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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. 07-2263-03

QWEST CORPORATION'S RESPONSE TO THE PETITION OF ESCHELON TELECOM OF UTAH, INC. FOR ARBITRATION WITH QWEST PURSUANT TO THE TELECOMMUNICATIONS ACT OF 1996

Pursuant to 47 U.S.C. § 252, Qwest Corporation ("Qwest") submits this response to the Petition for Arbitration of Eschelon Telecom of Utah, Inc. ("Eschelon").

I. IDENTIFICATION OF THE PARTIES AND THEIR COUNSEL

The following attorneys will represent Qwest in connection with this arbitration:

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II. NEGOTIATION HISTORY

Eschelon's petition accurately describes the parties' negotiations that took place before Eschelon filed the petition. However, Qwest does not accept Eschelon's assertions in Section II that the unresolved issues described in the petition are essential to Eschelon's "ability to compete meaningfully" or that Eschelon's decision to raise these issues arises from "a compelling business need to do so." The language Qwest has proposed in the ICA ensures that all CLECs are able to compete and, as set forth below,

Eschelon cannot demonstrate a compelling business need for any of its proposed language.

The parties have continued to negotiate since Eschelon file its petition last October and have resolved a substantial number of issues included in the petition. The following issues listed in the petition are settled and no longer in dispute: 4-5(b), 9-32 (and subparts), 9-35, 9-36, 9-39, 9-46, 9-50, 9-52, 9-54(a), 10-63, 12-70, 12-74, 12-75(a), 12-76, 12-76(a), 12-77, 12-78, 12-79, 12-81, 12-82, 12-86, and 24-92.

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

Qwest agrees that the parties have waived the nine-month deadline, set forth in Section 252 of the Act, for state commissions to resolve arbitrations. The agreement to waive the deadline arises from the significant number of issues presented in this arbitration and the fact that the parties are involved in arbitration and post-arbitration proceedings in five other states. These factors prevent resolution of the disputed issues within the nine-month period prescribed in Section 252.

IV. PROPOSED ARBITRATION SCHEDULE

Qwest stipulates to the arbitration schedule listed in Section IV of Eschelon's petition.

V. RELEVANT DOCUMENTATION

Eschelon's petition includes the necessary documentation relating to the resolved and unresolved issues.

In addition to the documentation that accompanies Eschelon's Petition, Qwest intends to support its position with the filing of written testimony and other evidence. Qwest requests that the Commission permit it to file written direct, rebuttal, and

surrebuttal testimony in support of this Response, consistent with the procedures established by the Commission for arbitration proceedings under 47 U.S.C. § 252.

VI. DISPUTED ISSUES

In the section that follows, Qwest provides a brief overview of the disputed issues and a statement of its position with respect to each issue.

A. Background: Evolution of the Telecommunications Industry

Eschelon's petition comes approximately 11 years after the Federal Communications Commission ("FCC") issued its *Local Competition Order*, which was the FCC's first comprehensive effort at implementing the local competition provisions of the Act.[1] As this Commission is well aware, the telecommunications industry has changed dramatically in these ten years. The advancements in technology have been revolutionary and have led to forms of competition that barely existed or did not exist at all when the FCC issued the *Local Competition Order*. On a related note, local and long distance markets throughout most of the country have become highly competitive, and telecommunications consumers now have more choice than ever before.

As the telecommunications industry has undergone these monumental changes in the decade since Congress passed the Act, so too has the law governing the industry. Courts, the FCC, and state commissions have been faced with the significant challenge of applying an Act that was designed for an older, almost bygone era to a new world characterized by revolutionary technologies and highly competitive markets. Their

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[1] First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd. 15499 (FCC August 8, 1996) ("*Local Competition Order*"), *aff'd in part and rev'd in part on other grounds*, *Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *aff'd in part and rev'd in part on other grounds*, *AT&T v. Iowa Utils. Bd.*, 525 U.S. 366 (1999).

primary challenge has been to ensure that the law is applied to account for these changes so that the Act does not become an anachronism.

Thus, the recent and large body of law relating to implementation of the Act is replete with examples of courts and regulatory agencies recognizing that with the rapid emergence of competition in local exchange markets, there is no longer a need for the level of regulation that has been applied in the past. Perhaps most significant in this regard are the FCC's rulings in the *Triennial Review Order* and the *Triennial Review Remand Order* that have significantly reduced the unbundled network elements ("UNEs") ILECs are required to provide at highly regulated, cost-based rates under Section 251(c)(2).[2] In these rulings, the FCC has determined—and the United States Court of Appeals for the D.C. Circuit has affirmed[3]—that there is neither legal nor economic justification for mandatory unbundling at cost-based rates for many network elements for which there is now robust competitive supply.

The recognition that regulation should decrease as the telecommunications industry evolves and competition increases is consistent with the Act and Congress's intent to move the industry toward deregulation. As stated in the House of Representatives Report relating to the Act, a "primary purpose" of the Act was "to

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[2] *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, 18 FCC Rcd. 16978, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking (2003) ("*TRO*"); *In the Matter of Unbundled Access to Network Elements and Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313 and CC Docket No. 01-338, Order on Remand, 20 FCC Rcd. 2533 (2005) ("*TRRO*").

[3] *See Covad Communications Co. v. FCC*, No. 05-1095 (D.C. Cir. June 16, 2006); *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*").

increase competition in telecommunications markets and *to provide for an orderly transition from a regulated market to a competitive and deregulated market*."[4]

B. The Adoption of Standardized Procedures and Process Through the Collaborative Efforts of State Commissions, Qwest, and CLECs

This arbitration represents another step toward implementing the Act in the new competitive environment that has evolved since Congress passed the Act. Shortly after passage of the Act, this Commission conducted multiple Section 252 arbitrations involving the full panoply of wholesale obligations imposed by Section 251. Those arbitrations, like similar arbitrations throughout the country, typically involved dozens of disputed, often far-reaching issues relating to the scope of the rights and obligations created by Sections 251(b) and (c). Because the issues were novel and the precedent was minimal or non-existent, rulings and ICA terms differed from one state to the next and from one contract to another. The resulting inconsistencies in ICA terms and conditions created significant operational challenges for ILECs and CLECs alike. Nowhere were these challenges more evident than in the processes for ordering, provisioning, measuring, and billing interconnection services and UNEs. For obvious reasons relating to efficiencies and costs, ILECs and CLECs have a strong interest in having standardized processes in place for each of these service components. The legal patchwork that evolved in the years immediately following passage of the Act worked against this desired standardization.

From Qwest's perspective, the lack of standardization in the processes for ordering, provisioning, measuring, and billing added exponentially to the challenges the

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[4] H.R. Rep. 104-204(I), 104th Cong., 1st Sess. 1995, 1996 U.S.C.C.A.N. 10, 1995 WL 442504. (Emphasis added).

company faced as a new wholesale provider for hundreds of CLECs in 14 different states. Fortunately, the region-wide proceedings Qwest initiated in 2000 under 47 U.S.C. § 271 for entry into the long distance markets in its 14-state territory offered a solution. Those proceedings provided a forum for Qwest, CLECs, and regulators to come together and reach resolution on many standardized procedures and processes. While there were sometimes strong differences of opinion concerning the appropriate procedures and processes, virtually all parties agreed on the need for standardization to ensure that (1) CLECs receive high quality service, (2) CLECs are treated equally, (3) Qwest and CLEC employees clearly understand their obligations to each other, and (4) Qwest's wholesale performance is measured fairly and meaningfully.

Qwest, the CLECs, and regulators invested extraordinary amounts of time and resources to develop and implement standardized processes through Qwest's Section 271 workshop proceedings. In those proceedings, all participants hammered out in detail a set of obligations to implement the duties in the Act, and developed a comprehensive set of measurements, known as the performance indicator definitions ("PIDs"), to determine the quality of the service Qwest was providing to CLECs.

