An Integra Telecom Company

July 15, 2008

Filed electronically and
via overnight Federal Express

Public Utility Commission of Oregon
ATTN: Filing Center
550 Capitol Street NE, Suite 215
Salem, OR 97308-2148

Re: In the Matter of the Petition of Eschelon Telecom of Oregon, Inc. for Arbitration with Qwest Corporation, Pursuant to 47 U.S.C. Section 252 of the Federal Telecommunications Act of 1996
Docket No. ARB 775
Supplemental Authority

Dear Sir/Madam

Enclosed as supplemental authority are an original and three copies of the recent Report and Order on Arbitration of Interconnection Agreement of the Utah Public Service Commission related to the Qwest-Eschelon interconnection agreement in the Utah arbitration.

Sincerely,

Tobe Goldberg

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- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

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

ISSUED: July 11, 2008

SYNOPSIS

Having reviewed the evidence presented, as well as the arguments of the parties, the Commission directs the parties to submit an interconnection agreement that includes the terms and conditions reflecting their mutual agreement and the Commission's resolution of the disputed issues discussed and resolved herein.

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By The Commission:

I. PROCEDURAL HISTORY

On April 30, 2007, Eschelon Telecom of Utah, Inc. ("Eschelon") filed a Petition for Arbitration of Intercarrier Negotiations with Qwest Corporation under the Telecommunications Act of 1996 ("Petition") seeking Commission arbitration pursuant to 47 U.S.C. § 252(b) of the unresolved issues between Eschelon and Qwest Corporation ("Qwest") (together with Eschelon hereinafter referred to jointly as the "parties") in the parties' interconnection agreement ("ICA") negotiations. The Petition and its attached exhibits identified 77 open issues remaining for arbitration. These issues were grouped into 26 distinct subject-matter areas. In its Petition, Eschelon stated the parties had agreed to waive the nine-month deadline for conclusion of the arbitration in light of the number of issues to be resolved. The Parties also jointly proposed a procedural schedule to govern the conduct of these proceedings. Therefore, on May 21, 2007, the Administrative Law Judge ("ALJ") issued a Scheduling Order substantially adopting the proposed schedule.

On May 22, 2007, Qwest filed its Response to the Petition of Eschelon Telecom of Utah, Inc., For Arbitration with Qwest Pursuant to the Telecommunications Act of 1996 ("Qwest Response") noting the parties had continued negotiations since the filing of the Petition and had resolved a number of issues. Thus, according to the Qwest Response, the following Arbitration Issues identified in the Petition and its attached exhibits were no longer in dispute: 4-5(b), 9-32 (and subparts), 9-35, 9-36, 9-39, 9-46, 9-50, 9-52, 9-54(a), 10-63, 12-70, 12-74, 12-75(a), 12-76, 12-76(a), 12-77, 12-78, 12-79, 12-81, 12-82, 12-86, and 24-92.

On June 21, 2007, the parties filed a Joint Motion of Eschelon and Qwest for Single Compliance Filing of the Interconnection Agreement and, If Granted, a Revised Schedule ("Joint Motion") in which the parties stated the Settlement Agreement then pending Commission approval in Docket No. 06-049-40 would, if approved, resolve all open ICA language encompassed by Arbitration Issues 9-37 through 9-42 (the "Wire Center issues") in the instant docket. As a result, the parties by their Joint Motion sought Commission permission to, if the Settlement Agreement were approved in Docket No. 06-049-40, file a single proposed ICA for Commission approval in the instant docket only after the Commission has issued orders resolving all of the open arbitration issues, rather than requiring the parties to file, for example, a contract addressing the Wire Center issues and a later amendment upon resolution by the Commission of the remaining arbitration issues. On July 31, 2007, in Docket No. 06-049-40, the Commission issued its Report and Order Approving Settlement Agreement. That same day, the ALJ issued an Order Granting Joint Motion for a Single Compliance Filing of the Interconnection Agreement.

On July 19, 2007, the parties filed a Joint Notice of Closure of Arbitration Issue No. 9-51 stating the parties had closed this issue by agreeing to include specified language in Section 9.7.5.2.1 of the ICA.

On July 27, 2007, Qwest filed a Motion for Protective Order. The Commission thereafter issued a Protective Order on August 16, 2007.

On August 27, 2007, pursuant to Scheduling Order issued May 21, 2007, the Division of Public Utilities ("Division") filed a Utah Disputed Issues List ("Issues List") detailing the issues remaining for resolution via arbitration.

Pursuant to notice, hearing on the remaining open issues convened before the ALJ on September 12, 2007. Eschelon was represented by Gregory Merz of Gray, Plant & Mooty. Qwest was represented by Jason D. Topp of Qwest, John M. Devaney of Perkins Coie, and Ted D. Smith of Stoel Rives. Each party filed evidence and offered testimony on its behalf.[1]

At the close of hearing, the parties agreed to one round of post-hearing briefs to be filed on November 16, 2007. However, on November 14, 2007, counsel for Qwest emailed the ALJ to request an extension to November 20, 2007, due to scheduling conflicts. The request indicated Eschelon did not object to said extension. The ALJ replied to all parties by email on November 14, 2007, indicating the filing deadline was extended as requested. The parties thereafter filed their respective briefs on November 20, 2007.

On January 23, 2008, Eschelon filed as supplemental authority the Arbitrator's Report and Decision issued January 18, 2008, in a companion arbitration before the Washington State Utilities and Transportation Commission ("Washington Commission").

On February 6, 2008, Eschelon filed as supplemental authority the February 4, 2008, Order of the Minnesota Public Utilities Commission ("Minnesota Commission") issued in a companion arbitration to the present docket.

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[1] Although participants pre-filed and offered into evidence confidential testimony and exhibits, the evidentiary hearing remained open at all times. This Order discloses no confidential information; no confidential order has been prepared or issued in this docket.

On March 4, 2008, Qwest filed as supplemental authority the February 22, 2008, Opinion and Order the Administrative Law Judge in a companion arbitration before the Arizona Corporation Commission ("Arizona Commission").

On March 31, 2008, Eschelon filed as supplemental authority the March 26, 2008, Arbitrator's Decision in a companion arbitration before the Public Utility Commission of Oregon ("Oregon Commission").

II. ISSUES DISCUSSION, FINDINGS, AND CONCLUSIONS

Numerous issues remain for Commission decision below. Unless otherwise specified, Eschelon's proposed ICA language is re-printed throughout this Report and Order in underscored text while Qwest's objections to Eschelon's proposed language are indicated by strikeout font. The parties' proposed language for several of the issues listed below is too voluminous to efficiently re-print here. In such cases, as with every issue before the Commission in this matter, said proposed language is contained in the Issues List.

A. Interval Changes – Issues 1-1, 1-1(a) through 1-1(e)

A service interval is the period of time Qwest is permitted to provision a requested service to a competitive local exchange carrier ("CLEC"). Exhibit C to the proposed ICA lists the various service intervals in question. Eschelon's proposed language for ICA Sections 1.7.2, 7.4.7, 9.23.9.4.3, and 24.4.4.3, as well as Exhibits C, I, N, and O, would, if adopted, result in the ICA governing the parties' interval change process instead of the Change

Management Process ("CMP")[2] within which interval changes are currently made. Qwest's proposed language would leave modification of intervals under the CMP.

Eschelon Position

According to Eschelon, service intervals determine how quickly Eschelon will be able to provide service to its end user customers. An increase in the length of an interval means that Eschelon's customer will wait longer for service and, accordingly, is a matter of great significance to Eschelon. Because of the importance of service intervals to Eschelon's service quality, Eschelon has proposed that the currently existing intervals be incorporated into the ICA so that they cannot be changed unilaterally by Qwest.

Eschelon has done a number of things to attempt to address Qwest's professed desire for flexibility without compromising its own need to maintain the consistency of its service quality. First, its alternate proposal would be permit Qwest to shorten intervals through the CMP while an ICA amendment would only be required to lengthen intervals. According to Qwest, since it obtained its Section 271 approval, it has shortened intervals thirty-nine times and lengthened intervals only once. Thus, the lengthened interval changes to which Eschelon's alternate proposal would apply are exceedingly rare, but are, according to Eschelon, of sufficient significance for Eschelon's customers that such changes should not be made without Eschelon's agreement or the Commission's approval. Eschelon has also proposed that, when parties are able to agree on an interval change, said agreement may be documented by a simple, one-page

[2]Through its CMP, Qwest operates a forum for the CLECs with which it does business that includes discussions and information about Qwest products or changes to those products. These changes are typically published via a Product Catalog ("PCAT") available on Qwest's website.

advice letter rather than a more formal amendment, similar to the process used when parties agree to add a new product to an ICA. Qwest contends that it needs flexibility because shortening the interval of one product may require lengthening the interval for another product. However, Qwest acknowledges that, while it has decreased a number of intervals since receiving Section 271 approval, it has never had to correspondingly lengthen other intervals.

Qwest Position

Qwest argues the issue of interval changes is fairly straightforward, but its context is one of the fundamental disputes that exist in this arbitration. Specifically, Qwest has attempted for some period of time to create standardized processes for handling CLEC orders. Qwest initially pursued standardization as a method to obtain Section 271 approval and has since continued that effort because it has proven to be an effective and efficient manner in which to serve CLECs and comply with the myriad obligations imposed by state regulations, interconnection agreement terms and performance standards.

According to Qwest, Eschelon does not seek to change any of Qwest's current intervals, but it does seek to hamstring any potential changes to intervals by having them placed as an exhibit to the ICA. Qwest notes that the issue of intervals has always been handled within, and no disputes that have arisen out of, the CMP. Eschelon has not presented a single example of Qwest abusing the CMP to change intervals or any indication that such a problem will occur in the future. Furthermore, in the event Qwest were to abuse the process, Commission rules permit Eschelon to bring an expedited complaint addressing such issues. In contrast, Eschelon's proposals will impose significant administrative burdens on Qwest by requiring ICA

amendments or adoption letters with every CLEC in the event of an interval change. According to Qwest, such a burden should only be imposed if there is a significant justification for doing so. Since none exists in this case, Qwest's position should be adopted.

Decision

Given that Qwest has in recent years shortened intervals dozens of times and lengthened intervals only once, the ALJ is not persuaded by Eschelon's concern at leaving interval changes under the CMP. While interval lengths are very important to CLEC's, there is no evidence presented that Qwest has abused the CMP with respect to interval changes or that it might do so in the future. In light of this, it would not be reasonable to impose significant administrative burdens on Qwest by moving the interval change process from the CMP which is open to all CLECs to individual ICAs. The ALJ therefore recommends the Commission adopt Qwest's proposed language on this Issue and its subparts.

B. Effective Date of Rate and Legally Binding Changes – Issues 2-3 and 2-4

These issues concern how and when changes to either Commission-approved rates or to the law will be implemented during the term of the ICA where the effective date of the change of law is not specified.

Issue 2-3

Issue 2-3 involves whether ICA Section 2.2, which deals with change of law questions, should specify a default effective date for rate changes when the applicable Commission order fails to establish one, and whether Section 22.4.1.2 should specify that interim rates only apply prospectively when the applicable Commission order is silent on the subject of

true-ups. To deal with changes ordered to rates, Qwest proposed the following language be added to Section 2.2:

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

Qwest argues this language removes any ambiguity regarding rate issues.

In response, Eschelon filed alternative proposals. The first would simply strike Qwest's proposed language and add the following to Section 2.2: "The rates in Exhibit A and when they apply are addressed in Section 22." Eschelon's second proposal would likewise strike Qwest's proposed language for Section 2.2 and would add language to Sections 2.2 and 22.4.1.2 that, according to Eschelon, expressly reserves the question of whether a rate will be subject to true-up and, if the Commission order approving the rate is silent on that issue, gives the rate prospective effect from the effective date of the order adopting or changing the rate.

Decision on Issue 2-3

Utah Code Annotated § 54-7-10(1) states "Orders of the commission shall take effect and become operative on the date issued, except as otherwise provided in the order." As this provision applies to all Commission orders, including those pertaining to final and interim rates, the ALJ concludes the parties' proposed language concerning the effective date of rate changes and interim rates is unnecessary, and recommends the Commission adopt neither party's proposed language on this issue.

With respect to the subject of true-ups, Eschelon's proposed Section 22.4.1.2 merely restates Utah law and practice wherein rate changes are applied prospectively and no

true-up is approved unless the applicable Commission order specifies otherwise. Therefore, the ALJ recommends the Commission adopt Eschelon's proposed language on this point.

Issue 2-4

Issue 2-4, dealing with changes of law other than rate changes, stems from Qwest's proposal that a party be required to provide notice within 30 days of a legally binding change if a party wants that change to be effective on the date of the applicable Commission order. Qwest's proposed language for Section 2.2, underlined below, is as follows:

> When a regulatory body or court issues an order causing a change in law and that order does not include a specific implementation date, a Party may provide notice to the other Party within thirty (30) Days of the effective date of that order and any resulting amendment shall be deemed effective on the effective date of the legally binding change or modification of the Existing Rules for rates, and to the extent practicable for other terms and conditions, unless otherwise ordered. 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. . . .

Qwest argues this language provides a significant incentive for parties to take action immediately if they want to quickly implement a change in law. Qwest believes its proposal prevents the possibility of a complaint similar to those brought by Level 3 in several states in which Level 3 sought very significant financial payments for an alleged change in law that took place years ago. See *In the Matter of Level 3 Communications, LLC's Verified Complaint and Request for Expedited Proceeding to Enforce Interconnection Agreement with Qwest Corporation,* Minnesota PUC Docket No. P-421/C-05-721.

Qwest challenges as "remarkable" Eschelon's complaint that Qwest's proposal would unfairly require Eschelon to keep track of legal changes because it is a smaller company than Qwest, noting that the record in this case establishes that Eschelon pours tremendous resources into regulatory issues, participating with vigor before state commissions, the FCC, in the CMP and in other significant regulatory proceedings. Furthermore, Eschelon does business in far fewer states than Qwest, making the need to track and notify much less burdensome. Qwest notes Eschelon has failed to identify a single historical example where it would have been adversely affected by Qwest's proposed language.

Eschelon, on the other hand, has filed two alternative proposals for Issue 2-4. The first would require that changes in the law other than rate changes be implemented and applied prospectively as of the effective date of the order, unless the Commission orders otherwise. Eschelon's alternative proposal clarifies that, when there is a change in the law, either party may seek a different implementation schedule, but provides that, absent some other direction, an order changing the law will be implemented as of the order's effective date. This proposal also confirms that it is the duty of the parties to keep the ICA up to date. According to Eschelon, either of its proposals will assure that the ICA properly reflects any order that changes the law, including any direction given in such an order regarding when the ordered change will be given effect.

Eschelon argues that, under Qwest's proposed language, when a change in law takes effect may depend on whether one party provides the other party with notice of the order

giving rise to the change. Where neither party gives notice, the change takes effect as of the effective date of an ICA amendment incorporating the change. According to Eschelon, Qwest's proposed language allows a party to "game the system" by intentionally not giving notice of a decision that changes the law adversely to that party, thereby possibly delaying when that decision will take effect. Because Qwest has greater resources and will be more likely than Eschelon to be aware of, if not a participant in, any proceeding that results in a change of law, this ability to game the system favors Qwest to Eschelon's disadvantage.

According to Eschelon, Qwest's proposal also creates great potential for future disputes. First, Qwest's language distinguishes between an order's "specific implementation date" and its "effective date."[3] One might reasonably expect that, if an order is silent as to its implementation date, the "implementation date" and the "effective date" would be one and the same. Although that is true under Eschelon's proposed language, it is not the case under Qwest's proposal. Qwest's language leaves open for later the argument that, even though an order states an effective date, the order does not state a specific implementation date. Under such circumstances, notwithstanding the Commission's order, Qwest's proposal would have the effective date of the change of law determined by whether one party gives the other notice of the order.

[3]Exhibit Qwest 2R, p. 5, lines 7-8 ("An 'effective date' is the date the order takes effect. An implementation date is the date on which the parties are obligated to act pursuant to the order.")

Decision on Issue 2-4

As noted above, under Utah law, a Commission order is effective when issued unless the order specifies otherwise. Therefore, the ALJ recommends the Commission refuse to adopt either party's language addressing the effective date or prospective application of Commission orders. With respect to the effective date of other changes of law, the ALJ recognizes the parties' desire for business certainty. However, while both parties offer reasonable arguments in support of their proposed language, the ALJ believes the effective date of changes of law and ICA amendments based thereon is best left to a case-by-case agreement of the parties or, lacking agreement, decision of the Commission based on the facts presented at that time. Therefore, the ALJ recommends the Commission accept neither parties' proposed language, except for Eschelon's proposal that "Each party has an obligation to ensure that the Agreement is amended accordingly." Such a result protects each party's rights by deferring resolution to a future adjudication based on the facts and law specific to an actual dispute.

