MEMORANDUM

May 11, 2009

TO: Chairman Goltz
Commissioner Jones
Commissioner Oshie
David Danner
Anne Solwick
Ann Rendahl (w/attachments)
Sally Brown (w/attachments)
Marilyn Meehan
Bill Weinman

FROM: Lisa Wyse, Records Center

SUBJECT: Qwest Corporation v. Washington Utilities and Transportation Commission; Jeffrey Goltz, in his official capacity as Chairman of the Washington Utilities and Transportation Commission; Patrick Oshie, in his official capacity as a Commissioner of the Washington State Utilities and Transportation Commission; Philip Jones, in his official capacity as a Commissioner of the Washington State Utilities and Transportation Commission, and Eschelon Telecom, Inc.
(UT-063061)
Civil Action Case No. 3:09-CV-0529-RBL
Complaint and Claim for Declaratory and Injunctive Relief

A Complaint and Claim for Declaratory and Injunctive Relief has been filed in U.S. District Court for the Western District of Washington on May 6, 2009, by Lisa A. Anderl, representing Plaintiff listed above. The petition was received by the Commission on May 7, 2009.

Please contact the Records Center if you would like copies of the attachments.

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Lisa A. Anderl
Associate General Counsel
Regulatory Law Department

Qwest
Spirit of Service®

May 6, 2009

Via E-mail and
Overnight Mail

Mr. David Danner, Executive Director and Secretary
Washington Utilities & Transportation Commission
1300 S. Evergreen Park Drive SW
P.O. Box 47250
Olympia, WA 98504-7250

Re: Qwest Corp. v. WUTC, et al.
USDC Western District of Washington
Civil Action Case No. 3:09-CV-0529-RBL

Dear Mr. Danner:

Enclosed please find 5 copies of the Complaint in the above-captioned matter, as well as a Notice of Lawsuit and Waiver of Service of Summons form for each named defendant. We have also included a postage-paid envelope in which to return the Waiver forms to me. I will copy your counsel on this letter, and deliver an additional copy of the complaint to the AG's office under separate cover. Please feel free to contact me if you have any questions.

Sincerely,

Lisa A. Anderl

LAA/llw
Enclosures

cc: Sally Brown, AAG (w/o encl.)

2009 MAY -7 AM 9:05

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON

AT SEATTLE

QWEST CORPORATION,

Plaintiff,

v.

WASHINGTON STATE UTILITIES AND TRANSPORTATION COMMISSION; JEFFREY GOLTZ, in his official capacity as Chairman of the Washington State Utilities and Transportation Commission; PATRICK OSHIE, in his official capacity as a Commissioner of the Washington State Utilities and Transportation Commission; PHILIP JONES, in his official capacity as a Commissioner of the Washington State Utilities and Transportation,

and

ESCHELON TELECOM, INC.,

Defendants.

No. CIV -

COMPLAINT

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Plaintiff Qwest Corporation ("Qwest") brings this claim for declaratory and injunctive relief against the Washington State Utilities and Transportation Commission (the "Washington Commission"), a regulatory agency of the State of Washington; defendants Jeffrey Goltz, Patrick Oshie, and Philip Jones in their official capacities as Commissioners of the Washington Commission; and Eschelon Telecom, Inc. ("Eschelon").

In support of its Complaint, Qwest alleges as follows.

NATURE OF THE ACTION

1. This action arises under the Telecommunications Act of 1996 ("the Act"), 47 U.S.C. § 151, *et. seq.* The Act imposes certain duties on telecommunications carriers described in Sections 251(b) and (c) and defined further in the Federal Communication Commission's ("FCC") implementing rules and orders. Pursuant to Section 252, incumbent local exchange carriers ("ILECs") and competitive local exchange carriers ("CLECs") are required to set forth the terms and conditions relating to the duties imposed by Sections 251(b) and (c) in negotiated or arbitrated "interconnection agreements" that must be filed with state public utility commissions for approval. When an ILEC and a CLEC are unable to agree on the terms of an interconnection agreement, either party may petition a state commission pursuant to Section 252(b)(1) to arbitrate the remaining open issues relating to implementation of Sections 251(b) and (c). The Act limits the arbitration authority of state commissions to resolving open issues that specifically involve the services mandated by Sections 251(b) and (c).

2. In this case, Qwest and Eschelon were unable to resolve multiple issues and, on August 9, 2006, Qwest filed a petition with the Washington Commission seeking arbitration of those issues. Following an arbitration hearing, the Commission issued a "Final Order" on

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October 16, 2008 that ruled upon the open arbitration issues.[1]

3. Among other rulings in the Final Order, the Commission adopted Eschelon's demand that the parties' interconnection agreement impose upon Qwest certain terms and conditions for services that are not among those required under Sections 251(b) and (c). These services, known as "private line" and "special access" services, are provided by Qwest pursuant to intrastate and interstate tariffs and pursuant to Section 271 of the Act. Qwest indisputably has no obligation to provide these services under Section 251, and the Washington Commission therefore does not have any authority to impose terms and conditions relating to them. The absence of this authority is established by the language in Section 252 and by multiple federal court decisions holding that state commissions are permitted to set terms only for the services mandated by Section 251.[2] By imposing contractual terms for these non-251 services, the Washington Commission exceeded its authority and acted unlawfully.

4. The Commission's absence of authority also is established by the fact that most of the private line and special access services that Qwest provides to competitive local exchange carriers ("CLECs") like Eschelon are *interstate* (as opposed to *intrastate*) services that are provided pursuant to *federal* tariffs under the exclusive jurisdiction of the FCC. As a state

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[1] *See In the Matter of the Petition for Arbitration of an Interconnection Agreement Between Qwest Corporation and Eschelon Telecom, Inc. Pursuant to 47 U.S.C. Section 252(b)*, Docket No. UT-063061, Order No. 18, Final Order Granting, In Part, Eschelon's Petition For Review; Granting, In Part, Qwest's Petition For Review; Affirming, In Part, and Modifying, In Part, Arbitrator's Report and Decision. (Attached as "Exhibit A").

[2] *See, e.g., Bellsouth v. Georgia Public Service Comm'n, et al.*, 587 F. Supp. 2d 1258, 1263 (N.D. Ga. 2008) *affirmed by* Nos. 08-10521, 08-10522, 2009 WL 368527, at *1 (11th Cir. Jan. 26, 2009); *Southwestern Bell Tel. L.P. v. Missouri Pub. Serv. Comm'n,* 461 F. Supp. 2d 1055, 1067 (E.D. Mo. 2006), *affirmed by* 530 F.3d 676 (8th Cir. 2008).

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commission, the Washington Commission does not have any authority over these interstate services. For this additional reason, the ruling of the Commission is outside the scope of its legal authority.

5. By imposing upon Qwest an interconnection agreement containing terms and conditions for non-251 services, the Commission's rulings exceed Congressionally limited arbitration authority and violate the substantive provisions of the Act and federal policy.

6. For these reasons and those set forth below, Qwest brings this Complaint against the Commission and its individual members in their official capacities seeking a declaration that the rulings in the Final Order setting terms and conditions for non-251 services are unlawful and an injunction prohibiting the Commission and Eschelon from enforcing the relevant provisions of the Final Order. Further, Qwest seeks an order directing the Commission to remedy the legal errors in the Final Order and to issue a revised arbitration order that is consistent with Qwest's and rights and obligations under federal law.

JURISDICTION AND VENUE

7. This Court has jurisdiction under 28 U.S.C. § 1331 and 47 U.S.C. § 252(e)(6).

8. Venue is proper under 28 U.S.C. §§ 1391(a)(1) and (a)(2) because one or more defendants reside in this District and a substantial part of the events giving rise to the claims occurred in this District.

THE PARTIES

9. Qwest is a Delaware corporation with its principal place of business at 1801 California Street, Denver, Colorado 80202. It is an ILEC that provides local telephone service in Washington and 13 other mid-western and western states.

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10. Defendant Washington Commission is a governmental body organized under the laws of the State of Washington, and has authority to regulate telecommunications carriers providing intrastate service in Washington. The Commission is headquartered at 1300 S. Evergreen Park Dr. SW, Olympia, Washington 98504-7250.

11. Qwest brings this action against the Washington Commission in its capacity as the agency of Washington state government authorized by the United States Congress to take certain limited actions related to interconnection agreements pursuant to a delegation of authority under Section 252 of the Act.

12. Defendants Jeffrey Goltz, Patrick J. Oshie, and Philip B. Jones are the present members of the Commission and are named in their official capacities.

13. Defendant Eschelon is a Minnesota corporation with its principal place of business at 730 Second Ave., Minneapolis, Minnesota 55402. Eschelon is a CLEC that operates in multiple states, including Washington.

STATEMENT OF FACTS

A. The 1996 Telecommunications Act

1. The Substantive Duties Imposed by Section 251

14. The 1996 Act was enacted to facilitate greater competition, including facilities-based competition, in telecommunications markets. Congress also intended that the Act would lead to reduced regulation of the telecommunications markets, describing the Act as establishing a "pro-competitive, deregulatory" framework for the provision of

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telecommunications services.[3]

15. Sections 251(b) and (c) set forth the substantive duties that apply to "local exchange carriers" under the Act. Section 251(b) lists the duties that apply to all local exchange carriers, including both ILECs and CLECs. These duties require, for example, that a local exchange carrier permit other carriers to resell its telecommunications services and enter into reciprocal compensation arrangements with other carriers for the transport and termination of telecommunications. Section 251(c) lists the duties that apply only to ILECs. These duties require an ILEC, for example, to permit a CLEC to interconnect its network with that of the ILEC to facilitate the exchange of traffic between the two networks.

16. Of particular significance in this case, the Section 251(c) duties unique to ILECs include the obligation to provide CLECs with leased access to unbundled network elements ("UNEs") at cost-based rates. 47 U.S.C. §§ 251(c)(3), 252(d)(1). The UNEs that ILECs must provide at these rates are limited to only those that the FCC has determined meet the "impairment" standard in Section 251(d)(2). Only if the FCC makes a fact-based determination under Section 251(d)(2) that CLECs will be competitively impaired without access to a network element in providing the services they seek to offer must an ILEC provide the element on an unbundled basis under Section 251(c)(3) at a cost-based rate. The rates that apply to these UNEs are set by state commissions applying the FCC's "TELRIC" ("total element long-run incremental cost") pricing methodology.

17. There is a direct correlation between a determination by the FCC under Section

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[3] Joint Explanatory Statement of the Committee of Conference, S. Conf. Rep. No. 230, 104th Cong., 2d Sess. 113 (1996).

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251(d)(2) that CLECs will be competitively impaired without access to a network element and the requirement that ILECs provide such UNEs subject to the highly regulated terms and conditions imposed by state commissions in Section 252 arbitrations. Through the provisions in Section 251, Congress decreed that if there is limited supply and availability of a network element, ILECs must provide the element at highly regulated terms and rates established by state commissions in arbitrations. But if the element is available from sources other than the ILEC so that a CLEC is not competitively impaired without highly regulated access to the element, the Act requires that ILECs be permitted to provide the element free of the ultra-regulatory requirements of Section 251.

18. The FCC has issued a series of orders in which it has applied the impairment standard in Section 251(d)(1) to determine which network elements ILECs must unbundle under Section 251(c)(3) at cost-based rates. In the most recent of these orders – the *Triennial Review Remand Order* ("*TRRO*")[4] issued February 4, 2005 – the FCC eliminated the obligation of ILECs to provide under Section 251 network elements referred to as high-capacity loops and high capacity dedicated interoffice transport when certain criteria are satisfied.[5] A "loop" is the wire or cable that connects homes and offices to a telephone company's "central office," where the telephone switch is located. High capacity loops, such as "DS1" and "DS3" loops, are capable of carrying large volumes of telecommunications traffic and are typically used by businesses. High capacity transport facilities, such as DS1 and DS3 transport, are essentially

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[4] Order on Remand, *Review of the Section 251 Unbundling Obligations of ILECs*, 20 FCC Rcd 2533 (2005), *aff'd*, *Covad Communications Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006).

[5] The *TRRO* establishes that ILECs are not required to provide these facilities in wire centers or geographic areas that have certain minimum volumes of business lines and CLECs that are "collocating" in ILEC central offices. *TRRO* at ¶¶ 66, 146.

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large optical fiber pipes that carry high volumes of telecommunications traffic between different central offices and switches.

19. In conjunction with its removal of these network elements from Section 251, the FCC ruled that CLECs are required to convert from using the elements to alternative service arrangements that are not covered by Section 251's unbundling requirements.[6] In the case of both high capacity transport and high capacity loops, the FCC adopted 12-month plans for CLECs to convert to alternative facilities or arrangements.[7] Within that time period, CLECs using high capacity transport that is de-listed from Section 251 must "transition from UNEs to alternative transport options, including special access services offered by the incumbent LEC."[8] Similarly, the FCC adopted a 12-month transition period for CLECs to transition from using high capacity loops that were removed from Section 251 in the *TRRO*, directing CLECs to switch to "self-provided facilities, alternative facilities offered by other carriers, or tariffed services offered by the incumbent LEC."[9]

2. Interconnection Agreements and the Limited Arbitration Authority of State Commissions

20. ILECs and CLECs are required to include the terms and conditions that govern the obligations imposed by Sections 251(b) and (c) in interconnection agreements approved by state commissions. Congress intended that interconnection agreements would be reached through negotiation between the parties. If negotiations fail to resolve all disputed issues, a party may seek compulsory arbitration under Section 252(b) before a state commission, such as

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[6] *TRRO*, at ¶¶ 142, 195.
[7] *Id.*
[8] *Id.* at ¶ 142.
[9] *Id.* at ¶ 195.

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the Washington Commission.

21. In serving as an arbitrator under the Act, the only authority that state commissions have is that which Congress has clearly and expressly delegated to them. As federal courts around the country have uniformly held, the provision of the Act that gives state commissions their arbitration authority – Section 252 – permits a state commission to impose only those obligations required by Sections 251(b) and (c).[10] In this regard, Section 252(c), which sets forth "standards for arbitration," expressly directs state commissions to resolve "open issues" by imposing "conditions [that] *meet the requirements of section 251*." (Emphasis added). There is thus an express linkage between the "open issues" state commissions are permitted to arbitrate and the "requirements of section 251."

22. Because the arbitration authority of states is limited to imposing terms and conditions that implement the duties in Sections 251(b) and (c), state commissions have no authority in a Section 252 arbitration – such as the arbitration at issue here – to require that an arbitrated interconnection agreement include terms or rates for network elements or services that the FCC has removed from Section 251(c)(3) in the *TRRO* based on findings of non-impairment.

3. The Regulatory Framework of Section 271

23. Under Section 271, "Regional Bell Operating Companies" ("BOCs") like Qwest that historically were permitted only to provide intrastate local exchange service in designated geographic territories were given the opportunity to enter interLATA markets to provide long distance service. Section 271 authorizes the FCC to approve a BOC's application for entry into

[10] *See supra,* n. 2.

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a long distance market if the BOC has opened its local exchange market to competition by satisfying a "competitive checklist" of requirements enumerated in Section 271(c).

24. The only authority that Section 271 gives to state commissions relates to the requirement in Section 271(d)(2)(B) that the FCC consult with state commissions before making a determination relating to a BOC's application to provide in-region interLATA services. Section 271 does not grant state commissions any decision-making authority and, specifically, does not authorize state commissions to impose terms or prices for any services that BOCs provide under that section.

25. The Section 271 competitive checklist requires BOCs that are seeking or have obtained approval to enter long distance markets to provide access to certain network elements, including high capacity transport and high capacity loops. As described above, Qwest satisfies this obligation through the private line and special access services it provides to CLECs when they convert from UNEs to the private line and special access services.

26. Because the obligation of BOCs to provide access to specifically enumerated network elements under Section 271 is different from the unbundling obligations in Section 251, the FCC's removal high capacity transport and high capacity loops from Section 251 does not affect the BOCs' obligations to unbundle the elements under Section 271. However, the absence of any competitive impairment relating to those elements eliminates the applicability of the highly regulated terms and prices that apply to Section 251 UNEs.

27. Consistent with the fact that the states have no decision-making authority under Section 271, the FCC alone has authority over the terms and prices pursuant to which BOCs

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offer Section 271 services.[11]

B. The Washington Arbitration Proceeding

1. Eschelon's Unlawful Demands Relating to Non-251 Services

28. In the arbitration proceeding, Eschelon requested that the Commission regulate the private line and special access services that Qwest makes available after Eschelon has converted its service from high capacity UNEs (high capacity loops and transport) to a non-251 service, as required under the *TRRO*. Specifically, Eschelon requested that the Commission require Qwest to: (1) use the same circuit identification number for the private line or special access service that it used for the UNE service; (2) issue bills for the service using an "adder" or a "surcharge" reflecting the difference between the old UNE price and the new price for the replacement non-UNE service; and (3) create a new "universal service ordering code" ("USOC") reflecting the creation of this new charge.[12]

29. As Qwest established in the arbitration proceeding, complying with the requirement of a single circuit ID for UNE conversions will significantly disrupt and interfere with Qwest's ability to provide private line and special access services. The highly sophisticated computer systems – operation support systems ("OSSs") – that Qwest uses to provide these services rely on information reflected by the circuit ID numbers to determine (1) whether a circuit is a UNE or a private line/special access circuit; (2) the type of testing

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[11] *TRO* at ¶ 664.

[12] A "USOC" is a numbering code that carriers assign to their individual service offerings. Through the use of USOCs, a carrier's electronic operating and provisioning systems are able to recognize a service for provisioning, billing, and maintenance purposes.

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parameters that apply to the circuit; (3) the Qwest maintenance and repair center that is responsible for the circuit; and (4) the inventory database in which the circuit is stored. When a CLEC orders a private line circuit that replaces the UNE, 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.

30. Eschelon's demand that Qwest design its bills for private line and special access services by listing "adders" or "surcharges" instead of the full and actual prices for these services would result in a significant departure from how Qwest's OSSs currently generate bills for these services. Qwest would have to make costly changes to its billing OSSs to include the adders and surcharges and to substitute them for the full prices that are currently included in bills. Similarly, Qwest does not have a USOC for the adders and surcharges and would therefore have to invest significant time and expense to develop USOCs.

31. In addition to its demands relating to private line and special access services, Eschelon requested that Qwest modify the bills its issues for these non-251 services when they are used with "point-to-point commingled enhanced extended links." These point-to-point "commingled EELs" are typically a combination of a Section 251 UNE loop commingled with an access service or a private line transport service. This service permits CLECs "to commingle UNEs and combinations of UNEs with services (*e.g.*, switched and special access services offered pursuant to tariff), and to require incumbent LECs to perform the necessary functions to

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effectuate such commingling upon request."[13] In imposing the requirement for ILECs to provide commingled EELs, the FCC made it clear that the different regulatory requirements that apply to these distinct components of an EEL would not be altered, so that the UNE component of an EEL is governed by Section 251's regulatory scheme while the terms and prices for the non-UNE component are established by tariffs and commercial agreements.[14]

32. Eschelon requested specifically that Qwest redesign its bills and customer service records ("CSR") by including on each bill and CSR the circuit identification number of both components of the commingled EEL. In other words, the bill and CSR for the UNE component would have to list the serial number of the associated non-UNE component. Likewise, the bill and CSR for the non-UNE component would have to list the serial number of the associated UNE component. To comply with this requirement, Qwest would have to make significant, costly changes to its billing OSSs and build this cross-referencing capability into its systems.

33. By making this demand, Eschelon was seeking to impose an additional requirement for non-251 services. Specifically, as described, the non-UNE component of a commingled EEL is the same private line or special access service that CLECs use after they convert from UNE service. In demanding that Qwest include cross-referencing on bills for this service, Eschelon sought to impose yet another term for non-251 services that are outside the Commission's jurisdiction.