Standard processes would not have been effective had they been designed to remain static. As a part of the Section 271 proceedings, therefore, Qwest, the CLECs and regulators developed a process for updating Qwest processes that would provide flexibility to change with a dynamic industry, while ensuring that change would be handled fairly and efficiently. Known as the Change Management Process ("CMP"), this process has been endorsed by state commissions as a part of Qwest's Section 271

applications and approved by the FCC as an appropriate vehicle for updating Qwest's processes for handling wholesale orders under the Act.[5]

It is beyond reasonable dispute that the combination of standardized processes, along with an appropriate change management process, has been successful. Qwest's wholesale performance pursuant to the PIDs improved rapidly and has consistently reached outstanding levels over the last five years. In 2002 and 2003, the FCC reviewed Qwest's processes and procedures in connection with the company's application for entry into the long distance markets in its 14 states. In granting Qwest entry into the long distance markets in each of these states, the FCC found that Qwest satisfied the 14-point checklist in Section 271(c)(2)(B), stating that "Qwest has taken the statutorily required steps to open its local exchange markets in these states to competition."[6]

The state of competition in Qwest's local exchange markets, including in Utah, directly reflects the success of the collaborative Section 271 process. Competition is robust in both the residential and business markets. State commissions have recognized this competition in granting Qwest competitive classification for virtually all of its business services throughout most of Qwest's territory. And, in the residential markets,

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[5] *Application by Qwest Communications International, Inc. for Authorization to Provided In-Region, Inter-LATA Services in the States of Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington and Wyoming,* WC Docket No. 02-314, Memorandum Opinion and Order, 17 FCC Rcd 26303, 26409-10, at pages18-32 (2002) (Qwest Nine State Order); *Application by Qwest Communications International, Inc. for Authorization to Provide In-Region, InterLATA Services in New Mexico, Oregon and South Dakota*, WC Docket No. 03-11, Memorandum Opinion and Order, 18 FCC Rcd 7325 at pages 19-20 (2003); *Application by Qwest Communications International Inc. for Authorization to Provide In-Region, InterLATA Services in Minnesota*, WC Docket No. 03-90, Memorandum Opinion and Order, 18 FCC Rcd 13323, ¶ 15 (2003); *Application by Qwest Communications International Inc. for Authorization to Provide In-Region, InterLATA Services in Arizona*, WC Docket No. 03-194, Memorandum Opinion and Order, 18 FCC Rcd 25504, ¶¶ 20-21 (2003).

[6] Qwest Nine State Order, ¶ 1.

competition from cable, wireless, and voice over Internet providers ("VoIP") is intensive. Cable companies, in particular, have entered local exchange markets aggressively, having taken large portions of the market in areas in which they have focused. VoIP providers also have emerged as strong competitors, taking advantage of efficient infrastructures largely free from regulatory restrictions.

C. Eschelon's Proposals: Disregarding the Need for Standardized Procedures and Processes and Avoiding Changes in the Law

Against this background, it is essential that the ICA between Qwest and Eschelon recognize and retain the standardized procedures and processes that state commissions, Qwest, and the CLEC community have jointly developed for ordering, provisioning, measuring, and billing interconnection services and UNEs. It is also vital that any changes to the procedures and processes governing these facets of wholesale service be carried out through the Commission-endorsed CMP—not through a single arbitration—so that all CLECs with an interest in these issues can provide their input.

As described below and as Qwest will demonstrate during this arbitration, many of Eschelon's proposals seek specialized procedures and processes for Eschelon that, if adopted, would undermine the standardization the local exchange industry has achieved through the significant efforts of recent years. Moreover, by demanding processes specifically tailored to its desires in this arbitration, Eschelon is effectively end-running the CMP and asking this Commission to adopt far-reaching changes in the way that wholesale service is provided and received without obtaining the input of the many other CLECs that would be affected by the changes. The CMP is designed precisely to prevent this type of approach to industry-wide issues. Under Eschelon's proposals, the clock

would be turned back to the time when there were wide variations in the procedures and processes governing wholesale service.

Eschelon's proposals also would turn back the clock by failing to give the required effect to recent decisions and orders of the FCC and the courts interpreting and applying the Act. Those decisions recognize and implement Congress' intent to move toward less regulation as the competition in local exchange markets increases. In violation of these rulings, including the FCC's rulings in the *TRO* and the *TRRO*, Eschelon continues to seek to impose outdated obligations that the FCC and the courts have eliminated based on the rapid growth of competition in local exchange markets. Thus, for example, Eschleon would have the Commission require Qwest to provide access to certain databases and services that the FCC has determined ILECs are no longer required to provide. Needless to say, it would be entirely improper to adopt an ICA that turns back the clock by failing to give effect to the substantial body of law that reflects the far-reaching changes of recent years in the telecommunications industry.

In contrast to Eschelon's proposals, the ICA Qwest is proposing maintains the standardization of procedures and processes that the industry has achieved, while keeping the door open to change through the CMP and with the participation and input of all carriers with an interest in these issues. Further, Qwest's ICA proposals carefully track the recent pronouncements from the FCC and the courts that have refined ILEC and CLEC rights and obligations as competitive conditions have changed.

It is vital that the Commission review the issues in dispute in this arbitration with a view to the future, rather than ignoring the monumental legal and market developments of recent years. For the reasons summarized below in connection with the parties'

positions on the disputed issues, Qwest submits that its contract proposals best reflect this perspective and urges the Commission to adopt those proposals.

D. Specific Disputed Issues

SECTIONS 1 THROUGH 7

1. Interval Changes (Section 1.7.2): Issues 1-1, 1-1(a), 1-1(b), 1-1(c), 1-1(d), 1-1(e)

Because these issues relate closely to Section 12 of the agreement, they are discussed in that portion of the response.

2. Application of Rates in Exhibit A (Section 2.2): Issue 2-3.

Section 22 and Exhibit A address rate issues. Qwest discusses this issue in that section of this response.

3. Effective Date of Legally Binding Changes (Section 2.2): Issue 2-4.

This issue relates to changes in law and whether they are effective on the date of the change in law or effective on the date that the ICA is amended. Qwest suggests that the Commission adopt language that first defers to the language of any applicable order. Nonetheless, in the absence of clear direction in an FCC or court order, Qwest urges that the Commission adopt language that provides incentive to parties to either quickly resolve differences in appropriate language or quickly bring such disputes to the Commission. Such language will reduce litigation by removing one potential issue from complaint proceedings and will ensure that the parties have incentive to quickly resolve change of law issues that arise in the future.

4. Design Changes (Sections Section 9.2.3.8, 9.2.3.9, 9.2.4.4.2, 9.6.3.6, and 9.20.13): Issues 4-5 and 4-5(a)-(c).

The parties have settled Issue 4-5(b). Issues 4-5, 4-5(a) and 4-5(c) involve disputes relating to Qwest's right to assess charges and recover its costs for design

changes it is required to make for Eschelon relating to unbundled loops and connection facility ("CFA") assignments. As Qwest will demonstrate at the hearing, Qwest incurs costs to perform design change requests that Eschelon submits relating to transport facilities, loops and CFA assignments. Eschelon is proposing non-compensatory rates for loop and CFA design changes. Its proposed rates are not supported by cost studies and would deny Qwest the cost recovery to which it is entitled under the Act.

5 through 7. Discontinuation of Order Processing (Section 5.4.2): Issues 5-6, 5-7 and 5-7(a)
De Minimis Amount (Section 5.4.5): Issue 5-8
Definition of Repeatedly Delinquent (Section 5.4.5): Issue 5-9
Disputes Before Commission (Section 5.4.5): Issue 5-11
Deposit Requirement (Section 5.4.5): Issue 5-12
Review of Credit Standing (Section 5.4.7): Issues 5-13

Each of the issues listed above involves the parties' rights and obligations relating to billing and payment of bills. They fall into three general subparts related to: the time at which a party may discontinue processing orders because of the other party's failure to make full payment; the definition of "repeatedly delinquent;" and a party's right to review a credit report and increase deposit requirements. In the Minnesota arbitration, Qwest witness, William Easton, summed up Qwest's position on these issues:

> Qwest believes that it needs to have protection against ultimate failure to pay its bills. As a company begins to not pay its bills, Qwest needs the opportunity to take action.

(Minnesota Hearing Tr., V.1, p. 143, l. 7 – 15).

