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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)

SURREBUTTAL TESTIMONY

OF

DOUGLAS DENNEY

ON BEHALF OF

ESCHELON TELECOM, INC.

August 10, 2007

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1 **I. INTRODUCTION**

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

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

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

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

10 **Q. HAVE YOU PREVIOUSLY TESTIFIED IN THIS PROCEEDING?**

11 A. Yes. I filed Direct Testimony in this proceeding on June 29, 2007, and Rebuttal
12 Testimony on July 27, 2007.

13 **Q. WHAT IS THE PURPOSE OF YOUR SURREBUTTAL TESTIMONY?**

14 A. The purpose of my Surrebuttal Testimony is to respond to the Rebuttal Testimony
15 of Qwest witnesses Renee Albersheim, Karen Stewart, Teresa Million, and
16 William Easton relating to the issues I addressed in my Direct and Rebuttal
17 Testimony.

18 **Q. PLEASE DESCRIBE HOW THE REMAINDER OF YOUR TESTIMONY**
19 **IS ORGANIZED.**

1 A. Below I describe the exhibit(s) to my Surrebuttal testimony. The remainder of my
2 testimony is organized by subject matter number, in the same manner as my
3 Direct and Rebuttal Testimonies. Each subject matter heading may contain one or
4 more disputed issues from the interconnection agreement. For each subject
5 matter, I briefly summarize the issue. In addition, I summarize Qwest's position,
6 as put forth by its respective witness on the subject matter, and explain the flaws
7 in Qwest's position.

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

9 A. Yes. My Surrebuttal testimony has the following exhibits:

- 10 • **Eschelon 2SR.1 (Confidential)** -- Dun and Bradstreet Reports for Qwest
11 and Eschelon. These reports show that, unlike Qwest, Eschelon poses no
12 significant risk of default on its payments.
- 13 • **Eschelon 2SR.2** -- Excerpt from the testimony of Dr. Bowman, on behalf
14 of Qwest, regarding factors and loadings

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

16 **SUBJECT MATTER NOS. 2. RATE APPLICATION & 3. EFFECTIVE DATE**
17 **OF LEGALLY BINDING CHANGES**

18 **Issue Nos. 2-3 and 2-4: ICA Sections 2.2 and 22.4.1.2**

19 **Q. PLEASE PROVIDE A SUMMARY OF ISSUE NOS. 2-3 AND 2-4 AND**
20 **EACH COMPANIES' PROPOSALS FOR THESE ISSUES.**

21 A. Issue 2-3 (the first open provision in Section 2.2 of the ICA) is specific to rates
22 and concerns when Commission-ordered rate changes will take effect. Qwest has

1 proposed language be included in Section 2.2 providing that rate changes will be
2 given prospective effect unless otherwise ordered by the Commission. Eschelon
3 proposes the following sentence from Section 2.2 of the SGAT remain
4 unchanged: “Any amendment shall be deemed effective on the effective date of
5 the legally binding change or modification of the Existing Rules for rates, and to
6 the extent practicable for other terms and conditions, unless otherwise ordered.”¹
7 This language respects the authority of the relevant body to determine, at the time
8 it issues an order changing rates, when that ruling will take effect. Eschelon has
9 also offered to add the following sentence to address Qwest’s stated concerns:
10 “The rates in Exhibit A and when they apply are addressed in Section 22.”²
11 Section 22 is entitled “Pricing” and lays out the general principles applicable to
12 pricing. It contains a subsection entitled “Interim Rates” (Section 22.4). Closed
13 language in Section 22.4.1 provides that unapproved rates “are Interim Rates
14 under this Agreement.” Therefore, although Qwest’s proposal for Issue 2-3 is to
15 place language within Section 2.0 (“Interpretation and Construction”), Section 22
16 (and specifically Section 22.4) is the correct place in the contract to deal with
17 whether rates will be applied prospectively or not (*i.e.*, whether there will be a
18 true-up or not).

¹ I provide Eschelon’s entire proposed language for Sections 2.2 at Exhibit Eschelon 2, Denney Direct, pp. 11-14.

² Eschelon has also indicated (Exhibit Eschelon 2, Denney Direct, p. 13, line 11) that it would agree to add the word “further” to this sentence to recognize that Section 22 (Pricing) is in addition to Section 2.2, as follows: “The rates in Exhibit A and when they apply are *further* addressed in Section 22.”

1 Qwest argues the ICA language *should* be expanded to provide (in Section 2.2 –
2 under Interpretation and Construction) that there is no true-up unless the
3 Commission orders otherwise.³ If the Commission rules that the ICA language
4 should be expanded to more specifically address true-ups, then the Commission
5 should adopt Eschelon’s proposal for Issue 2-3 and Eschelon’s proposal number
6 two for Issue 2-4.

7 Issue 2-4 is similar to the previous issue in that it concerns when changes of law
8 will take effect (but it is not limited to rates). The parties have agreed that the
9 ICA “shall be amended to reflect such legally binding modification or change.”⁴

10 Regarding Issue 2-4, Qwest proposes, when an order that changes the law “does
11 not include a specific *implementation* date,”⁵ the *effective* date of such a change
12 will depend on whether one party gives the other notice of the change. Qwest’s
13 proposed language creates a new presumption that, when this Commission or
14 another regulatory body issues an order expressly stating that its ruling becomes
15 “effective immediately,” Qwest and other parties do *not* have to implement the
16 order immediately -- even if no party has requested a separate implementation
17 date or a stay of the order -- unless the Commission on its own also expressly
18 identifies a separate, specific implementation date. When one party gives the
19 other party notice within thirty days of the effective date of the order, Qwest

³ Qwest Exhibit 2, Easton Direct, p. 3, lines 17-22.

⁴ ICA, Section 2.2.

⁵ Qwest Exhibit 2, Easton Direct, p. 6, lines 21-22.

1 proposes that the amendment will be “deemed *effective* on the date of that
2 order.”⁶ When one party does not give notice, Qwest proposes that the *effective*
3 *date* of the legal change will be – not the date ordered by the Commission if it has
4 said that its order is effective immediately (or is effective immediately by
5 operation of law) – but an effective date in the ICA amendment reflecting that
6 change.

7 Eschelon’s first proposal for Issue 2-4 is simply to strike Qwest’s additions to
8 Section 2.2 and use the above-quoted SGAT sentence. Eschelon’s second,
9 alternative proposal for Issue 2-4 is to add three provisions to Section 2.2 (shown
10 in underlining on pages 12-13 of my direct testimony) to clean up the distinction
11 that Qwest appears to desire between an “implementation” date and an “effective”
12 date, as well as to add the following language to the end of Section 22.4.1.2:

13 Each Party reserves its rights with respect to whether Interim Rates
14 are subject to true-up. If, however, the Commission issues an order
15 with respect to rates that is silent on the issue of a true-up, the rates
16 shall be implemented and applied on a prospective basis from the
17 effective date of the legally binding Commission decision as
18 described in Section 2.2.

19 The first provision of Eschelon’s alternate proposal confirms that each party has
20 an obligation to ensure the agreement is amended. The second provision adds
21 clarification as to the relationship between Section 2.2 and Section 22 (Pricing).
22 The third provision recognizes that the effective date and implementation may (or
23 may not) be different and establishes that the burden is on the companies (*i.e.*, not

⁶ Qwest Exhibit 2, Easton Direct, p. 6, lines 24-25.

1 the Commission) to identify when they are different and, if a different date is
2 desired, to request a date different from the effective date for implementation of a
3 ruling. To address Qwest's stated concerns that a presumption is needed in cases
4 when the order is silent on the issue, Eschelon's proposal provides, when the
5 order is silent, the implementation date and effective date are the same, unless the
6 Commission orders otherwise or, if allowed by the order, the parties to the ICA
7 agree otherwise.⁷

8 Eschelon's second, alternative proposal for Issue 2-4 includes addition of two
9 sentences to Section 22.4.1.2. In response to Qwest's proposal, Eschelon has
10 proposed two sentences which expressly state the companies reserve their rights
11 with respect to a true-up. Eschelon's proposal number two also provides that, if
12 an order is silent as to a true-up, Qwest gets the default provision it seeks,
13 indicating rates will be applied and implemented on a prospective basis (except
14 for new products when Section 1.7.1.2 is used).

15 **Q. REGARDING YOUR LAST POINT AS TO A TRUE-UP, DOES QWEST**
16 **AGREE THAT LANGUAGE IN SECTION 22 IS APPROPRIATE?**

17 A. Yes. Although Qwest agrees that language in Section 22 is appropriate, Qwest
18 rejects Eschelon's proposal without explanation.⁸ Eschelon's proposed language
19 for the end of Section 22.4.1.2 clarifies that both Eschelon and Qwest reserve

⁷ Exhibit Eschelon 2, p. 23.

⁸ Qwest Exhibit 2R, Easton Rebuttal, p. 4, lines 1-11.

1 their rights with respect to true-ups; has companies first look to a Commission
2 order with regard to whether rates are subject to a true-up; and in cases where a
3 Commission order is silent provides for the prospective treatment of rates.

4 Qwest's language, on the other hand, creates a default presumption that there will
5 not be a true-up, fails to acknowledge each company's rights with respect to true-
6 up arguments, and lastly looks to a Commission order to determine whether the
7 Commission overrode the no true-up presumption.⁹

8 Qwest ignores the language of its own proposal. Although Mr. Easton claims that
9 its proposed language "avoids ambiguity" in cases when the Commission does not
10 specify a true-up requirement,¹⁰ Qwest's proposed language for Sections 2.2 and
11 *22 does not even mention* the term "true-up."¹¹

12 **Q. ARE QWEST AND ESCHELON IN GENERAL AGREEMENT**
13 **REGARDING THE PRINCIPLES THAT SHOULD BE USED TO**
14 **GOVERN PROPER CHANGE OF LAW LANGUAGE (ISSUE NO. 2-4)?**

15 A. Yes. Mr. Easton and I agree that the "change of law language should: 1) provide
16 the parties with clear guidance as to when a change of law will take effect; 2) not
17 provide an opportunity for any party to delay the effect of a change of law; and 3)

⁹ Qwest Exhibit 2R, Easton Rebuttal, p. 4, lines 4-7.

¹⁰ Qwest Exhibit 2R, Easton Rebuttal, p. 2, line 6.

¹¹ Exhibit Eschelon 2R, Denney Rebuttal, pp. 5-6.

1 preserve the authority of the relevant regulatory body.”¹² However, it is clear that
2 despite Qwest’s agreement with these principles, Qwest’s language fails all three
3 criteria.

4 **Q. REGARDING THE FIRST CRITERION, DOES QWEST’S PROPOSED**
5 **LANGUAGE PROVIDE CLEAR GUIDANCE AS TO WHEN A CHANGE**
6 **OF LAW WILL TAKE EFFECT?**

7 A. No. As discussed above, for example, one of the situations in which guidance is
8 needed involves a true-up requirement, and only Eschelon’s proposed language
9 uses the term true-up and clearly indicates when a change in law will take effect if
10 the Commission’s order is silent on the issue.

11 **Q. REGARDING THE SECOND CRITERION, DOES QWEST’S PROPOSED**
12 **LANGUAGE LIMIT A PARTY’S ABILITY TO DELAY A CHANGE OF**
13 **LAW?**¹³

14 A. No. As discussed in my direct testimony (Exhibit Eschelon 2, Denney Direct, pp.
15 19-20) and rebuttal testimony (Exhibit Eschelon 2R, p. 10), Qwest’s language
16 would allow a company to attempt to avoid a change of law by remaining silent
17 about changes that work against a company, in hopes that the company
18 advantaged by the change of law fails to take notice. Given its greater resources,
19 Qwest will more likely be a company in every proceeding impacting Qwest, while

¹² Qwest Exhibit 2R, Easton Rebuttal, p. 4, lines 4-7.

¹³ Qwest Exhibit 2, Easton Direct, p. 10, lines 11-14.

1 all CLECs (including smaller CLECs opting into this agreement) are less likely to
2 be a party to all of these same cases, it is Qwest that will likely benefit from
3 selective silence. If Qwest were truly concerned about avoiding delay, then it
4 would accept Eschelon's alternative proposal, which clearly affirms that both
5 companies have the obligation to amend the contract upon a change of law.¹⁴

6 Mr. Easton argues that Eschelon is sophisticated and shows a "great deal of
7 awareness" and would likely know of any changes of law.¹⁵ Qwest ignores that
8 Eschelon is a small company compared to Qwest, and the resources available to
9 Eschelon reflect that difference in size. In addition, if Qwest is confident in
10 Eschelon's ability to take advantage of changes of law that benefit Eschelon, why
11 would Qwest be opposed to Eschelon's language? The only answer can be that
12 Qwest hopes to catch Eschelon or another, smaller carrier who happens to opt into
13 Eschelon's ICA.¹⁶

14 **Q. REGARDING THE THIRD CRITERION, DOES QWEST'S PROPOSED**
15 **LANGUAGE IMPINGE UPON A REGULATORY BODY'S**
16 **AUTHORITY?¹⁷**

¹⁴ See Eschelon's Second Alternative proposal, which is discussed in Exhibit Eschelon 2, Denney Direct, pp. 21-23.

¹⁵ Qwest Exhibit 2R, Easton Rebuttal, p. 7, lines 5-6.

¹⁶ Qwest argues that the ability for CLECs to opt into other CLEC negotiated agreements is part of the reason Qwest has chosen to stop updating its SGATs. See Qwest Exhibit 3, Stewart Direct, pp. 44-46.

¹⁷ Qwest Exhibit 2R, Easton Rebuttal, p. 7, lines 10-21.

1 A. Yes.¹⁸ Qwest’s language establishes scenarios when Qwest could argue a
2 Commission-ordered effective date is voided due to Eschelon’s failure to notify
3 Qwest¹⁹ of the order, even in circumstances when Qwest was a party to the case
4 causing the change of law (and even when Eschelon was *not* a party). When Mr.
5 Easton suggests that Qwest’s language “applies only when an effective date is not
6 specified,”²⁰ he again ignores Qwest’s own proposal. Qwest’s proposal states,
7 when an “order does not include a specific *implementation date*” and neither
8 company provides notice of the order to the other company, “the *effective date* of
9 the legally binding change shall be the *effective date of the amendment* unless the
10 Parties agree to a different date.” Qwest’s proposed language flies in the face of a
11 regulatory body’s authority because it means that, even though the Commission
12 may order that its ruling be “effective immediately,” the effective date “shall” be
13 the date of the *amendment* – and *not* the date ordered by the Commission!
14 Although Eschelon pointed this out to Qwest,²¹ Qwest continues to propose a

¹⁸ See also Exhibit Eschelon 2, Denney Direct, pp. 17-18.

¹⁹ Note: Qwest’s language would also apply in cases where Qwest fails to give notice to Eschelon, but as described previously, this scenario is less likely.

²⁰ Qwest Exhibit 2R, Easton Rebuttal, p. 7, lines 20-21.

²¹ For example, in an April 11, 2006 memo to Qwest regarding Section 2.2, Eschelon said: “Qwest also added a sentence about what happens “in the event” that neither party provides notice. If Qwest is a party to a proceeding and Eschelon is not and Qwest receives an adverse result, Qwest’s language would allow Qwest to delay the effectiveness of that adverse ruling by simply not notifying Eschelon of the ruling. Is this really Qwest’s position? Also, while the previous sentence includes the language “unless otherwise ordered,” this sentence does not. If a Commission issues an order in a generic cost proceeding that has been properly noticed and the order states that it is effective immediately, does Qwest believe it can change the effective date of the order because neither party gave the other notice (even if one or both parties were party to the proceeding)? That is what Qwest’s language says. Is this really Qwest’s position?”

1 change not to the implementation date, but to the “effective date of the legally
2 binding change.”

3 Even assuming this problem with Qwest’s language were belatedly corrected,
4 correcting it would be more helpful if the terms used are clear. Only Eschelon’s
5 proposal recognizes that there may (or may not) be two different dates (effective
6 date and implementation date) and spells out what this means. Eschelon’s
7 language reflects the correct presumption. It provides that, if the order is silent,
8 the effective date and the implementation date are the same. This places the
9 burden on the appropriate company – the company wanting a separate
10 implementation date – to speak up during a proceeding and request that date.
11 Qwest’s language has the opposite presumption: if the order is silent and neither
12 company provides notice, the effective date and the implementation date are two
13 different dates, with the companies and not the Commission setting the effective
14 date. Qwest’s proposal places the burden on the Commission to identify the need
15 for a separate implementation date, even when the companies do not request a
16 date or a stay of the Commission’s order.

17 An illustration of the problems with Qwest’s language is the Arizona
18 Commission’s Decision No. 64922 in Phase II of the UNE Cost Docket T-
19 00000A-0194.²² Mr. Easton argues that the Show Cause proceeding that resulted
20 from Qwest’s failure to implement the Arizona Commission’s order in the UNE

²² See Exhibit Eschelon 2, Denney Direct, pp. 14-15.

1 Cost Docket “did not relate at all to the effective date of a cost docket order.”²³
2 Mr. Easton misses the point, as the dispute was regarding the **implementation**
3 **date** of a Commission order. Although Qwest’ language contains no definition of
4 these terms, Qwest in its testimony defines an effective date as “the date the order
5 takes effect”²⁴ and implementation date as “the date on which the parties are
6 obligated to act pursuant to the order.”²⁵ Nowhere in Arizona Commission
7 Decision No. 64922 is a separate implementation date established, as the
8 Commission expected the order to be implemented immediately.²⁶ In that case,
9 Qwest suggested that it could therefore implement the order on a different
10 schedule (five months to a year.)²⁷ Qwest’s proposed ICA language incorporates
11 Qwest’s approach in that case for orders without a separate, specific
12 implementation date. Therefore, instead of simply delaying the date on which
13 “Qwest would have its systems modified to reflect the new prices”²⁸ Qwest could
14 also deny the effective date of the order to Eschelon, or any CLEC opting into
15 Eschelon’s interconnection agreement, if Eschelon (or the opting CLEC) failed to

²³ Qwest Exhibit 2R, Easton Rebuttal, p. 9, lines 5-6.

²⁴ Qwest Exhibit 2R, Easton Rebuttal, p. 5, line 7.

²⁵ Qwest Exhibit 2R, Easton Rebuttal, p. 5, line 8.

²⁶ At the open meeting, the Arizona Commission indicated that it believed it was reasonable to conclude that an order indicating that it was effective “immediately” means “fairly soon” *see* Transcript of 12/2/02 Special Open Meeting, AZ Show Cause Case, p. 9, lines 12-15, and that, in any event, “any definition of immediately is not five months later.” *See id.*, p. 10, lines 6-7.

²⁷ *See* Transcript of 12/2/02 Special Open Meeting, AZ Show Cause Case, p. 10, line 25 – p. 11, line 8 (emphasis added) (quoted on Exhibit Eschelon 2, Denney Direct, p. 27, lines 5-7).

²⁸ Qwest Exhibit 2R, Easton Rebuttal, p. 9, lines 7-8.

1 give notice to Qwest within 30 days of the Commission's order. Clearly, Qwest's
2 language would circumvent the authority of the Commission.

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

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

5 **Issue Nos. 4-5, 4-5(a), and 4-5(c): ICA Sections 9.2.3.8, 9.2.3.9, 9.2.4.4.2,**
6 **9.2.0.13 and Exhibit A**

7 **Q. PLEASE PROVIDE A BRIEF SUMMARY OF ISSUE 4-5 AND SUBPARTS**
8 **(DESIGN CHANGES).**

9 A. Issues 4-5, 4-5(a) and 4-5(c) apply to design changes for loops [issue 4-5], CFA
10 changes [issue 4-5(a)], and their respective charges [issue 4-5(c)] in Exhibit A.
11 Eschelon's language makes clear that Qwest will continue to provide design
12 changes and CFA changes for loops and that if any charges apply they reflect
13 cost-based rates.

14 **Q. MS. STEWART STATES THAT, BECAUSE QWEST AGREES TO**
15 **ESCHELON'S PROPOSED LANGUAGE IN ICA SECTIONS 9.2.3.8 AND**
16 **9.2.4.4.2, ISSUE 4-5 SHOULD BE CLOSED.²⁹ IS THIS ISSUE CLOSED?**

17 A. No. Issue 4-5 establishes language in the contract regarding Qwest's ability to
18 charge for design changes for loops. Issue 4-5(c) determines the interim rate that
19 would apply to such design changes. Issue 4-5 can not be separated from issue 4-

²⁹ Qwest Exhibit 3R, Stewart Rebuttal, p. 2.

1 5(c). Otherwise, the contract would establish Qwest's ability to charge for design
2 changes for loops, without establishing an appropriate rate for such charges,³⁰
3 and the result would be Qwest's unilateral implementation of rates for design
4 changes for loops.³¹ This was also discussed in detail in my rebuttal testimony
5 (Exhibit Eschelon 2R, Denney Rebuttal, pp. 12-13). Eschelon has made clear for
6 many months now that it reserves the right to argue that there should be no
7 separate rate for design changes for loops and CFAs because these costs are
8 already recovered in recurring rates. Eschelon's proposed language is subject to
9 that contingency (*i.e.*, Eschelon does not agree to language stating that Qwest may
10 charge Eschelon without also assuring in the ICA that the charge will be a cost-
11 based rate). The language cannot be closed, therefore, until the cost issue is
12 addressed. Exhibit Eschelon 2.3 (Denney) shows that Eschelon made this
13 position clear to Qwest in writing as early as May 4, 2006, though Eschelon made
14 its position clear to Qwest in negotiations prior to that time.³² It is important to
15 consider Eschelon's proposals for Issues 4-5 and subparts together so that the ICA
16 is clear as to if and when Eschelon would pay separate non-recurring rates for
17 these design changes and what these rates would be. If the Commission were to
18 find, for example, that any costs to Qwest were already included in the recurring

³⁰ A similar linkage occurs with issue 4-5(a) and 4-5(c). 4-5(a) establishes when Qwest can charge for CFA changes and 4-5(c) establishes the appropriate rate.

³¹ *See also* Exhibit Eschelon 2R, Denney Rebuttal, pp. 11-13.

³² *See also*, Exhibit Eschelon 2, Denney Direct, p. 31, lines 8-10.

1 rate, it would be inappropriate to include the proposed language stating that
2 Qwest could also charge a non-recurring rate.

3 As stated in my direct testimony, Exhibit Eschelon 2, p. 29, there are three open
4 issues for resolution: (1) whether Qwest may charge a separate charge for design
5 changes for unbundled loops even though Qwest has not done so in the past (ICA
6 Section 9.2.3.8; Issue 4-5); (2) if so, whether Qwest may charge the same rate that
7 it charges to perform design changes for UDITs or all loops to perform design
8 changes associated with certain Connecting Facility Assignment (“CFA”) changes
9 that are relatively common, require very little time, and can be performed on the
10 day of cut during the loop installation process when Eschelon is already paying
11 for coordination (ICA Section 9.2.3.9; Issue 4-5(a)); and (3) what is the
12 appropriate rate (Exhibit A Section 9.20.13; Issue 4-5(c)). Specifically with
13 respect to the rate, if Qwest may charge separately for design changes for
14 unbundled loops: (a) what rate Qwest may charge for design changes for loops
15 (Exhibit A Section 9.20.13.2); (b) what rate Qwest may charge for certain CFA
16 changes (Exhibit A Section 9.20.13.3); and (c) whether the rates identified by the
17 Commission in this arbitration should be Interim Rates.

18 **Q. MS. STEWART DISAGREES WITH YOUR TESTIMONY THAT THERE**
19 **IS NO BASIS FOR DESIGN CHANGE CHARGES FOR LOOPS IN THE**

1 **SGAT OR ICA.³³ HAS SHE IN THE PAST AGREED WITH YOU ON**
2 **THIS POINT?**

3 A. Yes. I addressed this issue at Exhibit Eschelon 2, Denney Direct, pp. 29-30 and
4 Exhibit Eschelon 2R, Denney Rebuttal, pp. 13-14. Ms. Stewart argues that her
5 admission in Minnesota that “neither Qwest’s SGAT nor the parties’ current ICA
6 includes a design change charge for loops” was unique to Minnesota and does not
7 apply in Utah.³⁴ In Minnesota Ms. Stewart testified:

8 **Minnesota**

9 “Mr. Denney **is correct** in stating that neither Qwest's SGAT nor
10 the parties' current ICA includes a design change charge for loops.
11 However, **that fact** should not prevent Qwest from recovering the
12 costs it incurs to provide these changes for Eschelon's benefit.”
13 (Stewart Minnesota Rebuttal Testimony, pp. 6-7, September 22,
14 2006, emphasis added).

15 Qwest can not point to any language in the SGAT or Eschelon’s current ICA that
16 provides for the basis for Qwest to charge the design change charges for loops in
17 Utah. Qwest’s argues that because the design change charge is listed in the
18 Miscellaneous section of Exhibit A, it applies to both loops and CFA changes. I
19 explained in my rebuttal testimony (Exhibit Eschelon 2R, pp. 26-27)
20 miscellaneous charges do not automatically apply to all UNEs, but the contract
21 points to the specific situations in which the charges in Exhibit A apply. The fact
22 that the SGAT included the design change charge only for transport and for years

³³ Qwest Exhibit 3R, Stewart Rebuttal, p. 8.

³⁴ Qwest Exhibit 3R, Stewart Rebuttal, p. 8.

1 Qwest charged this rate only for transport demonstrates that the rate was not
2 intended to apply to unbundled loops or 2/4 wire loop cutover CFA changes.

3 **Q. MS. MILLION CLAIMS THAT YOUR STATEMENT THAT “QWEST**
4 **HAS PROVIDED NO RELATED COST STUDY, OBTAINED NO**
5 **RELATED ICA AMENDMENT, AND SOUGHT NO RELATED**
6 **COMMISSION APPROVAL, BUT, INSTEAD, SIMPLY COMMENCED**
7 **BILLING FOR DESIGN CHANGES FOR LOOPS”³⁵ IS INACCURATE. ³⁶**
8 **PLEASE RESPOND.**

9 A. Ms. Million states that this statement “is not quite true,”³⁷ by explaining that the
10 Utah Commission approved the design change charge as part of Docket No. 00-
11 049-105.³⁸ She further argues that the rate in Utah was “quite clearly... intended
12 to apply in a variety of circumstances to a variety of Qwest products including
13 loops.”³⁹ I have explained throughout my direct, rebuttal and surrebuttal
14 testimony that, contrary to Ms. Million’s claims, the rate for design changes was
15 designed to apply to UDIT, and was not intended to apply to loops or CFA
16 changes. This is evidenced not only by Qwest’s cost study for design changes,⁴⁰

³⁵ Exhibit Eschelon 2, Denney Direct, p. 214.

³⁶ Qwest Exhibit 4R, Million Rebuttal, p. 16.

³⁷ Qwest Exhibit 4R, Million Rebuttal, p. 16, lines 8-9.

³⁸ Qwest Exhibit 4R, Million Rebuttal, p. 16, lines 9-11.

³⁹ Qwest Exhibit 4R, Million Rebuttal, p. 16, lines 11-13.

⁴⁰ Qwest Exhibit 4R.1, Million Rebuttal is a copy of Qwest’s design change cost study as approved by the Utah Commission. A review of this study demonstrates that it is not an average of different types of design changes and does not in any way include CFA changes. The probabilities reflected in this study represent Commission ordered flow through rates and reductions to Qwest’s labor time

1 but also by the facts that there is no authority in the SGAT or ICA for assessing a
2 design change charge for loops or CFA, and Qwest did not assess a design
3 changes for loops/CFAs for years until its unilateral decision to change course in
4 September 2005.⁴¹

5 **Q. MS. STEWART STATES THAT THE “REAL DISPUTE” IS “WHETHER**
6 **ESCHELON WILL AGREE TO RATES THAT COMPENSATE QWEST**
7 **FOR THE COSTS IT INCURS TO PERFORM” DESIGN CHANGES.⁴² IS**
8 **THIS THE “REAL DISPUTE”?**

9 A. No. The fact that Eschelon has agreed to compensate Qwest for design changes
10 (either because Qwest is already recovering design change costs in existing rates
11 or because Qwest establishes cost-based rates for design changes) cannot be
12 disputed. This is clear in Eschelon’s direct testimony,⁴³ rebuttal testimony,⁴⁴ and
13 most importantly, the ICA language.⁴⁵ Eschelon has also agreed to language in

and do not represent a blending of various activities.

⁴¹ See e.g., Exhibit Eschelon 2, Denney Direct, p. 213.

⁴² Qwest Exhibit 3R, Stewart Rebuttal, p. 3. See also, Qwest Exhibit 3R, Stewart Rebuttal, p. 6 and pp. 15-16.

⁴³ Exhibit Eschelon 2, Denney Direct, p. 35, lines 3-4 (“Qwest can assess a cost-based rate for design changes.”) and Exhibit Eschelon 2, Denney Direct, p. 28, lines 18-19 (“Eschelon needs a ruling that provides certainty that Qwest will continue to provide changes at TELRIC rates.”).

⁴⁴ Exhibit Eschelon 2R, Denney Rebuttal, p. 14, lines 4-6 (“Eschelon’s position statement, testimony and, most importantly, contract language make very clear that Eschelon is not attempting to prevent or limit Qwest from recovering its costs.”) See also, Exhibit Eschelon 2R, Denney Rebuttal, p. 17, lines 9-12 (“Eschelon’s language does in fact allow Qwest to assess a CFA design change charge in these circumstances – an interim rate, pending Qwest requesting and obtaining approval of a different rate. ”).

⁴⁵ Exhibit Eschelon 2, Denney Direct, pp. 31-34.

1 Section 5.1.6 of the ICA which states that “Nothing in this Agreement shall
2 prevent either Party from seeking to recover costs...”

3 Ms. Stewart points to my testimony at the Minnesota hearing as “the basis for
4 [her] concern that Eschelon’s proposal may be designed to prevent Qwest from
5 recovering the costs”⁴⁶ of design changes and other UNE-related activities.
6 However, Ms. Stewart misses the point of my testimony in Minnesota. I
7 explained that separate non-recurring charges for design changes and other UNE-
8 related activities may not be appropriate because “Qwest is compensated”⁴⁷ in the
9 existing rates for UNEs. As I explained, cost and maintenance factors were
10 applied to Qwest’s existing recurring rates to recover costs related to network
11 operations, doing repairs, maintaining the network, and moving circuits.⁴⁸ It
12 would be inappropriate for Qwest to recover these costs in its recurring rates
13 (through the application of these cost and maintenance factors) and recover them
14 again in separate non-recurring charges,⁴⁹ particularly given that charges for these
15 activities should be TELRIC based (as I also explained in my Minnesota
16 testimony).⁵⁰

17 **Q. WHAT IS THE REAL DISPUTE?**

⁴⁶ Qwest Exhibit 3R, Stewart Rebuttal, p. 16.

⁴⁷ Minnesota Hearing Transcript, V. 4, p. 204, line 22.

⁴⁸ Minnesota Hearing Transcript, V. 4, p. 207.

⁴⁹ *See, e.g.*, Exhibit Eschelon 2, Denney Direct, p. 45.

⁵⁰ Minnesota Hearing Transcript, V. 4, p. 206, lines 18-21.

1 A. The real dispute is whether Qwest already recovers design change costs in other
2 rates, and if not, whether Qwest should be allowed to apply the same charge for
3 UDIT design changes to design changes for loops and CFAs, and the appropriate
4 rate that should apply for design changes. To the extent that Qwest shows that
5 these costs are not recovered elsewhere, those rates should be non-discriminatory,
6 cost-based TELRIC rates.

7 **Q. MS. STEWART CLAIMS THAT “QWEST IS NOT SEEKING TO**
8 **ESTABLISH” TARIFFED RATES FOR DESIGN CHANGES IN UTAH.⁵¹**
9 **WOULD YOU LIKE TO COMMENT?**

10 A. Yes. As discussed in my direct testimony at Exhibit Eschelon 2, pp. 35-36, Qwest
11 previously indicated its intent to apply tariff rates to design changes and Ms.
12 Stewart testifies, “while Qwest believes that design changes are not a service
13 required under Section 251 of the Act and therefore are not governed by the Act’s
14 cost-based pricing requirement, Qwest is not seeking to establish that right in the
15 Utah interconnection agreement with Eschelon.”⁵² Qwest should commit that
16 Qwest will not seek to impose tariffed designed change charges on Eschelon in
17 another proceeding after this proceeding is complete. Eschelon has expended the
18 time and resources to negotiate and arbitrate the issue in this arbitration.⁵³ Qwest

⁵¹ Qwest Exhibit 3R, Stewart Rebuttal, p. 3.

⁵² Qwest Exhibit 3R, Stewart Rebuttal, p. 3.

⁵³ *See, e.g.*, Exhibit Eschelon 1, Starkey Direct, p. 50.

1 should not be able to avoid this issue simply by agreeing today and raising the
2 issue tomorrow after this case has concluded.⁵⁴

3 Similarly, Ms. Stewart testifies: "...Qwest is not seeking to establish that right in
4 the Utah interconnection agreement with Eschelon"⁵⁵ Again, Ms. Stewart is
5 careful to leave Qwest's options open by referring to "the Utah interconnection
6 agreement." As the five examples Mr. Starkey describes in his direct testimony
7 show,⁵⁶ Qwest's intent today may not be what Qwest actually does. Qwest's
8 September 2005 letter that informed CLECs that it would begin assessing design
9 change charges for loops, despite the absence of support for the charge in the
10 SGAT and ICAs, was an unexpected and substantial change in Qwest's charges
11 for design changes, and was done without seeking ICA amendments. This shows
12 that Qwest's representations that it will not assess tariff charges for design
13 changes, without clear ICA language prohibiting such a policy, cannot be relied
14 upon.

15 Furthermore, as explained by Mr. Starkey under Issue 9-31, Qwest's recent
16 attempt at crafting language related to design changes and other UNE-related
17 activities is an attempt at stripping these activities from Section 251 of the Act so
18 that Qwest can apply rates that are not TELRIC-based. Why would Qwest object

⁵⁴ Ms. Stewart testified in Minnesota that "Qwest will raise that issue in a separate proceeding that permits all interested parties – not just Qwest and Eschelon – to present their views on the subject." (Stewart Minnesota Rebuttal Testimony, p. 6, lines 12-14).

⁵⁵ Qwest Exhibit 3R, Stewart Rebuttal, p. 3.

⁵⁶ Exhibit Eschelon 1, Starkey Direct, pp. 52-105.

1 to recognizing design changes and other UNE-related activities as “access” to
2 UNEs in the ICA if Qwest did not intend to apply non-TELRIC, tariff rates for
3 them? And why would Qwest have modified its position in negotiations and
4 issued its 8/31/06 non-CMP notice modifying its Negotiations Template to
5 indicate that tariff charges will apply to design changes and other UNE-related
6 activities, if Qwest did not intend to apply tariff rates to them? This is further
7 supported by Ms. Stewart’s claim that design changes and other UNE-related
8 activities are not governed by Section 251 of the Act.

9 **Q. MS. STEWART STATES THAT YOUR ASSERTION THAT THERE IS A**
10 **RISK THAT QWEST WILL STOP PROVIDING DESIGN CHANGES IS**
11 **NOT CORRECT.⁵⁷ IS THIS RISK SUPPORTED BY PAST**
12 **EXPERIENCE?**

13 A. Yes. There have been cases in which an ICA contains express language regarding
14 a product or service and Qwest has still refused to provide it. For instance,
15 despite clear language in the ICA entitling Eschelon to expedites for UNE loops,
16 Qwest denied its obligation in this regard.⁵⁸ And, despite clear language entitling
17 CLECs to UNE Combinations in the early ICAs, Qwest initially refused to
18 provide UNE-P under the ICAs, forcing Eschelon to get orders from the state
19 commissions in Minnesota and Arizona before Qwest would provide it.

⁵⁷ Qwest Exhibit 3R, Stewart Rebuttal, p. 2.

⁵⁸ Qwest denied that the following contract provision entitles Eschelon to receive expedites for UNE loops: Qwest “shall provide CO-PROVIDER the capability to expedite a service order...” See, discussion of Issue 12-67 in Exhibit Eschelon 2, Denney Direct, p. 159 and Exhibit Eschelon 2R, Denney Rebuttal, p. 94.

1 Furthermore, if Qwest is able to remove these activities from Qwest’s obligation
2 to provide nondiscriminatory “access” to UNEs and charge non-cost based tariff
3 rates,⁵⁹ and in addition restrict access,⁶⁰ Qwest will still put Eschelon at a
4 competitive disadvantage although Qwest is making these functions “available.”

5 **Q. MS. STEWART TESTIFIES THAT “THERE IS NO BASIS FOR” YOUR**
6 **ASSUMPTION THAT THE COSTS FOR DESIGN CHANGES FOR**
7 **LOOPS ARE LESS THAN THOSE FOR UDIT DESIGN CHANGES.⁶¹ IS**
8 **HER TESTIMONY CORRECT?**

9 A. No. I have provided a basis for why the design change charge for loops, to the
10 extent they are not recovered in other rates, should be less than the design change
11 charge for UDIT. *See* Exhibit Eschelon 2, Denney Direct, pp. 48-57 and Exhibit
12 Eschelon 2R, Denney Rebuttal, pp. 18-21 and pp. 29-30. This information was
13 available to Ms. Stewart when she claimed that I provided “no basis” for
14 Eschelon’s position. I have shown that, to the extent, if any, that separate charges
15 for design changes for loops and CFAs are proper, a number of other factors
16 support the use of lower rates than the rate which applies to UDIT.⁶²

⁵⁹ Exhibit Eschelon 2, Denney Direct, pp. 35-39.

⁶⁰ Exhibit Eschelon 2, Denney Direct, pp. 40-53 and Exhibit Eschelon 2.4 (Denney).

⁶¹ Qwest Exhibit 3R, Stewart Rebuttal, p. 7.

