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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

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

REBUTTAL TESTIMONY
OF
MICHAEL STARKEY
ON BEHALF OF
ESCHELON TELECOM, INC.

July 27, 2007

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1 **I. INTRODUCTION**

2 **Q. PLEASE STATE YOUR NAME AND BUSINESS ADDRESS FOR THE**
3 **RECORD.**

4 A. My name is Michael Starkey. My business address is QSI Consulting, Inc., 243
5 Dardenne Farms Drive, Cottleville, Missouri 63304.

6 **Q. ARE YOU THE SAME MICHAEL STARKEY WHO FILED DIRECT**
7 **TESTIMONY IN THIS PROCEEDING ON JUNE 29, 2007?**

8 A. Yes.

9 **II. OVERVIEW OF REBUTTAL TESTIMONY**

10 **Q. WHAT IS THE PURPOSE OF YOUR REBUTTAL TESTIMONY?**

11 A. I will respond to direct testimony of Qwest. I have listed below the issues I
12 address in my rebuttal testimony and the corresponding Qwest witness who
13 addressed that issue in his or her direct testimony.

14 • Section III: Contractual Certainty – Interconnection Agreement/Change
15 Management Process – Issues (Qwest witnesses Renee Albersheim¹ and
16 Karen Stewart²);

¹ Direct Testimony of Renee Albersheim on behalf of Qwest Corp., Qwest Exhibit 1, Utah Public Service Commission Docket No. 07-2263-03; June 29, 2007.

² Direct Testimony of Karen Stewart on behalf of Qwest Corp., Qwest Exhibit 3, Utah Public Service Commission Docket No. 07-2263-03; June 29, 2007. Ms. Stewart provides at page 2 of her direct testimony (Exhibit Eschelon 3, p. 2) what she refers to as a “status on settled issues since the filing of the request for arbitration” was filed. In this status, Ms. Stewart states that since the Petition for Arbitration was filed, the following issues have been resolved: 4-5, 4-5(a), 9-32, 9-35, 9-36, 9-39, 9-

- 1 • Section IV: Subject Matter 1 (Interval Changes and Placement) – Issue 1-1
2 and subparts (Qwest witness Renee Albersheim);
- 3 • Section V: Subject Matter 14 (Nondiscriminatory Access to UNEs) – Issue 9-
4 31 (Qwest witness Karen Stewart³);
- 5 • Section VI: Subject Matter 16 (Network Maintenance and Modernization) –
6 Issue Nos. 9-33 and 9-34 (Qwest witness Karen Stewart⁴);
- 7 • Section VII: Subject Matter 18 (Conversion) – Issues 9-43 / 9-44 and subparts
8 (Qwest witness Teresa Million⁵);
- 9 • Section VIII: Subject Matter 24 (Loop-Transport Combinations) – Issue 9-55
10 (Qwest witness Karen Stewart⁶); and
- 11 • Section IX: Subject Matter 27 (Multiplexing/Loop-Mux Combinations) –
12 Issue 9-61 and subparts (Qwest witness Karen Stewart⁷).

13 **Q. HOW IS YOUR REBUTTAL TESTIMONY STRUCTURED?**

41, 9-42, 9-50, 9-51, 9-52, 9-54, 9-54(a), and 24-92. (Qwest Exhibit 3 (Stewart Direct), p. 2, lines 11-16). For clarification purposes, some of these issues were resolved *before* Eschelon’s Petition for Arbitration was filed – not after (as Ms. Stewart testifies). These issues are: 9-32, 9-35, 9-36, 9-50, 9-52, 9-54, 9-54(a), and 24-92. That these issues were resolved before Eschelon’s Petition for Arbitration was filed is evidenced by the proposed ICA and the fact that these issues were excluded from the disputed issues in Eschelon’s Petition for Arbitration as well as the Joint Disputed Issues Matrix filed with the Petition (Exhibit 3 to Eschelon’s Petition).

³ Qwest Exhibit 3 (Stewart Direct).

⁴ *Id.*

⁵ Direct Testimony of Teresa Million on behalf of Qwest Corp., Qwest Exhibit 4; Utah Public Service Commission Docket No. 07-2263-03; June 29, 2007.

⁶ Qwest Exhibit 3 (Stewart Direct).

⁷ *Id.*

1 A. Qwest's direct testimony includes a general discussion of the Change
2 Management Process or CMP⁸ as a basis for excluding terms from the
3 interconnection agreement (which I respond to below in my discussion of the
4 need for contractual certainty), as well as a discussion of the individual issues on
5 the Issues by Subject Matter List⁹ and Disputed Issues Matrix.¹⁰ Even though a
6 greater number of the topics are not part of the contractual certainty/CMP
7 discussion, I will again (as in my direct testimony) address the contractual
8 certainty debate first to avoid repetitive discussion, as it impacts several issues
9 addressed by Ms. Johnson, Mr. Denney and me. Following the contractual
10 certainty/CMP discussion, I will discuss individual issues by issue number. For
11 the issues listed above, I provide a brief summary of the issue. I then address the
12 arguments Qwest raised in its direct testimony regarding each of these issues,
13 explain the flaws in Qwest's positions and then describe why Eschelon's ICA
14 language should be adopted.

⁸ Qwest Exhibit 1 (Albersheim Direct), pp. 3-26.

⁹ The Issues by Subject Matter List was filed as Exhibit 2 to Eschelon's Petition for Arbitration (filed 4/27/07). I provided an annotated, updated Issues by Subject Matter List reflecting any changes that were made to the list since Eschelon filed its Petition for Arbitration and the Eschelon witness who addresses each disputed issue as Exhibit Eschelon 1.2, attached to my direct testimony.

¹⁰ The Joint Disputed Issues Matrix (4/30/07) was filed as Exhibit 3 to Eschelon's Petition for Arbitration. Regarding position statements in the Matrix, see footnote 3 on page 3 of my direct testimony.

1 **III. THE NEED FOR CONTRACTUAL CERTAINTY**

2 **Q. PLEASE PROVIDE A BRIEF SUMMARY OF EACH COMPANY'S**
3 **POSITION AS IT RELATES TO THE NEED FOR CONTRACTUAL**
4 **CERTAINTY.**

5 A. For several of the arbitration topics,¹¹ Eschelon and Qwest disagree as to whether
6 the Eschelon-Qwest ICA should contain language detailing each company's
7 responsibilities, or whether the Commission should simply "pass" on those issues,
8 choosing instead to allow Qwest or Qwest's CMP process to govern the ultimate
9 terms and conditions rather than the certainty afforded by the ICA. It is
10 Eschelon's position that language in the filed and approved ICA is critical so that
11 Eschelon has certainty to plan and conduct its business. However, Eschelon's
12 proposal is not without flexibility as Qwest's testimony indicates.¹² When (or if)
13 mutually agreeable modifications or changes in law occur, Qwest and Eschelon
14 could simply amend the existing ICA. This process provides Eschelon the
15 necessary certainty it requires, and also ensures that other CLECs can opt-in or
16 negotiate similar terms consistent with Section 252 of the Act and Qwest's
17 nondiscrimination obligation.¹³ Qwest, on the other hand, proposes to exclude or

¹¹ Issue 1-1 (Interval Changes and Placement), Issue 12-64 (Root Cause & Acknowledgement of Mistakes), Issues 12-71 – 12-73 (Jeopardies), Issue 12-67 (Expedited Orders), Issue 12-87 (Controlled Production). Exhibit Eschelon 1 (Starkey Direct), p. 14, footnote 22 (previously, nearly one third of the issues related to this topic, but as discussed above and in direct testimony, several of these issues have since closed).

¹² Qwest Exhibit 1 (Albersheim Direct), p. 34, lines 1-2, regarding Issue 1-1 ("set . . . in stone").

¹³ Although the FCC eliminated the pick-and-choose rule in favor of the all-or-nothing rule, when it did so, the FCC clearly stated that doing so did not limit the nondiscrimination provisions of the Act,

1 minimize language on these issues from the ICA and relegate them to a forum in
2 which it has much more control, and there is much less Commission oversight –
3 *e.g.*, CMP.¹⁴ For other important business issues, Qwest seeks to simply exclude
4 them from the ICA in favor of Qwest’s own discretion.¹⁵

5 **A. RESPONSE TO QWEST’S PROPOSED NEW STANDARD**

6 **Q. HAS QWEST, AS PART OF ITS CMP ARGUMENT, PROPOSED A NEW**
7 **STANDARD FOR EXCLUDING TERMS FROM THE ICA?**

8 A. Yes. For the first time in these Qwest-Eschelon arbitrations, in Oregon, Qwest
9 alleged that the burden should be on Eschelon to provide a “compelling
10 justification” for allegedly altering “existing processes.”¹⁶ Qwest makes the same
11 argument in its Utah direct testimony.¹⁷ Previously, Qwest argued that processes
12 should not be in the ICA at all (and, in fact, continues to make that argument in

which remain available to protect CLECs. *See* Second Report and Order, *In re. Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338 (Rel. July 13, 2004), at ¶¶20-23.

¹⁴ Issue 1-1 (Interval Changes and Placement); Issue 12-67 (Expedited Orders); and Issues 12-71 – 12-73 (Jeopardies).

¹⁵ Regarding Issue 12-87 (Controlled Production), Qwest does not even rely upon CMP. As discussed by Ms. Johnson with respect to this issue, Qwest is violating a previously agreed upon requirement to bring its IMA implementation guidelines through CMP. *See also* Exhibit Eschelon 3 (Johnson Direct), pp. 106-108. Instead, Qwest wants the ICA to be silent on the issue addressed by Eschelon’s proposal (which reflects Qwest’s current practice), leaving it entirely to Qwest’s discretion to change course. Regarding Issue 12-64 (Root Cause Analysis and Acknowledgement of Mistakes), Qwest did not submit processes ordered by the Minnesota Commission to CMP despite its own claims about CMP, as discussed by Ms. Johnson regarding Issue 12-64.

¹⁶ Qwest Exhibit 1 (Albersheim Direct), p. 8, lines 9-10; *see also id.* p. 24, line 19 & p. 57, line 4.

¹⁷ Qwest Exhibit 1 (Albersheim Direct), p. 24.

1 Utah).¹⁸ After closing (with Eschelon’s language) several open issues which
2 Qwest previously argued were process issues that did not belong in an ICA,¹⁹
3 however, Qwest now appears to recognize that terms which Qwest chooses to
4 characterize as processes may be appropriate for inclusion in an ICA. Qwest
5 suggests that processes may be appropriately included in an ICA upon showing a
6 “compelling justification.”²⁰

7 **Q. WHAT BASIS DOES QWEST PROVIDE FOR ITS PROPOSED**
8 **STANDARD?**

9 A. Qwest cites no authority but relies instead upon Ms. Albersheim’s stated belief.
10 Qwest asserts that the basis for shifting the burden to Eschelon to provide a
11 compelling justification is that it “has successfully provided services via that
12 *CMP*.”²¹ Ms. Albersheim testifies: “*Based on that history*, I believe this
13 Commission should require Eschelon to demonstrate a compelling justification
14 for altering existing processes or before locking processes into interconnection

¹⁸ See, e.g., Qwest Exhibit 1 (Albersheim Direct), p. 25, lines 7-8; Qwest Exhibit 1 (Albersheim Direct), p. 25, lines 10-14; see also Qwest Exhibit 1 (Albersheim Direct), p. 57, lines 9-11 (Issues 12-71 – 12-73, Jeopardies).

¹⁹ See, e.g., the agreed-upon language in: Sections 9.1.2.1.3.2.1; 9.1.2.1.3.2.2; 9.2.2.3.2 & 9.2.2.16 (Issue 9-32, Delayed Orders); Section 12.1.5.4.7; 12.1.5.5 & 12.1.5.4.8 (Issues 12-65, 12-66 & 12-66(a), Communications with Customers); Section 12.2.3.2 (Issue 12-68 Supplemental Orders); Section 12.2.7.2.3 (Issue 12-70, PSONs); Section 12.2.7.2.6.1 and subpart (Issue 12-74 Fatal Rejection Notices); Sections 12.3.1 and subpart & Section 12.4.3.6.3 (Issue 12-75 & 12-75(a) Tag at Demarcation Point); Sections 12.3.7.1.1, 12.3.7.1.2 (Issues 12-76 & 12-76(a) Loss and Completion Reports); Section 12.4.3.5 (Issue 12-81, Test Parameters); and Sections 12.4.4.1; 12.4.4.2 & 12.4.4.3 (Issue 12-86, Trouble Report Closure).

²⁰ Qwest Exhibit 1 (Albersheim Direct), p. 8, lines 8-10.

²¹ Qwest Exhibit 1 (Albersheim Direct), p. 8, lines 7-8 (emphasis added). Cf. Exhibit Eschelon 2.24, Minnesota Arbitrators’ Report, ¶ 22 (quoted in next Q&A regarding Qwest’s unilateral actions in CMP).

1 agreement.”²² In other words, Qwest argues that its track record in CMP justifies
2 shifting the burden to Eschelon before “altering existing processes.”²³

3 **Q. HAS ANY COMMISSION REVIEWED QWEST’S TRACK RECORD IN**
4 **CMP AND DISAGREED WITH QWEST’S CONCLUSION ABOUT ITS**
5 **CMP HISTORY?**

6 A. Yes. In Minnesota, where more of these types of issues were open in that
7 arbitration, the Minnesota Arbitrators, as affirmed by the Minnesota Commission,
8 found that “Eschelon has provided *convincing evidence* that the CMP process
9 does not always provide CLECs with adequate protection from Qwest making
10 *important unilateral changes* in the terms and conditions of interconnection.”²⁴

11 **Q. DO THE COMPANIES AGREE UPON THE EXISTING PROCESS IN**
12 **EVERY CASE, AND CAN QWEST’S PROPOSED TEST BE APPLIED**
13 **WITHOUT THE COMMISSION RESOLVING ANY DISAGREEMENT?**

14 A. No. Although Qwest assumes its claimed processes are existing processes, a
15 process resulting from a Qwest unilateral change on an important issue²⁵ does not
16 properly constitute an existing process. Regarding issues for which the
17 companies currently disagree as to the current process or disagree as to whether it
18 is an existing process (because, for example, it was developed outside of both

²² Qwest Exhibit 1 (Albersheim Direct), p. 8, lines 8-10 (emphasis added).

²³ Qwest Exhibit 1 (Albersheim Direct), p. 8, lines 9-10.

²⁴ Exhibit Eschelon 2.24, Minnesota Arbitrators’ Report, ¶ 22 (emphasis added).

²⁵ Exhibit Eschelon 2.24, Minnesota Arbitrators’ Report, ¶ 22.

1 CMP and ICA negotiations without CLEC input),²⁶ the Commission - to apply
2 Qwest's proposed new standard - would need to first determine whether there is
3 an existing process and what that process is before determining if the proposed
4 language alters an existing process.

5 The proper inquiry in an ICA arbitration, however, is whether the terms and
6 conditions of the individual ICA meet the requirements of the federal Act,
7 applicable FCC regulations, and relevant state law and regulations.²⁷ In
8 Minnesota, for example, the ALJs said they agreed with the Minnesota
9 Department of Commerce ("DOC" or "Department") "analysis that any
10 negotiated issue that relates to a term and condition of interconnection may
11 properly be included in an ICA, subject to a balancing of the parties' interests and
12 a determination of what is reasonable, non-discriminatory, and in the public
13 interest."²⁸ Ms. Stewart testified that individual carrier's needs are appropriately
14 addressed in ICAs, even when they "may be different from one CLEC to
15 another."²⁹

²⁶ See, e.g., Exhibit Eschelon 1 (Starkey Direct), pp. 85-106 & Exhibit Eschelon 3.16 (non-CMP secret TRRO PCAT example).

²⁷ Order, *In the Matter of Covad Communications Company, Petition for Arbitration of an Interconnection Agreement with Qwest Corporation*, Docket No. ARB 584, Order No. 05-980, entered Sept. 6, 2005, p. 2.

²⁸ Exhibit Eschelon 2.24, Minnesota Arbitrators' Report, ¶ 22.

²⁹ Qwest Exhibit 3 (Stewart Direct), p. 43, lines 4-9 ("The individual ICA negotiation process was clearly contemplated by the Telecommunications Act. Specifically, the Act requires that ILECs negotiate individually with CLECs and reach agreements that are tailored to each carrier's needs. While this approach, mandated by the Act, results in terms and conditions that may be different

1 **Q. WHAT OPEN ISSUES FALL WITHIN THIS CMP AND CONTRACTUAL**
2 **CERTAINTY DEBATE?**

3 A. Ms. Albersheim does not identify each issue in her CMP discussion. In my direct
4 testimony, I attempted to break the issues down by those for which Qwest
5 proposes ICA language (listed on Exhibit Eschelon 1 (Starkey Direct), pp. 13-14)
6 and those for which Qwest proposes silence in the ICA³⁰ or a reference to
7 Qwest's CMP, PCAT or wholesale web site (listed on Exhibit Eschelon 1
8 (Starkey Direct), p. 17). Although Qwest proposes its new compelling
9 justification standard based on its CMP history,³¹ Qwest does not propose use of
10 CMP, or has elected not to use CMP, for several of these issues. Qwest's
11 proposals for the open issues (for which Qwest proposes no ICA language or
12 references to outside sources) break down as follows:

13 • **INTERVAL CHANGES AND PLACEMENT (1):**

14 Issue No. 1-1 and subparts – Qwest proposes either no language or references
15 to outside sources and proposes use of CMP for all interval changes. Qwest
16 testifies, however, that under its existing process it “has only decreased”
17 intervals.³² Ms. Albersheim does not explain why, given that lengthening

from one CLEC to another, those differences are not an illegal or prohibited form of discrimination.”).

³⁰ Although Qwest may suggest that Eschelon's proposed language for Issues 9-33 and 9-34 (Network Maintenance and Modernization) reflects some change in process, Qwest proposes ICA language for these issues (i.e., does not propose either silence in the ICA or a reference to the web), and Qwest's network notices are not CMP notices. See Exhibit Eschelon 3.16, p. 9, footnote 5.

³¹ Qwest Exhibit 1 (Albersheim Direct), p. 8, lines 7-10.

³² Albersheim Oregon Direct (Qwest/1, Albersheim/33, line 23) (“so far, Qwest has only decreased intervals.”). See also, Qwest Response to Eschelon Utah Petition for Arbitration, p. 38 (“To date, since Qwest obtained 271 approval, *all* such modifications have been reductions in the lengths of service intervals for various services and have been for the benefit of CLECs.”) In Oregon, Ms. Albersheim later contradicted herself and testified that there were two occasions on which Qwest increased intervals (Oregon Direct, Qwest/18, Albersheim/25, line 8).

1 intervals would be a change, Qwest should not have to show a compelling
2 justification for lengthening intervals.

3 • **MANNER OF CONVERSION (18):**

4 Issue Nos. 9-43 and 9-44 and subparts - Qwest proposes to delete Eschelon's
5 language, but Ms. Million does not mention CMP in her testimony regarding
6 this issue. While both Ms. Albersheim and Ms. Stewart discuss CMP, neither
7 mentions this issue. Qwest claims it has an existing process even though it
8 was developed outside both CMP and ICA negotiations without CLEC
9 input.³³

10 • **ROOT CAUSE ANALYSIS AND ACKNOWLEDGEMENT OF**
11 **MISTAKES (29):**

12 Issue No. 12-64 and subparts – Qwest proposes to delete Eschelon's language,
13 but Qwest also opposes its use of CMP for this use. Qwest chose not to
14 implement the Minnesota Commission-ordered product and process
15 procedures through CMP (for Minnesota or any state) or to inform other
16 CLECs via CMP of the availability of such acknowledgments and how and
17 when to obtain them.³⁴

18 • **EXPEDITED ORDERS (31):**

19 Issue No. 12-67 and subparts – Qwest proposes to include language entitling
20 Qwest to charge Eschelon for expedites but exclude from the ICA the other
21 terms and conditions and instead refer to its PCAT. Qwest implemented a
22 Qwest-initiated change by CMP notification over the objection of multiple
23 CLECs to deny CLECs the capability to expedite orders for loops and other
24 UNEs using the emergency-based expedites process (or any process) under
25 the same ICA as Eschelon had been receiving expedites, without
26 amendment.³⁵

27 • **JEOPARDIES (33):**

28 Issue Nos. 12-71, 12-72, 12-73 – Qwest proposes to delete Eschelon's
29 language and replace it with a reference to its website. This issue has already

³³ See my discussion below of the Secret TRRO PCATs Example; see also Exhibit Eschelon 3.16 (Secret TRRO PCAT Chronology) to the testimony of Ms. Johnson.

³⁴ Exhibit Eschelon 1 (Starkey Direct), pp. 67-76 (Minnesota 616 example). Ms. Albersheim also claims that, contrary to Eschelon, PIDs provide sufficient protection to CLECs against systemic errors and "Eschelon cannot point to any evidence of systemic or chronic problems requiring further attention from Qwest." Qwest Exhibit 1 (Albersheim Direct), p. 43, lines 1-8. I addressed this issue at pages 74-75 of my direct testimony under the "Minnesota 616" example. Eschelon Exhibit 1 (Starkey Direct), pp. 74-75. Regarding Issue 12-64, see Johnson Direct, pp. 43-59.

³⁵ Exhibit Eschelon 2 (Denney Direct), pp. 163-166; see also Exhibit Eschelon 2.18, Exhibit Eschelon 3.53 and Exhibit Eschelon 3.54.

1 been through CMP, but Qwest now denies that one aspect of Eschelon’s
2 proposal is its current process.³⁶ Because Ms. Albersheim has admitted that
3 the bulk of Eschelon’s jeopardies language is Qwest’s current process,³⁷ her
4 own proposed standard if applied would require Qwest to establish a
5 compelling need to change Eschelon’s language.

6 • **CONTROLLED PRODUCTION (43):**

7 Issue No. 12-87 – Qwest agrees to the controlled production language closed
8 so far but proposes deletion of Eschelon’s proposed language regarding Issue
9 12-87. Qwest does not propose use of CMP. Qwest has testified that the IMA
10 Implementation Guideline documents are not and should not be under the
11 CMP control,³⁸ even though language was specifically added to the Scope
12 section of the CMP Document to ensure that the Implementation Guidelines
13 would be within the scope of CMP.³⁹

14 • **TRANSIT RECORD CHARGE AND BILL VALIDATION (9):**

15 Issue Nos. 7-18, 7-19 – Qwest proposes no ICA language, but Mr. Easton
16 does not mention CMP in his testimony regarding these issues. While both
17 Ms. Albersheim and Ms. Stewart discuss CMP, neither mentions these issues.
18 Generally, this issue has not been handled by either company as subject to the
19 CMP debate.⁴⁰

20 • **UNBUNDLED CUSTOMER CONTROLLED REARRANGEMENT**
21 **ELEMENT (UCCRE) (22):**

³⁶ Exhibit Eschelon 3 (Johnson Direct), pp. 60-95.

³⁷ Exhibit Eschelon 1.5 [Minnesota Tr., Vol. I, p. 37, lines 16-23 (Ms. Albersheim) (“Q Other than that phrase, at least a day before, is Eschelon’s proposal consistent with Qwest’s practice? A Current practice, yes, except for that sentence. Q So you agree with me that Qwest’s current practice is to provide the CLEC with an FOC after a Qwest facilities jeopardy has been cleared; is that right? A Yes.”)].

³⁸ Minnesota arbitration, MN PUC Docket No. P-5340, 421/IC-06-768, Surrebuttal Testimony of Renee Albersheim, p. 44 lines 4-10.

³⁹ See Exhibit Eschelon 3.80 to Ms. Johnson’s testimony containing Excerpts from Final Meeting Minutes of CLEC-Qwest Change Management Process Re-design meeting dated March 5-March 7, 2002 (Att. 5, Action Item 143). Exhibit Eschelon 3 (Johnson Direct), p. 106.

⁴⁰ Although Qwest opposes the particular language, Qwest implicitly admits that information needed for bill validation is an appropriate subject matter for inclusion in an ICA, because it has agreed upon other ICA language regarding information needed for bill validation. See, e.g., Section 21.8.4.3 (“Both CLEC and Qwest agree to . . . promptly provide all documentation regarding the amount disputed that is reasonably requested by the other Party”). Qwest and Eschelon do not agree that this information falls within this provision (i.e., whether Eschelon’s request is reasonable) and thus these specific issues remain open, despite closure of Section 21.8.4.3. Qwest has stated that rates are outside the scope of CMP. See, e.g., Exhibit Eschelon 3.63.

1 Issue No. 9-53 - Qwest proposes no ICA language, but Ms. Stewart does not
2 mention CMP in her testimony regarding this issue. While both Ms.
3 Albersheim and Ms. Stewart discuss CMP, neither mentions this issue in the
4 context of CMP. The UCCRE terms proposed by Eschelon remain in Qwest's
5 PCAT and in the SGAT but Qwest seeks to deny them to Eschelon.

6 • **COMMINGLED EELS/ARRANGEMENTS (26):**

7 Issue Nos. 9-58 and subparts, 9-59 – Qwest proposes to delete Eschelon
8 language, including Eschelon's interval proposal (9.23.4.4.3.1), even though
9 Qwest claims that intervals are a CMP issue (Issue 1-1) and Eschelon's
10 ordering language, even though Qwest claims ordering is a process subject to
11 CMP (9.23.4.5.1.1). Qwest claims it has an existing process even though it
12 was developed outside both CMP and ICA negotiations without CLEC
13 input.⁴¹ For example, Qwest claims regarding the circuit ID that its non-CMP
14 process requires more than one circuit ID and Eschelon must use CMP if it
15 wants to alter the alleged non-CMP process.⁴² Although Qwest did not use
16 CMP to develop its alleged process, it says Eschelon must use CMP because
17 the issue “involves processes that affect all CLECs, not just Eschelon.”⁴³ The
18 issue equally affected all CLECs when Qwest put its own terms into place, but
19 Qwest chose not to use CMP – a choice it does not extend to Eschelon.⁴⁴

20 **Q. PLEASE SUMMARIZE WHAT THE ABOVE LIST INDICATES ABOUT**
21 **THE ISSUES SUBJECT TO THE CMP DEBATE.**

22 A. The list shows, at a minimum, that Qwest has been inconsistent in its position
23 with respect to use of CMP. There are only three remaining open subject matters
24 for which Qwest proposes replacement of Eschelon's language with language
25 referring to CMP, the PCAT, or its web site: (1) Issue 1-1 (Intervals); (2)
26 Expedites (Issue 12-67); and (3) Issues 12-71 – 12-73 (Jeopardies). Before the
27 Minnesota Arbitrators' Report was issued and Qwest agreed to close some of

⁴¹ See my discussion below of the Secret TRRO PCATs Example; see also Exhibit Eschelon 3.16 (Secret TRRO PCAT Chronology) to the testimony of Ms. Johnson.

⁴² Qwest Exhibit 3 (Stewart Direct), p. 67, lines 15-16.

⁴³ Qwest Exhibit 3 (Stewart Direct), p. 67, lines 14-15.

⁴⁴ Qwest Exhibit 3 (Stewart Direct), p. 67, lines 15-16.

1 these issues with Eschelon's language, there were more open subject matters for
2 which Qwest proposed references to outside sources. For most, if not all, of those
3 issues, Qwest agreed that Eschelon's language reflected its current process. At
4 that time, therefore, Qwest relied primarily on an argument that existing processes
5 should not be set in stone. Now that only three such issues remain, Qwest has
6 proposed its new compelling justification standard for changes to existing
7 processes, apparently because Qwest is arguing for all three that Eschelon's
8 language changes existing process at least in some respect. Interestingly, with
9 respect to intervals, Qwest still argues that intervals should not be set in stone,⁴⁵
10 even though Qwest now wants to set in stone its own processes, unless Eschelon
11 shows a compelling justification to change them. More specifically, Qwest wants
12 to set them in stone *for Eschelon*, while allowing itself the flexibility to change
13 them in CMP. Under Qwest's approach, changes to an existing process are fine,
14 so long as Qwest gets to determine whether changes are made.

15 **Q. HAS ESCHELON PROVIDED COMPELLING JUSTIFICATION FOR ITS**
16 **PROPOSALS IN THIS CASE?**

17 A. Yes. Although Eschelon disagrees the Qwest-proposed standard applies,
18 assuming for the sake of argument that it were to be used, Eschelon meets the
19 standard for each issue. As to each issue, Eschelon's evidence is more
20 compelling than Qwest's assertions, which are often unsupported by any data or

⁴⁵ Qwest Exhibit 1 (Albersheim Direct), p. 34, lines 1-2.

1 documentation. In my direct testimony,⁴⁶ I explained the most important
2 justification for including Eschelon's proposals in the ICA – certainty to plan and
3 manage a business – a justification with which the FCC and state commissions
4 have agreed,⁴⁷ and provided examples of the types of problems that can arise if
5 Qwest is successful in punting these issues to CMP.⁴⁸ Furthermore, Eschelon
6 provided for each issue a description of the Eschelon business need related to that
7 issue explaining why each issue was important to Eschelon's business relationship
8 with Qwest, including a description of how these issues affect Eschelon's End
9 User Customers. Qwest has admitted that Eschelon is a very active participant in
10 CMP.⁴⁹ Eschelon has: (i) identified a relatively few issues⁵⁰ that are important to
11 Eschelon's business and customers, (ii) crafted specific ICA language that
12 addresses the issue and lets the companies “know what is expected of them under
13 the agreement and to avoid or minimize future disputes,”⁵¹ (iii) brought these
14 issues to the Commission for resolution, and (iv) explained to the Commission
15 why these issues are important to Eschelon and why Eschelon's language should
16 be adopted to address the issue. Though there is no basis for the burden Qwest is
17 attempting to impose on Eschelon, Eschelon has demonstrated the need for its
18 proposed ICA language.

⁴⁶ Exhibit Eschelon 1 (Starkey Direct), pp. 10-11.

⁴⁷ Exhibit Eschelon 1 (Starkey Direct), p. 24 and Exhibit Eschelon 1 (Starkey Direct), pp. 33-34.

⁴⁸ Exhibit Eschelon 1 (Starkey Direct), pp. 52-106.

⁴⁹ Qwest Exhibit 1 (Albersheim Direct), pp. 4 and 21.

⁵⁰ Exhibit Eschelon 1 (Starkey Direct), pp. 6-7.

⁵¹ Qwest Exhibit (Stewart Direct), p. 18, lines 12-13.

1 **B. RESPONSE TO QWEST’S OTHER CMP CLAIMS**

2 **Q. YOU EXPLAINED IN YOUR DIRECT TESTIMONY THAT QWEST HAS**
3 **CONFIRMED THE NEED FOR CERTAINTY IN THE ICA SO THAT**
4 **PARTIES KNOW WHAT IS EXPECTED FROM THEM.⁵² DID QWEST**
5 **CONFIRM THIS POSITION IN ITS DIRECT TESTIMONY?**

6 **A.** Yes. Qwest confirmed in its direct testimony that contractual certainty is
7 important and is a valid basis for deciding to include terms in an interconnection
8 agreement. Specifically, Qwest witness Ms. Stewart testified that “a paramount⁵³
9 goal of this arbitration should be to establish clarity concerning the parties’ rights
10 and obligations.”⁵⁴ And perhaps most telling is Ms. Stewart’s testimony that:

11 a basic purpose of the ICA, as with any contract, is to give the
12 parties certainty about their rights and obligations and to avoid or
13 minimize future disputes about their rights and obligations.⁵⁵

14 She added that “Clear ICA language is necessary so that the parties *know what is*
15 *expected of them* under the agreement and to avoid or minimize future
16 disputes.”⁵⁶ Further, Ms. Stewart has previously testified that it is a “reasonable
17 expectation” that a party’s obligations “should be clearly defined and should not
18 be subject to future interpretations” that a party “develops based on its needs and

⁵² Exhibit Eschelon 1 (Starkey Direct), pp. 17-19.

⁵³ In the Washington Qwest-Eschelon ICA arbitration, Ms. Stewart described this goal as “critical.” Stewart Washington Direct (Docket No. UT-063061, September 29, 2006), p. 20, lines 6-7.

⁵⁴ Qwest Exhibit 3 (Stewart Direct), p. 18, lines 10-11.

⁵⁵ Qwest Exhibit 3 (Stewart Direct), p. 27, lines 19-21.

⁵⁶ Qwest Exhibit 3 (Stewart Direct), p. 18, lines 11-13 (emphasis added); *see also* Qwest Exhibit 3 (Stewart Direct), p. 27, lines 20-21 (“avoid or minimize future disputes about their rights and obligations”).

1 desires at a given time,” and that contract language should further the “goal of
2 avoiding future disputes under the ICA.”⁵⁷ As I explained in my direct testimony,
3 Eschelon likewise needs this contractual certainty (or what Ms. Stewart identifies
4 as a “basic purpose of the ICA”) and known set of rules, especially for issues that
5 are likely to impact its core business operation and ultimately its ability to
6 effectively service its customers. The Commission should set those rules in an
7 ICA that is filed, approved and amended if changed. Unlike Qwest, Eschelon
8 asks that the Commission provide that known set of rules for all of the open issues
9 in the arbitration, and not just a subset hand-picked by Qwest.⁵⁸

10 **Q. HAS QWEST RECOGNIZED ESCHELON’S SIGNIFICANT**
11 **KNOWLEDGE OF, AND EXPERIENCE IN, CMP WHICH SUPPORTS**
12 **THE NOTION THAT ESCHELON’S CONCERNS ARE FOUNDED ON**
13 **EXPERIENCE?**

14 **A.** Yes. Qwest presented information in its testimony showing that Eschelon has
15 been a very active participant in CMP, attending every meeting and taking part in

⁵⁷ Stewart Washington Direct (Docket No. UT-063061, September 29, 2006), p. 20, lines 12-15. Qwest was specifically referring to itself as the party at the time. *See id.* Eschelon believes the statement applies to Qwest as well, such as Qwest’s position that language should be subject to future interpretations that Qwest develops based on its needs and desires at a given time, through CMP (*see e.g.*, CRUNEC example, Exhibit Eschelon 3.13, Exhibit Eschelon 3.14 and Exhibit Eschelon 3.15 & testing charge example, Exhibit Eschelon 3.37, Exhibit Eschelon 3.38, Exhibit Eschelon 3.39, Exhibit Eschelon 3.40); through disregarding CMP results (*see e.g.*, the jeopardies example in Exhibit Eschelon 3.71, Exhibit Eschelon 3.72, Exhibit Eschelon 3.73 and Exhibit Eschelon 3.74); and through non-CMP activities (*see e.g.*, Qwest’s recent collocation non-CMP notice discussed with respect to Issue 9-31, access to UNEs, and the non-CMP “TRRO” PCATs, discussed in Exhibit Eschelon 3.16 – 3.19). *See also* Exhibit Eschelon 3.34 (list of Qwest non-CMP TRRO PCATs and URLs).

⁵⁸ Exhibit Eschelon 1 (Starkey Direct), p. 18, line 11 – p. 19, line 2. *See also* Exhibit Eschelon 1 (Starkey Direct), pp. 19-20, where I explain this point in more detail.

