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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,) DOCKET NO. 07-2263-03
Pursuant to 47 U.S.C. Section 252 of the)
Federal Telecommunications Act of 1996)

DIRECT TESTIMONY
OF
DOUGLAS DENNEY
ON BEHALF OF
ESCHELON TELECOM, INC.

June 29, 2007

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1 **I. INTRODUCTION**

2 **Q. PLEASE STATE YOUR NAME AND BUSINESS ADDRESS.**

3 A. My name is Douglas Denney. I work at 730 2nd Avenue South, Suite 900, in
4 Minneapolis, Minnesota.

5 **Q. BY WHOM ARE YOU EMPLOYED AND IN WHAT CAPACITY?**

6 A. I am employed by Eschelon Telecom, Inc., as Director of Costs and Policy. My
7 responsibilities include negotiating interconnection agreements, monitoring,
8 reviewing and analyzing the wholesale costs Eschelon pays to carriers such as
9 Qwest, and representing Eschelon on regulatory issues.

10 **Q. PLEASE DESCRIBE ESCHELON'S HISTORY AND BUSINESS.**

11 A. Eschelon Telecom, Inc. was founded in 1996 and owes its existence to the 1996
12 Telecommunications Act. The Act allowed companies to enter the local exchange
13 service market and compete with the incumbent monopoly.

14 Originally named Advanced Telecommunications, Inc., Eschelon is headquartered
15 in Minneapolis and serves small and medium business customers in Arizona,
16 California, Colorado, Minnesota, Montana, Oregon, Nevada, Utah and
17 Washington. Eschelon provides telecommunications services, internet access,
18 and business telephone systems to over 66,000 customers region wide using over
19 600,000 access lines. In Utah, Eschelon serves over 3,700 customers with over
20 38,000 access lines. Eschelon provides its services and products individually or in

1 customized packages to serve customers with a fully-outsourced voice and data
2 network solution.

3 Eschelon's voice and data traffic is switched through its six Nortel DMS 500
4 voice switches, six Lucent 5ESS voice switches, six Cisco BPX data switches and
5 seven Nortel Passport ATM switches. Eschelon's investment in facilities also
6 includes building collocations in over 180 ILEC central offices, 16 of which are in
7 Utah. Eschelon accesses its end user customers via "last mile" facilities or UNE
8 loops purchased from Qwest, AT&T, or Verizon.

9 Eschelon's growth has been achieved through a combination of its own direct
10 sales force of over 200 employees and through acquisitions of other companies
11 also focused on serving small and medium business customers. In April, 2006
12 Eschelon acquired Oregon Telecom, Inc. Most recently on October 2, 2006
13 Eschelon completed the acquisition of OneEighty Communications, a CLEC
14 based in Billings, Montana,¹ and on November 1, 2006 Eschelon completed its
15 acquisition of Mountain Communications, Inc., a CLEC based in Tempe,
16 Arizona.²

17 In 2005, Eschelon was the first CLEC in the five years since the telecom bust of
18 2000 to complete an Initial Public Offering of its common stock. Eschelon's
19 bonds are also publicly traded.

¹ See, http://www.eschelon.com/about_us/section_detail.aspx?itemID=8118&catID=3085.

² See, http://www.eschelon.com/about_us/section_detail.aspx?itemID=8200&catID=3085.

1 On March 20, 2007 Eschelon signed a definitive agreement to be acquired by
2 Portland, Oregon-based Integra Telecom, Inc.³ The transaction is subject to
3 regulatory approvals.⁴

4 **Q. PLEASE DESCRIBE YOUR EDUCATION AND PROFESSIONAL**
5 **BACKGROUND.**

6 A. I received a B.S. degree in Business Management from Phillips University in
7 1988. I spent three years doing graduate work at the University of Arizona in
8 Economics, and then I transferred to Oregon State University where I have
9 completed all the requirements for a Ph.D. except my dissertation. My field of
10 study was Industrial Organization, and I focused on cost models and the
11 measurement of market power. I taught a variety of economics courses at the
12 University of Arizona and Oregon State University. I was hired by AT&T in
13 December 1996 and spent most of my time with AT&T analyzing cost models. In
14 December 2004, I was hired by Eschelon Telecom, Inc., where I am presently
15 employed.

16 I have participated in over 30 proceedings in the 14-state Qwest region. Much of
17 my prior testimony involved cost models — including the HAI Model, BCPM,
18 GTE's ICM, U S WEST's UNE cost models, and the FCC's Synthesis Model. I

³ [http://investors.eschelon.com/phoenix.zhtml?c=121503&p=irol-newsArticle&ID=975597&highlight=.](http://investors.eschelon.com/phoenix.zhtml?c=121503&p=irol-newsArticle&ID=975597&highlight=)

⁴ The Utah Commission provided regulatory approval on 6/14/2007. See [http://investors.eschelon.com/phoenix.zhtml?c=121503&p=irol-newsArticle&ID=1015736&highlight=.](http://investors.eschelon.com/phoenix.zhtml?c=121503&p=irol-newsArticle&ID=1015736&highlight=)

1 have also testified about issues relating to the wholesale cost of local service —
2 including universal service funding, unbundled network element pricing,
3 geographic de-averaging, and competitive local exchange carrier access rates. In
4 addition to the Eschelon / Qwest arbitrations,⁵ most recently I have filed
5 testimony regarding Qwest’s “non-impaired” wire center lists and related issues in
6 dockets in Utah, Oregon, Colorado, Minnesota and Arizona.

7 **Q. HAVE YOU PREVIOUSLY TESTIFIED IN UTAH?**

8 A. Yes, I have participated in numerous dockets in Utah. When with AT&T, I filed
9 testimony in numerous dockets in Utah relating to the pricing of Unbundled
10 Network Elements (“UNEs”) and Universal Service (dockets 01-049-85, 00-049-
11 105 and 94-999-01 3B and 3C). In addition I participated in a number of
12 workshops with the Division, other parties and the Commission pertaining to
13 Universal Service, the FCC Synthesis Model, Unbundled Network Elements, and
14 Collocation. I also filed testimony in the Triennial Review Order (“TRO”)
15 proceeding (03-999-04) which was suspended after the D.C. Circuit Court ruling
16 remanding certain portions of the TRO back to the FCC.

17 While with Eschelon I filed testimony on behalf of the Joint CLECs in the
18 investigation of Qwest’s wire center data – docket 06-049-40.

⁵ The docket numbers for the Qwest-Eschelon ICA arbitrations are, for Arizona, T-03406A-06-0572; T-01051B-06-0572 (“Arizona arbitration”); for Colorado, 06B-497T (“Colorado arbitration”); for Minnesota, P-5340, 421/IC-06-768 (“Minnesota arbitration”); for Oregon, ARB 775 (“Oregon arbitration”); for Utah, 07-2263-03; (“Utah arbitration”); and for Washington, UT-063061 (“Washington arbitration”). Transcript (“Tr.”) pages from the arbitration hearings in Minnesota are included as Exhibit Eschelon1.5 and in Arizona as Exhibit Eschelon 1.6 and in Colorado as Exhibit Eschelon 1.7 to the testimony of Mr. Starkey.

1 **Q. PLEASE DESCRIBE HOW YOUR TESTIMONY IS ORGANIZED.**

2 A. My testimony is organized by subject matter number.⁶ Each subject matter
3 heading may contain one or more disputed issues from the interconnection
4 agreement. For each subject matter, I explain Eschelon's business need relating
5 to this issue. In addition, I contrast Eschelon's proposed language with Qwest's
6 language and explain why Eschelon's language is more reasonable and
7 appropriate. I also explain the flaws in Qwest's proposal. For issues that have
8 closed since Eschelon filed its Petition for Arbitration in this case, I provide the
9 closed language.

10 **Q. ARE THERE ANY EXHIBITS TO YOUR TESTIMONY?**

11 A. Yes. Exhibits Eschelon 2.1 through 2.33 are exhibits associated with my
12 testimony. These exhibits are described below:

13 **Exhibit Eschelon 2.1:** Qwest's September 1, 2005 notice to Eschelon
14 indicating that Qwest would begin to apply Design Change charges to
15 unbundled loops. This exhibit is related to Subject Matter No. 4.

16 **Exhibit Eschelon 2.2:** Eschelon's escalation of Qwest's proposal to
17 inappropriately apply the Design Change charge to unbundled loops
18 ("PROS.09.01.05F.03204.Design_Chgs_Unbundld_Loop"). This exhibit
19 is related to Subject Matter No. 4.

20 **Exhibit Eschelon 2.3:** Eschelon email sent on May 4, 2006 explaining its
21 position on design changes and cost recovery. This exhibit is related to
22 Subject Matter No. 4.

23 **Exhibit Eschelon 2.4:** A chronology of Qwest's recent attempts to limit
24 the number of Connecting Facility Assignment ("CFA") changes to one on
25 the installation due date, with related documentation. This exhibit is

⁶ The subject matter numbers correspond to those in the Issues by Subject Matter List that is attached to the testimony of Mr. Starkey as Eschelon Exhibit 1.2.

1 related to Subject Matter No. 4 and Subject Matter No. 14 (addressed by
2 Mr. Starkey).

3 **Exhibit Eschelon 2.5:** August 31, 2006 Process Notice from Qwest
4 Regarding Changes to Qwest's Negotiations Template, and Excerpts from
5 Utah Negotiations Template Exhibit A. This exhibit is related to Subject
6 Matter No. 4 and Subject Matter No. 14 (addressed by Mr. Starkey).

7 **Exhibit Eschelon 2.6:** (Confidential) Chronology of Qwest's threat to
8 disconnect Eschelon's UNE circuits and stop processing Eschelon orders.
9 This exhibit is related to Payment and Deposit provisions contained in
10 Subject Matter Nos. 5, 6 and 7 and helps demonstrate why Qwest should
11 not have unilateral authority to require deposits, disconnect Eschelon's
12 circuits, or to stop processing Eschelon's orders.

13 **Exhibit Eschelon 2.7:** (Confidential) An exchange of emails between
14 Eschelon and Qwest showing that Qwest's past due records are not always
15 accurate. This exhibit is related to Payment and Deposit provisions
16 contained in Subject Matter Nos. 5, 6 and 7.

17 **Exhibit Eschelon 2.8:** Email exchange showing that Qwest threatens to
18 disconnect Eschelon's circuits and stop processing Eschelon's orders even
19 when Eschelon has already paid the bill Qwest claims is delinquent. This
20 exhibit is related to Payment and Deposit provisions contained in Subject
21 Matter Nos. 5, 6 and 7.

22 **Exhibit Eschelon 2.9:** (Confidential) An exchange of emails between
23 Eschelon and Qwest demonstrating that Qwest incorrectly classified
24 amounts as past due. This exhibit is related to Payment and Deposit
25 provisions contained in Subject Matter Nos. 5, 6 and 7.

26 **Exhibit Eschelon 2.10:** (Confidential) An email from Qwest showing that
27 sometimes Eschelon's payment disputes fall into the "black hole." This
28 exhibit is related to Payment and Deposit provisions contained in Subject
29 Matter Nos. 5, 6 and 7.

30 **Exhibit Eschelon 2.11:** (Confidential) An email exchange showing that
31 Qwest sometimes applies payments to incorrect accounts causing accounts
32 to appear past due when they are not. This exhibit is related to Payment
33 and Deposit provisions contained in Subject Matter Nos. 5, 6 and 7.

34 **Exhibit Eschelon 2.12:** Eschelon email to Qwest demonstrating that
35 Qwest does not always follow its own process and does not properly send
36 notification to appropriate Eschelon personnel, creating unnecessary

1 disputes regarding balances. This exhibit is related to Payment and
2 Deposit provisions contained in Subject Matter Nos. 5, 6 and 7.

3 **Exhibit Eschelon 2.13:** A copy of the Qwest bill dispute resolution
4 PCAT. This exhibit is related to Payment and Deposit provisions
5 contained in Subject Matter Nos. 5, 6 and 7.

6 **Exhibit Eschelon 2.14:** An email from Eschelon to Qwest making clear to
7 Qwest that Eschelon does not agree to the bill dispute resolution process
8 developed over Eschelon's objections in CMP and that, consistent with the
9 CMP document, Eschelon's contract will govern billing disputes. This
10 exhibit is related to Payment and Deposit provisions contained in Subject
11 Matter Nos. 5, 6 and 7.

12 **Exhibit Eschelon 2.15:** (Confidential) A calculation of the discrepancies
13 between Qwest and Eschelon in the amount of disputed payments. This
14 exhibit is related to Payment and Deposit provisions contained in Subject
15 Matter Nos. 5, 6 and 7.

16 **Exhibit Eschelon 2.16:** "Three Consecutive Months" standard. This
17 exhibit is related to Payment and Deposit provisions contained in Subject
18 Matter Nos. 5, 6 and 7. It contains pages of various carriers' ICAs/service
19 agreements with Qwest showing that Qwest has agreed to the three
20 consecutive month standard with numerous CLECs, CMRS providers and
21 paging companies.

22 **Exhibit Eschelon 2.17:** Documentation regarding Qwest's refusal to
23 provide requested cost support.

24 **Exhibit Eschelon 2.18:** A chart regarding expedite capability for
25 unbundled loops. This exhibit is related to Issues 12-67 and subparts
26 (Expedited Orders).

27 **Exhibit Eschelon 2.19:** Executive Summary from the Direct Testimony of
28 Pamela Genung (in which Arizona Staff concludes regarding expedites
29 that "Qwest did not adhere to the terms and conditions of the current
30 Qwest-Eschelon Interconnection Agreement"), *In re. Complaint of*
31 *Eschelon Telecom of Arizona, Inc. Against Qwest Corporation*, ACC
32 Docket No. T-01051B-06-0257, T-03406A-06-0257 (Jan. 30, 2007)
33 ["Arizona Complaint Docket"].

34 **Exhibit Eschelon 2.20:** Excerpts from the Direct Testimony of Robert F.
35 Kennedy, Qwest Corporation in Docket No. UT-003013, Part D,
36 November 7, 2001 in Washington and Docket No. T0000A-00-0194,
37 Phase II, March 15, 2001 in Arizona on expedites as UNEs.

1 **Exhibit Eschelon 2.21:** Current and historical tariff pages from Qwest’s
2 tariff FCC #1 regarding expedites (FCC tariff documents includes Qwest’s
3 transmittal to the FCC explaining its change in the expedite rate) and
4 Qwest’s Utah state access tariff.

5 **Exhibit Eschelon 2.22:** Eschelon dispute resolution letters regarding
6 expedited orders.

7 **Exhibit Eschelon 2.23:** Commission-Approved Qwest-Eschelon “Bridge
8 Agreement Until New Interconnection Agreements Are Approved.”

9 **Exhibit Eschelon 2.24:** A copy of the Arbitrators’ Report in the
10 interconnection agreement (“ICA”) arbitration between Qwest and
11 Eschelon in Minnesota. As it is cited in testimony, a copy is provided for
12 the Commission’s convenience. The Minnesota Commission order
13 adopting the MN Arbitrators’ Report, in part, and modifying it in part, is
14 provided as Exhibit Eschelon 2.25.

15 **Exhibit Eschelon 2.25:** “Order Resolving Arbitration Issues, Requiring
16 Filed Interconnection Agreement, Opening Investigations and Referring
17 Issue to Contested Case Proceeding” dated March 30, 2007 in the Qwest-
18 Eschelon interconnection agreement (ICA) arbitration in Minnesota.

19 **Exhibit Eschelon 2.26:** “Order Denying Reconsideration” dated June 4,
20 2007 in the Qwest-Eschelon interconnection agreement (ICA) arbitration
21 in Minnesota. Note: The Minnesota Arbitrators’ Report and the
22 “Commission Order Resolving Arbitration Issues...” are provided as
23 Exhibits Eschelon 2.24 and 2.25, respectively.

24 **Exhibit Eschelon 2.27:** Minnesota Testimony/Transcript Excerpts from
25 the Minnesota Arbitration regarding cost recovery as it relates to Access to
26 UNEs.

27 **Exhibit Eschelon 2.28:** Selected pages from the “Deposition of Jerome
28 Jenson before the Office of Administrative Hearings of the State of
29 Minnesota,” May 18, 2007, and selected pages from the “Deposition of
30 Mary Madill before the Office of Administrative Hearings of the State of
31 Minnesota,” May 17, 2007.

32 **Exhibit Eschelon 2.29:** Qwest’s proposed Minnesota cost study for
33 Coordinated Loop Installation without Cooperative Testing and Qwest’s
34 support documentation demonstrating that there are multiple activities that
35 make up a single rate.

1 **Exhibit Eschelon 2.30:** Joint Motion of Eschelon and Qwest for a Single
2 Compliance Filing of the Interconnection Agreement.

3 **Exhibit Eschelon 2.31:** Qwest’s TRO/TRRO Amendment taken from
4 Qwest’s website demonstrating that Qwest did not remove UCCRE from
5 carriers’ interconnection agreements as a result of TRO/TRRO. This
6 relates to Subject Matter 22 (Unbundled Customer Controlled
7 Rearrangement Element (“UCCRE”).

8 ([http://www.qwest.com/wholesale/downloads/2006/060629/TRO-TRRO-](http://www.qwest.com/wholesale/downloads/2006/060629/TRO-TRRO-Amendment-6-22-06.doc)
9 [Amendment-6-22-06.doc](http://www.qwest.com/wholesale/downloads/2006/060629/TRO-TRRO-Amendment-6-22-06.doc))

10 **Exhibit Eschelon 2.32:** A description of support for Eschelon’s UNE rate
11 proposals for UNE rates that have not been approved by the Commission.

12 **Exhibit Eschelon 2.33:** Expedite Amendment.

13 **II. CHANGE IN LAW (SUBJECT MATTER NOS. 2 AND 3)**

14 **SUBJECT MATTER NO. 2. RATE APPLICATION & SUBJECT MATTER NO. 3.**
15 **EFFECTIVE DATE OF LEGALLY BINDING CHANGES**

16 **Issue Nos. 2-3 and 2-4: ICA Section 2.2 (two issues in Section 2.2) & 22.4.1.2**

17 **Q. PLEASE DESCRIBE THE BUSINESS NEED REGARDING RATE**
18 **APPLICATION IN ISSUE NO. 2-3 AND EFFECTIVE DATE OF**
19 **LEGALLY BINDING CHANGES IN ISSUE NO. 2-4 (COLLECTIVELY**
20 **“CHANGE IN LAW”).**

21 **A.** Section 2.2 of the ICA addresses changes in law. When a change in law takes
22 effect is a question that can have very significant financial and other
23 consequences. Qwest proposes two additions to Section 2.2 that relate to when
24 certain changes of law will take effect. Qwest’s additions are not contained in the
25 SGAT and rather than add clarity to this section of the contract, Qwest’s language

1 provides an opportunity for a company to delay the effect of a change in law and
2 supersede the authority of the relevant regulatory body.

3 Issue No. 2-3 (Rate Application), which is the first of the two disputed issues
4 arising from Section 2.2, is more specific to rates and concerns language
5 regarding when rate changes resulting from a Commission order will take effect.

6 Issue No. 2-4 (Effective Date of Legally Binding Changes), which is the second
7 of two disputed issues in Section 2.2, concerns when legally binding changes in
8 the law will take effect.

9 Because of the potential for future disputes, it is important that the ICA language
10 on this issue: 1) provide the companies with clear guidance on when a change of
11 law will take effect, so that they can plan accordingly; 2) not provide an
12 opportunity for any company to delay the effect of a change in the law; 3)
13 preserve the authority of the relevant regulatory body – e.g., the Commission, the
14 FCC, or Congress – to determine when changes in the law will be given effect.

15 **Q. WHAT ARE ESCHELON'S PROPOSALS FOR ISSUES 2-3 AND 2-4?**

16 A. Eschelon has two proposals that encompass Issues 2-3 and 2-4. Eschelon offers
17 either proposal for adoption by the Commission. For both proposals, the entire
18 provision in this section of the ICA (Section 2.2) is shown, with underlining and
19 strikeouts to show the differences in the companies' positions. Eschelon's

1 proposal #2 also has a component in ICA Section 22.4 (“Interim Pricing”), shown
2 below.⁷

3 Proposal #1 (Issue Nos. 2-3 and 2-4)

4 2.2 The provisions in this Agreement are intended to be in compliance
5 with and based on the existing state of the law, rules, regulations
6 and interpretations thereof, including but not limited to state rules,
7 regulations, and laws, as of March 11, 2005 (the Existing Rules).
8 Nothing in this Agreement shall be deemed an admission by Qwest
9 or CLEC concerning the interpretation or effect of the Existing
10 Rules or an admission by Qwest or CLEC that the Existing Rules
11 should not be changed, vacated, dismissed, stayed or modified.
12 Nothing in this Agreement shall preclude or stop Qwest or CLEC
13 from taking any position in any forum concerning the proper
14 interpretation or effect of the Existing Rules or concerning whether
15 the Existing Rules should be changed, vacated, dismissed, stayed
16 or modified. To the extent that the Existing Rules are vacated,
17 dismissed, stayed or materially changed or modified, then this
18 Agreement shall be amended to reflect such legally binding
19 modification or change of the Existing Rules. Where the Parties
20 fail to agree upon such an amendment within sixty (60) Days after
21 notification from a Party seeking amendment due to a modification
22 or change of the Existing Rules or if any time during such sixty
23 (60) Day period the Parties shall have ceased to negotiate such new
24 terms for a continuous period of fifteen (15) Days, it shall be
25 resolved in accordance with the Dispute resolution provision of
26 this Agreement. It is expressly understood that this Agreement
27 will be amended as set forth in this Section 2.2, to reflect the
28 outcome of generic proceedings by the Commission for pricing,
29 service standards, or other matters covered by this Agreement,
30 except where CLEC notifies Qwest in writing that an amendment
31 is not required. The rates in Exhibit A and when they apply are
32 addressed in Section 22.⁸ ~~Rates in Exhibit A include legally~~

⁷ Because of the potential confusion between Section “2.2” and Section “22” as a result of the similar numbering, I will refer to the separate, later Section of the ICA as Section “22.0” for clarity. Section 22.4, which deals specifically with interim rates, is a sub-section of Section 22.0

⁸ As indicated in Eschelon’s position statement for Issue 2-3, “Eschelon proposes to either remain silent on this issue in Section 2.2 (by deleting Qwest’s proposed insertion) or, as an option, to include Eschelon’s proposed sentence that simply refers the reader to Section 22.0, where the issue is dealt with more completely.” See Utah Disputed Issues Matrix, Exhibit 3 to Eschelon’s Petition for Arbitration. Eschelon position statement, p. 9.

1 ~~binding decisions of the Commission and shall be applied on a~~
2 ~~prospective basis from the effective date of the legally binding~~
3 ~~Commission decision, unless otherwise ordered by the~~
4 ~~Commission. When a regulatory body or court issues an order~~
5 ~~causing a change in law and that order does not include a specific~~
6 ~~implementation date, a Party may provide notice to the other Party~~
7 ~~within thirty (30) Days of the effective date of that order and any~~
8 ~~resulting Any amendment shall be deemed effective on the~~
9 ~~effective date of the legally binding change or modification of the~~
10 ~~Existing Rules for rates, and to the extent practicable for other~~
11 ~~terms and conditions, unless otherwise ordered. In the event~~
12 ~~neither Party provides notice within thirty (30) Days, the effective~~
13 ~~date of the legally binding change shall be the effective date of the~~
14 ~~amendment unless the Parties agree to a different date. While any~~
15 ~~negotiation or Dispute resolution is pending for an amendment~~
16 ~~pursuant to this Section 2.2 the Parties shall continue to perform~~
17 ~~their obligations in accordance with the terms and conditions of~~
18 ~~this Agreement. For purposes of this Section, "legally binding"~~
19 ~~means that the legal ruling has not been stayed, no request for a~~
20 ~~stay is pending, and any deadline for requesting a stay designated~~
21 ~~by statute or regulation, has passed.~~

22 Proposal #2 (Issue Nos. 2-3 and 2-4)

23 2.2 The provisions in this Agreement are intended to be in
24 compliance with and based on the existing state of the law, rules,
25 regulations and interpretations thereof, including but not limited to
26 state rules, regulations, and laws, as of March 11, 2005 (the
27 Existing Rules). Nothing in this Agreement shall be deemed an
28 admission by Qwest or CLEC concerning the interpretation or
29 effect of the Existing Rules or an admission by Qwest or CLEC that
30 the Existing Rules should not be changed, vacated, dismissed,
31 stayed or modified. Nothing in this Agreement shall preclude or
32 estop Qwest or CLEC from taking any position in any forum
33 concerning the proper interpretation or effect of the Existing Rules
34 or concerning whether the Existing Rules should be changed,
35 vacated, dismissed, stayed or modified. To the extent that the
36 Existing Rules are vacated, dismissed, stayed or materially changed
37 or modified, then this Agreement shall be amended to reflect such
38 legally binding modification or change of the Existing Rules. Each
39 Party has an obligation to ensure that the Agreement is amended
40 accordingly. Where the Parties fail to agree upon such an
41 amendment within sixty (60) Days after notification from a Party

1 seeking amendment due to a modification or change of the Existing
2 Rules or if any time during such sixty (60) Day period the Parties
3 shall have ceased to negotiate such new terms for a continuous
4 period of fifteen (15) Days, it shall be resolved in accordance with
5 the Dispute resolution provision of this Agreement. It is expressly
6 understood that this Agreement will be amended as set forth in this
7 Section 2.2, to reflect the outcome of generic proceedings by the
8 Commission for pricing, service standards, or other matters covered
9 by this Agreement, except where CLEC notifies Qwest in writing
10 that an amendment is not required. The rates in Exhibit A and
11 when they apply are further addressed in Section 22. Generally,
12 with respect to rates, this Section 2.2 addresses changes to rates that
13 have been previously approved by the Commission, and Section 22
14 (Pricing) also addresses rates that have not been previously
15 approved by the Commission (Unapproved Rates). Rates in Exhibit
16 A will reflect include legally binding decisions of the Commission.
17 Each Party reserves its rights with respect to the effective date of a
18 legally binding modification or change of the Existing Rules and, if
19 different, other dates for implementation or application of an order,
20 if any. If a Party desires a particular deadline or time period for
21 application or implementation of any aspect of a proposed order, the
22 Party may request under the Commission's regularly established
23 rules that the Commission establish a specific implementation date,
24 stay the order, or provide other such relief as applicable. If,
25 however, the Commission enters an order that is silent on the issue,
26 the order shall be implemented and applied on a prospective basis
27 from the date that the order is effective either by operation of law or
28 as otherwise stated in the order (such as "effective immediately" or
29 a specific date), unless subsequently otherwise ordered by the
30 Commission or, if allowed by the order, agreed upon by the Parties.
31 ~~When a regulatory body or court issues an order causing a change~~
32 ~~in law and that order does not include a specific implementation~~
33 ~~date, a Party may provide notice to the other Party within thirty (30)~~
34 ~~Days of the effective date of that order and any resulting~~
35 ~~amendment shall be deemed effective on the effective date of the~~
36 ~~legally binding change or modification of the Existing Rules for~~
37 ~~rates, and to the extent practicable for other terms and conditions,~~
38 ~~unless otherwise ordered.~~⁹—While any negotiation or Dispute

⁹ As discussed under Proposal #1, the following sentence is from the SGAT (Section 2.2): "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." Eschelon offers Proposal #2 either with or without this sentence. As it ends with "unless otherwise ordered," it allows for a different date to be set.

1 resolution is pending for an amendment pursuant to this Section 2.2
2 the Parties shall continue to perform their obligations in accordance
3 with the terms and conditions of this Agreement. For purposes of
4 this Section, "legally binding" means that the legal ruling has not
5 been stayed, no request for a stay is pending, and any deadline for
6 requesting a stay designated by statute or regulation, has passed.

7 Following is the component of Eschelon's proposal #2 in Section 22.4:

8 22.4.1.2 If the Interim Rates are reviewed and changed by the
9 Commission, the Parties shall incorporate the rates established by
10 the Commission into this Agreement pursuant to Section 2.2 of this
11 Agreement. Such Commission-approved rates shall be effective as
12 of the date required by a legally binding order of the Commission.
13 Each Party reserves its rights with respect to whether Interim Rates
14 are subject to true-up. If, however, the Commission issues an order
15 with respect to rates that is silent on the issue of a true-up, the rates
16 shall be implemented and applied on a prospective basis from the
17 effective date of the legally binding Commission decision as
18 described in Section 2.2.

19 **Q. PLEASE BRIEFLY DESCRIBE ESCHELON'S TWO PROPOSALS**
20 **REGARDING CHANGE IN LAW (ISSUES 2-3 AND 2-4**
21 **COLLECTIVELY).**

22 A. Eschelon's first proposal for ICA Section 2.2 is to leave the closed portion of the
23 language of Section 2.2 unchanged by deleting Qwest's two proposed
24 insertions.¹⁰ Eschelon's first proposal would leave in place as closed language

¹⁰ Eschelon has also offered, as an option, to add one sentence cross referencing Section 22 ("Pricing"), where the issue of rates is dealt with more completely, if desired for clarity. As shown above, the optional proposed cross reference in Section 2.2 states: "The rates in Exhibit A and when they apply are further addressed in Section 22."

1 the following SGAT sentence¹¹ in Section 2.2 and the following approved Qwest-
2 AT&T ICA language¹² in Section 22.4:

3 2.2 . . . Any amendment shall be deemed effective on the effective
4 date of the legally binding change or modification of the Existing
5 Rules for rates, and to the extent practicable for other terms and
6 conditions, unless otherwise ordered. . . .¹³

7 22.4.1.2 If the Interim Rates are reviewed and changed by the
8 Commission, the Parties shall incorporate the rates established by
9 the Commission into this Agreement pursuant to Section 2.2 of this
10 Agreement. Such Commission-approved rates shall be effective as
11 of the date required by a legally binding order of the Commission.

12 The SGAT provision will assure that the ICA properly reflects any changes in the
13 law, including any direction given in any applicable order regarding when the
14 ordered change shall be given effect. The agreed upon sentence from the
15 approved Qwest-AT&T ICA will assure that the Commission will dictate when
16 Commission-approved rates become effective. These provisions, using agreed
17 upon language from the SGAT and the Qwest-AT&T ICA, are neutral as to the
18 effective date to be adopted ultimately by the appropriate regulatory body.

19 As discussed, except for Eschelon's optional proposal to add one sentence (with a
20 cross-reference to Section 22.0), Eschelon's first proposal is the Qwest-AT&T

¹¹ In addition to being in the SGAT, this sentence is also the same sentence as in the December 9, 2004 Qwest-AT&T ICA that was approved by the Utah Commission. *See* Utah Docket No. 04-049-09.

¹² The Qwest-AT&T ICA was approved by the Utah Commission on December 9, 2004 ("Qwest-AT&T ICA"). *See* Utah Docket No. 04-049-09. This Qwest-AT&T ICA was used by the companies in part as a basis for negotiations. *See, e.g.,* Exhibit Eschelon 3.3 (Draft Eschelon Section 12 (March 18, 2004), annotated), p. 1.

¹³ This portion of the sentence is closed, except the first word ("Any"), which Qwest proposes to change to "any resulting" after its inserted clause. Eschelon recommends deletion of Qwest's proposed insertion.

1 ICA language that was approved by the Utah Commission on December 09,
2 2004,¹⁴ with certain agreed upon modifications.¹⁵ The Qwest-AT&T ICA
3 language with the mutually agreed upon modifications was closed in the Qwest-
4 Eschelon proposed ICA in negotiations for some time. When Qwest re-opened
5 the language by proposing two new insertions to Section 2.2, Eschelon countered
6 with its second proposal. As a general matter, Eschelon's second proposal
7 (Proposal #2, shown above) is different from that modified Qwest-AT&T
8 language in three ways. First, this option affirms the companies' obligations to
9 keep their ICA up to date in an additional sentence. Second, this option provides
10 additional clarification regarding when rates changes will take effect. Third, this
11 option provides additional clarification regarding the effective date of ICA
12 amendments to the ICA that are entered into to reflect legally binding changes in
13 the law. These differences will be explained below.

14 **Q. WHAT IS QWEST'S PROPOSAL REGARDING CHANGE IN LAW**
15 **(ISSUES 2-3 AND 2-4 COLLECTIVELY)?**

16 A. Qwest has one proposal for change in law (Issues 2-3 and 2-4). It consists of two
17 language insertions in Section 2.2 and one language insertion in Section 22.4.
18 Regarding application of rates (Issue 2-3), Qwest proposes deletion of Eschelon's
19 proposed optional sentence in Section 2.2 and insertion of the following
20 underlined language:

¹⁴ See Utah Docket No. 04-049-09.

¹⁵ For example, the companies agreed to change the identified date for Existing Rules from August 15, 2003 in the Qwest-AT&T ICA to March 11, 2005 in the proposed Qwest-Eschelon ICA.

1 ~~The rates in Exhibit A and when they apply are addressed in~~
2 ~~Section 22. Rates in Exhibit A include legally binding decisions of~~
3 ~~the Commission and shall be applied on a prospective basis from~~
4 ~~the effective date of the legally binding Commission decision,~~
5 ~~unless otherwise ordered by the Commission.~~

6 Qwest’s proposed sentence does not appear in the SGAT or the approved Qwest-
7 AT&T ICA language used in negotiations.¹⁶

8 Regarding effective date of legally binding changes (Issue 2-4), Qwest proposes
9 to add the following two underlined sentences to Section 2.2 (which do not appear
10 in the SGAT or the Qwest-AT&T ICA):

11 When a regulatory body or court issues an order causing a change
12 in law and that order does not include a specific implementation
13 date, a Party may provide notice to the other Party within thirty
14 (30) Days of the effective date of that order and any resulting...
15 ~~Any~~ amendment shall be deemed effective on the effective date of
16 the legally binding change or modification of the Existing Rules
17 for rates, and to the extent practicable for other terms and
18 conditions, unless otherwise ordered. In the event neither Party
19 provides notice within thirty (30) Days, the effective date of the
20 legally binding change shall be the effective date of the
21 amendment unless the Parties agree to a different date.

22 Qwest proposes that when an order that changes the law “does not include a
23 specific implementation date,” the effective date of such a change will depend on
24 whether one party gives the other notice of the order. When one party gives
25 notice of the order within thirty days of the effective date of the order, Qwest
26 proposes that the amendment of the ICA reflecting the change in the law will be
27 “deemed effective on the date of that order.” When one party does not give notice

¹⁶ Eschelon’s suggested insertion of the cross reference to Section 22.0 is also not in either document. As discussed, addition of this sentence is optional, if desired for clarity.

1 of the order within thirty days, Qwest proposes that the legal change will take
2 effect on the effective date of the ICA amendment that reflects that change, unless
3 the parties agree otherwise. Regarding Section 22.4.1.2, Qwest's proposal is to
4 repeat its proposed sentence from Section 2.2 (regarding a prospective basis) in
5 Section 22.0:

6 22.4.1.2 If the Interim Rates are reviewed and changed by the
7 Commission, the Parties shall incorporate the rates established by
8 the Commission into this Agreement pursuant to Section 2.2 of this
9 Agreement. Such Commission-approved rates shall be effective as
10 of the date required by a legally binding order of the Commission.
11 Rates in Exhibit A include legally binding decisions of the
12 Commission and shall be applied on a prospective basis from the
13 effective date of the legally binding Commission decision, unless
14 otherwise ordered by the Commission.

15 Eschelon disagrees with this proposal for the same reasons that it disagrees with
16 this language in Section 2.2 (regardless of whether the language is placed in
17 Section 2.2, 22.0, or both).

18 **Q. WHY IS ESCHELON'S FIRST PROPOSAL (PROPOSAL #1) FOR ISSUES**
19 **2-3 AND 2-4 APPROPRIATE?**

20 A. Change in law provisions generally, and Section 2.2 specifically, are designed to
21 apply when the law changes *at a later time*. Eschelon's proposal does not pre-
22 judge (by, at this time, establishing a presumption one way or the other) the issue
23 of when rates approved by the Commission or other orders will take effect at a
24 later time. It defers to the authority of the relevant regulatory body if and when a
25 change in law occurs. This is appropriate not only because the appropriate

1 regulatory body has that authority but also because more will be known at that
2 time about the nature of the change in law and when it should take effect.

3 Regarding the application of rates, Section 22.0 (“Pricing”) already deals with the
4 application of rates in Exhibit A and does so more thoroughly and clearly than
5 Qwest’s proposed single sentence in Section 2.2.¹⁷ Most of Section 22.0 is agreed
6 upon and closed. The issues that remain open will be decided in this arbitration
7 with respect to Section 22.0 and need not also be litigated with respect to Section
8 2.2. With respect to when rate changes will take effect, Section 22.4.1, which the
9 companies have agreed upon in large part, states:

10 22.4.1 The Parties acknowledge that only some of the
11 prices contained in Exhibit A have been approved by the
12 Commission in a cost case. Prices that have not been approved by
13 the Commission shall be considered interim and subject to the
14 following provisions.

15 22.4.1.2 If the Interim Rates are reviewed and
16 changed by the Commission, the Parties shall incorporate
17 the rates established by the Commission into this
18 Agreement pursuant to Section 2.2 of this Agreement.
19 Such Commission-approved rates shall be effective as of
20 the date required by a legally binding order of the
21 Commission.¹⁸

22 As shown, Section 22.4.1.2 specifically states: “Such Commission-approved
23 rates shall be effective as of the date required by a legally binding order of the
24 Commission.” Therefore, Section 22.4.1.2 leaves the issue of whether rates will

¹⁷ Therefore, if additional language is desired, it makes sense to add Eschelon’s optional proposed sentence to Section 2.2: “The rates in Exhibit A and when they apply are further addressed in Section 22.”

¹⁸ Note, as discussed above, both companies have proposed additional language in 22.4.1.2, which is disputed.

1 be applied on a prospective basis to the discretion of the Commission to decide at
2 the appropriate time. Because this closed language in Section 22.4.1.2 applies to
3 any date required by an order of the Commission – including either an earlier
4 effective date (*e.g.*, a true-up) or a prospective date (*e.g.*, no true-up), whichever is
5 ordered by the Commission – Qwest is incorrect when it claims that “Section 22
6 is silent as to what is to occur when a Commission order does not specify a true-
7 up of past billing.”¹⁹ This closed language in Section 22 expressly states that the
8 effective date required by the order will apply.

9 The Commission has, in some cases, determined that the circumstances warranted
10 the establishment of an interim rate that would be subject to true up when the final
11 rate was determined and some, as reflected in the closed language of Section
12 22.4.1.2, that would not be subject to true up. The agreed upon language of
13 Section 22.4.1 and 22.4.1.2 is consistent with the range of the Commission’s past
14 practice, because it reflects the Commission’s cost docket rulings and, for other
15 issues, leaves it to the Commission to decide when a rate change will take effect.
16 Qwest’s new proposal in Section 2.2, in contrast, attempts to create an
17 unnecessary default that rate changes will be applied prospectively. The
18 ambiguity created by Qwest’s proposal is likely to lead to additional litigation.

¹⁹ See Arizona arbitration, Easton Rebuttal, p. 2, lines 17-18. In any event, Eschelon’s Proposal #2 even more explicitly addresses what is to occur when a Commission order does not specify a true-up of past billing, as discussed below.

1 **Q. HOW DOES ESCHELON’S SECOND PROPOSAL (PROPOSAL #2) FOR**
2 **ISSUES 2-3 AND 2-4 ADDRESS QWEST’S STATED CONCERNS ABOUT**
3 **THE LANGUAGE IN SECTION 2.2?**

4 A. Eschelon’s second, alternative proposal for Issues 2-3 and 2-4 is to add three
5 provisions to Section 2.2 to clean up the distinction that Qwest appears to desire
6 between an “implementation” date and an “effective” date, as well as to add
7 language to Section 22.4.1.2. The first provision of Eschelon’s alternate proposal
8 confirms that each company has an obligation to ensure the agreement is
9 amended. As I explain below, Eschelon is concerned that Qwest’s proposal
10 provides a means that would allow a company to delay the effect of an adverse
11 change in the law by not giving the other company notice of the order giving rise
12 to the change. The existing agreed upon language already provides that the
13 Agreement “shall” be amended to reflect a legally binding modification or change
14 of the Existing Rules.²⁰ The additional sentence that Eschelon proposes
15 (immediately after that closed sentence) confirms that there will be no delay in
16 doing so, by stating that “Each Party has an obligation to ensure that the
17 Agreement is amended accordingly.” Eschelon added this sentence to attempt to
18 address Qwest’s stated concern that the SGAT and Qwest-AT&T language
19 required amendment without addressing who had the obligation to ensure that it
20 was amended.

²⁰ The SGAT, Qwest-AT&T ICA, and closed language in the proposed Qwest-Eschelon ICA all state:
“To the extent that the Existing Rules are vacated, dismissed, stayed or materially changed or
modified, then this Agreement shall be amended to reflect such legally binding modification or
change of the Existing Rules.”

1 **Q. PLEASE EXPLAIN ESCHELON'S SECOND CHANGE TO THE**
2 **LANGUAGE REFLECTED IN ESCHELON'S SECOND PROPOSAL FOR**
3 **SECTION 2.2, WHICH CONCERNS WHEN RATE CHANGES WILL BE**
4 **GIVEN EFFECT.**

5 A. Testimony on behalf of the Minnesota Department of Commerce in the Minnesota
6 arbitration revealed the utility of distinguishing between changes to prices that
7 had been previously approved by the Commission and changes to prices not
8 previously approved. To address this issue, Eschelon's alternative proposal
9 includes language specifying that Section 2.2 is intended to govern changes to
10 existing rates that have been previously approved and that Section 22.0 also
11 addresses rates that have not been previously approved.

12 **Q. PLEASE EXPLAIN ESCHELON'S THIRD CHANGE TO THE**
13 **LANGUAGE REFLECTED IN ESCHELON'S SECOND PROPOSAL FOR**
14 **SECTION 2.2, WHICH CONCERNS THE EFFECTIVE DATE OF ICA**
15 **AMENDMENTS THAT REFLECT CHANGES OF LAW.**

16 A. Eschelon's proposed alternative permits a company to seek a particular time
17 period for application or implementation of an order that results in a legally
18 binding change in the law, including changes to previously-approved rates. It
19 clarifies that, if the order is silent on the issue of its implementation date, the
20 order will be implemented prospectively from the date the order becomes
21 effective according to the order's term or by operation of law. Thus, this

1 language expressly confirms that the “implementation date” of an order that is
2 “effective immediately” is the date of the order.

3 Qwest’s new proposal in Section 2.2, in contrast, attempts to create an
4 unnecessary default that rate changes will be applied prospectively. The
5 ambiguity created by Qwest’s proposal is likely to lead to additional litigation.

6 **Q. WHAT CHANGES DOES ESCHELON PROPOSE TO SECTION 22.0 IN**
7 **ITS SECOND, ALTERNATIVE PROPOSAL RELATED TO THESE**
8 **ISSUES?**

9 A. Eschelon’s second, alternative proposal for Issues 2-3 and 2-4 also includes
10 addition of two sentences to Section 22.4.1.2. Section 22.4 is entitled “Interim
11 Rates.” Although agreed upon language in Section 22.4.1.2 already provides that
12 interim rates “shall be effective as of the date required by a legally binding order
13 of the Commission,”²¹ Eschelon has proposed two sentences in response to
14 Qwest’s proposal which expressly state the companies reserve their rights with
15 respect to a true-up. If an order is silent as to a true-up, Qwest gets the default
16 provision it seeks (except for new products, which are addressed in Section
17 1.7.1.1), indicating rates will be applied and implemented on a prospective basis.
18 However, Eschelon’s language also clarifies that “Each Party reserves its rights
19 with respect to whether Interim Rates are subject to true-up.”

²¹ As discussed, 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.

1 **Q. YOU EXPLAINED ABOVE THAT QWEST’S PROPOSED**
2 **“PROSPECTIVE” RATE APPLICATION DEFAULT IN 2.2 IS**
3 **UNNECESSARY AND AMBIGUOUS. WHAT PROBLEMS DOES**
4 **QWEST’S PROPOSAL PRESENT FOR ESCHELON?**

5 A. Eschelon has three general concerns. First, the language is ambiguous, which is
6 likely to lead to disputes in the future. Second, the language creates an
7 opportunity for Qwest to delay the effect of a legal change that is not in its favor.
8 Third, the language intrudes on the province of the relevant regulatory authority
9 to determine when the legal change will take effect.

10 **Q. HOW IS QWEST’S PROPOSAL AMBIGUOUS?**

11 A. The proposal would govern what happens when an order “does not include a
12 specific implementation date.” Qwest’s language also provides, however, that
13 when a party gives notice of an order within thirty days, the legal change resulting
14 from that order will take effect on “the effective date of that order.” What this
15 tells me is that Qwest believes a “specific implementation date” of an order is
16 something different from an order’s effective date (consistent with the Arizona
17 example described below). Under Qwest’s proposal, it appears that an order that
18 the Commission states is to be “effective immediately” would not be one that has
19 a “specific implementation date” and would, therefore, be one that Eschelon
20 would have to give Qwest notice of within thirty days for the order to actually
21 have immediate effect.

1 In addition, what constitutes “notice” is also unclear. For example, Qwest’s
2 language would appear to require Eschelon to give Qwest “notice” even when
3 Qwest is an active party to the proceeding that results in the change of law.

4 **Q. HOW DOES QWEST’S PROPOSAL CREATE AN OPPORTUNITY FOR**
5 **DELAY?**

6 A. By proposing that the effective date of a change in the law will depend on
7 whether one party gives the other notice of the order giving rise to the change,
8 Qwest creates an opportunity for itself to delay implementation of adverse rulings.
9 If, for example, Qwest is a party to a proceeding and Eschelon (or another CLEC
10 that has opted into the ICA) is not, and Qwest receives an adverse result, Qwest’s
11 language would allow Qwest to delay the effect of that adverse ruling by simply
12 not notifying CLECs of the order. Because CLECs have much more limited
13 resources than Qwest to participate in regulatory proceedings and Qwest is likely
14 to have more complete knowledge regarding the proceedings and any changes in
15 the law that result, Qwest’s proposed “notice” requirement heavily favors Qwest
16 to the disadvantage of CLECs.

17 **Q. HOW DOES QWEST’S PROPOSAL INTRUDE ON THE AUTHORITY**
18 **OF REGULATORY BODIES TO DETERMINE WHEN LEGAL**
19 **CHANGES WILL TAKE EFFECT?**

20 A. Qwest is proposing to change the effective date to either the date of an ICA
21 amendment or a date agreed upon by the parties, even in cases when the

1 Commission has ordered a different effective date. For example, if the
2 Commission issues an order in a generic proceeding that has been properly
3 noticed and the order states that it is effective immediately, Qwest's language
4 would allow Qwest to implement that ruling at a later date if neither party gave
5 the other notice of the ruling (even if one or both parties were party to the
6 proceeding). Qwest should not be allowed to unilaterally alter a Commission-
7 ordered effective date in this manner. Eschelon's proposed language is consistent
8 with the notion that the effective date of an ICA amendment incorporating a
9 change in law should be determined by the Commission in light of sound public
10 policy, not by the procedural maneuverings of the parties.

11 **Q. HAS QWEST'S PREVIOUS CONDUCT RAISED A CONCERN THAT,**
12 **UNDER QWEST'S PROPOSAL, AN ORDER THAT IS "EFFECTIVE**
13 **IMMEDIATELY" COULD BE CONSIDERED TO LACK A "SPECIFIC**
14 **IMPLEMENTATION DATE"?**

15 A. Yes. Qwest's conduct in an Arizona cost case suggested that Qwest considered
16 the effective date of an order to be different from a specific implementation date
17 even though the order identified no separate date. In that case, the Commission
18 staff brought a complaint regarding Qwest's failure to implement rate changes.²²
19 Although the rate changes had been ordered by the Commission to be "effective
20 immediately" (*i.e.*, on June 12, 2002), and although Qwest had not sought a stay

²² *Arizona Corporation Commission v. Qwest Corporation*, Docket No. T-01051B-02-0871, Decision 65456, Complaint and Order to Show Cause ["AZ Show Cause Case"].

1 of the order despite a specific inquiry from the Commission as to whether a stay
2 would be sought, Qwest still had not implemented the rates months later.²³ The
3 Arizona Staff investigated²⁴ and the matter came before the Arizona Commission
4 on an order to show cause. At the open meeting, the Commission indicated that it
5 believed it was reasonable to conclude that an order indicating that it was
6 effective “immediately” means “fairly soon”²⁵ and that, in any event, “any
7 definition of immediately is not five months later.”²⁶ The Commission then asked
8 Qwest to define immediately, and Qwest responded:

9 I think *Qwest's definition of immediately is consistent with the*
10 *approach that has been taken in the implementation of orders*
11 *previously* by this Commission with respect to the 1986 record,
12 which was the last major order with wholesale rates. It took Qwest --
13 and we have discussed this with Staff -- it took Qwest *about a year*
14 to implement those rates.²⁷

15 Eschelon’s proposed language would prevent a re-occurrence of such a situation,
16 by requiring a company that needs additional time to implement an order to raise
17 that issue with the Commission and obtain an implementation schedule, rather
18 than Qwest’s engaging in self-help after the fact and taking additional time, with
19 no stay in place, to implement the order on Qwest’s own schedule.

²³ Transcript of 12/2/02 Special Open Meeting, AZ Show Cause Case, p. 9, lines 4-11 & p. 10, lines 2-3.

²⁴ Staff said it believed that “Qwest intentionally delayed implementation” of the cost case order “until Qwest could complete rate changes in nine other states for which it had 271 applications pending at the federal level.” See Transcript of 12/2/02 Special Open Meeting, AZ Show Cause Case, p. 5, lines 19-23.

²⁵ See Transcript of 12/2/02 Special Open Meeting, AZ Show Cause Case, p. 9, lines 12-15.

²⁶ See Transcript of 12/2/02 Special Open Meeting, AZ Show Cause Case, p. 10, lines 6-7.

²⁷ See Transcript of 12/2/02 Special Open Meeting, AZ Show Cause Case, p. 10, line 25 – p. 11, line 8 (emphasis added).

1 **Q. PLEASE SUMMARIZE ISSUES 2-3 AND 2-4 REGARDING CHANGES IN**
2 **LAW.**

3 A. Either of Eschelon's proposals regarding changes in law (Issues 2-3 and 2-4) are
4 better than Qwest's proposal for determining when changes to application of rates
5 and changes in law should take effect. Qwest's language is ambiguous, creates
6 the opportunity for delay, and intrudes upon the Commission's authority.
7 Eschelon's Proposal #1 or Proposal #2 should be adopted for these issues.

8 **III. DESIGN CHANGES (SUBJECT MATTER NO. 4)**

9 **SUBJECT MATTER NO. 4. DESIGN CHANGES**

10 **Issue Nos. 4-5, 4-5(a), 4-5(b) and 4-5(c): ICA Sections 9.2.3.8, 9.2.3.9 and**
11 **Section 9.20.13 of Exhibit A**

12 **Q. PLEASE IDENTIFY THE BUSINESS NEED UNDERLYING**
13 **ESCHELON'S PROPOSALS FOR DESIGN CHANGES (ISSUE NOS. 4-5**
14 **AND SUBPARTS) AND SUMMARIZE THE ISSUES.**

15 A. A design change allows a CLEC to change a service previously requested without
16 the unnecessary delay and cost involved in canceling and re-submitting the
17 request. Qwest provides Eschelon design changes today, and has since 2000
18 under its Commission-approved ICA. Eschelon needs a ruling that provides
19 certainty that Qwest will continue to provide design changes at TELRIC rates.
20 The Agreement must contain language that makes Qwest's obligation clear in this
21 regard so that Qwest does not refuse to provide design changes for loops at

1 TELRIC rates (or even quit providing design changes for loops altogether), or
2 severely restrict access to design changes.

3 There are three open issues for resolution: (1) whether Qwest may charge a
4 separate charge for design changes for unbundled loops even though Qwest has
5 not done so in the past (ICA Section 9.2.3.8; Issue 4-5); (2) if so, whether Qwest
6 may charge the same rate that it charges to perform design changes for UDITs for
7 design changes for loops and certain Connecting Facility Assignment (“CFA”)
8 changes that are relatively common, require very little time, and can be performed
9 on the day of cut during the loop installation process when Eschelon is already
10 paying for coordination (ICA Section 9.2.3.9; Issue 4-5(a)); and (3) what is the
11 appropriate rate (Exhibit A Section 9.20.13; Issue 4-5(c)). Specifically with
12 respect to the rate, if Qwest may charge separately for design changes for
13 unbundled loops: (a) what rate Qwest may charge for design changes for loops
14 (Exhibit A Section 9.20.13.2); (b) what rate Qwest may charge for certain CFA
15 changes (Exhibit A Section 9.20.13.3); and (c) the appropriate footnote to assign
16 to the interim for rates.²⁸

17 Issue 4-5 and its subparts also relate to both Issue 9-31 (Nondiscriminatory
18 Access to UNEs)²⁹ and Issue 22-90 (Unapproved Rates). Design changes is one
19 of the examples provided in the closed portion of the language in Section 9.1.2

²⁸ The issue of the footnote will be resolved by the Commission’s decision with respect to the appropriate interim rate for Design Changes for Loops and CFA changes.

²⁹ Issue 9-31 is addressed in the testimony of Mr. Starkey.

