

ATTACHMENT 2 TO ESCHELON POST-HEARING BRIEF
EVIDENCE IN THE RECORD SUPPORTING ESCHELON’S JEOPARDY PROPOSALS – ISSUES 12-71, 12-72 & 12-73

R o w #	ESCHELON LANGUAGE¹ (Column 1)	EVIDENCE SUPPORTING ESCHELON LANGUAGE – INCLUDING QWEST DOCUMENTS & ADMISSIONS (Column 2)	“QWEST’S EVIDENCE”² (Column 3)	ESCHELON COMMENTS TO QWEST’S RESPONSE (Column 4)
1	<p>12.2.7.2.4.4 A jeopardy caused by Qwest will be classified as a Qwest jeopardy, and a jeopardy caused by CLEC will be classified as Customer Not Ready (CNR).</p> <p><i>Issue 12-71 Proposal #1 (and first sentence of Proposal #2)</i></p>	<p>Qwest testified that: “We don’t disagree with the notion that a CNR jeopardy should be assigned appropriately.”³</p> <p>“Q. Eschelon’s proposal there is a jeopardy caused by Qwest will be classified as a Qwest jeopardy, and a jeopardy caused by CLEC will be classified as customer not ready(CNR). Is that right? A. Yes. Q. That’s Qwest’s process; correct? A. I believe that is. Q. And can you imagine any circumstances under which a CLEC might want something different than that? A. No.”⁴</p>	<p>[1] Qwest agrees with the broad statement of principal made in the cited testimony. It, however, begs the question of when you define a jeopardy as Qwest caused and when you define it as CNR. Qwest believes its current processes make that distinction appropriately and [2] that the evidence in this case demonstrates that Qwest’s processes more accurately allocate jeopardies than Eschelon’s proposed changes.[⁶</p>	<p>[1] Qwest ignores the proposed language (<i>see</i> Col. 1). If Qwest’s points [1] and [2] are correct, and Qwest already appropriately distinguishes “between Qwest- caused and CLEC/customer- caused delays”⁷ (with the latter being coded “CNR”), then Qwest admits that Eschelon’s language is accurate. Stating this undisputed principle in the ICA will help ensure appropriate treatment of jeopardies and avoid disputes. If Qwest opposes 12.2.7.2.4.4 because it wants the ability to classify Qwest-caused jeopardies as Eschelon-caused, there is no public policy reason to give Qwest that ability. Qwest states it “begs the question of when you define a jeopardy as Qwest caused,” but Eschelon’s Issue 12-72 language (Cols. 3, 5, & 8), proposes to answer that question.⁸ The</p>

¹ In response to all of these provisions, Qwest’s proposed language, in its entirety, provides: “12.2.7.2.4.4 Specific procedures are contained in Qwest’s documentation, available on Qwest’s wholesale web site.” *See* Exhibit Eschelon 3, Johnson Direct, p. 66, lines 2-3. In Minnesota, the commission adopted the following ALJs’ finding regarding Qwest PCAT changes in CMP: “Eschelon has provided convincing evidence that the CMP process does not always provide CLECs with adequate protection from Qwest making important unilateral changes in the terms and conditions of interconnection.” Exhibit Eschelon 2.24., Denney (Minnesota Arbitrators’ Report, ¶ 22). *See also* Washington Docket No. UT-063061 (Eschelon-Qwest Washington Arbitration), Hearing Ex. No. 158, ¶22. This conclusion of the Minnesota Arbitrator’s Report was adopted by the Minnesota Commission in the Minnesota PUC’s *Order Resolving Arbitration Issues, Requiring Filed Interconnection Agreement, Opening Investigations and Referring Issue to Contested Case Proceeding* (3/30/07), Exhibit Eschelon 2.25 Denney pp. 6-7.. *See also* Washington Docket No. UT-063061, Hearing Ex. No. 171, p. 22, ¶1.

² Information in brackets was inserted by Eschelon. For example, where Qwest referenced the Washington exhibit number, Eschelon inserted the corresponding Utah exhibit number in brackets. Also, when Qwest included multiple points in one row, Eschelon inserted numbering in brackets (and gray shading) to indicate the start of each point (with the corresponding number for that point in the next column containing Eschelon’s reply to that point).

³ Exhibit Eschelon 1.5 (MN Tr. Vol. 1, p. 94, lines 5-6 (Albersheim)). *See also* Washington Docket No. 063061, Hearing Ex. No. 73.

⁴ Exhibit Eschelon 1.6 (AZ Tr. Vol. 1, p. 64, lines 5-14 (Albersheim)). *See also* Washington Docket No. 063061, Hearing Ex. No. 178.

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		Qwest testified this Eschelon language is consistent with Qwest’s current process; ⁵ therefore, this Eschelon language cannot be inconsistent with the existing PIDs/PAP and thus requires no modification of them.		Commission’s decision on 12-72 will resolve that question. However it is resolved, there is no reason to reject the undisputed principle articulated in 12-71. <i>See also</i> Exhibit 3, Johnson Direct, p. 39, lines 5-12 & p. 78, fn 104; OR Tr., p. 203 ln 25 – p. 204 ln 19. [2] See also Row 12 below.
2	12.2.7.2.4.4Nothing in this	Exhibit B and Attachments 1 and 2 to Exhibit K of the Agreement.	Qwest does not disagree	Qwest ignores its own arguments which led to

⁶ See Row 12 below for Qwest’s footnote to this argument, along with Eschelon’s Reply. As part of that footnote, Qwest also cited the following in support of this statement: “(QWEST INSERTED) See discussion in Qwest’s Post Hearing Brief and hearing Exh. No. 126 [Exhibit Eschelon 3.76], Exh. No. 80 [Exhibit Eschelon 3.76], Exh. No. 110 [Exhibit Eschelon 3.76] and Exh. No. 28.[Exhibit Qwest1R.9].” Cf. Rows 6 and 9.

⁷ Qwest Response to Eschelon’s Petition for Arbitration, p. 43, lines 4-6. *See also* Washington Docket No. 063061, Hearing Ex. No. 1, p. 70, lines 18-19 (Albersheim).

⁸ Per Eschelon’s proposal for Issue 12-72 (Row 1 in Cols. 3, 5, & 8), if the reason that Eschelon was not ready is because, after a Qwest facility jeopardy, Qwest cleared the jeopardy but failed to send any FOC at all (or sent an untimely FOC) to notify Eschelon that the jeopardy had cleared (which would have allowed Eschelon notice that it needs to staff to accept the circuit and arrange any needed premise access with the customer), ***a CNR jeopardy attributing cause to Eschelon is inappropriate because Qwest’s failure caused the problem.*** When Qwest fails to send an FOC in this situation, Qwest breaches ICA Section 9.2.4.4.1 (last two sentences). Therefore, Eschelon could have taken a hard line and said that every situation in which Qwest breaches its contractual duty to provide an FOC should result in a penalty to Qwest for breach of contract. Instead, Eschelon is reasonably proposing that, even when Qwest breaches Section 9.2.4.4.1 by not sending an FOC, Eschelon will nonetheless use its best efforts to accept the circuit that day. (Row 1 in Col. 8.) If Eschelon succeeds, Qwest may benefit from Eschelon’s ability to overcome Qwest’s breach by meeting a due date commitment despite its own breach. If despite Eschelon’s best efforts, Eschelon cannot overcome Qwest’s breach, Qwest should not avoid any consequences of its breach by erroneously attributing cause to Eschelon.

⁵ Qwest, Albersheim Direct, p. 57, lines 11-12. *See also* Washington Docket No. 063061, Hearing Ex. No. 1 (Albersheim), p. 68, line 32 – p. 69, line 1 (referring to all of Eschelon’s proposal, without the phrase “the day before,” as Qwest’s “current PCAT process”). Qwest, Albersheim Rebuttal, p. 50, lines 20-22 and Washington Docket No. 063061, Hearing Ex. No. 18C (Albersheim), p. 57, lines 20-23 (indicating only that “the day before” is allegedly not part of the Qwest process); and Exhibit Eschelon 1.5 (MN Tr. Vol. 1, p. 37, lines 16-23 (Albersheim)) and Washington Docket No. 063061, Hearing Ex. No. 73 (MN Tr. Vol. 1, p. 37, lines 16-23). Qwest claims that Eschelon’s proposed phrase “at least the day before” is not part of Qwest’s current process. *See id.* p. 37: 11-19. *See also* CO Tr. Vol. 1, p. 72, lines 1-8 (Albersheim), provided as Washington Docket No. 063061, Hearing Ex. No. 180. Other than that phrase, however, Qwest admits that the remainder of Eschelon’s proposed language reflects Qwest’s current process. *See* Exhibit Eschelon 1.5 (MN Tr. Vol. 1, p. 34, lines 16-23 (Albersheim)), cited at Exhibit Eschelon 3 Johnson Direct, p. 40, footnote 36 and Exhibit Eschelon 3, Johnson Direct, p. 74, footnote 93. *See also* Washington Docket No. 063061, Hearing Ex. No. 73 (MN Tr Vol. 1, p. 34, lines 16-23 (Albersheim)), quoted at Washington Hearing Ex. No. 71, p. 224, footnote 734 (Starkey) and *id.* pp. 222-224.

