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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of the Petition of Eschelon Telecom of Utah, Inc. for Arbitration with Qwest Corporation, Pursuant to 47 U.S.C. Section 252 of the Federal Telecommunications Act of 1996	)))))	DOCKET NO. 07-2263-03

SURREBUTTAL TESTIMONY

OF

MICHAEL STARKEY

ON BEHALF OF

ESCHELON TELECOM, INC.

August 10, 2007

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I. INTRODUCTION

Q. PLEASE STATE YOUR NAME AND BUSINESS ADDRESS FOR THE RECORD.

A. My name is Michael Starkey. My business address is QSI Consulting, Inc., 243 Dardenne Farms Drive, Cottleville, Missouri 63304.

Q. ARE YOU THE SAME MICHAEL STARKEY WHO FILED DIRECT TESTIMONY IN THIS PROCEEDING ON JUNE 29, 2007, AND REBUTTAL TESTIMONY ON JULY 27, 2007?

A. Yes.

II. OVERVIEW OF SURREBUTTAL TESTIMONY

Q. WHAT IS THE PURPOSE OF YOUR SURREBUTTAL TESTIMONY?

A. I will respond to rebuttal testimony of Qwest. I have listed below the issues I address in my surrebuttal testimony and the corresponding Qwest witness who addressed that issue in his or her rebuttal testimony.

- Section III: Contractual Certainty – Interconnection Agreement/Change Management Process – Issues (Qwest witnesses Renee Albersheim[1] and Karen Stewart[2]);

[1] Rebuttal Testimony of Renee Albersheim on behalf of Qwest Corp., Qwest Exhibit 1R, Docket No. 07-2263-03. July 27, 2007.

[2] Rebuttal Testimony of Karen Stewart on behalf of Qwest Corp., Qwest Exhibit 3R, Docket No. 07-2263-03. July 27, 2007.

- Section IV: Subject Matter 1 (Interval Changes and Placement) – Issue 1-1 and subparts (Qwest witness Renee Albersheim);
- Section V: Subject Matter 14 (Nondiscriminatory Access to UNEs) – Issue 9-31 (Qwest witness Karen Stewart);[3]
- Section VI: Subject Matter 16 (Network Maintenance and Modernization) – Issue Nos. 9-33 and 9-34 (Qwest witness Karen Stewart);
- Section VII: Subject Matter 18 (Conversion) – Issues 9-43 and 9-44 and subparts (Qwest witness Teresa Million);
- Section VIII: Subject Matter 24 (Loop-Transport Combinations) – Issue 9-55 (Qwest witness Karen Stewart); and
- Section IX: Subject Matter 27 (Multiplexing/Loop-Mux Combinations) – Issue 9-61 and subparts (Qwest witness Karen Stewart).

III. CHANGE MANAGEMENT PROCESS, INTERCONNECTION AGREEMENT TERMS, AND THE NEED FOR CONTRACTUAL CERTAINTY

Q. HOW IS SECTION III OF YOUR TESTIMONY ORGANIZED?

A. I will first discuss Qwest's attacks on the factual record that Eschelon provided by way of four examples (and associated chronologies),[4] as well as Qwest's

[3] Qwest Exhibit 3R (Stewart Rebuttal).

[4] *Compare* Qwest Exhibit 1R (Albersheim Rebuttal), pp. 20-25 (and Qwest Exhibit 3R (Stewart Rebuttal), pp. 13-14) *with* Exhibit Eschelon 1 (Starkey Direct), pp. 51 – 105 & Exhibit Eschelon 3.13 – 3.19, 3.36, 3.44, 3.53-3.58, and 3.71-3.74.

arguments based on closed language "matters that have settled,"[5] and then I will discuss Qwest's more general claims regarding the CMP, contractual certainty, and the FCC and state commission decisions discussed in my direct testimony.[6] Both Ms. Albersheim and Ms. Stewart address these issues.

A. SPECIAL CONSTRUCTION (CRUNEC), DESIGN CHANGES, MINNESOTA 616, AND SECRET TRRO PCAT EXAMPLES OF WHEN QWEST VACILLATES OR MANEUVERS AS TO CMP

Q. QWEST TESTIFIES THAT ESCHELON HAS PRESENTED A "MISLEADING PICTURE" OF SEVERAL EXAMPLES OF QWEST'S HANDLING OF ISSUES IN CMP.[7] DO YOU AGREE?

A. No. The opposite is true, as my discussion of each example will show. Eschelon has presented an accurate picture of each example discussed in my direct testimony[8] and provided supporting documentation[9] to allow an independent review of the facts. In addition, to avoid voluminous filings of many exhibits, Eschelon has made efficient and proper use of summary information and excerpts,

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[5] Qwest Exhibit 1R (Albersheim Rebuttal), p. 25, line 17 – p. 26, line 18.

[6] *Compare* Qwest Exhibit 1R (Albersheim Rebuttal), pp. 2-20 (and Qwest Exhibit 3R (Stewart Rebuttal), pp. 13-14; Qwest Exhibit 3R (Stewart Rebuttal), pp. 52-55 & 61, lines 1-10) *with* Exhibit Eschelon 1 (Starkey Direct), pp. 10-51 & Exhibit Eschelon 3.10 (Johnson); *see also* Exhibit Eschelon 3.11 (Johnson) & Exhibit Eschelon 3.12 (Johnson).

[7] Qwest Exhibit 1R (Albersheim Rebuttal), p. 2, line 10.

[8] Exhibit Eschelon 1 (Starkey Direct), pp. 51-105.

[9] *See, e.g.*, Exhibits Eschelon 3.71 – 3.74 (Johnson), Exhibit Eschelon 3.76 (jeopardies), Exhibit Eschelon 3.36 (Johnson) (delayed/held orders), Exhibit Eschelon 3.13 (Johnson), Exhibit Eschelon 3.14 (Johnson), Exhibit Eschelon 3.15 (Johnson) (CRUNEC), and Exhibit Eschelon 3.16 – 3.19 (Johnson) (Secret TRRO PCAT); *see also* additional examples in Exhibit Eschelon 3.53 – 3.58 (Johnson) (expedited orders or "expedites").

while providing sufficient information (including URLs to information on Qwest's own web site) to allow further review of the entire documents (many of which were prepared by Qwest) if desired. Despite these efforts by Eschelon to be thorough and fair in reasonably presenting a large number of facts, Qwest testifies:

> Mr. Starkey and other Eschelon witnesses have presented a misleading picture of the examples they use as a basis for their claim that Qwest has been inconsistent in its behavior in the CMP. I will provide some additional details regarding the examples below.[10]

Similarly, in the Arizona arbitration,[11] Ms. Albersheim testified:

> …Eschelon has presented small pieces of the record for each of these topics, and chosen the pieces that seem on the surface to support Eschelon's position. I will present a more complete discussion of each topic....[12]

An examination of each example will show that Qwest presents even smaller pieces of the record (to the extent it attempts to support its assertions with evidence at all), and Qwest's version of events is inaccurate.[13] As in my direct

[10] Qwest Exhibit 1R (Albersheim Rebuttal), p. 19, line 22 – p. 20, line 3.

[11] 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 Eschelon 1.5 and in Arizona as Exhibit Eschelon 1.6 to the testimony of Mr. Starkey. Copies of the rulings of the Administrative Law Judges (ALJs) and the commission in Minnesota are included as Exhibits Eschelon 2.24 and 2.25 to the testimony of Mr. Denney.

[12] Qwest-Eschelon AZ ICA Arbitration, Docket No. T-03406A-06-0572, T-01051B-06-0572, Albersheim AZ Rebuttal (Feb. 9, 2007), p. 21, lines 2-4.

[13] Ms. Albersheim points to more than 1,000 product and process and system changes and claims that they demonstrate that the CMP works efficiently and effectively (Qwest Exhibit 1R (Albersheim Rebuttal), p. 4, line 17 – p. 5, line 4) and that Eschelon's examples "are portrayed in a light that Qwest does not believe reflects actual events" (Qwest Exhibit 1R (Albersheim Rebuttal), p. 4, lines

testimony, I will refer to the four primary examples as CRUNEC, Design Changes, MN 616 and Secret TRRO PCATs.[14] Ms. Albersheim also responds[15] to an example I provided with respect to Expedited Orders.[16] Mr. Denney addresses expedited orders (Issue 12-67), and Ms. Johnson responds specifically to Ms. Albersheim's claims regarding the example in my direct testimony.

1. CRUNEC Example[17]

Q. QWEST CITES SOME PERCENTAGES TO SHOW THAT THE DRAMATIC SPIKE IN HELD ORDERS WAS ONLY FOR A "SPECIFIC TYPE OF HELD ORDERS" BUT WAS "NOT REFLECTIVE OF HELD ORDERS OVER ALL."[18] DO THESE PERCENTAGES AFFECT YOUR ANALYSIS OF THIS ISSUE?

A. No. As I explained in my direct testimony, the CRUNEC example (involving a change that Qwest implemented through CMP relating to special construction

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21-22). I addressed Ms. Albersheim's argument at pages 104-106 of my direct testimony (Exhibit Eschelon 1 (Starkey Direct), pp. 104-106). Though Qwest claims these are isolated incidents, the significance of these examples is that they occurred at all. If CMP was the disciplined process Qwest claims it is, these examples would not have occurred at all. These examples demonstrate that: Qwest has used the CMP to advantage itself relative to its own policy positions, there is potential for abuse in the future, and safeguards in the form of clear ICA terms are needed to protect against this abuse. Furthermore, Ms. Albersheim's data on the amount of changes in CMP does not include product and process changes that Qwest tries to implement outside of CMP. *See, e.g.*, Secret TRRO PCATs example (Eschelon/1, Starkey/74-94 & Exhibit Eschelon 3.16 – 3.21 (Johnson) and Exhibit Eschelon 3.29 – 3.33 (Johnson)).

[14] Exhibit Eschelon 1 (Starkey Direct), pp. 51-106.

[15] Qwest Exhibit 1R (Albersheim Rebuttal), p. 10, line 4 – p. 11, line 6.

[16] Exhibit Eschelon 1 (Starkey Direct), pp. 49-50 (citing Eschelon Complaint against Qwest).

[17] Exhibit Eschelon 1 (Starkey Direct), pp. 52-63 and Exhibit Eschelon 3.13-3.15 (Johnson).

[18] Qwest Exhibit 1R (Albersheim Rebuttal), p. 22, lines 17-18.

charges, which Qwest calls "CLEC Requested UNE Construction" or "CRUNEC") relates to "no-build situations" that exist when Qwest will not build for CLECs because it would likewise not build for itself for the normal charges assessed to its customers.[19] As is apparent from my discussion of this example in the context of these no-build situations, the data I cited in my direct testimony[20] related to this specific type of held order ("service inquiry" or "no-build" held orders). The fact that Qwest used the CMP notice to apply no-build held orders to situations in which it should not do so is what caused the spike. In other words, my numbers related only to a specific type of held order because that type of held order is ***the only type relevant to the discussion***. The held orders that spiked were the ones for which Qwest started to demand charges and a lengthy process that would cause delay when none of those charges or that lengthy process applied previously.

Q. QWEST SUGGESTS THAT ITS CONDUCT IN ISSUING THIS NOTICE THROUGH CMP DID NOT CAUSE THE PROBLEMS FOR ESCHELON.[21] IS THAT ACCURATE?

A. No. The before and after effects of Qwest's one-word change to its PCAT speak for themselves. Before Qwest implemented this change in CMP, Eschelon did not have this problem, but afterwards it did. Similarly, Allegiance and Covad

[19] Exhibit Eschelon 1 (Starkey Direct), p. 53, lines 13-16.

[20] Exhibit Eschelon 1 (Starkey Direct), p. 56, lines 14 – 19.

[21] Qwest Exhibit 1R (Albersheim Rebuttal), p. 22, lines 3-12.

both submitted CMP comments indicating that they had "already" been negatively impacted by Qwest's implementation of this one-word change to Qwest's PCAT.[22] Twelve CLECs joined in opposing this change.[23] Only after the CLECs, including Eschelon, brought this issue to the attention of the Arizona Commission in the 271 proceeding did Qwest revoke it. Qwest's attempt to suggest the lack of a causal relationship is ineffective and contrary to the findings of the Arizona Commission.[24] Contrary to Qwest's suggestion that it was being responsive to its CLEC customers,[25] Qwest denied Covad's objection in CMP[26] and only retracted its change later after the Arizona Commission became involved.[27]

Q. MS. ALBERSHEIM CLAIMS THAT THE "CONDITIONING" IN THE CONTEXT OF CRUNEC "BEARS NO RESEMBLANCE WHATSOEVER" TO "CONDITIONING" LOOPS FOR DATA

[22] CLEC Comments Received from Allegiance and Covad on July 26, 2003 (stating the companies have "***already been negatively impacted***") (emphasis added). *See* Exhibit Eschelon 3.13 (Johnson), p. 3 citing http://www.qwest.com/wholesale/cnla/uploads/PROD%2E08%2E06%2E03%2EF%2E03494%2EDelayedResponseCRUNEC%2Edoc

[23] Exhibit Eschelon 3.13 (Johnson), pp. 3-4.

[24] September 16, 2003, 271 Order, ACC Docket No. T-00000A-97-0238 (Decision No. 66242), ¶109 (quoted at Exhibit Eschelon 1 (Starkey Direct), p. 60, lines 9-28).

[25] Qwest Exhibit 1R (Albersheim Rebuttal), p. 20, lines 3-5 ["In each case, what Eschelon has portrayed as Qwest 'changing its mind,' or Qwest acting 'inconsistently,' is in fact Qwest's significant efforts to be responsive to its CLEC customers."]

[26] Exhibit Eschelon 1 (Starkey Direct), p. 55, lines 15-21.

http://www.qwest.com/wholesale/downloads/2003/030521/CNL3_response_CRUNEC_V4.doc

[27] Exhibit Eschelon 3.13 (Johnson), pp. 4-5 (9/16/03, 9/18/03).

SERVICES,[28] AND THAT QWEST SUBMITTED THE LEVEL 3 CRUNEC NOTICE TO CLARIFY THIS POINT.[29] IS THERE ANY SUPPORT FOR MS. ALBERSHEIM'S CLAIMS?

A. No. Despite Ms. Albersheim's claim that the Level 3 CRUNEC notice was "simply a clarification,"[30] the results of Qwest's notice[31] and the Arizona Commission's order on the notice[32] speak for themselves. The record shows that this notice did not just clarify, rather it had serious business-affecting consequences on Eschelon and other CLECs.

Q. IS MS. ALBERSHEIM'S CLAIM THAT "CONDITIONING" FOR CRUNEC IS SOMETHING COMPLETELY DIFFERENT THAN "CONDITIONING" LOOPS FOR DATA SERVICES SUPPORTED BY THE RECORD?

A. No. Though Ms. Albersheim claims that my testimony reflects "confusion" on this point,[33] her attempt to distinguish between CRUNEC "conditioning" and loop

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[28] Qwest Exhibit 1R (Albersheim Rebuttal), p. 21, lines 8-9.

[29] Qwest Exhibit 1R (Albersheim Rebuttal), p. 21, lines 1-11.

[30] Qwest Exhibit 1R (Albersheim Rebuttal), p. 21, line 11.

[31] Exhibit Eschelon 1 (Starkey Direct), p. 56, lines 14-19. *See also* CLEC Comments Received from Allegiance and Covad on July 26, 2003 (stating the companies have "***already been negatively impacted***") (emphasis added), Exhibit Eschelon 3.13 (Johnson), p. 3, citing

http://www.qwest.com/wholesale/cnla/uploads/PROD%2E08%2E06%2E03%2EF%2E03494%2EDelayedResponseCRUNEC%2Edoc

[32] Exhibit Eschelon 1 (Starkey Direct), p. 60, lines 9-28. The Arizona Commission and Staff conditioned Checklist Items 2 and 4 of the Qwest Section 271 evaluation on Qwest's agreement to suspend the policy set forth in Qwest's Level 3 CRUNEC notice and provide refunds to CLECs.

[33] Qwest Exhibit 1R (Albersheim Rebuttal), p. 21, lines 6-7.

"conditioning" is undermined by the record. As shown in the Arizona Commission's 271 Order in Docket No. T-00000A-97-0238, the Arizona Commission and its Staff were concerned about Qwest's policy related to "line conditioning" – not some other different type of activity related to "CRUNEC" conditioning. I provided the pertinent language from the Commission's order in my direct testimony.[34] The Commission's Order states: "Staff agrees with Eschelon with respect to the recently imposed c***onstruction charges on CLECs for line conditioning***. Staff is extremely concerned that Qwest would implement such a ***significant change*** through its CMP process without prior Commission approval."[35] By referring to Qwest's Level 3 CRUNEC notice as a "significant change," the Arizona Commission made clear that Ms. Albersheim's claim that it was a simple clarification is false. More importantly, by clearly referring to construction charges for "line conditioning," the order shows that Ms. Albersheim's attempt to distinguish between line conditioning and CRUNEC conditioning to support her claim that it was not Qwest's Level 3 CRUNEC notice that caused problems for Eschelon and other CLECs should be rejected.

[34] Exhibit Eschelon 1 (Starkey Direct), p. 60, lines 9-28.

[35] September 16, 2003 Order in the 271 Docket, Docket No. T-00000A-97-0238 (Decision No. 66242) at ¶109 (emphasis added). The Arizona Commission also states: "Staff recommends that Qwest be ordered to immediately suspend its policy of assessing ***construction charges on CLECs for line conditioning and reconditioning***…" *Id*. (emphasis added)

Q. MS. ALBERSHEIM MAKES MUCH OF THE FACT THAT ESCHELON DOES NOT USE THE CRUNEC PROCESS.[36] WHY IS IT THEN THAT ESCHELON WAS SO CONCERNED ABOUT QWEST'S CRUNEC NOTICE?

A. It is the effect of the notice that greatly concerned Eschelon. As I said in my direct testimony, almost immediately after the effective date of Qwest's unilateral email notification, Eschelon began experiencing a dramatic spike in the number of no-build held orders relative to DS1 loops ordered from Qwest.[37] Because Eschelon did not use the CRUNEC process, it did not expect changes in that process to affect its business. A CMP notice for a process never used by Eschelon should not have had such a business-affecting impact on Eschelon.

Q. QWEST STATES THAT ITS NOTICE WAS JUST A "CLARIFICATION" OF THE CRUNEC PROCESS AND SUGGESTS THAT THE BUSINESS IMPACT THEREFORE WAS THE RESULT, NOT OF A QWEST CHANGE IN PROCESS IMPLEMENTED THROUGH CMP, BUT OF AN EFFORT BY QWEST TO COMPLY WITH A PREVIOUSLY EXISTING PROCESS.[38] QWEST ADDS THAT YOUR DESCRIPTION OF THESE EVENTS "IS NOT COMPLETELY ACCURATE."[39] PLEASE RESPOND.

[36] Qwest Exhibit 1R (Albersheim Rebuttal), p. 20, lines 18-20; Qwest Exhibit 1R (Albersheim Rebuttal), p. 22, line 7; and Qwest Exhibit 1R (Albersheim Rebuttal), p. 4, line 22 – p. 5, line 1.

[37] Exhibit Eschelon 1 (Starkey Direct), p. 56, lines 14-19.

[38] Qwest Exhibit 1R (Albersheim Rebuttal), p. 21, line 11.

[39] Qwest Exhibit 1R (Albersheim Rebuttal), p. 22, lines 11-12.

A. I accurately described this Qwest position in my direct testimony, where I quoted Qwest's claim word-for-word.[40] I said: "Qwest said:

> Qwest has in the past not fully enforced our contractual right to collect on the charges incurred when completing DS1 level unbundled services. Charging is the specific change that has occurred.[41]"

Qwest identifies no inaccuracy in my description of events. Qwest's claim that "[i]n error, Qwest's technicians had been constructing DS1 loops outside of process"[42] is no more persuasive now in this case than it was at that time and in the Arizona 271 proceeding. This was a clear, business-affecting and rate-impacting change that Qwest inappropriately attempted to implement through CMP but had to revoke as a result of the 271 proceedings. The Arizona Staff described it as a "significant change" and recommended "that Qwest be ordered to immediately suspend its policy."[43] This very type of impermissible significant change is the subject of Eschelon's proposal for Issue 9-31 (Nondiscriminatory Access to UNEs), as I discuss further below regarding Issue 9-31, and as Mr. Denney discusses in his surrebuttal testimony regarding cost recovery issues relating to Issue 9-31.

[40] Exhibit Eschelon 1 (Starkey Direct), p. 57, lines 11-14.

[41] Qwest (Teresa Taylor) email to Eschelon (July 3, 2003).

[42] Qwest Exhibit 1R (Albersheim Rebuttal), p. 22, lines 10-11.

[43] Arizona 271 Order, ¶109.

2. Design Changes Example

Q. QWEST STATES THAT IT IS "NOT VALID…TO TRY TO USE A RATE ISSUE AS AN EXAMPLE OF QWEST ACTIONS IN THE CMP."[44] IS THAT AN ACCURATE DESCRIPTION OF YOUR EXAMPLE?

A. No. I described the purpose of the design changes[45] example in my direct testimony as follows: "I discuss the issue here because Qwest's treatment of its proposed language for Issue 4-5 Design Changes is another example of Qwest's directing – or, inconsistently, not directing – issues to CMP, to its own advantage (and the corresponding disadvantage) of CLECs. Consequently, the issue highlights the need for the certainty of ICA language to govern the Qwest/Eschelon business relationship for the years to come."[46] On pages 63-65 of my direct testimony,[47] I provided, as evidence of Qwest's inconsistency, Qwest's differing positions over time with respect to whether the *definition* of the term design change should, or should not, be subject to CMP.

Qwest's single criticism of this example is that the rates associated with design changes are outside the scope of CMP.[48] I expressly discussed this distinction on page 64 of my direct testimony, where I said: "When Eschelon inquired about these changes, Qwest CMP personnel responded that 'this item is outside the

[44] Qwest Exhibit 1R (Albersheim Rebuttal), p. 20, lines 13-14.

[45] For a discussion of Subject Matter 4 (Design Changes, Issue 4-5), see the testimony of Mr. Denney.

[46] Exhibit Eschelon 1 (Starkey Direct), p. 63, lines 7-12.

[47] Exhibit Eschelon 1 (Starkey Direct), pp. 63-65.

[48] Qwest Exhibit 1R (Albersheim Rebuttal), p. 20, lines 7-14.

scope of CMP.'[49] Rates are outside the scope of CMP. Whether a definition that may affect the application of rates is or is not outside the scope of CMP, however, is not a point upon which Qwest has been consistent. In fact, Qwest's testimony that the definition of design change *should not* be handled in CMP because rates associated with design changes are outside the scope of CMP[50] is just one more example of Qwest's inconsistency, because this testimony is directly at odds with Qwest's position statement in the Minnesota arbitration stating that the definition of design change *should* be handled in CMP.[51] Qwest chose to address the *definition* of design changes outside the CMP and also chose to unilaterally establish new rates not only outside CMP but without benefit of Commission review or approval."[52] I suggested that the Commission should conclude from this example that Qwest's inconsistent treatment of design changes shows that CLECs must have contract language upon which they may fairly depend in their dealings with Qwest. Nothing in Qwest's rebuttal testimony alters this conclusion.

[49] Exhibit Eschelon 1 (Starkey Direct), p. 64, lines 2-3. *See also* Exhibit Eschelon 2.2 (Denney), p. 3.

[50] Qwest Exhibit 1R (Albersheim Rebuttal), p. 20, lines 7-14.

[51] Exhibit Eschelon 1 (Starkey Direct), p. 64, line 10 – p. 65, line 2 (quoting Qwest's position statement).

[52] Exhibit Eschelon 1 (Starkey Direct), p. 64, lines 2-8.

3. Minnesota 616 Example

Q. MS. ALBERSHEIM RESPONDED TO THE CRUNEC EXAMPLE, DESIGN CHANGES EXAMPLE, AND SECRET TRRO PCATS EXAMPLE IN SECTION III (CMP) OF HER REBUTTAL TESTIMONY. DID MS. ALBERSHEIM RESPOND TO THE MINNESOTA 616 EXAMPLE IN SECTION III OF HER REBUTTAL TESTIMONY?

A. No.[53] Ms. Albersheim responds to some of the points[54] I made in my direct testimony about the Minnesota 616 example in Section VIII of her testimony, within her discussion of Issue 12-64 (Root Cause Analysis and Acknowledgement of Mistakes).[55] I will address those points here, and Ms. Johnson discusses Issue 12-64 in her testimony.[56]

Q. MS. ALBERSHEIM TAKES ISSUE WITH YOUR TESTIMONY, CLAIMING THAT QWEST DOES NOT CONTRADICT "ITS OWN ADVOCACY" BY "PROPOSING TO INCLUDE ACKNOWLEDGEMENT OF MISTAKES LANGUAGE IN THE MINNESOTA ICA AND NOT IN THE UTAH ICA…"[57] PLEASE RESPOND.

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[53] Qwest Exhibit 1R (Albersheim Rebuttal), pp. 18-22, Section III(D), III(E), and III(F).

[54] Qwest Exhibit 1R (Albersheim Rebuttal), p. 32, lines 6-19 and Qwest Exhibit 1R (Albersheim Rebuttal), p. 33, lines 12-18.

[55] Ms. Albersheim discusses Issue 12-64 in her rebuttal testimony at Qwest Exhibit 1R (Albersheim Rebuttal), pp. 32-36.

[56] Exhibit Eschelon 3 (Johnson Direct), pp. 43-58 and Exhibit Eschelon 3R (Johnson Rebuttal), pp. 2-16. Ms. Johnson also addresses Issue 12-64 in her surrebuttal testimony.

[57] Qwest Exhibit 1R (Albersheim Rebuttal), p. 32, lines 7-9.

A. A simple comparison of Qwest's previous testimony about its preference for uniformity due to the disadvantages of alleged unique "one-off" processes[58] with Qwest's current testimony about the disadvantages of uniformity[59] demonstrates the contradiction in Qwest's own advocacy. If Qwest consistently opposed "one-off" processes, it could have voluntarily made the Minnesota 616 terms available to other CLECs and in other states to gain uniformity. Although Ms. Albersheim claims that the Minnesota Commission's order in the 616 case "did not rise to the level of a regulatory change request,"[60] the CMP Document provides for Qwest to

[58] *See, e.g.*, Qwest Exhibit 1R (Albersheim Rebuttal), p. 5, lines 18-21 ("Eschelon seeks to expand Qwest's obligations and create ***one-off, unique processes*** for CMP-related ICA issues in dispute: Issue 1-1: service intervals, Issues 12-71 through 12-73: jeopardy notices, and Issue 12-67: expedited orders. Eschelon's approach to these issues has a ***dire effect*** on the CMP . . . .. ") (emphasis added). [Ms. Albersheim has testified that Qwest believes its proposal of a Minnesota-only provision for Issue 12-64 is a "one-off" process. Qwest-Eschelon ICA MN Arbitration Transcript, Vol. I, p. 15, line 17 – p. 16, line 3 (Albersheim).] *See also* Qwest-Eschelon ICA MN Arbitration, Qwest (Mr. Linse) MN Direct, p. 12, lines 12-19 ("Even if Eschelon were to agree that its language constitutes a standing request to tag whenever necessary, this would still represent a significant 'one-off' from Qwest's existing process. Eschelon's proposed language would create a unique process that would apply only to Eschelon and other CLECs that may opt into Eschelon's agreement. Qwest's technicians on service calls would be unreasonably burdened with the responsibility of understanding this one-off process and keeping straight for which CLECs it applied. This would create significant administrative and logistical difficulties.") (Issue 12-75, now closed).

[59] See, e.g., Qwest Exhibit 1 (Albersheim Direct), p. 3, lines 13-15. Qwest has attempted to distinguish Issue 12-64 because it "was not necessary for Qwest to undertake systems changes" (Albersheim Arizona Rebuttal, p. 36, lines 17-18), but it was also not necessary for Qwest to undertake system changes for the now closed Issue 12-75 (tag at the demarcation point) (see previous footnote). *See* Qwest-Eschelon ICA MN Arbitration, Transcript, Vol. I, p. 104, line 10 – p. 105, line 11 (where Ms. Albersheim lists the issues in Section 12 that "anticipate systems change requests" and does not include tag at the demarcation point (Issue 12-75)). If the real reason for Qwest's objection were opposition to "one-off" terms, Qwest could have simply made the acknowledgement of mistakes terms available to all CLECs in CMP (as it says it is currently doing for tag at the demarcation point, Issue 12-75). As previously discussed, however, Qwest has chosen not to deal with this particular subject which is unfavorable to Qwest in CMP. Exhibit Eschelon 1 (Starkey Direct), pp. 72-73.

