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Carla M. Butler
Lead Paralegal

February 27, 2008

Frances Nichols Anglin
Oregon Public Utility Commission
550 Capitol St., NE
Suite 215
Salem, OR 97301

Re: ARB 775

Dear Ms. Nichols Anglin:

Enclosed for filing in the above entitled matter please find an original and (5) copies of Qwest Corporation's Notice of Supplemental Authority, along with a certificate of service.

If you have any questions, please do not hesitate to give me a call.

Sincerely,

A handwritten signature in black ink that reads "Carla". The signature is written in a cursive, flowing style.

Carla M. Butler

CMB:

Enclosure

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BEFORE THE PUBLIC UTILITY COMMISSION OF OREGON

ARB 775

<p>In the Matter of</p> <p>ESCHELON TELECOM OF OREGON, INC.</p> <p>Petition for Arbitration of an Interconnection Agreement with Qwest Corporation</p>	<p>QWEST CORPORATION'S NOTICE OF SUPPLEMENTAL AUTHORITY</p>
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Qwest Corporation, ("Qwest") respectfully submits this notice of supplemental authority in connection with the issues presented in this arbitration. The supplemental authority is the Administrative Law Judge's Recommended Opinion and Order, issued February 22, 2008, in the companion arbitration between Qwest and Eschelon Telecom, Inc., in Arizona.¹ A copy of the Recommended Opinion and Order is attached.

Dated: February 26, 2008

Respectfully submitted,

QWEST CORPORATION

By 

Alex M. Duarte
Qwest Corporation
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¹ Opinion and Order, *In the matter of the Petition of Eschelon Telecom, Inc. for Arbitration with Qwest Corporation Pursuant to 47 U.S.C. Section 252(b) of the Federal Telecommunications Act of 1996*, Docket Nos. T-03406a-0572 and T-01051b-06-0572 (Feb. 22, 2008).

Jason Topp
Qwest Corporation
200 South 5th Street
Minneapolis, MN 55402
Telephone: (612) 672-8905

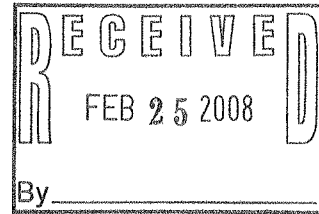
Attorneys for Qwest Corporation

COMMISSIONERS
MIKE GLEASON - Chairman
WILLIAM A. MUNDELL
JEFF HATCH-MILLER
KRISTIN K. MAYES
GARY PIERCE



BRIAN C. McNEIL
Executive Director

ARIZONA CORPORATION COMMISSION



DATE: FEBRUARY 22, 2008

DOCKET NOS: T-03406A-06-0572 and T-01051B-06-0572

TO ALL PARTIES:

Enclosed please find the recommendation of Administrative Law Judge Jane Rodda. The recommendation has been filed in the form of an Opinion and Order on:

ESCHELON TELECOM, INC. and
QWEST CORPORATION
(ARBITRATION)

Pursuant to A.A.C. R14-3-110(B), you may file exceptions to the recommendation of the Administrative Law Judge by filing an original and ten (10) copies of the exceptions with the Commission's Docket Control at the address listed below by **4:00** p.m. on or before:

MARCH 3, 2008

The enclosed is NOT an order of the Commission, but a recommendation of the Administrative Law Judge to the Commissioners. Consideration of this matter has tentatively been scheduled for the Commission's Working Session and Open Meeting to be held on:

MARCH 11, 2008 and MARCH 12, 2008

For more information, you may contact Docket Control at (602) 542-3477 or the Hearing Division at (602)542-4250. For information about the Open Meeting, contact the Executive Secretary's Office at (602) 542-3931.

A handwritten signature in black ink, appearing to read "B. C. McNeil".

BRIAN C. McNEIL
EXECUTIVE DIRECTOR

1 **BEFORE THE ARIZONA CORPORATION COMMISSION**

2 COMMISSIONERS

3 MIKE GLEASON, Chairman
4 WILLIAM A. MUNDELL
5 JEFF HATCH-MILLER
6 KRISTIN K. MAYES
7 GARY PIERCE

8 IN THE MATTER OF THE PETITION OF
9 ESCHELON TELECOM, INC. FOR
10 ARBITRATION WITH QWEST CORPORATION
11 PURSUANT TO 47 USC SECTION 252(b) OF THE
12 FEDERAL TELECOMMUNICATIONS ACT OF
13 1996.

DOCKET NO. T-03406A-06-0572

DOCKET NO. T-01051B-06-0572

DECISION NO. _____

14 OPINION AND ORDER

15 DATE OF ARBITRATION:

March 19 & 20, 2007

16 PLACE OF ARBITRATION:

Phoenix, Arizona

17 ARBITRATOR:

Jane L. Rodda

18 APPEARANCES:

19 Mr. Jason Topp and Mr. Norman
20 Curtright, Qwest Corporation Legal
21 Department; Mr. Philip Roselli, Kamlet,
22 Shepard & Reichert, LLP, and Mr. John
23 Devaney, Perkins Coie, LLP, on behalf of
24 Qwest Corporation; and

25 Mr. Gregory Merz, Gray Plant Mooty, on
26 behalf of Eschelon Telecom of Arizona.

27 **BY THE COMMISSION:**

28 Procedural Background

On September 8, 2006, Eschelon Telecom of Arizona, Inc. ("Eschelon") filed with the Arizona Corporation Commission ("Commission") a Petition for Arbitration of an interconnection agreement ("Petition") with Qwest Corporation ("Qwest") pursuant to A.A.C. R14-2-1505 and Section 252(b) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 ("the 1996 Act").

On October 3, 2006, Qwest filed its Response to the Petition.

By Procedural Order dated October 6, 2006, the Commission established procedural guidelines

1 and set the matter for arbitration, adopting the dates suggested by the parties. An Amended Procedural
2 Order dated October 10, 2006, corrected a filing date in the October 6, 2006, Procedural Order.

3 On October 23, 2006, Qwest and Eschelon filed a Joint Motion to Amend the Procedural
4 Schedule, seeking to extend the dates for filing testimony and for the arbitration due to the burden on
5 witnesses who were testifying in six other states.

6 By Procedural Order dated October 30, 2006, the Commission granted the Joint Motion and set
7 the arbitration to commence March 19, 2007.

8 On November 8, 2006, Qwest filed the Direct Testimony of Renee Albersheim, William
9 Easton, Teresa Million, Robert Hubbard and Karen Stewart. On the same date, Eschelon filed the
10 Direct Testimony of James Webber, Michael Starkey, Bonnie Johnson and Douglas Denney.

11 On February 9, 2007, Qwest filed the Rebuttal Testimony of Ms. Albersheim, Mr. Easton, Ms.
12 Million, Mr. Curtis Ashton, Mr. Hubbard and Ms. Stewart. On the same date, Eschelon filed the
13 Rebuttal Testimony of Ms. Johnson, Mr. Denney and Mr. Starkey.

14 On February 20, 2007, Eschelon filed a Notice of Errata, filing a corrected version of Ex MS-6
15 to Mr. Starkey's Rebuttal Testimony.

16 On March 1, 2007, Qwest filed a Motion to Dismiss Rate Issues.

17 On March 2, 2007, Eschelon filed the Surrebuttal Testimony of Mr. Starkey, Ms. Johnson and
18 Mr. Denney.

19 On March 2, 2007, Qwest filed the Surrebuttal Testimony of Ms. Albersheim, Mr. Easton, Ms.
20 Million, Mr. Ashton, Mr. Hubbard and Mr. Stewart.

21 On March 12, 2007, Eschelon filed a Response to Qwest's Motion to Dismiss Rate Issues.

22 Oral argument on the Motion to Dismiss was heard in a telephonic procedural conference on
23 March 14, 2007.

24 By Procedural Order dated March 14, 2007, the Motion to Dismiss was denied on procedural
25 grounds, pending resolution of the issue in the final arbitration order.

26 The arbitration convened as scheduled on March 19, 2007, at the Commission's Phoenix
27 offices. Following two days of arbitration, the matter was taken under advisement pending the
28 submission of Closing Briefs.

1 On April 27, 2007, Qwest and Eschelon filed Closing Briefs.

2 On June 6, 2007, Eschelon filed, as supplemental authority, a copy of the Minnesota Public
3 Utility Commission's Order Denying Reconsideration in the Qwest-Eschelon Minnesota arbitration
4 (Docket No. P-5340, 421/IC-06-0768).¹

5 On June 21, 2007, the parties filed a Joint Motion for Single Compliance Filing of the
6 Interconnection Agreement And, If Granted, A Revised Schedule. In their Joint Motion the parties
7 reported that they entered into a settlement agreement that would resolve the "wire center" issues
8 (Issues Nos. 8-37 – 8-42 in the Joint Matrix of Issues). The settlement agreement was filed in Docket
9 Nos. T-03632A-06-0091, T-03226A-06-0091, T-04202A-06-0091, T-03406-06-0091, T-03432A-06-
10 0091, and T-01051B-06-0091, and is being considered by the Commission in those dockets.² If the
11 settlement agreement is approved, the parties state that it would resolve all disputed language
12 encompassed by Issues Nos. 9-37 through 9-42. The wire center Settlement Agreement contains
13 language, which if approved, would be inserted into the Eschelon/Qwest ICA. The parties request that
14 the Commission approve a single compliance filing of the ICA to implement both the Commission's
15 order in this arbitration proceeding and the resolution of the wire center issues in Dockets Nos. T-
16 03632A-06-0091 et al. If the Settlement Agreement is not approved in the wire center dockets, then
17 the parties request a modification of the arbitration schedule to allow two rounds of supplemental
18 testimony and a round of briefing for the open wire center issues.

19 On July 18, 2007, the parties filed a Joint Notice of Closure of Arbitration Issue 9-51 and
20 Partial Closure of Arbitration Issue No. 22-90(f). Issue No. 9-51 is described as "Application of UDF-
21 IOF Termination (Fixed) Rate Element." The parties agreed to language for Section 9.7.5.2.1 of their
22 ICA to resolve this issue. Issue No. 22-90(f) concerns the nonrecurring rates for "ICDF Collocation"
23 for DS1 circuits, per two legs, and for DS3 circuits, per two legs.³ This issue is among those described
24 as "Unapproved Rates". The parties partially closed this issue by agreeing upon the nonrecurring rate
25 of \$75.83 for ICDF Collocation for DS1 circuits, per two legs, but have not agreed upon a

26 ¹ The related Minnesota Arbitrator's Report was previously filed as Exhibit DD-25 to Mr. Denney's Surrebuttal Testimony
27 (Ex E-16) and the Minnesota Commission's Order resolving Arbitration Issues was filed as Attachment 2 to Eschelon's
Closing Brief.

28 ² The Commission held a hearing on the wire center settlement agreement on October 30, 2007.

³ A leg is a segment of a multipoint circuit that lies between any two of the points.

1 nonrecurring rate for ICDF Collocation for DS3 circuits per two legs, and that portion of the Issue No.
2 22-90(f) remains in dispute.

3 On September 17, 2007, the parties filed a Joint Notice of Closure of Arbitration Issues No. 8-
4 21, 8-21(a), 8-21(b), 8-21(c), 8-21(d), 8-21(e), and 8-219(f). The parties closed this issue by agreeing
5 to language for Sections 8.2.1.29 –Power and 8.3.1.6 -48 Volt DC Power.

6 Because of the large number of issues to be resolved and the arbitration of those issues in
7 multiple states, Eschelon and Qwest agreed to waive the nine month deadline for a final Commission
8 order.

9 * * * * *

10 Pursuant to Section 252(b)(4)(C) of the Act, the Commission hereby resolves the issues
11 presented for arbitration.

12 **Discussion**

13 **Background**

14 Eschelon is a Minnesota corporation certificated by the Commission in Decision No. 62751
15 (July 27, 2000) as a facilities-based competitive local exchange carrier (“CLEC”) to provide local and
16 resold long distance telecommunications services. Qwest is an incumbent local exchange carrier
17 (“ILEC”) in Arizona. Eschelon and Qwest entered into an interconnection agreement (“ICA”) which
18 was approved by the Commission in Decision No. 62489 (April 28, 2000). The parties have agreed to
19 operate under the terms and conditions of the existing ICA until replaced with a successor Agreement.
20 The parties have attempted to negotiate, with some interruptions, a new ICA since 2000.

21 Many of the issues presented for arbitration revolve around Qwest’s advocacy of the Change
22 Management Process (“CMP”) to address matters of process and procedures and Eschelon’s
23 dissatisfaction or distrust with CMP and desire to have the parties’ rights and obligations established
24 in their ICA. Qwest is concerned that Eschelon’s proposals would result in preferential treatment for
25 Eschelon and would require Qwest to make changes to its procedures and systems to accommodate
26 only one CLEC. Eschelon complains that the CMP is controlled by Qwest, can result in changed
27 procedures that affect how Eschelon provides service to its end users and that Eschelon has a business
28 need for contractual certainty. The impact of the CMP is discussed in connection with the individual

1 issues.

2 Unless otherwise stated, the issues presented for arbitration track the contract sections and
3 proposed language as presented in the parties' "Arizona Disputed Issues List" updated on March 12,
4 2007 ("Joint Matrix").

5 **Issues Presented for Arbitration**

6
7 **Issue 1-1, 1-1(A), 1-1(B), 1-1(C), 1-1(D) and 1-1(E): Intervals - Should service intervals be
specified in the ICA or should they be addressed in the Change Management Process ("CMP")?**

8 **Echelon's Position**

9 Eschelon states that service intervals determine how quickly Eschelon will be able to provide
10 service to its end user customer and are critically important to Eschelon. Eschelon wants the currently
11 existing service intervals to be incorporated into the ICA so that Qwest cannot change them
12 unilaterally. In response to Qwest's professed desire for flexibility, Eschelon has proposed that as an
13 alternative to having interval changes reflected in an amendment to the ICA, that Qwest be permitted
14 to shorten intervals through the CMP and that an ICA amendment, and Commission approval, would
15 only be required to lengthen intervals. Eschelon asserts that lengthened intervals are exceedingly rare,
16 but are of sufficient significance to Eschelon's ability to provide service that such changes should not
17 be made without Eschelon's agreement or the Commission's approval. In addition, Eschelon has
18 proposed that when the parties are able to agree on interval changes, that agreement may be
19 documented by a one-page advice letter rather than a more formal amendment, similar to the process
20 used when the parties agree to add a new product to an ICA.

21 The Minnesota Commission adopted the Arbitrator's recommendation to adopt Eschelon's
22 proposed language for this issue. Eschelon argues that if Qwest prefers uniformity, it should prefer
23 using the same language and forms for the Arizona ICA as well.

24 **Qwest's Position**

25 Qwest argues the record is undisputed that there have been no disputes that have arisen out of
26 the CMP handling of this issue and that Eschelon's fears that Qwest might improperly use the CMP to
27 impose interval changes on CLECs is contrary to the history of the issue. Qwest states that it
28

1 withdrew the one proposed interval change that was opposed by CLECs in the CMP,⁴ and that Qwest's
 2 witness testified that it would be unwise for Qwest to impose interval changes over the objection of
 3 CLECs.⁵

4 Qwest asserts Eschelon's proposals would impose significant administrative burdens on Qwest
 5 by either requiring interconnection agreement amendments or adoption letters with every CLEC in the
 6 event of an interval change.⁶ Qwest argues that no justification exists in this case that would warrant
 7 imposing such burden.

8 Resolution

9 Intervals are essential terms of the products Eschelon orders from Qwest, and Eschelon relies
 10 on provisioning intervals to be able to provide certainty to its end users. Qwest's witness testified that
 11 if Eschelon succeeds in setting service intervals in stone in the ICA it would prevent the appropriate
 12 management of service intervals in the CMP and preclude Qwest from responding to changes in the
 13 industry, including requests for changes from CMP participants.⁷ She claims this would subvert the
 14 CMP process and prevent other CLECs from seeking changes to intervals without Eschelon's express
 15 permission.⁸ She stated that Qwest cannot support "one-off service intervals", and that to adopt
 16 Eschelon's language would lead down the slippery slope of having multiple CLECs requesting
 17 different service intervals.⁹ Qwest admits, however, that in recent years intervals have overwhelmingly
 18 been decreased.¹⁰

19 In light of the importance of certainty surrounding interval lengths, we do not find Qwest's
 20 arguments and prediction of the demise of the effectiveness of the CMP persuasive. In the vast
 21 majority of circumstances, technological changes will shorten intervals, and having current intervals
 22 set in the contract will not hamper other CLECs from requesting interval changes in the CMP. The
 23 intervals that would be incorporated into the Eschelon ICA are existing intervals. When there is

24 ⁴ Ex Q-1, Albersheim Direct at 42.

25 ⁵ Tr. at 88, lines 6-18.

26 ⁶ Ex Q-1, Albersheim Direct at 32-33.

27 ⁷ Id. at 41.

28 ⁸ Id.

⁹ Id. at 42.

¹⁰ Since Qwest's 271 proceedings, Qwest proposed shortening service intervals 39 times and proposed lengthening them only twice. Of the two proposed lengthened intervals, Qwest withdrew one because of CLEC concerns in the CMP and the one that was implemented received no comment or objection from CLECs. Ex Q-3, Albersheim Rebuttal at 34.

1 agreement that service intervals should be shortened, Eschelon has proposed a streamlined process that
2 does not require an amendment of the ICA.

3 Consequently, we adopt Eschelon's Proposal No. 1 with respect to issue 1-1, as well as
4 Eschelon's proposed language resolving issues 1-1(A) through (E).

5 **Issue 2-3: Effective Date of Rate Changes – How should the ICA address the application of rate
6 changes when the rate order does not set forth a specific implementation date?**

7 **Eschelon's Position**

8 Eschelon proposes the following language be included in Section 2.2 concerning the
9 application of rate changes:¹¹ "The rates in Exhibit A and when they apply are addressed in Section
10 22." Eschelon believes that the ICA should be clear about the relationship between Section 2.2 and
11 Section 22 regarding rate changes.

12 In Section 22.4.1.2 Eschelon proposes:

13 Each Party reserves its rights with respect to whether Interim Rates are
14 subject to true-up. If, however, the Commission issues an order with
15 respect to rates that is silent on the issue of a true-up, the rates shall be
implemented and applied on a prospective basis from the effective date of
the legally binding Commission decision as described in Section 2.2.

16 **Qwest's Position**

17 In its Brief, Qwest states that it agrees with Eschelon that language addressing the situation
18 where rate orders do not contain a specific implementation date should be addressed in Section 22 of
19 the ICA. Qwest proposes the following language for section 22.4.1.2:

20 Rates in Exhibit A include legally binding decisions of the Commission
21 and shall be applied on a prospective basis from the effective date of the
legally binding Commission decision, unless otherwise ordered by the
Commission.

22 Qwest believes that its language removes ambiguity regarding rate issues.

23 **Resolution**

24 Qwest does not appear to object to Eschelon's proposed language for Section 2.2 as it relates to
25 the application of rate changes, agreeing that the issue is appropriately addressed in Section 22 of the
26 ICA. Consequently, Eschelon's proposal for Section 2.2, addressing the issue of rates should be
27

28 ¹¹ Joint Matrix at 6.

1 adopted and incorporated into the ICA.¹²

2 Some of the prices contained in Exhibit A to the ICA have not been approved by the
3 Commission in a cost docket. Prices of products that have not yet been approved by the Commission
4 are considered interim rates. Section 22.4 addresses the situation when the Commission has reviewed
5 and changes the Interim Rate. The Parties' proposed language for Section 22.4.1.2 is not substantially
6 different, as both provide that where a Commission order is silent as to the implementation of a rate,
7 the rate shall be implemented on a prospective basis from the effective date of the Commission
8 decision. Eschelon's proposed language includes an express recognition that Interim Rates may be
9 subject to true-up. As such, we find it the more comprehensive approach and will adopt Eschelon's
10 proposed language for Section 22.4.1.2.

11 **Issue 2-4: Effective Date of Legally Binding Changes**

12 **Eschelon's Position**

13 For changes in law other than rate changes, Eschelon proposes that such changes be
14 implemented and applied prospectively as of the date that the order is effective, unless the
15 Commission orders otherwise. Eschelon's first proposal is as follows:

16 Any amendment shall be deemed effective on the effective date of the
17 legally binding change or modification of the Existing Rules for rates, and
18 to the extent practicable for other terms and conditions, unless otherwise
19 ordered.

20 Eschelon has an alternative proposal that states that when there is a change in law, the parties may
21 seek a different implementation schedule, but that absent some other direction, an order changing the
22 law will be implemented as of the order's effective date. This proposal also confirms the parties' duty
23 to keep the ICA up to date.¹³

24 Eschelon objects to Qwest's proposal because Eschelon believes that under Qwest's approach,
25 the effective date of a change in law would depend on whether one party provides the other with
26 notice of the order that gives rise to the change. Under Qwest's proposal, if an order does not contain
27 an implementation date, and one party gives the other party notice of the order within 30 days of the

28 ¹² Joint Matrix at 6-9.

¹³ Joint Matrix at 12-13.

1 order's effective date, the change is implemented as of the effective date. Where neither party gives
 2 notice, the change takes effect as of the effective date of an ICA amendment incorporating the change.
 3 Eschelon believes Qwest's proposal allows a party to "game the system" by intentionally not giving
 4 notice of a change in law that adversely affects that party and thus delay implementation of the
 5 change. Eschelon believes that because of its greater size and resources, Qwest would have a greater
 6 ability to engage in such gamesmanship.

7 Eschelon argues Qwest's proposal is further flawed by ambiguity that could lead to future
 8 disputes. Because it distinguishes between "implementation date" and "effective date", Eschelon
 9 argues Qwest's proposal leaves open for later argument that even though an order states it has an
 10 effective date or is "effective immediately" the order does not state a specific implementation date,
 11 and thus would require notice. Eschelon believes such result would be "absurd."

12 Qwest's Position

13 Qwest proposes that the parties be required to provide notice within 30 days of a legally
 14 binding change if the party wants that change to be effective on the date of such an order.
 15 Specifically, Qwest proposes:¹⁴

16 When a regulatory body or court issues an order causing a change in law
 17 and that order does not include a specific implementation date, a Party
 18 may provide notice to the other Party within thirty (30) Days of the
 19 effective date of that order and any amendment shall be deemed effective
 20 on the effective date of the legally binding change or modification of the
 21 Existing Rules or rates, and to the extent practicable for other terms and
conditions, unless otherwise ordered. In the event neither Party provides
notice within thirty (30) Days, the effective date of the legally binding
change shall be the effective date of the amendment unless the Parties
agree to a different date . . . (Eschelon objects to the underlined language)

22 Qwest argues its proposal provides a significant incentive for parties to take action immediately if they
 23 want to implement a change in law. Qwest states its proposal prevents the recurrence of a complaint
 24 that Level 3 had brought a couple years ago in several states for an alleged change in law.

25 Qwest dismissed Eschelon's claim that it would be unfair to require Eschelon to keep track of
 26 legal changes because it is smaller than Qwest. Qwest believes the record in this case demonstrates
 27 that Eschelon has an extensive regulatory and legal staff that is unlikely to miss an Arizona decision

28 ¹⁴ Qwest's proposed language is reflected by underlined text.

1 affecting their interests.

2 **Resolution**

3 Qwest's proposed language appears to be the result of a specific experience concerning
4 ambiguity between an implementation date and an effective date. However, Qwest's specific proposal
5 could provide incentive to one party to delay notice and the implementation of an adverse change of
6 law. In cases where a Commission order does not contain an implementation date, the easiest
7 presumption is that the change in law should apply as of the effective date of the order, whether or not
8 one of the parties has given notice to the other of the change. If there is a question as to the difference
9 between an implementation and effective date, the parties should retain their right to challenge the
10 presumption that absent directive, the implementation date and effective date are the same. Thus, we
11 adopt the following language for section 2.2:

12 Any resulting amendment shall be deemed effective on the effective date
13 of the legally binding change or modification of the Existing Rules or
14 rates, and to the extent practicable for other terms and conditions, unless
15 otherwise ordered. If an order is silent as to the implementation date, the
16 change or modification shall be implemented on a prospective basis from
the date the order is effective, either by operation of law, or as otherwise
stated in the order, unless subsequently otherwise ordered by the
Commission.

17 The addition of language "unless subsequently otherwise ordered by the Commission" is intended to
18 allow the parties to bring an action before the Commission to clarify the implementation of a change
19 of law order. This language incorporates some of the language Eschelon proposes in its alternative
20 proposal.¹⁵ We do not find that the remainder of Eschelon's alternative language that permits a party
21 to seek a particular deadline or implementation date to be necessary or that it would assist ease of
22 administration and interpretation of the provision.

23 **Issue 4-5 (a, b, c): Design Changes – What is the appropriate definition and charge for design
changes?**

24 A design change is defined in Section 4.0 of the ICA as a change in circuit design after
25 Engineering Review required by a CLEC supplemental request to change a service previously
26 requested by the CLEC. The current ICA includes a charge of \$72.79 for design changes to unbundled
27

28 ¹⁵ Joint Matrix at 13-14.

1 dedicated interoffice transport (“UDIT”). Qwest proposes to apply the same rate for design changes to
 2 loops and CFA-2/4 Wire Loop Cutovers.¹⁶ Eschelon proposes a \$30.00 design change rate for loops
 3 and \$5.00 for CFA-2/4 Wire Loop Cutovers.¹⁷ Eschelon proposes the following definition for the
 4 CFA design change:

5 9.2.3.9 CFA Changes – 2/4 Wire Loop Cutovers. Connecting Facility
 6 Assignment (CFA) changes for Coordinated Installation Options for 2-
 7 Wire and 4-Wire analog (voice grade) Loops (excluding the Batch Hot
 8 Cut Process) on the day of the cut, during test and turn up. When this
 charge applies, the Design Change rate for Unbundled Loops does not
 apply.

9 Qwest proposes the following language for Section 9.2.3.9:

10 9.2.3.9 Rates for CFA changes are set forth in Exhibit A (unless the need
 11 for such change is caused by Qwest, in which case this rate does not
 apply).

12 Eschelon’s Position

13 Eschelon asserts that design changes are part of Qwest’s obligation to provide
 14 nondiscriminatory access to UNEs under Section 251 of the 1996 Act and should be provided at
 15 TELRIC prices. The parties’ current ICA does not contain charges for loop design changes or CFA
 16 changes. Eschelon wants the new ICA to be clear that Qwest must provide design changes for loops
 17 and CFAs at TELRIC prices. Eschelon asserts that its proposed language for Sections 9.2.3.8, 9.2.3.9,
 18 9.20.13.2 and 9.20.13.3¹⁸ would allow Qwest to charge for these elements, and provides interim rates
 19 for loop and CFA design changes. Eschelon objects to Qwest’s approach which Eschelon states
 20 expands the application of the rate for UDIT design changes. Eschelon argues that the UDIT design
 21 change rates were never intended to apply to loop and CFA design changes and that the cost of
 22 providing the loop and CFA changes is less than the cost of UDIT changes.
 23

24 Eschelon has proposed interim rates for design changes for loops as well as for CFA changes
 25 under certain circumstances.¹⁹ Eschelon states that Qwest provided loop design changes from 1999

26 ¹⁶ CFAs are Connecting Facility Assignments which identify a complete communications channel between two places.

27 ¹⁷ Joint Matrix at 16.

28 ¹⁸ Joint Matrix at 15-16.

¹⁹ Eschelon’s proposal is limited to a 2/4 wire analog loop on the same day of a coordinated cut, during test and turn up, excluding batch hot cuts. Ex E-13 Denney Direct at 46-48.

1 until 2005 without a separate charge, but now asserts that the design charge rate of \$72.79 that was
2 approved by the Commission as part of the Phase II cost order was intended to apply to both UDIT
3 and loops. Eschelon claims Qwest takes this position even though both Qwest's Statement of
4 Generally Available Terms ("SGAT") and the current ICA describe the charge as applicable to UDIT
5 but not to loops. Eschelon argues that to accept Qwest's position that the rate applies to both, one
6 would have to believe that Qwest obtained a design change rate that applies to both loops and UDITs
7 but simply elected to apply that charge only to UDIT. Eschelon further argues that Qwest provided no
8 evidence why it did not charge what it now claims was the approved rate for design changes.²⁰
9 Eschelon believes the more reasonable explanation is that Qwest did not charge the design change rate
10 for loops because Qwest understood that the rate was intended to apply to UDIT and not loops.

11 Eschelon asserts that in light of the different activities involved in performing UDIT design
12 changes, loop design changes and CFA changes, it is not reasonable to think the rates for all three
13 activities would be the same. Eschelon claims loops and UDITs are different products that utilize
14 different systems, with UDIT being more complex, and with a higher cost associated with design
15 changes. According to Eschelon, Local Service Requests ("LSRs"), which are used for loops, have a
16 higher level of electronic flow-through than Access Service Requests ("ASRs"), which are used in
17 connection with UDIT. Similarly, Eschelon argues CFA changes, and particularly the limited type of
18 CFA change reflected in Eschelon's language for Section 9.2.3.8 are lower cost than UDIT design
19 changes because Qwest and Eschelon are already in contact and coordinating the cutover and the
20 Qwest central office technician is already standing at the frame. Thus, Eschelon claims, there is little,
21 if any, additional work required to perform a "lift and lay" to switch CFAs. The cost, Eschelon
22 argues, of a few minutes of a technician's time, should be minimal, and not rise to the level of a UDIT
23 design change charge.