2. The Commission's Arbitration Order

34. The Final Order adopts each of Eschelon's demands relating to the private line

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[13] *TRO*, at ¶ 579.
[14] *Id.* at ¶ 582.

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and special access services that Eschelon uses after it converts from UNE service, and the parties' interconnection agreement therefore includes Eschelon's contract language that implements those requirements. In its ruling adopting Eschelon's demands, the Commission found that statements by the FCC in the *TRRO* allegedly confer jurisdiction on state commissions to impose terms and conditions for the non-251 replacement services that CLECs use after converting from Section 251 UNE service. As described by the Commission, the FCC determined in the *TRRO* that in converting from UNE service, "carriers should negotiate and arbitrate new agreements in accordance with Section 252" and that carriers "'must negotiate in good faith regarding *any* rates, terms, and conditions necessary to implement our rule changes.'"[15] The Commission found that these statements broadly conferred upon state commissions "jurisdiction to address conversion-related issues," and that a finding of jurisdiction was allegedly further supported by "the importance of providing CLECs a reasonable transition process away from UNEs . . . ."[16] This purported grant of jurisdiction, the Commission concluded, permits it to impose terms and conditions not just for non-251 replacement services, but also for interstate private line and special access services.

35. The Commission's jurisdictional finding and its decision to impose terms and conditions for Qwest's private line and special access services are flawed for multiple reasons. 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.[17] It is Congress, not the

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[15] Final Order at ¶ 68 (quoting *TRRO* at ¶ 233) (emphasis added by Commission).
[16] *Id.* at ¶ 70.
[17] *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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FCC, that determines the authority of state commissions, including the authority of commissions to serve as arbitrators.[18] 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.

36. 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 from the agreements. 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. Thus, 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.[19] The Commission misinterpreted 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.

37. Third, 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

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

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

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negotiate (the terms subject to the Section 251/252 process) to those "necessary to implement our rule changes."[20] 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.

38. Fourth, although Qwest expressly raised the fact that CLECs typically use *interstate* private line and special access services after converting from UNE service, the Commission's Final Order does not contain any discussion of this fact, which is central to the jurisdictional question. As described above, state commissions have no jurisdiction over interstate private line and special access services, as the authority over those services rests exclusively with the FCC. In dictating the circuit identification numbers and billing content that Qwest must use for these interstate services, the Commission exceeded its authority. Further, the Commission's failure to discuss or provide any justification for its assertion of authority over interstate services violates basic requirements of administrative law and constitutes arbitrary and capricious decision-making.

39. The Commission also erred in its ruling that addresses Qwest's right to be compensated for the costs it will incur to comply with the Commission's legally improper imposition of terms and conditions for the non-251 services at issue. While recognizing that "Qwest is entitled to recover the reasonable costs of conversion," the Commission ordered Qwest to charge a "conversion rate" of $25 that Qwest had negotiated in a separate, earlier proceeding with a coalition of CLECs.[21] Importantly, as Qwest demonstrated to the Commission, that

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[20] *TRRO* at ¶ 233.

[21] Final Order at ¶¶ 89-91.

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negotiated charge was established long before the requirements at issue in the arbitration 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. The charge therefore violates the Act's requirement that an ILEC must be permitted to recover the costs it incurs to provide CLECs with services under the Act, including the costs of changes to OSSs and related processes,[22] and the related requirement that rates set by state commissions under the Act must be based on the costs of providing a service.[23]

40. That the $25 charge fails to comply with the Act's requirement of rates based on the costs of providing a service is confirmed by the Commission's acknowledgement that it "do[es] not know the details surrounding the derivation of the rate."[24] In addition to violating the Act's pricing requirements, the Commission acted arbitrarily and capriciously by adopting a rate without knowing how it was derived and the activities and costs it covers.

41. The Final Order also adopts Eschelon's proposal for commingled EELs, thereby requiring Qwest to cross-reference the UNE component of point-to-point commingled EELs on the bills and CSRs for the private line and special access services.[25]

42. Qwest sought reconsideration of the Final Order in a petition filed with the

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[22] *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.").

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

[24] Final Order at ¶ 91.

[25] *Id.* at ¶¶ 97-100.

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Commission on October 27, 2008. In an order issued January 30, 2009, the Commission denied Qwest's petition.[26] In an order issued April 2, 2009, the Commission approved the parties' arbitrated interconnection agreement that contains the terms that are the subject of this Complaint.

CAUSES OF ACTION

COUNT I

(Exceeding Section 252 Arbitration Authority with Respect to non-251 Services)

43. Qwest hereby incorporates and realleges paragraphs 1 through 42 of the Complaint as if fully set forth herein.

44. In acting as arbitrators under Section 252, state commissions only have authority to resolve issues and impose terms and conditions only relating to the substantive obligations imposed by Sections 251(b) and (c). There are no provisions in the Act that give states authority to impose requirements relating to the private line and special access services that Qwest provides pursuant to tariffs and that are not provided pursuant to the requirements of Section 251.

45. The Commission exceeded its arbitration authority by imposing terms and conditions in the interconnection agreement that require Qwest to use with its private line and special access services the same circuit identification number that was used with the UNE service, adders and surcharges, and USOCs reflecting the adders and surcharges.

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[26] *In the Matter of the Petition for Arbitration of an Interconnection Agreement Between Qwest Corporation and Eschelon Telecom, Inc. Pursuant to 47 U.S.C. Section 252(b)*, Docket No. UT-063061, Order No. 19, Order Denying Qwest's Petition for Reconsideration. (Attached as "Exhibit B").

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46. The Commission's unauthorized exercise of arbitration authority is ultra vires and violates Section 252.

COUNT II

(Exceeding Section 252 Arbitration Authority with Respect to Commingled EELs)

47. Qwest hereby incorporates and realleges paragraphs 1 through 46 of the Complaint as if fully set forth herein.

48. The Commission exceeded its arbitration authority by imposing terms and conditions in the interconnection agreement that require Qwest to cross-reference on bills and CSRs for private line and special access service the UNE component used with point-to-point commingled EELs.

49. The Commission's unauthorized exercise of arbitration authority is ultra vires and violates Section 252.

COUNT III

(Improperly Asserting Authority Over Section 271 Services)

50. Qwest hereby incorporates and realleges paragraphs 1 through 49 of the Complaint as if fully set forth herein.

51. The FCC has exclusive authority to apply, implement, and enforce the obligations imposed on BOCs in Section 271. State commissions have no authority to impose or enforce obligations under Section 271 and are authorized only to consult with the FCC in connection with a BOC's application for entry into interLATA markets.

52. The Commission exceeded the limited authority Congress delegated to state

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commissions under the Act by imposing terms and conditions for the high capacity loops and high capacity transport that Qwest provides in compliance with its obligations under Section 271.

53. The Commission's unauthorized imposition of terms and conditions for services Qwest provides under Section 271 improperly interferes with the FCC's exclusive jurisdiction over implementation and enforcement of that section in violation of Section 251 and Section 271. This unauthorized exercise of authority is ultra vires and violates Sections 251 and 271.

COUNT IV

(Violating the Act's Requirement of Cost-Based Prices)

54. Qwest hereby incorporates and realleges paragraphs 1 through 53 of the Complaint as if fully set forth herein.

55. Section 252 of the Act and the FCC's implementing regulations require that rates set by a state commission must be based upon the costs of the service provided and must permit an ILEC to recover its costs. The Commission violated this requirement by imposing a $25 charge that is unrelated to the costs of complying with the terms and conditions the Final Order imposes for non-251 replacement services and that will not permit Qwest to recover those costs.

56. Further, the Commission exceeded its arbitration authority by asserting rate-making authority over provisioning and billing activities relating to non-251 services.

COUNT V

(Arbitrary and Capricious Decision-Making)

57. Qwest hereby incorporates and realleges paragraphs 1 through 56 of the

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Complaint as if fully set forth herein.

58. The Final Order violates the requirements of administrative law that agency decisions must be supported by substantial evidence and rational explanations for the choices made.

59. The Commission's decision to impose the $25 charge without "know[ing] the details surrounding the derivation of the rate" is not supported by substantial evidence and is arbitrary and capricious.

60. The Commission's decision to assert authority over interstate services without providing any explanation of the alleged jurisdictional basis for that decision is arbitrary and capricious.

PRAYER FOR RELIEF

WHEREFORE, pursuant to 47 U.S.C. § 252(e)(6) and 28 U.S.C. §§ 1331, 2201-02, Qwest respectfully requests that this Court grant the following relief:

1. Judgment declaring that the Commission's rulings described herein violate federal law and are arbitrary and capricious.

2. Judgment declaring that the Commission exceeded its arbitration and pricing authority under the Act and acted ultra vires.

3. Permanent injunctive relief to implement the declaratory rulings of this Court, including:

a. Ordering the Commission to vacate the relevant portions of the Final Order;

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b. Enjoining the Commission from adopting language for the Qwest-Eschelon interconnection agreement that implements the rulings described herein;

c. Requiring the Commission to adopt and approve an interconnection agreement consistent with the relief described herein; and

d. Such other injunctive relief as is necessary to place into effect the Court's decisions on Qwest's request for declaratory relief.

4. Such other and further relief as the Court deems just and reasonable.

DATED this 1st day of May, 2009.

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EXHIBIT A

BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition of:	)	DOCKET UT-063061
	)	
	)	ORDER 18
QWEST CORPORATION	)	
	)	FINAL ORDER GRANTING, IN
and	)	PART, ESCHELON'S PETITION FOR
	)	REVIEW; GRANTING, IN PART,
ESCHELON TELECOM, INC.	)	QWEST'S PETITION FOR REVIEW;
	)	AFFIRMING, IN PART, AND
Pursuant to 47 U.S.C. Section 252(b)	)	MODIFYING, IN PART,
	)	ARBITRATOR'S REPORT AND
	)	DECISION
. . . . .	)	

1 ***SYNOPSIS.*** *The Commission grants, in part, both Eschelon's and Qwest's petitions for review as follows:*

- *Affirms the Arbitrator's decision on "discontinuation of order processing and disconnection" with modifying language agreed to by both parties.*
- *Reverses the Arbitrator's decision on the definition of the term "repeatedly delinquent" and adopts Qwest's proposed language.*
- *Affirms the Arbitrator's decision on "transit record charges and bill validation" with the modifying language proposed by Eschelon.*
- *Modifies the Arbitrator's decision regarding the conditions under which Qwest will provide "expedites" without a fee and adopts Qwest's proposed language for these "expedites."*

The Commission affirms the remainder of the Arbitrator's Report and Decision and requires the parties to file an interconnection agreement consistent with this Order within 30 days of the service date of this Order.

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BACKGROUND

2 **NATURE OF PROCEEDING.** This proceeding involves a request by Qwest Corporation (Qwest) and Eschelon Telecom, Inc., (Eschelon) to arbitrate an interconnection agreement (ICA) under 47 U.S.C. § 252(b) of the Telecommunications Act of 1996 (the Act). [1]

3 **APPEARANCES.** Lisa A. Anderl, Associate General Counsel, Seattle, Washington, and Jason Topp, Minneapolis, Minnesota, represent Qwest. Gregory J. Kopta, Seattle, Washington, and Gregory Merz, Minneapolis, Minnesota, represent Eschelon.

4 **PROCEDURAL HISTORY**. On August 9, 2006, Qwest, an incumbent local exchange carrier (ILEC) filed with the Washington Utilities and Transportation Commission (Commission) a request for arbitration of an interconnection agreement with Eschelon, a competitive local exchange carrier (CLEC) pursuant to Section 252(b) of the Act. Qwest asserted that the parties agreed to extend the timeframes in Section 252(b) of the Act including the formal negotiating period, the period for initiating arbitration, and the time in which a state commission must resolve open issues.[2]

5 Following an evidentiary hearing and briefing by the parties, on January 18, 2008, the Arbitrator entered Order 16, the Arbitrator's Report and Decision, resolving all contested issues. Eschelon and Qwest each filed a petition for review and a response to the opposing party's petition. On July 14, 2008, Qwest filed Supplemental Authority.

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[1] A glossary of acronyms and terms used in this Order is attached for the convenience of readers.
[2] The procedural history in this matter is described more fully in Order 16 in this docket and is not repeated here.

MEMORANDUM

6 **Petitions for Review.** Eschelon or Qwest dispute the Arbitrator's decisions concerning: (1) design changes, (2) discontinuation of order processing and disconnection, (3) the definition of "repeatedly delinquent," (4) transit record changes and bill validation, (5) conversions, (6) commingled arrangements – billing, (7) commingled arrangements – other arrangements, (8) expedite orders, (9) jeopardies, and (10) controlled production testing.

7 **Standard of Review.** Our regulations, WAC 480-07-630 and WAC 480-07-640, do not specify a standard of review for arbitrators' reports and decisions. As a matter of policy, we treat these decisions in the same manner as all recommended decisions such as initial orders. Accordingly, we conduct our review *de novo,* allowing us to accept, reject, or modify an arbitrator's decision.

Issues on Review.

1. Design Change Charges.

8 The parties have agreed to the definition of the term "design change" as follows:

> "Design Change" is a change in circuit design after Engineering Review required by a CLEC supplemental request to change a service previously requested by a CLEC. An Engineering Review is a review by Qwest personnel of the service ordered and the requested changes to determine what change in the design, if any, is necessary to meet the changes requested by the CLEC. . . [3]

9 Connection Facility Assignment (CFA) changes occur when a customer desires to obtain telecommunications service from Eschelon rather than Qwest or another carrier.[4] Eschelon submits a new connect service order to Qwest with a CFA location

[3] Denney, Exh. No. 130 at 21-22.
[4] Qwest Petition for Review at 5.

on the interconnection distribution frame (ICDF) in Qwest's central office.[5] A Qwest engineer then connects the customer's loop to the location specified. In the process of providing circuits to CLECs, it is sometimes necessary to change the CFA to the circuit on the day of installation requiring the circuit design to be reevaluated and reconfigured, if necessary. A design change allows a CLEC, through a supplemental service request, to change a service previously requested without the delay and cost associated with canceling and resubmitting the request.[6]

10 This dispute arises over the charges Qwest may assess Eschelon for CFA changes during a coordinated cutover of a loop and for loop design changes. The Arbitrator rejected Qwest's request to apply the Unbundled Dedicated Interoffice Transport (UDIT) design change charge to CFAs and loop design changes.[7] The Arbitrator accepted the charges Eschelon proposed as reasonable interim rates until Qwest files for, and the Commission approves, permanent rates.[8]

11 Qwest seeks to overturn the Arbitrator's decision arguing that Eschelon's rates should be rejected because there is no cost data to support them and they do not comply with the Total Element Long Run Incremental Cost (TELRIC) pricing methodology established by the Federal Communications Commission (FCC).[9] Qwest also contends that the Arbitrator overlooked Qwest's testimony in concluding that the record does not include underlying cost data supporting the proposition that UDIT design changes were intended to include costs for CFAs and loop design changes.[10] Qwest argues that its testimony demonstrates that its wholesale cost study calculated the costs of all types of design changes.[11] Finally, Qwest asserts that in recent

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[5] *Id.*
[6] Eschelon Response at 1.
[7] The Commission-approved manual rate for UDIT design changes is $53.65 and the mechanized rate is $50.45 per design change. Arbitrator's Report and Decision at ¶¶ 36 – 38. *In the Matter of the Continued Costing and Pricing Proceeding for Interconnection Unbundled Network Elements, Transport and Termination, and Resale;* Docket UT-003013, *44th Supplemental Order, Part D Final Order Establishing Nonrecurring and Recurring Rates for Unbundled Network Elements,* entered December 19, 2002, and *51st Supplemental Order; Approving Part D Compliance Filing*, entered June 16, 2003. Qwest Petition for Review *at 3.*
[8] Arbitrator's Report and Decision at ¶¶ 36 – 38.
[9] Qwest Petition for Review *at* 4.
[10] Arbitrator's Report and Decision at ¶ 37.
[11] Qwest Petition for Review at 7 and Million, Exh. No. 52 at 15.

arbitration proceedings involving Eschelon in Arizona and Oregon, the arbitrators rejected Eschelon's proposed rates.[12]

12 In response, Eschelon states that from 1999 until October 1, 2005, Qwest did not impose a separate charge for design changes for unbundled loops and CFA changes.[13] On September 1, 2005, Qwest sent a letter to CLECs stating that it would commence billing CLECs for such changes but cited no change of law and sought no contract amendment or Commission approval before imposing these charges.[14] Eschelon argues that because Qwest had not previously assessed charges for these services, Qwest must recover these costs elsewhere.[15] Eschelon further argues that failing to assess these charges is contrary to Qwest's argument that the 2002 Commission-approved UDIT charges were intended to apply to unbundled loops.[16] Given Qwest's actions from 1999 to 2005, Eschelon argues that there should be no separate charges for design changes and CFAs.[17] In the alternative, Eschelon argues that the costs associated with design changes for loops and CFAs are not comparable to the costs associated with UDIT design changes.[18]

13 Eschelon asserts that the evidence Qwest contends was overlooked was properly before the Arbitrator. Based on the Arbitrator's finding that Qwest had not produced cost data supporting permanent TELRIC rates, Qwest could reasonably be required to offer the services at $0.00 pending Qwest's production of a cost study. Eschelon argues that the Arbitrator's decision provides a reasonable practical solution to the problem presented by Qwest's failure to provide cost support.[19] Eschelon points out that that this result is consistent with FCC rules allowing state commissions to establish reasonable interim rates for elements that would be superseded once a commission has completed review of a TELRIC-compliant cost study.

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[12] Qwest Petition for Review at at 4-5.
[13] Eschelon Response at 2.
[14] *Id.*
[15] *Id.*
[16] *Id.* at 3.
[17] *Id.*
[18] *Id.*
[19] *Id.* at 5.

14 Eschelon notes that in the arbitration proceedings in Arizona and Oregon cited by Qwest, neither arbitrator recommended adopting Qwest's proposal to use UDIT rates as permanent rates for loop design changes and CFA changes.[20]

15 We affirm the Arbitrator's decision on the appropriate charges for design changes for loops and CFAs. First, we find that design changes for loops and CFAs and design changes for transport do not involve the same tasks.[21] The changes at issue are very limited in scope and only apply to: (1) 2/4 wire analog voice-grade loop cutovers, (2) coordinated cutovers; (3) changes made on the day of the cut; and (4) changes made during test and turn-up.[22] With these limitations, the changes only apply to situations in which Qwest and Eschelon personnel are already coordinating the cutover for a loop and find there is a need to change the CFA, which takes very little time to complete.[23] As for loop design changes, we conclude that loops and transport are separate and distinct facilities, and design changes for either involve services that require different processes. Further, transport processes typically are more complex.[24] As we find that UDIT design changes require a materially different level of service from that provided for loops and CFAs, we turn now to Qwest's argument that UDIT design change charges were intended to cover loops and CFAs.

16 Qwest cites to Docket UT-003013 as support for its assertion that UDIT charges were intended to apply to loop design changes and CFAs.[25] In that docket, Qwest submitted a cost study which examined, among other things, costs associated with Access Service Requests (ASR) which are used for dedicated transport and Local Service Requests (LSR) which are used for loops.[26] At that time, Qwest argued that ". . . ASR processing differs from LSRs, and ASRs are processed at a different service center,"[27] inferring that the costs associated with ASRs and LSRs are different. Such evidence supports the conclusion that service requests for transport

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[20] Qwest and Eschelon were simultaneously engaged in arbitration proceedings in Arizona, Oregon, Washington, and Minnesota. Eschelon states that that design change charges are not addressed in the Minnesota arbitration order because Minnesota does not allow Qwest to charge unapproved rates for services that Qwest has previously provided at no charge. *Id.* at 6.
[21] Denney, Exh. No. 130 at 38-39.
[22] Denney, Exh. No. 130 at 39. The definition would exclude batch hot cuts.
[23] *Id.* at 38.
[24] Denney, Exh. No. 130 at 32.
[25] *See* n. 7.
[26] Docket UT-003013, 44th and 51st Supplemental Orders. *See also* n. 7.
[27] *Id.*

and service requests for loops were intended to be treated differently, which undercuts Qwest's assertion that the costs to provision these two types of service requests are the same.

