October 26, 2007

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

Dear Sir/Madam:

Enclosed for filing are an original and three copies of Eschelon Telecom of Oregon, Inc.'s Post-Hearing Brief in the above-referenced matter. Electronic copies of this document were filed on October 26, 2007.

Also enclosed is a certificate of service. I have also enclosed an additional copy of this letter and request that you date stamp its receipt and return it to me in the enclosed self-addressed, stamped envelope.

Sincerely,

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Enclosures
cc: Jason Topp, Qwest (email and Federal Express)
Alex Duarte, Qwest (email and Federal Express)

BEFORE THE PUBLIC UTILITY COMMISSION OF OREGON

ARB 775

In the Matter of		
ESCHELON TELECOM OF OREGON, INC.	)	**ESCHELON TELECOM OF OREGON, INC.'S POST-HEARING BRIEF**
Petition for Arbitration of an Interconnection Agreement with Qwest Corporation, Pursuant to Section 252(b) of the Telecommunications Act	)	

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TABLE OF CONTENTS

Attachment to Eschelon's Post-Hearing Brief

I. INTRODUCTION

This Brief begins with a description of the Standard of Review, followed by an overview of Eschelon Telecom of Oregon, Inc.'s ("Eschelon's") business need for contractual certainty. In this discussion, Eschelon addresses Qwest Corporation's ("Qwest's) claim, with respect to a number of the disputed issues,[1] that issues should be excluded from the interconnection agreement ("ICA") and dealt with in Qwest's Change Management Process ("CMP") or Product Catalog ("PCAT"). Eschelon addresses this issue first because it covers multiple issues. After this discussion, the Brief turns to the individual issues set forth in the *Issues by Subject Matter List*.[2] The Issues by Subject Matter List is a roadmap to all of the open issues, ICA Section numbers, and groupings of issues.[3] As directed by the Administrative Law Judge, the parties have previously filed a *Testimony Map* that identifies the testimony (both pre-filed and oral testimony) and exhibits relevant to each of the remaining open issues, as well as a revised version of the Disputed Issues List.

Throughout this case, Qwest has engaged in various methods to shift attention away from the actual issue presented, in an attempt to make Eschelon's position seem

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[1] At the outset of the first arbitration (Minnesota), about one-third of the total disputed issues were issues for which Qwest wanted to exclude from the ICA and relegate to CMP, the PCAT or its own discretion. (Eschelon/1, Starkey/13, footnote 24). After the Minnesota Commission's ruling in the Qwest-Eschelon arbitration, a number of those issues closed with Eschelon's language for six states. The list of issues for which Qwest wants to exclude from the ICA is now less than one-third of the total open issues. (Eschelon/1, Starkey/16 and Eschelon/123, Starkey/4, footnote 13). The primary remaining issues that Qwest contends should be addressed in CMP and not in the companies' contract are Issue 1-1 (Interval Changes and Placement), Issue 12-64 (Root Cause & Acknowledgement of Mistakes), Issues 12-71 – 12-73 (Jeopardies), Issue 12-67 (Expedited Orders), Issue 12-87 (Controlled Production).

[2] Eschelon/3, Starkey (Annotated Issues by Subject Matter List - updated on May 3, 2007), discussed at Eschelon/1, Starkey/2-3 (discussing Issues by Subject Matter List).

[3] The cites (*i.e.*, page and line numbers) are from the public (non-confidential) electronic PDF version of the testimony.

extreme, infeasible, or unreasonably burdensome. These methods are based on four broad categories of analytical errors:

- Qwest Error Type Number One: Ignores proposed language
- Qwest Error Type Number Two: Ignores agreed upon language
- Qwest Error Type Number Three: Ignores contract principles
- Qwest Error Type Number Four: Ignores contrary facts in evidence

Identifying and correcting these errors will bring the focus back to where it should be: On the language being proposed and the evidence and the law supporting that language.

First, Qwest often ignores Eschelon's actual proposed language and argues, instead, against language that Eschelon is not, in fact, proposing. An obvious example of this is Issue 12-72 (Jeopardy Classification). Qwest suggests that Eschelon's proposal "contains the requirement that Qwest deliver an FOC on a jeopardy order at least the day before the new due date."[4] This is part of Qwest's claim that Eschelon's proposal "force[s] extra time" in to the process and causes delay.[5] Eschelon's language, however, provides that, even when Qwest does not provide a timely Firm Order Confirmation ("FOC") or provides no FOC at all, Eschelon "will nonetheless use its best efforts to accept the service" when delivered.[6] It specifically states that, if needed, the companies

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[4] Qwest/1, Albersheim/69, lines 4-5.

[5] Eschelon/127, Johnson/24, lines 5-6 [*citing* Washington arbitration (Albersheim Responsive) (Dec. 4, 2006), p. 58, line 21 – p. 59, line 1 ("If a jeopardy situation can be resolved on the original due date, all parties should try to ensure that it is. This is in the best interests of the end-user customer. It makes no business sense to force extra time into the process that could guarantee the original due date is **not** met. But that is exactly what Eschelon's 24-hour advance notice requirement would do.")]. *See* Eschelon/43, Johnson/75.

[6] Proposed ICA Section 12.2.7.2.4.4.1 (emphasis added), *see* Eschelon/43, Johnson/60, lines 24-25 and Eschelon/43, Johnson/61, lines 9-12; *see also* Eschelon/114 (Johnson)(more than 100 examples in which, despite no FOC from Qwest in violation of its own process, Eschelon used its best efforts and successfully accepted the circuit).

will attempt to set a new appointment time "***on the same day***."[7] Qwest ignores this language that on its face provides that, if Qwest attempts to deliver on the original requested due date, Eschelon will make every effort to accept the circuit that day, regardless of whether Qwest sends the required FOC to confirm the due date Eschelon requested or a new due date. A second example is found under Issue 9-34, under which Eschelon proposes language that would require Qwest to provide circuit ID information to Eschelon when Qwest makes a change to its network under 9.1.9 that is specific to an end user customer and the information is "readily available." Qwest, however, refers to switch software upgrades,[8] dialing plan changes,[9] and copper retirement[10] in arguing against language that is not found in Eschelon's proposal and that is applicable to situations to which Eschelon's proposed language does not apply. A more extreme proposal is easier to attack than a reasonable one. While there may be reasons to reject that more extreme proposal, Eschelon's reasonable proposal should not be rejected based on flaws not found in its language. When analyzing Qwest's arguments, each claim made by Qwest should be compared to the actual language of Eschelon's proposals.

Second, Qwest frequently ignores agreed upon language in the ICA (either in the same section or elsewhere in the ICA). An example of this second type of error may be found in Qwest's position with respect to Issue 9-31 (Nondiscriminatory Access to UNEs). There, Eschelon proposes that "access to UNEs" be defined to include "moving, adding to, repairing, and changing" UNEs.[11] Qwest has objected to this language on the

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[7] Proposed ICA Section 12.2.7.2.4.4.1 (emphasis added).

[8] Qwest/43, Stewart/15, line 26.

[9] Qwest/43, Stewart/15, lines 25-26.

[10] Qwest/37, Stewart/25 ("Again, in the Qwest-Covad arbitration, the Commission rejected Covad's notice proposal for copper retirements…")

[11] Proposed ICA Section 9.1.2 (closed language).

ground that this phrase is unduly vague.[12] Qwest's objection ignores the fact that the phrase "moving, adding to, repairing and changing" is closed language, *as this very language appears in Qwest's own proposal as well*.[13] Although Qwest accuses Eschelon of ignoring closed language with respect to this same Issue (9-31),[14] Qwest is actually pointing to language that, although closed, Qwest has expressly stated it interprets differently from Eschelon. That is very different from saying that language to which the parties have actually agreed is "vague." Qwest has made it very clear that it does not view the functions of "moving, adding to, repairing and changing" as related to "access" to UNEs under Section 251 of the Act.[15] If Qwest disagrees that these functions are governed by Section 251, then obviously ICA language is needed to make that obligation clear, or Qwest will unilaterally impose its judgment (resulting in less "access" and higher tariff rates).[16]

In this example, then, the parties have agreed to identical language for the phrase "moving, adding to, repairing, and changing." Qwest does not explain how the phrase can be unduly vague when proposed by Eschelon but not when proposed by Qwest. When analyzing Qwest's arguments, relevant closed language and the practical effect of that language should be considered when evaluating the claims made by Qwest.

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[12] Qwest/14, Stewart/15, lines 4-5; Qwest/14, Stewart/16, lines 3 and 27; and Qwest/14, Stewart/18, line 13. *See also* Eschelon/6, Starkey/46 [MN Transcript at Vol. 3, p. 131, lines 1-6 (cross examination by Mr. Devaney)].

[13] Qwest/14, Stewart/14, line 10 and Qwest/37, Stewart/15. *See also* Oregon Tr., Vol. 1, 0100, line 20 – 0101, line 9.

[14] Qwest/37, Stewart/10-12.

[15] *See e.g.*, Qwest/37, Stewart/3 ("While Qwest believes that design changes are not a service required under Section 251 of the Act and therefore are not governed by the Act's cost-based pricing requirement…")

[16] Eschelon/123, Starkey/87, lines 12-16.

Third, Qwest isolates language and argues that it has unintended or extreme consequences when it is clear that the language, when read together with other provisions in the ICA, has no such meaning. Generally applicable contract principles provide that, in interpreting a contract, the court must avoid an interpretation that would render a contract provision meaningless,[17] and the contract must be interpreted to give effect to all of its provisions.[18] Qwest ignores these contract principles. Issue 9-31 (Nondiscriminatory Access to UNEs) is also an example of this error type. Error types two and three may overlap and are closely related but, as this example shows, error type three represents an additional problem with Qwest's analysis. Qwest states that Eschelon's proposed language in Section 9.1.2 "implies that access to or use of a UNE entitles it to moves, adds and changes at no additional charge. That result would violate Qwest's right of cost recovery."[19] Qwest does not explain why Eschelon's proposal contains this implication but the other closed language in the same paragraph, which Qwest itself points out relates to the same issue of nondiscrimination, does not. Qwest's argument is simply contrary to the manner in which the contract is organized. In the ICA overall, the general terms and conditions are laid out first and then rate elements are discussed in separate sections, with the prices appearing in Exhibit A. Each sentence of the ICA does not end with a statement that Qwest may charge for this term. Instead, Qwest's concern is already addressed in the general Terms and Conditions section (Section 5) of the ICA. Specifically, Section 5.1.6 of the ICA provides: "Nothing in this

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[17] *Thomas Creek Lumber & Log Co. v. State Forester*, 157 Or App. 204, 213, 970 P.2d 659, 664 (Or. Ct. App. 1998); *Becker v. North's Restaurant's, Inc.*, 157 Or. App. 136, 145-46, 967 P.2d 1246, 1251 (Or. Ct. App. 1998).

[18] *Hardin v. Dimension Lumber Co.*, 140 Or. 385, 389, 13 P.2d 602, 603-04 (Or. 1932); *Anderson v. Divito*, 138 Or. App. 272, 278, 908 P.2d 315, 320 (Or. Ct. App. 1995).

[19] Qwest/37, Stewart/13-14 (last two lines of p. 13 and first two lines of p. 14).

Agreement shall prevent either Party from seeking to recover the costs and expenses, if any, it may incur in (a) complying with and implementing its obligations under this Agreement, the Act, and the rules, regulations and orders of the FCC and the Commission. . . ." When Section 5.1.6 is given effect and read together with Eschelon's proposed language for Section 9.1.2,[20] there is no reasonable inference that Qwest's right of cost recovery is violated. When analyzing Qwest's arguments, accepted contract principles (as well as the organization of the contract itself) should be considered.

Finally, Qwest frequently ignores contrary facts in evidence. Qwest's arguments regarding Issues 12-64 (Root Cause Analysis and Acknowledgement of Mistakes) and 12-72 (Jeopardy Classification) reflect examples of this error type. For example, as to Issue 12-64, Eschelon's proposed language for this section is based on an order by the Minnesota Commission in a complaint case brought by Eschelon against Qwest after a Qwest error resulted in Eschelon losing a large customer (the "*MN 616 Case*").[21] In response to Eschelon's complaint, the Minnesota Commission found Qwest's service inadequate and required Qwest to implement procedures for investigating and acknowledging its mistakes.[22] Qwest's witness, Ms. Albersheim, in testimony filed on May 25, 2007 asserted that, "Eschelon's proposed language expands Qwest's obligation well beyond what was ordered in Minnesota."[23] Ms. Albersheim failed to mention that two months earlier the Minnesota Commission adopted Eschelon's proposed language

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[20] In addition, if the rates are approved, they are reflected in Exhibit A or will be pursuant to Section 2.2 when approved. If the rates are unapproved, Section 22.6 provides a mechanism for Qwest to recover its costs. If Qwest seeks a right to charge a non-TELRIC based rate in some other proceeding (*see* Eschelon/6, Starkey/32 [MN Transcript, Vol. 2, pp. 136-137, Ms. Stewart]) and prevails, then the change in law provisions of the ICA will apply. Under Qwest's argument, none of these provisions are given effect, though they must be under Oregon law.

[21] Eschelon/1, Starkey/64-74.

[22] Eschelon/5, Starkey/1-5 [Order, *MN 616 Case* (Nov. 12, 2003)].

[23] Qwest/18, Albersheim/31, lines 14-15.

and unequivocally rejected Qwest's attempt to narrowly construe its previous order, stating, "The Commission's concern for the anticompetitive consequences of service quality lapses has never been as narrow as Qwest's language would suggest."[24] As to Issue 12-72 (Jeopardy Classification), Qwest testified it "never" made a commitment to provide an FOC the day before the due date.[25] Its commitment, however, is documented in CMP materials prepared by Qwest.[26] Each of these issues is described in more detail in the discussion below by Issue number.

Qwest's characterization of CMP is another way in which Qwest has ignored the evidence. Generally, Qwest has claimed: "The entire purpose of CMP was to ensure that the industry (not just Qwest or one CLEC) is involved in creating and approving processes so that processes are uniform among all CLECs."[27] The current CMP, however, was developed through a process known as CMP Redesign,[28] and only Eschelon provided documentation from the CMP Redesign process regarding the intended purpose of CMP. The CMP Redesign meeting minutes, which were prepared by Qwest, show that CMP was intended to account for differences in individual interconnection agreements.[29] The CMP Document contains the Scope language developed through CMP Redesign to ensure that CMP would account for individual

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[24] Eschleon/30, Denney/15.

[25] Qwest/18, Albersheim/46, lines 13-14 and Qwest/18, Albersheim/52, line 11.

[26] Eschelon/43, Johnson/70, citing Eschelon/113, Johnson/3 (2/26/04 CMP Materials prepared and distributed by Qwest). *See also* Eschelon/43, Johnson/81, lines 9-10 and footnote 137 and Eschelon/43, Johnson/84, footnote 145.

[27] *See* Eschelon/1, Starkey/62, citing Qwest's position statement from the Joint Disputed Issues Matrix (Qwest Position Statement for Issue 1-1 and several other issues). *See also* Eschelon/1, Starkey/27 and footnote 58.

[28] *See e.g.*, Eschelon/43, Johnson/21, lines 6-13.

[29] Eschelon/54 (Johnson) and Eschelon/55 (Johnson); *see also* Eschelon/123, Starkey/37-39.

contract differences.[30] Eschelon has presented extensive exhibits and testimony to provide the relevant facts. An unsupported assertion by Qwest that is contradicted by contrary facts in evidence should be rejected.[31]

The product of these four error types is that certain *myths* tend to develop that, when one or more of these errors is corrected, are then debunked. At the outset of its overview discussion and for each issue, Eschelon summarizes some of these myths and how it has debunked them. These bulleted summaries also help serve as another guide to where discussion of the facts is found in the record. After the myths are debunked, what is left is the actual issue presented by the contract language for resolution by the Commission. Eschelon believes that its proposals are reasonable and well-supported by the evidence. Accordingly, Eschelon asks the Commission to examine the actual issue in dispute, stripped of myth, and adopt Eschelon's language for each issue presented.

II. STANDARD OF REVIEW

The Commission is required by the Telecommunications Act of 1996 ("Telecom Act" or "Act") to resolve any issues set forth in a petition for arbitration of an interconnection agreement or in any response to such a petition.[32] Issues presented for arbitration must be resolved in accordance with Sections 251 and 252 of the Act and the

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[30] Eschelon/123, Starkey/36, lines 8-12 (quoting Section 1.0 of the CMP Document). *See also* Eschelon/1, Starkey/26, lines 6-16.

[31] Although research has not identified any precedent from the Oregon Commission regarding the burden of proof in arbitration proceedings, at least one other state commission has held that Qwest has the burden of proof. See, e.g,, Minn. R. part 7812.1700, subp. 23; see also *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*, MPUC Docket No. P-5692, 421/IC-04-546, Arbitrator's Report at ¶ 6 (December 15, 2004).

[32] 47 U.S.C. 252(4)(C).

rules adopted by the Federal Communications Commission ("FCC").[33] Section 252(c) of the Act requires a state commission resolving open issues through arbitration to, among other things, ensure that the resolution meets the requirements of Section 251 and its implementing regulations. The Commission is required to make an affirmative determination that the rates, terms and conditions that it prescribes in the arbitration proceeding for interconnection are consistent with the requirements of Sections 251(b) and (c) and Section 252(d) of the Act.[34] The Commission may also, under its own state law authority, impose additional requirements pursuant to Section 252(e)(3) of the Act, as long as such requirements are consistent with the Act and the FCC's regulations.[35]

Under Section 251, Qwest must provide interconnection with CLECs that is at least equal in quality to that which Qwest provides to itself and "on rates, terms and conditions that are just, reasonable, and nondiscriminatory . . . ."[36] This Section further requires that Qwest provide nondiscriminatory access to UNEs at any technically feasible point, individually and in combinations, at cost-based rates.[37] Similarly, this Section requires that Qwest provide, at rates, terms and conditions that are just, reasonable and nondiscriminatory, for physical collocation of equipment necessary for interconnection or access to UNEs at Qwest's premises (except that Qwest may provide for virtual collocation if it can demonstrate to the Commission that physical location is not practical for technical reasons or because of space limitations).[38]

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[33] *See* 47 U.S.C. §§251 and 252; *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 13042 (1996) ("*First Report and Order"*); 47 C.F.R. § 51.5 *et seq.*

[34] 47 U.S.C. § 252(d).

[35] 47 U.S.C. §252(e); *First Report and Order*, ¶¶ 233, 244.

[36] 47 U.S.C. § 251(c)(2).

[37] 47 U.S.C. § 251(c)(3).

[38] 47 U.S.C. § 251(c)(6).

III. OVERVIEW: ESCHELON'S BUSINESS NEEDS FOR INTERCONNECTION AGREEMENT TERMS

A. Contract Terms Proposed by Eschelon are Necessary to Provide Eschelon with the Certainty that it Needs to Effectively Compete.

1. Eschelon needs, and is legally entitled to, certainty in its relationship with Qwest

- ***Myth (Qwest decides CLEC business needs)***: Eschelon does not need terms in the contract because Qwest cannot act arbitrarily in CMP and is watching out for the CLECs' interests.[39]
- ***Debunked***: Qwest can and does unilaterally make important changes in CMP over the objections of CLECs. Despite Qwest's assertions that it prefers an opportunity for input from all interested carriers, Qwest rejected Eschelon's requests to give carriers that opportunity, both in these ICA negotiations (which Eschelon offered to open up to other carriers) and in CMP (where Eschelon asked Qwest to allow CLECs to have input into the development of Qwest's ICA template).[40] Eschelon provided many examples, discussed below, of when Qwest has vacillated or maneuvered in CMP to Eschelon's detriment.[41] Ms. Albersheim admitted during cross examination that Qwest is not obligated to withdraw changes in CMP based on CLEC objection,[42] which means that Qwest can act unilaterally in CMP despite CLEC opposition. Under the guise of looking out for the CLECs or being responsive to their needs, for example, Qwest cancelled Eschelon's delayed orders (ensuring they would not be filled), allegedly in response to Eschelon's request that Qwest reduce the substantial backlog by processing them.[43] Qwest tried to characterize this as fulfillment of Eschelon's

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[39] Qwest/18, Albersheim/9, lines 3-4; Qwest/18, Albersheim/21, lines 6-7; Qwest/1, Albersheim/22, lines 19-20; and Qwest/40, Albersheim/13, lines 29-30.

[40] Eschelon/123, Starkey/47, line 10 – /48, line 11; Eschelon/51 (Johnson) and Eschelon/52 (Johnson).

[41] *See e.g.*, Eschelon/1, Starkey/49-94.

[42] Oregon Tr. Vol. 1, 0013, line 16 – 0014, line 2 (Albersheim):

> Q. And when I talk about Qwest being obligated, I am referring specifically to Qwest's obligations under CMP. Under CMP, Qwest isn't specifically obligated to withdraw a change because a CLEC objects; is that correct?
>
> A. That's correct.
>
> Q. And in fact, Qwest isn't obligated to withdraw proposed changes even if all CLECs object; is that right?
>
> A. That's correct. It doesn't seem likely that Qwest would ignore such objections. But Qwest is not obligated, you are correct.

In fact, Qwest has pushed through changes in CMP despite unanimous objection by multiple CLECs, as in the case of the CRUNEC example. See, Eschelon/1, Starkey/57, lines 4-9.

[43] Eschelon/79, Johnson/3 (2/20/02) ("Eschelon advised that they felt the CR should be denied because Qwest isn't reducing the number of held orders, but rather canceling them.")]

> request, when in fact it was a denial.[44] Qwest also claims that its Secret TRRO PCATs, which Qwest has implemented without using CMP, are evidence of its responsiveness to CLECs,[45] even though multiple CLECs objected to Qwest's approach and asked Qwest to negotiate those terms with them in their ICAs.[46] These examples represent a portion of the same "convincing evidence"[47] provided by Eschelon in the Minnesota arbitration proceeding that led the Minnesota Commission to find that "CMP does not always provide CLECs with adequate protection from Qwest making important unilateral changes in the terms and conditions of interconnection."[48] [Error type number four – ignores contrary facts in evidence]

The Telecom Act requires that the Commission arbitrate interconnection agreements whose terms and conditions are tailored to the CLEC's particular business needs. As the FCC has recognized, the Act vests the state commissions with broad authority in establishing terms and conditions of interconnection:

> We expect that the states will implement the general nondiscriminatory rules set forth herein by adopting, *inter alia*, specific rules determining the timing in which incumbent LECs must provision certain elements, *and any other specific conditions they deem necessary to provide new entrants, including small competitors, with a meaningful opportunity to compete in local exchange markets.*[49]

The interconnection agreement that contains the negotiated and arbitrated rates, terms and conditions for interconnection, UNEs, and access to UNEs, is typically a

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[44] *See id*.

[45] Qwest/18, Albersheim/6, lines 24-27; Qwest/18, Albersheim/18, lines 6-9; and Qwest/18, Albersheim/22, lines 12-13.

[46] Eschelon/1, Starkey/75, line 11 – /76, line 9. *See also* Eschelon/59, Johnson/4-5 & Eschelon/59, Johnson/7-9 (11/17/04 & 6/30/05 CMP meeting minutes).

[47] Eschelon/29, Denney/7 [MN Arbitrators' Report ¶ 22], as adopted by the MN PUC Arbitration Order (Eschelon/30).

[48] *Id*.

[49] *First Report and Order* at ¶ 310 (emphasis added); *see also US WEST Communications, Inc. v Hix*, 57 F. Supp. 2d 1112, 1119 (D. Colo. 1999).

lengthy, detailed document. The Act envisions that the interconnection agreement will be a "working document"[50] containing "many and complicated" terms.[51]

The FCC has recognized the need for terms and conditions to be contained in interconnection agreements in order to provide CLECs with the certainty and reliability that they need to compete effectively. Thus, in rejecting Qwest's contention that information concerning its products that it posts on its website need not be contained in a publicly-filed interconnection agreement, the FCC stated that, "[A] 'web-posting exception' would render [Section 252(a)(1)] meaningless, *since CLECs could not rely on a website to contain all agreements on a permanent basis*."[52] While the interconnection agreement can be amended and therefore is not "permanent" in the sense that it is frozen in time, the FCC recognized that permanency is needed for the term of the contract when not amended. Including language in the interconnection agreement will, by providing certainty and predictability in the parties' relationship, minimize future disputes. The objectives of providing clarity and certainty and helping avoid future disputes are legitimate bases for determining that specific language should be included in an interconnection agreement.

For a number of the issues presented, Qwest has proposed contract language and thus agrees with Eschelon that the Commission should arbitrate specific contract language to address those issues. For certain issues, however, Eschelon has proposed

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[50] *TCG Milwaukee, Inc. v. Public Services Comm'n of Wisconsin*, 980 F. Supp. 952, 999 (W.D. Wisc. 1997); *US WEST Communications, Inc. v Hix*, 57 F. Supp. 2d 1112, 1119 (D. Colo. 1999).

[51] *In the Matter of Qwest Communications International, Inc. Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements under Section 252(a)(1)*, 17 FCC Red 19337 at ¶ 8 (rel. October 4, 2002) ("*Qwest Declaratory Ruling*").

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

contract terms that describe the parties' respective obligations and Qwest has proposed that the terms be eliminated altogether, often in favor of a reference to Qwest's Product Catalog ("PCAT") that Qwest maintains on its website. For these issues, Qwest offers no alternative language to describe its commitments; indeed, it offers no commitments at all. Thus, rather than including specific terms and conditions in an interconnection agreement over which the Commission exercises oversight, whose terms cannot be changed unless the contract is amended by either mutual agreement or arbitration, and which will be available for opt in by other CLECs, Qwest would relegate those terms to its PCAT and to its Change Management Process ("CMP").

For each provision that Eschelon advocates, Eschelon has presented evidence of its business reasons for including the provision in the ICA. In many cases, those business reasons relate directly to the service that Eschelon is able to provide to its customers. Qwest's argument is that Eschelon's business needs are irrelevant because the specific provisions that Qwest has identified are somehow qualitatively different, such that they are not appropriate to be included in an ICA. Thus, Qwest would have the Commission not consider the merits of Eschelon's proposals or the business purposes that those proposals are intended to address. Ultimately, in order to fulfill its responsibility to assure that the rates, terms and conditions of interconnection between Eschelon and Qwest are just, reasonable and nondiscriminatory, the Commission will need to evaluate the disputed provisions on their merits, rather than taking the short cut that Qwest urges.

Eschelon depends on the services that it receives from Qwest to be able to serve its customers. To plan its business and compete effectively, Eschelon, like any business,

requires certainty and reliability in its relationship with its most significant vendor.[53] When Qwest changes its processes, this requires that Eschelon also change its processes. With respect to the specific issues presented for arbitration, Eschelon has also presented evidence that shows why it needs the certainty that specific contract language it has proposed will provide.

2. Qwest's CMP and PCAT do not provide certainty and do not replace Section 252 or Commission oversight.

- ***Myth (exhaustion of remedies)***: Eschelon has throughout this entire proceeding claimed that there is a lack of recourse through CMP.[54]
- ***Debunked***: Eschelon has throughout this proceeding fully recognized and addressed the options available to CLECs through CMP.[55] Qwest describes recourse as being *through CMP or with Qwest.* The problem arises when it is clear Qwest and CLEC disagree and therefore a CLEC desires a decision maker *other than Qwest*. If the two companies disagree, the three primary problems regarding Qwest's position on dispute resolution are: (1) Qwest is attempting to push disputes to settings outside of the Commission's oversight, and preferably (from Qwest's perspective) into settings in which Qwest is the sole decision maker;[56] (2) Qwest is attempting to impose a new multiple CLEC requirement on CMP dispute resolution[57] that has no basis whatsoever in the language of the CMP Document;[58] and (3) Qwest is attempting to convert optional processes into a mandatory exhaustion of remedies requirement, in contravention of the CMP Document,[59] also to delay or avoid Commission oversight. The CMP Document expressly recognizes that the Commission (or a court) is the ultimate decision

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[53] *See e.g.*, Eschelon/1, Starkey/9, line 6 – /10, line 18.

[54] Qwest/18, Albersheim/6, lines 16-17 and Qwest/40, Alberhsheim/17, line 21 - /18, line 1.

[55] Eschelon/1, Starkey/45, lines 6-10 (postponement); *Id.* Starkey/49, lines 3-11 (CMP Document §15.0 dispute resolution and Commission complaint); *Id.* Starkey/48, line 10 – /49, line 11 (CMP Document dispute resolution provisions); Eschelon/123, Starkey/42, line 7 – /43, line 10 (postponement); Starkey/43, line 11 – /44, line 7 (dispute resolution); Starkey/44, lines 6-7 & footnote 178 (escalation); Starkey/44 - /45 (ADR); Starkey/44, line 8 – /47, line 9 (alleged multiple CLEC participation); and Eschelon/43, Johnson/18 - /19 (Oversight Review Process).

[56] *See e.g.*, Eschelon/1, Starkey/45, lines 6-8 and Eschelon/123, Starkey/13-14.

[57] *See e.g.*, Eschelon/123, Starkey/45-47.

[58] Eschelon/1, Starkey/48, line 15 – /49, line 11; Eschelon/123, Starkey/47, line 10 – /48, line 11; Eschelon/51 (Johnson) and Eschelon/52 (Johnson).

[59] Eschelon/123, Starkey/44, line 8 – /45, line 14 (quoting CMP Document provisions showing the procedures are optional).

maker, not Qwest.[60] The CMP Document does not require CLECs to forever remain in a CMP loop, recycling its request in many settings, all or most of which have Qwest as the decision maker. [Error type number four – ignores contrary facts in evidence]

- ***Myth (oversight not needed)***: "Qwest cannot force anything through the CMP."[61]
- ***Debunked***: Qwest, for example, forced a change relating to CRUNEC through CMP over the objection of multiple CLECs[62] that significantly disrupted CLEC orders for DS1 capable loops.[63] Only after the issue was raised before the Arizona Commission in a 271 proceeding did Qwest reverse the change.[64] [Error type number four – ignores contrary facts in evidence]

- ***Myth (Burden on Eschelon to provide a compelling justification for altering alleged existing processes):*** Based on the history of CMP, Eschelon should be required to demonstrate a compelling justification for altering existing processes or locking processes into interconnection agreements.[65]
- ***Debunked:*** Despite Eschelon and Qwest arbitrating these issues in four other states prior to Oregon, Qwest claimed for the first time in Oregon that the burden is on Eschelon to provide a "compelling justification"[66] for altering "existing processes." In prior states (and in Oregon as well) Qwest also argued that "processes" should not be in the ICA at all.[67] Qwest's change in its position shows that Qwest now appears to recognize that "processes" may be appropriate for inclusion in the ICA.[68] Qwest cited to no authority to support its "compelling justification" burden-shifting argument.[69] Despite Qwest's testimony that its track record in CMP justifies requiring Eschelon to make a "compelling showing" before altering changes made via CMP notice, the Minnesota Commission disagreed with Qwest's attempt to rewrite CMP history and concluded: "Eschelon has provided convincing evidence that the CMP process does not always provide CLECs with adequate protection from Qwest taking important unilateral changes in the terms and conditions of interconnection."[70] The proper inquiry in this

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[60] Eschelon/53, Johnson/100 (CMP Document, §15.0, p. 100, last bullet point and following sentence).

[61] Qwest/18, Albersheim/6, line 22.

[62] Eschelon/1, Starkey/57, lines 5-7 & footnote 120; and Eschelon/56, Johnson/3-4.

[63] Eschelon/1, Starkey/54, lines 1-14 and Eschelon/132, Starkey/5, line 7 – /6, line 11. *See* Eschelon/56 – Eschelon/58 (Johnson).

[64] Eschelon/1, Starkey/57, line 10 – /58, line 14. *See also* Eschelon/132, Starkey/7, lines 1-5.

[65] Qwest/1, Albersheim/8, lines 17-19; Qwest/1, Albersheim/24, line 9; Qwest/1, Albersheim/69, lines 8-9.

[66] Qwest/1, Albersheim/8, lines 18-19.

[67] Eschelon/123, Starkey/5. *See also* Eschelon/123, Starkey/34-35.

[68] Eschelon/123, Starkey/5-6.

[69] Eschelon/123, Starkey/6.

[70] Eschelon/123, Starkey/7, citing Eschelon/29 (Minnesota Arbitrators' Report, ¶ 22).

> arbitration is not whether Eschelon has made a compelling justification for changing Qwest's stated preferred approach but whether the proposed terms and conditions of an individual ICA meet the requirements of the federal Act, applicable FCC regulations and relevant state law and regulations.[71] [error type three – ignores contract principles – and error type four – ignores contrary facts in evidence]

Qwest has not attempted to dispute that Eschelon needs certainty in its relationship with Qwest.[72] Rather, Qwest's position is that CMP provides Eschelon with sufficient certainty by providing an opportunity for CLEC "input" regarding changes in Qwest's processes. Although Qwest has claimed that it cannot act arbitrarily in CMP, the evidence paints a very different picture. What the evidence shows is that, in CMP, Qwest is king. Thus:

- CMP permits Qwest to implement most changes, even changes that are universally opposed by CLECs, by simply posting a notice and waiting 31 days or less.[73]
- Although CMP provides CLECs with the right to comment on such changes, Qwest may, in its discretion, simply "respectfully decline" CLEC comments and proceed as planned.[74]
- Although the CMP document describes a voting process, voting takes place only in very limited circumstances, and none of the provisions that are at issue in this case would be subject to a vote if those provisions were being addressed in CMP.[75]
- Although CMP permits CLECs to request changes, CLECs, unlike Qwest, cannot simply implement a change by giving notice.[76] Rather, it is wholly up to Qwest to

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[71] Eschelon/123, Starkey/7-8.

[72] Ms. Stewart testified that "a paramount goal of this arbitration should be to establish clarity concerning the parties' rights and obligations" and that "[c]lear ICA language is necessary so that the parties know what is expected of them under the agreement and to avoid or minimize future disputes." Qwest/14, Stewart/15-16.

[73] Eschelon/1, Starkey/45, line 11 – /46, line 14.

[74] Eschelon/1, Starkey/37, lines 14-17 and Eschelon/1, Starkey/53, lines 7-13.

[75] Eschelon/1, Starkey/44, line 5 – /45, line 10 and Eschelon/123, Starkey/41, line 3 – /42, line 6.

[76] Eschelon/1, Starkey/47, line 1 – /49, line 11.

decide whether and how to implement a CLEC-requested change.[77] Further, even if Qwest agrees to implement a CLEC-requested change, Qwest may fail to follow its changed process and may even deny that such a change was ever implemented.[78]

- Although CMP permits a CLEC to request a postponement of a change, it is up to Qwest to decide whether a postponement will be granted.[79] If Qwest decides to not postpone the implementation of a change, Qwest may proceed with the change 30 days after giving notice that the postponement request has been denied.[80]

Eschelon's concerns that CMP and Qwest's PCAT do not provide adequate certainty are not speculative or hypothetical; rather, they are based on Eschelon's own experiences with CMP. Evidence regarding those experiences includes the following examples:

- The CRUNEC example – In April of 2003, Qwest provided a Level 3 CMP notification that it was making a change to its "CLEC Requested UNE Construction" ("CRUNEC") process.[81] This change, which took effect in June 2003, involved deleting the word "conditioning" from the definition of Incremental Facility Work. This seemingly small change to a process that Eschelon did not even use resulted in a sudden and dramatic increase in Eschelon's held orders.[82] Subsequently, all twelve of the CLECs who were active participants in CMP joined in escalating Qwest's conduct through CMP,[83] yet Qwest only agreed to suspend its new policy when the Arizona commission threatened to reopen its determination of compliance with two of the Section 271 checklist items.[84]

  What this example shows is that, through CMP, Qwest can, by notice and over unanimous CLEC objection, implement a policy that has significant adverse

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[77] For example, Eschelon submitted a Change Request to request that Qwest reduce the number of held orders. Qwest "granted" Eschelon's request to reduce the number of held orders by simply canceling the orders that had previously been in held status. *See* Eschelon/79, Johnson/3.

[78] *See e.g.*, Eschelon/110, Johnson.

[79] Eschelon/1, Starkey/45, lines 6-8.

[80] Eschelon/1, Starkey/45, lines 8-10. *See also* CMP Document (see Eschelon/53, Johnson/49), Section 5.5.3.3.

[81] Eschelon/56 (Johnson) and Eschelon/57 (Johnson). *See also* Eschelon/1, Starkey/50, line 12 – /60, line 13.

[82] Eschelon/1, Starkey/54, lines 1-14 and Eschelon/58 (Johnson).

[83] Eschelon/1, Starkey/57.

[84] Eschelon/56 (Johnson).

impacts on CLECs. In this instance, CLECs used CMP's escalation process, but to no avail, with Qwest only relenting after a state commission became involved.

- The Design Changes example – On September 1, 2005, Qwest issued a unilateral, non-CMP announcement[85] addressing two things that would occur in one month's time: (1) Qwest would commence billing CLECs new (non-Commission approved) non-recurring charges for design changes to Unbundled Loop Circuits; (2) Qwest would use a new definition of "design change."[86] When Eschelon inquired about these changes, Qwest CMP personnel responded that "this item is outside the scope of CMP." [87] While this statement would be correct regarding rate issues (which clearly do not belong in CMP), it does not answer the fact that Qwest chose to address the *definition* of design changes (a non-rate or rate application issue) outside the CMP, and also chose to unilaterally establish new rates not only outside CMP but without benefit of Commission review or approval. Qwest then changed its position on inclusion of 4-5 issues within CMP when it developed its position on design changes for arbitration. In its position statement for the definition of design change in the original Disputed Issues List in the Minnesota arbitration, Qwest stated that:

> Qwest agrees that there needs to be a common understanding of this definition, but this definition concerns a process that affects all CLECs, not just Eschelon. The entire purpose of CMP was to ensure that the industry (not just Qwest or one CLEC) is involved in creating and approving processes so that processes are uniform among all CLECs. Processes that affect all CLECs should be addressed through CMP, not through an arbitration involving a single CLEC. Further, implementing a unique process for Eschelon that Qwest does not follow for other CLECs would require Qwest to modify its systems or processes and would cause Qwest to incur costs it is entitled to recover under the Act.[88]

Despite Qwest's call for use of the CMP for addressing the definition of design changes, Qwest then proceeded to agree to a definition of "design change" in the Eschelon arbitration – outside of the CMP process – that differs markedly from

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[85] *See* Eschelon/10 (Denney). *See also* Eschelon/11 (Denney) for Eschelon's escalation of Qwest's notice.

[86] Eschelon/1, Starkey/61, lines 3-18. In its September 1, 2005 letter, Qwest stated that design changes include the following activities: Connecting Facility Assignments (CFA) change, Circuit Reference (CKR) change, CKL 2 end user address change on a pending LSR, Service Name (SN) change, and NC/NCI Code change on a pending LSR. *See* Eschelon/10 (Denney).

[87] *See* Eschelon/11, Denney/3.

[88] Eschelon/1, Starkey/62, lines 5-15.

the definition that it introduced in its September 2005 non-CMP letter to all CLECs.[89]

Regarding the rate for design changes, in the September 1, 2005, notice, Qwest stated that it would "commence billing CLECs non-recurring charges for design changes to Unbundled Loop circuits" beginning one month hence.[90] Qwest provided no basis for the sudden imposition of a new rate, indicating only that it would bill CLECs "at the rate found in the miscellaneous elements of Exhibit A or the specific rate sheet in your Interconnection agreement." [91] Such a reference would seem to presuppose support for the rate in the ICA, but, in fact, the only mention of design change charges in relevant governing documents is at Section 9.6.4.1.4 of the SGAT, which provides for design change charges not for loops but for "Unbundled Dedicated Interoffice Transport," (UDIT).[92] Qwest admitted as much when Ms. Stewart testified in Minnesota that "neither Qwest's SGAT nor the parties' current ICA includes a design change charge for loops."[93] Eschelon explained that this admission merits Qwest's prompt credit of Qwest's unsupported design change charges it has billed CLECs since October 2005.[94]

Qwest's vacillation on the treatment of a significant issue such as the governing definition for design change issues illustrates the need for ICA contract language to govern dealings between Eschelon and its wholesale provider. Qwest's treatment of the design change rate issue that arose in its unexpected non-CMP notice is similarly illustrative of the need for commercial certainty that only contract language can bring.[95]

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[89] *Cf.*, the closed definition of Design Changes (Eschelon/1, Starkey/62, footnote 126), which states in part that, "Design change does not include modifications to records without physical changes to facilities or services, such as changes in the circuit reference (CKR)…or Service Name (NM)…" with the definition in Qwest's September 1, 2005 letter (Eschelon/10, Denney), which states in part: "Among the charges for the design changes that will be billed, the following activities will generate a non-recurring design change charge per occurrence:…"Circuit Reference (CKR) change"…"Service Name (SN) change…" As Mr. Denney discusses further in his testimony, the jury is still out regarding Qwest's actual application of the agreed upon new definition. *See* Eschelon/9, Denney/42, fn. 49.

[90] Eschelon/10, Denney/1.

[91] *Id.*

[92] Eschelon/9, Denney/43.

[93] Mr. Starkey explained that Ms. Stewart acknowledged in her Minnesota arbitration that there was no basis in the SGAT or ICA for a design change charge for UNE loops: "…neither Qwest's SGAT nor the parties' current ICA includes a design change charge for loops." Ms. Stewart's rebuttal testimony in the Minnesota arbitration, 9/22/06, at page 6 – cited at Eschelon/1, Starkey/63, footnote 129.

[94] Eschelon/9, Denney/44, lines 3-6.

[95] Eschelon/1, Starkey/63, line 1 – /64, line 3.

- Minnesota 616 Example – "Minnesota 616" refers to the last digits of the docket number for two Minnesota PUC orders dated 7/31/03 and 11/12/03.[96] Eschelon's proposals for Issues 12-64 and subparts reflect the Minnesota procedures for acknowledging mistakes.[97] The Minnesota Commission, based on documented, "smoking gun" examples of Qwest's errors harming Eschelon's reputation,[98] in the Minnesota 616 orders required Qwest to create procedures for acknowledging mistakes that affect CLEC's End User Customers.[99] The Minnesota 616 example is another example of Qwest's waffling on what issues should and should not be addressed in CMP, and supporting the need for contractual certainty in the ICA. Eschelon clearly does not advocate the use of CMP for this issue as it has consistently maintained that it should be addressed in the ICA.[100] Qwest, on the other hand, has argued that processes and procedures should be handled in CMP and not in ICAs to avoid "one off" processes,[101] but for this issue of acknowledging mistakes (a decision that was unfavorable to Qwest), Qwest did not use CMP, even though it has admitted that Qwest's decision not to use CMP has resulted in an one-off process.[102] Qwest's inconsistent[103] actions in the Minnesota 616 example show that CMP is apparently optional for Qwest when issues affect multiple CLECs,[104] but for CLECs, Qwest's position provides no such option.[105]

- The Secret TRRO[106] PCATs example – In October 2004, Qwest issued a CMP CR addressing the availability of UNEs pursuant to Qwest's interpretation of the TRO,[107] the USTA II decision,[108] and the FCC's Interim Order.[109] Eschelon,

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96 Eschelon/5, Starkey.

97 Eschelon/1, Starkey/64-66. Though Ms. Albersheim claimed that Eschelon's language "expands Qwest's obligation well beyond what was ordered in Minnesota" (Qwest/18, Albersheim/31, lines 11-15), Eschelon showed that Ms. Albersheim was incorrect and that the Minnesota Commission disagreed with Ms. Albersheim on this point. (Eschelon/132, Starkey/15-16).

98 Eschelon/1, Starkey/66-67.

99 Eschelon/1, Starkey/65.

100 Eschelon/1, Starkey/70, lines 1-3. *See also* Eschelon/132, Starkey/16-19.

101 Eschelon/1, Starkey/70, lines 3-5.

102 Eschelon/1, Starkey/70, citing Eschelon/6 [MN Tr. Vol. 1, p. 15, line 17 – p. 16, line 3 (Albersheim)].

103 Eschelon/1, Starkey/72-74. *See also* Eschelon/132, Starkey/14-15.

104 Though Ms. Albersheim erroneously referred to the MN 616 docket as a "settlement" (Qwest/18, Albersheim/33, line 14) in an attempt to explain why Qwest did not use CMP, Eschelon showed that the MN 616 decisions are, in fact, not a settlement. (Eschelon/132, Starkey/20-21).

105 Eschelon/1, Starkey/70-71.

106 Order on Remand, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313; CC Docket No. 01-338, FCC 04-290 (rel. February 4, 2005) ("TRRO").

107 Report and Order and Order on Remand, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*,18 FCC Rcd 16978 (2003) ("TRO"), *vacated in part and remanded, USTA v. FCC,* 359 F.3d 554 (D.C. Cir.), *cert. denied,* 125 S.Ct. 313, 316, 345 (2004)

Covad, and other CLECs opposed the CR on the ground that changes that affected UNE availability should be addressed through ICA negotiation and arbitration rather than CMP, but Qwest refused to withdraw its TRO/USTA II PCAT. When the FCC issued the TRRO, however, it became apparent that Qwest's PCATs did not accurately reflect the permanent unbundling rules and, accordingly, Qwest withdrew the PCATs. Although initially assuring CLECs that it would negotiate with them regarding the TRRO changes, Qwest issued a notice outside of CMP regarding the TRRO requirements, posting new TRO/TRRO PCATs on a password-protected website and making the password available only to those CLECs that agreed to execute a TRO/TRRO ICA amendment. Although Qwest finally did, under pressure from Eschelon and CLECs, make the password to its TRO/TRRO PCAT website available to CLECs, it continued to maintain that there had been an "agreement" that TRO/TRRO issues would be addressed outside of CMP. Qwest represented that the TRRO process would be addressed in CMP after Qwest had revised its SGAT.[110] Subsequently, however, in this and other arbitration proceedings between Qwest and Eschelon, Qwest's witness, Ms. Stewart, testified that Qwest is no longer updating its SGAT, had not updated them in years, and has no intention to do so in the future.[111] Then, just as the hearing was about to begin in the Minnesota arbitration, Qwest changed its position, at least in part, stating that Qwest reached a "policy-related decision" to now that it intended to address some (but not all) of the TRO/TRRO issues in CMP.[112] Qwest made this policy-related decision on its own, without collaboration with or agreement from other companies.[113] Despite testifying at the Minnesota hearing that Qwest planned on taking all of the secret TRRO PCATs to CMP, Qwest later stated that it was taking some (but not all) of these to CMP and asked the CLECs to sort out what issues were in litigation (i.e., issues that Qwest will not take to CMP) and what issues are not.[114] Now that Qwest has unilaterally established processes outside of ICA negotiations (despite requests by Eschelon and other CLECs),[115] CMP (despite promises by Qwest),[116] and

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[108] *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("USTA II"), cert. denied, 125 S.Ct. 313, 316, 345 (2004).

[109] *Unbundled Access to Network Elements; Review of the Section 251 Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, WC Docket No. 04-313, 19 FCC Rcd 16783 ("Interim Order") For a discussion of facts relating to Qwest's secret TRRO PCAT, see Eschelon/87 (Johnson) and Eschelon/1, Starkey/74, line 3 – /94, line 18.

[110] Eschelon/132, Starkey/26, line 1 – /28, line 15.

[111] Qwest/14, Stewart/43, line 21 – /44, line 3.

[112] *See* Eschelon/78, Johnson [Letter from John Devaney, dated October 16, 2006, to Eschelon]. Subsequently, under questioning in the Minnesota hearing, Qwest's witness, Ms. Stewart, appeared to indicate that all of the TRO-related issues would go through CMP. *See* Eschelon/6, Starkey/45 [MN Transcript Vol. 3, p. 89, lines 10-21].

[113] Eschelon/1, Starkey/88.

[114] Eschelon/1, Starkey/88-90.

[115] Eschelon/59, Johnson/4 (11/17/04 CMP November monthly meeting minutes).

[116] Eschelon/59, Johnson/8-9 (6/30/05).

> Commission proceedings (also despite promises by Qwest),[117] it claims that this process constitutes Qwest's "existing" process and is attempting to avoid modifications to this "existing" process in CMP.[118]
>
> What the Secret TRRO PCAT example shows is that Qwest, not CLECs, determines if and when an issue will be addressed in CMP and that Qwest feels free to implement policies outside of CMP even when those policies have obviously far-reaching impact on CLECs. Having adopted its TRO/TRRO policies outside of CMP, without CLEC input, Qwest is now claiming[119] that to the extent those "existing policies" are addressed in CMP, it is prohibitively expensive or otherwise burdensome to make any significant changes. And as explained above in the myths, Qwest is also claiming that Eschelon should be required to provide a "compelling justification" for altering these "existing processes" that Qwest has put in place unilaterally.

These examples demonstrate how CMP really works and tell a story that Qwest's bare statistics regarding numbers of change requests submitted, objected to, or withdrawn[120] ignore. The evidence concerning these examples is detailed and consists primarily of Qwest's own documents. Qwest accuses Eschelon of presenting "a misleading picture of the examples[,]"[121] but fails to present any facts in support of this accusation. Instead, Qwest attempts to sow confusion by referring to change requests other than those that are the subject of Eschelon's examples[122] and attempting to revise

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[117] Eschelon/59, Johnson/8-9 (6/30/05).

[118] Eschelon/123, Starkey/131, footnote 397.

[119] *See, e.g.*, Eschelon/123, Starkey/131, footnote 397.

[120] Cf. Qwest/1, Albersheim/21; Qwest/18, Albersheim/8 - /9.

[121] Qwest/18, Albersheim/18, lines 4-5. Ms. Albersheim admitted during cross examination that she was not part of the Qwest CMP team and she does not usually participate in changes that Qwest made to its PCAT. (Oregon Tr., Vol. 1, 0011, line 25 – 0012, line 18). Eschelon witness, Ms. Johnson, is Eschelon's representative to the Change Management Process (Eschelon/43, Johnson/1, lines 16-20), and was personally involved (Eschelon/43, Johnson/10, line 29 – /11, line 2) in many of the examples that Ms. Albersheim characterizes as "misleading." The evidentiary support for the examples were provided as exhibits to Ms. Johnson's testimony. *See also* Oregon Tr., Vol. 1, 0026 – 0028 (Albersheim), where Ms. Albersheim testifies that she was not involved in the CMP changes related to expedites and that Ms. Johnson was involved. *See also* Oregon Tr., Vol. 1, 0036-0037, where Ms. Albersheim testifies that she was not involved in the changes made to Jeopardies in CMP.

[122] Thus, although the Jeopardies issue discussed in Ms. Johnson's testimony concerns an Eschelon change request, PC081403-1, Ms. Albersheim's testimony discusses a different change request,

history.[123] Again, the Minnesota Commission found that these examples provided by Eschelon in the Minnesota arbitration proceeding constitute "convincing evidence that the CMP process does not always provide CLECs with adequate protection from Qwest making important unilateral changes in the terms and conditions of interconnection."[124]

B. The Commission Should Address Each of the Disputed Issues on its Merits and Reject Qwest's Attempt to Defer Issues to Its PCAT and CMP.

1. Qwest's "standardization" argument should be rejected.

- ***Myth (standardization)***: The entire purpose of CMP is to ensure uniformity and standardization.[125]
- ***Debunked***: CMP was intended to allow and account for differences in individual interconnection agreements (including ICAs not based on SGATs) when

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PC072303-1, which did not relate to FOCs following a Qwest jeopardy. Eschelon/141, Johnson/36-39.

[123] For example, Ms. Albersheim denied that Qwest's June 2003 change to the CRUNEC process caused an increase in Eschelon's held order. Qwest/18, Albersheim/19, line 24 – /20, line 8. When confronted with the email from Qwest's employee confirming that the CRUNEC change had, in fact, caused Eschelon to experience held orders, Ms. Albersheim claimed that the Qwest employee, who was involved in investigating this issue at the time the events were taking place, was "confused." Eschelon/6, Starkey/9 [MN Transcript, Vol. 1, p. 54] Ms. Albersheim also claims that Qwest "never made such a commitment," when a jeopardy results from a lack of Qwest facilities, to provide an FOC at least a day before the new due date. Qwest/18, Albersheim/46, lines 13-14 and Qwest/18, Albersheim/52, line 11. In fact, as part of CMP, Qwest expressly acknowledged that its process is to provide an FOC at least a day before the new due date following a Qwest facilities jeopardy. Eschelon/43, Johnson/84, lines 6-8 and Eschelon/127, Johnson/23, lines 15-16. *See also* Eschelon/110, Johnson/4-5.

[124] Eschelon/29, Denney/7 [MN Arbitrators' Report, ¶ 22], as adopted in the MN PUC Arbitration Order (Eschelon/30).

[125] *See* Eschelon/1, Starkey/62 and Eschelon/123, Starkey/38, footnote 159, citing Qwest's position statements from the Joint Disputed Issues Matrix (Qwest position statements, all stating: "The ***entire purpose of CMP*** was to ensure that the industry (not just Qwest or one CLEC) is involved in creating and approving processes so that processes are ***uniform*** among all CLECs.") (emphasis added). *See also* Qwest/1, Albersheim/4 and Eschelon/123, Starkey/34, lines 25-28, citing Ms. Albersheim's Colorado Direct Testimony, pp. 7-8 ("Interconnection Agreements should not contain such product, process and systems operational specifics that these items cannot be managed via the CMP ***as intended***.") (emphasis added); Qwest/1, Albersheim/24 ("[t]rying to make systems or product and process changes in an interconnection arbitration subverts the purpose of the CMP"); Qwest/18, Albersheim/13, lines 8-11 ("The effect of Eschelon's proposed CMP-related ICA language contradicts the primary purposes for which the CMP was created - to establish a single set of systems and processes and a centralized mechanism for managing changes to those systems and processes."); Qwest/18, Albersheim/67, line 14 ("***standardized***" processes) (emphasis added).

implementing changes and using CMP, as shown by the CMP Document itself[126] and the minutes of the meetings when the CMP Document was developed.[127] As discussed below, the Minnesota Commission saw through Qwest's myth and rejected Qwest's claims on this issue. [Error type number four – ignores contrary facts in evidence]

- ***Myth (veto)***: Qwest will have to reject any change request submitted to the CMP by another CLEC if a term is included in Eschelon's ICA and Eschelon did not agree to the change. This gives Eschelon a form of veto power in the CMP.[128]
- ***Debunked***: Currently, different CLECs have different ICA terms,[129] and Qwest testified that individual tailoring of ICA terms is a trend that is often necessary to survive in today's highly competitive telecommunications markets.[130] Qwest provided no evidence that it had to reject any change based on these differing ICAs. In contrast, Eschelon provided evidence that, when Qwest prefers a process that is different from a CLEC's ICA, Qwest does not reject it based on an individual CLEC's ICA terms. For example, Qwest's recent dispute with McLeodUSA over contract terms relating to power[131] shows that when developing its power processes, Qwest did not reject or forego changes that conflicted with McLeodUSA's agreement. Instead, when McLeodUSA commented on a PCAT relating to power, Qwest simply told McLeodUSA (consistent with the Scope of the CMP Document) that McLeodUSA's contract controlled for McLeodUSA and Qwest did not conform its process to the McLeodUSA contract.[132] Eschelon also showed that Qwest is the party with the veto power, as demonstrated by Qwest's implementation of its Version 30 PCAT change to the expedite process over CLEC objection[133] and its implementation of the disruptive CRUNEC change over CLEC objection.[134] The CMP Document

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[126] CMP Document §1.0 (Scope) (Eschelon/53, Johnson/14 & Qwest/2, Albersheim/15), *quoted in* Eschelon/1, Starkey/26, lines 6-16 and Eschelon/123, Starkey/36, lines 8-12.

[127] Eschelon/54 (Johnson) and Eschelon/123, Starkey/37-38 [quoting Eschelon/54 (Johnson), January 22-24, 2002 CMP Redesign Minutes (Att. 9, excerpt from Gap Analysis matrix); Eschelon/54 (Johnson) April 2-4, 2002 CMP Redesign Minutes, p. 15; Att. 6 (Action Items Log, #227, pp. 167-168 & Att. 12); Transcript of CMP Workshop Number 6, Colorado Public Utilities Commission Docket Number 97I-198T (Aug. 22, 2001), p. 292, lines 8-13 (Andrew Crain of Qwest)].

[128] Eschelon/123, Starkey/34, line 28 – /35, line 8, citing Ms. Albersheim's Colorado Direct Testimony, pp. 7-8. *See also* Qwest/1, Albersheim/24, line 27 – /25, line 1 and MN Transcript, Vol. 1, p. 71, lines 2-5 (testimony of Renee Albersheim) ("Again, this is specific process language, it's our same problem, it forces this to be our going-forward procedure, it cannot be changed without Eschelon's agreement.")