1 change requests as well as the CMP Oversight Committee⁵⁹ and the CMP
2 Redesign process.⁶⁰ Eschelon is a carrier that can speak to Qwest's CMP process
3 through first-hand experience (as also evidenced by the examples provided in my
4 direct testimony and Ms. Johnson's direct testimony).⁶¹ It is worth noting that it
5 is exactly that experience which brought Eschelon to conclude that certain
6 provisions important to the day-to-day operation of its business must be contained
7 in the ICA if Eschelon is to effectively serve its customers going forward. Plainly
8 Eschelon has been an active participant in CMP⁶² with a wealth of experience
9 concerning both its benefits and limitations. The Commission can benefit from
10 that experience as it considers the disputed issues in this case.

11 Despite contrary claims by Qwest's witness,⁶³ including the relatively few terms
12 and conditions sponsored by Eschelon for incorporation in the ICA via this

⁵⁹ Several matters have been handled through Section 18.0 ("Oversight Review Process") of the CMP Document. Exhibit Eschelon 3.41 contains an example of a recent Eschelon request for Oversight Committee review of Qwest's refusal to provide minutes or review of minutes for CMP meetings per the CMP Document as it committed to do in CMP Redesign. Exhibit Eschelon 3.5 contains a list of CMP Oversight Committee Meeting Minutes posted on Qwest's wholesale website along with URLs that can be used to access the meeting minutes. The meeting minutes for the Oversight Committee Meetings held on 1/4/05 and 1/10/05 are provided in Exhibit Eschelon 3.27 and 3.28, respectively. Eschelon has been actively involved in this process.

⁶⁰ Qwest Exhibit 1 (Albersheim Direct), p. 4.

⁶¹ Exhibit Eschelon 1 (Starkey Direct), pp. 52-106; *see also* Exhibit Eschelon 3.71 & Exhibit Eschelon 3.76 (jeopardies), Exhibit Eschelon 3.36 (delayed/held orders), Exhibit Eschelon/3.13 – 3.15 (CRUNEC), Exhibit Eschelon 3.16 – 3.19 (Secret TRRO PCAT); *see also* additional examples in Exhibit 3.53 and Exhibit Eschelon 3.54.

⁶² Qwest Exhibit 1 (Albersheim Direct), pp. 4 and 21.

⁶³ Qwest Exhibit 1 (Albersheim Direct), p. 24, lines 23-26 ("trying to make systems or product and process changes in an interconnection arbitration subverts the purpose of the CMP. The CMP provides a centralized forum for all CLECs to be informed of, have a say in, and make requests for such changes.")

1 arbitration will not eliminate the established CMP process or Eschelon's
2 continued CMP participation.⁶⁴ This is demonstrated in part by the agreement of
3 both Eschelon and Qwest to include the CMP Document as an exhibit to the
4 ICA.⁶⁵ Like the CMP Document (Exhibit G) itself,⁶⁶ agreed upon language in the
5 ICA dictates that when differences exist between the ICA and CMP, the ICA
6 "shall prevail as between Qwest and CLEC."⁶⁷ While Eschelon has agreed to,
7 and does actively, participate in CMP, its participation does not diminish its
8 Section 252 rights to negotiate a meaningful ICA that dictates the terms and
9 conditions by which it will do business with Qwest. Eschelon has, once again,⁶⁸
10 reserved the right to bring issues to ICA negotiation and arbitration as needed,
11 notwithstanding use of CMP.

12 **Q. MS. ALBERSHEIM ARGUES THAT ESCHELON IS ATTEMPTING TO**
13 **SUBVERT THE CMP AND TO "TURN BACK THE CLOCK" IN SOME**

⁶⁴ Exhibit Eschelon 1 (Starkey Direct), pp. 26-28.

⁶⁵ ICA Exhibit G (closed language).

⁶⁶ Exhibit Eschelon 3.10 (as well as Qwest Exhibit 1.1), §1.0 & §5.4.

⁶⁷ ICA Section 12.1.6.1.4; *see also* ICA Section 2.3.

⁶⁸ *See* discussion below regarding the Gap Analysis in CMP Redesign when Eschelon identified, as a gap, the need for CMP to account for differences in individual CLEC ICAs. *See also* Exhibit Eschelon 3.10 (CMP Document), §1.0 & §5.4; and discussion below of Exhibit Eschelon 3.11 (CMP Redesign Meeting Minutes, January 22-24, 2002, Att. 9, Gap Analysis Issue #150 & CMP Redesign Meeting Minutes, April 2-4, 2002, p. 15; Att. 6, pp. 167-168, closing action item #227 and Gap Analysis Issue #150). Meeting Minutes for CMP Redesign are also available on Qwest's website, *See*,

http://www.qwest.com/wholesale/downloads/2002/020225/1_CMP_Redesign_Final_Meeting_Minutes_Jan_22-24-02-22-02.doc (January 22-24, 2002) and

http://www.qwest.com/wholesale/downloads/2002/020715/CMP_RedesignMeetingMinutesApril2-4FINAL07-15-02.doc (April 2-4, 2002).

1 **WAY TO RETURN US ALL TO THE DAYS BEFORE CMP. IS THAT**
2 **TRUE?**

3 A. Of course not. Eschelon is not attempting to eliminate,⁶⁹ undermine,⁷⁰ subvert,⁷¹
4 circumvent,⁷² or “turn back the clock”⁷³ on the CMP. Eschelon’s position is fully
5 consistent with the terms of the CMP Document and the Act, both of which allow
6 for individual contracts, as I explained on pages 24-38 of my direct testimony
7 (Exhibit Eschelon 1). CMP is not eliminated or subverted, as shown by the fact
8 that Eschelon has agreed to include CMP provisions in the ICA (see, e.g., Section
9 12.1.6). Ms. Albersheim describes CMP as a method by which Qwest system and
10 process changes are clearly “communicated” to the CLEC community.⁷⁴ That is
11 often the only way that CLECs receive important information from Qwest
12 regarding Qwest’s planned changes and policies. CLECs need to continue to
13 receive that information. Eschelon and other CLECs also need a mechanism to
14 comment on, or object to, proposed Qwest changes and to submit their own
15 requests because Qwest changes are not only internal to Qwest but have an effect
16 on Eschelon and how it may conduct business. Systems are used by both

⁶⁹ Qwest Exhibit 1 (Albersheim Direct), p. 3, lines 4-5 (“...eliminating the important role that the CMP plays...”).

⁷⁰ Qwest Exhibit 1 (Albersheim Direct), p. 67, lines 24-25.

⁷¹ Qwest Exhibit 1 (Albersheim Direct), p. 24, line 24; Qwest Exhibit 1 (Albersheim Direct), p. 34, line 9; Qwest Exhibit 1 (Albersheim Direct), p. 57, line 14 (Issues 12-71 – 12-73 Jeopardies).

⁷² Qwest Exhibit 1 (Albersheim Direct), p. 46, line 5 (Issue 12-67, Expedited Orders).

⁷³ Qwest Exhibit 1 (Albersheim Direct), p. 3, line 4 (purpose of testimony). Qwest also characterizes Eschelon’s proposals as attempting to “freeze” (Qwest Response to Eschelon’s Petition for Arbitration, p. 40, line 11), “lock in” (Qwest Exhibit 1, (Albersheim Direct), p. 25, line 5), and set “in stone” (Qwest Exhibit 1 (Albersheim Direct), p. 34, lines 1-2) processes in an ICA.

⁷⁴ Qwest Exhibit 1 (Albersheim Direct), p. 3, lines 22-23.

1 companies and they need to coordinate development and updating of those
2 systems over time. Therefore, it is not accurate to suggest that an effective ICA
3 process negates CMP or vice versa.

4 Additionally, some of Eschelon's proposals, which were made in earlier
5 arbitrations (where Qwest made the same arguments) but have now closed with
6 Eschelon's language, simply reflect and preserve the work that has been achieved
7 through the CMP process over a number of years.⁷⁵ For instance, the amount of
8 time spent in CMP developing the Pending Service Order Notifications
9 ("PSOs") (Issue 12-70)⁷⁶ and Loss and Completion Reports (Issue 12-76)⁷⁷ was
10 nearly as long or longer than the term of the new ICA,⁷⁸ and Eschelon has sought
11 to "reflect these improvements" for these terms that "have proven effective for
12 all."⁷⁹ Consistent with Eschelon's view of the ICA, Qwest has agreed to
13 inclusion of Eschelon's language regarding the Pending Service Order
14 Notifications ("PSOs") (Issue 12-70) and Loss and Completion Reports (Issue
15 12-76) in the ICA (in all six states). For the remaining issues of this type, Qwest
16 may deny that Eschelon's language reflects its current practice, but Eschelon will
17 show that it is Qwest's established practice even though Qwest may deny it in

⁷⁵ Exhibit Eschelon 1 (Starkey Direct), pp. 37-38.

⁷⁶ This issue is now closed.

⁷⁷ This issue is now closed.

⁷⁸ Issues 12-70 and 12-76 are now closed. *See also* Exhibit Eschelon 3 (Johnson Direct), pp. 60-95 (jeopardies). Qwest now denies a portion of the jeopardies result in CMP. *See id.*

⁷⁹ Qwest Exhibit 1 (Albersheim Direct), p. 26, lines 2-5.

1 arbitration (see Issue 12-72, Jeopardies & Issue 12-87, Controlled Production) or
2 Qwest has changed it unilaterally over CLEC objection (see Issue 12-67,
3 Expedites) or Qwest has no proper process but instead implemented an alleged
4 process outside of CMP and without CLEC input (see Issue 9-43, Conversions).
5 For other issues, Eschelon will show that its proposal is similar to or incorporates
6 existing Qwest practices (Issue 1-1, Intervals & Issue 12-64 Root Cause Analysis
7 and Acknowledgement of Mistakes). By including the now closed and
8 Eschelon’s proposed language for the remaining open provisions in the
9 interconnection agreement, the Commission will be assuring that terms that
10 Eschelon has come to rely on, and in some cases expended substantial resources
11 helping to develop, will continue to be available.

12 **Q. YOU QUOTE QWEST’S REFERENCE TO INCLUDING**
13 **“IMPROVEMENTS” MADE THROUGH CMP IN AN ICA. PLEASE**
14 **EXPLAIN, AND INDICATE WHETHER QWEST IS ADVOCATING A**
15 **BALANCED APPROACH IN THIS REGARD.**

16 A. The difference between my use of Qwest’s language above and Qwest’s use of
17 the same words⁸⁰ is that Qwest seeks to retain for itself alone the ability to decide
18 when, whether, and to what extent to “reflect” processes, improvements, or
19 other⁸¹ changes in an ICA.⁸² When Qwest deems an issue important, it wants the

⁸⁰ Qwest Exhibit 1 (Albersheim Direct), p. 26, lines 2-3.

⁸¹ This includes terms regarding changes of law that are not in Qwest’s template agreement or amendments but do appear in its PCAT, though they have not previously even been through CMP. Exhibit Eschelon 1 (Starkey Direct), pp. 85-106; and Exhibit Eschelon 34.16 – 3.19.

1 issue clearly stated in the ICA.⁸³ Qwest seeks to deny the same opportunity to
2 Eschelon, even in this arbitration, so its approach is not balanced.

3 **Q. QWEST SUGGESTS ITS NEGOTIATIONS TEMPLATE REFLECTS**
4 **RESULTS OF PROCEEDINGS AND EXTENSIVE COLLABORATION.⁸⁴**
5 **PLEASE RESPOND.**

6 A. Qwest suggests that its template has resulted from Qwest exercising its judgment
7 about which “improvements”⁸⁵ are best so that Qwest – knowing what is best for
8 Eschelon – has “taken steps”⁸⁶ that should be reflected in “its contract
9 language.”⁸⁷ Specifically, Qwest states:

10 It is true that there is process language contained in Qwest's
11 interconnection agreements today. Like industry standards for
12 systems and processes, Qwest's contract language has evolved over
13 time. Before the creation of the current CMP, many
14 interconnection agreements were highly individualized. Through
15 the extensive collaborations in the creation of the CMP, and the
16 section 271 evaluations of Qwest's systems and processes, Qwest
17 and the CLECs have created mechanisms to ensure that Qwest can
18 provide the best service for CLECs. As a result, Qwest has taken
19 steps to try to make its contract language reflect these
20 improvements. While process language still exists, Eschelon
21 should not be allowed to compound the problem and turn back the

⁸² Exhibit Eschelon 1 (Starkey Direct), pp. 46-51.

⁸³ Qwest Exhibit 3 (Stewart Direct), p. 18.

⁸⁴ Qwest Exhibit 1 (Albersheim Direct), p. 25, line 26 – p. 26, line 3.

⁸⁵ Qwest Exhibit 1 (Albersheim Direct), p. 26, line 3.

⁸⁶ Qwest Exhibit 1 (Albersheim Direct), p. 26, line 2.

⁸⁷ Qwest Exhibit 1 (Albersheim Direct), p. 26, line 2.

1 clock on the processes that have proven effective for all of Qwest's
2 CLEC customers.⁸⁸

3 This language suggests that a true collaborative effort is still going on that then
4 finds its way into Qwest's template and will continue to do so throughout the term
5 of the new ICA. That is not the case. The section 271 evaluations of Qwest's
6 systems and processes ended with Qwest's 271 approvals,⁸⁹ the first of which was
7 in December of 2002 and the last of which was in December of 2003. Before
8 those approvals were granted,⁹⁰ Qwest at least held collaborative sessions and
9 CMP CLEC Forums to discuss contract language changes with CLECs.⁹¹ Qwest
10 has not held a single similar CLEC Forum since then for this purpose.⁹² Indeed,

⁸⁸ Qwest Exhibit 1 (Albersheim Direct), pp. 25-26.

⁸⁹ In its *WA Covad Arbitration Order* (Order No. 4), for example, the Washington commission specifically rejected Qwest's argument that practices that resulted from Qwest's Section 271 proceedings were required to be "uniform" in interconnection agreements that Qwest enters into with individual CLECs. It said: "While Qwest relies heavily on 'consensus' reached in the Section 271 proceeding . . . that argument does not apply to an arbitration proceeding. Parties engage in arbitration to enter into an agreement tailored to the companies' needs, not to adopt a standard agreement." WAUTC Order No. 4 at ¶ 3-4. Regarding Qwest's claims about uniformity (Qwest Exhibit 1 (Albersheim Direct), p. 3, lines 14 and 18; *see also* Qwest Exhibit 3 (Stewart Direct), p. 19, lines 1-2; and Qwest Exhibit 3 (Stewart Direct), p. 91, lines 21-23), *see* Exhibit Eschelon 1 (Starkey Direct), pp. 27-29.

⁹⁰ June 16, 2003 Forum (<http://www.qwest.com/wholesale/calendar/eventDetails/1,1456,86,00.html>); Dec. 2003 CMP meeting minutes in which Eschelon asked when the next CLEC Forum would be (<http://www.qwest.com/wholesale/downloads/2004/040116/CMPDistPkg01-21-04.pdf>); Jan. 2003 CMP meeting minutes in which Qwest closed this action item without scheduling another CLEC Forum (<http://www.qwest.com/wholesale/downloads/2004/040119/JanuaryCMPSysDistributionPackage.pdf>).

⁹¹ Exhibit Eschelon 3.6, showing that Qwest did indeed discuss contract language in collaborative sessions and CLEC Forums before it received its 271 approvals. This exhibit shows that Qwest's own website describes the collaborative meetings to discuss the collocation terms as "CLEC Forums."

⁹² Qwest claimed in other state arbitration proceedings that Qwest held CLEC forums after 2003. The Commission should be aware that, to the extent Qwest makes the same argument in Utah, Qwest is wrong. Qwest held two identical telephone conference calls (whereas the CLEC Forums were in person) in the Summer of 2005 called "Qwest Wholesale Provisioning Forum." The notice for these

1 as discussed below, when Eschelon asked Qwest to use CMP to allow CLECs to
2 have input into development of its new template and for Qwest to provide status
3 information to CLECs about the template, Qwest flatly rejected the offer,
4 indicating that “this is not a CMP issue.”⁹³ Further, to the extent that Qwest puts
5 its proposals (*e.g.*, changes to the PCAT) through CMP, it largely does so through
6 notices,⁹⁴ not collaboration, and even then Qwest alone selects which language to
7 incorporate in its template and which to place only in its PCAT. Likewise, Qwest
8 includes language in its template over the objection of CLECs to a change on the
9 same issue in CMP,⁹⁵ and some proposals it does not put through CMP at all.⁹⁶

10 Recently, Qwest made a similar claim in Minnesota. McLeodUSA filed a Petition
11 for Commission Mediation to determine whether, as Qwest contended, the
12 “appropriate starting point for negotiations” should be “a ‘template’ agreement

conference calls states: "These calls are designed to convey information and insights related to the local service request provisioning process and the calls into the Qwest Call Handling Centers. They are intended for those who perform the work to assist them in their day to day work activities." In other words, these sessions were “how to” training sessions designed to “convey information” from Qwest to CLECs, and were not the back-and-forth discussions that were supposed to be “collaborative” in the previous CLEC Forums. In short, these 2005 conference calls were just training sessions and not collaborative sessions. Perhaps this is why Qwest gave them a different name, recognizing that they were not “Forums” for discussions of CLEC issues. The only other more recent forums listed on the Qwest web page are inapplicable “wireless” forums.

⁹³ Exhibit Eschelon 3.8 (Qwest Feb. 4, 2003 email).

⁹⁴ Exhibit Eschelon 1 (Starkey Direct), pp. 47-48.

⁹⁵ Exhibit Eschelon 2 (Denney Direct), pp. 198-199 (Issue 12-67, Expedites) & Exhibit Eschelon 3.53 – 3.57.

⁹⁶ Exhibit Eschelon 1 (Starkey Direct), p. 45, lines 4-7 & Exhibit Eschelon 3.36 (Qwest selectively putting 90 days but not “in the ground” language through CMP); *see also* Exhibit Eschelon 3.16 – 3.19 (Secret TRRO non-CMP PCAT notices); and discussion regarding Issue 9-31 (access to UNEs).

1 proposed by Qwest that McLeodUSA was never involved in creating.”⁹⁷ In its
2 response to the McLeod Mediation Petition, Qwest represented that the Qwest
3 template “reflects Commission arbitrations between Qwest and . . . Eschelon and
4 others.”⁹⁸ A comparison of the rulings in the Qwest-Eschelon Minnesota
5 arbitration decision to the Qwest template, however, shows that Qwest’s ICA
6 negotiations template did not change on each issue as a result of that decision. To
7 the extent that Eschelon prevailed on disputed issues, the Qwest template does not
8 reflect that Commission arbitration,⁹⁹ contrary to Qwest’s above-quoted claim.¹⁰⁰
9 A suggestion that Qwest updates the Qwest template collaboratively to reflect
10 Commission decisions is inaccurate.¹⁰¹

⁹⁷ Petition for Mediation, *In the Matter of Petition of McLeodUSA Telecommunications Services, Inc. for Commission Mediation Pursuant to 47 U.S.C. § 252(a)(2) of a Dispute with Qwest Corporation*, MN PUC Docket No. P-5323,421/M-07-609, pp. 1-2 (May 9, 2007) [“McLeod Mediation Petition”].

⁹⁸ Qwest Corporation’s Response to the Petition of McLeodUSA for Commission Mediation (“Qwest’s Response to McLeod”), MN Docket No. P-5323, 421/M-07-609 (May 30, 2007), p. 5. Qwest also claims that its negotiations template “arises from . . . Commission decisions” (Qwest’s Response to McLeod, p. 2) and “reflects changes in . . . State commission decisions” (*id.* p. 5).

⁹⁹ At a hearing in the matter, McLeod distributed a 20-page matrix describing, issue by issue, the Minnesota arbitration decision versus the Qwest template. Although the Qwest template contains state-specific provisions, it did not contain many MN terms won by Eschelon or the MN DOC on disputed issues. For example, Qwest’s template does not reflect Eschelon’s or the DOC’s language, adopted by the Minnesota PUC, for Issues 1-1, 2-3, 2-4, 4-5, 5-6, 5-9, 5-12, 5-13, 7-18, 7-19, 8-20, 9-31, 9-32, 9-33, 9-33(a), 9-34, 9-46, 9-50, 9-52, 9-53, 9-54, 9-61, 12-64, 12-65, 12-66, 12-67, 12-70, 12-71, 12-72, 12-73, 12-74, 12-75, 12-76, 12-77, 12-78, 12-80, 12-81, 12-83, 12-86, 12-87, 12-88, 12-90.

¹⁰⁰ Qwest’s Response to McLeod, p. 5.

¹⁰¹ In this case, for example, Qwest recognizes that the rate for Category 11 mechanized records (\$0.001222) was approved by this Commission. See Exhibit A, §7.9.4 (with note indicating rate is approved). Qwest’s negotiations template does not reflect this Commission decision. Instead, Qwest’s template includes a much higher per record rate (\$0.0025).

1 Generally, a company in negotiations does not come to the table and say “let’s
2 start with your language.” Qwest, however, has an entitlement mentality with
3 respect to its template.¹⁰² Through these types of arguments, Qwest is attempting
4 to place a mantle of authority on its template, when in fact its template is merely
5 Qwest’s proposal. Simply put, Qwest alone is in charge of its template and the
6 Commission should be aware that the template is not arrived at through
7 collaboration with CLECs either in CMP or elsewhere. It should not be accorded
8 any special status.

9 **Q. DOES QWEST BRING ALL PRODUCT AND PROCESS CHANGES**
10 **THROUGH CMP, CONSISTENT WITH ITS ARGUMENT THAT**
11 **“PROCESS DETAIL” BELONGS IN CMP¹⁰³?**

12 A. No. As I explained in my discussion of the Secret TRRO non-CMP PCAT
13 example,¹⁰⁴ it is clear that Qwest has unilaterally established its obligations (with
14 terms that, for other issues, it would describe as process issues) related to the
15 TRRO outside of CMP and outside the ICA, and now contends that it is too much
16 work or too costly to change them later when Qwest’s unilaterally-established

¹⁰² For example, in many cases, Qwest took the time to format the language proposals in its testimony differently from the proposed Qwest-Eschelon ICA (which the companies have negotiated from for years) and the Disputed Joint Issues Matrix, to reflect Qwest’s suggestion that its proposals are somehow the baseline (shown in black text) which Eschelon must justify changing (shown in underline/strikeout). In addition, before Eschelon pointed out this issue, rather than referring to its proposed language as simply Qwest proposals, Qwest referred to its own negotiation proposals (which Qwest offers in its template) as “the ICA.”¹⁰² See Direct Testimony of Philip Linse, Qwest Corp., Minnesota PUC Docket P-5340,421/IC-06-78/OAH Docket 3-2500-17369-2, August 25, 2006 p. 19, line 17.

¹⁰³ See, e.g., Qwest Exhibit 1 (Albersheim Direct), p. 57, line 10.

¹⁰⁴ Exhibit Eschelon 1 (Starkey Direct), pp. 85-106.

1 terms and conditions are called into question.¹⁰⁵ Qwest told CLECs that it was
2 going to update its SGATs and address TRRO issues in CMP after doing so.¹⁰⁶
3 Throughout 2005 and 2006, Qwest told Eschelon (through Qwest's service
4 management team, in CMP, and in ICA negotiations¹⁰⁷) that Qwest would be
5 updating its SGATs. It did not update the SGATs and then bring the issues
6 through CMP. Qwest now admits that it has not updated its SGATs since 2004¹⁰⁸
7 (before the TRRO was released) and suggested it has no intention to do so.¹⁰⁹

¹⁰⁵ See e.g., discussion of Qwest's non-CMP, non-ICA APOT procedure for conversions under Issues 9-43 and 9-44.

¹⁰⁶ See Exhibit Eschelon 3.16, pp. 8-9 (Qwest 6/30/05 CMP adhoc meeting minutes).

¹⁰⁷ Exhibit Eschelon 1 (Starkey Direct), pp. 92-93 (quoting Qwest's commitments to update its SGATs over time).

¹⁰⁸ Qwest Exhibit 3 (Stewart Direct), p. 45. As discussed above, after Qwest received 271 approval, it has not held a single CLEC Forum for the purposes of discussing Qwest's template agreement.

¹⁰⁹ Qwest Exhibit 3 (Stewart Direct), pp. 44-45. (Ms. Stewart also made this statement in her rebuttal testimony in Minnesota (at page 36) and in Washington (rebuttal page 26)). Ms. Stewart's direct testimony in the Colorado arbitration was filed on December 15, 2006. One month later, on January 16, 2007, Qwest filed Advice Letter No. 3058 in Colorado Docket No. 07S-028T and said its purpose was to replace in its entirety the Qwest wholesale tariff filing in Colorado. The Qwest wholesale tariff filing refers to the Colorado SGAT. In her testimony in the Colorado arbitration case filed only a month before, Ms. Stewart did not discuss Qwest's plans with respect to this Advice Letter or how it could relate to her suggestion that a filing with the commission is unnecessary because Qwest now has its own template proposed agreement. (Qwest Exhibit 3 (Stewart Direct), p. 44, line 18 – p. 45, line 14). Since then, Qwest has withdrawn the Colorado tariff filing. The approval in Colorado PUC Decision No. C07-197, Docket No. 07S-028T, of the withdrawal of the tariff filing to replace the material in the Colorado wholesale tariff filing confirms that the Colorado wholesale tariff filing is still in place. If Qwest had done something along the lines of this filing earlier when the TRRO was issued (as it had suggested it would do), then CLECs would have had an opportunity to comment upon the development of the terms. See Exhibit Eschelon 3.16, pp. 8-9 (Qwest 6/30/05 CMP adhoc meeting minutes state, with emphasis added, that Cindy Buckmaster of Qwest said "*as SGAT language changes, we will have a comment period* and that the States will engage you when decisions are made. *Cindy also said that PCAT changes will be brought through CMP.*") (emphasis added). As previously mentioned (Exhibit Eschelon 1 (Starkey Direct), pp. 100-102), Qwest is trying to conform the SGAT to its own template and its own non-CMP secret PCATs, instead of what should have been the reverse (making changes to the SGAT with Commission and CLEC participation first, and then updating its PCAT). As Qwest did not do so, it should have brought any desired terms to the negotiation for inclusion in the ICA, as consistently maintained by Eschelon. See e.g., Exhibit Eschelon 3.16, pp. 8-9 (6/30/05). To try to avoid Commission scrutiny in this arbitration now, Qwest may belatedly make the promised filing to

1 Qwest claims that the SGATs are outdated documents,¹¹⁰ but Qwest chose not to
2 update them contrary to its previous statements. The TRRO allowed Qwest to
3 stop offering certain products but did not prohibit Qwest from offering them.

4 **Q. YOU MENTION ABOVE QWEST STATED THAT IT WOULD UPDATE**
5 **ITS SGATS AND DEAL WITH TRO/TRRO ISSUES IN CMP, BUT DID**
6 **NOT DO SO. DOES THIS UNDERSCORE ESCHELON'S CONCERN**
7 **ABOUT PUNTING ISSUES TO QWEST, WHICH MAY OR MAY NOT**
8 **BRING THEM THROUGH CMP?**

9 A. Yes. Now that Qwest has established no fewer than 103 secret TRRO PCAT
10 versions¹¹¹ outside of CMP, outside of negotiation, and without CLEC input, as
11 discussed in my direct testimony,¹¹² Qwest indicated in a letter that it would take
12 some (but not all) TRO/TRRO issues to CMP. Then, at the Minnesota hearing,
13 Ms. Stewart testified that Qwest planned on taking *all* of the secret TRRO PCATs
14 to CMP.¹¹³ But, at the CMP Monthly Meeting held on November 15, 2006,
15 Qwest announced that it was bringing the TRO/TRRO CR (PC102704-1ES)¹¹⁴

update the SGAT. That would reward Qwest for its delay and force Eschelon to incur the costs of having negotiated and arbitrated this agreement, only to leave issues open for resolution in a proceeding about an SGAT, when Eschelon is not even opting in to the SGAT.

¹¹⁰ Answer Testimony of Karen Stewart, Colorado Docket No. 06B-497T, p. 31 (3/26/07).

¹¹¹ Exhibit Eschelon 3.34.

¹¹² Exhibit Eschelon 1 (Starkey Direct), pp. 100-102.

¹¹³ Exhibit Eschelon 1.5 [MN ICA Arbitration Transcript, Vol. III, p. 57, line 5- p. 58, line 4 (Oct. 18, 2006) (Ms. Stewart)].

¹¹⁴ Exhibit Eschelon 3.29 and Exhibit Eschelon 3.30. *See also* Exhibit Eschelon 3.27 and 3.28, which contain the Oversight Committee Meeting minutes for the 1/4/05 and 1/10/05 meeting in which CR

1 out of deferred status to address *some* (but not all) TRO/TRRO issues in CMP.¹¹⁵

2 At that time, Qwest was unable to provide any additional information on which
3 PCATs it intended to take to CMP at the following ad hoc call on this issue.

4 Later, Qwest indicated that it will not address issues that are in litigation and
5 asked CLEC CMP participants to sort out what is in litigation and what is not.

6 When re-designing CMP, New Edge pointed out that CLEC CMP participants are
7 operational business people, not attorneys who could address “regulatory, legal
8 type processes” and changes that “impacts an ICA.”¹¹⁶ Qwest replied that CLECs

9 should not be concerned about this because: (1) this has been addressed with
10 language in the CMP Document that states the ICA controls over CMP; and (2)

11 “contractual issues, themselves, would not be addressed” in CMP.¹¹⁷

12 Implementation of the TRO/TRRO is a legal and contractual¹¹⁸ issue.

PC102704-1ES was discussed. Exhibit Eschelon 3.25 and 3.26 contain two Qwest initiated change requests related to Qwest’s attempts to implement TRO/TRRO changes.

¹¹⁵ Qwest stated that “TRRO issues that are being addressed by Qwest and CLECs in arbitrations of their ICAs or items being challenged by law will not immediately be processed through CMP.” (11/15/06 CMP Monthly Meeting Minutes). However, as shown in Exhibit Eschelon 3.35, Qwest had indicated its intention to take to CMP issues being addressed between Eschelon and Qwest in this arbitration under Issue 9-58.

¹¹⁶ Transcript of 271 CMP Workshop Number 6, Colorado Public Utilities Commission Docket Number 97I-198T (Aug. 22, 2001), pp. 291-292.

¹¹⁷ Transcript of 271 CMP Workshop Number 6, Colorado Public Utilities Commission Docket Number 97I-198T (Aug. 22, 2001), pp. 291-292 (Andrew Crain of Qwest and Penny Bewick of New Edge); *see id.* p. 292, lines 14-15 (Mr. Crain) (“Contractual issues, themselves, would not be addressed in the Change Management Process.”)

¹¹⁸ TRRO, ¶196 & note 519 & ¶198.

1 Recently, Qwest again asked CLECs to identify and discuss legal issues in CMP
2 relating to the FCC's TRO/TRRO orders.¹¹⁹ CLECs indicated that Qwest's
3 PCAT deals with legal issues (such as when a product is legally available under
4 the FCC's rulings) that should be dealt with in ICAs and negotiation of those
5 agreements. In response, Qwest agreed on a CMP ad hoc call to circulate to
6 CLECs a redlined version of at least one non-CMP TRRO PCAT to show which
7 issues it believed were "process" issues that should be dealt with in CMP and
8 were not redundant of ICA or template ICA terms. At a later monthly CMP
9 meeting, however, Qwest reneged on that commitment.

10 If Qwest had updated its SGATs with the Commissions before unilaterally
11 implementing changes through non-CMP TRRO PCATs, as it initially committed
12 to do,¹²⁰ the appropriate legal and regulatory personnel would have had an
13 opportunity to be involved. Now that Qwest has unilaterally developed terms
14 outside of ICA negotiations (despite requests by Eschelon and other CLECs),¹²¹
15 CMP (despite promises by Qwest),¹²² and Commission proceedings (also despite
16 promises by Qwest),¹²³ it is considering these terms and conditions as Qwest's
17 "existing" terms and conditions. Qwest has repeatedly flip-flopped on whether

¹¹⁹ Exhibit Eschelon 3.31 – 3.33.

¹²⁰ Exhibit Eschelon 3.16, pp. 8-9 (6/30/05); *see id.* p. 9 (CMP Minutes quoting Cindy Buckmaster of Qwest stating: "She said that as SGAT language changes, we will have a comment period and that the States will engage you when decisions are made.")

¹²¹ Exhibit Eschelon 3.16, pp. 4-5 (11/17/04 CMP November monthly meeting minutes).

¹²² Exhibit Eschelon 3.16, pp. 8-9 (6/30/05).

¹²³ Exhibit Eschelon 3.16, pp. 8-9 (6/30/05).

1 TRO/TRRO issues belong in CMP, and even if Qwest decides a issue does belong
2 in CMP,¹²⁴ it will have likely already established an “existing” policy without any
3 CLEC or Commission input, and force the CLEC to carry the burden to prove
4 changes to that “existing” policy should be made. Indeed, as discussed above,
5 Qwest changed its direct testimony in Oregon and Utah from what it filed in
6 arbitration cases in other states to do just that – *i.e.*, attempt to impose on
7 Eschelon a burden, based on Qwest’s claim that it has “successfully provided
8 services via the CMP,” to provide a “compelling justification” for allegedly
9 altering “existing processes.”¹²⁵ However, Qwest should not be establishing
10 TRO/TRRO terms and conditions unilaterally in the first place. Rather, Qwest
11 should be establishing those terms and conditions in negotiations/arbitrations, as
12 CLECs have repeatedly requested and Qwest refused.

13 **Q. SHOULD EITHER CMP OR QWEST’S ICA TEMPLATE REPLACE**
14 **INDIVIDUALIZED NEGOTIATIONS, CONTRACTS SPECIFIC TO**
15 **INDIVIDUAL CLEC BUSINESS PLANS OR DECISIONS MADE BY THIS**
16 **COMMISSION BASED UPON THE FACTS PRESENTED BY EACH**
17 **COMPANY?**

18 A. No. At page 25 of my direct testimony,¹²⁶ I explained that the FCC rejected
19 Qwest’s claim that Qwest should be able to post terms on its website in lieu of an

¹²⁴ It remains unclear what issues Qwest will be submitting to CMP.

¹²⁵ Qwest Exhibit 1 (Albersheim Direct), p. 8, lines 8-10.

¹²⁶ Exhibit Eschelon 1 (Starkey Direct), p. 25.

1 ICA, in part, because of the lack of Commission review and avoidance of
2 Congressionally-mandated mechanisms of Section 252(e) of the Act. The FCC
3 came to this conclusion approximately two years *after* the CMP was in place.
4 The creation of the CMP did nothing to change the individualized nature of
5 CLECs' business plans and did not change the Congressionally-mandated
6 negotiation/arbitration process, which according to the FCC, should be detailed
7 based on the individual needs of CLECs and available on a "permanent"¹²⁷ basis
8 for the life of the contract (subject to ICA amendment).

9 Nonetheless, Qwest attempts to intimate that its template is the predestined ICA
10 with a mantle of authority, so Eschelon should not be deviating from Qwest's
11 template and, if it does, Qwest attempts to impose a burden on Eschelon for
12 proving Qwest's template wrong.¹²⁸ The Act does not assign this burden to
13 Eschelon or establish any presumption in Qwest's favor.