17 Qwest's action following Docket UT-003013 provides additional evidence as to whether the UDIT charges developed in that docket were intended to apply to loop design changes and CFAs. First, it is reasonable to assume that a telecommunications carrier will charge for services it renders to wholesale and retail customers. If a carrier is entitled to compensation, then it will normally seek it. The record is clear that Qwest performed loop design changes without charge from 1999 to 2005.[28] While Qwest argues that it is not unprecedented for it to forego charging CLEC's approved rates,[29] we find that Qwest's actions support two conclusions; (1) that loop design changes and CFAs were not included in any tariff authorized by the Commission ; or (2) that Qwest chose to provide services *gratis* to its competitors. We believe that the former conclusion is more reasonable. If UDIT charges were intended to apply to loop design changes and CFAs, we believe Qwest would have commenced charging those rates as soon as they were approved by the Commission, but it did not.[30] Furthermore, we find no reference in Docket UT-003013's record to indicate that UDIT charges were intended to cover loops and CFAs.

18 Given the evidence in this proceeding, the record in Docket UT-003013, and Qwest's actions that followed, we conclude that Qwest's UDIT tariff does not cover the loop and CFA design changes at issue here. Without an applicable tariff, we now address how Qwest should be compensated for such services.[31]

19 First, we believe the record supports assessing some charge in conjunction with design changes for loops and CFAs.[32] Having rejected Qwest's proffered UDIT rates[33] for these services, we turn to the rates offered by Eschelon. Eschelon proposed

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[28] Denney, Exh. No. 130 at 27.
[29] Million, Exh. No. 53 at 12-13.
[30] Docket UT-003013 compliance filing was approved by the UTC in 2003.
[31] While we could find that Qwest is not authorized to charge for design changes for loops and CFAs until it provides a cost study supporting permanent rates, we believe this result to be inequitable and choose not to do so.
[32] Denney, Exh. No. 130 at 41, Denney, Exh. No. 137 at 15, - 24, Denney, Exh. No. 152 at 24 – 39.
[33] $53.65 for manual design changes and $50.45 for mechanized design changes.

a $30.00 loop design change rate and a $5.00 CFA design change rate.[34] The Commission-approved rate for basic loop installation is $37.53,[35] which is intended to recover all costs Qwest incurs in providing installation services for CLECs. As we recognized earlier, performing loop design changes and CFAs involve fewer tasks than the range of functions encompassed by loop installation. Given the simplicity of the tasks involved, the rate for minor changes during the installation process should be less, not more, than the approved rate for installations.

20 The Arbitrator found that Eschelon's proposed rates lacked sufficient support to establish a TELRIC rate, but found them reasonable interim rates until such time as Qwest files for, and the Commission approves, permanent rates.[36] Qwest contends that Eschelon's proposed rates should be rejected as they are not supported by a cost study and do not comply with TELRIC principles. While these criticisms are accurate, they do not support overturning the Arbitrator's ruling.

21 The FCC has recognized that ILECs have asymmetric access to cost data,[37] and places on them the obligation to present rates supported by a cost study prepared with a forward-looking economic cost model."[38] However, the FCC has also recognized that it may not be possible for supporting cost studies to be performed, analyzed, and adopted by states within the time constraints of interconnection arbitrations. Therefore, the FCC allows states to establish reasonable interim rates that may be replaced with permanent rates once a TELRIC-compliant cost study has been reviewed.[39] Acting within the authority granted by the FCC, the Arbitrator established interim rates, acknowledged that permanent rates must comply with TELRIC principles, and recognized that Eschelon's rates do not meet that standard. The interim rates will stand until Qwest files a TELRIC-compliant cost study covering the services in question that has been reviewed by the Commission in an appropriate cost proceeding.

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[34] Denney, Exh. No. 130 at 41.
[35] *Id.*
[36] Arbitrator's Report and Decision, ¶ 38.
[37] I*n the Matter of Implementation of the Local Competition Provision of the Telecommunications Act of 1996*, CC Docket No. 96-98, FCC 99-238, ¶ 680 (1999).
[38] 47 C.F.R. § 51.511.
[39] Eschelon Response at 5; 47 C.F.R.§ 51.513.

22 In its petition, Qwest also argues that Eschelon's proposed rates were not adopted by either the Arizona or Oregon Commissions during their consideration of the Qwest/Eschelon arbitration petitions in those states. A review of these decisions confirms Qwest's argument. However, it is also true that neither state adopted Qwest's UDIT rates as permanent rates for loop design changes and CFAs.

23 In the Arizona proceeding, Qwest's rates were adopted as *interim* rates that were to be reviewed during an upcoming phase of a Qwest cost docket.[40] The Arizona Commission noted that ". . . Eschelon does raise questions that could indicate that design change charges might be different for different products."[41] That is the conclusion we reach here; design change charges for these products warrant different rates than those imposed for transport activities and until a fully-developed TELRIC-compliant rate can be developed, charges for these services should be less than transport rates and adopted on an interim basis.

24 In Oregon, both Qwest's and Eschelon's proposed rates were rejected by the Arbitrator who concluded that the difference between Qwest's and Eschelon's proposed loop design rates was not substantial and recommended that the Commission split the difference between the two proposals.[42] For CFA changes, the Arbitrator was ". . . persuaded by Eschelon's argument that the cost of performing a CFA change should not exceed the installation cost of the underlying loop facility" and adopted a rate equal to the installation cost.[43]

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[40] *In the Matter of Petition of Eschelon for Arbitration with Qwest,* Docket Nos. T-03406A-06-0572, T-0105B-06-572, Opinion and Order at 15 (Feb. 22, 2008) referred to hereafter as the "Arizona Arbitrator's Decision." (Emphasis supplied). Adopted by the Arizona Corporation Commission on May 16, 2008, referred to hereafter as the "Arizona Commission Order."

[41] *Id.*

[42] *In the Matter of Eschelon Telecom of Oregon, Inc. Petition for Arbitration of an Interconnection Agreement with Qwest Corporation, Pursuant to Section 252(b) of the Telecommunications Act.* ARB 775 at 20-21, (Mar. 26, 2008) referred to hereafter as the "Oregon Arbitrator's Decision." The Oregon Arbitrator recognized that "[T]his 'split the baby' approach is admittedly imperfect, but it effectively equalizes any adverse rate impact that may occur while the *interim* rates remain in effect." (Emphasis supplied). This issue was not raised on review of the Arbitrator's decision. By Order 08-365 entered July 7, 2008, the Public Utility Commission of Oregon approved, with modifications, the Arbitrator's decision. The order approving the Arbitrator's decision is referred to hereafter as the "Oregon Commission Decision."

[43] *Id.*

25 In summary, we find the Arbitrator's decision here to be reasonable and supported by the record. Our decision adopts rates that are not TELRIC-compliant, but are reasonable interim rates, which should remain in effect until permanent rates are adopted.

2. Discontinuation of Order Processing and Disconnection.

26 These issues address the circumstances under which Qwest may discontinue processing Eschelon's service orders and those circumstances under which Qwest may disconnect service. The Arbitrator rejected Eschelon's proposal to require prior Commission approval before Qwest could do either, concluding Qwest's proposed language afforded Eschelon a significant opportunity to pay *undisputed* billing amounts before order processing could be discontinued or service disconnected.[44]

27 In its petition, Eschelon seeks to clarify that discontinuation of service or disconnection can occur only in circumstances of "non-compliance" with the deadlines for submitting payment of undisputed billing amounts.[45] In addition, Eschelon argues that Qwest should provide an additional 10 business days' notice before discontinuing orders or disconnecting service.[46] Eschelon expresses concern that Qwest could send a notice of non-compliance and Eschelon could respond with what it believes is a satisfactory payment or explanation and that, at some future date, Qwest could suddenly disrupt service without further notice.[47]

28 In response, Qwest does not object to adding the term "non-compliance" to the ICA language at issue, but believes it unnecessary.[48] However, it does object to providing Eschelon an additional 10 days' notice before discontinuing order processing or disconnecting service.[49] Qwest argues that Eschelon's proposal could have a significant negative financial impact on it because Eschelon pays it over $1 million per week for services rendered.[50] An additional 10 business day delay in receiving

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[44] Arbitrator's Report and Decision ¶¶ 42, 43, 47, and 48. (Emphasis in original).
[45] Eschelon Petition for Review at 4-8.
[46] *Id.*
[47] *Id.* at 5-7.
[48] Qwest Response at 2.
[49] *Id.* at 1-2.
[50] Qwest Response at 2; Denney, Exh. No. 152 at 55.

payment would, on a region-wide basis, cost Qwest approximately $2 million should Eschelon default on its payment obligation.[51]

29 We modify the Arbitrator's decision to include the undisputed clarifying language proposed by Eschelon, and revise Sections 5.4.2 and 5.4.3 of the ICA to include the term "non-compliance." We also affirm the remainder of the Arbitrator's recommendations as to these issues, adopt Qwest's language, and reject Eschelon's request to include an additional 10 days' notice before order processing can be discontinued or service disconnected.

30 We conclude that the ICA already provides Eschelon with a reasonable opportunity to pay undisputed billing amounts. When Qwest bills Eschelon for services rendered, payment of undisputed amounts is not due for 30 days. Under the ICA language recommended by the Arbitrator, Eschelon has an additional 30 days following the due date to submit payment plus 10 business days' notice before Qwest can discontinue order processing.[52] Thus, Eschelon has more than 70 days to pay undisputed billing amounts before Qwest is entitled to discontinue order processing.[53] Eschelon is provided even more time before Qwest's services are disconnected. Again, payment of undisputed billed amounts is not due for 30 days. However, before Qwest may disconnect service, it must provide Eschelon with an additional 60 days following the payment due date to remit payment plus 10 business days' notice, or a total of more than 100 days notice to Eschelon.[54]

31 We conclude that the ICA allows Eschelon reasonable periods to remit payment for undisputed amounts, which should not be extended by an additional 10 business days' notice. We find compelling Qwest's argument that such extensions would increase its financial risk by $1 - $2 million should Eschelon default in its payment obligation.[55] In reaching this conclusion, we acknowledge Eschelon's concern that Qwest may abruptly discontinue order processing or disconnect service, but find it to be

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[51] Qwest Response at 2.
[52] Easton, Exh. No. 42 at 7-8.
[53] Because the notice provision is for 10 *business* days rather than 10 *calendar* days, the notice must be greater than 10 consecutive days.
[54] *Id.*
[55] Easton, Exh. No. 42 at 11-12 and Denney, Exh. No. 153 at 55.

speculative and insufficient to offset the potential for significant financial harm to Qwest.

3. Definition of "Repeatedly Delinquent."

32 Under the terms of the ICA, Qwest is entitled to demand a security deposit if Eschelon is "repeatedly delinquent" in making payment for services rendered. The parties do not agree as to the definition of the term "repeatedly delinquent."

33 The Arbitrator adopted Eschelon's alternative proposal to define "repeatedly delinquent" as the payment of undisputed amounts more than 30 days after the payment date three or more times in a six-month period. [56] The Arbitrator concluded that Qwest failed to demonstrate that Eschelon's proposal was insufficient to protect its interests and that the language is consistent with language in Qwest's ICAs with other CLECs.[57] Qwest petitions for review of the Arbitrator's ruling.

34 Qwest contends that the term "repeatedly delinquent" should be defined as the failure to pay undisputed bills three times within a 12-month period.[58] It asserts that the record demonstrates that Eschelon's proposal would not protect its financial interests arguing that if Eschelon was in poor financial health or employed a strategy of "slow paying" bills, Eschelon's proposal would result in financial harm to Qwest. Qwest points out that Eschelon pays it approximately $55 million per year, so each week's delay in payment could cost Qwest over $1 million should Eschelon default.[59] Qwest asserts that Eschelon has a history of late and slow payment and argues that Eschelon's behavior justifies a more stringent standard for a deposit than that imposed on other CLECs.[60] Qwest also argues that a customer who failed to make payments for undisputed bills 50 percent of the time would expose Qwest an extremely high level of risk, and if such a situation arose, Qwest would likely seek disconnection rather than a deposit.[61] Finally, Qwest states that the other ICAs with the same language adopted by the Arbitrator are very old and should not be relied upon.[62]

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[56] Arbitrator's Report and Decision at ¶ 55.
[57] *Id.*
[58] Qwest Petition for Review at 9-11.
[59] *Id.* at 10; Denney, Exh. No. 152 at 55.
[60] *Id.* at 10; Easton, Exh. No. 43C at 7.
[61] *Id.*
[62] Qwest Petition for Review at 11.

35 In response, Eschelon states that all four of the Arbitrator decisions issued in the Qwest/Eschelon arbitration proceedings, to date, have recommended adopting Eschelon's proposed language.[63] The Minnesota and Oregon Arbitrators recommended adopting Eschelon's proposal to require a deposit when payment is made more than 30 days after the due date in three consecutive months.[64] The Arizona and Washington Arbitrators recommended adopting Eschelon's alternate proposal to require a deposit when payment is made more than 30 days after the due date three or more times in a six month period.[65]

36 Eschelon points out that, in the Minnesota arbitration proceeding, Qwest acknowledged that the ICA provisions regarding late payment charges are designed to provide the incentive for timely payment,[66] and that the deposit provisions are intended to protect against ultimate non-payment. Eschelon argues that Qwest's allegation that Eschelon has a history of late or slow payment was hotly contested in this proceeding.

37 Eschelon contends that while Qwest focuses on the potential harm to Qwest, it does not recognize any potential harm to Eschelon, a much smaller company.[67] Eschelon argues that a security deposit, which could be equal to approximately $5 million, could have a significant financial impact on its operations.[68] Eschelon and Qwest agree that one purpose of a security deposit is to protect against the risk of non-

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[63] Eschelon Response at 13.

[64] *In the Matter of the Petition of Eschelon Telecom, Inc., for Arbitration of an Interconnection Agreement with Qwest Corporation Pursuant to 47 U.S.C. § 252(b) of the Federal Telecommunications Act of 1996, OAH 3-2500-17369-2, MPUC No. P-5340,421/IC-06-768* at ¶ 55 *(Jan. 16, 2007)* referred to hereafter as the " Minnesota Arbitrator's Decision– affirmed by the Minnesota Public Utilities Commission by *Order Resolving Arbitration Issues, Requiring Filed Interconnection Agreement, Opening Investigations and Referring Issue to Contested Case Proceeding* (Mar.30, 2007) referred to hereafter as the "Minnesota Commission Decision." Oregon Arbitrator's Decision at 26-27. No party sought review of this issue in Oregon and the decision was approved in the Oregon Commission Decision.

[65] The Arizona Commission Decision affirmed the Arizona Arbitrator's Decision in relevant part. Arbitrator's Report and Decision at ¶ 55.

[66] Eschelon Response at 14; Starkey, Exh. No. 73 at 17 (MN TR., Vol. 1, 150).

[67] Qwest employs around 40,000 individuals compared to Eschelon's approximate 1,300 employees. Eschelon Response at 13.

[68] Eschelon's "annual revenue is less than 2% of Qwest's annual revenue." Denney, Exh. No. 130 at 45.

payment of outstanding balances. Qwest, however, also argues that a primary function of a deposit is to provide an incentive for timely payment. We concur with Qwest.

38 While we agree that security deposits ensure that a creditor has a financial resource from which to seek reimbursement for unpaid charges if a debtor becomes insolvent, we conclude that protection against non-payment is not the sole purpose of a deposit. We believe that security deposits also provide an incentive for a billed party to timely render payment for undisputed amounts. The deposit-related delinquency is not triggered until 60 days after billing, which is sufficient time for Eschelon to meet its obligation to pay Qwest. Allowing such late payment three times in 12 months before a deposit is required balances the legitimate interest of Qwest in timely and secure payment against Eschelon's interest in flexibility and avoiding the financial burden of a deposit.

39 The definition of "repeatedly delinquent" that best balances the parties' interests is that proposed by Qwest. Consequently, we reverse the Arbitrator's decision on this issue and adopt Qwest's definition of the term "repeatedly delinquent" as the payment of any undisputed amount more than 30 days after the payment due date, three or more times during a 12-month period.

4. Transit Record Changes and Bill Validation.

40 Transit traffic originates on one carrier's network, travels on a second carrier's network, and terminates on the network of a third carrier. When a call originates on Eschelon's network, traverses Qwest's network, and terminates on a third carrier's network, Qwest serves as the transit traffic provider and bills Eschelon for that service.

41 This dispute involves two issues. First, whether Qwest must provide Eschelon with billing records of transit traffic, without charge, for the purpose of allowing Eschelon to verify transit traffic charges. Second, if Qwest must provide billing verification, what data must Qwest provide?

42 Eschelon requested that Qwest provide transit traffic records, upon request, without charge once every six months to verify the validity of Qwest's transit traffic bills.[69] Qwest opposed supplying the records arguing that Eschelon's switch records provide a better basis to verify transit traffic billings.[70] Qwest argued that it was unreasonable and inefficient to require Qwest to provide Eschelon with information Eschelon already has.[71]

43 The Arbitrator recommended approving Eschelon's proposal and concluded that Qwest must provide Eschelon with sufficient information to allow it to understand and confirm the basis for Qwest charges.[72] The Arbitrator further concluded that it should not be unduly burdensome for Qwest to provide the call record detail because requests for bill verification would be limited to once every six months, provided the bills are accurate.[73] In addition, the Arbitrator concluded that Qwest was already obligated to undertake the programming task of producing the requested records because Eschelon's proposal had been adopted earlier in Minnesota.[74]

44 Qwest petitions for review and argues that the Arbitrator misstated the Minnesota Commission's decision.[75] Qwest points out that "[o]n February 7, 2008(sic), the Minnesota Commission issued an order clarifying its earlier order," after determining that the ICA language describing the call record detail to be provided Eschelon imposed an additional burden on Qwest and should be deleted.[76] Qwest requests the same result here.[77] Qwest also urges us to delete Eschelon's proposed language requiring Qwest to provide any transit traffic records arguing that Eschelon's switch records provide a better means for Eschelon to obtain the information.[78] Qwest

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[69] Denney, Exh. No. 130 at 80-82.
[70] Easton, Exh. No. 42 at 26.
[71] *Id.* at 26-27.
[72] Arbitrator's Report and Decision ¶ 73.
[73] *Id. at* ¶ 74.
[74] *Id.*
[75] Qwest Petition for Review at 12.
[76] *Id.* As support for its petition for review, Qwest appended, as Attachment 2, a decision from the Minnesota Commission. Attachment 2 is the original Minnesota Arbitrators' Report and Decision which is already an exhibit in this proceeding (Denney, Exh. No, 158). The Commission located the Minnesota decision it believes that Qwest intended to reference in its petition, but it is a decision dated February 4, 2008, not February 7, 2008. Our references to the Minnesota Decision in this section of the Order use the February 4, 2008, decision.
[77] Qwest Petition for Review at 12.
[78] *Id.*

contends that if Eschelon wants Qwest to create a new functionality, Eschelon should be required to pay for it.[79]

45 In response, Eschelon asserts that there are two, not one, transit traffic record issues: (1) the charges for producing sample records; and (2) the data necessary to verify the transit bills.[80] With respect to the first issue, Eschelon argues that it is requesting a limited sample of the records it believes necessary to verify the accuracy of Qwest's transit traffic bills.[81] Eschelon asserts that while its switch records information on calls originated by its customers, this information is only half the puzzle.[82] In order to verify the accuracy of Qwest's transit traffic bill, Eschelon argues that it needs to reconcile its switch data with the information Qwest used to generate its transit traffic bill in order to verify the accuracy of Qwest's bill.[83] Eschelon requests that Qwest be required to provide this information, at no charge, once every six months.[84] It argues that the Arizona and Minnesota Commissions have agreed with its position.[85]

46 With respect to the second issue – the data necessary to verify transit bills – Eschelon asserts that Qwest has confused the issue but that a plain reading of the proposed language demonstrates there is no requirement that the information be added to any particular record or provided in any particular form.[86] Eschelon argues that Qwest seems to have succeeded in creating confusion on this point in Oregon as the Oregon Arbitrator discusses Qwest being "forced to modify its software programming to produce the requested data."[87] Eschelon states that the requested provision is straightforward; it requires Qwest, when it bills, to provide key data, when requested, to verify its bills.[88] To avoid any further confusion, Eschelon proposes alternate language to make it clear that what it requests for bill verification should not be

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[79] *Id.*
[80] Eschelon Response at 15.
[81] *Id.* at 16.
[82] *Id.*
[83] *Id.*
[84] *Id.* at 17.
[85] *Id.* Arizona Arbitrator's Decision at 28 affirmed by the Arizona Commission (May 16, 2008); Minnesota Arbitrators' Decision affirmed and clarified by *Order Clarifying Arbitration Issues and Requiring Filed Interconnection Agreement,* Minnesota Commission Order (Feb. 4, 2008).
[86] Eschelon Response at 17.
[87] *Id. a*t 18; Oregon Arbitrator's Decision at 33.
[88] Eschelon Response at 18.

unduly burdensome for Qwest to produce.[89] It argues that this language confirms that Qwest need only provide data to the extent it is available.[90] Eschelon contends that if this data is not available, a separate question may arise as to whether Qwest has any basis to bill Eschelon for unverifiable amounts.[91]

47 We concur with Eschelon that there are two issues to be resolved. The first issue is whether we should require Qwest to provide sample transit record billings at no charge. We conclude that the Arbitrator's decision regarding charges should be affirmed and that Qwest must provide these sample billings, upon request, once every six months, without charge.