[129] Eschelon/43, Johnson/16-18 and Eschelon/47 (Johnson). *See also* Eschelon/123, Starkey/39, line 6 – /40, line 7 and Eschelon/44, Johnson.

[130] Eschelon/132, Starkey/36, line 4 – /37, line 1 and footnotes 160 and 161, citing Ms. Stewart's Rebuttal Testimony in the Minnesota arbitration proceeding.

[131] Eschelon/1, Starkey/128 and footnote 241.

[132] Eschelon/43, Johnson/18 (quoting Qwest CMP response to McLeodUSA).

[133] See discussion of Issue 12-67 (Expedited Orders) below.

[134] Eschelon/1, Starkey/57, lines 6-7 & footnote 120. *See also* Eschelon/56, Johnson/3-4.

> expressly recognizes that conflicts will occur and, when they do, the ICA should have veto power.[135] It also says the Commission is the ultimate decision maker, not Qwest.[136] Qwest is the party seeking the veto power – over the Commission's role per the CMP Document and Section 252. [Error type number four – ignores contrary facts in evidence]

Qwest has claimed that certain provisions proposed by Eschelon are not appropriate for inclusion in the ICA because they interfere with the alleged goal of "uniformity" that Qwest contends CMP was intended to advance.[137] Qwest's claim is contrary to: 1) the Telecom Act, which provides for individualized ICAs that are appropriately tailored to the specific business needs of individual CLECs; 2) the ICA and CMP Document, both of which recognize the possibility for conflict between the ICA and Qwest's PCAT and that, in the event of such conflict, that the ICA controls; and 3) Qwest's advocacy before the FCC and testimony that Qwest has offered in this case, which recognized that the ICA is not intended to be a "one size fits all" document.

Nothing in the Telecommunications Act requires that the terms and conditions of an interconnection agreement be identical for all CLECs. To the contrary, the purpose and structure of the Act reflect exactly the opposite: that an interconnection agreement should be tailored to accommodate the specific needs of the CLEC that is a party to it, in order to provide that CLEC with a "meaningful opportunity to compete."

First, the Act requires that the ILEC engage in negotiations with any CLEC that requests it and, when those negotiations do not result in a completed agreement, to participate in arbitration. The Act does not provide for negotiations and arbitration

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[135] Eschelon/53, Johnson/15-16 (CMP Document, §1.0 ("In cases of conflict between the changes implemented through this CMP and any CLEC interconnection agreement (whether based on the Qwest SGAT or not), the rates, terms and conditions of such interconnection agreement shall prevail as between Qwest and the CLEC party to such interconnection agreement.").

[136] Eschelon/53, Johnson/101 (CMP Document, §15.0, p. 101, last bullet point and following sentence).

[137] *See e.g.*, Qwest/1, Albersheim/4, lines 5 & 9 and Qwest/1, Albersheim/26, line 9.

between the ILEC and the "CLEC community," generally. It does not provide for state commissions to conduct generic dockets in order to develop identical terms and conditions for all CLECs. The Act does not limit the ILEC's obligation to that of simply filing a tariff that reflects terms and conditions of interconnection. Rather, it requires that the ILEC negotiate in good faith with each individual CLEC that requests such negotiations.

In the context of the requirement for in-region interLATA entry, the Act permits the incumbent to satisfy those requirements, in part, by making available a commission-approved "statement of the terms and conditions that the company generally offers to provide such access and interconnection" (commonly referred to as a "Statement of Generally Available Terms" or "SGAT").[138] Had Congress intended that the interconnection agreement be a "one size fits all" documents, it would have provided the SGAT as the sole means by which terms and conditions of interconnection would be made available by ILEC. That it did not do so shows that Congress recognized the need for individual CLECs to be able to enter into agreements that are specific to their particular competitive needs.[139]

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[138] 47 U.S.C. § 271(c)(1)(B).

[139] In its *WA Covad Arbitration Order*, the Washington commission specifically rejected Qwest's argument that practices that resulted from Qwest's Section 271 proceedings were required to be "uniform" in interconnection agreements that Qwest enters into with individual CLECs:

> While Qwest relies heavily on "consensus" reached in the Section 271 proceeding as a strong reason for retaining the 30-day period, that argument does not apply to an arbitration proceeding. Parties engage in arbitration to enter into an agreement tailored to the companies' needs, not to adopt a standard agreement. Covad is not bound to the 30 day payment period simply because it was a party to the SGAT negotiations and hearings.

Arbitrator's Report and Decision, *In The Matter Of The Petition For Arbitration Of Covad Communications Company, With Qwest Corporation, Pursuant To 47 U.S.C. Section 252(B) And The Triennial Review Order*, WUTC Docket No. UT-043045, Order No. 04, Nov. 2, 2004 ["WA Covad Arbitration Order"], at note 16 to ¶100.

The ICA similarly recognizes that interconnection agreements are not intended to be "one size fits all" and envisions that there will be differences between the terms and conditions contained in the ICA and the terms published in Qwest's PCAT. To that end, agreed upon language in the ICA provides:

> Unless otherwise specifically determined by the Commission, in cases of conflict between the Agreement and Qwest's Tariffs, PCAT, methods and procedures, technical publications, policies, product notifications or other Qwest documentation relating to Qwest's or CLEC's rights or obligations under this Agreement, then the rates, terms and conditions of this Agreement shall prevail.[140]

The ICA further provides that "*Qwest agrees that CLEC shall not be held to the requirements of the PCAT.*"[141]

The CMP document, too, makes room for substantive differences between changes implemented through CMP and the terms and conditions of CLEC interconnection agreements:

> In cases of conflict between the changes implemented through this CMP and any CLEC interconnection agreement (whether based on the Qwest SGAT or not), the rates, terms and conditions of such interconnection agreement shall prevail as between Qwest and the CLEC party to such interconnection agreement. In addition, if changes implemented through this CMP do not necessarily present a direct conflict with a CLEC interconnection agreement, but would abridge or expand the rights of a party to such agreement, the rates, terms and conditions of such interconnection agreement shall prevail as between Qwest and the CLEC party to such agreement.[142]

These provisions of the ICA and the CMP document would be meaningless if the terms and conditions of interconnection are required to be "standardized," as Qwest

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[140] ICA, Section 2.3. Similar language appears in the SGAT, Section 2.3.

[141] ICA, Section 4 (definition of "Product Catalog"). This same language appears in the SGAT, Section 4.0.

[142] Qwest/2, Albersheim/14-15 [CMP Document Section 1.0].

claims. They would instead provide that, in cases of conflict, CMP controls to maintain uniformity.

Further, Qwest's advocacy before the FCC has recognized the need and appropriateness for specific, individualized interconnection agreements that are tailored to a CLEC's particular needs.[143] Thus, in opposing the then current application of the FCC's "pick and choose" rule, Qwest argued that:

> [T]he pick-and-choose rule restricts the ILEC's willingness to *tailor negotiations and contracts to the specific needs of CLECs and their business plans*. Further, the current rule does not realistically reflect the ordinary trade-offs and give-and-take that characterize free negotiations, in which an ILEC would ordinarily be willing to give up one term of a contract in order to get another.[144]

Further, Qwest argued that, "The ability of carriers to negotiate binding agreements with each other was a cornerstone of the Act."[145]

Qwest's witness, Ms. Stewart, similarly notes that, since the FCC's elimination of the "pick and choose" rule, "CLECs are much less likely to opt into a standard SGAT when ICAs have become increasingly more tailored to CLECs."[146] Ms. Stewart went on to acknowledge that CLECs need individualized ICAs in order to be able to effectively compete, stating, "This tailoring has increased as CLECs have shaped their businesses to have a specialized focus, which is often necessary to survive in today's highly

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[143] Eschelon/1, Starkey/33, line 3 – /34, line 7.

[144] Comments of Qwest Corporation International, Inc., CC Docket Nos. 01-338, 96-98, 98-147 (October 16, 2003) at 4 (emphasis added), discussed at Eschelon/1, Starkey/33-34.

[145] Comments of Qwest Corporation International, Inc., CC Docket Nos. 01-338, 96-98, 98-147 (October 16, 2003) at 6, discussed at Eschelon/1, Starkey/33-34.

[146] Eschelon/132, Starkey/36, line 4 – /37, line 1, citing Ms. Stewart's Rebuttal Testimony in the Minnesota arbitration proceeding.

competitive telecommunications market."[147] Thus, Qwest's argument regarding uniformity represents an error type number four (ignores facts in evidence) – with Qwest even ignoring the testimony of its own witness.

The Minnesota Commission rejected Qwest's arguments on this point, stating:

> The CMP document itself provides that in cases of conflict between changes implemented through the CMP and any CLEC ICA, the rates, terms and conditions of the ICA shall prevail. In addition, if changes implemented through CMP do not necessarily present a direct conflict with an ICA but would abridge or expand the rights of a party, the rates, terms, and conditions of the ICA shall prevail. Clearly, the CMP process would permit the provisions of an ICA and the CMP to coexist, conflict, or potentially overlap. The Administrative Law Judges agree with the Department's analysis that any negotiated issue that relates to a term and condition of interconnection may properly be included in an ICA, subject to a balancing of the parties' interests and a determination of what is reasonable, non-discriminatory, and in the public interest.[148]

2. Qwest's "process" labeling argument should be rejected

- ***Myth (process label is meaningful)***: Process and procedure detail should be addressed only in CMP and not in an interconnection agreement.[149]
- ***Debunked***: Qwest provided no test to distinguish the process and procedure detail that is currently in closed language in the contract, such as that dealing with Customer Service Records, from the terms Qwest seeks to exclude from the ICA.[150] The "process" label is a results-oriented approach that allows Qwest to pick and choose which issues it deems "must" go through CMP.[151] For example, Qwest agreed to individual contract terms with Covad that resulted in Covad being able to charge Qwest for certain repairs.[152] Those contract terms included "process details" such as steps the CLEC must follow (including providing test results isolating the trouble between consecutive CLEC access test points;

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[147] Eschelon/132, Starkey/36, line 23 – /37, line 1, citing Ms. Stewart's Rebuttal Testimony in the Minnesota arbitration proceeding.

[148] Eschelon/29, Denney/6-7 [MN Arbitrators' Report, ¶ 21], as adopted in the MN PUC Arbitration Order (Eschelon/30).

[149] MN Transcript, Vol. 1, p. 58, lines 3-11 (testimony of Renee Albersheim).

[150] *See e.g.*, Sections 12.2.7.2.1 & 12.2.4.1.2 in the Proposed ICA (closed language) and the SGAT.

[151] *See* discussion of Issue 12-64 below.

[152] Eschelon/47, Johnson.

> reporting the repeat trouble within three business days; and providing circuit-specific test results).[153] If Qwest had required this process to go through CMP, other CLECs would have also had an opportunity to charge Qwest for dispatches for repeat troubles (just as Qwest claims it can charge CLECs for expedites and optional testing because it put the terms of those "processes" through CMP).[154] Qwest, however, entered into the agreement with Covad on a "one-off" basis rather than use CMP when the result would have been unfavorable to Qwest.[155] [Error type number four – ignores contrary facts in evidence]

Qwest has also claimed that language describing "process" is inappropriate for inclusion in interconnection agreements because such provisions will "lock in"[156] Qwest's process and "affect multiple CLECs."[157] First, applying this standard, it is unclear what Qwest would contend should be the interconnection agreement, beyond descriptions of the products and rates. The FCC, however, has unequivocally rejected the notion that the terms of an interconnection agreement are properly limited to a "schedule of itemized charges and associated descriptions of the service to which the charges apply."[158]

Second, the proposed ICA is replete with agreed upon language that describes the "manner in which something is accomplished"[159] and could be described as a "process." In any event, to the extent that terms can be described as "processes" or "procedures," the FCC has said that processes and procedures are appropriate content for interconnection agreements:

> Individual incumbent LEC and competitive LEC arrangements governing the ***process and procedures*** for obtaining access to an UNE to which a

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[153] *See id*.

[154] Eschelon/93, Johnson (Expedite Chronology) and Eschelon/80, Johnson (Optional Testing).

[155] Eschelon/1, Starkey/20.

[156] Qwest/1, Albersheim/24, line 25.

[157] *See e.g*., Qwest/1, Albersheim/4, lines 24.

[158] *Qwest Declaratory Ruling* at ¶ 8.

[159] Qwest Response, p. 40, lines 24-25.

> competitive LEC is entitled, are more appropriately addressed in the context of individual interconnection agreements pursuant to section 252 of the Act.[160]

As Qwest acknowledges, there is no bright line between "interconnection agreement terms," on the one hand, and "processes," on the other that will take the decision out of the hands of the Commission.[161] Labeling something as a "process" will not aid the Commission in determining whether a provision should be included in the interconnection agreement. Rather, the Commission must evaluate the disputed provisions on their merits and determine, with respect to each, whether those terms should be contained in the interconnection agreement, not based on some abstract and ambiguous standard, but based on the evidence concerning the specific business needs that those provisions are intended to address.

The Arizona Commission, in connection with Qwest's Section 271 application, rejected an attempt by Qwest to make what Qwest characterized as a "process change" through CMP.[162] Specifically, the Arizona Commission said:

> Staff agrees with Eschelon with respect to the recently imposed construction charges on CLECs for line conditioning. Staff is extremely concerned that Qwest would implement such a significant change through its CMP process without prior Commission approval. As noted by AT&T, during the Section 271 proceeding, the issue of conditioning charges was a contested issue. Language was painstakingly worked out in the Qwest SGAT dealing with the issue of line conditioning which Qwest's new policy is at odds with. Staff recommends that Qwest be ordered to immediately suspend its policy of assessing construction charges on CLECs for line conditioning and reconditioning and immediately provide refunds to any CLECs relating to these unauthorized charges. Qwest should reinstitute its prior policy on these issues as reflected in its current

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[160] *TRRO*, ¶358 (emphasis added).

[161] Qwest/18, Albersheim/16.

[162] *In the Matter of U.S. WEST Communications, Inc.'s Compliance with Section 271 of the Telecommunications Act of 1996*, Docket No. T-00000A-97-0238, Decision No. 66242 ("*AZ 271 Order*").

> SGAT. If Qwest desires to implement this change, then it should notify the Commission in Phase III of the Cost Docket, but must obtain Commission approval of such a change prior to its implementation. To the extent Qwest does not agree to these conditions, Staff recommends that Qwest's compliance with Checklist Items 2 and 4 be reopened. We agree with Staff.[163]

What this demonstrates is that Qwest's decision to label a change as a matter of "process" does not mean that CMP is the only appropriate forum for addressing that change.

Similarly without merit is Qwest's claim that Eschelon's language will "lock in" Qwest's processes. First, this argument ignores the agreed upon language that provides for the ICA to be amended, either by mutual agreement or through an arbitration proceeding before the Commission.[164] Including these terms in the ICA means that flexibility will not be entirely one-sided, as it is under CMP, and that the burden will be on the party seeking a change to the status quo to justify that change. Second, Qwest advances its argument that including specific language in the ICA will result in Qwest's processes that are "locked in"[165] or "frozen in time"[166] in the abstract, without regard to the specific disputed language. When one reviews the actual language, it is apparent that that language does no such thing.

Finally, the Commission should be extremely skeptical of Qwest's implication that it is acting out of a desire to somehow protect other CLECs**.** As the FCC has observed:

> [I]ncumbent LECs have little incentive to facilitate the ability of new entrants, including small entities, to compete against them and, thus have little incentive to provision unbundled elements in a manner that would

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[163] *AZ 271 Order* at ¶ 109.

[164] ICA Section 1.7.

[165] Qwest/1, Albersheim/24, line 27.

[166] Qwest Response, p. 43, line 4.

> provide efficient competitors with a meaningful opportunity to compete. We are also cognizant of the fact that incumbent LECs have the incentive and the ability to engage in may kinds of discrimination. For example, incumbent LECs could potentially delay providing access to unbundled network elements, or they could provide them to new entrants at a degraded level of quality.[167]

Now that Qwest has its approval under Section 271, Qwest has even less incentive to cooperate. Qwest's lack of incentive to voluntarily cooperate with Eschelon's efforts to compete against it make it all the more important that Eschelon's interconnection agreement contain binding commitments of sufficient specificity as to provide Eschelon with a meaningful opportunity to compete. Absent such commitments, there will be very little to prevent Qwest from making changes to the ways in which Eschelon is able to obtain access to UNEs, to Eschelon's competitive disadvantage and to the disadvantage of Eschelon's customers in Oregon.

IV. ISSUES BY SUBJECT MATTER

1.[168] Interval Changes: Issue 1-1 and subparts

- ***Myth (cumbersome special process)***: The process for lengthening intervals is a cumbersome, burdensome, time consuming and resource intensive new special process that requires Qwest to train its employees to jump over new hurdles.[169]
- ***Debunked***: The process proposed by Eschelon for lengthening intervals is virtually identical to the existing Qwest ICA and SGAT process for new products (reflected in Section 1.7.1). Qwest complains that the process requires Qwest to use "specific forms."[170] Section 1.7.1 (new product) requires the virtually identical forms (Exhibits L and M to the ICA and the SGAT). Eschelon's proposed Exhibits N and O are the same forms, except intervals are substituted for

[167] *First Report and Order*, ¶ 307.

[168] The numbering of issues in this brief corresponds to the Subject Matter numbers found in the Issues by Subject Matter List, see Exhibit 2 to Eschelon's Petition for Arbitration. There are gaps in the numbering because some issues have closed.

[169] Qwest/18, Albersheim/25, line 17 – /26, line 11.

[170] Qwest/18, Albersheim/25, line 24.

> new products. The body of Exhibit N is four lines long; the body of Exhibit O is two paragraphs long. Given that Eschelon's proposed streamlined process for lengthening of intervals is virtually identical to the one that Qwest has had in place for years under the SGAT for new products, no training is required. Furthermore, if Qwest's statements discussed above about its preference for uniformity are valid, it should prefer using the same language and forms for the Oregon ICA as it already must use for lengthening of intervals under the Minnesota order.[171] [Error type number two – ignores agreed upon language]

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.[172] Because of the importance of service intervals to Eschelon's service quality,[173] Eschelon has proposed that the currently existing intervals be incorporated into the ICA so that they cannot be changed unilaterally by Qwest. Although there is no dispute that the language proposed by Eschelon accurately reflects the intervals that are in place today, Qwest takes the position that intervals do not belong in the contract and that they should be subject to change through CMP. Qwest argues that intervals are not appropriate for inclusion in the ICA because it needs "flexibility" to be able to respond to "industry changes."[174]

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[171] Eschelon/29, Denney/7 [MN Arbitrators' Report, ¶22], as adopted by the MN PUC Arbitration Order (Eschelon/30).

[172] Eschelon/1, Starkey/96, lines 16-19. *See also* Qwest/1, Albersheim/26, lines 7-8 (service intervals pertain to "how much time is permitted for Qwest to provision various services to CLECs").

[173] The Minnesota Commission has already recognized the importance of service intervals to CLECs' ability to compete. In the Qwest 271 case, Qwest attempted to increase the loop interval from 5 days to 9 days by simultaneously lengthening the interval for its retail customers and arguing that it should be required to provide service to CLECs only at parity with that provided to its retail customers. The Minnesota Commission rejected Qwest's parity argument, concluding that Qwest cannot make wholesale intervals unreasonable by lengthening its retail intervals and that the 5 day loop interval provided CLECs a meaningful opportunity to compete. *See Findings of Fact, Conclusions of Law and Recommendations, In the Matter of a Commission Investigation into Qwest's Compliance with Section 271(c)(2) (B) of the Telecommunications Act of 1996: Checklist Items 1, 2, 4, 5, 6, 11, 13, and 14*, Docket No. P-421/CI-03-1371 (Sept. 16, 2003) ("*MN ALJ Order*") at ¶ 125.

[174] Qwest/1, Albersheim/34, lines 6-18.

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, although Eschelon has proposed that any change to an interval must be reflected in an ICA amendment, it has also proposed, as an alternative, that Qwest would be permitted to shorten intervals through CMP and that an ICA amendment would only be required to lengthen intervals.[175] According to Qwest, since it obtained its 271 approval, it has shortened intervals thirty nine times[176] and lengthened intervals once.[177] Thus, the interval changes to which Eschelon's second proposal would apply – lengthened intervals – are exceedingly rare, but 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, that agreement may be documented by a simple, one-page advice letter rather than a more formal amendment, similar to the process used when parties agree to add a new product to an ICA.[178]

Qwest contends that it needs flexibility because shortening the interval of one product may require lengthening the interval for another product.[179] The facts do not

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[175] Eschelon/1, Starkey/98, lines 10-12.

[176] Qwest/18, Albersheim/25, lines 7-8. *See also* Oregon Tr., Vol. 1, 0015, lines 6-8 (Albersheim).

[177] Oregon Tr., Vol. 1, 0015, lines 23 – 0016, line 4. The transcript at 0015, line 24 contains a typo. The transcript says that there were "81 instances of a lengthened interval." This should say "1 instance of a lengthened interval." This is evident by the testimony surrounding this sentence: *see e.g.*, the following Q&A says (Q. And in the instance of the one time Qwest lengthened an interval, no CLEC objected to that? A. That's correct.") Further, Ms. Albersheim has provided conflicting testimony on the number of interval increases that have occurred. In direct testimony, Ms. Albersheim testified that Qwest had never increased intervals (Qwest/1, Albersheim/33, line 23 ("so far, Qwest has only decreased intervals"); in rebuttal testimony, Ms. Albersheim testified that there had been two lengthened intervals (Qwest/18, Albersheim/25); and during cross examination, Ms. Albersheim testifies that there has been one lengthened interval (see above). *See also* Eschelon/132, Starkey/62-63, discussing Qwest's inconsistency on this issue.

[178] Eschelon/1, Starkey/107, line 17 – /108, line 11. *See also* ICA Exhibits N and O.

[179] Qwest/1, Albersheim/33, line 26 – /34, line 4.

support Qwest's speculative concern, however. Qwest acknowledges that, while it has decreased a number of intervals since receiving 271 approval, it has never made the trade-off that it asserts "might" be necessary.[180] Qwest also contends that intervals affect all CLECs and that it needs to be able to address intervals in CMP in order to be responsive to the needs of other CLECs.[181] Qwest would apparently have the Commission believe that it is seeking to safeguard the "interests"[182] of CLECs to wait longer to receive service. It is difficult to imagine, however, a groundswell of support within the CLEC community for longer intervals and Qwest has offered no reason to believe that is something that is likely to happen in the future.

When addressing Issue 1-1 and subparts in the Eschelon-Qwest Minnesota arbitration proceeding, the Minnesota ALJs and Commission found as follows:

> Eschelon has provided convincing evidence that the CMP process does not always provide CLECs with adequate protection from Qwest making important unilateral changes in the terms and conditions of interconnection. Service intervals are critically important to CLECs, and Qwest has only shortened them in the last four years. Qwest has identified no compelling reason why inclusion of the current intervals in the ICA would harm the effectiveness of the CMP process or impair Qwest's ability to respond to industry changes. The Administrative Law Judges recommend that Eschelon's first proposal for Issue 1-1 be adopted and that its language for Issues 1-1(a)-(e) also be adopted.[183]

2/3. Rate Application and Effective Date of Legally Binding Changes: Issues 2-3 and 2-4

- ***Myth: (necessary to clear ambiguity)***: Qwest's language must be adopted to avoid ambiguity.[184]

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[180] Qwest/1, Albersheim/33, line 24 and Qwest/1, Albersheim/34, lines 13-14.

[181] Qwest/1, Albersheim/33, lines 13-21.

[182] *See e.g.*, Qwest Response, p. 9, line 23.

[183] Eschelon/29, Denney/7 [MN Arbitrators' Report, ¶ 22], as adopted in the MN PUC Arbitration Order (Eschelon/30).

[184] Qwest/13, Easton/3, lines 18-19.

- ***Debunked:*** Qwest fails to properly take into account that Eschelon has added alternative contract language that addresses stated Qwest's concerns regarding the need for clarity. When Qwest noted that Section 22.4.1.2 is silent regarding the effect of a Commission order that does not specify a true-up of past billing,[185] Eschelon added proposed language to specify that in such cases the rates shall be implemented and applied on a prospective basis from the effective date of the legally binding Commission decision.[186] To provide even more clarity regarding the potential for interim rates to be subject to "true up," Eschelon added language to Section 22.4.1.2 to state that each Party reserves its rights with respect to whether Interim Rates are subject to true-up.[187] Eschelon's added language was crafted to meet Qwest's stated concerns regarding contract clarity surrounding the application of rates. [Error type one – ignores proposed language]

These issues concern how and when changes – either changes in Commission-approved rates or changes in the law – will be implemented during the term of the ICA. The Commission must decide whether a party should have the ability to delay the implementation of an adverse ruling by not giving the other party notice of that ruling (Issue 2-4) and whether the contract should include language that makes the relationship between Section 2.2 and Section 22.0, regarding price changes, explicit (Issue 2-3).

For Issue 2-3, Eschelon originally proposed to either remain silent on the issue in Section 2.2 (by deleting Qwest's proposed insertion that creates a presumption of a prospective rate application)[188] or to include a sentence that simply refers to Section 22.0, where the issue is dealt with more completely.[189] Since this time, Eschelon has maintained its proposal referring to Section 22.0 as its proposal #1 for Issue 2-3, and has made another proposal to Qwest with respect to when rates will take effect (proposal #2), which Eschelon developed in response to a suggestion by the Minnesota Department of

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[185] Qwest/13, Easton/4, lines 3-10 and Qwest/33, Easton/2.

[186] Eschelon/9, Denney/22.

[187] *Id.*

[188] Qwest's proposed language is shown at Eschelon/9, Denney/16-17.

[189] Eschelon/9, Denney/11, lines 17-18. Eschelon's sentence (which Qwest opposed) reads as follows: "The rates in Exhibit A and when they apply are addressed in Section 22."

Commerce in the Minnesota arbitration proceeding.[190] This alternative, which is shown at Eschelon/125, Denney/82, is that while new rates are addressed in Section 22, changes to existing rates are addressed in Section 2.2. Under both of Eschelon's proposals,[191] the issue of whether a rate will be subject to true-up is expressly reserved and, if the Commission order approving the rate is silent on that issue, the rate is given prospective effect from the effective date of the order adopting or changing the rate.

For changes in the law other than rate changes (Issue 2-4), Eschelon's proposal is that such changes be implemented and applied prospectively as of the date that the order is effective, 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. Eschelon's alternative proposal also confirms that it is the duty of the parties to keep their ICA up to date. Either of Eschelon's 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.

Under Qwest's proposal, 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. Qwest's proposal is that, if an order that changes the law does not include a "specific implementation date" and one party gives the other party notice of the order within 30 days of the order's effective date, the change is to be implemented as of the

[190] Eschelon/29, Denney/8 [MN Arbitrators' Report, ¶ 26]. The Minnesota Commission adopted the MN DOC's language for Issue 2-3. See, Eschelon/30 (Denney).

[191] Eschelon/9, Denney/10-13.

effective date. Where neither party gives notice, the change takes effect as of the effective date of an ICA amendment incorporating the change.

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.[192]

Qwest's proposal is further flawed by ambiguity which creates the great potential for future disputes. First, Qwest's language distinguishes between an order's "specific implementation date" and its "effective date."[193] 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 (including a statement that the order to be "effective immediately") that 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. The Commission should not adopt a provision that allows for such an absurd result.

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[192] Eschelon/9, Denney/24, line 12 – /25, line 17.

[193] Qwest/33, Easton/5, lines 5-6 ("An 'effective date' is the date the Commission order takes effect. An implementation date is the date on which the parties are obligated to act pursuant to the order.")

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

- ***Myth (cost recovery):*** Eschelon's proposals on design changes reflect an effort to prevent Qwest from recovering its costs or to limit Qwest's ability in this regard.[194]

- ***Debunked:*** Eschelon's position statement, testimony, and contract language make very clear that Qwest's claims about Eschelon attempting to prevent or limit cost recovery is inaccurate.[195] In fact, Eschelon has proposed interim design change rates for UDIT, loops and Connecting Facility Assignments (CFAs) for the purposes of allowing Qwest to recover its costs for design changes unless and until Qwest seeks, and the Commission approves, different rates.[196] Eschelon's proposal simply makes sure that (a) Qwest continues to provide design changes to Eschelon as it has for years, and (b) Qwest does not double recover its costs for design changes in both non-recurring charges and recurring charges, or assess charges for design changes that in no way reflect the underlying costs of performing the design change.[197] Contrary to Qwest's assertion,[198] Eschelon has consistently maintained that Qwest is entitled to recover its costs.[199] [Error types one – ignores proposed language – and four – ignores contrary facts in evidence]

- ***Myth (Qwest's design change rate applies to all UNEs):*** Though there is not at this time a Commission-approved rate for design changes for UDIT, loops or CFA changes, Qwest claims that its proposed design change rate in Oregon and the Commission-approved design change rate in other states was designed for and applies to all UNEs – not just UDIT[200] – and was included in the Miscellaneous Charges section of Exhibit A to recognize that it applies to all UNEs.[201]

- ***Debunked:*** The contract determines if and when Miscellaneous Charges apply and the fact that a charge is listed in the miscellaneous section of Exhibit A does not provide Qwest unlimited ability to apply that rate to any UNE in the contract.[202] In addition, the cost study on which Qwest's design change charge is based was developed specifically to apply to UDIT and not other UNEs. Eschelon provided public excerpts from Qwest's cost study for the design change

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194 Qwest/14, Stewart/6, lines 23-27 and Qwest/14, Stewart/13, line 28 – /14, line 2.

195 Eschelon/125, Denney/14, lines 3-5.

196 Eschelon/125, Denney/14, lines 7-10 and Eschelon/125, Denney/16, line 17 – /18, line 2.

197 Eschelon/125, Denney/14, lines 5-7. *See also* Eschelon/133, Denney/18, line 3 – /19, line 19.

198 Qwest/14, Stewart/6, lines 23-27 and Qwest/14, Stewart/12-13.

199 Escchelon/125, Denney/14, line 15 – /15, line 16.

200 Qwest/17, Million/17-18.

201 Qwest/37, Stewart/8.

202 Eschelon/125, Denney/23-24. For example, the miscellaneous charge Additional Engineering , 9.20.1 of Exhibit A, applies to collocation, but has nothing to do with loops, while the miscellaneous charge Additional Labor Installation, section 9.20.2 of Exhibit A, applies to out of hours work for loops and UDIT rearrangements, but has nothing to do with collocation. *See* Eschelon/125, Denney/24, lines 13-19.

charge[203] showing that the cost study does not average together costs for all design change products as Qwest claims,[204] but is rather based on 100% probabilities that UDIT-related activities will take place and UDIT-related systems will be used.[205] Further, Qwest recognized itself that the rate applied only to UDIT, as evidenced by the fact that Qwest, for approximately six years, applied the design change charge to unbundled transport and not to design changes for unbundled loops and CFA changes.[206] [Error type four – ignores contrary facts in evidence]

- ***Myth (no basis that design change costs for different UNEs are different):*** "There is no basis"[207] for Eschelon's contention that the costs for design changes for loops are less than those for UDIT design changes.
- ***Debunked:*** Eschelon did in fact establish a basis for concluding that the costs for design changes for loops and CFAs are not the same – and are lower – than the costs for design changes for UDIT. Eschelon showed the unreasonableness and illogical nature of applying a rate for design changes for loops and CFA changes that exceed the rate for the entire installation of the loop (with coordination).[208] Eschelon showed, with help from Qwest's own cost study for design changes, that the costs for design changes for loops are lower than for UDIT and the Qwest rate for design changes applies to UDIT only and is inappropriate to apply it to other UNEs.[209] Eschelon also explained the minimal work that goes into a same day pair change (that occurs when the Qwest technician is already standing at the frame and must only perform a lift and lay) that makes applying a rate developed for UDIT to CFA changes particularly inappropriate.[210] [Error type four – contrary to facts in evidence]

A design change is a change in circuit design after Engineering Review required by a CLEC supplemental request to change a service previously requested by CLEC.[211] Design changes are part and parcel of Qwest's obligation to provide nondiscriminatory access to UNEs under Section 251 of the Act and should be provided at TELRIC

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[203] Eschelon/9, Denney/52-53.

[204] *See* Eschelon/133, Denney/27, line 6 – /28, line 5, responding to Qwest/39, Million/17-18.

[205] Eschelon/133, Denney/27, line 17 – /28, line 5. *See also* Eschelon/125, Denney/31-32.

[206] Oregon Tr., Vol. 1, at 0084, lines 8-15 (testimony of Teresa Million).

[207] Qwest/37, Stewart/7.

[208] Eschelon/9, Denney/47, line 25 – /48, line 15.

[209] Eschelon/9, Denney/52-55.

[210] Eschelon/9, Denney/55, line 13 – /56, line 2. *See also* Eschelon/133, Denney/22, line 14 – /23, line 8.

[211] *See* agreed definition of design change in ICA Section 4.0, Eschelon/9, Denney/40, lines 2-16.

prices.[212] Eschelon's proposed language makes two things clear: 1) that Qwest must continue to provide design changes to Eschelon pursuant to the ICA and 2) that Qwest must provide design changes at TELRIC rates.

The parties' current ICA does not describe any charges for loop design changes or for CFA changes. Eschelon has proposed language that would allow Qwest to charge for these elements, but that language proposal is intertwined with Eschelon's position that loop design changes and CFA changes represent a form of access to UNEs which must be priced at cost-based rates. Eschelon has proposed interim rates for loop design changes and CFA changes, notwithstanding the lack of any evidence provided by Qwest to establish the cost of these types of design changes. Qwest's approach to this issue is to simply expand the application of the rate for UDIT design changes to types of design changes that that rate was never intended to apply to. If the contract is to allow Qwest to assess a new, separate charge for loop design changes and CFA changes, there must be a recognition that the rate for those activities is to be cost based. Indeed, Qwest witness Ms. Million admitted during cross examination that Eschelon is entitled to design changes for UNEs at cost based rates.[213]

Eschelon's proposal is not that it be provided design changes at no charge. To the contrary, Eschelon has proposed interim rates for design changes for loops as well as for CFA changes under certain circumstances (*i.e.*, cutovers of 2 and 4 wire analog loops with Coordinated Installation). This proposal is reasonable, given that Qwest provided

[212] *See e.g.*, Eschelon/9, Denney/47, lines 13-24. See also, Issue 9-31.

[213] Oregon Tr., Vol. 1, 0084, lines 4-7 (Million) ("Q. There is no dispute that Eschelon is entitled to design changes for UNE's at cost based rates, is there? A. No, there's not.")

loop design changes from 1999 until 2005 without a separate charge.[214] Qwest takes the position in this case that the design change rate it proposes of $51.76, a rate that was not approved in Oregon, but rather adopted by the New Mexico Commission, applies to UDIT and loops as well as CFA changes.[215] It is undisputed, however, that, from 1999 until October 1, 2005, Qwest charged an unapproved rate of $103.10 in Oregon for UDIT design changes, but provided CFA changes and loop design changes at no additional charge,[216] which was consistent with the language of both Qwest's SGAT and the parties' current ICA, which describe the application of design changes to UDIT but not to loops.[217] On October 1, 2005, however, Qwest began charging the same unapproved rate that it had been charging for UDIT design changes for loop design changes and CFA changes as well.[218]

In order to accept Qwest's position, the Commission must also accept that Qwest determined that the same design change rate should apply to both loops and UDITs but nonetheless elected to apply that charge only to UDIT and forego payment for loops, a circumstance that Qwest regards as an anathema.[219] Although has Qwest attempted to explain away this incongruity by referring to other circumstances where Qwest did not implement approved rates, it remains that Qwest has provided no evidence regarding why it did not charge any rate (approved or unapproved) for design changes for loops and

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[214] *See, e.g*., Oregon Tr., Vol. 1, 0084, lines 8-15.

[215] Qwest 39/Million/17, lines 8-13.

[216] Oregon Tr., Vol. 1, at 0084, lines 8-15 (testimony of Teresa Million); Eschelon/9, Denney/37, lines 4-9.

[217] Eschelon/9, Denney/43, line 12 – p. 44, line 6 and Eschelon/125, Denney/31-32.

[218] Eschelon/125, Denney/16, lines 1-15.

[219] Cf. Qwest/43, Stewart/4, lines 5-6 ("Any denial of complete cost recovery, even for a limited period, would be unlawful and improper.")

CFA changes.[220] Absent such evidence which, if it existed, would be in Qwest's possession, the reasonable conclusion is the one that Eschelon urges: that Qwest did not apply the design change rate to loops because Qwest understood that the rate was intended to apply to UDIT and not loops.

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. First, 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).[221] Eschelon explained that such a result defies logic because a design change is a component(s) of the installation, and should, therefore, never exceed the rate for the installation itself.[222] Second, the costs for design changes for UDIT versus loops are not similar, as loops and UDIT are different products that utilize different systems,[223] with UDIT being more complex – and higher cost – than loops.[224] Qwest has admitted that UDIT is higher cost than loops by recognizing that LSRs – used for loops – have a higher level of electronic flow-through than ASRs – used for UDIT.[225] Similarly, CFA changes, and particularly

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[220] Eschelon/7, Starkey/24 (AZ Hearing Tr. Vol. 1, pp. 142-145).

[221] Eschelon/9, Denney/48, lines 2-15.

[222] Eschelon/9, Denney/48.

[223] Eschelon showed, with help from Qwest's own cost study, that the design change charge is based on ASRs used for UDIT – not LSRs which are used for loops. It also assumes the use of order processing systems and billing systems for UDIT (EXACT and IABS) – not loops (IMA and CRIS). Eschelon/9, Denney/53-54 and footnotes 60 and 61.

[224] Eschelon/9, Denney/53-55.

[225] Eschelon/9, Denney/55, lines 3-10, quoting Qwest's DR response in Utah Docket 06-049-40, which states, "LSRs have a higher level of electronic flow-through than ASRs." Higher levels of electronic flow-through result in lower levels of manual work and lower costs.

the limited type of CFA change reflected in Eschelon's language for 9.2.3.8,[226] are lower cost than UDIT design changes. In this scenario, Qwest and Eschelon are already in contact and coordinating the cutover (and Eschelon is paying for this coordination[227]) and the Qwest central office technician is already standing at the frame.[228] Accordingly, it requires little, if any additional work to perform a "lift and lay" to switch CFAs.[229] 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 to perform the lift and lay to the new CFA), and certainly would not rise to the level of the UDIT design change charge.[230] Eschelon's proposals for Issues 4-5 and subparts reflect the fact that costs associated with design changes for loops and CFAs (to the extent that they are not already recovered in Qwest's recurring rates) are not comparable to the costs associated with UDIT design changes, and therefore, the same, expensive rate developed for design changes for UDIT should not also apply to loops and CFAs. Unless and until a separate Commission approved rate is established for design changes for UDIT, loops and CFAs, Eschelon's proposed interim rate would reasonably allow Qwest to cover its costs.

[226] The CFA change referred to in Eschelon's proposal (or a same day pair change), is limited to a 2/4 wire analog loop on the same day of a coordinated cut, during test and turn up, excluding batch hot cuts. *See* Eschelon/9, Denney/50, footnote 57. *See also* Eschelon/9, Denney/55, line 13 – /56, line 2.

[227] Eschelon/9, Denney/51, footnote 58.

[228] Eschelon/9, Denney/50, lines 3-4.

[229] Eschelon/9, Denney/50, lines 9-12.

[230] Eschelon/9, Denney/51, lines 3-7.

5. Discontinuation of Order Processing and Disconnection: Issue 5-6, 5-7 and 5-7(a)

- ***Myth (refusal to pay bills):*** Eschelon does not pay its bills and wants the ability to refuse to pay its bills.[231]
- ***Debunked:*** Sections 5.4.2 and 5.4.3 of the ICA clearly state that Qwest may discontinue processing orders and disconnect relevant services when Eschelon fails to pay undisputed amounts. Eschelon's proposals allow for Commission involvement when Qwest employs such serious steps. Eschelon's provisions allow Eschelon the opportunity to dispute Qwest's right to discontinue processing orders and disconnect Eschelon's circuits when Qwest's basis for doing so is in dispute.[232] Eschelon makes regular payments to Qwest[233] and the provisions here would not allow Eschelon to circumvent its obligation to pay its bills. This is not an issue of whether Eschelon pays its bills, but an issue about what process should be in place in the case that bills are not paid in a timely manner.[234] [Error types two – ignores agreed upon language – and four – ignores contrary facts in evidence]

- ***Myth (pay bills on time):*** Eschelon simply needs to pay its bills on time to avoid consequences.[235]
- ***Debunked:*** Qwest ignores two issues in this regard. First, closed language in Section 5.4 requires Eschelon to pay its bills in a timely manner. Eschelon's proposed language, providing some degree of Commission oversight, does not change this. Second, because Qwest reserves for itself the right to determine whether a bill is undisputed,[236] if parties currently are in dispute regarding the amount of Qwest's bills that are in dispute,[237] Qwest would have the unilateral ability to stop processing orders and disconnect relevant services even in cases where Eschelon pays its undisputed bills in a timely manner. [Error types two – ignores agreed upon language – and four – ignores contrary facts in evidence]

- ***Myth (Qwest can't discontinue order processing):*** Eschelon does not explain when Qwest can discontinue order processing.[238]

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[231] *See e.g.*, Qwest/33, Easton/10 and Qwest/33, Easton/14.

[232] Eschelon/125, Denney/38, lines 4-7.

[233] Eschelon/133, Denney/46, lines 9-13.

[234] Eschelon/133, Denney/39, lines 3-14.

[235] Qwest/33, Easton/10, lines 6-8; Qwest/33, Easton/10, lines 16-18; and Qwest/42, Easton/9, lines 19-20.

[236] Eschelon/6, Starkey/14 [MN Transcript, Vol. I, p. 119, lines 10 – 14 (testimony of William Easton)].

[237] Eschelon/6, Starkey/14 [MN Transcript at Vol. 1, p. 118, line 23-p. 119, line 9 (testimony of William Easton)] and Eschelon/9, Denney/81, line 5 – /82, line 2.

[238] Qwest/42, Easton/11, lines 14-22.

- ***Debunked*:** The closed language of 5.4.2 describes the circumstances under which Qwest can discontinue order processing. [Error type two – ignores closed language]

- ***Myth (Commission involvement):*** Eschelon's language would require the Commission to get involved in every payment issue.[239]
- ***Debunked*:** There are a multitude of payment issues that never come before the Commission and Eschelon's language does not change this fact. Commission involvement only comes into play in the extreme circumstance when Qwest takes the drastic steps of discontinuing the processing of orders or disconnecting Eschelon's services. In fact, Eschelon's second proposal for Issue 5-6 would only involve the Commission in cases where Eschelon disputes whether Qwest is justified in discontinuing the processing of orders.[240] [Error type one – ignores proposed language]

- ***Myth (Recourse):*** Eschelon has recourse under the provisions of the ICA if it believes that Qwest is treating it unfairly.[241]
- ***Debunked:*** The closed language of 5.4.2 and 5.4.3 provides that Qwest need only give 10 days notice of its intention to cease processing orders or disconnecting services. It is highly unlikely this matter would be resolved through the dispute resolution provisions of this contract in that time frame.[242] [Error type two – ignores agreed upon language]

This issue concerns whether the ICA should provide for some form of Commission review before Qwest may discontinue processing Eschelon's service orders or disconnect Eschelon's circuits for alleged non-payment. The issue here is ***not*** whether Eschelon pays its bills on time, but rather, what processes should be contained in the contract to address what happens if bills are not paid in a timely manner.[243] Both Eschelon and Qwest have proposed language that allows Qwest to discontinue order

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[239] Qwest/13, Easton/19, lines 2-5. Qwest makes the same argument for issue 5-12 and 5-13. *See* Qwest/13, Easton/29, lines 9-13; Qwest/33, Easton/26, lines 9-11; Qwest/42, Easton/15, lines 16-17; and Qwest/33, Easton/28, lines 19-20 (with regard to 5-13).

[240] *See* Eschelon's proposals in Section 5.4.2. Also note with respect to 5-12, Qwest admits that Eschelon's proposals allow Qwest to obtain a security deposit, see Eschelon/6, Starkey/14 [MN Transcript at Vol. 1, p. 120, lines 6 – 20 (testimony of William Easton)].

[241] Qwest/13, Easton/15, line 21 – /16, line 1.

[242] Eschelon/9, Denney/82, line 14 – /83, line 7.

[243] Eschelon/133, Denney/39, lines 3-14.

processing and disconnect circuits if Eschelon does not make timely payment. Eschelon provided substantial evidence showing that, contrary to Qwest's assertions, these issues are not as simple as Eschelon just paying its undisputed bills on time,[244] as there are numerous reasons why Eschelon and Qwest may disagree about how much Eschelon owes Qwest.[245]

Further, it is undisputed that the discontinuation of order processing and disconnection would have very serious consequences for Eschelon and its customers.[246] 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.[247] 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 because Qwest has decided to disconnect Eschelon's circuits.[248] This would not only be service-affecting but would also be potentially dangerous for Eschelon's customers as they would unexpectedly be left without emergency services.[249]

The difference between the parties' positions is that Eschelon's proposal (with two alternative proposals for Issue 5-6) would help assure that such drastic action is not taken unless it is warranted and that end user customers are protected from the potential for harm. Eschelon has proposed two alternatives that would provide for Commission review before Qwest may discontinue order processing. The first proposal is that Qwest

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[244] *See* Qwest's Position Statements in the Disputed Issues Matrix for Issues 5-7, 5-7(a), 5-8, 5-9, 5-11 and 5-12 (10/10/06, pp. 35-46).

[245] Eschelon/9, Denney/75-82 and Eschelon/12, Eschelon/13, Eschelon/14, Eschelon/15, Eschelon/16, Eschelon/17, Eschelon/18, Eschelon/19, and Eschelon/20.

[246] Qwest/33, Easton/11, lines 13-16.

[247] Eschelon/6, Starkey/13 [MN Transcript at Vol. 1, p. 115 (testimony of William Easton)].

[248] Eschelon/9, Denney/62, lines 16-19.

[249] Eschelon/9, Denney/62, line 19 – /63, line 1.

could only discontinue processing Eschelon's orders if it receives Commission approval. The second proposal is that Qwest could proceed with discontinuing order processing unless Eschelon asks the Commission to take action to prevent that from happening. Eschelon's proposal for Issue 5-7 (Section 5.4.3) would allow Qwest to disconnect "any and all relevant services" for failure to pay undisputed amounts once Qwest has obtained Commission approval. And for Issue 5-7(a), Eschelon proposes language in Section 5.13.1 that requires a Party to apprise the Commission of a continuing payment default and obtain Commission approval before disconnecting services for untimely payment of undisputed amounts.

In support of its proposals with respect to discontinuation of order processing, disconnection, and deposits, Qwest has presented testimony in an effort to show that Eschelon has a history of not paying its bills on time.[250] Qwest's testimony ignores two facts. First, the closed language of Sections 5.4.2 and 5.4.3 allows Qwest to discontinue order processing and disconnect relevant services in cases where Eschelon does not pay its bills in a timely manner. Second, Qwest's version of this history does not mention that Eschelon has paid Qwest $4.7 million per month for the past year and that Eschelon is a $55.9 million per year wholesale customer for Qwest.[251] Although Qwest criticizes Eschelon as paying its bills more slowly than the industry average, the evidence shows that Eschelon pays, on average, only a few days more slowly than Qwest, and that Eschelon is rated more highly than Qwest with respect to creditworthiness.[252] Plainly, timeliness of payment is not the only, or even the best, indicator of whether a bill will

[250] Qwest/33, Easton/12-14.

[251] Eschelon/133, Denney/46, lines 9-13.

[252] Eschelon/133, Denney/47, line 12 – /48, line 17.

ultimately be paid. To the extent that Qwest's concern is timeliness of payment, rather than the risk of nonpayment, Qwest acknowledges that that concern is addressed by agreed upon provisions regarding late payment charges.[253]

Further, even assuming that Qwest's characterization of Eschelon were accurate, Eschelon's proposals for 5.4.2 and 5.4.3 adequately protect Qwest's interest in receiving payment. Most of these sections have been closed. Eschelon agrees that Qwest may discontinue processing orders and disconnect relevant services if Eschelon fails to pay its undisputed bills in a timely manner. The evidence in this case shows, however, that whether an undisputed amount is past due is itself a subject on which there may be, and has been, disagreement.[254] Under Eschelon's proposal, when there is such a disagreement, it is the Commission, rather than Qwest, that determines the merits of that disagreement. If Qwest is correct, and determining the undisputed past due amount is the simple task that Qwest represents it to be,[255] then Qwest should have little difficulty making its case to the Commission. If Eschelon is correct, however, and the problem of determining whether there is an undisputed past due amount is murkier than Qwest would acknowledge, then Eschelon's chief competitor should not have in its hands the ability to act unilaterally in imposing consequences that Qwest admits would be highly disruptive for Eschelon and its customers.

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[253] Eschelon/6, Starkey/17 [MN Transcript at Vol. 1, p. 150 (testimony of William Easton)].

[254] Eschelon/9, Denney/75-82.

[255] *See e.g.*, Qwest/33, Easton/10, lines 16-18. In arguing that determining the undisputed amount owed by Eschelon is a simple matter, Mr. Easton refers to the process developed in CMP for billing disputes. Qwest/33, Easton/16, lines 11-14. What this testimony overlooks is that the process that Mr. Easton describes is not part of Eschelon's ICA and does not apply to Eschelon. Eschelon/9, Denney/80-81.

Notwithstanding Qwest's contention that "it serves no useful purpose to have the Commission get involved in collection issues at this stage,"[256] the discontinuation of order processing and disconnect are precisely the kind of customer-impacting disputes that call for the Commission's review from the perspective of the public interest. Further, under Eschelon's second proposal for Issue 5-6, Commission review would only be required when Eschelon disputes Qwest's action.

Nor is it a solution to say, as Qwest has said, that Eschelon would still have the ability to bring a dispute to the Commission after the fact, because the ability to dispute Qwest's action after it has occurred would not protect Eschelon and its customers from the harm that such a drastic action would necessarily entail.[257] While such a dispute is pending, Eschelon would be unable to place orders and its customers' services would be disconnected, so even if such a dispute could be resolved very quickly, this would mean that Eschelon's customers would be disconnected and Eschelon would be unable to serve new customers or change service for its existing customers for weeks or, more likely, months. Accordingly, the damage will have already been done. 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 these remedies *before* they are invoked.

6/7. Deposits: Issues 5-8, 5-9, 5-11, 5-12, and 5-13

These issues all relate to the circumstances under which Qwest may demand a deposit to secure future payment. Issues 5-8, 5-9, 5-11, and 5-12 all relate to Section 5.4.5, which sets out the circumstances under which Qwest may demand a deposit as a

[256] Qwest/13, Easton/15, lines 15-17.

[257] Eschelon/9, Denney/82, line 14 – /83, line 7.

consequence of non-payment. Issue 5-13 relates to Section 5.4.7, which concerns the circumstances under which Qwest may seek an increase in the amount of a deposit. Here, too, Eschelon has proposed language that sufficiently protects Qwest's interests, by allowing Qwest to obtain a deposit when there is a legitimate concern about future payment. However, unlike Qwest's language, Eschelon's proposals would trigger the deposit obligation only when there is a real reason for concern. The amount of a potential deposit is substantial – up to two months' worth of charges – so there is good reason to limit the circumstances that would require payment of a deposit to those where it is truly necessary. There are basically four issues relating to deposits: 1) Whether the deposit requirement should be triggered by Eschelon's failure to pay a "de minimus" or non-material amount; 2) What standard should be used for determining whether payment is "Repeatedly Delinquent," thus requiring a deposit; 3) Whether Eschelon should be required to pay a deposit within 30 days of a demand by Qwest in cases when Eschelon has challenged Qwest's deposit demand with the Commission; 4) Whether Qwest should be permitted to require a deposit even if Eschelon has consistently paid its undisputed bills in a timely manner, based on an undefined "review" by Qwest.

a. Non –de minimus or Material amount (Issue 5-8)

- ***Myth (increased disputes):*** Non-de Minimus language increases the likelihood of disputes before the Commission.[258]
- ***Debunked:*** Qwest claims it would not invoke the deposit provisions for trivial amounts,[259] therefore adding this clarification to the contract would not impact disputes before the Commission. Further, Eschelon has proposed, as an alternative to "de minimus," the synonym "non-material."[260] Because materiality

[258] Qwest/13, Easton/23, lines 10-13.

[259] Qwest/13, Easton/23, lines 13-15.

[260] Eschelon/9, Denney/91-92.

> is a concept found in a number of agreed upon provisions in the ICA, this substitution should address Qwest's concern. [Error types two – ignores agreed upon language – and four – ignores contrary facts in evidence]

Eschelon has proposed that the deposit requirement may be triggered by the failure to pay an undisputed "non-de minimus" amount, reasoning that the failure to pay a de minimus amount does not reflect the sort of concern about future payment that should result in a multi-million dollar deposit requirement. In response, Qwest has not claimed that the failure to pay a de minimus amount should trigger a deposit requirement, but only that the addition of this qualification is vague and unnecessary.[261] In response to the concern that the term "non-de minimus" is too vague, Eschelon has proposed, as an alternative, the requirement that a deposit be triggered by the failure to pay a "material" undisputed amount. The term material is used in closed language in numerous sections of the contract and, accordingly, can hardly be considered unreasonably vague.[262] Although Qwest has not agreed to use of the word material in this section, it has not explained why it believes this word does not address its concern about vagueness.

Nor does Qwest's statement that "[i]t is not Qwest's practice to undertake this kind of collection activity for minimal dollar amounts"[263] render this provision unnecessary. Such an expression of intent would provide Eschelon with little protection in the event of a future dispute. If it is the case, as Qwest claims, that Qwest does not intend to demand a deposit based on Eschelon's nonpayment of a de minimus (or non-material) amount, there is no obstacle to the Commission ordering the language that Eschelon has proposed.

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[261] *See e.g.*, Qwest/33, Easton/30-31.

[262] Eschelon/9, Denney/90, line 20 – /92, line 3.

[263] Qwest/13, Easton 23, lines 15-16.

b. Repeatedly Delinquent (Issues 5-9 and 5-12)

- ***Myth (business advantage):*** Eschelon's "Repeatedly Delinquent" proposal gives Eschelon an "unwarranted business advantage."[264]
- ***Debunked:*** Eschelon's "Repeatedly Delinquent" proposal is contained in the interconnection agreements of a number of other carriers.[265] [Error type four – ignores facts in evidence]

- ***Myth (proper incentive):*** Eschelon's "Repeatedly Delinquent" proposal fails to give Eschelon the incentive to pay its bills in a timely manner.[266]
- ***Debunked:*** Section 5.4.8 of the ICA discusses late payment charges and provides the incentive for Eschelon to pay its bills in a timely manner. Section 5.4.5 protects Qwest in the event of non-payment.[267] [Error type two – ignores agreed upon language]

The purpose of language regarding the definition of "Repeatedly Delinquent" is to identify those circumstances where Qwest faces a legitimate threat that it will not be paid. A CLEC making regular, substantial payments, even if payment is occasionally late, does not constitute a threat of nonpayment. The parties have agreed that Qwest will be able to obtain a deposit if payment is "Repeatedly Delinquent," but disagree over how "Repeatedly Delinquent" should be defined. Eschelon has proposed that payment be considered "Repeatedly Delinquent" if made more than thirty days after the due date in three consecutive months. This "three consecutive month" standard is the same as is found in other ICAs to which Qwest is a party, including its ICA in Utah with McLeodUSA, and its ICA with an Eschelon subsidiary, ATI, in Washington.[268] The Minnesota Commission adopted the "three consecutive months" definition to resolve this issue in the Eschelon-Qwest Minnesota arbitration proceeding, stating: "Eschelon's

[264] Qwest/13, Easton/25, line 19 and Qwest/42, Easton/13, line 21 – /14, line 2.

[265] Eschelon/9, Denney/93, line 3 – /94, line 2 and Eschelon/22.

[266] Qwest/13, Easton/25, line 12.

[267] Eschelon/6, Starkey/17 [MN Transcript at Vol. 1, p. 150, lines 1-13 (testimony of William Easton)].

