



UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON
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WILLIAM M. MCCOOL
District Court Executive
Clerk of Court

JOE WHITELEY
Deputy in Charge

October 16, 2012

Lisa Wyse, Records Manager
Washington Utilities and Transportation
Commission
1300 S Evergreen Pk Dr SW
Olympia, WA 98504-7250

RECEIVED
PROGRAMS MANAGEMENT
2012 OCT 18 AM 8:18
STATE OF WASHINGTON
UTILITY AND TRANSPORTATION
COMMISSION

RE: C09-5259RBL
Qwest Corporation v. Washington State Utilities and Transportation Commission et al, and
Eschelon Telecom Inc. (UT-063061)

Dear Ms. Wyse,

This letter is a follow up to our voicemail exchange regarding the US District Court Clerk's Office request to either return or destroy the administrative record submitted by your office in the above mentioned matter.

Pursuant to the information and instructions in your voicemail October 12, 2012, the administrative record received in the clerk's office will be destroyed as the original is maintained by your office. In addition, per your request, enclosed please find copies of the following items:

- Docket #19- Notice of Filing Paper Materials with the Clerk (submitted 6/30/09 with the record)
- Docket #45- Order Affirming WUTC Decision- Orders 18 and 19
- Docket #46- Findings of Fact, Conclusions of Law, and Order of Judgment
- Docket #47- Judgment

If you require additional information or have any questions, please feel free to contact me directly.

Sincerely,

Gayle M. Riekema
Deputy Clerk

Enclosures

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25

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09-CV-05259-NTC

UNITED STATES DISTRICT FOR THE
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

QWEST CORPORATION,

Plaintiffs,

v.

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

and

ESCHELON TELECOM, INC.,

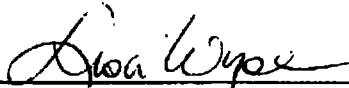
Defendants.

NO. 3:09-CV-05259-RBL

NOTICE OF FILING PAPER
MATERIALS WITH THE CLERK

The administrative record in Docket UT-063061, RE: Petition for Arbitration of Interconnection Agreement between Qwest Corporation and Eschelon Telecom of Washington, Inc., is being filed in paper form with the Clerk's Office for the Western District of Washington. The document will remain in the Clerk's custody until appropriate disposition pursuant to the Local Rules of the Western District of Washington.

DATED this 29th day of June, 2009.



Lisa Wyse, Records Manager
Washington Utilities and Transportation
Commission
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lwyse@utc.wa.gov

HONORABLE RONALD B. LEIGHTON

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

QWEST CORPORATION,

Plaintiff,

v.

WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION, et al,

Defendants.

Case No. C09-5259RBL

ORDER

THIS MATTER comes before the entitled Court on an appeal and cross-appeal of an order of the Washington Utilities and Transportation Commission (“WUTC” or “Commission”) that resolved disputed issues in an arbitration proceeding, conducted pursuant to Section 252 of the Telecommunications Act of 1996 (“the Act”), to establish terms and conditions of interconnection between Qwest Corporation (“Qwest”) and Eschelon Telecom, Inc. (“Eschelon”). The issues raised in the appeal and cross-appeal have been fully briefed and presented to the Court in written form and during oral argument conducted on June 21, 2010.

As a threshold matter, Qwest alleges that the defendant Commission exceeded its limited authority in discharging its duties as an arbitrator under the Act. Qwest argues that in ordering the inclusion of terms

1 and conditions relating to conversions and commingling in the parties' interconnection agreement, the WUTC
2 exceeded its jurisdiction. Issues of jurisdiction are reviewed *de novo*. Qwest relies primarily upon a 2009
3 decision of the Ninth Circuit Court of Appeals, *Qwest Corp. v. Arizona Corp. Comm'n.*, 567 F.3d 1109 (9th
4 Cir. 2009). That case concerned a challenge to a state commission order that relied on § 271 of the Act,
5 which sets forth conditions for entry of former AT&T subsidiaries into the long distance markets, to establish
6 rates for network elements not required to be unbundled under § 251. The parties agree that the arbitration
7 authority of state commissions is limited to imposing terms that implement the obligations imposed in
8 §§ 251(b) and (c). Pursuant to the decision in *Qwest*, "all state commission arbitration authority under
9 Section 252 is inextricably tied to the duties imposed under Section 251."
10