48 The bills Qwest provides to Eschelon for Eschelon-originated calls do not contain call record detail; rather they list the number of transit minutes and the transit traffic rate.[92] Eschelon requests the opportunity to request sufficient call record detail to verify billings, once every six months, at no charge.[93] Qwest is willing to provide the data, but only if Eschelon purchases the call detail records.[94] We agree with the Arbitrator that Qwest should be required to provide sufficient information to allow Eschelon to verify the accuracy of Qwest's billings. We do not find it unduly burdensome to require Qwest to provide that verification under the terms and conditions Eschelon requests. Qwest would only be required to substantiate its own billings, at no charge, once every six months and *only* if Eschelon requested billing verification. Moreover, it is not unreasonable to require Qwest to provide verification for its own billings without imposing a fee. As further support, Eschelon points out that Qwest is already providing this information free of charge to CLECs for the

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[89] *Id.* at 18-20.
[90] *Id.* Section 7.6.4, as modified by Eschelon provides that: Qwest will provide the non-transit provider, upon request, bill validation detail, which may be non-mechanized if not available in a mechanized form, including but not limited to (as needed to verify the information in bills): originating and terminating CLLI code, originating and terminating Operating Company Number, originating and terminating state jurisdiction, number of minutes being billed, rate elements being billed, and rates applied to each minute, to the extent such data is available and verifies Qwest's bills to the non-transit provider for the purposes of accurately billing the non-transit provider.
[91] *Id.*
[92] Denney, Exh. No. 130 at 80.
[93] *Id.*
[94] *Id.*

purpose of billing originating carriers. Like the Minnesota Commission, we cannot justify allowing Qwest to charge Eschelon for essentially the same information.[95]

49 The second issue we must resolve regarding transit traffic billing is more complex; what data must Qwest provide to verify transit traffic billings? We again agree with Eschelon. Perhaps the Oregon Arbitrator was confused about the data Eschelon requested for bill verification as the decision assumes that Qwest would need to perform some programming tasks in order to verify its own billings.[96] Eschelon's Response demonstrates that it is not seeking information that Qwest should have to independently generate, but is only seeking access to the underlying data Qwest uses to bill it for transit traffic.[97] We conclude that it is reasonable to expect Qwest to substantiate its own billings with sufficient detail to ensure that Eschelon is being properly billed. Under Eschelon's proposed modification to the language in Section 7.6.4 of the ICA,[98] it is clear that Qwest is not required to perform any programming tasks but must merely provide the underlying call detail data to the extent it is available. Simply put, Qwest would be required to provide an itemized bill for its transit charges. Accordingly, we affirm the Arbitrator's conclusion that Qwest must provide the data Eschelon requests, but modify the language in Section 7.6.4 as Eschelon proposes.

50 We adopt the modifying language to alleviate Qwest's concern that it must undertake programming tasks to generate the bill verification data. The clarifying language demonstrates that Qwest must provide records ". . . in the manner in which Qwest routinely maintains the data for purposes of accurately billing the non-transit provider."[99] We further agree with Eschelon that if Qwest is unable to provide any underlying data to substantiate its own billings, Qwest will likely not be able to demonstrate *any* basis to bill Eschelon for transit traffic.

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[95] The Minnesota Commission found that if Qwest provides " . . . the records free of charge to CLECs for the purpose of billing originating carriers it is hard to see why Qwest should not be required to provide sample records free of charge to Eschelon, once every six months, for the purpose of verifying Qwest's bills." Minnesota Arbitrator's Decision affirmed by Minnesota Commission Orders (Mar. 30, 2007 and Feb. 4, 2008).

[96] Oregon Arbitrator's Decision at 33, and approved by the Oregon Commission Decision, without review of this issue.

[97] Eschelon Response at 18-20.

[98] *See* the full text of this language in n. 90.

[99] *See* n. 90.

51 Finally, Qwest argues that the Minnesota Commission eliminated the language in Section 7.6.4 because it imposed an additional burden on Qwest. We reviewed the Minnesota Commission order and confirm that Section 7.6.4 was completely eliminated from that ICA.[100] However, it does not appear that the Minnesota Commission did so, as Qwest argues, because the language imposed an additional burden on Qwest.[101] The Minnesota Commission noted that Section 7.6.4 did not require anything more than that which was already required by the Commission-approved Section 7.6.3.1.[102] Thus the Minnesota Commission concluded "[r]ather than approve superfluous language for Section 7.6.4, the Commission will simply decline to approve any language for that section at all."[103] While the language may also be superfluous here, we conclude that sufficient confusion has been generated on this issue to warrant the use of explicit clarifying language in Section 7.6.4.

5. Conversions.

52 The parties dispute the process for converting circuits provided by Qwest to CLECs from an Unbundled Network Element ("UNE") platform to another service arrangement, a process change which may be necessary as a result of unbundling relief granted by the FCC as a result of the *Triennial Review Remand Order* ("TRRO") proceeding.[104] In that proceeding, the FCC took steps to eliminate ILEC unbundling obligations for high capacity transport and loops where certain competitive conditions are observed in particular ILEC wire centers. In those instances where sufficient competitive alternatives to ILEC UNEs in a wire center are available, the wire center is deemed "non-impaired" and CLEC access to UNEs is eliminated. As a consequence of the FCC's TRRO decision, where wire centers are deemed non-impaired, CLECs must convert from UNEs to alternative wholesale services to maintain operation of existing circuits previously purchased as UNEs.

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[100] Minnesota Commission Order at 7 (Feb. 4, 2008).
[101] Qwest Petition for Review at 12.
[102] Minnesota Commission Order at 6-7 (Feb. 4, 2008). We have already noted that the language in Section 7.6.3.1 in this proceeding is identical to that approved by the Minnesota Commission.
[103] *Id.* at 7.
[104] *In the Matter of Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* WC Docket No. 04-313, CC Docket No. 01-338, Order on Remand, FCC 04-290 (rel. Feb. 4, 2005) hereinafter referred to as the *"Triennial Review Remand Order" or "TRRO."*

53 In this proceeding, the parties disagree about a number of jurisdictional, procedural, and billing issues regarding UNE circuit conversions. First, they disagree about the Commission's jurisdiction over the terms and conditions of converting circuits that were provided pursuant to Section 251(c)(3) of the Act to tariffed or contractual services to which this provision does not apply. Second, given their polarized views on conversions, the parties differ on the need for a separate or generic proceeding to address conversion-related issues. Third, the parties hold opposing views on how conversions should be managed administratively; that is, by changing or retaining a circuit's ID in Qwest's operational support systems after a circuit is converted to a non-UNE service. Finally, Qwest and Eschelon dispute how billing should be adjusted to new rates and displayed by Qwest on its bills after circuits are converted from a UNE platform to alternative service offerings.

54 The Arbitrator recommended adopting Eschelon's proposed contract language for conversions because it "ensures that the conversions from UNEs to non-UNEs do not cause disruption for [Eschelon's] business operations and potential harm to its end user customers."[105] The Arbitrator also concluded that a mechanism already exists under which Qwest is compensated for conversion-related activities. Finally, the Arbitrator noted that Qwest did not offer alternative contract language for conversion-related issues and had opposed efforts to have such matters considered in the Change Management Process (CMP) for these activities. [106]

55 On review, Qwest states that the terms, conditions, and prices for UNE services are highly regulated under Sections 251 and 252 of the Act and are subject to different requirements than tariffed services.[107] Consequently, Qwest asserts that it uses separate and distinct computerized ordering, inventory, and billing systems for UNE-based services and different processes to provision these services.[108] Qwest contends that the disputes that give rise to this issue result from Eschelon's unreasonable demands that Qwest undertake very costly changes to its systems and provisioning

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[105] Arbitrator's Report and Decision at ¶ 91.
[106] The Change Management Process was created as a vehicle for helping implement Section 271 of the Act and is the vehicle Qwest uses to announce changes related to terms that are not addressed in an ICA.
[107] Qwest Petition on Review at 13.
[108] *Id.*

procedures.[109] Qwest argues that Eschelon has not demonstrated that these changes are necessary, asserting that it has carried out more than 500 conversions in its region without complaint that a conversion caused a service problem for a CLEC's customer.[110]

56 Qwest argues that conversion of UNEs to non-UNE services require changes to each circuit ID and that it is or should be entitled to recover all of the costs it incurs to facilitate those conversions.[111] Qwest also asserts that the issue of these conversions is beyond the scope of an interconnection agreement arbitration and would be better addressed in a separate generic proceeding that would allow all affected CLECs the opportunity to participate.[112]

57 In support of its position that Eschelon's conversion-related language is unreasonable, Qwest asserts that arbitrators in three other jurisdictions have refused to adopt Eschelon's proposals.[113] A decision by an arbitrator in Arizona concluded that Qwest had undertaken conversions without any disruption to CLEC end users and had demonstrated a legitimate and reasonable reason for its business practices.[114] Oregon and Minnesota Commissions declined to adopt Eschelon's contract proposal, deciding instead to review conversion processes in a separate proceeding.[115]

58 Qwest argues that notwithstanding Eschelon's inability to demonstrate any need for the changes and the substantial costs they would impose on Qwest, the Arbitrator inappropriately and without foundation adopted Eschelon's proposed language in a single four-sentence paragraph that does not evaluate Qwest's objections or testimony.[116] Qwest asserts that it did not provide alternative language because its position is that the *status quo* should not be altered.[117] Qwest argues that we should reject the Arbitrator's ruling and permit Qwest to continue using separate systems and

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[109] *Id.*
[110] Million, Exh. No. 51 at 15.
[111] *Id.* at 9.
[112] *Id.*
[113] Minnesota, Arizona, and Oregon.
[114] Arizona Arbitrator's Decision at 45, affirmed by the Arizona Commission (May 16, 2008).
[115] Oregon Arbitrator's Decision at 44; approved without review of this issue by the Oregon Commission Decision; Minnesota Arbitrators' Decision at 38; affirmed by the Minnesota Commission Order.
[116] Qwest Petition for Review at 15.
[117] *Id.* at 22.

processes for UNEs and tariffed services or alternatively we should resolve this issue in a separate generic docket.[118]

59 Qwest argues that Section 252(b)(4)(C) authorizes state commissions to serve as arbitrators but limits that authority to imposing terms and conditions necessary to implement the requirements of Section 251 of the Act.[119] Qwest asserts that the UNE conversions at issue involve network elements that the FCC specifically removed from Section 251(c)(3), i.e., high capacity loops and transport, and the conversion of those elements to alternative tariffed services.[120] Accordingly, Qwest argues that the Commission lacks jurisdiction to impose terms and conditions relating to alternative services because Section 251 does not apply to tariffed non-UNE services.[121]

60 With respect to the process and billing-related aspects of UNE conversions, Qwest states that high capacity UNEs are different from services that CLECs purchase through tariffs and commercial agreements because these products are classified and priced under distinct regulatory schemes; UNEs are subject to cost-based pricing under the FCC's TELRIC pricing methodology and alternative services are provided through commercial contracts and tariffs at commission-approved or market-based pricing.[122] Qwest states that UNEs are available only to CLECs whereas alternative service arrangements are available to CLECs, interexchange carriers, and large business customers and that it has developed separate ordering, maintenance, and repair processes for these services.[123] Qwest contends that conversions involve significant activity within three different functional areas of its ordering and provisioning organizations.[124] Conversions involve input from the Service Delivery Coordinator, the Designer, and the Service Delivery Implementer and Qwest must undertake a variety of steps within these job functions to assure itself that the data for the converted circuit is accurately recorded in the appropriate systems.[125] Qwest asserts that if we affirm the Arbitrator's recommendation to adopt Eschelon's contract language, then we should also rule that Qwest is entitled to recover the costs

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[118] *Id.* at *16.*
[119] Qwest Petition for Review at 17.
[120] *Id. See* n. 104.
[121] Qwest Petition at 17.
[122] *Id.* Million, Exh. No. 51 at 14-15.
[123] *Id.*
[124] *Id.* at 26.
[125] *Id.*

associated with changing the foregoing processes to implement Eschelon's demands.[126]

61 Eschelon responds that the FCC has recognized that the conversion between wholesale services and UNEs is ". . . largely a billing function [for which the FCC therefore expects] carriers to establish appropriate mechanisms to remit the correct payment after the conversion request."[127] Eschelon also points out that this Commission also recognized that operational procedures should be in the ICA, finding ". . . it is reasonable to include in the amendment a provision addressing 'operational procedures' to ensure customer service quality is not affected by conversions."[128]

62 Eschelon argues that conversion of UNE circuits should only involve changing the rate applied to each circuit, a procedure it argues could be accomplished without changing the circuit ID.[129] Eschelon's proposal for re-pricing the converted facilities would simply require Qwest to use an adder or surcharge and a Universal Service Ordering Code (USOC) in the manner Qwest previously used for the conversion of circuits from unbundled UNE-Platform (UNE-P) to Qwest's Platform Plus (QPP) service offering.[130] Eschelon opposes Qwest's proposal that these matters be addressed in a separate proceeding because Qwest had previously rejected the opportunity to address these issues through Qwest'sCMP; a forum in which all CLECs could have provided input.[131]

63 Eschelon notes that when Qwest first converted special access circuits to UNEs, circuit IDs did not change.[132] Eschelon contends that this demonstrates that there is no legitimate need for the circuit ID to change when the reverse process occurs and Qwest converts from UNEs to non-UNEs.[133] Further, Eschelon asserts that while

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[126] *Id.* at 27.
[127] Eschelon Response at 21 citing TRO at ¶ 588.
[128] Eschelon Response at 21; *In the Matter of the Petition for Arbitration of an Amendment to Interconnection Agreements of Verizon Northwest, Inc., with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers in Washington,* Order 17, Docket UT-043013, ¶ 416 (July 8, 2005), affirmed in relevant part in Order No. 18 (Sept. 22, 2005).
[129] Starkey, Exh. No. 62 at 142, 148 – 149.
[130] *Id.* at 149.
[131] *Id.* at 69.
[132] Starkey, Exh. No. 62 at 156.
[133] Eschelon Response at 22.

Qwest argues that the two products are subject to different regulatory schemes, are available to different customers, and are inventoried differently, the fact remains that after the conversion Eschelon's end-user customer is using exactly the same physical circuit or facility that was previously used on a UNE basis.[134] Eschelon contends that the end-user customer should be wholly unaware of a conversion because that process should simply be a pricing conversion and Qwest should be required to maintain existing circuit IDs to prevent the risk of end-user disconnections; a possibility it contends is inherent in Qwest's desire to process conversions through "disconnect" and "new service order" processes.[135]

64 Eschelon asserts that past experience shows that Qwest has the ability to implement Eschelon's simpler-pricing approach for conversions; pointing to Qwest's implementation of QPP agreements. Under the QPP agreements, Qwest does not physically convert circuits, but simply re-prices the circuits using either an adder or surcharge for the billing difference between the old and new rates.[136] Eschelon proposes the same approach for the conversions at issue here.

65 Eschelon argues that Qwest ignores the substantial savings for both parties in not needing to physically convert circuits and simply modifying the billing to reflect the price differential. Eschelon also asserts that Qwest presented no data in the record to support its claims about the cost of conversions.[137] Eschelon states that the Arbitrator found that Qwest will be compensated for conversion-related activities by the non-recurring charge for the conversion. Eschelon argues that although the costs of re-pricing (through the use of a surcharge) are minimal, Qwest is being over-compensated for the conversion.[138] Eschelon states that to date, the only arbitrator to rule on the merits of the non-recurring conversion charges recommended a charge of $0.00.[139] In Arizona, the Commission Staff also recommended a charge of $0.00.[140]

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[134] *Id.;* Starkey, Exh. No. 62 at 151.
[135] Eschelon Response at 22.
[136] *Id.*
[137] Eschelon Response at 24.
[138] The surcharge of $25.00 is part of the Settlement Agreement filed in Docket UT-073035, *In the Matter of the Petition of Qwest Corporation, For Investigation Concerning the Status of Competition and Impact of the FCC's Triennial Review Remand Order on the Competitive Telecommunications Environment in Washington State,* and represents the rate the parties reached through compromise. The Settlement was approved by Order 05 entered March 21, 2008.
[139] Eschelon Response at 24.

Eschelon states that Qwest is the cost-causer and is the only party benefitting from the conversion.[141]

66 Eschelon argues that this arbitration, not a generic docket, is the proper forum to address these issues.[142] Eschelon notes that while Qwest suggests a generic docket forum, it next argues that the Commission lacks jurisdiction over these issues. Eschelon contends that it would be unjust for it to have expended resources to exercise its Section 252 right to obtain a ruling from the Commission in this docket only to have to re-litigate these issues in a new docket, where Qwest may again argue the Commission lacks jurisdiction.[143] In any event, Eschelon argues that this Commission has already determined that it has jurisdiction, through the Section 252 process, to address the transition away from provisioning elements on an unbundled basis pursuant to the TRRO.[144]

67 We concur with Qwest that the Arbitrator's ruling on conversions is, at best, sparse and that her summary disposition of these issues is inadequate. Although, we consider each argument raised by the parties and offer further analysis below, in the end we reach the same result as the Arbitrator.

68 *Commission Jurisdiction.* When the FCC considered how to implement changes in unbundling obligations, it determined that ILECs should not unilaterally change interconnection agreements, but that carriers should negotiate and arbitrate new agreements in accordance with Section 252.[145] The conversion from a UNE to a non-UNE service is one such change in the ILECs' unbundling obligations. In the TRRO proceeding, the FCC stated:

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[140] AZ Docket Nos. T-03632A-06-0091, *et.al*, (Oct. 20, 2006).
[141] Eschelon Response at 24. Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* 18 FCC Rcd 16978 (2003) (*Triennial Review Order or TRO).* The TRO allows Qwest to stop offering UNEs, but does not require it to do so.
[142] Eschelon Response at 25.
[143] Eschelon Response at 24-25.
[144] Docket UT-043013, Order 17 at ¶ 150, citing TRO, ¶¶ 700-701, TRRO, ¶ 142 n. 399, ¶ 198 n. 524, ¶ 228 n. 630, ¶ 233, affirmed, in relevant part, Order 18 (Sept. 22, 2005).
[145] TRO, ¶¶ 700, 701; TRRO, ¶ 233.

