a UNE circuit is as follows: 15.HCFU.043644.NW. In this series of letters and numbers, the prefix of "15.HCFU" tells Qwest's systems and personnel whether a circuit is associated with a UNE product or a non-UNE product. That identification permits Qwest to determine the applicable testing parameters and the identity of the appropriate maintenance and repair center for the circuit. While Qwest requests that the Commission eliminate any requirement to keep the same circuit ID upon a conversion, in the alternative, Qwest asks that the Commission at least permit Qwest to change the prefix of the circuit ID while keeping the rest of the circuit ID the same. Under this alternative, compromise proposal, the circuit ID listed above would become 15.HCGS.043644.NW.

29 This alternative approach would balance the needs of both parties, while protecting Eschelon and its customers from the service problems associated with using the same circuit ID for both the UNE and the non-UNE circuit. Because the portion of the circuit ID following the prefix would remain the same, Eschelon should still be able to track the circuit in its systems by relying on the prior circuit ID. At the same time, Qwest would have access to the product-specific information that it needs to ensure an adequate level of service and would not have to make the costly systems and process changes described above.

30 While this compromise approach would not address the jurisdictional concerns described above, it would result in a practical solution that could cause Qwest to set the jurisdictional

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concerns aside. Accordingly, if the Commission does not permit Qwest to use an entirely different circuit ID upon converting to a non-UNE, Qwest requests that it adopt this alternative proposal.

B. The Commission's Order fails to Compensate Qwest for the Costs it will Incur to Comply with the Requirements Imposed for UNE Conversions.

31 Qwest's challenge to the Commission's ruling relating to the rate Qwest is permitted to charge to recover the costs of the UNE conversion requirements imposed by the Final Order rests on two grounds. The first ground of challenge is jurisdictional. As a result of the Commission's rulings, Qwest would be required to provision the non-251 services that CLECs convert to by using the same circuit ID number, using an adder or surcharge for pricing purposes, and by creating a new Universal Service Ordering Code for the services.[30] The discussion set forth above relating to the limited arbitration authority of state commissions and the absence of authority over Section 271 services establishes that the Commission lacks authority to impose any of these requirements and, further, that the Commission cannot set the rate that Qwest is permitted charge for complying with these requirements. Simply stated, the requirements relate to a non-251 service, and the Commission has no authority over such services.

32 The courts have been particularly clear in confirming that state commissions have no authority under the Act to set rates for non-251 services, which is what the Commission has effectively done by limiting Qwest to a $25 conversion charge to recover the costs of the requirements imposed by the Final Order. The First Circuit, for example, ruled that the Maine and New Hampshire commissions exceeded their statutory authority in setting rates for non-251 elements, holding that the FCC alone has "the right" to set rates for Section 271 elements.[31] These rulings confirm that the Commission does not have the authority to determine the rate

[30] Final Order at ¶¶ 85, 87.

[31] *Verizon New England*, 509 F.3d at 7.

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Qwest may charge for the costs of complying with how non-251 services are provisioned. Accordingly, the Commission acted without authority in limiting Qwest to the $25 charge.

33 Additionally, even if the Commission had jurisdiction, the $25 charge plainly does not include the costs of complying with the Commission-imposed requirements for the non-251 services used with UNE conversions. As the Commission recognizes in the Final Order, that charge was negotiated in connection with the Wire Center proceeding and was agreed upon long before the requirements at issue here were imposed upon Qwest. Those requirements were not even known when the $25 charge was agreed upon and therefore were not – and could not have been – considered in developing the charge. Therefore, the Commission is wrong in stating the rate must be proper in this circumstance because "it is reasonable to assume that each party in that proceeding adequately represented its own interests in arriving at that rate."[32] Qwest could not have possibly "represented its interests" by including the costs at issue in the $25 rate, since the UNE conversion requirements the Commission has imposed were not known at the time the rate was agreed upon. Accordingly, the rate indisputably does not allow Qwest to recover the costs of complying with the requirements the Commission has imposed. It is of course fundamental that an ILEC must be permitted to recover the costs it incurs to provide interconnection, including the costs of changes to OSSs and related processes.[33] The Commission's ruling violates this requirement and the requirement in the Act that state commissions must set rates that are based on the costs of providing a service.[34]

34 In sum, because the Commission is without authority to set rates for non-251 services, it

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[32] Final Order at ¶ 91.