⁶² Exhibit Eschelon 2, Denney Direct, pp. 48-52, explaining that design changes should not exceed the installation rate because design changes are component(s) of installation. *See also*, Exhibit Eschelon 2, Denney Direct, pp. 52-53, explaining that the design change cost study Qwest relies upon assumes processing and billing systems associated with transport services (EXACT and IABS), not loop systems (IMA and CRIS); Exhibit Eschelon 2, Denney Direct, pp. 55-56, explaining that the work involved with transport is typically more complex than that involved in

1 **Q. DOES QWEST’S PROPOSAL TO CHARGE THE SAME RATE FOR**
2 **UDIT DESIGN CHANGES AS FOR DESIGN CHANGES FOR LOOPS**
3 **AND CFAS CONFLICT WITH ANOTHER QWEST RATE PROPOSAL?**

4 A. Yes. Qwest’s claim that the costs for all design changes – whether UDIT, loop or
5 CFA – should be the same⁶³ conflicts with Qwest’s proposed rate for UNE to
6 private line conversions, where Qwest has sought a conversion charge for
7 transport that is about ten times the rate for loop conversions,⁶⁴ which shows that
8 Qwest believes that work related to transport is more complex, more manually-
9 intensive, and thus higher cost than that for loops.⁶⁵ However, when it comes to
10 design changes, Qwest argues that they should be the same. Qwest certainly
11 cannot have it both ways.

12 **Q. QWEST CLAIMS THAT YOUR TESTIMONY “FAILS TO ACCOUNT**
13 **FOR THE RE-DESIGN WORK THAT MAY BE REQUIRED BECAUSE**

loops; and Exhibit Eschelon 2, Denney Direct, p. 56, explaining that the time and work involved in a CFA change during test and turn-up is minimal because the Qwest technician is already standing at the frame and is coordinating the cutover with Qwest testing personnel and Eschelon personnel.

⁶³ Qwest Exhibit 3R, Stewart Rebuttal, p. 8.

⁶⁴ Compare Qwest’s proposed rate in section 9.6.12 of Exhibit A (Private Line / Special Access to UDIT Conversion) of \$115.34 to the rate in section 9.2.8 of Exhibit A (Private Line / Special Access to Unbundled Loop Conversion) of \$11.58 (comprised of \$8.48 for installation and \$3.10 for disconnect). *See also, e.g.*, Million Colorado Direct Testimony (Docket No. 06B-497T; 12/15/06), p. 17, lines 3-5, indicating that Qwest is proposing a rate of \$30.72 for converting UNE loops to private line circuits and a rate of \$137.36 for converting UDIT to private line circuits.

⁶⁵ Compare Qwest’s proposed rate in section 9.6.12 of Exhibit A (Private Line / Special Access to UDIT Conversion) of \$115.34 to the rate in section 9.2.8 of Exhibit A (Private Line / Special Access to Unbundled Loop Conversion) of \$11.58 (comprised of \$8.48 for installation and \$3.10 for disconnect).

1 **OF THE USE OF FIBER MUXING EQUIPMENT.”⁶⁶ DOES THIS**
2 **SUPPORT QWEST’S POSITION?**

3 A. No. This was addressed in my rebuttal testimony (Exhibit Eschelon 2R, pp. 30-
4 31). Qwest’s lone example regarding the use of muxing equipment shows the
5 danger in relying on Qwest’s conjecture about costs, rather than requiring Qwest
6 to file cost studies to support its claim that the costs of design changes for loops
7 and CFA (to the extent that they are not already recovered) are sufficiently similar
8 to design changes for UDIT that applying the same rate for all is appropriate.

9 **Q. QWEST CLAIMS THAT YOU HAVE NOT ACCURATELY DESCRIBED**
10 **THE WORK REQUIRED FOR CFAS AND THE COSTS ASSOCIATED**
11 **WITH THEM.⁶⁷ WOULD YOU LIKE TO RESPOND?**

12 A. Yes. Qwest made the same argument in its direct testimony, and I responded to
13 this argument at Exhibit Eschelon 2R, Denney Rebuttal, p. 19.⁶⁸ Ms. Stewart
14 stated in her direct testimony that, “In advocating a much lower rate for CFA
15 changes, Eschelon focuses on only the “lift and lay” component of this process,
16 failing to acknowledge the multiple other steps that are involved.”⁶⁹ As I
17 explained in my rebuttal testimony (Exhibit Eschelon 2R, pp. 19-20), Qwest is
18 wrong because Eschelon is paying for coordination of the cut separately, which

⁶⁶ Qwest Exhibit 3R, Stewart Rebuttal, p. 8.

⁶⁷ Qwest Exhibit 3R, Stewart Rebuttal, pp. 3-4.

⁶⁸ Exhibit Eschelon 2R, Denney Rebuttal, p. 19 refers to a deposition of Mr. Jenson. The relevant pages from his deposition are provided as Exhibit Eschelon 2.28 (Denney).

⁶⁹ Qwest Exhibit 3, Stewart Direct, p. 13.

1 will cover the activities that Qwest claims I ignore.⁷⁰ Since Eschelon's language
2 limits the CFA change option to coordinated installations, none of the activities
3 that Ms. Stewart claims I ignore should factor in to the appropriate rate for a CFA
4 design change.

5 **Q. MS. STEWART COMPLAINS THAT YOU DID NOT PROVIDE A COST**
6 **STUDY FOR THE INTERIM RATES THAT ESCHELON PROPOSES.⁷¹**
7 **HAVE YOU ALREADY ADDRESSED THIS ISSUE?**

8 A. Yes, I addressed this issue in my rebuttal testimony (Exhibit Eschelon 2R, pp. 33-
9 34), where I explained that it is Qwest's – not Eschelon's – obligation to provide
10 cost support for the charges that Qwest will assess Eschelon. Furthermore,
11 Eschelon's proposed rates for design change charges for loops and CFAs on the
12 day of the cut are offered by Eschelon as interim rates,⁷² until such time that the
13 Commission reviews and sets appropriate rates.⁷³ Therefore, Ms. Stewart's
14 criticism about the lack of a cost study is misplaced.

15 **Q. MS. MILLION DISAGREES THAT THE DESIGN CHANGE CHARGE**
16 **WAS DEVELOPED SPECIFICALLY FOR UDOT, AND CLAIMS THAT**

⁷⁰ Exhibit Eschelon 2, Denney Direct, p. 51 (“Eschelon is paying for coordination, or for Qwest's central office technician to remain in contact with personnel in Qwest's test center so that the technician has real time access to information during the cutover.”) *See also*, Exhibit Eschelon 2R, Denney Rebuttal, p. 19 (“Eschelon is already separately paying for coordination during these coordinated cuts, and this coordination should cover the types of activities that serve as the basis for Ms. Stewart's erroneous claim that a CFA change turns “a standard installation into a coordinated installation without additional coordinated installation cost recovery by Qwest.”)

⁷¹ Qwest Exhibit 3R, Stewart Rebuttal, p. 9.

⁷² *See*, Eschelon's position statement for Issue 4-5(c) in the Disputed Issues Matrix.

⁷³ *See, e.g.*, Exhibit Eschelon 2, Denney Direct, pp. 212-238.

1 **THE COST STUDY CALCULATES THE AVERAGE COST FOR ALL**
2 **DESIGN CHANGE PRODUCTS.⁷⁴ DID MS. MILLION PROVIDE ANY**
3 **COST SUPPORT INFORMATION TO SUPPORT HER CLAIM?**

4 A. No. In my direct testimony I provided excerpts from a Qwest cost study showing
5 that its design change charge was constructed based on UDIT systems and ASRs
6 (which are used for UDIT) instead of LSRs (which are used for loops).⁷⁵ Nothing
7 in the study refers to LSRs, loops or CFA changes, which would be contained in
8 the study if the study actually included costs for these items.

9 Ms. Million states, “it is clear from the description of the design change element,
10 included in the Executive Summary of the Nonrecurring Cost Study... that the
11 study and the rate resulting from it were intended to apply to all types of design
12 changes, not just transport or UDIT.”⁷⁶ Qwest should be able to point to specific
13 information in its cost study, rather than a study’s Executive Summary, which has
14 nothing to do with the actual cost calculations, to support its claim that the design
15 change charge was developed for all design change charge products – but it has
16 not. Further, in response to Qwest’s only example (fiber mux) for why the cost of
17 design changes for transport **may** be the same as design changes for loops, it is
18 certain that this rate was not intended to apply to CFA changes.

⁷⁴ Qwest Exhibit 4R, Million Rebuttal, p. 3, lines 12-15. *See also*, Qwest Exhibit 3R, Stewart Rebuttal, p.8.

⁷⁵ Exhibit Eschelon 2, Denney Direct, pp. 52-53.

⁷⁶ Qwest Exhibit 4R, Million Rebuttal, p. 3, line 24 – p. 4, line 1.

1 **Q. IS MS. MILLION’S CLAIM THAT THE DESIGN CHANGE RATE WAS**
2 **BASED ON AN AVERAGE FOR ALL DESIGN CHANGE PRODUCTS**
3 **SUPPORTED BY QWEST’S COST STUDY FOR DESIGN CHANGES?**⁷⁷

4 A. No, and perhaps this is why Ms. Million does not rely on the actual cost study
5 calculations to substantiate her claim. Qwest’s design change cost studies show
6 clearly that the rate for design change charge does not average together costs for
7 all design change products. For example, as shown in the Probability columns of
8 the cost study, the probability for all almost of the activities are shown as 100%⁷⁸
9 and the exceptions, contrary to Ms. Million’s claims, have nothing to do with
10 averaging together the “cost of performing a design change for all types of
11 products (i.e., loops and transport) and under all types of circumstances including
12 CFA (connecting facility assignment) changes.”⁷⁹ If this cost study averaged
13 together different activities for different design change products as Qwest claims,
14 all of the probabilities would not be 100%. The fact that there is no averaging
15 together of different activities, or assumed probability that certain activities would
16 occur for some design changes but not others, shows that this cost study is
17 developed to apply to one product – UDIT. If this cost study averaged UDIT
18 design change costs together with loop design change costs, as Qwest claims, it

⁷⁷ Qwest Exhibit 4R, Million Rebuttal, p. 3.

⁷⁸ See Exhibit Eschelon 2, Denney Direct, p.54.

⁷⁹ Qwest Exhibit 4R, Million Rebuttal, p. 3, lines 13-14. The exceptions have to do with manual versus mechanical ordering and another manual activity labeled, “Manually calculate charges if the service is interLCA facility or other manually billed products (tandem exhaust, etc.)” The notes in this study indicate that this is applied to “ASRs manually handled.” See Exhibit Eschelon 2, Denney Direct, p. 54.

1 would have to include assumptions for loops – but it does not.

2 **Q. IF MS. MILLION IGNORES THE COST STUDY SHOWING THAT THE**
3 **DESIGN CHANGE CHARGE WAS DEVELOPED FOR UDIT ONLY, ON**
4 **WHAT DOES SHE RELY FOR HER CLAIM THAT THE COST STUDY**
5 **AVERAGES TOGETHER COSTS FOR ALL DESIGN CHANGE**
6 **PRODUCTS?**

7 A. She relies on the description of the rate element in the Executive Summary of
8 Qwest’s compliance filing, which refers to “end user premises” and “channel
9 interface,” and claims that this terminology supports the application of this charge
10 to loops and CFAs.⁸⁰ First of all, Ms. Million’s claim does not comport with the
11 cost study information explained above, showing that the design change charge
12 was developed specifically to apply to UDIT and not loops or CFA. Second,
13 contrary to Ms. Million’s testimony, the description of the rate element in the
14 Executive Summary (and the use of the phrase “type of channel interface”) does
15 not specifically contemplate situations involving the CFA changes (or same day
16 pair changes) discussed under Issue 4-5. A change to the type of channel
17 interface means a change to the NC/NCI code, which a same day pair change does
18 not require (a same day pair change does not require a redesign of the circuit;
19 rather the circuit is terminated to a different slot, and the circuit ID may or may
20 not change). Therefore, Qwest’s own compliance filing clearly shows that the
21 rate does not apply to CFA changes discussed in Section 9.2.3.9 of the ICA.

⁸⁰ Qwest Exhibit 4R, Million Rebuttal, p. 4, lines 2-4.

1 Further, Ms. Stewart's testimony verifies the fact that CFA changes are not a part
2 of the design change charge. Ms. Stewart states, "while Mr. Denney focuses on
3 the technician-related work required for CFAs, he fails to recognize that
4 technician time is not included in the costs underlying Qwest's proposed rate for
5 design changes."⁸¹ Although the amount of time is small,⁸² technicians are
6 clearly involved in CFA changes, which Qwest admits require a technician's
7 involvement in the lift & lay⁸³ and which Ms. Stewart claims also requires other
8 technician work.⁸⁴ Because technician time is part of the CFA costs and the cost
9 study for the design change charge does not include any technician time, this rate
10 could not have contemplated (or included) CFA changes. Therefore, it is not
11 correct that the design change charge "calculates the average cost of performing a
12 design change for all types of products (i.e., loops and transport) and under all
13 types of circumstances including CFA (connecting facility assignment)
14 changes."⁸⁵ The design change charge calculation can not be the average of
15 activities that are not even in the study to begin with.

16 Although Qwest argues that it has the right to charge the design change charge for

⁸¹ Qwest Exhibit 3R, Stewart Rebuttal, p. 4.

⁸² Exhibit Eschelon 2R, Denney Rebuttal, pp. 19-21.

⁸³ Qwest Exhibit 3, Stewart Direct, p. 13 lines 9-10 ("Qwest central office technician's disconnection of a jumper from one CFA on a frame and reconnection of the jumper to another CFA on a frame") & *id.* lines 20-23 ("Once the tester has coordinated these efforts, the tester will have the CO tech run a jumper from the tie pair to the new CFA per the new design, i.e., the "lift and lay" portion of the effort").

⁸⁴ *See, e.g.*, Qwest Exhibit 3, Stewart Direct, p. 13, lines 13-14 ("The Central Office technician is also involved in the coordination").

⁸⁵ Qwest Exhibit 4R, Million Rebuttal, p. 3, lines 13-14.

1 UDIT, Loops and CFA changes,⁸⁶ the rate has not been approved for either
2 application and historically Qwest applied this unapproved rate only to design
3 changes for UDIT. Qwest's previous conduct (until September 1, 2005⁸⁷)
4 demonstrates that Qwest understood that the approved UDIT charge did not apply
5 to CFA changes. Before September 1, 2005, Qwest charged the rate for UDITs
6 but not loops,⁸⁸ consistent with the correct application of the UDIT charge per
7 Qwest's own cost study that *does not address technician time* (and the SGAT
8 language authorizing use of the charge for UDITs but not loops⁸⁹). Qwest can no
9 more properly apply an approved UDIT charge to CFA changes than it can select
10 an approved Collocation charge and apply it to CFA changes. The approved rate
11 must be applied appropriately and in light of the costs and activities upon which
12 the rate was based, which, in this case, Qwest admits does not include the
13 technician time involved in CFA changes.⁹⁰

14 **Q. MS. MILLION TESTIFIES THAT THERE HAS NEVER BEEN A**
15 **DISPUTE ABOUT THE FACT THAT QWEST'S MISCELLANEOUS**

⁸⁶ Qwest Exhibit 3R, Stewart Rebuttal, p. 8.

⁸⁷ Exhibit Eschelon 2.1 (Denney). See also Exhibit Eschelon 1, Starkey Direct, pp. 63-67.

⁸⁸ Exhibit Eschelon 2, Denney Direct, pp. 37-38.

⁸⁹ The SGAT authorizes Qwest to charge Design Change charges for dedicated transport but not loops. (*Compare* SGAT Section 9.6.4.1.4(c) *with* SGAT Section 9.2.4.). See Exhibit Eschelon 2, Denney Direct, pp. 31-32.

⁹⁰ Qwest Exhibit 3R, Stewart Rebuttal, p 4.

1 **CHARGES APPLY IN A VARIETY OF CIRCUMSTANCES AND TO A**
2 **VARIETY OF PRODUCTS.⁹¹ IS THIS ACCURATE?**

3 A. No. There have been long standing disputes regarding Qwest's application of
4 miscellaneous charges. In the Colorado cost docket, 99A-577T, AT&T
5 recommended that these charges be set to zero.⁹² In the Minnesota UNE cost
6 docket the ALJs ruled (and the Commission upheld) that miscellaneous charges
7 should be set to zero. Paragraph 196 of the ALJs' order reads:

8 **MISCELLANEOUS CHARGES (9.20)**

9 Qwest has identified a number of miscellaneous charges (in half-
10 hour increments, as opposed to quarter-hour increments approved in
11 the Generic Cost Case) relating to additional engineering, labor,
12 testing, and maintenance. Some, but not all, are listed for pricing in
13 the Second UNE Pricing Prehearing Order. Many of these charges
14 relate to troubles on the line. Qwest's list is modeled on its FCC
15 tariff charges, as opposed to any cost study based on TELRIC
16 methodology. **Qwest has failed to explain how these charges**
17 **would be applied, such as how it would distinguish between**
18 **situations when such costs are already included in element**
19 **prices, or when "additional" engineering, labor, testing, or**
20 **maintenance justifiably would be required.** Qwest has clarified
21 only that none of these charges would apply if trouble were found
22 on Qwest's side of the network. **Qwest has failed to adequately**
23 **explain the application of these charges, and they should be**
24 **deleted from its SGAT.⁹³**

25 Page 10 of the Minnesota Commission order states:

⁹¹ Qwest Exhibit 4R, Million Rebuttal, p. 4, lines 10-12.

⁹² See Direct and Rebuttal Testimony of Michael Hydock on Behalf of the Joint Case of AT&T Communications of the Mountain States, Inc., Worldcom, Inc. & XO Colorado, Inc., In the Matter of U S West Communications, Inc.'s Statement of Generally Available Terms and Conditions, Docket No. 99A-577T, June 27, 2001, Exhibit MH-1, page 20.

⁹³ Emphasis added, footnotes deleted. August 2, 2002 ALJs' Report in MN PUC Docket CI-01-1375.

1 The Commission appreciates the concerns raised by the CLECs.
2 The ALJ Report noted the need for clarity when discussing
3 miscellaneous charges (ALJ Report ¶ 196), category 11
4 mechanized charges (¶ 208), and the charges listed in Qwest’s
5 Statement of Generally Available Terms (SGAT) (¶ 223). But the
6 principle applies more broadly. **There is little point in**
7 **establishing costs related to mere labels;** costs must correspond
8 to real world phenomena. **If Qwest intends to charge a CLEC for**
9 **an element or a service, Qwest should be able to say what the**
10 **charge is for.** The description should conform to how an element
11 is used in the relevant cost model, and provide sufficient
12 information to let purchasers determine what they want to buy and
13 whether they have received it.⁹⁴

14 **Q. IS MS. MILLION’S TESTIMONY THAT MISCELLANEOUS CHARGES**
15 **“APPLY IN A VARIETY OF CIRCUMSTANCES AND TO A VARIETY**
16 **OF PRODUCTS”⁹⁵ CONSISTENT WITH QWEST’S OWN ACTIONS**
17 **REGARDING MISCELLANEOUS CHARGES?**

18 A. No. For example, in the state of Washington the Commission approved
19 miscellaneous charges for additional labor installation which applies to out of
20 hours installations. Despite the Commission approved rate, Qwest forced
21 Eschelon to sign a contract amendment in order to obtain out of hours
22 installations for EELs. Qwest was unwilling to apply this miscellaneous charge to
23 EELs without specific language in the contract allowing this charge. In this case,

⁹⁴ Emphasis added, footnotes deleted. October 2, 2002 Order in MN PUC Docket CI-01-1375 (“MN 271 Cost Order”).

⁹⁵ Qwest Exhibit 4R, Million Rebuttal, p. 4, lines 10-12.

1 Eschelon communicated to Qwest that it was clear this rate applied to both out of
2 hour loop and EEL installations, yet Qwest demanded a contract amendment.⁹⁶

3 For design changes, where parties disagree on the rate application, Qwest has
4 implemented this charge across its states (except Minnesota) without contract
5 amendments via a simply email notice.⁹⁷ When convenient, Qwest applies
6 miscellaneous charges at will, as with design changes, but in other circumstances
7 Qwest demands a contract amendment to clarify when miscellaneous charges
8 apply.

9 **Q. MS. MILLION DISAGREES WITH YOUR SUGGESTION THAT IT IS**
10 **NECESSARY TO DEVELOP SEPARATE RATES FOR DESIGN**
11 **CHANGES FOR LOOPS AND CFAS.⁹⁸ WOULD YOU LIKE TO**
12 **RESPOND?**

13 A. Yes. Ms. Million implies that Eschelon's proposal would require Qwest to
14 develop a rate to accommodate "every possible nuance of every possible way that
15 every possible product might be provisioned by Qwest for the CLECs."⁹⁹ Ms.
16 Million's claim is misleading and exaggerated. Eschelon's position is simple: if
17 Qwest is not already recovering the costs of design changes for loops and CFAs
18 (something for which Qwest did not previously assess an additional charge prior

⁹⁶ Qwest forced Eschelon to sign an amendment in Washington.

⁹⁷ Exhibit Eschelon 2, Denney Direct, pp. 40-42.

⁹⁸ Qwest Exhibit 4R, Million Rebuttal, p. 4, lines 23-26 and p. 5, lines 1-23.

⁹⁹ Qwest Exhibit 4R, Million Rebuttal, p. 4, lines 25-26 and p. 5 line 1.

1 to its unilateral September 2005 notification), it should be required to show that
2 the costs for these are sufficiently similar to that of UDIT before being allowed to
3 charge that rate. If Qwest is able to make this showing, then it would be allowed
4 to charge the same rate for each. However, I have shown that the costs for design
5 changes for loops and CFAs are *not* similar to that of design changes for UDIT,
6 and therefore, a proper cost-based rate should reflect the costs for that activity –
7 otherwise the rate developed will not reflect the underlying costs for loops and
8 CFAs (charges that a CLEC will face more frequently than the UDIT design
9 change charge).

10 Though Ms. Million attempts to confuse the issue by referring to “every possible
11 nuance” and “every possible ‘flavor,’” the fact of the matter is that the
12 Commission has required separate TELRIC-based charges for many different
13 “nuances” or “flavors” of a particular product. For example, the Commission has
14 required Qwest to provide separate rates for various types (or “flavors”) of loops
15 (*e.g.*, analog and digital, 2 wire and 4 wire, etc.). Likewise, Qwest has developed
16 separate non-recurring installation charges for loops of various types (*e.g.*, 2 wire,
17 DS1 and DS3). Qwest has even proposed different non-recurring charges for
18 conversions for loops versus UDIT, which shows that even Qwest understands
19 that when costs for products are not the same, separate rates should be established
20 based on the underlying costs for each. Taking Ms. Million’s argument to its
21 logical conclusion, Qwest could develop just one rate element to apply to all loops
22 or installation of all loops. However, the reason for different cost based rates for

1 different products is that the underlying costs for each of the products is different,
2 and therefore, applying a rate to a product that has no relationship to its
3 underlying cost would violate the cost-based pricing principles required by the
4 Act.

5 **Q. HOW DO YOU RESPOND TO QWEST’S ARGUMENT THAT “THE**
6 **FACT THAT QWEST DECLINED TO CHARGE THE COMMISSION-**
7 **APPROVED RATE FOR CERTAIN TYPES OF DESIGN CHANGES IN**
8 **THE PAST DOES NOT MEAN, CONTRARY TO MR. DENNEY’S**
9 **ASSERTION, THAT QWEST’S DESIGN CHANGE COST STUDY AND**
10 **THE RESULTING RATE EXCLUDES THE COSTS FOR THOSE**
11 **DESIGN CHANGES.”¹⁰⁰**

12 A. CLECs make business plans and decisions based upon the costs they face. Qwest
13 has a responsibility during a UNE cost case to clearly identify how the rates it
14 proposes will be applied. Qwest should not be allowed to creatively apply rates to
15 new applications three years after it started charging the rate. If Qwest believes a
16 Commission ordered rate applies to a certain product or service, but for some
17 reason Qwest decides not implement that rate, then Qwest should make it clear in
18 both Exhibit A and CLEC’s contracts regarding the application of the rate. Qwest
19 has done this in the past for other rate elements, therefore it is difficult to believe
20 that Qwest simply failed to make these clarifications for design change charges.

¹⁰⁰ Qwest Exhibit 4R Million Rebuttal, p.4 lines 16-19.

1 For example, the Exhibit A to the Eschelon/Qwest ICA in this case contains the
2 following footnote(s), which are not in dispute in this arbitration:

3 Footnote 5: Effective August 1, 2003, Qwest will no longer bill the
4 recurring and nonrecurring charges for Channel Regeneration.
5 Qwest reserves the right to revert back to the contractual rate only
6 after appropriate notice is given.

7 Footnote 9 (applies to numerous rate elements): Qwest will not
8 charge for this element until the Commission has an opportunity to
9 review and approve a rate in a future cost proceeding.

10 This example is from the Exhibit A filed with the petition for arbitration, but it is
11 not unique to Eschelon, nor is it exhaustive regarding Qwest's use of footnotes to
12 clarify when charges will apply. Following are two additional examples are from
13 the Colorado Exhibit A:

14 Footnote 6: Effective 8/1/03, Qwest will not charge the Channel
15 Regeneration charges of: DS1 REC \$2.32, NRC \$ 477.52 and DS3
16 REC \$7.34, NRC \$1,806.53 that were approved in Docket 99A-
17 577T. Contract amendments to remove the charges are not
18 required. Qwest reserves the right to revert back to the contractual
19 rate only after appropriate notice is given. Future regulatory
20 rulings and/or events may be subject to the conditions described
21 under "Change in Law Provisions" of the SGAT (Section 2.2) or
22 the applicable interconnection agreement.

23 Footnote 8: The Recurring charge applies when the NID is
24 purchased separately. Qwest has not implemented the NID
25 recurring charge of \$0.60 approved in Docket 99A-577T but
26 reserves to right to assess such a charge in the future.

27 **Q. WHAT WAS THE PURPOSE OF YOUR COMPARISON IN YOUR**
28 **DIRECT TESTIMONY OF THE DESIGN CHANGE CHARGE TO THE**
29 **LOOP INSTALLATION CHARGES?¹⁰¹**

¹⁰¹ Exhibit Eschelon 2, Denney Direct, pp. 48-50.

1 A. As stated in my direct testimony, “Because connecting to the CFA is one
2 component (or a subset of components) of installation, the work (and cost)
3 involved in performing a CFA change will be less than the work (and cost) of
4 performing the installation.”¹⁰² Ms. Million is critical of my comparison of the
5 design change charge to the 2/4 wire loop installation charge, claiming that the
6 comparison should have been made to all installations rather than just to the
7 installation for the 2/4 wire loop.¹⁰³ It is important to note that Ms. Million does
8 not take issue with the fact that the work and, therefore, the cost for the design
9 change is a subset of the work and cost of an installation, which was the point of
10 my original statement.

11 **IV. PAYMENT AND DEPOSITS (SUBJECT MATTERS NOS. 5, 6 & 7)**

12 **SUBJECT MATTER NOS. 5, 6 & 7. DISCONTINUATION OF ORDER**
13 **PROCESSING, DISCONNECTION, DEPOSITS AND REVIEW OF CREDIT**
14 **STANDING**

15 **Issue Nos. 5-6, 5-7, 5-7(a) 5-8, 5-9, 5-11, 5-12 and 5-13: ICA Sections 5.4.2,**
16 **5.4.5 and 5.4.7**

17 **Q. PLEASE PROVIDE A BRIEF SUMMARY OF THE PAYMENT AND**
18 **DEPOSIT ISSUES (ISSUES 5-6, 5-7, 5-7(A), 5-8, 5-9, 5-11, 5-12 AND 5-13).**

19 A. Issue 5-6 relates to whether Commission approval should be obtained before
20 Qwest takes the customer impacting action of discontinuing processing

¹⁰² Exhibit Eschelon 2, Denney Direct, p. 49, lines 13-15.

¹⁰³ Qwest Exhibit 4R, Million Rebuttal, p. 7, lines 5-7.

1 Eschelon's orders based on allegations of Eschelon's failure to make timely
2 payment (as proposed by Eschelon), or whether Qwest should be permitted to act
3 unilaterally to discontinue order processing when it alleges failure to pay (as
4 Qwest proposes). Issue 5-7 and subpart address whether Qwest should obtain
5 Commission approval before being allowed to disconnect Eschelon's customers'
6 circuits (as proposed by Eschelon), or whether Qwest can take this serious step
7 unilaterally.

8 Issues 5-8 and 5-9 address the definition of "Repeatedly Delinquent" which is a
9 key term in determining if and when Qwest can require Eschelon to make a
10 deposit. Issue 5-8 relates to whether an amount must be "non de minimus" for
11 that amount to be used in determining whether payment has been Repeatedly
12 Delinquent, as Eschelon proposes, or whether payment may be considered
13 Repeatedly Delinquent based on any late undisputed amount, no matter how small
14 that amount is, as proposed by Qwest. Issue 5-9 relates to whether Repeatedly
15 Delinquent payment should be defined as late payments in three consecutive
16 months (Eschelon's proposal)¹⁰⁴ or late payments in three or more months in a 12
17 month period (Qwest's proposal).

18 Issue 5-11 addresses whether a party should be able to seek Commission relief
19 once the other party demands a deposit. Eschelon's proposal would require
20 payment of a deposit within 30 days unless one party challenges the deposit

¹⁰⁴ Eschelon has an alternative proposal for Issue 5-9 that would define repeatedly delinquent as three late payments in a six month period.

1 amount at the Commission, in which case the deposit payment due date would be
2 ordered by the Commission. Qwest proposes that a party should pay the deposit
3 within 30 days with no vehicle to challenge this deposit amount at the
4 Commission before making the payment.

5 Eschelon's proposal for Issue 5-12 takes an alternative approach: instead of
6 relying on the definition of Repeatedly Delinquent as the trigger for a deposit
7 requirement, this proposal would allow the Commission to make this
8 determination based on all relevant circumstances. Qwest does not have an
9 alternative proposal under Issue 5-12.

10 Issue 5-13 relates to whether a separate provision is needed that would allow one
11 party to unilaterally review the other party's credit standing and increase the
12 deposit amount (or, according to Qwest, establish a new deposit requirement)
13 based on this review, as Qwest proposes, or whether deposit requirements are
14 sufficiently addressed elsewhere in the contract, as Eschelon proposes.¹⁰⁵

15 **Q. MR. EASTON SEEMS SURPRISED THAT ESCHELON SPENDS MORE**
16 **THAN 40 PAGES DISCUSSING THE DISPUTES REGARDING THE**
17 **CONTRACT LANGUAGE AND DOES NOT DISCUSS WHETHER**

¹⁰⁵ Eschelon has an alternative proposal for Issue 5-13 that would allow the review Qwest seeks but would require Commission approval.

1 **ESCHELON SHOULD PAY ITS BILLS ON TIME.¹⁰⁶ CAN YOU**
2 **EXPLAIN?**

3 A. Yes, Eschelon’s testimony discusses the contract language proposals and the
4 implications of the companies’ proposals because it is the contract language that
5 has brought the parties to these arbitration disputes. Mr. Easton states, “Eschelon
6 devotes more than 40 pages to criticizing Qwest’s proposed payment and deposit
7 language, but devotes little space to explaining why Eschelon should not pay its
8 bills on time.”¹⁰⁷ The contract language regarding when bills are due and
9 Eschelon’s obligations to pay its bills **is not in dispute.**¹⁰⁸

10 **Q. MR. EASTON STATES THAT “ESCHELON NEED ONLY PAY ITS**
11 **UNDISPUTED BILLS IN A TIMELY MANNER TO AVOID**
12 **CONSEQUENCES SUCH AS THE DISCONTINUANCE OF TAKING**
13 **ORDERS OR BECOMING SUBJECT TO DEPOSIT REQUIREMENTS”¹⁰⁹**
14 **AND THAT THE ABILITY TO PREVENT THESE CONSEQUENCES**
15 **LIES “SOLELY” WITH ESCHELON.¹¹⁰ IS MR. EASTON CORRECT?**

¹⁰⁶ Qwest Exhibit 2R, Easton Rebuttal, p. 10, lines 3-7.

¹⁰⁷ Qwest Exhibit 2R, Easton Rebuttal, p. 10, lines 3-7.

¹⁰⁸ See sections 5.4.1, 5.4.2, 5.4.3, 5.4.5 and 5.4.8.

¹⁰⁹ Qwest Exhibit 2R, Easton Rebuttal, p. 10, lines 7-10.

¹¹⁰ Qwest Exhibit 2R, Easton Rebuttal, p. 10, lines 6-10. Mr. Easton also implies that all Eschelon has to do is dispute amounts that it believes are inappropriate to avoid consequences. Qwest Exhibit 2R, Easton Rebuttal, p. 11, lines 8-9. However, even if Eschelon disputes charges and Qwest disagrees, Qwest can simply “resolve” the dispute and force Eschelon to escalate the dispute or Qwest will reclassify the amount as “late.” This is especially egregious given that this is not the billing dispute process set forth in the Qwest/Eschelon ICA.

1 A. No. If it were that simple this would not be an issue. I showed in my direct
2 testimony that there are many reasons why the information on which Qwest bases
3 these decisions may be inaccurate. These reasons include: (1) Qwest declaring
4 disputes as “resolved” when no agreement has been reached and Qwest has taken
5 no action to bring the matter to dispute resolution,¹¹¹ (2) Qwest not posting
6 Eschelon’s payments in a timely manner,¹¹² (3) Qwest claiming as past due
7 amounts, payments that are not due yet,¹¹³ and (4) Qwest not updating
8 information about where to send Eschelon’s invoices/correspondence¹¹⁴ - just to
9 name a few.¹¹⁵ Contrary to Mr. Easton’s claim, even if Eschelon paid all
10 undisputed amounts, these problems, individually or in combination, could lead
11 Qwest to believe Eschelon is past due and invoke remedies. In addition, these
12 examples show that the ability to avoid these consequences is not solely in
13 Eschelon’s control.

¹¹¹ Exhibit Eschelon 2, Denney Direct, pp. 72-74 and pp. 76-80; Exhibit Eschelon 2.10 (Denney) (Confidential); Exhibit Eschelon 2.13 (Denney) and Exhibit Eschelon 2.14 (Denney).

¹¹² Exhibit Eschelon 2, Denney Direct, p. 74 and Exhibit Eschelon 2.8 (Denney).

¹¹³ Exhibit Eschelon 2, Denney Direct, p. 74 and Exhibit Eschelon 2.7 (Denney) (Confidential).

¹¹⁴ Exhibit Eschelon 2, Denney Direct, p. 75 and Exhibit Eschelon 2.12 (Denney). Qwest continues to have difficulties in this regard. On April 2, 2007 Qwest sent a notice to Eschelon demanding a deposit and threatening to stop order processing and disconnect circuits effective April 16, 2007 for billing that Qwest *sent to the wrong address*. Eschelon followed Qwest’s process and updated the Qwest questionnaire with the correct billing information in November of 2006, but after inquiries from Eschelon about the bills, only corrected the information at Qwest in March. Though Eschelon had been in communication with Qwest about this issue, and even though Eschelon paid undisputed amounts once it tracked down the bills, Qwest sent this notice of disconnection and disruption of order processing to Eschelon. This example demonstrates the need for Eschelon’s proposed language in these sections. Qwest’s proposal for an open-ended provision to demand a deposit without any standard should be rejected.

¹¹⁵ See also, Exhibit Eschelon 2, Denney Direct, pp. 67-70 and Exhibit Eschelon 2.6 through Exhibit Eschelon 2.12 (Denney).

1 Case in point: in the case of Exhibit Eschelon 2.8, Qwest sent Eschelon a letter on
2 10/24/06 claiming that Eschelon had outstanding undisputed amounts and
3 threatened to stop processing Eschelon's orders and disconnect Eschelon's
4 circuits within three days if Qwest's demands were not met. However, Eschelon
5 had already paid the amount Qwest was claiming was overdue a week before
6 Qwest sent its letter. If Eschelon had not taken steps to show Qwest this mistake
7 very quickly (Qwest threatened to take action in 3 days), Qwest could have
8 stopped processing Eschelon's orders and disconnected circuits based on incorrect
9 information. Qwest's mistake of not posting Eschelon's payment, which led to
10 Qwest's letter threatening disconnection, was not in Eschelon's control.¹¹⁶ Mr.
11 Easton's testimony ignores the reality that Eschelon could pay all undisputed
12 charges, but if Qwest disagrees (because Qwest incorrectly posted a payment as
13 late, for example), Qwest could invoke remedies based on flawed information and
14 Eschelon and its customers would face dire consequences through no fault of
15 Eschelon's.¹¹⁷

¹¹⁶ Though Eschelon asked Qwest to examine its process to see why this mistake occurred, Qwest simply responded that the payment had been posted and the account was current – without any explanation of why the problem occurred.

¹¹⁷ Mr. Easton testifies at Qwest Exhibit 2R, Easton Rebuttal, p. 11, lines 19-22 that Qwest cannot unjustifiably disconnect circuits or stop processing Eschelon's orders because "Qwest will only disconnect service or discontinue order processing based on the fact that Eschelon has not paid for services that Qwest has previously provided under the terms of the contract." The problem with Mr. Easton's reasoning is that he calls Qwest's view of Eschelon's payment status a "fact," when it is not a fact and can oftentimes be incorrect. When Qwest's view of Eschelon's payment status is incorrect, Eschelon runs the risk of Qwest unjustifiably disconnecting its circuits or refusing to process Eschelon's orders as demonstrated by Exhibit Eschelon 2.11 (Denney) (Confidential). Qwest has indicated that it reserves the right to disconnect Eschelon's circuits and stop processing Eschelon's orders without further notice. Exhibit Eschelon 2.6, p. 2 (Denney) (Confidential), letter from Kathie Makie (Qwest) to Christopher Gilbert (Eschelon), dated 4/20/06.

1 **Q. MR. EASTON DISAGREES THAT COMMISSION OVERSIGHT IS**
2 **NEEDED TO PROTECT ESCHELON AND ITS END USER**
3 **CUSTOMERS.¹¹⁸ WOULD YOU LIKE TO RESPOND?**

4 A. Yes. On the one hand Qwest objects to Commission oversight in what it calls
5 standard business practices,¹¹⁹ but on the other hand suggests that if Eschelon has
6 a problem with the actions taken by Qwest “there is no doubt that Eschelon would
7 protect its interest through appropriate action before this Commission.”¹²⁰
8 Qwest’s proposals provide Qwest with the unilateral right to disrupt Eschelon’s
9 end user customers by failing to process orders or to disrupt Eschelon’s business
10 by demanding a deposit, but limits Eschelon’s ability to dispute Qwest’s actions.
11 As discussed in my direct testimony at Exhibit Eschelon 2, Denney Direct, pp. 77-
12 78 and 79-81, and my rebuttal testimony at Exhibit Eschelon 2R, Denney
13 Rebuttal, pp. 44-45 and pp. 50-51, the dispute resolution process would likely be
14 too slow to avoid irreparable harm as a result of Qwest’s actions. End user
15 customers in Utah are best served if these issues are handled up front, rather than
16 in crisis mode, before the Commission.

