Gregory J. Kopta (WSBA No. 20519)
Davis Wright Tremaine LLP
2600 Century Square
1501 Fourth Avenue
Seattle, Washington 98101-1688
Telephone: 206-628-7692
Facsimile: 206-628-7699
Email: gregkopta@dwt.com

Gregory Merz
Gray Plant Mooty
500 IDS Center
80 South Eighth Street
Minneapolis, Minnesota 55402
Telephone: 612-632-3257
Facsimile: 612-632-4257

Karen L. Clauson
Senior Director of Interconnection/Associate General Counsel
Integra Telecom
730 2nd Ave. South, Suite 900
Minneapolis, MN 55402
Telephone: 612 436 6026
Facsimile: 612 436 6816
Email: klclauson@integratelecom.com

On behalf of Eschelon Telecom of Utah, Inc.

BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

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

ESCHELON TELECOM OF UTAH, INC.'S PETITION FOR RECONSIDERATION, REVIEW, OR REHEARING

I. INTRODUCTION

Pursuant to Utah Administrative Code R746-100-11.F, Eschelon Telecom of Utah, Inc. ("Eschelon") respectfully petitions the Utah Public Service Commission ("Commission") to reconsider, review or rehear the Report and Order on Arbitration of Interconnection Agreement issued July 11, 2008 in this matter (the "Report and Order"). Eschelon continues to believe that the interconnection agreement ("ICA") language that it has proposed for each issue in this case is supported by the evidence and represents the better alternative from the perspective of the public interest. Nonetheless, in this Petition, Eschelon does not address every issue not decided in its favor. Instead, Eschelon requests reconsideration, review or rehearing with respect to the key issues of Intervals (Issue 1-1 and subparts) and the contract language for Unapproved Rates (Issue 22-90).

II. DISCUSSION

First, Eschelon begins with an Executive Summary that focuses on three points raised in the Report and Order regarding intervals. A fuller discussion, including citations to the record, follows the Executive Summary. Eschelon asks the Commission to adopt Eschelon's Proposal #1, which was adopted by the Minnesota Commission and recommended by the Washington arbitrator. Second, given the need for consistency with Commission procedures described in the Report and Order, Eschelon asks the Commission to adopt simplified, revised language that was recently adopted by the Oregon Commission regarding unapproved rates. Finally, regarding timing of the compliance filing of the ICA, Eschelon asks the Commission to establish a deadline that is on or after 30 days after issuance of a final order (after petitions for reconsideration, review, or rehearing) in this matter.

A. INTERVALS (ISSUE 1-1 AND SUBPARTS)

EXECUTIVE SUMMARY – INTERVALS

Does Eschelon's Proposal #1 "impose significant burdens on Qwest" due to "individual ICAs"?[1]

No. Per Eschelon's Proposal #1, no amendment is needed when intervals are shortened. *No* individual ICAs are required, so long as Qwest does not lengthen intervals, consistent with its practice of many years. Qwest has shortened intervals dozens of times and lengthened intervals only once. Qwest admits there was no objection to its one interval increase. If Eschelon does not object to lengthening the interval, a mutually agreed upon amendment is easily obtained, particularly via the streamlined letter-agreement process.

Does Eschelon's Proposal #1 concern not "leaving" interval changes in CMP and "moving" them to ICA amendments?[2]

No. Interval length reductions will remain in CMP, consistent with Qwest's current practice. Regarding lengthening intervals, Eschelon's proposal is not a change in process. Intervals have traditionally been contained in ICAs, such as Exhibit C to the SGAT. The CMP Document does not allow Qwest to lengthen an interval in a parties' ICA (as opposed to an interval on Qwest's web page). There is no "move," therefore, to ICA amendments. Amendments are contemplated by ICAs and the SGAT. Change in law provisions, for example, require an amendment, and Qwest suggested change in law may be a future reason to lengthen an interval. The fact that Qwest has rarely ever lengthened an interval in CMP, and ***never*** when the increase was disputed, is consistent with the CMP Document's scope provision stating the ICA controls, despite Qwest's current claim that it may lengthen intervals in CMP. The party seeking to lengthen an existing interval should bear the burden of obtaining the interval change via ICA amendment.

Is it necessary to find that Qwest has "abused," or will abuse, CMP[3] **to adopt Eschelon's Proposal #1**?

No. This is not a complaint case seeking remedies for abuse. In this arbitration proceeding, the issue is the appropriate language for inclusion in the ICA to establish the terms on which the parties will operate going forward. Important terms, such as interval maximums, belong in a filed ICA. The FCC, when addressing the scope of the Act's mandatory filing requirement, rejected Qwest's narrow view of the content of ICAs and pointed out that §252(a)(1) does not so limit the types of agreements that carriers must submit to state commissions. Eschelon properly submitted its interval ICA language. The FCC has created no special "web-posting exception" to the filing requirement for postings (such as a SIG or PCAT) that are made via CMP, as advocated by Qwest. The important role that intervals play in providing quality service to customers and giving CLECs a meaningful opportunity to compete weighs heavily in favor of contractual certainty with respect to interval length maximums.