C. Design Changes – Issues 4-5, 4-5(a) and 4-5(c)

As described by Qwest, a "design change" is any change to an order that requires engineering review. When a CLEC has submitted an order for a facility or a service and then submits a change to that order, a Qwest engineer must review the changes requested by the CLEC to determine what change in the design, if any, is necessary to satisfy the request. A design change could include, for example, a change of end-user premises within the same serving wire center, or the addition or deletion of optional features or functions. A design

change could also include a change in the type of channel interface, the type of interface group or the technical specification of a package.

These Issues involve language proposed for ICA Sections 9.2.3.8, 9.2.3.9, and Exhibit A section 9.20.13. The central dispute concerns the design change charges Qwest may charge Eschelon for loop design changes and connecting facility assignment ("CFA") changes. CFA changes occur when a customer desires to obtain service from Eschelon instead of from Qwest or another carrier. After Eschelon submits a new connect service order, a Qwest engineer must connect the customer's loop to Eschelon's equipment collocated in a Qwest central office. To enable Qwest to perform this connection on its behalf, Eschelon provides Qwest with a CFA on the interconnection distribution frame ("ICDF") in Qwest's central office. In other words, Eschelon identifies the specific place on the ICDF where the Qwest engineer should connect the loop. In some cases, the ICDF locations that Eschelon gives Qwest are incorrect, which requires Eschelon to submit a new CFA and, in turn, requires Qwest to redesign the order.

Exhibit A currently lists no specific charge for loop design and CFA changes. Both parties agree Qwest may levy cost-based charges for these changes. However, while Qwest proposes adopting the $35.89 rate it currently charges for Unbundled Dedicated Interoffice Transport ("UDIT") changes, Eschelon proposes a $30.00 interim rate for loop design changes and a $5.00 interim rate for CFA 2/4 Wire Loop Cutovers until such time as the Commission establishes cost-based rates for these items.

Eschelon Position

According to Eschelon, its proposal is reasonable, given that Qwest provided loop design changes from 1999 until 2005 without a separate charge. Furthermore, in light of the very different activities involved in performing UDIT design changes, loop design changes, and CFA changes, it is not reasonable to think that the rates for all three would be the same. Qwest's proposal on its face is unreasonable, given that it results in design change charges for loops and CFAs that exceed the installation charges for loops, including coordinated installation charges. Such a result defies logic because a design change is a component of the installation, and should, therefore, never exceed the rate for the installation itself. In addition, the costs for design changes for UDIT versus loops are not similar, as loops and UDIT are different products that utilize different systems, with UDIT being more complex and higher cost than loops. Qwest has admitted this by recognizing that the Local Service Request ("LSR") used for loops has a higher level of electronic flow-through than the Access Service Request ("ASR") used for UDIT.

Similarly, CFA changes, and particularly the limited type of CFA change reflected in Eschelon's language for Section 9.2.3.8, are lower cost than UDIT design changes. In this scenario, Qwest and Eschelon are already in contact and coordinating the cutover and the Qwest central office technician is already standing at the frame. Accordingly, it requires little, if any, additional work to perform a "lift and lay" to switch CFAs. The cost for this activity, to the extent that it is not already recovered in Qwest's recurring charges, would be very minimal, reflecting a few seconds or minutes of the Qwest technician's time, and certainly would not rise to the level of the UDIT design change charge.

Qwest Position

Qwest, on the other hand, points out that review of orders by engineers and other Qwest personnel requires time and imposes costs on Qwest. Eschelon's proposed rates of $30.00 for loops and $5.00 for CFAs are below the rate this Commission has adopted and substantially below the design rates that commissions throughout Qwest's region have ordered. If adopted, those rates would violate Qwest's right of cost recovery established by Sections 252(c) and (d) of the Telecommunications Act of 1996 (the "Act").

Issue 4-5(a) involves the relatively narrow issue of the charge that should apply when Qwest is required to perform a CFA change while Qwest and Eschelon are in the process of performing a "coordinated cut-over" of a "2/4 wire loop analog (voice grade) loop." Eschelon bases its proposed $5.00 charge on the claim that the presence of a Qwest engineer in the central office to perform a coordinated cut-over dramatically reduces the costs of the CFA change. However, for several reasons, Eschelon's proposed CFA rate of $5.00 is seriously flawed.

First, Eschelon fails to provide any meaningful evidence showing how it derived the rate; there is no evidence in the record concerning activities, times, or labor rates associated with the rate. Eschelon did not support this proposed rate with a cost study, cost data, or any evidence other than narrative testimony. There is thus no meaningful evidence upon which the Commission could conclude that that the rate meets the Act's cost-based standard set forth in Section 252 (d)(1)(A).

Second, in contrast to Eschelon's unsupported rate proposal, this Commission adopted the rate of $35.89 for all design changes using a cost-based study that utilized the FCC's

prescribed TELRIC pricing methodology. The study and the resulting Commission-ordered rate of $35.89 are based on the average cost of performing a design change for all types of products, such as loops and transport, and includes CFA changes, as confirmed by the explanation in the executive summary that it applies to all types of design changes and by the reference to "type[s] of channel interface[s]," which is a reference specific to CFAs. In addition, the design charge rate this Commission adopted appears in the "Miscellaneous Charges" section of Exhibit A to existing ICAs and Qwest's Statement of Generally Available Terms ("SGAT"). If the charge applied only to transport or UDIT related design activities, as Eschelon claims, it would be listed in the section of Exhibit A devoted to transport and would not be listed among the miscellaneous charges that have broad application.

Third, there is no factual foundation for Eschelon's assumption that the presence of a Qwest technician in a central office during a coordinated cut-over reduces the costs of CFA changes and thereby renders the $35.89 rate inapplicable. As an initial matter, the TELRIC cost study that this Commission used to establish this rate does not include any time or costs for technician activities in a central office. Accordingly, even if Eschelon were correct in claiming that coordinated cut-overs reduce the time technicians must spend on CFA changes, that would not support reducing the rate the Commission ordered. Eschelon's assumption, which is unsupported by any testimony from an engineer, is based on an inaccurate and over-simplified description of the activities required to perform CFA changes. The activity involving a Qwest central office technician's disconnection of a jumper from one CFA on a frame and reconnection of the jumper to another CFA on a frame is only one of the actions required for a CFA design

change. Multiple other activities must be performed to carry out CFAs properly. For example, testing personnel must coordinate with the central office technician to determine whether a new CFA that Eschelon submits is available and viable. If it is, the tester provides a service delivery coordinator with the CFA information to supplement the order. A designer must then review and potentially redesign the circuit with the new CFA. Once the tester has coordinated these efforts, he or she must have the central office technician run a jumper from a tie pair to the new CFA. The tester may have to re-test to confirm with Eschelon's testing personnel that the circuit is operational. Finally, Qwest must update its downstream operation support systems to reflect the new, correct CFA information. The presence of a Qwest technician in a central office for a coordinated cut-over does not eliminate the need to perform any of these activities.

Likewise, Issue 4-5(c) arises from Eschelon's contention that the Commission's TELRIC rate of $35.89 for design changes does not apply to design changes involving unbundled loops and applies only to design changes involving UDIT. As with its proposed CFA charge, Eschelon has provided no meaningful support for its proposed $30.00 rate for loops. Therefore, the Commission has no basis upon which to determine whether the $30.00 rate is cost-based and consistent with TELRIC. There also is no basis for Eschelon's claim that loop design changes are not in the TELRIC study upon which the Commission's rate is based. The Commission's rate is based on the average cost of performing a design change for multiple products, including loops, UDIT, and CFAs. That the study is not limited to UDIT and includes loops is confirmed by the fact that it specifically refers to network facilities used with "end-user premises." Loops connect end-user premises to the network, unlike UDIT which is used to

connect central offices and does not involve end-user premises. If the cost study this Commission used to set the $35.89 rate were limited to UDIT, it would not refer to end-user premises.

Eschelon argues that the cost study must be limited to UDIT since CLECs order UDIT, as opposed to loops, through the ASRs that are assumed in the study. However, the study uses ASRs not because it is limited to UDIT but, rather, because it relied upon a prior design change study involving access services that used ASRs. Indeed, that original study was not limited to UDIT design changes even though it assumed the use of ASRs. The use of ASRs was a simplifying assumption that had no appreciable affect on the estimated cost of loop-related design changes.

As discussed above in connection with the charge for CFAs, the listing of the design change rate in the "Miscellaneous Charges" section of Exhibit A of the SGAT and ICAs instead of in the "Transport" section confirms that the charge is not limited to UDIT. The transport section includes multiple rates that apply only to transport, including, for example, the transport-specific rates for "DS1 Transport Termination Fixed and DS1 Transport Facilities Per Mile." These rates apply only to transport and not to other UNEs or services. By contrast, rates listed in the "Miscellaneous Charges" section of Exhibit A may apply in multiple circumstances and, in several instances, to more than one network element or activity. Eschelon's reading of Exhibit A assumes illogically that Qwest and CLECs included a transport-specific charge in a section of the ICA pricing exhibit that is not specific to transport and that applies to multiple elements, services, and activities.

Decision

The ALJ agrees with Qwest that Eschelon's proposed interim rates lack evidentiary support in the record. In addition, the evidence does not support Eschelon's contention that Qwest's Commission-approved $35.89 design change charge was intended to apply only to UDIT, and not to loops and CFAs. As noted by Qwest, this charge is located under the "Miscellaneous Charges" section of Exhibit A, indicating it is intended to apply generally across the range of Qwest products rather than to only specifically denominated activities. While Eschelon raises a legitimate question as to whether design change charges should be different for different products, this arbitration is not the appropriate proceeding in which to consider this question or to change rates. Parties remain free to request the Commission open a cost docket to consider setting separate design change rates for loops and CFAs based upon appropriate evidence not available in this arbitration. Therefore, the ALJ recommends the Commission adopt Qwest's proposed language, including Qwest's proposed rates. However, given the evidentiary uncertainty surrounding the actual costs incurred for loop and CFA design changes, it is reasonable that the ICA specify said rates are an interim, subject to true-up.

D. Discontinuation of Order Processing – Issues 5-6, 5-7, and 5-7(a)

These Issues pertain to discontinuation of order processing and disconnection for nonpayment of undisputed bills. Issue 5-6 relates to ICA Section 5.4.2, Issue 5-7 to Section 5.4.3 and Issue 5-7(a) to Section 5.13.1. Eschelon has filed two alternate proposals for section 5.4.2; Qwest counters with one proposal. Under Eschelon's first proposal, Qwest could only discontinue processing Eschelon's orders if its receives Commission approval. The language of

the second proposal would permit Qwest to discontinue order processing unless Eschelon asks the Commission to intervene. Qwest's proposed language would merely remove "With the Commission's approval" from Eschelon's first proposal such that Qwest need not obtain Commission approval to discontinue processing Eschelon orders if Eschelon fails to make payments under the ICA.

With respect to service disconnects, Eschelon proposes ICA Section 5.4.3 begin as follows: "With the Commission's approval pursuant to Section 5.13.1". Qwest's proposal is the same as Eschelon's, except that the language quoted above is removed. Likewise, Eschelon's proposed language for Section 5.13.1 requires that a party believing the other has defaulted in payment or otherwise breached a material provision of the ICA "must notify the Commission in writing" and may seek relief in accordance with the dispute resolution provision of the ICA. Qwest proposes removing "must notify the Commission in writing" from this section.

Eschelon Position

Eschelon argues its proposed language would provide some form of Commission review before Qwest may discontinue processing Eschelon's service orders or disconnect Eschelon's circuits for alleged non-payment. Eschelon notes the discontinuation of order processing and disconnection would have very serious consequences for Eschelon and its customers. If Qwest were to discontinue processing Eschelon's orders, Eschelon could not order new service, nor could it make any changes to a customer's existing service. If Eschelon's services were disconnected, Eschelon's customers could pick up the telephone one day to

discover that they do not have dial tone. This would not only be service-affecting but potentially dangerous as Eschelon's customers could unexpectedly be left without emergency services. The key to Eschelon's proposals is that the Commission will have an opportunity to weigh in on disputes related to the basis for invoking the remedies of discontinuation of order processing and disconnection before they are invoked by Qwest.

Qwest Position

Qwest argues its proposed language regarding order processing and disconnection is nothing new; it is part of Qwest's Utah SGAT, as well as Qwest's recently-approved interconnection agreements with Covad and AT&T, and was developed as part of the 271 workshop process. In short, what Qwest proposes is simply a reasonable business precaution designed to encourage timely payment and, when it does not occur, provide Qwest the ability to limit its financial risk.

Qwest argues Eschelon's proposals would require Qwest not only to go through a hearing to disconnect, but also to go to the Commission to take less drastic steps to collect bills, such as discontinuing order processing. The cumulative effect of Eschelon's proposals is to slow down and significantly impair Qwest's ability to collect valid, undisputed bills owed by Eschelon. Qwest notes the Commission rejected similar attempts to water down collection terms in the recent Covad arbitration.[4]

[4] *In the Matter of the Petition of DIECA Communications, Inc., D/B/A Covad Communications Company, for Arbitration to Resolve Issues Relating to an Interconnection Agreement with Qwest Corporation*, Docket No. 04-2277-02, Arbitration Report and Order, pp. 40-41 (February 8, 2005).

Decision

The ALJ concludes the notice provisions in Qwest's proposed language, as amended below, adequately protect Eschelon from any Qwest attempts to arbitrarily discontinue order processing or disconnect Eschelon services while also supporting Qwest's ability to collect valid, undisputed bills. Under Qwest's Section 5.4.2, Qwest must wait 30 days after the Payment Due Date to commence the process to discontinue order processing. Because Section 5.4.1, puts the Payment Due Date at the later of 30 days after the date of the invoice or 20 days after receipt of the invoice, Eschelon will have at least 60 days to pay its bills before Qwest can begin to discontinue order processing. Qwest must then give both Eschelon and the Commission 10 business days notice prior to discontinuing order processing.

Likewise, under Qwest's Section 5.4.3, Qwest may only begin the service disconnect process 60 days after the Payment Due Date, giving Eschelon at least 90 days to pay its bills prior to facing the possibility of disconnection. Qwest must then give Eschelon 10 business days notice prior to disconnection of the unpaid services. However, in contrast to its Section 5.4.2, Qwest's Section 5.4.3 would not require Qwest to provide similar notification to the Commission. The ALJ therefore recommends the Commission adopt Qwest's proposed language except that Section 5.4.3 be modified to require 10 business days notification to both Eschelon and the Commission prior to disconnection.

E. Deposits – Issues 5-8, 5-9, 5-11, 5-12, and 5-13

As with the prior issues relating to discontinuation of order processing and service disconnection, these Issues pertaining to deposits generally arise from Eschelon's attempts to

provide itself more protections, more time before Qwest can invoke remedies, as well as the explicit right to bring the dispute before the Commission.

For instance, with respect to Issues 5-8, 5-9, and 5-11, Eschelon would add the term "non-de minimus" to the definition of Repeatedly Delinquent in ICA Section 5.4.5 which seeks to limit a party's ability to demand a deposit. Eschelon would also restrict the use of the term Repeatedly Delinquent in this section to only those situations in which a party's payments are received more than thirty days after the payment due date "for three (3) consecutive months." Qwest, on the other hand, objects to the use of the term "non-de minimus" and proposes payments be classified as Repeatedly Delinquent if they are more than thirty days late "three (3) or more times during a twelve (12) month period".[5] Finally, while Qwest's proposed language would permit the billing party to require payment of a deposit by a Repeatedly Delinquent party within thirty days after demand, Eschelon would limit this provision by inserting "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."

Issue 5-12 pertains to a complete re-draft of Section 5.4.5 that would remove any reference to a Repeatedly Delinquent party and would instead provide an opportunity for the Commission to review a party's payment history and determine whether "all relevant

[5]Eschelon alternatively proposes the definition of Repeatedly Delinquent require late payment three or more times during a "six (6) month" period. For this alternative, Qwest proposes a requirement of three or more late payments during a "twelve (12) month" period.

circumstances warrant a deposit." Eschelon argues this alternative provides the Commission with the flexibility to determine contested deposit requirements on a case-by-case basis when such cases arise. Qwest disagrees with this approach entirely.

Issue 5-13 arises from Qwest's proposed language for ICA Section 5.4.7 as follows : "The Billing Party may review the other Party's credit standing and increase the amount of deposit required but in no event will the maximum amount exceed the amount stated in Section 5.4.5." Eschelon objects to this language, believing it would render irrelevant the limitations of Section 5.4.5 on a party's ability to demand a deposit. Because of the potential for abuse inherent in Qwest's proposal, Eschelon proposes that Section 5.4.7 be deleted in its entirety. However, in the alternative, Eschelon proposes changes to Qwest's language that would limit any deposit increase to situations where the standard for requiring a deposit under Section 5.4.5 has already been met. Eschelon would also require Commission approval of any deposit increase.