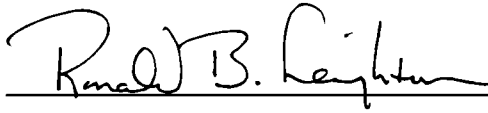
11
12 In rejecting Qwest's jurisdiction argument, the Commission observed that it followed the guidance
13 of the Federal Communications Commission ("FCC") to address, through the Section 252 arbitration process,
14 the transition conversion process at the center of the Qwest/Eschelon dispute and to establish any rates, terms
15 and conditions necessary to implement the changes prescribed by the FCC. C.R. 3221 (WUTC Order 19)
16 ¶20. This Court agrees. The terms and conditions that govern how conversions and commingling will be
17 accomplished are inextricably tied to duties imposed under Section 251 to convert existing circuits from a
18 UNE basis (unbundled network elements) to a non-UNE basis. The Section 252 arbitration was an
19 appropriate and lawful process for the Commission to use to determine the terms and conditions which would
20 control as of the moment the conversion was complete.
21

22
23 The Court has also reviewed the merits of the other arguments made by Qwest and Eschelon in their
24 appeal and cross-appeal. With the exception of the jurisdictional issue discussed above, all other issues in
25 the case are subject to the arbitrary and capricious standard of review. Because the Court finds that the
26 decisions under review from the WUTC were supported by substantial evidence and did not reflect a clear
27 error of judgment, the Court affirms the decision of the WUTC and accepts without modification the Findings
28 of Fact and Conclusions of Law submitted by the Commission. Orders 18 and 19 of the Washington Utilities

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and Transportation Commission are hereby **AFFIRMED**.

Dated this 4th day of August, 2010.



RONALD B. LEIGHTON
UNITED STATES DISTRICT JUDGE

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Honorable Ronald B. Leighton

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

QWEST CORPORATION,

Plaintiff,

v.

WASHINGTON 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 Commission,

and

ESCHELON TELECOM, INC.,

Defendants.

CASE NO. 3:09-cv-05259-RBL

FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND
ORDER FOR JUDGMENT

1 This matter having come before the Court for hearing, and the Court having read the
2 briefs of the parties and heard the argument of counsel, and having reviewed the administrative
3 record submitted by the Defendant Washington Utilities and Transportation Commission, and
4 being fully advised, the Court hereby enters its Findings of Fact, Conclusions of Law, and
5 Order for Judgment as follows:
6

7 **FINDINGS OF FACT**

8 1. This matter concerns an appeal and cross-appeal of an order of the Washington
9 Utilities and Transportation Commission (“WUTC” or “Commission”) that resolved disputed
10 issues in an arbitration proceeding, conducted pursuant to Section 252 of the
11 Telecommunications Act of 1996 (“the Act”)¹, to establish terms and conditions of
12 interconnection between Qwest Corporation (“Qwest”) and Eschelon Telecom, Inc.
13 (“Eschelon”).
14

15 **A. The Telecommunications Act of 1996**

16 2. Congress adopted the Telecommunications Act of 1996 to develop competition
17 in local telecommunications markets. The Act distinguishes between incumbent local
18 exchange carriers (“ILECs”), which historically operated as monopoly providers of
19 telecommunications services in their geographic service territories, and competitive local
20 exchange carriers (“CLECs”).
21

22 3. Qwest is an ILEC, while Eschelon is a CLEC.

23 4. As the Federal Communications Commission (“FCC”) has observed, the Act
24 has “strong procompetitive goals,” and directs the removal of “not only statutory and
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¹ 47 U.S.C. § 151 et seq.