---

1 Report and Order, p. 9.

2 Report and Order, p. 9.

3 Report and Order, p. 9.

1. Intervals and the Dispute Defined

The length of the time interval between a CLEC's order submission and the due date for Qwest's delivery of the ordered service to CLEC dictates the timing of a number of significant activities. It dictates the scheduling of activities that a CLEC must perform to accept the service from Qwest and to prepare for providing service to CLEC's end user customer, as well as the due date upon which the end user customer is scheduled to receive working service. Provisioning intervals, therefore, are critical to Eschelon's ability to provide timely service to its end user customers on the date they expect service.[4] A longer interval means longer delays. Intervals are thus a key term of interconnection.

The Utah Statement of Generally Available Terms ("SGAT"), for example, contains intervals in the SGAT itself,[5] rather than referring to an outside source, such as Qwest's web-posted Service Interval Guide ("SIG").[6] Like the Utah SGAT, the proposed Qwest-Eschelon ICA[7] contains a number of intervals in Exhibit C[8] and language in the body of the agreement addresses those intervals.[9] Qwest admits that "Eschelon does not

---

[4] Eschelon Exhibit E1 (Starkey Dir.), p. 108, lines 1-11. See also Report and Order, p. 9 ("interval lengths are very important to CLECs").

[5] See, e.g., Utah SGAT §8.4 (collocation intervals) & SGAT Exhibit C (service interval table).

[6] Section 2.3 of the Utah SGAT states: "Unless otherwise specifically determined by the Commission, in cases of conflict between the SGAT and Qwest's Tariffs, PCAT, methods and procedures, technical publications, policies, product notifications or other Qwest documentation relating to Qwest's or CLEC's rights or obligations under this SGAT, then the rates, terms and conditions of this SGAT shall prevail. To the extent another document abridges or expands the rights or obligations of either Party under this Agreement, the rates, terms and conditions of this Agreement shall prevail." This same language (except that "Agreement" is substituted for "SGAT") is agreed upon language in Section 2.3 of the parties' proposed ICA.

[7] The body of the proposed ICA is Exhibit 4 to Eschelon's Petition for arbitration, filed on April 30, 2007 ("Petition"). An updated Qwest-Eschelon multi-state draft of the body of the ICA was provided to the Arbitrator on Oct. 10, 2007.

[8] Exhibit C to the proposed ICA is Exhibit 5(C) to Eschelon's Petition.

[9] See, e.g., the SGAT and agreed upon language in the parties' proposed ICA at ¶¶9.1.7, 9.2.2.1, 9.2.2.9.1.3, 9.2.2.9.7.1, 9.3.5.2.3; 9.6.4.1.3 (all quoted in footnote below).

seek to change any Qwest intervals."[10] There is no dispute, therefore, that the intervals in proposed Exhibit C and the ICA[11] accurately reflect the intervals that are in place today.[12] This is true whether the intervals are agreed upon or disputed (with the latter being the minority of the intervals in Exhibit C,[13] where Eschelon proposes to add intervals to Exhibit C for products in the ICA and Qwest disagrees).

The dispute concerns how changes to certain intervals may be made during the term of the ICA. Eschelon proposes either that all intervals in the ICA (including those Eschelon proposes to add to Exhibit C) be changed (shortened and lengthened) via a simple letter-amendment process (*Eschelon Proposal #2*); or, that intervals in the ICA (including those Eschelon proposes to add to Exhibit C) be shortened via Qwest's Change Management Process ("CMP") so that only increases, if any, to the length of intervals in the ICA require a letter-amendment (*Eschelon Proposal #1*). Both the Washington ALJ and the Minnesota Commission selected Eschelon's Proposal #1.[14]

Qwest takes the position that intervals in Exhibit C should be changed through CMP, and not via an ICA amendment. Qwest's proposed language states:

---

[10] Qwest Post-Hearing Brief, p. 4, lines 1-2.

[11] In addition to intervals in Exhibit C, the parties have agreed to a number of intervals that appear in the body of the ICA. As indicated in agreed upon language on page 5 of Exhibit C, intervals for collocation appear in Section 8.0 of the ICA and intervals for number portability appear in Section 10.0 of the ICA. See Exhibit C, p. 5, §§7.0-8.0. Collocation intervals appear in Section 8.4, which is entirely agreed upon/closed language. Similarly, the interval language in Section 10 (primarily in Section 10.2.5) is entirely agreed upon/closed language.

[12] Qwest Post-Hearing Brief, p. 4, lines 1-2.

[13] The majority of the language and intervals in Exhibit C to the proposed ICA is agreed upon. (See black text in Exhibit C.) Only relatively few portions of Exhibit C are open for resolution by arbitration. (See redlined text in Exhibit C; *see also* Joint Disputed Issues Matrix (8/16/07), Issues 1-1(c)-(d), pp. 3-4.)