Decision

Regarding Issue 5-8 and Eschelon's desire to insert the term "non-de minimus" into Section 5.4.5, the ALJ finds said term to be vague and unnecessary and recommends adoption of Qwest's proposed language defining "Repeatedly Delinquent" in terms of "any undisputed amount." However, with respect to Issue 5-9, the ALJ concludes requiring a security deposit is a serious matter that could unnecessarily impact Eschelon's financial strength. Therefore, the ICA should not lightly permit Qwest to require such deposits. Accordingly, the ALJ finds Eschelon's proposed Section 5.4.5 language requiring late payment for "three (3)

consecutive months" before invoking the deposit requirement reasonably balances Qwest's desire for financial assurance with Eschelon's desire that it not too quickly be required to pay a potentially large security deposit. As noted by Eschelon, this result is also consistent with agreed language in other Qwest Utah ICAs.

Under Issue 5-11, Eschelon proposes language that would permit Eschelon recourse to the Commission to challenge a security deposit demand by Qwest and to delay paying said deposit until required to do so by the Commission. Qwest's proposal would merely require Eschelon to pay the deposit 30 days after demand, regardless of whether Eschelon challenges the deposit demand before the Commission. On this Issue, the ALJ recommends the Commission adopt Qwest's language since the language adopted for Issue 5-9 above adequately protects Eschelon.

Given the decisions noted above adopting various language for ICA Section 5.4.5, the ALJ recommends the Commission refuse to adopt as unnecessary Eschelon's proposed re-write of Section 5.4.5 under Issue 5-12.

Regarding Issue 5-13, the ALJ agrees with Eschelon that Qwest's proposed language could enable Qwest to bypass the deposit-triggering language of Section 5.4.5 as adopted above. While Eschelon's alternate proposed language would condition Qwest's ability to increase the deposit amount on the requirements of Section 5.4.5 having been met, the ALJ, consistent with decisions noted above, cannot conclude Eschelon's attempt to build automatic Commission review into this process is appropriate. The ALJ therefore recommends the

Commission adopt Eschelon's alternate proposed language on this Issue, minus the phrase "if approved by the Commission."

F. Nondisclosure Agreement – Issue 5-16

This Issue concerns the disclosure of CLEC individual forecasts and forecasting information. In accordance with agreed language at ICA Section 5.16.9.1, Qwest may disclose this information only to legal personnel, if a legal issue arises, and to certain CLEC personnel "responsible for preparing or responding to such forecasts or forecasting information." In order to confirm that its confidential information is being adequately protected, Eschelon proposes adding the following language to this section: "Qwest shall provide CLEC with a signed copy of each non-disclosure agreement executed by Qwest personnel within ten (10) Days of execution."

Qwest argues this provision would place an unnecessary administrative burden on Qwest, particularly if the precedent set here forces Qwest to provide every CLEC with copies of nondisclosure agreements ("NDAs"). Qwest also points out that Eschelon is already adequately protected in this regard by ICA Section 18.3.1 which permits either party to "request an audit of the other party's compliance with the Agreement's measures and requirements applicable to limitations on distribution, maintenance, and use of proprietary or other protected information that the requesting party has provided to the other." However, Eschelon argues it is not clear Section 18.3.1 would allow an audit for the purpose of determining whether Qwest has complied with the requirements of the ICA relating to the internal disclosure of Eschelon's confidential information. In addition, Section 18.3.1 permits an audit no more frequently than once every three years.

Decision

The ALJ agrees with Eschelon that the once-every-three-years audit provision of Section 18.3.1 does not adequately protect Eschelon's interests pertaining to disclosure of confidential information. Furthermore, the ALJ is not persuaded by Qwest's argument that adopting Eschelon's language, as amended below, would impose an unnecessary administrative burden on Qwest. It is reasonable that Eschelon should be informed within a relatively brief period of time which Qwest employees have signed an NDA respecting Eschelon confidential information.

In deciding this Issue, the Oregon arbitrator adopted Eschelon's language but permitted Qwest 20 days rather than 10 to provide the signed NDA to Eschelon and also permitted Qwest to provide said NDA by electronic or other means. The ALJ finds this approach strikes a reasonable balance between Eschelon's need to know and Qwest's desire that the NDA process not be overly burdensome. The ALJ therefore recommends the Commission adopt Eschelon's proposed language with the following modifications: "Qwest shall provide CLEC, by electronic filing or other mutually acceptable method, a signed copy of each nondisclosure agreement executed by Qwest personnel within twenty (20) days of execution."

G. Transit Record Charge and Bill Validation – Issues 7-18 and 7-19

When a call originates on the Eschelon network and travels across the Qwest network to be terminated on the network of a third telecommunications carrier, Qwest in most cases is acting as the transit provider and bills Eschelon for that service. Issue 7-18 arises from

the following language Eschelon proposes for ICA Section 7.6.3.1 so that Eschelon can obtain transit records from Qwest in order to validate the bills that Qwest sends to Eschelon:

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

Similarly, Issue 7-19 stems from Eschelon's proposed language for Section 7.6.4:

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

Qwest opposes these two sections in their entirety, arguing that requiring Qwest to provide Eschelon with detailed records at no charge is an unreasonable and inefficient way for Eschelon to determine appropriate billing. Qwest notes that, with respect to these bills, Eschelon is the originating provider and its switch produces the best information with regard to traffic it sends to Qwest for termination with a third party. Qwest does not have a method developed to provide Eschelon with the records it seeks and Qwest's records do not contain most of the information Eschelon seeks.

Eschelon counters 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.

Decision

While the ALJ understands Eschelon's desire to periodically validate its bills from Qwest, it does not appear that Qwest's systems currently produce the types of data sought by Eschelon. Consequently, requiring Qwest to provide this information could prove costly and time-consuming for Qwest yet Eschelon does not offer to pay Qwest for its efforts. For these reasons, the ALJ views Eschelon's proposed language as unworkable and recommends the Commission reject said language.

H. Nondiscriminatory Access to UNEs – Issue 9-31

Eschelon and Qwest agree the Act imposes an obligation on Qwest to provide Eschelon nondiscriminatory access to unbundled network elements ("UNEs"). However, they differ on the language of ICA Section 9.1.2 intended to give effect to this obligation, as shown below:

> 9.1.2 Qwest shall provide non-discriminatory access to Unbundled Network Elements on rates, terms and conditions that are non-discriminatory, just 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. Access to ~~Activities available for~~ Unbundled Network Elements includes moving, adding to, repairing and changing the UNE (through, *e.g.*, design changes, maintenance of service including trouble isolation, additional dispatches, and cancellation of orders) and will provided at TELRIC rates~~at the applicable rates~~. ...[6]

[6]This proposed language is taken from the Issues Matrix. However, at page 23 of its Post-Hearing Brief, Qwest proposes adding "Additional" immediately preceding "activities available for".

Eschelon Position

Eschelon argues it was prompted to propose its language as a result of Qwest's attempts to apply non-cost-based, tariff rates to activities that are necessary for Eschelon to be able to obtain the functionality of UNEs. Qwest's language, on the other hand, would take these activities outside the scope of Section 251(c)(3) of the Act. By adding that Qwest will perform these activities "at the applicable rate," Qwest seeks to disavow its obligations to provide access to UNEs at TELRIC-based rates. In addition, according to Eschelon, Qwest's recent conduct, such as issuing a non-CMP notice indicating its intent to assess tariff rates to a variety of services necessary for CLECs to access UNEs, demonstrates the need for contractual certainty on this issue.

Qwest Position

Qwest argues its proposed language serves two important purposes. First, it ensures that Qwest will perform the activities listed in Eschelon's proposal, thereby directly responding to Eschelon's purported concern that Qwest will refuse to perform them. Second, it recognizes and establishes that Eschelon may have to pay for those activities "at the applicable rate," which could be a rate different from the monthly recurring rate for a UNE or a tariffed rate. Thus, the language provides some assurance that Qwest will be properly compensated.

Given the extensive provisions in the ICA ensuring nondiscriminatory access to UNEs, Qwest is skeptical that nondiscrimination is the motive behind Eschelon's proposed language. Qwest is concerned that by using the term "access" to UNEs and providing a long list of activities constituting "access" Eschelon will contend that the recurring monthly rate it pays

for UNEs entitles it to all of these activities at no additional charge. Adding to this concern is the fact that "moving," "adding to," and "changing" are undefined terms. Indeed, Eschelon testified these terms encompass "thousands" of activities, including activities that may change over time and therefore are unknown today.

With thousands of unknown activities encompassed by these terms, it is not possible to conclude, as Eschelon asserts, that every activity will be within the requirements of Section 251 and hence governed by cost-based TELRIC rates. However, such would be the effect of Eschelon's proposed language. By contrast, Qwest's proposal that these activities be provided at the "applicable rate" recognizes that while many of the activities will be governed by a cost-based rate, some may fall outside Section 251 and may be governed by a non-TELRIC rate.

Decision

There is no dispute that Section 251(c)(3) of the Act requires nondiscriminatory access to UNEs. Eschelon's proposed language merely specifies that the listed activities are included within the meaning of the word "access" such that Qwest must perform these activities at cost-based rates. This language does not, as suggested by Qwest, give Eschelon the right to obtain these activities at no charge. Furthermore, the ALJ agrees with the conclusion of the Minnesota and Oregon arbitrators that Qwest's proposed language is more ambiguous than Eschelon's language because it would leave open the question of what rate is "applicable" to these activities rather than specifying that rates will be cost-based. The ALJ therefore recommends the Commission adopt Eschelon's proposed ICA language.

I. Network Maintenance and Modernization – Issues 9-33 and 9-34

ICA Section 9.1.9 governs Qwest's network maintenance and modernization. Issue 9-33 involves Eschelon's proposed language for Section 9.1.9 under which Qwest would be prohibited from making a change to its network for purposes of maintenance or modernization if the change would "adversely affect service to any End User Customers." Issue 9-34 involves the information Qwest will include in the notices that inform Eschelon of changes to Qwest's network resulting from maintenance and modernization. Section 9.1.9, with Eschelon's proposed additions underscored, is as follows:

> 9.1.9 In order to maintain and modernize the network properly, Qwest may make necessary modifications and changes to the UNEs in its network on an as needed basis. Such changes may result in minor changes to transmission parameters but the changes to transmission parameters will not adversely affect service to any CLEC End User Customers (other than a reasonably anticipated temporary service interruption, if any, needed to perform the work). (In addition, in the event of emergency, see Section 9.1.9.1). This Section 9.1.9 does not address retirement of copper Loops or Subloops, which are addressed in Sections 9.2.1.2.2 (and subparts), 9.2.1.2.2.3, 9.2.1.2.3 (and subparts), and 9.2.2.3.3. Network maintenance and modernization activities will result in UNE transmission parameters that are within transmission limits of the UNE ordered by CLEC. Qwest shall provide CLEC advance notice of network changes pursuant to applicable FCC rules, including changes that will affect (i) CLEC's performance or ability to provide service (ii) network Interoperability or (iii) the manner in which Customer Premises equipment is attached to the public network. Changes that affect network Interoperability include changes to local dialing from seven (7) to ten (10) digit, area code splits, and new area code implementation. FCC rules are contained in CFR Part 51 and 52. Such notices will contain the location(s) at which the changes will occur including, if the changes are specific to a CLEC End User Customer, the circuit identification and CLEC End User Customer address information, and any other information required by applicable FCC rules. Qwest provides such disclosures on an Internet web site.

Alternatively, Eschelon proposes:

> 9.1.9 In order to maintain and modernize the network properly, Qwest may make necessary modifications and changes to the UNEs in its network on an as needed basis. Such changes may result in minor changes to transmission parameters. If such changes result in the CLEC's End User Customer experiencing unacceptable changes in the transmission of voice or data, Qwest will assist the CLEC in determining the source and will take the necessary corrective action to restore the transmission quality to an acceptable level if it was caused by the network changes This Section 9.1.9 does not address retirement of copper Loops or Subloops, which are addressed in Sections 9.2.1.2.2 (and subparts), 9.2.1.2.2.3, 9.2.1.2.3 (and subparts), and 9.2.2.3.3. Network maintenance and modernization activities will result in UNE transmission parameters that are within transmission limits of the UNE ordered by CLEC. Qwest shall provide CLEC advance notice of network changes pursuant to applicable FCC rules, including changes that will affect (i) CLEC's performance or ability to provide service (ii) network Interoperability or (iii) the manner in which Customer Premises equipment is attached to the public network. Changes that affect network Interoperability include changes to local dialing from seven (7) to ten (10) digit, area code splits, and new area code implementation. FCC rules are contained in CFR Part 51 and 52. Such notices will contain the location(s) at which the changes will occur including, if the changes are specific to an End User Customer, circuit identification, if readily available, and any other information required by applicable FCC rules. Qwest provides such disclosures on an Internet web site.

Eschelon Position

According to Eschelon, its proposed additions simply confirm that Qwest's activities to modernize and maintain its network will not adversely affect service to end user customers. As modified in response to Qwest's concerns, Eschelon's proposed language expressly permits changes that have an adverse effect on customers to the extent such adverse effects are limited to reasonably anticipated service interruptions that are necessary to perform the work. Eschelon's alternative proposal states that if Qwest's network changes cause

unacceptable degradation to Eschelon's End User customer's voice or data service Qwest would be required to assist Eschelon in identifying the problem and taking corrective action to restore service to an acceptable level of quality.

Eschelon's language is designed to address situations where a network change modifies transmission parameters that, although meeting applicable standards, might still have an adverse impact on the service that Eschelon is able to provide to its customer, to the point of losing service entirely. Eschelon's concern is based on actual experience. In particular, Eschelon presented evidence regarding Qwest's practice of, as a matter of course, adjusting the decibel ("dB") loss on circuits from 0 to -7.5, a change that fell within the standard, which provided a range for dB loss of 0 to -16. According to Qwest, in response to complaints from its end users customers, it implemented a practice of instructing its technicians to re-set the dB loss to -7.5 whenever they performed a repair, in furtherance of a plan to change the default setting throughout the Qwest network from 0 dB to -7.5 dB.

In making this change, Qwest was responding to the requests of its customers to the detriment of Eschelon's customers who, as a result, received circuits that did not work. That the dB loss was set within the standard range was of no consolation to those customers who could not use their telephones. Contrary to Qwest's claims, Eschelon's language would not prohibit such changes, but rather, if a change was made that resulted in a problem, would require that Qwest set the circuit at a level that would enable service to be provided. In other words, if a Qwest network modernization or maintenance activity causes a problem, the remedy is for Qwest to fix it.

When a change is specific to an end user customer, Eschelon has proposed language that would require Qwest to provide circuit identification ("circuit ID") and customer address information. Circuit ID is the generally accepted locator within the network and customer address information identifies particular customers. With this information, Eschelon cross references its records to determine which customers Qwest's network change will affect, so that it can provide those customers with information and assist them as necessary.

According to Eschelon, the requirement to provide circuit ID and customer address information applies only to changes that are specific to an end user. This requirement would not apply to the kinds of changes about which Qwest expresses concern–switch upgrades and dialing plans–because neither of these changes is specific to any particular end user. Qwest's claim of undue burden is belied by the closed language of ICA Section 9.2.1.2.3 which provides that, although notices of copper retirement will generally be posted on Qwest's website, Qwest will provide direct notice to Eschelon of any planned replacement of copper with fiber "when CLEC or its End User Customers will be affected." This agreed language shows that Qwest can distinguish between changes that will affect Eschelon's end user customers and those that will not.

Qwest Position

Qwest argues it is essential that Qwest have the ability to both maintain and modernize its telecommunications network without unnecessary interference and restriction. Utah consumers deserve—and Qwest strives to provide—the latest state-of-the art telecommunications technologies. According to Qwest, it is also inevitable that an ILEC's

maintenance and modernization of its network will sometimes have effects on CLECs and other carriers that are interconnected with the network or otherwise rely on the network to provide service to their customers.

Through its proposed language, Qwest demonstrates its intent to preserve its ability to maintain and modernize its network without undue interference while also ensuring that Eschelon continues to receive the UNE transmission quality to which it is entitled. In addition, Qwest's proposal ensures that Eschelon will receive notice of these network activities that is consistent with the FCC's rules relating to notices of network changes. Qwest believes that, taken as a whole, these provisions ensure that its modernization and maintenance activities will not improperly interfere with Eschelon's operations while still protecting Qwest's vital right to engage in those activities. The additional provisions that Eschelon proposes are vague and unnecessary and would improperly expose Qwest to open-ended risk when it maintains and modernizes its network.

With respect to Issue 9-33, Qwest's fundamental objection to Eschelon's "no adverse effect" proposal is that it is not tied to any industry standard and therefore would leave Qwest guessing as to whether a network change is permitted or prohibited. The concept of "adverse effect" is not defined anywhere in the ICA. If allowed in the ICA, it would create a purely subjective notion that could be used anytime to block a network upgrade that Eschelon or one of its end users does not like.

Eschelon's alternate language has similar flaws. Specifically, the reference to "unacceptable changes" is as vague as Eschelon's "no adverse affect" language. Eschelon does

not define "unacceptable" or tie the term to any measurable industry standard. In addition, while the proposal would require Qwest to restore transmission quality to "an acceptable level," Eschelon does not define what is "acceptable" or tie this term to any industry standard. As a result, Qwest would have no meaningful way of knowing, first, whether a change to its network is permitted under the ICA or, second, what specific corrective steps to take in response to an impermissible change.

