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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

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

QWEST CORPORATION'S POST-HEARING BRIEF

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INTRODUCTION

Qwest Corporation ("Qwest") submits this post-hearing brief in support of its positions in this arbitration. While the varied and large number of issues presented in this arbitration are difficult to categorize, there are several themes that underlie Qwest's proposals for the interconnection agreement ("ICA") with Eschelon Telecom, Inc. ("Eschelon").

First, Qwest's proposals are consistent with governing law established by this Commission and the Federal Communications Commission (the "FCC"). For example, Qwest's proposals reflect prior rulings from this Commission relating to billings and collections, notices of network changes, the change management process ("CMP"), and rates for specific services that Qwest provides to Eschelon and other CLECs. Similarly, the ordering, billing, and provisioning processes that Qwest proposes are consistent with those that this Commission, other state commissions, and the FCC reviewed and approved in connection with Qwest's application to provide long distance service under the Telecommunications of 1996 ("the Act"). Importantly, Qwest's proposals also are designed to reflect precisely the relevant rulings of the FCC relating to unbundled network elements ("UNEs") in the *Triennial Review Order* ("*TRO*")[1] and the *Triennial Review Remand Order* ("*TRRO*").[2]

Second, Qwest's proposals reflect its obligation to provide Eschelon and other CLECs with nondiscriminatory access to UNEs and interconnection services. As an ILEC that provides wholesale services to hundreds of CLECs, Qwest's ICAs and operating

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[1] *In the Matter of Review of the Section 251 Undundling Obligations of Incumbent Local Exchange Carriers*, Report and Order, 17 FCC Rcd 16978 (2003).

[2] *In the Matter of Unbundled Access to Network Elements and Review of Section 251 Unbundling Obligations*, Order on Remand, 20 FCC Rcd 2533 (2005).

procedures must have a level of uniformity that ensures nondiscriminatory treatment of all CLECs. While there may be room to meet unique business needs of a CLEC in an ICA, it is essential for purposes of nondiscrimination that Qwest's basic procedures – *e.g.*, ordering, provisioning, billing, and network access procedures – be uniform from one CLEC to another. Qwest's proposals reflect this obligation, as well as the practical reality of having to provide wholesale services to hundreds of different carriers.

Third, Qwest's proposals reflect the critical fact that after 11 years of operating under the 1996 Act, Qwest and CLECs have a large body of experience upon which draw. This arbitration is not like those that took place before this and other commissions shortly after the Act was passed when all parties were trying to find there way across the dramatically changed landscape that Congress commanded. Instead, through business relationships that are now long-standing, countless arbitrations before this and other commissions, and the exhaustive consideration of UNE and interconnection processes in the Section 271 proceedings, a basic business framework between Qwest and CLECs has been established and is working quite well. Qwest's proposals reflect this large body of experience and the consensus it has forged among many carriers in its local exchange markets.

By contrast, Eschelon's proposals often seek treatment that, if allowed, would be preferential and would require significant, costly changes in Qwest's procedures and systems. In many cases, Eschelon ignores the consensus that has emerged in the years since the Act was passed, despite Eschelon's representations that it is not seeking to require Qwest to change its existing processes and systems. Further, in proposing ICA language that would require Qwest to make significant changes to its ordering, provisioning, billing, collections, and network access processes and systems, Eschelon refuses at every turn to compensate Qwest for the very substantial costs it would incur if the Commission adopted the proposals. Sections 252(c) and (d) require CLECs compensate ILECs for the costs they incur to provide

access to UNEs and interconnection, and Eschelon's proposals for far-reaching changes without compensation plainly violate this requirement. It is not Qwest's position that procedures and processes established over the last decade are forever fixed and cannot be changed. To be sure, additional experience and improvements in technologies will continue to support change in the telecommunications industry. But ILECs must be compensated for such changes, which Eschelon consistently fails to acknowledge.

For these reasons and those discussed below in connection with the specific issues before the Commission, Qwest respectfully requests that the Commission adopt Qwest's language for each of the disputed issues and the interim rates that Qwest is proposing.

DISPUTED ISSUES

Issues 1-1, 1-1(A), 1-1(B), 1-1(C), 1-1(D) and 1-1(E) – Intervals (Section 1.7.2 and Exhibits N and O; *See* (a) to (e) below for related issues in 7.4.7, Exhibits C and I and 9.23.9.4.3/24.4.4.3)

This issue boils down to one question – should intervals continue to be addressed in the change management process ("CMP"), as Qwest suggests, or should they be included in an interconnection agreement exhibit. While the disputed issue is fairly straightforward, its context is one of the fundamental disputes that exist in this arbitration. Specifically, Qwest has attempted for some period of time to create standardized processes for handling CLEC orders. Qwest initially pursued standardization as a method to obtain Section 271 approval and has since continued that effort because it has proven to be an effective and efficient manner in which to serve CLECs and comply with the myriad of obligations imposed by state regulations, interconnection agreement terms and performance standards. It is simply unreasonable to expect any individual Qwest employee to follow widely varying obligations and perform its job as efficiently and effectively as possible.

In this arbitration, Eschelon has proposed many changes to Qwest processes. In this instance, Eschelon does not seek to change any of Qwest's current intervals, but it does seek to hamstring any potential changes to intervals in its interconnection agreements by having intervals placed as an exhibit to the agreement. (Qwest/1, Albersheim Direct/34:27 - 35:5.)

One would expect Eschelon to have presented evidence that the current approach has proven problematic. In fact, the record demonstrates the opposite. Since its creation, this issue has been handled in CMP. (Qwest/1, Albersheim Direct/29:25 - 30:5.) There have been no disputes that have arisen out of CMP handling of this issue. (*See id.*; Tr. 69:13 - 69:22.) Eschelon has not presented one example of Qwest abusing the CMP process to change intervals in the past (Qwest/1R, Albersheim Rebuttal/27:11 - 27:18) or any indication that such a problem will occur in the future. In the event Qwest were to abuse the process in the future, Commission rules permit Eschelon to bring an expedited complaint addressing such issues. (*See* Qwest/1, Albersheim Direct/29:7 – 29:17. 30:25 -30:29; Qwest/1R, Albersheim Rebuttal/27:23 - 28:5) (discussing availability of commission procedures in the event of a dispute.)

Eschelon's proposals will impose significant administrative burdens on Qwest by either requiring interconnection agreement amendments or adoption letters with every CLEC in the event of an interval change. (Qwest/1, Albersheim Direct/30:5 - 30:10; Qwest/1R, Albersheim Rebuttal/29:9 - 29:19.) Such a burden should only be imposed if there is a significant justification for doing so. None exists in this case. Qwest's position should be adopted.

Issue 2-3: Effective Date of Rate Changes (Sections 2.2 and 22.4.1.2).

This issue addresses rate decisions that do not set forth a specific implementation date. Qwest has agreed with the suggestion of Eschelon that such language appear in Section

22 of the agreement. (Eschelon/2SR, Denney Surrebuttal/3:8 – 3:18; Qwest/2, Easton Direct/6:4 - 6:9.) Although Qwest believes adding its proposed language to Section 22 is appropriate, Qwest believes the added language should read as follows:

> Rates in Exhibit A include legally binding decisions of the Commission and shall be applied on a prospective basis from the effective date of the legally binding Commission decision, unless otherwise ordered by the Commission.

Qwest's language removes any ambiguity regarding rate issues and should be adopted.

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

Qwest has proposed that the parties be required to provide notice within 30 days of a legally binding change if the party wants that change to be effective on the date of such an order:

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

Eschelon objects to the underlined language.

Qwest opposes the many twists and turns associated with Eschelon's proposed language. (Qwest/2SR, Easton Surrebuttal/6:14 - 6:19.) Qwest's proposal provides a significant incentive for parties to take action immediately if they want to quickly implement a change in law. Qwest's proposal prevents the possibility of a complaint similar to those brought by Level 3 in several states, in which Level 3 sought very significant financial payments for an alleged change in law that took place years ago. *See In the Matter of Level 3*

Communications, LLC's Verified Complaint and Request for Expedited Proceeding to Enforce Interconnection Agreement with Qwest Corporation, Minnesota PUC Docket No. P-421/C-05-721.

Eschelon's primary complaint about Qwest's proposal is that it is unfair to require Eschelon to keep track of legal changes, because it is a smaller company than Qwest. (Eschelon/2R, Denney Rebuttal/10:6 - 10:8.) Eschelon's assertion is remarkable, given that the record in this case establishes that Eschelon pours tremendous resources into regulatory issues, participating with vigor before state commissions, the FCC, in the change management process and in other significant regulatory proceedings. (Qwest/2SR, Easton Surrebuttal/5:21 - 6:3.) It is difficult to imagine that, with its extensive regulatory and legal staff, Eschelon would miss a Utah decision that has en effect on its interests. Furthermore, Eschelon does business in far fewer states than Qwest, making the need to track and notify much less burdensome. Quite telling is the fact that Eschelon has failed to identify a single historical example where it would have been adversely affected by Qwest's proposed language.

Eschelon is fully capable of protecting its interests associated with a change in law. Qwest's 30 day notice proposal protects against a possibility that has occurred in the past and could occur in the future as clever Qwest and CLEC lawyers parse out past precedents, attempt to interpret them in a novel manner, and then attempt to send a bill to the other party after success in pushing a new position. (Qwest/2R, Easton Rebuttal/6:5 - 6:13.) Qwest's proposal is fair to both parties and allows businesses to make decisions based on their agreement without the risk that its terms will retroactively change at some point in the future.

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

A "design change" is any change to an order that requires engineering review. When a CLEC has submitted an order for a facility or a service and then submits a change to that

order, a Qwest engineer must review the change to determine if the facility or service should be provided in a manner different from that called for by the CLEC's original order. Stated another way, the Qwest engineer must review the changes requested by the CLEC to determine what change in the design, if any, is necessary to meet the changes requested by the CLEC. A design change could include, for example, a change of end-user premises within the same serving wire center, or the addition or deletion of optional features or functions. A design change could also include a change in the type of channel interface, the type of interface group or the technical specification of a package. This review of orders by engineers and other Qwest personnel requires time and imposes costs on Qwest. (Qwest/3, Stewart Direct/7.)

The disputes relating to this issue have included the definition of design changes, the UNEs to which design change charges apply, and the appropriate rates for design changes.[3] The heart of these disputes is that although Qwest incurs significant costs to perform design changes for Eschelon and other CLECs, Eschelon is proposing rates for certain design changes that would recover only a fraction of Qwest's costs. The design change study that Qwest submitted in Docket No. 00-049-105 produced a rate of $35.89. The Commission set that rate as part of a group of rates known as "Miscellaneous rates." The rate is the result of a compliance run of Qwest's nonrecurring cost study ordered by the Commission and filed by Qwest in June 2002. (Qwest/4R, Million Rebuttal/2-3.)

Eschelon's proposed rates of $30.00 for loops and $5.00 for CFAs are below the rate this Commission has adopted and substantially below the design rates that commissions

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[3] At various places in its testimony, Eschelon asserts that this issue also involves whether Qwest will provide design changes to Eschelon and whether it will do so at cost-based rates instead of tariffed rates. These assertions attempt to create disputes where none exist. Qwest has expressly committed in this arbitration that it will provide design changes to Eschelon at cost-based rates.

throughout Qwest's region have ordered. If adopted, those rates would violate Qwest's right of cost recovery established by Sections 252(c) and (d) of the 1996 Act.

Issue 4-5

This dispute originally involved two ICA sections, Sections 9.2.4.4.2 and 9.2.3.8. Qwest has agreed to Eschelon's proposed language for both of these sections, which should close Issue 4-5. However, in the rebuttal testimony of Mr. Denney, Eschelon raises an issue involving loop and CFA design change charges that is unrelated to the ICA being arbitrated in this proceeding. According to Mr. Denney, Qwest has charged Eschelon and other CLECs for loop and CFA design changes without having a right to do so in *existing* ICAs or in Qwest's Oregon Statement of Generally Available Terms ("SGAT"). Based on this assertion, Mr. Denney argues that Qwest should be required to credit Eschelon and other CLECs for the loop and CFA charges it has previously assessed. However, this claim is plainly half-hearted, as Eschelon makes no attempt to quantify the amount of "credits" it is supposedly owed and offers no legal support for its obviously flawed position that it has standing in this arbitration of a *prospective* ICA to seek remedies for *past* events on behalf of itself and other *non-party* CLECs.

Moreover, Eschelon did not raise this issue in its petition for arbitration and, accordingly, Qwest did not address the issue in its response to the petition. In serving as arbitrators under Section 252, state commissions only have authority to resolve "open issues" that are raised in the petition or response. *See* Section 252(b)(4)(C). Because the "credit" issue was not raised in Eschelon's petition or Qwest's response, it is not an "open issue" that the Commission can adjudicate.

Eschelon also is wrong on the merits in claiming that existing ICAs and Qwest's Oregon SGAT do not give Qwest the right to charge for loop and CFA design changes. Eschelon bases its assertion on Ms. Stewart's statement in the Minnesota arbitration that

"neither Qwest's SGAT nor the parties' current ICA includes a design change charge for loops."[4] However, that statement was unique to Minnesota and accurately reflects the fact that there is no design change rate in that state.

For these reasons, Eschelon's assertion that it is entitled to credits is procedurally and factually flawed and should be rejected.

Issue 4-5(a)

This issue involves design changes that Qwest must perform when Eschelon submits an inaccurate or otherwise flawed CFA to Qwest in connection with attaching a network facility – a loop, for example – to a frame in a Qwest central office. When this occurs, Eschelon must submit a new CFA, which requires Qwest to "redesign" Eschelon's order. Issue 4-5(a) involves the relatively narrow issue of the charge that should apply when Qwest is required to perform a CFA change while Qwest and Eschelon are in the process of performing a "coordinated cut-over" of a "2/4 wire loop analog (voice grade) loop." Eschelon proposes a charge of $5.00 in contrast to the unified design charge of $35.89 that this Commission has adopted. Eschelon bases its proposed *de minimis* charge on the claim that the presence of a Qwest engineer in the central office to perform a coordinated cut-over dramatically reduces the costs of the CFA change. As discussed below, however, even if the assumption about reduced engineering time were correct, it would not reduce Qwest's costs performing CFA changes.

As an initial matter, it is important to be clear about why Qwest is required to make CFA changes and to incur the costs they impose. CFA changes occur when a customer desires to obtain service from Eschelon instead of from Qwest or another carrier. After Eschelon submits a new connect service order, a Qwest engineer must connect the customer's loop to Eschelon's equipment collocated in a Qwest central office. To enable

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[4] *See* (Qwest/3, Stewart Rebuttal/8.)

Qwest to perform this connection on its behalf, Eschelon provides Qwest with a "connecting facility assignment" or CFA on the interconnection distribution frame ("ICDF") in Qwest's central office. In other words, Eschelon identifies the specific place on the ICDF where the Qwest engineer should connect the loop. In some cases, the ICDF locations that Eschelon gives Qwest are incorrect, which requires Eschelon to submit a new CFA and, in turn, requires Qwest to redesign the order. (Qwest/3, Stewart Direct/13.)

For multiple reasons, Eschelon's proposed CFA rate of $5.00 is seriously flawed. First, Eschelon fails to provide any meaningful evidence showing how it derived the rate. As a general rule, a cost-based nonrecurring charge, like a design change charge, should be established through a specific methodology that involves: (1) identifying the activities a carrier's personnel must perform, (2) estimating the time required to perform the activities, and (3) applying an appropriate labor rate to the activities and times. Eschelon's $5.00 proposal does not come close to meeting this rate-setting standard, as there is no evidence in the record concerning activities, times, or labor rates associated with the rate. Eschelon did not support this proposed rate with a cost study, cost data, or any evidence other than narrative testimony. There is thus no meaningful evidence upon which the Commission could conclude that that the rate meets the Act's cost-based standard set forth in Section 252 (d)(1)(A).