[60] Qwest Exhibit 1R (Albersheim Rebuttal), p. 33, line 16.

voluntarily initiate a change request (with no regulatory order at all),[61] as I explained in my direct testimony.[62]

Qwest did not use CMP for acknowledgement of mistakes, even though Qwest has admitted[63] its choice not to do so has resulted in a "one-off" process. At the same time, Qwest asks the Commission to send issues for which Eschelon requests contractual certainty to CMP to avoid one-off processes. If Qwest is opposed to one-off processes, then it should be willing to adopt, for the Utah ICA, the ICA language on root cause analysis and acknowledgement of mistakes that was adopted in the Minnesota ICA. Eschelon has sought the same terms for Issue 12-64 in all of the states in which it operates.

Q. MS. ALBERSHEIM TESTIFIES THAT "ESCHELON'S PROPOSED LANGUAGE EXPANDS QWEST'S OBLIGATION WELL BEYOND WHAT WAS ORDERED IN MINNESOTA."[64] PLEASE RESPOND.

A. There is no reason that an ICA provision that will apply on a going forward basis needs to be limited to the scope of the example in that case. There should be no arbitrary limitation to the context in which the customer-affecting error occurs before Qwest should acknowledge such errors or analyze the errors such that they

[61] CMP Document (Exhibit Eschelon 3.10 and Qwest Exhibit 1.1), §5.4.

[62] Exhibit Eschelon 1 (Starkey Direct), p. 72, lines 11-14.

[63] Qwest-Eschelon Minnesota arbitration, Transcript, Vol. I, p. 15, line 17 – p. 16, line 3 (Albersheim) (Exhibit Eschelon 1.5), quoted in Exhibit Eschelon 1 (Starkey Direct), p. 73, lines 4-7 and footnote 140.

[64] Qwest Exhibit 1R (Albersheim Rebuttal), p. 32, lines 18-19.

can be avoided, or minimized, on a going-forward basis. In any event, in her rebuttal testimony, Ms. Johnson addressed Qwest's claim that Eschelon's language goes beyond the scope of the Minnesota order, explaining that the Minnesota Commission itself disagreed with Qwest's view on the scope of its own commission order.[65] In fact, in March, the Minnesota commission not only adopted Eschelon's proposed language but also it said its "concern for the anticompetitive consequences of service quality lapses has ***never*** been as narrow as Qwest's language would suggest."[66] In April, Ms. Albersheim testified that she was aware that the Minnesota Commission had rejected Qwest's narrow interpretation of that Commission's own 616 order.[67] She provides no basis for testifying on July 27, 2007 -- with no mention of the Minnesota Commission's own ruling on this point -- that Eschelon's language "expands Qwest's obligation well beyond what was ordered in Minnesota."[68]

Q. MS. ALBERSHEIM STATES THAT ESCHELON HAS ARGUED THAT QWEST SHOULD HAVE SUBMITTED THE ACKNOWLEDGEMENT OF MISTAKES ISSUE TO CMP.[69] IS THAT AN ACCURATE DESCRIPTION OF YOUR TESTIMONY AND ESCHELON'S POSITION?

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[65] Exhibit Eschelon 3R (Johnson Rebuttal), p. 5, lines 6-8.

[66] Exhibit Eschelon 2.25 (Denney), p. 15 (emphasis added) (March 30, 2007).

[67] Colorado Transcript (April 17, 2007), Docket No. 06B-497T, Vol, I, p. 80, lines 20-24 ("Q And you were aware, were you not, that the Minnesota Commission actually rejected Qwest's narrow interpretation of its order in the Minnesota 616 case, correct? A Yes.") (Ms. Albersheim).

[68] Qwest Exhibit 1R Albersheim Rebuttal), p. 32, lines 18-19.

[69] Qwest Exhibit 1R (Albersheim Rebuttal), p. 33, lines 12-15.

A. No. Qwest cites page 72 of my direct testimony.[70] On that page, I specifically testified (with emphasis in original): "Eschelon is ***not*** advocating use of the CMP procedures, as it has consistently maintained that this issue should be addressed in the interconnection agreement."[71] Eschelon addresses not its own position but the "inconsistency in Qwest's position,"[72] because Qwest has argued in this proceeding both that this issue should be dealt with in CMP and that it should not.[73] Qwest has been inconsistent, and this inconsistency should be taken into account when evaluating Qwest's claims.

As discussed above, Qwest's stated position is that processes, procedures, and business practices should be handled in CMP to avoid "one-off" processes,[74] but for this particular issue of acknowledging Qwest mistakes, Qwest did not use CMP even though as discussed above Qwest admits that its decision not to do so has resulted in a "one-off" process.[75] In an attempt to explain away this

[70] Qwest Exhibit 1R (Albersheim Rebuttal), p. 33, line 12.

[71] Exhibit Eschelon 1 (Starkey Direct), p. 72, line 15 – p. 73, line 2.

[72] Exhibit Eschelon 1 (Starkey Direct), p. 73, line 7.

[73] *Compare* Exhibit 3 to Eschelon's Arbitration Petition in Oregon Docket ARB 775 (Joint Disputed Issues Matrix, dated 10/10/06), Qwest Position Statement, pp. 162-163 ("this issue involves processes that affect all CLECs… Processes that affect all CLECs should be addressed through CMP….") (quoted in Exhibit Eschelon 1 (Starkey Direct), p. 76, lines 3-12) *with* Qwest Exhibit 1R (Albersheim Rebuttal), p. 33, lines 12-15 (when asked whether "Qwest should have submitted the acknowledgement of mistakes issue in the Minnesota docket to the CMP," Ms. Albersheim responded "No").

[74] Qwest Exhibit 1R (Albersheim Rebuttal), p. 5, line 18; *id*. Qwest Exhibit 1R (Albersheim Rebuttal), p. 14, line 14.

[75] Qwest-Eschelon Minnesota arbitration, Transcript, Vol. I, p. 15, line 17 – p. 16, line 3 (Albersheim) (Exhibit Eschelon 1.5), quoted in Exhibit Eschelon 1 (Starkey Direct), p. 73, lines 4-7 and footnote 140.

inconsistency, Ms. Albersheim has testified that this issue does not "apply to all CLECs."[76] Apparently to bolster this claim, Qwest also erroneously describes the results of the MN 616 Case as a "settlement,"[77] as further discussed below. The Minnesota Commission's orders in the Minnesota 616 Case clearly apply to all CLECs and not only Eschelon. The Minnesota Commission found that Qwest had "failed to adopt operational procedures to promptly acknowledge and take responsibility for mistakes in processing wholesale orders."[78] The order did not say "Eschelon orders." The Minnesota Commission also found that "[p]roviding adequate wholesale service includes taking responsibility when the wholesale provider's actions harm customers who could reasonably conclude that ***a competing carrier*** was at fault. Without this kind of accountability and transparency, retail competition cannot thrive."[79] The order did not say that the customer would blame "Eschelon." Similarly, in its later order finding Qwest's compliance filing inadequate, the Minnesota Commission's ordering paragraphs regarding the required contents of Qwest's next compliance filing included several items that referred to all Qwest wholesale orders and CLECs generally (not only Eschelon).[80]

[76] See, e.g., Minnesota arbitration Hearing Ex. 2 (Albersheim Reb.), p. 40, lines 13-15 ("nor does it apply to all CLECs").

[77] Qwest Exhibit 1R (Albersheim Rebuttal, p. 35, line 3.

[78] Exhibit Eschelon 1.4 (Starkey), p. 13.

[79] Exhibit Eschelon 1.4 (Starkey), p. 13 (emphasis added).

[80] Exhibit Eschelon 1.4 (Starkey), pp. 4-5; see, e.g., *id*. at paragraphs (f), (i), (j), (k), (l).

Qwest's required compliance filing reflects this same use of references to "all" Qwest wholesale orders and CLECs generally (not only Eschelon).[81] Despite the Minnesota Commission-ordered requirements that are clearly not limited to Eschelon and Qwest's own earlier position statement stating that this issue "involves processes that affect all CLECs, not just Eschelon,"[82] Ms. Albersheim has supported Qwest's choice not to use CMP by repeatedly testifying: "This process is not one that requires Qwest to alter its procedures overall, nor does it apply to all CLECs."[83] This is results-oriented conduct. It is not a process affecting all CLECs, because Qwest did not want to use CMP, so it says it is not one. If these Commission-ordered requirements to ***implement***[84] steps regarding acknowledgment provisions for ***all*** Qwest errors in processing wholesale orders,[85] which the Commission described as "***processes and procedures***,"[86] are not processes that affect all CLECs[87] that "should be addressed through CMP"[88]

[81] Minnesota 616 case, Qwest Compliance Filing (Dec. 15, 2003), pp. 3-5.

[82] Exhibit 3 to Eschelon's Arbitration Petition in Oregon Docket ARB 775 (Joint Disputed Issues Matrix, dated 10/10/06), Qwest Position Statement, pp. 162-163.

[83] Albersheim Arizona Rebuttal, p. 40, lines 9-11; Albersheim Minnesota Rebuttal, p. 40, lines 13-15; Albersheim Washington Rebuttal, p. 39, lines 9-11 (same quote in all three states).

[84] Exhibit Eschelon 1.4 (Starkey), p. 5.

[85] Exhibit Eschelon 1.4 (Starkey), p. 4, paragraph (f).

[86] Exhibit Eschelon 1.4 (Starkey), p. 3.

[87] Terms may be implemented in CMP on a state-specific basis. Expedites, for which Qwest offers unique terms in Washington but not its other 13 states (see Mr. Denney's discussion of Issue 12-67), is an example.

[88] Exhibit 3 to Eschelon's Arbitration Petition in Oregon Docket ARB 775 (Joint Disputed Issues Matrix, dated 10/10/06), Qwest Position Statement, pp. 162-163 ("this issue involves processes that affect all CLECs… Processes that affect all CLECs should be addressed through CMP….") (quoted in Exhibit Eschelon 1 (Starkey Direct), p. 76, lines 3-12).

according to Qwest, then Qwest's proposed test for excluding terms from the interconnection agreement on the basis that they are processes or affect multiple CLECs is meaningless. Qwest's own inconsistency on this issue demonstrates that Qwest's approach to CMP is one of convenience and does not offer Eschelon any certainty upon which Eschelon may plan its business.

Q. MS. ALBERSHEIM REFERS TO THE RESULTS OF THE MINNESOTA 616 DOCKET AS A "SETTLEMENT."[89] IS THIS AN ACCURATE CHARACTERIZATION OF THE RESULTS IN MINNESOTA?

A. No. Qwest is attempting to explain why Qwest did not use CMP, despite its statements about CMP in its position statement.[90] In her direct testimony, Ms. Albersheim described the *MN 616 Case* order as a "decision" by the Commission.[91] The word "settlement" did not appear in the direct testimony of Ms. Albersheim related to Issue 12-64. Section 4.1 of the CMP Document contains procedures applicable to regulatory change requests.[92] Now, in her rebuttal testimony, Ms. Albersheim has started to describe the decisions of the Minnesota Commission erroneously as a "settlement."[93] By portraying the ruling

[89] Qwest Exhibit 1R (Albersheim Rebuttal), p. 35, line 3.

[90] Exhibit 3 to Eschelon's Arbitration Petition in Oregon Docket ARB 775 (Joint Disputed Issues Matrix, dated 10/10/06), Qwest Position Statement, pp. 162-163.

[91] Qwest Exhibit 1 (Albersheim Direct), p. 41, line 20.

[92] Exhibit Eschelon 1 (Starkey Direct), p. 72 (quoting Section 4.1 in footnote 136). The CMP Document outlines procedures for voluntarily initiating a change request, if a regulatory change request is not required. *Id*. p. 72, lines 11-14.

[93] Qwest Exhibit 1R (Albersheim Rebuttal), p. 35, line 3.

as a voluntary settlement, Qwest may argue that the Commission-ordered requirements did not fall within the CMP's definition of a regulatory change, because Section 4.1 of the CMP Document (Exhibit Eschelon 3.10 and Qwest Exhibit 1.1) provides that regulatory changes "are not voluntary." The requirements, however, were not voluntary. In the *MN 616 Case*, the Commission ruled that "Qwest failed to provide adequate service at several key points in the customer transfer process and that these inadequacies reflect system failures that must be addressed."[94] The Commission made this ruling based on documented facts and not a settlement.[95] The Commission exercised its "general authority to require telephone companies to provide adequate service" without a contested case *not* because of a settlement but because the Commission found there were insufficient disputed facts to require a contested case hearing before making its findings.[96] In the Minnesota arbitration, the ALJs said that the "Commission ***ordered*** Qwest to make a compliance filing"[97] and, with respect to the compliance filing, said that Qwest "made three compliance filings, eventually agreeing, in response to ***increasingly specific direction from the Commission***, to implement procedures."[98] At the Minnesota arbitration hearing, Ms. Albersheim,

[94] Exhibit Eschelon 1.4 (Starkey) [Order, *MN 616 Case* (July 30, 2003)], p. 5.

[95] *See, e.g., id.*, p. 3 ("Interpretations aside, the following facts are not disputed.") (quoting Qwest email to Eschelon customer).

[96] *Id.*

[97] Exhibit Eschelon 2.24 (Denney), p. 51 [MN Arbitrators' Report, ¶206].

[98] Exhibit Eschelon 2.24 (Denney), p. 51 [MN Arbitrators' Report, ¶207 (emphasis added)].

who is an attorney,[99] acknowledged that, in fact, the result of the *MN 616 Case* was not a settlement, but a Commission Order.[100]

4. Secret TRRO PCAT Example[101]

Q. QWEST COMPLAINS ABOUT WHAT IT CALLS INFLAMMATORY LANGUAGE.[102] WHAT INFLAMMATORY LANGUAGE IS MS. ALBERSHEIM REFERRING TO?

A. Ms. Albersheim apparently finds troubling my use of the term *secret* to refer to Qwest's password–protected TRRO PCATs.[103] She claims that there was nothing secret about them. According to Ms. Albersheim, Qwest issued its TRRO PCAT as password-protected (originally without providing the password until the CLEC blindly signed Qwest's form TRRO amendment) "to avoid the confusion of having the TRRO-related PCAT posted on the same website with the original PCAT."[104] Eschelon defined the first-ever password-protected PCATs as "secret" to clearly distinguish them "from generally available PCATs accessible

[99] Qwest Exhibit 1 (Albersheim Direct), p. 2, lines 1-3.

[100] Exhibit Eschelon 1.5 (Starkey), p. 3 [MN Transcript, Vol. 1, p. 15, lines 10-16 (testimony of Ms. Albersheim)].

[101] Exhibit Eschelon 1 (Starkey Direct), pp. 85-106; Exhibit Eschelon 3.16 – 3.21 (Johnson); Exhibit Eschelon 3.25 and 3.26 (Johnson) and Exhibit Eschelon 3.29 – 3.33 (Johnson).

[102] Qwest Exhibit 1R (Albersheim Rebuttal), p. 23, lines 11-12.

[103] Exhibit Eschelon 1 (Starkey Direct), p. 89, footnote 170.

[104] Qwest Exhibit 1R (Albersheim Rebuttal), p. 24, lines 12-13.

without a password distributed through Qwest notice process."[105] Apparently, Qwest does not like it when the shoe is on the other foot. The reality is that Qwest could have included the password in its initial notice if its motivation had been as simple as to "avoid confusion," but Qwest chose not to do so. Until it distributed the password and, today, for those who are unfamiliar with the password process, the "TRRO" PCATs were and are secret. This term distinguishes them from the generally available PCATs.

Q. IS THE REASON PROVIDED BY MS. ALBERSHEIM FOR WHY QWEST PASSWORD PROTECTED ITS TRRO PCATS CONVINCING?

A. No. There are many different offerings in Qwest's PCAT on its website, some which apply to a CLEC and some which do not. There is no basis to believe that Qwest's non-CMP TRO/TRRO PCAT would have caused any more confusion for carriers who had not signed TRRO amendments if they were not password-protected than any other offering in Qwest's PCAT that doesn't apply to a particular carrier. CLECs did not ask for these TRRO PCATs to be password-protected, nor did the CLECs give Qwest any reason to believe that they would have been confused if the TRRO PCAT was not password-protected. Though Ms. Albersheim testifies that "it is simply ridiculous to contemplate that Qwest would even attempt"[106] to keep the TRRO-related PCAT secret, Ms. Albersheim ignores

[105] Exhibit Eschelon 1 (Starkey Direct), p. 89, footnote 170. *See also* Exhibit Eschelon 3.16 (Johnson), p. 11, footnote 6.

[106] Qwest Exhibit 1R (Albersheim Rebuttal), p. 24, lines 16-17.

the fact that, at that time, there were several CLECs who had not signed such agreements and were contesting the terms of the TRRO in various state proceedings.[107] Therefore, Qwest had a vested interest in keeping its unilateral implementation of the FCC's TRO/TRRO decisions secret from those who had not signed the amendments yet, so that these non-CMP PCATs (which proved to be premature and not reflective of the FCC's final rules) could not be used in the state dockets to show how Qwest was implementing the FCC's decisions.

Q. MS. ALBERSHEIM STATES THAT THE CHANGE REQUEST RELATED TO THE TRRO PCAT WAS REACTIVATED AT THE NOVEMBER CMP MEETING.[108] WOULD YOU LIKE TO COMMENT?

A. Yes. I discussed this issue in my direct and rebuttal testimony.[109] Qwest told CLECs that Qwest was placing the Change Request in completed status (though all of it was not completed)[110] and was instead opening new, separate Change Requests for each of the remaining products Qwest had previously included in the

[107] In the Minnesota Qwest-Eschelon ICA arbitration, Ms. Albersheim acknowledged this point as follows: "Qwest was aware that several CLECs had not signed such agreements and were contesting the terms of the TRRO in various state dockets." Albersheim Minnesota Rebuttal Testimony (MNPUC Docket No. P-5340, 421/IC-06-76 8 OAH Docket No. 3-2500-17369-2, 9/22/06), p. 28, lines 13-15. Ms. Albersheim did not include this explanation in her testimony in the Utah arbitration proceeding.

[108] Qwest Exhibit 1R (Albersheim Rebuttal), p. 25, lines 13-15. *See also* Qwest Exhibit 3R (Stewart Rebuttal), p. 52, lines 14-26.

[109] Exhibit Eschelon 1 (Starkey Direct), pp. 99-102 and Exhibit Eschelon 1R (Starkey Rebuttal), p. 28, line 9 – p. 31, line 12.

[110] Qwest indicated in its minutes for the meeting that it asked at the meeting if there were any objections to the closure of this Change Request, but the minutes are inaccurate in this respect because Qwest did not ask about objections. Qwest simply announced it was closing the Change Request.

former single Change Request.[111] Based on this unilateral action by Qwest in disregard of Eschelon's repeated requests to negotiate these issues with respect to the ICA rather than placing UNE availability and other terms through CMP, Ms. Stewart testified: "discussions are under way as to how best to review the various systems and process changes that occurred as a result of these FCC orders."[112] Apparently, Qwest is attempting to assure the Commission that it needs to do nothing here because there is another forum in which issues are being discussed. Although Qwest could have used its own CMP forum at any time (as in 2005 it said it would do, along with SGAT updates),[113] it chose to issue non-CMP notices[114] instead and is only choosing to bring the issues to CMP now that

[111] Per the CMP document, the definition of development is: "Development – A product/process CR is updated to a Development status when Qwest's response requires development of a new or revised process. A systems CR is updated to Development status when development begins for the next OSS Interface Release." (*See* Exhibit Eschelon 3.10 or http://www.qwest.com/wholesale/downloads/2007/070129/QwestWholesaleChangeManagementDocument_01_29_07.doc, *at p. 55).*

[112] Qwest Exhibit 3R (Stewart Rebuttal), p. 52, lines 23-24.

[113] Exhibit Eschelon 3.29 (Johnson), p. 14, 6/30/05 CMP meeting minutes ("Cindy B-Qwest said that this CR was opened as a way to communicate changes in the TRO/TRRO. She said that there are more changes coming & the CR is the means to share those changes. Cindy said that the CR was initially issued when the TRO came out and had changes. She said that we had to pull back some of the PCATs but will keep the CR open until we can finish CR. . . . She said that as SGAT language changes, we will have a comment period & that the States will engage you when decisions are made. Cindy also said that PCAT changes will be brought through CMP.") *See also* Exhibit Eschelon 3.16 (Johnson), pp. 1 and 8 (chronology, quoting these minutes).

[114] Qwest has argued this was not a choice but the result of an agreement not to use CMP. Apparently to explain away its failure to use CMP as it had previously indicated it would do, Qwest claimed there was an agreement in CMP that PCAT changes specific to the TRRO are handled outside the scope of CMP. *See* Exhibit Eschelon 1 (Starkey Direct), pp. 90-92. As discussed below, Qwest repeatedly used this alleged agreement as a sword to prevent mutual development of processes (which Eschelon requested occur in ICA negotiations) based on an alleged inability to act because of that agreement. Note how quickly the "agreement" dissipated upon Qwest's self-interest in bringing the PCATs into CMP. Suddenly, the alleged obstacle that prevented discussion of these issues for years is no obstacle at all.

Commission oversight in the arbitrations is imminent. Qwest should not be able to dodge review of the issues in that manner at this late date.

Qwest ignores the fact that when this issue was previously discussed in CMP (*i.e.*, pre-arbitrations), CLECs said the proper alternative to CMP was to handle TRRO changes in law through ICA negotiations that, if unsuccessful, would be decided by state commissions in ICA arbitrations.[115] CLECs including Eschelon maintained that Qwest should negotiate TRRO issues, including operational and conversion issues, in ICA negotiations,[116] as recommended by the FCC.[117] Eschelon continues to maintain that is the case.

Furthermore, Qwest has said over time that changes will be made in conjunction with SGAT updates. Qwest has taken this position in CMP, through its service management team, and in ICA negotiations. On June 30, 2005, Qwest committed in CMP:

> ***. . . as SGAT language changes, we will have a comment period*** and that the States will engage you when decisions are made. ***Cindy also said that PCAT changes will be brought through CMP.***[118]

On March 29, 2006, Qwest service management similarly told Eschelon:

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[115] *See, e.g.,* Exhibit Eschelon 3.16 (Johnson), pp. 4-5 (11/17/04 CMP November monthly meeting minutes). A comparison of the full text from the change request (Exhibit Eschelon 3.19 (Johnson), p. 2) with the excerpt in the chronology (Exhibit Eschelon 3.16 (Johnson), pp. 4-5) shows that Eschelon accurately and fairly quoted from the minutes in its chronology.

[116] Exhibit Eschelon 3.16 (Johnson), pp. 4-5 (11/17/04 CMP November monthly meeting minutes).

[117] TRRO, ¶¶ 196 and 227.

[118] Exhibit Eschelon 3.16 (Johnson), pp. 8-9 (6/30/05) (emphasis added).

> As agreed to at CMP, the PCATs/Business Procedures associated specifically to TRRO are handled outside the scope of CMP ***until such time that there is an approved SGAT,*** which is why the change was noticed as a non-CMP document.[119]

Again, on April 6, 2006, the Qwest ICA negotiations team told Eschelon:

> From those discussions it was agreed that ***until such time that a SGAT is filed*** and the TRRO related issues were finalized that all of the TRRO processes and issues would be deferred from a CMP perspective.[120]

Q. DOES QWEST'S TESTIMONY IN THIS PROCEEDING TELL A DIFFERENT STORY?

A. Yes. I explained in my direct testimony[121] that what Qwest said it would do does not square with what Qwest has actually done. Despite the assurances (quoted above) over more than a year's time from every one of these groups within Qwest that Qwest would update the SGATs and deal with "TRRO" issues (including those that Eschelon was asking Qwest to negotiate under Section 252) in CMP as

[119] Exhibit Eschelon 3.16 (Johnson), p. 11.

[120] Exhibit Eschelon 3.16 (Johnson), p. 12 (4/6/06) (emphasis added). As the above quotation shows (*see also* full paragraph quoted at Exhibit Eschelon 3.16 (Johnson), p. 12), in April of 2006, Qwest was still promising to raise the separate, business impacting "processes and issues" with the Commission in association with SGAT filings. Qwest made the latter statement in response to Eschelon's Section 252 request to negotiate collocation and APOT issues (*see id*. & Exhibit Eschelon 3.21). Yet, Qwest responded that it is "premature to initiate TRRO discussion at this time." Exhibit Eschelon 3.16 (Johnson), p. 12. Given that Eschelon asked to negotiate TRRO issues years ago (*see, e.g*., Exhibit Eschelon 3.16 (Johnson), pp. 4-5 (11/17/04) and also the APOT issue promptly when Qwest finally disclosed it (*see* Exhibit Eschelon 3.21 (Johnson)), the Commission should not allow Qwest to exclude these issues from this arbitration because Qwest has steadfastly refused to take up the issues in negotiations (or even CMP) in the intervening months and years. Eschelon has properly brought them to negotiation and before this Commission in arbitration. [*See* Subject Matters 18 (Conversions) and 26 (Commingled Arrangements).]

[121] Exhibit Eschelon 1 (Starkey Direct), pp. 93-96.

Qwest did so, Qwest has testified that it "***stopped updating its SGATs***"[122] and that Qwest "has not made any updates to incorporate changes in law since 2004."[123] This raises a genuine question about Qwest's conduct in representing to Eschelon and other CLECs that it will deal with issues in conjunction with updating the SGAT when, according to Ms. Stewart's sworn testimony, Qwest had no intention at all of updating those SGATs. As I explained in my direct testimony, Qwest also recently notified CLECs that Qwest was no longer making the SGATs available for CLEC opt in.[124]

As the above quotations illustrate, Qwest has consistently pushed out dealing with business-impacting issues that have resulted from the TRO/TRRO based on its promise to deal with them collaboratively when the time is right. At the same time, Qwest has been busily churning out business-affecting[125] secret (*i.e.*, password-protected) PCATs[126] that have not gone through any collaborative process at all – not ICA negotiations (as requested by Eschelon and other CLECs),[127] not CMP in conjunction with SGAT filings (as promised by

[122] Qwest Exhibit 3 (Stewart Direct), p. 45, lines 10-11.

[123] Qwest Exhibit 3 (Stewart Direct), p. 45, lines 11-12. See also Stewart Colorado Rebuttal Testimony (06B-497T, 3/26/07), p. 31 ["SGATS have not been updated to incorporate changes of law since 2002 and are therefore outdated documents."] ; Stewart Arizona Rebuttal Testimony (T-03406A-06-0572; T-01051B-06-0572, 2/9/07), pp. 32-33 (same); Washington Responsive Testimony (UT-063061, 12/4/06), p. 26 (same).

[124] Exhibit Eschelon 1 (Starkey Direct), p. 27, footnote 27 and p. 31, lines 12-14 and pp. 93-96.

[125] Exhibit Eschelon 3.34 (Johnson) and Exhibit Eschelon 3.21 (Johnson).

[126] Exhibit Eschelon 3.34 (Johnson).

[127] Exhibit Eschelon 3.16 (Johnson), pp. 4-5 (11/17/04 CMP November monthly meeting minutes).

Qwest),[128] and not Commission proceedings (as also promised by Qwest).[129] Qwest implements its own "TRRO" view of the world through notifications that it chose for years to *not send through the CMP* notification or change request processes, while at the same time it refused to negotiate these issues under Section 252 on the grounds that *Eschelon* should take the issue to CMP.[130] Eschelon has exercised its Section 252 right to raise these issues in negotiation and arbitration. Qwest, as the party advocating they belong in CMP, elected not to raise them there (or in any regulatory proceeding) during negotiations and before Eschelon incurred the expense of the ICA arbitrations. As such, Eschelon maintains that this arbitration is the appropriate place to deal with the business impacting aspects of the TRO/TRRO.

Qwest has implemented its many TRRO PCATs[131] without scrutiny (through CMP or otherwise) and is now, remarkably, claiming that the "existing"[132] processes are already in place and it will be too costly or time-consuming to change them (e.g., conversions, see Issues 9-43/9-44). However, Qwest should not have implemented them unilaterally in the first place. If it ultimately incurs costs in changing terms and processes that it should not have put in place

[128] Exhibit Eschelon 3.16 (Johnson), pp. 8-9 (6/30/05).

[129] Exhibit Eschelon 3.16 (Johnson), pp. 8-9 (6/30/05).

[130] Exhibit Eschelon 3.9 (Johnson); *See also,* Qwest Exhibit 3R (Stewart Rebuttal), p. 54, line 25 – p. 55, line 6 and p. 61.

[131] Exhibit Eschelon 3.34 (Johnson).

[132] *See e.g.*, Oregon Rebuttal Testimony of Teresa Million, Oregon Exhibit Qwest/39, p. 10, line 25.

unilaterally and over Eschelon's objections, Qwest is the cost causer and should bear those alleged costs.