1 (Issue 9-31) which Eschelon's proposal describes as examples of "Access to"
2 UNEs and Qwest's proposal describes as examples of "Activities Available for"
3 UNEs. The difference between the companies' proposals for Issue 9-31 revolves
4 largely around whether the rate for UNE-related activities will be priced at
5 TELRIC rates. If the rate is to be TELRIC, as proposed by Eschelon, the timing
6 of when Qwest may charge the rate in situations for which it has not previously
7 separately charged for the same activity is a subject of Section 22.6 (Issue 22-90).
8 As discussed below, until recently, Qwest did not charge CLECs separately for
9 design changes for unbundled loops (including CFA changes). Of the six Qwest
10 states in which Eschelon historically does business, the only state in which Qwest
11 did not unilaterally start charging Eschelon for design changes for loops was
12 Minnesota. Eschelon's proposal for Section 22.6 reflects the Minnesota process
13 (under which Qwest must obtain Commission approval before charging for
14 activities Qwest previously performed without charge). If Eschelon's proposal
15 for Issue 22-90 had been in place, Qwest would have needed to obtain
16 Commission approval before charging for design changes for loops in Utah as
17 well, instead of simply sending a letter to Eschelon. Particularly given that one
18 day Qwest just started charging for design change charges for loops with no
19 approval or change in the ICA in Utah – even though it has admitted there is no
20 design change charge for loop in the current Commission-approved Qwest-
21 Eschelon ICA (or the SGAT)³⁰ – the Commission needs to require Qwest to

³⁰ In the Minnesota arbitration proceeding, Qwest witness Karen Stewart testified that "Mr. Denney is

1 obtain Commission approval before imposing such charges. Eschelon's proposals
2 for Issue 4-5 and subparts allow Qwest, upon Commission approval of the ICA, to
3 assess interim rates. Nothing in Eschelon's proposals for Issues 4-5, 9-31, or 22-
4 90 would prevent Qwest from coming to the Commission to propose different
5 rates for design changes and substantiate its costs.

6 **Q. WHAT IS ESCHELON'S PROPOSAL FOR ISSUE NO. 4-5 RELATING**
7 **TO DESIGN CHANGES FOR LOOPS?**

8 A. Eschelon offers a contingent proposal under which, if an interim rate is negotiated
9 by the companies or set by the Commission for design changes for loops,
10 Eschelon will agree to Qwest's proposed language for Section 9.2.3.8. Section
11 9.2.3 (Unbundled Loop Rate Elements) states: "The following rates for
12 Unbundled Loops are set forth in Exhibit A of this Agreement." This sentence is
13 followed by a list of rate elements. Qwest's proposal is to add the following
14 language to the list:

15 **Issue 4-5**
16 **Section 9.2.3.8 Design Change rates for Unbundled Loops (unless**
17 **the need for such change is caused by Qwest, in which case this**
18 **rate does not apply).**

19 If an interim rate is negotiated by the companies or set by the Commission for
20 design changes for loops, then this provision will be accurate, because Exhibit A

correct in stating that neither Qwest's SGAT nor the parties' current ICA includes a design change charge for loops." Stewart MN Rebuttal, p. 6, lines 27-28 (9/22/06).

1 will contain such a rate for unbundled loops. Therefore, with such a rate in place,
2 Eschelon would withdraw its objection to this language.

3 As provided by Eschelon's proposals for Issues 9-31 and 22-90, Qwest should
4 have to continue to provide design changes for loops without an additional charge
5 (as it did, until recently, for years under the existing ICA) until Qwest
6 substantiates its costs and obtains Commission approval for a charge. If
7 Eschelon's proposals for Issues 9-31 and 22-90 are adopted (even if an interim
8 rate is not set, as in Minnesota), then Eschelon will also agree to Qwest's
9 proposed language for Section 9.2.3.8, because those proposals will prevent
10 Qwest from unilaterally charging an unapproved non-negotiated rate. In
11 Minnesota, for example, Eschelon and Qwest have agreed to the above language
12 for Section 9.2.3.8 with no rate in Exhibit A for design changes, because the
13 Minnesota cost order requires Qwest to "obtain Commission approval before
14 charging for a UNE or process that it has previously offered without a charge."³¹

15 If there is no interim rate and Eschelon's language is not adopted for Issue 22-90,
16 then Qwest's proposed language for Section 9.2.3.8 should be deleted, just as in
17 the SGAT and the current Qwest-Eschelon ICA there is no rate for design

³¹ October 2, 2002 Order in MN PUC Docket CI-01-1375 ("MN 271 Cost Order"). The language for Section 22.6 is somewhat different in Minnesota, but to the extent Qwest argues it has a different meaning than the language proposed by Eschelon for Section 22.6 in this case, the Minnesota requirements are laid out in the MN 271 Cost Order, which explains why Eschelon could agree to the language in Minnesota but not here until those same requirements apply in Utah. As I discuss below, Eschelon has consistently said that its proposal for Section 22.6 (Issue 22-90) is to use the Minnesota approach in the other states and only recently had to modify its language when it became clear that Qwest was going to attempt to construe the language in other states more narrowly.

1 changes for unbundled loops³² and no associated language allowing Qwest to
2 charge for design changes for unbundled loops.³³ The absence of language
3 should not be interpreted to mean, however, that Qwest does not have to provide
4 design changes for unbundled loops as discussed with respect to Issue 9-31.³⁴

5 **Q. WHAT LANGUAGE DO THE COMPANIES PROPOSE FOR ISSUE NO.**
6 **4-5(A) RELATING TO DESIGN CHANGES FOR CONNECTING**
7 **FACILITY ASSIGNMENT (“CFA”) CHANGES?**

8 A. The companies’ proposals for design changes for CFA changes are as follows:

9 **Eschelon’s Proposal for Issue 4-5(a)**
10 9.2.3.9 CFA Change – 2/4 Wire Loop Cutovers. Connecting
11 Facility Assignment (CFA) changes for Coordinated Installation
12 Options for 2-Wire and 4-Wire analog (voice grade) Loops
13 (excluding the Batch Hot Cut Process) on the day of the cut, during
14 test and turn up. When this charge applies, the Design Change rate
15 for Unbundled Loops does not apply.

16
17 **Qwest’s Proposal for Issue 4-5(a)**
18 9.2.3.9 Rates for CFA changes are set forth in Exhibit A (unless
19 the need for such change is caused by Qwest, in which case this
20 rate does not apply).

21 As I discuss below, design changes associated with CFA changes during the
22 installation of a loop should have a separate rate, as this activity is relatively
23 common, requires very little time and can be performed on the day of cut during
24 the loop installation process. As with Eschelon’s proposal for Section 9.2.3.8

³² See Stewart MN Rebuttal, p. 6, lines 27-28 (9/22/06).

³³ The SGAT authorizes Qwest to charge Design Change charges for dedicated transport but not loops. (Compare SGAT Section 9.6.4.1.4(c) with SGAT Section 9.2.4.)

³⁴ See Mr. Starkey’s testimony for discussion of Issue 9-31.

1 (Issue 4-5), for Issue 4-5(a), Eschelon offers a contingent proposal under which, if
 2 an interim rate is negotiated by the companies or set by the Commission for
 3 design changes for loops, Eschelon will agree to Qwest’s proposed language for
 4 Section 9.2.3.9. If Eschelon’s proposals for Issues 9-31 and 22-90 are adopted
 5 (even if an interim rate is not set, as in Minnesota), then Eschelon will also agree
 6 to Qwest’s proposed language for Section 9.2.3.9, because those proposals will
 7 prevent Qwest from unilaterally charging an unapproved non-negotiated rate, for
 8 the reasons discussed.

9 **Q. WHAT LANGUAGE DO THE COMPANIES PROPOSE FOR ISSUE NO.**
 10 **4-5(c) RELATING TO CHARGES FOR DESIGN CHANGES?**

11 A. The companies’ proposals for charges for design changes and for CFA changes
 12 are as follows:

13 **Eschelon’s Proposal for Issue No. 4-5(c) (Sections in Exhibit A):**

14	9.20.13 Design Change		
15	9.20.13.1 Design Change (Transport)	\$35.89	C ³⁵
16	9.20.13.2 Design Change (Loop)	\$35.89 <u>\$30.00</u>	1 ³⁶
17	9.20.13.3 CFA – 2/4 Wire Loop cutovers	\$35.89 <u>\$5.00</u>	1

18

19 **Qwest’s Proposal for Issue No. 4-5(c) (Sections in Exhibit A):**

20	9.20.13 Design Change		
21	9.20.13.1 Design Change (Transport)	\$35.89	C
22	9.20.13.2 Design Change (Loop)	\$30.00 <u>\$35.89</u>	1
23	9.20.13.3 CFA – 2/4 Wire Loop cutovers	\$5.00 <u>\$35.89</u>	1

³⁵ Note “C” to Exhibit A provides in agreed upon language: “Cost Docket 00-049-105 Effective 7/10/02.”

³⁶ Note “1” to Exhibit A provide in agreed upon language: “Rate not approved in Cost Docket.”

1 **Q. WHAT IS THE EFFECT OF ESCHELON'S PROPOSED LANGUAGE?**

2 A. Eschelon's language makes two things clear: (1) Qwest must continue to provide
3 design changes to Eschelon pursuant to the ICA and (2) Qwest can assess a cost-
4 based rate for design changes. Eschelon's language actually benefits Qwest by
5 providing the opportunity for Qwest to charge Commission-approved cost-based
6 rates for design changes for loops and CFAs (and interim rates until Commission-
7 approved rates are established) – something that Qwest has never been able to do
8 under the existing Qwest/Eschelon ICA, while at the same time maintaining the
9 status quo with regard to UDIT design changes.

10 Under Eschelon's proposal, there is no need for the Commission to set permanent
11 rates at this time. For loops and CFA changes, Eschelon's proposal allows Qwest
12 to assess an interim rate that Qwest could charge unless and until the Commission
13 approved a different rate for these design changes (*see* Issue 4-5(c)). Nothing in
14 Eschelon's proposal would prevent Qwest from coming to the Commission to
15 propose different rates for Design Changes and substantiate its costs.

16 **Q. WHAT IS THE EFFECT OF QWEST'S PROPOSED LANGUAGE?**

17 A. The effective result would allow Qwest to assess the very same design change
18 charge for all three types of design changes discussed under Issue No. 4-5 (*i.e.*,
19 loops, CFAs and UDIT). Further, as indicated by Qwest during negotiations and
20 evidenced by Qwest's 8/31/06 non-CMP notice (which is discussed below),
21 Qwest's ultimate objective is to apply tariff rates for design changes. Despite the

1 interim rates that Qwest would be allowed to charge for design changes under
2 Eschelon's proposal for Issue 4-5(c), Qwest argues that Eschelon's proposal
3 would improperly limit Qwest's ability to assess charges for design changes and
4 would prevent Qwest from recovering the costs.³⁷

5 **Q. CAN YOU PROVIDE EXAMPLES THAT SUBSTANTIATE**
6 **ESCHELON'S CONCERNS AS REAL BUSINESS CONCERNS?**

7 A. Yes. During negotiations on design changes, Qwest submitted a proposal that
8 would have applied tariff rates to design changes. Qwest later changed its
9 position in negotiations, but indicated in meetings between the two companies
10 that Qwest's change in position for negotiations should not be construed as
11 Qwest's giving up on its tariff rate proposal for design changes, and that Qwest
12 fully intended to pursue this proposal outside of negotiations. Qwest confirmed
13 its previously stated strategy of pursuing tariff rates for design changes in its
14 August 31, 2006 non-CMP notice (Process Notification
15 PROS.08.31.06.F.04159.Amendments.ComlAgree.SGAT),³⁸ effective on one
16 day's notice, which announced that Qwest was posting a new "template"
17 interconnection agreement on its website on September 1, 2006.³⁹ This new
18 negotiations template added a tariff reference for the following rate elements:

³⁷ Qwest Response, p. 12.

³⁸ Qwest's 8/31/06 non-CMP notice is Exhibit Eschelon 2.5 to my direct testimony.

³⁹ Mr. Starkey explains that Qwest's position stands in stark contrast to the FCC's rules and orders that require Qwest to provide nondiscriminatory access not only to UNEs themselves, but also nondiscriminatory *access* to those UNEs that provide a CLEC with a meaningful opportunity to compete. *See* Issue 9-31.

1 Additional Dispatch, Trouble Isolation Charge, Design Charge, Expedite Charge,
2 Cancellation Charge, and Maintenance of Service Charge. Qwest's position is
3 that design changes are "not UNEs" and therefore do not need to adhere to the
4 federal TELRIC pricing rules. This new revelation was made by Qwest despite
5 all of the work that was done in the 271 proceedings relating to nondiscriminatory
6 access to UNEs and regardless of whether or not a state commission already has a
7 cost-based rate for that activity in place.

8 What is concerning to Eschelon about this recent non-CMP notice is that Qwest
9 has already indicated to Eschelon that Qwest's ultimate objective is to apply tariff
10 rates to Eschelon (*i.e.*, the same changes that Qwest announced in its 8/31/06 non-
11 CMP notice), even though Qwest is not currently pursuing that proposal in
12 negotiations/arbitrations with Eschelon (or CMP, for that matter). This means
13 that Qwest could refuse to negotiate its tariff proposal (by pursuing a different
14 proposal in arbitrations), yet ultimately apply that tariff proposal to Eschelon once
15 the arbitrations are finished.

16 **Q. WHAT SHOULD BE TAKEN FROM THIS EXAMPLE?**

17 A. Both of Qwest's positions on design change charges (*i.e.*, that all design change
18 charges should be priced at the same unapproved rate for UDIT and that tariff
19 rates should apply to design changes) stand in stark contrast to the stance Qwest
20 took between 1999 and late 2005, during which time Qwest provided design
21 change charges in Utah for loops (including CFA changes) without additional

1 charge. Qwest announced both of these misguided proposals with no
2 corresponding change in the ICA or other Commission approval. This highlights
3 the need for certainty and Commission oversight related to design changes for
4 UNEs so that Eschelon is not subjected to Qwest's continual efforts to charge
5 non-cost based rates for design changes. This arbitration is the appropriate forum
6 for addressing the ICA language and ensuring that the Commission maintains
7 jurisdiction over UNE-based rates; adopting Eschelon's language will establish
8 equitable contract language and avoid future disputes.

9 **Q. ARE THERE OTHER EXAMPLES DEMONSTRATING THAT**
10 **ESCHELON'S CONCERNS ARE REAL?**

11 A. Yes. On September 11, 2006, Qwest issued a Level 3 CMP notice⁴⁰ that revised
12 its Provisioning and Installation Overview to change the verbal supplement for
13 CFA slot change on the due date. Qwest added the following language:

14 NOTE: For CFA or slot changes, it is the CLEC's responsibility to
15 provide Qwest with a new CFA that will work. Qwest will only
16 accept one verbal CFA change on the due date. If that CFA fails to
17 work, Qwest will place the order in jeopardy (customer jeopardy).
18 No further action will be taken on Qwest's part until Qwest
19 receives a valid supplemental request to change the due date and
20 the CFA (if applicable). Additional charges may apply.

21 This language clearly restricts the availability of CFA changes (CFA changes are
22 discussed in more detail below), unnecessarily complicates the provisioning
23 process and leaves the door open for Qwest to assess "additional charges" –

⁴⁰ PROS.09.11.06.F.04161.P_&_I_Overview_v91.

1 which, coupled with Qwest's 8/31/06 non-CMP notice, means that Qwest will
2 apply tariff rates. While Qwest later retracted this CMP notice,⁴¹ Mr. Starkey
3 explains in his direct testimony that Qwest subsequently issued a MCC notice that
4 again limited CFA changes to one on the day of the cut and now Qwest claims
5 (erroneously) that it has always been Qwest's intent to limit these CFA changes to
6 one.⁴² Qwest's recent CMP notice and Qwest's subsequent MCC notice only
7 confirms the concern I expressed above that, without the specific language
8 Eschelon is proposing for Issue 4-5 and subparts, Qwest may attempt to quit
9 providing design changes altogether (or severely restrict access to design
10 changes).

11 **Q. HAVE SOME ISSUES RELATING TO DESIGN CHANGES CLOSED?**

12 A. Yes. The companies have agreed upon a definition for design changes in Section
13 4.0,⁴³ and it is reflected in the proposed ICA that Eschelon filed with its Petition.
14 In addition, the parties agreed to delete language that had been placed in Sections
15 9.2.4 and 9.6.4 (Ordering Processes)⁴⁴ and deal with the rate element issues more
16 logically in Section 9.2.3 and 9.6.3 (Rate Elements). This resulted in the deletion

⁴¹ Qwest filed a notice on 10/20/06 (PROS.10.20.06.F.04281.Retract_CFA_P&I_OvrvwV91) to retract PROS.09.11.06.F.04161.P_&I_Overview_v91.

⁴² I have attached a chronology of Qwest's attempts to limit the number of CFA changes to one on the installation due date as Exhibit Eschelon 2.4. This exhibit includes a chronology, Qwest's notices, Eschelon's escalations, and excerpts from the minutes of the 10/18/06 and 11/15/06 CMP meetings.

⁴³ See Exhibit Eschelon 3.2 to Ms. Johnson's direct testimony.

⁴⁴ For some reason, the SGAT has language authorizing Qwest to charge Design Change charges for dedicated transport in the ordering rather than rate element section. (See SGAT Section 9.6.4.1.4(c).)

1 of Section 9.2.4.4.2 (formerly a part of Issue 4-5) in its entirety and closure of
2 Section 9.6.4.1.4 with the following language:

3 9.6.4.1.4 Subsequent changes to the quantity of services on an
4 existing order will require a revised order.

5 In addition, as there is an interim rate for design changes *for UDITs* in Exhibit A,
6 Section 9.6.3.6 (formerly Issue 4-5(b)) closed with the following language:

7 9.6.3.6 Design Change rates for UDITs are contained in Exhibit A
8 of this Agreement. This rate does not apply when the need for
9 such change is caused by Qwest.

10 **Q. YOU'VE SAID THAT THE COMPANIES HAVE REACHED**
11 **AGREEMENT ON THE DEFINITION OF "DESIGN CHANGES." WHAT**
12 **IS THE AGREED UPON DEFINITION?**

13 A. The term "Design Change" is defined in Section 4 of the Agreement as follows:

14 "Design Change" is a change in circuit design after Engineering
15 Review required by a CLEC supplemental request to change a
16 service previously requested by CLEC. An Engineering Review is
17 a review by Qwest personnel of the service ordered and the
18 requested changes to determine what change in the design, if any,
19 is necessary to meet the changes requested by CLEC. Design
20 Changes may include a change in the type of Network Channel
21 Interface (NCI code) on pending orders and changes in End User
22 Customer address within the same Serving Wire Center requiring
23 changes to facilities or terminations. Design Change does not
24 include modifications to records without physical changes to
25 facilities or services, such as changes in the circuit reference
26 (CKR) (i.e., the circuit number assigned by CLEC) or Service
27 Name (SN) (i.e., the name of the End User Customer at a circuit
28 location).

29 **Q. IS THE DESIGN CHANGE ISSUE AN EXAMPLE OF QWEST USING**

1 **THE CMP PROCESS TO ITS OWN ADVANTAGE – AND THE**
2 **DISADVANTAGE OF CLECS?**

3 A. Yes. Qwest provided design changes from 1999 – 2005 without any additional
4 charges to Eschelon. On September 1, 2005, Qwest sent an unexpected letter to
5 CLECs stating that “Qwest will commence billing CLECs non-recurring charges
6 for design changes to Unbundled Loop circuits” beginning on Oct. 1, 2005.⁴⁵ In
7 that letter, Qwest also included a definition of “design change.”⁴⁶ Qwest notified
8 CLECs of these changes and new charges for design changes without using the
9 CMP and without obtaining Commission approval for the charges. When
10 Eschelon inquired about this change,⁴⁷ Qwest CMP personnel responded that
11 “this item is outside the scope of CMP.”⁴⁸ Qwest will likely argue that
12 addressing the change regarding rates for design changes outside CMP was
13 correct because CMP does not deal with rates or rate application, but Qwest chose
14 not to address the definition of design changes (a non-rate or rate application
15 issue) in the CMP, and also chose not to seek Commission approval for its rates.

16 However, Qwest changed its tune when it developed its position on design

⁴⁵ Exhibit Eschelon 2.1, September 1, 2005 letter from Qwest with the subject line “Billing for design changes on Unbundled Loop.” Document No.

PROS.09.01.05.F.03204.Design_Chgs_Unbundld_Loop.

⁴⁶ In its September 1, 2005 letter, Qwest stated that design changes include the following activities: Connecting Facility Assignments (CFA) change, Circuit Reference (CKR) change, CKL 2 end user address change on a pending LSR, Service Name (SN) change, and NC/NCI Code change on a pending LSR.

⁴⁷ Eschelon escalated this item on September 26, 2005 (escalation no. 092605-1E35). I have provided as Exhibit Eschelon 2.2 an email exchange between Eschelon and Qwest detailing Eschelon’s escalation, Qwest’s confirmation and Qwest’s response.

⁴⁸ See, Exhibit Eschelon 2.2, p. 3.

1 changes for its arbitrations with Eschelon. In its position statement for the Issues
2 Matrix in Minnesota (the first state in which the arbitration was filed), Qwest
3 provided the following position on the definition of Design Change (an issue that
4 has since been closed in these arbitrations):

5 Qwest agrees that there needs to be a common understanding of
6 this definition, but this definition concerns a process that affects all
7 CLECs, not just Eschelon. The entire purpose of CMP was to
8 ensure that the industry (not just Qwest or one CLEC) is involved
9 in creating and approving processes so that processes are uniform
10 among all CLECs. Processes that affect all CLECs should be
11 addressed through CMP, not through an arbitration involving a
12 single CLEC. Further, implementing a unique process for Eschelon
13 that Qwest does not follow for other CLECs would require Qwest
14 to modify its systems or processes and would cause Qwest to incur
15 costs it is entitled to recover under the Act.

16 Qwest had every opportunity to address the definition of design change in the
17 CMP, but instead introduced a definitional change that affected all CLECs in a
18 non-CMP announcement. But when Eschelon raised the issue in arbitration,
19 Qwest stated that the definition of design change is properly addressed in CMP
20 because it affects all CLECs.

21 Furthermore, the definition of design change was closed, with Qwest agreeing to a
22 definition of “design change” that differs from the definition that it introduced in
23 its September 2005 letter to all CLECs.⁴⁹ Qwest made the determination to close

⁴⁹ The closed definition of Design Changes states that, “Design change *does not include* modifications to records without physical changes to facilities or services, such as changes in the circuit reference (CKR)... or Service Name (NM)...” (emphasis added) Yet, Qwest’s September 1, 2005 letter states as follows: “Among the charges for the design change that will be billed, the following activities will generate a non-recurring design change charge per occurrence:...”Circuit Reference (CKR) change”...”Service Name (SN) change...” Despite Qwest’s agreement to language in the Eschelon ICA that excludes CKR and SN changes from design change charges, Qwest is still charging design

1 on the definition of design change, agreeing to Eschelon's proposed definition,
2 outside the CMP, although its original position was that the ICA should not
3 include Eschelon's definition because it was an issue that affected all CLECs and
4 should be addressed in CMP.⁵⁰ Qwest's continued inconsistency on this issue
5 underscores the need for the Commission to deal with the issue of design changes
6 now in this ICA arbitration, which is the proper forum for resolution of these
7 issues between Qwest and Eschelon, in order to provide Eschelon with the
8 certainty that it needs to run its business and serve its customers.

9 **Q. DOES THE SGAT OR THE COMPANIES' CURRENT ICA HAVE ANY**
10 **LANGUAGE AUTHORIZING CHARGES FOR DESIGN CHANGES FOR**
11 **LOOPS OR CFA CHANGES?**

12 A. No, there is no basis in the SGAT or current ICA for a design change charge for
13 loops or CFA changes. The only mention of design change charges anywhere is
14 Section 9.6 of the SGAT entitled "Unbundled Dedicated Interoffice Transport,"
15 which states (Section 9.6.4.1.4) that: "additional charges apply for the following
16 modifications to existing orders unless the need for such change is caused by
17 Qwest...c) Design change..." However, no similar language is included under

change charges for these activities. And Qwest is applying a design change charge designed for dedicated transport, though the agreed to language identifies these activities as modifications without physical changes to facilities or services.

⁵⁰ There are numerous other examples of Qwest cherry picking issues to address in CMP because they allegedly affect all CLECs, and then agreeing to issues in bilateral negotiations that affect all CLECs when Qwest likes the terms. See the testimony of Michael Starkey and Bonnie Johnson.

1 the UNE loops section (Section 9.2), and indeed, the words “design change” do
2 not appear anywhere else in the ICA.

3 **Q. HAS QWEST AGREED THAT DESIGN CHANGE CHARGES FOR UNE**
4 **LOOPS AND CFAS ARE NOT IN QWEST'S SGAT OR THE CURRENT**
5 **ICA?**

6 A. Yes. As I mentioned, on September 1, 2005, Qwest sent an unexpected letter to
7 CLECs stating that "Qwest will commence billing CLECs non-recurring charges
8 for design changes to Unbundled Loop circuits" beginning on Oct. 1, 2005. In
9 that notice, Qwest stated no basis for the charges, but indicated that it would bill
10 CLECs, including Eschelon, "at the rate found in the miscellaneous elements of
11 Exhibit A or the specific rate sheet in your Interconnection agreement." Qwest's
12 reference to the ICA in the letter suggested, therefore, that Qwest was claiming it
13 had some contractual right to bill these rates. In the Minnesota arbitration
14 proceeding, however, Qwest witness Karen Stewart testified that "neither Qwest's
15 SGAT nor the parties' current ICA includes a design change charge for loops."⁵¹
16 Based on this admission, Qwest should credit CLECs, including Eschelon, for the
17 rates it has billed to date and not bill additional charges for design charges for
18 loops (including CFA changes) unless and until it obtains an ICA that allows it to
19 charge for design changes.

20

⁵¹ Minnesota Arbitration, Stewart MN Rebuttal, p. 6, lines 27-28 (9/22/06).

1 **ISSUE 4-5 AND 4-5(a)**

2 **Q. HAS ESCHELON UNCONDITIONALLY AGREED TO PAY QWEST**
3 **FOR DESIGN CHANGES?**

4 A. No. Between 1999 and 2005, Qwest performed design changes for loops without
5 separate explicit charges, and the only support for any separate design change
6 charge found anywhere is in the UDIT section of the SGAT. Qwest unilaterally
7 changed this policy when it issued its September 2005 letter indicating that Qwest
8 would begin assessing design charges for UNE loops. To make sure that Qwest
9 does not refuse to provide design changes to Eschelon altogether, Eschelon
10 conditionally agreed as a concession in these negotiations to add language in the
11 Loops section dealing with design change charges and agreed to pay interim rates.
12 One aspect of Eschelon's conditional concession was that Qwest would
13 substantiate design change charges at the Commission (with the rate being located
14 in the Agreement) and Eschelon could argue for a \$0.00 rate if Qwest was already
15 recovering design change charges in other rates. A reasonable rate for design
16 changes would also require them to be TELRIC rates. Eschelon conditionally
17 agreed to compensate Qwest based on these conditions because they provide the
18 certainty Eschelon needs to be able to reasonably compete in the market (*i.e.*,
19 ensures that Qwest does not have unilateral control over establishing and
20 changing the rates for design changes) and ensure that Qwest is not double-
21 recovering costs.

1 **Q. PLEASE DESCRIBE HOW QWEST’S PROPOSALS REGARDING**
2 **DESIGN CHANGES WILL INCREASE ESCHELON’S COSTS.**

3 A. One of the sub-issues under Issue No. 4-5 – CFA change – brings to life the
4 impact the lack of certainty and Commission oversight could have on Eschelon’s
5 business. Qwest applies the same expensive charge it developed for design
6 changes for unbundled dedicated transport (UDIT) – a charge that is higher than
7 the original installation charge in many Qwest states including Utah – to all
8 design changes, including CFA changes. However, the CFA change involves a
9 simple “lift and lay” activity by the Qwest central office technician who is already
10 at the frame and in contact with the CLEC representative and the Qwest personnel
11 coordinating the process. As a result, this activity takes only a few seconds or
12 perhaps minutes, yet Qwest assesses a design change charge that exceeds the
13 original installation charge for the entire loop. Given that the CFA change is
14 comprised of one of a number of activities involved in installation (*i.e.*, lift and
15 lay), a rate for a CFA change that exceeds (or even comes close) to the installation
16 rate for a loop is much too high. Since the CFA change described in Eschelon’s
17 language is the most frequent design change to occur and the least expensive to
18 perform, Eschelon needs the certainty of Commission oversight over any attempt
19 by Qwest to impose expensive, non-cost based charges for CFA (or other) design
20 changes that greatly increases Eschelon’s costs (whether that be Qwest’s proposal
21 to apply the UDIT design change charge to all design changes or Qwest’s
22 proposal to apply tariff rates to design changes). Eschelon would otherwise be

1 unable to adequately budget and plan its business with this type of uncertainty
2 looming over its cost of doing business.

3 **Q. CAN YOU QUANTIFY, IN DOLLAR TERMS, HOW ESCHELON'S**
4 **BUSINESS IS AFFECTED BY QWEST'S DESIGN CHANGE CHARGE**
5 **PROPOSALS?**

6 A. Yes. I have provided below a number of examples in which the CFA change
7 described above – an activity that takes a matter of seconds or minutes – has
8 significantly increased Eschelon's costs:

- 9 1. In Oregon, on Qwest Order Number N47554579, PON OR648868JAS, with a
10 completion date of 3/14/06, Qwest billed non-recurring charges of \$634.00. The
11 one time charge for installation (coordinated installation without cooperative
12 testing) was \$15.40 but because the CFA changed 6 times, at the rate of \$103.10
13 per Design Change charge, the final installation cost \$634.00.
- 14 2. In Oregon, on Qwest Order Number N55606983, PON OR690001JXY, with a
15 completion date of 6/19/06, Qwest billed non-recurring charges of \$427.80. The
16 one time charge for installation (coordinated installation without cooperative
17 testing) was \$15.40 but because the CFA changed 4 times, at the rate of \$103.10
18 per Design Change charge, the final installation cost \$427.80.
- 19 3. In Oregon, on Qwest Order Number N56303135, PON OR702166LSR, with a
20 completion date of 6/20/06, Qwest billed non-recurring charges of \$216.95. The
21 one time charge for installation (coordinated installation without cooperative
22 testing) was \$10.75 but because the CFA changed twice, at the rate of \$103.10 per
23 Design Change charge, the final installation cost \$216.95.
- 24 4. In Washington, on Qwest Order Number N55909589, with a completion date of
25 7/3/06, Qwest billed non-recurring charges of \$160.71. The one time charge for
26 installation (coordinated installation without cooperative testing) was \$59.81 but
27 because the CFA changed twice, at the rate of \$50.45 per Design Change charge,
28 the final installation cost \$160.71.
- 29 5. In Arizona, on Qwest Order Number N53397956, PON AZ684385JKY, with a
30 completion date of 5/11/06, Qwest billed non-recurring charges of \$191.50. The
31 one time charge for installation (coordinated installation without cooperative

1 testing) was \$45.92 but because the CFA changed twice, at the rate of \$72.79 per
2 Design Change charge, the final installation cost \$191.50.

3 **Q. WHY SHOULD DESIGN CHANGE CHARGES BE PRICED AT TELRIC?**

4 A. The design change charges discussed in my testimony pertain to design changes
5 for UNEs (*e.g.*, UNE loop and UDIT). UNEs are required to be priced according
6 to the federal TELRIC pricing rules, and the design changes are part and parcel of
7 Qwest's obligation under Section 251(c)(3) of the Telecommunications Act to
8 provide "nondiscriminatory access to network elements on an unbundled
9 basis...on rates, terms, and conditions that are just, reasonable, and
10 nondiscriminatory..." The Telecommunications Act requires Qwest to provide
11 UNEs as well as functions necessary to ready those UNEs for CLECs' use in a
12 nondiscriminatory manner and at cost-based rates. This TELRIC-based pricing
13 requirement ensures that Eschelon does not pay more than Qwest "pays" for using
14 the same facilities.

15 **Q. ARE QWEST'S DESIGN CHANGE CHARGES AS THEY RELATE TO**
16 **UNE LOOPS AND CFA CHANGES IN LINE WITH THEIR**
17 **UNDERLYING COSTS?**

18 A. No. A comparison of Qwest's design change charges to its installation charges
19 across the Qwest region shows that Qwest accesses a design change charge that
20 exceeds the charge for Coordinated Installation Without Cooperative Testing for
21 Analog loops in Arizona, Colorado, Iowa, Idaho, Montana, Nebraska, North

1 Dakota, Oregon, South Dakota, Utah, and Wyoming.⁵² Qwest's proposed design
2 change rate for all types of design changes in Utah (\$35.89)⁵³ exceeds the
3 installation charge for a 2/4 wire analog loop (\$29.10)⁵⁴ by 23% and also exceeds
4 the rate for Coordinated Installation Without Cooperative Testing (\$32.99)⁵⁵ by
5 9%. This defies logic, as design change charges, especially as applied to CFA
6 changes, should be less than the installation charge for initially establishing the
7 circuit. The fact that Qwest is charging more for CFA changes than for
8 installation and the effect this has on Eschelon's cost to acquire customers
9 (particularly with regard to loop and CFA design changes) demonstrates the need
10 for Commission oversight for design changes.

11 **Q. WHY WOULD CFA CHANGE CHARGES BE LESS THAN LOOP**
12 **INSTALLATION CHARGES?**

13 A. Because connecting to the CFA is one component (or a subset of components) of
14 installation, the work (and cost) involved in performing a CFA change will be less
15 than the work (and cost) of performing the installation.

16 CFA ("Connecting Facility Assignment") is part of the physical provisioning
17 process that allows Eschelon to transfer a customer's loop from the Qwest's

⁵² Qwest's SGAT Exhibit As, containing the rates mentioned, can be downloaded from the following website: <http://www.qwest.com/wholesale/clecs/sgatswireline.html>. As explained by Mr. Starkey, Qwest no longer makes SGATs available for opt in and has provided SGATs in its website for reference purposes only. See Exhibit Eschelon 3.22, Exhibit Eschelon 3.23, and Exhibit Eschelon 3.24.

⁵³ Exhibit A, 9.20.13.

⁵⁴ Exhibit A, 9.2.4.1.1.1.

⁵⁵ Exhibit A, 9.2.4.4.1.1.

1 switch to Eschelon's switch. As part of the transfer process, Eschelon
2 electronically assigns the customer's loop (i) to specific facilities in Eschelon's
3 switch, (ii) to equipment located in Eschelon-owned collocation space, (iii) and to
4 a Connecting Facility Assignment ("CFA") on the ICDF Frame that will be used
5 by the Qwest technician to connect the customer's loop to Eschelon's collocated
6 equipment. On the day of cut (*i.e.*, installation) Qwest removes the old cross
7 connection jumper that connected the customer's loop to Qwest's switch and
8 terminates the pre-wired cross connection from Eschelon's CFA to the customer's
9 loop. Occasionally, the CFA assigned to the customer is bad, and Eschelon and
10 Qwest can not complete the cutover.⁵⁶ In this instance, Eschelon assigns a new
11 CFA to the customer and the Qwest central office technician reconnects the cross
12 connect to the newly assigned CFA on the ICDF Frame. A CFA design change is
13 needed to reassign the customer from the CFA to which the customer was
14 originally assigned (which was bad) to the new CFA. This is also referred to as a
15 "same day pair change" because the customer's pair is changed from one CFA to
16 another on the day of the cut.⁵⁷

17 In this scenario, Qwest and Eschelon are already in contact and coordinating the
18 cutover, and the Qwest central office technician is already standing at the frame.

19 Once it is determined that a CFA change is necessary, the Qwest central office

⁵⁶ The need for a CFA change in these instances can be Eschelon-caused and Qwest-caused.

⁵⁷ The type of CFA change addressed in my testimony (same day pair change) is the CFA change addressed in Eschelon's proposal for Issue 4-5(a), which is a very limited type: *i.e.*, a CFA change to a 2/4 wire analog loop, on the day of a coordinated cut, during test and turn up, excluding batch hot cuts.

1 technician simply removes the jumper from the bad CFA and reattaches to the
2 new CFA. Depending on where the new CFA resides on the frame in relation to
3 the old, Qwest's technician may have to move a few steps (or may not have to
4 move at all) to attach to the new CFA. In these situations, the Qwest CO
5 technician is already available and working on the cutover, and it requires little, if
6 any, additional time to switch CFAs. This activity is a simple "lift and lay"
7 activity that can be performed in a matter of seconds or minutes. By comparison,
8 this would be akin to plugging a lamp into an outlet, realizing that the outlet does
9 not work, and plugging the lamp into a different outlet somewhere in the room
10 (the new outlet may be the one directly above or below the bad outlet or you may
11 use an outlet across the room that requires you to walk a few steps). And all the
12 while, Eschelon is paying for coordination, or for Qwest's central office
13 technician to remain in contact with personnel in Qwest's test center so that the
14 technician has real time access to information during the cutover. Therefore, if it
15 is discovered that a CFA change is needed, the central office technician can
16 immediately perform another "lift and lay" to another CFA.⁵⁸

17 Obviously, the work and costs involved in this design change, to the extent they
18 are not already recovered in other rates, would be very minimal, reflecting, at

⁵⁸ During a coordinated cut, the Qwest central office technician is in constant contact with personnel in Qwest's CLEC Coordination Center (QCCC), who is, in turn, in contact with Eschelon personnel responsible for test and turn up. If after the central office technician performs the "lift and lay" and Eschelon's testing determines there is a problem and a CFA change is needed, the central office technician will have real time access to this information through the QCCC and will be able to immediately perform another "lift and lay." Eschelon pays for the coordination of this cut (or the involvement of QCCC) separately.

1 most a few minutes of the central office technician's time. It is these types of
2 design changes, however, that can drive up Eschelon's cost of installation by
3 hundreds of dollars per install.

4 Qwest's current practice of billing more for CFA changes than the Commission-
5 approved installation rate (*i.e.*, for a new install and not just a later change in
6 design) shows that Commission oversight is needed with regard to CFA change
7 charges.⁵⁹ There is no evidence to suggest that the cost of CFA changes
8 associated with loops exceeds the initial cost of installing a loop, and indeed,
9 everything points to the contrary. Design changes associated with CFA changes
10 during the installation of a loop should have a separate rate, as this activity is
11 relatively common, requires very little time and can be performed on the day of
12 cut during the loop installation process. That is why Eschelon has proposed
13 separate ICA language addressing design changes for loops and CFAs and
14 separate rates for those activities in Exhibit A.

15 **Q. ARE THE COSTS INVOLVED IN A DESIGN CHANGE FOR UDIM SO**
16 **SIMILAR TO THAT OF LOOPS THAT THE UDIM RATE COULD**
17 **REASONABLY BE USED AS A PROXY FOR THE LOOP DESIGN**
18 **CHANGE RATE OR EVEN A LOOP CFA CHANGE RATE?**

⁵⁹ For example in the following states Qwest charges a design change charge that exceeds the SGAT rates for Coordinated Installation Without Cooperative Testing for Analog loops: Arizona, Colorado, Iowa, Idaho, Montana, Nebraska, North Dakota, Oregon, South Dakota, Utah, and Wyoming.

1 A. No. Loop and transport are separate and distinct services and involve different
2 processes and work – with transport typically being more complex (and higher
3 cost) than loops. I explained above why the UDIT Design Change charge should
4 not apply to a CFA change. Likewise, this is the case with regard to the UDIT
5 design change rate Qwest is applying to loop design changes. As a result,
6 applying a rate designed for UDIT to loops will result in Qwest over-recovering
7 its costs related to design changes for loops.

8 **Q. HOW DO YOU KNOW THE MANNER IN WHICH QWEST**
9 **STRUCTURES IT'S DESIGN CHANGE CHARGES FOR UDIT?**

10 A. Qwest filed a non-proprietary non-recurring cost study for a design change charge
11 for unbundled dedicated interoffice transport in the Oregon UNE case 1025.⁶⁰
12 This cost study shows that Qwest's design change costs for transport are based on
13 cost assumptions associated with Access Service Requests (ASRs) for dedicated
14 transport and not Local Service Requests (LSRs) (which are used for loops). I
15 have provided an excerpt from the Oregon cost study for design changes below
16 from the "Design" tab:

⁶⁰ I do not have a copy of the study Qwest used for its compliance filing to set the Transport Design Change rate in Utah. However, I was involved in that case and Qwest's studies across all states were largely similar. Further, any unique attributes to the Utah study would not impact the points made in this testimony – that the study was designed for Design Changes for transport and that the study did not include the costs for loop CFA changes.

Line Num	Line Type	Line Description	Time Estimate	Prob #1	Prob #2	Prob #3	Prob #4	Labor Code
	HEADER	DESIGN CHANGE						
1001	ADD							
1200	GROUP	SERVICE DELIVERY COORDINATOR						
1200	COMMENT	.90 PROBABILITY IS MECHANICAL HANDLING						
1200	COMMENT	.10 PROBABILITY IS MANUAL HANDLING						
1200	COMMENT	.65 PROBABILITY MANUAL HANDLING						
1200	COMMENT	.50 PROBABILITY MANUAL HANDLING						
1200	COMMENT	.03 PROBABILITY ASR's MANUALLY HANDLED						
1	WORKITEM	RECEIVE ASR MECHANICALLY	1	0.9	0	0	0	02
2	WORKITEM	RECEIVE ASR VIA FAX	10	0.1	0	0	0	02
3	WORKITEM	VALIDATE ASR IN EXACT	10	1	0	0	0	02
4	WORKITEM	VALIDATE CONTRACT RATES	3	1	0	0	0	02
5	WORKITEM	INTRA COMPANY CALLS	13	1	0	0	0	02
6	WORKITEM	EXACT/TUF/IABS	1	1	0	0	0	02
7	WORKITEM	VALIDATE IABS SERVICE ORDER	2	1	0	0	0	02
8	WORKITEM	MANUALLY CALCULATE CHARGES IF THE SERVICE IS INTERLCA FACILITY OR OTHER MANUALLY BILLED PRODUCTS (TANDEM Exhaust, etc.)	5	0.03	0	0	0	02
9	WORKITEM	DISTRIBUTE ORDER IN IABS	1	1	0	0	0	02
10	WORKITEM	VALIDATE 3 SUCCESSES IN SOAC TIRKS INTERFACE	1	1	0	0	0	02
11	WORKITEM	EXACT/TUF/IABS	1	1	0	0	0	02
12	WORKITEM	VALIDATE IABS SERVICE ORDER	2	1	0	0	0	02
13	WORKITEM	DISTRIBUTE ORDER IN IABS	1	1	0	0	0	02
14	WORKITEM	PC LIST ASR	1	1	0	0	0	02
15	WORKITEM	FOC MANUAL	3	0.1	0	0	0	02
16	WORKITEM	FOC ELECTRONICALLY	1	0.9	0	0	0	02
17	WORKITEM	CHECK WFA	3	1	0	0	0	02
18	WORKITEM	CHECK IABS SERVICE ORDER	5	1	0	0	0	02
19	WORKITEM	COMPLETE IABS SERVICE ORDER	1	1	0	0	0	02
20	WORKITEM	COMPLETE EXACT	1	1	0	0	0	02
21	WORKITEM	NOTE EXACT	2	1	0	0	0	02
2300	GROUP	DESIGN						
2100	COMMENT	Work is 100% manual.						
1	1	WORKITEM	NAME AND LOG FACILITY	35	1	0	0	05
2	2	WORKITEM	BUILD DRI AND WA	6	1	0	0	05
3	3	WORKITEM	BUILD CIRCUIT DESIGN	10	1	0	0	05
4	4	WORKITEM	CXRH & DISTRIBUTE DOC	4	1	0	0	05

2 Lines 1 through 3 indicate that the design change charge is based on ASRs that
 3 are used for dedicated transport, not LSRs which are used for UNE loops.

4 **Q. DOES THIS MEAN THAT QWEST INAPPROPRIATELY INFLATES**
 5 **THE COSTS OF LOOP DESIGN CHANGES WHEN IT APPLIES A RATE**
 6 **DESIGNED FOR UDOT TO UNE LOOPS?**

7 A. Yes, because processes associated with Access Service Requests (ASRs) are more
 8 manually-intensive than are Local Service Requests (LSRs), ASR will result in

1 higher costs than will LSR. And the cost study above assumes the use of order
2 processing systems and billing systems for transport services⁶¹ (see line numbers
3 3, 6, 7, 9, 11, 12, 13, 18-21 above), rather than the order processing system and
4 billing system that are used for UNE loops.⁶² Since the systems for loops
5 generally have a higher flow-through rate than do systems for dedicated transport,
6 these are further indicia that the design change costs developed for UDIT are too
7 high for loops.

8 **Q. HAS QWEST ACKNOWLEDGED THAT ASRS ASSOCIATED WITH**
9 **TRANSPORT ARE MORE MANUALLY-INTENSIVE THAN LSRS**
10 **ASSOCIATED WITH LOOPS?**

11 A. Yes, on numerous occasions. For instance, in the meeting minutes from the
12 Change Management Process meeting that occurred on November 12, 2004,
13 Qwest⁶³ stated that “the ASR is not as mechanized as the LSR process.” Qwest
14 provided a specific jeopardy (jep) notice example that showed that the “LSR jep
15 is generated by a system” and “the ASR jep would be generated manually and
16 sent via email” and that “the process becomes much more manual as the systems
17 are not mechanized [and] more time consuming...”⁶⁴ Qwest also confirmed this
18 point in data request responses from Utah Docket No. 06-049-40. In that docket,

⁶¹ EXACT order processing system and IABS billing system.

⁶² IMA order processing systems and CRIS billing systems.

⁶³ Qwest employee Phyllis Sunins made this statement.

⁶⁴ Change Management Process meeting minutes for the following Change Request (CR) PC070804-1 ASR Jeopardy Process Ad Hoc Meeting November 12, 2004.

1 a group of CLECs asked Qwest to confirm that an LSR has a higher electronic
2 flow through than an ASR. Qwest responded in the affirmative and explained the
3 differences between ASRs and LSRs. Qwest's response follows:

4 While it may be true that *LSRs have a higher level of electronic*
5 *flow-through than ASRs*, it is irrelevant to the inquiry of the
6 appropriate vehicle for processing a conversion order. As
7 discussed in response to data request 01-009, ASRs are designed
8 for use with the billing and downstream systems that support
9 Access Services products, such as Private Line services, and LSRs
10 are designed to be used with the systems that support Local
11 Service products.⁶⁵ (emphasis added)

12 Higher levels of electronic flow-through result in lower levels of manual work
13 and lower costs.

14 **Q. DOES ESCHELON'S LANGUAGE IN SECTION 9.2.3.9 APPLY TO ALL**
15 **CFA CHANGES?**

16 A. No, Eschelon's language is very limited in scope and is designed to address a very
17 narrow circumstance. Eschelon's language is limited by the following qualifiers:
18 (1) applies only to 2/4 wire analog voice grade loops cutovers, (2) applies only to
19 coordinated cutovers (3) excludes batch hot cuts, (4) must be on the day of the
20 cut, and (5) must be during test and turn-up. In other words, Eschelon's language
21 only applies in a situation in which both Eschelon and Qwest personnel are
22 already working the cutover for a 2 wire/4wire analog loop and there is a need for
23 a design change to resolve a bad CFA. Applying the expensive charges that are
24 designed for UDIT (or worse yet, applying tariff rates) in these instances results in

⁶⁵ Qwest's cost expert Ms. Terri Million is identified as the respondent.

1 charges for this activity that significantly exceed its underlying costs and a
2 windfall for Qwest.

3 **ISSUE 4-5(c)**

4 **Q. PLEASE EXPLAIN ESCHELON'S RATE PROPOSAL UNDER ISSUE 4-**
5 **5(C).**

6 A. Eschelon proposes separate interim rates for design changes for loops and CFAs,
7 and has proposed language to the title of 9.20.13.1 to clarify this application.
8 Qwest proposes a single interim rate that would apply to all three rate elements.
9 The commission has approved a design change charge for UDIT, but not for loops
10 and same day pair changes. For design change charges for loops, Eschelon
11 agrees to pay a Commission-approved cost based rate if one is established in the
12 future. In the interim, Eschelon has proposed a rate of \$30.00, which is
13 appropriately less than the rate for UDIT of \$35.89 because of the cost differences
14 between UDIT and loops. Given that the Commission-approved rate for basic
15 installation is \$29.10, an interim rate of \$30.00 for loop design change is very
16 reasonable. Likewise, Eschelon agrees to pay a cost-based Commission-approved
17 rate for CFA design change, and has, in the interim, proposed a rate of \$5.00.
18 This interim rate is reasonable in light of the minimal work that is required in
19 these instances.⁶⁶

⁶⁶ As described above, if an interim rate is established, Eschelon's proposal is to allow Qwest to assess interim rates for design changes for loops and same day pair changes until a different rate is approved by the Commission. This proposal does not prevent or otherwise limit Qwest from

1 **Q. DOES ESCHELON'S LANGUAGE PROHIBIT QWEST FROM**
2 **REQUESTING COMMISSION APPROVAL OF DIFFERENT RATES?**

3 A. No. To the extent that Qwest believes that the interim rates Eschelon has
4 proposed for loop and CFA design changes do not allow Qwest to recover its
5 costs, Eschelon's proposal provides the opportunity for Qwest to propose a cost
6 based rate for these design changes and substantiate its charges before the
7 Commission. If Qwest truly believes that all design changes should be the same
8 charge, all it has to do is make a filing to get the issue before the Commission.

9 **Q. PLEASE SUMMARIZE ISSUE NOS. 4-5, 4-5(A), AND 4-5(C)**
10 **REGARDING DESIGN CHANGES.**

11 A. Eschelon's language requires Qwest to provide design changes to Eschelon,
12 something that is an obligation of Qwest's and that has been provided for years.
13 Eschelon's proposal provides Qwest with the opportunity to recover its costs by
14 allowing Qwest to apply interim rates until the Commission approves rates for
15 design changes. This is all despite the facts that (i) there is no language in the
16 Eschelon/Qwest ICA or Qwest's SGAT that would permit Qwest to assess
17 charges for design changes for loops or CFAs, (ii) Qwest has consistently
18 provided design changes for loops in Utah without additional charges in the past,

recovering its costs for design changes. Furthermore, it is not Eschelon's responsibility to submit and defend a cost study for an interim charge that Qwest will ultimately assess on CLECs (see Qwest Response, p. 12, lines 5-6, stating that Eschelon's proposed interim rates are not supported by cost studies). First, that burden lies with Qwest, and Qwest has submitted no cost support for any design change in this proceeding (or in negotiations, although Eschelon requested cost studies for Qwest's rates in negotiations). Second, Eschelon's proposed interim rates are just that – i.e., interim – and therefore such cost support information is unnecessary.

1 and (iii) Qwest's failure to seek separate cost recovery for design changes for
2 loops suggests that they may be recovered in other rates. For all of the reasons
3 described in Eschelon's business need and in these responses, the Commission
4 should adopt Eschelon's language for Issues 4-5 and subpart (a). The
5 Commission should also adopt Eschelon's interim rate proposals in subpart (c) for
6 Loop design changes, and CFA changes specific to changes on the day of the cut
7 for 2/4 wire loop coordinated cuts.

8 **IV. PAYMENT AND DEPOSITS (SUBJECT MATTER NOS. 5, 6 & 7)**

9 **Q. ARE YOU ADDRESSING A NUMBER OF ISSUES FROM SECTION 5.4**
10 **OF THE ICA?**

11 A. Yes. I am addressing Issue Nos. 5-6, 5-7, 5-8, 5-9, 5-11, 5-12 and 5-13, all of
12 which pertain to Section 5.4 of the ICA "Payment and Deposit."⁶⁷ Issue Nos. 5-6,
13 5-7 and 5-7(a) are addressed under Subject Matter No. 5 (Discontinuation of
14 Order Processing and Disconnection); Issue Nos. 5-8, 5-9, 5-11, and 5-12 are
15 addressed under Subject Matter No. 6 (Deposits); and Issue No. 5-13 is addressed
16 under Subject Matter No. 7 (Review of Credit Standing).

17 **Q. PLEASE DESCRIBE ESCHELON'S BUSINESS REASONS FOR ITS**
18 **PROPOSALS REGARDING THE "PAYMENT AND DEPOSIT" ISSUES**
19 **(ISSUE NOS. 5-6, 5-7, 5-7(A), 5-8, 5-9, 5-11, 5-12 AND 5-13).**

⁶⁷ I also address Issue 5-7(a), which addresses Section 5.1.13.1.

1 A. The Payment and Deposits issues pertain to the ability of Qwest to disconnect
2 Eschelon's circuits, discontinue processing Eschelon's orders, and demand a
3 deposit (or increased deposit amount) from Eschelon, due to an alleged concern
4 about Qwest's ability to get paid, when Eschelon disagrees with the basis for
5 Qwest's actions.⁶⁸ To fully appreciate the importance of these issues from a
6 business perspective, it is important to understand the breadth of the provisions in
7 question. The ability to disconnect circuits or discontinue processing orders –
8 remedies in the Payment and Deposit provisions – are very serious steps that
9 would be very disruptive for Eschelon's customers and should only be used as a
10 last resort. The effects are not limited to particular orders or customers, but could
11 lead to disruption for large groups of customers. Unjustified disconnection or
12 disruption of service order processing would be devastating to Eschelon's
13 operations and might leave current and potential Utah customers who currently
14 have working service, or were initiating or changing service, without
15 telecommunications service on the planned date of service. For instance,
16 Eschelon's End User Customers could pick up the telephone one day to discover
17 that they do not have dial tone because Qwest has decided to disconnect
18 Eschelon's circuits. This would not only be service-affecting but would also be
19 potentially dangerous for Eschelon's customers as they would unexpectedly be
20 left without access to emergency services, not to mention the potential lost

⁶⁸ The party that would be disconnecting circuits, discontinuing orders or demanding deposits or deposit increases would be Qwest and the party facing these actions would be Eschelon in a vast majority, if not all, instances because Eschelon, in most instances, is the purchaser of services under the ICA.