> We expect that incumbent LECs and competing carriers will implement the Commission's findings as directed by section 252 of the Act.[146] Thus, carriers must implement changes to their interconnection agreements consistent with our conclusions in this Order.[147] We note that the failure of an incumbent LEC or a competitive LEC to negotiate in good faith under section 251(c)(1) of the Act and our implementing rules may subject that party to enforcement action. Thus, the incumbent LEC and competitive LEC must negotiate in good faith regarding ***any*** rates, terms, and conditions necessary to implement our rule changes.[148] We expect that parties to the negotiating process will not unreasonably delay implementation of the conclusions adopted in this Order. We encourage the state commissions to monitor this area closely to ensure that parties do not engage in unnecessary delay.

Thus, the FCC specifically anticipated that disputes about *"any"* rate, term or condition related to conversions would be addressed within the context of negotiating or arbitrating changes to existing interconnection agreements.

69 We have previously addressed this issue. In Docket UT-043013, the Arbitrator rejected Verizon Northwest Inc.'s argument that disconnect or conversion charges are outside the scope of Sections 251 and 252 and state commission review.[149] There the Arbitrator noted that ". . . the Commission specifically provided that the parties address through the Section 252 process the transition away from provisioning elements on an unbundled basis that the FCC has determined are no longer required to be unbundled."[150] We affirmed that ruling.[151]

70 Accordingly, it is clear from both the FCC's perspective and our own that we have jurisdiction to address conversion-related issues. We are not persuaded by Qwest's argument that we should refrain from exercising jurisdiction over conversions given the importance of providing CLECs a reasonable transition process away from UNEs and, more importantly, ensuring a seamless or uninterrupted effect on services provided to their end users.

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[146] 47 U.S.C. § 252.
[147] *Id.*
[148] 47 U.S.C. § 251(c)(1); 47 U.S.C. § 252(b)(5). (Emphasis supplied).
[149] Docket UT-043013, Order 17 at ¶ 150.
[150] TRRO ¶ 142 n. 399, ¶ 198 n. 524, ¶ 228 n. 630. Docket UT-043013, Order 17, at ¶ 150. This issue was not presented for review in Docket UT-043013.
[151] Docket UT-043013, Order 18, (Sept. 22, 2005).

71 *Separate or Generic Proceeding.* We next consider Qwest's argument that conversion issues should be addressed in a separate generic proceeding that would allow other CLECs to participate.

72 Qwest notes that in other Qwest/Eschelon arbitration proceedings, several state commissions have decided to address conversion issues in a separate proceeding. Qwest points to Oregon, where in a recent proceeding the Arbitrator rejected Eschelon's proposed contract language on conversions and recommended that the commission initiate a general investigation of Qwest's conversion process.[152] The Oregon Arbitrator concluded that "[T]he evidence presented by Eschelon raises serious questions as to whether the conversion process implemented by Qwest, apparently without CLEC input, is consistent with the FCC's expectations [for a seamless transition of UNE products and services to alternative service arrangements.][153] The Arizona Commission adopted the Arbitrator's recommendation to accept Qwest's proposal to change the circuit ID during conversions and concluded that there was an insufficient record to evaluate Eschelon's approach to employ an "adder" and that such a decision is best made in a separate rate docket.[154] The Arizona Commission concluded that, in the conversions undertaken to date, Qwest made the conversions without disruption to the CLEC end-user customers.[155] The Minnesota Arbitrators adopted the Department of Commerce's recommendation to explore these issues in a generic docket and to leave these sections of the ICA blank.[156]

73 Eschelon opposes a separate proceeding arguing that, as the Arbitrator pointed out, Qwest did not seek to address this issue in its CMP) which is open to all CLECs, but now argues disingenuously that all CLECs should have input regarding this issue.

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[152] Oregon Arbitrator's Decision at 44. This issue was not raised on review and the Oregon Commission adopted the Arbitrator's recommendation.
[153] *Id.*
[154] Arizona Arbitrator's Decision at 45-46 and affirmed by the Arizona Commission May 16, 2008.
[155] *Id.*
[156] Minnesota Arbitrators' Decision at 38.

74 We find that regardless of whether other state commissions have chosen to consider conversion issues in a separate proceeding, we previously concluded that it was appropriate to use the Section 252 process to address the transition away from UNEs.[157] In arbitration proceedings, the parties present the issues they wish the Commission to resolve. Here, Qwest and Eschelon included these issues for Commission consideration on the joint disputed issue list. While the evidence on this topic is markedly diverse, both Qwest and Eschelon presented testimony and exhibits in support of their respective positions. It seems patently unfair to require Eschelon to undergo the time and expense of "re-litigating" these issues in a separate docket. We also conclude that it is an inefficient use of Commission resources to initiate a separate proceeding to consider, again, issues that were addressed extensively in this proceeding.

75 Moreover, while Qwest's primary argument in support of a separate proceeding is to receive input from other CLECs on this topic, Qwest had that opportunity in the CMP, but chose not to do so.[158] Instead, apparently Qwest chose to unilaterally develop and issue notices of how its obligations regarding UNEs had changed since the issuance of the TRO/TRRO prompting Eschelon to raise the issue in this proceeding.[159]

76 We do not approve a unilateral process for the transition from UNE's to non-UNE tariffed products and services, but as noted above, believe the Section 252 process more appropriate.[160] While the CMP might have sufficed for that purpose, at this stage we will resolve the issue on the record before us for the previously stated reasons.

77 *Lack of Qwest Proposed Language.* Next, we address whether Qwest should have offered alternative ICA language in support of its position to maintain the *status quo*; a criticism leveled by the Arbitrator in ruling against Qwest on this matter.

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[157] *See* n. 154.
[158] Eschelon Response at 27; Starkey, Exh. No. 67 at 36-37.
[159] *Id.*
[160] *See* n. 149.

78 In arbitration proceedings, each party is responsible for making its own decisions regarding the presentation of its position. Some of these decisions may be factual determinations while others are strategic, designed to present a party's position in the best light. We consider the decision of whether to offer alternative ICA language in the latter category. Qwest's decision to decline to offer alternative ICA language limits the Commission's options.

79 In arbitration proceedings the parties present disputed issues for our consideration, which represent only the "tip of the iceberg" with respect to the volume of issues parties ultimately resolve and include in an interconnection agreement. We never see the broad spectrum of issues until after the arbitration and review process have concluded and the parties submit an ICA for our approval. Only then, do we have the opportunity to view issues the parties resolved through the negotiation process.

80 During the course of an arbitration, if we reject a party's primary argument and that party has not offered any alternative ICA language, we are left in an untenable position. We can either attempt to craft some language from whole cloth (not knowing if it will conflict with unseen and agreed-upon portions of the ICA) or we can select from language offered by the prevailing party because generally, it presents the least risk of conflict with other provisions of the ICA to adopt language proposed by the parties. The parties are privy to the language in the negotiated sections of the ICA and are more likely to draft language that does not present conflict or controversy where none existed before. It is not unusual, and this arbitration is no exception, for parties to present alternative proposed language and clearly state the primary position for which they advocate.[161] If the primary position is not adopted, we then have the option of selecting among the alternatives proposed by the parties.

81 In this proceeding, Qwest did not offer alternative language, relying instead on its position that conversion-related language did not belong in the ICA. Contrary to the Arbitrator's decision, however we agree that Qwest's decision to refrain from offering an alternative proposal is not dispositive. To do so would unfairly penalize a party for asserting, as Qwest does here, that matters are beyond the scope or jurisdiction of the proceeding. Nevertheless, for other reasons discussed above, we reject Qwest's

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[161] *See,* for example, the resolution of Issue 5-13, Review of Credit Standing, in the Arbitrator's Report and Decision at ¶ 6 (which is not raised on review).

argument that conversion-related issues are beyond our jurisdiction or the scope of Section 252 arbitration.

82 We turn now to the merits of the issues concerning conversions.

83 *Change in Circuit ID.* In considering whether Qwest may change the circuit ID for products converted from UNEs to alternative products and services, we are guided primarily by the FCC's conclusion that conversion is largely a billing function. For wire centers that are designated as non-impaired, Qwest is no longer obligated to provide UNEs under the FCC's TELRIC pricing methodology and is permitted to offer alternative services through commercial contracts and tariffs. Qwest notes that UNE and non-UNE facilities are subject to different regulatory schemes, available to different sets of customers, and are inventoried differently. Nonetheless, we cannot escape the fact that the actual underlying facilities being used at the time of conversion do not change; only the *classification* of those facilities changes. As Eschelon points out, customers are served over exactly the same facilities before and after the conversion. The only change is that Qwest is now entitled to bill Eschelon for these facilities in a manner differently than it billed UNEs.

84 Accordingly, the issue is whether the required billing change is a sufficient basis to warrant a change in circuit ID. We conclude it is not. We are persuaded by Eschelon's argument that Qwest has successfully converted facilities in the reverse direction; that is, from a non-UNE classification to a UNE classification without altering the circuit ID.[162] When Qwest first converted special access circuits (which are non-UNEs) to UNEs, it did so without altering the circuit ID.[163] We agree with Eschelon that Qwest should be able to accomplish the reverse; a conversion from UNE to non-UNE, with the same degree of success without altering the circuit ID. Changing only the classification, and not the circuit ID, is consistent with the FCC's conclusion that these conversions should largely entail only billing functions; that is, the rate that is charged for the service or product is based on a different pricing mechanism.

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[162] Eschelon Response at 22; Starkey, Exh. No. 62 at 156.
[163] *Id.*

85 Further, we find that retaining the circuit ID appears to be the best method to ensure that the transition from UNE to non-UNE classification is a seamless transition. Although Qwest appears to have conducted a significant number of conversions without complaint that CLEC customers were disrupted, we are not persuaded that Qwest's use of the current process alone should govern the outcome of this issue. We share Eschelon's concern that Qwest's procedure to process circuit ID changes through "disconnecting" the UNE and "reconnecting" the non-UNE product increases the risk of problems with either the "disconnection or "reconnection" phase, or both.[164] That risk may increase as Qwest classifies more wire centers as non-impaired and the number of conversions increases.[165] We agree with Eschelon that the risk of end-user customer disconnection is inherent in this processing method. Therefore, we affirm the Arbitrator's ruling on this issue.

86 *Conversion charge.* The final issue is the method to be used to re-price a circuit to be converted from a UNE to a non-UNE product and the recovery by Qwest of the costs, if any, for revising its billing information. For re-pricing a circuit, Eschelon proposes the use of an adder or surcharge to address the difference between the previous rate and a new rate. Eschelon argues that Qwest has ample experience with this type of pricing change because it was the method used for the conversion of unbundled UNE-P to the corresponding non-UNE product, QPP.[166] Qwest opposes this approach and argues that it must take a variety of steps to ensure that the data for the converted circuit is accurately recorded in the appropriate systems. Qwest also asserts that its experience with converting UNE-P to QPP is not representative of the conversions it now faces.[167]

87 Again, past practice is prologue because it appears that Qwest successfully used the adder or surcharge method to effect changes from UNE-P to QPP. This seems to be an efficient process for implementing the rate changes associated with the conversion of these products. While Qwest argues that its experience with the UNE-P to QPP conversions is not representative of these conversions, we agree with Eschelon that

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[164] Qwest Petition for Review at 20.
[165] *See,* for example, Docket UT-073033, *In the Matter of the Petition of Qwest Corporation for Commission Approval of 2007 Additions to Non-impaired Wire Center List,* Order 10, entered July 30, 2008.
[166] Eschelon Response at 23; Starkey, Exh. No. 62 at 162-163.
[167] Qwest Petition for Review at 26; Million, Exh. No. 51 at 11.

UNE-P to QPP conversions were more complex than the current conversions. Accordingly, we affirm the Arbitrator's ruling to implement price changes through an adder or surcharge and Universal Service Ordering Codes.

88 Although Qwest argues that it must be compensated for the costs associated with these conversions,[168] Eschelon contends that Qwest did not provide any data to support its cost claims.[169] Eschelon also argues that Qwest ignores the significant savings that will inure to both parties by not changing circuit IDs and using a simplified manner of billing.[170] The Arbitrator concluded that Qwest is compensated for conversion-related activities through the $25.00 conversion charge agreed upon in a separate proceeding.[171]

89 Qwest contests this finding and contends that the agreed-upon conversion charge relates solely to the costs Qwest incurs to receive and process orders from CLECs to convert from UNEs to alternative services.[172] Eschelon asserts that Qwest is the "cost-causer" and the only party to benefit from the conversions. Eschelon claims that Qwest is *authorized* but not *required* to convert UNE products to non-UNE products so there must a pecuniary benefit for doing so.[173] While these assertions are true, they do not address the fact that Qwest is entitled to recover the reasonable costs of conversion. The rub, however, lies in determining what those costs might be.

90 While Qwest claims it is entitled to recover its costs, it does not provide any data in this record to establish what those costs might be. Similarly, Eschelon claimed that it would incur some costs if required to record new circuit IDs for converted circuits, but provided no information to support its position. The Arbitrator ultimately concluded that, absent adequate costing evidence introduced in this proceeding, the agreed-upon conversion rate of $25.00 determined in Docket UT-073035 should compensate Qwest for any costs it may incur to make the necessary billing adjustments necessitated by Eschelon's billing proposal.

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[168] Qwest Petition for Review at 21.
[169] Eschelon Response at 24.
[170] *Id.*
[171] Arbitrator's Report and Decision at ¶¶ 90 – 91; Docket UT-073035, Order 05, Order Approving Settlement (Mar. 21, 2008); *See also* Notice of Finality (Apr. 17, 2008).
[172] Qwest Petition for Review at 21.
[173] Eschelon Response at 24.

91 We agree that the $25.00 conversion rate adopted in Docket UT-073035 represents a reasonable compromise rate for the conversion process at this time. Because this rate was established during the negotiation process and was ultimately part of a settlement of all disputed issues in Docket UT-073035, we do not know the details surrounding the derivation of the rate. However, it is reasonable to assume that each party in that proceeding adequately represented its own interests in arriving at the rate. Consistent with our decision in Sections 1 and 8 of this Order, we adopt the $25.00 rate as an interim rate, subject to revision in an appropriate costing proceeding.

6. Commingled Arrangements – Billing.

92 A commingled arrangement consists of a UNE connected to a tariffed service.[174] The parties dispute whether Qwest should include the UNE and non-UNE elements of a Commingled Enhanced Extended Link (EEL) on a single bill.[175]

93 Qwest asserts that it has separate billing systems for UNEs and tariffed services and that it would be an extraordinary burden to include information on commingled arrangements on a single bill.[176] In the arbitration, Eschelon argued in favor of a single order, single circuit ID, single bill, and single billing account number (BAN),[177] but alternatively requested that commingled elements be listed separately on a single bill to ensure that it could manage repair and billing functions to its customers' satisfaction.[178]

94 The Arbitrator rejected Eschelon's preferred proposal and adopted Qwest's language together with Eschelon's alternate language which would require separate commingled components to be identified and related.[179] Under the recommended language, Qwest may require separate ordering, circuit IDs, and billing for the UNE and non-UNE elements that comprise a commingled arrangement, but Qwest must then identify and relate the separate components on the bill and customer service

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[174] Arbitrator's Report and Decision at ¶ 98.
[175] *Id.* at ¶ 115.
[176] Qwest currently assigns a single circuit ID to a UNE EEL and proposes to assign two circuit IDs for commingled EELs even where a UNE EEL is being converted to a commingled EEL. Stewart, Exh. No. 57 at 79. Denney, Exh. No. 130 at 149.
[177] This is how UNE EELs are provided today.
[178] Denney, Exh. No. 130 at 154.
[179] Arbitrator's Report and Decision at ¶ 118.

records.[180] The Arbitrator concluded that the recommended language properly balances both parties' interests, while preserving Qwest's interest in ensuring that UNE-based elements are billed at the appropriate [TELRIC] rate and that non-UNE elements are billed at the tariffed rate.[181] The Arbitrator also found that Eschelon has an interest in ensuring that it is properly billed for each commingled element and absent some information on the bill separately identifying the components, it would be onerous for Eschelon to track and verify the elements.[182]

95 Qwest petitions for review arguing that the UNE elements of a commingled arrangement are priced and provisioned under a regulatory scheme that does not apply to tariffed services.[183] Qwest contends that it uses separate billing systems for UNEs and tariffed services [184] and that these billing systems do not communicate with each other. It argues that compliance with the Arbitrator's ruling would require costly redesign of its billing systems.[185] Qwest also argues that it has no obligation to make these changes and that Eschelon does not propose to compensate Qwest for the substantial costs it would incur.[186] It contends that the Arbitrator's recommendation violates the long-established principle than an ILEC is not required to provide access to an "as yet unbuilt superior network."[187] Finally, Qwest argues that Eschelon's proposals are more properly raised in the CMP.[188]

96 In response, Eschelon asserts that the FCC eliminated its previous restrictions on commingling and requires ILECs "to perform the necessary functions to effectuate such commingling upon request."[189] Eschelon contends that commingling is an important competitive option for CLECs in light of the FCC's limitations on an ILEC's unbundling obligations in the TRRO. It argues that Qwest's proposal creates operational barriers that diminish the value of commingling a competitive service

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[180] *Id.*
[181] *Id.*
[182] *Id.*
[183] Qwest Petition for Review at 27.
[184] *Id.* at 29.
[185] *Id.*
[186] *Id.* at 30.
[187] *Id.* at 31, citing *Iowa Utilities Board v. Federal Communications Commission,* 120 F.3d 753, 813 (8th Cir. 1997).
[188] *Id.* at 31.
[189] Eschelon Response at 30; TRO at ¶ 570.

alternative.[190] Eschelon contends that separate orders, separate circuit IDs, and separate bills are examples of operational barriers that make commingled arrangements difficult or infeasible to use.[191] Eschelon points out that the only difference between the current combinations of loops and transport is the change in price of one of its components.[192] Finally, Eschelon believes that the Arbitrator's ruling establishes balance between the parties' interests and achieves a workable solution.[193] It urges the Commission not to upset this balance.

97 We previously recognized in our discussion on conversions that Qwest provides UNE and non-UNE products and services under separate regulatory schemes, pricing structures, and billing systems. Qwest contends that complying with the Arbitrator's recommendation would require a costly redesign of these systems without compensation from Eschelon. We are not convinced that such a costly redesign would be necessary.

98 The primary distinction between a UNE EEL and a commingled EEL is the price change for one component, [194] which should not be unduly cumbersome for Qwest to incorporate into its existing systems. Certainly, such a change does not rise to the level of constructing a "superior, unbuilt network."[195] It should be a relatively simple function to perform, particularly if Qwest is not required to provide commingled arrangements under a single order, single circuit ID, or single bill process. We recognize that Qwest provided access to UNE EELs through such a unitary process, so apparently it is feasible. Nonetheless, we respect Qwest's legitimate business interest in accurately billing for the UNE and non-UNE components of a commingled arrangement and accept its argument that it has proposed the best method for doing so.

99 We also believe that commingled arrangements must be offered in a manner that avoids operational barriers and makes them useful products to CLECs. If these commingled arrangements are not offered in a functional manner, then the FCC's ruling allowing such arrangements will not serve its intended goal; to lift the

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[190] Eschelon Response at 31.
[191] Denney, Exh. No. 130 at 134.
[192] *Id.* at 151, 153.
[193] Eschelon Response at 31.
[194] Denney, Exh. No. 130 at 153.
[195] *See* n.187.

restriction on commingling which placed CLECs at a competitive disadvantage and constituted an unjust and unreasonable practice.[196] Qwest has an interest in *billing* at the appropriate rate; Eschelon has no less interest in ensuring that it is *paying* the appropriate rate. We conclude that the Arbitrator's approach appropriately balances both parties' interests.