Q. MS. ALBERSHEIM DESCRIBES THESE EVENTS AS QWEST'S CONSIDERABLE ATTEMPTS TO BE RESPONSIVE TO ITS CLEC CUSTOMERS.[133] WHAT IS YOUR REACTION?

A. This testimony is telling as to Qwest's view of how it may treat its wholesale customers. In the face of clearly expressed desires by its customers to deal with these issues in pretty much any way other than the unilateral approach Qwest has taken, Qwest persists undeterred in its objectionable approach. Persisting in advancing the opposite of the CLECs' desired outcome is a unique interpretation of "responsiveness," and fully underscores Eschelon's insistence in this docket for contractual certainty. Eschelon is clearly not going to get a resolution through Qwest's customer service efforts, and therefore, needs the statutorily assigned oversight of the Commission to resolve these issues.

Q. MS. ALBERSHEIM CLAIMS THAT ESCHELON IN ITS EXAMPLES AND EXHIBITS IS TRYING TO FALSELY PAINT QWEST AS "CHANGING ITS MIND" AND ACTING INCONSISTENTLY IN CMP[134] BY PRESENTING INSUFFICIENT OR MISLEADING[135] INFORMATION. IS MS. ALBERSHEIM CORRECT WITH REGARD TO

[133] Qwest Exhibit 1R (Albersheim Rebuttal), p. 25, lines 6-8.

[134] Qwest Exhibit 1R (Albersheim Rebuttal), p. 20, lines 3-4.

[135] Qwest Exhibit 1R (Albersheim Rebuttal), p. 2, line 10.

THE SECRET TRRO PCAT EXAMPLE?

A. No. Ms. Albersheim's claim is incorrect as it relates to all of the examples I provide, but with regard to the secret TRRO PCAT example specifically, Exhibit Eschelon 3.16 (Johnson) provides an accurate description of events, and the documents associated with the chronology in Exhibit Eschelon 3.17, 3.18 and 3.19 confirm the facts as presented in that chronology.[136] The chronology in Exhibit Eschelon 3.16 contains quotations from the documents. A comparison of the excerpts in Exhibit Eschelon 3.16 to those documents shows that Eschelon's chronology in Exhibit Eschelon 3.16 accurately and fairly quotes that documentation, provides information (such as URLs) to allow easy access to those documents, and includes additional information as well. And despite Ms. Albersheim's claim that Eschelon provided a "misleading picture"[137] and her previous criticism of these same examples as being based on only "small pieces"[138] of the record on this issue, Ms. Albersheim provides no examples of information omitted by Eschelon to support her claims.

[136] In the Minnesota arbitration proceeding, Qwest criticized Eschelon for not providing the entire public record for these examples and attached several documents to its Minnesota rebuttal testimony that purportedly provided the remainder of the public record. Though Eschelon disagreed with Qwest's criticism, to avoid a similar argument in Utah, Eschelon included the documentation that Qwest claimed Eschelon left out in Minnesota. They demonstrate that Eschelon's summaries and excerpts are fair and accurate.

[137] Qwest Exhibit 1R (Albersheim Rebuttal), p. 2, line 10.

[138] Qwest-Eschelon AZ ICA Arbitration, Docket No. T-03406A-06-0572, T-01051B-06-0572, Albersheim AZ Rebuttal (Feb. 9, 2007), p. 21, lines 2-4 (quoted above).

5. Closed ICA Language and CMP

Q. QWEST TESTIFIES ABOUT THE ALLEGED "IMPACT" OF CLOSED ICA LANGUAGE ON CMP.[139] PLEASE RESPOND.

A. Ms. Albersheim testifies that Qwest's acceptance of Eschelon's language in the ICA on issues that were previously disputed but closed in several states after the Minnesota Commission rejected Qwest's position will have the impact of making it necessary for Qwest to seek an amendment to Eschelon's ICA to accommodate changes in CMP.[140] Her testimony flatly contradicts the language of the CMP Document,[141] as well as Qwest's own conduct.[142] One example given by Qwest is Fatal Rejection Notices.[143] Issue 12-74 showed that Qwest is happy to agree that the consequences of assignment of fault is appropriate content for inclusion in

[139] Qwest Exhibit 1R (Albersheim Rebuttal), p. 25, line 17 – 26, line 18.

[140] Qwest Exhibit 1R (Albersheim Rebuttal), p. 25, line 17 – 26, line 18.

[141] CMP Document (Exhibit Eschelon 3.10 (Johnson)), Section 1.0 (Scope); *see, e.g.*, Exhibit Eschelon 1R (Starkey Rebuttal), pp. 38-41.

[142] Exhibit Eschelon 3.2 (Johnson). *See also* Exhibit Eschelon 3.4 (Johnson). In the McLeodUSA example on pages 19-20 of Ms. Johnson's direct testimony (Exhibit Eschelon 3R (Johnson Rebuttal), pp. 19-20), for example, McLeodUSA pointed out that its ICA language was different from Qwest's PCAT but Qwest had not sought an amendment from McLeodUSA before making those changes. Instead, Qwest confirmed what the CMP Document provides, that McLeodUSA's ICA will govern for McLeodUSA anyway. Other conduct by Qwest that is contrary to this statement is Qwest's choice not to bring certain issues through CMP. For example, as discussed with respect to Issue 12-64 (acknowledgement of mistakes), Qwest was ordered to put certain processes in place but did not bring those processes through CMP either as a regulatory or other change request. And, with respect to the Covad-Qwest ICA language on testing that allows Covad to charge Qwest in certain instances (Exhibit Eschelon 3.4 (Johnson)), Qwest did not make those terms available through CMP so other CLECs could also apply the same procedures (as the language includes intervals and other procedures, and not merely charges). Instead, Qwest made Eschelon go into arbitration in Minnesota on this issue to obtain similar terms before Qwest later agreed to language.

[143] Qwest Exhibit 1R (Albersheim Rebuttal), p. 26, line 15.

an interconnection agreement when fault is assigned to Eschelon, and only Eschelon is bound to consequences. Both Sections 12.2.7.2.4.1 and 12.2.7.2.4.2 deal with the consequences of an error in the context of Fatal Rejection Notices. Note that Qwest did not object to Section 12.2.7.2.4.1, which obligates Eschelon to resubmit its order when Eschelon makes a mistake, and did not insist that this language be replaced with a reference to the PCAT because it is unsuitable for a contract. On the flip side, however, when the subject matter is Qwest's obligations when Qwest makes an error, suddenly Qwest argued the content is inappropriate for inclusion in an interconnection agreement and belongs in the PCAT. Not only is Qwest not prevented from making changes in CMP (so long as it respects the Scope provision indicating that Eschelon's ICA controls for Eschelon and any CLECs opting into that ICA), but also Qwest failed to show any legitimate interest in reserving for itself the ability to, through CMP, assign the consequences of Qwest errors to CLECs.

Ironically, Ms. Albersheim is making the very argument that the Minnesota Commission rejected when adopting Eschelon's language – after which Qwest closed the language in other states. She is essentially arguing that ICA and CMP terms cannot conflict or overlap so that one or the other must be modified to ensure uniformity. The Minnesota ALJs' recommendations (approved by the Minnesota Commission), upon which Qwest closed these issues, expressly rejected this argument, finding: "Clearly, the CMP process would permit the

provisions of an ICA and the CMP to coexist, conflict, or potentially overlap."[144] With respect to Ms. Albersheim's example of Loss and Completion Reports,[145] the Minnesota ALJs said: "Qwest has failed to identify any credibly adverse effect on CLECs, itself, or the public interest if this language were incorporated into the ICA.[146] With respect to Ms. Albersheim's example of the Pending Service Order Notifications ("PSONs"),[147] the Minnesota ALJs said that Ms. Albersheim's concerns were "overstated"[148] and found:

> It appears to be unlikely that the inclusion of this language will "freeze" CMP processes, create an administrative burden for Qwest, or cause Qwest to maintain separate systems, processes, and procedures for Eschelon versus other CLECs. The CMP document itself envisions that CMP processes may well differ from those in negotiated ICAs. Qwest has failed to show that maintaining the current level of information in the PSON will harm the CMP process or other CLECs or create a burden for Qwest. This language would not prevent Qwest from adding to the information made available to other CLECs, through the CMP, nor would it prevent Qwest from changing the format of the information. It does not appear that any systems modification would be necessary to comply with this provision. Eschelon credibly contends that this minimal amount of information is reasonable and necessary for it to accurately coordinate the provision of service to new customers.[149]

[144] Exhibit Eschelon 2.24 (Denney), p. 7 [MN Arbitrators' Report, ¶22].

[145] Qwest Exhibit 1R (Albersheim Rebuttal), p. 26, line 15.

[146] Exhibit Eschelon 2.24 (Denney), pp. 59-60 [MN Arbitrators' Report, ¶¶244 & 246]. Issue 12-74 (Fatal Rejection Notices) has since closed in all six states with Eschelon's language.

[147] Qwest Exhibit 1R (Albersheim Rebuttal), p. 26, line 15.

[148] Exhibit Eschelon 2.24 (Denney), p. 56 [MN Arbitrators' Report, ¶229]. Issue 12-70 (PSONs) has since closed in all six states with Eschelon's language.

[149] Exhibit Eschelon 2.24 (Denney), p. 56 [MN Arbitrators' Report, ¶229]. Issue 12-70 (PSONs) has since closed in all six states with Eschelon's language.

Ms. Albersheim concludes that "Eschelon has succeeded in preventing the CMP from working as it was intended"[150] without acknowledging that the Minnesota Commission expressly found this is exactly how CMP was intended to work.[151] The federal Act likewise envisions this result.[152]

B. CMP SCOPE AND QWEST'S CLAIM THAT IT CANNOT ACT ARBITRARILY IN CMP

Q. BEFORE ADDRESSING THE MERITS OF MS. ALBERSHEIM'S REBUTTAL TESTIMONY ON THE RELATIONSHIP BETWEEN THE ICA AND CMP AND THE NEED FOR CONTRACTUAL CERTAINTY, DO YOU HAVE ANY GENERAL COMMENTS ABOUT HER TESTIMONY ON THIS ISSUE?

A. Yes. Numerous times throughout Ms. Albersheim's rebuttal testimony, she refers to Eschelon's proposals as "Eschelon's proposed CMP-related ICA language."[153] Ms. Albersheim's use of this phrase is an attempt to use semantics to make it appear as if Eschelon has CMP-related proposals. To be clear: Eschelon does not have "CMP-related ICA language" proposals. What Ms. Albersheim is apparently referring to is Eschelon's proposals on the issues for which Qwest

[150] Qwest Exhibit 1R (Albersheim Rebuttal), p. 26, lines 17-18.

[151] Exhibit Eschelon 2.24 (Denney), pp. 7 & 56 [MN Arbitrators' Report, ¶22 & ¶229].

[152] Exhibit Eschelon 1 (Starkey Direct), pp. 33-38.

[153] Qwest Exhibit 1R (Albersheim Rebuttal), p. 5, line 2. *See also* Qwest Exhibit 1R (Albersheim Rebuttal), p. 5, line 13; Qwest Exhibit 1R (Albersheim Rebuttal), p. 6, line 2; and Qwest Exhibit 1R (Albersheim Rebuttal), p. 17, line 22 ("CMP related issues.")

wants to omit from the ICA and rely exclusively on the CMP.[154] For these issues, Eschelon's proposals are not "CMP-related." Rather, a more accurate description of them would be "ICA-related" because they provide the contractual certainty that is the purpose of ICAs. It is only Qwest's proposals for these issues that can be accurately characterized as "CMP-related" because, rather than clearly spelling out terms and conditions in the ICA, they are silent or point to the CMP, Qwest's PCAT, Qwest's Standard Interval Guide ("SIG") on its web site, or Qwest's discretion.[155]

Q. MS. ALBERSHEIM CLAIMS IN HER REBUTTAL TESTIMONY THAT THE PURPOSE OF CMP IS TO CENTRALIZE PROCESSES AND PROCEDURES AND MAKE THEM UNIFORM ACROSS CLECS.[156] IS QWEST'S REBUTTAL TESTIMONY CONSISTENT ON THIS POINT?

A. No. Ms. Albersheim once again discusses the ability of the CMP to centralize processes and systems[157] to ensure uniformity.[158] Ms. Albersheim argues that

[154] This list of issues is found at page 17 of my direct testimony (Exhibit Eschelon 1 (Starkey Direct), p. 17).

[155] *See, e.g.*, Qwest's proposal for 1-1(a) and 1-1(e). Compare to Eschelon's proposals for the same issues. Exhibit Eschelon 1 (Starkey Direct), pp. 111-112. Regarding Issue 12-87 (Controlled Production), Qwest does not even rely upon CMP. As discussed by Ms. Johnson with respect to this issue, Qwest is violating a previously agreed upon requirement to bring its IMA implementation guidelines through CMP. Instead, Qwest wants the ICA to be silent on the issue addressed by Eschelon's proposal (which reflects Qwest's current practice), leaving it entirely to Qwest's discretion to change course. Regarding Issue 12-64 (Root Cause Analysis and Acknowledgement of Mistakes), Qwest did not submit processes ordered by the Minnesota Commission to CMP despite its own claims about CMP, as discussed by Ms. Johnson regarding Issue 12-64.

[156] Qwest Exhibit 1R (Albersheim Rebuttal), p. 14, lines 7-10 & Qwest Exhibit 1R (Albersheim Rebuttal), p. 16, lines 8-10.

[157] Qwest Exhibit 1R (Albersheim Rebuttal), p. 14, lines 7-10.

even though older ICAs contained specific terms, Qwest has "worked hard to eliminate" those specific terms processes and procedures from interconnection agreements.[159] She again claims that adopting Eschelon's proposals would have Qwest "turn back the clock"[160] on Qwest's hard work in this regard.[161] In contrast, Qwest witness Ms. Stewart has told the exact opposite story from the one told by Ms. Albersheim. Ms. Stewart has testified as follows:

> In an order issued in 2004, the FCC established that under the opt-in provision in Section 252(i), a CLEC can only opt into an entire ICA or SGAT, not just individual provisions. Under this "all-or-nothing" rule, CLECs that choose to opt into another carrier's ICA or an SGAT can no longer "pick-and-choose" individual provisions that they want and reject other provisions they don't want. A CLEC that elects to negotiate an agreement instead of opting into one has, by definition, chosen not to be eligible to pick and choose any or all of the provisions from another carrier's ICA. While a CLEC can negotiate terms and conditions of its own choosing, Qwest is not bound to accept every term and condition, even if it is a part of another agreement. The FCC explained the reason behind the "all-or-nothing rule," stating that the rule would promote more give and take in negotiations and would produce agreements that are more tailored to the individual needs of carriers. [162]

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[158] Qwest Exhibit 1R (Albersheim Rebuttal), p. 16, lines 8-10 and Qwest Exhibit 1R (Albersheim Rebuttal), p. 78, line 20. *See also*, Qwest Exhibit 3R (Stewart Rebuttal), p. 76.

[159] Qwest Exhibit 1R (Albersheim Rebuttal), p. 18, lines 2-4.

[160] Qwest Exhibit 1R (Albersheim Rebuttal), p. 18, line 5.

[161] I have explained why Ms. Albersheim is wrong when she contends that the purpose of CMP is to implement uniform processes and procedures for all CLECs as well as why Eschelon is not attempting to "turn back the clock." *See* Exhibit Eschelon 1R (Starkey Rebuttal), p. 18, line 12 – p. 21, line 11.

[162] Stewart Colorado Rebuttal Testimony (06B-497T, 3/26/07), p. 32. Despite providing this testimony in the Eschelon-Qwest ICA Arbitration in Colorado (as well as other states in which the companies have arbitrations, *see* Stewart Arizona Rebuttal Testimony (T-03406A-06-0572/T-01051B-06-0572, 2/9/07), p. 33; Stewart Washington Responsive Testimony (UT-063061, 12/4/06), p. 27; Stewart Minnesota Rebuttal Testimony (PUC Docket No . P-5340,421/IC-06-768/OAH Docket No . 3-2500-17369-2, 9/22/06), p. 370, Ms. Stewart omits this from her testimony in Utah. Ms. Stewart also testified in her Colorado Rebuttal testimony (at page 33) and her Minnesota Rebuttal

Similarly, in Minnesota, Ms. Stewart testified:

> Moreover, due to the FCC's elimination of the "pick-and choose" rule and its move to the "all-or-nothing" rule, as discussed CLECs are much less likely to opt into a standard SGAT when ICAs have become increasingly more tailored to CLECs. This tailoring has increased as CLECs have shaped their businesses to have a specialized focus, which is often necessary to survive in today's highly competitive telecommunications market.[163]

Ms. Stewart's statement that CLEC ICAs have become increasingly tailored to the CLEC's specialized business is in direct conflict with Ms. Albersheim's testimony which states that Qwest has "worked hard to eliminate" these specialized terms from CLEC ICAs.[164] Moreover, Ms. Stewart states that tailoring ICAs to meet the specialized needs of CLECs is often necessary for CLEC survival in the competitive telecommunications marketplace, but Ms. Albersheim is asking that any terms tailored to meet Eschelon's specialized focus be omitted from the ICA. Based on Ms. Stewart's testimony describing the benefits of ICAs tailored to the individual needs of carriers, it appears that Ms. Albersheim's testimony and the Qwest's positions which she supports, would

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Testimony (at page 39) that "it is essential that the disputed issues in this arbitration be resolved on their merits and based on the law as it exists today."

[163] Qwest-Eschelon ICA MN Arbitration, Stewart MN Rebuttal, p. 36, lines 19-25.

[164] Qwest Exhibit 1R (Albersheim Rebuttal), p. 18, lines 2-4. It is also directly contradictory to Ms. Albersheim's claim that "Before the creation of the current CMP, many interconnection agreements were highly individualized. Through the extensive collaborations in the creation of the CMP, and the section 271 evaluations of Qwest's systems and processes, Qwest and the CLECs have created mechanisms to ensure that Qwest can provide the best service for CLECs. As a result, Qwest has taken steps to try to make its contract language reflect these improvements. While process language still exists, Eschelon should not be allowed to compound the problem and turn back the clock on the processes that have proven effective for all of Qwest's CLEC customers." (Qwest Exhibit 1 (Albersheim Direct), p. 25, line 25 – p. 26, line 5) What Ms. Albersheim refers to as compounding a problem, Ms. Stewart refers to as necessary for survival in the telecommunications market.

have the effect of making it more difficult for Eschelon to survive in today's telecommunications marketplace. After all, Ms. Albersheim testifies that Qwest has "worked hard to eliminate"[165] the very thing that Ms. Stewart testifies is necessary to survival in today's telecommunications marketplace – *i.e.*, individualized ICAs.

Q. DESPITE MS. ALBERSHEIM'S TESTIMONY ATTACKING SPECIALIZED ICAS, HAS SHE PREVIOUSLY TESTIFIED IN SUPPORT OF SPECIALIZED TERMS IN ICAS WITH CLECS?

A. Yes. In her rebuttal testimony in the Minnesota arbitration proceeding, Albersheim testified "of course Qwest supports unique negotiated agreements with CLECs."[166] Ms. Albersheim's testimony from Minnesota stands in stark contrast to the position Ms. Albersheim expressed in her testimony here,[167] as well as Qwest's position in this case on a sub-set of the issues that uniformity should rule.[168] Additionally, as I explained in my direct testimony, Eschelon is

[165] Qwest Exhibit 1R (Albersheim Rebuttal), p. 17, lines 9-12 ["Qwest undertook significant efforts over the last four years to negotiate with Eschelon and to reach agreement on disputed ICA language. In the spirit of these negotiations, Qwest compromised when it could and tried hard to avoid including too much process and procedure in the ICA."] Ms. Stewart testifies that there has been increasingly tailored ICAs since the FCC's All Or Nothing Rule, which was issued in mid-2004 – the same time frame that, according to Ms. Albersheim, Qwest was engaging in negotiations with the goal of not including too much process and procedure detail in the ICAs.

[166] Albersheim Minnesota Rebuttal Testimony, p. 14. Ms. Albersheim left this testimony out of her direct and response testimonies in Utah.

[167] Qwest Exhibit 1R (Albersheim Rebuttal), p. 29, lines 9-10 ("This is an administrative burden for Qwest that could result in one special process for Eschelon (and opt-ins) and another process for other CLECs.") *See also* Qwest Exhibit 1R (Albersheim Rebuttal), p. 5, lines 18-19.

[168] *See* Exhibit Eschelon 1 (Starkey Direct), p. 17 for a list of issues for which Qwest would like to deal with in CMP rather than have specific contract language in the ICA.

not attempting to defeat uniform processes.[169]

Q. MS. ALBERSHEIM CLAIMS THAT UNIFORM PROCESSES ARE NEEDED SO THAT IT CAN TRAIN ITS EMPLOYEES ON ONE SET OF PROCESSES AND HAS RESULTED IN A HIGHER QUALITY OF SERVICE,[170] AND THAT "UNIQUE",[171] "ONE-OFF"[172] PROCESSES UNDERMINES THESE OBJECTIVES. DOES MS. ALBERSHEIM'S CLAIM HOLD UP TO SCRUTINY?

A. No. I addressed this issue in my rebuttal testimony,[173] where I explained that CLEC ICAs are not uniform today and have not been in the past, yet Ms. Albersheim describes Qwest's service quality as "outstanding."[174] If Qwest's service quality has been "outstanding" (as Ms. Albersheim puts it) when CLEC ICA terms are not uniform, then uniform terms are not needed going forward to maintain that level of service quality. Ms. Albersheim's reasoning does not make sense.

Ms. Albersheim also claims that uniform processes helps ensure that CLECs are treated in a nondiscriminatory manner.[175] Section 252(i) of the federal Act,

[169] Exhibit Eschelon 1 (Starkey Direct), p. 37, line 13 – p. 38, line 4.

[170] Qwest Exhibit 1R (Albersheim Rebuttal), p. 15, lines 14-16.

[171] Qwest Exhibit 1R (Albersheim Rebuttal), p. 5, line 18.

[172] Qwest Exhibit 1R (Albersheim Rebuttal), p. 5, line 18.

[173] Exhibit Eschelon 1R (Starkey Rebuttal), p. 41, line 8 – p. 42, line 13 and Exhibit Eschelon 3.4.

[174] Qwest Exhibit 1R (Albersheim Rebuttal), p. 15, line 17.

[175] Qwest Exhibit 1R (Albersheim Rebuttal), p. 15, lines 12-13.

however, serves that purpose by requiring interconnection agreements to be publicly filed and available for opt-in to avoid discrimination. For example, the Washington Commission has rejected the notion that different publicly filed ICA terms amounted to discrimination. ["The fact that there are differences in change of law provisions among various agreements is not discriminatory: It reflects the variations in negotiation and arbitration of terms in interconnection agreements…"][176]

Q. MS. ALBERSHEIM CLAIMS THAT "UNIFORM PROCESSES AND PROCEDURES"[177] ARE SUPPORTED BY THE CMP SCOPE CLAUSE. IS SHE CORRECT?

A. No. At page 16 of her rebuttal testimony,[178] Ms. Albersheim quotes Section 1.0 of the CMP as follows:

> CMP provides a means to address changes that support of affect pre-ordering, ordering/provisioning, maintenance/repair and billing capabilities and associated documentation and production support issues for local services…provided by…CLECs to their end users. The CMP is applicable to Qwest's 14-state in-region serving territory.

This language does not support Ms. Albersheim's notion that the purpose of CMP was to make processes and procedures uniform among all CLECs. First, as

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

[177] Qwest Exhibit 1R (Albersheim Rebuttal), p. 16, line 10.

[178] Qwest Exhibit 1R (Albersheim Rebuttal), p. 16.

pointed out by the Minnesota Department of Commerce ("DOC") staff,[179] the language says that "CMP provides *a* means to address changes…", the language does not say that CMP is *the only* means to address changes. Section 1.0 of the CMP Document (Exhibit Eschelon 3.10) specifically provides:

> In cases of conflict between the changes implemented through this CMP and any CLEC interconnection agreement (whether based on the Qwest SGAT or not), the rates, terms and conditions of such interconnection agreement shall prevail as between Qwest and the CLEC party…[180]

Second, Exhibit Eschelon 3.2 (Johnson) shows that Qwest has agreed to language in the ICA that differs from what is in Qwest's PCAT without CMP activity. One example is Issue 8-24, which is found at pages 2-3 of Exhibit Eschelon 3.2 (Johnson). Qwest agreed to close this issue based on Eschelon's proposal – a proposal that Qwest testified would be a "change in existing Qwest process" and a change "that will impact all CLECs,"[181] and a proposal that was different from Qwest's PCAT. Notably, Qwest closed this language without any CMP activity. This undercuts Ms. Albersheim's notion that uniformity is the overarching goal, and generic ICAs relying upon detailed processes discussed in CMP are required for the sake of efficiency.

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[179] Qwest-Eschelon MN ICA Arbitration, Reply Testimony of Minnesota DOC witness Ms. Doherty (Sept. 22, 2006), p. 10, lines 13-16 ("Q. Does inclusion of a process/product/procedure in CMP preclude that process/product/procedure from being defined in an ICA between two parties? A. No, it does not. It is important to note that in defining the scope of CMP, Qwest's CMP document states that "CMP provides a means to address changes" to OSS interfaces.").

[180] Section 1.0 of Exhibit Eschelon 3.10 (Johnson); *see also* Exhibit Eschelon 1R (Starkey Rebuttal), p. 37, line 21 – p. 41, line 7.

[181] Qwest (Hubbard) Washington Direct Testimony, p. 45, lines 15-18.

Q. MS. ALBERSHEIM CRITICIZES YOUR USE OF THE TERM "NOTICE AND GO" WHEN DESCRIBING QWEST'S CMP NOTICES.[182] ARE HER CRITICISMS WARRANTED?

A. No. Ms. Albersheim simply ignores the meaning of Notice and Go I discussed in my testimony, establishes her own definition, and then criticizes me for not subscribing to her definition.

Q. PLEASE ELABORATE.

A. I discussed Qwest's "Notice and Go" ability in CMP in my direct testimony as follows: "if Qwest wants to make a change, it simply notices CLECs, solicits and then may deny their requests for modifications, and implements its proposed change in as little as 31 days after initial notice."[183] Therefore, the "go" in the "notice and go" allows Qwest to implement its proposed change once the notice period is over (which is 31 days for a Level 3 Notice).[184] No vote is taken regarding the change[185] and Qwest can reject (or "respectfully decline")[186] objections from CLECs and implement the change.[187]

[182] Qwest Exhibit 1R (Albersheim Rebuttal), p. 8.

[183] Exhibit Eschelon 1 (Starkey Direct), p. 48, lines 6-9.

[184] Exhibit Eschelon 1 (Starkey Direct), p. 48, lines 6-9.

[185] I describe the two narrow circumstances that may trigger a vote in CMP at pages 46 and 47 of my direct testimony (Exhibit Eschelon 1 (Starkey Direct), pp. 46-47). No votes are taken on whether Qwest product or process notices or CRs may be implemented.

[186] *See e.g.*, discussion of CRUNEC example, Exhibit Eschelon 1 (Starkey Direct), pp. 52-63. *See also* Exhibit Eschelon 3.13 and Exhibit Eschelon 3.14.

[187] Exhibit Eschelon 1 (Starkey Direct), pp. 47-48.

Ms. Albersheim states that my description is not accurate and that only Level 0 and Level 1 notices can be "notice and go."[188] She equates notice and go with "effective immediately," whereas I defined it for purposes of my testimony as to "go" after the applicable notice period. Ms. Albersheim states notices that give CLECs an opportunity to comment or object cannot be "notice and go." However, she fails to realize that the comments and objections are ineffectual if Qwest disagrees because it can, and does, implement its changes even over unanimous CLEC opposition.[189] I suppose there can be various definitions or uses of "notice and go," but arguing semantics is silly when the real issue here is the ability of Qwest to move forward (*i.e.*, "go") with its changes after issuing a notice of the change, regardless of the comments or objections it may receive from CLECs.[190]

Q. MS. ALBERSHEIM TAKES ISSUE WITH YOUR EXPLANATION THAT CMP PROVIDES NO REAL ABILITY TO KEEP QWEST FROM

[188] Qwest Exhibit 1R (Albersheim Rebuttal), p. 8, lines 5-9. *See also* Qwest Exhibit 1R (Albersheim Rebuttal), p. 21, claiming that Qwest's 2003 CRUNEC cannot be accurately characterized as "notice and go."

[189] Exhibit Eschelon 1 (Starkey Direct), p. 59, line 13 – p. 60, line 2. *See also,* CMP Document (Exhibit Eschelon 3.10), Section 5.4. For example, in the CRUNEC example, the twelve active CLECs all unanimously objected, and Qwest moved forward anyway, until the Arizona Commission became involved. Exhibit Eschelon 3.13 (Johnson), pp. 3-4.