[268] Eschelon/9, Denney/93, line 3 – /94, line 2.

proposal, to define the term as payment of overdue amounts for three consecutive months, would adequately protect both parties when there is a legitimate concern about future payment. Eschelon's language should be adopted."[269] Alternatively, Eschelon proposes that "Repeatedly Delinquent" be defined as payment more than thirty days after the due date three or more times in a six month period. Finally, Eschelon has proposed a third alternative that, rather than using the term "Repeatedly Delinquent," would allow Qwest to seek Commission approval for a deposit if payment is more than 90 days late.[270]

Qwest argues that its proposal, which would allow a deposit if payment is made 30 days after the due date three times in a twelve month period, is preferable because it provides Eschelon with "the proper incentive for timely payment."[271] As Mr. Easton acknowledged at the hearing in Minnesota, the ICA provisions regarding late payment charges are designed to provide the incentive for timely payment;[272] the deposit provisions are intended to protect against ultimate non-payment. Eschelon's language adequately protects Qwest against such a concern.[273] Qwest's proposed standard – three late payments in a twelve month period – would require a deposit when Eschelon regularly pays its bills and poses no risk to Qwest of nonpayment.[274]

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[269] Eschelon/29, Denney/14 [MN Arbitrators' Report, ¶ 55], as adopted by the MN PUC Arbitration Order (Eschelon/30).

[270] *See* Issue 5-12.

[271] Qwest/13, Easton/25, line 12.

[272] Eschelon/6, Starkey/17 [MN Transcript at Vol. 1, p. 150].

[273] See Eschelon/29, Denney/14 [MN Arbitrators' Report, ¶ 55], as adopted by the MN PUC Arbitration Order (Eschelon/30) ["If incentive for timely payment is the concern, there are other remedies in the agreement that address this issue (*e.g.*, penalties for late payment). The term at issue is a demand to make a security deposit, which is a serious step that could jeopardize Eschelon's cash flow, depending on the amount of the deposit required."]

[274] Eschelon/9, Denney/94, lines 3-9 and Eschelon/125, Denney/47, line 19 – /48, line 2.

c. Commission review (Issue 5-11)

- ***Myth (second opportunity to dispute):*** Eschelon seeks a second opportunity to dispute Qwest's bills.[275]
- ***Debunked:*** Eschelon's language for this issue in 5.4.5 clearly does not provide Eschelon with an opportunity to dispute Qwest's bills, but only an opportunity to justify to the Commission, if justification exists, as to why it should not be required to pay a deposit. [Error type one – ignores proposed language]

- ***Myth (pay bills on time):*** Eschelon need only pay its bills in a timely manner in order to avoid having to pay a deposit.[276]
- ***Debunked:*** Closed language in Section 5.4 requires Eschelon to pay its bills in a timely manner. Eschelon's proposed language does not change this. Further, Qwest has indicated that it believes it should be able to request a deposit regardless of whether Eschelon makes timely payments.[277] Further, Qwest reserves for itself the right to determine whether Eschelon has paid its undisputed bills on time. Because Qwest reserves for itself the right to determine whether a bill is undisputed,[278] and parties currently are in dispute regarding the amount of Qwest's bills that are in dispute,[279] Qwest has the unilateral ability to require a deposit under Qwest's proposed language. [Error types two – ignores agreed upon language – and four – ignores contrary facts in evidence]

Eschelon has proposed language providing that, if it disputes the deposit requirement, the deposit will be due as provided by any subsequent Commission order in connection with the dispute. This provision assures that, when there is a genuine dispute about whether a deposit may be required, Eschelon will not be burdened by having to make a multi-million dollar deposit while the dispute is pending.[280]

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[275] Qwest/13, Easton/27, lines 16-18.

[276] Qwest/33, Easton/29, lines 5-7 and Qwest/42, Easton/12, lines 10-12. Qwest applies this argument generally to all of the payment and deposit disputes.

[277] *See* Issue 5-13.

[278] Eschelon/6, Starkey/14 [MN Transcript at Vol. 1, p. 119, lines 10 – 14 (testimony of William Easton)].

[279] Eschelon/6, Starkey/14 [MN Transcript at Vol. 1, p. 118, line 23 through p. 119, line 9 (testimony of William Easton)] and Eschelon/9, Denney/81, line 5 – /82, line 2.

[280] Eschelon/9, Denney/95, lines 4-6 ("If Eschelon is forced to rely solely on the dispute resolution provision in this instance, it is likely that Eschelon would be required to pay a deposit that Qwest demanded before recourse could be sought and obtained at the Commission.")

Qwest objects to this provision on the ground that, because the deposit requirement only applies to undisputed past due amounts, Commission oversight is unnecessary.[281] However, as discussed above and as the evidence shows, Qwest's decision to label an amount as "undisputed" does not mean that Eschelon does not dispute that amount. Commission involvement may well be necessary in order to determine whether an amount claimed by Qwest to be past due is, in fact, "undisputed."

d. Review of Credit Standing Causing Deposit Demand: Issue 5-13

- ***Myth (limits of 5.4.7):*** Qwest's proposed Section 5.4.7 is limited by both 5.4.5 and the need for a "triggering event."[282]
- ***Debunked:*** The only limit in 5.4.5 that applies to section 5.4.7 is the size of the security deposit. Qwest admits that the language in 5.4.7 operates independently of 5.4.5 and even if Eschelon paid its bills in a timely manner, Qwest could still require a deposit under 5.4.7.[283] Further, Qwest argues that the credit review is the "triggering event" but can not point to what part of the credit review triggers action and in fact states that there may be no change at all and yet Qwest could seek a security deposit.[284] [Error types two – ignores closed language – three – ignores contract principles – and four – ignores contrary facts in evidence]

Even more egregious than Qwest's position with respect to deposits is the language that Qwest has proposed with respect to the circumstances under which it may seek an "increase" in the amount of the deposit. Although Qwest is ostensibly willing to agree that Section 5.4.5 should contain limitations on its ability to demand a deposit,

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[281] Qwest/33, Easton/26, lines 6-14.

[282] Qwest/13, Easton/30, line 28 – /31, line 3 and Qwest/33, Easton/27, lines 8-13.

[283] Eschelon/6, Starkey/15 [MN Transcript at Vol. 1, p. 122, lines 4 – 18 (testimony of William Easton)].

[284] *See* Qwest/42, Easton/16, lines 19-20 ("I would suggest that judgment is appropriate for many business issues and relationships.") Similarly, Mr. Easton testified in his Minnesota Surrebuttal Testimony at p. 15, lines 6-9 ("I would suggest that not every business practice needs to have objective, quantifiable criteria. Judgment is appropriate for many business issues and relationships. Calculating credit risk is not a matter of black or white and is not a precise science.") *See also* Eschelon/6, Starkey/15 [MN Transcript at Vol. 1, pp. 122 – 125 (testimony of William Easton)].

Qwest's proposal for Section 5.4.7, if accepted, would render those limitations irrelevant. This is because Qwest takes the position that its proposed 5.4.7 would allow it to increase the amount of Eschelon's deposit from zero, based on Qwest's "review" of Eschelon's "credit standing" or "history"[285] without regard for the limitations set forth in Section 5.4.5.

Qwest is willing to agree in Section 5.4.5 that it would only be allowed to seek a deposit: 1) in connection with the reconnection of service after disconnection for nonpayment; 2) in connection with the resumption of order processing after discontinuation of order processing for nonpayment; 3) if Eschelon is Repeatedly Delinquent in payment of undisputed amounts. With Qwest's proposed Section 5.4.7, however, Qwest takes the position that it should be permitted to demand a deposit up to the full amount of the maximum provided for under 5.4.5[286] even if Eschelon has consistently paid its bill in full in a timely manner and even if Qwest has never disconnected Eschelon's service or discontinued processing of Eschelon's orders. Qwest's proposal does not describe what its review might consist of or the information to be reviewed or even require that the information be credible or verifiable.[287] Qwest also takes the position that its proposal is necessary because "changed circumstances" may warrant a deposit.[288] Under Qwest's proposed language, however, Qwest's ability to

[285] Qwest/33, Easton/17, lines 1-2.

[286] Because of the way Qwest has drafted Section 5.4.7, the determination of the maximum amount of the deposit under that Section is not clear. *See* Eschelon/125, Denney/55, line 18 – /57, line 3.

[287] Eschelon/6, Starkey/15 [MN Transcript at Vol. 1, pp. 122-125].

[288] Eschelon/6, Starkey/15 [MN Transcript at Vol. 1, p. 122 (testimony of William Easton: "What section 5.4.7 is intended to do is to address situations where there is a change in circumstances.")]

demand a deposit based on its "review" is not limited to "changed circumstances."[289] The Minnesota ALJs, as confirmed by the Minnesota Commission, agreed with Eschelon on the lack of standards in Qwest's proposed language for 5.4.7: "Qwest's language is essentially without a standard, and it would permit Qwest to demand a deposit at any time based on its own judgment about the significance of what is in a credit report."[290]

Qwest suggests, in particular, that the ability to demand a deposit based on its "review" of Eschelon's "credit history" would provide Qwest with protection in the event that Eschelon filed for bankruptcy.[291] As a matter of bankruptcy law, however, a payment to a creditor for an antecedent debt of the debtor that is made 90 days or less before a filing for bankruptcy is avoidable as a preference.[292] Such a deposit, to the extent made fewer than 90 days before bankruptcy, would likely not be available, as Qwest appears to assume, to be applied to "large receivables"[293] that might have accrued prior to the bankruptcy filing.

Because of the potential for abuse inherent in Qwest's proposal, Eschelon has proposed that Section 5.4.7 be deleted in its entirety. If, however, it is determined that it is necessary to include a provision that allows Qwest to increase the deposit amount, Eschelon has proposed an alternative that limits such an increase to situations when the standard for requiring a deposit under Section 5.4.5 has already been met (thus prohibiting Qwest from increasing the deposit from zero). This would at least retain

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[289] Eschelon/6, Starkey/15 [MN Transcript, Vol. 1, at pp. 122-23 (testimony of William Easton: the only change in circumstances necessary under Qwest's proposed 5.4.7 is a change in Qwest's belief about whether a deposit is necessary)].

[290] Eschelon/29, Denney/18 [MN Arbitrators' Report, ¶ 74], as adopted by the MN PUC Arbitration Order (Eschelon/30).

[291] Qwest/33, Stewart/28-29.

[292] 11 U.S.C. § 547(b).

[293] Qwest/33, Easton/28, line 24.

Section 5.4.5 as a limit on Qwest's ability to impose a deposit, rather than allowing Qwest to use Section 5.4.7 to ignore that limit.

In resolving these issues related to deposits in the Minnesota arbitration, the Minnesota Commission steered a compromise course between the language proposed by Eschelon and that proposed by Qwest. Thus, the Commission ordered:

- The adoption of Qwest's position with respect to whether the requirement to pay a deposit may be based on Eschelon's failure to pay a de minimus or non-material amount (Issue 5-8);[294]
- The adoption of Eschelon's position (three consecutive months) with respect to the definition of "repeatedly delinquent" (Issue 5-9);[295]
- The adoption of Qwest's position that no prior Commission approval should be required before Eschelon could be required to pay a deposit (Issues 5-11 and 5-12);[296]
- The adoption of Eschelon's position with respect to the increase of the amount of a deposit (permitting Qwest to increase a deposit requirement if one is already in place), but without Eschelon's proposal that Commission approval be required before any such increase (Issue 5-13).[297]

In addition, in Minnesota, agreed upon language requires Commission approval prior to any disconnection of service. In evaluating the language proposed by the parties, the Minnesota Commission attempted to reach a result that balanced Qwest's need to be protected from the risk of nonpayment against Eschelon's need to be protected from

[294] Eschelon/29, Denney/13 [MN Arbitrators' Report, ¶ 50], as adopted by the MN PUC Arbitration Order (Eschelon/30).

[295] Eschelon/29, Denney/14 [MN Arbitrators' Report, ¶ 55], as adopted by the MN PUC Arbitration Order (Eschelon/30).

[296] Eschelon/29, Denney/15 & 16 [MN Arbitrators' Report, ¶¶ 62, 68], as adopted by the MN PUC Arbitration Order (Eschelon/30).

[297] Eschelon/29, Denney/18 [MN Arbitrators' Report, ¶ 74], as adopted by the MN PUC Arbitration Order (Eschelon/30).

unnecessary and over-reaching demands for a deposit.[298] Neither party sought reconsideration of this aspect of the Minnesota Commission's order.

8. Copy of Non-Disclosure Agreement: Issue 5-16

- ***Myth (creates a burden)***: Eschelon's proposal is burdensome.[299]

- ***Debunked:*** The burden Qwest refers to is mailing a copy of signed protective agreements to Eschelon.[300] Further, Qwest regularly provides copies of signed protective agreements to carriers for other matters.[301] [Error type four – ignores contrary facts in evidence]

- ***Myth (unnecessary)***: Eschelon has the ability to audit under Section 18.3.1 if it believes Qwest has abused the process.[302]
- ***Debunked*****:** Section 18.3.1 provides only for very limited audit rights. [Error type two – ignores closed language]

Section 5.16.9.1 describes who within Qwest may, and more importantly, may not, have access to Eschelon's confidential forecasting information. In particular, Qwest employees involved in retail marketing, sales, or strategic planning are prohibited from having access to Eschelon's forecasting information. This Section also requires employees who have access to Eschelon's forecasting information to execute a nondisclosure agreement. In order to confirm that its confidential information is being adequately protected, Eschelon has proposed language, opposed by Qwest, which would

[298] Eschelon/29, Denney/13 [MN Arbitrators' Report, ¶ 50], as adopted by the MN PUC Arbitration Order (Eschelon/30).

[299] Qwest/13, Easton/34, lines 12-15.

[300] Eschelon/6, Starkey/16 [MN Transcript at Vol. 1, p. 127, line 15 through p. 128, line 1 (testimony of William Easton)].

[301] Eschelon/9, Denney/104, line 19 – /105, line 5.

[302] Qwest/13, Easton/34, line 18 – /35, line 2.

require Qwest to provide Eschelon with a copy of the executed nondisclosure agreements.

Qwest opposes Eschelon's proposed language on the ground that it is a "burden,"[303] although Qwest provides no detail or evidence supporting its claim of burden. The nature of the alleged burden did become somewhat clearer at the hearing in Minnesota, however. Under existing practices, there is a Qwest employee who is responsible for securing signatures on nondisclosure agreements and maintaining the signed agreements in a file.[304] Accordingly, the burden that Qwest complains of is the burden associated with putting a copy of the agreement in an envelope and dropping the envelope in the mail.[305] Although Qwest identified "job churn" as a source of burden,[306] Qwest has provided no evidence of the frequency of employee turnover in the relevant positions.[307] Thus, although Qwest has made no effort to quantify the supposed burden, the testimony of Qwest's own witness shows that the burden is, in fact, minimal to nonexistent.

Qwest also claims that it is not necessary for it to provide Eschelon with copies of signed nondisclosure agreements because Qwest already mandates very strict procedures for the handling of CLEC forecasting information and because another part of the ICA, Section 18.3.1, already provides for audits regarding compliance with requirements applicable to the use of proprietary information.[308] First, one of the reasons that the ICA

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[303] Qwest/13, Easton/34, lines 11-16 and Eschelon/6, Starkey/16 [MN Transcript at Vol. 1, p. 127 (testimony of William Easton)].

[304] Eschelon/6, Starkey/16 [MN Transcript at Vol. 1, pp. 126-27 (testimony of William Easton)].

[305] Eschelon/6, Starkey/ 16 [MN Transcript at Vol. 1, pp. 126-27 (testimony of William Easton)].

[306] Qwest/42, Easton/20, line 25.

[307] Eschelon/6, Starkey/16 [MN Transcript, Vol. 1, pp. 126-127 (testimony of William Easton)].

[308] Qwest/13, Easton/34, line 18 – /35, line 2.

requires the execution of nondisclosure agreements is because Eschelon should not be required to take on faith the adequacy of Qwest's procedures for handling confidential information. Second, Section 18.3.1 provides only for limited audit rights regarding the review of "books, records, and other documents used in the Billing process" and it is not clear that that section would allow an audit for the purpose of determining whether Qwest had complied with the requirements of the contract relating to the internal disclosure of Eschelon's confidential information.[309] Further, that audit provision permits an audit no more frequently than once every three years.[310]

9. Transit Record Charge and Bill Validation: Issues 7-18 and 7-19

- ***Myth (Qwest data is not necessary)*:** Eschelon has all the information it needs in order to validate its transit bills from Qwest.[311]
- ***Debunked:*** Eschelon has only half of the information it needs to validate Qwest's bills. Eschelon has detailed call records of the calls made from Eschelon's switch, but does not have detailed call records for the calls for which Qwest bills transit. The ability to match what Eschelon buys (transit on certain originating calls) with what Qwest charges is what Eschelon is seeking in its language.[312] Further, Qwest has stated that it is willing to provide Eschelon sample records, on a limited basis,[313] which is what Eschelon's proposed language requires. [Error type four – ignores contrary facts in evidence]

[309] The word "Audit" as used in Section 18.3.1 is a defined term that means "the comprehensive review of the books, records, and other documents used in the Billing process for services performed, including, without limitation, reciprocal compensation and facilities provided under this Agreement." See ICA Section 18.1.1. At the hearing in Colorado, Qwest's witness, Mr. Easton, stated that the nondisclosure agreements required by Section 5.16.9.1 would not fall within the scope of this provision. See Eschelon/124, Starkey/17 – 18 [CO Transcript, Vol. II, at p. 276, line 6 – p. 279. line 2].

[310] Eschelon/9, Denney/105, lines 21-22.

[311] Qwest/13, Easton/37, lines 8-11; Qwest/33, Easton/31, lines 10-18; and Qwest/42, Easton/21, lines 12-20.

[312] Eschelon/9, Denney/106, line 21 – /107, line 4; Eschelon/125, Denney/61-62 and Eschelon/133, Denney/62-63.

[313] Qwest/33, Easton/33, lines 11-13.

When a call originates on the Eschelon network and then 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.[314] Issues 7-18 and 7-19 concern the information that Qwest must provide to Eschelon on a limited basis in order to allow Eschelon to verify Qwest's transit bills. Eschelon's proposed language would require Qwest to provide Eschelon with sample records for specific offices no more frequently than once every six months, at no charge, in order to allow Eschelon to verify Qwest's transit bills.[315] 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.[316]

11. Power: Issues 8-21 and subparts

These issues are now closed.[317]

14. Nondiscriminatory Access to UNEs: Issue 9-31

- ***Myth: (clarifying compromise)****:* Qwest's proposed additions are a necessary compromise to clarify and narrow the concept of "moving, adding to, repairing and changing the UNE."[318]
- ***Debunked****:* As Qwest accepted Eschelon's proposed language regarding "moving, adding to, repairing and changing the UNE," it simultaneously

[314] Eschelon/9, Denney/106, line 17 – /107, line 6.

[315] Eschelon/29, Denney/21 [MN Arbitrators' Report, ¶ 85], as adopted by the MN PUC Arbitration Order (Eschelon/130). ["If Qwest provides 11-01-XX records free of charge to CLECs for the purpose of billing originating carriers, it is hard to see why Qwest should not be required to provide sample records free of charge to Eschelon, once every six months, for the purpose of verifying Qwest's bills. Eschelon's language for Section 7.6.3.1 should be adopted."]

[316] Eschelon/125, Denney/61-62 and Eschelon/133, Denney/62-63.

[317] See Joint Notice of Closure of Arbitration Issues No. 8-21, 8-21(a), 8-21(b), 8-21(c), 8-21(d), 8-21(e), and Partial Closure of Issue No. 22-90(n).

[318] Qwest/37, Stewart/13-16.

> eviscerated the concept of providing access to such UNE components by framing them as "activities available" for UNEs "at the applicable rates" – in other words, outside of Qwest's § 251 obligations.[319] Qwest explained its "compromise" language as necessary to prevent Eschelon's expanding the word "access"--which Qwest defines as "paying a recurring rate to be able to 'use' the UNE"[320]--to include what it characterizes as a vague list of UNE concepts which are outside the scope of the UNE.[321] Qwest ignores basic contract law when it fails to explain how this justification of its "compromise" fits with the preceding sentence of Section 9.1.2: "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." This agreed upon sentence, requiring "the access to be provided to that element" to be offered with the UNE in a manner that is "equal between all Carriers," clearly encompasses the essential changes, adds, and repairs that have historically been considered part and parcel of the UNE.[322] [Error types one – ignores proposed language – and three – ignores contract law principles]

Under the Telecom Act, Qwest is required 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."[323] "Access" to an unbundled element "refers to the means by which requesting carriers obtain an element's functionality in order to provide a telecommunications service."[324] In order to give effect to this requirement, Eschelon has proposed language that confirms that "Access to Unbundled Network Elements includes moving, adding to, repairing or changing the UNE." Eschelon was prompted to propose this provision as a result of Qwest's attempts to apply non-cost-based, tariff rates to activities that are necessary for Eschelon to be able

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[319] Qwest/37, Stewart/13-16.

[320] Qwest/43, Stewart/10, lines 14-15.

[321] Qwest/43, Stewart/10.

[322] "MAC" = "Moves, Adds and Changes. When you first install a phone system it will cost money to run wires and install phones all over the building. Very quickly you will notice that you'll need to move people and their phones, add phones for new people and change phones around." *Newton's Telecom Dictionary 16th Ed.*

[323] 47 U.S.C. § 251(c)(3).

[324] First Report and Order at ¶ 269. *See also* Eschelon/1, Starkey/151, line 22 – /154, line 15.

obtain the functionality of network elements.[325] Eschelon's language provides Eschelon with reasonable assurance that it will continue to have available to it things that it has available to it now.[326]

Qwest's proposed "compromise" actually represents an attempt to effectively eliminate Eschelon's language altogether. By describing "moving, adding to, repairing and changing" UNEs as "Activities available for Unbundled Network elements" rather than as "Access to" UNEs, Qwest would take these activities, which are essential to Eschelon's ability to obtain the functionality of UNEs, outside of the scope of Section 251(c)(3). 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.[327] Qwest points to other language contained in Section 9.1.2 that requires nondiscriminatory access to unbundled elements as sufficient to address Eschelon's concern.[328] However, because Qwest refuses to acknowledge that "access to UNEs" includes "moving, adding to, repairing and changing" UNEs, this general prescription to provide nondiscriminatory access to UNEs is not enough. Qwest evidently requires further direction to assure that it will comply with its legal obligations.[329] Even if Qwest states that it does not seek, in this case, to impose its tariff rates, unless Eschelon's proposed language is adopted, Qwest will be free to claim, after this case is concluded,

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[325] Eschelon/1, Starkey/143-149. *See also* Qwest/37, Stewart/3 (1st full Q&A).

[326] Eschelon/132, Starkey/101, lines 1-4 ("Qwest provides or has provided these functions for CLECs at cost-based rates, and Eschelon is only asking for certainty that Qwest will continue to provide them at cost-based rates in the future (unless the ICA is amended.") (footnote omitted).

[327] Eschelon/6, Starkey/32 [MN Transcript at Vol. 2, p. 136 (testimony of Karen Stewart)].

[328] Qwest/37, Stewart/11-12.

[329] Eschelon/29, Denney/32, citing Minnesota DOC Witness Dr. Fagerlund's Minnesota Surreply Minnesota testimony at page 13. Page 13 of Dr. Fagerlund's Minnesota Surreply Testimony states: "Eschelon wants the Commission to address this issue so that the parties have a clear decision on whether Qwest can charge non-TELRIC prices for these functions. I continue to support the Eschelon language.") (citations omitted).

that, because "moving, adding to, repairing and changing" UNEs are "not UNEs," it is entitled to charge a tariff rate for these activities.

Although Qwest has argued that the phrase "moving, adding to, repairing, and changing" is unduly vague,[330] this language is actually agreed upon between the parties.[331] Qwest's argument is another example of error type number 2 (ignores agreed upon language). The issue is not what these activities consist of, but whether Qwest is required to perform them pursuant to Section 251(c)(3) at cost-based rates. Apparently, Qwest has no difficulty deciphering what "moving, adding to, repairing, and changing" require it to do, so long as it can charge a tariff rate to do those things.[332]

Qwest relies on testimony by Mr. Starkey that the phrase "move, add to, and change" could potentially include thousands of activities as a basis for its claim that phrase is vague.[333] With this testimony, Mr. Starkey merely recognized Qwest's propensity for breaking activities into "sub-activities" and even "sub-sub-activities" that must be performed to accomplish any particular task involved in providing access to UNEs.[334] To illustrate, Mr. Starkey provided an example of a recent Qwest cost study in which Qwest identified 73 sub-activities to support on rate.[335] And, supporting documentation provided by Qwest for its cost study listed other sub-sub-activities that Qwest says are included within many of these 73 steps.[336] Rather than attempt to list every conceivable activity, sub-activity, and sub-sub-activity that Qwest might perform to

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[330] Qwest/14, Stewart/16, line 27.

[331] Qwest/14, Stewart/14. *See also* Oregon Tr., Vol. 1, 0100, line 20 – 0101, line 9.

[332] Oregon Tr., Vol. 1, 0102, lines 17-20 and Oregon Tr., Vol. 1, 0140-0141.

[333] Qwest 37, Stewart/16-17.

[334] Eschelon/132, Starkey/103, line 10 - 106, line 4.

[335] Eschelon/132, Starkey/104, line 5 - 105, line 7.

[336] Eshelon/132, Starkey/105, lines 3-4.

provide access to UNEs, Eschelon has proposed the terms "move, "add to," and "change" that are generally-accepted in the industry to describe Qwest's obligations.[337] Qwest's argument fails to recognize that Eschelon's language is limited in two important ways. First, the language applies only to those activities that Qwest performs in connection with providing UNEs.[338] Second, the language only requires Qwest to perform those activities that it performs for itself and its retail customers.[339]

Qwest professes concern that Eschelon's proposed language would require Qwest to provide Eschelon with a "superior network" and will prevent Qwest from recovering its costs.[340] This speculation not only ignores Eschelon's proposed language but also ignores other, agreed upon, contract language. First, Eschelon's language requires only "non-discriminatory access," meaning that Qwest will provide Eschelon with the same access that it provides to itself and its retail customers. There is no claim here that "moving, adding to, repairing, and changing" UNEs would require Qwest to do something for Eschelon that it does not do for itself.[341] Furthermore, nothing in Eschelon's proposed language would require Qwest from recovering its costs.[342] The

[337] Eshelon/132, Starkey/105, lines 17-20.

[338] Eschelon/132, Starkey/106, lines 8-15.

[339] Eschelon/132, Starkey/106, lines 16-21.

[340] Qwest/14, Stewart/16-17.

[341] Eschelon 29, Denney/32, describing the Minnesota DOC's position in the Minnesota arbitration proceeding as follows: "In the Department's view, Eschelon's language only commits Qwest to providing nondiscriminatory access to the types of routine network modifications that are necessary to provide access to the functionality of the UNE."

[342] *See Id*.; *see also* Oregon Tr., Vol. 1, 0097, lines 16-20 (testimony of K. Stewart) ("Q. Would you agree with me that Eschelon's proposed language relating to 9-31 doesn't say what would be charged for access to UNE[s]; it only defines what that phrase means? A. I would agree with that.".

parties have agreed upon language, contained at Section 5.1.6, that expressly confirms Qwest's right to recover its costs.[343]

The Minnesota Commission agreed with Eschelon on Issue 9-31 and found as follows:

> It is difficult to understand Qwest's position that Eschelon's language might require Qwest to provide access to an "as yet unbuilt, superior network" or that it might mean Qwest would be unable to charge at all for making such changes. It is a real stretch to find this kind of ambiguity in Eschelon's language. Qwest has pointed to nothing in the language that would require it to perform an activity that is obviously outside of its existing § 251 obligations.
>
> Qwest's proposed language is in fact more ambiguous than Eschelon's, because it would leave unanswered the question whether routine changes in the provision of a UNE would be priced at TELRIC or at some other "applicable rate."
>
> Federal law requires that when a CLEC leases a UNE, the ILEC remains obligated to maintain, repair, or replace it. Unless and until the Commission or other authority determines to the contrary, these types of routine changes to UNEs should be provided at TELRIC rates. Eschelon's language should be adopted for this section.[344]

Qwest's recent conduct demonstrates the need for contractual certainty on this issue. In particular, on August 31, 2006, Qwest issue a non-CMP notice indicating its intention to assess tariff rates to a variety of services necessary for CLECs to have access to UNEs, including design changes.[345] Although Qwest has subsequently claimed that it is not seeking, in this proceeding, approval to charge tariffed rates for these services, it

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[343] ICA Section 5.1.6: "Nothing in this Agreement shall prevent either Party from seeking to recover the costs and expenses, if any, it may incur in (a) complying with and implementing its obligations under this Agreement, the Act, and the rules, regulations and orders of the FCC and the Commission . . . ."

[344] Eschelon/29, Denney/32 [MN Arbitrators' Report], ¶¶ 130-132, 47 C.F.R. § 51.309(c); see also *TRO* ¶ 639 (requiring a LEC to modify an existing transmission facility, in the same manner it does for its own customers, provides competitors access only to a functionally equivalent network, rather than one of superior quality) (as adopted by the MN PUC Arbitration Order (Eschelon/30, Denney).

[345] Eschelon/9, Denney/35, line 13 – /37, line 2.

also has not disavowed an intention to begin doing so in the future. Subsequently, Qwest issued September 11, 2006, Level 3 CMP notice[346] that changed the same day pair changes (i.e., the same limited CFA change covered by Eschelon's proposed language for 9.2.3.9 under Issue 4-5(a)) to limit them to one on the day of the cut – which unnecessarily caused delay for the customer and increased cost for Eschelon.[347] Though Qwest later withdrew this notice, Qwest continued to pursue this change in another forum.[348] Moreover, that Qwest issued the notice at all only serves to underscore the need for clear contract language regarding Qwest's obligations to provide design changes as well as other forms of access to UNEs.

16. Network Maintenance and Modernization: Issues 9-33 and 9-34

- ***Myth (ten digit dialing)***: Section 9.1.9 applies to a change from seven digit dialing to ten digit dialing.[349]
- ***Debunked***: By the terms of ICA Section 9.1.9, Issue 9-33 deals *only* with a sub-set of Qwest network maintenance and modernization "changes to the UNEs in its network." That subset of *UNE changes* is "such changes" as "may result in minor *changes to transmission parameters*."[350] Eschelon proposes to add language to this sentence, and this sentence only, which states that *such changes* will not adversely affect service to End User Customers.[351] Eschelon has not proposed language in this Section saying other types of changes will not adversely affect service to End User Customers. Despite this, Qwest suggests that Eschelon's proposal should be rejected on the grounds that changes to local dialing from seven (7) to ten (10) digits would adversely affect service to End User

[346] PROS.09.11.06.F.04161.P_&_I_Overview_v91.

[347] Eschelon/9, Denney/38, line 11- /39, line 2. Qwest withdrew this particular notice, but as explained in Eschelon/27, Denney, Qwest is still pursuing this change.

[348] Eschelon/1, Starkey/148-149.

[349] Eschelon/6, Starkey/33 [MN Transcript at Vol. 2, p. 138, line 22 – p. 139, line 17 (testimony of Karen Stewart)].

[350] Proposed ICA Section 9.1.9 (Eschelon proposed language) (". . .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 will not adversely affect service to any End User Customers (other than a reasonably anticipated temporary service interruption, if any, needed to perform the work)" (emphasis added).

[351] *See id.*

Customers.[352] A change to local dialing from seven (7) to ten (10) digits is not a change to the UNEs in Qwest's network that results in changes to transmission parameters.[353] This is clear from the closed language of Section 9.1.9 which states that changes to local dialing from seven (7) to ten (10) digits are "changes that affect network Interoperability" and therefore require notice under this Section and the FCC rules.[354] They are two different discussions of two different types of changes, only one of which is open. [Error types two – ignores agreed upon language – and four – ignores contrary evidence]

- ***Myth (undefined consequences)*:** Eschelon's proposed language prohibits network maintenance and modernization changes that have an adverse effect and undefined consequences for violating that prohibition would put Qwest at substantial risk whenever it makes a network change.[355]
- **Debunked**: As Qwest has acknowledged, Eschelon's proposed language does not prohibit Qwest from making changes to its network. Rather, Eschelon's language specifies a remedy if Qwest makes changes that adversely effect service to Eschelon's customers; specifically, if a change adversely impacts an Eschelon customer, Eschelon's language requires Qwest to take corrective action to restore transmission parameters to an acceptable level.[356] [Error type one – ignores proposed language]

Section 9.1.9 governs Qwest's network maintenance and modernization. Two issues remain relating to this Section: 1) Whether Qwest's "network maintenance and modernization" may result in changes that adversely affect service to Eschelon's end user customers; 2) Whether the notice that Qwest provides regarding changes that are specific to an end user customer must include end user customer specific information.

[352] MN Transcript at Vol. 4, p. 15, line 23 – p. 16, line 3; *Id*. p. 17, lines 19-22 (cross by Mr. Devaney of Mr. Webber).

[353] Ms. Stewart admitted during cross examination that an area code split was not a minor change in transmission parameters. Oregon Tr., Vol. 1, 0111, lines 10-12 ("Q. You would agree with me that an area code split is not a minor change in transmission parameters? A. I would agree.") *See also* [MN Transcript at Vol. 5, p. 13, line 22 – p. 14, line 3 (testimony of Mr. Minnesota Department of Commerce Witness Schneider)] and MN Transcript at Vol. 4, p. 18, lines 1-2 (testimony of Mr. Webber).

[354] Proposed ICA Section 9.1.9 (closed language).

[355] Qwest/43, Stewart/15, lines 1-12.

[356] Eschelon/7, Starkey/34 [AZ Hearing Transcript at Vol. 2, pp. 201-202].

a. Adverse Effect on End User Customers (Issue 9-33)

The parties have agreed that Qwest may undertake activities to modernize and maintain its network and that such activities may result in "minor changes to transmission parameters."[357] Eschelon has proposed language that confirms that such changes will not adversely affect service to end user customers and has proposed additional alternative language to address Qwest's stated concerns on this issue.[358] Thus, in response to issues raised by Qwest, Eschelon modified its proposal to expressly permit 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.[359] Eschelon also proposed a second alternative, that states that if Qwest changes caused 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.[360] This language, which was suggested by the Minnesota Department of Commerce, was adopted by the Minnesota Commission, based on the ALJs' conclusion that that language "appears to balance the reasonable needs of both parties in an even-handed matter."[361] The Minnesota Commission specifically rejected Qwest's vagueness argument, observing that "The reference to correcting transmission quality to 'an acceptable level' does not, as Qwest argues, make

[357] Eschelon/1, Starkey/162, lines 16-17, citing closed language in Section 9.1.9 of the ICA.

[358] Eschelon's alternative proposals are set out in Eschelon/1, Starkey/162-163.

[359] See, Eschelon's Option #1, Eschelon/1, Starkey/162-163.

[360] See, Eschelon's Option #2, Eschelon/1, Stakey/163.

[361] Eschelon/29, Denney/34 [MN Arbitrators' Report at ¶142], as adopted by the Minnesota Commission's Order (Eschelon/30).

this language unacceptably vague. The language merely commits Qwest to taking action to restore transmission quality to that which existed before the network change."[362]

Qwest opposed Eschelon's proposed language on the ground that it "faced with a prohibition against changes that have an 'adverse effect' and undefined consequences for violating that prohibition, Qwest would have substantial risk whenever it were to make a network change."[363] At the Arizona hearing, however, Qwest's witness, Ms. Stewart, acknowledged that these concerns are not, in fact, based on Eschelon's proposed language. As Ms. Stewart admitted, Eschelon's Option #2 does not prohibit Qwest from making changes to its network and does define a consequence if a network change causes an unacceptable change in the transmission of voice or data – that is, in the event of such an unacceptable change, Eschelon's language only requires Qwest to take necessary corrective action.[364]

As a general matter, the FCC's rules recognize that industry standards, although obviously important, may not tell the whole story. To that end, the FCC's unbundling rule provides, in part, that, "An incumbent LEC shall not engineer the transmission capabilities of its network in a manner, or engage in any policy, practice, or procedure, that *disrupts or degrades access* to the local loop."[365] In adopting this rule, the FCC was not content to simply refer to industry standard; rather the focus of the rule is on the end that such standards are intended to advance – access to the local loop. As a practical matter, if a network maintenance or modernization activity results in a change that causes

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[362] Eschelon/29, Denney/34 [MN Arbitrators' Report at ¶ 142], as adopted by the Minnesota Commission (Eschelon/30).

[363] Qwest/43, Stewart/15, lines 7-10.

[364] Eschelon/7, Starkey/34 [AZ Hearing Transcript at Vol. 2, pp. 201-202 (testimony of Karen Stewart)].

[365] 47 C.F.R. § 51.319(a)(8) (emphasis added). *See also* Eschelon/123, Starkey/166, line 14-168, line 10.

an Eschelon customer to be dissatisfied with the service, then that is a change that would be of concern to Eschelon.

Eschelon's language is designed to address situations where a change might result in a change to 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.[366] 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 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.[367] 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.[368] 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.[369] 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 dB 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.

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[366] Eschelon/1, Starkey/160-162.

[367] Eschelon/1, Starkey/171, footnote 284.

[368] Eschelon/86, Johnson/1.

[369] Eschelon/86, Johnson.

Qwest also argues that Eschelon's language should be rejected because it would apply to network modifications that impact any retail customer, not just Eschelon's customers, asserting that Eschelon's proposal represents a "clearly improper . . . attempt through this ICA to set terms and conditions for Qwest's relationship with other CLECs."[370] Qwest's argument ignores normal rules of grammar and usage.

Eschelon's proposed language applies to changes to the service of a "CLEC End User Customer."[371] Qwest contends that, because this language uses the defined term "End User Customer," which is not limited to Eschelon's customers, Eschelon's proposal is overly broad.[372] This claim overlooks that Section 1.2 of the ICA defines "CLEC" to mean "Eschelon Telecom of Oregon."[373] The only reasonable way to read Eschelon's language is that the word "CLEC" (i.e., Eschelon) modifies "End User Customer," limiting the phrase to only Eschelon's customers. Qwest, however, would ignore the word "CLEC" immediately preceding the phrase "End User Customer" to reach a wholly illogical and grammatically unsustainable interpretation of Eschelon's proposal.[374] In other words, Qwest is reading the phrase "CLEC End User Customer" to have the same meaning as "End User Customer," even though the purpose of inserting "CLEC" before "End User Customer" is to modify the defined term to apply to the CLEC's End User Customer. Words in a contract should be given effect, and Qwest's interpretation gives no effect to the modifying term "CLEC" before "End User Customer."

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[370] Qwest/14, Stewart/25, line 19 - /26, line 5. Qwest makes the same argument with respect to Issue 9-34. See Qwest/14, Stewart/28, lines 18-30.

[371] Eschelon/1, Starkey/162 - /163 and footnote 274.

[372] Oregon Tr. 0117, lines 9-23 (testimony of K. Stewart).

[373] ICA, Section 1.2; Oregon Tr. 0117, line 25 – 0118, line 22 (testimony of K. Stewart).

[374] Oregon Tr. 0119, line 4 – 0120, line 5.

b. Location of Changes (Issue 9-34)

Section 9.1.9 also refers to obligations arising under the FCC's rules with respect to notice of network changes. Specifically with respect to planned network changes, 47 C.F.R. § 51.327 provides a list of items that a public notice of network changes must include. The rule is expressly a minimum list of requirements and is not all-inclusive.[375] Part (a)(4) of § 51.327 states that the list must include "the location at which the changes will occur." The term "location," as used in this rule, must be considered in the context of 47 C.F.R. § 51.325(a), which states that the public notice must include notice regarding any network change that "will affect a competing service provider's performance or ability to provide service." Consistent with these rules, Eschelon has proposed language that would require that, when a change is specific to an end user customer, information regarding the location where a change will occur must include circuit identification and customer address information. Such information is necessary for the notice to fulfill its intended purpose. Circuit identification 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.[376]

Qwest objects to Eschelon's language on the ground that the language is "overly burdensome."[377] In particular, Qwest expresses concern that the proposed language would require it to "provide to Eschelon a list of every Eschelon customer address and

[375] "The FCC rules do not set out "maximum" requirements that cannot be surpassed." *See* Eschelon/29, Denney/36-37 [MN Arbitrators' Report], ¶ 153, as adopted by the Minnesota Commission Order (Eschelon/30).

[376] Eschelon/1, Starkey/177, lines 13-17.

[377] Qwest/14, Stewart/27, line 26.

every circuit that is used by Eschelon to serve its customers for an entire exchange and for each exchange which Qwest plans to upgrade its switch software."[378] Qwest further complains that the burden would be even greater if Qwest were to modify its dialing plan, because such a modification would typically have a LATA-wide effect.[379] Qwest's objections ignore not only the language that Eschelon has proposed (error type number one), but also the language that the parties have agreed upon (error type number two).

First, as Eschelon's testimony makes clear, the requirement to provide circuit identification 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.[380] Following the evidentiary hearing in Minnesota, Eschelon modified its Proposal #1 to make even clearer that the requirement to provide circuit i.d. and customer address applies only to end user specific changes. Additionally, based on a recommendation by the Minnesota Department of Commerce and adopted by the Minnesota Commission in the Minnesota arbitration proceeding,[381] Eschelon proposed another alternative for Issue 9-34 to require circuit i.d. information for changes that are specific to an end user customer "if readily available."[382] Qwest has this information available to it for its customers and is, therefore, able to keep its customers informed regarding planned network modernization and maintenance activities. Eschelon

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[378] Qwest/14, Stewart/28, lines 9-13.

[379] Qwest/14, Stewart/28, line 15.

[380] Eschelon/123, Starkey/122, lines 1-12 and Eschelon/132, Starkey/123, lines 6-10. *See also* MN Transcript, Vol. 4, 29-30 (testimony of James Webber) ("To the extent that an activity is going to impact a particular end user customer, then Eschelon needs to be noticed of that and they need to have information that's described in the contract language.")

[381] Eschelon/29, Denney/36-37 (MN Arbitrators' Report, ¶ 153, as adopted by the MN PUC Arbitration Order (Eschelon/30)).

[382] Eschelon/1, Starkey/163, lines 15-19.

provided evidence showing that this information is readily available to Qwest and, therefore, Qwest should provide it to Eschelon without its imposing a burden on Qwest. In particular, Eschelon has provided, with its testimony, a form that was provided to it by Qwest that contains precisely the type of information that Eschelon is asking be provided.[383] The prohibition on discrimination requires that Eschelon be provided with the same access to information so that Eschelon customers are not disadvantaged.[384]

Qwest's claim of undue burden is also belied by closed language. Thus agreed upon language in Section 9.2.1.2.3 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 upon language shows that Qwest can distinguish between changes that will affect Eschelon's End User Customers and those that will not.[385]

17. <u>Wire Center Issues: Issues 9-37, 9-37(a), 9-38, 9-39 (except caps), 9-40, 9-41, and 9-42</u>

These issues are now closed.[386]

<u>18. Conversions: Issues 9-43 and 9-44 and subparts</u>

- ***Myth (conversions issues 9-43 and 9-44 are settled)***: Because the rate for conversions was settled in the Wire Center Docket, Issues 9-43 and 9-44 (Conversions) are now closed and there is no reason to rule on those issues in this arbitration.[387]

[383] Eschelon/1, Starkey/178, line 14 – /180, line 8 and Eschelon/4, Starkey.

[384] Eschelon/132, Starkey/125, line 12 – /126, line 12.

[385] Eschelon/1, Starkey/177, line 21 – /180, line 8.

[386] See Ruling Granting Joint Motion for Single Compliance Filing and Revision of Schedule (July 13, 2007.

[387] Qwest/44, Million/6.

- ***Debunked*:** Issues 9-43 and 9-44 are not closed. The issue related to the rate for conversions is Issue 9-40 (NRCs for Conversion)[388] – not Issues 9-43 and 9-44 – and Issue 9-40 is subject to the settlement in the Wire Center Docket, while Issues 9-43 and 9-44 are not. This fact is evident in Qwest's Response to Eschelon's Petition for Arbitration, in which Qwest identifies Issues 9-37 through 9-42 (the wire center issues) as "issues addressed in the Commission's TRRO wire center proceeding,"[389] but does not identify Issues 9-43 and 9-44 (Conversions) as issues subject to the wire center proceeding and therefore does discuss them further in its Response.[390] The Commission must still rule on Issues 9-43 and 9-44 regardless of the settlement in the Wire Center Docket because Issues 9-43 and 9-44 relate to the conversions process – not the rate, which Issue 9-40 addresses – and without Eschelon's language for Issues 9-43 and 9-44, there will be nothing in the companies' ICA explaining how conversions are to take place. Ms. Million admitted under cross-examination that Issues 9-43 and 9-44 are not settled and are still open for determination in this proceeding.[391] [error type one – ignores proposed language; error type two – ignores agreed upon language; and error type four – ignores contrary facts in evidence].

- ***Myth (change to circuit i.d. required)***: It is necessary to change the circuit i.d. in order to convert a circuit from a UNE to a non-UNE.[392]

- ***Debunked:*** Conversion of a circuit from a UNE to a non-UNE is primarily a billing change.[393] Before and after the conversion, the circuit uses the same facilities and there is no engineering or other physical change to the circuit required.[394] Changing the circuit i.d. in order to convert a circuit is only necessary because Qwest has chosen to create a complex and cumbersome process that makes it necessary.[395] This policy was implemented outside of CMP, without seeking the input of CLECs. The FCC has said that conversions should be "seamless."[396] Qwest's process is *not* seamless, and it creates the potential for

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[388] Eschelon/9, Denney/139.

[389] Qwest Response Eschelon's Petition for Arbitration, ARB 775, April 23, 2007 ("Qwest Response"), p. 48, lines 24-25.

[390] Qwest Response, pp. 26-28.

[391] Oregon Tr., Vol. 1, 0081, line 16 – 0082, line 3 ("Q. But it is, in fact, your understanding that issues 943 and 944 are not resolved? A. Yes. Q. And remain open for determination in this arbitration? A. That's correct?)

[392] Qwest/16, Million/13, lines 8-10 and Qwest/39, Million/10-11.

[393] TRO, ¶ 588.

[394] Eschelon/1, Starkey/192, lines 3-11. *See also* Eschelon/6, Starkey/27 [MN Transcript, Vol. 2, p. 70, lines 13-24; p. 72, lines 21-25; p. 80, lines 16-19].

[395] Eschelon/6, Starkey/28 [MN Transcript at Vol. 2, p. 80, lines 9-12 (testimony of Teresa Million)].

[396] TRO, ¶ 586.

error and for disruption of customers' service.[397] [Error type four – ignores contrary facts in evidence]

In the TRO and TRRO, the FCC declared that certain circuits that were formerly available as UNEs no longer are UNEs; as a result, it is necessary to "convert" those circuits from UNEs to non-UNEs.[398] The FCC, in the TRO, declined to adopt rules setting out specific process and procedures for conversions, envisioning, instead, that parties would negotiate in good faith to develop process for the conversion of circuits.[399] Although leaving the details up to the parties, the FCC did provide guidance on what such processes should, and should not, entail. Specifically, the FCC directed that conversion should be a "seamless process that does not affect the customer's perception of service quality"[400] and described such conversions as "largely a billing function."[401] Qwest acknowledges that the circuit uses the same physical facilities after the conversion as it did before and the conversion does not involve making any physical changes to the circuit.[402]

In order to give effect to these directives of the FCC and to assure that Eschelon end user customers are not adversely affected by conversion of circuits from UNEs to non-UNE wholesale arrangements, Eschelon has proposed ICA language that: 1) provides that the circuit i.d will not change as a result of the conversion; and 2) provides

[397] Eschelon/1, Starkey/195, line 18 – p. 196, line 15.

[398] Eschelon/1, Starkey/182-183.

[399] TRO, ¶ 585.

[400] TRO, ¶ 586.

[401] TRO, ¶ 588.

[402] Eschelon/6, Starkey/27 [MN Transcript at Vol. 2, pp. 70, 72 (testimony of Teresa Million)].

for the conversion to be handled as a price change rather than a physical conversion.[403] Notwithstanding the FCC's requirement that parties negotiate in good faith regarding conversion processes, Qwest has declined to propose any alternative language.

Rather than negotiate with Eschelon and other CLECs, Qwest has chosen to act on its own in erecting a Rube Goldberg-esque process that involves personnel in three different functional areas (including a "Designer" who doesn't design anything because there is nothing to design[404]), multiple databases and systems, orders to "disconnect" and "connect" service, and much "reviewing" and "confirming" and "assuring" and "verifying" and "validating," all to the end of changing what the UNE is called and how much Qwest will charge.[405] Qwest chose to establish its process through a series of password-protected PCATs that were developed and implemented outside of CMP, without CLEC input, and without the approval of any state commission.[406] Having created this unwieldy contraption, 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 i.d. in order to convert the circuit from a UNE to a non-UNE.

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[403] Eschelon/1, Starkey/199-206. Such a price change could be implemented through the use of an adder or surcharge to be applied to converted circuits, similar to the way that Qwest has implemented the price increases under its QPP agreements. Eschelon/1, Starkey/203-204.

[404] Eschelon/6, Starkey/28 [MN Transcript at Vol. 2, p. 78 (testimony of Teresa Million)].

[405] Qwest/16, Million/15-17.

[406] Eschelon/1, Starkey/74-94 (describing the process followed by Qwest in implementing the "secret" TRRO PCATs); see also Eschelon/29, Denney/36, citing Minnesota DOC Witness Dr. Fagerlund's Minnesota Reply Testimony at pages 18-22. Page 19 of Dr. Fagerlund's Minnesota Reply testimony states: "Qwest should not have the right to unilaterally determine the conversion process and the prices it charges for converted elements."

Qwest acknowledges that this entire elaborate process would be unnecessary if Qwest did not, as part of the conversion, change the circuit i.d.[407] Although Qwest asserts that the circuit i.d. "must" change in order to convert a circuit from a UNE to a non-UNE,[408] this assertion is unsupported as a matter of law and fact. First, Qwest implies that the Commission should not be concerned about conversions because CLECs have a "choice" to utilize alternative arrangements in lieu of converting their existing UNE circuits.[409] Contrary to this claim, 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 TRRO, no longer available as a UNE.[410] 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. Second, rather than attempting to show how its conversion process complies with the FCC's directive that such a process be "seamless," Qwest refers vaguely to FCC and Commission rules that it says require it to accurately maintain records.[411] Qwest does not identify the rules on which it means to rely and does not explain how those rules require Qwest to change the circuit i.d.s of converted circuits. Qwest's argument, which is wholly unsubstantiated by any citation to authority, is entitled to no weight.[412]

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[407] Eschelon/6, Starkey/28 [MN Transcript at Vol. 2, p. 80].

[408] Qwest/16, Million/16, line 10; Qwest/16, Million/20, line 21; and Qwest/39, Million/16, line 23.

[409] Qwest/16, Million/13, line 12 – /14, line 10.

[410] Eschelon/1, Starkey/182-183.

[411] Qwest/39, Million/11, lines 5-10.

[412] In previous arbitration proceedings, Qwest did cite a particular rule, 47 C.F.R. § 32.12, in support of this argument. *See, e.g., In the Matter of the Petition of Qwest Corporation for Arbitration with Eschelon Telecom, Inc., Pursuant to 47 U.S.C. Section 252 of the Federal Telecommunications Act of 1996*, Washington State Utilities and Transportation Commission Docket No. UT-063061, Direct Testimony of Teresa K. Million (Hearing Ex. 51) at p. 16, lines 3-20. As Eschelon pointed out in

Finally, as a factual matter, it is undisputed that, when Qwest began converting special access circuits to UNEs, the circuit i.d.s did not change, thus demonstrating the feasibility of retaining the same circuit i.d. when a circuit is converted.[413] The conversion from a UNE to a non-UNE is the mirror image of that previous process,[414] and there is no more reason to change the circuit i.d. now than there was then. Qwest attempts to explain away this history with the claim that it discontinued this practice in April 2005 (perhaps not coincidentally, at about the same time that Qwest was getting ready to implement its secret TRRO PCAT) because it was "experiencing difficulty in managing the large number of circuits" and "incurring a substantial amount of expense."[415] Qwest has failed, however, to provide any further detail or supporting evidence concerning these alleged "difficulties." Absent such detail, Qwest's claim that it "must" change the circuit i.d. in order to convert a circuit from a UNE to a non-UNE is entitled to no weight.

In considering this issue, the Commission should weigh the lack of any demonstrable need to change the circuit i.d. 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.[416] Further, if both Eschelon's and Qwest's systems are not timely and accurately updated to reflect the new circuit i.d.s there will likely be problems identifying the correct circuit if a circuit requires repair or maintenance, because Qwest

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response to Qwest's argument, that rule requires only that information be maintained in sufficient detail as to facilitate the reporting of specific information; it says nothing about circuit i.d.s. Apparently recognizing that the rule does not, in fact, support its position, Qwest now makes its argument without referring to any particular rule.

[413] Eschelon/1, Starkey/196, lines 16-22 and Qwest/29, Million/12-13.

[414] Eschelon/6, Starkey/29 [MN Transcript at Vol. 2, p. 84 (testimony of Teresa Million)].

[415] Qwest/39, Million/12, lines 19-20. *See also* Eschelon/6, Starkey/30 [MN Transcript, Vol. 2, p. 86].

[416] Eschelon/1, Starkey/196, lines 1-5.

and Eschelon may not be using the same i.d. number to identify the circuit.[417] Adopting Eschelon's proposals with respect to circuit conversions will, thus, help to prevent service interruptions and promote quality service.

22. Unbundled Customer Controlled Rearrangement Element (UCCRE) (Issue 9-53)

- ***Myth (burdensome):*** Eschelon's proposal places a burden upon Qwest because it requires notification each time Qwest offers UCCRE.[418]
- ***Debunked:*** Eschelon's proposal does not require notice each time Qwest offers the product, but only requires that Qwest make the product available to Eschelon as long as it is made available to other CLECs.[419] [Error type one – ignores proposed language]

- ***Myth (FCC removed Qwest's obligation):*** The FCC eliminated Qwest's obligation to provide UCCRE.[420]
- ***Debunked:*** Qwest interprets the rewriting of the FCC's unbundling rules to remove a reference to digital cross connect systems, but retain a reference to central office cross connect systems, to relieve Qwest from its obligation to provide UCCRE. Because a digital cross connect system is a subset of central office cross connect systems, Qwest's interpretation is incorrect. Further, there is no discussion in any FCC order specifically removing Qwest's obligation to provide UCCRE. When the FCC has eliminated ILEC obligations, it has done so expressly.[421] [Error type four – ignores contrary facts in evidence]

- ***Myth (no more pick and choose):*** Offering this product to some CLECs and not others is not discrimination because contracts can be different.[422] Pick and choose is gone, thus Qwest can offer different products to different CLECs.[423]
- ***Debunked:*** 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

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[417] Eschelon/1, Starkey/196, lines 5-13.

[418] Qwest/14, Stewart/41, lines 3-13.

[419] Eschelon/125, Denney/84, line 14 – /85, line 2.

[420] Qwest/14, Stewart/34, lines 18-20 and Qwest/37, Stewart/30 (2nd full Q&A).

[421] Eschelon/9, Denney/160, line 1 – /161, line 13.

[422] Qwest/37, Stewart/25 (1st Q&A) and Qwest/37, Stewart/27.

[423] *See* Eschelon/133, Denney/80, responding to Qwest/14, Stewart/43-44.

discrimination.[424] The elimination of pick and choose does not mean that Qwest can selectively offer products to CLECs. [Error type four – ignores contrary facts in evidence]

Issue 9-53 (as well as the now-closed Issue 9-50 "Subloops – Qwest Cross Connect/Wire Work) involves the application of the Telecom Act's prohibition on discrimination.[425] Although the language in Section 9.3 for Issue 9-50 has closed (with Eschelon proposed language),[426] Qwest's handling of Issue 9-50 related to cross connects/wire work remains a good example of the type of situation in which Eschelon's proposed language for Section 1.7.3 (including an alternative using the Minnesota Department of Commerce's proposed phase out language) is needed. Although Qwest has finally agreed to include language regarding cross-connects/wire work in the ICA, it did so only after extensive litigation in arbitrations, as well as after Eschelon introduced evidence that Cox had similarly requested wire work in a recent Arizona proceeding.[427] Fortunately, Cox's filing came in time to be used in the Eschelon-Qwest arbitration hearings, or it may have occurred after the record closed with Qwest still continuing to claim no demand for the product. A more orderly and efficient approach is needed, such as the approach reflected in Eschelon's proposals for Section 1.7.3 (which remains open). If there truly is no demand or anticipated demand during the life of a contract for a product and withdrawal of the product is legitimate for that or other reasons, Qwest will have an opportunity to withdraw the product pursuant to Section 1.7.3.

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[424] Second Report and Order, *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338 (July 8, 2004) ("Second Report and Order") ¶¶ 18, 20 23. *See also* Eschelon/133, Denney/80, lines 9-13.

