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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

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

REBUTTAL TESTIMONY

OF

DOUGLAS DENNEY

ON BEHALF OF

ESCHELON TELECOM, INC.

July 27, 2007

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I. INTRODUCTION

Q. PLEASE STATE YOUR NAME AND BUSINESS ADDRESS.

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

Q. ARE YOU THE SAME DOUGLAS DENNEY WHO FILED DIRECT TESTIMONY IN THIS PROCEEDING ON JUNE 29, 2007?

A. Yes.

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

A. My testimony is organized by subject matter number in the same manner my Direct Testimony is organized. Each subject matter heading may contain one or more disputed issues from the interconnection agreement. For each subject matter, I briefly summarize the issue. In addition, I summarize Qwest's position, as put forth by its respective witness on the subject matter. I also explain the flaws in Qwest's position.

Q. ARE THERE ANY EXHIBITS TO YOUR REBUTTAL TESTIMONY?

A. Yes.

Exhibit Eschelon 2R.1 Minnesota Cost Docket Expedite Charge Nonrecurring Cost Study 9709 filed by Qwest on July 3, 2007 "In the Matter of Qwest Corporation's Application for Commission Review of TELRIC Rates Pursuant to 47 U.S.C. § 251," MPUC Docket P-421/AM-06-713.

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

SUBJECT MATTER NO. 2. RATE APPLICATION & SUBJECT MATTER NO. 3. EFFECTIVE DATE OF LEGALLY BINDING CHANGES

Issue Nos. 2-3 and 2-4: ICA Sections 2.2 (two issues in Section 2.2) & 22.4.1.2

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

A. Issue 2-3 (Application of Rates) and Issue 2-4 (Effective Date of Legally Binding Changes) relate to two open provisions in Section 2.2, which is within Section 2.0 ("Interpretation and Construction") of the ICA.[1] There is some overlap in these issues, so I will discuss them together as I did in my direct testimony. Eschelon has offered two alternate language proposals to resolve Issues 2-3 and 2-4, which are shown in my direct testimony.[2]

Issue 2-3 (the first open provision in Section 2.2 of the ICA) is specific to rates and concerns when Commission-ordered rate changes will take effect. Issue 2-4 is similar to Issue 2-3 in that it concerns when changes of law will take effect (but it is not limited to rates). Eschelon's first proposal to address Issues 2-3 and 2-4 is to leave the portion of 2.2 that is from the SGAT language (and language from the Commission-approved Qwest/AT&T ICA) unchanged (*i.e.*, strike Qwest's proposed additions). Specifically, for Issues 2-3 and 2-4, Eschelon's proposal

[1] Eschelon's proposal #2 includes a component that appears in Section 22.4.1.2, within Section 22 ("Pricing"), of the ICA.

[2] Exhibit Eschelon 2, Denney Direct, pp. 11-14.

includes the following sentence from the SGAT: "Any amendment shall be deemed effective on the effective date of the legally binding change or modification of the Existing Rules for rates, and to the extent practicable for other terms and conditions, unless otherwise ordered." This language respects the authority of the relevant body to determine, at the time it issues an order changing law, when that ruling will take effect. Eschelon has also offered to add the following sentence to address Qwest's stated concerns: "The rates in Exhibit A and when they apply are addressed in Section 22."[3] Section 22 is entitled "Pricing" and lays out the general principles applicable to pricing. It contains a subsection entitled "Interim Rates" (Section 22.4). Closed language in Section 22.4.1 provides that unapproved rates "are Interim Rates under this Agreement."

Eschelon's second, alternative proposal for Issues 2-3 and 2-4 is to add three provisions to Section 2.2 (shown in underlining in my direct testimony)[4] to clean up the distinction that Qwest appears to desire between an "implementation" date and an "effective" date, as well as to supplement the language of Section 22.4.1.2 reserving each company's rights with respect to a true-up of interim rates, and clarifying that if a Commission order is silent with respect to the issue of true-up, the rates will be implemented and applied on a prospective basis.

[3] Eschelon has also indicated Exhibit Eschelon 2, Denney Direct, p.14, footnote 10) that it would agree to add the word "further" to this sentence to recognize that Section 22 (Pricing) is in addition to Section 2.2, as follows: "The rates in Exhibit A and when they apply are ***further*** addressed in Section 22."

[4] Exhibit Eschelon 2, Denney Direct, pp. 12-14.

The first provision of Eschelon's alternate proposal confirms that each party has an obligation to ensure the agreement is amended. Eschelon added this sentence in response to Qwest's allegations that, despite use of the word "shall" in the previous sentence,[5] a party to the ICA could avoid or delay amending it when the law changes.[6] The second provision adds clarification as to the relationship between Section 2.2 and Section 22 (Pricing). Eschelon added this sentence in response to observations made by the witness for the Minnesota Department of Commerce in the Minnesota arbitration proceeding regarding the utility of distinguishing between changes to prices that had been previously approved by the Commission and changes to prices not previously approved.[7] The third provision recognizes that the effective date and implementation date may (or may not) be different and establishes that the burden is on the companies (*i.e.*, not the Commission) to identify when they are different and, if a different date is desired, to request a date different from the effective date for implementation of a ruling. To address Qwest's stated concerns that a presumption is needed in cases when the order is silent on the issue, Eschelon's proposal provides, when the order is silent, the implementation date and effective date are the same, unless the Commission orders otherwise or, if allowed by the order, the parties to the ICA

[5] The parties have agreed that the ICA in Section 2.2 states "this Agreement shall be amended to reflect such legally binding modification or change."

[6] Exhibit Eschelon 2, Denney Direct, p. 21.

[7] Exhibit Eschelon 2, Denney Direct, p. 22. In the sentence which states "Rates in Exhibit A will reflect legally binding decision of the Commission," Qwest proposes to change "will reflect" to "include." (Exhibit Eschelon 2, Denney Direct, p. 17). Section 4.0 of the ICA defines "include" to mean "including but not limited to."

agree otherwise.[8] Eschelon's second, alternative proposal also includes the addition of two sentences to Section 22.4.1.2. In response to Qwest's proposal, Eschelon has proposed two sentences which expressly state the companies reserve their rights with respect to a true-up. Though Qwest previously argued in the Qwest-AT&T arbitrations that an arbitration was not the appropriate forum to argue true-ups of interim rates,[9] Qwest is making the opposite argument here and now wants to set a default with respect to a true-up for interim rates. If the Commission goes that route, Eschelon's proposal number two provides that, if an order is silent as to a true-up, Qwest gets the default provision it seeks, indicating rates will be applied and implemented on a prospective basis (except for new products when Section 1.7.1.2 is used).

Q. REGARDING A TRUE-UP, MR. EASTON TESTIFIES THAT "QWEST IS ATTEMPTING TO AVOID AMBIGUITY IN SITUATIONS WHERE A COMMISSION ORDER DOES NOT SPECIFICALLY STATE A TRUE-UP REQUIREMENT AS PART OF A COST DOCKET ORDER."[10] DOES QWEST'S PROPOSAL EXPRESSLY ADDRESS A TRUE-UP REQUIREMENT?

[8] Exhibit Eschelon 2, Denney Direct, p. 14.

[9] Initial Commission Decision, *In the Matter of Petition of Qwest Corporation for Arbitration of an Interconnection Agreement with AT&T Communications of the Mountain States, Inc. and TCG-Colorado Pursuant to 47 U.S.C. §252(b)*, Decision No. C03-1189, CPUC Docket No. 03B-287T (Oct. 14, 2003) ("Qwest-AT&T Colorado Arbitration Order"), p. 91. *Compare* Qwest-AT&T Colorado Arbitration Order, p. 91 *with* Exhibit Qwest 2, Easton Direct, p. 3, lines 17-22.

[10] Exhibit Qwest 2, Easton Direct, p. 3, lines 18-19.

A. No. Qwest ignores the language of its own proposal. Ironically, although Mr. Easton claims that its proposed language "avoids ambiguity" in cases when the Commission does not specify a true-up requirement,[11] Qwest's proposed language for Sections 2.2 and 22 *does not even mention* the term "true-up." If Qwest's goal is to avoid ambiguity about a true-up, language expressly referring to a true-up (*i.e.*, Eschelon's proposed language above) is less ambiguous than language that does not even use the term (*i.e.* Qwest's proposed language). Mr. Easton testifies that "Under Qwest's proposal, one looks first to the commission order to determine when a rate applies. If the commission order fails to address the issue, a rate change is applied prospectively."[12] In fact, the actual language of Qwest's proposal does the opposite. Under Qwest's proposal, one first looks to the presumption in the ICA (that changes in law "shall be applied on a prospective basis") and *then* consults the commission order ("unless otherwise ordered by the Commission."). Eschelon's language better captures the sequence of events as described by Mr. Easton himself. Yet, even though Eschelon's proposal has been provided to Qwest in other states, Mr. Easton has not identified why Eschelon's proposed language does not satisfy Qwest.

Qwest also ignores other closed language in the ICA as well as Eschelon's alternative proposed language, which specifically addresses the situation Qwest raises. The *closed* Utah language in Section 22.4.1 specifically states: "The

[11] Exhibit Qwest 2, Easton Direct, p. 3, line 18.

[12] Exhibit Qwest 2, Easton Direct, pp. 5-6. *See also* Easton Arizona Rebuttal Testimony (ACC Docket Nos. T-03406A-06-0572/T-01051B-06-0572, 2/9/07), p. 3, lines 2-4.

parties acknowledge that only some of the prices contained in Exhibit A have been approved by the Commission in a cost case. Prices that have not been approved by the Commission shall be considered interim and subject to the following provisions." One of those provisions is Eschelon's proposed 22.4.1.2, which states, "Each Party reserves its rights with respect to whether Interim Rates are subject to true-up. If, however, the Commission issues an order with respect to rates that is silent on the issue of a true-up, the rates shall be implemented and applied on a prospective basis from the effective date of the legally binding Commission decision as described in Section 2.2." So, if Qwest's concern comes to pass and the commission issues an order that is silent on a true-up for interim rates, Eschelon's alternative proposal (which contains a component in Section 22.4.1.2) will provide the clarity that Qwest apparently seeks. In addition, *closed* language in Section 1.7.1.2 (mirroring the SGAT language) provides regarding new products under an interim advice letter: "The rates, and to the extent practicable, other terms and conditions contained in the final amendment will relate back to the date the Interim Advice Adoption Letter was executed." Qwest's suggestion that true-up requirements are not addressed adequately in the ICA without its proposed language is inaccurate. Eschelon has believed, based on the ICA language, that a Commission order would not be silent on the issue of a true-up in the case of new products. Given Qwest's claimed desire to avoid ambiguity, perhaps the last sentence of Section 22.4.1.2 should end with the clause "except for new products as described in Section 1.7.1.2."

Q. DO YOU AGREE WITH MR. EASTON'S ASSERTION THAT PROSPECTIVE APPLICATION OF RATES IS THE MORE APPROPRIATE PROCESS?[13]

A. Not necessarily. The argument that Mr. Easton makes about the need for predictability in order to make informed business decisions[14] is more appropriately made to the Commission in the context of a particular rate issue, rather than in the abstract. In the Qwest-AT&T arbitrations, Qwest made this very argument. For instance, Qwest's position on true-up for interim rates in the Colorado Qwest-AT&T arbitration was described by the Colorado Commission as follows: "Qwest argues that the Commission's generic proceedings, whether a cost proceeding or other proceeding, provide the appropriate forum for consideration of the propriety of true-ups of interim rates."[15] Commissions have recognized that there are circumstances when it is appropriate for rates to be made subject to true-up. The contract should not create a presumption to the contrary. Nonetheless, in the interest of resolving this issue, if Eschelon's second, alternate proposal is adopted, Qwest will receive the default presumption it seeks, but with language that clearly and expressly addresses the true-up requirement.

Q. MR. EASTON STATES THAT QWEST'S PROPOSED LANGUAGE FOR SECTION 2.2: (1) REMOVES THE INCENTIVE FOR EITHER PARTY

[13] Exhibit Qwest 2, Easton Direct, p. 3.

[14] Exhibit Qwest 2, Easton Direct, p. 4.

[15] Qwest-AT&T Colorado Arbitration Order, p. 90.

TO DELAY NEGOTIATIONS OF A CHANGE IN LAW; AND (2) ELIMINATES THE POSSIBILITY, AND SUBSEQUENT SIGNIFICANT FINANCIAL IMPACT, OF EITHER PARTY ATTEMPTING TO APPLY CHANGE IN LAW RETROACTIVELY OVER A LONG PERIOD OF TIME.[16] DO YOU AGREE?

A. No. This was addressed in my Direct Testimony.[17] Under Qwest's language Qwest would have the opportunity to ignore changes in law that Qwest does not like, while embracing changes in law that work to Qwest's advantage. Because Qwest has greater regulatory resources than Eschelon and is more likely to know of all such changes, Qwest's language places Eschelon at a clear disadvantage in implementing changes in law. Further, if Qwest is truly concerned about incentives to delay changes in law, then it should embrace Eschelon's alternative proposal placing the obligation on both parties to amend the contract when there are changes in law.

Q. QWEST PROPOSES THAT PARTIES WOULD BE REQUIRED TO PROVIDE NOTICE WITHIN THIRTY (30) DAYS OF A LEGALLY BINDING CHANGE IMPACTING THE INTERCONNECTION AGREEMENT IN ORDER FOR AN AMENDMENT TO THE AGREEMENT TO HAVE AN EFFECTIVE DATE CONSISTENT WITH

[16] Exhibit Qwest 2, Easton Direct, pp. 7-8.

[17] Exhibit Eschelon 2, Denney Direct, pp. 24-26.

THE CHANGE IN LAW. WOULD A LONGER NOTICE PERIOD ELIMINATE THE PROBLEMS WITH QWEST'S PROPOSAL?

A. No, it would not eliminate them. As explained in my Direct Testimony,[18] Qwest's notice requirement is problematic because it allows a party to delay an adverse change in law by remaining silent in hopes that the other party missed the change. Since Qwest is significantly bigger than Eschelon (and small CLECs that may opt into the ICA) and is involved in more proceedings than Eschelon, Qwest is likely to know about changes in law of which Eschelon is unaware. While a longer notice period is an improvement over Qwest's proposal, it does nothing to eliminate the asymmetry of information available to Qwest and CLECs. Further, a longer notice period does nothing to address the ambiguity in Qwest's language between the implementation date and effective date of an order.

Q. WILL THE QWEST PROPOSED LANGUAGE FOR ISSUE 2-4 REDUCE LITIGATION BETWEEN THE COMPANIES?[19]

A. No. By creating a distinction between an order's effective date and implementation date but not defining that distinction, Qwest has created ambiguity that will likely lead to future disputes regarding the amendments to the interconnection agreement. Eschelon's language makes clear that the effective date of a legally binding change will be the date of the legally binding change unless otherwise ordered.

[18] Exhibit Eschelon 2, Denney Direct, pp. 26-27.

[19] Exhibit Qwest 2, Easton Direct, p. 8.

Q. DOES ESCHELON'S ALTERNATE PROPOSAL FOR ISSUE 2-4 SIMPLY DELAY DISPUTES FOR ANOTHER DAY?[20]

A. No. Eschelon's proposal #2 simply states that, if a party wishes that an implementation date of an order regarding a legally binding modification or change to existing rules is something other than the effective date of that order, then the party should obtain a ruling from the Commission to that effect. Eschelon's alternative would avoid future disputes such as occurred in the Arizona UNE cost case[21] by clarifying that it is a party's obligation, rather than a party's discretion, to implement a legally binding modification or change to existing rules consistent with the effective date of the order causing the modification or change, unless otherwise ordered by the Commission.

III. DESIGN CHANGES (SUBJECT MATTER NO. 4)

SUBJECT MATTER NO. 4. DESIGN CHANGES

Issue Nos. 4-5, 4-5(a), and 4-5(c): ICA Sections 9.2.3.8, 9.2.3.9 and Exhibit A Section 9.20.11

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

A. Issues 4-5, 4-5(a), 4-5(b) and 4-5(c) apply to design changes for loops, CFA changes, unbundled dedicated interoffice transport ("UDIT") and charges for

[20] Exhibit Qwest 2, Easton Direct, p. 9.

[21] Exhibit Eschelon 2, Denney Direct, pp. 25-27.

design changes in Exhibit A, respectively. Issue 4-5(b) relating to design changes for UDIT is closed.

Q. QWEST INDICATES THAT THE ONLY ISSUE IN DISPUTE WITH RESPECT TO DESIGN CHANGES SHOULD BE THE RATES.[22] IS THIS ACCURATE?

A. No. The issue with regard to the proper rates for design changes for loops and CFA changes can not be separated from the issue with regard to the proper language describing design changes and CFA changes in the contract. By agreeing to some, but not all, of Eschelon's language, Qwest would have the ICA require Eschelon to pay a separate non-recurring charge for design changes for loops and CFAs without providing the requisite showing that these costs are not recovered elsewhere or that the separate non-recurring rate Qwest proposes to charge for these activities is cost-based. Qwest's proposal would circumvent the Commission's review and authority of the rates it charges its CLEC wholesale customers. This is especially objectionable given that Qwest provided design changes for loops and CFA for years without assessing separate non-recurring charges and has not attempted to establish a cost-based rate for these activities in any of its cost dockets.[23] It is important to consider Eschelon's proposals for Issues 4-5 and subparts together so that the ICA is clear as to if and when Eschelon would pay separate non-recurring rates for these design changes and

[22] Exhibit Qwest 3, Stewart Direct, p. 8.

[23] Exhibit Eschelon 2, Denney Direct, pp. 29-31.

what that rate will be. That is, Eschelon should not be required to pay a separate non-recurring charge for design changes for loops and CFAs unless and until Qwest shows that the costs are not recovered in other rates. Eschelon is willing to pay the interim rates it proposes until such time as Qwest files and the Commission approves an appropriate separate TELRIC-based rate, if any, for these activities.

To this end, there are three open issues for resolution: (1) whether Qwest may charge a separate charge for design changes for unbundled loops even though Qwest has not done so in the past and the Commission has not approved such a rate through a UNE cost case (ICA Section 9.2.3.8; Issue 4-5); (2) if so, whether Qwest may charge the same rate it proposes to charge to perform design changes for UDITs to design changes for all loops and certain Connecting Facility Assignment ("CFA") changes that are relatively common, require very little time, and are performed on the day of cut during the loop installation process when Eschelon is already paying for coordination (ICA Section 9.2.3.9; Issue 4-5(a)); and (3) what is the appropriate rate (Exhibit A Section 9.20.13; Issue 4-5(c)). Specifically with respect to the rate: (a) what rate Qwest may charge for design changes for loops (Exhibit A Section 9.20.13.2) and (b) what rate Qwest may charge for certain CFA changes (Exhibit A Section 9.20.13.3).

Q. QWEST CLAIMS THAT ESCHELON'S PROPOSALS ON DESIGN CHANGES REFLECT AN EFFORT TO PREVENT QWEST FROM

RECOVERING ITS COSTS OR TO LIMIT QWEST'S ABILITY IN THIS REGARD.[24] IS THIS AN ACCURATE CHARACTERIZATION OF ESCHELON'S PROPOSAL FOR ISSUES 4-5 AND SUBPARTS?

A. No. Eschelon's position statement, testimony and, most importantly, contract language make very clear that Eschelon is not attempting to prevent or limit Qwest from recovering its costs. Eschelon only wants to ensure that Qwest does not double recover its costs or assess charges for design changes that in no way reflect the underlying costs of performing the design change.[25] That is why Eschelon has proposed interim rates for loops and CFAs so that Qwest is allowed to recover its costs for design changes unless and until Qwest seeks, and the Commission approves, different rates. Eschelon's proposal is imminently reasonable, particularly given that there is no basis in the current ICA or SGAT for design change charges for loops[26] and Qwest has not attempted to file for Commission approval of a rate related to loops.

[24] Exhibit Qwest 3, Stewart Direct, p. 7 and Exhibit Qwest 3, Stewart Direct, pp. 11-12.

[25] Performing design changes are part and parcel of Qwest's obligation under Section 251/252 of the Act to provide nondiscriminatory access to UNEs and should, therefore, be cost-based. *See* Exhibit Eschelon 2, Denney Direct, pp. 29-31; Exhibit Eschelon 2, Denney Direct, p. 48; and Mr. Starkey's discussion of Issue 9-31.

[26] Exhibit Eschelon 2, Denney Direct, pp. 30-31 and Exhibit Eschelon 2, Denney Direct, pp. 43-44.

ISSUE 4-5

Q. MS. STEWART IMPLIES THAT ESCHELON'S INITIAL POSITION WAS THAT QWEST SHOULD NOT BE ALLOWED TO RECOVER COSTS FOR DESIGN CHANGES FOR LOOPS.[27] IS THIS ACCURATE?

A. No. Eschelon has always maintained that Qwest is entitled to recover its costs. However, Qwest simply announced one day that it was going to begin charging for design changes for loops, which it had never done before. The fact that Qwest had never before assessed separate charges for design changes for loops and was not pursuing recovery of design change costs via separate design change rates in UNE rate cases, suggested to Eschelon that Qwest already recovers these costs elsewhere and should therefore not recover them again in separate charges. Accordingly, Eschelon objected to Qwest's unilateral determination to begin imposing design change charges on loops without any basis for doing so in Eschelon's ICA or the SGAT. This in no way was an attack on Qwest's right to recover its costs. Qwest has admitted in sworn testimony that there is no basis in the SGAT or the ICA for Qwest to assess design change charges for loops[28] (nor was there when Qwest made its unilateral announcement) and Qwest has made no attempt to develop a rate for design changes for loops. Accordingly, it was (and still is) reasonable for Eschelon to disagree with Qwest's decision in September of 2005 to unilaterally begin assessing charges for an activity with no basis in the

[27] Exhibit Qwest 3, Stewart Direct, p. 7 and Exhibit Qwest 3, Stewart Direct, pp. 11-12.

[28] Minnesota Rebuttal Testimony of Karen Stewart (MN PUC Docket P-5340, 421/IC06-768, 9/22/06), pp. 6-7.

companies' contract, and want Qwest to substantiate costs related to these charges – the position Eschelon has always held.

Q. YOU MENTIONED ABOVE THAT QWEST ADMITTED IN SWORN TESTIMONY THAT THERE WAS NO BASIS IN THE SGAT OR ICA FOR QWEST TO ASSESS A DESIGN CHANGE CHARGE FOR LOOPS. PLEASE ELABORATE.

A. As indicated in my direct testimony,[29] on September 1, 2005, Qwest sent an unexpected letter to CLECs stating that "Qwest will commence billing CLECs non-recurring charges for design changes to Unbundled Loop circuits" beginning on Oct. 1, 2005.[30] In that notice, Qwest stated no basis for the charges, but indicated that it would bill CLECs, including Eschelon, "at the rate found in the miscellaneous elements of Exhibit A or the specific rate sheet in your Interconnection agreement."[31] Qwest's reference to the ICA in the letter suggested, therefore, that Qwest was claiming it had some contractual right to bill these rates. However, in the Eschelon-Qwest Minnesota arbitration proceeding, Ms. Stewart testified that "Mr. Denney is correct in stating that neither Qwest's SGAT nor the parties' current ICA includes a design change charge for loops."[32]

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[29] Exhibit Eschelon 2, Denney Direct, pp. 40-43.

[30] Exhibit Eschelon 2.1 (September 1, 2005 letter from Qwest with the subject line "Billing for design changes on Unbundled Loop.") Document No. PROS.09.01.05.F.03204.Design_Chgs_Unbundld_Loop.

[31] *See id.*

[32] Minnesota Rebuttal Testimony of Karen Stewart (MN PUC Docket P-5340, 421/IC06-768, 9/22/06), pp. 6-7.

Based on this admission (a clear contradiction with Qwest's 9/1/05 letter), Qwest should credit CLECs, including Eschelon, for the rates it has billed to date and not bill additional charges for design charges for loops (including CFA changes) unless and until it obtains an ICA that allows it to charge for design changes.

ISSUE 4-5(a)

Q. DOES MS. STEWART MISCHARACTERIZE ESCHELON'S PROPOSAL WITH REGARD TO ISSUE 4-5(A) "CFA CHANGE"?

A. Yes. Ms. Stewart incorrectly states that Eschelon's proposal would "not permit Qwest to recover the costs it incurs."[33] To the contrary, Eschelon's language does in fact allow Qwest to assess a CFA design change charge in these circumstances – an interim rate, pending Qwest requesting and obtaining approval of a different rate. Eschelon's language for 4-5(a) is found in Section 9.2.3.9 – a subsection of 9.2.3 (Unbundled Loop Rate Elements). Section 9.2.3 is a list of rate elements for unbundled loops that are set forth in Exhibit A to the ICA, and 9.2.3.9 (CFA Change – 2/4 Wire Loop Cutovers) is the ninth rate element on this list. And as shown in Eschelon's proposed language for Issue 4-5(c), Eschelon is proposing an **interim rate** of $5.00 to be included in Exhibit A for these same day pair changes until the Commission approves a different rate. Furthermore, Eschelon's language in 9.2.3.9 states that "When this charge applies, the Design Change rate for Unbundled Loops does not apply." "This charge" referred to in Eschelon's

[33] Exhibit Qwest 3, Stewart Direct, p. 7.

language is the "CFA Change – 2/4 Wire Loop Cutover" Charge found in Exhibit A mentioned above under Eschelon's proposal. Eschelon's proposal identifies a specific charge to apply to CFA changes during a coordinated cut in the ICA and includes a specific interim rate for that rate element in Exhibit A (interim rate of $5.00).

Eschelon's proposal for design changes is reasonable; Eschelon wants the ICA to be clear on Qwest's obligation to perform design changes so that Qwest cannot stop providing them or substantially alter the rates, terms and conditions without an ICA amendment, and Eschelon wants the rates to be TELRIC-based.

Q. MS. STEWART IMPLIES THAT CFA CHANGES ARE COMPLEX AND REQUIRES A "SIGNIFICANT" AMOUNT OF TIME.[34] WHAT IS THE PURPOSE OF THIS TESTIMONY?

A. Ms. Stewart is attempting to build upon her incorrect notion that Eschelon's language would prevent Qwest from assessing an appropriate charge for this type of CFA design change by referring to costs that would purportedly go un-recovered if Qwest were not allowed to assess a charge in these instances. However, Ms. Stewart's notion is incorrect, as under Eschelon's proposal Qwest has the opportunity to charge an interim rate and to substantiate its costs regarding these design changes at the Commission in order to obtain Commission approval for a different rate. The actual design change work of the central office technician

[34] Exhibit Qwest 3, Stewart Direct, pp. 13-14.

to perform a CFA design change in this scenario would take a matter of seconds or minutes.[35] A few minutes of the central office technician's time should not amount to a charge of $35.89, which is Qwest's proposed rate.[36]

Recently, on May 18, 2007 in Depositions in the Minnesota UNE Cost case, Qwest's subject matter expert with regard to the central office technician times verified that on the day of cut a CFA change was a fairly simple process.[37] Mr. Jenson testified that CFA changes usually occur at a single location. He also noted that the extent of the central office technician's work was to obtain the new CFA, go to the ICDF and move the jumper cable. Mr. Jenson supported times of four minutes to perform the cross connect.

In addition, Eschelon is already separately paying for coordination during these coordinated cuts, and this coordination should cover the types of activities that serve as the basis for Ms. Stewart's erroneous claim that a CFA change turns "a standard installation into a coordinated installation without additional coordinated

[35] Exhibit Eschelon 2, Denney Direct, pp. 49-52.

[36] Utah Exhibit A, Section 9.20.13. *See also* Exhibit Eschelon 2, Denney Direct p. 34. Qwest proposes this rate for all design changes – i.e., UDIT, loops and CFAs.