[190] This is why Ms. Albersheim's claim that the CMP allows CLECs to "prevent" Qwest changes is false (*see, e.g.*, Qwest Exhibit 1R (Albersheim Rebuttal), p. 6, line 11; Qwest Exhibit 1R (Albersheim Rebuttal), p. 8, lines 12-14.). Qwest would only change/postpone/withdraw a notice or CR in CMP if it wants to, and a CLEC cannot force Qwest's hand.

MAKING CHANGES QWEST WANTS TO MAKE IN CMP.[191] WOULD YOU LIKE TO RESPOND?

A. Yes. Though Ms. Albersheim points to a number of provisions by which a CLEC can pursue a disagreement with Qwest,[192] the bottom line is that Qwest has the ability in CMP to overrule CLEC disagreement and go forward with the Qwest change. If a CLEC asks Qwest to postpone a change, Qwest can reject the request.[193] If a CLEC files comments expressing disagreement with Qwest's change, Qwest can deny the comments.[194] If a CLEC raises an issue in CMP Oversight Committee meetings, Qwest can reject it.[195] The CRUNEC example shows that Qwest moved forward with a serious, business-affecting change against the unanimous escalation and opposition of CLECs in CMP, and only changed its tune once a state commission weighed in and conditioned a favorable 271 recommendation on Qwest reverting back to its prior CRUNEC policy.

Q. MS. ALBERSHEIM CLAIMS THAT OUT OF THE 436 CHANGE REQUESTS MADE BY QWEST IN CMP, IT WITHDREW 97 OF THOSE BECAUSE OF VOCAL OPPOSITION BY CLECS OR BECAUSE, IN THE

[191] Qwest Exhibit 1R (Albersheim Rebuttal), p. 7-11. *See also* Qwest Exhibit 1R (Albersheim Rebuttal), p. 11, line 14 – p. 12, line 2 and Qwest Exhibit 1R (Albersheim Rebuttal), p. 7, lines 7-9.

[192] Qwest Exhibit 1R (Albersheim Rebuttal), p. 7, lines 9-11.

[193] Exhibit Eschelon 1 (Starkey Direct), p. 47, lines 7-11 and Exhibit Eschelon 3.10 (Johnson) (CMP Document), Section 5.5.3.3.

[194] Exhibit Eschelon 3.10 (Johnson) (CMP Document).

[195] Exhibit Eschelon 1 (Starkey Direct), p. 87, footnote 164. CLECs argued that changes to UNE availability should be addressed in negotiation/arbitration and not in CMP.

CASE OF SYSTEM CHANGES, THEY WERE GIVEN SUCH A LOW PRIORITY BY CLECS.[196] HAVE YOU ALREADY ADDRESSED THIS CLAIM?

A. Yes. This issue was addressed in my rebuttal testimony[197] and in Exhibit Eschelon 3.7 (Johnson). This information shows that Ms. Albersheim is wrong. Qwest only withdraws changes in CMP if it wants to, and there is nothing in the CMP Document that requires Qwest to withdraw changes because of CLEC opposition. Indeed, there is not even a vote taken on Qwest proposed product and process changes in CMP.[198]

Q. MS. ALBERSHEIM POINTS TO A LEVEL 1 NOTICE IT ISSUED ON SEPTEMBER 27, 2006, REGARDING MAINTENANCE AND REPAIR DOCUMENTATION, AND STATES THAT QWEST RETRACTED THE NOTICE AND WITHDREW THE DOCUMENTATION CHANGES BASED ON CLECS' CONCERNS.[199] DOES THIS EXAMPLE SHOW THAT CLECS CAN "PREVENT" QWEST PROPOSED CHANGES AS MS. ALBERSHEIM CLAIMS?[200]

A. No. Ms. Albersheim omits key facts that, when disclosed, show Qwest will unilaterally implement changes over CLEC objection.

[196] Qwest Exhibit 1R (Albersheim Rebuttal), p. 7, lines 13-16.

[197] Exhibit Eschelon 1R (Starkey Rebuttal), p. 53, line 7 – p. 57, line 2.

[198] Exhibit Eschelon 1 (Starkey Direct), p. 39, lines 9-11.

[199] Qwest Exhibit 1R (Albersheim Rebuttal), p. 8, lines 15-20.

[200] Qwest Exhibit 1R (Albersheim Rebuttal), p. 8, lines 12-13.

On July 27, 2007, Ms. Albersheim testified that, after CLECs expressed concerns about a September 27, 2006 Level 1 notice, Qwest "withdrew the documentation changes."[201] Ms. Johnson indicates in her surrebuttal testimony (Eschelon Exhibit 3S) that a core CLEC concern about the September 27, 2006 changes was Qwest's proposed deletion of the following sentence from the Dispatch PCAT: "When a Qwest technician is dispatched to a premise, the Qwest demarcation point will be tagged if a tag is not present." Qwest noticed documentation changes to the Dispatch PCAT again on December 1, 2006 (Level 3) and on April 2, 2007 (Level 4). Qwest sent the latter notice almost four months before the filing of Ms. Albersheim's testimony. Both the December and the April changes included deletion of the same sentence about which CLECs "expressed concerns" (*i.e.*, objected) in September of 2006 and which was reflected in the "documentation changes" that Ms. Albersheim recently testified Qwest withdrew. Qwest implemented changes on May 17, 2007, including deletion of that key sentence, over Eschelon's objection.[202] Ms. Johnson of Eschelon participated in these CMP discussions.[203] She describes Exhibit Eschelon 3SR.1 in her testimony. These developments, which occurred before Ms. Albersheim submitted her testimony but which she does not mention, show that CLECs

[201] Qwest Exhibit 1R (Albersheim Rebuttal), p. 8, lines 17-19.

[202] Exhibit Eschelon 3SR.1 (Johnson).

[203] Exhibit Eschelon 3SR.1 (Johnson) (Change Request PC030607-1, documenting participation of Ms. Johnson but not Ms. Albersheim). I discussed this example in footnote 197 on page 53 of my rebuttal testimony. See, Exhibit Eschelon 1R (Starkey Rebuttal), p. 53, footnote 197. Ms. Johnson provided Exhibit Eschelon 3.42, which consists of meeting minutes, CMP notices, comments and emails related to this issue, with her direct testimony (Exhibit Eschelon 3).

cannot prevent Qwest unilateral action in CMP, as claimed by Ms. Albersheim.

That Qwest implemented this change over CLEC objection shows that CLECs cannot "prevent" Qwest from making these changes in CMP. For Qwest-initiated changes (including Level 4 – change requests), after Qwest abides by the time frames in the CMP document, it may implement changes over CLEC objection (as it did in the CRUNEC example).

Q. REGARDING YOUR TESTIMONY THAT QWEST'S NOTICE AND GO PROCESS IS RELATIVELY QUICK COMPARED TO A STATE COMMISSION COMPLAINT PROCEEDING,[204] MS. ALBERSHEIM TESTIFIES THAT A COMMISSION DOCKET IS NOT A VALID COMPARISON TO THE PROCESSES AVAILABLE TO ESCHELON THROUGH CMP.[205] IN YOUR TESTIMONY, WERE YOU COMPARING THE PROCESS AVAILABLE TO ESCHELON?

A. No. Ms. Albersheim responds to this particular question on pages 10-11 of her rebuttal testimony by listing various optional CMP procedures available *to Eschelon and other CLECs* and appears to suggest that some of them may have taken less time.[206] The comparison I was making, however, was between (1) the

[204] Exhibit Eschelon 1 (Starkey Direct), pp. 49-50.

[205] Qwest Exhibit 1R (Albersheim Rebuttal), p. 10, line 11 – p. 11, line 6.

[206] Ms. Albersheim provides no basis to show that any of the procedures for which Qwest is the decision maker would have led to any different result from Qwest's current position. If litigation in six states does not change Qwest's position, more time in CMP would not do so. The result would be delay, with this Commission still needing in the end to resolve the issue.

CMP *notice* procedures available *only* to *Qwes*t and (2) state commission complaint proceedings that *CLECs* may bring pursuant to the dispute resolution provisions of their ICAs and/or CMP.[207] Despite Ms. Albersheim's discussion of alternative procedures in CMP, there simply is no provision in the CMP Document that allows CLECs to implement product and process changes over the objection of Qwest in any timeframe, much less on 31 or fewer days notice. As the CRUNEC and other examples show, Qwest has the ability to implement changes quickly over the objection of multiple CLECs.

Q. MS. ALBERSHEIM TESTIFIES THAT ESCHELON OMITTED THE PRIMARY REASON FOR WHY THE HEARING WAS DELAYED IN THE PARTICULAR EXAMPLE YOU USED WHEN COMPARING THE LENGTH OF TIME FOR QWEST TO MAKE A CHANGE VERSUS CLECS.[208] PLEASE RESPOND.

A. In my testimony, I pointed out that the ten-month time period required to obtain a hearing date in the Arizona Complaint Docket as a result of Eschelon's CMP dispute resolution efforts is a far cry from the 31-day time period in which Qwest

[207] Qwest Exhibit 1.1 (Albersheim), p. 100 (CMP Document) (Section 15.0 states: "This process does not limit any party's right to seek remedies in a regulatory or legal arena at any time."). Ms. Albersheim testifies that I asserted a CLEC "must" seek a Commission determination and suggests that I ignored other available processes. Qwest Exhibit 1R (Albersheim Rebuttal), pp. 10-11. I testified, however, that a CLEC "may" seek dispute resolution in each state, and I recognized other provisions of the CMP Document, while pointing out that they are optional. Exhibit Eschelon 1 (Starkey Direct), p. 49, lines 6-7 & footnote 101.

[208] Qwest Exhibit 1R (Albersheim Rebuttal), p. 11, lines 4-6.

can accomplish changes through Level 3 CMP notifications.[209] This is true regardless of the reason for the length of the time needed to process the case.[210] In the event that Qwest were to claim that ten months is an unusually long period of time and Eschelon may receive relief earlier in other dispute resolutions, I specifically quoted the representation of Qwest counsel that six months to hear a single issue presented by a complaint was so short an amount of time that Qwest had not even heard of rocket dockets proceeding that fast.[211] The need to make that point is validated by Ms. Albersheim's rebuttal testimony in which Qwest does, in fact, try to suggest that "the scheduling of the hearing for the Arizona docket" may not be the "norm for complaint proceedings."[212] According to Qwest's own counsel, however, several months is like a rocket docket compared to the norm.[213] The time required for a CLEC to obtain a result through CMP

[209] Exhibit Eschelon 1 (Starkey Direct), pp. 49-50. Similarly, when Eschelon wanted a change in the delayed order policy, completion of Eschelon's delayed order change request in CMP from submission to an unsatisfactory closure, took 469 days, whereas when Qwest wanted a change Qwest was able to implement it in CMP in only 43 days. *See* Exhibit Eschelon 3.36 (Johnson).

[210] Qwest asserts that one of its attorneys on the case had a scheduling conflict with another case. Qwest Exhibit 1R (Albersheim Rebuttal), p. 11, lines 4-6. Surely Qwest is not suggesting that this is a one-time experience and no other scheduling conflicts will arise in any other case to cause delays in other dispute resolution proceedings. Qwest does not point to any complaint case that has been tried in less than the 31-day period available to Qwest for its own Level 3 CMP changes. In fact, Qwest's "rocket docket" comment (quoted below) suggests that the opposite is more generally true.

[211] AZ Complaint Docket, Transcript, Procedural Conference (July 27, 2006), p. 18, lines 20-24 (Counsel for Qwest stated: "So the whole point is, we look at this scheduling question as one that is perplexing; that why is it that we are moving -- I mean I've been involved in rocket dockets. I've never seen a case that goes from beginning to end within this period of time that we've proposed in this case, and maybe there's cases here that I'm unaware of. None in my experience.")

[212] Qwest Exhibit 1R (Albersheim Rebuttal), p. 11, lines 3-4.

[213] AZ Complaint Docket, Transcript, Procedural Conference (July 27, 2006), p. 18, lines 20-24 (quoted above).

dispute resolution (regardless of whether that time is the same or somewhat different from the time needed in the Arizona Complaint Docket) is much longer than the 31-day period in which Qwest can accomplish changes through Level 3 CMP notifications. I also referred to Qwest's expressed intent to conduct multiple depositions and other discovery in that case as an example of the expense and resources that a CLEC in dispute resolution will experience that Qwest does not with its quick and easy notification process.[214] These facts should be considered when weighing any Qwest suggestion that dispute resolution for CLECs is the best means to address every issue. This is particularly true because Qwest will "probably never"[215] be the party initiating CMP dispute resolution. As noted in the Staff testimony in the Arizona Complaint Docket,[216] Qwest certainly did not initiate other dispute resolution in the situation in the Arizona Complaint Docket, despite its own alleged conclusion that this should have been done.

Q. DOES THE COMMISSION HAVE TO FIND THAT "THE CMP IS NOT WORKING" TO ADOPT ESCHELON'S LANGUAGE ON THE ISSUES?[217]

[214] Exhibit Eschelon 1 (Starkey Direct), pp. 49-50.

[215] Exhibit Eschelon 3.12 (Johnson) (October 2-3, 2001 CMP Redesign Meeting Minutes, Att. 4, p. 36, Action Item #86). *See also* Exhibit Eschelon 1R (Starkey Rebuttal), p. 46, line 1 – p. 47, line 2.

[216] The Arizona Staff indicated that "Qwest should have expedited the request first and then followed up afterwards with the dispute resolution process." Staff Testimony, Arizona Complaint Docket, p. 34, lines 19-20.

[217] Qwest Exhibit 1R (Albersheim Rebuttal), p. 25, line 7.

A. No.[218] In many instances Eschelon is relying upon the established CMP rules for its position.[219] None of its positions is inconsistent with the scope of CMP.[220] As I indicated in my direct testimony,[221] although CMP has weaknesses that become self-evident when describing CMP procedures and providing examples of how Qwest has used CMP to its advantage,[222] the Commission does not have to find that CMP is "bad" or "broken" to determine any of the disputed issues in Eschelon's favor. Likewise, the Commission need not determine that an ICA supersedes CMP – the parties to CMP, including Qwest, have already agreed that is the case. The issue is whether when a CLEC like Eschelon believes a particular process or policy is important enough to its business to arbitrate that issue on its own merits, does that issue warrant inclusion in the contract, and if so, whether Eschelon's or Qwest's proposed language better fits the bill.

[218] Exhibit Eschelon 1 (Starkey Direct), pp. 106-107.

[219] *See, e.g.*, Exhibit Eschelon 1R (Starkey Rebuttal), p. 37, line 21 – p. 41, line 7.

[220] *See id.*

[221] Exhibit Eschelon 1 (Starkey Direct), p. 106, line 17 – p. 107, line 3.

[222] Ms. Albersheim disagrees with my testimony at page 106 of my direct where I liken Qwest's conduct to playing cards with a big brother who "makes up the rules of the game as he goes along." Qwest Exhibit 1R (Albersheim Rebuttal), p. 12, lines 8-11. She then goes on to explain that Qwest cannot unilaterally change the CMP Document (or "make up the rules"). Ms. Albersheim missed the point of my testimony. I was referring to Qwest's conduct in CMP that is demonstrated in the four examples I provided in my direct testimony – examples showing that Qwest determines whether or not to address issues in CMP, and oftentimes changes its mind on this point along the way. ["As these examples show…] I was not referring to Qwest's ability to modify the CMP Document. ["it is the Commission who should set the 'rules' by establishing interconnection agreement terms and conditions that must be filed, approved, and amended if changed."] *See also*, Exhibit Eschelon 1 (Starkey Direct), p. 106, lines 3-4 ["The Commission who should set the 'rules' by establishing interconnection agreement terms and conditions…"] As I mentioned at page 46 of my direct testimony, changes to the CMP Document are only 1 of 2 examples of when voting in the CMP occurs (Exhibit Eschelon 1 (Starkey Direct), p. 46, lines 7-10).

Q. MS. ALBERSHEIM STATES THAT QWEST HAS NOT PROPOSED A LITMUS TEST OR BRIGHT LINE RULE FOR WHAT SHOULD OR SHOULD NOT BE INCLUDED IN THE ICA, AND THAT YOU ARE WRONG TO SUGGEST THAT THE LACK OF A LITMUS TEST IS A FLAW IN QWEST'S REASONING.[223] WOULD YOU LIKE TO RESPOND?

A. Yes, I'm afraid that Ms. Albersheim misunderstood the point I was making. My point is that Qwest's position on these issues rests on the assumption that an issue is either inherently a "CMP issue" or a "contractual issue" – and for that position to be valid, there must be some way to make the determination of whether an issue is a CMP issue or a contractual issue.[224] The purpose of my testimony was to show that despite claiming that an issue inherently belongs in either CMP or the ICA, Qwest provided no test for making this determination (and the "tests" Qwest had proposed in the past have been rejected by the FCC). As a result, Qwest would be free to make that call based on what suits its objectives at any particular time.

The purpose of my testimony was not to criticize Qwest for not having a litmus test; it was to point out the inconsistency in Qwest acting as though there was one when there is not. Because ICAs and CMP co-exist, with the ability for terms in

[223] Qwest Exhibit 1R (Albersheim Rebuttal), p. 17, line 20-p. 18, line 4; *See also,* Qwest Exhibit 1R (Albersheim Rebuttal), p. 18, lines 16-17.

[224] Exhibit Eschelon 1 (Starkey Direct), pp. 19-20.

ICAs to vary from what is in CMP, there does not need to be a test to determine whether issues belong in CMP versus ICA. As the Staff said in the Arizona Complaint Docket, "changes made through the CMP may affect some, but not all, CLECs depending on the terms of their Interconnection Agreements."[225] What is important is whether parties have negotiated issues and taken steps pursuant to Section 251/252 to seek Commission resolution of these issues. When this occurs, the Commission should decide the issues on their merits and adopt an ICA with clear terms, rather than leaving those issues up to future changes or interpretations by either of the parties. There is no dispute that these issues have been negotiated in this case, and therefore these issues are properly before the Commission for resolution of contract language.

C. THE FCC ORDERS ARE ON POINT

Q. MS. ALBERSHEIM TAKES ISSUE WITH THE FCC ORDERS YOU REFERENCE IN YOUR DIRECT TESTIMONY[226] THAT YOU SAY SUPPORT ESCHELON'S POSITION. WHAT IS MS. ALBERSHEIM'S PRIMARY COMPLAINT?

A. Ms. Albersheim claims that because the *Declaratory Ruling* and *Forfeiture Order* do not expressly reference Qwest's CMP process, they "do not speak to the issues

[225] Staff Testimony, Arizona Complaint Docket, p. 10, lines 3-4.

[226] Exhibit Eschelon 1 (Starkey Direct), pp. 24-25.

Mr. Starkey claims."[227] Ms. Albersheim is wrong. The purpose of my testimony in this regard is to show that the FCC has rejected Qwest's proposals for determining whether provisions should be excluded from an ICA. As I discussed in my direct testimony,[228] Qwest has stated that provisions should be excluded from an ICA if (a) the label Qwest puts on the provision is "process" or "procedure"[229] or (b) if the provision affects all CLECs[230] – or in other words, Qwest proposes to limit the ICA to a schedule of itemized charges and associated description of the services to which the charges apply. The FCC orders I point to – the *Declaratory Ruling* and *Forfeiture Order* – show that Qwest's view of what should be excluded from an ICA is wrong. Though Ms. Albersheim focuses on these orders not expressly referencing Qwest's CMP process,[231] they did not need to because they speak to Qwest's narrow view of the scope of an ICA (the same view Qwest is taking in this proceeding) – and reject that view. Not to mention that the *Forfeiture Order* was issued two years after Qwest's CMP was implemented, when the FCC was fully aware of the CMP's existence.[232] Obviously, if the FCC has rejected Qwest's view of what should be *excluded* from an ICA, that means that those provisions are to be *included* in an ICA when negotiated/arbitrated – it does not mean that the FCC meant for these to be

[227] Qwest Exhibit 1R (Albersheim Rebuttal), p. 18, lines 20-21.

[228] Exhibit Eschelon 1 (Starkey Direct), pp. 20-23.

[229] Exhibit Eschelon 1 (Starkey Direct), pp. 20-23. *See also* Ms. Johnson's discussion of Issue 12-64.

[230] Exhibit Eschelon 1 (Starkey Direct), p. 22, line 6.

[231] Qwest Exhibit 1R (Albersheim Rebuttal), p. 19, lines 5-7.

[232] Exhibit Eschelon 1 (Starkey Direct), p. 25, lines 14-16.

addressed in CMP (although the FCC did not specifically say that).

For example, the FCC's *Declaratory Ruling* states: "***We therefore disagree with Qwest that the content of interconnection agreements should be limited to the schedule of itemized charges and associated descriptions of the services to which those charges apply***." In contrast, Ms. Albersheim has testified that "It is Qwest's position that business procedures do not belong in this agreement…"[233] The FCC said that the ICAs should not be limited only to rates and descriptions of services, which can only mean that the FCC envisioned that business process and procedures describing the manner by which CLECs will access those services should be included in ICAs, contrary to Ms. Albersheim's assertions.

Q. MS. ALBERSHEIM STATES THAT THE FCC ADOPTED LANGUAGE JUST EIGHT WEEKS BEFORE THE DECLARATORY RULING THAT PROVIDED FOR CERTAIN MATTERS TO BE ADDRESSED THROUGH CHANGE MANAGEMENT PROCESS.[234] MS. ALBERSHEIM CLAIMS THAT THE FCC WOULDN'T HOBBLE AN FCC APPROVED PROCESS AFTER ADVOCATING ITS USE WEEKS EARLIER.[235] IS MS. ALBERSHEIM'S TESTIMONY ON THIS POINT MISLEADING?

A. Yes, very much so. First, the decision to which Ms. Albersheim points is not an

[233] Albersheim Minnesota Rebuttal Testimony (MN PUC Docket No. P-5340, 421/IC-06-768, OAH Docket No. 3-2500-17369-2, 9/22/06), p. 12, lines 20-21.

[234] Qwest Exhibit 1R (Albersheim Rebuttal), p. 19, lines 7-11.

[235] Qwest Exhibit 1R (Albersheim Rebuttal), p. 19, lines 11-14.

Order adopted by the FCC, rather it is a decision of the Wireline Competition Bureau who was called upon to decide issues in the stead of the state commission. Accordingly, this decision has no more bearing on Oregon than any other state commission order. In contrast, the *Declaratory Ruling* I cite in my testimony is an order voted on by the FCC. Ms. Albersheim's attempt to make it appear as if my position rests on an assumption that the FCC issued two contradictory orders within weeks of each other is simply not true. The authority to which Ms. Albersheim cites is not an FCC order.

Ms. Albersheim also takes out of context the mention of the Change Management process in the WCB's decision. The Change Management Process discussed in the WCB's decision is the Verizon – not Qwest – Change Management Process, so this decision does not even apply to Qwest, and Ms. Albersheim provides no indication that the Qwest CMP process is comparable to Verizon's. Perhaps more importantly, the WCB included a reference to Verizon's Change Management Process in the ICA at the request of the CLEC (AT&T),[236] not the ILEC, as Qwest is doing here. The WCB therefore was not addressing a situation in which the ILEC was attempting to point to the CMP process instead of addressing provisions in the ICA, as Qwest is proposing in this proceeding. These two situations are not comparable.

[236] *In the Matter of Petition of WorldCom, Inc., et al. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc.* CC Docket Nos. 00-218, 00-249, and 00-251; Memorandum Opinion and Order. DA 02-1731; Rel. July 17, 2002 ("Verizon Virginia Arbitration Order"), ¶ 343.

Moreover, the ICA adopted by the WCB in the decision to which Ms. Albersheim refers contained the very business processes and procedures that Qwest is attempting to exclude here. For instance, the WCB's decision adopted specific provisioning intervals to be included in ICAs,[237] the very thing that Qwest opposes under Issues 1-1 and subparts. Therefore, the WCB decision Ms. Albersheim relies on actually undermines Qwest's proposals in this case.

Q. IS MS. ALBERSHEIM'S CRITICISM OF YOUR RELIANCE ON THE *FORFEITURE ORDER* ALSO MISPLACED?

A. Yes. In the *Forfeiture Order*, the FCC rejected Qwest's notion that it could simply post its service offering information on its website in lieu of Section 252 Agreements because it would render Section 252 ICAs meaningless and provide no certainty to CLECs.[238] This is precisely what Qwest is attempting to do by omitting critical terms and conditions from the ICA and defer to the CMP/PCAT/SIG that Qwest maintains on its website – *i.e.*, undermine the certainty of contractual language in favor of a "process" (CMP) controlled by Qwest. In its *Forfeiture Order*,[239] the FCC expressly rejected Qwest's claim that

[237] *See e.g.*, Verizon Virginia Arbitration Order, ¶406 ["We adopt AT&T's proposed section 1.3.4. Verizon does not dispute AT&T's statement that the parties reached agreement on a 45-day augmentation interval. Verizon's language is similar to AT&T's, except that Verizon would use the collocation intervals set forth in its applicable tariff. Given the choice of language that specifies an exact interval to which the parties have already agreed or language referencing intervals set forth in a tariff that may not be in effect at the time this Order is issued, we select the former because it is more specific."]

[238] Exhibit Eschelon 1 (Starkey Direct), p. 25, lines 1-13.

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

the *Declaratory Ruling* authorized posting of information regarding service offerings on a website ***in lieu of*** an agreement filed with, and approved by, state commissions.

IV. SUBJECT MATTER NO. 1. INTERVAL CHANGES AND PLACEMENT

Issue No. 1-1 and subparts: ICA Sections 1.7.2; 7.4.7, 9.23.9.4.3, Exhibit C (Group 2.0 & Group 9.0), Exhibit I (Section 3), Exhibit N, Exhibit O

Q. ARE MOST OF MS. ALBERSHEIM'S REBUTTAL ARGUMENTS ON ISSUES 1-1 AND SUBPARTS ALREADY ADDRESSED IN YOUR PREVIOUS TESTIMONY?

A. Yes. In the interest of brevity, I will not repeat those arguments but will identify where that issue has been addressed elsewhere in my testimony.[240] I would, however, like to specifically address one point I made previously in my testimony that Ms. Albersheim raises again in her rebuttal testimony. Ms. Albersheim takes issue with my testimony that Qwest could make unilateral changes to provisioning intervals if its proposal on Issues 1-1 and subparts is adopted,[241] and

[240] Like in her direct testimony, Ms. Albersheim claims that Eschelon's goal is to "freeze" specific provisions in place. (Qwest Exhibit 1R (Albersheim Rebuttal), p. 14, line 13; p. 15, line 7; p. 30, line 2). For a response to this Qwest argument, see Exhibit Eschelon 1R (Starkey Rebuttal), p. 19, line 3 – p. 21, line 11, and p. 66, line 14 – p. 68, line 2. Ms. Albersheim also claims that the amendment process proposed by Eschelon is a special process for Eschelon (Qwest Exhibit 1R (Albersheim Rebuttal), p. 29, line 10). I explained the reasons showing this is not a special process for Eschelon's proposal, rather identical, agreed-to amendments exist for new products (Exhibit Eschelon `1R (Starkey Rebuttal), p. 64, line 5 – p. 66, line 2).

[241] I discussed in my direct testimony that the real issue here is whether Qwest can implement changes (in this instance, changes to intervals) over CLEC comments and objections in CMP and put those changed intervals in the SIG – and Qwest can. (*See*, Starkey Direct, pp. 52-63 (Exhibit Eschelon 1 (Starkey Direct), pp. 52-63) (CRUNEC example)) and Exhibit Eschelon 3.13 – 3.15). Ms.

claims that there is no opportunity in any non-contractual sources for Qwest to make unilateral changes to intervals.[242] However, as I previously stated,[243] the ALJs and Commission in Minnesota agreed with Eschelon that Qwest can make unilateral changes, and that adopting Eschelon's proposal (the same proposal Eschelon has offered in this proceeding for Issues 1-1 and subparts) would not harm the effectiveness of CMP or Qwest's ability to respond to industry changes.[244]

Q. MS. ALBERSHEIM CLAIMS THAT ESCHELON IGNORES THE "REALITY" THAT "TELECOMMUNICATIONS IS A DYNAMIC INDUSTRY IN WHICH TECHNOLOGICAL ADVANCEMENTS ARE MADE VIRTUALLY ON A DAILY BASIS."[245] IS THIS "REALITY" SUPPORT FOR QWEST'S PROPOSAL TO LENGTHEN INTERVALS WITHOUT COMMISSION APPROVAL?

Albersheim seems to believe that Qwest cannot take "unilateral" actions because CMP provides the opportunity for comment, request for postponement, and escalation for some of these changes (at least for Level 4 change requests, which increased intervals are - *See* Exhibit Eschelon 1 (Starkey Direct), pp. 47-50 for discussion of Qwest's "Notice and Go" ability for most changes). But the point is that Qwest can implement these changes over CLEC objections once the comment/response timeframes have expired or the comments or requests for postponement have been rejected by Qwest – *i.e.*, the ability of "unilateral" actions I discuss.