[14] Arbitrator's Report and Decision, *In the Matter of the Petition for Arbitration of an Interconnection Agreement between Qwest Corporation and Eschelon Telecom, Inc. Pursuant to 47 U.S.C. Section 252(b)*, **Washington** Docket No. UT-063061, Order No. 16 (Jan. 18, 2008), p. 9, ¶ 20 ("WA ALJ Report"). **Minnesota** – Eschelon Exhibit 2.24, p. 25 (MN Arbitrators' Report, ¶ 22), *aff'd*, March 30, 2007 MN Order Resolving Arbitration Issues, p. 22, ¶1 (Eschelon Exhibit 2.25). In **Oregon**, although the Commission did not adopt Eschelon's language, the Commission indicated that its Arbitrator's decision "does ***not*** require that service intervals currently included in the ICA must now be dealt with in the CMP." OR Order No. 08-365, Docket No. ARB 775 (July 7, 2008), p. 6 (emphasis added).

1.7.2 Notwithstanding any other provision in this Agreement, the attached Exhibit C will be modified pursuant to the Change Management Process ("CMP") without requiring the execution of an amendment.

With its language, Qwest seeks to reverse operation of the language in the ICA (and SGAT) that indicates that products will be provisioned in accordance with the intervals in Exhibit C.[15] Eschelon's language, in contrast, is consistent with those ICA provisions, as well as the ICA provisions requiring an amendment to modify the terms of the ICA, as discussed below.

2. <u>Neither the CMP Document Nor the Federal Act Relegates Maximum Interval Lengths to the Change Management Process</u>.

Qwest's position is inconsistent with the very document which governs operation of CMP (the "CMP Document").[16] The CMP Document states that changes to intervals "in *Qwest's* Service Interval Guide ("SIG")" may be made through CMP.[17] Significantly, the CMP Document does *not* refer to making changes in CMP to intervals in parties' interconnection agreements, Exhibit C of those agreements, or the SGAT.[18] Instead, the CMP Document is very clear that ICA terms can conflict with changes in

---

[15] See, e.g., the SGAT and ***agreed upon*** language in the parties' proposed ICA, both stating: "Installation intervals for Unbundled Network Elements are contained in Exhibit C" (¶9.1.7); "Unbundled Loops shall be provisioned in accordance with Exhibit C" (¶9.2.2.1); "For basic installation of existing 2/4 wire analog Loops, Qwest provides a Quick Loop with or without Local Number Portability (LNP) option that enables CLEC to receive the Quick Loop installation interval as set forth in Exhibit C (¶9.2.2.9.1.3); In addition, intervals in Exhibit C will apply. (¶9.2.2.9.7.1); "Once the FCP is in place, the Subloop Provisioning intervals contained in Exhibit C shall apply" (¶9.3.5.2.3); "The installation intervals have been established and are set forth in Exhibit C, Section 2.0 of this Agreement." (¶9.6.4.1.3).

[16] Qwest Exhibit 1 (Albersheim Direct), p. 4, lines 9-13 ("The current CMP was designed by a joint group that included Qwest and a number of CLECs. Eschelon was an active participant in this process. Extensive negotiations took place in meetings from the fall of 2001 to the fall of 2002. ***The end result was the Wholesale Change Management Process Document that governs the CMP today***.") (emphasis added). The CMP Document is in the record as both Qwest Exhibit 1.1 and Eschelon Exhibit 3.10.

[17] Qwest Exhibit 1.1 (CMP Document) at Section 5.4.5 (increases to SIG intervals; Level 4 change) (emphasis added); *see also* Section 5.4.3 (decreases to SIG intervals; Level 2 change).

[18] *See id*.; *see also* Eschelon Exhibit 1R (Starkey Reb.), p. 62, line 15 – p. 63, line 1.

CMP and, when they do, the ICA governs.[19] This principle is so important and so integral to CMP in relation to the ICA that language must appear in all CMP notices to inform CLECs receiving the notice that it does not apply to them if it conflicts with their ICAs.[20]

Eschelon's proposed language is consistent with the governing ICA (and SGAT) provisions that indicate that products will be provisioned in accordance with the intervals in Exhibit C.[21] It is also consistent with agreed upon language in ICA Section 5.30.1 (establishing that changes to the ICA are generally made by amendment),[22] as well as other ICA provisions requiring an ICA amendment. Change in law provisions, for example, require an ICA amendment,[23] and Qwest has suggested change in law may be a

---

[19] The CMP Document (Qwest Exhibit 1.1) at Section 1.0 states: "In cases of conflict between the changes implemented through this CMP and any CLEC interconnection agreement (whether based on the Qwest SGAT or not), the rates, terms and conditions of such interconnection agreement shall prevail as between Qwest and the CLEC party to such interconnection agreement. In addition, if changes implemented through this CMP do not necessarily present a direct conflict with a CLEC interconnection agreement, but would abridge or expand the rights of a party to such agreement, the rates, terms and conditions of such interconnection agreement shall prevail as between Qwest and the CLEC party to such agreement." About CMP, the arbitrators in Minnesota found that the CMP Document "permit[s] the provisions of an ICA and the CMP to coexist, conflict, or potentially overlap." MN ALJ Report, ¶21.