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	<p>Section 12.2.7.2.4.4 modifies the Performance Indicator Definitions (PIDs) set forth in Exhibit B and Attachments 1 and 2 to Exhibit K of this Agreement.</p> <p><i>Issue 12-71</i> Proposal #2 (second sentence)</p>	<p>Exhibit B = PIDs Exhibit K = PAP</p> <p>Qwest testified that the PIDs currently require Qwest “to differentiate between Qwest caused and CLEC/customer caused delays.”⁹</p>	<p>with this general statement. The general statement does not, however, address the dispute between the parties (see comments above and footnote 10). [now footnote 11]</p>	<p>addition of this alternative proposal. At one time, Qwest’s central attack on 12-71 – 12-73 was that the proposal modified the PIDs.¹⁰ Only after Eschelon proposed this alternative to specifically address that attack does Qwest claim that the language does not “address the dispute.” It addresses it by eliminating this former Qwest argument.</p>
3	<p>12.2.7.2.4.4.1 There are several types of jeopardies. Two of these types are: (1) CLEC or CLEC End User Customer is not ready or service order is not</p>	<p>Exhibit Qwest 1.7, Albersheim (<i>see also</i> Washington Docket No. 063061, Hearing Ex. No. 14) (entitled “Jeopardy Data”) lists the different types of jeopardies by code.¹¹ The two types of potential customer (CNR) jeopardies described in Section 12.2.7.2.4.4.1 are coded in Qwest/11, Albersheim (Washington Docket No. 063061, Hearing Ex. No. 14) as CO1 and CO2,</p>	<p>[1] Eschelon’s analysis misstates the significance of Due Date jeopardies when it claims Qwest has represented it means a CLEC should “not to prepare to accept the circuit (<i>i.e.</i>, do not disregard the jeopardy</p>	<p>[1] Qwest ignores the implication of its claim – that, in every case on every day until attempted delivery,¹⁹ Eschelon must staff personnel to test and accept the circuit and contact the customer when premise access is needed, even though Qwest has notified Eschelon that Qwest has an unresolved facility issue. When asked at the hearing if Qwest expects that Eschelon should have technicians standing around waiting to</p>

⁹ Qwest Response to Eschelon’s Petition for Arbitration, p. 43, lines 4-6. *See also* Washington Docket No. 063061, Hearing Ex. No. 1, p. 70, lines 18-19 (Albersheim).

¹⁰ See, e.g., Qwest, Albersheim Rebuttal, p. 62, lines 20-21 (“changing PID measurements”).

¹¹ Exhibit Qwest 1.7, Albersheim and Washington Docket No. 063061, Hearing Ex. No. 14. *See also* Exhibit Eschelon 3.76, p. 1-2, footnotes 5 and 6 and Washington Docket No. 063061, Hearing Ex. No. 80, footnotes 5 and 6, regarding the different types of jeopardies and discussion of “K” jeopardies (Qwest-caused jeopardies) and providing the applicable Qwest URLs.

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	<p>accepted by the CLEC (when Qwest has tested the service to meet all testing requirements.); and (2) End User Customer access was not provided.</p> <p><i>Issue 12-72 (first two sentences)</i></p>	<p>and Eschelon’s ICA language mirrors Qwest’s PCAT “User Friendly Jeopardy Description” of these two jeopardies.¹²</p> <p>A Qwest-caused jeopardy is called a “Qwest jeopardy,”¹³ and Qwest identifies them in Qwest/11, Albersheim (<i>see also</i> Washington Docket No. 063061, Hearing Ex. 14)¹⁴ Qwest’s PCAT language shows Qwest differentiates jeopardy notices and tells CLECs to plan to prepare to accept the circuit (<i>i.e.</i>, disregard the jeopardy notice) even if the CLEC is not advised of a new due date for one category of jeopardy types (Critical Date jeopardies) and not to prepare to accept the circuit (<i>i.e.</i>, do not disregard the jeopardy notice) unless Qwest advises CLEC of a new due date for the other (DD jeopardies).¹⁵ Qwest facility</p>	<p>notice) unless Qwest advises CLEC of a new due date for the other (DD jeopardies).” [2] Nothing in the PCAT or the record supports such a statement.[¹⁸] To the contrary a due date jeopardy is one that might be delivered late, and the jeopardy notice makes the CLEC aware of the possibility. <i>See e.g.</i> Exh. No. 11, [Exhibit Qwest 1R.4](Qwest’s Provisioning and Installation Overview PCAT), at page 11[Exhibit Qwest 1.4]: “DD</p>	<p>accept the circuit, Ms. Albersheim admitted that she “wouldn’t expect them to stand around and wait.”²⁰ However, this is the effect of Qwest’s current position that Eschelon may never disregard a jeopardy notice, even though Qwest is supposed to send a timely FOC when the Qwest facility jeopardy clears. Qwest’s position would defeat a key purpose of the FOC²¹ and impose major inefficiencies upon Eschelon, to its competitive disadvantage. <i>See also</i> Exhibit Eschelon 3, Johnson Direct, p. 91 line 1 – p. 92, line 16.</p> <p>[2] Qwest’s claim ignores its own PCAT. Qwest singles out a single PCAT phrase (“DD jeopardies mean your due date is in jeopardy”), as though the PCAT ended there. As the PCAT language quoted in Col. 2 shows, Qwest’s PCAT goes on to elaborate that the difference</p>

¹⁹ Under Qwest’s new approach it proposes in arbitration, Eschelon would have staffed personnel for *forty business days* to accept a circuit that Qwest did not deliver in an example provided by Ms. Johnson. *See* Exhibit Eschelon 3, Johnson Direct, p. 73, line 7 – p. 74, line 10.

¹² Exhibit Qwest 1.7, Albersheim/1-2. *See also* Washington Docket No. 063061, Hearing Ex. No. 14, pp. 1-2.

¹³ CO Tr. Vol. 1, p. 71, lines 13-15, provided as Washington Docket No. 063061, Hearing Ex. No. 180.

¹⁴ Exhibit Qwest 1.7, Albersheim. *See also* Washington Docket No. 063061, Hearing Ex. No. 14.

¹⁵ Exhibit Qwest 1R.9, p. 8 (Qwest’s Provisioning and Installation Overview PCAT): “Qwest differentiates between DD jeopardies and Critical Date jeopardies. DD jeopardies indicate that your due date is in jeopardy; however, Critical Date jeopardies indicate that a critical date prior to the DD is in jeopardy. **Critical Date jeopardies can be ignored by you.** Critical Date jeopardies are identified in the Jeopardy Data document (see download in the following paragraph) in the column labeled “Is Due Date in Jeopardy?” **If the DD is not in jeopardy, this column will contain “No” and you can disregard the jeopardy notice** sent for this condition and continue your provisioning process with the scheduled DD. **If the column contains “Yes” and Qwest has the responsibility to resolve the jeopardy condition, we will advise you of the**

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		<p>jeopardies (“K” jeopardies) are Due Date (“DD”) jeopardies.¹⁶</p> <p>Qwest testified this Eschelon language is Qwest’s current process;¹⁷ therefore, this Eschelon language cannot be inconsistent with the existing PIDs/PAP and thus requires no modification of them.</p>	<p>jeopardies mean your due date is in jeopardy”.</p>	<p>between Critical Date and DD jeopardies is that CLECs should prepare to accept the circuit for Critical Date jeopardies and <i>not</i> prepare to accept the circuit for DD jeopardies. This PCAT language addresses the very inefficiencies that Qwest’s current position would create, by documenting that CLEC technicians do not have to stand around and wait to accept delivery for DD jeopardies. Instead, CLECs need not prepare until they receive a timely FOC “to advise you of the new</p>

new DD when the jeopardy condition has been resolved. This is usually within 72 hours.” (emphasis added). See also Exhibit Eschelon 3, Johnson Direct, p. 91 lines 14-25; p. 92, lines 1-2 and Washington Docket No. 063061, Hearing Ex. No. 11. See also Exhibit Eschelon 3.76, Johnson p. 1-2, footnotes 5 and 6, regarding the different types of jeopardies and discussion of “K” jeopardies (Qwest-caused jeopardies) and providing the applicable Qwest URLs; and OR Tr. Vol. 1, 0048-0049 (Albersheim cross examination) (“Q. Then looking at the last sentence of that same paragraph, it says, ‘If the column contains yes, and Qwest is responsible for resolution of the jeopardy condition, you will be advised of a new due date when the jeopardy condition has been resolved. Resolution usually occurs within 72 hours.’ Do you see that? A. Yes. Q. And the yes column is the column that’s checked when it’s a due date jeopardy; isn’t that right? A. Yes. What that is discussing is the list of jeopardy codes, and when those codes imply that the due date is in jeopardy. Q. And if those due date codes apply, then what Qwest is saying here that it will do is provide a new due date when the jeopardy condition has been resolved, correct? A. Correct.”) See also OR Tr. Vol. 1, 0055-0056.