[242] Qwest Exhibit 1R (Albersheim Rebuttal), p. 27, lines 10-11.

[243] Exhibit Eschelon 1 (Starkey Direct), p. 124, line 7 – p. 126, line 10.

[244] Exhibit Eschelon 2.24 (Denney), p. 7 [MN Arbitrators' Report ¶22 (quoted on page 61 of my rebuttal testimony, Exhibit Eschelon 1R (Starkey Rebuttal), p. 61, lines 8-19.

[245] Qwest Exhibit 1R (Albersheim Rebuttal), p. 30, lines 4-6.

A. No. I addressed this claim in my rebuttal testimony.[246] Ms. Albersheim said that "these processes and procedures have been effectively addressed through the CMP."[247] However, in cases in which disagreement will result (as in the case of increased intervals, as Ms. Albersheim has acknowledged),[248] it is not "effective" or "efficient" to require the parties to negotiate/arbitrate an ICA, have Qwest lengthen an interval in CMP, potentially follow the dispute resolution process of CMP, only to later come to the Commission for resolution. It would be more efficient to require Commission approval in the first instance for lengthening intervals, as Eschelon proposes. In addition, as noted above, the Minnesota Commission upheld the ALJs' finding that Eschelon's proposal would not harm Qwest's ability to respond to industry changes or harm the effectiveness of CMP.[249]

Q. MS. ALBERSHEIM DISAGREES WITH YOUR TESTIMONY REGARDING COMMISSION INVOLVEMENT.[250] PLEASE RESPOND.

[246] Exhibit Eschelon 1R (Starkey Rebuttal), p. 71, line 16 – p. 73, line 6.

[247] Qwest Exhibit 1R (Albersheim Rebuttal), p. 30, lines 6-7. In Arizona, Ms. Albersheim testified: "These processes and procedures are more *efficiently* addressed through CMP." Rebuttal Testimony of Renee Albersheim, Arizona Docket T-03406A-06-0572/T-01051B-06-0572, p. 36, lines 6-7 (2/9/07). (emphasis added)

[248] Ms. Albersheim: "Over all that time, and over all 41 service interval changes, there were only two that might have raised CLEC objections, and might have caused CLECs to involve the Commission…" Qwest Exhibit 1R (Albersheim Rebuttal), p. 28, lines 12-14. Ms. Albersheim also testified in the Minnesota arbitration proceeding that, "It is likely that there will be disputes any time Qwest attempts to lengthen an interval." (Albersheim Minnesota Rebuttal Testimony, p. 35, lines 6-7).

[249] Exhibit Eschelon 2.24 (Denney), p. 7 [MN Arbitrator's Report, ¶22] and Exhibit Eschelon 2.25 (Denney), p. 22 [MN PUC Arbitration Order, p. 22, ¶ 1].

[250] Qwest Exhibit 1R (Albersheim Rebuttal), p. 27, line 19 – p. 28, line 5.

A. First of all, Ms. Albersheim misquotes my testimony. Ms. Albersheim claims that I said: "The Commission would have no opportunity to make these determinations [concerning service interval changes] if Qwest has its way."[251] This is not my testimony. My testimony to which Ms. Albersheim cites actually says: "the Commission would have no opportunity to make these determinations ***before Qwest makes these changes*** if Qwest has its way."[252] This is important because though Ms. Albersheim is correct that a CLEC can pursue its disagreement at the state commission, what she fails to mention is that in my testimony, I explained that with Qwest's proposal, Qwest would be able to implement an increase to an interval in CMP before Eschelon can obtain a decision on Qwest's action from the state commission.[253] As a result, the Commission would have no opportunity to make these determinations before Qwest's lengthened interval would take effect. This would cause Eschelon to make changes to adapt to this longer interval before it can receive a decision from the state commission, and even if the Commission ultimately agrees with Eschelon, Eschelon would have already incurred the expense to change to the longer interval, and would incur more expense to change back to the shorter interval following the commission's decision. All the while, Eschelon's customers are forced to wait longer for service. This would also result in the

[251] Qwest Exhibit 1R (Albersheim Rebuttal), p. 27, lines 20-22.

[252] Exhibit Eschelon 1 (Starkey Direct), p. 115, lines 17-18. (emphasis added)

[253] Exhibit Eschelon 1 (Starkey Direct), p. 36, lines 6-17.

Commission being asked to resolve this issue in "crisis mode." That is a key difference in Eschelon's proposal: it allows the Commission to make these determinations *before* an increase to an interval takes effect.

Q. MS. ALBERSHEIM CRITICIZES YOUR REFERENCE TO THE DECISIONS OF THE WASHINGTON AND MINNESOTA COMMISSIONS THAT REJECTED PREVIOUS QWEST ATTEMPTS TO LENGTHEN INTERVALS. SHE POINTS TO THE CHANGES TO INTERVALS QWEST HAS PROPOSED SINCE THE 271 PROCEEDINGS AS SUPPORT FOR HER CLAIM THAT THE WASHINGTON AND MINNESOTA ORDERS SHOULD HAVE NO BEARING HERE.[254] WOULD YOU LIKE TO RESPOND?

A. Yes. I'm not quite sure what point Ms. Albersheim is making here, but if her point is that Qwest has not pursued lengthened intervals in CMP since the CMP was approved, that makes no difference. Qwest could change its strategy to pursue longer intervals at any time in CMP, and based on its testimony and position on Issue 1-1, that is a very likely scenario.

Nonetheless, the point of my references to the state commission orders was to show that other commissions have already found the need to exert their authority with regard to Qwest's attempts to lengthen intervals, and that the Utah Commission's authority in this regard should be preserved so that it can decide

[254] Qwest Exhibit 1R (Albersheim Rebuttal), p. 28, lines 7-18.

before the interval change takes effect and customers are harmed, as Eschelon's proposal provides.

Q. QWEST COMPLAINS THAT ESCHELON'S PROPOSAL REQUIRES QWEST TO "USE SPECIFIC FORMS" WHICH IS AN "ADMINISTRATIVE BURDEN FOR QWEST THAT COULD RESULT IN ONE SPECIAL PROCESS FOR ESCHELON (AND OPT-INS) AND ANOTHER PROCESS FOR OTHER CLECS."[255] PLEASE RESPOND.

A. I address these forms and Qwest's burdensomeness argument in my rebuttal testimony.[256] Eschelon proposes to use, for lengthening intervals, the identical streamlined vehicle that is in place today for new products under Section 1.7.1 of the SGAT and other approved interconnection agreements, making use of simple advice adoption letters.[257] I address Qwest's claims about unique or one-off processes in Section III of this testimony. If Qwest's statements about its preference for uniformity[258] are valid, however, it should prefer using the same language and forms for the Utah ICA as it already must use for lengthening of intervals under the Minnesota order.[259]

[255] Qwest Exhibit 1R (Albersheim Rebuttal), p. 29, lines 9-10.

[256] Exhibit Eschelon 1R (Starkey Rebuttal), p. 64, line 5 – p. 66, line 2.

[257] As explained in my rebuttal testimony (Exhibit Eschelon 1R (Starkey Rebuttal), p. 64, footnote 236), Qwest recently removed these exhibits from its Negotiations Template through a non-CMP notice effective on one day's notice. Exhibit Eschelon 3.84 (Johnson).

[258] *See, e.g.*, Exhibit 1R (Albersheim Rebuttal), p. 16, lines 8-10.

[259] Exhibit Eschelon 2.24 (Denney), p. 7 [MN Arbitrators' Report ¶22] and Exhibit Eschelon 2.25 (Denney), p. 22 [MN PUC Arbitration Order, p. 22, ¶ 1].

Q. MS. ALBERSHEIM REFERS TO TWO INTERVAL INCREASES AND 39 SHORTENED INTERVALS SINCE THE 271 PROCEEDINGS.[260] WITH REGARD TO THE TWO LENGTHENED INTERVALS, MS. ALBERSHEIM SAYS THAT YOU FAILED TO MENTION THAT ONE OF THEM WAS WITHDRAWN IN PART BECAUSE OF CLEC CONCERNS AND THE OTHER ONE RECEIVED NO CLEC COMMENT OR OBJECTION.[261] IS MS. ALBERSHEIM'S CRITICISM WARRANTED?

A. No. I find it ironic that Ms. Albersheim would criticize my testimony for failing to mention certain details regarding these two lengthened intervals when Ms. Albersheim completely failed to mention them at all in her direct testimony. In fact, Ms. Albersheim represented in her direct testimony that Qwest had never to date increased intervals.[262] Ms. Albersheim changes her tune in her rebuttal testimony to create a concern where none exists. At least, none existed for Qwest when Ms. Albersheim testified in her direct testimony that Qwest had only shortened intervals, so far.[263] Nonetheless, to the extent that Ms. Albersheim is

[260] Qwest Exhibit 1R (Albersheim Rebuttal), p. 28, lines 10-11.

[261] Qwest Exhibit 1R (Albersheim Rebuttal), p. 28, lines 14-16.

[262] Qwest Exhibit 1 (Albersheim Direct), p. 30, lines 2 – 4 ["Since Qwest obtained section 271 approval, all such modifications have been reductions in the lengths of service intervals for various services and have been for the benefit of CLECs."] See also, Qwest's Response to Eschelon's Petition for Arbitration, p. 38, lines 22-24. Ms. Albersheim also testified in Oregon that: "so far, Qwest has only decreased intervals." Albersheim Oregon Direct Testimony (ARB 775; May 11, 2007), p. 33, line 23.

[263] Ms. Albersheim testifies that she "erred when I stated on page 28 of my direct testimony that Qwest has only decreased intervals. Subsequent research found this one unopposed change request that increased an interval." Qwest Exhibit 1R (Albersheim Rebuttal), p. 28, footnote 7. Ms. Albersheim

attempting to create the impression that Eschelon's proposal is not needed because interval increases may not trigger CLEC objection, this is a false impression and is not consistent with Ms. Albersheim's prior testimony, where she stated that "it is likely that there will be disputes any time Qwest attempts to lengthen an interval."[264] Ms. Albersheim also claims that Qwest withdrew one of these proposed increases "in part because of CLEC concerns,"[265] but this claim is not supported by Ms. Albersheim's own Qwest Exhibit 1R.6. Nowhere on Qwest Exhibit 1R.6 does it say that a CLEC objected to this CR, nor does it say that Qwest withdrew the CR because of CLEC objection.

V. SUBJECT MATTER NO. 14: NONDISCRIMINATORY ACCESS TO UNES

Issue No. 9-31: ICA Section 9.1.2

Q. WHAT IS THE CRUX OF THE DISPUTE UNDER ISSUE 9-31?

A. Qwest maintains that tariff or other non-TELRIC rates may apply to moves, adds, and changes *to a UNE,*[266] whereas Eschelon relies upon authority showing that TELRIC rates apply to access to UNEs, including moves, adds, and changes to

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does not show that one increased interval, which Qwest did not even recall and had to perform research to find, was or should be basis for concern.

[264] Albersheim Minnesota Rebuttal Testimony (MN PUC Docket P-5340, 421/IC-06-768, 9/22/06) p. 35, lines 6-7.

[265] Qwest Exhibit 1R (Albersheim Rebuttal), p. 28, lines 15-16.

[266] *Compare* Qwest Exhibit 3R (Stewart Rebuttal), p. 16 (the activities encompassed by Eschelon's proposed language "could easily include activities that are not part of 'access' to a UNE") *with* Eschelon's proposals for Section 9.1.2 ("Access to Unbundled Network Elements includes moving, adding to, repairing and changing ***the UNE*** . . .") (emphasis added).

the UNE.[267] When applying TELRIC rates, for example, the Oregon Commission has said that competitive carriers need to "gain[] full use of the loop's capabilities."[268] Without moves, adds, and changes to loops, Eschelon will not have full use of the loop's capabilities. Although Section 9.1.2 contains language regarding nondiscriminatory access to UNEs, Qwest's conduct (described below) shows that – notwithstanding Section 9.1.2 and all other provisions of the ICA – Qwest's position is that it may charge retail tariff rates for activities that have historically been provided at TELRIC rates without first obtaining regulatory approval. Qwest has confirmed in testimony that the goal of its proposed modifications to Section 9.1.2 is to allow it to do just that:

> Q. I mean, is it what -- is Qwest's goal here with this language, additional activities available for UNEs, to hold open the option to charge tariffed rates for moving, adding to, repairing and changing UNEs?
> A. In the example I just gave, it was a tariff rate, yes.[269]

> Q Now, is it Qwest's position that "at the applicable rates" would be a TELRIC-based rate?
> A It would depend on the activity being performed.
> Q Would -- if it were, for example, design changes, maintenance of service, including trouble isolation, additional dispatches and cancellation of orders, you would agree that those things would all be subject to TELRIC rates, wouldn't you?
> A You're moving a little fast for me, but, for example, no. . . . So it would -- you know, in one case there would be no charge, one case it

[267] Exhibit Eschelon 1 (Starkey Direct), p. 136, line 17 – p. 139, line 2 (citing FCC rules and orders).

[268] Order No. 03-085, Oregon PUC Docket UT/138/UT 139, Phase III, p. 14, footnote 51, citing FCC UNE Remand Order, ¶172). Similarly, in its *First Report and Order* at ¶ 268, the FCC found that the requirement to provide "access to UNEs" must be read broadly, concluding that the Act requires that UNEs "be provisioned in a way that would make them useful."

[269] Exhibit Eschelon 1.6 (Starkey), p. 33 [Arizona arbitration, Transcript Vol. II (March 20, 2007), p. 199, line 25 – p. 200, line 5 (Ms. Stewart)].

would be a TELRIC, and another case, such as expedites, it potentially could be a tariff charge. So that's why it's applicable rates.[270]

In the latter quotation, Ms. Stewart provides expedites as an example of an activity for which Qwest would charge a tariff rate under this section of the ICA expressly dealing only with non-discriminatory access to Section 251 Unbundled Network Elements. Qwest's use of expedites as an example shows that the goal of Qwest's proposed Section 9.1.2 language is to unilaterally implement tariff rates with no prior contract amendment or prior Commission approval allowing it to do so, as Qwest has already done for expedites.[271]

The CRUNEC example described in my direct testimony is another example of a situation in which Qwest unilaterally implemented much higher rates including potential tariff rates[272] for activities that have historically been provided as part of access to UNEs at TELRIC rates, without obtaining Commission approval or an

[270] Colorado arbitration, Transcript Vol. I (April 17, 2007) (Ms. Stewart).

[271] *See e.g.*, Exhibit Eschelon 2.18 (Denney), p. 1 (showing no change in ICA language while Qwest implemented changes to expedites, so that expedites that had been available for loops under the ICA were no longer available under the same ICA without paying tariff rate) & Exhibit Eschelon 2 (Denney Direct), p. 163 at footnote 131 (providing corresponding Utah ICA provisions). Expedites (Issue 12-67) are addressed in the testimony of Mr. Denney and Ms. Johnson, including her exhibits. See Exhibits Eschelon 2.24, 2.19, 2.22, and 3.53 through 3.70.

[272] Qwest's CRUNEC PCAT states that the CLEC "will be responsible for any construction charges that a Qwest retail end-user would be responsible for paying. . . . When facilities are not available, Qwest will build facilities dedicated to an end-user if Qwest would be legally obligated to build such facilities to meet its Provider of Last Resort (POLR) obligation to provide basic Local Exchange Service or its Eligible Telecommunications Carrier (ETC) obligation to provide primary basic Local Exchange Service. In other situations, Qwest does not agree that it is obligated to build UNEs . . . ." See http://www.qwest.com/wholesale/clecs/crunec.html

ICA amendment.[273] Mr. Denney discusses the CRUNEC example further in his discussion regarding Issue 9-31 and recurring and non-recurring rates.

If Eschelon is unable to obtain access to UNEs on reasonable terms and conditions and at cost based rates, Eschelon will be competitively disadvantaged vis-à-vis Qwest. Either of Eschelon's two alternative language proposals confirms that access to UNEs includes moving, adding to repairing and changing *the UNE* (*i.e.*, not a tariff or other non-UNE product), and therefore these UNE activities are available at TELRIC rates (unless the contract is amended, such as pursuant to the change in law provision). The Commission should adopt Eschelon's proposal for Issue 9-31 and preserve nondiscriminatory access to UNEs at cost-based rates.

Q. MS. STEWART TESTIFIES THAT THE DISPUTE UNDER ISSUE 9-31 "BOIL[S] DOWN" TO "QWEST'S ABILITY TO CHARGE FOR ACTIVITIES AND TO RECOVER ITS COSTS."[274] IS THIS DIFFERENT FROM YOUR DESCRIPTION ABOVE OF THE CRUX OF THE ISSUE?

A. Yes. Qwest's ability to charge for activities and to recover its costs for all activities under the ICA, including any activities addressed in Section 9.1.2, is already established in agreed upon language in the ICA. I quoted the agreed upon

[273] Exhibit Eschelon 1 (Starkey Direct), pp. 52-63 (CRUNEC example).

[274] Qwest Exhibit 3R (Stewart Rebuttal), p. 5, lines 19-20.

language in ICA Section 5.1.6 in my direct and rebuttal testimony,[275] just as I have quoted it in other states.[276] Yet, Ms. Stewart does not mention this agreed upon language in Section 5.1.6 in either her direct or rebuttal testimony, even though she is critical of not "discussing or even mentioning" agreed upon language in the ICA.[277] The dispute is not whether Qwest may recover its costs but whether Qwest may wrongfully over-recover by charging tariff or other non-TELRIC rates when TELRIC rates apply.

Q. MS. STEWART TESTIFIES THAT ESCHELON'S LANGUAGE "WOULD VIOLATE QWEST'S RIGHT OF COST RECOVERY,"[278] CLAIMS THAT ESCHELON MAY ATTEMPT TO CHANGE THE APPLICATION OF A RATE,[279] AND STATES THAT QWEST'S ALLEGED COST RECOVERY CONCERN IS BASED AT LEAST IN PART ON TESTIMONY OF MR. DENNEY IN THE "COMPANION ARBITRATION IN MINNESOTA."[280] WHERE DOES ESCHELON RESPOND TO THESE CLAIMS?

[275] Exhibit Eschelon 1 (Starkey Direct), p. 38 at footnote 77; Exhibit Eschelon 1R (Starkey Rebuttal), p. 76, lines 4 – 14.

[276] *See e.g.*, Washington arbitration, Starkey Rebuttal, pp. 80-81 (Dec. 4, 2006); Colorado arbitration, Starkey Rebuttal, pp. 81-82 (March 26, 200) (both quoting Section 5.1.6 within my discussion of Issue 9-31). Ms. Stewart did not mention Section 5.1.6 in her surrebuttal testimony in Washington or Colorado either.

[277] Qwest Exhibit 3R (Stewart Rebuttal), p. 11, line 16.

[278] Qwest Exhibit 3R (Stewart Rebuttal), p. 14, lines 19-20.

[279] Qwest Exhibit 3R (Stewart Rebuttal), pp. 14-15.

[280] Qwest Exhibit 3R (Stewart Rebuttal), p. 16, line 12.

A. Mr. Denney responds to these claims in his surrebuttal testimony regarding cost recovery issues relating to Issue 9-31.[281]

Q. MS. STEWART QUOTES PORTIONS OF AGREED UPON LANGUAGE IN THE ICA, ALLEGES THAT YOU IGNORED THEM, AND SUGGESTS THAT THEY RENDER ESCHELON'S PROPOSAL UNNECESSARY.[282] PLEASE RESPOND.

A. This is first of the four Qwest concerns that I described on page 74 of my rebuttal testimony as Qwest's concern that "the closed ICA language fully captures Qwest's legal obligations so no additional language is needed to ensure nondiscriminatory access to UNEs.[283] I responded to that concern on pages 75-76 of my rebuttal testimony. Nonetheless, Ms. Stewart twice states that I allege an absence of an obligation in the ICA for Qwest to provide non-discriminatory access to UNEs "without discussing or even mentioning" agreed upon language in Section 9.1.2.[284] She states, as she has in four other states, that this is "surprising."[285] Eschelon has fully recognized agreed upon language in the ICA

[281] *See also* Exhibit Eschelon 1R (Starkey Rebuttal), p. 76, line 15 – p. 87, line 7 and p. 91, line 11 – p. 92, line 12.

[282] Qwest Exhibit 3R (Stewart Rebuttal), pp. 11-13.

[283] Exhibit Eschelon 1R (Starkey Rebuttal), p. 74, lines 11-12, citing Qwest Exhibit 3 (Stewart Direct), p. 15 – line 25 – p. 16, line 7; Qwest Exhibit 3 (Stewart Direct), p. 16, lines 23-25; and Qwest Exhibit 3 (Stewart Direct), p. 21, lines 3-5.

[284] Qwest Exhibit 3R (Stewart Rebuttal), p. 11, line 16.

[285] Qwest Exhibit 3R (Stewart Rebuttal), p. 11, line 14. Arizona arbitration, Stewart Rebuttal, p. 11, line 23; Colorado arbitration, Stewart Answer, p. 11 (no line numbers); Minnesota arbitration, Stewart Rebuttal, p. 10, line 18, Washington arbitration, Stewart Responsive, p. 10, line 13.

stating that Qwest must provide non-discriminatory access to UNEs, while also explaining why additional language is needed in Section 9.1.2.[286]

It is Qwest that ignores the issue here. Eschelon has been forthright in describing the Qwest conduct (revising its rate proposals in negotiations and in its 8/31/06 ICA negotiations template) to refer to retail tariffs that initially prompted Eschelon to pursue its language for Section 9.1.2.[287] Qwest did not raise this in the first instance in a cost case or other filing with the Commission. Although Eschelon pointed to this Qwest conduct,[288] Ms. Stewart discusses Issue 9-31 "without discussing or even mentioning" its revised rate proposals in negotiations and the corresponding changes to Qwest's 8/31/06 ICA negotiations template as reasons why the agreed upon portion of Section 9.1.2 may be insufficient by itself. When Qwest later reverted to its earlier negotiations position with respect to Exhibit A (*i.e.*, removing references to the tariff for the items mentioned in the parenthetical in Section 9.1.2), Qwest told Eschelon that doing so did not indicate that Qwest's position that tariff rates apply had changed. Ms. Stewart's testimony since then (such as the above-quoted testimony) has confirmed that Qwest intends its proposed "applicable rates" language in Section 9.1.2 to allow it to charge tariff rates for activities for which TELRIC rates have applied. Eschelon

[286] S*ee e.g.*, Exhibit Eschelon 1 (Starkey Direct), p. 128, line 4 – p. 129, line 3 (quoted in above footnote).

[287] Exhibit Eschelon 1 (Starkey Direct), pp. 129-130.

[288] Exhibit Eschelon 1 (Starkey Direct), pp. 129-130.

disagrees.[289] A decision from the Commission and more explicit contract language is needed to resolve this issue and help avoid future disputes.

Q. QWEST CONTENDS THAT ESCHELON IS ATTEMPTING TO "IMPERMISSIBLY EXPAND THE ACCESS QWEST PROVIDES TO UNES AT COST-BASED RATES BEYOND THE REQUIREMENTS IMPOSED BY GOVERNING LAW."[290] PLEASE RESPOND.

A. I explained in my direct testimony[291] how Eschelon's proposals are consistent with Qwest's existing obligation under governing law. For brevity, I will not repeat those arguments here. Qwest provides or has provided these functions for CLECs at cost-based rates, and Eschelon is only asking for certainty that Qwest will continue to provide them at cost-based rates in the future (unless the ICA is

[289] Exhibit Eschelon 1 (Starkey Direct), pp. 137-138 (citing FCC rules and orders).

[290] Qwest Exhibit 3R (Stewart Rebuttal), p. 11, lines 4-5. *See also*, Qwest Exhibit 3R (Stewart Rebuttal), p. 14, line 27 ("go beyond the routine network maintenance"); Qwest Exhibit 3R (Stewart Rebuttal), p. 14, lines 22-23 ("violates the long-established rule that an ILEC is only required to provide access to its existing network, not access to 'a yet unbuilt superior one.'") I addressed Qwest's "superior network" argument in my rebuttal testimony (Exhibit Eschelon 1R (Starkey Rebuttal), p. 80, line 3 – p. 81, line 22). I also addressed Ms. Stewart's claim that the terms "add to" and "changing the UNE" are vague and could require Qwest to build new facilities. *See* Exhibit Eschelon 1R (Starkey Rebuttal), p. 94, line 17 – p. 96, line 6. Ms. Stewart states that Eschelon's proposal "would potentially obligate" Qwest to provide Eschelon access it doesn't provide to other CLECs or Qwest retail customers (Qwest Exhibit 3R (Stewart Rebuttal), p. 14, lines 16-17), but she makes no attempt to support this claim. The word "potentially" is important because this means that Ms. Stewart can provide no concrete examples of Eschelon's language going beyond the FCC's requirements despite four specific functions listed in Eschelon's language.

[291] Exhibit Eschelon 1 (Starkey Direct), pp. 136-138.

amended).[292] The examples of Qwest conduct provided by Eschelon illustrate the business need for contractual certainty on this issue.

Q. MS. STEWART CLAIMS THAT THE TERM "ADD TO" IS "UNDEFINED,"[293] EVEN THOUGH THIS TERM IS AGREED UPON LANGUAGE IN SECTION 9.1.2. HAS MS. STEWART PROVIDED AN EXAMPLE THAT SHEDS LIGHT ON THE PROBLEM WITH QWEST'S POSITION?

A. Yes. I also addressed Ms. Stewart's similar claim that the terms "add to" and "changing the UNE" are vague and could require Qwest to build new facilities in my rebuttal testimony.[294] At the hearing in Arizona, Ms. Stewart provided the following example:

> However, one of our concerns is this was so open-ended, and particularly the e.g., meaning that this is an example, not the definitive list, that what if what you asked for is we add to the UNE a private line? In that

[292] Ms. Stewart claims that Eschelon's language is not necessary to ensure nondiscriminatory access to UNEs. Qwest Exhibit 3R (Stewart Rebuttal), p. 11, lines 6-17. Yet, Qwest has made it very clear that it does not view these functions as related to "access" to UNEs under Section 251 of the Act. *See e.g.*, Qwest Exhibit 3R (Stewart Rebuttal), p. 3, lines 5-7. If Qwest disagrees that these functions are governed by Section 251, then obviously language is needed to make that obligation clear, or Qwest will impose its unilateral judgment (resulting in less "access" and higher, non-cost based rates). Ms. Stewart points to other language in the ICA that speaks to Qwest's obligations to provide access to UNEs. Other sections may discuss Qwest's obligations in this regard, but Eschelon's proposed language in 9.1.2 makes clear that these activities are required as part of Qwest's obligation to provide nondiscriminatory "access" to UNEs at cost-based rates. Based on Qwest's view of these activities, just because they are mentioned in the ICA, does not mean that Qwest will provide (or continue to provide) nondiscriminatory access to them at cost-based rates, which is why Eschelon's Section 9.1.2 is crucial. Eschelon has identified a business need and proposed language to address that need, and like the other sections of the ICA referenced by Ms. Stewart, that language is designed to spell out Qwest's obligations regarding access to UNEs.

[293] Qwest Exhibit 3R (Stewart Rebuttal), p. 14, line 25.

[294] *See* Exhibit Eschelon 1R (Starkey Rebuttal), p. 94, line 17 – p. 96, line 6.

> commingled arrangement, the private line rates would apply. Therefore, the applicable rate would be a private line rate.[295]

Ms. Stewart ignores Eschelon's proposed language for Section 9.1.2 which specifically states that "Access to Unbundled Network Elements includes . . . adding ***to . . . the UNE***." Her example involves adding another product to an order,[296] not adding to the UNE for the purpose of accessing the UNE. If this example involved adding to the UNE, the end result would be access to that UNE. Ms. Stewart admits, however, that the result in her example would not be access to a UNE but would be a "commingled arrangement."[297]

Ms. Stewart asks the question: "what if what you asked for is we add to the UNE a private line?"[298] Despite her repeated statements about ignoring agreed upon language in the ICA,[299] she does not look to the contract for the answer. If she had, she would have found that Eschelon has already reasonably agreed to language that clearly answers her question:

> 24.1.2.1 The UNE component(s) of any Commingled arrangement is governed by the applicable terms of this Agreement. The other component(s) of any Commingled arrangement is governed by the terms of the alternative service arrangement pursuant to which that

[295] Exhibit Eschelon 1.6 (Starkey), p. 33 [Arizona arbitration, Transcript Vol. II (March 20, 2007), p. 199, lines 14-20].

[296] Per Qwest's position on Issue 9-58, these two products could not even be ordered on the same service request.