14 **Q. SINCE THE MERE PRESENCE IN THE PCAT OR QWEST'S**
15 **TEMPLATE DOES NOT INDICATE WHEN, WHETHER, AND TO**
16 **WHAT EXTENT TO INCLUDE LANGUAGE IN AN ICA, WHAT**
17 **FACTORS SHOULD THE COMMISSION CONSIDER?**

¹²⁷ *In the Matter of Qwest Corporation Apparent Liability for Forfeiture*, FCC File No. EB-03-IH-0263, Notice of Apparent Liability for Forfeiture (rel. March 12, 2004) ("*Qwest Forfeiture Order*"), ¶ 32.

¹²⁸ See my discussion of Qwest's "entitlement mentality" above.

1 A. I discussed these factors in my direct testimony.¹²⁹ Also, as indicated above,
2 Qwest in its direct testimony recognized the contractual certainty that I discussed
3 as one of these factors, and many of the examples given throughout Eschelon’s
4 direct testimony and in its rebuttal testimony support the business and Customer-
5 affecting issues that I raised as additional factors.

6 **Q. QWEST ARGUES AGAINST INCLUDING “PROCESSES” IN AN ICA.¹³⁰**
7 **DO YOU AGREE?**

8 A. No. In Qwest’s direct testimony, Qwest continues to argue against including
9 “processes” in an interconnection agreement; however, Qwest has already agreed
10 to do just that. Consistent with the FCC’s definition of OSS,¹³¹ closed language
11 in ICA Section 12.1.1 states: “This Section describes Qwest’s ... *manual*
12 *processes* that Qwest shall provide to CLEC to support Pre-ordering, Ordering,
13 Provisioning, Maintenance and Repair and Billing.”¹³² This is not the first time
14 Qwest has entered into an ICA containing processes either. The existing
15 approved ICAs in Arizona, Colorado, Utah, and Washington specifically identify

¹²⁹ Exhibit Eschelon 1 (Starkey Direct), pp. 10-11 and Exhibit Eschelon 1 (Starkey Direct), pp. 14-20.

¹³⁰ Qwest Exhibit 1 (Albersheim Direct), p. 25, lines 7-8; Qwest Exhibit 1 (Albersheim Direct), p. 25, lines 10-14; *see also* Qwest Exhibit 1 (Albersheim Direct), p. 57, lines 9-11 (Issues 12-71 – 12-73, Jeopardies).

¹³¹ In the Third Report and Order (at ¶ 425), the FCC said: “In the *Local Competition First Report and Order*, the Commission defined OSS as consisting of pre-ordering, ordering, provisioning, maintenance and repair, and billing *functions* supported by an incumbent LEC’s databases and information. OSS includes the *manual*, computerized, and automated systems, *together with associated business processes* and the up-to-date data maintained in those systems.” (emphasis added)

¹³² ICA Section 12.1.1 (emphasis added); *see also* SGAT Section 12.1.1 (“This Section describes the interfaces and *manual processes* that Qwest has developed and shall provide to CLEC.”)

1 the attachment containing similar provisions as “Business Processes”¹³³ or
2 “Business Process Requirements.”¹³⁴ Attachments 5 and 6 to the existing Qwest-
3 Eschelon ICAs in Minnesota (which is an opt-in of the AT&T ICA) and Oregon
4 deal with Provisioning and Ordering and Maintenance terms and conditions. In
5 other words, state commissions, including the Utah Commission, have previously
6 recognized the need to address processes in interconnection agreements.
7 Furthermore, I explained in my direct testimony¹³⁵ that the FCC and the
8 Washington Commission have both found the need for detailed and often
9 complicated ICAs, as the devil is in the details. Most recently, Qwest itself has
10 again recognized this need by agreeing to language in the proposed ICA that
11 Qwest had previously argued contained processes or too much detail.¹³⁶ By
12 addressing terms in the agreement, future potential disputes about those terms can
13 be avoided.

14 **Q. HAS QWEST’S ARGUMENTS SUPPORTING ITS NOTION THAT**
15 **“PROCESSES” SHOULD BE EXCLUDED FROM AN ICA AND DEALT**
16 **WITH IN CMP SHIFTED OVER TIME?**

¹³³ CO Qwest-Eschelon ICA, Attachment 8.

¹³⁴ AZ, UT, and WA Qwest-Eschelon ICA, Attachment 5.

¹³⁵ Exhibit Eschelon 1 (Starkey Direct), p. 25 and Exhibit Eschelon 1 (Starkey Direct), pp. 33-34.

¹³⁶ See, e.g., the agreed-upon language in: Sections 9.1.2.1.3.2.1; 9.1.2.1.3.2.2; 9.2.2.3.2 & 9.2.2.16 (Issue 9-32, Delayed Orders): Section 12.1.5.4.7; 12.1.5.5 & 12.1.5.4.8 (Issues 12-65, 12-66 & 12-66(a), Communications with Customers): Section 12.2.3.2 (Issue 12-68 Supplemental Orders): Section 12.2.7.2.3 (Issue 12-70, PSOs): Section 12.2.7.2.6.1 and subpart (Issue 12-74 Fatal Rejection Notices): Sections 12.3.1 and subpart & Section 12.4.3.6.3 (Issue 12-75 & 12-75(a) Tag at Demarcation Point): Sections 12.3.7.1.1, 12.3.7.1.2 (Issues 12-76 & 12-76(a) Loss and Completion Reports: Section 12.4.3.5 (Issue 12-81, Test Parameters): and Sections 12.4.4.1; 12.4.4.2 & 12.4.4.3 (Issue 12-86, Trouble Report Closure).

1 A. Yes. Though Qwest has remained consistent in arguing against inclusion of
2 processes in an ICA, its argument has shifted from state to state.¹³⁷ Throughout
3 the joint Disputed Issues Matrix in other state arbitration cases, Qwest argued
4 against inclusion of language that crossed an allegedly bright line that it labeled
5 processes and “PCAT-like process language” generally.¹³⁸ In its testimony in
6 other states, Qwest seemed to recognize that there may be a spectrum or “gray
7 area” in which processes may, or may not, be appropriate content for inclusion in
8 an ICA. Specifically, Qwest said that interconnection agreements should not
9 contain “*such* product, process and systems operational *specifics* that these items
10 cannot be managed via the CMP as intended.”¹³⁹ In other words, Qwest argued
11 there should not be too much detail.¹⁴⁰ Now, as discussed, Qwest modified its
12 argument again in its direct testimony in Oregon and Utah, and now claims that
13 processes may be included in an ICA if the Commission adopts a new compelling
14 justification standard for “altering existing processes or before locking processes
15 into interconnection agreement.”¹⁴¹ Qwest’s argument should be rejected because

¹³⁷ Utah is the sixth state in which the companies have filed testimony in these arbitrations. The companies have also filed testimony in Minnesota, Arizona, Washington, Colorado, and Oregon.

¹³⁸ See, e.g., Exhibit 3 to Eschelon’s Petition for Arbitration in Oregon, Oregon Disputed Issues Matrix, Qwest position statement, Issue 1-1, p. 1. As explained at page 3, footnote 3 of my direct testimony, I reference the Oregon disputed issues matrix instead of the Utah disputed issues matrix because Qwest did not provide position statements for the Utah disputed issues matrix.

¹³⁹ Direct Testimony of Renee Albersheim, Colorado PUC Docket 06B-497T, p. 7, lines 30-32 (12/15/06) (Albersheim Colorado Direct Testimony). (emphasis added)

¹⁴⁰ Qwest Exhibit 1 (Albersheim Direct), p. 57, line 10 (Issues 12-71 – 12-73, Jeopardies) (“process detail”).

¹⁴¹ Qwest Exhibit 1 (Albersheim Direct), p. 8.

1 it inappropriately shifts the burden to Eschelon to meet a standard different from
2 that established in the federal Act for ICA arbitrations.

3 **Q. PLEASE ELABORATE ON THE DIFFERENCES IN QWEST'S**
4 **TESTIMONY IN THIS REGARD.**

5 A. In Ms. Albersheim's direct testimony in both the Colorado arbitration case
6 (Colorado PUC Docket 06B-497T, filed 12/15/06) and the instant proceeding
7 (and recently in Oregon Docket ARB 775), Qwest asks the question: "Q. Do
8 changes made via the CMP trump provisions contained in individual CLEC
9 interconnection agreements?"¹⁴² Ms. Albersheim answers this same question
10 differently in Utah than it did in Colorado.¹⁴³ Compare Ms. Albersheim's Utah
11 response to her Colorado response below:

12 Albersheim Utah Direct Testimony, p. 8, lines 5-10:
13 None of the parties who participated in the redesign of the CMP in
14 2002 believed that the CMP should be used as a mechanism to
15 subvert commitments established via interconnection agreements.
16 Nonetheless Qwest has successfully provided services via the
17 CMP. Based on that history, I believe this Commission should
18 require Eschelon to demonstrate a compelling justification for
19 altering existing processes or before locking processes into
20 interconnection agreement.

21 Albersheim Colorado Direct Testimony, pp. 7-8:
22 None of the parties who participated in the redesign of the CMP in
23 2002 believed that the CMP should be used as a mechanism to
24 subvert commitments established via interconnection agreements .
25 But it is also true that interconnection agreements should not be

¹⁴² Qwest Exhibit 1 (Albersheim Direct), p. 7. *See also* Albersheim Colorado Direct Testimony, p. 7.

¹⁴³ Ms. Albersheim quotes the CMP scope provision in her responses in Colorado, Oregon and Utah. *See*, Qwest Exhibit 1 (Albersheim Direct), pp. 7-8.

1 used as a mechanism to subvert the CMP. Interconnection
2 agreements should not contain such product, process and systems
3 operational specifics that these items cannot be managed via the
4 CMP as intended. Such provisions in an interconnection agreement
5 make it impossible for the CMP participants to implement changes
6 without first obtaining an amendment (and agreement from the
7 parties) to that interconnection agreement. This goes to the core of
8 the issues covered in this testimony. Many of Eschelon's proposals
9 contain such specific operational detail that they effectively lock in
10 the processes, and if adopted by this Commission, will prevent
11 Qwest or any other CMP participant from requesting a change to
12 the process that can be implemented efficiently through the CMP.
13 This eliminates the purpose and effectiveness of the CMP
14 altogether.

15 Ms. Albersheim does not make the claims in Oregon and Utah, like she did in
16 Colorado (and other states), that the CMP was “intended” to manage product,
17 process and systems instead of an ICA and that Eschelon’s proposal “eliminates
18 the purpose and effectiveness of the CMP altogether.”¹⁴⁴ This comparison shows
19 Qwest’s reasoning for excluding terms from an ICA and relegating to CMP is a
20 moving target.

21 **Q. YOU STATE THAT QWEST HAS CLAIMED THAT EXCLUDING**
22 **TERMS FROM THE ICA IN FAVOR OF CMP WAS “INTENDED.”¹⁴⁵ DO**

¹⁴⁴ Since Qwest first made this argument, Eschelon has provided in evidence the Qwest-prepared CMP Redesign materials that show this was not the intent. *See, e.g.*, Exhibit Eschelon 1 (Starkey Direct), pp. 27-29, citing Exhibit Eschelon 3.11, pp. 2-3 (Gap Analysis #150) (CMP redesign meeting minutes addressing CMP in relation to ICAs).

¹⁴⁵ Albersheim Colorado Direct Testimony, pp. 7-8 (“Interconnection agreements should not contain such product, process and systems operational specifics that these items cannot be managed via the CMP as intended.”); *see also* Qwest Exhibit 1 (Albersheim Direct), p. 67, lines 24-25 (“undermine the CMP”); and Albersheim Colorado Direct Testimony, p. 8, line 8 (“This eliminates the purpose and effectiveness of the CMP altogether.”)

1 **YOU AGREE THAT THE CMP DOCUMENT AND ITS DEVELOPMENT**
2 **REFLECT SUCH INTENT?**

3 A. No. Qwest admits that the proceedings, meetings, and history of CMP culminated
4 in creation of the CMP Document (Exhibit G to the ICA). Qwest specifically
5 testified that, after the CMP Re-Design meetings, the “end result was the
6 Wholesale Change Management Process Document that governs CMP today.”¹⁴⁶
7 The language of the CMP Document is very clear that interconnection agreement
8 terms can conflict with activities in CMP and the PCAT and, when they do, the
9 ICA governs:

10 In cases of conflict between the changes implemented through this
11 CMP and any CLEC interconnection agreement (whether based on
12 the Qwest SGAT or not), the rates, terms and conditions of such
13 interconnection agreement shall prevail as between Qwest and the
14 CLEC party...

15 Ms. Albersheim quotes this very language from the Scope section of the CMP
16 Document in her direct testimony,¹⁴⁷ and states that changes made via the CMP
17 do not “trump”¹⁴⁸ provisions contained in individual CLEC interconnection
18 agreements. Ms. Albersheim has testified that the “converse should also be
19 true,”¹⁴⁹ and she states that “interconnection agreements should not be used as a

¹⁴⁶ Qwest Exhibit 1 (Albersheim Direct), p. 4, lines 11-13.

¹⁴⁷ Qwest Exhibit 1 (Albersheim Direct), p. 7, line 23 – p. 8, line 3.

¹⁴⁸ Qwest Exhibit 1 (Albersheim Direct), pp. 7-8.

¹⁴⁹ Albersheim Washington Direct Testimony (Docket No. UT-063061, September 29, 2006), p. 9, lines 3-4. Ms. Albersheim’s use of “should” suggests that, while Qwest may believe the converse “should” be true, it recognizes that it is not, in fact, true.

1 mechanism to subvert the CMP.”¹⁵⁰ Given the very clear directive in the CMP
2 Document that ICAs govern in cases of conflict with CMP, the converse – *i.e.*, in
3 cases of conflict between an ICA and the CMP, the CMP governs – cannot also be
4 true. It would directly contradict the express provision found in the CMP
5 Document (which is both Exhibit G to the ICA and is also posted on Qwest’s
6 website),¹⁵¹ the SGAT,¹⁵² and the ICA.¹⁵³ Simply put, there can be only one
7 “trump,” and consistent with the very foundation of CMP (*i.e.*, the CMP
8 Document), that trump is the ICA.

9 Also, that the converse was not intended is shown by the CMP Redesign
10 documentation leading to adoption of the scope language, quoted above. That
11 documentation, which is attached to the testimony of Ms. Johnson,¹⁵⁴ indicates
12 that the parties to the CMP Redesign identified gaps in Qwest’s CMP that needed
13 to be corrected to meet Qwest’s obligation to provide CMP before obtaining 271
14 approval. Qwest created a “Gap Analysis” matrix listing these gaps and assigning
15 them gap analysis numbers.¹⁵⁵ Eschelon identified, as a gap, the need for CMP to

¹⁵⁰ Albersheim Colorado Direct Testimony (Docket 06B-497T, 12/15/06), p. 7, lines 30-31 (emphasis added).

¹⁵¹ Exhibit Eschelon 3.10 (CMP Document), §1.0 and §5.4.

¹⁵² SGAT, §2.3 & Exhibit G, §1.0 & §5.4.

¹⁵³ ICA §2.3 & Exhibit G, §1.0 & §5.4.

¹⁵⁴ Exhibit Eschelon 3.11 (January 22-24, 2002 CMP Redesign Minutes) (Att. 9 to the Minutes, excerpt from Gap Analysis matrix).

¹⁵⁵ Exhibit Eschelon 3.11 (January 22-24, 2002 CMP Redesign Minutes) (Att. 9 to the Minutes, excerpt from Gap Analysis matrix). Meeting Minutes also available on Qwest’s website, *see*,

http://www.qwest.com/wholesale/downloads/2002/020225/1_CMP_Redesign_Final_Meeting_Minutes_Jan_22-24-02-22-02.doc

1 account for differences in individual CLEC ICAs. It appears as gap analysis
2 number 150 in the posted CMP Redesign matrix:

3 Qwest needs to establish and document a process to account for
4 individual interconnection agreements (“ICAs”) when
5 implementing changes and using the Change Management Process
6 (“CMP”). Qwest needs to ensure that ICAs are not unilaterally
7 modified.

8 In Colorado, Qwest said:

9 ‘First of all, it has been addressed in these workshops by inserting
10 language into the SGAT that indicated that the contract language
11 controls over anything that could come out of the Change
12 Management Process -- a contract is a contract, and I believe that's
13 the same for any other ICA, as well.’¹⁵⁶

14 The CMP Redesign Gap Analysis quoted this Qwest commitment and identified
15 the gap to be addressed in CMP Redesign as follows:

16 Qwest needs documented processes and checks and balances in
17 place to ensure that Qwest can implement this concept and account
18 for differences in ICAs (including ICAs not based on SGATs).
19 The experience to date shows that Qwest’s structure anticipates
20 making global changes and steps need to be developed to account
21 for individual differences before implementation.¹⁵⁷

22 On April 4, 2002, Gap Analysis Issue #150 and related Action Item #227 (to
23 “clarify SGAT language on CMP in sections 2.3.1 and 12.2.6, in addition, add
24 language that states that CMP will not supersede an ICA”) were closed in CMP
25 Redesign because the above quoted language (from Section 1 of the CMP

¹⁵⁶ Transcript of 271 CMP Workshop Number 6, Colorado Public Utilities Commission Docket Number 97I-198T (Aug. 22, 2001), p. 292, lines 8-13 (Andrew Crain of Qwest) (quoted in Exhibit Eschelon 3.11).

¹⁵⁷ Exhibit Eschelon 3.11, pp. 1-3 (Att. 9 to CMP Redesign Minutes, pp. 99-100 (Gap Analysis issue #150) (the CO 271 CMP transcript is cited in a footnote in the CMP Redesign Gap Analysis).

1 Document) was “inserted into the Scope section” of the CMP Document.¹⁵⁸
2 These documents show that, contrary to Qwest’s claim,¹⁵⁹ the CMP was created
3 in a manner to ensure that unwanted global (*i.e.*, uniform) changes would not be
4 forced on CLECs, and that CLECs retained their Section 252 right to negotiate
5 and arbitrate individual contracts with individual differences. Qwest obtained 271
6 approvals after closing this “gap” by providing these assurances to CLECs, and
7 Qwest should not be allowed to backslide on this commitment now.

8 **Q. MS. ALBERSHEIM CLAIMS THAT UNIFORM PROCESSES ARE**
9 **NEEDED SO THAT QWEST CAN TRAIN ITS EMPLOYEES ON ONE**
10 **SET OF PROCESSES AND CONSISTENTLY PERFORM AT A HIGH**
11 **LEVEL OF QUALITY SERVICE FOR QWEST’S WHOLESALE**
12 **CUSTOMERS.¹⁶⁰ DOES MS. ALBERSHEIM’S CLAIM HOLD UP TO**
13 **SCRUTINY?**

14 A. No. ICAs are not uniform among CLECs today and have not been in the past.
15 Therefore, it is not uniform processes that have led to the service Qwest provides
16 its wholesale customers. Exhibit Eschelon 3.4 shows some of the differences

¹⁵⁸ Exhibit Eschelon 3.11, pp. 4-8 (April 2-4, 2002 CMP Redesign Minutes), p. 15; Att. 6 (Action Items Log, #227, pp. 167-168 & Att. 12). Meeting Minutes available on Qwest’s website, *see*,

http://www.qwest.com/wholesale/downloads/2002/020715/CMP_RedesignMeetingMinutesApril2-4FINAL07-15-02.doc

¹⁵⁹ *i.e.*, Qwest’s claim that the “entire purpose of CMP was to ensure that the industry (not just Qwest or one CLEC) is involved in creating and approving processes so that processes are uniform among all CLECs.” This claim is repeated throughout Qwest’s position statements in the Oregon Joint Disputed Issues Matrix, *See; e.g.*, Exhibit 3 to Eschelon’s Petition for Arbitration in the Oregon Arbitration case (Oregon Docket ARB 775, Issue 1-1, p. 1.

¹⁶⁰ Qwest Exhibit 1 (Albersheim Direct), p. 3, lines 13-16.

1 between the Eschelon ICA and Covad ICA. Ms. Johnson also describes more
2 differences between the ICAs of various CLECs in her direct testimony.¹⁶¹ This
3 shows that processes are not uniform today and have not been in the past, yet Ms.
4 Albersheim's testimony claims that consistent, high quality of service depends on
5 uniform processes and procedures. Given that Ms. Albersheim has referred to the
6 service quality Qwest has provided its wholesale customers in the past as
7 "outstanding,"¹⁶² Ms. Albersheim has therefore acknowledged that Qwest does
8 not depend on uniform processes and procedures in ICAs in order to provide high
9 quality of service to wholesale customers. If Ms. Albersheim's claim was true
10 that terms need to be uniform in order for Qwest to provide the service quality it
11 has provided in the past, then CLEC ICAs would have had to been uniform in the
12 past. But that is not the case. ICAs have not been uniform in the past and are not
13 uniform today.

14 **Q. WITH RESPECT TO THE SCOPE OF CMP, DOES QWEST**
15 **RECOGNIZE THAT RATES AND THE APPLICATION OF RATES ARE**
16 **OUTSIDE THE SCOPE OF CMP?**

17 A. Yes, at least to some degree. Qwest admits that CMP does not "manage" rate
18 changes and states that "Rate management is product specific and not a CMP
19 activity."¹⁶³ As indicated in my direct testimony,¹⁶⁴ rates and the application of

¹⁶¹ Exhibit Eschelon 3 (Johnson Direct), pp. 17-20.

¹⁶² Albersheim Washington Response Testimony (UT-063061, 12/4/06), p. 14, line 18.

¹⁶³ Qwest Exhibit 1 (Albersheim Direct), p. 7, line 9.

1 rates are outside the scope of Qwest's CMP. However, the Commission must be
2 aware that certain terms and conditions that Qwest insists should be decided in
3 CMP (rather than in an ICA) have the affect of changing rates, applying rates in
4 situations when the recurring rate already covers the activity (*i.e.*, double
5 recovery), or at a minimum, requiring CLECs to pay rates that they may not have
6 been required to pay in the past. Eschelon opposes those types of CMP changes
7 even though Qwest may call them something other than a rate change. One
8 example is the CRUNEC example I discussed in my direct testimony.¹⁶⁵

9 **Q. IN ADDITION TO DISCUSSING THE SCOPE OF CMP, QWEST**
10 **DESCRIBES THE VOTING, POSTPONEMENT, AND DISPUTE**
11 **RESOLUTION PROVISIONS OF THE CMP DOCUMENT. WILL YOU**
12 **COMMENT ON THESE PROVISIONS?**

13 A. Yes, I'll address voting first. Ms. Albersheim indicates that voting procedures are
14 described in Section 17 of the CMP Document.¹⁶⁶ She does not, however,
15 describe when voting in CMP occurs and, more importantly, when it does not. As
16 I explained in my direct testimony, there is some ranking for systems changes and
17 voting on issues of CMP procedure. However, for product and process changes

¹⁶⁴ Exhibit Eschelon 1 (Starkey Direct), p. 57, lines 15-16.

¹⁶⁵ Exhibit Eschelon 1 (Starkey Direct), pp. 52-63; and Exhibit Eschelon 3.13.

¹⁶⁶ Qwest Exhibit 1 (Albersheim Direct), p. 23, lines 19-21; *see also* Qwest Exhibit 1 (Albersheim Direct), p. 14, lines 27-29 (referring to a vote on the procedure of changing the disposition and not the substance of the underlying request); Qwest Exhibit 1 (Albersheim Direct), p. 23, lines 15-17 (referring to a vote on the procedure of making an exception request and not the substance of the underlying request).

1 (which are different from “systems” changes), Qwest does not need any kind of
2 vote on adoption of, or consent to, its notification or change “request” before
3 implementing it, provided that Qwest follows the applicable time periods.¹⁶⁷ In
4 other words, Qwest is able to, and does, deny a CLEC product and process change
5 request without a vote. Further, Qwest can, and does, implement its own
6 sponsored product and process changes without the need for a vote. I mention
7 that here because without this background, the reader may get an inaccurate
8 impression from Qwest’s testimony about the significance of CMP’s voting
9 procedures which states: “Key to this section is the provision that every carrier
10 (including Qwest) has one vote in the CMP.”¹⁶⁸ Rather than being “key” to the
11 issues in this case (which would almost without exception entail no vote),¹⁶⁹
12 voting is insignificant due to Qwest’s inherent ability in CMP to deny these types
13 of proposals without a vote.

14 **Q. DOES THE CMP DOCUMENT PROVIDE A CLEC WITH AN OPTION**
15 **TO REQUEST POSTPONEMENT OF A CHANGE WITH WHICH IT**
16 **DISAGREES?**

¹⁶⁷ Exhibit Eschelon 1 (Starkey Direct), p. 39, lines 9-11.

¹⁶⁸ Qwest Exhibit 1 (Albersheim Direct), p. 23, lines 20-21.

¹⁶⁹ Changes, if any, related to Eschelon’s proposals would largely be identified as product or process, not system, changes in CMP and, for any issue that Qwest would claim requires system changes, Eschelon is not requesting any change to the status quo that would require a change.

1 A. Yes, Ms. Albersheim discusses those provisions in her direct testimony.¹⁷⁰ The
2 option to seek a postponement,¹⁷¹ however, offers very little protection to CLECs.

3 **Q. WHY DO YOU SAY THAT?**

4 A. First, the decision of whether to grant a CLEC's request for postponement of a
5 change is left solely up to Qwest.¹⁷² Second, even if Qwest grants a
6 postponement, that postponement may be for as few as thirty days.¹⁷³ This means
7 that if a CLEC needs to prevent a change from going into effect, it may have only
8 thirty days in which to bring a complaint in each state in which Qwest intends to
9 make the change and secure at least a preliminary ruling preventing Qwest from
10 going forward with the change. It is for this reason that the CMP postponement
11 criteria makes it very likely that important issues can come before the
12 Commission in "crisis mode" in which a CLEC is asking the Commission, on a
13 very short timetable, to prohibit Qwest from making a change that will adversely
14 impact the CLEC's business. In these types of situations, given the leeway for a
15 modest postponement window, it is likely that the Commission will be called
16 upon to decide these types of issues on very limited record development.

¹⁷⁰ Qwest Exhibit 1 (Albersheim Direct), pp. 15-17.

¹⁷¹ A CLEC "may" make an optional postponement request (Section 5.5.2.1.1 of the Qwest CMP Document, Exhibit Eschelon 3.10), but whether it does so does not affect the CLEC's right to "seek remedies in a legal or regulatory arena at any time" (Section 15.0 of the Qwest CMP Document, Exhibit Eschelon 3.10).

¹⁷² Exhibit Eschelon 1 (Starkey Direct), p. 47, lines 7-9. *See also* Sections 5.5.3.2 and 5.5.3.3 of the Qwest CMP Document (Exhibit Eschelon 3.10).

¹⁷³ Qwest CMP Document (Exhibit Eschelon 3.10), Section 5.5.3.2.

1 Q. QWEST REFERS NUMEROUS TIMES TO THE CMP'S DISPUTE
2 RESOLUTION PROCESS.¹⁷⁴ PLEASE DESCRIBE THE DISPUTE
3 RESOLUTION PROCESS IN THE CMP.

4 A. The dispute resolution process of the CMP Document sets forth certain terms that
5 a CLEC may pursue if the CLEC “does not agree with Qwest’s reply or a CR
6 [change request] is rejected.”¹⁷⁵ Although the CMP Document provides that
7 Qwest may also use the dispute resolution procedures, such a circumstance will
8 “probably never”¹⁷⁶ occur because Qwest determines whether notifications are
9 implemented and change requests are completed or denied.¹⁷⁷ In other words,
10 since Qwest can unilaterally choose what it will, and will not, implement within
11 CMP, it seems unlikely that Qwest would ever need to dispute its own decision.
12 This type of circumstance has an important impact on Qwest’s willingness to
13 “negotiate” any disputed changes, and also on the cost of bringing litigation that is

¹⁷⁴ Qwest Exhibit 1 (Albersheim Direct), pp. 10, 14, 15, 19, 23, 29 and 53.

¹⁷⁵ Exhibit Eschelon 3.12 (October 2-3, 2001 CMP Redesign Meeting Minutes, Att. 4, p. 34, Action Item #72). Meeting Minutes available on Qwest’s website, *see*,
http://www.qwest.com/wholesale/downloads/2001/011114/CMP_Redesign_Meeting_October_2_3_Final_Minutes.doc

¹⁷⁶ When asked in CMP why Qwest would ever invoke the dispute resolution process, Qwest could not “think of anything” but wanted to “leave it in anyway.” Exhibit Eschelon 3.12 (October 2-3, 2001 CMP Redesign Meeting Minutes, Att. 4, p. 36, Action Item #86). The issue was closed with the notation to “keep in mind that Qwest will *probably never* use it.” *Id.* (emphasis added).

¹⁷⁷ For system changes, although there is ranking, Qwest determines the amount of resources that it will devote, which ultimately limits the number or size of changes that can be made.

1 necessarily borne by the CLEC. There is also an escalation process, but it is not a
2 prerequisite to dispute resolution.¹⁷⁸

3 **Q. PLEASE EXPLAIN YOUR LAST POINT MORE FULLY.**

4 A. The dispute resolution process of the CMP Document (Section 15) states that: “In
5 the event that an impasse issue develops, **a party may** pursue the dispute
6 resolution processes set forth below” (emphasis added). Those dispute resolution
7 processes include the following:¹⁷⁹ (1) “Qwest or **any CLEC may** suggest that the
8 issue be resolved through an Alternative Dispute Resolution (ADR) process, such
9 as arbitration or mediation using the American Arbitration Association (AAA) or
10 other rules.” (emphasis added); (2) “Without the necessity for a prior ADR
11 Process, Qwest or **any CLEC may submit the issue, following the commission’s**
12 **established procedures, with the appropriate regulatory agency requesting**
13 **resolution of the dispute. This provision is not intended to change the scope of**
14 **any regulatory agency's authority with regard to Qwest or the CLECs.**”
15 Importantly, the dispute resolution process includes this express provision: “**This**
16 **process does not limit any party’s right to seek remedies in a regulatory or legal**
17 **arena at any time.**” Therefore, the term “may” in the earlier provision is clearly
18 permissive, and a CLEC may choose not to use the CMP Document’s dispute

¹⁷⁸ Exhibit Eschelon 3.12 (October 2-3, 2001 CMP Redesign Meeting Minutes, Att. 4, pp. 35-36, Action Item #83). Meeting Minutes available on Qwest’s website, *see*,
http://www.qwest.com/wholesale/downloads/2001/011114/CMP_Redesign_Meeting_October_2_3_Final_Minutes.doc

¹⁷⁹ Section 15 (Dispute Resolution) also sets forth the process for identifying a dispute in CMP and the format and content of these notices and timeframes.

1 resolution procedures and may seek other remedies, including, but not limited to,
2 raising issues through Section 252 arbitration. That is the forum Eschelon has
3 chosen for these various topics and its choice is fully consistent with CMP.

4 The dispute resolution process of the CMP Document expressly allows for an
5 individual CLEC to file for resolution of a CMP impasse issue at the state
6 commission, and does not limit any party from seeking commission relief at any
7 time.

8 **Q. QWEST HAS ACKNOWLEDGED THAT THE CMP DISPUTE**
9 **RESOLUTION PROCESS ALLOWS FOR CMP ISSUES TO BE**
10 **ADDRESSED IN AN ARBITRATION AT THE STATE COMMISSION,**
11 **BUT HAS CLAIMED THAT THE ARBITRATION SHOULD INVOLVE**
12 **ALL CLEC PARTICIPANTS FROM CMP.¹⁸⁰ IS THIS CORRECT?**

13 A. No. This is another example of Ms. Albersheim changing her testimony in
14 Oregon and Utah from what she filed in prior arbitration proceedings. For
15 instance, in her direct testimony in the Colorado proceeding, Ms. Albersheim
16 testified:

17 As noted above, the CMP Document provides for arbitration of
18 unresolved CMP disputes. All parties to the CMP should be
19 permitted to participate in such arbitrations. The results of such
20 arbitrations impact all parties to the CMP. This arbitration is
21 between Qwest and Eschelon. It is not appropriate to bring a CMP

¹⁸⁰ Albersheim Colorado Direct Testimony (Docket 06B-497T, 12/15/06), p. 24.

1 dispute into an Interconnection Arbitration between two parties
2 when the end result has an impact on all members of the CMP.¹⁸¹

3 However, Ms. Albersheim omits this Q&A from her direct testimony in Utah (and
4 recently in Oregon). Nonetheless, as explained in my direct testimony,¹⁸² both
5 the dispute resolution process of CMP and the typical state commission complaint
6 case allow for a single CLEC to dispute an issue with Qwest, as well as CLECs to
7 intervene in, or jointly bring, disputes against Qwest. Further, an ICA is
8 necessarily an agreement between two parties, in this case Qwest and Eschelon,
9 and established Commission procedures govern arbitration of ICA issues. So,
10 despite Qwest's prior unsubstantiated assertion that it is "not appropriate"¹⁸³ to
11 raise a CMP dispute in an arbitration between two parties, the CMP Document
12 expressly recognizes the right of a single CLEC to pursue remedies in any
13 appropriate forum, including with the Commission, at any appropriate time.
14 Qwest's prior appeal for multiple-party arbitrations is just a re-hashing of Qwest's
15 argument that CMP must be used so as to ensure homogenous terms and
16 conditions among carriers – an argument the FCC and state commissions have
17 already refuted. Further, even the existing CMP documentation does not support
18 Qwest's assertions as to the proper method of dealing with these types of disputes.
19 The highlighted (bolded) language in the Q&A above shows that the CMP dispute

¹⁸¹ Albersheim Colorado Direct Testimony (Docket 06B-497T, 12/15/06), p. 24. This was Ms. Albersheim's response to the question: "Eschelon states in its issue matrix position statements that it wishes to bring certain request denials before this Commission in this arbitration, is that appropriate?"

¹⁸² Exhibit Eschelon 1 (Starkey Direct), p. 51.

¹⁸³ Albersheim Colorado Direct Testimony (Docket 06B-497T, 12/15/06), p. 24, lines 10-12.

1 resolution process refers to Qwest and one CLEC (in the singular) pursuing
2 remedies. There is no basis for Qwest's prior statement that disagreements
3 should¹⁸⁴ be addressed at the state commission only in proceedings involving all
4 CLEC CMP participants.¹⁸⁵

5 **Q. MS. STEWART ACCUSES ESCHELON OF IGNORING THE CMP AND**
6 **SUGGESTS THAT QWEST WOULD PREFER TO PROVIDE "THE**
7 **OPPORTUNITY FOR INPUT FROM ALL INTERESTED CARRIERS**
8 **WHO WOULD BE AFFECTED BY THE CHANGES."**¹⁸⁶ **IS THERE ANY**
9 **EVIDENCE TO SUGGEST THAT QWEST'S STATED PREFERENCE**
10 **FOR INPUT FROM ALL INTERESTED CARRIERS IS LESS THAN**
11 **GENUINE?**

12 **A.** Yes.¹⁸⁷ Qwest soundly rejected two opportunities for input from all interested
13 carriers in this very negotiation and arbitration as well as in CMP. First, Eschelon
14 asked Qwest to agree to coordination and participation of other CLECs in these

¹⁸⁴ Albersheim Colorado Direct Testimony (Docket 06B-497T, 12/15/06), p. 24, line 8. Ms. Albersheim's use of "should" suggests that, while Qwest may claim that a multiple CLEC arbitration "should" be permitted, it recognizes that it is not, in fact, required.