¹⁸ See Qwest Albersheim Rebuttal, p. 60, lines 5-15.

²⁰ Oregon transcript page 72 lines 14-24.

²¹ See Memorandum Opinion and Order, In the Matter of Application by Qwest Communications International, Inc. for Authorization To Provide In-Region, InterLATA Services in the States of Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington and Wyoming, WC Docket No. 02-314, Decision No. 02-332 (Dec. 23, 2002), ¶85 (quoted at Exhibit Eschelon 3, Johnson Direct, p. 93, fn 156).

¹⁶ See Exhibit Qwest 1.7, Albersheim and Washington Docket No. 063061, Hearing Ex. No. 14, pp. 1-2 (showing the column contains “Yes” for these jeopardies).

¹⁷ Qwest Albersheim Direct, p. 57, lines 11-12. See also Washington Docket No. 063061, Hearing Ex. No. 1 (Albersheim), p. 68, line 32 – p. 69, line 1 (referring to all of Eschelon’s proposal, without the phrase “the day before,” as Qwest’s “current PCAT process”). See also Exhibit Eschelon 1.5, (MN Tr. Vol. 1, p. 34, lines 16-23 (Albersheim)), cited at Exhibit Eschelon 3 Johnson Direct, p. 40, footnote 36 and Exhibit Eschelon 3, Johnson Direct, p. 74, footnote 93.; and Washington Docket No. 063061, Hearing Ex. No. 73 (MN Tr Vol. 1, p. 34, lines 16-23 (Albersheim), quoted at Washington Hearing Ex. No. 71, p. 224, footnote 734 (Starkey) and *id.* pp. 222-224.

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				DD when the jeopardy condition has been resolved.” ²² Qwest’s willingness to ignore or re-characterize its PCAT language regarding a distinction developed in CMP ²³ underscores the problems with Qwest’s proposal to delete all of Eschelon’s language in favor of a reference to Qwest’s web site.
4	12.2.7.2.4.4.1 . . . For these two types of jeopardy, . . . <i>Issue 12-72</i> (portion of third sentence)	Exhibit Qwest 1.7 describes other types of customer (“C”) jeopardies, ²⁴ which are not impacted by Eschelon’s language. ²⁵ Qwest testified this Eschelon language is Qwest’s current process; ²⁶ therefore, this Eschelon language cannot be inconsistent with the existing PIDs/PAP and thus requires no modification of them.	These jeopardies are not in dispute in this proceeding.	Qwest ignores the fact that these jeopardy types are undisputed when advocating rejection of this language, which Qwest admits is accurate.

²² See Exhibit Qwest 1R.4 , Albersheim p. 8.

²³ See Exhibit Qwest 1R.4, Albersheim p. 8(redlined PCAT changes showing addition of paragraph beginning with “Qwest differentiates . . .”). *See also, e.g.*, Exhibit Qwest 1R.2, Albersheim, p. 5, Qwest CMP minutes in which Qwest said: “Cindy Macy – Qwest asked how will the CLECs know which jeopardy codes to ignore? Jill and Phyllis asked for the CLECs preference to how they would like this identified on the matrix. Agreement was reached to add a column to the matrix (3rd column) and call it ‘Due Dates in Jeopardy’.”

²⁴ Exhibit Qwest 1.7, Albersheim. *See also* Washington Docket No. 063061, Hearing Ex. No. 14 (Albersheim).

²⁵ For example, it does not apply to customer jeopardy CO3 (“Subscriber Change in Requirements”) (*see* Exhibit Qwest 1.7, Albersheim, p. 2 and Washington Docket No. 063061, Hearing Ex. No. 14, p.2), because the failure to deliver the FOC does not affect the customer (CLEC) opportunity to be ready; the CLEC’s change in requirements does. In contrast, for CO2, which is subject to the language, Eschelon needs the FOC to have a reasonable opportunity to contact its customer to gain access to the premises needed to accept delivery of the circuit. This shows Eschelon’s language is narrowly tailored to the business need.

²⁶ Exhibit Qwest, Albersheim Direct, p. 57, lines 11-12 and Washington Docket No. 063061, Hearing Ex. No. 1, p. 68, line 32 – p. 69, line 1; and Exhibit Eschelon 1.5, Starkey (MN Tr. Vol. 1, p. 37, lines 16-23 (Albersheim)), cited at Exhibit Eschelon 3 Johnson Direct, p. 40, footnote 36 and Exhibit Eschelon 3, Johnson Direct, p. 74, footnote 93.. *See also*, Washington Docket No. 063061, Hearing Ex. No. 73, cited at Washington Hearing Ex. No. 71, p. 224.

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5	<p>12.2.7.2.4.4.1 . . . For these two types of jeopardies, Qwest will not characterize a jeopardy as CNR or send a CNR jeopardy to CLEC if a Qwest jeopardy exists, Qwest attempts to deliver the service, and Qwest has not sent an FOC notice to CLEC after the Qwest jeopardy occurs but at least the day before Qwest attempts to deliver the service.</p> <p><i>Issue 12-72 (third</i></p>	<p>Qwest’s witness admitted that, if the CLEC does not have adequate notice that the circuit is being delivered (with the agreed upon process for adequate notice consisting of an FOC), then it is “<i>not appropriate</i>” for Qwest to assign a CLEC-caused (CNR) jeopardy.²⁷</p> <p>Qwest’s witness admitted the reason Qwest is required to send an FOC after a Qwest facility jeopardy has been cleared is to let the CLEC know that it should be expecting to receive the circuit so that the CLEC will have sufficient notice to make personnel available and perhaps make arrangements with the customer to have access to the premises available.²⁸</p> <p>Qwest CMP minutes state that Qwest confirmed “Qwest cannot expect the CLEC to be ready for the service if we haven’t notified you.”²⁹</p> <p>Excluding the phrase “at least the day before” (see below): Qwest testified this</p>	<p>[1] The evidence establishes that Eschelon’s proposal would usually assign fault to Qwest [2] even though the CLEC has adequate notice that a circuit is being delivered and is able to accept delivery. See discussion in Qwest’s Post Hearing Brief and hearing Exh. No. 126 [Exhibit Eschelon 3.76], Exh. No. 80 [Exhibit Eschelon 3.76], Exh. No. 110 [Exhibit Eschelon 3.76] and Exh. No. 28 [Exhibit Qwest 1R.9] Exh. No. 117 [Exhibit Eschelon 3.75].</p>	<p>[1] Qwest ignores its own testimony that “such issues are rare”³¹ when it complains of the alleged frequency of Qwest-caused jeopardies (<i>i.e.</i> “usually”). The frequency, in any event, is within Qwest’s control under Eschelon’s proposal, as Qwest may send a timely FOC to avoid the 12-72 scenario. Regardless of the reason Qwest does not comply with its commitment to always send the FOC before the due date, two facts remain constant: (1) the non-compliance is on Qwest’s side (as is the Qwest facility problem); and (2) as a result of Qwest’s non-compliance, Eschelon does not receive proper³² notice to allow it to prepare to accept service delivery.³³ Qwest has provided no valid reason why fault should not be assigned to Qwest in these situations when, despite best efforts, Eschelon cannot accept delivery. More to the point, as found in MN, “where Eschelon had no role in causing Qwest to issue an initial jeopardy notice, and had no role in delaying Qwest’s issuance of a subsequent FOC until less than a day before the deadline, the Commission cannot find the merit</p>

²⁷ Exhibit Eschelon 1.5, Starkey, p. 11 (MN Tr. Vol. 1, p. 94, lines 40-11 (Albersheim, emphasis added)). See also Washington Docket No. 063061, Hearing Ex. No. 73.

²⁸ Exhibit Eschelon 1.5, Starkey, pp. 6-7 (MN Tr. Vol. 1, p. 37, line 24 – p. 38, line 6 (Albersheim)), cited at Exhibit Eschelon 3, Johnson Direct, p. 73, footnote 89. See also Washington Docket No. 063061, Hearing Ex. No. 73.

²⁹ Exhibit Eschelon 3.72, Johnson, p. 5 and Exhibit Qwest, 1R.2, Albersheim, p. 5.. See also Washington Docket No. 063061, Hearing Ex. No 23, p. 5 (Albersheim).