[37] Deposition of Jerry Jenson of Qwest, *In the Matter of Qwest Corporation's Application for Commission Review of TELRIC Rates Pursuant to 47 U.S.C. § 251* MPUC Docket No. P-421/AM-06-713; OAH Docket No. 3-2500-17511-2, May 18, 2007. Mr. Jenson is not a Qwest cost witness, but is an internal Qwest employee who supplied the times for central office work for loop installations that are used by Qwest in its cost studies. The pertinent portions of the transcript of Mr. Jensen's deposition is pages 2-8 of Exhibit Eschelon 2.28, provided with my direct testimony.

installation cost recovery by Qwest."[38] She fails to recognize that Eschelon's proposed CFA change language only applies to coordinated installations.

Q. QWEST CLAIMS THAT YOU HAVE NOT ACCURATELY DESCRIBED THE WORK REQUIRED FOR CFAS AND THE COSTS ASSOCIATED WITH THEM.[39] WOULD YOU LIKE TO RESPOND?

A. Yes. Ms. Stewart claims that Eschelon improperly focuses on only one step of the CFA change (*i.e.*, the lift & lay) and ignores the involvement of other departments required to accomplish the CFA change.[40] Ms. Stewart points to other activities involved: testing personnel needed to coordinate this effort[41] (*i.e.*, coordination with the Central Office technician to confirm the new CFA is viable,[42] provision of the CFA information to the Service Delivery Coordinator to supplement the order,[43] confirmation with the CLEC testing personnel that the circuit is operational[44]) and a Designer to redesign of the circuit with the new CFA.[45]

Ms. Stewart is wrong, however, to suggest that I have ignored these activities involved in a CFA change. I explained in my direct testimony[46] that the Qwest

[38] Exhibit Qwest 3, Stewart Direct, p. 13.
[39] Exhibit Qwest 3, Stewart Direct, pp. 13-14.
[40] Exhibit Qwest 3, Stewart Direct, p. 13.
[41] Exhibit Qwest 3, Stewart Direct, p. 13
[42] Exhibit Qwest 3, Stewart Direct, p. 13..
[43] Exhibit Qwest 3, Stewart Direct, p. 13..
[44] Exhibit Qwest 3, Stewart Direct, p. 13.
[45] Exhibit Qwest 3, Stewart Direct, p. 13.
[46] Exhibit Eschelon 2, Denney Direct, p. 51.

CLEC Coordination Center (QCCC) coordinates the cutover with both the Qwest central office technician and Eschelon personnel in much the same way that Ms. Stewart describes. And I also explained that this is part of the coordinated installation – which Eschelon pays for separately. Because Eschelon separately pays for the coordination activities and because Eschelon's language for 9.2.3.9 limits the CFA change option to coordinated installations, none of the activities that Ms. Stewart claims I ignore should factor in to the appropriate rate for a CFA design change because they are already being recovered elsewhere. Allowing Qwest to recover costs related to the above-mentioned activities through the coordinated installation rate as well as through the CFA design change charge would amount to double-recovery.

Q. DOES QWEST ATTEMPT TO MAKE A CFA CHANGE APPEAR MORE COMPLEX THAN IT ACTUALLY IS?

A. Yes. Ms. Stewart refers to "The Designer"[47] and the need to "potentially redesign the circuit with the new CFA."[48] This testimony may lead the reader to believe that engineers are involved in designing a new circuit from scratch. This is not the case. Because parties (*i.e.*, CLEC personnel, QCCC and central office technician) are in communication with each other during the coordinated cut, the effort involved to make a CFA change during the cut is minor. The "engineering" to which Ms. Stewart refers really amounts to a records change for Qwest. More

[47] Exhibit Qwest 3, Stewart Direct, p. 13.

[48] Exhibit Qwest 3, Stewart Direct, p. 13, lines 19-20.

importantly, the costs for a CFA change during test and turn up are what they are, but clearly they are not so similar to the cost of a design change for UDIT that the same rate should apply, and that is the key to the proper resolution of Issue 4-5. That is, any rate for a CFA change (or any design change, for that matter) should be TELRIC-based and should not allow double-recovery.

Q. QWEST INSINUATES THAT ESCHELON HAS A QUALITY CONTROL PROBLEM WITH REGARD TO CFA INVENTORY.[49] IS THIS TRUE?

A. No. Again, Qwest raises a red herring, as this issue is irrelevant to determining the proper interim rate to apply to CFA design changes. Nevertheless, the Commission should be aware of the fact that Eschelon does indeed have a quality control process (or "CFA Validation" process) to ensure that the CFA information in its systems is accurate so that multiple CFA changes can be minimized. If a bad CFA is discovered during the conversion process, Eschelon will block the use of that CFA until it can be confirmed working or is repaired. In addition, Eschelon periodically undertakes a CFA audit clean up project. During this project, Eschelon reconciles differences in the CFA status by reviewing CFA records. If the status of a CFA can not be determined through a review of the records, then an Eschelon Central Office technician visits the collocation to determine the appropriate status of the CFA.

Not all CFA changes are Eschelon's "fault." In some cases, the need for a CFA

[49] Exhibit Qwest 3, Stewart Direct, p. 14.

change is brought about by Qwest's failure to properly disconnect an order. An example of this scenario is: Customer A wants to disconnect Eschelon's service, so Eschelon processes the disconnect order in Eschelon's system and sends a disconnect order to Qwest to be processed. Customer B subsequently wants to become an Eschelon customer, and Eschelon assigns Customer B to the CFA which Customer A previously used – which is now vacant in Eschelon's systems. However, if Qwest has not processed the disconnect order, the CFA shows up as occupied in Qwest's systems, necessitating a CFA change at the time of the coordinated cut. If Qwest fails to remove wiring associated with the disconnect, the CFA may show available in both the Eschelon and Qwest systems, but appear unavailable when Qwest attempts the wiring for customer B. In these instances, the reason that a CFA change is needed (*i.e.*, Qwest has not properly processed the disconnect order) is under Qwest's control – not Eschelon's.

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Q. QWEST STATES THE EXHIBIT A IN UTAH CONTAINED THE DESIGN CHANGE CHARGE IN THE "MISCELLANEOUS CHARGES" SECTION AND, THEREFORE, IT APPLIES TO ALL UNES – NOT JUST TRANSPORT.[50] IS THIS CORRECT?

A. No. Ms. Million's testimony is factually incorrect in this regard. Ms. Million states regarding the design change charge, "the design change element in Utah is

[50] Exhibit Qwest 4, Million Direct, pp. 3-4.

contained within the 'Miscellaneous Changes' section of its Exhibit A and not in the section where the rates pertaining specifically to UDIT are contained."[51] Qwest has previously testified that because the design change rate element resides in the "Miscellaneous Charges" section of the ICA, this "mean[s] they are applicable to all UNEs in the ICA."[52] The contract determines if and when miscellaneous charges apply and the fact that a charge is listed in the miscellaneous section of Exhibit A does not provide Qwest unlimited ability to apply that rate to any UNE in the contract. The contract points to the specific situations in which the charges in Exhibit A apply, including miscellaneous charges. Importantly, the only mention of a design change charge in Qwest's SGAT was found in the ordering section for transport. Therefore, for the associated rate in Exhibit A to make any sense, it would apply only to transport. It makes no sense for a rate element listed in the SGAT only for transport to also apply to loops, but that is what Qwest argues. The fact that Qwest placed the design change charge in the "Miscellaneous Charges" section of Exhibit A[53] should have no bearing on the element or elements to which it applies. The SGAT describes the rates found in Exhibit A and how they should be applied, and the relevant point is that Qwest's SGAT to which the Exhibit A is associated, references the design change charge only with respect to transport. One would have to ignore the SGAT and the description of the design change charge

[51] Exhibit Qwest 4, Million Direct, p. 4, lines 17-19.

[52] Colorado Direct Testimony of Karen Stewart (Docket 06B-497T, 12/15/06), p. 8. *See id*., p. 7.

[53] Exhibit Qwest 4, Million Direct, p. 4, lines 17-18.

contained therein to claim that the design change charge should apply to all UNEs.

Furthermore, contrary to Qwest's assertion that a charge in the Miscellaneous Charge section should apply to all UNEs, there are numerous other miscellaneous charges that do not apply to all UNEs. For example, the miscellaneous charge Additional Engineering, 9.20.1 of Exhibit A, applies to collocation, but has nothing to do with loops, while the miscellaneous charge Additional Labor Installation, section 9.20.2 of Exhibit A, applies to out of hours work for loops and UDIT rearrangements, but has nothing to do with collocation. The fact that a rate is listed as a miscellaneous charge does not imply that the rate applies to any and every rate element in Exhibit A.

Q. MS. MILLION TESTIFIES THAT THERE HAS NEVER BEEN A DISPUTE ABOUT THE FACT THAT QWEST'S MISCELLANEOUS CHARGES APPLY IN A VARIETY OF CIRCUMSTANCES AND TO A VARIETY OF PRODUCTS.[54] IS THIS ACCURATE?

A. No. There have been long standing disputes regarding Qwest's application of miscellaneous charges. In the Minnesota UNE cost docket the Minnesota ALJs ruled (and the Commission upheld) that miscellaneous charges should be set to zero. Paragraph 196 of the ALJ's order reads:

[54] Exhibit Qwest 4, Million Direct, p. 4, lines 19-21.

MISCELLANEOUS CHARGES (9.20)

> Qwest has identified a number of miscellaneous charges (in half-hour increments, as opposed to quarter-hour increments approved in the Generic Cost Case) relating to additional engineering, labor, testing, and maintenance. Some, but not all, are listed for pricing in the Second UNE Pricing Prehearing Order. Many of these charges relate to troubles on the line. Qwest's list is modeled on its FCC tariff charges, as opposed to any cost study based on TELRIC methodology. **Qwest has failed to explain how these charges would be applied, such as how it would distinguish between situations when such costs are already included in element prices, or when "additional" engineering, labor, testing, or maintenance justifiably would be required.** Qwest has clarified only that none of these charges would apply if trouble were found on Qwest's side of the network. **Qwest has failed to adequately explain the application of these charges, and they should be deleted from its SGAT.**[55]

Page 10 of the Minnesota Commission order states:

> The Commission appreciates the concerns raised by the CLECs. The ALJ Report noted the need for clarity when discussing miscellaneous charges (ALJ Report ¶ 196), category 11 mechanized charges **(**¶ 208), and the charges listed in Qwest's Statement of Generally Available Terms (SGAT) (¶ 223). But the principle applies more broadly. **There is little point in establishing costs related to mere labels**; costs must correspond to real world phenomena. **If Qwest intends to charge a CLEC for an element or a service, Qwest should be able to say what the charge is for.** The description should conform to how an element is used in the relevant cost model, and provide sufficient information to let purchasers determine what they want to buy and whether they have received it.[56]

Q. IS MS. MILLION'S TESTIMONY THAT MISCELLANEOUS CHARGES "APPLY IN A VARIETY OF CIRCUMSTANCES AND TO A VARIETY

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

[56] Emphasis added, footnotes deleted. October 2, 2002 Order in MN PUC Docket CI-01-1375 ("MN 271 Cost Order").

OF PRODUCTS"[57] CONSISTENT WITH QWEST'S OWN ACTIONS REGARDING MISCELLANEOUS CHARGES?

A. No. For example, in the state of Washington the Commission approved miscellaneous charges for additional labor installation which applies to out of hours installations. Despite the Commission approved rate, Qwest forced Eschelon to sign a contract amendment in order to obtain out of hours installations for EELs. Qwest was unwilling to apply this miscellaneous charge to EELs without specific language in the contract allowing this charge. In this case, Eschelon communicated to Qwest that it was clear this rate applied to both out of hour loop and EEL installations, yet Qwest demanded a contract amendment.[58]

For design changes, where companies disagree on the rate application, Qwest has implemented this charge across its states (except Minnesota) without contract amendments, via a simple email notice.[59] When convenient Qwest applies miscellaneous charges at will, as with design changes, but in other circumstances Qwest demands a contract amendment to clarify when miscellaneous charges apply.

Q. MS. MILLION DISAGREES WITH YOUR SUGGESTION THAT IT IS NECESSARY TO DEVELOP SEPARATE RATES FOR DESIGN

[57] Exhibit Qwest 4, Million Direct, p. 4, lines 20-21.

[58] Eschelon was forced to sign a similar Amendment in Oregon.

[59] Exhibit Eschelon 2.1.

CHANGES FOR LOOPS AND CFAS.[60] WOULD YOU LIKE TO RESPOND?

A. Yes. Ms. Million implies that Eschelon's proposal would require Qwest to develop a rate to accommodate "every possible nuance of every possible way that every possible product might be provisioned by Qwest for the CLECs."[61] Ms. Million's claim is misleading and exaggerated. Eschelon's position is simple: if Qwest is not already recovering the costs of design changes for loops and CFAs (something for which Qwest did not previously assess an additional charge prior to its unilateral September 2005 notification), it should be required to show that the costs for these are sufficiently similar to that of UDIT before being allowed to charge that rate. If Qwest is able to make this showing, then it would be allowed to charge the same rate for each. However, I have shown that the costs for design changes for loops and CFAs are ***not*** similar to that of design changes for UDIT, and therefore, a proper TELRIC-based rate should reflect the costs for that activity – otherwise the rate developed will not reflect the underlying costs for loops and CFAs (charges that a CLEC will face more frequently than the UDIT design change charge).

Though Ms. Million attempts to confuse the issue by referring to "every possible nuance" and "every possible 'flavor,'" the fact of the matter is that the Commission has required separate TELRIC-based charges for many different

[60] Exhibit Qwest 4, Million Direct, p. 5.

[61] Exhibit Qwest 4, Million Direct, p. 5, lines 4-5.

"nuances" or "flavors" of a particular product. For example, the Commission has required Qwest to provide separate rates for various types (or "flavors") of loops (*e.g.*, analog and digital, 2 wire and 4 wire, etc.). Likewise, Qwest has developed separate non-recurring installation charges for loops of various types (*e.g.*, 2 wire, DS1 and DS3). Qwest has even proposed different non-recurring charges for conversions for loops versus UDIT, which shows that even Qwest understands that when costs for products are not the same, separate rates should be established based on the underlying costs for each. Taking Ms. Million's argument to its logical conclusion, Qwest could develop just one rate element to apply to all loops or installation of all loops. However, the reason for different TELRIC-based rates for different products is that the underlying costs for each of the products is different, and therefore, applying a rate to a product that has no relationship to its underlying cost would violate the TELRIC-based pricing principles required by the Act.

Q. PLEASE ADDRESS MS. MILLION'S TESTIMONY THAT THE DESCRIPTION OF THE DESIGN CHANGE ELEMENT IN THE EXECUTIVE SUMMARY OF QWEST'S NONRECURRING COST STUDY SHOWS THAT IT WAS DEVELOPED TO APPLY TO ALL UNES.[62]

A. Ms. Million relies on the description of the rate element in the Executive Summary of Qwest's compliance filing, which refers to "end user premises" and

[62] Exhibit Qwest 4, Million Direct, p. 5.

"channel interface," and claims that this terminology supports the application of this charge to loops and CFAs.[63] First of all, Ms. Million's claim does not comport with the cost study information explained in my direct testimony, showing that the design change charge was developed specifically to apply to UDIT and not loops or CFA. Second, contrary to Ms. Million's testimony, the description of the rate element in the Executive Summary (and the use of the phrase "type of channel interface") does not specifically contemplate situations involving the CFA changes (or same day pair changes) described in Eschelon's language for 9.2.3.9. A change to the type of channel interface means a change to the NC/NCI code, which a same day pair change does not require (a same day pair change does not require a redesign of the circuit; rather the circuit is terminated to a different slot, and the circuit ID may or may not change). Therefore, Qwest's own Executive Summary clearly shows that the rate does not apply to CFA changes discussed in Section 9.2.3.9 of the ICA.

Q. QWEST CLAIMS THAT YOUR TESTIMONY "FAILS TO ACCOUNT FOR THE RE-DESIGN WORK THAT MAY BE REQUIRED BECAUSE OF THE USE OF FIBER MUXING EQUIPMENT."[64] DOES THIS SUPPORT QWEST'S POSITION?

A. No. Qwest's lone example regarding the use of muxing equipment shows the danger in relying on Qwest's conjecture about costs, rather than requiring Qwest

[63] Exhibit Qwest 4, Million Direct, p. 4, lines 6-13.

[64] Exhibit Qwest 3, Stewart Direct, p. 12, lines 24-26.

to file cost studies to support its claim that the costs of design changes for loops and CFA (to the extent that they are not already recovered) are sufficiently similar to design changes for UDIT that applying the same rate for all is appropriate. Ms. Stewart provides no detail about this example, and she admits that use of fiber muxing equipment "may be required,"[65] which also means that it may *not* be required. Ms. Stewart's testimony is too speculative to establish one rate for all different types of design changes, when there has been considerable information provided showing that the costs are not similar.

Furthermore, while Qwest argues that Ms. Stewart's lone example regarding muxing equipment "may" apply to loops, Qwest cannot even speculate that it always applies to the CFA changes that are subject to Eschelon's section 9.2.3.9. Fiber muxing equipment is not used in these same day pair changes. Given that Qwest's testimony suggests that use of fiber muxing equipment is part of the basis for Qwest's proposal to apply the same rate to all design changes, Qwest's example is additional information supporting the notion that Qwest's rate is inappropriate for CFA changes.

Q. IS APPLYING THE SAME, EXPENSIVE DESIGN CHANGE CHARGE TO ALL UNES CONSISTENT WITH HOW THE COST STUDY WAS CONSTRUCTED, AS MS. MILLION CLAIMS?[66]

[65] Exhibit Qwest 3, Stewart Direct, p. 12, line 25.

[66] Exhibit Qwest 4, Million Direct, p. 4.

A. No. I demonstrated in my direct testimony that her understanding is incorrect. I showed that the cost study for Qwest's design change charge is designed based on ASRs (specific to transport) instead of LSRs (specific to loops), and is based on transport-specific systems and processes, which are more manually-intensive and complex.[67] In sum, Qwest's cost development for its design change charges is transport-specific and the only language found in the SGAT that mentions such a charge is in the UDIT section, and nothing in the SGAT suggests that it should apply to UNEs other than Transport. This shows that Qwest's attempt to apply this same, expensive[68] rate to all UNEs is inappropriate and should be rejected.

Furthermore, the only mention of a design change charge in Qwest's SGAT was found in the ordering section for transport. Therefore, for the associated rate in Exhibit A to make any sense, it would apply only to transport. It makes no sense for a rate element listed in the SGAT only for transport to also apply to loops, but that is what Qwest argues. The fact that Qwest placed the design change charge in the Miscellaneous section of Exhibit A should have no bearing on the element or elements to which it applies. The SGAT describes the rates found in Exhibit A and how they should be applied, and the relevant point is that Qwest's SGAT to which the Exhibit A is associated, references the design change charge only with respect to transport. One would have to ignore the SGAT and the description of

[67] Exhibit Eschelon 2, Denney Direct, pp. 54-55.

[68] Exhibit Eschelon 2, Denney Direct, p.45. Qwest's proposed rate for Design Change charge in Utah exceeds the installation rate for a UNE loop. It defies logic for the design change charge to exceed the installation rate. Exhibit Eschelon 2, Denney Direct, pp.46-47.

the design change charge contained therein to claim that the design change charge should apply to all UNEs.

Q. MS. STEWART STATES THAT ESCHELON HAS NOT PROVIDED COST STUDIES TO SUPPORT PROPOSED RATES FOR DESIGN CHANGES.[69] IS IT ESCHELON'S RESPONSIBILITY TO SUBMIT COST STUDIES?

A. No. The FCC rules require ILECs – not CLECs – to file cost studies to substantiate cost-based rates for UNEs. 47 CFR § 51.505 (e) states:

> e) *Cost study requirements.* An incumbent LEC must prove to the state commission that the rates for each element it offers do not exceed the forward-looking economic cost per unit of providing the element, using a cost study that complies with the methodology set forth in this section and §51.511.[70]

The FCC also explains in the Local Competition Order (¶ 680) that:

> ...[I]ncumbent LECs have greater access to the cost information necessary to calculate the incremental cost of the unbundled elements of the network. Given this asymmetric access to cost data, we find that incumbent LECs must prove to the state commission the nature and magnitude of any forward-looking cost that it seeks to recover in the prices of interconnection and unbundled network elements.

[69] Exhibit Qwest 3, Stewart Direct, pp. 9-10.

[70] 47 CFR §51.511 "Forward-looking economic cost per unit" requires UNE rates to be calculated on total demand. ["the forward–looking economic cost per unit of an element equals the forward-looking economic cost of the element, as defined in §51.505, divided by a reasonable projection of the sum of the total number of units of the element that the incumbent LEC is likely to provide to requesting telecommunications carriers and the total number of units of the element that the incumbent LEC is likely to use in offering its own services, during a reasonable measuring period."]

These passages are clear in requiring Qwest to prove that its rates for UNEs comply with applicable standards by submitting cost studies. Nothing in the FCC's rules or orders require CLECs to file cost studies to prove the ILEC's charges. Qwest has made no attempt to substantiate the costs related to design changes for loops or CFAs, as required by the FCC's rules, and its attempts to shift this obligation to Eschelon is completely inappropriate. That is not to say, however, that Eschelon did not provide any support for its proposed interim rates, and in fact, Eschelon provided substantial information explaining its interim rate proposals.[71] Furthermore, Qwest recently changed its PCAT via a non-CMP notice to apply tariff rates to design changes (and other activities).[72] Unless the Commission adopts Eschelon's proposal and establishes an interim rate for design changes for loops and CFAs (as described in Section 9.2.3.9) until Qwest files cost studies and substantiates different rates, Qwest will never prove its costs related to these activities and will move forward with its agenda to apply tariff changes for design changes.

[71] Exhibit Eschelon 2, Denney Direct, pp. 221-234 and Exhibit Eschelon 2.32.

[72] Exhibit Eschelon 2, Denney Direct, pp. 36-38. Qwest's August 31, 2006 non-CMP notice (Process Notification PROS.08.31.06.F.04159.Amendments.ComlAgree.SGAT) is provided as Exhibit Eschelon 25.

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

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

Issue Nos. 5-6, 5-7, 5-7(a) 5-8, 5-9, 5-11, 5-12 and 5-13: ICA Sections 5.4.2, 5.4.3, 5.4.5, 5.4.7 and 5.13.1

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

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

Issues 5-8 and 5-9 address the definition of "Repeatedly Delinquent" which is a key term in determining if and when Qwest can require Eschelon to make a deposit. Issue 5-8 relates to whether an amount must be "non de minimus" for that amount to be used in determining whether payment has been Repeatedly Delinquent, as Eschelon proposes, or whether payment may be considered

Repeatedly Delinquent based on any late undisputed amount, no matter how small that amount is, as proposed by Qwest. Issue 5-9 relates to whether Repeatedly Delinquent payment should be defined as late payments in three consecutive months (Eschelon's proposal)[73] or late payments in three or more months in a 12 month period (Qwest's proposal).

Issue 5-11 addresses whether a party should be able to seek Commission relief once the other party demands a deposit. Eschelon's proposal would require payment of a deposit within 30 days unless one party challenges the deposit amount at the Commission, in which case the deposit payment due date would be ordered by the Commission. Qwest proposes that a party should pay the deposit within 30 days with no vehicle to challenge this deposit amount at the Commission before making the payment.

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

Issue 5-13 relates to whether a separate provision is needed that would allow one party to unilaterally review the other party's credit standing and increase the

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

deposit amount (or, according to Qwest, establish a new deposit requirement) based on this review, as Qwest proposes, or whether deposit requirements are sufficiently addressed elsewhere in the contract, as Eschelon proposes.[74]

Q. IS QWEST'S TESTIMONY PROPERLY FOCUSED ON THE ACTUAL ISSUES SURROUNDING THIS DISPUTED ICA LANGUAGE?

A. No. The dispute regarding these provisions is actually about whether Qwest can take unilateral actions, based upon disputed information, which puts customers in this State out of service. These provisions are about Qwest's ability to hold Eschelon hostage through threats to end user customers. These provisions are about extreme actions that should be taken only as a last resort; therefore, Commission involvement in these actions is entirely appropriate. In a Nebraska proceeding AT&T concisely summarized the need for Commission oversight as follows:

> AT&T has from time to time insisted on provisions in its contracts with customers that require security deposits and other provisions that protect against default. The critical difference is that, if the customer is not satisfied with the terms AT&T offers or the deposit that AT&T requires, the customer can seek to obtain services from another provider. The customer of a dominant LEC, by contrast, generally has no such choices – which is why the FCC has always recognized the need for prescription in this context that minimizes dominant ILEC abuse of security deposit, advance payment and termination requirements.[75]

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

[75] Comments of AT&T Communications of the Midwest, Inc. *In the Matter of the Nebraska Public Service Commission on its own motion, seeking to investigate the impact of telecommunications carrier bankruptcies,* Application No. PI – 62/C-2777/NUSF-29, September 6, 2002; FN 1.

Mr. Easton claims that Qwest's proposals are appropriate because "Qwest is entitled to timely payment for services rendered and to take remedial action ***if the risk of non-payment is apparent.***"[76] Mr. Easton also claims that the Commission should not get involved in these issues "as a normal course of business."[77] Qwest's testimony would lead you to believe that the disputes are about whether Qwest is entitled to timely payment[78] or whether the Commission should be involved in the day to day business operations between Eschelon and Qwest.[79] Even a casual careful reading of Eschelon's proposed language, however, demonstrates that Qwest will have protection from untimely payments. It specifically requires timely payment and provides remedies for untimely payment; the Commission would only become involved as a last resort.

ISSUES 5-6 AND 5-7

Q. QWEST CHARACTERIZES ESCHELON'S PROPOSALS FOR ISSUES 5-6 AND 5-7 AS REQUIRING UNREASONABLE COMMISSION INVOLVEMENT.[80] IS THIS AN ACCURATE CHARACTERIZATION?

A. No. Mr. Easton downplays the importance of the disagreements under Issues 5-6 and 5-7. Mr. Easton testifies: "Qwest believes it serves no useful purpose to have

[76] Exhibit Qwest 2, Easton Direct, p. 13, lines 23-34. (emphasis added)

[77] Exhibit Qwest 2, Easton Direct, p. 15, line 7.

[78] Exhibit Qwest 2, Easton Direct, pp. 13, 17 and 23.

[79] Exhibit Qwest 2, Easton Direct, p. 15, lines 6-7; pp. 27-28; p. 25, lines 34-36.

[80] Exhibit Qwest 2, Easton Direct, p. 15, lines 6-7; pp. 27-28; p. 25, lines 34-36.

the Commission get involved in collection issues at this stage."[81] However, while Qwest is opposed to seeking "Commission approval" prior to discontinuing order processing or disconnecting Eschelon's end user customers,[82] Qwest proposes instead that Eschelon seek Commission protection in cases where it feels Qwest has taken these actions inappropriately.[83]

Issues 5-6 and 5-7 address situations in which Qwest may unilaterally discontinue processing Eschelon's orders or disconnect Eschelon customers even when the basis for doing so is disputed, which is much more serious than a typical payment issue. As I explained in my direct testimony,[84] Eschelon and Qwest have had disputes concerning the accuracy of Qwest's bills, the timeliness of Qwest's recognition of Eschelon's payments, Qwest's handling of Eschelon payments and Qwest's calculation of disputed amounts. Qwest has threatened, and continues to threaten, to disconnect Eschelon's services and stop processing Eschelon's orders based on an amount Qwest alleges Eschelon owes on a combined six state region without providing sufficient detail to verify this amount – and all the while, Eschelon believes it is current with Qwest. These facts show that Eschelon's concern about Issues 5-6 and 5-7 is real and warranted, and that Commission involvement should be preserved to address any significant disagreements before

[81] Exhibit Qwest 2, Easton Direct, p. 14, lines 21-23.