1 regulatory impediments to competition, but economic and operational impediments as well.”²

2 5. Section 251(b) of the Act places certain obligations on LECs in general, and
3 Section 251(c) of the Act places additional obligations on ILECs alone, to open local markets
4 to competition. Of particular significance for this case, Section 251(c)(3) requires ILECs to
5 provide CLECs with “nondiscriminatory access to network elements on an unbundled basis at
6 any technically feasible point, on rates, terms, and conditions that are just, reasonable, and
7 nondiscriminatory, in accordance with the terms and conditions of the [parties’
8 interconnection] agreement and the requirements of this section and section 252 [of the Act].”

9
10 6. Section 251(c)(1) of the Act requires ILECs and CLECs to negotiate in good
11 faith regarding the terms and conditions of an interconnection agreement, which includes the
12 terms governing a CLEC’s access to unbundled network elements (“UNEs”).

13
14 7. The “elements” that are necessary to provide local telecommunications service
15 include the “loop,” which is usually a pair of wires connecting a customer location to the
16 central office; and “transport,” which carries calls between central offices. Unbundled access
17 allows a CLEC to separately lease the elements that make up the ILEC’s network. The Act
18 requires that the rates, terms, and conditions under which the ILEC provides the CLEC with
19 unbundled access be “just, reasonable, and nondiscriminatory.”

20
21 8. Section 252(d)(1) of the Act requires that the rates an ILEC charges for UNEs
22 be cost-based. Non-UNEs that could be used to provide the same service can be priced at
23 higher rates.

24
25 _____
26 ² First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Radio Service Providers*, CC Docket Nos. 96-98, 95-185, 11 FCC Rcd 15499 (1996), ¶¶ 3, 245.

1 9. When an ILEC and a CLEC are not able to reach agreement on the terms
2 of an interconnection agreement, Section 252(b)(1) of the Act authorizes either party to
3 petition the state utilities commission to arbitrate any “open issues.” Section 252(c)(1)
4 of the Act, in turn, provides:

5 STANDARDS FOR ARBITRATION.—In resolving by arbitration under
6 subsection (b) any open issues and imposing conditions upon the parties to the
7 agreement, a State commission shall—

- 8 (1) ensure that such resolution and conditions meet the requirements of
9 section 251, *including the regulations prescribed by the [Federal
Communications] Commission pursuant to section 251.*

10 (Emphasis added).

11 **B. The FCC’s *Triennial Review Order* and *Triennial Review Remand Order***

12 10. The FCC has established regulations to implement the requirements set forth in
13 the Act, including those pertaining to unbundling, and those requiring ILECs to provide
14 “conversions” and “commingling”.³ The purpose of the FCC’s rules is “to implement Sections
15 251 and 252” of the Act.⁴

16 11. Section 251(d)(2) requires the FCC to determine which elements ILECs are
17 required to offer to CLECs on an unbundled basis. In making this determination, the FCC
18 must consider whether access to the network element would impair the CLEC’s ability to
19 provide service. The FCC addressed the issue of what elements must be offered as UNEs in
20 two orders, the *Triennial Review Order* [TRO]⁵ and the *Triennial Review Remand Order*
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25 ³ See 47 C.F.R. §§51.309(e) - (g) & 51.316(a).

⁴ 47 C.F.R. §51(b).

⁵ Report and Order, *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent
26 Local Exchange Carriers*, 18 FCC Red. 16978 (2003), *vacated in part, remanded in part, U.S. Telecom Ass’n
[USTA] v. FCC*, 359 F.3d 554 (D.C. Cir. 2004).

1 [TRRO].⁶ Initially, the FCC took the position that ILECs had to unbundle and provide most
2 basic network elements at cost-based prices. Later, as a result of a series of court decisions,⁷
3 the FCC limited the number of elements that had to be provided as UNEs, holding that CLECs
4 would not be impaired without access to such elements. Among the elements that the FCC
5 “delisted” from section 251 unbundling requirements are high-capacity loops and high-
6 capacity dedicated transport.⁸

8 12. This delisting process further led to the issue of “conversions” that is presented
9 in this case—that is, the process of converting a product originally provided as a UNE to an
10 alternative service arrangement.