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	sentence)	Eschelon language is Qwest’s current process; ³⁰ therefore, this Eschelon language (excluding, per Qwest, the phrase “at least the day before”) cannot be inconsistent with the existing PIDs/PAP and thus requires no modification of them.		in holding Eschelon responsible when the deadline is missed.” ³⁴ This result is consistent with the principle with which Qwest agrees (Row 1). [2] Qwest provides inadequate <i>advance</i> notice. See Row 12 below. Even then, Qwest escapes the consequences of breaching its FOC duties when Eschelon, using best efforts, accepts the circuit. See Row 8 below.
6	12.2.7.2.4.4.1 . . . sent an FOC notice . . . <i>Issue 12-72</i> (portion of third sentence)	Qwest testified: “Q. Now, before Qwest delivers, they are going to provide an FOC; isn’t that right? A. They are supposed to, yes. Q. And that’s the requirement.	[1] Eschelon ignores the following portion of Ms. Albersheim’s Minnesota testimony Q Are you saying that the CLEC ought to be	[1] Qwest ignores its own proposal referring to its web site and its CMP argument that ICA terms are not needed because Eschelon may rely upon process detail developed in CMP. ⁴² Here, Qwest argues that Qwest is free to ignore those CMP/PCAT processes. Even when a

³¹Exhibit Qwest, Albersheim Rebuttal, p. 60, lines 5-15.

³² See Row 6 regarding the FOC as the agreed upon proper form of notice.

³³Exhibit Eschelon 3R, Johnson Rebuttal, pp. 19-23.

³⁰ Exhibit Qwest, Albersheim Direct, p. 57, lines 11-12. and Washington Docket No. 063061, Hearing Ex. No. 1, p. 68, line 32 – p. 69, line 1; Exhibit Eschelon 1.5, Starkey, p. 6 (MN Tr. Vol. 1, p. 37, lines 16-23(Albersheim)), cited at Exhibit Eschelon 3 Johnson Direct, p. 40, footnote 36 and Exhibit Eschelon 3, Johnson Direct, p. 74, footnote 93.; and Washington Docket No. 063061, Hearing Ex. No. 73, cited at Washington Ex. No. 71, p. 224, footnote 734 (Starkey) and *id.* pp. 222-224.

³⁴ Exhibit Eschelon 2.25, Denney, p. 21 (MN Order Resolving Arbitration Issues, p. 21).

⁴² See, e.g., Exhibit Qwest, Albersheim Direct, p. 57, line 5 and lines 10-11. . Cf. Exhibit Eschelon 3, Johnson Direct, pp. 81-84. & Exhibit Eschelon 3R, Johnson Rebuttal, p. 27, line 15 – p. 29, line 8.

ATTACHMENT 2 TO ESCHELON POST-HEARING BRIEF
EVIDENCE IN THE RECORD SUPPORTING ESCHELON’S JEOPARDY PROPOSALS – ISSUES 12-71, 12-72 & 12-73

R o w #	ESCHELON LANGUAGE¹ (Column 1)	EVIDENCE SUPPORTING ESCHELON LANGUAGE – INCLUDING QWEST DOCUMENTS & ADMISSIONS (Column 2)	“QWEST’S EVIDENCE”² (Column 3)	ESCHELON COMMENTS TO QWEST’S RESPONSE (Column 4)
		<p>And if you look at Exhibit 21, you see that requirement is set out in the Qwest PCAT; is that right? A. Yes. *** Q. And the way that Qwest advises the jeopardy condition has been resolved is be providing the FOC; isn’t that right? A. That is the official formal way, yes.”³⁵</p> <p>“Q. The contract requires the FOC; correct? A. The PCAT requires the FOC. Your contract proposal requires the FOC.³⁶ Q. And Qwest's current process is to provide the FOC? A. That is the process.”³⁷</p> <p>“Q The FOC is the agreed upon process by which Qwest informs Eschelon of the due date for a circuit?</p>	<p>relying on something other than the official notice, the FOC that it receives from Qwest, as the indication of when the circuit is going to be delivered? A For a formal process, no. But it also doesn't make sense [2] if we're in communication with each other and [3] the circuit can be accepted not to install the circuit and have it done on time. Albersheim, Exh. No. 73, [Exhibit Eschelon 1.5] MN TR, 95:11- 95:25. Ms. Albersheim also made the same point in the Washington hearing. Exh. No. 29 [Exhibit Qwest, Albersheim Rebuttal], Albersheim Rebuttal, 35:3 – 35:32</p>	<p>procedure has been developed in 271 proceedings⁴³ and is required by the Qwest PCAT,⁴⁴ Qwest reserves the right to unilaterally ignore those procedures – and its contractual obligation⁴⁵ – to instead place the blame on the CLEC, which may result in a delay to CLEC’s customer.⁴⁶ This argument, in particular, emphasizes the need for contractual certainty through ICA language that allows Eschelon to plan its business and its resources. See Exhibit Eschelon 3, Johnson Direct, p. 39, lines 5-12 & p. 72, line 9 – p. 74, line 10 & p. 78, fn 104 & p. 93, line 1 – p. 96, line 7; OR Tr., p. 203 line 25 – p. 204 line 19. [2] See Row 12 below re. advance notice. [3] See Row 8 below showing that, under Eschelon’s proposal, if the circuit can be accepted and installed on time, it will be, even when Qwest breaches its FOC duty.</p>

³⁵ OR Tr. Vol. 1, 0055, lines 1-7 and 0056, lines 8-11.

³⁶ In making this response, Ms. Albersheim ignores that other language in the proposed contract, which is closed and agreed upon, requires the FOC. See Section 9.2.4.4.1 (quoted below).

³⁷ Exhibit Eschelon 1.6, Starkey, p. 15 (AZ Tr. Vol. 1, p. 70, lines 13-18 (Albersheim)). See also Washington Docket No. 063061, Hearing Ex. No. 178.

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		<p>A Yes.”³⁸</p> <p>...</p> <p>“Q And you would agree that that’s not proper, if the CLEC hasn’t received an FOC in adequate time to be able to act on it; correct?</p> <p>A According to procedure, yes.</p> <p>Q That’s Qwest’s procedure?</p> <p>A Yes.”³⁹</p> <p>Closed language in the ICA (like the SGAT) states (with emphasis added) in Section 9.2.4.4.1: “. . . If Qwest must make changes to the commitment date, Qwest will promptly issue a Qwest Jeopardy notification to CLEC that will clearly state the reason for the change in commitment date. Qwest will also <i>submit a new Firm Order</i></p>		

⁴³ See Memorandum Opinion and Order, In the Matter of Application by Qwest Communications International, Inc. for Authorization To Provide In-Region, InterLATA Services in the States of Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington and Wyoming, WC Docket No. 02-314, Decision No. 02-332 (Dec. 23, 2002), ¶85 (quoted at Exhibit Eschelon 3, Johnson Direct, p. 93, fn. 156).

⁴⁴ Exhibit Eschelon 1.6, Starkey, p. 15 (AZ Tr. Vol. 1, p. 70, lines 13-18 (Albersheim)).

⁴⁵ See agreed upon language in Section 9.2.4.4.1.

⁴⁶ Exhibit Eschelon 3, Johnson Direct, p. 63, lines 5-15.

³⁸ Exhibit Eschelon 1.5, Starkey, p. 7 (MN Tr. Vol.1, p. 38, lines 17-19 (Albersheim)), cited at Exhibit Eschelon 3, p. 62, footnote 68. *See also* Washington Docket No. 063061, Hearing Ex. No. 73, cited at Washington Hearing Ex. No. 71 (Starkey), p. 231; and CO Tr. Vol. 1, p. 71, lines 20-25 (Albersheim) (“formal notice”), provided as Washington Docket No. 063061, Hearing Ex. No. 180.

³⁹ Exhibit Eschelon 1.5, Starkey, p. 11 (MN Tr. Vol. 1, p. 95, lines 19-24 (Albersheim)), cited at Exhibit Eschelon 3, Johnson, p. 78, footnote 102. *See also* Washington Docket No. 063061, Hearing Ex. No. 73, cited at Washington Hearing Ex. No. 114 (Johnson), p. 24, note 44.