¹¹⁸ Qwest Exhibit 2R, Easton Rebuttal, p. 26, lines 5-6.

¹¹⁹ Qwest Exhibit 2R, Easton Rebuttal, p 26, lines 5-6.

¹²⁰ Qwest Exhibit 2R, Easton Rebuttal, p. 16, lines 19-21.

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

3 **Issue Nos. 5-6, 5-7, and 5-7(a): ICA Sections 5.4.2, 5.4.3, 5.1.13.1**

4 **Q. THE PAYMENT AND DEPOSITS ISSUES (ISSUES 5-6, 5-7, 5-8, 5-9, 5-11,**
5 **5-12 AND 5-13) RELATE TO QWEST'S ABILITY TO DISCONNECT**
6 **ESCHELON'S CIRCUITS, DISCONTINUE PROCESSING ESCHELON'S**
7 **ORDERS, AND DEMAND DEPOSITS FOR PAYING UNDISPUTED**
8 **CHARGES LATE. WHY IS IT IMPORTANT FOR THE COMMISSION**
9 **TO RESOLVE ANY DISPUTE ABOUT ESCHELON'S PAYMENT**
10 **STATUS BEFORE QWEST TAKES THESE ACTIONS?**

11 A. Because the determination of undisputed amounts is not always clear. I have
12 explained that there are a number of reasons why the disputed amounts that Qwest
13 calculates and the disputed amounts that Eschelon calculates can differ.
14 Therefore, it is crucial that, when a disagreement exists about payment status, the
15 information relied upon for these remedies is accurate, reliable, and reviewed by
16 the Commission before the remedy is invoked.¹²¹ Eschelon's proposal does not
17 limit Qwest's ability to protect its financial interests when a legitimate concern
18 about the future ability to pay exists, rather it includes the Commission in the
19 equation before Qwest is able to take the serious step¹²² of disconnecting

¹²¹ See, Exhibit Eschelon 2, Denney Direct, pp. 71-72.

¹²² Mr. Easton agrees at Qwest Exhibit 2R, Easton Rebuttal, p. 11, line 5 that discontinuing the processing of orders is a very serious step. It is puzzling why, if Mr. Easton agrees that this is a very serious step, why the Commission should not have the ability to ensure that information is accurate and substantiated before the serious step is taken.

1 Eschelon's circuits, for example. If Qwest can disconnect Eschelon's circuits or
2 stop processing Eschelon's orders without Commission approval, even if
3 Eschelon later demonstrates to the Commission that Qwest's actions were not
4 justified, the damage to Eschelon and its End User Customers will have already
5 been done. That is why it is important for the Commission to review these
6 disagreements *before* Qwest takes action.

7 To this end, Eschelon's proposals for Issues 5-6 and 5-7 require Commission
8 approval before a Billing Party may stop processing orders or disconnect circuits
9 of the Billed Party based on allegations of failure to make timely payment. Under
10 Issues 5-8 and 5-9, Eschelon proposes a reasonable definition of "Repeatedly
11 Delinquent," which is a key term in determining if and when Qwest can demand a
12 deposit, and under Issue 5-11, Eschelon proposes language so that the Billed Party
13 may seek Commission relief if it disagrees with the Billing Party's demand for a
14 deposit. For Issue 5-12, Eschelon offers an alternative provision that would allow
15 the Commission to make determinations regarding deposits based on all relevant
16 circumstances. And finally, Eschelon disagrees with Qwest's attempt to get a
17 second and unnecessary "bite at the apple" with respect to increasing deposit
18 amounts and demanding new deposits under Issue 5-13.

19 **Q. MR. EASTON'S TESTIMONY SUGGESTS THAT ESCHELON'S**
20 **PROPOSAL PROVIDES NO PROTECTION FOR QWEST IN THE**

1 **EVENT OF A LEGITIMATE CONCERN ABOUT ESCHELON'S**
2 **FUTURE ABILITY TO PAY.¹²³ IS THIS TRUE?**

3 A. No. Eschelon's proposal provides for the same protections as Qwest's proposal,
4 the difference being that Eschelon's proposal is designed to ensure that these
5 remedies are invoked with Commission approval. Eschelon's language protects
6 both Qwest and Eschelon by safeguarding Qwest against legitimate concerns
7 about future ability to pay, while at the same time protecting Eschelon from
8 having its order processing stopped, circuits disconnected, or a substantial deposit
9 imposed, based on inaccurate information regarding undisputed amounts. Under
10 Eschelon's proposal, if Qwest is correct about Eschelon's payment status, then
11 Eschelon will pay a deposit (either because Eschelon agrees or because the
12 Commission agrees with Qwest's assessment). In contrast, Qwest's language, by
13 allowing Qwest to take action without Commission approval, protects only Qwest
14 and puts Eschelon at the distinct competitive disadvantage of having its ability to
15 conduct business dictated by Qwest's view of Eschelon's payment status – which
16 has been shown in the past to be incorrect.

17 **Q. DOES MR. EASTON'S REBUTTAL TESTIMONY SHOW THAT QWEST**
18 **AND ESCHELON CAN DISAGREE ABOUT DISPUTED AMOUNTS?**

19 A. Yes. Mr. Easton acknowledges this in his rebuttal testimony at Qwest Exhibit 2R
20 Easton Rebuttal, p. 13 lines 1-2 where he discusses the recent Qwest threat to stop
21 processing Eschelon orders and disconnect Eschelon circuits. As he points out,

¹²³ Qwest Exhibit 2R, Easton Rebuttal, p. 16, lines 2-10.

1 Eschelon claimed that \$932,000 was in dispute, while Qwest’s records showed
2 less than half that amount in pending dispute status.¹²⁴ Therefore, according to
3 Mr. Easton’s own testimony, what Eschelon and Qwest consider to be disputed
4 amounts can differ. Eschelon also did not agree with Qwest about the amount of
5 undisputed payments that were past due.

6 **Q. IS ESCHELON A SIGNIFICANT PAYMENT RISK TO QWEST?**

7 A. No. Mr. Easton claims that Eschelon ignores payment due dates, pays less than it
8 owes and misuses the dispute process to avoid timely payment.¹²⁵ He also claims
9 that Eschelon pays its bills later than other CLECs.¹²⁶ Mr. Easton fails to
10 acknowledge that Eschelon is a regular payer of large sums of money to Qwest.
11 Eschelon regularly pays about \$5 million per month to Qwest. This is not
12 indicative of a company that is a payment risk to Qwest because it does not pay its
13 bills. When there is a dispute, Eschelon will withhold disputed amounts, but this
14 does not mean that Eschelon “pays less than it owes” as Mr. Easton claims.
15 Rather, it shows that Eschelon sometimes disagrees with the amount Qwest
16 claims Eschelon owes – which is Eschelon’s right under its ICA, and is not really
17 surprising given the amount of services purchased and amounts of money that are
18 involved. I also disagree with Mr. Easton’s assertion that Eschelon misuses the
19 dispute process to avoid timely payment. Mr. Easton does not provide any

¹²⁴ Qwest Exhibit 2R, Easton Rebuttal, p. 13, lines 1-2.

¹²⁵ Qwest Exhibit 2R, Easton Rebuttal, p. 9, lines 19-20.

¹²⁶ Qwest Exhibit 2R, Easton Rebuttal, p. 10, lines 1-2.

1 examples or other evidence in support of his claims, nor am I aware of any
2 instances of Eschelon misusing the billing dispute process. It is actually Qwest
3 who abuses the billing dispute process by ignoring the process set forth in
4 Eschelon's ICA with Qwest and using instead a process that Qwest developed
5 through CMP. The CMP billing dispute process Qwest imposes on Eschelon
6 results in Qwest forcing Eschelon to escalate disputes if it disagrees with Qwest's
7 assessment, and allows Qwest to call disputes "resolved" when Eschelon does not
8 agree – problems that can lead to Eschelon and Qwest disagreeing on Eschelon's
9 disputed amounts, and increased risk that Qwest will invoke serious remedies
10 when there is no basis for doing so.¹²⁷

11 Furthermore, because Mr. Easton does not provide the supporting data on which
12 he relies in support of his comparison of Eschelon's timeliness of payment with
13 that of other CLECs, it is difficult to comment on that assertion. However,
14 information from Dun and Bradstreet (D&B) indicates that both Qwest and
15 Eschelon pay more slowly than the industry average. While Eschelon pays
16 somewhat more slowly than Qwest, Eschelon's creditworthiness is rated higher
17 than Qwest's.¹²⁸ Therefore, Mr. Easton's comparison of Eschelon's payment

¹²⁷ Mr. Easton testifies: "As to amounts in dispute, through the Change Management Process ("CMP") Qwest and the CLECs, including Eschelon, have developed a formal process to insure that disputes are formally identified and resolved." Qwest Exhibit 2R, Easton Rebuttal, p. 15, lines 19-21. I explained in my direct testimony (Exhibit Eschelon 2, Denney Direct, p. 77 and Exhibit Eschelon 2.14) Eschelon did not develop the CMP billing dispute process with Qwest. Further, the billing dispute process developed in CMP is not the same process as in Eschelon's ICA and Qwest's CMP billing dispute process labels disputes as "resolved" even when Eschelon may disagree.

¹²⁸ See Exhibit Eschelon 2SR.1 (Denney) (Confidential).

1 interval to other CLEC customers of Qwest is unproven and does not demonstrate
2 that Eschelon is a risk for future payment. But even if, assuming *arguendo*, Mr.
3 Easton were correct that Eschelon pays later than other CLECs and constitutes a
4 legitimate payment risk, Qwest would be protected in this situation under
5 Eschelon's proposal.

6 **Q. PLEASE DESCRIBE MORE FULLY THE DUN AND BRADSTREET**
7 **INFORMATION YOU REFER TO ABOVE.**

8 A. The D&B Commercial Credit Scoring Report shows that Qwest also pays later
9 than the industry average.¹²⁹ That information shows that Eschelon pays 14 days
10 later than the industry average and Qwest pays 10 days later than the industry
11 average. However, Eschelon actually has a better commercial credit score rating
12 than does Qwest – with Eschelon scoring a “fair” rating and Qwest scoring a
13 “significant risk”¹³⁰ rating. The bottom line is that the evidence shows Eschelon
14 poses no credit risk to Qwest.

15 Finally, Qwest's nonspecific references to risk based on credit scores support the
16 need for standards if credit scores are cited as a means to demand further deposits.

17 To the extent that the Commission accepts the use of credit report data for such a

¹²⁹ See, Exhibit Eschelon 2SR.1 (Denney). This exhibit contains D&B reports for Qwest and Eschelon as well as an overview of the D&B Commercial Credit Score, including an explanation of how these scores are calculated and the data included in the scores.

¹³⁰ D&B Credit Score Class ranges from 0-5, with Qwest scoring a 4 “significant risk.” The credit score classes are as follows: 1=low risk; 2=moderate risk; 3=average risk; 4=significant risk; 5=high risk.

1 purpose, an acceptable credit score should be conversely used to determine that a
2 deposit is *not* necessary or can be decreased.

3 **Q. YOU DISCUSS ABOVE THE POTENTIAL FOR ESCHELON AND**
4 **QWEST TO DISAGREE ABOUT DISPUTED AMOUNTS. DO THE**
5 **COMPANIES CURRENTLY AGREE ABOUT THE AMOUNT OF**
6 **DISPUTED CHARGES?**

7 A. No. Qwest continues to claim that Eschelon is in default¹³¹ (which, according to
8 Qwest, means that Qwest can stop processing Eschelon's orders or demand a
9 deposit without further notice). Eschelon believes that it is current with Qwest.¹³²

10 **Q. MR. EASTON CLAIMS THAT SINCE QWEST'S RECENT THREAT TO**
11 **STOP PROCESSING ORDERS RESULTED IN ESCHELON PAYING A**
12 **SUBSTANTIAL AMOUNT OF MONEY TO QWEST, THIS SHOWS**
13 **THAT QWEST'S PROPOSAL WORKS.¹³³ DO YOU AGREE?**

14 A. No. Nothing has really been resolved. Because Qwest continues to claim that
15 Eschelon is in default, Eschelon is still at risk of Qwest's refusing (without further
16 notice) to process its orders or of Qwest's disconnecting Eschelon's circuits.
17 Neither Qwest's threat nor its proposed language does anything to address the
18 problems explained above that leads to disagreements about disputed amounts.

¹³¹ Qwest Exhibit 2R, Easton Rebuttal, p. 13, lines 19-20.

¹³² Eschelon does not have undisputed amounts due Qwest more than 30 days past the payment due date.

¹³³ Qwest Exhibit 2R, Easton Rebuttal, p. 14, lines 3-10.

1 This is precisely why Eschelon's proposal would involve the Commission when
2 disagreements arise to make sure that the information relied upon for making
3 these determinations is accurate and substantiated.

4 **Q. DID ESCHELON AND QWEST, THROUGH THE CHANGE**
5 **MANAGEMENT PROCESS, DEVELOP A FORMAL PROCESS**
6 **REGARDING PAYMENT DISPUTES?**¹³⁴

7 A. No. This was documented in my direct testimony (Exhibit Eschelon 2, p. 77 and
8 Exhibit Eschelon 2.14).

9 **SUBJECT MATTER NO. 6. DEPOSITS**

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

11 **Q. MR. EASTON STATES THAT THERE IS NO WAY THAT QWEST**
12 **COULD DEMAND A DEPOSIT WHEN THERE IS NO LEGITIMATE**
13 **CONCERN ABOUT ESCHELON'S ABILITY TO PAY.**¹³⁵ **DO YOU**
14 **AGREE WITH MR. EASTON?**

15 A. No. Mr. Easton states that since Qwest's deposit requirements are triggered by a
16 history of delinquent payment, deposits would only be triggered when a history of
17 delinquent payment raises a legitimate concern about a company's risk of

¹³⁴ Qwest Exhibit 2R, Easton Rebuttal, p. 15, lines 19-21.

¹³⁵ Qwest Exhibit 2R, Easton Rebuttal, p. 16, lines 2-7.

1 nonpayment.¹³⁶ Mr. Easton’s reasoning is somewhat circular. The disagreement
2 under Issue 5-8 addresses what constitutes “Repeatedly Delinquent” – which is
3 the key term used to determine whether a deposit is justified. Mr. Easton’s
4 testimony simply assumes that Qwest’s proposed definition of “Repeatedly
5 Delinquent” is the correct one, and so any collection action taken under Qwest’s
6 proposed definition is appropriate and justified. This is not the case. Though
7 Qwest appears to agree that a de minimus amount should not trigger a deposit
8 requirement, it will not agree to recognize that in the ICA. If Qwest later changed
9 its mind and decided to demand a deposit on a de minimus amount, Qwest’s
10 proposal would allow for it.

11 In addition, Repeatedly Delinquent is defined in terms of *undisputed* charges paid
12 more than 30 days after the payment due date. Given that there are significant
13 disagreements about what those undisputed amounts are, Qwest could claim that
14 Eschelon is Repeatedly Delinquent based on Qwest’s view of Eschelon’s payment
15 status even when Eschelon disagrees with Qwest and has made timely payment to
16 Qwest.

17 **Q. HOW DOES MR. EASTON RESPOND TO THE INFORMATION IN**
18 **YOUR TESTIMONY SHOWING THAT THE**
19 **INTERCONNECTION/SERVICE AGREEMENTS OF OTHER**

¹³⁶ Qwest Exhibit 2R, Easton Rebuttal, p. 16, lines 2-10.

1 **CARRIERS WITH QWEST CONTAIN THE SAME “3 CONSECUTIVE**
2 **MONTH” STANDARD ESCHELON PROPOSES?**¹³⁷

3 A. Mr. Easton states that the “agreements cited by Mr. Denney are either very old
4 agreements or are wireless/paging agreements.”¹³⁸ Mr. Easton’s attempt to
5 downplay this issue is not convincing. Mr. Easton never says that the “3
6 consecutive month standard” in these agreements is insufficient to protect its
7 interests,¹³⁹ nor does Mr. Easton address the discrimination that occurs when it
8 forces Eschelon to take less favorable terms than are provided to other carriers.

9 **Q. UNDER ISSUES 5-11 AND 5-12, MR. EASTON DISAGREES THAT**
10 **COMMISSION OVERSIGHT IS NEEDED.**¹⁴⁰ **WOULD YOU LIKE TO**
11 **RESPOND?**

12 A. Yes. I have explained above why the Commission’s independent evaluation of
13 the facts regarding the imposition of a deposit is needed in these circumstances.¹⁴¹
14 Mr. Easton’s claim that Qwest would not invoke deposit requirements if Eschelon
15 pays timely¹⁴² is not supported by the examples I provide above in my direct
16 testimony showing that Qwest threatened action based on amounts Eschelon paid

¹³⁷ See Exhibit Eschelon 2, Denney Direct, pp. 91-92.

¹³⁸ Qwest Exhibit 2R, Easton Rebuttal, p. 25, lines 12-14.

¹³⁹ Though Mr. Easton claims that Qwest has not experienced the same magnitude of non payment issues related to wireless/paging carriers as CLECs, he provides no evidence to support this claim. Qwest Exhibit 2R, Easton Rebuttal, p. 25, lines 17-18.

¹⁴⁰ Qwest Exhibit 2R, Easton Rebuttal, p. 26, lines 5-6.

¹⁴¹ See also Exhibit Eschelon 2, Denney Direct, pp. 92-94 and Exhibit Eschelon 2R, Denney Rebuttal, pp. 50-51.

¹⁴² Qwest Exhibit 2R, Easton Rebuttal, p. 26, lines 9-10. [“There is simply no need for Qwest to invoke the deposit requirements if Eschelon pays undisputed amounts in a timely manner.”]

1 *early*. Further, Mr. Easton’s claim gives Eschelon little comfort given Qwest’s
2 position on Issue 5-13 (Section 5.4.7) that Qwest could demand a deposit at
3 Qwest’s discretion even when Eschelon is current with Qwest.¹⁴³

4 **Q. WHAT IS MR. EASTON’S RESPONSE TO YOUR LIST OF**
5 **EXPLANATIONS REGARDING WHY ESCHELON AND QWEST**
6 **OFTEN DISAGREE ABOUT THE AMOUNT OF ESCHELON’S**
7 **UNDISPUTED AMOUNTS ESCHELON OWES QWEST?**

8 A. Mr. Easton’s rebuttal testimony at Qwest Exhibit 2R Easton Rebuttal, p. 10 lines
9 7-10 demonstrates that disputes exist regarding the amounts owed that are in
10 dispute. As a result, it should be clear that, despite Mr. Easton’s statement that
11 “Eschelon need only pay its *undisputed* bills in a timely manner to avoid
12 consequences such as the discontinuance of taking orders or becoming subject to
13 deposit requirements,”¹⁴⁴ the issue is not that simple.

14 Further, a careful reading of Mr. Easton’s testimony demonstrates that the issues
15 raised in my direct testimony are legitimate and lead to disputes regarding
16 payments due.

17 • Qwest admits that it declares disputes “resolved” despite CLEC disagreement, but
18 claims this is not unilateral because the CLEC can escalate Qwest’s conclusion.¹⁴⁵

¹⁴³ Exhibit Eschelon 2R, Denney Rebuttal, pp. 53-58.

¹⁴⁴ Qwest Exhibit 2R, Easton Rebuttal, p. 10, lines 7-10.

¹⁴⁵ Qwest Exhibit 2R, Easton Rebuttal, p.18, line 20 – p. 19, lines 1-13. The end point of the escalation Qwest refers to is to the Commission. Though Qwest has testified that the Commission should not become involved in the day to day business disputes between the companies it proposes that Eschelon bring these disputes to the Commission in instances where Eschelon disagrees with Qwest.

1 Further, Qwest concludes that the use of Qwest’s process “would go a long way
2 towards reducing misunderstandings between the parties.”¹⁴⁶ Another way of
3 saying this is that Qwest believes billing disputes would disappear if Eschelon
4 would simply drop its dispute when Qwest does not agree. This is precisely the
5 problem I illustrated in my direct testimony.

6 • Mr. Easton does not deny that some of Qwest’s notices of past due status did not
7 include BAN detail.¹⁴⁷

8 • Mr. Easton also does not deny that BAN detail did not always match with the
9 amount Qwest was claiming to be past due.¹⁴⁸

10 • Mr. Easton admits that Qwest does not always post payments in a timely manner,
11 but criticizes Eschelon’s example because it was in relation to “out of region
12 services, not local services purchased under the interconnection agreement.”¹⁴⁹

13 • Mr. Easton admits that Qwest included amounts that were not past due in its past
14 due totals.¹⁵⁰

15 • Mr. Easton admits that Qwest applies billing refunds owed to carriers to amounts
16 Qwest determines are past due, which could include amounts in dispute.¹⁵¹

17 • Mr. Easton does not deny that disputes may fall into the “black hole” but states
18 that the particular email as part of Exhibit Eschelon 2.10 with the “black hole”
19 reference was not a case of an Eschelon dispute.¹⁵²

20 • Mr. Easton disagrees that the DSL Rate adjustment was improperly applied.¹⁵³

21 • Mr. Easton does not deny that payments are misapplied, but blames Eschelon for
22 poor communication.¹⁵⁴

¹⁴⁶ Qwest Exhibit 2R, Easton Rebuttal, p. 19, lines 3-5.

¹⁴⁷ Qwest Exhibit 2R, Easton Rebuttal, p. 19, lines 15-19.

¹⁴⁸ Qwest Exhibit 2R, Easton Rebuttal, p.19, lines 21-23.

¹⁴⁹ Qwest Exhibit 2R, Easton Rebuttal, p. 20, lines 1-17.

¹⁵⁰ Qwest Exhibit 2R, Easton Rebuttal, p.20, lines 18-22.

¹⁵¹ Qwest Exhibit 2R, Easton Rebuttal, p. 20, line 24 through p. 21, lines 1-2.

¹⁵² Qwest Exhibit 2R, Easton Rebuttal, p.21, lines 4-11.

¹⁵³ Qwest Exhibit 2R, Easton Rebuttal, p. 21, lines 13-17.

¹⁵⁴ Qwest Exhibit 2R, Easton Rebuttal, p. 21, lines 19-22 through p. 22, lines 1-2. Note that Mr. Easton did not provide any details supporting his claim blaming Eschelon.

- 1 • Mr. Easton does not deny there is confusion between Qwest’s payment center and
2 collections group, but blames Eschelon for failing to send copies of its remittance
3 letter to both groups.¹⁵⁵
- 4 • Mr. Easton does not deny or address the final two issues raised in my direct
5 testimony regarding Qwest employee turnover resulting in lost disputes and
6 Qwest’s failing to update information about where to send invoices.¹⁵⁶

7 Mr. Easton states that “Telecommunications billing is a complex process”¹⁵⁷ and
8 cites to Eschelon’s 269 accounts and 19 different due dates.¹⁵⁸ Mr. Easton states
9 that “Given this complexity, it is not surprising at all that there may be occasional
10 misunderstandings and disputes between the parties.”¹⁵⁹ However, despite this
11 complexity and the history of misunderstandings and disputes, Qwest proposes
12 that it have extreme flexibility in determining when to stop processing Eschelon’s
13 orders and/or demand a payment deposit.

14 **Q. DO THE EXAMPLES ABOVE RELATE TO HOW LONG IT TAKES**
15 **ESCHELON TO PAY ITS BILLS?**

16 A. No. In fact, the length of time allowed under the contract for a carrier to pay its
17 bills is not in dispute.¹⁶⁰ Mr. Easton misrepresents the purpose of these billing
18 dispute examples provided in my direct testimony. Mr. Easton implies that the
19 examples were related to Qwest’s complaints about the length of time it takes

¹⁵⁵ Qwest Exhibit 2R, Easton Rebuttal, p.22, lines 4-8.

¹⁵⁶ Exhibit Eschelon 2, Denney Direct, p. 75, lines 21-26.

¹⁵⁷ Qwest Exhibit 2R, Easton Rebuttal, p. 23, line 6.

¹⁵⁸ Qwest Exhibit 2R, Easton Rebuttal, p. 23, lines 6-7.

¹⁵⁹ Qwest Exhibit 2R, Easton Rebuttal, p. 23, lines 7-15.

¹⁶⁰ See sections 5.4.1, 5.4.2, 5.4.3, 5.4.5 and 5.4.8 of the Interconnection Agreement.

1 Eschelon to pay its bills.¹⁶¹ My direct testimony clearly states regarding the list
2 above, “There are several reasons that Eschelon and Qwest could disagree on the
3 amount of undisputed charges.”¹⁶² Disagreements about the amount of
4 undisputed charges are directly relevant to Eschelon’s proposed language
5 regarding payment and deposits and the necessity of the language proposed by
6 Eschelon, including the need for Commission oversight before extreme measures
7 such as stopping of order processing is taken.

8 **Q. IS QWEST’S EXAMPLE REGARDING OREGON TELECOM**
9 **RELEVANT TO THE OPEN LANGUAGE REGARDING PAYMENT AND**
10 **DEPOSITS?**¹⁶³

11 A. No. Again there is no dispute regarding the amount of time Eschelon has to pay
12 its bills. Mr. Easton’s testimony regarding Oregon Telecom has nothing to do
13 with the issues in dispute. Further, I disagree with Mr. Easton’s characterization
14 regarding Oregon Telecom’s bill payments since the company was purchased by
15 Eschelon. Mr. Easton provided no detail to allow Eschelon to determine how his
16 numbers were developed, but it appears Mr. Easton’s numbers include disputed
17 amounts, despite Mr. Easton’s testimony¹⁶⁴ that the contract language in dispute

¹⁶¹ See the question on Qwest Exhibit 2R, Easton Rebuttal, p.23, lines 1-4, where Mr. Easton relates the examples in my Direct Testimony to the length of time Eschelon pays its bills. See also the first question on Qwest Exhibit 2R, Easton Rebuttal, p.23, lines 17-19, where he relates Qwest’s billing process to the time it takes Eschelon to pay its bills.

¹⁶² Exhibit Eschelon 2, Denney Direct, p. 73, lines 12-13.

¹⁶³ Qwest Exhibit 2R, Easton Rebuttal, p.23, lines 20-22 and p. 24, lines 1-6.

¹⁶⁴ See Qwest Exhibit 2R, Easton Rebuttal, p. 11, lines 5-8, where he states, “Qwest’s language reflects rights it has had under prior interconnection agreements and contains limitations designed to protect

1 applies only to undisputed amounts. Eschelon is diligent in its review of Qwest's
2 bills and after the purchase of Oregon Telecom has undertaken an effort to review
3 the bills it receives. Oregon Telecom's bills with Qwest are current and the
4 amounts represented by Mr. Easton Qwest Exhibit 2R.2 are **not** past due.¹⁶⁵

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

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

7 **Q. MR. EASTON CLAIMS THAT QWEST NEEDS TO BE ABLE TO**
8 **INCREASE DEPOSITS UNDER SECTION 5.4.7 BECAUSE**
9 **“CIRCUMSTANCES CAN CHANGE OVER THE COURSE OF THE**
10 **PARTIES’ BUSINESS RELATIONSHIP.”¹⁶⁶ WILL THE ICA HANDLE**
11 **CHANGES IN CIRCUMSTANCES AS THEY RELATE TO DEPOSITS**
12 **ABSENT QWEST’S PROPOSED SECTION 5.4.7?**

13 **A.** Yes. Section 5.4.5 allows Qwest to demand a deposit if the other party is doing
14 business with Qwest for the first time and has not established satisfactory credit
15 with Qwest *or* if the other party is Repeatedly Delinquent *or* if the other party is
16 reconnected after a disconnection or discontinuation of order processing.

CLECs: (1) **excludes disputed amounts...**”

¹⁶⁵ Qwest did not provide proprietary Exhibit 2R.2 to Eschelon in Utah, presumably pending issuance of a protective order. In other states, the referenced exhibit contains a Qwest summary of data for an Eschelon-owned company (which is not unavailable to Eschelon on confidentiality grounds, as it is Eschelon company-owned data). My testimony is based on the assumption that Qwest has not changed the data for Utah.

¹⁶⁶ Qwest Exhibit 2R, Easton Rebuttal, p. 26, line 20.

1 Therefore, not only can Qwest demand a deposit under 5.4.5 if a party is doing
2 business with Qwest for the first time, but Qwest also can demand a new deposit
3 if circumstances change. For example, if a party that previously paid its bills on
4 time became Repeatedly Delinquent, as defined in 5.4.5, Qwest could demand a
5 new deposit. Section 5.4.6 also allows an existing deposit requirement to be
6 recalculated based on a “material change in financial standing.” Therefore, the
7 ICA already accomplishes (in closed language) Qwest’s stated purpose for
8 Section 5.4.7 – to allow Qwest to demand a new deposit or deposit increase to
9 reflect a change in circumstances.¹⁶⁷

10 **Q. DOES QWEST’S LANGUAGE IN 5.4.7 EFFECTIVELY NULLIFY THE**
11 **DEPOSIT LANGUAGE IN 5.4.5?**

12 A. Yes. Mr. Easton disagrees with this statement from my direct testimony on page
13 96 arguing that Qwest’s language in 5.4.7 “is actually complementary to the
14 language in section 5.4.5...”¹⁶⁸ However, this is precisely the problem with
15 Qwest’s language in section 5.4.7. Qwest views this language as a “second bite at
16 the apple,” an additional opportunity to impose a payment deposit upon Eschelon
17 regardless of the language in section 5.4.5. Section 5.4.5 contains strict standards
18 and specific circumstances under which a deposit would be required. Qwest’s
19 section 5.4.7 language nullifies this because it acts on its own and provides Qwest

¹⁶⁷ See Exhibit Eschelon 2, Denney Direct, pp.98-99.

¹⁶⁸ Qwest Exhibit 2R, Easton Rebuttal, p. 26, line 22.

1 with unilateral authority to impose a payment deposit.¹⁶⁹ Qwest’s language in
2 section 5.4.7 contains no standards, measures, or triggering events that would
3 warrant a payment deposit.

4 **Q. QWEST DISAGREES THERE IS NO TRIGGERING EVENT STATING,**
5 **THAT “THE CREDIT REVIEW ITSELF IS THE TRIGGERING**
6 **EVENT.”¹⁷⁰ IS QWEST’S STATEMENT ACCURATE?**

7 A. No. I addressed this argument at Exhibit Eschelon 2R, pp. 55-57 of my rebuttal
8 testimony. Simply put, Mr. Easton is reading language into the ICA that does not
9 exist. The “date of credit review” is not one of the triggering events listed under
10 Section 5.4.5. Therefore, if Qwest’s Section 5.4.7 is adopted, Qwest may attempt
11 to interpret its 5.4.7 so that the deposit cap established under Section 5.4.5 does
12 not apply.¹⁷¹ Further, Qwest’s Section 5.4.7 places no criteria around what a
13 credit review entails (like Section 5.4.5 does), nor does Qwest indicate what part
14 of a credit review would trigger an increase in the deposit. This lack of detail in
15 Section 5.4.7 is troublesome and provides Qwest the ability to unilaterally require
16 a deposit or deposit increase without regard to the language in Section 5.4.5.

17 Since Qwest on its own whim decides when to perform a credit review, it means
18 nothing for Qwest to argue the review is the triggering event. Qwest is essentially

¹⁶⁹ Exhibit Eschelon 2, Denney Direct, p. 99.

¹⁷⁰ Qwest Exhibit 2R, Easton Rebuttal, p. 27, line 9.

¹⁷¹ Exhibit Eschelon 2, Denney Direct, pp. 98-99 and Exhibit Eschelon 2R, Denney Rebuttal, pp. 55-57.

1 arguing that if Qwest feels a review is warranted, then Qwest may demand a
2 deposit. Under Qwest’s language in section 5.4.7, there is no standard of review
3 and the language does not even require Qwest to demonstrate a deposit is
4 necessary. Qwest may use the simple fact it decided to review Eschelon’s credit
5 standing. Mr. Easton disagrees with my statement that Qwest could read
6 something in the newspaper and increase Eschelon’s deposit, but then notes, “It is
7 possible however that Qwest could read something in the paper that would lead it
8 to question Eschelon’s credit worthiness. Based on this information, Qwest could
9 then perform a credit review.”¹⁷² Under Qwest’s language, this undefined review
10 does not need to turn up one real cause for concern in order for Qwest to be able
11 to invoke a payment deposit. This is what I was referring to when I noted
12 Qwest’s language in section 5.4.7 nullifies the language in section 5.4.5.

13 **Q. QWEST DEFENDS ITS PAYMENT AND DEPOSIT PROPOSALS BY**
14 **STATING SIMILAR LANGUAGE TO QWEST’S PROPOSALS RESIDES**
15 **IN THE UTAH SGAT AND THE AT&T AND COVAD ICAS.¹⁷³ DOES**
16 **THIS MEAN ESCHELON’S PROPOSALS SHOULD BE REJECTED, AS**
17 **MR. EASTON IMPLIES?**

18 **A. No. Just because language is contained in an agreement elsewhere does not mean**
19 **that language cannot be improved upon, and the Covad ICA, to which Mr. Easton**

¹⁷² Qwest Exhibit 2R, Easton Rebuttal, p. 27, lines 15-17.

¹⁷³ Qwest Exhibit 2R, Easton Rebuttal, p. 27, lines 1-2.

1 refers, is a prime example. I addressed this Qwest argument in my rebuttal
2 testimony (Exhibit Eschelon 2R, pp. 49-50).

3 **Q. MR. EASTON STATES THAT QWEST IS OPPOSED TO ESCHELON'S**
4 **ALTERNATIVE LANGUAGE FOR SECTION 5.4.7.¹⁷⁴ WHAT REASONS**
5 **DOES MR. EASTON PROVIDE FOR QWEST'S DISAGREEMENT?**

6 A. Qwest disagrees with the alternative language because it involves the Commission
7 and because it makes clear that Section 5.4.7 applies to increasing the amount of
8 an existing deposit and does not allow the establishment of a new deposit.¹⁷⁵
9 According to Mr. Easton, this undermines the purpose of Section 5.4.7, which is
10 to reflect a change in circumstances.¹⁷⁶

11 **Q. DO YOU AGREE?**

12 A. No. I have explained in detail why the Commission should be involved when
13 disagreements exist about Eschelon's payment status before these remedies are
14 invoked and will not repeat those arguments here. Regarding Mr. Easton's
15 second claim about Eschelon's alternative language – that it undermines the
16 purpose of Section 5.4.7 – I have demonstrated Qwest's stated purpose of Section
17 5.4.7 is already accounted for in Sections 5.4.5 and 5.4.6 of the ICA.

¹⁷⁴ Qwest Exhibit 2R, Easton Rebuttal, p. 28, lines 12-13.

¹⁷⁵ Qwest Exhibit 2R, Easton Rebuttal, p. 28, lines 14-15.

¹⁷⁶ Qwest Exhibit 2R, Easton Rebuttal, p.28, lines 15-16.

1 **V. NON DISCLOSURE AGREEMENTS, BILL VALIDATION AND**
2 **NONDISCRIMINATORY ACCESS TO UNES (SUBJECT MATTER NOS.**
3 **8, 9 & 14)**

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

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

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

7 A. Qwest has agreed that Qwest employees to whom Eschelon's forecasts and
8 forecasting information are disclosed will be required to execute a nondisclosure
9 agreement covering the information. Eschelon's proposed language would
10 require Qwest to provide Eschelon with a signed copy of each non-disclosure
11 agreement within ten days of execution. Qwest objects to having to provide
12 copies of signed non-disclosure agreements.

13 **Q. DID MR. EASTON OF QWEST RAISE ANY NEW ARGUMENTS IN**
14 **REBUTTAL TESTIMONY RELATED TO THIS ISSUE TO WHICH YOU**
15 **WOULD LIKE TO RESPOND?**

16 A. No. Mr. Easton raised two arguments in his rebuttal testimony. Mr. Easton
17 implies that Eschelon is protected because "the Qwest language mandates strict
18 procedures for the handling of CLEC forecasted information."¹⁷⁷ Mr. Easton also
19 states that Eschelon is protected via section 18 of the agreement because it can
20 audit Qwest if it believes the information is being misused.¹⁷⁸ I address these

¹⁷⁷ Qwest Exhibit 2R, Easton Rebuttal, p. 29, lines 16-17.

¹⁷⁸ Qwest Exhibit 2R, Easton Rebuttal, p. 29, lines 19-22 and p.30 line 1.

1 arguments and explain why Eschelon’s simple proposal that Qwest provide copies
2 of signed nondisclosure agreements is preferable in my direct testimony, Exhibit
3 Eschelon 2, Denney Direct, pp. 101-105 and rebuttal testimony, Exhibit Eschelon
4 2R, pp. 58-62.

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

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

8 **Q. PLEASE SUMMARIZE THIS ISSUE.**

9 A. In order to validate the bills Qwest provides, Eschelon needs occasional access to
10 a limited number of call records that would allow for bill verification. Eschelon’s
11 language allows for Eschelon to obtain these records from Qwest for the purpose
12 of bill verification.

13 **Q. MR. EASTON CLAIMS ESCHELON HAS ALL THE INFORMATION IT**
14 **NEEDS TO VALIDATE QWEST’S TRANSIT BILLING.¹⁷⁹ IS THIS**
15 **CORRECT?**

16 A. No. Mr. Easton provides a copy of the type of information Qwest would provide
17 to Eschelon with its bills and suggests that Eschelon can reconcile this data with
18 information recorded in Eschelon’s switch. However, it is precisely the inability

¹⁷⁹ Qwest Exhibit 2R, Easton Rebuttal, p. 31, lines 7-8. Note Mr. Easton also offers to explain to Eschelon “how billing validation can be accomplished.” (Qwest Exhibit 2R, Easton Rebuttal, p. 31, lines 22-22) Eschelon knows how to validate its bills and the language Eschelon proposes in this section is designed for that purpose.