[425] *See* 47 U.S.C. § 251(c)(3) (duty of incumbent local exchange carrier to provide nondiscriminatory access to network elements on an unbundled basis).

[426] Eschelon/9, Denney/145.

[427] Eschelon/7, Starkey/35 [AZ Hearing Transcript at Vol. 2, p. 224, lines 11-17].

Qwest may attempt to argue, now that Section 9.3 is closed, that the remaining issues in Issue 9-53 (Sections 9.9 and 1.7.3) relate to a change in law and may be dealt with under Section 2 of the ICA. As discussed below, Eschelon does not agree that UCCRE is the subject of a change in law; the Minnesota Department of Commerce's phase out proposal (one of Eschelon's alternative proposals for Section 1.7.3) recognizes that changes in law must also be handled on a nondiscriminatory basis with Qwest having to either amend all agreements or ask the Commission for a different process; and, in any event, that Issue 9-50 went as far as it did in litigation shows that Qwest will attempt to withdraw a product for one CLEC while still making it available to other CLECs if the phase out and nondiscrimination issues are not addressed.

It is undisputed that Qwest makes UCCRE available to other CLECs, both under ICAs and its SGAT.[428] Eschelon's proposal only requires Qwest to make UCCRE available to it on the same terms and conditions as it makes those products available to other CLECs.[429] 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

[428] Eschelon/9, Denney/155, lines 2-6; Eschelon/9, Denney/157, lines 8-11; Eschelon/9, Denney/158, line 18 – /159, line 8; Qwest/37, Stewart/29-30; and Eschelon/6, Starkey/35 [MN Transcript at Vol. 2, p. 169 (testimony of Karen Stewart)].

[429] Note that Eschelon's proposal represents a compromise from its original position. Originally, Eschelon had proposed incorporating the language from the AT&T ICA that set forth the terms and conditions under which Qwest would provide cross connects and UCCRE. Eschelon has since modified its proposal (Proposal #1) by eliminating the detailed terms and conditions, providing only that, if Qwest offers to provide cross connects or UCCRE for any other CLEC during the term of the ICA, Eschelon will notify Eschelon and offer an ICA amendment that provides cross connects or UCCRE on the same terms as provided to the other CLEC. *See* Eschelon Proposal #1, Disputed Issues Matrix (10/10/06), p. 117 and Eschelon/9, Denney/148-149. Eschelon has also offered Qwest three alternative proposals (see Proposal #s 2, 3 and 4, Eschelon/9, Denney/149-154) that would allow Qwest to seek phase out of a particular product based on either Commission approval of Qwest's proposed phase out process (see, Proposal #s 2 and 4) or the results of a generic proceeding (see, Proposal # 3). Eschelon's proposal #2 was adopted by the Minnesota Commission to resolve this issue. Eschelon/29, Denney/41 [MN Arbitrators' Report, ¶ 168] and Eschelon/30, Denney/7.

and Eschelon will not. Such a difference in treatment is precisely the sort of discrimination that the Telecom Act was intended to prevent.

Qwest argues that Eschelon, in seeking to require Qwest to make available UCCRE on the same terms as it makes those products available to other CLECs, is attempting to "pick and choose," contrary to the FCC's "all or nothing" rule.[430] However, 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.[431] Similarly unavailing is Qwest's suggestion that the Commission should ignore the terms of its SGAT because its SGAT is "out dated."[432] Nothing has relieved Qwest of the obligation to provide products and services under the terms of its SGAT and if a CLEC sought to opt in to the SGAT, Qwest would be obligated to comply with those terms.

Qwest's main argument on Issue 9-53 is that there is no CLEC demand for UCCRE and that it intends to discontinue offering it "on a going forward basis."[433] 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.[434] In response to the Minnesota Department of Commerce's suggestion in the Minnesota arbitration proceeding that the ICA include a provision that allows for elements to be phased out,[435]

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[430] Qwest/14, Stewart/43-44.

[431] *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, Second Report and Order at ¶¶ 18, 20, 23 (July 8, 2004).

[432] Qwest/14, Stewart/43-44.

[433] Qwest/14, Stewart/35, lines 1-2.

[434] Eschelon/6, Starkey/35 [MN Transcript at Vol. 2, pp. 167-69 (testimony of Karen Stewart)].

[435] Eschelon/29, Denney/40-41.

Eschelon has offered three different alternatives that would allow Qwest to phase out products, subject to Commission approval, while still preventing discriminatory treatment that would result from allowing Qwest to selectively eliminate products for some CLECs but not others.[436] Qwest has not countered with any alternative language of its own, apparently content to continue to insist that it should have the right to eliminate products when and how it sees fit.

Eschelon's first phase out proposal[437] permits Qwest to seek Commission approval for a process to phase out a particular product. This proposal does not require Qwest to use a specific phase out process, and states that this process is not necessary if Qwest promptly phases out the product from all CLEC ICAs in the state within a 3 month timeframe of an FCC order affecting the product, or follows a phase out process ordered by the FCC.[438] The Minnesota ALJs, as affirmed by the Minnesota Commission, adopted Eschelon's first phase out proposal (Proposal #2) for resolution of these issues in the Minnesota arbitration, finding that this proposal "efficiently balance[s] the concerns of both parties and would permit any interested CLEC to provide comment to the Commission if it had concerns about the elimination of a particular element, service, or functionality."[439]

Eschelon's second phase out proposal[440] would require Qwest to obtain Commission approval in a generic proceeding in which CLECs are provided with notice

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[436] Eschelon/9, Denney/149-154.

[437] Eschelon's first phase out proposal is identified as "Proposal #2" in Mr. Denney's. Note that Mr. Denney corrected the Eschelon proposed language for Proposal #2 (Eschelon's first phase out proposal) in his rebuttal testimony. Eschelon/125, Denney/82.

[438] Eschelon/125, Denney/82.

[439] Eschelon/29, Denney/41 [MN Arbitrators' Report, ¶ 168], as adopted by the MN PUC Arbitration Order (Eschelon/30).

[440] Eschelon's second phase out proposal is identified in Mr. Denney's direct testimony as "Proposal #3." Eschelon/9, Denney/150-152.

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 is consistent with the way the Commission has addressed previous efforts by Qwest to eliminate certain products. This phase out proposal, 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 phase out proposal[441] 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…"[442] Eschelon's third phase-out proposal also allows Qwest to cease a wholesale offering by promptly amending all ICAs containing the offering to remove it – but 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.

24. Loop-Transport Combinations: Issue 9-55

- ***Myth (creation of new product)*:** Eschelon is attempting to force Qwest to provide a new product called a "Loop Transport Combination."[443]

[441] Eschelon's third phase out proposal is identified as "Proposal #4" in Mr. Denney's direct testimony. Eschelon/9, Denney/152-154.

[442] Eschelon's proposed 1.7.3 (Eschelon Proposal #4), Eschelon/9, Denney/152, lines 25-27.

[443] Qwest/14, Stewart/71, line 2 and line 27.

- ***Debunked*:** The plain language of Eschelon's proposal acknowledges that there is not presently any Qwest product called "Loop Transport Combination."[444] Further, that language makes clear that the phrase "Loop Transport Combination" accurately identifies three types of combinations of loop and transport that are currently available: EELs, high capacity EELs, and Commingled EELs.[445] [Error type one – ignores proposed language]

- ***Myth (application of ICA to non-UNEs):*** Eschelon, with its proposal regarding Loop Transport Combinations, is seeking to apply the provisions of the ICA to services and products that are not required to be provided on an unbundled basis.[446]
- ***Debunked***: Other closed language provides that UNE components of a commingled arrangement are governed by the ICA and that other components will be governed by the terms of the alternative service arrangement under which those components are offered.[447] Not only does language in Section 24 make this clear, Eschelon modified its proposal for Issue 9-55 to make this point crystal clear. [Error type two – ignores agreed upon language]

This issue, together with Issues 9-58 and 9-59, concerns how "Commingled EELs" (i.e., a combination of loop and transport where one part of the combination is a UNE and the other part is a non-UNE) will be addressed under the ICA. Eschelon has proposed language that 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. Issue 9-55 concerns, in particular, the nomenclature that is used to describe combinations of loop and transport. This issue 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.

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[444] ICA Section 9.23.4.

[445] MN Transcript Vol. 3, p. 139, lines 7-17 (testimony of Michael Starkey).

[446] Qwest/37, Stewart/35 and Qwest/37, Stewart/43.

[447] Eschelon's proposed language for Section 9.23.4 and closed language in Section 24.1.2.1; see also MN Transcript at Vol. 3, p. 141, line 18-p. 143, line 1.

The FCC, in the TRO, used the term "loop-transport combination" to identify EELs,[448] Commingled EELs,[449] and high capacity EELs.[450] Eschelon has proposed language that uses the term "Loop-Transport Combination" as the FCC did – as an umbrella term that includes EELs, Commingled EELs, and high capacity EELs.[451] Loop-Transport Combinations promote competition by giving the CLEC the ability to provide service to end user customers who are served out of wire centers in which the CLEC is not collocated.[452] Using a combination of loop and transport, either an EEL, high capacity EEL, or a Commingled EEL, extends the loop from the end user's location to a wire center where the CLEC is collocated.[453]

Qwest does not dispute that EELs, Commingled EELs, and high capacity EELs are, in fact, different types of combinations of loop and transport. Eschelon's proposed language, thus, accurately reflects that that is the case. Qwest, however, objects to any use of the term "Loop-Transport Combination" on the ground that Eschelon is using that term to create a new "product."[454] Qwest's objection mischaracterizes Eschelon's proposal. 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."[455] Eschelon's language further confirms that "If no component of the Loop-Transport Combination is a UNE, however, the Loop-Transport Combination is not

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[448] TRO, ¶¶575, 576.

[449] TRO, ¶¶584, 593, 595.

[450] TRO, ¶¶593.

[451] Eschelon/1, Starkey/212-216.

[452] Eschelon/9, Denney/178-179.

[453] Eschelon/9, Denney/178, lines 20-24. Although a CLEC could eliminate the need for a loop-transport combination by collocating, the cost associated with collocation may make that option cost-prohibitive. *See* Eschelon/9, Denney/181.

[454] Qwest/14, Stewart/67, line 30 and 70, lines 24-25.

[455] ICA Section 9.23.4.

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."[456] This language shows that, contrary to Qwest's claims, Eschelon is not attempting to bring non-UNEs within the scope of the ICA.

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

- ***Myth (audits without cause):*** The FCC allows Qwest to conduct audits without cause.[457]
- ***Debunked:*** In the TRO the FCC stated that the auditing procedures it was adopting were comparable to those previously established and that details should be worked out in carriers' ICAs. Further, in the TRO the FCC specifically referenced its previous decision regarding the need for cause before an audit is conducted.[458] [Error type four – ignores contrary facts in evidence]

The FCC, in its *Supplemental Order Clarification*,[459] established a framework of self-certification and auditing as the means for assuring compliance with local usage requirements applicable to UNEs.[460] 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

[456] *See* ICA Section 9.23.4, Eschelon/1, Starkey/209, lines 19-23. Section 24.1.2.1 of the ICA states in closed language: "The UNE component(s) of any Commingled arrangement is governed by the applicable terms of this Agreement. The other component(s) of any Commingled arrangement is governed by the terms of the alternative service arrangement pursuant to which that component is offered (e.g., Qwest's applicable Tariffs, price lists, catalogs, or commercial agreements)."

[457] Qwest/14, Stewart/53, lines 4-7; Qwest/14, Stewart/54, lines 4-6; and Qwest/37, Stewart/40.

[458] Eschelon/125, Denney/98, lines 1-13.

[459] *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*").

[460] TRO, ¶ 620.

incumbent LEC has a concern that a requesting carrier has not met the criteria for providing a significant amount of local service."[461] In order to give effect to this limitation, and to assure that audits do not become a "routine practice,"[462] 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.[463] 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.

The limitation that Eschelon proposes is very modest and fully consistent with the FCC's direction that such audits should be undertaken only when the ILEC has a concern that the requesting carrier has not met the relevant criteria. 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 objects, however, even to these modest limitations, maintaining that it should have the right to conduct an audit, annually, as a matter of course, even if it has no reason to believe that Eschelon has failed to comply with the Service Eligibility Criteria. Qwest criticizes Eschelon's witness, Mr. Denney, for his reliance on the *Supplemental Order Clarification* as support for Eschelon's proposed language, arguing that the TRO superseded the *Supplemental Order Clarification*.[464] What Qwest overlooks, however, is that the FCC also relied on the *Supplemental Order Clarification* in its discussion in the TRO regarding determining compliance with the Service Eligibility Criteria. Rather than

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

[462] *See* Eschelon/125, Denney/98, citing TRO, ¶ 621.

[463] Eschelon/9, Denney/166-167.

[464] Qwest/37, Stewart/41.

superseding the audit standard established in the *Supplemental Order Clarification*, the FCC reaffirmed that standard, stating, "Although the bases and criteria for the service tests we impose in this Order differ from those of the *Supplemental Order Clarification*, we conclude that they share the basic principles of entitling requesting carriers unimpeded UNE access based on self-certification, subject to later verification *based upon cause*, are equally applicable."[465]

26. Commingled EELs/Arrangements: Issues 9-58 (including subparts (a) through (e)) and 9-59

- ***Myth (separate circuit i.d.s)*:** It is necessary assign the UNE and non-UNE portions of a Commingled EEL separate circuit i.d.s.[466]
- ***Debunked*:** As with conversions, assigning separate circuit i.d.s to the UNE and non-UNE portions of a Commingled EEL is only necessary because Qwest has chosen to implement its commingling policies through a go-it-alone strategy, without seeking CLEC input.[467] A Commingled EEL is functionally the same as an EEL, which Qwest today provides using a single circuit i.d. to identify both the loop and transport portion of the circuit.[468] [Error type four – ignores contrary facts in evidence]

- ***Myth (changes through CMP)*:** Qwest wants to address its "existing process" for ordering, provisioning and repair of Commingled EELs through CMP so that it can obtain the input of other CLECs.[469]
- ***Debunked*:** Eschelon and other CLECs have been, for two years, attempting to open a dialogue with Qwest regarding this and other TRO/TRRO related issues, either through ICA negotiations (the CLECs' preferred alternative) or through CMP.[470] Although Qwest assured CLECs that it would address the TRO/TRRO

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[465] TRO, ¶ 622 (emphasis added).

[466] Qwest/14, Stewart/64, lines 1-17.

[467] Eschelon/6, Starkey/36-37 [MN Transcript at Vol. 2, p. 181, line 22 - p. 183, line 5].

[468] Eschelon/9, Denney/178, lines 17-22.

[469] Eschelon/78, Johnson [Letter from John Devaney, dated October 16, 2006, to Karen Clauson]; Eschelon/6, Starkey/43 and 45 [MN Transcript Vol. 3, p. 57, line 12-22; p. 87, line 22-p. 88 – line l (testimony of Karen Stewart). *See also* MN Transcript, Vol. 3, p.94, line 17-p. 95, line 1. (comments of Mr. Devaney concerning Qwest's position regarding addressing commingling in CMP)].

[470] Eschelon/1, Starkey/74, line 19 – /77, line 7.

> issues through CMP, it then proceeded to implement password-protected, secret TRO/TRRO PCATs outside of CMP.[471] As with conversions, it is the result of that "go it alone" strategy that Qwest claims should be accorded some preference as its "existing process." Certainly Qwest could have, at any time before now, solicited CLEC input regarding these issues, yet it chose not to, over CLEC objection. Qwest's last minute about face, by "agreeing" to now address this issue through CMP, should be seen for what it is: An attempt to take the issue of commingling outside of the Commission's jurisdiction. The parties having gone to the effort to litigate this issue, the Commission should not now defer a decision to CMP, the result of which will only be further delay. [Error type four – ignores contrary facts in evidence]

In the TRO, the FCC eliminated its previous restrictions on commingling, permitting requesting carriers to commingle UNEs and combinations of UNEs with services offered pursuant to tariffs and requiring incumbent carriers "to perform the necessary functions to effectuate such commingling upon request."[472] In lifting the previous restriction on commingling, the FCC found:

> [T]he commingling restriction puts competitive LECs at an unreasonable competitive disadvantage by forcing them either to operate two functionally equivalent networks – one network dedicated to local services and one dedicated to long distance an other services – or to choose between using UNEs and using more expensive special access services to serve their customers. Thus, we find that a restriction on commingling would constitute "an unjust and unreasonable practice" under [section] 201 of the Act, as well as an "undue and unreasonable prejudice or advantage" under section 202 of the Act. Furthermore, we agree that restricting commingling would be inconsistent with the nondiscrimination requirements in section 251(c)(3).[473]

Commingling has become a particularly important competitive option for CLECs in light of the FCC's limitations on the ILECs' unbundling obligations in the TRRO.

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[471] Eschelon/1, Starkey/77, line 8 – /78, line 5.

[472] TRO, ¶ 579. The FCC defines "commingling" as "the connecting, attaching, or otherwise linking of a UNE or a UNE combination to one or more facilities or services that a requesting carrier has obtained at wholesale from an incumbent LEC pursuant to any method other than unbundling under section 251(c)(3) of the Act, or the combining of a UNE or UNE combination with one or more such wholesale services."

[473] TRO, ¶ 581 (footnotes omitted).

Thus, 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 previously have been served with an EEL.[474] 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.[475] The only difference is the price, because, for an 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.[476] The dispute here is whether Qwest may, consistent with the FCC's order regarding commingling, erect operational barriers -- requiring separate orders, separate circuit i.d.s and separate bills -- that make Commingled EELs difficult to use.

In order to assure 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[477] Loop Transport Combinations, including Commingled EELs, to be ordered on a single service request, to be identified by a single circuit i.d., to be billed on the same Billing Account Number ("BAN"), and to be repaired pursuant to a

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[474] Eschelon/9, Denney/170, footnote 139.

[475] Eschelon/9, Denney/180, line 14 – /181, line 4.

[476] Eschelon/9, Denney/182, line 6 – /183, line 11. *See also* Eschelon/6, Starkey/36 [MN Transcript at Vol. 2, p. 181 (testimony of Karen Stewart)]:

> Q. I want you to think of a hypothetical circuit that before the TRRO was a UNE EEL and after the TRRO is a commingled EEL.
>
> A. Yes.
>
> Q. The difference between those two things is the price; is that correct?
>
> A. Typically, yes.

[477] A point-to-point Loop-Transport Combination is a combination where the loop and the transport are the same bandwidth, so no multiplexing is necessary. Eschelon/9, Denney/179.

single trouble ticket. Qwest's proposal is, in essence, the very thing that the FCC sought to prevent: That Eschelon be required to operate two functionally equivalent networks, one for UNEs and one for commingled arrangements. Eschelon's proposal, in contrast, would eliminate operational obstacles that Qwest would impose and that would impede the effective use of UNEs:

- Ordering: Eschelon's proposal will avoid the delay that will inevitably result from Qwest's requirement that Eschelon order the UNE and non-UNE portion of a Commingled EEL separately. Qwest requires that Eschelon must submit an LSR and receive the FOC for the unbundled loop before submitting an ASR for the private line transport. Because the interval for a UNE loop is shorter than the interval for private line transport, the two parts of the circuit almost certainly will not be delivered at the same time.[478] When Eschelon receives the loop portion of the circuit, it must still wait for delivery of the private line transport before it will have a completed circuit that it can test and use to provide service. Furthermore, if one part of the circuit is held for lack of facilities, Eschelon must pay recurring charges for a partial circuit that it cannot use.[479]

- Single circuit i.d: A single identifier for both the loop and private line transport portion of the Commingled EEL will enable both Qwest and Eschelon to track and manage facilities and minimize errors that may have an adverse effect on end user customers.[480]

- Billing: Billing the loop and transport portions of Commingled EELs separately will greatly complicate Eschelon's review and reconciliation of bills, requiring a line by line review of Eschelon's UNE bill to determine whether a UNE is part of Commingled EEL. Further, although Eschelon receives loss and completion reports that allow it to assure that it is not being billed for disconnected UNEs, no such report is provided for tariffed services, which means that Eschelon could continue to be billed, and pay, for the private line portion of a circuit after the loop portion has been disconnected.[481]

- Intervals: Qwest's position is that the private line and loop components of a Commingled EEL must be delivered not only separately, but sequentially. This means that the interval for a Commingled EEL will be the combination of the interval of the interval for the loop and the interval for the transport. Eschelon's proposal is that the interval for a Commingled EEL be the longer

[478] Eschelon/9, Denney/187, line 3 – /188, line 2.

[479] Eschelon/9, Denney/185, lines 1-10 and Eschelon/9, Denney/195, lines 9-11.

[480] Eschelon/9, Denney/186, line 16 – /187, line 2.

[481] Eschelon/9, Denney/189.

of the interval for the loop or transport, thus allowing the intervals to run concurrently, rather than sequentially.[482] This is the way that Qwest provisions EELs today, and the FCC's prohibition on restrictions on commingling means that service to an end user should not be delayed merely because that customer is served with a Commingled EEL rather than an EEL.

- Repair: Like the ordering process for Commingled EELs, Qwest's process for repair of EELs is also a sequential process. Thus, if Eschelon experiences trouble with a Commingled EEL, it must first submit on either the UNE or non-UNE portion of the EEL and only if Qwest does not find trouble on the special access portion may Eschelon open a repair ticket on the other portion. As a result, completion of the repair may be delayed and Eschelon will incur additional expense.[483]

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 not legitimate.[484] 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"[485] and that the issue should be addressed, if at all, through CMP rather than in an ICA. In evaluating Qwest's claims regarding its "existing process," it is important to keep in mind that Eschelon's proposal with respect to point-to-point Commingled EELs is the same as Qwest's current process for provisioning, maintaining and repairing point-to-point EELs.[486] There is no functional difference between an 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

[482] Eschelon/9, Denney/190-191.

[483] Eschelon/9, Denney/196-199; Eschelon/125, Denney/108, line 16 – /109, line 11; and Eschelon/133, Denney/95, line 9 – /96, line 4.

[484] *See e.g.*, Qwest/14, Stewart/73, lines 9-27.

[485] Qwest/37, Stewart/48 ("…Qwest's existing systems and processes…")

[486] Eschelon/9, Denney/179-182.

replacing, pursuant to a finding of "non-impairment."[487] As Mr. Denney explained, "Eschelon's proposal is not unique because Eschelon is not proposing a change from Qwest's current process which uses a single order, single circuit ID, and single bill for Eschelon's Point-to-Point EELs. Eschelon is merely proposing to treat EELs in a similar manner, as they have been in the past."[488]

Moreover, although Qwest contends that this issue should be addressed through CMP, so that other CLECs can have input, what Qwest characterizes as its "existing process" was not developed in CMP, nor did any CLEC have any input.[489] Now, faced with the possibility of Commission review of that process, Qwest urges that the Commission defer to CMP.[490] As with conversions, Qwest would have the Commission reward its go-it-alone strategy by according the process that was the result of that strategy some sort of special, protected status.

Qwest insists that it "must" assign different circuit i.d.s to, and bill separately for, the UNE and non-UNE parts of a Commingled EEL and that to require a single circuit i.d. and BAN would cause Qwest to incur substantial expense. For reasons discussed above and in Eschelon's testimony, Eschelon disagrees. However, to the extent the Commission rejects Eschelon's proposal to require Commingled EELs to be identified

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[487] Eschelon/9, Denney/179-180.

[488] Eschelon/9, Denney/184, lines 1-4. *See also* Eschelon/133, Denney/91, lines 10-11 ("The fact that Qwest combines loop and transport circuits on a regular basis demonstrates that Qwest's fears [about the expense of implementing Eschelon's proposed language] are unfounded.")

[489] Eschelon/6, Starkey/36 [MN Transcript at Vol. 2, p. 181-82 (testimony of Karen Stewart)].

[490] Although Qwest has claimed that there was an "agreement" with CLECs that activity in CMP would be held in abeyance until state TRRO-related dockets were completed, it has not identified even one CLEC that it claims was a party to such an agreement, nor has it come up with even one scrap of paper evidencing any such agreement. Furthermore, to the extent that such an agreement did exist, Qwest obviously felt free to disregard it, because on the day that the evidentiary hearing commenced in the Minnesota arbitration case, it sent Eschelon a letter stating that it would submit issues relating to commingled arrangements through CMP "within the next two months." Eschelon/78, Johnson/1-2 [Letter from John Devaney, dated October 16, 2006, to Karen Clauson].

with a single circuit i.d. and billed on a single BAN, Eschelon offers an alternative to help alleviate the problems in two particularly customer-affecting areas – billing and repairs – where Qwest's position will most greatly diminish the utility of Commingled EELs. 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.[491] In connection with repairs, Eschelon's proposal is that it be permitted to submit multiple circuit i.d.s associated with a single Commingled EEL and that Qwest would assess a "no trouble found" charge only if no trouble is found on both the UNE and non-UNE portions of the circuit. 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.

27. Multiplexing (Loop-Mux Combinations): Issues 9-61 and subparts[492]

- ***Myth (stand alone multiplexing):*** Eschelon is asking Qwest to provide multiplexing as a stand alone UNE.[493] Eschelon is seeking to use multiplexing to commingle UNEs with tariffed services.[494]

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[491] Eschelon/9, Denney/173, lines 22-24.

[492] Eschelon's proposal on these issue as set forth in the Revised Disputed Issues List (10/10/06) contains certain errors that should be corrected as follows: (1) ICA Section 9.23.2 (at page 150 of the Disputed Issues List): The word "and" following "Loop Mux Combinations" should be deleted; and (2) ICA Section 9.23.9.3.2.2 (at the top of page 154 of the Disputed Issues List): "28 channels" should be "24 channels."

[493] Qwest/14, Stewart/81, line 11; Qwest/14, Stewart/85, lines 6-7; and Qwest/37, Stewart/66 (2nd full paragraph).

[494] Qwest/37, Stewart/66 (3rd full paragraph) and Qwest/43, Stewart/27, lines 21-25.

- **Debunked:** Eschelon is asking for multiplexing at UNE rates in two scenarios. The first is for UNE EELs and this scenario is not in dispute. The second is for Loop-Mux Combinations ("LMC").[495] The closed language defining Loop-Mux Combinations[496] clarifies that LMCs do not include interoffice transport and are connected to a collocation cage. Further, closed language of 24.2.1.1 states that the multiplexer will be billed at the rates in Exhibit A, if all circuits entering the multiplexer are UNEs or the UNE Combination terminates at a collocation. Eschelon is not seeking to use UNE multiplexing to commingle UNEs with tariffed services. [Error type two – ignores agreed upon language]

- ***Myth (multiplexing with loop-mux combination involves muxing commingled with transport):*** "The dispute concerns the rates, terms, and conditions that apply to multiplexing when Qwest provides multiplexing commingled with a non-UNE – typically private line transport."[497]
- ***Debunked:*** Qwest's characterization of this issue is contrary to closed language that defines a loop-mux combination as a loop connected to a multiplexer connected to the CLEC's collocation with no interoffice transport.[498] [Error type two – ignores agreed upon language]

- ***Myth (voluntary offer):*** Qwest voluntarily offered multiplexing historically.[499]
- ***Debunked:*** Qwest has historically offered multiplexing.[500] There is nothing in Qwest's historical offering or evidence in this record, other than Qwest's after the fact claims, that its previous offer was voluntary.[501] As the Minnesota Commission concluded, "If Qwest wishes to withdraw or limit multiplexing in the manner it proposes here, it should file a petition with the Commission to obtain permission to modify all ICAs that currently provide for UNE pricing of the multiplexing of a UNE loop into non-UNE transport within a central office."[502] [Error type four – ignores contrary facts in evidence]

The issue presented is whether Qwest is required to provide access to multiplexing ("muxing") at TELRIC rates when Eschelon requests muxing with an

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[495] Eschelon/132, Starkey/143, line 12 – /144, line 5.

[496] *See* 9.23.9.1.1/24.4.1.1 of the ICA.

[497] Qwest/43, Stewart/27, lines 16-18.

[498] See ICA Section 9.23.9.1.1. Because the parties disagree about whether the multiplexer should be a UNE when provided as part of a loop-mux combination, they disagree about whether the loop and the multiplexer are "combined" or "Commingled."

[499] Qwest/37, Stewart/68.

[500] Eschelon/1, Starkey/231, lines 18-23.

[501] Eschelon/132, Starkey/151-152.

[502] Eschelon/29, Denney/49 [MN Arbitrators' Report, ¶ 199], as adopted by the Minnesota Commission Order (Eschelon/30). (footnote omitted)

unbundled loop. Qwest currently provides an unbundled product, which it has named "Loop Mux Combination," consisting of an unbundled loop with multiplexing equipment attached, pursuant to Commission-approved TELRIC rates. Eschelon's proposal is only that Qwest continue to provide this product as it has been.[503] Even though the Commission has approved a TELRIC-based rate, Qwest contends that it has provided this product only "voluntarily" and that it should be permitted to discontinue providing it. Qwest's position is contrary to law.[504]

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.[505] 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 components (e.g., load coils, bridge taps, repeaters, multiplexing equipment) that are usually intended to facilitate the provision of narrowband voice services.[506]

Further, 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

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[503] Eschelon/1, Starkey/231-232.

[504] To the extent Qwest seeks to discontinue offering any product, it should first be required to obtain Commission approval, for the reasons discussed in connection with Eschelon's "phase out" proposal.

[505] 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 . . . .")

[506] 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.")

modifications" both with respect to the provisioning of unbundled loops and unbundled transport.[507]

Qwest argues that multiplexing is not a feature, function or capability of a loop because a loop can function without multiplexing.[508] Qwest also argues that the FCC rules that Eschelon has relied on are inapplicable because those rules are referring to "an entirely different type of multiplexing than is at issue here."[509] Qwest does not offer any legal support for either of these assertions and, in fact, they are legally incorrect.

Qwest asserted in its written testimony[510] and also in oral testimony[511] that multiplexing is a feature, function or capability of unbundled transport but not 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.[512] Qwest fails to offer any rationale for distinguishing between unbundled loop and transport in this regard. Further, there are a number of other things – such as repeaters and load coils – that are not required for a loop to function but are clearly features, functions, or capacities of the loop.[513]

Similarly unsupported is Qwest's claim that the FCC rules cited by Eschelon are inapplicable. Qwest has identified no language in either those rules or any FCC order

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[507] 47 C.F.R. §§ 51.319(a)(7) and 51.319(e)(4); *see also* Eschelon/132, Starkey/147, line 17 – /149, line 2.

[508] Qwest/37, Stewart/70-71.

[509] Qwest/37, Stewart/72.

[510] Qwest/37, Stewart/68 (1st full Q&A).

[511] Eschelon/6, Starkey/38 [MN Transcript, Vol. 2, p. 186-87 (testimony of Karen Stewart)].

[512] Eschelon/132, Starkey/146-147.

[513] 47 C.F.R. § 51.319(a) (defining the loop as including repeaters and load coils); *see also* Eschelon/132, Starkey/146-147.

that would support a conclusion that the multiplexing referred to in those rules is "entirely different"[514] from the multiplexing that is at issue here.

Qwest argued that Eschelon's language is contrary to the FCC decision in the Verizon Virginia Arbitration Order.[515] 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. As the Minnesota Commission found, however, the FCC's Verizon Virginia Arbitration 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.[516]

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[514] Qwest/37, Stewart/72.

[515] Qwest/14, Stewart/82-83, citing *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).

[516] Eschelon/29, Denney/48 [MN Arbitrators' Report, ¶ 196 (footnotes omitted, quoting the Verizon Virginia Arbitration Order at ¶¶ 490], as adopted by the Minnesota Commission Order (Eschelon/30).

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.[517] For the reasons explained above and in Eschelon's testimony, the Commission should similarly adopt Eschelon's language for Issue 9-61 and subparts.[518]

29. Root Cause Analysis and Acknowledgement of Mistakes: Issues 12-64, (a) and 12-64(b)

- ***Myth (additional burden)***: A valid acknowledgement of mistake requires no root cause, so it would be burdensome to require Qwest to also provide root cause.[519]
- ***Debunked***: "In order to 'acknowledge its error' with any authenticity, Qwest must have identified the root cause of the error. It is not unreasonable for Eschelon to require that this information be provided."[520] [Error type four – ignores contrary facts in evidence]

- ***Myth (sensitive information revealed)***: Qwest must provide an acknowledgement letter containing all data associated with a root cause analysis, forcing Qwest to publicly reveal sensitive and protected information.[521]
- **Debunked**: The plain language shows that Eschelon has asked only that the letter recap sufficient data to identify the issue. Under Eschelon's proposal, root cause

[517] Eschelon/29, Denney/49 [MN Arbitrators' Report, ¶ 199], as adopted by the Minnesota Commission Order (Eschelon/30).

[518] The Minnesota Commission adopted Eschelon's language on Issue 9-61 and subparts. *See* Eschelon/29, Denney/49 [MN Arbitrators' Report, ¶ 199], as adopted by the Minnesota Commission Order (Eschelon/30). ["Qwest agrees that it must offer multiplexing at UNE rates when it connects two UNEs, or when it is a feature, function, or capability of UNE transport. Given that Qwest has previously provided multiplexing as a UNE when it is provided in conjunction with a UNE loop, as well as when it is provided in conjunction with UNE transport, the Administrative Law Judges agree with the Department's recommendations that Eschelon's language be adopted in the ICA."]

[519] Qwest/1, Albersheim/53, lines 6-7 and Qwest/18, Albersheim/31, lines 14-15.

[520] Eschelon/29, Denney/50 [MN Arbitrators' Report at ¶ 203], citing Minnesota DOC witness Doherty's Minnesota Rebuttal testimony, pages 14-19. Ms. Doherty made the quote above at page 19, lines 13-16 of her Minnesota Rebuttal testimony; *see also* Eschelon/43, Johnson/47, line 17 – /50, line 12.

[521] Qwest/18, Albersheim/31, line 24 – /32, line 3.

analysis does not constitute the content of the letter, rather, it predates the letter.[522] [Error type one – ignores proposed language]

- ***Myth (MN 616 Order limited to wholesale order)***: Eschelon's proposed language goes beyond what was previously ordered by the Minnesota Commission because that order was limited to wholesale orders.[523]
- **Debunked**: In adopting Eschelon's proposed language on this issue, the Minnesota Commission expressly rejected Qwest's narrow interpretation of its Order in the MN 616 case, stating, "The Commission's concern for the anticompetitive consequences of service quality lapses *has never been as narrow* as Qwest's language would suggest."[524] [Error type four – ignores facts in evidence]

Eschelon compensates Qwest, as its vendor, for certain services. For those services, Eschelon 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's customer's service, which then results in harm to Eschelon. Eschelon's proposed language, therefore, addresses Qwest mistakes that create service impacting conditions.[525] Under Eschelon's proposal, the context of the error (*e.g.*, installation or repair) is not a trigger for whether Qwest must perform root cause analysis or an acknowledgement of a mistake because one or both may be requested if the error, however it arose, created a "service impacting condition."[526] As explained in Eschelon's

[522] ICA Proposed Section 12.1.4.2 & 12.1.4.2.1; see also Oregon Tr. 0023, line 12-0024, line 18.

[523] Qwest/40, Albersheim/21 at line 2-4.

[524] Eschleon/30, Denney/15 (emphasis added); see also Eschelon /127, Johnson/6, line 7-Johnson/7, line 16.

[525] *See* Proposed ICA Section 12.1.4.1 (requiring CLEC to follow procedures to correct a "service impacting condition" before beginning the process of requesting an error acknowledgement).

[526] *See* Proposed ICA Section 12.1.4.1 (requiring CLEC to follow procedures to correct a "service impacting condition" before beginning the process of requesting an error acknowledgement). Regardless of whether a Qwest typist fat-fingers a service order (an error in processing an LSR or ASR) or a Qwest technician knocks off a connector (during a repair), if the end result is that the customer's service is impacted Eschelon, after following the usual procedures to restore service,

testimony,[527] Eschelon has provided an alternative proposal for Section 12.1.4.1 regarding the single phrase on this issue that remained open in Minnesota. Although in Oregon Qwest *opposes* all of Eschelon's proposed language for Issue 12-64,[528] Qwest *agreed* in Minnesota to all of Eschelon's proposed language (which is the same in both states), except one phrase ("a mistake relating to products and services provided under this Agreement.") Eschelon's alternate proposal (proposal #2) regarding that one open phrase ("mistake(s) in processing wholesale orders, including pre-order, ordering, provisioning, maintenance and repair, and billing") was provided at Eschelon/43, Johnson/43-44, and as discussed below, was adopted by the Minnesota Commission.

In contrast, Qwest opposes all of Eschelon's proposed language and proposes to leave 12.1.4 blank. This is despite Qwest agreeing in Minnesota to all of Eschelon's proposed language except one phrase (described above). As Eschelon explained,[529] a comparison of Qwest's testimony about the disadvantages of unique "one-off" processes[530] with Qwest's testimony about the disadvantages of uniformity for Issue 12-64[531] demonstrates the contradiction in Qwest's advocacy in this arbitration. Eschelon has consistently maintained that this issue should be addressed in the interconnection agreement.[532] In contrast, Qwest's stated position is that processes, procedures, and

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wants the ability to receive a root cause analysis to help prevent a reoccurrence of the event and/or an acknowledgement of the Qwest error that may be used in communications with its customer.

[527] Eschelon/43, Johnson/43-35.

[528] Qwest/1, Albersheim/51, line 31 – /52, line 1. *See also* Oregon Tr., Vol. 1, 0019, line 25 – 0020, line 9; Oregon Tr., Vol. 1, 0024, line 25 – 0025, line 5; and Eschelon/43, Johnson/44, lines 27-28.

[529] Eschelon/132, Starkey/13-15.

[530] *See e.g.*, Qwest/1, Albersheim/24, line 21; Qwest/1, Albersheim/25, lines 1-3; and Qwest/1, Albersheim/32, line 31.

[531] Qwest/18, Albersheim/31, lines 2-15.

[532] *See e.g.*, Eschelon/1, Starkey/69, footnote 138. Qwest erroneously represents that Eschelon argued that "Qwest should have submitted the acknowledgment of mistakes issue in the Minnesota docket to the CMP." Qwest/18, Albersheim/32, lines 5-8. Eschelon is clearly questioning an inconsistency

business practices should be handled in CMP and not in interconnection agreements[533] to avoid "one-off" processes,[534] but for this particular issue of acknowledging Qwest mistakes in Minnesota, Qwest ***did not use CMP***[535] even though Qwest admits that its decision not to do so has resulted in a "one-off" process.[536] Before Eschelon pointed this out,[537] Qwest said in this proceeding that this issue "involves processes that affect all CLECs, not just Eschelon."[538] After Eschelon pointed this out,[539] Qwest, to explain why Qwest did not use CMP, presented convenient sworn testimony that the same issue does not "apply to all CLECs."[540] Apparently to bolster this claim, Qwest also erroneously described the results of the *MN 616 Case* as a "settlement."[541] This is an example of

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between Qwest's conduct and statements and is not advocating use of CMP for this issue. Eschelon/1, Starkey/69-71. Eschelon's position that this issue should be in the ICA is consistent with the testimony of the Minnesota Department of Commerce in the Minnesota arbitration proceeding. *See e.g.*, Eschelon/29, Denney/6, citing Minnesota DOC Witness Doherty's Minnesota Reply testimony at pages 2-14. Page 10, lines 15-17 of Ms. Doherty's Minnesota rebuttal testimony states: "'CMP provides ***a*** means to address changes'" and not "'the ***only*** means' or even ***the*** means.'" (emphasis in original)

533 MN Transcript, Vol. 1, p. 58, lines 1-18 (testimony of Ms. Albersheim); *see also* Qwest/18, Albersheim/6, lines 7-11.

534 Qwest/18, Albersheim/6, lines 7-11 and Qwest/18, Albersheim/13.

535 Eschelon/1, Starkey/69-71.

536 Eschelon/6, Starkey/3 [MN Transcript, Vol. 1, p. 16, lines 1-3 (testimony of Ms. Albersheim)].

537 Eschelon/1, Starkey/19, line 17 – /20, lines 3 and Eschelon/1, Starkey/21, lines 5-7.

538 Qwest Response, p. 38, lines 11-12.

539 Eschelon/1, Starkey/19, line 17 – /20, lines 3 and Eschelon/1, Starkey/21, lines 5-7.

540 Eschelon/1, Starkey/73, lines 17-18 and footnote 149 ("nor does it apply to all CLECs").

541 *See* Qwest/18, Albersheim/33, line 14. In its direct testimony, Qwest described the *MN 616 Case* order as a "decision" by the Commission. Qwest/1, Albersheim/51, line 35 and Qwest/1, Albersheim/53, line 7. The word "settlement" did not appear in the direct testimony of Ms. Albersheim related to this issue. Eschelon pointed out in its previous testimony that Section 4.1 of the CMP Document contains procedures applicable to regulatory changes requests [*see* Eschelon/1, Starkey/68, footnote 138], which apparently has led Qwest to change course and describe the decisions of this Commission erroneously as a "settlement." Qwest/18, Albersheim/33, line 14. By portraying the ruling as a voluntary settlement, Qwest argued that the Commission-ordered requirements did not fall within the CMP's definition of a regulatory change, because Section 4.1 of the CMP Document (Qwest/2) provides that regulatory changes "are not voluntary." The requirements, however, were not voluntary. In the *MN 616 Case*, the Commission ruled that "Qwest failed to provide adequate service at several key points in the customer transfer process and that these inadequacies reflect system failures that must be addressed." Eschelon/5, Starkey/10 [Order, *MN 616 Case* (July 30, 2003), p. 5]. The Commission made this ruling based on documented facts and not a settlement. *See e.g.*, *id*., p. 3 ("Interpretations aside, the following facts

Qwest error type number four (ignores contrary facts in evidence). The Commission's orders in the MN 616 Case clearly apply to all CLECs and not only Eschelon. The Minnesota Commission found that Qwest had "failed to adopt operational procedures to promptly acknowledge and take responsibility for mistakes in processing wholesale orders."[542] The order did not say "Eschelon orders." The Minnesota Commission also found that "[p]roviding adequate wholesale service includes taking responsibility when the wholesale provider's actions harm customers who could reasonably conclude that ***a competing carrier*** was at fault. Without this kind of accountability and transparency, retail competition cannot thrive."[543] The order did not say that the customer would blame "Eschelon."

Similarly, in its later order finding Qwest's compliance filing inadequate, the Minnesota Commission's fourteen ordering paragraphs (a-n) regarding the required contents of Qwest's next compliance filing included, for example, the following items that referred to "all" Qwest wholesale orders and CLECs generally (not only Eschelon):

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are not disputed.") (quoting Qwest email to Eschelon customer). The Commission exercised its "general authority to require telephone companies to provide adequate service" without a contested case *not* because of a settlement but because the Commission found there were insufficient disputed facts to require a contested case hearing before making its findings. *Id*.

At the Minnesota hearing, Ms. Albersheim acknowledged that, in fact, the result of the *MN 616 Case* was not a settlement, but a Commission Order. Eschelon/6, Starkey/3 [MN Transcript at Vol. 1, p. 15, lines 10-16 (testimony of Renee Albersheim)]. At the Arizona hearing, Ms. Albersheim, who is an attorney (Oregon Tr. 0011, lines 18-21), again argued that the decision is a settlement (using a rationale that would make virtually any commission order into a settlement, (id. pp. 44-45), but she did admit "this wouldn't be like a settlement between the parties, which is normally how you would use this term" (id. p. 45, lines 2-4). In fact, it is difficult to imagine any sense in which an order from a state commission that required Qwest to undertake specific procedures to remedy inadequate service could be reasonably considered a "settlement."

[542] Eschelon/5, Starkey/1 & 13 [Order, *MN 616 Case* (July, 30, 2003), p. 8 and (Nov. 13, 2003)].

[543] Eschelon/5, Starkey/1 & 13 [Order, *MN 616 Case* (July, 30, 2003), p. 8 and (Nov. 13, 2003)]. (emphasis added).

(f) Procedures for extending the error acknowledgment procedures set forth in part (e) to ***all*** Qwest errors in processing wholesale orders.[544]

(i) Procedures for providing the acknowledgement to the ***competitive local exchange carrier***, who in turn may provide it to the end user customer, to prevent improper contacts with the other carrier's customer.[545]

(j) Procedures for preventing use of a confidentiality designation in acknowledgements, to ensure that the ***competitive local exchange carrier*** can provide the acknowledgment to its end user customer.[546]

(k) Procedures for making the acknowledgement process readily accessible to competitive local exchange ***carriers***, including procedures for identifying clearly the person(s) to whom requests for acknowledgments should be directed.[547]

(l) Procedures for ensuring that persons designated to provide acknowledgements have been appropriately trained and have the authority to provide acknowledgements.[548]

Despite these Commission-ordered requirements that are clearly not limited to Eschelon and its own earlier filing stating that this issue involves "processes that affect all CLECs, not just Eschelon,"[549] Qwest filed the following testimony in support of its choice not to use CMP: "This process is not one that requires Qwest to alter its procedures overall, nor does it apply to all CLECs."[550] This is an incredible example of results-oriented conduct. It is not a process affecting all CLECs, because Qwest did not want to use CMP so it says it is not one. If these Minnesota Commission-ordered requirements to ***implement***[551] steps regarding acknowledgment provisions for ***all*** Qwest

[544] Eschelon/5, Starkey/4 [Order, *MN 616 Case* (Nov. 13, 2003) p. 4] (emphasis added).

[545] Eschelon/5, Starkey/4 [Order, *MN 616 Case* (Nov. 13, 2003) p. 4] (emphasis added).

[546] Eschelon/5, Starkey/4 [Order, *MN 616 Case* (Nov. 13, 2003) p. 4] (emphasis added).

[547] Eschelon/5, Starkey/4 [Order, *MN 616 Case* (Nov. 13, 2003) p. 4] (emphasis added).

[548] Eschelon/5, Starkey/5 [Order, *MN 616 Case* (Nov. 13, 2003) p. 5].

[549] Qwest's Response, p. 38, lines 11-12.

[550] Eschelon/1, Starkey/73, lines 17-18 and footnote 149, citing Albersheim Arizona Rebuttal, p. 40, lines 9-11; Albersheim Minnesota Rebuttal, p. 40, lines 13-15; Albersheim Washington Rebuttal, p. 39, lines 9-11 (same quote in all three states).

[551] Eschelon/5, Starkey/5 [Order, *MN 616 Case* (Nov. 13, 2003) p. 5, ¶2].

errors in processing wholesale orders, which the Minnesota Commission described as "***processes and procedures***,"[552] are not "processes that affect all CLECs"[553] that "should be addressed through CMP" [554] according to Qwest, then Qwest's proposed test for excluding terms from the interconnection agreement on the basis that they are processes or affect multiple CLECs is meaningless. Qwest's own inconsistency on this issue demonstrates that Qwest's approach to CMP offers Eschelon no certainty upon which Eschelon may plan its business.

As a result of its results-oriented approach, for this particular issue, Qwest is not proposing to deal with acknowledgement of mistakes in CMP. Therefore, the parties agree that a decision is needed on the contract language. Qwest testifies that Eschelon's language "gives Eschelon unfettered leeway to demand a root cause analysis even when it is readily apparent that a problem has not been caused by Qwest."[555] This claim ignores Eschelon's proposed language (error type number one), which is limited to "mistakes" that create a "service impacting condition" that Eschelon may raise after following the "usual procedures" to correct that condition.[556] There are also other provisions in the ICA that guard against this alleged problem. For example, Qwest's usual procedures require Eschelon to isolate trouble and provide the test results showing the trouble is in Qwest's network (not caused by Eschelon) before reporting a trouble, or

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[552] Eschelon/5, Starkey/3 [Order, *MN 616 Case* (Nov. 13, 2003), p. 3] (emphasis added).

[553] A process affecting "all CLECs" that Qwest contends belongs in CMP may be specific to one state. *See e.g.*, the Washington-only expedite terms. Qwest/9, Albersheim/3 [Qwest's PCAT, *Expedites and Escalations Overview – V. 41.0*, stating: "The Expedites Requiring Approval section of this procedure does not apply to any of the products listed below (unless you are ordering services in the state of WA)."].

[554] Disputed Issues Matrix (10/10/06, p. 162): "Processes that affect all CLECs should be addressed through CMP, not through an arbitration involving a single CLEC."

[555] Qwest/18, Albersheim/34, lines 14-16.

[556] *See* Proposed ICA Sections 12.1.4 & 12.1.4.1.

Qwest will not even open a trouble ticket.[557] This usual procedure is reflected in closed ICA language, along with a requirement that Eschelon is responsible for resolution of any service trouble in its network (caused by Eschelon) reported by its customers.[558] This is an example of Qwest's error type number two (ignoring agreed upon language) and number three (ignoring contract principles). Interpreting the closed language in the ICA together to give effect to all of its provisions shows that requests for root cause analysis are not unfettered and that Qwest has protection in the ICA against demands when it is readily apparent that a problem has not been caused by Qwest. These protections are in addition to the practical protections that would inhibit a CLEC from wasting its resources on frivolous demands.

Qwest argues that "Eschelon can use such a request as a tactic to delay responding to one of its end user customer's complaints and to cast blame on Qwest for a problem even when Qwest is not at fault."[559] If Qwest is not at fault, however, the end result of the root cause analysis (which is performed by Qwest) will be that blame is cast on Eschelon. Qwest does not explain how Eschelon would benefit from causing delay for its own customer and then compounding the problem by having to tell the customer in the end that Qwest says Eschelon is at fault (or promising an acknowledgment from Qwest and then not being able to deliver on that promise to the customer). The argument is illogical. Further, Qwest testified it routinely provides Eschelon with root cause

[557] *See e.g.*, Qwest/26, Albersheim/10 ("Test Results Before Submitting a Trouble Report"); *see also* Proposed ICA Section 12.4.1.3 (closed language). This is also an example of Qwest method number two (ignoring agreed upon language).

[558] Proposed ICA Section 12.4.1.3 (closed language).

[559] Qwest/18, Albersheim/34, lines 16-18.

analysis.[560] In fact, providing root cause analysis is a defined part of the Qwest's Service Manager's Role.[561] Therefore, Eschelon's proposal does not impose additional "burden" on Qwest, as claimed by Ms. Albersheim in prior arbitration proceedings.[562] There is no evidence from which to conclude that Eschelon would abuse this contract provision. In contrast, there is evidence of the benefits of the language. Root-cause analyses are necessary to the correct attribution of mistakes and, therefore, necessary to the development of procedures designed toward the reduction of such mistakes. Qwest itself admits that root cause analysis may help "prevent a reoccurrence of the event."[563]

Ironically, whereas Qwest criticizes Eschelon's proposed language because it allegedly gives "unfettered"[564] discretion to Eschelon to request root cause, Qwest praises its own "current practice" because it provides Qwest "discretion" as to when it will perform root cause for repairs.[565] Qwest defines discretion *for itself* as "protection."[566]

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[560] Qwest/18, Albersheim/34, lines, 19-20. *See also* Eschelon/87 to Johnson Direct (Eschelon/43) containing actual examples in which Qwest provided root cause analysis to Eschelon. Regarding Qwest's recent refusal to provide root cause analyses regarding problems with jeopardies and firm order confirmations that result in customer affecting delays, however, see Eschelon/117 to Johnson Direct (Eschelon/43).

[561] Eschelon/92, Johnson/2 (last paragraph). This is Qwest documentation posted on its website which, as discussed previously, Qwest may change unilaterally and, as shown by Eschelon/117 (with respect to Qwest's refusal to provide root cause for jeopardy examples) Qwest is disregarding currently. These facts show that the commitment to perform root cause analysis needs to be in the interconnection agreement.

[562] Eschelon/127, Johnson/8, lines 11-16.

[563] Qwest/4, Albersheim/3 (sixth bullet point). *See also* Eschelon/87, Johnson/1 & 3 (Example 3) & (Example 8) (both examples of root cause analyses that resulted in additional training for the Qwest personnel to prevent a reoccurrence of the event).

[564] Qwest/18, Albersheim/34, line 14.

[565] Qwest/18, Albersheim/34, lines 20-22. Qwest has given conflicting testimony with respect to its current practice, depending on which point it is making. When arguing that acknowledgement of mistakes does not belong in CMP, Qwest testified about the root cause process for repair documented in the PCAT: "It's my understanding that ***no other CLEC*** has asked a service manager for root cause analysis." MN Transcript, Vol. 1, p. 84, lines 6-15 (emphasis added). When arguing that root cause analysis is already adequately addressed in the PCAT, the same Qwest witness testified: "Under Qwest's current practice, CLECs can ***and do*** ask for root cause analyses for repair." Qwest/18, Albersheim/34, lines 18-19 (emphasis added). If the Commission can't get a straight answer, Eschelon has even less hope of getting one without Commission oversight. These terms need to be in the ICA.

Qwest does not explain why Qwest alone should be afforded protection. Qwest's proposal is to strike Eschelon's language and be silent in this section of the ICA as to root cause analysis. Silence offers no protection for Eschelon.

Silence also provides no contractual certainty or any rules to follow to avoid disputes. By contrasting its approach with an allegedly unfettered approach, Qwest suggests that its approach is more narrowly tailored (*i.e.*, not unfettered) and thus provides such guidance. In reality, however, under Qwest's current practice as reflected in its Account Manager PCAT, the test for when a CLEC may request root cause analysis for repair issues from its account manager is whether there is "an unusual repair event."[567] Qwest complains about terminology it claims is vague,[568] but does not define "unusual."[569] Under its current process, Qwest has discretion to determine whether a repair event is unusual[570] and thus has "unfettered leeway"[571] to deny a request for root cause analysis. Qwest's own position is that unfettered leeway is a basis for rejecting a proposal.[572] Because Qwest's proposed root cause terms are in the PCAT and not in the ICA, Qwest also reserves the right to change or remove those terms during the term of the ICA without amending it, thus depriving Eschelon of any contractual certainty. This is hardly a more narrowly tailored or superior approach. The Commission should adopt Eschelon's proposals for all of the open language in Section 12.1.4 (Issue 12-64 and subparts):

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[566] Qwest/18, Albersheim/34, line 21.

[567] Qwest/4, Albersheim/3 (sixth bullet point).

[568] *See e.g.*, Qwest/18, Albersheim/31, line 19.

[569] Qwest/4, Albersheim/3 (sixth bullet point). Qwest's Account Manager PCAT provides a single example of "unusual." *See id*. That example is an "event over eight hours." *See id.*

[570] Qwest/4, Albersheim/3 (sixth bullet point).

[571] Qwest/18, Albersheim/34, lines 14-15.

[572] Qwest/18, Albersheim/34, lines 14-15.

	Eschelon Proposal	**Qwest Proposal**
(a)[573]	Both root cause analysis & acknowledgement of a mistake	Intentionally Left Blank.
(b)[574]	Mistakes creating a service impacting condition	Intentionally Left Blank.[575]
(c)[576]	*Usual* procedures to correct *a* service impacting condition	Intentionally Left Blank.
(d)[577]	Sufficient pertinent information to identify the issue ("e.g." = for example)[578]	Intentionally Left Blank.
(e)[579]	Qwest acknowledges its mistake. . . . not made by the *other* service provider	Intentionally Left Blank.
(f)[580]	Written responses acknowledging Qwest error will be provided with Qwest identification, and will be provided by the Qwest Service Manager to Eschelon.	Intentionally Left Blank.
(g)[581]	Written responses acknowledging Qwest error will be provided on a non-confidential basis and will not include a confidentiality statement[582]	Intentionally Left Blank.

[573] *See* Proposed ICA Sections 12.1.4, 12.1.4.1, 12.1.4.2

[574] *See* Proposed ICA Sections 12.1.4

[575] Qwest's proposal in Minnesota was related to mistakes in processing an LSR/ASR. *See* Eschelon/29, Denney/50 [MN Arbitrators' Report at ¶ 203 ["The Department asserts that the Commission's language was intended to encompass errors that may occur in pre-ordering, ordering, provisioning, maintenance, and billing; it rejects Qwest's argument that the Commission limited its decision to errors in processing of an LSR/ASR."]; and citing Minnesota DOC witness Doherty's Minnesota Reply Testimony at pages 14-19. At page 19, lines 6-10, Ms. Doherty states: "It is my opinion that the Commission's language is intended to encompass errors which may occur throughout the end-to-end order provisioning process, not just those which may occur during the typing or processing of an LSR/ASR. I therefore believe that Eschelon's broader terminology is more consistent with the plain language as well as with the spirit of the Commission's Order than is that proposed by Qwest." Eschelon agrees with the Minnesota DOC's interpretation of "processing wholesale orders" as "the end-to-end order provisioning process" is reasonable, but unfortunately Qwest does not agree and interprets this phrase much more narrowly.

