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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,) DOCKET NO. 07-2263-03
Pursuant to 47 U.S.C. Section 252 of the)
Federal Telecommunications Act of 1996)

**ESCHELON TELECOM OF UTAH, INC.'S REPLY TO PETITION OF
QWEST CORPORATION FOR RECONSIDERATION, REVIEW OR
REHEARING**

I. INTRODUCTION

Pursuant to Utah Administrative Code R746-100-11.F, Eschelon Telecom of Utah, Inc. (“Eschelon”) respectfully submits this reply to Qwest Corporation’s (“Qwest”) petition to reconsider, review or rehear the Utah Public Service Commission’s (“Commission”) Report and Order on Arbitration of Interconnection Agreement issued July 11, 2008 in this matter (the “Report and Order”).

II. DISCUSSION

Eschelon opposes Qwest’s request for reconsideration of the Order. Qwest is asking the Commission to reverse the Commission’s well-considered rulings with respect to three issues: (A) Issue 5-9 (Deposits - Definition of Repeatedly Delinquent); (B) Issue 9-33 (Network Maintenance & Modernization - Affect on End User Customers); and (C) Issues 12-71, 12-72 and 12-73 (Jeopardies). Qwest presents no new evidence and, to the extent that Qwest provides citations in its Petition for Reconsideration, cites information that has already been rebutted in the extensive record in this matter. The Commission’s decisions in the Report and Order on these issues are consistent with the facts, the law and the public interest.

A. Deposits - Definition of “Repeatedly Delinquent” (Issue 5-9)

The parties agreed that Qwest will be able to obtain a deposit if payment is “Repeatedly Delinquent,” but disagreed over how “Repeatedly Delinquent” should be defined. Eschelon proposed that payment be considered “Repeatedly Delinquent” if made more than thirty days after the due date in three consecutive months or, in the

alternative, three or more times in a six-month period. The Report and Order adopts Eschelon’s first proposal (the “three consecutive months” definition), stating:

Accordingly, the ALJ finds Eschelon’s proposed section 5.4.5 language requiring late payment for ‘three (3) consecutive months’ before invoking the deposit requirement reasonably balances Qwest’s desire for financial assurance with Eschelon’s desire that it not too quickly be required to pay a potentially large security deposit.¹

All of the arbitrators which have considered Issue 5-9 that have issued decisions in the Qwest-Eschelon ICA arbitrations to date have also adopted Eschelon’s language.² Each commission that has ruled on the arbitrators’ recommendations has adopted the arbitrator’s recommendation to use Eschelon’s language for Issue 5-9.³

As Qwest has acknowledged, the ICA provisions regarding *late payment charges* are designed to provide the incentive for timely payment,⁴ whereas the *deposit* provisions are intended more to protect against ultimate non-payment.⁵ As the arbitrator in Minnesota found, Eschelon’s deposit language adequately protects Qwest against the deposit-related concern:

If incentive for timely payment is the concern, there are other remedies in the agreement that address this issue (*e.g.*, penalties for late payment). The term at issue is a demand to make a security deposit, which is a serious step that could jeopardize Eschelon’s cash flow, depending on the amount of the deposit required. A remedy this dramatic should be reserved for more serious financial issues than late payment three times over the course of one year. Eschelon’s proposal, to define the term as payment of overdue amounts for three consecutive

¹ Report and Order, pp. 26-27.

² Arizona ALJ Report, p. 22, lines 21-23, *aff’d* by AZ Commission, Decision No. 70356, p. 23, AZ Docket No. T-03406-A-06-0572 (Eschelon Proposal #2); Minnesota ALJ Report, p. 14, ¶55, *aff’d* by MN Commission, Order Resolving Arbitration Issues, MN Docket No. P-5340,421/IC-06-768 (Eschelon Proposal #1); Oregon ALJ Report, pp. 25-27, *aff’d* by OR Commission, Order No. 08-365, p. 3, Oregon Docket No. ARB 775 (Eschelon Proposal #1); Washington ALJ Report, ¶55 (no ruling by Commission yet), WA Docket No. UT-063061 (Eschelon Proposal #2).

³ *See id.*

⁴ Qwest (Easton), MN TR., Vol. 1, 150:8-13 (Eschelon Exhibit 1.5, p. 17 of 50, attached to Starkey Direct).