1 to reconcile this information that would cause Eschelon to seek detailed call
2 records from Qwest. It is not possible to compare Eschelon's originating switch
3 records¹⁸⁰ with Qwest's invoice because Qwest's invoice is a summary bill and
4 does not contain usage by call by ANI. Qwest bills are summaries over a period
5 of time -- they do not even contain usage by date. It is also not possible to use
6 billing from terminating carriers¹⁸¹ to validate Qwest's bills, as Eschelon is bill
7 and keep with many carriers and thus these records are not provided to Eschelon.
8 Further, even if Eschelon were able to make such a comparison for some sample
9 of records, Mr. Easton does not suggest what to do when the two sources of data
10 do not match. It is precisely these reasons why Eschelon seeks data, on a limited
11 basis, in order to verify Qwest's bills.

12 **Q. MR. EASTON CLAIMS THAT QWEST'S SYSTEMS WOULD REQUIRE**
13 **A "SIGNIFICANT AMOUNT OF ADDITIONAL PROGRAMMING"¹⁸² IN**
14 **ORDER TO PROVIDE ESCHELON WITH THESE RECORDS. IS THIS**
15 **ACCURATE?**

16 A. No. Qwest must already have the ability to generate call records in order to
17 produce the bills it sends to Eschelon, otherwise, how would it be able to generate
18 summary bills. It makes no sense that Qwest can not provide the background data

¹⁸⁰ Qwest Exhibit 2, Easton Direct, p. 32, lines 13-15 ["Through a comparison with the recordings from its own switch, Eschelon can validate that Qwest transited these calls to the terminating carrier."]

¹⁸¹ Qwest Exhibit 2, Easton Direct, p. 32, lines 15-17.

¹⁸² Qwest Exhibit 2, Easton Direct, p. 33, line 5. *See also*, Qwest Exhibit 2R, Easton Rebuttal, p. 31, line 5 ("significant expense").

1 used to produce those summary bills. Further, Eschelon is able to provide IXCs
2 both originating and terminating call records when they request background data
3 in order to validate their bills.

4 **Q. MR. EASTON STATES THAT “QWEST HAS OFFERED TO WORK**
5 **WITH ESCHELON AND HAS PROVIDED SEVERAL CALL-BY-CALL**
6 **REPORTS TO HELP IT VALIDATE BILLS.”¹⁸³ HOW DO YOU**
7 **RESPOND?**

8 A. This is precisely the point of Eschelon’s proposed language. Eschelon’s language
9 would require Qwest to provide “sample 11-01-XX records for specified
10 offices.”¹⁸⁴ Eschelon’s language reasonably limits this request to a maximum of
11 once every six months, provided that Qwest’s billing is accurate.¹⁸⁵ Qwest’s
12 unwillingness to put its offer to provide such information going forward in writing
13 is a concern. Mr. Easton does not explain why Qwest is unwilling to continue to
14 work with Eschelon in this manner going forward. If Qwest is willing to do so,
15 documenting these terms in the ICA should not be an issue.

¹⁸³ Qwest Exhibit 2R, Easton Rebuttal, p. 31, lines 21-22.

¹⁸⁴ See Eschelon proposed language for 7.6.3.1.

¹⁸⁵ See Eschelon proposed language for 7.6.3.1.

1 **SUBJECT MATTER NO. 14: NONDISCRIMINATORY ACCESS TO UNES**

2 **Issue No. 9-31: ICA Section 9.1.2**

3 **Q. DO YOU AND MR. STARKEY BOTH ADDRESS ISSUES RELATED TO**
4 **NONDISCRIMINATORY ACCESS TO UNES?**

5 A. Yes. In her rebuttal testimony, Ms. Stewart states that a basis for Qwest's stated
6 concern about cost recovery is my testimony in "the companion arbitration in
7 Minnesota."¹⁸⁶ I will respond to Ms. Stewart's claims regarding cost recovery
8 and my testimony on cost recovery. Mr. Starkey addresses Qwest's other
9 testimony regarding Issue 9-31 in his surrebuttal testimony (Exhibit Eschelon
10 1SR) on this issue.

11 **Q. DO YOU AGREE WITH MS. STEWART'S SUMMARY OF YOUR**
12 **TESTIMONY IN "THE COMPANION ARBITRATION IN**
13 **MINNESOTA"**¹⁸⁷?

14 A. No. Ms. Stewart indicates that, at least for a phrase from the Minnesota testimony
15 upon which she relies, "Qwest will provide a copy of this excerpt during the
16 hearing."¹⁸⁸ She does not indicate why she does not include the pertinent
17 Minnesota testimony with her testimony to allow full review and comment.
18 Eschelon sees no reason to wait for the hearing and has attached excerpts from my

¹⁸⁶ Qwest Exhibit 3R, Stewart Rebuttal, p. 16.

¹⁸⁷ Qwest Exhibit 3R, Stewart Rebuttal, p. 16.

¹⁸⁸ Qwest Exhibit 3R, Stewart Rebuttal, p. 16 at footnote 5 (but not footnote 6).

1 Minnesota testimony, including the portions cited by Ms. Stewart, in Exhibit
2 Eschelon 2.27.

3 Ms. Stewart then provides a summary of my testimony. She states that in
4 Minnesota I “asserted” that “because the costs of *all* of the activities required by
5 Eschelon’s language are allegedly already included in monthly *recurring* rates,
6 adoption of Eschelon’s language would not require the development of any new
7 rates or rate elements or payment by Eschelon of any rates other than the existing
8 recurring rates for UNEs.”¹⁸⁹ A reading of Exhibit Eschelon 2.27 shows this
9 summary is inaccurate, and is particularly inaccurate with respect to Utah.¹⁹⁰ I
10 specifically testified, for example, that there are two ways of generating
11 compensation to Qwest (recurring or nonrecurring rates)¹⁹¹ and that there would
12 be a debate in the upcoming Minnesota cost case as to whether costs are
13 appropriately recovered in recurring or nonrecurring rates.¹⁹² At several points in
14 my Minnesota testimony, I indicate that costs associated with access to UNEs
15 may, or may not, be included in existing recurring or non-recurring rates, and I

¹⁸⁹ Qwest Exhibit 3R, Stewart Rebuttal, p. 16 (emphasis added), citing Minnesota Hearing Transcript, Vol. 4, p. 206, line 22 – p. 208, line 6. For cited testimony, see Exhibit Eschelon 2.27 (Denney), p. 5.

¹⁹⁰ As I explain regarding Issue 22-90, Minnesota has procedures in place with respect to unapproved rates that are currently unique to Minnesota. *See, e.g.*, Exhibit Eschelon 2, Denney Direct, p. 214. In Minnesota, Commission policy and prior ruling provides that Qwest cannot assess miscellaneous charges on CLECs without Commission approval. *See* Exhibit Eschelon 2.27 (Denney), p. 12, lines 6-8. Also, in the testimony cited by Qwest, Qwest asks me whether the activities under Eschelon’s language “are already included in the monthly recurring rates *in Minnesota* for UNEs,” but Ms. Stewart omits any mention of this state-specific reference. *See* Exhibit Eschelon 2.27 (Denney), p. 5 (Minnesota arbitration, Transcript, Vol. 4, p. 207, lines 24-25) (emphasis added).

¹⁹¹ Exhibit Eschelon 2.27 (Denney), p. 4-5 (p. 204, line 25 – p. 205, line 5).

¹⁹² Exhibit Eschelon 2.27 (Denney), p. 5 (p. 208, lines 3-11).

1 also acknowledge Qwest’s right to come before the Commission to propose rates
2 and substantiate its costs.¹⁹³

3 Dr. Edward Fagerlund of the Minnesota Department of Commerce (the
4 “Department” or “DOC”) expressly disagreed with Qwest’s suggestion, as shown
5 by the following exchange with the ALJ in Minnesota:

6 Q . . . But the question is in the language that’s proposed does that already
7 reach the conclusion without going through that process? If it requires
8 TELRIC rates for those activities that are identified, doesn’t it already
9 make that determination that those costs are included in the UNE recurring
10 rate?

11 A No, I would say those are two separate things. First of all, are the costs
12 recovered somewhere? That’s one question. Then a second question is do
13 you get to recover these at TELRIC or at a nonTELRIC? So those really
14 are two separate questions. . . . It does not say that any conceivable
15 moving, adding to, repairing, and changing are already covered in current
16 rates. I don’t read that here at all.¹⁹⁴

17 . . .

18 Q So you’re just reading it to mean that it has to be a TELRIC rate, and
19 whether or not that rate’s been established or that cost is included in some
20 TELRIC rate is still an open issue?

21 A Yes.¹⁹⁵

22 The ALJs in Minnesota recommended adoption of Eschelon’s proposed language
23 for Issue 9-31 (proposal #1), and the Commission adopted that
24 recommendation.¹⁹⁶

¹⁹³ See, e.g., Exhibit Eschelon 2.27 (Denney), p. 12 at lines 4-6 & line 15; *id.* p. 13 at footnote 9 (“may” already be recovered); *id.* p. 14, lines 1-2 & 5-6; *id.* p. 16, at 11-12 (“**whether** Qwest already recovers design change charges elsewhere and, **if not**, the appropriate rate”) (emphasis added); *id.* p. 17, lines 9-10; *id.* p. 18, lines 7-9; *id.* p. 20, lines 2-3 & 11-12.

¹⁹⁴ Exhibit Eschelon 2.27 (Denney), p. 8 (p. 52 line 9 – p. 53, line 2) (Judge Sheehy; Dr. Fagerlund).

¹⁹⁵ Exhibit Eschelon 2.27 (Denney), p. 8 (p. 53 lines 6-10) (Judge Sheehy; Dr. Fagerlund).

1 **Q. MS. ALBERSHEIM NONETHELESS FOCUSES ON RECURRING OR**
2 **MONTHLY RATES¹⁹⁷ AND QUOTES YOU AS TESTIFYING THAT**
3 **“THOSE TYPES OF THINGS ARE ALREADY RECOVERED IN THE**
4 **RECURRING RATES.”¹⁹⁸ WHAT TYPES OF THINGS WERE YOU**
5 **DISCUSSING IN THAT RESPONSE?**

6 A. I was discussing cost factors that were used in establishing recurring rates.¹⁹⁹
7 Instead of identifying each and every activity and assigning a separate rate per
8 activity, cost factors, such as maintenance factors, are used.²⁰⁰ I was responding
9 to Qwest’s suggestion that, “if this language is adopted, for Qwest to be
10 compensated there has to be rate elements in the interconnection agreement that
11 link up with the activities encompassed by those three terms.”²⁰¹ In those
12 situations in which costs are recovered through cost factors, that will not be the
13 case.²⁰²

14 **Q. IS THIS USE OF COST FACTORS A DISPUTED ISSUE?**

¹⁹⁶ Exhibit Eschelon 2.24 (Denney), MN Arbitrators’ Report, ¶132, affirmed in relevant part in the MN PUC Order Resolving Arbitration (Exhibit Eschelon 2.25 (Denney), p. 6 & p. 22 ¶1) (Topic 17). See discussion of the ALJs’ ruling at Exhibit Eschelon 1 (Starkey Direct), pp. 141-142.

¹⁹⁷ Qwest Exhibit 3R, Stewart Rebuttal, pp. 16-17.

¹⁹⁸ Qwest Exhibit 3R, Stewart Rebuttal, p. 16, citing Minnesota Transcript, Vol. 4, p. 207, lines 17-18. See Exhibit Eschelon 2.27 (Denney), p. 5.

¹⁹⁹ Exhibit Eschelon 2.27 (Denney), p. 5 (p. 207, lines 5-6).

²⁰⁰ Exhibit Eschelon 2.27 (Denney), p. 5 (p. 207, lines 9-12).

²⁰¹ Exhibit Eschelon 2.27 (Denney), p. 5 (p. 206, line 24 – p. 207, line 3) (Mr. Devaney).

²⁰² It is also important to note that when I testified in Minnesota that these activities were included in the current Minnesota recurring rates (Exhibit Eschelon 2.27, p. 5 (p. 207, line 22 – p. 208, line 11) (Devaney)), I was speaking specifically with regard to Minnesota and the fact that in the last UNE cost case the Minnesota Commission denied Qwest separate NRCs for many of these activities. I also noted that this issue would be addressed in the upcoming Minnesota cost case.

1 A. No, it is well established. As shown in Exhibit Eschelon 2SR.2, Qwest (then US
2 West) similarly testified before the Oregon Commission in 1995 that the
3 company's cost methodology followed the Oregon Commission's seven cost
4 principles, including "to capture cost associated with the provisioning of a
5 building block, factors and investment loadings should be used when costs cannot
6 easily be identified directly."²⁰³ In his surrebuttal testimony (Exhibit Eschelon
7 1SR), Mr. Starkey discusses the activities and sub-activities that may go into
8 access to UNEs. If activities and sub-activities are recovered in the recurring rate,
9 creating a separate additional charge would allow double recovery. If Qwest
10 substantiates that they are not recovered in a recurring or non-recurring charge,
11 Qwest may substantiate its costs to the Commission and obtain an approved
12 TELRIC based rate that will then be added to the ICA per Section 2.2. In
13 Arizona, Ms. Stewart agreed generally that "in order for Qwest to charge a
14 separate rate, Qwest has to prove that the cost to perform that activity is not
15 already recovered in another rate."²⁰⁴

16 **Q. HAS ANY STATE COMMISSIONS ADDRESSED MAINTENANCE**
17 **FACTORS, THE RELATIONSHIP BETWEEN RECURRING AND NON-**
18 **RECURRING CHARGES, AND POTENTIAL DOUBLE RECOVERY FOR**
19 **ACCESS TO UNES?**

²⁰³ Exhibit Eschelon 2SR.2 (Docket No. UM 351).

²⁰⁴ Exhibit Eschelon 1.6 (Starkey) [Arizona arbitration Transcript Vol. II, p. 200, lines 16-20].

1 A. Yes. The Oregon Commission found that “loop conditioning and other similar
2 outside plant rearrangement activities are included in the maintenance factors to
3 develop monthly recurring UNE rates.”²⁰⁵ Therefore, the Oregon Commission
4 declined to adopt non-recurring charges for loop conditioning “to prevent double
5 recovery of these costs.”²⁰⁶ Moreover, the Oregon Commission said that, before
6 it would consider establishing a non-recurring charge for loop conditioning, “it
7 would first be necessary for the ILECs to remove loop conditioning costs from the
8 maintenance factor included in the monthly recurring cost of the loop.”²⁰⁷

9 The principles applied by the Oregon Commission in that case are the principles
10 that I discussed throughout the Minnesota proceeding, as I have done in this case,
11 with respect to the two ways of generating compensation to Qwest (recurring or
12 nonrecurring rates) where a separate charge should not be used if the costs are
13 already recovered in one or the other of these two types of rates.

14 **Q. DOES QWEST’S CONDUCT WITH RESPECT TO LOOP**
15 **CONDITIONING SHORTLY AFTER THE OREGON COMMISSION**
16 **ISSUED ITS ORDER PROVIDE SUPPORT FOR ADOPTION OF**
17 **ESCHELON’S PROPOSED LANGUAGE?**

18 A. Yes. The Oregon Commission entered Order No. 03-085 regarding loop
19 conditioning on February 5, 2003. On April 30, 2003, Qwest sent to all

²⁰⁵ Oregon PUC Order No. 03-085, Docket No. UT 138/UT 139, pp. 14-15.

²⁰⁶ Oregon PUC Order No. 03-085, Docket No. UT 138/UT 139, p. 15.

²⁰⁷ Oregon PUC Order No. 03-085, Docket No. UT 138/UT 139, p. 15 & footnote 53.

1 participating CLECs a Level 3 (“notice and go”) CMP notification, indicating an
2 effective date of June 16, 2003, for a one-word change to its PCAT.²⁰⁸ The one-
3 word change was to delete “conditioning” from the list of incremental facility
4 work that Qwest would perform as part of access to loops.²⁰⁹ When Eschelon
5 contacted Qwest about the unexpected impact to Eschelon and its customers,
6 Qwest admitted that the effect of its CMP notice was to implement a new Qwest
7 policy related to “charging” for certain activities for which it had assessed no
8 charges in the past. Qwest said:

9 Qwest has in the past not fully enforced our contractual right to
10 collect on the charges incurred when completing DS1 level
11 unbundled services. Charging is the specific change that has
12 occurred.²¹⁰

13 Less than three months after the Oregon Commission entered Order No. 03-085
14 stating that there is no separate NRC for loop conditioning, Qwest refused to
15 provide loop conditioning as part of provisioning the loop. Qwest denied access
16 to loops that needed conditioning and told CLECs that they had to use the special
17 construction process (which requires lengthy delays and substantial costs to
18 build), which Qwest calls CRUNEC. This had a significant impact on Eschelon
19 and its customers. As described by Mr. Starkey, Qwest implemented this change
20 over the unanimous objection of the multiple participating CLECs, and the change

²⁰⁸ Exhibit Eschelon 3.14 (Johnson).

²⁰⁹ Exhibit Eschelon 3.13 (Johnson).

²¹⁰ Qwest (Teresa Taylor) email to Eschelon (July 3, 2003).

1 was reversed only after CLECs raised the issue with the Arizona commission
2 (which still had an open 271 proceeding at that time).²¹¹

3 Eschelon’s proposed language gets to this very type of situation. Under
4 Eschelon’s proposed language, Qwest must continue to provide access to UNEs at
5 TELRIC-based rates. While Qwest may challenge rates or seek new charges
6 when it can substantiate unrecovered costs, it must do so in an orderly manner and
7 not by unilaterally stopping to perform the activity or only performing it at
8 unsubstantiated rates that it unilaterally declares are “applicable.”

9 **Q. MS. STEWART CLAIMS THAT ESCHELON MAY ATTEMPT TO**
10 **CHANGE THE APPLICATION OF AN EXISTING RATE²¹² BASED ON**
11 **ITS LANGUAGE BECAUSE THE COSTS ARE CURRENTLY**
12 **RECOVERED IN A NON-RECURRING CHARGE RATHER THAN A**
13 **RECURRING CHARGE. PLEASE RESPOND.**

14 A. The point is that the costs are recovered, not where they are recovered.
15 Eschelon’s proposal language simply provides that the rates for access to UNEs
16 will be TELRIC based. Either a TELRIC based non-recurring charge or a
17 TELRIC-based recurring charge falls within that language. When costs are
18 analyzed, if Qwest substantiates costs that are not recovered in either a recurring

²¹¹ Exhibit Eschelon 1, Starkey Direct, pp. 52-63 (CRUNEC example); Exhibit Eschelon 3.13 (Johnson) (CRUNEC chronology).

²¹² Qwest Exhibit 3R, Stewart Rebuttal, pp. 14-15.

1 or a non-recurring charge, Qwest may obtain a Commission-approved TELRIC
2 rate to recover those costs.²¹³

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

5 Issues Nos. 9-37, 9-37(a), 9-37(b), 9-38, 9-39 (except caps), 9-40, 9-41 and 9-42:
6 ICA Sections 9.1.13.3, 9.1.14.4, 9.1.14.4.3 (and subparts), 9.1.13.4.1.2, 9.1.13.4,
7 9.1.13.4.2, 9.1.13.4.1.2.1, 9.1.14.4.2, 9.1.13.5.2, 9.1.14.6, 9.1.15.2.1, and
8 9.1.14.4.1 and definitions

9 **Q. HAVE ISSUES 9-37 THROUGH 9-42 CLOSED?**

10 A. Yes. The above issues have closed²¹⁴ with the following language:

11 **Section 4 (Definitions):**

12 “Commission-Approved Wire Center List” means a list approved by the
13 Commission in a Wire Center Docket(s) that identifies DS1 and DS3 Unbundled
14 Loop facilities that are non-impaired and, regarding DS1, DS3, and Dark Fiber
15 unbundled transport facilities, identifies non-impairment designations based on
16 Wire Center Tier Designation(s).

17 “Non-Impaired Facilities” are those network elements identified in an applicable
18 FCC order as no longer available as unbundled network elements (“UNEs”) under
19 47 U.S.C. §251(c)(3) as reflected in this Agreement based on non-impairment or
20 tier designations and that have been reviewed and approved by the Commission
21 using the process and methodology ordered in a Wire Center Docket.

22 “Wire Center Docket” means Commission Docket No. 06-049-40 entitled “In the
23 Matter of the Investigation into Qwest Wire Center Data,” and any successor or
24 separate Commission docket in which Qwest files a request(s) to add additional
25 non-impaired wire center(s) to the Commission-Approved Wire Center List, and
26 the Commission approves addition of wire center(s) to the list.

²¹³ ICA Section 5.1.6. See Exhibit Eschelon 2.27 (Denney), p. 58, lines 1-6 (Dr. Fagerlund addressing UDIT rearrangements).

²¹⁴ The Commission approved the Settlement Agreement in the Wire Center Docket (06-049-40) on July 31, 2007 (<http://www.psc.utah.gov/telecom/07orders/Jul/0604940ROasa.pdf>). This order is subject to reconsideration. If the status of approval changed, the status of the language would be affected. Eschelon has closed the language subject to that caveat.

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Section 9 (UNEs):

9.1.13 To submit an order to obtain a High Capacity Loop or high capacity transport UNEs, CLEC must undertake a reasonably diligent inquiry and, based on that inquiry, self-certify that, to the best of its knowledge, its request is consistent with the requirements discussed in parts IV, V, and VI of the Triennial Review Remand Order as reflected in this Agreement and that it is therefore entitled to unbundled access to the particular Unbundled Network Elements sought pursuant to section 251(c)(3). Before placing the first such order under this Agreement, CLEC shall provide its self-certification through a letter sent to Qwest, or in another form to which the Parties mutually agree in writing. The applicable UNE rate(s) in Exhibit A will apply to UNEs and UNE Combinations.

9.1.13.1 CLEC will maintain appropriate records to support the self-certification described in Section 9.1.13. See Section 9.23.4 for Service Eligibility Criteria for High Capacity EELs.

9.1.13.2 Qwest has a limited right to audit compliance with the Service Eligibility Criteria for High Capacity EELs, as described in Section 9.23.4.3. Notwithstanding any other provision of this Agreement, there is no other auditing requirement for self-certification, as CLEC certifies only to the best of its knowledge.

9.1.13.3 Whether a High Capacity Loop or high capacity transport UNE is unavailable, and the date upon which it becomes unavailable, based on non-impairment wire center designations have been or will be determined by the Commission in a Wire Center Docket. The Parties will follow any procedures established by the Commission in the Wire Center Docket with respect to exchange of data and Confidential Information and requests for additions to the Commission-Approved Wire Center List. For non-impaired facilities identified using the initial Commission-Approved Wire Center List, CLEC will not order an unbundled DS1 or DS3 Loop or an unbundled DS1, DS3 or Dark Fiber transport circuit when the order would be restricted based on the Wire Center designations identified on the applicable Commission-Approved Wire Center List. Regarding ordering after any additions are made to the initial Commission-Approved Wire Center List, see Section 9.1.14.4. CLEC will transition such UNEs impacted by the Commission-Approved Wire Center List as described in Section 9.1.14.

9.1.13.4 Upon receiving a request for access to a High Capacity Loop or high capacity transport UNE pursuant to Section 9.1.13,

1 Qwest must immediately process the request. Qwest shall not
2 prevent order submission and/or order processing (such as via a
3 system edit, or by requiring affirmation of the information in the
4 self-certification letter through remarks in the service request, or
5 through other means) for any such facility on non-impairment
6 grounds, unless the Parties agree otherwise in an amendment to
7 this Agreement. Regarding ordering with respect to the initial
8 Commission-Approved Wire Center List, see Section 9.1.13.3, and
9 regarding ordering after any additions are made to the initial
10 Commission-Approved Wire Center List, see Section 9.1.14.4.
11 Regarding changes in law, see Section 2.2.

12 9.1.13.4.1 To the extent that Qwest seeks to challenge
13 access to any such UNE(s), it subsequently can raise that
14 issue through the Dispute resolution procedures in Section
15 5.18 of this Agreement. Regarding Service Eligibility
16 Criteria for High Capacity EELs, see Sections 9.23.4.2.1.3
17 and 9.23.4.3.

18 9.1.13.4.1.1 If Qwest seeks to challenge any such
19 UNEs, it will provide written notice to CLEC of its
20 request for Dispute resolution.

21 9.1.13.4.1.2 If Qwest seeks to challenge any such
22 UNEs, it will also provide CLEC with data to
23 support its claim.

24 9.1.13.4.1.2.1 For Wire Centers: This may,
25 in some cases, be limited to providing a
26 copy of a Commission Approved Wire
27 Center List, while in other cases the data
28 may be more extensive (such as data that
29 allows CLEC to identify the disputed
30 circuits and other data upon which Qwest
31 relies). In the event of such a dispute, CLEC
32 will also provide Qwest the data upon which
33 it relies for its position that CLEC may
34 access the UNE.

35 9.1.13.4.1.2.2 For Caps:

36 9.1.13.4.1.2.2.1 With respect to
37 disputes regarding the caps described
38 in Sections 9.2 and 9.6.2.3, data that
39 allows CLEC to identify all CLEC

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circuits relating to the applicable Route or Building [including if available circuit identification (ID), installation purchase order number (PON), Local Service Request identification (LSR ID), Customer Name/Service Name, installation date, and service address including location (LOC) information (except any of the above, if it requires a significant manual search), or such other information to which the Parties agree]. In the event of such a dispute, CLEC will also provide Qwest the data upon which it relies for its position that CLEC may access the UNE.

9.1.13.4.1.2.2.2 Notwithstanding anything in this Section 9.1.13.4 that may be to the contrary, to the extent that Qwest challenges access to any UNE(s) on the basis that CLEC's access to or use of UNEs exceeds the caps described in Sections 9.2 or 9.6.2.3 because CLEC has ordered more than ten UNE DS1 Loops or more than the applicable number of DS3 Loop circuits or UDIT circuits in excess of the applicable cap on a single LSR (or a set of LSRs submitted at the same time for the same address for which CLEC populates the related PON field to indicate the LSRs are related), Eschelon does not object to Qwest rejecting that single LSR (or the set of LSRs that meets the preceding description) on that basis. The means by which Qwest will implement rejection of such orders is addressed in Section 9.1.13. Except as provided in this Section 9.1.13.4.1.2.2.2, in all other

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situations when Qwest challenges access to any UNE(s) on the basis that CLEC's access to or use of UNEs exceeds the caps described in Sections 9.2 or 9.6.2.3, Qwest must immediately process the request and subsequently proceed with the challenge as described in Section 9.1.13.4.1.

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9.1.13.5 If the Parties agree or it is determined through Dispute resolution that CLEC was not entitled to unbundled access to a particular UNE that is not subject to one of the transition periods described in Section 9.1.14, or the transition period has ended, CLEC will place an order within thirty (30) Days to either disconnect the UNE or convert such UNE to an alternative service arrangement. Back billing for the difference between the rates for UNEs and rates for the Qwest alternative service arrangements will apply no earlier than the later of: (1) the installation date; or (2) the effective date of the TRO or TRRO, whichever is applicable.

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9.1.13.5.1 With respect to the caps described in Sections 9.2 and 9.6.2.3, the back billing period described in Section 9.1.13.5 will apply no earlier than the later of: (1) the installation date; or (2) the effective date of the TRO or TRRO, whichever is applicable; unless the Parties agree to a different date or a different date is determined through Dispute resolution.

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9.1.13.5.2 For each such facility converted from a UNE to an alternative service arrangement, Qwest will, for at least three (3) years from the effective date in the Wire Center Docket of the initial Commission-Approved Wire Center List, assess an effective net non-recurring charge of \$25 for each such facility converted from a UNE to an alternative service arrangement. Qwest may assess a non-recurring charge in excess of \$25, so long as Qwest provides a clearly identified lump sum credit within three (3) billing cycles that results in an effective net non-recurring charge of \$25. No additional non-recurring charges apply, other than OSS non-recurring charges if applicable pursuant to Section 12.7.

1 9.1.13.5.2.1 The Parties disagree as to the amount
2 of the applicable non-recurring charge after the
3 three-year period identified in this Section. Each
4 Party reserves all of its rights with respect to the
5 amount of the charges after that date. Nothing in
6 this Agreement precludes a Party from addressing
7 the non-recurring charge after that three-year
8 period. A different non-recurring charge will apply,
9 however, only to the extent authorized by an
10 applicable regulatory authority, or agreed upon by
11 the Parties, and reflected in an amendment to this
12 Agreement (pursuant to Section 2.2 and/or Section
13 5.30).

14 9.1.14 Transition periods. A transition period allows CLEC to transition
15 away from use of UNEs where they are not impaired. The transition plans
16 described in this Section apply only to the embedded End User Customer
17 base. During the applicable transition period, CLEC will retain access to
18 the UNE at the terms described in this Section.

19 9.1.14.1 For a 12-month period beginning on March 11, 2005, any
20 DS1 Loop UNEs, DS3 Loop UNEs, DS1 Dedicated Transport
21 UNEs, and DS3 Dedicated Transport UNEs that CLEC leases from
22 Qwest as of that date, but which Qwest is not obligated to
23 unbundle, shall be available for lease from Qwest at a rate equal to
24 the higher of (1) 115% of the rate CLEC paid for the element on
25 June 15, 2004, or (2) 115% of the rate the Commission has
26 established or establishes, if any, between June 16, 2004, and
27 March 11, 2005, for that element.

28 9.1.14.1.1 Within ninety (90) Days of Commission
29 approval of this Agreement, notwithstanding any other
30 provision in this Agreement, Qwest shall back bill CLEC
31 for such rate adjustment for the time period for which the
32 facilities were in place between March 11, 2005 to March
33 10, 2006. Such back billing shall not be subject to billing
34 measurements and penalties (as identified in this
35 Agreement) on the grounds that such back billing was not
36 implemented earlier than ninety (90) Days after approval of
37 this Agreement.

38 9.1.14.2 For an 18-month period beginning on March 11, 2005,
39 any Dark Fiber Loop UNEs and Dark Fiber Dedicated Transport
40 UNEs that CLEC leases from Qwest as of that date shall be

1 available for lease from Qwest at a rate equal to the higher of (1)
2 115% of the rate CLEC paid for the element on June 15, 2004, or
3 (2) 115% of the rate the Commission has established or
4 establishes, if any, between June 16, 2004, and March 11, 2005,
5 for that element.

6 9.1.14.2.1 Within ninety (90) Days of Commission
7 approval of this Agreement, notwithstanding any other
8 provision in this Agreement, Qwest shall back bill CLEC
9 for such rate adjustment for the time period for which the
10 facilities were in place between March 11, 2005 to
11 September 10, 2006. Such back billing shall not be subject
12 to billing measurements and penalties (as identified in this
13 Agreement) on the grounds that such back billing was not
14 implemented earlier than ninety (90) Days after approval of
15 this Agreement.

16 9.1.14.3 Bridge Period from March 11, 2006 until Effective Date
17 of this Agreement.

18 9.1.14.3.1 Within ninety (90) Days of Commission
19 approval of this Agreement, notwithstanding any other
20 provision in this Agreement, for the period from March 11,
21 2006 until the Effective Date of this Agreement, Qwest
22 shall back bill retroactive to March 11, 2006 (or a later
23 date, if a UNE became unavailable after that date) for the
24 time period for which the facilities were in place and CLEC
25 agrees to pay Qwest pursuant to this Agreement the
26 difference between the UNE rate(s) and the applicable
27 alternate service rate(s) (such as Special Access Service
28 rate(s)) on all Loop and transport UNEs that were no longer
29 required to be offered by Qwest as UNEs beginning March
30 11, 2006.

31 9.1.14.4 Additional Non-Impaired Wire Centers. When Qwest
32 files a request(s) with the Commission to add additional Wire
33 Center(s) to the Commission-Approved Wire Center List, Qwest
34 will follow the procedures for making such requests adopted by the
35 Commission in the Wire Center Docket. When additional Qwest
36 Wire Center(s) meet the relevant factual criteria discussed in
37 Sections V and VI of the FCC's Triennial Review Remand Order
38 as reflected in this Agreement and the Commission adds the Wire
39 Center(s) to the Commission-Approved Wire Center List, the
40 terms of this Section will apply to facilities subject to the transition

1 based on any addition(s) to the Commission-Approved Wire
2 Center List. Fifteen (15) Days after Commission-approval of
3 addition(s) to that list, CLEC will no longer order impacted High
4 Capacity Loops, high capacity transport UNEs, or Dark Fiber Loop
5 and Dark Fiber Dedicated Transport UNEs in (for loops) or
6 between (for transport) those additional Wire Centers. Qwest and
7 CLEC will work together to identify those circuits impacted by
8 such change.

9 9.1.14.4.1 Transition Periods for additions to the
10 Commission-Approved Wire Center List.

11 9.1.14.4.1.1 For a ninety (90) Day period beginning
12 on the effective date on which the Commission
13 approves an addition to the Commission-Approved
14 Wire Center List, any DS1 Loop UNEs, DS3 Loop
15 UNEs, DS1 Dedicated Transport UNEs, and DS3
16 Dedicated Transport UNEs that CLEC leases from
17 Qwest as of that date, but which Qwest is not
18 obligated to unbundle, shall be available for lease
19 from Qwest at a rate equal to 115% of the UNE
20 rates applicable as of the effective date on which the
21 Commission adds the Wire Center to the
22 Commission-Approved Wire Center List.

23 9.1.14.4.1.2 For a one-hundred and eighty (180)
24 Day period beginning on the effective date on
25 which the Commission approves an addition to the
26 Commission-Approved Wire Center List, any Dark
27 Fiber Loop UNEs and Dark Fiber Dedicated
28 Transport UNEs that CLEC leases from Qwest as of
29 that date, but which Qwest is not obligated to
30 unbundle, shall be available for lease from Qwest at
31 a rate equal to 115% of the UNE rates applicable as
32 of the effective date on which the Commission adds
33 the Wire Center to the Commission-Approved Wire
34 Center List.

35 9.1.14.4.1.3 The 115% rate described in Sections
36 9.1.14.4.1.1 and 9.1.14.4.1.2 will be applied to
37 CLEC bills on the following bill cycle, and may be
38 applied as a manual adjustment. Any manual bill
39 adjustment for the time period for which the
40 facilities were in place will be applied to each
41 account based on the Billing Telephone Number
42 (BTN) and/or Circuit (CKT) identification number

1 per Billing Account Number (BAN) with an
2 effective bill date as of the effective date on which
3 the Commission adds the Wire Center to the
4 Commission-Approved Wire Center List.

5 9.1.14.4.2 Data. Qwest will file supporting data with the
6 Commission when filing a request to obtain additional non-
7 impaired designations added to the Commission-Approved
8 Wire Center List. Qwest will also provide a copy of the
9 supporting data pursuant to the terms of the applicable
10 protective agreement/order to CLEC if CLEC has signed
11 the applicable protective agreement/order (or is subject to
12 any applicable standing protective order put in place by the
13 Commission).

14 9.1.14.4.2.1 If Qwest relies upon Fiber-Based
15 Collocators for its proposed non-impairment
16 designation, the supporting data provided to CLEC
17 will include at least the information required by the
18 Commission in the Wire Center Docket.

19 9.1.14.4.2.2 If Qwest relies upon Switched
20 Business Line Count data for its proposed Non-
21 Impairment Designation, the supporting data
22 provided to CLEC will include at least the
23 information required by the Commission in the
24 Wire Center Docket.

25 9.1.14.4.3 Methodology: The Parties agree to use the
26 methodology for non-impairment or tier designations
27 adopted by the Commission in the Wire Center Docket.

28 9.1.14.5 If it is determined by CLEC and Qwest that CLEC's
29 access to or use of UNEs exceeds the caps described in Sections
30 9.2 and 9.6.2.3, CLEC has thirty (30) Days to convert such UNEs
31 to alternate service arrangements and CLEC is subject to back
32 billing for the difference between rates for the UNEs and rates for
33 the Qwest alternate service arrangements.

34 9.1.14.6 For each such facility converted from a UNE to an
35 alternative service arrangement, Qwest will, for at least three (3)
36 years from the effective date in the Wire Center Docket of the
37 initial Commission-Approved Wire Center List, assess an effective
38 net non-recurring charge of \$25 for each such facility converted
39 from a UNE to an alternative service arrangement. Qwest may

1 assess a non-recurring charge in excess of \$25, so long as Qwest
2 provides a clearly identified lump sum credit within three (3)
3 billing cycles that results in an effective net non-recurring charge
4 of \$25. No additional non-recurring charges apply, other than OSS
5 non-recurring charges if applicable pursuant to Section 12.7.

6 9.1.14.6.1 The Parties disagree as to the amount of the
7 applicable non-recurring charge after the three-year period
8 identified in this Section. Each Party reserves all of its
9 rights with respect to the amount of the charges after that
10 date. Nothing in this Agreement precludes a Party from
11 addressing the non-recurring charge after that three-year
12 period. A different non-recurring charge will apply,
13 however, only to the extent authorized by an applicable
14 regulatory authority, or agreed upon by the Parties, and
15 reflected in an amendment to this Agreement (pursuant to
16 Section 2.2 and/or Section 5.30).

17 9.1.15 If CLEC has not converted or disconnected a UNE facility that the
18 Parties agree, or it is determined in Dispute resolution that the facility,
19 should be converted or disconnected by the end of the applicable transition
20 period described in Sections 9.13 and 9.14, Qwest will convert facilities to
21 month-to-month service arrangements in Qwest's FCC No. 1 Tariff or, for
22 Dark Fiber facilities, begin the disconnect process after reasonable notice
23 to CLEC sufficiently identifying the Dark Fiber facility(ies) to be
24 disconnected. If such a facility is disconnected, the applicable
25 disconnection charge in Exhibit A, if any, will apply. Qwest and CLEC
26 will work together to identify impacted facilities.

27 9.1.15.1 If Qwest believes or asserts that a particular UNE's
28 availability status has changed, Qwest shall notify CLEC of
29 Qwest's claim and the basis for the claim and upon request,
30 provide sufficient data to enable CLEC to identify and agree upon
31 any impacted facility(ies). If the Parties do not reach agreement,
32 Qwest must continue to provide the UNE to CLEC until the
33 Dispute is resolved. See Section 9.1.14.

34 9.1.15.2 If Qwest converts a facility to an analogous or alternative
35 service arrangement pursuant to Section 9.1.15, the terms and
36 conditions of this Section 9.1.15.2 will apply.

37 9.1.15.2.1 For each such facility converted from a UNE to
38 an alternative service arrangement, Qwest will, for at least
39 three (3) years from the effective date in the Wire Center

1 Docket of the initial Commission-Approved Wire Center
2 List, assess an effective net non-recurring charge of \$25 for
3 each such facility converted from a UNE to an alternative
4 service arrangement. Qwest may assess a non-recurring
5 charge in excess of \$25, so long as Qwest provides a
6 clearly identified lump sum credit within three (3) billing
7 cycles that results in an effective net non-recurring charge
8 of \$25. No additional non-recurring charges apply, other
9 than OSS non-recurring charges if applicable pursuant to
10 Section 12.7.

