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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of the Petition of Eschelon Telecom of Utah, Inc. for Arbitration with Qwest Corporation, Pursuant to 47 U.S.C. Section 252 of the Federal Telecommunications Act of 1996	)))))	DOCKET NO. _____

PETITION OF ESCHELON TELECOM OF UTAH, INC. FOR ARBITRATION OF INTERCARRIER NEGOTIATIONS WITH QWEST CORPORATION UNDER THE TELECOMMUNICATIONS ACT OF 1996

Pursuant to 47 U.S.C. § 252 (b), Eschelon Telecom of Utah, Inc. ("Eschelon") requests that the Utah Public Service Commission ("Commission") arbitrate the unresolved issues in the interconnection agreement negotiations between Eschelon and Qwest Corporation ("Qwest") that have taken place pursuant to Sections 251 and 252 of the Telecommunications Act of 1996 ("Telecommunications Act").

In support of this Petition, and pursuant to Utah Code Ann. § 54-8b-2.2 and 47 U.S.C. §252, Eschelon provides the following information.

I. IDENTIFICATION OF THE PARTIES AND THEIR COUNSEL

Eschelon is a Delaware corporation with headquarters in Minneapolis, Minnesota, and is registered and qualified to do business in the State of Utah. Eschelon is certified to provide telecommunications services in Utah pursuant to order of the Commission issued April 6, 1999, in Docket No. 98-2263-01. Eschelon is a facilities-based competitive local exchange carrier ("CLEC") providing local voice and data and resold long distance telecommunications services in Qwest's service territory in Utah.

Eschelon's address is:

Eschelon Telecom of Utah, Inc.
730 2nd Avenue South, Suite 900
Minneapolis, MN 55402

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The Respondent, Qwest, is a Colorado corporation authorized to operate as a telecommunications company providing local exchange and other services throughout the state of Utah. Qwest is an "incumbent local exchange carrier" in Utah as that term is defined in Section 251(h) and 252 of the Federal Act. Qwest is also a "Bell Operating Company" or "BOC," as that term is defined in Section 3(35) of the Act, 47 U.S.C. § 153(35).

Qwest's address is:

Qwest Corporation
1801 California Street
Denver, CO 80202-1043

Upon information and belief, Eschelon states that counsel representing Qwest in this matter is:

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II. NEGOTIATION HISTORY

Eschelon entered into an interconnection agreement ("Agreement") with Qwest dated April 4, 2000, in Docket No. 00-049-06. The Agreement provides that it is to

remain in effect until June 26, 2001. The Parties agreed to continue to operate under the terms and conditions of the existing Agreement until replaced with a successor Agreement.

The multi-state negotiations began in approximately 2001. The negotiations went into hiatus on more than one occasion. For between six months and a year, negotiations were not held while Qwest worked on its multi-state arbitration template. Negotiations also lapsed due to TRO/TRRO developments. When negotiations were in session, the parties held numerous telephone conference calls, most frequently twice a week and lasting two hours per session. Since May of 2004, a representative of the Minnesota Department of Commerce observed or participated in the sessions but did not mediate. On a number of occasions, Qwest and Eschelon mutually agreed to extend the effective negotiation request dates to continue negotiations, with the objective of trying to resolve disputes when possible.

By letter dated October 27, 2005, Eschelon gave Qwest formal notice under Section 252 of the Telecommunications Act of its intent to initiate interconnection agreement negotiations in Arizona, Oregon and Utah. In connection with those negotiations, Eschelon proposed using the same base document as was being used in the negotiations that had been proceeding in Minnesota, Colorado, and Washington, and modifying that document to makes such state-specific changes as may be necessary. A copy of the correspondence to Qwest initiating negotiations is attached to this Petition as Exhibit 1.

Eschelon and Qwest have agreed to extend the effective negotiation request dates in order to continue negotiations with the objective of trying to resolve disputes when possible.

On December 8, 2005, Eschelon and Qwest signed a Bridge Agreement Until New Interconnection Agreements Are Approved ("Bridge Agreement"). Qwest filed the executed document with the Public Service Commission of Utah on January 12, 2006 in Docket No. 06-049-05. Under the Bridge Agreement, Eschelon and Qwest agreed that they would address the change of law effects of the *TRO/TRRO* as part of the new ICA that they were currently negotiating (in Utah as well as five other states), rather than in an amendment to their existing ICA.

Through their extensive ICA negotiations, the parties have been able to resolve many issues. The closed language does not represent the ideal of either side, but the parties did resolve those issues. Eschelon has compromised on an abundance of issues to help reach resolution.[1] The issues that remain are issues that are important to Eschelon's business and its ability to compete meaningfully. Many of the terms and conditions on which Eschelon seeks arbitration have a direct impact on Eschelon's Customers.

[1] While the number of resolved issues far surpasses the number of unresolved issues, there are unresolved issues. The number of unresolved issues is similar to the number of disputed issues in the initial AT&T and MCI state ICA arbitrations with Qwest. While the more recent Qwest-AT&T ICA arbitrations had fewer issues, that arbitration followed literally *years* of 271 multi-state workshops in which many more disputed issues were resolved with the aid of commission staff participation and recommendations, independent monitors or consultants, and multiple carriers. Eschelon has negotiated a contract with Qwest of similar length and breadth without the benefit of such staff and independent monitor recommendations to assist in resolving issues before they reached the Commission in arbitration. And, the more recent Qwest-AT&T arbitration ***preceded the TRO/TRRO***. In Washington, Verizon and CLECs arbitrated more than thirty issues with respect to a TRO/TRRO amendment only (without all the other terms under which the parties do business). Eschelon, a much smaller CLEC, has had to negotiate with Qwest over time through the various iterations of the TRO/TRRO rulings and attempt to resolve those issues and changes of law in negotiations, in addition to all of the other terms and conditions of interconnection in a full interconnection agreement (*i.e.*, not an amendment only).

Eschelon has every incentive to resolve issues to the greatest extent possible without sacrificing its significant business interests or its ability to serve its Customers. Eschelon is a much smaller company than Qwest and arbitration is an expensive and time-consuming process that only serves to take away resources that Eschelon would prefer to spend serving its Customers. In fact, the parties have reached agreement on the overwhelming majority of the provisions contained in an ICA that, including exhibits, is over 500 pages long. Furthermore, the nature of the parties' business relationship is such that issues arise on an almost daily basis and Eschelon has worked cooperatively with Qwest to resolve the vast majority of these day-to-day business issues as well. The Commission can reasonably infer that Eschelon – in winnowing from the large number of daily business issues the relatively few and specific issues that remain – has focused on those remaining issues because it has a compelling business need to do so. A Commission decision arbitrating specific ICA language on these issues is critical and will help to avoid future disputes.

III. DATE OF INITIAL REQUEST FOR NEGOTIATION AND 135 DAYS, 160 DAYS AND NINE MONTHS AFTER THAT DATE

As noted above, Eschelon provided Qwest with formal notice of its intent to initiate negotiations for Utah on October 27, 2005. (Exhibit 1). On a number of occasions, Eschelon and Qwest agreed to extend the effective negotiation request dates to continue negotiations with the objective of trying to resolve disputes when possible. Under the timeline provided under the Telecommunications Act, all outstanding issues are to be resolved within nine months. In light of the number of issues to be resolved and the proceedings that are already pending in other states, Qwest and Eschelon have agreed to waive the nine month deadline and to jointly propose a procedural schedule.

Eschelon's petition is, therefore, timely under the Telecommunications Act and Eschelon requests that the Commission arbitrate all remaining unresolved issues.

IV. PROPOSED ARBITRATION SCHEDULE

In addition to this proceeding, the parties have been engaged in ICA arbitration proceedings in Minnesota, Washington, Colorado, Arizona, and Oregon. In order to avoid scheduling conflicts and promote efficiency, Qwest and Eschelon have agreed to jointly propose the following schedule, recognizing, of course, that this proposal will be subject to modification as the Commission and/or Administrative Law Judge may deem appropriate:

Eschelon's arbitration petition	April 30, 2007
Qwest's response	May 30, 2007
Simultaneous direct testimony	June 29, 2007
Simultaneous rebuttal testimony	July 27, 2007
Simultaneous surrebuttal testimony	August 10, 2007
Hearing commences	September 10, 2007

V. RELEVANT DOCUMENTATION

Eschelon has provided a Table of Contents to the Petition to outline the components of the Petition. Eschelon's Petition includes and incorporates by reference the following Exhibits:

Exhibit 1: Correspondence reflecting Eschelon's request for arbitration and establishing the initial timeline for this arbitration under Section 252 of the Federal Act;

Exhibit 2: Issues by Subject Matter List, which summarizes the disputed issues by topic;

Exhibit 3: Joint[2] Disputed Issues Matrix, which provides a brief narrative describing the parties' positions on the disputed issues and includes:

Appendix i, which is a list of acronyms used in the Petition and its Exhibits;

Appendix ii, which is a list of relevant legal authority cited in the Petition and in Eschelon's position statements set forth in the Disputed Issues Matrix;

Exhibit 4: Proposed Interconnection Agreement ("ICA"), showing resolved and disputed issues;

Exhibit 5: Proposed Exhibits to the Interconnection Agreement.

The format of Exhibits 4 and 5 is intended to help the reader readily distinguish between resolved (closed) and unresolved/disputed (open) issues. The resolved issues are shown in normal type (*i.e.*, black text --they are not redlined). In addition to red-lining which indicates the closed and disputed issues, status lines (such as "OPEN – Eschelon proposed; Qwest does not agree") appear before unresolved language. The status line above each open provision is key to determining which party proposes the redlined modifications (*i.e.*, without the modifications, the language is the other party's proposal). The cover page to Exhibit 4 (the ICA) provides a description and example of the format. The Exhibit A (Rates) to the Proposed Interconnection Agreement has a slightly different format, because redlining is more difficult in Excel. In Exhibit A, Qwest's proposals are shown in red and Eschelon's proposals are shown in blue (with notes in the margin).

[2] Eschelon prepared the Joint Disputed Issues Matrix, including Qwest's proposed language column. Qwest reviewed a draft of the matrix and responded that it had no changes, so it is a joint matrix in that Qwest has reviewed it and concurred with its language. In other states, Qwest also provided its position statements, as Eschelon expected Qwest would do in Utah as well. Eschelon requested position statements from Qwest, and Qwest replied that it would review and return by COB on Wednesday (April 25, 2007). On Thursday morning (April 26, 2007), Qwest informed Eschelon that it would not provide position statements for the matrix. Qwest's position on the unresolved issues, therefore, is that Qwest does not agree.

In some cases, entire paragraphs are closed except for a word or sentence. The format of Exhibit 4 permits the reader to easily determine the disputed language without having to perform a word by word comparison to discover that small change. The redlining is intended to create efficiencies for all when identifying the areas of dispute.

Exhibit 2 to this Response is a list of all of the open issues organized by topic (the "Issues by Subject Matter List"). ***The Issues by Subject Matter List is a roadmap to all of the open issues by Issue Number, ICA Section number, and grouping of issues by topic*.** The Issues by Subject Matter List follows the same grouping and issue numbering as found in the Disputed Issues Matrix, for ease of reference. In the Issues by Subject Matter List and the Disputed Issues Matrix, the issues are generally discussed in the order in which they appear in the proposed Interconnection Agreement ("ICA"). Generally, the first number of the Issue Number refers to the Section number of the ICA. For example, Issue 2-3 refers to contract language that appears in Section 2 of the ICA (entitled "Interpretation and Construction") and issue number three of the total open issues. There are 26 Subject Matter groupings identified on the Issues by Subject Matter List (excluding those that have been closed and are now marked "Intentionally Left Blank"). These represent the topics covered by the open arbitration issues.

In addition to the documentation that accompanies this Petition, Eschelon intends to support its position with the filing of written testimony and other evidence. Eschelon requests that the Commission permit it to file written direct, rebuttal, and surrebuttal testimony in support of this Petition, consistent with the procedures established by the Commission for arbitration proceedings under 47 U.S.C. § 252, as well as the procedural schedule to be established.

VI. DISPUTED ISSUES

A. Identification and Organization of Disputed Issues

The issues that Eschelon understands to be unresolved are identified in the Disputed Issues Matrix (Exhibit 3), the Proposed Interconnection Agreement (Exhibit 4), and Exhibits A, C, I, N and O to the Proposed Agreement (Exhibit 5). Eschelon incorporates by reference in this Petition the open issues and Eschelon's proposed language, positions, and cited legal authority with respect to those issues as set forth in Exhibits 3, 4, and 5 to this Petition. To the extent Qwest asserts that any other provisions remain in dispute, Eschelon reserves the right to present evidence and argument as to why those provisions were considered closed and why they should be resolved in the manner shown in the Proposed Interconnection Agreement.

B. Standard of Review

This arbitration must be resolved by the standards established in Sections 251 and 252 of the Act and the rules adopted by the Federal Communications Commission ("FCC").[3] Section 252(c) of the Act requires a state commission resolving open issues through arbitration to:

> (1) ensure that such resolution and conditions meet the requirements of section 251 of this title, including the regulations prescribed by the [FCC] pursuant to section 251 of this title; [and]
>
> (2) establish any rates for interconnection, services, or network elements according to subsection (d) of this section . . .[4]

The Commission is required to make an affirmative determination that the rates, terms and conditions that it prescribes in the arbitration proceeding for interconnection are

[3] *See* 47 U.S.C. §§251 and 252; *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 13042 (1996) (*"First Report and Order"*); 47 C.F.R. § 51.5 *et seq.*

consistent with the requirements of Sections 251(b) and (c) and Section 252(d) of the Act.[5] The Commission may also, under its own state law authority, impose additional requirements pursuant to Section 252(e)(3) of the Act, as long as such requirements are consistent with the Act and the FCC's regulations.[6]

Section 251 of the Act provides the minimum standards for Qwest in negotiating and providing interconnection to CLECs, including Eschelon. Under the Act, Qwest must provide interconnection with CLECs that is at least equal in quality to that which Qwest provides to itself and "on rates, terms and conditions that are just, reasonable, and nondiscriminatory . . . ."[7] This Section further requires that Qwest provide nondiscriminatory access to UNEs at any technically feasible point, individually and in combinations, at cost-based rates.[8] Similarly, this Section requires that Qwest provide, at rates, terms and conditions that are just, reasonable and nondiscriminatory, for physical collocation of equipment necessary for interconnection or access to UNEs at Qwest's premises (except that Qwest may provide for virtual collocation if it can demonstrate to the Commission that physical location is not practical for technical reasons or because of space limitations).[9] Section 252(c) requires that a state commission, "in resolving by arbitration" any open issues and imposing conditions upon the parties to the agreement,

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[4] 47 U.S.C. §252(c).

[5] 47 U.S.C. § 252(d).

[6] 47 U.S.C. §252(e); *First Report and Order*, ¶¶ 233, 244.

[7] 47 U.S.C. § 251(c)(2).

[8] 47 U.S.C. § 251(c)(3).

[9] 47 U.S.C. § 251(c)(6).

"shall establish any rates for interconnection, services or network elements according to subsection (d) of this section."[10]

Section 252(d) of the Act sets forth the applicable pricing standards for interconnection, network elements, and resale at wholesale rates of ILEC retail services. Section 252(d) also sets the applicable pricing standard for transport and termination of traffic.[11] The FCC rules also recognize that the Commission may set rates in arbitration and therefore impose a duty to produce in negotiations cost data relevant to setting rates in arbitration.[12]

C. The Commission Has A Continuing Responsibility For Oversight Over The Terms And Conditions of Interconnection Between Qwest And CLECs.

For disputed issues for which Qwest has proposed contract language, Qwest agrees with Eschelon that the Commission should arbitrate specific contract language to address those issues. For the remaining disputed issues, which concern primarily provisioning intervals or provisions of Section 12 of the ICA, Eschelon has proposed contract terms that describe the parties' respective obligations and Qwest has proposed that the term be eliminated altogether, often in favor of a reference to Qwest's Product Catalog ("PCAT") or Service Interval Guide ("SIG") on its website. For these issues, Qwest offers no alternative language to describe its commitments; indeed, it offers no

[10] 47 U.S.C. § 252(c). Section 252(d) of the Act sets forth the applicable pricing standards for interconnection, network elements, and resale at wholesale rates of ILEC retail services. It states that rates shall be cost-based and nondiscriminatory. 47 U.S.C. § 252(d)(1)(A)(i) & (ii).

[11] 47 U.S.C. § 252 (d).

[12] *See* 47 C.F.R. § 51.301(c)(8)(iii) ("If proven to the Commission, an appropriate state commission, or a court of competent jurisdiction, the following actions or practices, among others, violate the duty to negotiate in good faith: . . . (8) Refusing to provide information necessary to reach agreement. Such refusal includes, but is not limited to: . . . (ii) Refusal by an incumbent LEC to furnish ***cost data*** that would be relevant to ***setting rates*** if the parties were ***in arbitration***.") (emphasis added).

commitments at all. Thus, rather than including specific terms and conditions in an interconnection agreement over which the Commission exercises oversight, whose terms cannot be changed unless the contract is amended by either mutual agreement or arbitration, and which will be available for opt in by other CLECs, Qwest would relegate those terms to its PCAT and, in some cases, to its Change Management Process ("CMP"), its website, or its own discretion.