1 revenue and expended resources that Eschelon's customers would incur as
2 Eschelon and its customers scramble to get them up and running again. With
3 regard to order processing discontinuation, Eschelon may have an order pending
4 for a business customer who is planning a big grand opening at a new location
5 and needs phone service, but Eschelon is unable to serve the customer in time for
6 the opening because Qwest has decided to stop processing Eschelon's orders.
7 This would lead to significant financial losses for the customer and harm to
8 Eschelon's reputation. Another example is a new medical facility that is opening
9 and has chosen Eschelon as its service provider. This facility could be left
10 without the vital emergency services they need if Qwest stops processing
11 Eschelon's orders.

12 Eschelon does not object to the inclusion of the Payment and Deposit provisions
13 and remedies in the ICA because it agrees that Qwest (and Eschelon) should have
14 the ability to protect its financial interests when there is a legitimate concern
15 about future payment. After all, the intent of the payment and deposit provisions
16 is to address situations when legitimate concerns exist in this regard. However, if
17 Qwest is able to disconnect Eschelon's circuits or stop processing Eschelon's
18 orders in cases where no legitimate concern about ability to pay exists, it would
19 cause significant harm to Eschelon and to customers. Given the seriousness of
20 these steps, and the effects they would have on Eschelon and its End User
21 Customers (not Qwest or Qwest's customers), Commission oversight should be
22 available before these steps are taken.

1 Similarly, if Qwest decided to demand a deposit (or deposit increase) from
2 Eschelon when no legitimate concern about ability to pay exists, Qwest could
3 affect the financial resources available to Eschelon for other uses such as facilities
4 needed to compete with Qwest. Eschelon is a relatively small facilities-based
5 carrier that does not have the resources that Qwest has,⁶⁹ and cannot have its
6 financial resources tied up in frivolous deposits. The deposit amounts required of
7 Eschelon, under the ICA, could be an amount equal to two months' worth of
8 Qwest charges on Eschelon, which across Qwest's region could be around \$10
9 million. This amount of money may be a drop in the bucket to Qwest (this
10 represents 0.07% of Qwest's annual operating revenues),⁷⁰ but this is real money
11 to Eschelon (this represents 3.6% of Eschelon's annual total revenue or almost
12 half of our cash holdings that could be tied up in a deposit to Qwest).⁷¹ And
13 again, Qwest would not be faced with paying any deposit to Eschelon.

14 Commission oversight on these matters is particularly important so that there is an
15 independent arbiter of the facts and to ensure that the information relied upon to
16 make these decisions is accurate. Eschelon and Qwest have had serious
17 disagreements about billing information (discussed below), which means that

⁶⁹ Eschelon's annual revenue is less than 2% of Qwest's annual revenue. Stated differently, Qwest earns more revenues by the first week of January than Eschelon earns all year. Qwest has around 40,000 employees compared to Eschelon's approximate 1,300 employees.

⁷⁰ Qwest's YE2006 total operating revenue was \$13,923 million.

http://ww3.ics.adp.com/streetlink_data/dirQ0000/annual/HTML1/default.htm.

⁷¹ Eschelon's YE2006 total revenue was \$274.5 million. Eschelon's YE2006 cash and cash equivalents were \$21.1 million.

<http://library.corporate-ir.net/library/12/121/121503/items/242984/ESCH2006AR.pdf>.

1 Qwest could invoke these remedies based on information with which Eschelon
2 disagrees – even when Eschelon believes that it is current in its payment of
3 undisputed amounts to Qwest. If Eschelon challenges an action by Qwest, and
4 the Commission finds Qwest to be correct, then Qwest is not harmed. However,
5 if Qwest can override Eschelon’s challenge and make these decisions without
6 Commission approval, Eschelon would be faced with these serious business-
7 affecting and customer-affecting problems even if the basis for Qwest’s decision
8 is flawed. At the same time, if Eschelon has no basis to disagree with Qwest’s
9 claim, then it certainly would not waste the time and money pursuing such a
10 dispute, and would simply pay the outstanding charges and/or the deposit Qwest
11 demanded.

12 Eschelon is only asking that Commission authority be reserved if there is a
13 disagreement about these issues so that Qwest cannot cut off Eschelon’s
14 customers or cripple Eschelon’s ability to provide service to its customers based
15 upon faulty premises.

16 **Q. CAN YOU PROVIDE AN EXAMPLE THAT ILLUSTRATES THE NEED**
17 **FOR COMMISSION INVOLVEMENT WHEN ESCHELON DISAGREES**
18 **WITH QWEST’S DECISION TO DISCONNECT ESCHELON’S**
19 **CIRCUITS, STOP PROCESSING ESCHELON’S ORDERS OR DEMAND**
20 **A DEPOSIT?**

1 A. Yes. Eschelon and Qwest have had many disagreements about the accuracy of
2 Qwest's bills, the timeliness of Qwest's recognition of payments and the handling
3 of disputed billings. And Eschelon oftentimes disagrees with Qwest about the
4 amount past due and the amount disputed by Eschelon. Case in point: in the
5 Spring of 2006, Qwest threatened to disconnect Eschelon's service or stop
6 processing Eschelon's orders, or both, due to an alleged overdue balance due from
7 Eschelon to Qwest under ICAs from several states in which Eschelon purchases
8 services from Qwest. Included as Exhibit Eschelon 2.6 (Confidential) is a
9 chronology that explains the details of this issue along with the supporting
10 documentation.

11 On April 20, 2006, Eschelon received a letter from Qwest indicating that
12 Eschelon had a total past due balance across all states of over \$4 million, and
13 further indicating that if Qwest did not receive payment in full by May 4, 2006,
14 Qwest would suspend Eschelon's service order activity and disconnect Eschelon's
15 services on May 5, 2006. However, Exhibit Eschelon 2.6 (Confidential) shows
16 that the amount Qwest was demanding from Eschelon did not reflect the
17 payments that Eschelon had already made to Qwest, and that Eschelon and Qwest
18 were disagreeing on the amount of the outstanding charges from the beginning
19 and are still disagreeing (*see* Exhibit Eschelon 2.6 (Confidential), 3/29/06 email,
20 4/5/06 email and reply email, 4/25/06 email, 5/22/06 email, 5/24/06 conference
21 call, 5/25/06 letter, 6/5/06 letter, 7/5/06 letter and 7/12/06 letter). In addition,
22 Qwest never identified a specific amount that was due under any particular ICA

1 (or in any state) and did not follow the ICA process in raising the issue (*see*
2 Exhibit Eschelon 2.6, Qwest’s 3/14/06 letter). However, after a lengthy debate
3 and additional threats of service disruption, in order to avoid any possibility of
4 disruption of services to its customers, Eschelon paid all amounts alleged by
5 Qwest making payment of almost \$9 million.⁷² After going through all of this,
6 Qwest notified Eschelon that it remained in default and that Qwest unilaterally
7 decided to apply credits due and owing to past due balances, even if those
8 balances were in dispute, leaving Eschelon under a cloud of possible disruption of
9 service despite Eschelon’s payment of all undisputed bills.⁷³ As indicated in
10 Eschelon’s July 12, 2006 letter (*See* Exhibit Eschelon 2.6 (Confidential)),
11 Eschelon continues to dispute the outstanding charges that Qwest alleges is owed
12 to it by Eschelon. And as indicated in Qwest’s August 11, 2006 letter, it still has
13 not identified an amount that is allegedly past due in Utah, or any other state.
14 Yet, Qwest continues to insist that Eschelon is in default under the ICA.

15 **Q. HOW DOES THIS EXAMPLE SUPPORT ESCHELON’S PROPOSALS**
16 **ON PAYMENT AND DEPOSITS?**

17 A. It shows that, because of the potential for billing disagreements, Commission
18 oversight is necessary to prevent Qwest from inappropriately using its ability to

⁷² The following is an excerpt from Eschelon’s 6/5/06 letter to Qwest: “In Qwest’s May 25th letter, Qwest threatened Eschelon with ‘suspending service order activity.’ That means Qwest would disrupt our customer orders, and Qwest said it would do *so this month!* The consequences of Qwest carrying out that threat would be so disruptive and potentially devastating that, to avoid that possibility, Eschelon has no choice but to bring our account current even though Qwest did not provide the amount allegedly due by state and despite Eschelon’s valid disputes.”

⁷³ Qwest stated in its 7/5/06 letter: “Qwest will, for the time being, refrain from taking further collection action against Eschelon.”

1 disconnect circuits, stop processing orders, or extracting deposits. In this
2 example, Qwest provided a lump sum amount that it demanded was due for six
3 states, without providing any detail regarding what was due in each state or what
4 portion of the total amount was disputed or undisputed charges. Surely it would
5 not be appropriate for Utah customers to get cut off because Qwest claims
6 Eschelon did not pay a charge rendered in Colorado, but that could be the effect
7 of Qwest's proposals for the Payment and Deposits issues. If Qwest's proposals
8 are adopted, Qwest could disconnect circuits or stop processing Eschelon's orders
9 without providing any detail or verification of the charges it claims are
10 outstanding. And if Eschelon believes that it is now current with Qwest (and
11 Qwest has indicated in its letter that it could take action without further notice),
12 Qwest could still potentially put Eschelon's customers out of service
13 unexpectedly since Section 5.4.2 of the ICA provides that, if Qwest determines
14 that Eschelon is still in non-compliance after initial notice, Qwest can refuse to
15 accept additional orders from Eschelon without further notice.

16 Therefore, Commission oversight is needed when disagreements like these arise
17 to make sure that the Payment and Deposit remedies are invoked properly and
18 based on accurate information.

1 **SUBJECT MATTER NO. 5. DISCONTINUATION OF ORDER PROCESSING**
2 **AND DISCONNECTION**

3 *Issue Nos. 5-6, 5-7, and 5-7(a): ICA Sections 5.4.2, 5.4.3, 5.13.1*

4 **Q. PLEASE BRIEFLY DESCRIBE ISSUE NOS. 5-6 AND 5-7 AND SUBPART.**

5 A. These issues address the remedies available to Qwest when Eschelon does not pay
6 in full the undisputed charges it owes – the ability to disconnect Eschelon’s
7 services and stop processing Eschelon’s orders. The proposals under Issue Nos.
8 5-6, 5-7 and 5-7(a) indicate the conditions that exist before these remedies can be
9 invoked.

10 **Q. WHAT ARE ESCHELON’S PROPOSALS FOR ISSUES 5-6, 5-7, AND 5-**
11 **7(A)?**

12 A. Eschelon provides two options for Issue No. 5-6, and offers either one for the
13 Commission’s adoption.

14 **Issue No. 5-6 – (1 of 2 options)**

15 5.4.2 With the Commission’s approval, One Party may
16 discontinue processing orders for relevant services for the failure
17 of the other Party to make full payment, less any disputed amount
18 as provided for in Section 21.8 of this Agreement, for the relevant
19 services provided under this Agreement within thirty (30) Days
20 following the Payment Due Date...

21 **Issue No. 5-6 – (2 of 2 options)**

22 5.4.2. ...One Party may discontinue processing orders for
23 relevant services for the failure of the other Party to make full
24 payment, less any disputed amount as provided for in Section 21.8
25 of this Agreement...If the billed Party asks the Commission to
26 prevent discontinuance of order processing and/or rejection of
27 orders (e.g., because delay in submitting dispute or making
28 payment was reasonably justified due to inaccurate or incomplete

1 Billing), the Billing Party will continue order processing while the
2 proceedings are pending, unless the Commission orders otherwise.

3 **Issue No. 5-7**

4 5.4.3 With the Commission's approval pursuant to Section
5 5.13.1, t~~he~~ the Billing Party may disconnect any and all relevant
6 services for failure by the billed Party to make full payment, less
7 any disputed amount as provided for in Section 21.8 of this
8 Agreement, for the relevant services provided under this
9 Agreement within sixty (60) Days following the Payment Due
10 Date...If the Billing Party does not disconnect the billed Party's
11 service(s) on the date specified in the ten (10) business days notice,
12 and the billed Party's noncompliance continues, nothing contained
13 herein shall preclude the Billing Party's right to disconnect any or
14 all relevant services of the non-complying Party without further
15 notice, if disconnection has been approved by the Commission...

16 **Issue 5-7(a)**

17 5.13.1 If either Party defaults in the payment of any amount due
18 hereunder, or if either Party violates any other material provision
19 of this Agreement, and such default or violation shall continue for
20 thirty (30) Days after written notice thereof, the other Party must
21 notify the Commission in writing and may seek relief in
22 accordance with the Dispute resolution provision of this
23 Agreement. The failure of either Party to enforce any of the
24 provisions of this Agreement or the waiver thereof in any instance
25 shall not be construed as a general waiver or relinquishment on its
26 part of any such provision, but the same shall, nevertheless, be and
27 remain in full force and effect. Neither Party shall disconnect
28 service to the other Party without first obtaining Commission
29 approval. To the extent that either Party disputes, pursuant to
30 Section 21.8, any amount due hereunder, the Party's withholding
31 of such disputed amounts pursuant to Section 21.8 shall not
32 constitute a default under this Section 5.13 during the pendency of
33 such dispute.

34 Both of Eschelon's proposals under Issue No. 5-6 are intended to provide for
35 Commission oversight in the instance that Qwest wants to discontinue processing
36 Eschelon's orders. Eschelon's first option for Issue 5-6 requires Commission
37 approval before Qwest may discontinue processing Eschelon's orders for the

1 alleged failure of Eschelon to make full payment of undisputed charges. This
2 would ensure that order processing does not stop (and no action is taken that will
3 disrupt service to end users) until the Commission has at least had a chance to
4 verify whether there is a legitimate disagreement. The ICA already provides that
5 Qwest give the Commission notice of the alleged late payment and of Qwest's
6 proposal to discontinue services (Section 5.4.2), and Eschelon's proposal would
7 simply provide that Qwest would include a request for approval of that action
8 with its notice. If the Commission does not want to require Commission approval
9 in every instance in which Qwest intends to stop processing Eschelon's orders,
10 the Commission should ensure that it will have an opportunity to act on the
11 public's behalf before the services of End User Customers are disrupted when
12 Eschelon disagrees with Qwest's proposed action. To that end, Eschelon's
13 alternative option provides that if Eschelon disputes Qwest's determination and
14 seeks Commission review, Eschelon's orders will continue to be processed while
15 its dispute is pending or until a date specified by the Commission. This would
16 ensure that Commission authority is preserved when there is a disagreement, and
17 would prevent Qwest from being able to take such a serious step as stopping order
18 processing unilaterally or based on information with which Eschelon disagrees.

19 For Issue 5-7, Eschelon proposes language to ensure that before Qwest takes the
20 very serious step of disconnecting Eschelon's services, that it first obtains
21 Commission approval. This will allow the Commission to evaluate the basis for
22 the proposed disconnection and ensure that any actions taken in this regard are

1 justified and in the public interest. Regarding Issue 5-7(a), Eschelon proposes
2 language that would assure that the Commission is kept informed of alleged
3 defaults under the ICA that will allow the Commission to monitor disputes, and
4 become involved to the extent necessary and appropriate for the protection of the
5 public interest.

6 **Q. WHAT ARE QWEST'S PROPOSALS FOR ISSUES 5-6, 5-7 AND 5-7(A)?**

7 A. Qwest's proposals are shown below:

8 **Issue 5-6**

9 5.4.2 ~~With the Commission's approval,~~ One Party may
10 discontinue processing orders for relevant services for the failure
11 of the other Party to make full payment, less any disputed amount
12 as provided for in Section 21.8 of this Agreement, for the relevant
13 services provided under this Agreement within thirty (30) Days
14 following the Payment Due Date.

15 **Issue 5-7**

16 5.4.3 ~~With the Commission's approval pursuant to Section~~
17 ~~5.13.1,~~ The Billing Party may disconnect any and all relevant
18 services for failure by the billed Party to make full payment, less
19 any disputed amount as provided for in Section 21.8 of this
20 Agreement, for the relevant services provided under this Agreement
21 within sixty (60) Days following the Payment Due Date...If the
22 Billing Party does not disconnect the billed Party's service(s) on the
23 date specified in the ten (10) business days notice, and the billed
24 Party's noncompliance continues, nothing contained herein shall
25 preclude the Billing Party's right to disconnect any or all relevant
26 services of the non-complying Party without further notice,~~if~~
27 ~~disconnection has been approved by the Commission...~~

28 **Issue 5-7(a)**

29 5.13.1 If either Party defaults in the payment of any amount due
30 hereunder, or if either Party violates any other material provision
31 of this Agreement, and such default or violation shall continue for
32 thirty (30) Days after written notice thereof, the other Party ~~must~~

1 ~~notify the Commission in writing and~~ may seek relief in
2 accordance with the Dispute resolution provision of this
3 Agreement. The failure of either Party to enforce any of the
4 provisions of this Agreement or the waiver thereof in any instance
5 shall not be construed as a general waiver or relinquishment on its
6 part of any such provision, but the same shall, nevertheless, be and
7 remain in full force and effect. ~~Neither Party shall disconnect~~
8 ~~service to the other Party without first obtaining Commission~~
9 ~~approval.~~ To the extent that either Party disputes, pursuant to
10 Section 21.8, any amount due hereunder, the Party's withholding
11 of such disputed amounts pursuant to Section 21.8 shall not
12 constitute a default under this Section 5.13 during the pendency of
13 such dispute.

14 The difference in Qwest's language is that Commission approval would not be
15 necessary for Qwest to stop processing Eschelon's orders or disconnect
16 Eschelon's circuits. In fact, Qwest's language would allow it to invoke these very
17 serious remedies even if Eschelon has a legitimate disagreement pertaining to the
18 charges Qwest alleges it owes (as in the example provided above). In support of
19 its position, Qwest argues that it is Eschelon's obligation to pay its bills in a
20 timely fashion and that Eschelon can invoke dispute resolution or dispute the
21 charges if it disagrees.⁷⁴

22 **Q. PLEASE ELABORATE ON THE IMPORTANCE OF ISSUE 5-7 AND**
23 **SUBPART.**

24 **A.** The need for Commission oversight related to the ability to disconnect services is
25 even greater than in the circumstance in which orders are rejected. Disconnecting
26 services would leave existing End User Customers without dial tone and without

⁷⁴ Qwest Response, p. 14.

1 access to critical 9-1-1 emergency services. Not only would such a drastic
2 measure likely harm Eschelon's business very seriously, if not fatally, it would be
3 extremely disruptive for Eschelon's customers who would lose their telephone
4 service as a result. Before Qwest takes such a step, it should have the obligation
5 to first seek permission from the Commission in order to make sure that the
6 interests of the public are adequately protected.

7 **Q. WOULD THE PROVISIONS SET OUT IN ESCHELON'S PROPOSAL BE**
8 **UNIQUE TO UTAH?**

9 A. No. In Minnesota, the Commission requires approval for disconnection, and
10 Qwest agreed to this language and issue 5-7 was not arbitrated in Minnesota.
11 Therefore, Qwest will have a process for providing notice to the Commission
12 before disconnection that it could use in Utah.

13 **Q. COULDN'T ESCHELON JUST PAY ALL OF THE UNDISPUTED**
14 **AMOUNTS IT OWES QWEST AND AVOID QWEST DISCONNECTING**
15 **CIRCUITS OR DISRUPTING ORDER PROCESSING?**

16 A. Though Qwest will likely argue that this problem is solely within Eschelon's
17 control because Eschelon only need to pay all undisputed amounts to avoid these
18 remedies,⁷⁵ Qwest is wrong. There are a number of reasons that Eschelon and

⁷⁵ Qwest states that "If a bill is undisputed, Eschelon should pay it." *See*, Oregon Disputed Issues Matrix, Exhibit 3 to Eschelon's Petition for Arbitration in the Eschelon-Qwest Oregon arbitration, Qwest's Position Statement for Issues 5-7, 5-7(a), 5-8, 5-9, 5-11 and 5-12. Note that I refer to the Oregon Disputed Issues Matrix (Exhibit 3 to Eschelon's Petition in Oregon). As explained at page 8, footnote 2 of Eschelon's Petition for Arbitration in this proceeding, Eschelon prepared the Joint Disputed Issues Matrix in Utah, including Qwest's proposed language column. In other states,

1 Qwest may have very different views about amounts that are disputed and
2 undisputed – which is the case in the example explained above. And since
3 Qwest’s data on Eschelon’s disputed and undisputed amounts is a determining
4 factor as to whether Qwest can invoke the payment and deposits remedies, it is
5 critical that Qwest’s data be shown to be correct before Qwest takes the serious
6 step of disconnecting Eschelon’s customers based on that data. Otherwise, Qwest
7 will attempt to impose its view of Eschelon’s payment status to invoke these
8 remedies, despite the fact that Eschelon believes that its payments of all
9 undisputed amounts to Qwest are current. That is why Commission involvement
10 should be preserved.

11 **Q. HOW CAN THESE DISCREPANCIES OCCUR?**

12 A. There are several reasons that Eschelon and Qwest could disagree on the amount
13 of undisputed charges. I will briefly describe some of these reasons below:

- 14 • Qwest takes it upon itself to simply declare disputes to be “resolved” even when
15 no agreement has been reached and Qwest has taken no action to bring the matter
16 to dispute resolution. This has led to Qwest understating what Eschelon has put
17 in dispute. Qwest’s approach to “resolving” billing disputes is discussed in more
18 detail below.
- 19 • Qwest’s notices of past due status do not always include detail by Billing Account
20 Number (BAN) or by state for that matter, of what Qwest considers past due.
21 Qwest historically has only identified a lump sum amount without providing any
22 detail. *See*, Exhibit Eschelon 2.6 (Confidential).

Qwest also provided its position statements, as Eschelon expected Qwest would do in Utah as well. Eschelon requested position statements from Qwest for Utah, and Qwest replied that it would review and return by close of business on April 25, 2007. On April 26, 2007, Qwest informed Eschelon that it would not provide position statements for the Utah matrix. Qwest’s position, therefore, on the unresolved issues in the Utah matrix is that Qwest does not agree. Qwest’s position statements contained more detail in Oregon and other states.

- 1 • Even when Qwest does provide detail on what it claims to be past due, that detail
2 sometimes does not match up with the amount Qwest is claiming as past due.
3 Case in point: Qwest provided detail on August 29, 2006 about a letter it sent on
4 August 11th concerning an amount Qwest claimed was overdue on August 1st.
5 The detail provided on August 29th did not match up with the amount Qwest
6 claimed in its August 11th correspondence. I have provided an email string
7 between Eschelon and Qwest describing this problem and supporting
8 documentation as Exhibit Eschelon 2.7 (Confidential).
- 9 • Qwest does not always post Eschelon's payment in a timely manner, and counts
10 payments that Qwest has already received as past due. I have attached Exhibit
11 Eschelon 2.8, an email exchange between Qwest and Eschelon, that typifies this
12 problem. This exhibit shows that Qwest sent a letter to Eschelon on 10/24/06
13 claiming that Eschelon had outstanding undisputed amounts due Qwest in
14 Oregon, and threatening to stop processing orders or disconnect Eschelon's
15 circuits if this payment was not made in full by 10/27/06 (three days later).
16 However, Exhibit Eschelon 2.8 shows that Eschelon had already paid the amount
17 Qwest was claiming was overdue on 10/16/06 – one week before it was due and
18 over a week before Qwest's letter was sent threatening disconnection. Despite
19 Eschelon's request for Qwest to "review your internal process to determine why
20 payments are not applied in a timely manner," Qwest simply informed Eschelon
21 that its payment had been posted and the account was current (with no
22 explanation of why Qwest threatened such drastic measures when Eschelon was
23 actually current with Qwest).
- 24 • Qwest also includes in its past due amounts payments that are not even due yet.
25 Exhibit Eschelon 2.9 (Confidential) is an instance of Qwest claiming that an
26 account was past due in September when in fact payment was not due until
27 October 10th.
- 28 • Instead of providing billing refunds owed to carriers, Qwest, by its own admission
29 in a July 5, 2006 letter (see Exhibit Eschelon 2.6 (Confidential)), applies these
30 refunds to any amounts that Qwest determines are past due (which may include
31 amounts that Eschelon disputes). This causes Qwest's aging to be inaccurate and
32 a discrepancy between what Eschelon shows as disputed and what Qwest shows
33 as disputed.
- 34 • Disputes that are submitted by Eschelon are sometimes not responded to by
35 Qwest, and sometimes Qwest loses them. Qwest recently referred to this as the
36 "black hole." See Exhibit Eschelon 2.10 (Confidential).
- 37 • Qwest routinely denies Eschelon's disputes for multiple months until such time
38 when Qwest later recognizes the disputes and either records them or ignores them.
39 For example, in December 2005, Eschelon disputed DSL rates that Qwest had

1 applied to the November 2005 invoice. Qwest denied the dispute, but corrected
2 the rates on the February 2006 invoice. However, Qwest did not go back to
3 correct this mistake on the November 2005 invoice (or any invoices in between),
4 when the mistake was first identified and disputed.

5 • Qwest incorrectly applies Eschelon's payments. Eschelon provides a check stub
6 and the invoice remittance with each payment that contains the amounts and
7 BANs to which the check should be applied. At times, Qwest posts some
8 payments to the wrong account or posts the wrong amount to the proper account.
9 Qwest apparently applies payments to disputes that have been "resolved" from
10 Qwest's perspective, but not Eschelon's. It is Eschelon's position that Qwest
11 should apply payments to the invoice being paid, not simply to any open balance.
12 I have provided as Exhibit Eschelon 2.11 (Confidential) an email exchange
13 between Eschelon and Qwest that discusses these misapplied payments.

14 • Qwest's payment processing center doesn't effectively communicate with the
15 billing representatives with whom Eschelon interacts regarding billing disputes.
16 Or, in other words, Qwest's "left hand" does not always know what its "right
17 hand" is doing. As a result, Qwest has asked that Eschelon send its remittance
18 information to two separate groups. See, Exhibit Eschelon 2.6 (Confidential),
19 Qwest's July 5, 2006 letter (page 2) from Mary Dobesh (Qwest) to Bill Markert
20 (Eschelon).

21 • Qwest's employee turnover in the department that processes Eschelon's billing
22 disputes can cause disputes to get lost or not addressed by the new employees.
23 This also means that Eschelon may work with Qwest personnel to resolve a
24 billing dispute for quite some time, only to be forced to start all over when new
25 Qwest personnel are assigned that are unfamiliar with the dispute's history. See,
26 Exhibit Eschelon 2.10.

27 • Qwest's billing department may not update its information about where to send
28 Eschelon invoices/correspondences (information that is updated by Eschelon in
29 the CLEC Questionnaire), which can lead to invoices being paid late, or balances
30 being addressed later because the proper Eschelon employees have not been
31 notified in a timely manner. I have attached an email sent from Eschelon to
32 Qwest on this issue as Exhibit Eschelon 2.12.⁷⁶

⁷⁶ A recent example of this problem occurred on April 2, 2007. Qwest sent a notice to Eschelon demanding a deposit and threatening to stop order processing and disconnect circuits effective April 16, 2007 for billing that Qwest *sent to the wrong address*. Eschelon followed Qwest's process and updated the Qwest questionnaire with the correct billing information in November of 2006, but after inquiries from Eschelon about the bills, Qwest only corrected the information in March. Though Eschelon had been in communication with Qwest about this issue, and even though Eschelon paid undisputed amounts once it tracked down the bills, Qwest sent this notice of disconnection and

1 **Q. IN YOUR ANSWER ABOVE EXPLAINING WHY ESCHELON AND**
2 **QWEST OFTEN DISAGREE ABOUT DISPUTED AMOUNTS, YOU**
3 **MENTION THAT QWEST DETERMINES THAT DISPUTES ARE**
4 **“RESOLVED” EVEN WHEN NO AGREEMENT HAS BEEN REACHED.**
5 **PLEASE ELABORATE.**

6 A. First, Qwest’s use of the word “resolved” in connection with payment disputes is
7 a misnomer because, in fact, no agreement has necessarily been reached between
8 Qwest and Eschelon. What “resolved” means to Qwest is that Qwest believes that
9 the dispute should be resolved in Qwest’s favor and the disputed charges be paid
10 by Eschelon. Then, when Qwest labels the dispute “resolved,” even if Eschelon
11 still disputes the charges, Qwest does not recognize the dispute any longer and
12 removes this amount from their systems that track disputed charges and adds it to
13 the overdue category. I have provided as Exhibit Eschelon 2.13 a flow diagram of
14 the Qwest billing Dispute Resolution process it developed in CMP. This flow
15 diagram shows that once Qwest has received a billing dispute and confirms that it
16 has received the information Qwest requires, Qwest will “resolve” (or possibly
17 “status”) the dispute within 28 calendar days. As I mention above, “resolve”
18 means that Qwest can reject the dispute and re-label the amount as past due.
19 Once Qwest has “resolved” the dispute, the flow diagram shows that if the CLEC
20 does not agree, the *CLEC* must invoke the escalation process to pursue the dispute
21 further.

disruption of order processing to Eschelon. This example demonstrates the need for Eschelon’s proposed language in these sections.

1 **Q. DOES THIS CMP BILLING PROCESS OF “RESOLVING” BILLING**
2 **DISPUTES APPLY TO ESCHELON AND DID ESCHELON ASSIST**
3 **QWEST IN ITS DEVELOPMENT?**

4 A. No. I have attached Exhibit Eschelon 2.14 which is an email exchange between
5 Eschelon and Qwest on this CMP billing dispute process, as well as Eschelon’s
6 Comments to the Qwest Change Request (“CR”) that introduced the new billing
7 dispute process. Eschelon’s 4/6/05 email to Qwest states in part: “Although
8 Qwest has developed its own processes for billing through CMP, CMP is both not
9 a part of these ICAs and, even were it to apply, the CMP document specifically
10 provides that the ICA controls. There is no requirement in our ICAs to use the
11 process you describe.” This excerpt, as well as Eschelon’s comments on Qwest’s
12 CR, show very clearly that Eschelon did not develop this process with Qwest, nor
13 does the process even apply to Eschelon. Therefore, Qwest should not even be
14 applying this CMP billing dispute process to Eschelon, but Qwest does anyway –
15 and it is this process that can cause disagreements between Qwest and Eschelon
16 as to Eschelon’s payment status.

17 **Q. IS THIS PROCESS OF “RESOLVING” BILLING DISPUTES THAT**
18 **QWEST IMPOSES ON ESCHELON CONTAINED IN THE CURRENT**
19 **ESCHELON/QWEST ICA?**

20 A. No. Attachment 5, Section 4.1.18 of the companies’ current ICA addresses
21 billing disputes, and allows Qwest to pursue bill disputes under the current ICA.
22 Attachment 5, Section 4.1.18.4 of the current ICA provides that if a bill dispute is

1 not resolved within 120 days of the Notice of Discrepancy, Qwest can take it to
2 dispute resolution. Importantly, Section 4.1.18.3 of the existing ICA states that
3 “[c]losure of a specific billing period shall occur by joint agreement of the Parties
4 whereby the Parties agree that such billing period is closed to any further analysis
5 and financial transactions...” However, instead of following these procedures
6 from the ICA, Qwest instead follows the procedure it established in CMP. By
7 using the CMP billing dispute process instead of the process in the ICA, Qwest
8 supplants the “joint agreement” needed to close a billing dispute in the ICA with
9 its unilateral judgment to “resolve” the issue. Also, Qwest attempts to make the
10 collections process self-executing by “resolving” the issue and forcing the CLEC
11 to invoke escalation if it disagrees with Qwest’s decision – instead of Qwest
12 escalating the dispute if it disagrees with the CLEC (as would be allowed under
13 the ICA). Thus, Qwest’s approach is the opposite of the typical billing and
14 collections process and the opposite of the process provided for under the ICA:
15 Qwest pushes onto Eschelon, as the party disputing the bill, the burden of proving
16 that the money isn’t owed. Qwest wants Eschelon to prove that it does not owe
17 money to Qwest, when in fact, once Eschelon disputes an amount, it should be
18 Qwest’s responsibility to escalate the dispute. Since Qwest takes it upon itself to
19 decide what is in dispute, Qwest’s proposed ICA language would enable it to
20 declare what amount it considers disputed and require Eschelon to pay the
21 remaining amount (even if Eschelon disagrees) or face dire consequences.

1 **Q. HAS QWEST’S APPROACH TO “RESOLVING” BILLING DISPUTES**
2 **CAUSED THE PARTIES TO DISAGREE ABOUT DISPUTED**
3 **AMOUNTS?**

4 A. Yes. I have provided as Exhibit Eschelon 2.10 (Confidential), an email exchange
5 between Eschelon and Qwest showing that Qwest’s determination of an issue as
6 “resolved” results in Qwest changing the status from disputed to overdue over the
7 disagreement of Eschelon. As Eschelon explained in its 9/13/06 email to Qwest
8 on this issue:

9 You spoke about requiring Eschelon to escalate disputes if they are
10 not resolved. As you can see with this one, I did request escalation
11 back in 2003, but nothing ever was done by Qwest after my
12 request.

13 We provided proof that our position was correct, provided the
14 Department of Revenue's response to our inquiry, which was in our
15 favor. Yet, nothing was ever done by Qwest other than to continue
16 to deny our dispute and not reflect it as a valid dispute in your
17 aging/systems.

18 Qwest does not show any of this amount disputed and continues to show the
19 amounts associated with this dispute past due and owed by Eschelon. Exhibit
20 Eschelon 2.15 (Confidential) is a spreadsheet that shows the significant
21 discrepancy between Eschelon’s calculations of disputed amounts and what
22 Qwest believes is disputed. These discrepancies are caused by the reasons listed
23 above, including Qwest’s approach to “resolving” billing disputes.

24 **Q. PLEASE ELABORATE ON QWEST’S ARBITRARY CONTROL IN THIS**
25 **REGARD.**

1 A. The correspondence provided as Exhibit Eschelon 2.6 (Confidential) is an
2 example of the arbitrary control Qwest would have over these remedies if its
3 proposals were adopted. With arbitrations soon to be commenced, Qwest decided
4 that it was time to send its letter and pursue these remedies, presumably to paint
5 Eschelon as a “bad actor.” This shows that Qwest could pursue these remedies
6 when it is convenient for Qwest, and that other factors could similarly motivate
7 Qwest during the term of the ICA to take these actions – that is, unless
8 Commission oversight is preserved. Qwest – Eschelon’s largest competitor –
9 should not be permitted to exercise this type of arbitrary control.

10 **Q. IF QWEST STOPPED PROCESSING ESCHELON’S ORDERS OR**
11 **DISCONNECTED ESCHELON’S SERVICES AND ESCHELON**
12 **DISAGREED, COULD ESCHELON SEEK COMMISSION RECOURSE**
13 **THROUGH DISPUTE RESOLUTION?**

14 A. Eschelon could seek dispute resolution before the Commission if Eschelon
15 disagreed with Qwest’s view of late payment and/or overdue amount, but it likely
16 could not do so in time to keep Qwest from refusing to process Eschelon’s orders
17 or disconnecting Eschelon’s customers – so the damage to Eschelon and its End
18 User Customers would have already been done. Under the ICA language, Qwest
19 need only give 10 days notice of its intention to cease processing orders and
20 disconnect services. It would be very difficult, if not impossible, for Eschelon to
21 file a complaint, get it on the Commission’s schedule, conduct a Commission
22 hearing and have a decision within 10 business days. In addition, this will cause

1 Eschelon to come to the Commission in crisis mode, which significantly
2 compresses timeframes for fact-checking and deliberations and adds additional
3 burden on the Commission, Eschelon and Qwest.

4 **Q. ARE THERE OTHER MEANS BY WHICH QWEST CAN COLLECT**
5 **UNPAID UNDISPUTED BILLS BESIDES REJECTING ORDERS OR**
6 **DISCONNECTING CUSTOMERS?**

7 A. Yes. Other remedies are available, like late payment fees and dispute resolution.
8 *See, e.g.,* Sections 5.4.8 and 5.18. These other means of redress available to
9 Qwest support the notion that Commission approval should be required before
10 taking the much more serious step of order rejection or disconnection.

11 **Q. WHY SHOULD THE COMMISSION ADOPT ESCHELON'S PROPOSAL**
12 **FOR ISSUE NOS. 5-6, 5-7 AND 5-7(A)?**

13 A. Eschelon's proposals maintain Commission authority in these instances so that
14 Qwest can not unilaterally discontinue processing Eschelon's orders or
15 unilaterally disconnect Eschelon's services. I explained above the devastating
16 effect on Eschelon that would result from Qwest unjustifiably taking these
17 actions. I also explained that the information that would be used by Qwest to
18 determine whether to reject Eschelon's orders and shut off Eschelon's services is
19 not always accurate or current, and is extremely vague. The Commission should
20 be involved on behalf of the public interest to ensure that these remedies are being
21 invoked properly and after a careful examination of the facts (particularly of the

1 data Qwest is using to allege non-payment) to ensure that these serious steps are
2 justified.

3 **SUBJECT MATTER NO. 6. DEPOSITS**

4 **Issue Nos. 5-8, 5-9, 5-11 and 5-12: ICA Section 5.4.5**

5 **Q. YOU HAVE EXPLAINED THE BUSINESS REASON UNDERLYING**
6 **ESCHELON’S PROPOSALS ON PAYMENTS AND DEPOSITS ABOVE.**
7 **WHAT SERVES AS THE DISAGREEMENT BETWEEN ESCHELON**
8 **AND QWEST FOR ISSUE NOS. 5-8, 5-9, 5-11 AND 5-12?**

9 A. Eschelon and Qwest disagree on (1) whether the deposit requirement should be
10 triggered when Eschelon fails to pay a “de minimus” undisputed amount (with the
11 word de minimus serving as the disagreement) [Issue No. 5-8]; (2) how
12 “Repeatedly Delinquent” should be defined in terms of failure to pay undisputed
13 amounts [Issue No. 5-9]; (3) whether Eschelon should be required to pay a deposit
14 to Qwest within 30 days if Eschelon has challenged the merits of the deposit
15 requirement at the Commission [Issue No. 5-11]; and (4) whether a separate
16 option is appropriate in which the deposit requirement does not hinge on the
17 definition of Repeatedly Delinquent, but instead provides an avenue for the
18 Commission to review a party’s payment history and determine whether “all
19 relevant circumstances warrant a deposit.” [Issue No. 5-12]

20 **Q. WHAT ARE ESCHELON’S PROPOSALS FOR THESE ISSUES?**

21 A. On these issues, Eschelon proposes the following language modifications (with

1 Eschelon’s proposed language underlined):

2 **Issue No. 5-8**

3 5.4.5 “Repeatedly Delinquent” means payment of any undisputed
4 non-de minimus amount received more than thirty (30) Days after
5 the Payment Due Date...⁷⁷

6 **Issue No. 5-9 (1st of 2 options)**

7 5.4.5 . . . “Repeatedly Delinquent” means payment of any
8 undisputed . . . amount received more than thirty (30) Days after
9 the Payment Due Date, for three (3) consecutive months or more
10 ~~times during a twelve (12) month period~~ on the same Billing
11 account number. . . .

12 **Issue No. 5-9(2nd of 2 options)**

13 5.4.5 . . . “Repeatedly Delinquent” means payment of any
14 undisputed . . . amount received more than thirty (30) Days after
15 the Payment Due Date, three (3) or more times during a six (6)
16 ~~twelve (12)~~ month period on the same Billing account number.

17 **Issue No. 5-11**

18 5.4.5Required deposits are due and payable within thirty (30)
19 Days after demand and conditions being met, unless the billed
20 Party challenges the amount of the deposit or deposit requirement
21 (e.g., because delay in submitting disputes or making payment was
22 reasonably justified due to inaccurate or incomplete Billing)
23 pursuant to Section 5.18. If such a Dispute is brought before the
24 Commission, deposits are due and payable as of the date ordered
25 by the Commission.

26 **Issue No. 5-12**

27 5.4.5 ~~Each Party will determine the other Party's credit status~~
28 ~~based on previous payment history as described below, or if, If the~~
29 ~~Parties are doing business with each other for the first time, each~~
30 ~~Party will determine the other Party's credit status based on credit~~
31 ~~reports such as Dun and Bradstreet. If a Party that is doing~~
32 ~~business with the other Party for the first time has not established~~
33 ~~satisfactory credit with the other Party according to the previous~~

⁷⁷ As explained below, Eschelon also offers to use the word “material” in place of “non-de minimus.” The word “material” is used in closed language numerous times throughout the ICA and, therefore, has a commonly-understood meaning.

1 sentence ~~or the Party is Repeatedly Delinquent in making its~~
2 ~~payments~~, or the Party is being reconnected after a disconnection
3 of service or discontinuance of the processing of orders by the
4 Billing Party due to a previous non-payment situation, the Billing
5 Party may require a deposit to be held as security for the payment
6 of charges before the orders from the billed Party will be
7 provisioned and completed or before reconnection of service. The
8 Billing Party may also require a deposit for the failure of the other
9 Party to make full payment, less any disputed amount as provided
10 for in Section 21 of this Agreement, for the relevant services
11 provided under this Agreement within ninety (90) Days following
12 the Payment Due Date, if the Commission determines that all
13 relevant circumstances warrant a deposit. “Repeatedly delinquent”
14 ~~means any payment received thirty (30) Days or more after the~~
15 ~~Payment Due Date, three (3) or more times during a twelve (12)~~
16 ~~month period on the same Billing account number. Accounts with~~
17 ~~amounts disputed under the dispute provisions of this agreement~~
18 ~~shall not be included as Repeatedly Delinquent based on amounts~~
19 ~~in dispute alone.~~ The deposit may not exceed the estimated total
20 monthly charges for an average two (2) month period within the 1st
21 three (3) months from the date of the triggering event which would
22 be either the date of the request for reconnection of services or
23 resumption of order processing ~~and/or the date CLEC is repeatedly~~
24 ~~delinquent as described above~~ for all services. The deposit may be
25 a surety bond if allowed by the applicable Commission regulations,
26 a letter of credit with terms and conditions acceptable to the Billing
27 party, an interest bearing escrow account, or some other form of
28 mutually acceptable security such as a cash deposit. Required
29 deposits are due and payable within thirty (30) Days after demand
30 and conditions being met.

31 Issues 5-8 and 5-9 address the definition of “Repeatedly Delinquent,” which is the
32 operative term in determining whether Qwest can demand a deposit. In other
33 words, if payment by Eschelon is “Repeatedly Delinquent,” as that term will be
34 defined by this arbitration, Qwest can invoke remedies set forth in the Payment
35 and Deposit language of the contract. Eschelon’s proposal under Issue No. 5-8 is
36 designed so that the deposit requirement (a deposit that can amount to 2 months

1 worth of charges, or about \$10 million for Eschelon) under Section 5.4.5 is
2 triggered only when there is a failure to pay a non-de minimus, undisputed
3 amount. The deposit requirement is designed to protect Qwest when there is a
4 legitimate concern regarding future payment, and a de minimus outstanding
5 amount does not rise to this level.

6 For Issue 5-9, Eschelon provides two options, one that defines “Repeatedly
7 Delinquent” in terms of three late payments in three consecutive months, and one
8 that defines the term as late payments in three months out of a six month period –
9 either of which is acceptable to Eschelon. Again, Eschelon’s language is
10 designed to trigger a deposit when there is a legitimate concern about its ability to
11 pay. Regarding Issue 5-11, Eschelon’s language simply recognizes that deposits
12 are payable in 30 days except when challenged at the Commission pursuant to
13 dispute resolution.⁷⁸ In these instances the Commission would determine the
14 payment due date of the deposit.

15 As a separate alternative, Eschelon proposes language in Issue 5-12 that would
16 not hinge on the definition of “Repeatedly Delinquent,” but rather would allow
17 the Commission to determine whether a deposit is warranted based on the
18 Commission’s review of a party’s payment history and “all relevant
19 circumstances.” Adopting Eschelon’s language on Issue 5-12 would avoid the
20 need to rule on Issues 5-8, 5-9 and 5-11.

⁷⁸ Section 5.18 is the dispute resolution provision of the ICA.

1 **Q. WHAT ARE QWEST’S PROPOSALS ON THESE ISSUES?**

2 A. Qwest proposes the following language on these issues (Qwest language opposed
3 by Eschelon is underlined and Eschelon proposed language opposed by Qwest in
4 ~~strikeout~~):

5 **Issue No. 5-8**

6 5.4.5 “Repeatedly Delinquent” means payment of any undisputed
7 ~~non de minimus~~ amount received more than thirty (30) Days after
8 the Payment Due Date . . .

9 **Issue No. 5-9**

10 5.4.5 . . . “Repeatedly Delinquent” means payment of any
11 undisputed . . . amount received more than thirty (30) Days after
12 the Payment Due Date, ~~for three (3) consecutive months~~ or more
13 times during a twelve (12) month period on the same Billing
14 account number.. .

15 **Issue No. 5-11**

16 5.4.5Required deposits are due and payable within thirty (30)
17 Days after demand and conditions being met, ~~unless the billed~~
18 ~~Party challenges the amount of the deposit or deposit requirement~~
19 ~~(e.g., because delay in submitting disputes or making payment was~~
20 ~~reasonably justified due to inaccurate or incomplete Billing)~~
21 ~~pursuant to Section 5.18. If such a Dispute is brought before the~~
22 ~~Commission, deposits are due and payable as of the date ordered~~
23 ~~by the Commission.~~

24 **Issue No. 5-12**

25 Qwest does not offer an alternative proposal under Issue 5-12 as
26 Eschelon does.

27 For Issue 5-8, Qwest proposes to omit the term “non de minimus,” which means
28 that any undisputed amount, even a few dollars, that is received after 30 days after
29 the due date could be counted by Qwest as “Repeatedly Delinquent” and used to
30 invoke the deposit requirement. Qwest states that the term non de minimus is

1 vague and would lead to further disagreements requiring Commission
2 resolution.⁷⁹ For Issue 5-9, Qwest proposes to define Repeatedly Delinquent as
3 late payments in three months within a twelve month period. Qwest notes that its
4 proposed timeframe is consistent with the timeframe adopted in the past.⁸⁰ Under
5 Issue 5-11, Qwest proposes to demand payment of deposits within 30 days with
6 no exceptions. Qwest complains that the exception in Eschelon's language
7 (allowing a deposit demand to be challenged at the Commission and the
8 Commission to set the deposit due date) would cause delay in the payment of the
9 deposit and would require the Commission to "micro manage" the companies'
10 relationship.⁸¹ Qwest does not provide a separate proposal under Issue 5-12.

11 **Q. PLEASE DESCRIBE THE DISAGREEMENT UNDER ISSUE 5-8 "DE**
12 **MINIMUS AMOUNT" (FIRST OF FOUR ISSUES).**

13 A. There is a provision in the contract under Section 5.4.5 that allows a Billing Party
14 to demand a deposit from the Billed Party if the Billed Party is "Repeatedly
15 Delinquent" in making payments. The operative, agreed to language of Section
16 5.4.5 states that:

17 If a Party that is doing business with the other Party for the first
18 time has not established satisfactory credit with the other Party
19 according to the previous sentence or the Party is *Repeatedly*
20 *Delinquent* in making its payments, or the Party is being
21 reconnected after a disconnection of service or discontinuance of
22 the processing of orders by the Billing Party due to a previous non-

⁷⁹ Qwest Response, pp. 16-17.

⁸⁰ Qwest Response, p. 17.

⁸¹ Qwest Response, p. 18.

1 payment situation, the Billing Party may require a deposit to be
2 held as security for the payment of charges before the orders from
3 the billed Party will be provisioned and completed or before
4 reconnection of service. (emphasis added)

5 The key to Issues 5-8 and 5-9 is the appropriate definition of “Repeatedly
6 Delinquent.” Eschelon proposes to include the term “non de minimus” in the
7 definition of Repeatedly Delinquent so that a few dollars of undisputed late
8 payments do not trigger a significant deposit requirement.

9 **Q. WHY SHOULD DE MINIMUS AMOUNTS NOT TRIGGER THE**
10 **DEPOSIT REQUIREMENT?**

11 A. The purpose of this deposit provision is to allow Qwest to obtain a deposit when
12 there is a legitimate concern about Eschelon’s ability to pay future charges. A *de*
13 *minimus* amount of undisputed late charges does not rise to the level of a
14 legitimate concern in this regard, and should therefore not trigger the requirement
15 of Section 5.4.5 to pay a substantial deposit.

16 **Q. WHAT CONSTITUTES A DE MINIMUS AMOUNT?**

17 A. “De Minimus” is defined as “of trifling consequence of importance; too
18 insignificant to be worthy of concern.”⁸² According to *Webster’s*, the term *de*
19 *minimus* is derived from the Latin phrase *de minimus non curat lex*, which:

20 ...refers to the principle of law that even if a technical violation of
21 a law appears to exist according to the letter of the law, if the effect
22 is too small to be of consequence, the violation of the law will not
23 be considered as a sufficient cause of action...

⁸² Webster’s dictionary online: <http://www.webster-dictionary.net/definition/Minimus>

1 So, under Eschelon’s proposal, for Qwest to be able to demand a deposit under
2 the “Repeatedly Delinquent” provision, the amount received more than 30 days
3 after the payment due date would need to be “worthy of concern” and not of
4 “trifling consequence.” Amounts that are “too small to be of consequence” do not
5 rise to the level of a legitimate concern about Eschelon’s ability to pay. The term
6 “non de minimus” should be included to acknowledge this.

7 **Q. IS THIS TERM TOO VAGUE TO BE USEFUL?**

8 A. Though Qwest may complain that the term is vague,⁸³ the dictionary definition
9 quoted above shows that the term is commonly understood. Other terms in the
10 ICA that also have a commonly understood meaning are likewise not defined.
11 For example, the term “material” and the concept of “materiality” are used
12 throughout the agreement in closed language without being defined in those
13 provisions. See ICA Sections 2.1, 2.2, 5.1.3.1, 5.4.6, 5.6.2, 5.8.4, 5.13.1,
14 7.2.2.9.6, 8.2.1.29, 10.6.2.5.1, 10.8.2.14, 10.8.2.18 & 11.3. In a way, “material”
15 is the flip side of “de minimus,” because a de minimus amount would not be
16 material. In fact, another way to resolve this issue would be to adopt the
17 following language for this sentence in Issue 5-8:

18 “Repeatedly Delinquent” means payment of any undisputed
19 material amount received more than thirty (30) Days after the
20 Payment Due Date.

21 Eschelon also offers this language as a means to resolve this issue. The term

⁸³ Qwest Response, pp. 16-17.

1 “material” has the advantage (unlike the term “non de minimus”) of being used
2 elsewhere in the interconnection agreement. And the parties must be able to
3 determine its meaning, given the frequency of its use in other provisions of the
4 agreement. In fact, it is already used within the Payment and Deposit provisions
5 of Section 5.4. In Section 5.4.6, agreed-to language states:

6 Upon a material change in financial standing (including Qwest
7 transfer of relevant exchanges to any unaffiliated party as
8 described in Section 5.12.2), the billed Party may request and the
9 Billing Party will consider a recalculation of the deposit.

10 If a change in financial standing can be determined “material” or not, then an
11 undisputed amount can likewise be determined “material” or not. Eschelon does
12 not object to use of either “non de minimus” or “material” to resolve this issue.

13 **Q. PLEASE DESCRIBE THE DISAGREEMENT UNDER ISSUE 5-9**
14 **“DEFINITION OF REPEATEDLY DELINQUENT” (SECOND OF FOUR**
15 **ISSUES).**

16 A. Eschelon proposes to define Repeatedly Delinquent to mean undisputed amounts
17 received more than 30 days after the Payment Due Date for three consecutive
18 months for the same billing account number (“BAN”). Qwest, on the other hand,
19 proposes that Repeatedly Delinquent should mean late payment three or more
20 times in a twelve month period (*i.e.*, the three months do not need to be
21 consecutive).

22 **Q. WHY IS ESCHELON’S PROPOSAL SUPERIOR TO QWEST’S?**

1 A. Similar to Issue 5-8, Eschelon's proposal would trigger a deposit requirement
2 when there is actually a legitimate concern about a party's ability to pay, while
3 Qwest's proposal would trigger a deposit requirement when there is no legitimate
4 concern.

5 Under Qwest's proposed language, if Eschelon were to pay Qwest a portion of the
6 amount due late in months one and two (even a de minimus amount), make timely
7 payments in full for the next nine months, and then pay a portion of the amount
8 due late in month twelve, Qwest could demand a large security deposit. This
9 scenario does not provide evidence of the financial stress that gives rise to a
10 legitimate need for payment "security."

11 **Q. HAS QWEST AGREED TO THE "3 CONSECUTIVE MONTH"**
12 **STANDARD ESCHELON IS PROPOSING HERE IN ICAS WITH OTHER**
13 **CLECS?**

14 A. Yes. For example, in a recent filing in Utah, McLeodUSA quoted the definition
15 of "Repeatedly Delinquent" in § 26.4.4 of its ICA with Qwest as "being thirty
16 (30) days or more delinquent for three (3) consecutive months."⁸⁴ In addition,
17 ATI, which was recently acquired by Eschelon, has the three consecutive month
18 standard in Section 26.4.4 of its current ICA with Qwest in Washington. In
19 addition to these CLECs for whom Qwest utilizes the 3 consecutive month

⁸⁴ The pertinent portion of McLeodUSA's brief is provided in Exhibit Eschelon 2.16. I have provided as Exhibit Eschelon 2.16 the pertinent pages of various carriers' interconnection/service agreements with Qwest which shows that Qwest has agreed to the three consecutive month standard with numerous CLECs, CMRS providers and paging companies.