[82] Exhibit Qwest 2, Easton Direct, pp. 14 and 18-19.

[83] Exhibit Qwest 2, Easton Direct, pp. 14-15.

[84] Exhibit Eschelon 2.6 (Confidential Exhibit).

Qwest ceases accepting Eschelon's orders and begins disconnecting Eschelon's customers.

Q. COULDN'T ESCHELON "SIMPLY PAY ITS BILL"[85] FOR UNDISPUTED AMOUNTS IT OWES QWEST AND AVOID QWEST DISCONNECTING CUSTOMERS OR DISRUPTING ORDER PROCESSING?

A. If it were that easy, this would not be an issue. Though Mr. Easton insinuates that this problem is solely within Eschelon's control because Eschelon only need to pay all undisputed amounts to avoid the harm caused by Qwest invoking these actions,[86] Qwest is wrong. As explained in my direct testimony[87] there are a number of reasons that are not in Eschelon's control that could cause Eschelon and Qwest to have very different views about amounts that are disputed and undisputed. However, under Qwest's proposal, Qwest could ignore these reasons as well as Eschelon's disagreement with Qwest's view of Eschelon's payment status and invoke these actions. That is why Commission involvement should be preserved.

Q. QWEST OBSERVES THAT "QWEST IS THE ONLY PARTY THAT IS PROCESSING ORDERS UNDER THE ICA" SO SECTION 5.4.2

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[85] Exhibit Qwest 2, Easton Direct, p. 21, line 28. *See also* Exhibit Qwest 2, Easton Direct, pp. 13-14 and 15.

[86] Qwest has stated in its position statements in the Disputed Issues Matrix for other states that "If a bill is undisputed, Eschelon should pay it." *See, e.g.,* Qwest Position Statements in Oregon Disputed Issues Matrix, Exhibit 3 to Eschelon's Oregon Petition for Arbitration, Issues 5-7, 5-7(a), 5-8, 5-9, 5-11 and 5-12.

[87] Exhibit Eschelon 2, Denney Direct, pp. 73-75.

"RESTRICTS ONLY QWEST'S ABILITY TO DISCONTINUE PROCESSING ESCHELON'S ORDERS IF ESCHELON FAILS TO PAY."[88] IS THIS OBSERVATION MEANINGFUL?

A. Yes, but this point actually supports Eschelon's position. Mr. Easton is correct that Qwest is the party processing orders under the ICA, and this means that Eschelon is the only party that could have its ability to conduct business disrupted by the other party. Thus, if Qwest is wrong and there is no payment due, but it discontinues processing orders or disconnects customers anyway, Eschelon's entire business is disrupted for no reason.

On the other hand, the risk to Qwest under Eschelon's language, assuming there is an outstanding undisputed amount, is that it may receive its payment after the 30 day due date – a risk that is addressed in the Agreement through late-payment charges and interest charges. Therefore, the risks of service disruption facing Eschelon under this scenario are much more serious than the potential risk of late payment facing Qwest. I agree that Qwest should have the ability under the ICA to take these remedial actions ***under appropriate circumstances***, but, particularly in light of the extreme consequences of such a step for Eschelon and its Customers, it is critical that there be Commission oversight, especially when there are disagreements about outstanding amounts.

[88] Exhibit Qwest 2, Easton Direct, p. 13, lines 26-28.

Q. QWEST CLAIMS THAT REQUIRING COMMISSION APPROVAL FOR QWEST TO BE ABLE TO DISCONTINUE PROCESSING ESCHELON'S ORDERS WOULD ALLOW ESCHELON TO CONTINUE TO INCUR DEBT WHILE COMMISSION ACTION IS PENDING.[89] DOES QWEST'S CONCERN MAKE SENSE?

A. No. Because Eschelon would incur costs to dispute that amount at the Commission and Eschelon would still end up having to pay the charges (potentially with interest and late fees) in the event that the Commission ruled in favor of Qwest, Eschelon has a disincentive to mount additional outstanding charges that it has no reason to dispute. Section 5.4.1 of the ICA states when undisputed amounts are due, and this language is closed. Eschelon is not attempting to circumvent its obligation to pay its undisputed bills, rather the companies do not always agree regarding the amounts that are in dispute.

Q. MR. EASTON STATES THAT ESCHELON'S ALTERNATIVE PROPOSAL FOR ISSUE 5-6 IS "EQUALLY INEQUITABLE" AS ITS PRIMARY PROPOSAL.[90] IS MR. EASTON'S CRITICISM OF ESCHELON'S ALTERNATIVE PROPOSAL WARRANTED?

A. No. Mr. Easton implies that Eschelon's alternative proposal lowers the bar for Eschelon so that "the simple act of its 'asking' the Commission"[91] (instead of

[89] Exhibit Qwest 2, Easton Direct, p. 14.

[90] Exhibit Qwest 2, Easton Direct, p. 14, line 10.

[91] Exhibit Qwest 2, Easton Direct, p. 14, lines 14-15.

Commission approval, as in the first proposal) would prevent Qwest from taking remedial actions. Mr. Easton misses the point of Eschelon's proposals. Eschelon's proposals are designed to ensure that, where a dispute exists, Qwest obtains Commission approval ***before*** taking the serious step of disconnecting customers or rejecting orders. Eschelon's first proposal is to require Qwest to seek the Commission's approval before taking these drastic steps. If that is not accepted, Eschelon's second proposal is designed to assure that the Commission does not have to make a decision on the issue in "crisis mode," with Qwest's action either imminent (note that Qwest's proposal requires that it give only ten days advance notice of its discontinuance of order processing) or perhaps having already taken place. Whether Qwest is required to seek prior Commission approval or Eschelon has the ability to stay Qwest from acting pending the determination of the dispute that it brings to the Commission, both parties would be required to prove their case to the Commission, with the Commission serving as an independent arbiter of the facts.

Q. MR. EASTON CLAIMS THAT ESCHELON'S PROPOSAL IS UNNECESSARY BECAUSE ESCHELON CAN INVOKE DISPUTE RESOLUTION.[92] HAVE YOU ALREADY ADDRESSED THIS ISSUE?

A. Yes. I addressed this in my direct testimony.[93] Dispute resolution may eventually resolve the issue, but it is unlikely such action will occur before serious damage is done to Eschelon and its end user customers.

[92] Exhibit Qwest 2, Easton Direct, pp. 13-14 and Exhibit Qwest 2, Easton Direct, p. 17.

Q. IF THE COMMISSION WERE INVOLVED, WHAT STANDARD WOULD THE COMMISSION USE TO DETERMINE WHETHER QWEST COULD DISCONTINUE ORDER PROCESSING OR DISCONNECT CIRCUITS?

A. Any dispute under the interconnection agreement may come before the Commission pursuant to the closed and agreed upon language in ICA Section 5.18 ("Dispute Resolution"), and those standards would apply to this dispute. In addition, standards for use are described in closed language of sections 5.4.2 (discontinue order processing) and 5.4.3 (disconnection) of the ICA. Eschelon's second option for 5.4.2 offers additional guidance. The necessity of Commission oversight derives from the fact that discontinuing order processing and/or disconnection of service is an extreme remedy that impacts customers in Utah. Section 5.4.2 states that a party may "discontinue processing orders for relevant services for the failure of the other Party to make full payment, less any disputed amount as provided for in Section 21.8 of this Agreement, for the relevant services provided under this Agreement within thirty (30) Days following the Payment Due Date." Section 5.4.3 states that a party may "disconnect any and all relevant services for failure by the billed Party to make full payment, less any disputed amount as provided for in Section 21.8 of this Agreement, for the relevant services provided under this Agreement within sixty (60) Days following the Payment Due Date."

[93] Exhibit Eschelon 2, Denney Direct, pp.80-81 and Exhibit Eschelon 2, Denney Direct, pp. 76-79.

Because a disruptive customer-impacting situation may occur in cases of disconnection and discontinuation of order processing, specific language is needed (in addition to the dispute resolution provisions of Section 5.18) to address the timing of dispute resolution – *before* customers are impacted. As described in my direct testimony,[94] disputes commonly exist regarding whether bills, "less any disputed amount" are properly paid. Before such an extreme customer impacting step such as discontinuing order processing or disconnection of service is taken, Commission review of the facts and approval should be required.

ISSUE 5-8

Q. FOR ISSUE 5-8, MR. EASTON CLAIMS THAT ESCHELON'S INCLUSION OF THE TERM "NON DE MINIMUS" IS VAGUE AND WOULD LEAD TO DISPUTES BETWEEN THE PARTIES.[95] IS HE CORRECT?

A. No. I addressed this issue in my direct testimony.[96] There is no reason to believe that the inclusion of this term will cause any more disputes than inclusion of the term "material," which Qwest agrees to include in the ICA numerous times.[97] As indicated in my direct testimony, Eschelon is willing to use the word "material" in place of "non de minimus."

[94] Exhibit Eschelon 2, Denney Direct, pp. 73-75.

[95] Exhibit Qwest 2, Easton Direct, p. 21.

[96] Exhibit Eschelon 2, Denney Direct, pp. 88-90.

[97] *See* ICA Sections, 2.1, 2.2, 5.1.3.1, 5.4.6, 5.6.2, 5.8.4, 5.13.1, 7.2.2.9.6, 8.2.1.29.1, 8.4.1.2, 9.23.4.3.1.3.2, 9.23.4.3.1.3.4, 9.23.4.3.1.3.5, 9.23.4.3.1.4, 9.23.4.3.1.5, 10.6.2.5.1, 10.8.2.18 and 11.13.

Q. MR. EASTON CHARACTERIZES ESCHELON'S REASONING FOR INCLUDING THE TERM NON DE MINIMUS AS "UNFOUNDED."[98] PLEASE RESPOND.

A. Mr. Easton states that it is not "Qwest's practice" to invoke collections actions based on insignificant amounts, nor has Eschelon claimed that Qwest has ever done so.[99] That being the case, Qwest should have no problem memorializing that in the ICA by including the term "non de minimus." Though Mr. Easton claims that it is not Qwest's "practice," nothing would stop Qwest from changing its practice to invoke collections actions over de minimus amounts except the ICA language Eschelon proposes. Contrary to Mr. Easton's suggestion, Eschelon does not need to provide a specific example for its proposal to be adopted, and the fact that Qwest will not agree to Eschelon's proposal raises concerns.

Mr. Easton goes on to state that it is not "financially wise or feasible, to take collection action for 'a few dollars."[100] However, as a competitor of Eschelon as well as a provider of essential, bottleneck inputs to Eschelon's business, Qwest has the incentive to take collection action – *e.g.*, discontinue processing Eschelon's orders, disconnect Eschelon's circuits and demand deposits – in the greatest number of circumstances as possible because these actions make it increasingly difficult for Eschelon to compete with Qwest. Therefore, unless

[98] Exhibit Qwest 2, Easton Direct, p. 21, line 10.

[99] Exhibit Qwest 2, Easton Direct, p. 21, lines 10-13.

[100] Exhibit Qwest 2, Easton Direct, p. 22, lines 1-2.

there is specific language included in the ICA that speaks to "non de minimus" amounts, nothing would stop Qwest from following this incentive and invoking collections action for a few dollars.

Q. MR. EASTON TESTIFIES THAT ESCHELON'S PAYMENT HISTORY DOES NOT REFLECT DE MINIMUS AMOUNTS OF UNDISPUTED CHARGES.[101] IS IT ESCHELON'S POSITION THAT THE AMOUNT QUOTED BY MR. EASTON IS DE MINIMUS?

A. No. It is not Eschelon's position that $3 million is a de minimus amount, as Mr. Easton suggests, nor does Eschelon agree that the undisputed amounts that Qwest quotes are accurate.

ISSUE 5-9

Q. MR. EASTON CLAIMS THAT ESCHELON'S PROPOSAL FOR ISSUE 5-9 (REGARDING REPEATEDLY DELINQUENT) "FAILS TO PROVIDE THE PROPER INCENTIVE FOR TIMELY PAYMENT."[102] DID MR. EASTON SUPPORT THIS STATEMENT WITH ANY DATA OR REAL WORLD EXAMPLES?

A. No. Mr. Easton's support for this statement is his observation that Eschelon would not be "Repeatedly Delinquent" under Eschelon's proposal if it paid

[101] Exhibit Qwest 2, Easton Direct, pp. 21-22.

[102] Exhibit Qwest 2, Easton Direct, pp. 22-23. Mr. Easton expresses the same concerns for Eschelon's alternative proposal under Issue 5-9 (Exhibit Qwest 2, Easton Direct, p. 23). I will address them together.

undisputed amounts late for two months, then made a timely payment in month 3, and then made untimely payments in months 4 and 5.[103] However, as I explained in my direct testimony,[104] Qwest already has ICAs/service agreements with CLECs and other carriers that contain the three consecutive month standard proposed by Eschelon, and Qwest has not provided a single example of this standard failing to provide the proper incentive for timely payment by those companies.

More important, the intent of the definition of Repeatedly Delinquent is not meant as an incentive for timely payment, but instead to provide an indication of a company that poses a risk to Qwest of being unable to pay its bills. The consequences of being defined Repeatedly Delinquent is the imposition of a payment deposit. As Mr. Easton acknowledged at the hearing in the Minnesota arbitration, the ICA provisions regarding late payment charges, section 5.4.8, are designed to provide the incentive for timely payment;[105] the deposit provisions, section 5.4.5, are intended to protect against ultimate non-payment.

In addition, Mr. Easton has not shown that Qwest's standard of three months in a twelve month period provides a better incentive for timely payment or more reasonably protects Qwest from non-payment than the three consecutive month standard in other carriers' contracts with Qwest. As I explained in my direct

[103] Exhibit Qwest 2, Easton Direct, p. 22.

[104] Exhibit Eschelon 2, Denney Direct, pp. 91-92. Exhibit Eschelon 2.16.

[105] Exhibit Eschelon 1.5 [MN Transcript, Vol. 1 at p. 150, lines 1-13 (testimony of William Easton)].

testimony,[106] Qwest's proposal would result in Eschelon's payments being deemed "Repeatedly Delinquent" if Eschelon paid a portion, even a de minimus portion, late for two months and made timely payments for 9 consecutive months and then missed an additional month. A carrier making timely payment in 9 consecutive months out of ten months does not constitute a legitimate risk about future payment or provide evidence of the financial stress that warrants a security deposit.

Q. MR. EASTON CHARACTERIZES ESCHELON'S PROPOSAL AS ATTEMPTING TO "CHANGE" THE LANGUAGE AGREED TO IN THE SECTION 271 WORKSHOPS "TO GIVE ITSELF ADDITIONAL AND UNWARRANTED BUSINESS ADVANTAGE."[107] IS THIS A FAIR CHARACTERIZATION OF ESCHELON'S PROPOSAL?

A. No. Mr. Easton assumes that any differences between SGAT language and ICA language should be rejected, and that the ICA should not deviate from the SGAT. This is not the case. When language can be improved upon in an ICA, it certainly should be, even if it differs from other sources. Eschelon's proposed language provides Qwest the opportunity to seek a deposit, when warranted.

Further, I explained in my direct testimony[108] that the "3 consecutive month" standard proposed by Eschelon is used by Qwest in its ICAs/service agreements

[106] Exhibit Eschelon 2, Denney Direct, pp. 90-91.

[107] Exhibit Qwest 2, Easton Direct, p. 23, lines 1-2.

[108] Exhibit Eschelon 2, Denney Direct, pp. 91-92 and Exhibit Eschelon 2.32.

with numerous CLECs and wireless service providers. Therefore, one reason to adopt Eschelon's proposal is to avoid giving those other CLECs the "additional and unwarranted business advantage" over Eschelon that is inherent in Qwest's proposal – *i.e.*, to hold Eschelon to a higher "3 months in a 12 month period" standard, while Eschelon's competitors are held to the "3 consecutive month" standard.

ISSUE 5-11

Q. WHAT IS QWEST'S CONCERN WITH ESCHELON'S PROPOSAL UNDER ISSUE 5-11?

A. Mr. Easton states that Eschelon can invoke the dispute resolution process if it disagrees with a deposit amount, so a second opportunity to do so is unnecessary and inequitable.[109] However, in my direct testimony,[110] I explained that the dispute resolution process may not be capable of providing Eschelon with the relief it seeks in time to avoid the damage that could be done if Eschelon is required to pay a deposit. Under Qwest's proposal, Eschelon could be required to pay a deposit on thirty days' notice. If the ICA does not provide a mechanism that stays that requirement if Eschelon seeks Commission review, Eschelon would need to file its complaint with the Commission, get on the Commission's agenda, and obtain an order granting at least interim relief, all within thirty days, and the

[109] Exhibit Qwest 2, Easton Direct, p. 24.

[110] Exhibit Eschelon 2, Denney Direct, pp. 93-94.

Commission would, again, be faced with having to deal with an issue in "crisis mode." Therefore, contrary to Mr. Easton's claim, Eschelon's language is necessary. Furthermore, providing an opportunity for Eschelon to seek Commission relief when it disagrees with Qwest's actions in these regards is imminently fair, since Eschelon is the party who is at risk of having its orders rejected, its customers disconnected, or having to pay a deposit.

ISSUE 5-12

Q. UNDER ISSUE 5-12, QWEST STATES THAT ESCHELON'S PROPOSAL WOULD RESULT IN THE COMMISSION MICRO-MANAGING THE COMPANIES' RELATIONSHIP AND PROHIBIT QWEST FROM UTILIZING REASONABLE BUSINESS PRACTICES.[111] DO YOU AGREE WITH MR. EASTON'S CHARACTERIZATION OF ESCHELON'S PROPOSAL?

A. No. I disagree with Mr. Easton's contention that Commission involvement in significant disagreements between an ILEC provider of wholesale services and a CLEC purchaser of those wholesale services constitutes micro-managing. Indeed, state Commissions are charged with acting as an independent decision-maker when disputes arise between an ILEC and a CLEC concerning the companies' performance of their respective obligations under an ICA. Eschelon's proposal would not prevent Qwest from employing reasonable business practices, rather it

[111] Exhibit Qwest 2, Easton Direct, p. 25.

would simply require Qwest – if it wishes to take the extraordinary step of requiring Eschelon to make a payment deposit of as much as $5 million – to first have its actions approved by the Commission. It is commonplace for state commissions to review an ILEC's business practices as they relate to their CLEC wholesale customers. And if Qwest's attempt to collect a deposit from Eschelon is reasonable based on relevant circumstances, then the Commission will approve Qwest's deposit requirement.

Q. MR. EASTON TESTIFIES THAT THE CONCERN UNDER ISSUE 5-12 IS REAL FOR QWEST.[112] WOULD YOU LIKE TO RESPOND?

A. Yes. Mr. Easton states that Qwest has "found it necessary on numerous occasions to take action to limit its exposure when a CLEC struggles,"[113] but he provides no support to back his claim, nor does he show that the provisions in Eschelon's proposal for the Payment and Deposits issues would not be sufficient to protect Qwest should such a circumstance arise. And given that Eschelon's proposal would allow Qwest to demand a deposit when a legitimate concern about future ability to pay exists – subject to Commission approval when disagreements exist about Eschelon's payment status – Mr. Easton's claim that Eschelon's proposal would not protect Qwest is not supported by the ICA language. Though Mr. Easton complains that Eschelon's proposal would force Qwest to incur additional debt while the Commission determines whether Qwest's actions are justified, the

[112] Exhibit Qwest 2, Easton Direct, p. 26.

[113] Exhibit Qwest 2, Easton Direct, p. 26.

fact of the matter is that if Qwest is correct, it would receive payment (albeit potentially later than if Qwest was able to act unilaterally). However, if Qwest's proposal is adopted, Eschelon would be put in a position where it would be forced to either pay the total amount of charges that Qwest demands – even if Eschelon disagrees with Qwest's view of Eschelon's payment status – or be forced to pay a substantial deposit. Again, Qwest's concern boils down to the timing of payment it will receive, while Eschelon's concern is whether Eschelon will be able to continue to serve its customers. The disagreement between Eschelon and Qwest evident in Exhibit Eschelon 2.6 (Confidential) shows that Eschelon's concern is real.

ISSUE 5-13

Q. MR. EASTON TESTIFIES THAT QWEST'S PROPOSAL FOR ISSUE 5-13 ALLOWS QWEST TO "REVIEW THE OTHER PARTY'S CREDIT STANDING AND INCREASE THE AMOUNT OF DEPOSIT."[114] IS MR. EASTON'S TESTIMONY MISLEADING?

A. Yes. It is important to note that when Mr. Easton testifies that Qwest would be able to "review a credit report"[115] as support for increasing a deposit under its proposed Section 5.4.7, that is not the only information that Qwest could review as support for this action. In fact, under Qwest's proposal for Issue 5-13, the

[114] Exhibit Qwest 2, Easton Direct, p. 27, lines 12-14.

[115] Exhibit Qwest 2, Easton Direct, p. 27, lines 12-13.

options are almost limitless for Qwest in this regard. During negotiations on this issue, Qwest indicated that, under this provision, it could simply read something in the newspaper that caused it concern and demand a deposit increase based solely on that information. This lack of standards or objectivity greatly concerns Eschelon, especially when other sections of the ICA already provide Qwest with sufficient ability to establish and increase deposits from its customers (See, Sections 5.4.5 and 5.4.6).

Mr. Easton's testimony is also misleading in stating that its proposal for Issue 5-13 applies to an "increase"[116] in the amount of a deposit. This would suggest that Qwest has already demanded a deposit from Eschelon and 5.4.7 would apply to increasing that amount. However, Qwest is actually interpreting this as allowing Qwest to demand an entirely new deposit (*i.e.*, an "increase" from $0) – something that is already addressed in 5.4.5. To this end, Eschelon offered Option #2 for Issue 5-13,[117] which is repeated below.[118]

> 5.4.7 If a Party has received a deposit pursuant to Section 5.4.5 but the amount of the deposit is less than the maximum deposit amount permitted by Section 5.4.5, the Billing Party may review the other Party's credit standing and increase the amount of deposit required, if approved by the Commission, but in no event will the maximum amount exceed the amount stated in Section 5.4.5. Section 5.4 is not intended to change the scope of any regulatory agency's or bankruptcy court's authority with regard to Qwest or CLECs.

[116] Exhibit Qwest 2, Easton Direct, p. 27, line 13.

[117] Eschelon's Option #1 is for 5.4.7 to be intentionally left blank.

[118] Exhibit Eschelon 2, Denney Direct, p. 96.

Eschelon's Option #2 makes clear that 5.4.7 applies to an increase in an existing deposit established under 5.4.5, rather than a second opportunity for Qwest to demand a deposit based on a complete lack of standards or criteria. Eschelon's Option #2 would require Commission approval for a change in deposit amount under 5.4.7 in order to ensure that the credit review conducted and the information relied upon justifies the increase in deposit. And because Qwest has indicated that 5.4.7 is needed because of the frequency of CLEC financial troubles and bankruptcies,[119] Eschelon's Option #2 makes clear that 5.4.7 does not affect any regulatory agency's or bankruptcy court's authority in this regard.

Q. QWEST CLAIMS THAT ITS PROPOSAL FOR ISSUE 5-13 TO REVIEW ESCHELON'S CREDIT STANDING AND INCREASE THE DEPOSIT AMOUNT OR ESTABLISH A NEW DEPOSIT REQUIREMENT IS A "REASONABLE AND CUSTOMARY BUSINESS PRACTICE."[120] WOULD YOU LIKE TO RESPOND?

A. Yes. Section 5.4.5 permits Qwest to require a deposit on certain conditions. That provision should be adequate to meet Qwest's business needs. In light of the remedies that Qwest already has available to it, Section 5.4.7 is unnecessary and that is the reason why Eschelon's first proposal on this issue is that the Section be left intentionally blank. However, assuming that the Commission determines that the ICA should contain some provision that allows Qwest to increase the amount

[119] Exhibit Qwest 2, Easton Direct, p. 27.

[120] Exhibit Qwest 2, Easton Direct, p. 27, line 14.

of a payment deposit, I disagree that Qwest should be able to make this determination unilaterally without any objective, quantifiable criteria or procedure. There is no way for Eschelon to know if the actions that Qwest is taking are "reasonable" because Qwest's decision making under its proposal for Issue 5-13 is not subject to any standard. In other words, there is no limit on the circumstances under which Qwest could demand an entirely new deposit or an increase to an existing deposit, which would render the limitations provided for under Section 5.4.5 meaningless. In fact, Eschelon's credit standing would not even need to change for Qwest to invoke Section 5.4.7 and demand a deposit or deposit increase. Providing this type of control to an ILEC over its CLEC competitors – to tie its competitor's financial resources up in potentially frivolous deposits – is not "customary" from a public policy perspective.

It is more "reasonable and customary" for the Commission to have a say in these issues between ILEC and CLEC – which is what is called for in Eschelon's proposal. Though Qwest claims that the need for it to act unilaterally is "acute"[121] due to the "frequency of telecommunications carriers declaring bankruptcy or simply shutting their doors,"[122] again, Qwest provides no information supporting the acuteness of this problem or the frequency of these occurrences. Furthermore, Qwest provides no reason why its ability to demand deposits under 5.4.5 does not already sufficiently protect Qwest's interest.

[121] Exhibit Qwest 2, Easton Direct, p. 27, line 21.

[122] Exhibit Qwest 2, Easton Direct, p. 27, lines 18-19.

In addition, as a matter of bankruptcy law, a payment to a creditor for an antecedent debt of the debtor that is made 90 days or less before a filing for bankruptcy is avoidable as a preference.[123] Such a deposit, to the extent made fewer than 90 days before bankruptcy, would likely not be available, as Qwest appears to assume.

Q. MR. EASTON ATTEMPTS TO CLARIFY QWEST'S POSITION ON ISSUE 5-13 BY STATING THAT QWEST'S UNILATERAL CREDIT REVIEW IS THE "TRIGGERING EVENT."[124] DOES THIS SATISFY THE CONCERN THAT YOU EXPRESSED IN YOUR DIRECT TESTIMONY REGARDING THE LACK OF A TRIGGERING EVENT IN SECTION 5.4.7?

A. No. Under Qwest's proposal for Section 5.4.7, the maximum amount of the deposit may not "exceed the amount stated in Section 5.4.5." The maximum under Section 5.4.5 is determined based on the average two month period from the date of either of two specific, objective, verifiable events: (1) date of the request for reconnection of services or resumption of order processing and (2) the date CLEC is repeatedly delinquent. Therefore, based on the known dates of these triggering events, Eschelon can calculate the potential maximum deposit to which Qwest is entitled under Section 5.4.5 and ensure that Qwest is not exceeding the maximum. Qwest asserts that its decision to review Eschelon's

[123] 11 U.S.C. § 547(b).

[124] Exhibit Qwest 2, Easton Direct, p. 27.

"credit standing"[125] is yet another "triggering event" that can be used to determine the amount of the maximum. This concept is nowhere to be found in Qwest's proposed contract language, however.

Furthermore, Eschelon has no control over and no knowledge of the date on which Qwest decided to conduct its unilateral credit review. Qwest could simply select a date at a time in which Eschelon's monthly charges are the highest so that the deposit is as high as possible (that is, if the deposit required under Qwest's language for Section 5.4.7 is even capped by Section 5.4.5[126]). This type of gamesmanship would not be allowed under the triggering events found in Section 5.4.5 because the dates are objective and known by all parties.