Eschelon's proposals do precisely the opposite. Eschelon seeks to decrease Qwest's ability to collect its bills by requiring Qwest to clear hurdles such as waiting for Commission review before discontinuing order processing (Issues 5-6) or demanding a deposit (Issues 5-12, 5-13, 5-14). Eschelon seeks to water down its obligation to pay bills by limiting its obligations to pay not to the amount of the bill, but rather an amount that is

close to the amount billed. (Issue 5-8). Even then, Eschelon seeks to water down that obligation to re-define "repeatedly delinquent" in such a manner that it would only be obligated to pay its bills on time four months a year to avoid triggering a potential deposit requirement. (Issue 5-9).

Eschelon does not stop there. It proposes limiting Qwest's ability to seek a deposit further by attempting to limit that right to its weakened definition of "repeatedly delinquent," thereby eliminating all other possibilities where a deposit request would be appropriate (Issue 5-13). Even in that situation, Eschelon seeks to require Qwest to either seek Commission approval or wait for a Commission decision to demand a deposit. (Issue 5-11).

Eschelon's proposals are inconsistent with this Commission's resolution of similar billing and payment issues in the recent arbitration between Qwest and Covad Communications Company. In that proceeding, Covad proposed provisions similar to those Eschelon is proposing here, and the Commission rejected them on the ground that they improperly deviated from the billing and payment processes that resulted from the Section 271 proceedings in this state, unnecessarily deviated from accepted industry standards and practices, and undermine Qwest's legitimate need for protection against financial risk. *In the Matter of DIECA Communications, Inc., D/B/A Covad Communications Company, for Arbitration to Resolve Issues Relating to an Interconnection Agreement with Qwest Corporation,* Docket No. 04-2277-02, Arbitration Report and Order at 40-42 (Utah Commission Feb. 8, 2005) ("Qwest-Covad Arbitration Order").

The cumulative effect of Eschelon's proposals is to make it nearly impossible for Qwest to take effective action to collect valid, undisputed bills owed by Eschelon. In the event Eschelon were in poor financial health or employed a strategy of paying bills slowly, Eschelon's proposals would have significant adverse consequences for Qwest. Eschelon has indicated in several proceedings that it pays Qwest approximately $55 million per year. Thus, each week of delay would cost Qwest over one million dollars. Recent Minnesota Commission proceedings involving requests to disconnect have taken months to proceed to a hearing. Eschelon's proposals would require Qwest not only go through a hearing to disconnect, but also go to the Commission to take less drastic steps to collect bills - discontinue order processing and demand a deposit. The delay alone associated with such an approach is unnecessary, particularly when Eschelon knows full well it can seek Commission intervention if Qwest were to take any of these steps improperly.

Discontinuing Orders. Eschelon is proposing language under which Qwest would not be permitted to discontinue processing Eschelon orders for non-payment of bills unless Qwest obtains approval from the Commission. As this Commission recognized in the Qwest-Covad arbitration, Qwest is entitled to timely payment for services rendered and to take remedial action if there is an apparent risk of non-payment. Although the language in Section 5.4.2 is written as if it applies to either party, in practice, it applies only to Qwest because Qwest is the only party that is processing orders under the agreement. Therefore, this section restricts only Qwest's ability to discontinue processing Eschelon's orders if Eschelon fails to pay.

Qwest's language provides Eschelon with 30 days before the billed amount is due and another 30 days thereafter before Qwest would discontinue processing orders if Eschelon failed to pay. This is precisely the time period that this Commission adopted in the Qwest-Covad Arbitration. *See Qwest-Covad Arbitration Order* at 36-42. The commercial reasonableness of Qwest's proposal is further demonstrated by the fact that Eschelon may invoke a dispute resolution process under section 5.4.4 if it has a good faith dispute about its bill. Under this process, Eschelon is not required to pay disputed amounts until the dispute is resolved. Eschelon's first of its two proposals for this issue would prevent Qwest from taking action unless and until it obtains Commission approval. Placing the burden on Qwest to file for Commission action and allowing Eschelon to continue to incur debt while that action is pending is unreasonable in light of the fact that: (1) it is Eschelon's obligation to pay its bills in a timely fashion; and (2) Eschelon can invoke dispute resolution and refuse to pay bills that it reasonably disputes.

Eschelon proposes a second alternative to Qwest's language that is equally inequitable. Whereas Eschelon's first alternative asks the Commission to adopt language requiring Qwest to obtain Commission approval prior to discontinuing the processing of orders as a result of Eschelon's own failure to pay its bills in a timely fashion, Eschelon's second alternative proposes language whereby the simple act of its "asking" the Commission to prevent the discontinuation of order processing would prevent Qwest from protecting itself from mounting unpaid debt and force it to continue to process orders pending the outcome of a proceeding. There is a transparent double standard in the provisions proposed by Eschelon. Eschelon seeks to require Qwest to obtain Commission approval to take action, on the one hand, and, on the other hand, to continue

to fail to pay its bills without consequence by "asking" for the Commission's permission, in whatever form that "asking" may take. In other words, Eschelon seeks the ability under the parties' ICA to refuse to pay its bills without the discontinuance of its orders both when it disputes amounts under the process in section 5.4.4, and even when it does not. In addition to being plainly inequitable and commercially unreasonable, this position directly conflicts with the result on the Qwest-Covad arbitration.

Definition of "Repeatedly Delinquent." Under section 5.4.5, a party that is "repeatedly delinquent" in making payments may be required to submit a deposit before orders will be provisioned and completed, or reconnected. The dispute between the parties concerning the definition of "repeatedly delinquent" concerns three issues: (1) whether the word "non-de minimis" should be inserted to qualify the billing amount at issue; (2) the time frame within which a party's nonpayment becomes "repeatedly delinquent"; and (3) when required deposits become due and payable.

Eschelon seeks to insert the word "non-de minimis" in the following definition: "Repeatedly Delinquent" means payment of any undisputed *non-de minimis* amount received more than thirty (30) days after the Payment Due Date . . . ." This vague addition to the definition ensures that the parties will in all likelihood be appearing before the Commission again in short order to clarify what they intended by "non de-minimis amount." Eschelon argues that this language protects it from Qwest action in the event Eschelon pays the wrong amount in error and is off by a few dollars. As evidenced by a relatively recent request from Qwest that Eschelon pay **undisputed** outstanding bills of over $3 million dollars, it is not Qwest's practice, nor is it financially wise or feasible, to

take collection action for "a few dollars." Eschelon's proposed language invites litigation and is wholly unnecessary.

Consistent with the 30-day due date proposal in section 5.4.2, Qwest proposes that "repeatedly delinquent" means "any payment received 30 calendar days or more after the payment due date three (3) or more times during a twelve (12) month period." Qwest's proposal is commercially reasonable and is identical to the "repeatedly delinquent" definition that was reviewed and approved in the Section 271 workshops. Additionally, this proposal is consistent with the Commission's recognition in the Qwest-Covad arbitration that Qwest is entitled to meaningful recourse when CLECs fail to pay bills. Further, in the 11 years since the Act was passed, there have been virtually no cases where Qwest or a CLEC has been required to go to the Commission in this kind of circumstance. Adding commission involvement now, when it hasn't been needed before now, serves to solve a problem that does not exist. Such a proposal runs directly counter to the reality of the telecommunications market, which is evolving toward more competition instead of more regulation.

Eschelon proposes that "repeatedly delinquent" applies only to situations where non-payment occurs for three *consecutive* months. Under this proposal, Eschelon could be delinquent in its payments for two months, pay its bill for the third month on time, and then be delinquent again for the next two months. That definition is not commercially reasonable.

Deposit Requirements. As part of section 5.4.5, Eschelon proposes three alternative provisions under which it would add language requiring a party to abstain from demanding and collecting a deposit pending the outcome of a Commission

proceeding addressing the issue of whether a deposit can be required. By proposing this type of delay, Eschelon seeks to have the Commission micro-manage the parties' relationship and prohibit a party from utilizing reasonable business practices. If a billed party is "repeatedly delinquent," the billing party should be entitled to protect itself from increasing debt and credit risk by requiring the other party to pay a deposit. Eschelon has a right under section 5.4.4 to dispute Qwest's billing; a second opportunity to do so, which is what Eschelon seeks here, is unnecessary and inequitable.