24 Eschelon argues that unless and until the Commission approves a rate for design changes to
25 loops and CFAs, Eschelon's proposed interim rates would reasonably allow Qwest to cover its costs.

26 ...

27
28 ²⁰ Tr at 142-145.

1 **Qwest's Position**

2 Qwest states that when a CLEC submits an order for a facility or a service and then submits a
3 change to that order, a Qwest engineer must review the change to determine if the facility or service
4 should be provided in a manner different from that required by the CLEC's original order. Qwest
5 explains that a design change could be a change of end user premises within the same serving wire
6 center, the addition or deletion of optional features or functions, a change in the type of channel
7 interface or the type of interface group, or the technical specification of a package. From Qwest's
8 point of view, the heart of this dispute is that although Qwest incurs significant costs to perform design
9 changes, Eschelon is proposing rates for certain of those changes that would recover only a fraction of
10 Qwest's costs. Qwest argues Eschelon's proposed rates conflict with the approved rate of \$72.29 that
11 the Commission established in Phase II of the Cost Docket, and violates Qwest's right of cost recovery
12 established in Sections 252(c) and (d) of the 1996 Act. Qwest asserts that Eschelon is wrong when it
13 states that neither the current ICA or Qwest's SGAT give Qwest the right to charge for loop and CFA
14 design changes. According to Qwest, in Arizona the Commission established the design change
15 charge of \$72.79, which applies not only to UDIT, but also to unbundled loops and CFA changes.

16 Qwest argues that Eschelon's proposed \$5.00 rate, and the assumptions underlying it, for a
17 CFA change are flawed and should be rejected. Qwest states that after Eschelon submits a new
18 connect service order, a Qwest engineer must connect the customer's loop to Eschelon's equipment
19 collocated in a Qwest central office. To enable Qwest to perform this connection, Eschelon provides
20 Qwest with a CFA on the interconnection distribution frame ("ICDF") in Qwest's central office, which
21 Qwest explains means Eschelon tells Qwest where the Qwest engineer should connect the loop on the
22 ICDF. Qwest states that sometimes the ICDF locations that Eschelon gives Qwest are incorrect and
23 requires Eschelon to submit a new CFA and requires Qwest to redesign the order.

24 Qwest asserts that Eschelon's proposed \$5.00 charge is not supported by a cost study, or any
25 other evidence, showing how the rate was derived. Qwest argues that a cost-based nonrecurring
26 charge, like a design change charge, should be established by identifying the activities a carrier's
27 personnel must perform, estimating the time required to perform the activities and applying an
28

1 appropriate labor rate to the activities and times.²¹ Qwest asserts that the \$72.79 rate that was
2 approved in Phase II of the Cost Docket was based on the average cost of performing a design change
3 for all types of products, including loops and transport, and includes CFA changes. Qwest states that
4 in the explanation in the “executive summary” of the study it indicates that the rate applies to all types
5 of design changes and to CFAs, by reference to “type[s] of channel interface[s].” In addition, Qwest
6 asserts the \$72.79 rate appears in the “Miscellaneous Charges” section of Exhibit A to the Arizona
7 ICA and Qwest’s SGAT. Qwest claims that if the charge applied only to the transport or UDIT related
8 design activities, it would be listed instead in the section of Exhibit A devoted to transport.²²

9 Qwest argues there is no factual basis for Eschelon’s assumption that the presence of a Qwest
10 technician in a central office during a coordinated cut-over reduces the costs of CFA changes. Qwest
11 notes that the \$72.79 rate does not include any time of a central office technician, such that even if a
12 coordinated cut-over reduced technician time on CFA changes, it would not reduce the rate. Qwest
13 believes that Eschelon’s assumptions are unsupported by testimony from an engineer and is an over-
14 simplified description of the activities required to perform CFA changes.²³

15 Qwest argues that Eschelon’s proposed \$30.00 rate for loop design changes is flawed for many
16 of the same reasons as the proposed \$5.00 CFA charge: i.e. there is no supporting cost study or
17 evidence of the activities, times and costs associated with loop design changes. In addition, Qwest
18 argues there is no basis for Eschelon’s claim that loop design changes are not in the TELRIC study
19 that produced the \$72.79 rate. Qwest asserts the cost study is not limited to UDIT and includes loops
20 because the study specifically refers to network facilities used with “end-user premises.” Qwest states
21 that loops connect end-user premises to the network, unlike UDIT which is used to connect central
22 offices and does not involve end-user premises. Thus, according to Qwest, if the cost study were
23 limited to UDIT, it would not have referred to end-user premises.²⁴

24 Qwest notes further that the transport section of Exhibit A includes multiple rates that apply
25 only to transport, for example, “DS1 Transport Termination Fixed” and “DS1 Transport Facilities Per
26

27 ²¹ Tr at 366-368.

²² Ex Q-15 Million Rebuttal at 18-20.

²³ Ex Q-17 Stewart Direct at 10.

28 ²⁴ Ex Q-16, Million Surrebuttal at 14-15.

1 Mile.” Qwest states that by contrast, rates listed in the “Miscellaneous Charges” section of Exhibit A
 2 may apply in multiple circumstances or to more than one network element or activity. Qwest claims
 3 Eschelon’s reading of Exhibit A to include a transport specific charge in the miscellaneous section is
 4 illogical.

5 Qwest asserts there is no foundation for Eschelon’s claim that design changes to loops involve
 6 less work than for UDIT changes. Qwest offered testimony that DS1 and DS3 unbundled loops on
 7 fiber systems can require the same type or re-design work required for UDIT.²⁵

8 Resolution

9 The evidence does not indicate that when it approved a design change charge of \$72.29, the
 10 Commission intended that it apply only to UDIT, and not to loops or CFAs. Qwest provided evidence,
 11 such as its location under “miscellaneous charges” and references to “customer premises,” that
 12 indicates the charge was intended to apply to design changes for loops as well as transport.
 13 Furthermore, Eschelon has failed to demonstrate that its proposed \$30 charge for loop design changes
 14 and \$5 for CFA changes are cost-based and would permit Qwest to recover its costs. However,
 15 Eschelon does raise questions that could indicate that design change charges might be different for
 16 different products. While we do not have a sufficient record in this proceeding to set a different rate
 17 for the design change charge for loops and CFAs, nor do we believe an arbitration is the best forum for
 18 considering rate changes, we believe that the rates for design change charges for loops and CFAs
 19 should be reviewed in the upcoming Phase III of the Qwest cost docket. Thus, we adopt Qwest’s
 20 proposed language, except that we will order that a footnote be added that indicates that the design
 21 change charge for loops and CFAs will be reviewed by the Commission in the Phase III of the cost
 22 docket.

23 **Issues 5-6 & 5-7: Discontinuance of Order Processing & Disconnection (Sections 5.4.2, 5.4.3 &**
 24 **5.13.1) – What is the appropriate procedure for Qwest to discontinue processing orders and/or**
 25 **disconnect Eschelon for non-payment of bills?**

26 **Issues 5-8, 5-9, 5-11 and 5-13: When may Qwest demand a deposit to secure future payment?**

27 Eschelon’s Position

28 Eschelon’s proposed language for Section 5.4.2 states in relevant part:

²⁵ Ex Q-18, Stewart Rebuttal at 8.

1 5.4.2 With the Commission's approval, one Party may discontinue
 2 processing orders for relevant services for the failure of the other Party to
 3 make full payment, less any disputed amount as provided for in Section
 21.8 of this Agreement, for the relevant services provided under this
 Agreement within thirty (30) Days following the Payment Due Date.

4 As an alternative, Eschelon proposes:

5 5.4.2 One Party may discontinue processing orders for relevant services
 6 for the failure of the other Party to make full payment, less any disputed
 amount as provided for in Section 21.8 of this Agreement, for the relevant
 7 services provided under this Agreement within thirty (30) Days following
 the Payment Due Date. . . . If the billed Party asks the Commission to
 8 prevent discontinuance of order processing and/or rejection of orders (e.g.,
because delay in submitting dispute or making payment was reasonably
 9 justified due to inaccurate or incomplete Billing), the Billing Party will
continue order processing while the proceedings are pending, unless the
 10 Commission orders otherwise . . .

11 Qwest objects to the underlined portions of Eschelon's proposals.

12 Eschelon's proposed language for Section 5.4.3, which addresses disconnection, contains
 13 similar language concerning the role of Commission approval.²⁶

14 Issues 5-8, 5-9 and 5-12, relate to Section 5.4.5 and address when a party may demand a
 15 deposit as a consequence of non-payment. Issue 5-13 relates to Section 5.4.7, which specifies when a
 16 party may seek an increase in the amount of a deposit. With respect to the disputed portions of
 17 Sections 5.4.5 and 5.4.7, Eschelon proposed the following:

18 5.4.5 "Repeatedly Delinquent" means payment of any undisputed non de
 19 minimus amount received more than thirty (30) Days after the Payment
 20 Due Date, for three (3) consecutive months or more times during a twelve
 21 (12) month period on the same Billing account number. . . . Required
 22 deposits are due and payable within thirty (30) Days after demand and
 23 conditions being met, unless the billed Party challenges the amount of the
deposit or deposit requirement (e.g., because delay in submitting disputes
or making payment was reasonably justified due to inaccurate or
incomplete Billing) pursuant to Section 5.18. If such a Dispute is brought
before the Commission, deposits are due and payable as of the date
ordered by the Commission.

24 5.4.7 If a Party has received a deposit pursuant to Section 5.4.5 but the
 25 amount of the deposit is less than the maximum deposit amount permitted
 26 by Section 5.4.5, tThe Billing Party may review the Other Party's credit
 27 standing and increase the amount of deposit required, if approved by the
Commission, but in no event will the maximum amount exceed the
 amount stated in Section 5.4.5. Section 5.4 is not intended to change the

28 ²⁶ Joint Matrix at 19-22.

1 scope of any regulatory agency's or bankruptcy court's authority with
2 regard to Qwest or CLECs.

3 Qwest opposes the underlined language and advocates the struck through language.

4 Eschelon believes the ICA should provide for some form of Commission review before Qwest
5 may unilaterally discontinue processing service orders or disconnect Eschelon's circuits for "alleged
6 non-payment." Eschelon asserts that it offered substantial evidence showing that there are numerous
7 reasons why Eschelon and Qwest may disagree about Eschelon's undisputed amounts.²⁷ Eschelon
8 believes that the detrimental effect on Eschelon's business if Qwest refuses to continue processing
9 orders, or disconnects Eschelon, is undisputed, and argues that Commission review and approval
10 before Qwest discontinues order processing, or disconnects Eschelon, would assure that drastic action
11 is not taken unless warranted and end user customers are protected.

12 Eschelon explains that its first proposal for Section 5.4.2 provides that Qwest could only
13 discontinue processing Eschelon's orders if it receives Commission approval. Eschelon's alternative
14 proposal is that Qwest could proceed with discontinuing order processing unless Eschelon asks the
15 Commission to take action to prevent that from happening. Eschelon's proposal for Section 5.4.3
16 would allow Qwest to disconnect services for failure to pay undisputed amounts once Qwest has
17 obtained Commission approval. Eschelon also proposed language in Section 5.13.1 that requires a
18 party to apprise the Commission of a continuing payment default and obtain Commission approval
19 before disconnecting services for untimely payment of undisputed amounts.

20 Eschelon argues that the evidence in this case shows that whether an undisputed amount is past
21 due is itself a subject of disagreement.²⁸ Mr. Denny's testimony provides examples of circumstances
22 where Qwest and Eschelon have disagreed on the amount of undisputed charges, including: Qwest
23 unilaterally declaring a dispute "resolved"; Qwest notices of past due status not including detail by
24 Billing Account number; amounts in past due notices not matching the billing detail; Qwest's failure
25 to post payment in a timely manner; and billing mistakes, etc.²⁹ Eschelon asserts that under its
26 proposal, when there is such a disagreement, it is the Commission, rather than Qwest, that determines
27 the merits of that disagreement. Eschelon is concerned that Qwest's proposal gives Qwest, a

27 ²⁷ Ex E-13, Denney Direct at 65-71.

28 ²⁸ Ex E-13, Denny Direct at 64-71.

29 ²⁹ Id. at 65-66.

1 competitor, the power to act unilaterally in imposing consequences that would be highly disruptive to
2 Eschelon and its customers. Eschelon argues that discontinuation of order processing and
3 disconnection are precisely the types of customer-impacting disputes that call for Commission review.
4 Eschelon notes that under its second proposal for issue 5-6, Commission review would only be
5 required when Eschelon disputes Qwest's action.

6 Eschelon asserts Qwest's proposal that would allow Eschelon to bring a complaint to the
7 Commission after the fact would not protect Eschelon and its customers. Eschelon states that while
8 the dispute is pending, Eschelon would be unable to place orders, its customers would be
9 disconnected, and the damage would have already been done.

10 In addition, Eschelon argues that because the amount of a deposit can be substantial, up to two
11 months' worth of charges, there is good reason to limit requiring a deposit to circumstances of real
12 necessity. Eschelon believes there are four issues relating to deposits: 1) whether the deposit
13 requirement should be triggered by Eschelon's failure to pay a "de minimus" or non-material amount;
14 2) the standard that should be used for determining when payment is "repeatedly delinquent"; 3)
15 whether Eschelon should be required to pay a deposit within 30 days of a demand by Qwest in cases
16 when Eschelon has challenged Qwest's deposit demand with the Commission; and 4) whether Qwest
17 should be permitted to require a deposit even if Eschelon has consistently paid its undisputed bills in a
18 timely matter, based on an undefined "review" by Qwest.

19 Eschelon argues that its proposed use of the term "de minimus" would not increase disputes
20 before the Commission, and has offered, as an alternative, the failure to pay a "material" undisputed
21 amount. Because the term "material" is used elsewhere in the contract, Eschelon argues Qwest should
22 not object to it as unreasonably vague. Eschelon notes that Qwest has expressed the intent not to
23 demand a deposit based on the amount to pay a de minimus amount, but believes that such expression
24 of intent offers little protection to Eschelon.

25 Eschelon argues that a CLEC making regular, substantial payments, even if payment is
26 occasionally late, does not constitute a threat of non-payment warranting a deposit. Eschelon has
27 proposed that payment be considered "repeatedly delinquent" if made more than 30 days after the due
28 date in three consecutive months. Eschelon asserts that the three month standard is the same as found

1 in other ICAs in which Qwest is a party, and that the Minnesota commission adopted the “three
2 consecutive months” definition in the recent arbitration in that state. Alternatively, Eschelon offers a
3 definition of “repeatedly delinquent” as being more than 30 days late three or more times in a six
4 month period, or that the billing party could demand a deposit if payment is more than 90 days late.
5 Eschelon argues that late payment charges are designed to provide incentive for timely payment and
6 the deposit provisions are intended to protect against ultimate non-payment. Eschelon argues that
7 Qwest’s proposed language of three late payments in a twelve month period would require a deposit
8 even though Eschelon regularly pays its bill and poses no risk to Qwest of nonpayment.

9 Eschelon states that its proposed language provides that if it disputes the deposit requirement,
10 the deposit will be due as provided by any subsequent Commission order in connection with the
11 dispute. Eschelon believes that this language assures that when there is a genuine dispute about
12 whether a deposit may be required, Eschelon will not be burdened by having to make a potentially
13 multi-million dollar deposit while the dispute is pending. Although the deposit requirement only
14 applies to undisputed past due amounts, Eschelon fears that Qwest’s decision to label an amount as
15 “undisputed” does not mean that Eschelon does not dispute that amount. Eschelon asserts that
16 Commission involvement may be necessary in order to determine whether an amount claimed by
17 Qwest to be past due is, in fact, “undisputed.”

18 Eschelon believes that Qwest’s position with respect to increasing deposits is egregious.
19 Eschelon states that Qwest’s proposal for Section 5.4.7 would allow it to increase a deposit without the
20 limitations of Section 5.4.5. According to Eschelon, under Qwest’s proposal for Section 5.4.7, Qwest
21 could demand a deposit up to the maximum amount even if Eschelon has consistently paid its bill in
22 full in a timely manner and even if Qwest has never disconnected processing Eschelon’s orders.
23 Further, Eschelon complains that Qwest’s proposal does not describe what its review would entail.
24 Eschelon states that because of the potential for abuse inherent in Qwest’s proposal, Eschelon
25 proposes that Section 5.4.7 be deleted in its entirety. In the alternative, Eschelon proposes that
26 increases in deposits should be limited to situations when the standard for requiring a deposit under
27 Section 5.4.5 has already been met. Further, Eschelon argues that its proposal would retain Section
28 5.4.5 as a limit on Qwest’s ability to impose a deposit.

1 **Qwest's Position**

2 Qwest asserts that its proposed language for these payment and billing issues merely continues
3 the current practice as expressed in Qwest's Arizona SGAT and in Qwest's recently approved
4 interconnection agreements with Covad and AT&T. Qwest asserts that its proposed language is a
5 reasonable business precaution designed to encourage timely payment, and when timely payment is
6 not made, they provide Qwest with the ability to limit its financial risk.

7 Qwest argues that Eschelon's proposals diminish Qwest's ability to collect its bills by requiring
8 Qwest to wait for Commission review before demanding a deposit. Qwest objects to Eschelon's
9 alleged attempts to "water down" its obligation to pay bills by limiting its obligations to pay an
10 amount close to the amount billed (issue 5-8) and to re-define "repeatedly delinquent" such that it
11 would only be obligated to pay its bills on time four months a year to avoid triggering a potential
12 deposit requirement (issue 5-9). Likewise, Qwest complains that Eschelon would limit Qwest's ability
13 to seek a deposit to only those situations where Eschelon is "repeatedly delinquent," and eliminate all
14 other possibilities where a deposit would be appropriate (issue 5-13), and would require Qwest to seek
15 Commission approval to demand a deposit (issue 5-11). Qwest argues that Eschelon's proposals could
16 have serious adverse financial consequences for Qwest, and that the cumulative effect is to slow down
17 and significantly impair Qwest's ability to collect valid, undisputed bills owed by Eschelon.

18 Qwest asserts that its experience in Minnesota, which requires commission approval before
19 disconnection, shows that it can take months to get to hearing.³⁰ Qwest objects to the proposal that
20 would require Qwest not only to go through a hearing to disconnect, but also to take less drastic steps
21 such as discontinuing order processing and demanding a deposit. Moreover, Qwest asserts that
22 Eschelon has not shown that Qwest has misused its authority to make collection efforts in the past.

23 **Resolution**

24 Disputes involving Section 5.4 of the ICA involve "undisputed" portions of late payments.
25 Section 21.8 of the ICA provides a framework for disputed bills.

26 Section 5.4.2 provides the framework for when the Billing Party can discontinue order
27

28 ³⁰ Ex Q-8 Easton Surrebuttal at 10.

1 processing. Under Qwest's proposed language for Section 5.4.2, the Billing Party has the right to
2 discontinue processing orders if the other party does not pay the undisputed amount of the bill within
3 30 days of the payment due date. Further, the Billing Party is required to notify the other Party in
4 writing and the Commission on a confidential basis at least ten business days prior to discontinuing the
5 processing of orders for the relevant services. While the proposal is not unreasonable, as it appears to
6 give sufficient time to allow the Billed Party to determine if the bill is disputed, Eschelon raises a
7 concern that the discontinuance of order processing and disconnection can have a significant adverse
8 effect on the end user. In addition, as proposed by Qwest, the remedies could be undertaken even if a
9 very minor portion of the bill remained unpaid. Billing errors or misunderstandings are likely reasons
10 why a small portion of a bill would remain unpaid, but not be identified as "disputed." Eschelon's
11 alternative proposal for Section 5.4.2 is a reasonable compromise. Under this proposal, Commission
12 intervention is not required to affect a discontinuance of order processing or to reject orders, but the
13 Billed Party can seek Commission intervention to prevent such actions when late payment is
14 reasonably justified. We do not believe it is beneficial to either party, or the public, to unnecessarily
15 involve the Commission in relatively minor billing disputes. However, we are concerned that end
16 users do not suffer unnecessarily on account of a billing dispute not of their making. Because the
17 Billed Party can designate a bill as disputed, the added protections for the benefit of the end user
18 afforded by Eschelon's alternative proposal will unreasonably burden the Billing Party or prevent it
19 from collecting a legitimate past due account.

20 Section 5.4.3 and Section 5.13 address when and how the Billing Party may disconnect the
21 Billed Party for failure to make full payment of an otherwise "undisputed" bill. Eschelon proposes
22 inserting language into these sections that makes Commission approval a prerequisite to disconnecting
23 service. Under Eschelon's proposal, Section 5.4.3 refers to the process of Section 5.13.1 for
24 disconnecting service. We believe that these Sections should mirror the language we approve for
25 Section 5.4.2 that gives the Billed Party the option to request that the Commission prevent
26 disconnection, rather than require Commission pre-approval in all cases. Thus, we shall approve the
27 following language for the relevant portions of Sections 5.4.3:

28 5.4.3 The Billing Party may disconnect any and all relevant services for

1 failure by the billed Party to make full payment, The Billing Party
 2 will notify the billed Party at least ten (10) business days prior to
 3 disconnection of the unpaid service(s). If the billed Party asks the
 4 Commission to prevent disconnection of service(s) (e.g., because delay in
submitting dispute or making payment was reasonably justified due to
inaccurate or incomplete Billing), the Billing Party will not disconnect the
relevant service(s) while the proceedings are pending, unless the
 Commission orders otherwise. . . .

5 With this addition, we do not find that Eschelon's proposed addition to the language for Section 5.13.1
 6 is required. Our resolution requires the Billed Party to take the necessary steps to prevent the Billing
 7 Party from taking action with respect to remedies under these provisions, and does not accept
 8 Eschelon's proposal for Section 5.13.1 that the Billing Party notify the Commission of the default or
 9 the requirement that Commission approval for disconnection is required in all circumstances.

10 The disputes concerning Section 5.4.5 (issues 5-8 and 5-9) involve the definition of "repeatedly
 11 delinquent" and affect how the parties will determine the other's credit status. Eschelon proposes to
 12 insert a "de minimus" standard and to define "repeatedly delinquent" as meaning payment of any
 13 undisputed non-de-minimus amount received more than thirty days after the due date, for three
 14 consecutive months. As an alternative, Eschelon offers the term "material" instead of "non-de
 15 minimus." According to Eschelon, Qwest has agreed to the use of the term "material" in other
 16 sections of the ICA. Qwest's proposed language does not refer to a "non-de minimus" amounts or to
 17 any other qualifier, and would consider "repeatedly delinquent as being more than 30 days past due
 18 three times during a 12 month period". Eschelon is concerned that Qwest could require a significant
 19 deposit if Eschelon is occasionally delinquent on small amounts. Eschelon notes that a two month
 20 deposit for it could be \$5 million.³¹ The imposition of a deposit for relatively minor past due
 21 payments could negatively impact competition. We find that Eschelon's second alternative proposal,
 22 which defines "repeatedly delinquent" as three or more times delinquent during a six-month period is a
 23 reasonable compromise.

24 We believe that although not strictly defined, a word such as "material" can assist in the
 25 resolution of disputes when they are brought to the Commission, even if they do not prevent the
 26 dispute in the first instance, thus we will adopt Eschelon's proposal to insert "material" in Section

27
 28 ³¹ Ex E-13, Denny Direct at 75.

1 5.4.5.

2 Eschelon's third proposal requires Commission action to impose a deposit based on all relevant
3 circumstances.³² We do not adopt Eschelon's third alternative proposal, as we believe it may
4 needlessly require Commission involvement in deposit disputes even where Eschelon would not
5 otherwise oppose the deposit requirement.

6 Issue 5-11 concerns that portion of Section 5.4.5 that provides when deposits are due. Eschelon
7 proposes that deposits would be due within 30 days after demand, unless the Billed Party disputes the
8 deposit requirement with the Commission, and then the deposit would be due on the date ordered by
9 the Commission.³³ The undisputed portion of Section 5.4.5 provides that a deposit can not exceed two
10 months estimated monthly charges, and may be required when the Billed Party has been repeatedly
11 delinquent or is being reconnected after discontinuance, and such deposits are due within 30 days of
12 demand. Eschelon's proposed language for when deposits are due mirrors what we have found
13 reasonable with respect to disconnection or rejection of processing. We find this approach is fair and
14 reasonable for determining when deposits will be due and we will adopt Eschelon's proposed language
15 for this issue.

16 Issue 5-12 also affects the deposit requirement. If a deposit is required by Eschelon's credit
17 worthiness, Qwest should be able to protect its interests and demand a deposit due within 30 days and
18 without seeking Commission intervention. Unless necessitated and supported by good cause, the
19 Commission should not be required to become involved in a routine business matter. Given our
20 resolution of the meaning of "repeatedly delinquent" above, we find Qwest's proposed language to be
21 reasonable and order that it be adopted.

22 Issue 5-13 addresses circumstances when an existing deposit may be increased. Eschelon
23 proposes to add language to Section 5.47 that provides that a deposit that is less than the maximum
24 amount allowed may be increased if approved by the Commission.³⁴ The Minnesota arbitration order
25 found that Qwest's proposed Section 5.4.7 was without standard. If Qwest has already imposed a
26 deposit pursuant to Section 5.4.5, then it should be able to increase that deposit if there is a change in

27 ³² Joint Matrix at 27.

28 ³³ Joint Matrix at 26.

³⁴ Joint Matrix at 29.

1 circumstances that warrant such increase. Because of the potential adverse effect on a competitor's
 2 ability to do business, it should not be permitted to increase the deposit on a whim. The Billed Party
 3 may not have disputed the current deposit amount, but might find a larger deposit to be unduly
 4 burdensome and unnecessary under the circumstances. Eschelon's proposed language, for Section
 5 5.4.7, however, requires Commission involvement, even in situations where there is no dispute
 6 concerning the increased deposit. We favor a provision that allows the Billing Party to protect its
 7 ability to collect monies owed without unnecessary Commission involvement, while protecting the
 8 Billed Party from an unreasonable and unjustified deposit increase. Thus, we approve the following
 9 language for Section 5.4.7:

10 The Billing Party may review the other Party's credit standing and
 11 increase the amount of deposit required if circumstances warrant, such as
 12 but not limited to, increased or greater delinquencies or significant adverse
 13 changes appearing in the Billed Party's credit reports, such as Dun and
 14 Bradstreet, but in no event will the maximum amount exceed the amount
 stated in Section 5.4.5. Unless the Billed Party challenges the amount of
 the increase, by filing a dispute with the Commission, the increased
 deposit shall be due as provided in Section 5.4.5 concerning initial
 deposits.

15 **Issue 5-16: Nondisclosure Agreement**

16 **Eschelon's Position**

17 Section 5.16.9.1 of the ICA requires employees with access to Eschelon's forecasting
 18 information to execute a nondisclosure agreement. Eschelon proposes to add the following:

19 Qwest shall provide CLEC with a signed copy of each non-disclosure
 20 agreement executed by Qwest personnel within ten (10) Days of
 execution.

21 Eschelon claims that Qwest has not provided any detail or evidence that would support its claim that
 22 the requirement would be a burden. Eschelon argues that the audit requirement of Section 18.3.1
 23 provides only limited audit rights regarding the review of "books, records, and other documents used
 24 in the Billing process" and that it is not clear it would allow an audit for the purpose of determining
 25 whether Qwest had complied with the requirements of the contract relating to the internal disclosure of
 26 Echelon's confidential information. Furthermore, Eschelon states the audit provision permits an audit
 27 no more frequently than once every three years.

Qwest's Position

Qwest asserts that Eschelon's proposed language to provide a copy of the nondisclosure agreement within 10 days of execution places an unnecessary administrative burden on Qwest, particularly if the precedent of this section forces Qwest to have to provide every CLEC with copies of nondisclosure agreements. Qwest argues that Section 18.3.1 of the ICA, which allows either party to request an audit of the other party's compliance with the ICA's requirements concerning limitations on distribution, maintenance, and use of proprietary or other protected information, gives Eschelon adequate protection and recourse if it believes that Qwest has misused confidential information.³⁵

Resolution

There is no evidence that Qwest is disregarding its obligations with respect to confidential information. However, we agree with Eschelon, the burden of sending a copy of an executed confidentiality agreement to the other party after it has been signed should not be overly burdensome. We do not find Qwest's generalized claim of burden persuasive, however, to accommodate administrative needs, additional time to return the executed agreement is reasonable. Consequently, we modify Eschelon's proposed language for Section 5.16.9.1 to increase the time to return the non-disclosure agreement to thirty days.