100 We are not persuaded otherwise bythe decisions in other jurisdictions. Both Oregon and Minnesota deferred resolution of this issue to a separate investigative docket. We again conclude that a separate proceeding places an unfair burden on Eschelon and is an inefficient use of the parties' and Commission's time and resources to re-litigate this issue. The arbitrator in Arizona adopted language comparable to that adopted by the Arbitrator here, except that in Arizona Qwest is only required to relate and track components of commingled EELs if it performs those functions for itself. This seems to be a distinction without a difference because it appears that Qwest already performs both functions albeit in different systems.

7. Commingled Arrangements – Other Arrangements.

101 The term "other commingled arrangements" refers to commingled arrangements that do not involve commingled EELs.[197] The dispute centers on whether the Commission should establish processes for ordering, billing, and repair of other commingled arrangements. The Arbitrator recommended adopting Eschelon's proposal and establishing processes for other commingled arrangements consistent with the rulings recommended for commingled arrangements in Issue 9-58(c), *(Commingled Arrangements)* if technically feasible, and the parties do not agree otherwise.[198]

102 On review, Qwest argues that Eschelon is attempting to impose obligations on Qwest for products that do not exist today.[199] Qwest asserts that Eschelon is attempting to impose the same requirements on "*other commingled arrangements*" that Eschelon proposed for the commingled arrangements Qwest currently offers.[200] Qwest contends that the Arbitrator's ruling for Commingled Arrangements - Billing is fundamentally different from the recommended ruling on this issue creating an

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[196] TRO at ¶ 581.
[197] Eschelon Response at 36.
[198] *Id.* Arbitrator's Report and Decision at ¶ 122.
[199] Qwest Petition for Review at 31.
[200] *Id.*

irreconcilable inconsistency that should be remedied by rejecting the Arbitrator's ruling.[201] Qwest argues that the Arbitrator rejected Eschelon's proposal for a single order, single circuit ID, and single bill for existing commingled products and then imposed those conditions for products that do not yet exist.[202] Qwest suspects this may be an inadvertent error and surmises that the Arbitrator may have intended to only require Qwest to refer to the UNE and tariffed components on bills and customer requests.[203]

103 Qwest argues that there is no factual or legal basis for establishing terms and conditions for unidentified products.[204] Qwest contends that the proper approach would be for Qwest and Eschelon to enter into an ICA amendment when Qwest begins offering a product so that ordering, provisioning, and billing requirements could be tailored to that product.[205]

104 In response, Eschelon contends that Qwest's assertion that the affected products do not exist flies in the face of the FCC's ruling on commingling and the agreed-upon language in the ICA regarding Eschelon's right today to order any commingled arrangements.[206] Eschelon argues that the guidelines are necessary because they will help avoid the situation confronted in the case of Commingled EELs where Qwest unilaterally developed terms and then claimed it was too expensive to change them.[207]

105 Eschelon contends that the Arbitrator's ruling is consistent with all the disputed sections of the ICA addressing the operational issues associated with commingled arrangements.[208] Eschelon asserts that Qwest's primary opposition to the proposed procedures regarding Commingled EELs is that they are contrary to established procedures.[209] Eschelon asserts there are no procedures yet established for "other commingled arrangements" so Qwest's argument disappears with respect to these

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[201] *Id.* at 32.
[202] *Id.*
[203] *Id.* at 32-33.
[204] *Id. at* 33.
[205] *Id.*
[206] TRO at ¶ 579 and Sections 24 (*Commingling*) and 17.0 (*Bona Fide Request*) of the ICA.
[207] Eschelon Response at 37.
[208] *Id.* at 38.
[209] *Id.*

products.[210] Eschelon argues that should the Arbitrator's recommendation be rejected, the parties will be back before the Commission each time Eschelon attempts to exercise its existing right to order any commingled arrangement other than Commingled EELs.[211]

106 We affirm the Arbitrator's ruling. As we noted in our earlier discussion of Commingled EELs, the FCC determined that the restriction against commingling should be lifted because it places CLECs at a competitive disadvantage and constitutes an unjust and unreasonable practice.[212] However, in order for the right to order commingled arrangements to be more than a hollow victory, we must ensure that CLECs have the opportunity to exercise the right to order these products without operational barriers. We recognize that this subsection of the ICA addresses commingled arrangements that may not exist at the present time. We conclude that requiring the parties to amend an ICA whenever new commingling arrangements are contemplated constitutes a barrier to use of those products. Should litigation ensue, it will serve only to delay usage of these products and to increase the costs to the parties. Moreover, requiring the parties to initiate ICA amendment proceedings to address each commingled arrangement is not consistent with concepts of judicial economy and efficiency.

107 Qwest's primary argument against modifying the provisions related to commingled EELs is that it uses an established process and modifying this process would be costly and burdensome.[213] With respect to "other commingled arrangements," Qwest does not have an established process for these products. As these products are developed, processes will be established governing the terms and conditions of the products' use. We conclude that general guidelines regarding these arrangements should be adopted in the context of this proceeding. As Eschelon notes, the retail customer's needs should be paramount in developing other commingled arrangements and the language adopted by the Arbitrator best protects those customers.

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[210] *Id.*
[211] *Id.*
[212] TRO at ¶ 581.
[213] *See* n. 185. *See also,* Section 6, herein.

108 Finally, we reject Qwest's contention that the Arbitrator's ruling on this issue is inconsistent with the approach adopted for Commingled EELs. The Arbitrator's recommended language is consistent throughout the subsections addressing these arrangements.[214] If for any reason it is not technically feasible to implement this approach or if the parties agree otherwise, the separate elements will be identified and related.[215]

8. Expedite Orders.

109 An "expedite" order is one for which Qwest provides service more quickly than it would under a standard provisioning interval.[216] The dispute arises over the conditions and charges, if any, that should apply to expedite orders.[217]

110 We note that the parties' conflicting views on the expedite dispute reflect the natural tension that exists between a purchaser of wholesale services (Eschelon) and its wholesale provider (Qwest). At issue are the terms and conditions (including the rates) that the parties believe should apply to expedites for interconnection services and unbundled network elements offered pursuant to the ICA. Both are required by Eschelon to compete effectively with Qwest and other telecommunications carriers in Washington.

111 The record reflects a great deal of ambiguity regarding how expedites are currently addressed in Washington versus other states in Qwest's region. There is also significant dispute about the extent to which the parties' impasse surrounding expedites was vetted through Qwest's CMP; Eschelon contends the matter was barely addressed in the CMP while Qwest asserts it was thoroughly considered with little apparent resistance from Eschelon's representatives. Finally, there is also disagreement about the degree to which the expedite process for wholesale services should mirror expedites afforded Qwest's retail customers for comparable services.

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[214] *See* n. 208.
[215] Eschelon Response at 38.
[216] Denney, Exh. No. 152 at 107-108.
[217] Arbitrator's Report and Decision at ¶ 140.

112 The Arbitrator recommended adopting Eschelon's expedite proposals.[218] For those expedites involving emergency situations, the Arbitrator recommended adopting Eschelon's first contract language proposal because it clearly specifies the conditions that qualify for emergency treatment and most closely approximates the manner in which Qwest currently handles these events in Washington.[219] Under this proposal, Qwest would not be entitled to impose expedite charges for certain specified emergency situations.[220] For expedite orders not treated as an emergency, the Arbitrator recommended adopting Eschelon's pricing proposal on an interim basis until the Commission establishes permanent rates in a generic cost docket. [221]

113 Qwest seeks review and requests that we reject the Arbitrator's proposed language because it allows Eschelon to receive expedites for free in situations where Qwest customers and other CLECs do not. Further, Qwest asserts that the language allows Eschelon to pay a fee for expedites in situations where Qwest does not offer fee-based expedites to its retail or CLEC customers.[222] Qwest argues that Eschelon's language actually expands the list of products for which free expedites would be available because it does not distinguish between design and non-design services.[223] Qwest contends that Eschelon also added a new category, "disconnect in error," that is not part of Qwest's current process and should not be included on the list of emergency conditions under which an order may be expedited at no charge.[224] Qwest argues that the difference in treatment afforded to Eschelon constitutes discrimination because the Arbitrator's ruling imposes terms and conditions different from those developed in the CMP.[225]

114 Recognizing and respecting the Arbitrator's recommendation that contract language address this issue, Qwest proposes new ICA language to make Eschelon's contract

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[218] *Id.* at ¶ 146.
[219] *Id.* at ¶ 147.
[220] *Id.*
[221] *Id.* Eschelon's proposed interim rate for expedites is $100. In contrast to Eschelon's interim rate, Qwest proposed an expedite fee of $200 to be applied per day for each day that an order is expedited in advance of normal deadlines for providing service according to a standard provisioning interval.
[222] Qwest Petition for Review at 35.
[223] *Id.*
[224] *Id.* at 35-36.
[225] *Id.* at 36 and 51 C.F.R. §§ 51.31(a), 313(a) and Section 1.3 of the ICA.

consistent with the service offered other providers.[226] Qwest's proposed language would eliminate the emergency condition for "disconnect in error"[227] unless the disconnect in error is caused by Qwest, delete the provision that indicates that expedite charges specified in the ICA will apply,[228] and delete the expedite charge of $100.[229]

115 In response, Eschelon asserts that all four of the arbitrator decisions issued in the Qwest/Eschelon arbitrations to date have recommended adopting Eschelon's proposed language.[230]

116 Eschelon claims that Qwest witnesses testified that the company did not offer expedites for retail services because it does not have an approved tariff for this offering and "will be filing a tariff soon."[231] When filed, Qwest's tariff is intended to propose the same rate that Qwest charges in all other states for design services, $200 per day.[232] Eschelon noted that Qwest's retail tariffs and the Washington Access Service tariff provide that charges apply to expedites.[233] Eschelon argues that Qwest offers expedites to its retail customers and it is discriminatory to deny this service for a fee to its CLEC designed services customers in Washington.[234] Eschelon asserts that Qwest has yet to file a tariff to include expedites and when it does, Qwest made it apparent that all it will change is the rate for the service.[235] Eschelon contends that Qwest's existing retail tariff provides that the expedite charge cannot exceed 50

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[226] Qwest Petition at 36.
[227] Section 12.2.1.2.1(f) of the ICA.
[228] Section 12.2.1.2.2 of the ICA.
[229] Section 9.20.14 of the ICA.
[230] Arbitrator's Report and Decision at ¶¶ 146-147; Oregon Arbitrator's Decision at 64-67 (affirmed by Oregon Commission Decision); Minnesota Arbitrators' Decision at 55 (affirmed and clarified by Minnesota Commission Decision (Feb. 4, 2008)); and Arizona Arbitrator's Decision at 83 (as modified by Arizona Commission vote to approve rate as interim and subject to true-up).
[231] Eschelon Response at 42; Albersheim, Exh. No. 1 at 57.
[232] *Id.*
[233] Eschelon Response at 42-43; Webber, Exh. No. 175; Albersheim, Exh. No. 18C at 47. Qwest's retail services are currently provided under an alternative form of regulation approved by Orders 06, 08, and 09 in Docket UT-061625, *In the Matter of the Petition of Qwest Corporation for an Alternative Form of Regulation Pursuant to RCW 80.36.135.* Therefore, there is no longer a retail tariff addressing this issue.
[234] Eschelon Response at 43; Albersheim, Exh. No. 9 at 3 indicating that expedites for a fee are available in all states except Washington.
[235] Eschelon Response at 44.

percent of the total nonrecurring charges associated with the order.[236] To ensure non-discrimination, Eschelon urges adoption of the Arbitrator's recommended language and interim rate.[237]

117 Eschelon argues that Qwest's Product Catalog (PCAT) specifically provides that emergency-based expedites are available for design services in Washington.[238] The PCAT states that the "Expedites Requiring Approval section of this procedure does not apply to any of the products listed below **(unless you are ordering services in the state of WA)**" and Eschelon provided examples of Qwest's practice of providing expedites for loop orders at no additional fee for CLEC disconnects in error.[239] Moreover, Eschelon argues that including the "disconnect in error" language under the emergency-based expedite section is not a novel approach; Qwest grants expedites when a CLEC's end-user customer is out-of-service due to a CLEC disconnect in error.[240] Eschelon argues that restoring service to an end-user customer should be the priority and notes that it pays the non-recurring installation charge to restore service after a CLEC disconnect in error (unlike a Qwest customer which receives a waiver of that charge), so it has no motivation to abuse this exception.[241] Eschelon requests that we adopt the Arbitrator's recommendation.

118 On review, we are asked to address two issues regarding expedite service. The first issue addresses expedite service under emergency situations. In these instances, service is restored under an accelerated provisioning schedule with no fee assessed other than a standard installation charge. This type of expedite service is commonly referred to as "expedites requiring approval" because Qwest must confirm that the emergency-based conditions are met before service is restored on an expedited basis without the imposition of an expedite fee.[242] On review, Qwest offers alternative language for emergency-based expedites which provides that Qwest will provide no-fee expedite service if Qwest disconnects service in error. We conclude that Qwest's alternative language is reasonable and should be adopted.[243]

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[236] *Id.* Webber, Exh. No. 175 at 3.
[237] Eschelon Response at 46.
[238] *Id.*
[239] Eschelon Response at 47 (Emphasis in original).. Johnson, Exh. No. 101 at 1.
[240] Eschelon Response at 48; Johnson, Exh. No. 77 at 10-11; Denney, Exh. No. 152 at 148.
[241] Eschelon Response at 48. Denney, Exh. No. 152 at 148.
[242] Eschelon Response at 41.
[243] When the parties file an ICA for Commission approval, Section 12.2.1.2.1(f) should reflect the

119 The alternative advanced by Qwest more appropriately and fairly provides that the carrier responsible for disconnecting an end-user customer's service in error will bear the costs associated with that error. If Qwest disconnects in error, it must provision service to a CLEC end-user customer on an expedited basis without a fee. If Eschelon disconnects its own customer in error, it must bear the costs associated with that mistake and pay a fee to have service provisioned quickly. Accordingly, we modify the Arbitrator's ruling to adopt Qwest's language proposed on review regarding emergency-based expedites.

120 The second issue is whether non-emergency expedites should be offered for a fee and, if so, the appropriate fee. We affirm the Arbitrator's ruling on this issue. The evidence in this record supports the conclusion that expedite service is available for a fee in Washington for Qwest's retail customers.[244] We agree with the overarching principle advanced by Eschelon; Qwest should be required to provide wholesale service to Eschelon that is equal in quality to the functionally equivalent service it provides itself and its retail customers.[245] We conclude that requiring Qwest to offer fee-based expedites allows the ILECs and CLECs, such as Eschelon, to more effectively compete to provide service to end-user customers.

121 Having determined that fee-based expedites should be required, we turn to the question of the level of the fee. Qwest argues in favor of having the language setting forth the fee deleted entirely from the agreement; preferring rates be addressed through the CMP or that a rate of $200 per day apply for each day that an order is expedited in advance of the standard provisioning interval. Eschelon supports retaining the $100 fee in the ICA as adopted by the Arbitrator. We note that neither of the fee proposals is cost-based.

122 We affirm the Arbitrator's ruling regarding the fee because it provides certainty and clarity regarding the charges for expedite services provisioned under the terms of the ICA. We are not persuaded that leaving the expedite issue to the CMP, as Qwest advocates, provides a reasonable opportunity to maintain parity between Qwest's retail and wholesale customers seeking fee-based expedites. While the CMP may be

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revised language in Qwest's Petition for Review at 37.

[244] Webber, Exh. No. 175, Albersheim, Exh. No. 18C at 47-48. *See also* n. 256.

[245] 47 C.F.R. ¶ 51.511.

a useful forum for addressing a host of issues pertaining to interconnection services, we are not convinced that it serves as an effective substitute for explicit provisions in the ICA.

123 The $100 fee we affirm here reflects a compromise position advocated by Eschelon that is well short of the $200 per day rate advocated by Qwest but seems reasonable as an interim measure until a suitable cost-based rate can be established. As we decided in our discussion regarding "design change charges"[246] the $100 expedite fee approved here for non-emergency based expedites, is approved only as an *interim* rate until we establish permanent rates in a future cost proceeding.

9. Jeopardies.

124 A "jeopardy" is a condition associated with a service order that makes it likely that the service delivery date will not be met. For "designed" facilities including unbundled loop orders, the CLEC causing the jeopardy (Customer Not Ready or CNR) is required to supplement its order by requesting a new due date at least three days after the date of the supplemental order.[247] If the jeopardy is classified as caused by Qwest, the CLEC is not required to supplement the due date.[248] The failure of Qwest to provide a Firm Order Commitment (FOC) indicating the service delivery due date or a timely FOC may be classified as a CNR with the resulting delay in service delivery.[249] The parties' dispute whether the ICA should include language regarding jeopardy-related issues.

125 Qwest proposed that procedures for addressing jeopardies should be available on its website rather than in the ICA.[250] Eschelon proposed that the ICA address jeopardies caused by either Qwest or a CLEC and explain the consequences of either classification.[251] The Arbitrator recommended adopting Eschelon's proposal, concluding that jeopardy-related issues should be addressed in the ICA to provide clarity and stability.[252] The Arbitrator noted that if "Qwest's proposal is adopted,

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[246] *See* ¶ 25 of this Order.
[247] Starkey, Exh. No. 73 at 6 (Albersheim, MN TR. Vol. I at 36).
[248] Starkey, Exh. No. 71 at 222 – 227.
[249] Starkey, Exh. No. 73 at 8 (Albersheim, MN TR Vol. I at 43).
[250] Albersheim, Exh. No. 1 at 67.
[251] Webber, Exh. No. 172 at 112.
[252] Arbitrator's Report and Decision at ¶ 152.

Qwest could unilaterally alter the procedures published on its website."[253] The Arbitrator concluded that given the consequences for assignment of jeopardies, it is preferable to have stability regarding this topic. [254] The Arbitrator found that while Eschelon's proposal reflects terms developed through the CMP, these terms would be more stable in the ICA than on Qwest's website.[255]

126 In its Petition for Review, Qwest contends that the Arbitrator incorrectly concluded that Eschelon's language reflects terms developed through the CMP.[256] Qwest asserts that under the CMP, the timing of a FOC is irrelevant to whether a jeopardy is classified as CNR. Qwest suggests that we alter the Arbitrator's recommendation to reflect Qwest's current practice which involves deleting the phrase "at least the day" before with respect to the timing of a FOC notice.[257]

127 In response, Eschelon argues that the Arbitrator's recommendation to adopt Eschelon's proposal is well-founded and supported by the record in this proceeding.[258] In the four Qwest/Eschelon arbitrations to date, Eschelon-proposed language was adopted.[259]

128 Eschelon contends that the timing of an FOC notice is important to plan and schedule resources for service delivery[260] and that Qwest committed to providing an FOC notice at least a day in advance of service delivery. Eschelon asserts that Qwest's commitment to this standard is well documented in the current process developed in the CMP, in Qwest-prepared CMP minutes, and on Qwest's website.[261]

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[253] *Id.*
[254] *Id.*
[255] *Id.*
[256] Qwest Petition for Review at 38.
[257] *Id.* at 39.
[258] Eschelon Response at 49; Johnson Exh. Nos. 79, 80, 97, 110, 11, 116, 117; Webber, Exh. No. 176 at 76-106; Starkey, Exh. No. 71 at 214 -233.
[259] The Minnesota and Arizona Commissions affirmed the Arbitrators' recommendations, which adopted Eschelon's language, and the Washington and Oregon Arbitrators recommended adopting Eschelon's language.
[260] Eschelon Response at 51-52.
[261] *Id.* Johnson, Exh. No. 114 at 26 -27; Johnson, Exh. No. 116; Albersheim, Exh. No. 23 at 5.