1 standard for defining Repeatedly Delinquent, Qwest uses it for the following
2 additional companies (this list is not meant to be exhaustive): AT&T Wireless
3 Services; Pathnet, Inc.; Autotel; Arch Paging, Inc.; Airtouch Paging, Inc.;
4 MetroArea User; and Alamosa PCS LLC. The fact that Qwest has agreed to
5 include “3 consecutive month” language in interconnection/service agreements
6 with other companies shows that Qwest recognizes that this standard adequately
7 protects its interests. Holding Eschelon to a higher standard is unnecessary and
8 discriminatory. Qwest attempts to support its position by pointing out that its
9 proposal has been adopted in the past, but as shown in Exhibit Eschelon 2.16,
10 Eschelon’s proposal has also been adopted in the past, and Qwest/US WEST has
11 agreed to it.

12 **Q. WHY IS ESCHELON’S ALTERNATIVE PROPOSAL – “3 MONTHS IN A**
13 **SIX MONTH PERIOD” - SUPERIOR TO QWEST’S PROPOSAL?**

14 A. Again, Eschelon’s language addresses a situation in which a legitimate concern
15 exists about a party’s ability to pay. For instance, under Eschelon’s alternative
16 proposal, if the billed party had nine consecutive months of timely payment in
17 full, it would not be Repeatedly Delinquent (unlike under Qwest’s proposal).
18 Eschelon offers either proposal #1 or #2 for the Commission’s adoption.

19 **Q. PLEASE DESCRIBE THE DISAGREEMENT UNDER ISSUE 5-11**
20 **“DISPUTES BEFORE COMMISSION” (THIRD OF FOUR ISSUES).**

1 A. This disagreement addresses whether Eschelon can dispute the amount of a
2 deposit or deposit requirement at the Commission before it is implemented.
3 Qwest’s proposal is that “deposits are due and payable within thirty (30) days
4 after demand and conditions are met.” Eschelon’s proposal contains this same
5 language, but also provides an exception if the billed party challenges the amount
6 of the deposit or deposit requirement to the Commission, in which case the
7 deposit due date would be established by the Commission. Eschelon’s language
8 identifies an example in which this scenario may occur, that is, delay in
9 submitting disputes or making payment was reasonably justified due to inaccurate
10 or incomplete billing – much like the examples I discuss above.

11 **Q. IS THE DISPUTE RESOLUTION PROVISION CAPABLE OF**
12 **ADDRESSING ESCHELON’S CONCERNS ABOUT QWEST LEVYING**
13 **DEPOSIT?**

14 A. No. If Eschelon is forced to rely solely on the dispute resolution provision in this
15 instance, it is likely that Eschelon would be required to pay a deposit that Qwest
16 demanded before recourse could be sought and obtained at the Commission.

17 **Q. COULD THE COMMISSION REQUIRE ANY DEPOSIT PAYMENT DUE**
18 **DATE IT WISHES UNDER ESCHELON’S LANGUAGE?**

19 A. Yes. Eschelon’s language simply states that if it brings a dispute to the
20 Commission, the due date for payment of any deposit would be as of the date
21 ordered by the Commission. In this instance, the Commission could require

1 Eschelon to provide interim relief to Qwest while the dispute is being litigated, or
2 the Commission could require payment of a deposit at the conclusion of the
3 dispute, or the Commission could find the deposit unwarranted and require no
4 deposit to be paid. Eschelon's language, therefore, would allow the Commission
5 to make the call on when a deposit is paid when a disagreement regarding that
6 deposit arises.

7 **Q. WOULD ESCHELON'S LANGUAGE REQUIRE THE COMMISSION TO**
8 **MAKE A DETERMINATION IN EVERY INSTANCE?**

9 A. No. Eschelon's language only applies if Eschelon challenges the deposit amount
10 or requirement at the Commission. If Eschelon does not challenge the deposit, it
11 would pay within 30 days as set forth in Section 5.4.5. Eschelon would not waste
12 the resources of the Commission, Qwest, or itself by raising a baseless challenge
13 that would result in Eschelon ultimately paying the deposit anyway.

14 **Q. ESCHELON'S LANGUAGE FOR ISSUE 5-12 HAS AN ALTERNATIVE**
15 **STANDARD OF WHEN THE COMMISSION "DETERMINES THAT ALL**
16 **RELEVANT CIRCUMSTANCES WARRANT A DEPOSIT" (FOURTH OF**
17 **FOUR ISSUES). PLEASE EXPLAIN.**

18 A. Eschelon has proposed alternative language in Issue 5-12 that would not hinge on
19 the definition of "Repeatedly Delinquent." Instead, it would allow the
20 Commission to determine whether a deposit is warranted based on the
21 Commission's review of a Billed Party's payment history and "all relevant

1 circumstances.” Since this option does not rely on the definition of “Repeatedly
2 Delinquent” and defers to Commission authority, it avoids the need to rule on
3 Issues 5-8, 5-9 and 5-11. Eschelon’s alternative language is shown above.

4 **Q. WHAT ARE SOME OF THE ADVANTAGES OF THIS ALTERNATIVE?**

5 A. This option provides the Commission the ability to determine contested deposit
6 requirements on a case-by-case basis if and when they arise. This option would
7 provide the greatest degree of flexibility to the Commission in addressing
8 potential disagreements. If Eschelon does not have a legitimate disagreement
9 with Qwest, Commission approval would be straightforward. However, if there
10 was a disagreement, this alternative would allow the Commission to weigh all
11 relevant facts. The key here is that Commission oversight is preserved and Qwest
12 is not allowed to unilaterally demand deposits.

13 **SUBJECT MATTER NO. 7. REVIEW OF CREDIT STANDING**

14 **Issue No. 5-13: ICA Section 5.4.7**

15 **Q. WHAT IS THE SOURCE OF DISAGREEMENT UNDER ISSUE 5-13 (THE**
16 **FINAL “PAYMENT AND DEPOSITS” ISSUE)?**

17 A Qwest proposes to include language that would allow Qwest to increase a deposit
18 amount or require a new deposit for Eschelon based on Qwest’s unilateral review
19 of Eschelon’s credit standing.

20 **Q. WHAT IS ESCHELON’S PROPOSAL FOR ISSUE 5-13?**

1 A. Eschelon offers two options for Issue 5-13.

2 **Issue No. 5-13 (1st of 2 options)**

3 5.4.7 Intentionally Left Blank

4 **Issue No. 5-13 (2nd of 2 options)**

5 5.4.7 If a Party has received a deposit pursuant to Section 5.4.5
6 but the amount of the deposit is less than the maximum deposit
7 amount permitted by Section 5.4.5, the Billing Party may review
8 the other Party's credit standing and increase the amount of deposit
9 required, if approved by the Commission, but in no event will the
10 maximum amount exceed the amount stated in Section 5.4.5.
11 Section 5.4 is not intended to change the scope of any regulatory
12 agency's or bankruptcy court's authority with regard to Qwest or
13 CLECs.

14 Eschelon's first option is to leave this section intentionally blank. Eschelon
15 contends that Qwest's proposed Section 5.4.7 is undefined and unnecessary.
16 Eschelon provides option #2 in case the Commission is inclined to agree with the
17 concept of allowing Qwest to increase deposit amounts based on its review of
18 Eschelon's credit standing, in which case Commission approval should be
19 required and the language should recognize that 5.4.7 applies to increasing a
20 deposit amount and not establishing a new deposit.⁸⁵

21 **Q. WHAT IS QWEST'S PROPOSAL FOR ISSUE 5-13?**

22 A. Qwest has proposed language that would allow it to review Eschelon's credit
23 standing and unilaterally increase the amount of the deposit. Qwest proposes the
24 following language under Section 5.4.7:

⁸⁵ Qwest contends that its proposed Section 5.4.7 could allow Qwest to not only increase existing deposits but also to demand a new deposit. Qwest has stated that an increase takes into consideration zero as a starting point.

1 5.4.7 The Billing Party may review the other Party's credit
2 standing and increase the amount of deposit required but in no
3 event will the maximum amount exceed the amount stated in
4 Section 5.4.5.

5 **Q. WHY DOES ESCHELON DISAGREE WITH QWEST'S LANGUAGE IN**
6 **5.4.7?**

7 A. There are several reasons. First, Qwest's proposed language would grant it
8 unilateral authority to increase Eschelon's deposit without any recourse by
9 Eschelon. In fact, Eschelon's credit standing would not even need to change for
10 Qwest to invoke Section 5.4.7 and demand a deposit or deposit increase. Again,
11 Eschelon could seek dispute resolution, but as explained above, Commission
12 relief would likely come after Eschelon has already been required to pay Qwest's
13 unilaterally-determined deposit amount.

14 Second, Qwest's proposed provision contains no criteria or standards defining
15 when this provision may be invoked. Qwest's language does not describe the
16 "credit history" that would be subject to review, the conditions that might justify a
17 review, or the circumstances that would warrant an increase. Indeed Qwest has
18 indicated during negotiations that it could simply read something in the
19 newspaper regarding Eschelon and use that information to invoke Section 5.4.7
20 and increase Eschelon's deposit (or require a new deposit).

21 Third, this language would effectively nullify the limitations on deposit
22 requirements under Section 5.4.5. Section 5.4.5 would allow a party to demand a
23 deposit when a party (i) has not established satisfactory credit with the other

1 Party, (ii) is Repeatedly Delinquent in making its payments, or (iii) the Party is
2 being reconnected after a disconnection of service or discontinuance of the
3 processing of orders due to a previous non-payment situation. Qwest's proposed
4 language in 5.4.7 is not limited in any of these respects. In fact, Qwest's
5 proposed language would grant Qwest the authority to increase a deposit
6 requirement even when Eschelon is current in its payments to Qwest. A
7 legitimate concern about Eschelon's ability to pay certainly does not exist when
8 Eschelon is current with Qwest, but Qwest's 5.4.7 would allow it to demand a
9 deposit anyway.

10 **Q. DOES ESCHELON DISAGREE WITH QWEST'S 5.4.7 FOR ANY OTHER**
11 **REASONS?**

12 A. Yes. The provision in Qwest's proposed Section 5.4.7 that allows Qwest to
13 increase deposit amounts is unnecessary because Sections 5.4.5 and 5.4.6 already
14 address how deposits should be recalculated based on financial standing. There is
15 no reason to duplicate less clear provisions in Section 5.4.7. In addition, Qwest is
16 interpreting Section 5.4.7 to allow Qwest to require a new deposit and not just an
17 increase in an existing deposit (*i.e.*, an increase from \$0), and this, too, is
18 unnecessary given that Section 5.4.5 already addresses new deposit requirements.
19 The ICA already provides Qwest with a means to establish and increase a deposit
20 for Eschelon, and it is unnecessary and unfair for Qwest to have a second
21 opportunity to do through Section 5.4.7.

1 Furthermore, Qwest's proposed Section 5.4.7 states that the amount of the
2 deposit, when increased, may not exceed the maximum amount under Section
3 5.4.5. Section 5.4.5, however, provides no method for calculation of a maximum
4 for Qwest's proposed Section 5.4.7. Specifically, Section 5.4.5 states that "[t]he
5 deposit may not exceed the estimated total monthly charges for an average two
6 (2) month period within the first three (3) months, *from the date of the triggering*
7 *event*, which would be either the date of the request for reconnection of services
8 or resumption of order processing and/or the date CLEC is Repeatedly Delinquent
9 as described above for all services." (*emphasis added*) However, under Qwest's
10 Section 5.4.7 there would be no "triggering event" that could be used to select
11 three months for purposes of computing an average. In other words, Section 5.4.7
12 does not involve reconnection, resumption of order processing, or Eschelon being
13 Repeatedly Delinquent, so the deposit cap in 5.4.5 makes no sense within the
14 context of Qwest's proposed Section 5.4.7.

15 **Q. IS THERE REASON FOR CONCERN ABOUT MISUSE OF THIS**
16 **SECTION?**

17 A. Yes. Eschelon has requested examples from Qwest in which Section 5.4.7 would
18 apply that are not already covered by Sections 5.4.5 and 5.4.6. Qwest failed to
19 provide any examples and responded that Qwest has the right to secure its
20 accounts if it determines there may be a financial risk. "Financial risk" is a broad
21 term and suggests that Qwest could take the liberty to read Section 5.4.7 very
22 broadly. The closed language in 5.4.5 reads: "each Party will determine the other

1 Party's credit status based on previous payment history as described below or, if
2 the Parties are doing business with each other for the first time, based on credit
3 reports such as Dun and Bradstreet.” Given that Eschelon and Qwest already
4 agreed to language in Section 5.4.5 that explains how credit status will be
5 determined and does not grant the unilateral authority carved out in Qwest’s
6 proposed Section 5.4.7, there is reason for concern.

7 **Q. WHY IS ESCHELON’S ALTERNATIVE LANGUAGE PROPOSAL**
8 **SUPERIOR TO QWEST’S PROPOSAL FOR SECTION 5.4.7?**

9 A. Eschelon’s alternative would alleviate the concern regarding the unilateral
10 authority granted to Qwest under its proposed Section 5.4.7 by requiring
11 Commission approval of an increase in the deposit amount. This would also
12 allow the Commission to review whatever criteria and/or standards are used by
13 Qwest to increase (or establish) the deposit amount, and also allow the
14 Commission to address any issues related to the deposit cap under Section 5.4.7.
15 Eschelon’s alternative for Section 5.4.7 also recognizes that Section 5.4.7 applies
16 to increasing existing deposit amounts and not establishing new deposit
17 requirements.

18 **Q. PLEASE SUMMARIZE THE PAYMENT AND DEPOSIT ISSUES (ISSUES**
19 **5-6, 5-7, 5-7(A), 5-8, 5-9, 5-11, 5-12 AND 5-13).**

20 A. Eschelon does not object to the inclusion of the Payment and Deposit provisions
21 and remedies in the ICA because it agrees that Qwest (and Eschelon) should have

1 the ability to protect its financial interests when there is a legitimate concern
2 about future payment. After all, the intent of the payment and deposit provisions
3 is to address situations when legitimate concerns exist in this regard. However, if
4 Qwest is able to invoke these provisions in cases where no legitimate concern
5 about ability to pay exists, it could cause significant harm to Eschelon and to
6 customers. Given the seriousness of these steps, and the effects they would have
7 on Eschelon and its customers, Commission oversight should be available to
8 protect the public interest before these steps are taken.

9 **V. NON DISCLOSURE AGREEMENTS AND BILL VALIDATION**
10 **(SUBJECT MATTER NOS. 8 AND 9)**

11 **SUBJECT MATTER NO. 8. COPY OF NON-DISCLOSURE AGREEMENT**

12 **Issue No. 5-16: ICA Section 5.16.9.1**

13 **Q. PLEASE DESCRIBE THE BUSINESS NEED REGARDING COPY OF**
14 **NON-DISCLOSURE AGREEMENT IN ISSUE NO. 5-16.**

15 A. Eschelon provides forecasting information to Qwest. This information is highly
16 competitive and sensitive and this information should not be disclosed to Qwest
17 employees who are in a position to use it to Eschelon's competitive disadvantage.
18 Qwest has agreed that Qwest employees to whom Eschelon's forecasts and
19 forecasting information are disclosed will be required to execute a nondisclosure
20 agreement covering the information. However, Qwest disagrees as to whether
21 Qwest must agree to provide Eschelon with a signed copy of each non-disclosure

1 agreement within ten days of execution. Eschelon should be able to know who at
2 Qwest is reviewing Eschelon's highly confidential information.

3 **Q. WHAT IS ESCHELON'S PROPOSAL TO ADDRESS THIS ISSUE?**

4 A. Eschelon proposes the following (underlined) language for ICA Section 5.16.9.1:

5 5.16.9.1 The Parties may disclose, on a need to know basis only,
6 CLEC individual forecasts and forecasting information disclosed
7 by Qwest, to legal personnel, if a legal issue arises about that
8 forecast, as well as to CLEC's wholesale account managers,
9 wholesale LIS and Collocation product managers, network and
10 growth planning personnel responsible for preparing or responding
11 to such forecasts or forecasting information. In no case shall retail
12 marketing, sales or strategic planning have access to this
13 forecasting information. The Parties will inform all of the
14 aforementioned personnel, with access to such Confidential
15 Information, of its confidential nature and will require personnel to
16 execute a non-disclosure agreement which states that, upon threat
17 of termination, the aforementioned personnel may not reveal or
18 discuss such information with those not authorized to receive it
19 except as specifically authorized by law. Qwest shall provide
20 CLEC with a signed copy of each non-disclosure agreement
21 executed by Qwest personnel within ten (10) Days of execution.
22 Violations of these requirements shall subject the personnel to
23 disciplinary action up to and including termination of employment.

24 **Q. WHAT IS QWEST'S PROPOSAL ON THIS ISSUE?**

25 A. Qwest proposes to delete Eschelon's proposed language.

26 **Q. WHAT TYPE OF FORECAST INFORMATION IS PROVIDED**
27 **PURSUANT TO THE ICA?**

28 A. Forecasts provided under the ICA include competitively sensitive information
29 related to Interconnection Trunks in ICA Section 7.2.2.8; future Central Office
30 space Collocation requirements in ICA Section 8.4.1.4; and forecasted demand by

1 DS0, DS1 and DS3 capacities that will be terminated on the Interconnection
2 Distribution Frame (ICDF) by Qwest on behalf of CLEC in ICA Section 8.4.4.1.

3 **Q. WHY IS ESCHELON'S PROPOSAL NECESSARY AND REASONABLE?**

4 A. If Qwest does not provide Eschelon with copies of executed nondisclosure
5 agreements, Eschelon will have insufficient information to object if sensitive
6 information is provided to a Qwest employee not authorized by the ICA to receive
7 it. Eschelon thus will have no way to confirm that its confidential information is
8 being adequately protected. Qwest has already agreed that employees will sign
9 the agreement. Eschelon's proposal to require Qwest to provide a copy of that
10 existing executed agreement imposes no additional burden on Qwest. Qwest's
11 unwillingness to provide copies of executed nondisclosure agreements renders the
12 agreed upon requirement to actually execute these agreements difficult to enforce.

13 Eschelon's proposal to receive copies of executed non-disclosure agreements
14 reflects the common practice in other contexts under which the parties exchange
15 signature pages of confidentiality protective agreements so that a party will be
16 aware of who is receiving its confidential information and will be in a position to
17 raise objections if necessary.

18 Because providing executed protective agreements is common practice and
19 facilitates Eschelon's ability to enforce these agreements, Qwest should be
20 required to provide signed copies of these agreements to Eschelon.

1 **Q. IS IT BURDENSOME TO PROVIDE SIGNED COPIES OF PROTECTIVE**
2 **AGREEMENTS?**

3 A. No. Providing copies of signed protective agreements is common practice and
4 can not reasonably be considered a burden.

5 **Q. IS ESCHELON PROTECTED UNDER SECTION 18 OF THE ICA?**

6 A. No. Though section 18.3.1 allows Eschelon to audit Qwest's compliance with
7 this interconnection agreement, the most obvious potential cause of non-
8 compliance with the Agreement regarding the handling of Eschelon's forecast
9 would be the signatories of the protective agreement. This is precisely the type of
10 information that should be made available to Eschelon to ensure the proper
11 handling of forecasted data. Section 18.3.1 reads in its entirety [emphasis added]:

12 18.3.1 Either Party may request an Audit of the other Party's
13 compliance with this Agreement's measures and requirements
14 applicable to limitations on the distribution, maintenance, and use
15 of proprietary or other protected information that the requesting
16 Party has provided to the other. Those *Audits shall not take place*
17 *more frequently than once in every three (3) years unless cause is*
18 *shown* to support a specifically requested audit that would
19 otherwise violate this frequency restriction. *Examinations will not*
20 *be permitted in connection with investigating or testing such*
21 *compliance.* Other provisions of this Section that are not
22 inconsistent herewith shall apply, except that in the case of audits,
23 the Party to be audited may also request the use of an independent
24 auditor.

25 **Q. PLEASE SUMMARIZE THIS ISSUE.**

26 A. Qwest has agreed that Qwest employees to whom Eschelon's forecasts and
27 forecasting information are disclosed will be required to execute a nondisclosure

1 agreement covering the information. Eschelon's proposed language would
2 require Qwest to provide Eschelon with a signed copy of each non-disclosure
3 agreement within ten days of execution. Eschelon's language is reasonable and
4 should be adopted.

5 **SUBJECT MATTER NO. 9. TRANSIT RECORD CHARGE AND BILL**
6 **VALIDATION**

7 **Issues Nos. 7-18 and 7-19: ICA Sections 7.6.3.1 and 7.6.4**

8 **Q. PLEASE DESCRIBE THE BUSINESS NEED RELATED TO TRANSIT**
9 **RECORD CHARGE AND BILL VALIDATION IN ISSUE NOS. 7-18 AND**
10 **7-19.**

11 A. "Transit Traffic" is defined as any traffic that originates from one
12 Telecommunications Carrier's network, transits another Telecommunications
13 Carrier's network, and terminates to yet another Telecommunications Carrier's
14 network⁸⁶ Qwest is a transit provider and bills Eschelon for transit for certain
15 Eschelon originated calls. The bills that Qwest provides to Eschelon for Eschelon
16 originated calls do not contain call record detail, but instead simply contain the
17 number of transit minutes and the transit traffic rate. In order to validate the bills
18 that Qwest provides, Eschelon requests, on a limited basis, call records that would
19 allow for bill verification. It is unclear whether Qwest will even provide the

⁸⁶ See ICA, Section 4 - Definitions.

1 transit records necessary for bill verification, and if so, whether Qwest would
2 attempt to charge for the information necessary to validate Qwest's bills.

3 **Q. WHAT IS ESCHELON'S PROPOSAL TO ADDRESS THIS ISSUE?**

4 A. Eschelon proposes the following (underlined) language:

5 **Issue No. 7-18:**

6 7.6.3.1 In order to verify Qwest's bills to CLEC for Transit Traffic
7 the billed party may request sample 11-01-XX records for
8 specified offices. These records will be provided by the transit
9 provider in EMI mechanized format to the billed party at no
10 charge, because the records will not be used to bill a Carrier. The
11 billed party will limit requests for sample 11-01-XX data to a
12 maximum of once every six months, provided that Billing is
13 accurate.

14 **Issue No. 7-19:**

15 7.6.4 Qwest will provide the non-transit provider, upon request,
16 bill validation detail including but not limited to: originating and
17 terminating CLLI code, originating and terminating Operating
18 Company Number, originating and terminating state jurisdiction,
19 number of minutes being billed, rate elements being billed, and
20 rates applied to each minute.

21 **Q. WHAT IS QWEST'S PROPOSAL ON THIS ISSUE?**

22 A. Qwest proposes that Eschelon's language be deleted.

23 **Q. WHY IS ESCHELON'S LANGUAGE NECESSARY?**

24 A. Qwest has already agreed to provide reasonably requested documentation that will
25 expedite the resolution of disputes between Eschelon and Qwest.⁸⁷ Section 7.6.3
26 of this ICA contains agreed upon language describing the circumstances under
27 which Qwest can charge CLEC for transit records.

⁸⁷ See ICA Section 21.8.4.3 of this Interconnection Agreement.

1 7.6.3 If the non-transit provider requests records pursuant to ICA
2 Sections 7.6.1 or 7.6.2, the Parties will charge the same rate for
3 Category 11-01-XX records sent in an EMI mechanized format.
4 *These records are used to provide information necessary for each*
5 *Party to bill the Originating Carrier.* The charge listed in Exhibit
6 A of this Agreement is applicable to each transit record that meets
7 the definition of a billable record. (Emphasis added)

8 Because ICA Section 7.6.3 appears to be limited to records necessary to bill the
9 Originating Carrier and the records sought by Eschelon are records of Eschelon
10 originated calls, Eschelon proposes to add a provision that explicitly states that
11 there is no charge for sample records used to verify Qwest's bills to CLEC.
12 Qwest does not bill Eschelon transit charges for calls originated by a third party.
13 Qwest does bill Eschelon transit charges for calls originated by Eschelon and it is
14 these records Eschelon seeks to review for bill validation purposes.

15 It should also be noted that Eschelon's language limits the request for these
16 records to once every six months, provided Qwest's billing is accurate. ICA
17 Section 7.6.4 of Eschelon's proposal simply provides detail regarding the
18 information Eschelon seeks when it requests transit records for the purpose of bill
19 validation.

20 **Q. WHY CAN'T ESCHELON VERIFY THE INFORMATION ON QWEST'S**
21 **TRANSIT BILLS?**

22 A. Qwest's transit bills provide information at the summary level. The bills tell you
23 the number of minutes terminated to a particular office, but do not provide call
24 detail information, such as the time and duration of each individual call. Because

1 Eschelon originates these calls, Eschelon may be able to compare its own switch
2 records with the bill summaries. However, in instances when Eschelon's data
3 does not reconcile with Qwest's summary bills, Eschelon would require more
4 detailed information to determine why differences exist.

5 **Q. DOES QWEST HAVE THE INFORMATION REQUESTED BY**
6 **ESCHELON?**

7 A. Yes. Qwest must have call detail information available to it in order to generate
8 the summary bills. Otherwise, how is Qwest able to bill Eschelon for these
9 minutes? Eschelon is simply seeking information that it can use to validate the
10 bills it receives from Qwest. Eschelon's proposal for Section 7.6.4 does not ask
11 that the information be added to other records; it merely seeks to obtain
12 information on a request basis when needed to validate bills.

13 **Q. PLEASE SUMMARIZE THIS ISSUE.**

14 A. In order to validate the bills that Qwest provides, Eschelon needs occasional
15 access to a limited number of call records that would allow for bill verification.
16 Eschelon's language allows for Eschelon to obtain these records from Qwest for
17 the purpose of bill verification. Eschelon's language is reasonable and therefore
18 should be adopted.

1 **VI. WIRE CENTER ISSUES (ISSUE NOS. 9-37, 9-37(A), 9-37(B), 9-38, 9-39**
2 **(EXCEPT CAPS), 9-40, 9-41 AND 9-42)**

3 **Q. PLEASE COMMENT REGARDING THE WIRE CENTER ISSUES**
4 **(ISSUES 9-37, 9-37(A), 9-37(B), 9-38, 9-39, 9-40, 9-41, AND 9-42).**

5 A. Please refer to Exhibit 2.30 regarding the Joint Motion between Eschelon and
6 Qwest regarding a single compliance filing and the wire center issues.

7 **VII. UNE AVAILABILITY, CERTAIN RATE APPLICATIONS AND**
8 **COMMINGLED EELS (SUBJECT MATTER NOS. 22, 22A, 25 AND 26)**

9 **SUBJECT MATTER NO. 22, UNBUNDLED CUSTOMER CONTROLLED**
10 **REARRANGEMENT ELEMENT (“UCCRE”)**

11 **Issue No. 9-53: ICA Sections 1.7.3, 9.9 and 9.9.1**

12 **Q. PLEASE DESCRIBE THE BUSINESS NEED AND SUMMARIZE THE**
13 **ISSUE RELATED TO UNBUNDLED CUSTOMER CONTROLLED**
14 **REARRANGEMENT.**

15 A. Discrimination is harmful to Eschelon’s business, as it is at a disadvantage vis-à-
16 vis its competitors if it is discriminated against. Eschelon offers four alternative
17 proposals for Subject Matter 22 that are all designed to remedy the following
18 situation: Qwest refuses to offer a product to Eschelon on the grounds that Qwest
19 plans to discontinue the product (such as for lack of demand), but Qwest does not
20 discontinue it. The product remains in the SGAT and/or ICAs with other CLECs,
21 and Qwest takes no action (such as amending those ICAs or seeking Commission
22 approval) to remove the product, while Qwest will not provide the product on the

1 same terms to Eschelon in its ICA. Eschelon is willing to accept the identical
2 language and rates for these products in its ICA as are currently contained in the
3 SGAT and/or the Qwest-AT&T ICA, but Qwest refuses to include those terms in
4 Eschelon's ICA.

5 Through Eschelon's four language options as to how to remedy this problem,
6 Eschelon offers to (1) require Qwest to notify Eschelon and offer it the same
7 terms upon which it offers the product to another CLEC, if during the term of this
8 Agreement Qwest performs or offers to perform the identified services to the
9 other CLEC; (2) require Qwest to obtain Commission approval to phase out or
10 otherwise cease offering a wholesale product or service to all CLECs; (3) require
11 Qwest to obtain Commission approval to phase out or otherwise cease offering a
12 wholesale product or service to all CLECs (with additional procedures included to
13 address Qwest's stated concerns about the second proposal); or (4) require Qwest
14 to continue to offer products on nondiscriminatory terms until it amends all
15 agreements to eliminate the product or asks the Commission for approval to phase
16 out or otherwise cease offering a wholesale product or service to all CLECs (with
17 no language about the procedures for doing so, as they will be determined later by
18 the Commission, should Qwest request such a process). All of these proposals are
19 compromises from Eschelon's initial position, which was simply to include the
20 same language for these products that is currently included in the SGAT and/or
21 the Qwest-AT&T ICA. Eschelon made the second, third, and fourth proposals
22 (the "phase out" proposals) after the witness for the Minnesota Department of

1 Commerce pointed out in testimony that a commission process for phasing out
2 products may be needed if Qwest prefers not to individually amend each
3 interconnection agreement.

4 Qwest proposes to delete Eschelon's language and provide only that it will
5 provide this product if the Commission approves "a new negotiated ICA or
6 negotiated amendment" during the term of the agreement. AT&T already has this
7 product in its ICA. Under Qwest's proposal, Qwest could provide this product to
8 AT&T pursuant to the existing approved Qwest-AT&T ICA on the date after the
9 Qwest-Eschelon proposed ICA becomes effective, and Qwest would not have to
10 offer the same product to Eschelon because AT&T's ICA is not a "new negotiated
11 ICA." Qwest's proposed language does nothing to remedy the identified
12 problem. If Qwest does not amend its ICAs with AT&T and other CLECs that
13 contain this product, Qwest should have to provide it to Eschelon on the same
14 terms or approach the Commission to discontinue it generally to avoid
15 discrimination and ensure an orderly phase out of the product.

16 The product that is at issue in Issue 9-53 is Unbundled Customer Controlled
17 Rearrangement Element ("UCCRE"). Qwest claims that it is discontinuing this
18 product due to lack of demand, but UCCRE is in the Qwest-AT&T ICA, the
19 SGAT and a Qwest-Qwest ICA in Oregon.⁸⁸ UCCRE enables Eschelon to

⁸⁸ In Oregon Qwest Corporation (Qwest) has an interconnection agreement with its CLEC, Qwest Communications Corp. that contains UCCRE. Further, when this agreement was updated with a TRRO Amendment, UCCRE was not removed from the interconnection agreement. The TRRO amendment as part of the Qwest-Qwest contract was approved by the Oregon Commission on

1 control the configuration of UNEs or ancillary services on a Near Real Time basis
2 through a digital cross connect device, when this device is available in a Qwest
3 central office. Qwest previously had agreed in negotiations to provide UCCRE to
4 Eschelon but now claims it plans to discontinue the product.

5 **Q. WHAT IS ESCHELON'S PROPOSAL TO ADDRESS THIS ISSUE?**

6 A. The language of Eschelon's four alternative language proposals for these issues is
7 as follows:

8 **Proposal #1 (Sections 9.9 & 9.9.1)**

9 **9.9 Unbundled Customer Controlled Rearrangement Element**
10 **(UCCRE)**

11 9.9.1 If Qwest provides or offers to provide UCCRE to any
12 other CLEC during the term of this Agreement, Qwest will
13 notify CLEC and offer CLEC an amendment to this
14 Agreement that allows CLEC, at its option, to request
15 UCCRE on nondiscriminatory terms and conditions.

16 **Proposal #2 (Sections 1.7.3, 9.9 & 9.9.1)**

17 1.7.3 If Qwest desires to phase out the provision of an element,
18 service or functionality included in this Agreement, it must first
19 obtain an order from the Commission approving its process for
20 withdrawing the element, service of functionality. Obtaining such
21 an order will not be necessary if Qwest (1) promptly phases-out an
22 element, service or functionality from the agreements of all CLECs
23 in Utah within a three-month time period when the FCC has
24 ordered that the element, service of functionality does not have to
25 be ordered, or (2) follows a phase-out process ordered by the FCC.

26 **9.9 Unbundled Customer Controlled Rearrangement Element**
27 **(UCCRE)**
28

1 9.9.1 Qwest shall provide Unbundled Customer Controlled
2 Rearrangement Element (UCCRE) to CLEC in a non-
3 discriminatory manner according to the terms and
4 conditions of Section 9.9 and subparts of the SGAT, unless
5 Qwest obtains a phase-out order (pursuant to Section 1.7.3)
6 from the Commission within four months from the
7 effective date of this Agreement.

8 **Proposal #3 (Sections 1.7.3, 9.9 & 9.9.1)**

9 1.7.3 If Qwest desires to phase out or otherwise cease offering on
10 a wholesale basis (without first individually amending every
11 interconnection agreement containing that term and updating the
12 SGAT) an Interconnection service, access to Unbundled Network
13 Elements (UNEs), Ancillary Services or Telecommunications
14 Services available for resale, Qwest must request and obtain
15 Commission approval, after CLEC and other potentially affected
16 carriers are afforded reasonable notice and opportunity to be heard
17 in a generic Commission proceeding. For example, if a product is
18 generally available per the terms of the SGAT and is contained in
19 the ICAs of other CLECs (but not CLEC), before refusing to make
20 that product available to CLEC on the same terms on the basis that
21 Qwest intends to cease offering the product (such as due to lack of
22 demand), Qwest must either (1) amend the ICAs of those other
23 CLECs and update the SGAT to remove the product; or (2) obtain
24 Commission approval to cease offering the product on a wholesale
25 basis. This provision is intended to help facilitate
26 nondiscrimination by ensuring that Qwest cannot refuse to offer a
27 product on the same terms to CLEC while that product is still
28 contained in the ICAs of other CLECs or in the SGAT.

29
30 1.7.3.1 If the basis for Qwest's request is that Qwest is no
31 longer required to provide the product or service pursuant
32 to a legally binding modification or change of the Existing
33 Rules, in the cases of conflict, the pertinent legal ruling and
34 the terms of Section 2.2 of this Agreement govern
35 notwithstanding anything in this Section 1.7.3.

36
37 1.7.3.2 This Section 1.7.3 is not intended to change the
38 scope of any regulatory agency's authority with regard to
39 Qwest or CLECs.

40
41 1.7.3.3 This Section 1.7.3 relates to the cessation of a
42 product or service offering on a wholesale basis as

1 described in Section 1.7.3 (referred to as a “phase out” or
2 as “cease offering”). Nothing in this Section 1.7.3 prevents
3 another CLEC and Qwest from mutually agreeing to
4 remove a product from an individual ICA to which CLEC
5 is not a party.

6
7 1.7.3.4 Before Qwest submits a request to phase out or
8 cease offering a product or service (as those terms are used
9 in this Section 1.7.3) pursuant to this Section 1.7.3, and
10 while a request pursuant to this Section 1.7.3 is pending
11 before the Commission, Qwest must continue to offer the
12 product or service, unless the Commission orders
13 otherwise.

14
15 1.7.3.4.1 If the Commission orders that Qwest need
16 not offer the product or service while the
17 proceeding is pending, the Commission may place
18 such restrictions on that order as allowed by its
19 rules and authority, including a condition that if
20 Qwest later offers the product or service to any
21 CLEC, it must then inform CLECs of the
22 availability of the product or service and offer it to
23 other CLECs on the same terms and conditions. If
24 those terms and conditions are in this Agreement
25 (but were not in effect due to the Commission order
26 that Qwest need not offer the product or service
27 while the proceeding is pending), once Qwest offers
28 those terms to any other CLEC, Qwest must offer
29 those terms to CLEC pursuant to those terms in this
30 Agreement without amendment as well.

31
32 1.7.3.5 If the Commission approves the phase out or other
33 cessation of a product or service offering that is contained
34 in this Agreement, the product or service will no longer be
35 available per the terms of the Commission’s order without
36 the need for an amendment to this Agreement, unless the
37 Commission orders otherwise or the Parties agree to amend
38 this Agreement. Qwest will amend its SGAT consistent
39 with the Commission’s ruling, unless the Commission
40 orders otherwise.

41
42 **9.9 Unbundled Customer Controlled Rearrangement Element**
43 **(UCCRE)**
44

1 9.9.1 Qwest shall provide Unbundled Customer Controlled
2 Rearrangement Element (UCCRE) to CLEC in a non-
3 discriminatory manner according to the terms and conditions of
4 Section 9.9 and subparts of the SGAT, unless Qwest obtains an
5 order from the Commission that it need not offer UCCRE to
6 CLECs, such as an order pursuant to Section 1.7.3 of this
7 Agreement.

8
9 **Proposal #4 (Sections 1.7.3, 9.9 & 9.9.1)**

10 1.7.3 If Qwest desires to phase out or otherwise cease offering a
11 product, service, element, or functionality on a wholesale basis that
12 it has previously made available pursuant to Section 251 of the
13 Act, Qwest must first obtain an order from the Commission
14 adopting a process for doing so. Once that process in place, Qwest
15 may use that process as ordered by the Commission.

16
17 1.7.3.1 Unless and until a process is approved by the
18 Commission as described in Section 1.7.3, Qwest must
19 continue to offer such products, services, elements, or
20 functionalities on a nondiscriminatory basis, such that
21 Qwest may not refuse to make an offering available to
22 CLEC on the same terms as it is available to other CLECs
23 through their ICAs or the SGAT on the grounds that Qwest,
24 although it has not yet amended those agreements, indicates
25 that it intends to cease offering that product (such as due to
26 lack of demand). If the Commission does not adopt a
27 process as described in Section 1.7.3 or Qwest chooses not
28 to use that process, Qwest may cease a wholesale offering
29 by promptly amending all ICAs containing that offering to
30 remove it.

31 **For 9.9 & subparts: As part of Proposal #4, Eschelon proposes that the**
32 **language of the SGAT (copied below) for Section 9.9 and subparts be**
33 **included in the Qwest-Eschelon ICA, subject to Qwest being able to remove**
34 **it through the process described in Section 1.7.3.**

35
36 **9.9 Unbundled Customer Controlled Rearrangement Element (UCCRE)**

37 Qwest shall provide Unbundled Customer Controlled Rearrangement Element
38 (UCCRE) in a non-discriminatory manner according to the following terms and
39 conditions.

40 **9.9.1 Description**

41 9.9.1.1 Unbundled Customer Controlled Rearrangement Element

1 (UCCRE) provides the means by which CLEC controls the configuration
2 of Unbundled Network Elements (UNEs) or ancillary services on a near
3 real time basis through a digital cross connect device. UCCRE utilizes the
4 Digital Cross-Connect System (DCS). UCCRE is available in Qwest Wire
5 Centers that contain a DCS and such DCS is UCCRE compatible.

6 **9.9.2 Terms and Conditions**

7 9.9.2.1 DCS ports are DS1, DS3 and Virtual Ports (Virtual Ports are for
8 connecting one End User to another). The DCS Port is connected to the
9 Demarcation Point using tie cables via the appropriate DSX cross-connect
10 panel. The DSX panel serves both as a “Design-To” point and a network
11 interface at the DCS. CLEC is responsible for designing to the “Design-
12 To” point. CLEC may connect the UCCRE ports to its elements or CLEC
13 designated equipment. If CLEC desires DS0 Port functionality, CLEC
14 will order a DS1 UCCRE Port and provide its own multiplexer (or DS1
15 UDIT multiplexers) and connect them together. This combination will
16 form the equivalent of 24 DS0-level ports.

17 9.9.2.2 The reconfiguration of the service is accomplished at the DS0
18 signal level. Reconfiguration of these services can be accomplished
19 through two methods: Dial Up or Attendant Access.

20 9.9.2.2.1 Dial Up Access. Qwest will provide access to mutually
21 agreed upon UCCRE points in those offices where UCCRE is
22 available. Qwest will provide and engineer this service in the same
23 manner that it is currently provided to Qwest’s End Users.

24 9.9.2.2.2 Attendant Access. When CLEC requests Qwest to make
25 changes on its behalf, an attendant access charge will apply per
26 transaction.

27 **9.9.3 Rate Elements**

28 9.9.3.1 Recurring rate elements include:

29 9.9.3.1.1 DS1 Port;

30 9.9.3.1.2 DS3 Port;

31 9.9.3.1.3 Dial Up Access; and

32 9.9.3.1.4 Attendant Access.

33 9.9.3.2 Nonrecurring rate elements include:

34 9.9.3.2.1 DS1 Port;

35 9.9.3.2.2 DS3 Port; and

36 9.9.3.2.3 Virtual Ports.

37 **9.9.4 Ordering Process**

1 9.9.4.1 Ordering processes and installation intervals are specified in
2 Exhibit C of this Agreement and are the same as specified in the UNEs -
3 UDIT Section. UCCRE is ordered via the ASR process.

4 9.9.4.2 UCCRE is ordered with the Basic Installation option. Qwest will
5 begin the work activity on the negotiated Due Date and notify CLEC when
6 the work activity is complete. Test results performed by Qwest are not
7 provided to CLEC.

8 **Q. WHAT IS QWEST’S PROPOSAL ON THIS ISSUE?**

9 A. Qwest opposes all of Eschelon’s language for Issue 9-53, and proposes to leave
10 Section 9.9 intentionally blank.

11 **Q. QWEST PROPOSES THE DELETION OF ALL LANGUAGE PROPOSED**
12 **BY ESCHELON, INCLUDING DELETION OF ALL THREE PHASE OUT**
13 **PROPOSALS FOR SECTION 1.7.3. WHY IS ESCHELON’S LANGUAGE**
14 **APPROPRIATE?**

15 A. This issue presents a straight-forward application of the prohibition against
16 discrimination.⁸⁹ Qwest currently offers to other CLECs an option under which it
17 will provide UCCRE and, when it does so, charges the Commission-approved rate
18 for the services provided. Specifically, Qwest makes this option available to itself
19 and AT&T pursuant to those carriers’ ICAs that were approved by this
20 Commission. When the FCC reversed the pick-and-choose rule, it made clear that
21 “existing state and federal safeguards against discriminatory behavior” were still
22 in effect and remained “in place” to provide needed protection against

⁸⁹ See 47 U.S.C. § 251(c)(3) (duty of local exchange carrier to nondiscriminatory access to network elements on an unbundled basis).

1 discrimination.⁹⁰ Therefore, Qwest cannot, consistent with its obligation to not
2 discriminate, offer such a UNE term under its ICAs with other carriers but refuse
3 to make that term available under its agreement with Eschelon.

4 Qwest has opposed Eschelon's proposed contract language regarding Qwest's
5 obligation to provide UCCRE primarily on the ground that there is no CLEC
6 demand for this product and that Qwest, therefore, is discontinuing offering it on
7 a "going forward basis."⁹¹ The Minnesota Department of Commerce witness Dr.
8 Fagerlund recommended that the ICA include language that would enable Qwest
9 to "phase out" elements that are either no longer required or not needed. In
10 response to Dr. Fagerlund's recommendation, Eschelon has proposed new
11 language (Eschelon proposals #2-#4) that would allow Qwest to phase out
12 elements, subject to Commission review.

13 Eschelon proposed placing the language in Section 1.7, because this section
14 already deals with ICA amendments. As Section 1.7.1, in a sense, deals with the
15 "phasing in" of new products, Section 1.7.3 seemed like a logical place to place
16 language relating to the "phasing out" of products.

17 Eschelon's Proposal #3 is offered to alleviate concerns asserted by Qwest during
18 cross examination on this issue in the Minnesota arbitration. Eschelon's Proposal

⁹⁰ ["Second Report and Order"] Second Report and Order, In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338 (July 8, 2004) ¶¶ 18, 20-23.

⁹¹ See Oregon Disputed Issues Matrix, Exhibit 3 to Eschelon's Petition for Arbitration in the Oregon Eschelon-Qwest arbitration, Qwest's position statement for Issue No. 9-53. Qwest did not provide position statements in the Utah. See footnote 75 for more detail.

1 #3 clarifies that its proposal is intended to govern the operation of this
2 interconnection agreement and does not interfere with the negotiations of other
3 CLECs. An example has been added to assist in identifying the situation being
4 addressed.

5 Eschelon's Proposal #4 is an alternative approach that allows Qwest to propose
6 for Commission review and adoption a process for the phase out or withdrawal of
7 a product or service. Unless and until the Commission approves such a process
8 and it is followed by Qwest, Qwest must either amend all its ICAs individually to
9 eliminate the offering or offer the products and services on a nondiscriminatory
10 basis. This proposal is also responsive to Qwest's suggestion that the other phase
11 out proposals had too much detail in them and perhaps the procedures for a phase
12 out proposal should be worked out in a more generic proceeding. Under Proposal
13 #4, Qwest has the opportunity to obtain a phase out process in such circumstances
14 and, until then, may withdraw products by amending the agreements containing
15 them to eliminate those terms.

16 All three of Eschelon's phase out proposals attempt to remedy the current
17 situation in which Qwest is holding out products and services as being generally
18 available through its SGATs, and Qwest is obligated to provide them to other
19 CLECs under their ICAs, but Qwest will not offer these products and services to
20 Eschelon.

21 **Q. WHY IS QWEST'S PROPOSAL INSUFFICIENT?**

1 A. Qwest's proposal would allow Qwest to leave the other agreements in place and
2 discriminate against Eschelon. For UCCRE, Qwest's language is silent, allowing
3 Qwest to offer this to other CLECs while excluding its availability to Eschelon.

4 **Q. QWEST ARGUES THAT THERE IS NO DEMAND FOR UCCRE.**
5 **SHOULD DEMAND BE TAKEN INTO ACCOUNT?**

6 A. No. If Qwest were permitted to unilaterally withdraw a product based on nothing
7 more than its assertion that there is "no demand" for the product, Eschelon would,
8 without Commission review, have little or no means for challenging such an
9 assertion. "Lack of demand" may or may not be a factor that the Commission
10 will wish to take into account, but Qwest should be required to make its case to
11 the Commission, rather than engaging in self help and proceeding without
12 Commission oversight.

13 There is nothing in the Act that limits access only to products and services with
14 current demand. If Eschelon has a legitimate business reason to believe it may
15 use a service during the term of the ICA (particularly in light of dwindling UNE
16 access and the need to explore alternatives going forward), it should be able to get
17 that service, particularly as long as that service is offered to other CLECs.
18 Eschelon's phase out proposal would, nonetheless, provide Qwest a mechanism to
19 withdraw offerings if it can make its case for withdrawal to the Commission.

1 For purposes of applying the prohibition under federal and state law against
2 discrimination, the issue is not whether there is “demand” for a product or service,
3 but rather, whether Qwest makes the product or service available to other CLECs.

4 Qwest’s approach of attempting to remove this rate element on an ICA by ICA
5 basis will result in some carriers having access to this service while others do not.
6 If Qwest proposes changes in Commission-approved rates, including the
7 availability of products for which this Commission has set rates, Qwest should go
8 to the Commission, rather than to each CLEC. Unless and until it does so, Qwest
9 has an obligation to offer the service to all carriers on the same terms and
10 conditions.

11 Qwest makes this product available pursuant to its SGAT as well as pursuant to
12 interconnection agreements that it has with other carriers such as AT&T.⁹²
13 Because Qwest provides this product to other carriers, it must also provide it to
14 Eschelon.⁹³ Eschelon’s proposal, consistent with Qwest’s obligations to not
15 discriminate among carriers, only requires that Qwest provide Eschelon with this
16 product on the same terms and conditions as it offers or provides the elements to
17 another carrier.

⁹² See SGAT and AT&T/Qwest ICA, § 9.9. In addition, Qwest is required to provide CLECs with nondiscriminatory access to unbundled network elements pursuant to 47 U.S.C. § 251(c)(3).

⁹³ *Second Report and Order* at ¶¶ 18, 20 23.

1 Qwest's proposal, in contrast, allows Qwest to continue to provide access to these
2 products to other CLECs under its existing SGATs and ICAs while denying such
3 access to Eschelon. This is discriminatory and violates the Act.

4 **Q. CAN YOU PROVIDE ANY EXAMPLES WHERE THERE WAS**
5 **SIGNIFICANT DEBATE OVER A UNE SERVICE, YET LITTLE**
6 **ACTUAL DEMAND?**

7 A. Yes. In the past, there was considerable debate regarding access to dark fiber.⁹⁴
8 Few, if any CLECs, ordered dark fiber for a long time, but CLECs still had a legal
9 right to it and eventually it has been used. What this example illustrates is that,
10 because of rapid and frequent changes in both the law and technology in the
11 telecommunications field, it is difficult to predict the future demand for a product
12 or service for which the current demand may be minimal.

13 **Q. DID THE *TRRO* REMOVE QWEST'S OBLIGATION TO PROVIDE**
14 **UCCRE?**

15 A. No. Qwest argues that, because the FCC omitted a reference to "digital cross-
16 connect systems" when it re-wrote the unbundling rule, 47 C.F.R. § 51.319 ("Rule
17 319"), this means that it is not obligated to provide UCCRE as a UNE.

18 Rule 319 sets forth the FCC's unbundling rules. Prior to its revision pursuant to
19 the *TRO*, 47 C.F.R. § 51.319(d)(2)(iv) provided that:

⁹⁴ Section 9.7.1.1 of the ICA defines Dark Fiber as follows: "Dark Fiber, unlike "lit" fiber, is unused fiber within an existing fiber optic cable that has not yet been activated through optronics to render it capable of carrying communications services."

1 “The incumbent shall . . . permit, to the extent technically feasible,
2 a requesting telecommunications carrier to obtain the functionality
3 provided by the incumbent LEC’s digital cross-connect systems in
4 the same manner that the incumbent LEC provides such
5 functionality to interexchange carriers.”

6 This rule was substantially re-written in 2003 (and re-written again pursuant to the
7 *TRRO*) to set forth a process by which state commissions would conduct an
8 impairment analysis to determine what elements must be unbundled. As a result
9 of the re-write, § 51.319(d)(2)(iv) was omitted from the rule. Qwest interprets
10 this to mean that the FCC found that incumbents are not required to offer access
11 to digital cross connect systems and, therefore, that Qwest is not required to offer
12 UCCRE, which is accessed using a digital cross connect system.

13 However, after Rule 319 was re-written, 47 C.F.R. § 51.305(a)(2)(iv) continued to
14 require incumbents to provide CLECs with interconnection at “central office
15 cross-connect points.” The reasonable interpretation is that, in amending Rule
16 319, the FCC was focused on establishing a process for conducting the necessary
17 impairment analysis, and not that the FCC had concluded that unbundled access
18 to cross-connects would no longer be required. There is no discussion in the
19 FCC’s Order relieving incumbents from the obligation to offer access using cross-
20 connects. When the FCC has eliminated such obligations in other cases, it has
21 done so expressly.

22 In the absence of any amendment by the FCC to its unbundling rules, it remains
23 obligatory that Qwest make this product available pursuant to its SGAT as well as

1 pursuant to interconnection agreements that it has with other carriers.⁹⁵ Because
2 Qwest provides this product to other carriers, it must also provide it to Eschelon.⁹⁶
3 Eschelon's proposal, consistent with Qwest's obligations to avoid discrimination
4 among carriers, only requires that Qwest provide Eschelon with this product on
5 the same terms and conditions as it offers or provides them to another carrier.

6 **Q. PLEASE SUMMARIZE THIS ISSUE.**

7 A. Eschelon's language states that the rates and services Qwest currently offers to
8 other CLECs related to UCCRE be available to Eschelon so long as they are
9 available to other CLECs. This proposal is reasonable and allows Eschelon to
10 utilize this product, to the extent Qwest makes it available to other CLECs.
11 Eschelon offers three alternative proposals that would all allow Qwest to
12 discontinue products (such as for lack of demand) without individually amending
13 every ICA containing those products, so any alleged burden of doing so has been
14 adequately addressed by Eschelon's proposals.

15 **SUBJECT MATTER NO. 22A. APPLICATION OF UDF-IOF TERMINATION**
16 **(FIXED) RATE ELEMENT**

17 *Issue No. 9-51: ICA Section 9.7.5.2.1.a*

18 **Q. HAS THIS ISSUE CLOSED?**

19 A. Yes. This issue has closed with the following language:

⁹⁵ See SGAT §9.9, Qwest-AT&T ICA § 9.9. In addition, Qwest is required to provide CLECs with nondiscriminatory access to unbundled network elements pursuant to 47 U.S.C. § 251(c)(3).

⁹⁶ *Second Report and Order* at ¶¶ 18, 20 23.

1 9.7.5.2.1.a) UDF-IOF Termination (Fixed) Rate Element. This rate
2 element is a recurring rate element and provides a termination at the
3 interoffice FDP within the Qwest Wire Center(s). A UDF-IOF termination
4 charge applies per single strand termination or per pair termination at an
5 FDP or like cross-connect point.