Second, in contrast to Eschelon's unsupported rate proposal, this Commission adopted the rate of $35.89 for all design changes using a cost-based study that utilized the FCC's prescribed "TELRIC" (total element long run incremental cost) pricing methodology. That study properly estimates the amount of time it will take to perform the tasks required for a design change, the probability that the carrier will have to perform the tasks, and the labor rate that will apply to the tasks. As Ms. Million explained, the study and the resulting Commission-ordered rate of $35.89 are based on the average cost of performing a design

change for all types of products (*i.e.*, loops and transport) and include CFA changes. (Qwest/4R, Million Rebuttal/3-4.) That the study includes CFA changes is confirmed by the explanation in the "executive summary" that it applies to all types of design changes and by the reference to "type[s] of channel interface[s]," which is a reference specific to CFAs. (*Id.*) In addition, the design charge rate this Commission adopted appears in the "Miscellaneous Charges" section of Exhibit A to existing ICAs and Qwest's SGATs. If the charge applied only to transport or "UDIT" related design activities, as Eschelon claims, it would be listed in the section of Exhibit A devoted to transport and would not be listed among the miscellaneous charges that have broad application.[5] (Qwest/4R, Million Rebuttal/4.)

Third, there is no factual foundation for Eschelon's assumption that the presence of a Qwest technician in a central office during a coordinated cut-over reduces the costs of CFA changes and thereby renders the $35.89 rate inapplicable. As an initial matter, the TELRIC cost study that this Commission used to establish this rate does not include *any* time or costs for technician activities in a central office. (Qwest 4R, /Million Rebuttal/6; Qwest 4SR, /Million Surrebuttal/14.) Accordingly, even if Eschelon were correct in claiming that coordinated cut-overs reduce the time technicians must spend on CFA changes, that would not support reducing the rate the Commission ordered. In all events, Eschelon's factual assumption, which is unsupported by any testimony from an engineer, is based on an inaccurate and over-simplified description of the activities required to perform CFA changes. The activity involving a Qwest central office technician's disconnection of a jumper from

[5] Mr. Denney's claim that the rate for coordinated installations includes the costs of these changes necessarily assumes that coordinated installation rates are set with the assumption that CLECs would provide defective CFAs and thereby impose costs upon Qwest. There is no support for that assumption. While Mr. Denney asserts that certain activities associated with the coordinated cut-overs required for CFA changes are already included in rates for coordinated installation rate, he fails to cite anything from a cost study or a Commission rate order to support this assertion. In fact, the rates for coordinated installations does not include the additional cut-over activities and costs that Qwest must perform and incur when a CLEC like Eschelon provides defective CFAs. (Qwest/3, Stewart Rebuttal/6-7.)

one CFA on a frame and reconnection of the jumper to another CFA on a frame is only one of the actions required for a CFA design change. Multiple other activities must be performed to carry out CFAs properly. For example, testing personnel coordinate must coordinate with the central office technician to determine whether a new CFA that Eschelon submits is available and viable. If it is, the tester provides a "service delivery coordinator" ("SDC") with the CFA information to supplement the order. A designer must then review and potentially redesign the circuit with the new CFA. Once the tester has coordinated these efforts, he or she must have the central office technician run a jumper from a tie pair to the new CFA. The tester may have to re-test to confirm with Eschelon's testing personnel that the circuit is operational. Finally, Qwest must update its downstream operation support systems to reflect the new, correct CFA information. The presence of a Qwest technician in a central office for a coordinated cut-over does not eliminate the need to perform any of these activities. (Qwest/3, Stewart Direct/13-14.)

For these reasons, the Commission should reject Eschelon's proposed charge of $5.00 for CFA changes and, instead, should adopt the Commission-ordered rate of $35.89 for all design changes, including CFA design changes.

Issue 4-5(b)

This issue is settled.

Issue 4-5(c)

This issue arises from Eschelon's contention that the Commission's TELRIC rate of $35.89 for design changes does not apply to design changes involving unbundled loops and applies only to design changes involving UDIT. In place of the Commission-ordered charge for design changes, Eschelon proposes a design change charge for loops of $30.00. For many of the same reasons that require rejecting Eschelon's proposed $5.00 CFA charge, the Commission also should reject this proposed design change charge for unbundled loops.

As with its proposed CFA charge, Eschelon has not provided any meaningful support for its proposed $30.00 rate for loops. Again, in contrast to the Utah-specific cost study that Ms. Million describes in her testimony, Eschelon has failed to provide any evidence of the activities, times, and costs that it claims are associated with design changes involving loops. This failure of evidence precludes any serious consideration of the proposal, as the Commission has no basis upon which to determine whether the $30.00 rate is cost-based and consistent with TELRIC.

There also is no basis for Eschelon's claim that loop design changes are not in the TELRIC study upon which the Commission's rate is based. As discussed above and established by Ms. Million's testimony, the Commission's rate is based on the average cost of performing a design change for multiple products, including loops, UDIT, and CFAs. That the study is not limited to UDIT and includes loops is confirmed by the fact that it specifically refers to network facilities used with "end-user premises." Loops connect end-user premises to the network, unlike UDIT which is used to connect central offices and does not involve end-user premises. If the cost study this Commission used to set the $35.89 rate were limited to UDIT, there would not be a reference in it to end-user premises. (Qwest/4R, Million Rebuttal/3-4.)

Through Mr. Denney's testimony, Eschelon argues that the cost study must be limited to UDIT since CLECs order UDIT – as opposed to loops – through the "access service requests" ("ASRs") that are assumed in the study. As Ms. Million explained, however, the study uses ASRs not because it is limited to UDIT but, rather, because it relied upon a prior design change study involving access services that used ASRs. Indeed, that original study was not limited to UDIT design changes even though it assumed the use of ASRs. The use of ASRs was a simplifying assumption that had no appreciable affect on the estimated cost of loop-related design changes. (Qwest/4SR, Million Surrebuttal/18.)

As discussed above in connection with the charge for CFAs, the listing of the design change rate in the "Miscellaneous Charges" section of Exhibit A of the SGAT and ICAs instead of in the transport section confirms that the charge is not limited to UDIT. The transport section includes multiple rates that apply only to transport, including, for example, the transport-specific rates for "DS1 Transport Termination Fixed and DS1 Transport Facilities Per Mile." These rates apply only to transport and not to other UNEs or services. By contrast, rates listed in the "Miscellaneous Charges" section of Exhibit A may apply in multiple circumstances and, in several instances, to more than one network element or activity. Eschelon's reading of Exhibit A assumes illogically that Qwest and CLECs included a transport-specific charge in a section of the ICA pricing exhibit that is not specific to transport and that applies to multiple elements, services, and activities.

The assumption behind the rate is that CLECs will order several types of design changes and that an averaged rate will ensure that CLECs pay an appropriate amount and that Qwest will recover its costs. In the case of unbundled loops, there is no basis for Eschelon's assumption that loop-related design changes involve less work and fewer costs than UDIT design changes. As Ms. Stewart explained, DS1 and DS3 unbundled loops on fiber systems can require the same type of re-design work that is required for UDIT, using similar fiber muxing equipment. (Qwest 3/Stewart Direct 12.) In his testimony on this subject, Mr. Denney fails to account for the re-design work that may be required because of the use of fiber muxing equipment.

Accordingly, the Commission should reject Eschelon's attempt to limit application of the Commission's existing design change charge and also should reject as unsupported by the record Eschelon's proposed design rates for CFA changes and loop design changes.

Collection Issues

Issue 5-6: **Discontinuation of Order Processing (Section 5.4.2).**

Issue 5-8: **De Minimus Amount (Section 5.4.5).**

Issues 5-9, 5-10: **Definition of Repeatedly Delinquent (Section 5.4.5).**

Issue 5-11: **Disputes Before Commission (Section 5.4.5).**

Issue 5-12: **Deposit Requirement (Section 5.4.5).**

Issues 5-13, 5-14: **Review of Credit Standing (Section 5.4.7).**

All of the above-listed issues concern payment and billing. Qwest's proposed language is nothing new. It is part of Qwest's Utah SGAT and Qwest's recently-approved interconnection agreements with Covad and AT&T. (Qwest/2R, Easton Rebuttal/10:10 - 10:13.) Qwest witness William Easton has provided testimony that Qwest's proposed language was developed as a part of the 271 workshop process. (Qwest/2R, Easton Rebuttal/25:11 - 25:12.) Mr. Easton summed up Qwest's position on these issues in his testimony, "The payment and deposit language Qwest is proposing is simply a reasonable business precaution designed to encourage timely payment and, when it does not occur, provide the ability for Qwest to limit its financial risk." (Qwest/2R, Easton Rebuttal/10:10 - 10:12.)

Eschelon's proposals do precisely the opposite. Eschelon seeks to decrease Qwest's ability to collect its bills by requiring Qwest to clear hurdles such as waiting for commission review before discontinuing order processing (Issues 5-6) or demanding a deposit. (Issue 5-13.) Eschelon seeks to water down its obligation to pay bills by limiting its obligations to pay not to the amount of the bill, but rather an amount that is close to the amount billed. (Issue 5-8.) Even then, Eschelon seeks to water down that obligation to re-define "repeatedly delinquent" in such a manner that it would only be obligated to pay its bills on time four months a year to avoid triggering a potential deposit requirement. (Issue 5-9.)

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

The cumulative effect of these proposals is to slow down and significantly impair Qwest's ability to collect valid, undisputed bills owed by Eschelon. In the event Eschelon were in poor financial health or employed a strategy of slow paying bills, Eschelon's proposals would impose significant financial harm on Qwest. Eschelon testified it pays Qwest approximately $55 million per year. (Eschelon/2SR, Denney Surrebuttal/48:11.) Thus, each week of delay would cost Qwest over one million dollars.

This Commission rejected similar attempts to water down collection terms in the Covad Arbitration.[6] In *Covad*, the arbitrator rejected Covad's argument that it should have 45 days to pay certain bills because it would delay payment by 45 days of undisputed amounts. The arbitrator found such delay, "would present serious billing system challenges and expenses for Qwest and could also negatively impact Qwest's cash flow while providing little or no tangible benefit to the parties' billing and payment relationship." (*Id.* p. 40.) The arbitrator also rejected Covad's proposed extension of the deadline for stopping order processing. Reasoning that "Qwest has the right to discontinue order processing and disconnect service for nonpayment; Covad merely seeks to delay Qwest's ability to act in accordance with this right" and because "the record amply reflects that the time periods contained in Qwest's proposed language represent current industry practice and standard."

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[6] *In the Matter of the Petition of DIECA Communications, Inc., D/B/A Covad Communications Company, for Arbitration to Resolve Issues Relating to an Interconnection Agreement with Qwest Corporation,* Docket NO. 04-2277-02, Arbitration Report and Order, pp. 40-41 (Utah Commission Feb. 8, 2005).

(*Id.* p. 41.) Consistent with the arbitrator's reasoning in the *Covad* proceeding, the Commission adopted the language Qwest proposes in this proceeding. (*Id.*).

Qwest has experience with similar proceedings in Minnesota, which requires commission approval before disconnection. Recent Minnesota Commission proceedings involving requests to disconnect have taken months to get to hearing. (Qwest/2SR, Easton Surrebutal/11:6 - 11:16.) Eschelon's proposals would require Qwest not only go through a hearing to disconnect, but also go to the commission to take less drastic steps to collect bills - discontinue order processing and demand a deposit.

Given the serious ramifications of Eschelon's proposed language, one would expect that evidence would demonstrate that Qwest has misused its authority to make collection efforts in the past. Eschelon has not provided such justification. Its proposals should be rejected.

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

This section concerns the disclosure of CLEC individual forecasts and forecasting information. It mandates very strict procedures. Qwest may disclose the information only to legal personnel, if a legal issue arises, and to a CLEC's wholesale account managers, wholesale LIS and Collocation product managers, and network and growth planning personnel "responsible for preparing or responding to such forecasts or forecasting information." The provision expressly prohibits disclosure to retail marketing, sales or strategic planning, and requires Qwest employees to execute nondisclosure agreements.

Eschelon demands a change to this provision to require Qwest to provide it with copies of employees' nondisclosure agreements within 10 days of execution. This demand places an unnecessary administrative burden on Qwest, particularly if the precedent set here forces Qwest to have to provide every CLEC with copies of NDAs. Already, Qwest bears

the burden of ensuring that forecasts and forecasting information are handled properly and securely.

Section 18.3.1 of the ICA provides that "either party can request an audit of the other party's compliance with the Agreement's measures and requirements applicable to limitations on distribution, maintenance, and use of proprietary or other protected information that the requesting party has provided to the other." In addition to the stringent requirements set forth in section 5.16.9.1, under Section 18, Eschelon has adequate protection and recourse if it believes that Qwest has misused confidential information.

Issue 7-18: Application of Transit Record Charge (Section 7.6.3.1).

Issue 7-19: Transit Record Bill Validation Detail (Section 7.6.4).

In Section 7.6.3.1, Eschelon seeks to obtain transit records from Qwest in order to validate bills that Qwest sends to Eschelon that are based on Eschelon provided data. With respect to these bills, Eschelon is the originating provider. Its switch produces the best information with regard to traffic it sends to Qwest for termination with a third party. Qwest does not have a method developed to provide Eschelon with the records it seeks. Qwest's records do not contain most of the information that Eschelon seeks. (Qwest/2R, Easton Rebuttal/31:1 - 31:6.)

Unlike Eschelon, Qwest has extensive experience with trying to produce and provide category 11 transit records. Qwest witness William Easton described the problems with Eschelon's proposal:

1. Eschelon's records provide a better source for the requested information. (Qwest/2R, Easton Rebuttal/31:1 - 32:1.)

2. Category 11 records are designed to capture information for terminating carriers not originating carriers as Eschelon seeks with this language. (Qwest/2R, Easton

Rebuttal/31:1 - 31:3.) Eschelon seeks to reverse that process and capture them based on its status as an originating carrier. Such a reversal of process would require significant programming to meet the needs of one carrier. (Qwest/2R, Easton Rebuttal/31:4 - 31:17.)

3. Eschelon's speculation that Qwest already creates these records is wrong. (Qwest/2R, Easton Rebuttal/31:1 - 31:8.)

4. Even if it were possible to use Qwest's existing transit records, Qwest's records do not contain the information Eschelon lists as a part of it proposed language in Section 7.6.4 (Issue 7-19), such as originating and terminating common language identification ("CLLI") codes, originating and terminating state jurisdiction, the rates being billed, or the rates applied to each minute. (Qwest/2, Easton Direct/33:26 - 34:3.)

5. Qwest has worked with Eschelon to verify bills when necessary in lieu of the records Eschelon seeks here. (Qwest/2R, Easton Rebuttal, p. 31:19 - 32:1.)

Requiring Qwest to provide Eschelon with detailed records is an unreasonable and inefficient way to determine appropriate billing by Eschelon. Accordingly, Qwest opposes Eschelon's language.

Issue 9-31: Access to Unbundled Network Elements (Section 9.1.2).

Qwest recognizes that the Act imposes an obligation to provide Eschelon and all CLECs with nondiscriminatory access to UNEs and therefore it has committed in the ICA to provide nondiscriminatory access through multiple agreed provisions in the ICA. These multiple provisions provide several layers of protection for Eschelon, beginning with the following language in Section 9.1.2 that broadly requires Qwest to provide nondiscriminatory access:

> Qwest shall provide non-discretionary access to Unbundled Network Elements on rates, terms and conditions that are nondiscriminatory, just and reasonable. The quality of an Unbundled Network element Qwest provides, as well as the access provided to that element, will be equal between all carriers requesting access to that element.

Significantly, this language requires more than just nondiscriminatory "access;" it also requires Qwest to provide Eschelon with UNEs that are equal in "quality" to those Qwest provides to other CLECs. (Qwest/3, Stewart Direct/17.)

Qwest takes its nondiscrimination obligations a step further with Eschelon by making it explicit that the UNEs and access Eschelon receives will be equal to the UNEs and access Qwest provides to itself and its affiliates. This obligation also is established by agreed language in Section 9.1.2:

> Where Technically Feasible, the access and Unbundled Network Element provided by Qwest will be provided in 'substantially the same time and manner' to that which Qwest provides to itself or to its Affiliates.