11 9.1.15.2.1.1 The Parties may disagree as to the
12 amount of the applicable non-recurring charge after
13 the three-year period identified in this Section.
14 Each Party reserves all of its rights with respect to
15 the amount of the charges after that date. Nothing
16 in this Agreement precludes a Party from
17 addressing the non-recurring charge after that three-
18 year period. A different non-recurring charge will
19 apply, however, only to the extent authorized by an
20 applicable regulatory authority, or agreed upon by
21 the Parties, and reflected in an amendment to this
22 Agreement (pursuant to Section 2.2 and/or Section
23 5.30).

24 9.1.15.2.2 The Parties will complete the transition of
25 facility(ies) using a seamless process that does not affect
26 the End User Customer's perception of service quality. The
27 Parties will establish and abide by any necessary
28 operational procedures to ensure Customer service quality
29 is not affected by conversions.

30 **Q. HAVE ISSUES 9-43 AND 9-44 CLOSED OR "SETTLED" IN**
31 **CONJUNCTION WITH THE WIRE CENTER DOCKET, AS CLAIMED**
32 **BY MS. MILLION²¹⁵?**

²¹⁵ Qwest Exhibit 4R (Million Rebuttal), p. 2, lines 8-16.

1 A. No. I responded to this claim on pages 66-69 of my rebuttal testimony (Exhibit
2 Eschelon 2R).²¹⁶ Mr. Starkey also addresses this claim in his discussion of Issues
3 9-43 and 9-44 (Conversions) in his rebuttal and surrebuttal testimony.

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

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

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

9 **Q. PLEASE SUMMARIZE THIS ISSUE.**

10 A. This issue deals with the circumstances under which Qwest can cease to offer to
11 CLECs products and services that it has previously offered and that have been
12 approved by the Commission. The product that prompted Eschelon’s proposal is
13 Unbundled Customer Controlled Rearrangement Element (“UCCRE”) (Issue 9-
14 53), because Qwest will not offer it to Eschelon even though this product
15 continues to be offered to other CLECs through Qwest’s SGAT and ICA with
16 other CLECs. Eschelon’s proposed language would require that the rates and
17 services approved by this Commission related to UCCRE be available to
18 Eschelon so long as they are available to other CLECs.²¹⁷ In addition, Eschelon
19 has proposed to make a product phase-out process available to Qwest when Qwest

²¹⁶ Also, compare Qwest’s discussion of Conversions (Issues 9-43 and 9-44) at pages 23-25 of its Response to Eschelon’s Petition for Arbitration, with Qwest’s discussion of Wire Center Issues at page 23.

²¹⁷ See Exhibit Eschelon 2, Denney Direct, pp. 112-117.

1 desires to cease offering products but does not want to individually obtain ICA
2 amendments from every CLEC. Both proposals address the problem of Qwest
3 offering a product to some CLECs but not others and the need for
4 nondiscriminatory treatment.

5 **Q. MS. STEWART TESTIFIES THAT THERE IS NO DEMAND FOR THE**
6 **SERVICE SUBJECT TO THIS DISPUTE.²¹⁸ SHOULDN'T DEMAND BE**
7 **TAKEN INTO ACCOUNT?**

8 A. As I stated in my Direct Testimony, the issue, for purposes of applying the
9 prohibition under federal and state law against discrimination, is not whether there
10 is “demand” for a product or service, but rather, whether Qwest makes the
11 product or service available to other CLECs.²¹⁹ Qwest does not dispute that it
12 does, in fact, make UCCRE available to CLECs, both under its SGAT and under
13 ICAs.

14 Furthermore, if Qwest were permitted to unilaterally withdraw a product based on
15 nothing more than its assertion that there is “no demand” for the product,
16 Eschelon would, without Commission review, have little or no means for
17 challenging such an assertion. “Lack of demand” may or may not be a factor that
18 the Commission will wish to take into account, but Qwest should be required to

²¹⁸ Qwest Exhibit 3R, Stewart Rebuttal, p. 27 and p. 32.

²¹⁹ Exhibit Eschelon 2, Denney Direct, pp. 117-119.

1 make its case to the Commission, rather than engaging in self help and proceeding
2 without Commission oversight.

3 **Q. HOW DO YOU RESPOND TO MS. STEWART’S TESTIMONY THAT**
4 **QWEST IS NO LONGER UPDATING ITS SGAT AND AS A RESULT**
5 **THE SGAT IS OUT OF DATE?²²⁰**

6 A. This issue is being addressed by Mr. Starkey in his discussion of the “Secret
7 TRRO PCAT Example” in Section III(A)(4) of his surrebuttal testimony (Exhibit
8 Eschelon 1SR).

9 **Q. MS. STEWART CITES AN ORDER ISSUED IN 2004, IN WHICH THE**
10 **FCC ESTABLISHED THAT UNDER THE OPT-IN PROVISION IN**
11 **SECTION 252(i), A CLEC CAN ONLY OPT INTO AN ENTIRE ICA OR**
12 **SGAT, NOT JUST INDIVIDUAL PROVISIONS.²²¹ HOW DO YOU**
13 **RESPOND?**

14 A. First, Eschelon is not seeking to opt in to an ICA; it is negotiating and arbitrating
15 one. Second, in adopting the all-or-nothing rule, the FCC clearly stated that doing
16 so did not limit the nondiscrimination provisions of the Act, which continue to
17 protect CLECs.²²² Finally, Qwest should find Eschelon’s proposed language

²²⁰ Qwest Exhibit 3, Stewart Direct, p.44.

²²¹ Qwest Exhibit 3, Stewart Direct, pp. 44-45.

²²² *See, e.g.*, Exhibit Eschelon 1R, Starkey Rebuttal, note 13 on page 4: “Although the FCC eliminated the pick-and-choose rule in favor of the all-or-nothing rule, when it did so, the FCC clearly stated that doing so did not limit the nondiscrimination provisions of the Act, which remain available to protect CLECs. See Section Report and Order, In re. Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338 (Rel. July 13, 2004), at

1 acceptable because Qwest has that language in its SGAT and other CLEC ICAs.
2 It is interesting that, on the one hand, Qwest points to the SGAT as the basis for
3 its own template, but on the other, Eschelon is not supposed to be able to point out
4 when the SGAT or other CLEC ICAs are the basis of its language.

5 **Q. QWEST CLAIMS THAT ESCHELON CAN STILL OBTAIN THE UCCRE**
6 **PRODUCT THROUGH ITS TARIFFED COMMAND-A-LINK**
7 **PRODUCT.²²³ DOES THIS ALLEVIATE ESCHELON’S CONCERNS?**

8 A. No. The fact Qwest offers a product that Eschelon purchases through its tariffs as
9 well as at cost based rates does not remove from Qwest the obligation to provide
10 the product at TELRIC rates, nor does it offer protection to Eschelon if it chooses
11 to utilize this product. First, Qwest’s tariffed products are often priced
12 significantly above cost. Second, the FCC in the *TRRO* specifically determined
13 that an ILEC’s offer of a product to CLECs through its special access tariffs was
14 not a basis for removal of a product as a UNE.²²⁴

¶¶20-23.

²²³ Qwest Exhibit 3R, Stewart Rebuttal, p. 30.

²²⁴ See *TRRO* ¶46 where the FCC states: “We find that statutory concerns, administrability concerns, and concerns about an anticompetitive price squeeze, preclude a rule that forecloses UNE access upon a finding by the Commission that carriers are potentially able to compete using special access or other tariffed alternatives. We also find that a competitor’s current use of special access does not, on its own, demonstrate that that carrier is not impaired without access to UNEs.”

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

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

3 **Q. PLEASE SUMMARIZE THIS ISSUE.**

4 A. Qwest is required by the FCC to have cause before conducting an audit regarding
5 CLEC compliance with service eligibility requirements. Eschelon's proposed
6 language memorializes this requirement and requires Qwest to provide
7 information to Eschelon that Qwest used to support its cause for review.

8 **Q. MS. STEWART CLAIMS YOU IGNORE THE "FCC'S RULINGS IN THE**
9 **TRO RELATING TO AUDIT RIGHTS."²²⁵ IS THIS CORRECT?**

10 A. No. As I testified in my Direct and Rebuttal Testimony, in the TRO the FCC
11 stated that its auditing procedures were comparable to those it established in a
12 previous order. The FCC took specific note of the requirements of that order and
13 directed carriers to develop the details regarding auditing in their interconnection
14 agreements.²²⁶

15 **Q. MS. STEWART ARGUES QWEST IS REQUIRED TO REIMBURSE**
16 **CLECS IN CERTAIN INSTANCES FOR AUDIT COSTS PURSUANT TO**

²²⁵ Qwest Exhibit 3R, Stewart Rebuttal, p. 42.

²²⁶ Exhibit Eschelon 2, Denney Direct, pp. 127-128; Exhibit Eschelon 2R, Denney Rebuttal, pp. 81-82. At Qwest Exhibit 3R, Stewart Rebuttal, p. 42, Ms. Stewart claims that I ignore footnote 1898 of the TRO, but this is not the case. Paragraph 621 of the TRO lists the Commission findings regarding audit requirements in its *Supplemental Order Clarification* to convert tariffed loop-transport combinations to UNE rates. A clear reading of this paragraph and footnote 1898 demonstrates that the conditions set forth in footnote 1898 were principles in addition that audits only be taken when the ILEC has a concern that CLEC has not met the relevant criteria for conversion.

1 **ICA SECTION 9.23.4.3.1.3.5. DOES THIS ALLEVIATE ESCHELON'S**
2 **CONCERNS REGARDING AUDITS WITHOUT CAUSE?**²²⁷

3 A. No. Although Ms. Stewart is correct that ICA Section 9.23.4.3.1.3.5 requires
4 Qwest to reimburse Eschelon in the event the Independent Auditor finds Eschelon
5 complied in material respects with the Service Eligibility Criteria, that provision
6 doesn't necessarily reimburse Eschelon for its indirect costs and lost opportunity
7 costs.²²⁸ Every time Eschelon is required to redirect an employee from one
8 activity to another, that employee is unable to work on the business task to which
9 he or she was originally assigned. While Eschelon may be able to recoup the cost
10 of the employee's time spent working on the audit, the work the employee should
11 have been doing has gone undone. Thus, the audit imposes a very real
12 opportunity cost on Eschelon. The opportunity cost to Eschelon of the employee
13 working on unnecessary audit activities is the cost of the next best alternative,
14 which is the foregone benefit that the employee would have generated for
15 Eschelon had the employee been able to work on his or her assigned tasks.

²²⁷ Qwest Exhibit 3R, Stewart Rebuttal, pp. 42-43.

²²⁸ An opportunity cost is the value of the best foregone alternative use of the resources employed. In this case, the opportunity costs are the value of the work the employee could have been doing if the employee had not been diverted to work on the audit.

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

2 *Issue Nos. 9-58, 9-58(a), 9-58(b), 9-58(d), 9-58(e) and 9-59: ICA Sections*
3 *9.23.4.5.1, 9.23.4.5.1.1, 9.23.4.5.4, 9.23.4.6.6 (and subparts), 9.1.1.1.1,*
4 *9.1.1.1.1.2, and 9.23.4.7*

5 **Q. PLEASE SUMMARIZE THESE ISSUES.**

6 A. Qwest attempts to add an operational glue charge in order for Eschelon to
7 purchase a point-to-point commingled EEL. Unlike UNE EELs and the special
8 access equivalent to a UNE EEL, for commingled EELs Qwest proposals will
9 delay installation of commingled EELs, lengthen the repair intervals for these
10 circuits and make bill verification difficult. Qwest accomplishes this task by
11 requiring separate orders, separate trouble tickets and separate bills for each
12 component of the commingled EEL. Qwest's proposal not only diminishes the
13 usefulness of commingled EELs, but also impacts the terms and conditions of the
14 UNE component of the commingled circuit.

15 A point-to-point Commingled EEL should be a useful and meaningful alternative
16 for the circumstances when a UNE EEL is no longer available. Because a
17 Commingled EEL is functionally equivalent to a UNE EEL, a Commingled EEL
18 should be put together (ordering, tracking, repair and billing) in a manner similar
19 to a UNE EEL. Eschelon's language accomplishes this task, while Qwest's
20 language allows Qwest to diminish the usefulness of the commingled EEL by
21 delaying provisioning and repair. In addition, Qwest's language allows Qwest to
22 provide bills for the components of the commingled EEL that are not related in

1 any way and thus extremely difficult to review and verify. I address these issues,
2 along with many of the points raised by Qwest in my direct testimony at Exhibit
3 Eschelon 2, Denney Direct, pages 128-159, and in my rebuttal testimony at
4 Exhibit Eschelon 2R, pp. 82-94.

5 **Q. WHAT GENERAL CRITICISMS DOES QWEST RAISE WITH RESPECT**
6 **TO ESCHELON'S PROPOSALS RELATED TO COMMINGLED**
7 **EELS/ARRANGEMENTS?**

8 A. Qwest raises three general criticisms of Eschelon's language proposals. First,
9 Qwest complains that this issue should be raised through CMP, not through
10 Eschelon's arbitration.²²⁹ Second, Qwest claims the costs to make all of
11 Eschelon's changes would be prohibitive and Eschelon is not willing to
12 compensate Qwest to make these changes.²³⁰ Third, Qwest argues that Eschelon
13 is attempting to impact the terms of Qwest's special access products and that
14 Qwest is not required to change its systems.²³¹

15 **Q. IS CMP THE PROPER FORUM FOR THIS ISSUE?**²³²

16 A. No. The issue of why it is inappropriate to send these issues to CMP is discussed
17 in the testimony of Mr. Starkey. Mr. Starkey's surrebuttal testimony specifically
18 addresses Qwest's secret PCAT and Qwest's attempt to implement provisions of

²²⁹ Qwest Exhibit 3R, Stewart Rebuttal, pp. 51-55 and p. 61.

²³⁰ Qwest Exhibit 3R, Stewart Rebuttal, pp. 44, 54 and 48.

²³¹ Qwest Exhibit 3R, Stewart Rebuttal, pp. 45, 48, 53, 58 and 59.

²³² *See also* Exhibit Eschelon 2R, Denney Rebuttal, p. 93.

1 the TRO/TRRO conditions outside the scope of CMP. It should also be noted that
2 the provisions in these sections of the ICA have nothing at all to do with the wire
3 center dockets, the completion of which Ms. Stewart claims Qwest is awaiting.²³³
4 Even more problematic is Qwest's claim that Eschelon's disputes should be
5 ignored because other CLECs are operating under Qwest's unilaterally
6 implemented current procedures.²³⁴ In essence, what Qwest is arguing is: (1)
7 commingled EEL issues should be handled through CMP; (2) Qwest will not
8 submit the issues to CMP, claiming it is waiting for the outcome of the unrelated
9 non-impaired wire center proceedings;²³⁵ (3) in the meantime, CLECs should use
10 the Qwest non-CMP process; and (4) Qwest concludes that there is no reason for
11 dispute regarding ICA language for commingled EELs / arrangements because
12 CLECs are already using the non-CMP Qwest process.²³⁶ Qwest's circular logic
13 should be rejected, as further addressed in the testimony of Mr. Starkey.

14 **Q. QWEST CLAIMS THAT THE PROVISIONS PROPOSED BY ESCHELON**
15 **WOULD CAUSE QWEST TO INCUR SIGNIFICANT COST AND**
16 **SHOULD, THEREFORE, BE REJECTED. WHAT IS YOUR**
17 **RESPONSE?**²³⁷

²³³ Qwest Exhibit 3R, Stewart Rebuttal, p. 52.

²³⁴ Qwest Exhibit 3R, Stewart Rebuttal, p. 50, lines 16-26.

²³⁵ Ms. Stewart now claims that these issues are being dealt with in CMP (Qwest Exhibit 3R, Stewart Rebuttal, pp. 52-53), but at this point in time Qwest has not presented any CRs associated with these PCATs. Exhibit Eschelon 3.29 (Johnson).

²³⁶ Qwest Exhibit 3R, Stewart Rebuttal, p. 36.

²³⁷ See also Exhibit Eschelon 2, Denney Direct, pp. 142-143, pp. 147-148, pp. 148-149 and Exhibit

1 A. First, it is important to understand that today Qwest allows CLECs to order UNE
2 EELs on one order, issue trouble reports for the entire circuit, and receive billing
3 for the two components on a single bill. This is also the case for the special
4 access equivalent of a UNE EEL. Thus, Qwest's claim that it is prohibitively
5 expensive to implement Eschelon's proposals is difficult to believe. Qwest
6 attempts to verify this expense by claiming that the UNE and non-UNE circuits
7 must be separated in all practical respects, or else mass confusion will result.
8 Qwest claims it will have trouble provisioning, repairing and billing for these
9 circuits if they are combined any way other than the physical combination
10 required by the FCC. The fact that Qwest combines loop and transport circuits on
11 a regular basis demonstrates that Qwest's fears are unfounded. Qwest uses the
12 threat of unsubstantiated extraordinary expense in an attempt to stop CLECs from
13 making practical requests for the ordering, maintenance and billing of
14 combinations of circuits that Qwest is legally required to provide.²³⁸

15 **Q. IS ESCHELON ATTEMPTING TO ALTER THE TERMS AND**
16 **CONDITIONS OF QWEST'S SPECIAL ACCESS CIRCUITS THROUGH**
17 **ITS LANGUAGE PROPOSALS?**²³⁹

18 A. No. The purpose of this proceeding is to determine the terms and conditions that
19 apply to UNEs. It is Qwest that is attempting to weaken the terms and conditions

Eschelon 2R, Denney Rebuttal, pp. 87-88.

²³⁸ Exhibit Eschelon 2.28 (Denney), p. 106 refers to a deposition of Ms. Madill indicating that the same provisioning center processes orders for UNE and Private Line circuits.

²³⁹ See also Exhibit Eschelon 2R, Denney Rebuttal, pp. 84-85.

1 that apply to the UNE component of commingled EELs by delaying installation
2 and lengthening the process for repairs. Eschelon's proposal does not seek to
3 alter the terms and conditions of the non-UNE component of the commingled
4 EEL, but instead insures that the commingled facility is sufficiently described
5 such that it can be practically used by Eschelon.

6 **Q. DOES QWEST HAVE A LEGITIMATE NEED TO USE DIFFERENT AND**
7 **SEPARATE PROVISIONING INTERVALS FOR THE UNE AND NON-**
8 **UNE CIRCUIT OF A COMMINGLED EEL?²⁴⁰**

9 A. No. Qwest is currently able to provision a UNE EEL under a single provisioning
10 interval. Thus, Ms. Stewart's claim that "it is essential for Qwest to use and
11 preserve different provisioning intervals"²⁴¹ is not accurate. Further, Ms. Stewart
12 argues that "it is difficult to believe that a 48-hour delay 'diminishes the
13 usefulness of the commingled arrangement' and makes it 'inferior,' as Mr.
14 Denney suggests."²⁴² Contrary to Ms. Stewart's claim, provisioning intervals are
15 important and allowing Qwest to delay the provisioning interval to CLECs for
16 two to three days is inappropriate and improper.

²⁴⁰ Qwest Exhibit 3R, Stewart Rebuttal, p. 64.

²⁴¹ Qwest Exhibit 3R, Stewart Rebuttal, p. 64.

²⁴² Qwest Exhibit 3R, Stewart Rebuttal, p. 65. Note that Ms. Stewart takes issue with the 72 hour delay I mention in my Direct Testimony claiming the delay would only be 48 hours. Qwest is required to provide a FOC for an unbundled DS1 loop within 72 hours. Qwest is required to provide a FOC for a DS1 point to point UNE EEL within 48 hours. Since, in the example given, Eschelon would be combining an unbundled DS1 loop with non-UNE transport, I used the 72 hour interval for the loop. Regardless whether it is a two or three day delay, there is still a delay and the delay is significant.

1 **Q. MS. STEWART SUGGESTS THAT YOU EXAGGERATE IN YOUR**
2 **DIRECT TESTIMONY REGARDING THE CHOICE OF HAVING TO**
3 **EXIT THE MARKET FOR COMMINGLED EELS OR SWITCH TO**
4 **HIGHER PRICED SPECIAL ACCESS LINES.²⁴³ HOW DO YOU**
5 **RESPOND?**

6 A. Eschelon, as other CLECs certainly would do, evaluates the costs before selling
7 services to its customers. Eschelon cannot ignore the price it pays or any
8 diminished product functionality of the circuits it leases from Qwest. As the price
9 that Eschelon pays for each circuit increases, Eschelon's willingness to offer
10 products to end users using these circuits diminishes. This is not a hypothetical
11 threat, but an economic reality. Currently Eschelon sells products to end users by
12 purchasing unbundled network elements from Qwest and attaching these elements
13 to the Eschelon network. In some situations Eschelon also uses UNE EELs to
14 serve end user customers. Eschelon does not use UNE EELs in every market
15 where they could be used, as the conditions in each market dictate the practicality
16 of using EELs to serve customers in that market. The use of non-UNE
17 components to serve end user customers is even more limited and requires
18 evaluation on a case by case basis. There should be no doubt that decrease in
19 usability or increase in the cost of facilities that Eschelon leases from Qwest will
20 impact Eschelon's participation in certain markets in Utah.

²⁴³ Qwest Exhibit 3R, Stewart Rebuttal, pp. 46-47.

1 **Q. AT PAGE 59 OF HER REBUTTAL TESTIMONY (QWEST EXHIBIT 3R),**
2 **MS STEWART STATES THAT ESCHELON’S PROPOSAL FOR A**
3 **SINGLE BILLING ACCOUNT NUMBER (“BAN”) POTENTIALLY**
4 **BECOMES A FORM OF “RATE RATCHETING” THAT QWEST IS**
5 **EXPLICITLY NOT REQUIRED TO DO FOR CLECS AS PART OF THE**
6 **TRO. HOW DO YOU RESPOND?**

7 A. This is in no way ratcheting. Ratcheting is when the rates for UNE and special
8 access services are blended based on proportional use. Eschelon is not proposing
9 blended or ratcheted rates for Commingled EELs and its proposals would not
10 result in ratcheting or blended rates, contrary to Ms. Stewart’s testimony. A
11 single BAN would simple contain the appropriate charges for the commingled
12 facilities on a single bill. Eschelon’s proposal does not impact the rates it would
13 pay for either UNEs or special access circuits.

14 **Q. ARE TWO UNIQUE CIRCUIT IDS NECESSARY FOR POINT-TO-POINT**
15 **COMMINGLED EELS?²⁴⁴**

16 A. No. Qwest currently uses a single circuit ID for point-to-point UNE EELs and
17 point-to-point special access circuits and is able to provision, bill and document
18 service quality for these circuits. There is no reason why Qwest can not use a
19 single circuit ID for point-to-point commingled EELs. This is discussed in detail
20 in my direct testimony at Exhibit Eschelon 2, Denney Direct, pages 130-131.

²⁴⁴ Qwest Exhibit 3R, Stewart Rebuttal, p. 54.

1 **Q. DO MULTIPLEXED EELS HAVE MULTIPLE CIRCUIT IDS**
2 **ASSOCIATED WITH THE MULTIPLEXED EEL ARRANGEMENT?**

3 A. Yes. Ms. Stewart concludes that because “Eschelon has not suggested that Qwest
4 commingle two separate facilities of different bandwidth/capacity into one order,
5 one bill, and one circuit ID,” she fails to understand how a point-to-point
6 commingled EEL “provisioned with two service orders and two circuit IDs would
7 be so burdensome.”²⁴⁵

8 Ms. Stewart made the same argument in her direct testimony at Qwest Exhibit 3
9 Stewart Direct pages 59-60, and I responded how multiplexed EELs are different
10 in my rebuttal testimony on pages 90-91.²⁴⁶

11 **Q. WOULD QWEST’S PROPOSAL FOR ISSUE 9-59 SOLVE THE**
12 **PROBLEM OF DELAY FOR THE REPAIR OF A COMMINGLED EEL?**

13 A. No. Ms. Stewart claims there is no basis for my claim that Qwest’s proposal
14 would delay the repair of a commingled EEL,²⁴⁷ but then contradicts herself a few
15 sentences later. Ms. Stewart explains that if Eschelon guesses correctly whether
16 the UNE or non-UNE portion of the circuit has problems, “Eschelon will not have
17 any need to submit a second repair ticket.”²⁴⁸ If Eschelon guesses wrong, “only

²⁴⁵ Qwest Exhibit 3R, Stewart Rebuttal, p. 47.

²⁴⁶ Exhibit Eschelon 2R, Denney Rebuttal, pp. 90-91.

²⁴⁷ Qwest Exhibit 3R, Stewart Rebuttal, p. 66.

²⁴⁸ Qwest Exhibit 3R, Stewart Rebuttal, p. 66.

1 then will it become necessary for Eschelon to submit a second trouble ticket.”²⁴⁹
2 It is the submission of the second repair ticket that provides for the delay. Ms.
3 Stewart states Qwest will “immediately begin the repair process for the second
4 ticket and thereby avoid delay.”²⁵⁰ However, the fact that an extra step, checking
5 one component of the commingled product before a second repair ticket can be
6 opened, was introduced into the repair process can not help but introduce delay to
7 the repair of the entire circuit.

8 **Q. MS. STEWART STATES THAT “WITHOUT SEPARATE BANS FOR**
9 **THE DISTINCT PRODUCTS THAT COMPRISE COMMINGLED**
10 **ARRANGEMENTS, BILLING ERRORS WOULD BE INEVITABLE.”²⁵¹**
11 **DO YOU AGREE?**

12 A. No. This was discussed in my rebuttal testimony at Exhibit Eschelon 2R, Denney
13 Rebuttal, pp. 88-90.

14 **Q. DO YOU AGREE WITH MS. STEWART’S STATEMENT THAT, IF**
15 **ESCHELON’S PROPOSALS ARE NOT REJECTED BY THE**
16 **COMMISSION, THEN AT A MINIMUM “THE COMMISSION WOULD**
17 **NEED TO EXCLUDE SUCH HYBRID PRODUCTS FROM THE UTAH**
18 **UNE-SPECIFIC PERFORMANCE INDICATOR MEASUREMENTS.”²⁵²**

²⁴⁹ Qwest Exhibit 3R, Stewart Rebuttal, p. 66.

²⁵⁰ Qwest Exhibit 3R, Stewart Rebuttal, p. 66.

²⁵¹ Qwest Exhibit 3R, Stewart Rebuttal, p. 56.

²⁵² Qwest Exhibit 3R, Stewart Rebuttal, p. 49.

1 A. No. The UNE components of commingled arrangements should continue to be
2 subject to the Utah Performance Assurance Plan (“QPAP”). The QPAP provides
3 incentives for Qwest for on time provisioning, timely repair and accurate billing
4 for products and services purchased by CLECs from Qwest. Allowing Qwest to
5 circumvent the PAP for UNEs simply because they are part of a commingled
6 arrangement further undermines the value of the commingled EEL. Ms. Stewart is
7 inappropriately arguing against language that Qwest has already agreed upon in
8 the ICA. Closed language in Section 24.1.2.1 specifically states that the
9 performance measurements and remedies apply to the UNE component(s) of any
10 Commingled arrangement:

11 24.1.2.1 . . . Performance measurements and/or remedies under this
12 Agreement apply only to the UNE component(s) of any
13 Commingled arrangement. Qwest is not relieved from those
14 measurements and remedies by virtue of the fact that the UNE is
15 part of a Commingled arrangement.

16 **VIII. EXPEDITED ORDERS**

17 **SUBJECT MATTER NO. 31. EXPEDITED ORDERS**

18 **Issues Nos. 12-67 and 12-67(a)-(g)**

19 **Q. MS. ALBERSHEIM STATES IN HER REBUTTAL TESTIMONY THAT**
20 **THE FUNDAMENTAL DISPUTE BETWEEN THE COMPANIES**

1 **REGARDING EXPEDITES IS “ABOUT THE WAY THAT QWEST**
2 **SHOULD OFFER EXPEDITES.”²⁵³ DO YOU AGREE?**

3 A. No. As stated in my direct and rebuttal testimony,²⁵⁴ the two over-arching
4 questions for resolution are:

5 (1) **Interim Wholesale Rate (whether TELRIC)**: At what rate
6 should expedites be provided to a Qwest wholesale customer (*i.e.*
7 Eschelon), at least on an interim basis until a permanent rate is set?
8 and

9 (2) **Exceptions to Charging Additional Fee for Expedites**:
10 Should the circumstances when Qwest provides exception(s) to
11 charging an additional fee for expedites be nondiscriminatory?

12 Ms. Albersheim’s testimony focuses on the second of these two questions. In
13 other words, she is focusing on the exception rather than the general rule. Ms.
14 Albersheim’s testimony also focuses on the first of Eschelon’s alternate proposals
15 for the exception, with no recognition of the compromise Eschelon has offered
16 with its alternate proposal for exceptions to charging an additional fee for
17 expedites. Ms. Albersheim states that the difference in the Qwest contract
18 language is “the distinction between designed services and non-designed
19 services.”²⁵⁵ Under Eschelon’s second (and fourth²⁵⁶) proposal, however, “Qwest

²⁵³ Qwest Exhibit 1R, Albersheim Rebuttal, p. 37.

²⁵⁴ Exhibit Eschelon 2, Denney Direct, pp. 160-161 and Exhibit Eschelon 2R, Denney Rebuttal, pp. 94-95.

²⁵⁵ Qwest Exhibit 1R, Albersheim Rebuttal, p. 37, lines 8-9.

²⁵⁶ Eschelon now also has a fourth proposal, which contains the language of the second proposal but also addresses resource availability. Exhibit Eschelon 2R, Denney Rebuttal, pp. 116-117. The first and third proposals are Eschelon’s *initial* proposal (with resource availability addressed in the third proposal). Eschelon’s *alternate* proposal is its second and fourth versions.

1 will grant and process CLEC's expedite request, and expedite charges are not
2 applicable, if Qwest does not apply expedite charges to its retail Customers, such
3 as when certain conditions (*e.g.*, fire or flood) are met and the applicable
4 condition is met with respect to CLEC's request for an expedited order." To the
5 extent the distinction between designed services and non-designed services
6 applies to its retail customers, this language should address Ms. Albersheim's
7 stated concern.

8 **Q. QWEST STATES THAT YOU "ATTEMPT TO DISMISS THE**
9 **DISTINCTION THAT QWEST DRAWS BETWEEN DESIGNED AND**
10 **NON-DESIGNED SERVICES" AND INDICATES THAT EXPEDITES**
11 **SHOULD BE PROVIDED UNDER TWO OPTIONS, ONE FOR AN**
12 **ADDITIONAL FEE AND ANOTHER WITH NO ADDITIONAL FEE.²⁵⁷**
13 **PLEASE COMMENT.**

14 A. I disagree. The Oregon Commission, for example, has said that it is
15 "unconvinced" by Qwest's (then US West's) "claim that it is necessary from a
16 technical standpoint to provision all unbundled elements in the same manner as
17 private lines and other complex telecommunications services."²⁵⁸ This lends
18 support for adoption of Eschelon's proposal number one (or three) for Issue 12-
19 67(a).

²⁵⁷ Qwest Exhibit 1R, Albersheim Rebuttal, p. 37, lines 4-23 and p. 39 lines 1-8.

²⁵⁸ Oregon PUC Order No. 98-444.

1 Even with this finding from the Oregon Commission, Eschelon has reasonably
2 offered in the alternative to compromise on Issue 12-67(a) (Exceptions to
3 Charging an Additional Fee) with its alternate proposal, which I described above.
4 Although the latter proposal accommodates Qwest's claimed distinction,²⁵⁹ Qwest
5 has not accepted it and barely acknowledges its existence. For example, on pages
6 44-45 of her rebuttal testimony (Qwest Exhibit 1R Albersheim Rebuttal), Ms.
7 Albersheim testifies that Eschelon is seeking preferential treatment because she
8 claims sub-paragraph (f) of Echelon's proposal number one is different from
9 Qwest's practice.²⁶⁰ There is no sub-paragraph (f), or any sub-paragraphs at all,
10 in Eschelon's alternate proposal. If Qwest is dissatisfied with proposals number
11 one and two, it may accept alternative proposals number three or four for Issue
12 12-67(a).

²⁵⁹ Although Qwest claims that its language distinguishes between designed and non-designed services, Qwest rejected Eschelon's proposal in negotiations to identify products in the definitions of the terms "designed," "non-designed" and "POTS" in the ICA. Under Qwest's proposal here (which refers to the PCAT), by simply moving a product from one category to another in its PCAT, Qwest could make expedites unavailable for additional product(s). When Eschelon provided its definition proposal to Qwest in 2004, Eschelon also enclosed an August 16, 2002 Qwest ex parte filing with the FCC in which Qwest identifies which products it believes are defined and which are non-designed, which was used as a basis for Eschelon's proposed definitions. Qwest nonetheless would not agree to identify products in the definition of these terms in the ICA. Ironically, Qwest now claims that its proposal is "product-specific." Qwest Exhibit 1R, Albersheim Rebuttal, p. 37, lines 17-18.

²⁶⁰ Eschelon's proposal that would provide for expedited service in on an emergency basis when a customer's service is disconnected in error is consistent with Qwest's past practice. (See Exhibit Eschelon 3.53 at Section 5, "Qwest Attempted to Change the Expedites Process to Exclude CLEC-Caused Disconnects in Error, But Retracted its Proposal After Eschelon Objected", citing Initial "Expedites & Escalation Overview – V29.0). See Exhibit Eschelon 2, Denney Direct, p. 160, footnote 120.

1 Ms. Albersheim’s testimony about the two expedite options under Qwest’s
2 proposal,²⁶¹ as though there were not two under Eschelon’s proposal, is puzzling.
3 Under both companies’ proposals, there is one “option” when charges apply (*see*
4 Section 12.2.1.2.3 – “expedite charges in Exhibit A will apply”)²⁶² and another
5 “option” when charges do not apply (*see* Section 12.2.1.2.1, #2 & #4 – “expedite
6 charges are not applicable, if Qwest does not apply expedite charges to its retail
7 Customers”).²⁶³ It is undisputed that Qwest provides expedites to itself²⁶⁴ and its
8 retail customers.²⁶⁵ It is also undisputed that Qwest does not charge its retail
9 customers an additional expedite fee in all cases; rather, Qwest provides
10 exceptions to charging an additional fee for expedites under certain conditions.²⁶⁶

²⁶¹ *See, e.g.*, Qwest Exhibit 1R, Albersheim Rebuttal, pp. 38-39.

²⁶² Qwest Exhibit 1R, Albersheim Rebuttal, p. 38 (“The first option applies to expedites for designed services (like an unbundled loop) and charges apply.”).

²⁶³ Qwest Exhibit 1R, Albersheim Rebuttal, p. 38 (“The second provides expedites for non-designed service (POTS) and charges do not apply.”).

²⁶⁴ Exhibit Eschelon 1.6 (Starkey), Arizona arbitration Transcript, Vol. I, p. 58, lines 19-21 (“Q. Now, you would agree with me that Qwest provides itself with expedites; correct? A. Yes.”) (Ms. Albersheim).

²⁶⁵ *See, e.g.*, Colorado arbitration, Albersheim Colorado Direct, p. 49, (Qwest “provides expedites to its retail POTS customers and design services customers...”); Exhibit Eschelon 2.21 (Denney) (Qwest tariff pages for Qwest retail customers, including those receiving services over a “designed” facility); Qwest Exhibit 1R, Albersheim Rebuttal, p. 38 (“The first option applies to expedites for designed services (like an unbundled loop) and charges apply.”); Qwest Exhibit 1R, Albersheim Rebuttal, p. 38 (“The second provides expedites for non-designed service (POTS) and charges do not apply.”).

²⁶⁶ Qwest (Ms. Martain) Direct (Aug. 28, 2006), Arizona Complaint Docket, p. 40, lines 4-10 (“The tariff then goes on to state that if the end user elects to move service to a temporary location (either within the same building, or a different building) that non-recurring charges would apply. This would include the non recurring charge to expedite a design service. However, when the customer moves its service, via a service order, back to the original premise location, if it meets the criteria as outlined in 3.2.2.d included below, the non-recurring charges would be *waived (including the expedite fee)*” (emphasis added)). *See also* Qwest Exhibit 1R, Albersheim Rebuttal, p. 38, lines 15-17 (“It is critical to note, first, for non-designed services (POTS services), CLECs and Qwest’s retail customers alike both can obtain an expedited due date under certain defined circumstances at no charge.”).

1 Eschelon’s proposed language takes into account these undisputed facts with its
2 two “options” (*i.e.*, the general rule and the exception).

3 **Q. MS. ALBERSHEIM TESTIFIES THAT THE RETAIL ANALOGUE**
4 **LEGAL STANDARD AND PIDS SUPPORT THE DISTINCTION**
5 **BETWEEN DESIGNED AND NON-DESIGNED SERVICES.²⁶⁷ IS QWEST**
6 **CONSISTENT ON THIS POINT?**

7 A. No. Qwest wants this Commission to treat *all* loops (DS0, DS1 and higher) as
8 designed services.²⁶⁸ In this particular response, Ms. Albersheim states “there is
9 no retail analogue for the provisioning of unbundled *DS0* loops,”²⁶⁹ while
10 omitting any reference to DS1 and higher loops. Qwest’s position is that high
11 capacity loops (DS1 and higher) have a retail analogue, which is the retail private
12 line,²⁷⁰ a point Qwest made in the Arizona Complaint Case specifically regarding
13 expedites.²⁷¹ If, per Qwest, the retail analogue standard is the standard for the

²⁶⁷ Qwest Exhibit 1R, Albersheim Rebuttal, p. 39, lines 10-15.

²⁶⁸ Qwest rejects all expedite orders for loops, not only high capacity loops, under the existing ICA. See Exhibit Eschelon 2.18 (Denney). See Qwest Exhibit 1R, Albersheim Rebuttal, p. 39, lines 5-6 (“Examples of wholesale designed services are unbundled loops (DS0, DS1, DS3, etc.). Examples of retail designed services are private lines (DS1, DS3, etc.).”).

²⁶⁹ Qwest Exhibit 1R, Albersheim Rebuttal, p. 40, lines 4-5 (emphasis added).