6 In addition, the rate in Exhibit A for 9.7.4.1.4 for UDF-IOF Single Strand
7 Termination will be \$2.76.

8 **SUBJECT MATTER NO. 25. SERVICE ELIGIBILITY CRITERIA**

9 *Issue Nos. 9-56 and 9-56(a): ICA Sections 9.23.4.3.1.1 and 9.23.4.3.1.1.1.1*

10 **Q. PLEASE DESCRIBE THE BUSINESS NEED RELATED TO SERVICE**
11 **ELIGIBILITY CRITERIA.**

12 A. Qwest is required by the FCC to have cause before conducting an audit regarding
13 CLEC compliance with service eligibility requirements. Eschelon's proposed
14 language memorializes this requirement and requires Qwest to provide
15 information to Eschelon that Qwest used to support its cause for review. Service
16 eligibility audits impose a burden and cost upon Eschelon and because Qwest is
17 required to have cause for such an audit, Qwest should also be required to provide
18 the rationale supporting its request for an audit. Besides being consistent with the
19 requirement that Qwest have cause before conducting on audit, providing this
20 information is likely to facilitate resolution of any disputes.

21 **Q. WHAT IS ESCHELON'S PROPOSAL TO ADDRESS THIS ISSUE?**

22 A. Eschelon proposes the following language:

23 **Issue No. 9-56: Service Eligibility Audits**

1 9.23.4.3.1.1 After CLEC has obtained High Capacity EELs in
2 accordance with ICA Section 9.23.4.1.2, Qwest may conduct a
3 Service Eligibility Audit to ascertain whether those High Capacity
4 EELs comply with the Service Eligibility Criteria set forth in ICA
5 Section 9.23.4.1.2., when Qwest has a concern that CLEC has not
6 met the Service Eligibility Criteria.

7 **Issue No. 9-56(a): Service Eligibility Audits**

8 9.23.4.3.1.1.1.1 The written notice shall include the cause
9 upon which Qwest has a concern that CLEC has not met
10 the Service Eligibility Criteria. Upon request, Qwest shall
11 provide to CLEC a list of circuits that Qwest has identified
12 as of that date, if any, for which Qwest alleges non-
13 compliance or which otherwise supports Qwest's concern.

14 **Q. WHAT IS QWEST'S PROPOSAL ON THIS ISSUE?**

15 A. Qwest proposes that Eschelon's language be deleted for both 9.23.4.3.1.1 and
16 9.23.4.3.1.1.1.1.

17 **Q. WHY IS ESCHELON'S LANGUAGE NECESSARY?**

18 A. Eschelon's language is necessary in order to ensure that Qwest has a reasonable
19 basis for requesting an audit and to potentially give Eschelon a chance to resolve
20 any issues before an audit is conducted, avoiding the necessity of an audit.
21 Consistent with the FCC requirement, Eschelon's proposal would allow Qwest to
22 perform an audit per the ICA terms when Qwest has a concern that Eschelon has
23 not met the Service Eligibility Criteria. Eschelon's proposal would require Qwest
24 to disclose the reasons for its concern. Qwest has rejected this very modest
25 provision, in effect insisting that it should be able to conduct an audit without
26 cause. The FCC held, however, that:

1 ...audits will not be routine practice, but will **only** be undertaken
2 when the incumbent LEC has a concern that a requesting carrier
3 has not met the criteria for providing a significant amount of local
4 exchange service.⁹⁷ (emphasis added)

5 Before Eschelon is put to the work that an audit necessarily entails, Qwest should
6 be required to have at least some reason to believe that there may be
7 noncompliance that will be uncovered by an audit. Otherwise, the audit process
8 becomes not a reasonable measure for assuring compliance, but rather, the very
9 sort of “routine practice” that the FCC precluded.

10 **Q. DOES THE FCC REQUIRE QWEST TO PROVIDE ANY INFORMATION**
11 **TO ESCHELON AS A CONDITION OF AN AUDIT?**

12 A. The FCC in the *TRO*, determined that the states are in a better position to address
13 implementation of the audit provisions.⁹⁸ Eschelon’s proposal is precisely the
14 sort of implementation issue that the FCC left to the states to determine.

15 Eschelon’s language would require Qwest to describe its concern regarding
16 Eschelon’s compliance with the Service Eligibility Criteria, as discussed above,
17 and to identify any non-complying circuits that it has identified. Eschelon’s
18 proposal would require Qwest to provide information that may allow Eschelon to
19 respond to Qwest’s articulated concerns and further early resolution, thereby

⁹⁷ *TRO* at ¶ 621, citing *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Supplemental Order Clarification (2000), at ¶¶ 28-33, *aff’d sub nom. CompTel v. FCC*, 309 F.3d 3 (D.C. Cir. 2002).

⁹⁸ *TRO* at ¶ 625.

1 avoiding the possibility of a costly audit, or a dispute ending up in front of the
2 Commission.

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

11 **Q. PLEASE SUMMARIZE THIS ISSUE.**

12 A. Qwest is required by the FCC to have cause before conducting an audit regarding
13 CLEC compliance with service eligibility requirements. Eschelon's proposed
14 language memorializes this requirement and requires Qwest to provide
15 information to Eschelon that Qwest used to support its cause for review. As a
16 result, Eschelon's language should be adopted.

17 **SUBJECT MATTER NO. 26. COMMINGLED EELS/ARRANGEMENTS**

18 Issue Nos. 9-58, 9-58(a), 9-58(b), 9-58(d), 9-58(e) and 9-59: ICA Sections
19 9.23.4.4.3.1, 9.23.4.5.1, 9.23.4.5.1.1, 9.23.4.5.4, 9.23.4.6.6 (and subparts),
20 9.23.4.7 (and subparts), 9.1.1.1.1, 9.1.1.1.1.1, 9.1.1.1.1.2, and 24.3.2.

21 **Q. WHAT IS A LOOP-TRANSPORT COMBINATION AND WHAT IS THE**

1 **BUSINESS NEED RELATED TO LOOP-TRANSPORT COMBINATIONS**
2 **AND COMMINGLED EELS/ARRANGEMENTS.**

3 A. A Loop-Transport Combination is a combination of a loop and dedicated
4 transport.⁹⁹ The term “Loop-Transport Combination” is an umbrella term to
5 cover both UNE EELs and Commingled EELs, since both are functionally the
6 same. Eschelon may purchase commingled EELs in situations where UNE EELs
7 are not available.¹⁰⁰

8 The intent of Eschelon’s proposed language is to ensure that point-to-point¹⁰¹
9 Commingled EELs are a useful offering and a meaningful alternative to the point-
10 to-point UNE EEL product it is replacing. Because a Commingled EEL is
11 functionally equivalent to a UNE EEL, a Commingled EEL should be put
12 together (ordering, tracking, repair and billing) in a manner similar to a UNE
13 EEL. Further, Qwest should not be able to alter the terms of the UNE portion of a
14 commingled EEL simply because the UNE is commingled.

15 Qwest ’s proposal would make Commingled EELs difficult to use by requiring
16 separate orders, separate circuit IDs and separate bills for each component of the

⁹⁹ TRO at ¶575 and ¶583.

¹⁰⁰ A UNE EEL may not be available because one of the components of this EEL has been classified as “non-impaired.” When a component of a UNE EEL is not available, Eschelon is able to order a Commingled EEL, which replaces the “non-impaired” UNE component of the UNE EEL with another Qwest wholesale product, such as private lines. For example, if DS1 UNE transport between two offices is no longer available due to a finding of “non-impairment,” then Eschelon can replace the UNE transport with private line transport. The UNE Loop / Private Line Transport combination is an example of a Commingled EEL.

¹⁰¹ Point-to-point refers to the case where the loop and transport component of the loop transport combination is of the same bandwidth. See ICA closed language section 9.23.4.4.

1 commingled arrangement. Qwest's proposals would extend the installation time
2 for commingled EELs, lengthen the time and cost for installation and repair, and
3 make bill verification more difficult than with point-to-point UNE EELs or end-
4 to-end special access.

5 **Q. WHAT ARE ESCHELON'S PROPOSALS TO ADDRESS THESE ISSUES?**

6 A. Eschelon's proposals are simple, as these proposals align the ordering, tracking,
7 repair and billing provisions of a point-to-point UNE EEL or point-to-point
8 Special Access circuit with a point-to-point Commingled EEL. As is explained in
9 more detail below, a lack of alignment diminishes the usefulness of a
10 Commingled EEL compared to the UNE EEL, by extending the provisioning and
11 repair timeframes and making tracking of the circuit difficult.

12 **Issue No. 9-58: Ordering for Commingled Arrangements**

13 9.23.4.5.1 CLEC will submit orders for Loop Transport EELs
14 Combinations using the LSR process. Submission of LSRs is
15 described in ICA Section 12.

16 9.23.4.5.1.1 If any component of the Loop-Transport
17 Combination is not a UNE (i.e., not a component to which
18 UNE pricing applies), CLEC will indicate on the LSR that
19 the component is not a UNE (e.g., CLEC is ordering the
20 component as an alternate service such as special access).
21 CLEC will indicate this information in the Remarks section
22 of the LSR, unless the Parties agree otherwise.

23 9.23.4.5.4 One (1) LSR is required when CLEC orders
24 Point-to-Point EELs, and Point-to-Point Commingled
25 EELs. . . .

26 This language makes it clear that only a single order is required for point-to-point
27 Commingled EELS.

1 **Issue No. 9-58(a): Circuit ID for Commingled Arrangements**¹⁰²

2 9.23.4.5.4 One (1) LSR is required when CLEC orders Point-to-
3 Point EELs—, and Point-to-Point Commingled EELs. For such
4 Point-to-Point Loop-Transport Combinations, Qwest will assign a
5 single circuit identification (ID) number for such combination.
6 Qwest may require two (2) service requests when CLEC orders
7 Multiplexed ~~EELs~~ Loop-Transport Combinations (which are not
8 Point-to-Point) and EEL loops (as part of a multiplexed EEL).
9 Regarding Commingling see ICA Section 24. (Emphasis added).

10 This language makes it clear that a single circuit ID will be used for point-to-point
11 Commingled EELs.¹⁰³ Eschelon also offers, in the alternative, if the remainder of
12 this language is adopted, to replace “LSR” with “service request” in issues 9-58
13 and 9-58(a).

14 **Issue No. 9-58(b): Billing for Commingled Arrangements**

15 9.23.4.6.6 For each Point-to-Point Loop-Transport Combination
16 (see ICA Section 9.23.4.5.4), all chargeable rate elements for such
17 combination will appear on the same Billing Account Number
18 (BAN).

19 This language makes it clear that chargeable elements of a point-to-point
20 Commingled EEL will appear on the same BAN.

21 In the event that the Commission accepts Qwest’s position on 9.23.4.6.6 in Issue
22 No. 9-58(b) above, Eschelon proposes the following alternative language:

23 **Issue No. 9-58(c): Billing for Commingled Arrangements –**
24 **Alternative Proposal**

¹⁰² Note the first part of ICA Section 9.23.4.5.4 is part of issue 9-58.

¹⁰³ For Eschelon’s alternative proposal (if single circuit ID is rejected), *see* Issue No. 9-59 for ICA Section 9.23.4.7 in subpart below.

1 9.23.4.6.6 For each Point-to-Point Commingled EEL (see Section
2 9.23.4.5.4), so long as Qwest does not provide all chargeable rate
3 elements for such EEL on the same Billing Account Number
4 (BAN), Qwest will identify and relate the components of the
5 Commingled EEL on the bills and the Customer Service Records.
6 Unless the Parties agree in writing upon a different method(s),
7 Qwest will relate the components of the Commingled EEL by
8 taking at least the following steps:

9 9.23.4.6.6.1 Qwest will provide, on each Connectivity Bill
10 each month, the circuit identification (“circuit ID”) for the
11 non-UNE component of the Commingled EEL in the sub-
12 account for the related UNE component of that
13 Commingled EEL;

14 9.23.4.6.6.2 Qwest will assign a separate account type to
15 Commingled EELs so that Commingled EELs appear on an
16 account separate from other services (such as special
17 access/private line);

18 9.23.4.6.6.3 Each month, Qwest will provide the summary
19 BAN and sub-account number for the UNE component of
20 the Commingled EEL in a field (e.g., the Reference Billing
21 Account Number, or RBAN, field) of the bill for the non-
22 UNE component; and

23 9.23.4.6.6.4 For each Commingled EEL, Qwest will
24 provide on all associated Customer Service Records the
25 circuit ID for the UNE component; the RBAN for the non-
26 UNE component; and the circuit ID for the non-UNE
27 component.

28 The proposal above simple provides that if Qwest is not required to provide
29 chargeable elements of a point-to-point Commingled EEL on a single BAN, then
30 these elements should at least be related.

31 **Issue No. 9-58(d): Other Commingled Arrangements**

32 9.1.1.1.1 Commingled EELs are addressed in Section 9.23. For
33 any other Commingled arrangement, the following terms apply, in
34 addition to the general terms described in Section 24:

1 9.1.1.1.1.2 When a UNE or UNE Combination is
2 connected or attached with a non-UNE wholesale service,
3 unless it is not Technically Feasible or the Parties agree
4 otherwise, CLEC may order the arrangement on a single
5 service request; if a circuit ID is required, there will be a
6 single circuit ID; and all chargeable rate elements for the
7 Commingled service will appear on the same BAN. If
8 ordering on a single service request, using a single
9 identifier, and including all chargeable rate elements on the
10 same BAN is not Technically Feasible, Qwest will identify
11 and relate the elements of the arrangement on the bill and
12 include in the Customer Service Record for each
13 component a cross reference to the other component, with
14 its billing number, unless the Parties agree otherwise.

15 The provisions above require the option of a single order, single Circuit ID and
16 single BAN treatment for commingled arrangements other than EELs.

17 **Issue No. 9-58(e): Interval for Commingled Arrangements**

18 9.23.4.4.3.1 When any component of the Loop-Transport
19 Combination is not a UNE, the service interval for the combination
20 will be the longer interval of the two facilities being Commingled.
21 See Section 24.1.2.1.

22 24.3.2 See Section 9.23.4.4.3.1 regarding intervals for
23 Commingled EELs.

24 ~~24.3.2 The service interval for Commingled EELs will be as~~
25 ~~follows. For the UNE component of the EEL see Exhibit C. For~~
26 ~~the tariffed component of the EEL see the applicable Tariff.~~

27 9.1.1.1.1 Commingled EELs are addressed in Section 9.23. For
28 any other Commingled arrangement, the following terms apply, in
29 addition to the general terms described in Section 24:

30 9.1.1.1.1.1 When a UNE and another service are
31 Commingled, the service interval for the Commingled
32 arrangement will be the longer interval of the two facilities
33 being Commingled.

1 The provisions above logically require that when ordering a Commingled EEL the
2 total service interval will be no longer than the component with the longest
3 interval.

4 In the event that the Commission accepts Qwest's position for 9-58(a), Eschelon
5 proposes the following language:

6 **Issue No. 9-59: Circuit ID – Alternate Proposal**

7 **9.23.4.7 Maintenance and Repair for UNE Component of**
8 **Point-to-Point Commingled EELs**

9 9.23.4.7.1 When CLEC reports a trouble through any of
10 the means described in Section 12.4.2.2, so long as Qwest
11 provides more than one circuit ID per Commingled EEL,
12 CLEC may provide ~~all~~ ~~both~~ circuit IDs associated with the
13 Commingled EEL in a single trouble report (i.e., Qwest
14 shall not require CLEC to submit separate and/or
15 consecutive trouble reports for the different circuit IDs
16 associated with the single Commingled EEL). If CLEC is
17 using CEMR to submit the trouble report, for example, ~~the~~
18 CLEC may ~~will~~ first report one circuit ID (the circuit it
19 believes ~~has the trouble~~) and include the other circuit ID in
20 the remarks section (unless the Parties agree to a different
21 method). Qwest will communicate a single trouble report
22 tracking number (i.e., the "ticket" number) (described in
23 Section 12.1.3.3.3.1.1) for the Commingled EEL to CLEC
24 at the time the trouble is reported. ~~Should a second repair~~
25 ~~ticket be required for the circuit in the remarks section,~~
26 ~~Qwest will contact CLEC, and they will mutually agree~~
27 ~~who will open the second repair ticket.~~

28 9.23.4.7.1.1 If any circuit ID is missing from any
29 Customer Service Record associated with the
30 Commingled EEL, Qwest will provide the circuit
31 ID information to CLEC at the time CLEC submits
32 the trouble report.

33 9.23.4.7.1.2 Qwest may charge a single
34 Maintenance of Service or Trouble Isolation Charge

1 (sometimes referred to as “No Trouble Found”
2 charge) only if Qwest dispatches and no trouble is
3 found on both ~~either~~ circuits associated with the
4 Commingled EEL. If CLEC may charge Qwest
5 pursuant to Section 12.4.1.8, CLEC may also
6 charge only a single charge for both circuits
7 associated with the Commingled EEL.

8 This provision simply requires that Qwest treat a point-to-point Commingled EEL
9 as a single circuit for the purpose of maintenance and repair.

10 **Q. WHAT ARE QWEST’S PROPOSAL ON THESE ISSUES?**

11 A. Qwest proposes the following language:

12 **Issue No. 9-58: Ordering for Commingled Arrangements**

13 9.23.4.5.1 CLEC will submit orders for ~~Loop-Transport~~ EELs
14 ~~Combinations~~ using the LSR process. Submission of LSRs is
15 described in Section 12.

16 ~~9.23.4.5.1.1 If any component of the Loop-Transport~~
17 ~~Combination is not a UNE (i.e., not a component to which UNE~~
18 ~~pricing applies), CLEC will indicate on the LSR that the~~
19 ~~component is not a UNE (e.g., CLEC is ordering the component as~~
20 ~~an alternate service such as special access). CLEC will indicate~~
21 ~~this information in the Remarks section of the LSR, unless the~~
22 ~~Parties agree otherwise.~~

23 9.23.4.5.4 One (1) LSR is required when CLEC orders Point-to-
24 Point EELs and ~~Point-to-Point Commingled EELs.~~

25 **Issue No. 9-58(a): Circuit ID for Commingled Arrangements**

26 9.23.4.5.4 One (1) LSR is required when CLEC orders Point-to-
27 Point EELs. ~~and Point-to-Point Commingled EELs. For such~~
28 ~~Point-to-Point Loop-Transport Combinations, Qwest will assign a~~
29 ~~single circuit identification (ID) number for such combination.~~
30 Qwest may require two (2) service requests when CLEC orders
31 Multiplexed EELs ~~Loop-Transport Combinations~~ (which are not

1 Point-to-Point) and EEL loops (as part of a multiplexed EEL).
2 Regarding Commingling see ICA Section 24.

3 **Issue No. 9-58(b): Billing for Commingled Arrangements**

4 9.23.4.6.6 For Commingling see Section 24.

5 Qwest rejects Eschelon's alternative language to 9-58(b), contained in Issue No.
6 9-58(c).

7 **Issue No. 9-58(d): Other Commingled Arrangements**

8 Qwest proposes deletion of Eschelon's language.

9 **Issue No. 9-58(e): Interval for Commingled Arrangements**

10 ~~9.23.4.4.3.1—When any component of the Loop Transport~~
11 ~~Combination is not a UNE, the service interval for the combination~~
12 ~~will be the longer interval of the two facilities being Commingled.~~
13 ~~See Section 24.1.2.1.~~

14 24.3.2 The service interval for Commingled EELs will be as
15 follows. For the UNE component of the EEL see Exhibit C. For
16 the tariffed component of the EEL see the applicable Tariff.

17 ~~9.1.1.1.1 Commingled EELs are addressed in Section 9.23. For~~
18 ~~any other Commingled arrangement, the following terms apply, in~~
19 ~~addition to the general terms described in Section 24:~~

20 ~~9.1.1.1.1—When a UNE and another service are~~
21 ~~Commingled, the service interval for the Commingled~~
22 ~~arrangement will be the longer interval of the two facilities~~
23 ~~being Commingled.~~

24 **Issue No. 9-59: Circuit ID – Alternative Proposal**

25 **9.23.4.7 Maintenance and Repair for UNE Component of**
26 **~~Point to Point~~ Commingled EELs**

27 9.23.4.7.1 When CLEC reports a trouble through any of
28 the means described in Section 12.4.2.2, ~~so long as Qwest~~
29 ~~provides more than one circuit ID per Commingled EEL,~~
30 CLEC may provide ~~all~~ both circuit IDs associated with the

1 Commingled EEL in a single trouble report. ~~(i.e., Qwest~~
2 ~~shall not require CLEC to submit separate and/or~~
3 ~~consecutive trouble reports for the different circuit IDs~~
4 ~~associated with the single Commingled EEL).~~ If CLEC is
5 using CEMR to submit the trouble report, for example, the
6 CLEC may will first report one circuit ID (the circuit it
7 believes has the trouble) and include the other circuit ID in
8 the remarks section ~~(unless the Parties agree to a different~~
9 ~~method).~~ ~~Qwest will communicate a single trouble report~~
10 ~~tracking number (i.e., the “ticket” number) (described in~~
11 ~~Section 12.1.3.3.1.1) for the Commingled EEL to CLEC~~
12 ~~at the time the trouble is reported. Should a second repair~~
13 ~~ticket be required for the circuit in the remarks section,~~
14 Qwest will contact CLEC, and they will mutually agree
15 who will open the second repair ticket.

16 9.23.4.7.1.1 Intentionally Left Blank. ~~If any circuit~~
17 ~~ID is missing from any Customer Service Record~~
18 ~~associated with the Commingled EEL, Qwest will~~
19 ~~provide the circuit ID information to CLEC at the~~
20 ~~time CLEC submits the trouble report.~~

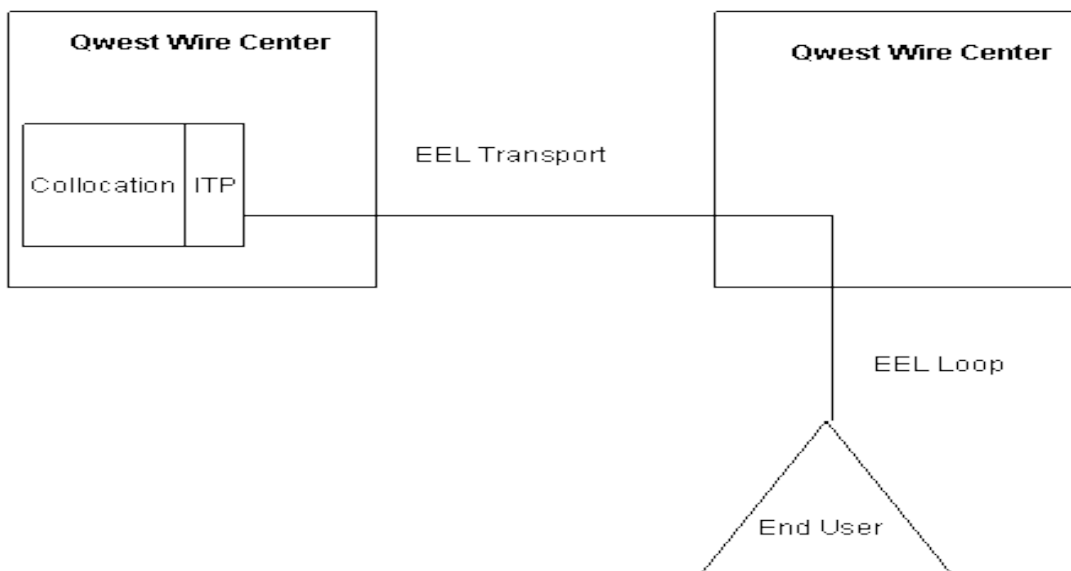
21 9.23.4.7.1.2 Qwest may charge a single
22 Maintenance of Service or Trouble Isolation Charge
23 (sometimes referred to as “No Trouble Found”
24 charge) only if Qwest dispatches and no trouble is
25 found on either both circuits associated with the
26 Commingled EEL. ~~If CLEC may charge Qwest~~
27 ~~pursuant to Section 12.4.1.8, CLEC may also~~
28 ~~charge only a single charge for both circuits~~
29 ~~associated with the Commingled EEL.~~

30 **Q. WHAT IS A UNE EEL AND HOW IS A COMMINGLED EEL**
31 **DIFFERENT FROM A UNE EEL?**

32 A. An EEL is a type of Loop-Transport Combinations where both components of the
33 Combination are unbundled network elements. A Commingled EEL is identical
34 to the EEL in function, except one component of the Loop-Transport

1 Combination is not a UNE.¹⁰⁴ Loop-Transport Combinations promote
2 competition by giving CLECs access to end user customers in wire centers where
3 the CLEC is not collocated.¹⁰⁵ In other words, the Loop-Transport Combination
4 extends the loop from the end user's location to a wire center where the CLEC is
5 collocated. The diagram below shows a picture of a Point-To-Point EEL. Point-
6 To-Point simply refers to the fact that the loop and transport are of the same
7 bandwidth, in other words no multiplexing is involved.

Point-To-Point EEL with Collocation



8

9 Source: Qwest TRRO/OFO Enhanced Extended Loop (EEL) PCAT -
10 <http://www.qwest.com/wholesale/pcat/trroeel.html>

¹⁰⁴ As is explained below, it is the price that is different between a UNE EEL and a Commingled EEL.

¹⁰⁵ TRO at ¶576.

1 The picture for a Point-To-Point Commingled EEL, would be identical to the
2 picture above, except that the label, not the facilities, for “EEL Transport” or
3 “EEL Loop” would be replaced with non-UNE label, such as “Private Line
4 Transport” or “Channel Termination.”

5 **Q. WHY IS ESCHELON’S LANGUAGE NECESSARY?**

6 A. In several provisions of the ICA, Eschelon proposes the use of a single order,
7 single circuit ID, and single bill for Point-To-Point Commingled EELs, just as
8 Qwest provides for a single order, single circuit ID, and single bill for Point-To-
9 Point UNE EELs today. A Commingled EEL is nothing more than a change in
10 name and price to the UNE EEL it is replacing. As such, it is a network facility
11 that Qwest has already been provisioning, maintaining and repairing. Except for
12 the price there is absolutely nothing new about a Commingled EEL from a
13 technical, network, provisioning or maintenance standpoint. Therefore, the terms
14 based upon well-established history proposed by Eschelon should be acceptable to
15 Qwest.

16 A single order is required for a Point-To-Point EEL. Point-to-Point EEL requests
17 are issued using a Common Language Circuit ID, which is identified on the
18 customer service record (CSR) as CLS. With respect to repair, CLECs submit a
19 single trouble report for a Point-To-Point EEL.¹⁰⁶ Qwest also provides trouble

¹⁰⁶ Qwest Wholesale Website, Maintenance and Repair Overview - V64.0,
<http://www.qwest.com/wholesale/clecs/maintenance.html>

1 isolation and testing as a joint process for Point-To-Point EELs.¹⁰⁷ EELs are
2 billed on a single Customer Records and Information System (CRIS) summary
3 bill. Thus, Eschelon is able to place a single order, receive a single bill, track the
4 EEL using a single Circuit ID, and issue a single repair ticket for EELs.

5 There is no functional difference between a UNE EEL and a Commingled EELs -
6 the facilities are the same; the function is the same; and the end-user experience is
7 the same for both a UNE EEL and a Commingled EEL. However, Qwest is
8 attempting to create differences by treating the two pieces of a Commingled EEL
9 separately, rather than together as Qwest treats an EEL. Qwest wants CLECs to
10 order the two components of a Commingled EEL using two separate orders;
11 Qwest wants to bill CLECs two separate bills; Qwest wants to assign two separate
12 Circuit IDs to the Commingled circuit which adds to the complexity of tracking
13 the Commingled EEL and would require CLECs to issue separate repair ticket for
14 combined components of the Commingled EEL.

15 A CLEC would purchase a Commingled EEL in a situation where a UNE EEL is
16 not available. UNE EELs availability can be limited due to limits placed upon the
17 availability of high capacity unbundled loops and transport in and between certain
18 wire centers. The CLEC could build a collocation eliminating the need for the
19 loop-transport combination. However, collocations are capital intensive and time
20 consuming. For example, the direct cost charged by Qwest to Eschelon for a new

¹⁰⁷ Qwest Wholesale Website, Maintenance and Repair Overview - V64.0,
<http://www.qwest.com/wholesale/clecs/maintenance.html>

1 collocation (space, power, APOT) is approximately \$40,000. In addition to this
2 cost, the CLEC must place equipment in the collocation space. Without Loop-
3 Transport combinations, such as Commingled EELs, CLECs might have to
4 abandon the particular market where UNE EELs are not available.

5 By complicating the ordering, maintenance, and billing processes for
6 Commingled EELs, Qwest makes this commingled arrangement less useful and
7 raises Eschelon's cost by either 1) imposing onerous and inefficient processes for
8 the purchase and use of a Commingled EEL or 2) making the use of loop
9 transport combination so difficult that the only alternative is to exit (cease to offer
10 products using this combination) from the market or purchase the arrangement at
11 a yet higher price, solely from Qwest's special access tariff. Qwest's proposed
12 language diminishes Eschelon's ability to compete effectively against Qwest,
13 because the language prevents Eschelon from:

- 14 1) ordering a Commingled EEL on a single order;
- 15 2) receiving a Commingled EEL identified by a single circuit ID; and
- 16 3) being billed for a Commingled EEL on a single bill.

17 **Q. WHY DOESN'T ESCHELON SIMPLY PURCHASE END-TO-END**
18 **SPECIAL ACCESS CIRCUITS FROM QWEST INSTEAD OF**
19 **COMMINGLED EELS?**

20 A. The FCC has upheld a CLECs right to purchase UNE combinations, including
21 Commingled EELs. Eschelon should not be forced to migrate to yet a higher
22 priced alternative because Qwest prefers not to provide Commingled EELs on

1 reasonable terms and conditions. UNE EELs, Commingled EELs and end-to-end
 2 Special Access circuits are all functionally identical. The difference between
 3 them is their price. The table below compares the wholesale cost of a DS1 UNE
 4 EEL, a DS1 Commingled EEL and a DS1 end-to-end special access arrangement.

Loop-Transport Combinations / Special Access Price Comparison				
Utah (DS1)				
	UNE EEL	Commingled EEL		Special Access
	UNE Loop / UNE Xport	SA Loop / UNE Xport	UNE Loop / SA Xport	SA Loop / SA Xport
Loop (Urban) / Channel Term (Zone 1)	\$69.76	\$165.00	\$69.76	\$165.00
IIP	\$1.46	\$1.46	\$1.46	\$10.00
Transport (10 miles)	\$61.32	\$61.32	\$252.00	\$252.00
Total	\$132.54	\$227.78	\$323.22	\$427.00
UNE Rate Sources: Exhibit A - Loop 9.2.3.3, IIP - 9.1.2, Transport - 9.6.2.2.				
SA Rate Sources: FCC Tariff No. 1 - Channel Term.(Loop) and Transport, 17.2.11, IIP 7.11.4.				

5
 6 The first comparison is for a UNE EEL and shows the cost of a DS1 UNE Loop
 7 and DS1 UNE transport. The second and third cases show Commingled EELs.
 8 The second is a DS1 Channel Termination combined with a DS1 UNE Transport
 9 and the third is a DS1 loop combined with a DS1 special access transport circuit.
 10 The final case shows an end-to-end special access circuit using a DS1 channel
 11 termination and DS1 special access dedicated transport.

12 **Q. WILL ESCHELON'S PROPOSAL CAUSE QWEST TO INCUR**
 13 **SIGNIFICANT COSTS?**

14 **A.** No, Eschelon is not asking Qwest to modify systems and incur costs, but simply

1 treat point-to-point commingled EELs as point-to-point UNE EELs and end-to-
2 end special access circuits are treated today. Qwest is attempting to turn what is
3 essentially a price change into something much more – an unusable alternative.
4 With respect to ordering, Qwest claims that Eschelon’s proposal is “unique” and
5 that Eschelon’s proposal would impose upon Qwest costly systems and
6 processing changes.¹⁰⁸ Eschelon’s proposal is not unique because Eschelon is not
7 proposing a change from Qwest’s current process which uses a single order,
8 single circuit ID, and single bill for Eschelon’s Point-To-Point EELs. Eschelon is
9 merely proposing to treat EELs in a similar manner, as they have been in the past.
10 In fact, for Eschelon’s embedded base of EELs, those circuits are billed on the
11 same bill and have a single circuit ID, and were originally ordered on a single
12 order.

13 **Issue No. 9-58: ICA Sections 9.23.4.5.1, 9.23.4.5.1.1; 9.23.4.5.4 - Ordering,**
14 **Billing, and Circuit ID for Commingled Arrangements – ORDERING**

15 **Q. WHAT IS THE SPECIFIC BUSINESS NEED INVOLVED IN ISSUE NO. 9-**
16 **58 – ORDERING, BILLING AND CIRCUIT ID FOR COMMINGLED**
17 **ARRANGEMENTS?**

18 A. Under Qwest’s proposed ordering process, Eschelon must submit separate orders
19 for the UNE and non-UNE components of Commingled EELs. The problem with
20 the separate ordering process is that once Eschelon receives the FOC for the UNE
21 segment, only then may Eschelon submit an ASR for the non-UNE component.

¹⁰⁸ Qwest Response, p. 29.

1 Using a DS1 UNE loop and PLT transport as an example, there are at least two
2 problems with this process: (1) there is a time delay since Qwest can take up to
3 72 hours to return a FOC for a DS1 UNE loop; and (2) receipt of a FOC is no
4 guarantee that the UNE facility will actually be delivered on the due date.

5 Because the EEL circuit is incomplete without the loop facility, completion of the
6 PLT transport order without the loop is of no use to Eschelon or its customer. In
7 that case there is no complete functioning circuit, because the UNE and non-UNE
8 segments are provisioned using a separate orders. If one segment goes held
9 because of lack of facilities, Eschelon may end up paying recurring charges for a
10 partial circuit, even though Eschelon's end-user is not yet receiving service and
11 Eschelon is not able to commence billing to its end-user. The customer thus has
12 no service, and there may be no specified time by which it will have service, and
13 all the while Eschelon is paying for a partial circuit which is of no use to Eschelon
14 or its customer.

15 **Q. HOW DOES ESCHELON'S PROPOSED LANGUAGE FOR ISSUE NO. 9-**
16 **58, ICA SECTIONS 9.23.4.5.1; 9.23.4.5.1.1; AND 9.23.4.5.4 ADDRESS**
17 **THESE ISSUES?**

18 A. Eschelon proposes language in ICA Section 9.23.4.5.1 and its subpart
19 9.23.4.5.1.1, and ICA Section 9.23.4.5.4 that provides for ordering Commingled
20 EELs on a single LSR. In ICA Section 9.23.4.5.1, Eschelon proposes use of the
21 term "Loop Transport Combination" which would include Commingled EELs as

1 being ordered through the LSR process. ICA Section 9.23.4.5.1.1 is a new
2 subpart proposed by Eschelon that specifies how non-UNE components (e.g.,
3 special access) would be specified on the LSR. Eschelon is proposing that for
4 non-UNE components, Eschelon would use the Remarks section of the LSR to
5 indicate that non-UNE components are included in the LSR. In ICA Section
6 9.23.4.5.4, Eschelon proposes adding the language “Point-to-Point Commingled
7 EELs” to clarify that Commingled EELs are ordered using one (1) LSR. Eschelon
8 proposes alternate language below in Issue No. 9-59 if Qwest’s position is
9 adopted for ICA Section 9.23.4.5.4.

10 **Issue No. 9-58 (a): ICA Sections - 9.23.4.5.4 - Ordering, Billing, and Circuit ID**
11 **for Commingled Arrangements – CIRCUIT ID [2 of 2 issues in ICA Section**
12 **9.23.4.5.4; For 1st issue (terminology), see Issue No. 9-58 above]**

13 **Q. WHAT IS THE SPECIFIC BUSINESS NEED IN 9-58(A) RELATED TO**
14 **SINGLE CIRCUIT ID?**

15 A. Qwest assigns a single circuit ID to a UNE EEL and provides it to the ordering
16 CLEC for tracking purposes. For Commingled EELs, Qwest proposes to assign
17 two circuit IDs (one to the UNE and another to the non-UNE). Qwest makes this
18 proposal even in the case where a UNE EEL is being converted to a Commingled
19 EEL – in other words, the arrangement started with a single circuit ID and Qwest
20 is proposing to break them apart.

21 The linchpin of effective EEL facility management is the use of a single circuit ID
22 to cover all segments of the facility. It is this single identifier that permits both

1 Qwest and Eschelon to easily and accurately track facility inventories, order
2 correctly, repair in the most efficient manner possible, and bill in a way that
3 actually permits verification of bill and rate accuracy. The end result, of course,
4 is that both companies manage what is a single facility from the end user
5 customer's perspective in the most efficient manner possible, which ensures the
6 best possible delivery of service to a customer.

7 **Q. WHAT PROBLEMS RESULT FROM HAVING A COMMINGLED EEL**
8 **ASSIGNED MORE THAN ONE CIRCUIT ID?**

9 A. Under Qwest's proposal, instead of installing one EEL, the parties must install
10 two separate circuits at two different times. This leads to multiple problems,
11 including mismatches between service delivery intervals for the separate circuits.
12 For example, the gap in time between deliveries of the two circuits will cause a
13 delay in Eschelon's ability to conduct full testing on the customer's entire circuit.
14 The DS1 UNE loop interval is 5 days and the PLT transport interval is 9 days. If
15 Qwest wants to meet the PID performance for the loop, it will deliver the loop
16 within 5 days. Because the PLT transport piece will not be delivered until many
17 days later, however, there is no point in Eschelon testing the loop segment
18 because the circuit for the Commingled EEL is not complete until all segments
19 are installed. Qwest, however, will start to bill CLEC for the loop. The loop and
20 transport together serve the end user customer and whether that customer's
21 service is working "end-to-end" cannot be determined until the two are connected.
22 To make matters worse, Qwest's proposal related to intervals (as discussed in 9-

1 58(e)) forces Eschelon to order sequentially rather than concurrently, which
2 causes a delay. If Eschelon orders circuits concurrently, Eschelon must accept,
3 test and turn up of the loop independently of the special access circuit. This
4 testing process is futile because Eschelon is testing a loop not connected to the
5 customer. Thus, even if Eschelon tests and accepts the UNE loop, there is no
6 guarantee that the entire circuit is going to work.

7 **Q. HOW DOES ESCHELON'S LANGUAGE PROPOSAL FOR ICA**
8 **SECTIONS 9.23.4.5.1 AND SUBPARTS SOLVE THE ISSUES DESCRIBED**
9 **ABOVE?**

10 A. Eschelon's language makes clear that a single circuit ID will be provided for
11 Point-To-Point loop-transport combinations.

12 **Q. WILL QWEST HAVE TO MODIFY ITS INTERNAL SYSTEMS IN**
13 **ORDER TO ASSIGN A SINGLE CIRCUIT ID TO A COMMINGLED**
14 **EEL?**

15 A. Qwest currently provides combinations of loops and transport (EELs and special
16 access) using a single circuit ID. The only difference that is taking place with a
17 Commingled EEL is that the price of one of the components is changing. In most
18 cases, the price change occurs for all loops in a wire center, or all transport
19 facilities on a route as a result of a non-impairment finding in the wire center
20 proceeding. The result is that in most situations, both UNEs and Special Access
21 services will not be simultaneously available in a given wire center or along a

1 given transport route, thus the change really is as simple as an increase in price.
2 Qwest surely is competent at raising prices.

3 **Issue No. 9-58 (b): ICA Sections - 9.23.4.6.6 (and subparts), Ordering, Billing,**
4 **and Circuit ID for Commingled Arrangements – BILLING**

5 **Q. WHAT IS THE SPECIFIC BUSINESS NEED RELATED TO BILLING?**

6 A. When billing Eschelon for a UNE EEL, Qwest bills the UNE EEL as a single
7 facility on one billing account number (BAN). Bill review and reconciliation will
8 be challenging at best, and unmanageable at worst, if Qwest implements its
9 proposal to bill the two components of the Commingled EEL separately. In the
10 absence of a single circuit ID or relating the segments of the Commingled EEL on
11 the bills (as proposed by Eschelon in its alternative proposal), Eschelon will not
12 know whether a particular UNE is a part of a Commingled EEL. Thus, Eschelon
13 will have to review every line item on its UNE bill to attempt to determine
14 whether that UNE is part of a Commingled EEL. Given the volume of Eschelon's
15 UNE inventory, this kind of undertaking is simply not feasible. Similarly, while
16 Eschelon can track loss and completion reports to ensure accurate billing for
17 disconnected UNEs, no loss and completion reports are provided for tariffed
18 services such as special access. Without some indication that the UNE and non-
19 UNE segments of a Commingled EEL are related, a loop may be disconnected
20 and Eschelon could conceivably continue to pay for the non-UNE segment for no
21 reason at all. Thus, billing the UNE and non-UNE segments on a single bill will

1 allow Eschelon to track these segments in tandem, which makes sense since they
2 are combined together to make up the Commingled EEL.

3 **Q. IS PROVIDING A SINGLE BAN FOR COMMINGLED EELS COSTLY**
4 **FOR QWEST?**

5 A. No, it should not be costly. First, Qwest currently provides a single bill for UNE
6 EELs today. As mentioned above, the difference between a UNE EEL and a
7 commingled EEL is the price of one of the components of the EEL. In most
8 cases, the change in price is brought about by a change in the availability of a
9 UNE component of the UNE EEL. This change in availability means that what
10 was once available at a TELRIC rate is now available at an alternative, higher
11 rate, such as special access. Qwest need only change the rate that it is charging to
12 Eschelon. Qwest does not need to virtually separate the two components of the
13 loop-transport combination, so that ordering, repair and billing for these
14 components are contained in separate systems.

15 *Issue No. 9-58 (c): ICA Sections - 9.23.4.6.6 (and subparts) Ordering, Billing,*
16 *and Circuit ID for Commingled Arrangements – BILLING - (Alternate*
17 *proposal to 9.23.4.6.6)*

18 **Q. IF THE COMMISSION DETERMINES THAT QWEST DOES NOT NEED**
19 **TO PROVIDE A SINGLE BILL FOR COMMINGLED EELS, WHAT**
20 **ALTERNATIVE DOES ESCHELON PROPOSE?**

21 A. As discussed above in Issue No. 9-58(b), Eschelon supports a single bill for the
22 components of a Commingled EEL. However, to the extent that the Commission

1 adopts Qwest's language for these provisions, the Commission should order that
2 Eschelon's alternative language for ICA Sections 9.23.4.6.6 (and subparts) and
3 9.23.4.7 (and subparts) also be included in the ICA. Eschelon's alternative
4 language only requires that Qwest relate the UNE and non-UNE segments of the
5 Commingled EEL.

6 Eschelon's proposed language spells out the process for relating the UNE and
7 non-UNE segments of the Commingled EEL in the billing system so Eschelon
8 can track the individual components. A single circuit ID for the Commingled
9 EEL facility, relating the loop and transport segments as laid out above, is the
10 only way that Eschelon can manage the repair and billing for Commingled EELs
11 to any customer's satisfaction. Absent an identified relationship between the
12 UNE and non-UNE segments of the same EEL, no CLEC can feasibly use a
13 Commingled EEL. This is not an acceptable implementation of the FCC's
14 mandate to eliminate restrictions on commingling, and Qwest should not be
15 permitted to so deliberately tilt the field to the advantage of its exorbitantly
16 expensive retail products. For these reasons, Eschelon proposes this alternate
17 language if Qwest's position on 9.23.4.6.6 is accepted in arbitration.

18 **Issue No. 9-58 (d): ICA Section 9.1.1.1.1 & 9.1.1.1.2 Ordering, Billing, and**
19 **Circuit ID for Commingled Arrangements – OTHER ARRANGEMENTS**

20 **Q. WHAT IS THE SPECIFIC BUSINESS NEED RELATED TO ORDERING,**
21 **BILLING, AND CIRCUIT ID FOR COMMINGLED ARRANGEMENTS –**

1 **OTHER ARRANGEMENTS?**

2 A. The same types of problems that will occur with Commingled EELs if there is not
3 a single LSR, single circuit ID, and single bill will arise with other Commingled
4 arrangements as well. Therefore, these sections create a default to have a single
5 LSR, single circuit ID, and single bill, unless the Parties agree otherwise or doing
6 so is not Technically Feasible. In the latter case, the components of the
7 Commingled arrangement are to be related for these purposes, unless the Parties
8 agree otherwise. Such language will help prevent Qwest from proceeding again
9 in the unilateral manner in which Qwest approached implementing Commingled
10 EELs and its initially password protected terms.

11 *Issue No. 9-58(e) - ICA Sections 9.23.4.4.3.1 & 24.3.2; 9.1.1.1.1 & 9.1.1.1.1.1*
12 *INTERVAL for Commingled Arrangements*

13 **Q. WHAT IS THE SPECIFIC BUSINESS NEED RELATED TO INTERVALS**
14 **FOR COMMINGLED ARRANGEMENTS?**

15 A. As discussed earlier, when Eschelon is forced to order the UNE and non-UNE
16 components separately, separate service installation intervals apply.¹⁰⁹ Qwest's
17 position is that the tariffed component and the UNE component must be installed
18 separately from each other, and that "because each service order for each
19 component must be complete before installation, the provisioning intervals for
20 each component may have to be added together to determine the total time

¹⁰⁹ See discussion for Issue No. 9-58(a).

1 required for installation.”¹¹⁰ In other words, Qwest’s position is that the intervals
2 for the individual components must be provisioned consecutively, rather than
3 concurrently, which has the effect of lengthening the overall interval for
4 Commingled arrangements. This is unnecessary, as it does not work that way
5 today for EELs. As discussed below, Eschelon agrees to a lengthened interval by
6 applying the longer of the ICA and Tariff interval to the Commingled product.

7 **Q. HOW IS QWEST’S PROPOSAL DIFFERENT FROM ESCHELON’S**
8 **PROPOSAL ON THIS ISSUE?**

9 A. On its face, Qwest’s proposal appears similar. Qwest states that the UNE interval
10 will apply to the UNE and the tariffed interval will apply to the tariffed
11 component. When Qwest’s proposal is closely scrutinized and facts outside its
12 proposed ICA language are known, however, the proposals are very different. A
13 key difference is that Eschelon’s proposal allows the Commission to retain full
14 jurisdiction over the UNE, whereas Qwest’s proposal allows factors outside the
15 approved ICA to change the operation of the UNE terms, in contradiction to the
16 ICA. Qwest is attempting to limit ICA terms as they apply to UNE components
17 of commingled arrangements by imposing terms that are outside the ICA.

18 For example, Qwest’s language in ICA Section 9.23.4.5.4 appears to allow a
19 CLEC to order a UNE loop and tariffed transport on separate service requests on

¹¹⁰ See Oregon Disputed Issues Matrix, Exhibit 3 to Eschelon’s Petition for Arbitration in the Oregon Eschelon-Qwest arbitration, Qwest’s position statement for Issue No. 9-58(e), p. 144. Qwest did not provide position statements in the Utah. See footnote 75 for more detail.

1 the same day and then, pursuant to ICA Section 24.3.2, calculate the interval. If
2 that were true, the result would be the same as under Eschelon's proposed
3 language and the longer interval would be the latest date for installation of the two
4 services. That, in fact, is not how the calculation of the interval will work. The
5 reason cannot be found in the ICA language that Qwest has presented to this
6 Commission for approval. Rather, Qwest's proposed calculation of the interval is
7 based on terms that were initially distributed by Qwest in a secret, password-
8 protected form, with the password available only to CLECs after they signed the
9 Qwest TRO amendment.¹¹¹

10 Qwest's secret PCAT states that consecutive ordering is required for each
11 component of a commingled EEL. This lengthens the total time required to install
12 the commingled EEL. Specifically, Qwest's TRRO EEL PCAT, which is not part
13 of the ICA, states:

14 ...When commingling an EEL Loop with the same bandwidth PLT
15 transport, an LSR and an ASR is required. **Your LSR for EEL**
16 **Loop must be submitted first** and must include the following
17 specific information:

18 PriLoc Section = End user Location

19 Sec Loc Section = Dangling Wire Center

20 Remark = "EEL, Install Dangling/Commingled Circuit."

21 **Once you have received the FOC with circuit ID for your**
22 **commingled EEL Loop, you may submit your ASR for PLT**

¹¹¹ Qwest has since provided Eschelon the password in order to access the secret PCATs. (For a discussion of the non-CMP secret "TRRO" PCATs, see the testimony of Mr. Starkey.) Although the password is now available, these PCATs remain password protected. The term "secret" is used to distinguish them from the portions of the PCAT that are not password protected.

1 transport to be commingled with an EEL Loop of the same
2 bandwidth... (Emphasis added).¹¹²

3 As a result, Qwest's PCAT process lengthens the interval of delivery of a working
4 service to the end user customer because the CLEC cannot submit the second
5 order until it receives an FOC on the first order. Thus, if the FOC commitment is
6 72 hours for the loop, this pushes out the later due date by up to three days.
7 Consequently, there is no way to calculate the installation interval from Qwest's
8 proposed ICA language.

9 CLECs need certainty for planning purposes and to set customer expectations.
10 CLECs who signed the TRO amendment before receiving the password to the
11 secret PCAT may have been surprised to discover this. Eschelon was certainly
12 surprised to discover it once the terms were posted on the website. The terms of
13 the secret PCAT affect the UNE ordered under this ICA. As a result, under
14 Qwest's proposal, the time period for service delivery applicable to the entire
15 commingled EEL would be longer than ordering the same circuit as a special
16 access facility, thus diminishing the usefulness of the commingled arrangement.

17 Further problems arise if either one of the orders goes held because of a lack of
18 available facilities. Eschelon would end up paying for a partial circuit, while
19 waiting for the held order to clear. In addition, the overall lengthened interval
20 means that Eschelon is not able to serve its end-user customer in a timely manner.

¹¹² See Qwest PCAT, <http://www.qwest.com/wholesale/pcat/trroeel.html>.

1 From a provisioning standpoint, this makes Commingled Arrangements inferior to
2 Point-To-Point EELs or Special Access, because the combined provisioning
3 interval is longer as a result of Qwest's requirement of consecutive ordering.
4 Eschelon's proposal is reasonable because it applies the longer of the two
5 intervals for the individual components to the Commingled Arrangement.

6 Issue No. 9-59 (alternate): ICA Sections 9.23.4.7 and subparts Ordering,
7 Billing, and Circuit ID for Commingled Arrangements- CIRCUIT ID -
8 (Alternate proposal to 9.23.4.5.4)

9 **Q. WHAT IS THE SPECIFIC BUSINESS NEED SURROUNDING**
10 **ESCHELON'S ALTERNATE PROPOSAL FOR ORDERING, BILLING**
11 **AND CIRCUIT ID FOR COMMINGLED ARRANGEMENTS -- CIRCUIT**
12 **ID?**

13 A. Eschelon supports language for ICA Section 9.23.4.5.4 as specified in Issue No.
14 9-58 and 9-58(a). However, to the extent the Commission adopts Qwest's
15 proposed language for ICA Section 9.23.4.5.4, Eschelon proposes alternate
16 language in 9.23.4.7 relating to repair of a commingled EEL. This language is
17 necessary because Qwest's proposed language would delay the repair of a
18 commingled EEL in some circumstances.

19 Currently, for UNE EELs, CLEC opens a trouble report and Qwest assigns a
20 trouble ticket number.¹¹³ When CLEC opens the ticket, the clock starts running

¹¹³ See proposed ICA Section 12.1.3.3.3.1.1.

1 under the PIDs for mean time to repair.¹¹⁴ For Commingled EELs, however,
2 Qwest is proposing that the CLEC first submit the trouble ticket on one
3 component of the commingled EEL and then, if the problem is not resolved, a
4 second trouble ticket would be opened on the other component of the commingled
5 EEL.

6 Like the consecutive placement of orders discussed in connection with intervals in
7 ICA Section 9.23.4.4.3.1 (Issue No. 9-58(d)), Qwest's repair process for
8 Commingled EELs is also a consecutive process. Only if Qwest does not find
9 trouble on the first portion of the EEL will Qwest contact the CLEC and open a
10 repair ticket on the other portion of the EEL.

11 The customer is out of service the entire time and does not know or care whether
12 the trouble is in one circuit or the other. The customer just wants it repaired. This
13 process will certainly delay repair time for the customer's service when the
14 trouble is in the portion of the commingled EEL which was not investigated first.

15 **Q. COULD ESCHELON OPEN TROUBLE TICKETS ON BOTH**
16 **COMPONENTS OF THE COMMINGLED EEL SIMULTANEOUSLY?**

17 A. If Eschelon defies Qwest's requirement to open a trouble ticket on one portion of
18 the EEL and instead opens trouble tickets on both circuits (UNE and non-UNE),
19 Eschelon increases the likelihood of incurring additional charges to uncover
20 problems that are in the Qwest network. Finding trouble on both circuits of a

¹¹⁴ See ICA Exhibit B (MR-5).

1 commingled EEL at the same time is likely rare. Much more likely is that the
2 trouble is on one circuit or the other, but the parties do not know which one. If
3 CLEC simultaneously opens a ticket on both circuits (assuming Qwest accepts
4 them) to avoid delay, Qwest will code one ticket as no trouble found (NTF) in
5 every case, because the trouble will likely be on only one of the two circuits.
6 Qwest charges the CLEC maintenance of service charges on tickets that Qwest
7 codes as NTF. The end result is that Eschelon would have to do more work to
8 open and track more tickets, while paying Qwest more charges, for trouble that is
9 found to be in Qwest's network.