¹⁸⁵ In addition, all CLEC CMP participants may not be certified in a particular state, may not be affected by an issue, or may not have the resources to pursue regulatory relief. In any event, in this arbitration, most of these issues raised by Eschelon (some of which have recently closed with Eschelon's language), there is or was no CMP dispute as Eschelon has simply been seeking to preserve work already completed in CMP. Exhibit Eschelon 1 (Starkey Direct), pp. 37-38.

¹⁸⁶ Qwest Exhibit 3 (Stewart Direct), p. 5, lines 19-20.

¹⁸⁷ As indicated by the preceding discussion of the CMP Document's scope and dispute resolution provisions, Qwest is the party ignoring the CMP Document's express requirements.

1 ICA negotiations, but Qwest said no.¹⁸⁸ Second, Eschelon asked Qwest to use
2 CMP to allow CLECs to have input into development of its new template and for
3 Qwest to provide status information to CLECs about the template, but Qwest also
4 flatly rejected the offer, indicating that “this is not a CMP issue.”¹⁸⁹ Both of these
5 offers show that Eschelon welcomed multiple CLEC participation. In contrast,
6 despite Qwest’s many claims of concern about other CLECs,¹⁹⁰ Qwest would not
7 agree to participation of other CLECs regardless of the context – negotiation,
8 arbitration, or CMP.

9 **Q. QWEST TESTIFIES THAT NO CHANGE REQUESTS DEVELOPED**
10 **THROUGH CMP CONFLICTED WITH INTERCONNECTION**
11 **AGREEMENTS.¹⁹¹ DO YOU AGREE WITH QWEST’S SUGGESTION?**

12 A. No. Significantly, Qwest did not testify that no Qwest *notification* has conflicted
13 with interconnection agreements and that is an important distinction. As indicated
14 in my direct testimony, a vast majority of Qwest-initiated product and process

¹⁸⁸ Exhibit Eschelon 3.9 (Qwest-Eschelon letter exchange dated Sept. 23, 2003; Oct. 9, 2003; and Oct. 17, 2003).

¹⁸⁹ Exhibit Eschelon 3.8 (Qwest Feb. 4, 2003 email).

¹⁹⁰ The Commission should be extremely skeptical of Qwest’s implication that it is acting out of a desire to somehow “protect” other CLECs. As the FCC has observed:

Incumbent LECs have little incentive to facilitate the ability of new entrants, including small entities, to compete against them and, thus have little incentive to provision unbundled elements in a manner that would provide efficient competitors with a meaningful opportunity to compete. We are also cognizant of the fact that incumbent LECs have the incentive and the ability to engage in many kinds of discrimination. For example, incumbent LECs could potentially delay providing access to unbundled network elements, or they could provide them to new entrants at a degraded level of quality. FCC *First Report and Order*, ¶ 307.

¹⁹¹ Qwest Exhibit 1 (Albersheim Direct), p. 21, lines 2-5.

1 CMP changes are accomplished through Level 0-3 email notifications,¹⁹² and it is
2 telling that Qwest carefully limited its testimony to change requests. All requests
3 by CLECs are change requests, as only Qwest can implement changes by email
4 notifications in CMP. Naturally, a CLEC is unlikely to submit a change request
5 that conflicts with its own ICA. Completed CLEC change requests are unlikely to
6 result in conflicts with ICAs.

7 To the extent Qwest is suggesting that its own CMP activity, including its many
8 notifications, has not resulted in conflicts with interconnection agreements,
9 Eschelon disagrees. In the CRUNEC example in my direct testimony, Qwest
10 created a conflict with CLEC ICAs by issuing a CMP notification containing a
11 one-word change that was very business-affecting.¹⁹³ Issue 12-67 (expedites),
12 which is discussed by Mr. Denney, is another example. Given that Eschelon has a
13 pending complaint against Qwest related to expedites,¹⁹⁴ it is pretty obvious that
14 Qwest is not taking into account the perspective of CLECs¹⁹⁵ when making this
15 unsupported suggestion.

¹⁹² Exhibit Eschelon 1 (Starkey Direct), pp. 47-48.

¹⁹³ Exhibit Eschelon 1 (Starkey Direct), pp. 52-63 and Exhibit Eschelon 3.13.

¹⁹⁴ Complaint, *In re. Complaint of Eschelon Telecom of Arizona, Inc. Against Qwest Corporation*, ACC Docket No. T-01051B-06-0257, T-03406A-06-0257 (April 14, 2006) ["Arizona Complaint Docket"]. The Staff's conclusions in the Arizona Complaint Docket are provided in Exhibit Eschelon 2.19, and the order establishing interim relief in the Arizona Complaint Docket is provided in Exhibit Eschelon 3.70.

¹⁹⁵ Exhibit Eschelon 3.54, p. 3, row 10 (Integra's CMP comments).

1 **Q. MS. ALBERSHEIM STATES THAT QWEST CANNOT ACT**
2 **ARBITRARILY “AT ALL”¹⁹⁶ IN THE CMP. WOULD YOU LIKE TO**
3 **RESPOND?**

4 A. The question is not whether Qwest can act “arbitrarily.” The more pertinent
5 question is whether Qwest can act in support of its own self interest at the expense
6 of the CLECs. The answer to that question is “yes.”

7 **Q. BUT MS. ALBERSHEIM CLAIMS THAT CLECS CAN PREVENT**
8 **QWEST FROM “UNILATERALLY MAKING CHANGES VIA THE**
9 **CMP”¹⁹⁷ AND PROVIDES DATA PURPORTING TO SHOW THAT**
10 **QWEST WITHDREW 99 CHANGE REQUESTS EITHER BECAUSE**
11 **CLECS VOCALLY OPPOSED THE CHANGES OR BECAUSE, IN THE**
12 **CASE OF SYSTEMS REQUESTS, THEY WERE GIVEN SUCH A LOW**
13 **PRIORITY.¹⁹⁸ IS MS. ALBERSHEIM’S TESTIMONY ON THIS POINT**
14 **MISLEADING?**

¹⁹⁶ Qwest Exhibit 1 (Albersheim Direct), p. 22, lines 25-26.

¹⁹⁷ Qwest Exhibit 1 (Albersheim Direct), p. 20, lines 20-22. In Arizona, as an example that CLECs can “prevent” Qwest proposed changes, Ms. Albersheim pointed to a Level 1 CMP notice Qwest issued on September 27, 2006, regarding maintenance and repair documentation, and stated that Qwest retracted the notice and withdrew the documentation changes based on CLECs’ concerns. (See Qwest-Eschelon ICA Arizona Arbitration, Albersheim AZ Rebuttal (ACC Docket No. T-03406A-06-0572/T-01051B-06-0572, 2/9/07), pp. 8-9.) Exhibit Eschelon 3.42 consists of meeting minutes, CMP notices, comments and emails related to that issue. Exhibit Eschelon 3.42 shows, for example, that there are internal inconsistencies in the PCATs, and PCAT changes may differ markedly from what Qwest describes as Qwest’s existing process. While Qwest has since agreed to submit a Level 4 change request regarding that issue, this situation is not evidence that CLECs may “prevent” Qwest from making changes. For Qwest-initiated changes (including Level 4 – change requests), after Qwest abides by the time frames in the CMP document, it may implement changes over CLEC objection (as it did in the CRUNEC example). See Exhibit Eschelon 1 (Starkey Direct), pp. 52-63.

¹⁹⁸ Qwest Exhibit 1 (Albersheim Direct), p. 20, lines 20-28.

1 A. Yes. Ms. Albersheim claims that Qwest has withdrawn 99 change requests for
2 one of two reasons: (1) CLECs have vocally opposed the changes, or (2) in the
3 case of a systems change, the request was given a low priority. Given that Ms.
4 Albersheim admits that the systems CRs were not withdrawn due to CLEC
5 objection, what she is claiming is that all of the product and process CRs that
6 were withdrawn by Qwest were withdrawn because CLECs vocally opposed
7 them. Ms. Johnson provides Exhibit Eschelon 3.7, which shows that between
8 2001 and September 2006, Qwest withdrew 14 of the total 114 Qwest product and
9 process CRs. Importantly, this exhibit shows that, contrary to Ms. Albersheim's
10 claim, none of these CRs were withdrawn solely because of CLEC objection.¹⁹⁹
11 In fact, there was no CLEC objection at all to 12 of these.²⁰⁰ And though Ms.
12 Albersheim's testimony may leave the impression that 25% of Qwest's changes
13 (99 CRs out of a total 397 CRs) were withdrawn because of CLEC opposition in
14 CMP, even under Qwest's misguided logic, this would only apply to the 14
15 product and process CRs that were withdrawn since 2001 – or 3.5% of total CRs.
16 Ms. Albersheim's claim that Qwest has withdrawn CRs – all of the product and

¹⁹⁹ Exhibit Eschelon 3.7, columns entitled "Did Qwest Withdraw the CR Due to CLEC Objection?" and "CR Information on Reason for Withdraw." These columns show that none of the 14 product and process CRs in question were withdrawn because of CLEC opposition. For CR entries 7/22/04 and 3/6/06, it was jointly decided among Qwest and CLECs to withdraw them for good reason – not solely because CLECs objected. Qwest withdrew the 7/22/04 CR because Covad prevailed on the issue in an arbitration case and as explained in Eschelon/50, Qwest withdrew the 3/6/06 CR because CLEC volume was very small and because it was pointed out that the change conflicted with Qwest's SGAT. Though CLECs objected to these two CRs, Qwest agreed to withdraw them because CLECs provided a valid reason for withdrawal, so Qwest should not have introduced the CRs in the first place. Qwest's withdrawal of these change requests is not evidence of voluntary responsiveness to CLEC business concerns, as Ms. Albersheim insinuates.

²⁰⁰ Exhibit Eschelon 3.7.

1 process CRs that have been withdrawn – because of CLEC opposition is not
2 supported by the facts.

3 In any event, there is nothing in the CMP Document that requires Qwest to
4 withdraw a notice or change request due to CLEC opposition (verbal or written),
5 so despite Qwest’s claims, CLEC opposition cannot prevent Qwest from
6 unilaterally pursuing its own interests in CMP.²⁰¹ Further, the examples I
7 provided in my Direct Testimony show that when the issue is in Qwest’s interest,
8 it will implement changes despite vociferous CLEC objections – and that is the
9 problem. Ms. Albersheim’s statistics do nothing to refute the fact that Qwest has
10 the ability within CMP to implement important changes despite CLEC objections,
11 and that is why the certainty of an arbitrated ICA is so important. Ms.
12 Albersheim points to a “number of procedures detailed in the CMP Document that
13 prevent Qwest from acting arbitrarily in the CMP.”²⁰² However, those procedures
14 only go so far. Because of the extent of Qwest’s control over CMP and Qwest’s
15 potential ability to adversely affect a CLECs’ business,²⁰³ Qwest can choose to

²⁰¹ For example, although Section 5.3.1 of the CMP Document (Exhibit Eschelon 3.10) provides that “the CR will be closed when CLECs determine that no further action is required for that CR,” Section 5.3 applies only to CLEC-initiated change requests. In addition, under Section 5.3, Qwest first has an opportunity to deny the CLEC-initiated change request, so the language of 5.3.1 only applies to those CLEC-initiated change requests that Qwest does not deny and chooses to implement. Section 5.4 applies to Qwest-initiated changes, and it does not contain language similar to the quoted language from Section 5.3.1.

²⁰² Qwest Exhibit 1 (Albersheim Direct), p. 22, lines 25-26.

²⁰³ Almost immediately after the effective date of Qwest’s unilateral email notification implementing a one-word PCAT change in the CRUNEC example discussed in my direct testimony (Exhibit Eschelon (Starkey Direct), pp. 52-56), Eschelon began experiencing a dramatic spike in the number of held orders relative to DS1 loops ordered from Qwest. Qwest’s position as the monopoly provider of facilities ordered under the ICA places it in a position of control.

1 follow those procedures or not, despite its earlier commitment to adhere to
2 them.²⁰⁴ The jeopardies situation described in Ms. Johnson's testimony²⁰⁵ is an
3 excellent example of this. Despite all of Eschelon's efforts in CMP, and Qwest's
4 completion of the change request, Qwest has elected to disregard the terms
5 developed in CMP.²⁰⁶ Ms. Albersheim also points to the dispute resolution
6 provisions of the CMP document,²⁰⁷ but they apply only to disputes and impasse
7 issues. In the jeopardies example, there is no impasse issue in CMP because on
8 paper Qwest completed the change request and agreed with Eschelon.

9 The bottom line is this: when a company expends the substantial resources
10 necessary to bring issues properly before the Commission under Section 252,
11 nothing in the CMP Document allows CMP to prevent resolution of the
12 substantive issues in arbitration. Eschelon has identified specific contract
13 language about important business and Customer-affecting issues that comports
14 with existing law and underlying public policy. Despite Qwest's arguments to the
15 contrary, it is the Commission in this forum, and not Qwest via CMP, which

²⁰⁴ Exhibit Eschelon 3.81 (excerpts from CMP Redesign meeting minutes regarding Qwest's commitment that implementation guidelines would be within the scope of CMP) (discussed by Ms. Johnson regarding Issue 12-87, Controlled Production); Exhibit Eschelon 3.41 (excerpts from CMP Redesign meeting minutes regarding Qwest's commitment to provide meeting minutes and review of those minutes for ad hoc calls and Qwest's email indicating Qwest took the position it did not have to provide them).

²⁰⁵ Exhibit Eschelon 3 (Johnson Direct), pp. 75-76. *see also* Exhibit Eschelon 3.71 – 3.74 (Issues 12-71 – 12-73).

²⁰⁶ *See id.*

²⁰⁷ Qwest Exhibit 1 (Albersheim Direct), p. 23, lines 11-13.

1 should make the final decision as to which language should govern the
2 relationship between the companies through the term of the ICA.

3 **C. CLOSED ICA LANGUAGE AND CMP**

4 **Q. QWEST TESTIFIES ABOUT THE ALLEGED “IMPACT” OF CLOSED**
5 **ICA LANGUAGE ON CMP.²⁰⁸ PLEASE RESPOND.**

6 A. Ms. Albersheim testifies that Qwest’s acceptance of Eschelon’s language in the
7 ICA on issues that were previously disputed but closed in several states after the
8 Minnesota Commission rejected Qwest’s position will have the impact of making
9 it necessary for Qwest to seek an amendment to Eschelon’s ICA to accommodate
10 changes in CMP.²⁰⁹ Her testimony flatly contradicts the language of the CMP
11 Document,²¹⁰ as well as Qwest’s own conduct.²¹¹ One example given by Qwest

²⁰⁸ Qwest Exhibit 1 (Albersheim Direct), p. 26, lines 14-18.

²⁰⁹ Qwest Exhibit 1 (Albersheim Direct), p. 26, line 26 – p. 27, line 3.

²¹⁰ CMP Document (Exhibit Eschelon 3.10), Section 1.0 (Scope).

²¹¹ Exhibit Eschelon 3.2 (Closed Language and Associated CMP Activity, if Any, Matrix). *See also* Exhibit Eschelon 3.4. In the McLeodUSA example on pages 19-20 of Ms. Johnson’s direct testimony (Exhibit Eschelon 3), for example, McLeodUSA pointed out that its ICA language was different from Qwest’s PCAT but Qwest had not sought an amendment from McLeodUSA before making those changes. Instead, Qwest confirmed what the CMP Document provides, that McLeodUSA’s ICA will govern for McLeodUSA anyway. Other conduct by Qwest that is contrary to this statement is Qwest’s choice not to bring certain issues through CMP. For example, as discussed with respect to Issue 12-64 (acknowledgement of mistakes), Qwest was ordered to put certain processes in place but did not bring those processes through CMP either as a regulatory or other change request. And, with respect to the Covad-Qwest ICA language on testing that allows Covad to charge Qwest in certain instances (Exhibit Eschelon 3.4), Qwest did not make those terms available through CMP so other CLECs could also apply the same procedures (as the language includes intervals and other procedures, and not merely charges). Instead, Qwest made Eschelon go into arbitration in Minnesota on this issue to obtain similar terms before Qwest later agreed to language.

1 is Fatal Rejection Notices.²¹² Issue 12-74 showed that Qwest is happy to agree
2 that the consequences of assignment of fault is appropriate content for inclusion in
3 an interconnection agreement when fault is assigned to Eschelon, and only
4 Eschelon is bound to consequences. Both Sections 12.2.7.2.4.1 and 12.2.7.2.4.2
5 deal with the consequences of an error in the context of Fatal Rejection Notices.
6 Note that Qwest did not object to Section 12.2.7.2.4.1, which obligates Eschelon
7 to resubmit its order when Eschelon makes a mistake, and did not insist that this
8 language be replaced with a reference to the PCAT because it is unsuitable for a
9 contract. On the flip side, however, when the subject matter is Qwest's
10 obligations when Qwest makes an error, suddenly Qwest argued the content is
11 inappropriate for inclusion in an interconnection agreement and belongs in the
12 PCAT. Not only is Qwest not prevented from making changes in CMP (so long
13 as it respects the Scope provision indicating that Eschelon's ICA controls for
14 Eschelon and any CLECs opting into that ICA), but also Qwest failed to show any
15 legitimate interest in reserving for itself the ability to, through CMP, assign the
16 consequences of Qwest errors to CLECs.

17 Ironically, Ms. Albersheim is making the very argument that the Minnesota
18 Commission rejected when adopting Eschelon's language – after which Qwest
19 closed the language in other states. She is essentially arguing that ICA and CMP
20 terms cannot conflict or overlap so that one or the other must be modified to

²¹² Qwest Exhibit 1 (Albersheim Direct), p. 27, line 2.

1 ensure uniformity. The Minnesota ALJs' recommendations (approved by the
2 Minnesota Commission), upon which Qwest closed these issues, expressly
3 rejected this argument, finding: "Clearly, the CMP process would permit the
4 provisions of an ICA and the CMP to coexist, conflict, or potentially overlap."²¹³
5 With respect to Ms. Albersheim's example of Loss and Completion Reports,²¹⁴
6 the Minnesota ALJs said: "Qwest has failed to identify any credibly adverse
7 effect on CLECs, itself, or the public interest if this language were incorporated
8 into the ICA."²¹⁵ With respect to Ms. Albersheim's example of the Pending
9 Service Order Notifications ("PSOs"),²¹⁶ the Minnesota ALJs said that Ms.
10 Albersheim's concerns were "overstated"²¹⁷ and found:

11 It appears to be unlikely that the inclusion of this language will
12 "freeze" CMP processes, create an administrative burden for
13 Qwest, or cause Qwest to maintain separate systems, processes,
14 and procedures for Eschelon versus other CLECs. The CMP
15 document itself envisions that CMP processes may well differ
16 from those in negotiated ICAs. Qwest has failed to show that
17 maintaining the current level of information in the PSO will harm
18 the CMP process or other CLECs or create a burden for Qwest.
19 This language would not prevent Qwest from adding to the
20 information made available to other CLECs, through the CMP, nor
21 would it prevent Qwest from changing the format of the
22 information. It does not appear that any systems modification
23 would be necessary to comply with this provision. Eschelon
24 credibly contends that this minimal amount of information is

²¹³ Exhibit Eschelon 2.24 [MN Arbitrators' Report, ¶22].

²¹⁴ Qwest Exhibit 1 (Albersheim Direct), p. 27, lines 2-3.

²¹⁵ Exhibit Eschelon 2.24 [MN Arbitrators' Report, ¶¶244 & 246]. Issue 12-74 (Fatal Rejection Notices) has since closed in all six states with Eschelon's language.

²¹⁶ Qwest Exhibit 1 (Albersheim Direct), p. 27, line 2.

²¹⁷ Exhibit Eschelon 2.24 [MN Arbitrators' Report, ¶229]. Issue 12-70 (PSOs) has since closed in all six states with Eschelon's language.

1 reasonable and necessary for it to accurately coordinate the
2 provision of service to new customers.²¹⁸

3 Ms. Albersheim concludes that “Eschelon has succeeded in preventing the CMP
4 from working as it was intended”²¹⁹ without acknowledging that the Minnesota
5 Commission expressly found this is exactly how CMP was intended to work.²²⁰
6 The federal Act likewise envisions this result.²²¹

7 **IV. SUBJECT MATTER NO. 1. INTERVAL CHANGES AND PLACEMENT**

8 *Issue No. 1-1 and subparts: ICA Sections 1.7.2; 7.4.7, 9.23.9.4.3, Exhibit C*
9 *(Group 2.0 & Group 9.0), Exhibit I (Section 3), Exhibit N, Exhibit O*

10 **Q. PLEASE PROVIDE A BRIEF SUMMARY OF ISSUE 1-1 AND SUBPARTS**
11 **RELATING TO INTERVALS.**

12 A. Issue 1-1 and subparts deals with whether service intervals should be in the ICA
13 and changed (lengthened) via a streamlined ICA amendment, as proposed by
14 Eschelon, or whether intervals should be excluded from the ICA and instead
15 governed and changed by non-contractual sources, as proposed by Qwest.²²²

²¹⁸ Exhibit Eschelon 2.24 [MN Arbitrators’ Report, ¶229]. Issue 12-70 (PSOs) has since closed in all six states with Eschelon’s language.

²¹⁹ Qwest Exhibit 1 (Albersheim Direct), p. 27, lines 4-5.

²²⁰ Exhibit Eschelon 2.24 [MN Arbitrators’ Report, ¶22 & ¶229].

²²¹ Exhibit Eschelon 1 (Starkey Direct), pp. 33-38.

²²² The contract language is found, by Issue number, in the Disputed Issues Matrix (Exhibit 3 to Eschelon’s Petition for Arbitration).

1 **Q. MS. ALBERSHEIM CLAIMS THAT ESCHELON’S POSITION**
2 **REGARDING INTERVALS “SUBVERTS THE CMP PROCESS.”²²³ DO**
3 **YOU AGREE?**

4 A. No. It bears repeating²²⁴ that this same issue was examined in Minnesota and the
5 Minnesota Arbitrators’ Report²²⁵ (which was affirmed by a 4-0 vote of the
6 Minnesota commission)²²⁶ ruled in favor of Eschelon on Issues 1-1 and subparts,
7 finding that:

8 22. Eschelon has provided convincing evidence that the CMP
9 process does not always provide CLECs with adequate
10 protection from Qwest making important unilateral changes in
11 the terms and conditions of interconnection. Service intervals
12 are critically important to CLECs, and Qwest has only
13 shortened them in the last four years. Qwest has identified no
14 compelling reason why inclusion of the current intervals in the
15 ICA would harm the effectiveness of the CMP process or
16 impair Qwest’s ability to respond to industry changes. The
17 Administrative Law Judges recommend that Eschelon’s first
18 proposal for Issue 1-1 be adopted and that its language for
19 Issues 1-1(a)-(e) also be adopted.²²⁷

20 The Minnesota ALJs, as affirmed by the Minnesota Commission, agreed with
21 Eschelon that Qwest can make unilateral changes, and that adopting Eschelon’s
22 proposal (the same proposal Eschelon has offered in this proceeding for Issues 1-1

²²³ Qwest Exhibit 1 (Albersheim Direct), p. 34, line 9. Ms. Albersheim also claimed in her Colorado direct testimony that “CMP would be undermined” by adopting Eschelon’s proposal on Issues 1-1 and subparts (*see* Albersheim Colorado Direct Testimony (Docket 06B-497T, 12/15/06), p. 28, line 7).

²²⁴ Exhibit Eschelon 1 (Starkey Direct), pp. 124-126.

²²⁵ Exhibit Eschelon 2.24.

²²⁶ Exhibit Eschelon 2.25.

²²⁷ Exhibit Eschelon 2.24, Minnesota Arbitrators’ Report, as affirmed by the Minnesota PUC (Exhibit Eschelon 2.25).

1 and subparts) would not harm the effectiveness of CMP or Qwest's ability to
2 respond to industry changes.

3 **Q. WHAT REASON DOES QWEST PROVIDE TO SUPPORT ITS**
4 **CONTENTION THAT ITS PROPOSAL ON ISSUE 1-1 AND SUBPARTS**
5 **IS SUPERIOR TO ESCHELON'S?**

6 A. Qwest rests its proposal for Issues 1-1 and subparts largely on its view that
7 requiring intervals to be included in the ICA and changed via ICA amendment
8 gives Eschelon control over service interval management, and takes it away from
9 CMP.²²⁸ Qwest expresses this concern about both Eschelon's primary proposal
10 (*i.e.*, ICA amendments required for lengthening service intervals only) as well as
11 Eschelon's alternative proposal (*i.e.*, ICA amendments required for all service
12 interval changes).²²⁹

13 **Q. IS QWEST'S ASSUMPTION THAT INTERVALS ARE MEANT TO BE**
14 **WITHIN CMP'S CONTROL CORRECT?**

15 A. No. The CMP Document states that it governs changes to intervals "in Qwest's
16 Service Interval Guide ("SIG")."²³⁰ Significantly, it does not refer to intervals in
17 a company's interconnection agreement because the ICA controls when those

²²⁸ Qwest Exhibit 1 (Albersheim Direct), p. 27, lines 18-21; Qwest Exhibit 1 (Albersheim Direct), p. 34, lines 7-9; with respect to Qwest's CMP argument generally, see above discussion.

²²⁹ Qwest Exhibit 1 (Albersheim Direct), p. 30.

²³⁰ Exhibit Eschelon 3.10 (CMP Document) at Section 5.4.5 (increases to SIG intervals; Level 4 change); *see also* Section 5.4.3 (decreases to SIG intervals; Level 2 change).

1 intervals change.²³¹ In a puzzling piece of testimony, Ms. Albersheim testifies
2 that “Qwest’s Service Interval Guide” is “attached to the proposed contract as
3 Exhibit C.”²³² Exhibit C (Service Interval Tables) is *not* the SIG. Qwest and
4 Eschelon are at impasse on Issue 1-1(e) because Eschelon believes the interval
5 should appear in Exhibit C and be part of the ICA and, as stated in its position
6 statement in the joint Disputed Issues Matrix in other state arbitration cases for
7 Issue 1-1(e), Qwest’s position is: “For the reasons stated above, intervals belong
8 in the Service Interval Guide (SIG).” With this position statement, Qwest
9 recognizes that Exhibit C and the SIG are distinct.²³³ Exhibit C contains
10 contractual terms. The SIG, which contains intervals for additional products and
11 services that Eschelon did not request be included in its ICA, is a web posting of
12 intervals for Qwest’s offerings.

13 **Q. WOULD ESCHELON’S PROPOSAL INAPPROPRIATELY TAKE**
14 **CONTROL OVER SERVICE INTERVAL MANAGEMENT AS QWEST**
15 **CLAIMS?**

16 A. No. First of all, the intervals proposed by Eschelon are the same intervals that are
17 in place today, and Eschelon has proposed no changes to those intervals.
18 Eschelon is not attempting to take control over the intervals, which are already

²³¹ Exhibit Eschelon 3.10 (CMP Document) at Sections 1.0 & 5.4; *see also* ICA/CMP discussion above.

²³² Qwest Exhibit 1 (Albersheim Direct), p. 27, lines 11-12.

²³³ Ms. Stewart contradicts Ms. Albersheim on this point, where she testifies: “the proper placement of service intervals should be in the Qwest Service Interval Guide and not in Exhibit C.” (Qwest Exhibit 3 (Stewart Direct), p. 89, lines 12-13).

1 established. Rather, Eschelon is attempting to provide certainty with respect to
2 these intervals over the life of the ICA based on existing intervals, while at the
3 same time allowing those intervals to be amended via a simple, streamlined ICA
4 amendment.

5 **Q. WHY DO YOU CLAIM THAT THE AMENDMENT WOULD BE**
6 **STREAMLINED WHEN QWEST CLAIMS IT IS CUMBERSOME²³⁴ AND**
7 **WILL REQUIRE MICRO-MANAGEMENT²³⁵ BY THE COMMISSION?**

8 A. Eschelon proposes to use, for lengthening intervals, the identical, agreed-to,
9 streamlined vehicle that is in place today for new products under Section 1.7.1 of
10 the SGAT and other approved interconnection agreements.²³⁶ This makes use of
11 simple advice adoption letters.²³⁷ The advice adoption letters under Section 1.7.2

²³⁴ Qwest Response to Eschelon's Petition for Arbitration, p. 39, line 3. *See also* Albersheim Colorado Direct Testimony (Docket 06B-497T, 12/15/06), p. 28, lines 16 and 18.

²³⁵ Qwest Response to Eschelon Petition for Arbitration, p. 39, line 9; Albersheim Colorado Direct Testimony (Docket 06B-497T, 12/15/06), p. 28, line 24.

²³⁶ Nonetheless, Qwest has recently removed these exhibits from its negotiations template. Qwest implemented this change with a non-CMP notice effective the next business day. *See* Exhibit Eschelon 3.84. These exhibits are closed in the Eschelon-Qwest proposed ICA. Eschelon requested their inclusion because Eschelon values the streamlined process and intends to use it. As this language is closed, it will be in Eschelon's ICA and the ICA of any CLEC which opts into the ICA. CLECs that may be unaware of these terms in Eschelon's ICA and use the negotiations template will not have the streamlined process available to them. Through Qwest's notice, therefore, it is creating the type of "one-off" process that it has claimed it opposes. *See, e.g.*, Albersheim Colorado Rebuttal, p. 6, lines 3-7 ("Eschelon seeks to expand Qwest's obligations and create **one-off, unique processes** for CMP-related ICA issues in dispute: Issue 1-1: service intervals, Issues 12-71 through 12-73: jeopardy notices, and Issue 12-67: expedited orders.") (emphasis added).

²³⁷ Eschelon and Qwest agree that Advice Adoption Letters identified as Exhibits L and M (also SGAT exhibits) should be used for new products. Both Exhibits are attached to the proposed ICA, with closed language that is the same as the language of these same exhibits to the SGAT. Eschelon proposes that Advice Adoption Letters identified as Exhibits N and O should be used for intervals, which are nearly identical to Exhibits L and M in format and substance (though they apply to intervals instead of products) and would be used to amend the ICA in the same way. Because an interval is simply a time period as opposed to a new product (which would have a description and

1 of the proposed ICA are not forms merely of Eschelon's creation but rather reflect
2 minor edits of the existing advice adoption letters used for new products under
3 Section 1.7.1 of the SGAT.²³⁸ The body of Exhibit N (like the first paragraph of
4 Exhibit L) is four lines long. Exhibit O (like Exhibit M) is a one page letter.
5 These are not complex or entirely new forms or procedures.

6 If a CLEC is prepared to accept Qwest's terms, the CLEC signs the letter (in the
7 form attached to the ICA) and sends the letter to the Commission for approval.
8 There are also interim terms for when the parties do not agree to all the terms (as
9 in Section 1.7.1.2 for new products). This "letter" that is also available for new
10 products under the SGAT, is not cumbersome and does not require micro-
11 management. It is designed to be easier than administering other ICA agreements
12 or amendments that come before the Commission for approval. The presence of
13 the virtually identical, agreed-to amendment for new products in the SGAT also
14 demonstrates that this is not unique to Eschelon's proposal, as Qwest claims.

other requirements), language from Exhibits L and M referring to other requirements on Qwest's web site has been omitted from Exhibits N and O. (Because the interval, unlike all of the terms associated with a new product, is repeated in the Advice Adoption Letter, the interval-related exhibits do not need the additional language about terms found in the website but not the letter. The interval is in the letter.)

²³⁸ Compare closed Exhibits L (Advice Adoption Letter) and M (Interim Advice Adoption Letter) that apply to new products to Eschelon-proposed Exhibits N (Interval Advice Adoption Letter) and O (Interval Interim Advice Adoption Letter) that apply to new intervals. Differences between the agreed-to Advice Adoption Letters and the Eschelon-proposed Advice Adoption Letters is that Eschelon's proposed Advice Adoption Letters use the term "new interval for product/service" instead of the term "new product" (with a few additional textual changes to refer to intervals instead of "rates, terms and conditions" for a new product). The agreed-to Advice Adoption Letters also require the rates, terms and conditions related to the new product be attached to the Letter, whereas the Eschelon-proposed Letter would refer to the new interval in the body of the Letter.

1 Qwest routinely manages other ICA amendments and may manage these in the
2 same way.

3 **Q. WHAT IF QWEST WANTS TO LENGTHEN ONE OF THESE**
4 **INTERVALS IN THE SIG, WOULD IT BE PREVENTED FROM DOING**
5 **SO BECAUSE INTERVALS ARE IN THE ESCHELON/QWEST ICA?**

6 A. No. Qwest has the opportunity to propose a lengthened SIG interval via the CMP
7 process, and if it chooses, also seek a change to that interval in Eschelon's ICA
8 via an advice letter amendment to the ICA. Qwest's view of the interplay
9 between CMP/SIG and ICAs is incorrect. For the reasons I discussed above with
10 respect to the scope of the CMP, Qwest has it backwards. Qwest claims that
11 terms and conditions established in CMP/SIG should govern the ICA, when the
12 CMP Document recognizes individual ICA differences and states that they
13 govern.

14 **Q. IF THE COMMISSION ADOPTS ESCHELON'S PROPOSAL AND**
15 **INCLUDES EXISTING SERVICE INTERVALS IN THE ICA, DOES THIS**
16 **MEAN THAT QWEST'S SERVICE INTERVALS ARE SET IN STONE,**
17 **AS QWEST CLAIMS?²³⁹**

18 A. No. Eschelon's primary proposal would allow intervals to be shortened without
19 ICA amendment, which means that based on past experience, a vast majority (if
20 not all) interval changes could be modified without ICA amendment. The only

²³⁹ Qwest Exhibit 1 (Albersheim Direct), p. 34, lines 1-2 ("...all of these changes are Eschelon's attempt to set current intervals in stone in its contract...")

1 way an amendment would be necessary is if Qwest departs from past practice and
2 pursues lengthened intervals – something that Qwest testified it has not done
3 before²⁴⁰ and a strategy that could harm Eschelon and its customers who rely on
4 those intervals. The fact that Qwest will not agree to Eschelon’s language
5 suggests to me that it may attempt to pursue such a strategy if the Commission
6 adopts Qwest’s proposal.

7 Regarding Ms. Albersheim’s characterizations of Eschelon’s proposal as
8 “locking” terms in place²⁴¹ and setting them in “stone” in the contract,²⁴² the FCC
9 had a related characterization of its own – permanence. When rejecting Qwest’s
10 contention that information posted on its website need not be contained in a
11 publicly-filed interconnection agreement, the FCC stated that “[a] ‘web-posting
12 exception’ would render [Section 252(a)(1)] meaningless, since CLECs could not
13 rely on a website to contain all agreements *on a permanent basis*.”²⁴³ While the
14 interconnection agreement can be amended and therefore is not “permanent” in
15 the sense that it is frozen in time, set in stone, locked in place, *etc.*, the FCC
16 recognized that permanency, or certainty, is needed for the term of the contract
17 when not amended. Eschelon should be able to rely on the terms and conditions

²⁴⁰ Albersheim Oregon Direct (Qwest/1, Albersheim/33, line 23) (“so far, Qwest has only decreased intervals.”). See also, Qwest Response to Eschelon Petition for Arbitration, p. 38 (“To date, since Qwest obtained 271 approval, *all* such modifications have been reductions in the lengths of service intervals for various services and have been for the benefit of CLECs.”)