129 We affirm the Arbitrator's ruling. On review, Qwest does not argue that the Arbitrator's ruling is unreasonable, but rather than it does not accurately reflect Qwest's current practice. Therefore, Qwest requests modification of the ruling to comply with what it asserts is the practice regarding jeopardies by deleting the language that requires an FOC "at least one day" before scheduled delivery after a Qwest jeopardy.[262] Contrary to Qwest's assertion, there is ample evidence in the record demonstrating that the standard adopted by the Arbitrator is the current practice and was indeed developed during the CMP.[263] Further, the Arbitrators and state commissions in Minnesota, Oregon and Arizona reached the same conclusion on apparently substantially similar records.

130 We further conclude that, contrary to Qwest's assertion, the assignment of a jeopardy does have consequences. As Eschelon points out, if the jeopardy is caused by the CLEC and categorized as CNR, then the CLEC essentially has to commence the circuit ordering process anew with the commensurate delay in delivery of service to its end-user customer. If the CLEC is the cause of the jeopardy, that is fair. Conversely, Eschelon and its end-user customers should not be penalized if Qwest fails to give adequate notice of service order delivery, i.e., an FOC, with sufficient time for Eschelon to schedule resources for Qwest's delivery. We affirm the Arbitrator's recommended language without modification.

10. Controlled Production Testing.

131 Qwest's Operational Support System (OSS) uses various electronic interface systems that exchange information with CLECs and must be tested when Qwest updates existing versions or implements new systems. Controlled production testing involves submitting a CLEC's real product orders to the interface to verify that the data is exchanged according to industry standards. The dispute arises over whether controlled production testing should be required for recertification or upgrades to existing systems as well as new system implementation.[264]

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[262] Qwest Petition for Review at 38 – 39.
[263] *See* nn. 258 and 261.
[264] Arbitrator's Report and Decision at ¶ 154.

132 The Arbitrator recommended adoption of Eschelon's proposal to maintain the *status quo* and avoid costly and time-consuming controlled production testing for recertification. The Arbitrator concluded that recertification should involve less complicated testing procedures than new implementations.[265] The Arbitrator acknowledged that if Eschelon elects to not participate in certain testing, it may not have access to certain functionalities.[266]

133 In its Petition for Review, Qwest asserts that its primary concern is that Eschelon not have access to certain functions if it has elected to not participate in controlled production testing.[267] Qwest argues that the Arbitrator shared this concern and justified use of Eschelon's language on the grounds that it prohibited Eschelon from such access.[268] Qwest proposes new language to more accurately reflect the Arbitrator's intent and make it clear that the CLEC does not have the right to "veto" controlled production testing.[269]

134 In response, Eschelon asserts that controlled production testing is not currently required for recertification regardless of whether the CLEC intends to order the products or services.[270] Eschelon contends that Qwest's new proposal would alter the *status quo,* thus Eschelon recommends affirming the Arbitrator's recommendation.[271]

135 The Oregon and Arizona arbitrators recommended adopting Qwest's language which does not allow Eschelon to opt out of controlled production testing.[272] The Minnesota arbitrators recommended adopting Eschelon's first proposal concluding that as long as Qwest controls access to particular applications, Eschelon should have the right to decide whether to invest the resources in this testing.[273]

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[265] *Id.* at ¶ 157.
[266] *Id.*
[267] Qwest Petition for Review at 40.
[268] *Id.*
[269] *Id.*
[270] Eschelon Response at 55; Albersheim, Exh. No. 1 at 98.
[271] Eschelon Response at 57.
[272] Oregon Arbitrator's Decision at 73 (Affirmed by the Oregon Commission Decision); Arizona Arbitration Decision at 80 (Affirmed by Arizona Commission Decision).
[273] Minnesota Arbitrators' Decision at 62 (Affirmed by Minnesota Commission Decision).

136 We affirm the Arbitrator's ruling to adopt Eschelon's first proposal. We have reviewed the new language Qwest proposes in response to the Arbitrator's ruling and believe that this language does not clarify the Arbitrator's intent. The Arbitrator clearly recommends adopting Eschelon's first proposal and explains that recertification should involve less complicated testing processes than new implementations.[274] The Arbitrator's citations to Eschelon's testimony make it clear that the reference to "opting out" of testing relates to the recertification process as it pertains to new functionalities of the updated existing system; where Eschelon is not currently required to expend resources if it does not plan to use the new functionality implementations.[275]

137 While Qwest appears to propose new language simply to clarify the Arbitrator's decision, the new language actually imposes stricter testing requirements than those the Arbitrator recommended. Qwest did not present any perceivable benefit or legitimate business function for implementing more stringent testing requirements. Absent an offsetting benefit, it is unnecessary to increase the cost and time CLECs must spend as a result of controlled production testing. It appears that the current process adequately protects both Qwest's and Eschelon's interests. Eschelon's first proposal for ICA language should be adopted without modification.

138 In addition, we affirm the Arbitrator's recommendation as it accurately reflects the manner in which Qwest currently treats controlled production testing for recertification.[276] In arbitration, Qwest agreed that Eschelon's proposal accurately reflected the current practice and agreed that the process agreed to in the CMP has not been modified.[277] If Qwest is not following that process, it appears that it was in violation of CMP for the period such testing was not required.[278]

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[274] Arbitrator' Report and Decision at ¶ 157.
[275] *Id.;* Webber, Exh. No. 176 at 106 – 108.
[276] *See* n. 288.
[277] *Id.*
[278] Eschelon Response at 56.

FINDINGS OF FACT

139 Having discussed above in detail the evidence received in this proceeding concerning all material matters, and having stated findings and conclusions upon issues in dispute among the parties and the reasons therefore, the Commission now makes and enters the following summary findings of fact, incorporating by reference pertinent portions of the preceding detailed findings:

140 (1) The Washington Utilities and Transportation Commission is an agency of the State of Washington vested by statute with the authority to regulate the rates and conditions of service of telecommunications companies within the state, and to take actions, conduct proceedings, and enter orders as permitted or contemplated for a state commission under the Telecommunications Act of 1996.

141 (2) Qwest is an incumbent local exchange carrier, providing local exchange telecommunications service to the public for compensation within Washington.

142 (3) Eschelon is authorized to operate in Washington as a competitive local exchange carrier.

143 (4) Design changes for loops and change facility assignments are less complicated than design changes associated with transport.

144 (5) Discontinuation of service processing or disconnection of service can occur only where a carrier does not comply with the deadlines for paying undisputed billing amounts.

145 (6) The Section 252 process addresses the transition away from provisioning elements on an unbundled basis to alternate products and services.

146 (7) The conversion of unbundled network elements to alternative products and services is primarily a billing function.

147 (8) Qwest is compensated for conversion-related costs by the agreed-upon conversion rate of $25.00.

148 (9) Controlled production testing is not currently required for recertification regardless of whether a competitive local exchange carrier intends to order a particular product or service.

CONCLUSIONS OF LAW

149 Having discussed above all matters material to this decision, and having stated detailed findings, conclusions, and the reasons therefore, the Commission now makes the following summary conclusions of law incorporating by reference pertinent portions of the preceding detailed conclusions:

150 (1) The Washington Utilities and Transportation Commission has jurisdiction over the subject matter of, and parties to, this proceeding.

151 (2) Allowing Qwest to assess design change charges of $30.00 for loop design changes and $5.00 for connection facility assignment changes results in reasonable interim rates for these services until permanent TELRIC-compliant cost based rates are established in a cost proceeding.

152 (3) Adopting Eschelon's undisputed proposed modification to the language governing discontinuance of order processing and service disconnection is reasonable because it removes any ambiguity regarding when discontinuation of order processing and service connection may occur.

153 (4) Adopting Qwest's time limitations before it can discontinue order processing or disconnect service affords Eschelon a reasonable opportunity to pay undisputed billing charges.

154 (5) Allowing Qwest to collect a security deposit if Eschelon fails to remit timely payment of undisputed billing charges more than three times during a 12-month period protects Qwest against the risk of non-payment of assessed charges and provides an incentive for Eschelon to render timely payment of undisputed billing charges.

155 (6) Requiring Qwest to provide sample transit record billings at no charge once every six months upon request by Eschelon affords the company a reasonable means to verify transit record billings.

156 (7) Requiring Qwest to provide the underlying data it uses to generate transit traffic billings does not impose an undue burden on Qwest.

157 (8) Conversion between wholesale services and Unbundled Network Elements should be implemented without operational barriers to CLECs.

158 (9) Converted facilities should be re-priced in a manner that allows for a seamless transition of Unbundled Network Elements to alternative service arrangements.

159 (10) Requiring Qwest to identify and relate the separate components of commingled EELs balances Qwest's interest in billing the separate components of the arrangement at the appropriate rate and Eschelon's interest in ensuring it is paying the appropriate rate for these arrangements.

160 (11) Establishing terms and conditions for "other commingled arrangements" in this proceeding promotes efficiency and judicial economy by not requiring the parties to file amendments to the interconnection agreement when Eschelon orders these arrangements.

161 (12) Requiring Qwest to provide expedites for disconnects in error at no fee only when Qwest is the carrier that caused the disconnect in error is reasonable and non-discriminatory.

162 (13) Allowing Qwest to charge $100 for fee-based expedites results in reasonable interim rates for these services until permanent rates are established in a cost proceeding.

163 (14) Requiring Eschelon to engage in controlled production testing for new system implementation and allowing Eschelon to opt out of controlled production testing for recertification adequately protects both Qwest's and Eschelon's interests.

ORDER

THE COMMISSION ORDERS:

164 (1) Eschelon Telecom, Inc.'s Petition for Review of the Arbitrator's Report and Decision is granted, in part, consistent with the findings and conclusions in this Order.

165 (2) Qwest Corporation's Petition for Review of the Arbitrator's Report and Decision is granted, in part, consistent with the findings and conclusions in this Order.

166 (3) The Arbitrator's recommendations in Order 16 concerning "design changes," "conversions," "commingled arrangements – billing," "commingling – other arrangements," "jeopardies," and "controlled production testing" are affirmed.

167 (4) The Arbitrator's recommendation in Order 16 concerning the "definition of repeatedly delinquent" is reversed consistent with the findings and conclusions in this Order.

168 (5) The Arbitrator's recommendations in Order 16 concerning "discontinuation of order processing and disconnection," "expedites," and "transit record charges and bill validation," are modified consistent with the findings and conclusions in this Order.

169 (6) Qwest Corporation and Eschelon Telecom, Inc., must file an Interconnection Agreement with the Commission, consistent with this Order, no later than 30 days after the service date of this Order.

Dated at Olympia, Washington, and effective October 16, 2008.

WASHINGTON STATE UTILITIES AND TRANSPORTATION COMMISSION

MARK H. SIDRAN, Chairman

PATRICK J. OSHIE, Commissioner

PHILIP B. JONES, Commissioner

NOTICE TO PARTIES: This is a final order of the Commission. In addition to judicial review, administrative relief may be available through a petition for reconsideration, filed within 10 days of the service of this order pursuant to RCW 34.05.470 and WAC 480-07-850, or a petition for rehearing pursuant to RCW 80.04.200 or RCW 81.04.200 and WAC 480-07-870.

APPENDIX A

GLOSSARY

TERM	DESCRIPTION
Act	The Telecommunications Act of 1996, 47 U.S.C. §251, *et. seq.*
ASR	Access Service Request. Request to ILEC to provision circuit to switch.
BAN	Billing Account Number
CDR	Call Detail Records. Computer link between carriers that exchanges call data.
Central Office	A building where the local loops are connected to switches to allow connection to other customers; also referred to as a wire center where there are several switches functioning as a switch exchange. *(From Newton's, at page 157.)*
CFA Assignment	"Connecting Facility Assignment." A change to the location on a frame in a central office where a CLEC will access a UNE.
CIC	Carrier Identification Code. Built into Feature Group D trunk to allow ILEC to assess access charges.
CLEC	Competitive local exchange company. Not an ILEC, and generally subject to very limited regulation.
Design Change	Any change to an order that requires engineering review.
DS1	The initial level of multiplexing in the time division hierarchy of the telephone network; a 1.544 megabytes per second (Mbps) signal that provides the equivalent of **24 64 kbps DSO channels**. The same as a T1 facility. (*TRO, n. 634*)
DS3	A digital local loop having a total digital signal speed of 44.736 Mbps provided over various transmission media, including, but not limited to fiber optics, coaxial cable, or radio. DS3 loops can be channelized into **28 DS1 channels**, or unchannelized to provide a continuous bit stream for data. (*TRO, n. 634*)
EEL	Enhanced Extended Links
FCC	Federal Communications Commission
ICB	Individual Case Basis
ICDF	Interconnection Distribution Frame
ID	Identification
ILEC	Incumbent local exchange company; a company in operation at the time the Act was enacted (August 1996).

TERM	DESCRIPTION
Interconnection	Connection between facilities or equipment of a telecommunications carrier with a local exchange carrier's network under Section 251(c)(2).
Interconnection Agreement or ICA	An agreement between an ILEC and requesting telecommunications carrier (which may be a CLEC) addressing terms, conditions and prices for interconnection, services or network elements pursuant to Section 251.
IXC	Interexchange carrier, i.e., a long-distance carrier.
LATA	Local Access and Transport Area. A service area for Bell Operating Companies.
LIS	Local Interconnection Service
Loop	The local loop - The copper wire, fiber, or cable serving a particular customer, generally running from a central office to a residence or building.
LSR	Local Service Request
Network Element	A facility or equipment used in providing telecommunications services.
Section 251(c)(3)	The section of the Act that requires ILECs to provide unbundled access to network elements, or UNEs.
Section 271	The portion of the Act under which Bell Operating Companies, or BOCs, could obtain authority from the FCC to provide long distance service in addition to service within their in-state service areas.
SGAT	Statement of Generally Available Terms
TELRIC	Total Element Long Run Incremental Cost – A method of determining the cost, and thus, prices for network elements using a forward-looking process, rather than the existing network of a carrier.
TRO	The FCC's Triennial Review Order. An August 2003 Order addressing UNEs and the impairment standard for UNEs, vacated in part and remanded in part by the D.C. Circuit Court of Appeals in *USTA II v. FCC.*
TRO Remand Order	FCC decision entered in response to D.C. Circuit's USTA II decision: Eliminates local switching as a UNE as of March 11, 2006, and limits unbundling of high-capacity transport and loops. (High-capacity refers to the ability of the facility to handle an amount of information at a single time, e.g., DS1, DS3, Ocn capacity.)
Trunk	A communication line between two switching systems. A single trunk, capable of carrying a single conversation, is referred to DS0.

TERM	DESCRIPTION
UDIT	Unbundled Dedicated Interoffice Transport
Unbundled	A network element that is provided by itself, not in connection with or "bundled" with another network element. A means for a carrier to request particular services from an ILEC to customize the service it provides, and to avoid an ILEC from offering certain services as a package that the carrier must take as an all or nothing option.
UNE	Unbundled network element. Generally a network element an ILEC must make available under Section 251(c)(3).
USOC	Universal Service Order Codes
Wholesale	Services provided by one carrier to another pursuant to Section 251 of the Act and generally through TELRIC pricing.

EXHIBIT B

**BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION**

In the Matter of the Petition of:	)	DOCKET UT-063061
	)	
QWEST CORPORATION	)	ORDER 19
	)	
and	)	
	)	ORDER DENYING QWEST'S
ESCHELON TELECOM, INC.	)	PETITION FOR
	)	RECONSIDERATION
Pursuant to 47 U.S.C. Section 252(b)	)	
	)	
.....	)	

1 ***SYNOPSIS.*** *The Commission denies Qwest's petition for reconsideration of three rulings in our Final Order, Order 18, regarding circuit identification numbers, UNE to non-UNE conversion charges, and informational requirements for bills and customer service records of commingled enhanced extended links.*

BACKGROUND

2 **NATURE OF PROCEEDING.** This proceeding involves a request by Qwest Corporation (Qwest) and Eschelon Telecom, Inc., (Eschelon) to arbitrate an interconnection agreement (ICA) under 47 U.S.C. § 252(b) of the Telecommunications Act of 1996 (the Act).[1]

3 **APPEARANCES.** Lisa A. Anderl, Associate General Counsel, and Adam L. Sherr, Seattle, Washington, represent Qwest. Gregory J. Kopta, Seattle, Washington, and Karen L. Clauson, and Gregory Merz, Minneapolis, Minnesota, represent Eschelon.

4 **PROCEDURAL HISTORY**. Following an evidentiary hearing and briefing by the parties, on January 18, 2008, the Arbitrator entered Order 16, the Arbitrator's Report

[1] A glossary of acronyms and terms used in this Order is attached for the convenience of readers.

and Decision, resolving all contested issues. [2] Eschelon and Qwest each filed a petition for review and a response to the opposing party's petition. On October 16, 2008, the Commission entered a Final Order, Order 18, Granting, In Part, and Denying, In Part, each petition for review.

5 On October 27, 2008, Qwest filed a petition for reconsideration of three issues addressed in our Final Order. The Commission issued a Notice Requesting Answer to the petition on October 28, 2008. On October 29, 2008, Qwest requested an extension of time to file an interconnection agreement (ICA). By notice entered October 30, 2008, the Commission extended the deadline to file an ICA until 30 days after entering an order on reconsideration or 30 days following expiration of the deadline to do so. On November 7, 2008, Eschelon filed an answer. By notice entered on November 13, 2008, the Commission established January 30, 2009, as the deadline for ruling on the petition for reconsideration. Both Qwest and Eschelon filed supplemental authority on December 23, 2008.

MEMORANDUM

6 **Petition for Reconsideration.** Qwest requests reconsideration of three rulings in the Final Order: (1) that Qwest must retain the same circuit identification number when it converts Eschelon's service from an unbundled network element (UNE) to a non-UNE service, (2) that the $25 conversion charge negotiated and adopted in a separate proceeding involving Qwest and Eschelon permits Qwest to recover its conversion costs; and (3) that Qwest must include information in bills and customer service records that cross-reference UNE and non-UNE elements of point-to-point commingled enhanced extended links (EELs).[3] Eschelon opposes reconsideration.

7 **Standard of Review.** We review petitions for reconsideration under WAC 480-07-850. While our rule provides that "the purpose of a petition for reconsideration is to request that the commission change the outcome with respect to one or more issues determined by the commission's final order," a party must do more than simply

[2] The full procedural history in this matter is described more fully in Order 16 in this docket and is not repeated here.
[3] Qwest Petition for Review at 1-2.

reargue an issue decided in a final order.[4] We will grant petitions for reconsideration only if the petitioner demonstrates that our order is erroneous or incomplete.[5] A petition for reconsideration must also cite to portions of the record and laws or rules for support of the request for reconsideration, and must present sufficient argument to warrant a finding that our order is erroneous or incomplete. Should we grant reconsideration, we may modify our prior order or take other appropriate action.[6]

Issues on Reconsideration.

1. Jurisdiction.

8 For each ruling under reconsideration, Qwest alleges that the Commission exceeded the scope of its jurisdiction when serving as an arbitrator pursuant to Section 252 under the Act. Qwest asserts that federal courts have ruled unanimously that state commissions are authorized only to set terms and conditions relating directly to the obligations imposed on incumbent local exchange carriers (ILECs) and competitive local exchange carriers (CLECs) under Sections 251(b) and (c) of the Act.[7] Qwest argues that the Commission exceeded its limited arbitration authority by: (1) requiring it to use the same circuit identification number for a circuit converted from a UNE to a non-UNE service; (2) adopting a fee for conversions from UNE to non-UNE services; and (3) establishing the content of bills and customer service records for commingled UNE and non-UNE services (commonly referred to as commingled EELs).