V. NON DISCLOSURE AGREEMENTS AND BILL VALIDATION (SUBJECT MATTER NOS. 8 & 9)

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

Issue No. 5-16: ICA Section 5.16.9.1

Q. PLEASE SUMMARIZE THIS ISSUE.

A. Qwest has agreed that Qwest employees to whom Eschelon's forecasts and forecasting information are disclosed will be required to execute a nondisclosure agreement covering the information. Eschelon's proposed language would require Qwest to provide Eschelon with a signed copy of each non-disclosure

[125] Exhibit Qwest 2, Easton Direct, p. 27, line 12.

[126] Exhibit Eschelon 2, Denney Direct, pp. 96-99.

agreement within ten days of execution. Qwest proposes to delete Eschelon's proposed language.

Q. WHAT ISSUES DID QWEST RAISE RELATED TO THIS ISSUE?

A. Qwest objects to Eschelon's proposal because it "places an unnecessary administrative burden on Qwest"[127] and that, "In addition to the stringent requirements set forth in section 5.16.19.1, under section 18, Eschelon has further protection and recourse if it believes that Qwest has misused confidential information."[128]

Q. IS IT BURDENSOME TO PROVIDE SIGNED COPIES OF PROTECTIVE AGREEMENTS?

A. No. As addressed in my direct testimony, providing copies of signed protective agreements is common practice and can not reasonably be considered a burden.[129] Mr. Easton described the burden as the effort Qwest would have to undertake to put a copy of the agreement in an envelope and drop the envelope in the mail.[130]

Q. DOES SECTION 18 OF THE ICA OFFER THE PROTECTION ASSERTED BY MR. EASTON?

A. No. Section 18.0 of the contract is titled "Audit Process." Section 18.1.1 defines audit as dealing with the Billing process:

[127] Exhibit Qwest 2, Easton Direct, p. 30, line 3.

[128] Exhibit Qwest 2, Easton Direct, p. 30, lines 8-10. .

[129] Exhibit Eschelon 2, Denney Direct, p. 103.

[130] Exhibit Eschelon 1.5 [MN Transcript, Vol. 1 at 126-127 (testimony of William Easton)].

> 18.1.1 "Audit" shall mean the comprehensive review of the books, records, and other documents used in the Billing process for services performed, including, without limitation, reciprocal compensation and facilities provided under this Agreement.

Qwest refers to section 18.3.1,[131] stating that it allows Eschelon to audit Qwest's compliance with this interconnection agreement. Section 18.3.1 reads in its entirety [emphasis added]:

> 18.3.1 Either Party may request an Audit of the other Party's compliance with this Agreement's measures and requirements applicable to limitations on the distribution, maintenance, and use of proprietary or other protected information that the requesting Party has provided to the other. Those ***Audits shall not take place more frequently than once in every three (3) years unless cause is shown*** to support a specifically requested audit that would otherwise violate this frequency restriction. ***Examinations will not be permitted in connection with investigating or testing such compliance.*** Other provisions of this Section that are not inconsistent herewith shall apply, except that in the case of audits, the Party to be audited may also request the use of an independent auditor.

Section 18.3.1 must be read in the context of section 18.0 and the use of the term "Audit" in section 18.3.1, by virtue of both the capitalized term and the specific statement in 18.1 that "For purposes of this section the following definitions shall apply," refers audit as defined in 18.1.1. Section 18.0 of the contract deals with audits of the billing process, not Qwest's use of confidential forecast data provided to Qwest by Eschelon. Mr. Easton agrees that the nondisclosure

[131] Exhibit Qwest 2, Easton Direct, p. 30.

agreements that are the subject of Section 5.16.9.1 are not documents used in the billing process and, accordingly, would not be covered by the audit provision.[132]

The most obvious potential cause of non-compliance with the Agreement regarding the handling of Eschelon's forecast would be the signatories of the protective agreement.[133] This is precisely the type of information that should be made available to Eschelon to ensure the proper handling of forecasted data.

Q. WHAT HAPPENS IF QWEST DOES NOT PROVIDE A COPY OF THE NON-DISCLOSURE AGREEMENT WITHIN TEN DAYS?

A. The closed and agreed upon dispute resolution provisions in Section 5.18 of the interconnection agreement apply to any dispute under the ICA, including this one. If Eschelon requested a copy and did not receive it, or if Eschelon later learned that its confidential information was in the wrong hands and Eschelon had not received a copy of an executed non-disclosure agreement for the person possessing the information, Eschelon could use those procedures to seek redress. Eschelon hopes to avoid such disputes by including a requirement in the contract and asking Qwest to honor that contractual commitment.

Other alternatives do not address the problem as well. Confidential information should not be in the wrong hands for a lengthy time period, so increasing the number of days is not a good solution. Also, it is unworkable to change the time

[132] Exhibit Eschelon 1.7 (CO Hearing Transcript at Vol. 2, pp. 276-279).

[133] Exhibit Eschelon 2, Denney Direct, p. 104.

period to "upon request," because Eschelon will not know when an additional person at Qwest is given access to Eschelon's confidential information and will, therefore, not know when to make such a request.

SUBJECT MATTER NO. 9. TRANSIT RECORD CHARGE AND BILL VALIDATION

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

Q. PLEASE SUMMARIZE THIS ISSUE.

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

Q. WHAT ISSUES DID QWEST RAISE RELATED TO THIS ISSUE?

A. Again, the issues raised by Qwest miss the point of the disagreement surrounding this language. Qwest cites an agreement negotiated in connection with the resolution of a complaint proceeding in Minnesota that the "best source of information for determining the source of such calls was the originating switch."[134] Qwest also states that "[r]equiring Qwest to provide Eschelon with detailed records of information it already has and to do so without charge is an

[134] Exhibit Qwest 2, Easton Direct, p. 31, lines 16-17.

unreasonable and inefficient way to determine appropriate ***billing by Eschelon***."[135]

Q. WHY ARE QWEST'S ARGUMENTS OFF THE MARK?

A. First, it is crucial to understand that Qwest bills Eschelon for transit when an Eschelon originated call transits the Qwest network and terminates to a third party carrier. Eschelon's language has nothing to do with **Eschelon's** billing, but relates to Eschelon's ability to validate the bills it receives from **Qwest.**[136] Further, Qwest admits that "[t]ransit records are a poor substitute for originating switch records because the purpose of a transit switch is to complete calls, **with billing considerations being secondary**."[137] Yet, Qwest is billing Eschelon for these records and does not provide the call detail information necessary to justify these bills. Eschelon agrees that its switch records information on calls originated by Eschelon's customers, but this is only half of the puzzle. In attempting to verify Qwest's bills for transit traffic, Eschelon needs to be able to reconcile the originating call information collected by Eschelon's switch with the call records Qwest used to generate its transit bill to Eschelon.[138] Without Qwest's call record data, there is no way to verify Qwest's billing.

[135] Exhibit Qwest 2, Easton Direct, p. 31, line 25 to p. 32, line 2. (emphasis added).

[136] Exhibit Eschelon 2, Denney Direct, pp. 106 and 108.

[137] Exhibit Qwest 2, Easton Direct, p. 31, lines 17-19.

[138] Exhibit Eschelon 2, Denney Direct, pp. 107-108.

Finally, Qwest protests that Eschelon asks Qwest to provide this data without charge.[139] However, Eschelon should not be required to pay in order to receive the details behind the bills Qwest provides to Eschelon. Further, Eschelon's language makes clear that Qwest will provide Eschelon-originated transit records, on a limited basis, only for the purpose of bill verification as part of the category 11 records.[140]

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

Q. PLEASE COMMENT REGARDING THE WIRE CENTER ISSUES (ISSUES 9-37, 9-37(A), 9-37(B), 9-38, 9-39, 9-40, 9-41, AND 9-42), AS WELL AS MS. MILLION'S CLAIM THAT, IF THE COMMISSION SEPARATELY APPROVES THE WIRE CENTER SETTLEMENT AGREEMENT, "THERE WILL BE NO FURTHER NEED TO ADDRESS THE CONVERSIONS ISSUE IN THIS ARBITRATION."[141]

A. Qwest and Eschelon agreed upon a specific list of issues that are "addressed in the Commission's TRRO wire center proceeding."[142] They are Issue Nos. 9-37

[139] Exhibit Qwest 2, Easton Direct, pp. 31-32. . As stated in my direct testimony, Qwest has already agreed to provide reasonably requested documentation that will expedite the resolution of disputes between Eschelon and Qwest under Section 21.8.4.3 of this Interconnection Agreement. (Exhibit Eschelon 2, Denney Direct, pp. 106-107.)

[140] Exhibit Eschelon 2, Denney Direct, p. 107.

[141] Qwest Exhibit 4, Million Direct, p. 6, lines 17-19.

[142] Qwest's Response to Eschelon's Arbitration Petition (May 30, 2007) ("Qwest's Response"), p. 23, lines 11-12.

through 9-42.[143] These issues are described in the Issues by Subject Matter List.[144] The ICA language that is the subject of Issue Nos. 9-37 through 9-42 is set forth in the Joint[145] Disputed Issues Matrix (Exhibit 3 to Eschelon's Petition) on pages 63-79. With respect to *only* these issues, Qwest and Eschelon have brought a Joint Motion of Eschelon and Qwest for Single Compliance Filing of the Interconnection Agreement and, if Granted, a Revised Schedule (Exhibit 2.30).[146] If that Joint Motion is not granted, Eschelon will rely upon the information in its Petition and its Exhibits, the Commission's orders in the wire center docket,[147] any surrebuttal testimony Eschelon files, and briefing on these issues. If the Joint Motion is granted and there are additional rounds of testimony under the circumstances described in the Joint Motion, Eschelon will further discuss these issues in those rounds of testimony and briefing.

[143] Qwest's Response, p. 23, lines 10-12. See also Exhibit 2.30 (Joint Motion of Eschelon and Qwest for Single Compliance Filing of the Interconnection Agreement and, if Granted, a Revised Schedule – "Joint Motion") (referring to Issues 9-37 through 9-42), pp. 1-2.

[144] Exhibit 2 to Eschelon's Petition, pp. 3-4 & Eschelon Exhibit 1.2, p. 4.

[145] As indicated in footnote 2 on page 8 of Eschelon's Petition, although Qwest did not provide position statements for the Joint Disputed Issues Matrix, it is a joint matrix by Qwest and Eschelon in that Qwest has reviewed it and concurred with its language. Qwest has indicated it may update its wire center language later in the proceeding if needed.

[146] Ms. Stewart and Ms. Million attempt to characterize these issues and the Joint Motion in their testimony. See Qwest Exhibit 3 (Stewart Direct), p. 2, line 17 – p. 4, line 2; Qwest Exhibit 4 (Million Direct), p. 6, lines 12 -21. The Commission should look to the actual language of the Settlement Agreement and the Joint Motion, rather than Qwest's characterization of those documents and the issues.

[147] Utah Commission Orders dated November 3, 2006 and September 11, 2006 in docket 06-049-40, *In the Matter of the Investigation into Qwest Wire Center*. Documents related to this order, including the orders, are available at: http://www.psc.state.ut.us/telecom/Indexes/0604940Indx.htm.

All other issues in this matter are to be addressed pursuant to the Commission's Scheduling Order regarding prefiled testimony (which ends with surrebuttal testimony on August 10, 2007 and a hearing commencing September 10, 2007).[148] If the companies' request in the Joint Motion for a revised schedule is granted, the requested revisions to the schedule relate only to Issues 9-37 through 9-42 per the terms of the Joint Motion. The issues that are "addressed in the Commission's TRRO wire center proceeding"[149] and subject to the Joint Motion[150] do *not* include Issues 9-43 - 9-44 ("Conversions").[151] Nonetheless, under the heading "Issues 9-43 and 9-44 – Conversions,"[152] Ms. Million states: "Assuming approval by the Commission [of the settlement agreement in the wire center docket], there will be no further need to address the conversions issue in this arbitration."[153]

Ms. Million makes this statement in response to a question about the "appropriate *charge* for conversions."[154] As indicated in the Issues by Subject Matter List, *Issue 9-40* deals with the non-recurring charges (NRCs) (*not* Issue Numbers 9-43

[148] Scheduling Order, Docket No. 07-2263-03 (May 21, 2007).

[149] Qwest's Response to Eschelon's Arbitration Petition (May 30, 2007) ("Qwest's Response"), p. 23, lines 11-12.

[150] Exhibit 2.30 (Joint Motion), pp. 1-2 (referring to Issues 9-37 through 9-42).

[151] *Compare* Qwest's Response, p. 23, lines 10-16 (wire center issues) *with* Qwest's Response, p. 23, line 17 – p. 25, line 7 (conversions).

[152] Qwest Exhibit 4, Million Direct, p. 6, line 1 (heading). There is no other heading or Issue Number before Ms. Million's discussion of the wire center settlement agreement on page 6, lines 12-21.

[153] Qwest Exhibit 4, Million Direct, p. 6, lines 17-19.

[154] Qwest Exhibit 4, Million Direct, p. 6, lines 12-13 (emphasis added).

and 9-44).[155] Issue 9-40 is one of the issues referred to generally as the "wire center" issues (Issues 9-37 through 9-42). Both the Issues by Subject Matter List and the Joint Disputed Issues Matrix described Issue 9-40 as "NRCs for Conversion" and both list the ICA Sections at issue in Issue 9-40 as 9.1.13.5.2, 9.1.14.6, and 9.1.15.2.1 (which all relate to the applicable charge).[156] Per the issues identified in the Joint Motion, Issue 9-40 is a wire center issue addressed in the wire center docket and subject to the request for a revised scheduled under the circumstances described in the Joint Motion.[157] To the extent that Ms. Million intended to refer to Issue Number 9-40 (although she does not mention Issue 9-40), Eschelon agrees that Issue 9-40 (dealing with the applicable *charge* for conversions) is a subject of the Settlement Agreement and the Joint Motion.[158]

To the extent that Ms. Million refers (in the above-quoted sentence) to Issue Numbers 9-43 and 9-44 and subparts, she is incorrect, as those issues are *not* the subject of the settlement agreement, or the Joint Motion. By mixing the issue numbers and her broad statement about conversions no longer being addressed in this arbitration, Ms. Million may be suggesting that a resolution as to the applicable charge (Issue 9-40) also resolves Issue 9-43 and 9-44 relating to the

[155] Exhibit 2 to Eschelon's Petition, pp. 3-4 & Eschelon Exhibit 1.2, p. 4.

[156] Eschelon Exhibit 1.2, p. 4; Exhibit 3 to Eschelon Petition (Joint Disputed Issues Matrix), p. 76.

[157] Exhibit 2.30 (Joint Motion), pp. 1-2 (referring to Issues 9-37 through 9-42).

[158] If the conversion charge applicable to Qwest and the defined Joint CLECs under the settlement agreement in the wire center case is approved, that conversion charge will apply to Qwest and Eschelon (one of the defined Joint CLECs). In that case, per the settlement agreement, the compromise language for ICA Sections 9.1.13.5.2, 9.1.14.6, and 9.1.15.2.1 will be included in the ICA (and the $25 negotiated rate will be included in Exhibit A to the ICA).

manner of conversion. That is not the agreement of the companies,[159] and it is not correct. The manner of conversion (e.g., whether to change the circuit ID) was not addressed in the wire center proposed settlement.[160] The $25 compromise rate was not designed to recover the costs of specific activities, but rather to strike a balance between Qwest's proposal of $50 and the CLEC's proposal of zero. If the wire center settlement agreement is approved by the Commission, the issue of the rate will be settled, and the issue of whether it is appropriate for Qwest to charge for activities that benefit Qwest at Eschelon's inconvenience becomes academic as to the parties to the settlement. However, the manner of conversion (Issues 9-43 and 9-44) is still in issue, and Qwest's proposed method of conversion continues to harm Eschelon and its customers (regardless of the rate paid for these conversions), as discussed by Mr. Starkey with respect to Issues 9-43 and 9-44.

If Eschelon's position for Issues 9-43 and 9-44 is adopted in this arbitration, Qwest will be able to charge a rate that is high compared to the minimal amount of work (i.e., repricing). For example, if Qwest takes the position that the compromise rate includes the cost of changing the circuit ID, then Eschelon will as part of its compromise on the rate pay the cost of changing the circuit ID even

[159] Exhibit 2.30 (Joint Motion), pp. 1-2 (referring to Issues 9-37 through 9-42).

[160] As described in Eschelon Exhibit 2, Denney Direct p. 4, lines 3 – 6 and 17-18 I testified on behalf of the Joint CLECs in the Wire Center proceedings in Utah as well as other Qwest states. In addition, I was the lead negotiator on behalf of Eschelon during the settlement negotiations and was directly involved in all of the settlement discussions.

though the circuit ID will not change under Eschelon's proposed ICA language. The rate is not intended as a cost-based rate; it is a negotiated[161] rate only. Qwest can be overcompensated by the $25 compromise rate not only if Eschelon's position on 9-43 and 9-44 is adopted, but also if Qwest's method of conversions is allowed and the Commission were to find that it is inappropriate for Qwest to charge CLECs for undertaking this method. The settlement agreement renders this second point academic here as a charge will have been set between Qwest and Eschelon. To the extent that Qwest claims that it incurs any costs (such as associated with use of a new USOC), Qwest will receive ample compensation, pursuant to a rate to which it has agreed. That Eschelon has agreed to such a high rate illustrates that Eschelon's primary concern when proposing a repricing manner of conversion is not the rate but the potential impact of any conversion on customers. Please refer to Mr. Starkey's discussion of Issues 9-43 and 9-44 in his direct and rebuttal testimony.

VII. UNE AVAILABILITY, CERTAIN RATE APPLICATIONS AND COMMINGLED EELS (SUBJECT MATTER NOS. 22, 22A, 23, 25 & 26)

SUBJECT MATTER NO. 22, UNBUNDLED CUSTOMER CONTROLLED REARRANGEMENT ELEMENT ("UCCRE")

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

Q. PLEASE SUMMARIZE THIS ISSUE.

[161] See 47 U.S. C. §252(a)(1).

A. This issue deals with the circumstances under which Qwest can cease to offer to CLECs products and services that it has previously offered and that have been approved by the Commission. The product that has prompted Eschelon's proposal is Unbundled Customer Controlled Rearrangement Element ("UCCRE") (Issue 9-53), because Qwest will not offer it to Eschelon even though this product continues to be offered to other CLECs through Qwest's SGAT and other CLEC ICAs.[162] Eschelon's proposed language would require that the rates and services approved by this Commission related to UCCRE be available to Eschelon so long as they are available to other CLECs.[163] In addition, as an alternative, Eschelon has proposed to make a product phase-out process available to Qwest when Qwest desires to cease offering products but does not want to individually obtain ICA amendments from every CLEC. Both proposals address the problem of Qwest offering a product to some CLECs but not others and the need for nondiscriminatory treatment.

Q. WHAT CONCERNS DID QWEST RAISE RELATED TO THIS ISSUE?

A. Qwest objects to Eschelon's language based on several arguments, including: (1) although Qwest provided UCCRE to CLECs in the past, it has no legal obligation to provide it;[164] (2) there is no demand for UCCRE from CLECs, including

[162] Issue 9-50 (cross connects for CLECs on intrabuilding cable subloops) prompted a similar Eschelon proposal. Issue 9-50 is now closed.

[163] Exhibit Eschelon 2, Denney Direct, pp. 109-112.

[164] Exhibit Qwest 3, Stewart Direct, p. 36, lines 8 and 25-26; p. 42, line 3; p. 45, line 17; and p. 47, lines 3-4.

Eschelon;[165] (3) "grandfathering" services is a common industry practice and does not amount to discrimination;[166] (4) Qwest has no processes or systems in place that would permit it to provide notification to Eschelon in the event Qwest offers the service to another CLEC;[167] and (5) ICAs are publicly filed and Eschelon can review them for itself to determine whether Qwest is offering the service to other CLECs.[168]

Q. DOES QWEST HAVE AN OBLIGATION TO PROVIDE UCCRE TO ESCHELON?

A. Yes. I address this issue in my Direct Testimony.[169] Contrary to Ms. Stewart's claim to the contrary, the FCC did not eliminate UCCRE from its network unbundling rules.[170] Qwest's own proposed TRO-TRRO interconnection agreement amendment does not eliminate UCCRE from carriers' interconnection agreements.[171]

Q. IS GRANDPARENTING COMMON INDUSTRY PRACTICE, AS DESCRIBED BY MS. STEWART?

[165] Exhibit Qwest 3, Stewart Direct, p. 36, lines 8-9 and line 25. *See also* Exhibit Qwest 3, Stewart Direct, p. 42, lines 2-3.

[166] Exhibit Qwest 3, Stewart Direct, p. 43, lines 15 and 24.

[167] Exhibit Qwest 3, Stewart Direct, p. 41.

[168] Exhibit Qwest 3, Stewart Direct, p. 41.

[169] Exhibit Eschelon 2, Denney Direct, pp. 122-124.

[170] Exhibit Qwest 3, Stewart Direct, p. 46, lines 23-24. .

[171] Qwest's TRO-TRRO Amendment was attached to my direct testimony as Exhibit Eschelon 2.31.

A. No. Qwest seeks to "grandparent" these services without regulatory approval. This is not common practice. In fact, the example provided by Ms. Stewart regarding "grandparenting" is contrary to Ms. Stewart's claim regarding the "industry practice." To illustrate her grandfathering argument, Ms. Stewart uses the elimination of the high frequency portion of the loop ("HFPL") as an example where pre-TRO rates were no longer available for CLECs that did not have "grandfathered" line sharing arrangements. This example actually shows that regulatory approval was needed before the ILEC could grandparent that service. Qwest can seek that regulatory approval under Eschelon's proposed Section 1.7.3 or, if there is a change of law, the ICA will be amended pursuant to Section 2.2. In the *TRO*, rather than allowing the ILEC to eliminate HFPL CLEC-by-CLEC, allowing the ILEC to withdraw the product from some ICAs but not others, as the ILEC saw fit, the FCC ordered a transition plan including a specific grandparenting rule. In contrast, under Qwest's proposed language, Qwest could eliminate services from Eschelon's ICA with a provision that Eschelon can only order that service if Qwest offers it to another CLEC in a newly negotiated agreement. The next day, Qwest could provide the same product to another carrier under the existing SGAT or an existing (*i.e.*, not newly negotiated) ICA, and Eschelon would be precluded from receiving the same service on a nondiscriminatory basis.

Q. IS ESCHELON REQUESTING THAT QWEST PROVIDE NOTICE TO ESCHELON EACH TIME QWEST OFFERS THE SERVICE TO ANOTHER CLEC?

A. No. Qwest currently offers this product to other CLECs today and will likely continue to do so at the completion of this interconnection agreement. Eschelon's language provides that Qwest must allow Eschelon to obtain this product on nondiscriminatory terms and does not require Qwest to provide notice each time it offers this product to another CLEC. In addition, Qwest regularly provides notice to CLECs through its notification process and places optional contract amendments on its web site. There is no reason Qwest cannot continue to do this going forward.

Q. QWEST ARGUES THAT THERE IS NO DEMAND FOR UCCRE. SHOULD DEMAND BE TAKEN INTO ACCOUNT?

A. No. I address this issue in my direct testimony.[172] "Lack of Demand" does not determine whether Qwest has a legal obligation to offer a product.

Q. DOES QWEST AGREE THAT A PHASE OUT PROCEEDING WOULD BE A REASONABLE APPROACH WHEN QWEST WISHES TO DISCONTINUE A PRODUCT?

A. This is unclear. Ms. Stewart objects to Eschelon's phase out proposal, stating, "The proper forum in which to consider an issue with this type of far-reaching

[172] Exhibit Eschelon 2, Denney Direct, pp. 120-122.

effect is one in which all interested Utah local exchange carriers can provide input concerning the necessity and contours of such a process. If the Commission were to adopt such a process, the proper method for doing so would be through a generic order that applies to all carriers, not through a single arbitration and ICA between Qwest and Eschelon."[173] From this testimony, it appears that Qwest agrees that a "generic order" applicable to all carriers would be appropriate before Qwest discontinues a product. The Eschelon Section 1.7.3 proposal based on the Minnesota Department of Commerce approach (Proposal #4) responds to this concern. Under Proposal number four, any phase out process would be adopted by the Commission through a generic order. It specifically requires Qwest to "obtain an order from the Commission adopting a process" before the process would be applicable under the ICA. Eschelon Proposal number four provides that, until a process is adopted, the normal rules governing amendment of agreements apply. If Qwest opposes a process, under Proposal number four, it need not obtain one. If it does not, it must continue to offer products on a nondiscriminatory basis as described in Section 1.7.3.1 of Proposal number four.

Q. WOULD ESCHELON'S PHASE OUT PROPOSAL "REQUIRE A TIME-CONSUMING, RESOURCE-INTENSIVE GENERIC DOCKET RELATING TO PRODUCT WITHDRAWALS IN RESPONSE TO QWEST'S ATTEMPT TO STOP OFFERING PRODUCTS THAT NO

[173] Exhibit Qwest 3, Stewart Direct, p. 41, lines 17-20.

CLEC IS ORDERING AND FOR WHICH THERE IS NO FORESEEABLE DEMAND?"[174]

A. No. It would make no sense for CLECs to spend the time and resources to argue for products for which they have no use. However, it is important that Qwest not be allowed to be the unilateral decision maker regarding the products and services which Qwest no longer is required to offer.

Also, as I indicated in my previous response, under Eschelon Proposal number four, any phase out process would be developed in a proceeding before the Commission. Therefore, during that proceeding, any concerns by Qwest along these lines could be addressed.

Q. WHAT OTHER OBJECTIONS DOES QWEST RAISE TO ESCHELON'S PHASE OUT PROPOSALS?

A. Qwest lists three additional objections to Eschelon's phase out proposals. (1) Qwest argues that Eschelon is attempting "to regulate through the Qwest-Eschelon ICA Qwest's relationships with other CLECs."[175] (2) Qwest argues that because it quit updating its SGAT, "Eschelon's alternative proposals would improperly require Qwest to update its SGAT."[176] (3) Qwest argues that

[174] Exhibit Qwest 3, Stewart Direct, p. 41, line 27 through p. 42, line 2.

[175] Exhibit Qwest 3, Stewart Direct, p. 41, lines 1-2.

[176] Exhibit Qwest 3, Stewart Direct, p. 45, lines 5-6. Starting at line 10 Ms. Stewart states, "Qwest stopped updating its SGATs and has not made any updates to incorporate changes in law since 2004."

Eschelon's phase out proposals would apply to "a product or service that the FCC has removed from its unbundling rules."[177]

Q. IS ESCHELON ATTEMPTING TO REGULATE QWEST'S RELATIONSHIPS WITH OTHER CLECS?

A. No. Ms. Stewart argues that Eschelon's phase out proposal "would be triggered by Qwest's decision to stop offering a wholesale product or service to "any" CLEC, not just Eschelon."[178] Ms. Stewart claims that Qwest would have to go through the phase out proposal in the case where Qwest and another CLEC agreed to remove a product from its ICA.[179] This is not the case. All of Eschelon's phase out proposals relate to the case where Qwest seeks to phase out or otherwise cease offering a product on a wholesale basis.[180] This would not prohibit Qwest and a CLEC from agreeing to remove a product from their interconnection agreement. This is dealt with in varying ways in the alternative proposals and yet Qwest not only does not agree with any of them, it makes no counter proposal to remedy what it claims are problems with the language.

Q. WOULD ESCHELON'S PROPOSAL IMPROPERLY REQUIRE QWEST TO UPDATE ITS SGAT?

[177] Exhibit Qwest 3, Stewart Direct, p. 46, lines 25-26.

[178] Exhibit Qwest 3, Stewart Direct, p. 41, lines 4-5.

[179] Exhibit Qwest 3, Stewart Direct, p. 41, lines 5-8.

[180] See Exhibit Eschelon 2, Denney Direct, pp. 112-115.