²⁴¹ e.g., Qwest Exhibit 1 (Albersheim Direct), p. 25, line 12.

²⁴² Qwest Exhibit 1 (Albersheim Direct), p. 34, lines 1-2.

²⁴³ *Qwest Forfeiture Order* at ¶32 (emphasis added).

1 for intervals, to make them useful and meaningful, during the term of the
2 agreement.

3 **Q. QWEST POINTS TO REQUESTS MADE BY A NUMBER OF CLECS TO**
4 **CHANGE EXISTING SERVICE INTERVALS.²⁴⁴ DOES THIS**
5 **OBSERVATION SUPPORT QWEST’S PROPOSAL ON ISSUE 1-1?**

6 A. No, Qwest’s observation supports Eschelon’s proposal. Ms. Albersheim points to
7 interval change requests (“CRs”) submitted in CMP by AT&T, Eschelon,
8 Comcast, Covad and Qwest, presumably to support the point made in her previous
9 Q&A that Eschelon’s language would somehow prevent other CLECs from
10 requesting changes to Qwest’s intervals. All of the CLEC-requested changes,
11 however, were to shorten intervals, which are allowed under Eschelon’s proposal
12 without an ICA amendment.²⁴⁵ And, again, Qwest could pursue a lengthened
13 interval in CMP independent of the interval in Eschelon’s contract or could
14 negotiate with Eschelon to include a similar lengthened interval in the ICA.
15 Therefore, contrary to Qwest’s assertion, Eschelon’s language would not prevent
16 CLECs from requesting interval changes via CMP or somehow set existing
17 intervals “in stone.” Only Qwest may unilaterally prevent CLECs from obtaining

²⁴⁴ Qwest Exhibit 1 (Albersheim Direct), p. 34, line 24 – p. 35, line 5.

²⁴⁵ Eschelon’s primary proposal would require an interconnection agreement amendment using a streamlined process for lengthening intervals but not shortened intervals. Under Eschelon’s first proposal, no amendment is required for decreased intervals.

1 interval changes via CMP. For example, of those CLEC change requests referred
2 to by Ms. Albersheim, Qwest denied seven of them.²⁴⁶

3 **Q. QWEST DISCUSSES THE NEED FOR “FLEXIBILITY”²⁴⁷ IN**
4 **LENGTHENING SERVICE INTERVALS WITHOUT ICA AMENDMENT.**
5 **WOULD YOU LIKE TO RESPOND?**

6 A. Yes. Ms. Albersheim testifies that a decreased (or shortened) interval for one
7 product could result in an increased (or lengthened) interval for another product,
8 as Qwest diverts resources from the former product to the latter.²⁴⁸ According to
9 Qwest, it “need[s] the flexibility to be able to respond to such industry changes in
10 this way via the CMP.”²⁴⁹ However, the data does not support Qwest’s assertion.
11 There have been many shortened intervals implemented through CMP, and
12 according to Qwest’s own testimony, there have been no lengthened intervals.²⁵⁰
13 If Qwest actually needed the flexibility that it claims it does to lengthen intervals

²⁴⁶ Following are the URLs for the seven (7) CLEC change requests asking for reductions to provisioning and repair intervals that Qwest denied:

http://www.qwest.com/wholesale/cmp/archive/CR_PC110303-1.htm;
http://www.qwest.com/wholesale/cmp/archive/CR_5608142.htm;
http://www.qwest.com/wholesale/cmp/archive/CR_PC010705-1.htm;
http://www.qwest.com/wholesale/cmp/archive/CR_PC072604-1.htm;
http://www.qwest.com/wholesale/cmp/archive/CR_PC012703-1.htm;
http://www.qwest.com/wholesale/cmp/archive/CR_5371475.htm;
http://www.qwest.com/wholesale/cmp/archive/CR_PC031804-1.htm

²⁴⁷ Qwest Exhibit 1 (Albersheim Direct), p. 335, lines 13-14.

²⁴⁸ Qwest Exhibit 1 (Albersheim Direct), p. 35.

²⁴⁹ Qwest Exhibit 1 (Albersheim Direct), p. 35, lines 13-14.

²⁵⁰ Albersheim Oregon Direct (Qwest/1, Albersheim/33, line 23) (“so far, Qwest has only decreased intervals.”). See also, Qwest Response to Eschelon Petition for Arbitration, p. 38 (“To date, since Qwest obtained 271 approval, *all* such modifications have been reductions in the lengths of service intervals for various services and have been for the benefit of CLECs.”)

1 in response to shortened intervals, the data should show lengthened intervals
2 corresponding to at least some of these shortened intervals – but that is not the
3 case.

4 Qwest implies that changes to ILEC obligations like the ones that occurred in the
5 TRO and TRRO could result in the tradeoff between shortened and lengthened
6 intervals explained above, but Qwest then goes on to admit that “these changes
7 have not resulted in the service interval trade-off...”²⁵¹ These so-called examples
8 do not support Qwest’s point at all. When changes in law such as TRO/TRRO
9 occur, a contract amendment is needed anyway. Qwest’s choice of the TRO and
10 TRRO as an example of when CMP might be used is particularly off base, given
11 that Qwest is attempting to implement its TRO/TRRO changes unilaterally
12 without using its own CMP.²⁵²

13 **Q. MS. ALBERSHEIM HAS CLAIMED THAT ESCHELON IS NOT**
14 **OPPOSED TO THE USE OF CMP WHEN IT BENEFITS ESCHELON.**²⁵³
15 **IS MS. ALBERSHEIM’S CHARACTERIZATION OF ESCHELON’S**
16 **POSITION ACCURATE?**

²⁵¹ Qwest Exhibit 1 (Albersheim Direct), p. 35, line 23 – p. 36, line 1.

²⁵² Exhibit Eschelon 1 (Starkey Direct), pp. 85-104 (Secret TRRO PCAT example). *See also* Exhibit Eschelon 3.16 (Secret TRRO PCAT Chronology).

²⁵³ Albersheim Colorado Direct Testimony (Docket 06B-497T, 12/15/06), p. 30, lines 10-12 (“Q. But isn’t Eschelon opposed to the use of the CMP for changes in service intervals? A. No, not when it benefits Eschelon.”) Ms. Albersheim omitted this Q&A from her testimony in Utah, so it is unclear if she has changed her opinion. I address the issue here in case Ms. Albersheim raises it later in this proceeding.

1 A. No. Ms. Albersheim has insinuated that Eschelon would garner some special
2 benefit from there being a provision in the ICA requiring Commission approval
3 for lengthened intervals, but not for shortened intervals. This is not the case and
4 the two situations are not comparable. Qwest ignores one key piece of
5 information: if a CLEC submits a request for a shortened interval in CMP, Qwest
6 could ultimately reject it, forcing the CLEC to drop its request or pursue dispute
7 resolution.²⁵⁴ But if Qwest submits a change request to lengthen an interval in
8 CMP – an action that is likely to trigger CLEC disagreement – Qwest can
9 implement that change over CLEC objections. CLECs do not have the same
10 luxury as Qwest does when it comes to implementing changes in CMP – *i.e.*, the
11 ability to implement a change over the objections of others. Eschelon is seeking
12 approval of its language that allows shortened intervals in CMP without
13 Commission approval not to advantage Eschelon, but because there would be
14 agreement among CLECs and Qwest for this change (unlike a lengthened
15 interval), and therefore, no need for Commission intervention.

16 **Q. DOES MS. ALBERSHEIM MAKE OTHER ASSERTIONS THAT ARE**
17 **NOT SUPPORTED?**

18 A. Yes. Ms. Albersheim claims that Qwest needs the flexibility to increase intervals
19 without Commission approval because:

²⁵⁴ Qwest can also submit a notice for a shortened interval, but likely would not pursue it if Qwest thought that its competitors would garner a competitive advantage.

1 [T]he telecommunications industry in general and technology in
2 particular, change rapidly. There are times when Qwest and
3 CLECs should be able to flexibly and efficiently move forward
4 with changes to service intervals.²⁵⁵

5 First, there have unarguably been substantial changes in the telecommunications
6 industry and technology in general in past years, but Qwest has testified that to
7 date it never found the need to increase service intervals.²⁵⁶ There is no reason to
8 believe (and Ms. Albersheim does not provide a reason) that the changes to the
9 industry and technology that will occur in the future would trigger the need for the
10 ability for Qwest to impose longer intervals on CLECs without Commission
11 approval, especially when improvements in technology and systems should herald
12 reduced intervals based upon increased efficiencies.

13 For the most part, I agree with Ms. Albersheim's statement that there are times
14 that Qwest and CLECs should be able to flexibly and efficiently move forward
15 with changes to service intervals. Those times are when there is agreement about
16 the change, and I have shown that this has happened 39 times since 2002 (all
17 reductions), but no times at which increased intervals were needed.²⁵⁷ If
18 disagreement will result (as in the case of increased intervals, as Ms. Albersheim

²⁵⁵ Qwest Exhibit 1 (Albersheim Direct), p. 30, lines 18-20.

²⁵⁶ Albersheim Oregon Direct (Qwest/1, Albersheim/33, line 23) ("so far, Qwest has only decreased intervals."). See also, Qwest Response to Eschelon Petition for Arbitration, p. 38 ("To date, since Qwest obtained 271 approval, *all* such modifications have been reductions in the lengths of service intervals for various services and have been for the benefit of CLECs.")

²⁵⁷ Exhibit Eschelon 1 (Starkey Direct), pp. 117-118.

1 has acknowledged²⁵⁸), particularly when the change can have anticompetitive
2 effects, it is not “efficient” to require the parties to negotiate/arbitrate an ICA,
3 have Qwest lengthen an interval in CMP, potentially follow the dispute resolution
4 process of CMP, only to later come to the Commission for resolution. It would be
5 more efficient to require Commission approval in the first instance for
6 lengthening intervals.

7 **Q. DOES MS. ALBERSHEIM MAKE ANY MORE UNSUPPORTED**
8 **ASSERTIONS REGARDING ESCHELON’S PROPOSAL?**

9 A. Yes. Ms. Albersheim also makes the unsupported assertion that Qwest’s service
10 quality would be “hamstrung”²⁵⁹ by requiring Commission approval for
11 lengthened intervals. Not only is this assertion unsupported (*i.e.*, Ms. Albersheim
12 does not describe how it would be hamstrung), it also doesn’t make sense. The
13 result of a lengthened provisioning interval of the variety discussed in Issue 1-1 is
14 that Eschelon and its customers wait longer for service. Accordingly, it would be
15 Eschelon’s – not Qwest’s – service quality that would be “hamstrung” if Qwest’s
16 proposal is adopted. Even if there was a concern about Qwest’s service quality,
17 Qwest could make that case to the state commission when it requests the
18 lengthened interval.

²⁵⁸ Ms. Albersheim testified in the Eschelon-Qwest Minnesota arbitration proceeding: “It is likely that there will be disputes any time Qwest attempts to lengthen an interval.” (Albersheim Minnesota Rebuttal in Minnesota Docket P-5340, 421/IC-06-768, September 22, 2006, p. 35, lines 6-7).

²⁵⁹ Qwest Exhibit 1 (Albersheim Direct), p. 30, lines 23-24.

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

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

4 **Q. PLEASE PROVIDE A BRIEF SUMMARY OF ISSUE 9-31**
5 **(NONDISCRIMINATORY ACCESS TO UNES).**

6 A. If Eschelon is unable to obtain access to UNES on reasonable terms and
7 conditions and at cost based rates, Eschelon will be competitively disadvantaged
8 vis-à-vis Qwest. Eschelon proposes that the ICA language expressly state that
9 “access to” UNES includes “moving, adding to, repairing, and changing”²⁶⁰
10 UNES. Qwest makes four arguments against Eschelon’s proposed language: (1)
11 the closed ICA language fully captures Qwest’s legal obligations so no additional
12 language is needed to ensure nondiscriminatory access to UNES;²⁶¹ (2)
13 nondiscriminatory access to UNES does not include moving, adding to, repairing,
14 and changing UNES, because these are part of a yet unbuilt superior network, and
15 therefore TELRIC rates do not apply;²⁶² (3) Eschelon seeks to impose obligations

²⁶⁰ Proposed ICA Section 9.1.2 (closed language); Exhibit Eschelon 1 (Starkey Direct), p. 134. *See also* Exhibit Eschelon 2.24 [MN Arbitrators’ Report ¶132 (“Federal law requires that when a CLEC leases a UNE, the ILEC remains obligated to maintain, repair, or replace it. Unless and until the Commission or other authority determines to the contrary, these types of routine changes to UNES should be provided at TELRIC rates. Eschelon’s language should be adopted for this section.”) (citing 47 C.F. R. §51.309(c) & *TRO*, ¶639)].

²⁶¹ Qwest Exhibit 3 (Stewart Direct), p. 15, line 25 – p. 16, line 7; Qwest Exhibit 3 (Stewart Direct), p. 16, lines 23-25; and Qwest Exhibit 3 (Stewart Direct), p. 21, lines 3-5.

²⁶² Qwest Exhibit 3 (Stewart Direct), p. 16, lines 8-9; Qwest Exhibit 3 (Stewart Direct), p. 19, lines 3-5 and lines 7-9. *See also* Stewart Washington Direct Testimony (UT-063061; Sept. 29, 2006), p. 21, lines 12-15 [“Qwest is also concerned through this proposal, Eschelon may be attempting to obtain modifications to UNES without paying for them or by seeking TELRIC (‘Total Element Long Run Incremental Costs’) rates for services not within Section 251 of the Act and for which TELRIC rates do not apply.”].

1 without agreeing to compensate Qwest;²⁶³ and (4) Eschelon’s proposal is vague
2 and undefined.²⁶⁴ None of these claims has merit, which is evident by the fact
3 that Qwest’s own language includes these same terms, but identifies them as
4 “available” for UNEs at “applicable rates” instead of as “access to” UNEs at
5 TELRIC rates– meaning that Qwest has no problem with these terms being
6 identified in the contract so long as Qwest can assess tariff charges or other non-
7 TELRIC rates for them.

8 **Q. PLEASE ADDRESS THE CONCERNS QWEST RAISES WITH**
9 **ESCHELON’S PROPOSED LANGUAGE.**

10 A. First, Qwest has made it clear that it does not view these functions as related to
11 “access” to UNEs under Section 251 of the Act and argued that cost based rates
12 do not apply to them.²⁶⁵ However, Qwest is mistaken in that regard. And
13 because Qwest disagrees that these functions are governed by Section 251,
14 specific contract language is needed to make that obligation²⁶⁶ clear, or Qwest
15 will unilaterally impose its judgment (resulting in less UNE “access” and higher

²⁶³ Qwest Exhibit 3 (Stewart Direct), p. 16, lines 11-13. *See also* Stewart Washington Direct Testimony (UT-063061; Sept. 29, 2006), p. 21, lines 12-20.

²⁶⁴ Qwest Exhibit 3 (Stewart Direct), p. 16, lines 10-11; Qwest Exhibit 3 (Stewart Direct), p. 17, lines 15-16; Qwest Exhibit 3 (Stewart Direct), p. 18, lines 13-15; and Qwest Exhibit 3 (Stewart Direct), p. 21, line 6.

²⁶⁵ Qwest Exhibit 3 (Stewart Direct), p. 19, lines 3-5; *see also* Stewart Washington Direct Testimony (UT-063061; Sept. 29, 2006), p. 21, lines 12-15 (quoted in above footnote).

²⁶⁶ As discussed in my direct testimony (Exhibit Eschelon 1 (Starkey Direct), pp. 136-139) and in the discussion below, Qwest is required to provide nondiscriminatory access to the UNEs themselves as well as to the means of obtaining the UNEs, repairing the UNEs, and modifying the UNEs.

1 tariff rates).²⁶⁷ The fact that Qwest refuses to acknowledge that “access to UNEs”
2 includes “moving, adding to, repairing and changing” UNEs shows that the
3 general prescription to provide nondiscriminatory access to UNEs is not enough.

4 Second, Eschelon’s proposal, on its face, refutes Qwest’s assertion that Eschelon
5 is seeking to require Qwest to provide a “superior” network. Eschelon’s language
6 requires only “non-discriminatory access,” meaning that Qwest will provide
7 Eschelon with the same access that it provides to itself and its retail customers.
8 For instance, Qwest obviously performs maintenance of service for all customers
9 – one of the listed activities in Eschelon’s language – and must provide it for
10 UNEs on a nondiscriminatory basis. Qwest also cancels orders when requested –
11 another listed activity in Eschelon’s language – and there is no basis for Qwest to
12 claim that it need not do this for Eschelon’s UNEs. There is no legitimate claim
13 here that “moving, adding to, repairing, and changing” UNEs would require
14 Qwest to do something for Eschelon that it does not do for itself.

15 Third, Qwest states that Eschelon, through its proposed language in Section 9.1.2,
16 is attempting to obtain modifications to UNEs “without paying anything
17 additional for them,”²⁶⁸ which “could deny Qwest the cost recovery it is entitled
18 to under the Act for providing access to UNEs and services related to such

²⁶⁷ Qwest Exhibit 3 (Stewart Direct), p. 18, lines 1-4.

²⁶⁸ Qwest Exhibit 3 (Stewart Direct), p. 18, lines 3-4; and Qwest Exhibit 3 (Stewart Direct), p. 18, lines 8-9 (“without paying any additional compensation for them”).

1 access.”²⁶⁹ Qwest’s concern is unfounded, and indeed, Qwest does not explain
2 why Eschelon’s proposal contains this implication but other language in the same
3 paragraph that is agreed upon and closed²⁷⁰ – which Qwest itself relies upon²⁷¹ -
4 does not. Qwest’s argument is simply contrary to the manner in which the
5 contract is organized. In the ICA overall, general terms and conditions are laid
6 out first and then rate elements are discussed in separate sections, with the prices
7 appearing in Exhibit A. Qwest’s concern is already addressed in the general
8 Terms and Conditions section (Section 5) of the ICA. Specifically, Section 5.1.6
9 of the ICA provides in closed language: “Nothing in this Agreement shall prevent
10 either Party from seeking to recover the costs and expenses, if any, it may incur in
11 (a) complying with and implementing its obligations under this Agreement, the
12 Act, and the rules, regulations and orders of the FCC and the Commission. . . .”
13 When Section 5.1.6 is read together with the remainder of the contract,²⁷²
14 including Eschelon’s proposed language for Section 9.1.2, there is no reasonable
15 inference that Qwest will not recover its costs. However, the Commission should

²⁶⁹ Qwest Exhibit 3 (Stewart Direct), p. 19, lines 22-23; *see also* Stewart Washington Direct Testimony (UT-063061; Sept. 29, 2006), p. 21, lines 18-20 (“That result would clearly violate Qwest’s legal right to recover the costs it incurs to provide access to UNEs and interconnection, since UNE rates do not include the costs of these activities.”)

²⁷⁰ Qwest Exhibit 3 (Stewart Direct), p. 17, lines 3-6. Ms. Stewart erroneously shows the entire sentence as open (when presenting Eschelon’s proposal). Qwest’s presentation of the language (and Ms. Stewart’s description of Eschelon’s language as a new “addition,” *see* Qwest Exhibit 3 (Stewart Direct), p. 17, line 1, even though most of the sentence also appears in Qwest’s proposal) causes unnecessary confusion.

²⁷¹ Qwest Exhibit 3 (Stewart Direct), p. 20.

²⁷² In addition, if the rates are approved, they are reflected in Exhibit A or will be pursuant to Section 2.2 when approved. If the rates are unapproved, Section 22.6 provides a mechanism for Qwest to recover its costs. If Qwest seeks a right to charge a non-cost based rate in some other proceeding and prevails, then the change in law provisions of the ICA will apply.

1 be aware that the primary point is whether Qwest will be allowed to recover the
2 costs it incurs (*i.e.*, Eschelon’s proposal), or whether Qwest will be allowed to
3 assess higher, non cost-based rates for more and more of the standard activities
4 required to provide UNEs and/or finished services. In other words, Eschelon is
5 not trying to get something for free; rather it is simply trying to assure that it pays
6 cost based rates while being provided nondiscriminatory treatment with respect to
7 the activities Qwest regularly undertakes in servicing its own customers.

8 Finally, Qwest is left with its argument that Eschelon’s proposed phrase “moving,
9 adding to, repairing, and changing”²⁷³ is vague and undefined.²⁷⁴ Qwest’s
10 vagueness argument ignores the fact that *this very language appears in Qwest’s*
11 *own proposal as well.*²⁷⁵ The companies have agreed to identical language for the
12 phrase “moving, adding to, repairing, and changing.”²⁷⁶ Qwest does not explain
13 how the same phrase can be vague and undefined when proposed by Eschelon but

²⁷³ Proposed ICA Section 9.1.2 (closed language); Exhibit Eschelon 1 (Starkey Direct), p. 134.

²⁷⁴ Qwest Exhibit 3 (Stewart Direct), p. 17, lines 15-16; Qwest Exhibit 3 (Stewart Direct), p. 18, line 14; Qwest Exhibit 3 (Stewart Direct), p. 19, line 14; and Qwest Exhibit 3 (Stewart Direct), p. 19, line 22.

²⁷⁵ Qwest Exhibit 3 (Stewart Direct), p. 16, lines 19-22 (showing Qwest’s proposal, including the language “moving, adding to, repairing and changing the UNE,” which Ms. Stewart correctly shows as agreed upon and closed language because this same language is also in Eschelon’s proposal). As I indicated in my direct testimony (Exhibit Eschelon 1 (Starkey Direct), p. 135), Qwest has proposed the following language: (“Additional activities for Access to Unbundled Network Elements includes moving, adding to, repairing and changing the UNE (through *e.g.*, design changes, maintenance of service including trouble isolation, additional dispatches, and cancellation of orders) at the applicable rate.”). See E-mail of Qwest negotiations team (K. Salverda) to Eschelon negotiations team (Sept. 22, 2006) (p. 1 of enclosure); Qwest (Ms. Stewart) Minnesota Rebuttal, p. 15, lines 1-5 (Sept. 22, 2006); Multi-State ICA Draft (showing Qwest’s multi-state proposal for all six states, including Oregon, for Section 9.1.2 (April 25, 2007), p. 200.

²⁷⁶ See *id.*

1 not when proposed by Qwest. Instead, Qwest recognizes that “Qwest’s
2 alternative proposal still uses Eschelon’s undefined terms – ‘change,’ ‘add to’ and
3 ‘move,’” but claims that Qwest’s “proposal provides some assurance that Qwest
4 will not have to provide the multiple activities that potentially fall within these
5 terms without being compensated for them.”²⁷⁷ This shows that Qwest has no
6 difficulty deciphering what “moving, adding to, repairing, and changing” require
7 it to do, so long as it can charge a tariffed or other non-TELRIC based rate to do
8 those things. If Qwest is willing to charge TELRIC rates, then Qwest’s proposed
9 language would state that these activities are available at “TELRIC” or “cost-
10 based” rates. Qwest has specifically chosen to delete the reference to “access” to
11 UNEs and describe the rates as “applicable” rates to allow it to charge tariff or
12 other rates that are not cost based.

13 Given that the phrase moving, adding to, repairing, and changing is actually
14 agreed upon between the companies, the issue is not what these activities consist
15 of, but whether Qwest is required to perform them pursuant to Section 251(c)(3)
16 of the Act at cost-based rates. With respect to this issue, Qwest said: “Clear ICA
17 language is necessary so that the parties know what is expected of them under the
18 agreement and to avoid or minimize future disputes.”²⁷⁸ Eschelon asks the
19 Commission to address this issue so that the companies have a clear decision on

²⁷⁷ Qwest Exhibit 3 (Stewart Direct), p. 20, lines 19-21.

²⁷⁸ Qwest Exhibit 3 (Stewart Direct), p 18.

1 whether Qwest can charge non-TELRIC prices for these functions, which Qwest
2 has previously provided and provides today at TELRIC-based rates.

3 **Q. PLEASE ELABORATE ON THE FLAWS IN MS. STEWART’S**
4 **“SUPERIOR NETWORK” ARGUMENT.**

5 A. The FCC analyzed this “superior network” issue in its *TRO* Order. The FCC
6 found that incumbent LECs can be required to modify their facilities “to the
7 extent necessary to accommodate interconnection or access to network elements,”
8 but cannot be required “to *alter substantially* their networks in order to provide
9 *superior* quality interconnection and unbundled access.”²⁷⁹ Ms. Stewart contends
10 that Eschelon’s language, specifically the reference to “adding to” and “changing”
11 the UNE, could be read to require Qwest to alter substantially its network and
12 build a superior network. This claim does not square with the FCC’s discussion
13 on the matter. The FCC has determined that “adding to” and “changing UNEs”
14 are activities that do not render the modification a substantial alteration or
15 constitute the provision of a superior un-built network. *See TRO*, ¶¶ 634 and 635.

16 The FCC also stated:

17 Verizon contends that the Commission cannot require incumbent
18 LECs to *add* capacity or circuits, including constructing and
19 modifying loops by adding electronics, where these facilities do
20 not already exist. That is, Verizon argues that these modifications
21 are not necessary to provide access to existing UNEs, they are the
22 “creation of *new or improved* UNEs” that would unlawfully force
23 an incumbent LEC to provide superior quality access. In
24 particular, Verizon claims that the Commission is barred from

²⁷⁹ *TRO*, ¶ 34 (emphasis in original).

1 requiring incumbent LECs to build a new loop, place new line
2 cards or electronics on a circuit, and provide line conditioning,
3 because these are all “substantial alterations to an ILEC’s existing
4 network.” We disagree and, with the exception of constructing an
5 altogether new local loop, we find that requiring an incumbent
6 LEC to modify an existing transmission facility in the same
7 manner it does so for its own customers provides competitors
8 access only to a functionally equivalent network, rather than one of
9 superior quality. Indeed, incumbent LECs routinely add a drop for
10 a second line without objection...²⁸⁰

11 There is nothing in Eschelon’s language that would require Qwest to build an
12 altogether new loop for Eschelon. Rather, Eschelon’s language simply requires
13 Qwest to provide a “functionally equivalent network,” as required by the FCC.

14 In the Minnesota arbitration, the ALJs agreed with Eschelon. They said:

15 It is difficult to understand Qwest’s position that Eschelon’s
16 language might require Qwest to provide access to an “as yet
17 unbuilt, superior network” or that it might mean Qwest would be
18 unable to charge at all for making such changes. It is a real stretch
19 to find this kind of ambiguity in Eschelon’s language. Qwest has
20 pointed to nothing in the language that would require it to perform
21 an activity that is obviously outside of its existing § 251
22 obligations.²⁸¹

23 **Q. YOU MENTIONED A TARIFFED RATE. DOES QWEST’S LANGUAGE**
24 **ALLOW IT TO APPLY NON-TELRIC RATES, INCLUDING TARIFF**
25 **RATES, TO SERVICES NECESSARY FOR ACCESS TO UNES?**

26 **A.** Yes. As I described above, Qwest proposes to delete the reference to “access” to
27 UNEs and describe the rates as “applicable” rates to allow it to charge tariff rate

²⁸⁰ TRO, ¶ 639.

²⁸¹ Exhibit Eschelon 2.24 [MN Arbitrators’ Report, ¶130], affirmed by the Minnesota PUC (Exhibit Eschelon 2.25).

1 or other rates that are not cost based. Qwest’s proposal confirms its previously
2 stated position²⁸² that these services are not UNEs (*i.e.*, not within Section 251 of
3 the Act)²⁸³ so Qwest believes it may apply tariff and other non-TELRIC rates,
4 which Qwest refers to in its proposal as “applicable” rates.²⁸⁴ This position was
5 further memorialized in Qwest’s non-CMP notice issued on 8/31/06
6 (PROS.08.31.06.F.04159.Amendments.ComlAgree.SGAT), in which Qwest
7 added a tariff reference for the following rate elements: Additional Dispatch,
8 Trouble Isolation Charge, Design Change Charge, Expedite Charge, Cancellation
9 Charge, and Maintenance of Service Charge.²⁸⁵ Since these are the same
10 activities in Eschelon’s language for Issue 9-31,²⁸⁶ Qwest’s plan to charge tariff
11 rates with regard to these UNE related activities is crystal clear.

12 By asking the Commission to reject Eschelon’s proposed language, Qwest is
13 attempting to avoid altogether a determination of the issue of what constitutes
14 nondiscriminatory access to UNEs in this arbitration under the Commission’s

²⁸² Exhibit Eschelon 1 (Starkey Direct), pp. 127-130; *see also*, Exhibit Eschelon 3.53, p. 11 [quoting Qwest’s 11/18/05 CMP response indicating that Qwest claims expedites are not a UNE (*i.e.*, “Qwest does not sell Unbundled Loops to its end user customers. . . . so it is not appropriate to make a comparison to retail in this situation.”)].

²⁸³ Stewart WA Direct (UT-063061; Sept. 29, 2006), p. 21, lines 14-15 [“services not within Section 251 of the Act”].

²⁸⁴ Qwest Exhibit 3 (Stewart Direct), p. 16, line 22; and Qwest Exhibit 3 (Stewart Direct), p. 16, lines 23-28.

²⁸⁵ Process Notification PROS.08.31.06.F.04159.Amendments.ComlAgree.SGAT. I discussed this non-CMP notice at pages 145-146 of my direct testimony (Exhibit Eschelon 1 (Starkey Direct), pp. 129-130).

²⁸⁶ Qwest Exhibit 3 (Stewart Direct), p. 16, lines 19-22 (showing Qwest’s proposal, including the language “moving, adding to, repairing and changing the UNE,” which Ms. Stewart correctly shows as agreed upon and closed language because this same language is also in Eschelon’s proposal, see Exhibit Eschelon 1 (Starkey Direct), p. 134.

1 jurisdiction, while at the same time maintaining its tariff rate position outside of
2 arbitration (and outside of CMP). Qwest has already started to charge CLECs for
3 design changes for unbundled loops when it previously did not do so under the
4 ICA,²⁸⁷ even though it has admitted that it has no basis in the ICA (or even the
5 SGAT) to charge CLECs.²⁸⁸ Although Qwest currently does not appear to be
6 charging a tariffed rate for these design changes for loops, Qwest's negotiating
7 template indicates Qwest "uses rates from Qwest's Tariff FCC No. 1 Section 5,"
8 clearly opening the door for Qwest to attempt to apply tariff rates for these
9 activities.²⁸⁹ Qwest's suggestion that it does not intend to apply tariff rates for
10 design changes is belied by its own negotiations template.

11 Similarly, in states other than Washington, and applying one of the same legal
12 theories as it asserts in this arbitration and through its new negotiations template,
13 Qwest has already eliminated the availability of expedites for loop orders under
14 the existing Qwest-Eschelon ICA in 13 states by denying expedites of UNE
15 orders to Eschelon despite: (1) the presence of expedite language in the existing
16 approved ICA,²⁹⁰ (2) years of Qwest having provided expedited UNE loop orders

²⁸⁷ Exhibit Eschelon 2 (Denney Direct), pp. 41 & Exhibit Eschelon 2.1.

²⁸⁸ Stewart Minnesota Rebuttal Testimony (PUC Docket P-5340, 421/IC-06-768/OAH Docket 3-2500-17369-2, 9/22/06), p. 6, lines 27-28 ("Mr. Denney is correct in stating that neither Qwest's SGAT nor the parties' current ICA includes a design change charge for loops.") (Sept. 22, 2006).

²⁸⁹ Exhibit Eschelon 2.5, Exhibit A, § 9.20.13.

²⁹⁰ *See, e.g.*, Qwest-Eschelon existing approved Utah ICA, Attachment 5, Section 3.2.2.12 ("US WEST and CO-PROVIDER shall mutually develop expedite procedures to be followed when CO-PROVIDER determines an expedite is required to meet subscriber service needs."); Section 3.2.2.13 ("Expedites: US WEST shall provide CO-PROVIDER the capability to expedite a service order. Within two (2) business hours after a request from CO-PROVIDER for an expedited order, US

1 to Eschelon under the ICA,²⁹¹ and (3) the absence of any change in that same ICA
2 language allowing Qwest to stop providing this service.²⁹² In other words, Qwest
3 has substantially altered the manner by which it provides access to the UNE in
4 question in Utah and other states without having made any change in the ICA
5 terms or having requested any commission review or approval of that change.
6 That is why language specifically addressing this issue is so important in this ICA
7 – so as to answer the issue and avoid future disputes.

8 It seems clear that Additional Dispatches, Trouble Isolation, Design Changes,
9 Cancellations, and Maintenance of Service are next on the agenda, if this
10 Commission does not expressly rule otherwise. As important as the capability to
11 expedite loop orders is to the ability to compete meaningfully, the elimination by
12 Qwest of these other services under the ICA would effectively eliminate any
13 useful purpose of the UNE and threaten the ability of a CLEC to conduct
14 business. If Qwest is successful in excluding Eschelon’s proposed language from
15 Section 9.1.2 and if Qwest employs the same strategy as it has for expedites, it

WEST shall notify CO-PROVIDER of US WEST’s confirmation to complete, or not complete, the order within the expedited interval.”); Section 3.2.4.2.1 (“If CO-PROVIDER requests a due date earlier than the standard due date interval, then expedite charges may apply.”); Section 3.2.4.3.1 (“If CO-PROVIDER requires a due date earlier than the U S WEST offered due date and US WEST agrees to meet the CO-PROVIDER required due date, then that required due date becomes the committed due date and expedite charges may apply.”); and Section 3.2.4.4 (“Subsequent to the initial order submission, CO-PROVIDER may request a new/revised due date that is earlier than the committed due date. If U S WEST agrees to meet the new/revised due date, then that new/revised due date becomes the committed due date and expedite charges may apply.”)

²⁹¹ Exhibit Eschelon 3.53, p. 8 (citing PON MN510386TIFAC, completed on July 6, 2005).

²⁹² See discussion of expedites (Issue 12-67) in Eschelon’s Direct Testimony (Exhibit Eschelon 2 (Denney Direct), pp. 159-198).

1 will stop providing these other services to Eschelon under the ICA (Section 251),
2 even though these services have also long been available as part of access to
3 UNEs.

4 Although there is other language in the ICA addressing availability of these
5 services that logic would dictate means that Qwest must continue to provide them,
6 the same is true of expedited orders for loops. In Arizona, for example, despite
7 the clarity of the ICA's intent to allow Eschelon to order expedites for UNE
8 loops, Qwest denies²⁹³ that the following contract provision entitles Eschelon to
9 receive expedites for UNE loops: Qwest "shall provide CO-PROVIDER the
10 capability to expedite a service order."²⁹⁴ Qwest has indicated that it will charge
11 non-UNE rates to undertake such an expedite, even though the expedite is
12 specifically undertaken when accessing a UNE loop, and currently denies orders
13 for expedites on loop orders to any CLEC that will not pay that tariff rate.²⁹⁵
14 Therefore, Eschelon takes little comfort that equally clear provisions in the
15 contract relating to the other services would stop Qwest from following through
16 with its plans to alter its access to those UNEs. Qwest's position illustrates that
17 describing each of these services in other sections of the ICA is insufficient to
18 protect their availability pursuant to this Commission's jurisdiction without

²⁹³ Qwest Answer in Arizona Complaint Docket.

²⁹⁴ AZ Qwest-Eschelon ICA, Att. 5, §3.2.2.13 (Exhibit Eschelon 3.53, p. 4, footnote 9); *see also* Issue 12-67 in Eschelon's Direct testimony regarding Issue 12-67.