For each provision that Eschelon advocates, Eschelon will present evidence of its business reasons for including the provision in the ICA. In many cases, those business reasons will relate directly to the service that Eschelon is able to provide to its Customers. Qwest's argument is that Eschelon's business needs are irrelevant because the specific provisions that Qwest has identified are somehow qualitatively different such that they are not appropriate to be included in an ICA. Thus, Qwest would have the Commission not consider the merits of Eschelon's proposals or the business purposes that those proposals are intended to address. Ultimately, in order to fulfill its responsibility to assure that the rates, terms and conditions of interconnection between Eschelon and Qwest are just, reasonable and nondiscriminatory, the Commission will need to evaluate the disputed provisions on their merits, rather than taking the short cut that Qwest urges.

1. Qwest's CMP and PCAT do not replace arbitrated interconnection agreements.

The Telecommunications Act requires that the Commission arbitrate interconnection agreements whose terms and conditions are tailored to their particular business needs. As the FCC has recognized, the Telecommunications Act vests the state commissions with broad authority in establishing terms and conditions of interconnection:

> We expect that the states will implement the general nondiscriminatory rules set forth herein by adopting, *inter alia*, specific rules determining the timing in which incumbent LECs must provision certain elements, *and any other specific conditions they deem necessary to provide new entrants, including small competitors, with a meaningful opportunity to compete in local exchange markets.*[13]

The interconnection agreement that contains the negotiated and arbitrated rates, terms and conditions for interconnection, UNEs, and access to UNEs, is typically a lengthy, detailed document. The Telecommunications Act envisions that the interconnection agreement will be a "working document"[14] containing "many and complicated" terms.[15]

In the context of determining the types of agreements that are required under the Telecommunications Act to be filed with state commissions, Qwest attempted to reduce the interconnection agreement required by the Act to a glorified product and rate sheet. The FCC, however, expressly rejected Qwest's argument, stating:

> We therefore disagree with Qwest that the content of interconnection agreements should be limited to the schedule of itemized charges and associated descriptions of the service to which the charges apply. Considering the many and complicated terms of interconnection typically established between an incumbent and competitive LEC, we do not believe that section 252(a)(1) can be given the cramped reading that Qwest proposes.[16]

Under Section 54-8b-2.2(D)(i) of the Utah statutes, "[a] telecommunications corporation shall file with the Commission the prices, terms and conditions of any agreement it makes with the interconnection of essential facilities or the purchase of

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[13] *First Report and Order* at ¶ 310 (emphasis added); *see also US WEST Communications, Inc. v Hix*, 57 F. Supp. 2d 1112, 1119 (D. Colo. 1999).

[14] TCG Milwaukee, Inc. v. Public Services Comm'n of Wisconsin, 980 F. Supp. 952, 999 (W.D. Wisc. 1997); US WEST Communications, Inc. v Hix, 57 F. Supp. 2d 1112, 1119 (D. Colo. 1999).

[15] In the Matter of Qwest Communications International, Inc. Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements under Section 252(a)(1), 17 FCC Red 19337 at ¶ 8 (rel. October 4, 2002) ("Qwest Declaratory Ruling").

[16] Qwest Declaratory Ruling at ¶ 8.

essential services."[17] The FCC has defined "interconnection agreement" broadly, to include "*any* agreement that creates an ongoing obligation pertaining to resale, number portability, dialing parity, access to rights-of-way, reciprocal compensation, interconnection, unbundled network elements, or collocation."[18] In doing so, the FCC placed no arbitrary limitation on this definition for issues labeled as "process" issues.

The FCC furthermore has emphasized the continuing role of state commission review of interconnection agreements, observing that "unlike the terms of an SGAT, web-posted materials are not subject to state commission review, further undermining the congressionally established mechanisms of section 252(e)."[19] The FCC, which made this ruling more than a year after Qwest implemented its CMP procedures, specifically said there is no "web-posting exception" to Section 252.[20] Despite this regulatory regime and related history, Qwest argues that several arbitration topics should be excluded from the publicly available interconnection agreement because terms should be standard (providing "uniformity" for "multiple CLECs") or because the topic may conveniently be labeled a "process" issue. Instead of including those terms in the ICA, Qwest urges that CMP is the only appropriate forum where those issues may be addressed.

[17] Utah Code, Section 54-8b-2.2(D)(i).

[18] *In the Matter of Qwest Corporation Apparent Liability for Forfeiture*, FCC File No. EB-03-IH-0263, Notice of Apparent Liability for Forfeiture at ¶ 11 (rel. March 12, 2004) ("*Qwest Forfeiture Order*").

[19] Qwest Forfeiture Order at ¶ 32.

[20] Qwest Forfeiture Order at ¶ 32.

a. Qwest's standardization argument[21] should be rejected.

Nothing in the Telecommunications Act requires that the terms and conditions of an interconnection agreement be identical for all CLECs. To the contrary, the purpose and structure of the Act reflect exactly the opposite: that an interconnection agreement should be tailored to accommodate the specific needs of the CLEC that is a party to it, in order to provide that CLEC with a "meaningful opportunity to compete."

First, the Act requires that the ILEC engage in negotiations with any CLEC that requests it and, when those negotiations do not result in a completed agreement, to participate in arbitration. The Act does not provide for negotiations and arbitration between the ILEC and the "CLEC community," generally. It does not provide for state commissions to conduct generic dockets in order to develop identical terms and conditions for all CLECs. The Act does not limit the ILEC's obligation to that of simply filing a tariff that reflects terms and conditions of interconnection. Rather, it requires that the ILEC negotiate in good faith with each individual CLEC that requests such negotiations.

In the context of the requirements for in-region interLATA entry, the Act permits the incumbent to satisfy those requirements, in part, by making available a commission-approved "statement of the terms and conditions that the company generally offers to provide such access and interconnection" (commonly referred to as a "Statement of

[21] *See*, *e.g.*, Qwest position statements, Washington Joint Disputed Issues Matrix, Ex. 1 to Qwest Petition for Arbitration (Aug. 9. 2006), pp. 1, 5, 6, 7, 8, 58, 76, 81, 168, 173, 174, 197 ("This issue involves processes that affect all CLECs, not just Eschelon. Eschelon is attempting to import PCAT-like process language into the ICA and thereby undermine the Commission approved CMP process. The entire purpose of CMP was to ensure that the industry (not just Qwest or one CLEC) is involved in creating and approving processes so that processes are uniform among all CLECs. Processes that affect all CLECs should be addressed through CMP, not through an arbitration involving a single CLEC.") (same position statement repeated for several issues).

Generally Available Terms" or "SGAT").[22] Had Congress intended that the interconnection agreement be a "one size fits all" document, it would have provided the SGAT as the sole means by which terms and conditions of interconnection would be made available by ILEC. That it did not do so shows that Congress recognized the need for individual CLECs to be able to enter into agreements that are specific to their particular competitive needs.

Although contrary to the position it has taken in this case, Qwest's advocacy before the FCC has recognized the need and appropriateness for specific, individualized interconnection agreements that are tailored to a CLEC's particular needs. On October 16, 2003, Qwest, in opposing the then current application of the FCC's "pick and choose" rule, filed extensive comments extolling the virtues of negotiated interconnection agreements and the importance of the "…dynamic, innovative interconnection negotiations intended by the Telecommunications Act of 1996."[23] Qwest recognized that: "ILECs and CLECs have a fundamental interest in making the interconnection process as cooperative and open as possible, since both parties benefit from well-negotiated and mutually beneficial wholesale arrangements."[24] Even more specific to the point here, Qwest argued that:

> [T]he pick-and-choose rule restricts the ILEC's willingness to *tailor negotiations and contracts to the specific needs of CLECs and their business plans*. Further, the current rule does not realistically reflect the ordinary trade-offs and give-and-take that characterize free negotiations, in which an ILEC would ordinarily be willing to give up one term of a contract in order to get another.[25]

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[22] 47 U.S.C. § 271(c)(1)(B).

[23] *Comments of Qwest Communications International Inc*., CC Docket Nos. 01-338, 96-98, 98-147, October 16, 2003, page ii.

[24] *Id*., 3-4.

[25] *Id*., 4.

Finally, Qwest argued that, "The ability of carriers to negotiate binding agreements with each other was a cornerstone of the Act."[26]

The ICA similarly recognizes that interconnection agreements are not intended to be "one size fits all" and envisions that there will be differences between the terms and conditions contained in the ICA and the terms published in Qwest's PCAT. To that end, agreed upon language in the ICA provides:

> Unless otherwise specifically determined by the Commission, in cases of conflict between the Agreement and Qwest's Tariffs, PCAT, methods and procedures, technical publications, policies, product notifications or other Qwest documentation relating to Qwest's or CLEC's rights or obligations under this Agreement, then the rates, terms and conditions of this Agreement shall prevail.[27]

The ICA further provides that "*Qwest agrees that CLEC shall not be held to the requirements of the PCAT*."[28]

The CMP document, too, makes room for substantive differences between changes implemented through CMP and the terms and conditions of CLEC interconnection agreements:

> In cases of conflict between the changes implemented through this CMP and any CLEC interconnection agreement (whether based on the Qwest SGAT or not), the rates, terms and conditions of such interconnection agreement shall prevail as between Qwest and the CLEC party to such interconnection agreement. In addition, if changes implemented through this CMP do not necessarily present a direct conflict with a CLEC interconnection agreement, but would abridge or expand the rights of a party to such agreement, the rates, terms and conditions of such interconnection agreement shall prevail as between Qwest and the CLEC party to such agreement.[29]

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[26] *Id.*, 6.

[27] ICA, Section 2.3. Similar language appears in the SGAT, Section 2.3.

[28] ICA, Section 4 (definition of "Product Catalog"). This same language appears in the SGAT, Section 4.0.

[29] CMP Document Section 1.0.

These provisions of the ICA and the CMP document would be meaningless if the terms and conditions of interconnection are required to be standardized, as Qwest claims. They would instead provide that, in cases, of conflict, CMP controls to maintain uniformity. In the Qwest-Eschelon interconnection agreement arbitration in Minnesota, the commission upheld the following finding of the Administrative Law Judges (ALJs):

> The CMP document itself provides that in cases of conflict between changes implemented through the CMP and any CLEC ICA, the rates, terms and conditions of the ICA shall prevail. In addition, if changes implemented through CMP do not necessarily present a direct conflict with an ICA but would abridge or expand the rights of a party, the rates, terms, and conditions of the ICA shall prevail.[30] Clearly, the CMP process would permit the provisions of an ICA and the CMP to coexist, conflict, or potentially overlap. The Administrative Law Judges agree with the Department's analysis that any negotiated issue that relates to a term and condition of interconnection may properly be included in an ICA, subject to a balancing of the parties' interests and a determination of what is reasonable, non-discriminatory, and in the public interest. Eschelon has provided convincing evidence that the CMP process does not always provide CLECs with adequate protection from Qwest making important unilateral changes in the terms and conditions of interconnection.[31]

In its *WA Covad Arbitration Order*,[32] the Washington commission specifically rejected Qwest's argument that practices that resulted from Qwest's Section 271 proceedings were required to be uniform in interconnection agreements that Qwest enters into with individual CLECs:

> While Qwest relies heavily on "consensus" reached in the Section 271 proceeding as a strong reason for retaining the 30-day period, that

[30] Ex. 1 (Albersheim MN Direct) at RA-1, part 1.0, page 15.

[31] Arbitrators' Report, 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 ["Minnesota Qwest-Eschelon ICA Arbitration"], OAH No. 3-2500-17369-2; MPUC Docket No. P-5340,421/IC-06-768 (Jan. 16, 2006) ("Arbitrators' Report"), at ¶¶ 21-22; aff'd Order Resolving Arbitration Issues, Requiring Filed Interconnection Agreement, Opening Investigations and Referring Issue to Contested Case Proceeding, MPUC Docket No. P-421/CI-07-370; P-421/CI-07-371 (March 30, 2007), p. 22 ¶ 1 ["Order Resolving Arbitration"].

[32] Arbitrator's Report and Decision, In The Matter Of The Petition For Arbitration Of Covad Communications Company, With Qwest Corporation, Pursuant To 47 U.S.C. Section 252(B) And The Triennial Review Order, WUTC Docket No. UT-043045, Order No. 04 (Nov. 2, 2004) ("WA Covad Arbitration Order").

> argument does not apply to an arbitration proceeding. Parties engage in arbitration to enter into an agreement tailored to the companies' needs, not to adopt a standard agreement. Covad is not bound to the 30 day payment period simply because it was a party to the SGAT negotiations and hearings.[33]

In addition, while Covad participated fully in the 271 proceedings, the Arizona Commission indicated that a Staff investigation into Qwest's compliance with Section 252(e) revealed that four parties, including Eschelon, "were precluded from actively participating in the 271 process."[34]

b. Qwest's "process" labeling argument should be rejected.

Qwest has also claimed that language describing "process" is inappropriate for inclusion in interconnection agreements.[35] First, applying this standard, it is unclear what Qwest would contend should be the interconnection agreement, beyond descriptions of the products and rates. The FCC, however, has unequivocally rejected the notion that the

[33] *WA Covad Arbitration Order* at note 16 to ¶100. Although the Commission rejected Covad's 30-day proposal (which is not an issue in this case), it did so on other grounds. Similarly, the arbitrator in the recent Verizon arbitration case in Washington said:

> The fact that there are differences in change of law provisions among various agreements is not discriminatory: It reflects the variations in negotiation and arbitration of terms in interconnection agreements. The interconnection agreements are filed with the Commission and available for review. CLECs have opted into a number of agreements, including the agreement originally arbitrated by MCI.

Washington State Utilities and Transportation Commission, Docket UT-043013, Order No. 17 Arbitrator's Report and Decision dated July 8, 2005 at ¶79, ("*Washington ALJ Report*"), affirmed in relevant part in "Washington Order No. 18."

[34] *AZ 271 Order* at ¶ 3-4.

[35] Transcript, Minnesota Qwest-Eschelon ICA Arbitration, Vol. 1, p. 58, lines 3-11 (Ms. Albersheim, Qwest) ("Q Now, just as an overall question, am I correct to understand from your testimony that there are some issues that should be addressed only in the CMP and should not be in an interconnection agreement? A Yes. Q Is that right? A I believe that process and procedure detail, which is covered in our PCATs, is intended to be managed through the CMP and not through individual interconnection agreements.").

terms of an interconnection agreement are properly limited to a "schedule of itemized charges and associated descriptions of the service to which the charges apply."[36]

Second, the proposed ICA is replete with agreed upon language that describes the "manner in which something is accomplished" and could be described as a "process." In any event, to the extent that terms can be described as "processes" or "procedures," the FCC has said that processes and procedures are appropriate content for interconnection agreements:

> Individual incumbent LEC and competitive LEC arrangements governing the ***process and procedures*** for obtaining access to an UNE to which a competitive LEC is entitled, are more appropriately addressed in the context of individual interconnection agreements pursuant to section 252 of the Act.[37]

Labeling something as a "process" simply will not aid the Commission in determining whether a provision should be included in the interconnection agreement. Rather, the Commission must evaluate the disputed provisions on their merits and determine, with respect to each, whether those terms should be contained in the interconnection agreement, not based on some abstract and ambiguous standard, but based on the evidence concerning the specific business needs that those provisions are intended to address.

The Arizona Commission, in connection with Qwest's Section 271 application, rejected an attempt by Qwest to make what Qwest characterized as a "process change" through CMP.[38] Specifically, the Arizona Commission said:

> Staff agrees with Eschelon with respect to the recently imposed

[36] See Qwest Declaratory Ruling at ¶ 8.

[37] *TRRO* ¶358 (emphasis added).

[38] In the Matter of U.S. WEST Communications, Inc.'s Compliance with Section 271 of the Telecommunications Act of 1996, Docket No. T-00000A-97-0238, Decision No. 66242 ("AZ 271 Order").

> construction charges on CLECs for line conditioning. Staff is extremely concerned that Qwest would implement such a significant change through its CMP process without prior Commission approval. As noted by AT&T, during the Section 271 proceeding, the issue of conditioning charges was a contested issue. Language was painstakingly worked out in the Qwest SGAT dealing with the issue of line conditioning which Qwest's new policy is at odds with. Staff recommends that Qwest be ordered to immediately suspend its policy of assessing construction charges on CLECs for line conditioning and reconditioning and immediately provide refunds to any CLECs relating to these unauthorized charges. Qwest should reinstitute its prior policy on these issues as reflected in its current SGAT. If Qwest desires to implement this change, then it should notify the Commission in Phase III of the Cost Docket, but must obtain Commission approval of such a change prior to its implementation. To the extent Qwest does not agree to these conditions, Staff recommends that Qwest's compliance with Checklist Items 2 and 4 be reopened. We agree with Staff.[39]

What this demonstrates is that Qwest's decision to label a change as a matter of "process" does not mean that CMP is the only appropriate forum for addressing that change.