Review of Credit Standing. Qwest proposes language that would allow it to review Eschelon's credit standing and increase the amount of deposit required from Eschelon, subject to the limitations set forth in section 5.4.5. This proposal reflects a reasonable and customary business practice. Again, a billing party is entitled to protect itself from credit risk. Eschelon argues that there is no "triggering event" for the deposit requirement, but the credit review itself is that event; if Eschelon's credit standing reveals a level of risk that warrants a deposit, the requirement of a deposit is triggered. Experience in the highly competitive local exchange market demonstrates that the risk of telecommunications carriers declaring bankruptcy or simply shutting their doors is hardly remote, and, hence, a service provider like Qwest have the ability to conduct credit reviews and take actions in response to them. This is a fundamental reality of running a business.

8. Copy of Non-disclosure Agreement (Section 5.16.9.1): Issue 5-16

This section concerns the disclosure of CLEC individual forecasts and forecasting information. Because of the highly sensitive nature of this information, strict procedures must apply to disclosures of the information. Under Qwest's proposal, Qwest would be permitted to disclose the information only to legal personnel, if a legal issue arises, and to

a CLEC's wholesale account managers, wholesale LIS and Collocation product managers, network and growth planning personnel "responsible for preparing or responding to such forecasts or forecasting information." The provision expressly prohibits disclosure to retail marketing, sales or strategic planning, and requires Qwest employees to execute nondisclosure agreements ("NDAs").

Eschelon demands a change to this provision that would require Qwest to provide Eschelon with copies of nondisclosure agreements executed by Qwest employees within 10 days of execution. This demand would impose an unnecessary administrative burden on Qwest, particularly since this precedent could require Qwest to provide every CLEC with copies of NDAs. Qwest already operates under careful procedures that ensure the protection of CLEC forecasts and related information; there is no need for this additional administrative burden.

Further, Section 18.3.1 of the ICA provides that "either party can request an audit of the other party's compliance with the Agreement's measures and requirements applicable to limitations on distribution, maintenance, and use of proprietary or other protected information that the requesting party has provided to the other". In addition to the stringent requirements set forth in Section 5.16.9.1, under Section 18, Eschelon has adequate protection and recourse if it believes that Qwest has misused confidential information. For this additional reason, there is no justification for Eschelon's demand that Qwest provide executed copies of non-disclosure agreements.

9. Transit Record Charge and Bill Validation (Section 7.6.3.1): Issues 7-18 and 7-19

In this section, Eschelon seeks to obtain transit records from Qwest in order to validate bills that are based on data Eschelon itself provides to Qwest. In a recent

complaint proceeding in Minnesota, Qwest negotiated a compromise solution to exchanging records when Qwest hands transit traffic to a terminating provider. In that proceeding, all parties recognized that the best source of information for determining the source of such calls is the originating switch. Transit records are a poor substitute for such records because the purpose of a transit switch is to complete calls, with billing considerations being secondary. Nonetheless, because the terminating provider does not necessarily know the identity of the originating company, an extensive records exchange is one way to identify and track down originators of traffic that are improperly routing calls.

This issue presents the opposite situation. Here, Eschelon is the originating provider, and therefore its switch produces the best information with regard to traffic it sends to Qwest for termination with a third party. Requiring Qwest to provide Eschelon with detailed records and to do so without charge is an unreasonable and inefficient way to determine appropriate billing by Eschelon. Accordingly, Qwest opposes Eschelon's language.

SECTION 9 – UNBUNDLED NETWORK ELEMENTS

14. Nondiscriminatory Access to UNEs (Sections 9.1.2.1.3.2.1, 9.1.2.1.3.2.2, 9.2.2.3.2, 9.2.2.16): Issue 9-31

This issue arises from Eschelon's demand to include language in the ICA establishing that access to UNEs "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)." It has long been established that the Act only requires an ILEC to provide access to its *existing* network, not access to "a yet unbuilt superior one." *Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 813 (8th Cir. 1997). Under

Eschelon's proposed language, Qwest could be required to build new facilities and to provide access to "a yet unbuilt superior network." For example, the undefined requirement for Qwest to "add to" UNEs could obligate Qwest to build new facilities and to go beyond the routine network maintenance that ILECs must provide. Similarly, Eschelon does not define the meaning of "changing the UNE," thereby leaving the door open to changes that go beyond routine network maintenance.

Through this proposal, Eschelon also may be attempting to obtain modifications to UNEs without paying for them. Although it is not clear from the proposed language, Eschelon's proposal may assume that the monthly recurring price it pays to lease a UNE from Qwest entitles it to repairs, changes, additions, and modifications without further payment. That result would clearly violate Qwest's legal right to recover the costs it incurs to provide access to UNEs and interconnection, since monthly UNE rates do not include the costs of all of these activities.

16. Network Maintenance And Modernization Activities (Sections 9.1.9 and 9.1.9.1): Issues 9-33 and 9-34

a. Issue 9-33

This issue involves the parties' rights and obligations when Qwest modifies its network for maintenance purposes or to modernize its facilities and technologies. The dispute arises from Eschelon's demand for an ICA provision establishing that Qwest's network modifications "will not adversely affect service" to any Eschelon customer. Eschelon's proposed prohibition against changes that "adversely affect" service should be rejected for several reasons.

First, Qwest maintains and modernizes its network consistent with industry standards and as contemplated by FCC rules. The service to be measured for purposes of

application of industry standards is the service Qwest provides to Eschelon, not the service Eschelon provides to its customers. This focus is proper since Eschelon, not Qwest, ultimately controls the service that Eschelon's customers receive. Eschelon's proposed standard improperly focuses on the service Eschelon provides to its customers, not on the service Qwest provides to Eschelon.

Eschelon's proposed requirement that any modernization or maintenance must "not adversely affect service to any End User customers" also is flawed because it is not tied to industry standards and is too vague to be capable of reliable and predictable contract implementation. Eschelon's failure to tie the phrase "adversely affect service" to any measurable standard creates considerable ambiguity about whether a change in the network has a negative effect and, as a result, will inevitably lead to disputes between the parties.

Eschelon's language also fails to recognize that end users could be adversely affected by Qwest's maintenance and modernization because of the equipment and technologies Eschelon may be using in its network. Qwest of course should not be held responsible for adverse effects on service resulting from Eschelon's use of equipment and technologies that are not compatible with Qwest's modernization of its network.[7]

b. Issue 9-34

This issue relates to the notice Qwest will provide to Eschelon of changes to its network because of network maintenance and modernization activities. Qwest will provide notice of changes to its network, including the location of changes, consistent with the requirements of applicable FCC rules. Eschelon's proposal improperly converts

[7] Eschelon's alternative proposal relating to this issue would prohibit Qwest from making "unacceptable" network changes. Eschelon also fails to define this term, and the resulting ambiguity renders this proposal as flawed as the first proposal.

the requirement for Qwest to provide notice of the locations of network changes into a requirement for Qwest to identify the Eschelon customers who could be affected by the changes. Specifically, Eschelon seeks to require Qwest to include the addresses of Eschelon's customers, along with the circuit identification numbers of the circuits serving those customers, in notices of network changes. There is no such requirement in 47 C.F.R. § 51.327, the FCC rule that governs notice of network changes, and, moreover, Eschelon itself has the information it needs to determine if a change to Qwest's network could affect an Eschelon customer. Eschelon's attempt to impose a form of notice that is not required under the governing FCC rule should be rejected.

17. Wire Centers: Issues 9-37 (and subparts), 9-38 through 9-42

The issues encompassed by these issue numbers involve issues addressed in the Commission's *TRRO* wire center proceeding. For reasons of efficiency and to avoid inconsistent outcomes, the parties should not litigate these issues in this arbitration but, instead, should incorporate the results of the wire center proceeding into their interconnection agreement. This is consistent with the approach the parties have taken in other states.

18. UNE Conversions (Section 9.1.15.2.3): Issue 9-43, 9-44, and 9-44(a)-(c)

a. Issue 9-43

This issue arises from Eschelon's demand relating to the circuit identification numbers Qwest will use when Eschelon converts from using a UNE leased from Qwest to using a replacement tariffed service. These conversions are necessary in wire centers where there is no longer impairment under the criteria set forth in the FCC's *Triennial Review Remand Order* and, hence, no continuing obligation for Qwest to provide high

capacity transport and high capacity loops as UNEs. Eschelon is demanding that Qwest use the same circuit identification number assigned to the UNE for the tariffed service to which Eschelon converts its service. This request is improper for several reasons.