9 Under Section 252(b)(4)(C), state commissions are authorized to serve as arbitrators but are required to resolve open issues by imposing conditions required to implement Section 252(c). The standards for arbitration set forth in Section 252(c) require commissions to impose conditions that meet the requirements of Section 251. Thus, Qwest argues, state commissions are limited to resolving only those issues relating to the duties imposed by Section 251 and that they are neither authorized nor required to resolve issues regarding other services or the company's obligations arising under

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[4] WAC 480-07-850(1).
[5] WAC 480-07-850(2).
[6] WAC 480-07-850(6).
[7] *See,* for example, *Southwestern Bell Telephone v. Missouri Public Service Commission,* 530 F.3d 676 (8th Cir. 2008).

Section 271. Qwest contends that we erred by not relying on the language in Section 252 to determine the scope of our arbitration authority.

10 Qwest further argues that the Federal Communications Commission's (FCC's) *Triennial Review Remand Order* (TRRO) does not give state commissions authority over non-Section 251 services.[8] Qwest contends that we misinterpret the TRRO's directives for transitioning certain UNE's from the Section 251 obligations as allowing states to regulate the terms and conditions of non-Section 251 services. Qwest asserts that the authority of state commissions is limited to that granted by the Act, not the FCC.

11 Finally, Qwest contends that the Commission has no authority over these issues because at least some of the non-Section 251 services Qwest offers for UNE conversions are provided pursuant to Section 271 and the authority to regulate network elements and services under Section 271 rests solely with the FCC.

12 In its answer, Eschelon argues that Qwest erred in framing the threshold question of jurisdiction. Eschelon contends that the proper threshold question is whether issues relating to conversions and commingled arrangements fall within the scope of a CLEC's arbitration rights given that they emanate directly from the diminution of ILEC unbundling obligations under the Act. Eschelon argues that the Commission properly concluded that conversions and commingled arrangements clearly fall within those rights and the Commission's jurisdiction.[9]

13 Eschelon contends that none of the federal court decisions cited by Qwest deal with whether UNE conversions and commingled arrangements fall within the scope of a CLEC's arbitration rights. Accordingly, Eschelon argues the cases are irrelevant to the Commission's determination that these issues are within the scope of this arbitration. Eschelon further argues that the issue of state authority to enforce Section 271 obligations was not raised by either party in the three rounds of testimony or the hearing regarding these issues. Eschelon concludes that while the Commission has

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[8] *In the Matter of Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligation of Incumbent Local Exchange Carriers,* WC Docket No. 04-313, CC Docket No. 01-338, Order on Remand, FCC 04-290 (rel. Feb. 4, 2005) hereinafter referred to as the *"Triennial Review Remand Order:* or "TRRO."

[9] Order 18, ¶¶ 68-70; Docket UT-043013, Order 17, ¶¶ 150, 287, and 291.

not asserted authority over Section 271 network elements, the Commission properly determined that conversions and commingled EELs are within the scope of Sections 251 and 252 of the Act and the Commission clearly has authority over these sections.

14 Eschelon argues that Section 252(c) requires that state commissions, in resolving open issues, "shall ensure that such resolution and conditions meet the requirements of section 251, including the regulations prescribed by the Commission pursuant to section 251."[10] Thus, Eschelon contends, the Act mandates state commissions to ensure that their arbitration rulings comply with FCC regulations. Eschelon notes that the Final Order specifically references Sections 251 and 252 in its discussion of jurisdiction.[11]

15 Finally, Eschelon notes that the FCC's *Triennial Review Order* (TRO)[12] and TRRO clearly address the unbundling, interconnection, and nondiscrimination obligations of ILECs under Section 251 of the Act, including their obligations arising from the unbundling relief granted in those orders, which address both conversions and commingled EELs. Eschelon contends that while Qwest criticizes the Commission for relying on portions of the TRO and TRRO orders, Qwest refers to those same FCC orders to support its position on the scope of the Commission's jurisdiction. Eschelon argues that the Commission's interpretation is correct.

16 ***Commission Decision.*** Section 251 of the Act directs the FCC to determine the circumstances under which components of an ILEC's network must be available on an unbundled basis. In the TRO and TRRO decisions, the FCC also determined the circumstances under which ILECs may be relieved of their unbundling obligations. The FCC specifically found that ILECs are not to unilaterally change interconnection agreements but are to negotiate and arbitrate new agreements in accordance with Section 252.[13]

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[10] Eschelon Answer at 8, quoting 47 U.S.C. § 252 (emphasis in Answer). In this citation, the reference to Commission means the FCC.
[11] Order 18, ¶¶ 68 – 69.
[12] Report and Order, *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local exchange Carriers,* 17 FCC Rcd 16978 (2003), vacated in part, remanded in part, *U.S. Telecom Ass'n v. FCC,* 359 F.3d 554 (D.C. Cir. 2004). (hereinafter referred to as TRO).
[13] TRO at ¶¶ 700, 701. TRRO at ¶ 233.

17 That is exactly the circumstance that gave rise to this proceeding. The initial ICA between Qwest and Eschelon expired July 24, 2000, but the parties continued to operate under that agreement while attempting to negotiate a new agreement. While those negotiations were underway, the FCC issued its TRO and TRRO decisions regarding ILECs' unbundling obligations. Thus, Qwest and Eschelon attempted to negotiate terms and conditions of a new ICA that complied with the FCC's intent under the TRO and TRRO orders, as well as all other provisions in the expired ICA. The parties reached agreement on many issues narrowing the scope of this arbitration from more than 250 pages of disputed issues to approximately 150 pages of disputed issues. Of the large number of issues originally teed up to be addressed in this arbitration, only three relating to conversion and commingling issues are raised in the petition for reconsideration.

18 These remaining issues merely address the operational processes attendant to converting existing circuits from a UNE basis to a non-UNE basis. The issues arise directly as a consequence of the unbundling relief the FCC afforded ILECs such as Qwest in the TRO and TRRO proceedings.

19 We reject Qwest's contention that a series of federal court decisions, including a recent decision by the United States Court of Appeals for the Eighth Circuit,[14] implicate or place limits on our Section 252 authority with respect to conversions and commingling. Those decisions are not on point. The cases address efforts by other state commissions to rely upon state law or Section 271 to impose or address unbundling issues; a circumstance not present in this proceeding. Our Final Order did not attempt to establish rates or address operational conditions for Qwest's obligations under Section 271 nor to apply state law in some fashion to retain unbundling requirements where relief had been granted by the FCC. The issues under reconsideration merely addressed the operational processes attendant to converting existing circuits from a UNE basis to a non-UNE basis and fall well within our authority pursuant to Section 252 and the FCC's orders revising ILEC obligations under Section 251.

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[14] *Southwestern Bell Telephone v. Missouri Public Service Commission,* 530 F. 3d 676 (8th Cir. 2008).

20 As in our Final Order, we reject Qwest's contention that we exceeded our authority under Section 252 to address these issues. In that Order, we followed the FCC's specific guidance to carriers and state commissions to address, through the Section 252 process, the transition from UNE services to non-UNE services and establish any rates, terms, and conditions necessary to implement the changes prescribed by the FCC. As envisioned by the FCC, we appropriately exercised our jurisdiction to provide CLECs a reasonable transition process away from UNEs and ensure a seamless effect on services provided to their end-users.

21 We believe that Qwest continues to exaggerate the distinction between UNE and non-UNE terms and conditions. We reiterate the FCC's conclusion, and our own, that the primary difference between the two is the rate at which Qwest is entitled to bill for services; a rate which was formerly limited by TELRIC pricing. By overstating the distinction between UNE and non-UNE terms and conditions, Qwest misinterprets the basis and scope of our authority.

2. Conversions.

A. Change in Circuit ID.

22 Our Final Order concluded that we had jurisdiction to address this issue and that the conversion from UNEs to alternative products and services is largely a billing function.[15] We required Qwest to retain the same circuit identification number, or ID, for conversions, finding that retaining a common circuit ID appeared to be the best method to ensure that the transition from UNE to non-UNE classification is a seamless transition for CLECs and their end-users.

23 Qwest requests that we reverse our ruling because we lack jurisdiction to impose a term or condition for a service that it does not provide under § 251.[16] In addition, Qwest argues that using a single circuit ID number will adversely affect service, cause prejudice to other CLECs, and cause financial harm to Qwest.[17] Qwest asserts that it explained in testimony and prior briefs that separate circuit ID numbers are required

[15] Order 18, ¶¶ 67 – 70, 83 – 85.
[16] For a more complete discussion of Commission jurisdiction *see* ¶¶ 16 - 20 above.
[17] Qwest Petition for Reconsideration at 11.

for UNE and non-UNE products because they are subject to separate regulatory schemes and are available to different categories of customers.[18] Therefore, Qwest asserts that it developed separate and distinct computerized ordering, inventory, and billing systems for these services.[19] Qwest contends that the differences between these systems are embodied in the circuit ID numbers.[20]

24 Qwest further argues that the Commission relies heavily on Qwest's past successful conversion from special access circuits to UNEs to require it to retain the same circuit ID number for conversions in this proceeding. Qwest contends that this conclusion is incorrect because Qwest found that process unworkable and created a risk of service degradation.[21] Qwest argues that our decision is also erroneous because it finds that the use of different circuit ID numbers increases the risk of problems relating to disconnection and reconnection of circuits without recognizing that Qwest converted nearly 1,500 circuits in 2006 without experiencing any problems.[22]

25 In the alternative, Qwest proposes to change the alphabetical prefix of circuit ID numbers while retaining the remainder of the number,[23] arguing that this balances the needs of both parties while protecting Eschelon and its customers from service problems related to retaining the same circuit ID number for both UNE and non-UNE products.

26 Eschelon responds that the FCC clearly contemplated that conversion issues would be addressed by state commissions under Section 252 of the Act.[24] Eschelon further contends that Qwest's petition fails to comply with WAC 480-07-850(2) because Qwest fails to provide citations to the record in support of its claims.[25]

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[18] *Id.*
[19] *Id.*
[20] *Id.* at 12.
[21] *Id.* at 13.
[22] *Id.* at 13 -14. While Qwest raises additional arguments, these arguments are not supported by citations to evidence in the record and are raised for the first time on reconsideration. Accordingly, these arguments do not meet the standards in WAC 480-07-850 and will not be addressed.
[23] *Id.* at 15.
[24] *See* also ¶¶ 12 – 15 above.
[25] Eschelon Answer at 17.

27 According to Eschelon, conversions typically only involve changing the rate charged for the facility and, in the vast majority of cases, the facility itself does not change.[26] Eschelon contends that a change in regulatory regime reinforces the need for conversions to be transparent and emphasizes that while the conversion reduces Qwest's legal obligations relative to UNEs, it is Eschelon who bears all the risk of failure.[27] Eschelon argues that logic dictates that not changing the circuit ID on a properly operating existing facility is less likely to cause service disruption than changing the circuit ID.[28] Moreover, Eschelon contends that the Commission properly evaluated the evidence regarding Qwest's process for converting circuits from UNEs to new private line service.[29]

28 In response to Qwest's alternative proposal, Eschelon asserts that it is not new; Qwest raised the same proposal in an Oregon wire center docket in 2006.[30] Eschelon contends that the alternative proposal does not resolve any of the issues Eschelon raised in this case.

29 ***Commission Decision.*** Having already rejected Qwest's jurisdictional argument, we conclude that Qwest's other arguments do not comply with WAC 480-07-850.[31] The rule is clear that Qwest must demonstrate that our order is erroneous or incomplete and provide citations to the record in support of its reconsideration claims. Qwest fails to do so and, save for its alternative circuit ID proposal which is raised for the first time on reconsideration, fails to raise any new arguments not already considered and rejected by the Commission. As previously stated, a petition for reconsideration requires more than a repetition of prior arguments on an issue.

30 Nor is it appropriate to raise for the first time in a petition for reconsideration new options or proposals that should have been addressed during the evidentiary phase of a docket, when they can be fully vetted through testimony, cross-examination, and rebuttal. At this juncture, our consideration is specifically limited to any errors or

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[26] *Id.* at 22.
[27] *Id.*
[28] *Id.*
[29] *Id.* at 23.
[30] The decision in the Oregon proceeding was admitted as an exhibit in this proceeding: Denney, Exh. No. 169.
[31] *See* ¶¶ 16 – 20.

incomplete findings in our previous ruling. Having not previously considered Qwest's alternative circuit ID proposal, we cannot "reconsider" it here.

B. Conversion charge.

31 In Order 18, we agreed with the arbitrator that the $25.00 conversion rate adopted in Docket UT-073035[32] represents a reasonable compromise rate for the conversion process and accepted that rate as an interim rate, subject to revision in an appropriate costing proceeding.[33]

32 Qwest reiterates its argument that we lack jurisdiction to address this issue and asserts that the $25 conversion charge does not compensate Qwest for UNE conversion costs because those costs were not known at the time the charge was agreed upon.[34] Qwest asserts that an ILEC must be permitted to recover the costs it incurs to provide interconnection.[35]

33 Eschelon again responds that we have jurisdiction to address this issue and that Qwest failed to provide appropriate citations to the record in support of its petition. Moreover, Eschelon asserts that Qwest did not provide cost studies in this case despite the requirement that it do so.[36] Eschelon contends that there is no evidence in this record to support a conversion charge other than the one adopted by the Commission.[37] Eschelon also contends that we already considered and rejected the arguments Qwest raises again here.[38]

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[32] *In the Matter of the Petition of Qwest Corporation For Investigation Concerning the Status of Competition and Impact of the FCC's Triennial Review Remand Order on the Competitive Telecommunications Market in Washington,* Docket UT-073035, Order 05 (March 21, 2008). Notice of Finality entered April 17, 2008.
[33] Order 18, ¶¶ 86 – 91.
[34] Qwest Petition for Reconsideration at 17.
[35] *Id.*
[36] Eschelon Answer at 32 – 33. Arbitrator's Report, Order 16, ¶ 173.
[37] Eschelon Answer at 33.
[38] *Id.*

34 Moreover, Eschelon argues that Qwest agreed to the conversion charge of $25 when it executed the wire center settlement in June 2007.[39] Thus, Qwest voluntarily agreed to a conversion rate before the manner of conversion was determined in this case. Likewise, Eschelon agreed to the $25 conversion rate at a time when other commissions concluded an appropriate rate should be $0.00.[40]

35 ***Commission Decision.*** Consistent with our previous analysis we reject Qwest's jurisdictional argument and find that it has failed to comply with WAC 480-07-850, failed to provide citations to the record, and failed to raise any argument regarding the conversion charge not already considered and rejected. Accordingly, we deny reconsideration of the conversion charge.

3. Commingled Arrangements – Billing.

36 In Order 18, we required Qwest to separately identify commingled components on bills and customer service records, concluding that this balanced Qwest's need to appropriately bill for the separate UNE and non-UNE elements of a commingled arrangement and Eschelon's need to ensure that it was being billed properly. [41]

37 Qwest requests reconsideration arguing that the Commission lacks jurisdiction to impose terms and conditions on these services.[42] Alternatively, Qwest asserts that it is not technologically possible to comply with the ruling absent significant changes to Qwest's operating system and requests a delay in implementation to allow Qwest time to assess feasibility and perform the required changes.[43]

38 Eschelon responds that it has already addressed Qwest's jurisdictional arguments.[44] Regarding Qwest's request for delay, Eschelon believes Qwest's claims to be exaggerated; unsupported by data or any citations to evidence in the record.[45] In

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[39] *Id.*
[40] *Id.* at 35.
[41] Order 18, ¶¶ 97 – 100.
[42] Qwest Petition for Reconsideration at 18 – 19. For a more complete discussion of jurisdiction see ¶¶ 16 -20 above.
[43] Qwest Petition for Reconsideration at 19.
[44] Eschelon Answer at 36.
[45] *Id.* at 38.

addition, Eschelon points out that the request for delay is open-ended and too vague to assure that the Commission's ruling would ever be implemented.[46] If the Commission entertains Qwest's request, Eschelon recommends that we require Qwest to regularly provide Eschelon with spreadsheets containing the information identified in our ruling until the billings contain that information.[47]

39 ***Commission Decision.*** Again, and for reasons previously discussed, we reject Qwest's jurisdictional arguments. Qwest's petition for reconsideration of this billing issue fails to comply with the standards set forth in WAC 480-07-850, does not provide citations to the record, and does not raise new arguments that we have not previously considered and rejected.

40 As for delaying implementation of our ruling regarding billing to allow Qwest time to assess its feasibility and perform required changes, Qwest fails to demonstrate that delay is warranted. All that is required of Qwest is a separate listing of commingled elements on billings and customer service records. Since Qwest has the capacity to bill each commingled element at the appropriate UNE or non-UNE rate, it must have already identified the separate elements and their respective rates. Accordingly, it should not be burdensome to simply list the elements. We deny reconsideration of our previous ruling on this issue.

ORDER

THE COMMISSION ORDERS:

41 (1) Qwest Corporation's Petition for Reconsideration of Order 18 is denied.

42 (2) Qwest Corporation and Eschelon Telecom, Inc., must file an Interconnection Agreement with the Commission, consistent with Order 16 as modified by Order 18, and this Order, no later than 30 days after the service date of this Order.

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[46] *Id.*
[47] *Id.* at 38 -39.

43 (3) The Commission retains jurisdiction over the subject matter and parties to the proceeding to effectuate the terms and conditions of this Order.

Dated at Olympia, Washington, and effective January 30, 2009.

WASHINGTON STATE UTILITIES AND TRANSPORTATION COMMISSION

MARK H. SIDRAN, Chairman

PATRICK J. OSHIE, Commissioner

PHILIP B. JONES, Commissioner

APPENDIX A

GLOSSARY

TERM	DESCRIPTION
Act	The Telecommunications Act of 1996, 47 U.S.C. §251, *et. seq.*
CLEC	Competitive local exchange company. Not an ILEC, and generally subject to very limited regulation.
Commingling	Commingling is the connection of an unbundled network element or unbundled network element combination with other wholesale facilities and/or services.
Conversion	A conversion occurs when an unbundled network element is converted to a non-unbundled network arrangement.
EEL	Enhanced Extended Links
FCC	Federal Communications Commission
ID	Identification
ILEC	Incumbent local exchange company; a company in operation at the time the Act was enacted (August 1996).
Interconnection	Connection between facilities or equipment of a telecommunications carrier with a local exchange carrier's network under Section 251(c)(2).
Interconnection Agreement or ICA	An agreement between an ILEC and requesting telecommunications carrier (which may be a CLEC) addressing terms, conditions and prices for interconnection, services or network elements pursuant to Section 251.
Network Element	A facility or equipment used in providing telecommunications services.
Section 251(c)(3)	The section of the Act that requires ILECs to provide unbundled access to network elements, or UNEs.
Section 271	The portion of the Act under which Bell Operating Companies, or BOCs, could obtain authority from the FCC to provide long distance service in addition to service within their in-state service areas.
TELRIC	Total Element Long Run Incremental Cost – A method of determining the cost, and thus, prices for network elements using a forward-looking process, rather than the existing network of a carrier.

TERM	DESCRIPTION
TRO	The FCC's Triennial Review Order. An August 2003 Order addressing UNEs and the impairment standard for UNEs, vacated in part and remanded in part by the D.C. Circuit Court of Appeals in *USTA II v. FCC.*
TRO Remand Order	FCC decision entered in response to D.C. Circuit's USTA II decision: Eliminates local switching as a UNE as of March 11, 2006, and limits unbundling of high-capacity transport and loops. (High-capacity refers to the ability of the facility to handle an amount of information at a single time, e.g., DS1, DS3, Ocn capacity.)
Unbundled	A network element that is provided by itself, not in connection with or "bundled" with another network element. A means for a carrier to request particular services from an ILEC to customize the service it provides, and to avoid an ILEC from offering certain services as a package that the carrier must take as an all or nothing option.
UNE	Unbundled network element. Generally a network element an ILEC must make available under Section 251(c)(3).
Wholesale	Services provided by one carrier to another pursuant to Section 251 of the Act and generally through TELRIC pricing.