Issue 7-18: Application of Transit Record Charge (Section 7.6.3.1)

Issue 7-19: Transit Record Bill; Validation Detail (Section 7.6.4)

Eschelon's Position

When a call originates on the Eschelon network and then travels across the Qwest network to be terminated on the network of a third carrier, Qwest acts as the transit provider and bills Eschelon for that service. Eschelon's proposed language would require Qwest to provide Eschelon with sample records for specific offices no more frequently than once every six months, at no charge, in order to allow Eschelon to verify Qwest's transit bills. Eschelon states, that contrary to Qwest's claim, Eschelon's switch provides Eschelon with information regarding its originating portion of the call, but does not provide the information that Eschelon needs to reconcile the information provided by its switch to Qwest's charges for transiting the traffic.

³⁵ Qwest Brief at 18.

1 Eschelon wants to include the following provisions:

2
3 7.6.3.1 In order to verify Qwest's bills to CLEC for Transit Traffic the
4 billed party may request sample 11-01-XX records for specified offices.
5 These records will be provided by the transit provider in EMI mechanized
6 format to the billed party at no charge, because the records will not be
7 used to bill a Carrier. The billed party will limit requests for sample 11-
8 01-XX data to a maximum of once every six months, provided that Billing
9 is accurate.

10 7.6.4 Qwest will provide the non-transit provider, upon request, bill
11 validation detail including but not limited to: originating and terminating
12 CLLI code, originating and terminating Operating Company Number,
13 originating and terminating state jurisdiction, number or minutes being
14 billed, rate elements being billed, and rates applied to each minute.

15 **Qwest's Position**

16 Qwest opposes Eschelon's proposed language. Qwest states that in a complaint proceeding in
17 Minnesota, Qwest negotiated a compromise solution for exchanging records when Qwest hands transit
18 traffic to a terminating provider. Qwest states that in that proceeding the parties recognized that the
19 best source of information for determining the source of such calls was the originating switch. Qwest
20 asserts that transit records are a poor substitute for such records because the purpose of a transit switch
21 is to complete calls, with billing considerations being secondary. In this case, Qwest asserts, Eschelon
22 is the originating provider, and its switch produces the best information with regard to traffic it sends
23 to Qwest for termination with a third party. Qwest argues that requiring Qwest to provide Eschelon
24 with detailed records and to do so without charge is unreasonable and an inefficient way to determine
25 appropriate billing by Eschelon.

26 **Resolution**

27 Mr. Easton testified for Qwest that its monthly transit bills provide detail of transiting minutes
28 by end office and provide the company code of the terminating carrier.³⁶ Mr. Easton claims that
through a comparison with the recordings of its own switch, Eschelon can validate that Qwest
transited these calls to the terminating carrier. In addition, he asserts that the terminating carrier is
billing Eschelon for termination, and Eschelon can compare the details of the termination bill with the

³⁶ Ex Q-6, Easton Rebuttal at 30.

1 Qwest transit bill to determine if there are inconsistencies. Mr. Easton states the Qwest category 11
2 transit record product was designed to create records for terminating carriers, not originating carriers,
3 and Qwest cannot without significant expense, provide category 11 records associated with the transit
4 traffic originated by Eschelon. If the terminating party does not request the transit records, Qwest
5 states that it does not create them. Moreover, Mr. Easton asserts, existing transit records do not
6 contain all of the information Eschelon seeks.³⁷

7 Eschelon's witness, Mr. Denny, testified that in order to validate the bills that Qwest provides
8 to Eschelon as the originating carrier for transit traffic, Eschelon needs occasional access to a limited
9 number of call records. Eschelon's proposed language would allow Eschelon to obtain these records
10 for bill verification at no charge.³⁸ Mr. Denny testifies that Qwest is billing Eschelon for the transit
11 traffic but is not providing call detail information necessary to justify the bills.³⁹ He asserts that to
12 verify Qwest's bills, Eschelon needs to be able to reconcile the originating call information collected
13 by Eschelon's switch with the call records Qwest used to generate its transit bill.⁴⁰ Mr. Denney
14 argues that Eschelon should not be required to pay to receive details behind the bills Qwest provides to
15 Eschelon, and further, that Eschelon's proposed language makes clear that Qwest will provide the
16 records on a limited basis, only for the purpose of bill verification as part of the category 11 records.

17 Neither party directly and completely responds to all of the arguments of the other, and often
18 the parties' testimony appears to talk past each other giving the impression there is either a
19 misunderstanding or attempt to obfuscate the real issue. Eschelon does not respond to Qwest's claim
20 that the existing records are designed for termination carriers and do not contain the information that
21 Eschelon wants here, or that Qwest may have to incur substantial costs to provide the information.
22 Qwest does not fully respond to Eschelon's claim that if it can generate a summary report why it
23 cannot provide the underlying records. Based on this record it is impossible to accept either party's
24 position.

25 We find that if the information that Eschelon wants exists, then Qwest should provide it for
26

27 ³⁷ *Id.* at 30-31.

³⁸ Ex E-13, Denney Direct at 99.

³⁹ Ex E-15, Denney Rebuttal at 55.

⁴⁰ *Id.*

1 those sample end offices so that Eschelon can verify its bills from Qwest. If Qwest is able to produce a
 2 summary bill, there must be call details that were used to produce that report, and Qwest should
 3 provide these call records to Eschelon so that Eschelon can verify its bills from Qwest. Qwest states
 4 that upon request, it provides record detail to terminating carriers. We cannot determine from the
 5 record before us whether the records similar to those provided to the terminating carriers for billing
 6 purposes would provide Eschelon with the information it wants, or whether Qwest's records provide
 7 all the information required under Eschelon's proposed Section 7.6.4. It is reasonable that if the
 8 information exists Qwest should provide it to Eschelon. If the individual call records do not contain
 9 the information Eschelon seeks, we are not requiring Qwest to provide more information than the
 10 records currently contain. Eschelon has not convinced us that the benefits it would receive from the
 11 requested information would justify the potential costs to Qwest of having to perform significant
 12 programming changes to provide additional information that it does not currently gather. Producing
 13 these reports on a limited basis should not be overly burdensome, however, and we agree with
 14 Eschelon that it should be provided at no additional charge.

15 Consequently, we adopt Eschelon's proposed language for Section 7.6.31 and as modified for
 16 Section 7.6.4 as follows:

17 7.6.4 Qwest will provide the non-transit provider, upon request, bill
 18 validation detail, including but not limited to: originating and terminating
 19 CLLI code, originating and terminating Operating Company Number,
 20 originating and terminating state jurisdiction, number of minutes being
 billed, rate elements being billed, and rates applied to each minute, to the
extent such data is available.

21 **Issues 8-21 and 8-21(a)-(f): DC Power**

22 These issues involved how Qwest will charge Eschelon for provisioning power to Eschelon's
 23 collocation equipment. The parties resolved these issues subsequent to the arbitration and closing
 24 briefs by agreeing to language to be included in Sections 8.2.1.29 and 8.3.1.6 (and subparts) of the
 25 ICA. In their submitted language, the parties reserve the right to advocate for changes in the rates and
 26 the application of the rates in another Commission docket, such as a cost docket. The proposed
 27 settlement language is a reasonable resolution of the issues raised concerning DC Power, and will be
 28 adopted as part of this Order.

1 **Issue 9-31: Access to Unbundled Network Elements**2 **Eschelon's Position**

3 Eschelon states that under the 1996 Act, Qwest is required to provide “nondiscriminatory
4 access to network elements on an unbundled basis at any technically feasible point on rates, terms and
5 conditions that are just, reasonable and nondiscriminatory.”⁴¹ Access to an unbundled element “refers
6 to the means by which requesting carriers obtain an element’s functionality in order to provide a
7 telecommunications service.”⁴² Eschelon proposes language that would confirm that “Access to
8 Unbundled Network Elements includes moving, adding to, repairing or changing the UNE.” Eschelon
9 states it proposed this provision as a result of Qwest’s attempts to apply non-cost-based tariff rates to
10 activities that are necessary for Eschelon to be able to obtain the functionality of network elements.

11 Eschelon argues that Qwest’s proposed language that would replace “Access to” with
12 “Activities available for Unbundled Network Elements, includes moving, adding to, repairing and
13 changing the UNE . . .” would take these activities outside the scope of Section 251(c)(3). Further, by
14 adding language that Qwest will perform these activities “at the applicable rate,” Eschelon asserts
15 Qwest is disavowing its obligations to provide access to UNEs at TELRIC-based rates. Eschelon
16 argues that despite other language in Section 9.1.2 of the ICA that requires non-discriminatory access
17 to unbundled elements, Qwest’s refusal to acknowledge that “access to UNEs” includes “moving,
18 adding to, repairing and changing” UNEs indicates that the general prescriptive language is not
19 sufficient.

20 **Qwest's Position**

21 Qwest argues that language in Section 9.1.2 of the ICA gives Eschelon nondiscriminatory
22 access to unbundled network elements. Agreed language in Section 9.1.2 provides:

23 Qwest shall provide non-discriminatory access to Unbundled Network
24 Elements on rates, terms and conditions that are nondiscriminatory, just
25 and reasonable. The quality of an Unbundled Network Element Qwest
provides, as well as the access provided to that element, will be equal
between all carriers requesting access to that element.

26 Qwest states Section 9.1.2 is explicit that the UNEs and access Eschelon receives will be equal to the

27 ⁴¹ 47 USC § 251(c)(3).

28 ⁴² *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 13042 (1996) (“*First Report and Order*”) at ¶ 269.

1 UNEs and access Qwest provides to itself and its affiliates:

2 Where Technically Feasible, the access and Unbundled Network Element
3 provided by Qwest will be provided in ‘substantially the same time and
4 manner’ to that which Qwest provides to itself or to its Affiliates.

5 Further, Qwest states agreed language in Section 9.1.2 provides that Eschelon is entitled to the
6 “routine network modifications” that Qwest provides to its own retail customers:

7 Qwest shall perform for [Eschelon] those Routine Network Modifications
8 that Qwest performs for its own End User Customers. The requirement
9 for Qwest to modify its network on a nondiscriminatory basis is not
10 limited to copper loops and applies to all unbundled transmission
11 facilities, including Dark Fiber Transport when available pursuant to
12 Section 9.7.

13 Qwest states that given the extensive provisions in the ICA ensuring nondiscriminatory access
14 to UNEs, Qwest is skeptical that nondiscrimination is the motive behind Eschelon’s proposed
15 language. Qwest is concerned that Eschelon’s proposed language that the recurring monthly rate it
16 pays for UNEs (e.g. \$9.05 for a Zone 1 unbundled loop) entitles it to all of the listed activities at no
17 additional charge. Qwest also argues the terms “moving,” “adding to” and “changing” are undefined
18 and vague. Qwest asserts that the Eschelon witness who provided testimony in this area did not offer
19 a definition of the terms, and was not willing to speculate about the activity potentially encompassed
20 by the terms.⁴³ Qwest argues that if Eschelon’s proposal is adopted, Qwest would be faced with the
21 prospect of having to perform an unknown number of potential activities relating to Eschelon’s use of
22 UNEs without any additional compensation.⁴⁴

23 Qwest proposes the following language, which Qwest asserts ensures that Qwest will perform
24 the activities listed in Eschelon’s proposal and recognizes and establishes that Eschelon may have to
25 pay for those activities “at the applicable rate”:

26 Additional activities available for Unbundled Network Elements include
27 moving, adding to, repairing and changing the UNE (through, e.g. design
28 changes, maintenance of service including trouble isolation, additional
29 dispatches, and cancellation of orders) at the applicable rate.⁴⁵

30 **Resolution**

31 The issues raised in this section are Eschelon’s right of access to UNEs on a nondiscriminatory

32 ⁴³ Tr at 268, line 25 to 269, line 16.

33 ⁴⁴ Ex Q-17, Stewart Dir. at 16.

34 ⁴⁵ Ex Q-18, Stewart Rebuttal, pp 16-17.

1 basis and, more contentiously, at what price. Eschelon is entitled to the functional equivalent of the
 2 UNE at TELRIC rates. Qwest does not appear to disagree. Qwest is concerned that Eschelon's
 3 proposed language would entitle Eschelon to request certain modifications to UNEs at no additional
 4 charge for which Qwest would otherwise be entitled to additional compensation. Eschelon is
 5 concerned that Qwest is going to charge tariffed rates, or non-cost based rates, for access to the UNE
 6 which Eschelon is entitled to receive without additional charge.

7 We agree with Eschelon that access to UNEs can require Qwest to move, add to, repair or
 8 change the UNE to provide access to a functionally equivalent network. However, we share some of
 9 Qwest's concerns, as demonstrated by Eschelon's inability or unwillingness to define the terms, that
 10 there is an element of ambiguity and vagueness to the proposed language. Eschelon asserts that the
 11 language of ICA Section 5.1.6 offers Qwest comfort that it will be entitled to recover its costs, when
 12 appropriate. Specifically, Section 5.1.6 provides "nothing in this Agreement shall prevent either Party
 13 from seeking to recover the costs and expenses, if any, it may incur in (a) complying with and
 14 implementing its obligations under this Agreement, the Act, and the rules, regulations and orders of
 15 the FCC and the Commission"⁴⁶

16 To some extent, the undisputed portion of Section 9.1.2 would appear to encompass Qwest's
 17 obligation to provide access to UNEs. The undisputed portion of Section 9.1.2 provides as follows:

18 Qwest shall provide nondiscriminatory access to Unbundled Network
 19 Elements on rates, terms and conditions that are non-discriminatory, just
 20 and reasonable. The quality of an Unbundled Network Element Qwest
 21 provides, as well as the access provided to that element Qwest shall
 22 perform for CLEC those Routine Network Modifications that Qwest
 23 performs for its own End User Customers. The requirement for Qwest to
 24 modify its network on a nondiscriminatory basis is not limited to copper
 25 loops and applies to all unbundled transmission facilities, including Dark
 26 Fiber transport when available pursuant to Section 9.7. Where
 27 Technically Feasible, the access and Unbundled Network Element
 provided by Qwest will be provided in "substantially the same time and
 manner" to that which Qwest provides to itself or to its Affiliates. In those
 situations where Qwest does not provide access to Network Elements to
 itself, Qwest will provide access in a manner that provides CLEC with a
 meaningful opportunity to compete. For the period of time Qwest
 provides access to CLEC to an Unbundled Network Element, CLEC shall
 have exclusive use of the Network Element, except when the provisions

28 ⁴⁶ Ex E-7, Starkey Rebuttal at 84.

1 herein indicate that a Network Element will be shared. Notwithstanding
 2 the foregoing, Qwest shall provide access and UNEs at the service
 3 performance levels set forth in Section 20. Notwithstanding specific
 4 language in other sections of this Agreement, all provisions of this
 5 Agreement regarding Unbundled Network Elements are subject to this
 6 requirement. In addition, Qwest shall comply with all state wholesale
 7 service quality requirements.

8 However, we find that access may require Qwest to move, add to, repair, and change the UNE
 9 as it would for its own customers. In the *TRO*, the FCC stated:

10 . . .with the exception of constructing an altogether new local loop, we
 11 find that requiring an incumbent LEC to modify an existing transmission
 12 facility in the same manner it does so for its own customers provides
 13 competitors access only to a functionally equivalent network, rather than
 14 one of superior quality. Indeed, incumbent LECs routinely add a drop for
 15 a second line without objection *TRO* ¶ 639.

16 In an attempt to balance Eschelon's concerns that access may require Qwest to move, add to, repair or
 17 change a UNE at TELRIC prices, with Qwest's concerns that the terms can be vague and encompass
 18 more than would otherwise be required to provide access, we adopt the following language in place of
 19 the disputed sentence:

20 Access to Unbundled Network Elements includes moving, adding to,
 21 repairing and changing the UNE (through, e.g. design changes,
 22 maintenance of service including trouble isolation, additional dispatches
 23 and cancellation of orders), in the same manner Qwest does for its own
 24 End User Customers, itself or its affiliates.

25 We expect that if Qwest would otherwise be entitled to compensation for a "move," "addition,"
 26 "repair," or "change," that is, the request would constitute more than Qwest is obligated to perform to
 27 provide access to the UNE, Qwest would seek compensation pursuant to Section 5.1.6, as Eschelon
 28 appears to acknowledge would be appropriate. If there is a dispute the Parties are free to pursue all
 available dispute resolution procedures.

29 **Issues 9-33, 9-34, 9-35 and 9-36: network maintenance and modernization**

30 **Eschelon's Position**

31 **Issue 9-33**

32 The Parties agree that Qwest may need to make changes to, or modernize, its network, which
 33 changes may result in "minor changes to transmission parameters." Eschelon states that it has
 34 proposed language for ICA Section 9.1.9 that confirms that such changes will not adversely affect
 35 service to end user customers. Eschelon proposed three alternatives in an attempt to address Qwest's

1 concerns. In the third alternative, which was adopted in the Minnesota proceeding, Eschelon
2 proposes:

3 If such changes result in the CLEC's End User Customer experiencing
4 unacceptable changes in the transmission of voice or data, Qwest will
5 assist the CLEC in determining the source and will take the necessary
6 corrective action to restore the transmission quality to an acceptable level
7 if it was caused by the network changes.

8 Thus, Eschelon explains if Qwest's changes cause unacceptable degradation to Eschelon's end user
9 customer's voice or data service, Qwest would be required to assist Eschelon in identifying the
10 problem and taking corrective action to restore service to an acceptable level of quality. Eschelon
11 argues that its proposed language does not prohibit Qwest from making changes to its network and
12 does not define a consequence if a network change causes an unacceptable change in the transmission
13 of voice or data, but only requires that in the event of an unacceptable change, Qwest take necessary
14 corrective action.

15 Eschelon notes that FCC rules do not rely totally on industry standards, but rather recognize
16 that the goal is to provide access to the local loop. Thus, 47 CFR § 51.319(a)(8) provides, in part, that,
17 "An incumbent LEC shall not engineer the transmission capabilities of its network in a manner, or
18 engage in any policy, practice, or procedure, that disrupts or degrades access to the local loop."
19 Eschelon states that its proposed language "is designed to address situations where a change might
20 result in a change to transmission parameters that, although meeting applicable standards, might still
21 have an adverse impact on the service that Eschelon is able to provide to its customer."⁴⁷ In its
22 testimony, Eschelon recounted a situation where Qwest had adjusted its network within industry
23 standards, but which caused Eschelon customers to receive circuits that did not work.⁴⁸ Eschelon
24 asserts its proposed language would not prohibit such changes, but rather if the change resulted in a
25 problem, would require Qwest to help remedy the problem.

26 **Issue 9-34**

27 Section 9.1.9 also refers to obligations arising under the FCC's rules with respect to notice of
28 network changes. Eschelon states that it has proposed language that would require that when a change

⁴⁷ Eschelon Brief at 81.

⁴⁸ Ex E-9, Webber Direct at 16.

1 is specific to an end user customer, information regarding the location where a change will occur must
 2 include circuit identification and customer address information. Eschelon asserts this language is
 3 consistent with FCC rules which provide a list of items which a public notice concerning planned
 4 network changes must include. Part (a)(4) of § 51.327 states that the list must include “the location at
 5 which the changes will occur.” Further, Eschelon argues the term “location,” as used in the rule, must
 6 be considered in the context of 47 CFR § 51.327 which states that the public notice must include
 7 notice regarding any changes that “will affect a competing service provider’s performance or ability to
 8 provide service.” Eschelon asserts with circuit ID and customer address information, Eschelon can
 9 cross reference its records to determine which customers Qwest’s network change will affect, so that it
 10 can provide those customers with information and assist them as necessary.

11 Eschelon refutes Qwest’s claims that Eschelon’s proposed language would be too burdensome,
 12 by requiring it to “provide to Eschelon a list of every Eschelon customer address and circuit that is
 13 used by Eschelon to serve its customers for an entire exchange and for each exchange which Qwest
 14 plans to upgrade its switch software;” and that the burden would be even greater if Qwest were to
 15 modify its dialing plan, because such modification would have a LATA-wide effect.⁴⁹ Eschelon
 16 argues that its testimony makes clear that the requirement to provide circuit identification and
 17 customer address information applies only to changes that are specific to an end user, and would not
 18 apply to switch upgrades and dialing plans because neither of these is specific to any particular end
 19 user. After the Minnesota proceeding, Eschelon proposed the following language concerning notice of
 20 network changes:

21 Such notices will contain the location(s) at which the changes will
 22 occur including, if the changes are specific to an End User Customer, the
circuit identification and End User Customer address information, and any
 23 other information required by the applicable FCC rules.

24 Eschelon notes that in Section 9.2.1.2.3 of the ICA, concerning notices of copper retirement,
 25 Qwest has agreed to language that notices will be posted on Qwest’s website and will provide direct
 26 notice to Eschelon when any planned replacement of copper with fiber “when CLEC or its End User
 27 Customers will be affected.” Eschelon argues this language shows that Qwest can distinguish between

28 ⁴⁹ Ex Q-17, Stewart Direct at 31.

1 changes that will affect Eschelon's End User Customers and those that will not.

2 **Qwest's Position**

3 **Issue 9-33**

4 Qwest asserts it is essential for Qwest to have the ability to maintain and modernize its network
5 without unnecessary interference and restriction. Qwest states it is inevitable that its maintenance and
6 modernization of the network will sometimes have an effect on interconnected CLECs. Qwest notes
7 that Congress and the FCC have recognized that as technologies evolve, an ILEC must be able to
8 modify its network, and thus Section 251(c)(5) of the 1996 Act, and 47 CFR § 51.325 of FCC rules,
9 implicitly authorize changes that may "affect the interoperability of . . . facilities and networks" and
10 impose a notice requirement relating to these changes. Qwest asserts that through its proposed
11 language, its intent is to preserve its ability to maintain and modernize its network without undue
12 interference while ensuring that Eschelon continues to receive the UNE transmission quality to which
13 it is entitled. Qwest asserts the agreed upon portion of Section 9.1.9 ensures that Eschelon will receive
14 notice of network activities that is consistent with the FCC's rules relating to network changes. Thus,
15 Qwest objects to Eschelon's proposed language.⁵⁰ In addition, Qwest notes that in Section 9.1.9.1 it
16 has agreed that in the event of an emergency maintenance or modernization activity, it will notify
17 Eschelon of the activity by e-mail within three business days of completing the activity, and that
18 Qwest will provide its repair centers with information relating to the status of network emergencies
19 relating to modernization and maintenance activities to the same extent Qwest provides such
20 information for its own customers. Furthermore, in Section 9.1.9.1 Qwest agrees that it will not assess
21 charges for dispatches that are required as a result of network emergencies arising from Qwest's
22 network maintenance and modernization.

23 Qwest argues that Eschelon's proposed language is vague and unnecessary and would
24 improperly expose Qwest to open-ended risk when it maintains and modernizes its network. Qwest
25 states that its fundamental objection to Eschelon's "no adverse effect" proposal is that it is not tied to
26 any industry standard and therefore would leave Qwest guessing as to whether a network change is
27

28 ⁵⁰ See Joint Matrix at 46-52, for full text of the provision.

1 permitted or prohibited. Qwest states the concept “adverse effect” is not defined in the ICA, and if
 2 allowed, would create a purely subjective notion that could block a network upgrade that Eschelon, or
 3 its end user, does not like.

4 Qwest argues that Eschelon’s language is flawed because it is so broad that it does not even
 5 reflect Eschelon’s intent. Qwest notes that Eschelon’s witness testified that the intent of the proposal is
 6 to avoid situations where a change would cause a service to “stop working,”⁵¹ but that the use of
 7 “adverse effect” encompasses far more situations than where a service “stops working.”

8 Qwest argues that the ambiguity of Eschelon’s proposal could have a chilling effect on
 9 Qwest’s modernization of its network, as Qwest would perform network changes at the risk of
 10 violating the ICA. In addition, Qwest argues that Eschelon’s proposal improperly focuses on the
 11 service that Eschelon provides to its end user customers, while the proper focus should be on the
 12 service that Qwest provides to Eschelon. According to Qwest, it is this latter relationship which is
 13 governed by the American National Standards Institute (“ANSI”) and other industry standards.

14 Qwest argues that the alternative language adopted in the Minnesota proceeding, and which
 15 Eschelon promotes here, has similar flaws to the primary alternative. Specifically, Qwest argues
 16 references to “unacceptable changes” is vague as “unacceptable” is not defined or tied to any
 17 measurable industry standard. Similarly, the provision would require Qwest to restore transmission
 18 quality to “an acceptable level” but does not define “acceptable” or tie it to any industry standard.
 19 Thus, Qwest argues it would have no meaningful way to know whether a change to its network is
 20 permitted under the ICA, or what specific corrective steps to take in response.

21 **Issue 9-34**

22 Qwest states that it is committing to provide notices that meet the requirements of the FCC’s
 23 rule relating to notice of network changes as set forth in 47 CFR § 51.327. Qwest states that consistent
 24 with this rule, Qwest’s notices will include:

- 25 (1) The carrier’s name and address;
- 26 (2) The name and telephone number of a contact person who can supply
 27 additional information regarding the planned changes;

28 ⁵¹ TR at 327, line 19, to p. 328, line 1.

- 1 (3) The implementation date of the planned changes;
- 2 (4) The location(s) at which the changes will occur;
- 3 (5) A description of the type of changes planned (Information provided to
4 satisfy this requirement must include, as applicable, but is not limited
5 to, references to technical specifications, protocols, and standards
6 regarding transmission, signaling, routing, and facility assignment as
7 well as references to technical standards that would be applicable to
8 any new technologies or equipment, or that may otherwise affect
9 interconnection); and
- 10 (6) A description of the reasonably foreseeable impact of the planned
11 changes.

12 Qwest states there is no requirement in FCC Rule 51.327 or in any other FCC rule for ILECs to
13 provide the additional information Eschelon seeks in notices of network changes. Qwest argues that
14 Eschelon's proposal would improperly require Qwest to identify each and every Eschelon end user
15 customer address and associated customer circuit(s) when it makes a network change. Qwest objects
16 to having to provide this information regardless of whether the change would actually have a
17 noticeable impact on either Eschelon or its end user customers. Qwest asserts it would impose a
18 significant burden on it, since it does not have electronic access to this information and would
19 therefore have to conduct extensive, time-consuming manual searches for each notice of a network
20 change.

21 Qwest asserts that the magnitude of the burden is demonstrated by the example of Qwest's
22 relatively common practice of upgrading software used with switches. Qwest states that although
23 these upgrades typically do not have a noticeable effect on CLEC end user customers, Eschelon's
24 proposed language would nevertheless require Qwest to provide the address and circuit ID for every
25 Eschelon end user customer within the entire exchange in which an upgrade takes place. Qwest states
26 the information would not serve any useful purpose, but would require Qwest to engage in time-
27 consuming manual searches. Qwest states the burden on Qwest would be even greater for network
28 changes involving modifications to dialing plans (i.e. number of digits dialed), since those changes
typically span an entire LATA. Qwest argues that since Eschelon fails to define "End-User Customer
specific", the provision could be interpreted as applying to any change that affects any End-User
Customer. Qwest states that if Eschelon's intent is to limit its proposed notice requirement to network
changes that take place at a specific identified customer premise, it should modify its language to

1 make that intent clear.

2 Qwest claims that with the information concerning the locations of network changes that
3 Qwest routinely provides in its notices, Eschelon can readily identify its customers who may be
4 affected by a network change and obtain their addresses and circuit IDs. Qwest believes that even
5 Eschelon's final alternative, although an improvement, still improperly shifts the burden of
6 determining circuit IDs from Eschelon to Qwest.

7 Finally, Qwest argues that the Eschelon proposal is inconsistent with the Commission's
8 Decision in the Qwest-Covad arbitration concerning notices of network changes. Qwest states that in
9 that arbitration, the Commission rejected Covad's demand that Qwest should provide CLEC customer
10 addresses in notices relating to Qwest's retirement of copper loops.⁵² Qwest argues its obligation is
11 not to provide Eschelon with the addresses of its customers that could be affected by network changes,
12 but to provide Eschelon with sufficient information about where a network change is taking place so
13 that Eschelon, not Qwest, can identify the addresses of any of its customers that could be affected by
14 the change.

15 **Resolution**

16 We believe that if a network change causes an Eschelon end user to suffer loss of service or
17 impairment in the quality of service, it is reasonable that Qwest should assist Eschelon in determining
18 a resolution. Because Qwest would be responsible for making the network modifications, Qwest
19 would likely have the best information on the cause of a problem and how to rectify it. The evidence
20 presented in the arbitration indicates that while network modifications may cause problems for
21 Eschelon end users, the number of instances has not been substantial. Consequently, we will adopt
22 Eschelon's alternative proposal, with some modification in an attempt to address Qwest's concerns
23 concerning ambiguity. We acknowledge that the language does not eliminate the potential for future
24 disputes, but fairness dictates that Qwest assist in restoring an end user's functionality in the event a
25 network modification caused a degradation of service. Thus, we adopt the following language for
26 Section 9.1.9 in resolution of Issue 9-33:

27

28 ⁵² See Decision No. 68440 at 11 (February 2, 2006).