2. Inclusion of terms and conditions in an interconnection agreement is necessary to provide the certainty that Eschelon needs to be able to effectively compete.

The FCC has recognized the need for terms and conditions to be contained in interconnection agreements in order to provide CLECs with the certainty and reliability that they need to compete effectively. Thus, in rejecting Qwest's contention that information concerning its products that it posts on its website need not be contained in a publicly-filed interconnection agreement, the FCC stated that, "[A] 'web-posting exception' would render [Section 252(a)(1)] meaningless, *since CLECs could not rely on a website to contain all agreements on a permanent basis*."[40] While the interconnection agreement can be amended and therefore is not "permanent" in the sense that it is frozen in time, the FCC recognized that permanency is needed for the term of the contract when

[39] *AZ 271 Order* at ¶ 109.

[40] *Qwest Forfeiture Order* at ¶ 32 (emphasis added).

not amended. Including language in the interconnection agreement will minimize future disputes. The objectives of providing clarity and certainty and helping avoid future disputes are legitimate bases for determining that specific language should be included in an interconnection agreement.

Eschelon depends on the services that it receives from Qwest to be able to serve its Customers. To plan its business and compete effectively Eschelon, like any business, requires certainty and reliability in its relationship with its most significant vendor. When Qwest changes its process, this requires that Eschelon also change its process. Yet, if a term is contained in Qwest's PCAT but not the interconnection agreement, Qwest is free to change that term without Eschelon's consent; Eschelon will not have certainty or reliability. CMP permits Qwest to implement most changes, even changes that are universally opposed by CLECs, by simply posting a notice and waiting 31 days or less.

Eschelon is not seeking to force Qwest to make substantial changes in how it does business. Indeed, several of the provisions that Eschelon proposed, and Qwest has opposed on the ground that they deal with issues that should be addressed in CMP, did not require Qwest to make any change at all. Rather, those proposals merely reflected Qwest's current practices, often as reflected in its PCAT. In fact, several of the issues for which Qwest took this same position closed for all six states after the Minnesota ruling[41]

[41] Minnesota Arbitrators' Report, ¶229 (PSONs); ¶¶ 244 & 246 (Fatal Rejection Notices); ¶¶ 249 & 251 (Trouble Report Closure); *see id*. ("Qwest would delete all of the disputed language. In the section concerning trouble report closure, it would simply reference the procedures available on its wholesale website. Qwest maintains inclusion of this language in Eschelon's ICA would 'lock in' these processes, preclude future changes, and require Qwest to operate in one way for Eschelon and another way for all other CLECs. . . . The disputed language exactly reflects Qwest's current practice. Inclusion of Eschelon's language in the ICA would not prohibit future changes, whether through the CMP or ICA amendment. Eschelon's language merely defines the minimum elements that make these resources useful to CLECs. Eschelon's language should be adopted for these

with Eschelon language in the ICA, showing that they are appropriate for inclusion in an ICA. For the remaining issues of this type, Qwest may deny that Eschelon's language reflects its current practice, but Eschelon will show that it was Qwest's practice even though Qwest may deny it in arbitration (see Issue 12-72, Jeopardies & Issue 12-87 Controlled Production) or Qwest has changed it unilaterally over CLEC objection (see Issue 12-67, Expedites). For other issues, Eschelon will show that its proposal is similar to or incorporates existing Qwest practices (Issue 1-1, Intervals & Issue 12-64 Root Cause Analysis and Acknowledgement of Mistakes). By including those provisions in the interconnection agreement, the Commission will be assuring that terms that Eschelon has come to rely on, and in some cases expended substantial resources helping to develop, will continue to be available.

Although evidence in this case will reveal weaknesses in CMP that underscore the inadequacy of CMP as a vehicle for providing certainty and reliability, Eschelon's case is not an attack on CMP. Eschelon emphasizes that the Commission need not find that CMP is "broken" or "bad" to rule in Eschelon's favor on any particular issue. Rather, it need only recognize, as both the Telecommunications Act and the CMP document itself recognize, that the terms and conditions of interconnection agreements may vary, depending on the particular needs of the parties to those agreements.

3. Inclusion of terms and conditions in an interconnection agreement permits appropriate Commission oversight and prevents discrimination.

Including a particular term in the ICA does not mean that that term can never be changed or that the ICA is inflexible. Agreed upon provisions of the ICA describe the

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issues.").

process by which either party may seek an amendment of the ICA, first through negotiations and, if those negotiations are unsuccessful, by petitioning the Commission. Including these terms in the ICA means that flexibility will not be entirely one-sided and that the burden will be on the party seeking a change to the status quo to justify that change.

Qwest has accused Eschelon of trying to "turn back the clock" by failing to recognize what it characterizes as "Congress' intent to move toward less regulation as competition in the local exchange market increases."[42] In fact, the Telecommunications Act, when it was adopted, carved out a specific role for state commissions to assure that the "rules of the game" are fair, just, and nondiscriminatory. Qwest discusses changes in the law that have taken place since the passage of the Telecommunications Act, particularly with respect to the identification of elements that ILECs must offer to CLECs on an unbundled basis. What has not changed, however, is the important role that state commissions play in arbitrating and enforcing interconnection agreements. The Act has not been repealed, and the state commissions still play that role. By requiring that terms and conditions of interconnection be included in an ICA, the Commission will be assuring that it continues to serve this important oversight function. In fact, the very changes in law upon which Qwest relies reaffirm that the Commission should perform this function.

Although the FCC may have allowed "less regulation" for elements that ILECs no longer must offer on an unbundled basis, those elements are not at issue in the interconnection agreement and are not a part of this arbitration. The reverse is also true.

The FCC *denied* the ILECs' request for less regulation for elements that ILECs must continue to offer on an unbundled basis. Those elements are a part of this arbitration and the FCC's rejection of the ILECs' request means that UNE terms belong in an interconnection agreement and remain subject to regulation and Commission oversight. Any Qwest argument for less regulation reveals its true intent to relegate issues to CMP because it allows Qwest to achieve less regulation (by avoiding regulation in the form of Commission oversight) and not because CMP is a superior means of dealing with these issues.

Nor is Eschelon trying to get a special deal that is not available to other CLECs. To the contrary, the Telecommunications Act's requirement that interconnection agreements be publicly filed is one of the Act's primary mechanisms for preventing discrimination. The Act not only requires that interconnection agreements be publicly filed and approved by the state commission, it entitles a CLEC to opt-in to an interconnection agreement entered into by another CLEC, providing:

> A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.[43]

In requiring that terms and conditions of interconnection be made available on an equal basis to all CLECs, Section 252(i) plays a critical role in assuring that the ILEC does not engage in discrimination. As the FCC has observed:

> Requiring all contracts to be filed also limits an incumbent LEC's ability to discriminate among carriers, for at least two reasons. First, requiring

[42] Qwest Corporation's Petition for Arbitration, In the Matter of the Petition of Qwest Corporation for Arbitration with Eschelon Telecom, Inc., Pursuant to 47 U.S.C. Section 252 of the Federal Telecommunications Act of 1996 ("*Qwest Washington Petition*") at ¶ 31.

[43] 47 U.S.C. § 252(i); *see also* 47 C.F.R. § 51.809.

> public filing of agreements enables carriers to have information about rates, terms, and conditions that an incumbent LEC makes available to others. Second, any interconnection, service or network element provided under an agreement approved by the sate commission under section 252 must be made available to any other requesting telecommunications carrier upon the same terms and conditions, in accordance with section 252(i).[44]

Because the Act allows a CLEC to opt in to an interconnection agreement entered into by another CLEC, the terms of conditions of interconnection need not be identical for all CLECs; they merely must be equally available to all.[45]

Finally, the Commission should be extremely skeptical of Qwest's implication that it is acting out of a desire to somehow protect other CLECs**.** As the FCC has observed:

> [I]ncumbent LECs have little incentive to facilitate the ability of new entrants, including small entities, to compete against them and, thus have little incentive to provision unbundled elements in a manner that would provide efficient competitors with a meaningful opportunity to compete. We are also cognizant of the fact that incumbent LECs have the incentive and the ability to engage in may kinds of discrimination. For example, incumbent LECs could potentially delay providing access to unbundled network elements, or they could provide them to new entrants at a degraded level of quality.[46]

Now that Qwest has its approval under Section 271, Qwest has even less incentive to cooperate. Qwest's lack of incentive to voluntarily cooperate with Eschelon's efforts to compete against it make it all the more important that Eschelon's interconnection agreement contain binding commitments of sufficient specificity as to provide Eschelon with a meaningful opportunity to compete. Absent such commitments, there will be very

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[44] *First Report and Order* at ¶ 167; *see also, id.* at ¶ 1321 (concluding that allowing a CLEC to opt in to an existing interconnection agreement on an expedited basis "furthers Congress's stated goals of opening up local markets to competition and permitting interconnection on just, reasonable, and nondiscriminatory terms . . . .")

[45] See Washington ALJ Report, at ¶79.

[46] First Report and Order at ¶ 307.

little to prevent Qwest from making changes to the ways in which Eschelon is able to obtain access to UNEs, to Eschelon's competitive disadvantage and to the disadvantage of Eschelon's Customers in Utah.

D. Specific Disputed ICA Provisions

With this background in mind, Eschelon will now address the specific disputed issues that the parties have identified for arbitration. Section numbers below correspond to the numbering of the Issues by Subject Matter List.

1. Interval Changes: Issues 1-1, 1-1(a), 1-1(b), 1-1(c), 1-1(d), 1-1(e)

Issue 1-1 and the related sub-issues concern provisioning intervals. In each instance, Eschelon proposes language requiring that interval changes will be accomplished by amending the contract, using a streamlined amendment process (that is currently available for new products). Qwest takes the position that it should be free to change intervals through CMP, without first obtaining either CLEC agreement or Commission approval.

Intervals are particularly significant because they impact the timing of Eschelon's delivery of service to its Customers. Changes in intervals critically impact the quality of service that Eschelon is able to offer its Customers and create other operational issues, particularly when the interval is lengthened. Lengthening of intervals forces a carrier to provide worse service to its Customers (who must wait longer for service) while also

incurring costs and spending resources on adjusting internal systems and processes to adjust to the longer interval.[47]

Eschelon has made two alternative proposals with respect to interval changes. The first proposal is that, if Qwest lengthens an interval, the ICA must be amended (using the streamlined process), thus allowing the Commission the opportunity to exercise its oversight, to assure that the longer interval continues to be consistent with the public interest. Under this proposal, Qwest could make changes that shorten intervals through CMP, without amending the contract. Under Eschelon's second proposal, it would be necessary to amend the ICA (also using the streamlined process) to either lengthen or shorten an interval.

Eschelon's first of its two alternative proposals for Section 1.7.2 would require an amendment of the ICA only for changes that result in *longer* intervals. Qwest has said that since it obtained 271 authority, all modifications that it has made to intervals have been to shorten the intervals.[48] Qwest will not, however, commit to continuing that trend for the next few years, doubtless because, unlike in previous years, no 271 approvals are pending to provide Qwest with an incentive to shorten intervals.

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[47] The Washington Commission recognized the potentially harmful effects of lengthened provisioning intervals in the context of its review of Qwest's Section 271. In that case, Qwest proposed an interval for DS-1 loops that was longer than the interval that the Commission had established when it approved US WEST's merger with Qwest, and the Commission directed that the proposed interval be reduced to that the Commission had previously approved. Twentieth Supplemental Order; Initial Order (Workshop Four): Checklist Item No. 4; Emerging Services, General Terms and Conditions, Public Interest, Track A, and Section 272, *In the Matter of the Investigation Into U S WEST COMMUNICATIONS, INC.'s Compliance With Section 271 of the Telecommunications Act of 1996* and *In the Matter of U S WEST COMMUNICATIONS, INC.'s Statement of Generally Available Terms Pursuant to Section 252(f) of the Telecommunications Act of 1996*, Washington Docket Nos. UT-003022 and UT-003040 (November 14, 2001) ("*WA 271 Order*") at ¶ 125. In the recent Verizon-CLEC arbitration in Washington, the Commission found it appropriate to include an interval in the interconnection agreement to protect both the ILEC and CLECs "from unnecessary delay and gamesmanship." *Washington Order No. 18* at ¶¶ 70, 114.

[48] See Qwest Washington Petition at ¶ 137. Since then, Qwest testified: "I erred when I stated . . . that Qwest has only decreased intervals. Subsequent research found this one unopposed change request that increased an interval." Albersheim CO Answer Testimony, p. 36, footnote 9.

2. Change in Law - Rate Application: Issue 2-3

Issue 2-3 (Application of Rates) and Issue 2-4 (Effective Date of Legally Binding Changes) relate to open provisions in Section 2.2 of the ICA and one open provision in Section 22.4.1.2 of the ICA. These issues are related to change in law. Issue 2-3 is specific to rates and concerns when Commission-ordered rate changes will take effect. Eschelon proposes the following sentence from Section 2.2 of the SGAT remain unchanged: "Any amendment shall be deemed effective on the effective date of the legally binding change or modification of the Existing Rules for rates, and to the extent practicable for other terms and conditions, unless otherwise ordered." This language respects the authority of the relevant body to determine when issuing an order changing rates when that ruling will take effect. Eschelon has also offered to add the following sentence to address Qwest's stated concerns: "The rates in Exhibit A and when they apply are addressed in Section 22." Qwest proposes adding the following sentence to agreed upon language in Section 2.2: "Rates in Exhibit A include legally binding decisions of the Commission and shall be applied on a prospective basis from the effective date of the legally binding Commission decision, unless otherwise ordered by the Commission." Eschelon opposes this addition to Section 2.2 because another section of the ICA, Section 22.0 ("Pricing"), already deals with the application of rates in Exhibit A and does so more thoroughly and clearly than Qwest's proposed single sentence here. Section 22.4.1.2, which the companies have agreed upon, states: "Such Commission-approved rates shall be effective as of the date required by a legally binding order of the Commission." Unlike Qwest's language, Section 22.0 does not attempt to pre-judge whether the rates will be applied on a prospective basis and leaves that issue to the

discretion of the Commission to decide at the appropriate time. Adopting Eschelon's proposal provides the Commission more flexibility to decide the issue later at a time when, unlike in this arbitration, the Commission will have the relevant facts of the pending rate case before it from which to determine the appropriate effective date.

The Commission has, in other cases, determined that the circumstances warranted use of an interim rate that would be subject to true up when the final rate was determined.[49] The agreed upon language of Section 22.4.1.2 is consistent with the Commission's past practice, because it leaves it to the Commission to decide when a rate change will take effect. Qwest's new proposal in Section 2.2, in contrast, attempts to create an unnecessary default that rate changes will be applied prospectively. The potential inconsistency between Section 22.4.1.2 and Qwest's proposal for Section 2.2 creates an ambiguity that is likely to lead to additional litigation.

3. Change in Law - Effective Date of Legally Binding Changes: Issue 2-4

When a change in the law takes effect is a question that can have very significant financial and other consequences. Because of the potential for future disputes, it is important that ICA language on this issue: 1) provide the parties with clear guidance on when a change of law will take effect, so that they can plan accordingly; 2) not provide an opportunity for any party to delay the effect of a change in the law; 3) preserve the authority of the relevant regulatory body – i.e., the Commission, the FCC, Congress – to determine when changes in the law will be given effect.

[49] *See* SGAT Sections 9.20.3.4, 9.21.3.5, 9.24.3.5 (all providing that these interim rates are subject to true-up). While these elements may no longer be available, the Commission found that a true-up was appropriate at that time when they were available. The Commission may or may not find a true-up appropriate for any particular rate element in the future. Eschelon's proposal (relying upon closed

Agreed upon language of Section 2.2 provides that, when a change of law occurs, the ICA "shall be amended to reflect such legally binding modification or change."

Regarding Issue 2-4, Qwest proposes, when an order that changes the law "does not include a specific ***implementation*** date," the ***effective*** date of such a change will depend on whether one party gives the other notice of the change. Note that Qwest's language does *not* say, when an order does not include a specific implementation date, the *implementation* date will depend on a party giving notice. Qwest's proposed language creates a new presumption that, when this Commission or another regulatory body issues an order expressly stating that its ruling becomes "effective immediately," Qwest and other parties do ***not*** have to implement the order immediately -- even if no party has requested a separate implementation date or a stay of the order -- unless the Commission on its own also expressly identifies a separate, specific implementation date.

When one party gives the other party notice within thirty days of the effective date of the order, Qwest proposes that the amendment will be "deemed ***effective*** on the date of that order." When one party does not give notice, Qwest proposes that the ***effective date*** of the legal change will be not the date ordered by the Commission if it has said that its order is effective immediately (or is effective immediately by operation of law), but an effective date in the ICA amendment reflecting that change.