[297] Exhibit Eschelon 1.6 (Starkey), p. 33 [Arizona arbitration, Transcript Vol. II (March 20, 2007), p. 199, line 18 (quoted above)].

[298] Exhibit Eschelon 1.6 (Starkey), p. 33 [Arizona arbitration, Transcript Vol. II (March 20, 2007), p. 199, lines 16-17 (quoted above)].

[299] Qwest Exhibit 3R (Stewart Rebuttal), pp. 10-13.

component is offered (e.g., Qwest's applicable Tariffs, price lists, catalogs, or commercial agreements).

This agreed upon language appears in Section 24 ("Commingling"). As with any contract, the provisions of the contract must be read together, and the contract must be interpreted to give effect to all of its provisions. There is no genuine concern that a term Qwest claims is vague (despite using it in its own proposal) will somehow change the operation of this clear closed language, which allows Qwest to charge its private line tariff rate for the private line component of any commingled arrangement.

Q. MS. STEWART AGAIN[300] REFERS TO YOUR PREVIOUS STATEMENT THAT THE PHRASE MOVE, ADD TO, AND CHANGE COULD POTENTIALLY INCLUDE THOUSANDS OF ACTIVITIES.[301] HAVE YOU ALREADY ADDRESSED THIS ISSUE?

A. Yes. I addressed this issue at pages 97-101 of my rebuttal testimony (Exhibit Eschelon 1R), where I provided examples (including examples from Qwest's cost studies) of how the general activities of moving, adding to, and changing UNEs may include many sub-activities and sub-sub-activities. The companies have agreed to identical language for the phrase "moving, adding to, repairing, and

[300] Qwest Exhibit 3 (Stewart Direct), p. 18, line 18.

[301] Qwest Exhibit 3R (Stewart Rebuttal), p. 16, line 20.

changing."[302] Qwest still does not explain how the same phrase can be vague and undefined when proposed by Eschelon but not when proposed by Qwest.

Q. WHEN THERE ARE POTENTIALLY MANY ACTIVITIES, HOW CAN THE COMMISSION BE CONFIDENT THAT ALL OF THOSE ACTIVITIES SHOULD BE SUBJECT TO TELRIC-BASED RATES?

A. Eschelon's language for Section 9.1.2 is limited in two important ways. First, that language only applies to activities that Qwest performs in connection with providing UNEs. Eschelon's proposed language for Section 9.1.2 specifically states that "Access to Unbundled Network Elements includes moving, adding to, repairing and changing ***the UNE***." I discussed above the limiting nature of this language in connection with Ms. Stewart's commingling example. If Qwest performs an activity in order to provide something that is not a UNE, such as a private line service, Section 9.1.2 does not apply to such an activity.

Second, the language requires nondiscrimination. The activities are defined by the activities which Qwest performs for itself and its end user customers. Ms. Stewart complains that the activities may change over time or as technology changes.[303] The same is true, however, of the activities that Qwest performs for itself and its retail customers. Qwest will be able to identify these activities as changes occur, because they will also occur for Qwest and its retail customers.

[302] Qwest Exhibit 3 (Stewart Direct), p. 16, lines 19-22; see also Exhibit Eschelon 1 (Starkey Direct), p. 134. See Joint Disputed Issues Matrix (Exhibit 3 to the Arbitration Petition), pp. 52-53.

[303] Qwest Exhibit 3R (Stewart Rebuttal), p. 16, lines 21-22.

Q. QWEST AGAIN[304] PROVIDES ITS COUNTERPROPOSAL FOR ISSUE 9-31 IN ITS REBUTTAL TESTIMONY.[305] IS THIS LANGUAGE ACCEPTABLE TO ESCHELON?

A. No. I addressed the shortcomings of Qwest's language in my direct testimony.[306] Qwest's counter-proposal contains the very same language ["moving, adding to, repairing and changing the UNE (through *e.g.*, design changes, maintenance of service including trouble isolation, additional dispatches, and cancellation of orders)"][307] that Qwest criticizes in Eschelon's proposal as being vague and undefined.[308] As indicated in her above-quoted testimony, Ms. Stewart has acknowledged that Qwest's proposed language holds open the option for Qwest to charge retail tariff or other non-TELRIC rates. Here, she testifies that the Qwest proposed language "eases" Qwest's concerns.[309] Of course opening the door to charging higher, non-TELRIC based rates would ease any alleged concern about whether a list of examples is exclusive, if the longer the list, the more Qwest can charge. A more disciplined approach, based on the law governing access to

[304] Qwest Exhibit 3 (Stewart Direct), p. 20.

[305] Qwest Exhibit 3R (Stewart Rebuttal), p. 15, line 26 – p. 16, line 3.

[306] Exhibit Eschelon 1 (Starkey Direct), p. 140, line 15 – p. 141, line 15.

[307] Qwest Exhibit 3 (Stewart Direct), p. 20, lines 11-14. At Qwest Exhibit 3R (Stewart Rebuttal), p. 15, line 27, Ms. Stewart shows the phrase "moving, adding to, repairing and" underlined, which could suggest that this phrase is disputed (though this phrase is underlined, while the disputed language is bold and underlined). However, as shown in Ms. Stewart's direct testimony (Qwest Exhibit 3 (Stewart Direct), p. 20, lines 11-14), Qwest has agreed to this phrase. See Exhibit Eschelon 1R (Starkey Rebuttal), p. 78, footnote 275.

[308] Qwest Exhibit 3R (Stewart Rebuttal), p. 14, line 12 – p. 15, line 15.

[309] Qwest Exhibit 3R (Stewart Rebuttal), p. 16, line 6.

UNEs, is needed for the language in this ICA provision relating to nondiscriminatory access to UNEs. The federal Act still requires access to UNEs at TELRIC rates.[310]

Q. MS. STEWART TAKES ISSUE WITH TWO EXAMPLES YOU PROVIDED IN YOUR TESTIMONY.[311] PLEASE RESPOND REGARDING THE FIRST EXAMPLE.

A. Ms. Stewart notes that Qwest withdrew its December 2005 CMP notice that would have barred UNEs from being used to serve another CLEC, IXC or other telecommunications provider, and is not imposing this limitation.[312] She also notes Qwest has not attempted to impose this limitation on Eschelon. Whether or not Qwest ultimately withdrew this particular notice or not, this example shows that absent clear and unambiguous language in the ICA about what nondiscriminatory access is, Qwest can and will attempt to make this determination for itself through CMP (or outside of CMP) after the arbitration is

[310] 47 U.S.C. § 252 (d)(1)(A)(i) & § 251(c)(3) (entitled "Unbundled Access") ("nondiscriminatory ***access to*** network elements on an unbundled basis" must be provided "in accordance with . . . section 252") (emphasis added). In the *Local Competition Order*, the FCC established the TELRIC methodology as the pricing methodology that state commissions must use to determine what are permissible cost-based rates. *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket Nos. 96-98, 95-185, First Report and Order, ¶¶679-89 (1996). The Supreme Court upheld this allocation of federal and state jurisdiction, *see AT&T Corp. v. Iowa Util. Bd.*, 525 U.S. 366, 377-86 (1999), and upheld the TELRIC pricing methodology, *see Verizon Communications v. FCC*, 535 U.S. 467 (2002). Issues presented for arbitration must be resolved in accordance with Sections 251 and 252 of the Act and the rules adopted by the FCC. *See* 47 U.S.C. §§251 and 252; *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 13042 (1996) ("*First Report and Order"*); 47 C.F.R. § 51.5 *et seq.*

[311] Qwest Exhibit 3R (Stewart Rebuttal), pp. 13-14.

[312] Qwest Exhibit 3R (Stewart Rebuttal), p.13, lines 13-25.

over – at a time when Qwest rather than this Commission will decide the issue. This example also shows that Qwest has no problem pursuing changes in CMP even when that change conflicts with the terms and conditions of an ICA, which seriously undercuts Qwest's claim that terms and conditions in an ICA prevents Qwest and other CMP participants from pursuing different terms and conditions in CMP. And though Qwest withdrew this particular notice, without specific ICA language, nothing prevents Qwest from pursuing this notice or a similar notice at a later date in CMP, even though Eschelon has properly raised the issue in arbitration and incurred the expense of arbitrating it to obtain a resolution in the ICA.

Q. PLEASE RESPOND TO MS. STEWART'S CRITICISM OF YOUR SECOND EXAMPLE.

A. Ms. Stewart also takes issue with the example I provided regarding Qwest's Level 3 CMP notice to restrict the availability of CFA changes to one on the day of a cut.[313] Ms. Stewart testifies that this change "did not deny access to any UNEs or UNE activities," but was instead a "reasonable clarification by Qwest…"[314] Qwest's CMP change over CLEC objection[315] to limit CFA changes to one on the day of the cut is clearly not a clarification of Qwest's CFA changes process. I

[313] Exhibit Eschelon 1 (Starkey Direct), p. 132, line 3 – p. 134, line 7.

[314] Qwest Exhibit 3R (Stewart Rebuttal), p. 13, lines 27-28.

[315] Exhibit Eschelon 3.85 (Johnson), discussed at Exhibit Eschelon 1R (Starkey Rebuttal), p. 91, lines 4 – 6.

addressed this issue in my direct testimony,[316] where I explained that this is a change to Qwest's process. That this is a process change (and not just a clarification) is supported by the fact that Qwest has provided multiple CFA changes on the day of the cut for four years, as well as the fact that one of the examples used to illustrate the CFA change request included multiple CFA changes.[317] Ms. Stewart provides no support for her assertions that CLECs were "abusing"[318] the CFA change request process, or that multiple CFA changes are the result of an inadequate CLEC CFA management system,[319] or that Qwest was facing any risk of not completing other service orders due to multiple CFA changes.[320] Ms. Stewart also erroneously suggests that CFA changes are necessarily the CLEC's fault.[321] She states, for example, that the result would "unfairly" affect "CLECs that provide correct, working CFAs,"[322] as though CLECs not providing correct, working CFAs caused all the CFA changes. In fact, the problem may occur on Qwest's side, as Ms. Johnson pointed out to Qwest in

[316] Exhibit Eschelon 1 (Starkey Direct), p. 132, line 3 – p. 134, line 7.

[317] Exhibit Eschelon 1 (Starkey Direct), p. 133, line 17 – p. 134, line 1.

[318] Qwest Exhibit 3R (Stewart Rebuttal), p. 14, line 1.

[319] Qwest Exhibit 3R (Stewart Rebuttal), p. 14, lines 2-4. Mr. Denney addresses Qwest's assertions regarding CFA management quality control in his discussion of Design Changes. Exhibit Eschelon 2R (Denney Rebuttal), p. 22, line 6 – p. 23, line 13.

[320] Qwest Exhibit 3R (Stewart Rebuttal), p. 14, lines 5-8.

[321] Qwest Exhibit 3R (Stewart Rebuttal), p. 13, line 26 – p. 14, line 11.

[322] Qwest Exhibit 3R (Stewart Rebuttal), p. 14, lines 9-10.

CMP.[323] Qwest nonetheless implemented this change over Eschelon's objection with no exception to the limitation of a single CFA change for when the problem is on Qwest's side.[324] If the new CFA fails to work, Qwest will place the order in a customer jeopardy ("CNR") status. No further action will be taken on Qwest's part until Qwest receives a valid supplemental request to change the Due Date and the CFA (If applicable).[325]

This is an example demonstrating that Qwest can and does make significant changes to the access to UNEs afforded CLECs through the CMP process – a process over which Qwest has control[326] – and, therefore, contract language is needed to provide certainty regarding UNE access for the term of the contract

[323] Exhibit Eschelon 2.4 (Denney), p. 34. Mr. Denney addresses Qwest's claims that CFA changes are the CLEC's fault in his testimony. Exhibit Eschelon 2R (Denney Rebuttal), p. 22, line 6 – p. 23, line 13.

[324] Exhibit Eschelon 2.4 (Denney), p. 33. Qwest claimed in CMP that CLECs could request that Qwest perform additional testing to avoid this result and, if the problem is on Qwest's side, "additional testing would not apply." *Id*. The Qwest representative appears to be referring to charges for additional testing. If so, she is incorrect. Eschelon conducts its own testing so generally does not order additional testing, which is supposed to be optional. Qwest's optional testing product is addressed in agreed upon language in Section 12.4.1.6. It provides that, regardless of which side the problem is on, optional testing charges apply. *Other charges*, such as maintenance of service charges, may not apply when the trouble is on Qwest's side, but optional testing charges will apply. See Section 12.4.1.5. Eschelon should not have to pay additional charges "so Qwest can find and fix their problems." Exhibit Eschelon 2.4 (Denney), p. 33. Regarding the optional testing product (which Qwest also implemented in CMP over CLEC objection), see Exhibit Eschelon 3.37 – 3.40 (Johnson).

[325] Exhibit Eschelon 2.4 (Denney), p. 20 (Qwest states: "If the CLEC requests the CFA be changed, it is the responsibility of the CLEC to make sure the new CFA works. Qwest will accept only one verbal CFA change on the Due Date. If the new CFA fails to work, Qwest will place the order in a customer jeopardy status. No further action will be taken on Qwest's part until Qwest receives a valid supplemental request to change the Due Date and the CFA (If applicable)."). Regarding CNR jeopardies and the three-day interval requirement for supplemental orders, see Ms. Johnson's testimony regarding Issues 12-71 – 12-73.

[326] *See e.g.*, Exhibit Eschelon 1 (Starkey Direct), p. 47, line 12 – p. 48, line 16 and Exhibit Eschelon 1R (Starkey Rebuttal), p. 55, line 3 – p. 56, line 8.

(unless amended). Eschelon's ICA language provides the needed clarity on this point. As indicated by the ALJs in Minnesota, "Qwest's proposed language is in fact more ambiguous than Eschelon's, because it would leave unanswered the question whether routine changes in the provision of a UNE would be priced at TELRIC or at some other 'applicable rate.'"[327] If Qwest intends to charge Eschelon non-TELRIC rates to access UNEs via these, or other, means (*e.g.*, Additional Dispatches, Trouble Isolation, Design Changes, Cancellations, Expedites, and Maintenance of Service), then it must request and gain approval from the Commission to do so,[328] and terms and conditions to that effect must be included in the companies' ICA. The Commission should not accept Qwest's invitation to leave the issue unresolved, allowing Qwest to later implement its view unilaterally using the ambiguity in its language to its own advantage.

VI. SUBJECT MATTER NO. 16. NETWORK MAINTENANCE AND MODERNIZATION

Issue Nos. 9-33 and 9-34: ICA Sections 9.1.9

Q. PLEASE SUMMARIZE THE NETWORK MAINTENANCE AND MODERNIZATION ISSUES (ISSUES 9-33 – 9-34).

[327] Exhibit Eschelon 2.24 (Denney), p. 32 [MN Arbitrators' Report, ¶131], as affirmed by the Minnesota PUC (Exhibit Eschelon 2.25).

[328] Exhibit Eschelon 2.24 (Denney), p. 33 [MN Arbitrators' Report, ¶134], as affirmed by the Minnesota PUC (Exhibit Eschelon 2.25) ("Qwest should not be permitted to charge non-TELRIC rates for these activities without the express approval of the Commission.")

A. These issues are summarized in my direct and rebuttal testimony.[329] Issue 9-33 addresses whether minor changes in transmission parameters include changes that adversely affect Eschelon's End User Customer's service (or are unacceptable changes, as proposed in Eschelon's alternative proposal) on more than a temporary or emergency basis [Issue 9-33] and Issue 9-34 addresses whether, in situations when Qwest makes changes that are specific to an Eschelon End User Customer, Qwest should include the circuit identification and Eschelon End User Customer address information in the notice (or, in the alternative, circuit ID information when that information is "readily available").

Issue 9-33

Q. IT APPEARS THAT QWEST'S PRIMARY COMPLAINT[330] ABOUT ESCHELON'S PROPOSAL ON ISSUE 9-33 IS THAT THE TERM

[329] Exhibit Eschelon 1 (Starkey Direct), pp. 143-145 and Exhibit Eschelon 1R (Starkey Rebuttal), p. 102, line 17 – p. 105, line 6.

[330] Qwest also claims that Eschelon's language inappropriately focuses on the service quality experienced by Eschelon's End User Customers. Qwest Exhibit 3R (Stewart Rebuttal), p. 20, lines 6-12. Eschelon already addressed this issue in its direct testimony (Exhibit Eschelon 1 (Starkey Direct), p. 151, line 19 – p. 152, line 5) and rebuttal testimony (Exhibit Eschelon 1R (Starkey Rebuttal), p. 110, line 14 – p. 111, line 2). I explained that the FCC rules contain the very same focus as contained in Eschelon's proposal (*i.e.*, "service quality perceived by the requesting telecommunications carrier's end-user customer.") 47 CFR § 51.316(b). Ms. Stewart also expresses concerns about Eschelon's use of the term "end user customer" at page 23 of her rebuttal testimony (Qwest Exhibit 3R (Stewart Rebuttal), p. 23, lines 1-20), which I already addressed at pages 114-116 of my rebuttal testimony (Exhibit Eschelon 1R (Starkey Rebuttal), p. 114, line 11 – p. 116, line 2). The language adopted in Minnesota and offered here also refers to changes that result "in the CLEC's End User Customer experiencing unacceptable changes in the transmission of voice or data"). Changes in formerly working service that are unacceptable to Eschelon's customer are generally unacceptable to Eschelon. To the extent that Qwest criticizes the DOC language adopted in Minnesota because it is unclear to whom it must be unacceptable, Eschelon has no objection to adding "to CLEC" after "unacceptable" in proposal #2 [as has been done in closed language in Section 9.21.2.1.5 ("unacceptable to CLEC")].

"ADVERSELY AFFECT" IS VAGUE AND NOT TIED TO INDUSTRY STANDARDS.[331] IS QWEST'S REASONING FLAWED?

A. Yes. Ms. Stewart claims that there is no legitimate need for Eschelon's "adversely affect" language because Qwest has already agreed that the changes would be "minor" as well as within industry standards.[332] Because of this, Qwest states that Eschelon should have no concern about whether Qwest's maintenance and modernization activities would adversely affect Eschelon's customers. However, if there was no concern in this regard, then Qwest should have no problem with agreeing to either Eschelon's first proposal or Eschelon's alternative proposal based on the Minnesota language ("unacceptable changes in the transmission of voice or data"). Qwest appears to agree with my point[333] that "minor" changes in transmission parameters should not adversely affect customers whose service is working fine.[334] And that being the case, Qwest should have no objection to making that point clear in the ICA. Qwest's objection to Eschelon's language suggests that Qwest believes that "minor" changes can adversely affect Eschelon's End User Customers. Qwest's argument that Eschelon should find assurance in this language[335] is circular because it assumes that the companies agree on which changes are "minor" when Qwest's

[331] Qwest Exhibit 3R (Stewart Rebuttal), p. 19, line 27 – p. 20, line 5.

[332] Qwest Exhibit 3R (Stewart Rebuttal), p. 19, lines 1-20.

[333] Exhibit Eschelon 1R (Starkey Rebuttal), p. 103, lines 5-11.

[334] Qwest Exhibit 3R (Stewart Rebuttal), p. 19, lines 13-20.

[335] Qwest Exhibit 3R (Stewart Rebuttal), p. 19, lines 16-20.

opposition to Eschelon's language suggests that non-temporary, non-emergency customer-impacting changes to formerly working service is "minor." Although Qwest claims that Eschelon's language will lead to disputes, Qwest's language is more likely to do so based on the known disagreement of the companies. Rather than build a known dispute into the contract, the Commission should adopt additional language providing that non-temporary, non-emergency customer-impacting transmission parameter changes to working service are not minor. Qwest claims that Eschelon's proposal "could have the undesirable effect of discouraging Qwest from carrying out network maintenance and modernization activities."[336] Labeling an unacceptable customer-impacting change to otherwise working service as "network maintenance and modernization" should not make that change acceptable or something to be encouraged. Eschelon's proposal for Section 9.1.9 encourages proper network maintenance and modernization, allows for minor changes to transmission parameters and even temporary service interruption, and "merely commits Qwest to taking action to restore transmission quality to that which existed before the network change."[337]

Eschelon is not arguing against the use of industry standards, and in fact, under Eschelon's proposal, industry standards would be met.[338] Eschelon's language would require the circuit to be both within industry standards and, when it is, also

[336] Qwest Exhibit 3R (Stewart Rebuttal), p. 20, lines 4-5.

[337] Exhibit Eschelon 2.24 (Denney), p. 34 [MN Arbitrators' Report ¶142].

[338] *See, e.g.,* closed Section 23 of the ICA ("Network Standards"). *See also,* ICA Sections 9.2.2.1, 9.2.6, 9.5.2, 9.6.4.5, 12.2.7.2 ("industry standard").

to work.[339] Again, Issue 9-33 addresses customers that have working service and should not have that working service interrupted through Qwest's network maintenance and modernization activities that change transmission parameters – activities that are by Qwest's own admission supposed to be "minor."

Q. MS. STEWART REFERS TO THE "HYPOTHETICAL" AND "EXAGGERATED"[340] NATURE OF YOUR CONCERNS RELATED TO QWEST PUTTING ESCHELON'S CUSTOMERS OUT OF SERVICE DURING MAINTENANCE OR MODERNIZATION ACTIVITIES. WOULD YOU LIKE TO RESPOND?

A. Yes. Ms. Stewart does not state that Qwest has never put Eschelon's customers out of service, rather she states that I did not identify any examples of this occurring and that she was personally not aware of any examples. In Ms. Stewart's testimony, she poses the following question: "Has Qwest ever put an Eschelon customer out of service because of network maintenance or modernization activities?"[341] However, she never answers this question with a "yes" or "no." Notably, Qwest has not claimed that it has never put Eschelon's

[339] *See* dB level example, Exhibit Eschelon 1 (Starkey Direct), pp. 155-159; Exhibit Eschelon 3.43 (Johnson). In that example, Qwest argued that it met its obligations if the customer was ***taken out of service*** if the change in transmission standards was somewhere within a range allowed by industry standards, even if the customer's service would have ***worked*** had Qwest used another setting also within the range allowed by industry standards. *See* Exhibit Eschelon 1 (Starkey Direct), p. 158, line 8 – p. 159, line 2. Regardless of whether any particular outage occurred from modernization activities in that particular example, Qwest revealed a problem with its interpretation of this language in that situation.

[340] Qwest Exhibit 3R (Stewart Rebuttal), p. 18, lines 27-29.

[341] Qwest Exhibit 3R (Stewart Rebuttal), p. 18, lines 21-23.

(or other CLECs') customers out of service with its network maintenance and modernization activities, and the dB loss example[342] shows that if Qwest has not already done so, the potential for Qwest doing so exists. The dB loss example also shows that it may be very difficult for Eschelon to determine whether it is Qwest's maintenance and modernization activities that cause service problems for its customers.[343] Eschelon's proposal is needed to make sure that any such adverse effect does not happen going forward.

Q. MS. STEWART CHARACTERIZES YOUR DESCRIPTION OF THE DB LOSS EXAMPLE AS "VAGUE"[344] AND CLAIMS THAT THIS SINGLE EXAMPLE "HARDLY JUSTIFIES THE CONCLUSION THAT

[342] Exhibit Eschelon 1 (Starkey Direct), pp. 155-159 and Exhibit Eschelon 3.43 (Johnson). Although Qwest may attempt to claim this example is limited to installation and not modernization activities, Qwest's own email shows this is not the case. *See* Email from Qwest – Senior Attorney (Joan Peterson) to Eschelon (including Ms. Johnson) dated 10/12/04. Exhibit Eschelon 3.43 (Johnson), p. 1. Though the particular problems Eschelon brought to Qwest's attention at that time arose during installation, in the course of investigating the cause of this problem, Qwest revealed its *maintenance and modernization policy* to proactively reset dB level at a default of -7.5 during repairs. Qwest's admission in this email (which is quoted at Exhibit Eschelon 1 (Starkey Direct), p. 157, lines 3-7) shows that Qwest instructed its technicians that, whenever performing work needed for repairs, they should also reset the dB level at -7.5 (not as part of a needed repair but rather as part of its modernization activities to move to a different default setting). It stands to reason, however, that if Eschelon had to obtain an adjustment in the dB level during installation to obtain an operational circuit, that a later action to return the dBs back to the former level during those modernization efforts would likely once again cause the circuit to become non-operational. Because Qwest provided no advance notice to Eschelon of the instruction that Qwest provided to its technicians in this regard, however, Eschelon would not have known, when troubles or repeat troubles occurred, that changes made per this instruction had been the cause.

[343] Qwest only revealed its new policy related to dB settings after Eschelon brought examples of service problems to Qwest's attention.

[344] Qwest Exhibit 3R (Stewart Rebuttal), p. 20, line 27.

COMPLIANCE WITH INDUSTRY STANDARDS IS IRRELEVANT…"[345]

WOULD YOU LIKE TO RESPOND?

A. Yes. Ms. Stewart's testimony is inaccurate. With respect to Ms. Stewart's claim that my description of the dB loss example is "vague," one only needs to review my description of the dB loss example[346] and the supporting documentation Eschelon provided as Exhibit Eschelon 3.43 to the direct testimony of Ms. Johnson, to understand that there is no substance to Ms. Stewart's complaint. For instance, Eschelon dedicated multiple pages of testimony to describing this example,[347] where Eschelon: (1) explained the Eschelon business issue behind the dB loss example,[348] (2) provided background information on the example,[349] (3) described the applicable standard,[350] (4) explained the source of the problem,[351] (5) explained how Eschelon learned of Qwest's network maintenance and modernization policy to reset dB settings,[352] (6) quoted directly from a Qwest

[345] Qwest Exhibit 3R (Stewart Rebuttal), p. 21, lines 15-16. See also, Qwest Exhibit 3R (Stewart Rebuttal), p. 21, lines 2-6 ("According to Mr. Starkey, the fact that the circuits allegedly were non-working, even though they met industry standards for db loss, demonstrates that industry standards are of limited utility in measuring performance. This claim ignores the long-standing importance of industry standards for establishing performance and quality expectations and for measuring performance.")

[346] Exhibit Eschelon 1 (Starkey Direct), pp. 155-159.

[347] Exhibit Eschelon 1 (Starkey Direct), pp. 155-159.

[348] Exhibit Eschelon 1 (Starkey Direct), p. 155, lines 4-9.

[349] Exhibit Eschelon 1 (Starkey Direct), pp. 155-159.

[350] Exhibit Eschelon 1 (Starkey Direct), p. 155, lines 14-15 and footnote 284.

[351] Exhibit Eschelon 1 (Starkey Direct), p. 157, lines 8-18.

[352] Exhibit Eschelon 1 (Starkey Direct), pp. 157-158.

email for the source of the network maintenance and modernization policy,[353] and (7) explained why the dB loss example supports Eschelon's proposal.[354] In addition, Eschelon provided a ten page exhibit (Exhibit Eschelon 3.43) consisting of emails and a letter between Qwest and Eschelon addressing the dB loss problem. These are accurate and correct copies of the correspondence, and they show that the description and quotes related to the dB loss example in my testimony are accurate. Furthermore, Eschelon provided the facts of this example to Qwest in ICA negotiations. I don't know what else Eschelon could have provided to clear this issue up for Ms. Stewart, and she does not point to any information that Eschelon omitted from its testimony and exhibits related to the dB loss example. The bottom line is that this example shows that Qwest will defend a non-working circuit as being acceptable, within transmission limits, and meeting the ICA, even when the circuit does not work – when another setting also within industry standard would both meet the standard and work.

Q. DID YOU CONCLUDE THAT COMPLIANCE WITH INDUSTRY STANDARDS IS "IRRELEVANT" OR OF "LIMITED UTILITY," AS MS. STEWART CLAIMS?[355]

A. No. My conclusion is that Qwest should provide circuits to Eschelon that are both within industry standards ***and*** work,[356] and the ICA should recognize this

[353] Exhibit Eschelon 1 (Starkey Direct), p. 157, lines 3-7, citing Qwest email to Eschelon 10/21/04. *See also* Exhibit Eschelon 3.43 (Johnson), p. 1.

[354] Exhibit Eschelon 1 (Starkey Direct), p. 158, line 8 – p. 159, line 2.

[355] Qwest Exhibit 3R (Stewart Rebuttal), p. 21, line 4 and line 16.

point. Obviously, industry standards are important – primarily because they result in working service to customers – and Eschelon is neither attempting to ignore those standards,[357] nor asking Qwest to provide service outside of those standards.[358]

In the dB loss example, the applicable industry standard was a range of between -16.5 and 0,[359] not a specific number (-7.5, for example) – because service will work somewhere within that range, but, based on certain factors, may not work at all points within that range.[360] It was Qwest's network maintenance and modernization policy[361] that pegged the number at -7.5 to move "the network over time to a default setting of -7.5."[362] However, the -7.5 default selected by Qwest is not the industry standard, and it results in loops not working in some instances. Therefore, it was Qwest who was ignoring the industry standard range through its network maintenance and modernization policy.