⁵ Qwest (Easton), MN TR., Vol. 1, 150:1-7 (Eschelon Exhibit 1.5, p. 17 of 50, attached to Starkey Direct).

months, would adequately protect both parties when there is a legitimate concern about future payment. Eschelon's language should be adopted.⁶

Similarly, the arbitrator in Oregon said: "Eschelon's proposal of three consecutive months identifies the potential risk of nonpayment more accurately than Qwest's, which is more focused on preventing 'slow pay' situations."⁷

Qwest relies on the fact that its proposed language was in the SGAT for this particular issue and therefore should not be changed.⁸ In Oregon, the arbitrator expressly rejected Qwest's argument, stating: "Although Qwest's language is currently included in the Oregon SGAT and Commission-approved ICAs, I am persuaded that Eschelon's proposal identifies more precisely the circumstances under which security deposits should be required."⁹ Although different from SGAT language, Eschelon's three-consecutive month language is the same as is found in other ICAs to which Qwest is a party, including its ICA in Utah with McLeodUSA, and its ICA with an Eschelon subsidiary, ATI, in Washington.¹⁰

Eschelon has been a steady Qwest customer for years and is logically most unlikely to simply stop paying for the essential services it purchases. Qwest has presented no evidence to show that it has ever failed to collect undisputed amounts due from Eschelon, or that its late payment charges at § 5.4.8 of the ICA have failed to keep it whole. As stated in the Report and Order, Eschelon's language reasonably balances Qwest's desire for financial assurance with Eschelon's desire that it not too quickly be

⁶ Minnesota ALJ Report, p. 14, ¶55, *aff'd* by MN Commission, Order Resolving Arbitration Issues, MN Docket No. P-5340,421/IC-06-768 (adopting Eschelon Proposal #1).

⁷ Oregon ALJ Report, p. 27, *aff'd* by OR Commission, Order No. 08-365, p. 3, Oregon Docket No. ARB 775 (adopting Eschelon Proposal #1).

⁸ Qwest Petition for Reconsideration, p. 3.

⁹ OR ALJ Report, p. 27.

¹⁰ Denney Dir., Exh. No. 2, pp. 91-92.

required to pay a potentially large security deposit.¹¹ Qwest’s petition to reconsider, review or rehear the decision regarding Issue 5-9 should be denied.

B. Network Maintenance and Modernization - Affect on End User Customers (Issue 9-33)

Issue 9-33 concerns Eschelon customers who have a working circuit and are up and running without any service problems. Qwest then makes changes to transmission parameters that were not requested by Eschelon or Eschelon’s customer. Any resulting customer disruption is unexpected from the end user customer’s perspective because the problem was caused by a Qwest-initiated maintenance or modernization activity – not an Eschelon-initiated or customer-initiated request.¹² The expectation reflected in Section 9.1.9 should be that, once any anticipated temporary disruption (such as a brief outage during non-working hours needed to perform the work) or any emergency (such as when a brief anticipated outage develops into an unanticipated extended outage) has ended, the end user customer’s service will work, as it worked before.

The Report and Order achieves this result by requiring Qwest to return transmission quality to “previous levels.”¹³ This is a modification of language initially proposed by the Minnesota Department of Commerce (“DOC”) in the Minnesota Qwest-Eschelon arbitration.¹⁴ The DOC proposed, and the Minnesota commission adopted, the following language:

9.1.9 . . . If such changes result in the CLEC’s End User Customer experiencing unacceptable changes in the transmission of voice or data, Qwest will assist the CLEC in determining the source and will take the

¹¹ Report and Order, pp. 26-27.

¹² See Starkey Direct (Eschelon Exhibit 1), pp. 143-145.

¹³ Report and Order, p. 41.

¹⁴ MN ALJ Report ¶140; Starkey Direct (Eschelon Exhibit 1), p. 148, lines 17-18.

necessary corrective action to restore the transmission quality to an acceptable level if it was caused by the network changes....¹⁵

Qwest's witness testified that the DOC's reference "to 'unacceptable changes' is as vague as Eschelon's 'no adverse affect' language. Eschelon does not define 'unacceptable' or tie the term to any measurable industry standard. In addition, while the proposal would require Qwest to restore transmission quality to 'an acceptable level,' Eschelon does not define what is 'acceptable' or tie this term to any industry standard. As a result, Qwest would have no meaningful way of knowing, first, whether a change to its network is permitted under the ICA or, second, what specific corrective steps to take in response to an impermissible change."¹⁶ The Commission agreed with Qwest that the "language regarding 'unacceptable changes' in transmission quality is unnecessarily vague" and made two changes to the above DOC language: (1) modified the first reference to "unacceptable changes" with language adopted in Arizona and Oregon; and (2) modified the second reference (to "acceptable level") to replace it with the explicit term "previous levels,"¹⁷ as follows:

9.1.9 . . . If such changes result in the CLEC's End User Customer experiencing ~~unacceptable changes~~ a degradation in the transmission quality of voice or data, such that CLEC's End User Customer loses functionality or suffers material impairment, Qwest will assist the CLEC in determining the source and will take the necessary corrective action to restore the transmission quality to ~~an acceptable level~~ previous levels if it was caused by the network changes....