A. No. As discussed by Mr. Starkey, Qwest's attempt to eliminate the SGAT without Commission involvement is improper.[181] Eschelon is not aware of any state commission eliminating Qwest's SGAT and therefore the SGATs remain available for carriers to opt into, despite Qwest's unilateral notice stating it is not.[182] The TRO/TRRO allowed ILECs to stop offering certain products under certain conditions, but it did not require ILECs to do so. If Qwest intended to stop offering those products, it could have asked the Commissions to allow it to update its SGATs. Instead, the SGAT remains in place.

Q. DO ESCHELON'S PHASE OUT PROPOSALS APPLY TO PRODUCTS AND SERVICES ELIMINATED FROM THE UNBUNDLING RULES BY THE FCC?

A. First, as discussed above and in Direct Testimony, UCCRE was not eliminated by the FCC. Second, Eschelon's phase out proposals exclude products eliminated as a result of a change in law, such as an FCC ruling. Eschelon's proposal #2 (first phase out proposal, based on Minnesota DOC language) contains an explicit exclusion for products eliminated by the FCC as long as Qwest promptly eliminates this product from carriers agreements or follows a phase out process ordered by the FCC. The second sentence from this proposal is copied below:

> Obtaining such an Order will not be necessary if Qwest (1) promptly phases-out an element, service or functionality from the

[181] See Exhibit Eschelon 1, Starkey Direct, pp. 93-96.

[182] Exhibit Eschelon 3.23 (Qwest's Level 1 notice) ("The SGATs are no longer available to opt into and have been replaced with the Negotiations Template Agreement (NTA).").

> agreements of all CLECs in Utah within a three-month time period when the FCC has ordered that the element, service or functionality does not have to be ordered, or (2) follows a phase-out process ordered by the FCC.[183]

Eschelon's proposal #3 (second phase out proposal) contains language in 1.7.3.1 (contained below) noting that if Qwest seeks to remove a product due to a change in the Existing Rules section 2.2 of the interconnection agreement, pertaining to a change in Existing Rules would apply. Section 2.2 requires that parties amend their agreement as a result of a change in Existing Rules.

> 1.7.3.1 If the basis for Qwest's request is that Qwest is no longer required to provide the product or service pursuant to a legally binding modification or change of the Existing Rules, in the cases of conflict, the pertinent legal ruling and the terms of Section 2.2 of this Agreement govern notwithstanding anything in this Section 1.7.3.[184]

Eschelon's proposal #4 (third phase out proposal) indicates in section 1.7.3.1 that Qwest can not refuse a product that it offers to other CLECs "on the grounds" that it intends to cease offering the product (see language below). Section 2.2 would continue to apply to changes in Existing Rules (i.e., a product that Qwest does not offer to CLECs on the grounds that the law changed).

> 1.7.3.1 Unless and until a process is approved by the Commission as described in Section 1.7.3, Qwest must continue to offer such products, services, elements, or functionalities on a nondiscriminatory basis, such that Qwest may not refuse to make an offering available to CLEC on the same terms as it is available

[183] This is the second sentence of 1.7.3 in Eschelon's Proposal #2 for issue 9-53. This proposal is listed previously in this testimony.

[184] This is a part of Eschelon Proposal #3 for issue 9-53. See Exhibit Eschelon 2, Denney Direct, p. 113.

> to other CLECs through their ICAs or the SGAT on the grounds that Qwest , although it has not yet amended those agreements, indicates that it intends to cease offering that product (such as due to lack of demand). If the Commission does not adopt a process as described in Section 1.7.3 or Qwest chooses not to use that process, Qwest may cease a wholesale offering by promptly amending all ICAs containing that offering to remove it.[185]

Q. QWEST CLAIMS THAT ESCHELON CAN STILL OBTAIN THE UCCRE PRODUCT THROUGH ITS TARIFFED COMMAND-A-LINK PRODUCT.[186] DOES THIS ALLEVIATE ESCHELON'S CONCERNS?

A. No. The fact Qwest offers a product that Eschelon purchases through its tariffs as well as at cost based rates does not remove from Qwest the obligation to provide the product at TELRIC rates, nor does it offer protection to Eschelon if it chooses to utilize this product. First, Qwest's tariffed products are often priced significantly above cost. Second, the FCC in the TRRO specifically determined that an ILEC's offer of a product to CLECs through its special access tariffs was not a basis for removal of a product as a UNE.[187]

Q. WHY SHOULD ESCHELON'S LANGUAGE BE APPROVED?

A. Eschelon's proposal is a reasonable compromise to deal with Qwest's claims that it no longer plans to offer this product in the future even though Qwest offers this

[185] This is a part of Eschelon Proposal #4 for issue 9-53. See Exhibit Eschelon 2, Denney Direct, p.115.

[186] Exhibit Qwest 3, Stewart Direct, p. 42, lines 23-24.

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

product in the present. Rather than dispute the availability and Qwest's obligation to provide a product that Eschelon currently does not use, Eschelon's language simply provides that as long as Qwest makes this product available to other CLECs, Eschelon will have the option to amend its interconnection agreement to use this product. In addition, Eschelon is willing to create a process in which Qwest could seek to remove its obligation to provide this product to Eschelon. If Qwest's obligations are removed in the future, then Qwest is under no obligation to offer an amendment for this product to Eschelon.

SUBJECT MATTER NO. 25. SERVICE ELIGIBILITY CRITERIA

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

Q. PLEASE SUMMARIZE THIS ISSUE.

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

Q. WHAT ISSUES DID QWEST RAISE RELATED TO THIS ISSUE?

A. Qwest objects to Eschelon's proposed language that Qwest provide support for cause before conducting an audit because: (1) Qwest claims there is no language in the *TRO* or FCC rules requiring Qwest to have cause before conducting an

audit; and (2) Eschelon's proposal interferes with and weakens the audit rights Qwest was granted in the *TRO*.[188]

Q. DO THE FCC RULES SUPPORT ESCHELON'S PROPOSAL THAT QWEST SHOULD HAVE CAUSE BEFORE CONDUCTING A SERVICE ELIGIBILITY AUDIT?

A. Yes, as I testified in my Direct Testimony[189] Eschelon's language is supported by the FCC in the *TRO*. The FCC stated that the auditing procedures it was adopting were "comparable to those established in the *Supplemental Order Clarification* for our service eligibility criteria…"[190] The FCC specifically noted that these criteria held that:

> …audits will not be routine practice, but will **only** be undertaken when the incumbent LEC has a concern that a requesting carrier has not met the criteria for providing a significant amount of local exchange service.[191]

Further, the FCC recognized "that the details surrounding the implementation of these audits may be specific to related provisions of interconnection agreements or to the facts of a particular audit, and that the states are in a better position to address that implementation."[192]

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[188] Exhibit Qwest 3, Stewart Direct, p. 55.

[189] Exhibit Eschelon 2, Denney Direct, pp. 127-128.

[190] *TRO,* ¶ 622.

[191] *TRO,* ¶ 621, citing *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* CC Docket No. 96-98, Supplemental Order Clarification (2000), at ¶¶ 28-33 (emphasis added), *aff'd sub nom. CompTel v. FCC,* 309 F.3d 3 (D.C. Cir. 2002).

[192] *TRO,* ¶ 625.

Eschelon's language is therefore not only reasonable, but consistent with the FCC's findings in the *TRO*. It only makes sense that Qwest should be required to have at least some reason to believe that there may be noncompliance that will be uncovered by an audit. Otherwise, the audit process becomes a potential tool for bullying rather than a measure for assuring compliance.

Q. DOES ESCHELON'S PROPOSAL INTERFERE WITH AND WEAKEN QWEST'S AUDIT RIGHTS UNDER THE TRO?

A. No. Eschelon's proposal is consistent with the *TRO* and merely provides that Qwest have a concern that Eschelon has not met the service eligibility requirements and that Qwest share this concern with Eschelon upon notice of an audit. Additionally, Eschelon's language requires Qwest to share information, if it has any, about any circuits where Qwest believes there is non-compliance. Eschelon's language is not only reasonable, but may facilitate the resolution of any concerns by initiating dialog through the exchange of information.

SUBJECT MATTER NO. 26. COMMINGLED EELS/ARRANGEMENTS

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

Q. PLEASE SUMMARIZE THESE ISSUES.

A. Qwest attempts to add an operational glue charge in order for Eschelon to purchase a point-to-point commingled EEL. Unlike UNE EELs and the special

access equivalent to a UNE EEL, for commingled EELs Qwest proposals will delay installation of commingled EELs, lengthen the repair intervals for these circuits and make bill verification difficult. Qwest accomplishes this task by requiring separate orders, separate trouble tickets and separate bills for each component of the commingled EEL. Qwest's proposal not only diminishes the usefulness of commingled EELs, but impacts the terms and conditions of the UNE component of the commingled circuit.

A point-to-point Commingled EEL should be a useful and meaningful alternative for the circumstances when a UNE EEL is no longer available. Because a Commingled EEL is functionally equivalent to a UNE EEL, a Commingled EEL should be put together (ordering, tracking, repair and billing) in a manner similar to a UNE EEL. Eschelon's language accomplishes this task, while Qwest's language allows Qwest to diminish the usefulness of the commingled EEL by delaying provisioning and repair. In addition, Qwest's language allows Qwest to provide bills for the components of the commingled EEL that are not related in any way and thus extremely difficult to review and verify. Eschelon's alternative proposal, in the event its first proposal is rejected, contains modest protections to overcome some of these obstacles.

Q. WHAT ISSUES DID QWEST RAISE RELATED TO THIS ISSUE?

A. Qwest raises a number of generic arguments that Qwest repeats throughout its testimony on this issue. Qwest argues that: (1) Eschelon is seeking to have

Qwest's special access and private line circuit's terms and conditions be governed by the ICA ;[193] (2) Eschelon should have taken this issue through CMP,[194] though Qwest's testimony indicates it would have denied Eschelon's request; (3) other CLECs are already using the commingled EELs differently than the way that Eschelon has proposed;[195] (4) Qwest is not required by law to modify its systems and Eschelon's proposal would require Qwest to modify its systems at significant costs;[196] (5) Qwest would have problems generating proper bills if Eschelon's proposals were implemented;[197] and (6) other types of transport-loop combinations require multiple orders and circuit ids.[198]

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

A. No. The purpose of this proceeding is to determine the terms and conditions that apply to UNEs. It is Qwest that is attempting to modify the terms and conditions that apply to the UNE component of commingled EELs. Qwest would accomplish this goal by delaying installation and lengthening the process for repairs. Eschelon's proposal does not seek to alter the terms and conditions of the non-UNE component of the commingled EEL, but instead insures that the

[193] Exhibit Qwest 3, Stewart Direct, p. 59, lines 5-6 and pp. 50-51.

[194] Exhibit Qwest 3, Stewart Direct, pp. 64-65 and p. 67.

[195] Exhibit Qwest 3, Stewart Direct, pp. 66-67.

[196] Exhibit Qwest 3, Stewart Direct, pp. 64, 66, 77 and 80.

[197] Exhibit Qwest 3, Stewart Direct, p. 72.

[198] Exhibit Qwest 3, Stewart Direct, pp. 59-60.

commingled facility is sufficiently described such that it can be practically used by Eschelon.

Ms. Stewart states that "Eschelon's demands that commingled arrangements be put in place or ordered through a single local service request ("LSR") and be billed through the billing system that Qwest uses for UNEs (the "CRIS" system) is a direct attempt by Eschelon to have this Commission (via an ICA arbitration) force Qwest to change its special access and private line service order process and billing arrangements."[199] The intent of Eschelon's language is to allow Eschelon to place a single order and receive a single bill for commingled EELs. Eschelon's language is not intended to dictate the process that Qwest uses. Eschelon is willing to change "LSR" to "Service Order" in 9.23.4.5.1 and 9.23.4.5.4, which should clarify Eschelon's language and address Qwest's concern.

Q. WOULD THE TERMS AND CONDITIONS, SUCH AS ORDERING, MAINTENANCE AND BILLING, RELATED TO LOOP-TRANSPORT COMBINATIONS BE BETTER ADDRESSED IN CMP, RATHER THAN THIS ARBITRATION?

A. No. It is surprising that Qwest would make this claim since Qwest has stated that this issue is currently not appropriate for CMP.[200] Qwest's proposal to leave key

[199] Exhibit Qwest 3, Stewart Direct, p. 50.

[200] *See* email Communications between Eschelon and Qwest attached to the Direct Testimony of Ms. Johnson as Exhibit Eschelon 3.20.

terms of the contract until some undefined later date[201] is unreasonable, especially since parties are already before the Commission and Qwest is indicating that Eschelon's proposals will be rejected in CMP. This issue is addressed in detail in the testimony of Mr. Starkey. Mr. Starkey summarizes the need to address these issues in the Interconnection Agreement rather than CMP.

> [S]afeguards are needed to protect against the capability that Qwest has to wield CMP as a shield and sword. Section 252 affords these safeguards through arbitrated interconnection agreement terms. Eschelon has exercised its right to bring certain terms and conditions to the Commission for review and to obtain a dispositive decision. By dispositive, I mean a decision that meets Eschelon's business need for certainty to plan its business and remain competitive and also helps avoid disputes in the future by providing clear contractual terms on important issues. Relegating those issues to CMP, rather than providing commercial certainty by deciding each issue on the merits of the disputed contract language, would not meet that need.[202]

Q. SHOULD THE COMMISSION CONSIDER WHETHER OR NOT OTHER CLECS ARE CURRENTLY PURCHASING COMMINGLED EELS UNDER QWEST'S ONEROUS TERMS IN DECIDING WHETHER TO ADDRESS THIS ISSUE IN ESCHELON'S CONTRACT?

A. No. The fact that other CLECs may have signed Qwest's contract amendments or have begun purchasing commingled EELs under terms dictated by Qwest is not evidence or justification for imposing those terms, without question, on all

[201] Note, there is no agreement to address these issues at a later date in CMP while Qwest unilaterally implements changes in the meantime. *See* Exhibit Eschelon 1, Starkey Direct, pp. 99-104 and Exhibit Eschelon 1, Starkey Direct, pp. 61-65.

[202] Exhibit Eschelon 1, Starkey Direct, p. 105.

CLECs. Other CLECs decisions not to litigate onerous terms should not waive Eschelon's rights to raise these issues in its contract negotiations and have the Commission decide these issues on the merits of the proposals. In any event, Qwest provided no evidence to support its unverified suggestion about the alleged success of other CLECs in purchasing commingled EELs. There is nothing in the record to show that the problems Eschelon describes are not being and will not be experienced by those CLECs.

Q. DOES ESCHELON'S PROPOSAL REQUIRE QWEST TO MODIFY ITS SYSTEMS?

A. No. As stated in my direct testimony, Eschelon's proposals simply "align the ordering, tracking, repair and billing provisions of a point-to-point UNE EEL or point-to-point Special Access circuit with a point-to-point Commingled EEL."[203] Further, "Eschelon is not asking Qwest to modify systems and incur costs…"[204] Qwest already has the systems in place for the Loop-Transport Combination UNE EELs such that a CLEC can place one order, obtain one circuit ID and receive one bill,[205] and Qwest need not alter its systems for the Loop-Transport Combination Commingled EELs.

[203] Exhibit Eschelon 2, Denney Direct, p. 130.

[204] Exhibit Eschelon 2, Denney Direct, p. 142, line 14.

[205] Exhibit Eschelon 2, Denney Direct, p. 143.

Qwest has not explained why it can not do for Commingled EELs what it already does for UNE EELs, other than to make sweeping statements about significant systems changes and the high cost to implement these changes.

Q. SHOULD QWEST HAVE PROBLEMS GENERATING PROPER BILLS IF ESCHELON'S PROPOSAL IS IMPLEMENTED?

A. There is no reason why Qwest should not be able to implement the price increases associated with commingled EELs.[206] As addressed in my direct testimony, Qwest provides a single bill for UNE EELs today. Qwest claims that if a non-UNE circuit is mis-identified as a UNE circuit then billing errors could occur.[207] However, what Qwest fails to recognize is that in most cases, the necessity of a commingled EEL is driven by the fact that a UNE component of a UNE EEL is no longer available due to a finding of "non-impairment." All high capacity UNE loops may no longer be available in a wire center, or high capacity UNE transport no longer available between two Qwest offices. Because the UNE component of the Loop-Transport combination is no longer available, there will not be two rates for that component. There will only be the single non-UNE rate, and thus no reason for Qwest to become confused. Qwest's claims of billing complexity due to multiple rates for the same element are especially incredible given Qwest's UNE-P substitute products, Qwest Platform Plus ("QPP") and Qwest's Local Services Platform products ("QLSP"). QPP circuits are subject to annual rate

[206] Exhibit Eschelon 2, Denney Direct, pp. 141-142.

[207] Exhibit Qwest 3, Stewart Direct, pp. 66-67.

increases and the rate changes involved with QPP are significantly more complex that the rate change involved in changing from UNE rates to private line rates. Besides changing each year, QPP rates differ depending upon whether the end-user customer is a residential or a business customer and upon whether the CLEC has met certain volume quotas. Qwest's new QLSP contains twelve different switch port rates, for the same switch port in a single state, depending on whether the end user customer is residence or business and the CLEC's year over year volume changes.

Qwest further states that, because a UNE Loop is ordered via LSRs and billed through CRIS and non-UNE transport is ordered via ASRs and billed through IABS, the circuits must be kept separate.[208] This claim ignores a number of facts. First, it is Qwest who insisted on separate billing systems, over the protest of AT&T and MCI in the initial arbitrations.[209] Second, while UNE Loops are ordered via LSRs and UNE transport is ordered via ASRs, UNE EELs (a combination of UNE Loop and UNE Transport) are ordered on a single order using an LSR and the bill contains both the UNE Loop and UNE Transport on a single bill. Third, conversions from private line to UNE are ordered on a single LSR, but Qwest claims that with this single order it processes changes in its

[208] Exhibit Qwest 3, Stewart Direct, p. 58.

[209] See for example, *In the Matter of the Petition of AT&T Communications of the Pacific Northwest, Inc., for Arbitration of Interconnection Rates, Terms, and Conditions Pursuant to 47* Pursuant to 47 U.S.C. § 252 (b) of the Telecommunications Act of 1996, **ARBITRATOR'S DECISION**, Docket No. ARB 3, Issued December 6, 1996, Issues 41 – 45, pages 10 – 12.

systems dealing with both ASRs and LSRs.[210] Further, because the same provisioning centers process orders for EELs and Private Lines, Qwest should not have difficulties processing a single order for a commingled EEL.[211]

Q. ARE TWO UNIQUE CIRCUIT IDS NECESSARY FOR POINT-TO-POINT COMMINGLED EELS?[212]

A. No. Qwest currently uses a single circuit ID for point-to-point UNE EELs and point-to-point special access circuits and is able to provision, bill and document service quality for these circuits. There is no reason why Qwest can not use a single circuit ID for point-to-point commingled EELs. This is discussed in detail in my direct testimony.[213]

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

A. Yes. Ms. Stewart concludes that because Eschelon has not suggested "that Qwest commingle two separate facilities of different bandwidth/capacity into one order, one bill, and one circuit ID,"[214] a single circuit ID is not necessary for point-to-point commingled EELs.

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[210] Deposition of Mary Madill, In the Matter of Qwest Corporation's Application for Commission Review of TELRIC Rates Pursuant to 47 U.S.C. § 251 MPUC Docket No.: P-421/AM-06-713; OAH Docket No. 3-2500-17511-2, May 17, 2007. The pertinent portions of the transcript of Ms. Madill's deposition are pages 9-13 of Exhibit Eschelon 2.28, attached to my direct testimony.

[211] *Id.*

[212] Exhibit Qwest 3, Stewart Direct, pp. 66-67.

[213] Exhibit Eschelon 2, Denney Direct, pp. 139-142.

[214] Exhibit Qwest 3, Stewart Direct, p. 60.

First, Ms. Stewart admits that this type of multiplexed arrangement is treated the same whether it is UNE, private line, or commingled arrangement. As a result, we do not have a case where Qwest has made a commingled arrangement more difficult to use than its UNE or special access alternatives as is the case with a point-to-point commingled EEL.

Second, because there are multiple customers involved in a multiplexed arrangement, multiple circuit IDs help to identify specific customer's circuit in this arrangement. For example, in the case where a repair is necessary, the CLEC is generally able to determine whether the problem is on the loop or interoffice part of the multiplexed arrangement based on whether the trouble impacts a single customer (then it is likely the loop) or multiple customers (then it is likely interoffice). There is no way to make this determination with a point-to-point EEL.

Q. DOES QWEST ADMIT THAT ITS PROPOSAL WILL DELAY THE INSTALLATION OF COMMINGLED EELS?

A. Yes. Qwest argues that it "must install the tariffed circuit and the UNE circuit separately from each other. In addition, the service orders for each circuit must be complete before Qwest can install either circuit."[215] Qwest states that it must be allowed to "add these intervals together to determine the total time required for

[215] Exhibit Qwest 3, Stewart Direct, p. 76.

installation of commingled EELs."[216] As addressed in my direct testimony, Qwest's proposal is problematic not only because it delays installation, but also because it makes it impossible for the CLEC to calculate installation intervals for this product and thus the CLEC cannot communicate effectively with its end user customer regarding projected service readiness.[217]

Q. DOES QWEST'S MODIFIED REPAIR PROCESS[218] ADDRESS ESCHELON'S CONCERNS RELATED TO DELAY IN THE REPAIR OF TROUBLED CIRCUITS?

A. No, Qwest's proposed language still does not address the underlying concerns related to the repair process that I identify and discuss in my Direct Testimony.[219] While Qwest acknowledges that no charges should apply in repair situations where the trouble is found to be in Qwest's network, Qwest's proposal still requires sequential, rather than parallel, repair processes, which could cause an overall delay in repairing service to the end user customer. Qwest's newly proposed language also does not address the issue that Qwest would avoid performance requirements as a result of its sequential delay process.[220] Therefore, Eschelon does not support Qwest's new language.

[216] Exhibit Qwest 3, Stewart Direct, p. 76.

[217] Exhibit Eschelon 2, Denney Direct, pp. 153-154.

[218] Exhibit Qwest 3, Stewart Direct, pp. 78-82.

[219] Exhibit Eschelon 2, Denney Direct, pp. 155-157.

[220] Exhibit Eschelon 2, Denney Direct, pp. 146-147.

Eschelon's alternative proposal in issue 9-59 allows for Eschelon to open a single trouble report for both of the circuits associated with a commingled EEL.[221]

Q. HAS QWEST PROPOSED ADDRESSING THIS ISSUE THROUGH CMP?

A. Qwest's unilateral implementation of processes relating to TRO/TRRO issues is discussed by Mr. Starkey.[222] As Mr. Starkey explains, Qwest has chosen to adopt those policies, including policies relating to commingling, outside of CMP and without CLEC input. However, on the day that the hearing in the Minnesota arbitration commenced, Qwest changed its position, as reflected in a letter that it sent to Eschelon[223] in which it stated its intention to address some (but not all) of the *TRO/TRRO* issues in CMP. Since then, however, Qwest has stated that CMP will not address issues that are presently the subject of pending arbitrations or legal proceedings. It is now unclear what issues Qwest will be submitting to CMP.[224] What is clear, however, is that CLECs, including Eschelon, have made repeated requests to Qwest to negotiate regarding the terms and conditions that would govern the *TRO/TRRO* issues and Qwest consistently refused.

Q. PLEASE SUMMARIZE THESE ISSUES.

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[221] Exhibit Eschelon 2, Denney Direct, pp. 155-159.

[222] Exhibit Eschelon 1, Starkey Direct, pp. 99-104.

[223] Exhibit Eschelon 3.35.

[224] Ms. Stewart states that "*TRRO*-related systems work has been deferred pending completion of the *TRRO* wire center dockets in Qwest's states." (Exhibit Qwest 3, Stewart Direct, p. 65) However, the wire center dockets have nothing to do with the issues being discussed here. The wire center dockets will determine when a CLEC no longer has access to a UNE EEL, thus making commingled EELs an alternative, but will not resolve ordering, repair or billing issues related to commingled EELs.

A. Commingled EELs should be a useful and meaningful alternative to UNE EELs. Because a Commingled EEL is functionally equivalent to a UNE EEL, a Commingled EEL should be put together (ordering, tracking, repair and billing) in a manner similar to a UNE EEL. Eschelon's language accomplishes this task, while Qwest's language allows Qwest to diminish the usefulness of a commingled EEL by delaying provisioning and repair. In addition, Qwest's language allows Qwest to provide bills for the components of the commingled EEL that are not related in any way and thus extremely difficult to review and verify. Eschelon's language should be adopted for these issues.

VIII. EXPEDITED ORDERS

SUBJECT MATTER NO. 31. EXPEDITED ORDERS

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

Q. PLEASE PROVIDE A BRIEF SUMMARY OF ISSUE 12-67 AND ITS SUBPARTS.

A. The two over-arching questions regarding expedited orders for resolution in this arbitration are: (1) **Interim Wholesale Rate (whether TELRIC)**: At what rate should expedites be provided to a Qwest wholesale customer (*i.e*. Eschelon), at least on an interim basis until a permanent rate is set? and; (2) **Exceptions to**

Charging for Expedites: Should the circumstances when Qwest provides exception(s) to charging an additional fee for expedites be nondiscriminatory?[225]

Eschelon's proposed interim rate and ICA language[226] should be adopted. Although Ms. Albersheim testifies that "Eschelon's language is excerpted almost word-for-word from the section of the Expedite PCAT titled 'Expedites Requiring Approval,'"[227] she is referring to Eschelon's proposal #1 for Section 12.2.1.2.1. That section relates only to Issue 12-67(a) (Exceptions to Charging - Emergencies), which I discuss below. Ms. Albersheim complains that Eschelon's language is placed in Section 12, "which is supposed to contain language about Access to OSS."[228] This comment assumes that Access to OSS does not include such ordering processes. Placement of these terms in Section 12 is appropriate because the term OSS is much broader than that, as I explained in direct testimony.[229] Qwest's ICA proposal states that a "request for an expedite will be allowed ***only*** when the request meets the criteria outlined in the Pre-Approved Expedite Process in Qwest's Product Catalog for expedite charges at Qwest's

[225] *See* Exhibit Eschelon 2, Denney Direct, pp. 159-162.

[226] All of Eschelon's language for Issue 12-67 and subparts should be adopted. See Exhibit Eschelon 2, Denney Direct, pp. 171-181.

[227] Exhibit Qwest 1, Albersheim Direct, p. 51, lines 13-14.

[228] Exhibit Qwest 1, Albersheim Direct, p. 51, lines 15-17.

[229] Exhibit Eschelon 2, Denney Direct, p. 179, citing Section 12.1.1 of proposed ICA (closed language) & Third Report and Order, *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98 (Released Nov. 5, 1999), ¶425 ("OSS includes the ***manual***, computerized, and automated systems, ***together with associated business processes*** and the up-to-date data maintained in those systems") (citing "*Local Competition First Report and Order*, 11 FCC Rcd at 15763-64, paras. 518, 523").

wholesale web site."[230] Qwest's PCAT posted on its web site states: "If the request being expedited is for a product contained in the 'Pre-Approved Expedites' section below, your ICA ***must contain*** language supporting expedited requests ***with a 'per day' expedite rate***."[231] If the Commission disagrees with Qwest that an ICB rate in every case is a "per day" rate, sets a rate that is not a per day rate, and/or adopts Eschelon's proposal of a per order interim rate, Qwest's language is inaccurate and, at a minimum, creates confusion. In contrast, Eschelon's language adds clarity to the ICA and helps avoid future disputes.[232]

Regarding Qwest's additional claims, that "the expedite process should be handled in the PCAT rather than the interconnection agreement"[233] and "process"

[230] Qwest proposed language for Section 7.3.5.2.2 (emphasis added); *see also* 9.1.12.1.2 (same except it says "expedites" rather than "expedite charges"). By limiting expedites to the fee-added "Pre-Approved Expedite Process," Qwest is indicating that the emergency-based "Expedites Requiring Approval" process is not available under the ICA at all. *See id*.