In addition, in circumstances where Qwest does not provide access to UNEs to itself, agreed language in Section 9.1.2 assures Eschelon that the access to UNEs it receives will provide it with "a meaningful opportunity to compete." (Qwest/3R, Stewart Rebuttal/11-12.)

Further ensuring nondiscriminatory access, Qwest establishes through additional agreed language in Section 9.1.2 that Eschelon is entitled to the "routine network modifications" that Qwest provides to its own retail customers:

> Qwest shall perform for [Eschelon] those Routine Network Modifications that Qwest performs for its own End User Customers. The requirement for Qwest to modify to network on a nondiscriminatory basis is not limited to copper loops and applies to all unbundled transmission facilities, including Dark Fiber transport when available pursuant to Section 9.7. (Qwest/3R, Stewart Rebuttal/12.)

The dispute encompassed by Issue 9-31 must be considered with these multiple non-discrimination provisions in mind. The dispute arises because of Eschelon's claim that the ICA fails to ensure that Eschelon will receive nondiscriminatory access to UNEs and that such access can only be ensured by adding the following disputed language to Section 9.1.2:

> Access to Unbundled Network Elements includes moving, adding to, repairing and changing the UNE (through, e.g., design changes, maintenance of service including trouble isolation, additional dispatches, and cancellation of orders).

According to Eschelon, it is critical to include to ensure that CLECs receive nondiscriminatory access to UNEs. (Tr., pp. 137-138.)

Given the extensive provisions in the ICA ensuring nondiscriminatory access to UNEs, Qwest has been skeptical that nondiscrimination is the motive behind Eschelon's proposed language. Ms. Stewart voiced this skepticism in her testimony, expressing the concern that by using the term "access" to UNEs and providing a long list of activities—moving, adding to, repairing, changing, design changes, maintenance of service, trouble isolation, additional dispatches, and cancellation of orders—Eschelon will contend that the recurring monthly rate it pays for UNEs entitles it to all of these activities at no additional charge.[7] Adding to this concern is the fact that "moving," "adding to," and "changing" are

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[7] Qwest/37, Stewart Rebuttal/14.

undefined terms. At the hearing, Mr. Starkey confirmed this vagueness and the legitimacy of Qwest's concerns when he testified that these terms encompass "thousands" of activities, including activities that may change over time and therefore are unknown today. (Tr., p. 134.)

With thousands of unknown activities encompassed by these terms, it is not possible to conclude, as Eschelon asserts, that every activity will be within the requirements of Section 251 and hence governed by cost-based TELRIC rates. But that is the effect of Eschelon's proposed language, since the language would not permit Qwest to charge anything but a cost-based rate for these thousands of activities. By contrast, Qwest's language – specifically, its proposal that these activities will be provided at the "applicable rate" – recognizes that while many of the activities will be governed by a cost-based rate, some may fall outside Section 251 and may be governed by a non-TELRIC rate.

The hearings in the Qwest-Eschelon arbitrations have confirmed Qwest's skepticism and Ms. Stewart's concerns, as Mr. Denney has broadly asserted in testimony – without pointing to specific provisions of cost studies[8] – that existing monthly recurring rates include all of the costs of the countless and even unidentifiable activities potentially encompassed by Eschelon's language. (Qwest/3R, Stewart Rebuttal/11-12.) The real purpose of Eschelon's proposal is not to add another cumulative guarantee against nondiscrimination but, instead, to obtain the activities listed in its proposal by paying few, if any, further charges. (Qwest/3R, Stewart Rebuttal/16.) If Eschelon's proposal is adopted, Qwest would thus be faced with the prospect of having to perform an unknown number of potential activities relating to

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[8] Eschelon did not introduce into evidence the "cost factors" from the cost models that the Commission used to set recurring UNE rates. There is thus no evidence supporting Eschelon's claim that the costs of the "thousands" of activities encompassed by the terms "moving," "adding to," and "changing" are included in Utah recurring UNE rates that CLECs are paying.

Eschelon's use of UNEs and without any additional compensation from Eschelon. (Qwest/3, Stewart Direct/18.)

For these reasons, Eschelon's proposed addition to Section 9.1.2 should be rejected in its entirety. The addition is not needed to ensure Eschelon of nondiscriminatory access to UNEs, and adoption of it would give rise to the strong possibility of Eschelon demanding that Qwest perform activities not covered by existing recurring rates while refusing to pay for them.

Instead, the Commission should adopt the following Qwest proposal for Section 9.1.2:

> Additional activities available for Unbundled Network Elements include 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) at the applicable rate. (Qwest/3R, Stewart Rebuttal/15-16.)

This proposal serves two important purposes. First, it ensures that Qwest will perform the activities listed in Eschelon's proposal, thereby directly responding to Eschelon's purported concern that Qwest will refuse to perform them. Second, while the language still includes the undefined terms that are a concern for Qwest, it at least recognizes and establishes that Eschelon may have to pay for those activities "at the applicable rate," which could be a rate different from the monthly recurring rate for a UNE or a tariffed rate. Thus, the language provides some assurance that Qwest will be properly compensated.

Accordingly, the Commission should reject Eschelon's proposed addition to Section 9.1.2 or, alternatively, adopt Qwest's modified version of the addition.

Issues 9-33, 9-34, 9-35, and 9-36: Network Maintenance and Modernization (Sections 9.1.9, 9.1.9.1).

These issues involve ICA terms and conditions relating to activities Qwest undertakes to maintain and modernize its network. Before turning to the specific ICA provisions in dispute, some context is appropriate.

It is of course essential that Qwest have the ability to both maintain and modernize its telecommunications network without unnecessary interference and restriction. Utah consumers deserve—and Qwest strives to provide—the latest state-of-the art telecommunications technologies. This objective is consistent with a basic purpose of the Act which, as set forth in Section 706, is to increase the deployment of advanced telecommunications services. (Qwest/3, Stewart Direct/21.)

It is inevitable that an ILEC's maintenance and modernization of its network will sometimes have effects on CLECs and other carriers that are interconnected with the network or otherwise rely on the network to provide service to their customers. Because most changes involving maintenance and modernization are designed to improve service, the effects on other carriers resulting from these activities generally should be positive. Congress and the FCC have recognized that as technologies evolve, an ILEC must have the right to modify its network and that such modifications may affect CLECs and other carriers that rely on the ILEC's network. Thus, Section 251(c)(5) implicitly authorizes changes that may "affect the interoperability of…facilities and networks" and imposes a notice requirement relating to these changes. The FCC similarly allows for network changes that affect interoperability and service provided to other carriers and imposes certain notice requirements relating to these changes. *See* 47 C.F.R. § 51.325.

Through its proposed language relating to these issues, Qwest's intent is to preserve its ability to maintain and modernize its network without undue interference while also ensuring that Eschelon continues to receive the UNE transmission quality to which it is

entitled. In addition, Qwest's proposal ensures that Eschelon will receive notice of these network activities that is consistent with the FCC's rules relating to notices of network changes. Thus, in the agreed to provisions of Section 9.1.9 and 9.1.9.1, Qwest commits that in maintaining and modernizing its Utah network, it will: (1) ensure that maintenance and modernization activities "result in UNE transmission parameters that are within transmission limits of the UNE ordered by [Eschelon];" and (2) provide Eschelon "advance notice of network changes pursuant to applicable FCC rules," including notice containing "the location(s) at which the changes will occur, and any other information required by applicable FCC rules." (Qwest/3, Stewart Direct/23.)

In addition to these obligations, Qwest has also agreed in Section 9.1.9.1 that in the event of an emergency maintenance or modernization activity, it will notify Eschelon of the activity by e-mail within three business days of completing the activity. Agreed language in Section 9.1.9.1 also establishes that Qwest will provide its repair centers with information relating to the status of network emergencies relating to modernization and maintenance activities to the same extent Qwest provides such information for its own customers. Additional agreed language for Section 9.1.9.1 confirms that Qwest will not assess charges for dispatches that are required as a result of network emergencies arising from Qwest's network maintenance and modernization. (Qwest/3, Stewart Direct/23-24.)

Taken as a whole, these provisions ensure that Qwest's modernization and maintenance activities will not improperly interfere with Eschelon's operations while still protecting Qwest's vital right to engage in those activities. As discussed below, the additional provisions that Eschelon proposes are vague and unnecessary and would improperly expose Qwest to open-ended risk when it maintains and modernizes its network.

Issue 9-33: The Commission Should Reject Eschelon's Proposed Prohibition On Network Changes That Have An Undefined "Adverse Effect" On End-Users.

This issue involves Eschelon's proposed language for Section 9.1.9 under which Qwest would be prohibited from making a change to its network for purposes of maintenance or modernization if the change would "adversely affect service to any End User Customers." For multiple reasons, this proposal is flawed and should be rejected.

Qwest's network is a complex aggregation of network facilities and technologies that Qwest regularly updates and modifies to ensure that its retail and wholesale customers have state-of-the-art service. Qwest maintains and modernizes its network based on the requirements in industry standards (*e.g.*, ANSI standards), technical publications, and FCC rules. These standards and technical publications allow Qwest to maintain and update its network in a seamless manner for its millions of customers. Qwest's fundamental objection to Eschelon's "no adverse effect" proposal is that it is not tied to any industry standard and therefore effectively would leave Qwest guessing as to whether a network change is permitted or prohibited. (Qwest/3, Stewart Direct/27-28.) The concept of "adverse effect" is not defined anywhere in the ICA. If allowed in the ICA, it would create a purely subjective notion that could be used anytime to block a network upgrade that Eschelon (or one of its End Users) does not like. Thus, in the Minnesota arbitration, the Commission rejected the use of this term, relying on the Minnesota Department of Commerce's determination that the term is vague and would create the possibility of future litigation concerning whether a network activity was permissible.[9]

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[9] *In the Matter of the Petition of Eschelon Telecom, Inc., for Arbitration of an Interconnection Agreement with Qwest Corporation Pursuant to 47 U.S.C. § 252 (b) of the Federal Telecommunications Act of 1996*, MPUC No. P-5340, 421/IC-06-78, Arbitrators' Report at ¶¶ 140, 142 (Jan. 16, 2007) ("*Minnesota Arbitration Order*").

In addition to failing to define "adverse effect," as Mr. Starkey acknowledged, Eschelon's proposal fails to (1) provide any metric for measuring whether there is an adverse effect; (2) set forth a process for determining whether there has been an adverse effect, including who will determine if such an effect has occurred; or (3) define the consequences of a network change resulting in an adverse effect, including whether such a change could result in penalties or fines. (Tr., pp. 144-145.)

The problem with the ambiguity of Eschelon's proposal is that it could have a chilling effect on Qwest's modernization and maintenance of its network. Specifically, with the presence of the undefined term "adverse affect" in the ICA, Qwest would be required to perform network changes at the risk of being in violation of the ICA through application of an uncertain, malleable concept. A rational response could be to decide not to perform a maintenance activity, which would undermine the Act's basic purpose of fostering the development and deployment of new, advanced forms of technologies. (Qwest/3, Stewart Direct/25.)

Eschelon's proposal also improperly focuses on the service Eschelon provides to its end-user customers, assuming incorrectly that the service for which quality is to be measured is that which Eschelon provides to its end user customers. The proper focus for this ICA between Qwest and Eschelon is the UNEs and service that Qwest provides to Eschelon, not that Eschelon provides to its end user customers. That is what ANSI and other industry standards measure for ILEC-CLEC interconnection relationships. Indeed, it is Eschelon that ultimately is responsible for the service its end user customers receive, and Eschelon—not Qwest—has final control over the quality of that service. (Qwest/3, Stewart Direct/26.)

In the alternative, Eschelon proposes the following language that the Minnesota Department of Commerce and that the Minnesota Commission adopted:

> Such changes may result in minor changes to transmission parameters. If such changes result in the CLEC's End User

> Customer experiencing unacceptable changes in the transmission of voice or data, Qwest will assist the CLEC in determining the source and will take the necessary corrective action to restore the transmission quality to an acceptable level if it was caused by the network changes.

This language has flaws similar to those in Eschelon's primary proposal. Specifically, the reference to "unacceptable changes" is as vague as Eschelon's "no adverse affect" language. Eschelon does not define "unacceptable" or tie the term to any measurable industry standard. In addition, while the proposal would require Qwest to restore transmission quality to "an acceptable level," Eschelon does not define what is "acceptable" or tie this term to any industry standard. As a result, Qwest would have no meaningful way of knowing, first, whether a change to its network is permitted under the ICA or, second, what specific corrective steps to take in response to an impermissible change. (Qwest/3, Stewart Rebuttal/22.)

In sum, the agreed language summarized above protects Eschelon against the remote possibility that Qwest's network maintenance and modernization activities could prevent Eschelon from providing service that meets industry standards, while protecting Qwest's right to engage in those activities. Eschelon's vague proposals should be rejected.

Issue 9-34: Notices Of Network Changes.

This issue involves the information Qwest will include in the notices that inform Eschelon of changes to Qwest's network resulting from maintenance and modernization. As described above, Qwest is committing to provide notices that meet the requirements of the FCC's notice rule relating to network changes, set forth in 47 C.F.R. § 51.327. Consistent with the requirements of this rule, Qwest's notices will include:

> (a) Public notice of planned network changes must, at a minimum, include:
>
> (1) The carriers' name and address;

(2) The name and telephone number of a contact person who can supply additional information regarding the planned changes;

(3) The implementation date of the planned changes;

(4) The location(s) at which the changes will occur;

(5) A description of the type of changes planned (Information provided to satisfy this requirement must include, as applicable, but is not limited to, references to technical specifications, protocols, and standards regarding transmission, signaling, routing, and facility assignment as well as references to technical standards that would be applicable to any new technologies be applicable to any new technologies or equipment, or that may otherwise affect interconnection); and

(6) A description of the reasonably foreseeable impact of the planned changes.

(Qwest/3, Stewart Direct/29.)

This dispute arises because of Eschelon's demand that Qwest's notices include circuit identification numbers and customer addresses when network changes are "End User Customer specific." There is no requirement in FCC Rule 51.327 or in any other FCC rule for ILECs to provide this information in notices of network changes. Eschelon specifically proposes the following underlined additions to Section 9.1.9:

> 9.1.9 . . . .Such notices will contain the location(s) at which the changes will occur, **including if End User Customer specific, the circuit identification and End User Customer address information,** and any other information required by applicable FCC rules. . . .

Eschelon's proposed language would improperly require Qwest to identify each and every Eschelon end user customer address and associated customer circuit(s) when Qwest makes a network change. Under Eschelon's proposal, Qwest would be required to provide this information regardless of whether the change would actually have a noticeable impact on either Eschelon or its end user customers. This would impose a significant burden, since Qwest does not have electronic access to this information and would therefore have to

conduct extensive, time-consuming manual searches for each notice of a network change. By contrast, Eschelon has electronic access to this information and therefore can retrieve it without any manual effort. (Tr., p. 154.) With the information relating to the locations of network changes that Qwest routinely provides in its notices—wire center areas, for example—Eschelon can readily identify its customers who may be affected by a network change and obtain their addresses and circuit IDs through its electronic database.

The magnitude of the burden that Eschelon's proposal would impose on Qwest is demonstrated by the example of Qwest's relatively common practice of upgrading software used with switches. When Qwest performs these upgrades, it provides notice to carriers consistent with the FCC's rule governing notices of network changes. Although these upgrades typically do not have any noticeable effect on CLEC end user customers, Eschelon's proposed language would nevertheless require Qwest to provide the address and circuit ID for every Eschelon end user customer within the entire exchange in which an upgrade takes place. This information would not serve any useful purpose but would require Qwest to engage in time-consuming manual searches. The burden on Qwest would be even greater for network changes involving modifications to dialing plans (*i.e.*, number of digits dialed), since those changes typically span an entire LATA. Eschelon's language would require Qwest to identify the address and circuit ID for every Eschelon end user customer in the LATA. (Qwest/3, Stewart Direct/31.)