Regarding Issue 9-34, Qwest has committed to provide notices that meet the requirements of the FCC's notice rule relating to network changes, set forth in 47 C.F.R. § 51.327. The parties' dispute arises because of Eschelon's demand that Qwest's notices include circuit IDs and customer addresses when network changes are "End User Customer specific." There is no requirement in FCC Rule 51.327 or in any other FCC rule for ILECs to provide this information in notices of network changes.

Eschelon's proposed language would improperly require Qwest to identify each and every Eschelon end user customer address and associated customer circuit(s) when Qwest makes a network change. Under Eschelon's proposal, Qwest would be required to provide this information regardless of whether the change would actually have a noticeable impact on either Eschelon or its end user customers. This would impose a significant burden since Qwest does not have electronic access to this information and would therefore have to conduct extensive, time-consuming manual searches for each notice of a network change. By contrast, Eschelon has electronic access to this information and therefore can retrieve it without any manual effort. With the information relating to the locations of network changes that Qwest routinely provides

in its notices, Eschelon can readily identify its customers who may be affected by a network change and obtain their addresses and circuit IDs through its electronic database.

Eschelon asserts its language is not intended to have such a broad effect, since the language limits the requirement to provide circuit identifications and customer addresses to changes that are "End-User Customer specific."[7] However, Eschelon fails to define the term "End-User Customer specific," leaving the provision open to the interpretation that Qwest must provide circuit identifications and customer addresses for any change that affects any "End-User Customer." If Eschelon's intent is to limit its proposed notice requirement to network changes that take place at a specifically identified customer premise, it should modify its language to make that intent clear.

While Eschelon's alternative proposal is an improvement, it still improperly attempts to shift the burden of determining circuit IDs from Eschelon to Qwest. Because Eschelon has access to circuit IDs in its own records and Qwest has neither ready access to those IDs nor a legal obligation to provide them, Eschelon's alternative proposal is improper and should be rejected.

Decision

Regarding Issue 9-33, the ALJ agrees Qwest must have the ability to both maintain and modernize its telecommunications network without unnecessary interference and restriction. However, Qwest is also obligated to ensure maintenance and modernization activities do not result in significant service disruptions to Eschelon's end user customers. That

[7]Qwest also points out Eschelon's use of the term "End-User Customer" in connection with Qwest's notices of network changes is improper since the defined term includes customers of carriers other than Eschelon.

significant, albeit unintended, disruptions can occur is evidenced by Qwest's efforts to reset its dB loss parameter. When such disruptions occur, it is reasonable to expect Qwest to assist Eschelon in restoring service. Eschelon's alternate proposal for Section 9.1.9 is a reasonable approach to requiring Qwest to provide such assistance.

However, Qwest rightly points out that Eschelon's language regarding "unacceptable changes" in transmission quality is unnecessarily vague and potentially burdensome. Language adopted in the Oregon and Arizona arbitrations corrects this ambiguity by replacing "unacceptable changes in the transmission of voice and data" with "a degradation in the transmission quality of voice and data, such that CLEC's End User Customer loses functionality or suffers material impairment." In order to address Qwest's similar concern regarding Eschelon's proposed language that would require Qwest to return service to an "acceptable level," while recognizing that Qwest's maintenance and modernization activities should not have the effect of reducing the transmission quality offered to CLEC end users, "an acceptable level" should be replaced with "previous levels." The ALJ therefore recommends the Commission adopt Eschelon's alternate proposed language, with the modifications outlined above, for this Issue.

Likewise, for Issue 9-34, the ALJ concludes that Eschelon's alternative proposal requiring Qwest to provide the circuit ID if the changes are specific to a CLEC End User Customer and if the circuit ID information is "readily available" best balances Eschelon's desire to obtain, and Qwest's obligation to provide, meaningful network change location information with Qwest's concern that requiring Qwest to provide the circuit ID in all cases would be overly

burdensome. The ALJ therefore recommends the Commission adopt Eschelon's alternate proposed language for Issue 9-34.

J. Circuit IDs Relating to Conversions – Issues 9-43 and 9-44

In order to ensure that Eschelon end user customers are not adversely affected by the conversion of circuits from UNEs to non-UNE wholesale arrangements, Eschelon has proposed adding the following ICA Section 9.1.15.2.3 providing that the circuit ID will not change as a result of the conversion:

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

In addition, Eschelon proposes a new Section 9.1.15.3 that would require the conversion be handled as a price change rather than as a physical change:

> 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 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.

Eschelon Position

Eschelon argues that, rather than negotiate with Eschelon and other CLECs, Qwest has chosen to act on its own in erecting a process that involves personnel in three different functional areas; multiple databases and systems; orders to "disconnect" and "connect" service; and much "reviewing," "confirming," "assuring," "verifying" and "validating," all to the end of changing what the UNE is called and how much Qwest will charge. Qwest chose to

establish its process through a series of password-protected PCATs that were developed and implemented outside of the CMP, without CLEC input, and without the approval of any state commission. Qwest now argues that Eschelon should bear the costs associated with that process as well as the burden of the potential customer disruption that results from needlessly changing the circuit ID in order to convert the circuit from a UNE to a non-UNE. Qwest acknowledges that this elaborate process would be unnecessary if Qwest did not, as part of the conversion, change the circuit ID.

The ability to convert a circuit from a UNE to a non-UNE is a critical aspect of the FCC's transition plan when a facility that was formerly available as a UNE is, as a result of the *Triennial Review Remand Order* ("*TRRO*")[8], no longer available as a UNE. Without the ability to convert, CLEC customers, and only CLEC customers, would face the disruption that would inevitably result from having to switch from an existing, working circuit provided by Qwest, to facilities provided by another carrier. In addition, rather than attempting to show how its conversion process complies with the FCC's directive in the *Triennial Review Order ("TRO")*[9] that such a process be seamless, Qwest only refers to FCC and Commission rules that it says require it to accurately maintain records.

Finally, as a factual matter, it is undisputed that, when Qwest began converting special access circuits to UNEs, the circuit IDs did not change, thus demonstrating the feasibility of retaining the same circuit ID when a circuit is converted. The conversion from a UNE to a

[8] *In the Matter of Unbundled Access to Network Elements and Review of Section 251 Unbundling Obligations*, Order on Remand, 20 FCC Rcd 2533 (2005).

[9] *In the Matter of Review of the Section 251 Undundling Obligations of Incumbent Local Exchange Carriers*, Report and Order, 17 FCC Rcd 16978 (2003).

non-UNE is the mirror image of that previous process, and there is no more reason to change the circuit ID now than there was then.

In considering this issue, the Commission should weigh the lack of any demonstrable need to change the circuit ID against the very real potential for harm that such changes will involve. Because Qwest converts circuits by "disconnecting" the UNE and "connecting" the non-UNE, a simple typing error could result in a customer being placed out of service. Further, if both Eschelon's and Qwest's systems are not timely and accurately updated to reflect the new circuit IDs, there will likely be problems identifying the correct circuit if a circuit requires repair or maintenance because Qwest and Eschelon may not be using the same circuit ID. Adopting Eschelon's proposals, on the other hand, will help to prevent service interruptions and promote quality service.

Qwest Position

Qwest opposes these sections in their entirety, arguing that because Qwest provisions and bills tariffed products through inventory databases and systems that are separate and distinct from the databases and systems used for UNEs, it is essential to Qwest's operations that a new circuit ID be assigned upon a conversion. Without a circuit ID specific to the tariffed product, absent very costly systems changes that may not be technically feasible, Qwest would not be able to properly provision and bill the tariffed product after the conversion.

Further, the use of appropriate and distinct circuit IDs for UNEs and tariffed products is essential for Qwest to comply with the FCC rules that require carriers to maintain accurate records that track inventories of circuits. Specifically, 47 C.F.R. § 32.12(b) and (c)

require Qwest to maintain subsidiary records in sufficient detail to align specific circuits with the billing, accounting, and jurisdictional reporting requirements related to the services that these circuits support. In other words, Qwest must be able to distinguish for purposes of tracking and reporting its UNE products separately from its other products, such as its tariffed private line services. Qwest accomplishes this through the use of circuit IDs and other appropriate codes, depending on the systems affected by the requirement.

Even more important than meeting these reporting requirements, changing the circuit ID upon conversion ensures that Eschelon will receive proper support for testing, maintenance and repairs from the appropriate Qwest centers. UNEs and private line circuits are ordered, maintained and repaired differently and out of different centers and systems. Thus, unique circuit IDs for these different products are needed to route order and repair submissions for these facilities to the appropriate systems and centers.

Qwest is able to maintain, track and service all of its customers, including CLECs and their end-user customers, better and more efficiently if it is able to identify accurately the types of services and facilities it is providing to these respective categories of customers. It would be grossly inefficient, expensive and wasteful for Qwest to make changes to its myriad operation support systems, processes and tracking mechanisms, such as circuit IDs, in order to accommodate each new regulatory nuance regarding how it offers its services to its customers and its competitors.

Decision

While Eschelon correctly points out that the FCC has mandated a seamless transition of UNE products and services to alternative arrangements, Eschelon has failed to demonstrate how Qwest's current process fails this mandate. Qwest, on the other hand, has adequately demonstrated how Eschelon's proposed language would invoke a process that would be very time consuming, burdensome, and potentially expensive for Qwest. Therefore, the ALJ recommends the Commission not adopt Eschelon's proposed ICA language for these Issues.

K. Unbundled Customer Controlled Rearrangement Element – Issue 9-53

The product that is at issue here is the Unbundled Customer Controlled Rearrangement Element ("UCCRE") which enables Eschelon to control the configuration of UNEs or ancillary services on a near-real time basis through a digital cross-connect device when this device is available in a Qwest central office. According to Eschelon, Qwest previously agreed to provide UCCRE to Eschelon but now plans to discontinue this product. In response, Eschelon has submitted three alternative product phase-out proposals,[10] too lengthy to reproduce herein, to govern the process by which Qwest could phase out a product it no longer wishes to offer. Qwest opposes, and seeks deletion of, each of these proposals and offers no alternative language.

[10] An earlier issues matrix filed in this proceeding in April 2007 listed four alternative proposals for this Issue. However, at hearing, Eschelon indicated it now proposes only three of these, originally denominated in the April 2007 issues matrix and Eschelon's pre-filed direct testimony as Proposals 2, 3, and 4. The Issues Matrix now lists only three proposals under this Issue. For convenience, we refer to these simply as Eschelon's first, second and third proposals.

Eschelon Position

According to Eschelon, it is undisputed that Qwest makes UCCRE available to other CLECs, both under ICAs and its SGAT. Eschelon's proposals only require Qwest to make UCCRE available to it on the same terms and conditions as it makes those products available to other CLECs. Qwest's main argument against Eschelon's proposals is that there is no CLEC demand for UCCRE and that it intends to discontinue offering it "on a going forward basis." What this means is that UCCRE will continue to be available to those CLECs, such as AT&T and Covad, who already have them in their interconnection agreements, but will be unavailable to CLECs, such as Eschelon, who enter into new agreements. Qwest acknowledges that, unless these provisions are included in the ICA, other CLECs who have these products in their contracts will be able to order them and Eschelon will not. Such a difference in treatment is precisely the sort of discrimination that the Act was intended to prevent.

Eschelon's first alternative would permit Qwest to seek Commission approval for a process to phase out a particular product but would not require Qwest to use a specific phase out process. Furthermore, this process would not be necessary if Qwest were to promptly phase out the product from all CLEC ICAs in the state within three months of an FCC order affecting the product, or if the phase out is in accordance with a phase out process ordered by the FCC.

Eschelon's second alternative would require Qwest to obtain Commission approval in a generic proceeding in which CLECs are provided with notice and a reasonable opportunity to be heard, prior to phasing out a product. This proposal would allow the Commission the opportunity to consider all of the relevant factors and, like all of Eschelon's

phase out proposals, excludes from its scope the elimination of elements that are no longer required to be offered as a result of a change in law, which are to be governed by the ICA's change of law provision.

Eschelon's third proposal offers Qwest even more flexibility, by permitting Qwest to seek Commission approval for a process to phase out a particular product "on a wholesale basis that it has previously made available pursuant to Section 251 of the Act…" It also allows Qwest to cease a wholesale offering by promptly removing it from all ICAs containing the offering. However, this alternative makes clear that unless and until a phase out process is approved by the Commission, or Qwest promptly amends all ICAs containing the product, Qwest must make that product available on a nondiscriminatory basis. Thus, this proposal does not bind Qwest to follow any particular process, but reasonably places the burden on Qwest to propose, and obtain Commission approval for, a process if it wishes to phase out a product.

In general, Eschelon argues its proposals requiring Qwest to make UCCRE available on the same terms available to other CLECs are not an attempt to "pick and choose," contrary to the FCC's "all or nothing" rule. When the FCC reversed the pick and choose rule, it made clear that "existing state and federal safeguards against discriminatory behavior" were still in effect and remained "in place" to provide needed protection against discrimination. Similarly unavailing is Qwest's suggestion that the Commission should ignore the terms of its SGAT because its SGAT is "out dated." Nothing has relieved Qwest of the obligation to provide products and services under the terms of its SGAT; if a CLEC sought to opt in to the SGAT, Qwest would be obligated to comply with those terms.

Qwest Position

Qwest argues Eschelon's demand that ICA Section 9.9 make the UCCRE product available is improper since the FCC has removed from its network unbundling rules the former requirement for ILECs to provide digital cross-connects for UCCRE. UCCRE was the product Qwest developed to meet the former FCC requirement for ILECs to provide a means by which a CLEC could control the configurations of UNEs and ancillary services through the use of a digital cross-connect device. Although Qwest developed and made UCCRE available to CLECs, there has never been any CLEC demand for this product. No CLEC has ever ordered it or otherwise suggested a need for it. Because the FCC has removed UCCRE from its rules, and given the absence of demand for it, Qwest has decided to discontinue offering this product on a going-forward basis.

Qwest believes Eschelon's proposals on this narrow issue are far-reaching and go way beyond cross-connects to create a mandatory process for Qwest to follow when it desires to discontinue offering a product, even if there is no legal obligation to offer the product and no demand for it. For several reasons, these proposals are legally flawed and should be rejected.

First, one or more of the proposals appears to improperly attempt to regulate, through the Qwest-Eschelon ICA, Qwest's relationships with other CLECs. Specifically, the required "generic proceeding" apparently could be triggered by Qwest's decision to stop offering a wholesale product or service to "any" CLEC, not just Eschelon. For example, if another CLEC decided that it no longer needed a product and wanted to exclude the product from its ICA, Qwest would have to go through Eschelon's proposed process to stop offering the product to that

CLEC. Eschelon offers no authority for the unsupportable proposition that it can regulate Qwest's relationships with other CLECs. There is no such authority and Eschelon's proposal is thus unlawful.

Second, it would not be appropriate in an interconnection arbitration between one CLEC and one ILEC to adopt and include in an ICA a broad, generic process that would apply to all local exchange carriers in Utah. The proper forum in which to consider an issue with this type of far-reaching effect is one in which all interested Utah local exchange carriers can provide input concerning the necessity and contours of such a process.

Third, it would be neither logical nor efficient to require a time-consuming, resource-intensive, generic docket relating to product withdrawals in response to Qwest's attempt to stop offering products that no CLEC is ordering and for which there is no foreseeable demand. The fact that there is no demand for a product and no legal obligation to provide it should suffice as a basis for Qwest to stop offering the product.

Finally, according to Qwest, Eschelon's new and alternative proposal relating to this issue would improperly require Qwest to update its SGAT to reflect the results of any generic product withdrawal proceeding. However, Qwest and CLECs typically do not rely any longer on Qwest's SGAT. CLECs now have multiple other options available to them, including other carriers' ICAs that CLECs are able to opt into and also Qwest's multi-state "Template Agreement." Because of the effectiveness and utility of the Template Agreement, Qwest stopped updating its SGATs and has not made any updates to incorporate changes in law since

2004. Accordingly, there would be no utility in requiring Qwest to update its SGAT to reflect withdrawals of network element and other product offerings.[11]

Decision

The ALJ agrees with Qwest that Eschelon's proposals are far-reaching and go beyond cross-connects to create a mandatory process for Qwest to follow when it desires to discontinue offering a product, even if there is no legal obligation to offer the product and no demand for it. The ALJ therefore recommends the Commission adopt none of Eschelon's proposals for this Issue. However, Qwest has previously offered and continues to offer its UCCRE product to other CLECs in accordance with other ICAs. It would therefore appear unreasonable and discriminatory to permit Qwest to forego offering this product under its ICA with Eschelon while continuing to offer it to other CLECs. The ALJ therefore recommends the Commission require the parties to submit applicable ICA language, at Section 9.9.1 or wherever appropriate, under which Qwest will continue to offer UCCRE. If Qwest wishes to withdraw its UCCRE product, it should request permission from the Commission to modify all of its ICAs accordingly so that all CLECs would be treated equally.