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[356] Exhibit Eschelon 1 (Starkey Direct), p. 159, lines 10-21. The point is that the circuit should both meet industry standards and work.

[357] *See, e.g.,* closed Section 23 of the ICA ("Network Standards"). *See also,* ICA Sections 9.2.2.1, 9.2.6, 9.5.2, 9.6.4.5, 12.2.7.2 ("industry standard").

[358] Exhibit Eschelon 1 (Starkey Direct), p. 159, lines 13-16.

[359] Exhibit Eschelon 1 (Starkey Direct), p. 155, lines 14-15 and footnote 284.

[360] Exhibit Eschelon 1 (Starkey Direct), p. 155, line 14 – p. 156, line 7.

[361] Eschelon addressed Ms. Stewart's claim that this is an installation issue and not a network maintenance and modernization issue (Qwest Exhibit 3R (Stewart Rebuttal), p. 21, lines 6-10). *See* Exhibit Eschelon 1 (Starkey Direct), p. 158, lines 2-7.

[362] Exhibit Eschelon 1 (Starkey Direct), p. 157, lines 3-7, citing Qwest email to Eschelon 10/21/04. *See also* Exhibit Eschelon 3.43 (Johnson), p. 1.

Q. YOU STATE THAT ESCHELON'S PROPOSAL #2 FOR ISSUE 9-33 IS BASED ON THE MINNESOTA DOC'S PROPOSAL THAT WAS ADOPTED BY THE MINNESOTA COMMISSION – A RECOMMENDATION THAT MS. STEWART HAS CHARACTERIZED IN HER REBUTTAL TESTIMONY AS "VAGUE."[363] WOULD YOU LIKE TO RESPOND?

A. Yes. As explained in my direct testimony, the Minnesota Commission adopted this language for Issue 9-33 and rejected the same concerns Ms. Stewart has raised here.[364] Qwest has proposed no substitute for either "adversely affect" or "unacceptable changes" that it would accept. It simply criticizes the terms as being undefined, even though many terms in the contract[365] – including these same words[366] – are used in the contract without separate definitions. It is easier to advocate silence than offer a workable solution. Silence, however, does nothing to address the business need to ensure Utah customers continue receiving working service within industry standards. The ICA needs to articulate a standard

[363] Qwest Exhibit 3R (Stewart Rebuttal), p. 19, line 28 and p. 20, line 2.

[364] Exhibit Eschelon 1 (Starkey Direct), p. 148, line 16 – p. 149, line 1 and Exhibit Eschelon 2.25 (Denney), p. 22 [MN PUC Arbitration Order, p. 22, ¶1].

[365] *See, e.g.*, closed language in ICA Section 9.2.2.1 ("Unbundled Loops shall be provisioned in accordance with Exhibit C and the performance metrics set forth in Section 20 and with a ***minimum of service disruption***") (emphasis added).

[366] *See* closed language in ICA Section 9.21.2.1.5 ("If CLEC requests conditioning and such conditioning significantly degrades the voice services on the Loop to the point that it is ***unacceptable*** to CLEC, CLEC shall pay the conditioning rate set forth in Exhibit A to recondition the Loop.") (emphasis added); ICA Section 10.2.4.2 ("Qwest queries shall not ***adversely affect*** the quality of service to CLEC's Customers or End User Customers as compared to the service Qwest provides its own Customers and End User Customers") (emphasis added).

on this issue and, if a dispute later occurs with respect to the meaning of that standard, the dispute resolution provisions of the ICA are available to obtain further definition, just as they are available for other terms used in the contract without separate definitions. Eschelon has offered several ways to resolve these issues, but nothing – not even a solution acceptable to the DOC staff, ALJs, and commission in Minnesota – satisfies Qwest.

Q. MS. STEWART DISCUSSES AN EXAMPLE OF AN AREA CODE SPLIT AND HYPOTHESIZES ABOUT THE EFFECT THAT ESCHELON'S PROPOSED "UNACCEPTABLE CHANGE"[367] LANGUAGE FOR ISSUE 9-33 COULD HAVE. IS MS. STEWART'S EXAMPLE ON POINT?

A. No. Ms. Stewart's example is based on a flawed premise. For instance, Ms. Stewart testifies: "For example, what if an area code split discussed below is an 'unacceptable change' for an end user customer?"[368] Then, Ms. Stewart goes on to describe problems that Qwest would allegedly experience because of Eschelon's language if the area code split is an "unacceptable change."[369] However, this is another example in which Qwest ignores Eschelon's proposed ICA language. First of all, an area code split is not governed by the language in dispute under Issue 9-33, and therefore, the question Ms. Stewart poses (quoted above) does not apply here. Eschelon's proposal #2 states in part that "*If such*

[367] Qwest Exhibit 3R (Stewart Rebuttal), p. 22.

[368] Qwest Exhibit 3R (Stewart Rebuttal), p. 22, lines 16-17.

[369] Qwest Exhibit 3R (Stewart Rebuttal), p. 22, lines 16-17.

changes result in the CLEC's End User Customer experiencing unacceptable changes in the transmission of voice or data…" (emphasis added) The "such changes" referred to in Eschelon's Proposal #2 refers to "minor changes to transmission parameters" referred to in closed language in the previous sentence of 9.1.9. Also, closed language in 9.1.9 states that "Changes that affect network interoperability include changes to local dialing from seven (7) to ten (10) digit, area code splits, and new area code implementation." Since the changes referenced in Eschelon's proposed language for Issue 9-33 are "minor changes to transmission parameters," and because area code splits are not minor changes to transmission parameters (but are instead "changes that affect network interoperability"), Ms. Stewart's area code split example is not applicable to Eschelon's proposed language for Issue 9-33.

Ms. Stewart's concern about providing a list of customers affected by area code splits to Eschelon (presumably in response to Eschelon's proposal for Issue 9-34) is similarly flawed. Eschelon's proposal for Issue 9-34 applies to changes that "are specific to a CLEC End User Customer," and an area code split is not a change that is specific to a CLEC End User Customer.[370] As a result, an area code split is not applicable to the narrow situation accounted for in Eschelon's proposal for Issue 9-34.

[370] Exhibit Eschelon 1 (Starkey Direct), p. 165, line 5 – p. 166, line 3.

Issue 9-34

Q. MS. STEWART STATES THAT "LOCATION" REFERRED TO BY THE FCC IN RULE 51.327 MEANS THE PLACE IN THE NETWORK WHERE THE CHANGE WILL TAKE PLACE RATHER THAN THE CUSTOMER'S PREMISES.[371] DO YOU READ RULE 51.327 THE SAME WAY?

A. No. There are at least two points to be made here. First of all, Eschelon's language only requires Circuit ID (and, for proposal #1, customer address information) when the change is "specific to a CLEC End User Customer." As a result, the location at which the change takes place should identify the location of the Eschelon End User Customer to be affected. If a change is not specific to an Eschelon End User Customer, as in the case of a dialing plan change for example, the circuit ID and customer address information would not be needed to determine the "location" at which the changes are taking place, and would not be required under Eschelon's proposal. Ms. Stewart also raises the issue of an area code split which, as Eschelon already explained, is a red herring and not a change "specific to an Eschelon End User Customer" that would be covered under Issue 9-34.[372] Ms. Stewart ignores that Eschelon's requirement would only apply in narrow circumstances. As with the terms "adversely affect" and "unacceptable changes"

[371] Qwest Exhibit 3R (Stewart Rebuttal), p. 24, lines 14-19.

[372] Exhibit Eschelon 1R (Starkey Rebuttal), p. 116, line 8 – p. 117, line 4. *See also* Exhibit Eschelon 1 (Starkey Direct), p. 165, line 5 – p. 166, line 3.

in Issue 9-33, Qwest merely advocates silence (*i.e.*, deletion) instead of offering any constructive alternative language in lieu of "specific to an Eschelon End User Customer" to address the business need in Issue 9-34. Eschelon's previous proposal did not include this phrase, but Eschelon offered it specifically in response to Qwest's claim that the request for circuit ID information was otherwise overbroad and burdensome. Eschelon then again modified its proposal to offer in its proposal #2 the Minnesota DOC's further narrowing of the language by deleting the reference to customer address and inserting "if readily available" in this clause. Eschelon's modest proposal should be adopted to help ensure that Eschelon customers in Utah with working service that may be adversely impacted by a Qwest network change may have their service restored as quickly as possible because Eschelon will have the information necessary to identify the cause of the problem to get it corrected.

Second, FCC Rule 51.327 is not meant to be all-inclusive ("Public notice of planned network changes must, at a minimum, include…").[373] As indicated by the Minnesota ALJs: "The FCC rules do not set out 'maximum' requirements that cannot be surpassed."[374] Therefore, just because Rule 51.327 does not expressly say that change notices that are specific to an End User Customer must include Circuit ID and customer address information, this does not mean that Qwest should not provide it. The FCC obviously included the words "at a

[373] Exhibit Eschelon 1 (Starkey Direct), p. 159, lines 4-8.

[374] Exhibit Eschelon 2.24 (Denney), pp. 36-37 [MN Arbitrators Report ¶153].

minimum" to allow supplementing the information to be required for these notices. And I have already shown that requiring this information in these narrow circumstances gives meaning to the FCC's rules.[375] So, contrary to Ms. Stewart's suggestion,[376] I am not reading anything into the FCC's rule that is not there.

Q. MS. STEWART CLAIMS THAT ESCHELON'S PROPOSAL WOULD "FORCE QWEST TO RESEARCH THIS INFORMATION – WHICH WOULD HAVE TO BE DONE MANUALLY…"[377] IS MS. STEWART'S CLAIM SUPPORTED BY THE RECORD?

A. No. I provided Exhibit Eschelon 1.3 (Starkey), which shows that Qwest already collects this information (both circuit ID and customer address information) for CLEC circuits that are impacted by network changes. This means that Eschelon's proposal would not require any work of Qwest because Qwest is already collecting the information. Qwest would only need to share this information with Eschelon – as it did (apparently in error)[378] in the case of Exhibit Eschelon 1.3 (Starkey).[379] The Minnesota Arbitrators' Report found that "if this information is readily available, Qwest should provide it."[380] Exhibit Eschelon 1.3 (Starkey) shows that this information is readily available to Qwest, so Qwest should provide

[375] Exhibit Eschelon 1 (Starkey Direct), p. 160, line 9 – p. 161, line 5.

[376] Qwest Exhibit 3R (Stewart Rebuttal), p. 24-25.

[377] Qwest Exhibit 3R (Stewart Rebuttal), p. 25, lines 2-3.

[378] Exhibit Eschelon 1.3 (Starkey), p. 3.

[379] Exhibit Eschelon 1 (Starkey Direct), p. 164, line 16 – p. 165, line 2, citing Section 251 of the Act and 47 CFR § 51.313(b).

[380] Exhibit Eschelon 2.24 (Denney), pp. 36-37 [MN Arbitrators' Report, ¶153].

it to Eschelon. Eschelon's proposal #2, based on the language adopted in Minnesota, specifically provides that Qwest will provide "circuit identification, if readily available."[381] Although Qwest may argue that Eschelon's proposal shifts the burden of determining circuit IDs from Eschelon to Qwest,[382] the language in Eschelon proposal #2 indicates, this information would be provided "if readily available." If the information is readily available, as Exhibit Eschelon 1.3 (Starkey) indicates, then there is no burden being imposed on Qwest – rather it's a matter of passing this information along to Eschelon.

VII. SUBJECT MATTER NO. 18. CONVERSIONS

Issue Nos. 9-43 and 9-44 and subparts: ICA Sections 9.1.15.2.3; 9.1.15.3 and subparts; 9.1.15.3.1; 9.1.15.3.1.1; 9.1.15.3.1.2

Q. ISSUES 9-43 AND 9-44 AND SUBPARTS RELATE TO CONVERSIONS FROM UNES TO ALTERNATIVE/ANALOGOUS SERVICES DUE TO A FINDING OF NON-IMPAIRMENT. SHOULD THESE CONVERSIONS INVOLVE PHYSICAL WORK THAT COULD NEGATIVELY AFFECT ESCHELON'S BUSINESS AND END USER CUSTOMERS?

A. No. According to the FCC's rules and orders, conversions should be "seamless" to the End User Customer, should amount to largely a billing function, and

[381] The term "readily available" is another term that Qwest has criticized as being undefined, but it is already used in closed language in the ICA without separate definition. *See* ICA Section 12.4.0 ("This number shall give access to the location where records are normally located and where current status reports on any trouble reports are ***readily available***.") (emphasis added).

[382] *See, e.g.*, Stewart Arizona Rebuttal Testimony (ACC Docket Nos. T-03406A-06-0572/T-01051B-06-0572, 2/9/07), p. 28, lines 12-14.

should, therefore, not negatively affect Eschelon's business or the service quality perceived by Eschelon's End User Customers. However, Qwest ignores the FCC's decisions on conversions, and instead asks the Commission to exclude language from the ICA on conversions so that Qwest can impose its onerous and potentially service-affecting APOT "procedure" for conversions that Qwest developed unilaterally outside of negotiation/arbitration and outside of CMP. Qwest's non-proposal should be rejected.

Rather, the ICA language should preserve the FCC's conclusions regarding conversions, and should ensure that service quality to Eschelon's End User Customers is not disrupted – especially since a "conversion" should be a simple records change and Qwest's customers do not face any risk associated with conversions. Eschelon's proposal for Issues 9-43 and 9-44 and subparts accomplishes this objective by keeping circuit IDs assigned to the facility the same during conversions (Issue 9-43)[383] and identifying a conversion as a billing records change, just as the FCC has referred to it (Issues 9-44 and subparts). In

[383] In its interstate access tariff, Qwest distinguishes an administrative change ("the change is administrative only in nature") from a change that "involves actual physical change to the service." See Qwest Tariff F.C.C. No. 1, Section 7.1.1.A.2.c.3, Original Page 7-22. Qwest states that "Change of customer circuit identification" is an "administrative change." *Id*. at Original Page 7-23. Qwest does not identify circuit ID changes with the other changes requiring actual physical change to the service. *Id*. at Original Pages 7-23 – 7-24. The interstate access tariff provides that circuit ID changes will be made at no charge to the Qwest retail customer. *Id*. at Original Pages 7-22 – 7-23.

addition to discussing these issues in my previous testimony,[384] I also discuss aspects of this issue in the Secret TRRO PCAT example.

Q. DOES QWEST ADDRESS ISSUES 9-43/9-44 (CONVERSIONS) IN ITS REBUTTAL TESTIMONY?

A. No. Even more clearly than in her direct testimony,[385] Ms. Million claims that "Conversions (Issues 9-43 and 9-44)" are "settled" pursuant to the Settlement Agreement filed in the Wire Center Docket (Docket No. 06-049-40).[386] As explained on pages 64-69 of Mr. Denney's rebuttal testimony, as well as in my

[384] Exhibit Eschelon 1 (Starkey Direct), pp. 167-189. Ms. Million has testified that repricing for QPP is different than repricing facilities that were UNEs prior to a conversion. Million Oregon Rebuttal Testimony (ARB 775; 5/25/07), Qwest Exhibit 39, pp. 15-16. The fact of the matter is that in the QPP scenario, Qwest is no longer required to provide UNE-P at TELRIC rates and has effectuated this regulatory change through a price change via USOCs to bill the difference between the UNE rates associated with UNE-P to new non-UNE rates associated with QPP. This is the same thing that is occurring in a conversion – that is, if Qwest is no longer required to provide a UNE loop at TELRIC rates (because of a finding of non-impairment), a price change must be effectuated to change from the non-UNE rates associated with the UNE loop to non-UNE rates associated with the alternative/analogous service. According to Ms. Million's account, Qwest chose to "voluntarily" create a new product QPP in order to effectuate the regulatory change associated with UNE-P, which allowed these price changes to take place via USOCs (Million Oregon Rebuttal Testimony, ARB 775, Qwest/39, p. 15). This "voluntary" decision was made without any FCC rules or orders requiring Qwest to create the QPP product. However, when it comes to conversions, Qwest ignores clear FCC rules and orders requiring conversions to be effectuated via price changes, and instead of working with CLECs to convert circuits found to be non-impaired (as Qwest claims it did in the case of UNE-P/QPP) in a seamless fashion, attempts to make conversions manually-intensive and costly. The fact that Qwest has effectuated price changes for QPP via USOCs and the fact that Qwest actually performed conversions in the past without changing circuit IDs shows that Qwest can, in fact, convert circuits without changing circuit IDs, but has simply chosen not to, opting instead to unilaterally create a conversion "procedure" outside of ICA negotiation/arbitration and outside of CMP that does not comply with the FCC's rules.

[385] Qwest Exhibit 4 (Million Direct), p. 6, lines 1 and 12-21.

[386] Qwest Exhibit 4R (Million Rebuttal), p.2, lines 8-12; see also Qwest Exhibit 4R (Million Rebuttal), p. 2, lines 13-14 ["…assuming approval of that Agreement by the Commission, there should be no further need to address the rate for conversions in this arbitration."].

own rebuttal testimony,[387] that is clearly not the case. Issues 9-43 and 9-44 (Conversions) are not settled and are to be resolved as part of this arbitration. Specifically, Eschelon continues to ask the Commission to adopt its proposed language for ICA Sections 9.1.15.2.3 and 9.1.15.3 and subparts, which appears on pages 173-174 of my direct testimony.[388] Absent Eschelon's proposed language for Issues 9-43/9-44, there will be no language in the ICA describing how these conversions should be made, which leaves the door open for Qwest to impose manually-intensive, potentially disruptive procedures.[389] There is a "need"[390] for the Commission to adopt Eschelon's proposed language for Issues 9-43/9-44 to avoid putting Eschelon's customers at risk of disruption – a risk that Qwest and its customers do not similarly face.[391]

Ms. Million also testifies regarding Issues 9-43 and 9-44 that, if the settlement agreement is not approved,[392] "the parties have requested that they be permitted to

[387] Exhibit Eschelon 1R (Starkey Rebuttal), pp. 120-122.

[388] This language does not set forth the charge for conversions. The charge for conversions (Issue 9-40) is addressed in ICA Sections 9.1.13.5.2, 9.1.14.6, and 9.1.15.2.1. See Joint Disputed Issues Matrix (Exhibit 3 to Arbitration Petition), pp. 76-77. See also Issues by Subject Matter List, p. 4. [identifying Issue 9-40 "NRCs for Conversion" as part of subject matter 17 ("wire center" issues) and Issues 9-43 and 9-44 as subject matter 18 ("Conversions")]. (The Issues by Subject Matter List is both Exhibit 2 to the Arbitration Petition and Exhibit 1.2 to my direct testimony.) Also, *compare* Qwest's Response to Petition, p. 23, lines 10-16 (wire center issues) *with* Qwest's Response to Petition, p. 23, line 17 – p. 25, line 7 (conversions).

[389] Qwest's APOT procedure for conversions is discussed in more detail at Exhibit Eschelon 1 (Starkey Direct), pp. 168-173.

[390] Qwest Exhibit 4R (Million Rebuttal), p. 2, lines 13-14 ["…there should be no further need to address…"]

[391] See, Exhibit Eschelon 1 (Starkey Direct), p. 167, line 16 – p. 168, line 2.

[392] Since then, the Commission approved the settlement agreement as between Qwest and the Joint CLECs, including Eschelon. See Report and Order Approving Settlement Agreement, Docket No.

address this issue at a later time in the proceeding."[393] This is surprising testimony, given that the joint request to which she refers is readily available to Ms. Million, as it is Exhibit 2.30 to the direct testimony of Mr. Denney. On its face, Exhibit 2.30 shows the parties' June 20, 2007 request was made only "in connection with Issue Nos. 9-37 – 9-42."[394] On July 19, 2007, Mr. Devaney (counsel for Qwest) asked Eschelon a question that Eschelon interpreted as relating to the status of Issue 9-43. Eschelon responded, regarding Issue 9-43, "No, it is not closed." Mr. Devaney clarified that his "actual question" related to the conversion charge. On July 19, 2007, Eschelon responded: "It appears you are asking about Issue 9-40 (which, per the Issues by Subject Matter List, is described as "**Issue 9-40: NRCs for Conversion** – Sections 9.1.13.5.2, 9.1.14.6, 9.1.15.2.1"). If so, Issue 9-40 is subject to the enclosed Motion (which was granted). Therefore, there won't be testimony on Issue 9-40 in this round. If you still have additional questions, please let me know (and please provide the Issue number)."[395] Qwest did not ask additional questions or otherwise respond. More

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06-049-40 (July 31, 2007). Although paragraph VII(A)(1)(b) of the settlement agreement allows Eschelon ten business days after approval of the settlement agreement to update the multi-state negotiations draft to add the language in Attachment C, Eschelon updated it and provided it to Qwest within a day (on August 1, 2007), given the upcoming surrebuttal testimony deadline in this case.

[393] Qwest Exhibit 4R (Million Rebuttal), p.2, lines 14-16.

[394] Exhibit Eschelon 2.30 (Joint Motion), p. 1. The issue numbers (9-37 – 9-42) are set forth eight times in the Joint Motion. *See id*. pp. 1-4.

[395] July 19, 2007, email exchanges between Eschelon (copied to Mr. Denney) and Qwest (Mr. Devaney and Mr. Topp). The referenced "enclosed Motion" was the Washington version of the Joint Motion, similar to the Utah joint motion in Eschelon Exhibit 2.30. In Washington, the ALJ granted that motion.

than a week later (on July 27, 2007), however, Qwest filed the rebuttal testimony of Ms. Million in this case in which she testifies that "Conversions (Issues 9-43 and 9-44)" are "settled"[396] – with no mention of the fact that Qwest knows Eschelon does not agree. Apparently, it is Qwest's new arbitration position that, unbeknownst to Eschelon, the settlement agreement resolved Issues 9-43 and 9-44. Again, as explained on pages 64-69 of Mr. Denney's rebuttal testimony, as well as in my own rebuttal testimony,[397] that is clearly not the case. Particularly given the July 19, 2007 email exchange showing that Eschelon disagrees with Qwest's new claim, Qwest should have provided its alleged basis for its position in rebuttal testimony. If it does so for the first time in surrebuttal testimony, Eschelon will be deprived of an opportunity to respond.

VIII. SUBJECT MATTER NO. 24. LOOP-TRANSPORT COMBINATIONS

Issue No. 9-55: ICA Sections 9.23.4; 9.23.4.4; 9.23.4.4.1; 9.23.4.5; 9.23.4.6; 9.23.4.5.4

Q. PLEASE SUMMARIZE ISSUE 9-55 RELATING TO LOOP TRANSPORT COMBINATIONS.

A. At least one component of a Loop Transport Combination is a UNE, and as a result, Loop Transport Combinations should be referenced in Section 9 of the ICA (UNEs). This is important so that the ICA recognizes that the UNE component of

[396] Qwest Exhibit 4R (Million Rebuttal), p.2, lines 8-12.

[397] Exhibit Eschelon 1R (Starkey Rebuttal), pp. 120-122.

the Loop Transport Combination is governed by the ICA (and Section 9 of the ICA) even when that UNE is commingled with a non-UNE component. At the same time, the ICA is very clear about how non-UNE components of a Loop Transport combination are to be treated. To this end, Eschelon proposes to define the term Loop-Transport Combinations in the ICA and refer to Loop Transport Combinations in Section 9 (UNEs). This proposed umbrella definition is in addition to the individual definitions also included in Section 9.23.4 of the ICA, in closed language,[398] for "EEL," "Commingled EEL," and "High Capacity EEL." Eschelon's agreement to, and use of, these individual terms in the ICA shows that Ms. Stewart's claim that Eschelon is attempting to "eliminate the distinctions between the product offerings and commingled arrangement"[399] is untrue. Eschelon has committed to those distinctions in the ICA itself.

In Eschelon's proposal, the umbrella term is used when the different combinations are referenced collectively, and the individual terms are used when a specific type of Loop Transport Combination is intended. Just as the FCC has used these individual terms when referring to a specific combination and the umbrella term when referring to more than one, therefore, so does Eschelon in its language.[400] Qwest has not indicated that any one of these terms is used incorrectly in the ICA

[398] The only open issue in these definitions is the capitalization of Loop Transport Combination. As Eschelon's proposal contains a definition for Loop Transport Combination in Section 9.23.4, the term would then be capitalized in later references.

[399] Qwest Exhibit 3R (Stewart Rebuttal), p. 33, lines 26-27.

[400] *TRO*, ¶¶575 & 576.

to refer to the wrong combination.[401] Instead, Qwest proposes to exclude these references from the ICA and limit references in Section 9 to only one type of Loop Transport Combinations – EELs. A problem with Qwest's less clear proposal is that it raises the question of how UNEs in a commingled Loop Transport Combination are to be treated and leaves the door open for Qwest to subject these UNEs to terms and conditions of its tariffs. At some point, the products need to be discussed together, to know how each one operates and is differentiated from the other, and Eschelon's proposal does that in the most clear and efficient manner.

Another problem with Qwest's proposal is that it simply does not reflect the manner in which closed language in the ICA is already organized. The Service Eligibility Criteria in Section 9 ("UNEs"), for example, apply to both UNE EELs and Commingled EELs.[402] Qwest's claim that Section 9 cannot contain commingling terms because commingling is addressed in Section 24[403] simply does not reflect the organization of the contract. Just as Sections 2.0 ("Interpretation and Construction") and Section 5.0 ("Terms and Conditions") contain general terms about issues that are later addressed in more detail in other

[401] If, for example, Qwest had indicated that the collective term was used in a particular situation when one of the individual terms was intended, the companies could have negotiated that issue to determine if they agree that the terminology is correct. Qwest has not identified any such mis-application of the collective term.

[402] Closed language in ICA Section 9.23.4.1 ("Service Eligibility for High Capacity EELs") and 9.23.4 (definition of "High Capacity EEL" to include "either EEL or Commingled EEL").

[403] Qwest Exhibit 3R (Stewart Rebuttal), p. 33, lines 4-15.

sections of the ICA, Section 24 ("Commingling") contains general commingling terms, while specific provisions in other parts of the contract address specific commingling issues. Efficiencies were gained by placing commingling general terms together in one section, rather than repeating terms in different places in the ICA, but Section 24 does not eliminate the need to sometimes address commingling within the discussion of UNEs, as Section 9.23.4.1 shows. The companies changed the title of Section 9.23 from the former SGAT title ("Unbundled Network Elements Combinations (UNE Combinations))" to "Combinations" – in closed language – to reflect that Section 9.23 contains both UNE Combinations and other combinations (such as the loop and transport combination in a commingled EEL in Section 9.23.4.1). Although the different combinations are addressed together, however, Eschelon's proposed language makes clear that this does not subject non-UNE components of a commingled arrangement to the terms of the Agreement:

> Loop-Transport Combination – For purposes of this Agreement, "Loop-Transport Combination" is a Loop in combination, or Commingled, with a Dedicated Transport facility or service (with or without multiplexing capabilities), together with any facilities, equipment, or functions necessary to combine those facilities. At least as of the Effective Date of this Agreement "Loop-Transport Combination" is not the name of a particular Qwest product. "Loop-Transport Combination" includes Enhanced Extended Links ("EELs"), Commingled EELs, and High Capacity EELs. If no component of the Loop-transport Combination is a UNE, however, the Loop-Transport Combination is not addressed in this Agreement. The UNE components of any Loop-Transport Combinations are governed by this Agreement and the other component(s) of any Loop-Transport Combinations are governed

by the terms of an alternative service arrangement, as further described in Section 24.1.2.1.[404]

Q. QWEST CLAIMS THAT CONFUSION WOULD RESULT BY DEFINING THE TERM "LOOP-TRANSPORT" TO INCLUDE THREE OFFERINGS.[405] IS QWEST'S PURPORTED CONCERN ABOUT CONFUSION WARRANTED?

A. No. I addressed this issue in my rebuttal testimony.[406] Though Ms. Stewart refers to "confusion" no fewer than four[407] times in her rebuttal testimony as it relates to Eschelon's proposal for Issue 9-55, she provides no substance to back up these claims and ignores Eschelon's language that clearly explains how each component of a Loop Transport combination will be treated.[408]

Eschelon added to its language for Section 9.23.4 a reference to Section 24.1.2.1 of the ICA that addresses how non-UNE portions of a commingled Loop Transport combination are to be treated and an express statement that non-UNEs are governed by the alternative service arrangement. ["The UNE components of any Loop-Transport Combinations are governed by this Agreement and the other component(s) of any Loop-Transport Combinations are governed by the terms of

[404] The latter phrase was modified previously to address Qwest's stated concerns. *See* Exhibit Eschelon 1R (Starkey Rebuttal), p. 129, lines 3-15 and p. 135, lines 18-22.

[405] Qwest Exhibit 3R (Stewart Rebuttal), p. 34, line 4.