Eschelon's first proposal for Issue 2-4 is simply to strike Qwest's additions to Section 2.2 and use the above-quoted SGAT sentence. Eschelon's second, alternative proposal for Issue 2-4 is to add three provisions to Section 2.2 to clean up the distinction that Qwest appears to desire between an "implementation" date and an "effective" date,

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language in Section 22.0 and deleting Qwest's proposal in Section 2.2) best recognizes that Commission prerogative. (See also, Eschelon's alternative proposal with respect to Issue 2-4.)

as well as to add a sentence to Section 22.4.1.2. The first provision of Eschelon's alternate proposal confirms that each party has an obligation to ensure the agreement is amended. Eschelon added this sentence in response to Qwest's allegations in other arbitrations that, despite use of the word "shall" in the previous sentence, a party to the ICA could avoid or delay amending it when the law changes. The second provision adds clarification as to the relationship between Section 2.2 (change in law) and Section 22 (Pricing). Eschelon added this sentence in response to observations made by the witness for the Minnesota Department of Commerce in the Minnesota Qwest-Eschelon arbitration proceeding regarding the utility of distinguishing between changes to prices that had been previously approved by the Commission and changes to prices not previously approved. The third provision recognizes that the effective date and implementation may (or may not) be different and establishes that the burden is on the companies (*i.e.*, not the Commission) to identify when they are different and, if a different date is desired, to request a date different from the effective date for implementation of a ruling. To address Qwest's concerns stated in other proceedings that a presumption is needed in cases when the order is silent on the issue, Eschelon's proposal provides, when the order is silent, the implementation date and effective date are the same, unless the Commission orders otherwise or, if allowed by the order, the parties to the ICA agree otherwise.

Eschelon's second, alternative proposal for Issue 2-4 also includes addition of two sentences to Section 22.4.1.2. Section 22.4 is entitled "Interim Rates." Although agreed upon language in Section 22.4.1.2 already provides that interim rates "shall be effective as of the date required by a legally binding order of the Commission,"[50] Eschelon has

[50] Because this closed language could refer to establishing either an earlier effective date (*i.e.*, a true-up) or a prospective date (*i.e.*, no true-up), it is applicable in either case.

proposed two sentences in response to Qwest's proposal which expressly state the companies reserve their rights with respect to a true-up. If an order is silent as to a true-up, Qwest gets the default provision it seeks (except for new products, which are addressed in Section 1.7.1.1), indicating rates will be applied and implemented on a prospective basis.

4. Design Changes: Issues 4-5 and 4-5(a)-(c)

The issue here arises primarily from Qwest's attempt to impose the design change charge approved for UDITs to design changes for loops and changes to Connecting Facility Assignments ("CFA changes"). There is no cost support for extending the charge beyond the element for which it was developed -- UDITs. To the contrary, the evidence will show that the design change charge for UDITs is not a reasonable charge for changing the design of a loop or for making CFA changes.

a. Application of design change rates for unbundled loops

Historically, there has been no additional charge for design changes for unbundled loops (above and beyond the approved recurring and non-recurring loop charges), as the only rate for design changes applied only to design changes for transport.[51] Qwest nonetheless recently began to unilaterally charge CLECs for design changes for loops, without obtaining any ICA amendment or cost case ruling allowing it to do so. Eschelon opposes Qwest's attempt to expand the UDIT design change charge to loops without amending the ICA, without obtaining Commission approval, and without providing any

[51] *E.g.*, *compare* SGAT Section 9.2.4.1 (ordering for loops, with no design change language) *with* SGAT Section 9.6.4.1.4(c) (ordering for transport, with design change language).

evidence that Qwest's cost of performing all design changes for loops is the same as for UDITs.

Qwest complains that Eschelon has not provided cost support for the interim rate that it has proposed for loop design changes. It is Qwest's burden to provide cost support for its claimed charges.[52] If Qwest wishes to begin charging a design change charge for loops, it is incumbent on Qwest to show that its charge is cost-based, and the ICA provides a process by which Qwest can do so.

Eschelon has offered language in Section 9.2.3.8 that allows for Design Change rates to be applied to Unbundled Loops if Qwest is able to prove that such unrecovered charges exist, if and when Qwest accepts that Interim Rates for Unbundled Loops (and CFA Changes, as discussed below) will be negotiated or set by the Commission in the arbitration. Without such a commitment, Unbundled Loop Design Change rate language does not belong in the ICA, because Qwest has no basis for simply unilaterally moving the rate over from the approved UDIT Design Change charge. Consistent with historical practice, the ICA would then require Qwest to perform the work but not charge a separate rate, unless and until a separate rate is approved by the Commission. In the alternative, if an interim rate is established in this arbitration, Eschelon's language should be adopted.

b. Application of rates for changes to Connecting Facility Assignments ("CFA Changes")

Connecting Facility Assignment ("CFA") changes occur for analog loop hot cuts on the day of cut during test and turn up (excluding batch hot cuts). The CFA change involves a simple "lift and lay" activity by the Qwest central office technician who is

[52] See, e.g., Report and Order, In the Matter of an Application by the Division of Public Utilities for Commission Determination of a Model and to Establish Rates for Collocation for Qwest Corporation, Utah Docket No. 00-049-106 (December 3, 2001) at § 9.

already at the frame and in contact with the CLEC representative and the Qwest personnel coordinating the process. If a CFA cannot be used and a new CFA is assigned during a cutover, the costs of such a change are minimal because both parties' personnel are already participating in the loop cutover. In such situations, the Qwest central office ("CO") technician is already available and working on the cutover. It requires less additional work, and there is little if any extra time involved, to change pairs in such situations, as compared to circumstances requiring Design Changes when the CO technician must be separately dispatched, for example. Pair changes to install or repair service at no additional charge are part of a long-standing standard industry practice.

Qwest now proposes, however, to begin charging the same expensive rate for Design Changes for all CFA changes as it charges for Design Changes to UDITs, regardless of circumstance. Eschelon has proposed language that identifies certain CFA changes to which the transport charge at a minimum should not apply. If any charge is allowed in this context, it should be cost-based and, therefore, minimal. The ICA should also specifically state that the separate Design Change rate does not apply when the CFA change charge applies, to avoid ambiguity and potential double recovery.

Like the language for Unbundled Loops in 4-5, Eschelon's proposed language for CFA only belongs in the ICA if an Interim Rate is negotiated between the parties, or set by the Commission in the arbitration. Without such a commitment, the language allowing Qwest to charge a separate charge for this activity should be deleted from the ICA, because Qwest has not offered any support for a charge for this service. Consistent with historical practice, the ICA would require Qwest to perform the work but not charge a separate rate, unless and until a separate rate is approved by the Commission. In the

alternative, if an interim rate is established in this arbitration, Eschelon's language should be adopted.

5. Discontinuation of Order Processing and Commission approval before disconnection of service: Issues 5-6 and 5-7/5-7(a)

Subjects 5 through 7 (Issues 5-6 through 5-13) relate to the "Payment and Deposit" provisions in Section 5.4 of the interconnection agreement. Issues 5-6 and 5-7 deal specifically with remedies for alleged non-payment that may affect service to unsuspecting Utah End User Customers. For both of these issues, Eschelon proposes that the interconnection agreement expressly recognize that Commission approval or oversight may be required before these types of remedies may be invoked.

a. Continuation of order processing pending either Commission approval or Commission proceeding: Issue 5-6

Section 5.4.2 allows Qwest to discontinue processing all orders "for the relevant services" if CLEC does not make "full payment" of undisputed amounts. If Qwest were to discontinue processing Eschelon's orders, this would be a very serious step that could have a significant negative effect on current and potential Eschelon Customers. For example, Utah Customers who are initiating or converting service may find themselves without service on the planned date of service. For example, an Eschelon Customer who requested blocking would be unable to receive it and an Eschelon Customer who desired to remove services to no longer be charged for them could not do so, because Qwest would not process Eschelon orders on behalf of those Customers. Before Customers are impacted in this manner, stronger safeguards are needed in the contract to protect them.

Qwest has other remedies, such as late payment fees and dispute resolution, available to it. Before Qwest takes a step as serious and disruptive as discontinuance of

order processing, the Commission should be involved on behalf of the public interest. Therefore, Eschelon's first and preferred proposal is to require Commission approval before Qwest may discontinue order processing under these circumstances.

If the Commission declines to adopt Eschelon's proposal to require approval in every case in which Qwest seeks to discontinue order processing, the Commission should at least ensure that it will have an opportunity to act on the public's behalf to maintain the status quo when a party seeks Commission relief. To that end, Eschelon's second option allows the Commission this opportunity by providing that, if Commission intervention is sought, Qwest will continue order processing while the proceedings are pending, unless the Commission orders otherwise.

Qwest may argue that its proposal that it be permitted to discontinue order processing when payment is delinquent by more than 30 days is the same timeframe as was adopted in the Qwest-Covad arbitration. The issue here, however, is not the amount of time (30 versus 45 days) that must pass before Qwest avails itself of this extreme remedy, as in the Covad arbitration. Rather, the issue is whether Qwest should be permitted to take such a step without Commission involvement. The Commission did not address this issue in the Covad case, because it was not raised there.[53]

Commission oversight on these matters is particularly important so that there is an independent arbiter of the facts and to ensure that the information relied upon to make these decisions is accurate. Eschelon and Qwest have had serious disagreements about billing information – including whether a dollar amount has been disputed. Although

[53] Cf. Report and Order, In the Matter of the Petition of DIECA Communications, Inc. d/b/a Covad Communications Company, for Arbitration to Resolve Issues Relating to an Interconnection Agreement with Qwest Corporation, Utah Docket No. 04-2277-02 (February 8, 2005) at at 29-36 ("UT Covad-Qwest Arbitration Order").

Eschelon could seek dispute resolution under the agreement, because this provision allows Qwest to discontinue processing Eschelon's orders on only ten days' notice, it would be difficult, if not impossible, for Eschelon to file a complaint, get on the Commission's schedule, and get a ruling, all within ten business days. In the meantime, if Eschelon is correct but no decision is possible in that timeframe, the End User Customers whose orders will not be processed suffer.

b. Commission approval before disconnection of service: Issues 5-7 and 5-7(a)

This dispute concerns the circumstances under which Qwest may disconnect Eschelon's service, including service to its End User Customers, for alleged non-payment. The disconnection of service is an even more drastic measure than the discontinuation of order processing and the need for Commission oversight is correspondingly greater. Not only would Qwest's disconnection of Eschelon's service very seriously, if not fatally, harm Eschelon's business, but it would be extremely disruptive, to say the least, for Eschelon's Customers, who would lose their telephone service as a result. Before Qwest disconnects service affecting potentially numerous Utah Customers, it should have the obligation to first seek to the permission of the Commission, in order to be sure that the interests of the public are adequately protected.

Qwest's proposed language, furthermore, would not, in all cases, require notice before Qwest discontinued order processing. Thus, Qwest's proposal provides that, if Qwest gives ten days notice of its intent to disconnect service, but then does not follow through with disconnection at the end of those ten days, Qwest may, thereafter, disconnect service without giving Eschelon further notice.

Eschelon recently faced this very issue. In April of last year, Eschelon received a letter from Qwest indicating that Eschelon had a total past due balance across all states of over $4 million, and further indicating that if Qwest did not receive payment in full by May 4, 2006, Qwest would suspend Eschelon's service order activity and disconnect Eschelon's services on May 5, 2006. Even though the amount Qwest was demanding from Eschelon did not reflect the payments that Eschelon had already made to Qwest and Eschelon and Qwest were in disagreement regarding the outstanding amount, Eschelon paid all amounts alleged by Qwest--making payment of almost $9 million--in order to avoid the possibility of disruption for its customers. Yet, after going through all of this, Qwest notified Eschelon that it remained in default and that Qwest unilaterally decided to apply credits due and owing to past due balances, even if those balances were in dispute, leaving Eschelon under a cloud of possible disruption of service despite Eschelon's payment of all undisputed bills. Under Qwest's proposed language, Qwest would be free to disconnect Eschelon's service without further notice to Eschelon, much less to the Commission.

6. Deposits: Issues 5-8, 5-9, 5-11 and 5-12

Section 5.4.5 concerns the circumstances under which Qwest may demand that Eschelon provide a payment deposit. The amount of a potential deposit – up to two months' worth of charges – is substantial, particularly for a small company like Eschelon. It is, accordingly, important that, if the ICA is to provide for payment of a deposit, it do so only under circumstances in which there is a legitimate, realistic concern about future payment.

a. De Minimus Amount

Eschelon has proposed language that would limit application of the deposit requirement to situations when there is a failure to pay an undisputed "non-de minimus" amount. It is unreasonable that the deposit requirement should be triggered when, as a result of an error for example, a payment is off by a few dollars, particularly in light of the amount and complexity of Qwest's bills to Eschelon. A deposit should be required when there is a legitimate concern about a company's ability to pay future charges. Such a concern does not arise when the amount that is not paid is de minimus.[54]

b. Definition of "Repeatedly Delinquent"

The parties have agreed that a deposit may be required when payment is "Repeatedly Delinquent."[55] They disagree about how this standard should be defined.

Eschelon has offered two alternative definitions of "Repeatedly Delinquent." The first proposal is that payment be considered Repeatedly Delinquent when payment is received late in three consecutive months. Qwest uses this "three consecutive month" standard in other contracts, including contracts with some CLECs. This standard adequately protects Qwest's legitimate interests while reducing the likelihood that a deposit will be imposed when it should not be imposed. Eschelon's second option for the definition of "Repeatedly Delinquent" is the same as Qwest's definition, except that Eschelon proposes six months instead of twelve months during a twelve-month period. Under either of Eschelon's proposed definitions, Qwest would be protected in circumstances when late payment might reasonably be viewed as creating a legitimate concern about ability to pay that would justify a deposit.

[54] Qwest has objected that the term "non de minimus" is vague. Although Eschelon disagrees, it would also accept "material" in place of "non de minimus" The term "material" is used in a number of agreed on provisions of the ICA and, accordingly, is a term with which Qwest is already sufficiently familiar.

[55] Eschelon also offers an alternative that does not rely upon this definition. *See* Issue 5-12 below.

Qwest's proposal is that payment be considered "Repeatedly Delinquent" if received more than thirty days late for any three months in a twelve-month period. Qwest has argued previously that its definition was discussed in the 271 proceedings. Those proceedings are not binding upon Eschelon in an interconnection agreement arbitration.[56] Under Qwest's proposal, if a CLEC were to pay a portion of the amount due late in months one and two, make timely payments in the full amount for nine consecutive months, and then pay a portion of the amount due late in month twelve, Qwest could demand a large security deposit. Such a scenario – with CLEC paying in full for nine consecutive months – does not provide any evidence of the financial stress that gives rise to a legitimate need for payment "security." Either of Eschelon's proposals provides a better balance of interests.

c. Disputes before Commission

The parties have agreed on language that provides that a required deposit will be due within thirty days of demand. Eschelon has proposed an exception for situations when the party on whom the demand is made challenges with the Commission either whether a deposit is required or the amount of the deposit. In such an instance, the deposit would be due as ordered by the Commission. This exception gives effect to, and is consistent with, the parties' right to bring disputes to the Commission for resolution.[57]

d. Deposit requirement: Issue No. 5-12

Eschelon proposes a third option for determining when Qwest may demand a deposit. This third option does not hinge on the definition of Repeatedly Delinquent.

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[56] *See WA Covad Arbitration Order*, at note 16 to ¶100 ("Parties engage in arbitration to enter into an agreement tailored to the companies' needs, not to adopt a standard agreement. Covad is not bound . . . simply because it was a party to the SGAT negotiations and hearings.")

[57] *See* ICA Section 5.18.1.

Instead, this option provides an opportunity for the Commission to review a party's payment history and determine whether "all relevant circumstances warrant a deposit." This option provides the Commission with flexibility to determine contested deposit requirements on a case-by-case basis if and when such cases arise.

7. Review of credit standing: Issue 5-13

Qwest has proposed a provision that would allow it to review Eschelon's credit standing and increase the amount of the deposit. Because this provision contains no criteria or standards defining when this provision may be invoked, Qwest could attempt to use it to effectively nullify the limitations set out in Section 5.4.5 on Qwest's ability to demand a deposit. Qwest's proposal does not describe the "credit history" that would be subject to review, the conditions that might justify such a review, or the circumstances that would warrant a modification. There is no limitation on ability to increase a deposit amount even when the Billed Party is current in its payments. Such an unlimited ability to demand an increase in the amount of a deposit would be an open invitation to arbitrary action.

Qwest's proposal for this Section is also inconsistent with Section 5.4.5 in another way. Section 5.4.7, as proposed by Qwest, states that the amount of the deposit, when increased, may not exceed the maximum amount provided for under Section 5.4.5. That Section, however, provides no method for calculation of a maximum when the amount of a deposit is to be modified.

Qwest has taken the position that the "triggering event" to be used for determining the amount of the deposit is the credit review itself.[58] This is not what

[58] See Qwest Washington Petition at ¶ 52.

Qwest's proposed language says, however. Qwest's proposal refers expressly to Section 5.4.5 as setting forth the method for determining the maximum amount of the deposit. Section 5.4.5 identifies two potential "triggering events": 1) the date of the request for reconnection of service or resumption of order processing, or 2) the date when the CLEC is Repeatedly Delinquent. Neither of these triggering events would apply in a situation in which Qwest's demand for an increased deposit is based on Qwest's review of Eschelon's "credit history." Accordingly, there would be no way to compute the amount of the deposit.