¹⁵ MN ALJ Report, ¶ 140, *aff'd* in relevant part by the MN PUC Arbitration Order.

¹⁶ Qwest Exhibit 3R (Stewart Reb.), p. 22, lines 7-15; see also Qwest Exhibit 3SR (Stewart Surreb.), p. 14, lines 3-13.

¹⁷ Report and Order, p. 41.

Qwest did not petition for reconsideration with respect to the first of these changes, but Qwest does request reconsideration of the second of these changes, regarding “previous levels” (shown in gray shading above).¹⁸

Qwest asserts that, by being more explicit regarding the restoration of service required by Section 9.1.9, the Commission reached a result that is inconsistent with the Minnesota DOC’s use of “acceptable level,” which was also adopted in Oregon and Arizona.¹⁹ Qwest’s allegation of an inconsistency is cause for concern – and justifies being explicit – because the DOC’s language also requires Qwest to restore service quality to previous levels. As the Minnesota arbitrators explained, the “reference to correcting transmission quality to ‘an acceptable level’ does not, as Qwest argues, make this language unacceptably vague. The language merely commits Qwest to taking action *to restore transmission quality to that which existed before the network change.*”²⁰ The inconsistency alleged by Qwest does not exist,²¹ because both the phrase “acceptable level” and “previous levels” require Qwest to take action to restore transmission quality to that which existed before the network change. The fact that Qwest now suggests that the phrase “acceptable level” does not require Qwest to restore transmission quality to previous levels, however, supports the Commission’s adoption of more explicit language. It will aid in avoiding future disputes.

¹⁸ Qwest Petition for Reconsideration, p. 5 (“Qwest’s exception relates to the adoption of ‘previous levels’ in place of Eschelon’s language that would require Qwest to restore services to ‘an acceptable level.’”).

¹⁹ Qwest Petition for Reconsideration, p. 6.

²⁰ MN ALJ Report, ¶ 142 (emphasis added), *aff’d* in relevant part by the MN PUC Arbitration Order.

²¹ In addition to being an inaccurate claim because the result is not inconsistent across states, Qwest’s claim is itself inconsistent. For both of the other issues addressed by Qwest in its Petition for Reconsideration (Issues 5-9 and 12-71), Qwest argues that the Utah Commission should adopt a result that is *different* from both Arizona and Oregon (as well as other states). Contrary to Qwest’s claims (on page 6) about the need for consistency across states, this shows that, when an inconsistent result would be in Qwest’s favor, then Qwest advocates inconsistency across multiple states. The Commission should evaluate each issue on its merits and not accept Qwest’s results-oriented approach.

Qwest states that the phrase “restore the transmission quality to previous levels if it was caused by the network changes” means “the same transmission levels that existed before the network change.”²² Qwest then suggests the Commission adopted an “inflexible obligation” to restore transmission to “previous levels,” which would allegedly prevent Qwest from implementing quality improvements.²³ If the ability to provide *better* quality transmission levels were Qwest’s concern, the parties likely have been able to agree upon ICA language. Specifically, Qwest would have had no objection to Eschelon’s Proposal #1 for Issue 9-33, which prevents “adverse” affects to an end user customer’s service,²⁴ clearly allowing quality improvements of benefit to Eschelon and its customers.

The disputed issue, however, is whether Qwest may diminish quality. Eschelon has long argued that its customers’ service should not be adversely affected. Eschelon’s position was accurately captured by the Washington ALJ, who also concluded that “‘modernization’ and ‘maintenance’ efforts should enhance or maintain, not diminish, transmission quality.”²⁵ When Qwest asserts that its network changes are “*usually* positive for customers” and create only a “very small *chance of negative*

²² Qwest Petition for Reconsideration, p. 5.

²³ Qwest Petition for Reconsideration, p. 5 (emphasis added). Qwest claims that this would be a “detriment” to “Eschelon and its customers.” *Id.* Qwest, a competitor of Eschelon’s, is not the appropriate party to determine whether Eschelon will benefit or not. If Qwest were acting in Eschelon’s interests, Qwest would agree to Eschelon’s proposed language.

²⁴ See Starkey Direct (Eschelon Exhibit 1), p. 146 (Eschelon proposal #1).