Eschelon asserts that its language is not intended to have such a broad effect, since the language limits the requirement to provide circuit identifications and customer addresses to changes that are "End-User Customer specific."[10] However, Eschelon fails to define the term "End-User Customer specific," leaving the provision open to the interpretation that

[10] Eschelon's use of the term "End-User Customer" in connection with Qwest's notices of network changes is improper, since the defined term includes customers of carriers other than Eschelon.

Qwest must provide circuit identifications and customer addresses for any change that affects any "End-User Customer." If Eschelon's intent is to limit its proposed notice requirement to network changes that take place at a specifically identified customer premise, it should modify its language to make that intent clear. (Qwest/3SR, Stewart Surrebuttal/16.)

Eschelon also presents the following alternative proposal:

> Such notices will contain the location(s) at which the changes will occur including, if the changes are specific to an End User Customer, the circuit identification, if readily available."

While this alternative proposal is an improvement on Eschelon's original proposal, it still improperly attempts to shift the burden of determining circuit IDs from Eschelon to Qwest. Because Eschelon has access to circuit IDs in its own records and Qwest has neither ready access to those IDs nor a legal obligation to provide them, Eschelon's alternative proposal is improper and should be rejected.

Issues 9-37 to 9-42: Wire Center Issues.

These issues have been resolved pursuant to the settlement agreement in Docket 06-049-40, the "Wire Center Docket."

Issues 9-43 and 44: UNE Conversion Charges And Circuit Identification Numbers Relating To UNE Conversions (Section 9.1.15 Subparts).

Conversion Charges

Per the settlement in Docket 06-049-40, the parties have resolved the issue of the charge for the conversions of UNEs to alternative facilities that Qwest performs for CLECs.

Circuit Identification Numbers Relating to Conversions from UNEs to Alternative Facilities

This issue arises because of Eshcelon's demand that upon converting the UNEs that Eschelon is leasing from Qwest to alternative, tariffed facilities, Qwest continue using the

same UNE-specific circuit identification number for the tariffed facilities. Because Qwest provisions and bills tariffed products through inventory databases and systems that are separate and distinct from the databases and systems used for UNEs, it is essential to Qwest's operations that a new circuit identification be assigned upon a conversion to a UNE. Without an identification number specific to the tariffed product, absent very costly systems changes that may not be technically feasible, Qwest would not be able to properly provision and bill the tariffed product after he conversion.

Further, the use of appropriate and distinct circuit identification numbers for UNEs and tariffed products is essential for Qwest to comply with the FCC rules that require carriers to maintain accurate records that track inventories of circuits. Specifically, 47 C.F.R. § 32.12(b) and (c) require Qwest to maintain subsidiary records in sufficient detail to align specific circuits with the billing, accounting, and jurisdictional reporting requirements related to the services that these circuits support. In other words, Qwest must be able to distinguish for purposes of tracking and reporting its UNE products separately from its other products, such as its tariffed private line services. Qwest accomplishes this through the use of circuit IDs and other appropriate codes, depending on the systems affected by the requirement. (Qwest/4SR, Million Surrebuttal/5.)

Even more important than meeting these reporting requirements, changing the circuit ID upon a conversion ensures that Eschelon will receive proper support for testing, maintenance and repairs from the appropriate Qwest centers. UNEs and private line circuits are ordered, maintained and repaired differently and out of different centers and systems, and unique circuit IDs for these different products are needed to route order and repair submissions for these facilities to the appropriate systems and centers. (Qwest/4SR, Million Surrebuttal/7.)

As Ms. Million testified, Qwest is able to maintain, track and service all of its customers, including CLECs and their end-user customers, better and more efficiently if it is able to identify accurately the types of services and facilities it is providing to these respective categories of customers. It would be grossly inefficient, expensive and wasteful for Qwest to make changes to its myriad of operation support systems, processes and tracking mechanisms, such as circuit IDs, in order to accommodate each new regulatory nuance regarding how it offers its services to its customers and its competitors. (Qwest/4SR, Million Surrebuttal/4-5.)

For these reasons, the Commission should confirm Qwest's right to assess a conversion charge and to use a separate circuit ID for the alternative facilities that are used following a conversion.

Issue 9-53: Access to UCCRE (Section 9.9).

This issue arises from Eschelon's initial request that Qwest make available in Section 9.9 of the ICA a product referred to as "Unbundled Customer Controlled Rearrangement Element" ("UCCRE"). Eschelon's demand is improper, since the FCC has removed from its network unbundling rules the former requirement for ILECs to provide digital cross-connects for UCCRE.[11] UCCRE was the product Qwest developed to meet the former FCC requirement for ILECs to provide a means by which a CLEC could control the configurations of UNEs and ancillary services through the use of a digital cross-connect device. (Qwest/3, Stewart Direct/35.)

Although Qwest developed and made UCCRE available to CLECs, there has never been any CLEC demand for this product. No CLEC has ever ordered it or otherwise suggested a need for it. Because the FCC has removed UCCRE from its rules and given the

[11] *See* and compare former 47 C.F.R. § 51.319(d)(2)(iv) and current 47 C.F.R. § 51.319(d)(2).

absence of demand for it, Qwest has decided to discontinue offering this product on a going-forward basis. (Qwest/3, Stewart Direct/35.) Accordingly, Qwest opposes Eschelon's request to include the following language relating to the product in the ICA:

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

Eschelon's request to include this language in the ICA rests in part on its claim that the FCC did not intend to eliminate UCCRE from its unbundling rules even though it is undisputed that UCCRE was once in those rules but is no longer there. This claim is wrong. First, if there were any merit to the argument that the FCC's unbundling rules should not be implemented as they are written but should instead be implemented as a party believes they were intended, the rules would be completely malleable and uncertain. Second, there is no basis for Eschelon's conclusion that the FCC did not intend to eliminate access to digital cross-connect systems in its post-*TRO* rules. If that were the case, the FCC would have corrected its alleged oversight through an errata or some other corrective measure. That it has not done so confirms that it deliberately eliminated UCCRE from its unbundling rules. (Qwest/3, Stewart Rebuttal/31.)

Eschelon suggests that the requirement in FCC Rule 51.305(a)(2)(iv) for ILECs to provide interconnection at "central office cross-connect points" implicitly imposes a requirement to provide access to cross-connect systems. However, that rule does not even mention an obligation to provide access to cross-connect systems. If the FCC had intended to continue requiring ILECs to provide access to UCCRE, it would not have deleted the rule requiring that access in reliance on a different rule that does not mention access to cross-connect systems. It is simply illogical to assume, as Eschelon does, that the FCC chose to

move from a clear requirement in a former rule to a vague, inferential requirement based on a rule that does not even address UCCRE.

There also is nothing in the *TRO* or the *TRRO* suggesting that ILECs must seek approval from a state commission before discontinuing the UNEs and services the FCC eliminated from Section 251 in those orders. On the contrary, the FCC made it clear in the *TRRO* that its changes in unbundling requirements are to be implemented through the interconnection negotiation process, not by seeking approval of the changes from state commissions. Thus, the FCC states at paragraph 233 of the *TRRO* that "the incumbent LEC and competitive LEC must negotiate in good faith regarding any rates, terms, and conditions necessary to implement our rule changes." That is what Qwest has done through the ICA negotiation and arbitration process.

If the FCC determines that there is no longer a competitive need for ILECs to offer a product or a service, ILECs have no legal obligation to continue offering the product or service in new ICAs. Under Eschelon's "discrimination" argument, Qwest would be denied the benefits from these changes in the law for indefinite periods of time because old ICAs do not include the new legal requirements. The result would be that Qwest would be forced to enter into new ICAs that reflect old law and competitive conditions that no longer exist. That approach is not consistent with sound public policy and law, as it would fail to give effect to the FCC's determinations based on competitive conditions.

Further, in the highly unlikely event that Qwest provides UCCRE to another CLEC on a single, isolated basis, Qwest cannot reasonably be expected to notify Eschelon that the product has been offered. Qwest has no processes or systems in place that would permit it to comply with that type of notification requirement. On the other hand, in the very unlikely event that Qwest agrees in the future to include UCCRE in another CLEC's ICA or

amendment, Eschelon will have notice of that through Qwest's public filing of the ICA or amendment with the Commission.

Eschelon's second, alternative proposal in response to this narrow issue is far-reaching and goes way beyond cross-connects to create a mandatory process for Qwest to follow when it desires to discontinue offering a product, even if there is no legal obligation to offer the product and no demand for it. This proposal is set forth in Eschelon's multiple alternative versions of its proposed Section 1.7.3 and sub-parts. Under proposal "number 2," if Qwest desires to "phase-out the provision of an element, service or functionality," it must obtain approval from the Commission unless the element, service, of functionality is promptly removed from the ICAs of all CLECs following an order from the FCC or unless Qwest follows a phase-out process ordered by the FCC. Eschelon's proposal "numbers 3 and 4" are extremely lengthy and thus not susceptible to summary here, but they are based on the same concept that Qwest should not be permitted to stop offering products for which there is neither a legal obligation nor demand without obtaining Commission approval. For several reasons, these proposals are legally flawed and should be rejected.

First, one or more of the proposals appears to attempt improperly to regulate through the Qwest-Eschelon ICA Qwest's relationships with other CLECs. Specifically, the "generic proceeding" required under the proposal apparently could be triggered by Qwest's decision to stop offering a wholesale product or service to "any" CLEC, not just Eschelon. For example, if another CLEC decided that it no longer needed a product and wanted to exclude the product from its ICA, Qwest would have to go through Eschelon's proposed process to stop offering the product to that CLEC. Eschelon of course offers no authority for the insupportable proposition that it can regulate Qwest's relationships with other CLECs. There is no such authority and Eschelon's proposal is thus unlawful.

Second, it would not be appropriate in an interconnection arbitration between one CLEC and one ILEC to adopt and include in an ICA a broad, generic process that would apply to all local exchange carriers in Utah. The proper forum in which to consider an issue with this type of far-reaching effect is one in which all interested Utah local exchange carriers can provide input concerning the necessity and contours of such a process. If the Commission were to adopt such a process, the proper method for doing so would be through a generic order that applies to all carriers, not through a single arbitration and ICA between Qwest and Eschelon.

Third, it would be neither logical nor efficient to require a time-consuming, resource-intensive generic docket relating to product withdrawals in response to Qwest's attempt to stop offering products that no CLEC is ordering and for which there is no foreseeable demand. The fact that there is no demand at all for a product, such as the cross-connect offering, and no legal obligation to provide it should provide a sufficient basis for Qwest to stop offering the product. It should not be necessary to go through a time-consuming generic docket to reach this logical and seemingly inevitable outcome.

Finally, Eschelon's new and alternative proposal relating to this issue would improperly require Qwest to update its SGAT to reflect the results of any generic product withdrawal proceeding. As Ms. Stewart described, Qwest and CLECs typically do not rely any longer on Qwest's SGAT. (Qwest/3, Stewart Direct/45.) CLECs now have multiple other options available to them, including other carriers' ICAs that CLECs are able to opt into and also Qwest's multi-state "Template Agreement." Because of the effectiveness and utility of the Template Agreement, Qwest stopped updating its SGATs and has not made any updates to incorporate changes in law since 2004. (*Id.*) Accordingly, there would be no utility in requiring Qwest to update its SGAT to reflect withdrawals of network element and other product offerings.

For these reasons, the Commission should reject each of Eschelon's proposals. The Commission should adopt Qwest's proposed language for Section 9.3.3.8.3.1, as that language provides assurance that Eschelon will be able to obtain access to UCCRE cross-connects in the unlikely event Qwest makes this service available to other CLECs in future ICAs.

Issue 9-55: Combinations Of Loops And Transport (Sections 9.23.4, 9.23.4.4, 9.23.4.4.1, 9.23.4.5, 9.23.4.5.4 & 9.23.4.6).

There are important distinctions between UNE combinations, which are combinations of unbundled network elements, and commingled arrangements, which are comprised of a UNE connected or attached to a tariffed service (*e.g.*, a special access service). As elements mandated and regulated under Section 251 of the Act, UNEs are priced and provisioned under a regulatory scheme that does not apply to tariffed services. Issue 9-55 arises because of Eschelon's attempt to cloud the critical distinctions between UNE combinations and commingled arrangements by insisting upon use of the broad term, "loop-transport combinations," to refer to both products. As Eschelon acknowledges, Qwest does not have a product called "loop transport combinations." Instead, Qwest offers three distinct products that are comprised of combinations of loops and transport: (1) enhanced extended loops ("EELs"), (2) commingled EELs, and (3) high capacity EELs. (Qwest/3, Stewart Rebuttal/33-34.)

Each of these products is different from the other and, as acknowledged by Mr. Starkey, has its own unique pricing and provisioning requirements. (Tr., pp. 155-156.) Use of the generic term "loop transport combination" in reference to all three products therefore creates a significant risk that Eschelon could attempt to apply terms and rates to all the products that should apply to only one of the products. To avoid the confusion and potential improper application of rates and terms that could result from Eschelon's

"umbrella" term, Qwest's proposed Section 9.23.4 preserves the distinct labels and terms that apply to these three products. This approach is consistent with the clear statements from the FCC and other state commissions that the UNE component of a commingled product should be governed by UNE terms and the tariffed component by tariffed terms or a price list. The FCC reinforced this point several times in the *TRO*:

> Thus, our rules permit incumbent LECs to assess the rates for UNEs (or UNE combinations) commingled with tariffed access services on an element-by-element and a service-by-service basis. This ensures that competitive LECs do not obtain an unfair discount off the prices for wholesale services, while at the same time ensuring that competitive LECs do not pay twice for a single facility. (Internal citations omitted). *TRO*, at ¶ 582.
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> For example, a competitive LEC connecting a UNE loop to special access interoffice transport facilities would pay UNE rates for the unbundled loops and tariffed rates for the special access service. *Id*. at n.1796.
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> Thus, competitive LECs that commingle UNEs or UNE combinations with, for example, interstate access services would pay the appropriate rates for each service. *Id*. at n.1800.

State commissions have similarly repeatedly ruled that rates for the UNE component of a commingled arrangement are governed by UNE rates, while the tariffed portion of the arrangement is governed by tariffed rates.[12]

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[12] *See, e.g.*, *Re Momentum Telecom, Inc.*, Docket 29543, Final Order Resolving Disputed Issues, 2006 WL 1752312, *31 (Ala. P.S.C. Apr. 20, 2006); *In re: Petition to Establish Generic Docket to Consider Amendments to Interconnection Agreements Resulting from Changes in Law, by BellSouth Telecommunications, Inc.*, 041269-TP, PSC-06-0299-FOF-TP, Second Order on Generic Proceeding, 2006 WL 1085095 (Fla. P.S.C. Apr. 17, 2006); *Re MCImetro Access Transmission Services*, LLC, Cause No. 42893-INT-01, Order, 2006 WL 521649, *25 (Ind. U.R.C. Jan. 11, 2006); *Re Verizon New England, Inc. dba Verizon Massachusetts*, D.T.E. 04-33, Arbitration Order, 2005 WL 1712200, *65 (Mass. D.T.E. July 14, 2005); *Re Consider Change-of-Law to Existing Interconnection Agreements*, Docket No. 2005-AD-139, Order, 2005 WL 4673626, *12 (Miss. P.S.C. Dec. 2, 2005).

The net result of Eschelon's proposal to use the same label for products that are fundamentally different is that it creates a risk of applying improper terms to these products. In response to Qwest's concerns about this type of confusion, the Minnesota Commission rejected Eschelon's proposed use of "loop-transport combinations."[13] Indeed, any confusion that could result in UNE terms being applied to non-Section 251 services would be improper because ICAs must, as a matter of law, be limited to terms and conditions relating to the services and elements required by Sections 251(b) and (c). Thus, in *DIECA Communications, Inc. v. Florida Public Service Commission*,[14] a Florida district court recently affirmed the Florida Commission's determination that its arbitration authority under the Act is limited to imposing conditions that implement the requirements of Section 251. Other federal courts have recently reached the same conclusion.[15] Special access and private line circuits are not within Section 251 and are therefore governed by tariffs, not arbitrated ICAs.