[20] Qwest is required, per the CMP Document, to include this language in CMP notices. *See* CMP Document (Qwest Exhibit 1.1), §5.4, which states (with emphasis added): "The following defines five levels of Qwest originated product/process changes and the process by which Qwest will originate and implement these changes. None of the following shall be construed to supersede timelines or provisions mandated by federal or state regulatory authorities, certain CLEC facing Web sites (*e.g.*, ICONN and Network Disclosures) or individual interconnection agreements. ***Each notification will state that it does not supersede individual interconnection agreements***."

[21] See, e.g., the agreed upon language in the parties' proposed ICA and SGAT language, quoted in footnote 15 above.

[22] See, e.g., agreed upon language in the parties' proposed ICA, ¶5.30.1: "Except as otherwise provided in this Agreement, the provisions of this Agreement may not be amended, modified or supplemented unless executed in writing and signed by an authorized representative of both Parties. In addition, no course of dealing or performance or failure of a Party to strictly enforce any provision of this Agreement shall be construed as an amendment, modification, supplement to, or waiver of any such provision. By entering into this Agreement neither Party waives any rights granted to them pursuant to the Act."

[23] Proposed ICA, Section 2.2 ("To the extent that the Existing Rules are vacated, dismissed, stayed or materially changed or modified, then this Agreement shall be amended to reflect such legally binding modification or change of the Existing Rules.").

future reason to lengthen an interval.[24] The amendment requirement was implicit in the agreed upon portions of the ICA (and SGAT) without Eschelon's express language. Qwest's practice of changing the parties' ICA intervals by shortening them in CMP despite the CMP Document's reference to Qwest's SIG only,[25] however, indicates that the issue of changes to intervals should be addressed more specifically in ICA language.

Important terms of service offerings -- such as maximum interval lengths that determine when Eschelon may meet its customers' due date expectations -- belong in a filed ICA. In a *Declaratory Ruling*, the FCC addressed the scope of the mandatory filing requirement under Section 252(a)(1) of the Telecommunications Act, as follows:

> [W]e find that an agreement that creates an ongoing obligation pertaining to resale, number portability, dialing parity, access to rights-of-way, reciprocal compensation, interconnection, unbundled network elements, or collocation is an interconnection agreement that must be filed pursuant to section 252(a)(1). This interpretation, which directly flows from the language of the Act, is consistent with the pro-competitive, deregulatory framework set in the Act. This standard recognizes the statutory balance between the rights of competitive LECs to obtain interconnection terms pursuant to section 252(i) and removing unnecessary regulatory impediments to commercial relations between incumbent and competitive LECs. ***We therefore disagree with Qwest that the content of interconnection agreements should be limited to the schedule of itemized charges and associated descriptions of the services to which those charges apply***. Considering the ***many and complicated terms*** of interconnection typically established between an incumbent and competitive LEC, ***we do not believe that section 252(a)(1) can be given the cramped reading that Qwest proposes***. Indeed, on its face, section 252(a)(1) does not further limit the types of agreements that carriers must submit to state commissions.[26]

---

[24] Qwest Exhibit 1R (Albersheim Reb.), p. 35, line 7 – p. 36, line 5.

[25] Qwest Exhibit 1.1 (CMP Document) at Sections 5.4.3 & 5.4.5 (discussed above).

[26] Memorandum and Order, *In the Matter of Qwest Communications International Inc. Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements under Section 252(a)(1),* WC Docket No. 02-89, (rel. October 4, 2002) ("*Declaratory Ruling*") at ¶ 8 (footnotes omitted) (emphasis added).

In its *Forfeiture Order*,[27] the FCC also expressly rejected Qwest's claim that the *Declaratory Ruling* authorized posting of information regarding service offerings on a website in lieu of an agreement filed with, and approved by, state commissions. The FCC observed: "At no point did we create a general 'web-posting exception' to section 252(a)…[A] 'web-posting exception' would render that provision meaningless, since CLECs could not rely on a website to contain all agreements on a permanent basis. Moreover, unlike the terms of an SGAT, web-posted materials are not subject to state commission review, further undermining the congressionally established mechanisms of section 252(e)."[28] In other words, the FCC has created no special "web-posting exception" to the ICA filing requirement for intervals posted in Qwest's SIG. An interconnection term as integral to providing quality service to customers as the maximum interval for service delivery should require an ICA amendment to lengthen the interval. Regarding the additional intervals that Eschelon seeks to add to Exhibit C (see Issues 1-1(c)-(d)),[29] they should be part of the filed ICA because of their importance to delivery of products in the ICA (LIS Trunking and products with an ICB interval) and so an ICA letter-amendment is required to lengthen these intervals as well.

3. Eschelon's Proposal #1 Offers a Compromise that Recognizes the Difference Between Shortening Intervals (to Deliver Service to Customers Earlier) and Lengthening Intervals (Which May Delay Service to Customers).