Because of the inconsistency of Section 5.4.7 with the general deposit requirement set out in Section 5.4.5, Eschelon recommends that Section 5.4.7 be deleted. The provision is unnecessary in any event. The only legitimate need to modify a deposit that has been identified is recalculation of the deposit based upon financial standing, and that is already covered in Section 5.4.6. Eschelon's other proposed option for this language is to modify it to require that any increase in the amount of the deposit be approved by the Commission.

8. Copy of non-disclosure agreement: Issue 5-16

The parties agree that Qwest employees to whom Eschelon's forecasts and forecasting information are disclosed will be required to execute a nondisclosure agreement covering the information. Eschelon proposes that Qwest be required to provide copies of executed non-disclosure agreements. Eschelon's proposal to receive copies of executed non-disclosure agreements reflects the common practice in other contexts under which the parties exchange signature pages of confidentiality protective agreements so that a party will be aware of who is receiving its confidential information

and will be in a position to raise objections if necessary. If Qwest does not provide Eschelon with copies of executed nondisclosure agreements, Eschelon will have insufficient information to object if sensitive information is provided to a Qwest employee not authorized by the ICA to receive it. Qwest has already agreed that employees will sign the agreement. Eschelon's proposal to require Qwest to provide a copy of that existing executed agreement imposes little, if any, burden on Qwest.

9. Transit record charge and bill validation: Issue 7-18 and 7-19

"Transit Traffic" is defined as any traffic that originates from one Telecommunications Carrier's network, transits another Telecommunications Carrier's network, and terminates to yet another Telecommunications Carrier's network.[59] Qwest is a transit provider and bills Eschelon for transit for certain Eschelon originated calls. The bills that Qwest provides to Eschelon for Eschelon originated calls do not contain call record detail, but instead simply contain the number of transit minutes and the transit traffic rate. In order to validate the bills that Qwest provides, Eschelon requests, on a limited basis, call records that would allow for bill verification. Qwest apparently will agree to supply transit records, but only if the records are purchased by Eschelon. Eschelon should not be put in the position to have to pay Qwest additional charges in order to validate the invoices Qwest is sending to Eschelon.

Qwest has argued that Eschelon should obtain the necessary information from its own switch, rather than seeking it from Qwest. Although Eschelon does record certain information at its switch, those records only tell Eschelon who was called and that the call was handed off to Qwest. Eschelon can only infer from our records whether Qwest

[59] *See* ICA, Section 4 - Definitions.

is acting as a transit provider. Discrepancies between Eschelon's records and the bills Eschelon receives from Qwest are one reason Eschelon might request records from Qwest for bill verification.

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14. Nondiscriminatory Access to UNEs: Issue 9-31

In the last year, Qwest revealed a new plan to charge tariff rates for activities that had previously been properly performed at TELRIC rates pursuant to Qwest's Section 251 obligations to provide access to UNEs. Because Qwest did not raise this issue in the cost case or ICA negotiations before Eschelon filed its first arbitration petition,[60] Eschelon only learned of it later through Qwest's new rate proposals, in which Qwest referred to the tariff instead of Commission approved rates for certain elements. According to Qwest, application of TELRIC rates is limited to the enumerated list of UNEs; if not named on that list (such as "loops"), it is not a UNE for which TELRIC rates apply. Qwest described items that are not enumerated as UNEs, for example, as including trouble isolation charges, expedites, design changes, *etc*., even when these activities are performed on UNE orders. Despite all of the work that was done in the 271 proceedings relating to nondiscriminatory access to UNEs, now that Qwest has its interLATA authority, Qwest wants to charge its tariff rate for these activities, even when the Commission has previously approved a TELRIC rate. According to Qwest, the Commission does not have jurisdiction to determine such "non-UNE" rates.

Qwest confirmed its intent to attempt to avoid Commission oversight of TELRIC rates in favor of imposing its own tariff rates on August 31, 2006, when it announced that

[60] Eschelon filed its petition for arbitration with Qwest in Minnesota on May 26, 2006. (Eschelon and Qwest have now arbitrated an interconnection agreement in six states (AZ, CO, MN, OR, UT, and WA)).

it would post a new "template" interconnection agreement on its website on September 1, 2006.[61] In its announcement, Qwest described changes it is making to the template agreement that represents its offer to CLECs in interconnection agreement negotiations. Specifically, Qwest said that it has added a reference to Qwest's tariff to the following rate elements in Exhibit A: Additional Dispatch, Trouble Isolation Charge, Design Charge, Expedite Charge, Cancellation Charge, and Maintenance of Service charge.[62] Qwest previously made such changes to Exhibit A in negotiations with Eschelon (before changing back to its current position). By changing its position in the arbitrations with Eschelon while maintaining its tariff position outside of arbitration, Qwest seeks to avoid a Commission ruling on these issues. The absence of a Commission ruling gives Qwest the type of flexibility without close scrutiny that it seeks through its CMP advocacy. Given Qwest's expansive view of CMP, without a Commission ruling in this case there would be little to protect Eschelon from Qwest's unilaterally imposing its tariff position (particularly because Qwest claims the Commission does not have jurisdiction), after extensive time and resources have been expended on this arbitration. Therefore, Eschelon proposes alternative language proposals in Section 9.1.2, relating to nondiscriminatory access to UNEs, that place the issue squarely before the Commission. A ruling is truly needed to minimize future disputes.

Qwest's position is contrary to the law. Qwest must provide not only the UNE but also meaningful access to the UNE. The FCC found that the requirement to provide "access to UNEs" must be read broadly, concluding that the Act requires that UNEs "be provisioned in a way that would make them useful" and that "[t]he ability of other

[61] PROS.08.31.06.F.04159.Amendments.ComlAgree.SGAT, see M:\Documents and Settings\karenc\Local Settings\Temporary Internet Files\OLK1\ContactMailAttach.htm.

carriers to obtain access to a network element for some period of time does not relieve the incumbent LEC of the duty to maintain, repair, or replace the unbundled network element."[63] The FCC's rules regarding access to unbundled elements prescribe that an ILEC must provide a carrier purchasing UNEs not only the physical facility, but also all the capabilities of providing service, such as add/move/change, provisioning and maintenance and repair. Section 51.307(c) provides: "An incumbent LEC shall provide a requesting telecommunications carrier access to an unbundled network element, along with all of the unbundled network element's features, functions, and capabilities, in a manner that allows the requesting telecommunications carrier to provide any telecommunications service that can be offered by means of that network element." Eschelon's proposed language reflects these obligations and needs to be added to the ICA to avoid disputes in light of Qwest's expressed intention to unilaterally require payment of tariff rates, even when the Commission has approved TELRIC rates.

Eschelon made its proposals in direct response to Qwest's assertion that certain miscellaneous activities that are necessary for Eschelon to have nondiscriminatory access to UNEs are "not UNEs" subject to the requirements of Section 251. Eschelon's language is necessary to block Qwest's attempt to read access to UNEs out of the ICA and out of Section 251 by providing those activities that are part and parcel of such access not under the terms of the ICA, but under the terms of its access tariff.

Qwest furthermore has claimed, and may claim here, that Eschelon is trying to require Qwest to provide a "yet unbuilt superior network" and that Eschelon is trying to obtain modifications to UNEs without paying for them. This is not Eschelon's intent, nor

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62 First Report and Order at ¶ 268.

63 First Report and Order at ¶268.

is it what Eschelon's proposed language requires. Eschelon seeks to confirm Qwest's obligation to provide access to UNEs on nondiscriminatory, just and reasonable terms under Section 251, as it has throughout the term of its existing interconnection agreement. Eschelon has no objection to paying Qwest cost-based rates for activities necessary to provide access to UNEs. To confirm this intent, and answer any Qwest objection that Eschelon seeks from Qwest an uncompensated "superior network," Eschelon has proposed an alternative proposal that specifically states: "**…..** Access to Unbundled Network Elements includes moving, adding to, repairing and changing the UNE (through, *e.g.*, design changes, maintenance of service including trouble isolation, additional dispatches, and cancellation of orders) and will be provided at TELRIC rates…."

16. Network Maintenance And Modernization: Issues 9-33 and 9-34

a. Effect on End User Customers

The companies have agreed that Qwest may make necessary modifications and changes to UNEs in its network on an as needed basis and that such changes "may result in minor changes to transmission parameters."[64] Eschelon has two proposals that provide language that clarifies that Qwest may not disrupt or disable a CLEC's previously reliable, working circuit in the name of "modernization." Eschelon's proposed clarifications do not arise from an idle concern: Qwest takes the position that a network modification may be considered "minor" even if the change results in a permanent service outage. The Customer whose previously working service is permanently disabled would hardly describe this as modernization with a minor impact.

[64] *See* proposed ICA Section 9.1.9; *see* SGAT Section 9.1.9.

b. Location at which changes occur

The second issue in Section 9.1.9 relates to the FCC's requirement that ILECs provide CLECs advance notice of network changes. Eschelon again has offered two proposals that would require Qwest, ***only*** in those circumstances when modifications and changes to the UNEs in its network addressed in a Qwest notice are "End User Customer specific," to include circuit identification and/or customer address, as part of any notice of network changes. If the changes are specific to an Eschelon End User Customer, there is no reason why Qwest should not provide this information so that Eschelon may have sufficient information to assist its Customer. Qwest contends, incorrectly, that Eschelon would impose an obligation that goes beyond what the FCC requires.

In 47 C.F.R. § 51.327, the FCC provides a list of items that a public notice of network changes must include. The rule states that the list is a minimum and is not all-inclusive. Part (a)(4) of § 51.327 states that the list must include "the location at which the changes will occur." The term "location" must be considered in the context of 47 C.F.R. § 51.325(a), which states that the public notice must include notice regarding any network change that "will affect a competing service provider's performance or ability to provide service."

Eschelon's proposal is consistent with these rules. It provides that, *if* the network changes are Customer-specific, Qwest will provide the information necessary to provide the location of the Customers for whom Eschelon's performance will be affected. That necessary information is circuit identification and customer addresses. The former is the generally accepted locator within the network and the latter is the locator within the

CLEC's list of customers. Without this information, the notice will not fulfill the intended purpose.

17. Wire Centers: Issues 9-37, 9-37(a), 9-37(b), 9-38; 9-40; 9-41 and 9-42

After the Triennial Review Order (TRO) was issued in August of 2003, Qwest and Eschelon exchanged negotiation proposals relating to that order, in December of 2003 and May of 2004 and afterward. The Triennial Review Remand Order (TRRO) was released in February of 2005, and the companies continued to exchange negotiation proposals related to those issue. In December of 2005, Eschelon and Qwest signed a Bridge Agreement Until New Interconnection Agreements Are Approved ("Bridge Agreement").[65] It states: "the Parties elect to address the changes of law as part of their new ICAs for each state (Arizona, Colorado, Minnesota, Oregon, Utah, and Washington) ("new ICAs") and not as an amendment to the existing ICAs between Qwest and CLEC for each such state ("existing ICAs")." Also in December of 2005, Eschelon proposed centralizing open issues, including the wire center issues, in Sections 9.1.13 – 9.1.15 of the ICA (where they are now located). On or about February 15, 2006, CLECs including Eschelon, filed requests with the state Commissions in Arizona, Colorado, Minnesota, Oregon, and Utah asking that the state Commissions, in accordance with the TRRO, develop and approve a list of Non-Impaired Wire Centers and a process for future updates of the wire center list. In September and November of 2006, this Commission issued its orders in the Utah wire center proceeding ("Utah Wire Center Orders").[66] Eschelon's proposed language for the wire center issues is intended to be consistent with

[65] Qwest filed the executed document with the Public Service Commission of Utah on January 12, 2006 in Docket No. 06-049-05.

the Utah Wire Center Orders. The FCC said in the TRRO that it expects companies to negotiate mechanisms to implement its order through the section 252 process.[67] These issues are appropriate subjects, therefore, for inclusion in the ICA. Including these provisions in the ICA will help avoid disputes.

a. Wire Center List (Issue 9-37)

The primary difference between the companies' proposals for Issue 9-37 (Wire Center List) is that Eschelon's language requires the Wire Center List to be approved by the Commission, but Qwest's language allows Qwest to unilaterally dictate which wire centers are on the list. Eschelon opposes Qwest's language, which would violate Eschelon's obligation to conduct a reasonable diligent inquiry by requiring Eschelon to rely upon the unverified assertions of its major vendor/competitor instead of conducting the type of inquiry being conducted in the wire center proceeding. Qwest's language raises the very same concerns that led the Commission to commence its wire center impairment investigation. CLECs should not have to "take on faith" on Qwest's identification of unimpaired wire centers. Now that the Commission has ruled in the Utah Wire Center Orders there appears to be no debate that there will be a Commission-approved wire center list, as reflected in Eschelon's language.

b. Additional Non-Impaired Wire Centers (Issue 9-37(a))

As indicated in Issue 9-37(a), the companies disagree on terms for adding wire centers to list. Eschelon's proposals together require a Commission-Approved Wire Center List. Therefore, if Qwest seeks to add to that list, Eschelon's language provides

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[66] Utah Commission Orders dated November 3, 2006 and September 11, 2006 in docket 06-049-40, *In the Matter of the Investigation into Qwest Wire Center Data*. Documents related to this order, including the order are available at: http://www.psc.state.ut.us/telecom/Indexes/0604940Indx.htm.

[67] See, e.g., TRRO ¶142, note 399.

Qwest must follow the procedures established by the Commission to update the Commission-Approved Wire Center List. If the Commission approves an addition to the Commission-Approved Wire Center List, CLECs will need time to notify and train their personnel to prevent ordering from the additional Wire Center. Eschelon has proposed thirty days after the wire center is added to the list as a reasonable time to make any preparations. (This issue does not relate to back billing. The dates for which back billing occur are identified separately.) Qwest proposes thirty days after ***notification from Qwest*** that it is adding a wire center to the list. Qwest may be incorrect and the Commission may not approve its proposed addition to the list, however, and then CLEC would have been wrongfully prevented from ordering in that wire center in the meantime. Regarding the methodology used to determine whether a wire center is on the list, certainty is needed in the ICA as to how these determinations will be made. The methodology proposed by Eschelon is consistent with the Commission's order in the Wire Center docket.

c. Change in UNE Status (Issue 9-37(b)

As reflected in Section 9.1.13.4.1, if Qwest seeks to challenge access to UNEs ordered by CLEC, the Parties agree that Qwest must do so after processing the order, through Dispute resolution (Section 5.18 of the ICA). Eschelon has proposed an additional sentence, in a subpart, that simply states that Qwest will provide Eschelon with the data to support its claim. This approach will help avoid disputes. Once Eschelon reviews the data, the companies may be able to agree or at least narrow their disputes. Qwest would eventually need to provide the data to prove its claim. Doing so earlier is

more efficient and cost effective and offers administrative efficiencies for the Commission, which will not have to hear the dispute if it is resolved.

d. Processing of High Capacity Loop and Transport Requests (Issue 9-38)

Agreed upon language in Section 9.1.13 describes the requirements for ordering high capacity loops and transport. Section 9.1.13.4 provides that upon receiving "such" a request, Qwest must immediately process the request, as required in the TRRO (¶ 234). Use of "such" incorporates the agreed upon terms of Section 9.1.13 without having to repeat them. Qwest restates those terms in a manner different from the agreed upon language and thus introduces an apparent ambiguity in the contract. While it may seem obvious that "immediate" processing of a request requires processing the order and not rejecting it, Qwest previously initiated a Change Request through its Change Management Process to implement a systems change to block CLEC orders, even when CLECs have self-certified, if Qwest unilaterally determines a wire center is non-impaired. [See Qwest CR #SCR083005-01 (currently in deferred status).] Consistent with the FCC's unequivocal requirement that Qwest immediately process such requests, Qwest also cannot delay or forego its response by requiring the CLEC to affirm information that it has already provided in the self-certification letter (such as in remarks that must be manually typed on each service order, which adds work and time to the ordering process). If at any point the parties agree to allow, or the Commission allows, Qwest to block certain orders, the language provides that the agreement may be amended accordingly.

e. Review of Wire Center List (Issue 9-39)

Obtaining appropriate data early will help resolve disputes and reduce objections that would otherwise be filed with the Commission. Including the list of data in the ICA will provide certainty and facilitate analysis of Qwest's claims and resolution of disputes. The list of data which Eschelon proposes Qwest should provide is consistent with the Commission's order in the Wire Center docket.

f. Non-Recurring Charges (NRCs) for Conversion (Issue 9-40)

This amount of the NRC is pending in the Wire Center docket and Eschelon's language reflects that the NRC adopted by the Commission will apply. Qwest proposes to charge "all applicable" NRCs without identifying them or indicating that they will be TELRIC based. No other non-recurring charges apply, with the possible exception of OSS charges, if any. OSS charges are separately dealt with in closed language in Section 12.7 (which is cross referenced in Eschelon's proposal).

g. Length of Time Period (Issue 9-41) and Rate During Time Period (Issue 9-42)

The length and rate of the time periods proposed by Eschelon are consistent with the Commission's order in the Wire Center docket. Placement of the language regarding length and time of the transition period for additions to the wire center list is in issue. Qwest places the length of the transition period within a larger paragraph dealing with other issues and then proposes a sub-paragraph for the rate (and then the sub-paragraph also refers to the length of the time period). Eschelon's proposal is more clear and efficient. Eschelon moves both issues to one section, with one sub-paragraph for each of the two time periods. The length of the period and the rate during that period are dealt with together, so the terms are clear as to what applies when.