²⁷⁰ Qwest Exhibit 1R, Albersheim Rebuttal, p. 44, line 11 (“a DS1 private line (the retail analogue)”).

²⁷¹ Qwest’s Response to Eschelon’s Motion for Summary Judgment, or in the Alternative, Partial Summary Judgment, *In the Matter of the Complaint of Eschelon Telecom of Arizona Inc. Against Qwest Corporation*, ACC Docket No. T-01051B-06-0257, T-03406A-06-0257 (Aug. 18, 2006) [“Arizona Complaint Docket”], p. 17, lines 8-9 (emphasis added).

1 distinction,²⁷² then its position would be that DS0 loops are non-designed services
2 and DS1 and higher loops are designed services, instead of its current position
3 that all loops are designed services.

4 Similarly, the PIDs do not support this Qwest proposition. Qwest cites a PID here
5 (OP-3) and it has cited another PID previously (OP-4) for this proposition.²⁷³ The
6 PIDs are attached to the Petition as Exhibit B to the proposed ICA.²⁷⁴ Qwest
7 suggests that, in these two PIDs, standards for resale and QPP POTS services are
8 set at “parity” with Qwest retail POTS, while unbundled loops are compared to
9 “benchmark” standards because there is no retail analogue for loops on the Qwest
10 retail side. Even a brief review of the PIDs shows that the suggestion is simply
11 incorrect. In these PIDs, standards for a number of UNE loops are set as “parity”
12 with retail, including 4-wire loops, ISDN-capable loops, DS3 loops and higher.
13 DS1 UNE loops are compared to “parity” with retail for all states on OP-3, and
14 for half of the states for OP-4.²⁷⁵ Qwest refers specifically to “DS0 loops.”²⁷⁶

²⁷² The FCC made clear that the lack of a retail analogue did not mean that the BOC would be subject to a more lenient nondiscrimination obligation. The FCC stated that “we do not view the ‘meaningful opportunity to compete’ standard to be a weaker test than the ‘substantially the same time and manner’ standard.” The meaningful opportunity to compete standard is, rather, “intended to be a proxy for whether access is being provided in substantially the same time and manner and [is], thus, nondiscriminatory.” *In the Matter of the Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York*, Memorandum Opinion and Order, FCC 99-404, CC Docket No. 99-295, rel. December 22, 1999, ¶ 45.

²⁷³ Minnesota arbitration, Albersheim Surrebuttal, p. 26, line 11 (“The same is true for OP-4, the standard installation interval.”).

²⁷⁴ The Proposed ICA is Exhibit 5 to Eschelon’s Petition, so the PIDs are Exhibit 5(B) to Eschelon’s Petition. In Petition Exhibit 5(B), PID OP-3 (Installation Commitments Met) is found on pages 36-38; PID OP-4 (Installation Interval) is found on pages 39-41.

²⁷⁵ Petition Exhibit 5(B), p. 37 (OP-3) and p. 40 (OP-4).

1 The term “DS0 loops” is not used in the PIDs. There are many PIDs that use
2 “parity” at retail, however, as the comparison for analog and non-loaded 2-wire
3 loops.²⁷⁷ If, per Qwest, the PIDs determine the distinction, then its position
4 would be that DS0 loops are non-designed services and DS1 and higher loops are
5 designed services, instead of its current position that all loops are designed
6 services.

7 **Q. MS. ALBERSHEIM DESCRIBES THE JANUARY RULING OF THE**
8 **MINNESOTA ALJS IN THE QWEST-ESCHELON ARBITRATION**
9 **PROCEEDING REGARDING ISSUE 12-67.²⁷⁸ DO YOU AGREE WITH**
10 **HER DESCRIPTION?**

11 A. No. The ALJs’ Recommended Decision is attached to my direct testimony as
12 Exhibit Eschelon 2.24.²⁷⁹ Ms. Albersheim states that “the ALJs recommended
13 adoption of Qwest’s proposed ICA language for expedites.”²⁸⁰ The ALJs,
14 however, adopted Qwest’s language and position with respect to a single sub-

²⁷⁶ Qwest Exhibit 1R, Albersheim Rebuttal, p. 40, line 2.

²⁷⁷ See PIDs OP-5(A), OP-6, OP-15, MR-3, MR-4, MR-5, MR-7 and MR-8. The PID “Definition of Terms” contains the following definition for purposes of the PIDs: “Plain Old Telephone Service (POTS) – Refers to basic 2-wire, non-complex analog residential and business services. Can include feature capabilities (e.g., CLASS features).”

²⁷⁸ Qwest Exhibit 1R, Albersheim Rebuttal, p. 47, lines 5-14.

²⁷⁹ The Commission’s orders in the Minnesota Arbitration are attached to my direct testimony as Exhibit Eschelon 2.24 and Exhibit Eschelon 2.25. The Commission’s order denying Qwest’s motion for reconsideration is provided with this testimony as Exhibit Eschelon 2.26. Ms. Albersheim also addresses the Arizona Staff Testimony. Qwest Exhibit 1R, Albersheim Rebuttal, pp 48-49. The Arizona Staff Conclusions are attached to my direct testimony as Exhibit Eschelon 2.19. See Exhibit Eschelon 2, Denney Direct, pp. 197-199.

²⁸⁰ Qwest Exhibit 1R, Albersheim Rebuttal, p. 47, lines 8-9 (citing MN Arbitrators’ Report ¶220 in footnote 18).

1 point only (nondiscrimination). Qwest cites paragraph 220 of the Arbitrators’
2 Report, which states (with emphasis added): “There is no discrimination. *On this*
3 *point*, Qwest’s position and language should be adopted.” A reading of the ALJs’
4 decision on expedites (paragraphs 219-222) shows that the ALJs rejected Qwest’s
5 position on the other issues. These issues include (1) the role of the CMP; (2)
6 expedites being an integral part of access to UNEs (i.e., *not* a superior service);
7 and (3) cost-based rates.²⁸¹ The ALJs rejected Qwest’s per day tariff rate
8 proposal²⁸² and recommended adoption of Eschelon’s positions regarding an
9 interim rate and TELRIC pricing.²⁸³ The sub-point for which the ALJs adopted
10 Qwest’s position – whether emergency situations should create an exception to
11 charging an additional fee for expedited ordering – is dealt with in Section
12 12.2.1.2.1 and subparts of Eschelon’s proposed language. Eschelon recognizes
13 that the Minnesota ALJs rejected these sections of Eschelon’s language. If this
14 Commission agrees, Eschelon offers two alternatives: (1) modify the list of
15 conditions in Section 12.2.1.2.1 to include only those that the Commission finds
16 Qwest provides to its retail customers;²⁸⁴ or (2) do not reach the issue of which

²⁸¹ Exhibit Eschelon 2.24 (Denney), pp. 6-7 and pp. 54-55 [MN Arbitrators’ Report, ¶¶ 21-22 & 219-222]. See also Exhibit Eschelon 2R (Denney Rebuttal), pp. 97-114.

²⁸² Qwest’s proposed ICA language states: “The request for expedite will be allowed only when the request meets the criteria outlined in the Pre-Approved Expedite Process in Qwest’s Product Catalog for expedite charges at Qwest’s wholesale web site.” See, e.g., Qwest proposed language for Section 7.3.5.2.2. The Product Catalog (“PCAT”) states: “If the request being expedited is for a product contained in the “Pre-Approved Expedites” section below, your ICA *must contain* language supporting expedited requests *with a “per day” expedite rate*.²⁸² Exhibit Eschelon 3.67 (Johnson) (emphasis added). This PCAT language is inconsistent with the Minnesota ALJs’ ruling on pricing.

²⁸³ Exhibit Eschelon 2.25 (Denney), p. 55 [MN Arbitrators’ Report, ¶¶ 221-222].

²⁸⁴ See, e.g., Qwest (Ms. Martain) Direct (Aug. 28, 2006), Arizona Complaint Docket, p. 40, lines 4-10

1 conditions create an exception to charging and instead adopt Eschelon’s alternate
2 proposal (number two or number four) for Section 12.2.1.2.1 (which articulates a
3 nondiscrimination standard but does not include a list of conditions in the
4 contract).

5 In her July 27, 2007, rebuttal testimony Ms. Albersheim also said about the
6 Minnesota ALJs’ ruling: “Qwest has filed an exception to the latter
7 recommendation because it is contrary to law. The Commission adopted the
8 ALJs recommendations, but it appears that Eschelon and Qwest have differing
9 interpretations regarding the Commission’s order on expedites. It is likely that
10 the parties will again go before the Minnesota Commission to settle this issue.”²⁸⁵

11 Qwest filed the referenced exception on January 26, 2007. The Commission
12 rejected Qwest’s position in its order dated March 30, 2007. Though Ms.
13 Albersheim claims that the Minnesota Commission’s decision on expedites is
14 contrary to law, Qwest did not move to reconsider on the expedites issue after its
15 exception was denied by the Minnesota Commission. Qwest moved for
16 reconsideration on other issues (not expedites) on April 9, 2007. The Minnesota
17 Commission denied Qwest’s motion for reconsideration on June 4, 2007 (Exhibit
18 Eschelon 3.67). The time for appeal has since expired.

(quoted below). *See, also.*, JW-3 (Qwest retail tariff pages), p. 3 (“Nonrecurring Charges Do Not Apply” “Charges do not apply for the reestablishment of service following a fire, flood or other occurrence attributed to an Act of God. . . .”

²⁸⁵ Qwest Exhibit 1R, Albersheim Rebuttal, p. 47, lines 10-14.

1 Nonetheless, Ms. Albersheim claims that the parties will again go before the
2 Minnesota Commission to settle “this issue.”²⁸⁶ She is apparently referring to the
3 upcoming compliance filing of the interconnection agreement in Minnesota for
4 approval by that commission. Despite her claim, a compliance filing is not an
5 opportunity to move for reconsideration or appeal issues that have been decided
6 and for which those deadlines have passed. The “issue” in the compliance filing
7 is *not* the ALJs’ and Commission’s ruling on (1) the role of the CMP; (2)
8 expedites being an integral part of access to UNEs (i.e., *not* a superior service);
9 and (3) cost-based rates.²⁸⁷ For example, there is no dispute that Exhibit A in
10 Minnesota will include an interim flat \$100 rate and a TELRIC rate should be
11 adopted.²⁸⁸ Qwest has said regarding Issue 12-67 that the “entire debate boils
12 down to the fact that Eschelon does not want to pay” to expedite “orders for
13 unbundled loops.”²⁸⁹ Under the Minnesota Commission’s decision as reflected in

²⁸⁶ Qwest Exhibit 1R, Albersheim Rebuttal, p. 47, lines 10-14.

²⁸⁷ Exhibit Eschelon 2.24 (Denney), pp. 6-7 and pp. 54-55 [MN Arbitrators’ Report, ¶¶ 21-22 & 219-222]. See also Exhibit Eschelon 2R (Denney Rebuttal), pp. 97-114.

²⁸⁸ The Minnesota ALJs found that a “TELRIC study should be done.” Exhibit Eschelon 2.24, p. 55, ¶222. The Minnesota Commission referred the TELRIC cost issue to a cost docket and stated: “On an interim basis, Qwest may charge Eschelon up to \$100 to expedite an order on behalf of an Eschelon customer.” Exhibit Eschelon 2.25, p. 23, ¶5. Per the Minnesota Commission order, Qwest has filed its TELRIC cost study in the Minnesota cost docket. See Exhibit Eschelon 2R.1, discussed in Exhibit Eschelon 2R (Denney Rebuttal), p. 105, line 19 – p. 112, line 17.

²⁸⁹ Qwest Response to MN Arbitration Petition, p. 49. Qwest said that Eschelon “does not want to pay Qwest \$200 per day to expedite orders for unbundled loops.” *Id.* The Minnesota Commission found that Eschelon was correct about the rate and should not have to pay Qwest \$200 per day to expedite orders for unbundled loops. See Exhibit Eschelon 2.25 (Order Resolving Arbitration Issues, p. 19 & p. 23, ¶5).

1 *Eschelon's language*, Eschelon will pay to expedite orders -- including orders for
2 all types of unbundled loops (which Qwest refers to as “designed services”²⁹⁰).

3 The Minnesota Commission adopted Eschelon's pricing “position,”²⁹¹ which is
4 not only the rate in Exhibit A but also the language of Section 12.2.1.2 and
5 subparts that explains how pricing will apply.²⁹² Also, fundamental to Eschelon's
6 pricing position is that the terms and conditions need to be included in the ICA --
7 as opposed to an outside source such as Qwest's Product Catalog or “PCAT” via
8 CMP.²⁹³ Therefore, Eschelon has provided to Qwest a copy of the
9 interconnection agreement that shows Eschelon's expedite language for
10 Minnesota as it appears in my direct testimony for Issue 12-67 (p. 166); Issue 12-
11 67(b) (p. 167); and 12-67(c) – 12-67(g) (p. 168). For the single sub-point for
12 which the Minnesota ALJs adopted Qwest's position – emergency exceptions to
13 charging an additional fee for expedited ordering (Issue 12-67(a)) – for
14 Minnesota, Eschelon has deleted its proposals (Issue 12-67(a) on pages 166-167

²⁹⁰ Qwest (Albersheim) MN Direct, p. 58, lines 2-3; Qwest Exhibit 1 (Albersheim Direct), p. 46, lines 25-26.

²⁹¹ Exhibit Eschelon 2.25, MN Arbitrators' Report, ¶221.

²⁹² *See, e.g.*, Eschelon proposed ICA Section 12.2.1.2.2 (“Qwest will grant and process CLEC's expedite request, but the expedite charges in Exhibit A will apply, unless the need for the expedite is caused by Qwest.”) & Section 12.2.1.2.3 (“Nothing in this Section 12.2.1.2 alters whether a non-recurring installation charge in Exhibit A applies to the CLEC order pursuant to the terms of the applicable section of this Agreement. The expedite charge, if applicable, is separate from the installation charge.”).

²⁹³ *See, e.g.*, MN Hearing Exhibit 33, Eschelon MN Direct Testimony (Webber, pp. 80-81) (The expedite events in CMP “provide an example of Qwest unilaterally changing the rules that govern the parties' contractual relationship and further underscore why it is important to include expedite terms and conditions in the ICA rather than, as Qwest has insisted, simply referring in the ICA to expedite requirements contained in Qwest's PCAT.”)

1 of my direct) and replaced its language with “Intentionally Left Blank” based on
2 that Commission’s ruling. Therefore, Eschelon has provided ICA language to
3 Qwest for the compliance filing that reflects the Minnesota ruling, including its
4 ruling “on this point.”²⁹⁴

5 Nonetheless, Qwest claims that the Minnesota Commission adopted all of its
6 expedited ordering language and none of Eschelon’s language reflecting
7 Eschelon’s pricing position on expedited ordering.²⁹⁵ For the Minnesota
8 compliance filing, Qwest proposes all of its expedite ICA language, which refers
9 to the PCAT that Qwest updates through CMP,²⁹⁶ even though the Minnesota
10 ALJs found that the “CMP process by which Qwest reached its current position is
11 not the controlling factor”²⁹⁷ for the expedites issue and found generally that
12 “Eschelon has provided convincing evidence that the CMP process does not
13 always provide CLECs with adequate protection from Qwest making important
14 unilateral changes in the terms and conditions of interconnection.”²⁹⁸ If this ICA
15 language issue comes before the Minnesota commission in the context of

²⁹⁴ Exhibit Eschelon 2.25 (Denney), p. 55 [MN Arbitrators’ Report, ¶ 220].

²⁹⁵ Qwest Exhibit 1R, Albersheim Rebuttal, p. 47, lines 5-14.

²⁹⁶ Qwest’s language states that the “request for expedite will be allowed *only* when the request meets the criteria outlined in the Pre-Approved Expedite Process in Qwest’s Product Catalog for expedites at Qwest’s wholesale web site.”²⁹⁶ See Section 9.1.12.1.2 (UNEs) (emphasis added). One of the Product Catalog (“PCAT”) criteria for fee-added Pre-Approved expedites is that the CLEC’s “ICA *must* contain language supporting expedited requests with a ‘per day’ expedite rate.” See Exhibit Qwest 1.5, p. 1 (emphasis added). This PCAT criterion (reflected in Qwest’s language, which it seeks to have included in the compliance filing) is directly contrary to the Minnesota Commission’s ruling (adopting a one-time flat interim expedite rate that is not applied on a per day basis).

²⁹⁷ Exhibit Eschelon 2.25 (Denney), MN Arbitrators’ Report, at ¶¶ 219.

²⁹⁸ Exhibit Eschelon 2.25 (Denney), MN Arbitrators’ Report, at ¶¶ 21-22.

1 approval of the interconnection agreement compliance filing, the decisions of the
2 Minnesota ALJs and PUC will not be subject to reconsideration, as that time has
3 passed. In Utah, on the single sub-point for which the Minnesota ALJs adopted
4 Qwest's position (exceptions to charging, Issue 12-67(a)), Eschelon has since
5 offered third and fourth alternative language proposals for this Commission's
6 consideration.²⁹⁹

7 **Q. REGARDING PLACEMENT OF THE EXPEDITE ICA LANGUAGE, MS.**
8 **ALBERSHEIM TESTIFIES THAT QWEST PROPOSES PRODUCT-**
9 **SPECIFIC PLACEMENT WHEREAS "SECTION 12 CONCERNS**
10 **ACCESS TO OSS AND IS NOT INTENDED TO ADDRESS PRODUCT-**
11 **SPECIFIC OPERATIONAL PROCEDURES."**³⁰⁰ **DOES QWEST'S**
12 **LANGUAGE COVER ALL PRODUCTS FOR WHICH EXPEDITES**
13 **SHOULD BE AVAILABLE?**

14 A. No. I address placement of the ICA language (Issues 12-67(d)-(f)), including the
15 nature of Section 12,³⁰¹ on pages 178 -179 of my direct testimony (Exhibit
16 Eschelon 2, Denney Direct) and on pages 95 and 96 of my rebuttal testimony

²⁹⁹ See Exhibit Eschelon 2R (Denney Rebuttal), pp. 116-117.

³⁰⁰ Qwest Exhibit 1R, Albersheim Rebuttal, p. 39, lines 14-22 and p. 38, lines 1-2

³⁰¹ See Section 12.1.1 of proposed ICA (closed language). See also Third Report and Order, *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98 (Released Nov. 5, 1999), ¶425 (citing "*Local Competition First Report and Order*, 11 FCC Rcd at 15763-64, paras. 518, 523") ("In the *Local Competition First Report and Order*, the Commission defined OSS as consisting of pre-ordering, ordering, provisioning, maintenance and repair, and billing functions supported by an incumbent LEC's databases and information. OSS includes the *manual*, computerized, and automated systems, *together with associated business processes* and the up-to-date data maintained in those systems") (emphasis added).

1 (Exhibit Eschelon 2R). By limiting expedites to two product areas (UNEs in
2 Section 9 and Interconnection in Section 7), Qwest’s language is too narrow.
3 Qwest’s language contains no language in Section 10 (Ancillary Services), which
4 includes Local Number Portability. Expedites need to be available, however, for
5 local number portability.³⁰² Eschelon’s language regarding expedited ordering is
6 logically placed in the Section (12.2) addressing “Pre-Ordering, Ordering, and
7 Provisioning.”

8 Ms. Albersheim states that Section 12 is “not intended to address product-specific
9 operational procedures,”³⁰³ but provides no support for this statement. A reading
10 of Section 12 shows that is not the case. Section 12.4.1.6, for example, addresses
11 optional testing, *which only applies to loops*. Section 12.4.3.4 on its face applies
12 *only to UNEs* (“Qwest shall test to ensure the electrical continuity of all UNEs”).
13 If Ms. Albersheim’s revisionist view of the structure of the contract were correct,
14 these provisions would be in Section 9 (UNEs). Even though they only deal with
15 UNEs and are not systems issues, they are in Section 12 because it logically
16 belongs under Maintenance & Repair (one of the delineated “OSS” categories³⁰⁴),
17 just as expedited ordering logically belongs under Ordering in Section 12.

³⁰² Qwest Exhibit 1.5 (Albersheim), p. 4 (Qwest expedites PCAT) provides expedites are available for local number portability (“Port In/Port Within”) for fee-added expedites and the listed resold products for the expedite charge. Eschelon has agreed in all of its alternative language proposals to pay an expedite charge.

³⁰³ Qwest Exhibit 1R, Albersheim Rebuttal, p. 38, lines 1-2.

³⁰⁴ *See also* Third Report and Order, ¶425 (“the Commission defined OSS as consisting of pre-ordering, ordering, provisioning, maintenance and repair, and billing functions”).

1 There is no reason to repeat the language in two or more places when the terms
2 can be centralized in one place, as is done for other provisions in Section 12.³⁰⁵
3 Section 12.4.1.8, for example, deals with both Maintenance of Service charges
4 (which apply to one set of products) and Trouble Isolation charges (which apply
5 to a different set of products). Section 12.2.2 (Service Requests), for example,
6 deals with ordering for various products that are covered elsewhere in the contract
7 (such as Section 12.2.2.2's provision that ASRs will be used for ordering UDITs,
8 even though UDITs are otherwise dealt with in Section 9). Eschelon's proposal is
9 more logical for the user of the contract, which will look to the ordering section
10 regarding expedited ordering (just as in the existing ICAs expedited ordering is in
11 the ordering section).

12 **Q. MS. ALBERSHEIM TESTIFIES THAT THE UTAH ADVANCED**
13 **COMMUNICATIONS SERVICES CATALOG PAGES PROVIDED BY**
14 **ESCHELON IN EXHIBIT ESCHELON 2.21 HAVE “NOTHING TO DO**
15 **WITH EXPEDITED ORDERS.”³⁰⁶ PLEASE RESPOND.**

16 A. Ms. Albersheim testifies (with emphasis in original) that “Section 3.2.2 concerns
17 *repairs*³⁰⁷ . . . and has nothing to do with expedited orders.”³⁰⁸ Jill Martain, a

³⁰⁵ Eschelon has proposed to place cross references to Section 12 in Sections 7 and 9 (where Qwest would otherwise place its language).
³⁰⁶ See, e.g., Qwest Exhibit 1R, Albersheim Rebuttal, p. 40, lines 16-17.
³⁰⁷ Qwest Exhibit 1R, Albersheim Rebuttal, p 40, lines 15-16.
³⁰⁸ Qwest Exhibit 1R, Albersheim Rebuttal, p. 40, lines 16-17.

1 former Qwest’s CMP Process Manager³⁰⁹ who is identified in a Change Request
2 relating to expedites as the “owner” of that expedite change request,³¹⁰ has also
3 testified on this issue. While she also attempted to portray the waiver of non-
4 recurring charges for retail customers as a repair-related issue, she testified in the
5 Arizona Complaint Docket about Section 3.2.2 of Qwest’s retail tariff:

6 The tariff then goes on to state that if the end user elects to move
7 service to a temporary location (either within the same building, or
8 a different building) that non-recurring charges would apply. This
9 would include the non recurring charge to expedite a design
10 service. However, when the customer moves its service, via a
11 service order, back to the original premise location, if it meets the
12 criteria as outlined in 3.2.2.d included below, the non-recurring
13 charges would be *waived (including the expedite fee)*” (emphasis
14 added)).³¹¹

15 According to Ms. Albersheim, Section 3.2.2 has nothing to do with expedites, but
16 according to Ms. Martain, Section 3.2.2 shows that the expedite fee will be
17 waived under certain circumstances (as contended by Eschelon when it provided
18 Exhibit Eschelon 2.21 with its direct testimony). Both of these witnesses were
19 testifying for Qwest; yet, they provide different information. This provides some
20 insight into the difficulty of pinning down Qwest as to which conditions it extends
21 exceptions to charging to itself and its retail customers to obtain
22 nondiscriminatory treatment, leading to the need for contractual certainty.

³⁰⁹ Exhibit Eschelon 3.71 (Johnson), p. 17.

³¹⁰ Exhibit Eschelon 3.67 (Johnson) p. 5.

³¹¹ Qwest (Ms. Martain) Direct (Aug. 28, 2006), *In re. Complaint of Eschelon Telecom of Arizona, Inc. Against Qwest Corporation*, Arizona Docket Nos. T-03406A-06-0257 and T-01051B-06-0257, [“Arizona Complaint Docket”], p. 40, lines 4-10.

1 The particular tariff pages are less pertinent to Eschelon's more recent alternate
2 proposal number two (and four) for Section 12.2.1.2.1 (Issue 12-67(a))³¹² because
3 proposal number two (four) does not include a list of emergency conditions.
4 Section 12.2.1.2.1 addresses when Qwest makes exception(s) to charging an
5 additional fee for expedites. Eschelon's proposal number two/four states that
6 Qwest will grant and process CLEC's expedite request, and expedite charges are
7 not applicable, if Qwest does not apply expedite charges to its retail Customers,
8 such as when certain emergency conditions (*e.g.*, fire or flood) are met and the
9 applicable condition is met with respect to CLEC's request for an expedited order.
10 If Qwest offers an exception to charging a separate expedite fee either at the
11 commencement of the term of the ICA or during its term (as may be reflected in
12 current or future tariff pages), Eschelon's proposal number two/four provides that
13 Qwest must offer that exception to Eschelon as well when the same emergency
14 conditions are met. The issue then becomes, when there is no exception to
15 charging for retail or wholesale customers, what rate applies. As I indicated in
16 my direct testimony (Exhibit Eschelon 2, Denney Direct, pp. 194-195), the
17 approach reflected in Eschelon's first proposal is preferable in that it offers more
18 certainty as to the conditions under which exceptions to charging a separate fee
19 will be made. If the Commission finds that some of all of these conditions are
20 inapplicable (or does not reach that issue), however, Eschelon's alternate proposal
21 at least articulates a nondiscrimination standard. It also limits future disputes at

³¹² Exhibit Eschelon 2R, Denney Rebuttal, pp. 114-115 and pp. 116-117 (#4).

1 least to the extent that the companies agree Qwest does not apply expedite
2 charges for its retail customers.

3 **Q. DOES MS. ALBERSHEIM’S INTERPRETATION OF THE EXISTING**
4 **ICA LANGUAGE RAISE CONCERNS?**

5 A. Yes. Ms. Albersheim interprets the current contract to give Qwest “*complete*
6 *discretion* to decide whether or not to grant expedites.”³¹³ She cites no contract
7 provision to support this claim, and there is none.³¹⁴ In the Colorado arbitration,
8 Ms. Albersheim cited the following contract provision as the basis for her claim
9 of complete discretion:

10 3.2.2.12 “U S WEST shall provide CO-PROVIDER the capability to
11 expedite a service order.”³¹⁵

12 Ms. Albersheim’s testimony about the existing contract language reinforces
13 Eschelon’s concern about the need for specific expedite terms in the

³¹³ Qwest Exhibit 1R, Albersheim Rebuttal, p 49, lines 12-13 (emphasis added).

³¹⁴ In Exhibit Eschelon 2.18, expedite language from Qwest-Eschelon ICAs that is the same in some other states (such as Arizona) is quoted. In Utah as well, Qwest provided expedite capability for unbundled loop orders during the time period before January of 2006 under the current ICA language. See, e.g., Qwest-Eschelon existing approved Utah ICA, Attachment 5, Section 3.2.2.12 (“US WEST and CO-PROVIDER shall mutually develop expedite procedures to be followed when CO-PROVIDER determines an expedite is required to meet subscriber service needs.”); Section 3.2.2.13 (“Expedites: US WEST shall provide CO-PROVIDER the capability to expedite a service order. Within two (2) business hours after a request from CO-PROVIDER for an expedited order, US WEST shall notify CO-PROVIDER of US WEST’s confirmation to complete, or not complete, the order within the expedited interval.”); Section 3.2.4.2.1 (“If CO-PROVIDER requests a due date earlier than the standard due date interval, then expedite charges may apply.”); Section 3.2.4.3.1 (“If CO-PROVIDER requires a due date earlier than the U S WEST offered due date and US WEST agrees to meet the CO-PROVIDER required due date, then that required due date becomes the committed due date and expedite charges may apply.”); and Section 3.2.4.4 (“Subsequent to the initial order submission, CO-PROVIDER may request a new/revised due date that is earlier than the committed due date. If U S WEST agrees to meet the new/revised due date, then that new/revised due date becomes the committed due date and expedite charges may apply.”)

³¹⁵ Colorado arbitration, Albersheim Answer, p. 55, lines 4-5 (quoting Att. 5, Section 3.2.2.12).

1 interconnection agreement (as opposed to referring to Qwest’s PCAT, as
2 proposed by Qwest³¹⁶). It certainly provides another reason to choose Eschelon’s
3 language over Qwest’s language.

4 Use of the word “shall” generally indicates a mandatory obligation. Instead,
5 Qwest is apparently arguing that it may comply with the above contract provision
6 by providing a capability that could at Qwest’s discretion never actually result in
7 an order being expedited. It defies logic that this is the intended meaning of this
8 language.

9 **Q. DO YOU AGREE WITH MS. ALBERSHEIM ABOUT THE**
10 **IMPORTANCE OF CLEARLY DELINEATING TERMS IN THE**
11 **CONTRACT³¹⁷ AND, IF SO, DO YOU DRAW THE SAME CONCLUSION**
12 **AS MS. ALBERSHEIM?**

13 A. Eschelon agrees that it is important to clearly delineate terms in the contract
14 (which is one reason why its proposal for Issue 12-67 and subparts includes terms
15 in the ICA, whereas Qwest’s language refers to Qwest’s PCAT³¹⁸). Mr. Starkey
16 discusses the value of obtaining contractual certainty so the companies may plan
17 their business needs and avoid or minimize disputes in his testimony.³¹⁹ I

³¹⁶ Qwest Proposed ICA Sections 7.3.5.2.2 & 9.1.12.1.2.

³¹⁷ Qwest Exhibit 1R, Albersheim Rebuttal, p. 49, lines 12-15.

³¹⁸ Qwest Proposed ICA Sections 7.3.5.2.2 & 9.1.12.1.2.

³¹⁹ *See, e.g.*, Exhibit 1, Starkey Direct, pp. 10-11; Exhibit Eschelon 1R, Starkey Rebuttal, pp. 4-5.

1 disagree with Ms. Albersheim’s conclusion that Qwest’s proposed language
2 accomplishes that important objective.

3 Ms. Albersheim suggests that problems with the above-quoted contract language
4 will be avoided here because expedite terms are “clearly delineated” in Qwest’s
5 proposed contract language.³²⁰ To evaluate Ms. Albersheim’s claim that Qwest’s
6 language delineates Qwest’s expedite obligations more clearly than the previous
7 contract language, one need only review Qwest’s proposed language. To the
8 extent to which Qwest’s language deals with the issue at all (as opposed to
9 referring to the PCAT), Qwest’s proposed language provides merely that
10 expedites “*are allowed*.”³²¹ Following Ms. Albersheim’s logic, Qwest’s language
11 for the new ICA would also give Qwest “complete discretion to decide whether or
12 not to grant expedites.”³²² It could even be viewed as less certain because it uses
13 permissive language (allowed) rather than mandatory language (shall). Nowhere
14 in Qwest’s proposed language does it expressly say that Qwest will actually grant
15 an expedite. In contrast, Eschelon has learned its lesson from Qwest’s unilateral

³²⁰ Qwest Exhibit 1R, Albersheim Rebuttal, p. 49, lines 12-15. Ms. Albersheim also testifies that Qwest’s language is more clearly delineated because expedites are “always granted for designed services at a cost of \$200 per day,” a process that she says is consistent for all Qwest customers. Qwest Exhibit 1R, Albersheim Rebuttal, p. 49, lines 14-17. Her testimony on this point, however, is inconsistent and does not deliver the promised clarity. Ms. Albersheim testified separately in this proceeding that expedites are *not* always available but are provided only when resources are available. Qwest Exhibit 1, Albersheim Direct, p. 54, lines 19-20 (“Via the approved expedite process discussed above, Qwest provides expedites to CLEC for any order upon request (*so long as resources are available*) for a fee of \$200 per day.”) (emphasis added); *see also* Qwest Exhibit 1R, Albersheim Rebuttal, p. 49, lines 13-15.

³²¹ Qwest Proposed ICA Sections 7.3.5.2, 7.3.5.2.2, 9.1.12.1.2, 9.1.12.1.2 (emphasis added).

³²² Qwest Exhibit 1R, Albersheim Rebuttal, p. 49, lines 12-13.

1 interpretation of the existing contracts.³²³ Based on that experience, Eschelon
2 proposed language which specifically provides: “Qwest will *grant and process*
3 CLEC’s expedite request” when the terms are met (which includes Eschelon’s
4 payment of the rate in Exhibit A).³²⁴ Eschelon agrees with Qwest that more
5 clearly delineating contract terms is an advantage;³²⁵ however, Eschelon’s
6 position is that only Eschelon’s proposed language accomplishes this objective
7 and minimizes future disputes.

8 **Q. MS. ALBERSHEIM STATES THAT “[F]OR DESIGNED SERVICES,**
9 **CLECS AND QWEST’S RETAIL CUSTOMERS ALIKE BOTH CAN**
10 **OBTAIN EXPEDITES FOR ANY REASON SO LONG AS THEY PAY A**
11 **\$200 PER DAY CHARGE”³²⁶ AND CLAIMS ESCHELON IS SEEKING**
12 **“SPECIAL TREATMENT.”³²⁷ PLEASE RESPOND.**

³²³ In the Arizona Complaint Docket, for example, Arizona Staff concluded that “CLECs should not be forced into signing” the expedite amendment. (Direct Testimony of Pamela Genung, *In re. Complaint of Eschelon Telecom of Arizona, Inc. Against Qwest Corporation*, ACC Docket No. T-01051B-06-0257, T-03406A-06-0257 (Jan. 30, 2007) [“Arizona Complaint Docket”], p. 34, lines 10-11.) The Arizona Staff added that “since CLEC interconnection agreements are voluntarily negotiated or arbitrated,” Qwest “rather than trying to force Eschelon into signing an amendment,” could have taken the issue to arbitration under the Qwest-Eschelon ICA. (*Id.* p. 36, line 21 – p. 37, line 2.)

³²⁴ Eschelon’s Proposed ICA Section 12.2.1.2.2 (emphasis added).

³²⁵ See e.g., Exhibit Eschelon 1, Starkey Direct, p. 18, lines 2-3, citing Minnesota Direct Testimony of Karen Stewart, p. 13, lines 6-7 [“clear ICA language is necessary so that the parties know what is expected of them under the agreement and to avoid or minimize future disputes.”] See also, Minnesota Direct Testimony of Karen Stewart, p. 13, lines 16-17; Arizona Direct Testimony of Karen Stewart, p. 16, lines 6-8; and Washington Direct Testimony of Karen Stewart, p. 20, lines 8-9.

³²⁶ Qwest Exhibit 1R, Albersheim Rebuttal, p. 38, lines 17-19.

³²⁷ Qwest Exhibit 1R, Albersheim Rebuttal, p. 43, line 15.

1 A. The mistake Ms. Albersheim makes is to equate providing a retail service *at the*
2 *same price* with providing wholesale service on nondiscriminatory terms. The
3 threshold question to be addressed is whether for itself Qwest provides the service
4 to its retail customers, separate from the question of price. Ms. Albersheim has
5 admitted that Qwest provides expedites for itself.³²⁸ Therefore, the analysis
6 moves to another question, which addresses what the wholesale price should be
7 (whether TELRIC-based). Qwest inappropriately collapses these two questions
8 into one, as I described in my rebuttal testimony.³²⁹ I discussed this analysis and
9 Qwest's claims about superior³³⁰ service in my rebuttal testimony (Exhibit
10 Eschelon 2R, pp. 97-104).

11 Ms. Albersheim's claim of special treatment suggests that she believes that
12 Eschelon's desire for cost-based pricing for expedites would somehow preclude
13 any other CLEC from making the same arguments and seeking the same rates.
14 Cost-based pricing for expedites would put Eschelon on equal footing with Qwest
15 when it comes to providing expedites to its end-user customers because, under
16 cost-based pricing, both Qwest and Eschelon would face the same economic
17 signals (cost) with regard to expedites.

³²⁸ Exhibit Eschelon 1.6 (Starkey), AZ Arbitration Transcript, Vol. I, p. 58, lines 19-21 (“Q. Now, you would agree with me that Qwest provides itself with expedites; correct? A. Yes.”).

³²⁹ Exhibit Eschelon 2R, Denney Rebuttal, pp 97-98.

³³⁰ Qwest Exhibit 1R, Albersheim Rebuttal, p.43, lines 2-11.

1 Further, CLECs in Utah would be able to opt into Eschelon's ICA. To conclude
2 that Eschelon is somehow inappropriately carving itself an Eschelon-only
3 exemption is contrary to the principles of Section 252(i) of the Act, which are
4 discussed in more detail by Mr. Starkey.³³¹

5 **Q. WAS IT ALWAYS QWEST'S POSITION THAT NON COST BASED**
6 **RATES APPLY AND EXPEDITE CHARGES REQUIRE NO**
7 **COMMISSION APPROVAL?**

8 A. No. Historically Qwest has treated expedites as a rate element subject to cost
9 based pricing, as I described in my direct testimony (Exhibit Eschelon 2, Denney
10 Direct) at pages 185-189.

11 **Q. MS. MILLION REFERENCES A DECISION OF THE FLORIDA**
12 **COMMISSION IN SUPPORT FOR HER ARGUMENT THAT THE**
13 **EXPEDITE CHARGES ASSOCIATED WITH UNE ORDERS SHOULD**
14 **NOT BE COST-BASED.³³² IS THIS CITATION PERSUASIVE?**

15 A. No. Contrary to the Eighth Circuit's superior service analysis, the Florida
16 Commission failed to consider the nature of the service that the incumbent
17 provided to itself. The correct analysis of that issue is that reflected in the
18 decision of the North Carolina Commission in the *NewSouth* case.³³³ In that
19 case, the North Carolina commission rejected BellSouth's arguments and affirmed

³³¹ See, e.g., Exhibit Eschelon 1, Starkey Direct, p. 37.

³³² Qwest Exhibit 4R, Million Rebuttal, p. 11, lines 9-19.

³³³ *Re NewSouth Communications Corp.*, 2006 WL 707683 (N.C.U.C. February 8, 2006).