[11] Qwest concludes by arguing the Commission should adopt Qwest's proposed language for Section 9.3.3.8.3.1, as that language provides assurance that Eschelon will be able to obtain access to UCCRE cross-connects in the unlikely event Qwest makes this service available to other CLECs in future ICAs. However, nowhere within the proposed ICA, Qwest's pre-filed testimony, the Issues List, or live testimony at hearing does Qwest offer its proposed language for this section or urge Commission adoption of said language. The ALJ notes that Qwest appears to have offered language for this section in arbitrations in other states but the record in Utah contains no such proposal.

L. Loop-Transport Combinations – Issues 9-55

This Issue concerns the nomenclature used to describe combinations of loop and transport in ICA Section 9.23.4 and its subparts. Specifically, the parties differ over whether a commingled extended enhanced loop ("EEL") should be defined as a loop-transport combination. The particular nomenclature used takes on a larger significance in the context of Issues 9-58 and 9-59, which concern the terms that will apply to commingled arrangements. Eschelon offers two proposals, both of which add the phrase "Loop-Transport Combination:" to the section title's agreed language "Enhanced Extended Links (EELs), Commingled EELs, and High Capacity EELs." Through this and other proposed language, Eschelon would include EELs, commingled EELs, and High Capacity EELs together in a newly defined "Loop-Transport Combination." Qwest's proposed language would delete Eschelon's references to Loop-Transport Combinations and simply note that when a UNE circuit is commingled with a non-UNE circuit, the rates, terms and conditions of the ICA will apply to the UNE circuit while the non-UNE circuit will be governed by the appropriate tariff provision.

Eschelon Position

Eschelon argues its proposed language is designed to preserve the Commission's jurisdiction over the UNE portion of such combinations while Qwest's proposal would effectively allow the tariffed terms applicable to the non-UNE to determine the terms and conditions under which the UNE is available. Eschelon notes the FCC, in the *TRO*, used the term "loop-transport combination" to identify EELs, commingled EELs, and high capacity EELs just as Eschelon proposed to do. Qwest does not dispute that EELs, Commingled EELs, and

high capacity EELs are different types of combinations of loop and transport. Eschelon's proposed language, thus, accurately reflects this.

Qwest objects, arguing that Eschelon is using the term "Loop-Transport Combination" to create a new product. However, Eschelon's proposal expressly provides that "At least as of the Effective Date of this Agreement "Loop-Transport Combination" is not the name of a particular product." Eschelon's language further confirms that "If no component of the Loop-Transport Combination is a UNE, however, the Loop-Transport Combination is not addressed in this Agreement. The UNE components of any Loop-Transport Combinations are governed by this Agreement and the other component(s) of any Loop-Transport Combinations are governed by the terms of an alternative service arrangement, as further described in Section 24.1.2.1." This language demonstrates Eschelon is not attempting to bring non-UNEs within the scope of the ICA.

Qwest Position

Qwest, on the other hand, notes there are important distinctions between UNE combinations, which are combinations of unbundled network elements, and commingled arrangements, which are comprised of a UNE connected or attached to a tariffed service. As elements mandated and regulated under Section 251 of the Act, UNEs are priced and provisioned under a regulatory scheme that does not apply to tariffed services. Qwest argues this dispute arises because of Eschelon's attempt to cloud the critical distinctions between UNE combinations and commingled arrangements by insisting upon use of the term "loop-transport combination" to refer to both products. Qwest does not offer a product called "loop-transport

combination" and instead offers three distinct products that are comprised of combinations of loops and transport: (1) EELs, (2) commingled EELs, and (3) high capacity EELs.

Use of the generic term "loop-transport combination" in reference to all three products therefore creates a significant risk that Eschelon could attempt to apply terms and rates to all the products that should apply to only one of the products. In contrast, Qwest's proposed Section 9.23.4 preserves the distinct labels and terms that apply to these three products. This approach is consistent with the clear statements from the FCC and other state commissions that the UNE component of a commingled product should be governed by UNE terms and the tariffed component by tariffed terms or a price list.

Decision

While both parties contend the other's proposed language will cause confusion, the ALJ concludes Qwest's proposal most clearly describes which circuits are governed by the ICA and which are to be governed by tariff. The ALJ therefore recommends the Commission adopt Qwest's proposed ICA language for this Issue.

M. Service Eligibility Criteria Audits – Issues 9-56 and 9-56(a)

Eschelon and Qwest agree Qwest may conduct audits to determine whether Eschelon is complying with the FCC's service eligibility criteria that apply to orders for high capacity EELs. Issue 9-56 concerns whether Qwest should be allowed to conduct such audits without cause. Eschelon contends it need not submit to an audit unless Qwest demonstrates cause to believe that Eschelon is violating the eligibility criteria and proposes to add the following underlined language to ICA Section 9.23.4.3.1.1:

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

Issue 9-56(a) pertains to Eschelon's proposed subsection 9.23.4.3.1.1.1.1 and the information Qwest must provide to Eschelon in requesting an audit, including whether the notice must set forth a cause for the audit:

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

Qwest would delete this entire subsection.

Eschelon Position

According to Eschelon, the FCC, in its *Supplemental Order Clarification*,[12] established a framework of self-certification and auditing as the means for assuring compliance with local usage requirements applicable to UNEs. In the *TRO*, the FCC again addressed this system of self-certification and auditing, citing the *Supplemental Order Clarification* for the proposition that "audits will not be routine practice, but will only be undertaken when the incumbent LEC has a concern that a requesting carrier has not met the criteria for providing a significant amount of local service."[13] In order to give effect to this limitation, and to assure that

[12] *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) ("*Supplemental Order Clarification*").

[13] *TRO*, ¶ 621, quoting the *Supplemental Order Clarification* at n. 86.

audits do not become a "routine practice," Eschelon has proposed ICA language that would allow Qwest to perform such an audit when Qwest has a concern that Eschelon has not met the Service Eligibility Criteria. In addition, Eschelon's proposed language would also require Qwest to disclose to Eschelon the circuits that Qwest has identified, if any, that support Qwest's concern. Although Eschelon's proposal provides that Qwest will provide a list of circuits that it believes do not comply, such a list is not a prerequisite for conducting an audit. Rather, Eschelon's proposed language only requires Qwest to provide the information that it has available to it, if any.

Qwest Position

According to Qwest, in the *TRO*, the FCC established service eligibility criteria for high-capacity EELs that are designed to ensure access to these facilities for bona fide providers of "qualifying services" while also protecting against the potential for "gaming" by providers. By "gaming," the FCC was referring to the practice of providers that obtain access to UNE facilities even though the services they provide do not qualify for use with UNEs. Through this practice, carriers attempt to obtain favorable UNE rates when they are not entitled to them or otherwise engage in regulatory rate arbitrage.

In paragraphs 625-629 of the *TRO*, the FCC describes the rights that ILECs have to conduct audits of CLECs to determine whether they are complying with the service eligibility criteria. As described in paragraph 626 of the *TRO*, an ILEC is permitted to "obtain and pay for an independent auditor to audit, on an annual basis, compliance with the qualifying service eligibility criteria." The auditor must issue an opinion regarding the requesting carrier's

compliance with the criteria. If the auditor determines that the CLEC is not in compliance, the CLEC must make true-up payments, convert non-complying circuits to the appropriate service, and may have to pay the costs of the independent auditor. If the auditor concludes that the CLEC is complying with the criteria, the ILEC must reimburse the CLEC for its costs associated with the audit. As described by the FCC in paragraph 628, the intent of this reimbursement requirement for ILECs is to "eliminate the potential for abusive or unfounded audits."

In agreed provisions of the ICA, such as Section 9.23.4.3.1.3.5, Qwest and Eschelon have incorporated these rules relating to service eligibility audits into the ICA. These agreed provisions include a commitment by Qwest to reimburse Eschelon for the costs of an audit that results in a finding that Eschelon is complying with the service eligibility criteria. Thus, the reimbursement scheme the FCC adopted as protection against abusive audits is in the ICA. There is therefore no practical need and no legal basis for Eschelon's "cause" proposal.

Qwest further argues there is no support in the *TRO* or FCC rules for Eschelon's proposal that would limit Qwest's rights to conduct an audit to only when Qwest states it has "cause" to believe Eschelon has not met the Service Eligibility Criteria. Eschelon's proposal impermissibly interferes with and weakens the audit rights Qwest was granted in the *TRO*. If the FCC had intended to limit audits to situations where there is demonstrable cause, it would have said so. It did not and, instead, established a compensation and reimbursement scheme that provides CLECs with incentives to comply with the service eligibility criteria and ILECs with incentives not to conduct wasteful audits.

Eschelon relies on a partial quote of paragraph 621 of the *TRO* where the FCC quotes a prior order stating audits "will not be routine practice" and will be undertaken only when the ILEC has a concern about compliance with the service eligibility criteria. The first problem with Eschelon's presentation of this quote is that the statement is from the *Supplemental Order Clarification* that was superseded by the *TRO*'s pronouncements relating to service eligibility requirements and ILEC audit rights. It is curious that Eschelon does not quote or describe in any detail the FCC's rulings in the *TRO* relating to audit rights, since those rulings are the FCC's latest and last word on the subject. The second problem with Eschelon's reliance on this quote is the failure to discuss footnote 1898 from the *TRO* that follows the paragraph from which the quote is taken. In that paragraph, the FCC summarizes the audit rights it established in the *Supplemental Order Clarification*. Conspicuously absent from that summary is any mention of a "for cause" requirement.

Decision

The ALJ agrees with Qwest that the FCC's audit reimbursement requirement included at ICA Section 9.23.4.3.1.3.5 is the appropriate mechanism by which ILECs are prevented from abusing their ability to conduct service eligibility audits. In light of Qwest's obligation to reimburse Eschelon for audit expenses should the audit find Eschelon in compliance, the ALJ concludes Eschelon's proposed language is unnecessary and unduly restrictive of Qwest's ability to conduct such audits. The ALJ therefore recommends the Commission decline to adopt Eschelon's proposed language for Sections 9.23.4.3.1.1 and 9.23.4.3.1.1.1.1.

N. Commingled Arrangements: Ordering, Billing, & Circuit IDs – Issue 9-58

As described by Qwest, when a CLEC orders either an EEL loop or EEL transport commingled with a private line transport circuit or a channel termination circuit, it is necessary to order, provision and bill each circuit out of the appropriate Qwest service order systems and to follow the established processes Qwest has for these products. For example, when a CLEC orders an EEL loop commingled with a private line transport circuit, the design of Qwest's systems and processes requires that the CLEC order the EEL loop by submitting a local service request ("LSR"). Qwest bills the CLEC for this network element through its "CRIS" system. By contrast, the design of Qwest's systems and processes requires that the CLEC order the private line transport circuit by submitting an access service request ("ASR"), and Qwest bills the CLEC for this circuit through a different billing system referred to as the "IABS system." Each circuit is separate and is assigned its own circuit ID. Moreover, the EEL loop is provided pursuant to terms and conditions that are specific to that facility, and the private line transport circuit is provided based on specifically defined terms and conditions set forth in tariffs.

This Issue, with its subissues (a) through (e), involves ICA Sections 9.23.4.5.1, 9.23.4.5.1.1, 9.23.4.5.4, 9.23.4.6.6, 9.1.1.1.1, 9.23.4.4.3.1, and 24.3.2 related to commingled arrangements and concerns the parties' disagreement over the ordering, billing, and identification of commingled EELs. Eschelon's additions to the ICA sections noted above variously propose: using a single LSR to order commingled EELs; assigning a single circuit ID to a commingled EEL, using a single billing account number ("BAN") for all chargeable rate elements in a loop-transport combination, including commingled EELs; using a single service

request, circuit ID, and BAN for commingled arrangements other than commingled EELs; and specifying that the service interval for provisioning commingled EELs and other commingled arrangements shall be the longer of the two facilities being commingled. Eschelon's proposed language also uses the term "Loop-Transport Combinations" throughout in place of the term "EELs." Qwest objects to all of Eschelon's proposed language and, with respect to service intervals, proposes the service interval for the UNE component of a commingled EEL be determined as indicated at ICA Exhibit C while using the applicable tariff to determine the interval for the non-UNE component.

Eschelon Position

Eschelon notes commingling has become a particularly important competitive option for CLECs in light of the FCC's limitations on ILECs' unbundling obligations in the *TRRO*. For instance, if UNE transport is no longer available as the result of a finding of "non-impairment," commingling of an unbundled loop with private line transport may be the most cost-effective choice for Eschelon to provide service to a customer that Eschelon could have previously served with an EEL. There is no functional difference between a UNE EEL and a commingled EEL; the facilities are the same, the function is the same, and the customer's experience is the same. The only difference is the price, because, for a UNE EEL, both the loop and transport portions of the circuit are available at TELRIC-based rates, while, for a commingled EEL, the UNE portion of the circuit is still available at a TELRIC-based rate but the non-UNE portion is subject to a higher, tariffed rate. The dispute here is whether Qwest may, consistent with the FCC's order regarding commingling, erect operational barriers, such as

requiring separate orders, separate circuit IDs and separate bills, that make commingled EELs difficult to use.

In order to ensure that commingling remains an effective competitive option, Eschelon has proposed language that prevents Qwest from subjecting commingled EELs to burdensome and discriminatory conditions. To that end, Eschelon's proposal would provide for point-to-point[14] Loop Transport Combinations, including commingled EELs, to be ordered on a single service request, to be identified by a single circuit ID, to be billed on the same BAN, and to be repaired pursuant to a single trouble ticket. Qwest's proposal, in contrast, would require Eschelon to operate two functionally equivalent networks, one for UNEs and one for commingled arrangements.

Eschelon notes Qwest does not deny that at least some of the problems and potential customer disruptions that Eschelon identified in its testimony will, in fact, result from the Qwest proposals regarding commingled EELs, or that Eschelon's claims regarding its business needs are legitimate. Rather, Qwest's main argument, similar to its argument with respect to conversions, is that Eschelon's needs and Eschelon's customers' needs are outweighed by Qwest's desire to preserve its "existing processes" and that the issue should be addressed, if at all, through the CMP rather than in an ICA. However, Qwest's existing process was not developed in the CMP, nor did any CLEC have any input. Now, faced with the possibility of Commission review of that process, Qwest urges that the Commission defer to the CMP. Furthermore, it is important to keep in mind that Eschelon's proposal with respect to point-to-

[14]Eschelon defines a point-to-point Loop-Transport Combination as a combination where the loop and the transport are the same bandwidth so no multiplexing is necessary.

point commingled EELs is the same as Qwest's current process for provisioning, maintaining and repairing point-to-point EELs. There is no functional difference between a UNE EEL and a commingled EEL. Indeed, in many cases, a commingled EEL is nothing more than a change in name and price to the UNE EEL it is replacing, pursuant to a finding of "non-impairment."

Qwest Position

Qwest argues this dispute arises because of Eschelon's demands that Qwest substantially modify its Operation Support Systems ("OSS") and provisioning processes to provide commingled EELs as though they are a single, unified element instead of a combination of two very distinct circuits with distinct characteristics and provisioning requirements. Eschelon's demands would require very substantial changes to Qwest's systems and processes not just in Utah, but in other states in Qwest's region since Qwest's systems and processes are used in multiple states. The costs of the changes would therefore be very substantial.

In addition to the fact that Qwest has no obligation to make these changes, Eschelon is not proposing to compensate Qwest for the substantial costs they would impose, even though it has long been established that ILECs have a statutory right under the Act to recover the costs they incur to modify their systems to accommodate CLEC orders for wholesale services. Although Eschelon is seeking to require Qwest to substantially change its ordering process, its provisioning process, and its billing process and systems, Eschelon makes the extraordinary claim that its demands would not require any "systems changes" or cause Qwest to incur any costs. However, the changes Eschelon seeks to impose cannot be implemented without costly feasibility studies and process and system changes.

Further, the changes Eschelon is seeking would affect all CLECs in Utah that obtain commingled arrangements, all of whom have been obtaining commingled products from Qwest without any difficulty using Qwest's existing systems and processes. Those CLECs would be affected by the far-reaching changes Eschelon is proposing and ultimately they would also be required to compensate Qwest for cost recovery associated with such far reaching OSS changes. These other CLECs should not have the significant Qwest OSS changes and the resulting compensation obligations imposed upon them in a single arbitration in which they are not participating and will not be heard.

As discussed above in connection with Issue 9-55, when it eliminated the prior restriction on commingling in the *TRO*, the FCC did not eliminate the fundamental distinctions between the nature and provisioning of the UNE components and tariffed components of commingled arrangements. On the contrary, the FCC and state commissions have held that those distinctions are to be preserved, as demonstrated by the multiple rulings from the FCC and state commissions establishing that the UNE component and tariffed component of commingled arrangements are governed by different pricing schemes. Indeed, the distinct components of commingled arrangements have their own ordering, provisioning, and billing systems and methods. In eliminating the restriction on commingling in the *TRO*, the FCC did not require ILECs to eliminate these distinct processes and methods.