²⁵ WA ALJ Report, ¶83 (adopting the DOC language - Eschelon’s proposal #2). *See also* AZ Commission Decision 70356, p. 39, lines 24-25 (“fairness dictates that Qwest assist in restoring an end user’s functionality in the event a network modification caused a *degradation* of service”) (emphasis added); MN Arbitrators’ Report, ¶ 142 (“The language merely commits Qwest to taking action to restore transmission quality to that which existed before the network change”), *aff’d* in relevant part by the MN PUC Arbitration Order; OR ALJ Report, p. 39 (“it is reasonable to expect Qwest to assist Eschelon in restoring customer service”), *aff’d* OR Order No. 08-365; UT Report and Order, p. 41 (“Qwest’s maintenance and modernization activities should not have the effect of *reducing* the transmission quality offered to CLEC end users”).

consequences,”²⁶ Qwest indirectly admits that its changes may negatively affect, or diminish, quality of service to customers. In fact, the Commission found that significant adverse consequences to customers have resulted from Qwest changes to transmission parameters. The Commission said: “That significant, albeit unintended, disruptions can occur is evidenced by Qwest’s effort to reset its dB loss parameter.”²⁷

The dB loss example is described on pages 154-158 of Mr. Starkey’s direct testimony (Eschelon Exhibit 1) and is documented in Eschelon Exhibit 3.43 (Qwest/Eschelon email exchanges). As Mr. Starkey explained: “This example demonstrates that Qwest will defend a non-working circuit (that previously worked just fine for the Customer) as being acceptable, within transmission limits, and meeting the ICA if it can conceivably be described as within those limits, even though it *does not work*, when another setting – also within transmission limits – would both meet the standard and *work*. Therefore, while it may have seemed obvious (given use of the word ‘minor’ in the ICA) before this example arose that the service should work *as it did before* Qwest performed its network maintenance and modernization activities, it is now clear that the ICA needs to expressly address this point.”²⁸ In the Report and Order, the Commission correctly prevents Qwest from re-defining “acceptable” in this manner by replacing “acceptable” with a more explicit reference to the previous quality levels at which the end user customer’s service was working before Qwest disrupted it.

²⁶ Qwest Petition for Reconsideration, p. 4 (emphasis added).

²⁷ Report and Order, pp. 40-41. *See also* OR ALJ Report, p. 39 (“The problems experienced by Eschelon as a result of Qwest’s plan to reset the dB loss parameter demonstrate that Qwest’s commitment to comply with industry standards does not always guarantee that Eschelon’s end user customers will be protected from significant service disruptions as a result of Qwest’s network maintenance or modernization activities.”).

²⁸ See Starkey Direct (Eschelon Exhibit 1), pp. 158-159 (emphasis modified).

Section 9.1.9, as modified by the Commission, will help ensure that the quality of the transmission before Qwest’s “minor changes” will be restored after Qwest makes changes to transmission parameters. Eschelon should be able to continue to provide working service to its customers using the UNEs for which it has compensated Qwest. If Qwest desires a change to the Commission’s language, the change should be more explicit to prevent unilateral interpretation by Qwest of “acceptable” (as in the dB loss example) and not less explicit, as argued by Qwest. To the extent that the Commission desires to change its language at all, a more explicit change that is much more likely to avoid disputes would be to add “or other mutually agreeable levels,” as follows (in gray shading):

9.1.9 . . . If such changes result in the CLEC’s End User Customer experiencing ~~unacceptable changes~~ a degradation in the transmission quality of voice or data, such that CLEC’s End User Customer loses functionality or suffers material impairment, Qwest will assist the CLEC in determining the source and will take the necessary corrective action to restore the transmission quality to ~~an acceptable level~~ previous levels, or other mutually agreeable levels, if it was caused by the network changes....

This additional phrase would ensure that Qwest may make changes to transmission parameters which the parties agree are positive, while also preventing negative consequences to transmission quality. Network modernization efforts “should enhance or maintain, not diminish, transmission quality.”²⁹

Qwest’s petition to reconsider, review or rehear the decision regarding Issue 9-33 should be denied. If the Commission were to grant Qwest’s petition for reconsideration of the phrase “previous levels,” then the Commission should explicitly state in its Order that the language adopted by the Commission commits Qwest to taking action to restore

²⁹ WA ALJ Report, ¶83.

transmission quality to that which existed before the network change³⁰ and/or order the parties to insert “or other mutually agreeable levels” to Section 9.1.9, as shown above.

C. Jeopardy Notices (Issues 12-71, 12-72 and 12-73)

A jeopardy notice is a notice that Qwest sends to inform a CLEC that a due date is in jeopardy of being missed.³¹ A jeopardy that is attributable to the CLEC or the CLEC’s customer is referred to as a “Customer Not Ready” or “CNR” jeopardy.³² To illustrate the Jeopardies scenario described in Eschelon’s proposed language, Eschelon provided an example in the record in which Qwest failed to provide timely notice³³ and instead notified Eschelon only *nine minutes* before showing up to deliver a circuit.³⁴ This deprived Eschelon of a reasonable amount of time to prepare to accept it, and caused a delay. The resolution in the Report and Order will help ensure timely notice to avoid customer-affecting delays.