First, circuit IDs often include product-specific information that Qwest relies upon for proper processing and billing of products. For example, circuit IDs reflect whether a facility a CLEC is leasing is an unbundled network element or a tariffed service, and that distinction affects the rate and billing for the facility. Using a circuit ID assigned to a UNE for a tariffed alternative service may result in mis-identification of the service and lead to billing and other errors. Second, there is no legal requirement for Qwest to change its systems for this purpose; indeed, Qwest uses separate circuit ID numbers for other CLECs, so adoption of that approach for Eschelon will not result in unequal treatment. In fact, no other CLEC has made a similar demand or voiced concerns about a change in circuit ID numbers upon converting to an alternative service. Third, it would be extremely costly for Qwest to modify its operation systems to meet Eschelon's demand for use of the same circuit ID number after a conversion. Fourth, Eschelon's demand involves processes that affect all CLECs, not just Eschelon, and it therefore should be addressed through the CMP, not through an arbitration involving a single CLEC.

b. Issue 9-44

The *TRRO* establishes that in wire centers where there is no impairment, as that term is defined in Section 251(d)(2)(B), CLECs must convert from using high capacity UNE transport and loops to alternative service arrangements. The parties agree that if Eschelon fails to carry out such a conversion, Qwest may perform the conversion to a

month-to-month service arrangement under its applicable tariff. This dispute arises because of Eschelon's proposal that would treat these conversions Qwest performs as something "in the manner of a price change on the existing records and not a physical conversion."

Eschelon's proposal ignores the nature of conversions from UNEs to alternative tariffed services. The effect of Eschelon's proposal would be to deny Qwest the recovery of the costs it incurs to perform conversions. That result would plainly be unlawful.

22. Unbundled Customer Controlled Rearrangement Element ("UCCRE") (Section 9.9 and subparts): Issue 9-53

The FCC has removed from its rules the former requirement for ILECs to provide digital cross-connects for the unbundled customer controlled rearrangement element ("UCCRE"). *Compare* former 47 C.F.R. § 51.319(d)(2)(iv) and current 47 C.F.R. § 51.319(d)(2). Eschelon acknowledges that Rule 51.319 defines the unbundling obligations of ILECs, but it dismisses as irrelevant the fact that the FCC affirmatively removed from that rule the former obligation of ILECs to provide UCCRE. The FCC's unbundling rules are definitive and binding, and the fact that the FCC has removed UCCRE from those rules establishes that ILECs no longer have an obligation to provide this service. Further, although Qwest offered this service in the past, CLECs did not order it. If Eschelon desires this service, it can obtain the service through a tariff or through the bona fide request process.

Because Qwest will not be offering this service to any CLECs that enter into new interconnection agreements, there is no merit to Eschelon's assertion that it would be discriminatory for Qwest not to offer the service to Eschelon. The service will no longer be offered to Eschelon or to any other CLEC that enters into a new interconnection

agreement, and Eschelon is therefore being treated on a par with other CLECs. Under Eschelon's argument, Qwest would be prohibited from ending on a going-forward basis an offering it has no legal obligation to provide and that CLECs do not order simply because the offering is included in another carrier's interconnection agreement that is several years old. This position relies on an improper application of the Act's non-discrimination requirements and would improperly force Qwest to continue voluntary offerings of services for which there is no demand.

Eschelon also proposes in the alternative adoption of a process Qwest would be required to follow to obtain approval from the Commission to stop offering any product, including products for which there is no demand and no legal requirement to provide. As Qwest will explain in testimony, this proposal improperly interferes with Qwest's right to stop offering products that it has been offering voluntarily and creates a disincentive against providing products and services that are not within the mandatory provisioning requirements of Section 251 of the Act.

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

Eschelon's proposal assumes incorrectly that Qwest is always required to perform only one cross-connect to provide UDF-IOF terminations. In fact, more than one cross-connect may be necessary, which is why Qwest's proposed language permits recovery for each cross-connect that is required for a facility. Eschelon's proposal would improperly prevent Qwest from charging for more than one cross-connect when multiple cross-connects are required and would thereby deny Qwest cost recovery.

24. Combinations of Loops and Transport (Section 9.23.4 and sub-parts): Issue 9-55

This dispute arises because of Eschelon's proposed use of the term "loop-transport combination" to include more than EELs and varieties of EELs. The FCC uses the term "loop-transport" to describe varieties of EELs, not to establish an unbundled product separate from EELs. By contrast, Eschelon uses "loop-transport" as a defined term that includes varieties of EELs but also encompasses any combination of a loop with dedicated transport.

Qwest has no legal obligation to offer loop-transport combinations other than EELs. Eschelon asserts that certain provisions of the *TRO* recognize a category of loop-transport combinations that encompasses more than EELs, but that is an inaccurate characterization of the *TRO*. The provisions Eschelon relies upon, when read in proper context, refer only to EELs, not to loop-transport combinations other than EELs.

Although "loop-transport" is not a Qwest product, Eschelon improperly proposes to assign product attributes to it. *See, e.g.*, §§ 9.23.4.4.3.1 (intervals); 9.23.4.5.1.1. (Billing); 9.23.4.6.6. ("BANS"). Qwest has developed and implemented systems, procedures and intervals for EELs, UNEs and tariffed services and is under no legal requirement to modify these systems to provide Eschelon's proposed "loop-transport" product. Moreover, even if there were such a legal requirement, the necessary modifications to Qwest's systems and procedures would impose significant costs that Qwest would have a right to recover under the Act's cost recovery provisions. Eschelon is unwilling to compensate Qwest for those costs.

25. Service Eligibility Criteria -- Audits (Sections 9.23.4.3.1.1 and sub-parts): Issue 9-56 and 9-56(a)

a. Issue 9-56

The *TRO* gives ILECs the right to conduct audits of CLECs to ensure compliance with the *TRO*'s eligibility criteria for high-capacity EELs. *TRO* at ¶¶ 625-29. There is no support in the *TRO* for Eschelon's proposal that would permit Qwest to conduct an audit only if Qwest states and explains the "cause upon which Qwest has a concern that [Eschelon] has not met the Service Eligibility Criteria." In addition, Eschelon's proposal improperly would require Qwest to identify specific Eschelon circuits that Qwest believes do not comply with the service eligibility criteria. There is no requirement in the *TRO* for Qwest to identify non-complying circuits as a condition to conducting an audit. Eschelon's proposal impermissibly interferes with and weakens the audit rights Qwest is granted in the *TRO*.

b. Issue 9-56(a)

This sub-issue is related to Issue 9-56 and Eschelon's attempt to weaken Qwest's right to conduct service eligibility audits. Specifically, the issue involves Eschelon's request for ICA language that would require Qwest to submit to Eschelon a notice of Qwest's intent to conduct a service eligibility audit. The notice would describe the basis for Qwest's belief that Eschelon is not complying with the service eligibility criteria and would identify the non-compliant Eschelon circuits. As explained above, the audit rights the FCC granted in the *TRO* are not conditioned upon a showing of cause by Qwest, and, relatedly, there is no requirement for Qwest to identify circuits that fail to comply with the service eligibility criteria. For these reasons, there is no legal support for the notice requirement that Eschelon is attempting to impose.

26. Ordering, Billing, and Circuit ID for Commingled Arrangements (Sections 9.23.4.5.1, 9.23.4.5.1.1; *See* subparts (a)-(e) for related issues in 9.23.4.5.4, 9.23.4.6.6 (and subparts), 9.23.4.7 and subparts; 9.1.1.1.1 & 9.1.1.1.1.2): Issues 9-58, 9-58(a)-(e) and 9-59

a. Issues 9-58, 9-58(a)-(e)

In these sections, Eschelon proposes unique processes for ordering, billing and circuit identification numbers relating to "loop-transport combinations." As discussed above in connection with Issue 9-55, EELs are the only loop-transport combinations Qwest is required to provide, and Eschelon's use of the term "loop-transport combinations" is therefore overly broad. In the sections implicated by this dispute, Eschelon attempts to assign product attributes to "loop-transport combinations" despite the fact that Qwest has no such product and no legal obligation to offer such combinations other than EELs. Accordingly, the Commission should reject Eschelon's demand that Qwest alter its processes by requiring only one LSR for point to point commingled EELs.