Moreover, Eschelon's demands that commingled arrangements be put in place or ordered through a single local service request ("LSR") and be billed through the billing system that Qwest uses for UNEs (the "CRIS" system) is a direct attempt by Eschelon to have this Commission (via an ICA arbitration) force Qwest to change its special access and private line service order process and billing arrangements. In eliminating the pre-existing restriction on commingling in the *TRO*, the FCC modified its rules to permit CLECs to commingle UNEs and combinations of UNEs with services (*e.g.*, switched, special access

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[13] Minnesota Arbitration Order at ¶ 166.

[14] *DIECA Communications, Inc. v. Florida Public Service Comm'n, et al.,* 447 F. Supp. 2d 1281 (N.D. Fla. 2006).

[15] *See, e.g.*, *Verizon New England v. Maine Public Utilities Comm'n, et al.,* Nos. 06-2151, 06-2429, 2007 WL 2509863 (1st Cir. Sept. 6, 2007); *Qwest Corp. v. Arizona Corp. Comm'n.,* 496 F. Supp. 2d 1069 (D. Ariz. 2007); ; *Southwestern Bell Tel., L.P. v. Missouri Public Service Comm'n,* 461 F. Supp. 2d 1055 (E.D. Mo. 2006).

and private line services offered pursuant to tariff) that a requesting carrier has obtained at wholesale from an ILEC pursuant to any method other than unbundling under section 251(c)(3) of the Act. However, wholesale services such as switched and special access services have always been separate and distinct products from those UNE products provided to CLECs under the terms and conditions of their Section 252 ICAs. Each of these products, whether the product is tariffed or a Section 251 UNE, has its own established ordering, provisioning, and billing systems and methods. The FCC did not require combined processes, systems, and methods for the distinct components of commingled arrangements when it eliminated the restriction on commingling. Nowhere in the *TRO* or *TRRO* does the FCC require ILECs to modify the rates, terms and conditions of their special access and private lines services, beyond removing any commingling with UNE restrictions. (Qwest/3, Stewart Direct/36-37.)

If Eschelon's real objective is to eliminate the possibility of having tariffed terms apply to UNEs, as Mr. Starkey has asserted (Tr., pp. 158-160.), it should agree to the following language that Qwest has proposed to settle Issue 9-55:

> When a UNE circuit is commingled with a non-UNE circuit, the rates, terms and conditions of the ICA will apply to the UNE circuit (including Commission jurisdiction) and the non-UNE circuit will be governed by the rates, terms and conditions of the appropriate Tariff.[16] (Qwest/3R, Stewart Rebuttal/35.)

Qwest would agree to insert this language both in section 9.23 and in the Eschelon proposed Section 24 Commingling section of the ICA. This is a clear and straightforward manner for addressing Eschelon's concerns without creating undue confusion in Section 9.23 of the ICA. In fact, Qwest has already made such a commitment at section 24.1.2.1.

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[16] Tariff as used in the ICA is a defined term that refers to Qwest interstate Tariffs and state tariffs, price lists and price schedules.

Nonetheless, Qwest would agree to state it again to assure Eschelon that this is not a problem that needs extensive and confusing edits to the ICA.

For these reasons, the term "loop-transport combination" should be deleted from each product section of the ICA. The sections from which this term should be excluded include Sections 9.23.4 (general terms and conditions for EELs), 9.23.4.4. and 9.23.4.4.1 (Additional Terms for EELs), 9.23.4.5 and 9.23.4.5.4 (Ordering Process for EELs), and 9.23.4.6 (Rate Elements for EELs).[17]

Issue 9-56 and 9-56(a): Service Eligibility Criteria Audits (Sections 9.23.4.3.1.1 & 9.23.4.3.1.1.1.1).

These two issues involve disputes relating to the audits Qwest is permitted to conduct, as contemplated by FCC rules, to determine whether Eschelon is complying with the FCC's service eligibility criteria that apply to orders for high capacity EELs. The parties agree such audits are permitted. However, the dispute encompassed by Issue 9-56 concerns whether Qwest should be allowed to conduct audits without cause, as Eschelon relies on a plainly flawed reading of the *TRO* in contending that it need not submit to an audit unless Qwest demonstrates cause to believe that Eschelon is violating the eligibility criteria. The errors in this reading were recently confirmed by the Minnesota Commission, which rejected Eschelon's "cause" proposal.[18] Issue 9-56(a) involves the information Qwest must provide

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[17] Eschelon claims that the FCC has used "loop-transport combination" in the same manner Eschelon is proposing to use the term here. However, paragraphs 575 and 576 of the *TRO* discuss "UNE combinations," which means a combination that is made up of a UNE loop and UNE Transport. Neither of these cites refers to combinations of UNEs and non-UNEs. The other references Eschelon relies on—paragraphs 584 and 593 of the *TRO*—actually support Qwest's language. Paragraph 584 notes that combinations of UNE and private line combinations are clearly identified as "commingled" loop transport combinations, and paragraph 593 further defines such arrangements as a "commingled EEL." Commingled EEL is the Qwest name for UNE and private line loop-transport combinations. In sum, none of the FCC references identified by Eschelon supports using "loop transport combination" as an umbrella term to cover Qwest's three unique loop-transport UNE combination and commingled product offerings.

[18] *Minnesota Arbitration Order* at ¶ 185.

to Eschelon in requesting an audit, including whether the notice of an audit must set forth a cause for the audit. (Qwest/3, Stewart Direct/53.)

In the *TRO*, the FCC established service eligibility criteria for high-capacity EELs that are designed to ensure access to these facilities for bona fide providers of "qualifying services" while also protecting against the potential for "gaming" by providers. By "gaming," the FCC was referring to the practice of providers that obtain access to UNE facilities even though the services they provide do not qualify for use with UNEs. Through this practice, carriers attempt to obtain favorable UNE rates when they are not entitled to them or otherwise engage in regulatory rate arbitrage.[19] (Qwest/3, Stewart Direct/53.)

In paragraphs 625-629 of the *TRO*, the FCC describes the rights that ILECs have to conduct audits of CLECs to determine whether they are complying with the service eligibility criteria. As described in paragraph 626 of the *TRO*, an ILEC is permitted to "obtain and pay for an independent auditor to audit, on an annual basis, compliance with the qualifying service eligibility criteria." The auditor must issue an opinion regarding the requesting carrier's compliance with the criteria. If the auditor determines that the CLEC is not in compliance, the CLEC must make true-up payments, convert non-complying circuits to the appropriate service, and may have to pay the costs of the independent auditor. If the auditor concludes that the CLEC is complying with the criteria, the ILEC must reimburse the CLEC for the costs associated with the audit. As described by the FCC in paragraph 628, the intent of this reimbursement requirement for ILECs is to "eliminate the potential for abusive or unfounded audits." (Qwest/3, Stewart Direct/54.)

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[19] To protect against gaming, the FCC adopted the following service eligibility criteria for high-capacity EELs at paragraph 597 of the *TRO*: (1) the requesting carrier must have a state certification of authority to provide local voice service; (2) the requesting carrier must have at least one local number assigned to each circuit and must provide 911 or E911 capability to each circuit; and (3) the requesting carrier must have certain "circuit-specific architectural safeguards" in place to prevent gaming. The FCC describes these specific "architectural safeguards" in paragraph 597.

In agreed provisions of the ICA, Qwest and Eschelon have incorporated these rules relating to service eligibility audits into the ICA. *See* ICA Section 9.23.4.3.1.3.5. These agreed provisions include a commitment by Qwest to reimburse Eschelon for the costs of an audit that results in a finding that Eschelon is complying with the service eligibility criteria. *See* Section 9.23.4.3.1.3.5. Thus, the reimbursement scheme the FCC adopted as protection against abusive audits is in the ICA. There is therefore no practical need and no legal basis for Eschelon's "cause" proposal. (Qwest/3R, Stewart Rebuttal/43.)

There is no support in the *TRO* or FCC rules for Eschelon's proposal that would limit Qwest's rights to conduct an audit to only when Qwest states it has "cause" to believe Eschelon has not met the Service Eligibility Criteria." Eschelon's proposal impermissibly interferes with and weakens the audit rights Qwest was granted in the *TRO*. If the FCC had intended to limit audits to situations where there is demonstrable cause, it would have said so. It did not and, instead, established a compensation and reimbursement scheme that provides CLECs with incentives to comply with the service eligibility criteria and ILECs with incentives not to conduct wasteful audits. (Qwest/3, Stewart Direct/55.)

Eschelon relies on a partial quote of paragraph 621 of the *TRO* where the FCC quotes a prior order in which it said that audits "will not be routine practice" and will be undertaken only when the ILEC has a concern about compliance with the service eligibility criteria. The first problem with Eschelon's presentation of this quote is that the statement is from an FCC order—the *Supplemental Order Clarification*—that was superseded by the *TRO*'s pronouncements relating to service eligibility requirements and ILEC audit rights. It is curious that Eschelon does not quote or describe in any detail the FCC's rulings in the *TRO* relating to audit rights, since those rulings are the FCC's latest and last word on the subject. The second problem with Eschelon's reliance on this quote is the failure to discuss the footnote—footnote 1898 from the *TRO*—that follows the paragraph from which the quote is

taken. In that paragraph, the FCC summarizes the audit rights it established in the *Supplemental Order Clarification*. Conspicuously absent from that summary is any mention of a "for cause" requirement. (Qwest/3R, Stewart Rebuttal/42.)

Accordingly, as the Minnesota Commission recently concluded, there is no legal support for Eschelon's proposal. Agreed language in the ICA already protects Eschelon against the unlikely prospect of improper audits in the precise manner prescribed by the FCC. Eschelon's attempt to impose the additional "for cause" requirement would potentially gut Qwest's audit rights, contrary to the FCC's command in the *TRO*.

Issue 9-58 (a,b,c,d,e): Ordering, Billing, And Circuit ID Numbers For Commingled Arrangements (Sections 9.23.4.5.1, 9.23.4.5.1.1, 9.23.4.5.4, 9.23.4.7, 9.23.4.6.6, 9.1.1.1.1, 9.1.1.1.1.2).

Issue 9-58 and the related sub-issues (a,b,c,d,e) involve process-related disputes relating to commingled arrangements. When a CLEC orders either an EEL loop or EEL transport commingled with a private line transport circuit or a channel termination circuit, it is necessary to order, provision and bill each circuit out of the appropriate Qwest service order systems and to follow the established processes Qwest has for these products. For example, when a CLEC orders an EEL Loop commingled with a private line transport circuit, the design of Qwest's systems and processes requires that the CLEC order the EEL loop by submitting a local service request ("LSR"). Qwest bills the CLEC for this network element through its "CRIS" system. By contrast, the design of Qwest's systems and processes requires that the CLEC order the private line transport circuit by submitting an access service request ("ASR"), and Qwest bills the CLEC for this circuit through a different billing system referred to as the "IABS system." Each circuit is separate and is assigned its own circuit identification number ("circuit ID"). Moreover, the EEL loop is provided pursuant to terms and conditions that are specific to that facility, and the private line transport

circuit is provided based on specifically defined terms and conditions set forth in tariffs. (Qwest/3R, Stewart Rebuttal/44.)

This dispute arises because of Eschelon's demands that Qwest substantially modify its Operation Support Systems ("OSS") and provisioning processes to provide commingled EELs as though they are a single, unified element instead of a combination of two very distinct circuits with distinct characteristics and provisioning requirements. Eschelon's demands would require very substantial changes to Qwest's systems and processes not just in Utah, but in other states in Qwest's region since Qwest's systems and processes are used in multiple states and the costs of the changes would therefore be very substantial. (Qwest/3, Stewart Direct/58.) In many respects, this request is similar to the effect that ratcheting (billing a single circuits at multiple rates, both UNE and private line access) would have had within the Qwest provisioning systems. With ratcheting, a first step would have required that either the Qwest CRIS billing system or the IABS system would have been modified so that it could do cross billing of and associate of the products. In an affidavit submitted by Qwest in New Mexico in 2002 in Utility Case No. 3495 regarding the potential of requiring Qwest to ratchet rates, Qwest demonstrated that a switch in billing UNEs from Qwest's CRIS system to its IABS system would alone require many thousands of hours in coding and other work. This was in addition to the daunting challenge of the necessary transfer of ordering UNEs on LSRs to ordering UNEs on ASRs, as private line access is ordered today. The net effect of Eschelon's current demands is that Qwest be required to allow Eschelon to order private line access circuits via an LSR and to bill them in CRIS, which could result in very similar work efforts as would have been required for the ratcheting proposal. (Qwest/3SR, Stewart Surrebuttal/23.)

In addition to the fact that Qwest has no obligation to make these changes, Eschelon is not proposing to compensate Qwest for the substantial costs they would impose, even

though it has long been established that ILECs have a statutory right under the Act to recover the costs they incur to modify their systems to accommodate CLEC orders for wholesale services.[20] Although Eschelon is seeking to require Qwest to substantially change its ordering process (one order instead of two), its provisioning process (one circuit ID instead of two), and its billing process and systems (one bill instead of two), Mr. Denney makes the extraordinary claim that Eschelon's demands would not require any "systems changes" or cause Qwest to incur any costs. (Eschelon/2, Denney Direct/142.) Anyone who has familiarity with ordering, provisioning, and billing processes in the telecommunications industry would know the fallacy of Mr. Denney's claim. The changes Eschelon seeks to impose cannot be implemented without costly feasibility studies and process and system changes. Mr. Denney surely must know this based on his experience in the industry. In any case, he acknowledged during the hearing that he has not studied what would be required to implement these changes (Tr., p. 170.), which directly undermines his claim that the changes would not impose costs or require systems modifications.

Further, the changes Eschelon is seeking would affect all CLECs in Utah that obtain commingled arrangements, all of whom when they order commingled arrangements have been obtaining commingled products from Qwest without any difficulty using Qwest's existing systems and processes. Those CLECs would be affected by the far-reaching changes Eschelon is proposing and ultimately they would also be required to compensate Qwest for cost recovery associated with such far reaching OSS changes. (Qwest/3SR, Stewart Surrebuttal/54-55.) These other CLECs should not have the significant Qwest OSS changes

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[20] *See Verizon Pennsylvania v. Pennsylvania Public Utility Commission*, 380 F.Supp.2d 627, 655 (E.D. Pa. 2005) ("While the FCC regulations dictate that incumbents must cooperate with competitors and provide them with access to OSS based on the cost of provision, it does not follow, as MCI seems to suggest, that such access must be completely subsidized by incumbents."); *AT&T Communications, Inc. v. BellSouth Communications, Inc.*, 20 F.Supp.2d 1097, 1104 (E.D. Ky. 1998) ("Because the electronic interfaces will only benefit the CLECs, the ILECs, like BellSouth, should not have to subsidize them.").

(and internal operational changes) and the resulting compensation obligations imposed upon them in a single arbitration between two carriers in which they are not participating and will not be heard.

As discussed above in connection with Issue 9-55, when it eliminated the prior restriction on commingling in the *TRO*, the FCC did not eliminate the fundamental distinctions between the nature and provisioning of the UNE components and tariffed components of commingled arrangements. On the contrary, the FCC and state commissions have held that those distinctions are to be preserved, as demonstrated by the multiple rulings from the FCC and state commissions establishing that the UNE component and tariffed component of commingled arrangements are governed by different pricing schemes. Indeed, the distinct components of commingled arrangements have their own ordering, provisioning, and billing systems and methods. In eliminating the restriction on commingling in the *TRO*, the FCC did not require ILECs to eliminate these distinct processes and methods.

There also is nothing unusual in the telecommunications industry about carriers being required to submit more than one order and to use more than circuit identification number for products. Numerous UNEs, access and private line network arrangements require CLECs to place more than one order and to use more than one circuit ID. Even Eschelon acknowledges with its language in Section 9.23.4.5.4 that multiplexed facilities require at least two service orders and multiple circuits IDs. Eschelon has not suggested that Qwest commingle two separate facilities of different bandwidth/capacity into one order, one bill, and one circuit ID. (Qwest/3R, Stewart Rebuttal/46.)