18. Conversion: Issues 9-43, 9-44, and 9-44(a) – (c)

A conversion happens when a circuit that was formerly available as a UNE must be converted to a non-UNE alternative arrangement, as the result of a finding of "non-impairment." The FCC found that "as contemplated in the Act, individual carriers will have the opportunity to negotiate specific terms and conditions necessary to translate our rules into the commercial environment, and to resolve disputes over any new contract language arising from differing interpretations of our rules."[68] Such a "conversion" involves only changing the rate charged for the facility and, in the vast majority of circumstances, the CLEC and its End User Customer will use the same facility that was used before the conversion. These conversions are required solely for purposes of implementing a regulatory construct and have nothing to do with improving or otherwise managing the Customer's service – in essence, the conversion is intended to re-label what was before a UNE, something different.

The FCC addressed the issue of conversions in the *TRO*[69] and found that conversions should be seamless from the End User's perspective and should involve only billing changes from Qwest's perspective. At paragraph 586 of the *TRO*, the FCC explained the seamlessness of conversions:

> Converting between wholesale services and UNEs or UNE combinations should be a seamless process that does not affect the customer's perception of service quality.

The FCC codified the requirement that conversions should be seamless from the perspective of the CLEC's End User in 47 C.F.R. §51.316(a) as follows:

[68] *TRO*, pp. 14-15. Similarly, the Washington Commission has found that this transition away from UNEs is within the scope of Sections 251 and 252 of the Act. Washington ALJ Report in Verizon-CLEC arbitration (Order No. 17), at ¶150.

> (b) An incumbent LEC shall perform any conversion from a wholesale service or group of wholesale services to an unbundled network element or combination of unbundled network elements without adversely affecting the service quality perceived by the requesting telecommunications carrier's end-user customer.

Consistent with the FCC's direction to minimize Customer disruption, Eschelon has proposed language regarding conversions that would require such conversions to be handled as the billing changes that they are. Thus, Qwest would not change the circuit ID and would bill for the circuit under the alternative arrangement though the use of a billing "adder" or "surcharge." Such re-pricing is technically feasible and is similar to the way that Qwest handled pricing changes in its Qwest Platform Plus agreements.

Eschelon's proposed language would also provide that a conversion would not result in a change to the circuit ID. The changing of a circuit ID when a circuit is converted from a UNE to an alternative arrangement is not only unnecessary, but it also creates the potential for Eschelon and its Customers to experience disruption. If, as part of that conversion, Qwest changes the circuit ID for the circuit that is already in place and working well for the Customer, additional service and billing problems may occur at a later date. For example, if, six months after the conversion, the End User calls Eschelon with a repair but the circuit ID is incorrect as a result of conversion activity, Eschelon may not even be able to open a ticket with Qwest because Qwest requires a correct circuit ID to open a ticket. When a ticket is opened, the repair will be delayed and require additional resources to resolve. All of this can be avoided. If Eschelon's re-pricing proposal is adopted, the circuit IDs will not change, and the risk of such problems arising will be eliminated.

[69] The TRO addressed conversions from UNEs to wholesale services and from wholesale services to UNEs.

22. Unbundled Customer Controlled Rearrangement Element ("UCCRE"): Issue 9-53

Unbundled Customer Controlled Rearrangement Element ("UCCRE"), when available, enables Eschelon to control the configuration of UNEs or ancillary services on a Near Real Time basis through a digital cross connect device. Qwest argues that, because the FCC omitted a reference to "digital cross-connect systems" when it re-wrote the unbundling rule, Qwest is not obligated to provide UCCRE as a UNE. Qwest is wrong for two reasons: (1) Qwest misinterprets the FCC's unbundling rule; and (2) aside from the FCC's identification of the network elements that must be unbundled pursuant to Section 251, the prohibition on discrimination requires that Qwest provide Eschelon with UCCRE as a UNE, as it does other CLECs. Qwest's claim that other CLECs do not order this element is insufficient so long as other CLECs continue to have that element available to them.

UCCRE remains generally available to other CLECs through Qwest's SGAT as well as pursuant to interconnection agreements that it has with other carriers. Qwest is required to provide CLECs with nondiscriminatory access to unbundled network elements. (47 U.S.C. § 251(c)(3).) Because Qwest provides UCCRE to other carriers, it must also provide it to Eschelon.[70] Qwest, however, will not offer those terms to Eschelon. Qwest claims that it has ceased to offer this product even though it is available today to other CLECs. Therefore, UCCRE is an example of circumstances under which Qwest can cease to offer to CLECs products and services that it has previously offered (and currently is offering to other carriers) and that have been approved by the Commission. Although the language for Issue 9-50 closed recently (with Eschelon

[70] See also Second Report and Order ¶¶ 18, 20 23.

proposed language), after the hearing in the Arizona arbitration, Qwest's handling of cross connects/wire work also remains a good example of this type of situation. Eschelon has proposed language in Section 1.7.3 on this issue. In the Minnesota arbitration, the Minnesota Department of Commerce proposed that a phase-out process be included in the ICA that would require Qwest to obtain Commission approval before eliminating a service; Commission approval would not be required, however, if Qwest were able to obtain, in relatively short order, ICA amendments from all affected CLECs removing the service.[71] Eschelon has offered the Department's language, as well as alternative proposals for Section 1.7.3, for all states.

Although Qwest finally agreed to include language regarding cross-connects/wire work in the ICA, it did so only after extensive litigation in arbitrations, as well as after Eschelon introduced evidence in the Arizona arbitration that Cox had similarly requested wire work in a recent Arizona proceeding.[72] A more orderly and efficient approach is needed, such as the approach reflected in Eschelon's proposals for Section 1.7.3 (which remain open as part of Issue 9-53). If there truly is no demand or anticipated demand during the life of a contract for a product and withdrawal of the product is legitimate for that or other reasons, Qwest will have an opportunity to withdraw the product pursuant to Section 1.7.3.

Eschelon's first proposal is a compromise on Eschelon's part because, instead of including the terms of UCCRE that appear today in the SGAT and other carriers' ICAs, Eschelon offers language that articulates a nondiscriminatory obligation for Qwest to offer UCCRE to Eschelon if it offers UCCRE to another CLEC during the term of the

[71] MN Arbitrators' Report, ¶¶ 164-165.

[72] AZ Hearing Transcript at Vol. 2, p. 224, lines 11-17; Hearing Exhibit E-5.

ICA. Alternatively, Eschelon's other proposals include more general phase out terms (Section 1.7.3), in response to the Minnesota Department's proposal in Minnesota (which was adopted by the Commission) to deal in the ICA with how to phase out products and services when this situation arises. Each phase out proposal offers a benefit to Qwest, because it is an alternative to amending each and every ICA, if Qwest desires to do so.

22A. Issue 9-51: Application of UDF-IOF termination (fixed) rate element (Section 9.7.5.2.1.a)

This issue concerns how the recurring rate for UDF-IOF terminations will apply. Eschelon has proposed two alternatives. The first alternative mirrors the language from Qwest's SGAT, so it is difficult to understand why this alternative is not acceptable to Qwest. Qwest, however, has proposed the addition of a phrase, providing that the rate applies "per cross-connect provided on the facility." The rate for this element will not change and it is unclear how Qwest believes that the addition of this phrase impacts the application of the rate. In order to address what Eschelon believes Qwest may be getting at with this phrase, Eschelon's second proposal includes language that clarifies that the rate applies to each of the end points of the facility.

24. Loop-Transport Combinations: Issue 9-55

The crux of the issue presented by these disputed sections is how Loop-Transport Combinations will be treated under the ICA, particularly if they involve commingling (*i.e.*, combining a UNE with a non-UNE). Qwest is attempting to position commingling so that, if any part of such a Combination is not a UNE, then the non-UNE's terms can dictate how the UNE is ordered, provisioned, and repaired. The Commission should retain its jurisdiction over the UNE component of Loop-Transport Combinations

(including the UNE in a Commingled EEL) and ensure that terms that affect the UNE are included in the filed and approved ICA.

In Section 9.23.4, Eschelon has proposed a definition of "Loop-Transport Combination" which mirrors the way that the FCC has used that term, to define any combination of loop and transport.[73] The use of this defined term is efficient from a drafting perspective because it provides an umbrella that includes three of the types of Loop-Transport Combinations that are specifically addressed in the ICA currently – EELs, Commingled EELs, and High Capacity EELs – thus avoiding having to repeat all three terms throughout the document. Further, this proposed definition makes clear that only the UNE components of a Loop-Transport Combination are subject to the ICA. It also expressly states that, if no component is a UNE, the combination is not governed by the ICA, to eliminate any suggestion that the terminology is some kind of attempt to govern non-UNEs in the ICA. Eschelon's proposed language also expressly recognizes that there is not currently a Qwest product called "Loop-Transport Combination." In other words, Eschelon has addressed each of Qwest's objections to these provisions in contract language, showing that Eschelon stands by its commitment that it is not attempting to do any of the objectionable things that Qwest has alleged may result from use of this accurate terminology.

25. Service Eligibility Criteria – Audits: Issues 9-56 and 9-56(a)

Qwest and Eschelon agree that Qwest shall have the right to conduct an audit to determine Eschelon's compliance with the Service Eligibility Criteria applicable to High Capacity EELs. Two issues remain to be resolved with respect to such audits. First, is

Qwest entitled to conduct an audit "without cause"? Second, should Qwest be required to provide Eschelon with known information supporting its audit request?

Eschelon's proposal would allow Qwest to perform an audit when it has a concern that Eschelon has not met the Service Eligibility Criteria. Qwest has rejected this very modest limitation on its audit rights, in effect insisting that it should be able to conduct an audit without cause. The FCC held, however, that "audits will not be routine practice, but will **only** be undertaken when the incumbent LEC has a concern that a requesting carrier has not met the criteria for providing a significant amount of local exchange service."[74] Before Eschelon is put to the work and expense that an audit necessarily entails, Qwest should be required to have at least some reason to believe that there may be noncompliance that will be uncovered by an audit. Otherwise, the audit process becomes not a reasonable measure for assuring compliance, but rather, the very sort of "routine practice" that the FCC precluded. Eschelon's proposed language allows Qwest to fully protect its interest in verifying compliance with the Service Eligibility Criteria while protecting Eschelon from undue burden without cause.

Eschelon also proposes that Qwest be required to describe its concern regarding Eschelon's compliance with the Service Eligibility Criteria and that Qwest be required to identify any non-complying circuits that it has identified. Eschelon's proposal would

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[73] *See TRO* ¶¶ 25 & 575 (both using "loop-transport combinations"); *see also TRO* ¶ 599 ("We apply the service eligibility requirements on a circuit-by-circuit bases, so each DS1 EEL (*or combination of* DS1 loop with DS3 transport) must satisfy the service eligibility criteria.")(emphasis added).

[74] *See TRO* at ¶621 (citing *Supplemental Order* 15 FCC Rcd. 9587, 9603-04, n. 86 (emphasis added); *see also Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Supplemental Order Clarification (2000), *aff'd sub nom. CompTel v. FCC*, 309 F.3d 3 (D.C. Cir. 2002).

require Qwest to provide information that may allow Eschelon to respond to Qwest's articulated concerns and further early resolution.

Eschelon's notice proposal is not burdensome. Qwest knows the reason for its concern and must merely state it. In addition, the language states only that Qwest will provide, upon request, a list of allegedly non-complying circuits "if any" only if Qwest has identified such circuits "as of that date." If Qwest has a list of non-complying circuits, there is no reason for it to not provide that information to facilitate root cause analysis and allow CLEC to respond fully. If Qwest does not have such a list, the language places no burden on Qwest to create one.

26. Commingled EELs/arrangements: Issues 9-58, 9-58(a)-(e), and 9-59

a. Ordering, billing and circuit ID for Commingled Arrangements

Eschelon proposes use of a single LSR, single circuit ID, and single bill for point-to-point Commingled EELs, just as Qwest provides a single LSR, single circuit ID, and single bill for point-to-point UNE EELs today. This proposal is based on the fact that a commingled EEL is nothing more than a point-to-point circuit with multiple segments. As such, it is a network facility that Qwest has been provisioning, maintaining and repairing for decades, whether in the form of a special access circuit, an EEL or, now, a commingled EEL. Thus, there is absolutely nothing new about a commingled EEL from a technical, network, provisioning or maintenance standpoint. Therefore, the terms proposed by Eschelon, which are based upon well-established history, should be acceptable to Qwest.

Instead, Qwest proposes fundamental operational changes that ensure both a terrible End User Customer experience and the complete inability of any CLEC to

actually and successfully use the commingled EEL product. In other words, Qwest's proposal is similar to initial ILEC proposals when UNE-P was first introduced, when Qwest also opposed ordering of UNE-P on a single order (though after proceedings about UNE-P it was then ordered on a single order. Qwest's proposed operational changes will delay provisioning of commingled EELs, interfere with proper testing of the commingled circuit, and unnecessarily complicate billing. Since these changes are unnecessary to accomplish Qwest's stated purposes, and their ultimate impact and effect is anti-competitive, Qwest's proposed language for these provisions should be rejected.

Alternatively, if the Commission does not accept Eschelon's proposal with respect to ordering commingled EELs on a single order form, billing such arrangements on a single bill, and assigning commingled circuits a single circuit ID, Eschelon requests that Qwest be required to relate the non-UNE and UNE portions of the commingled arrangement so that Eschelon can easily identify the facilities that are combined. This is a modest request based on the reasonable notion that Qwest, to bill Eschelon and conduct repairs, needs to know how these facilities relate and should share that information with Eschelon so that it can perform necessary tasks, verify Qwest's bills, and ensure timely repairs and proper charges for repairs. This would not be an acceptable implementation of the FCC's mandate to eliminate restrictions on commingling.

b. Intervals for Commingled Arrangements

For commingled arrangements, including Commingled EELs, Eschelon proposes that the interval be the longer interval of the two facilities being commingled. Although Qwest's proposal, on its face, appears to be similar, Eschelon's proposal allows the Commission to retain full jurisdiction over the UNE while Qwest's proposal allows

factors outside the approved ICA to change the operation of the UNE terms, in contradiction to the ICA. For example, Qwest's language in Section 9.23.4.5.4 appears to allow a CLEC to order a UNE loop and tariffed transport on separate service requests on the same day and then, pursuant to Section 24.3.2, calculate the interval. If that were true, the result would be the same as under Eschelon's proposed language and the longer interval would be the latest date for installation of the two services. That, in fact, is not how the interval will be determined. That is because Qwest, through its PCAT, requires the UNE and the non-UNE parts of the circuit to be ordered consecutively, which lengthens the total time required (i.e., the latest date for installation of the two services is pushed out).

c. Maintenance and Repair for UNE Component of Commingled EELs

Unlike Eschelon, Qwest does not propose repair language for the UNE component of commingled EELs. Qwest proposes deletion of Eschelon's language. This, combined with the fact that Qwest leaves the UNE repair language unchanged, could suggest that repairs for the UNE component of the EEL will remain unchanged. Information that Qwest has posted on its website, without obtaining Commission approval or even using CMP, tells a different story.

Currently, for UNE EELs, CLEC opens a trouble report and Qwest assigns a trouble ticket number.[75] When CLEC opens the ticket, the clock starts running under the PIDs for mean time to repair.[76] For Commingled EELs, however, Qwest requires CLECs to use a different process that adds delay for CLEC Customers while building in

[75] *See* ICA Section 12.1.3.3.3.1.1.

[76] *See* ICA Exhibit B (MR-5).

protection against PID payments for Qwest. Like the consecutive placement of orders required for commingled arrangements, this is also a consecutive process, with special access first. When a CLEC Customer served by a commingled EEL experiences a service affecting problem, Qwest requires the CLEC to first submit an Assist Ticket (AT) on the special access portion of the EEL, even though the trouble may be on the loop portion of the circuit. An AT does not start the clock running under the PIDs for mean time to repair. Only if Qwest does not find trouble on the special access portion of the EEL will Qwest contact the CLEC and ask the CLEC to open a repair ticket on the loop portion of the EEL.

The Customer is out of service the entire time and does not know or care whether the trouble is in one circuit or the other. The Customer just wants it repaired. This process will certainly delay repair time for the Customer's service when the trouble is in the loop, but that additional delay will not affect Qwest's PID performance under the ICA.[77]

If Eschelon opens trouble tickets on both circuits (UNE and non-UNE), this increases the likelihood of incurring additional charges because Qwest is choosing to treat them as multiple circuits instead of one point-to-point circuit (with one circuit ID). Finding trouble on both circuits of a commingled EEL at the same time is likely rare. Much more likely is that the trouble is on one circuit or the other, but the parties do not know which one. If Eschelon simultaneously opens a ticket on both circuits (assuming Qwest accepts them) to avoid delay, Qwest will code one ticket as no trouble found (NTF) in every case in which the trouble is on one of the two circuits. Qwest charges the

[77] *See* ICA Exhibits B & K.