[406] Exhibit Eschelon 1R (Starkey Rebuttal), p. 135, line 3 – p. 136, line 12.

[407] Qwest Exhibit 3R (Stewart Rebuttal), p. 34, line 4, line 15, p. 35, line 22, and p. 38, line 7.

[408] Exhibit Eschelon 1R (Starkey Rebuttal), p. 135, lines 13-22.

an alternative service arrangement, as further described in Section 24.1.2.1"] This is in addition to closed language in Section 24.1.2.1 that makes clear that non-UNE components of any commingled arrangement are "governed by the terms of the alternative service arrangement…"[409] Even without the added clarification in Eschelon's proposed 9.23.4, Qwest's concern that Eschelon's language would govern non-UNEs in Section 9 would be unjustified because 24.1.2.1 explains precisely how non-UNEs in a commingled arrangement are to be treated. But now that Eschelon's proposal for 9.23.4 is even clearer on the matter, Qwest certainly cannot convincingly argue that Eschelon's language for 9.23.4 would govern non-UNEs in Section 9 of the ICA.

Eschelon's language in 9.23.4 says three things about components of a Loop Transport Combination: (1) if no component is a UNE, the ICA does not govern the combination, (2) UNE components of a Loop-Transport combination are governed by the ICA, and (3) non-UNE components are governed by the terms of an alternative service arrangement, as further described in 24.1.2.1 (which explains that non-UNE components are governed by the alternative service arrangement, and not the ICA). Nowhere in 9.23.4 does it say that the ICA governs non-UNE components, nor does Eschelon's proposed language,

[409] The Minnesota Arbitrators' Report concludes that Qwest's language should be adopted for Issue 9-55 (Exhibit Eschelon 2.24 (Denney), pp. 42-43 (MN Arbitrators' Report, ¶176)) because Eschelon's "language would permit the inference that if any part of a combination is a UNE, the entire combination would be covered by the ICA." However, Eschelon added the reference to Section 24 in its proposed Section 9.23.4 to address this very issue. Based on this clarification, Eschelon's language cannot be read to imply that the entire commingled circuit would be governed by Section 9.23.4.

reasonably read, imply that is the case – especially with the added reference to Section 24.1.2.1. As a result, there is no basis for Ms. Stewart's concerns about having the entire commingled arrangement (not just the UNE circuit) governed by the ICA, nor is there any basis for Ms. Stewart's claim that Eschelon's proposal "goes way beyond, and is not consistent with, Eschelon's stated objectives…"[410] According to Ms. Stewart, Eschelon's stated objective is to ensure that only the UNE components of the Loop Transport Combination are subject to the ICA,[411] and that is precisely what Eschelon's language for Section 9.23.4 does.

Q. MS. STEWART EXPRESSES CONCERNS ABOUT "HAVING THE ENTIRE COMMINGLED ARRANGEMENT (NOT JUST THE UNE CIRCUIT) GOVERNED BY THE ICA UNDER ESCHELON'S LOOP TRANSPORT UMBRELLA TERM."[412] ARE MS. STEWART'S CONCERNS WARRANTED?

A. No. As I explain above, Eschelon's proposal clearly distinguishes between UNE and non-UNE components of a Loop Transport Combination and there is nothing in Eschelon's language that could be read as an attempt to govern non-UNEs by Section 9 (UNEs) of the ICA. Eschelon's language in Section 9.23.4 contains an express statement that non-UNEs are governed by the terms of an alternative service arrangement and a cross reference to Section 24.1.2.1, which expressly

[410] Qwest Exhibit 3R (Stewart Rebuttal), p. 35, lines 3-4.

[411] Qwest Exhibit 3R (Stewart Rebuttal), p. 35, lines 3-8.

[412] Qwest Exhibit 3R (Stewart Rebuttal), p. 36, lines 12-15.

states in closed language that the non-UNE component is "governed by the terms of the alternative service arrangement pursuant to which that component is offered (e.g., Qwest's applicable Tariffs, price lists, catalogs, or commercial agreements)." Given that Eschelon's proposal would not govern non-UNEs by the ICA, the concerns that Ms. Stewart raises[413] are actually non-issues.[414]

Q. MS. STEWART STATES THAT YOU HAVE PROVIDED NO SUPPORT FOR YOUR CLAIM THAT QWEST HAS ATTEMPTED TO HAVE ACCESS TO UNES DICTATED BY ITS ACCESS TARIFFS.[415] IS THIS TRUE?

A. No. I addressed Ms. Stewart's claim in my direct and rebuttal testimony.[416] One example is Qwest's attempt to apply tariff rates to activities related to nondiscriminatory access to UNEs.[417] Another example is Mr. Denney's discussion of intervals for commingled arrangements under Issue 9-58(e).[418] I also provided an example of Qwest attempting to subject UNEs to other non-ICA,

[413] Qwest Exhibit 3R (Stewart Rebuttal), p. 36, line 12 – p. 37, line 14.

[414] Mr. Denney addresses Ms. Stewart's claims regarding a single LSR and CRIS billing in his testimony. *See* Exhibit Eschelon 2R (Denney Rebuttal), p. 85, lines 3 – 12.

[415] Qwest Exhibit 3R (Stewart Rebuttal), p. 37, lines 19-21.

[416] Exhibit Eschelon 1 (Starkey Direct), pp. 189-190 and Exhibit Eschelon 1R (Starkey Rebuttal), p. 133, line 19 – p. 134, line 6.

[417] Exhibit Eschelon 1R (Starkey Rebuttal), p. 133, line 19- p. 134, line 3. *See also* Exhibit Eschelon 1 (Starkey Direct), pp. 129-130; Exhibit Eschelon 1R (Starkey Rebuttal), p. 78, line 8 – p. 80, line 2; and Exhibit Eschelon 2.5 (Denney).

[418] Exhibit Eschelon 2 (Denney Direct), pp. 151-155.

non-CMP terms and conditions, as in the case of Qwest's non-CMP notice related to the APOT procedure for conversions.[419]

Q. MS. STEWART TAKES ISSUE WITH YOUR REFERENCES TO THE TERM "LOOP TRANSPORT COMBINATIONS" IN THE FCC'S *TRO*.[420] WOULD YOU LIKE TO RESPOND?

A. Yes, I will address each of Ms. Stewart's criticisms, but before I do, it is important to reiterate the purpose of my testimony to which Ms. Stewart responds. The purpose of my testimony[421] was to show that Eschelon's language for Issue 9-55 (specifically Section 9.23.4) uses the term "Loop Transport Combinations" in the same way as the FCC uses the term. Ms. Stewart testified in her direct testimony that Eschelon's proposal was troubling given that Eschelon's definition of Loop Transport includes commingled arrangements, but the references to the FCC order in my testimony shows that Eschelon's definition is consistent with the way the FCC uses the term.[422] I now turn to Ms. Stewart's criticisms.

First, she states that references to both paragraphs 575 and 576 of the *TRO* discuss UNE combinations, so "[n]either of these cites discusses combinations between

[419] Exhibit Eschelon 1R (Starkey Rebuttal), p. 134, lines 3-6; Exhibit Eschelon 1R (Starkey Rebuttal), p. 124, footnote 385.

[420] Qwest Exhibit 3R (Stewart Rebuttal), p. 38, line 9 – p. 39, line 4.

[421] Exhibit Eschelon 1 (Starkey Direct), p. 194, lines 17-22.

[422] Exhibit Eschelon 1R (Starkey Rebuttal), p. 130, lines 7-11 and Exhibit Eschelon 1 (Starkey Direct), pp. 194-196.

UNEs and non-UNEs."[423] References to these paragraphs were provided to show that the FCC has referred to a UNE combination of loop and transport as a "Loop Transport Combination," just as Eschelon's language for Section 9.23.4 does ("Loop Transport Combination includes Enhanced Extended Links ("EELs")…"). Contrary to Ms. Stewart's assertions, I make no "leap of logic" to "thrust upon Qwest a new loop-transport definition";[424] rather, the FCC refers to combinations between UNE transport and UNE loops as Loop Transport Combinations, and so does Eschelon's Section 9.23.4.[425]

Second, Ms. Stewart claims that the references to paragraphs 584, 593 and 594 of the *TRO* support Qwest's position because they refer to "*commingled* Loop Transport combinations."[426] Paragraphs 584 and 593 of the *TRO* show that the FCC has referred to commingled arrangements as "loop transport combinations," just as Eschelon's language for 9.23.4 does ("Loop Transport Combinations include…Commingled EELs…").

To sum up, Eschelon's language for 9.23.4 defines a Loop Transport Combination to include: (1) EELs, (2) Commingled EELs, and (3) High Capacity EELs, and the FCC has used the same term to refer to all three.[427]

[423] Qwest Exhibit 3R (Stewart Rebuttal), p. 38, lines 15-16.

[424] Qwest Exhibit 3R (Stewart Rebuttal), p. 39, lines 16-18.

[425] Exhibit Eschelon 1 (Starkey Direct), pp. 194-196.

[426] Emphasis added.

[427] Exhibit Eschelon 1 (Starkey Direct), p. 195, line 17 – p. 196, line 2.

Q. MS. STEWART PROPOSES ALTERNATIVE LANGUAGE FOR ISSUE 9-55.[428] IS THIS LANGUAGE ACCEPTABLE TO ESCHELON TO CLOSE THIS ISSUE?

A. No. I addressed this issue in my rebuttal testimony,[429] where I explained that Qwest's language, which references "the appropriate Tariff," is not acceptable because the non-UNE circuit will not necessarily be governed by a tariff,[430] and because the companies have already agreed to language in Section 24.1.2.1, which is not limited to Qwest's tariffs, but also recognizes other alternative arrangements. Section 24.1.2.1 not only makes Qwest's proposed alternative language unnecessary, but Section 24.1.2.1 is also more accurate.

IX. SUBJECT MATTER NO. 27: MULTIPLEXING (LOOP-MUX COMBINATIONS)

Issue No. 9-61 and subparts: ICA Sections 9.23.9 and subparts; 24.4 and subparts; 9.23.2; 9.23.4.4.3; 9.23.6.2; 9.23.9.4.3; 9.23.4.4.3; 9.23.6.2; Exhibit C; 24.4.4.3; Exhibit A; Section 9.23.6.6 and subparts

Q. SUBJECT MATTER 27 (ISSUES 9-61 AND SUBPARTS) ADDRESSES LOOP MUX COMBINATIONS ("LMC"). PLEASE BRIEFLY SUMMARIZE THIS ISSUE.

[428] Qwest Exhibit 3R (Stewart Rebuttal), p. 35, lines 15-18.

[429] Exhibit Eschelon 1R (Starkey Rebuttal), p. 132, line 14 – p. 133, line 18.

[430] Footnote 13 at page 35 of Ms. Stewart's rebuttal testimony (Qwest Exhibit 3R (Stewart Rebuttal), p. 35, footnote 13) states, "Tariff as used in the ICA is a defined term that refers to Qwest interstate tariffs and state tariffs, price lists and price schedules." Ms. Stewart's testimony is misleading. Tariff is a defined term in the ICA not limited to Qwest's tariffs and price lists. *See* Section 4 ["Tariff refers to the applicable tariffs, price lists, and price schedules that have been approved or are otherwise in effect pursuant to applicable rules and laws, *whether the Tariff is a Qwest retail Tariff or a CLEC Tariff*."] (emphasis added)

A. There is no dispute that the loop component of a LMC is a Section 251 UNE. So, regardless of how multiplexing is treated,[431] the LMC should be included in Section 9 of the ICA,[432] which is Eschelon's proposal for Issue 9-61. Eschelon's proposal is based on the language of Section 9.23.8 entitled "Loop Mux Combination (LMC)" within Section 9.23 entitled "Unbundled Network Elements Combinations (UNE Combinations)" in the Qwest-AT&T interconnection agreement that was approved by this Commission and later used in negotiations as one source of language for the proposed contract.[433] Eschelon agreed upon the same placement in the contract within Section 9 as used by Qwest and AT&T. In the Qwest-AT&T approved ICA, just as in Eschelon's proposed language, the description of the Loop Mux UNE Combination states that it is a combination of an unbundled loop with a multiplexer and collocation located within the same Qwest Wire Center.[434] In response to Qwest's stated concerns, Eschelon agreed to additional language in the description expressly stating that the loop is combined with a multiplexed facility "with no interoffice transport."[435]

[431] Eschelon's position is that multiplexing should be provided at TELRIC-based rates in two specific scenarios when it is combined with a Section 251 UNE. Qwest's position is that multiplexing should be obtained pursuant to Qwest's tariff.

[432] Qwest claims that the proper location is Section 24. Qwest Exhibit 3R (Stewart Rebuttal), p. 68, lines 21-22.

[433] Exhibit Eschelon 3.8 (Johnson), p. 1 (2/4/03 email).

[434] Qwest-AT&T ICA §9.23.8.1.1.

[435] ICA Section 9.23.9.1.1 (closed language).

Under Issue 9-61(a), the LMC should be defined as a UNE combination in the ICA instead of a commingled arrangement. Qwest has previously provided multiplexing in three ways: (1) as part of a multiplexed EEL, (2) as part of a Loop-Mux Combination, and (3) as a stand alone UNE.[436] All Eschelon is asking for is Qwest to provide multiplexing in two distinct scenarios in combination with Section 251 UNEs. Contrary to misdirection from Qwest as to multiplexing as stand alone UNEs,[437] Eschelon's language does not request them or require Qwest to provide them. The Commission should not allow Qwest to severely restrict access to multiplexing in this arbitration, especially when this restriction is not based in the FCC rules or orders. To this end, intervals and rates for LMC should be included in the ICA and changed via ICA amendment under Issues 9-61(b) and 9-61(c).

Issue 9-61 addresses whether the Loop Mux Combination ("LMC") should continue to be included in Section 9 of the ICA as a UNE combination as it was in the Qwest-AT&T ICA (Eschelon proposes that it should be, and Qwest disagrees); Issue 9-61(a) addresses the proper definition of an LMC, either as a UNE (as proposed by Eschelon) or a commingling arrangement (as proposed by Qwest); Issue 9-61(b) addresses whether service intervals for LMCs should be included in the ICA and changed via ICA amendment (as proposed by Eschelon)

[436] Exhibit Eschelon 1 (Starkey Direct), p. 212, line 23 – p. 213, line 3.

[437] *See, e.g.*, Qwest Exhibit 3R (Stewart Rebuttal), p. 68, lines 23-25 ("Eschelon's demand that Qwest provide the stand-alone multiplexing service as a UNE instead of as a tariffed facility.")

or excluded from the ICA and established via CMP (as proposed by Qwest); and Issue 9-61(c) addresses whether rates for LMC Multiplexing should be included in the ICA (as proposed by Eschelon) or excluded from the ICA (as proposed by Qwest).

Q. DO YOU HAVE ANY GENERAL RESPONSE TO MS. STEWART'S REBUTTAL TESTIMONY ON ISSUE 9-61?

A. Yes. When evaluating Qwest's arguments regarding Issue 9-61, it is important to note that Issue 9-61 does not address transport or stand alone multiplexing, as I explained in my rebuttal testimony (quoting ICA Section 24.2.1.1).[438] Also, despite Eschelon and Qwest asking the Commission to determine how multiplexing should be treated when combined with a UNE loop, as I explained in my rebuttal testimony,[439] Qwest's testimony makes it appear as if this issue has already been decided in Qwest's favor. For instance, in the very first Q&A in Ms. Stewart's rebuttal testimony on this issue, she testifies: "Accordingly, a CLEC ***must*** order the multiplexed facility used for LMCs through the applicable tariff."[440] Ms. Stewart also states in her rebuttal testimony on Issue 9-61, that, "LMC is comprised of an unbundled loop…combined with a DS1 or DS3

[438] Exhibit Eschelon 1R (Starkey Rebuttal), p. 136, line 18 – p. 138, line 6.

[439] Exhibit Eschelon 1R (Starkey Rebuttal), p. 143, line 16 – p. 144, line 19.

[440] Qwest Exhibit 3R (Stewart Rebuttal), p. 68, lines 15-16. (emphasis added)

multiplexer…that a CLEC obtains from a tariff."[441] Ms. Stewart couches her rebuttal testimony as if Qwest's position on this issue is fact, but it is not a fact, and Eschelon and Qwest are asking the Commission to resolve that very issue under Issue 9-61(a).

Q. IS A GOOD PORTION OF MS. STEWART'S REBUTTAL TESTIMONY ON ISSUES 9-61 AND SUBPARTS SPENT REHASHING ISSUES YOU HAVE ALREADY ADDRESSED IN YOUR TESTIMONY?[442]

A. Yes. Ms. Stewart's primary rebuttal argument is that Eschelon is seeking access to multiplexing as a "stand alone UNE."[443] I addressed this claim in my rebuttal testimony.[444]

Q. MS. STEWART CLAIMS THAT MULTIPLEXING IS A FEATURE OR FUNCTION OF UDIT,[445] BUT NOT LOOPS. IS SHE CORRECT?

A. Ms. Stewart is only partly correct. I agree with Ms. Stewart that multiplexing is a feature or function of UDIT and should be provided at TELRIC rates in these

[441] Qwest Exhibit 3R (Stewart Rebuttal), p. 68, lines 7-10. *See also* Qwest Exhibit 3R (Stewart Rebuttal), p. 75, lines 12-14 ("Because an LMC is a combination of a UNE and a tariffed multiplexing service, it is not a UNE combination…")

[442] Ms. Stewart cites to the Verizon-Virginia arbitration decision (e.g., Qwest Exhibit 3R (Stewart Rebuttal), p. 69, lines 19-27). I addressed this issue at pages 139-141 of my rebuttal testimony (Exhibit Eschelon 1R (Starkey Rebuttal), p. 139, line 8 – p. 141, line 16).

[443] Qwest Exhibit 3R (Stewart Rebuttal), p. 68, line 11 and line 24; p. 69, line 16 and lines 17-18 and line 19; p. 71, lines 8 and 13 and 17 and 19.

[444] Exhibit Eschelon 1R (Starkey Rebuttal), p. 138, line 7 – p. 139, line 3.

[445] Qwest Exhibit 3R (Stewart Rebuttal), p. 70, line 6.

instances.[446] However, I disagree with the notion that multiplexing is not a feature or function of loops.[447]

Ms. Stewart argues that since loops can function independently of multiplexing, then multiplexing is not a feature/function of the loop.[448] Ms. Stewart describes her determination of whether multiplexing is a feature of function of a UNE as follows:

> central office-based multiplexing is not required for a UNE loop facility to function. If the functioning of a DS1 loop, for example, was dependent upon multiplexing, there might be a factual argument that multiplexing is a feature or function of the loop. But since a DS1 loop functions regardless whether there is multiplexing used to mux together multiple loops, multiplexing cannot reasonably be viewed as a "feature, function, or capability" of the loop. In addition, the multiplexing function is provided through equipment that is physically separate from and independent of UNE loops.[449]

Ms. Stewart's test makes no sense and does not support Qwest's proposal to provide multiplexing as a feature or function of UDIT, but not UNE loops. First, there are a whole host of items that are features or functions of the loop on which the loop is not *dependent*. For instance, repeaters and load coils are features and functions of the loop, but a properly functioning loop is not always dependent on the existence of these features or functions, and when the loop is used for data service, they are oftentimes removed altogether from the loop during loop

[446] Qwest Exhibit 3R (Stewart Rebuttal), p. 70.

[447] Exhibit Eschelon 1 (Starkey Direct), pp. 210 – 212.

[448] Qwest Exhibit 3R (Stewart Rebuttal), pp. 72-73.

[449] Qwest Exhibit 3R (Stewart Rebuttal), p. 72, line 27 – p. 73, line 6.

conditioning. Contrary to Ms. Stewart's claim, the loop does not have to be dependent on the item in question for it to be a feature or function of the loop. Second, transport is not "dependent" on multiplexing either, but Ms. Stewart agrees that multiplexing is a feature or function of UNE transport.[450] For instance, a CLEC could combine a DS1 UNE transport with a DS1 UNE loop, and this would not require multiplexing.

Q. MS. STEWART ARGUES THAT YOUR RELIANCE ON FCC AUTHORITY IS MISPLACED BECAUSE THE CITES YOU POINT TO ARE TALKING ABOUT A DIFFERENT TYPE OF MULTIPLEXING THAN WHAT IS DISCUSSED IN ISSUE 9-61.[451] WOULD YOU LIKE TO RESPOND?

A. Yes. I discussed in my direct testimony[452] the routine network modifications rules and pointed out that these rules include deploying a new multiplexer and reconfiguring existing multiplexers for loops as part of the nondiscriminatory obligations of the ILEC. 47 CFR § 51.319(a)(7). Ms. Stewart claims that the FCC "is being clear"[453] that the multiplexing being discussed under this rule is different from the multiplexing discussed under Issue 9-61. I disagree with Ms. Stewart's narrow view of the FCC's rules.

[450] Qwest Exhibit 3R (Stewart Rebuttal), p. 70, line 6.

[451] Qwest Exhibit 3R (Stewart Rebuttal), p. 74, lines 14-15.

[452] Exhibit Eschelon 1 (Starkey Direct), p. 211, line 13 – p. 212, line 2.

[453] Qwest Exhibit 3R (Stewart Rebuttal), p. 74, line 18.

If the routine network modifications rule for loops under § 51.319(a)(7) is compared to the routine network modifications rule for transport under § 51.319(e)(4), they are nearly identical. Like the rule applying to loops, the transport rule states that routine network modifications include "deploying a new multiplexer or reconfiguring an existing multiplexer." There is no distinction in the routine network modification rules between different types of multiplexing – though the FCC could have easily written one into the rule. The FCC could have made such a distinction if it so desired, given that it did make the loop rule specific to loops and the transport rule specific to transport.[454] What this means is that the FCC crafted a specific rule to apply to loops versus transport, rather than simply "cutting and pasting" the same routine network modification rule for each UNE, and the FCC could have written a multiplexing distinction into the rule at that time – but didn't. Therefore, the distinction that Ms. Stewart makes regarding multiplexing is not grounded in the FCC's rules.

Q. ARE THERE OTHER REASONS WHY MS. STEWART'S CLAIM THAT MULTIPLEXING IS A FEATURE OR FUNCTION OF UNE TRANSPORT BUT NOT UNE LOOPS IS UNCONVINCING?

A. Yes. At page 69 of her rebuttal testimony, Ms. Stewart states that Qwest agrees that when multiplexing is used to connect a UNE transport and UNE loop, then

[454] For instance, the only differences between the loop and transport rules (besides referring to loops versus transport) is that the transport rule does not include mention of "adding a smart jack", "adding a line card", or attaching electronics/equipment for DS1 loop as routine network modifications – all of which are included in the loop rule.

multiplexing should be provided at TELRIC.[455] In support of this position Ms. Stewart states: "because multiplexing is not a feature or function of the UNE loop, multiplexing used to combine multiple unbundled loops together (without transport) is stand-alone multiplexing – in other words, it is not provided as a feature or function of a transport UNE. As such, that stand-alone multiplexing is not governed by UNE combination rates or other UNE terms and conditions."[456] Similarly, in Washington, Ms. Stewart testified: "because multiplexing is not a feature or function of the UNE loop, multiplexing used to commingle UNE loops with tariffed private line transport (as opposed to UNE transport) is stand-alone multiplexing…"[457] What is being addressed under Issue 9-61, however, is Loop Mux Combination, or an arrangement in which multiplexing connects a UNE loop directly to a CLEC's ***collocation*** – not another loop or transport. As I discussed in my rebuttal testimony,[458] multiplexing in those other contexts is dealt with in closed language in Section 24.2.1.1 of the ICA and, despite all of Qwest's efforts to confuse the issue so it appears that Eschelon is asking for more than it is, the latter two issues are ***not*** the subject of Issue 9-61.

As shown by Section 24.2.1.1, Qwest agrees that multiplexing should be provided at TELRIC rates when UNE transport provided at TELRIC rates is connected to a

[455] Qwest Exhibit 3R (Stewart Rebuttal), p. 69, lines 1-7.

[456] Qwest Exhibit 3R (Stewart Rebuttal), p. 74, lines 3-8.

[457] Stewart Washington Response Testimony (Docket No. UT-063061, 12/4/06), p. 82, lines 7-9.

[458] Exhibit Eschelon 1R (Starkey Rebuttal), p. 136, line 18 – p. 138, line 6.

UNE loop provided at TELRIC rates. Following this same logic, multiplexing used to connect UNE loop provided at TELRIC rates to collocation provided at TELRIC rates (which LMC is) should be provided at TELRIC rates. The fact that Qwest does not agree in this instance exposes an inconsistency in Qwest's position.

Q. MS. STEWART ARGUES THAT SINCE THE FCC'S *TRO* LIFTED THE COMMINGLING RESTRICTION, QWEST WILL STOP PROVIDING LOOP MUX COMBINATIONS AS IT HAS IN THE PAST.[459] DID THE *TRO* SAY ANYTHING ABOUT A QUID PRO QUO ASSOCIATED WITH COMMMINGLING OR THAT LIFTING THE COMMINGLING RESTRICTION RELIEVED THE ILECS OF THEIR OBLIGATION TO PROVIDE MULTIPLEXING AS THEY HAVE PREVIOUSLY PROVIDED IT?

A. No, and Ms. Stewart provides no support for this suggestion. Ms. Stewart's support for her claim that Qwest was acting "voluntarily"[460] in providing Loop Mux Combinations is not grounded in any FCC order or rules. Rather, she cites to the Wireline Competition Bureau's decision in the Verizon-Virginia

[459] Qwest Exhibit 3R (Stewart Rebuttal), pp. 70-72.

[460] Qwest Exhibit 3R (Stewart Rebuttal), p. 70, line 15.

Arbitration as support, and I have explained that Ms. Stewart's reliance on this decision is misplaced.[461]

Ms. Stewart also claims that the FCC's reference to multiplexing as an "interstate access service" in paragraph 583 of the *TRO* "refutes any claim by Eschelon that it is entitled to multiplexing at UNE rates, terms, and conditions when it obtains multiplexing for use with commingled arrangements."[462] However, multiplexing, like loops and transport, is available both within the context of Section 251 of the Act (as part of the ILEC's obligation to provide nondiscriminatory access to UNEs) as well as under interstate access tariffs (which are not governed by Section 251 of the Act). And contrary to Ms. Stewart's claim, just because a facility or function is available as an "interstate access service" does not mean that it cannot also be available under the Act and the FCC's rules for UNEs/interconnection, as evidenced by the fact that both loops and transport also are available within both contexts. Indeed, the same sentence in paragraph 583 of the *TRO* also referred to transport as an "interstate access service," but transport is unarguably available also within the context of Section 251 of the Act.

Q. YOU SAID ESCHELON DISAGREES THAT QWEST VOLUNTARILY PROVIDED LMC.[463] PLEASE ELABORATE.

[461] Exhibit Eschelon 1R (Starkey Rebuttal), p. 140, line 6 – p. 141, line 16.

[462] Qwest Exhibit 3R (Stewart Rebuttal), p. 72, lines 3-5.

[463] Qwest Exhibit 3R (Stewart Rebuttal), p. 70, line 15.

A. As I mentioned above, the basis for Ms. Stewart's claim that Qwest voluntarily provided Loop Mux Combinations appears to be the Wireline Competition Bureau's Verizon Virginia arbitration decision,[464] and I have shown that Ms. Stewart's reliance on this decision is misplaced.[465] In addition, the Minnesota Commission adopted the following recommendation by the ALJs:

> Qwest agrees that it must offer multiplexing at UNE rates when it connects two UNEs, or when it is a feature, function, or capability of UNE transport. Given that Qwest has previously provided multiplexing as a UNE when it is provided in conjunction with a UNE loop, as well as when it is provided in conjunction with UNE transport, the Administrative Law Judges agree with the Department's recommendations that Eschelon's language be adopted in the ICA. If Qwest wishes to withdraw or limit multiplexing in the manner it proposes here, it should file a petition with the Commission to obtain permission to modify all ICAs that currently provide for UNE pricing of the multiplexing of a UNE loop into non-UNE transport within a central office.[466]

Qwest has previously provided a Commission-approved LMC product at TELRIC rates, and if Qwest wishes to withdraw or limit multiplexing at TELRIC rates over CLEC objection, it should obtain Commission permission before doing so.

Q. DOES THIS CONCLUDE YOUR TESTIMONY?

A. Yes.

[464] Qwest Exhibit 3R (Stewart Rebuttal), p. 70, lines 16-19.

[465] Exhibit Eschelon 1R (Starkey Rebuttal), p. 140, line 6 – p. 141, line 16.

[466] Exhibit Eschelon 2.24 (Denney), p. 49 [MN Arbitrators' Report ¶199] and Exhibit Eschelon 2.25 (Denney), p. 22 [MN PUC Arbitration Order, p. 22, ¶1].