11 13. In the *TRO*, the FCC stated that conversions should be “a seamless process that
12 does not affect the customer’s perception of service quality,” and that the parties should
13 implement operational procedures to ensure this result. The FCC further stated that because
14 both ILECs and CLECs are bound by duties to negotiate with each other in good faith,
15 conversions should, therefore, be accomplished as part of the parties’ interconnection
16 agreements. The FCC declined to adopt rules establishing specific conversion processes and
17 procedures.⁹

19 14. In the *TRRO*, the FCC further addressed conversion issues. However, it again
20 did not establish specific rules governing the process by which such transitions would take
21 place. Instead, terms and conditions for conversions are to be established by Section 252
22

24 ⁷ Order on Remand, *In the Matter of Review of the Section 252 Unbundling Obligations of Incumbent
25 Local Exchange Carriers*, 20 FCC Rcd. 2533 (2005), *aff’d*, *Covad Communications Co. v. FCC*, 450 F.3d 528
(D.C. Cir. 2006).

26 ⁸ See *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 388-91 (2002); *USTA v. FCC*, 290 F.3d 415 (D.C.
Cir. 2002); *USTA v. FCC*, 359 F.3d 554 (D.C. Cir. 2004).

⁹ *TRRO*, ¶¶ 142, 195.

1 interconnection agreement negotiations. The FCC stated:

2 We expect that incumbent LECs and competing carriers will implement the
 3 Commission's findings as directed by section 252 of the Act. Thus, carriers
 4 must implement changes to their interconnection agreements consistent with our
 5 conclusions in this Order. We note that the failure of an incumbent LEC or a
 6 competitive LEC to negotiate in good faith under section 252(c)(1) of the Act
 7 and our implementing rules may subject that party to enforcement action. *Thus,*
 8 *the incumbent LEC and competitive LEC must negotiate in good faith regarding*
 9 *any rates, terms, and conditions necessary to implement our rule changes. We*
 10 *expect that parties to the negotiating process will not unreasonably delay*
 11 *implementation of the conclusions adopted in this Order. We encourage the*
 12 *state commissions to monitor this area closely to ensure that parties do not*
 13 *engage in unnecessary delay.*¹⁰

14 15. The FCC also addressed the issue of "commingled arrangements" that is
 15 presented in this case. Commingling consists of a UNE connected to a tariffed, non-UNE
 16 service. At issue in this case are point-to-point combinations of loop and transport, commonly
 17 referred to as an "enhanced extended loop," or "EEL."¹¹ An EEL allows a carrier to serve
 18 customers connected to a particular central office without the added expense and resources of
 19 having collocation and equipment in that central office.¹² There is no functional difference
 20 between a UNE EEL and a commingled EEL. They use the same facilities and do the same
 21 things. The primary distinction between the two is simply the price change for one
 22 component.¹³ This change in price results from a legal finding of "non-impairment" in a
 23 particular central office—in other words, the delisting of one component of the EEL from the
 24 UNE pricing requirements of section 251. Whereas, in a UNE EEL, both the loop and

25 ⁹ *TRO*, ¶ 585, 586, 588 (footnotes omitted).

¹⁰ *Id.*, ¶ 233 (emphasis added) (footnotes omitted).

¹¹ *See TRO*, ¶ 576.

¹² Eschelon (Denney) Direct Testimony, CR 7094, Ex. 130, at 141.

¹³ Eschelon (Denney) Direct Testimony, CR 7094, Ex. 130, at 153.

1 transport are available at UNE prices (i.e., the lowest rate), in a commingled EEL, either the
 2 loop or the transport is available at UNE prices, but not both.