[576] *See* Proposed ICA Sections 12.1.4.1.

[577] *See* Proposed ICA Sections 12.1.4.2.1

[578] *See e.g.*, Eschelon/29, Denney/50 [MN Arbitrators' Report at ¶ 203], citing Minnesota DOC witness Doherty's Minnesota Reply Testimony at pages 14-19. At page 19, lines 13-15, Ms. Doherty states: "Eschelon's insertion of the words "sufficient to identify the issue" appears to me to clarify the purpose of the information required (i.e. to identify the issue) and imposes no administrative burden on Qwest."

[579] *See* Proposed ICA Sections 12.1.4.2.1

[580] See Proposed ICA Sections 12.1.4.2.3 and 12.1.4.2.4.

[581] *See* Proposed ICA Sections 12.1.4.2.5.

In Minnesota (where Qwest had initially agreed to only portions of Eschelon's proposed language), the Commission adopted the ALJs' conclusion[583] that "Qwest's proposed language for the ICA is inconsistent with commitments it made in its compliance filings in the *MN 616* Docket."[584] The Minnesota ALJs found that "Eschelon's language is not vague or burdensome . . . and it is more consistent with the Commission's order."[585] Regarding the single phrase that remained open after the ALJs' ruling, the ALJs in Minnesota specifically found that *Eschelon's language* (Eschelon's Proposal #1) – "a mistake relating to products and services under this Agreement – is "consistent with the record and in the public interest."[586] In its March 30, 2007 written order, the Minnesota Commission adopted Eschelon's proposal, but it adopted Eschelon's proposal #2 – "mistake(s) in processing wholesale orders, including pre-order, ordering, provisioning, maintenance and repair, and billing" - for inclusion in the ICA.[587] Eschelon has offered Eschelon's proposal #2 for adoption in Oregon as well.

31. Expedited Orders: Issues 12-67 and subparts

- ***Myth (free)***: Eschelon seeks to get "free expedites."[588]
- ***Debunked***: Eschelon will pay a separate fee for expedites under its proposed Section 12.2.1.2.2 and Exhibit A. Eschelon has proposed an interim rate of $100 (see Issue 12-67(g)). In addition, Eschelon will pay the non-recurring charge for

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582 Eschelon/43, Johnson/52.

583 Eschelon/30, Denney/22, MN PUC Arbitration Order, p. 22, ¶1.

584 Eschelon/29, Denney/51-52 [MN Arbitrators' Report, ¶208].

585 Eschelon/29, Denney/51-52 [MN Arbitrators' Report, ¶208]

586 Eschelon/29, Denney/52 [MN Arbitrators' Report, ¶208(last sentence)]. Incredibly, Ms. Albersheim's selective quotation from this paragraph makes it appear as if the Minnesota ALJs' decision supported Qwest's position. *See* AZ Transcript, Vol. 1, pp. 37-41.

587 Eschelon/30, Denney/23, MN PUC Arbitration Order, p. 23, ¶4 (Topic 27).

588 Qwest/18, Albersheim/41, line 18.

the installation as described in its proposed Section 12.2.1.2.3 for expedited orders (regardless of whether there is any exception to charging, such as when emergency conditions are met). Qwest acknowledged that expediting service does not require any additional provisioning activities; it merely involves performing the same provisioning activities that are already covered by that installation fee more quickly than would otherwise be the case.[589]

- ***Myth***: Providing a wholesale service at a price different from the retail rate equals providing a superior service.[590]
- ***Debunked***: Ms. Albersheim admitted that Qwest provides expedites for itself and its retail customers.[591] After answering this threshold question, which is separate from the question of price, the analysis moves to another question: what the wholesale price should be (whether TELRIC-based). Qwest inappropriately collapses these two questions into one.[592] The wholesale price should be based on cost because Qwest faces its own costs in providing expedites of orders. The problem is that Qwest attempts to inappropriately profit from providing expedites to Eschelon by charging rates that exceed the underlying costs of performing expedites based on the misguided notion that expedites are a "premium" or "superior service."[593] The Minnesota Commission correctly found that the "The concerns articulated by the 8th Circuit and the FCC regarding 'superior service' have no relevance to this issue [expedites]."[594] [Error types two – ignores agreed upon language – and four – ignores contrary facts in evidence]

- ***Myth (CMP originated)***: The expedite process was implemented through CMP.[595]
- ***Debunked***: The Qwest expedite process, for retail and CLEC UNE customers, pre-dated CMP and, when first documented in the PCAT in 2001, was already being used by retail and CLEC UNE customers.[596] Qwest specifically recognized in its 2001 product notification adding the process to the PCAT that "these updates reflect current practice."[597] Although Qwest later added another option in

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[589] MN Transcript, Vol. 2, p. 97, line 18-p, 98, line 22.

[590] *See e.g.*, Qwest/1, Albersheim/64, lines 12-18. *See also* Qwest/39, Million/23-28.

[591] Eschelon/7, Starkey/12, AZ Hearing Transcript, Vol. 1, p. 58, lines 19-21 ("Q. Now, you would agree with me that Qwest provides itself with expedites; correct? A. Yes."); *see also* Qwest/18, Albersheim/35, lines 10-11 ("Qwest offers expedites to CLECs on the same terms and conditions as it offers them to its retail customers.")

[592] Eschelon/9, Denney/224, lines 14-15.

[593] *See e.g.*, Qwest/18, Albersheim/40, line 9 and Qwest/39, Million/23-28.

[594] Eschelon/30, Denney/18, MN PUC Arbitration Order, p. 18.

[595] *See* e.*g.*, MN Transcript, Vol. 4, p. 128, lines 13-19 (Mr. Devaney cross of Ms. Johnson).

[596] MN Transcript, Vol. 4, p. 128, line 22- p. 129, line 1 (Ms. Johnson); *see also* Eschelon./93, Johnson/5.

[597] Qwest Product Notification for Version 1 of the Expedites & Escalations Overview, quoted in Eschelon/93, Johnson/5.

CMP under that process, the process of expediting orders itself was not developed through CMP.[598] [Error type four – ignores contrary facts in evidence]

- ***Myth (design/nondesign)***: An expedite process must necessarily distinguish between non-design and design products because they are so different.[599]
- ***Debunked***: The Qwest expedite terms reflected in Eschelon's proposal number one for Section 12.2.1.2.1 were available to CLEC UNE customers at no additional charge with no distinction between non-design and design products for many years in 14 states and are still available for CLEC UNE orders in Washington.[600] Under that process and without an amendment, Qwest approved expedites for Eschelon UNE loop ("designed") orders over a period of years, including after implementation in 2004 of the fee-added process under the Covad change request.[601] In the Arizona Complaint Docket under the existing ICA, the Arizona Staff concluded that "Qwest should continue to support the same Expedite Process that has been used in the past for all products and services (including unbundled loops) if the order meets any of the Emergency criteria or conditions or where the customer's safety may be an issue if the Expedite is not processed."[602] This is further evidence that an expedite process need not distinguish between non-design and design products and Eschelon's proposal number one for Issue 12-67(a) would simply "put Qwest in the position of providing expedites" [603] in the manner which Qwest provided them in Oregon for years. [Error type four – ignores contrary facts in evidence]

- ***Myth***: There are no exceptions to charging an additional expedite fee for expediting unbundled loop orders because they are designed services.[604]

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[598] Eschelon/93, Johnson/5-10.

[599] Qwest/1, Albersheim/56-57; Qwest/18, Albersheim/35-36 and Qwest/18, Albersheim/35, lines 5-7 ("Eschelon proposes language that puts Qwest in the position of providing expedites without accounting for the differences between the products being expedited.").

[600] Eschelon/9, Denney/203-206; Eschelon/93, Johnson/5-10 and Eschelon/94 (Johnson); *see also* Eschelon/33, Denney/1 (Staff Conclusion No. 1). Regarding Washington, *see* Eschelon/9, Denney/205, footnote 173, citing Eschelon/104, Johnson/3 ("The Expedites Requiring Approval section of this procedure does not apply to any of the products listed below (unless you are ordering services in the state of WA))."

[601] *See id*.; *see also* Eschelon/107 (Johnson) (Examples of Expedite Requests Approved by Qwest for Unbundled Loop Orders).

[602] Eschelon/33, Denney/1 (Staff Conclusion No. 1).

[603] Qwest/18, Albersheim/35, lines 5-7.

[604] Qwest's proposed ICA language (Sections 7.3.5.2.2 and 9.1.12.1.2) in both of these provisions provides that expedites will be allowed "only" when the request meets the criteria for fee-added "Pre-Approved" Expedites. In all Qwest states except Washington, for unbundled loop products, expedites at no additional fee are not available, even when the emergency-based conditions are met, under Qwest's "Pre-Approved" Expedites process. *See* Qwest/9, Albersheim (Qwest's expedites PCAT).

- ***Debunked***: Qwest has admitted it provides exceptions to charging an additional fee for expediting orders in emergencies for designed services for its retail customers.[605] In fact, for its retail customers, Qwest waives both the expedite fee and the installation fee[606] (the latter of which Eschelon would pay per its proposed Section 12.2.1.2.3 regardless of whether the emergency conditions were met).

- ***Myth (process replaced)***: There was a former expedite process that was replaced by a new expedite process created in July of 2005 through a Covad change request.[607]
- ***Debunked***: The Covad change request was implemented in 2004[608] as an enhancement to the expedite process to offer optional fee-added terms, in addition to the terms available at no additional charge when emergency conditions were

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[605] Eschelon/9, Denney/237, footnote 256 [citing Qwest (Ms. Martain, CMP Process Manager) Direct, Arizona Complaint Docket, p. 40, lines 4-10 ("The tariff then goes on to state that if the end user elects to move service to a temporary location (either within the same building, or a different building) that non-recurring charges would apply. This would include the non recurring charge to expedite a design service. However, when the customer moves its service, via a service order, back to the original premise location, if it meets the criteria as outlined in 3.2.2.d included below, the non-recurring charges would be ***waived*** (***including the expedite fee***)" (emphasis added)]; *.See e.g.*, Eschelon/36, Denney/8-9 (Qwest retail tariff pages), pp. 3 & 5 ("When Nonrecurring Charges Do Not Apply" "Charges do not apply for the reestablishment of service following a fire, flood or other occurrence attributed to an Act of God. . . ."); *see also e.g.*, Qwest's PCAT, *Expedites and Escalations Overview* available at http://www.qwest.com/wholesale/clecs/exescover.html ("The Expedites Requiring Approval section of this procedure does not apply to any of the products listed below (***unless you are ordering services in the state of WA***)).

[606] Eschelon/9, Denney/237, footnote 256 [citing Qwest (Ms. Martain, CMP Process Manager) Direct, Arizona Complaint Docket, p. 40, lines 4-10 (quoted in above footnote)].

[607] Qwest/1, Albersheim/55-56. Qwest/1, Albersheim/55, line 12, Qwest asks the question: "How did Qwest develop its current expedite process?" In the next line, Qwest begins by stating: "In February 2004, Covad submitted a change request to the CMP requesting an expedite process for design services, like unbundled loops." The Covad change request was implemented in 2004 with Version 11 of the PCAT. *See* Eschelon/93, Johnson/5-6. On Qwest/1, Albersheim/55, line 22 Qwest appears to be continuing its discussion of the Covad change request. Qwest neglects to mention, when it begins to discuss the process today, that the changes made "via the CMP" (Qwest/1, Albersheim/22) were Qwest-initiated changes made, not as part of the Covad change request, but by Qwest announcements distributed to CLECs in October of 2005, relating to Versions 27 and 30 of the PCAT. Eschelon/93, Johnson/8-12 and Eschelon/108 to Johnson Direct. For example, Qwest's description on Qwest/1, Albersheim/56, lines 6-7 of the second option (emergency-based expedite process "Requiring Approval") as a process that applies only to non-designed services is inaccurate under the Covad change request. After implementation of the Covad change request, the emergency-based expedite process "Requiring Approval" remained available for UNE loops (designed services) without an amendment. Eschelon/93, Johnson/5-6. It was only after Qwest's Version 30 notification, to which multiple CLECs objected, that it became unavailable for UNE loops and restricted to non-designed services under the current ICA. *Id.* at 10, *see also* Eschelon/108, Johnson.

[608] The Covad change request was effective on July 31, 2004. Eschelon/93, Johnson/6. Although the paperwork on the change request was later completed in 2005, the optional fee-added process was implemented and available in addition to the emergency-based process in the meantime. *See* Eschelon/93, Johnson/5-9; Eschelon/107 (Johnson) and Eschelon/141, Johnson/26-27.

met.[609] After implementation of the Covad change request, the emergency-based expedites "Requiring Approval" process remained available for UNE loops (designed services) without an amendment.[610] [Error type four – ignores facts in evidence]

- ***Myth (reason replaced):*** The reason for the Covad change request asking for a fee-added process was that CLECs wanted more certainty than the emergency-based expedite process provided.[611]
- ***Debunked***: Covad wanted a fee-added process because expedites were not otherwise available if the emergency conditions were not met, and it received support for the request so long as the imposition of charges was optional and the expedites meeting the emergency conditions were still available (at no additional charge).[612] In Qwest's response to the Covad change request, Qwest reassured CLECs that: "If a CLEC chooses not to amend their Interconnection Agreement, the current expedite criteria and process will be used."[613] The referenced "current expedite criteria and process" are the emergency conditions that Qwest suggests CLECs were dissatisfied with,[614] but this shows that CLECs were not only satisfied with them but seeking assurance that they would remain in place.[615] [Error type four – ignores contrary facts in evidence]

- ***Myth (gaming)***: The reason Qwest modified its expedite service by CMP notification to remove UNEs from the emergency-based expedites process was because CLECs were "gaming the system and submitting spurious emergency expedite requests."[616] The emergency-based expedites "became unworkable because of the large number of illegitimate CLEC expedite requests."[617]
- ***Debunked***: At the time it modified its expedite service by CMP notification (Version 30), Qwest told CLECs that its reason was to bring parity across its entire customer base. Qwest specifically said, in its November 18, 2005 CMP Response: "Qwest does not sell Unbundled Loops to its end user customers" and added "so it is not appropriate to make a comparison to retail in this situation."[618] The absence of any mention of alleged gaming or illegitimate requests by Qwest (at a time when CLECs could comment upon that claim) as well as by CLECs in

[609] Eschelon/94, Johnson/9-10 (##22-24).

[610] Eschelon/93, Johnson/5-6.

[611] Qwest/1, Albersheim/55, lines 21-22.

[612] Eschelon/93, Johnson/5-6; *see also* Eschelon/125, Denney/204-206.

[613] Eschelon/93, Johnson/6.

[614] Qwest/1, Albersheim/55, lines 19-22.

[615] Eschelon/93, Johnson/6; *see also* Eschelon/94, Johnson/9-10 (##22-24).

[616] Qwest/18, Albersheim/42, line 25 – /43, line 1.

[617] Qwest/18, Albersheim/42, line 25 – /43, line 3 and Qwest/40, Albersheim/42, line 23 – /43, line 7.

[618] Eschelon/93, Johnson/11.

their comments[619] shows that alleged gaming was not Qwest's reason.[620] Moreover, Qwest does not explain how gaming could even occur when Qwest unilaterally approves or denies all such requests.[621] [Error type four – ignores contrary facts in evidence]

- ***Myth (remedy exhaustion)***: Eschelon participated in CMP activities that produced the "current expedite process," but did not seek postponement, CMP Oversight Committee Review, or dispute resolution,[622] suggesting Eschelon should have exhausted its options in CMP.
- ***Debunked***: By continuing to refer to a "change request,"[623] Qwest perpetuates the myth that the objectionable change it made in its October 2005 Version 30 PCAT announcement (effective in January 2006) is somehow a result of the Covad change request implemented in 2004.[624] Qwest then erroneously claims that CLECs had "ample advance notice" of the changes to the expedite process.[625] Qwest's own objectionable change was made via a Qwest Level 3 announcement and not a change request.[626] Eschelon did, in fact, take several steps in CMP,[627] as well as use the dispute resolution process,[628] with respect to Qwest's

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[619] Eschelon/94, Johnson/3-4 (##8-10).

[620] Eschelon/141, Johnson/27-28.

[621] Qwest/9, Albersheim/2.

[622] Qwest/1, Albersheim/63, lines 8-25.

[623] Qwest/1, Albersheim/63 (complaining that Eschelon did not request a postponement or seek Oversight Committee review - all of the "change request").

[624] Eschelon/141, Johnson/26-27. The Covad change request was implemented in July of 2004 and the change request was considered "completed" in July of 2005. On a separate issue, Qwest pointed out that: "The CMP document also states that, 'A CR is updated to Completed status when the CLECs and Qwest agree that no further action is required to fulfill the requirements of the CR.'" Qwest/18, Albersheim/51, lines 3-6. The Qwest Version 27 and 30 notifications were not sent until more than a year after the Covad change request was implemented and months after "completion" of the Covad change request, in October of 2005, and Version 30 was not effective until January 3, 2006. Eschelon/93, Johnson/5-11 and Eschelon/108 (Johnson). Qwest's Version 27 and 30 notifications are not part of the Covad change request. Qwest specifically put "not applicable" on its Version 27 and 30 notices in the space Qwest itself provides for listing any "Associated CR Number." Eschelon/108, Johnson/1-2. On notices for earlier Versions, issued before the Covad change request was completed, Qwest placed the Covad change request number in this category. Eschelon/108, Johnson/3-4.

[625] Qwest/40, Albersheim/24, lines 15-16. That CLECs did ***not*** have advance notice is apparent from the objections they filed in CMP to Qwest's Version 30 expedite PCAT. Eschelon/94, Johnson/3-4. *See e.g.*, Integra CMP Comments (11/3/05): "When Integra signed the Qwest Expedite Amendment we were not advised that by signing the amendment it would change the current Expedites Requiring Approval process. We signed the amendment believing that this would ADD to our options of having an order completed outside the standard interval." *Id*. pp. 3-4 (#10).

[626] Eschelon/106, Johnson/26-27 and Eschelon/93, Johnson/10-11. *See also* Eschelon/141, Johnson/26-27.

[627] Eschelon/141, Johnson/17-19. *See also* Eschelon/93, Johnson/12-15 and Eschelon/94, Johnson/1-5. Eschelon also commented on the Covad change request.

[628] Remarkably, in its rebuttal testimony, Qwest continued to claim: "No CLECs requested postponement of Qwest's proposed changes to the expedites process, or sought dispute resolution

objectionable Version 30 announcement, even though the CMP steps are optional and there is ***no*** requirement in the CMP Document to exhaust remedies before going to the Commission in any forum, including this one.[629] [Error type four – ignores contrary facts in evidence]

The Expedited Orders issue is a myth-laded issue that, to adjudicate, requires really cutting through the myths to get to the actual facts. It may help to first define terms before moving on to discussion of an additional charge for expedites and exceptions to charging the additional fee.

a. Intervals and expedites defined

An interval for provisioning an order is a known number of days (or hours) from when a CLEC submits a service request/order until the date upon which service is scheduled to be delivered. For example, in "other states," the normal interval for a DS1 capable loop (which is sometimes referred to as a T-1) is five business days,[630] whereas it is nine days (the same as Qwest retail) in Oregon.[631] In other states, if a CLEC submits a complete and accurate service request for a DS1 capable loop on Monday (Day 0), then the due date for service delivery is the following Monday (Day 5). In Oregon, if a CLEC submits a complete and accurate service request for a DS1 capable loop on Monday (Day 0), then the due date for service delivery is Thursday of the following week (Day 9).

Provisioning intervals dictate the timing of service delivery to the End User Customer, as well as timing of the activities that the CLEC must perform in preparation

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pursuant to the CMP Document, or filed a complaint against Qwest as a result of the changes implemented through CMP." Qwest/18, Albersheim/43, lines 4-7. Eschelon said in its direct testimony: "As part of a CMP dispute resolution, Eschelon filed a complaint against Qwest before the Arizona state commission in April of 2006" (quoting Complaint, *In re. Complaint of Eschelon Telecom of Arizona, Inc. Against Qwest Corporation*, ACC Docket No. T-01051B-06-0257, T-03406A-06-0257 (April 14, 2006) ["Arizona Complaint Docket"]). Eschelon/1, Starkey/47, lines 8-9 and footnote 104. *See also* Eschelon/93, Johnson/14 (2nd full paragraph).

[629] Eschelon/123, Starkey/43-47.

[630] See Qwest/18, Albersheim/40, line 22 - /41, line 8; Oregon Tr., Vol. 1, 0031, line 16 – 0035, line 13.

[631] Oregon Tr., Vol. 1, 0031, line 16 – 0035, line 13.

for service provisioning.[632] An interval for a retail End User Customer establishes the due date upon which the retail End User Customer is scheduled to receive working service. An interval for a wholesale customer (e.g., a CLEC) establishes the due date upon which Qwest will deliver the wholesale service to the CLEC. For unbundled network element ("UNE" or "unbundled") loops, there is still more work that the CLEC needs to do after Qwest delivers the UNE loop to make service work for CLEC's End User Customer, as Qwest does not perform the end user retail functions for a wholesale service.[633] Qwest indicated that state commissions have found a five-day interval for CLEC DS1 capable loop orders is appropriate in other states, where the retail interval is nine days.[634] Given that the interval for retail customers is nine days, Qwest itself has the full nine days of the interval to prepare for service provisioning on the due date for its End User Customers. CLECs receive the DS1 loop on a wholesale basis from Qwest on Day 5 in other states and then are allowed time to perform the additional work CLEC needs to perform to make service work for CLEC's retail End User Customer per that recognized interval. In Oregon, CLECs receive the DS1 loop from Qwest on Day 9 (the same day as Qwest retail customers). Qwest said that the FCC and state commissions have recognized that, by providing services according to Commission approved standard intervals (*e.g.*, nine days for DS1 capable loops in Oregon), Qwest is giving CLECs a

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[632] Ms. Albersheim testified regarding the "standard" interval: "Qwest works very hard to deliver circuits as quickly as possible after a jeopardy is resolved, and even when Eschelon must supplement an order, the designed services are often delivered in advance of the three-day interval required for these services." Qwest/18, Albersheim/53, lines 4-6. To the extent that Ms. Albersheim is referring to delivery without a requested expedite or other change (e.g., without a revised Firm Order Confirmation), Ms. Albersheim is incorrect. Unexpected untimely delivery (early or late) causes problems (such as not allowing CLEC to prepare when service is delivered early unexpectedly). The interval, including requested expedites to the interval, is not used here to refer to unexpected premature delivery, which was not requested by CLEC.

[633] See Oregon Tr., Vol. I, p. 108, lines 19-24; p. 114, line 22 – p. 115, line 2; p. 116, lines 17-21; p. 120, lines 11-14.

[634] See, e.g., footnote 14 to Qwest/18, Albersheim/39, lines 12-15 (citing Arizona decision).

meaningful opportunity to compete, even where (unlike in Oregon) the wholesale and retail intervals are different (e.g., Arizona),[635] for services delivered to wholesale and retail customers within normal intervals.

When a customer -- wholesale or retail[636] -- submits a request to Qwest to shorten the length of the normal or "standard" interval to receive service earlier than the due date using the normal interval, Qwest refers to the customer's request as a request for an "expedite."[637] For example, if a CLEC requests a timeframe of one day, instead of nine days, for a DS1 capable loop order, delivery of the loop to the CLEC is "expedited" by nine days. An expedite, therefore, is to provision service more quickly than would otherwise be the case under the regularly-applicable service interval.

Expedites enable carriers to accommodate customers' needs, such as when unanticipated circumstances arise (*e.g.*, when a customer's service is disconnected unexpectedly).[638] If one carrier may accommodate its End User Customer's needs and another may not, the latter carrier is disadvantaged. Just as Qwest provides service within "standard" intervals in many cases to its own customers, Qwest admits it also provides "expedites" to itself and its retail customers in other cases.[639] Therefore,

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[635] *See id*. & Qwest/18, Albersheim/39, lines 12-15.

[636] On July 15, 2004, Qwest said that fee-added expedites would allow CLECs to "expedite without reason" for a rate "like the Retail and Access customer." See Qwest Version 22 CMP Response, Eschelon/93, Johnson/6.

[637] See, e.g., for retail customers, Eschelon/36/Denney/1, Qwest Retail Private Line Transport Services, §4.1.4 (heading of "Expedite") and, for CLEC customers, Eschelon/104/Johnson/1, Qwest Expedites and Escalations Overview ("Expedites PCAT)" on page 1 (heading of "Expedites").

[638] See, e.g., examples provided in Eschelon/107, Johnson/1.

[639] *See*, *e.g*., Eschelon/9, Denney/201 at footnotes 158 & 159, citing: Eschelon/7, Arizona arbitration Transcript, Vol. I, p. 58, lines 19-21 ("Q. Now, you would agree with me that Qwest provides itself with expedites; correct? A. Yes.") (Ms. Albersheim); Colorado arbitration, Albersheim Colorado Direct, p. 49, (Qwest "provides expedites to its retail POTS customers and design services customers…"); Exhibit Eschelon/36 (Qwest tariff pages for Qwest retail customers, including those receiving services over a "designed" facility). At all relevant times, Qwest's effective retail tariffs indicated that Qwest offered expedites for a fee, with certain exceptions to charging fees, to its retail

Qwest's suggestion that – to avoid providing "superior" service –[640] 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).

b. Charge for expedited service

Eschelon is offering to pay a separate fee for expedites and is proposing an interim rate in this case. An interim rate is needed because Qwest has not implemented a cost-based ICB rate. Although Qwest has substantial experience provisioning "designed" services on an expedited basis for itself, its retail customers, and CLECs for years in Oregon,[641] Qwest has not implemented a cost-based ICB rate. Qwest admits that

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customers. Before July 31, 2004, Qwest's tariff for designed services read: "The Expedited Order Charge is based on the extent to which the Access Order has been processed at the time the Company agrees to the expedited Service Date." (See Eschelon/36, Denney/14: Qwest's Tariff F.C.C. #1, Original Page 5-25.) Further, the tariff stated: "but in no event shall the charge exceed fifty percent (50%) of the total nonrecurring charges associated with the Access Order." (*Id*.) Qwest told CLECs in CMP that in 2004 it was providing its "Retail and Access" customers with an "improved rate." (Eschelon/93/ Johnson 6 (Qwest's July 15, 2004 Response to Eschelon's comments on Covad Change Request).) In other words, in 2004, Qwest introduced, for its retail customers – who already had expedites at a fee when the emergency conditions were not met available to them per the tariff – a retail rate increase (to $200 per day advanced). In contrast, for wholesale CLEC customers, Qwest offered expedites at a fee (i.e., the retail rate) when the emergency conditions were not met in 2004 for the first time.

[640] See Qwest/18, Albersheim/40, line 22 - /41, line 8.

[641] Eschelon/9, Denney/203 and Eschelon/4, Starkey; *see also* Eschelon/7, Starkey/12, AZ Arbitration Transcript, Vol. I, p. 58, lines 19-21 ("Q. Now, you would agree with me that Qwest provides itself with expedites; correct? A. Yes."); and Qwest/18, Albersheim/35, lines 10-11 (". . . Qwest offers expedites to CLECs on the same terms and conditions as it offers them to its retail customers.").

the $200 per day rate that it proposes to charge[642] is not cost based,[643] and expressly denies that the rate should be cost based.[644] Eschelon's proposal, in contrast, is interim specifically to allow establishment of a cost based rate.[645] In the Arizona Complaint Docket, the Arizona staff concluded that the rate(s) for expedites be considered as part of a cost docket.[646] Eschelon has provided evidence, including points of comparison, showing that its proposal for an interim rate until that cost-based rate can be set is reasonable.[647]

Eschelon's proposed language shows that Eschelon agrees to pay an additional cost-based charge to expedite orders[648] in addition to the installation charge.[649] The difference between the companies' rate proposals is that Qwest proposes a retail rate[650] and Eschelon proposes a wholesale rate, as Eschelon is a wholesale customer of Qwest's.[651] Eschelon proposes its rate as an interim rate.[652]

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.[653] Eschelon's position that expedite charges associated with UNE orders should be

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[642] Qwest/1, Albersheim/64, lines 16-18.

[643] Qwest/1, Albersheim/64, lines 10-18 and Qwest/39, Million/26, lines 19-20 ("based on what the market will bear").

[644] Qwest/1, Albersheim/64, lines 11-12.

[645] Qwest/125, Easton/120, line 15 – /121, line 11.

[646] Qwest/33, Denney/2, Staff Testimony, Executive Summary, Staff Conclusion No. 7.

[647] *See e.g.*, Eschelon/9, Denney/233, line 11 – /236, line 11; Eschelon/133, Denney/121-122; and Eschelon/9, Denney/232-236.

[648] Proposed ICA Section 12.2.1.2.2 (Eschelon proposed language).

[649] Proposed ICA Section 12.2.1.2.3 (Eschelon proposed language).

[650] Qwest/1, Albersheim/64, lines 13-23.

[651] Eschelon/133, Denney/117, line 5 – /119, line 10.

[652] Proposed ICA Exhibit A, footnote 1. Interim Rates are addressed in Section 22 of the ICA.

[653] Eschelon/9, Denney/224-226. *See also* discussion of Issue 9-31.

based on costs follows directly from the application of rule §51.313(b).[654] 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. By proposing to charge Eschelon a non cost based rate that is higher than Qwest's own expedite costs, Qwest proposes to 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 a wholesale expedite price that exceeds the cost of expedite, Qwest is gaining an unfair advantage because Qwest can "profit" on the difference between the retail price of an expedite and Qwest's cost associated with expedites. This advantage is very similar to an advantage that Qwest would have if it charged above-cost rates for UNE loops and other UNE elements – a situation that the unbundling rules and TELRIC pricing are designed to avoid.[655] The Minnesota ALJs, as affirmed by the Minnesota Commission, also agreed with Eschelon on this point and found that "When Eschelon requests an expedite, it will be for access a UNE. Under 47 U.S.C. §§ 51.307 and 51.313, it must be provided under Section 251 of the Act and, thus, at TELRIC rates."[656] The Minnesota Commission in its March 30, 2007 order adopted the recommendation of the ALJs and further found that "the cost Qwest bears to provide expedited access to UNEs for its retail customers is

[654] Eschelon/9, Denney/225 (quoting §51.313(b)). *See also* Eschelon/125, Denney/115.

[655] Eschelon/9, Denney/226, lines 4-6.

[656] Eschelon/9, Denney/233, citing Eschelon/29, Denney/55 [MN Arbitrators' Report at ¶ 221].

simply the cost of expediting the service. This is also the cost that CLECs should bear to expedite access for their customers."[657]

Eschelon has proposed an interim rate of $100 for expedited ordering. According to Exhibit A, Qwest's proposal, which was submitted without cost data, is to charge an Individual Case Basis ("ICB") rate for expedites.[658] Eschelon pointed out the problems with Qwest's ICB rate proposal in its direct testimony.[659] In Qwest's direct testimony, Ms. Albersheim states: "Qwest proposes to charge the tariff rate of $200 per day."[660] Ms. Albersheim's testimony confirms that Qwest interprets an "ICB" rate as allowing it to charge Qwest's unapproved template ICA rate of $200 per day.[661]

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 rate – a per day charge – shows that that rate cannot be cost-based.[662] The Minnesota ALJs, as affirmed by the Minnesota Commission, agreed

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[657] Eschelon/30, Denney/18, MN PUC Arbitration Order, p. 18.

[658] Exhibit A to Proposed ICA at §9.20.12; *see also* Joint Disputed Issues Matrix (10/10/06, p. 180), Qwest position statement for Issues 12-67(g), stating: "9.20.12 Expedite Charge ICB 3,5").

[659] Eschelon/9, Denney/228-236.

[660] Qwest/1, Albersheim/64, lines 22-23.

[661] Qwest/1, Albersheim/64, footnote 39 ("The expedite charge for LIS is listed in section 7.8.1 as ICB (Individual Case Basis), which Qwest charges at $200 per day. The expedite charge for unbundled loops is listed in section 9.20.14 at $200 per day and references FCC Tariff No. 1.") Qwest's proposed language for Sections 7.3.5.2.2 and 9.1.12.12 states that CLEC's expedite request must meet "the criteria outlined in the Pre-Approved Expedite Process in Qwest's Product Catalog." The Pre-Approved Expedite Process in Qwest's Product Catalog specifically conditions use of the Pre-Approved Expedite Process on a "per day" rate, regardless of whether a Commission has ordered a per day rate or not. *See* Qwest/9, Albersheim/1 (The PCAT states: "If the request being expedited is for a product contained in the 'Pre-Approved Expedites' section below, your ICA must contain language supporting expedited requests with a "per day" expedite rate.").

[662] Indeed, the Qwest witness who testified concerning the justification for Qwest's proposed rate admitted that she did not know how a rate of $200 per day was arrived at. Eschelon/6, Starkey/31 [MN Transcript at Vol. 2, pp. 96-97 (testimony of Teresa Million)]. In her written testimony, Ms. Million stated that this charge was based on "what the market will bear." Qwest/39, Million/26, lines 19-20. The issue presented, however, is on what terms and conditions Qwest must provide unbundled network elements on an expedited basis. The only reason these elements are available on

with Eschelon on this point too, and found "as to pricing, Eschelon's position should be adopted[663]…Eschelon's proposal for an interim rate of $100 is appropriate"[664] and agreed a TELRIC study should be done.[665]

Qwest acknowledges, if expedites are not a "superior service," then cost-based pricing is appropriate.[666] Qwest argues that expedited service is a superior service because Eschelon can obtain expedited service more cheaply than can retail customers, which is, in turn, a function of the fact that the interval for a loop is shorter than the interval for private line service.[667] Specifically, Qwest testified: "Eschelon can obtain orders for high-capacity loops expedites by Qwest at rates, terms and conditions that are superior to what Qwest provides to itself. Qwest's standard provisioning interval for DS1 and DS3 private lines is nine days. CLECs, including Eschelon, can obtain a DS1-capable loop in five days, and a DS3 capable loop in seven days."[668] However, under cross examination, it was shown that the wholesale interval for DS1 capable loop in Oregon is not five days as Qwest claimed in pre-filed testimony, but instead 9 days – the same as the retail private line interval.[669] This is probably why Ms. Albersheim's pre-filed testimony stated that: "Eschelon receives superior service under these circumstances

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an unbundled basis is that there is no competitive "market" to which Eschelon can turn to obtain the service. *See* Eschelon/133, Denney/117-119.

663 Eschelon/9, Denney/233, citing Eschelon/29, Denney/55 [MN Arbitrator's Report, ¶¶ 221-222].

664 Eschelon/9, Denney/233, citing Eschelon/29, Denney/55 [MN Arbitrator's Report, ¶222].

665 Eschelon/9, Denney/233, citing Eschelon/29, Denney/55 [MN Arbitrator's Report, ¶222]. ("Eschelon's proposal for TELRIC pricing for the expedite charge and an interim rate of $100 should be adopted.")

666 Eschelon/6, Starkey/31 [MN Transcript Vol. 2, pp. 94-95 (testimony of Teresa Million)].

667 Qwest/18, Albersheim/40-41 and Qwest/40, Albersheim/23-24.

668 Qwest/18, Albersheim/40-41. *See also* Oregon Tr., Vol. 1, 0031-0032 (Albersheim) ("For the expedite, $200 a day is the same charge. The difference here is that Eschelon is already beginning with a shorter interval than is available to Qwest's own customers. And, therefore, expediting at a shorter interval gives them a greater advantage. That is a superior service that we're speaking of.")

669 Oregon Tr., Vol. 1, 0031, line 16 – 0035, line 13.

in other states."[670] Regarding other states, as indicated above when discussing the definitions of intervals and expedited service, Qwest acknowledges that it provides ***both*** "standard" intervals in some cases and expedited service in others to its retail customers. It is not superior service, therefore, to also offer ***both*** "standard" intervals in some cases and expedited service in others to its wholesale CLEC customers.[671]

Regarding Oregon, on cross, Ms. Albersheim admitted that, based on the same Oregon interval of nine days for both wholesale high capacity loops and retail private lines, that expedites ***would not constitute a superior service*** under Qwest's definition.[672] It is also undisputed that Qwest offers expedited service to its retail customers in the regular course of its business.[673] Thus, Eschelon's expedite proposal does not require Qwest to do anything for Eschelon that it does not already do for its retail customers.[674] Therefore, cost-based pricing is appropriate.[675]

Qwest's "superior service" argument is also based on a legally incorrect statement of what constitutes "superior service." Qwest's argument mistakenly confuses the quality

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[670] Qwest/18, Albersheim/41, lines 7-8 (emphasis added)

[671] Qwest said that the FCC and state commissions have recognized that, by providing services according to Commission approved standard intervals (*e.g.*, nine days for DS1 capable loops in Oregon), Qwest is giving CLECs a meaningful opportunity to compete, even where (unlike in Oregon) the wholesale and retail intervals are different (e.g., Arizona), for services delivered to wholesale and retail customers within normal intervals. (Qwest/18, Albersheim/39, lines 12-15.) Just as Qwest provides service within normal intervals in many cases to its own customers, Qwest admits it also provides expedites to itself and its retail customers in other cases. (*See, e.g.*, Eschelon/9, Denney/201 at footnotes 158 & 159, quoted above.)

[672] Oregon, Tr. Vol. 1, 0035, lines 6-13 ("Q. By Mr. Merz: So you would agree with me, assuming that it is the case that the private line interval in Oregon is nine days, and the DS1 loop interval in Oregon is nine days, that that is not superior service as you have used that term in your testimony, correct? A. That would not be in this case, that's correct.")

[673] Eschelon/6, Starkey/4 [MN Transcript, Vol. 1, pp. 23-24 (testimony of Renee Albersheim)].

[674] As Mr. Denney explained (Eschelon/125, Denney/134/135), although Qwest cannot deny that it makes exceptions to charging an expedite fee to retail customers, Qwest disputes when and for what products it makes an exception. To simplify this debate, Eschelon proposed an alternative to Qwest for Issue 12-67(a) which simply states that expedite charges are not applicable if Qwest does not apply expedite charges to its retail customers, such as when certain conditions (e.g., fire or flood) are met.

[675] Eschelon/6, Starkey/31 [MN Transcript Vol. 2, pp. 94-95 (testimony of Teresa Million)].

of service with price.[676] Any argument that uses price to determine whether quality of service is "superior" for purposes of determining whether that service must be offered at cost-based rates is ultimately circular. Qwest obviously would not argue that, because the price of loops is lower than the price of private line, loops are, therefore a superior service that need not be offered at TELRIC-based rates.[677] The same is true for other wholesale rates that this Commission has set for UNEs. Resale is also provided not at retail rates, but at a wholesale discount. Qwest does not perform the end user retail functions for a wholesale service.[678] Therefore, a cost-based wholesale price, which takes into account this difference between wholesale and retail, would be lower than a retail rate.

Likewise, the wholesale rate for expedites should be lower than the retail rate for expedites.[679] The requirement that Qwest provide access to UNEs on nondiscriminatory terms means providing CLECs with the same level of access as Qwest provides to its retail customers, not at retail rates, but cost-based rates.[680] Both FCC rules and state law require that service provided by the incumbent be at least equal in quality to the service it provides to itself and its retail customers.[681] That equal in quality service is also required to be provided on reasonable and nondiscriminatory terms and conditions, which is the

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[676] *See* Eschelon/125, Denney/116-120.

[677] Eschelon/6, Starkey/4-5 [MN Transcript, Vol. 1, pp. 25-26 (testimony of Renee Albersheim)].

[678] See Oregon Tr., Vol. I, p. 108, lines 19-24; p. 114, line 22 – p. 115, line 2; p. 116, lines 17-21; p. 120, lines 11-14.

[679] Qwest has acknowledged that expediting service does not require any additional provisioning activities; it merely involves performing the same provisioning activities more quickly than would otherwise be the case. Exhibit MS-6, MN ICA Arbitration Transcript, Vol. II, p. 97, line 18 - p, 98, line 22 (quoted at Hrg. Ex. E-4, Denney Reb., pp. 59-60). See also Complaint, ¶38, p. 12, lines 1-3 ["Qwest recovered its costs through the Commission approved charges, because with an expedite Qwest performs the same work (as the work included in the standard charge), but Qwest just performs that work earlier."].

[680] Hearing Ex. E-4 (Denney Reb.), p. 45, line 7 – p. 46, line 9.

[681] 47 C.F.R. § 51.311 (nondiscriminatory access to unbundled network elements).

basis for the requirement that access to unbundled elements be provided at cost-based rates.[682] Whether a service is "superior" must be determined with respect to the quality of the service, not its price.

Rather than superior service, Eschelon is only seeking nondiscriminatory treatment, to which it is entitled as a matter of law. The Minnesota Commission rejected Qwest's "superior" service argument and found that "In arguing that expediting a UNE is a "superior service" which Qwest is not obligated to provide – and certainly not obligated to provide at cost – Qwest misapplies a term of art. . . . The concerns articulated by the 8th Circuit and the FCC regarding 'superior service' have no relevance to this issue [expedites]."[683]

The North Carolina state commission has dealt specifically with the obligation to provide expedited service on a non-discriminatory basis.[684] In arbitrating an interconnection involving BellSouth, the North Carolina commission found that BellSouth was required under the Telecommunications Act to provide expedited service pursuant to Section 251. BellSouth sought reconsideration of that conclusion, arguing that it had no obligation under Section 251 to expedite service orders and that its only requirement under Section 251 was to provide service according to its standard intervals.[685] BellSouth also argued, as Qwest argues here, that since it had no obligation under Section 251 to provide expedited service, it had no obligation to provide such service at TELRIC rates and that it could meet its nondiscriminatory obligation by

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[682] 47 C.F.R. § 51.313(b); *see also* Eschelon/9, Denney/225 and Eschelon/125, Denney/115.

[683] Eschelon/30, Denney/18, MN PUC Arbitration Order, p. 18.

[684] *Re NewSouth Communications Corp*., 2006 WL 707683 (N.C.U.C. February 8, 2006).

[685] *Id*. at *43.

charging CLECs the $200 per day rate set out in its tariff.[686] The North Carolina commission rejected BellSouth's arguments and affirmed its conclusion that expedited service is subject to the obligations of Section 251, stating, "The Commission also believes that expediting service to customers is simply one method by which BellSouth can provide access to UNEs and that, since BellSouth offers service expedites to its retail customers, it must provide service expedites at TELRIC rates pursuant to Section 251 and Rule 51.311(b)."[687]

c. Exceptions to charging for expedites

Regarding exceptions to charging an additional expedite fee, Eschelon's first proposal for Issue 12-67(a) regarding Section 12.2.1.2.1 incorporates the same emergency-based expedite conditions[688] that were, until recently, available to expedite loop orders in Oregon and continue to be available at least to Qwest's CLEC UNE customers in Washington and its QPP/reseller customers in other states.[689] Eschelon's second proposal for exceptions to charging omits the itemized list of conditions and instead articulates a standard that Qwest will grant and process CLEC's expedite request,

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[686] *Id.* at *44.

[687] *Id*. at *47; *see also Re Verizon Delaware , Inc*., 2002 WL 31521484 at *12 (Del. Pub. Serv. Comm'n 2002) (requiring cost-based rate for expedited CLEC service orders).

[688] Qwest/1, Albersheim/61, lines 15-16 ("Eschelon's language is excerpted almost word-for-word from the section of the Expedite PCAT titled 'Expedites Requiring Approval.'"). A minor difference in language appears in criteria (f) ("Disconnect in error when one of the other conditions on this list is present or is caused by the disconnect in error") but it is consistent with Qwest's practice under the emergency-based Expedites Requiring Approval process. Eschelon/9, Denney/215, footnote 191. *See also* Eschelon/93, Johnson/9-10 ("Qwest Attempted to Change the Expedites Process to Exclude CLEC-Caused Disconnects in Error, But Retracted its Proposal After Eschelon Objected."). As indicted in the language of Section 12.2.1.2.1(f), Eschelon is not asking for emergency-based expedites at no additional charge when the CLEC disconnects in error and no other condition is met. When a critical condition is met and resources are available, the expedite should be granted at no additional charge – regardless of which carrier caused the disconnect in error.

[689] Eschelon/9, Denney/215, footnote 191.

and expedite charges are not applicable, if Qwest does not apply expedite charges to its retail Customers, such as when certain emergency conditions (*e.g.*, fire or flood) are met and the applicable condition is met with respect to CLEC's request for an expedited order.

When an exception to charging an expedite fee will be made (*i.e.*, when an expedite will be provided at no additional fee over and above the installation charge when certain emergency-based conditions are met) is addressed in Eschelon's two alternate proposals for Section 12.2.1.2.1 and Qwest's proposal for Sections 7.3.5.2.2 and 9.1.12.1.2. This is Issue 12-67(a). As its proposed language shows, Qwest's ICA proposal allows no exceptions in emergency-type situations to charging an additional fee for expediting orders for unbundled loops and other "designed" products.[690]

Qwest does not, however, charge an additional expedite fee in every case when providing designed services for its retail customers. Qwest makes certain exceptions. In its retail tariff, Qwest refers to exceptions to charging an additional non-recurring fee for expedites as "Reestablishment of Service Following Fire, Flood, or Other Occurrence" – "Nonrecurring Charges Do Not Apply."[691] Regarding the tariff, Ms. Albersheim testified (with emphasis in original) that "Section 3.2.2" of Qwest's retail tariff "concerns ***repairs***[692] . . . [and] has nothing to do with expedited orders."[693] Jill Martain was Qwest's CMP Process Manager.[694] She is identified in a Change Request relating to expedites as

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[690] One possible exception, though it is unclear because Qwest does not include it in its proposed ICA language, is expedites due to a Qwest-caused reason. Qwest/9, Albersheim/3. The PCAT lists no other exceptions to charging (such as when the emergency conditions are met) for fee-added Pre-Approved Expedites. *See id.* pp. 3-5.

[691] Eschelon/36, Denney/6-9.

[692] Qwest/18, Albersheim/38, line 19.

[693] Qwest/18, Albersheim/38, lines 20-21.

[694] Eschelon/110, Johnson/16-18 (Qwest emails in which Ms. Martain identifies herself as the "CMP

the "owner" of that expedite change request.[695] Ms. Martain testified in the Arizona Complaint Docket about Section 3.2.2 of Qwest's retail tariff:

> The tariff then goes on to state that if the end user elects to move service to a temporary location (either within the same building, or a different building) that non-recurring charges would apply. This would include the non recurring charge to expedite a design service. However, when the customer moves its service, via a service order, back to the original premise location, if it meets the criteria as outlined in 3.2.2.d included below, the non-recurring charges would be ***waived*** (***including the expedite fee***)."[696]

According to Ms. Albersheim, Section 3.2.2 has nothing to do with expedites, but according to Ms. Martain, Section 3.2.2 shows that the expedite fee will be waived under 3.2.2.d in these circumstances (as contended by Eschelon when it provided Eschelon/36 with its direct testimony[697]). Both of these witnesses were testifying for Qwest; yet, they provide different information. This provides some insight into the difficulty of pinning down Qwest as to which conditions it extends exceptions to charging to itself and its retail customers to obtain nondiscriminatory treatment -- leading to the need for contractual certainty.

From before 2000[698] through January 2, 2006,[699] Qwest provided an exception to charging an additional fee for expedited orders for products and services, *including all loops ("designed"[700] services)*, when Qwest approved them as meeting certain

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Process Manager").

[695] Qwest/8, Albersheim/1. Ms. Albersheim is not identified as a participant. *See id.*

[696] Eschelon/9, Denney/237, footnote 256 [quoting Qwest (Ms. Martain) Direct (Aug. 28, 2006), *In re. Complaint of Eschelon Telecom of Arizona, Inc. Against Qwest Corporation*, Arizona Docket Nos. T-03406A-06-0257 and T-01051B-06-0257, ["Arizona Complaint Docket"], p. 40, lines 4-10 (emphasis added)].

[697] Eschelon/36, Denney.

[698] Eschelon/93, Johnson/5.

[699] Eschelon/93, Johnson/10.

[700] Qwest/1, Albersheim/55, line 4.

emergency-based conditions (applicable to retail and CLEC customers alike).[701] These expedite terms were not developed in CMP, but were later documented in the PCAT through CMP.[702] Qwest continues to provide the exception to charging for emergency-based expedites to other customers but not to CLEC UNE customers today.[703] Eschelon had no expedite amendment before January 3, 2006, but was able to receive expedites in Oregon for UNE ("designed") services without an amendment.[704] Now, due to Qwest's new policy that it implemented over CLEC objection in its Version 30 PCAT (effective January 3, 2006), CLECs cannot receive expedites in Oregon for UNE ("designed") services per Qwest without an amendment, even though the ICA under which the companies have been operating for years did not change on January 3, 2006.[705] Contract language is needed to address this issue. Although Qwest argues that "expedites are not UNEs,"[706] expediting service to customers is a method by which Qwest provides ***access to*** UNEs.[707] Therefore, Qwest must provide expedites on a nondiscriminatory basis at TELRIC-based rates.[708]

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[701] Eschelon/93, Johnson/5-10 & Eschelon/94, Johnson/1, #1 (Qwest admission that "Qwest previously expedited orders for unbundled loops on an expedited basis for Eschelon") & Eschelon/107 (Johnson) (Examples of Expedite Requests Approved by Qwest for Unbundled Loop Orders).

[702] Eschelon/93, Johnson/5. ("The mutually agreed upon process was in place before Qwest documented it on its website. On September 22, 2001, Qwest issued a product notification that Qwest had updated its website on methods and procedures for Expedites and Escalations to document the definition of expedite and valid expedite reasons (*i.e.*, the emergency conditions). (*See* Product Notification for Version 1 of the Expedites & Escalations Overview.) . . . Qwest specifically recognized in its product notification that "these updates reflect current practice.").

[703] Eschelon/9, Denney/237, lines 1-4 and Eschelon/36.

[704] Eschelon/9, Denney/203-206 and Eschelon/125, Denney/130-132.

[705] *See id.*

[706] Qwest/1, Albersheim/64, line 12.

[707] Eschelon/9, Denney/224-226 and Eschelon/125, Denney/114-116.

[708] *See id.*

Regarding nondiscrimination, the FCC has developed two alternative tests to be used to determine if a BOC is offering interconnection and access to network elements on a nondiscriminatory basis:

> First, for those functions the BOC provides to competing carriers that are analogous to the functions a BOC provides to itself in connection with its own retail service offerings, the BOC must provide access to competing carriers in "substantially the same time and manner" as it provides to itself. Thus, where a retail analogue exists, a BOC must provide access that is equal to (*i.e.*, substantially the same as) the level of access that the BOC provides itself, its customers, or its affiliates, in terms of quality, accuracy, and timeliness. For those functions that have no retail analogue, the BOC must demonstrate that the access it provides to competing carriers would offer an efficient carrier a "meaningful opportunity to compete."[709]

Qwest's current position is that there is no retail analogue for DS0 loops[710] and there *is* a retail analogue for DS1 and DS3 loops.[711] In either case, however, Qwest can not discriminate. The FCC made clear that the lack of a retail analogue did not mean that the BOC would be subject to a more lenient nondiscrimination obligation. The FCC stated that "we do not view the 'meaningful opportunity to compete' standard to be a weaker test than the 'substantially the same time and manner' standard."[712] The meaningful opportunity to compete standard is, rather, "intended to be a proxy for whether access is being provided in substantially the same time and manner and [is], thus, nondiscriminatory."[713] Eschelon's proposal number two for Section 12.2.1.2.1 (Issue 12-67(a)) articulates this nondiscrimination standard in the ICA, requiring Qwest to provide

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[709] *In the Matter of the Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York,* Memorandum Opinion and Order, FCC 99-404, CC Docket No. 99-295, rel. December 22, 1999 ("FCC NY271 Order"), ¶ 44 (citations omitted).

[710] Qwest/18, Albersheim/37, lines 13-14.

[711] Qwest/18, Albersheim/41, lines 4-5 and Qwest/18, Albersehim/36.

[712] FCC NY271 Order, ¶ 45.

[713] FCC NY271 Order, ¶ 45.

an exception to charging only under the same conditions for which it provides exceptions for its retail customers.[714]

This position is consistent with Eschelon's request for cost-based rates. Under Eschelon's proposal for expedited orders, Eschelon continues to pay the installation NRC separate from the expedite fee,[715] unlike a Qwest retail customer which also receives a waiver of installation and other non-recurring charges.[716] In addition, Qwest provides expedites when the identified emergency conditions are met ("Expedites Requiring Approval") only if resources are available.[717] 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 asks the Commission to adopt its language for all of the subparts to Issue 12-67, support for which is provided in Eschelon's testimony:

> Issue 12-67:[718] Expedite description (Eschelon 12.2.1.2 v. Qwest 7.3.5.2 & 9.1.12.1) and when they can be ordered - only when submitting order (Qwest 7.3.5.2.1 & 9.1.12.1.1) or also after order submission (Eschelon 12.2.1.2/second sentence)
>
> Issue 12-67(a):[719] Exceptions to charging - when emergency conditions are met (Eschelon proposal #1 for 12.2.1.2.1 with subparts; Qwest proposes deletion); on a nondiscriminatory basis (Eschelon proposal #2 for 12.2.1.2.1; Qwest proposes deletion), or not at all (Qwest 7.3.5.2.2, referring to the PCAT Pre-Approved process, which contains no exceptions)

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[714] Regarding Eschelon's proposal number one for Issue 12-67(a), *see* Eschelon/9, Denney/207-208.

[715] Eschelon proposed ICA Sections 12.2.1.2.2 & 12.2.1.2.3.

[716] Eschelon/36, Denney (Qwest tariff pages); *see also* Qwest (Ms. Martain, CMP Process Manager) Direct, Arizona Complaint Docket, p. 40, lines 4-10 (quoted above); Eschelon/93, Johnson/4 note 10.

[717] Per Qwest's PCAT, the emergency-based Expedites Requiring Approval (at no additional fee) are subject to resource availability; the fee-added Pre-Approved Expedites are not. *See* Eschelon/104, Johnson (current Qwest Escalations and Expedites PCAT). The PCAT is quoted at Eschelon/9, Denney/238.

[718] Eschelon/9, Denney/200-215.

[719] Eschelon/9, Denney/215-216; Eschelon/125, Denney/122-125 and Eschelon/133, Denney/98-101.

Issue 12-67(b):[720] When the expedite charges in Exhibit A apply (Eschelon 12.2.1.2.2 v. Qwest 7.2.5.3, 7.3.5.2.2 & 9.2.12.1.2); whether if charges apply Qwest must grant and process the request or only allow them (Eschelon 12.2.1.2.2 v. Qwest 7.2.5.3, 7.3.5.2.2 & 9.1.12.1, 9.2.12.1.2); and whether there is an exception to charging when the need for an expedite is caused by Qwest (Eschelon 12.2.1.2.2; Qwest proposes deletion and relies on a reference to the PCAT)

Issue 12-67(c):[721] Whether the contract should confirm the expedite fee is separate from the installation NRC (Eschelon 12.2.1.2.3; Qwest proposes deletion)

Issue 12-67(d) (e) & (f):[722] *Placement* of expedited ordering language – in Section 12.2 "Pre-Ordering, Ordering and Provision" (Eschelon, with cross references in 7.3.5.2, 9.1.12.1 & 9.23.4.5.6 to Section 12.2.1.2) or in Section 9 "UNEs" and Section 7 "Interconnection" (Qwest 7.3.5.2 and subparts & 9.1.12.1 and subparts; Qwest proposes deletion of all expedite language in Section 12)

Issue 12-67(d): UNEs (Eschelon cross ref. to §12; Qwest §9)

Issue 12-67(e): UNE Combinations (Eschelon cross ref. to §12)

Issue 12-67(f): Trunk Orders (Eschelon cross ref. to §12; Qwest §7)

Issue 12-67(g):[723] Expedite Charge in Exhibit A - $100 interim rate (Eschelon) v. ICB rate for which Qwest proposes to charge $200 per day advanced (*e.g.*, $1,000 if advanced by 5 days).[724]

33. Jeopardies: Issues 12-71, 12-72, and 12-73

- ***Myth (not the day before the due date)***: Qwest "never" made a commitment to provide an FOC the day before the due date.[725]
- ***Debunked***: The discussions in CMP were so explicit that Eschelon, to finally pin down Qwest on this issue, gave an example in which Eschelon asked "shouldn't we have received the releasing FOC ***the day before*** the order is due?" and Qwest responded: "***Yes*** an FOC should have been sent prior to the Due Date."[726] This

[720] Eschelon/9, Denney/216-218.

[721] Eschelon/9, Denney/218-220.

[722] Eschelon/9, Denney/220-222.

[723] Eschelon/9, Denney/222-223.