There also is nothing unusual in the telecommunications industry about carriers being required to submit more than one order and to use more than circuit ID for products. Numerous UNEs, access and private line network arrangements require CLECs to place more

than one order and to use more than one circuit ID. Even Eschelon acknowledges with its language in Section 9.23.4.5.4 that multiplexed facilities require at least two service orders and multiple circuits IDs.

Turning to the specifics of Eschelon's proposals for ICA Sections 9.23.4.5.1, 9.23.4.5.1.1 and 9.23.4.5.4, Eschelon is seeking to require far-reaching changes to accommodate its improper "Loop-Transport Combination" product. Under its proposal, Qwest would be required to (1) create an entirely new and unique hybrid service, (2) combine a tariffed service and a UNE into one circuit, (3) permit Eschelon to submit one order for this hybrid service, and (4) issue just one bill even though the product would be comprised of separate elements. In addition to the flaws in this proposal described above, the proposal fails to recognize that there are sound reasons for, and benefits from, the current processes and systems that Qwest uses to separately process UNE orders and orders for tariffed services.

For example, circuit IDs include product-specific information that Qwest relies upon for proper processing, monitoring of performance indicator measurements and billing of products. Using a circuit ID assigned to a UNE for a tariffed service may result in mis-identification of the service and lead to billing and other errors. Further, if a single LSR and single circuit ID were utilized, Qwest's systems could not recognize what part of the hybrid circuit had an installation and/or repair issue and thus Qwest could not know if specific performance indicator measurements and potential payments applied. Likewise, Eschelon's demand that Qwest use a single bill for the elements comprising its proposed "Loop-Transport Combination" product fails to recognize that BANs contain essential product-specific

information that affects the proper billing for products, such as whether a product is billed at a UNE-based rate or at a tariffed rate. Without separate bills or "BANs" for the distinct products that comprise commingled arrangements, billing errors would be inevitable.

Adding to the complexity and shortcomings of Eschelon's proposal is the fact that Qwest's provisioning of UNEs is subject to specific performance indicator measurements ("PIDs") and potential payments to which special access and private line arrangements are not subject. If Qwest were required to create the type of hybrid product Eschelon is seeking—a mix of both the UNE circuit and private line facilities—the existing PIDs and related payment provisions could not apply.

Eschelon's alternative LSR-related proposal also does not fix these shortcomings. Eschelon proposes using the "remarks" section of the LSR to indicate that the two specific circuits of a commingled arrangement are connected with each other. While the remarks section could be used to convey information at the time of ordering or repair, once the initial activity has been completed, Qwest's systems do not retain, much less read, the remarks section of the original LSR. Therefore, this is not a sustainable "fix" and is yet another overly simplistic approach that cannot be implemented in the current Qwest OSS systems.

Finally, while Eschelon's proposals relating to these issues are flawed, it bears emphasis that they are properly raised not here, but in the CMP. Indeed, the CMP is designed to address precisely the types of provisioning and process issues Eschelon is raising. CMP allows CLECs collectively to prioritize what changes should be made to OSS related systems. Because CLECs have agreed that certain legal issues relating to implementation of the *TRRO* must still be

resolved, the CMP change request ("CR") intended to complete *TRRO*-related systems work had been deferred pending completion of the *TRRO* wire center dockets in Qwest's states. However, Qwest has recently announced its intent to re-activate the CR and to have the *TRO* and *TRRO*-related systems changes reviewed and addressed in CMP.

For these reasons, the Commission should adopt Qwest's proposed Section 9.23.4.5, which sets forth the process Qwest has been using successfully to provide other CLECs with commingled arrangements. The Commission should reject Eschelon's language in its proposed sections 9.23.4.5.1, 9.23.4.5.1.1, and 9.23.4.5.4.

Decision

Consistent with the ALJ's recommendation regarding Issue 9-55 above, the ALJ recommends the Commission decline to adopt Eschelon's proposed use of the term "Loop Transport Combinations" in numerous ICA sections noted above. Furthermore, the evidence supports Qwest's contention that adoption of Eschelon's proposed language for ordering, provisioning, and billing would cause Qwest to incur substantial expense undertaking system changes. Finally, because such changes would necessarily impact all CLECs with whom Qwest does business, the ALJ agrees with Qwest that the issues Eschelon raises here are best addressed through the CMP. Therefore, the ALJ recommends the Commission reject Eschelon's proposed language and adopt the language proposed by Qwest.

O. Repairs Involving Commingled Arrangements – Issue 9-59

Eschelon Position

The Commission having rejected Eschelon's proposed Section 9.23.4.5.4 to require commingled EELs to be identified with a single circuit ID and billed on a single BAN, Eschelon offers an alternative in ICA Section 9.23.4.7 and its sub-parts to address billing and repairs of commingled arrangements. With respect to billing, Eschelon's alternative proposal is that Qwest relate the separate components of commingled EELs on bills so that Eschelon will be able to at least determine which separately identified circuits are combined to make up a completed circuit. In connection with repairs, Eschelon proposes that it be permitted to submit multiple circuit IDs associated with a single commingled EEL and that Qwest assess a "no trouble found" charge only if no trouble is found on both the UNE and non-UNE portions of the circuit. Eschelon argues this alternative would eliminate the delay resulting from having to submit separate, sequential trouble reports and would also reduce Eschelon's expenses. Because the loop and private line portions of a commingled EEL make up a completed circuit, there is no technical reason why Qwest could not test both parts at the same time.

Qwest Position

Qwest argues Eschelon's proposal would require Qwest to make significant modifications to the systems and processes it uses for carrying out repairs associated with the individual circuits that are included in commingled EELs and, as noted with respect to Issue 9-58, Eschelon is not offering to compensate Qwest for the costs of those modifications. Most important, Eschelon is seeking that, in the event of a "trouble" associated with a commingled

EEL arrangement, it be permitted to submit a single trouble report instead of a report for each circuit that comprises the commingled EEL.

According to Qwest, its offered language for Section 9.23.4.7 and subparts addresses Eschelon's concerns regarding the repair process without requiring the substantial systems modifications and associated costs that Eschelon's proposal would require. In addition, Qwest's language recognizes that there may be instances in which a second trouble ticket is necessary.

Decision

Eschelon appears to have two concerns regarding this Issue: first, that it should only have to file one, rather than two, trouble reports when a problem exists with a commingled arrangement, and, second, that Qwest should be able to bill a "no trouble found" charge only if no trouble is found with both the UNE and non-UNE portions of the commingled EEL. The ALJ notes Qwest's proposed language for ICA Section 9.23.4.7.1.2 satisfies this second concern by permitting Qwest to assess said charge only if no trouble is found on either circuit associated with the commingled EEL. As such, and for the reasons stated above with respect to Issue 9-58, the ALJ recommends the Commission reject Eschelon's additions to the parties' otherwise agreed language for ICA Section 9.23.4.7 and its subparts.

P. Multiplexing (Loop-Mux Combinations) – Issue 9-61

This Issue involves whether Qwest is required to provide access to multiplexing ("muxing") at TELRIC rates when Eschelon requests muxing with an unbundled loop. Qwest currently provides an unbundled product, the "Loop Mux Combination" ("LMC"), comprised of

an unbundled loop combined with a DS1 or DS3 multiplexed facility with no interoffice transport. Multiplexing with LMC allows traffic from several individual loops to be carried over a single, higher bandwidth facility. According to Eschelon, its proposed language for ICA Section 9.23.9 and subparts would only require Qwest to continue providing this product at Commission-approved TELRIC rates as it has done in the past. Eschelon's language would also set forth service intervals for LMCs in Exhibit C and prices for these products in Exhibit A. Qwest, on the other hand, argues that because LMC involves the connecting or linking of a UNE, an unbundled loop, provided under Section 251 with a non-UNE tariffed facility it is a commingled arrangement subject to tariffed pricing, not a standalone UNE available at UNE rates. Qwest therefore proposes language dealing with LMC be placed in ICA Section 24, Commingling, rather than Section 9.23, Combinations, as proposed by Eschelon.

Eschelon Position

According to Eschelon, the FCC's rules require that, in providing access to an unbundled network element, the ILEC must provide all of the features, functions and capabilities of the element.[15] In the *TRO*, the FCC included multiplexing among the features, functions, and capabilities included as part of the loop:

> At its most basic level, a local loop that serves the mass market consists of a transmission medium, which almost always includes copper wires of various gauges. The loop may include additional

[15] 47 C.F.R. § 51.307(c) ("An incumbent LEC shall provide a requesting telecommunications carrier access to an unbundled 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."); see also 47 C.F.R. § 51.319(a) (defining the "local loop" to include "all features, functions, and capabilities of such transmission facility . . . .")

> components (e.g., load coils, bridge taps, repeaters, multiplexing equipment) that are usually intended to facilitate the provision of narrowband voice services.[16]

Eschelon also argues the FCC's rules provide that deploying a multiplexer or reconfiguring a multiplexer is included as part of the ILEC's obligations to perform "routine network modifications" both with respect to the provisioning of unbundled loops and unbundled transport.[17]

Qwest asserted in both written and oral testimony that multiplexing is a feature, function or capability of unbundled transport but not of an unbundled loop. However, because transport can also function independently of multiplexing, this testimony is inconsistent with Qwest's purported test for determining whether multiplexing is a feature, function, or capability of the loop. Qwest fails to offer any rationale for distinguishing between unbundled loops and transport in this regard.

Qwest argues that Eschelon's language is contrary to the FCC decision in the *Verizon Virginia Arbitration Order*.[18] According to Qwest, that order forecloses treatment of multiplexing as a UNE when provided on a stand alone basis or as part of a commingled arrangement. However, as the Minnesota Commission found, the *Verizon Virginia Arbitration*

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[16]*TRO*, ¶ 214; *See also TRO* ¶ 635 ("Verizon cannot refuse to provision a particular loop by claiming that multiplexing equipment is absent from the facility. In that case, Verizon must provide the multiplexing equipment, because the requesting carrier is entitled to a fully functioning loop.")

[17]47 C.F.R. §§ 51.319(a)(7) and 51.319(e)(4); *see also* Exhibit Eschelon 1SR, p. 120, line 7 – p. 121, line 14.

[18]*In the Matter of the Petition of WorldCom, Inc. for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon-Virginia and for Arbitration,* CC Docket Nos. 00-218, 249, 251, 17 FCC Rcd. 27,039 (FCC Wireline Competition Bureau July 17, 2002) ("*Verizon Virginia Arbitration Order*").

Order did not address muxing as a UNE when provided as part of a loop mux combination, stating:

> In the *Verizon Virginia Arbitration Order*, the FCC rejected the notion that multiplexing is a stand-alone UNE, but required Verizon to offer multiplexing as a feature of UNE dedicated transport. The FCC declined to address the issue whether multiplexing can also be a feature, function, or capability of a UNE loop in the circumstances at issue here:
>
> > [T]he parties appear to disagree over Verizon's obligation to provide multiplexing associated with cross-connects between local loops and collocated equipment. This debate over Verizon's obligations under the contract in particular circumstances relates to implementation of the agreement. While the parties apparently disagree on this implementation point, the specific question is not addressed by contract language proposed by either party for this issue and thus is not squarely presented. We emphasize that our adoption of Verizon's proposed contract language on this issue should not be interpreted as an endorsement of Verizon's substantive positions expressed in this proceeding regarding its multiplexing obligations under applicable law.[19]

The Minnesota Commission further found that, given that Qwest had previously provided multiplexing as a UNE when provided in conjunction with a UNE loop, it should continue to do so unless and until it receives permission to withdraw that product. For the reasons explained above, the Commission should similarly adopt Eschelon's language for Issue 9-61 and subparts.

[19]MN Arbitrators' Report, ¶ 196 (footnotes omitted, quoting the Verizon Virginia Arbitration Order at ¶¶ 490), as adopted by the Minnesota Commission Order.

Qwest Position

Qwest notes that, until the FCC made commingling available in the *TRO*, CLECs had no readily available mechanism for "handing off" UNE loops to their collocation spaces to connect the loops to the higher bandwidth transport facilities. To address this situation, Qwest voluntarily provided LMC to CLECs. With commingling becoming available after the *TRO*, CLECs no longer need access to LMC since commingling permits CLECs to terminate unbundled loops directly on the special access transport facilities they obtain from Qwest.

However, Eschelon is seeking to require Qwest to continue providing its LMC offering at UNE rates, terms, and conditions. Eschelon seeks to have LMC treated as a stand-alone UNE in the ICA and to be governed by UNE rates and service intervals that apply only to UNEs. There is no legal basis for assigning UNE attributes to LMC when it is used with commingled arrangements. On the contrary, the FCC has made it clear that (1) the multiplexing used with commingled arrangements is a tariffed product, and (2) multiplexing is not a stand-alone UNE.

In ruling that ILECs are required to provide commingled arrangements, the FCC explained that commingling allows a CLEC to attach a UNE to an "interstate access service." Significantly, in providing an example of a tariffed "interstate access service" to which a CLEC may attach a UNE, the FCC specifically referred to multiplexing: "Instead, commingling allows a competitive LEC to connect or attach a UNE or UNE combination with an interstate access service, such as high-capacity multiplexing or transport services."[20] In the very next sentence,

[20] *TRO* at ¶ 583.

the FCC emphasized that "commingling will not enable a competitive LEC to obtain reduced or discounted prices on tariffed special access services . . . ." This portion of the *TRO* directly refutes any claim by Eschelon that it is entitled to multiplexing at UNE rates, terms, and conditions when it obtains multiplexing for use with commingled arrangements.

Consistent with this ruling, in the *Verizon Virginia Arbitration Order* the FCC's Wireline Competition Bureau rejected WorldCom's proposed language that would have established multiplexing as an independent network element, stating that the FCC has never ruled that multiplexing is such an element:

> We thus reject WorldCom's proposed contract language because it defines the "Loop Concentrator/Multiplexer" as a network element, which the Commission has never done.[21]

Indeed, the only network elements that ILECs are required to provide as UNEs at TELRIC rates are those for which the FCC has made fact-based findings of competitive impairment pursuant to Section 251(d)(2)(B). The FCC has never made a finding of impairment for multiplexing and indisputably has not found that multiplexing is a UNE. Thus, Eschelon's statement that "Loop-Mux Combinations are also a UNE combination" is incorrect; multiplexing has never been found to be a UNE.

There also is no merit to Eschelon's back-up position that multiplexing is a feature or function of the unbundled loop and, hence, is governed by UNE rates, terms, and conditions. FCC Rule 51.319(a)(1) defines the local loop as "a transmission facility between a distribution frame (or its equivalent) in an incumbent LEC central office and the loop

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[21] *Verizon Virginia Arbitration Order* at ¶ 494.

demarcation point at an end-user customer premise." The rule provides further that the loop "includes all features, functions, and capabilities of such transmission facility." In other words, to qualify as a feature or function of the loop, a piece of equipment must be located with or a part of the "transmission facility" that runs between a distribution frame or equivalent frame and a customer's premise. The multiplexing equipment used to commingle a UNE loop and tariffed transport is not located between a distribution frame or equivalent frame and a customer premise. Instead, it is located on the transport or central office side of a frame in a central office and thus is not part of the loop transmission facility. Further, the functioning of a DS1 loop, for example, is not dependent upon the use of multiplexing; it functions regardless of whether there is multiplexing used with the loop. For this additional reason, multiplexing cannot reasonably be viewed as a "feature, function, or capability" of the loop.

The statements from the FCC that Eschelon cites in support of its contention that multiplexing is a feature or function of the loop involve an entirely different type of multiplexing than is at issue here. In those statements, the FCC is being clear that to the extent any type of multiplexing, such as digital loop carrier systems, which are often viewed as a form of multiplexing, between the end user premises and the main distribution frame ("MDF") in the central office is required, the ILEC must "de-mux" the loop so it can be handed off to the CLEC in the central office. By contrast, the multiplexing that is in dispute between Qwest and Eschelon is transport multiplexing that takes place not between a customer's premises and the MDF, but after a fully functional loop has been provided to the CLEC.

Thus, with respect to the location of LMC terms and conditions within the ICA, the fact that LMC is not a UNE requires setting forth the terms relating to this offering in Section 24 not in Section 9.23. Eschelon's demand that Qwest provide LMC at UNE rates and terms instead of as a tariffed facility is directly contrary to the FCC's unequivocal statements in the *TRO* that the multiplexing used with commingling is a tariffed "access service" for which CLECs must pay full tariffed rates. Furthermore, since LMC is a commingled service and not a UNE combination, the proper placement of service intervals should be in the Qwest Service Interval Guide and not in Exhibit C, which only addresses service intervals for UNEs. Likewise, because LMC is not a UNE combination, the rates for LMC should not be included in the UNE Combination section of Exhibit A, as Eschelon is proposing. There is no legal basis for Eschelon to apply UNE-based rates in Exhibit A to this non-UNE product. The appropriate rates are those set forth in the applicable tariff for multiplexed facilities. Accordingly, the Commission should reject Eschelon's proposed references to the rates in Exhibit A for multiplexing.