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		<p><i>Confirmation</i> that will clearly identify the new Due Date.”⁴⁰</p> <p>Qwest testified this Eschelon language is Qwest’s current process; ⁴¹ therefore, this Eschelon language cannot be inconsistent with the existing PIDs/PAP and thus requires no modification of them.</p>		
7	<p>12.2.7.2.4.4.1 . . .at least the day before <i>Issue 12-72</i> (portion of third sentence)</p>	<p>Qwest CMP minutes state: “Bonnie [Eschelon] confirmed that the CLEC should <i>always</i> receive the FOC <i>before the due date</i>. Phyllis [Qwest] agreed . . .”⁴⁷</p> <p>Qwest made the following documented commitment in CMP in response to an example provided by Eschelon: “Action #1: As you can see receiving the FOC releasing the order on the day the order is due does not provide</p>	<p>Qwest provided extensive testimony discussing documentation demonstrating that [1] Eschelon initiated a change request asking for a requirement that an FOC be provided a day in advance, and [2] that request was ultimately resolved without making</p>	<p>[1] Eschelon requested a documented “designated time frame to respond to a released delayed order.”⁵⁵</p> <p>[2] Qwest confirmed in CMP documentation that it was Qwest’s existing process to send the FOC at least the day before. Therefore, no change in process that would result in a PCAT change was required. <i>See</i> Exhibit Eschelon 3, Johnson Direct, p. 85, line 1 – p. 90, line 15.</p> <p>[3] The word “instead” is inaccurate. Qwest expanded the scope of the change request to</p>

⁴⁰Exhibit Eschelon 3.76, Johnson, p. 3, footnote 4: “**ICA Section 9.2.4.4.1:** “. . . If Qwest must make changes to the commitment date, Qwest will promptly issue a Qwest Jeopardy notification to CLEC that will clearly state the reason for the change in commitment date. Qwest will also *submit a new Firm Order Confirmation* that will clearly identify the new Due Date.” (emphasis added). This language appears in the SGAT and Qwest’s negotiations template. *See also* the PCAT provisions (cited in footnote 5) for “DD Jeopardies” that indicate Qwest’s process is to send an FOC after the facility jeopardy notice if the condition is resolved so that the CLEC should expect delivery.” *See also* Exhibit Eschelon 3, Johnson Direct, p. 77, line 16 – p. 78, line 2 and Washington Docket No. 063061, Hearing Ex. No. 71, pp. 216-217.

⁴¹ Exhibit Qwest, Albersheim Direct, p. 57, lines 11-12 and Washington Docket No. 063061, Hearing Ex. No. 1, p. 68, line 32 – p. 69, line 1; Exhibit Eschelon 1.5, Starkey, p. 6 (MN Tr. Vol. 1, p. 37, lines 16-23(Albersheim)), cited at Exhibit Eschelon 3 Johnson Direct, p. 40, footnote 36 and Exhibit Eschelon 3, Johnson Direct, p. 74, footnote 93.; and Washington Docket No. 063061, Hearing Ex. No. 73, cited at Washington Ex. No. 71, p. 224, footnote 734 (Starkey) and *id.* pp. 222-224.

⁴⁷ Exhibit Eschelon 3.72, Johnson, p. 5; Exhibit Qwest, 1R.2, Albersheim, p. 5.; and Washington Docket No. 063061, Hearing Ex. No. 23 p. 5. *See also* Exhibit Eschelon 3.71, p. 5 and Washington Docket No. 063061, Hearing Ex. No. 79, p. 4.

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		<p>sufficient time for Eschelon to accept the circuit. Is this a compliance issue, <i>shouldn’t we have received the releasing FOC the day before the order is due?</i> In this example, should we have received the releasing FOC on 1-27-04? [Qwest] Response #1 <i>This example is non-compliance to a documented process. Yes an FOC should have been sent prior to the Due Date.</i>⁴⁸</p> <p>The CMP Change Request closed with the above mutual understanding of the documented process and a confirmation by Qwest that conduct contrary to the process would be treated as non-compliance with the process that could be brought to Qwest service management.⁴⁹ After the Change Request closed subject to compliance</p>	<p>any changes to PCAT language that in any way related the timing of an FOC to the date service would attempt to be delivered. [3] Instead the language contained a provision indicating that Qwest would usually provide an updated due date within 72 hours. (Exh. 29, Albersheim Rebuttal [Qwest/18], 29:8 – 32:11) and [4] that the record does not reflect Qwest committing to such a process in CMP. (<i>Id.</i>) Exh. 23 [Qwest/20] RA22 [Qwest/19], Exh. 24,</p>	<p>also include the “overall” jeopardy process, part of which was a separate 72 hour issue⁵⁶ highlighted by Eschelon after Qwest indicated it would look at additional jeopardy issues.⁵⁷ <i>See id.</i> at pp. 82-84.⁵⁸</p> <p>[4] The record shows Qwest documented its commitment to “always” provide the FOC before the due date in CMP minutes posted on the web. <i>See</i> Row 7.</p>

⁵⁵ Exhibit Qwest 1R.2, Albersheim, p. 2 (Eschelon Expected Deliverable: “Qwest will modify, document and train a process, that requires Qwest to send an updated FOC and allow a CLEC a reasonable amount of time (from the time the updated FOC is sent) to prepare for testing before Qwest contacts the CLEC to test and accept the circuit. Qwest should cease applying a jeopardy status of CNR to delayed orders that are released and the CLEC has not been provided a reasonable amount of time to prepare to test/accept the circuit.”).

⁴⁸ Exhibit Eschelon 3.74, Johnson, and Washington Docket No. 063061, Hearing Ex. No. 116, (February 26, 2004 CMP materials prepared and distributed by Qwest) (emphasis added). *See also* CO Tr. Vol. 1, p. 76, lines 9-22 provided as Washington Docket No. 063061, Hearing Ex. No. 180 (Qwest prepared these materials, which are part of the CMP record).

⁴⁹ Exhibit Eschelon 3.72, Johnson, p. 4; Exhibit Qwest 1R.2, Albersheim, p. 3; and Washington Docket No. 063061, Hearing Ex. No. 23, p. 3 (“Qwest would like to close this CR. Bonnie Johnson – Eschelon advised she is having a problem with compliance to this process. . . . Jill Martain – Qwest asked if this is a compliance issue or a process problem. Bonnie said it is hard to determine at times, but she is willing to close this CR and handle the compliance issue with the Service Manager. The CLECs agreed to close the CR.”), *quoted in* Washington Docket No. 063061, Hearing Ex. No. 114, p. 27, lines 5-6 and footnote 52.

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		<p>issues, Qwest continued to recognize that Qwest’s process was to send an FOC before the due date (<i>i.e.</i>, a “timely” FOC) and treated Qwest failure to do so in particular cases as non-compliance with its process.⁵⁰</p> <p>For example, Qwest told Eschelon at that time that, in five examples “where a FOC was not sent <i>timely prior to the due date</i>,” Qwest provided coaching to the non-compliant Qwest employee(s) and indicated Qwest would continue to monitor compliance with the process.⁵¹</p>	RA23. ¹	

⁵⁶ Exhibit Qwest 1R.4, Albersheim, p. 8, Changes to PCAT which state “Within 72 hours of the initial jeopardy notice, either an updated jeopardy notification with *more specific details of the jeopardy condition or a FOC* advising of the new DD will be sent to you. If an updated jeopardy notice is sent, we will also send a FOC advising you of the DD Qwest can meet when the RFS Date is known.” (Emphasis added).

⁵⁷ Exhibit Eschelon 3.72, Johnson, p. 7, see second complete paragraph - Qwest CMP minutes: “Bonnie [of Eschelon] advised they do want more detail on what the jep'd problem is. They need to know if it is a **F1** pair, or the street needs to be dug up. She would like more detail on one jep in particular: 'Local Facility not available'. Bonnie asked when does this jep occur. What situation causes this jep to be assigned?”

⁵⁸ It is also illogical to assume that Qwest sending either updated details about the reason for a jeopardy or an FOC within 72 hours after the initial jeopardy satisfied Eschelon request for “a reasonable time frame to prepare” before the due date. In some cases Qwest may not send Eschelon a Qwest facility jeopardy notice until the day before or even sometimes on Eschelon’s requested due date. To believe the 72 hour change would satisfy Eschelon’s request, therefore, one would have to believe that Qwest sending the FOC one or two days *after* Eschelon’s requested due date would meet Eschelon’s request for reasonable advance notice *before* the due date.

⁵⁹ Exhibit Eschelon 3.78, Johnson, pp. 8-9 and Washington Docket No. 063061, Hearing Ex. No. 111, pp. 3-4. (Qwest service manager email dated Aug. 25, 2004). *See also* Exhibit Eschelon 3.71, Johnson, pp. 5-9 and Washington Docket No. 063061, Hearing Ex. No. 79 (July 21, 2004 – March of 2005).