CLEC maintenance of service charges on tickets that Qwest codes as NTF. Eschelon has to do more work to open and track more tickets, while paying Qwest more charges.

27. Multiplexing (Loop-Mux Combinations): Issues 9-61 and 9-61(a) – (c)

Qwest has previously offered unbundled multiplexing in three ways: as part of a multiplexed EEL, as part of a Loop-Mux Combination, and as a stand alone UNE. The Commission has set TELRIC rates for unbundled multiplexing and the UNE rates established for loops and transport include the cost of multiplexing where appropriate. Multiplexing is a "feature, function, or capability" associated with both unbundled loops and transport and, pursuant to the FCC's unbundling rules, Eschelon is entitled to use that feature, function, or capability.[78] In addition, the definition of "Routine Network Modification" (to which the parties have agreed) states that this term means "activities of the type that Qwest undertakes for its own End User Customers" and expressly includes "deploying a new multiplexer or reconfiguring an existing multiplexer."[79] Qwest has argued, however, that it need not provide multiplexing at the TELRIC rates established by this Commission.

Although Eschelon disagrees, Eschelon's position in this arbitration only requires Qwest to provide multiplexing at UNE rates when the loops and/or transport connected to the multiplexer are UNEs. This would include providing multiplexing at UNE rates in connection with multiplexed EELs (*i.e.*, a combination of loop and transport where the loop and transport components have different bandwidths and multiplexing is necessary

[78] *See* 47 C.F.R. § 51.307(c).

[79] *See also* 47 C.F.R. § 51.319(a)(7).

to connect the facilities) and also as part of a Loop-Mux Combination when unbundled loops are connected to the multiplexer and the multiplexer is connected to Eschelon's collocation, with no transport provided. Eschelon has already agreed that when it "orders a UNE Loops in combination with Qwest special access transport," the "applicable Tariff" rate will apply. (Section 24.2.1.1.) Standalone multiplexing and multiplexing in combination with transport are ***not*** subjects of Issue 9-61.

Qwest may contend that Eschelon's language is contrary to the FCC decision in the Verizon Virginia Arbitration Order. According to Qwest, that order forecloses treatment of multiplexing as a UNE when provided on a stand alone basis or as part of a commingled arrangement.[80] As the Minnesota Commission found, however, the FCC's Verizon Virginia Arbitration Order did not address muxing as a UNE when provided as part of a loop mux combination. The Minnesota Arbitrators said:

> In the *Verizon Virginia Arbitration Order*, the FCC rejected the notion that multiplexing is a stand-alone UNE, but required Verizon to offer multiplexing as a feature of UNE dedicated transport. The FCC declined to address the issue whether multiplexing can also be a feature, function, or capability of a UNE loop in the circumstances at issue here:
>
> > [T]he parties appear to disagree over Verizon's obligation to provide multiplexing associated with cross-connects between local loops and collocated equipment. This debate over Verizon's obligations under the contract in particular circumstances relates to implementation of the agreement. While the parties apparently disagree on this implementation point, the specific question is not addressed by contract language proposed by either party for this issue and thus is not squarely presented. We emphasize that our adoption of Verizon's proposed contract language on this issue should not be interpreted as an endorsement of

[80] AZ Hearing Ex. Q-17 (Stewart Dir.) at pp. 87-88, citing In the Matter of the Petition of WorldCom, Inc. for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon-Virginia and for Arbitration, CC Docket Nos. 00-218, 249, 251, `7 FCC Rcd. 27,039 (FCC Wireline Competition Bureau July 17, 2002).

> Verizon's substantive positions expressed in this proceeding regarding its multiplexing obligations under applicable law.[81]

The Minnesota Commission further found that, given that Qwest had previously provided multiplexing as a UNE when provided in conjunction with a UNE loop, it should continue to do so unless and until it receives permission to withdraw that product.[82] The Utah Commission should similarly adopt Eschelon's language for Issue 9-61 and subparts.[83]

29. Root cause analysis and acknowledgement of mistakes: Issues 12-64 and 12-64(a) – (b)

Eschelon compensates Qwest, as its vendor, for certain services. For those services, Eschelon depends on Qwest to be able to provide service to its customers, in order to provide service to new customers, to change existing service, and to perform maintenance and repair. If Qwest makes a mistake, this may result in disruption of Eschelon's customer's service, which then results in harm to Eschelon. Eschelon's proposed language, therefore, addresses Qwest mistakes that create service impacting conditions.[84] Under Eschelon's proposal, the context of the error (*e.g.*, installation or repair) is not a trigger for whether Qwest must perform root cause analysis or an acknowledgement of a mistake because one or both may be requested if the error,

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[81] AZ Hearing Exhibit E-16 (Denney Surreb.) at DD-25 [MN Arbitrators' Report, ¶ 196 (footnotes omitted, quoting the Verizon Virginia Arbitration Order at ¶¶ 490], as adopted by the MN PUC Arbitration Order.

[82] AZ Hearing Exhibit E-16 (Denney Surreb.) at DD-25 [MN Arbitrators' Report, ¶ 199], as adopted by the MN PUC Arbitration Order.

[83] Regarding placement, Qwest and AT&T addressed the Loop-Mux Combination in Section 9.23, and Eschelon accepted this placement when using that ICA, in part, as a basis for negotiations. There is no non-UNE component of the Loop-Mux, as it terminates at a collocation. Loop-Mux Combination refers to the combination of a loop and multiplexing equipment. Regardless of whether Qwest must provide unbundled multiplexing, the UNE Loop is a component of the Loop-Mux Combination. Therefore, it is appropriate that 9.23.2, which sets forth general terms and conditions for UNE Combinations, include Loop-Mux Combinations.

however it arose, created a "service impacting condition."[85] Eschelon has provided an alternative proposal for Section 12.1.4.1 regarding the single phrase on this issue that remained open in Minnesota. Although in Utah Qwest *opposes* all of Eschelon's proposed language for Issue 12-64, Qwest *agreed* in Minnesota to all of Eschelon's proposed language (which is the same in both states), except one phrase ("a mistake relating to products and services provided under this Agreement."). Eschelon's proposal tracks an earlier commission decision by the Minnesota Commission.[86] Eschelon's language, including its alternate proposal (proposal #2) regarding that one open phrase ("mistake(s) in processing wholesale orders, including pre-order, ordering, provisioning, maintenance and repair, and billing"), was adopted by the Minnesota Commission.[87]

Eschelon has proposed that it be entitled to obtain from Qwest a root cause analysis and/or acknowledgement of a Qwest mistake that impacts an Eschelon Customer. These terms will be implemented in Minnesota and thus could also be implemented in Utah. Qwest, however, would like the parties' ICA in all states other than Minnesota to be silent regarding this root cause/ acknowledgement issue. Qwest can point to no state-specific reason why the terms should vary by state, so that Customers in Minnesota may receive these explanations, but not Customers in Utah.

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[84] *See* Proposed ICA Section 12.1.4.1 (requiring CLEC to follow procedures to correct a "service impacting condition" before beginning the process of requesting an error acknowledgement).

[85] *See* Proposed ICA Section 12.1.4.1 (requiring CLEC to follow procedures to correct a "service impacting condition" before beginning the process of requesting an error acknowledgement). Regardless of whether a Qwest typist fat-fingers a service order (an error in processing an LSR or ASR) or a Qwest technician knocks off a connector (during a repair), if the end result is that the customer's service is impacted Eschelon, after following the usual procedures to restore service, wants the ability to receive a root cause analysis to help prevent a reoccurrence of the event and/or an acknowledgement of the Qwest error that may be used in communications with its customer. .

[86] Order Finding Service Inadequate and Requiring Compliance Filing, In the Matter of a Request by Eschelon Telecom for an Investigation Regarding Customer Conversion by Qwest and Regulatory Procedures, Docket No. P-421/C-03-616, (July 30, 2003).

[87] MN Order Resolving Arbitration, p. 23, ¶4 (Topic 27).

As the Minnesota Commission recognized, without a requirement for Qwest to acknowledge mistakes, Eschelon is unable to assign a Qwest error to the correct company -- making it likely that the End User Customer will ascribe the resulting service defect to Eschelon as the Customer's immediate provider. Nearly all CLEC Customers are hard-won from Qwest, the dominant monopoly provider of 100 years. If such a Customer believes that Eschelon's actions have caused a service disruption, the Customer is very likely to return to its former provider. If the error was really caused by Qwest, the lack of attribution is another barrier to Eschelon's meaningful opportunity to compete.

The ability to request a root cause analysis will enable Eschelon (and Qwest) to identify the cause of mistakes and will help avoid similar mistakes in the future. Qwest complains that Eschelon is attempting to "dictate" Qwest's investigation of errors, the implication being that whether Qwest performs such an investigation is none of Eschelon's business. Of course, it is Eschelon's business, because repeat or systemic problems in Qwest's provisioning of wholesale services to Eschelon adversely affects Eschelon and Eschelon's Customers each time they occur.

31. Expedited orders: Issues 12-67 and 12-67(a) – (g):

An expedited order, or an "expedite," is an order for which Qwest provides service more quickly than it otherwise would under the regular interval. For example, if the interval for a particular UNE is five days, Qwest can expedite the order for that UNE by providing it in less than five days. Under certain circumstances, an Eschelon Customer may need service by a certain date, such as the date of the grand opening of its business or some other important event, or may need service restored following a disaster, such as a fire or flood that might require the Customer to have to move to

different offices on short notice. Qwest provides expedites for itself and its retail customers.[88] As a wholesale customer, Eschelon should receive that service but at a wholesale rate. Eschelon proposes to pay an additional expedite charge for expedites on an interim basis, even though Qwest has not provided any cost support showing there are additional costs, until a cost-based rate is established by the Commission.

In certain circumstances, Qwest provides an exception to charging a separate expedite fee for other customers. Regarding exceptions to charging, Eschelon's first language proposal reflects the terms offered by Qwest to provide expedited service for unbundled loop orders to Eschelon in Utah until January of this year, when Qwest gave notice over CLEC objection that the process that the parties had followed since Eschelon entered into its current interconnection agreement would no longer be available (even though the contract had not changed). Eschelon's second proposal for exceptions to charging articulates a nondiscrimination standard. To assure that Eschelon has available a means of obtaining expedited service on nondiscriminatory terms and in a manner that meets its business needs and the needs of its Customers, and to avoid the potential for future disputes regarding the terms and conditions applicable to expedited service, Eschelon asks that the Commission adopt Eschelon's proposed expedite provisions.

a. Interim Wholesale Rate

Eschelon offers to voluntarily pay additional charges for expedites, even though Qwest has established no cost-based rate to expedite orders. Eschelon proposes an interim rate of $100 per order. Eschelon's proposed rate is higher than the most expensive Commission approved one-time rate for the complete installation of an entire

[88] [AZ Tr., Vol. I, p. 58, lines 19-21 ("Q. Now, you would agree with me that Qwest provides itself with expedites; correct? A. Yes."); *see also* Hearing Exhibit Q-1 (Albersheim AZ Dir.), p. 61, lines 15-16 (". . .

new loop (*i.e.*, DS1 capable loop Coordinated Install with Cooperative Testing) in some states. Eschelon's arbitration proposed charge is expressly an interim rate. Eschelon believes it exceeds costs. Eschelon offers the rate on an interim basis as a compromise in the arbitrations until a cost-based rate is established. It affords Qwest the opportunity to obtain a higher permanent rate, if Qwest can provide a TELRIC study to support that rate. If Qwest can present a cost study that supports a per-day charge, then it will be permitted to assess such a charge. To date, however, Qwest has provided no cost study and thus made no effort to prove that it incurs additional costs when providing expedites that are not recovered in the installation charge and the $100 interim additional expedite fee. Eschelon is truly interested in establishing a cost-based rate. If the Commission decides to subject the rate to a true-up, then a cost based rate will apply from the time the interim rate is established.

Eschelon and Qwest do not agree as to the rate. Qwest's proposal for a charge for expediting orders has been a moving target, varying over time and by state. Under Qwest's Utah SGAT, the rate for expedites is stated as "ICB."[89] In Washington, Qwest testified: "It is Qwest's position that the appropriate ICB rate is $200.00 per day consistent with Qwest's its practices in other states."[90] At times, Qwest has proposed language in Exhibit A that states "$200 per day advanced" (which is the rate in its tariff and in its template ICA amendment that Qwest currently requires CLECs to sign in many cases before it will provide expedited treatment for orders – regardless of other expedite language in the CLEC's current ICA). At other times, Qwest has proposed a reference to its federal tariff for this rate (instead of inserting the dollar amount in Exhibit A),

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Qwest offers expedites today to its retail customers. . .").]

[89] *See* Arizona SGAT at 9.21.14.

claiming that state commissions do not have jurisdiction to decide a rate because expediting a UNE order is "not a UNE" and therefore the UNE standard does not apply.

Expedited treatment of UNE orders is obtained for purposes of accessing that UNE and, as such, are subject to the FCC's TELRIC rules when determining charges for those rates. This conclusion follows directly from the FCC's language regarding "access to unbundled elements" reflected in 47 C.F.R. §51.307 and 51.313. In ¶ 268 of its *First Report and Order*, the FCC similarly found that the requirement to provide "access" to UNEs must be read broadly, concluding that the Act requires that UNEs "be provisioned in a way that would make them useful." As evident from these citations, an unbundled network element includes not only the physical facility, but also all the capabilities of providing service, such as provisioning and maintenance and repair. (*See also* Issue 9-31 above.) As accurately summarized by the North Carolina commission in a recent BellSouth proceeding, "[t]he Commission also believes that expediting service to Customers is simply one method by which BellSouth can provide access to UNEs and that, since BellSouth offers service expedites to its retail Customers, it must provide service expedites at TELRIC rates pursuant to Section 251 of the Act and Rule 51.311(b)."[91] Based on this reasoning, the North Carolina Commission affirmed its initial decision that BellSouth must provide service expedites at TELRIC-compliant rates.

It seems highly unlikely that Qwest's per day tariffed fee has any recognizable relationship to underlying costs that may be incurred by Qwest to expedite an order. Under an expedite request, Qwest performs the same work it would undertake under generally applicable service date intervals, with the main difference being that this work

[90] Albersheim WA Direct, p.. 60, lines 2-4..

[91] *Re NewSouth Communications Corp*., 2006 WL 707683 at *47 (N.C.U.C. February 8, 2006).

is performed earlier. Clearly, the simple fact that the work is performed earlier does not necessarily mean that it costs more to undertake the very same activities. The only cost that Qwest *may* incur would be the cost of processing the expedite order – which is likely to be relatively small. For example, Qwest's SGAT in some states contains a commission-approved rate that may be considered a proxy, or at least a ballpark estimate, of the likely additional costs (over and above the applicable NRC, if any) that Qwest would incur for processing an expedite order. This rate is the charge for Date Change of $10.22 per date change.[92]

It is not clear that an expedite request causes Qwest to incur any increased cost beyond those already accounted for in its existing NRCs for the normal provisioning interval. In such circumstances, an expedite fee of, for example, $200 per day advanced (which could be as high as $1,000 to shorten a normal service date interval of 5 days) would be duplicative of its existing NRCs and as such, wholly inappropriate given the FCC's pricing rules and previous decisions of this Commission. 47 C.F.R. § 51.507 requires that "[e]lement rates shall be structured consistently with the manner in which the costs of providing the elements are incurred." The only likely cost of performing a job five days earlier than the standard interval is the cost of processing of the expedite order. This cost is a per-order, not per-day cost. Because it is hard to imagine circumstances that would drive costs of an expedite request to be per-day-based, Qwest's unilateral decision to implement a per-day rate structure through its PCAT indicates that this rate is not cost-based.

[92] *See, e.g.*, SGAT Section 9.20.12.