Finally, it is important to emphasize that contrary to its suggestions, Eschelon will still have access to multiplexing if its proposals relating to this issue are rejected. Qwest agrees that if Eschelon requests a UNE combination comprised of a UNE loop combined with UNE transport, Qwest will provide multiplexing at TELRIC rates. Further, Eschelon can obtain multiplexing through Qwest's tariffed offering of this product and also can self-provision multiplexing in its own collocation space.

Decision

The parties' dispute here focuses on whether Qwest is required to provide multiplexing with a UNE loop at TELRIC rates where the loop is connected directly to Eschelon's collocation without UNE transport. The FCC has not spoken definitively on this question, but Qwest has previously offered and continues to offer its LMC product as a UNE. As the ALJ determined with respect to Issue 90-53 above, it would appear unreasonable and discriminatory to permit Qwest to forego offering this product under its ICA with Eschelon while continuing to offer it to other CLECs. The ALJ therefore recommends the Commission adopt Eschelon's proposed ICA language. If Qwest wishes to withdraw its LMC product, it should request permission from the Commission to modify all of its ICAs accordingly so that all CLECs would be treated equally.

Q. Root Cause Analysis/Mistakes Acknowledgment – Issue 12-64 & Subparts

This Issue and its subparts relate to Eschelon's proposed language, and alternate proposal, for ICA Section 12.1.4 and its subparts that would require Qwest, upon request by Eschelon, to timely investigate and take responsibility for mistakes and to provide information regarding the mistake to Eschelon on a non-confidential basis. Qwest opposes Eschelon's proposed language entirely and would leave Section 12.1.4 blank.

Eschelon Position

Eschelon argues it depends on Qwest to be able to provide service to its customers, in order to provide service to new customers, to change existing service, and to perform maintenance and repair. If Qwest makes a mistake, this may result in disruption of

Eschelon customers' service, which results in harm to Eschelon. Eschelon's proposed language addresses Qwest mistakes that create service impacting conditions and details the root cause analysis and mistake acknowledgment Qwest must undertake.

Qwest Position

According to Qwest, this Issue has to do with whether processes in Minnesota relating to mistakes in processing Eschelon orders should be exported to Utah. Qwest believes the Utah Commission should focus on whether the process proposed by Eschelon is necessary. Qwest argues it has established that Qwest already has processes in place to address Eschelon's concerns and Eschelon's proposed language could have the effect of changing those existing processes. Eschelon acknowledges investigation into mistakes is available under current processes. Eschelon's proposed language is simply unnecessary and should be rejected.

Decision

The ALJ concludes it is reasonable that the ICA require Qwest to, upon request, investigate the cause of a mistake relating to products or services provided to Eschelon under the ICA, and to accept responsibility for such mistakes if warranted by the investigation. The ALJ agrees with Eschelon that since Qwest's mistakes can directly impact Eschelon's end user customers Eschelon should be able to share information regarding the cause of and responsibility for such mistakes with its end user customers. Therefore, the ALJ recommends the Commission adopt Eschelon's first proposal for ICA Section 12.1.4.1, as well as Eschelon's proposed language for Section 12.1.4.2 and its subparts.

R. Expedite Orders – Issue 12-67 and subparts

An interval for provisioning an order is a known number of days, or hours, from when a CLEC submits a service request or order to the date or time upon which service is scheduled to be delivered. When a customer submits a request to Qwest to shorten the length of the normal or "standard" interval, Qwest refers to the customer's request as a request for an "expedite." This Issue involves reference to and treatment of expedites in ICA Sections 12.2.1.2 and its subparts, 7.3.5.2 and its subparts, 9.1.12.1 and its subparts, 9.23.4.5.6, and Section 9.20.14 of Exhibit A. In some cases, Qwest opposes Eschelon's proposed language in its entirety while for some sub-issues Qwest proposes language of its own. Qwest frames the questions before the Commission regarding this Issue as follows:

> (1) Whether the contract language should all appear in one place or should be placed in the sections of the contract associated with the products Eschelon orders;
>
> (2) Under what terms and conditions Qwest should provide expedites to Eschelon's customers for free;
>
> (3) Under what terms and conditions Qwest should provide expedites to Eschelon for a charge; and
>
> (4) If an expedite fee is charged, whether that fee should be TELRIC based as contended by Eschelon or the same rate Qwest charges retail customers?

Eschelon Position

According to Eschelon, expedites enable carriers to accommodate customers' needs when unanticipated circumstances arise. If one carrier can accommodate its end user customer's needs and another can not, the latter is disadvantaged. Qwest admits it provides

expedites to itself and its retail customers. Therefore, Qwest's suggestion that to avoid providing "superior" service it should be able to offer standard intervals for UNEs in all cases to CLECs, while offering expedites of intervals to itself and its retail customers in some cases, would place CLECs at a competitive disadvantage. Expedites need to be available to Qwest's wholesale CLEC customers, just as expedites are available to Qwest's retail customers. The issue then becomes the rate appropriate for wholesale CLEC customers, and whether there are any exceptions, such as emergency situations when resources are available, to charging that wholesale rate.

Under Eschelon's proposal for expedited orders, Eschelon continues to pay the installation non-recurring charge separate from the expedite fee, unlike a Qwest retail customer which also receives a waiver of installation and other non-recurring charges. In addition, Qwest provides expedites when the identified emergency conditions are met only if resources are available. Qwest incurs no cost to add resources for expediting an order when the emergency conditions are met. If resources are not available, Qwest simply denies the request and incurs no expedite costs.

Eschelon also agrees to pay an additional cost-based charge to expedite orders in addition to the installation charge. However, while Qwest proposes a $200 retail rate based on its Tariff FCC No. 1, Eschelon proposes a $100 interim wholesale rate because Eschelon is a wholesale customer of Qwest. Eschelon believes an interim rate is needed to allow establishment of a cost-based rate because Qwest has not implemented a cost-based Individual Case Basis ("ICB") rate even though Qwest has substantial experience provisioning "designed"

services on an expedited basis for itself, its retail customers, and CLECs in Utah. Qwest admits that the $200 per day rate that it proposes to charge is not cost-based, and expressly denies that the rate should be cost-based.

The ability to expedite UNE orders is integral to a company's ability to gain "access to a UNE" and therefore, such access must be provided at TELRIC-based rates in accordance with FCC Rule §51.313(b). Qwest does not charge itself a non-cost-based, market rate in order to expedite orders for its retail customers. Rather, it only incurs the cost of expediting such orders. Therefore, Qwest's proposal to charge Eschelon a non-cost-based rate that is higher than Qwest's own expedite costs would violate Rule §51.313 because this price constitutes terms that are less favorable than terms faced by Qwest in expediting its own orders.

Eschelon and Qwest compete in the retail market and this competition includes an ability to offer expedite service to retail customers on competitive terms. By charging Eschelon an expedite price that exceeds the cost of the expedite, Qwest gains an unfair advantage similar to the advantage that Qwest would have if it charged above-cost rates for UNE loops and other UNE elements.

Because Qwest acknowledges that expediting service involves performing the same tasks as would otherwise be performed, but performing them sooner, even the structure of Qwest's proposed per day charge shows that rate cannot be cost-based. Qwest acknowledges if expedites are not a "superior service" then cost-based pricing is appropriate. It is not superior service to offer its wholesale CLEC customers standard intervals in some cases and expedited service in others. Therefore, cost-based pricing is appropriate. Rather than superior service,

Eschelon argues it is only seeking nondiscriminatory treatment, to which it is entitled as a matter of law.

Regarding exceptions to charging an additional expedite fee, Eschelon claims its proposal incorporates the same emergency-based expedite conditions that were, until recently, available to expedite loop orders in Utah and continue to be available to Qwest's CLEC UNE customers in Washington and its reseller customers in other states. From before the year 2000 through January 2, 2006, Qwest provided an exception to charging an additional fee for expedited orders for products and services, including all loops, referred to as "designed" services, when Qwest approved them as meeting certain emergency-based conditions applicable to retail and CLEC customers alike. These expedite terms were not developed in the CMP, but were later documented in the PCAT. Qwest continues to provide the exception to charging for emergency-based expedites to other customers but not to CLEC UNE customers.

Qwest Position

Qwest's first objection to Eschelon's proposal involves where in the ICA expedite language should be appropriately placed. Qwest argues a distinction should exist between designed and non-designed services and that a compensated expedite, if it should be available at all, should only be available for designed products, which are discussed in Sections 7 and 9 of the ICA. Qwest therefore proposes expedite language be confined to these two sections. Eschelon, on the other hand, proposes expedite language be placed in Section 12 which applies to all products.

With respect to free expedites, Qwest proposes reference to its product catalogue for determining when free expedites will be available to a CLEC. For a number of reasons, Qwest opposes each of Eschelon's four proposals regarding free expedites. According to Qwest, Eschelon's first proposal is inconsistent with Qwest's treatment of retail customers and allows Eschelon to obtain a free expedite when Eschelon accidentally disconnects a customer. Eschelon should not be able to put Qwest in a position of having to cover Eschelon's mistakes for free. Furthermore, Eschelon's language imposes an expedite obligation without any reference to whether Qwest has resources available to provide an expedite.

Eschelon's proposals 2 and 3 also fail, in Qwest's eyes, to adequately address these concerns. Eschelon's option 4 comes closest to resolving the concerns Qwest has raised but does not distinguish between design and non-design services and does not use the same language as Qwest's tariffs regarding resource availability, thereby creating potential for vagueness. In addition, by including this language in the ICA, Eschelon creates the potential that it would be treated differently from other wholesale customers who have their terms and conditions determined pursuant to Qwest's product catalogue.

Qwest argues Eschelon's proposed language for fee-based expedites should also be rejected because it goes beyond what Qwest provides for itself or to other CLECs. Eschelon proposes language in Section 12.1.2.2 that obligates Qwest to provide fee-based expedites without regard to whether resources are available to fill Eschelon's request. Eschelon's proposed language provides that "Qwest will grant and process CLEC's expedite

request." However, Qwest does not unconditionally provide fee-based expedites to its retail or wholesale customers.

Eschelon's proposed language becomes particularly onerous if combined with TELRIC pricing, as Eschelon suggests. One could easily imagine Eschelon making a business decision that it will compete by having all of its wholesale orders expedited, thereby being able to beat installation dates offered by Qwest. Furthermore, Eschelon would be able to compete by using Qwest resources. In effect, Qwest would be required to have sufficient staffing available to fill orders for Eschelon as quickly as Eschelon desires. Such availability would impose tremendous costs on Qwest and it is difficult to imagine a cost study that could accurately quantify costs because Qwest's costs are entirely dependent on the business decisions made by CLECs.

With respect to both free and fee-based expedites, Qwest argues Eschelon's language would require Qwest to provide Eschelon with a superior service in violation of the Act. Under the Act, Qwest is required to provide Eschelon with service that is at parity with what Qwest provides retail customers. 47 U.S.C. § 251(c)(3) (2006). In the event that no retail analogue exists for the service, Qwest is required to provide service at a level which provides the CLEC with a meaningful opportunity to compete. *See e.g., In re 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,* 15 FCC Rcd 3953 ¶ 8 (Rel. Dec. 22, 1999). Eschelon's proposed expedited service goes beyond these requirements. Section 251(c)(3) requires that access to UNEs be nondiscriminatory:

> Unbundled access. The duty to provide… nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252.

47 U.S.C. § 251(c)(3) (2006). Initially, the FCC's *First Report and Order* interpreted this as requiring ILECs to provide "superior" service. The Eighth Circuit struck this language down as a violation of the 1996 Act and the United States Supreme Court has never disturbed that portion of the Eighth Circuit's decision. *See e.g., Iowa Utilities Board v*. AT&T, 120 F.3d 753, 812-13 (8th Cir. 1997), *aff'd in part and rev'd in part*, 525 U.S. 366, 397 (1999).

Agreed terms in the parties' ICA likewise mandate nondiscrimination between carriers purchasing from Qwest: "Qwest shall provide such Interconnection, UNEs, Ancillary Services and Telecommunications Services on rates, terms and conditions that are just, reasonable and nondiscriminatory in accordance with the terms and conditions of this Agreement and the requirements of the Act and state law and the rules and regulations promulgated thereunder." ICA Section 1.3. Thus, the parties' ICA requires Qwest to treat all CLECs the same. That is exactly what Qwest is doing. Scores of CLECs across Qwest's region and in Utah have adopted the unbundled loops expedite terms that Qwest and the CLECs developed in the CMP. However, Eschelon is asking this Commission to endorse a process for expediting orders for unbundled loops that is superior to the process used by every other CLEC in Utah.

Decision

The ALJ concludes ICA language concerning the provisioning of expedites should appear in Section 12 of the ICA since this section relates to ordering and provisioning and

there is no need to repeat expedite terms for specific products throughout the ICA. The ALJ therefore recommends adoption of Eschelon's position that ICA Section 12.2.1.2 and its subparts be used to address expedites.

Eschelon offers four alternative proposals under ICA Section 12.2.1.2.1 to require Qwest to provide no-fee emergency expedites for all products and services, including designed services. While opposing all of these alternatives, Qwest concedes Eschelon's fourth proposal comes closest to addressing Qwest's concerns. The ALJ agrees and concludes Eschelon's fourth proposal reasonably provides for no-fee expedites for all products on a non-discriminatory basis since Qwest need only provide such expedites to the extent that it provides them to its own retail customers. The ALJ therefore recommends the Commission adopt Eschelon's fourth proposal for Section 12.2.1.2.1.

Concerning the terms and conditions under which Qwest should provide expedites to Eschelon for a charge, the ALJ concludes both the Act and FCC rules require Qwest to provide expedited access to UNE loops since Qwest regularly provides such expedites to its customers. The ability to expedite access to UNE loops is therefore necessary to enable Eschelon to compete with Qwest on a non-discriminatory basis. With regard to pricing, the Act requires Qwest to provide CLECs access to UNEs on terms and conditions no less favorable than those it provides to itself. Since Qwest provides expedite service to its own retail customers at cost, it must provide the same service to Eschelon at the same rates. Eschelon proposes adoption of a $100.00 interim expedite rate since a cost-based expedite rate has not been previously approved. Given that Qwest proposes a $200 market rate and that the record is not sufficient in

this arbitration to appropriately calculate and set a final rate, nor would it be appropriate to do so in this docket, the ALJ recommends the Commission adopt Eschelon's proposed language for this Issue and sub-issues, including, on an interim basis, Eschelon's proposed $100.00 expedite rate located at Section 9.20.14 of Exhibit A.

S. Jeopardy Notices – Issues 12-71, 12-72, and 12-73

A jeopardy notice is a notice that Qwest sends to inform a CLEC that a due date is in jeopardy of being missed. Whether Qwest classifies a jeopardy as Qwest-caused (a "Qwest jeopardy") or Eschelon-caused ("Customer Not Ready" or "CNR") may affect whether service to Eschelon's customer is delayed. When a jeopardy is classified as CNR for designed facilities, including unbundled loop orders, the CLEC is required to supplement its order by requesting a new due date that is at least three days after the date of the supplemental order. A Qwest jeopardy does not require the CLEC to supplement the due date and does not build in this three day delay. Eschelon's concern regarding jeopardies is that an erroneous CNR classification of a jeopardy actually caused by Qwest's failure to provide a Firm Order Confirmation ("FOC") or a timely FOC, will require Eschelon to request the three-day delay associated with a CNR.

To address its concerns, Eschelon proposes the following language for ICA Section 12.2.7.2.4.4 and its indicated subparts:

> 12.2.7.2.4.4 A jeopardy caused by Qwest will be classified as a Qwest jeopardy, and a jeopardy caused by CLEC will be classified as Customer Not Ready (CNR).
>
> 12.2.7.2.4.4.1 There are several types of jeopardies. Two of these types are: (1) CLEC or CLEC End User Customer is not ready or service order is not accepted by the CLEC (when Qwest has tested the service to meet all testing requirements.); and (2) End User

> Customer access was not provided. For these two types of jeopardies, Qwest will not characterize a jeopardy as CNR or send a CNR jeopardy to CLEC if a Qwest jeopardy exists, Qwest attempts to deliver the service, and Qwest has not sent an FOC notice to CLEC after the Qwest jeopardy occurs but at least the day before Qwest attempts to deliver the service. CLEC will nonetheless use its best efforts to accept the service. If needed, the Parties will attempt to set a new appointment time on the same day and, if unable to do so, Qwest will issue a Qwest Jeopardy notice and a FOC with a new Due Date.
>
> 12.2.7.2.4.4.2 If CLEC establishes to Qwest that a jeopardy was not caused by CLEC, Qwest will correct the erroneous CNR classification and treat the jeopardy as a Qwest jeopardy.