---

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

[28] *FCC Forfeiture Order* at ¶ 32, discussed in Eschelon Exhibit 1 (Starkey Direct), p. 25, lines 1-18.

[29] Some of the disputed language in Exhibit C is addressed as part of issues other than Issue 1-1. For example, Qwest's proposed deletion of the heading "UCCRE" in Section 2.0 of Exhibit C relates to Issue 9-53.

For years, Qwest could shorten intervals in CMP without objection,[30] despite the CMP Document's requirement that the ICAs control over CMP,[31] because CLECs generally agree with interval length decreases.[32] If the interval between order submission and delivery of service to CLECs is shortened, CLECs can then provide service more quickly to their own customers.

In contrast, in the case of lengthening of intervals, Qwest has acknowledged: "It is likely that there will be disputes any time Qwest attempts to lengthen an interval."[33] Although Eschelon has offered to enter into an ICA amendment for all interval changes (Eschelon Proposal #2), Eschelon has accounted for these practical realities in its Proposal #1. Eschelon's Proposal #1 allows shortening of intervals (which is likely mutually agreeable) via CMP while requiring a streamlined[34] ICA letter-amendment (to ensure either agreement or prior Commission resolution of any disagreement[35]) for lengthening existing intervals. Only under Eschelon's proposal is the interval's *status*

---

30 Qwest Exhibit 1R (Albersheim Reb.), p. 28, lines 7-17.

31 Qwest Exhibit 1.1 (CMP Document) at Section 1.0 (Scope) (quoted in above footnote).

32 Eschelon Exhibit 1R (Starkey Reb.), p. 72, lines 13-17 ("For the most part, I agree with Ms. Albersheim's statement that there are times that Qwest and CLECs should be able to flexibly and efficiently move forward with changes to service intervals. Those times are when there is agreement about the change, and I have shown that this has happened 39 times since 2002 (all reductions), but no times at which increased intervals were needed"); *see also* Eschelon Exhibit 1 (Starkey Direct), pp. 117-118.

33 Qwest (Albersheim) Minnesota Rebuttal in Minnesota Docket P-5340, 421/IC-06-768, September 22, 2006, p. 35, lines 6-7, cited in Eschelon Exhibit 1R (Starkey Reb.), p. 73 at note 258.

34 This streamlined ICA amendment process is modeled after the letter-agreements used for new products in Section 1.7.1 of both the Utah SGAT and agreed upon language in the parties' proposed agreement. See Eschelon Exhibit 1R (Starkey Reb.), p. 64, line 5 – p. 66, line 2. Qwest is also familiar with this process specifically as to intervals, from adoption of Eschelon's Proposal #1 in Minnesota (MN ALJ Report, ¶ 22, aff'd, MN Order Resolving Arbitration Issues, p. 22, ¶1), where the new ICA is currently in effect.

35 Agreed upon language in proposed ICA Section 5.30.2 states: "Either Party may request an amendment to this Agreement at any time by providing to the other Party in writing information about the desired amendment and proposed language changes. If the Parties have not reached agreement on the requested amendment within sixty (60) Days after receipt of the request, either Party may pursue resolution of the amendment through the Dispute resolution provisions of this Agreement."

quo – the interval in place today[36] – automatically maintained as to the length of those intervals while resolution of a dispute is pending. The arbitrator in the Washington Qwest-Eschelon arbitration said:

> Adopting Eschelon's first proposal, in essence, preserves the *status quo* and requires changes through a stable process unless the service provisioning intervals would be reduced, not lengthened. Provisioning intervals are important terms and conditions in the ICA. Therefore, parties must negotiate changes and request Commission approval as amendments to the ICA.[37]

4. <u>The Onus Should be on Qwest When It Seeks to Lengthen an Existing Interval</u>.

In CMP, Qwest's position is that the onus is upon Eschelon to act to prevent a change in the status quo (the existing interval length) when Qwest notifies CLECs that Qwest intends to lengthen an interval in Exhibit C, even when the interval has long been in place and relied upon by Eschelon.[38] Under Qwest's proposal, Qwest may implement a change to an interval in Exhibit C in CMP, unless Eschelon takes a number of steps to maintain the existing interval length, including "filing comments, escalation, postponement, dispute resolution or filing a complaint with the Commission."[39] Under Qwest's approach, for example, Eschelon must expend resources to battle *both* whether Qwest's modification to the existing interval will be postponed and whether it should permanently be changed, even though the interval is in Exhibit C to the ICA.

Qwest's approach is the reverse of what should happen when Qwest is the party seeking to change an interval in Exhibit C of the ICA without Eschelon's agreement. If

---

[36] The intervals are the same as the intervals currently in place between Qwest and Eschelon. See Qwest Post-Hearing Brief, p. 4, lines 1-2 ["Eschelon does not seek to change any Qwest intervals"].

[37] WA ALJ Report, ¶¶ 20-21.