10 **Q. HOW DOES ESCHELON'S PROPOSED LANGUAGE SOLVE THIS**
11 **ISSUE?**

12 A. Eschelon's proposed language makes clear that when Eschelon reports trouble on
13 a commingled EEL, Eschelon can simultaneously submit multiple circuit IDs on a
14 single trouble report; if necessary, Qwest will facilitate identifying the multiple
15 circuit IDs for the commingled EEL; and Qwest will charge Eschelon a "no
16 trouble found" charge, only in cases where the trouble is not on either component
17 of the commingled arrangement.

18 **Q. WOULD THE TERMS AND CONDITIONS, SUCH AS ORDERING,**
19 **MAINTENANCE AND BILLING, RELATED TO LOOP-TRANSPORT**
20 **COMBINATIONS BE BETTER ADDRESSED IN CMP, RATHER THAN**
21 **THIS ARBITRATION?**

1 A. No. For years, Qwest has stated that this issue was currently not appropriate for
2 CMP,¹¹⁵ while Qwest pursued unilaterally developing terms outside of CMP.¹¹⁶
3 Qwest's proposal to exclude key terms from the contract until some later date,
4 while Qwest has developed and implemented its own terms, is unreasonable,
5 especially since parties are already before the Commission and Qwest has stated
6 that Eschelon's proposals will be rejected in CMP. This issue is addressed in
7 detail in the testimony of Mr. Starkey.¹¹⁷

8 **Q. SHOULD THE COMMISSION CONSIDER WHETHER OR NOT OTHER**
9 **CLECS ARE CURRENTLY PURCHASING COMMINGLED EELS**
10 **UNDER QWEST'S ONEROUS TERMS IN DECIDING WHETHER TO**
11 **ADDRESS THIS ISSUE IN ESCHELON'S CONTRACT?**

12 A. No. The fact that other CLECs may have signed Qwest's contract amendments or
13 have begun purchasing commingled EELs under terms dictated by Qwest is not
14 evidence or justification for imposing those terms, without question, on all
15 CLECs. Other CLECs decisions not to litigate onerous terms should not waive
16 Eschelon's rights to raise these issues in its contract negotiations and have the
17 Commission decide these issues on the merits of the proposals.

18 **Q. PLEASE SUMMARIZE THESE ISSUES.**

¹¹⁵ See Communications attached to the Testimony of Ms. Johnson, *e.g.*, Exhibit Eschelon 3.16 (which is discussed in the testimony of Mr. Starkey).

¹¹⁶ See Testimony of Mr. Starkey (including his discussion of the non-CMP TRRO PCATs); *see also* Exhibit Eschelon 3.16 and Exhibit Eschelon 3.34 to the direct testimony of Ms. Johnson.

¹¹⁷ See Exhibit Eschelon 1 (Starkey Direct).

1 A. Commingled EELs should be a useful and meaningful alternative to UNE EELs.
2 Because a Commingled EEL is functionally equivalent to a UNE EEL, a
3 Commingled EEL should be put together (ordering, tracking, repair and billing) in
4 a manner similar to a UNE EEL. Eschelon's language accomplishes this task,
5 while Qwest's language allows Qwest to diminish the usefulness of a commingled
6 EEL by delaying provisioning and repair. In addition, Qwest's language allows
7 Qwest to provide bills for the components of the commingled EEL that are not
8 related in any way and thus extremely difficult to review and verify. Eschelon's
9 language should be adopted for these issues.

10 **VIII. EXPEDITED ORDERS**

11 **SUBJECT MATTER NO. 31. EXPEDITED ORDERS**

12 **Issues Nos. 12-67 and 12-67(a)-(g): ICA Sections 12.2.1.2 (and subparts),**
13 **7.3.5.2 (and subparts), 9.1.12.1 and subparts, 9.23.4.5.6, and Exhibit A Section**
14 **9.20.14**

15 **Q. SUBJECT MATTER 31 HAS EIGHT RELATED SUBPARTS. HOW IS**
16 **YOUR DISCUSSION OF THIS SUBJECT ORGANIZED?**

17 A. It is organized as follows: (A) Summary and Background; (B) Description of
18 Language and Proposals; and (C) Key Cost Issues, including (1) Wholesale
19 Access at Cost-Based Rates and (2) Exceptions to Charging an Additional
20 Expedite Fee.

21

1 **(A) SUMMARY AND BACKGROUND**

2 **Q. PLEASE PROVIDE A BRIEF SUMMARY OF ISSUE 12-67 AND ITS**
3 **SUBPARTS.¹¹⁸**

4 A. An expedited order, or an “expedite,” is an order for which Qwest delivers service
5 more quickly than it otherwise would under the normal service provisioning
6 interval. It is undisputed that Qwest provides expedites to itself¹¹⁹ and its retail
7 customers.¹²⁰ It is also undisputed that Qwest does not charge its retail customers
8 an additional expedite fee in all cases; rather, Qwest provides exceptions to
9 charging an additional fee for expedites under certain conditions.¹²¹ The two
10 over-arching questions regarding expedited orders for resolution in this arbitration
11 are:

12 (1) **Interim Wholesale Rate:** At what rate should expedites be
13 provided to a Qwest wholesale customer (*i.e.* Eschelon), at least on
14 an interim basis until a permanent rate is set? and

¹¹⁸ Regarding expedited orders, see also Exhibit Eschelon 2.24, 2.18, 2.19, 2.22, and 3.53 through 3.70. In Arizona, Eschelon has a complaint pending against Qwest related to Qwest’s new expedite changes (*See In re. Complaint of Eschelon Telecom of Arizona, Inc. Against Qwest Corporation*, ACC Docket No. T-01051B-06-0257, T-03406A-06-0257.) Eschelon will refer to it in its testimony as the “Arizona Complaint Docket.” *See* Exhibit Eschelon 2.19.

¹¹⁹ Exhibit Eschelon 1.6, Arizona arbitration Transcript, Vol. I, p. 58, lines 19-21 (“Q. Now, you would agree with me that Qwest provides itself with expedites; correct? A. Yes.”) (Ms. Albersheim).

¹²⁰ *See, e.g.*, Colorado arbitration, Albersheim Colorado Direct, p. 49, (Qwest “provides expedites to its retail POTS customers and design services customers...”); Exhibit Eschelon 2.21 (Qwest tariff pages for Qwest retail customers, including those receiving services over a “designed” facility).

¹²¹ Qwest (Ms. Martain) Direct (Aug. 28, 2006), Arizona Complaint Docket, p. 40, lines 4-10 (“The tariff then goes on to state that if the end user elects to move service to a temporary location (either within the same building, or a different building) that non-recurring charges would apply. This would include the non recurring charge to expedite a design service. However, when the customer moves its service, via a service order, back to the original premise location, if it meets the criteria as outlined in 3.2.2.d included below, the non-recurring charges would be *waived (including the expedite fee)*” (emphasis added)).

1 (2) **Exceptions to Charging Additional Fee for Expedites:**
2 Should the circumstances when Qwest provides exception(s) to
3 charging an additional fee for expedites be nondiscriminatory?

4 Regarding both of these issues, the ability to expedite UNE orders is integral to a
5 company's ability to gain "access to a UNE" and therefore such access must be
6 provided on nondiscriminatory terms and at cost-based rates.¹²² Although
7 deciding those two issues will resolve the bulk of the dispute regarding expedites,
8 there are sub-issues relating to the ICA language as well. Eschelon asks the
9 Commission to adopt its language for Issue 12-67 and all of its subparts.

10 Another question, whether expedite terms belong in the interconnection
11 agreement ("ICA") or in Qwest's PCAT through CMP, is dealt with by Mr.
12 Starkey in the first section of his direct testimony (Exhibit Eschelon 1). He
13 discusses, in particular, that the governing term of the CMP Document (Exhibit
14 Eschelon 3.10 at § 1.0) anticipates that terms in individual ICAs may vary and
15 may conflict with CMP and provides, that when they do, the ICA controls.¹²³

16 Recently the Minnesota Commission adopted Eschelon's proposed interim rate
17 and ruled that expedites on CLEC UNE orders constitute access to UNEs and,
18 therefore, their prices should be cost-based in the Minnesota Qwest-Eschelon ICA
19 Arbitration.¹²⁴ In addition, Arizona Staff testimony in the pending Arizona

¹²² 47 U.S.C. §252(d); 47 C.F.R. §§51.311 & 51.313.

¹²³ See, Exhibit Eschelon 1 (Starkey Direct).

¹²⁴ See Exhibit Eschelon 2.24, p. 25 (MN Arbitrators' Report, ¶¶ 221-222). This was affirmed in the Minnesota commission's March 30, 2007 Order Resolving Arbitration Issues. Exhibit Eschelon

1 Complaint Docket confirmed that expedites should be subject to cost-based
2 pricing. Specifically, Arizona Staff Conclusion Number Seven¹²⁵ states that the
3 rate(s) for expedites be considered as part of the next cost docket.¹²⁶

4 **Q. DOES QWEST PROVIDE ESCHELON WITH EXPEDITED SERVICE**
5 **FOR UNEs PER THE ICA IN UTAH TODAY?**

6 A. No. Although per Qwest an ICB rate in a Qwest tariff in Utah applies to CLEC
7 expedite orders,¹²⁷ Qwest will not expedite an unbundled loop order in Utah
8 under the existing interconnection agreement¹²⁸ regardless of whether emergency
9 conditions are met or not¹²⁹ even when a CLEC is willing to pay an ICB rate
10 based on costs.¹³⁰ Explicit language is needed in the proposed ICA addressing
11 when Qwest will process expedite orders.

2.25, pp. 17-19.

¹²⁵ Arizona Staff conclusions are summarized in the Direct Testimony of Pamela Genung, *In re. Complaint of Eschelon Telecom of Arizona, Inc. Against Qwest Corporation*, ACC Docket No. T-01051B-06-0257, T-03406A-06-0257 (“Arizona Complaint Docket”) (Jan. 30, 2007) (“Arizona Staff Expedite Testimony”) at Executive Summary. This Executive Summary is attached to this testimony as Exhibit Eschelon 2.19.

¹²⁶ Exhibit Eschelon 2.19, p. 2 (Arizona Staff Expedite Testimony, Executive Summary, Staff Conclusion No. 7).

¹²⁷ Qwest Response to Petition, p. 42.

¹²⁸ Qwest-Eschelon existing approved Utah ICA, Attachment 5, Sections 3.2.2.12, 3.2.2.13, 3.2.4.2.1, 3.2.4.3.1 and 3.2.4.4.

¹²⁹ See Exhibit Eschelon 3.65, p. 3 (Qwest Expedites & Escalations PCAT).

¹³⁰ See, e.g., Exhibit Eschelon 2.22 [showing Eschelon offered to pay cost-based approved rates, including on a case-by-case (i.e., ICB) basis, as stated on page 2 of Eschelon’s April 3, 2006 letter: “The charges Eschelon will pay includes the installation charge for the order requesting the expedite. Installation charges cover the costs of the work activities to process the order. (In an expedite situation, the same work activities take place; they simply occur earlier.) Although the installation charges generally also include the cost of a dispatch, if Qwest dispatches a technician to complete an expedite, Eschelon will also pay the dispatch charge. (When the dispatch cost is included in the installation charge, this is a double recovery by Qwest.) If Qwest spends additional

1 **Q. DID QWEST PROVIDE ESCHELON WITH EXPEDITED ORDERING**
2 **FOR UNEs IN UTAH PREVIOUSLY UNDER THE SAME ICA?**

3 A. Yes. I provide a one-page summary of the change in Qwest's conduct over time,
4 while the existing approved ICA language did not change, in Exhibit Eschelon
5 2.18.¹³¹ From the very beginning of the interconnection relationship between
6 Eschelon and Qwest, when Eschelon opted in to the AT&T interconnection
7 agreement in 2000 (before Qwest even created the expedites PCAT¹³²), Qwest
8 provided Eschelon with expedite capability at no additional charge for loops and
9 other UNEs when certain specified emergency conditions were met ("emergency-

time due to the expedite itself, Eschelon will also pay the half hourly labor rate (which in Arizona is the same rate whether billed as repair or additional labor, other) for that time. Payment of these charges is provided for under the current interconnection agreements, and no amendment is necessary."]. Although the example in this quotation referred to Arizona, the dispute resolution letters covered several states, including Utah, and citations from the Utah cost docket was included with the letters. *See* Exhibit Eschelon 2.22; *id.* at pp. 5-7 (attached list of ICA citations).

¹³¹ In Exhibit Eschelon 2.18, expedite language from Qwest-Eschelon ICAs that is the same in some other states (such as Arizona) is quoted. In Utah as well, Qwest provided expedite capability for unbundled loop orders during the time period before January of 2006 under the current ICA language. *See, e.g.*, Qwest-Eschelon existing approved Utah ICA, Attachment 5, Section 3.2.2.12 ("US WEST and CO-PROVIDER shall mutually develop expedite procedures to be followed when CO-PROVIDER determines an expedite is required to meet subscriber service needs."); Section 3.2.2.13 ("Expedites: US WEST shall provide CO-PROVIDER the capability to expedite a service order. Within two (2) business hours after a request from CO-PROVIDER for an expedited order, US WEST shall notify CO-PROVIDER of US WEST's confirmation to complete, or not complete, the order within the expedited interval."); Section 3.2.4.2.1 ("If CO-PROVIDER requests a due date earlier than the standard due date interval, then expedite charges may apply."); Section 3.2.4.3.1 ("If CO-PROVIDER requires a due date earlier than the U S WEST offered due date and US WEST agrees to meet the CO-PROVIDER required due date, then that required due date becomes the committed due date and expedite charges may apply."); and Section 3.2.4.4 ("Subsequent to the initial order submission, CO-PROVIDER may request a new/revised due date that is earlier than the committed due date. If U S WEST agrees to meet the new/revised due date, then that new/revised due date becomes the committed due date and expedite charges may apply.")

¹³² *See* Exhibit Eschelon 3.56 (Sept. 22, 2001 product notification) (discussed in Exhibit Eschelon 3.53, p. 5).

1 based expedites”).¹³³ This continues to be the practice in Washington.¹³⁴
2 However, in January of 2006, in Utah and all other states but Washington,¹³⁵
3 Qwest implemented a Qwest-initiated change by CMP notification¹³⁶ over the
4 objection of multiple CLECs¹³⁷ to deny CLECs the capability to expedite orders
5 for loops and other UNEs using the emergency-based expedites process (or any
6 process under the same ICA as Eschelon had been receiving expedites, without
7 amendment).¹³⁸ Instead, irrespective of any expedite provisions in an existing
8 approved ICA, Qwest unilaterally requires an amendment that specifies a “per

¹³³ See, e.g., Exhibit Eschelon 3.68 (Examples of Expedite Requests Approved by Qwest for Unbundled Loop Orders); see also Arizona Complaint Docket, at Answer, May 12, 2006, p. 9, ¶ 14, lines 24-25 (“Qwest admits that it previously expedited orders for unbundled loops on an expedited basis for Eschelon. . .”); See also Qwest (Ms. Novak) Direct (July 13, 2006) (Arizona Complaint Docket), p. 5, lines 5-12 & lines 21-22 (Qwest “uniformly followed the process in existence at the time for expediting orders for unbundled loops”).

¹³⁴ See Exhibit Eschelon 3.65, p. 3 (Qwest Expedites & Escalations PCAT, stating: “The Expedites Requiring Approval section of this procedure does not apply to any of the products listed below (unless you are ordering services in the state of WA)”). Qwest now refers to expedites in these emergency situations as “Expedites Requiring Approval.” Qwest has a UNE tariff in Washington that contains approved rates. Qwest has not received Commission approval for a UNE \$200 per day advanced rate in Washington. After input from Washington staff, Qwest withdrew proposed tariffs in Washington containing its non cost based \$200 per day rate. (Docket Nos. UT-041886; UT-041890; withdrawn Nov. 18, 2004, see <http://tabb.qwest.com/PPNB.NSF/JobNum?OpenView&Start=1&Count=50&Expand=19#19>)

¹³⁵ See Exhibit Eschelon 3.65, p. 3 (Qwest Expedites & Escalations PCAT, stating: “The Pre-Approved expedite process is available in all states except Washington for the products listed below when your ICA contains language for expedites with an associated per day expedite charge.”). Qwest now refers to expedites for an added fee (as opposed to those available on an emergency basis) as “Pre-Approved” expedites.

¹³⁶ See Exhibit Eschelon 3.69 (Qwest notice annotated to highlight information showing it was a Qwest-initiated notice not associated with any change request).

¹³⁷ See Exhibit Eschelon 3.53, pp. 12-15 (summary in Chronology); Exhibit Eschelon 3.54, pp. 1-5 (Rows 2-14); Exhibit Eschelon 3.63, pp. 7-10; and Exhibit Eschelon 3.64, pp. 12-18.

¹³⁸ See Exhibit Eschelon 3.53 (Chronology) & Exhibit Eschelon 3.57. p 1 (Qwest notice effective January 3, 2006).

1 day” rate before it will expedite UNE orders.¹³⁹ In the Eschelon complaint case
2 against Qwest under the existing Arizona ICA, Staff in Arizona concluded that
3 “CLECs should not be forced into signing” the Qwest expedite amendment.¹⁴⁰
4 The Staff added that “since CLEC interconnection agreements are voluntarily
5 negotiated or arbitrated,” Qwest “rather than trying to force Eschelon into signing
6 an amendment,” could have taken the issue to arbitration under the Qwest-
7 Eschelon ICA.¹⁴¹

8 A chronology and list of documented facts regarding expedites in CMP is
9 attached to Ms. Johnson’s testimony as Exhibit Eschelon 3.53 and Exhibit
10 Eschelon 3.54. They provide a detailed account of these events, including
11 CLECs’ objections to Qwest’s refusal to provide expedites using the emergency-
12 based expedite process for unbundled loops and other UNEs. Ms. Johnson
13 personally participated in CMP during these events. The events provide an
14 example of Qwest’s changing the rules that govern the companies’ contractual
15 relationship without Commission approval and underscore why it is essential to
16 include expedite terms and conditions in the ICA, rather than, as Qwest has
17 insisted, simply referring in the ICA to expedite requirements contained in

¹³⁹ See Exhibit Eschelon 3.65, p. 1 (Qwest Expedites & Escalations PCAT, stating: “your ICA must contain language supporting expedited requests with a “per day” expedite rate”).

¹⁴⁰ Exhibit Eschelon 2.19, Direct Testimony of Pamela Genung, *In re. Complaint of Eschelon Telecom of Arizona, Inc. Against Qwest Corporation*, ACC Docket No. T-01051B-06-0257, T-03406A-06-0257 (Jan. 30, 2007) [“Arizona Complaint Docket”], p. 34, lines 10-11.

¹⁴¹ *Id.* p. 36, line 21 – p. 37, line 2.

1 Qwest's PCAT.¹⁴² Qwest wants contractual certainty for itself on pricing through
2 its proposal to document a rate in Exhibit A to the ICA but asks the Commission
3 to exclude the terms regarding when that rate would apply from the ICA –
4 denying needed contractual certainty to Eschelon. Mr. Starkey discusses the need
5 for contractual certainty in his direct testimony.

6 **(B) DESCRIPTION OF LANGUAGE AND PROPOSALS**

7 **Q. WHAT IS ESCHELON'S PROPOSED LANGUAGE FOR ISSUE 12-67**
8 **AND ITS SUBPARTS?**

9 A. Eschelon proposes to include the following language in the contract:

10 **Issues 12-67 (Section 12):**

11 12.2.1.2 Expedites. CLEC may request a Due Date earlier than the
12 applicable Due Date interval for that product or service. Requests for
13 expedites can be made either prior to, or after, submitting CLEC's service
14 request.

15
16 **Issue 12-67(a) – first of two options**

17 12.2.1.2.1 Notwithstanding any other provision of this Agreement,
18 for all products and services under this Agreement (except for
19 Collocation pursuant to Section 8), Qwest will grant and process
20 CLEC's expedite request, and expedite charges are not applicable,
21 if one or more of the following conditions are met:

22
23 a) Fire;

24
25 b) Flood;

26
27 c) Medical emergency;

¹⁴² Qwest proposed language for Sections 9.1.12.1.2 and 7.3.5.5.2; Oregon Disputed Issues Matrix, Exhibit 3 to Eschelon's Petition for Arbitration in the Oregon Eschelon-Qwest arbitration, pp. 171-172, Qwest's position statement, Issue 12-67. Qwest did not provide position statements in the Utah. See footnote 75 for more detail.

1
2 d) National emergency;

3
4 e) Conditions when the End User Customer is
5 completely out of service (primary line);

6
7 f) Disconnect in error when one of the other
8 conditions on this list is present or is caused by the
9 disconnect in error;

10
11 g) Requested service necessary for CLEC End User
12 Customer's grand opening event delayed for facilities or
13 equipment reasons with a future Ready For Service (RFS)
14 date;

15
16 h) Delayed orders with a future RFS date that meet
17 any of the above described conditions;

18
19 i) National Security;

20
21 j) Business Classes of Service unable to dial 911 due
22 to previous order activity; or

23
24 k) Business Classes of Service where hunting, call
25 forwarding or voice mail features are not working correctly
26 due to previous order activity where the End User
27 Customer's business is being critically affected.

28
29 **Issue 12-67(a) – second of two options**

30 12.2.1.2.1 Notwithstanding any other provision of this Agreement,
31 for all products and services under this Agreement (except for
32 Collocation pursuant to Section 8), Qwest will grant and process
33 CLEC's expedite request, and expedite charges are not applicable,
34 if Qwest does not apply expedite charges to its retail Customers,
35 such as when certain conditions (e.g., fire or flood) are met and the
36 applicable condition is met with respect to CLEC's request for an
37 expedited order.

38
39 **Issue 12-67(b)**

40 12.2.1.2.2 If none of the conditions described in Section 12.2.1.2.1
41 are met, Qwest will grant and process CLEC's expedite request,
42 but the expedite charges in Exhibit A will apply, unless the need
43 for the expedite is caused by Qwest.

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Issue 12-67(c)

12.2.1.2.3 Nothing in this Section 12.2.1.2 alters whether a non-recurring installation charge in Exhibit A applies to the CLEC order pursuant to the terms of the applicable section of this Agreement. The expedite charge, if applicable, is separate from the installation charge.

Issue 12-67(d), 12-67(e) (Section 9):

9.1.12.1 For expedites, see Section 12.2.1.2.

9.23.4.5.6 For expedited orders, see Section 12.2.1.2.

Issue 12-67(f) (Section 7) (1st of 2 options):

7.3.5.2 For expedites, see Section 12.2.1.2.

Issue 12-67(f) (Section 7) (2nd of 2 options):

~~7.3.5.2 Expedite requests for Interconnection LIS trunk orders are allowed. Expedites are requests for intervals that are shorter than the interval defined in Qwest's Service Interval Guide (SIG) or Individual Case Basis (ICB) Due Dates. Expedite charges as identified in Exhibit A apply per order for every day that the Due Date interval is shortened, based on the standard interval in the SIG or based on ICB criteria for Due Dates.~~

~~7.3.5.2.1 CLEC will request an expedite for Interconnection LIS trunks, including an expedited Due Date, on an the Access Service Request (ASR).~~

~~7.3.5.2.2 The request for expedite will be allowed only when the request meets the criteria outlined in Section 12.2.1.2.2, the Pre Approved Expedite Process in Qwest's Product Catalog for expedite charges at Qwest's wholesale website.~~

Issue 12-67(g)(Exhibit A):

9.20.14 Expedite Charge \$100 (footnote 1)¹⁴³

¹⁴³ Footnote 1 to Exhibit A states: "Rates not approved in cost docket."

1 Q. WHAT IS QWEST'S PROPOSED LANGUAGE?

2 A. Qwest proposes the following language for Issue 12-67 and its subparts:

3 **Issues 12-67, 12-67(a), 12-67(b), 12-67(c) (Section 12):**

4 [Qwest proposes deletion, with no counter language.]

5 **Issue 12-67(d), 12-67(e) (Section 9):**

6 9.1.12.1 Expedite requests for designed Unbundled Network Elements are
7 allowed. Expedites are requests for intervals that are shorter than the
8 interval defined in Qwest's Service Interval Guide (SIG), Exhibit C or
9 Individual Case Basis (ICB) Due Dates as applicable.

10 9.1.12.1.1 CLEC will request an expedite for designed Unbundled
11 Network Elements, including an expedited Due Date, on the Local
12 Service Request (LSR) or the Access Service Request (ASR), as
13 appropriate.

14 9.1.12.1.2 The request for an expedite will be allowed only when
15 the request meets the criteria outlined in the Pre-Approved
16 Expedite Process in Qwest's Product Catalog for expedites at
17 Qwest's wholesale web site.

18 [For Section 9.23.4.5.6, Qwest proposes deletion, with no counter language.]

19 **Issue 12-67(f) (Section 7) (same for both options):**

20 7.3.5.2 Expedite requests for ~~Interconnection~~ LIS trunk orders are
21 allowed. Expedites are requests for intervals that are shorter than the
22 interval defined in Qwest's Service Interval Guide (SIG) or Individual
23 Case Basis (ICB) Due Dates. Expedite charges as identified in Exhibit A
24 apply per order for every day that the Due Date interval is shortened,
25 based on the standard interval in the SIG or based on ICB criteria for Due
26 Dates.

27 7.3.5.2.1 CLEC will request an expedite for ~~Interconnection~~ LIS
28 trunks, including an expedited Due Date, on ~~an~~ the Access Service
29 Request (ASR).

30 7.3.5.2.2 The request for expedite will be allowed only when the
31 request meets the criteria outlined in ~~Section 12.2.1.2.2~~ the Pre-
32 Approved Expedite Process in Qwest's Product Catalog for
33 expedite charges at Qwest's wholesale web site.

34

1 **Issue 12-67(g)(Exhibit A):**

2 9.20.14 Expedite Charge, per Day Advanced (uses rates from
3 Qwest’s Tariff FCC No. 1 Section 5) \$200

4 **Q. DOES THE DISPUTED ISSUES MATRIX ACCURATELY REPRESENT**
5 **THE CHARGE FOR EXPEDITES PROPOSED BY QWEST?**

6 A. No. On page 157 of the Disputed Issues Matrix (Exhibit 3 to the Petition for
7 Arbitration), Qwest lists its proposal as consisting of a reference to “Qwest’s FCC
8 Tariff No. 1.” Yet, Qwest’s Response to the Petition indicates that Qwest’s
9 proposal is an ICB charge for expedites. Qwest specifically states in its Response
10 in Utah that its position is that “the tariff authorizes charges on an ICB (Individual
11 Case Basis) basis” and that “Eschelon must be required to pay Qwest . . .
12 consistent with the terms of the governing tariff.”¹⁴⁴ Qwest’s proposal for a
13 charge for expediting orders has varied over time and by state.

14 **Q. WHAT ARE THE DISPUTED ISSUES ASSOCIATED WITH EXPEDITED**
15 **ORDERS?**

16 A. The two over-arching issues described above have ICA language and a rate
17 associated with them that have been broken down for purposes of numbering the
18 arbitration issues into eight sub-parts. The eight numbered disputed issues
19 associated with expedited orders are:

- | | | |
|----|----------------|--------------------------------------|
| 20 | Issue 12-67: | General provisions |
| 21 | Issue 12-67(a) | Exceptions to Charging - Emergencies |
| 22 | Issue 12-67(b) | Application of Charges in Exhibit A |

¹⁴⁴ Qwest Response to Petition, p. 41.

1	Issue 12-67(c)	Separate Non-Recurring Charge
2	Issue 12-67(d)	Placement - UNEs
3	Issue 12-67(e)	Placement - UNE Combinations
4	Issue 12-67(f)	Placement - Trunk Orders
5	Issue 12-67(g)	Expedite Charge

6 These issues are associated with Section 12.2.1.2 and its subparts, as well as
7 7.3.5.2 and its subparts, 9.1.12.1 and its subparts, 9.23.4.5.6, and Exhibit A.

8 **Q. PLEASE EXPLAIN THE KEY POINTS IN ESCHELON'S PROPOSED**
9 **LANGUAGE FOR ISSUE 12-67.**

10 A. Issue 12-67 (General provisions) deals with the expedite description (Eschelon
11 12.2.1.2 v. Qwest 7.3.5.2 & 9.1.12.1) and when expedites can be ordered - only
12 when submitting an order (Qwest 7.3.5.2.1 & 9.1.12.1.1) or also after order
13 submission (Eschelon 12.2.1.2/second sentence).

14 First, Eschelon's proposed language (in Section 12.2.1.2) describes expedites in
15 terms of "Due Date" – a term that is defined in the agreed-upon "Definitions"
16 section of the contract.¹⁴⁵ In contrast, Qwest's proposed language (in Sections
17 9.1.12.1 and 7.3.5.2) refers to intervals, including in Qwest's Service Interval
18 Guide (SIG). Some intervals are already contained in Exhibit A to the proposed
19 ICA and, if Eschelon's proposal for Issue 1-1 is adopted, applicable intervals will
20 be contained in the ICA, not the SIG. Eschelon's proposal describes expedites as
21 requests for due dates earlier than the due dates that would otherwise apply under

¹⁴⁵ This definition in Section 4.0 of the proposed ICA states as follows: "Due Date" means the specific date on which the requested service is to be available to the CLEC or to CLEC's End User Customer, as applicable.

1 the ICA. Because the due dates are defined elsewhere in the contract, Eschelon's
2 proposed definition of expedites leaves no ambiguity.

3 Second, Eschelon's proposed language for Section 12.2.1.2 explains that requests
4 for expedites can be made either with Eschelon's service order request, or after
5 Eschelon submits the request.¹⁴⁶ It is important that expedites can be made after
6 the initial Eschelon order is submitted because circumstances requiring an
7 expedite may arise *after* the initial order. These circumstances may include
8 emergency conditions that did not exist originally or a change of Eschelon's End
9 User Customer's plans. In addition, if Eschelon were to cancel its original request
10 so that it could submit a new request in order to ask for an expedite, and Qwest
11 were then to deny Eschelon's expedite request, Eschelon would have lost the due
12 date interval to which it was entitled under its original request.

13 **Q. PLEASE EXPLAIN ESCHELON'S PROPOSAL FOR ISSUE NO. 12-67(A)**
14 **REGARDING EXCEPTIONS TO CHARGING AN ADDITIONAL**
15 **EXPEDITE FEE.**

16 A. Issue 12-67(a) (Exceptions to charging) addresses when emergency conditions are
17 met (Eschelon proposal #1 for 12.2.1.2.1 with subparts; Qwest proposes deletion);
18 on a nondiscriminatory basis (Eschelon proposal #2 for 12.2.1.2.1; Qwest

¹⁴⁶ Qwest's PCAT relating to expedites provides: "For any of the above conditions, expedited request can be made *either prior to, or after, submitting* your service request." See Exhibit Eschelon 3.65, p. 2. In contrast, Qwest's proposed language is more limiting. For example, Qwest's proposed Section 9.1.12.1.1 provides that the expedite request must be made on "the" LSR or ASR (singular), which would preclude making an expedite request prior to or after submitting that LSR or ASR.

1 proposes deletion), or not at all (Qwest 7.3.5.2.2, referring to the PCAT Pre-
2 Approved process, which contains no such exceptions).

3 Eschelon offers two alternative proposals for Section 12.2.1.2.1 for Issue 12-67(a)
4 (Exceptions to Charging). The first proposal contains an itemized list of
5 conditions for which an exception to charging an additional fee will be made
6 (using substantially the same list of conditions¹⁴⁷ that is available for UNE orders
7 in Washington today and was available in Utah and other states for UNE orders
8 before Qwest took it away over CLEC objection in January of 2006, as I
9 described above). The second proposal articulates a nondiscrimination standard
10 but does not contain an itemized list of conditions. The CMP background (and
11 Qwest's claim about its changes to the PCAT that are allegedly based on the
12 differences between "designed" and "non-designed" facilities¹⁴⁸) is less pertinent
13 if the Commission adopts Eschelon's proposal number two for Section 12.2.1.2.1,
14 because much of that background deals with the list of emergency conditions that
15 is enumerated in the subparts to Section 12.2.1.2.1 in Eschelon's first proposal.

¹⁴⁷ The list of conditions is contained in Qwest's PCAT. (Exhibit Eschelon 3.65, pp. 1-2) A minor difference is condition (f). Qwest's PCAT language lists under the item (f) condition "Disconnect in error by Qwest." Eschelon's proposal is to include "Disconnect in error when one of the other conditions on this list is present or is caused by the disconnect in error." From the customer's perspective, it does not matter why the service was disconnected or which company caused the disconnection; the customer needs its service restored without delay. Eschelon's proposal that would provide for expedited service in on an emergency basis when a customer's service is disconnected in error is consistent with Qwest's past practice. (See Exhibit Eschelon 3.53, pp. 9-10 at Section 5, "Qwest Attempted to Change the Expedites Process to Exclude CLEC-Caused Disconnects in Error, But Retracted its Proposal After Eschelon Objected", citing Initial "Expedites & Escalation Overview – V29.0) Although Eschelon would not pay the added fee, Eschelon would pay the installation charge for the order to correct the disconnect in error.

¹⁴⁸ See, e.g., Qwest's Response to Eschelon's Petition for Arbitration in the Utah Eschelon-Qwest arbitration, p. 41.

1 Exceptions to charging is one of the two over-arching expedite issues that I
2 discuss in greater detail below.

3 **Q. PLEASE DESCRIBE ESCHELON'S PROPOSAL WITH RESPECT TO**
4 **ISSUE NO. 12-67(B) REGARDING SITUATIONS WHEN THE EXPEDITE**
5 **CHARGE APPLIES.**

6 A. Issue 12-67(b) (Application of Charges in Exhibit A) addresses when the expedite
7 charges in Exhibit A apply (Eschelon 12.2.1.2.2 v. Qwest 7.2.5.3, 7.3.5.2.2 &
8 9.2.12.1.2); whether if charges apply Qwest must grant and process the request or
9 only allow them (Eschelon 12.2.1.2.2 v. Qwest 7.2.5.3, 7.3.5.2.2 & 9.1.12.1,
10 9.2.12.1.2); and whether there is an exception to charging when the need for an
11 expedite is caused by Qwest (Eschelon 12.2.1.2.2; Qwest proposes deletion and
12 relies on a reference to the PCAT).

13 First, regarding applying the charge in Exhibit A, the expedite charge is one of the
14 two over-arching issues that I discuss in detail below.

15 Second, in the Arizona Complaint Docket, Qwest denied¹⁴⁹ that the following
16 sentence from the Arizona and Utah Qwest-Eschelon ICA entitles Eschelon to
17 receive expedites for UNE loops: Qwest "shall provide CO-PROVIDER the
18 capability to expedite a service order."¹⁵⁰ In Colorado, Qwest testified that, under
19 that provision: "Qwest had complete discretion to decide whether or not to grant

¹⁴⁹ Qwest Answer in Arizona Complaint Docket.

¹⁵⁰ AZ Qwest-Eschelon ICA, Att. 5, §3.2.2.13 (Exhibit Eschelon 2.22, p. 5). This sentence is located in the same section in the current UT Qwest-Eschelon ICA.

1 expedites.”¹⁵¹ Qwest also suggested that alleged problems with the quoted
2 Arizona and Colorado contract language will be avoided because expedite terms
3 are “clearly delineated” in Qwest’s proposed contract language.¹⁵² Qwest
4 therefore argues that providing the capability to expedite a loop order does not
5 require Qwest to actually expedite a loop order under the existing ICA terms in
6 any case. Following the logic of Qwest’s testimony, Qwest’s language for the
7 new ICA would also give Qwest “complete discretion to decide whether or not to
8 grant expedites.”¹⁵³ It could even be viewed as less certain, because Qwest’s
9 proposal uses permissive language (allowed) rather than mandatory language
10 (shall). Nowhere in Qwest’s proposed language does it expressly say that Qwest
11 will actually grant or process an expedite request. In contrast, Eschelon’s
12 proposed language in Section 12.2.1.2.2 specifically provides: “Qwest will **grant**
13 **and process** CLEC’s expedite request” when the terms are met (which includes
14 Eschelon’s payment of the rate in Exhibit A).¹⁵⁴ Eschelon agrees with Qwest that
15 more clearly delineating contract terms is an advantage,¹⁵⁵ however, Eschelon’s
16 position is that only Eschelon’s proposed language accomplishes this objective
17 and minimizes future disputes. By providing more information and direction in
18 the interconnection agreement in regarding the terms upon which Qwest must

¹⁵¹ Colorado arbitration, Albersheim Answer, p. 55, lines 15-16.

¹⁵² Colorado arbitration, Albersheim Answer, p. 55, lines 12-17.

¹⁵³ Colorado arbitration, Albersheim Answer, p. 55, lines 15-16.

¹⁵⁴ Eschelon’s Proposed ICA Section 12.2.1.2.2 (emphasis added).

¹⁵⁵ Colorado arbitration, Albersheim Answer, p. 55, lines 12-17.

1 expedite loop¹⁵⁶ orders, Eschelon's proposed language is aimed at avoiding such
2 disputes going forward.

3 Third, Eschelon's proposed language for Section 12.2.1.2.2 states that the
4 expedite charges in Exhibit A apply, unless the need for the expedite is caused by
5 Qwest. Qwest's PCAT provides: "Any requests that are expedited due to a
6 Qwest caused reason, do not incur an expedite charge. Additionally, if the due
7 date of an expedited request is missed due to Qwest reasons, expedite charges do
8 not apply."¹⁵⁷ Qwest's proposed ICA language, however, does not contain this
9 exception. Instead, Qwest proposed to simply refer to its PCAT even though, as
10 further described by Mr. Starkey, Qwest may change the PCAT over CLEC
11 objection. Eschelon's language provides contractual certainty on this point and is
12 more likely to minimize future disputes.

13 **Q. PLEASE DESCRIBE ESCHELON'S PROPOSAL WITH RESPECT TO**
14 **ISSUE NO. 12-67(C) RELATED TO NON-RECURRING INSTALLATION**
15 **CHARGES FOR EXPEDITED ORDERS.**

16 A. Issue 12-67(c) (Separate Non-Recurring Charge) addresses whether the contract
17 should confirm the expedite fee is separate from the installation Non-Recurring
18 Charge ("NRC") (Eschelon 12.2.1.2.3; Qwest proposes deletion).

¹⁵⁶ Eschelon's proposed language states that the expedite provision applies to "all products and services under this Agreement (except for Collocation pursuant to Section 8)" (See Section 12.2.1.2.1) and therefore includes all types of unbundled loops.

¹⁵⁷ Exhibit Eschelon 3.65, p. 4 (Qwest expedites PCAT).

1 Eschelon is not trying to get something for nothing through its expedite proposal.
2 Thus, Eschelon proposes language in Section 12.2.1.2.3 that spells out that
3 applicable NRC charges apply in addition to any applicable expedite charges.
4 Qwest does not propose alternative language for Section 12.2.1.2.3. Eschelon's
5 language ensures that the provisions of Section 12.2.1.2 will not alter the
6 application of installation charges under Exhibit A when they appropriately apply.
7 Expedites are not free under Eschelon's proposal. Eschelon clarifies that it will
8 pay the installation charge (covering Qwest's costs), in addition to expedite
9 charges (for which Qwest has proven no cost basis) when applicable.

10 For example, the basic installation non-recurring charge for a DS1 capable loop is
11 \$54.55 per circuit.¹⁵⁸ In response to stated concerns by Qwest about potential
12 confusion between this installation NRC and expedite charges, Eschelon's
13 language in Section 12.2.1.2.3 confirms that Eschelon will pay the expedite
14 charge, when applicable, in addition to this installation NRC. Eschelon's
15 proposal is particularly reasonable because, for retail customers, Qwest in some
16 cases waives the installation NRC in addition to not charging an expedite
17 charge¹⁵⁹ and because Qwest performs the same work for the installation,
18 regardless of whether it is expedited or not. The only material difference is that
19 the work is performed earlier, as I discuss below.

¹⁵⁸ Section 9.2.5.1.1.1 of Exhibit A to the proposed ICA.

¹⁵⁹ Qwest (Ms. Martain) Direct (Aug. 28, 2006), Arizona Complaint Docket, p. 40, lines 4-10 (quoted above; describing situation when, for Qwest retail customers, "the non-recurring charges would be *waived (including the expedite fee)*" (emphasis added)).

1 **Q. WHAT IS ESCHELON’S PROPOSAL WITH RESPECT TO ISSUE NOS.**
2 **12-67(D), 12-67(E), AND 12-67(F) RELATED TO PLACEMENT OF**
3 **LANGUAGE REGARDING EXPEDITED ORDERS IN THE ICA?**

4 A. For expedites, Eschelon’s language and Qwest’s counter language do not appear
5 in the same sections of the ICA. Issues 12-67(d), 12-67(e), and 12-67(f)¹⁶⁰ all
6 relate to placement of expedited ordering terms in the ICA – in Section 12.2 “Pre-
7 Ordering, Ordering and Provision” (Eschelon, with cross references in 7.3.5.2,
8 9.1.12.1 & 9.23.4.5.6 to Section 12.2.1.2) or in Section 9 “UNEs” and Section 7
9 “Interconnection” (Qwest 7.3.5.2 and subparts & 9.1.12.1 and subparts;¹⁶¹ Qwest
10 proposes deletion of all expedite language in Section 12).

11 As stated in Section 12.2.1.2.1, Eschelon’s proposal is to deal with expedites “for
12 all products and services under this Agreement (except for Collocation pursuant
13 to Section 8)” in Section 12. Eschelon does not believe that any other expedite
14 language is needed in the ICA, other than possibly cross references to Section
15 12.2.1.2 (and the rate in Exhibit A). Therefore, for all three issues, Eschelon
16 proposes addressing expediting the due date when ordering centrally in Section

¹⁶⁰ Regarding Issue 12-67(f) (Trunk orders), Qwest objects to use of the word “Interconnection” instead of “LIS” in the language for Section 7.3.5.2. The word “Interconnection” is used in the approved Qwest-AT&T ICA, which was used in part as the basis for negotiations. “LIS” is Qwest’s product name for interconnection service (which is the industry generic term, and as such, is more appropriate in the contract than a company product name). Examination of the agreed-upon language of the ICA shows that the ICA uses the terms “Interconnection” and “Local Interconnection Service” to denote the same set of services. This conclusion is evident from the introductory closed language of ICA Section 7.1.1 (“Interconnection”). In other words, Eschelon’s proposal to use the industry-wide term “Interconnection,” rather than Qwest’s product name “LIS,” correctly describes the scope of the provision in section 7.3.5.2.

¹⁶¹ The substantive differences in these sections are discussed with respect to the corresponding language in Eschelon’s proposed language in Section 12.

1 12.2 (“Pre-Ordering, Ordering, and Provisioning”). Qwest proposes addressing
2 this subject separately in Section 7 (“Interconnection”) and Section 9
3 (“Unbundled Network Elements”).

4 Because expedites are requests associated with provisioning a CLEC order, it is
5 logical to include provisions about expedites in the ordering and provision portion
6 of Section 12. This is consistent with the manner in which expedites are placed in
7 the current Qwest-Eschelon ICA, in which expedites are addressed in Attachment
8 5, entitled “Business Process Requirements” (rather than the product specific
9 attachments to the ICA).¹⁶² The companies have agreed in the proposed ICA that
10 Section 12 “describes Qwest’s OSS interfaces, as well as manual processes, that
11 Qwest shall provide to CLEC to support Pre-Ordering, Ordering, Provisioning,
12 Maintenance and Repair and Billing.”¹⁶³ Section 12.2 specifically addresses
13 “Pre-Ordering, Ordering, and Provisioning.” Therefore, Eschelon proposes that
14 expedited ordering be addressed in Section 12.2.1.2 and subparts. This is also
15 more efficient than repeating terms in different sections.

¹⁶² Qwest-Eschelon existing approved Utah ICA, Attachment 5, Sections 3.2.2.12, 3.2.2.13, 3.2.4.2.1, 3.2.4.3.1 and 3.2.4.4.

¹⁶³ Section 12.1.1 of proposed ICA (closed language). Although Qwest may attempt to define “OSS” more narrowly to include systems only, that is not how the term is defined in the contract. *See id.* In addition, in the Third Report and Order (at ¶ 425), the FCC said: “In the *Local Competition First Report and Order*, the Commission defined OSS as consisting of pre-ordering, ordering, provisioning, maintenance and repair, and billing functions supported by an incumbent LEC’s databases and information. OSS includes the *manual*, computerized, and automated systems, *together with associated business processes* and the up-to-date data maintained in those systems” (emphasis added). *See Third Report and Order, In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98 (Released Nov. 5, 1999), ¶425 (citing “*Local Competition First Report and Order*, 11 FCC Rcd at 15763-64, paras. 518, 523”).

1 **Q. PLEASE DESCRIBE ESCHELON’S PROPOSAL WITH RESPECT TO**
2 **ISSUE NO. 12-67(G) RELATED TO EXPEDITE CHARGE.**

3 A. Issue 12-67(g) (Expedite Charge) addresses the charge in Exhibit A - flat non-
4 recurring interim fee of \$100 (Eschelon) versus an ICB rate for which Qwest may
5 propose in every case to charge \$200 per day advanced (*e.g.*, \$1,000 if advanced
6 by 5 days)¹⁶⁴ (Qwest).

7 Eschelon’s proposal represents a compromise by Eschelon. Eschelon proposes to
8 set a specific rate for non-emergency-based (fee-based) expedites, despite the fact
9 that no cost basis has been established for such rate, in order to avoid additional
10 litigation in this case. However, Eschelon reserves its right to a cost-based rate if
11 this rate is litigated in a cost case. Therefore, Eschelon proposes its expedite
12 charge as an interim rate.

13 Qwest’s “expedite amendment,” which as I discussed above Qwest now requires
14 CLECs to sign in order to obtain expedited ordering for UNEs,¹⁶⁵ contains a rate
15 of \$200 *per day* expedited. The same rate is listed in Qwest’s Exhibit A for Utah
16 to its current negotiation template (Qwest’s generic price offer),¹⁶⁶ which

¹⁶⁴ See Washington arbitration, Albersheim Washington Direct, p. 60, lines 2-4 (“It is Qwest’s position that the appropriate ICB rate is \$200.00 per day consistent with Qwest’s its practices in other states.”).

¹⁶⁵ See Exhibit Eschelon 3.65, p. 1 (Qwest Expedites & Escalations PCAT, stating: “your ICA must contain language supporting expedited requests with a “per day” expedite rate”). See Exhibit Eschelon 2.33 for a copy of Qwest’s expedite amendment.

¹⁶⁶ <http://www.qwest.com/wholesale/downloads/2007/070208/ORNegTempTRROExhibitA1-31-07.xls>

1 references Qwest's FCC access service tariff as a source for this rate.¹⁶⁷ Qwest
2 made similar rate proposals in Minnesota and other states where Qwest and
3 Eschelon are engaged in ICA arbitration proceedings. By proposing a \$100
4 interim flat fee to be charged by Qwest for expedites, Eschelon is offering a
5 compromise.

6 Charging an additional fee for expedites is the first over-arching issue identified
7 in my summary above, and I turn to that issue now.

8 **(C) KEY COST ISSUES**

9 **1. WHOLESALE ACCESS AT COST-BASED RATES**

10 **Q. PLEASE EXPLAIN ESCHELON'S POSITION THAT THE EXPEDITE**
11 **CHARGE SHOULD BE A COST-BASED RATE.**

12 A. Eschelon is a wholesale customer of Qwest's and should pay a wholesale rate.
13 Section 252(d) of the federal Act sets forth the applicable pricing standards for
14 interconnection, network elements, and resale at wholesale rates of ILEC retail
15 services. It states that rates shall be cost-based and nondiscriminatory.¹⁶⁸
16 Nonetheless, Qwest has argued that Eschelon should pay the "same" charge as the
17 \$200 per day advanced fee (e.g., \$1,000 per order if advanced by 5 days) that

¹⁶⁷ Specifically, Qwest's Utah Exhibit A to its negotiation template notes as follows: "Market-based prices, All charges and increments shall be the same as the comparable charges and increments provided in Qwest FCC, Retail Tariffs, Catalogs, or Price Lists." <http://www.qwest.com/wholesale/downloads/2007/070430/UTNT04-30-07.xls> rows 857 (expedite rate) and 1096 (explanation of footnote 11).

¹⁶⁸ 47 U.S.C. § 252(d)(1)(A)(i) & (ii).

1 Qwest charges its private line retail customers.¹⁶⁹ Qwest erroneously equates
2 providing a retail service *at the same price* with providing wholesale service on
3 nondiscriminatory terms. The threshold question to be addressed is whether for
4 itself Qwest provides the service to its retail customers, separate from the question
5 of price. If so, the analysis moves to another question, which addresses what the
6 wholesale price should be (whether TELRIC-based). Qwest inappropriately
7 collapses these two questions into one.

8 As it is undisputed that Qwest provides expedites to itself¹⁷⁰ and its retail
9 customers,¹⁷¹ the threshold question is met and the inquiry moves to the price.
10 The wholesale price should be based on cost because Qwest faces its own costs in
11 providing expedites of orders. Qwest does not explicitly or implicitly charge
12 itself a non cost based, market rate in order to expedite orders for its retail
13 customers. Rather, it only incurs the cost of expediting such orders. By
14 proposing to charge Eschelon a non cost based price that is higher than Qwest's
15 own expedite costs, Qwest proposes to violate its nondiscrimination obligation¹⁷²

¹⁶⁹ See, e.g., Colorado arbitration, Albersheim Colorado Direct, p. 52.

¹⁷⁰ Exhibit Eschelon 1.6, Arizona arbitration Transcript, Vol. I, p. 58, lines 19-21 (“Q. Now, you would agree with me that Qwest provides itself with expedites; correct? A. Yes.”) (Ms. Albersheim).

¹⁷¹ See, e.g., Colorado arbitration, Albersheim Colorado Direct, p. 49 (Qwest “provides expedites to its retail POTS customers and design services customers...”); Exhibit Eschelon 2.21 (Qwest tariff pages for Qwest retail customers, including those receiving services over a “designed” facility).

¹⁷² See §51.313 (quoted below). See also FCC First Report and Order ¶218 (“Therefore, we reject for purposes of section 251, our historical interpretation of “nondiscriminatory,” which we interpreted to mean a comparison between what the incumbent LEC provided other parties in a regulated monopoly environment. We believe that the term “nondiscriminatory,” as used throughout section 251, applies to the terms and conditions an incumbent LEC imposes on third parties *as well as on itself.*”) (emphasis added).

1 because this price constitutes terms that are less favorable than terms faced by
2 Qwest in expediting its own orders (*i.e.*, the term that Qwest offers “to itself”).¹⁷³

3 The need for this comparison stems from the fact that Qwest acts in a dual role of
4 the CLEC’s provider of bottleneck facilities and the CLEC’s competitor in retail
5 markets. This standard for comparison is captured in the following federal rule:

6 **§ 51.313 Just, reasonable and nondiscriminatory terms and**
7 **conditions for the provision of unbundled network elements.**

8 (b) Where applicable, the terms and conditions pursuant to which
9 an incumbent LEC offers to provide access to unbundled network
10 elements, including but not limited to, the time within which the
11 incumbent LEC provisions such access to unbundled network
12 elements, shall, *at a minimum, be no less favorable to the*
13 *requesting carrier than the terms and conditions under which the*
14 *incumbent LEC provides such elements to itself.* (emphasis added).

15 Eschelon and Qwest compete in the retail market and this competition includes an
16 ability to offer expedite service to retail customers “on competitive” terms. By
17 charging Eschelon a wholesale expedite price that exceeds the cost of expedite,
18 Qwest is gaining an unfair advantage because Qwest can “profit” on the
19 difference between the retail price of an expedite and Qwest’s cost associated
20 with expedites. This advantage is very similar to an advantage that Qwest would
21 have if it charged above-cost rates for UNE loops and other UNE elements – a
22 situation that the unbundling rules and TELRIC pricing are designed to avoid.
23 For example, although Qwest takes the position that private line service is the

¹⁷³ See §51.313(b) (nondiscriminatory terms for the provision of UNEs shall be no less favorable to CLEC than the terms that the ILEC provides “to itself”).

1 retail analogue of an unbundled DS1 Capable Loop,¹⁷⁴ Qwest presumably would
2 not claim it is appropriate to charge the same price for the unbundled loop as for
3 the retail service. Certainly, that is not what the Commission has found with
4 respect to loop rates. An expedite rate for UNE orders should be cost-based, and
5 not set based on market-based pricing or retail tariff offerings.

6 **Q. QWEST HAS ARGUED THAT EXPEDITES SHOULD NOT BE COST-**
7 **BASED BECAUSE “EXPEDITES ARE NOT UNE’S.”¹⁷⁵ IS THAT THE**
8 **APPROPRIATE ANALYSIS?**

9 A. No. The proper analysis not whether a term (*e.g.*, “expedite”) is itemized on the
10 minimum list of “UNEs”; the issue is nondiscriminatory *access to* UNEs.¹⁷⁶ In
11 Paragraph 268 of its *First Report and Order*, the FCC found that the requirement

¹⁷⁴ Arizona arbitration, Albersheim Arizona Rebuttal, p. 51, lines 13-14; *see also* 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.”].

¹⁷⁵ Colorado arbitration, Albersheim Colorado Direct, p. 52.

¹⁷⁶ For those functions with a retail analogue (“the BOC provides to competing carriers that are analogous to the functions a BOC provides to itself in connection with its own retail service offerings”), the BOC “must provide access to competing carriers in “substantially the same time and manner” as it provides to itself. Thus, where a retail analogue exists, a BOC must provide access that is equal to (*i.e.*, substantially the same as) the level of access that the BOC provides itself, its customers, or its affiliates, in terms of quality, accuracy, and timeliness.” *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, ¶ 45. 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.” *Id.* ¶ 44. 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.