1
2 If such changes result in the CLEC's End User Customer experiencing a
3 degradation in the transmission quality of voice or data, such that CLEC's
4 End User Customer loses functionality or suffers material impairment,
Qwest will assist the CLEC in determining the source and will take the
necessary corrective action to restore the transmission quality to an
acceptable level if it was caused by the network changes.

5 With respect to Issue 9-34 regarding providing notice of network changes, we find that
6 Qwest's proposed notices of network changes would provide sufficient information to Eschelon to
7 allow Eschelon to determine the address and circuit ID of Eschelon's affected end users. Qwest may
8 or may not have easy access to the information Eschelon seeks, but we find Eschelon's proposal would
9 unnecessarily, and without good reason, shift responsibility from Eschelon to Qwest.

10 **Issues 9-37 – 9-42: Unimpaired Wire Centers**

11 On June 14, 2007, in Docket Nos. T-03632A-06-0091, T-03226A-06-0091, T-04202A-06-
12 0091, T-03406-06-0091, T-03432A-06-0091, and T-01051B-06-0091, Qwest and Eschelon, along
13 with several other CLECs, filed a proposed settlement agreement that would resolve issues related to
14 the designation of Qwest wire centers as unimpaired. The Commission held a hearing on the
15 settlement agreement on October 30, 2007. In the settlement agreement, Qwest and Eschelon agree on
16 contract language which if approved by the Commission, would be incorporated in the ICA that is the
17 subject of this arbitration. In the current docket, Qwest and Eschelon propose that if the settlement
18 agreement is approved, that the Commission approve a single compliance filing of the ICA to
19 implement both the Commission's order in this arbitration proceeding and the resolution of the wire
20 center issues. If the settlement agreement is not approved in the wire center dockets, then Qwest and
21 Eschelon request a modification of the arbitration schedule to allow two rounds of supplemental
22 testimony and a round of briefing for the open wire center issues.

23 The parties' proposal is reasonable. The settlement agreement presents a resolution of the wire
24 center issues for a number of larger CLECs and it makes sense to have a universal resolution of those
25 issues. If the wire center settlement is approved, it is appropriate to include the relevant language in
26 Eschelon's ICA with Qwest. If the settlement agreement is not approved, then the current arbitration
27 would need to be re-opened for additional testimony and argument in order to resolve the issues
28 related to wire centers that had been raised in the Petition. In any case, for a complete ICA, it would

1 be most efficient for the parties to make only one compliance filing, which would include whatever
2 language is ultimately approved concerning wire centers.

3 **Issue 9-43: UNE Conversions and Circuit ID**

4 **Eschelon's Position**

5 Eschelon proposes, and Qwest opposes, the following language for Section 9.1.15.2 and 9.1.15.3:

6
7 9.1.15.2.3 The circuit identification ("circuit ID") will not change.
After the conversion, the Qwest alternative service arrangement will have
8 the same circuit ID as formerly assigned to the high capacity UNE.

9 9.1.15.3 If Qwest converts a facility to an analogous or alternative
service arrangement pursuant to Section 9.1.15, the conversion will be in
10 the manner of a price change on the existing records and not a physical
conversion. Qwest will re-price the facility by application of a new rate.

11 9.1.15.3.1 Qwest may perform the re-pricing through use of an
"adder" or "surcharge" used for Billing the difference between the
12 previous UNE rate and the new rate for the analogous or alternative
service arrangement, much as Qwest currently does to take advantage of
13 the annual price increases in its commercial Qwest Platform Plus product.

14 9.1.15.3.1.1 Qwest may add a new Universal Service Ordering Code
("USOC") for this purpose and assign the "adder" or "surcharge" rate to
15 that USOC.

16 9.1.15.3.1.2 For any facility converted to an analogous or alternative
service arrangement pursuant to Section 9.1.15.3, Qwest will either use the
17 same USOC or the USOB will be deemed to be the same as the USOC for
the analogous or alternative service arrangement for pricing purposes,
18 such as for the purpose of calculating volumes and discounts for a regional
commitment plan.

19
20 Eschelon objects to Qwest's position, that in converting a UNE to a non-UNE, it must change
the circuit ID. Eschelon argues there is no legal or engineering need to change the ID in the
21 conversion and that Qwest has needlessly created a complex and cumbersome process that is contrary
22 to FCC policy.

23
24 By way of background, in the Triennial Review Order ("*TRO*")⁵³ and Triennial Review
25 Remand Order ("*TRRO*")⁵⁴, the FCC declared that circuits that were formerly available as UNEs are

26 ⁵³ *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16878 (2003),
aff'd in part and rev'd and vacated in part, *United States Telecom Association v FCC*, 359 F.3d 554 (D.C. Cir. 2004) (USTA
27 II).

28 ⁵⁴ *In the Matter of Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of
Incumbent Local Exchange Carriers*, (Order on Remand) FCC 04-290 (WC Docket No. 04-313 and CO Docket No. 01-
338 released February 4, 2005).

1 no longer UNEs, and thus, it is necessary to “convert” those circuits from UNEs to non-UNEs. The
2 FCC has not adopted rules that provide a specific process for conversions, but Eschelon states the FCC
3 envisioned a process under which the parties would negotiate in good faith to develop a process for
4 converting circuits.⁵⁵ Eschelon states that the FCC provided guidance on the issue, directing that
5 conversion should be a “seamless process that does not affect the customer’s perception of service
6 quality”,⁵⁶ and described conversions as “largely a billing function.”⁵⁷ To prevent discriminatory
7 practices, the FCC has prohibited ILECs from imposing “wasteful and unnecessary charges, such as
8 termination charges, re-connect and disconnect fees, or non-recurring charges associated with
9 establishing a service for the first time.”⁵⁸

10 Eschelon asserts that Qwest acknowledges that the circuit uses the same physical facilities after
11 conversion as before, and that the conversion does not involve making any physical changes to the
12 circuit. Eschelon claims the process that Qwest undertakes to convert a circuit involves a purely
13 paperwork “disconnection” and “re-connection,” which involves exactly the kinds of activities for
14 which the FCC has made clear CLECs cannot be charged.

15 Eschelon states that in order to give effect to the FCC’s directives concerning conversions and
16 to assure that Eschelon end users are not adversely affected by the conversion, Eschelon has proposed
17 language that: 1) provides that the circuit ID will not change as a result of the conversion; and 2)
18 provides for the conversions to be handled as a price change rather than a physical conversion.

19 Eschelon complains that Qwest has created a process for conversion that involves personnel in
20 three different functional areas, multiple databases and systems, orders to “disconnect” and “connect”
21 service and that requires “reviewing” and “confirming” and “assuring” and “verifying” and
22 “validating.” Eschelon states that Qwest created its process outside the CMP, without CLEC input and
23 without the approval of any state commission. Eschelon asserts that Qwest acknowledges that its
24 elaborate process would not be necessary if Qwest did not change the circuit ID as part of the
25 conversion. Eschelon claims the “need” to change the circuit ID is not supported as a matter of law or

26
27 ⁵⁵ See *TRO* ¶585.

⁵⁶ *Id.* at ¶586.

⁵⁷ *Id.* at ¶588.

⁵⁸ *Id.* at ¶587.

1 fact. Eschelon asserts that it is undisputed that when Qwest began converting special access circuits to
2 UNEs, the circuit IDs did not change. Eschelon argues that Qwest's claims that it abandoned the
3 practice because it was "experiencing difficulty in managing the large number of circuits" and
4 "incurring a substantial amount of expense," is not supported with detail or evidence of the alleged
5 "difficulties." Eschelon argues the Commission must weigh the lack of demonstrable need to change
6 the circuit ID against the real potential for harm that such changes cause. Eschelon states that a simple
7 typing error could result in a customer being placed out of service, and if both Eschelon's and Qwest's
8 systems are not timely and accurately updated to reflect the new circuit IDs there will likely be
9 problems identifying the correct circuit if it would need repair or maintenance. Thus, Eschelon argues,
10 its proposal will prevent service interruptions and promote quality of service.

11 **Qwest's Position**

12 In the *TRRO*, the FCC established that in wire centers in which CLECs are not "impaired," as
13 defined in Section 251, Qwest is no longer required to provide access to DS1 or DS3 UNE loops, or
14 DS1 or DS3 inter-office transport. Qwest argues that to the extent that Qwest incurs costs to facilitate
15 the CLEC's conversion from a UNE to a private line service, Qwest should be entitled to assess an
16 appropriate charge. Qwest proposes to charge Eschelon \$40.32 for converting UNE loops to private
17 line circuits and \$126.14 for converting unbundled dedicated interoffice transport ("UDIT") to private
18 line circuits based on the rates contained in other CLECs' ICAs.

19 Qwest argues that contrary to Eschelon's claims, the conversion of a UNE to a special private
20 line circuit requires a variety of steps to assure that data for the converted circuit is accurately recorded
21 in the appropriate systems. Qwest asserts that the conversion to private line facilities is not analogous
22 to the conversion from UNE-P to Qwest Platform Plus ("QPP") as Eschelon suggests. Qwest notes
23 that DS1s and DS3s are only being converted to private line services in the wire centers that have been
24 determined to be non-impaired, and that in all other wire centers, DS1s and DS3s will continue to be
25 classified as UNEs. In the case of UNE-P, the loop portion of the product remains a UNE in all wire
26 centers, while the switching and shared transport components of UNE-P are no longer UNEs. When
27 Qwest was no longer required to provide UNE-P, Qwest created a new product, QPP, in order to
28 replace UNE-P. Qwest states QPP is billed differently through the assignment of USOCs without

1 consideration for other system centers. Unlike with DS1s and DS3s, there is no circuit ID associated
2 with the loop with the UNE-P or QPP services. As part of UNE-P, the QPP elements were already
3 being billed out of the Customer Record Information System (“CRIS”) billing system, and thus a
4 change in USOC was all that was necessary to effectuate new rates. The way in which Qwest tracks
5 the loop for purposes of repair and maintenance does not change as a result of the conversion from
6 UNE-P to QPP. Thus, Qwest argues, Eschelon’s comparison is not meaningful.⁵⁹

7 Qwest asserts, however, that in the case of DS1 and DS3 UNEs, the character of the product
8 offering changes after conversion and both products (UNE and private line) are identified by circuit
9 IDs. DS1s and DS3s are available as UNEs at TELRIC rates only to CLECs, in wire centers that
10 continue to be identified as “impaired”. In order to charge a rate for the DS1 and DS3 services in the
11 non-impaired wire centers at something other than TELRIC, as Qwest is entitled to do under the
12 FCC’s *TRRO* decision, Qwest states that it must re-classify them as something other than UNEs. In
13 converting the UNE product to a tariffed private line product, Qwest states that it must change the
14 circuit ID in order to properly track the differently-classified products in the appropriate systems.
15 Qwest asserts that because of the change in the nature of the circuits from UNE products to private
16 line services, and because these circuits are billed, inventoried and maintained differently in Qwest’s
17 systems, Qwest must process them as an “order-out” and an “order-in” and thus change the circuit
18 identifiers to move them from one product category to another. According to Qwest, the products are
19 distinguishable from each other, by price and classification, as well as by the customers to whom they
20 are available and by the different ordering, maintenance and repair processes they employ. Qwest
21 explains that circuit IDs identify, among other things, whether a circuit is a UNE or private line, what
22 type of testing parameters apply, and which maintenance and repair center is responsible for that
23 circuit.⁶⁰

24 Qwest asserts that the use of appropriate and distinct circuit IDs for UNEs and tariffed products
25 is essential for Qwest to comply with the FCC rules that require carriers to maintain accurate records
26

27 _____
28 ⁵⁹ Ex Q-14 Million Direct at 22-23.

⁶⁰ Ex Q-16, Million Surrebuttal at 10-11.

1 that track inventories of circuits.⁶¹ Qwest states it must be able to distinguish for purposes of tracking
 2 and reporting its UNE products separately from its other products, and it does this through the use of
 3 circuit IDs and other appropriate codes. Qwest argues it is able to maintain, track and service all of its
 4 customers better and more efficiently if it is able to identify accurately the types of services and
 5 facilities it is providing to these respective categories of customers.

6 **Resolution**

7 Eschelon argues that because the physical facility does not change during a conversion from a
 8 non-UNE to a UNE, there is no reason for the circuit ID to change. Qwest states, however, that the
 9 circuit ID identifies the type of facility, and is important in tracking inventories and complying with
 10 Qwest's reporting obligations. Because DS1s and DS3s can be UNEs in those wire centers that are
 11 considered to be "impaired," Qwest needs to change the circuit ID to distinguish the UNEs from the
 12 non-UNEs from what is essentially the same type of facility.

13 It is uncertain how many conversions will occur in the future. As wire centers are determined
 14 to be "unimpaired" CLECs will be making the decision on how they will continue to provide service
 15 to their end customers in those wire centers. Qwest stated that in over 500 conversions to private line
 16 services, it is not aware of any complaints from CLECs that their customers' service was disrupted by
 17 the conversion process.⁶² Eschelon cites the potential dangers from changing the circuit IDs,⁶³ but
 18 does not claim that Eschelon end users have actually suffered from the conversion process or change
 19 in circuit ID to date. Without more concrete evidence of service quality issues arising from the change
 20 in circuit IDs, we find that Eschelon has not demonstrated that Qwest's process for conversion is
 21 unreasonably burdensome.

22 We find that Qwest has demonstrated a legitimate and reasonable reason to change the circuit
 23 ID during conversion from a UNE to a non-UNE. We do not have a sufficient record in this case,
 24 however, to determine if Qwest's charges for performing the conversions, or all of the steps Qwest

25 ⁶¹ According to Qwest, the circuit ID is an alpha/numeric identifier whose sequence of letters and numbers define the
 26 characteristics of a particular circuit and which indicates attributes of the circuit, such as the LATA and jurisdiction, as well
 27 as the type of circuit, service code and service modifiers. The circuit ID contains a serial number for the circuit to ensure
 that no duplication occurs, and an identifier for the region in which the circuit is physically located. Ex Q14, Million Direct
 at 15, n.5.

28 ⁶² Ex Q-14, Million Direct at 18.

⁶³ Ex E-6, Starkey Direct at 159.

1 claims are necessary, are reasonable. Neither can we evaluate the reasonableness of Eschelon's
 2 approach to employ an "adder." Such pricing decision is best made in a separate rate docket. In the
 3 interim, Qwest's charges should be considered interim and subject to refund pending a final
 4 determination of the appropriate charge. The parties should note in their Exhibit A that the conversion
 5 rates are interim and subject to true-up pending a Commission approved rate in a cost docket.

6 We cannot adopt Eschelon's proposed language for Section 9.1.15. The evidence indicates
 7 that in the conversions made to date, Qwest has made the conversion "seamlessly" without disruption
 8 to the CLEC end user. Because Qwest does not make conversions affecting its own customers, the
 9 fact that it charges for the conversion does not of itself, indicate impermissible discrimination.

10 **Issue 9-51: Unbundled Dark Fiber (UDF) Termination Rate**

11 Eschelon's Position

12 In Section 9.7.5.2.1.a of the ICA, Eschelon proposes the following:

13 9.7.5.2.1(a) UDF-IOF Termination (Fixed) Rate Element. This rate
 14 element is a recurring rate element and provides a termination at the
 15 interoffice FDP within the Qwest Wire Center. Two UDF-IOF
 16 terminations apply (one for each of the two end points in the termination
 path) per pair ~~cross connect provided on the facility~~. Termination charges
 apply for each intermediate office terminating at an FDP or like cross-
 connect point.

17 Alternatively, Eschelon proposes:

18 9.7.5.2.1(a) UDF-IOF Termination (Fixed) Rate Element. This rate
 19 element is a recurring rate element and provides a termination at the
 20 interoffice FDP within the Qwest Wire Center. Two UDF-IOF
 21 terminations apply per pair ~~cross connect provided on the facility~~.
 Termination charges apply for each intermediate office terminating at an
 FDP or like cross-connect point.

22
 23 Eschelon asserts that it wants clear ICA language relating to the application of rates in Exhibit
 24 A, especially as they relate to the application of the UDF-IOF Termination (fixed) rate element.⁶⁴

25 ⁶⁴ UDF-IOF is Unbundled Dark Fiber – Interoffice Facility. UDF is a deployed, unlit pair of fiber optic cable or strands
 26 that connects two points within Qwest's network. UDF is a single transmission path between two Qwest Wire Centers, or
 27 between a Qwest Wire Center and a CLEC Wire Center, or between a Qwest Wire Center and either an appropriate outside
 28 plant structure or an End User Customer premises in the same LATA and state. UDF exists in two (2) distinct forms: (a)
 UDF Interoffice Facility (UDF-IOF), which constitutes a deployed route between two (2) Wire Centers; and (b) UDF-
 Loop, which constitutes a deployed Loop or section of a deployed Loop between a Qwest Wire Center and an End User
 Customer premises.

1 Eschelon claims that Qwest's proposed language would result in this rate element being applied to
2 Eschelon differently than Qwest applies the rate element to other CLECs, and is different than the
3 application of the rate reflected in Qwest's SGAT. Eschelon states the result of Qwest's position is
4 higher costs for Eschelon compared to other CLECs.

5 Eschelon provides two alternative proposals – one alternative Eschelon claims addresses
6 Qwest's concern with the language it uses for other carriers by clarifying that the rate element applies
7 to each end of the transport path. Eschelon's second alternative mirrors the language in Qwest's
8 SGAT. Eschelon asserts that Qwest has provided no cost support or other justification for departing
9 from its SGAT and applying this rate differently to Eschelon than the way it applies it to other CLECs.

10 **Qwest's Position**

11 Qwest asserts that by the proposed changes to the definition of this rate element, Eschelon is
12 seeking to limit Qwest's ability to recover all the costs that it incurs for dark fiber terminations.
13 Eschelon's language would, according to Qwest, limit UDF-IOF terminations to two per pair – one for
14 each end of the termination path. Qwest states that Eschelon acknowledges that sometimes Qwest
15 needs to perform more than one dark fiber termination in a central office and that Qwest should be
16 compensated for each termination.⁶⁵ Qwest argues that despite these acknowledgements, Eschelon's
17 proposal would deny Qwest compensation when more than one termination is required.

18 Qwest states that it has consistently applied this rate on a "per termination path", which means
19 that it has applied the rate based on one termination on each end of the path, plus additional
20 terminations at each of the intermediate offices through which the UDF-IOF passes along its
21 designated route. Qwest states that to ensure that it recovers its termination costs, Qwest charges all
22 CLECs on a per termination basis without a cap on the number of terminations as Eschelon proposes.
23 Qwest states that it is trying to ensure that it applies the rate element in Eschelon's ICA consistent with
24 the way that Qwest applies the rate to other CLECs.

25 Qwest argues that Eschelon's witness' assertion that the Arizona cost study upon which the
26 UDF-IOF termination rate is based *could* be based on an average number of terminations per UDF-

27
28 ⁶⁵ Tr at 380.

1 IOF, is without evidentiary support.⁶⁶ Because Eschelon's witness, Mr. Denney, did not analyze the
 2 cost study, Qwest argues that his unsupported speculation should be rejected.

3 Resolution

4 With respect to the rate element for UDF-IOF, Qwest's August 29, 2003, SGAT provides:

5 9.7.5.2.1 Unbundled Dark Fiber - IOF Rate Elements

6 a) UDF-IOF Termination (Fixed) Rate Element. This rate element
 7 is a recurring rate element and provides a termination at the
 8 interoffice FDP within the Qwest Wire Center. Two UDF-IOF
 9 terminations apply per pair. Termination charges apply for each
 10 intermediate office terminating at an FDP⁶⁷ or like cross-connect
 11 point.

12 Eschelon's proposal # 2 comports with the SGAT language, while Qwest's proposed language
 13 deviates from its SGAT language. Qwest did not offer testimony on the subject of the UDF-IOF rate
 14 element, and it is unclear from its brief whether it opposes the use of its SGAT language. We find that
 15 absent testimony supporting a reason to deviate from the current SGAT language, the SGAT language
 16 remains reasonable and should be adopted. Consequently, we adopt Eschelon's second alternative
 17 proposal. We do not, however, read this language as limiting the number of terminations and charges
 18 that might be required or find that Qwest has not applied this provision fairly in the past.

19 In connection with the next issue (9-53) Qwest argues that its SGAT is out of date. Whether
 20 any CLEC utilizes the SGAT any more or not, the SGAT continues to exist as an option for CLECs to
 21 interconnect and if its terms are no longer reasonable, it is Qwest's responsibility to seek to withdraw
 22 it or keep it updated.

23 **Issue 9-53: Unbundled Customer Controlled Rearrangement Elements ("UCCRE")**

24 Eschelon's Position

25 Eschelon makes several alternative proposals affecting Qwest's offering of UCCRE and the
 26 procedure for Qwest to phase out offering a product:⁶⁸

27 9.9 Unbundled Customer Controlled Rearrangement Element

28 ⁶⁶ TR at 377-379.

⁶⁷ Fiber Optic Distribution Panel.

⁶⁸ Underlined text is Eschelon-proposed language. Regular text is agreed language.

(UCCRE)

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3
4
9.9.1 If Qwest provides or offers to provide UCCRE to any other CLEC during the term of this Agreement, Qwest will notify CLEC and offer CLEC an amendment to this Agreement that allows CLEC, at its option, to request UCCRE on nondiscriminatory terms and conditions.

Proposal # 2:

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10
1.7.3 Phase out process. If Qwest desires to phase-out the provision of an element, service or functionality included in this agreement, it must first obtain an Order from the Commission approving its process for withdrawing the element, service or functionality. Obtaining such an Order will not be necessary if Qwest (1) promptly phases-out an element, service or functionality from the agreements of all CLECs in [insert applicable state] within a three-month period when the FCC has ordered that the element, service or functionality does not have to be ordered, or (2) follows a phase-out process ordered by the FCC.

Option # 1 for 9.3.3.8.3:

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15
9.3.3.8.3 If CLEC elects to move its service to the new minimum point of entry, CLEC will perform its own cross-connect. Qwest has previously performed this service, and will either obtain a phase-out order (pursuant to Section 1.7.3) from the Commission within four months of the effective date of this Agreement or perform this service if CLEC requests.

Option # 2 for 9.3.3.8.3:

16
17
18
19
9.3.3.8.3 If CLEC elects to move its service to the new minimum point of entry, CLEC may either perform its own cross-connect or request that Qwest perform the cross-connect. If Qwest performs the cross-connect appropriate time and material charges are applicable.

20
21
22
9.9.1 Qwest shall provide Unbundled Customer Controlled Rearrangement Element (UCCRE) to CLEC in a non-discriminatory manner according to the terms and conditions of Section 9.9 and subparts of the SGAT, unless Qwest obtains a phase-out order (pursuant to Section 1.7.3) from the Commission within four months from the effective date of this Agreement.

Proposal # 3:

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24
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26
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28
1.7.3 If Qwest desires to phase out or otherwise cease offering on a wholesale basis (without first individually amending every interconnection agreement containing that term and updating the SGAT) an Interconnection service, access to Unbundled Network Elements (UNEs) Ancillary Services or Telecommunications Services available for resale, Qwest must request and obtain Commission approval, after CLEC and other potentially affected carriers are afforded reasonable notice and opportunity to be heard in a generic Commission proceeding. For example, if a product is

1 generally available per the terms of the SGAT and is contained in
2 the ICA's of other CLECs (but not CLEC), before refusing to
3 make that product available to CLEC on the same terms on the
4 basis that Qwest intends to cease offering the product (such as due
5 to lack of demand), Qwest must either (1) amend the ICAs of those
6 other CLECs and update the SGAT to remove the product; or (2)
7 obtain Commission approval to cease offering the product on a
8 wholesale basis. This provision is intended to help facilitate
9 nondiscrimination by ensuring that Qwest cannot refuse to offer a
10 product on the same terms to CLEC while that product is still
11 contained in the ICAs of the CLECs or in the SGAT.

12 1.7.3.1 If the basis for Qwest's request is that Qwest is no longer
13 required to provide the product or service pursuant to a legally
14 binding modification or change of the Existing Rules, in the cases
15 of conflict, the pertinent legal ruling and the terms of Section 2.2
16 of this Agreement govern notwithstanding anything in this Section
17 1.7.3.

18 1.7.3.2 This Section 1.7.3 is not intended to change the scope of
19 any regulatory agency's authority with regard to Qwest or CLECs.

20 1.7.3.3 This Section 1.7.3 relates to the cessation of a product or
21 service offering on a wholesale basis as described in Section 1.7.3
22 (referred to as a "phase out" or as "cease offering"). Nothing in
23 this Section 1.7.3 prevents another CLEC and Qwest from
24 mutually agreeing to remove a product from an individual ICA to
25 which CLEC is not a party.

26 1.7.3.4 Before Qwest submits a request to phase out or cease
27 offering a product or service (as those terms are used in this
28 Section 1.7.3) pursuant to this Section 1.7.3, and while a request
29 pursuant to the Section 1.7.3 is pending before the Commission,
30 Qwest must continue to offer the product or service, unless the
31 Commission orders otherwise.

32 1.7.3.4.1 If the Commission orders that Qwest need not offer
33 the product or service while the proceeding is pending, the
34 Commission may place such restrictions on that order as allowed
35 by its rules and authority, including a condition that if Qwest later
36 offers the product or service to any CLEC, it must then inform
37 CLECs of the availability of the product or service and offer it to
38 other CLECs on the same terms and conditions. If those terms and
39 conditions are in this Agreement (but were not in effect due to the
40 Commission order that Qwest need not offer the product or service
41 while the proceeding is pending), once Qwest offers those to any
42 other CLEC, Qwest must offer those terms to CLEC pursuant to
43 those terms in this Agreement without amendment as well.

44 1.7.3.5 If the Commission approves the phase out or other
45 cessation of a product or service offering that is contained in this
46 Agreement, the product or service will no longer be available per
47 the terms of the Commission's order without the need for an
48 amendment to this Agreement, unless the Commission orders
49 otherwise or the Parties agree to amend this Agreement. Qwest
50 will amend its SGAT consistent with the Commission's ruling,

1 unless the Commission orders otherwise.

2 9.9.1 Qwest shall provide Unbundled Customer Controlled
 3 Rearrangement Element (UCCRE) to CLEC in a non-
 4 discriminatory manner according to the terms and conditions of
 5 Section 9.9 and subparts of the SGAT, unless Qwest obtains an
 6 order from the Commission that it need not offer UCCRE to
 7 CLECs, such as an order pursuant to Section 1.7.3 of this
 8 Agreement.

9 **Proposal # 4:**

10 1.7.3 If Qwest desires to phase out or otherwise cease offering a
 11 product, service, element, or functionality on a wholesale basis that
 12 it has previously made available pursuant to Section 251 of the
 13 Act. Qwest must first obtain an order from the Commission
 14 adopting a process for doing so. Once that process is in place
 15 Qwest may use that process as ordered by the Commission.

16 1.7.3.1 Unless and until a process is approved by the Commission
 17 as described in Section 1.7.3, Qwest must continue to offer such
 18 products, services, elements, or functionalities on a
 19 nondiscriminatory basis, such that Qwest may not refuse to make
 20 an offering available to CLEC on the same terms as it is available
 21 to other CLECs through their ICAs or the SGAT on the grounds
 22 that Qwest, although it has not yet amended those arrangements,
 23 indicates that it intends to cease offering that product (such as due
 24 to the lack of demand). If the Commission does not adopt a
 25 process as described in Section 1.7.3 or Qwest chooses not to use
 26 that process, Qwest may cease a wholesale offering by promptly
 27 amending all ICAs containing that offering to remove it.

28 Qwest shall provide Unbundled Customer Controlled
Rearrangement Element (UCCRE) in a non-discriminatory manner
according to the following terms and conditions.

9.9.1 Description

9.9.1.1 Unbundled Customer Controlled Rearrangement Element
(UCCRE) provides the means by which CLEC controls the
configuration of Unbundled Network Elements (UNEs) or
ancillary services on a near real time basis through a digital cross
connect device. UCCRE utilizes the Digital Cross-Connect
System (DCS). UCCRE is available in Qwest Wire Centers that
contain a DCS and such DCS is UCCRE compatible.

9.9.2 Terms and Conditions

9.9.2.1 DCS ports are DS1 And DS3 and Virtual Ports (Virtual
Ports are for connecting one end user to another). The DCS Port is
connected to the Demarcation Point using tie cables via the
appropriate DSX crossconnect panel. The DSX panel services
both as a "Design-To" point and a network interface at the DCS.
CLEC is responsible for designing to the "Design-To" point.
CLEC may connect the UCCRE ports to its elements or CLEC
designated equipment. If CLEC desires DS0 Port functionality,
CLEC will order a DS1 UCCRE Port and provide its own

1 multiplexer (or DS1 UDIT multiplexers) and connect them
 2 together. This combination will form the equivalent of 24 DS0-
 3 level ports.

4 9.9.2.2 The reconfiguration of the service is accomplished at the
 5 DS0 signal level. Reconfiguration of these services can be
 6 accomplished through two methods: Dial Up or Attendant Access.