In an alternate version of Section 12.2.7.2.4.4, Eschelon proposes adding the sentence "Nothing in this Section 12.2.7.2.4.4 modifies the Performance Indicator Definitions (PIDs) set forth in Exhibit B and Attachments 1 and 2 to Exhibit K of this Agreement" in order to address Qwest concerns that its proposal modifies the PIDs. Qwest objects to all of this language and instead offers the following in resolution of these Issues:

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

Eschelon Position

Eschelon acknowledges that its proposed language for Sections 12.2.7.2.4.4 and 12.2.7.2.4.4.2 state seemingly self-evident propositions, that a jeopardy will be classified based on which party caused the jeopardy and that if Eschelon proves to Qwest that Eschelon was not responsible for a given jeopardy Qwest will correct the erroneous classification and treat the jeopardy as a Qwest jeopardy. However, Eschelon argues these sections, along with Section 12.2.7.2.4.4.1, are required due to Qwest's history of incorrectly assigning jeopardies to

Eschelon and its refusal to re-classify them when informed of its error. Eschelon also points to Qwest's admission that Eschelon's entire proposal, excluding the phrase "at least the day before" from Section 12.2.7.2.4.4.1, reflects Qwest's current PCAT process.

Qwest Position

Qwest characterizes the dispute on this Issue as whether Qwest may properly characterize its failure to deliver as CNR when (1) Qwest has previously issued certain jeopardy notices on the order, (2) Qwest has cleared the jeopardy but has not sent an FOC and (3) Eschelon was unable to accept the order. Qwest proposes that any changes to these classifications be handled pursuant to its CMP.

Qwest argues Eschelon's proposal would impose a significant burden on Qwest because it would force Qwest to classify a jeopardy as a Qwest jeopardy if Qwest does not send an FOC at least a day before the date on which Qwest attempts to deliver service. This would require Qwest to implement new processes for Eschelon that would be costly and complicated, and potentially lead to provisioning errors. Eschelon believes the absence of an FOC means that Eschelon's failure to accept service should always be classified as caused by Qwest. Qwest argues Eschelon's position is unreasonable for the following reasons:

- Eschelon's proposal will do nothing to speed up service. Qwest provides the FOC as soon as possible, and often is able to deliver service on the same day it issues the FOC.

- Eschelon is usually able to accept service without an FOC because informal communication between technicians helps make the provision of service possible.

- While Qwest recognizes there will be situations where a jeopardy is classified as CNR when in fact Eschelon had no opportunity to be

ready to deliver service, those situations are rare. In many instances, Eschelon has adequate opportunity to provide service.

- The financial impact on Eschelon is extremely small. The impact on Qwest, by contrast, could be significant.

- The details of these sorts of performance measurements should be determined in industry-wide forums rather than individual interconnection agreements.

Decision

Eschelon's proposed language is similar to Qwest's current PCAT process and reasonably ensures that Qwest may not hold Eschelon responsible for Qwest jeopardies, except that Eschelon's proposed language ensures Qwest will not issue a CNR if it has failed to issue an FOC to Eschelon at least one day prior to Qwest's attempt to deliver service. This is a reasonable proposal since the ICA obligates Qwest to provide an FOC and one day's notice is not unreasonable to ensure Eschelon adequate time to prepare to accept service. Where Eschelon is not prepared to accept service because Qwest has failed to provide adequate notice, the consequences of delay should be borne by Qwest, not Eschelon. Therefore, the ALJ recommends the Commission adopt Eschelon's second proposal for ICA Section 12.2.7.2.4.4, as well as sub-sections 12.2.7.2.4.4.1 and 12.2.7.2.4.4.2.

T. Controlled Production Testing – Issue 12-87

This Issue involves ICA Section 12.6.9.4 and the parties' dispute as to whether Eschelon has the option under the ICA to choose not to perform controlled production testing after Qwest modifies or installs upgrades in its OSS. Controlled production testing consists of controlled submission of CLEC real product orders to the new or updated interface. This test

verifies that the data exchange between Qwest and CLEC is done according to industry standard. Eschelon argues its needs certainty in the ICA that controlled production testing will continue to be necessary for a new implementation effort and unnecessary for re-certification. A new implementation effort involves transactions that CLEC does not yet have in production using a current version of Qwest's Interconnect Mediated Access ("IMA") electronic interface. Re-certification is defined in agreed-upon language of the proposed ICA as "the process by which CLECs demonstrate the ability to generate correct functional transactions for enhancements not previously certified." Eschelon therefore proposes the following language, with Qwest's proposed deletions and additions shown in strikeout and underscored font, respectively:

> 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 consists of the controlled submission of actual CLEC production requests 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 production 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~~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.

Alternatively, Eschelon proposes:

> 12.6.9.4 Controlled Production – Qwest and CLEC will perform controlled production for new implementations, such as new products, and as otherwise mutually agreed by the Parties. 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 consists of the controlled submission of actual CLEC production requests 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 production 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.

Eschelon Position

Eschelon argues that under its proposal, along with closed language at ICA Sections 12.6.1 through 12.6.9.10, testing will be conducted for both new implementations and re-certifications, and that under both of its proposals, Eschelon would participate in controlled production testing with new releases, or "new implementations." Eschelon's proposal simply reflects the status of the parties' testing today and ensures that testing under the ICA will be appropriate for the type of change being made; for instance, with a re-certification requiring less testing than an initial certification. For re-certifications, the transaction has previously been in production and is simply being enhanced and Eschelon's proposed language simply recognizes its business need to avoid unnecessary, costly and time consuming controlled production testing in such a circumstance.

Qwest Position

Qwest argues its CMP Document provides for certification testing as follows:

> New Releases of the application-to-application interface may require re-certification of some or all business scenarios. A determination as to the need for re-certification will be made by the Qwest coordinator in conjunction with the Release Manager of each Release. Notification of the need for re-certification will be provided to CLEC as the new Release is implemented. The suite of re-certification test

> scenarios will be provided to CLECs with the Final Technical Specifications. If CLEC is certifying multiple products or services, CLEC has the option of certifying those products or services serially or in parallel, if technically feasible.

There is no question in this provision regarding who determines the need for re-certification: Qwest. This approach makes sense. Qwest's OSS serves not only Eschelon, but also all other CLECs, other wholesale customers and retail operations. The risks associated with a failure of that system are substantial and go far beyond Eschelon.

Furthermore, Eschelon's fear of unnecessary controlled production testing is unfounded. Eschelon has not presented a single example of unnecessary controlled production testing in its testimony. Such unnecessary testing is unlikely. Qwest makes decisions regarding testing levels on a release basis and does not make different decisions for different CLECs. Qwest will also face far greater costs associated with controlled production testing than would Eschelon because Qwest would be testing not only with Eschelon but also with other customers.

Decision

In offering its proposals, Eschelon seeks to prevent unnecessary testing but it offers no evidence that Qwest has required unnecessary testing in the past. Furthermore, the evidence indicates that Qwest would incur much greater expense from unnecessary testing than would Eschelon or any individual CLEC. Qwest therefore has a strong incentive not to order the unnecessary testing that Eschelon fears. Because Qwest must ensure that new implementations, upgrades and changes work for all CLECs, it is reasonable that Qwest should be able to require whatever testing it deems necessary in a particular situation. For these reasons, the ALJ recommends the Commission adopt Qwest's proposed language for this Issue.

U. Rates for Services – Issues 22-88, 22-88(a), and 22-89

According to Eschelon, agreed upon language in the ICA reflects that Qwest may purchase certain services from Eschelon, including transiting and exchange of traffic, trouble isolation, managed cuts and installation of interconnection trunks. The dispute over these Issues concerns whether Exhibit A to the ICA, which contains the rates for products and services provided under the ICA, should, as Qwest proposes, refer only to the rates that Qwest charges or whether it should, as Eschelon proposes, reflect the fact that the ICA authorizes Eschelon to charge Qwest for certain services that it provides to Qwest. Accordingly, Eschelon proposes the following language for ICA Section 22.1.1, with Qwest's additional language underlined:

> 22.1.1 The rates in Exhibit A apply to the services by Qwest to CLEC provided pursuant to this Agreement.

Likewise, Eschelon proposes the following for Section 7.11 of Exhibit A, with Qwest's additional language underlined:

> Qwest's Utah Access Services Tariff

Finally, Eschelon proposes the following language for Section 22.4.1.3:

> 22.4.1.3 Nothing in this Agreement shall waive any right of either Party to request a cost proceeding at the Commission to establish a Commission-approved rate to replace an Interim Rate.

Qwest proposes leaving Section 22.4.1.3 blank.

Qwest insists Exhibit A should reflect only the rates that Qwest charges to Eschelon, claiming the ICA already sufficiently spells out the applicable rates for services that Eschelon provides to Qwest. However, Eschelon notes several agreed ICA sections state that

rates Eschelon will charge Qwest for various services are set forth in Exhibit A. Therefore, to limit Exhibit A to Qwest's charges would be inaccurate and potentially confusing. Eschelon also proposes to spell out in the ICA that each company has a right to request a cost proceeding at the Commission to establish a permanent rate to replace an interim rate. According to Eschelon, Qwest agreed to this language in Minnesota, and has provided no reason why this language is appropriate in Minnesota, but not in Utah.

Decision

Agreed sections of the ICA, such as Sections 7.3.3, 7.3.7.2, 7.6, 10.2.5.5.4, and 21.14.1, state Exhibit A contains the rates Eschelon may charge Qwest for a given service. It is therefore reasonable that ICA Section 22.1.1 should not be limited to referencing only rates for services provided by Qwest to Eschelon. The same reasoning holds for Qwest's attempt to exclude from Section 7.11 any implied reference to Eschelon's tariff or price list. Therefore, the ALJ recommends the Commission adopt Eschelon's proposed language for these two sections. Likewise, Eschelon's proposed ICA Section 22.4.1.3 does nothing more than permit parties to seek Commission action to replace an interim rate with a final one; this is a process already available to the parties notwithstanding the ICA. The ALJ finds no support for Qwest's opposition to this section and therefore recommends the Commission adopt Eschelon's proposed language for this section.

V. Unapproved Rates – Issue 22-90 and subparts

This Issue concerns whether the ICA should include procedures for establishing rates where such rates have not been approved by the Commission. Eschelon proposes that if Qwest offers a Section 251 product for which there is no Commission-approved rate, the interim

rate could be a rate established by the Commission, or a rate negotiated between the two companies. Specifically, if the two companies have not agreed on a negotiated rate, Qwest will develop a TELRIC study in support of its proposed rate and submit it to the Commission for review within a certain time frame. If the two companies agree on a negotiated rate, Qwest will file this rate with the Commission within 60 days. Further, Eschelon proposes that Qwest provide a copy of its cost support filed with the Commission to Eschelon upon request. Finally, if Eschelon and Qwest have not agreed upon a negotiated rate, and until the Commission orders an interim or permanent rate, Eschelon would use the Qwest-proposed rate to order the product. Eschelon's proposed language reflecting this procedure is as follows:

> 22.6.1 Qwest shall obtain Commission approval before charging for a UNE or process that it previously offered without charge. If Qwest offers a new Section 251 product or service or one that was previously offered with a charge for which a price/rate has not been approved by the Commission in a TELRIC Cost Docket ("Unapproved rate"), Qwest shall develop a TELRIC cost-based rate and submit that rate and related cost support to the Commission for review within sixty (60) Days of the later of (1) the Effective Date of this Agreement, or (2) Qwest offering the rate to CLEC, unless the Parties agree in writing upon a negotiated rate (in which case Qwest shall file the negotiated rate with the Commission within 60 Days). Except for negotiated rates, Qwest will provide a copy of the related cost support to CLEC (subject to an applicable protective agreement, if the information is confidential) upon request or as otherwise ordered by the Commission. If the Parties do not agree upon a negotiated rate and the Commission does not establish an Interim Rate for a new product or service or one that was previously offered under Section 251 with an Unapproved Rate, CLEC may order, and Qwest shall provision, such product or service using such Qwest proposed rate until the Commission orders a rate. In such cases, the Qwest proposed rate (including during the aforementioned sixty (60) Day period) shall be an Interim Rate under this Agreement.

> 22.6.1.1 For a UNE or process that Qwest previously offered without charge, the rates in Exhibit A do not apply until Qwest obtains Commission approval or the Parties agree to a negotiated rate. If the Parties do not agree on a negotiated rate, the Commission does not establish an Interim rate, and Qwest does not submit a proposed rate and related cost support to the Commission within the time period described in Section 22.6.1 for a new product or service or one that was previously offered under Section 251 with an Unapproved Rate, the Unapproved rate(s) in Exhibit A do not apply. Qwest must provision such products and services pursuant to the terms of this Agreement, at no additional charge, until Qwest submits the rate and related cost support to the Commission for approval.

Eschelon argues requiring Qwest to provide Eschelon its supporting cost study filed with the Commission is necessary to avoid Eschelon having to expend the money and resources to intervene in a cost docket case in order to see the cost filing, but needing the cost filing to determine whether to intervene.

Qwest disagrees and recommends deleting these entire sections as unnecessary and more appropriately handled in Commission procedural rules instead of an interconnection agreement.

Subparts (a) through (e) for this Issue address rates for a number of items that have not been addressed in cost dockets in Utah. These rates are found at ICA Exhibit A, Sections 8.1.1.2; 8.8.1; 8.15.2.1; 8.15.2.2; 10.7.10; 10.7.12.1; 12.3; 9.2.8; 9.23.6.5; 9.23.7.6; 9.6.1.2; 9.23.6.8.1; 9.23.6.8.2; 9.23.7.7.1; 9.23.7.7.2; 8.13.1.1; 8.13.1.2.1; 8.13.1.2.2; 8.13.1.2.3; 8.13.1.3; 8.13.1.4; and 8.13.2.1.

According to Eschelon, the difference between Qwest and Eschelon is that Qwest wants these rates to go into effect without any Commission scrutiny, while Eschelon seeks Commission review to assure the rates that Qwest charges are not excessive. Thus, a decision to

defer consideration of the rate issues is, in fact, a decision to allow Qwest to charge its proposed rates; rates which the evidence in this case shows to be in excess of Qwest's costs.

Eschelon argues the Commission's role is to evaluate the evidence presented by the parties and determine which of the parties' proposed interim rates most closely approximates the TELRIC standard. Qwest has provided the Commission with no support for its proposed rates. Eschelon, in contrast, proposes interim rates that it believes are closer to the "cost-based, just, reasonable and non-discriminatory" standard than the interim rates proposed by Qwest and are more consistent with prior Commission decisions. According to Eschelon, Qwest takes the position that "when Qwest calculates costs for new elements subsequent to a Commission decision in a cost docket, it is not obligated to rigidly follow the inputs ordered in that docket." Yet Qwest should not be permitted, as a result of proposing interim rates, to simply ignore this Commission's previous cost decisions, particularly when it seeks, at the same time, to defer Commission review of those proposed rates to some indefinite time in the future.

According to Qwest, its proposed interim rates are based on detailed cost studies which are updated from time to time as products evolve and as cost studies are updated to accurately reflect costs. Qwest offers these same rates to all CLECs and these rates are updated as time goes by. It would be unfair for Eschelon to receive different interim rates than those offered to other CLECs.

Decision

The ALJ concludes Eschelon's proposed ICA Sections 22.6.1. and 22.6.1.1 are unnecessary and potentially confusing and conflicting with established Commission procedures.

As noted in the Washington arbitration, Qwest has an obligation to provide access to the elements at issue and to seek Commission approval for new UNEs and UNEs previously offered at no charge. If Qwest fails in this obligation, Eschelon may petition the Commission to take appropriate action. The ALJ therefore recommends the Commission decline to adopt Eschelon's proposed language for these sections.

With respect to the competing interim rates offered for approval by Eschelon and Qwest, the ALJ continues to note this arbitration is not the appropriate forum for approval of cost-based rates. Eschelon argues the Commission should order its proposed rates because they more closely resemble the TELRIC rates that would be developed and approved in a cost docket. However, there is clearly insufficient evidence in this record for the Commission to reach such a conclusion–gathering such evidence is precisely the purpose of a cost docket and this is not a cost docket. The same is true for Qwest's proposed rates.

However, the ALJ concludes that, since the burden of preparing cost studies and filing a cost docket rests on Qwest, it is reasonable that the Commission permit the use of Eschelon's proposed rates on an interim basis, subject to true-up, pending said Qwest filing and adoption of final rates by the Commission. Therefore, the ALJ recommends the Commission adopt Eschelon's proposed rates as provided in the ICA Exhibit A sections noted above.

Wherefore, the Parties are directed to submit an interconnection agreement that includes the terms and conditions reflecting their mutual agreement and the resolution of the disputed issues discussed herein.

DATED at Salt Lake City, Utah, this 11th day of July, 2008.

/s/ Steven F. Goodwill
Administrative Law Judge

Approved and Confirmed this 11th day of July, 2008, as the Arbitration Report and Order of the Public Service Commission of Utah.

/s/ Ted Boyer, Chairman

/s/ Ric Campbell, Commissioner

/s/ Ron Allen, Commissioner

Attest:

/s/ Julie Orchard
Commission Secretary
G#58075