3 16. The FCC had previously restricted the obligation of an ILEC to commingle
 4 UNEs with tariffed services. In the *TRO*, however, it eliminated this restriction, and required
 5 “incumbent LECs to perform the necessary functions to effectuate such commingling upon
 6 request.”¹⁴ The FCC further emphasized that commingling, and an ILEC’s duties pertaining to
 7 commingling, may include combinations of UNEs and interstate access services:
 8

9 We conclude that the Act does not prohibit the commingling of UNEs and
 10 wholesale services and that section 251(c)(3) of the Act grants authority for the
 11 Commission to adopt rules to permit the commingling of UNEs and
 12 combinations of UNEs with wholesale services, including interstate access
 13 services. An incumbent LEC’s wholesale services constitute one technically
 14 feasible method to provide nondiscriminatory access to UNE and UNE
 combinations. . . . For these reasons, we require incumbent LECs to effectuate
 commingling by modifying their interstate access service tariffs to expressly
 permit connections with UNEs and UNE combinations.¹⁵

15 17. The FCC also addressed the argument that commingling should be prohibited
 16 because of the billing and operational issues involved in commingling a UNE with an interstate
 17 access service. Significantly, the FCC concluded that these billing and operational issues
 18 could be addressed “through the same process that applies for other changes in our unbundling
 19 requirements adopted herein, *i.e., through change of law provisions in interconnection*
 20 *agreements.*”¹⁶ Interconnection agreements are subject to the arbitration provisions of Section
 21 252 of the Act.
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25 ¹⁴ *TRO*, ¶ 579.

26 ¹⁵ *Id.*, ¶ 581 (footnotes omitted).

¹⁶ *Id.*, ¶ 583 (emphasis added).

1 **C. The Qwest-Eschelon Arbitration Proceedings before the Commission and the**
 2 **Issues Presented for Review**

3 18. In 2001, Qwest and Eschelon began to negotiate the terms and conditions of an
 4 interconnection agreement to replace their then-existing agreement.¹⁷ Although the parties
 5 agreed on many provisions, they also reached an impasse on multiple issues.¹⁸

6 19. On August 9, 1996, Qwest filed a petition with the WUTC for arbitration of the
 7 remaining issues, “pursuant to 47 U.S.C. § 252(b).”¹⁹ Among the issues that Qwest expressly
 8 requested the Commission to arbitrate are both of the issues which are the subject of Qwest’s
 9 complaint and Eschelon’s counterclaim in this proceeding: (1) conversions [arbitration issue
 10 numbers 9-43 and 9-44 through 9-44(c); and (2) commingling [arbitration issue numbers 9-58
 11 and subparts and issue 9-59, of which issue 9-58(c) relates to billing and customer service
 12 record for commingled EELs.]²⁰

13
 14 20. The parties filed three rounds of written testimony and conducted an evidentiary
 15 hearing before an administrative law judge acting as Arbitrator. Following post-hearing briefs,
 16 the Arbitrator issued a Report and Decision resolving the contested issues.²¹ Both Eschelon
 17 and Qwest sought review of certain issues, and the Commission issued its Order affirming the
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 22 ¹⁷ Qwest’s Petition for Arbitration, *In the Matter of the Petition of Qwest Corporation for Arbitration*
 23 *with Eschelon Telecom, Inc., Pursuant to 47 U.S.C. Section 252 of the Federal Telecommunications Act of 1996*,
 24 Certified Record (“CR”) 0003, ¶ 8, at 3.

25 ¹⁸ As the Commission indicated in Docket UT-063061, Order 19, Order Denying Qwest’s Petition for
 26 Reconsideration, ¶ 17, at 7, (“Order 19”) approximately 150 issues were originally presented to the Commission
 for arbitration. CR 3221. Now, only the issues pertaining to conversions and billing for commingled EELs
 remain in this appeal.

¹⁹ *Id.*,

²⁰ Qwest Arbitration Petition, CR 0003, Exhibit 1, at 81-87 (conversions); and at 62-64 and 111-128
 (commingling).

²¹ Docket UT-063061, Order 16, Arbitrator’s Report and Decision, CR 2272.