[724] Eschelon/9, Denney/222-223 and Qwest/1, Albersheim/64, lines 16-18.

[725] Qwest/18, Albersheim/46, line 14 and /52, line 11.

[726] Eschelon/43, Johnson/70, lines 13-14; Eschelon/43, Johnson/81, lines 9-10 and Eschelon/43, Johnson/84, footnote 145. (emphasis added). *See* Att. 1 to this Brief (row addressing "the day before" language).

written exchange was then discussed on a CMP call during which Eschelon "confirmed that the CLEC should ***always*** receive the FOC before the due date."[727] Qwest "***agreed***, and confirmed that Qwest cannot expect the CLEC to be ready for the service if we haven't notified you."[728] With this commitment from Qwest, Eschelon's change request was completed.[729] As reflected in its title, Eschelon's change request specifically requested "***a designated time frame*** to respond to a released delayed order after Qwest sends an updated FOC."[730] Completion of the change request showed that Eschelon received its requested designated time frame (*i.e.*, "the day before") to fulfill the requirements of the change request.[731] Qwest agreed to treat situations in which the FOC was not provided the day before the due date as compliance issues[732] and did treat them that way for a period of time afterward.[733] [Error type four – ignores contrary facts in evidence]

- ***Myth (compromise)***: Qwest did not agree to a designated time frame in response to Eschelon's Change Request ("CR") but as part of "the CR" the parties agreed to a compromise instead.[734]
- ***Debunked***: Qwest presented two versions of this myth. The alleged "compromise" was either exchanging one Change Request for another, or exchanging a change regarding 72 hours for the requested change within the same Change Request. First, Qwest suggested a change in the timing of jeopardies until 6 p.m. for situations when the due date was provided on an FOC as a result of the *Before 5:00 p.m. CNR Jeopardy Change Request* resolved a separate request for a reasonable time frame to prepare to accept the circuit in situations when Qwest failed to deliver a FOC after a facility jeopardy in the *Qwest*

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[727] *See* Eschelon/43, Johnson/69, footnote 93; Eschelon/43, Johnson/70, lines 15-16; Eschelon/43, Johnson/71, line 9; Eschelon/43, Johnson/76, footnote 118 and Eschelon/43, Johnson/85, line 9. *See also* Eschelon/132, Starkey/7, lines 6-7, citing Eschelon/111, Johnson/5.

[728] *See id*.

[729] Eschelon/110, Johnson/5-6 (7/21/04) and Eschelon/111 [CR PC081403-1 Detail]. Qwest agreed that, after a Qwest facility jeopardy, if Qwest did not send an FOC with the new due date the day before, this should be treated as a "compliance issue." *See id*. In other words, Qwest's process is to provide the FOC the day before, and when it does not do so, it is out of compliance with its own process.

[730] Eschelon/110, Johnson/17 (Change Request PC081403-1) (emphasis added). *See also* Eschelon/111 [CR PC081403-1 Detail]. When the Change Request was expanded, it was given a new title, which was more general in scope and thus broader and more inclusive than the original title. *See id*. Eschelon ensured that the Change Request still included Eschelon's original request, which included a "designated time frame." *See id*. ("Bonnie Johnson agreed to change this CR, ***as long as we retained the original CR description***.") (emphasis added).

[731] Qwest pointed out that: "The CMP document also states that, 'A CR is updated to Completed status when the CLECs and Qwest agree that no further action is required to fulfill the requirements of the CR.'" Qwest/18, Albersheim/51, lines 4-6.

[732] Eschelon/43, Johnson/70, lines 12-13. In other words, Qwest's process is to provide the FOC the day before, and when it does not do so, it is out of compliance with its own process. *See id*. citing Eschelon/110, Johnson/ 4-5 (7/21/04) and Eschelon/111 [CR PC081403-1 Detail].

[733] Eschelon/110, Johnson/5-7.

[734] Qwest/18, Albersheim/47-49.

Jeopardy Change Request.[735] In fact, there was no such compromise and the resolution of one Change Request did not replace the other;[736] the CMP mintues show there were two phases, both of which were to be completed.[737] Second, Qwest suggested that Eschelon accepted Qwest's agreement to provide additional information regarding a jeopardy within 72 hours instead of what Eschelon had requested: "a reasonable time from to prepare to accept the circuit (from the time the updated FOC is sent)."[738] As discussed below, (1) Qwest's claim leads to illogical outcomes; (2) the *Qwest Jeopardy Change Request* was expanded to include the 72 hour issue *in addition to* Eschelon's other expected deliverable; and (3) Qwest's CMP minutes and PCAT redline show a different result than the one suggested by Qwest now.[739] There was no alleged compromise. [Error type four – ignores contrary facts in evidence]

- ***Myth (PIDs protect already)***: Eschelon is already protected by the Performance Indicator Definitions (PIDs) (which differentiate between Qwest-caused and CLEC-caused delays).[740] PID PO-5 (Firm Order Confirmations) provides Qwest with a "significant incentive."[741]
- ***Debunked***: Due to the differentiation between Qwest-caused and CLEC-caused delays, the responsibility must be properly classified as required by Eschelon's language,[742] or the PID results will be inaccurate, to Qwest's benefit.[743] When a CNR jeopardy is erroneously applied, Qwest's PID performance will not reflect the missed due date.[744] The PIDs also exclude or do not measure CNR jeopardies (preventing them from being counted for measurement purposes).[745] Eschelon's

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[735] Eschelon/141, Johnson/36-44 and Eschelon/111 (*Qwest Jeopardy Change Request*) and Eschelon/112 (*Before 5:00 p.m. CNR Jeopardy Change Request*).

[736] Eschelon/141, Johnson/42, line 1 – /44, line 4.

[737] Qwest clearly refers in the quotation upon which it relies for the alleged compromise to two ***phases***, both of which will be completed, and ***not*** a compromise to complete one request and not the other. Qwest/18, Albersheim/49, lines 5-7 and 10.

[738] Qwest/18, Albersheim/47, lines 4-15.

[739] Eschelon/111, Johnson/4; Qwest/22, Albersheim/8, row 1, 2nd bullet point.

[740] Qwest/1, Albersheim/52, line 26 – /53, line 2 and Qwest/18, Albersheim/57, lines 19-23.

[741] Qwest/18, Albersheim/57, lines 19-21.

[742] Proposed ICA Section 12.2.7.2.4.4 (Eschelon proposed language).

[743] Eschelon/1, Starkey/71-72.

[744] Eschelon/43, Johnson/62, lines 9-15.

[745] The PIDs are contained in Exhibit B to the ICA (Exhibit 5-B to Eschelon's Arbitration Petition). PID OP-3 excludes "due dates missed for customer and non-Qwest reasons" including "no access to customer premises." If Qwest attempts delivery with little or no notice so that Eschelon has no time to arrange access to the customer premises and Qwest classifies it as CNR, it is excluded from OP-3, along with any other CNR ("customer reason"). PID OP-4 provides that it applies, when the customer delays the due date, to the revised date (*i.e.*, the date three days later when Eschelon has to submit a supplemental order because Qwest classified it as CNR). It also excludes orders with customer requested due dates greater than the current standard interval. See, Exhibit B to the ICA. *See also* Eschelon/6, Starkey/8 [MN Transcript Vol. 1, p. 43, lines 4-24].) Qwest admitted that PID OP-4 "is going to exclude almost all instances where there's a CNR jeopardy." Eschelon/6,

proposal is most consistent with the purpose of the PIDs to accurately measure performance because it requires accuracy in the classification of CNR jeopardies so they do not erroneously fall into an exclusion or otherwise get miscounted. That Eschelon has been able to provide over 100 examples in which Qwest failed to provide any FOC following a Qwest facilities jeopardy,[746] even though Qwest now states that its own processes requires it, shows that the PIDs are not providing a particularly powerful incentive.[747] Furthermore, to address any concern that Eschelon is attempting to address a PIDs issue in its ICA language, Eschelon has proposed language that makes clear that Eschelon's proposal does not modify the PIDs.[748] [Error types one – ignores proposed language – and four – ignores contrary facts in evidence]

- ***Myth (no Qwest vacillation or violation)*:** There is no evidence that Qwest has somehow changed its mind, acted inconsistently, or violated what was agreed to in CMP.[749]
- ***Debunked***: (1) Qwest agreed to provide an FOC the day before the due date as part of the change request; Qwest provided FOCs the day before the due date and treated instances when it did not as non-compliance with its process;[750] (2) Qwest then changed its policy and began to deny that providing FOCs the day before the due date was part of its process; Qwest did not take any action in CMP to change the designated time frame in CMP associated with this change in policy;[751] (3) Qwest's CMP Manager even denied that providing the FOC at all was a requirement[752] and instead characterized it as a "goal";[753] (4) Qwest then admitted that providing an FOC after a Qwest facility jeopardy has cleared is part of Qwest's process, to let Eschelon know to have personnel available and make any arrangements with the customer so as to be prepared to accept the circuit;[754] (5) Qwest then said that when there is ***no FOC at all*** -- in violation of Qwest's process and even though Qwest agrees that Eschelon needs advance notice and an

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Starkey/8 [MN Transcript at Vol. 1, p. 43, lines 4-24]. PID OP-6 has language similar to OP-4 (See, Exhibit B to ICA), and it excludes "orders affected only by delays that are solely for customer and/or CLEC reasons." Regarding PID PO-5, Qwest admitted at the Minnesota hearing that PO-5 does not measure whether the FOC provides CLEC with notice in advance of when a circuit is delivered (Eschelon/6, Starkey/8 [MN Transcript at Vol. 1, p. 45, lines 4-8]), which is an issue here.

[746] Eschelon/114.

[747] When Qwest attempts delivery on the requested due date and Eschelon accepts the circuit, even though Qwest did not provide notice via FOC, there is no impact to Qwest in the PIDs because Qwest met the due date (due to Eschelon's best efforts).

[748] Eschelon/43, Johnson/63, lines 1-7.

[749] Qwest/18, Albersheim/18, lines 6-9.

[750] Eschelon/43, Johnson/70. *See also* Eschelon/110.

[751] Eschelon/43, Johnson/76, line 18 – /77, line 2 and Eschelon/110. *See also* debunking of the two previous myths.

[752] Regarding the requirement to provide an FOC, *see* Eschelon/115, footnotes 4-5.

[753] Eschelon/43, Johnson/77, lines 3-5 and Eschelon/110.

[754] Eschelon/6, Starkey/6 [MN Transcript, Vol. 1, p. 37, line 20 – p. 38, line 6].

FOC is the agreed upon process to provide that notice[755] -- it is appropriate to classify the jeopardy when Eschelon cannot be ready due to lack of the required notice as Eschelon-caused (CNR);[756] (6) Despite its own classification of twelve jeopardies with no FOC at all as Eschelon-caused (CNR) in its own Exhibit Qwest/27, Qwest testified that it is improper, under Qwest's current process, to categorize the CLEC's inability to take the circuit as a CNR jeopardy when Qwest did not provide an FOC after the jeopardy cleared.[757] Qwest's statements contradict each other, and its conduct contradicts its statements. These facts show that Qwest has changed its policy, without using the CMP; Qwest has violated its own process and the commitments made in CMP; and contractual certainty is sorely needed. [Error type four – ignores contrary facts in evidence]

a. Eschelon's proposed language relating to jeopardies will help Eschelon to provide timely service to its customers.

A jeopardy notice is a notice that Qwest sends to inform a CLEC that a due date is in jeopardy of being missed.[758] Whether Qwest classifies a jeopardy as Qwest-caused (a "Qwest jeopardy") or Eschelon-caused ("Customer Not Ready" or "CNR") may affect whether service to Eschelon's customer is delayed. When a jeopardy is classified as a CLEC-caused (CNR) jeopardy for "designed" facilities including unbundled loop orders, the CLEC is required to supplement its order by requesting a new due date that is at least ***three days after*** the date of the supplemental order.[759] A Qwest jeopardy properly

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[755] Eschelon/6, Starkey/7 [MN Transcript, Vol. 1, p. 38, lines 17-19 (Ms. Albersheim); *see also id.* p. 37, line 20 – p. 38, line 6].

[756] Qwest/18, Albersheim/55, line 24 – /56, line 8 (Qwest said that its classification of 12 jeopardies as Eschelon-caused (CNR) was appropriate, even though Qwest admits that for all 12 of these examples, Qwest sent no FOC at all); Eschelon/115, Johnson (Category A); *see also* Eschelon/6, Starkey/7 [MN Transcript, Vol. 1, p. 40, lines 5-14 (Ms. Albersheim) (8 examples clearly had no FOC but Qwest claimed CNR classification appropriate)].

[757] Eschelon/6, Starkey/11 [MN Transcript, Vol. 1, p. 95, lines 6-24].

[758] Eschelon/43, Johnson/56, lines 1-2.

[759] Eschelon/6, Starkey/6 [MN Tr. Vol. 1, p. 36, line 20 – p. 37, line 2.] While Qwest admits that the interval it requires CLECs to request is three days, Ms. Albersheim quibbles with the description of this as a requirement and states that Qwest may attempt to deliver the circuit earlier than three days. *See* Qwest/18, Albersheim/57, lines 11-14. There is no guarantee, however, that the timeframe will be shorter. Because three days is Qwest's required interval, Qwest may apply it in each case; certainly Eschelon must anticipate that likely possibility. No supplemental order would be required, however, if Qwest sent an FOC after the facility jeopardy cleared and Eschelon accepted the circuit. In other words, Qwest is forcing Eschelon to request a later date (on a supplemental order) to correct Qwest's failure to send an FOC and then, if it delivers late but less than the three days late, it is

classified as caused by Qwest does not require the CLEC to supplement the due date and does not build in this three day delay.[760] In contrast, an erroneous classification of a missed due date as caused by CLEC, when in fact the delay was due to Qwest's failure to provide an FOC or a timely FOC, will build in this required request for a three-day delay.[761] Timely delivery of service to the customer is of the utmost importance to Eschelon.[762] Therefore, Eschelon's proposals for Issues 12-71 – 12-73 require proper handling of jeopardies to help ensure timely delivery of service. Qwest's inconsistent statements and conduct,[763] along with its admission that it will classify a missed due date as Eschelon-caused even when Qwest sends no FOC at all[764] (in violation of the contract/SGAT[765] and its own process[766]), demonstrates the need to include this language in the interconnection agreement. Every sentence and phrase of Eschelon's language is supported by the record, including Qwest documentation and admissions, as shown in greater detail in Attachment 1 to this Post-Hearing Brief ("Evidence in the Record Supporting Eschelon's Jeopardy Proposals").[767]

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telling Eschelon that it ought to be grateful that the delay was not even longer (the entire three-day supplemental order period or more).

[760] Eschelon/43, Johnson/59.

[761] Eschelon/43, Johnson/59.

[762] Eschelon/43, Johnson/67, lines 3-4. *See also* Eschelon/43, Johnson/57, lines 17-18 ("Perhaps the ***most important consequence*** of attributing a jeopardy to a carrier is the ***effect on the due date*** for providing service."); *see also* Eschelon/43, Johnson/90, lines 5-7 ("Eschelon will attempt to overcome these obstacles ***because delivery of service to its end user customer is so important to Eschelon***.") (emphasis added).

[763] Eschelon/43, Johnson/76-79 and Eschelon/110 (jeopardies chronology). *See also,* summary provided in the above "no Qwest vacillation or violation" myth.

[764] Qwest/18, Albersheim/55, line 24 – /56, line 8 (Qwest said that its classification of 12 jeopardies as Eschelon-caused (CNR) was appropriate, even though Qwest admits that for all 12 of these examples, Qwest sent no FOC at all); Eschelon/115, Johnson (Category A).

[765] ICA & SGAT Section 9.2.4.4.1; Footnote 4 to Eschelon/115 (Johnson).

[766] MN Tr., Vol. 1, p. 32, lines 17-19 and Eschelon/6, Starkey/11 [MN Tr., Vol. 1, p. 95, lines 19-24 (Ms. Albersheim)], cited at Eschelon/43, Johnson/72, footnote 103.

[767] Eschelon provided a similar matrix with its post-hearing briefs in the arbitrations in other states. In Washington, Qwest replaced Eschelon's third column ("Qwest Evidence that the PIDs/PAP Provide

Eschelon's proposal for Issue 12-71 (Section 12.2.7.2.4.4) is that a jeopardy caused by Qwest will be classified as a Qwest jeopardy, and a jeopardy caused by CLEC will be classified as caused by CLEC (*i.e.*, Customer Not Ready or CNR). This is a proposition that, but for Qwest's admission[768] and inconsistent conduct,[769] would seem self-evident: Similarly, Eschelon's proposal for Issue 12-73 (Section 12.2.7.2.4.4.2) provides, if Eschelon establishes to Qwest that a jeopardy was not caused by Eschelon, Qwest will correct the erroneous CNR classification and treat the jeopardy as a Qwest jeopardy. To address any concern that the PIDs may be affected by Eschelon's proposal,[770] Eschelon's proposal for Issues 12-71 through 12-73 provides that nothing in the entire Section 12.2.7.2.4.4 modifies the Performance Indicator Definitions (PIDs) set forth in Exhibit B and Appendices A and B to Exhibit K of this Agreement.[771] Qwest testified that it agrees "a CNR jeopardy should be assigned appropriately."[772] Qwest provided no valid reason to reject Eschelon's language which, consistent with these Qwest admissions, establishes jeopardies will be assigned appropriately.

Something Different" – which was populated in each case with "none") with its own reply (entitled "Qwest's Evidence"). In Attachment 1 to this Brief, Eschelon has included Qwest's Column 3 ("Qwest's Evidence") from Washington (while inserting cites to the Oregon record in brackets) and then added Eschelon's own Column 4 ("Eschelon Comments to Qwest's Response") to provide Eschelon's reply.

[768] Qwest/18, Albersheim/55, line 24 – /56, line 8 (Qwest said that its classification of 12 jeopardies as Eschelon-caused (CNR) was appropriate, even though Qwest admits that for all 12 of these examples, Qwest sent no FOC at all). *See* Eschelon/115 (Category A).

[769] Eschelon/43, Johnson/76-79. *See also* Eschelon/110 (Johnson) (jeopardies chronology) and summary provided in the above "no Qwest vacillation or violation" myth.

[770] Eschelon/43, Johnson/62-63. In the event that Qwest nonetheless claims that Eschelon's language in effect modifies or contradicts the PIDs, citations to record evidence showing this is not the case are provided in Attachment 2 to this Post-Hearing Brief.

[771] Eschelon/43, Johnson/60. With the addition of this sentence, the Minnesota Commission adopted Eschelon's language for Issues 12-71 through 12-73. Eschelon/30, Denney/23-24, MN PUC Arbitration Order, pp. 23-24 ¶ 6 (Topic 31).

[772] Eschelon/6, Starkey/11 [MN Tr., Vol., 1, p. 94, lines 5-6 (Ms. Albersheim)].

Eschelon's proposal for Issue 12-72 (Section 12.2.7.2.4.4.1) reflects Eschelon's experience with one particular recurring fact pattern, when Qwest incorrectly classifies Qwest-caused jeopardies as CNR jeopardies. This has occurred when Qwest provides an initial jeopardy notice indicating that the due date will be missed because there are no facilities to fill the order and then, when facilities become available, Qwest fails to provide a Firm Order Confirmation ("FOC") or a timely FOC to let Eschelon know that it is ready to deliver.[773] Because Eschelon must have personnel available and may need to secure access to the customer premises, it may be unable to accept delivery if Qwest unexpectedly attempts to deliver a circuit. However, because of the lack of proper notice or timely notice to Eschelon, it is unreasonable to treat that inability to accept service as an Eschelon-caused (CNR) jeopardy. Qwest admits, however, that it has and will classify jeopardies as CNR despite its failure to send an FOC,[774] confirming the need for explicit contract language to address this issue.

The key facts are largely undisputed. Qwest agrees, with the exception of one phrase (at least the day before),[775] Eschelon's proposed language for Issues 12-71 – 12-73 reflect Qwest's current process.[776] Regarding Issue 12-72, Qwest is required to send an

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[773] Eschelon/43, Johnson/57.

[774] Qwest/18, Albersheim/55, line 24 – /56, line 8 (Qwest said that its classification of 12 jeopardies as Eschelon-caused (CNR) was appropriate, even though Qwest admits that for all 12 of these examples, Qwest sent no FOC at all); Eschelon/115, Johnson (Category A).

[775] Despite Qwest's denials, Qwest's commitment to a time frame of the "day before" is documented, by Qwest, in its own CMP minutes and materials (which also refer to a "documented process" within Qwest). Eschelon/111 (Qwest-prepared meeting minutes) and Eschelon/113 (February 26, 2004 CMP materials prepared and distributed by Qwest). *See also* Eschelon/43, Johnson/69, lines 10-17. The CMP documentation shows that Ms. Johnson was present for these CMP discussions (and Ms. Albersheim was not). *See* Oregon Tr. Vol. 1, 0036-0037.

[776] Qwest/1, Albersheim/69, line 16 (referring to all of Eschelon's proposal, without the phrase "the day before," as Qwest's "current PCAT process"); Qwest/18, Albersheim/46, lines 6-7 (indicating only that "at least the day before" is allegedly not part of the Qwest process) and Eschelon/6, Starkey/6 [MN Tr., Vol. 1, p. 37, lines 16-23 (Ms. Albersheim)]. Qwest claims that Eschelon's proposed phrase "at least the day before" is not part of Qwest's current process. *See id*. p. 37, lines 11-19.

FOC with the due date after clearing a Qwest facility jeopardy,[777] and Qwest admits that its current process requires it to do so.[778] Qwest also admits that the reason Qwest is required to send an FOC after a Qwest facility jeopardy has been cleared is to let the CLEC know that is should be expecting to receive the circuit so that the CLEC will have personnel available and make arrangements with the customer to have access to the premises available when access is needed.[779] Qwest admits that, for itself, it allows even more notice and preparation time (three days) than reflected in Eschelon's language for Eschelon (at least the day before).[780] Qwest even admitted that, under its current process, if the CLEC does not have adequate notice that the circuit is being delivered (with the agreed upon process for adequate notice consisting of an FOC), then it is ***"not appropriate"*** for Qwest to assign a CNR (CLEC-caused) jeopardy.[781]

b. Qwest's objections to Eschelon's proposed language are without merit.

Despite these facts being undisputed, as discussed, Qwest nonetheless takes the position that it may classify jeopardies as CLEC-caused (CNR) when Qwest fails to send an FOC or a timely FOC per the agreed upon process to give CLEC an opportunity to prepare to accept the circuit.[782] Qwest makes six claims[783] to attempt to defend this

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Other than that phrase, however, Qwest admits that the remainder of Eschelon's proposed language reflects Qwest's current process. *See id*. p. 37, lines 16-23 [quoted at Eschelon/43, Johnson/37, footnote 36].

[777] *See e.g*., ICA Section 9.2.4.4.1 & footnote 4 to Eschelon/115 (Johnson).

[778] Eschelon/6, Starkey/6 [MN Transcript, Vol. 1, p. 37, lines 16-23 (testimony of Renee Albersheim)].

[779] Eschelon/6, Starkey/6 [MN Transcript, Vol. 1, p. 37, line 24 – p. 38, line 6 (testimony of Renee Albersheim)].

[780] Qwest/18, Albersheim/57, lines 5-10, discussed at Eschelon/43, Johnson/67-69.

[781] Eschelon/6, Starkey/11 [MN Transcript, Vol. 1, p. 94, lines 4-11 (testimony of Renee Albersheim) (emphasis added)].

[782] Qwest/18, Albersheim/55, line 24 – /56, line 8 (Qwest said that its classification of 12 jeopardies as Eschelon-caused (CNR) was appropriate, even though Qwest admits that for all 12 of these examples, Qwest sent no FOC at all); Eschelon/115, Johnson (Category A and Category B).

position: (1) process details do not belong in an ICA so the issue should be returned to CMP;[784] (2) Eschelon's language "would impact Qwest's PIDs";[785] (3)the phrase "at least the day before" is not documented in the PCAT, in addition to being documented in the CMP materials, so it may be disregarded,[786] and, in any event, it is meaningless if Qwest waits until the due date to attempt delivery without an FOC;[787] (4) regardless of the type of jeopardy, CLECs should disregard the jeopardy notice and always take all steps to prepare to accept a circuit even when Qwest has told the CLEC (through a Qwest facility jeopardy) that Qwest has a facility problem in its network that needs to be resolved before the circuit can be delivered to CLEC and Qwest sends no FOC to indicate the facility problem has been cleared;[788] (5) the FOC status notices required by the contract and SGAT and Qwest's process are a formality that Qwest can disregard in favor of

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[783] Qwest also claimed that Eschelon's language would cause service to be delayed. See, e.g., Eschelon/43, Johnson/73, citing Ms. Albersheim's Washington Response Testimony, p. 58, line 23. As discussed in the introduction to this Brief, that argument should be rejected as contrary to the language that Eschelon has proposed (error type one – ignores proposed language). Eschelon's proposed language provides for ***advance*** notice before the due date to help ensure ***timely*** delivery of the circuit on the due date. Eschelon's language in Section 12.2.7.2.4.4.1 provides that, even when Qwest provides no FOC, Eschelon "will nonetheless use its best efforts to accept the service" when delivered. It specifically states that, if needed, the companies will attempt to set a new appointment time "***on the same day***." Eschelon's devotion to ensuring the best interests of its customers is evident from the more than 100 examples in which, despite ***no*** FOC from Qwest in violation of Qwest's own process, Eschelon used its best efforts and successfully accepted the circuit. Eschelon/114 and Eschelon/43, Johnson 65 and 75. When Eschelon, through no fault of its own, cannot accept the circuit due to Qwest's failure to provide the agreed upon FOC for advance notice, however, Qwest should not be allowed to cause additional delay by requiring a supplemental order with an interval for a new due date (which Qwest admits is a consequence of assigning a "CNR" jeopardy).

[784] Qwest/1, Albersheim/55-56.

[785] Qwest/18, Albersehim/53, line 13-17.

[786] Eschelon/7, Starkey/48-49 [AZ Transcript, Vol. 2, Q-22 & Q-23 & pp. 340-341; *see id*. p. 340 lines 18-19 (Mr. Topp: "no language whatsoever" referring to at least the day before in the PCAT) & *see id.* p. 34, lines 1-18 (Ms. Johnson's response that Qwest confirmed in CMP that Qwest would give CLECs an FOC the day before and her references on the stand to pages 37 and 21 of Eschelon/110 (Johnson))].

[787] Qwest/1, Albersheim/69, lines 4-7.

[788] Eschelon/7, Starkey/14 [AZ Transcript, AZ Vol. 1, pp. 67-69 (Ms. Albersheim)].

potential informal communications;[789] and (6) Eschelon agreed to a compromise or alternative proposal regarding 72 hours instead of obtaining advance notice of delivery.

i. Eschelon's jeopardy language is appropriately included in the companies' contract.

First, regarding Qwest's claim that process details do not belong in an ICA so the issue should be returned to CMP,[790] there is nothing to do in CMP with respect to every provision of Eschelon's proposal for which Qwest has testified it is Qwest's current process. No change is needed. Qwest has admitted with respect to key aspects of Eschelon's proposal that it cannot "imagine any circumstances under which a CLEC might want something different."[791] With respect to the single phrase Qwest disputes, the long and tortured history of the jeopardies issue in CMP, in which Qwest vacillated (without using CMP itself when it changed position)[792] and made commitments that it now denies,[793] should be sufficient reason to reject this request to send the issue back to the same forum that has failed to address it adequately and led to this dispute. Doing so will build a certain dispute into the interconnection agreement. The multiple myths (see above) demonstrate that this is an example of Qwest error type four (ignores contrary

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[789] Oregon Tr., Vol. 1, 0055, lines 8-13 (Q. So it would be fair for Eschelon to assume that if they haven't received an FOC, that there hasn't been a new due date; isn't that right? A. If you're going to rely solely on the FOC, that would be correct. But our technicians are in communication with each other.") *See also* Eschelon/7, Starkey/15 [AZ Transcript, Vol. I, p. 70, lines 4-9 (Ms. Albersheim) ("Q. Does that assume this Qwest has sent the FOC with a new due date or that it hasn't? A. Qwest is supposed to. Q. And let's assume that it doesn't. A. The formality is that Qwest is supposed to, but the technicians are in touch with each other.")].

[790] Qwest/1, Albersheim/55-56 and 61.

[791] Eschelon/7, Starkey/13 [AZ Transcript, Vol. 1, p. 64, lines 5-14 (testimony of Ms. Albersheim); *see also* AZ Transcript at Vol. 1, p. 64, line 19 – p. 65, line 3 (testimony of Ms. Albersheim)].

[792] Eschelon/43, Johnson/76-79 and Eschelon/110 (Johnson) (jeopardies chronology). *See also* summary provided in the above "no Qwest vacillation or violation" myth.

[793] *Compare* Qwest CMP minutes ("Bonnie [Eschelon] confirmed that the CLEC should ***always*** receive the FOC ***before the due date***. Phyllis [Qwest] agreed . . .") in Eschelon/111, Johnson/5 (emphasis added) *with* Qwest denial ("Qwest ***never*** made such a commitment") in Qwest/18, Albersheim/46, line 14.(emphasis added)

facts in evidence), as well as error type number one (ignores proposed language). In short, Eschelon did use CMP to attempt to address this issue and believed that it had been addressed, only to find that Qwest would not comply with the process that it had agreed to and even denied that there ever had been such an agreement. The terms need to be in the ICA. Qwest's admission that it will classify a missed due date as Eschelon-caused (CNR) when Qwest sends no FOC at all[794] (in violation of the contract/SGAT[795] and its own process[796]) also demonstrates the need to include this language in the interconnection agreement. The Commission should adopt Eschelon's language to avoid future disputes on this very issue.

ii. Eschelon's proposed language advances appropriate application of the PIDs by helping enure that jeopardies are correctly classified.

Second, regarding Qwest's alleged concern that Eschelon's language "would impact Qwest's PIDs,"[797] it is important to note that the PIDs are not the primary business issue. Eschelon's proposal should be adopted to avoid customer delays.[798] Therefore, Eschelon has voluntarily proposed language committing Eschelon to use best efforts to accept delivery of the circuit/service even when Qwest has provided an untimely FOC or no FOC at all.[799] Despite Qwest's previous claims about Eschelon's

[794] Qwest/18, Albersheim/55, line 24 – /56, line 8 (Qwest said that its classification of 12 jeopardies as Eschelon-caused (CNR) was appropriate, even though Qwest admits that for all 12 of these examples, Qwest sent no FOC at all); Eschelon/115 (Category A).

[795] ICA & SGAT Section 9.2.4.4.1; Footnote 4 to Eschelon/115 (Johnson).

[796] MN Tr., Vol. 1, p. 32, lines 17-19. *See also* Eschelon/6, Starkey/11 [MN Tr., Vol. 1, p. 95, lines 19-24 (Ms. Albersheim)], cited at Eschelon/43, Johnson/72, footnote 103.

[797] Qwest/18, Albersehim/53, line 13-17.

[798] Eschelon/43, Johnson/57, line 19- /59, line 15.

[799] ICA Section 12.2.7.2.4.4.1.

attempt to "gain advantageous PAP treatment,"[800] this Eschelon ICA language means that Eschelon *will not receive PAP payments* for the untimely or missed FOC as a direct result of Eschelon's own efforts to accept service despite Qwest's failure to provide a timely FOC. Eschelon's proposed language is solid evidence that the first priority under that language, consistent with the public interest, is to serve end user customers in a timely manner. If, despite Eschelon's best efforts, Qwest's failure to provide an FOC or a timely FOC causes a missed due date, Qwest is not be able under the existing PIDs or PAP to legitimately attribute its failure to Eschelon by coding the missed due date as CNR.

To address Qwest's purported concerns that Eschelon's proposed language regarding jeopardies will somehow result in a modification of the PIDs, Eschelon, following the ALJ's recommended decision in the Minnesota case, added to its is proposed Section 12.2.7.2.4.4 the express statement that nothing in that Section in any way modifies the PIDs and, with that modification, the Minnesota Commission adopted Eschelon's proposed language.[801] Notwithstanding this express language, Qwest contends that "Since Eschelon's proposed language reduces the occurrence of CNR jeopardies, its proposed language cannot help but impact Qwest performance on these PIDs.[802] In fact, Eschelon's proposed language advances the goal of the PIDs of assuring service quality by helping ensure that jeopardies are correctly classified.

When applying the PIDs today, Qwest is not supposed to blindly assign "CNR" jeopardies in every case but rather is supposed to review the facts to determine which

[800] Qwest Reconsideration Request, p. 7.

[801] Eschelon/43, Johnson/60. lines 6-13., /62, line 16-/63, line 7.

[802] Qwest/18, Albersheim/53, lines 15-17.

carrier "caused" the delay and, if it was the CLEC/customer, then assign a "CNR" jeopardy. Qwest's witness on this issue, Ms. Albersheim, acknowledged that "a CNR jeopardy should be assigned appropriately."[803] In her rebuttal testimony, Ms. Albersheim added: "The OP-3 PIDs, which measure whether Qwest delivers service on time, exclude CNR jeopardies."[804] Note that Ms. Albersheim does *not* state that the OP-3 PIDs exclude CNR jeopardies regardless of whether they are CLEC/customer caused and even when Qwest *erroneously* assigns cause to a CLEC (by assigning CNR) when the delay is not caused by CLEC. That would be an improbable reading of the PIDs and inconsistent with her own reading of the PIDs leading her to conclude that the PIDs require Qwest to look at the *cause* of the delay (e.g., why CLEC is not ready). It would also give Qwest an incentive to classify Qwest-caused delays as CNR. Therefore, the only logical reading of the existing PIDs (without modification) is that they exclude *valid* CNR jeopardies (CLEC/customer caused delays). Eschelon's language does not modify the PIDs. With adoption of Eschelon's language, the PIDs will continue to exclude *valid* CNR jeopardies.

Ms. Albersheim has testified that, with the exception of a single phrase (which is

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[803] Eschelon/6, Starkey/10 [Minnesota arbitration Tr., Vol., 1, p. 93, lines 25- p. 94, line 11 (testimony of R. Albersheim]:

> Q. And what Eschelon is saying is, look, if you haven't told us the circuit is coming, you can't treat that as a CNR jeopardy, right?
>
> A. Yes,
>
> Q. And Qwest disagrees with that; is that correct?
>
> A. We don't disagree with the notion that a CNR jeopardy should be assigned appropriately.
>
> Q And if the CLEC doesn't have adequate notice that the circuit is being delivered, adequate notice consisting of an FOC, then you would agree that a CNR jeopardy is not appropriate; correct?
>
> A Yes.

[804] Qwest/18, Albersheim/53, lines 12-15.

otherwise documented by Qwest in its own CMP materials[805]), Eschelon's jeopardies language reflects Qwest's current process.[806] At no point does Qwest explain how any of Eschelon's language reflecting Qwest's current process can be inconsistent with the current PIDs or the current PAP or require modification of either of them. *If* Qwest is appropriately applying the PIDs and PAP today under its current process, then the result would not change under appropriate application of the PIDs or the PAP under ICA language reflecting that process.

While Qwest claims that it classifies jeopardies appropriately (*e.g.*, reflective of the company to which the jeopardy condition and missed due date are properly attributable, consistent with the PIDs and PAP), in practice Qwest will inappropriately classify a jeopardy as CNR when Qwest has failed to provide a timely FOC or even any FOC at all. Specifically, when Ms. Albersheim (who separately testified that a CNR

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[805] Eschelon/113, Johnson/3 (February 26, 2004 CMP materials prepared and distributed by Qwest) (emphasis added); Johnson/11 (March 4, 2004 CMP ad hoc call minutes.

[806] Eschelon/6, Starkey/6 [Minnesota arbitration Tr., Vol. 1, p. 37, lines 11-23 (testimony of R. Albersheim):

> Q You say there that Eschelon's proposal does not reflect Qwest's current practice because it adds the phrase at least a day to when Qwest will provide a FOC following a Qwest jeopardy?
>
> A At least a day before, yes.
>
> Q Other than that phrase, at least a day before, is Eschelon's proposal consistent with Qwest's practice?
>
> A Current practice, yes, except for that sentence.
>
> Q So you agree with me that Qwest's current practice is to provide the CLEC with an FOC after a Qwest facilities jeopardy has been cleared; is that right?
>
> A Yes.
>
> Q And the reason for that is you want to let the CLEC know that the CLEC should be expecting to receive the circuit; right?
>
> A Yes.

would be inappropriate if no FOC is provided[807]) was provided with Eschelon's examples, she admitted that even in the eight examples for which she admitted Qwest provided *no FOC at all* (as opposed to an untimely FOC not provided at least the day before), Qwest had classified the missed due date as Eschelon-caused (CNR).[808]

Qwest's purpose in opposing Eschelon's language is made clear from Qwest's following statement regarding the PAP:

> Eschelon is technically correct that its proposal has no impact on the performance indicator definitions; it nonetheless has a very significant impact on Qwest's Performance Assurance Plan. ***Specifically, if a Qwest technician classifies an order as a Qwest jeopardy, it counts as a missed commitment, even though Qwest was ready and able to deliver the circuit. If, by contrast, the Qwest technician classifies the order as customer not ready, it is excluded from the calculation entirely.***[809]

There you go. If Qwest is allowed to assign "CNR" to a jeopardy whenever the CLEC is not ready regardless of whether Qwest caused CLEC to be not ready by failing to provide an FOC or timely FOC, Qwest's own words show that the erroneous classification benefits Qwest under the existing PIDs and PAP (without modification).

Qwest cites nothing in the PIDs or the PAP stating or suggesting that, if Qwest violates its duty regarding FOCs[810] and as a result Eschelon is denied the opportunity to

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[807] Eschelon/6, Starkey/10 [Minnesota arbitration Tr., Vol., 1, p. 94, lines 7-11 (testimony of R. Albersheim]Minnesota arbitration Tr. Vol. I p. 94, lines 7-11.

[808] Eschleon/6, Starkey/7 [Minnesota arbitration Tr. Vol. I p. 39, line 15 – p. 40, line 14 (Ms. Albersheim)].

[809] Eschelon/43, Johnson/63, footnote 79.

[810] Regarding FOCs, the Minnesota Commission expressly found that "Qwest acknowledges that it has ***a duty*** to give notice (called a firm order confirmation, or FOC) when scheduling an order due date, and when re-confirming an order that had previously been placed in jeopardy." Exhibit Eschelon 2.25 (MN Order Resolving Arbitration), p. 19 (emphasis added). This is a contractual duty. Agreed upon language in Oregon ICA Section 9.2.4.4.1 (like the SGAT) provides: "If Qwest must make changes to the commitment date, Qwest will promptly issue a Qwest Jeopardy notification to CLEC that will clearly state the reason for the change in commitment date. Qwest will also submit a new Firm Order Confirmation that will clearly identify the new Due Date."

adequately prepare to accept delivery so that the due date is missed, Qwest may shift the consequences of its failure to Eschelon and require Eschelon to supplement its order for a delayed due date. In other words, Qwest has provided no facts to support its suggestion that Eschelon's proposal changes the intended and correct application of the PIDs. To the contrary, Qwest seems to be admitting that it is currently incorrectly applying the PIDs so it should be allowed to continue to do so, to Eschelon's and its customers' detriment. Qwest should correctly apply the PIDs, if it is not doing so today. As the Minnesota Commission stated:

> The Commission realizes that circumstances change and not every deadline will be met; the Commission also realizes that circumstances change and some previously unmeetable deadlines can in fact be met. The Commission cannot know when these circumstances will reflect some fault on the part of Qwest and when they simply reflect the challenges of managing a complex telecommunications system; for this reason the PIDs do not prescribe penalties for every instance of missing a deadline, but merely for cumulative instances. But where Eschelon had no role in causing Qwest to issue an initial jeopardy notice, and had no role in delaying Qwest's issuance of a subsequent FOC until less than a day before the deadline, the Commission cannot find the merit in holding Eschelon responsible when the deadline is missed.
>
> Nothing in Eschelon's language requires Qwest to delay filling an order. To the contrary, Eschelon's language calls upon each party to use their best efforts to meet deadlines with or without a timely FOC. Eschelon's language merely specifies the consequences for failing to offer a timely FOC - specifically, Eschelon would not be held responsible for any failure to meet the installation deadline, and the new deadline need not be delayed a minimum of three days.
>
> Nor does the Commission read Eschelon's language to alter the PIDs. Given the apparent confusion on that point, however, the Commission will approve Eschelon's language together with Eschelon's statement clarifying that this new language does not modify the PIDs.[811]

[811] Eschelon/30, Denney/21.

iii. That Qwest will, following a Qwest facility jeopardy, provide an FOC at least a day before the due date is a documented aspect of Qwest's jeopardy process.

Third, regarding Qwest's claim that the phrase "at least the day before" is not documented in the PCAT -- in addition to being documented in CMP materials (which Qwest cannot deny -- so it may be disregarded,[812] there is no evidence that all Qwest's procedures are documented in the PCAT or that they must be contained in the PCAT to be applied by Qwest. To the contrary, the evidence shows that when Qwest believes it is to its advantage to do so, Qwest relies upon processes documented in CMP materials, internally, or not at all, regardless of whether they are *also* in the PCAT.[813] With respect to jeopardies specifically, the evidence showed that Qwest for a time recognized its documented commitment in CMP to provide the FOC the day before[814] and treated its own failure to do so as non-compliance with its process, before changing its position

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[812] Eschelon/7, Starkey/48-49 [AZ Transcript, Vol. 2, Q-22 & Q-23 & pp. 340-341]; *see id*. p. 340 lines 18-19 (Mr. Topp: "no language whatsoever" referring to at least the day before in the PCAT) & *see id.* p. 34, lines 1-18 (Ms. Johnson's response that Qwest confirmed in CMP that Qwest would give CLECs an FOC the day before and her references on the stand to Eschelon/110 to her direct testimony).

[813] *See e.g.*, Eschelon/43, Johnson/80, footnote 132, citing Ms. Albersheim's Arizona Rebuttal testimony at p. 21, lines 15-17 ("In order to present a more complete record of the activities that took place regarding the Change Requests in question, I have attached the actual Change Requests, which include the minutes from the Project meeting."); *see id*., citing Albersheim Arizona Rebuttal testimony at pp. 22 & 24 (relying upon CMP meeting minutes); Eschelon/143, cited at Echelon/141, Johnson/22; *see* Eschelon/141, Johnson/22, lines 10-11 ("'although Qwest has existing internal processes, Qwest has not documented many of those processes for CLECs'" (quoting Change Request PC030603-1)); *see also* Eschelon/100, Johnson (showing Qwest took away CLEC access to Qwest internal documentation and said on page 1 of Eschelon/100 it would make "efforts" to provide not all process information but only that which Qwest found "critical"; and defining external documentation beyond the PCAT to include "business procedures" and other information). Another example of a process followed but not documented in the PCAT was provided by Qwest in CMP documentation. *See* Eschelon/113, Johnson/1 ("Our current documented process does not state that additional detailed information would be provided, or in what timeframes we could provide the information, however there have been times when the centers have sent subsequent jeopardy notices providing additional detail in an effort to provide better customer service.")

[814] Eschelon/113 (February 26, 2004 CMP materials prepared and distributed by Qwest) (emphasis added); Eschelon/110, Johnson/4 (March 4, 2004 CMP ad hoc call minutes) (emphasis added). Both of these Qwest statements reflecting Qwest's commitment in CMP are directly quoted at Eschelon/43, Johnson/70.

without going back to CMP.[815] On behalf of Eschelon, Ms. Johnson relied upon Qwest's statements and its documentation, including its documentation of these Qwest commitments,[816] when the change request was closed subject to review of Qwest ***compliance*** with this process.[817]

Since then, Qwest has attempted to narrowly define the Qwest documentation that reflects the commitments it made during the history of the jeopardy Change Requests as being limited to information in its PCAT.[818] As indicated above, that is not how Qwest or the CMP works. In the particular PCAT version referenced by Qwest, Qwest documented in its PCAT some ***changes*** to its jeopardies process,[819] but Qwest took the position in CMP that providing an FOC at least the day before the due date was already part of its ***current*** internally documented process (*i.e*., as an existing process, it did not need to be documented through a PCAT change). Specifically, Qwest said: "This example is non-compliance to a ***documented process.*** Yes an FOC should have been sent prior to the Due Date."[820] Qwest is referring to an internally documented process, as it is not documented in the PCAT.[821] Additional documentation is not needed to demonstrate Qwest's commitment in this case, because Qwest documented its commitment in written and posted CMP materials.

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[815] *See e.g*., Eschelon/110, Johnson/1 and pp. 4-6.

[816] Eschelon/113 (February 26, 2004 CMP materials prepared and distributed by Qwest) (emphasis added) and Eschelon/110, Johnson/4 (March 4, 2004 CMP ad hoc call minutes) (emphasis added).

[817] Eschelon/111, Johnson/4 ("Jill Martain – Qwest asked if this is a compliance issue or a process problem. Bonnie said it is hard to determine at times, but she is willing to close this CR and handle the compliance issue with the Service Manager. The CLECs agreed to close the CR.").

[818] Eschelon/7, Starkey/48-49 [AZ Transcript, Vol. 2, Q-22 & Q-23 & pp. 340-341; *see id*. p. 340 lines 18-19 (Mr. Topp: "no language whatsoever" referring to at least the day before *in the PCAT*)].

[819] Eschelon/7, Starkey/48-49 [AZ Transcript, Vol. 2, Q-22 & Q-23].

[820] Eschelon/113 (February 26, 2004 CMP materials prepared and distributed by Qwest).

[821] Eschelon/7, Starkey/48-49 [AZ Transcript, Vol. 2, Q-22 & Q-23 & pp. 340-341; *see id*. p. 340 lines 18-19 (Mr. Topp: "no language whatsoever" referring to at least the day before *in the PCAT*)].

Despite Qwest's suggestion to the contrary,[822] the absence of additional documentation in the PCAT is not evidence that Eschelon gave up its Change Request or associated expected deliverables as part of a compromise or otherwise. Eschelon did not give up its request in exchange for something else.[823] The jeopardies discussion was ***expanded*** in CMP to include more issues. This is shown by the new title, which is more general in scope and thus broader and more inclusive than the original title, while still including Eschelon's original request:

> "Title: Jeopardy Notification Process Changes (new title). Delayed order process modified to allow the CLEC a designated time frame to respond to a released delayed order after Qwest sends an updated FOC (old title)."[824]

The description of change (the first paragraph in the Change Request) makes it clear that Qwest updated the Change Request with Qwest's new, *additional* description of change and expected deliverable. The description of this change states:

> "Changed the description of this CR as a result of synergies with PC072303-1. During the October 15 CMP meeting we discussed whether we should close/leave open/ or update CR PC081403-1 'Delayed order process modified to allow the CLEC a designated time frame to respond to a released delayed order'. The reason we wanted to close/leave open or update PC081403-1 is because PC072303-1 is meeting many of the needs. Bonnie Johnson agreed to change this CR, ***as long as we retained the original CR description***."[825]

Ms. Johnson asked that Eschelon's description of change remain as a part of the Change Request so it would be clear that Eschelon's request would be included and to avoid the very kind of confusion Qwest now attempts to introduce. There are two

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[822] Qwest/18, Albersheim/48, line 31 and Qwest/18, Albersheim/52, lines 9-11, discussed at Eschelon/141, Johnson/42-44.

[823] Eschelon/141, Johnson/42-44.

[824] Eschelon/111, Johnson/1. A copy of Change Request PC081403-1 is provided as Eschelon/111.

[825] Eschelon/111, Johnson/1. (emphasis added)

expected deliverables in this Change Request. The later expected deliverable asked more generally to "change the jeopardy notification process to reduce unnecessary jeopardy notices being sent to the CLEC when the Due Date is not in jeopardy ***and*** to improve the ***overall*** jeopardy notification process.'"[826] This description is very broad, referring generally to improving the overall process (including Eschelon's request). Eschelon's initial description of change and expected deliverable, which remained a part of the Charge Request, stated:

> "Qwest will contact the CLEC to test and accept only after the updated FOC has been sent and ***a designated time frame*** has passed. ***Qwest will not put the order in a CNR (customer not ready) jeopardy status*** until this time frame has passed and the CLEC is not ready. When Qwest puts a CLECs request in delayed for facilities jeopardy status, Qwest should be ***required to send the CLEC an updated FOC when the delayed order is released*** and ***allow the CLEC a reasonable time frame to prepare*** to accept the circuit. Qwest releases orders form a held status (in some cases the CLEC has not even received an updated FOC) and immediately contacts the CLEC to accept the circuit. Because Qwest does not allow the CLEC a reasonable amount of time to prepare for the release of the delayed order, the CLEC may not be ready when Qwest calls to test with the CLEC. Qwest then places the request in a CNR jeopardy status. Qwest should modify the Delayed order process, to require Qwest ***to send an updated FOC and then allow a reasonable amount of time for the CLEC to react and prepare to accept the circuit before contacting the CLEC for testing***.
>
> Expected Deliverable:
> ***Qwest will modify, document and train a process, that requires Qwest to send an updated FOC and allow a CLEC a reasonable amount of time (from the time the updated FOC is sent) to prepare for testing before Qwest contacts the CLEC to test and accept the circuit***."[827]

This shows that Eschelon clearly made these requests as part of this Change Request, which was completed in CMP on July 21, 2004.[828] The description of change

[826] Eschelon/111, Johnson/2.

[827] Eschelon/111, Johnson/2.(emphasis added)

[828] Eschelon/111, Johnson/1.

quoted above shows that Ms. Johnson took steps to ensure that, when Qwest expanded the scope of the Change Request, Eschelon's request (including this expected deliverable) remained a part of the Change Request.[829] Eschelon specifically requested a documented[830] "designated time frame" to "allow CLEC a reasonable amount of time (from the time the updated FOC is sent)" and, as the Qwest CMP documentation shows, Qwest committed in writing in posted minutes (*i.e.*, documented) that it had an internally documented process to provide the FOC the day before delivering the circuit.[831] The "day before" is the designated time frame documented in CMP, and Qwest introduced no evidence of any later Change Request initiated by Qwest or any other carrier to alter that time frame. When Qwest does not provide the FOC the day before (such as in the example when Qwest provided the FOC nine minutes before delivering the circuit[832]) Qwest's conduct remains "non-compliance to a ***documented process***."[833] That the Qwest documentation is CMP minutes and not the PCAT is inconsequential. Qwest's denial of this documented fact, after all of Eschelon's efforts in CMP, demonstrates the need for language in the interconnection agreement establishing the designated time frame. Any proposal to refer to the PCAT, which Qwest admits contains no time frame at all,[834] should be rejected.

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[829] Eschelon/111, Johnson/1 ("as long as we retained the original CR description").

[830] Note, the above-quoted reference is for a "documented" process, which did not specify and was not limited to documentation in the PCAT, as Qwest also provides documentation in other ways, such as CMP minutes.

[831] "This example is non-compliance to a ***documented process.*** Yes an FOC should have been sent prior to the Due Date." Eschelon/111, Johnson (February 26, 2004 CMP materials prepared and distributed by Qwest) (emphasis added).

[832] Eschelon/43, Johnson/36, p. 66, and p. 84 (Row 11 in Eschelon/115, Johnson/14-15).

[833] Eschelon/113 (February 26, 2004 CMP materials prepared and distributed by Qwest)

[834] Eschelon/7, Starkey/48-49 [AZ Transcript, Vol. 2, Q-22 & Q-23 & pp. 340-341; *see id*. p. 340 lines 18-19 (Mr. Topp: "no language whatsoever" referring to at least the day before *in the PCAT*)].

Ironically, despite Qwest's current claims about the PCAT, Qwest's proposed language (consistent with Eschelon's position that relevant Qwest documentation is broader than the PCAT) does not refer specifically to the PCAT but rather provides: "12.2.7.2.4.4 Specific procedures are contained in Qwest's documentation, available on Qwest's wholesale web site." Qwest's documentation on its wholesale web site (*i.e*, CMP materials) provides the "CLEC should ***always*** receive the FOC ***before the due date***."[835] Because Qwest denies this documented commitment, however, its proposed language does nothing to resolve the dispute. Qwest witness Karen Stewart testified that "a critical goal of this arbitration should be establishing clarity concerning the parties' rights and obligations," and she added that "clear ICA language is necessary so that the parties ***know what is expected of them*** under the agreement and to avoid or minimize future disputes."[836] The Commission should adopt Eschelon's language so that the companies will know what is expected of them, including when Eschelon can expect to receive an FOC after a Qwest facility jeopardy clears and before Qwest attempts to deliver the circuit.

The result should not be different when – by waiting to clear the jeopardy until the due date – Qwest violates its own documented process and does not allow Eschelon time to prepare in advance to accept the circuit.[837] Nonetheless, Qwest also argues that all of Eschelon's language should be rejected because "the requirement that Qwest

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[835] Eschelon/111, Johnson/5.

[836] Direct Testimony of Karen Stewart, Minnesota PUC Docket No. P-5340, 421/IC-06-768; OAH Docket No. 3-2500-17369-2; August 25, 2006 ("Stewart Minnesota Direct"), p. 13, lines 4-6. This and other similar Qwest statements are discussed in Mr. Starkey's direct testimony (*see e.g.*, Eschelon/1, Starkey16-17).

[837] Eschelon 111/Johnson/5, March 4, 2004 CMP ad hoc call minutes prepared by Qwest ("Bonnie confirmed that the ***CLEC should always receive the FOC before the due date***. ***Phyllis agreed,*** and confirmed that ***Qwest cannot expect the CLEC to be ready for the service if we haven't notified you***.") (emphasis added).

deliver an FOC on a jeopardy order at least a day before the new due date. . . is meaningless in situations where a facility problem is cleared on the same day an order is due."[838] In other words, Qwest is saying that its own conduct in not clearing the jeopardy until the due date prevents Qwest from adhering to its documented process to provide an FOC the day before the due date. The incentive should be, consistent with Qwest's documented process, to clear the jeopardy earlier and timely notify Eschelon so that Eschelon may be prepared to accept the circuit. Contrary to Qwest's suggestion, therefore, the provision is not meaningless, as it sets forth the correct expectation for the norm and provides the correct incentive. Again, Eschelon is ***not*** proposing that, in any circumstance (with or without an FOC; on the original due date or on another date[839]), Qwest cannot attempt to deliver the circuit or that Qwest must wait to deliver the FOC before attempting delivery. This is self-evident from the language of Eschelon's proposed language. (see below). Therefore, if Qwest does not send an FOC the day before the due date and then, on the due date, clears the jeopardy and attempts delivery, Eschelon's language provides that Eschelon will nonetheless use best efforts to accept delivery.

[838] Qwest/1, Albersheim/69, lines 4-7.

[839] The "original" due date means the due date requested by CLEC on its order (*i.e.*, the date in jeopardy). Qwest sometimes refers to the "due date" without distinguishing whether it means the original date, the new due date, or the date of attempted delivery without an FOC identifying the new due date. There is no properly established due date until Qwest sends an FOC with a new due date after the jeopardy is cleared. (*See* ICA Section 9.2.4.4.1) In other words, Qwest is making delivery unexpectedly without properly establishing the due date. (Eschelon may refer to the date of attempted delivery as the new due date for ease of reference, but I wanted to clarify that it is not properly a new due date until an FOC is sent with that date.) In any event, whether the unexpected delivery occurs on the original due date or another date, under Eschelon's proposed language, Eschelon will use best efforts to accept service delivery.

iv. Qwest's suggestion that Eschelon should be ready to accept service on the original due date, notwithstanding a due date jeopardy is unreasonable and contrary to the evidence.

Fourth, regarding Qwest's testimony that, regardless of the type of jeopardy, CLECs should disregard the jeopardy notice and always take all steps to prepare to accept a circuit,[840] that is not what Qwest has documented in its PCAT.[841] This recent claim, which Qwest made at the hearing,[842] is not the process reflected in Qwest's own documentation. The documented process in Qwest's Provisioning and Installation Overview PCAT states (with emphasis added) with respect to Qwest facility jeopardies: "***we will advise you of the new DD when the jeopardy condition has been resolved.***"[843] In other words, for this type of jeopardy (when Qwest has insufficient facilities or a problem with the facilities), the CLEC is told to do nothing to prepare unless Qwest sends a notice advising the condition has been resolved. To ignore or disregard a jeopardy notice means to plan to prepare to accept delivery as though you had not received a notice.