[231] Exhibit Qwest 1.5 (Expedites PCAT) (emphasis added).

[232] For example, although in Minnesota Eschelon's pricing proposal was adopted, Qwest's witness disputed this and suggested that all of Qwest's language was adopted in Minnesota (instead of only the portion on discrimination). *See* Colorado arbitration, CO Hearing Exhibit 27 (Denney Surreb.), pp. 103-104. The Minnesota ALJs and Commission adopted a per order rate (rejecting Qwest's per day rate). *See* Exhibit Eschelon 2.25, Denney 23, ¶5 (Topic 29) ("On an interim basis, Qwest may charge Eschelon ***up to $100*** to expedite an order on behalf of an Eschelon customer.") (emphasis added). As Qwest's proposed ICA language regarding the criteria of the PCAT (quoted in the text) shows, however, only Eschelon's ICA language accurately states the application of that rate (*see, e.g.*, 12.2.1.2.2 referencing Exhibit A and 12.2.1.2.3 stating the expedite charge is a separate charge), whereas Qwest's proposed ICA language by reference to the PCAT includes the very term rejected in Minnesota.

[233] Exhibit Qwest 1, Albersheim Direct, p. 51, lines 1-2.

is "something properly handled in CMP,"[234] Mr. Starkey addresses these issues in his discussion of the need for contractual certainty.[235]

1. WHOLESALE ACCESS AT COST-BASED RATES

Q. MS. ALBERSHEIM STATES THAT QWEST "CHARGES ITS RETAIL CUSTOMERS THE SAME $200 FEE TO EXPEDITE ORDERS."[236] PLEASE RESPOND.

A. The mistake Ms. Albersheim makes is to equate providing a retail service *at the same price* with providing wholesale service on nondiscriminatory terms. The threshold question to be addressed is whether for itself Qwest provides the service to its retail customers, separate from the question of price. Ms. Albersheim has admitted that Qwest provides expedites for itself.[237] Therefore, the analysis moves to another question, which addresses what the wholesale price should be (whether TELRIC-based). Qwest inappropriately collapses these two questions into one, as I described in my direct testimony.[238]

Ms. Albersheim testifies: "The result of Eschelon's language is that it gives Eschelon access to expedited orders beyond what anyone else, CLECs or other

[234] Exhibit Qwest 1, Albersheim Direct, p. 52, lines 6-7.

[235] Exhibit Eschelon 1, Starkey Direct, pp. 10-106.

[236] Exhibit Qwest 1, Albersheim Direct, p. 54, lines 17-18; *id.* p. 55, lines 6-8.

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

[238] Exhibit Eschelon 2, Denney Direct, pp. 181-182.

Qwest customers, has access to."[239] Cost-based pricing for expedites, however, would put Eschelon on equal footing with Qwest when it comes to providing expedites to its end-user customers, because under cost-based pricing both Qwest and Eschelon would face the same economic signals (cost) with regard to expedites. Additionally, CLECs in Utah would be able to opt into Eschelon's ICA. To conclude that Eschelon is somehow inappropriately carving itself an Eschelon-only exemption is contrary to the principles of Section 252(i) of the Act, which are discussed in more detail by Mr. Starkey.[240]

Q. IN SUPPORT OF QWEST'S EXPEDITE CHARGE PROPOSAL, MS. ALBERSHEIM ALSO STATES THAT QWEST OFFERS EXPEDITES TO CLECS UNDER THE SAME TERMS AND CONDITIONS AS IT OFFERS TO ITS RETAIL CUSTOMERS.[241] IS IT PROPER TO COMPARE CHARGES IMPOSED BY QWEST ON *CLECS* WITH EXPEDITE CHARGES IMPOSED BY QWEST ON ITS *RETAIL* CUSTOMERS?

A. No. The relevant comparison, for purposes of determining whether charges are discriminatory, is between the charges faced by CLECs and the expedite charges *Qwest* incurs when it expedites service to one of its retail customers (i.e., what Qwest implicitly charges "*itself*"). This is the appropriate comparison because

[239] Exhibit Qwest 1, Albersheim Direct, p. 51, lines 6-8.

[240] *See, e.g.*, Exhibit Eschelon 1, Starkey Direct, pp. 31-38.

[241] Exhibit Qwest 1, Albersheim Direct, p. 55, lines 2-5.

Qwest acts in a dual role of the CLECs' provider of bottleneck facilities and the CLECs' competitor in retail markets, and is supported by the following FCC rule:

> **§ 51.313 Just, reasonable and nondiscriminatory terms and conditions for the provision of unbundled network elements.**
>
> (b) Where applicable, the terms and conditions pursuant to which an incumbent LEC offers to provide access to unbundled network elements, including but not limited to, the time within which the incumbent LEC provisions such access to unbundled network elements, shall, *at a minimum, be no less favorable to the requesting carrier than the terms and conditions under which the incumbent LEC provides such elements to itself.*[242] (emphasis added)

Qwest faces only the cost of an expedite when expediting its own orders, instead of the non-cost-based per day charge that it charges its retail customers. Ms. Albersheim states that this is a $200 per day advanced rate for Qwest retail customers and CLECs and admits that this rate is not cost-based.[243] UNEs are a wholesale product and the expedite rate for *accessing* UNEs should be cost-based, and not set based on retail tariff offerings.

Charging Eschelon a non-cost based, retail price that is higher than Qwest's own expedite costs would violate rule §51.313 because this price constitutes terms that are less favorable than terms faced by Qwest in expediting its own orders. Eschelon and Qwest compete in the retail market and this competition includes an ability to offer expedite service to retail customers "on competitive" terms. This advantage would be the same as the advantage that Qwest would have if it

[242] 47 CFR § 51.313.

[243] Exhibit Qwest 1, Albersheim Direct, pp. 54-55, lines 17-1; 6-8 and footnote 33.

charged above-cost rates for UNE loops and other UNE elements – a situation that the unbundling rules and TELRIC pricing are designed to avoid.

Q. MS. ALBERSHEIM CLAIMS THAT EXPEDITE CHARGES OFFERED TO ESCHELON AND OTHER CLECS FOR UNE ORDERS SHOULD NOT BE COST BASED.[244] WHAT BASIS DOES SHE PROVIDE FOR THIS CONCLUSION?

A. The key to Ms. Albersheim's argument is her incorrect assumption that expedites comprise "premium" services so they are "not UNEs."[245]

Q. ON WHAT BASIS DOES MS. ALBERSHEIM ASSERT THAT EXPEDITES REPRESENT A PREMIUM OR SUPERIOR SERVICE THAT IS NOT SUBJECT TO SECTION 252?

A. The basis for this claim is not clear because nowhere in her testimony does Ms. Albersheim define the concept of "premium service." Ms. Albersheim appears to be claiming that expedited service is a "premium service" because, as stated above, she claims expedites are not UNEs. In other words, Ms. Albersheim seems to argue that expedited service is a "premium" service provided under the regular interval. If this is, in fact, the basis of Qwest's position, it is incorrect.

Qwest witness Ms. Teresa Million cited the Eighth Circuit's decision in the *Iowa Utilities Board* case in her Answer Testimony in Colorado[246] for the proposition

[244] Exhibit Qwest 1, Albersheim Direct, p. 55, lines 2-3.

[245] *Id.* (In prior testimony, Qwest has used the phrases "superior service" and "premium service" interchangeably.)

that nondiscriminatory access does not require the incumbent to provide superior service.[247] While Ms. Million parrots the phrase "superior service," she overlooks that, in discussing what constituted superior service, the Eighth Circuit found that the Act does not require an incumbent to provide service that is superior *to what the incumbent provides itself* in connection with providing service to its retail customers.[248] Thus, if Qwest provides a particular service – such as expedites – to its retail customers, and therefore to itself, as a matter of course, then that service is not "superior."

Significantly, Ms. Million does *not* argue that expedites are a superior service because Qwest does not expedite orders for its own retail customers. Similarly, Ms. Million does *not* argue that expedites comprise a superior service because customers other than Eschelon (for example, other CLECs or retail customers) cannot request that orders be expedited. Qwest cannot deny that it expedites orders for other CLECs and for itself[249] and its own retail customers.[250] Expedited orders are provided to a variety of Qwest's customers and therefore, they do not comprise a superior service.

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[246] *Iowa Utilities Board v. FCC*, 120 F.3d 753 (8th Cir. 1997), *aff'd in part, rev'd in part*, 525 U.S. 366 (1999) ("*Iowa Utilities Board*").

[247] Colorado Arbitration Million Answer Testimony, p. 29-30.

[248] *Iowa Utilities Board*, 120 F.3d at 812 ("Another source of disagreement between the petitioners and the FCC arises over the Agency's decision to require incumbent LECs to provide interconnection, unbundled network elements, and access to such elements at levels of quality that are superior to levels at which the incumbent LECs provide these services to themselves.")

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

[250] *See, e.g.*, Albersheim Arizona Direct (ACC Docket No. T-03406A-06-0572/T-01051B-06-0572; 11/8/06), p. 61, lines 15-16 (". . . Qwest offers expedites today to its retail customers. . .").

Further, if the ability to expedite UNE installation, for example, is available as *an option*, it does not mean that such expedited access to UNEs should not be subject to cost-based regulation. Indeed, Qwest offers *options*, if you will, for a number of products that constitute access to UNEs. For example, Qwest offers UNE loop installation in different forms – Basic Installation, Basic Installation with Performance Testing, and Coordinated Installation with Cooperative Testing.[251] Qwest does not argue that only the Basic Installation option should be priced consistent with cost-based principles, while all other, arguably "superior" options should be based on the price that the market can "bear."[252] Similarly, Exhibit A to the parties' interconnection agreement, which lists the rates applicable to unbundled elements and services to be provided under Section 252, contains the agreed-upon charges for Standard, Overtime and ***Premium*** Managed Cuts,[253] and Overtime and ***Premium*** Labor.[254] To the best of my knowledge, Qwest has not argued these options or "premium" access to these products should be subject to a different pricing standard than those standards which are applicable to "basic" access or level of service because these options constitute "superior service."

[251] See ICA Exhibit A, Section 9.2.4. The notes for these rate elements indicate the rate is a Commission approved rate.

[252] Colorado Arbitration Million Rebuttal testimony (COPUC Docket No. 06B-497T; 3/26/07), p. 32.

[253] See ICA Exhibit A, Section 10.1.2. The note for this rate indicates it is not approved in a cost docket.

[254] See ICA Exhibit A, Section 9.20.2. The note for this rate indicates it is a Commission approved rate.

Finally, that Qwest proposes to provide expedites under an amendment to Eschelon's ICA, rather than pursuant to a commercial agreement, demonstrates that Qwest, itself, recognizes that expedites fall within the scope of Section 252.

Q. COULD QWEST BE CLAIMING THAT THE EXPEDITE SERVICE IT IS WILLING TO PROVIDE ESCHELON COULD "BE COMPLETED FOR LESS COST" THAN A COMPARABLE RETAIL EXPEDITE?

A. Ms. Albersheim has stated that, because the "standard provisioning interval" for a high-capacity loop is shorter than the comparable retail services, the private line customer would pay more than the UNE customer to have the service delivered in one day.[255] As discussed above and in my direct testimony,[256] it is incorrect to equate not providing a wholesale service *at the same price* as a retail service with superior service, because it confuses these concepts and inappropriately collapsed the two questions into one.[257]

Ms. Albersheim states that Qwest charges its retail customers the same $200 fee to expedite orders.[258] This is an incorrect correlation as retail services are regulated based on a different set of standards than access to UNE markets

[255] Exhibit Qwest 1, Albersheim Direct, p. 55.

[256] Exhibit Eschelon 2, Denney Direct, pp. 181-184.

[257] At the hearing in the Minnesota arbitration proceeding, Ms. Albersheim admitted that the fact that there's a difference in price between two services does not mean that the lower priced service is a superior service for purposes of determining whether that service is a UNE. *In the Matter of the Petition of Eschelon Telecom, Inc. for Arbitration with Qwest Corporation, Pursuant to 47 U.S.C. Section 252 of the Federal Telecommunications Act of 1996*, Minnesota Public Utilities Commission Docket No. P-5340, 421/IC-06-768, Hearing Transcript, Vol. 1 at page 26, lines 14-18.

[258] Exhibit Qwest 1, Albersheim Direct, pp. 54-55.

(network elements *in impaired markets*). The TRRO confirmed the need for a different pricing standard in the markets for UNEs than the pricing standard used in the access markets. This fact is captured in the following citation from the FCC TRRO:

> Here, upon further consideration, we determine that in the local exchange market, the availability of a tariffed alternative should not foreclose unbundled access to a corresponding network element, even where a carrier could, in theory, use that tariffed offering to enter a market.[259]

> Thus, Congress's enactment of section 251(c)(3), and the associated cost-based pricing standard in section 252(d)(1), at a time when special access services were already available to carriers in the local exchange market indicates that UNEs were intended as an *alternative* to these services, available **at alternative pricing**.[260]

Q. IS ESCHELON'S PROPOSED $100 PER EXPEDITE ORDER COST BASED, AND DOES IT ALLOW FOR QWEST TO OBTAIN A COST BASED RATE?

A. Eschelon believes its proposed interim rate exceeds costs. It is clearly a better reflection of cost based rates than Qwest's proposed rate of $200 per day, as evidenced by Qwest's own cost information, discussed below. Eschelon offers the rate on an interim basis as a compromise in the arbitrations until a cost-based rate is established. Eschelon's arbitration proposed charge is expressly an interim rate. It affords Qwest the opportunity to obtain a higher permanent rate, if Qwest

[259] *TRRO*, ¶ 48.

[260] *TRRO*, ¶ 51 (italicized font is original to the source; bold font added for emphasis).

can provide a TELRIC study to support that rate and permanent rates are ordered by the Commission. If Qwest can present to the Commission a TELRIC cost study in Utah that justifies a per-day charge, then Qwest will be permitted to assess such a charge. To date, however, Qwest has provided no cost study in Utah and thus made no effort to prove that it incurs additional costs when providing expedites that are not recovered in the installation charge and the $100 interim additional expedite fee. Although Qwest states that "Eschelon has not provided a cost study to support its rate either,"[261] Eschelon has been straightforward in presenting this as a compromise offer[262] and therefore no adverse inference is warranted. Eschelon is truly interested in establishing a cost-based rate. If the Commission decides to subject the rate to a true-up, then a cost based rate will apply from the time the interim rate is established.

Eschelon's arbitration interim proposal for a flat per order charge is more reasonable than Qwest's and is not arbitrary. It is a per order charge; not a per day charge. Because the only additional cost that Qwest *may* incur to expedite an order involves the cost of processing the expedite order, this cost will not vary based on the number of days by which service is sought to be expedited. Accordingly, a per day charge is inappropriate.

Q. HAS QWEST PROVIDED A COST STUDY FOR EXPEDITES IN ANY OTHER STATE SHOWING THAT ITS PROPOSED COSTS ARE

[261] Exhibit Qwest 1, Albersheim Direct, p. 55 at footnote 33.

[262] Exhibit Eschelon 2, Denney Direct, p. 180.

INCURRED ON A "PER EXPEDITE REQUEST" BASIS AND DO NOT VARY BASED ON THE NUMBER OF DAYS FOR WHICH THE EXPEDITE IS REQUESTED?

A. Yes. Qwest submitted a cost study for expedites in an ongoing cost docket in Minnesota (MPUC Docket No. P-421/AM-06-713/OAH Docket No. 3-2500-17511-2).[263] This cost study supports my point that Qwest's rate proposal is unreasonable. Qwest proposes a rate of $65.85 for an expedite charge per LSR/ASR order per day,[264] which shows that a $200/day expedite charge is more than three times higher than what Qwest believes a TELRIC-based analysis produces. The difference of $134.15 per day represents a cost advantage to Qwest who can, according to Qwest's study, expedite an order for at a cost of $65.85 per day while it proposes to charge Eschelon $200 per day. This fact alone should be sufficient to reject Qwest's rate proposal for expedites.

Q. QWEST'S COST STUDY PRODUCES A "PER DAY" RATE. DOES THAT SUPPORT QWEST'S PROPOSAL IN UTAH TO APPLY AN EXPEDITE CHARGE "PER DAY" INSTEAD OF ON A "PER ORDER" BASIS, AS ESCHELON PROPOSES?

A. No, because Qwest's cost study in Minnesota shows that Qwest's proposed costs do not vary by the number of days the order is requested to be expedited. Qwest's expedite study calculates Qwest's proposed total costs of *an expedite* and simply

[263] See Exhibit Eschelon 2R.1.

[264] Minnesota Cost Docket Expedite Charge Nonrecurring Cost Study 9709, Tab "Expedite Details Output," cell F203. See, Exhibit Eschelon 2R.1, p. 6. See also, id., p. 1.

divides this number by three days, which Qwest claims is the average number of days expedited.

Qwest's proposed cost study for expedites from Minnesota shows that Qwest models the cost it incurs to provide an expedite based on the cost *per Expedite request* (i.e., per expedite order and not per day). Qwest lists activities that it claims are involved in providing an expedite, estimates times for each of these activities, applies probability of occurrence factors to these activities, and then multiplies this by an hourly labor rate to develop a cost per activity.[265] It is important to note that Qwest's proposed work activities, estimated time for these activities, probability of occurrence that activity occurs, and probability factor for number of circuits are all based on a "per expedite request" basis – not on a "per day" basis – and do not vary by the number of days of the expedite request.

For example, the first activity on Qwest's list is "Customer's Service order or call, initiate expedite – reasons, expectations, etc."[266] The expedite request discussed in this activity would take place only once per expedite request (it would not take place on each day the order is requested to be expedited), and Qwest assumes that this takes place 100% of the time in its cost study.[267] If Qwest's cost model was

[265] Minnesota Cost Docket Expedite Charge Nonrecurring Cost Study 9709, Tab "Expedite Details Output." See Exhibit Eschelon 2R.1, pp. 2-6.

[266] Minnesota Cost Docket Expedite Charge Nonrecurring Cost Study 9709, Tab "Expedite Details Output," cell B18. See Exhibit Eschelon 2R.1, p. 2.

[267] Minnesota Cost Docket Expedite Charge Nonrecurring Cost Study 9709, Tab "Expedite Details Output", cell D18. See Exhibit Eschelon 2R.1, p. 2. Qwest likewise assumes that, 100% of the time, time will be spent to "monitor expedite approval" or "explain (or plead) the case" for an expedite. See *id*., cell D19. Qwest's assumption of 100% is just one example of the manner in

actually based on a "per day" cost of providing an expedite, the probability of this activity would be 0 in any day after the day of the initial request. This shows that Qwest is modeling a "per expedite request" cost, not a "per day" cost. Similarly, "Receive request…", "Receive notification…", or "Receive page" is part of every work step in Qwest's cost study for the Loop Provisioning Center, Design, Central Office Resource Administration Center, Load Resource Administration Center, Install, and Implementor/Project Coordinator. Obviously, these work groups would only need to receive this information one time during the expedite request and Qwest assumes that they all occur 100% of the time. This further demonstrates that Qwest's cost study models the cost of an expedite "per request."

After calculating the total cost of providing an expedite, Qwest in its cost model assumes that an average expedite request is for 3 days, and divides its total proposed cost of an expedite by 3 (or applies a 0.33 probability factor).[268] Note

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which Qwest's study over-estimates Qwest's costs. As discussed below, Qwest is unclear as to why expedites would be denied when the CLEC is compensating Qwest to perform the expedite. Keep in mind that Qwest refers to expedites for a fee as "Pre-Approved," so activities dedicated to time spent seeking or pleading for approval are contrary to Qwest's representation of pre-approval. See Qwest Exhibit 1.4 p. 6 of 9 (Qwest stating in CMP minutes about fee-added pre-approved expedites: "Jill explained that when you amend your contract there are ***not reasons for expedites any longer***. Qwest agrees to expedite and there is a charge for all expedites.") (emphasis added); see also Qwest Exhibit 1, Albersheim Direct, p. 45, lines 7-15 (Qwest's account of the reason for its pre-approved expedite process). Although Qwest claims that there will be an order or call to initiate the expedite with "reasons, expectations, etc." 100% of the time (*see id*.), therefore, when a CLEC pays the required fee (for expedite requests other than emergency-based expedite requests), reasons are not required. The CLEC does not need to discuss with Qwest and instead has the option to check a box on the order. See, e.g., Qwest Exhibit 1.5, p. 3 ("It is not necessary for you to call into Qwest to have the expedite approved. To expedite a service request on an ASR or LSR you must populate the EXP field and put the desired expedited due date in the DDD field on the ASR or LSR."). Why pay extra for "pre-approval," if 100% of the time, Qwest has to monitor or obtain approval?

[268] Minnesota Cost Docket Expedite Charge Nonrecurring Cost Study 9709, Tab "Expedite Details

that Qwest's Prob #3 applies a 0.33 factor to each and every one of Qwest's proposed activities, which effectively cuts Qwest's proposed costs by 1/3rd.[269] Qwest has effectively calculated a total direct cost of about $147.48 for an expedite (Qwest's proposed total direct cost of $49.16[270] times three)[271] and then divided that number by three (assuming that an average expedite is for 3 days), and proposes to assess a charge based on 1/3rd of the total cost of an expedite on a "per day" basis. This is inappropriate, however, because Qwest did not incur its cost to provide the expedite on a "per day" basis. This is evidenced by Qwest's cost study as well as the fact that in all instances in which the expedite request is something other than Qwest's assumed 3 days, based on Qwest's proposed application on a "per day" basis, Qwest will either double recover expedite costs (if the request is for more than 3 days) or under-recover expedite costs (if the request is for 1 or 2 days). Because Qwest's proposed costs show that Qwest incurs cost for an expedite on a "per request" basis, it would be more appropriate for Qwest to assess the charge on a "per request" basis. A "per request" charge is easily calculated by simply not dividing the total TELRIC cost of an expedite by 3 – a step for which there is really no reason for other than to attempt to apply its "per day" rate application – and it would avoid the issue of whether Qwest

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Output", column F Prob #3, and cell B16 (describing Prob #3). See Exhibit Eschelon 2R.1.

[269] Minnesota Cost Docket Expedite Charge Nonrecurring Cost Study 9709, Tab "Expedite Details Output", column F. See Exhibit Eschelon 2R.1.

[270] Minnesota Cost Docket Expedite Charge Nonrecurring Cost Study 9709, Tab "Expedite Details Output", cell J145. See Exhibit Eschelon 2R.1, p. 5.

[271] Based on Qwest's proposed rate in Minnesota of $65.85, a "per request" rate in Minnesota would be about $197.55 ($65.85 times three). See Exhibit Eschelon 2R.1.

double-recovers or under-recovers its costs depending on the number of days of the expedite request.

Q. YOU MENTION THAT QWEST CALCULATES A TOTAL DIRECT COST OF ABOUT $150 (OR $200 INCLUSIVE OF COMMON AND OTHER EXPENSES) PER EXPEDITE REQUEST IN MINNESOTA. DOES THIS MEAN THAT ESCHELON'S INTERIM RATE PROPOSAL OF $100/EXPEDITE REQUEST IS TOO LOW?

A. No. First of all, Eschelon's proposal is interim and provides Qwest the opportunity to request Commission approval of a different permanent rate in a cost docket. Therefore, any concern by Qwest about the interim rate could be easily resolved by Qwest simply filing cost support in Utah and requesting Commission approval of a different rate.

Furthermore, Qwest's cost model is inflated, so the $200 total cost for an expedite (which Qwest converts to a $65.85/day rate) is too high. For example, Qwest includes a significant amount of time and cost related to expedite requests that are denied. Qwest builds into the rate for expedites costs related to 1 out of 4 expedite requests being denied ("Manual work required for denied requests").[272] First, it is unclear on why expedites would be denied when the CLEC is compensating Qwest in order to perform the expedite.[273] Second, these costs

[272] Minnesota Cost Docket Expedite Charge Nonrecurring Cost Study 9709, Tab "Expedite Details Output," rows 23-29, 38-39, 50-51, 60-61, 70-71, 80-81, 92-93, 102-103, 112-113, 122-123, and 132-133. See Exhibit Eschelon 2R.1, pp. 2-4.

[273] See, e.g., Qwest Exhibit 1.4 p. 6 of 9 (Qwest stating in CMP minutes about fee-added pre-approved

related to denied expedite request constitute about 20%[274] of Qwest's proposed total direct cost for an expedite. It is not appropriate for Qwest to roll up costs related to denied expedite request into the expedite rate. Qwest adds the cost of denied expedite orders by: duplicating all of the activities, times and costs it proposes for an expedite, dividing that number by 4 (assuming 1 in 4 expedite request are denied) and then adding that number to the cost of an approved expedite. However, if an expedite request is denied, Qwest would not have to undertake all of the activities necessary for an approved expedite request. For example, why would it take Qwest the same amount of time for "Overall coordination with departments to monitor success of expedited request" when the request is denied? Assuming for the sake of argument, that this coordination is needed for the successful completion of an expedite, there should be no question that this coordination is *not* needed for an expedite request that is denied. If the resources are not available to approve an emergency-based expedite, for example, Qwest simply denies the expedite, and would therefore not incur costs related to approving the expedite.

Qwest's cost study is also rife with costs related to various Qwest personnel "monitoring" and "coordinating" the expedite request to no real end. Recall that an expedite involves the same familiar service provisioning installation process

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expedites: "Jill explained that when you amend your contract there are ***not reasons for expedites any longer***. Qwest agrees to expedite and there is a charge for all expedites.") (emphasis added); see also Qwest Exhibit 1, Albersheim Direct, p. 45, lines 7-15 (Qwest's account of the reason for its pre-approved expedite process).

[274] 9.78/49.16 = 19.9%.

Qwest already uses, only it occurs earlier, and Eschelon is paying for that installation through a separate non-recurring charge that covers the coordination, monitoring, etc., of the installation. Some examples of Qwest's constant coordination and monitoring include "Monitor TIRKS, WFA status & assist to insure order still moving."[275] This monitoring activity appears to be an unnecessary duplication of work Qwest's systems are designed to do. Qwest also assumes time related to "Overall coordination with departments to monitor success of expedited request" for three different work groups (Service Manager, Process Management – Market Units and Process Management – Design Services[276]), constituting 31% of Qwest's total direct cost for the service. The duplication of effort is also shown in other activities. Qwest assumes that both the Loop Provisioning Center and the Design group will perform the activity: "Receive notification, query status of order, notify/status appropriate work groups."[277] Again, Qwest's proposed excessive costs related to coordination and monitoring are in addition to the coordination and monitoring cost for service provisioning recovered in the installation rate, which is paid in addition to an expedite charge.

[275] Minnesota Cost Docket Expedite Charge Nonrecurring Cost Study 9709, Tab "Expedite Details Output," Cell B22 and Cell B29.

[276] Minnesota Cost Docket Expedite Charge Nonrecurring Cost Study 9709, Tab "Expedite Details Output," rows 107 through 133.

[277] Minnesota Cost Docket Expedite Charge Nonrecurring Cost Study 9709, Tab "Expedite Details Output," rows 37, 39, 49 and 51.