[38] Joint Disputed Issues Matrix (8/16/07), p. 1 (Qwest proposed language for Section 1.7.2 – quoted in text above). Qwest's position is that its language allows changes to agreed upon intervals in ICA Exhibit C over CLEC's objection without an amendment, despite agreed upon language in the ICA stating that service will be provisioned in accordance with the intervals in Exhibit C (see, e.g., ¶9.2.2.1) *See id*.

[39] Qwest Exhibit 1 (Albersheim Direct), p. 29, lines 15-17.

Qwest seeks to modify a term of the ICA, such as lengthening the intervals currently contained in the parties' proposed ICA,[40] Qwest is the party which should have to request the change in the parties' ICA from Eschelon and, if the companies do not agree, seek dispute resolution from the Commission.

Despite the CMP Document's requirement that the ICAs control over CMP changes and despite the fact that the only interval lengthened to date in CMP was modified without objection,[41] Qwest has made it clear that its position is that it may rightfully lengthen them in CMP, even when the interval is in Exhibit C to a CLEC's ICA and the CLEC disagrees with the modification.[42] When adopting Eschelon's language regarding Issues 1-1 and subparts (Intervals), the Minnesota Commission affirmed the Minnesota ALJs' finding that:

> 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.[43]

The Arbitrator in Oregon pointed to an example of this regarding Issue 12-67 (Expedites), stating:

> Qwest argues that its current process was properly implemented through the CMP, but the record casts doubt upon that assertion. Evidence presented by Eschelon strongly indicates that the 2006 changes implemented by Qwest are (a) contrary to the parties' long-standing interpretation of the ICA, (b) inconsistent with representations made to Eschelon and other CLECs in the CMP process, and (c) contrary to the governing provisions of the CMP Document. Because of the

---

40 The majority of the language and intervals in Exhibit C to the proposed ICA is agreed upon. (See black text in Exhibit C as filed with the arbitration Petition on April 30, 2007.) Although Qwest opposes adding to Exhibit C the intervals for LIS trunking and products with an ICB interval (Issues 1-1(c)-(d)), Qwest recognizes that the intervals proposed by Eschelon in Exhibit C for these products accurately reflect the intervals in place today. Qwest Post-Hearing Brief, p. 4, lines 1-2.

41 Qwest Exhibit 1.1 (CMP Document) at Section 1.0.

42 See, e.g., Qwest Exhibit 1R (Albersheim Reb.), p. 28, lines 10-18.

43 Eschelon/29, Denney/7, Minnesota Arbitrators' Report, ¶ 22, *aff'd* MN PUC Arbitration Order, Eschelon/30"], p. 7 & p. 22, ¶1. Cf. Arbitrator's Decision, p. 9 (discussed below).

> outstanding questions surrounding the implementation of Qwest's current process for no-fee expedites, that process should not be incorporated in the ICA.[44]

Although the Report and Order states that there is no evidence presented that Qwest has abused the CMP specifically with respect to interval changes,[45] the issue in this arbitration proceeding is the appropriate language for inclusion in the ICA to establish the interval change terms on which the parties will operate going forward. The important role that intervals play in providing quality service to end user customers and giving CLECs a meaningful opportunity to compete weighs heavily in favor of contractual certainty with respect to maximum interval lengths. The onus should be on Qwest to seek a modification to the ICA when it seeks to lengthen an existing interval without Eschelon's agreement. The Commission should adopt Eschelon's Proposal #1 which, as discussed in the next section, limits the need to seek an amendment at all to a scenario which Qwest says is rare (lengthening of intervals).

5. Eschelon's Letter-Amendment Proposal Is Not Burdensome Because It Should Rarely, If Ever, Be Used.

The Report and Order states that "Qwest has in recent years shortened intervals dozens of times and lengthened intervals only once. . . ."[46] Assuming no change in this practice, under Eschelon's Proposal #1, Qwest virtually always obtains its desired result of handling interval changes in CMP. No amendment is needed when intervals are

---

44 OR Arbitrator's Decision, p. 64.

45 Report and Order, p. 9.

46 Report and Order, p. 9. In fact, in its Response to the Petition in this matter, Qwest claimed it had ***never*** lengthened an interval. Qwest Response, p. 38, lines 22-24, where Qwest said: "To date, since Qwest obtained 271 approval, ***all*** such modifications have been reductions in the lengths of service intervals for various services and have been for the benefit if CLECs." Qwest also stated at page 39 of its Response: "Eschelon seeks protection against modifications that ***have not occurred even once*** since 271 approval, that is, the lengthening of service intervals…" (emphasis added) (quoted in Eschelon Exhibit 1, Starkey Direct, p. 117 at note 230). See also MN ALJ Report (Eschelon Exhibit 2.24), ¶ 22 ("Qwest has only shortened [intervals] in the last four years"). When Qwest later indicated that it had increased an interval once, Qwest said there was no objection to the one, undisputed interval increase. Qwest Exhibit 1R (Albersheim Reb.), p. 28, lines 16-17.

shortened, regardless of how many dozens of times that could occur.[47] The Report and Order states that "it would not be reasonable to impose significant administrative burdens on Qwest" by requiring individual contract amendments.[48] No individual contract amendments are required per Eschelon's Proposal #1, however, so long as Qwest does not increase intervals, consistent with its practice over the years since 271 approval.[49] The fact that Qwest has rarely ever lengthened an interval in CMP, and never when the increase was disputed,[50] is consistent with the CMP Document's scope provision stating the ICA controls, despite Qwest's current claim that it may lengthen intervals in CMP. Unless Qwest plans to lengthen intervals far more frequently than in the past, Eschelon's first proposal should be of little concern to Qwest.