The decision to adopt Eschelon’s proposed language on Jeopardies is well grounded in the record. For example, every sentence and phrase of Eschelon’s proposed language for Issues 12-71 – 12-73 (Jeopardies) is supported by the record, including Qwest documentation and admissions, as shown in greater detail in Attachment 2 to

³⁰ MN ALJ Report, ¶ 142, *aff’d* in relevant part by the MN PUC Arbitration Order.

³¹ Eschelon Exhibit 3 (Johnson Dir.), p. 61, lines 1-2.

³² Eschelon Exhibit 3, p. 60, lines 13-14.

³³ As indicated in Exhibit Eschelon 3.76, Johnson, p. 3, footnote 4, the ICA requires Qwest to provide notice via a Firm Order Confirmation (“FOC”) in this situation: “**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 of Attachment 2 to the Post-Hearing Brief) 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.

³⁴ Eschelon Exhibit 3.76/Johnson/14-15 (Row 11).

Eschelon's Post-Hearing Brief ("Evidence in the Record Supporting Eschelon's Jeopardy Proposals").³⁵ In addition, the Report and Order is consistent with the other state Qwest-Eschelon ICA arbitration rulings to date, each adopting Eschelon's language on Jeopardies.³⁶

Nonetheless, Qwest asks the Commission to reconsider its decision to adopt Eschelon's well documented language for ICA Sections 12.2.7.2.4.4, 12.2.7.2.4.4.1, and 12.2.7.2.4.4.2 and replace all of this language with Qwest's proposal, which states in its entirety:

12.2.7.2.4.4 Specific procedures are contained in Qwest's documentation, available on Qwest's wholesale web site.³⁷

In support of this language, Qwest argues that the issue should be dealt with in the Change Management Process ("CMP") because it affects all CLECs.³⁸ Jeopardies has already been through CMP,³⁹ where Qwest confirmed its existing documented process.⁴⁰ Qwest agrees, with the exception of one phrase (at least the day before),⁴¹ Eschelon's language for Issues 12-71 – 12-73 reflects that process.⁴² Inclusion of Eschelon's

³⁵ In addition, Issues 12-71 – 12-73 (Jeopardies) are addressed on pages 137-171 of Eschelon's Post-Hearing Brief.

³⁶ Arizona ALJ Report, pp. 86-87, *aff'd* by AZ Commission, Decision No. 70356; MN Commission Order Resolving Arbitration Issues, p. 21; Oregon ALJ Report, pp. 69-71, *aff'd* by OR Commission, Order No. 08-365, p. 5; Washington ALJ Report, ¶152.

³⁷ Joint Disputed Issues Matrix (8/16/07), pp. 96-98.

³⁸ Qwest Petition for Reconsideration, p. 7.

³⁹ Eschelon Exhibit 3, pp. 81-84 and Eschelon Exhibit 3.71 (jeopardies chronology).

⁴⁰ Exhibit Eschelon 3, Johnson Direct, p. 75, line 4.

⁴¹ Despite Qwest's denials, Qwest's commitment to a time frame of the "day before" is documented, by Qwest, in its own CMP minutes and materials (which also refer to a "documented process" within Qwest). Exhibit Eschelon 3.72 (Qwest-prepared meeting minutes) and Exhibit Eschelon 3.74 (February 26, 2004 CMP materials prepared and distributed by Qwest). *See also* Exhibit Eschelon 3, p. 74, lines 11-18. The CMP documentation shows that Ms. Johnson of Eschelon was present for these CMP discussions (and Ms. Albersheim of Qwest was not). *See* Utah Tr., p. 45, lines 9-24.

⁴² Qwest Exhibit 1, p. 57, lines 11-12 (referring to all of Eschelon's proposal, without the phrase "the day before," as Qwest's "current PCAT process"); Qwest Exhibit 1R, p. 50, lines 20-21 (indicating only that "at least the day before" is allegedly not part of the Qwest process) and Exhibit Eschelon 1.5, p. 6 [MN Tr., Vol. 1, p. 37, lines 16-23 (Ms. Albersheim)].

language in the ICA is particularly needed as a result of Qwest's conduct that is inconsistent and non-compliant with the results of CMP.⁴³ The arbitrator in Oregon said about CMP and Qwest's non-compliance with the result in CMP:

Qwest contends that jeopardy issues should be addressed in the CMP because they affect all CLECs. However, Eschelon has presented substantial evidence demonstrating that Qwest has already committed in the CMP to provide a FOC one day in advance of service delivery. Qwest's refusal to acknowledge its CMP commitment, its past practice of improperly assigning CNRs, and the need to ensure adequate notice in the future all substantiate Eschelon's position that jeopardy language must be included in the ICA to provide the requisite level of business certainty.⁴⁴

The Arizona Commission agreed with the need for business certainty, as opposed to leaving the Jeopardies issue to the website or CMP:

By incorporating the process in the ICA, any new processes developed in CMP that are contrary to the contract language will not take effect automatically. However, we believe Eschelon's proposed language is fair and reasonable and will not undermine the benefits of the CMP. CMP will continue to operate and any new processes developed and agreed to in CMP related to this topic can be adopted in ICA amendments, just as they are with any topic.⁴⁵

The Washington arbitrator also agreed with the need for business certainty, stating: "If Qwest's proposal is adopted, Qwest could unilaterally alter the procedures published on its website. Given the consequences of assignment of jeopardies, it is preferable to have stability regarding this topic."⁴⁶

Qwest denies that Eschelon suffers consequences of assignment of jeopardies, claiming erroneously: "Classifying an order as 'customer not ready' has no adverse

⁴³ Eschelon Exhibit 3, pp. 81-84 and Eschelon Exhibit 3.71 (jeopardies chronology). *See also* summary provided in Eschelon's Post-Hearing Brief (page 141) regarding Jeopardies and the "no Qwest vacillation or violation" myth.

⁴⁴ Oregon ALJ Report, p. 71, *aff'd* by OR Commission, Order No. 08-365, p. 5.

⁴⁵ ACC Decision No. 70356, p. 87, lines 7-11.

⁴⁶ Washington ALJ Report, ¶152.

impact on Eschelon.”⁴⁷ This contention was expressly rejected by the Oregon arbitrator, who specifically found that improperly classifying Qwest-caused jeopardies as CNR “harms Eschelon.”⁴⁸

Contrary to Qwest’s claim of no adverse affect, whether Qwest classifies a jeopardy as Qwest-caused (a “Qwest jeopardy”) or Eschelon-caused (“Customer Not Ready” or “CNR”) may affect whether service to Eschelon’s customer is delayed. When a jeopardy is classified as a CLEC-caused (CNR) jeopardy for “designed” facilities including 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.⁴⁹ A Qwest 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.⁵⁰ In contrast, an erroneous classification of a missed due date as caused by CLEC (“CNR”), when in fact the delay was due to Qwest’s failure to provide an FOC or a timely FOC, will build in this required request for a three-day delay.⁵¹ The Report and Order properly concludes that, when “Eschelon is not prepared to accept service because Qwest has

⁴⁷ Qwest Petition for Reconsideration, p. 8.

⁴⁸ Oregon ALJ Report, p. 71, *aff’d* by OR Commission, Order No. 08-365, p. 5.

⁴⁹ Qwest (Albersheim), MN Tr. Vol. 1, p. 36, line 20 – p. 37, line 2 (Eschelon Exhibit 1.5, p. 6). While Qwest admits that the interval it requires CLECs to request is three days, Ms. Albersheim quibbles with the description of this as a requirement and states that Qwest may attempt to deliver the circuit earlier than three days. *See* Qwest Exhibit 1R, p. 65, lines 16-20. There is no guarantee, however, that the timeframe will be shorter. Because three days is Qwest’s required interval, Qwest may apply it in each case; certainly Eschelon must anticipate that likely possibility. No supplemental order would be required, however, if Qwest sent an FOC after the facility jeopardy cleared and Eschelon accepted the circuit. In other words, Qwest is forcing Eschelon to request a later date (on a supplemental order) to correct Qwest’s failure to send an FOC and then, if it delivers late but less than the three days late, it is telling Eschelon that it ought to be grateful that the delay was not even longer (the entire three-day supplemental order period or more).

⁵⁰ Eschelon Exhibit 3, pp. 63-64.