In addition to the flaws in the merits of its position that are described below, Eschelon's proposed Sections 9.1.1.1.1, 9.1.1.1.1.1, and 9.1.1.1.1.2 are duplicative in that they address the same subjects that Eschelon addresses in Section 9.23.4 and related sub-sections. For example, Eschelon addresses service intervals for commingled arrangements in both Section 9.1.1.1.1.1 and 9.23.4.4.3.1. Similarly, it addresses ordering and billing procedures for commingled arrangements in Section 9.1.1.1.1.2 and again in Sections 9.23.4.5.4 and 9.23.4.6.6. These repetitive ICA provisions create unnecessary confusion, and, accordingly, Sections 9.1.1.1.1, 9.1.1.1.1.1, and 9.1.1.1.1.2 should be eliminated in their entirety.

In addition to being duplicative of other Eschelon proposals, these proposed ICA provisions are inappropriately set forth in a general section of the Agreement containing general terms and conditions relating to UNEs. It is confusing and inconsistent with the overall organization of the ICA to include specific terms and conditions relating to

commingling in a section of the Agreement that is intended to define the broad terms and conditions that apply to UNEs. For this additional reason, Sections 9.1.1.1.1, 9.1.1.1.1.1, and 9.1.1.1.1.2 should be eliminated from the ICA.

In contrast to Eschelon's confusing approach, Qwest addresses specific issues relating to commingling in the section of the ICA titled "Commingling." Specifically, per mutual agreement of the parties, Section 24 is titled "Commingling," and it sets forth the parties' general commingling rights and obligations. In proposed Section 24.3.2, for example, Qwest includes language establishing the service intervals for commingled EELs. These and other specific sections relating to commingling are appropriately included in the section of the Agreement devoted to commingling and should not be addressed in different sections with duplicative provisions.

With respect to the merits of this issue, Eschelon's demand that Qwest use a single circuit identification number for commingled EELs instead of separate identification numbers for the UNE and non-UNE components (Issue 9-58(a)) is improper for several reasons. First, circuit IDs often include product-specific information that Qwest relies upon for proper processing and billing of products. Using a circuit ID assigned to a UNE for a tariffed alternative service may result in mis-identification of the service and lead to billing and other errors. Second, there is no legal requirement for Qwest to change its systems for this purpose; indeed, Qwest uses separate circuit ID numbers for other CLECs, so adoption of that approach for Eschelon will not result in unequal treatment. Third, it would be very costly for Qwest to modify its operation systems to meet Eschelon's demand for use of the same circuit ID number after a conversion. Fourth, Eschelon's demand involves processes that affect all CLECs, not just Eschelon, and it

therefore should be addressed through the CMP, not through an arbitration involving a single CLEC. Finally, there is no merit to Eschelon's claim that the use of two circuit IDs could result in difficulties in completing repairs for Eschelon customers. Qwest provides CLECs with the circuit IDs for commingled EELs, which should eliminate any repair-related concerns if Eschelon properly updates its own records.

Eschelon's demand that Qwest use a single billing account number ("BAN") for the elements comprising a point-to-point commingled EEL (Issue 9—58(b) and (c)) fails to recognize that BANs contain essential product-specific information that affects the proper billing for products. This information affects, for example, whether a product is billed at a UNE-based rate or at a tariffed rate. Not only are separate BANs important to Qwest's provisioning and billing of the elements that make up point-to-point commingled EELs, but Eschelon's demand for a single BAN would impose very substantial costs on Qwest because of the systems changes that would be required. Qwest has no legal obligation to make those changes, and, moreover, Eschelon is not offering to compensate Qwest for the costs of performing them. Qwest has developed and implemented systems, procedures and intervals for EELs, UNEs and tariffed services and is under no legal requirement to modify these systems to provide Eschelon's proposed "loop-transport" product (Issues 9-58(d) and (e)). Such modifications would require Qwest to incur significant costs that it is entitled to recover under the Act.

Issue 9-58(e) also implicates Eschelon's proposal that Qwest be required to provision the tariffed components of commingled arrangements based on intervals that are different from those set forth in tariffs. This demand for terms that deviate from tariffs is improper and should be rejected.

b. Issue 9-59

This issue arises because of Eschelon's demand that in the event of a "trouble" associated with a commingled EEL, it be permitted to submit just a single trouble report instead of more than one report for each facility that comprises the commingled EEL. In addition, Eschelon proposes to limit Qwest's right of cost recovery in circumstances where Qwest must dispatch a field engineer to check on a trouble associated with a commingled EEL.

Eschelon's proposal fails to recognize that different repair-related obligations and performance intervals may apply depending on whether a facility is a UNE or a tariffed service. These different obligations require submission of a trouble report and a separate circuit ID for each component of a commingled EEL. In addition, to the extent Eschelon's proposal is designed to require Qwest to use a single circuit ID for commingled EELs, for the reasons discussed in connection with Issue 9-43, that would be improper.

Eschelon's proposal also would permit Qwest to recover only a single maintenance of service or trouble isolation charge for commingled EELs, and that single charge would be permitted only if Qwest dispatches a field engineer who does not find a trouble on either circuit of a commingled EEL. However, the costs Qwest incurs resulting from trouble reports associated with commingled EELs are not limited to checking just one circuit of a commingled EEL and are not incurred only if a trouble is not found. Accordingly, Eschelon's proposal would improperly deny Qwest full recovery of the costs it incurs in connection with trouble reports for commingled EELs.

27. Loop-Mux Combination (Sections 9.23.2, 9.23.4.4.3, 9.23.6.2, 9.23.9 (and sub-parts), and 9.24.4 (and sub-parts)): Issues 9-61 and 9-61(a)-(c)

The disputes encompassed by Issue 9-61 and the related sub-issues involve a commingled arrangement referred to as a "loop-mux combination," or "LMC." LMC is comprised of an unbundled loop, as defined in Section 9.2 the ICA (referred to in this Section as an LMC Loop), combined with a DS1 or DS3 multiplexed facility (with no interoffice transport) that a CLEC obtains from a tariff. A multiplexer is electronic equipment which allows two or more signals to pass over a single circuit. When used with LMC, multiplexing allows the traffic from several individual loops to be carried over a single, higher bandwidth facility. Because LMC involves the connecting or linking of a UNE provided under Section 251 (*i.e.,* an unbundled loop) with a non-UNE tariffed facility (*i.e.,* a tariffed DS1 or DS3 private line or special access service), it is a commingled arrangement within the following definition of "commingling" set forth in the *TRO.*[8]

Until the FCC made commingling available in the *TRO,* CLECs had no readily available mechanism for "handing off" UNE loops to their collocation spaces to connect the loops to the higher bandwidth transport facilities. To address this situation, Qwest voluntarily provided LMC to CLECs, thereby allowing CLECs to connect or hand off their loops to those transport facilities. With commingling becoming available after the *TRO,* CLECs no longer need access to Qwest's voluntary LMC offering in order to hand off loops to the larger transport facilities terminated in their collocation spaces.

While this dispute involves several issues, they are all linked by the overarching fact that Eschelon is seeking to require Qwest to continue providing its voluntary LMC offering at UNE rates, terms, and conditions even though commingling is available under

[8] *TRO,* at ¶ 579.

the ICA and LMC is therefore no longer necessary to connect UNE loops with tariffed transport facilities. Eschelon seeks to have LMC treated as a stand-alone UNE in the ICA and to be governed by UNE rates and service intervals that apply only to UNEs. There is no legal basis for assigning UNE attributes to LMC when it is used with commingled arrangements. On the contrary, the FCC has made it clear that (1) the multiplexing used with commingled arrangements is a tariffed product,[9] and (2) multiplexing is not a stand-alone UNE.[10]

There also is no merit to Eschelon's back-up position that multiplexing is a feature or function of the unbundled loop and, hence, is governed by UNE rates, terms, and conditions. FCC Rule 51.319(a)(1) defines the local loop as "a transmission facility between a distribution frame (or its equivalent) in an incumbent LEC central office and the loop demarcation point at an end-user customer premise." The rule provides further that the loop "includes all features, functions, and capabilities of such transmission facility." In other words, to qualify as a feature or function of the loop, a piece of equipment must be located with or a part of the "transmission facility" that runs between a distribution frame or equivalent frame and a customer's premise. The multiplexing equipment used to commingle a UNE loop and tariffed transport is *not* located between a distribution frame or equivalent frame and a customer premise. Instead, it is located on the transport or central office side of a frame in a central office and thus is not part of the loop transmission facility.