1 Arbitrator's Report and Decision, in part, and modifying it, in part.²² Subsequently, the
 2 Commission denied Qwest's petition for reconsideration.²³ Qwest then filed its complaint
 3 before this Court contesting portions of the Commission's decision, and Eschelon filed its
 4 counterclaim and cross-claim.

5
 6 21. Eschelon proposed interconnection agreement language regarding conversions
 7 providing that the circuit identification number ("circuit ID") would not be changed as a result
 8 of a conversion from a UNE to a non-UNE, and that Qwest implement the conversion through
 9 a price change.²⁴ Eschelon presented evidence that a change in circuit ID when converting a
 10 circuit was unnecessary, imposed unnecessary costs on Eschelon, and caused a risk of
 11 disrupting service to its customers.²⁵ Qwest argued that its existing process required a change
 12 in the circuit ID when a UNE conversion was made, and that using the same circuit ID would
 13 inappropriately impose costs on Qwest and interfere with its ability to provide services.²⁶
 14 Qwest, however, did not offer any alternative contract language for conversion-related issues.²⁷

15
 16 22. The Arbitrator recommended the adoption of Eschelon's proposed ICA
 17 language for conversions, finding that Eschelon's proposed language ensures that conversions
 18 do not cause disruptions for its business operations and potential harm to its end user
 19 customers.²⁸ The Commission likewise adopted Eschelon's position that the circuit ID may
 20 not be changed as a result of a conversion. The Commission was guided primarily by the
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 23 ²² Docket UT-063061, Order 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,
 October 16, 2008 ("Order 18"), CR 3046.

24 ²³ Order 19, *supra*.

²⁴ Order 18, ¶¶ 53, 59, 62, CR 3066-3069.

²⁵ Eschelon (Starkey) Direct Testimony, Exh. 62, at 154-157, CR 5589-5592.

²⁶ Order 18, ¶ 60. CR 3068.

²⁷ *Id.*, ¶ 54. CR 3066.

²⁸ Order 16, ¶ 91.

1 FCC's conclusion that conversion is largely a billing function, and that the underlying facilities
2 do not change merely as a result of UNE services being repriced as non-UNE, tariffed
3 services.²⁹ The Commission also was persuaded that Qwest has successfully converted
4 facilities in the reverse direction, i.e., from non-UNE to UNE, without altering the circuit ID.³⁰
5

6 23. The Commission also adopted the Arbitrator's recommendation that a
7 conversion rate of \$25.00 per circuit, which was agreed upon by Qwest, Eschelon, and other
8 parties in a separate WUTC docket, represented a "reasonable compromise rate for the
9 conversion process at this time." The Commission noted that this rate was arrived at through
10 negotiation, and that it is reasonable to assume that each party in that proceeding adequately
11 represented its interests in arriving at the \$25.00 rate. The Commission expressly adopted this
12 as an interim rate, subject to revision in an appropriate costing proceeding. The Commission
13 rejected Qwest's claim to recover its alleged conversion costs, since Qwest failed to provide
14 any data in the record to establish what those costs might be.³¹
15

16 24. Regarding commingled EELs, Qwest asserted that it had separate billing
17 systems for UNEs and tariffed services and that it would be an extraordinary burden to include
18 information on commingled arrangements on a single bill. Eschelon presented two alternatives
19 before the Arbitrator. It argued in favor of a single order, single circuit ID, single bill, and
20 single billing account number. Alternatively, it requested that commingled elements be listed
21 separately on a single bill, to ensure that it could manage repair and billing functions to its
22 customers' satisfaction. The Arbitrator rejected Eschelon's preferred proposal and adopted
23

24
25 ²⁹ Order 18, ¶ 83. CR 3076.

26 ³⁰ *Id.*, ¶ 84, CR 3076, citing Eschelon's Reply to Qwest's Petition for Review, at 22, CR 2702; Eschelon
(Starkey) Direct Testimony, Exh. 62, at 156, CR 5591.

³¹ *Id.*, ¶ 90-91. CR 3078-3079.