Turning to the specifics of Eschelon's proposals for ICA Sections 9.23.4.5.1, 9.23.4.5.1.1 and 9.23.4.5.4, Eschelon is seeking to require far-reaching changes to accommodate its improper "Loop-Transport Combination" product. Under its proposal, Qwest would be required to (1) create an entirely new and unique hybrid service, (2)

combine a tariffed service and a UNE into one circuit, (3) permit Eschelon to submit one order for this hybrid service, and (4) issue just one bill, not two, even though the product would be comprised of separate elements. In addition to the flaws in this proposal described above, the proposal fails to recognize that there are sound reasons for and benefits from the current processes and systems that Qwest uses to process UNE orders, on the one hand, and orders for tariffed services, on the other. (Qwest/3, Stewart Direct/61.)

For example, circuit IDs include product-specific information that Qwest relies upon for proper processing, monitoring of performance indicator measurements and billing of products. Using a circuit ID assigned to a UNE for a tariffed service may result in mis-identification of the service and lead to billing and other errors. (Qwest/3, Stewart Direct/66-67.) Further, if a single LSR and single circuit ID were utilized, Qwest's systems could not recognize, for example, what part of the hybrid circuit had an installation and/or repair issue and thus Qwest could not know if specific performance indicator measurements and potential payments applied. In addition, Qwest's systems used to track these measurements do not read and filter results by the remarks section of the LSR. Likewise, Eschelon's demand that Qwest use a single bill for the elements comprising its proposed "Loop-Transport Combination" product fails to recognize that BANs contain essential product-specific information that affects the proper billing for products. This information affects, for example, whether a product is billed at a UNE-based rate or at a tariffed rate. Without separate bills or "BANs" for the distinct products that comprise commingled arrangements, billing errors would be inevitable. (Qwest/3, StewartDirect/70.)

Adding to the complexity and shortcomings of Eschelon's proposal is the fact that Qwest's provisioning of UNEs is subject to specific performance indicator measurements ("PIDs") and potential payments. Special access and private line arrangements are not subject to the same performance indicator measurements and potential payments. If Qwest

were required to create the type of hybrid product Eschelon is seeking—a mix of both the UNE circuit and private line facilities—the existing PIDs and related payment provisions could not apply. (Qwest/3R, Stewart Rebuttal/49.)

Eschelon's alternative LSR-related proposal also does not fix the shortcomings of its proposal. Eschelon proposes using the "remarks" section of the LSR to indicate that the two specific circuits of a commingled arrangement are connected with each other. While the remarks section could be used to convey information at the time of ordering or repair, once the initial activity has been completed, Qwest's systems do not retain, much less read, the remarks section of the original LSR. (Qwest/3R, Stewart Rebuttal/48.) Therefore, this is not a sustainable "fix" and is yet another over simplistic approach that cannot be implemented in the current Qwest OSS systems.

There also is no merit or support provided that substantiates Eschelon's highly exaggerated suggestion that it could be required to exit the local exchange market without adoption of these proposals relating to commingled arrangements. Often the need for a commingled arrangement is for transport between non-impaired wire centers, and as Ms. Stewart points out in her testimony, this may have limited impact on Eschelon in Utah.[21] (Qwest/3SR, Stewart Rebuttal/47.)

Finally, while Eschelon's proposals relating to these issues are flawed, it bears emphasis that they are properly raised not here, but in the CMP. Indeed, the CMP is designed to address precisely the types of provisioning and process issues Eschelon is raising. CMP allows CLECs collectively to prioritize what changes should be made to OSS related systems. Because CLECs have agreed that certain legal issues relating to implementation of the *TRRO* must still be resolved, the CMP change request ("CR") intended to complete *TRRO*-related systems work had been deferred pending completion of the *TRRO*

[21] *See* Stewart Direct Testimony Confidential Qwest Exhibit 3.1.

wire center dockets in Qwest's states. However, Qwest has recently announced its intent to re-activate the CR and to have the *TRO* and *TRRO*-related systems changes to be reviewed and addressed in CMP. (Qwest/3, Stewart Direct/65.)

For these reasons, the Commission should adopt Qwest's proposed Section 9.23.4.5, which sets forth the process Qwest has been using successfully to provide other CLECs with commingled arrangements. The Commission should reject Eschelon's proposed language in its proposed sections 9.23.4.5.1, 9.23.4.5.1.1, and 9.23.4.5.4 for the multiple reasons discussed above.

Issue 9-59: Eschelon's Alternate Proposal For Repairs Involving Commingled Arrangements (Section 9.23.4.7).

This issue also involves commingled EELs. If the Commission rejects Eschelon's demand relating to a single circuit ID for commingled EELs, as it should, Eschelon is proposing alternative language in its proposed Section 9.23.4.7 and sub-parts. Eschelon's proposal would require Qwest to make significant modifications to the systems and processes it uses for carrying out repairs associated with the individual circuits that are included in commingled EELs and, again, Eschelon is not offering to compensate for the costs of those modifications. (Qwest/3, Stewart Direct/84.)

Because of the length of Eschelon's proposed language, Qwest will not quote the proposal here. Most important, Eschelon is seeking that in the event of a "trouble" associated with a commingled EEL arrangement, it be permitted to submit just a single trouble report instead of a report for each circuit that comprises the commingled EEL. However, there are very legitimate and necessary reasons why a CLEC may be required to submit two trouble reports for commingled EELs, and, accordingly, Qwest opposes Eschelon's proposal. In fact, Qwest repair processes for commingled arrangements are

consistent with the repair practices of SBC as noted in Qwest Exhibit 3.1 to Ms. Stewart's direct testimony. (Qwest Direct/3, Stewart/78.)

In the interest of compromise and possible resolution of this issue, Qwest has agreed to make changes to its repair process for commingled EELs to address the concerns Eschelon has expressed about this process. Specifically, Qwest has agreed to modify its process for repairs involving commingled EELs in the manner summarized below when Qwest is providing all of the network elements. However, given the complexities and various repair problems that can occur with these facilities, it may be necessary that a second repair ticket be opened and therefore Qwest cannot agree that there will never be a second repair ticket. This is not unique to commingled arrangements. Frequently, for both UNE EELs and private line access repair situations, a second ticket is required. For example, if a repair is called in on the loop portion of a UNE EEL, or channel termination (private line loop) and the trouble is found on the high capacity transport instead, a second repair ticket becomes necessary and is opened. This allows for proper tracking, and future references for repair history. In some cases, there may need to be an additional repair center involved that would deal with a loop-only related failure.

Qwest agrees to modify its process as follows:

> First, the CLEC would do isolation testing to the Qwest network, and the CLEC must provide overall test results across both circuits or authorize optional testing for the UNE circuit before opening a trouble ticket. Charges for Qwest performing testing on behalf of the CLEC are found in Exhibit A of the ICA.
>
> Second, the CLEC submits a repair ticket following the normal process, on the specific Commingled circuit the CLEC has reason to believe has the failure. For illustrative purposes, let's assume it is the UNE Loop.
>
> Third, the CLEC will reference in the remarks field, the circuit ID of the circuit that is linked (commingled) with the circuit identified as having the failure. In our illustrative example; this would be the Private Line mux and high capacity transport.

> Fourth, Qwest processes the ticket and begins the repair process on the UNE Loop, and if trouble is found on the UNE Loop, Qwest makes the repair and the ticket is closed.
>
> In the alternative, the UNE Loop tests clear, but Qwest finds trouble on the high capacity transport portion of the commingled circuit. Qwest will close the UNE Loop repair ticket; and communicate to the CLEC what was found. No maintenance of services charges will apply since the trouble was isolated in the Qwest network (even if not specifically on the UNE loop). The Qwest technician will contact the CLEC and they will mutually agree upon which company opens the second repair ticket for the high capacity transport. If the Qwest technician opens the ticket, it will be a manual ticket and not contain the bonded automated trouble ticket advantages. If the CLEC opens the trouble ticket, it can follow the normal bonded process and enjoy all automated ticket advantages.
>
> Fifth, no time delay occurs regardless of whether Qwest or the CLEC opens the second ticket, and thus the repair process is not delayed. Qwest will already be using the testing information gained from the first ticket to begin the repair process for the second ticket.
>
> Sixth, due to the fact that these are different services, the repair clock for quality service measurements will start and end with the opening and closing of the ticket associated with the specific circuit. In this example, the UNE repair ticket would be closed with no trouble found, but no maintenance of service charges would apply, since there was trouble found within the Qwest network on the private line transport portion circuit.

The advantage of Qwest's proposal is that it addresses Eschelon's concerns regarding Qwest's repair process without requiring the substantial systems modifications and associated costs that Eschelon's proposal would require. Further, Qwest's proposal realistically recognizes that there may be circumstances in which a second trouble ticket is necessary. The intent of Qwest's proposal is to eliminate the need in most circumstances for Eschelon to open two repair tickets instead of one for commingled arrangements. The specific language Qwest is proposing for Section 9.23.4.7 and sub-parts is set forth in Ms. Stewart's direct testimony and the parties' updated issues matrix. (Qwest/3, Stewart Direct/79-81.)

An additional shortcoming of Eschelon's proposed Section 9.23.4.7.1.1 is that it appears to require Qwest to add the circuit ID of the Commingled EEL to the trouble ticket if it was missing from the Customer Service Record. Qwest is uncertain about the context in which Eschelon believes this could occur and, given this significant ambiguity, cannot agree to the proposal. In addition, if Eschelon does not indicate the additional circuit IDs it believes may be experiencing trouble, it would not be appropriate for Qwest to "assume" the identity of the circuits and to start adding circuit IDs to the trouble report.

With respect to Section 9.23.4.7.1.2, "No Trouble Found" is not a defined term in the ICA and therefore likely would result in ambiguity and disputes in implementing the ICA. Moreover, Qwest's commitment to the potential for only a single charge for Maintenance of Service or Trouble Isolation is clearly conveyed through Qwest's proposed language. Finally, Section 12.4.1.8 remains in dispute between the parties, and, therefore, Qwest opposes a reference to that section in Section 9.23.4.7.1.2. (Qwest/3, Stewart Direct/83.)

It is also critical that Qwest maintain accurate repair history detail on each circuit. These various obligations require submission of a trouble report specific to the circuit where trouble was actually found. However, with appropriate trouble isolation testing, the CLEC will generally know which circuit is experiencing trouble. Accordingly, CLECs should be able to routinely submit their trouble tickets with accurate listings of the circuit IDs. If this does not occur, the repair process will not be delayed. Further, if no trouble is found on the circuit identified in the trouble ticket, Qwest will also test the commingled circuit identified in the remarks section of the ticket. (Qwest/3, Stewart Direct/83.)

For these reasons, the Commission should adopt Qwest's proposed compromise language for Section 9.23.4.7 and sub-parts. In contrast to Eschelon's proposal, Qwest's language realistically recognizes that a second repair ticket may be necessary, yet it allows

the end-to-end repair process to begin with the issuing of a single repair ticket and without the very substantial systems-related costs that Eschelon's proposal would require.

Issue 9-61 (a,b,c): Loop-Mux Combinations (Sections 9.23.2, 9.23.4.4.3, 9.23.6.2, 9.23.9).

Loop-Mux Combinations are not a UNE.

The disputes encompassed by Issue 9-61 and the related sub-issues involve a commingled arrangement referred to as a "loop-mux combination," or "LMC." LMC is comprised of an unbundled loop, as defined in Section 9.2 the ICA (referred to in this Section as an LMC Loop), combined with a DS1 or DS3 multiplexed facility (with no interoffice transport) that a CLEC obtains from a tariff. A multiplexer is electronic equipment which allows two or more signals to pass over a single circuit. When used with LMC, multiplexing allows the traffic from several individual loops to be carried over a single, higher bandwidth facility. (Qwest/3SR, Stewart Surrebuttal/68.) Because LMC involves the connecting or linking of a UNE provided under Section 251 (*i.e.,* an unbundled loop) with a non-UNE tariffed facility (*i.e.,* a tariffed DS1 or DS3 private line or special access service), it is a commingled arrangement within the following definition of "commingling" set forth in the *TRO*:

> By commingling, we mean the connecting, attaching, or otherwise linking of a UNE, or a UNE combination, to one or more facilities or services that a requesting carrier has obtained at wholesale from an incumbent LEC pursuant to any method other than unbundling under section 251(c)(3) of the Act, or the combining of a UNE or UNE combination with one or more such wholesale services.[22]

Until the FCC made commingling available in the *TRO*, CLECs had no readily available mechanism for "handing off" UNE loops to their collocation spaces to connect the loops to the higher bandwidth transport facilities. To address this situation, Qwest

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[22] *TRO*, at ¶ 579.

voluntarily provided LMC to CLECs, thereby allowing CLECs to connect or hand off their loops to those transport facilities. With commingling becoming available after the *TRO*, CLECs no longer need access to Qwest's voluntary LMC offering in order to hand off loops to the larger transport facilities terminated in their collocation spaces. Commingling permits CLECs to terminate unbundled loops directly on the special access transport facilities they obtain from Qwest. By being able to purchase commingled arrangements—UNE loops commingled with special access or private line tariffed service, for example—CLECs now have a legally mandated mechanism available to them through which ILECs provide multiplexing in conjunction with higher bandwidth tariffed services to connect UNE loops.

While this dispute involves several issues, they are all linked by the overarching fact that Eschelon is seeking to require Qwest to continue providing its voluntary LMC offering at UNE rates, terms, and conditions even though commingling is available under the ICA and LMC is therefore no longer necessary to connect UNE loops with tariffed transport facilities. Eschelon seeks to have LMC treated as a stand-alone UNE in the ICA and to be governed by UNE rates and service intervals that apply only to UNEs. There is no legal basis for assigning UNE attributes to LMC when it is used with commingled arrangements. On the contrary, the FCC has made it clear that (1) the multiplexing used with commingled arrangements is a tariffed product, and (2) multiplexing is not a stand-alone UNE. (Qwest/3R, Stewart Rebuttal/70-71.)

In ruling that ILECs are required to provide commingled arrangements, the FCC explained that commingling allows a CLEC to attach a UNE to an "interstate access service." Significantly, in providing an example of a tariffed "interstate access service" to which a CLEC may attach a UNE, the FCC specifically referred to multiplexing: "Instead, commingling allows a competitive LEC to connect or attach a UNE or UNE combination

with an interstate access service, ***such as high-capacity multiplexing*** or transport services."[23] In the very next sentence, the FCC emphasized that "***commingling will not enable a competitive LEC to obtain reduced or discounted prices on tariffed special access services*** . . . ." (Qwest/3R, Stewart Rebuttal/71.)

This portion of the *TRO* directly 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. First, the FCC states very clearly that the multiplexing used with commingling is "an interstate access service." This statement directly contradicts Eschelon's claim that the multiplexing used with commingling is nothing more than a feature or function of the UNE loop component of a commingled arrangement. Instead, it is a separate "access service." Second, the FCC states unambiguously that when a CLEC obtains an access service like multiplexing for use with commingling, it is not entitled to "reduced or discounted prices on [the] tariffed special access services." In other words, Eschelon is required to pay the full tariffed rate for multiplexing used with commingling and is not entitled to a UNE rate or any other discounted rate.

Consistent with this ruling, in the decision of the FCC's Wireline Competition Bureau in the *Verizon-Virginia Arbitration*, paragraph 491, the Bureau rejected WorldCom's proposed language that would have established multiplexing as an independent network element, stating that the FCC has never ruled that multiplexing is such an element:

> We thus reject WorldCom's proposed contract language because it defines the "Loop Concentrator/Multiplexer" as a network element, which the Commission has never done.[24]

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[23] *TRO* at ¶ 583.

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

Indeed, the only network elements that that ILECs are required to provide as UNEs at TELRIC rates are those for which the FCC has made fact-based findings of competitive impairment pursuant to Section 251(d)(2)(B). The FCC has never made a finding of impairment for multiplexing and indisputably has not found that multiplexing is a UNE, as Mr. Starkey acknowledged during the hearing. Thus, Mr. Starkey's statement (Eschelon/1, Starkey/209.) that "Loop-Mux Combinations are also a UNE combination" is incorrect; multiplexing or a "mux" has never been found to be a UNE. (Qwest/3R, Stewart Rebuttal/69.)