⁵¹ Exhibit Eschelon 3.78, Johnson, pp. 8-9. (Qwest service manager email dated Aug. 25, 2004) (emphasis added); *id.* p. 8 (“Five of the LSRs in the spreadsheet are where a *FOC was not sent timely prior to the due date* . . . Qwest will continue to monitor this”) (emphasis added); *id.* p. 8 (“5 were due to the issue described above with resolving the facility really late in the process; 5 of those will be addressed through coaching”). Qwest’s use of “timely” before “prior to” the due date, shows that Qwest also understood that a “timely” FOC is one delivered “prior to” the due date. *See id.* p. 8. Qwest’s service manager said that the Qwest non-compliance (which she referred to as a “breakdown”) in these five examples was not in the delayed order process itself (*e.g.*, a jeopardy was cleared but a timely FOC was not sent) but the failure to send a timely FOC was caused by Qwest “resolving the facility issue late in the process and still attempting to meet the customers due date.” *See id.* p. 8. In other words, Qwest

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		Ms. Bonnie Johnson of Eschelon personally participated in these CMP events and dealt directly with Qwest service management on these issues; ⁵² Ms. Renee Albersheim of Qwest did not. ⁵³ Ms. Johnson prepared the jeopardies Chronology (Exhibit Eschelon 3.71, Johnson based on Ms. Johnson’s personal knowledge of the facts. ⁵⁴		
8	12.2.7.2.4.4.1 . . . CLEC will nonetheless use its best efforts to	Exhibit Eschelon 3.75 contains more than one hundred examples of orders for which Qwest did not send any FOC after a Qwest facility jeopardy, and for	[1] Qwest discussed this exhibit extensively in its testimony. Exhibit 117	[1] Qwest ignores the language of Eschelon’s proposal. Timely delivery of service to the customer is of the utmost importance to

admitted that the problem occurred as a result of Qwest conduct (Qwest failure to clear the jeopardy in a timely manner so that a timely FOC could be sent) that lead to insufficient notice to Eschelon. Therefore, the jeopardy should not be attributed to Eschelon (by coding it as Customer Not Ready (“CNR”)). Regardless of the reason for Qwest failing to send a timely FOC prior to the due date (*e.g.*, either because the facility cleared but Qwest failed to send a timely FOC or because Qwest cleared it too late to send a timely FOC), if Qwest does not send a timely FOC, Eschelon does not receive proper notice before attempted delivery to indicate that Eschelon should prepare to accept service delivery. *See also* Washington Docket No. 063061, Hearing Ex. No. 111, pp. 3-4.

⁵² Exhibit Eschelon 3, Johnson Direct, p. 75, footnote 95 and Washington Docket No. 063061, Hearing Ex. No. 114, p. 27, footnote 50. *See also* Exhibit Eschelon 3.72, Johnson, p. 1 and Washington Docket No. 063061, Hearing Ex. 23, p. 1 (Change Request PC081403-1, referring on page 1 to Bonnie Johnson as being the originator of the jeopardy Change Request and referring to Ms. Johnson throughout the Change Request’s history).

⁵³ OR Tr., Vol. 1, 0036, line 213 – 0037, line 9 (Albersheim cross examination) (“Q. You talk, beginning at page 46, about CMP change requests that related to Qwest’s jeopardy process; is that right? A. Yes. Q. You were not yourself involved in any of those change requests? A. Not directly. Q. So your testimony is based on documents that you reviewed, and what other Qwest employees told you; is that right? A. That’s correct. Qwest employees who were involved in those change requests, yes.”) *See also* CO Tr. Vol. 1, p. 77, lines 1-6 (Washington Docket No. 063061 Hearing Ex. No. 180) (“You were not involved in preparing the materials for the March 4th ad hoc meeting, were you? A No. Q. And you did not participate in the March 4th ad hoc meeting. Isn't that right? A That's correct.”). *See also* Exhibit Eschelon 3, Johnson Direct, p. 75, footnote 95 and Washington Docket No. 063061, Hearing Ex. No. 114, p. 27, footnote 50; CO Tr. Vol. 1, pp. 99-100 (Washington Docket No. 063061, Hearing Ex. No. 180 (Albersheim)); *id.* p. 98, lines 10-11 (“I’m not a part of the change management team itself.”); and Exhibit Eschelon 3.72, Johnson and Washington Docket No. 063061, Hearing Ex. No. 23 (Change Request PC081403-1 - no reference to Ms. Albersheim in the entire Change Request history).

⁵⁴ Exhibit Eschelon 3, Johnson Direct, p. 11, lines 22-28 and Washington Docket No. 063061, Hearing Ex. No. 74, p. 9, lines 7-8.

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	<p>accept the service. If needed, the Parties will attempt to set a new appointment time on the same day . . .</p> <p><i>Issue 12-72</i> (fourth sentence and start of fifth sentence)</p>	<p>which Eschelon nevertheless not only used best efforts to accept the circuit but also succeeded in doing so.⁵⁹</p> <p>Qwest admitted, if Qwest classifies a delay as Eschelon-caused (CNR), this pushes out the due date for loop orders at least three days.⁶⁰ In other words, the Parties cannot “set a new appointment time on the same day” if Qwest erroneously classifies a jeopardy as CNR because Qwest then requires CLEC to request a due date three days later.</p> <p>Qwest testified this Eschelon language is Qwest’s current process;⁶¹ therefore,</p>	<p>[Exhibit Eschelon 3.75] demonstrates that 80% of the time, Eschelon is able to accept service on time without an FOC. [2]The exhibit also demonstrates that Eschelon’s claimed concern about delayed due dates is illusory because Qwest and Eschelon technicians work hard to deliver circuits as soon as possible and could not have delivered earlier even if an earlier due date had</p>	<p>Eschelon. Therefore, under Eschelon’s proposal, if Eschelon is able to accept service on time without an FOC, Eschelon will do so, despite Qwest’s breach of its FOC duty. Exhibit Eschelon 3.75 demonstrates Eschelon’s commitment. <i>See</i> Exhibit Eschelon 3R, Johnson Rebuttal, p. 27, line 15 – p. 29, line 8.</p> <p>[2] Qwest’s own process shows that Eschelon’s concerns about delay are very real. Eschelon’s language avoids delay by allowing a new appointment time <i>on the same day</i>. In contrast, in the same circumstances, Qwest’s process requires Eschelon to supplement the order with a due date at least <i>three days out</i>.⁶² <i>See also</i></p>

⁵⁹ Exhibit Eschelon 3.75, Johnson; OR Tr. Vol. 1, 0043, lines 11-15; and Washington Docket No. 063061, Hearing Ex. No. 117. *See also* Exhibit Eschelon 3, Johnson Direct, pp. 80-84; Exhibit Eschelon 3R, Johnson Rebuttal, pp. 23-27; Exhibit Eschelon 3SR, Johnson Surrebuttal, pp. 29-33; and Washington Docket No. 063061, Hearing Ex. No. 71, pp. 219-222. Eschelon seeks no delay. Eschelon commits in the ICA to use its best efforts to accept service at the time of attempted delivery or on the same day, even when Qwest sends no FOC (see 12.2.7.2.4.4.1 – “nonetheless”), and Eschelon provided evidence in Eschelon/114, Johnson (and Washington Docket No. 063061, Hearing Ex. No. 117) that Eschelon does accept service when it is able to do so despite Qwest’s failure to provide an FOC.

⁶⁰ Exhibit Eschelon 3, Johnson Direct, pp. 62-63 and Washington Docket No. 063061, Hearing Ex. No. 71, p. 223, lines 2-8 (Starkey). When a jeopardy is classified as a CLEC-caused (CNR) jeopardy for unbundled loop orders, the CLEC is required to supplement its order by requesting a new due date that is at least *three days after* the date of the supplemental order. Eschelon/6, Starkey/6 (MN Tr. Vol. 1, p. 36, line 20 – p. 37, line 2 (Albersheim)). *See also* Washington Docket No. 063061, Hearing Ex. No. 73. A jeopardy properly classified as caused by Qwest does not require the CLEC to supplement the due date and does not build in this three day delay. Exhibit Eschelon 3, Johnson Direct, p. 64, lines 6-8; Exhibit Eschelon 3, Johnson Direct, p. 72, footnote 87; and Washington Docket No. 063061, Hearing Ex. No. 71, p. 223, lines 6-8.

⁶¹ Exhibit Eschelon 1.5, Starkey, p. 6 (MN Tr. Vol. 1, p. 34, lines 16-23 (Albersheim)), cited at Exhibit Eschelon 3 Johnson Direct, p. 40, footnote 36; Exhibit Eschelon 3, Johnson Direct, p. 74, footnote 93 and Exhibit Eschelon 3R, Johnson Rebuttal, p. 17, footnote 55. Ms. Albersheim’s Minnesota testimony was also quoted in Washington Docket No. 063061, Hearing Ex. No. 71, p. 224, footnote 734. *See also* Washington Docket No. 063061, Hearing Ex. No. 73.

⁶² *See* Exhibit Eschelon 3R, p. 25, footnote 82, citing Qwest Request for Reconsideration, Minnesota Arbitration (Apr. 9, 2007), p. 3 (“Eschelon accurately indicated to the Commission that, when Qwest classifies an order as customer not ready, Eschelon is required to supplement its order to reflect a new due date that at least three days out.”).