7 9.9.2.2.1 Dial up Access. Qwest will provide access to mutually
 8 agreed upon UCCRE points in those offices where UCCRE is
 9 available. Qwest will provide and engineer this service in the same
 10 manner that it is currently provided to Qwest's End User
 11 Customers.

12 9.9.2.2.2 Attendant Access. When CLEC requests Qwest to make
 13 changes on its behalf, an attendant access charge will apply per
 14 transaction.

15 **9.9.3 Rate elements**

16 9.9.3.1 Recurring rate elements include

17 9.9.3.1.1 DS1 Port;

18 9.9.3.1.2 DS3 Port;

19 9.9.3.1.3 Dial Up Access; and

20 9.9.3.1.4 Attendant Access.

21 9.9.3.2 Nonrecurring rate elements include:

22 9.9.3.2.1 DS1 Port;

23 9.9.3.2.2 DS3 Port; and

24 9.9.3.2.3 Virtual Ports

25 **9.9.4 Ordering Process**

26 9.9.4.1 Ordering processes and installation intervals are specified
 27 in Exhibit C of this Agreement and are the same as specified in the
 28 UNE-UDIT Section. UCCRE is ordered via the ASR process.

9.9.4.2 UCCRE is ordered with the Basic Installation option.
Qwest will begin the work activity on the negotiated Due Date and
notify CLEC when the work activity is complete. Test results
performed by Qwest are not provided to CLEC.

29 Eschelon argues that pursuant to its proposal, if there truly is no demand for a product, and
 30 withdrawal of the product is legitimate for that or other reasons, Qwest will have an opportunity to
 31 withdraw the product pursuant to Section 1.7.3. Eschelon argues that it is impermissible
 32 discrimination for Qwest to withdraw a product for one CLEC while still making it available to other
 33 CLECs.

34 Eschelon states that it is undisputed that Qwest makes UCCRE available to other CLECs, both
 35 pursuant to ICAs and to its SGAT. Eschelon asserts that its proposal only requires Qwest to make

1 products available to it on the same terms and conditions as it makes those products available to other
2 CLECs. According to Eschelon, if these provisions are not included in the ICA, other CLECs who
3 have these products in their contracts will be able to order them and Eschelon will not; Eschelon
4 argues such different treatment is precisely the sort of discrimination the 1996 Act was intended to
5 prevent. Eschelon argues that when the FCC reversed the “pick and choose rule,” it made clear that
6 existing state and federal safeguards against discriminatory behavior would remain in effect.
7 Furthermore, Eschelon argues, Qwest is obligated to provide the products and services pursuant to the
8 terms of its SGAT, and even if Qwest claims the SGAT is “out dated,” Qwest must provide products
9 and services under the terms of the SGAT if a CLEC opts into the SGAT.

10 Eschelon claims that Qwest has expressed an intent to discontinue offering UCCRE on a
11 going-forward basis.⁶⁹ Eschelon states this would mean they would remain available to those CLECs
12 that already have them in their ICAs, but would be unavailable to CLECs, such as Eschelon, with new
13 ICAs. Eschelon has offered three different alternatives which it states would allow Qwest to phase out
14 products, subject to Commission approval, while preventing Qwest making them available to some
15 CLECs, but not others.

16 Eschelon explains that its first phase-out proposal permits Qwest to seek Commission approval
17 for a process to phase out a particular product, and does not require Qwest to use a specific phase-out
18 process, and further provides that this process is not necessary if Qwest promptly phases-out the
19 product from all CLEC ICAs in the state within a 3 month timeframe of an FCC order affecting the
20 product, or follows a phase-out process ordered by the FCC. (See Proposal #2)⁷⁰

21 Eschelon’s second phase-out proposal (Proposal # 3) would require Qwest to obtain
22 Commission approval in a generic proceeding in which CLECs are provided with notice and a
23 reasonable opportunity to be heard, prior to phasing out a product. Eschelon asserts that this proposal
24 would allow the Commission the opportunity to consider all of the relevant factors. The scope of this
25 proposal excludes the elimination of elements that are no longer required to be offered as a result of a
26 change in law, which are to be governed by the ICA’s change of law provision.

27 _____
28 ⁶⁹ Ex Q-18, Stewart Rebuttal at 29-30.

⁷⁰ Eschelon notes that the Minnesota Commission adopted this approach to the issue.

1 Eschelon asserts that its third phase-out provision (proposal # 4) offers Qwest more flexibility,
2 by permitting Qwest to seek Commission approval for a process to phase-out a particular product “on
3 a wholesale basis that it previously made available pursuant to Section 251 of the Act. . . .” This
4 proposal allows Qwest to cease a wholesale offering by promptly amending all ICAs containing the
5 offering, but makes clear that unless and until a phase-out is approved by the Commission (or Qwest
6 promptly amends all ICAs containing the product), Qwest must make that product available on a
7 nondiscriminatory basis. Eschelon states this proposal does not bind Qwest to follow any particular
8 process, but places the burden on Qwest to propose and obtain Commission approval of a process if it
9 wishes to phase-out a product.

10 **Qwest’s Position**

11 Qwest asserts that Eschelon’s demand that Qwest make UCCRE available is improper because
12 the FCC has removed from its unbundling rules the requirement that ILECS provide digital cross-
13 connects for UCCRE. Qwest explains that UCCRE was the product Qwest developed to meet the
14 former FCC requirement for ILECs to provide a means by which a CLEC could control the
15 configurations of UNEs and ancillary services through the use of a digital cross-connect device.
16 Qwest states that although it made UCCRE available to CLECs, there has never been any CLEC
17 demand for this product, no CLEC has ever ordered it or otherwise suggested a need for it. Qwest
18 states that because the FCC removed UCCRE from its rules, and given the absence of demand for it,
19 Qwest has decided to discontinue offering this product on a going-forward basis. Accordingly, Qwest
20 states that it opposes Eschelon’s language that would require Qwest to notify Eschelon if it offers to
21 provide UCCRE to any other CLEC and make UCCRE available to Eschelon on nondiscriminatory
22 terms and conditions.

23 Qwest believes that Eschelon’s language is premised on the mistaken claim that the FCC did
24 not intend to eliminate UCCRE from its unbundling rules. Qwest asserts that it is clear that the FCC
25 deliberately eliminated UCCRE from its unbundling rules. Qwest also argues that there is nothing in
26 the *TRO* or *TRRO* suggesting that an ILEC must seek approval from a state commission before
27 discontinuing the UNEs and services that the FCC eliminated from Section 251. Qwest states that on
28 the contrary, the FCC made clear in the *TRRO* that its changes in unbundling requirements are to be

1 implemented through the interconnection negotiation process, not by seeking approval of the changes
2 from state commissions.⁷¹

3 Qwest argues that if the FCC determines that there is no longer a competitive need for ILECs
4 to offer a product or service, ILECs have no legal obligation to continue offering the product or
5 service in new ICAs. Qwest states that under Eschelon's "discrimination" argument, Qwest would be
6 denied the benefits from these changes in the law for indefinite periods of time because old ICAs do
7 not include the new legal requirements. Thus, Qwest argues it would be forced to enter into new ICAs
8 that reflect old law and competitive conditions that no longer exist, and such approach would not be
9 consistent with sound public policy and law.

10 Further, Qwest argues that in the event that it provides UCCRE to another CLEC on a single
11 isolated basis, Qwest cannot reasonably be expected to notify Eschelon that the product has been
12 offered, as Qwest has no processes or systems in place that would permit it to comply with that type of
13 notification requirement. On the other hand, Qwest asserts, if it agreed to include UCCRE in another
14 CLEC's ICA, Eschelon would have notice of that through Qwest's public filing of the ICA or
15 amendment with the Commission.

16 With respect to Eschelon's second alternative proposal, Qwest argues it goes far beyond cross-
17 connection to create a mandatory process for Qwest to follow when it desires to discontinue offering a
18 product. Qwest asserts that all of Eschelon's proposed alternatives are legally flawed and should be
19 rejected. First, Qwest argues, it appears the proposals attempt to regulate Qwest's relationship with
20 other CLECs through Eschelon's ICA, as the "generic proceeding" could be triggered by Qwest's
21 decision to stop offering a product to any CLEC, not just Eschelon. Second, Qwest argues it is not
22 appropriate for one CLEC and ILEC to adopt a broad, generic process that would apply to all local
23 exchange carriers in Arizona. Third, Qwest asserts it is neither logical nor efficient to require a time-
24 consuming, resource-intensive generic proceeding in response to Qwest's attempt to withdraw offering
25 products for which there is no foreseeable demand. Fourth, Qwest argues Eschelon's proposal violates
26 the requirement in Section 252 that ILECs and CLECs must negotiate proposed ICA provision for 135

27 _____
28 ⁷¹ Citing ¶ 233 of the *TRRO*: "the incumbent LEC and competitive LEC must negotiate in good faith regarding any rates, terms, and conditions necessary to implement our rule changes."

1 days before submitting them to arbitration. In this case, Qwest states that Eschelon did not present its
 2 proposal until after filing its arbitration petition, which according to the plain language of Section
 3 252(b) (the provision that governs arbitration authority of state commissions), indicates that the
 4 proposal is not an “open issue” subject to arbitration. Finally, Qwest argues that Eschelon’s new and
 5 alternative proposal would improperly require Qwest to update its SGAT to reflect the results of any
 6 generic product withdrawal proceeding. Qwest claims that Qwest and CLECs typically do not rely
 7 any longer on Qwest’s SGAT, as CLECs have multiple other options available to them, including
 8 other ICAs to opt into and Qwest’s multi-state “Template Agreement.” Qwest states that because of
 9 the effectiveness and utility of the Template Agreement, Qwest stopped updating its SGAT in 2003.

10 Qwest argues its proposed language for Section 9.3.3.8.3.1 provides assurance that Eschelon
 11 will be able to obtain access to UCCRE cross-connects in the unlikely event Qwest makes this service
 12 available to other CLECs in future ICAs. According to the Joint Matrix (p. 58), Qwest proposed the
 13 following language for Section 9.3.3.8.3.1:

14 If during the term of this agreement a new negotiated ICA or negotiated
 15 amendment has been approved by the Commission that contains the option
 16 for Qwest to perform cross connect jumper work for intrabuilding cable, at
 17 CLEC’s request, Qwest will offer CLEC an amendment to this agreement
 which will include all the associated rates, terms and conditions as it
 negotiated.⁷²

18 **Resolution**

19 We find that Eschelon’s proposed alternatives go far beyond the issue of whether Qwest should
 20 be required to make UCCRE available to Eschelon, and raise issues that are best resolved in a generic
 21 docket rather than in an ICA that only affects two parties. Given the nature of the product, its removal
 22 from the FCC’s requirement that it be unbundled, and the lack of demand, we find that Qwest’s
 23 proposed language for Section 9.3.3.8.3.1 offers a reasonable solution to Eschelon’s concerns of
 24 potential discrimination. Qwest’s proposed language for Section 9.3.3.8.3.1 does not appear to

25 ⁷² Qwest offered this language in connection with Issue 9-50, which issue the parties were able to resolve consensually.
 26 With respect to issue 9-50, the parties agreed to the following language as Section 9.3.3.8.3:

27 If CLEC elects to move its service to the new minimum point of entry, CLEC may either
 28 perform its own cross-connect or request that Qwest perform the cross-connect. If Qwest
 performs the cross-connect appropriate time and material charges are applicable.

1 conflict with the parties' agreed language for Section 9.3.3.8.3, and should be adopted.

2 Our adoption of Qwest's position with respect to this issue does not relieve it of its obligation
3 to update its SGAT or seek its withdrawal.

4 **Issue 9-55 : Loop Transport Combination**⁷³

5 **Eschelon's Position**

6 **Issue 9-55**

7 Eschelon states that its proposed language uses the term "Loop-Transport Combination" as the
8 FCC did, in the *TRO* to identify EELs⁷⁴, Commingled EELs and high capacity EELs. Eschelon
9 proposes the following language:

10 9.23.4 Loop-Transport Combinations: Enhanced Extended Links (EELs),
11 Commingled EELs, and High Capacity EELs

12 Loop-Transport Combinations – For purposes of this Agreement, "Loop-
13 Transport Combination" is a Loop in combination, or Commingled, with a
14 Dedicated Transport facility or service (with or without multiplexing
15 capabilities), together with any facilities, equipment, or functions
16 necessary to combine those facilities. At least as of the Effective Date of
17 this Agreement "Loop-Transport Combination" is not the name of a
18 particular Qwest product. "Loop-Transport Combination" includes
19 Enhanced Extended Links ("EELs") Commingled EELs, and High
20 Capacity EELs. If no component of the Loop-Transport Combination is a
21 UNE, however, the Loop-Transport Combination is not addressed in this
22 Agreement. The UNE components of any Loop-Transport Combination
23 are governed by this Agreement and the other component(s) of any Loop-
24 Transport Combinations are governed by the terms of an alternative
25 service arrangement, as further described in Section 24.1.2.1.

20 Eschelon asserts that its proposed language is designed to preserve the Commission's jurisdiction over
21 the UNE portion of such combinations, while Qwest's proposal would effectively allow the tariffed
22 terms applicable to the non-UNE to determine the terms and conditions under which the UNE is
23 available. Eschelon claims that it is using the term "Loop-Transport Combinations" as an umbrella
24 term that includes EELs, Commingled EELs and high capacity EELs, as the FCC did in its *TRO*.
25 Eschelon states that Loop-Transport Combinations promote competition by giving the CLEC the

26 ⁷³ Issues 9-55, 9-58 and 9-59 are related, and concern the combination of loop and transport where one part of the
27 combination is a UNE and the other part is a non-UNE. Issue 9-55 concerns, in particular, the nomenclature used to
28 describe the combination of loops and transport. Issues 9-58 and 9-59 concern the terms that apply to commingled
arrangements.

⁷⁴ Enhanced Extended Link. An EEL is a combination of unbundled loop, switching and dedicated transport.

1 ability to provide service to end users who are served out of wire centers in which the CLEC is not
2 collocated. Using a combination loop and transport, Eschelon explains, extends the loop from the end
3 user's location to a wire center where the CLEC is collocated.

4 Eschelon states that Qwest is objecting to the term "Loop-Transport Combination" on the
5 grounds that Eschelon is using the term to create a new "product." However, Eschelon states that its
6 proposed language is clear that the term is not a new product, and that if there is no UNE component,
7 the Loop-Transport Combination is not governed by the ICA.

8 Qwest's Position

9 Qwest states that there are important distinctions between UNE combinations which are
10 combinations of unbundled network elements, and commingled arrangements, which are comprised of
11 a UNE connected or attached to a tariffed service (e.g. a special access service). Qwest asserts that
12 Eschelon's proposed use of the term "loop-transport combination" to refer to both UNE combinations
13 and commingled arrangements clouds the critical distinction between the products.

14 Qwest states that it offers three distinct products that are combinations of loops and transport:
15 (1) enhanced extended loops ("EELS"), (2) commingled EELs, and (3) high capacity EELs. Qwest
16 states that each of these products is different from the others and has its unique pricing and
17 provisioning requirements. Qwest argues that Eschelon's use of the generic term "loop transport
18 combination" in reference to all three products creates a significant risk that Eschelon could attempt to
19 apply terms and rates to all the products that should apply to only one product. Qwest states that its
20 proposed language for Section 9.23.4 preserves the distinct labels and terms that apply to these
21 products. Qwest proposes the following:

22 9.23.4 Enhanced Extended Links ("EELS"), Commingled EELs, and High 23 Capacity EELs

24 When a UNE circuit is commingled with a non-UNE circuit, the rates,
25 terms and conditions of the ICA will apply to the UNE circuit (including
the Commission jurisdiction) and the non-UNE circuit will be governed by
the rates, terms and conditions of the appropriate Tariff.

26 Qwest argues that its approach is consistent with the clear statements of the FCC and other state
27 commissions that the UNE component of a commingled product should be governed by UNE terms
28 and the tariffed component by tariffed terms or a price list. Qwest argues that Eschelon's approach

1 creates a risk of applying improper terms to these products.

2 Moreover, Qwest asserts, Eschelon's proposal that commingled arrangements be ordered
3 through a single local service request ("LSR") and billed through the billing system that Qwest uses
4 for UNEs (the "CRIS" system) is a direct attempt by Eschelon to have the Commission force Qwest to
5 change its special access and private line service order process and billing arrangements. Qwest
6 asserts that the tariffed products and Section 251 UNE products have their own established ordering,
7 provisioning and billing systems and methods; and the FCC did not require combined processes,
8 systems and methods for the distinct components of commingled arrangements when it eliminated the
9 restriction on commingling. Qwest argues that nowhere in the *TRO* or *TRRO* does the FCC require
10 ILECs to modify the rates, terms and conditions of their special access and private lines services,
11 beyond removing any commingling with UNE restrictions.

12 Qwest argues its proposed language is a clear and straightforward manner for addressing
13 Eschelon's concerns without creating undue confusion in Section 9.23 of the ICA.

14 **Resolution**

15 Both parties argue that the other party's approach would create the risk that improper terms
16 would be applied to these products and services. Our review of the proposed language leads us to
17 conclude that Eschelon's proposal creates more ambiguity than that proposed by Qwest. We do not
18 find that Qwest's proposed language improperly attempts to limit or restrict Commission jurisdiction
19 over the UNE portion of a product. Consequently, we will adopt Qwest's proposed language for
20 Section 9.23.4., and agree with Qwest that the term "Loop-Transport Combination" as proposed by
21 Eschelon, should be deleted from Section 9.23.4.4 and 9.23.4.4.1 (Additional Terms for EELs),
22 9.23.4.5 and 9.23.4.5.4 (Ordering Process for EELs) and 9.23.4.6 (Rate Elements for EELS).

23 **Issue 9-56 and 9-56(a): Service Eligibility Criteria - Audits**

24 Eschelon asserts that its proposed language would allow Qwest to perform an audit for
25 assuring compliance with local usage requirements applicable to the UNEs when it has a concern that
26 Eschelon has not met the Service Eligibility Criteria. Eschelon's proposed language would require
27 Qwest to disclose to Eschelon the circuits that Qwest has identified, if any, that support Qwest's
28

1 concern. Eschelon's proposed language follows⁷⁵:

2
3 9.23.4.3.1.1 After CLEC has obtained High Capacity EELs in
4 accordance with Section 9.23.4.1.2, Qwest may conduct a Service
5 Eligibility Audit to ascertain whether those High Capacity EELs comply
6 with the Service Eligibility Criteria set forth in Section 9.23.4.1.2, when
7 Qwest has a concern that CLEC has not met the Service Eligibility
8 Criteria.

9 9.23.4.3.1.1.1.1 The written notice shall include the cause upon which
10 Qwest has a concern that CLEC has not met the Service Eligibility
11 Criteria. Upon request, Qwest shall provide to CLEC a list of circuits that
12 Qwest has identified as of that date, if any, for which Qwest alleges non-
13 compliance or which otherwise supports Qwest's concern.

14 Eschelon states that in its *Supplemental Order Clarification*⁷⁶, the FCC established a framework of
15 self-certification and auditing as the means for assuring compliance with local usage requirements
16 applicable to UNEs. In the *TRO*, the FCC cited the *Supplemental Order Clarification* for the
17 proposition that "audits will not be routine practice, but will only be undertaken when the incumbent
18 LEC has a concern that a requesting carrier has not met the criteria for providing a significant amount
19 of local service."⁷⁷ Eschelon argues that the *TRO* reaffirmed the standard established in the
20 *Supplemental Order Clarification*, stating, "Although the bases and criteria for the service tests we
21 impose in this Order differ from those of the *Supplemental Order Clarification*, we conclude that they
22 share the basic principles of entitling requesting carriers unimpeded UNE access based on self-
23 certification, subject to later verification *based upon cause*, are equally applicable."⁷⁸

24 Eschelon argues that its proposed limitations are modest and fully consistent with the FCC's
25 direction that such audits should be undertaken only when the ILEC has a concern that the requesting
26 carrier has not met the relevant criteria. Eschelon states that a list of suspected non-complying circuits
27 is not required, but is only required if Qwest has the information available.

28 **Qwest's Position**

Qwest objects to Eschelon's proposed language. Qwest argues that Eschelon is relying on a
flawed reading of the *TRO* when it argues that Qwest is entitled to conduct audits only for cause.

⁷⁵ Language proposed by Eschelon, and opposed by Qwest is underlined.

⁷⁶ *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Supplemental Order Clarification, 15 FCC Rcd 9587 (2000) aff'd sub. nom. *CompTel v. FCC*, 309 F.3d 3 (D.C. Cir. 2002).

⁷⁷ *TRO* ¶ 621, quoting the Supplemental Order Clarification at n. 86.

⁷⁸ *TRO* ¶ 622 (emphasis added).

1 Qwest asserts that in the *TRO*, the FCC established service eligibility criteria for high-capacity EELs
2 that are designed to ensure access to these facilities for bona fide providers of “qualifying services”
3 while also protecting against the potential for “gaming” by providers. Qwest states that by “gaming”
4 the FCC was referring to the practice of providers of obtaining access to UNE facilities even though
5 the services they provide do not qualify for use with UNEs. Qwest asserts that in ¶ 626 of the *TRO*, an
6 ILEC is permitted to “obtain and pay for an independent auditor to audit, on an annual basis,
7 compliance with the qualifying service eligibility criteria.” Qwest states further, that if the auditor
8 determines that the CLEC is not in compliance, the CLEC must make true-up payments, convert non-
9 complying circuits to the appropriate service, and may have to pay the costs of the independent
10 auditor. Further, if the auditor concludes that the CLEC is complying with the criteria, the ILEC must
11 reimburse the CLEC for the costs associated with the audit. According to Qwest, the FCC states that
12 the intent of the reimbursement requirement is to eliminate potentially abusive or unfounded audits.⁷⁹

13 Qwest states that in agreed portions of the ICA, the parties have set out the rules relating to
14 service eligibility.⁸⁰ Qwest notes these provisions include a commitment by Qwest to reimburse
15 Eschelon for the costs of an audit that results in a finding that Eschelon is complying with the service
16 eligibility criteria, thus, the ICA includes the reimbursement scheme that the FCC adopted as
17 protection against abusive audits. Qwest argues that therefore there is no practical or legal basis for
18 Eschelon’s “cause” proposal.

19 Qwest argues that Eschelon’s proposal interferes with and weakens Qwest’s audit rights
20 granted in the *TRO*. Qwest states that Eschelon is relying on the *Supplemental Order Clarification*
21 which was superseded by the *TRO*. Furthermore, Qwest argues, footnote 1898 of the *TRO*
22 summarizes the audit rights and makes no mention of a “for cause” requirement.

23 **Resolution**

24 We concur with Qwest, and do not adopt Eschelon’s proposed language. The *TRO* provides
25 the most current direction concerning audit rights and does not impose a “for cause” requirement.
26 Language agreed upon in Section 9.23.4.3.1.3.5 of the ICA already protects Eschelon from abusive

27 _____
28 ⁷⁹ *TRO* ¶ 628.

⁸⁰ See ICA Section 9.23.4.3.1.3.5.

1 audits, by requiring Qwest to reimburse Eschelon for the costs of the audit in the event the audit report
2 confirms that Eschelon is in compliance with the service eligibility criteria.

3 **Issues 9-58 & 9-59: Commingled EELs/Arrangements**

4 **Eschelon's Position**

5 Eschelon's proposed language for the ICA sections affected by issues 9-58 and 9-59 is as
6 follows⁸¹:

7 9.23.4.5.1 CLEC will submit orders for Loop Transport EELs
8 Combinations using the LSR process. Submission of LSRs is described in
9 Section 12.

10 9.23.4.5.1.1 If any component of the Loop-Transport Combination is
11 not a UNE (i.e., not a component to which UNE pricing applies), CLEC
12 will indicate on the LSR that the component is not a UNE (e.g., an
13 alternate service such as special access). CLEC will indicate this
14 information in the Remarks section of the LSR, unless the Parties agree
15 otherwise.

16 9.23.4.5.4 One (1) LSR is required when CLEC orders Point-to-Point
17 EELs, and Point to-Point commingled EELs. For such Point-to-Point
18 Loop-Transport Combinations, Qwest will assign a single circuit
19 identification (ID) number for such combination. Qwest may require two
20 (2) service requests when CLEC orders Multiplexed EELs-Loop-Transport
21 Combinations (which are not Point-to-Point) and EEL loops (as part of a
22 multiplexed EEL). Regarding Commingling see Section 24.

23 Eschelon's proposed alternative if single circuit ID is rejected:

24 9.23.4.7 Maintenance and Repair for UNE Component of Point-to-Point
25 commingled EELs.

26 9.23.4.7.1 When CLEC reports a trouble through any of the means
27 described in Section 12.4.2.2, so long as Qwest provides more than one
28 circuit ID per Commingled EEL, CLEC may provide all both circuit IDs
associated with the Commingled EEL in a single trouble report (i.e.,
Qwest shall not require CLEC to submit separate and/or consecutive
trouble reports for the different circuit IDs associated with the single
Commingled EEL). If CLEC is using CEMR to submit the trouble report,
for example, the CLEC may will first report one circuit ID (the circuit it
believes has the trouble) and include the other circuit ID in the remarks
section (unless the Parties agree to a different method), Qwest will
communicate a single trouble report tracking number (i.e., the "ticket"
number) (described in Section 12.1.3.3.1.1) for the Commingled EEL to
CLEC at the time the trouble is reported. Should a second repair ticket be
required for the circuit in the remarks section, Qwest will contact CLEC
and they will mutually agree who will open the second repair ticket.)

⁸¹ Underlined text indicates Eschelon's proposed language to which Qwest objects. Lined out text is language that Qwest proposes and to which Echelon objects. Plain text is agreed language.

1 9.23.4.7.1.1 If any circuit ID is missing from any Customer Service
 2 Record associated with the Commingled EEL, Qwest will provide the
 3 circuit ID information to CLEC at the time CLEC submits the trouble
 4 report.

5 9.23.4.7.1.2 Qwest, may charge a single Maintenance of Service or
 6 Trouble Isolation Charge (sometimes referred to as "No Trouble Found"
 7 charge) only if Qwest dispatches and no trouble is found on both either
 8 circuits associated with the Commingled EEL. If CLEC may charge
 9 Qwest pursuant to Section 12.2.1.8, CLEC may also charge only a single
 10 charge for both circuits associated with the Commingled EEL.

11 For Sections 9.23.4.6.6 Qwest proposes:

12 9.23.4.6.6 For Commingling see Section 24.

13 Eschelon proposes:

14 9.23.4.6.6 For each Point-to-Point Loop-Transport Combination (see
 15 Section 9.23.4.5.4), all chargeable rate elements for such combinations
 16 will appear on the same Billing Account Number (BAN).

17 If single BAN is rejected, Eschelon proposes the following alternative:

18 9.23.4.6.6 For each Point-to-Point Commingled EEL (see Section
 19 9.23.4.5.4), so long as Qwest does not provide all chargeable rate elements
 20 for such EEL on the same Billing Account Number (BAN), Qwest will
 21 identify and relate the components of the Commingled EEL on the bills
 22 and the Customer Service Records. Unless the Parties agree in writing
 23 upon a different method(s), Qwest will relate the components of the
 24 Commingled EEL by taking at least the following steps:

25 9.23.4.6.6.1 Qwest will provide, on each Connectivity Bill each month,
 26 the circuit identification ("circuit ID") for the non-UNE component of the
 27 Commingled EEL in the sub-account for the related UNE component of
 28 that Commingled EEL;

9.23.4.6.6.2 Qwest will assign a separate account type to Commingled
EELs so that Commingled EELs appear on an account separate from other
services (such as special access/private line);

9.23.4.6.6.3 Each month, Qwest will provide the summary BAN and
sub-account number for the UNE component of the Commingled EEL in a
field (e.g. the Reference Billing Account Number, or RBAN, field) of the
bill for the non-UNE component; and

9.23.4.6.6.4 For each Commingled EEL, Qwest will provide on all
associated Customer Service Records the circuit ID for the UNE
component; the RBAN for the non-UNE component; and the circuit ID for
the non-UNE component.

Finally, for issues 9-58(d) and 9.58(e), affecting Sections 9.1.1.1.1, 9.1.1.1.2, 9.23.4.4.3.1, 24.3.2,

1 and 9.1.1.1.1 Eschelon proposes the following, all of which Qwest objects to:

2
3 9.1.1.1.1 Commingled EELs are addressed in Section 9.23. For any other Commingled arrangement, the following terms apply, in addition to the general terms described in Section 24;

4
5 9.1.1.1.1.2 When a UNE or UNE Combination is connected or attached with a non-UNE wholesale service, unless it is not Technically Feasible or the Parties agree otherwise, CLEC may order the arrangement on a single service request; if a circuit ID is required, there will be a single circuit ID; and all chargeable rate elements for the Commingled service will appear on the same BAN. If ordering on a single identifier, and including all chargeable rate elements on the same BAN is not Technically Feasible, Qwest will identify and relate the elements of the arrangement on the bill and include in the Customer Service Record for each component a cross reference to the other component, with its billing number, unless the Parties agree otherwise.