²⁹⁵ Exhibit Eschelon 2 (Denney Direct), pp. 159-198.

1 express language in Section 9.1.2 making clear that they are part of
2 nondiscriminatory access to UNEs.

3 **Q. HOW DOES QWEST'S NOTICE REGARDING CHANGES TO ITS**
4 **NEGOTIATIONS TEMPLATE IMPACT ESCHELON'S ICA WITH**
5 **QWEST?**

6 A. It would be extremely unfair and harmful to Eschelon's business to come to the
7 conclusion of this arbitration having obtained an approved ICA that contains
8 language relating to Additional Dispatches, Trouble Isolation, Design Changes,
9 Cancellations, Expedites, and Maintenance of Service (and other terms for which
10 Qwest has not yet deployed this strategy but later decides to do so), only to find
11 that Qwest will not make those services available pursuant to the Commission-
12 approved ICA without an amendment containing rates based on Qwest's tariff
13 (*i.e.*, as Qwest has done with expedites for loops).

14 Qwest will have then accomplished to effectively change its nondiscrimination
15 obligations under the Act, undermine the work done to ensure nondiscriminatory
16 access to UNEs in the 271 review proceedings,²⁹⁶ and increase its competitors'
17 costs – all without negotiating or arbitrating its tariff rate proposal, let alone the

²⁹⁶ Although since the 271 proceedings the FCC, in the TRO/TRRO, may have allowed less regulation for elements that ILECs no longer must offer on an unbundled basis, the reverse is also true. The FCC denied the ILECs' request for less regulation for elements that ILECs must continue to offer on an unbundled basis through filed and approved ICAs. The FCC's rejection of the ILECs' request means that UNE terms (including provisioning of UNEs "in a way that would make them useful" pursuant to the First Report and Order at ¶268) belong in an ICA and remain subject to regulation and Commission oversight.

1 rates themselves. Eschelon therefore proposes language in Section 9.1.2 relating
2 to nondiscriminatory access to UNEs that places the issue squarely before the
3 Commission. While Eschelon strongly opposes Qwest's intentions to assess tariff
4 rates for these types of services that clearly fall within Qwest's non-
5 discriminatory obligations regarding access to UNEs, Eschelon objects as well to
6 the manner by which Qwest is attempting to effectuate such a change (*i.e.*,
7 through silence in this proceeding and unilateral efforts elsewhere). As indicated
8 by the ALJs in Minnesota, "Qwest's proposed language is in fact more ambiguous
9 than Eschelon's, because it would leave unanswered the question whether routine
10 changes in the provision of a UNE would be priced at TELRIC or at some other
11 'applicable rate.'"²⁹⁷ If Qwest intends to charge Eschelon non-TELRIC rates to
12 access UNEs via these, or other, means (*e.g.*, Additional Dispatches, Trouble
13 Isolation, Design Changes, Cancellations, Expedites, and Maintenance of
14 Service), then it must request and gain approval from the Commission to do so,²⁹⁸
15 and terms and conditions to that effect must be included in the companies' ICA.
16 The Commission should not accept Qwest's invitation to leave the issue
17 unresolved, allowing Qwest to later implement its view, unilaterally, using the
18 ambiguity in its language to its own advantage.

²⁹⁷ Exhibit Eschelon 2.24 [MN Arbitrators' Report, ¶131], as affirmed by the Minnesota PUC (Exhibit Eschelon 2.25).

²⁹⁸ Exhibit Eschelon 2.24 [MN Arbitrators' Report, ¶134], as affirmed by the Minnesota PUC (Exhibit Eschelon 2.25) ("Qwest should not be permitted to charge non-TELRIC rates for these activities without the express approval of the Commission.")

1 **Q. QWEST TESTIFIES THAT “CONSISTENT WITH APPLICABLE LEGAL**
2 **REQUIREMENTS” QWEST WILL PROVIDE NONDISCRIMINATORY**
3 **ACCESS TO UNES.²⁹⁹ ARE YOU AWARE OF ANY RECENT EXAMPLE**
4 **TO THE CONTRARY?**

5 A. Yes. However, before I describe specific examples, it is important to note that an
6 ICA is meant to include specific terms and conditions, not only overarching
7 promises regarding Qwest’s intentions. Eschelon’s language puts meaning to
8 Qwest’s promise. Leaving for another day the issue of whether these particular
9 terms are required by the non-discriminatory treatment Qwest promises (*i.e.*,
10 Qwest’s position), will definitely lead to future disputes and problems. Given that
11 Eschelon has expended the necessary resources to arbitrate this dispute in this
12 proceeding, the issue should be resolved here.

13 **Q. ARE QWEST’S PROMISES AND ITS ACTIONS TWO DIFFERENT**
14 **THINGS?**

15 A. Yes. I explained in my direct testimony at pages 132-134³⁰⁰ that Qwest issued a
16 Level 3 CMP change that restricted the verbal CFA changes (or same day pair
17 changes) to one change on the due date.
18 (PROS.09.11.06.F.04161.P_&_I_Overview_V91, effective October 26, 2006).
19 With this notice, Qwest was creating a fallback position for itself, outside of the
20 Commission’s scrutiny in this arbitration, in the event Qwest does not prevail on

²⁹⁹ Qwest Exhibit 3 (Stewart Direct), p. 15, lines 25-27.

³⁰⁰ Exhibit Eschelon 1 (Starkey Direct), pp. 132-134.

1 its proposals for Issue 4-5 (and subparts). That is, Qwest’s notice showed that if
2 Qwest did not get the rate it wants (or apparently even if it does), it would simply
3 stop providing, or severely restrict, the service (in this instance, same day pair
4 changes). For same day pair changes, Qwest and Eschelon are already in contact
5 and coordinating the cutover, and the Qwest central office technician is already
6 *standing at the frame*.³⁰¹ The Qwest central office technician simply removes the
7 jumper from the bad CFA and reattaches to the new CFA.³⁰² In these situations,
8 the Qwest CO technician is already available and working on the cutover, and it
9 requires little, if any, additional time to switch CFAs.³⁰³ Despite these facts,
10 Qwest’s notice indicated that Qwest planned on making life difficult for CLECs
11 by requiring the Qwest central office technician who is already standing at the
12 frame (while Qwest is being paid for coordination)³⁰⁴ to refuse to take any
13 “further action” that day, requiring CLECs to submit a supplemental order for a
14 later due date, requiring the CLEC’s Customer to experience a delay while
15 waiting for that later due date, and imposing “additional charges” on CLECs,
16 including Eschelon – charges to pay Qwest for sending the technician back to the

³⁰¹ Exhibit Eschelon 2 (Denney Direct), pp. 50-51.

³⁰² *Id.*

³⁰³ *Id.*

³⁰⁴ Exhibit Eschelon 2 (Denney Direct), p. 50, lines 17-18. *See also* Exhibit Eschelon 2 (Denney Direct), p. 51, footnote 58.

1 frame to complete what he/she could have completed with very little effort during
2 the original dispatch.³⁰⁵

3 While Qwest later retracted this CMP notice,³⁰⁶ on October 26, 2006, Qwest
4 issued an internal notification (MCC) that it distributed to CLECs which again
5 limits CFA changes to one per circuit on the day of the cut, but directs Qwest
6 testers to use their “best judgment to determine if it is reasonable to expect the
7 next CFA change to resolve the issue” and if Qwest’s tester decides that this
8 expectation is not reasonable, the “CFA change should be refused and the CLEC
9 should be pointed to the supplemental process.” Qwest’s 10/26/06 document also
10 states that “If Qwest receives frequent attempts from a CLEC to verbally request
11 numerous changes on DD before a good CFA is found, the Tester should post a
12 Customer Jeopardy to the order and contact the CLEC’s Service Manager to
13 inform them of the situation.” Qwest claims (incorrectly) that it has always been
14 Qwest’s intent to limit CFA changes to one per circuit on the day to the cut, and
15 that this MCC notice only reiterates the current practice. Eschelon asked Qwest
16 to retract this MCC notice,³⁰⁷ explaining that this is a change in process and
17 should be issued as a Level 4 CMP change request, and that limiting CFA
18 changes on the day of the cut to one per circuit was not Qwest’s intent and that

³⁰⁵ PROS.09.11.06.F.04161.P_&_I_Overview_V91.

³⁰⁶ Qwest filed a notice on 10/20/06 (PROS.10.20.06.F.04281.Retract_CFA_P&I_OvrvwV91) to retract PROS.09.11.06.F.04161.P_&_I_Overview_v91.

³⁰⁷ Eschelon made this request in October, and Qwest has not responded.

1 Qwest has been performing multiple CFA changes for four years.³⁰⁸ The intent to
2 apply to multiple CFA changes is evident on the face of the change request. It
3 provides examples to illustrate the request, and one of those examples includes
4 multiple changes to one CFA. Qwest then issued a Qwest-originated Change
5 Request limiting CFA changes on the day of the cut to one per circuit and
6 implemented it over Eschelon's objection.³⁰⁹ Qwest's actions with regard to its
7 CFA change notices is further proof that Qwest's promises regarding
8 nondiscriminatory access to UNEs and its actions are two different things and that
9 the Commission should remedy this situation by making Qwest's obligations clear
10 in the contract under Issue 9-31.

11 **Q. PLEASE ELABORATE ON THE FLAWS IN QWEST'S CLAIM THAT**
12 **ESCHELON SEEKS TO IMPOSE OBLIGATIONS WITHOUT**
13 **AGREEING TO COMPENSATE QWEST.**

14 A. As I mentioned in my summary of this issue, the ICA contains provisions that
15 allow Qwest to recover its costs. I also explained in my direct testimony that
16 these are activities necessary for nondiscriminatory access to UNEs and are,
17 therefore, governed by Section 251 and should be priced at TELRIC.³¹⁰ Qwest
18 has not provided any indication that it does not provide these same activities for

³⁰⁸ Mr. Denney provides a CFA Change Chronology as Exhibit Eschelon 2.4. This exhibit also includes Qwest's CMP and MCC CFA change notices, Eschelon's request for Qwest to retract those notices and Qwest's 10/26/06 retraction notice. Qwest has not retracted its 10/26/06 MCC notice.

³⁰⁹ Exhibit Eschelon 3.85.

³¹⁰ Exhibit Eschelon 1 (Starkey Direct), pp. 127-130.

1 its own retail customers, and as explained above, these activities simply provide
2 Eschelon with a functionally equivalent network. If Qwest were able to price
3 these activities at rates that exceed their underlying costs, Qwest would
4 undermine the FCC's requirement to provide access to UNEs on terms, rates and
5 conditions that are nondiscriminatory. Finally, regarding Qwest's claim that
6 Eschelon is attempting to avoid paying Qwest, one only need to examine
7 Eschelon's position on Issue 4-5 (Design Changes for UNE loops) – one of the
8 "activities" in question – to understand that Eschelon is not attempting to avoid
9 compensating Qwest for these activities. Ms. Stewart is simply attempting to
10 raise a "red herring" issue in arguing that Eschelon is trying to get something for
11 nothing. Eschelon has more than demonstrated its willingness to pay cost-based
12 rates.

13 **Q. PLEASE ELABORATE ON THE FLAWS IN QWEST'S ARGUMENT**
14 **THAT ESCHELON'S PROPOSAL IS VAGUE AND UNDEFINED.**

15 A. Qwest complains that Eschelon's language is "broad," "undefined" and
16 "vague,"³¹¹ which it claims leads to two problems: First, Qwest argues that by
17 including a non-exhaustive list of UNE-related activities, the language could lead
18 to future disputes. Second, according to Qwest, Eschelon seeks to use vague terms
19 to circumvent the *TRO*. Both claims are invalid, and I discuss them separately
20 below.

³¹¹ Qwest Exhibit 3 (Stewart Direct), p. 18, lines 13-21. See also Qwest Exhibit 3 (Stewart Direct), p. 16, lines 10-11; p. 17, lines 15-16; p. 19, line 22; p. 20, line 18; and p. 20, line 23 (where Ms. Stewart states that Eschelon's proposal is "open-ended," and "undefined.")

1 **Q. DO YOU TAKE ISSUE WITH QWEST’S CLAIM THAT THE LIST OF**
2 **EXAMPLES SHOULD BE EXHAUSTIVE?**

3 A. Yes. Contrary to Qwest’s claim, Eschelon’s language is very specific about the
4 activities covered by Eschelon’s language. Eschelon’s language spells out
5 categories of activities that are necessary for access to UNEs [“moving, adding to,
6 repairing and changing the UNE”] and then goes on to provide a list of specific
7 examples of these activities [“design changes, maintenance of serving including
8 trouble isolation, additional dispatches, and cancellation of orders”]. This list of
9 examples should address concerns about Eschelon’s language being overly broad
10 or vague, but it appears that the “e.g.” concerns Qwest because it indicates that
11 the list is non-exhaustive. Qwest does not object to “e.g.” being used dozens of
12 other times in the ICA to refer to a non-exhaustive list, and there is no reason that
13 the inclusion of “e.g.” in Eschelon’s 9.1.2 would lead to any more disputes than
14 use of the same mechanism in other parts of the contract. The examples provide
15 clarifying information as to the meaning of the language.

16 Further, an exhaustive list is unnecessary and opens the door to Qwest arguing
17 that other services that are routinely provided today as part of access to UNEs
18 need not be provided because they are not on the list. Importantly, the FCC when
19 defining Qwest’s obligations regarding non-discriminatory access specifically
20 refused to prepare an exhaustive list of all such activities such an obligation

1 would entail.³¹² The fact that Eschelon identifies a few specific examples here,
2 while maintaining the overarching principle of non-discriminatory treatment, is
3 perfectly consistent with the FCC's approach in this regard.

4 That all said, the real problem with trying to identify every particular activity that
5 might fall within Qwest's obligation to provide non-discriminatory access is that
6 Eschelon cannot predict where Qwest might try to scale back what it must provide
7 to CLECs pursuant to Section 251 of the Act in the future. Prior to having
8 witnessed Qwest's actions regarding loop design changes and expedites, Eschelon
9 would not have anticipated that Qwest would suddenly claim that either design
10 changes for loops or expedites, which Qwest had routinely provided as part of
11 access to UNEs under the existing ICA, were not UNEs but instead, subject to
12 non-cost based rates. If it had to compile an exhaustive list beforehand, Eschelon
13 would not have known to include these services. Similarly, Eschelon cannot
14 anticipate what Qwest may be planning next. Instead, as demonstrated by the
15 FCC on this point, the language should set forth the rule, with examples to help
16 clarify the rule.

17 **Q. DO YOU ALSO DISAGREE WITH QWEST'S CLAIM THAT ESCHELON**
18 **SEEKS TO USE ALLEGEDLY VAGUE LANGUAGE TO CIRCUMVENT**
19 **THE TRO?**

³¹² TRO, ¶ 634.

1 A. Yes. Qwest alleges that, by using the term “add to,” Eschelon is seeking to
2 include installing “new cables and wires” to “violate the TRO.”³¹³ Like Qwest’s
3 claim that Eschelon seeks to impose obligations without agreeing to compensate
4 Qwest, Qwest’s claim that Eschelon seeks to violate the *TRO* is shown to be false
5 by the closed language in the contract itself. Qwest cites paragraph 632 of the
6 *TRO* to support its claim.³¹⁴ A simple comparison of the language of paragraph
7 632 of the *TRO* with closed ICA language shows that Qwest’s allegations about
8 Eschelon’s motives and the meaning of Section 9.1.2 are completely unfounded:

9 **Paragraph 632 of the TRO:**³¹⁵

10 “By ‘routine network modifications’ we mean that incumbent LECs must
11 perform those activities that incumbent LECs regularly undertake for their
12 own customers. Routine modifications, however, do not include the
13 construction of new wires (i.e., installation of new or buried cable) for a
14 requesting carrier.”

15 **ICA Section 4.0, Definition of “Routine Network Modification(s)”:**

16 “‘Routine Network Modification(s)’ means those activities of the type that
17 Qwest regularly undertakes for its own End User Customers. Routine
18 Network Modifications include . . . attachment of electronics (*except for*
19 building a Loop from scratch *by trenching* or pulling cable). . . . Routine
20 Network Modifications *do not include the installation of new aerial or*
21 *new buried cable for CLEC.*”³¹⁶

³¹³ Qwest Exhibit 3 (Stewart Direct), p. 19, lines 14-15 and p. 19, line 17. Ms. Stewart has also alleged that Eschelon may be “seeking to require Qwest to ‘add to’ a UNE by digging a trench and installing additional facilities.” Stewart Washington Direct Testimony (UT-063061; Sept. 29, 2006), p. 22, lines 1-2.

³¹⁴ Qwest Exhibit 3 (Stewart Direct), p. 19, line 13.

³¹⁵ See also TRO, ¶636 (“We do not find, however, that incumbent LECs are required to trench or place new cables for a requesting carrier.”)

³¹⁶ Proposed ICA Section 4.0 (definition of Routine Network Modification(s)) (closed language) (emphasis added).

1 Qwest is well aware of this ICA provision, which Eschelon and Qwest agreed
2 upon and closed some time ago, after the FCC issued the *TRO*. Yet, Qwest
3 affirmatively represents to the Commission that there “is no restriction in
4 [Eschelon’s] proposed language that would prohibit this type of demand even
5 though the demand would violate the *TRO*,”³¹⁷ without mentioning that there *is*
6 such a restriction *in the ICA*, and Eschelon has agreed to it.

7 **Q. IF QWEST’S STATED CONCERNS ABOUT ESCHELON DEMANDING**
8 **THE CONSTRUCTION OF NEW CABLES ARE ALREADY ADDRESSED**
9 **BY AGREED UPON LANGUAGE, WHAT, IN YOUR OPINION, IS THE**
10 **ACTUAL REASON QWEST IS SO OPPOSED TO ESCHELON’S**
11 **PROPOSED LANGUAGE?**

12 A. Qwest wants the contract language to be as vague as possible on this point
13 because Qwest wants the ability, after this arbitration is over and an ICA is
14 signed, to continue to scale back existing UNE activities based solely on its
15 discretion. It is for this reason that Qwest is stretching for any reason to oppose
16 Eschelon’s proposed language without being obvious that it wants no language at
17 all. However, Eschelon’s language should not be rejected for a false reason.
18 Even if the Commission ultimately decides that Qwest somehow has the ability to
19 severely restrict activities it undertakes for UNEs (*i.e.*, the same activities it
20 undertakes to support its retail services), then a specific and determinative

³¹⁷ Qwest Exhibit 3 (Stewart Direct), p. 19, lines 15-17.

1 decision should be made on that issue and the ICA should specifically reflect that
2 decision. The Commission must reject Qwest's invitation to simply reject
3 Eschelon's proposed language without adding any additional specificity. Qwest's
4 arguments completely ignore the entire structure, content, and context of the ICA
5 so as to read Eschelon's proposal for Section 9.1.2 in isolation and find that it
6 means something it does not.

7 Contrary to Qwest's assertions that Eschelon's request is "undefined,"³¹⁸
8 Eschelon has been very up-front that it is seeking to continue to receive these
9 functions as part of access to UNEs at TELRIC-based rates, just as it has received
10 them as part of access to UNEs under the existing ICA.³¹⁹

11 **Q. MS. STEWART REFERS TO YOUR PREVIOUS TESTIMONY IN**
12 **HEARINGS THAT THE PHRASE MOVE, ADD TO, AND CHANGE**
13 **COULD POTENTIALLY INCLUDE THOUSANDS OF ACTIVITIES.³²⁰**
14 **WHAT IS YOUR BASIS FOR THAT TESTIMONY?**

15 A. I was only making the point that the general activities of moving, adding to, and
16 changing UNEs may include many "sub-activities" and even "sub-sub-activities"
17 that may be performed. I'll provide examples of this below. Although Qwest
18 uses the same list of examples in its proposed language, Qwest has criticized
19 Eschelon's alternative proposals because they provide examples rather than an

³¹⁸ Qwest Exhibit 3 (Stewart Direct), p. 19, line 7.

³¹⁹ Regarding design changes, please refer to Mr. Denney's discussion of Issue 4-5.

³²⁰ Qwest Exhibit 3 (Stewart Direct), p. 18, line 18.

1 exhaustive list of moves, adds, changes.³²¹ As discussed above, if an exhaustive
2 list were adopted in ICA language, the language may build in an incentive for
3 Qwest to separately identify one or more of those sub-activities or sub-sub-
4 activities to circumvent the use of TELRIC based costs when TELRIC rates
5 apply.³²² By simply re-naming an activity or referring to a sub-activity, Qwest
6 could argue that it is not encompassed in the exhaustive list.

³²¹ Exhibit Eschelon 1.6, Arizona arbitration, Transcript Vol. II (March 20, 2007), p. 199, lines 14-16 (Ms. Stewart) (“However, one of our concerns is this was so open-ended, and particularly the e.g., meaning that this is an example, not the definitive list. . .”).

³²² During a time period when the Minnesota Commission had approved a single NRC for installations of a loop, Qwest suddenly stopped processing Eschelon’s orders (in Minnesota, Arizona, and Utah) for loop installations, even though Qwest had previously been processing those orders under the existing ICA. Qwest said that it had conducted a scrub on interconnect contracts over the weekend and found that Eschelon did not have coordinated loop installation options in its contract. When Eschelon escalated this extremely disruptive conduct, Qwest said that Eschelon would need to sign a contract amendment to add those options to its ICA. (Email from Cindy Buckmaster of Qwest to Eschelon, including Bonnie Johnson, dated Feb. 28, 2001.) The issue of whether the single loop installation rate approved at that time by the Minnesota commission included testing, coordination, etc. (*i.e.*, the activities Qwest later identified separately and for which it included a separate charge in its amendments) had been litigated previously, however, in Minnesota as part of the rate compliance filing. When making its compliance filing, Qwest argued that restrictions should be placed on the single loop installation rate, such as requesting that the rate be treated as a basic rate not including coordination, dispatch, and testing (see Qwest’s proposed compliance run in MN Docket No. P442, 5321, 3167, 466, 421/CI-96-1540). Qwest asked the Commission to adopt such restrictions. Eschelon (then Cady) filed opposing comments (Oct. 19, 1999). The Commission refused to adopt Qwest’s restrictions and instead adopted the single rate for all installation of loops. Despite the Commission’s ruling on this issue, Qwest unilaterally disrupted Eschelon’s ordering to attempt to force Eschelon to sign an amendment giving up its right to that single NRC and having to pay separate unapproved charges for multiple sub-activities. When Qwest later properly obtained rates (which were lower than those Qwest unilaterally attempted to impose when disrupting Eschelon’s ordering) for at least some of these separate activities through cost proceedings (instead of disrupting its orders), Eschelon paid the approved rates. There should be no incentive for use of the order disruption in the future. Under Qwest’s proposed language, however, Qwest will only provide access to moves, adds and changes at unspecified “applicable rates.” If a disagreement arises as to which rate is applicable, nothing in Qwest’s language states that Qwest will continue to perform the activity. The same old problem of Qwest demanding an unnecessary ICA amendment could arise, with Qwest refusing to perform the activity until Eschelon signs an amendment agreeing to Qwest’s rate. (With expedites, for example, Qwest requires an ICA amendment to obtain expedites at its tariff rate, even though the existing ICA provides for expedites, as explained by Mr. Denney regarding Issue 12-67.)

1 As I said, many “sub-activities” and even “sub-sub-activities” may be performed
2 when accessing UNEs. For example, “Coordinated Installation Without Testing”
3 is a method of installation that Qwest offers for loops. In a pending cost case in
4 Minnesota, Qwest submitted a non-recurring cost (“NRC”) study for Loop
5 Coordinated Installation Without Testing that identifies 73 different steps that are
6 performed by eight different functional areas within Qwest when Qwest provides
7 coordinated installation of a loop without testing at that non-recurring charge.³²³
8 Supporting documentation provided by Qwest for its cost study lists other
9 activities that are included within many of these 73 steps. If each step and sub-
10 step identified for this and every other rate were added together,³²⁴ the total
11 number would quickly become a large number for activities involved in a
12 relatively few number of cost-based rates. The larger number of specified
13 activities does not mean that each one is not part of accessing the UNE at cost-
14 based rates.

15 Another example involves the rates for loop conditioning (either recurring or non-
16 recurring). Eschelon’s language requires cost-based rates without specifying
17 whether recovery is through recurring or non-recurring rates, because the
18 Commission may allow recovery through one or both types of rates. For
19 example, this Commission has provided for cost recovery for loop conditioning

³²³ A copy of Qwest cost study is attached as part of Exhibit Eschelon 2.29.

³²⁴ Another example of a Qwest cost study for a single rate that identifies many sub-activities is its cost support for the UDIT design change charge. See Exhibit Eschelon 2 (Denney Direct), p. 54 (chart showing 25 activities for a single OR UDIT design change charge).

1 using two types (recurring rate for the loop and NRC for loop conditioning),³²⁵
2 whereas the Oregon Commission did not adopt a separate NRC because it found
3 that “loop conditioning and other similar outside plant rearrangement activities
4 are included in the maintenance factors to develop monthly recurring UNE
5 rates.”³²⁶ If each outside plant rearrangement activity were separately identified,
6 the total number of activities would quickly increase. Regarding the activities for
7 the examples used in the agreed upon portion of the language for Section 9.1.2,³²⁷
8 Qwest has complained that “these activities are not included” in recurring rates
9 for UNEs³²⁸ without mentioning that (like loop conditioning in Utah³²⁹) they *are*
10 included in the non-recurring rates (NRCs)³³⁰ and that Eschelon agrees in the ICA
11 to pay the Commission-approved NRCs for these activities.³³¹ Qwest later

³²⁵ Exhibit A §§9.2.2.4 & 9.2.2.5.

³²⁶ OR Cost Docket, Order No. 03-085, Docket No. UT 138/UT 139, pp. 14-15.

³²⁷ See Exhibit 3 to Eschelon Petition (Joint Disputed Issues Matrix), pp. 52-53 (showing the same examples in agreed upon language in the same parenthetical used in the language proposals of both companies for Issue 9-31).

³²⁸ See Stewart Surreb., WA Exh. No. 61, p. 14, lines 1-5 (specifically referring to maintenance of service including trouble isolation, additional dispatches, and cancellation of orders).

³²⁹ Exhibit A §§9.2.2.4 & 9.2.2.5.

³³⁰ Exhibit A §9.20.5 (maintenance of service), §9.20.11 (additional dispatch), §9.20.15 (cancellation charge), §12.4 (trouble isolation – which states “see 9.20”). Except for Cancellation (which has a note of “3” indicating an ICB rate), each of these NRCs has a note of “C” in Exhibit A. Note “C” refers to Commission-approved rates, and the corresponding note at the end of Exhibit A provides the docket number (“Cost Docket 00-0049-105”).

³³¹ See, e.g., agreed upon language in ICA Section 4.0 (definition of Maintenance of Service charge, referring to the charges set forth in Exhibit A) and ICA Sections 9.2.5.2, 9.2.5.2.1, 9.2.5.3, 9.6.4.1.5, 9.7.3.4, 9.21.3.3.1, 9.23.4.7.1.2, 9.24.3.3.1, 12.4.1.5, 12.4.1.5.1, 12.4.1.6, as well as the rates in Exhibit A noted above. Although Qwest has speculated about arguments that other CLECs opting in to the agreement may make at a later date (see Stewart WA Surreb., Exh. No. 61, p. 14, lines 8-10), any CLEC opting in to the ICA would likewise be bound by these provisions requiring payment of these Commission-approved rates in Exhibit A for these activities. In contrast, despite the presence of Commission-approved rates in the ICAs in various states, Qwest at least temporarily

1 admitted that, to charge for an activity, Qwest must show that the cost of
2 performing that activity is not already recovered in an existing rate.³³² When
3 Qwest makes or has made that showing, Eschelon agrees to pay the approved rate
4 (whether recurring or NRC).³³³

5 Rather than attempt to list every conceivable activity, sub-activity, and sub-sub-
6 activity that Qwest might perform to provide Eschelon with access to UNEs,
7 Eschelon proposed terms, “move,” “add to,” and “change,” that are generally-
8 accepted in the industry to describe Qwest’s obligations in that regard. Qwest’s
9 proposal, in contrast, because it does not include these activities within the
10 definition of access to UNEs, would allow Qwest to claim that an activity that it
11 has performed at a TELRIC rate as part of providing a loop is a “new product” for
12 which Eschelon must pay a tariffed rate.

13 **Q. WHEN THERE ARE POTENTIALLY MANY ACTIVITIES, HOW CAN**
14 **THE COMMISSION BE CONFIDENT THAT ALL OF THOSE**
15 **ACTIVITIES SHOULD BE SUBJECT TO TELRIC-BASED RATES?**

took the negotiation position that it could declare the Commission had no jurisdiction so those rates would be inapplicable and retail tariff rates would apply. See, e.g., Exhibit Eschelon 1 (Starkey Direct), p. 128, line 9 – p. 129, line 20; Exhibit Eschelon 2.24, MN Arbitrators’ Report, ¶ 133. Qwest’s actual conduct, therefore, prompted the need for greater specificity in Section 9.1.2 about access to UNEs being provided at TELRIC rates. If Qwest were to later obtain a different ruling, the change in law and pricing provisions of Sections 2.2 and 22 would apply. See *id.*, MN Arbitrators’ Report, ¶ 132 (“Unless and until the Commission or other authority determines to the contrary, these types of routine changes to UNEs should be provided at TELRIC rates.”).

³³² Stewart, WA Transcript, p. 193, line 23 – p. 194, line 2.

³³³ See ICA Sections 2.2 and 22; see also sections of Exhibit A cited in above FN. The structure of a rate to perform an activity (i.e., whether the cost is recovered explicitly, through an NRC, or implicitly through a recurring charge) is an issue that is separate from whether the activity must be performed at cost-based rates. Eschelon’s language for Section 9.1.2 addresses the latter question.

1 A. Eschelon’s language for Section 9.1.2 is limited in two important ways. First, that
2 language only applies to activities that Qwest performs in connection with
3 providing UNEs. Eschelon’s proposed language for Section 9.1.2 specifically
4 states that “Access to Unbundled Network Elements includes moving, adding to,
5 repairing and changing *the UNE*.” If Qwest performs an activity in order to
6 provide something that is not a UNE, such as a private line service, Section 9.1.2
7 does not apply to such an activity.

8 Second, the language requires nondiscrimination. The activities are defined by
9 the activities which Qwest performs for itself and its end user customers. Ms.
10 Stewart complains that the activities may change over time or as technology
11 changes.³³⁴ The same is true, however, of the activities that Qwest performs for
12 itself and its retail customers. Qwest will be able to identify these activities as
13 changes occur, because they will also occur for Qwest and its retail customers.

14 **VI. SUBJECT MATTER NO. 16. NETWORK MAINTENANCE AND**
15 **MODERNIZATION**

16 *Issues Nos. 9-33 and 9-34: ICA Section 9.1.9*

17 **Q. PLEASE BRIEFLY SUMMARIZE THE NETWORK MAINTENANCE**
18 **AND MODERNIZATION ISSUES (ISSUES 9-33 AND 9-34).**

19 A. The two network maintenance and modernization issues are (1) whether minor
20 changes in transmission parameters include changes that adversely affect the End

³³⁴ See, e.g., Oregon Rebuttal Testimony of Karen Stewart (Oregon PUC Docket ARB 775), p. 16.

1 User Customer's service on more than a temporary or emergency basis [Issue 9-
2 33] and (2) whether, in situations when Qwest makes changes that are specific to
3 an End User Customer, Qwest should include certain customer specific
4 information in the notice [Issue 9-34].

5 Regarding Issue 9-33, the ICA should make clear that the SGAT term "minor"
6 actually means minor by providing that "minor changes to transmission
7 parameters" should not adversely affect service to Eschelon's End User
8 Customers. The customer's service worked before Qwest makes a minor change,
9 and it should work after Qwest makes a minor change. "Minor changes" to
10 transmission parameters should not degrade or disrupt a customer's service on an
11 ongoing basis. Qwest's suggestion in negotiations that "minor changes" may
12 include ongoing service disruption,³³⁵ combined with Qwest's continued refusal
13 to agree to Eschelon's language or the Minnesota Department of Commerce's
14 alternative language, however, indicates that specific language in the ICA is
15 needed on this point to avoid future disputes. Eschelon's proposal for Issue 9-33
16 is reasonable and is not an attempt to hold Qwest to a zero outage standard when
17 making changes in its network. Eschelon's proposed language specifically states
18 that there may be "a reasonably anticipated temporary service interruption" when
19 "needed to perform the work," and it also recognizes that emergencies may occur
20 and addresses restoration of service in those situations. Qwest has identified only

³³⁵ Exhibit Eschelon 1 (Starkey Direct), p. 155, lines 4-9.

1 two situations when Qwest claims that it may legitimately disrupt the customer's
2 service with more than minor changes to transmission parameters in non-
3 temporary or non-emergency situations: (1) copper retirement;³³⁶ and (2) a single
4 situation in which a CLEC intends to use a loop outside of the parameters of the
5 loop ordered by CLEC.³³⁷ Eschelon's proposed language takes care of both.
6 First, copper retirement is already addressed in closed language. Second, closed
7 language in Section 9.1.9 already states that "Network maintenance and
8 modernization activities will result in UNE transmission parameters that are
9 within transmission limits of the UNE ordered by CLEC." Ms. Stewart's example
10 contradicts this language, to which Qwest has agreed, because it assumes that the
11 transmission limits will be outside of the UNE ordered by CLEC.³³⁸ Qwest is
12 protected from improper use of UNEs by this language, as well as other contract
13 provisions defining the UNEs.³³⁹

14 Regarding Issue 9-34, when Qwest makes changes that are specific to an
15 Eschelon End User Customer, Qwest should provide sufficient information to
16 inform Eschelon where the changes will occur so that Eschelon may better assist
17 Eschelon customers in Utah adversely affected by Qwest network changes. This
18 is particularly true when the information is readily available, as provided in the

³³⁶ See closed language for Issue 9-33(a) in Section 9.1.9.

³³⁷ Qwest Exhibit 3 (Stewart Direct), p. 27, line 6 ("If the CLEC had ordered the proper loop").

³³⁸ Ms. Stewart's example is addressed in more detail below.

³³⁹ See *e.g.*, ICA Section 9.2.2.2 (Analog (voice grade) Unbundled Loops are available as a two-wire or four-wire voice grade, point-to-point configuration "suitable for local exchange type services").

1 approved Minnesota language that Eschelon has offered in Utah as well. The
2 ALJs in the Minnesota arbitration proceeding found (as upheld by the Minnesota
3 Commission) that “if this information is readily available, Qwest should provide
4 it”³⁴⁰ and Eschelon has shown that Qwest provides the information Eschelon is
5 requesting to itself.³⁴¹ This Commission should likewise find that Qwest should
6 provide this information to Eschelon.