Q. IS THERE OTHER EVIDENCE THAT A REASONABLE EXPEDITE CHARGE WOULD NOT EXCEED THE COST OF INSTALLATION OF THE LOOP?

A. Yes. On July 16, 2004, Qwest increased its expedite charge in its special access tariff to reflect a new $200 per day charge.[278] Before July 31, 2004, Qwest's charges for expedited orders better reflected the relationship between installation and the expedite charge. At that time, Qwest's tariff read, "The Expedited Order Charge is based on the extent to which the Access Order has been processed at the time the Company agrees to the expedited Service Date."[279] Further, the tariff stated, "***but in no event shall the charge exceed fifty percent (50%) of the total nonrecurring charges*** associated with the Access Order."[280] As indicated above, an additional expedite charge that approaches or even exceeds the amount of the charge for all of the activities for an entire installation of a facility should more than amply compensate Qwest for performing the installation activities more quickly. With its former tariff provision, Qwest implicitly recognized that a reasonable charge to expedite an installation would not exceed the charge for all of the work performed in the entire installation; in fact, it would be no more than

[278] Exhibit Eschelon 2.21, Qwest's Tariff FCC #1, section 5.2.2.D, 1st Revised Page 5-25. This is also available on the Qwest website at: http://tariffs.qwest.com:8000/idc/groups/public/documents/tariff/fcc1_s005p021.pdf#Page=1&PageMode=bookmarks.

[279] Exhibit Eschelon 2.21, Qwest's Tariff F.C.C. #1, Original Page 5-25. This is also available on the FCC website at: http://svartifoss2.fcc.gov/cgi-bin/ws.exe/prod/ccb/etfs/bin/binary_out.pl?69762

[280] *Id.* (emphasis added).

half. The non-recurring charge for the installation of a DS1 channel termination, the private line equivalent of a loop, at the time was $313.25.[281]

2. EXCEPTIONS TO CHARGING AN ADDITIONAL EXPEDITE FEE

Q. WHAT OBJECTION DOES QWEST MAKE TO SECTION 12.2.1.2.1 REGARDING ISSUE 12-67(A) (EXCEPTIONS TO CHARGING - EMERGENCIES)?

A. Ms. Albersheim complains that Eschelon's first proposal for Issue-12-67(a) "is excerpted almost word-for-word from the section of the Expedite PCAT titled 'Expedites Requiring Approval.'"[282] Because Section 12.2.1.2.1 relates to exceptions to charging an additional fee when the emergency-based conditions are met, language regarding Expedites Requiring Approval (i.e., emergency-based expedites) is appropriate in that section. The general rule, requiring payment of a separate expedite fee, is set forth in the other provisions of Section 12.2.1.2.

Also, in response to this and other Qwest complaints, Eschelon has offered a second alternative that does not include the itemized emergency conditions from the PCAT. Qwest also opposes Eschelon's proposal #2. First, Ms. Albersheim

[281] Exhibit Eschelon 2.21, Qwest's Tariff F.C.C. #1, 1st Revised Page 7-346. This is also available on the FCC website at:

http://svartifoss2.fcc.gov/cgi-bin/ws.exe/prod/ccb/etfs/bin/binary_out.pl?69765

[282] Exhibit Qwest 1, Albersheim Direct, p. 51, lines 13-14. She notes a difference relating to subparagraph (f) of Eschelon's proposal #1 for Section 12.2.1.2.1. I addressed this issue in my direct testimony. See Exhibit Eschelon 2, Denney Direct, p. 173 at footnote 147, citing Exhibit Eschelon 3.53, pp. 9-10 at Section 5, "Qwest Attempted to Change the Expedites Process to Exclude CLEC-Caused Disconnects in Error, But Retracted its Proposal After Eschelon Objected", citing Initial "Expedites & Escalation Overview – V29.0.

states that Eschelon's proposal #2 for Issue 12-67(a) "makes no distinction between designed and non-designed service expedites."[283] Eschelon's second proposal for Section 12.2.1.2.1 specifically provides, however, that an exception to charging for expedites will only be provided under the same conditions as they are provided to Qwest's retail customers. Therefore, if Qwest makes a distinction between designed and non-designed service expedites for its retail customers, as Ms. Albersheim claims it does,[284] then Eschelon's second proposal provides for this. While this proposal offers Eschelon less contractual certainty than the first proposal, it articulates a nondiscrimination standard and limits disputes at least to the extent that the companies agree an exception is allowed.[285] Second, Ms. Albersheim claims Eschelon's language does not address resource availability. I address this point in my next answer.

Q. QWEST CRITICIZES ESCHELON'S LANGUAGE ON THE GROUNDS THAT IT "IMPOSES AN OBLIGATION TO PROVIDE EXPEDITES WHETHER OR NOT RESOURCES ARE AVAILABLE."[286] PLEASE INDICATE WHETHER QWEST MADE THIS OBJECTION TO THE LANGUAGE IN NEGOTIATIONS AND RESPOND REGARDING THE PROPOSED LANGUAGE.

[283] Exhibit Qwest 1, Albersheim Direct, p. 51, line 18.

[284] Exhibit Qwest 1, Albersheim Direct, p. 46, lines 6-9.

[285] *See* Qwest (Ms. Martain) Direct (Aug. 28, 2006), Arizona Complaint Docket, p. 39, lines 27-28; *see id*. p. 40, lines 4-10.

[286] Exhibit Qwest 1, Albersheim Direct, p. 51, lines 8-9 *See also id.* Exhibit Qwest 1, Albersheim Direct, p. 52 line 12 – p. 53, line 3; *id.* Exhibit Qwest 1, Albersheim Direct, p. 54, line 16.

A. No. Qwest neither raised it as an objection nor made any counter proposal regarding resource availability in negotiations. And, Qwest's current proposed ICA language in this case also contains no resource availability language. Despite Qwest's testimony that "the expedite process should be handled in the PCAT rather than the interconnection agreement,"[287] Qwest appears to suggest now that this particular term should be handled in the ICA. In fact, Qwest points out that its own negotiations template ICA language deals with this issue,[288] even though Qwest's ICA language in this case refers to the PCAT instead of addressing the issue in the ICA. Nonetheless, now that Qwest is claiming the ICA proposals should include language regarding resource availability, Eschelon is willing to accommodate Qwest's desire for exceptions to charging an additional fee by providing the following alternative proposals in Utah (with the modification shown in gray shading):

Issue 12-67(a) – third of four options[289]

12.2.1.2.1 Notwithstanding any other provision of this Agreement, for all products and services under this Agreement (except for Collocation pursuant to Section 8), Qwest will grant and process CLEC's expedite request, and expedite charges are not applicable, if resources are available and one or more of the following conditions are met:

Issue 12-67(a) – fourth of four options[290]

[287] Exhibit Qwest 1, Albersheim Direct, p. 52, lines 16 & 22-24. Although Qwest argues this language applies to resource availability, it does not actually mention resources. *See id*.

[288] Exhibit Qwest 1, Albersheim Direct, p. 51, lines 7-9; *See also id.* Exhibit Qwest 1, Albersheim Direct, p. 52, line 12 – p. 53, line 2.

[289] Without the gray shading, this is Eschelon's proposal #1 for Issue 12-67(a).

[290] Without the gray shading, this is Eschelon's proposal #2 for Issue 12-67(a).

> 12.2.1.2.1 Notwithstanding any other provision of this Agreement, for all products and services under this Agreement (except for Collocation pursuant to Section 8), Qwest will grant and process CLEC's expedite request, and expedite charges are not applicable, if Qwest does not apply expedite charges to its retail Customers, such as when certain conditions (*e.g.*, fire or flood) are met and the applicable condition is met with respect to CLEC's request for an expedited order. If the conditions are met, but resources are not available, Qwest will grant and process CLEC's expedite request only to the extent that it would grant and process an expedite request for a retail Customer when resources are not available.

Q. YOU INDICATE THAT ESCHELON'S MODIFIED RESOURCE AVAILABILITY PROPOSED LANGUAGE APPLIES FOR EXCEPTIONS TO CHARGING. IS IT APPROPRIATE TO APPLY THE RESOURCE AVAILABILITY LANGUAGE TO EXPEDITES FOR WHICH ESCHELON PAYS THE ADDITIONAL EXPEDITE FEE?

A. No. What is Qwest charging an expedite fee for, if not to make resources available to expedite the order? If Qwest personnel are readily available, Qwest incurs no cost to add resources for expediting an order. In the case of emergency-based Expedites Requiring Approval, if resources are not available, Qwest simply denies the request.

Q. MS. ALBERSHEIM TESTIFIES THAT QWEST'S "CURRENT PRACTICE" IS THAT ALL EXPEDITES (EVEN ALL FEE-ADDED EXPEDITES) ARE SUBJECT TO RESOURCE AVAILABILITY.[291] IS THIS TESTIMONY ACCURATE?

[291] Exhibit Qwest 1, Albersheim Direct, p. 52, lines 13-14 & 16; *id.* p. 53, lines 1-2.

A. No. Ms. Albersheim's testimony contradicts both Qwest's PCAT and documented Qwest statements made in CMP regarding expedites. This testimony highlights one of the problems with relegating issues to CMP or the PCAT, as Qwest may simply deny or re-interpret documented CMP and PCAT provisions later. The terms need to be documented in an enforceable ICA that is subject to Commission approval and oversight.

First, Qwest's PCAT provides that the emergency-based Expedites Requiring Approval (at no additional fee) are subject to resource availability, but the fee-added Pre-Approved Expedites are *not*.[292] Specifically, under the heading "Expedites Requiring Approval" for emergency-based expedites, Qwest's PCAT states:

> Once your expedite request is received, your Wholesale representative will review the request based on the previous list of available expedite scenarios to determine if the request is eligible for an expedite. If approved, the next step is to contact our Network organization to determine ***resource availability***.[293]

In contrast, the fee-added "Pre-Approved Expedites" section of the PCAT does not contain this step or this language.[294] In fact, there is only one narrow exception in the Pre-Approved Expedites section of the PCAT for resource availability, and that applies when Qwest attempts service delivery but the CLEC

[292] Qwest's Escalations and Expedites PCAT is provided as both Exhibit Qwest 1.5 and Exhibit Eschelon 3.61.

[293] Exhibit Qwest 1.5 (emphasis added). The phrase "if approved" refers to Qwest's determination that one of the emergency conditions is met.

[294] Exhibit Qwest 1.5, pp. 3-5.

is not ready, Qwest assigns a Customer Not Ready ("CNR") jeopardy, and CLEC asks "to expedite the ***newly requested*** due date."[295] As described by Ms. Johnson, when Qwest assigns a CNR jeopardy, Qwest requires CLECs to submit an order requesting an interval at least three days out. In this narrow exception to the general rule that Pre-Approved Expedites are not subject to resource availability, if the CLEC was not ready and wants Qwest to deliver service earlier than the Qwest-required three-day interval, CLEC may obtain an expedite if both the CLEC pays an additional per day expedite fee[296] and resources are available.[297] Other than this narrow circumstance (which Eschelon is willing to add to its language, though Qwest would likely argue it its too much "detail"), fee-added Pre-Approved Expedites are not subject to resource availability under Qwest's current PCAT process.

Second, Qwest confirmed when it initially implemented a fee-added Pre-Approved Expedites process (which was optional at that time)[298] that, *because CLECs were paying for the expedites*, the fee-added expedites would not

[295] Exhibit Qwest 1.5, p. 5 (emphasis added). Regarding CNR jeopardies, see Ms. Johnson's testimony regarding Issues 12-71 – 12-72.

[296] Exhibit Qwest 1.5, p. 1 ("If the request being expedited is for a product contained in the 'Pre-Approved Expedites' section below, your ICA ***must contain*** language supporting expedited requests ***with a 'per day' expedite rate***.") (emphasis added).

[297] Exhibit Qwest 1.5, p. 5.

[298] A key distinction between the Covad change request and the "current" expedite process implemented by Qwest over CLEC objection is that the earlier fee-added expedites for loops were optional (so Eschelon continued to receive expedites for loops when the emergency conditions were met under the existing ICA) whereas under the more recent Qwest-initiated process, Qwest will no longer provide expedites for loops when the emergency conditions were met under the same existing ICA. *See* Exhibit Eschelon 2.18 & Exhibit Eschelon 3.53.

otherwise impact resources.[299] This is one of two assurances that Eschelon obtained to determine that there was no impact on the existing emergency-based option to challenge at that time (with the first assurance being that fee-added expedites were optional and did not replace the existing emergency-based process for loops).[300] Ironically, this discussion occurred during CMP activity relating to the Covad change request referenced in Ms. Albersheim's testimony.[301] Although she suggests there that the "current expedite process" was developed as a result of the Covad change request, she ignores these two fundamental premises of that change.

Regarding resources, Eschelon made the following comment and Qwest made the following reply in CMP:

> Eschelon
> June 18, 2004

[299] Exhibit Eschelon 3.54, row 23. See also Qwest Exhibit 1.4, p. 6 of 9 (CMP minutes show that Eschelon asked "how this new process affects resource assignment of network technicians" and Qwest replied "we have the resources to cover expedited requests. We have performed volume forecasts. An expedite request and a regular request are equally weighted.").

[300] In response to Eschelon's CMP comments on the Covad change request, Eschelon obtained two commitments from Qwest (both reflected in Qwest's CMP Response): (1) implementation of the Covad CR would not result in replacement of the existing emergency-based option (*i.e.*, "If a CLEC chooses not to amend their Interconnection Agreement, the current expedite criteria and process will be used") *see* Exhibit Eschelon 3.67; and (2) resources would remain available to process expedite requests under the existing emergency-based option even with the addition of the optional fee-added alternative (*i.e.*, "this will not impact resources"), Exhibit Eschelon 3.54, row 23. Although Qwest criticizes Eschelon for not seeking postponement, oversight committee review, or dispute resolution with respect to Covad's change request (Exhibit Qwest 1, Albersheim Direct, p. 53), there was no reason to do so, because Qwest made these commitments to Eschelon and, therefore, there was no impact on the existing emergency-based option to challenge at that time. Eschelon continued to receive expedites for loops when the emergency-based conditions were met after implementation of the Covad change request (until Qwest's Version 30 change implemented over CLEC objection). See Exhibit Eschelon 3.53.

[301] Exhibit Qwest 1, Albersheim Direct, p. 45, line 6..

> Comment: Echelon objects to Qwest's premature process change based on the following reasons: . . .
> 3. Qwest will confirm that if a CLEC chooses not to sign the amendment and pay the Qwest approved rates (when Qwest obtains approved rates) how this will impact resources for those CLECs requesting expedites for the 'conditions' listed in Qwest Expedite and Escalation Overview. All CLECs have been on equal footing for expediting approval. This will change those dynamics.
>
> Qwest Response . . .
> 3. If a CLEC chooses not to sign the amendment and pay the approved rates, this will not impact resources. . . . This comment is accepted.[302]

Note that Qwest does *not* say that resources will not be impacted because Qwest will not perform the expedites if resources will not be available. Qwest relied on the fact that, under the new optional fee-added process, CLECs would pay to make additional resources available so other resources would not be affected. As discussed above, Qwest's current PCAT reflects this understanding. Before the Covad change request, the PCAT reflected only emergency-based expedites (with no optional fee-added process). At that time, the PCAT said: *"**All** expedite requests require approval to ensure resource availability."*[303] When Qwest implemented Version 11 of the PCAT in connection with the Covad change request, *Qwest redlined out and deleted this sentence,*[304] *as resource availability no longer applied to all expedites*. It has not appeared in the PCAT since then,

[302] Qwest Response to Document in Review (July 15, 2004), Product/Process: Expedites &Escalations Overview V11, Notification Number PROS.06.29.04.F.01840.ReissueExpeditesV11, at http://www.qwest.com/wholesale/downloads/2004/040715/DNLD_QwestResponse_Exp_Escl_V11.doc

[303] Exhibit Eschelon 3.61 (Version 6 of the expedites PCAT) (emphasis added).

[304] *See* Qwest-prepared redline of the PCAT showing deleting of this sentence, at http://www.qwest.com/wholesale/downloads/2004/040629/PCAT_Exp_Escl_V11_0_reissue.doc

and it does not appear in the current PCAT.[305] Qwest said that, with these changes, CLEC customers and Qwest retail and access customers are bound by the same terms,[306] which at that time still included emergency-based expedites for loops.

Q. WHEN ASKED HOW QWEST DEVELOPED ITS CURRENT EXPEDITE PROCESS, MS. ALBERSHEIM BEGINS WITH A COVAD CHANGE REQUEST AND DESCRIBES THE EXPEDITE PROCESS AS HAVING BEEN "DEFINED AND CREATED" IN CMP.[307] DO YOU AGREE THAT MS. ABLERSHEIM ACCURATELY OR COMPLETELY DESCRIBES DEVELOPMENT OF THE EXPEDITE PROCESS?

A. No. The expedite process pre-dates CMP. Qwest provided Eschelon with expedite capability at no additional charge for loops and other UNEs when certain specified emergency conditions were met ("emergency-based expedites") from the very beginning of the interconnection relationship between Eschelon and Qwest, when Eschelon opted in to the AT&T interconnection agreement in 2000 (before Qwest even created the expedites PCAT[308]).[309] Qwest implemented the

[305] Exhibit Qwest 1.5.

[306] Qwest Response to Document in Review (July 15, 2004), Product/Process: Expedites &Escalations Overview V11, Notification Number PROS.06.29.04.F.01840.ReissueExpeditesV11, at http://www.qwest.com/wholesale/downloads/2004/040715/DNLD_QwestResponse_Exp_Escl_V11.doc

[307] Exhibit Qwest 1, Albersheim Direct, p. 46, line 4 and p. 47, lines 1-7. *See also* Exhibit Qwest 1, Albersheim Direct, p. 51, lines 3-5.

[308] *See* Exhibit Eschelon 3.56 (Sept. 22, 2001 product notification) (discussed in Exhibit Eschelon 3.53, p. 5.

[309] *See, e.g.*, Exhibit Eschelon 3.68 (Examples of Expedite Requests Approved by Qwest for

process that it claims is the current expedite process via a Qwest-initiated change by CMP notification[310] over the objection of multiple CLECs including Eschelon[311] to deny CLECs the capability to expedite orders for loops and other UNEs using the emergency-based expedites process (or any process) under the same ICA as Eschelon had been receiving expedites, without amendment.[312] Despite Qwest's suggestions that these changes were associated with Covad's change request,[313] Qwest's objectionable changes were not initiated by Covad or any other CLEC.[314] I summarized these events in my direct testimony,[315] and

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Unbundled Loop Orders); *see also* Arizona Complaint Docket, at Answer, May 12, 2006, p. 9, ¶ 14, lines 24-25 ("Qwest admits that it previously expedited orders for unbundled loops on an expedited basis for Eschelon. . ."); *See also* Qwest (Ms. Novak) Direct (July 13, 2006) (Arizona Complaint Docket), p. 5, lines 5-12 & lines 21-22 (Qwest "uniformly followed the process in existence at the time for expediting orders for unbundled loops").

[310] *See* Exhibit Eschelon 3.69 (Qwest notice annotated to highlight information showing it was a Qwest-initiated notice not associated with any change request by Covad or any other CLEC).

[311] *See* Exhibit Eschelon 3.53, pp. 12-15 (summary in Chronology); Exhibit Eschelon 3.54, pp. 1-5, (Rows 2-14); Exhibit Eschelon 3.63, pp. 7-10; Exhibit Eschelon 3.64, pp. 13-18. For example, Integra made the following objection: "Integra objects to Qwest proposed change to remove the existing approval required expedite process for designed products. When Integra signed the Qwest Expedite Amendment we were not advised that by signing the amendment it would change the current Expedites Requiring Approval process. We signed the amendment believing that this would ADD to our options of having an order completed outside the standard interval. When Integra signed the amendment UBL DS0 loops were not included as a product on the list of products in the 'Pre- Approved Expedites' list. When the UBL DS0 was added to this list Integra did not comment as at that time we still believed the Expedites Requiring Approval process was in place for our use."

[312] *See* Exhibit Eschelon 3.53 (Chronology) & Exhibit Eschelon 3.57 (Qwest notice effective January 3, 2006).

[313] *See, e.g*., Exhibit Qwest 1, Albersheim Direct, p. 45, lines 14-15 ("hence, Covad's change request").

[314] *See* Exhibit Eschelon 3.69 (Qwest notice annotated to highlight information showing it was a Qwest-initiated notice not associated with any change request by Covad or any other CLEC).

[315] Exhibit Eschelon 2, Denney Direct, pp. 163-166 & Exhibit Eschelon 2.18.

they are described in detail by Ms. Johnson in her chronology and the other expedite exhibits that are part of her direct testimony.[316]

Expedites, as they should be available today, is provided for in the existing Qwest-Eschelon ICAs, which have not changed since Qwest provided emergency-based expedites to Eschelon under that very same approved ICA.[317] In testimony in the pending Arizona Complaint Docket, Arizona Staff concludes regarding expedites that "Qwest did not adhere to the terms and conditions of the current Qwest-Eschelon Interconnection Agreement."[318]

Q. MS. ALBERSHEIM PROVIDES QWEST DEFINITIONS OF DESIGNED AND NON-DESIGNED SERVICES.[319] DO THESE DEFINITIONS APPEAR IN THE PROPOSED ICA?

A. No. In negotiations, Eschelon asked Qwest to include definitions of these terms in the ICA, but Qwest refused to do so. Qwest's ICA proposal contains no definitions of these terms, and Eschelon has been unable to find the definitions in the PCAT to which Qwest's ICA proposal refers. Ms. Albersheim admits that, when in CMP Qwest took away the emergency-based "Expedites Requiring

[316] Exhibit Eschelon 3.53 (Chronology) and Exhibit Eschelon 3.54 – Exhibit Eschelon 3.54 – Exhibit Eschelon 3.69.

[317] Exhibit Eschelon 2.18; Exhibit Eschelon 2, Denney Direct, p. 163 at footnote 131.

[318] Arizona Staff conclusions are summarized in the 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 ("Arizona Complaint Docket") (Jan. 30, 2007) ("Arizona Staff Expedite Testimony") at Executive Summary. This Executive Summary was provided as Exhibit Eschelon 2.19.

[319] Exhibit Qwest 1, Albersheim Direct, p. 46.

Approval" exception to charging for expedites for loops that it previously provided under the existing ICA for loops (including DS0 loops), it did so based on its distinction between designed and non-designed services.[320] Qwest would not, however, agree to define those terms in the ICA. In fact, Qwest's proposal for the new ICA is to eliminate the emergency-based exceptions to charging an additional expedite fee by limiting availability of expedites under the ICA to those described at any given time in the fee-added "Expedites Requiring Approval" in Qwest's PCAT.[321]

Q. PLEASE RESPOND TO MS. ALBERSHEIM'S CLAIM THAT ITS TWO DIFFERENT PCAT EXPEDITE OFFERINGS RELATED TO DIFFERENCES BETWEEN QWEST'S RETAIL POTS AND DESIGN TARIFF PRODUCT OFFERINGS.[322]

A. Although Qwest claims it makes this differentiation for Qwest retail,[323] the terms designed and non-designed are also not clearly defined throughout Qwest's tariffs. In its testimony in the Arizona Complaint Docket, Arizona Staff said that it could not find the definitions in Qwest's intrastate tariffs[324] and made the following conclusion: "Qwest should include a definition of designed and non-

[320] Exhibit Qwest 1, Albersheim Direct, p. 56, lines 4-5.

[321] Qwest proposed language for Section 7.3.5.2.2 (emphasis added); *see also* 9.1.12.1.2 (same except it says "expedites" rather than "expedite charges"). By limiting expedites to the fee-added "Pre-Approved Expedite Process," Qwest is indicating that the emergency-based "Expedites Requiring Approval" process is not available under the ICA at all. *See id.*

[322] Exhibit Qwest 1, Albersheim Direct, p. 46, lines 6-9 & p. 47, lines 1-7.

[323] Exhibit Qwest 1, Albersheim Direct, p. 46, lines 6-7.

[324] Arizona Staff Testimony (Ms. Genung), p. 23, lines 18-19.

designed services in its Arizona tariffs."[325] In that case, Qwest said: "the ***only*** retail analogue is between ***high capacity*** loops (DS1 and DS3 Capable Loops) and high-capacity private lines."[326] Ms. Albersheim does not explain why she nonetheless refers to the Qwest retail tariff as the comparable comparison for all loops, including DS0 loops, for this purpose.

Qwest does not charge its retail customers an additional expedite fee in all cases; rather, Qwest provides exceptions to charging an additional fee for expedites under certain conditions, including retail customers ordering services such as private line that Qwest would designate as a designed service.[327] In other words, Ms. Albersheim's statement that Qwest offers *only* fee-based expedites to its retail design services is not supported by Qwest's tariffs for designed services.[328] Further, Qwest had been offering emergency-based expedite for both design and

[325] Exhibit Eschelon 2.19, Conclusion No. 5.

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

[327] Qwest (Ms. Martain) Direct (Aug. 28, 2006), Arizona Complaint Docket, p. 40, lines 4-10 ("The tariff then goes on to state that if the end user elects to move service to a temporary location (either within the same building, or a different building) that non-recurring charges would apply. This would include the non recurring charge to expedite a design service. However, when the customer moves its service, via a service order, back to the original premise location, if it meets the criteria as outlined in 3.2.2.d included below, the non-recurring charges would be ***waived*** (***including the expedite fee***)" (emphasis added)).

[328] Similarly, Ms. Albersheim's assertion that non-designed expedites "are free" (Exhibit Qwest 1, Albersheim Direct, p. 51, line 4) is unsupported. For example, Qwest offers an "express service" which essentially is an expedite service offered to residential customers in some states and defined as provisioning of access line dial tone prior to the standard installation service date. Under its express service offering, Qwest offers same-day installation for $21.50 flat (per order) fee in Utah. See Qwest Utah Exchange and Network Services Catalog, Section 3.1.8 pages 8 and 9. (This is attached as Eschelon Exhibit 2.21 pages 24 and 25.) There is no requirement that emergency conditions be met to obtain express service for this fee. *See id*.

non-design facilities for many years, up until recently, and the "complexity" of design services had not been an issue for all these years. Ms. Albersheim did not explain why *complexity of design facilities* necessarily means *complexity of expedites for design facilities*. Finally, Qwest does not explain how these complexities can possibly justify a rate difference of $200 per day. As I discuss above, Qwest performs the same provisioning work for an expedited order as it does for an order provisioned within normal service intervals -- the only difference is that Qwest performs the function sooner than it would otherwise.

IX. RATES FOR SERVICES, UNAPPROVED RATES AND INTERCONNECTION ENTRANCE FACILITIES (SUBJECT MATTER NOS. 44, 45 & 46)

SUBJECT MATTER NO. 44. RATES FOR SERVICES

Issues 22-88, 22-88(a) and 22-89: ICA Sections 22.1.1 and 22.4.1.3, and Exhibit A, Section 7.11.

Q. PLEASE SUMMARIZE ISSUE 22-88 AND ITS SUBPARTS.

A. Issues 22-88 and 22-88(a) deal with the language characterizing rates contained in Exhibit A.[329] Eschelon proposes that rates in Exhibit A be referred to in general terms, as "rates for services," without specifying the provider of services. Qwest proposes that rates in Exhibit A be referred to as Qwest's rates. As I explained in my direct testimony, a number of rates contained in Exhibit A apply to Eschelon's

[329] Issue 22-88 deals with the general references to rates in Exhibit A, while Issue 22-88(a) deals with a specific line item in Exhibit A describing rates for IntraLATA toll traffic.

charges to Qwest.[330] Therefore, the ICA and its Exhibit A should not inaccurately confine rates to "Qwest rates" or misleadingly refer solely to "Qwest tariffs," as proposed by Qwest. Eschelon's proposal for Issue 22-89 complements the already agreed-upon portions of the ICA[331] that set a process for establishment of interim rates. Eschelon's proposal for Issue 22-89 clarifies that each company has a right to request a cost proceeding at the Commission to set permanent rates.