6
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10
11 9.23.4.4.3.1 When any component of the Loop-Transport Combination is not a UNE, the service interval for the combination will be the longer interval of the two facilities being Commingled. See Section 24.1.2.1.

12
13 24.3.2 See Section 9.23.4.4.3.1 regarding intervals for Commingled EELs.

14
15 9.1.1.1.1.1 When a UNE and another service are Commingled, the service interval of the Commingled arrangement will be the longer interval of the two facilities being Commingled.

16
17
18 Eschelon states that commingling of UNEs with services offered pursuant to a tariff has
19 become an important competitive option for CLECs since the FCC limited the ILECs' unbundling
20 obligations in the *TRRO*. Eschelon states that if UNE transport is not available because a wire center
21 has been found to be "non-impaired," commingling unbundled loops with private line transport may
22 be the most cost-effective option for Eschelon to provide service to a customer that could previously
23 have been served by an EEL. Eschelon claims there is no functional difference between a UNE EEL
24 and a Commingled EEL, except for the price. For a Commingled EEL, the UNE portion of the circuit
25 is available at TELRIC-based rates, but the non-UNE portion is subject to a higher tariffed rate.

26 Eschelon states that it has proposed language that would prevent Qwest from subjecting
27 Commingled EELs to burdensome and discriminatory conditions. Eschelon would have point-to-point
28 Loop Transport Combinations, including Commingled EELs, to be ordered on a single service request,

1 to be identified by a single circuit ID, to be billed on the same Billing Account Number (“BAN”), and
2 to be repaired pursuant to a single trouble ticket. Eschelon asserts that Qwest’s proposal would
3 impose operational burdens on Eschelon and impede the effective use of UNEs.

4 Eschelon argues its proposal would avoid the delay that it claims will inevitably result from
5 Qwest requiring that Eschelon order the UNE and non-UNE portion of a Commingled EEL separately.
6 Eschelon states that because the interval for a loop is shorter than the interval for private line transport,
7 the two parts of the circuit will not be delivered at the same time. In addition, if one part of the
8 circuits is held for lack of facilities, Eschelon would pay recurring charges for a partial circuit that it
9 cannot use. Eschelon claims that a single identifier for both the loop and private line transport portion
10 of the Commingled EEL will enable both Qwest and Eschelon to track and manage facilities and
11 minimize errors that may have an adverse effect on end user customers. In addition, Eschelon argues
12 that billing loop and transport portions of Commingled EELs separately will complicate Eschelon’s
13 review and reconciliation of bills. Eschelon states that it would not receive a report for disconnected
14 tariffed services, as it receives for UNEs, which means that Eschelon could continue to be billed and
15 pay, for the private line portion of a disconnected circuit. Eschelon proposes that if the loop and
16 private transport portions of the circuit must be delivered separately, the interval for delivery should be
17 the longer of the two, rather than the combination of the two intervals. Eschelon asserts that its
18 proposal reflects how Qwest currently provisions EELs.

19 Eschelon objects to Qwest’s process for repair of EELs, which Eschelon states is also
20 sequential. Eschelon states that if it experiences trouble with a commingled EEL, it must first submit
21 either the UNE or non-UNE portion, and only if Qwest does not find trouble on the special access
22 portion can Eschelon open a repair ticket on the other portion. Eschelon argues that Qwest’ sequential
23 process will delay repairs. Eschelon also objects to Qwest’s proposal that the issues raised by Eschelon
24 concerning Commingled EELs be addressed in the CMP.

25 If the Commission rejects Eschelon’s proposal to require Commingled EELs to be identified
26 with a single circuit ID and billed on a single BAN, Eschelon offers an alternative that it believes
27 would help alleviate the problems in the areas of billing and repairs. With respect to billing, Eschelon
28 proposes that Qwest relate the separate components of Commingled EELs on bills so that Eschelon

1 will be able to determine which separately identified circuits are combined to make up a completed
2 circuit. With respect to repairs, Eschelon proposes that it be permitted to submit multiple circuit IDs
3 associated with a single Commingled EEL and that Qwest assess a “no trouble found” charge only if
4 no trouble is found on both the UNE and non-UNE portions of the circuit. Eschelon states that this
5 alternative would eliminate the delay resulting from having to submit separate, sequential trouble
6 reports and would also reduce Eschelon’s expenses. Eschelon argues that because the loop and private
7 line portions of a Commingled EEL make up a completed circuit, there is no technical reason why
8 Qwest could not investigate both parts at the same time.

9 **Qwest’s Position**

10 Qwest states that when a CLEC orders either an EEL loop or EEL transport commingled with a
11 private line transport circuit or a channel termination circuit, it is necessary to order, provision and bill
12 each circuit out of the appropriate Qwest service order systems and to follow the established processes
13 Qwest has for these products. Qwest asserts that Eschelon’s proposal would require Qwest to
14 substantially modify its Operation Support Systems (“OSS”) and provisioning processes to provide
15 commingled EELs as though they are a single, unified element instead of a combination of two distinct
16 circuits. Qwest argues the effect would require process changes beyond Arizona and would involve a
17 tremendous cost and thousands of hours of work.

18 Qwest argues too that Eschelon is not proposing to compensate Qwest for the substantial costs
19 Eschelon’s proposals would impose, even though it is established that ILECs have a statutory right
20 under the 1996 Act to recover the costs they incur to modify their systems to accommodate CLEC
21 orders for wholesale services. Furthermore, Qwest states, Eschelon’s proposed changes would affect
22 all Arizona CLECs, all of whom, Qwest asserts, have been ordering commingled services without any
23 difficulty using Qwest’s existing systems and processes. Qwest argues other CLECs should not have
24 the costs caused by significant Qwest OSS changes imposed on them as a result of a single arbitration
25 between two carriers.

26 Qwest notes that the FCC did not eliminate the fundamental distinctions between the nature
27 and provisioning of the UNE components and tariffed components of commingled arrangements, and
28 did not require ILECs to eliminate the distinct processes and methods associated with each component

1 of a commingled facility. Qwest states that there is nothing unusual in the telecommunications
2 industry about carriers being required to submit more than one order and to use more than one circuit
3 ID.

4 Qwest asserts that Eschelon's proposal fails to recognize that there are sound reasons for and
5 benefits from the current processes and systems that Qwest uses to process UNE orders and for
6 tariffed services. Qwest states that using a circuit ID assigned to a UNE for a tariffed service may
7 result in a mis-identification of the service and lead to billing and other errors. In addition, according
8 to Qwest, if a single LSR and single circuit ID were utilized, Qwest's systems could not recognize
9 what part of the hybrid circuit had an installation and/or repair issue and thus Qwest could not know if
10 specific performance indicator measurements and potential payments applied. Qwest claims that
11 without separate bills or BANs for the distinct products that comprise commingled arrangements,
12 billing errors would be inevitable. Furthermore, Qwest states the shortcomings of Eschelon's proposal
13 are complicated by the fact that Qwest's provisioning of UNEs is subject to specific performance
14 indicator measurements and potential payments.

15 Qwest states that Eschelon's alternative proposal to use the "Remarks" section of the LSR to
16 indicate that the two specific circuits are connected does not fix the shortcomings of the proposal.
17 Qwest states that its systems do not retain, much less read, the remarks section of the original LSR.
18 Qwest believes that Eschelon's claims that it would not be able to compete without the adoption of its
19 proposals relating to commingled arrangements are overstated. Qwest notes that commingled
20 arrangements are used for transport between "non-impaired" wire centers, which means there is likely
21 little impact on Eschelon in Arizona.

22 Qwest believes that Eschelon's proposals are more appropriately raised in the CMP rather than
23 in an ICA. Qwest states that the CMP is designed to address the type of provisioning and process
24 issues Eschelon is raising.

25 With respect to issue 9-59, Eschelon's alternative proposal for repairs of commingled
26 arrangements, Qwest asserts that Eschelon's alternate proposal would require Qwest to make
27 significant modifications to the systems and processes it uses for repairing the individual circuits that
28 are included in commingled EELS. Again, Qwest notes that Eschelon is not offering to compensate

1 Qwest for the costs of those modifications. Qwest objects to Eschelon's proposal to submit a single
2 trouble report for a commingled EEL arrangement. Qwest argues there are legitimate and necessary
3 reasons why a CLEC may be required to submit two trouble reports for a commingled EEL.

4 Qwest states that it has agreed to make changes to its repair process for commingled EELs to
5 address Eschelon's concerns. Specifically, Qwest states it has agreed to modify its process for repairs
6 as follows: (1) CLEC would do isolation testing to Qwest's network and provide test results across
7 both circuits before opening a trouble ticket (charges for Qwest performing testing on behalf of CLEC
8 are found in Exhibit A); (2) CLEC submits a repair ticket on the specific commingled circuit that it has
9 reason to believe contains the failure; (3) CLEC will reference the circuit ID in the remarks field of the
10 circuit that is linked to the one suspected to have the failure; (4) Qwest would process the ticket on the
11 component suspected to have the failure and if trouble is found, would make the repair and close the
12 ticket; if the suspected circuit was clear, but Qwest finds trouble on the linked portion of the
13 commingled circuit, Qwest would close the repair ticket on the clear circuit and communicate with the
14 CLEC what was found, no maintenance or service charges would apply since the trouble was isolated
15 in the Qwest network, the Qwest technician would contact the CLEC and they would mutually agree
16 upon which company would open the second repair ticket; (5) according to Qwest, no time delay
17 occurs regardless of which entity opens the second ticket, Qwest states it would already be using the
18 testing information gained from the first ticket to begin the repair process for the second ticket; and (6)
19 the repair clock for quality service measurements would start and end with the opening and closing of
20 the ticket associated with the specific circuit.

21 Qwest states that the advantage of its proposal is that it addresses Eschelon's concerns without
22 requiring the substantial system modifications and associated costs that Eschelon's proposal would
23 require. Furthermore, Qwest states, it recognizes that there may be circumstances when a second
24 trouble ticket is necessary. Qwest states the intent of its proposal is to eliminate the need in most
25 circumstances for Eschelon to open two repair tickets instead of one for commingled arrangements.

26 Qwest objects to Eschelon's proposal that would require Qwest to add the circuit ID of the
27 Commingled EEL to the trouble ticket if it was missing from the Customer Service Record because of
28 the ambiguity Qwest finds in the context in which Eschelon believes this could occur. In addition,

1 Qwest states, if Eschelon does not indicate the additional circuit IDs it believes may be experiencing
2 trouble, it would not be appropriate for Qwest to “assume” the identity of the circuits and add them to
3 the trouble report.

4 Qwest believes that Eschelon’s proposed use of the term “No Trouble Found” in Section
5 9.23.4.7.1.2 could result in ambiguity and disputes as the term is not defined in the ICA. Qwest states
6 that its commitment to the potential for only a single charge for Maintenance of Service or Trouble
7 Isolation is clearly conveyed in Qwest’s proposed language. Qwest also opposes a reference to Section
8 12.4.1.8, since that section is in dispute between the parties.

9 **Resolution**

10 Eschelon’s proposals for ordering, circuit IDs, and billing related to commingled EELs would
11 require substantial changes to Qwest’s processes, which would result in undetermined, but potentially
12 substantial costs for Qwest. It would also appear to affect all other CLECs requesting the same
13 services from Qwest. Changes to these processes are better addressed in the CMP, or similar forum,
14 or in a generic docket. Consequently, we adopt Qwest’s proposed language for issue 9-58. Qwest’s
15 proposed procedures for repairs appears to take steps that address Eschelon’s concerns concerning
16 multiple repair tickets and delay, however, Qwest’s proposed contract language does not appear to
17 incorporate its repair procedure. We direct the parties to negotiate and submit with their compliance
18 filing, language that incorporates Qwest’s repair proposal. If the parties are unable to agree on
19 language, we will re-open the arbitration to address this issue. We adopt Qwest’s proposal for the
20 repair process because it seems the most efficient given existing operation systems, however, we have
21 some reservation that it is not as streamlined as it might be. We do not have sufficient information in
22 this docket to make a determination if it is the optimal approach. To the extent Eschelon continues to
23 have concerns about unnecessary delays, it should raise these concerns in the CMP, or continue to
24 negotiate a better system with Qwest.

25 **Issue 9-61: Multiplexing (Loop-Mux Combinations)**

26 **Eschelon’s Position**

27 Eschelon is asking for Loop-Mux Combinations (i.e. multiplexing or “Loop Mux
28

1 Combination” or “LMC”) at TELRIC rates when Eschelon requests muxing with an unbundled loop.⁸²
 2 Eschelon states that Qwest currently provides an unbundled product, named “Loop Mux
 3 Combinations,” pursuant to Commission-approved TELRIC rates. Eschelon objects to Qwest’s desire
 4 to discontinue providing this product, and wants Qwest to continue to provide it as it has in the past.

5 Eschelon argues that the FCC’s rules require that in providing access to an unbundled network
 6 element, the ILEC must provide all of the features, functions and capabilities of the element.⁸³ In the
 7 *TRO*, Eschelon states, the FCC included multiplexing among the features, functions, and capabilities
 8 included as part of the loop. Eschelon cites to paragraph 214 of the *TRO* in which the FCC provides:
 9 “At its most basic level, a local loop that serves the mass market consists of a transmission medium,
 10 which almost always includes copper wires of various gauges. The loop may include additional
 11 components (e.g., load coils, bridge taps, repeaters, multiplexing equipment) that are usually intended
 12 to facilitate the provision of narrowband voice services.”

13 Eschelon notes that Qwest claims that multiplexing is a function, feature or capability of
 14 unbundled transport, and not the loop because the loop can function without multiplexing. Eschelon
 15 argues that transport can also function independently of multiplexing and Qwest fails to offer any
 16 rationale for distinguishing between unbundled loop and transport. Eschelon also notes that there are a
 17 number of other things, such as repeaters and load coils, which are not required for a loop to function,
 18 but are clearly features, functions and capabilities of the loop.

19 Eschelon asserts that Qwest has not identified any language in the FCC rules or any FCC order
 20 that supports a conclusion that the Rules cited by Eschelon do not apply in the current case, or that the
 21 multiplexing referred to in those rules is “entirely different” from the multiplexing at issue here.

22 Eschelon notes further that the Minnesota Commission found that given that Qwest had
 23 previously provided multiplexing as a UNE when provided in conjunction with a UNE loop, it should
 24 continue to do so unless and until it receives permission to withdraw that product.

25 **Qwest’s Position**

26 ⁸² A multiplexer is electronic equipment which allows two or more signals to pass over one communications circuit.

27 ⁸³ 47 CFR §51.307(c) (“an incumbent LEC shall provide a requesting telecommunications carrier access to an unbundled
 28 network element, along with all of the network element’s features, functions, and capabilities in a manner that allows the
 requesting telecommunications carrier to provide any telecommunications service that can be offered by means of that
 network element.”)

1 Qwest asserts that because a loop-mux combination involves the connecting or linking of a
2 UNE provided under Section 251 (i.e. an unbundled loop) with a non-UNE tariffed facility (i.e. a DS1
3 or DS3 private line or special access service), it is a commingled arrangement within the definition of
4 “commingling” set forth in the *TRO*. Paragraph 579 of the *TRO* provides: “By commingling, we
5 mean the connecting, attaching, or otherwise linking of a UNE, or a UNE combination, to one or more
6 facilities or services that a requesting carrier has obtained at wholesale from an incumbent LEC
7 pursuant to any method other than unbundling under section 251(c)(3) of the Act, or the combining of
8 a UNE or UNE combination with one or more such wholesale services.” Qwest claims that until the
9 FCC made commingling available in the *TRO*, CLECs had no readily available mechanism for
10 “handing off” UNE loops to their collocation spaces to connect the loops to the higher bandwidth
11 facilities. Thus, Qwest states it voluntarily provided LMCs to CLECs. However, Qwest continues,
12 when commingling became available under the *TRO*, CLECs no longer need access to the LMC
13 offering to hand off loops to larger transport facilities because commingling permits CLECs to
14 terminate unbundled loops directly to the special access transport facilities they obtain from Qwest.

15 Qwest argues there is no legal basis for assigning UNE attributes to LMC when it is used with
16 commingled arrangements. Rather, Qwest argues, the FCC has found that: (1) multiplexing used with
17 commingled arrangements is a tariffed product, and (2) multiplexing is not a stand-alone UNE. At
18 paragraph 583, the *TRO* provides in part:

19 We find that commingling does not constitute the creation of a new UNE
20 for which an impairment analysis is required. Instead, commingling
21 allows a competitive LEC to connect or attach a UNE or UNE
22 combination with an interstate access service, such as a high-capacity
23 multiplexing or transport services. Because commingling will not enable
24 a competitive LEC to obtain reduced or discounted prices or tariffed
25 special access services because we are not requiring ratcheting, our
26 general impairment analysis for individual UNEs is adequate.

24 Qwest claims this portion of the *TRO* states clearly that the multiplexing used with commingling is “an
25 interstate access service”, which contradicts Eschelon’s claim that multiplexing used with
26 commingling is nothing more than a feature or function of the UNE loop. Qwest asserts its
27 multiplexing is a separate “access service”, and the FCC is unambiguous that when a CLEC obtains an
28

1 access service like multiplexing for use with commingling, it is not entitled to “reduced or discounted
2 prices on [the] tariffed special access services.” Qwest argues that Echelon is thus required to pay the
3 full tariffed rate for multiplexing used with commingling and is not entitled to a UNE rate or any other
4 discounted rate.

5 Qwest also relies on the FCC’s holding in the *Verizon-Virginia Arbitration Order*,⁸⁴ when the
6 FCC rejected WorldCom’s proposed language that would have established multiplexing as an
7 independent network element, because the FCC had never ruled that the multiplexing is such an
8 element. Qwest argues the only network elements that the ILECs are required to provide as UNEs at
9 TELRIC rates are those for which the FCC has made a fact-based finding of competitive impairment
10 pursuant to Section 251(d)(2)(B). Furthermore, Qwest states that in addition to FCC
11 pronouncements, state commissions have consistently ruled that tariffed rates govern the multiplexing
12 component of commingled arrangements. Qwest cites decisions of the South Carolina, Florida, North
13 Carolina, Alabama, and Mississippi commissions.⁸⁵

14 Qwest also disputes Eschelon’s claim that multiplexing is a feature or function of the
15 unbundled loop. Qwest states FCC Rule 51.319(a)(1) defines the local loop as “a transmission facility
16 between a distribution frame (or its equivalent) in an incumbent LEC central office and the loop
17 demarcation point at an end-user customer premise.” The rule also provides that a loop “includes all
18 features, functions, and capabilities of such transmission facility.” Qwest argues that to qualify as a
19 feature or function of the loop, a piece of equipment must be located with or as part of the
20 “transmission facility” that runs between a distribution frame or equivalent frame and a customer’s
21 premise. Qwest asserts the multiplexing equipment used to commingle a UNE loop and tariffed

23 ⁸⁴ *In the Matter of Petition of WorldCom, Inc., et al, for Preemption of the Jurisdiction of the Virginia State Corporation*
24 *Commission Regarding Interconnection Disputes with Verizon-Virginia and for Arbitration*, CC Docket Nos. 00-218, 249,
251, 17 FCC Rcd. 27,039 at ¶ 494 (FCC Wireline Competition Bureau July 17, 2002) (“*Verizon Virginia Arbitration*
Order”).

25 ⁸⁵ *Re BellSouth Telecommunications, Inc.*, Docket No. 2004-316-C, Order No. 2006-136, 2006 WL 2388163 (S.C.P.S.C
26 Mar. 10, 2006); *Petition to Establish Generic Docket to Consider Amendment to Interconnection Agreements Resulting*
27 *from Changes in Law, by BellSouth Telecommunications, Inc.*, 041269-TP, 2006-WL 1085095 (Fla. P.S.C. Apr. 17, 2006);
28 *Re BellSouth Telecommunications, Inc.*, Docket No. P-55, Sub 1549, 2006 WL 2360893 (N.C.U.C. July 10, 2006); *Re*
Momentum Telecom, Inc., Docket No. 29543, 2006 WL 1752312 at *31 (Ala. P.S.C. Apr 20, 2006); and *Re Consider*
Change-of-Law to Existing Interconnection Agreements, Docket No. 2005-AD-1139, 2005 WL 4673626 (Miss. P.S.C. Dec.
2, 2005).

1 transport is not so located, and thus is not part of the loop transmission facility. Qwest asserts that
 2 DS1 loops function regardless of whether there is multiplexing on the loop. Qwest asserts further that
 3 the FCC holdings cited by Eschelon involve a different type of multiplexing than is at issue in this
 4 case. According to Qwest, in those instances cited by Eschelon, the FCC is being clear that to the
 5 extent any type of multiplexing (such as digital loop carrier systems) between the end user premises
 6 and the MDF in the central office is required, the ILEC must “de-mux” the loop so it can be handed
 7 off to the CLEC in the central office. By contrast, Qwest states, the multiplexing in dispute in this
 8 case is transport multiplexing that takes place not between a customer’s premises and the MDF, but
 9 after a fully functional loop has been provided to the CLEC.

10 Resolution

11 It appears that there is no dispute that multiplexing is a feature of UNE transport. In the
 12 *Verizon Virginia Arbitration Order* the FCC’s Wireline Bureau, the arbitrator in that proceeding, held
 13 that multiplexing is a feature of UNE dedicated transport, but is not a separate UNE.⁸⁶ Qwest agrees
 14 that when multiplexing is provided with DS1 and DS3 transport that meets the *TRRO* impairment
 15 criteria, it is a UNE and will be provided at TELRIC rates.⁸⁷ Eschelon states it is not seeking
 16 multiplexing as a stand alone UNE.⁸⁸

17 The dispute here appears to be whether Qwest is required to provide multiplexing with a UNE
 18 loop, where the loop is connected directly to Eschelon’s collocation, without transport involved.
 19 There appears to be two circumstances when Eschelon would be utilizing multiplexing in connection
 20 with a loop. Eschelon could install multiplexing at the customer premises to convert a DS0 facility to
 21 a DS1, or a DS1 to a DS3. In this circumstance, the multiplexing would appear to be a feature of a
 22 high capacity loop and Qwest would make this facility available as it would any high capacity loop. It
 23 does not appear that this is the product that is generating the controversy. Another possibility is for
 24 Eschelon to want to add multiplexing at the collocation site, to aggregate various DS0s to DS1s or
 25 DS1s to DS3s. We find no FCC designation of this type of multiplexing to be a UNE. Multiplexing is
 26 performed at the collocation cage. Eschelon is able to provision multiplexing on its own and is not

27 ⁸⁶ Verizon Virginia Arbitration Order at ¶ 500.

⁸⁷ Ex Q-18 Stewart Rebuttal at 92.

28 ⁸⁸ Ex E-7, Starkey Rebuttal at 149.

1 required to utilize Qwest provisioned multiplexing. In such case, multiplexing is not required for the
2 loop to function, and Qwest should not be required to provide the multiplexing at TELRIC prices. We
3 believe that Qwest's proposed language for the affected ICA sections best reflects the current state of
4 the law on this issue, and thus we order the parties to incorporate Qwest's proposed language into their
5 ICA.

6 **Issue 12-64: Root Cause Analysis and Acknowledgement of Mistakes**

7 **Eschelon's Position**

8 Eschelon proposes language in Sections 12.1.4 and its subparts that would allow Eschelon to
9 make a written request for root cause analysis and/or acknowledgement of a mistake. Eschelon states
10 it depends on Qwest for Eschelon to provide service to its own customers, and a Qwest mistake could
11 result in disruption of service to Eschelon's customers. Thus, if Qwest makes an error that impacts an
12 Eschelon customer, Eschelon wants, after following the usual procedures to restore service, to be able
13 to request a root cause analysis to help prevent a reoccurrence of the event and/or an
14 acknowledgement of the Qwest error that Eschelon can use in communications with Eschelon's
15 customer. Qwest opposes Eschelon's proposed language and would leave this proposed ICA section
16 blank. In the Minnesota arbitration, Eschelon reports that Qwest agreed to all of Eschelon's proposed
17 language for this section, except for one phrase—i.e. that would have this provision apply to “a
18 mistake relating to products and services provided under this Agreement.” Consequently, in
19 Minnesota, Eschelon proposed to replace the disputed phrase with: “mistake(s) in processing
20 wholesale orders, including pre-order, ordering, provisioning, maintenance and repair, and billing”.
21 Ultimately, the Minnesota commission adopted this alternative approach. Eschelon asserts that despite
22 agreement in Minnesota to most of Eschelon's proposed language, which is identical to that proposed
23 in the Arizona ICA, Qwest opposes both alternatives in Arizona.

24 Eschelon argues that Qwest is not being consistent when it opposes Eschelon's proposal to
25 address this issue in the ICA based on the benefits of uniformity and using the CMP process, when it
26 agreed to the language in Minnesota. Eschelon asserts that agreed-upon language in other sections of
27 the ICA and interpreting the ICA as a whole to give effect to all of its provisions shows that requests
28 for root cause analyses are not unfettered and that Qwest is protected from demands when it is readily

1 apparent that a problem has not been caused by Qwest.

2 Eschelon asserts that contract silence provides no contractual certainty or rules to follow to
3 avoid disputes. Eschelon complains that Qwest's current approach, as reflected in its Account
4 Manager PCAT, the test for when a CLEC may request root cause analysis for repair issues from its
5 account manager is whether there is "an unusual repair event." Eschelon argues this terminology is
6 vague as to what constitutes "unusual" and gives Qwest "unfettered leeway" to deny a request for root
7 cause analysis. In addition, Eschelon complains that because Qwest's proposed root cause terms are in
8 the PCAT and not in the ICA, Qwest reserves the right to change or remove those terms during the
9 term of the ICA without amending it, which deprives Eschelon of contractual certainty.

10 **Qwest's Position**

11 Qwest's post-hearing brief does not address issue 12-64 specifically. Qwest asserts, however,
12 that for every single Section 12 issue in dispute Eschelon is suggesting a change in Qwest's existing
13 process. Qwest argues that because of the advantages associated with applying consistent existing
14 processes on all CLECs, Eschelon should be required to demonstrate a compelling need for making
15 such changes.

16 Qwest asserts the evidence is extensive that the CMP is an effective vehicle for managing
17 Qwest's processes. Qwest claims that Eschelon has raised four cherry-picked examples of its
18 complaints with the CMP to represent and exemplify the operation of the CMP, and has ignored the
19 vast majority of instances when the CMP approved and implemented Change Requests from CLECs.
20 Qwest asserts further that pursuant to the CMP Document, which governs the operation of the CMP,
21 CLECs have ample options for recourse in the event Qwest proposes a change, or rejects a proposed
22 change, contrary to the wishes of one or more CLECs. Qwest notes such recourse includes filing
23 comments, escalating a disputed issue, seeking postponement of a change until the dispute can be
24 resolved through other mechanisms, requesting arbitration, participating in good faith dispute
25 resolution, and filing a complaint with a state commission.

26 **Resolution**

27 This proposed ICA provision arises as result of a complaint that Eschelon filed in Minnesota
28 after a Qwest error in processing an LSR affected an Eschelon customer. The Minnesota commission

1 adopted Eschelon's proposed language because it found that it is not vague or burdensome and is more
 2 consistent with that commission's previous order in the complaint proceeding. The record in Arizona
 3 does not demonstrate that the request for root cause analysis and acknowledgement of mistake has
 4 ever been a problem for the parties. Qwest's witness testified that Eschelon has never requested an
 5 acknowledgement letter of mistake from Qwest for a customer.⁸⁹

6 The adoption of the provision in Minnesota is the result of a specific history of the issue in that
 7 state, and Qwest testified did not require the change of any processes. There appears to be a forum for
 8 Eschelon to request root cause analyses in the PACT. Absent a greater demonstration that there will
 9 be a benefit that outweighs the costs of the provision, we do not find it necessary to include this
 10 provision in the ICA at this time. Consequently, we adopt Qwest's position concerning issue No. 12-
 11 64.

12 **Issue 12-67: Expedited Orders**

13 **Eschelon's Position**

14 Eschelon argues that Qwest must provide it with the ability to expedite UNE orders at a
 15 TELRIC price. Eschelon's position is based on its argument that access to expedites is fundamental to
 16 its access to the UNE, and on the argument that Qwest must provide Eschelon with the same quality of
 17 service as it provides to itself. Eschelon proposed language that allows Eschelon to expedite UNE
 18 orders for a \$100 interim rate.⁹⁰ Eschelon makes two proposals concerning expedites⁹¹:

19 12.2.1.2 Expedites. CLEC may request a Due Date earlier than the
 20 applicable Due Date interval for that product or service. Requests for
 21 expedites can be made either prior to, or after, submitting CLEC's service
 22 request.

21 Proposal #1:

22 12.2.1.2.1 Notwithstanding any other provision of this Agreement, for
 23 all products and services under this Agreement (except for Collocation
 24 pursuant to Section 8), Qwest will grant and process CLEC's expedite
 25 request, and expedite charges are not applicable, if one or more of the
 26 following conditions are met:

- 25 a) Fire;
- 26 b) Flood;
- 27 c) Medical emergency;

27 ⁸⁹ Ex Q-4, Albersheim Surrebuttal at 17.