In addition to these pronouncements by the FCC, state commissions have consistently ruled that tariffed rates, not UNE rates, govern the multiplexing component of commingled arrangements. For example, in *Re BellSouth Telecommunications, Inc.*, Docket No. 2004-316-C, Order No. 2006-136, 2006 WL 2388163 (S.C.P.S.C. Mar. 10, 2006), the South Carolina Commission approved the following ICA language:

> When multiplexing equipment is attached to a commingled circuit, the multiplexing equipment will be billed from the same agreement or tariff as the higher bandwidth circuit. Central Office Channel Interfaces (COCI) will be billed from the same agreement or tariff as the lower bandwidth circuit."
> *Id*. at *33.

The Florida Commission reached the same conclusion in *In re: Petition to Establish Generic Docket to Consider Amendments to Interconnection Agreements Resulting from Changes in Law, by BellSouth Telecommunications, Inc.*, 041269-TP, 2006 WL 1085095 (Fla. P.S.C. Apr. 17, 2006), where it concluded that the multiplexing rate in a commingled circuit should be based on the higher bandwidth circuit." (page citation available from PSC website); *see also Re BellSouth Telecommunications, Inc.*, Docket No. P-55, Sub 1549, 2006 WL 2360893 (N.C.U.C. July 10, 2006); *Re Momentum Telecom, Inc.*, Docket No. 29543, 2006 WL 1752312 at *31 (Ala. P.S.C. Apr. 20, 2006) ("When multiplexing equipment is attached to a commingled arrangement, the multiplexing equipment will be billed from the

same agreement or tariff as the higher bandwidth circuit."); *Re Consider Change-of-Law to Existing Interconnection Agreements*, Docket No. 2005-AD-1139, 2005 WL 4673626 (Miss. P.S.C. Dec. 2, 2005) (Same).

There also is no merit to Eschelon's back-up position that multiplexing is a feature or function of the unbundled loop and, hence, is governed by UNE rates, terms, and conditions. FCC Rule 51.319(a)(1) defines the local loop as "a transmission facility between a distribution frame (or its equivalent) in an incumbent LEC central office and the loop demarcation point at an end-user customer premise." The rule provides further that the loop "includes all features, functions, and capabilities of such transmission facility." In other words, to qualify as a feature or function of the loop, a piece of equipment must be located with or a part of the "transmission facility" that runs between a distribution frame or equivalent frame and a customer's premise. The multiplexing equipment used to commingle a UNE loop and tariffed transport is *not* located between a distribution frame or equivalent frame and a customer premise. Instead, it is located on the transport or central office side of a frame in a central office and thus is not part of the loop transmission facility. Further, the functioning of a DS1 loop, for example, is not dependent upon the use of multiplexing; it functions regardless of whether there is multiplexing used with the loop. For this additional reason, multiplexing cannot reasonably be viewed as a "feature, function, or capability" of the loop. (Qwest/3R, Stewart Rebuttal/72-73.)

The statements from the FCC that Mr. Starkey cites (Eschelon/1, Starkey/212) in support of Eschelon's contention that multiplexing is a feature or function of the loop involve an entirely different type of multiplexing than is at issue here. In those statements, the FCC is being clear that to the extent any type of multiplexing (such as digital loop carrier systems, which are often viewed as a form of multiplexing) between the end user premises and the MDF in the central office is required, the ILEC must "de-mux" the loop so it can be handed

off to the CLEC in the central office. By contrast, the multiplexing that is in dispute between Qwest and Eschelon is transport multiplexing that takes place not between a customer's premises and the MDF, but after a fully functional loop has been provided to the CLEC. (Qwest/3R, Stewart Rebuttal/74.)

Because LMC is not a UNE or a feature or function of the unbundled loop, Eschelon's proposals must be rejected.

The analysis set forth above demonstrating that the LMC is not a UNE or a feature or function of the loop dictates the outcome of each of the disputed issues within Issue 9-61.

First, with respect to the location of LMC terms and conditions within the ICA (Issue 9-61), the fact that LMC is not a UNE requires setting forth the terms relating to this offering in Section 24, which addresses commingling, not in Section 9.23, which addresses UNE combinations. As noted above, it is undisputed that the FCC has never found that multiplexing or LMC is a UNE and, hence, LMC should not be included in the UNE section of the ICA. Qwest has properly included LMCs in Section 24 because it is a commingling offering comprised of a UNE and a tariffed multiplexing product. (Qwest/3R, Stewart Rebuttal/75.)

Second, Eschelon's demand that Qwest provide LMC at UNE rates and terms (Issue 9-61(a)) instead of as a tariffed facility is directly contrary to the FCC's unequivocal statements in the *TRO*, cited above, that the multiplexing used with commingling is a tariffed "access service" for which CLECs must pay full tariffed rates. It also is contrary to the ruling in the *Virginia Verizon Arbitration* in which the FCC Bureau rejected the claim that multiplexing is a stand-alone UNE. (Qwest/3R, Stewart Rebuttal/73; Qwest/3, Stewart Direct/86.)

Third, with respect to the service intervals that apply to LMC (Issue 9-61(b)), since LMC is not a UNE combination and is a commingled service, the proper placement of service intervals should be in the Qwest Service Interval Guide and not in Exhibit C. The

Service Interval Guide specifically sets forth the intervals for commingled arrangements. By contrast, Exhibit C addresses service intervals only for UNEs. Because LMC is a commingled arrangement and not a UNE or UNE combination, it should not be included in Exhibit C. (Qwest/3R, Stewart Rebuttal/75.)

Fourth, because LMC is not a UNE combination, the rates for LMC should not be included in the UNE Combination section of Exhibit A, as Eschelon is proposing (Issue 9-61(c)). There is no legal basis for Eschelon to apply UNE-based rates in Exhibit A to this non-UNE product. The appropriate rates are those set forth in the applicable tariff for multiplexed facilities. Accordingly, the Commission should reject Eschelon's proposed references to the rates in Exhibit A for multiplexing. (Qwest/3, Stewart Direct/91.)

Finally, it is important to emphasize that contrary to its suggestions, Eschelon will still have access to multiplexing if its proposals relating to this issue are rejected. Qwest agrees that if Eschelon requests a UNE combination comprised of a UNE loop combined with UNE transport, Qwest will provide multiplexing at TELRIC rates. Further, Eschelon can obtain multiplexing through Qwest's tariffed offering of this product and also can self-provision multiplexing in its own collocation space.

Section 12 and Related Issues

In analyzing whether to adopt language proposed by Eschelon or to defer to the change management process, the Commission should keep in mind that, in every case where this dispute arises, Eschelon is also seeking to change Qwest's existing procedures. Because of the importance of consistent procedures between CLECs, Eschelon should be required to make a compelling showing of need prior to this commission accepting any proposals that change Qwest's existing processes. As was discussed earlier, Eschelon failed to make such a showing for changes to intervals. (Issue 1-1 and subparts). Eschelon similarly fails for Acknowledgment of Mistakes, Expedites and Jeopardies.

Acknowledgment of Mistakes (Issue 12-64)

This issue has to do with whether processes in Minnesota relating to mistakes in processing Eschelon orders should be exported to Utah. Eschelon spends much energy debating the specifics of the requirements, many of which Qwest believes are unnecessary and inappropriate. (Qwest/1, Albersheim Direct/40:3 - 40:8, Qwest/1R, Albersheim Rebuttal/32:1 - 32:19.) Most important to Qwest, however, is that the Utah Commission focus on whether the process proposed by Eschelon is necessary at all. The testimony of Qwest witness Renee Albersheim[25] established that Qwest already has processes in place to address Eschelon's concerns and Eschelon's proposed language could have the effect of changing those existing processes. (Qwest/1R, Albersheim Rebuttal/33:1 - 33:3, 34:17 - 36:12.) Eschelon witness Bonnie Johnson acknowledges the extent to which investigation into mistakes are available under current processes. (Eschelon/3.44.) As sophisticated businesses, it is difficult to imagine and provide for every possible scenario that could potentially arise related to this type of issue. Qwest contends that there is no need for such anticipation. Eschelon's proposed language as simply unnecessary. It should be rejected.

Expedites

Issues 12-67 and 12-67(a) – (g); Sections 12.2.1.2 and subparts; 7.3.5. and subparts; 9.1.12.1 and subparts; 9.23.4.5.6; and Exhibit A, section 9.20.14.

These disputes relate to the handling of Echelon requests for service in a time frame shorted that Qwest's standard interval. The parties differ on a number of different aspects of this dispute, including:

1. Whether the contract language should all appear in one place or should be placed in the sections of the contract associated with the products Eschelon orders (Issues 12-67, 12-67(c), 12-67(d); 12-67(f));

[25] Qwest/1, Albersheim Direct/40:4 - 40:7; Qwest/1R, Albersheim Rebuttal/32:13 - 32:15, 34:17 - 35:29.

2. Under what terms and conditions should Qwest provide expedites to Eschelon's customers for free (Issue 12-67(a)(Eschelon's proposal), 12-67(d) and (g)(Qwest's proposals)).

3. Under what terms and conditions should Qwest provide expedites to Eschelon for a charge (Issue 12-67(b)(Eschelon's proposal) 12-67(f)(Qwest's proposal)).

4. If an expedite fee is charged, whether that fee should be TELRIC based as contended by Eschelon or the same rate Qwest charges retail customers (Issue 12-67(g)).

Expedite Language should appear with the relevant product

One of the basic disputes between the parties has to do with the location of expedites language. Eschelon would like language to appear in Section 12 of the contract. Qwest would like it to appear in sections 7 and 9 instead. While at first blush, this dispute would appear unimportant, it reflects a fundamental difference between the parties. Qwest believes that a distinction should exist between designed and non-designed services and that a compensated expedite, if it should be available at all, should only be available to designed products (*i.e.,* products contained in sections 7 and 9). Qwest's language placement accommodates this approach and will make the transition to provide a compensated expedite product a more straightforward process than using section 12, which could apply to all products. (Qwest/1, Albersheim Direct/46:4 - 47:7, Qwest/1R, Albersheim Rebuttal/37:5 - 39:8.) Having contract language specifically associated with the different product offerings makes sense and Qwest urges the commission to adopt its proposed approach.

Eschelon should not be entitled to free expedites when other CLECs do not receive them.

Qwest proposes reference to its product catalogue for determining when free expedites will be available to a CLEC. Eschelon proposes four different sets of language for

free expedites. (Issue 12-67(a)). Eschelon's proposal Number 1 specifically lists a number of instances in which expedites would be available. Eschelon's language is inconsistent with Qwest's treatment of retail customers and allows Eschelon to obtain a free expedite when it accidentally disconnects a customer. (Qwest/1, Albersheim Direct/51:27 - 52:2; Qwest/1R, Albersheim Rebuttal/44:21 - 45:6.) Eschelon should not be able to put Qwest in a position of having to cover Eschelon's mistakes for free. Furthermore, Eschelon's language imposes an expedite obligation without any reference to whether Qwest has resources available to provide an expedite. (Qwest/1, Albersheim Direct/51:5 - 51:11, 52:14 - 53:3; Qwest/1R, Albersheim Rebuttal/50:1 - 50:5.) Qwest imposes that restriction on its obligation with respect to both its retail customers and other wholesale customers. Eschelon's proposal 1 should be rejected.

Eschelon's proposals 2 and 3 also fail to adequately address these concerns. Proposal 2 fails to resolve the resource problem with its first proposal. Proposal 3 appears to continue to list the detailed situations when expedites will be available and includes an obligation to provide expedites when a customer is disconnected due to an Eschelon error. Eschelon's option 4 comes closest to resolving the concerns Qwest has raised but does not distinguish between design and non-design services and does not use the same language as Qwest's tariffs regarding resource availability, thereby creating potential for vagueness. In addition, by including this language in the contract, Eschelon creates the potential that it would be treated differently from other wholesale customers who have their terms and conditions determined pursuant to Qwest's product catalogue. Qwest has detailed the procedural problems such an approach creates, and Eschelon has failed to show that its language is necessary. All of Eschelon's proposals in issue 12-67(a) should be rejected.

Eschelon's proposed language for fee based expedites goes beyond what Qwest provides for itself or to other CLECs and should be rejected (Issue 12-67(b)).

Eschelon proposes language in section 12.1.2.2 that obligates Qwest to provide fee based expedites without regard for whether resources are available to fill Eschelon's request. Eschelon's proposed language provides that ". . . Qwest ***will*** grant and process CLEC's expedite request . . ." (Issue 12-67(b)(emphasis added). Qwest does not unconditionally provide fee based expedites to its retail customer. (Qwest/1, Albersheim Direct/54:15 - 55:8.) Qwest also does not unconditionally provide fee based expedites to its wholesale customers. (*Id.*)

Eschelon's proposed language becomes particularly onerous if combined with TELRIC pricing as Eschelon suggests for Issue 12-67(g). One could easily imagine Eschelon making a business decision that it will compete by having all of its wholesale orders expedited, thereby being able to beat installation dates offered by Qwest. Furthermore, Eschelon would be able to compete by using Qwest resources. In effect, Qwest would be required to have sufficient staffing available to fill orders for Eschelon as quickly as Eschelon desires. (Qwest/1, Albersheim Direct/51:5 - 51:11. 52:14 - 53:3; Qwest/1R, Albersheim Rebuttal/50:1 - 50:5.) Such availability would impose tremendous costs on Qwest and it is difficult to imagine a cost study that could accurately quantify costs because Qwest's costs are entirely dependent on the business decisions made by CLECs.

Qwest's approach to this issue is the more reasonable approach. It places Eschelon in the same position as Qwest's retail customers and places Eschelon in the same position as other CLECs. Eschelon's concerns about the adequacy of Qwest's CMP procedures are unfounded and should be sufficient to handle any necessary changes in the future.

Eschelon's Proposed Language for both free and paid expedites is Inconsistent with the Act.

Eschelon's language would require Qwest to provide Eschelon with a superior service in violation of the Act. For this reason, Eschelon's language should be rejected. Furthermore, even under Qwest's language, expedites are not unbundled network elements subject to TELRIC pricing. Accordingly, Eschelon's proposed rate should be rejected as well. (Issue 12-67(g)).

Under the Act, Qwest is required to provide Eschelon with service that is at parity with what Qwest provides retail customers. 47 U.S.C. § 251(c)(3) (2006). In the event that no retail analogue exists for the service, Qwest is required to provide service at a level which provides the CLEC with a meaningful opportunity to compete. *See e.g., In re Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York,* 15 FCC Rcd 3953 ¶ 8 (Rel. Dec. 22, 1999)**.**

Eschelon's proposed expedited service goes beyond these requirements. For example, the Kentucky Commission recently ruled:

> The Joint Petitioners contend that expedited service is part and parcel of UNE provisioning. The Commission disagrees. Standard provisioning intervals for service are required pursuant to Section 251. BellSouth should also provide non-discriminatory access to expedited service, but expedited service is not a Section 251 obligation.

In re Joint Petition for Arbitration of Newsouth Communications Corp., 2006 Ky. PUC LEXIS 159 at Issue 86 (Ky. PUC March 14, 2006). Section 251(c)(3) requires that access to UNEs be nondiscriminatory:

> Unbundled access. The duty to provide… nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with

> the terms and conditions of the agreement and the requirements of this section and section 252. …

47 U.S.C. § 251(c)(3) (2006). Initially, the FCC's *First Report and Order* interpreted this as requiring ILECs to provide "superior" service. The Eighth Circuit struck this language down as a violation of the 1996 Act and the United States Supreme Court has never disturbed that portion of the Eighth Circuit's decision. *See e.g., Iowa Utilities Board v*. AT&T, 120 F.3d 753, 812-13 (8th Cir. 1997), *aff'd in part and rev'd in part*, 525 U.S. 366, 397 (1999). A recent decision by the Florida Commission recognizes this point:

> It is clear there is no obligation imposed or implied in Rule 51.311(b) that an incumbent render services to a CLEC superior in quality to those provided to a retail customer ***requesting similar services***. *So long as rates are identical for all requesting parties, CLEC and retail alike, parity exists in the provisioning structure for service expedites*, and there is no conflict with Rule 51.311(b). We reiterate that current regulations do not compel an ILEC to provide CLECs with access superior in quality to that supplied to its own retail customers.