1 Qwest's language, together with Eschelon's alternative language. Thus, under the Arbitrator's
2 ruling, Qwest may require separate ordering, circuit IDs, and billing for UNE and non-UNE
3 elements that comprise a commingled arrangement, but Qwest must then identify and relate the
4 separate components on the bill and customer service records.³²

5
6 25. Qwest petitioned the Commission for review, arguing that UNE elements of a
7 commingled arrangement are priced and provisioned under a regulatory scheme that does not
8 apply to tariffed services.

9 26. Eschelon, significantly, did *not* petition for review of the Arbitrator's decision,
10 nor at any time did it request that the Commission reject that decision and adopt its "preferred"
11 alternative. While Eschelon did assert that *Qwest's* proposal creates operational barriers that
12 diminish the value of commingling, Eschelon described the Arbitrator's decision as one that
13 balances the parties' interests and achieves a workable solution.³³

14
15 27. The Commission adopted the Arbitrator's decision regarding billing for
16 commingled EELs. It concluded that this would result in commingled arrangements being
17 offered in a manner that avoids operational barriers and makes them useful products for
18 CLECs.³⁴

19
20 28. Qwest did not originally contest the Commission's jurisdiction to determine
21 matters related to conversions and commingling. In fact, Qwest originally requested that the
22 Commission arbitrate and decide these issues. Only after receiving an unfavorable decision
23 from the Arbitrator did Qwest first raise the claim, in its petition for administrative review (and
24

25 ³² *Id.*, ¶¶ 93-94 (also citing to Arbitrator's Report and decision at ¶ 118). CR 3079-3080.

26 ³³ *Id.*, ¶¶ 95-96, CR 3081-3082; Eschelon's Reply to Qwest's Petition for Review, ¶ 58, p. 31, and ¶ 64,
p. 36. CR 2711, 2716.

³⁴ Order 18, ¶¶ 97-100, CR 3082-3083.

1 now before this Court), that the Commission lacks jurisdiction over these matters. Qwest also
 2 claims that the Commission impermissibly regulated interstate services beyond its jurisdiction.

3 29. The Commission rejected Qwest's jurisdictional arguments, both in its Final
 4 Order (Order 18) and its Order Denying Qwest's Petition for Reconsideration (Order 19). The
 5 Commission found that both Sections 251 and 252 of the Act, together with the FCC's rules
 6 and orders implementing that Act, clearly conferred jurisdiction on the Commission to decide
 7 these matters. The Commission noted that the issues under consideration here address "the
 8 operational processes attendant to converting existing circuits from a UNE basis to a non-UNE
 9 basis and fall well within our authority pursuant to Section 252 and the FCC's orders revising
 10 ILEC obligations under Section 251." The Commission further noted that it simply was
 11 following "the FCC's specific guidance to carriers and state commissions to address, through
 12 the Section 252 process, the transition from UNE services to non-UNE services and establish
 13 any rates, terms, and conditions necessary to implement the changes prescribed by the FCC."³⁵

14 30. The Commission rejected Qwest's reliance on a series of federal court decisions
 15 placing limits on state authority as not on point with the facts here. The Commission noted
 16 that all of those decisions address efforts by other state commissions to rely upon state law or
 17 Section 271 of the Act to impose or address unbundling issues, which is a circumstance not
 18 present here.³⁶

19 31. The Minnesota Public Commission has ruled that it has jurisdiction, under
 20 Section 252 of the Act, over the terms and conditions relating to both the conversion and
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³⁵ Order 19, ¶¶ 19-20, CR 3221-3222.

³⁶ *Id.*

1 commingling processes.³⁷

2 **CONCLUSIONS OF LAW**

3 1. This Court has jurisdiction over Qwest's claims and Eschelon's counterclaim
4 and cross-claim pursuant to 47 U.S.C. § 252(e)(6).