⁵¹ Eschelon Exhibit 3, p. 64.

failed to provide adequate notice, the consequences of delay should be borne by Qwest, not Eschelon.”⁵²

The Arizona Commission also concluded that Eschelon’s proposal represented a fair balancing of the parties’ interests:

Eschelon’s proposed language does not require Qwest to issue the FOC at least a day in advance of rescheduled delivery, and it provides that Eschelon will use its best efforts to accept delivery even if an FOC is not issued. However, under this language if Qwest does not issue the FOC at least a day in advance, then it can not characterize the failure to deliver as a CNR jeopardy. We believe this is fair. The premise is that there has been a Qwest jeopardy. Eschelon should not be required to commit resources to accept delivery after being notified that Qwest might not be able to deliver the service as expected.⁵³

The Minnesota Commission summarized as follows: “Simply put, Eschelon should not be held responsible when it relies on Qwest’s statement that Qwest will not be able to meet a deadline.”⁵⁴

Contrary to Qwest’s claim that the examples in Qwest Exhibit 1R.9 help show “Eschelon’s proposal will do nothing to speed up service,”⁵⁵ Qwest’s own description of the result in the examples shows that Eschelon’s ICA language will avoid these very delays.⁵⁶ Eschelon’s language will do so by allowing the parties “to set a new appointment time *on the same day*”⁵⁷ instead of requiring Eschelon to submit a supplemental request for a date at least three days out.⁵⁸

⁵² Report and Order, p. 89. See also MN Commission Order Resolving Arbitration Issues, p. 21 (“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 in holding Eschelon responsible when the deadline is missed”).

⁵³ ACC Decision No. 70356, p. 87, lines 7-11.

⁵⁴ MN Commission Order Resolving Arbitration Issues, p. 21.

⁵⁵ Qwest’s Petition for Reconsideration, p. 8 (first bullet).

⁵⁶ Qwest’s Petition for Reconsideration, p. 8 (first bullet) (Qwest “often is able to deliver service on the same day”).

⁵⁷ ICA Section 12.2.7.2.4.4.1 (emphasis added).

⁵⁸ Eschelon Exhibit 3SR, pp. 75-76.

Qwest talks in terms of “faster service”⁵⁹ and speeding up delivery of service, such as in the first bullet point on page 8 of its Petition for Reconsideration.⁶⁰ Eschelon has made it clear that it is seeking advance notice to avoid delay and help ensure “timely” delivery of the circuit.⁶¹ Timely delivery is not always synonymous with “faster.” Regarding the examples in Qwest Exhibit 1R.9, Qwest used the terms “faster” and “early” to mean delivery earlier than the built-in delay (after the original due date but before the supplemented due date).⁶² A delay that is faster than an even longer delay is still slower than delivery on the requested due date. In other words, service delivery is still untimely, even if delivered earlier than an otherwise longer delay. 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.⁶³ Foregoing an FOC⁶⁴ in favor of keeping Eschelon guessing about when Qwest will attempt to deliver service (will it be early? will it be late? will it be late, but earlier than the described three days?)

⁵⁹ Qwest’s Request for Reconsideration Request, *In the Matter of the Petition of Eschelon Telecom Inc. for Arbitration of an Interconnection Agreement with Qwest Corporation Pursuant to 47 U.S. C. §252(b) of the Federal Telecommunications Act of 1996* [“Minnesota Qwest-Eschelon ICA Arbitration”], MPUC Docket No. P-421/CI-07-370; P-421/CI-07-371 (April 9, 2007) [“Qwest MN Reconsideration Request”], p. 1 (cited in Eschelon Exhibit 3SR). The Minnesota Commission rejected Qwest’s Reconsideration Request. See MN Order Denying Reconsideration, MN PUC Docket No. P-5340,421/IC-06-768 (June 4, 2007).

⁶⁰ Qwest Petition for Reconsideration, p. 8 (first bullet); *also* Qwest’s MN Reconsideration Request, p. 3 (Heading 1).

⁶¹ See, e.g., Exhibit Eschelon 3 (Johnson Direct), p. 62, line 15 – p. 63, line 1.

⁶² Qwest’s Reconsideration Request, p. 4; see Qwest Exhibit 1R (Albersheim Rebuttal), p. 65, line 8.

⁶³ Qwest Exhibit 1R (Albersheim Rebuttal), p. 64, lines 11-15. Regarding this testimony about Qwest’s need for flexibility to manage its technicians’ work assignments, see Exhibit Eschelon 3 (Johnson Direct), p. 72, line 9 – p. 74, line 10.

⁶⁴ Regarding Qwest’s suggestion that an FOC is a mere formality, see Eschelon’s response at Exhibit Eschelon 3 (Johnson Direct), p. 93, line 1 – p. 96, line 1. Regarding the ICA’s requirement to provide and FOC, see ICA Section 9.2.4.4.1 (quoted in above footnote).

is not a desirable or efficient approach.⁶⁵ The approach reflected in Eschelon’s ICA language is more accurate and efficient.