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[9] *TRO,* at ¶ 583.

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

Because LMC is not a UNE or a feature or function of the loop, the Commission should resolve each of the issues encompassed by Issue 9-61 in Qwest's favor: (1) The fact that LMC is not a UNE requires setting forth the terms relating to this offering in Section 24, which addresses commingling, not in Section 9.23, which addresses UNE combinations; (2) Eschelon's demand that Qwest provide LMC at UNE rates and terms (Issue 9-61(a)) instead of as a tariffed facility is directly contrary to the FCC's unequivocal statements in the *TRO* that the multiplexing used with commingling is a tariffed "access service" for which CLECs must pay full tariffed rates; (3) With respect to the service intervals that apply to LMC (Issue 9-61(b)), since LMC is not a UNE combination and is a commingled service, the proper placement of service intervals should be in the Qwest Service Interval Guide and not in Exhibit C; (4) Because LMC is not a UNE combination, the rates for LMC should not be included in the UNE Combination section of Exhibit A, as Eschelon is proposing (Issue 9-61(c)).

SECTIONS ADDRESSING SERVICE INTERVALS AND SECTION 12 - CHANGE MANAGEMENT PROCESS

Because many of the disputed issues within Section 12 of the ICA involve processes that affect all CLECs, not just Eschelon, it is appropriate to begin this section with a brief overview of the change management process, or "CMP." This overview is followed by a summary of most of the disputed issues within this section. Issues 12-68 and 12-86 are not addressed below, but are fully described in the Issues Matrix (Exhibit 3 to Eschelon's Petition for Arbitration). The CMP was approved as part of Section 271 proceedings by both this Commission and the FCC. From a CLEC's perspective, the purpose of CMP is to provide CLECs with a meaningful opportunity to modify systems, processes and procedures. From Qwest's perspective, CMP is to ensure that Qwest can

implement uniform systems, processes and procedures so it can train its people and perform at a consistently high level of quality for its wholesale customers.

The FCC painstakingly evaluated CMP as part of 271. The FCC found CMP to be "clearly drafted, well organized and accessible." *See, e.g., In the Matter of Application by Qwest Communications International, Inc. for Authorization to Provide In-Region, InterLATA Services in the States of Colorado et al.*, FCC 02-332 (Rel. Dec. 23, 2002) at ¶133. The FCC continued that CMP "effectively processes and communicates to competitive LECs 'any changes in Qwest's OSS interfaces and to products and processes that are within the scope of CMP." *Id.* Importantly, the FCC recognized that "a key component of an effective change management process is the existence of a forum in which both competing carriers and the BOC to improve . . . method[s]." *Id*. at ¶134. The FCC found CMP did just that. *Id*. For years now, Qwest and the CLECs in its region have used CMP to modify systems, and to improve processes and procedures. Eschelon has been very active in CMP; it has submitted 228 change requests and received approval of 188 of them. In this arbitration, however, Eschelon is trying to end-run CMP by defining certain systems requirements, processes and procedures in its interconnection agreement, which language will make it effectively impossible for the CMP to modify these processes going forward.

Based on its proposals, it appears that Eschelon has forgotten the difficulties experienced in the telecommunications industry for the first few years after passage of the Act. Industry participants were learning what their obligations were, and then doing their best to fulfill those obligations. The result was a hodge-podge. For example, Qwest (then U S WEST) often had multiple processes for performing the exact same task. This

resulted in two principle problems. First, some CLECs argued the processes were discriminatory because Qwest did not implement the same processes across the industry. Second, the myriad processes made it difficult for Qwest to perform at an acceptable level of quality because it could not document one uniform process, and then train its employees to the process.

The CLEC community brought this concern to the 271 proceedings. The net result was the creation of CMP and a highly detailed document governing how CMP would operate. This document was painstakingly negotiated and created by the industry as a whole, and the industry as a whole has the ability to modify the document. The parties have already agreed that that governing document – Exhibit G to Qwest's SGAT – will be an addendum to the Eschelon interconnection agreement. Exhibit G explains that CMP is where the industry creates and modifies processes:

> **1.0 INTRODUCTION AND SCOPE**
>
> This document defines the processes for change management of OSS interfaces, products and processes (including manual) as described below. ***CMP provides a means to address changes that support or affect pre-ordering, ordering/provisioning, maintenance/repair and billing capabilities and associated documentation and production support issues for local services provided by CLECs to their end users.***
>
> The CMP is managed by CLEC and Qwest representatives each having distinct roles and responsibilities. The CLECs and Qwest will hold regular meetings to exchange information about the status of existing changes, the need for new changes, what changes Qwest is proposing, how the process is working, etc. The process also allows for escalation to resolve disputes, if necessary.

(emphasis added).

The benefits of CMP are well known; indeed, the most active CLEC participant in the process is Eschelon itself. As discussed, Eschelon has requested several hundred change requests in CMP.

The CMP governing document also states that "[i]n cases of conflict between the changes implemented through the CMP and any CLEC interconnection agreement … the rates, terms and conditions of such interconnection agreement shall prevail . . ." *Exhibit G* at §1. To ensure uniform processes, Qwest studiously avoids placing process – the manner in which something is accomplished – in interconnection agreements. Eschelon is trying to use this contract negotiation – instead of the CMP – to define processes that the parties will utilize to order, provision and repair various services. For many of the disputed issues, Eschelon is trying to modify an existing process set or approved in CMP; in some instances, Eschelon is trying to obtain a process that was specifically rejected or vacated by CMP. In other words, Eschelon uses CMP to its advantage; however, when it does not like the results, it seeks a second bite at the apple by trying to create Eschelon specific process in this arbitration.

The Commission should reject Eschelon's strategy. The Commission should also recognize and enforce the importance of allowing the industry – not one party – to define uniform processes and avoid reverting to the days shortly after passage of the Act where multiple processes ruled the day, leaving Qwest unable to perform at an acceptable level of quality.

Issue 1-1 and Sub-Issues: Service Intervals (Section 1.7.2).

Exhibit C to the ICA contains service interval tables. Qwest proposes language for section 1.7.2 that references Exhibit C and makes clear that service intervals are subject to change through CMP without the need for an amendment to the ICA. Historically, Qwest has modified service intervals through CMP. To date, since Qwest obtained 271 approval, *all* such modifications have been reductions in the lengths of service intervals for various services and have been for the benefit of CLECs.

Eschelon's proposed language for section 1.7.2 attempts to stop progress in its tracks. Eschelon seeks to thwart the uniformity and processes established through CMP by incorporating into the ICA a cumbersome and wholly unnecessary requirement for the parties to amend the ICA in the event, which has never happened in the time since 271 approval, that the Commission orders, or Qwest chooses to offer, intervals longer than those set forth in Exhibit C. Tellingly, Eschelon does not seek in its first proposal to impose this burden on Qwest if Qwest desires to implement shorter service intervals than those set forth in Exhibit C.

Additionally, Eschelon's proposed language calls for micro-management of the parties' contractual obligations. It sets forth forms of letters to be attached to the ICA that the parties are supposed to use to amend their agreement. This kind of unique process, created just for Eschelon, would increase Qwest's administrative and system costs. If such costs are imposed on Qwest, it is entitled to recover them under the Act.

As explained above, the Commission-approved CMP was designed to create a flexible mechanism for changes in technology and the marketplace, and for standard processes. Service intervals are exactly the type of process that the Commission and the industry anticipated that CMP would address. CMP itself contains escalation and dispute resolution provisions to enable carriers to object to proposed changes.

Through its proposed language, Eschelon seeks protection against modifications that have not occurred even once since 271 approval, that is, the lengthening of service intervals, and, secondly, it seeks that protection in a context in which it already has sufficient recourse through CMP.