5 2. Qwest contests the Commission's jurisdiction to order (a) that the circuit ID not
6 be changed when the circuit is converted from a UNE to a non-UNE, and (b) that Qwest relate
7 the UNE and non-UNE portions of a commingled EEL on its bill. Qwest also contends that the
8 Commission's decision constitutes impermissible regulation of interstate services beyond its
9 jurisdiction.

10 3. Qwest also contests the Commission's decision adopting a \$25.00 per circuit
11 charge to convert a circuit, on the ground that this violated Qwest's right to recover its
12 reasonable costs and is inconsistent with the Act.

13 4. Eschelon's counterclaim and cross-claim contests the Commission's adoption of
14 Eschelon's alternative position concerning billing for commingled EELs, contending that the
15 Commission's decision is arbitrary and capricious and inconsistent with the Act.

16 5. The question of whether the Commission's decision complies with the
17 Telecommunications Act and its implementing regulations, including the scope of the
18 Commission's jurisdiction under the Act, is a question of law subject to *de novo* review. All
19
20
21

22 _____
23 ³⁷ Docket No. P-421/C-07-370, *In the Matter of Qwest Corporation's Conversions of UNEs to Non-*
24 *UNEs*; Docket No. P-421/C-07-371, *In the Matter of Qwest Corporation's Arrangements for Commingled*
25 *Elements*; Order Adopting Administrative Law Judge's Recommended Order On Motion for Summary
26 Disposition, at 2-3 (Minnesota Publ. Util. Comm'n, March 23, 2009).

Docket No. P-421/C-07-370, *In the Matter of Qwest Corporation's Conversions of UNEs to Non-*
UNEs; Docket No. P-421/C-07-371, *In the Matter of Qwest Corporation's Arrangements for Commingled*
Elements; Recommended Order on Motion for Summary Disposition (Minnesota Publ. Util. Comm'n, December
9, 2008).

1 other issues are subject to the arbitrary and capricious standard. A party claiming that a
2 decision is arbitrary and capricious must show either that the decision was not supported by
3 substantial evidence or that the agency made a clear error of judgment.³⁸

4 6. The Court finds that the Commission has jurisdiction under sections 251 and
5 252 of the Telecommunications Act, together with the FCC's rules and orders implementing
6 the Act, over all of the issues presented to the Court on appeal in this case. The Court rejects
7 Qwest's claim that the Commission lacks jurisdiction to decide these matters. The Court also
8 rejects Qwest's claim that the Commission's decision constitutes impermissible regulation of
9 interstate services beyond its jurisdiction.
10

11 7. The Court finds that the Commission's decision to adopt a \$25.00 per circuit
12 charge is consistent with the requirements of the Act, and is not arbitrary or capricious.
13

14 8. The Court rejects Eschelon's counterclaim and cross-claim contesting the
15 Commission's decision to adopt Eschelon's alternative position concerning billing for
16 commingled EELs. The Court finds that the Commission's decision is consistent with the
17 requirements of the Act, and is not arbitrary or capricious.
18

19 ORDER FOR JUDGMENT

20 Based upon the foregoing, the Court hereby rules that Orders 18 and 19 of the
21 Commission are AFFIRMED.

22 Dated this 4th day of July, 2010.

23 
24 RONALD B. LEIGHTON
25 UNITED STATES DISTRICT JUDGE
26

³⁸ *US West Communications v. MFS Intelenet*, 193 F.3d 1112, 1117 (9th Cir. 1999).

AO 450 (Rev. 5/85) (Mod. 10/93) Judgment in a Civil Case ◦

United States District Court
WESTERN DISTRICT OF WASHINGTON

JUDGMENT IN A CIVIL CASE

QWEST CORPORATION

v.

CASE NUMBER C09-5259 RBL

WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION, et al,

[] **Decision by Court.** This action came under consideration before the Court. The issues have been considered and a decision has been rendered.

THE COURT HAS ORDERED THAT

The Decision of the Washington Utilities and Transportation Commission are hereby
AFFIRMED.

Dated: August 6, 2010

BRUCE RIFKIN
Clerk

s/ Jean Boring
(By) Deputy Clerk