[33] *See* Section 252(d)(l). *See Verizon Pennsylvania v. Pennsylvania Public Utility Commission*, 380 F.Supp.2d 627, 655 (E.D. Pa. 2005) ("While the FCC regulations dictate that incumbents must cooperate with competitors and provide them with access to OSS based on the cost of provision, it does not follow, as MCI seems to suggest, that such access must be completely subsidized by incumbents."); *AT&T Communications, Inc. v. BellSouth Communications, Inc.*, 20 F.Supp.2d 1097, 1104 (E.D. Ky. 1998) ("Because the electronic interfaces will only benefit the CLECs, the ILECs, like BellSouth, should not have to subsidize them.").

[34] Section 252(d)(1)(A).

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should rescind its ruling relating to the rate Qwest is permitted to charge to comply with the provisioning requirements the Commission has imposed for non-251 services.

C. The Commission Lacks the Authority to Impose Requirements Relating to the Content of Qwest's Bills and Customer Service Records for the Non-251 Services Used with Point-To-Point Commingled EELs.

35 Point-to-point commingled EELs are comprised of a UNE – usually an unbundled loop – that is connected to a non-251 transport service – usually interstate private line transport. While the Commission properly rejected Eschelon's request for a single bill that would cover both components of a point-to-point commingled EEL, the Commission required Qwest to included detailed cross-referencing information on the bills and CSRs for the UNE and non-UNE component.[35] For the same reasons discussed above in connection with UNE conversions, the Commission exceeded its authority by imposing upon Qwest terms relating to bills and CSRs for services that are indisputably not Section 251 services.

36 The bills and CSRs that Qwest generates for the high capacity transport services used with point-to-point commingled EELs are, by definition, records relating to non-251 services. This is so because the definition of a point-to-point commingled EEL is a UNE that is combined with a wholesale service obtained through a means other than Section 251. Thus, any facility that qualifies as a point-to-point commingled EEL is necessarily one that includes a non-251 service. Because the high capacity transport Qwest provides with point-to-point commingled EELs is a non-251 service, the Commission has no Section 252 arbitration authority over that service. Moreover, in most cases, the high capacity transport used with this commingled service is interstate – not intrastate – and is therefore outside the Commission's jurisdiction for this additional reason. Accordingly, the Commission should eliminate the cross-referencing requirements it has imposed because it has not jurisdiction over the non-UNE components of point-to-point commingled EELs.

[35] Final Order at ¶ 99.

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37 In the event the Commission does not rescind this ruling, Qwest must inform the Commission that it is not technologically possible to comply with the ruling until the completion of significant changes to Qwest's operating systems. Indeed, Qwest is still evaluating the technical feasibility of the changes. It is clear that if the changes can be implemented, they will require significant programming and coding modifications that will require at least many months to complete. Qwest does not have a precise cost estimate for this work, but it appears initially that if the changes are technically feasible, the cost of implementing them will approach or exceed $1 million. In addition, Qwest may be required to submit the change to the Change Management Process if these Eschelon-specific billing, CSR and ordering process changes impact other CLECs.

38 For these reasons, if the Commission does not reverse this ruling on jurisdictional grounds, Qwest requests that the Commission permit a delay in implementation to permit Qwest the time needed to assess feasibility and to perform the changes.

III. CONCLUSION

39 For the reasons stated, Qwest respectfully requests that the Commission grant Qwest's petition for reconsideration with respect to each of the issues discussed herein.

DATED this _____ day of October, 2008.

QWEST

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