1 to provide “access” to UNEs must be read broadly, concluding that the Act
2 requires that UNEs be “provisioned in a way that would make them useful.”
3 Expedites are needed to make UNEs useful.

4 When it argues that expedites are not UNEs, Qwest is asking the Commission to
5 engage in the following rudimentary exercise: (1) take the list of seven or eight
6 UNEs identified by the FCC (*e.g.*, “loop”);¹⁷⁷ (2) compare the words on that list
7 to the term being requested (*e.g.*, “expedite”); and (3) find that Sections 251 and
8 252 do not apply if the same word is not on both lists. If the exercise were that
9 simple, there would hardly be several hundred pages of FCC orders discussing
10 *access to* UNEs. Note that ICA Exhibit A (the rate sheet) contains approximately
11 600 items with rates. If Qwest’s test were applied, Exhibit A would contain less
12 than ten items with rates. Obviously, Qwest’s proposed approach is not the test
13 the Commission has applied in determining cost-based rates pursuant to Sections
14 251 and 252. Nondiscriminatory access to UNEs must be provided at cost-based
15 rates.¹⁷⁸

16 **Q. WAS IT ALWAYS QWEST'S POSITION THAT NON COST BASED**
17 **RATES APPLY AND EXPEDITE CHARGES REQUIRE NO**
18 **COMMISSION APPROVAL?**

¹⁷⁷ See §51.319; *see also* FCC First Report and Order ¶ 27 [“The minimum set of network elements the Commission identifies are: local loops, local and tandem switches (including all vertical switching features provided by such switches), interoffice transmission facilities, network interface devices, signalling and call-related database facilities, operations support systems functions, and operator and directory assistance facilities.”]

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

1 A. No. Historically Qwest has treated expedites as a rate element subject to cost
2 based pricing. As discussed above, expedites were provided for unbundled loop
3 orders for six years as part of the Section 251 interconnection agreement between
4 Eschelon and Qwest in Utah and other states and are still provided in Washington
5 under the existing agreement when the emergency conditions are met. Qwest
6 confirmed that expedites were a part of accessing UNEs when Qwest previously
7 asked state commissions to establish an Individual Case Basis (“ICB”) rate for
8 expedites.¹⁷⁹ For example, in 2001 in Washington, Qwest introduced the expedite
9 charge in the direct testimony of Qwest witness Robert F. Kennedy under section
10 titled “Unbundled Network Elements (“UNEs”).”¹⁸⁰

11 Expedites is listed in Mr. Kennedy’s testimony as within the category of
12 unbundled network elements, which means that Qwest understood they were
13 subject to cost-based (*i.e.* TELRIC) pricing. Mr. Kennedy notes that, “Qwest
14 proposes to charge for Expedites and Cancellations on an ICB.”¹⁸¹

¹⁷⁹ See Qwest Response to Petition, p. 42 (“That tariff authorizes charges on an ICB basis.”).

¹⁸⁰ Exhibit Eschelon 2.2 (pages from Kennedy WA Direct). See Before the Washington Utilities and Transportation Commission, In the Matter of the Continued Costing and Pricing of Unbundled Network Elements, Transport, Terminations and Resale, Docket No. UT-003013, Part D (“Part D UNE Cost Docket”), Direct Testimony of Robert F. Kennedy (“Kennedy Direct”), Qwest Corporation, November 7, 2001, pp. 13 and 26. Qwest made the same arguments in Arizona, which is also included as part of Exhibit Eschelon 2.2. Note that I do not have access to the Utah testimony, but Qwest did request an ICB rate for Expedites as part of its UNE case in docket 01-049-85.

¹⁸¹ Exhibit Eschelon 2.2; See also Part D *UNE Cost Docket, Kennedy Direct*, p. 26.

1 As I discussed above, the ICB rate also appears in the Qwest UNE tariff in
2 Washington,¹⁸² yet Qwest will not expedite an unbundled loop order in
3 Washington under the existing interconnection agreement¹⁸³ when the emergency
4 conditions are not met¹⁸⁴ even when a CLEC is willing to pay an ICB rate based
5 on costs.¹⁸⁵ An ICB rate also appears in Exhibit A (Section 9.20.14) in the Utah
6 SGAT,¹⁸⁶ but Qwest will not provide expedites to Eschelon under the existing
7 ICA at an ICB rate based on costs.¹⁸⁷ Specific language and an interim rate
8 should be included in the proposed interconnection agreement to ensure expedited
9 ordering will be provided for unbundled loops on nondiscriminatory terms and at
10 cost-based rates.

11 **Q. DID ANY OTHER COMMISSIONS MAKE ANY RULING WITH**
12 **RESPECT TO QWEST EXPEDITE CHARGES?**

13 A. Yes. First, during 2001 Qwest made a filing similar to the Washington filing in
14 the Arizona cost docket, introducing an expedite rate under “UNE” section of its

¹⁸² Section 3.1, Access to Unbundled Network Elements, WN U-42 Interconnection Services Washington, Section 3, Effective June 26, 2003, Original Sheet 14.13 (page 46 of PDF) at http://tariffs.qwest.com:8000/idc/groups/public/documents/tariff/wa_i_t_s003p001.pdf#Page=1&PageMode=bookmarks

¹⁸³ See Qwest-Eschelon existing approved WA ICA, Att. 5, Section 3.2.2.13 (“Expedites: U S WEST shall provide CO-PROVIDER the capability to expedite a service order.”).

¹⁸⁴ Exhibit Eschelon 3.65 (Qwest expedite PCAT) (“The Pre-Approved expedite process is available in *all states except Washington* for the products below when your ICA contains language for expedites with an associated per day expedite charge.”) (emphasis added). Qwest refers to expedites for an additional fee as “Pre-Approved Expedites.”

¹⁸⁵ See, e.g., Exhibit Eschelon 2.22 (described in above footnote).

¹⁸⁶ See page 17 of 20 in the following link from Qwest’s website:
http://www.qwest.com/about/policy/sgats/SGATSDocs/utah/UT_Ex_A_7th_Rev_043004_Clean.pdf

¹⁸⁷ See Exhibit Eschelon 2.22 (and previous footnote).

1 testimony and proposing an ICB charge.¹⁸⁸ The Arizona Commission in its order
2 in the UNE Cost Docket found that “Qwest is directed to develop cost studies for
3 all services offered in this docket on an ICB price basis in Phase III. Qwest
4 should make every effort to develop reasonable cost-based prices for such
5 services even if it has little or no experience actually provisioning the
6 services.”¹⁸⁹ Because Qwest “offered in this docket on an ICB price basis” the
7 provision of expedites, expedite charges are subject to this order. Indeed, in its
8 current Arizona SGAT (dated February 10, 2005), Qwest lists footnote five next
9 to the Expedite rate element.¹⁹⁰ Footnote five reads: “Rates for this element will
10 be proposed in Arizona Cost Docket Phase III and may not reflect what will be
11 proposed in Phase III. There may be additional elements designated for Phase III
12 beyond what are reflected here.”¹⁹¹ Inclusion of this footnote indicates Qwest
13 recognized that expedite charges are subject to the Arizona Commission order.
14 Qwest has never sought permission from the Arizona Commission to remove
15 expedites from the list of UNE rate elements, nor has the Arizona Commission
16 issued an order removing expedites. Therefore, cost-based rates for Expedites are

¹⁸⁸ See Exhibit Eschelon 2.2. See also Before the Arizona Corporation Commission, In the Matter of Investigation into Qwest Corporation’s Compliance with Certain Wholesale Pricing Requirements for Unbundled Network Elements and Resale Discounts, Docket No. T-00000A-00-0194 Phase II (“Arizona Phase II UNE Cost Docket”), Direct Testimony of Robert F. Kennedy (“Kennedy Direct”), Qwest Corporation, March 15, 2001, p. 47.

¹⁸⁹ *Arizona Phase II UNE Cost Docket*, Phase II Opinion and Order, Decision No. 64922, June 12, 2002, p. 75.

¹⁹⁰ Qwest’s Arizona SGAT is available at its website. See page 12, section 9.20.14 for the Expedite rate element.
http://www.qwest.com/about/policy/sgats/SGATSDocs/arizona/AZ_14th_Rev_3rd_Amend_Exh_A_2_10_05_Clean.pdf

¹⁹¹ Qwest’s Arizona SGAT, page 16, note 5.

1 still required by the Arizona Commission's order (in addition to Section
2 252(d)(1)(A)(i) of the federal Act). In addition, Arizona Staff testimony in the
3 ongoing Arizona Complaint Docket further verifies that expedites should be
4 subject to cost-based pricing.¹⁹² Similarly, in Utah Qwest has not sought
5 permission to remove expedites from the list of UNEs.

6 Second, recently, in the Minnesota Qwest- Eschelon ICA Arbitration, the
7 Minnesota Commission ruled that expedites on CLEC UNE orders constitute
8 access to UNEs and therefore, their prices should be cost-based.¹⁹³

9 **Q. PLEASE DESCRIBE THE MINNESOTA DECISION.**

10 A. In a report upheld by the Minnesota commission, the ALJs agreed with Eschelon
11 with respect to: (1) the role of the Qwest Change Management Process ("CMP");
12 (2) expedites being an integral part of access to UNEs (i.e., *not* a superior
13 service); and (3) cost-based rates.¹⁹⁴ The ALJs rejected Qwest's per day rate
14 proposal and recommended adoption of Eschelon's positions regarding an interim
15 rate and TELRIC pricing.¹⁹⁵ The ALJs only disagreed with Eschelon on a single
16 sub-point, which I discuss in the next section below on exceptions to charging and
17 additional fee.

¹⁹² Exhibit Eschelon 2.19, p. 2 (Arizona Staff Expedite Testimony, Executive Summary, Staff Conclusion No. 7).

¹⁹³ Exhibit Eschelon 2.24, pp. 6-7 and 54-55 (Arbitrators' Report at ¶¶ 21-22 & 219-222), affirmed in Exhibit Eschelon 2.25, pp. 17-19 and 23 (Order Resolving Arbitration at pp. 17-19 & p. 23 ¶5).

¹⁹⁴ Exhibit Eschelon 2.24, pp. 6-7 and 54-55 (Arbitrators' Report at ¶¶ 21-22 & 219-222), affirmed in Exhibit Eschelon 2.25, pp. 17-19 and 23 (Order Resolving Arbitration at pp. 17-19 & p. 23 ¶5).

¹⁹⁵ Exhibit Eschelon 2.24, MN Arbitrators' Report, at ¶¶ 221-222.

1 First, regarding Qwest's expedite-related activities in CMP, the ALJs found that
2 the "CMP process by which Qwest reached its current position is not the
3 controlling factor on whether emergency situations should create an exception to
4 charging an additional fee for expedited ordering."¹⁹⁶ More generally regarding
5 CMP, the ALJs made a separate finding regarding CMP that:

6 The CMP document itself provides that in cases of conflict
7 between changes implemented through the CMP and any CLEC
8 ICA, the rates, terms and conditions of the ICA shall prevail. In
9 addition, if changes implemented through CMP do not necessarily
10 present a direct conflict with an ICA but would abridge or expand
11 the rights of a party, the rates, terms, and conditions of the ICA
12 shall prevail.¹⁹⁷ Clearly, the CMP process would permit the
13 provisions of an ICA and the CMP to coexist, conflict, or
14 potentially overlap. The Administrative Law Judges agree with the
15 Department's analysis that any negotiated issue that relates to a
16 term and condition of interconnection may properly be included in
17 an ICA, subject to a balancing of the parties' interests and a
18 determination of what is reasonable, non-discriminatory, and in the
19 public interest. *Eschelon has provided convincing evidence that*
20 *the CMP process does not always provide CLECs with adequate*
21 *protection from Qwest making important unilateral changes in*
22 *the terms and conditions of interconnection.*¹⁹⁸

23 Second, regarding access to UNEs, the ALJs specifically found: "When Eschelon
24 requests an expedite, it will be for accessing a UNE. Under 47 U.S.C. §§ 51.307
25 and 51.313, it must be provided under Section 251 of the Act and, thus, at
26 TELRIC rates."¹⁹⁹

¹⁹⁶ Exhibit Eschelon 2.24, MN Arbitrators' Report, at ¶ 219.

¹⁹⁷ Minnesota Arbitration, Albersheim Direct at RA-1, part 1.0, page 15.

¹⁹⁸ Exhibit Eschelon 2.24, MN Arbitrators' Report, at ¶¶ 21-22 (footnote in original; emphasis added).

¹⁹⁹ Exhibit Eschelon 2.24, MN Arbitrators' Report, at ¶ 221.

1 Finally, regarding cost-based rates, the ALJs rejected Qwest's per day rate
2 proposal and said "as to pricing, Eschelon's position should be adopted."²⁰⁰ The
3 ALJs noted that historically in Minnesota TELRIC rates have been substantially
4 less than Qwest's tariffed rates for similar services, and they found that
5 "Eschelon's proposal for an interim rate of \$100 is appropriate."²⁰¹ The ALJs
6 agreed with Eschelon that a TELRIC study should be done.²⁰²

7 **Q. WHICH EXPEDITE CHARGE PROPOSAL IS MORE REASONABLE?**

8 A. Eschelon's interim proposal for a flat per order charge is more reasonable.
9 Because the only additional cost that Qwest may incur to expedite an order
10 involves the cost of processing the expedite order, this cost will not vary based on
11 the number of days by which service is sought to be expedited. Accordingly, a
12 per day charge is inappropriate.

13 The reasonableness of Eschelon's proposed \$100 interim per order charge is also
14 shown by comparison of that charge with other rates that the Commission has
15 established. Eschelon's proposed interim expedite rate, for example, is almost
16 twice the rate – \$54.55 – for basic installation of a DS1 capable loop.²⁰³ Qwest
17 has acknowledged that expediting service does not require any additional
18 provisioning activities; it merely involves performing the same provisioning

²⁰⁰ Exhibit Eschelon 2.24, MN Arbitrators' Report, at ¶¶ 221-222.

²⁰¹ Exhibit Eschelon 2.24, MN Arbitrators' Report, at ¶ 222.

²⁰² Exhibit Eschelon 2.24, MN Arbitrators' Report, at ¶ 222.

²⁰³ If Eschelon expedited a loop order by 5 days, Qwest proposes to charge Eschelon \$1,000 (\$200 X 5 days).

1 activities more quickly than would otherwise be the case.²⁰⁴ An additional
2 expedite charge that approaches the amount of the charge for all of the activities
3 for an entire installation of a facility should more than amply compensate Qwest
4 for performing the installation activities more quickly.

5 Another point of comparison is the rate for “express service” – which essentially
6 is an expedite service offered to residential customers in some states and defined
7 as provisioning of access line dial tone prior to the standard installation service
8 date. Under its express service offering, Qwest offers same-day and next-day
9 installation for \$21.50 and \$16.50 flat (per order) fees in Utah.²⁰⁵

10 Another example of the reasonableness of Eschelon’s proposed \$100 per order
11 charge is a comparison with the rate that Qwest charges for a Due Date change.
12 For example, the approved rate for a Due Date change is \$2.93.²⁰⁶ More recently,
13 Qwest has proposed a higher rate for a Due Date change in the Minnesota UNE
14 cost case. Expediting an order changes the date to an earlier date. Qwest’s
15 proposed Due Date Change in Minnesota appears to apply when the date is
16 changed to a later date – “any time a customer requests a Due Date Change after
17 Qwest has assigned/dispatched a technician on the original due date.”²⁰⁷ For

²⁰⁴ See Exhibit Eschelon 1.5, MN ICA Arbitration Transcript, Vol. 2,p. 97, line 18-p, 98, line 22.

²⁰⁵ See Exhibit 2.21 Qwest Utah Exchange and Network Services Price List, Section 3.1.8.C.1, page 9, release 1, Issued 5-9-05.

²⁰⁶ See the Utah Exhibit A §9.20.12.

²⁰⁷ *In the Matter of Qwest Corporation's Application for Commission Review of TELRIC Rates Pursuant to 47 U.S.C. § 251*, Minnesota PUC Docket No. P-421/AM-06-713, OAH Docket No. 3-

1 these types of date changes, Qwest is proposing a per order (*i.e.*, *not* per day) non-
2 recurring charge of \$91.32, which is listed as the ***additional dispatch*** charge.²⁰⁸
3 In other words, in Minnesota, Qwest is proposing a per order charge for due date
4 changes that is ***lower*** than Eschelon’s proposed per order \$100 interim charge for
5 expediting the due date. Thus, in order to move the due date for a loop order up
6 by five days, Qwest proposes that it be permitted to charge \$1,000.00 (in addition
7 to the regularly applicable installation charge), although to move the due date for
8 a loop order out, Qwest proposes that it be permitted to charge an additional
9 \$91.32, regardless of the number of days that the due date is being moved.

10 Qwest has provided no evidence at all that expediting an order would require an
11 additional dispatch. To the contrary, Qwest has expressly admitted that
12 expediting service does not require *any* additional provisioning activities.²⁰⁹ Even
13 assuming that expedites involve some non-provisioning “front office” type
14 activities, there is no evidence to suggest that the cost of those activities exceed
15 not only the rate for basic installation of a DS1 capable loop but also Qwest’s own
16 recently proposed Due Date charge in the amount of an Additional Dispatch,
17 when no additional dispatch is required for expedites.

2500-17511-2 [“*MN UNE Cost Case*”], Attachment 3 Summary of Costs and Attachment 4 Element Description, December 21, 2006, at §§9.20.12 (Qwest proposed element description for §9.20.11).

²⁰⁸ *MN UNE Cost Case*, Attachment 3 Summary of Costs and Attachment 4 Element Description, December 21, 2006, at §§9.20.12 (Date Change – states “see 9.20.11”) & 9.20.11 (Additional Dispatch, per Order \$91.32).

²⁰⁹ Exhibit Eschelon 1.5, MN ICA Arbitration Transcript (Qwest witness Terry Million), Vol. 2, p. 97, line 18-p, 98, line 22; *id.* p. 98, lines 16-17.

1 Eschelon’s proposed charge is expressly an interim rate. It affords Qwest the
2 opportunity to obtain a higher permanent rate, if Qwest can provide a TELRIC
3 study to support that rate. If Qwest can present a cost study that supports a per-
4 day charge, then it will be permitted to assess such a charge. To date, however,
5 Qwest has provided no cost study and thus made no effort to prove that it incurs
6 additional costs when providing expedites that are not recovered in the installation
7 charge and the \$100 interim additional expedite fee.

8 **2. EXCEPTIONS TO CHARGING AN ADDITIONAL EXPEDITE**
9 **FEE**

10 **Q. PLEASE EXPLAIN ESCHELON’S PROPOSAL THAT EXCEPTIONS TO**
11 **CHARGING AN ADDITIONAL FEE FOR EXPEDITES SHOULD BE**
12 **NONDISCRIMINATORY.**

13 A. Qwest does not charge an additional expedite fee in every case. Qwest makes
14 certain exceptions -- providing expedites at no additional charge such as when
15 emergency-conditions are met and resources are available. For CLECs at least for
16 certain products, Qwest refers to the emergency-based expedite exceptions that
17 were previously provided in Utah for UNE orders as its “Expedites Requiring
18 Approval” process.²¹⁰ In its retail tariff, Qwest refers to exceptions to charging an
19 additional non-recurring fee for expedites within “Reestablishment of Service
20 Following Fire, Flood, or Other Occurrence” – “Nonrecurring Charges Do Not

²¹⁰ Exhibit Eschelon 3.65 (Qwest PCAT).

1 Apply.”²¹¹ Although Qwest cannot deny that it makes exceptions to charging an
2 expedite fee,²¹² Qwest disputes when and for what products it makes an
3 exception. Eschelon has offered its alternative ICA proposal #2 for Issue 12-
4 67(a) (ICA Section 12.2.1.2.1), described above, to simplify this debate.

5 Eschelon’s second proposal states that if Qwest does provide exceptions to
6 charging an additional fee for expedites for its retail customers (as Qwest
7 currently does, for example, “if a customer needs to restore service at the original
8 location when it is re-entering the original facility, after a fire, flood or Act of
9 God disaster”),²¹³ it will likewise provide those exceptions for CLECs when the
10 same conditions are met. The approach reflected in Eschelon’s first proposal is
11 preferable in that it offers more certainty as to the conditions under which
12 exceptions to charging a separate fee will be made. If the Commission finds that
13 some of all of these conditions are inapplicable (or does not reach that issue),
14 however, Eschelon’s second proposal at least articulates a nondiscrimination

²¹¹ See Exhibit Eschelon 2.21.

²¹² See Qwest (Ms. Martain) Direct (Aug. 28, 2006), Arizona Complaint Docket, p. 40, lines 4-10 (“The tariff then goes on to state that if the end user elects to move service to a temporary location (either within the same building, or a different building) that non-recurring charges would apply. This would include the non recurring charge to expedite a design service. However, when the customer moves its service, via a service order, back to the original premise location, if it meets the criteria as outlined in 3.2.2.d included below, the non-recurring charges would be *waived (including the expedite fee)*” (emphasis added)).

²¹³ See Qwest (Ms. Martain) Direct (Aug. 28, 2006), Arizona Complaint Docket, p. 39, lines 27-28; see *id.* p. 40, lines 4-10 (quoted in above footnote).

1 standard. It also limits future disputes at least to the extent that the companies
2 agree Qwest does not apply expedite charges for its retail customers.²¹⁴

3 **Q. IS ESCHELON'S PROPOSAL TO ALLOW NONDISCRIMINATORY**
4 **EXCEPTIONS TO CHARGING AN ADDITIONAL EXPEDITE FEE IN**
5 **CERTAIN EMERGENCY SITUATIONS CONSISTENT WITH**
6 **ESCHELON'S POSITION THAT RATES FOR EXPEDITES SHOULD BE**
7 **COST-BASED?**

8 A. Yes. As discussed, Eschelon continues to pay the installation NRC separate from
9 the expedite fee,²¹⁵ unlike a Qwest retail customer which also receives a waiver of
10 that installation charge.²¹⁶ In addition, Qwest provides expedites when the
11 identified emergency conditions are met ("Expedites Requiring Approval") only
12 if resources are available. Regarding Expedites Requiring Approval (but not fee-
13 added Pre-Approved Expedites),²¹⁷ Qwest's PCAT states:

14 Qwest will review your expedited request for resource availability.
15 In some cases, we may contact you to advise resources for expedite
16 are not available or offer an alternate date.²¹⁸

²¹⁴ *See id.*

²¹⁵ Eschelon proposed ICA Sections 12.2.1.2.2 & 12.2.1.2.3.

²¹⁶ *See* Qwest (Ms. Martain) Direct (Aug. 28, 2006), Arizona Complaint Docket, p. 39, lines 27-28; *see id.* p. 40, lines 4-10 (quoted in above footnote).

²¹⁷ Per Qwest's PCAT, the emergency-based Expedites Requiring Approval (at no additional fee) are subject to resource availability; the fee-added Pre-Approved Expedites are not. *See* Exhibit Eschelon 3.65 (Qwest Escalations and Expedites PCAT).

²¹⁸ *See* Exhibit Eschelon 3.65 (current Qwest Escalations and Expedites PCAT, discussing emergency-based Expedites Requiring Approval).

1 Qwest incurs no cost to add resources for expediting an order when the
2 emergency conditions are met. If resources are not available, Qwest simply
3 denies the request.

4 **Q. BOTH THE MINNESOTA ALJS AND THE ARIZONA STAFF DID NOT**
5 **SUPPORT A FINDING OF DISCRIMINATION REGARDING THE**
6 **CIRCUMSTANCES UNDER WHICH QWEST CURRENTLY OFFERS**
7 **EXCEPTIONS TO CHARGING AN ADDITIONAL EXPEDITE FEE**
8 **UNDER EMERGENCY CONDITIONS.²¹⁹ DO THESE CONCLUSIONS**
9 **IMPACT WHETHER OR NOT EXPEDITES SHOULD BE PROVIDED AT**
10 **COST-BASED RATES?**

11 A. No. Though Eschelon disagrees with the conclusion of the Minnesota ALJs' and
12 the Arizona Staff with respect to the conditions under which discrimination
13 occurs when applying an exception to charging a separate fee for expedites, both
14 the Minnesota ALJs and the Arizona Staff – despite those findings - support the
15 conclusion that expedites should be provided at cost-based rates.²²⁰ As for the

²¹⁹ See Exhibit Eschelon 2.24 (MN Arbitrators' Report, at ¶ 219) and Staff Testimony, Arizona Complaint Docket, p. 32, line 21. Staff concludes that there is no retail analogue for expedites of loop installations. *Id.* p. 32, lines 21-23. When there is no retail analogue, "no retail analogue" does not mean "no discrimination." An analysis must be made of whether the access the ILEC provides to CLECs offers a meaningful opportunity to compete. *See* Bell Atlantic NY 271 Order at ¶ 44. In any event, Qwest has now admitted that there *is* a retail analogue for DS1 and DS3 loops. *See, e.g.,* Albersheim AZ Rebuttal, AZ Docket Nos. T-03406A-06-0572, T-01051B-06-0572 (Feb. 9, 2007), p. 51, lines .13-14 ("a DSI private line (the retail analog)"); *see also* Albersheim Rebuttal in the Arizona Complaint Docket (Aug. 28, 2006), p. 12, lines 18-20 ("the Commission has already determined that DS1 Capable Loops and DS3 Capable Loops have a retail analogue; specifically, DS1 and DS3 private lines respectively").

²²⁰ Exhibit Eschelon 2.24 (MN Arbitrators' Report, at ¶ 221) and Exhibit Eschelon 2.19 (AZ Staff Testimony, Executive Summary, Staff Conclusion No. 7).

1 issue of not having a separate charge in emergency situations, it is consistent with
2 cost-based rates because Eschelon continues to pay the installation NRC separate
3 from the expedite fee,²²¹ and because Qwest provides emergency-based expedites
4 *only if resources are available* (as indicated in the PCAT language quoted in my
5 previous response).

6 Although the ALJs in Minnesota suggested that an expedite for a non-designed
7 service may be more involved than an expedite for a designed service,²²² the
8 evidence in this case shows that Qwest had been offering (and continues offering
9 in Washington) emergency-based expedites for both designed and non-designed
10 facilities for many years,²²³ and the “complexity” of design facilities had not been
11 an issue for all these years. Further, when discussing costs associated with an
12 expedite, Ms. Million of Qwest named cost of working the order into an existing
13 provisioning schedule, coordination of activities among the several Qwest’s
14 departments and communication with the customer regarding the status of the
15 order.²²⁴ Ms. Million’s description of these costs does not suggest that expedites
16 for design services would be more complex than expedites for non-design
17 services. Finally, Qwest does not explain how these complexities can possibly

²²¹ Eschelon proposed ICA Sections 12.2.1.2.2 & 12.2.1.2.3.

²²² Exhibit Eschelon 2.24, MN Arbitrators’ Report, at ¶ 220.

²²³ See Exhibit Eschelon 3.68; see also *In re. Complaint of Eschelon Telecom of Arizona, Inc. Against Qwest Corporation*, ACC Docket No. T-01051B-06-0257, T-03406A-06-0257 [“Arizona Complaint Docket”], Qwest (Ms. Novak) Direct (July 13, 2006), p. 5, lines 5-12 & lines 21-22 (Qwest “uniformly followed the process in existence at the time for expediting orders for unbundled loops”); see also Answer (May 12, 2006) (Arizona Complaint Docket), Page 9, ¶ 14, Lines 24-25 (“Qwest previously expedited orders for unbundled loops on an expedited basis for Eschelon”).

²²⁴ Minnesota arbitration, Million Minnesota Rebuttal, p. 28.

1 justify a rate difference between \$0 and \$200 per day. As I discuss above, the
2 ALJs agreed (as upheld by the Minnesota Commission) with Eschelon on the
3 latter point and rejected Qwest's \$200 per day proposed rate.

4 Further, Eschelon's Proposal # 2 for issue 12-67(a) would require Qwest to offer
5 the emergency conditions to Eschelon only to the extent that Qwest does not
6 apply expedite charges to its own customers, providing protection against
7 discrimination while addressing Qwest's stated concerns about its offering few if
8 any exceptions to charging for expedites for its retail customers.

9 **IX. RATES FOR SERVICES, UNAPPROVED RATES AND**
10 **INTERCONNECTION ENTRANCE FACILITIES (SUBJECT MATTER**
11 **NOS. 44, 45 AND 46)**

12 **SUBJECT MATTER NO. 44. RATES FOR SERVICES**

13 **Issues 22-88, 22-88(a) and 22-89: ICA Sections 22.1.1 and 22.4.1.3, and Exhibit**
14 **A, Section 7.11.**

15 **Q. PLEASE DESCRIBE ESCHELON'S BUSINESS NEED REGARDING**
16 **RATES FOR SERVICES REFLECTED IN ISSUES NOS. 22-88, 22-88(A)**
17 **AND 22-89.**

18 **A.** Eschelon needs the same certainty and clarity regarding the rates that Eschelon
19 charges Qwest as Qwest desires regarding the rates Qwest charges Eschelon.
20 Although the majority of rates in the ICA refer to Qwest's charges to Eschelon for
21 services and facilities, some of the rates apply to Eschelon's charges to Qwest.
22 Therefore, the ICA and its Exhibit A should not inaccurately confine rates to

1 “Qwest rates” or misleadingly refer solely to “Qwest” tariffs, as proposed by
2 Qwest. Eschelon and Qwest have agreed that Eschelon will charge Qwest in
3 certain instances; keeping the language in the ICA general as “rates,” rather than
4 “Qwest’s rates” avoids contradictions and confusions.

5 Issue 22-88 deals with the general references to rates in Exhibit A, while Issue 22-
6 88(a) deals with a specific line item in Exhibit A describing rates for IntraLATA
7 toll traffic. Issue 22-89 concerns the right of each company to request a cost
8 proceeding at the Commission to establish a rate to replace an interim rate.

9 **Q. WHAT IS ESCHELON’S PROPOSAL TO ADDRESS THESE ISSUES?**

10 A. Eschelon proposes language modifications to make clear that Eschelon has the
11 same right to charge for certain rates and services under the terms of the ICA as
12 Qwest does. Eschelon also proposes eliminating language in Exhibit A that
13 contradicts the parties’ agreement that they will mutually exchange, and
14 compensate for intraLATA toll traffic. In addition, Eschelon proposes to spell out
15 in the contract that each company has a right to request a cost proceeding at the
16 Commission to establish a permanent rate in replacement of an interim rate.
17 Eschelon proposes the following language modifications for Issues 22-88, 22-
18 88(a) and 22-89:

19 **Issue 22-88:**

20 22.1.1 The rates in Exhibit A apply to the services provided by
21 ~~Qwest to CLEC~~ pursuant to this Agreement.

22 **Issue 22-88(a):**

23 Exhibit A, Section 7.11

1 Qwest's Utah Access Services Tariff

2 **Issue 22-89:**

3 22.4.1.3 Nothing in this Agreement shall waive any right of either
4 Party to request a cost proceeding at the Commission to establish a
5 Commission-approved rate to replace an Interim Rate.

6 **Q. WHAT IS QWEST'S PROPOSAL ON THESE ISSUES?**

7 A. Qwest opposes Eschelon's proposals for these Sections. Qwest recommends
8 including the language in Section 22.1.1 that would confine the scope of the rates
9 in Exhibit A specifically to those that apply to services provided *by Qwest to*
10 *Eschelon* (thus in effect excluding agreed-upon Eschelon rates from Exhibit A).
11 Similarly, Qwest's proposal for Exhibit A, Section 7.11 is to confine the source of
12 access charges for the agreed-upon mutual exchange of intraLATA toll traffic to
13 Qwest's, and not Eschelon's, access tariff. In addition, Qwest opposes including
14 in the contract the provision regarding each company's right to request a cost
15 proceeding to replace an interim rate. Qwest proposes the following language
16 modifications:

17 **Issue 22-88:**

18 22.1.1 The rates in Exhibit A apply to the services provided by
19 Qwest to CLEC pursuant to this Agreement.

20 **Issue 22-88(a):**

21 Exhibit A, Section 7.11
22 Qwest's Utah Access Services Tariff

23 **Issue 22-89:**

24 ~~22.4.1.3 Nothing in this Agreement shall waive any right of either~~
25 ~~Party to request a cost proceeding at the Commission to establish a~~
26 ~~Commission-approved rate to replace an Interim Rate~~ Intentionally
27 Left Blank.

1 **Q. REGARDING ISSUE 22-88 (THE FIRST OF THE THREE ISSUES),**
2 **PLEASE EXPLAIN ESCHELON’S POSITION.**

3 A. Eschelon proposes striking the phrase “by Qwest to CLEC” because it contradicts
4 the fact that Exhibit A also includes rates for services provided by Eschelon to
5 Qwest.²²⁵ The contract language makes numerous references to rates charged by
6 CLECs, or by such nonspecific terms as “the originating carrier,” which are meant
7 to be equally applicable to Eschelon or Qwest. These contract references
8 furthermore state that these rates may be contained in Exhibit A. For example,
9 section 22.1.3 contains the following agreed-upon language:

10 22.1.3 Reciprocal Charges: See Section 7.3 regarding bill and
11 keep for reciprocal compensation. *To the extent that CLEC*
12 *provides services to Qwest, other than bill and keep for reciprocal*
13 *compensation, or services provided pursuant to this Agreement at*
14 *the rate in Exhibit A, CLEC may apply its tariffed rates as*
15 *provided in Section 22.1.3.1.*²²⁶

16 Below is a partial list of citations from the agreed-upon portions of the contract
17 that make references to charges that are assessed by Eschelon or by either
18 Eschelon or Qwest, and are based on Exhibit A rates and assumptions (emphasis
19 added):

20 **Interconnection**

21 **7.3.3 Trunk Non-recurring charges**
22 ...

²²⁵ 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).

²²⁶ Emphasis added.

1 7.3.3.1 *Installation non-recurring charges may be assessed*
2 *by the provider for each Interconnection trunk ordered at the rates*
3 *specified in Exhibit A, or the CLEC's Tariff when the rates in the*
4 *aggregate are not greater than the amount in Exhibit A.*

5
6 7.3.3.2 *Non-recurring charges for rearrangement may be*
7 *assessed by the provider for each Interconnection trunk*
8 *rearrangement ordered, at one-half (1/2) the rates specified in*
9 *Exhibit A.*

11 **7.3.7 Transit Traffic**

12 The following rates will apply:

13
14 7.3.7.1 Local Transit and ISP-bound Transit: *The*
15 *applicable Interconnection tandem switching and tandem*
16 *transmission rates at the assumed mileage contained in Exhibit A*
17 *of this Agreement, apply to the originating Party. (See Section*
18 *7.3.1.1.2) The assumed mileage will be modified to reflect actual*
19 *mileage, where the mileage can be measured, based on*
20 *negotiations between the Parties.*

21 7.3.7.2 IntraLATA Toll Transit: The applicable tariffed
22 Switched Access Tandem switching and tandem transmission rates
23 apply to the originating CLEC or LEC. *The assumed mileage*
24 *contained in Exhibit A of this Agreement shall apply.*

26 **7.6 Transit Records**

27 7.6.3 If the non-transit provider requests records pursuant
28 to Section 7.6.1 or 7.6.2, *the Parties will charge the same rate for*
29 *Category 11-01-XX records sent in an EMI mechanized format.*
30 These records are used to provide information necessary for each
31 Party to bill the Originating Carrier. *The charge listed in Exhibit A*
32 *of this Agreement is applicable to each transit record that meets*
33 *the definition of a billable record.*

34 **Labor Charges for Audits**

35 **8.2.3 General Terms--Caged and Cageless Physical Collocation**

36 8.2.3.10 All equipment placed will be subject to random safety
37 audits conducted by Qwest. Qwest will not enter CLEC's caged

1 Collocation space or access CLEC's cageless Collocation
2 equipment as part of a random safety audit. These audits will
3 determine whether the equipment meets the NEBS Level 1 safety
4 standards required by this Agreement. CLEC will be notified of
5 the results of this audit. If, pursuant to the random audit, Qwest
6 does not demonstrate non-compliance, *Qwest shall pay CLEC*
7 *using the rates in Exhibit A for Additional Labor Other, for CLEC*
8 *time spent, if any, as a result of Qwest's audit...*

9 **Trouble Isolation**

10 9.2.5.2 When CLEC requests that Qwest perform trouble isolation
11 with CLEC, a Maintenance of Service Charge will apply when
12 Qwest dispatches a technician and the trouble is found to be on the
13 End User Customer's side of the Loop Demarcation Point. If the
14 trouble is on the End User Customer's side of the Loop
15 Demarcation Point, and CLEC authorizes Qwest to repair the
16 trouble on CLEC's behalf, Qwest will charge CLEC the
17 appropriate Additional Labor Charges and Maintenance of Service
18 Charge, if any, as set forth in Exhibit A at 9.20. No charges shall
19 apply if CLEC provides Qwest with test results indicating trouble
20 in Qwest's network and Qwest confirms that such trouble is in
21 Qwest's network. In the event that Qwest reports no trouble found
22 in its network on a trouble ticket and it is subsequently determined
23 that the reported trouble is in Qwest's network, then Qwest will
24 waive or refund to CLEC any Maintenance of Service Charges
25 assessed to CLEC for that same trouble ticket. If Qwest reported
26 no trouble found in its network but, as a result of a repeat trouble,
27 CLEC demonstrates that the trouble is in Qwest's network, *CLEC*
28 *will charge Qwest a trouble isolation charge as described in*
29 *Section 12.4.1.8.*

30 **Local Number Portability Ordering**

31 10.2.5.5.3 Qwest will incur charges for the Qwest requested
32 Managed Cut

33 10.2.5.5.4 *Charges for Qwest requested Managed Cuts* shall
34 be based upon actual hours worked in one half (1/2) hour
35 increments. If the time to perform the Managed Cut is extended
36 due to CLEC error, CLEC will not charge Qwest for the additional
37 time. *Exhibit A of this Agreement contains the rates for Managed*
38 *Cuts.* Qwest understands and agrees that in the event Qwest does
39 not make payment for Qwest requested Managed Cuts, unless
40 disputed as permitted under Sections 5.4 and 21 of the Agreement,

1 CLEC may choose not to accept any new LSR requests for
2 Managed Cuts.

3 **Exchange of Usage Data**

4 **21.14.1. Daily Usage Files**

5 21.14.1.2 CLEC agrees to record call information in
6 accordance with this Section. Unless Qwest notifies CLEC in
7 writing that CLEC may discontinue doing so, CLEC shall provide
8 to Qwest access records. The access records provide Qwest with
9 usage by CLEC end office of originating switched access usage.
10 These records are in industry standard Category 11 Exchange
11 Message Interface (EMI) format. Category 1101 series records are
12 used to exchange detail Meet Point Billed access minutes-of-use.
13 Qwest will make accessible to CLEC through electronic means the
14 transmission method/media types available for these mechanized
15 records. *The CLEC may charge Qwest for these records in*
16 *accordance with Exhibit A.*

17 As is evident from these citations, the agreed-upon language of the contract
18 references Exhibit A as a basis of Eschelon-charged rates (or rates chargeable by
19 Qwest or Eschelon, dependent on the circumstances) in connection with a number
20 of topics, including reciprocal compensation, transit traffic, non-recurring charges
21 for interconnection trunks, transit and usage records, labor and trouble isolation
22 charges, and Local Number Portability managed cuts.

23 **Q. DOES INCLUSION OF ESCHELON'S PROPOSED LANGUAGE IN**
24 **SECTION 22.1.1 HELP FULFILL ESCHELON'S BUSINESS NEED FOR**
25 **CLARITY IN RATES OUTLINED ABOVE?**

26 A. Yes. Eschelon, as well as Qwest, will depend upon the ICA for certainty and
27 clarity in rates that will be charged for the term of the ICA. Elimination of the
28 words "by Qwest to CLEC" (as proposed by Eschelon) allows the general

1 sentence in Section 22.1.1 linking Exhibit A rates to the “services
2 provided...pursuant to this agreement” to apply to Eschelon as well as to Qwest.
3 For the terms and conditions under which the rates actually apply, each party
4 looks equally to the text of the ICA, allowing clarity in rates for each.²²⁷ Qwest’s
5 proposed addition of the qualifier “by Qwest to CLEC” in Section 22.1.1, on the
6 other hand, would destroy this framework, resulting at best in ambiguity and at
7 worst in a false conclusion that Eschelon cannot charge for services pursuant to
8 the ICA.

9 As I discussed above, various sections throughout the contract already contain the
10 agreed-upon language that references Exhibit A as a basis for certain Eschelon
11 rates. In light of these other agreed-upon provisions, Qwest’s proposal for
12 Section 22.1.1 – which describes rates in Exhibit A as Qwest’s rates – is clearly
13 inaccurate and misleading. In contrast, Eschelon’s proposal provides an accurate
14 and unambiguous description of rates contained in Exhibit A.

15 **Q. REGARDING ISSUE 22-88(A) (THE SECOND OF THE THREE ISSUES),**
16 **PLEASE EXPLAIN ESCHELON’S POSITION.**

17 A. Eschelon proposes that the language in Exhibit A, Section 7.11, refer simply to
18 the Utah Access Services Tariff rather than *Qwest’s* Utah Access Services Tariff.
19 Eschelon proposal is essential to bring clarity and certainty to the ICA’s treatment
20 of charges for the exchange of intraLATA toll traffic. Elimination of Qwest’s

²²⁷ Exhibit A itself simply provides rates – it does not make rates specific to Qwest, Eschelon, or either.

1 proposed qualifying reference to *Qwest's* tariff makes the language in Exhibit A
2 consistent with the agreed-upon portions of the contract that discuss the mutual
3 exchange of intraLATA toll traffic.

4 The topic Mutual Exchange of Traffic is found in Section 7.2 of the ICA.
5 Specifically included in this section is “Exchange Access (IntraLATA Toll) traffic
6 as defined in this Agreement.” (Section 7.2.1.2.2.) Qwest and Eschelon have
7 agreed that intraLATA toll traffic will be mutually exchanged and mutually
8 compensated for under the each provider’s respective tariff, as captured in the
9 following provisions of the agreed-upon language of the contract:

10 7.3.7.2 IntraLATA Toll Transit: The applicable tariffed
11 Switched Access Tandem switching and tandem transmission rates
12 apply to the originating CLEC or LEC. The assumed mileage
13 contained in Exhibit A of this Agreement shall apply.

14 7.3.10.1 Where either Party acts as an IntraLATA Toll
15 provider, each Party shall bill the other the appropriate charges
16 pursuant to its respective Tariff or Price Lists.

17 Given the agreed-upon language in the ICA regarding the assessment of mutual
18 compensation for the exchange of intraLATA toll traffic, the language in Section
19 7.11 of Exhibit A – which provides the Utah Access Services Tariff as the source
20 of the intraLATA toll traffic rates – must be general: This section must list the
21 source of intraLATA toll traffic rates not only for Qwest, but also for Eschelon.
22 Eschelon’s proposal that this section read simply “Utah Access Tariff,” in contrast
23 to Qwest’s proposal to limit this language to “Qwest’s Utah Access Tariff,”
24 provides necessary clarity regarding the mutuality of these charges. Both

1 Eschelon and Qwest will resort to their respective Utah access tariffs for the
2 application of intraLATA toll rates – thus, neither Eschelon’s nor Qwest’s access
3 tariff can be excluded from reference in Exhibit A.

4 Finally, the agreed-upon language at Section 7.2.2.3.3.1 regarding Qwest’s
5 payment of CLEC access charges could create confusion if read in combination
6 with Qwest’s proposal for Exhibit A, Section 7.11. Eschelon’s proposed language
7 (far from rendering Eschelon’s proposal unnecessary, as Qwest argues) provides
8 necessary clarification that each party will depend on its own Utah access tariff
9 for the application of access charges, in light of the agreed-upon language as
10 follows:

11 7.2.2.3.3.1 Notwithstanding any other provision of this
12 Agreement, in the case of Exchange Access (IntraLATA Toll)
13 traffic where Qwest is the designated IntraLATA Toll provider, or
14 where Qwest has agreed to be a presubscribed IntraLATA Toll
15 provider for other LEC end user toll Customers, Qwest will be
16 responsible to CLEC for payment of CLEC Tariff access rates for
17 traffic terminating to CLEC’s network. Qwest will also be
18 responsible for traffic originating from CLEC’s network for a
19 CLEC End User Customer utilizing an intraLATA Toll-free
20 service where Qwest is the provider of the intraLATA Toll-free
21 service.

22 This language states that when Qwest acts as a provider of the long-distance
23 intraLATA toll service, it pays access charges to the CLEC whose local network
24 it is using. Comparison of the contract language and Qwest’s proposed language
25 for Exhibit A creates confusion and unnecessary ambiguity: On the one hand, the
26 contract spells out a situation in which *CLEC charges Qwest* for intraLATA toll.

1 On the other hand, under Qwest's proposal, Exhibit A would say that rates for
2 intraLATA toll traffic are to be found only in *Qwest's Access Tariff*. Qwest's
3 proposed language could lead to the mistaken conclusion that a CLEC must
4 charge access rates out of Qwest's, rather than the CLEC's own, access tariff.
5 Eschelon's proposal to make a general reference to an "Utah Access Tariff,"
6 rather than "Qwest's Utah Access Tariff," will remove any ambiguity regarding
7 each party's use of its own Utah access tariff for its access charges, and thus will
8 reduce the likelihood of future disputes.

9 **Q. REGARDING ISSUE 22-89 (THE THIRD OF THE THREE ISSUES),**
10 **PLEASE EXPLAIN ESCHELON'S POSITION.**

11 A. Eschelon's proposed language preserves the right of either company to request a
12 cost case with the Commission to establish permanent rates in place of interim
13 rates. This issue is closely linked to the agreed-upon Section 22.4 (Interim Rates)
14 and Eschelon's proposed language in section 22.6.1 (Eschelon's proposal for
15 Issue 22-90).²²⁸ In section 22.4.1.1, Eschelon and Qwest agreed that the
16 Commission may review and change approved interim rates or interim rates. In
17 section 22.6.1, Eschelon proposes the process under which an *interim* rate may be
18 established for products for which the Commission has not established a rate.
19 Eschelon's proposal for Issue 22-89 clarifies that each company may request a
20 cost case to establish *permanent* rates. If for any reason Qwest files rates and cost
21 support with the Commission but there is not a contested cost case and a full

²²⁸ See the citation of section 22.6.1 under Issue 22-90 below.

1 review by the Commission, Eschelon’s proposal for Issue 22-89 ensures that
2 interim rates do not remain indefinitely *if* one of the companies asks the
3 Commission to review them. The opportunity to obtain permanent Commission-
4 approved rates is necessary to ensure that rates are cost-based, just, reasonable
5 and non-discriminatory.

6 **Q. WHAT ARGUMENTS DOES QWEST MAKE AGAINST ESCHELON’S**
7 **PROPOSAL FOR ISSUE 22-89?**

8 A. Qwest’s only argument against Eschelon’s proposal is that it places unnecessary
9 language in the interconnection agreement.²²⁹ Note that Qwest does not deny that
10 each party has the right to request a cost proceeding; it simply claims that such a
11 provision is unnecessary in the ICA. Qwest’s argument is flawed: First, this
12 issue concerns a subsection in Section 22.4 – the section titled “Interim Rates.”
13 Closed language in Section 22.4 states that the interim rates may be reviewed and
14 changed by the Commission (Section 22.4.1.1). Therefore, a clarification that
15 Eschelon or Qwest may request a cost proceeding in which the Commission
16 would review and change these rates (Eschelon’s proposal for Section 22.4.1.3,
17 which is Issue 22-89), is appropriate.

18 Second, Qwest has agreed to Eschelon’s proposal on Issue 22-89 (Section
19 22.4.1.3) in Minnesota. Because Qwest does not point to any state-specific reason

²²⁹ Qwest’s position statement for Issue 22-89 in the Oregon Disputed Issues Matrix in the Oregon Eschelon-Qwest arbitration (at page 241) states that Eschelon’s proposed provision is unnecessary. Qwest did not provide position statements in the Utah. See footnote 75 for more detail.

1 that this provision is “unnecessary” in Utah, but is “necessary” in Minnesota,
2 Qwest’s objections to Eschelon’s proposal in Utah are unsupported and
3 unreasonable.

4 **Q. PLEASE SUMMARIZE ISSUES 22-88, 22-88(A) AND 22-89 RELATING**
5 **TO RATES FOR SERVICES.**

6 A. Eschelon proposals for Issues 22-88 and 22-88(a) are consistent with the
7 numerous agreed-upon provisions of the contract – provisions that refer to Exhibit
8 A as a basis of CLEC-charged rates. Qwest’s proposal to treat Exhibit A as if
9 containing only Qwest-charged rates is inaccurate and confusing, and could lead
10 to needless disputes. Eschelon’s proposal for Issue 22-89 is a necessary
11 complement to Section 22.6 (Issue 22-90). As I discuss below, it has become
12 clear that Qwest is attempting to unreasonably narrow the agreed upon portion of
13 Section 22.6, to limit that language to a paper “filing” requirement, rather than
14 reading that language as reflecting the terms that already apply in Minnesota, as
15 has been Eschelon’s consistent position. Eschelon agreed to language in Section
16 22.6 regarding a set of circumstances (described in the next section) under which
17 Eschelon would pay Qwest’s proposed rates even though they are unapproved.
18 Section 22.6.1 specifically provides (in closed language) that Qwest’s proposed
19 rate will only apply “until the Commission orders a rate.” In other words, the
20 interim rate will not apply indefinitely and will be replaced by an approved
21 permanent rate. If for any reason Qwest files rates and cost support with the
22 Commission as required by Section 22.6 but there is not an associated contested

1 cost case, Qwest should not be able to avoid the provision of Section 22.6.1 that
2 the Commission will order a rate but not initiating a cost case and then arguing
3 that, by agreeing to Section 22.6, Eschelon has waived its right to initiate a cost
4 case. The underpinning of Section 22.6 is that interim rates will be replaced with
5 permanent rates, and Section 22.4.1.3 removes an opportunity for Qwest to delay
6 that intended result.

7 **SUBJECT MATTER NO. 45. UNAPPROVED RATES**

8 *Issue No. 22-90 and Subparts (a)-(e): ICA Sections 22.6.1 and 22.6.1.1 and*
9 *Exhibit A Sections 8.1.1.2, 8.3.2.7.5, 8.3.2.7.6, 8.3.2.7.7, 8.3.2.7.8, 8.8.1, 8.1.14,*
10 *8.6.1.1, 8.6.1.2, 8.6.2.2.1, 8.6.2.2.2, 8.7.1.2, 8.7.2.4, 8.8.4 (NRC), 8.15.2.1,*
11 *8.15.2.2, 8.13.1.1, 8.13.1.2.1, 8.13.1.2.2, 8.13.1.2.3, 8.13.1.3, 8.13.1.4, 8.13.2.1,*
12 *9.6.12, 9.7.6, 9.23.6 and subparts, 9.23.7.7.1, 9.23.7.7.2, and 10.7.10.*

13 **Q. PLEASE DESCRIBE ESCHELON'S BUSINESS NEED REGARDING**
14 **UNAPPROVED RATES AS REFLECTED IN ISSUE 22-90 AND ITS**
15 **SUBPARTS.**

16 **A.** Rates are key to decision making and planning with respect to products and
17 services. If rates are unknown or change unexpectedly, a business cannot plan its
18 expenses or budget appropriately. And, if rates are inflated and not cost based, a
19 business cannot remain competitive. Therefore, it is important that rates are
20 substantiated and approved in a timely manner. Eschelon's proposal addresses
21 two scenarios involving unapproved rates in particular: (1) without seeking
22 Commission approval, Qwest starts charging an unapproved rate for a UNE or
23 process that it previously provided under a Commission-approved agreement

1 without an additional charge; and (2) Qwest implements and imposes upon
2 Eschelon (under threat of not providing the service at all) Qwest's "going-in"
3 positions or "wish-list"²³⁰ unapproved rates and then leaves them in effect
4 indefinitely with no action by Qwest to support the rates to the Commission or
5 obtain Commission approval of those rates. An example of the first scenario, as I
6 discussed with respect to Issue 4-5, is design changes for loops. For years, Qwest
7 provided design changes for loops with no additional charge²³¹ under the existing
8 Commission-approved Qwest-Eschelon interconnection agreement before it
9 unilaterally announced in an unexpected letter to CLECs that it would commence
10 billing a non-recurring charge ("NRC") for these same design changes.²³²
11 Eschelon had no reason to anticipate or budget for these new NRCs for an activity
12 Qwest had been performing regularly under the ICA without these NRCs. An
13 example of the second scenario is when Qwest offers a new product and assigns it
14 a rate, does not substantiate the rate or seek Commission approval for the rate for
15 a substantial period of time, and yet will not process orders for the product unless
16 CLECs sign an amendment containing that unapproved rate.

17 In Section 22.6 and subparts, Eschelon's proposal tracks terms from a

²³⁰ For rates that are contested in cost cases, the going in rate proposal of a party, for which it wishes to obtain Commission approval, is frequently not adopted without any modification at all. There is often some modification that results in Commission approval of a rate lower than that initially proposed. Therefore, I refer to this initial proposal as a "going in" position or "wish list" rate.

²³¹ Although there is no *additional* charge (*i.e.*, separate rate), that does not necessarily mean that Qwest is not recovering its costs. The costs may be recovered elsewhere, such as in the recurring loop rate.