Eschelon's second option for language for section 1.7.2, identified as part of Issue 1-1 in the Matrix, involves a proposal under which the parties would set forth in a letter intervals different from those in the ICA if the parties agree to such intervals or the Commission orders them. This proposal suffers from the same flaws set forth above. It circumvents CMP. The same is true for Echelon's objections to Qwest's language for section 7.4.7 that addresses intervals for the provision of interconnection trunks, and to Qwest's proposed language in Exhibit C itself regarding rearrangements (Issue 1-1(b)), LIS trunking (Issue 1-1(c)), and ICB provisioning intervals (Issue 1-1(d)). Qwest's proposed language for Section 7.4.7 makes clear that such intervals may be modified through CMP pursuant to the procedures set forth in Exhibit G. By contrast, Eschelon argues that such intervals should be frozen in time in the ICA. It seeks the same freeze for intervals related to rearrangements, LIS trunking and ICB provisioning. Contrary to Eschelon's position, the parties should not be forced to amend the ICA to modify service intervals. Such a requirement creates unnecessary administrative burdens and risks the uniformity and standards created through CMP. Eschelon's position in this arbitration with respect to service intervals essentially asks this Commission to directly undermine CMP.

29. Eschelon's Proposal To Require Qwest To "Acknowledge Mistakes: Issue 12-64 and 12-64(a)-(b)

This issue emanates from a decision issued by the Minnesota Commission, where that Commission held that Qwest should take responsibility for mistakes when Qwest's actions harm CLEC customers. This process is unnecessary for a myriad of reasons.

Most importantly, this Commission has already adopted performance measurements (PIDs) and a Performance Assurance Plan that fines Qwest automatically

for failing to perform at an acceptable level of quality. This data shows that Qwest has consistently been performing for CLECs in Washington at a high level of quality. This data has been audited and is publicly available. This process already creates an incentive for Qwest to perform at a high level of quality. Additional process acknowledging a mistake on an individual order is simply not necessary.

Eschelon is attempting to expand the Minnesota Commission's decision beyond the actual language of the decision. In Minnesota, Qwest submitted a compliance filing, which Eschelon found acceptable. Now, however, Eschelon wants to go further than the process it already agreed was acceptable. Specifically, Echelon seeks a "root cause analysis" as well as an acknowledgement of mistake. Thus, Eschelon wants to be able to dictate situations when Qwest's investigation must go beyond an individual order to determine whether a systemic problem exists. This is unnecessary and would allow Eschelon too much control over Qwest's internal business workings. Again, Qwest's PIDs define levels of performance that allow the Commission to determine whether systemic problems in Qwest's performance exist. The PIDs therefore provide the protection Eschelon wants on an industry wide level without creating the very real potential of allowing a CLEC to dictate Qwest's internal workings.

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

Qwest provisions services – whether designed services like unbundled loops, or non-design services like resold POTS – according to standard intervals. There are times, however, when a CLEC such as Eschelon wants to "expedite" the order and obtain the circuit more quickly.

In the limited circumstances that Qwest offers expedites to CLECs, Eschelon must be required to pay Qwest for this unique service consistent with the terms of the

governing tariff. That tariff authorizes charges on an ICB basis. Eschelon's proposal to deviate from the tariff and to obtain expedites on terms different from those that apply to other CLECs must be rejected.

33. Defining A "Jeopardy" (Section 12.2.7.2.4.4): Issues 12-71, 12-72 and 12-73

This issue arises because of Eschelon's proposal to include the following language in Section 12.2.7.2.4.4 of the ICA: "A jeopardy caused by Qwest will be classified as a Qwest jeopardy, and a jeopardy caused by CLEC will be classified as Customer Not Ready (CNR)." The premise underlying this proposal is that it is important to distinguish between situations where a due date is missed due to Qwest caused problems versus CLEC caused problems. As a general rule, Qwest does not disagree with this premise; however, the threshold issue is whether this language belongs in the ICA. Indeed, Qwest's current performance indicator definitions (PIDs) – metrics that define Qwest's acceptable level of performance as created and agreed to by the entire Regional Oversight Committee in the 271 process, and managed through Qwest's PID Management Process with participating CLECs in Qwest's fourteen-state local service region – specifically differentiate between Qwest-caused delays and CLEC/customer-caused delays. For example, OP-4 (the performance measure titled "Installation Interval" states:

- The Applicable Due Date is the original due date or, ***if changed or delayed by the customer***, the most recently revised due date, subject to the following: ***If Qwest changes a due date for Qwest reasons,*** the Applicable Due Date is the customer-initiated due date, if any, that is (a) subsequent to the original due date and (b) prior to a Qwest-initiated, changed due date, if any.

- Time intervals associated with customer-initiated due date changes or delays occurring after the Applicable Due Date, as applied in the formula below, are calculated by subtracting the ***latest Qwest-initiated due*** date, if

> any, following the Applicable Due Date, from the subsequent customer-initiated due date, if any.

(emphasis added). This is just one of many such examples in the PIDs. Thus, Eschelon is already protected insofar as Qwest is currently required to differentiate between Qwest-caused and CLEC/customer-caused delays.

Qwest objects to including this language in the ICA because no CLEC should be able to dictate terms for the entire CLEC community. If the CLECs and Qwest decide to change a PID, they should be able to without fear of how it implicates an individual ICA. Certainly, Qwest cannot change PIDs without Commission oversight. Eschelon's proposed language is unnecessary and, once again, attempts to elevate Eschelon above other carriers.

43. Controlled Production Testing: Issue 12-87

The "Controlled Production process is designed to validate CLEC ability to transmit transactions that meet industry standards and complies with Qwest business rules. Controlled Production consists of submitting requests to the Qwest production environment for provisioning as production orders with limited volumes. Qwest and CLEC use Controlled Production results to determine operational readiness for full production turn-up." *Exhibit G* at Definitions. The CMP specifically recognizes that there are times when controlled testing is necessary. Eschelon is trying to create the contractual ability to opt out of controlled testing when it so chooses. Eschelon should not have this unilateral ability. While controlled testing is not always required, there are times when it is necessary. *See Exhibit G* at §11. Controlled testing protects both against system down time, and potential negative impact on other CLECs. Eschelon should not

be able to make unilateral decisions such as refusing controlled testing when it may be necessary to protect the industry at large.

SECTION 22

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

The rate issues involve several disputes. First, Eschelon seeks to have its rate sheet not only reflect rates Qwest charges Eschelon, but also reflect charges that Eschelon charges Qwest (issue 22-88, 22-88(a) and issue A-93). Qwest opposes such an approach.

Another area of dispute relates to the process for applying for and determining new rates. Qwest has agreed to Eschelon's suggested process that Qwest make a filing with the Commission for new rates which have not previously been approved. Qwest has agreed to file cost support with the Commission for such items within sixty days of either entering into the agreement or offering a new rate. CLECs would then have the opportunity to file objections to such rate filings and suggest that the Commission investigate the appropriateness of such rates.

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

These disputes relate to the process for applying for and determining new rates as well as the actual rates themselves. Qwest has agreed to Eschelon's suggested process that Qwest make a filing with the Commission for new rates which have not previously been approved. Qwest has agreed to file cost support with the Commission for such items within sixty days of either entering into the agreement or offering a new rate. CLECs would then have the opportunity to file objections to such rate filings and suggest that the Commission investigate the appropriateness of such rates. In light of that process, Qwest does not agree that it makes sense to determine interim rates in this

proceeding. The Commission should not treat Eschelon uniquely simply because it seeks determination of those rates in an interconnection proceeding. Such an approach could lead to numerous rate issues being litigated in numerous arbitrations, which would obviously be inefficient.

CONCLUSION

Qwest respectfully requests that this Commission adopt Qwest's proposals for all of the contract provisions at issue in this arbitration.

DATED this 22nd day of May, 2007.

QWEST CORPORATION

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CERTIFICATE OF SERVICE

On the 22nd day of May, 2007, I caused QWEST CORPORATION'S RESPONSE TO THE PETITION OF ESCHELON TELECOM OF UTAH, INC. FOR ARBITRATION WITH QWEST PURSUANT TO THE TELECOMMUNICATIONS ACT OF 1996 to be served by email and overnight mail on the following counsel for Eschelon Telecom of Utah:

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