1 its conclusion that expedited service is subject to the nondiscrimination
2 obligations of Section 251, stating, “The Commission also believes that
3 expediting service to customers is simply one method by which BellSouth can
4 provide access to UNEs and that, since BellSouth offers service expedites to its
5 retail customers, it must provide service expedites at TELRIC rates pursuant to
6 Section 251 and Rule 51.311(b).”³³⁴

7 **Q. MS. MILLION DESCRIBES TELRIC AND TSLRIC COSTING**
8 **METHODS.³³⁵ DOES HER DESCRIPTION SUPPORT QWEST’S**
9 **POSITION WITH RESPECT TO THE APPROPRIATE WHOLESALE**
10 **RATE FOR EXPEDITES?**

11 A. No. Ms. Million admitted that Qwest’s proposal for the expedite charge is not
12 based on cost.³³⁶ Accordingly, if the Commission rejects Qwest’s argument that
13 expedites are a superior service, then there is no dispute that Qwest’s non-cost
14 based expedite charge is inappropriate.

15 **Q. MS. MILLION ARGUES THAT EXPEDITE CHARGES FOR UNE**
16 **ORDERS SHOULD BE BASED ON A PRICE THAT A “MARKET CAN**
17 **BEAR.”³³⁷ PLEASE RESPOND.**

³³⁴ *Id.* at *47; *see also Re Verizon Delaware , Inc.*, 2002 WL 31521484 at *12 (Del. Pub. Serv. Comm’n 2002) (requiring cost-based rate for expedited CLEC service orders).

³³⁵ Qwest Exhibit 4R, Million Rebuttal, pp. 12-13.

³³⁶ Qwest Exhibit 4R, Million Rebuttal, pp. 13-14.

³³⁷ Qwest Exhibit 4R, Million Rebuttal, p. 13.

1 A. First, Ms. Million neglects to mention that the market in question is the wholesale
2 market for provisioning essential bottleneck facilities such as the UNE loop, *to*
3 *which Qwest is a dominant (if not sole) provider.* Eschelon cannot simply go to
4 another wholesale provider to get a better price. The FCC described this situation
5 as follows:

6 Congress recognized that, because of the incumbent LEC's
7 incentives and superior bargaining power, its negotiations with
8 new entrants over the terms of such agreements would be quite
9 different from typical commercial negotiations. As distinct from
10 bilateral commercial negotiation, the new entrant comes to the
11 table with little or nothing the incumbent LEC needs or wants. The
12 statute addresses this problem by creating an arbitration proceeding
13 in which the new entrant may assert certain rights, including that
14 the incumbent's prices for unbundled network elements must be
15 "just, reasonable and nondiscriminatory."³³⁸

16 Ms. Million fails to acknowledge that the dominant provider in the wholesale
17 market (Qwest) also competes with Eschelon and other CLECs in retail markets.
18 The dominant provider has the ability and incentives to use its "superior
19 bargaining power"³³⁹ in its wholesale markets to gain advantage in retail markets.
20 This very combination is what constitutes the economic barriers to meaningful
21 competition that the Telecommunications Act and federal unbundling rules were
22 developed to remedy.

23 Second, Ms. Million's argument that the price should be set at a level the market
24 can bear is meaningless: Ms. Million overlooks basic economic theory which is,

³³⁸ Local Competition Order, ¶15.

³³⁹ Local Competition Order, ¶15.

1 generally speaking, as the price of a good or service goes up, the quantity goes
2 down, and at some point the quantity of demand will drop to zero. Ms. Million's
3 suggestion (that the "value" of expedite should be determined based on the price
4 that the market can bear) does not result in the maximum *total* value of expedites.
5 Note that basic economic theory³⁴⁰ says that there exists a certain price level that
6 maximizes the total value for the product *for the producer* (Qwest); and there also
7 exists *another, lower* price level that maximizes the total value of the product *for*
8 *society* (which includes Qwest, Eschelon, other CLECs and End User Customers).
9 The first level is the price resulting from an unregulated monopoly market; the
10 second price is the price resulting from a competitive market. It is this basic
11 economic theory that has been at the heart of governmental regulation of local
12 telecommunications markets both before and after the Telecommunications
13 Act.³⁴¹ Now, Ms. Million is suggesting to dismiss this regulation and the
14 economic theory behind it, and instead, let the dominant provider dictate its price
15 for expedites. As is evident from the following citation, the *TRRO* confirmed that
16 the ILECs' dominance in the provisioning of essential bottleneck facilities
17 continues to be a reason for price regulation in UNE markets.

³⁴⁰ Virtually any microeconomic textbook covers this topic. See for example, B.E. Binger and E. Hoffman *Microeconomics with Calculus*, Scott, Foresman and Company, 1985, pp. 377-386.

³⁴¹ The Local Competition Order (at ¶ 740) elaborates on the issue of pricing in competitive and non-competitive markets as follows: "Just compensation is not, however, intended to permit recovery of monopoly rents. The just and reasonable rate standard of TELRIC plus a reasonable allocation of the joint and common costs of providing network elements that we are adopting attempts to replicate, with respect to bottleneck monopoly elements, the rates that would be charged in a competitive market, and, we believe, is entirely consistent with the just compensation standard." (footnotes omitted).

1 It would be unreasonable to conclude that Congress created a
2 structure to incent entry into the local exchange market, only to
3 have that structure undermined, and possibly supplanted in its
4 entirety, by services priced by, and largely within the control of,
5 incumbent LECs.³⁴²

6 **Q. MS. MILLION ARGUES THAT THE COMMISSION ACCEPTED THE**
7 **SAME EXPEDITE CHARGE AS QWEST PROPOSES HERE IN**
8 **MULTIPLE TARIFFS.³⁴³ DOES THIS ARGUMENT SUPPORT QWEST'S**
9 **POSITION?**

10 A. No. None of these tariffs dealt with access to UNES.³⁴⁴ These services were de-
11 regulated because the Commission found sufficient evidence of competition in
12 these markets, while the markets for essential local facilities such as the local loop
13 continue to be impaired without special pricing rules applied to them.³⁴⁵
14 Similarly, Access Services, which provide network access to long-distance
15 services, as well as local services *in the markets with sufficient facilities-based*
16 *competition*,³⁴⁶ are regulated based on a different set of standards than access to
17 UNE markets (network elements in impaired markets). The *TRRO* confirmed the
18 need for a different pricing standard in the markets for UNES than the pricing

³⁴² *TRRO*, ¶ 48.

³⁴³ Qwest Exhibit 4R, Million Rebuttal, p. 12, line 25 – p. 13, line 8.

³⁴⁴ In her testimony, Ms. Million refers specifically to the Private Line Transport Services Tariff and the Exchange and Network Services Tariff. Qwest Exhibit 4R Million Rebuttal, p. 13 lines 6-8

³⁴⁵ *TRRO*, ¶ 2. UNE Loop markets are those markets that continue to be considered impaired as defined by *TRRO*.

³⁴⁶ As defined by the *TRRO*.

1 standard used in the Access markets. This fact is captured in the following
2 citation from the FCC *TRRO*:

3 Here, upon further consideration, we determine that in the local
4 exchange market, the availability of a tariffed alternative should
5 not foreclose unbundled access to a corresponding network
6 element, even where a carrier could, in theory, use that tariffed
7 offering to enter a market.³⁴⁷

8 Thus, Congress's enactment of section 251(c)(3), and the associated cost-based
9 pricing standard in section 252(d)(1), at a time when special access services were
10 already available to carriers in the local exchange market, indicates that UNEs
11 were intended as an *alternative* to these services, available **at alternative**
12 **pricing**.³⁴⁸

13 **Q. IN SUPPORT OF HER CLAIM THAT EXPEDITED ORDERS FOR UNES**
14 **SHOULD NOT BE COST BASED, MS. MILLION MENTIONS THAT THE**
15 **FCC EXCLUDED CERTAIN NETWORK ELEMENTS FROM THE**
16 **UNBUNDLING REQUIREMENTS.**³⁴⁹ **PLEASE RESPOND.**

17 A. Ms. Million's argument is counter to Qwest's claim that expedite charges offered
18 to Eschelon for UNEs need not be cost based. Indeed, she says that the FCC's list
19 of Section 251 elements is limited to those elements and services that are
20 necessary for a CLEC to compete with the ILEC "on an equal footing."³⁵⁰ She

³⁴⁷ *TRRO*, ¶ 48.

³⁴⁸ *TRRO*, ¶ 51 (italicized font is original to the source; bold font added for emphasis).

³⁴⁹ Qwest Exhibit 4R, Million Rebuttal, p. 12.

³⁵⁰ Qwest Exhibit 4R, Million Rebuttal, p. 12, lines 13-14.

1 states that as part of its *TRRO*, the FCC excluded from this list unbundled
2 switching, shared transport and the UNE-Platform. This comment only confirms
3 the products *that remain* on the FCC list of elements – including unbundled loops
4 – are necessary for a CLEC to compete with the ILEC “on an equal footing.”³⁵¹
5 As such, non discriminatory access to those elements remains critical, and
6 Qwest’s proposal is contrary to the FCC’s continuing requirement that CLECs
7 remain able to avail themselves of these elements as required.

8 **Q. MS. MILLION CLAIMS THAT THE ABILITY TO EXPEDITE ORDERS**
9 **HAS VALUE BECAUSE IT ALLOWS ESCHELON TO “LEAPFROG”**
10 **OVER OTHER CUSTOMERS.³⁵² DOES THIS ARGUMENT JUSTIFY A**
11 **NON-COST BASED EXPEDITE FEE?**

12 A. No. Ms. Million neglects to recognize that as a wholesale provider and
13 competitor to CLECs in retail markets, Qwest faces a different expedite “fee”
14 than the fee it proposes to charge Eschelon. This fee is Qwest’s internal cost of
15 expediting the order. Because Qwest proposes to charge Eschelon an expedite fee
16 that is not based on costs, Qwest’s proposal allows Qwest to “leapfrog” ahead of
17 CLECs on unfair and discriminatory terms by using its unique position as a
18 provider of essential facilities.

³⁵¹ Qwest Exhibit 4R, Million Rebuttal, p. 12, lines 13-14.

³⁵² Qwest Exhibit 4R, Million Rebuttal, p.13.

1 In addition, Qwest provides expedites when the emergency conditions are met
2 only if resources are available.³⁵³ If resources are available, there is no one to
3 “leap” over.

4 **Q. MS. MILLION MENTIONS A QWEST TSLRIC STUDY RELATED TO**
5 **EXPEDITE CHARGES.³⁵⁴ HAS QWEST PROVIDED THIS STUDY?**

6 A. No. Qwest has not provided this study in negotiations or this arbitration even
7 though Eschelon requested cost support from Qwest.³⁵⁵ Qwest’s Transmittal No.
8 202, supporting the change in the interstate tariff expedite rate contained a cost
9 study with a rate of \$133.57.³⁵⁶ This cost study, available for download from the
10 FCC website, is the same as a proprietary cost study filed by Ms. Million in the
11 Arizona Complaint Docket. The only difference is the cost factors applied. Ms.
12 Million reports a rate of \$123.08.³⁵⁷ The expedite cost study includes two hours

³⁵³ Qwest Exhibit 1.5 (Albersheim), p. 2. Regarding resource availability, see Exhibit Eschelon 2R, Denney Rebuttal, pp. 115-121.

³⁵⁴ Qwest Exhibit 4R, Million Rebuttal, p. 10.

³⁵⁵ See, e.g., Exhibit Eschelon 2.17 (Denney).

³⁵⁶ Exhibit Eschelon 2.21 (Denney), pp. 17-29. See Qwest Transmittal No. 202, Description and Justification Qwest Expedite Order Charge, available at:

http://svartifoss2.fcc.gov/cgi-bin/ws.exe/prod/ccb/etfs/bin/binary_out.pl?70394. It is interesting to note that Qwest states that “This change is being made at the request of customers who want a simpler and easier method to expedite their orders and calculate the cost of that expedite” (paragraph 1). Apparently, Qwest is representing that its retail customers would prefer to pay a higher, but certain rate of \$200 per day, rather than a rate that may be between \$0 and \$156.63 but it is certain will not be more than \$156.63 (half of the installation charge). With Covad’s Change Request, Qwest’s CLEC customer (Covad), in contrast, was simply trying to get expedites at all when the emergency conditions were not met, as before that time Qwest would not provide them to CLECs for non-emergencies at any price. See Exhibit Eschelon 3.67 (Johnson). There was nothing to simplify about, or any cost calculation method to make easier for, a fee-added process in non-emergencies for CLECs, because there wasn’t one.

³⁵⁷ Ms. Million Direct Testimony in the Expedite Complaint Case, p. 6, line 21.

1 of unexplained coordination time, which accounts for over half of the cost result.
2 In addition, the costs include activities such as order processing for retail services,
3 which should not be included in wholesale costs. These studies also include
4 activities that would already be captured in the loop installation NRC such as
5 monitoring and logging service order completion, and testing.

6 Furthermore, I provided Exhibit 2R.1 with my rebuttal testimony,³⁵⁸ which is the
7 Qwest Expedite cost study from Minnesota showing the cost development for
8 Qwest's proposed expedite charge of \$65.85 per LSR/ASR order per day (one
9 third of Qwest's proposed \$200/day charge in Utah). I explained that Qwest's
10 cost development for its expedite charge in Minnesota is based on the cost per
11 expedite request – not per day³⁵⁹ - and that Qwest's proposed charge in Minnesota
12 is excessive because it includes costs related to expedite requests that are denied
13 and costs related to “monitoring” and “coordinating” to no real end.³⁶⁰

14 **Q. HAS QWEST ACKNOWLEDGED THAT A *PER DAY* CHARGE DOES**
15 **NOT REFLECT QWEST'S COSTS?**

16 A. Yes. In the Minnesota ICA arbitration proceeding between Eschelon and Qwest,
17 Ms. Million testified as follows:

18 Q. Are there activities that Qwest does when it
19 expedites that it doesn't do when it delivers a loop on the
20 normal regular interval?

³⁵⁸ See Exhibit Eschelon 2R, Denney Rebuttal, pp. 106-112.

³⁵⁹ Exhibit Eschelon 2R, Denney Rebuttal, pp. 107-110.

³⁶⁰ Exhibit Eschelon 2R, Denney Rebuttal, pp. 110-112.

1 A. There are not activities that are different, but the
2 activities performed on different days than they would
3 normally be done.

4 Q. You do the same thing; you just do it faster?

5 A. That's correct.³⁶¹

6 **Q. MS. MILLION PROVIDES AN EXAMPLE OF CONCERT-GOERS WHO**
7 **TYPICALLY PAY PREMIUM CHARGES FOR SEATS IN THE**
8 **FRONT.³⁶² DOES MS. MILLION'S EXAMPLE JUSTIFY QWEST'S NON-**
9 **COST BASED RATES?**

10 A. No. The telecommunications industry is not akin to a rock concert. Ms. Million's
11 example only underscores that a dominant provider (a music star or Qwest) with
12 market power, when non-price regulated, can charge rates in excess of cost.
13 Although both industries have dominant providers, they differ with respect to the
14 importance of services they provide and the manner in which they are regulated.
15 The importance of telecommunications services is demonstrated by the long
16 history of its regulation and is captured in the very first provision of the
17 Communications Act of 1934:

18 **SEC. 1. [47 U.S.C. 151] PURPOSES OF ACT, CREATION OF**
19 **FEDERAL COMMUNICATIONS COMMISSION.** For the
20 purpose of regulating interstate and foreign commerce in
21 communication by wire and radio so as *to make available, so far*
22 *as possible, to all the people of the United States, without*

³⁶¹ See, e.g., *In the Matter of the Petition of Eschelon Telecom, Inc. for Arbitration with Qwest Corporation, Pursuant to 47 U.S.C. Section 252 of the Federal Telecommunications Act of 1996*, Minnesota Public Utilities Commission Docket No. P-5340, 421/IC-06-768, Hearing Transcript, Vol. 2, p. 97, lines 18-25.

³⁶² Qwest Exhibit 4R, Million Rebuttal, p. 15.

1 discrimination on the basis of race, color, religion, national origin,
2 or sex, a rapid, efficient, Nationwide, and world-wide wire and
3 radio communication service with *adequate facilities at reasonable*
4 *charges, for the purpose of the national defense, for the purpose of*
5 *promoting safety of life and property through the use of wire and*
6 *radio communication, and for the purpose of securing a more*
7 *effective execution of this policy by centralizing authority*
8 *heretofore granted by law to several agencies and by granting*
9 *additional authority with respect to interstate and foreign*
10 *commerce in wire and radio communication, there is hereby*
11 *created a commission to be known as the "Federal*
12 *Communications Commission," which shall be constituted as*
13 *hereinafter provided, and which shall execute and enforce the*
14 *provisions of this Act.*³⁶³

15 **Q. MS. MILLION SUGGESTS THAT THE CHOICE TO EXPEDITE**
16 **SHOULD BE BASED ON THE “PERCEIVED VALUE TO THEIR**
17 **BUSINESS.”³⁶⁴ IS “VALUE OF SERVICE” APPROPRIATE PRICING**
18 **FOR WHOLESALE SERVICES?**

19 A. No. UNE rates are required to be based, not on the “value of service,” but on
20 economic cost. This is for good reason, as the rates are meant to allow
21 competitors to have access to similar cost structures as the ILEC. Imagine if
22 Qwest were allowed to charge the “value of service” for all wholesale products
23 and services offered. The “value of service” to the CLEC is essentially the
24 amount that it can charge its end-user customers for the service. In essence,
25 “value of service” pricing extracts any profit available to the CLEC and
26 redistributes that profit to the wholesale provider (*i.e.*, Qwest). It is no wonder

³⁶³ Emphasis added.

³⁶⁴ Qwest Exhibit 4R, Million Rebuttal, p. 15. The complete sentence reads: “Each CLEC makes the business choice to pay the fee or not to pay the fee on the basis of the perceived value to its business to expedite orders.”

1 that Qwest would prefer to charge this way for all wholesale services and it is
2 obvious why Congress and the FCC mandated economic costs, as meaningful
3 competition would not exist with UNEs priced according to the “value of
4 service.”

5 **Q. MS. ALBERSHEIM DENIES THAT QWEST PROVIDED ESCHELON**
6 **WITH AN EXCEPTION TO CHARGING A SEPARATE FEE FOR**
7 **EXPEDITES AND THEN SUDDENLY CHANGED ITS MIND AND**
8 **STARTED CHARGING ESCHELON AND OTHER CLECS FOR THIS**
9 **SERVICE.³⁶⁵ IS SHE CORRECT?**

10 A. No. Ms. Johnson addresses Qwest’s conduct with respect to expedites in CMP in
11 her testimony. As I indicated in my direct testimony,³⁶⁶ before Qwest initiated its
12 Version 27 and 30 CMP notices, from the very beginning of the interconnection
13 relationship between Eschelon and Qwest, when Eschelon opted in to the AT&T
14 interconnection agreement in 2000 (before Qwest even created the expedites
15 PCAT³⁶⁷), Qwest provided Eschelon with expedite capability at no additional
16 charge for loops and other UNEs when certain specified emergency conditions

³⁶⁵ Qwest Exhibit 1R, Albersheim Rebuttal, p. 46.

³⁶⁶ Exhibit Eschelon 2, Denney Direct, pp. 163-166 (referencing Ms. Johnson’s chronology and expedite exhibits).

³⁶⁷ See Exhibit Eschelon 3.56 (Johnson) (Sept. 22, 2001 product notification) (discussed in Exhibit Eschelon 3.53 (Johnson), p. 5).

1 were met (“emergency-based expedites”).³⁶⁸ In addition, Staff Conclusion
2 Number One from the Arizona Complaint Case further verifies that Qwest
3 provided Eschelon expedites for all products and services, including unbundled
4 loops, under Eschelon’s current contract for a period of almost six years. It states:

5 Qwest did not adhere to the terms and conditions of the current Qwest -
6 Eschelon Interconnection Agreement, which allows Eschelon the
7 capability to expedite orders, when Qwest denied this option without
8 Eschelon signing an amendment to the Agreement. Qwest should continue
9 to support the same Expedite Process that has been used in the past for all
10 products and services (including unbundled loops) if the order meets any
11 of the Emergency criteria or conditions or where the customer's safety
12 may be an issue if the Expedite is not processed. No additional charge
13 should be applied beyond the standard installation charge.³⁶⁹

14 Ms. Johnson addresses Qwest’s claims regarding expedites in CMP in her
15 testimony (Exhibit Eschelon 3SR).

16 **IX. SUBJECT MATTER NOS. 44 AND 45**

17 **SUBJECT MATTER NO. 44. RATES FOR SERVICES**

18 **Issues 22-88, 22-88(a) and 22-89: ICA Sections 22.1.1 and 22.4.1.3, and Exhibit**
19 **A, Section 7.11.**

20 **Q. PLEASE SUMMARIZE ISSUE 22-88 AND ITS SUBPARTS.**

³⁶⁸ See, e.g., Exhibit Eschelon 3.68 (Examples of Expedite Requests Approved by Qwest for Unbundled Loop Orders); see also Arizona Complaint Docket, at Answer, May 12, 2006, p. 9, ¶ 14, lines 24-25 (“Qwest admits that it previously expedited orders for unbundled loops on an expedited basis for Eschelon. . .”); See also Qwest (Ms. Novak) Direct (July 13, 2006) (Arizona Complaint Docket), p. 5, lines 5-12 & lines 21-22 (Qwest “uniformly followed the process in existence at the time for expediting orders for unbundled loops”).

³⁶⁹ Exhibit Eschelon 2.19 (Denney) (Staff Executive Summary).

1 A. Issues 22-88 and 22-88(a) deal with the language characterizing rates contained in
2 Exhibit A.³⁷⁰ Eschelon proposes that rates in Exhibit A be referred to in general
3 terms, as “rates for services,” without specifying the provider of services. Qwest
4 proposes that rates in Exhibit A be referred to as Qwest’s rates. As I explained in
5 my direct testimony, a number of rates contained in Exhibit A apply to Eschelon’s
6 charges to Qwest.³⁷¹ Therefore, the ICA and its Exhibit A should not inaccurately
7 confine rates to “Qwest rates” or misleadingly refer solely to “Qwest tariffs,” as
8 proposed by Qwest. Eschelon’s proposal for Issue 22-89 complements the
9 already agreed-upon portions of the ICA³⁷² that set a process for establishment of
10 interim rates. Eschelon’s proposal for Issue 22-89 clarifies that each company has
11 a right to request a cost proceeding at the Commission to set permanent rates.

12 **Issue 22-88**

13 **Q. MR. EASTON ARGUES THAT THE AGREED UPON ICA LANGUAGE**
14 **MAKES IT CLEAR WHAT RATES ESCHELON MAY CHARGE**
15 **QWEST.³⁷³ DO YOU AGREE?**

16 A. No. I have addressed this argument in my rebuttal testimony.³⁷⁴ I can only add

³⁷⁰ Issue 22-88 deals with the general references to rates in Exhibit A, while Issue 22-88(a) deals with a specific line item in Exhibit A describing rates for IntraLATA toll traffic.
³⁷¹ See numerous citations from the agreed-upon language of the ICA contained in Exhibit Eschelon 2, Denney Direct, pp. 202-205.
³⁷² Section 22.6.1.
³⁷³ Qwest Exhibit 2R, Easton Rebuttal, p. 32, lines 12-13.
³⁷⁴ Exhibit Eschelon 2R, Denney Rebuttal, pp. 128-129.

1 that Mr. Easton's claim that the ICA alone (without Exhibit A) specifies rates that
2 Eschelon may charge is contrary to the facts at his disposal: Mr. Easton
3 acknowledges reviewing³⁷⁵ the four pages of my direct testimony³⁷⁶ with citations
4 from the ICA language that reference Exhibit A as a source of rates that CLECs
5 may charge. Each one of these citations refers to rates (or parameters identifying
6 rates³⁷⁷) that are located in Exhibit A. Below I reproduce the list of these rates
7 and parameters:

8	7.3.3.1	Trunk Installation NRC
9	7.3.3.2	Trunk Rearrangement NRC
10	7.3.7.1	Assumed Mileage For Local Transit And ISP-
11		Bound Transit Tandem Switching And Tandem
12		Transmission Rates
13	7.3.7.2	Assumed Mileage For IntraLATA Toll Transit
14		Tandem Switching And Tandem Transmission
15		Rates
16	7.6.3	Transit Record Charges
17	8.2.3.10	Labor Charges For Audits
18	9.2.5.2	Trouble Isolation Charge
19	10.2.5.5.4	Rate For Managed Cuts
20	21.14.1.2	Daily Usage Files Records Charge

21 Without Exhibit A, the above listed rates – rates that Eschelon would charge
22 Qwest – are not specified.

³⁷⁵ Qwest Exhibit 2R, Easton Rebuttal, p. 32, lines 12-13.

³⁷⁶ Exhibit Eschelon 2, Denney Direct, pp. 202-205.

³⁷⁷ Such a parameter is the assumed mileage that determines the applicable rate for mileage-sensitive rates.

1 **Q. MR. EASTON CLAIMS THAT BECAUSE THE SUBSET OF SERVICES**
2 **FOR WHICH ESCHELON MAY CHARGE QWEST IS SMALL, THERE**
3 **IS NO NEED TO ACKNOWLEDGE THE FACT THAT ESCHELON**
4 **WILL CHARGE QWEST SOME OF THE RATES IN EXHIBIT A.³⁷⁸**
5 **PLEASE RESPOND.**

6 A. Mr. Easton's logic simply does not apply to a contract. He might as well argue
7 that because Eschelon purchases some UNE services from Qwest infrequently,
8 there is no need to include rates for those services in the ICA.

9 **Issue 22-88(a)**

10 **Q. REGARDING ISSUE 22-88(A), MR. EASTON CLAIMS THAT A**
11 **REFERENCE TO QWEST'S TARIFF UNDER THE RATES FOR**
12 **MUTUALLY EXCHANGED INTRALATA TOLL TRAFFIC IS**
13 **ACCEPTABLE BECAUSE IT DID NOT CONFUSE THE MANY OTHER**
14 **CARRIERS THAT HAVE THE SAME SPECIFICATION IN THEIR**
15 **EXHIBIT A.³⁷⁹ PLEASE RESPOND.**

16 A. Eschelon should not be held captive to the ICA language of other carriers,
17 especially if the ICAs of other carriers contain ambiguity.

18

³⁷⁸ Qwest Exhibit 2R, Easton Rebuttal, p. 32, lines 18-22.

³⁷⁹ Qwest Exhibit 2R, Easton Rebuttal, p. 33, lines 6-7.

1 **Issue 22-89**

2 **Q. MR. EASTON CLAIMS THAT “GIVEN THAT COMMISSION RULES**
3 **AND FEDERAL LAW GOVERN A PARTIES’ RIGHT TO INITIATE A**
4 **COST PROCEEDING, THERE IS NO NEED TO ADDRESS IT IN AN**
5 **ICA.”³⁸⁰ IS THIS CORRECT?**

6 A. No. This is addressed in my rebuttal testimony (Exhibit Eschelon 2R, pp. 130-
7 131). It is important to note that Mr. Easton is not stating that Eschelon has the
8 right to initiate a cost proceeding at the Commission, he simply notes,
9 “Commission rules and federal law govern a parties right to initiate a cost
10 proceeding...”³⁸¹ Mr. Easton does not conclude what these rules and laws state
11 and does not cite them. As discussed in my rebuttal testimony (Exhibit Eschelon
12 2R, p. 131) Qwest’s position is troubling in that Qwest argues interim rates should
13 not be dealt with in an arbitration, while at the same time seeking to limit
14 language that would allow Eschelon the right to request a cost proceeding to
15 replace interim rates with Commission approved rates. Eschelon’s proposed
16 language for this issue, section 22.4.1.3 of the ICA is repeated below.

17 Nothing in this Agreement shall waive any right of either Party to
18 request a cost proceeding at the Commission to establish a
19 Commission-approved rate to replace an Interim Rate.

³⁸⁰ Qwest Exhibit 2R, Easton Rebuttal, p. 33, lines 13-15.

³⁸¹ Qwest Exhibit 2R, Easton Rebuttal, p. 33, lines 13-14.

1 **SUBJECT MATTER NO. 45. UNAPPROVED RATES**

2 *Issue No. 22-90 and Subparts (a)-(e): ICA Sections 22.6.1 and 22.6.1.1 and*
3 *Exhibit A Sections 8.1.1.2, 8.3.2.7.5, 8.3.2.7.6, 8.3.2.7.7, 8.3.2.7.8, 8.8.1, 8.1.14,*
4 *8.6.1.1, 8.6.1.2, 8.6.2.2.1, 8.6.2.2.2, 8.7.1.2, 8.7.2.4, 8.8.4 (NRC), 8.15.2.1,*
5 *8.15.2.2, 8.13.1.1, 8.13.1.2.1, 8.13.1.2.2, 8.13.1.2.3, 8.13.1.3, 8.13.1.4, 8.13.2.1,*
6 *9.6.12, 9.7.6, 9.23.6 and subparts, 9.23.7.7.1, 9.23.7.7.2, and 10.7.10.*

7 **Q. PLEASE PROVIDE A BRIEF SUMMARY OF ISSUE 22-90 AND ITS**
8 **SUBPARTS.**

9 A. Issue 22-90 concerns Qwest's filing with the Commission for the approval of
10 previously unapproved rates for section 251 products. As I explained in my direct
11 testimony, this language is intended to reflect a decision by the Minnesota
12 Commission in the 271 case setting UNE rates.³⁸² Further, the cost support
13 information referenced in Eschelon's proposed language is necessary in order for
14 Eschelon to make a decision on whether to intervene in the case.³⁸³ Although
15 providing to Eschelon cost support that is already filed would require minimal
16 effort on the part of Qwest, Qwest does not agree to this proposal.³⁸⁴

17 Minnesota is currently the only Qwest state where Exhibit A contains no rates for
18 certain items for which Qwest has neither obtained a Commission-approved rate,
19 nor filed cost support and complied with that process, and yet Qwest must provide
20 the product under the terms of the interconnection agreement. In the other states
21 (including Utah), Qwest currently may force its wish list rates upon CLECs by

³⁸² Exhibit Eschelon 2, Denney Direct, p. 220, lines 11-15.

³⁸³ Exhibit Eschelon 2, Denney Direct, p. 221, lines 4-9.

³⁸⁴ Qwest Exhibit 2R, Easton Rebuttal, p. 35, lines 13-20.

1 refusing to provide the product at all if CLECs do not sign an amendment
2 containing its unapproved rates.³⁸⁵ The result in Minnesota is the appropriate
3 result because Qwest has both not met its burden to show that its rates comply
4 with the cost-based standard and not taken reasonable steps to obtain interim or
5 permanent rates from the Commission.

6 Although Eschelon is proposing the Minnesota process (with the same results) in
7 Utah and other states, Qwest is proposing a watered-down version that omits key
8 pieces of the Minnesota process – pieces that prevent Qwest from charging
9 unsupported, unapproved rates. Qwest seeks to avoid establishment of interim
10 rates to guarantee itself the ability to charge its unapproved wish list rates as long
11 as possible under the watered-down version, if adopted. Eschelon has proposed
12 language to be included in the ICA, which Qwest has not agreed to, providing that
13 “Qwest shall obtain Commission approval before charging for a UNE process that
14 it previously offered without charge” and that “[f]or a UNE or process that Qwest
15 previously offered without charge, the rates in Exhibit A do not apply until Qwest
16 obtains Commission approval or the Parties agree to a negotiated rate.”³⁸⁶ The

³⁸⁵ For example, see my discussion of emergency-based expedites (Issue 12-67) and Exhibit Eschelon 2.19, Direct Testimony of Pamela Genung, *In re. Complaint of Eschelon Telecom of Arizona, Inc. Against Qwest Corp.*, ACC Docket No. T-01051B-06-0257, T-03406A-06-0257 (1/30/07) (“Staff Expedite Testimony”) at Executive Summary (“CLECs should not be forced into signing” Qwest’s expedite amendment with Qwest’s \$200 per day rate.” Staff Testimony, p. 34, lines 10-11. Staff added that “since CLEC interconnection agreements are voluntarily negotiated or arbitrated,” Qwest could have taken the issue to arbitration under the Qwest-Eschelon ICA, “rather than trying to force Eschelon into signing an amendment.” *Id.* p. 36, line 21 – p. 37, line 2).

³⁸⁶ Proposed ICA Section 22.6.1 and 22.6.1.1 (Issue 22-90).

1 language further provides that, when the companies are unable to agree on a
2 negotiated rate, the Commission, not Qwest, may establish the interim rate.

3 What Eschelon's proposed language would not permit is what Qwest is seeking to
4 do here: simply impose rates that have not been agreed to and that the
5 Commission has not reviewed, and leave those rates in place indefinitely. Rather
6 than addressing interim rates in this arbitration, Qwest's solution is to unilaterally
7 impose excessive, non-cost based rate on Eschelon. Thus, Qwest's position is
8 that the arbitrated interconnection agreement should incorporate rates that have
9 not been agreed to by Eschelon or approved by the Commission. Specifically,
10 Qwest is proposing rates that are based on inputs that are inconsistent with the
11 Commission-ordered inputs and rates for which Qwest has provided either no cost
12 support or cost support that is insufficiently detailed. Qwest should bear the
13 burden to prove its costs. Qwest's language proposal for Issue 22-90 would
14 effectively reverse the burden by requiring Eschelon to pay Qwest's demanded
15 rates for a potentially long period of time based on no evidence in this record and
16 no Commission scrutiny in the meantime.

17 **Q. MS. MILLION ARGUES THAT UNAPPROVED RATES MAY BE IN**
18 **PLACE "FOR LONG PERIODS OF TIME, AND OFTEN THROUGH NO**
19 **FAULT OF QWEST."³⁸⁷ PLEASE RESPOND.**

³⁸⁷ Qwest Exhibit 4R, Million Rebuttal, p. 17, lines 7-8.

1 A. Qwest's attempt to blame the Commissions for long term unapproved rates does
2 not explain Qwest's refusal to negotiate rates. It does not explain Qwest's
3 practice of ignoring prior Commission decisions when establishing interim rates
4 and does not explain Qwest's practice of imposing unapproved rates on CLECs
5 for activities that Qwest had previously performed without charge.

6 Ms. Million cites two cases, Oregon and Minnesota, as alleged support for why
7 interim rates may be in place for an extended period.³⁸⁸ Regarding Minnesota, it
8 is ironic that Qwest would use this as an example, since it is the Minnesota
9 process which Eschelon is proposing be adopted in Utah. In Minnesota, Qwest is
10 not able to impose unapproved rates for activities that it previously performed
11 without charge without filing cost support and obtaining a rate. Qwest complains
12 of delay³⁸⁹ but, after interim rates were approved in 2004,³⁹⁰ Qwest could have
13 elected to file cost support and seek permanent rates earlier, but it did not choose
14 to do so until 2006.³⁹¹ Additionally, because the state commission is involved,
15 Qwest has mechanisms available to it (for all requested rates; i.e., not on a rate-
16 by-rate basis) to address any concerns about delay, such as through procedural
17 conferences, and about interim rates for activities that it previously performed
18 without charge, such as requesting a true-up, etc. And, in the meantime, Qwest is

³⁸⁸ Qwest Exhibit 4R, Million Rebuttal, p. 17, line 8 through p. 18 line 4.

³⁸⁹ Qwest Exhibit 4R, Million Rebuttal, p. 17, lines 7-8.

³⁹⁰ See Order Approving Stipulation Regarding Interim Rates, *In the Matter of Qwest Corporation Request for Approval of SGAT Elements*, MPUC Docket No. P-421/AM-03-1754 (Aug. 20, 2004).

³⁹¹ See *In the Matter of Qwest's Application for Commission Review of TELRIC Rates Pursuant to 47 U.S.C. §251*, MPUC Docket No. P-421/AM-06-713 (May 16, 2006).

1 and has been charging its requested rates for new products (i.e., *not* the activities
2 that it previously performed without charge) in Minnesota.

3 The contrast is Oregon, where Qwest has not provided cost support for all of its
4 new rate proposals. Qwest's position is that it may impose unapproved rates for
5 activities that it previously performed without charge and refuse to provide the
6 service (even when the service is addressed in a current approved ICA³⁹²) if
7 Eschelon does not succumb to those unapproved rates. This may include
8 unapproved rates that do not take into account for cost inputs consistent with prior
9 Commission orders. Therefore, whenever Qwest unexpectedly announces it will
10 begin to charge for activities that it previously performed without charge and
11 demands a contract amendment, Eschelon is left with the prospect of fighting
12 rates on a rate-by-rate basis. In addition to the cost, burden, and length³⁹³ of rate-
13 by-rate disputes, Qwest has the advantage when Qwest refuses to perform the
14 service while Eschelon needs it and thus gains leverage in obtaining its
15 unapproved rate. Even if an individual complaint is brought, Qwest may argue
16 that the rate issue is inappropriate for resolution in an individual complaint case
17 (as it has done in the Arizona expedite case) or in an arbitration (as it has done

³⁹² See, e.g., Issue 4-5 (Design Changes), including the Washington out of hours example discussed above and Issue 12-67 (Expedites). See also Direct Testimony of Staff (Pamela Genung), *In re. Complaint of Eschelon Telecom of Arizona, Inc. Against Qwest Corporation*, ACC Docket No. T-01051B-06-0257, T-03406A-06-0257 (Jan. 30, 2007) ["Arizona Complaint Docket"], p. 34, lines 10-11 ("CLECs should not be forced into signing" the expedite amendment.).

³⁹³ Eschelon filed its expedite complaint in Arizona on April 14, 2006, and the hearing is scheduled to commence on August 28, 2007. See Exhibit Eschelon 1SR (Starkey Surrebuttal), p. 50, line 9 – p. 52, line 14.

1 with rates in several Eschelon/Qwest arbitrations). While Ms. Million complains
2 of delays associated with a cost case, her complaint pales by comparison to an
3 indefinite period of time during which Qwest may unilaterally impose unapproved
4 rates.

5 During the Eschelon/Qwest Oregon negotiations, Qwest refused to negotiate
6 interim rates with Eschelon.³⁹⁴ Only during the arbitrations did Qwest propose
7 alternative rates to its interim rates in Oregon. Qwest's alternative rates were the
8 rates in New Mexico (where Eschelon does not operate and did not participate in
9 rate proceedings) ordered by the New Mexico Commission.³⁹⁵ Despite the fact
10 that some of these rates were lower than the rates proposed by Eschelon, Qwest
11 has failed to accept Eschelon's proposal.³⁹⁶ Even in those instances, Qwest
12 maintained its take-it-or-leave-it position.