In contrast, a single interval increase – such as an increase in the length of time between submission of an order and delivery of an important product such as unbundled loops – is significant for Eschelon and its end user customers. The Commission should adopt Eschelon's proposed language for Issue 1-1 and subparts and, specifically, Eschelon's Proposal #1 for Issue 1-1.

B. UNAPPROVED RATES – Contract Language (Issue 22-90)

---

47 Eschelon's Proposal #1 provides: "1.7.2 If the Commission orders, or Qwest chooses to offer and CLEC desires to accept ***intervals longer than those set forth in this Agreement, including Exhibit C, the Parties shall amend this Agreement*** under one (1) of the two (2) options set forth in Section 1.7.1 (an interval Advice Adoption Letter or interval interim Advice Adoption Letter terminating with approval of negotiated Amendment) pertaining to the new interval (rather than new product) (or as otherwise ordered by the Commission). The forms of such letters are attached hereto as Exhibits N -O.
1.7.2.1 Notwithstanding any other provision in this Agreement, the intervals in Exhibit C ***may be shortened pursuant to the Change Management Process (CMP)*** without requiring the execution or filing of any amendment to this Agreement." Joint Disputed Issues Matrix (8/16/07), pp. 1-2 (emphasis added).

48 Report and Order, p. 9.

49 Qwest Response to Petition, p. 38, lines 22-24.

50 Qwest Exhibit 1R (Albersheim Reb.), p. 28, lines 16-17.

Issue 22-90 and subparts ("Unapproved Rates") address situations when Commission-approved rates do not exist. Unapproved Rates are interim rates.[51] In Issue 22-90, Eschelon sought contract language addressing unapproved rates to obtain some check on Qwest's ability to impose unapproved, unreviewed rates. Consistent with Eschelon's position, the Arbitrator does not recommend excluding rate issues from this arbitration in which both parties made interim rate proposals and recommends interim rates in this proceeding.[52] This fact alone is an improvement over the situation to date, when Qwest has been able to unilaterally announce rates, force them upon CLECs by withholding service if not agreed upon,[53] and charge its unilateral rates indefinitely by choosing not to obtain approved rates from the Commission.

Eschelon also requested ICA language to address a specific scenario -- when Qwest has been providing an existing product or service at no additional charge (which may result, for example, when the costs are recovered in another rate) and then Qwest begins charging for that product or service, without seeking an ICA amendment or prior Commission approval. Eschelon proposed ICA language is consistent with the current

---

[51] *See* proposed ICA Section 24.4.1.1, which states in the portion of this Section that is closed: "Rates reflected on Exhibit A that have not been approved by the Commission in a cost case and require Commission approval shall be considered as Interim rates ("Interim Rates") by the Parties . . . ."

[52] Eschelon's interim rates were adopted because the burden of preparing cost studies and filing a cost docket rests on Qwest. See Report and Order, p. 98. The ALJ in Washington likewise recommended Eschelon's interim rates, based on Qwest not providing cost studies. See WA ALJ Report, ¶173.

[53] In the Eschelon complaint case against Qwest under the existing Arizona ICA, Staff in Arizona concluded that "CLECs should not be forced into signing" the Qwest 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 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. See Eschelon Exhibit 2 (Denney Direct), p. 165, lines 1-7; see also Eschelon Exhibit 2SR (Denney Surreb.), p. 33, line 18 – p. 34, line 2 & p. 123, note 323.

process in Minnesota.[54] Under Qwest's desired approach to unapproved rates, CLECs would have no remedy for this scenario because Qwest could impose its rate unilaterally. The Commission found, however, that "Qwest has an obligation to provide access to the elements at issue and to seek Commission approval for new UNEs and UNEs previously offered at no charge.[55] The Report and Order concludes that Eschelon's proposals for "Sections 22.6.1 and 22.6.1.1 are unnecessary and potentially confusing and conflicting with established procedures."[56]

Eschelon intends that rates be approved by the Commission using its normal rules and procedures. Including language in the ICA which requires Qwest to seek prior Commission approval in this particular scenario would help minimize future disputes and incent Qwest to bring proposed rate increases to the Commission in a timely and more efficient manner. Given the objections stated in the Report and Order to Eschelon's proposed language based on the need for clarity and consistency with Commission procedures, all of Eschelon's proposed language for Sections 22.6.1 and 22.6.1.1 could be replaced simply with a statement of how this particular scenario will be addressed, such as:

> 22.6.1 Qwest shall obtain Commission approval before charging for a UNE or process that Qwest has provided previously at no additional charge. Qwest may