Qwest's PCAT states:

> "Qwest differentiates between DD jeopardies and Critical Date jeopardies. DD jeopardies indicate that your due date is in jeopardy; however, Critical Date jeopardies indicate that a critical date prior to the DD is in jeopardy. ***Critical Date jeopardies can be ignored by you***. Critical Date jeopardies

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[840] Eschelon/7, Starkey/14 [AZ Transcript, Vol. 1, pp. 67-69 (Ms. Albersheim)]. She testified that, in every case, despite a jeopardy notice indicating the due date may be missed, the CLEC "should complete ***everything*** it needs to complete by the due date." *Id.* p. 68 lines 18-19 (emphasis added). Ms. Albersheim has previously admitted that the activities necessary to be prepared to accept the circuit include scheduling personnel to be available and contacting the customer when access to the customer premises is needed. *See e.g.*, Eschelon/6, Starkey/6 [MN Tr., Vol. 1, p. 37, line 24 – p. 38, line 6 (Ms. Albersheim)]; cited at Eschelon/43, Johnson/58.

[841] This highlights the problems with relying on the PCAT, which Qwest controls and can deny or re-interpret, rather than enforceable terms in an interconnection agreement.

[842] Oregon Tr., Vol. 1, 0044, line 12 – 0045, line 22.

[843] Eschelon/115, Johnson, footnote 5; Eschelon/43, Johnson/56, footnote 64; Eschelon/43, Johnson/59, footnote 72; Eschelon/43, Johnson/85-86; and Eschelon/43, Johnson/86, lines 18-19 (Qwest's Provisioning and Installation Overview PCAT), p. 11.

> are identified in the Jeopardy Data document (see download in the following paragraph) in the column labeled "Is Due Date in Jeopardy?" ***If the DD is not in jeopardy, this column will contain "No" and you can disregard the jeopardy notice*** sent for this condition and continue your provisioning process with the scheduled DD. ***If the column contains "Yes" and Qwest has the responsibility to resolve the jeopardy condition, we will advise you of the new DD when the jeopardy condition has been resolved.*** This is usually within 72 hours."[844]

As Qwest's own PCAT language shows, Qwest differentiates by type of jeopardy notice and tells CLECs to plan to prepare to accept the circuit (*i.e*., disregard the jeopardy notice) even if the CLEC is not advised of a new due date for one type (Critical Date jeopardies) and not to prepare to accept the circuit (*i.e*., do not disregard the jeopardy notice) unless Qwest advises CLEC of a new due date for the other type (DD jeopardies). The Qwest facility jeopardies that are the subject of Issue 12-72 (Proposed ICA Section 12.2.7.2.4.4.1)[845] fall within the "DD jeopardy" category.[846]

When asked at the hearing if Qwest expects that Eschelon should have technicians standing around waiting to accept the circuit, Ms. Albersheim admitted that she "wouldn't expect them to stand around and wait."[847] However, this is the effect of Qwest's current position that Eschelon may never disregard a jeopardy notice, even though Qwest is supposed to send a timely FOC when the Qwest facility jeopardy clears. Qwest's position

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[844] Eschelon/43, Johnson/86.

[845] The two types of potential customer (CNR) jeopardies described in Section 12.2.7.2.4.4.1 are coded in Qwest/11, Albersheim, and Eschelon's ICA language mirrors Qwest's PCAT "User Friendly Jeopardy Description" of these two jeopardies. Qwest/11, Albersheim/1-2.

[846] *See* Qwest/11, Albersheim/1-2 (showing "yes" in the column for CO1 and CO2 jeopardies). See Eschelon/43, Johnson/86, lines 16-19 ("If the column contains "Yes" and Qwest has the responsibility to resolve the jeopardy condition, we will advise you of the new DD when the jeopardy condition has been resolved.").

[847] Oregon Transcript page 72, lines 14-24.

would defeat a key purpose of the FOC[848] and impose major inefficiencies upon Eschelon, to its competitive disadvantage.

The above-quoted documented terms reflect that it would not be reasonable to require CLECs for every single day of the held order period to schedule personnel to handle additional circuit deliveries – and bother the customer to request access to the customer's premises – on the chance that Qwest may deliver the circuit when Qwest has a known problem in its network with its facilities. But that is the effect of what Qwest is proposing in this case.[849] For itself, Qwest ensures it receives advance notice and has preparation time "to ensure that Qwest ***technicians can be made available*** to provision a designed circuit to the CLEC. Qwest must have ***flexibility to manage the technicians work assignments*** in order to ensure that . . . ***customers are not negatively impacted*** ."[850] Qwest's PCAT confirms that, for these jeopardies in the "DD jeopardy" category, CLECs are likewise supposed to receive advance notice in the form of an FOC advising them of the new due date before preparing to accept the circuit.

v. The requirement that Qwest provide an FOC is not a mere formality; Eschelon properly relies on such notices to conduct its business.

Fifth, regarding Qwest's claim that the FOC status notices are a formality that Qwest can disregard in favor of potential informal communications, providing an FOC

[848] See Memorandum Opinion and Order, In the Matter of Application by Qwest Communications International, Inc. for Authorization To Provide In-Region, InterLATA Services in the States of Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington and Wyoming, WC Docket No. 02-314, Decision No. 02-332 (Dec. 23, 2002), ¶85 (quoted at Eschelon/43, Johnson/88, fn 157).

[849] Oregon Tr., Vol. 1, 0045, line 10 – 0047, line 10.

[850] Qwest/18, Albersheim/57, lines 5-10 (emphasis added); discussed in Eschelon/43, Johnson/67-69.

after a Qwest facility jeopardy has cleared is not a mere formality;[851] it is a contractual requirement (see closed language in Section 9.2.4.4.1). The contractual requirement is also part of the SGAT that the Commission and companies spent a significant amount of time reviewing in 271 workshops, as well as in Qwest's own proposed template interconnection agreement.[852] Regarding FOCs and jeopardy notices, the FCC said:

> [W]e address the OSS ordering issues that the Commission previously has found ***relevant and probative for analyzing a BOC's ability to provide access to its ordering functions in a nondiscriminatory manner***: a BOC's ability to return ***timely status notices*** such as ***firm order confirmation***, reject, ***jeopardy***, and service order completion notices, to process manually handled orders accurately, and to scale its system.[853]

Ms. Albersheim has not cited any authority to support her claim that a timely FOC has gone from "relevant and probative" in determining nondiscrimination[854] to a mere "formality."[855] Eschelon does not have a meaningful opportunity to compete if it must make inefficient use of resources (as described above) because Qwest is now

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[851] Eschelon/7, Starkey/15 [AZ Transcript, at Vol. 1, p. 70, lines 4-9 (Ms. Albersheim) ("Q. Does that assume this Qwest has sent the FOC with a new due date or that it hasn't? A. Qwest is supposed to. Q. And let's assume that it doesn't. A. The formality is that Qwest is supposed to, but the technicians are in touch with each other."). Note that Ms. Albersheim does not indicate when the technicians are allegedly "in touch with each other" (*e.g.*, how far in advance) and makes no effort to distinguish communications with technicians at the time of attempted delivery (which may be too late) versus the need for *advance* communications. And, despite Qwest's insistence that the phrase the "day before" needs to appear in the PCAT to be part of the process, Ms. Albersheim acknowledged that there is no PCAT language (even assuming technicians were the correct personnel to provide or receive this information) committing that Qwest technicians will communicate with CLECs in every case, or in particular, that they will do so in advance of attempting delivery to allow the CLEC time to obtain any needed customer access, schedule personnel, and otherwise prepare to deliver the circuit. See Oregon Tr., Vol. 1, 0076, line 18-0077, line 2.

[852] Eschelon/115, Johnson/footnote 4.

[853] Memorandum Opinion and Order, In the Matter of Application by Qwest Communications International, Inc. for Authorization To Provide In-Region, InterLATA Services in the States of Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington and Wyoming, WC Docket No. 02-314, Decision No. 02-332 (Dec. 23, 2002), ¶85 (emphasis added).

[854] *See id.*

[855] AZ Transcript at Vol. 1, p. 8, lines 8-9 (March 19, 2007).

willing to substitute informal technician or other communications instead of the mechanisms that were reviewed as part of the 271 process.

Consistent with these mechanisms, as Ms. Johnson testified,[856] at both Qwest and Eschelon, a service delivery type organization sends/receives the jeopardy and FOC notices,[857] and that organization is different in both companies from the network type of organization in which the technicians work. Consistent with this business structure, Qwest has admitted that the FOC (*i.e*. not informal communications or other order activity) is the agreed upon process by which Qwest informs Eschelon of the due date for delivery of a circuit.[858] The informal "communication" to which Qwest refers and suggests that Eschelon should rely upon in lieu of contract rights is potential communication that is not part of Qwest's documented jeopardy process,[859] yet Qwest would have it replace the agreed upon FOC. Qwest admits this process is not documented as an external process in Qwest's PCAT.[860] Furthermore, these potential communications do not serve the function of providing ***advance*** notice (*i.e*., notice in time to prepare for delivery, as opposed to communications at the time of delivery, when

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[856] Eschelon/43, Johnson/88-89.

[857] *See* Eschelon/43, Johnson/88-89, footnote 160 **("***Qwest's Provisioning and Installation Overview;"* If a LSR goes into a jeopardy condition and it is detected: . . . On the DD/ Once the Qwest CSIE is advised of the condition (if the RFS Date is known)/ Qwest sends a jeopardy notice. A FOC is subsequently sent advising you of the new DD that Qwest can meet.").

[858] Eschelon/6, Starkey/7 [MN Transcript, Vol. 1, p. 38, lines 17-19 (Ms. Albersheim)].

[859] See Qwest CMP meeting minutes for CR PC011403-1 or PC072303-1. See Eschlon/111 and Eschelon/112 (minutes from meetings). A search for the words "tech", "technician", communication(s)" and "informal" in CMP monthly meetings and ad hoc calls related to the above CRs shows Qwest did not discuss such informal communications, suggest that CLECs should depend on some type of informal communication in place of an FOC, or commit that Qwest had an internal process to always informally communicate advance notice of delivery or even represent that this informal communication always takes place. Particularly given Qwest's suggestion that CMP activity necessarily results in PCAT language, it is telling that Qwest has pointed to no PCAT language documenting its alleged practice of providing advance notice through informal communications.

[860] See Oregon Tr., p. 76, line 19 – p. 77, line 2.

the opportunity to prepare in advance has passed). Qwest's own technician notes show that the purpose of the communications (when they occurred) was to "test" or to "turn up" the circuit/service ***at the time of attempted delivery***,[861] rather than to provide ***advance*** notice of when Qwest would be turning up the service to allow Eschelon to prepare. These communications, occuring at the time of attempted delivery, come too late to allow advance preparation.

Ms. Stewart of Qwest testified it is a "reasonable expectation" that a party's obligations "should be clearly defined and should not be subject to future interpretations" that a party "develops based on its needs and desires at a given time."[862] Ms. Albersheim's testimony suggesting that the requirement to provide timely FOCs should be disregarded as a formality – adversely impacting the processes and organizations that both companies have built around the FOC and jeopardy status notice mechanisms – based on Qwest's desire to benefit from not sending an FOC is not persuasive and should be rejected. Eschelon should not have to rely upon potential informal communications that are outside the appropriate agreed upon process to plan its business and ensure timely delivery of circuits necessary to meet its customers' expectations.

Qwest notes that, of the examples of instances where Qwest failed to provide an FOC,[863] Eschelon was able to accept delivery on the original due date 76% of the time, which Qwest takes as evidence that "Eschelon is not dependent on the FOC to install

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[861] *See*, *e.g.*, Eschelon/115 (Qwest technician notes in column entitled "Qwest Review From MN RA-30") at Johnson/6 ("Contacted Eschelon to attempt to turn up the circuit"); Johnson/8-9 ("Contacted [ER] at Eschelon at 16:58 he said he would test and call back. [ER] called back at 17:23 can't see signal. Problem originally thought to be on CLEC side. 4/15 found trbl to be in Qwest wiring"); Johnson/16 ("referred order to CLEC to test"); Johnson/21 ("called [ER] at Eschelon, talked to [ER] advised ready to test and accept").

[862] Minnesota Direct Testimony of Karen Stewart, p. 13, lines 13-16, cited at Eschelon/1, Starkey/17, lines 2-5.

[863] See Eschelon/115.

service."[864] Of course, another way to look at this same evidence is that, of the examples Eschelon has provided, when Eschelon did not receive an FOC providing advance notice of delivery following a Qwest facility jeopardy, Eschelon was unable to accept delivery ***one in four times***.[865] Qwest offers no reason why, in those situations when Qwest fails to provide the contractually required FOC and thus Eschelon is not ready to accept delivery, the blame for Qwest's failure should fall on Eschelon.

vi. There was no compromise that eliminated Eschelon's request for a reasonable time to prepare to accept the circuit.

Finally, Qwest suggests that Eschelon accepted Qwest's agreement in CMP to provide additional information regarding a jeopardy within 72 hours as a compromise[866] instead of what Eschelon originally requested and continued to request all along: "a reasonable time from to prepare to accept the circuit (from the time the updated FOC is sent)."[867] Ms. Albersheim, was not involved in the CMP process relating to the change requests that she purports to characterize.[868] Eschelon's witness, Bonnie Johnson, in contrast, was Eschelon's representative in that process;[869] she was the one who initially submitted Eschelon's Change Request; she was the one who agreed that Qwest could expand the Change Request, so long as Eschelon's original Change Request was also retained; she was the one who agreed that this Eschelon concern had been addressed

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[864] Qwest/18, Albersheim/53, lines 8-12.

[865] Oregon Tr., Vol. 1, 0044, lines 4-11.

[866] Regarding Qwest's other version of an alleged compromise, see the "compromise" myth described above. Ms. Johnson discusses Qwest's alternate version of the alleged compromise at Eschelon/141, Johnson/42, line 1 – /44, line 4.

[867] Qwest/18, Albersheim/47, lines 4-15.

[868] Oregon Tr., Vol. 1, 0036, line 23-0037, line 9.

[869] Eschelon/127, Johnson/19, lines 18-19; Eschelon/141, Johnson/39, line 3-/41, line 32.

when Qwest confirmed that its documented process was that, following a Qwest jeopardy, Qwest would provide an FOC before the due date (*i.e.*, *not* when the separate 72-hour issue was addressed).

In addition, three facts, in particular, show that Ms. Albersheim's testimony does not accurately reflect what happened in CMP: (1) Qwest's claim leads to illogical outcomes; (2) the *Qwest Jeopardy Change Request* was expanded to include the 72 hour issue in addition to Eschelon's other expected deliverable; and (3) Qwest's CMP minutes and PCAT redline show a different result than the one suggested by Qwest now.

First, it is illogical to assume that Qwest sending either updated details about the reason for a jeopardy or an FOC within 72 hours after the initial jeopardy ("the 72 hour change") satisfied Eschelon request for "a reasonable time frame to prepare"[870] before the due date. It is clear from the examples that in some cases Qwest may not send Eschelon a Qwest facility jeopardy notice until the day before or even sometimes on Eschelon's requested due date.[871] To believe the 72 hour change would satisfy Eschelon's request, therefore, one would have to believe that Qwest sending the FOC one or two days ***after*** Eschelon's requested due date would meet Eschelon's request for reasonable advance notice ***before*** the due date. If Qwest sends the initial jeopardy on the requested due date, "within 72 hours" would mean that Qwest will not send additional details or an FOC until 2 to 3 days ***after*** the requested due date.[872]

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[870] Eschelon/111, Johnson/2; see also Qwest/20.

[871] See Eschelon/115; Qwest/27.

[872] For example, Row 17 of Exhibit Eschelon 3.76 describes an example when Qwest's own technician notes show Qwest provided no FOC. Eschelon/115 (Row 17 on pages Johnson/18-19). This example also appears in Row 20 of Qwest/27. In the Row 17 example, Eschelon's requested due date was Friday, April 14th. Per Qwest's notes, Qwest did not send its Qwest facility jeopardy, indicating it would not make the due date, until approximately 3:00 pm on the due date (April 14th). Per the Qwest 72-hour change, Qwest is to provide either additional information about the initial

Second, Qwest's CMP documentation clearly shows that, when Qwest expanded the scope of the *Qwest Jeopardy Change Request*, Eschelon's request (including the reasonable time frame expected deliverable) remained a part of the *Qwest Jeopardy Change Request*.[873] The description of the change request was expanded to broadly seek to "improve the ***overall*** jeopardy notification process'" on October 30, 2003.[874] The 72 hour request was not made until January 23, 2004.[875] Once the scope of the change request was expanded to the overall jeopardy process, Eschelon identified this additional issue of inadequate detail provided with Qwest's initial automated facility jeopardy notice. Qwest's CMP minutes reflect the following:

> Bonnie advised they do want more detail on what the jep'd problem is. They need to know if it is a F1 pair, or the street needs to be dug up. She would like more detail on one jep in particular: 'Local Facility not available'. Bonnie asked when does this jep occur. What situation causes this jep to be assigned?[876]

In other words, a jeopardy message indicating that a local facility is not available does not provide any indication for business planning purposes of whether the delay is likely to be very long (because, for example, a street needs to be dug up to provide the facility) or the delay is likely to be shorter (because, for example, a bad pair needs to be replaced). Although Qwest refers to an FOC in its response (as discussed below), the

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jeopardy or an FOC with a revised due date within 72 hours of the initial jeopardy. Qwest/22, Albersheim/8, row 1, 2nd bullet point. As the requested due date was a Friday and Qwest uses business hours, the 72 hour CMP change would mean that the 72 hour time period would not end until Wednesday, April 19th – days ***after*** the requested due date. In other words, a customer expecting delivery on Friday may not receive either an FOC or additional information about the delay until the following Wednesday. This result cannot possibly fulfill a request for advance notice in time to prepare for service delivery on the requested due date (Friday, April 14th, in this example).

[873] Eschelon/43, Johnson/81, line 14-/83, line 30.

[874] Eschelon/111, Johnson/2 (emphasis added) & /3 (fourth row – 10/30/03 entry).

[875] Eschelon/111, Johnson/6.

[876] Eschelon/111, Johnson/7.

issue with this additional aspect of the expanded change request dealt primarily with the content of the initial jeopardy notice. As Qwest claimed it had insufficient information at the time it sent the initial jeopardy about the nature of the Qwest facility problem,[877] Qwest committed to provide additional detail when it became available while the Qwest facility jeopardy condition continued[878] and to do so within 72 hours of the initial jeopardy.[879] This is not the same issue as Eschelon's request for reasonable advance notice to prepare for service delivery. The multi-issue expanded change request regarding the overall jeopardy process addressed both issues.[880]

Third, Qwest's CMP minutes and redlined PCAT show a different result than the one suggested by Qwest's witness now. Qwest CMP minutes state:

> Qwest proposed that an updated Jeopardy Notification with additional detailed remarks would be sent within 72 hrs from when the Initial Jeopardy was sent if a solution to the delayed condition has not been reached. The proposal means that within 72 hrs from the initial Jeopardy Notification, ***the CLEC will receive one of the following: 1. FOC confirming original Due Date 2. FOC confirming revised Due Date based on Network resolution of the Jeopardy condition including details on the delay. 3) An "updated" Jeopardy Notification with more specific details of the Jeopardy condition***. An FOC will follow when the revised Due Date has been determined.[881]

The redlined PCAT also states:

> Within 72 hours of the initial jeopardy notice, ***either an updated jeopardy notification*** with more specific details of the jeopardy condition ***or a FOC advising of the new DD*** will be sent to you. ***If an updated jeopardy***

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[877] *See, e.g.*, Eschelon/111, Johnson/6 ("Qwest does not know additional details until the engineer does investigation and finds out more.").

[878] Eschelon/111, Johnson/4.

[879] Eschelon/111, Johnson/4.

[880] Qwest admits that "Qwest made a number of revisions to the jeopardy process, including . . . ." Qwest/18, Johnson/47, line 10.

[881] Eschelon/111, Johnson/4 (emphasis added).

notice is sent, we will also send a FOC advising you of the DD Qwest can meet when the RFS Date is known.[882]

Note that none of the options identified by Qwest in CMP and its PCAT states (as now claimed by Qwest): The facility may be delivered without either an updated Jeopardy Notification or an FOC in advance of delivery.[883] Again, that result is illogical.

To address the separate problem of inadequate detail at the time an initial jeopardy is sent, either there is no delivery because the Qwest facility condition continues (and an updated jeopardy notice with more specific details about the condition is sent) or the Qwest facility condition is resolved and an FOC is sent with a due date for the upcoming delivery.[884] Neither 72-hour scenario involves delivery without a timely FOC to allow the CLEC to prepare. In CMP, to address the overall jeopardy notification process, Qwest committed both (1) to change the process to provide either an FOC or an updated Jeopardy Notification within 72 hours from the initial jeopardy (to address the problem of inadequate details about the Qwest facility jeopardy for planning purposes) and (2) to work on compliance with its existing process to provide the releasing FOC at least the day before the due date (to address the problem of inadequate notice to allow the CLEC to prepare for delivery).[885]

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[882] Qwest/22, Albersheim/8, row 1, 2nd bullet point.

[883] Similarly, it does *not* state: The facility may be delivered *unexpectedly (or after information received by word of mouth through technicians)* -- without either an updated Jeopardy Notification or an FOC in advance of delivery.

[884] If the jeopardy was cleared so that an FOC would be sent, Qwest did not have to provide the additional detail about the Qwest facility problem, as it was resolved. If, however, the problem was not resolved, the additional detail would provide CLECs information about the nature of the problem to help plan for how long the delay might be.

[885] Eschelon/111, Johnson/ 5 (3/4/04 Qwest CMP minutes).

43. Controlled Production: Issue 12-87

- ***Myth (Release 20)***: Eschelon will not be required to do controlled production testing for IMA Release 20.0.[886]
- ***Debunked***: Eschelon's language[887] requires it to do controlled production testing for IMA Release 20.0, which is a new implementation. [888] [Error types one – ignores proposed language – and two – ignores agreed upon language]

Eschelon needs certainty in the contract language that *controlled production testing* will continue to be necessary for a *new implementation* effort and unnecessary for *re-certification*. *Controlled production testing* consists of controlled submission of CLEC real product orders to the new or updated interface.[889] This test verifies that the data exchange between Qwest and CLEC is done according to the industry standard.[890] A *new implementation* effort involves transactions that CLEC does not yet have in production using a current IMA version.[891] *Re-certification* is defined in agreed-upon language of the proposed contract as "the process by which CLECs demonstrate the ability to generate correct functional transactions for enhancements not previously certified."[892] Qwest ignores the fact that, under Eschelon's proposal along with other closed language in the ICA, testing will be conducted for both new implementations and recertifications.[893] Under both of Eschelon's proposals,[894] Eschelon would indeed

[886] Qwest/40, Albersheim/35.

[887] Proposed ICA Section 12.6.9.4 (Eschelon proposed language) ("new implementations").

[888] Qwest/40, Albersheim/35, line 17. *See also* Oregon Tr., Vol. 1, 0057.

[889] Eschelon/43, Johnson/93-94.

[890] Eschelon/43, Johnson/93-94.

[891] Eschelon/43, Johnson/92; *See* Qwest's *EDI Implementation Guidelines – for Interconnect Mediated Access*, Version 19.2, p. 48.

[892] Section 12.6.4 of the proposed ICA (closed language).

[893] *See* closed language in Proposed ICA Sections 12.6.1 through 12.6.9.10.

[894] Eschelon/43, Johnson/94-95.

participate in controlled production testing with new releases such as IMA Release 20.0 (*i.e.*, "new implementations").[895]

Qwest previously proposed omitting Eschelon's proposed modifications but has since offered a counter proposal (described at Eschelon/43, Johnson/95 and pages 104-105). The counter proposal covers only a subset of the recertifications for which Qwest currently does not require controlled production.[896] Controlled production is not required currently for recertification (regardless of whether the CLEC intends or does not intend to order the products/features). There is no need to adopt this lesser alternative, which does not fully capture Qwest's current process.

As the closed contract language shows, Eschelon supports necessary testing. Nothing about Eschelon's proposal is inconsistent with the use of controlled production when applicable or the importance of testing, or Eschelon would not be proposing it. In Minnesota, the commission adopted the ALJs' recommendation to adopt Eschelon's first proposal and their finding that there "is no evidence that Eschelon has or would opt out of recertification testing for any improper purpose."[897] Eschelon's proposal simply reflects the status today,[898] and Qwest would not say that its testing today is inadequate. Under Eschelon's proposal, the testing, like that done today, will be appropriate for the type of

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[895] Qwest/40, Albersheim/35, line 17. Ms. Albersheim has admitted that Release 20.0 is a "new implementation" (*i.e.*, the term used in Eschelon's proposed language). *See* Qwest/40, Albersheim/35, lines 15-17 ("The underlying architecture of IMA Release 20.0 is changing from EDI to XML. This is such a significant change that Qwest is treating this as a new implementation"), discussed at Eschelon/43, Johnson/106 and footnote 206. *See also* Oregon Tr. Vol. 1, 0057-0058 (Albersheim).

[896] Eschelon/43, Johnson/104, lines 9-14,

[897] Eschelon/29, Denney/62-63 [MN Arbitrators' Report, ¶ 258], as adopted by the Minnesota Commission (Eschelon/30). *See also* Oregon Tr., Vol. 1, 0057 (Albersheim) ("Q. And you would agree with me that Eschelon has the strong interests in having those systems work properly, correct? A. I would hope so, yes.")

[898] Eschelon/43, Johnson/95 – 94. *See also* Eschelon/43, Johnson/97-99, discussing Qwest's inconsistency on this issue.

change being made (with a re-certification logically requiring less testing than an initial certification). Eschelon's business need is to avoid costly and/or time consuming controlled production testing that is unnecessary because, for recertifications, the transaction has previously been in production and is simply being enhanced.

Qwest argues that only it can decide whether controlled production is necessary. Qwest, however, has decided and Eschelon's language does nothing more than incorporate that decision. Ms. Albersheim has claimed Eschelon's language does not reflect current practice.[899] Apparently in support of this claim, Ms. Albersheim testifies Eschelon "cites the EDI Implementation Guidelines for Release 19.2, which *only applied* to Release 19.2 of IMA."[900] Eschelon, however, also quoted a similar provision for Release 20.0 in Eschelon's Testimony.[901] In contrast to her attempt to claim that Eschelon's proposed language does not reflect Qwest's current practice,[902] Qwest has testified in other states as follows:

> Q. ADDRESSING THE SECOND ISSUE, IS ESCHELON'S LANGUAGE ACCURATE WITH REGARD TO RECERTIFICATION?
>
> A. Yes.
>
> Q. IF ESCHELON'S LANGUAGE IS ACCURATE, WHY DOES QWEST OBJECT TO THE ADDITION OF THIS LANGUAGE IN THE CONTRACT?
>
> A. While the language may be accurate today, it may not be accurate tomorrow.[903]

Ms. Albersheim provided almost identical testimony in the Minnesota arbitration.[904] In Minnesota, the commission upheld the ALJs' finding: "Qwest agrees

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[899] Qwest/18, Albersheim/59, lines 19-22.

[900] Qwest/18, Albersheim/60, lines 3-4 (emphasis in original).

[901] Eschelon/43, Johnson/96-97.

[902] Qwest/18, Albersheim/59, lines 19-22.

[903] Arizona Direct Testimony of Renee Albersheim, p. 99, line 24 – p. 100, line 4, cited at Eschelon/43, Johnson/97-98.

that Eschelon's language accurately depicts its current practice, which does not require CLECs to recertify if they have successfully completed testing of a previous release; in addition, Qwest admits that Qwest can control whether a CLEC can access its OSS."[905] As Minnesota Commission found, "Qwest agrees" that Eschelon's proposal that would limit controlled production to new implementation (or, conversely would not require controlled production for re-certification) reflects the current status quo.[906] Thus, although Qwest's systems are subject to frequent change, as Qwest notes,[907] even those frequent changes have not, in Qwest's view, required production testing for re-certification.

Qwest describes Release 20.0, which will change the communications protocol from EDI to XML,[908] as the "prime example"[909] of why Eschelon's proposed language should not be accepted because, under that proposal "Eschelon could argue that it would not be required to do controlled production testing for IMA Release 20.0…"[910] This claim also overlooks the actual language of Eschelon's proposal. Under either of

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[904] Eschelon/43, Johnson,97-98, citing Qwest-Eschelon ICA MN Arbitration, Albersheim MN Direct, p. 99, line 24 – p. 100, line 4. In Oregon, however, Ms. Albersheim changes her testimony and testifies: "While the language may be accurate for one release of IMA, it may not be accurate for the next." (Qwest/1, Albersheim/86, lines 5-6).

[905] Eschelon/29, Denney/62 [MN Arbitrators' Report, ¶255].

[906] Eschelon/43, Johnson/104, line 18-Johnson/105, line5.

[907] Qwest/18, Albersheim/61, line 19.

[908] Qwest does not submit changes to its Implementation Guidelines to CMP. Eschelon/43, Johnson/100-101. Qwest asserts there is no requirement to do so. Qwest/40, Albersheim/37, lines 2-8. Qwest's CMP Document, however, specifically describes the scope of CMP as including OSS implementations: "Qwest will track changes to OSS Interfaces, products and processes. This CMP includes the identification of changes and encompasses, as applicable, Design, Development, Notification, Testing, ***Implementation***, Disposition of changes, etc. (See Change Request Status Codes, Section 5.8). Qwest will process any such changes in accordance with this CMP." Eschelon/53, Johnson/14 (emphasis added). This language should have ensured that the Implementation Guidelines would be within the scope of CMP. Qwest chooses when to comply with the CMP Document or not.

[909] Qwest/18, Albersheim/63, lines 18-19.

[910] Qwest/40, Albersheim/35, lines 22-23.

Eschelon's proposals, controlled production will continue to be required for "new implementations."[911] Because Release 20.0 is a new implementation,[912] Eschelon's proposed contract language would not relieve it of the obligation to participate in controlled production testing of that Release. Ms. Albersheim confirmed during cross examination that the change to IMA release 20.0 was a "new implementation" and that Eschelon's language agrees to perform controlled production for new implementations.[913] Particularly as the prime example identified by Qwest as a reason to reject Eschelon's language is incorrect on the face of the language, Qwest's position should be rejected and Eschelon's language adopted.

44. Rates for Services: Issues 22-88, 22-88(a), and 22-89

- ***Myth (No confusion):*** Qwest's proposed language will not result in confusion and probable dispute.[914]
- ***Debunked****:* Qwest's proposed language in Section 22.1.1 and Exhibit A, Section 7.11 would limit rates in Exhibit A to Qwest rates and tariffed charges to Qwest's.[915] Qwest's refusal to include language that would provide for certain "mirror image" CLEC rates and tariffs in the ICA fails to acknowledge that such inconsistent contract provisions, read together, will lead to confusion at best, and litigation at worst.[916] [Error types two – ignores agreed upon language—and three – ignores contract principles]

- ***Myth (language unnecessary):*** Eschelon's proposal for Issue 22-89 places "unnecessary language in the interconnection agreement."[917]

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[911] Proposed ICA Section 12.6.9.4 (Eschelon proposed language).

[912] Qwest/40, Albersheim/35, line 17.

[913] Oregon Tr., Vol. 1, 0057.

[914] Qwest/33, Easton/34.

[915] Eschelon/9, Denney/241-242 and Eschelon/9, Denney/243.

[916] Eschelon/9, Denney/240-241; Eschelon/9, Denney/250; and Eschelon/125, Denney/137.

[917] Eschelon/9, Denney/252, citing Qwest's position statement in the Disputed Issues Matrix (10/10/06, p. 241, position statement for 22-89). *See also* Eschelon/29, Denney/64 [MN Arbitrators' Report, ¶ 267] ("Qwest, however, has pointed to no downside of using Eschelon's language, except to say that it is not necessary. Eschelon is correct that its language would make the contract internally more consistent.")

- ***Debunked:*** Issue 22-89 concerns a subsection in Section 22.4 – the section titled "Interim Rates." Closed language in Section 22.4 states that the interim rates are reviewed and changed by the Commission (Section 22.4.1.2). Therefore, in order to make sure that an interim rate does not remain effective indefinitely, a clarification that Eschelon or Qwest may request a cost proceeding in which the Commission would review and change these rates (Eschelon's proposal for Section 22.4.1.3, which is Issue 22-89), is appropriate.[918] The opportunity to obtain permanent Commission-approved rates is necessary to ensure that rates are cost-based, just, reasonable and non-discriminatory.[919] Furthermore, Qwest agreed to Eschelon's proposal on Issue 22-89 (Section 22.4.1.3) in Minnesota, and has provided no state-specific reason why this provision is "unnecessary" in Oregon, but *is* "necessary" in Minnesota.[920] [Error types one – ignores proposed language – and two – ignores agreed upon language]

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.[921] The dispute in 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.[922] Because this agreed upon language refers to Exhibit A as setting forth the rates that Eschelon charges Qwest for the services it provides, Eschelon proposes striking from Section 22.1.1 language that limits Exhibit A to rates provided by Qwest to CLEC and also proposes striking from Exhibit A, Section 7.11, a reference that limits tariffed charges to Qwest's Oregon Access Services Tariff. Contrary to the closed contract

[918] Eschelon/9, Denney/252, lines 2-6; Eschelon/9, Denney/253-256; and Eschelon/9, Denney/262, lines 5-7.

[919] Eschelon/9, Denney/252, lines 4-6.

[920] Eschelon/9, Denney/252-253.

[921] Eschelon/9, Denney/244-247.

[922] Eschelon/9, Denney/244-247.

provisions discussed by Mr. Denney in his direct and rebuttal testimony,[923] Qwest insists that Exhibit A should reflect only the rates that Qwest charges to Eschelon, claiming that the ICA language already sufficiently spells out the applicable rates for services that Eschelon provides to Qwest.[924] As noted by Mr. Denney, however, the ICA language refers to Exhibit A as setting forth the rates that the CLEC will charge.[925] To limit Exhibit A to Qwest's charges, as Qwest proposes, is inaccurate and potentially confusing.[926] The Minnesota ALJs, as affirmed by the Minnesota Commission, agreed with Eschelon on Issues 22-88 and 22-88(a)[927] and found that "Qwest, however, has pointed to no downside of using Eschelon's language, except to say that it is not necessary. Eschelon is correct that its language would make the contract internally more consistent. The Administrative Law Judges recommend adoption of Eschelon's proposed language."[928] Eschelon also proposes, under Issue 22-89, to spell out in the contract that each company has a right to request a cost proceeding at the Commission to establish a permanent rate in replacement of an interim rate.[929] As discussed above, Qwest has agreed to Eschelon's language for Issue 22-89 in Minnesota, and has provided no reason why this language is appropriate in Minnesota, but not in Oregon.[930]

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[923] *See e.g.*, Eschelon/9, Denney/244-247 and Eschelon/125, Denney/136-137.

[924] Qwest/13, Easton/41.

[925] Eschelon/125, Denney/137-138.

[926] "Eschelon is correct that its language would make the contract internally more consistent. The Administrative Law Judges recommend adoption of Eschelon's proposed language." *See* Eschelon/29, Denney/64 [MN Arbitrators' Report, ¶ 267], as adopted by the Minnesota Commission's Arbitration Order (Eschelon/30).

[927] Issue 22-89 was not disputed in Minnesota. Qwest agreed to Eschelon's language in Minnesota, but has not agreed to this language in Oregon.

[928] Eschelon/29, Denney/64 [MN Arbitrator's Report, ¶ 267].

[929] Eschelon/9, Denney/242-243 and Eschelon/9, Denney/251-252.

[930] Eschelon/9, Denney/252-254.

45. Unapproved Rates: Issues 22-90 and (a) – (ae)

- ***Myth (Unnecessary):*** Eschelon's proposed language is unnecessary, because Qwest has agreed to litigate disputed rates in this proceeding.[931]
- ***Debunked:*** Qwest's agreement to litigate unapproved rates in this proceeding does not address this issue going forward.[932] Indeed, although Qwest has agreed to litigate rates in Oregon, in other arbitrations with Eschelon, Qwest has taken the position that rates were not a proper subject for arbitration, but rather, could only be addressed in a generic cost case, going so far as to seek dismissal of rate issues from the arbitration proceedings.[933] Eschelon's language is designed to help prevent Qwest from commencing to bill for a UNE process that it previously offered without charging a separate fee, as Qwest has done with respect to loop design changes.[934] [Error type four – ignores contrary facts in evidence]

- ***Myth (Service for free)*:** Eschelon's language would require Qwest to provision products at no charge.[935]
- ***Debunked:*** Eschelon's proposed language provides a mechanism for the setting of interim rates. The burden is on Qwest to support the rates that it proposes to charge. Notwithstanding Qwest's failure to provide cost support in this case for rates that it has proposed, Eschelon has proposed interim rates for those elements, not that those elements be provided "for free."[936] [Error type one – ignores proposed language]

- ***Myth (permanent rates):*** Eschelon's proposed rates represent the "lowest possible rates."[937]
- ***Debunked:*** As Mr. Denney said at the hearing, if he had selected the lowest possible rates, he would have selected the Minnesota rates, as they are lower.[938] Instead, for example, he adjusted proposed rates to reflect previous Commission findings.[939] Mr. Denney's testimony details the different methodologies that he used to develop Eschelon's proposed interim rates and the rationale supporting those choices.[940] As that testimony reflects, Mr. Denney's choice of methodology

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[931] Qwest/13, Easton/43, lines 3-8; Qwest/33, Easton/36, lines 6-9.

[932] Eschelon/133, Denney/132, lines 8-11.

[933] Eschelon/125, Denney/145, lines 3-12; Eschelon/133, Denney/133, line18-/134, line1, fn. 392.

[934] Eschelon/125, Denney/146, lines 3-15.

[935] Qwest/39, Million/30, line 21 - /31, line 1.

[936] Eschelon/125, Denney/144-145; Eschelon/133, Denny/135, line 3-/139, line 2.

[937] Qwest/44, Million/33, lines 6-9.

[938] Oregon Tr., Vol. 1, p. 223, line 25 – p. 224, line 4.

[939] Oregon Tr., Vol. 1, p. 224, lines 5-10.

[940] Eschelon/9, Denney/271-284, Eschelon/125, Denney/155-57; Eschelon/133, Denney/140-43.

was driven primarily by the nature of the information available, not the result. [Error type four – ignores contrary facts in evidence]

a. Process for Obtaining Approval of Unapproved Rates (Issue 22-90 and 22-90(a))

In a case in which Qwest offers a section 251 product for which there is no Commission-approved rate, a rate for this product (first, an interim rate and then, a permanent rate) needs to be established. In Issue 22-90, Eschelon proposes the process for establishing rates for which Commission-approved rates do not exist. Issues 22-90 and 22-90(a) concern the contract language regarding unapproved rates. More specifically, for Issue 22-90 (Section 22.6.1) 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 for Issue 22-90 that Qwest provide a copy of its cost support filed with the Commission to Eschelon upon request.[941] 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 Qwest-proposed rate to order the product.

Eschelon's proposed language on Issue 22-90 follows a commission's decision in a Minnesota 271 case. In the Minnesota 271 case the Minnesota Commission specified that Qwest cannot charge a rate for a section 251 product for which there is no Minnesota

[941] Eschelon/9, Denney/259, lines 19-23 and Eschelon/9, Denney/263.

Commission-approved, cost-based rate without petitioning for the Minnesota Commission's approval of the rate. Specifically, the Minnesota Commission's order establishing this prerequisite required Qwest to file its proposed rate and cost support with the Minnesota Commission within a prescribed timeframe triggered by the effective date of the ICA or the offering of the rate.[942] Eschelon's proposal in Issue 22-90 for Qwest to make available to Eschelon its supporting cost study filed with the Commission upon request is necessary to avoid Eschelon being put in a Catch 22 – having to intervene in a cost case (and expend the money and resources to intervene) in order to see the cost filing, but needing the cost filing to determine whether to intervene.[943]

For Issue 22-90(a) (Section 22.6.1.1), Eschelon's proposal addresses a situation not covered by Section 22.6.1 (Issue 22-90): If (1) Eschelon and Qwest have not agreed upon a negotiated rate, (2) the Commission has not established a rate and (3) Qwest does not submit a proposed rate and cost support to the Commission within the specified time frame, the unapproved rates do not apply, and Qwest must provision the product in question free of charge. Eschelon's proposal for Issue 22-90(a) clarifies the consequence if Qwest does not timely comply with the procedure for offering a currently Unapproved Rate. Eschelon's proposal for Section 22.6.1.1 thus ensures that Qwest cannot extend a

[942] Eschelon/9, Denney/256-257, citing October 2, 2002 Order in MN PUC Docket CI-01-1375 ("MN 271 Cost" Docket). Specifically, "Summary of the Commission's findings and conclusions" contains the following provisions on pp. A-6 and A-7: **"Price Under Development:** Qwest shall obtain Commission approval before charging for a UNE or process that it has previously offered without charge. Qwest may negotiate an interim price for a UNE and service not previously offered in Minnesota provided that Qwest file a permanent price, and related cost support, with the Commission within 60 days of offering the UNE or service. ALJ Report p. 64. ….**New UNE Price:** When offering a new UNE, Qwest shall file a cost-based price, together with an adequate description of the UNE's application, for Commission review within 60 days of offering. Qwest may charge a negotiated rate immediately if part of an approved interconnection agreement (ICA), provided the ICA is filed for Commission review within 60 days."

[943] Eschelon/9, Denney/263.

period by which it imposes unapproved rates by not filing cost support with the Commission and requesting approval of the rates.[944]

Eschelon proposes that Section 22.4.1.1, which deals with Interim rates, include a cross-reference to Section 22.6 – the section that addresses the mechanism for setting interim rates.[945] Eschelon's proposal is reasonable because it provides a logical connection between the two sections that deal with interim rates: Section 22.4.1.1, which deals with Unapproved Rates found in Exhibit A as Interim Rates; and 22.6, which deals with the conversion of Unapproved Rates to Commission-approved final rates.[946]

b. Interim rate proposals

Issues 22-90(b) through 22-90(ae) are specific interim rate proposals for products for which the Commission has not approved rates.[947] During negotiations, Qwest provided cost support for some, but not all, of the rates that it was proposing. Review of that cost support revealed a number of significant flaws, however, including: 1) Qwest ignored prior Commission orders regarding cost study inputs and, instead, was attempting to impose on Eschelon Qwest's "wish list" of rates; 2) in many cases Qwest's proposed rates were higher than the rates in the parties' current ICA; 3) Qwest's proposed interim rates for Oregon were usually well in excess of TELRIC rates ordered by state commissions in the other large Qwest states; 4) Qwest's proposed interim rates were sometimes higher than the rates it is offering to other carriers under its current negotiations template; and 5) Qwest's proposed rates were sometimes higher than the

[944] Eschelon/9, Denney/261.

[945] See ICA Section 22.4.1.1 (Eschelon proposed language).

[946] Eschelon/9, Denney/256.

[947] Eschelon/9, Denney/268-270. For proposed corrections to Eschelon's proposed interim rates, *see*, Eschelon/125, Denney/148-149 and Eschelon/133, Denney/139.

rates contained in agreements Qwest had with other carriers, including the ICA that Qwest negotiated with its affiliated CLEC.[948]

To address the flaws in Qwest's cost support (or lack of support), Eschelon made a number of modifications in order to develop rates that are 1) more in keeping with the applicable "cost-based, just, reasonable and nondiscriminatory" standard than the rates reflected in Qwest's cost studies;[949] 2) consistent with the Commission's prior decisions;[950] and 3) supported by evidence in the record. The rates being proposed by Eschelon[951] on an interim basis are the result of a variety of different methodologies:

- Averaging Commission-approved rates from other Qwest states in which Eschelon provides service[952] -- Eschelon proposed average of rates ordered by state commissions in five largest Qwest states. Eschelon did not choose the states with the lowest rates or the states with the highest rates, but the other large Qwest states that are comparable to Oregon and in which Eschelon is doing business, arbitrating an interconnection agreement with Qwest, and was a party to the UNE cost proceedings setting those rates.[953] Qwest has recognized the reasonableness of this "five state average" methodology by agreeing to used this methodology in Minnesota for certain labor rates.[954]

- Proposing rates from Eschelon-Qwest existing ICA[955] -- The current Eschelon-Qwest ICA has a number of collocation rates that Qwest is proposing to replace with new rates. In many instances, the rates proposed by Qwest are significantly higher than the parties have been operating under. Qwest has offered no reason why the contractual rates should be increased without first having a cost case to determine the reasonableness of those rates. e existing rate. Accordingly,

[948] Eschelon/9, Denney271, lines 2-16.

[949] 47 C.F.R. § 51.303.

[950] Eschelon/9, Denney/273, line 10-274, line 9.

[951] Eschelon's proposed interim rates are set forth on the table that is found at Eschelon/9, Denney/269-70.

[952] This methodology was used to develop rates proposed for Issues (22-90(b), 22-90(d), 22-90(f), 22-90(g), 22-90(h), 22-90(m), 22-90(n), 22-90(o), 22-90(r), 22-90(s), 22-90(v), 22-90(x), 22-90(y), 22-90(aa), 22-90(ab), 22-90(ac), 22-90(ad), and 22-90(ae).

[953] Eschelon/133, Denney/142-143.

[954] Eschelon/9, Denney/275, lines 10-15.

[955] This methodology was used to develop rates proposed for Issues (22-90(c), 22-90(e), 22-90(k), and 22-90(l).

Eschelon proposes that, unless the parties otherwise agree, the historical rate should remain in place as an interim rate.[956]

- Proposing rates from Qwest's SGAT, Qwest's Negotiation Template, Qwest's cost support for rates across states, or Qwest's proposed rates in other states[957] -- In some cases, the rate proposed by Qwest is higher than the rate under which it offers the same element to another CLEC, including its affiliated CLEC.[958]

- Adjusting Qwest's proposed rates to reflect past Commission decisions on cost study inputs/assumptions[959] -- Where there was sufficient information available, Eschelon was able to modify Qwest's costs studies to incorporate inputs previously ordered by the Commission regarding labor times, flow through, separation of mechanical and manual ordering, and overhead factors.[960] Qwest, in response to these adjustments, takes the position that "Qwest is not obligated to rigidly follow the inputs ordered in that docket."[961] 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. Further, to the extent Qwest may contend that the adjustments that Mr. Denney has made do not accurately reflect the Commission's prior orders, one option available to the Commission is to order Qwest to make a compliance filing of its cost studies incorporating the Commission's previously ordered inputs.

- Proposing one-half of Qwest's original proposed rate due to a complete lack of cost support and comparable rates[962] -- Eschelon proposed one-half of the Qwest proposed rate in these instances because Qwest failed to provide cost support for these elements and there were no other available means to calculate an appropriate interim rate. Eschelon could have proposed a zero rate, as Qwest had provided no support whatsoever, but Eschelon has proposed an interim rates as a reasonable compromise.[963]

In previous arbitrations with Eschelon, Qwest has insisted that rate issues are not appropriate for determination in arbitrations and has essentially declined to put on any

[956] Eschelon/9, Denney/277, line 1-278, line 3.

[957] This methodology was used to develop rates proposed for Issues 22-90(e), 22-90(i), 22-90(p), 22-90(r), 22-90(t), 22-90(u), 22-90(w), and 22-90(ae).

[958] Eschelon/9, Denney/278, line 4- 279, line 12.

[959] This methodology was used to develop rates proposed for Issues 22-90(aa) and 22-90(ad).

[960] Eschelon/8, Denney/273, line 10-274, line 9.

[961] Qwest/39, Million/32, lines 5-6.

[962] This methodology was used to develop rates proposed for Issues 22-90(r) and 22-90(u).

[963] Eschelon/9, Denney/280, line 3-281, line 3; Eschelon/133, Denney/143, lines 6-12.

affirmative case on the issue of rates. In Oregon, however, Qwest has changed its position from prior arbitration cases and apparently now concedes that interim rates can be addressed in an arbitration. However, rather than the rates that it was proposing during the parties' negotiations, Qwest now advocates for using New Mexico's rates as interim rates in Oregon.[964] Qwest's proposal that the Oregon Commission adopt the New Mexico rates should be rejected.[965]

Eschelon does not do business in New Mexico, did not participate in the cost case that produced the rates, and has no relationship to those rates.[966] Although Qwest proposes that this Commission adopt the New Mexico rates, the data underlying those rates has is not part of the record in this case and has not been made available to either Eschelon or the Commission for their scrutiny. Accordingly, Eschelon has no knowledge of the record in New Mexico, does not have access to the cost studies that were used to develop the rates, and has no knowledge regarding how any compliance studies were generated.[967] Further, New Mexico is a small, relatively rural state that is likely to differ in terms of cost structure from Oregon.[968] Although Qwest describes its proposed interim rates from New Mexico as a "compromise,"[969] those rates are, on average, 36% higher than Eschelon's proposed compromise interim rates.[970]

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[964] Qwest/16, Million/23, lines 13-16.

[965] Eschelon/125, Denney/152-153.

[966] Eschelon/125, Denney/153, lines 8-10. Eschelon doesn't do business in New Mexico, Eschelon was not a party to the proceeding that established the New Mexico rates, and Eschelon has no knowledge of the record in the New Mexico cost case. *See id.*

[967] Eschelon/125, Denney/153, lines 10-12.

[968] Eschelon/125, Denney/153-154.

[969] Qwest/16, Million/25, line 27-26, line 2.

[970] Eschelon/125, Denney/156. These are referred to as "compromise" interim rates because Eschelon's initial position was a compromise and Eschelon did not modify Qwest's cost studies to represent rates that Eschelon would advocate in a full cost case. Eschelon/125, Denney/158.

Eschelon has proposed its rates as interim rates, which would be subject to review in a later cost case, where permanent rata would be established. Under Eschelon's proposed ICA language regarding rate changes, it would be for the Commission to decide, at the time permanent rates are established, whether to make those permanent rates retroactive and with the interim subject to true-up.[971]

After the hearing, Qwest populated the updated Joint Disputed Issues Matrix recently filing with the Commission with its proposals for these issues. Qwest used only the New Mexico rates (replacing its previous negotiations proposals), and included no note or other limitation indicating that its proposal was a package offer. Qwest's new interim rate proposal is generally significantly greater than the rates proposed by Eschelon, but for about 20 percent of the rates in dispute Qwest's proposal is equal to or less than the Eschelon proposal.[972] Particularly now that Qwest's only proposal for each rate is the New Mexico rate, it is unclear why Qwest did not close these rate issues.[973] For example, Qwest's new proposed interim rate for rate elements 8.1.8.1.4.1 - .4 dealing with fiber terminations is identical to Eschelon's proposed rate, as is Qwest's new interim rate proposal for 8.1.16, Joint Inventory Visit Fee. Qwest's new interim rate proposal for the quote preparation fees (8.2.1.1, 8.3.1.1, 8.4.1.1, 8.15.4.1 and 8.15.4.2) are 60% less than the rates proposed by Eschelon.[974] These issues should close.[975]

Certain of the New Mexico rates are lower than Eschelon's proposed rates and, although Eschelon would be willing to those rates, Qwest takes the position that it entire list of rates represents an "all or nothing" proposition. See Eschelon/125, Denney/157, lines 5-13: Oregon Tr., Vol. 1, 0220, line 24-0221, line 3.

[971] Oregon Tr., Vol. 1, 0213, line 7-0214, line 1; see Eschelon proposed ICA Section 22.4.1.2 ("Each Party reserves its right with respect to whether Interim Rates are subject to true-up."

[972] See Qwest/17.

[973] Eschelon/25, Denney/157, lines 5-13.

[974] See Qwest/17.

Ms. Million referred to Qwest's new interim rate proposal as being offered "in the interest of compromise and in the hope that this Commission can determine interim rates in this arbitration without the need to conduct a complex TELRIC cost proceeding."[976] Qwest's new interim rate proposals are on average 19 percent less[977] than what it previously proposed and in that sense Qwest is showing some movement, which Qwest previously has not done. However, it is important to note that Eschelon's initial proposal was also a compromise. Eschelon did not modify Qwest's cost studies to represent rates that Eschelon would advocate in a full cost case. Thus to compare Qwest's initial proposal of its advocacy rates with Eschelon's compromise proposal would leave the wrong impression, and Eschelon would be disadvantaged if the Commission simply picked a point in the middle of the two proposals.

V. CONCLUSION

Based upon the evidence in this proceeding and the discussion above, Eschelon requests that the Commission order the inclusion in the ICA of the contract language proposed by Eschelon on each of the issues remaining in dispute.

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[975] Another 17% of Qwest's interim rate proposals are within five percent of the rates proposed by Eschelon.

[976] Qwest/16, Million/25, line 27 through Million/26, line 2.

[977] This is based on a simple average of percentage changes and does not take into account the level of each rate.

Dated: October 24, 2007

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ATTACHMENT 1 TO ESCHELON POST-HEARING BRIEF EVIDENCE IN THE RECORD SUPPORTING ESCHELON'S JEOPARDY PROPOSALS – ISSUES 12-71, 12-72 & 12-73				
Row #	**ESCHELON LANGUAGE[1] (Column 1)**	**EVIDENCE SUPPORTING ESCHELON LANGUAGE – INCLUDING QWEST DOCUMENTS & ADMISSIONS (Column 2)**	**"QWEST'S EVIDENCE"[2] (Column 3)**	**ESCHELON COMMENTS TO QWEST'S RESPONSE (Column 4)**
1	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). *Issue 12-71* Proposal #1 (and first sentence of Proposal #2)	Qwest testified that: "We don't disagree with the notion that a CNR jeopardy should be assigned appropriately."[3] "Q. Eschelon's proposal there is 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). Is that right? A. Yes. Q. That's Qwest's process; correct? A. I believe that is. Q. And can you imagine any circumstances under which a CLEC might want something different than that? A. No."[4] Qwest testified this Eschelon language is consistent with Qwest's current process; [5] therefore, this Eschelon	1] Qwest agrees with the broad statement of principal made in the cited testimony. It, however, begs the question of when you define a jeopardy as Qwest caused and when you define it as CNR. Qwest believes its current processes make that distinction appropriately and [2] that the evidence in this case demonstrates that Qwest's processes more accurately allocate jeopardies than Eschelon's proposed changes.[6]	[1] Qwest ignores the proposed language (*see* Col. 1). If Qwest's points [1] and [2] are correct, and Qwest already appropriately distinguishes "between Qwest- caused and CLEC/customer- caused delays"[7] (with the latter being coded "CNR"), then Qwest admits that Eschelon's language is accurate. Stating this undisputed principle in the ICA will help ensure appropriate treatment of jeopardies and avoid disputes. If Qwest opposes 12.2.7.2.4.4 because it wants the ability to classify Qwest-caused jeopardies as Eschelon-caused, there is no public policy reason to give Qwest that ability. Qwest states it "begs the question of when you define a jeopardy as Qwest caused," but Eschelon's Issue 12-72 language (Cols. 3, 5, & 8), proposes to answer that question.[8] The Commission's decision on 12-72 will resolve that question. However it is resolved, there is no reason to reject the undisputed principle

[1] In response to all of these provisions, Qwest's proposed language, in its entirety, provides: "12.2.7.2.4.4 Specific procedures are contained in Qwest's documentation, available on Qwest's wholesale web site." *See* Eschelon/43, Johnson/61, lines 2-3. In Minnesota, the commission adopted the following ALJs' finding regarding Qwest PCAT changes in CMP: "Eschelon has provided convincing evidence that the CMP process does not always provide CLECs with adequate protection from Qwest making important unilateral changes in the terms and conditions of interconnection." Eschelon/29, Denney/7 (Minnesota Arbitrators' Report, ¶ 22). *See also* Washington Docket No. UT-063061 (Eschelon-Qwest Washington Arbitration), Hearing Ex. No. 158, ¶22. This conclusion of the Minnesota Arbitrator's Report was adopted by the Minnesota Commission in the Minnesota PUC's *Order Resolving Arbitration Issues, Requiring Filed Interconnection Agreement, Opening Investigations and Referring Issue to Contested Case Proceeding* (3/30/07), Eschelon/30, Denney/6-7. *See also* Washington Docket No. UT-063061, Hearing Ex. No. 171, p. 22, ¶1.

[2] Information in brackets was inserted by Eschelon. For example, where Qwest referenced the Washington exhibit number, Eschelon inserted the corresponding Oregon exhibit number in brackets. Also, when Qwest included multiple points in one row, Eschelon inserted numbering in brackets (and gray shading) to indicate the start of each point (with the corresponding number for that point in the next column containing Eschelon's reply to that point).

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		language cannot be inconsistent with the existing PIDs/PAP and thus requires no modification of them.		articulated in 12-71. *See also* Eschelon/43, Johnson p. 36, lns 2-9 & p. 73, fn 105; OR Tr., p. 203 ln 25 – p. 204 ln 19. [2] See also Row 12 below.
2	12.2.7.2.4.4 . . .Nothing in this	Exhibit B and Attachments 1 and 2 to Exhibit K of the Agreement.	Qwest does not disagree with this general statement.	Qwest ignores its own arguments which led to addition of this alternative proposal. At one

[3] Eschelon/6, Starkey/11 (MN Tr. Vol. 1, p. 94, lines 5-6 (Albersheim)). *See also* Washington Docket No. 063061, Hearing Ex. No. 73.