7 **Q. DOES QWEST ACCURATELY REPRESENT ESCHELON’S**
8 **PROPOSALS IN ITS DIRECT TESTIMONY?**

9 A. No. Before the filing of direct testimony in this matter, Eschelon modified its
10 multi-state proposals in an attempt to be responsive to concerns stated by Qwest
11 at the Minnesota hearing during the week of October 16-20, 2006.³⁴² On October
12 31, 2006, Eschelon provided an alternative proposal to Qwest for Issue 9-33
13 (adding a parenthetical that states: “other than a reasonably anticipated service
14 interruption, if any, needed to perform the work”). In its direct testimony on June
15 29, 2007, however, Qwest addresses only Eschelon’s earlier proposal without any
16 discussion of its alternative proposal for Issue 9-33.³⁴³ On October 25, 2006,
17 Eschelon provided modified language (replacing “if End User Customer specific”

³⁴⁰ Exhibit Eschelon 2.24 and Exhibit Eschelon 2.25.

³⁴¹ Exhibit Eschelon 1.3.

³⁴² Eschelon’s proposals, as modified, appear in Eschelon’s direct testimony (Exhibit Eschelon 1 (Starkey Direct), p. 146) regarding Issues 9-33 and 9-34.

³⁴³ Qwest Exhibit 3 (Stewart Direct), p. 24, lines 15-16.

1 with “if the changes are specific to an End User Customer”) for Issue 9-34.³⁴⁴
2 Nonetheless, Qwest quotes the old language in its direct testimony without any
3 recognition that Eschelon has compromised to address Qwest’s stated concern.³⁴⁵
4 Despite Eschelon’s express use in its new language of “an” before the *singular*
5 use of “End User Customer,” for example, Qwest continues to argue that
6 “Eschelon’s proposed language apparently would require Qwest to provide to
7 Eschelon a list of every Eschelon customer address and every circuit that is used
8 by Eschelon to serve its *customers for an entire exchange. . . .*”³⁴⁶ Qwest has not
9 countered with any allegedly better way to limit the provision to situations that
10 are specific to an individual End User Customer. And, it has not pointed to any
11 reason to reject such a limited provision. Instead, Qwest chooses to ignore
12 Eschelon’s reasonable proposal and make the same old arguments, which do not
13 even apply to the current proposed language.

14 As a result, Qwest testifies against something that Eschelon has clearly indicated
15 to Qwest it is not even requesting. Qwest’s approach provides no incentive to
16 compromise and shifts the focus away from the real issue. This is not an isolated
17 incident. Ignoring the language of Eschelon’s proposal is a trend in Qwest’s

³⁴⁴ With respect to this language, Eschelon said to Qwest on October 25, 2006: “Regarding our discussion of ‘if End User Customer specific’ on 1/16/06 and at the hearing, we revised the phrase to make the intent that we discussed in negotiations even more clear. . . . If you have a phrase that you prefer which you are authorized to offer, please send us a counter proposal.” Qwest has not countered with any allegedly better way to limit the provision to situations that are specific to an individual End User Customer.

³⁴⁵ Qwest Exhibit 3 (Stewart Direct), p. 30, line 30 – p. 31, line 3.

³⁴⁶ Qwest Exhibit 3 (Stewart Direct), p. 31, lines 6-9 (emphasis added).

1 testimony. Therefore, when analyzing Qwest’s arguments, each claim made by
2 Qwest should be compared to the actual language of each Eschelon proposal.

3 **Issue 9-33: Affect on End User Customers - Section 9.1.9**

4 **Q. QWEST CLAIMS THAT ESCHELON’S LANGUAGE FOR ISSUE 9-33**
5 **COULD IMPEDE QWEST’S ABILITY TO MODERNIZE AND**
6 **MAINTAIN ITS NETWORK.³⁴⁷ IS THIS AN ACCURATE**
7 **CHARACTERIZATION OF ESCHELON’S LANGUAGE?**

8 A. No. Ms. Stewart misconstrues Eschelon’s proposal. First, the agreed to language
9 in Section 9.1.9 expressly allows Qwest to perform network maintenance and
10 modernization activities [“In order to maintain and modernize the network
11 properly, Qwest may make necessary modifications and changes to the UNEs in
12 its network on an as needed basis”]. The agreed to language also provides that
13 such changes “may result in minor changes to transmission parameters,” but does
14 not define minor. Eschelon’s proposal reasonably states that changes to
15 transmission parameters will not either adversely affect end user customers on a
16 non-temporary basis (proposal #1) or result in unacceptable changes on a non-
17 temporary basis (proposal #2). In addition, Eschelon’s modified proposal for
18 Issue 9-33 clarifies that an anticipated temporary service interruption needed to
19 perform that work would not be considered “adversely affecting” under Section
20 9.1.9. Furthermore, Eschelon’s language carves out copper loop retirement and

³⁴⁷ Qwest Exhibit 3 (Stewart Direct), p. 29, lines 3-4 (“Eschelon’s proposed language...could effectively prohibit Qwest from upgrading its network...”).

1 emergencies – two instances in which the network change could have an adverse
2 effect on End User Customers – and refers to terms governing those changes in
3 other sections of the ICA.

4 The key is that the agreed to Section 9.1.9 states that “such changes may result in
5 *minor* changes to transmission parameters”³⁴⁸ and Eschelon’s proposal recognizes
6 that “minor” changes to transmission parameters should by definition not result in
7 adverse effects on End User Customers. Whatever else “minor” may be, a change
8 is certainly not minor if it causes a permanent customer outage. Therefore,
9 Eschelon’s proposal expressly allows Qwest to maintain or modernize its network
10 (even when these activities may cause a temporary service interruption needed to
11 perform the work), and even recognizes that certain maintenance and
12 modernization activities could have an adverse effect on End User Customers.
13 Therefore, Ms. Stewart is incorrect when she states that, “Under Eschelon’s
14 proposed language, Qwest could only upgrade its network if Qwest was certain
15 that the upgrade would have no impact on Eschelon end users.”³⁴⁹

16 **Q. DOES MS. STEWART AGREE THAT NETWORK MAINTENANCE AND**
17 **MODERNIZATION ACTIVITIES SHOULD BE PERFORMED**
18 **WITHOUT ADVERSELY AFFECTING END USER CUSTOMERS?**

³⁴⁸ Emphasis added.

³⁴⁹ Qwest Exhibit 3 (Starkey Direct), p. 29, lines 5-7.

1 A. It appears so. She explains that Qwest will “maintain and update its network in a
2 *seamless* manner for its millions of customers.”³⁵⁰ If Qwest performs these
3 activities in a “seamless” manner, as Ms. Stewart testifies, Qwest should have no
4 problem with putting this commitment in the ICA relating to changes in
5 transmission parameters. That Qwest will not agree to this language raises
6 serious questions as to whether Qwest’s network maintenance and modernization
7 activities will be seamless to End User Customers in the future.

8 **Q. DOES MS. STEWART RAISE ANY OTHER CONCERNS ABOUT**
9 **ESCHELON’S LANGUAGE FOR SECTION 9.1.9 (ISSUE 9-33)?**

10 A. Yes. Ms. Stewart states that Eschelon’s “adversely affect” language is not tied to
11 ANSI standards and is vague.³⁵¹ Qwest’s position is that, so long as Qwest meets
12 ANSI standards, the Commission and Eschelon need not worry about whether
13 Eschelon’s End User Customers actually have working service over Qwest’s
14 UNEs.

15 **Q. PLEASE ADDRESS MS. STEWART’S CLAIM THAT THE TERM**
16 **“ADVERSELY AFFECT” IS NOT TIED TO INDUSTRY STANDARDS**
17 **AND IS VAGUE.**

³⁵⁰ Qwest Exhibit 3 (Stewart Direct), p. 24, lines 26-27 (emphasis added).

³⁵¹ Qwest Exhibit 3 (Stewart Direct), p. 25, lines 1-3. *See also* Qwest Exhibit 3 (Stewart Direct), p. 27.

1 A. Ms. Stewart is wrong. Eschelon explained in its direct testimony that Eschelon’s
2 proposal is grounded in the FCC rules.³⁵² Specifically, 47 CFR § 51.319(a)(8)
3 states:

4 (8) *Engineering policies, practices, and procedures.* An incumbent
5 LEC shall not engineer the transmission capabilities of its network
6 in a manner, or engage in any policy, practice, or procedure, that
7 *disrupts or degrades* access to a local loop...

8 As explained in Eschelon’s direct testimony, the FCC’s rule prohibits Qwest from
9 making a change to transmission parameters that “disrupts” or “degrades” access
10 to the loop over which a CLEC provides service to its End User Customer. Note
11 that this FCC rule is not tied to ANSI standards and does not delineate the degree
12 of degradation that would be prohibited – it simply prohibits degradation and
13 disruption. Eschelon’s language requires the same.

14 Furthermore, 47 CFR § 51.316(b), entitled “conversion of unbundled network
15 elements and services,” states:

16 (b) An incumbent LEC shall perform any conversion from a
17 wholesale service or group of wholesale services to an unbundled
18 network element or combination of unbundled network elements
19 without ***adversely affecting*** the service quality perceived by the
20 requesting telecommunications carrier's end-user customer.
21 (emphasis added)

22 As explained in Eschelon’s direct testimony, the FCC uses the term “adversely
23 affecting” in FCC Rule 51.316(b) to describe the ILECs’ obligations regarding
24 performing conversions of the CLEC’s UNEs the same way Eschelon’s proposal

³⁵² Exhibit Eschelon 1 (Starkey Direct), pp. 150-152.

1 uses the term to describe Qwest’s obligation regarding Qwest performing network
2 maintenance and modernization activities on Eschelon’s UNEs.

3 **Q. MS. STEWART CLAIMS³⁵³ THAT ESCHELON’S LANGUAGE HAS THE**
4 **WRONG FOCUS. ACCORDING TO HER, THE PROPER FOCUS IS ON**
5 **THE SERVICE QWEST PROVIDES TO ESCHELON, NOT THE**
6 **SERVICE THAT ESCHELON’S END USER CUSTOMERS**
7 **EXPERIENCE. IS SHE CORRECT?**

8 A. No. This is a situation in which Eschelon’s end user customer’s service is
9 working just fine until Qwest makes a network change, so the end user customer’s
10 perception is clearly relevant. As mentioned above, FCC Rule 51.316(c) focuses
11 directly on the “service quality perceived by the requesting telecommunications
12 carrier’s end-user customer.” Therefore, the FCC’s rules focus on service quality
13 perceived by the end user when the ILEC performs activities on the CLEC’s
14 UNEs, and Eschelon’s proposal reflects this approach.³⁵⁴

15 **Q. QWEST CLAIMS THAT THE CLOSED LANGUAGE EXPLAINS THAT**
16 **QWEST’S ACTIVITIES WILL RESULT IN UNE TRANSMISSION**

³⁵³ Qwest Exhibit 3 (Stewart Direct), pp. 25-26.

³⁵⁴ Ms. Stewart’s claim that Qwest will perform maintenance and modernization activities in a seamless manner is instructive because “seamless” is the exact same word that the FCC used to describe the manner in which conversions should be performed by ILECs on CLEC UNEs. (*TRO*, ¶ 586) When codifying the “seamless” conversion requirement in 47 CFR § 51.316(b), the FCC made clear that “seamless” meant “without *adversely affecting* the service quality perceived by the requesting telecommunications carrier’s end-user customer.” Therefore, if Qwest performs maintenance and modernization in a “seamless” manner, it should have no problem agreeing that they should not adversely affect the service quality perceived by Eschelon’s End User Customers.

1 **PARAMETERS THAT ARE WITHIN THE TRANSMISSION LIMITS OF**
2 **THE UNE ORDERED BY ESCHELON, AND THAT THIS LANGUAGE**
3 **SHOULD ALLAY ESCHELON’S CONCERNS. WHY DOESN’T THIS**
4 **CLOSED LANGUAGE ADEQUATELY ADDRESS ESCHELON’S**
5 **CONCERNS?**

6 A. As Eschelon explained in its direct testimony in the discussion of the dB loss
7 example,³⁵⁵ Qwest has previously taken the position in that example and in
8 negotiations that it meets its obligations under this language if it provides a UNE
9 within transmission parameters, even though the circuit is *not operational* and
10 there is a way to provision an operational circuit that is within transmission
11 parameters. The dB loss example shows that Eschelon’s concern is real and is not
12 accounted for under Qwest’s proposal.

13 **Q. THOUGH MS. STEWART IGNORES THE FCC RULES YOU DISCUSS**
14 **ABOVE, SHE DOES TESTIFY THAT THE TELECOMMUNICATIONS**
15 **ACT AND FCC RULES ANTICIPATE CHANGES THAT COULD**
16 **AFFECT OTHER CARRIERS.³⁵⁶ DOES HER TESTIMONY TELL THE**
17 **WHOLE STORY?**

18 A. No. The rules on which Ms. Stewart relies are not on point. Ms. Stewart points
19 to the “Notice of Changes” language of Section 251(c)(5) of the Act and 47 CFR
20 § 51.325, and claims that this language anticipates network changes that “affects

³⁵⁵ Exhibit Eschelon 1 (Starkey Direct), pp. 155-159.

³⁵⁶ Qwest Exhibit 3 (Stewart Direct), pp. 22-23.

1 other carriers.”³⁵⁷ But this language only addresses the ILECs’ obligation to
2 notify carriers of changes that could affect the interoperability of the networks of
3 the ILEC and CLEC so that steps can be taken to avoid adverse effects on End
4 User Customers. In addition, this language applies to all network changes – not
5 just “minor” changes – and the agreed language in Section 9.1.9 under Issue 9-33
6 is limited only to “minor” changes to “transmission parameters.” Ms. Stewart is
7 attempting to compare apples and oranges.

8 **Q. MS. STEWART TESTIFIES THAT QWEST’S MODERNIZATION**
9 **ACTIVITIES COULD AFFECT A CLEC CUSTOMER BECAUSE OF**
10 **THE FACILITIES THE CLEC IS USING.³⁵⁸ PLEASE RESPOND.**

11 A. Ms. Stewart hypothesizes that a CLEC could be providing DSL service to an end
12 user over a 2 wire analog loop instead of a data-capable digital loop, which could
13 cause CLEC’s DSL equipment to cease working if Qwest replaces the copper
14 loop with a hybrid (copper/fiber) loop. Ms. Stewart hypothesizes that in this
15 instance, the CLEC’s decision to use a 2 wire loop instead of a data-capable
16 digital loop led to the adverse impacts on the customer’s service. It is my
17 understanding that Eschelon does not use 2 wire *analog* loops to provide DSL
18 service, and therefore, Ms. Stewart presents a solution in search of a problem. If a
19 carrier does attempt this hypothetical practice, it likely will not be around long
20 enough to be a problem. Ms. Stewart provides no details on this hypothetical

³⁵⁷ Qwest Exhibit 3 (Stewart Direct), p. 23, lines 4-5.

³⁵⁸ Qwest Exhibit 3 (Stewart Direct), pp. 26-27.

1 example, and does not even claim that this problem has occurred.³⁵⁹ If a problem
2 does arise, Qwest needs to pursue that carrier and not “make a rule out of the
3 exception,” as Qwest has been known to argue.³⁶⁰

4 Moreover, the larger point is that under Qwest’s scenario the End User Customer
5 had a working circuit prior to Qwest’s maintenance or modernization activities
6 and has a non-working circuit after Qwest’s activities. This would not be a
7 “minor” change, as discussed in Section 9.1.9, and is therefore, not applicable to
8 the disagreement under Issue 9-33. In addition, Ms. Stewart makes no mention of
9 whether the change Qwest made in her scenario (*i.e.*, replacing copper loop with
10 hybrid loop) was “necessary” as required by Section 9.1.9.³⁶¹

11 **Q. MS. STEWART STATES THAT ESCHELON’S USE OF THE TERM**
12 **“END-USER CUSTOMER” IN ITS PROPOSED LANGUAGE FOR**
13 **SECTION 9.1.9 CREATES CONCERNS FOR QWEST. WOULD YOU**
14 **LIKE TO RESPOND?**

15 A. Yes. Ms. Stewart states that Eschelon’s use of the term “end-user customer”
16 raises 2 concerns: (1) it expands the prohibition against changes that have an

³⁵⁹ Qwest Exhibit 3 (Stewart Direct), pp. 26-27.

³⁶⁰ See Qwest (Linse) Washington Direct (WUTC Docket No. UT-063061, Sept. 29, 2006), p. 33, line 15. See also *id.*, p. 44, line 4.

³⁶¹ The closed language of 9.1.9 shows that Qwest does not have unlimited discretion in modifying and changing UNEs. Rather, according to Section 9.1.9, the modifications/changes must be “necessary.” Ms. Stewart makes it appear that Qwest has unlimited discretion in making these changes, which is not the case. See *e.g.*, Qwest Exhibit 3 (Stewart Direct), p. 21, lines 14-19 (“It is, of course, essential that Qwest have the ability to both maintain and modernize its telecommunications network without unnecessary interference and restriction. The need for this flexibility is particularly important in this era of rapidly changing technologies.”)

1 “adverse effect” to all third party retail customers – not just Eschelon’s customers
2 and (2) attempts to regulate Qwest’s relationship with other CLECs.³⁶² This is,
3 according to Ms. Stewart, because the term “end-user customer” is defined in
4 Section 4.0 of the ICA to include customers other than Eschelon’s customers.³⁶³

5 Ms. Stewart’s complaint in a nutshell is that Eschelon’s language makes clear that
6 minor changes in transmission parameters should not adversely affect any end
7 user customers, regardless of which carrier the customer uses. However, if
8 Eschelon would have drafted this language to be specific only to Eschelon’s end
9 user customers, Qwest would have likely argued that Eschelon was seeking
10 special treatment or a competitive advantage over other carriers. Eschelon is not
11 attempting to expand Qwest’s obligations with regard to other carriers or their
12 customers in Eschelon’s ICA, as Ms. Stewart claims. Rather, Eschelon’s
13 language recognizes a basic principle: minor changes in transmission parameters
14 should not adversely affect end user customers.

15 In any event, Eschelon’s Option #2 for Issue 9-33 (shown in my direct testimony
16 at page 146³⁶⁴), which is based on the Department of Commerce’s
17 recommendation in Minnesota and has been proposed by Eschelon in the spirit of
18 compromise, modifies “any End User Customers” (the term used in Eschelon’s
19 other options), to read: “CLEC’s End User Customer.” Therefore, Eschelon’s

³⁶² Qwest Exhibit 3 (Stewart Direct), p. 28.

³⁶³ Qwest Exhibit 3 (Stewart Direct), p. 28, lines 26-28.

³⁶⁴ Exhibit Eschelon 1 (Starkey Direct), p. 146.

1 Option #2 clarifies that the end user referred to in 9.1.9 is the end user of the
2 CLEC – or in this instance, Eschelon. This should allay Ms. Stewart’s concerns.

3 **Issue 9-34: Notices - Location at Which Changes Occur - Sections 9.1.9**

4 **Q. WHAT CONCERNS HAS QWEST RAISED ABOUT ESCHELON’S**
5 **PROPOSAL FOR ISSUE 9-34?**

6 A. Ms. Stewart claims that Eschelon’s language is not practical and is overly
7 burdensome.³⁶⁵

8 **Q. ARE MS. STEWART’S CONCERNS WARRANTED?**

9 A. No. In an attempt to poke holes in Eschelon’s proposal for Issue 9-34, Ms.
10 Stewart points to changes in dialing plans and switch software upgrades and
11 claims that Eschelon’s proposal for Qwest to provide circuit ID and customer
12 address information for these changes would be impractical and burdensome
13 because these changes would either affect a large geographic region or would not
14 impact CLEC customers at all.³⁶⁶ This is a red herring. Eschelon’s language
15 requires circuit ID (and customer address information for one alternative) only if
16 the change is specific to an End User Customer.³⁶⁷ The changes that Ms. Stewart

³⁶⁵ Qwest Exhibit 3 (Stewart Direct), p. 30, lines 22-24. Regarding Ms. Stewart’s claim that Eschelon’s language exceeds the FCC’s requirements (Qwest Exhibit 3 (Stewart Direct), p. 30, lines 5-6), *see* Eschelon’s direct testimony regarding Issue 9-34 (Exhibit Eschelon 1 (Starkey Direct), pp. 160-166).

³⁶⁶ Qwest Exhibit 3 (Stewart Direct), pp. 30-31.

³⁶⁷ Because Eschelon’s language is limited to changes specific to an End User Customer, Ms. Stewart misses the point when she complains that Eschelon’s proposal would require Qwest to provide this

1 points to (dialing plan changes and switch software upgrades) are not specific to
2 an End User Customer, so Qwest would not be required to provide the circuit ID
3 (and customer address) information. I described changes that are specific to an
4 end user customer and provided an example in my direct testimony.³⁶⁸

5 **Q. IS THERE EVIDENCE DEMONSTRATING THAT QWEST CAN**
6 **IDENTIFY CHANGES THAT ARE SPECIFIC TO AN END USER**
7 **CUSTOMER AND PROVIDE CIRCUIT ID AND CUSTOMER ADDRESS**
8 **INFORMATION TO ESCHELON?**

9 A. Yes. Eschelon provided this information in its direct testimony.³⁶⁹

10 **Q. PLEASE SUMMARIZE THE NETWORK MAINTENANCE AND**
11 **MODERNIZATION ISSUES (ISSUES 9-33 AND 9-34).**

12 A. First, minor changes to transmission parameters should not disrupt service for End
13 User Customers on a non-temporary basis. Eschelon's Customers' service should
14 not be adversely affected, especially when there are special exceptions when
15 service may be disrupted temporarily when needed to perform the work and
16 during emergencies, with disruptions that may not be temporary being addressed
17 separately in Section 9.2.1.2.3 relating to copper retirement. Finally, when Qwest
18 makes a change that is specific to an End User Customer, Qwest should be

information regardless if "the Qwest network change would actually have a noticeable impact to either Eschelon or its customer." (Qwest Exhibit 3 (Stewart Direct), p. 30, lines 25-27).

³⁶⁸ Exhibit Eschelon 1 (Starkey Direct), pp. 165-166.

³⁶⁹ See Exhibit Eschelon 1 (Starkey Direct), pp. 162-164 and Exhibit Eschelon 1.3.

1 required to provide readily available information to allow Eschelon to identify
2 and provide quality service to the affected Customer. For all of the reasons
3 discussed with respect to Eschelon's business need and in these responses, the
4 Commission should adopt Eschelon's language for Issues 9-33 and 9-34.

5 **VII. SUBJECT MATTER NO. 18. CONVERSIONS**

6 Issue Nos. 9-43 and 9-44 and subparts: ICA Sections 9.1.15.2.3; 9.1.15.3 and
7 subparts; 9.1.15.3.1; 9.1.15.3.1.1; 9.1.15.3.1.2

8 **Q. PLEASE PROVIDE A BRIEF SUMMARY OF THE CONVERSIONS**
9 **ISSUES 9-43 AND 9-44 AND SUBPARTS.**

10 A. These issues relate to the method used to convert UNE facilities to analogous or
11 alternative service arrangements due to a finding of non-impairment – an activity
12 that is within the scope of Section 251/252 of the Act.³⁷⁰ Issue 9-43 addresses
13 whether Qwest should be allowed to change the circuit identification information
14 assigned to the facility providing Eschelon's UNE service when converting that
15 facility to a non-UNE analogous or alternative service arrangement. Issue 9-44
16 addresses whether conversions should be achieved through a billing change (*i.e.*,
17 application of the new rate) and not a network change (*i.e.*, switching the
18 customer to a new facility) to avoid customer disruption and unnecessary work for
19 both companies. Issues 9-44(a) through 9-44(c) describe an option that would be

³⁷⁰ See *e.g.*, Exhibit Eschelon 1 (Starkey Direct), pp. 176, lines 1-2, citing Washington ALJ Report (Order No. 17 in Verizon/CLEC arbitration), ¶ 150.

1 available to Qwest in order to implement the billing change that takes place
2 during a conversion.

3 **Q. WHAT DOES QWEST ARGUE REGARDING ISSUES 9-43 AND 9-44?**

4 A. First, Qwest appears to suggest that the Conversions issues are part of a proposed
5 settlement, when in fact the charge for conversions (Issue 9-40) has settled subject
6 to approval, but Issues 9-43 and 9-44 have not settled. Second, Qwest suggests
7 that the primary reason for Eschelon's proposal is whether Qwest may charge a
8 non-recurring charge (NRC), when Eschelon has explained at length that its
9 primary concern is the quality of service for customers. Third, Qwest has argued
10 that Eschelon has a choice to obtain facilities from a source other than Qwest,
11 even though this does not address the manner of conversion when Qwest is the
12 provider. Fourth, Qwest has advocated a physical process involving Qwest
13 personnel and work that does not comply with the FCC's directive that a
14 conversion should be largely a billing function resulting in seamless conversions.
15 Finally, Qwest claims that changing the circuit ID is necessary for converting
16 UNEs to private lines services, when the evidence shows this is not the case. I
17 discuss each of these arguments in turn below.

18 **Q. PLEASE RESPOND TO QWEST'S FIRST ARGUMENT REGARDING**
19 **SETTLEMENT AND ADDRESS WHETHER SETTLEMENT ON THE**
20 **RATE FOR UNE TO PRIVATE LINE CONVERSIONS (ISSUE 9-40)**

1 **AVOIDS THE NEED TO ADDRESS CONVERSIONS (ISSUES 9-43 AND**
2 **9-44) IN THIS ARBITRATION.**

3 A. Under the heading “Issues 9-43 and 9-44 – Conversions,” Ms. Million states in
4 response to a question about the appropriate charge for conversions:

5 Pursuant to the Settlement Agreement among the parties in the
6 wire center docket (Docket No. UM 1251) filed with the
7 Commission on Friday, June 22, 2007, the issue of the appropriate
8 charge for UNE to private line conversions has been settled. That
9 Agreement is awaiting Commission review and approval.
10 Assuming approval by the Commission, there will be no further
11 need to address the conversions issue in this arbitration. Rather
12 than burdening the Commission with testimony on an issue upon
13 which the parties have reached agreement, I will defer any
14 substantive discussion of this issue, if any is necessary, until after
15 the Commission rules on the Settlement Agreement.³⁷¹

16 Note that Ms. Million states that the “issue related to the appropriate charge for
17 conversions” has been settled subject to Commission approval.³⁷² That is issue
18 number 9-40. Issue 9-40 is one of the issues subject to the Joint Motion between
19 Eschelon and Qwest regarding a single compliance filing and the wire center
20 issues.³⁷³ As explained by Mr. Denney in his rebuttal testimony regarding the
21 wire center issues (Issues 9-37 – 9-42), the settlement agreement and the Joint

³⁷¹ Exhibit Qwest 4, Million Direct, p. 6, lines 1 & 12-21. Ms. Million refers to the wire center docket number for Oregon (1251). In Utah, the wire center docket is docket number 06-049-40. Ms. Million also refers to the settlement agreement as being “among the parties in the wire center docket.” The settlement agreement states on its face that it is between Qwest and the “Joint CLECs” (which is a defined term in the settlement agreement). The definition identifies Eschelon as one of the Joint CLECs.

³⁷² Exhibit Qwest 4, Million Direct, p. 6, lines 15-16.

³⁷³ Exhibit 2.30 (Joint Motion), pp. 1-2 (referring to Issues 9-37 through 9-42).

1 Motion deal with Issue 9-40, but not Issues 9-43 and 9-44.³⁷⁴ This fact is evident
2 in Qwest's Response to Eschelon's Petition for Arbitration, in which Qwest
3 identifies Issues 9-37 through 9-42 (the wire center issues) as "issues addressed in
4 the Commission's *TRRO* wire center proceeding" so that Qwest does not discuss
5 them further in its Response,³⁷⁵ but does *not* identify Issues 9-43 and 9-44
6 (Conversions) as issues subject to the wire center proceeding and therefore does
7 discuss them further in its Response.³⁷⁶

8 There *is* a need for the Commission to adopt Eschelon's language on Issues 9-43
9 and 9-44, regardless of whether the proposed settlement for the price for the
10 conversion is approved, because without Eschelon's proposed language for Issues
11 9-43 and 9-44, there would be nothing in the companies' contract explaining how
12 conversions are to take place. This would be a critical omission because the
13 absence of these terms would expose Eschelon and its End User Customers to a
14 higher potential for service quality problems than Qwest and its customers, as
15 Qwest attempts to unnecessarily change circuit IDs and subject Eschelon to its

³⁷⁴ The limited discussion of costs in my direct testimony regarding Issues 9-43 and 9-44 is a policy discussion that supports Eschelon's position that the circuit ID should not change and did not address the rate (Issue 9-40). See Exhibit Eschelon 1 (Starkey Direct), p. 181, lines 3-21.

³⁷⁵ Qwest Response to Eschelon Petition for Arbitration, p. 23, lines 10-12.

³⁷⁶ Compare Qwest's discussion of Conversions (Issues 9-43 and 9-44) at pages 23-25 of its Response to Eschelon's Petition for Arbitration, with Qwest's discussion of Wire Center Issues at page 23.

1 unilateral APOT conversion procedure, which Qwest has refused to negotiate (or
2 take through CMP) and which erects operational barriers for CLECs.³⁷⁷

3 **Q. PLEASE RESPOND TO MS. MILLION'S SECOND ARGUMENT IN**
4 **WHICH SHE SUGGESTS THAT ESCHELON IS PROPOSING A "PRICE**
5 **ONLY" CHANGE FOR CONVERSIONS UNDER ISSUES 9-43 AND 9-44**
6 **SO THAT IT CAN AVOID PAYING A CONVERSION CHARGE. IS HER**
7 **CLAIM ACCURATE?**

8 A. No. Ms. Million states: "In Eschelon's view, this 'price only' change does not
9 justify Qwest charging a nonrecurring charge for conversions."³⁷⁸ However, the
10 fact that Eschelon has agreed to a high conversion charge (\$25)³⁷⁹ for the re-
11 pricing of a circuit illustrates that Eschelon's primary concern is not the rate of a
12 conversion, but the potential impact of any conversion on its customers. The
13 potential impact on customers is the concern addressed by Eschelon's proposals
14 for Issues 9-43 and 9-44.³⁸⁰

15 **Q. PLEASE RESPOND TO MS. MILLION'S THIRD ARGUMENT, THAT**
16 **CLECS HAVE A CHOICE OTHER THAN TO CONVERT THEIR UNE**

³⁷⁷ Qwest's proposed APOT procedure and the problems with this procedure were explained in my direct testimony at pages 168-173. Exhibit Eschelon 1, Starkey Direct, pp. 168-173.

³⁷⁸ Qwest Exhibit 4, Million Direct, p. 6, lines 6-8.

³⁷⁹ See Mr. Denney's rebuttal testimony regarding the wire center issues (Issues 9-37 – 9-42).

³⁸⁰ See Exhibit 3 to Eschelon Petition (Joint Disputed Issues List), pp. 79-86 (Eschelon's position statements for these issues discuss the impact to the customer at length with no reference to the rate); see *id.* p. 86 ("Eschelon's proposal is designed to avoid end user customer harm."). See also Exhibit Eschelon 1 (Starkey Direct), p. 167, lines 4-22; p. 176, line 12 – p. 177, line 3; p. 179, line 4 – p. 181, line 2; p. 184, line 17 – p. 187, line 20.

1 **CIRCUITS TO QWEST PRIVATE LINE SERVICES.³⁸¹ IS THE**
2 **EXISTENCE OF SUCH A CHOICE RELEVANT TO THE DISCUSSION**
3 **OF CONVERSIONS?**

4 A. No, it isn't relevant. The ability to convert a circuit from a UNE to a non-UNE is
5 a critical aspect of the FCC's transition plan when a facility that was formerly
6 available as a UNE, as a result of the *TRRO*, no longer is. In the *TRO*, the FCC
7 stated that such conversions should be accomplished seamlessly, in order to avoid
8 customer disruption and minimize any anticompetitive impact.³⁸² Ms. Million's
9 suggestion that Eschelon has a choice, rather than converting its existing UNE
10 circuits, of obtaining the facilities from a source other than Qwest, really offers no
11 choice at all. It also fails to comply with the FCC's rules on the method by which
12 conversions should take place – rules that Ms. Million has ignored in her
13 testimony in Utah as well as other states.

14 **Q. PLEASE ELABORATE.**

15 A. I addressed the FCC's rules and orders on this topic at pages 178 and 179 of my
16 direct testimony,³⁸³ citing *e.g.*, 47 CFR §51.316 and TRO ¶¶ 586-588. I will not
17 repeat the entirety of those rules and explanatory text here, but to recap:

- 18 • The FCC requires conversions to be a “seamless process that does not affect the
19 customer's perception of service quality”³⁸⁴ and

³⁸¹ Oregon Direct Testimony of Ms. Million, Qwest Oregon Exhibit 16 (ORPUC Docket ARB 775; 5/11/07), pp. 13-14.

³⁸² 47 CFR § 51.316(b). *See also* TRO ¶ 586.

³⁸³ Exhibit Eschelon 1, Starkey Direct, pp. 177-178.

- 1 • The FCC expects conversions to be largely a billing function, noting that one
2 way to effectuate a conversion is to establish a mechanism providing that any
3 pricing changes start the next billing cycle following the conversion request.³⁸⁵

4 The FCC’s rules and orders make clear that Qwest’s proposal to ignore the
5 method by which conversions will take place in the companies contract and
6 impose a manually-intensive procedure that is wrought with potential for
7 customer disruption fails to comply with the FCC’s rules. The FCC explains that
8 conversions should be largely a billing change that can be effectuated in a
9 “seamless” fashion to the End User Customer and in an “expeditious manner.”³⁸⁶

10 These same requirements are ingrained in Eschelon’s proposal, but the contract
11 would be silent on these requirements if Qwest’s arbitration proposal were
12 adopted.

13 **Q. PLEASE RESPOND TO MS. MILLION’S FOURTH CLAIM**
14 **REGARDING THE QWEST PERSONNEL AND WORK INVOLVED IN**

³⁸⁴ 47 CFR § 51.316(b). *See also TRO* ¶ 586.

³⁸⁵ *TRO*, ¶ 588. The fact that the FCC mentioned the ability for billing changes to take place by the start of the next billing cycle following the conversion request is significant because Qwest’s original non-CMP APOTS notice contained a 45 day conversion interval. *See Exhibit Eschelon 1 (Starkey Direct)*, p. 171, lines 3-4. This supports the notion that the process that Qwest is attempting to impose through non-CMP, non-ICA means is not what the FCC was expecting when it established its conversion rules.

³⁸⁶ When addressing conversions in ¶ 588 of the *TRO*, the FCC focused on minimizing the risk of incorrect payment because it found that a conversion is “largely a billing function.” Therefore, the FCC concluded that a conversion (or the act of applying a different rate to the same facility) “should be performed in an expeditious manner.”

1 **CONVERSIONS.³⁸⁷ IS THIS ANOTHER EXAMPLE OF QWEST**
2 **IGNORING THE FCC RULES AND ORDERS ON CONVERSIONS?**

3 A. Yes. The conversion procedure Ms. Million has described in her testimony in
4 other states is not indicative of a seamless process and is much more involved
5 than what the FCC requires. For instance, Ms. Million has described a situation
6 in which the Designer is to review the order to make sure that “no physical
7 changes to the circuit are needed.”³⁸⁸ If the Designer is to make sure that physical
8 changes are *not* needed, obviously Qwest believes that such changes *will be*
9 needed in at least some instances under its proposed procedure (which it has
10 developed outside of contract negotiation/arbitration and outside CMP). And,
11 Qwest has confirmed that it intends to require physical changes for conversions.
12 In its Response to Eschelon’s Petition for Arbitration, Qwest said “Eschelon’s
13 proposal ignores the nature of conversions from UNEs to alternative tariffed
14 services.”³⁸⁹ Qwest has also previously specifically alleged that “conversions
15 from UNEs to tariffed services can involve physical activities.”³⁹⁰ However,
16 “physical changes” are not billing functions, and making physical changes leads
17 to increased risk of service disruption to the End User Customer. This would not

³⁸⁷ Oregon Direct Testimony of Ms. Million, Qwest Oregon Exhibit 16 (ORPUC Docket ARB 775; 5/11/07), pp. 15-17.