²³² Exhibit Eschelon 2.1, non-CMP September 1, 2005 letter from Qwest with the subject line "Billing for design changes on Unbundled Loop." See also my discussion of Issue 4-5.

1 commission decision in Minnesota,²³³ where CLECs faced these same problem
2 scenarios involving unapproved rates. A comparison of the results in Minnesota
3 versus other states that do not have the Minnesota terms demonstrates the need for
4 such terms in Utah and other states as well. In the first scenario, there has been
5 no ICA change allowing Qwest to charge a separate NRC for design changes for
6 loops in any of the six states where Eschelon does business with Qwest.²³⁴ Yet,
7 Minnesota is the only one of these states in which Qwest is not charging CLECs a
8 new NRC for design changes for loops. In all of the other states, including Utah,
9 Qwest has provided *no* related cost study, obtained *no* related ICA amendment,
10 and sought *no* related Commission approval, but, instead, simply commenced
11 billing for design changes for loops. This is unjust, particularly as Qwest bears
12 the burden for substantiating its own rates. In the second scenario, Qwest has no
13 incentive to obtain an approved rate, which will never be higher and may be lower
14 than its proposed rate, if it can charge the unapproved rate indefinitely without
15 having to substantiate and obtain approval of that rate. For example, Qwest
16 initiated terms for its collocation transfer (or change) of responsibility amendment

²³³ October 2, 2002 Order in MN PUC Docket CI-01-1375 (“MN 271 Cost” Docket). Specifically, “Summary of the Commission’s findings and conclusions” contains the following provisions on pp. A-6 and A-7: **“Price Under Development:** Qwest shall obtain Commission approval before charging for a UNE or process that it has previously offered without charge. Qwest may negotiate an interim price for a UNE and service not previously offered in Minnesota provided that Qwest file a permanent price, and related cost support, with the Commission within 60 days of offering the UNE or service. ALJ Report p. 64.**New UNE Price:** When offering a new UNE, Qwest shall file a cost-based price, together with an adequate description of the UNE’s application, for Commission review within 60 days of offering. Qwest may charge a negotiated rate immediately if part of an approved interconnection agreement (ICA), provided the ICA is filed for Commission review within 60 days.”

²³⁴ The six states where Eschelon historically has done business with Qwest are: Colorado, Minnesota, Arizona, Oregon, Utah, and Washington.

1 in 2001,²³⁵ but its proposed rates for collocation transfer of responsibility remains
2 unapproved.²³⁶ Qwest will not process orders for collocation transfers of
3 responsibility without an ICA amendment containing Qwest's unapproved
4 rates.²³⁷ The ICA needs to contain terms and conditions that provide an incentive
5 for Qwest to substantiate its rates and obtain Commission approval of them in a
6 more timely manner.

7 Qwest has agreed to a portion of Eschelon's proposed language, as shown below.
8 Qwest will likely argue that Eschelon's business need and these concerns are met
9 by that portion of the language. That is not the case, however. Qwest chooses to
10 ignore the portion of the Minnesota order that requires Qwest to obtain
11 Commission approval before charging for a UNE or process that it has previously
12 offered without charge.²³⁸ This provision is critical to preventing situations like
13 the design change charge scenario, under which Qwest unexpectedly unilaterally
14 commenced billing for work it previously performed at no additional charge. It

²³⁵ See http://www.qwest.com/wholesale/cmp/archive/CR_5582318.htm ("07/27/01 - 90 day review process for Joint Planning process for Cancel, Decom and change of Responsibility Offering letter distributed.").

²³⁶ See Section 8.14 of Utah Exhibit A to Qwest Negotiations Template (with footnote "1" to Section 8.14 indicating "Rates not addressed in a Cost Docket (estimated TELRIC)"). See <http://www.qwest.com/wholesale/downloads/2007/070430/UTNT04-30-07.xls>

²³⁷ See <http://www.qwest.com/wholesale/pcat/collotransferresponsibilityreq.html>
("Qwest has provided a template Facility Transfer of Responsibility Agreement found in the Wholesale Interconnection Agreements & Amendments Interconnection Agreement PCAT which must be accepted or negotiated, signed by the vacating and assuming CLECs and appended to their Interconnection Agreements.").

²³⁸ October 2, 2002 Order in MN PUC Docket CI-01-1375 ("MN 271 Cost" Docket). Specifically, "Summary of the Commission's findings and conclusions" contains the following provisions on pp. A-6 and A-7: "**Price Under Development:** Qwest shall obtain Commission approval before charging for a UNE or process that it has previously offered without charge.

1 has recently become clear, in discussions with Qwest regarding the operation of
2 Section 22.6 in states outside of Minnesota, that Qwest is attempting to turn the
3 Eschelon proposed terms into a rubberstamp “filing” process under which Qwest
4 can charge any rate it proposes – even for work it has performed previously at
5 Commission approved rates (such as the loop recurring rate) – so long as it makes
6 a paper filing with the Commission. As Qwest knows, that has never been
7 Eschelon’s intent with this proposal,²³⁹ and it should not be this Commission’s
8 ruling. Eschelon thus has added an even clearer provision (the first sentence)
9 reflecting this portion of the Minnesota process to Section 22.6.1 to avoid a
10 situation in which Qwest interprets language intended to capture that process in a
11 different manner. There is no reason to believe that the Utah commission
12 intended for Qwest to unexpectedly unilaterally commence billing for work it
13 previously performed at no additional charge or operate indefinitely with
14 unapproved rates. Qwest’s conduct, however, demonstrates that language is
15 needed in the interconnection agreement to avoid these results in Utah.

16 Issue 22-90 concerns the contract language regarding unapproved rates, and
17 Issues 22-90(a) through 22-90(e) contain specific rate proposals for products for
18 which the Commission has not approved rates.

²³⁹ Eschelon reiterated in a January 17, 2006, email to the Qwest negotiation team: “As discussed previously with respect to Section 22, Eschelon’s Section 22 proposal is to use the MN PUC’s process in all six states.” Qwest is very familiar with the Minnesota PUC’s process, including the provision quoted in the previous footnote, through having applied it over the years. The difference in how design changes for loops are handled in Minnesota shows that Qwest knows there is a tangible difference in results under the Minnesota process for UNEs and processes that Qwest previously offered without a charge.

1 Q. WHAT IS ESCHELON'S PROPOSAL FOR CONTRACT LANGUAGE, IN
2 ISSUE 22-90?

3 A. Eschelon proposes the following language for Sections 22.6.1 and 22.6.1.1:

4 [Issue 22-90]

5 22.6.1 Qwest shall obtain Commission approval before charging
6 for a UNE or process that it previously offered without charge. If
7 Qwest offers a new Section 251 product or service or one that was
8 previously offered with a charge for which a price/rate has not
9 been approved by the Commission in a TELRIC Cost Docket
10 ("Unapproved rate"), Qwest shall develop a TELRIC cost-based
11 rate and submit that rate and related cost support to the
12 Commission for review within sixty (60) Days of the later of (1)
13 the Effective Date of this Agreement, or (2) Qwest offering the rate
14 to CLEC, unless the Parties agree in writing upon a negotiated rate
15 (in which case Qwest shall file the negotiated rate with the
16 Commission within 60 Days). Except for negotiated rates, Qwest
17 will provide a copy of the related cost support to CLEC (subject to
18 an applicable protective agreement, if the information is
19 confidential) upon request or as otherwise ordered by the
20 Commission. If the Parties do not agree upon a negotiated rate and
21 the Commission does not establish an Interim Rate for a new
22 product or service or one that was previously offered under Section
23 251 with an Unapproved Rate, CLEC may order, and Qwest shall
24 provision, such product or service using such Qwest proposed rate
25 until the Commission orders a rate. In such cases, the Qwest
26 proposed rate (including during the aforementioned sixty (60) Day
27 period) shall be an Interim Rate under this Agreement.

28 22.6.1.1 For a UNE or process that Qwest previously
29 offered without charge, the rates in Exhibit A do not apply
30 until Qwest obtains Commission approval or the Parties
31 agree to a negotiated rate. If the Parties do not agree on a
32 negotiated rate, the Commission does not establish an
33 Interim rate, and Qwest does not submit a proposed rate
34 and related cost support to the Commission within the time
35 period described in Section 22.6.1 for a new product or
36 service or one that was previously offered under Section
37 251 with an Unapproved Rate, the Unapproved rate(s) in
38 Exhibit A do not apply. Qwest must provision such
39 products and services pursuant to the terms of this

1 Agreement, at no additional charge, until Qwest submits
2 the rate and related cost support to the Commission for
3 approval.

4 **Q. PLEASE EXPLAIN ESCHELON’S PROPOSAL.**

5 A. For Issue 22-90 (Sections 22.6.1 and 22.6.1.1), Eschelon proposes language that
6 covers all three of the following situations involving unapproved rates: (1) Qwest
7 desires to charge for a UNE or process that it previously offered without a charge
8 but has not obtained an approved rate; and (2) Qwest offers a new product or
9 service and the rate is not yet approved; and (3) Qwest continues to offer a
10 product or service that it has previously offered but the rate remains unapproved.
11 In all three situations, the companies may negotiate a rate so long as the
12 negotiated rate is filed with the Commission (as, for example, part of a filed
13 interconnection agreement). If the companies do not negotiate a rate, the proposal
14 provides as follows. In the first situation, Qwest must obtain Commission
15 approval before charging for a UNE or process that it previously offered without a
16 charge. In the second and third situations, Qwest must develop a cost-based rate
17 and submit that rate and related cost support to the Commission for review. Once
18 that information is filed (and, under Eschelon’s proposal, provided to
19 Eschelon),²⁴⁰ Eschelon may order the product and service and will pay a
20 Commission-approved interim rate if one is established, or the Qwest-proposed
21 rate if no interim rate is set.

²⁴⁰ As part of Issue 22-90, Eschelon proposes language in Section 22.6.1 that states that, except for negotiated rates, Qwest will provide a copy of the related cost support to Eschelon (subject to an applicable protective agreement, if the information is confidential) upon request or as otherwise ordered by the Commission.

1 As part of Section 22.6.1.1, Eschelon’s language also addresses a situation not
2 covered by Section 22.6.1: If (1) Eschelon and Qwest have not agreed upon a
3 negotiated rate, (2) the Commission has not established an interim rate, and (3)
4 Qwest does not submit a proposed rate and cost support to the Commission within
5 the specified time frame, the unapproved rates do not apply, and Qwest must
6 provision the product in question at no additional charge.²⁴¹ Qwest and Eschelon
7 agree that Qwest must provision the product at no additional charge under Section
8 22.6.1.1, but disagree on the portion of the language dealing with a UNE or
9 process that Qwest previously offered without a charge.

10 **Q. PLEASE EXPLAIN WHY ESCHELON’S PROPOSAL FOR ISSUE 22-90**
11 **IS REASONABLE.**

12 A. The pricing standards of the federal rules require that rates, terms and conditions
13 for network elements and methods of obtaining access to interconnection and
14 network elements²⁴² be just, reasonable, non-discriminatory,²⁴³ and be established
15 by state commissions based on the forward-looking cost pricing standard.²⁴⁴ The
16 agreed-upon language in Section 22.4 of the ICA recognizes that some products

²⁴¹ Section 22.6.1.1 thus ensures that Qwest cannot extend a period by which it imposes unapproved rates by not filing cost support with the Commission and requesting approval of the rates.

²⁴² 47 CFR § 51.501(b) specifies that Subpart F of the rules (47 CFR § 51.501 through 47 CFR § 51.515) that deals with the pricing standards for network elements uses the word “element” to include interconnection and methods of obtaining access to UNEs and interconnection.

²⁴³ 47 CFR § 51.503(a).

²⁴⁴ 47 CFR § 51.503(b). Although the rules allow state commissions to use proxies for forward-looking economic cost as an alternative to forward-looking costing method, 47 CFR § 51.513(a(1)) explains that the proxy ceilings are a temporary method used in the absence of sufficient cost information and until the state commission reviews the cost study.

1 offered under the ICA may not have a Commission-approved rate yet, in which
2 case the rate constitutes an interim rate. Clearly, to ensure compliance with the
3 federal pricing rules, an unapproved rate should not remain unexamined by the
4 state commission indefinitely. Similarly, a Commission-approved rate (such as
5 the recurring loop rate) should not be undermined by allowing Qwest to
6 unexpectedly and unilaterally announce that it will commence billing for work for
7 which it is already recovering its costs in the approved rate. Such conduct would
8 defeat not only the requirement that rates be cost based but also the requirements
9 to obtain a Commission-approved amendment *before* changing the terms of the
10 existing agreement under which the companies are already operating.

11 As discussed, Eschelon's proposed language on Issue 22-90 follows a
12 commission's decision in a Minnesota 271 case and should be adopted to avoid
13 the disparity that exists today in which Qwest may commence billing for a UNE
14 or process that it previously offered without a charge in Utah, unlike in
15 Minnesota.

16 In addition, Eschelon proposes in Issue 22-90 that Qwest make available to
17 Eschelon its supporting cost study filed with the Commission. Eschelon's
18 proposal is a narrow one requiring only that Qwest provide the information "upon
19 request or as otherwise ordered by the Commission." Eschelon needs a
20 mechanism that allows it to obtain in a timely manner the details of Qwest's
21 filings that concern rates for UNEs offered under section 251. Eschelon needs to

1 be able to review Qwest's supporting cost studies in order to make a decision on
2 whether to intervene in the case regarding essential UNE products. Note that
3 Eschelon would likely receive notice of a section 251 rate filing later officially –
4 by intervening in the case. Without access to the rate information at the time of
5 Qwest's filing, however, Eschelon is trapped in a Catch-22: It must intervene in
6 the case in order to see the cost filing, but it needs the cost filing to decide
7 whether or not to intervene. Eschelon may determine that it does not wish to
8 intervene in the end, but in the meantime it has expended the money and
9 resources required for intervention.

10 **Q. WHAT IS QWEST'S PROPOSAL REGARDING ISSUE 22-90?**

11 A. For Issue 22-90, Qwest disagrees with Eschelon's proposed language
12 modifications and proposes exclusion from the ICA of Eschelon's proposed
13 insertions.

14 Eschelon's proposal is more consistent with requirements of federal law that rates
15 for UNEs and interconnection be just, reasonable, non-discriminatory and cost-
16 based.²⁴⁵ And, only Eschelon's proposal addresses the problems that arise when
17 Qwest unexpectedly and unilaterally commences billing for work it previously
18 performed at no additional charge under a Commission-approved ICA.

19 **Interim Rate Proposals – Issues 22-90(a) through 22-90(e)**

20 **Q. PLEASE EXPLAIN ESCHELON'S PROPOSAL FOR ISSUES 22-90(a)**

²⁴⁵ 47 C.F.R. § 51.303.

1 **THROUGH 22-90(e).**

2 A. For Issues 22-90 (a) through (e), both Qwest and Eschelon propose interim rates
3 for specific Qwest products where rates have not been approved by the
4 Commission.²⁴⁶ Eschelon’s interim rate proposals are based on prior Commission
5 decisions in UNE cost dockets, adjustments to Qwest cost studies (to the extent
6 available) to reflect prior Commission decisions, rates previously proposed by
7 Qwest to CLECs in Utah, and reductions to Qwest’s proposed rate due to lack of
8 any cost support. Eschelon’s proposed interim rates are more reflective of prior
9 Commission cost case decisions than the Qwest proposed interim rates. Qwest’s
10 interim rate proposals completely ignore prior Commission decisions and in some
11 cases have no cost support at all backing up these rates. In addition, Qwest’s rate
12 proposals to Eschelon are different than what Qwest has offered other CLECs.

13 **Q. SHOULD INTERIM RATES BE ADDRESSED IN THIS PROCEEDING?**

14 A. Yes. Both companies have proposed interim rates for these issues. Yet, Qwest
15 also takes the inconsistent position that rates should not be addressed in this
16 proceeding, but rather, should be deferred to a later generic cost case. In other
17 states Qwest has sought to dismiss the rate issues from the arbitrations.²⁴⁷

²⁴⁶ See Eschelon proposed ICA Section 22.4.1.1, which states in the portion of this Section that is closed: “Rates reflected on Exhibit A that have not been approved by the Commission in a cost case, including ICB and Unapproved rates, shall be considered as interim rates (“Interim Rates”) by the Parties, applicable until changed by agreement of the Parties or by order of the Commission only as described in Section 22.6.” Note the language that is not underlined or stricken is closed.

²⁴⁷ In Arizona and Colorado, the ALJs allowed the interim rate issues to proceed at hearing, while taking the issue under advisement for consideration by the Commissions. Regarding the Washington order rejecting Qwest’s motion, see my discussion below.

1 Qwest is incorrect in claiming that rate issues are inappropriate for arbitration.
2 The appropriate scope of this proceeding is established by federal law. Section
3 252(b)(4)(c) of the Federal Telecommunications Act (the “Act”) requires the
4 Commission to resolve each issue set forth in the petition.²⁴⁸ The Act expressly
5 envisions that individual arbitration proceedings may involve rates issues. To that
6 end, Section 252(c) requires that a state commission, “in resolving *by arbitration*”
7 any open issues and imposing conditions upon the parties to the agreement, “*shall*
8 *establish any rates* for interconnection, services or network elements according to
9 subsection (d) of this section.”²⁴⁹ The FCC’s rules also recognize that state
10 commissions may set rates in arbitration proceedings and therefore impose a duty
11 to produce in negotiations cost data relevant to setting rates in arbitration.²⁵⁰
12 There would be no reason to require that this data be provided if rates were not
13 proper subject for arbitration, and therefore the rule specifically refers to cost data
14 relevant to setting rates “in arbitration.”²⁵¹ The ALJ in the Washington arbitration
15 proceeding between Eschelon and Qwest relied on these provisions of the Act in
16 denying Qwest’s motion to dismiss in that case, noting that the interim rates
17 issues were raised in the petition for arbitration and the response and that “[T]he

²⁴⁸ 47 U.S.C. § 252(b)(4)(c).

²⁴⁹ 47 U.S.C. § 252(c) (emphasis added). 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).

²⁵⁰ 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).

²⁵¹ *Id.*

1 statue is mandatory and not only requires the Commission to establish rates but
2 sets forth the standard by which those rates must be established.”²⁵²

3 Consideration of Eschelon’s interim rate proposals in this case is fully consistent
4 with this Commission’s prior orders. CLECs must be given a fair opportunity to
5 negotiate a rate or challenge Qwest’s proposed rate outside the context of a cost
6 case, such as in an arbitration proceeding like this one.

7 What should be made clear is that Qwest is also seeking to establish interim rates
8 in this arbitration. The difference between Qwest and Eschelon on this point is
9 that Qwest wants its rates to go into effect without any Commission scrutiny,
10 while Eschelon seeks Commission review to assure that the rates that Qwest
11 charges are not excessive.

12 The Commission’s role here is to evaluate the evidence presented by the parties
13 and determine which of the companies’ proposed interim rates most closely
14 approximates the TELRIC standard. The Washington Commission explained the

²⁵² *In the Matter of the Petition for Arbitration of an Interconnection Agreement Between Qwest Corporation and Eschelon Telecom, Inc. Pursuant to 47 U.S.C. §252(b)*, Docket UT-063061, Order Denying Motion to Dismiss Issues, Order 10 (W.U.T.C. April 19, 2007). A copy of this order accompanies this brief as Attachment 7. See also *In the Matter of Petition of Buytel Communications, Inc. for Arbitration Pursuant to Section 252(b) to Resolve Open Issues for an Interconnection Agreement with Ameritech Indiana*, 2002 Ind. PUC LEXIS 277 at *20 (I.P.U.C. 2002) (“The establishment of rates is precisely the type of issue that the Arbitration provisions of TA-96 were promulgated to address. While generic proceedings such as that established in Cause No. 40611 can promote the competition and policy goals of TA-96 by permitting the full development and exploration of forward-looking costs, nothing in TA-96 or in the FCC’s rules permits such a generic proceeding to limit a requesting carrier’s right to petition a state commission to arbitrate such an unresolved issue.”).

1 relationship between generic cost proceedings and arbitration proceedings as
2 follows:

3 The Commission stated that rates adopted in the pending
4 arbitrations would be interim rates, pending the completion of the
5 generic proceeding. Accordingly, the price proposals made in this
6 arbitration have been reviewed with the goal of determining which
7 offers a more reasonable interim rate, more closely based on what
8 we believe to be accurately determined cost levels based on the
9 evidence specifically submitted in this docket, our recent prior
10 actions regarding cost studies, and our expertise as regulators.²⁵³

11 **Q. WHAT RATES IS ESCHELON PROPOSING FOR ISSUES 22-90(A)**
12 **THROUGH (E)?**

13 A. The following table summarizes Eschelon's, as well as Qwest's, proposal for each
14 disputed rate element:

²⁵³ *In the Matter of the Petition for Arbitration of an Interconnection Agreement Between TCG Seattle and U S WEST Communications, Inc., Pursuant to 47 U.S.C. § 252*, 1997 Wash. UTC LEXIS 9 at *5 (W.U.T.C. 1997); *see also In the Matter of the Petition of Ace Telephone Company*, 2006 Mich. PSC LEXIS 51 at *12 (M.P.S.C. 2006) (adopting interim rates for reciprocal compensation, pending approval of new rates in a separate proceeding); *see also In the Matter of the Sprint Communications Company L.P.'s Petition for Arbitration of Interconnection Rates, Terms, Conditions, and Related Agreements with GTE of the North, Inc.*, 1997 Ind. PUC LEXIS 9 at *21-22 (I.P.U.C. 1997) (establishing "interim proxy" rates in arbitration to be subject to true up upon the completion of a cost case).

Table. Basis for Eschelon's Rate Proposals for Issues 22-90(a) through 22-90(e)					
Issue #	Exhibit A Section	Rate Element	RATE PROPOSAL		Basis for Eschelon's Proposal
			Eschelon		
			REC	NRC	
22-90(a)	8.1.1.2	Cable Augment Quote Preparation Fee		\$0.00	Commission Ordered \$0 rate for all QPFs.
22-90(a)	8.3.2.7.5	-48 Volt DC Power Cable, per Feed, 100 Amp	\$26.43	\$14,153.23	Sum of Commission-approved 40 Amp and 60 Amp rates.
22-90(a)	8.3.2.7.6	-48 Volt DC Power Cable, per Feed, 200 Amp	\$52.86	\$28,306.46	100 Amp rates in 8.3.2.7.5 multiplied by 2.
22-90(a)	8.3.2.7.7	-48 Volt DC Power Cable, per Feed, 300 Amp	\$79.29	\$42,459.69	100 Amp rates in 8.3.2.7.5 multiplied by 3.
22-90(a)	8.3.2.7.8	-48 Volt DC Power Cable, per Feed, 400 Amp	\$105.72	\$56,612.92	100 Amp rates in 8.3.2.7.5 multiplied by 4.
22-90(a)	8.8.1	ICDF Collocation - Quote Preparation Fee		\$0.00	Commission Ordered \$0 rate for all QPFs.
22-90(b)	8.1.14	Collocation Space Option Administration Fee		\$1,681.94	Adjusted Qwest cost studies to reflect prior Commission decisions
22-90(b)	8.6.1.1	Remote Collocation Space, per Standard Mounting Unit	\$0.71	\$793.74	Adjusted Qwest cost studies to reflect prior Commission decisions
22-90(b)	8.6.1.2	Remote Collocation FDI Terminations, per 25 Pair	\$0.41	\$511.09	Adjusted Qwest cost studies to reflect prior Commission decisions
22-90(b)	8.6.2.2.1	Adjacent Collocation Space (per Standard Mounting Unit)	\$0.71	\$793.74	Adjusted Qwest cost studies to reflect prior Commission decisions
22-90(b)	8.6.2.2.2	Adjacent Collocation FDI Terminations, per 25 Pair	\$0.41	\$511.09	Adjusted Qwest cost studies to reflect prior Commission decisions
22-90(b)	8.7.1.2	CLEC-CLEC Fiber Flat Charge, per Request		\$1,301.21	Adjusted Qwest cost studies to reflect prior Commission decisions
22-90(b)	8.7.2.4	Cable Racking, Fiber, per Request	\$101.79		Adjusted Qwest cost studies to reflect prior Commission decisions
22-90(c)	8.8.4	ICDF Collocation D3S Circuit, per Two Legs		\$614.02	Qwest's proposed reduced by 50%.
22-90(c)	8.15.2.1	Special Site Assessment Fee		\$529.00	Qwest's proposed reduced by 50%.
22-90(c)	8.15.2.2	Network Systems Assessment Fee		\$831.50	Qwest's proposed reduced by 50%.
22-90(d)	8.13.1.1	DC Power Reduction Quote Preparation Fee, per Office		\$441.00	Rates offered to other CLECs
22-90(d)	8.13.1.2.1	Power Reduction/Restoration, Less than 60 Amps		\$346.00	Rates offered to other CLECs
22-90(d)	8.13.1.2.2	Power Reduction/Restoration, Equal to 60 Amps		\$346.00	Rates offered to other CLECs
22-90(d)	8.13.1.2.3	Power Reduction/Restoration, Greater than 60 Amps		\$587.00	Rates offered to other CLECs
22-90(d)	8.13.1.3	Power Off, per Feed Set, per Secondary Feed		\$597.60	Rates offered to other CLECs
22-90(d)	8.13.1.4	Power Maintenance Charge, per Fuse Set	\$37.00		Rates offered to other CLECs
22-90(d)	8.13.2.1	Power Restoration Quote Preparation Fee, per office		\$441.00	Rates offered to other CLECs
22-90(d)	8.13.2.2.1.1	Power Restoration with Reservation Less Than 60 Amps		\$346.00	Rates offered to other CLECs
22-90(d)	8.13.2.2.1.2	Power Restoration with Reservation Equal to 60 Amps		\$346.00	Rates offered to other CLECs
22-90(d)	8.13.2.2.1.3	Power Restoration with Reservation Greater Than 60 Amps		\$587.00	Rates offered to other CLECs
22-90(e)	9.6.12	Private Line/Special Access to UDIT Conversion		\$67.98	Adjusted Qwest cost studies to reflect prior Commission decisions
22-90(e)	9.7.6	Dark Fiber Splice		\$363.72	Adjusted Qwest cost studies to reflect prior Commission decisions
22-90(e)	9.23.6.2.1.1	Loop Mux, DS0 2-Wire Analog, First		\$129.39	Adjusted Qwest cost studies to reflect prior Commission decisions
22-90(e)	9.23.6.2.1.2	Loop Mux, DS0 2-Wire Analog, Each Add'l		\$84.44	Adjusted Qwest cost studies to reflect prior Commission decisions
22-90(e)	9.23.6.3.1.1	Loop Mux, DS0 4-Wire, Analog, First		\$129.39	Adjusted Qwest cost studies to reflect prior Commission decisions
22-90(e)	9.23.6.3.1.2	Loop Mux, DS0 4-Wire, Analog, Each Add'l		\$84.44	Adjusted Qwest cost studies to reflect prior Commission decisions
22-90(e)	9.23.6.4.1.1	Loop Mux, DS1 Loop, First		\$163.67	Adjusted Qwest cost studies to reflect prior Commission decisions
22-90(e)	9.23.6.4.1.2	Loop Mux, DS1 Loop, Each Add'l		\$119.83	Adjusted Qwest cost studies to reflect prior Commission decisions
22-90(e)	9.23.6.8.1	LMC Rearrangement - DS0		\$76.25	Adjusted Qwest cost studies to reflect prior Commission decisions
22-90(e)	9.23.6.8.2	LMC Rearrangement - High Capacity		\$86.54	Adjusted Qwest cost studies to reflect prior Commission decisions
22-90(e)	9.23.7.7.1	EEL Rearrangement - DS0		\$76.25	Adjusted Qwest cost studies to reflect prior Commission decisions
22-90(e)	9.23.7.7.2	EEL Rearrangement - High Capacity		\$86.54	Adjusted Qwest cost studies to reflect prior Commission decisions
22-90(e)	10.7.10	Poles, Ducts, ROWs-Transfer of Responsibility		\$70.07	Adjusted Qwest cost studies to reflect prior Commission decisions

1

2 **Q. PLEASE EXPLAIN THE BASIS FOR ESCHOLON'S PROPOSED RATES.**

3 A. During negotiations Eschelon asked Qwest for cost studies in support of rates that
 4 had not been approved by the Commission.²⁵⁴ Qwest provided cost studies for a
 5 number of rates, but did not produce cost support for all of the rates Qwest was
 6 proposing. Upon review of Qwest's cost studies and the Qwest proposed interim
 7 rates it became clear that: (1) Qwest ignored prior Commission orders regarding
 8 cost study inputs and instead was attempting to impose upon Eschelon's Qwest's
 9 "wish list" of rates; (2) Qwest's proposed interim rates in Utah were often in

²⁵⁴ Note that Eschelon also asked to review cost studies in a number of other situations.

1 excess of TELRIC rates ordered by the Commissions in the other large Qwest
2 states; (3) Qwest's proposed interim rates were sometimes higher than the rates
3 Qwest had offered to other CLECs; and (4) Qwest's proposed interim rates were
4 sometimes higher than the rates contained in other carrier agreements.

5 To fix the problems with Qwest's proposed cost support or lack thereof and
6 develop interim rates for these rate elements, Eschelon made the following
7 modifications:

- 8 • Corrected Qwest's cost studies to reflect Commission cost decisions
9 regarding overhead factors and work times. See, Exhibit A Sections
10 8.1.14, 8.6.1.1, 8.6.1.2, 8.6.2.2.1, 8.6.2.2.2, 8.7.1.2,²⁵⁵ 8.7.2.4,²⁵⁶ 9.6.12,
11 9.7.6, 9.23.6.2.1.1, 9.23.6.2.1.2, 9.23.6.3.1.1, 9.23.6.3.1.2, 9.23.6.4.1.1,
12 9.23.6.4.1.2, 9.23.6.8.1, 9.23.6.8.2, 9.23.7.7.1, 9.23.7.7.2, and 10.7.10.
- 13 • Proposed rate from prior Qwest Negotiations Template: See, Exhibit A
14 Sections 8.13.1.1, 8.13.1.2.1, 8.13.1.2.2, 8.13.1.2.3, 8.13.1.3, 8.13.1.4,
15 8.13.2.1, 8.13.2.2.1.1, 8.13.2.2.1.2, 8.13.2.2.1.3. These rates are contained
16 in the interconnection agreements of other CLECs, including AT&T and
17 Covad.²⁵⁷

²⁵⁵ Eschelon's proposed rate for this element is based on Qwest's Arizona cost study modified to incorporate Utah TELRIC decisions. Qwest's proposed Utah cost study was wildly inconsistent with the Utah Commission approved rates.

²⁵⁶ Eschelon's proposed rate for this element is based on Qwest's Arizona cost study, that Qwest provided to Eschelon as support for the Utah rates, modified to incorporate Utah TELRIC decisions.

²⁵⁷ See, for example, the Covad Exhibit A:

<http://www.psc.state.ut.us/telecom/04docs/04227702/ExhibitA--Arbitrated%208-18-05.xls>

- 1 • Halved Qwest’s “wish list” rates where Qwest failed to provide any cost
2 support. See, Exhibit A Sections 8.8.4, 8.15.2.1 and 8.15.2.2.
- 3 • Developed interim rates based on Commission-approved rates for similar
4 services. See, Exhibit A Sections 8.1.1.2, 8.3.2.7.5, 8.3.2.7.6, 8.3.2.7.7,
5 8.3.2.7.8, and 8.8.1.

6 **Q. HOW DO QWEST’S PROPOSED INTERIM RATES IGNORE PRIOR**
7 **COMMISSION ORDERS?**

8 A. My review of Qwest’s cost studies showed that Qwest’s inputs are inconsistent
9 with the Commission’s ordered inputs in cost cases. For example, Qwest’s
10 studies utilize overhead factors that are higher than the Commission-ordered
11 overhead factors and Qwest did not adjust for labor time adjustments ordered by
12 the Commission.²⁵⁸

13 Some of Qwest’s studies lacked the necessary level of detail and support. For
14 example, cost studies in support for rates 8.15.2.1 and 8.15.2.2, part of 22-90(c),
15 (Special Site Assessment Fees) contained unsupported assumptions about activity
16 durations that were not only unreasonably long, but also lacked the detail
17 necessary to evaluate them. Specifically, for the Site Assessment Fee, Qwest
18 study assumed that three activities were totaling 15 hours of labor – a level of
19 disaggregation that is inadequate to assess the reasonableness of these durations
20 and activities. For the Special Site Network Systems Assessment Fee, Qwest

²⁵⁸ See Commission decisions in docket nos. 00-049-105 and 00-049-106.

1 study assumed that twenty hours of labor (out of the total 24.5 hours of labor for
2 this NRC) would be spent on “installation.” Given that Qwest’s study did not
3 explain what exactly encompasses this “installation,” and that the activity in
4 question concerns *already existing* sites,²⁵⁹ Qwest’s assumption of the twenty-
5 hour installation activity cannot be accepted.

6 In other words, Qwest’s cost studies represent Qwest’s “wish list” for UNE rates
7 and do not incorporate forward-looking TELRIC-compliant inputs ordered by the
8 Commission. Note that Qwest-proposed rates are rarely approved as TELRIC
9 compliant without the Commission’s corrections to the cost studies that support
10 these rates. Therefore, I updated Qwest’s studies to make them more consistent
11 with the Commission-ordered inputs.²⁶⁰

12 For rate elements grouped under Issue 22-90(d), Qwest provided a cost study in
13 August 2006 – *several months after* Eschelon made its rate proposal. This study
14 is inadequately documented and contains inputs that are inconsistent with the
15 Commission’s prior decisions. With regard to Issue 22-90(d), it is important to
16 note that Eschelon’s proposal represents one of Qwest’s own proposals made
17 earlier in the ICA negotiations. Further, Eschelon’s proposal is also the same as
18 the rates contained in a prior versions of Qwest’s negotiation template²⁶¹ -- a

²⁵⁹ This rate concerns Special Sites, which the agreed-upon language of the ICA defines as collocation sites returned to Qwest through Chapter 7 bankruptcy or abandonment (See Section 8.2.10.4.1 of the ICA).

²⁶⁰ See Exhibit 2.32 for details.

²⁶¹ Qwest changed these rates in the June 1, 2006 Negotiations Template.

1 template that Qwest offered to all CLECs. Further, these rates are contained in
2 other carriers' interconnection agreements, including the agreements of Covad
3 and AT&T.

4 In another instance, Eschelon did not have any information, such as Qwest's
5 provided cost study or commission-approved rates in other states, to make a
6 specific proposal for a rate element.²⁶² The absence of a Qwest cost study for
7 these rates suggests that the interim rate would be more appropriately set at zero.
8 In other words, Eschelon had two starting points (boundaries) for its proposed rate
9 – Qwest's "wish list" proposal and zero. In this situation Eschelon used these two
10 boundaries to calculate an average "expected" rate (effectively dividing Qwest's
11 proposal by a factor of two). Eschelon's proposal is conservative because, as I
12 explained above, the absence of Qwest's cost studies supporting rates that Qwest
13 has claimed to be TELRIC would support a rate of zero until such time that Qwest
14 provides cost support.

15 **Q. PLEASE ELABORATE ON HOW ESCHELON CORRECTED QWEST'S**
16 **COST STUDIES TO REFLECT PRIOR COMMISSION DECISIONS ON**
17 **TELRIC?**

18 A. The corrections made to Qwest's cost studies to develop Eschelon's proposed
19 interim rates are explained in detail in Exhibit Eschelon 2.32. A majority of the
20 interim rates were developed by correcting Qwest's cost studies to reflect prior

²⁶² See rate 8.8.4 under Issues 22-90(c).

1 Commission TELRIC decisions were corrected for both Commission ordered
2 labor times and factors. Consistent with the prior Commission decision to set all
3 Quote Preparation Fees (or QPFs) at \$0.00, Eschelon proposes a \$0.00 for rate
4 elements 8.1.1.2 and 8.8.1. For rate elements 8.7.1.2 and 8.7.2.4, Qwest provided
5 a Arizona cost study as support for its Utah rate proposals. I modified the
6 Arizona study to reflect Utah cost factors.

7 **Q. YOU MENTION THAT QWEST PROPOSES INTERIM RATES THAT**
8 **ARE DIFFERENT THAN THE RATES CONTAINED IN AGREEMENTS**
9 **WITH OTHER CLECS. DOES THIS MEAN THAT QWEST DOES NOT**
10 **OFFER THE SAME RATES TO ALL CLECS INUTAH?**

11 A. Yes. Qwest offers different rates to different CLECs. For example, for the rate
12 elements under Issue 22-90(d) – Power Reduction/Power Restoration rates –
13 Eschelon’s proposal for these rates is based on Qwest’s negotiations template for
14 Utah, prior to June 1, 2006. These rates are contained in the Interconnection
15 agreement of other CLECs, including Covad and AT&T. Qwest has updated this
16 template in June 2006, changing its “offer” for rate elements in Issue 22-90(d). In
17 other words, if one CLEC signed an ICA with Qwest in March 2006 and used
18 Qwest’s negotiations template available at the time, and another CLEC signed an
19 ICA with Qwest in October 2006 by using the currently August 2006 negotiation
20 template, these two CLECs would have different rates for the same rate elements.
21 Eschelon initially accepted the rates proposed by Qwest, which are now
22 Eschelon’s proposed rates, but Qwest then increased its interim rate proposal.

1 The table below shows that Qwest’s current interim rate proposal for power
 2 reduction and power restoration are significantly higher than what Qwest has
 3 offered to other CLECs.

Table. Power Restoration / Power Reduction						
Issue #	Exhibit A Section	Rate Element	RATE PROPOSAL			
			Eschelon		Qwest	
			REC	NRC	REC	NRC
22-90(d)	8.13.1.1	DC Power Reduction Quote Preparation Fee, per Office		\$441.00		\$812.65
22-90(d)	8.13.1.2.1	Power Reduction/Restoration, Less than 60 Amps		\$346.00		\$631.94
22-90(d)	8.13.1.2.2	Power Reduction/Restoration, Equal to 60 Amps		\$346.00		\$888.76
22-90(d)	8.13.1.2.3	Power Reduction/Restoration, Greater than 60 Amps		\$587.00		\$1,116.51
22-90(d)	8.13.1.3	Power Off, per Feed Set, per Secondary Feed		\$597.60		\$1,070.64
22-90(d)	8.13.1.4	Power Maintenance Charge, per Fuse Set	\$37.00		\$51.58	
22-90(d)	8.13.2.1	Power Restoration Quote Preparation Fee, per office		\$441.00		\$812.65
22-90(d)	8.13.2.2.1.1	Power Restoration with Reservation Less Than 60 Amps		\$346.00		\$631.94
22-90(d)	8.13.2.2.1.2	Power Restoration with Reservation Equal to 60 Amps		\$346.00		\$888.76
22-90(d)	8.13.2.2.1.3	Power Restoration with Reservation Greater Than 60 Amps		\$587.00		\$1,116.51

4

5 **Q. YOU MENTIONED THAT QWEST’S PROPOSED INTERIM RATES**
 6 **EXCEED THE TELRIC RATES APPROVED BY OTHER**
 7 **COMMISSIONS IN QWEST STATES. PLEASE ELABORATE.**

8 A. One example of this is 22-90(b), rate element 8.1.14 “Collocation Space
 9 Administration Fee.” Qwest’s proposed rate is a NRC of \$1,828.19, yet the
 10 average of Commission-approved rates for this service in states where Eschelon
 11 does business is \$1,029.40.²⁶³ Qwest’s proposed rate exceeds this average by
 12 78%. Eschelon’s proposed rate for 8.1.14 (which is based on corrections to
 13 Qwest’s cost studies to reflect the Commission’s prior decision on factors) also
 14 exceeds the state commission approved average. In other states, Qwest has
 15 complained that my interim rate proposals under Issue 22-90 and subparts are

²⁶³ This includes state commission-approved rates for Colorado, Minnesota and Washington.

1 results-driven to achieve the lowest rate possible, but this example shows that
2 Qwest's complaint is not warranted. Another example is 9.7.6 Dark Fiber Splice
3 (22-90(e)), in which Qwest proposes a NRC of \$683.74 and the state commission
4 approved average is \$565.57.²⁶⁴

5 **Q. PLEASE ELABORATE ON HOW YOU CALCULATED INTERIM**
6 **RATES FOR POWER CABLES UNDER ISSUE 22-90(A).**

7 A. Qwest did not provide cost studies for the power cable rate elements under
8 8.3.2.7.5 (100 Amp), 8.3.2.7.6 (200 Amp), 8.3.2.7.7 (300 Amp), and 8.3.2.7.8
9 (400 Amp). For these rate elements, I added together the Commission-ordered
10 rates for 40 amp and 60 amp power cables to derive the rates for 100 Amp power
11 cables. Then I calculated the rates for the 200 Amp, 300 Amp and 400 Amp
12 varieties based on multiples of the 100 Amp rates. For instance, for 200 Amp
13 rates, I multiplied the 100 Amp rates by 2, and for 300 Amp rates, I multiplied the
14 100 Amp rates by 3, and so on. This approach calculates an upper bound on
15 reasonable costs for power cables and produces a reasonable proxy of TELRIC
16 costs. Given that there should be some economies achieved when using larger
17 power cables (as opposed to multiple, smaller power cables), the proposed interim
18 rates for these rate elements are conservative and may potentially overstate the
19 costs that a proper least-cost, forward-looking TELRIC study would produce.

20 **Q. PLEASE SUMMARIZE ESCHELON'S INTERIM RATE PROPOSALS.**

²⁶⁴ This includes state commission-approved rates for Colorado and Washington.

1 A. The following table provides a brief summary of Eschelon’s basis for its proposed
2 rates; a more detailed explanation is contained in Exhibit Eschelon 2.32.

Table. Eschelon's and Qwest's Proposals for Issues 22-90(a) through 22-90(e)						
Issue #	Exhibit A Section	Rate Element	RATE PROPOSAL			
			Eschelon		Qwest	
			REC	NRC	REC	NRC
22-90(a)	8.1.1.2	Cable Augment Quote Preparation Fee		\$0.00		\$1,512.51
22-90(a)	8.3.2.7.5	-48 Volt DC Power Cable, per Feed, 100 Amp	\$26.43	\$14,153.23	\$36.06	\$19,457.53
22-90(a)	8.3.2.7.6	-48 Volt DC Power Cable, per Feed, 200 Amp	\$52.86	\$28,306.46	\$68.30	\$36,851.10
22-90(a)	8.3.2.7.7	-48 Volt DC Power Cable, per Feed, 300 Amp	\$79.29	\$42,459.69	\$111.77	\$60,306.77
22-90(a)	8.3.2.7.8	-48 Volt DC Power Cable, per Feed, 400 Amp	\$105.72	\$56,612.92	\$159.69	\$86,162.16
22-90(a)	8.8.1	ICDF Collocation - Quote Preparation Fee		\$0.00		\$1,512.51
22-90(b)	8.1.14	Collocation Space Option Administration Fee		\$1,681.94		\$1,828.19
22-90(b)	8.6.1.1	Remote Collocation Space, per Standard Mounting Unit	\$0.71	\$793.74	\$0.99	\$862.76
22-90(b)	8.6.1.2	Remote Collocation FDI Terminations, per 25 Pair	\$0.41	\$511.09	\$0.58	\$555.53
22-90(b)	8.6.2.2.1	Adjacent Collocation Space (per Standard Mounting Unit)	\$0.71	\$793.74	\$0.99	\$862.76
22-90(b)	8.6.2.2.2	Adjacent Collocation FDI Terminations, per 25 Pair	\$0.41	\$511.09	\$0.58	\$555.53
22-90(b)	8.7.1.2	CLEC-CLEC Fiber Flat Charge, per Request		\$1,301.21		\$1,423.14
22-90(b)	8.7.2.4	Cable Racking, Fiber, per Request	\$101.79		\$109.72	
22-90(c)	8.8.4	ICDF Collocation DS3 Circuit, per Two Legs		\$614.02		\$1,228.04
22-90(c)	8.15.2.1	Special Site Assessment Fee		\$529.00		\$1,058.00
22-90(c)	8.15.2.2	Network Systems Assessment Fee		\$831.50		\$1,663.00
22-90(d)	8.13.1.1	DC Power Reduction Quote Preparation Fee, per Office		\$441.00		\$812.65
22-90(d)	8.13.1.2.1	Power Reduction/Restoration, Less than 60 Amps		\$346.00		\$631.94
22-90(d)	8.13.1.2.2	Power Reduction/Restoration, Equal to 60 Amps		\$346.00		\$888.76
22-90(d)	8.13.1.2.3	Power Reduction/Restoration, Greater than 60 Amps		\$587.00		\$1,116.51
22-90(d)	8.13.1.3	Power Off, per Feed Set, per Secondary Feed		\$597.60		\$1,070.64
22-90(d)	8.13.1.4	Power Maintenance Charge, per Fuse Set	\$37.00		\$51.58	
22-90(d)	8.13.2.1	Power Restoration Quote Preparation Fee, per office		\$441.00		\$812.65
22-90(d)	8.13.2.2.1.1	Power Restoration with Reservation Less Than 60 Amps		\$346.00		\$631.94
22-90(d)	8.13.2.2.1.2	Power Restoration with Reservation Equal to 60 Amps		\$346.00		\$888.76
22-90(d)	8.13.2.2.1.3	Power Restoration with Reservation Greater Than 60 Amps		\$587.00		\$1,116.51
22-90(e)	9.6.12	Private Line/Special Access to UDIT Conversion		\$67.98		\$115.34
22-90(e)	9.7.6	Dark Fiber Splice		\$363.72		\$683.74
22-90(e)	9.23.6.2.1.1	Loop Mux, DS0 2-Wire Analog, First		\$129.39		\$243.24
22-90(e)	9.23.6.2.1.2	Loop Mux, DS0 2-Wire Analog, Each Add'l		\$84.44		\$158.74
22-90(e)	9.23.6.3.1.1	Loop Mux, DS0 4-Wire, Analog, First		\$129.39		\$243.24
22-90(e)	9.23.6.3.1.2	Loop Mux, DS0 4-Wire, Analog, Each Add'l		\$84.44		\$158.74
22-90(e)	9.23.6.4.1.1	Loop Mux, DS1 Loop, First		\$163.67		\$307.68
22-90(e)	9.23.6.4.1.2	Loop Mux, DS1 Loop, Each Add'l		\$119.83		\$225.27
22-90(e)	9.23.6.8.1	LMC Rearrangement - DS0		\$76.25		\$137.50
22-90(e)	9.23.6.8.2	LMC Rearrangement - High Capacity		\$86.54		\$156.07
22-90(e)	9.23.7.7.1	EEL Rearrangement - DS0		\$76.25		\$137.50
22-90(e)	9.23.7.7.2	EEL Rearrangement - High Capacity		\$86.54		\$156.07
22-90(e)	10.7.10	Poles, Ducts, ROWs-Transfer of Responsibility		\$70.07		\$131.73

3

4 Q. WHAT ARE QWEST’S ARGUMENTS AGAINST ESCHELON’S

1 **PROPOSAL FOR ISSUES 22-90(A) THROUGH 22-90(E)?**

2 A. Even though Qwest has its own interim rate proposals in this docket, Qwest
3 argues that interim rates should be addressed in a cost docket, and not in the ICA
4 negotiations.²⁶⁵ Notably, Qwest does not propose a rate of zero in the meantime.
5 It is clearly seeking adoption of its proposed interim rates in this docket. As
6 discussed previously, in essence, Qwest is stating that Eschelon must submit to
7 any rate that Qwest proposes in negotiations, and then wait for Qwest to file with
8 the Commission for an interim rate. Clearly, this “dictatorial” position is
9 unacceptable to Eschelon. Qwest argument that ITS PROPOSED rates should not
10 be QUESTIONED in the ICA negotiations goes against the federal rules
11 regarding the ILEC’s duty to negotiate (47 CFR §51.301). Specifically, 47 CFR
12 §51.301 states that cost data should be provided as part of negotiations regarding
13 rates. Clearly, the federal rules would not require that cost data be provided if
14 they presumed that the CLEC should not question the ILEC’s rate proposal.
15 Below I reproduce the relevant portions of 47 CFR §51.301:

16 (a) An incumbent LEC shall negotiate in good faith the terms and
17 conditions of agreements to fulfill the duties established by
18 sections 251 (b) and (c) of the Act.
19
20 (c) If proven to the Commission, an appropriate state commission,
21 or a court of competent jurisdiction, the following actions or
22 practices, among others, violate the duty to negotiate in good faith:
23 ...

²⁶⁵ See, e.g., Oregon Disputed Issues Matrix , Exhibit 3 to Eschelon’s Oregon Petition for Arbitration, p. 245. See also, Qwest Response, pp. 44-45. Qwest did not provide position statements in the Utah. See footnote 75 for more detail.

1 (8) Refusing to provide information necessary to reach
2 agreement. Such refusal includes, but is not limited to:

3

4 (ii) *Refusal by an incumbent LEC to furnish cost*
5 *data that would be relevant to setting rates if the*
6 *parties were in arbitration.*²⁶⁶

7 By requiring that an ILEC negotiating in good faith should provide the cost data
8 for its negotiated rates, the rules imply that the individual rates will be discussed
9 during negotiations and arbitration.

10 **Q. PLEASE EXPLAIN WHY QWEST'S OTHER ARGUMENT – THAT**
11 **ESCHELON SHOULD NOT RECEIVE UNIQUE TREATMENT BY**
12 **NEGOTIATING RATES²⁶⁷ – IS INVALID.**

13 A. Qwest argues that Eschelon should accept Qwest's proposed rates because Qwest
14 offers its proposed rates to all CLECs, and Eschelon should not receive unique
15 treatment.²⁶⁸ First, as I explained above, by requiring that cost support be
16 provided for the ILEC rates addressed in the ICA negotiations, the federal
17 unbundling rules²⁶⁹ assume that rates will be scrutinized and negotiated – rather
18 than accepted at the level proposed by an ILEC – during the ICA negotiation and
19 arbitration. Negotiation implies that the negotiated rates may be different from
20 rates offered to other CLECs. Second, Eschelon should not be required to accept
21 Qwest's proposed unsupported, unapproved, unjust, unreasonable or

²⁶⁶ 47 CFR §51.301 (emphasis added).

²⁶⁷ See, e.g., Qwest Response, p. 45, lines 1-2.

²⁶⁸ See, e.g., Qwest Response, p. 45, lines 1-2.

²⁶⁹ 47 CFR §51.301.

1 discriminatory rates simply because some other CLEC accepted such rate
2 proposal. Third, Qwest's argument is contrary to the facts. As explained above
3 Qwest offers different rates to different CLECs.

4 **Q. PLEASE SUMMARIZE ISSUE 22-90 AND ITS SUBPARTS.**

5 A. The companies have agreed that rates reflected on Exhibit A that have not been
6 approved by the Commission in a cost case and require Commission approval
7 shall be considered as Interim rates.²⁷⁰ The Commission needs to decide pursuant
8 to Section 252(c) of the federal Act which rates will be reflected in Exhibit A for
9 these elements, as the companies have not agreed upon interim rates.

10 In addition, if Qwest files with the Commission cost studies in support for its rate
11 proposal, these cost studies should be available to Eschelon, if requested or as
12 otherwise ordered by the Commission. Because the rates in question concern
13 essential products and services offered to CLECs, CLECs' participation in the
14 Commission's review is important and contributes substantially to the process.

15 Eschelon proposes a number of interim rates for products and services for which
16 Qwest's cost support was particularly inadequate. Eschelon's rate proposal is
17 based (where available) on its corrections to Qwest's cost studies to include the
18 Commission-approved cost inputs, and when Qwest's cost study was not
19 available, Eschelon's proposed rates are based on an average of rates approved in

²⁷⁰ See the closed portion of the language of ICA Section 22.4.1.1 ("22.4.1.1 Rates reflected on Exhibit A that have not been approved by the Commission in a cost case . . . shall be considered as interim rates ("Interim Rates") by the Parties . . .").

1 other states or the rate for the product or service that is in Eschelon's historical
2 ICA with Qwest. Eschelon's rate proposal, as well as Eschelon's acceptance of a
3 large number of Qwest-proposed rates, do not mean that Eschelon considers these
4 rates, which are interim rates, to be cost-based, just, reasonable and non-
5 discriminatory. Eschelon reserves the right to modify its proposals when the
6 Commission considers permanent rates.

7 Qwest should not be permitted, as a result of proposing interim rates, to simply
8 ignore this Commission's previous cost decisions, particular when it seeks, at the
9 same time, to defer Commission review of those proposed rates to some indefinite
10 time in the future. Further, to the extent Qwest may contend that the adjustments
11 that I made do not accurately reflect the Commission's prior orders, one option
12 available to the Commission is to order Qwest to make a compliance filing of its
13 cost studies incorporating the Commission's previously ordered inputs.

14 **SUBJECT MATTER NO. 46. INTERCONNECTION ENTRANCE FACILITY**

15 **Issue No. 24-92: Section 24.1.2.2**

16 **Q. IS THIS ISSUE NOW CLOSED?**

17 A. Yes, this issue has closed and section 24.1.2.2 has been deleted.

18 **X. CONCLUSION**

19 **Q. WHAT ARE YOUR RECOMMENDATIONS TO THE UTAH**
20 **COMMISSION?**

1 A. I recommend that the Commission adopt Eschelon's proposed Interconnection
2 Agreement language as described in this testimony.

3 **Q. DOES THIS CONCLUDE YOUR TESTIMONY?**

4 A. Yes.