In re Joint Petition by NewSouth et al., 2005 Fla. PUC LEXIS 634 *150, Order No. PSC-05-0975-FOF-TP (Fla. PSC Oct. 11, 2005) (emphasis added). This case approved BellSouth's expedite fee of $200 per day for CLECs because BellSouth charged the same fee to its retail customers to expedite similar retail services. *Id*. at *150-151. That is exactly what Qwest is doing here.

Eschelon attempts to overcome this abundance of authority by citing to a decision of the North Carolina Commission. *In Re NewSouth Communications Corp. et al.,* 2006 WL 707683 *47 (N.C.U.C. Feb. 8, 2006).[26] That Commission determined, among other conclusions, some of which Qwest disagrees with, that Section 251 requires BellSouth to expedite orders to CLECs on the same terms and conditions as it expedites orders for its retail customers. Qwest more than satisfies this standard. As noted above, Qwest does

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[26] Eschelon/133, Denney Surrebuttal/116:1 – 116:6.

expedite orders for CLECs using the exact same processes and procedures as it does for its similarly situated retail customers.

By asking the Commission to adopt its proposed expedites language, Eschelon is requesting that the Commission endorse a violation of the legal principles that Eschelon sets forth in its own testimony. As Eschelon recognizes, federal and state law require that Qwest not discriminate between purchasers. 51 CFR §§ 51.311(a), 313(a)). Agreed terms in the parties' ICA likewise mandate nondiscrimination between carriers purchasing from Qwest: "Qwest shall provide such Interconnection, UNEs, Ancillary Services and Telecommunications Services on rates, terms and conditions that are just, reasonable and nondiscriminatory in accordance with the terms and conditions of this Agreement and the requirements of the Act and state law and the rules and regulations promulgated thereunder." ICA at § 1.3. Thus, the parties' ICA requires Qwest to treat all CLECs the same. That is exactly what Qwest is doing. Scores of CLECs across Qwest's region and in Utah have adopted the unbundled loops expedite terms that Qwest and the CLECs developed in the CMP. However, Eschelon is asking this Commission to endorse a process for expediting orders for unbundled loops that is superior to the process used by every other CLEC in Utah. The Commission should reject Eschelon's attempt to obtain special treatment and adopt the language proposed by Qwest for expedites.

Eschelon's proposed language is unnecessary to provide Eschelon with a meaningful opportunity to compete.

Eschelon asserts that it is necessary for the Commission to adopt specific terms regarding expedites in its ICA to provide Eschelon with an "ability to offer expedite services to retail customers "on competitive" terms." (Eschelon/2, Denney Direct/183:15 - 183:16.) Noticeably absent from Eschelon's testimony is any case that holds that the failure to provide expedited due dates for free somehow violates this standard. Indeed, the law clearly supports

Qwest on this subject. In Utah, the Commission approved performance metrics for the ordering and provisioning of unbundled loops. The law is plain that Qwest provides CLECs a meaningful opportunity to compete by virtue of the fact that it satisfies these Commission-approved performance measures. *See e.g., In re Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York,* 15 FCC Rcd 3953 ¶ 8 (Rel. Dec. 22, 1999); *In re Application by SBC Communications Inc., et al., Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services In Texas,* 15 FCC Rcd 18354, 18361-18362 ¶ 13 n.33 (FCC Rel. June 30, 2000); *In re Application by Verizon New England Inc. et al., for Authorization to Provide In-Region, InterLATA Services In Maine,* 17 FCC Rcd 11659 ¶ 7 (FCC Rel. June 19, 2002); *Re U. S. WEST Communications, Inc.,* 2002 WL 1378630, ¶ 7 (Ariz. Corp. Comm. May 21, 2002).

Issues 12-71; 12-72; 12-73 - Jeopardy Notices

This issue relates to whether Qwest may properly characterize its failure to deliver as "customer not ready" when (1) Qwest has previously issued certain jeopardy notices on the order, (2) Qwest has cleared the jeopardy but has not sent a firm order confirmation and (3) Eschelon was unable to accept the order. Qwest proposed that any changes to these classifications be handled pursuant to its change management process. Eschelon proposed specific contract language addressing these issues and proposed modifying Qwest's current processes to prohibit Qwest from classifying an order as "customer not ready" in this particular circumstance.

Eschelon's proposal would impose a significant burden on Qwest. It would require Qwest to implement new processes for Eschelon. Such an approach would be costly,

complicated and potentially could lead to provisioning errors. (Qwest/1R, Albersheim Rebuttal/62:4 - 62:10.) Eschelon takes pieces of the CMP record out of context in an effort to try and portray its proposal as reflecting Qwest's current process. For example, Eschelon attempts to skew a record relating to an effort to eliminate unnecessary jeopardy notices into one that created a category of jeopardy notices that meant the CLEC should not expect Qwest to attempt to deliver a circuit on time. That portrayal is wrong, as evidenced by the attachment Qwest is providing.

Eschelon's factual arguments create enormous complexity over what should be a relatively straightforward issue. Eschelon's proposed language would force Qwest to change its classify a jeopardy as a Qwest caused jeopardy if Qwest does not send a firm order confirmation ("FOC") at least a day before the date on which Qwest attempts to deliver service. Thus the issue is as follows – does the absence of an FOC mean that Eschelon's failure to accept service should always be classified as caused by Qwest? Eschelon says "yes." Qwest believes Eschelon's position is unreasonable for the following reasons:

- Eschelon's proposal will do nothing to speed up service. Qwest provides the FOC as soon as possible, and often is able to deliver service on the same day it issues the FOC. This viewpoint is confirmed by Eschelon's own exhibit in this case.[27]

- Eschelon is usually able to accept service without an FOC because informal communications between technicians help make the provision of service

[27] See Eschelon/3.75, 3.76, Qwest/1R.1, 1R.2, 1R.3, 1R.4, 1R.5, 1R.9 and Qwest/1R, Albersheim Rebuttal/59:4 - 59:17, 64:16 - 62:20, 67:4 - 67:10. (These exhibits and testimony relate to the same set of orders and shows the communication that took place between Qwest and Eschelon technicians in jeopardy situations. These records demonstrate extensive efforts to resolve issues quickly. In many instances, Qwest delivered service on the original due date). Eschelon/3.75 (provides over a hundred examples of situations where Eschelon received no FOC. In 76% of these examples, Qwest delivered and Eschelon accepted service on the due date. In several additional instances, Eschelon accepted service before the due date.)

possible. Again, this Eschelon exhibit demonstrates that Eschelon is usually able to accept circuits absent an FOC.[28]

- While Qwest recognizes that there will be situations where a jeopardy is classified as customer not ready, when in fact Eschelon had no opportunity to be ready to deliver service, those situations are rare. In many instances, Eschelon has adequate opportunity to provide service.[29]
- The financial impact on Eschelon is extremely small. The impact on Qwest, by contrast could be significant. (Qwest/1R, Albersheim Rebuttal/62:4 - 62:7.)
- The details of these sorts of performance measurements should be determined in industry wide forums rather than individual interconnection agreements.

Eschelon makes several attempts to cloud the issues and cloud the record on what should be a straightforward dispute. Anticipating that Eschelon will make the same attempt here, Qwest is providing with this brief as "Attachment A" an attachment to Eschelon's Washington post-hearing brief, altered to delete Eschelon's characterization of Qwest positions, with Qwest comments and record evidence in response to Eschelon's claims.

This Commission should expect that Eschelon would have many examples of situations where it has been unable to provide service to customers due to the failure to receive a firm order confirmation as support for its proposed language. The record demonstrates precisely the opposite conclusion. Eschelon has identified many instances in which it has been able to provide service despite not receiving an FOC. Eschelon's jeopardies proposal causes big hassles, but solves no problem.

Eschelon asserts two advantages to its proposed change.[30] First, it suggests that its proposed language will "help to ensure timely service to its customers." (Eschelon/3, Johnson Direct/66:9 - 66:12.) Second, Eschelon suggests that its proposed changes will not

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[28] Eschelon/3.75.

[29] *Id.*; Qwest/1R.9; Qwest/1R, Albersheim Rebuttal/59:4 - 59:7

[30] Eschelon has claimed that it is implementing Qwest's existing process, or at least a process Qwest committed to perform. Qwest has testified that Eschelon's proposed language does not reflect Qwest's practices (Q/1R, Albersheim Rebuttal/50:16 – 50:22) and that the record does not reflect Qwest committing to such a process in CMP. (*Id.* 51:1 – 51:11.)

alter Qwest's performance assurance plan and will more accurately allocate fault when Qwest technicians classify a jeopardy in this situation. (*Id.* 66:12 - 66:17, 68:1 - 68:4.) The record demonstrates that both of Eschelon's claimed benefits are inaccurate.

Eschelon's Language Change Will Not Speed Up Delivery of Service to Customers.

Ms. Johnson claims that without an advance FOC, Eschelon often is unable to accept a circuit. (*Id.* 76:1 - 76:4.) The record reveals overwhelmingly that both Qwest and Eschelon work very hard to deliver service either on the due date or as quickly as possible after a jeopardy has been cleared, and the record establishes quite clearly that Eschelon's proposal will not speed up service to customers. Two exhibits demonstrate this point. Qwest/1R.9 (Exhibit to Ms. Albersheim's Rebuttal testimony) shows the communication that took place between Qwest and Eschelon technicians in jeopardy situations. These records demonstrate extensive efforts to resolve issues quickly. In many instances, Qwest delivered service before the supplemented due date.

Eschelon/3.75 (Exhibit to Ms. Johnson's Direct testimony) provides additional evidence in support of this point. It shows over a hundred examples of situations where Eschelon received no FOC. In 76% of these examples, Qwest delivered and Eschelon accepted service on the due date. In several other instances, Eschelon accepted service before the due date.[31] Eschelon's own evidence establishes that, despite Qwest's ability to classify orders as customer not ready under its current process, Qwest delivers service as quickly as possible. Eschelon's language change will not improve service to Eschelon customers.

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[31] Eschelon/3.75

Eschelon's Language Change Alters Qwest's Performance Assurance Plan.

Eschelon attempted to dispel the Arbitrators' conclusion that it was attempting to alter the applicability of performance indicator definitions by proposing the following alternative language:

> Nothing in this Section 12.2.7.2.4.4 modifies the Performance Indicator Definitions (PIDs) set forth in Exhibit B and Appendices A and B to Exhibit K of this Agreement.

Eschelon is technically correct that its proposal has no impact on the performance indicator definitions; it nonetheless has a very significant impact on Qwest's Performance Assurance Plan. Specifically, if a Qwest technician classifies an order as a Qwest jeopardy, it counts as a missed commitment, even though Qwest was ready and able to deliver the circuit. If, by contrast, the Qwest technician classifies the order as customer not ready, it is excluded from the calculation entirely.

Eschelon's proposal, however, changes the application of those definitions. Such a change should happen as a part of PID management, rather than as a part of an interconnection agreement.

Eschelon Usually Knows an Order is Coming Without an FOC.

Eschelon claims in its testimony does not have notice that service will be delivered absent an FOC. Ms. Albersheim testified that an FOC is not the "sole notice function" for providing notice that a circuit will be delivered. (Qwest/1R, Albersheim Rebuttal/59:13 - 59:17.) In fact, informal communication also allows Eschelon to accept a circuit most of the time.

Eschelon/3.75 (Exhibit to Ms. Johnson's Direct Testimony) and Qwest/1R.9 (Exhibit to Ms. Albersheim's Rebuttal Testimony), confirm Ms. Albersheim's testimony. Collectively, they provide over 100 examples of orders that Eschelon was able to accept without an FOC.

These exhibits demonstrate that the technicians working to deliver circuits communicate with each other in order to complete the job. Eschelon's insistence on an FOC is an attempt to take advantage of form (namely having possession of a document) over substance (actually receiving service) in order to gain advantageous PAP treatment. Such treatment should be rejected for the purpose of classifying fault for failure to deliver a circuit.

Issue 12-87 – Controlled Production Testing (Section 12.6.9.4).

At bottom, this issue, which is Issue 12-87 and Section 12.6.9.4 of the ICA, concerns whether Eschelon has the option under the parties' ICA to choose not to perform controlled production testing after Qwest modifies or installs upgrades in its Operations Support System ("OSS"). The CMP Document provides for certification testing as follows:

> New Releases of the application-to-application interface may require re-certification of some or all business scenarios. ***A determination as to the need for re-certification will be made by the Qwest coordinator in conjunction with the Release Manager of each Release. Notification of the need for re-certification will be provided to CLEC as the new Release is implemented.*** The suite of re-certification test scenarios will be provided to CLECs with the Final Technical Specifications. If CLEC is certifying multiple products or services, CLEC has the option of certifying those products or services serially or in parallel, if technically feasible.[32]

There is no question in this provision regarding who determines the need for re-certification: Qwest.

This approach makes sense. Qwest's OSS serve not only Eschelon, but also all other CLECs, other wholesale customers and retail operations. (Qwest/1, Albersheim Direct/65:7 - 65:12.) The risks associated with a failure of that system are substantial and go far beyond Eschelon. Furthermore, Eschelon's fear of unnecessary controlled production testing is unfounded. Eschelon has not presented a single example of unnecessary controlled

[32] *See* Qwest/1.1 (Exhibit to Albersheim Direct), CMP Document, Chapter 11, page 84 (emphasis added).

production testing in its testimony. Such unnecessary testing is unlikely. Qwest makes decisions regarding testing levels on a release basis and does not make different decisions for different CLECs. (*Id.* 65:28 - 65:29, 66:9 - 67:9.) Qwest will face far greater costs associated with controlled production testing than would Eschelon, because Qwest would be testing not only with Eschelon but also with other customers. (Qwest/1R, Albersheim Rebuttal/72:16 - 73:7.)

Because Qwest's OSS serves such a crucial role in the transactions between Qwest and all CLECs and in Qwest's provision of wholesale services, Qwest respectfully asks the Commission to adopt its proposed language for the parties' ICA.

Rate Issues

Issue 22-90: Rate Filing Procedure

This issue relates to the procedure for filing new rates that have not been approved by the Commission. Qwest agreed to Eschelon's proposed language from negotiations and Eschelon added a clause requiring Qwest to serve Eschelon with notice and/or cost studies when Qwest makes such a filing.

Qwest views Eschelon's addition unnecessary and more appropriately handled in Commission procedural rules instead of an interconnection agreement. Procedural options exist to give Eschelon the ability to participate and respond to any such filing. Accordingly, Qwest respectfully requests that the Commission order Qwest's proposed language.

Issues 22-90 (a) – (f) (Exhibit A, Sections 8.1.1.2; 8.8.1; 8.15.2.1; 8.15.2.2; 10.7.10; 10.7.12.1; 12.3; 9.2.8; 9.23.6.5; 9.23.7.6; 9.6.1.2; 9.23.6.8.1; 9.23.6.8.2; 9.23.7.7.1, 9.23.7.7.2, 8.13.1.1; 8.13.1.2.1; 8.13.1.2.2; 8.13.1.2.3; 8.13.1.3; 8.13.1.4; and 8.13.2.1).

The interconnection agreement that is being arbitrated in this case contains a number of rates for items that have not been addressed in cost dockets in Utah. For the purpose of

determining interim rates for the purposes of this arbitration, Qwest relies on the testimony and information it provided in connection with the hearing.

CONCLUSION

For the reasons stated here and in Qwest's testimony, the Commission should adopt Qwest's proposed ICA language for each of the disputed provisions.

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing **QWEST CORPORATION'S POST-HEARING BRIEF** was served upon the following by U.S. Postal, postage prepaid, and by electronic delivery on the 20th day of November, 2007:

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