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		this Eschelon language cannot be inconsistent with the existing PIDs/PAP and thus requires no modification of them.	been set.	Exhibit Eschelon 3, Johnson Direct, p. 63, line 5 – p. 64, line 15.
9	12.2.7.2.4.4.1 . . . and, if unable to do so, Qwest will issue a Qwest Jeopardy notice and a FOC with a new Due Date. <i>Issue 12-72 (end of fifth/final sentence)</i>	The ICA provides: “. . . If Qwest must make changes to the commitment date, Qwest will <i>promptly issue a Qwest Jeopardy notification</i> to CLEC that will clearly state the reason for the change in commitment date. Qwest will also <i>submit a new Firm Order Confirmation</i> that will <i>clearly identify the new Due Date.</i> ” ⁶³ Qwest testified this Eschelon language is Qwest’s current process; ⁶⁴ therefore, this Eschelon language cannot be inconsistent with the existing PIDs/PAP and thus requires no modification of them.	[1]As a general matter it has not been Qwest’s advocacy that Jeopardy language should be tied to the PIDs/PAP. To the contrary, it is Qwest’s position that Eschelon’s proposed language has an impact on the PIDs/PAP which is one of several reasons Qwest opposes Eschelon’s overall proposal for this language. [2]The primary reason Qwest opposes Eschelon’s proposal is that it does NOT reflect Qwest’s	[1] Qwest’s advocacy has changed. <i>See</i> Row 2. Also, if Qwest appropriately assigns Qwest and CLEC/Customer (CNR) jeopardies, as it admits the PIDs require it to do, the PIDs/PAP will work as intended, with no impact. <i>See</i> Rows 1-2. In contrast, if the ICA is silent as proposed by Qwest, Qwest has an incentive to classify Qwest-caused jeopardies as Eschelon-caused (CNR) to erroneously exclude them from the PAP calculation entirely. ⁶⁵ When a delay is due to Qwest’s failure to provide an FOC or a timely FOC (so, for example, Eschelon had insufficient time to arrange customer premise access), Qwest would have the result be that the request is excluded from the PAP results because Qwest chooses to classify the delay as Eschelon-caused. Qwest cites no provision of

⁶³ ICA Section 9.2.4.4.1 (closed language).

⁶⁴ Exhibit Qwest, Albersheim Direct, p. 57, lines 11-12 and Washington Docket No. 063061, Hearing Ex. No. 1, p. 68, line 32 – p. 69, line 1. *See also* Exhibit Eschelon 1.5, Starkey, p. 6 (MN Tr. Vol. 1, p. 34, lines 16-23 (Albersheim)), cited at Exhibit Eschelon 3 Johnson Direct, p. 40, footnote 36; Exhibit Eschelon 3, Johnson Direct, p. 74, footnote 93 and Exhibit Eschelon 3R, Johnson Rebuttal, p. 17, footnote 55.. Ms. Albersheim’s Minnesota testimony was also quoted in Washington Docket No. 063061, Hearing Ex. No. 71, p. 224, footnote 734. *See also* Washington Docket No. 063061, Hearing Ex. No. 73.

⁶⁵ *See* Exhibit Eschelon 3, Johnson Direct, p. 68, footnote 78, citing “*See* Qwest Request for Reconsideration, Minnesota arbitration (April 9, 2007), p. 5 (regarding Qwest’s Performance Assurance Plan (PAP): if “the Qwest technician classifies the order as customer not ready, it is excluded from the calculation entirely”).” Remaining silent in the ICA as to “when you define a jeopardy as Qwest caused and when you define it as CNR,” as proposed by Qwest (*see* Row 1), provides Qwest with more flexibility to unilaterally classify the order as CNR to exclude it from the PAP calculation entirely.

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EVIDENCE IN THE RECORD SUPPORTING ESCHELON’S JEOPARDY PROPOSALS – ISSUES 12-71, 12-72 & 12-73

R o w #	ESCHELON LANGUAGE¹ (Column 1)	EVIDENCE SUPPORTING ESCHELON LANGUAGE – INCLUDING QWEST DOCUMENTS & ADMISSIONS (Column 2)	“QWEST’S EVIDENCE”² (Column 3)	ESCHELON COMMENTS TO QWEST’S RESPONSE (Column 4)
			<p>current practice.</p> <p>And</p> <p>[3]While this specific portion of Eschelon’s language may mirror Qwest’s current process, [4]it is Qwest’s position that resolving these issues is better handled on an industry wide basis as a part of the CMP.</p>	<p>the PID or PAP, nor any public policy, allowing for that result.</p> <p>[2] Qwest refers to “Eschelon’s proposal” when, in fact, this statement applies only to the single phrase “the day before.”⁶⁶ (That phrase is not the subject of the language in Col. 1 of this Row. <i>See</i> Row 7.) <i>See</i> Exhibit Eschelon 3, Johnson Direct, p. 75, line 4 – p. 76, line 19; Exhibit Eschelon 127, Johnson Rebutal, p. 18, line 3 – p. 23, line 4; Exhibit Eschelon 141, Johnson Surrebuttal, p. 64, lines 12-15.</p> <p>[3]As to the language in Col. 1 of this Row, Qwest admits that it “may mirror Qwest’s current process.” Despite this admission as to Qwest’s policy, the evidence shows that Qwest deviates from it in practice.⁶⁷ Unlike in CMP when Qwest admitted the deviations were non-compliance to a documented process,⁶⁸ in these proceedings Qwest defends the deviations. It seeks a result that allows Qwest to continue to</p>

⁶⁶ Exhibit Eschelon 3, Johnson Direct, p. 74, footnote 93, citing Minnesota arbitration Hrg. Ex. 1 (Albersheim Dir.), p. 67, line 21 (referring to all of Eschelon’s proposal, without the phrase “the day before,” as Qwest’s “current PCAT process”); Minnesota Tr., Vol. 1, p. 37, lines 16-23 (Ms. Albersheim). (“Q Other than that phrase, at least a day before, is Eschelon’s proposal consistent with Qwest’s practice? A Current practice, yes, except for that sentence.”).

⁶⁷ Despite Qwest’s admission that its process requires Qwest to issue an FOC, in this proceeding Qwest defends its classification in practice of several jeopardies as CNR(Eschelon-caused) in situations in which Qwest sent no FOC at all after the jeopardy cleared. *See* Exhibit Eschelon 3.76, Johnson, lines, 1, 2, 3, 4, 5, 6, 10, 4,16, 17, 18, 21; Eschelon used Eschelon 3.76 for ease of reference because the lines are numbered. *See* also Qwest/27.

⁶⁸ *See*, e.g., Exhibit Eschelon 3.74, Johnson, p. 3 (February 26, 2004 CMP materials).

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				<p>deviate in this manner, even though Qwest testified that it is not appropriate to assign a CLEC-caused (CNR) jeopardy if the CLEC does not have adequate notice that the circuit is being delivered (with the agreed upon process for adequate notice consisting of an FOC). <i>See</i> Rows 5-6.</p> <p>[4] Jeopardies have a long history in CMP, and this history and later events (which are summarized primarily in Exhibit Eschelon 3.71 and Exhibit Eschelon 3.78) provide ample evidence that sending this issue back to CMP will not resolve the problem. <i>See</i> Exhibit Eschelon 3, Johnson Direct, p. 81, line 8 – p. 84, line 17. <i>See also</i> Row 6.</p>
10	<p>12.2.7.2.4.4.2 If CLEC establishes to Qwest that a jeopardy was not caused by CLEC, Qwest will correct the erroneous CNR classification and treat the jeopardy as a Qwest jeopardy.</p>	<p>Qwest’s witness testified that: “We don't disagree with the notion that a CNR jeopardy should be assigned appropriately.”⁶⁹</p> <p>“Q. Eschelon's proposal there is if CLEC establishes to Qwest that a jeopardy was not caused by CLEC, Qwest will correct the erroneous CNR classification and treat the jeopardy as a Qwest jeopardy. Do you see that? A. Yes. Q. That's Qwest's process as well; correct?”</p>	<p>Qwest discussed its position on this issue in the first entry of this document.</p>	<p><i>See</i> Row 1. Qwest provided no evidence, nor any public policy reason, why Qwest should not correct an erroneous classification.</p>

⁶⁹ Exhibit Eschelon 1.5, Starkey, p. 11 (MN Tr., Vol. 1, p. 94, lines 5-6 (Albersheim)). *See also* Washington Docket No. 063061, Hearing Ex. No. 178.