The arguments in Qwest’s second, third, and fourth bullet points on page 8 of its Petition for Reconsideration are equally unsound, and have been thoroughly rebutted in the record.⁶⁶ The only other argument that Qwest makes is an indirect suggestion that Eschelon’s language alters the Performance Indicator Definitions (“PIDs”) or Performance Assurance Plan (“PAP”).⁶⁷ Qwest cites no support for this claim, which is unfounded. In Oregon, for example, the arbitrator said: “Eschelon’s proposals advance the goal of the PIDs by ensuring that jeopardies are correctly classified in the future. Improperly classifying Qwest-caused jeopardies as CNRs . . . results in misapplication of the PIDs and PAP.”⁶⁸

⁶⁵ Qwest’s proposed approach of Eschelon preparing for delivery even though it receives no FOC or an untimely FOC means that the Eschelon would be scheduling its personnel for acceptance of service, waiting all day on the due date, and possibly subsequent dates, standing ready to accept Qwest’s service – holding its own employees and the End User Customer – *just in case* Qwest clears its jeopardy in the last moment without adequate notice to Eschelon. In the end, Qwest may not show up. This wastes CLECs’ time and resources, not to mention the inconvenience Qwest is causing the CLEC’s End User Customer. Qwest gives itself three full days to prepare after CLEC is not ready on the due date. Qwest cannot expect Eschelon to staff resources and inconvenience the customer on the off chance that, even though Qwest hasn’t followed the ICA requirement to provide an FOC, it shows up at the doorstep. See Exhibit Eschelon 3 (Johnson Direct), p. 73, line 7 – p. 74, line 10.

⁶⁶ Regarding the second bullet point (informal communications), see Eschelon Exhibit 3, pp. 93-96; the third bullet point (rare), see Eschelon Exhibit 3SR, pp. 69-72; the fourth bullet point (impact), see Eschelon Exhibit 3, pp. 66 & 75-80. A review of the Qwest testimony cited by Qwest in its fourth bullet point shows that this “financial impact” point is simply a restatement of Qwest’s generic CMP argument, which is addressed earlier in this Reply.

⁶⁷ Qwest Petition for Reconsideration, p. 7. By referring to “PAP measurements,” Qwest appears to collapse the performance measurements (PIDs) and the associated payment plan (PAP). See *id.* Regarding Qwest’s claims that Eschelon’s proposed language would impact Qwest’s PIDs even though Eschelon’s language expressly states that nothing in the ICA language modifies the PIDs, see Eschelon Exhibit 3SR, pp. 35-41.

⁶⁸ Oregon ALJ Report, p. 71, *aff’d* by OR Commission, Order No. 08-365, p. 5. Qwest admitted that the PIDs currently require Qwest “to differentiate between Qwest caused and CLEC/customer caused delays.” Qwest Response to Eschelon’s Petition for Arbitration, p. 43, lines 4-6.

Timely delivery of service to the customer is of the utmost importance to Eschelon.⁶⁹ Therefore, Eschelon’s proposal for Issues 12-71 – 12-73 requires proper handling of jeopardies to help ensure timely delivery of service. The Report and Order appropriately concludes that Eschelon’s proposal “is a reasonable proposal since the ICA obligates Qwest to provide an FOC and one day’s notice is not unreasonable to ensure Eschelon adequate time to prepare to accept service.”⁷⁰ The Commission should deny Qwest’s Petition regarding Issues 12-71, 12-72, and 12-73 (Jeopardies).

III. CONCLUSION

Based upon the evidence in this proceeding and the discussion above, Eschelon respectfully requests that the Commission deny Qwest’s petition to reconsider, review or rehear the Commission’s well-considered rulings with respect to Issue 5-9 (Deposits - Definition of Repeatedly Delinquent), Issue 9-33 (Network Maintenance & Modernization - Affect on End User Customers) and Issues 12-71, 12-72 and 12-73 (Jeopardies).

If the Commission were to grant Qwest’s petition for reconsideration of the phrase “previous levels” with respect to Issue 9-33, then the Commission should explicitly state in its Order that the language adopted by the Commission commits Qwest to taking action to restore transmission quality to that which existed before the network change⁷¹ and/or order the parties to insert “or other mutually agreeable levels” to Section 9.1.9, as shown in the discussion of Issue 9-33 above.

⁶⁹ Eschelon Exhibit 3, p. 72, lines 3-4. *See also* Eschelon Exhibit 3, p. 62, lines 17-18 (“Perhaps the **most important consequence** of attributing a jeopardy to a carrier is the **effect on the due date** for providing service.”); *see also* Eschelon Exhibit 3, p. 95, lines 11-13 (“Eschelon will attempt to overcome these obstacles **because delivery of service to its end user customer is so important to Eschelon.**”) (emphasis added).

⁷⁰ Report and Order, p. 89.

⁷¹ MN ALJ Report, ¶ 142, *aff’d* in relevant part by the MN PUC Arbitration Order.

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