13 Eschelon's proposed language establishes terms that will eliminate the issue of
14 interim rates being dictated for Eschelon by Qwest for "long periods of time" as is

³⁹⁴ I participated on Eschelon's behalf in these negotiations.

³⁹⁵ Oregon Docket ARB 775, Million Direct, May 11, 2007, p. 23.

³⁹⁶ Oregon Docket ARB 775, Denney Rebuttal, May 25, 2007, p. 157, lines 5 – 13. Qwest agreed that in establishing interim rates it can be appropriate to look at the rates in other states that result from a contested cost docket. Ms. Million stated: "Qwest believes that the most equitable and efficient approach to setting interim rates in this proceeding is to use rates from another state that are the product of a comprehensive TELRIC cost docket." Oregon Docket ARB 775, Million Direct, May 11, 2007, p. 23, lines 7-10. Ms. Million continued, stating that this approach avoids the allegedly substantial burden of "having to present cost studies and other TELRIC evidence in this proceeding." Id. p. 23, lines 12-13. Ms. Million also noted that "rates can vary from one state to another." Id. p. 23, lines 20-21. Qwest's new proposal in Oregon actually validates the approach Eschelon has taken in developing its interim rates in other states, but the punch-line is that Qwest is proposing in Oregon not rates from states similar to Oregon or Utah, but surprisingly from New Mexico. Although Qwest appeared from its testimony to agree on this approach, therefore, its arbitration position reflected a results-oriented approach.

1 evidenced by the examples cited by Ms. Million. In Minnesota, there is no issue,
2 which is why Eschelon has proposed that process here. In Oregon, there are more
3 than 250 unapproved rates in Qwest's rate proposal, 150 of which are at issue in
4 the Eschelon/Qwest arbitration.³⁹⁷ In the Minnesota Eschelon/Qwest arbitration,
5 there were fewer than 5 unapproved rates in issue, because the Minnesota
6 approach works to ensure that Qwest cannot impose unapproved rates for
7 activities that it previously performed without charge without first obtaining an
8 interim³⁹⁸ and/or permanent rate, for which Qwest has now filed cost support in
9 Minnesota.³⁹⁹

10 **INTERIM RATE LANGUAGE PROPOSALS – ISSUE 22-90**

11 **Q. DOES MR. EASTON RAISE ANY NEW ARGUMENTS IN HIS**
12 **REBUTTAL TESTIMONY WITH REGARD TO ISSUE 22-90 AND THE**
13 **PROCESS FOR ESTABLISHING INTERIM RATES?**

14 A. No. Mr. Easton admits that Qwest has ignored the Minnesota process dealing
15 with rates, arguing “[t]his process is not one that this Commission has deemed to
16 be necessary in the past, and Eschelon offers no compelling reason why it is

³⁹⁷ Oregon Docket ARB 775, Denney Surrebuttal, June 8, 2007, p. 142, lines 1 – 3.

³⁹⁸ See Order Approving Stipulation Regarding Interim Rates, *In the Matter of Qwest Corporation Request for Approval of SGAT Elements*, MPUC Docket No. P-421/AM-03-1754 (Aug. 20, 2004), p. 1 (“Qwest Corporation’s Request for Approval of Unbundled Network Elements (UNEs) – Consideration of Proposed Stipulation Regarding Interim Rates for: 1) Several new UNEs that were not offered to CLECs at the time the 1375 cost docket had begun, and 2) Elements that have been offered to CLECs for which the Commission set a price of zero. The above-entitled matter has been considered by this Commission and the following disposition has been made: Approved the Stipulation. The Stipulation hereby approved is attached to this Order.”).

³⁹⁹ See *In the Matter of Qwest’s Application for Commission Review of TELRIC Rates Pursuant to 47 U.S.C. §251*, MPUC Docket No. P-421/AM-06-713.

1 necessary now.”⁴⁰⁰ Further, Mr. Easton argues that Qwest should not have to
2 provide Eschelon with cost support unless Eschelon intervenes in a cost docket.⁴⁰¹
3 Mr. Easton is incorrect on both counts. First, Eschelon has provided a compelling
4 reason why this process is needed. In my direct testimony, I said, “Rates are key
5 to decision making and planning with respect to products and services. If rates
6 are unknown or change unexpectedly, a business cannot plan its expenses or
7 budget appropriately. And, if rates are inflated and not cost based, a business
8 cannot remain competitive. Therefore, it is important that rates are substantiated
9 and approved in a timely manner.”⁴⁰² Without Eschelon’s proposal for Issue 22-
10 90, Qwest’s “wish list” rates would be in effect indefinitely and Qwest would
11 have no incentive to substantiate its costs to the Commission. To Mr. Easton’s
12 second point regarding cost support, I explained in my direct testimony that
13 Eschelon’s language is necessary so that Eschelon is not put in a Catch-22, in
14 which Eschelon must intervene in the case in order to see Qwest’s cost filing, but
15 Eschelon needs the cost filing to decide whether or not to intervene.⁴⁰³ By
16 rejecting Eschelon’s proposed language for Issue 22-90, Qwest has not agreed to
17 substantiate its costs in a timely manner or provide cost support to the
18 Commission for its rates and, thus, there may be no docket in which Eschelon can
19 intervene. Qwest’s proposal will result in the status quo in which Qwest can

⁴⁰⁰ Qwest Exhibit 2R, Easton Rebuttal, p. 34, lines 6-8.

⁴⁰¹ Qwest Exhibit 2R, Easton Rebuttal, p. 35, lines 13-20.

⁴⁰² Exhibit Eschelon 2, Denney Direct, p. 212, lines 16-20.

⁴⁰³ Exhibit Eschelon 2, Denney Direct, p. 221, lines 4-7.

1 impose its unapproved rates upon CLECs without ever having to justify these
2 rates before the Commission.

3 **Q. MR. EASTON TAKES ISSUES WITH YOUR TESTIMONY ABOUT**
4 **QWEST NOT PROCESSING ORDERS FOR A NEW PRODUCT UNLESS**
5 **CLECS SIGN AN AMENDMENT CONTAINING THE UNAPPROVED**
6 **RATE, AND STATES, “IT ONLY MAKES SENSE THAT AN**
7 **AMENDMENT CONTAINING THE TERMS AND CONDITIONS UNDER**
8 **WHICH A PRODUCT IS OFFERED IS ENTERED INTO BY THE**
9 **PARTIES.”⁴⁰⁴ WOULD YOU LIKE TO RESPOND?**

10 A. Yes. Mr. Easton misses the point of my testimony. Mr. Easton cites my direct
11 testimony at page 213, lines 12-16, which states: “An example of the second
12 scenario is when Qwest offers a new product and assigns it a rate, does not
13 substantiate the rate or seek Commission approval for the rate for a substantial
14 period of time, and yet will not process orders for the product unless CLECs sign
15 an amendment containing that unapproved rate.” As evident from my testimony
16 on page 213, I was not arguing the merits of Qwest requiring an ICA amendment
17 to obtain a new product in isolation, rather my testimony was describing how
18 Qwest’s proposal to not substantiate its costs in a timely manner for new products
19 *in conjunction with* Qwest’s refusal to process orders for a new product absent an
20 ICA amendment puts CLECs between a rock and a hard place. In other words, to
21 obtain a new product under Qwest’s proposal, CLECs would be forced to sign

⁴⁰⁴ Qwest Exhibit 2R, Easton Rebuttal, p. 35, lines 4-11.

1 Qwest's ICA amendment, but Qwest's ICA amendment will contain a rate for the
2 new product that has not been substantiated at the Commission and is more than
3 likely higher than what a proper cost-based analysis would produce. Therefore, to
4 obtain the new product, Qwest is attempting to force CLECs to pay whatever rate
5 Qwest wants to charge. Qwest should be required to substantiate its costs for new
6 products *before* it puts rates into ICA amendments; otherwise, CLECs will be
7 locked into Qwest's "wish list" rate for the term of the ICA amendment and
8 Qwest will have no incentive to substantiate its costs for that new product. The
9 Arizona Staff agrees with the point I made about Qwest attempting to force
10 CLECs to sign ICA amendment with Qwest's "wish list" rate in the Arizona
11 Expedite Complaint case. Arizona Staff testified that "CLECs should not be
12 forced into signing" Qwest's expedite amendment with Qwest's \$200 per day
13 rate. Instead, "since CLEC interconnection agreements are voluntarily negotiated
14 or arbitrated," Qwest could have taken the issue to arbitration under the Qwest-
15 Eschelon ICA, "rather than trying to force Eschelon into signing an
16 amendment."⁴⁰⁵

17 **Q. MS. MILLION CRITICIZES ESCHELON'S PROPOSAL IN 22-90**
18 **STATING THAT IT REQUIRES QWEST TO "PROVISION PRODUCTS**
19 **AT NO CHARGE."⁴⁰⁶ IS THIS AN ACCURATE REPRESENTATION OF**

⁴⁰⁵ See, Exhibit Eschelon 2.19 (Denney).

⁴⁰⁶ Qwest Exhibit 4R, Million Rebuttal, p. 16, lines 24-25.

1 **ESCHELON’S LANGUAGE PROPOSALS FOR SECTION 22.6.1 AND**
2 **22.6.1.1?**

3 A. No. Based upon Ms. Million’s testimony, it is unclear whether she has actually
4 read Eschelon’s proposals for this section of the contract. Ms. Million states,
5 “The point is that it would place a chilling effect on Qwest’s provisioning of
6 services for which permanent rates have not been established if Qwest were
7 expected to begin providing products and services to the CLECs, but not be able
8 to charge CLECs for those services until after the Commission approved rates for
9 them.”⁴⁰⁷ She continues, “many of the products and services that Qwest offers
10 are added at the request of CLECs.”⁴⁰⁸

11 Eschelon’s language in no way prohibits Qwest from recovering its cost. I have
12 copied Eschelon’s proposed language below:

13 22.6.1 Qwest shall obtain Commission approval before charging
14 for a UNE or process that it previously offered without charge. If
15 Qwest offers a new Section 251 product or service or one that was
16 previously offered with a charge for which a price/rate has not
17 been approved by the Commission in a TELRIC Cost Docket
18 (“Unapproved rate”), Qwest shall develop a TELRIC cost-based
19 rate and submit that rate and related cost support to the
20 Commission for review within sixty (60) Days of the later of (1)
21 the Effective Date of this Agreement, or (2) Qwest offering the rate
22 to CLEC, unless the Parties agree in writing upon a negotiated rate
23 (in which case Qwest shall file the negotiated rate with the
24 Commission within 60 Days). Except for negotiated rates, Qwest
25 will provide a copy of the related cost support to CLEC (subject to
26 an applicable protective agreement, if the information is
27 confidential) upon request or as otherwise ordered by the

⁴⁰⁷ Qwest Exhibit 4R Million Rebuttal, p. 17, line 25 – p. 18, line 2.

⁴⁰⁸ Qwest Exhibit 4R Million Rebuttal, p. 18, lines 3-4.

1 Commission. If the Parties do not agree upon a negotiated rate and
2 the Commission does not establish an Interim Rate for a new
3 product or service or one that was previously offered under Section
4 251 with an Unapproved Rate, CLEC may order, and Qwest shall
5 provision, such product or service using such Qwest proposed rate
6 until the Commission orders a rate. In such cases, the Qwest
7 proposed rate (including during the aforementioned sixty (60) Day
8 period) shall be an Interim Rate under this Agreement.

9 22.6.1.1 For a UNE or process that Qwest previously
10 offered without charge, the rates in Exhibit A do not apply
11 until Qwest obtains Commission approval or the Parties
12 agree to a negotiated rate. If the Parties do not agree on a
13 negotiated rate, the Commission does not establish an
14 Interim rate, and Qwest does not submit a proposed rate
15 and related cost support to the Commission within the time
16 period described in Section 22.6.1 for a new product or
17 service or one that was previously offered under Section
18 251 with an Unapproved Rate, the Unapproved rate(s) in
19 Exhibit A do not apply. Qwest must provision the such
20 products and services pursuant to the terms of this
21 Agreement, at no additional charge, until Qwest submits
22 the rate and related cost support to the Commission for
23 approval.

24 The first sentence of Eschelon's proposed 22.6.1 deals with a UNE or process that
25 Qwest has previously offered without charge and requires Commission approval
26 before Qwest can begin charging. As discussed in my direct testimony (Exhibit
27 Eschelon 2, Denney Direct, pp. 219-220), this provision is reasonable as a
28 Commission-approved rate (such as the recurring loop rate) should not be
29 undermined by allowing Qwest to unexpectedly and unilaterally announce that it
30 will commence billing for work for which it is already recovering its costs in the
31 approved rate. Such conduct would defeat not only the requirement that rates be
32 cost based, but also the requirements to obtain a Commission-approved
33 amendment *before* changing the terms of the existing agreement under which the

1 companies are already operating. Without this provision, Qwest would have the
2 incentive to avoid a review of its rates during a UNE cost case, because without
3 Commission review, Qwest attempts to impose whatever rate it desires. CLECs
4 make business decisions based upon the rates that Qwest charges at a certain point
5 in time. CLECs account for the fact that these rates may change and/or be
6 restructured during a cost case. It is impossible to account for possibility that
7 Qwest may create additional rates, for services it already performs and implement
8 those rates without Commission oversight.

9 The second sentence of Eschelon's proposed 22.6.1 states that for new products
10 and for products previously offered without charge, if Qwest wishes to charge a
11 rate, Qwest is required to submit cost support to the Commission unless parties
12 are able to negotiate a rate. This provision simply requires Qwest to make its cost
13 support available when it wishes to impose new rates. This requirement is
14 reasonable as the pricing standards of the federal rules require that rates, terms
15 and conditions for network elements and methods of obtaining access to
16 interconnection and network elements⁴⁰⁹ be just, reasonable, non-

⁴⁰⁹ 47 CFR § 51.501(b) specifies that Subpart F of the rules (47 CFR § 51.501 through 47 CFR § 51.515) that deals with the pricing standards for network elements uses the word "element" to include interconnection and methods of obtaining access to UNEs and interconnection.

1 discriminatory,⁴¹⁰ and be established by state commissions based on the forward-
2 looking cost pricing standard.⁴¹¹

3 The third sentence clarifies that Qwest will also provide this cost support to
4 Eschelon. Again, this is reasonable, as Qwest is proposing to charge Eschelon
5 these rates.

6 The fourth sentence indicates that for new products, if the Commission does not
7 establish an interim rate, then Qwest's proposed rate will apply, until the
8 Commission orders a permanent rate. Thus, in the case where "products and
9 services that Qwest offers are added at the request of CLECs"⁴¹² (*i.e.*, new
10 products) Eschelon's language clearly allows for Qwest to charge.

11 The fifth sentence clarifies that in the case above, Qwest's proposed rate is
12 classified as an interim rate.

13 Eschelon's proposed language in 22.6.1.1 describes what happens in the case
14 where Qwest fails to submit cost support to the Commission. In this case, Qwest
15 would not be able to charge for unapproved rates. This is solely within Qwest's
16 control.

⁴¹⁰ 47 CFR § 51.503(a).

⁴¹¹ 47 CFR § 51.503(b). Although the rules allow state commissions to use proxies for forward-looking economic cost as an alternative to forward-looking costing method, 47 CFR § 51.513(a(1)) explains that the proxy ceilings are a temporary method used in the absence of sufficient cost information and until the state commission reviews the cost study.

⁴¹² Qwest Exhibit 4R, Million Rebuttal, p. 18, lines 3-4.

1 To summarize, Eschelon’s proposal in no way prohibits Qwest from recovering
2 its cost or prohibit Qwest from charging for a UNE or process that it performs on
3 behalf of Eschelon, and in fact, Eschelon’s proposal is the mechanism by which
4 Qwest can charge for existing products for which Qwest previously did not charge
5 or entirely new products. Eschelon’s proposal places two limitations upon
6 Qwest’s ability to charge: First, Qwest must submit cost support for the rates it
7 wishes to charge. Second, if Qwest is currently providing a UNE or process to
8 Eschelon without a unique, separate charge,⁴¹³ then Qwest must obtain
9 Commission approval before charging for that UNE or process. In all cases,
10 Qwest has the opportunity to negotiate rates with the CLEC. Thus, Ms. Million’s
11 statement, “what is unjust is Mr. Denney’s suggestion that Qwest be required in
12 the current competitive environment to provision products at no charge”⁴¹⁴ does
13 not accurately reflect my testimony or Eschelon’s proposed language.⁴¹⁵

⁴¹³ See the discussion of issue 9-31 (Nondiscriminatory Access to UNEs) in this surrebuttal testimony and the surrebuttal testimony of Mr. Starkey (Exhibit 1SR). This section discusses how some processes are recovered implicitly through the factors applied to other UNEs. Commission review and approval is important before a charge is established for a UNE or process that Qwest previously offered without charge to ensure that the new rates are not already recovered in existing rates.

⁴¹⁴ Qwest Exhibit 4R, Million Rebuttal, p.16, lines 23-25.

⁴¹⁵ On page 16 of her rebuttal testimony (Qwest Exhibit 4R), Ms. Million takes issue with my design changes example and claims that the Commission-approved rate for design changes applies to a variety of products including loops and that CLECs benefited by Qwest not assessing charges for design changes for loops prior to September 2005. I address Ms. Million’s arguments above under Issue 4-5 (Design Changes), where I show that the design change charge is developed specifically for UDIT – and not loops – and explained that there is no authority in the SGAT or the current Eschelon-Qwest ICA for Qwest to assess a design change charge for loops. Therefore, Ms. Million’s statement that “CLECs quietly took advantage of” Qwest not assessing design change charges for loops in the past is inaccurate and misleading. See Qwest Exhibit 4R, Million Rebuttal, p. 16, line 15.

1 **INTERIM RATE PROPOSALS -- ISSUES 22-90(A) THROUGH 22-90(E)**

2 **Q. DOES QWEST'S TESTIMONY SUGGEST THAT QWEST MISSES THE**
3 **POINT OF THE ROLE OF INTERIM RATES IN ESCHELON'S**
4 **PROPOSAL?**

5 A. Yes. For instance, Ms. Million responds to my concern that Qwest's proposed
6 rates do not reflect prior Commission decisions by stating that Qwest is not
7 obligated to remain consistent with prior Commission decisions when calculating
8 costs for new elements and provides an example purporting to show why it is
9 inappropriate to apply prior Commission decisions to Qwest's newly calculated
10 rates.⁴¹⁶ Ms. Million states that this is the "main reason Qwest believes that the
11 appropriate place to review detailed inputs in cost studies and determine
12 permanent rates is in a cost proceeding instead of this arbitration."⁴¹⁷ Ms. Million
13 ignores that the input adjustments I made to reflect prior Commission orders are
14 for *interim* rates under Issues 22-90 and subparts (not for future permanent rates,
15 which would be the subject of the next cost proceeding). Given that the inputs I
16 used are the most recent inputs approved by the Commission, it is appropriate for
17 interim rates to reflect these inputs until such time when the Commission
18 determines that a different input is appropriate. Qwest has the opportunity to seek
19 a different input when the Commission reviews that rate to establish a permanent
20 cost-based rate.

⁴¹⁶ Qwest Exhibit 4R, Million Rebuttal, p. 19, line 12 – p. 20, line 17.

⁴¹⁷ Qwest Exhibit 4R, Million Rebuttal, p. 20, lines 15-17.

1 **Q. IS QWEST PROPOSING INTERIM RATES IN THIS ARBITRATION?**

2 A. Yes. Qwest argues that rates should be dealt with in a cost proceeding,⁴¹⁸ but
3 what Qwest is actually proposing is that Qwest's proposed interim rates be
4 adopted. For every rate that Eschelon has proposed an interim rate, Qwest has
5 also proposed an interim rate.⁴¹⁹ Unlike Eschelon, Qwest ignored prior
6 Commission decisions regarding rates⁴²⁰ and failed to provide cost support for
7 some of its own rate proposals.⁴²¹ Qwest is critical of Eschelon's interim rate
8 proposals,⁴²² but offers no support for some of its own interim rate proposals.
9 Note that for a number of elements Qwest was unable even to share its cost
10 studies as Qwest was unable to provide any cost support behind its interim
11 proposed rates.⁴²³

12 **Q. DOES ESCHELON PROPOSE THAT THE COMMISSION SET**
13 **PERMANENT RATES FOR DISPUTED RATE ELEMENTS IN THIS**
14 **DOCKET?**

⁴¹⁸ Qwest Exhibit 2R, Easton Rebuttal, p. 34, lines 10-15.

⁴¹⁹ All unapproved rates are interim rates under closed language of the ICA. See Section 22.4.1 (last sentence). A "1" in the "Notes" column of Exhibit A refers to: "Rate not approved in Cost Docket."

⁴²⁰ Qwest Exhibit 4R, Million Rebuttal, p. 19, lines 18-20.

⁴²¹ See Exhibit Eschelon 2, Denney Direct, p. 222, lines 9-11.

⁴²² Qwest Exhibit 4R, Million Rebuttal, pp. 18-19 and 20-21.

⁴²³ See Exhibit Eschelon 2.32 (Denney). Regarding cost support for approved rates, see Exhibit Eschelon 2.17 (Denney).

1 A. No. Ms. Million discusses “Eschelon’s proposed rates,”⁴²⁴ and the fact that the
2 Commission does not have “the opportunity to conduct a detailed analysis of the
3 underlying studies,”⁴²⁵ but ignores the fact that Eschelon’s proposed rates are
4 actually *interim* rates. Accordingly, Eschelon made a number of modifications to
5 bring Qwest’s proposed interim rates in line with what the Commission has
6 ordered historically. These changes are documented in detail in Exhibit Eschelon
7 2.32 to my direct testimony. That way, the interim rates Eschelon pays Qwest
8 would reflect Commission-ordered inputs until Qwest files for approval of
9 permanent rates with different inputs (to take the place of the interim rates) and
10 the Commission changes those inputs.

11 In contrast, Qwest proposes to charge CLECs rates that reflect Qwest’s view of its
12 costs (which is more often than not significantly higher than the costs approved
13 by the Commission when reviewed) for an indefinite period of time. Qwest’s
14 proposed rates ignore past Commission orders and are out of line with rates across
15 Qwest’s region. Furthermore, it is correct that the Commission does not have
16 “the opportunity to conduct a detailed analysis of the underlying studies.”⁴²⁶
17 However, this is because interim – not permanent rates are in question – as well as
18 because Qwest failed to provide cost studies for certain rates. Accordingly,
19 Qwest’s rates are inappropriate for interim rates.

⁴²⁴ Qwest Exhibit 4R, Million Rebuttal, p. 18, line 16.

⁴²⁵ Qwest Exhibit 4R, Million Rebuttal, p. 21, lines 3-4.

⁴²⁶ Qwest Exhibit 4R, Million Rebuttal, p. 21, lines 3-4.

1 Ms. Million states that “when Qwest calculates costs for new elements subsequent
2 to a Commission decision in a cost docket, it is not obligated to rigidly follow the
3 inputs ordered in that docket.”⁴²⁷ What she is effectively saying is that Qwest
4 should be allowed to ignore prior Commission orders when establishing interim
5 rates, until such time that the Commission reconfirms or alters its prior
6 decisions.⁴²⁸ I agree with Ms. Million that when Qwest files a cost case Qwest
7 may make arguments different from what the Commission has ordered. However,
8 we are talking about interim rates – rates that Qwest proposes to charge until such
9 time that a Commission has a cost case to determine permanent rates – and it is
10 appropriate for these rates to reflect prior Commission decisions. Otherwise,
11 Qwest would never have an incentive to have a cost case and when it does have a
12 cost case, Qwest would have no incentive to have all of the rates it proposes to
13 charge CLECs reviewed by the Commission. Qwest is essentially looking for the
14 right to charge its proposed rates, of which many lack cost support, to CLECs
15 indefinitely.

16 **Q. WHAT CRITICISMS DOES MS. MILLION MAKE OF ESCHELON’S**
17 **PROPOSED INTERIM RATES?**

18 A. Ms. Million has very few criticisms of Eschelon’s proposed interim rates. Ms.
19 Million’s criticisms of Eschelon’s proposed interim rates is provided in the

⁴²⁷ Qwest Exhibit 4R, Million Rebuttal, p. 19, lines 18-20.

⁴²⁸ Ms. Million also claims that the Commission’s prior decisions on inputs were specific to the rate elements they reviewed. (Qwest Exhibit 4R, Million Rebuttal, p. 20, lines 1-17) However, most of the changes I made to Qwest’s interim rates were based on generic decisions by the Commission that applied to all of Qwest’s rate elements and were not cost study specific.

1 following excerpt from pages 20-21 of her rebuttal testimony: “Mr. Denney uses
2 several approaches to determine the rates he is proposing on Eschelon’s behalf.
3 For example, in addition to adjusting Qwest’s rates to reflect prior Commission
4 decisions in some cases without examining what may have changed in the
5 interim, and ignoring prior Commission decisions in other cases as I discussed
6 above, he sometimes merely halved Qwest’s proposed rate. He does not justify
7 his ‘pick and choose’ approach to proposing interim rates; rather he goes to great
8 lengths to explain *what* he did in making each of his various proposals, but not
9 *why* it was appropriate to use so many varied approaches in proposing rates.”⁴²⁹

10 **Q. WHAT IS YOUR RESPONSE TO MS. MILLION’S CRITICISMS OF**
11 **ESCHELON’S PROPOSED INTERIM RATES?**

12 A. First, it is important to note that, while Ms. Million testifies that I went “to great
13 lengths to explain *what*” I did in making each of my proposals, Ms. Million offers
14 no support for Qwest’s proposed interim rates – neither *what* Qwest did to arrive
15 at its interim rate proposals, nor *why* Qwest did it. Qwest simply proposes interim
16 rates that depart from prior Commission decisions with no explanation or
17 justification for these changes whatsoever. This difference shows that, even
18 according to Ms. Million’s testimony, my interim rate proposal is better
19 substantiated than is Qwest’s.

⁴²⁹ Qwest Exhibit 4R, Million Rebuttal, p. 20, lines 21 – p. 21, line 2. (emphasis in original).

1 Second, Ms. Million criticizes the “several approaches” I used to derive
2 Eschelon’s interim rate proposal, characterizing it as a “pick and choose”
3 approach, and criticizes my proposal to reduce Qwest’s proposed interim rates by
4 50% in some instances. Ms. Million ignores my Exhibit Eschelon 2.32, which
5 explains *what* adjustments I made to Qwest’s proposed interim rates as well as
6 *why* those adjustments were made. For example, for three rate elements (8.8.4,
7 8.15.2.1 and 8.15.2.2), I proposed to reduce Qwest’s proposed interim rate by
8 half.⁴³⁰ As I explained in Exhibit Eschelon 2.32 (at page 7), for these three rate
9 elements, “Qwest failed to provide any cost support for its interim rate proposals
10 in 22-90(c). Without cost support Eschelon could have proposed the rate be zero,
11 but as a compromise, Eschelon’s proposal is to use half of the Qwest proposed
12 rates. Note that the other large Qwest states do not have Commission approved
13 rates for these rate elements.” This shows that I explained what adjustment I
14 made (*i.e.*, halved Qwest’s proposed rates) as well as why this adjustment was
15 made (*i.e.*, Qwest provided no cost support for these rate elements and other large
16 Qwest states do not have Commission approved rates for these elements).
17 Though Ms. Million criticizes the adjustment I made, she fails to mention that it
18 was Qwest’s failure to provide cost support – not Eschelon “picking and
19 choosing” adjustment – that required this type of adjustment to be made.
20 Eschelon’s proposal to reduce Qwest’s proposed rates by half for these three rate

⁴³⁰ Exhibit Eschelon 2, Denney Direct, p. 226 (see, Table, 22-90(c)).

1 elements is generous given that, absent cost support, a \$0 rate would have been a
2 completely reasonable recommendation.

3 Third, regarding Ms. Million's claims that I did not examine changes that may
4 have occurred since prior cost dockets and ignored prior Commission decisions in
5 other cases, Ms. Million again ignores my Exhibit Eschelon 2.32. In this exhibit,
6 I quoted directly from prior Commission orders which support the adjustments
7 that I made to reflect Commission-ordered inputs, and until Qwest proposes and
8 the Commission approves different inputs to be used in Qwest's cost studies,
9 there is no reason to change those inputs. Indeed, it is Qwest's – not Eschelon's –
10 burden to substantiate any changes that may have occurred since the Commission
11 established these inputs – and Qwest has provided no information or explanation
12 in this regard. Instead it is Qwest who has ignored prior Commission orders. For
13 example, as explained at pages 1-2 of Exhibit Eschelon 2.32, the Commission
14 previously set QPFs at \$0, yet Qwest proposes \$1,512.51 for QPFs in this case.

15 Finally, Ms. Million ignores the fact that numerous Eschelon proposed interim
16 rates are rates that Qwest offers to other CLECs,⁴³¹ and the discriminatory
17 outcome that would result if Qwest was successful in charging Eschelon more for
18 the same product than other CLECs.

19 **Q. YOU STATE THAT MS. MILLION'S CLAIM THAT YOU "PICK AND**
20 **CHOOSE" ADJUSTMENTS IGNORES YOUR EXHIBIT ESCHELON**

⁴³¹ Exhibit Eschelon 2, Denney Direct, p. 226, Table, 22-90(d).

1 **2.32. DID YOU ALSO ADDRESS THE JUSTIFICATION FOR**
2 **ESCHELON’S PROPOSED INTERIM RATES IN YOUR DIRECT**
3 **TESTIMONY?**

4 A. Yes. First, it is important to note that Eschelon has attempted to negotiate
5 reasonable interim rates with Qwest. Qwest has been unwilling to discuss interim
6 rates. Eschelon’s approach was to develop a set of interim rates that would be fair
7 and our initial hope was that Qwest would accept Eschelon’s compromise offer on
8 interim rates. Eschelon has not proposed rates that it would advocate before this
9 Commission in a UNE Cost Docket, but has looked to other sources to derive
10 rates that would be appropriate on an interim basis and fair to both parties.

11 Further, in my direct testimony (Exhibit Eschelon 2, Denney Direct, pp. 226-234),
12 I explained why Eschelon took the approach it did in proposing its interim rates. I
13 explained that Eschelon asked for cost studies from Qwest supporting Qwest’s
14 proposed rates and that, while Qwest supplied some cost studies, it did not supply
15 cost studies for other rates.⁴³² I explained that I reviewed of these cost studies and
16 found that they ignored prior Commission orders, were in excess of TELRIC rates
17 ordered by Commissions in the other large Qwest states, contained rates higher
18 than what Qwest was offering to other CLECs, and contained rates higher than
19 rates in other carriers’ ICAs.⁴³³

⁴³² Exhibit Eschelon 2, Denney Direct, p. 271.

⁴³³ Exhibit Eschelon 2, Denney Direct, pp. 226-227.

1 Because Qwest's cost studies were unreliable and Eschelon did not have the
2 information available to it to adjust all rates to make them consistent with prior
3 Commission orders, Eschelon took the following approach to interim rates. First,
4 Eschelon looked to determine whether it could accept any of Qwest's interim rate
5 proposals. It is important to note that Eschelon accepted Qwest's proposed
6 interim rate for over 40 rates. Ms. Million does not complain about this part of
7 my approach as Qwest has accepted this proposal.

8 Next, I looked to see what interim rate offers Qwest was making available to
9 other carriers and itself.⁴³⁴ These are Qwest proposed rates that have been
10 accepted by other carriers. Qwest has offered no justification as to why it makes
11 these interim rates available to other carriers in Utah, but not to Eschelon.

12 In cases where there were no Commission ordered rates, Eschelon attempted to
13 adjust Qwest cost studies to be consistent with the Commission's prior orders
14 (including adjusting Qwest's proposed QPFs to \$0 consistent with the
15 Commission's Order in Docket No. 00-049-106). As I have noted, we do not
16 have all of the information necessary to make all of the adjustments ordered by
17 the Commission and, as a result, this method produced interim rates on the high
18 side. In cases where interim rates could not be proposed by any of the means
19 above and Qwest failed to provide cost support at all, Eschelon proposed half of
20 Qwest's proposed rate. Eschelon could have proposed zero, as Qwest had

⁴³⁴ Exhibit Eschelon 2, Denney Direct, pp. 231-232.

1 provided absolutely no cost support, but was attempting to reach a reasonable
2 compromise.

3 Regarding DC power cables (22-90(a)) for cageless collocation, I used the
4 Commission approved rates for cageless collocation power feeds of lower
5 amperages (20A, 30A, 40A and 60A) to develop interim rates for the higher
6 amperage power feeds (100A, 200A, 300A and 400A).⁴³⁵ For 100A cageless
7 power feeds, I added the Commission-approved rates for 40A and 60A power
8 feeds. For 200A cageless power feeds, I multiplied the 100A rate by 2; for 300A
9 cageless power feeds, I multiplied the 100A rate by 3 and for 400A cageless
10 power feeds, I multiplied the 100A rate by 4.

11 In sum, Ms. Million's statement that while "he goes to great lengths to explain
12 *what* he did in making each of his various proposals, but not *why* it was
13 appropriate to use so many varied approaches in proposing rates"⁴³⁶ is inaccurate.
14 My direct testimony explained the *why* of Eschelon's proposals (Exhibit Eschelon
15 2, Denney Direct, pp. 225-236) and I provided Exhibit Eschelon 2.32 which
16 provided even more detail. Further, I agree with Ms. Million that I went to great
17 lengths to explain exactly *what* I did in making each proposal.

18 **Q. REGARDING YOUR METHODOLOGY FOR ADJUSTMENTS TO**
19 **CAGELESS DC POWER CABLE RATES, MS. MILLION CLAIMS THAT**

⁴³⁵ Exhibit Eschelon 2, Denney Direct, p. 226, Table 22-90(a). See also, Exhibit Eschelon 2.32, pp. 2-3.

⁴³⁶ Qwest Exhibit 4R, Million Rebuttal, p. 20, line 26 through p. 21 line 2.

1 **YOU UNDERSTATE QWEST’S COSTS BECAUSE YOUR**
2 **METHODOLOGY IGNORES THE SIZES OF CABLES AND OTHER**
3 **DIFFERENCES NECESSARY TO ACCOMMODATE LARGER**
4 **AMPERAGES.⁴³⁷ WOULD YOU LIKE TO RESPOND?**

5 A. Yes. Again, Ms. Million ignores my Exhibit Eschelon 2.32. On page 3 of Exhibit
6 Eschelon 2.32, I provided the Commission approved rates for DC power cables
7 for caged collocation from Docket No. 00-049-106 and explained that the
8 Commission approved 100A rates are 4.5% greater than the combination of 40A
9 and the 60A rates; the Commission approved rate for 200A is *less than* twice the
10 100A rate; and the Commission approved rates for 300A and 400A cables are
11 roughly three times and four times the 100A rates, respectively. I explained that
12 the Commission approved rates for caged DC power cables is consistent with and
13 supports Eschelon’s proposed interim rates for cageless DC power cables.

14 Despite this showing in Exhibit Eschelon 2.32, Ms. Million argues that this
15 methodology understates costs for larger cables and states: “These facts and their
16 effects on the costs of larger amp cables are evidenced by the cost studies for 100-
17 400 Amp power cables that have already been approved by this Commission for
18 Caged Physical Collocation in Docket No. 00-049-106.”⁴³⁸ However, as shown
19 by Exhibit Eschelon 2.32, I provided the Commission-approved for caged
20 collocation from Docket No. 00-049-106 and these rates support Eschelon’s

⁴³⁷ Qwest Exhibit 4R, Million Rebuttal, pp. 20-21.

⁴³⁸ Qwest Exhibit 4R, Million Rebuttal, p. 19, lines 2-5.

1 proposal and undermines Ms. Million's claims. Take for example, the
2 Commission approved rates for 200A caged DC power feed, which are less than
3 twice the Commission approved rates for 100A caged DC power feed. This
4 shows that Ms. Million is incorrect when she claims that multiplying the 100A
5 rates by two to derive 200A rates understates costs. In this particular instance, my
6 methodology would potentially *overstate* costs. Furthermore, Ms. Million's
7 claims are undermined by Qwest's own interim rate proposal. For example,
8 Qwest's proposed interim rate for 200A power cables (\$68.30 MRC and
9 \$36,851.10 NRC) is less than twice Qwest's proposed rate for 100A power cables
10 (\$36.06 MRC and \$19,457.53 NRC). Therefore, Ms. Million's criticism of
11 Eschelon's interim rate proposal for cageless DC power cables would apply
12 equally to Qwest's interim rate proposal – though Qwest proposes rates that are
13 significantly higher.

14 **Q. SHOULD INTERIM RATES REFLECT PRIOR COMMISSION**
15 **DECISIONS REGARDING COST INPUTS AND ASSUMPTIONS?**

16 A. This approach makes the most sense. Ms. Million states that “I think it is
17 important to note that when it calculates costs for new elements subsequent to a
18 Commission decision in a cost docket, Qwest is not obligated to rigidly follow the
19 inputs ordered in that docket.”⁴³⁹ What she is effectively saying is that Qwest
20 should be allowed to ignore prior Commission orders when establishing interim
21 rates, until such time that the Commission reconfirms or alters its prior decisions.

⁴³⁹ Qwest Exhibit 4R, Million Rebuttal, p. 19, lines 18-20.

1 I agree with Ms. Million that when Qwest files a cost case, Qwest may make
2 arguments different from what the Commission has ordered. However, we are
3 talking about interim rates – rates that Qwest proposes to charge until such time
4 that a Commission has a cost case to determine permanent rates – and it is
5 appropriate for these rates to reflect prior Commission decisions. Otherwise,
6 Qwest would never have an incentive to have a cost case and when it does have a
7 cost case, Qwest would have no incentive to have all of the rates it proposes to
8 charge CLECs reviewed by the Commission. Qwest is essentially looking for the
9 right to charge its proposed rates, of which many lack cost support, to CLECs
10 indefinitely.

11 **X. CONCLUSION**

12 **Q. WHAT ARE YOUR RECOMMENDATIONS TO THE UTAH**
13 **COMMISSION?**

14 A. I recommend that the Commission adopt Eschelon’s proposed Interconnection
15 Agreement language as described in this testimony.

16 **Q. DOES THIS CONCLUDE YOUR TESTIMONY?**

17 A. Yes.