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	<i>Issue 12-73</i>	<p>A. Yes. Q. And can you imagine a circumstance under which a CLEC might not want to have that? A. No.”⁷⁰</p> <p>Qwest testified this Eschelon language is Qwest’s current process;⁷¹ therefore, this Eschelon language cannot be inconsistent with the existing PIDs/PAP and thus requires no modification of them.</p>			
11		<p><i>Note:</i> Qwest added the information in Column 3 to the matrix, so there were no Eschelon Columns 1 and 2.</p>		<p>[1]QWEST EVIDENCE THAT THE PIDs/PAP PROVIDE SOMETHING DIFFERENT (Original Caption) [2] (Note – Eschelon’s caption of this section is misleading. Eschelon sets forth all of its evidence in support of</p>	<p>[1]Eschelon’s WA matrix contained this caption. Each row under this caption indicated that Qwest provided no evidence of a different result. When responding to Eschelon’s matrix, Qwest deleted this Eschelon column and replaced it with the “Qwest’s Evidence”</p>

⁷⁰ Exhibit Eschelon 1.6, Starkey, p. 7 (AZ Tr., Vol. 1, p. 64, line 19 – p. 65, line 3 (Albersheim)). See also Washington Docket No. 063061, Hearing Ex. No. 178.

⁷¹ Exhibit Qwest, Albersheim Direct, p. 57, lines 11-12 and Washington Docket No. 063061, Hearing Ex. No. 1, p. 68, line 32 – p. 69, line 1. See also Exhibit Eschelon 1.5, Starkey, p. 6 (MN Tr. Vol. 1, p. 34, lines 16-23 (Albersheim)), cited at Exhibit Eschelon 3 Johnson Direct, p. 40, footnote 36; Exhibit Eschelon 3, Johnson Direct, p. 74, footnote 93 and Exhibit Eschelon 3R, Johnson Rebuttal, p. 17, footnote 55. Ms. Albersheim’s Minnesota testimony was also quoted in Washington Docket No. 063061, Hearing Ex. No. 71, p. 224, footnote 734. See also Washington Docket No. 063061, Hearing Ex. No. 73.

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				<p>its language in its column and then artificially constrains Qwest’s response to commentary on PIDS/PAP). [3]Qwest’s responsive comments are not intended to exhaustively address the issues, but rather to provide a reference. Qwest relies on its testimony and briefing to fully address these issues.</p>	<p>column. [2] The caption accurately stated the purpose of the column – to provide Eschelon’s response to Qwest’s then specific claim about the PIDS/PAP. The caption was not misleading; Qwest would have simply preferred another purpose. There was no constraint on Qwest’s response, as Eschelon left that job to Qwest in its own Brief. [3] Eschelon agrees that the information in the Attachment, for both Parties, is not exhaustive, and that the record and briefing address the issues.</p>
12		<p><i>Note:</i> Qwest added the information in Column 3 to the matrix, so there were no Eschelon Columns 1 and 2.</p>		<p>[1] [see Footnote 2 above referencing Exhibit Eschelon 3.75 and 3.76] . . . (These exhibits relate to the same set of orders</p>	<p>[1] The informal “communication” to which Qwest refers and suggests that Eschelon should rely upon in lieu of contract rights is</p>

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				<p>and shows the communication that took place between Qwest and Eschelon technicians in jeopardy situations. [2] These records demonstrate extensive efforts to resolve issues quickly. In nearly every single instance, Qwest delivered service before the supplemented due date.). [3] Exh. No. 117 [Exhibit Eschelon 3.75] provides over a hundred examples of situations where Eschelon received no</p>	<p>potential communication that is not part of Qwest’s documented jeopardy process,⁷² yet Qwest would have it replace the agreed upon FOC. See Row 6. Qwest admits this process is not documented as an external process in Qwest’s PCAT.⁷³ Furthermore, these potential communications do not serve the function of providing <i>advance</i> notice (<i>i.e.</i>, notice in time to prepare for delivery, as opposed to communications at the time of delivery, when</p>

⁷² See Qwest CMP meeting minutes for CR PC011403-1 or PC072303-1. See Exhibit Eschelon 3.72 and 3.73 (minutes from meetings). A search for the words “tech”, “technician”, communication(s)” and “informal” in CMP monthly meetings and ad hoc calls related to the above CRs shows Qwest did not discuss such informal communications, suggest that CLECs should depend on some type of informal communication in place of an FOC, or commit that Qwest had an internal process to always informally communicate advance notice of delivery or even represent that this informal communication always takes place. Particularly given Qwest’s suggestion that CMP activity necessarily results in PCAT language, it is telling that Qwest has pointed to no PCAT language documenting its alleged practice of providing advance notice through informal communications.

⁷³ See OR Tr., p. 76 line 19 – p. 77 line 2.

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				<p>FOC. In 76% of these examples, Qwest delivered and Eschelon accepted service on the due date. In several additional instances, Eschelon accepted service before the due date.)</p>	<p>the opportunity to prepare in advance has passed). Qwest’s own technician notes show that the purpose of the communications (when they occurred) was to “test” or to “turn up” the circuit/service,⁷⁴ rather than to provide notice of when Qwest would be turning up the service. These communications, when they occur, come too late to allow advance preparation. <i>See also</i> Exhibit Eschelon 3, Johnson Direct, p. 93, line 17 – p. 95, line 6; OR Transcript, p. 199 line 19 – p. 202 line 24. [2] When Qwest attributes a missed due</p>

⁷⁴ See, e.g., Exhibit Eschelon 3.76, Johnson (Qwest technician notes in column entitled “Qwest Review From MN RA-30”) at p. 6 (“Contacted Eschelon to attempt to turn up the circuit”); pp. 8-9 (“Contacted [ER] at Eschelon at 16:58 he said he would test and call back. [ER] called back at 17:23 can’t see signal. Problem originally thought to be on CLEC side. 4/15 found trbl to be in Qwest wiring”); p. 16 (“referred order to CLEC to test”); p. 21 (“called [ER] at Eschelon, talked to [ER] advised ready to test and accept”).

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				<p>date to Eschelon by classifying the jeopardy as CNR, Qwest requires Eschelon to supplement its request for a later due date and this “almost always” results in a delay longer than the standard interval.⁷⁵ Regarding the 22 examples (Exhibit Eschelon 3.76), although Qwest attempts to suggest this delivery is early, early means earlier than the supplemented due date (Col. 3).⁷⁶ In other words, service delivery is still untimely, even if delivered earlier than</p>

⁷⁵ Minnesota Hrg. Tr. Vol. I p. 43, lines 8-17 (Ms. Albersheim).

⁷⁶ Any reference to provisioning “on the same day that the supplemental order was submitted should not be construed as the CLEC requested due date. For example, in the example in Row 2 (Exhibit Eschelon 3.76), Eschelon’s requested due date (i.e., for timely delivery) was Feb. 9th. Qwest missed that date. Qwest called to attempt delivery on the 10th but had not sent a timely FOC allowing Eschelon to prepare. Qwest sent a CNR jeopardy notice on Feb. 11th, which was a Friday. On Monday the 14th, Eschelon placed a supplemental order. Although Qwest provisioned the service on the same day that the supplemental order was submitted (Feb. 14th), service delivery was late because the requested due date was Feb. 9th.

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				<p>an otherwise longer delay. No supplemental order would have been required if Qwest had not erroneously said it was CNR. Qwest’s statements recognize that, in these examples, the <i>requested due date</i> was missed (<i>i.e.</i>, service to the customer was delayed).⁷⁷ Eschelon is seeking advance notice to avoid delay and help ensure “timely” delivery of the circuit.⁷⁸ Timely delivery is not always synonymous with faster or “quickly.” Faster is not better, if it means that Eschelon is given insufficient proper notice to</p>

⁷⁷ The requested due date is the due date Qwest confirms with an FOC. Qwest’s own documentation states: “The FOC is your acknowledgement that Qwest has received your request, created a Qwest service order, and *established a due date for your request*. The FOC provides you details for you to coordinate the overall provisioning and installation of the requested services” Exhibit Qwest, 1R.4 Albersheim, p. 4.

⁷⁸ See, e.g., Exhibit Eschelon 3, Johnson Direct, p. 68, line 15 – p. 72, line 8.

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				<p>prepare. To provide excellent service to its customers, Eschelon needs an opportunity to plan its resources, make arrangements for customer premise access, and set customer expectations – just as Qwest allows itself an opportunity to do these things for itself.⁷⁹</p> <p>[3] Regarding Exhibit Eschelon 3.75, another way to view Qwest’s 76% figure is that <i>one in four times</i> of these examples, Qwest failed to provide an FOC following the Qwest facility jeopardy, and thus Eschelon was not able to accept service by the original due date.⁸⁰</p>

⁷⁹ Exhibit Eschelon 3, Johnson Direct, p. 72, line 9 – p. 74, line 10.

⁸⁰ OR Tr. P. 21, lines 4-11 (Albersheim).