³⁸⁸ Oregon Direct Testimony of Ms. Million, Qwest Oregon Exhibit 16 (ORPUC Docket ARB 775; 5/11/07), p. 16, line 15 – p. 17, line 1.

³⁸⁹ Qwest’s Response to Eschelon’s Petition for Arbitration, p. 25, lines 5-6.

³⁹⁰ Qwest’s Petition for Arbitration in Colorado Docket No. 06B-497T, ¶ 101. *See also* Oregon Direct Testimony of Ms. Million, Qwest Oregon Exhibit 16 (ORPUC Docket ARB 775; 5/11/07), p. 16, line 15 – 17, line 1.

1 be a seamless conversion, as required by the FCC.³⁹¹ My concern about Ms.
2 Million's testimony in this regard is only heightened by a mention of reviewing
3 the circuit inventory in the TIRKS database to "ensure accuracy and database
4 integrity."³⁹² Again, while the testimony is phrased so as not to admit that Qwest
5 intends to physically move the CLEC's End User Customer from one circuit to
6 another during the conversion, Qwest suggests as much by discussing a review of
7 circuit availability. The CLEC's End User Customer is already on a circuit that is
8 available, so there is no reason for Qwest to be checking for circuit availability.
9 This is perhaps why Ms. Million has discussed the potential for a "service
10 interruption for the CLEC's end-user customer."³⁹³ This indicates strongly that
11 Qwest is envisioning a process under which converting circuits actually means
12 ordering new circuits so the CLEC is placed, potentially, on different facilities
13 from those currently used.

14 The manual work that Ms. Million has discussed in relation to the conversion
15 procedure is work created by Qwest related to Qwest making physical changes
16 during the conversion – physical changes that Eschelon does not want Qwest to

³⁹¹ Exhibit Eschelon 1 (Starkey Direct), pp. 177-178. *TRO*, ¶¶586 & 588.

³⁹² Oregon Direct Testimony of Ms. Million, Qwest Oregon Exhibit 16 (ORPUC Docket ARB 775; 5/11/07), p. 17, lines 2-3.

³⁹³ Oregon Direct Testimony of Ms. Million, Qwest Oregon Exhibit 16 (ORPUC Docket ARB 775; 5/11/07), p. 17, lines 4-5. Ms. Million states that this work is done to "ensure that there is no service interruption for the CLEC's end-user customer." However, if Qwest needs to confirm that Eschelon's end user customers will not have their service interrupted, that means that service interruption may occur in at least some instances. This is contrary to the FCC's requirement for conversions to be "seamless," and there is no reason for a billing change to interrupt service to Eschelon's End User Customers.

1 make. After all, if the End User Customer is on the same facility after the
2 conversion as it was before the conversion, what manual work should be involved
3 other than keystrokes to change the rate applied to that facility?

4 What Qwest's argument illustrates is that Qwest envisions dictating a physical,
5 network-impacting conversion process under which existing Eschelon circuits
6 will be cancelled and new circuits ordered and provisioned, all in an effort simply
7 to effectuate a different price. If so, Qwest has essentially ignored the FCC's
8 requirement for seamless, expeditious conversions that amount to largely a billing
9 change, and the Commission needs to order explicit language to prevent that
10 result.

11 **Q. PLEASE RESPOND TO MS. MILLION'S FINAL ARGUMENT, THAT**
12 **CIRCUIT ID CHANGES ARE NECESSARY FOR CONVERTING UNES**
13 **TO PRIVATE LINES SERVICES"³⁹⁴ SO QWEST "MUST"³⁹⁵ CHANGE**
14 **THE CIRCUIT IDS DURING CONVERSION TO PROPERLY TRACK**
15 **CIRCUITS AND AVOID SPENDING MORE MONEY.³⁹⁶ DO YOU**
16 **AGREE?**

³⁹⁴ Exhibit Qwest 4, Million Direct, p. 6, lines

³⁹⁵ Oregon Direct Testimony of Ms. Million, Qwest Oregon Exhibit 16 (ORPUC Docket ARB 775; 5/11/07), p. 16, line 10 and p. 20, line 21.

³⁹⁶ Oregon Direct Testimony of Ms. Million, Qwest Oregon Exhibit 16 (ORPUC Docket ARB 775; 5/11/07), p. 20. See also, Qwest's Response to Eschelon's Petition for Arbitration at page 24, where Qwest claims that it must change circuit IDs because they include product-specific information, and that Qwest is under no legal requirement to undertake "costly" modifications to its systems.

1 A. No. Ms. Million has admitted in sworn testimony in other states³⁹⁷ that Qwest has
2 already performed conversions without changing circuit IDs, so there is no basis
3 for Qwest’s claim that conversions “must” include changes to circuit IDs.³⁹⁸

4 **VIII. SUBJECT MATTER NO. 24. LOOP-TRANSPORT COMBINATIONS**

5 Issue No. 9-55: ICA Sections 9.23.4; 9.23.4.4; 9.23.4.4.1; 9.23.4.5; 9.23.4.6;
6 9.23.4.5.4

7 **Q. PLEASE PROVIDE A BRIEF SUMMARY OF ISSUE 9-55.**

8 A. Eschelon proposes to include in Section 9.23 the term “Loop-Transport
9 Combinations” to collectively refer to the various types of combinations involving
10 a loop and transport and to expressly provide in the ICA that the UNE piece of the
11 Loop-Transport Combination should continue to be governed by the ICA. This
12 language is needed to ensure that Qwest cannot position one type of Loop-
13 Transport combination, in particular – a commingled EEL – so the terms
14 governing the non-UNE will dictate how the UNE portion of the combination is
15 ordered, provisioned, and repaired. In his testimony regarding Issue 9-58 and
16 Issue 9-59, Mr. Denney describes how ordering and repair of UNEs are impacted
17 by Qwest’s non-ICA, non-CMP PCAT terms. Qwest proposes deletion of
18 Eschelon’s language.

³⁹⁷ See, e.g., Direct Testimony of Teresa Million, Colorado PUC Docket 06B-497T, p. 16 (12/15/06) (Q. Is it true that when Qwest originally converted CLECs’ private line circuits to UNEs, they were allowed to keep their private line circuit IDs? A. Yes…)”))

³⁹⁸ Exhibit Eschelon 1 (Starkey Direct), p. 180, line 18 – p. 181, line 2.

1 **Q. IS ESCHELON ATTEMPTING TO CREATE A NEW LOOP**
2 **TRANSPORT PRODUCT AS MS. STEWART INSINUATES?**³⁹⁹

3 A. No. Contrary to Ms. Stewart’s assertion, Eschelon’s proposal does not create a
4 new loop transport product. I explained in my direct testimony (see pages 194-
5 195)⁴⁰⁰ that Eschelon uses the term “loop transport combination” precisely how
6 the FCC uses it – to refer to a group of offerings that combine loop and transport
7 facilities, including commingled EELs.⁴⁰¹ Eschelon’s definition makes clear that
8 the term Loop Transport Combination is not a Qwest product offering, but
9 collectively refers to a group of offerings that Qwest is already required to
10 provide. To address Qwest’s concern, Eschelon’s proposal for ICA Section
11 9.23.4 expressly provides: “At least as of the Effective Date of this Agreement,
12 “Loop-Transport Combination” is not the name of a particular Qwest product.
13 “Loop-Transport Combination” includes Enhanced Extended Links (“EELs”),
14 Commingled EELs, and High Capacity EELs.” This language alone should be
15 sufficient for rejecting Qwest’s complaint.

16 **Q. DOES QWEST HAVE OTHER CONCERNS ABOUT ESCHELON’S**
17 **PROPOSAL FOR ISSUE 9-55?**

³⁹⁹ Qwest Exhibit 3 (Stewart Direct), p. 52, lines 18-19.

⁴⁰⁰ Exhibit Eschelon 1 (Starkey Direct), pp. 194-195.

⁴⁰¹ Ms. Stewart acknowledges this point [“The FCC uses the term ‘loop-transport’ to generally describe varieties of EELs...” Qwest Exhibit 3 (Stewart Direct), p. 65, lines 26-27]. One of the EELs described by the FCC is a commingled EEL.

1 A. Qwest claims that Eschelon's language is an attempt to eliminate the distinctions
2 between UNE combinations and commingled arrangements so that the non-UNE
3 components of a commingled arrangement are governed by the ICA.⁴⁰²

4 **Q. IS QWEST'S CONCERN LEGITIMATE?**

5 A. No. Ms. Stewart testifies that "Eschelon's proposal is particularly troubling given
6 that Eschelon's definition of Loop-Transport Combinations includes commingled
7 arrangements where UNE and non-UNE circuits are combined."⁴⁰³ But there is
8 no basis to find Eschelon's definition troubling because the FCC uses the term
9 Loop Transport Combination to refer to a commingled arrangement as well. *See*
10 pages 195 and 196 of my direct testimony, citing ¶¶ 584, 593 and 594 of the
11 *TRO*.⁴⁰⁴ Further, nothing in Eschelon's language suggests that the non-UNE
12 piece of the commingled arrangement would be governed by the ICA, and in fact,
13 Eschelon included language in its proposal that should easily dispel this claim.
14 To address Qwest's concern, Eschelon's proposal for ICA Section 9.23.4
15 expressly provides: "If no component of the Loop-Transport Combination is a
16 UNE, however, the Loop-Transport Combination is not addressed in this
17 Agreement. The UNE components of any Loop-Transport Combinations are
18 governed by this Agreement and the other component(s) of any Loop-Transport
19 Combinations are governed by the terms of an alternative service arrangement, as

⁴⁰² Qwest Exhibit 3 (Stewart Direct), p. 50, lines 19-20; and pp. 50-51 and p. 59.

⁴⁰³ Qwest Exhibit 3 (Stewart Direct), p. 48, lines 1-3.

⁴⁰⁴ Exhibit Eschelon 1 (Starkey Direct), pp. 195-196.

1 further described in Section 24.1.2.1.”⁴⁰⁵ Eschelon’s language does not subject
2 the non-UNE piece of a commingled Loop-Transport combination to the ICA.
3 Rather, Eschelon’s concern is that the UNE piece of the Loop-Transport
4 Combination should continue to be governed by the ICA – as is required by the
5 FCC. Eschelon’s concern is valid, as illustrated by the impact of Qwest’s non-
6 ICA, non-CMP PCAT terms on ordering and repair that is discussed in Mr.
7 Denney’s testimony.⁴⁰⁶

8 **Q. DOES ESCHELON’S PROPOSED LANGUAGE IMPLY THAT THE NON-**
9 **UNE COMPONENT IN THIS ARRANGEMENT WOULD BE**
10 **GOVERNED BY THE ICA?**

11 A. No. Eschelon previously made this clear in Section 24.1.2.1 and now Eschelon
12 has modified its language to make this point even clearer. Ms. Stewart claims that
13 the language in 9.23.4 implies an attempt by Eschelon to govern non-UNE
14 components via the ICA, and she ignores agreed upon language in 24.1.2.1 –
15 language that Ms. Stewart identifies at pages 51 and 52 of her direct testimony⁴⁰⁷
16 – that makes clear that the non-UNE portion of the commingled arrangement is
17 governed by the alternative arrangement by which that non-UNE component is
18 offered. Therefore, Ms. Stewart’s narrow focus on only one section of the ICA in
19 isolation leads her to the wrong conclusion. Mr. Stewart also ignores the

⁴⁰⁵ Exhibit Eschelon 1 (Starkey Direct), pp. 190-191.

⁴⁰⁶ Mr. Denney addresses Ms. Stewart’s claims regarding LSR and CRIS. Qwest Exhibit 3 (Stewart Direct), p. 50, lines 25-30.

⁴⁰⁷ Qwest Exhibit 3 (Stewart Direct), pp. 51-52.

1 modified language Eschelon has proposed to Section 9.23.4 to make this point
2 even clearer.

3 **Q. QWEST MODIFIED ITS PROPOSAL FOR ISSUE 9-55. WAS THIS**
4 **MODIFIED QWEST LANGUAGE REFLECTED IN YOUR DIRECT**
5 **TESTIMONY?**

6 A. No. Qwest previously proposed deletion of Eschelon's language, which is what is
7 shown in my direct testimony.⁴⁰⁸ Qwest modified its proposal for Section 9.23.4
8 to replace Eschelon's language with the following counter proposal:

9 When a UNE circuit is commingled with a non-UNE circuit, the
10 rates, terms and conditions of the ICA will apply to the UNE
11 circuit (including the Commission jurisdiction) and the non-UNE
12 circuit will be governed by the rates, terms and conditions of the
13 appropriate Tariff.

14 **Q. IS QWEST'S MODIFIED LANGUAGE ACCEPTABLE TO ESCHELON?**

15 A. No. Qwest's counterproposal conflicts with closed language in the agreement.
16 Qwest's proposed paragraph, which deals specifically with a Commingled EEL,
17 refers to the non-UNE portion of a Commingled EEL being governed only by the
18 "appropriate Tariff." The non-UNE portion of a Commingled EEL, even though
19 not subject to the ICA, will not necessarily be covered by a tariff, however. The
20 non-UNE portion of the circuit could be covered by something such as an order or
21 rule or other legal requirement that is neither a "tariff" nor an "agreement."

⁴⁰⁸ Exhibit Eschelon 1 (Starkey Direct), pp. 192-193.

1 Qwest has *already agreed* that the non-UNE portion of a commingled EEL could
2 be governed by something other than an agreement or tariff. The agreed upon and
3 closed language in Section 24.1.2.1, which was discussed above, provides (with
4 emphasis added) that:

5 The UNE component(s) of any Commingled arrangement is
6 governed by the applicable terms of this Agreement. The other
7 component(s) of any Commingled arrangement is governed by the
8 terms of the *alternative service arrangement* pursuant to which
9 that component is offered (*e.g., Qwest's applicable Tariffs, prices*
10 *lists, catalogs, or commercial agreements*).⁴⁰⁹

11 Section 24.1.2.1 makes clear that the non-UNE components of a commingled
12 arrangement will be covered by the applicable alternative service arrangement,
13 which may be something other than a “tariff” or an “agreement.” Qwest’s
14 proposed language excludes these other alternatives and thus conflicts with this
15 agreed upon language. Even assuming that the language of Section 24.1.2.1 were
16 used in Section 9.23.4, Qwest’s proposal is still incomplete and fails to address
17 the remaining issues that are more clearly and fully dealt with in Eschelon’s
18 proposed language for 9.23.4.

19 **Q. HAS QWEST ATTEMPTED TO GOVERN UNES WITH NON-UNE**
20 **SOURCES, SUCH AS TARIFFS?**

⁴⁰⁹ The agreement also provides, in agreed upon and closed language in Section 24.1.1.1: “Except as provided herein, and notwithstanding anything to the contrary in the definition of Commingling in Section 4 of this Agreement, Qwest shall permit CLEC to Commingle a UNE or Combination of UNEs with other wholesale facilities and services obtained from Qwest pursuant to any method other than unbundling under section 251(c)(3) of the Act, including any services offered for resale.”

1 A. Yes. Mr. Denney discusses examples of this under Issues 9-58 and 9-59,⁴¹⁰ and
2 as I discuss under Issue 9-31, Qwest is attempting to do just that by applying tariff
3 rates to design changes and other UNE related activities. In addition, as I explain
4 under Issues 9-43 and 9-44 and the Secret TRRO PCAT example, Qwest is
5 attempting to subject UNEs to non-ICA sources by requiring the APOT procedure
6 for conversions, which affects UNEs but was issued as a non-CMP notice.

7 **Q. IS MS. STEWART’S TESTIMONY ON “COSTLY MODIFICATIONS”⁴¹¹**
8 **RELEVANT?**

9 A. No. Ms. Stewart testifies that Qwest “is under no legal requirement to implement
10 costly modifications to provide Eschelon’s proposed ‘loop-transport’ product.”⁴¹²
11 However, as shown by Eschelon’s express language and as explained above,
12 Eschelon is not proposing a new Loop-Transport product – rather Eschelon’s
13 language simply defines this term to collectively refer to Loop-Transport
14 Combinations that Qwest is already required to provide, as the FCC has done.
15 Therefore, no modifications would be necessary. Once again, Ms. Stewart is
16 simply falling on a tired, and erroneous argument that somehow Eschelon is
17 trying to get something for nothing. The “distinct systems, procedures and
18 provisioning intervals for EELs, UNEs and tariffed services” referred to by Ms.

⁴¹⁰ Issues 9-58 and 9-59 are addressed in the testimony of Mr. Denney (Exhibit Eschelon 2 (Denney Direct), pp. 128-158).

⁴¹¹ Qwest Exhibit 3 (Stewart Direct), p. 52, line 18.

⁴¹² Qwest Exhibit 3 (Stewart Direct), p. 52, lines 17-19.

1 Stewart⁴¹³ that exist today would continue to be used and would not change
2 simply because the term Loop-Transport Combination is defined in the ICA.

3 **Q. QWEST CLAIMS THAT CONFUSION WOULD RESULT BY DEFINING**
4 **THE TERM “LOOP-TRANSPORT COMBINATION” TO INCLUDE**
5 **THREE OFFERINGS.⁴¹⁴ IS QWEST’S PURPORTED CONCERN ABOUT**
6 **CONFUSION WARRANTED?**

7 A. No. Ms. Stewart provides no substance to back up these claims and ignores
8 Eschelon’s proposed language. Ms. Stewart testifies that “it is Eschelon’s
9 proposed melding of EELs, Commingled EEL circuits and High-Capacity EELs
10 into a single umbrella product that creates the confusion regarding this issue.”⁴¹⁵
11 However, Ms. Stewart ignores Eschelon’s language which clearly explains how
12 each component of a Loop Transport Combination will be treated:

13 “Loop-Transport Combination” is not the name of a particular
14 Qwest product. “Loop-Transport Combination” includes Enhanced
15 Extended Links (“EELs”), Commingled EELs, and High Capacity
16 EELs. If no component of the Loop-transport Combination is a
17 UNE, however, the Loop-Transport Combination is not addressed
18 in this Agreement. The UNE components of any Loop-Transport
19 Combinations are governed by this Agreement and the other
20 component(s) of any Loop-Transport Combinations are governed
21 by the terms of an alternative service arrangement, as further
22 described in Section 24.1.2.1.

23 The fact that Eschelon’s proposed definition of Loop Transport includes EELs,
24 commingled EELs and High-Capacity EELs does not cause confusion because

⁴¹³ Qwest Exhibit 3 (Stewart Direct), p. 52, lines 16-17.

⁴¹⁴ Qwest Exhibit 3 (Stewart Direct), p. 52, lines 4-6.

⁴¹⁵ Qwest Exhibit 3 (Stewart Direct), p. 52, lines 4-6.

1 Eschelon’s language explains how each component of those Loop Transport
2 Combinations should be treated. Ms. Stewart points to no examples in the ICA
3 where Eschelon uses the term Loop Transport Combination and Qwest is
4 confused as to what type of Loop Transport Combination Eschelon is referring to,
5 or how to treat the components of the Loop Transport Combination. Therefore,
6 Ms. Stewart does not support her claim that Qwest’s alleged confusion stems
7 from the definition of Loop-Transport Combination identifying EELs,
8 Commingled EELs, and High Capacity EELs.⁴¹⁶ Instead, it appears her
9 “confusion” is actually a restatement of her original concern, *i.e.*, the extent to
10 which non-UNEs will be governed by the ICA given Eschelon’s proposed
11 language⁴¹⁷ – an issue already addressed in agreed upon language and further
12 addressed by Eschelon’s proposed language on this issue.

13 **IX. SUBJECT MATTER NO. 27: MULTIPLEXING (LOOP-MUX**
14 **COMBINATIONS)**

15 *Issue No. 9-61 and subparts: ICA Sections 9.23.9 and subparts; 24.4 and*
16 *subparts; 9.23.2; 9.23.4.4.3; 9.23.6.2; 9.23.9.4.3; 9.23.4.4.3; 9.23.6.2; Exhibit C;*
17 *24.4.4.3; Exhibit A; Section 9.23.6.6 and subparts*

18 **Q. PLEASE PROVIDE A BRIEF SUMMARY OF ISSUE 9-61 AND**
19 **SUBPARTS.**

⁴¹⁶ Qwest Exhibit 3 (Stewart Direct), p. 52, lines 4-6.

⁴¹⁷ Ms. Stewart discusses her alleged confusion in response to the question: “Q. Does Qwest commit in the ICA that the UNE circuit will be governed by the terms and conditions in the ICA?” Qwest Exhibit 3 (Stewart Direct), p. 51.

1 A. When evaluating Qwest’s arguments regarding Issue 9-61, it is important to note
2 both what Issue 9-61 does address and what it does not. Starting with the latter
3 first, Issue 9-61 does *not* deal with transport. Qwest’s arguments based on
4 transport are red herrings. Eschelon’s proposed definition of Loop-Mux
5 Combination does not include transport.⁴¹⁸ This is a combination of unbundled
6 loop and multiplexing that *terminates at a collocation*. The companies have
7 agreed to the following language (with emphasis added):

8 24.2.1.1 A multiplexed facility will be ordered and billed at
9 the rate in Exhibit A if all circuits entering the multiplexer are
10 UNEs *or the UNE Combination terminates at a Collocation, as*
11 *described in Section 9.23*. In all other situations when CLEC
12 orders multiplexing with a UNE (e.g., CLEC orders a UNE Loop
13 in combination with Qwest special access transport), the
14 multiplexed facility will be ordered and billed pursuant to the
15 applicable Tariff.

16 As this closed language demonstrates, Eschelon has also already agreed that when
17 it “orders a UNE Loops in combination with Qwest special access transport,” the
18 “applicable Tariff” rate will apply. Multiplexing in combination with transport is
19 a closed issue and is *not* the subject of Issue 9-61.

20 Regarding the real issues, Issue 9-61 addresses whether the Loop Mux
21 Combination (“LMC”) should be included in Section 9 of the ICA as a UNE
22 combination (Eschelon proposes that it should be, and Qwest disagrees); Issue 9-
23 61(a) addresses the proper definition of an LMC, either as a UNE combination (as

⁴¹⁸ See, e.g., closed language in Section 9.23.9.1.2 stating: “There is no interoffice transport between the multiplexer and CLEC’s Collocation.”

1 proposed by Eschelon) or a commingled arrangement (as proposed by Qwest);
2 Issue 9-61(b) addresses whether service intervals for LMCs should be included in
3 the ICA and changed via ICA amendment (as proposed by Eschelon) or excluded
4 from the ICA and established via CMP (as proposed by Qwest); and Issue 9-61(c)
5 addresses whether rates for LMC Multiplexing should be included in the ICA (as
6 proposed by Eschelon) or excluded from the ICA (as proposed by Qwest).

7 **Q. DOES QWEST CAST THE DISAGREEMENT FOR ISSUE 9-61 IN THE**
8 **PROPER LIGHT?**

9 A. No. The overarching disagreement between Eschelon and Qwest on Issue 9-61
10 and subparts revolves around Qwest's obligation to provide access to
11 multiplexing in combination with UNEs. Qwest repeatedly states that Eschelon's
12 language would require Qwest to provide multiplexing as a "stand alone" UNE
13 and that Qwest is under no obligation to do so.⁴¹⁹ This is inaccurate and
14 misleading. Eschelon's proposal would not require Qwest to provide
15 multiplexing as a "stand alone" UNE. Rather, as explained at page 213 of my
16 direct testimony,⁴²⁰ Eschelon's proposed language would require that access to
17 multiplexing be provided as a "feature, function and capability" of the loop in two
18 distinct scenarios – a multiplexed EEL and a Loop Mux Combination – both of
19 which involve providing access to multiplexing in conjunction with a UNE loop

⁴¹⁹ Qwest Exhibit 3 (Stewart Direct), p. 85, lines 1 and 15; p. 88, lines 10 and 12; p. 88, line 28 and 30; and p. 90, line 26.

⁴²⁰ Exhibit Eschelon 1 (Starkey Direct), p. 213.

1 (i.e., not on a stand alone UNE basis). Eschelon's position is supported by the
2 nondiscriminatory provisions of the Act, the FCC's rules and orders, the agreed to
3 ICA language on routine network modifications, and past practice.⁴²¹

4 **Q. MS. STEWART CLAIMS THAT MULTIPLEXING IS NOT A FEATURE**
5 **OR FUNCTION OF THE LOOP.⁴²² IS SHE CORRECT?**

6 A. No. My direct testimony at pages 210-212 explains why Ms. Stewart is incorrect
7 on this point.⁴²³

8 **Q. MS. STEWART POINTS TO THE FCC'S WIRELINE COMPETITION**
9 **BUREAU'S ("WCB") DECISION IN THE VERIZON VIRGINIA**
10 **ARBITRATION AS ALLEGED SUPPORT FOR QWEST'S POSITION.⁴²⁴**
11 **IS QWEST'S RELIANCE ON THIS DECISION MISPLACED?**

12 A. Yes. First, Qwest's argument ignores the procedural posture of the Virginia
13 Arbitration Order. This decision was the result of an arbitration of the FCC's
14 Common Carrier Bureau, acting in the stead of the Virginia state commission, in
15 which the state commission did not carry out its responsibilities. Accordingly,
16 this decision is no more binding on the Utah Commission than any other state
17 commission decision. Second, the Bureau emphasized that its decision should not
18 be interpreted as an endorsement of the Verizon position regarding the availability

⁴²¹ Exhibit Eschelon 1 (Starkey Direct), pp. 209-212.

⁴²² Qwest Exhibit 3 (Stewart Direct), p. 90, line 27.

⁴²³ Exhibit Eschelon 1 (Starkey Direct), pp. 210-212.

⁴²⁴ Qwest Exhibit 3 (Stewart Direct), p. 86.

1 of unbundled multiplexing associated with Loop-Mux combinations [“We
2 emphasize that our adoption of Verizon’s proposed contract language on this
3 issue should not be interpreted as an endorsement of Verizon’s substantive
4 positions expressed in this proceeding regarding its multiplexing obligations
5 under applicable law.”]⁴²⁵

6 **Q. IS THERE ANY OTHER REASON WHY QWEST’S RELIANCE ON THE**
7 **BUREAU’S DECISION IS MISPLACED?**

8 A. Yes. Importantly, this decision actually undermines Qwest’s position on this
9 issue. Ms. Stewart points out that this decision declined to require multiplexing
10 as a stand alone UNE, however, this point is moot because Eschelon is not
11 seeking multiplexing as a stand alone UNE. What Ms. Stewart fails to recognize
12 is that the decision does suggest multiplexing should be provided as a feature and
13 function of a UNE (in that case, UNE transport) in the same manner that Eschelon
14 is requesting it here. This undermines her claim that multiplexing is not a feature
15 or function of the UNE loop.⁴²⁶ The WCB stated as follows:

16 We agree with WorldCom that Verizon must provide multiplexing
17 “together with dedicated transport” and “Contrary to Verizon’s
18 argument..., the modified WorldCom language we adopt correctly
19 states that DCS and multiplexing are features of UNE dedicated
20 transport, but does not establish multiplexing equipment as a
21 separate UNE. Therefore, it is irrelevant that the Commission has

⁴²⁵ *In the Matter of Petition of WorldCom, Inc., at al., for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon-Virginia and for Arbitration*, CC Docket Nos. 00-218, 249, 251, 17 FCC Rcd. 27,039 (“Virginia Arbitration Order”), ¶ 490.

⁴²⁶ Qwest Exhibit 3 (Stewart Direct), p. 90, line 27.

1 not performed “necessary” or “impair” analysis for multiplexers.
2 Rather, the multiplexer is a feature, function, or capability of
3 dedicated transport, for which the Commission has performed the
4 requisite analysis.”⁴²⁷

5 I explained at pages 210-212 of my direct testimony⁴²⁸ that the FCC has indicated
6 that multiplexing is also a feature or function of a UNE loop. If Qwest disagrees,
7 the proper procedure is to seek resolution of the issue from the Commission and
8 not to unilaterally impose a higher non-TELRIC rate. For example, in Minnesota,
9 the ALJs said: “Given that Qwest has previously provided multiplexing as a UNE
10 when it is provided in conjunction with a UNE loop, as well as when it is
11 provided in conjunction with transport, the Administrative Law Judges agree with
12 the Department’s recommendation that Eschelon’s language be adopted in the
13 ICA. If Qwest wishes to withdraw or limit multiplexing in the manner it proposes
14 here, it should file a petition with the Commission to modify all ICAs that
15 currently provide for UNE pricing of the multiplexing of a UNE loop into non-
16 UNE transport within a central office.”⁴²⁹

17 **Q. MS. STEWART ALSO CLAIMS THAT CLECS HAVE THE ABILITY TO**
18 **PROVIDE THEIR OWN MULTIPLEXING WITHIN THEIR**

⁴²⁷ Virginia Arbitration Order, ¶¶ 499-500.

⁴²⁸ Exhibit Eschelon 1 (Starkey Direct), pp. 210-212.

⁴²⁹ Exhibit Eschelon 2.24 [MN Arbitrators’ Report ¶ 199]. Regarding Issue 9-61(b), the ALJs, as affirmed by the Minnesota PUC (Exhibit Eschelon 2.25), also adopted Eschelon’s language, in association with their findings in Eschelon’s favor regarding Issues 1-1 (intervals) and Section 12/CMP. *See id.*

1 **COLLOCATION SPACES.⁴³⁰ SHOULD THIS FACTOR INTO THE**
2 **COMMISSION’S DECISION ON ISSUE 9-61?**

3 A. No. The ability for a carrier to self provision a facility is a determination that
4 must be made when conducting a “necessary” and “impair” analysis for UNE
5 unbundling. *See* 47 CFR § 51.317. Since Eschelon is not seeking access to
6 multiplexing as a stand alone UNE, this determination need not be made. As
7 noted by the WCB in the above excerpt, the lack of a necessary and impair
8 analysis for multiplexing – which would include an examination of a CLEC’s
9 ability to self provision multiplexing – is relevant only when the FCC evaluates a
10 given facility or feature as a stand alone UNE. This is not the case in Eschelon’s
11 proposal.

12 **Q. WHAT SUPPORT DOES MS. STEWART PROVIDE TO BACK HER**
13 **STATEMENT THAT “MULTIPLEXING IS NOT A FEATURE OR**
14 **FUNCTION OF THE LOOP”?**⁴³¹

15 A. Though this is, in my opinion, the most important aspect of this issue, Ms. Stewart
16 does not provide any support for her statement. She does not cite to any FCC
17 rules or order that supports her claim and she does not attempt to address the
18 numerous sources to which I cite in my direct testimony that supports the notion
19 that multiplexing is a feature or function of a UNE loop. I suspect that Ms.
20 Stewart may attempt to address these sources in her rebuttal testimony, but I find

⁴³⁰ Qwest Exhibit 3 (Stewart Direct), p. 88, lines 1-4.

⁴³¹ Qwest Exhibit 3 (Stewart Direct), p. 90, line 27.

1 it telling that Ms. Stewart would make the claim that Eschelon’s proposal would
2 require Qwest to provide access to multiplexing on a stand alone UNE basis no
3 fewer than seven times in her testimony – a claim which is simply not true – but
4 would only dedicate one short phrase (*i.e.*, ten words) to the issue of multiplexing
5 as a feature and function of a UNE loop.⁴³²

6 **Q. HAVE YOU ALREADY ADDRESSED THE POINTS MS. STEWART**
7 **RAISES ABOUT INTERVALS (ISSUE 9-61(b)) AND RATES FOR LMC**
8 **MULTIPLEXING?**⁴³³

9 A. Yes. The benefits of including intervals in the ICA are explained under Issue 1-
10 1.⁴³⁴ With regard to the “product specific dispute”⁴³⁵ mentioned by Ms. Stewart, I
11 have explained why the LMC is properly viewed as a UNE combination.
12 Regarding Ms. Stewart’s claim that tariff rates should apply to multiplexing
13 because multiplexing is not a UNE, I have explained, for example, that Qwest has
14 previously provided a Commission approved LMC product at TELRIC rates and
15 has not received Commission approval to charge a higher non-TELRIC rate.

16 **Q. DO YOU HAVE ANY ADDITIONAL OBSERVATIONS ABOUT MS.**
17 **STEWART’S DIRECT TESTIMONY ON ISSUE 9-61?**

⁴³² Qwest Exhibit 3 (Stewart Direct), p. 90, line 27 [“Multiplexing is not a feature or function of the loop...”]

⁴³³ Qwest Exhibit 3 (Stewart Direct), pp. 89-90.

⁴³⁴ *See also* Exhibit Eschelon 2.24 [MN Arbitrators’ Report, ¶22] (quoted above with respect to Issue 1-1); *id.* footnote 149 to ¶199 (adopted Eschelon’s language for Issue 9-61(b)).

⁴³⁵ Qwest Exhibit 3 (Stewart Direct), p. 89, line 11.

1 A. Yes. The crux of this disagreement is whether the multiplexing component of the
2 LMC should be provided at TELRIC rates when combined with a UNE loop (if
3 defined as an UNE combination), or whether multiplexing should be purchased
4 from Qwest's tariff at tariff rates (if defined as a Commingled Arrangement).
5 Despite the companies' asking the Commission to resolve this issue in this
6 proceeding, Qwest makes it appear as if this question has already been answered
7 in favor of Qwest.

8 In the very first Q&A in Ms. Stewart's testimony on this issue, she testifies:
9 "Accordingly, a CLEC *must* order the multiplexed facility used for LMCs
10 *through the applicable tariff*."⁴³⁶ Ms. Stewart repeats this mantra several more
11 times in her direct testimony on Issue 9-61, claiming that, "LMC is comprised of
12 an unbundled loop...combined with a DS1 or DS3 multiplexed facility...that a
13 CLEC obtains from a tariff."⁴³⁷ Ms. Stewart couches her direct testimony as if
14 Qwest's position on multiplexing is fact, but it is not a fact, and the treatment of
15 multiplexing is at issue in this arbitration for the Commission to decide. That
16 Qwest has provided multiplexing in three other ways (*i.e.*, (1) as part of a
17 multiplexed EEL, (2) as part of a Loop-Mux Combination, and (3) as a stand
18 alone UNE), shows that Ms. Stewart is wrong when she claims that a CLEC
19 "must" obtain multiplexing from a tariff.

⁴³⁶ Qwest Exhibit 3 (Stewart Direct), p. 85, lines 5-6 (emphasis added)

⁴³⁷ Qwest Exhibit 3 (Stewart Direct), p. 84, lines 25-28. *See also* Qwest Exhibit 3 (Stewart Direct), p. 85 ("...because an LMC is a combination of a UNE and a tariffed multiplexing service, it is not a UNE combination.")

1 **Q. DOES THIS CONCLUDE YOUR TESTIMONY?**

2 A. Yes.