⁹⁰ Eschelon's proposal is a flat \$100 fee regardless of the number days expedited.

28 ⁹¹ Agreed language is in plain text. Eschelon's proposed language is underlined. Qwest's proposed language to which Eschelon objects is in strikethrough text.

- 1 d) National emergency;
 2 e) Conditions when the End User Customer is completely out of service
(primary line);
 3 f) Disconnect in error when one of the other conditions on this list is
present or is caused by the disconnect in error;
 4 g) Requested service necessary for CLEC End User Customer's grand
opening event delayed for facilities or equipment reasons with a future
Ready For Service (RFS) date;
 5 h) Delayed orders with a future RFS date that meet any of the above
described conditions;
 6 i) National Security;
 7 j) Business Classes of Service unable to dial 911 due to previous order
activity; or
 8 k) Business Classes of Service where hunting, call forwarding or voice
mail features are not working correctly due to previous order activity
where the End User Customer's business is being critically affected.

9 Proposal # 2:

10 12.2.1.2.1 Notwithstanding any other provision of this Agreement, for
 11 all products and services under this Agreement (except for Collocation
 12 pursuant to Section 8), Qwest will grant and process CLEC's expedite
 13 request, and expedite charges are not applicable, if Qwest does not apply
expedite charges to its retail Customers, such as when certain conditions
(e.g., fire or flood) are met and the applicable condition is met with respect
to CLEC's request for an expedited order.

14 12.2.1.2.2 If none of the conditions described in Section 12.2.1.2.1 are
 15 met, Qwest will grant and process CLEC's expedite request, but the
 16 expedite charges in Exhibit A will apply, unless the need for the expedite
is caused by Qwest.

17 12.2.1.2.3 Nothing in this Section 12.2.1.2 alters whether a non-
 18 recurring installation charge in Exhibit A applies to the CLEC order
pursuant to the terms of the applicable section of this Agreement. The
expedite charge, if applicable, is separate from the installation charge.

19 9.1.12.1 For expedites, see Section 12.2.1.2.

20 9.23.4.5.5 For expedited orders, see section 12.2.1.2.

21 7.3.5.2 Expedite request for Interconnection LIS trunk orders are
 22 allowed. ~~Expedites are requests for intervals that are shorter than the~~
 23 ~~interval defined in Qwest's Service Interval Guide (SIG) or Individual~~
 24 ~~Case Basis (ICB) Due Dates; Expedite charges as identified in Exhibit A~~
~~apply per order for every day that the Due Date interval is shortened,~~
~~based on the standard interval in the SIG or based on ICB criteria for Due~~
~~Dates.~~

25 7.3.5.2.1 CLEC will request an expedite for Interconnection LIS trunks,
 26 including ~~an expedited Due Date;~~ on an the Access Service Request
(ASR).

27 7.3.5.2.2 the request for expedite will be allowed only when the request
 28 meets the criteria outlined in Section 12.2.1.2.2 the Pre-Approved
Expedite Process in Qwest's Product Catalog for expedite charges at
Qwest's wholesale web site.

OPTION 2 – Replace all of Section 7.3.5.2 with the following:7.3.5.2 For expedites, see Section 12.2.1.2

For Exhibit A

9.20.1.14 Expedite Charge \$100^{1,5}

Qwest's Exhibit A to the ICA, the rate sheet, states that expedites will be provided on an Individual Cost Basis ("ICB"), but Qwest plans to charge a rate of \$200 per day to expedite UNE orders.⁹²

Eschelon asserts that expediting UNE orders is integral to its ability to gain "access to a UNE" and thus, should be provided at cost-based TELRIC rates. Eschelon notes that Qwest does not claim the \$200 per day charge is cost based.⁹³ Eschelon acknowledges that Qwest is not required to charge TELRIC rates for "superior services." Eschelon argues, however, that expedites are not a "superior service" which would allow Qwest to charge market-based rates. Eschelon asserts that because Qwest offers expedited service to its retail customers in the regular course of its business, providing Eschelon with the same capability is not requiring Qwest to provide a "superior" service. Eschelon cites a North Carolina commission decision, which when it faced this same issue, rejected BellSouth's arguments and found: "the Commission also believes that expediting service to customers is simply one method by which BellSouth can provide access to UNEs and that since BellSouth offers service expedites to its retail customers, it must provide service expedites at TELRIC rates pursuant to Section 251 and Rule 51.311(b)."

Secondly, Eschelon argues that Qwest does not charge itself a market rate to expedite orders for its retail customers. Rather, according to Eschelon, Qwest only incurs the cost of expediting such orders. Eschelon argues that to charge Eschelon a non-cost based fee for expedites would violate Rule § 51.313 because such non-cost based rate would be less favorable than the charge Qwest faces in expediting its own orders.⁹⁴ Eschelon claims that by charging Eschelon a wholesale expedite price

⁹² Ex Q-1 Albersheim Direct at 64.

⁹³ Ex Q-1 Albersheim Direct at 64; Ex Q-15 Denney Rebuttal at 97-98.

⁹⁴ 47 CFR § 51.313 provides: (a) the terms and conditions pursuant to which an incumbent LEC provides access to unbundled network elements shall be offered equally to all requesting telecommunications carriers.

(b) where applicable, the terms and conditions pursuant to which an incumbent LEC offers to provide access to unbundled network elements, including but not limited to, the time within which the incumbent LEC provisions such access to

1 that exceeds the cost of expediting, Qwest is gaining an unfair advantage because it profits from the
2 difference between the retail price of an expedite and the cost associated with expedites.

3 Qwest's proposed language allows no exceptions to paying an expedite fee in emergency-type
4 situations for expediting unbundled loops and other "designed" products. Eschelon has proposed two
5 alternatives for addressing when an expedite would be available under "emergency" conditions for no
6 additional charge. Eschelon notes that Qwest does not charge an additional expedite fee in every case
7 when providing designed services for its retail customers. In its retail tariff, Qwest makes exceptions
8 to charging an additional expedite fee for "Reestablishment of Service Following Fire, Flood or Other
9 Occurrence." Eschelon states that prior to January 3, 2006, Qwest provided expedited orders to retail
10 and CLEC customers, for products and services, including loops, when Qwest pre-approves them as
11 meeting certain emergency-based conditions. Following a Qwest policy that became effective January
12 3, 2006, CLECs cannot receive expedites in Arizona for UNE services without an amendment to their
13 ICA.

14 Even if there is no retail analogue for DS0 loops, as Qwest claims, Eschelon argues that Qwest
15 may not discriminate. Eschelon states the FCC has developed two alternative tests to determine if a
16 Bell Operating Company ("BOC") is offering interconnection and access to network elements on a
17 nondiscriminatory basis:

18 First, for those functions the BOC provides to competing carriers that are
19 analogous to the functions a BOC provides to itself in connection with its
20 own retail service offerings, the BOC must provide access to competing
21 carriers in "substantially the same time and manner" as it provides to
22 itself. Thus, where a retail analogue exists, a BOC must provide access
23 that is equal to (i.e. substantially the same as) the level of access that the
24 BOC provides itself, its customers, or its affiliates, in terms of quality,
25 accuracy, and timeliness. For those functions that have no retail analogue,
26 the BOC must demonstrate that the access it provides to competing
27 carriers would offer an efficient carrier a "meaningful opportunity to
28 compete."⁹⁵

Eschelon asserts that the FCC has made clear the lack of retail analogue does not mean a more

unbundled network elements, shall, at a minimum, be no less favorable to the requesting carrier than the terms and conditions under which the incumbent LEC provides such elements to itself.

(c) An incumbent LEC must provide a carrier purchasing access to unbundled network elements with the pre-ordering, ordering, provisioning, maintenance and repair, and billing functions of the incumbent LEC's operations support systems.

⁹⁵ *In the Matter of the Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York* memorandum Opinion and Order, FCC 99-404, CC Docket No. 99-295, rel. December 22, 1999, ¶44.

lenient nondiscrimination obligation, but rather has stated “we do not view the ‘meaningful opportunity to compete’ standard to be a weaker test than the ‘substantially the same time and manner’ standard.”⁹⁶ Rather, Eschelon asserts, the meaningful opportunity to compete standard is “intended to be a proxy for whether access is being provided in substantially the same time and a manner and [is], thus, nondiscriminatory.”⁹⁷ Eschelon states its proposal number two for Section 12.2.1.2.1 articulates this nondiscriminatory standard in the ICA, requiring Qwest to provide an exception to charging only under the same conditions for which it provides exceptions for its retail customers.

Qwest’s Position

Qwest asserts that Eschelon’s proposed language would provide it with special, discriminatory provisioning for expedites for both non-design and design services.⁹⁸ According to Qwest, Eschelon’s position is wrong because there is a meaningful difference between a design service (unbundled loops) and non-design service (POTS-type services), expedites are not a UNE, but rather a superior service that is not required to be provided at TELRIC rates. Qwest asserts that it provisions expedites for its retail customers in exactly the same way it provisions them for CLECs.

Qwest states that currently customers of non-design services (POTS), CLECs and retail customers alike, can obtain an expedited due date under certain, limited emergency circumstances at no charge. For design services (unbundled loops and private line circuits), Qwest states that CLECs and Qwest’s retail customers can both obtain an expedited due date for any reason as long as they pay a \$200 per day charge. Thus, Qwest asserts, it offers expedites to CLECs on the same terms and conditions as it offers the service to its retail customers.

Qwest claims that Eschelon is comparing the expedite terms that apply to unbundled loops in

⁹⁶ *Id.* at ¶45.

⁹⁷ *Id.*

⁹⁸ Qwest categorizes services based on whether they are “design” services or “non-design” services as follows:

	<u>Design</u>	<u>Non-design</u>
Wholesale	e.g. Unbundled Loops (DS0, DS1, DS3, etc)	e.g. QPP, Resale POTS
Retail	e.g. Private Lines (DS1, DS3, etc.)	e.g. Retail POTS

1 the wholesale design category, to the expedite terms that apply to retail POTS, in the retail non-design
2 category. Qwest argues that because these two categories of services – non-design and design—are
3 substantially different in the amount and nature of work required, Qwest’s processes for ordering and
4 provisioning differ substantially. Qwest argues that Eschelon’s argument that it is unfair to use one
5 provisioning process for unbundled loops, and a separate provisioning process for POTS services is
6 flawed because both FCC and state commissions have recognized and acknowledged the distinctions
7 between POTS-type services and unbundled loops through the approval of performance standards; the
8 work required to provision a private line is more complex and time consuming than that required for a
9 POTS circuit; and Qwest uses private line circuits to do the exact same thing as Eschelon. Qwest cites
10 numerous commission decisions from other states that find that the provision of an unbundled loop is
11 equivalent to the provision of a design service and that unbundled loops are not analogues to retail
12 non-design services.

13 Qwest asserts that Eschelon’s proposal is an attempt to create an entirely new process for
14 expedites just for Eschelon. Qwest asserts that Eschelon’s proposed language expands Qwest’s
15 current list of emergency conditions, which apply to expedites for free for non-design services only,
16 and applies the list to all services. Such attempt, Qwest argues would give Eschelon special treatment
17 and service superior to that received by all of Qwest’s retail customers and all other CLECs. Qwest
18 notes that both federal and state law require Qwest not to discriminate between purchasers.⁹⁹ Qwest
19 states that many CLECs across Qwest’s region have adopted the unbundled loops expedite terms that
20 Qwest and the CLECs developed in the CMP.

21 Qwest states that its current process for expediting unbundled loops provides Eschelon with a
22 meaningful opportunity to compete. Qwest asserts that Eschelon has not provided any authority that
23 holds that the failure to provide expedited due dates for free violates this standard. Indeed, Qwest
24 asserts that rather the law is plain that Qwest provides CLECs a meaningful opportunity to compete by
25 virtue of the fact it satisfies Commission–approved performance measures. Qwest believes that it is
26 important to note that Eschelon can expedite orders for high capacity loops on terms that are superior
27

28 ⁹⁹ 51 CFR §§ 51.311(a), 313(a).

1 to what Qwest provides to itself. Qwest's standard provision interval for DS1 and DS3 private lines is
2 9 days, while CLECs can obtain a DS1 capable loop in 5 days and a DS3 capable loop in 7 days.
3 Thus, Qwest states, if a wholesale customer wants a DS1 loop delivered in one day, it will have to
4 expedite 5 days for a cost of \$1,000 (\$200 per day for 5 days). If the same customer orders a DS1
5 private line (the retail analogue) and wants the line delivered in one day, the order will have to be
6 expedited 9 days, for a cost of \$1,800.

7 Qwest also argues that the 1996 Act does not require Qwest to provide expedited due dates.
8 Qwest cites a Kentucky commission decision that held that although standard provisioning intervals
9 for service are required pursuant to Section 251, and the incumbent should provide nondiscriminatory
10 access to expedited service, expedited service is not a Section 251 obligation.¹⁰⁰

11 Qwest argues that incumbents are not required to provide superior service as part of their
12 obligation under the 1996 Act. Qwest cites to a recent decision by the Florida commission that
13 recognizes this point:

14
15 It is clear there is no obligation imposed or implied in Rule 51.311(b) that
16 an incumbent render services to a CLEC superior in quality to those
17 provided to a retail customer requesting similar services. So long as rates
18 are identical for all requesting parties, CLEC and retail alike, parity exists
in the provisioning structure for service expedites, and there is not conflict
with Rule 51.311(b). We reiterate that current regulations do not compel
an ILEC to provide CLECs with access superior in quality to that supplied
to its own retail customers.¹⁰¹

19 Qwest states that the Florida commission approved BellSouth's expedite fee of \$200 per day for
20 CLECs because BellSouth charged the same fee to its retail customers to expedite similar retail
21 services.

22 Qwest states it offers retail design customers and CLECs ordering design services, the option
23 of requesting an expedite for any reason, subject to a charge of \$200 per day. Qwest explains it
24 established the \$200 per day charge based on total service long run incremental cost ("TSLRIC"), as
25 opposed to TELRIC. Qwest asserts that TELRIC pricing applies only to UNEs, and not to superior
26

27 ¹⁰⁰ In re Joint Petition for Arbitration of Newsouth Communications Corp., 2006 Ky, PUC LEXIS 159 at Issue 86 (Ky.
PUC March 14, 2006).

28 ¹⁰¹ In re Joint Petition by New South et al., 2005 Fla. PUC LEXIS 634 *150, Order No. PSC-05-0975-FOF-TP (Fla. PSC
Oct. 11, 2005).

1 services, such as expedites.

2 Qwest argues that an arbitration is not the proper forum for determining the appropriate charge
3 for an expedite.

4 In addition to its legal arguments, Qwest claims that common sense dictates that expedites are
5 superior service. First, Qwest claims commission have approved service intervals and have
6 determined that if Qwest meets them, then CLECs have a meaningful opportunity to compete.
7 Second, Qwest claims, if expedites are classified as UNEs and Qwest is compelled to provide them
8 under a TELRIC standard and/or at a charge even remotely similar to Eschelon's proposed charge,
9 then it is likely that CLECs will request expedites for virtually every order. Qwest argues this would
10 render service intervals meaningless and Qwest's limited resources will be taxed to their limit and
11 Qwest will not be able to provide all the expedites required which in turn could jeopardize customer
12 service in emergency situations.

13 **Resolution**

14 Eschelon argues that expedites are one means of providing access to a UNE, and thus must be
15 provided at TELRIC rates. Qwest argues that expedited delivery is a superior service for which it is
16 entitled to charge a market rate. Other state commissions that have addressed this issue are split.
17 Kentucky and Florida have sided with the ILEC, finding that there is no obligation to provide
18 expedites at TELRIC rates. The North Carolina commission determined that the ILEC must provide
19 expedites on a cost-based TELRIC rate. The Minnesota commission found that whether expedites are
20 superior services is irrelevant, as are the charges Qwest assesses its retail customers. The Minnesota
21 commission found that because Qwest provides expedited services to itself, and the cost to itself is
22 merely the cost of expediting the service, Qwest's cost to expedite is also the cost that Qwest should
23 charge CLECs to expedite service because Qwest is not permitted to discriminate. Minnesota adopted
24 Eschelon's proposed \$100 flat rate charge as an interim rate pending an investigation into an
25 appropriate cost in a pending cost proceeding.

26 We find that generally Qwest meets its obligation to provide access to the UNE by
27 provisioning the service within the approved service intervals. The service intervals were set in order
28 to provide CLECs with a meaningful opportunity to compete. We find no convincing authority for us

1 to conclude that expedites are required to provide access to the UNE and have to be provided at
2 TELRIC rates. By definition expedites are “superior” to regular service intervals. Providing an
3 expedite for any reason at a nominal fee would in essence eliminate the approved service interval as an
4 effective measure of Qwest’s performance. Under Eschelon’s proposal, which allows expedites at a
5 nominal fee, Qwest has legitimate concern that CLECs would routinely request expedites, which could
6 tax resources and affect Qwest’s ability to provide service.

7 Even if Qwest is not required to provide expedites as a UNE, Qwest may not discriminate
8 against Eschelon and must provide expedited service to Eschelon on the same terms and conditions as
9 Qwest provides the service to itself and its own retail customers. Qwest provides expedites for any
10 reason for design services at \$200 a day or at no additional charge for non-design services if certain
11 emergency conditions are met. By providing expedites to Eschelon on the same terms that it provides
12 the service to its retail customers, Qwest is not discriminating against Eschelon. For these reasons we
13 adopt Qwest’s proposed treatment for expedites, including for now, Qwest’s proposed \$200 per day
14 charge.¹⁰² In Phase II of the cost docket, the Commission determined to reconsider ICB rates in the
15 next phase of that proceeding. Because expedites are treated as ICB pricing, the expedite rate will be
16 considered again in Phase III of the cost docket, and should be considered an interim rate until final
17 resolution of the pricing issue in that docket.

18 **Issue 12-71; 12-72; 12-73: Jeopardy Notices**

19 **Eschelon’s Position**

20 Qwest sends a jeopardy notice to inform a CLEC when a due date is in jeopardy of being
21 missed. When a jeopardy is classified as a CLEC-caused (“customer not ready” or “CNR”) jeopardy
22 for “designed” facilities, the CLEC is required to supplement its order by requesting a new due date
23 that is at least three days after the date of the supplemental order. A jeopardy that is classified as
24 Qwest-caused (“Qwest jeopardy”) does not require the CLEC to supplement the due date and does not
25 build in the three day delay. Eschelon is concerned that when a jeopardy has been classified as CNR
26 but the jeopardy is in fact caused by Qwest failing to send a Firm Order Confirmation (“FOC”) to

27 ¹⁰² Our resolution of this issue does not affect the pending complaint in Docket Nos. T-01051B-06-0257 and T-03406A-06-
28 0257 between these same parties involving charges for expedites, as this arbitration order resolves the issue going forward
while the complaint involves a dispute pursuant to the existing ICA.

1 Eschelon, there will be a three day delay in delivering the circuit to Eschelon. Eschelon states this can
 2 occur when an initial jeopardy notice is issued because Qwest does not have facilities to fill the order
 3 and then fails to issue a timely FOC to let Eschelon know that it is ready to deliver. Eschelon asserts
 4 that if it does not have advance notice of delivery, it may be unable to accept delivery if/when Qwest
 5 attempts delivery. Eschelon states that Qwest has, and states it will, classify jeopardies as CNR
 6 despite its failure to send an FOC. Thus, Eschelon proposes language in the ICA that requires Qwest
 7 to send a FOC with the due date at least a day in advance of delivery after a Qwest jeopardy. In
 8 contrast, Qwest's proposed language refers to the procedures for jeopardies as set forth in
 9 documentation available on its wholesale website.¹⁰³

10 Eschelon states that its proposed language merely reflects Qwest's current processes.
 11 According to Eschelon, Qwest is claiming five reasons why Eschelon's proposed language should not
 12 be accepted: (1) process details do not belong in the ICA so the issue should be returned to CMP; (2)
 13 Eschelon's proposal forces extra time into the process and causes delay; (3) the phrase "at least the day
 14 before" is not documented in the PCAT, so it may be disregarded; (4) regardless of the type of
 15 jeopardy, CLECs should disregard the jeopardy notice and always take steps to accept a circuit even
 16 when Qwest has notified it that Qwest has a facility problem but does not send a FOC to indicate the
 17 facility problem has been cleared; and (5) the FOC notices are a formality that can be ignored in favor
 18 of potential informal communications.

19 Eschelon asserts its proposal reflects Qwest's current processes, so there is no change to take to
 20 CMP. Eschelon believes the history of the jeopardy issue in CMP is long and tortuous and that Qwest
 21 made commitments in CMP that it now denies, which shows that the CMP has not offered an adequate
 22 forum to address Eschelon's concerns with this issue.¹⁰⁴ Eschelon states that it did use CMP to
 23 attempt to address this issue and believed that it had been addressed, but that Qwest would not comply
 24 with the process that it had agreed to in CMP and denied that there had been an agreement.

25 Eschelon argues that its proposal provides for advance notice before the due date to help ensure
 26

103 Joint Matrix at 106.

104 Eschelon compares Qwest CMP minutes ("Eschelon confirmed that the CLEC should always receive the FOC before the due date. Qwest agreed) in Ex E-10 Johnson Dir, with Qwest denial ("Qwest never made such a commitment") in Ex Q-2 Albersheim Rebuttal at 21.

1 timely delivery of the circuit on the due date, and that its language for Section 12.2.7.2.4.4.1 provides
 2 that, even when Qwest provides no FOC, Eschelon “will nonetheless use its best efforts to accept the
 3 service” when delivered, and that if needed, the companies will attempt to set a new appointment time
 4 “on the same day.”

5 Eschelon asserts there is no evidence that all Qwest procedures are documented in the PCAT or
 6 that they must be contained in the PCAT to be applied by Qwest. Rather, Eschelon argues, the
 7 evidence shows that when Qwest believes it is to its advantage to do so Qwest relies on processes
 8 documented in CMP materials, internal processes, or even undocumented processes, regardless of
 9 whether they are also in the PCAT.¹⁰⁵ Eschelon claims that for a time Qwest recognized its
 10 commitment in CMP to provide the FOC the day before and treated its own failure to do so as non-
 11 compliance with its process, but changed its position without going back to CMP. Eschelon states that
 12 it relied on Qwest’s statements and documentation when the change request was closed in CMP,
 13 subject to review of Qwest’s compliance with this process.¹⁰⁶ Eschelon provides examples of apparent
 14 conflicts between Qwest’s statements and CMP documentation which Eschelon asserts, argue for clear
 15 language of the parties’ obligations to be incorporated in the ICA.¹⁰⁷

16 Eschelon asserts that Qwest’s suggestion at the hearing, that the CLEC should disregard a
 17 jeopardy notice and always take steps to prepare to accept a circuit is contrary to what Qwest has
 18 documented in its PCAT. Eschelon believes this highlights the problem of relying on the PCAT which
 19 Qwest controls and can deny and reinterpret, rather than relying on contract language.

20 Finally, Eschelon asserts that providing a FOC after a Qwest facility jeopardy has cleared is
 21 not a mere formality, but is a contractual requirement of Section 9.2.4.4.1, and is also part of Qwest’s
 22 SGAT, as well as in Qwest’s proposed template interconnection agreement. Eschelon argues that it
 23 does not have a meaningful opportunity to compete if it must make inefficient use of resources
 24 because Qwest wants to substitute informal technician or other communications instead of
 25 mechanisms that were reviewed as part of the Section 271 process.

26 _____
 27 ¹⁰⁵ Eschelon cites examples in Ex Q-2 Albersheim Rebuttal at 21 and 22 and 24; Ex E-11, Johnson Rebuttal at BJJ-35; Ex
 E-8 at 45; Ex E-10 Johnson Direct at BJJ-5 at 36.

28 ¹⁰⁶ Ex E-10 Johnson Direct at BJJ-5 at 20.

¹⁰⁷ See Eschelon Brief at 162-168.

1 **Qwest's Position**

2 Qwest asserts that Eschelon's proposal will not speed up service to customers. Rather, Qwest
3 argues the record demonstrates that Qwest and Eschelon have worked well together to deliver service
4 either on the due date or as quickly as possible after a jeopardy has been cleared. Qwest cites statistics
5 indicating that 76 percent of the time where Eschelon received no FOC after a jeopardy, Qwest
6 delivered, and Eschelon accepted, service on the due date.

7 Qwest also argues that Eschelon's proposed language has a significant impact on Qwest's
8 Performance Assurance Plan. According to Qwest, if a Qwest technician classifies an order as a
9 Qwest jeopardy, it counts as a missed commitment, even though Qwest was ready and able to deliver
10 the circuit, but if the technician classifies the order as customer not ready, it is excluded from the
11 calculation.

12 In addition, Qwest asserts that Eschelon usually knows that an order is coming without an
13 FOC. Qwest's witness testified that informal communication allows Eschelon to accept a circuit most
14 of the time.¹⁰⁸ Qwest states that the evidence demonstrates that the technicians working to deliver
15 circuits communicate with each other in order to complete the job, and that Eschelon's insistence on
16 an FOC is an attempt to take advantage of form over substance in order to gain advantageous PAP
17 treatment. Qwest argues such treatment should be rejected.

18 **Resolution**

19 Eschelon's proposed language reflects Qwest's current procedures for rescheduling circuit
20 deliveries after a jeopardy notice is issued, except that Qwest claims current procedures do not require
21 the FOC to issue one day in advance of the new delivery date. Eschelon is concerned that it not be
22 assigned a CNR jeopardy when the original cause of the delay was a Qwest caused issue. In addition,
23 Eschelon is concerned that the CMP is a Qwest controlled process and can result in changes to the
24 process being made over Eschelon's objection. Qwest argues that having one set of procedures for
25 Eschelon, and any CLECs opting in to the Eschelon ICA, and one for every other CLEC is not
26 efficient. Further, Qwest argues that Eschelon's requirement that the FOC issue a day before the
27

28 ¹⁰⁸ TR at 68-74.

1 rescheduled delivery date adds at least a day's delay when such delay might not be necessary.

2 Eschelon proposed the following language for Section 12.2.7.2.4.4:

3
4 12.2.7.2.4.4 A jeopardy caused by Qwest will be classified as a Qwest
5 jeopardy, and a jeopardy caused by CLEC will be classified as
6 Customer Not Ready (CNR). Nothing in this Section 12.2.7.2.4.4
7 modifies the Performance Indicator Definition (PIDs) set forth in
8 Exhibit B and Appendices A and B to Exhibit K of this Agreement.

9 12.2.7.2.4.4.1 There are several types of jeopardies. Two of these
10 Types are: (1) CLEC or CLEC End User Customer is not ready or
11 service order is not accepted by the CLEC (when Qwest has tested the
12 service to meet all testing requirements); and (2) End User Customer
13 access was not provided. For these two types of jeopardies, Qwest will
14 not characterize a jeopardy as CNR or send a CNR jeopardy to CLEC
15 if a Qwest jeopardy exists, Qwest attempts to deliver the service, and
16 Qwest has not sent an FOC notice to CLEC after the Qwest jeopardy
17 occurs but at least the day before Qwest attempts to deliver the service.
18 CLEC will nonetheless use its best efforts to accept the service. If
19 needed, the Parties will attempt to set a new appointment time on the
20 same day and, if unable to do so, Qwest will issue a Qwest jeopardy
21 notice and a FOC with a new Due Date.

22 12.2.7.2.4.4.2 If CLEC establishes to Qwest that a jeopardy was
23 not caused by CLEC, Qwest will correct the erroneous CNR
24 classification and treat the jeopardy as a Qwest jeopardy.

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

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

1 As stated above, we do not believe that Eschelon’s proposed language will result in delay, but
 2 to the extent it could, we expect that Eschelon has performed an adequate analysis of the effects of its
 3 language on its own operations.

4 Consequently, we adopt Eschelon’s proposed language for this issue.

5 **Issue 12-87: Controlled Production**

6 **Eschelon’s Position**

7 Controlled production testing consists of controlled submission of real CLEC product orders to
 8 a new or updated interface. The test is intended to verify that the data between Qwest and the CLEC is
 9 exchanged according to the industry standard. Eschelon states that it needs certainty in the contract
 10 language that controlled production testing will continue to be necessary for a new implementation
 11 effort and unnecessary for re-certification. A new implementation effort involves transactions that the
 12 CLEC does not yet have in production. Re-certification is defined in the ICA as “the process by which
 13 CLECs demonstrate the ability to generate correct functional transactions for enhancements not
 14 previously certified.”