[4] Eschelon/7, Starkey/13 (AZ Tr. Vol. 1, p. 64, lines 5-14 (Albersheim)). *See also* Washington Docket No. 063061, Hearing Ex. No. 178.

[5] Qwest/1, Albersheim/69, lines 16-17. *See also* Washington Docket No. 063061, Hearing Ex. No. 1 (Albersheim), p. 68, line 32 – p. 69, line 1 (referring to all of Eschelon's proposal, without the phrase "the day before," as Qwest's "current PCAT process"). Qwest/18, Albersheim/46, lines 6-8 and Washington Docket No. 063061, Hearing Ex. No. 18C (Albersheim), p. 57, lines 20-23 (indicating only that "the day before" is allegedly not part of the Qwest process); and Eschelon/6, Starkey/6 (MN Tr. Vol. 1, p. 37, lines 16-23(Albersheim)) and Washington Docket No. 063061, Hearing Ex. No. 73 (MN Tr. Vol. 1, p. 37, lines 16-23). Qwest claims that Eschelon's proposed phrase "at least the day before" is not part of Qwest's current process. *See id*. p. 37: 11-19. *See also* CO Tr. Vol. 1, p. 72, lines 1-8 (Albersheim), provided as Washington Docket No. 063061, Hearing Ex. No. 180. Other than that phrase, however, Qwest admits that the remainder of Eschelon's proposed language reflects Qwest's current process. *See* Eschelon/6, Starkey/6 (MN Tr. Vol. 1, p. 34, lines 16-23(Albersheim)), cited at Eschelon/43, Johnson/37, footnote 36 and Eschelon/43, Johnson/69, footnote 94. *See also* Washington Docket No. 063061, Hearing Ex. No. 73 (MN Tr Vol. 1, p. 34, lines 16-23 (Albersheim), quoted at Washington Hearing Ex. No. 71, p. 224, footnote 734 (Starkey) and *id*. pp. 222-224.

[6] See Row 12 below for Qwest's footnote to this argument, along with Eschelon's Reply. As part of that footnote, Qwest also cited the following in support of this statement: "(QWEST INSERTED) See discussion in Qwest's Post Hearing Brief and hearing Exh. No. 126 [Eschelon/115], Exh. No. 80 [Eschelon/115], Exh. No. 110 [Eschelon/115] and Exh. No. 28 [Qwest/27]." *Cf.* Rows 6 and 9.

[7] Qwest Response to Eschelon's Petition for Arbitration, p. 46, lines 3-5. *See also* Washington Docket No. 063061, Hearing Ex. No. 1, p. 70, lines 18-19 (Albersheim).

[8] Per Eschelon's proposal for Issue 12-72 (Row 1 in Cols. 3, 5, & 8), if the reason that Eschelon was not ready is because, after a Qwest facility jeopardy, Qwest cleared the jeopardy but failed to send any FOC at all (or sent an untimely FOC) to notify Eschelon that the jeopardy had cleared (which would have allowed Eschelon notice that it needs to staff to accept the circuit and arrange any needed premise access with the customer), ***a CNR jeopardy attributing cause to Eschelon is inappropriate because Qwest's failure caused the problem***. When Qwest fails to send an FOC in this situation, Qwest breaches ICA Section 9.2.4.4.1 (last two sentences). Therefore, Eschelon could have taken a hard line and said that every situation in which Qwest breaches its contractual duty to provide an FOC should result in a penalty to Qwest for breach of contract. Instead, Eschelon is reasonably proposing that, even when Qwest breaches Section 9.2.4.4.1 by not sending an FOC, Eschelon will nonetheless use its best efforts to accept the circuit that day. (Row 1 in Col. 8.) If Eschelon succeeds, Qwest may benefit from Eschelon's ability to overcome Qwest's breach by meeting a due date commitment despites it own breach. If despite Eschelon's best efforts, Eschelon cannot overcome Qwest's breach, Qwest should not avoid any consequences of its breach by erroneously attributing cause to Eschelon.

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	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. *Issue 12-71* Proposal #2 (second sentence)	Exhibit B = PIDs Exhibit K = PAP Qwest testified that the PIDs currently require Qwest "to differentiate between Qwest caused and CLEC/customer caused delays."[9]	The general statement does not, however, address the dispute between the parties (see comments above and footnote 10). [now footnote 11]	time, Qwest's central attack on 12-71 – 12-73 was that the proposal modified the PIDs.[10] Only after Eschelon proposed this alternative to specifically address that attack does Qwest claim that the language does not "address the dispute." It addresses it by eliminating this former Qwest argument.
3	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	Qwest/11, Albersheim (*see also* Washington Docket No. 063061, Hearing Ex. No. 14) (entitled "Jeopardy Data") lists the different types of jeopardies by code.[11] The two types of potential customer (CNR) jeopardies described in Section 12.2.7.2.4.4.1 are coded in Qwest/11, Albersheim (Washington Docket No. 063061, Hearing Ex. No. 14) as CO1 and CO2,	[1]Eschelon's analysis misstates the significance of Due Date jeopardies when it claims Qwest has represented it means a CLEC should "not to prepare to accept the circuit (*i.e.*, do not disregard the jeopardy	[1] Qwest ignores the implication of its claim – that, in every case on every day until attempted delivery,[19] Eschelon must staff personnel to test and accept the circuit and contact the customer when premise access is needed, even though Qwest has notified Eschelon that Qwest has an unresolved facility issue. When asked at the hearing if Qwest expects that Eschelon should have technicians standing around waiting to

[9] Qwest Response to Eschelon's Petition for Arbitration, p. 46, lines 3-5. *See also* Washington Docket No. 063061, Hearing Ex. No. 1, p. 70, lines 18-19 (Albersheim).

[10] See, e.g., Qwest/18, Albersheim/55, lines 22-23 ("changing PID measurements").

[11] Qwest/11, Albersheim and Washington Docket No. 063061, Hearing Ex. No. 14. *See also* Eschelon/115, Johnson/3-4, footnotes 5 and 6 and Washington Docket No. 063061, Hearing Ex. No. 80, footnotes 5 and 6, regarding the different types of jeopardies and discussion of "K" jeopardies (Qwest-caused jeopardies) and providing the applicable Qwest URLs.

	accepted by the CLEC (when Qwest has tested the service to meet all testing requirements.); and (2) End User	and Eschelon's ICA language mirrors Qwest's PCAT "User Friendly Jeopardy Description" of these two jeopardies.[12] A Qwest-caused jeopardy is called a "Qwest jeopardy,"[13] and Qwest identifies them in Qwest/11,	notice) unless Qwest advises CLEC of a new due date for the other (DD jeopardies)." [2]Nothing in the PCAT or the record supports such a statement.[[18]] To the	accept the circuit, Ms. Albersheim admitted that she "wouldn't expect them to stand around and wait."[20] However, this is the effect of Qwest's current position that Eschelon may never disregard a jeopardy notice, even though Qwest is supposed to send a timely FOC when the Qwest facility jeopardy clears. Qwest's position

[12] Qwest/11, Albersheim/1-2. *See also* Washington Docket No. 063061, Hearing Ex. No. 14, pp. 1-2.

[13] CO Tr. Vol. 1, p. 71, lines 13-15, provided as Washington Docket No. 063061, Hearing Ex. No. 180.

[14] Qwest/11, Albersheim. *See also* Washington Docket No. 063061, Hearing Ex. No. 14.

[15] Qwest/22, Albersheim/8 (Qwest's Provisioning and Installation Overview PCAT): "Qwest differentiates between DD jeopardies and Critical Date jeopardies. DD jeopardies indicate that your due date is in jeopardy; however, Critical Date jeopardies indicate that a critical date prior to the DD is in jeopardy. ***Critical Date jeopardies can be ignored by you***. Critical Date jeopardies are identified in the Jeopardy Data document (see download in the following paragraph) in the column labeled "Is Due Date in Jeopardy?" ***If the DD is not in jeopardy, this column will contain "No" and you can disregard the jeopardy notice*** sent for this condition and continue your provisioning process with the scheduled DD. ***If the column contains "Yes" and Qwest has the responsibility to resolve the jeopardy condition, we will advise you of the new DD when the jeopardy condition has been resolved.*** This is usually within 72 hours." (emphasis added). *See also* Eschelon/43, Johnson/86, lines 7-20 and Washington Docket No. 063061, Hearing Ex. No. 11. S*ee also* Eschelon/115, Johnson/3-4, footnotes 5 and 6, regarding the different types of jeopardies and discussion of "K" jeopardies (Qwest-caused jeopardies) and providing the applicable Qwest URLs; and OR Tr. Vol. 1, 0048-0049 (Albersheim cross examination) ("Q. Then looking at the last sentence of that same paragraph, it says, 'If the column contains yes, and Qwest is responsible for resolution of the jeopardy condition, you will be advised of a new due date when the jeopardy condition has been resolved. Resolution usually occurs within 72 hours.' Do you see that? A. Yes. Q. And the yes column is the column that's checked when it's a due date jeopardy; isn't that right? A. Yes. What that is discussing is the list of jeopardy codes, and when those codes imply that the due date is in jeopardy. Q. And if those due date codes apply, then what Qwest is saying here that it will do is provide a new due date when the jeopardy condition has been resolved, correct? A. Correct.") *See also* OR Tr. Vol. 1, 0055-0056.

[16] *See* Qwest/11, Albersheim and Washington Docket No. 063061, Hearing Ex. No. 14, pp. 1-2 (showing the column contains "Yes" for these jeopardies).

[17] Qwest/1, Albersheim/69, lines 16-17. *See also* Washington Docket No. 063061, Hearing Ex. No. 1 (Albersheim), p. 68, line 32 – p. 69, line 1 (referring to all of Eschelon's proposal, without the phrase "the day before," as Qwest's "current PCAT process"). *See also* Eschelon/6, Starkey/6 (MN Tr. Vol. 1, p. 34, lines 16-23(Albersheim)), cited at Eschelon/43, Johnson/37, footnote 36 and Eschelon/43, Johnson/69, footnote 94; and Washington Docket No. 063061, Hearing Ex. No. 73 (MN Tr Vol. 1, p. 34, lines 16-23 (Albersheim), quoted at Washington Hearing Ex. No. 71, p. 224, footnote 734 (Starkey) and *id*. pp. 222-224.

[18] See Qwest/18, Albersheim/53 line 18 – Albersheim/54 line 3.

[19] Under Qwest's new approach it proposes in arbitration, Eschelon would have staffed personnel for ***forty business days*** to accept a circuit that Qwest did not deliver in an example provided by Ms. Johnson. See Eschelon/43, Johnson/68, line 7 – p. 69, line 9.

[20] Oregon transcript page 72 lines 14-24.

[21] See Memorandum Opinion and Order, In the Matter of Application by Qwest Communications International, Inc. for Authorization To Provide In-Region, InterLATA Services in the States of Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington and Wyoming, WC Docket No. 02-314, Decision No. 02-332 (Dec. 23, 2002), ¶85 (quoted at Eschelon/43, Johnson/88, fn 157).

[22] See Qwest/22, Albersheim/8.

[23] See Qwest/22, Albersheim/8 (redlined PCAT changes showing addition of paragraph beginning with "Qwest differentiates . . ."). *See also*, *e.g*., Qwest/20, Albersheim/5, Qwest CMP minutes in which Qwest said: "Cindy Macy – Qwest asked how will the CLECs know which jeopardy codes to ignore? Jill and Phyllis asked for the CLECs preference to how they would like this identified on the matrix. Agreement was reached to add a column to the matrix (3rd column) and call it 'Due Dates in Jeopardy'."

ATTACHMENT 1 TO ESCHELON POST-HEARING BRIEF EVIDENCE IN THE RECORD SUPPORTING ESCHELON'S JEOPARDY PROPOSALS – ISSUES 12-71, 12-72 & 12-73				
Row #	**ESCHELON LANGUAGE[1] (Column 1)**	**EVIDENCE SUPPORTING ESCHELON LANGUAGE – INCLUDING QWEST DOCUMENTS & ADMISSIONS (Column 2)**	**"QWEST'S EVIDENCE"[2] (Column 3)**	**ESCHELON COMMENTS TO QWEST'S RESPONSE (Column 4)**
	Customer access was not provided. *Issue 12-72* (first two sentences)	Albersheim (*see also* Washington Docket No. 063061, Hearing Ex. 14)[14] Qwest's PCAT language shows Qwest differentiates jeopardy notices and tells CLECs to plan to prepare to accept the circuit (*i.e.*, disregard the jeopardy notice) even if the CLEC is not advised of a new due date for one category of jeopardy types (Critical Date jeopardies) and not to prepare to accept the circuit (*i.e.*, do not disregard the jeopardy notice) unless Qwest advises CLEC of a new due date for the other (DD jeopardies).[15] Qwest facility jeopardies ("K" jeopardies) are Due Date ("DD") jeopardies.[16] Qwest testified this Eschelon language is Qwest's current process; [17] therefore, this Eschelon language cannot be inconsistent with the existing PIDs/PAP and thus requires no modification of them.	contrary a due date jeopardy is one that might be delivered late, and the jeopardy notice makes the CLEC aware of the possibility. *See* e.g. Exh. No. 11, [Qwest/22](Qwest's Provisioning and Installation Overview PCAT), at page 11[Albersheim/8]: "DD jeopardies mean your due date is in jeopardy".	would defeat a key purpose of the FOC[21] and impose major inefficiencies upon Eschelon, to its competitive disadvantage. *See also* Eschelon/43, Johnson/85 line 12 – Johnson/87 line 8. [2] Qwest's claim ignores its own PCAT. Qwest singles out a single PCAT phrase ("DD jeopardies mean your due date is in jeopardy"), as though the PCAT ended there. As the PCAT language quoted in Col. 2 shows, Qwest's PCAT goes on to elaborate that the difference between Critical Date and DD jeopardies is that CLECs should prepare to accept the circuit for Critical Date jeopardies and ***not*** prepare to accept the circuit for DD jeopardies. This PCAT language addresses the very inefficiencies that Qwest's current position would create, by documenting that CLEC technicians do not have to stand around and wait to accept delivery for DD jeopardies. Instead, CLECs need not prepare until they receive a timely FOC "to advise you of the new DD when the jeopardy condition has been resolved."[22] Qwest's willingness to ignore or re-characterize its PCAT language regarding a distinction developed in CMP[23] underscores the problems with Qwest's proposal to delete all of Eschelon's language in favor of a reference to Qwest's web site.

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4	12.2.7.2.4.4.1 . . . For these two types of jeopardies, . . . *Issue 12-72* (portion of third sentence)	Qwest/11, Albersheim (and Washington Docket No. 063061, Hearing Ex. No. 14) describes other types of customer ("C") jeopardies,[24] which are not impacted by Eschelon's language.[25] Qwest testified this Eschelon language is Qwest's current process; [26] therefore, this Eschelon language cannot be inconsistent with the existing PIDs/PAP and thus requires no modification of them.	These jeopardies are not in dispute in this proceeding.	Qwest ignores the fact that these jeopardy types are undisputed when advocating rejection of this language, which Qwest admits is accurate.
5	12.2.7.2.4.4.1 . . . For these two types of jeopardies, Qwest will not characterize a jeopardy as CNR or send a CNR jeopardy to CLEC if a Qwest	Qwest's witness admitted that, if the CLEC does not have adequate notice that the circuit is being delivered (with the agreed upon process for adequate notice consisting of an FOC), then it is ***"not appropriate"*** for Qwest to assign a CLEC-caused (CNR) jeopardy.[27] Qwest's witness admitted the reason Qwest is required to send an FOC after	[1] The evidence establishes that Eschelon's proposal would usually assign fault to Qwest [2] even though the CLEC has adequate notice that a circuit is being delivered and is able to accept delivery. See discussion in	[1] Qwest ignores its own testimony that "such issues are rare"[31] when it complains of the alleged frequency of Qwest-caused jeopardies (*i.e*. "usually"). The frequency, in any event, is within Qwest's control under Eschelon's proposal, as Qwest may send a timely FOC to avoid the 12-72 scenario. Regardless of the reason Qwest does not comply with its commitment to always send the FOC before the

[24] Qwest/11, Albersheim. *See also* Washington Docket No. 063061, Hearing Ex. No. 14 (Albersheim).

[25] For example, it does not apply to customer jeopardy CO3 ("Subscriber Change in Requirements") (*see* Qwest/11, Albershein/2 and Washington Docket No. 063061, Hearing Ex. No. 14, p.2), because the failure to deliver the FOC does not affect the customer (CLEC) opportunity to be ready; the CLEC's change in requirements does. In contrast, for CO2, which is subject to the language, Eschelon needs the FOC to have a reasonable opportunity to contact its customer to gain access to the premises needed to accept delivery of the circuit. This shows Eschelon's language is narrowly tailored to the business need.

[26] Qwest/1, Albersheim/69, lines 16-17 and Washington Docket No. 063061, Hearing Ex. No. 1, p. 68, line 32 – p. 69, line 1; and Eschelon/6, Starkey/6 (MN Tr. Vol. 1, p. 37, lines 16-23 (Albersheim)), cited at Eschelon/43, Johnson/37, footnote 36 and Eschelon/43, Johnson/69, footnote 94. *See also*, Washington Docket No. 063061, Hearing Ex. No. 73, cited at Washington Hearing Ex. No. 71, p. 224.

[27] Eschelon/6, Starkey/11 (MN Tr. Vol. 1, p. 94, lines 40-11 (Albersheim, emphasis added)). *See also* Washington Docket No. 063061, Hearing Ex. No. 73.

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	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. *Issue 12-72* (third sentence)	a Qwest facility jeopardy has been cleared is to let the CLEC know that it should be expecting to receive the circuit so that the CLEC will have sufficient notice to make personnel available and perhaps make arrangements with the customer to have access to the premises available.[28] Qwest CMP minutes state that Qwest confirmed "Qwest cannot expect the CLEC to be ready for the service if we haven't notified you."[29] Excluding the phrase "at least the day before" (see below): Qwest testified this Eschelon language is Qwest's current process; [30] therefore, this Eschelon language (excluding, per Qwest, the phrase "at least the day before") cannot be inconsistent with the existing	Qwest's Post Hearing Brief and hearing Exh. No. 126 [Eschelon/115], Exh. No. 80 [Eschelon/115], Exh. No. 110 [Eschelon/115] and Exh. No. 28 [Qwest/27] Exh. No. 117 [Eschelon/114].	due date, two facts remain constant: (1) the non-compliance is on Qwest's side (as is the Qwest facility problem); and (2) as a result of Qwest's non-compliance, Eschelon does not receive proper[32] notice to allow it to prepare to accept service delivery.[33] Qwest has provided no valid reason why fault should not be assigned to Qwest in these situations when, despite best efforts, Eschelon cannot accept delivery. More to the point, as found in MN, "where Eschelon had no role in causing Qwest to issue an initial jeopardy notice, and had no role in delaying Qwest's issuance of a subsequent FOC until less than a day before the deadline, the Commission cannot find the merit in holding Eschelon responsible when the deadline is missed."[34] This result is consistent with the principle with which Qwest agrees (Row 1).

[28] Eschelon/6, Starkey/6-7 (MN Tr. Vol. 1, p. 37, line 24 – p. 38, line 6 (Albersheim)), cited at Eschelon/43, Johnson/68, footnote 90. *See also* Washington Docket No. 063061, Hearing Ex. No. 73.

[29] Eschelon/111, Johnson/5 and Qwest/20, Albersheim/5. *See also* Washington Docket No. 063061, Hearing Ex. No 23, p. 5 (Albersheim).

[30] Qwest/1, Albersheim/69, lines 16-17 and Washington Docket No. 063061, Hearing Ex. No. 1, p. 68, line 32 – p. 69, line 1; Eschelon/6, Starkey/6 (MN Tr. Vol. 1, p. 37, lines 16-23(Albersheim)), cited at Eschelon/43, Johnson 37, footnote 36 and Eschelon/43, Johnson/69, footnote 94; and Washington Docket No. 063061, Hearing Ex. No. 73, cited at Washington Ex. No. 71, p. 224, footnote 734 (Starkey) and *id*. pp. 222-224.

[31] Qwest/18, Albersheim/53, lines 1-3.

[32] See Row 6 regarding the FOC as the agreed upon proper form of notice.

[33] Eschelon/127, Johnson/20-23.

[34] Eschelon/30, Denney/21 (MN Order Resolving Arbitration Issues, p. 21).

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		PIDs/PAP and thus requires no modification of them.		[2] Qwest provides inadequate ***advance*** notice. *See* Row 12 below. Even then, Qwest escapes the consequences of breaching its FOC duties when Eschelon, using best efforts, accepts the circuit. *See* Row 8 below.
6	12.2.7.2.4.4.1 . . .sent an FOC notice . . . *Issue 12-72* (portion of third sentence)	Qwest testified: "Q. Now, before Qwest delivers, they are going to provide an FOC; isn't that right? A. They are supposed to, yes. Q. And that's the requirement. And if you look at Exhibit 21, you see that requirement is set out in the Qwest PCAT; is that right? A. Yes. *** Q. And the way that Qwest advises the jeopardy condition has been resolved is be providing the FOC; isn't that right? A. That is the official formal way, yes."[35] "Q. The contract requires the FOC; correct? A. The PCAT requires the	[1] Eschelon ignores the following portion of Ms. Albersheim's Minnesota testimony Q Are you saying that the CLEC ought to be relying on something other than the official notice, the FOC that it receives from Qwest, as the indication of when the circuit is going to be delivered? A For a formal process, no. But it also doesn't make sense [2] if we're in communication with each other and [3] the circuit can be accepted not to install the circuit and have it done on time. Albersheim, Exh. No. 73, [Eschelon/6] MN	[1] Qwest ignores its own proposal referring to its web site and its CMP argument that ICA terms are not needed because Eschelon may rely upon process detail developed in CMP.[42] Here, Qwest argues that Qwest is free to ignore those CMP/PCAT processes. Even when a procedure has been developed in 271 proceedings[43] and is required by the Qwest PCAT,[44] Qwest reserves the right to unilaterally ignore those procedures – and its contractual obligation[45] – to instead place the blame on the CLEC, which may result in a delay to CLEC's customer.[46] This argument, in particular, emphasizes the need for contractual certainty through ICA language that allows Eschelon to plan its business and its resources. *See* Eschelon/43, Johnson/36, lines 2-9 & Johnson 67, line 9 – p. 69, line 9 & Johnson 73, fn 105 & Johnson/87, line 9 – Johnson/90 line 14; OR Tr., p. 203 line 25 – p. 204 line 19. [2] See Row 12 below re. advance notice. [3] See Row 8 below showing that, under

[35] OR Tr. Vol. 1, 0055, lines 1-7 and 0056, lines 8-11.

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		FOC. Your contract proposal requires the FOC.[36] Q. And Qwest's current process is to provide the FOC? A. That is the process."[37] "Q The FOC is the agreed upon process by which Qwest	TR, 95:11- 95:25. Ms. Albersheim also made the same point in the Washington hearing. Exh. No. 29 [Qwest/18], Albersheim Rebuttal, 35:3 – 35:32	Eschelon's proposal, if the circuit can be accepted and installed on time, it will be, even when Qwest breaches its FOC duty.

[36] In making this response, Ms. Albersheim ignores that other language in the proposed contract, which is closed and agreed upon, requires the FOC. *See* Section 9.2.4.4.1 (quoted below).

[37] Eschelon/7, Starkey/15 (AZ Tr. Vol. 1, p. 70, lines 13-18 (Albersheim)). *See also* Washington Docket No. 063061, Hearing Ex. No. 178.

[38] Eschelon/6, Starkey/7 (MN Tr. Vol.1, p. 38, lines 17-19 (Albersheim)), cited at Eschelon/43, Johnson/57, footnote 68. *See also* Washington Docket No. 063061, Hearing Ex. No. 73, cited at Washington Hearing Ex. No. 71 (Starkey), p. 231; and CO Tr. Vol. 1, p. 71, lines 20-25 (Albersheim) ("formal notice"), provided as Washington Docket No. 063061, Hearing Ex. No. 180.

[39] Eschelon/6, Starkey/11 (MN Tr. Vol. 1, p. 95, lines 19-24 (Albersheim)), cited at Eschelon/43, Johnson/72, footnote 103. *See also* Washington Docket No. 063061, Hearing Ex. No. 73, cited at Washington Hearing Ex. No. 114 (Johnson), p. 24, note 44.

[40] Eschelon/115, Johnson/3, footnote 4: "**ICA Section 9.2.4.4.1**: ". . . If Qwest must make changes to the commitment date, Qwest will promptly issue a Qwest Jeopardy notification to CLEC that will clearly state the reason for the change in commitment date. Qwest will also ***submit a new Firm Order Confirmation*** that will clearly identify the new Due Date." (emphasis added). This language appears in the SGAT and Qwest's negotiations template. *See also* the PCAT provisions (cited in footnote 5) for "DD Jeopardies" that indicate Qwest's process is to send an FOC after the facility jeopardy notice if the condition is resolved so that the CLEC should expect delivery." *See also* Eschelon/43, Johnson/72, lines 14-17 and Washington Docket No. 063061, Hearing Ex. No. 71, pp. 216-217.

[41] Qwest/1, Albersheim/69, lines 16-17 and Washington Docket No. 063061, Hearing Ex. No. 1, p. 68, line 32 – p. 69, line 1; Eschelon/6, Starkey/6 (MN Tr. Vol. 1, p. 37, lines 16-23(Albersheim)), cited at Eschelon/43, Johnson 37, footnote 36 and Eschelon/43, Johnson/69, footnote 94; and Washington Docket No. 063061, Hearing Ex. No. 73, cited at Washington Ex. No. 71, p. 224, footnote 734 (Starkey) and *id*. pp. 222-224.

[42] See, e.g., Qwest/1, Albersheim/69, lines 10 & 15-16. *Cf*. Eschelon/43, Johnson/75, line 16 – p. 79, line 13 & Eschelon/127, Johnson/28, line 6 – p. 29, line 15.

[43] See Memorandum Opinion and Order, In the Matter of Application by Qwest Communications International, Inc. for Authorization To Provide In-Region, InterLATA Services in the States of Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington and Wyoming, WC Docket No. 02-314, Decision No. 02-332 (Dec. 23, 2002), ¶85 (quoted at Eschelon/43, Johnson/88, fn 157).

[44] Eschelon/7, Starkey/15 (AZ Tr. Vol. 1, p. 70, lines 13-18 (Albersheim)).

[45] See agreed upon language in Section 9.2.4.4.1.

[46] Eschelon/43, Johnson/58, lines 4-14.

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		informs Eschelon of the due date for a circuit? A Yes."[38] . . . "Q And you would agree that that's not proper, if the CLEC hasn't received an FOC in adequate time to be able to act on it; correct? A According to procedure, yes. Q That's Qwest's procedure? A Yes."[39] Closed language in the ICA (like the SGAT) states (with emphasis added) in Section 9.2.4.4.1: ". . . If Qwest must make changes to the commitment date, Qwest will promptly issue a Qwest Jeopardy notification to CLEC that will clearly state the reason for the change in commitment date. Qwest will also ***submit a new Firm Order Confirmation*** that will clearly identify the new Due Date."[40] Qwest testified this Eschelon language is Qwest's current process;[41] therefore, this Eschelon language cannot be inconsistent with the existing PIDs/PAP and thus requires no modification of them.		

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7	12.2.7.2.4.4.1 . . .at least the day before . . . . *Issue 12-72* (portion of third sentence)	Qwest CMP minutes state: "Bonnie [Eschelon] confirmed that the CLEC should ***always*** receive the FOC ***before the due date***. Phyllis [Qwest] agreed . . ."[47] Qwest made the following documented commitment in CMP in response to an example provided by Eschelon: "Action #1: As you can see receiving the FOC releasing the order on the day the order is due does not provide sufficient time for Eschelon to accept the circuit. Is this a compliance issue, ***shouldn't we have received the releasing FOC the day before the order is due***? In this example, should we have received the releasing FOC on 1-27-04? [Qwest] Response ***#1 This example is non-compliance to a documented process. Yes an FOC should have been sent prior to the Due Date.***" [48] The CMP Change Request closed with the above mutual understanding of the	Qwest provided extensive testimony discussing documentation demonstrating that [1]Eschelon initiated a change request asking for a requirement that an FOC be provided a day in advance, and [2] that request was ultimately resolved without making any changes to PCAT language that in any way related the timing of an FOC to the date service would attempt to be delivered. [3]Instead the language contained a provision indicating that Qwest would usually provide an updated due date within 72 hours. (Exh. 29, Albersheim Rebuttal [Qwest/18], 29:8	[1] Eschelon requested a documented "designated time frame to respond to a released delayed order."[55] [2]Qwest confirmed in CMP documentation that it was Qwest's existing process to send the FOC at least the day before. Therefore, no change in process that would result in a PCAT change was required. *See* Eschelon/43, Johnson/79, line 14 – p. 85, line 11. [3] The word "instead" is inaccurate. Qwest expanded the scope of the change request to also include the "overall" jeopardy process, part of which was a separate 72 hour issue[56] highlighted by Eschelon after Qwest indicated it would look at additional jeopardy issues.[57] *See id*. at pp. 82-84.[58] [4] The record shows Qwest documented its commitment to "always" provide the FOC before the due date in CMP minutes posted on the web. *See* Row 7.

[47] Eschelon/111, Johnson/5; Qwest/20, Albersheim/5; and Washington Docket No. 063061, Hearing Ex. No. 23 p. 5. *See also* Eschelon/110, Johnson/5 and Washington Docket No. 063061, Hearing Ex. No. 79, p. 4.

[48] Eschelon/113, Johnson and Washington Docket No. 063061, Hearing Ex. No. 116, (February 26, 2004 CMP materials prepared and distributed by Qwest) (emphasis added). *See also* CO Tr. Vol. 1, p. 76, lines 9-22 provided as Washington Docket No. 063061, Hearing Ex. No. 180 (Qwest prepared these materials, which are part of the CMP record).

[49] Eschelon/111, Johnson/4; Qwest/20, Albersheim/3; and Washington Docket No. 063061, Hearing Ex. No. 23, p. 3 ("Qwest would like to close this CR. Bonnie Johnson – Eschelon advised she is having a problem with compliance to this process. . . . Jill Martain – Qwest asked if this is a compliance issue or a process problem. Bonnie said it is hard to determine at times, but she is willing to close this CR and handle the compliance issue with the Service Manager. The CLECs agreed to close the CR."), *quoted in* Washington Docket No. 063061, Hearing Ex. No. 114, p. 27, lines 5-6 and footnote 52.

[50] Eschelon/117, Johnson/8-9 and Washington Docket No. 063061, Hearing Ex. No. 111, pp. 3-4. (Qwest service manager email dated Aug. 25, 2004). *See also* Eschelon/110, Johnson/5-9 and Washington Docket No. 063061, Hearing Ex. No. 79 (July 21, 2004 – March of 2005).

[51] Eschelon/117, Johnson/8-9. (Qwest service manager email dated Aug. 25, 2004) (emphasis added); *id*. p. 8 ("Five of the LSRs in the spreadsheet are where a ***FOC was not sent timely prior to the due date*** . . . . Qwest will continue to monitor this") (emphasis added); *id*. p. 8 ("5 were due to the issue described above with resolving the facility really late in the process; 5 of those will be addressed through coaching"). Qwest's use of "timely" before "prior to" the due date, shows that Qwest also understood that a "timely" FOC is one delivered "prior to" the due date. *See id*. p. 8. Qwest's service manager said that the Qwest non-compliance (which she referred to as a "breakdown") in these five examples was not in the delayed order process itself (*e.g*., a jeopardy was cleared but a timely FOC was not sent) but the failure to send a timely FOC was caused by Qwest "resolving the facility issue late in the process and still attempting to meet the customers due date." *See id*. p. 8. In other words, Qwest admitted that the problem occurred as a result of Qwest conduct (Qwest failure to clear the jeopardy in a timely manner so that a timely FOC could be sent) that lead to insufficient notice to Eschelon. Therefore, the jeopardy should not be attributed to Eschelon (by coding it as Customer Not Ready ("CNR")). Regardless of the reason for Qwest failing to send a timely FOC prior to the due date (*e.g*., either because the facility cleared but Qwest failed to send a timely FOC or because Qwest cleared it too late to send a timely FOC), if Qwest does not send a timely FOC, Eschelon does not receive proper notice before attempted delivery to indicate that Eschelon should prepare to accept service delivery. *See also* Washington Docket No. 063061, Hearing Ex. No. 111, pp. 3-4.

[52] Eschelon/43, Johnson/70, footnote 96 and Washington Docket No. 063061, Hearing Ex. No. 114, p. 27, footnote 50. *See also* Eschelon/111, Johnson/1 and Washington Docket No. 063061, Hearing Ex. 23, p. 1 (Change Request PC081403-1, referring on page 1 to Bonnie Johnson as being the originator of the jeopardy Change Request and referring to Ms. Johnson throughout the Change Request's history).

[53] OR Tr., Vol. 1, 0036, line 213 – 0037, line 9 (Albersheim cross examination) ("Q. You talk, beginning at page 46, about CMP change requests that related to Qwest's jeopardy process; is that right? A. Yes. Q. You were not yourself involved in any of those change requests? A. Not directly. Q. So your testimony is based on documents that you reviewed, and what other Qwest employees told you; is that right? A. That's correct. Qwest employees who were involved in those change requests, yes.") *See also* CO Tr. Vol. 1, p. 77, lines 1-6 (Washington Docket No. 063061 Hearing Ex. No. 180) ("You were not involved in preparing the materials for the March 4th ad hoc meeting, were you? A No. Q. And you did not participate in the March 4th ad hoc meeting. Isn't that right? A That's correct."). *See also* Eschelon/43, Johnson/70, footnote 96 and Washington Docket No. 063061, Hearing Ex. No. 114, p. 27, footnote 50; CO Tr. Vol. 1, pp. 99-100 (Washington Docket No. 063061, Hearing Ex. No. 180 (Albersheim)); *id*. p. 98, lines 10-11 ("I'm not a part of the change management team itself."); and Eschelon/111, Johnson and Washington Docket No. 063061, Hearing Ex. No. 23 (Change Request PC081403-1 - no reference to Ms. Albersheim in the entire Change Request history).

[54] Eschelon/43, Johnson/110, lines 20-24 and Washington Docket No. 063061, Hearing Ex. No. 74, p. 9, lines 7-8.

[55] Qwest/20, Albersheim/2 (Eschelon Expected Deliverable: "Qwest will modify, document and train a process, that requires Qwest to send an updated FOC and allow a CLEC a reasonable amount of time (from the time the updated FOC is sent) to prepare for testing before Qwest contacts the CLEC to test and accept the circuit. Qwest should cease applying a jeopardy status of CNR to delayed orders that are released and the CLEC has not been provided a reasonable amount of time to prepare to test/accept the circuit.").

[56] Qwest/22, Albersheim/8, Changes to PCAT which state "Within 72 hours of the initial jeopardy notice, either an updated jeopardy notification with ***more specific details of the jeopardy condition or a FOC*** advising of the new DD will be sent to you. If an updated jeopardy notice is sent, we will also send a FOC advising you of the DD Qwest can meet when the RFS Date is known." (Emphasis added).

[57] Eschelon/111, Johnson/7, see second complete paragraph - Qwest CMP minutes: "Bonnie [of Eschelon] advised they do want more detail on what the jep'd problem is. They need to know if it is a **F1** pair, or the street needs to be dug up. She would like more detail on one jep in particular: 'Local Facility not available'. Bonnie asked when does this jep occur. What situation causes this jep to be assigned?"

[58] It is also illogical to assume that Qwest sending either updated details about the reason for a jeopardy or an FOC within 72 hours after the initial jeopardy satisfied Eschelon request for "a reasonable time frame to prepare" before the due date. In some cases Qwest may not send Eschelon a Qwest facility jeopardy notice until the day

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		documented process and a confirmation by Qwest that conduct contrary to the process would be treated as non-compliance with the process that could be brought to Qwest service management.[49] After the Change Request closed subject to compliance issues, Qwest continued to recognize that Qwest's process was to send an FOC before the due date (*i.e.*, a "timely" FOC) and treated Qwest failure to do so in particular cases as non-compliance with its process.[50] For example, Qwest told Eschelon at that time that, in five examples "where a FOC was not sent ***timely prior to the due date***," Qwest provided coaching to the non-compliant Qwest employee(s) and indicated Qwest would continue to monitor compliance with the process.[51] Ms. Bonnie Johnson of Eschelon personally participated in these CMP events and dealt directly with Qwest service management on these issues;[52] Ms. Renee Albersheim of Qwest did not.[53] Ms. Johnson prepared the jeopardies Chronology (Eschelon/110,		

before or even sometimes on Eschelon's requested due date. To believe the 72 hour change would satisfy Eschelon's request, therefore, one would have to believe that Qwest sending the FOC one or two days ***after*** Eschelon's requested due date would meet Eschelon's request for reasonable advance notice ***before*** the due date.

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		Johnson and Washington Docket No. 063061, Hearing Ex. No. 79) based on Ms. Johnson's personal knowledge of the facts.[54]		
8	12.2.7.2.4.4.1 . . . 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 . . . *Issue 12-72* (fourth sentence and start of fifth sentence)	Eschelon/114, Johnson (Washington Docket No. 063061, Hearing Ex. No. 117) contains more than one hundred examples of orders for which Qwest did not send any FOC after a Qwest facility jeopardy, and for which Eschelon nevertheless not only used best efforts to accept the circuit but also succeeded in doing so.[59] Qwest admitted, if Qwest classifies a delay as Eschelon-caused (CNR), this pushes out the due date for loop orders at least three days.[60] In other words, the Parties cannot "set a new appointment time on the same day" if Qwest erroneously classifies a jeopardy as CNR because Qwest then requires	[1]Qwest discussed this exhibit extensively in its testimony. Exhibit 117 [Eschelon/114] demonstrates that 80% of the time, Eschelon is able to accept service on time without an FOC. [2]The exhibit also demonstrates that Eschelon's claimed concern about delayed due dates is illusory because Qwest and Eschelon technicians work hard to deliver circuits as soon as possible and could not	[1] Qwest ignores the language of Eschelon's proposal. Timely delivery of service to the customer is of the utmost importance to Eschelon. Therefore, under Eschelon's proposal, if Eschelon is able to accept service on time without an FOC, Eschelon will do so, despite Qwest's breach of its FOC duty. Exhibit Eschelon/114 demonstrates Eschelon's commitment. *See* Eschelon/127, Johnson/28, line 6 – p. 29, line 15. [2] Qwest's own process shows that Eschelon's concerns about delay are very real. Eschelon's language avoids delay by allowing a new appointment time *on the same day*. In contrast, in the same circumstances, Qwest's process

[59] Eschelon/114, Johnson; OR Tr. Vol. 1, 0043, lines 11-15; and Washington Docket No. 063061, Hearing Ex. No. 117. *See also* Eschelon/43, Johnson/75-79; Eschelon/127, Johnson/24-28; Eschelon/141, Johnson/29-31; and Washington Docket No. 063061, Hearing Ex. No. 71, pp. 219-222. Eschelon seeks no delay. Eschelon commits in the ICA to use its best efforts to accept service at the time of attempted delivery or on the same day, even when Qwest sends no FOC (see 12.2.7.2.4.4.1 – "nonetheless"), and Eschelon provided evidence in Eschelon/114, Johnson (and Washington Docket No. 063061, Hearing Ex. No. 117) that Eschelon does accept service when it is able to do so despite Qwest's failure to provide an FOC.

[60] Eschelon/43, Johnson/57-58 and Washington Docket No. 063061, Hearing Ex. No. 71, p. 223, lines 2-8 (Starkey). When a jeopardy is classified as a CLEC-caused (CNR) jeopardy for 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. Eschelon/6, Starkey/6 (MN Tr. Vol. 1, p. 36, line 20 – p. 37, line 2 (Albersheim)). *See also* Washington Docket No. 063061, Hearing Ex. No. 73. A jeopardy properly classified as caused by Qwest does not require the CLEC to supplement the due date and does not build in this three day delay. Eschelon/43, Johnson/59, lines 6-8; Eschelon/43, Johnson/67, footnote 88; and Washington Docket No. 063061, Hearing Ex. No. 71, p. 223, lines 6-8.

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		CLEC to request a due date three days later. Qwest testified this Eschelon language is Qwest's current process;[61] therefore, this Eschelon language cannot be inconsistent with the existing PIDs/PAP and thus requires no modification of them.	have delivered earlier even if an earlier due date had been set**.**	requires Eschelon to supplement the order with a due date at least *three days out.*[62] *See also* Eschelon/43, Johnson/58 line 4 – Johnson/59 line 15.
9	12.2.7.2.4.4.1 . . . and, if unable to do so, Qwest will issue a Qwest Jeopardy notice and a FOC with a new Due Date. *Issue 12-72* (end of fifth/final sentence)	The ICA provides: ". . . If Qwest must make changes to the commitment date, Qwest will ***promptly issue a Qwest Jeopardy notification*** to CLEC that will clearly state the reason for the change in commitment date. Qwest will also ***submit a new Firm Order Confirmation*** that will ***clearly identify the new Due Date***."[63] Qwest testified this Eschelon language is Qwest's current process; [64] therefore,	[1]As a general matter it has not been Qwest's advocacy that Jeopardy language should be tied to the PIDs/PAP. To the contrary, it is Qwest's position that Eschelon's proposed language has an impact on the PIDs/PAP which is one of several reasons Qwest opposes	[1] Qwest's advocacy has changed. *See* Row 2. Also, if Qwest appropriately assigns Qwest and CLEC/Customer (CNR) jeopardies, as it admits the PIDs require it to do, the PIDs/PAP will work as intended, with no impact. *See* Rows 1-2. In contrast, if the ICA is silent as proposed by Qwest, Qwest has an incentive to classify Qwest-caused jeopardies as Eschelon-caused (CNR) to erroneously exclude them from the PAP calculation entirely.[65] When a delay is due to Qwest's failure to provide an FOC or a

[61] Eschelon/6, Starkey/6 (MN Tr. Vol. 1, p. 34, lines 16-23 (Albersheim)), cited at Eschelon/43, Johnson/37, footnote 36 and quoted at Eschelon/43, Starkey/69-70, footnote 94 and Eschelon/127, Johnson/18, footnote 55. Ms. Albersheim's Minnesota testimony was also quoted in Washington Docket No. 063061, Hearing Ex. No. 71, p. 224, footnote 734. *See also* Washington Docket No. 063061, Hearing Ex. No. 73.

[62] See Eschelon/127, Johnson/26, fn 84, citing Qwest Request for Reconsideration, Minnesota Arbitration (Apr. 9, 2007), p. 3 ("Eschelon accurately indicated to the Commission that, when Qwest classifies an order as customer not ready, Eschelon is required to supplement its order to reflect a new due date that at least three days out.").

[63] ICA Section 9.2.4.4.1 (closed language).

[64] Qwest/1, Albersheim/69, lines 16-17 and Washington Docket No. 063061, Hearing Ex. No. 1, p. 68, line 32 – p. 69, line 1. *See also* Eschelon/6, Starkey/6 (MN Tr. Vol. 1, p. 34, lines 16-23 (Albersheim)), cited at Eschelon/43, Johnson/37, footnote 36 and quoted at Eschelon/43, Starkey/69-70, footnote 94 and Eschelon/127, Johnson/18, footnote 55. Ms. Albersheim's Minnesota testimony was also quoted in Washington Docket No. 063061, Hearing Ex. No. 71, p. 224, footnote 734. *See also* Washington Docket No. 063061, Hearing Ex. No. 73.

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		this Eschelon language cannot be inconsistent with the existing PIDs/PAP and thus requires no modification of them.	Eschelon's overall proposal for this language. [2]The primary reason Qwest opposes Eschelon's proposal is that it does NOT reflect Qwest's current practice. And [3]While this specific portion of Eschelon's language may mirror Qwest's current process, [4]it is Qwest's position that resolving these issues is better handled on an industry wide basis as a part of the CMP.	timely FOC (so, for example, Eschelon had insufficient time to arrange customer premise access), Qwest would have the result be that the request is excluded from the PAP results because Qwest chooses to classify the delay as Eschelon-caused. Qwest cites no provision of the PID or PAP, nor any public policy, allowing for that result. [2] Qwest refers to "Eschelon's proposal" when, in fact, this statement applies only to the single phrase "the day before."[66] (That phrase is not the subject of the language in Col. 1 of this Row. *See* Row 7.) See Eschelon/43, Johnson/70 line 4 – Johnson/71 line 18; Eschelon/127, Johnson/19 line 1 – Johnson/23 line 19; Eschelon/141, Johnson/47 lines 10-13. [3]As to the language in Col. 1 of this Row,

[65] See Eschelon/43, Johnson 63 at fn 79, citing "*See* Qwest Request for Reconsideration, Minnesota arbitration (April 9, 2007), p. 5 (regarding Qwest's Performance Assurance Plan (PAP): if "the Qwest technician classifies the order as customer not ready, it is excluded from the calculation entirely")." Remaining silent in the ICA as to "when you define a jeopardy as Qwest caused and when you define it as CNR," as proposed by Qwest (*see* Row 1), provides Qwest with more flexibility to unilaterally classify the order as CNR to exclude it from the PAP calculation entirely.

[66] Eschelon/43, Johnson/69-70 at fn 94, citing Minnesota arbitration Hrg. Ex. 1 (Albersheim Dir.), p. 67, line 21 (referring to all of Eschelon's proposal, without the phrase "the day before," as Qwest's "current PCAT process"); Minnesota Tr., Vol. 1, p. 37, lines 16-23 (Ms. Albersheim). ("Q Other than that phrase, at least a day before, is Eschelon's proposal consistent with Qwest's practice? A Current practice, yes, except for that sentence.").

[67] Despite Qwest's admission that its process requires Qwest to issue an FOC, in this proceeding Qwest defends its classification in practice of several jeopardies as CNR(Eschelon-caused) in situations in which Qwest sent no FOC at all after the jeopardy cleared. See Eschelon/115 lines, 1, 2, 3, 4, 5, 6, 10, 4,16, 17, 18, 21; Eschelon used Eschelon/115 for ease of reference because the lines are numbered. See also Qwest/27.

[68] See, e.g., Eschelon/113, Johnson/3 (February 26, 2004 CMP materials).

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				Qwest admits that it "may mirror Qwest's current process." Despite this admission as to Qwest's policy, the evidence shows that Qwest deviates from it in practice.[67] Unlike in CMP when Qwest admitted the deviations were non-compliance to a documented process,[68] in these proceedings Qwest defends the deviations. It seeks a result that allows Qwest to continue to deviate in this manner, even though Qwest testified that it is not appropriate to assign a CLEC-caused (CNR) jeopardy if the CLEC does not have adequate notice that the circuit is being delivered (with the agreed upon process for adequate notice consisting of an FOC). *See* Rows 5-6. [4] Jeopardies have a long history in CMP, and this history and later events (which are summarized primarily in Eschelon/110 and Eschelon/117) provide ample evidence that sending this issue back to CMP will not resolve the problem. *See* Eschelon/43, Johnson/76, line 6 – p. 79, line 13. *See also* Row 6.
10	12.2.7.2.4.4.2 If CLEC establishes to Qwest that a	Qwest's witness testified that: "We don't disagree with the notion that a CNR jeopardy should be assigned appropriately."[69]	Qwest discussed its position on this issue in the first entry of this document.	*See* Row 1. Qwest provided no evidence, nor any public policy reason, why Qwest should not correct an erroneous classification.

[69] Eschelon/6, Starkey/11 (MN Tr., Vol. 1, p. 94, lines 5-6 (Albersheim)). *See also* Washington Docket No. 063061, Hearing Ex. No. 178.

[70] Eschelon/7, Starkey/13 (AZ Tr., Vol. 1, p. 64, line 19 – p. 65, line 3 (Albersheim)). *See also* Washington Docket No. 063061, Hearing Ex. No. 178.

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	jeopardy was not caused by CLEC, Qwest will correct the erroneous CNR classification and treat the jeopardy as a Qwest jeopardy. *Issue 12-73*	"Q. Eschelon's proposal there is 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. Do you see that? A. Yes. Q. That's Qwest's process as well; correct? A. Yes. Q. And can you imagine a circumstance under which a CLEC might not want to have that? A. No."[70] Qwest testified this Eschelon language is Qwest's current process;[71] therefore, this Eschelon language cannot be inconsistent with the existing PIDs/PAP and thus requires no modification of them.		

[71] Qwest/1, Albersheim/69, lines 16-17 and Washington Docket No. 063061, Hearing Ex. No. 1, p. 68, line 32 – p. 69, line 1. *See also* Eschelon/6, Starkey/6 (MN Tr. Vol. 1, p. 34, lines 16-23 (Albersheim)), cited at Eschelon/43, Johnson/37, footnote 36 and quoted at Eschelon/43, Starkey/69-70, footnote 94 and Eschelon/127, Johnson/18, footnote 55. Ms. Albersheim's Minnesota testimony was also quoted in Washington Docket No. 063061, Hearing Ex. No. 71, p. 224, footnote 734. *See also* Washington Docket No. 063061, Hearing Ex. No. 73.

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11		*Note*: Qwest added the information in Column 3 to the matrix, so there were no Eschelon Columns 1 and 2.		[1]QWEST EVIDENCE THAT THE PIDs/PAP PROVIDE SOMETHING DIFFERENT (Original Caption) [2] (Note – Eschelon's caption of this section is misleading. Eschelon sets forth all of its evidence in support of its language in its column and then artificially constrains Qwest's response to commentary on PIDS/PAP). [3]Qwest's responsive comments are not intended to exhaustively address the issues, but rather to provide a reference. Qwest relies on its testimony and briefing to fully address these issues.	[1]Eschelon's WA matrix contained this caption. Each row under this caption indicated that Qwest provided no evidence of a different result. When responding to Eschelon's matrix, Qwest deleted this Eschelon column and replaced it with the "Qwest's Evidence" column. [2] The caption accurately stated the purpose of the column – to provide Eschelon's response to Qwest's then specific claim about the PIDs/PAP. The caption was not misleading; Qwest would have simply preferred another purpose. There was no constraint on Qwest's response, as Eschelon left that job to Qwest in its own Brief.

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					[3] Eschelon agrees that the information in the Attachment, for both Parties, is not exhaustive, and that the record and briefing address the issues.
12		*Note*: Qwest added the information in Column 3 to the matrix, so there were no Eschelon Columns 1 and 2.		[1] [see Footnote 2 above referencing Eschelon/114 and Eschelon/115] . . . (These exhibits relate to the same set of orders and shows the communication that took place between Qwest and Eschelon technicians in jeopardy situations. [2] These records demonstrate extensive efforts to resolve issues quickly. In	[1] The informal "communication" to which Qwest refers and suggests that Eschelon should rely upon in lieu of contract rights is potential communication that is not part of Qwest's documented jeopardy process,[72] yet Qwest would have it replace the agreed upon FOC. *See* Row 6. Qwest admits this process is not documented as an

[72] See Qwest CMP meeting minutes for CR PC011403-1 or PC072303-1. See Eschlon/111 and Eschelon/112 (minutes from meetings). A search for the words "tech", "technician", communication(s)" and "informal" in CMP monthly meetings and ad hoc calls related to the above CRs shows Qwest did not discuss such informal communications, suggest that CLECs should depend on some type of informal communication in place of an FOC, or commit that Qwest had an internal process to always informally communicate advance notice of delivery or even represent that this informal communication always takes place. Particularly given Qwest's suggestion that CMP activity necessarily results in PCAT language, it is telling that Qwest has pointed to no PCAT language documenting its alleged practice of providing advance notice through informal communications.

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				nearly every single instance, Qwest delivered service before the supplemented due date.). [3] Exh. No. 117 [Eschelon/114] provides over a hundred examples of situations where Eschelon received no FOC. In 76% of these examples,	external process in Qwest's PCAT.[73] Furthermore, these potential communications do not serve the function of providing ***advance*** notice (*i.e.*, notice in time to prepare for delivery, as opposed to communications at the time of delivery, when the opportunity to

[73] See OR Tr., p. 76 line 19 – p. 77 line 2.

[74] *See, e.g.*, Eschelon/115 (Qwest technician notes in column entitled "Qwest Review From MN RA-30") at Johnson/6 ("Contacted Eschelon to attempt to turn up the circuit"); Johnson/8-9 ("Contacted [ER] at Eschelon at 16:58 he said he would test and call back. [ER] called back at 17:23 can't see signal. Problem originally thought to be on CLEC side. 4/15 found trbl to be in Qwest wiring"); Johnson/16 ("referred order to CLEC to test"); Johnson/21 ("called [ER] at Eschelon, talked to [ER] advised ready to test and accept").

[75] Minnesota Hrg. Tr. Vol. I p. 43, lines 8-17 (Ms. Albersheim).

[76] Any reference to provisioning "on the same day that the supplemental order was submitted should not be construed as the CLEC requested due date. For example, in the example in Row 2 (Eschelon/115), Eschelon's requested due date (i.e., for timely delivery) was Feb. 9th. Qwest missed that date. Qwest called to attempt delivery on the 10th but had not sent a timely FOC allowing Eschelon to prepare. Qwest sent a CNR jeopardy notice on Feb. 11th, which was a Friday. On Monday the 14th, Eschelon placed a supplemental order. Although Qwest provisioned the service on the same day that the supplemental order was submitted (Feb. 14th), service delivery was late because the requested due date was Feb. 9th.

[77] The requested due date is the due date Qwest confirms with an FOC. Qwest's own documentation states: "The FOC is your acknowledgement that Qwest has received your request, created a Qwest service order, and ***established a due date for your request***. The FOC provides you details for you to coordinate the overall provisioning and installation of the requested services . . . ." Qwest/22, Albersheim/4.

[78] See, e.g., Eschelon/43, Johnson/64, line 14 – p. 67, line 8.

[79] Eschelon 43, p. 67, line 9 – p. 69, line 9.

[80] OR Tr. P. 21, lines 4-11 (Albersheim).

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				Qwest delivered and Eschelon accepted service on the due date. In several additional instances, Eschelon accepted service before the due date.)	prepare in advance has passed). Qwest's own technician notes show that the purpose of the communications (when they occurred) was to "test" or to "turn up" the circuit/service,[74] rather than to provide notice of when Qwest would be turning up the service. These communications, when they occur, come too late to allow advance preparation. *See also* Eschelon/43, Johnson/88; line 10 – Johnson /89, line 13; OR Transcript, p. 199 line 19 – p. 202 line 24. [2] When Qwest attributes a missed due date to Eschelon by classifying the jeopardy as CNR, Qwest requires Eschelon to supplement its request for a later due date and

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					this "almost always" results in a delay longer than the standard interval.[75] Regarding the 22 examples (Eschelon115), although Qwest attempts to suggest this delivery is early, early means earlier than the ***supplemented*** due date (Col. 3).[76] In other words, service delivery is still untimely, even if delivered earlier than an otherwise longer delay. No supplemental order would have been required if Qwest had not erroneously said it was CNR. Qwest's statements recognize that, in these examples, the *requested due date* was missed (*i.e.*, service to the customer was delayed).[77] Eschelon is seeking

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					advance notice to avoid delay and help ensure "timely" delivery of the circuit.[78] Timely delivery is not always synonymous with faster or "quickly." Faster is not better, if it means that Eschelon is given insufficient proper notice to prepare. To provide excellent service to its customers, Eschelon needs an opportunity to plan its resources, make arrangements for customer premise access, and set customer expectations – just as Qwest allows itself an opportunity to do these things for itself.[79] [3] Regarding Eschelon/114, another way to view Qwest's 76% figure is that ***one in four times*** of these examples, Qwest failed

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					to provide an FOC following the Qwest facility jeopardy, and thus Eschelon was not able to accept service by the original due date.[80]

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

Docket No. ARB 775

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

CERTIFICATE OF SERVICE

I hereby certify that Eschelon Telecom of Oregon, Inc.'s Post-Hearing Brief was filed electronically with the Oregon Public Utility Commission on October 26, 2007. The original and three copies were sent via overnight mail on the 26th day of October, 2007 to:

Oregon Public Utility Commission
ATTN: Filing Center
550 Capitol Street N.E.
Suite 215
Salem, Oregon 97301-2551

and true and correct copies were sent via email and overnight delivery on October 26, 2007, to:

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DATED this 26th day of October, 2007.

_____

Tobe L. Goldberg