---

[54] October 2, 2002 Order in MN PUC Docket CI-01-1375 ("MN 271 Cost" Docket). Specifically, "Summary of the Commission's findings and conclusions" contains the following provisions on pp. A-6 and A-7: **"Price Under Development:** Qwest shall obtain Commission approval before charging for a UNE or process that it has previously offered without charge. Qwest may negotiate an interim price for a UNE and service not previously offered in Minnesota provided that Qwest file a permanent price, and related cost support, with the Commission within 60 days of offering the UNE or service. ALJ Report p. 64. ….**New UNE Price:** When offering a new UNE, Qwest shall file a cost-based price, together with an adequate description of the UNE's application, for Commission review within 60 days of offering. Qwest may charge a negotiated rate immediately if part of an approved interconnection agreement (ICA), provided the ICA is filed for Commission review within 60 days." See Eschelon Exhibit E2R (Denney Reb.), pp. 132-133, note 348. The ALJ in Washington recommended Eschelon's language. WA ALJ Report, ¶169.

[55] Report and Order, p. 98.

[56] Report and Order, p. 97.

> request a generic cost proceeding pursuant to Commission rules and procedures or, if the rate is negotiated, may request Commission approval of an amendment to this Agreement.

To address concerns raised about clarity with respect to Commission procedures, this language confirms that the Commission retains full flexibility to establish procedures, determine whether an interim rate will be set, ensure the rate is available to other CLECs, etc.

The commission in Oregon, which likewise initially rejected Eschelon's proposed language for Sections 22.6.1 and 22.6.1.1 based on the need for clarity and consistency with commission procedures, adopted the above-quoted proposed language after reviewing Eschelon's exceptions to the Oregon Arbitrator's Report, in which Eschelon proposed this same revised language. The Oregon Commission stated:

> The Commission finds that the revised language proposed by Eschelon effectively eliminates the concerns raised by the Arbitrator while retaining the basic concept that Qwest should obtain Commission approval before charging for a UNE or process previously offered without charge. We agree with Eschelon that such a requirement is reasonable and appropriate. Moreover, we agree that it will minimize the likelihood of complaint proceedings to litigate rate changes arising from this particular scenario. Accordingly, we conclude that Eschelon's revised language for Section 22.6.1 should be included in the ICA.[57]

Eschelon asks the Commission to adopt the revised language to ensure that this important scenario is covered in the ICA in a manner that encourages timely, orderly, and efficient resolution of unapproved rate issues.

C. TIMING OF COMPLIANCE FILING OF THE ICA

The Report and Order states that "the Parties are directed to submit an interconnection agreement that includes the terms and conditions reflecting their mutual

[57] Order No. 08-365, Docket No. ARB 775, p 7.

agreement and the resolution of the disputed issues discussed herein."[58] Eschelon asks that the Commission establish a deadline that is on or after 30 days after issuance of a final order (after any petitions for reconsideration, review, or rehearing) in this matter. One compliance filing, after a final order, will avoid the expense and volume associated with potential multiple filings (making one compliance filing now based on the Report and Order and then, if any modifications are ordered based on any petitions for reconsideration, review, or rehearing, making a second filing of the ICA).

III. CONCLUSION

Eschelon respectfully petitions the Commission to reconsider, review or rehear the Report and Order, and:

1. Regarding intervals (Issue 1-1 and subparts), adopt Eschelon's language for Issues 1-1 and subparts (Intervals), including Eschelon's Proposal #1 for Issue 1-1.

2. Regarding contract language for unapproved rates (Issue 22-90), adopt the following contract language, which was recently adopted by the Oregon Commission:

> 22.6.1 Qwest shall obtain Commission approval before charging for a UNE or process that Qwest has provided previously at no additional charge. Qwest may request a generic cost proceeding pursuant to Commission rules and procedures or, if the rate is negotiated, may request Commission approval of an amendment to this Agreement.

[58] Report and Order, p. 98.

3. Regarding the timing of a compliance filing of the ICA, including exhibits, establish a deadline that is on or after 30 days after issuance of a final order (after any petitions for reconsideration, review, or rehearing) in this matter.

Eschelon appreciates the Commission's consideration of this matter.

Dated: August 8, 2008

By _____
Karen L. Clauson
Senior Director of Interconnection/
Associate General Counsel
Eschelon Telecom, Inc.
730 2nd Ave. South, Suite 900
Minneapolis, MN 55402
Telephone: 612-436-6026
Facsimile: 612-436-6816

Gregory J. Kopta
Davis Wright Tremaine LLP
2600 Century Square
1501 Fourth Avenue
Seattle, Washington 98101-1688
Telephone: 206-628-7692
Facsimile: 206-628-7699
Email: gregkopta@dwt.com

Gregory Merz
Gray Plant Mooty
500 IDS Center
80 South Eighth Street
Minneapolis, Minnesota 55402
Telephone: 612-632-3257
Facsimile: 612-632-4257

ON BEHALF OF ESCHELON TELECOM OF UTAH, INC.