Q. WHAT ARGUMENTS DOES QWEST MAKE AGAINST ESCHELON'S PROPOSAL IN ITS DIRECT TESTIMONY?

A. Mr. Easton claims that Qwest does not purchase any services from Eschelon, and therefore, rates in Exhibit A apply only to Qwest's services.[332] The various citations to agreed-upon contract language that I refer to in my direct testimony[333] demonstrate that Mr. Easton is simply incorrect: Qwest does potentially buy services from Eschelon, including those related to transit and exchange of traffic, trouble isolation, managed cuts, and installation of interconnection trunks. Many of these rates are set at the levels specified in Exhibit A. Mr. Easton is also wrong when he claims that Exhibit A need not refer to charges from Eschelon to Qwest because they are "spelled out specifically in the ICA."[334] The citations to the ICA in my direct testimony show that, without Exhibit A, it is often impossible to

[330] *See* numerous citations from the agreed-upon language of the ICA contained in Denney Direct (Exhibit Eschelon 2, Denney Direct, pp. 202-204).

[331] Section 22.6.1.

[332] Exhibit Qwest 2, Easton Direct, p. 35.

[333] Exhibit Eschelon 2, Denney Direct, pp. 202-204.

[334] Exhibit Qwest 2, Easton Direct, p. 35, line 8.

identify rates that Eschelon would charge. For example, the following provision is clearly insufficient – *unless Exhibit A is used as the source of Eschelon's rates* –to determine what rate Eschelon would charge Qwest:

> **8.2.3 General Terms--Caged and Cageless Physical Collocation**
>
> 8.2.3.10 …If, pursuant to the random audit, Qwest does not demonstrate non-compliance, *Qwest shall pay CLEC using the rates in Exhibit A for Additional Labor Other, for CLEC time spent, if any, as a result of Qwest's audit*…

Q. REGARDING ISSUE 22-88(A) "RATES FOR INTRA-LATA TOLL TRAFFIC," MR. EASTON CLAIMS THAT A REFERENCE TO QWEST'S ACCESS TARIFF (RATHER THAN SIMPLY TO UTAH ACCESS TARIFF) IS APPROPRIATE BECAUSE THE CONTRACT ALREADY SPELLS OUT WHEN ESCHELON'S ACCESS RATES APPLY. PLEASE RESPOND.

A. As I explained above, Exhibit A contains rates charged by both Qwest and Eschelon. Therefore, referring to rates for the mutual exchange of intraLATA toll traffic in Exhibit A as "Qwest's rates" is misleading. As I explained in my direct testimony,[335] comparison of the agreed-upon *contract language* and *Qwest's proposed language for Exhibit A* creates confusion and unnecessary ambiguity. On the one hand, the contract spells out a situation in which the *CLEC charges Qwest* for intraLATA toll, and on the other hand, under Qwest's proposal, Exhibit A would say that rates for intraLATA toll traffic are to be found only in *Qwest*'s

[335] Exhibit Eschelon 2, Denney Direct, pp. 207-209.

Access Tariff. Qwest's proposed language could lead to the mistaken conclusion that a CLEC must charge access rates out of Qwest's, rather than the CLEC's own, access tariff.

Q. REGARDING ISSUE 22-89, MR. EASTON STATES THAT ESCHELON'S PROPOSED LANGUAGE IS "UNNECESSARY."[336] PLEASE RESPOND.

A. Mr. Easton testifies that "[g]iven that commission rules and federal law govern a parties' right to initiate a cost proceeding, there is no need to address it in a contract."[337] I explained in my direct testimony why Eschelon's proposed language was necessary[338] and that Qwest has agreed to Eschelon's language in Minnesota.[339] The above quote from Mr. Easton's testimony confirms my direct testimony that "Qwest does not deny that each party has the right to request a cost proceeding; it simply claims that such a provision is unnecessary in the ICA"[340] – and contrary to Qwest's claim, Eschelon's language is necessary due to the relationship this language has with other agreed-to and Eschelon-proposed language in the ICA.[341]

Mr. Easton also warns about potential "danger" that "by including rights such as

[336] Exhibit Qwest 2, Easton Direct, p. 36, line 10.

[337] Exhibit Qwest 2, Easton Direct, p. 36, lines 10-11.

[338] Exhibit Eschelon 2, Denney Direct, pp. 210-212.

[339] Exhibit Eschelon 2, Denney Direct, pp. 210-211.

[340] Exhibit Eschelon 2, Denney Direct, p. 210.

[341] Exhibit Eschelon 2, Denney Direct, pp. 210-211.

this one, it could create a risk that other rights not listed are excluded."[342] Eschelon's language is not about the ICA including or excluding rights, rather it simply clarifies that nothing in the ICA is a waiver of rights to seek permanent rates[343] – rights that Qwest concedes exist.[344] This clarification is appropriate because it ensures that if Qwest files rates and cost support but there is no cost case and full review by the Commission, the interim rates do not remain in effect indefinitely if one of the companies asks the Commission to review them.[345]

What is troubling is that Qwest argues that arbitrations are not the proper forum to deal with disputes in rates while at the same time Qwest proposes to strike language that would specifically allow Eschelon to raise disputes with regard to cost. In negotiations Qwest told Eschelon that only Qwest could bring a cost case to the Commission. As a result, Eschelon's language is clearly necessary.

SUBJECT MATTER NO. 45. UNAPPROVED RATES

Issue No. 22-90 and Subparts (a)-(e): ICA Sections 22.6.1 and 22.6.1.1 and Exhibit A Sections 8.1.1.2, 8.3.2.7.5, 8.3.2.7.6, 8.3.2.7.7, 8.3.2.7.8, 8.8.1, 8.1.14, 8.6.1.1, 8.6.1.2, 8.6.2.2.1, 8.6.2.2.2, 8.7.1.2, 8.7.2.4, 8.8.4 (NRC), 8.15.2.1, 8.15.2.2, 8.13.1.1, 8.13.1.2.1, 8.13.1.2.2, 8.13.1.2.3, 8.13.1.3, 8.13.1.4, 8.13.2.1, 9.6.12, 9.7.6, 9.23.6 and subparts, 9.23.7.7.1, 9.23.7.7.2, and 10.7.10.

Q. PLEASE PROVIDE A BRIEF SUMMARY OF ISSUE 22-90 AND ITS SUBPARTS.

[342] Exhibit Qwest 2, Easton Direct, p. 36, lines 12-13.

[343] Exhibit Eschelon 2, Denney Direct, p. 209, lines 19-20.

[344] Exhibit Qwest 2, Easton Direct, p. 36, lines 10-11.

[345] Exhibit Eschelon 2, Denney Direct, pp. 210-211.

A. Issue 22-90 concerns Qwest's filing with the Commission for the approval of previously unapproved rates for section 251 products. As discussed in my direct testimony, it is important that rates are substantiated and approved in a timely manner.[346] In Section 22.6 and subparts of the proposed interconnection agreement (Issue 22-90), Eschelon proposes a process for ensuring that Qwest's "going-in" positions or "wish-list" rates are not unilaterally implemented and then remain in effect indefinitely. Very often, in cost cases, Qwest does not obtain commission approval, with no modification, of Qwest's "going-in" position for its desired rate. Commissions often approve something different than any one party's wish list of desired rates. Certainly, commissions generally do not order rates that are *greater than* Qwest's own proposed rates (making Qwest's proposals the highest possible rates to be imposed).

The proposed process explicitly anticipates and allows for Commission establishment of interim rates before or after Qwest files cost support with the Commission.[347] Eschelon's proposal follows a commission decision in Minnesota.[348] Eschelon's proposal also includes language that was added to

[346] Exhibit Eschelon 2, Denney Direct, pp. 212-213.

[347] Proposed ICA Sections 22.6.1 and 22.6.1.1. Qwest appears to be attempting to interpret the language in a manner that limits establishment of interim rates to a cost proceeding after Qwest files its cost support, but that is not what the language (including the portion agreed upon by Qwest) provides. *See* 22.6.1.1 (including a scenario under which Qwest has *not* filed cost support but the Commission *has* set interim rates, so the Commission-established interim rates – and not Qwest's proposed rates – apply).

[348] Exhibit Eschelon 2, Denney Direct, pp. 213-215. 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

confirm that the contract requirements regarding obtaining approval of unapproved rates are the same as those ordered in Minnesota.[349]

Minnesota is currently the only Qwest state in which Exhibit A contains no rates for certain items for which Qwest has neither obtained a Commission-approved rate or filed cost support and complied with that process and yet Qwest must provide the product under the terms of the interconnection agreement. In the other states (including Utah), Qwest currently may force its wish list rates upon CLECs by refusing to provide the product at all if CLECs do not sign an amendment containing its unapproved rates.[350] The result in Minnesota is the appropriate result when Qwest has both not met its burden to show that its rates meet the cost-based standard and not taken reasonable steps to obtain interim or permanent rates from the Commission.

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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."

[349] Although the companies closed upon different language in Minnesota, the Minnesota order will require adherence to that order in Minnesota. When it became apparent that Qwest was attempting to interpret Eschelon's proposed language in Minnesota more narrowly – despite Eschelon's clear indications that the intent is for the result to be the same across states – Eschelon expanded its language in other states to reflect the Minnesota order more fully. Exhibit Eschelon 2, Denney Direct, p. 216.

[350] *See e.g.*, Exhibit Eschelon 2.19, 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) ("Staff Expedite Testimony") at Executive Summary ("CLECs should not be forced into signing" Qwest's expedite amendment with Qwest's $200 per day rate. Staff Testimony, p. 34, lines 10-11. Staff added that "since CLEC interconnection agreements are voluntarily negotiated or arbitrated," Qwest could have taken the issue to arbitration under the Qwest-Eschelon ICA, "rather than trying to force Eschelon into signing an amendment." *Id*. p. 36, line 21 – p. 37, line 2.).

Qwest objects to Eschelon's interim rate process[351] and instead seeks to maintain the status quo which would allow Qwest to charge its proposed interim rates indefinitely. Eschelon has proposed language specific language to be included in the ICA to deal with both rates for new products and rates for products or services that Qwest currently offers without additional (or separate) charge. The language further provides that, when the companies are unable to agree on a negotiated rate, the Commission, not Qwest, may establish the interim rate. What Eschelon's proposed language would not permit is what Qwest has historically done in Utah: simply impose rates that have not been agreed to and that the Commission has not reviewed and leave those rates in place indefinitely.

Q. IS ESCHELON PROPOSING THAT THE COMMISSION HAVE A FULL COST CASE TO SET PERMANENT RATES IN THIS DOCKET?

A. No. As explained in my direct testimony, there are a number of rates in Exhibit A for which Qwest either lacks cost support, or has proposed rates that are in violation of prior Commission orders. Eschelon's proposals for Issues 22-90(a) through 22-90(e) would establish **interim rates** for products and services for which the Commission has not established an approved rate. Eschelon's interim rate proposal is based on its corrections to Qwest's cost studies (where available) to include the Commission-approved cost inputs, proposed rates from prior Qwest Negotiations Template, reductions to Qwest's "wish list" rates, and rates

[351] Exhibit Qwest 2, Easton Direct, p. 36.

developed based on Commission-approved rates for similar services.[352] The rates proposed by Eschelon in 22-90(a) through 22-90(e) would be considered interim rates only. Permanent rates would be established by the Commission in a cost case. Eschelon's rate proposal, as well as Eschelon's acceptance on an interim basis of a large number of Qwest-proposed rates does not mean that Eschelon considers these rates, which are interim rates, to be cost- based, just, reasonable and non-discriminatory. As explained in Eschelon's proposed language for Issue 22-89 discussed above, Eschelon reserves the right to request a cost case with the Commission to replace interim rates with permanent rates.

Ms. Million is off base when she states, "It would be presumptuous of Eschelon to believe its views represent the views of all of the other CLECs doing business in Utah."[353] As explained above, Eschelon is not seeking to establish permanent rates in this arbitration. Further, Qwest's statement leads one to wonder if Qwest believes that CLECs would claim they are better served paying rates that are above cost and have not been approved by the Commission. Eschelon's proposed interim rates are less than or equal to Qwest's proposed interim rates. If the Commission adopts these interim rates in this docket, and Qwest makes these interim rates available to other CLECs in Utah, certainly no CLEC would complain that it has to pay less money to Qwest.

[352] See, Exhibit Eschelon 2, Denney Direct, pp. 227-228 and Exhibit Eschelon 2.32.

[353] Exhibit Qwest 4, Million Direct, page 3.

Interim Rate Language Proposals – Issues 22-90 and 22-90(a)

Q. IN THE ESCHELON-QWEST ARBITRATIONS IN OTHER STATES, QWEST RAISED A NUMBER OF CONCERNS REGARDING ESCHELON'S PROPOSAL FOR 22-90 AND 22-90 (A). DOES QWEST RAISE THE SAME CONCERNS IN ITS DIRECT TESTIMONY IN UTAH?

A. No. Qwest's arguments and positions on Issues 22-90 and 22-90(a) are different in Utah than in other states. In his direct testimony in the Colorado Eschelon-Qwest arbitration proceeding, for example, Mr. Easton testified that Eschelon's language for Issue 22-90 would: (i) create "the opportunity to delay or eliminate compensation for services Qwest provides in the time period prior to the Commission making a decision regarding the new rate";[354] (ii) potentially "apply to pricing beyond Section 251 products and services"[355]; and (iii) require notice and cost studies even when the rates "will not impact them."[356] Mr. Easton also claimed (erroneously) in his Colorado Direct Testimony that there were three scenarios where Eschelon's language for 22-90 would result in Eschelon getting services for free.[357] In contrast, Mr. Easton's Utah direct testimony does not make any of these claims.[358] Instead, Mr. Easton's argument has been reduced to

[354] Easton Colorado Direct Testimony (06B-497T, 12/15/06), p. 36.

[355] Easton Colorado Direct Testimony (06B-497T, 12/15/06), p. 36.

[356] Easton Colorado Direct Testimony (06B-497T, 12/15/06), p. 37.

[357] Easton Colorado Direct Testimony (06B-497T, 12/15/06), p. 36.

[358] I include these examples in my testimony to illustrate how Mr. Easton's testimony on Issue 22-90 and subparts has changed from state to state. If Mr. Easton makes these arguments later in this

one sentence describing Qwest's concern with Eschelon's proposed ICA language for Issues 22-90 and 22-90(a): "This process is not one that this Commission has deemed to be necessary in the past, and Eschelon offers no compelling reason why it is necessary now."[359] Contrary to Mr. Easton's new arguments on this issue, Eschelon's language for 22-90 and 22-90(a) (Sections 22.6.1 and 22.6.1.1) is necessary.

Q. PLEASE RESPOND TO MR. EASTON'S CLAIM THAT ESHELON'S LANGUAGE FOR ISSUES 22-90 AND 22-90(A) IS UNNECESSARY.

A. Without Eschelon's language for Issues 22-90 and 22-90(a), Qwest would still be allowed to commence billing for a UNE process that it previously offered without a unique charge in Utah without Commission approval – and because Qwest opposes Eschelon's language for 22-89, Qwest would be allowed to assess that charge on Eschelon indefinitely. And to Mr. Easton's point that this Commission has not deemed Eschelon's language to be necessary in the past, Mr. Easton does not indicate that the Commission has not had the opportunity to address this issue in the past. One only needs to review the impact of Qwest's September 1, 2005 non-CMP notification on design changes, where Qwest unilaterally began charging CLECs a rate for loop design changes that was not approved by any state

proceeding, I will address them then.

[359] Exhibit Qwest 2, Easton Direct, p. 36, lines 21-22.

commission in every Qwest state except Minnesota,[360] to understand that this language, which reflects the requirement in Minnesota, is needed.

Q. REGARDING ISSUE 22-90, MS. MILLION MAKES A NUMBER OF INTRODUCTORY STATEMENTS ON PAGE 7 OF HER TESTIMONY. WOULD YOU LIKE TO RESPOND?

A. Yes. Ms. Million makes four statements that mix fact with advocacy and misconception that should be clarified. Ms. Million states that "many state commissions believed that it was their duty to adopt rates there were on the low end of the TELRIC range in order to "jump start" local competition in their states."[361] Eschelon disagrees with this statement. Ms. Million provides no support for this statement, thus it is difficult to know on what basis she makes this claim. Ms. Million's claim leaves the impression that early on state Commission's initially low-balled TELRIC rates and this justifies the dramatic rate increases proposed by Qwest. I have been involved in UNE cost dockets across the Qwest territory since 1997 and have followed Commission ordered rates in the Qwest states since that time. The Commissions have indicated that they were setting TELRIC rates, not some policy driven lower version of TELRIC rates. I agree with Ms. Million's second statement where she states "in many proceedings where commissions reduced the rates proposed by Qwest, they did so on the basis of competing models presented in those proceeding by the CLECs,

[360] *See* Exhibit Eschelon 2, p. 41 and Exhibit Eschelon 2.1.

[361] Exhibit Qwest 4, Million Direct, p. 7, lines 7-9.

most often AT&T."[362] AT&T was a major player in most initial cost cases in the Qwest region and continued its involvement in the large states (AZ, CO, OR, UT and WA) in the later rounds of cost cases. AT&T's competing cost models and deep pockets to provide the support for these models will be sorely missed by the CLEC community. It should also be noted that state Commissions have reduced Qwest's proposed costs even without competing cost models and the lack of a competing cost model should in no way lead the Commission to default to Qwest's proposed rates. I also agree in part with Ms. Million's third statement, "these same commissions rarely adopted the CLECs' competing models without making input adjustments aimed at better reflecting appropriate TELRIC costs."[363] I agree that commissions, when setting approved rates typically made adjustments to the cost studies, regardless of whose cost study (CLEC or Qwest) the commission was adjusting. I did not always agree with the adjustments made by state Commissions to the CLEC's cost models,[364] just as Qwest may not have agreed with adjustments to its models. The fact that the Commission made adjustments to both supports that the rates are independently developed TELRIC rates. Ms. Million's fourth statement reads, "contrary to the inference of Eschelon's statements, commissions have adopted rates that are higher than the rates initially set in earlier cost proceedings in those states, perhaps in recognition

[362] Exhibit Qwest 4, Million Direct, p. 7, lines 11-13.

[363] Exhibit Qwest 4, Million Direct, p. 7, lines 14-16.

[364] For many years I was AT&T's witness supporting the HAI Model which was used as the basis to set recurring loop rates in a number of Qwest's states.

that rates no longer need to be held artificially low in order to encourage competition."[365] First, Eschelon did not make the claim Ms. Million attributes to Eschelon. We have said that Commission's set rates lower than Qwest's proposed rates, but have made no claims regarding changes to approved rates. Second, again Ms. Million offers no support for her speculation about rates being held artificially low. In fact, in the last four UNE cases I was involved in rates typically were lowered and those rates remain in place today. For example, in Arizona the loop rate was reduced from $21.98 to $12.12, in Colorado it was reduced from $18.00 to $15.87, in Minnesota it was reduced from $18.02 to $12.86 and in Utah it was reduced from $16.64 to $12.97.[366] In Washington Qwest voluntarily reduced its loop rate from $17.94 to $14.27 in order to make it TELRIC compliant. These reductions took place in the 2002 – 2003 time frame and none of these states has since increased rates.

Interim Rate Proposals – Issues 22-90(a) through 22-90(e)

Q. DID QWEST ADDRESS ESCHELON'S INTERIM RATE PROPOSALS, ISSUES 22-90(A) THROUGH 22-90(E)?

A. No. Mr. Easton simply states that these issues should not be dealt with in this arbitration.[367] Section 252(b)(4)(c) of the Federal Telecommunications Act (the

[365] Exhibit Qwest 4, Million Direct, p. 7, lines 17-20. .

[366] These changes reflect changes to statewide average rates.

[367] Exhibit Qwest, 2, Easton Direct, p. 37. See also, Exhibit Qwest 4, Million Direct, p. 8.

"Act") requires the Commission to resolve each issue set forth in the petition.[368] The Act expressly envisions that individual arbitration proceedings may involve rates issues. To that end, Section 252(c) requires that a state commission, "in resolving ***by arbitration***" any open issues and imposing conditions upon the parties to the agreement, "***shall establish any rates*** for interconnection, services or network elements according to subsection (d) of this section."[369] The FCC's rules also recognize that state commissions may set rates in arbitration proceedings and therefore impose a duty to produce in negotiations cost data relevant to setting rates in arbitration.[370] There would be no reason to require that this data be provided if rates were not proper subject for arbitration, and therefore the rule specifically refers to cost data relevant to setting rates "in arbitration."[371]

It should be noted that Qwest has interim rate proposals in this case as well.[372] Although Mr. Easton states that "a cost docket is the most appropriate place to

[368] 47 U.S.C. § 252(b)(4)(c).

[369] 47 U.S.C. § 252(c) (emphasis added). Section 252(d) of the Act sets forth the applicable pricing standards for interconnection, network elements, and resale at wholesale rates of ILEC retail services. It states that rates shall be cost-based and nondiscriminatory. 47 U.S.C. § 252(d)(1)(A)(i) & (ii).

[370] 47 C.F.R. § 51.301(c)(8)(iii) ("If proven to the Commission, an appropriate state commission, or a court of competent jurisdiction, the following actions or practices, among others, violate the duty to negotiate in good faith: . . . (8) Refusing to provide information necessary to reach agreement. Such refusal includes, but is not limited to: . . . (ii) Refusal by an incumbent LEC to furnish ***cost data*** that would be relevant to ***setting rates*** if the parties were ***in arbitration***.") (emphasis added).

[371] *Id*.

[372] See, Exhibit Qwest 2, Easton Direct, p. 37, lines 15-20. See also, Exhibit Qwest 4, Million Direct, pp. 7-8. Closed language in Section 22.4.1 of the proposed ICA states that unapproved rates "are Interim Rates under this Agreement." Agreed upon language in footnote 1 in Exhibit A states which rates are unapproved ("rates not approved"), and therefore agreed upon placement of footnote 1 throughout Exhibit A identifies which rates are unapproved.

determine rates, not an arbitration between only two parties,"[373] Qwest is also seeking to establish interim rates in this arbitration docket – its own proposed charges for each unapproved rate. Qwest does not actually propose to address interim rates in a cost docket, but instead is actually asking the Commission that Qwest's own interim rates be adopted and that permanent rates be dealt with in a cost docket. Qwest has filed absolutely no support for its interim rates in this case. If Qwest believed that interim rates were inappropriate for this proceeding, then Qwest would withdraw its proposed interim rates from Exhibit A.

Q. DO YOU HAVE ANY FURTHER COMMENTS REGARDING QWEST'S FAILURE TO ADDRESS ESCHELON'S INTERIM RATE PROPOSAL?

A. Yes. Qwest has refused to negotiate on its interim rates and instead offers Eschelon "take it or leave it" proposals with regard to rate element availability and their associated rates.[374] For example, this January in Arizona Eschelon had

[373] Exhibit Qwest 2, Easton Direct, p. 37, lines 9-10.

[374] More generally, Qwest sometimes indicates that it will require a contract amendment when in fact it does not or should not. For example, Eschelon has a right to order UNE Combinations under its existing agreement but Qwest nonetheless told Eschelon that it would not accept orders for UNE Combinations (specifically, UNE-P) anywhere in its territory, except Minnesota, without a contract amendment. *See* "Eschelon's Comments Addressing UNE Combinations," *In the Matter of U S West Communications, Inc.'s Compliance with §271 of the Communications Act of 1996*, AZ Docket No. T-00000A-97-0238 (Sept. 21, 2000), pp. 4-9. It later processed UNE-P orders without a contract amendment in Arizona after Eschelon raised the issue with the Arizona Commission. In another example, Qwest suddenly stopped processing Eschelon's orders in Arizona for unbundled loops, telling Eschelon that Qwest required a contract amendment for coordinated installation options before Qwest would process any more orders. [*E.g.*, Email from Qwest (Cindy Buckmaster) to Eschelon (including Bonnie Johnson) (Feb. 28, 2001) ("I have advised your Account Manager – Judy Rixe, that you will need an amendment to permanently add these options to your profile.").] The existing Qwest-Eschelon ICA provides: ("For Customer conversions requiring coordinated cut-over activities, U S WEST and CO-PROVIDER will agree on a scheduled conversion time(s), which will be a designated two-hour time period within a designated date. ***Unless expedited***, U S WEST and CO-PROVIDER shall schedule the cut-over window at least forty-eight (48) hours in advance, and as part of the scheduling, U S WEST shall estimate for CO-PROVIDER the duration

to enter into an amendment to its current agreement containing Qwest's proposed rate before Qwest would provide CLEC-to-CLEC cross connects, even though Eschelon proposed to Qwest rates for this element that are consistent with the Commission's prior order. Eschelon's interim rate proposals (unlike Qwest's proposed rates) incorporate the Commission's cost factors.[375] Qwest has rejected Eschelon's proposed rates indicating that it would not negotiate any changes to its unapproved rate proposals in Exhibit A.

Similarly, Qwest has consistently refused to negotiate a wholesale interim rate for expediting orders (as discussed further regarding Issue 12-67 and subparts). In an Eschelon complaint case against Qwest under the existing ICA, Staff in Arizona concluded that "CLECs should not be forced into signing" the expedite amendment.[376] 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.[377]

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of any service interruption that the cut-over might cause. The cut-over time will be defined as a thirty (30) minute window within which both the CO-PROVIDER and U S WEST personnel will make telephone contact to complete the cut-over." Qwest-Eschelon ICA, Att. 5, §3.2.2.5 (emphasis added). Only after Eschelon escalated did Qwest re-start processing these loop orders, without a contract amendment.

[375] See Exhibit Eschelon 2.32 for a list of adjustments to Qwest's proposed rates.

[376] 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.

[377] *Id*. p. 36, line 21 – p. 37, line 2.

Qwest's refusal to negotiate interim charges for unapproved rates combined with Qwest's arguments in issue 22-89 that Eschelon can not initiate or even request a cost case before this Commission places Qwest in a position whereby Qwest can indefinitely charge above cost based rates to CLECs for products and services where the Commission has not ordered a rate. At the same time, Qwest seeks to remove from Commission jurisdiction oversight regarding rates that the Commission has previously approved.[378]

Further, Qwest's claim that the merits of Qwest-proposed rates should not be addressed in the ICA negations goes against the federal rules regarding the ILEC's duty to negotiate (CFR §51.301). Specifically, CFR §51.301 states that the cost data should be provided as part of negotiations regarding rates. Below I reproduce the relevant portions of CFR §51.301:

> (a) An incumbent LEC shall negotiate in good faith the terms and conditions of agreements to fulfill the duties established by sections 251 (b) and (c) of the Act.
> ….
> (c) If proven to the Commission, an appropriate state commission, or a court of competent jurisdiction, the following actions or practices, among others, violate the duty to negotiate in good faith:
> …
> (8) Refusing to provide information necessary to reach agreement. Such refusal includes, but is not limited to:
> ….
> (ii) *Refusal by an incumbent LEC to furnish cost data that would be relevant to setting rates if the parties were in arbitration.* [379]

[378] *See* Issues 9-31, 9-50, 9-53 and 9-54.

[379] CFR §51.301 (emphasis added).

Clearly, by requiring that an ILEC negotiating in good faith should provide the cost data for its negotiated rates, the rules imply that the "merits" of rates will be considered during negotiations and arbitration.

X. CONCLUSION

Q. WHAT ARE YOUR RECOMMENDATIONS TO THE UTAH COMMISSION?

A. I recommend that the Commission adopt Eschelon's proposed Interconnection Agreement language as described in Eschelon's testimony.

Q. DOES THIS CONCLUDE YOUR TESTIMONY?

A. Yes.