The Commission should establish a cost-based rate at the appropriate time and, if not set in this arbitration, set an interim rate here until that rate is set. As Qwest has provided no cost support to show that its costs are not recovered in the installation charge and recurring rates, a rate of zero would be appropriate. In the alternative, Eschelon has proposed for an interim rate a one-time charge of $100 (which is as much or more to expedite an order than to ***install*** a loop, even in states with higher NRCs).

b. Nondiscrimination: Exceptions to Charging - Emergencies

Qwest must provide access to UNEs on nondiscriminatory terms for all CLECs (facility-based and non-facility based), as well as for Qwest itself.[93] Qwest, including its predecessor USWC, historically provided expedites for no additional charge when certain "emergency" conditions were met. Qwest recovered its costs through Commission approved charges, because, when providing expedited service, Qwest performs the same work (as the work included in the installation NRC), but just performs that work earlier. Therefore, the expedites are not "free" but are included in those costs. Qwest continues to offer some exceptions to charging an additional fee for expedites for its own retail customers. Qwest also continues to grant expedite requests at no additional charge in the emergency situations to CLECs that use exclusively Qwest facilities via QPP or resale without amendment of their ICAs. In contrast, when a facilities-based CLEC such as Eschelon uses a loop to provide the same functionality and service as a Qwest retail Customer or a CLEC ordering resale voice or QPP, Qwest now refuses to grant expedite requests at no additional charge in the Emergency situations. Qwest initially claimed that it may change course because Qwest's retail POTS service is not the "retail analogue" for

[93] *See* 47 C.F.R. § 51.313.

loops. Qwest seemed to equate having no retail analogue with having no nondiscrimination obligation, but that is not the case. Whether or not there is a retail analogue, Qwest must provide access to unbundled loops on a nondiscriminatory basis.[94] As discussed with respect to intervals (see Section 1.7.2 above), however, the FCC stated specifically that the test for a "meaningful opportunity to compete" when there is no retail analogue is no less rigorous than the test when there is one.[95] Later, Qwest said there is a retail analogue for loops, but only for high capacity (DS1 and DS3) unbundled loops.[96] More recently, Qwest has focused on its argument that expedites are superior services and not UNEs. Expedites are not superior services as Qwest provides expedites for itself and its retail customers.[97] The issue is not whether a term (*e.g.*, "expedite") is itemized on the minimum list of "UNEs"; the issue is nondiscriminatory *access to* UNEs. In ¶268 of its *First Report and Order*, the FCC found that the requirement to provide "access" to UNEs must be read broadly, concluding that the Act requires that UNEs "be provisioned

[94] For those functions that have no retail analogue, the BOC must demonstrate that the access it provides to competing carriers would offer an efficient carrier a "meaningful opportunity to compete." *In the Matter of the Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York*, Memorandum Opinion and Order, FCC 99-404, CC Docket No. 99-295, rel. December 22, 1999, ¶ 44 (citations omitted). The FCC made clear that the lack of a retail analogue did not mean that the BOC would be subject to a more lenient nondiscrimination obligation. The FCC stated that "we do not view the 'meaningful opportunity to compete' standard to be a weaker test than the 'substantially the same time and manner' standard." The meaningful opportunity to compete standard is, rather, "intended to be a proxy for whether access is being provided in substantially the same time and manner and [is], thus, nondiscriminatory." *Id.* at ¶ 45

[95] Memorandum Opinion and Order, In the Matter of the Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York, FCC 99-404, CC Docket No. 99-295 (rel. December 22, 1999) ("NY 271 Order").

[96] Qwest's Response to Eschelon's Motion for Summary Judgment, or in the Alternative, Partial Summary Judgment, *In the Matter of the Complaint of Eschelon Telecom of Arizona Inc. Against Qwest Corporation*, ACC Docket No. T-01051B-06-0257, T-03406A-06-0257 (Aug. 18, 2006) ["Arizona Complaint Docket"], p. 17, lines 8-9 ["the only retail analogue is between high capacity loops (DS1 and DS3 Capable Loops) and high-capacity private lines."]; *see also* Albersheim CO Answer, p. 50, line 22.

[97] [AZ Tr., Vol. I, p. 58, lines 19-21 ("Q. Now, you would agree with me that Qwest provides itself with expedites; correct? A. Yes."); *see also* Hearing Exhibit Q-1 (Albersheim AZ Dir.), p. 61, lines 15-16 (". . . Qwest offers expedites today to its retail customers. . .").]

in a way that would make them useful."[98] Expedites are needed to make UNEs useful. Nondiscriminatory access to UNEs must be provided at cost-based rates.[99] If Qwest provides an exception to charging for itself or its retail customers, Qwest should provide the exception on nondiscriminatory terms.

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

Timely delivery of service on the requested due date is critical to meeting customer expectations and remaining competitive. A "jeopardy" is a situation in which Qwest is in danger of failing to meet the Due Dates of an order. As such, jeopardies directly impact the quality of the service that Eschelon is able to provide to its Customers. If a due date will not be met, how the companies will proceed may depend on how the "jeopardy" (relating to the reason for a missed due date) is classified. Eschelon's proposal reasonably states that Qwest will classify a jeopardy caused by Qwest as a Qwest jeopardy and a jeopardy caused by CLEC as a CLEC jeopardy (known as Customer Not Ready – "CNR"). (Issue 12-71.) Another provision requires Qwest to reclassify jeopardies that it has incorrectly classified as CNR jeopardies. (Issue 12-73.) Qwest has testified: "We don't disagree with the notion that a CNR jeopardy should be assigned appropriately."[100] Qwest cannot show that it is reasonable or in the public interest for Qwest to classify a jeopardy caused by Qwest as a CLEC jeopardy.

Eschelon has also proposed language to address one scenario in particular when Qwest should not incorrectly characterize a jeopardy as a CLEC-caused (CNR) jeopardy rather than a Qwest jeopardy. (Issue 12-72.) This occurs when, after CLEC

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[98] *See* Webber Direct (adopted), p. 98.

[99] 47 C.F.R. §51.307(a); 47 U.S. C. §252(d)(1)(A)(i).

[100] MN Tr., Vol., 1, p. 94, lines 5-6 (Ms. Albersheim).

submits its LSR, Qwest sends a Qwest jeopardy notice to CLEC. A certain type of jeopardy notice will indicate that Qwest has a facility problem in its network so CLEC should not expect delivery of the requested service unless Qwest advises of the new due date when the jeopardy condition has been resolved. Qwest admits the Firm Order Confirmation ("FOC") status notice is "the agreed upon process by which Qwest" will advise Eschelon "of the due date for a circuit."[101] After sending the Qwest facility jeopardy notice, Qwest clears the Qwest jeopardy (such as by locating available facilities). Qwest, however, does not notify Eschelon via an FOC that the jeopardy has been cleared and is no longer an obstacle to delivering the facilities. Because Eschelon has not received proper notice from Qwest, however, Eschelon has no reason to expect delivery and it has not planned resources or Customer access for a delivery that it has no reason to expect. Qwest admits that the reason Qwest is supposed to send an FOC after a Qwest facility jeopardy is cleared is "to let the CLEC know that the CLEC should be expecting to receive the circuit" so the CLEC may have personnel available and may make arrangements with the customer if access to the customer premises is needed.[102]

In such a situation in which Qwest has failed to properly inform Eschelon earlier that Qwest cleared the jeopardy and has failed to provide a due date, Eschelon's proposal for Issue 12-72 states that Eschelon will still use its best efforts to accept the service. Thus, any further disruption or delay in service is a direct product of Qwest's jeopardy action or inaction and subsequent failure to send a FOC, not of the Eschelon's unwillingness to mitigate the consequences. It is Qwest's conduct, in not properly providing advance notice to Eschelon that the jeopardy has been cleared, that has

[101] MN Tr., Vol. 1, p. 38, lines 17-19 (quoted in Attachment 1). *See also* ICA/SGAT Section 9.2.4.4.1.
[102] Tr. Vol. I p. 37, line 16 – p. 38, line 6 (Ms. Albersheim of Qwest) (quoted in Attachment 1).

prevented Eschelon from being able to accept delivery. If the obstacles are too great because of Qwest's conduct and Eschelon cannot accept delivery at the time, Qwest should not classify the consequences of Qwest's conduct as an Eschelon-caused (CNR) jeopardy. If a jeopardy is classified as a CNR, the due date will get pushed out by at least three days, even though Eschelon may be ready to accept delivery earlier, such as later the same day or the next day.

This issue is an appropriate subject matter for an ICA. For example, agreed upon language in Sections 9.2.2.9.3 and 9.2.2.9.4 deals with whether a jeopardy is a "Qwest jeopardy" and what happens if it is. Like Eschelon's proposed language here, those closed provisions provide that, if it is a Qwest jeopardy, "the Parties will attempt to set a new appointment time on the same day and, if unable to do so, Qwest will issue a Qwest Jeopardy notice and a FOC with a new Due Date."

Qwest proposes to exclude all of Eschelon's language in Section 12.2.7.2.4.4 and subparts from the ICA and replace it with a reference to its unfiled web site. Qwest may change its web site. Qwest's proposal offers no certainty on which Eschelon may plan its business regarding the critical issue of when it may deliver service to its customers.

43. Controlled Production Testing: Issue 12-87

Controlled production is one type of testing. Language relating to other types of testing is closed, and such testing will be conducted per the terms of the ICA. In addition, under Eschelon's proposal, controlled production testing will be performed in the same circumstances as it is performed today – which does not include recertification. Eschelon has already certified so does not also have to do controlled production for

recertifications. The Commission in the Minnesota Qwest-Eschelon arbitration adopted Eschelon's first proposal. The Arbitrators in that case said (¶255): "Qwest agrees that Eschelon's language accurately depicts its current practice, which does not require CLECs to recertify if they have successfully completed testing of a previous release; in addition, Qwest admits that Qwest can control whether a CLEC can access its OSS." The Arbitrators also said (¶258): "There is no evidence that Eschelon has or would opt out of recertification testing for any improper purpose." Eschelon has an incentive to avoid harm as well. Eschelon's language allows the parties to agree to perform controlled production for recertifications by mutual agreement if a situation arises in which an exception is needed to avoid harm.

Since the Minnesota proceeding, Qwest has attempted to back away from its earlier admission to claim that Eschelon's language no longer reflect current practice, based on alleged differences between system releases 19.0 and 20.0. Qwest's documentation for Release 20.0, however, was readily available at the time Qwest previously testified that Eschelon's language is accurate with regard to recertification. Also, the circumstances regarding Release 20.0 production have not changed since Qwest's previous testimony in August and November of 2006. No CLEC was in production with Qwest on Release 20.0 then, and no CLEC was in production with Qwest on Release 20.0 when Qwest changed its testimony. Eschelon will be the first, or one of the first, CLECs to be in production with Qwest on Release 20.0. No change in circumstance explains Qwest's reversal in position.

Qwest is wrong when it claims that Eschelon's language is not accurate for the current release, IMA 20.0. Eschelon's language regarding controlled production not

being required for *recertification* is *inapplicable* to Release 20.0 because, as Qwest has admitted,[103] Release 20.0 is a *new implementation*. Unlike Release 19.0, Release 20.0 introduces a new application-to-application interface (XML instead of EDI) and does not enhance existing application functionality (EDI to EDI; or XML to XML) for products that have already been certified on the same application-to-application interface. Eschelon's proposed language (both alternate versions) expressly provides that controlled production testing *will* be performed for new implementations, such as Release 20.0.

Controlled production is not required in all situations, but without Eschelon's modification, the first sentence reads as though it is. If this is not clarified as shown in Eschelon's first proposal, another alternative is to alter the first sentence to specifically state that controlled production applies to new implementations. In Minnesota, the Commission adopted Eschelon's first proposal.[104]

44. Rates for services: Issues 22-88, 22-88(a), and 22-89

a. Application of Exhibit A (Section 22.1.1 & Ex. A, Section 7.11)

Although the majority of rates in the ICA refer to Qwest's charges to Eschelon for services and facilities, some of the rates apply to Eschelon's charges to Qwest. *See*, *e.g.*, Sections 7.3.7.1 and 7.3.7.2 (charges for local, ISP-bound and intraLATA toll transit traffic); 9.2.5.2 and 9.2.5.2.1 (trouble isolation); and 10.2.5.5.4 and 10.2.5.5.5 (Qwest Requested LNP Managed Cuts). Notwithstanding that fact, Qwest proposes language that would limit the applicability of the rates in Exhibit A to Qwest's charges to Eschelon. Eschelon proposes striking language proposed by Qwest that would purport to

[103] Ms. Albersheim of Qwest has admitted that Release 20.0 is a "new implementation" (*i.e.*, the term used in Eschelon's proposed language). *See* Qwest-Eschelon ICA MN Arbitration, Albersheim MN Surrebuttal, p. 43, lines 13-15 ("The underlying architecture of IMA Release 20 .0 is changing from EDI to XML. This is such a significant change that Qwest is treating this as a new implementation").

limit the applicability of Exhibit A to Qwest's charges because that language is unnecessary and inaccurate.

b. Request for Cost Proceeding (Section 22.4.1.3)

Eschelon has proposed language, which Qwest has objected to, that preserves the right of either company to request that the Commission commence a cost case to replace an interim rate with a Commission-approved rate. This issue is linked to the Issue 22-90 regarding Eschelon's proposal for Section 22.6, which sets forth terms under which either company may seek Commission approval for an interim rate. The opportunity to obtain Commission-approved rates is necessary to ensure that rates are fair and reasonable.

45. Unapproved rates: Issue 22-90 and subparts (a)-(e)

a. Commission approval of unapproved rates

Often, in cost cases, the Commission does not ultimately adopt Qwest's "going-in" position for its desired rate. Commissions often approve something less than or different from any one party's wish list of desired rates. In Section 22.6 and subparts, Eschelon proposes a process for ensuring that Qwest's "going-in" positions or "wish-list" rates are not unilaterally implemented and then remain in effect indefinitely with no action by Qwest to support the rates to the Commission or obtain Commission approval of those rates. Eschelon's proposal tracks a commission decision in Minnesota in the 271 Cost Docket.[105] Because the Minnesota order has been in place for some time, it has already been implemented in Minnesota. While in some states (but not Utah) Qwest has agreed to a portion of Eschelon's language, Qwest's omissions would change the process

[104] MN Arbitrators' Report ¶258; MN Order Resolving Arbitration, p. 22, ¶ 1.

[105] Order Setting Prices and Establishing Procedural Schedule, *In the Matter of the Commission's Review and Investigation of Qwest's Unbundled Network Element (UNE) Prices*, Docket No. P-421/CI-01-1375 (M.P.U.C. October 2, 2002).

from the effective one in Minnesota to a lesser version that is more of an automatic filing process under which Qwest may file rates to obtain the ability to charge its proposed rates while attempting to block Eschelon from requesting an interim rate at any time or requesting a review of those rates in a cost proceeding.

Without the language that Eschelon has proposed, Qwest can extend the period by which it imposes unapproved rates by not filing cost support with the Commission and requesting approval of the rates. The Commission should recognize the benefits of the Minnesota ruling that can also be achieved in Utah and reject Qwest's limiting proposals.

Eschelon's proposal clarifies that, when Qwest offers a Section 251 product or service for which a price/rate has not been approved by the Commission in a TELRIC Cost Docket ("Unapproved rate"), and Qwest develops a cost-based rate and submits that rate and related cost support to the Commission *for review*, Qwest will notify Eschelon. Eschelon's language states that Qwest will provide Eschelon with notice of its filing and proposed rate and, upon request, will provide Eschelon with a copy of the related cost support for its proposed rates. The language states Qwest must submit cost support with its proposed rates when filing with the Commission. The language also provides that the parties may agree upon a rate. To negotiate a rate with Qwest and to know whether it objects to a rate filed with the Commission, Eschelon needs access to the cost support to assist in making these determinations. Eschelon's request to receive notice and, upon request, cost support is narrow and reasonable.

Section 22.6 as proposed by Eschelon anticipates that the Commission may set interim rates as needed (within or outside the context of a cost case) so that Qwest is not

able to charge its proposed rates indefinitely. This arbitration is one context in which interim rates may be set. Section 252(c) requires that a state commission, "in resolving by arbitration" any open issues and imposing conditions upon the parties to the agreement, "shall establish any rates for interconnection, services or network elements according to subsection (d) of this section."[106]

b. Unapproved Rates – Interim Rate Proposals - Exhibit A

Closed language in the proposed ICA defines rates not approved in a cost case as interim rates. (Section 22.4.1.1.) The Commission has not approved rates for many rate elements for which Qwest proposes rates in Exhibit A. Both Eschelon and Qwest are proposing interim rates in this proceeding for elements with unapproved rates. As between the two proposed rates for each element, the Commission should choose Eschelon's interim rate proposals.

Eschelon has accepted the majority of Qwest's proposed rates on an interim basis, even though Qwest's "going in" positions are often high. However, for certain rates for which there is no approved rate and for which Qwest has provided no cost support, Eschelon has proposed alternative rates that it believes more closely reflect Qwest's costs. Eschelon's interim rate proposals are appropriate because they either reflect rates that Qwest currently offers to other CLECs, are reasonable in light of Qwest's failure to provide any cost support, or incorporate findings from prior Commission decisions with respect to Collocation, Non-recurring and recurring rates. Until such time that Qwest seeks permanent rates to replace interim rates, Qwest should be required to reflect prior

[106] 47 U.S.C. § 252(c). Section 252(d) of the Act sets forth the applicable pricing standards for interconnection, network elements, and resale at wholesale rates of ILEC retail services. It states that rates shall be cost-based and nondiscriminatory. 47 U.S.C. § 252(d)(1)(A)(i) & (ii).

Commission decisions in its interim rate proposals. Eschelon's interim rate proposals are reasonable and should be adopted.

REQUEST FOR RELIEF

Eschelon requests that the Commission arbitrate the unresolved issues between Eschelon and Qwest in accordance with Sections 251 and 252 of the Telecommunications Act. Eschelon further requests that the Commission issue an order approving an interconnection agreement which includes all of the rates, terms, and conditions agreed to during negotiations and, on all disputed points, which incorporates and adopts the specific resolutions proposed by Eschelon.

Dated: April 27, 2007

By _____

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