15 The parties propose the following language concerning controlled production:
 16

17 Eschelon Proposal

Qwest Proposal

18 Proposal # 1:
 19 12.6.9.4 Controlled Production – Qwest and
 20 CLEC will perform controlled production. The
 21 controlled production process is designed to
 22 validate the ability of CLEC to transmit EDI data
 23 that completely meets X12 (or mutually agreed
 24 upon substitute) standards definitions and
 25 complies with all Qwest business rules.
 26 Controlled production of actual CLEC production
 27 request to the Qwest production environment
 28 Qwest treats these pre-order queries and orders as
 production pre-order and order transactions.
 Qwest and CLEC use controlled results to
 determine operational readiness. Controlled
 production requires the use of valid account and
 order data. All certification orders are considered
 to be live orders and will be provisioned.
 Controlled production is not required for
recertification, unless the Parties agree otherwise.
 Recertification does not include new
 implementations such as new products and/or

12.6.9.4 Controlled Production – Qwest and
 CLEC will perform controlled production. The
 controlled production process is designed to
 validate the ability of CLEC to transmit EDI data
 that completely meets X12 (or mutually agreed
 upon substitute) standards definitions and
 complies with all Qwest business rules.
 Controlled production of actual CLEC production
 request to the Qwest production environment
 Qwest treats these pre-order queries and orders as
 production pre-order and order transactions.
 Qwest and CLEC use controlled results to
 determine operational readiness. Controlled
 production requires the use of valid account and
 order data. All certification orders are considered
 to be live orders and will be provisioned.
 Controlled production is not required for features
or products that the CLEC does not plan on
ordering. Recertification does not include new
 implementations such as new products and/or
 activity types.

1 activity types.

2 Proposal #2:

3 12.6.9.4 Controlled Production – Qwest and
 4 CLEC will perform controlled production for
 5 new implementations, such as new products, and
 6 as otherwise mutually agreed by the Parties. The
 7 controlled production process is designed to
 8 validate the ability of CLEC to transmit EDI data
 9 that completely meets X12 (or mutually agreed
 10 upon substitute) standards definitions and
 11 complies with all Qwest business rules.
 Controlled production of actual CLEC production
 request to the Qwest production environment
 Qwest treats these pre-order queries and orders as
 production pre-order and order transactions.
 Qwest and CLEC use controlled results to
 determine operational readiness. Controlled
 production requires the use of valid account and
 order data. All certification orders are considered
 to be live orders and will be provisioned.

12
 13 Eschelon asserts that it supports necessary testing and nothing in its proposal is inconsistent
 14 with the use of controlled production when applicable, Eschelon claims that its proposal simply
 15 reflects the status today, and provides that testing will be appropriate for the type of change being
 16 made (with re-certification requiring less testing than an initial certification). Eschelon states that its
 17 business need is to avoid costly and/or time consuming controlled production testing that is
 18 unnecessary.

19 **Qwest's Position**

20 Qwest believes that it needs to be able to determine the extent of controlled production testing
 21 that is necessary when a CLEC must obtain recertification for access to Qwest's systems. Qwest is
 22 concerned that Eschelon's proposed language would allow Eschelon to veto certain decisions made by
 23 Qwest.

24 Qwest asserts that although Eschelon expresses concern that Qwest's position may result in
 25 unnecessary controlled production testing, and consequently expense, Eschelon has failed to identify a
 26 single situation in the last ten years in which Qwest has made an improper demand for controlled
 27 production testing. Qwest argues that any theoretical harm to Eschelon does not compare to the risks
 28

1 faced by Qwest to its OSS. Qwest asserts that a problem with Eschelon's interface could affect the
 2 entire industry in Qwest's region as opposed to simply Eschelon. Qwest states that if it requires
 3 unnecessary controlled production it would incur significant expense, thus, it believes it has a
 4 substantial incentive to keep testing costs down. Qwest argues that systems are constantly evolving,
 5 requiring that new testing decisions be made with new updates to the system, and that Qwest is in the
 6 best position to determine whether testing is appropriate.

7 **Resolution**

8 The disagreement with regard to controlled production does not seem to be based on problems
 9 or abuses encountered in the parties' past dealings, but rather with the concern by Eschelon that Qwest
 10 may require unnecessary testing, and by Qwest that Eschelon will not participate in necessary testing.
 11 We believe that both parties have significant incentive to engage in testing when required and not to
 12 require excessive testing. On balance, we find that Qwest is in the best position to judge when testing
 13 is necessary and the extent of that testing. Qwest's proposed language does not require Eschelon to
 14 engage in controlled production for products or features it does not plan to use. Consequently, we
 15 adopt Qwest's proposed language.

16 **Issue 21-87A: Information Service**

17 **Eschelon's Position**

18 The parties' proposed language for Section 21.10 as follows:
 19

20 Eschelon's Proposal:

Qwest's Proposal:

21 ~~Qwest does not now and will not during the term~~
 22 ~~of this Agreement~~ offers 976 services in the state
 23 of Arizona. If 976 service is provided by another
 24 Carrier in Arizona, nothing in this Agreement
 obligates either Party to bill and collect any
 Information Service provider (976) charges from
 their respective End User Customers.

Qwest does not now and will not during the term
 of this Agreement offers 976 services in the state
 of Arizona. If 976 service is provided by another
 Carrier in Arizona, nothing in this Agreement
 obligates either Party to bill and collect any
 Information Service provider (976) charges from
 their respective End User Customers.

25 This issue relates to caller-paid information services typically provided by Information
 26 Providers, allowing a caller, by dialing a 976 telephone number, to receive information such as
 27 weather or stock market reports for a charge. Eschelon argues that its proposal is designed to provide
 28 contractual certainty.

1 Eschelon states that in negotiations, Qwest indicated that the Arizona Commission has made a
 2 state-specific ruling on this issue, but that Qwest’s proposed contract language is the same in Arizona
 3 as for other states. Eschelon states that if the Arizona Commission has entered an order regarding
 4 Qwest’s offering of 976 services, Eschelon does not object to including that language in the ICA, but
 5 that Qwest provided no details about a state-specific ruling.

6 **Qwest’s Position**

7 Qwest did not address this issue in testimony or its Closing Brief.

8 **Resolution**

9 Qwest has not addressed this issue at all in this proceeding. We are not aware of a specific
 10 controlling order from this Commission on this issue. However, if Qwest does not provide 976
 11 service, it would not be appropriate to include contract language to the contrary. Based on the
 12 understanding that Qwest does not provide this service, we adopt Qwest’s proposed language.

13 **Issues 22-88, 22-88(a) and 22-89: Rates for Services**

14 The Parties proposed the following language concerning rates:

16 Eschelon’s Position:	Qwest’s Position:
17 22.1.1 The rates in exhibit A apply to the services 18 provided by Qwest to CLEC pursuant to this 19 Agreement.	22.1.1 The rates in exhibit A apply to the services provided by <u>Qwest to CLEC</u> pursuant to this Agreement.
19 Qwest’s Arizona Access Tariff	Qwest’s Arizona Access Tariff
20 <u>22.4.1.3 Nothing in this Agreement shall waive</u> 21 <u>any right of either party to request a cost</u> 22 <u>proceeding at the Commission to establish a</u> <u>Commission-approved rate to replace an Interim</u> <u>Rate.</u>	22.3.1.3 <u>Intentionally Left Blank</u>

23 **Eschelon’s Position**

24 Eschelon argues that Qwest’s proposed language will result in confusion. Eschelon asserts that
 25 the ICA provides that Qwest may purchase certain services from Eschelon, including transiting and
 26 exchange of traffic, trouble isolation, managed cuts and installation of interconnection trunks.
 27 Eschelon states that because the agreed-upon language refers to Exhibit A as setting forth the rates that
 28

1 Eschelon charges Qwest for the services Eschelon provides, the language in Section 22.1.1 that limits
2 Exhibit A to rates provided by Qwest and referring to Qwest's Arizona Access Services Tariff is
3 reasonable. Eschelon argues that otherwise the language is inaccurate and potentially confusing.

4 **Qwest's Position**

5 Qwest does not address these issues in its Closing Brief.

6 **Resolution**

7 According to Eschelon, Qwest agreed to the Eschelon-proposed language for Section 22.4.1.3
8 in the Minnesota proceeding. Absent Qwest argument to the contrary, we find Eschelon's proposed
9 language for Section 22.1.1 and 22.4.1.3 and Exhibit A- Section 7.11 to be reasonable and adopt it.

10 **Issue 22-90: Interim Rate Procedures & Unapproved Rates**

11 **Eschelon's Position**

12 Eschelon states that its proposed language defines "Unapproved Rate" governed by Sections
13 22.6.1 and 22.6.1.1 to mean a "new Section 251 product or service or one that was previously offered
14 with a charge for which a price/rate has not been approved by the Commission in a TELRIC Cost
15 Docket." Further, it asserts its proposed language provides a mechanism for setting interim rates, and
16 places the burden on Qwest to support the rates that it proposes to charge. Eschelon states that despite
17 Qwest not having provided cost support, Eschelon is proposing interim rates for those unapproved
18 elements, and has not proposed that those elements be provided "free." Eschelon states that its
19 proposed rates are interim, that it only offers these rates as reasonable interim rates until such time as
20 the Commission fully reviews and sets appropriate rates. Eschelon states that it needs to have interim
21 rates in Exhibit A because without rates in Exhibit A, Qwest will refuse to provide the product.

22 Eschelon states that when Qwest offers a Section 251 product for which there is no
23 Commission-approved rate, a rate for the product needs to be established, first as an interim rate, and
24 then, after review, made permanent. Eschelon proposes that if Qwest offers a Section 251 product for
25 which there is no Commission-approved rate, the interim rates could be a rate established by the
26 Commission, or a rate negotiated between the two companies. Eschelon's proposed language
27 provides that if the companies have not agreed upon a rate, Qwest will develop a TELRIC study in
28 support of its proposed rate and submit it to the Commission for review. Further, Eschelon proposes

1 that Qwest provide a copy of the cost support filed with the Commission to Eschelon upon request,
 2 and that until the Commission orders an interim or permanent rate, Eschelon would use the Qwest-
 3 proposed rate to order the product.

4 Eschelon explains that its proposed language for this issue follows a commission decision in a
 5 Minnesota Section 271 case. The Minnesota commission specified that Qwest cannot charge a rate for
 6 a Section 251 product for which there is no Minnesota-approved, cost-based rate without petitioning
 7 for the Minnesota commission's approval of the rate. Eschelon believes that upon request Qwest
 8 should provide Eschelon with any supporting cost study Qwest files with the Commission so that
 9 Eschelon would not have to incur the expense of intervening in a cost case to gain access to the cost
 10 filing when review of the cost study may indicate that intervention would not be necessary.

11 For Section 22.6.1.1 Eschelon proposes to address a situation not covered by Section 22.6.1. If
 12 (1) Eschelon and Qwest have not agreed upon a negotiated rate; (2) the Commission has not
 13 established a rate; and (3) Qwest does not submit a proposed rate and cost support to the Commission
 14 within the specified time frame, the unapproved rates do not apply, and Qwest must provision the
 15 product in question free of charge. Eschelon asserts that its proposal ensures that Qwest cannot extend
 16 a period by which it imposed unapproved rates by not filing cost support with the Commission and
 17 requesting approval of the rates.

18 Eschelon proposes that Section 22.4.1.1 which addresses interim rates, cross references Section
 19 22.6, the mechanism that addresses the mechanism for setting interim rates.

20 Issues 22-90(c) through 22-90(l) contain specific rate proposals for products for which the
 21 Commission has not approved rates. Eschelon's and Qwest's proposed interim rates for the specific
 22 services at issue follow:

23 Service	Eschelon:	Qwest:
24 7.9.4 .1 Mechanized Transit Records	\$0.001578	\$0.002827
25 7.9.4.2 Mechanized Access Records	\$0.001578	\$0.001827
26 8.7.1.2 Fiber Flat Charge, Per Request	\$1,178.59	\$1,975.68
27 8.7.2.4 Fiber, per Request	\$54.93	\$130.65

28

1	8.8.3 DS1 Circuit, per Two Legs	\$74.93	\$395.07
2	8.8.4 DS3 Circuit, per Two Legs	\$329.00	\$1,304.51
3	8.13.1.1 Quote preparation Fee (QPF) , per Office	\$441.00 NRC	\$914.07 NRC
4	8.13.1.2 Power Reduction <u>Restoration</u> , per Feed Set ¹⁰⁹		
5	8.13.1.2 Power Reduction, with or without Reservation, per Feed Set ¹¹⁰		
6	8.13.1.2.1 Less than 60 Amps	\$348.00 NRC	\$735.38 NRC
7	8.13.1.2.2 Equal to 60 Amps	\$348.00 NRC	\$1,025.79 NRC
8	8.13.1.2.3 Greater than 60 Amps	\$587.00 NRC	\$1,283.33 NRC
9	8.13.1.3 Power Off, per Feed Set, per Secondary Feed	\$68.92 NRC	\$947.35 NRC
10	8.13.1.4 Power Maintenance Charge (Reservation Chare), per Fuse Set	\$37.00 REC	\$50.04 REC
11	8.13.2 Power Restoration		
12	8.13.2.1 Quote Preparation Fee (QPF), per Office	\$441.00 NRC	\$914.07 NRC
13	8.15.2.1 Special Site Assessment Fee	\$529.00 NRC	\$1,058.00 NRC
14	8.15.2.2 Network Systems Assessment Fee	\$831.50 NRC	\$1,663.00 NRC
15	Private Line/Special Access UDIT Conversion	\$54.21	\$126.14
16	9.23.7.7.1 DS0	\$108.59	\$135.44
17	9.23.7.7.2 High Capacity	\$123.41	\$153.74
18	Transfer of Responsibility	\$64.21	\$128.42
19	10.7.12 Innerduct Occupancy Fee, per Foot, per Year	\$0.18	\$0.36
20	10.7.12.1 Microduct Occupancy Fee, per Microduct, per Foot, per Year	\$0.3345	\$0.4659
21	Eschelon Proposed language:		
22	9.2.2.5.1 Unbundled Loop Grooming (2-Wires) FN A ¹¹¹		
23	9.2.2.5.2 Unbundled Loop Grooming (4-Wire) FN A		
24	Qwest Proposed Language:		

¹⁰⁹ Eschelon proposed language

¹¹⁰ Qwest proposed language

¹¹¹ Footnote A provides: "Cost Docket T-00000A-00-0194 Phase II Oder No. 64922 Effective 6/12/02."

1	9.2.2.5.1 Unbundled Loop Grooming (2-Wire) FN A ₂		
2	5 ¹¹²		
3	9.2.2.5.2 Unbundled Loop Grooming (4-Wire) FN A ₂		
4	5		

Eschelon argues that Qwest is incorrect in claiming specific rates should not be addressed in an arbitration. Eschelon asserts that Section 252(b)(4)(c) of the 1996 Act requires the Commission to resolve each issue set forth in the petition. Eschelon states that Section 252(c) requires that a state commission "in resolving by arbitration" any open issues and imposing conditions upon the parties to the agreement, "shall establish any rates for interconnection, services or network elements according to subsection (d) of this section."¹¹³ Eschelon also relies on the FCC rules which it asserts recognize that state commissions may set rates in arbitration proceedings and impose a duty to produce cost data relevant to setting rates in negotiations.

Eschelon states that the difference between its and Qwest's proposal for rates for services for which there has not been a Commission decision, is that Qwest wants its rates to go into effect without any Commission scrutiny, while Eschelon seeks Commission review to assure that the rates Qwest charges are not excessive. Eschelon argues that to adopt Qwest's position and defer consideration of the rate issues in essence allows Qwest to charge its proposed rates, which rates, Eschelon believes it has shown to be in excess of its costs.

Eschelon argues that Qwest has provided no support for its proposed rates. Eschelon argues that it has presented evidence that its proposed rates are closer to the cost-based, nondiscriminatory standard that is supported by prior Commission decisions. Eschelon argues that Qwest should not be permitted, as a result of proposing interim rates, to ignore the Commission's previous cost decisions especially when it is deferring Commission review to those proposed rates to some time in the future.

With respect to the issue of unbundled loop grooming, Eschelon asserts that because grooming rates were set in the UNE Cost Docket, and there is no evidence that these rates would be reviewed in Phase III of that docket, Eschelon objects to including a footnote in this Exhibit A that would give the impression that these rates are to be reviewed in Phase III. Eschelon asserts there is no basis for

¹¹² Proposed footnotes A and 5 provide: "Rates for this element will be proposed in Arizona Cost Docket Phase III and may not reflect what will be proposed in Phase III. There may be additional elements designated for Phase III beyond what were reflected here."

¹¹³ Section 252(d) sets forth the applicable pricing standards for interconnection, network elements and resale at wholesale rates of ILEC retail services and provides that rates shall be cost-based and nondiscriminatory.

1 Qwest's proposed footnote 5.

2 **Qwest's Position**

3 Qwest asserts that rates for new services or products have historically been handled in cost
4 dockets where all parties have the opportunity to participate and the result is binding on all parties in
5 the state. Qwest notes that there have been two cost dockets in Arizona for the purpose of determining
6 UNE rates. In the second, or Phase II, the Commission decided that:

7
8 to the extent that issues are not addressed by the Decision, such issues are
9 deferred to Phase III of this proceeding For new services proposed by
10 Qwest with a new rate that has not been reviewed and approved by the
11 Commission, the interim rate shall be no more than the rate Qwest has
12 proposed. Such 'interim' rates shall be subject to a 'true-up' and refund
13 once permanent rates are established in Phase III. Decision No. 64922 at
14 81:1-9 and 84:20-22.

15 Qwest argues the Commission's approach makes sense because resolving these issues in isolated
16 interconnection arbitration proceedings could lead to inconsistent results and unnecessary repetition of
17 litigation. In addition, Qwest argues that the complexity of cost issues does not lend itself to
18 resolution in an arbitration context.

19 Qwest objects to Eschelon's proposed language that would require that Qwest obtain approval
20 before charging for a UNE or process that it previously offered without charge. First, Qwest asserts
21 that Eschelon's proposed language appears to apply beyond TELRIC priced unbundled network
22 elements and it raises the potential that Eschelon would argue it is entitled to services for free.

23 Qwest views Eschelon's proposal that Qwest provide cost support to Eschelon as unnecessary
24 and more appropriately handled in the Commission procedural rules instead of in an interconnection
25 agreement. Qwest notes that the Minnesota commission rejected this proposal as unnecessary.

26 Qwest argues that resolving the specific rates Eschelon proposes would require resolution of
27 issues that are normally addressed in cost dockets. Qwest disagrees with Eschelon's proposed
28 adjustments for inputs that were ordered in prior Arizona cost cases. Qwest argues that absent a
detailed review of Qwest's proposed costs for those elements and Eschelon's adjustments, it is
impossible to determine whether or not those adjustments are warranted based on past decisions.
Qwest asserts that for other rates, Eschelon proposed averaging ordered rates from certain states in

1 Qwest operates, but does not include states that have higher rates for the relevant elements. In other
2 instances, Qwest asserts Eschelon took Qwest's rate and cut it in half. Finally, Qwest disputes
3 Eschelon's claim that in some instances it did not provide Eschelon with cost studies.

4 Qwest asserts that this case contains little information to allow the Commission to resolve the
5 rate issues.

6 **Resolution:**

7 In normal circumstances arbitrations are not an appropriate forum for determining specific rate
8 elements because the time frame for resolving an arbitration is usually not sufficient to allow for the
9 required inquiry into and analysis of rate elements, and the inefficiencies associated with resolving a
10 rate element that would only apply to one CLEC. For these reasons, the Commission has heretofore
11 allowed Qwest to propose an interim rate for new elements until the Commission is able to examine
12 and approve a rate in a cost docket. Eschelon's proposal to not allow Qwest to charge for a new
13 element until Commission approved rates are determined would be a change in our procedure.
14 Because it is important to have uniform rates for all services and CLECs, we do not believe it is in the
15 public interest to alter our current procedure as the result of an arbitration proceeding that affects only
16 two parties. Likewise, an arbitration is not the best forum for modifying rates that had been previously
17 approved. Eschelon proposes changes to these rates. Qwest disputes some of Eschelon's claims and
18 we do not have sufficient evidence to find that Qwest has improperly applied approved rates.
19 Consequently, for all of the above reasons, we adopt Qwest's proposed language for this issue.

20 We do not believe that Qwest should be permitted to charge unapproved rates indefinitely.
21 Unapproved rates are interim and subject to refund, but if we do not conduct the next phase of the cost
22 docket, the parties lose the intended protections of the interim status. Thus, we will direct Staff to take
23 appropriate steps to commence Phase III of the cost docket, which should include, among other things,
24 a review of all of the rates elements at issue in this proceeding.

25 * * * * *

26 Having considered the entire record herein and being fully advised in the premises, the
27 Commission finds, concludes, and orders that:

28 ...

FINDINGS OF FACT

- 1
2 1. On September 8, 2006, Eschelon filed with the Commission a Petition for Arbitration
3 of an interconnection agreement with Qwest pursuant to A.A.C. R14-2-1505 and Section 252(b) of the
4 1996 Act.
- 5 2. On October 3, 2006, Qwest filed its Response to the Petition.
- 6 3. By Procedural Orders dated October 6, 2006, and October 10, 2006, the Commission
7 established procedural guidelines and set the matter for arbitration.
- 8 4. On October 23, 2006, Qwest and Eschelon filed a Joint Motion to Amend the
9 Procedural Schedule.
- 10 5. By Procedural Order dated October 30, 2006, the Commission granted the Joint Motion
11 and set the arbitration to commence March 19, 2007.
- 12 6. On November 8, 2006, Qwest filed the Direct Testimony of Renee Albersheim,
13 William Easton, Teresa Million, Robert Hubbard and Karen Stewart. On the same date, Eschelon filed
14 the Direct Testimony of James Webber, Michael Starkey, Bonnie Johnson and Douglas Denney.
- 15 7. On February 9, 2007, Qwest filed the Rebuttal Testimony of Ms. Albersheim, Mr.
16 Easton, Ms. Million, Mr. Curtis Ashton, Mr. Hubbard and Ms. Stewart. On the same date, Eschelon
17 filed the Rebuttal Testimony of Ms. Johnson, Mr. Denney and Mr. Starkey.
- 18 8. On February 20, 2007, Eschelon filed a Notice of Errata, filing a corrected version of
19 Ex MS-6 to Mr. Starkey's Rebuttal Testimony.
- 20 9. On March 1, 2007, Qwest filed a Motion to Dismiss Rate Issues.
- 21 10. On March 2, 2007, Eschelon filed the Surrebuttal Testimony of Mr. Starkey, Ms.
22 Johnson and Mr. Denney. On the same date, Qwest filed the Surrebuttal Testimony of Ms.
23 Albersheim, Mr. Easton, Ms. Million, Mr. Ashton, Mr. Hubbard and Mr. Stewart.
- 24 11. On March 12, 2007, Eschelon filed a Response to Qwest's Motion to Dismiss Rate
25 Issues.
- 26 12. Oral argument on the Motion to Dismiss was heard in a telephonic procedural
27 conference on March 14, 2007.
- 28 13. By Procedural Order dated March 14, 2007, the Motion to Dismiss was denied.

1 14. The arbitration convened as scheduled on March 19, 2007, at the Commission's
 2 Phoenix offices. Following two days of arbitration, the matter was taken under advisement pending
 3 the submission of Closing Briefs.

4 15. On April 27, 2007, Qwest and Eschelon filed Closing Briefs.

5 16. On June 6, 2007, Eschelon filed, as supplemental authority, a copy of the Minnesota
 6 Public Utility Commission's Order Denying Reconsideration in the Qwest-Eschelon Minnesota
 7 arbitration (Docket No, P-5340, 421/IC-06-0768).

8 17. On July 18, 2007, the parties filed a Joint Notice of Closure of Arbitration Issue 9-51
 9 and Partial Closure of Arbitration Issue No. 22-90(f). Issue No. 9-51 is described as "Application of
 10 UDF-IOF Termination (Fixed) Rate Element." The parties agreed to language in Section 9.7.5.2.1 of
 11 their ICA to resolve this issue. Issue No. 22-90(f) concerns the nonrecurring rates for "ICDF
 12 Collocation" for DS1 circuits, per two legs, and for DS3 circuits, per two legs. This issue is among
 13 those described as "Unapproved Rates" as "Matrix Issue No. 45." The parties partially closed this
 14 issue by agreeing upon the nonrecurring rate of \$75.83 for ICDF Collocation for DS1 circuits, per two
 15 legs, but have not agreed upon a nonrecurring rate for ICDF Collocation for DS3 circuits per two legs,
 16 and that portion of the Issue No. 22-90(f) remains in dispute.

17 18. On September 17, 2007, the parties filed a Joint Notice of Closure of Arbitration Issues
 18 No. 8-21, 8-21(a), 8-21(b), 8-21(c), 8-21(d), 8-21(e), and 8-219(f). The parties closed this issue by
 19 agreeing to language for Sections 8.2.1.29 –Power and 8.3.1.6 -48 Volt DC Power.

20 19. The Commission has analyzed the issues presented by the parties and has resolved the
 21 issues as set forth in the Discussion portion of this Order in accordance with the 1996 Act.

22 20. The Commission hereby adopts the Discussion and incorporates the parties' positions
 23 and the Commission's resolution of the issues herein.

24 21. Pursuant to A.A.C. R14-2-1506(A), the parties will be ordered to prepare and sign an
 25 interconnection agreement incorporating the issues as resolved by the Commission, for review by the
 26 Commission pursuant to the Act, as directed herein.

CONCLUSIONS OF LAW

27
 28 1. Eschelon is a public service corporation within the meaning of Article XV of the

- 1 2. Eschelon is a telecommunications carrier within the meaning of 47 U.S.C. § 252.
- 2 3. Qwest is a public service corporation within the meaning of Article XV of the Arizona
- 3 Constitution.
- 4 4. Qwest is an ILEC within the meaning of 47 U.S.C. § 252.
- 5 5. The Commission has jurisdiction over Eschelon and Qwest and of the subject matter
- 6 of the Petition.
- 7 6. The Commission's resolution of the issues pending herein is just and reasonable,
- 8 meets the requirements of the 1996 Act and regulations prescribed by the FCC pursuant to the Act, is
- 9 consistent with the best interests of the parties, and is in the public interest.

10 **ORDER**

11 IT IS THEREFORE ORDERED that the Commission hereby adopts and incorporates as its

12 Order the resolution of the issues contained in the above Discussion.

13 IT IS FURTHER ORDERED that Eschelon Telecom of Arizona, Inc. and Qwest Corporation

14 shall prepare and sign an interconnection agreement incorporating the terms of the Commission's

15 resolutions.

16 IT IS FURTHER ORDERED that the signed interconnection agreement shall be submitted to

17 the Commission for its review within thirty days of the date of the Commission issues a final Order

18 approving the Settlement Agreement in Docket Nos. T-03632A-06-0091 et al., or such other

19 resolution to the wire center issues to which Eschelon Telecom of Arizona, Inc. and Qwest

20 Corporation can both agree, or thirty days of the effective date of this Decision whichever is later. In

21 the event no settlement, or mutually agreeable resolution of the wire center issues is reached in

22 Dockets Nos. T-03632A-06-0091 et al., this arbitration docket shall be reopened to resolve issues 8-

23 37 through 8-42.

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28 ...

1 IT IS FURTHER ORDERED that the rates for specific products or elements raised in
2 connection with issues 4-5 (loop and CFA design changes), 9-43 (UNE conversions), 12-67
3 (expedites ICB rate), and 22-90 (rates) herein, shall be addressed in Phase III of the Cost Docket.

4 IT IS FURTHER ORDERED that this Decision shall become effective immediately.

5 BY ORDER OF THE ARIZONA CORPORATION COMMISSION.
6
7

8 _____ CHAIRMAN _____ COMMISSIONER

9
10
11 _____ COMMISSIONER _____ COMMISSIONER _____ COMMISSIONER

12
13
14 IN WITNESS WHEREOF, I, DEAN S. MILLER, Interim
15 Executive Director of the Arizona Corporation Commission,
16 have hereunto set my hand and caused the official seal of the
17 Commission to be affixed at the Capitol, in the City of Phoenix,
18 this ____ day of _____, 2008.

19
20
21 _____
22 DEAN S. MILLER
23 INTERIM EXECUTIVE DIRECTOR

24
25 DISSENT _____

26
27 DISSENT _____

28 JR::DAP

1 SERVICE LIST FOR: ESCHELON TELECOM, INC/ QWEST CORPORATION

2 DOCKET NOS.: T-03406A-06-0572 and T-01051B-06-0572

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22 Phoenix, AZ 85007

23 Ernest G. Johnson, Director
24 Utilities Division
24 ARIZONA CORPORATION COMMISSION
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25 Phoenix, AZ 85007

26
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28

CERTIFICATE OF SERVICE

ARB 775

I hereby certify that on the 27th day of February 2008, I served the foregoing QWEST CORPORATION'S NOTICE OF SUPPLEMENTAL AUTHORITY in the above entitled docket on the following persons via means of e-mail transmission to the e-mail addresses listed below, and via U.S. Mail, by mailing a correct copy to them in a sealed envelope, with postage prepaid, addressed to them at their regular office address shown below, and deposited in the U.S. post office at Portland, Oregon.

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DATED this 27th day of February, 2008.

QWEST CORPORATION



By: _____
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