ORDER NO. 08-365

ENTERED 07/07/08

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

ARB 775

In the Matter of ESCHELON TELECOM OF OREGON, INC. Petition for Arbitration of an Interconnection Agreement with QWEST CORPORATION, Pursuant to Section 252(b) of the Telecom-munications Act.	)	ORDER

DISPOSITION: ARBITRATOR'S DECISION APPROVED WITH MODIFICATIONS

Procedural History

On October 10, 2006, Eschelon Telecom of Oregon, Inc. (Eschelon), filed a petition with the Public Utility Commission of Oregon (Commission) requesting arbitration of an interconnection agreement (ICA or agreement) with Qwest Corporation (Qwest), pursuant to the Telecommunications Act of 1996 (Act). The parties agreed to waive the statutory timeline due to the number of arbitrations pending in different states. Pursuant to a revised schedule proposed by the parties and approved by the Arbitrator, Qwest responded to the petition on April 23, 2007.

Telephone conferences were held in this matter in April and June, 2007, to discuss various procedural matters. Standard Protective Order No. 07-178 was issued on July 7, 2007.

The arbitration hearing was rescheduled twice at the request of the parties. Rounds of testimony were filed on May 11, May 25, and June 8, 2007. The hearing was held on August 14, 2007, in Salem, Oregon. Post-hearing briefs were filed by the parties on October 26, 2007.

On March 26, 2008, the Arbitrator issued a decision, attached to this order as Appendix A. Eschelon and Qwest filed exceptions to the Arbitrator's Decision on April 29, 2008.

On May 5, 2008, Qwest filed objections to the exceptions filed by Eschelon regarding Issue 22-90 (Interim rates). Eschelon responded to Qwest's objections on the same date. The Arbitrator subsequently agreed to the parties' proposal to file additional comments regarding the interim rate issue. Qwest and Eschelon filed additional comments on May 13 and May 27, 2008, respectively.

Statutory Authority

The standards for arbitration are set forth in 47 U.S.C. §252(c):

> In resolving by arbitration under subsection (b) any open issues and imposing conditions upon the parties to the agreement, a State commission shall--
>
> (1) ensure that such resolution and conditions meet the requirements of section 251, including the regulations prescribed by the [Federal Communications] Commission pursuant to section 251;
>
> (2) establish any rates for interconnection, services, or network elements according to subsection (d); and
>
> (3) provide a schedule for implementation of the terms and conditions by the parties to the agreement.

Qwest Exceptions.

Issue 5-9 – Definition of "Repeatedly Delinquent" – Frequency of Delinquency.

This issue is addressed at pages 25-27 of the Arbitrator's Decision. The dispute between the parties relates to how often Eschelon may be delinquent in payments before Qwest may require a security deposit. The Arbitrator adopted Eschelon's proposal that payment is "repeatedly delinquent" and therefore subject to a security deposit demand if it is made more than 30 days after the due date for three consecutive months. Qwest proposed to define "repeatedly delinquent" to mean payment of any undisputed amount more than 30 days after the payment due date, three or more times during a 12-month period on the same billing account number. This language is contained in the Oregon SGAT as well as in Qwest's Oregon ICAs with AT&T and Covad.

The Arbitrator found that Eschelon's proposal is more clearly designed to protect against the risk of nonpayment, whereas Qwest's language is better designed to encourage timely payment. The Decision also holds that (a) the late-payment penalties already included in the ICA adequately address Qwest's concerns regarding untimely payment, and (b) security deposits should be implemented with caution because of the potential to jeopardize Eschelon's cash flow and operations. The record shows that the "three consecutive month" standard adopted by the Arbitrator is consistent with a decision recently entered by the Minnesota Commission in the Eschelon/Qwest arbitration in that state. It is also included in Qwest ICAs in Utah and Washington. [1]

In its exceptions, Qwest reiterates that the Arbitrator's Decision on this issue differs from the language included in the Oregon SGAT and other Qwest ICAs in Oregon. It also contends that there is no support for the conclusion that Qwest's proposal is designed to prevent slow payment rather than nonpayment and emphasizes that the deposit requirement is only triggered for failure to pay undisputed bills. In addition, Qwest maintains that the three-consecutive month rule "is an extremely high standard – one that is so high, that, if the situation arose, Qwest would likely be forced to seek disconnection rather than take the more intermediate and less drastic step of demanding a deposit."[2]

The purpose of imposing a security deposit is to protect Qwest from financial loss in circumstances where it faces a legitimate threat of nonpayment. Under the ICA, the maximum deposit amount is equal to two months' charges, making it important to limit deposits to circumstances where they are truly necessary.[3] Qwest's proposed language would allow it to impose a deposit if Eschelon's payment is late three times in a 12-month period. At the hearing, Qwest testified that Eschelon has a history of late payment and asserted that its proposal will provide "the proper incentive for timely payment."[4]

We agree with the Arbitrator that Qwest's proposal is better suited toward ensuring timely payment than it is toward protecting against the risk of nonpayment. Under Qwest's proposed language, Eschelon could be forced to pay a deposit where it makes regular payments that are occasionally overdue. As the Arbitrator recognized, however, the threat of nonpayment does not exist in those circumstances, and the late-payment charges in the ICA are the appropriate mechanism for addressing "slow-pay" situations. We are persuaded that the "three consecutive month" standard adopted by the Arbitrator is reasonable.

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[1] Eschelon/9, Denny/93.

[2] Qwest Exceptions at 4.

[3] The record does not disclose the charges paid by Eschelon in Oregon. Eschelon pays Qwest approximately $55 million per year in all states in which it does business. Qwest Exceptions at 3, citing Eschelon/133, Denny/46.

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

Issue 9-61 and subparts (a)–(c) – Loop Multiplexing Combinations.

This issue is addressed at pages 55-59 of the Arbitrator's Decision. The dispute between the parties relates to whether a Loop Multiplexing Combination (LMC) is a UNE that must be provided at TELRIC rates pursuant to the Act. Although LMC is currently made available to CLECs at Commission-approved TELRIC rates, Qwest contends that the FCC and a number of state regulatory agencies have recently concluded that LMC is not a UNE. Eschelon disagrees.

The Arbitrator stated:

> From a procedural standpoint, this issue presents essentially the same problem posed by Qwest's suggested treatment of UCCRE; that is, Qwest wants to discontinue a product that has been made available to Eschelon and other CLECs at Commission-approved TELRIC rates. Again, the trouble with this approach is that other CLECs are deprived of the opportunity to contribute to the outcome because they cannot participate in this arbitration proceeding.[5] To correct this situation, Qwest should request a simultaneous amendment of its ICAs to reflect its interpretation of the law regarding multiplexing and LMC. This will enable all interested CLECs to weigh in on the matter, and, to the extent the parties cannot reach agreement, allow the issue to be resolved via the dispute resolution process set forth in the ICAs.
>
> Even if there were no procedural obstacles to Qwest's approach, there remain outstanding questions regarding the FCC's stance on multiplexing when provided as part of a loop-mux combination. As demonstrated above, the FCC has made a number of statements regarding multiplexing that are susceptible to different interpretation. A more extensive factual and legal examination of this issue is necessary before the Commission (or other decision-making body) can make a fully informed decision on this matter.

In its exceptions, Qwest reiterates that the Commission should decide in this arbitration proceeding that LMC is not a UNE. Although Qwest makes cogent arguments in support of its position, we find that the procedural approach recommended by the Arbitrator is more reasonable, particularly in view of the fact that LMC is currently

[5] OAR 860-016-0030(6) provides that only the two negotiating parties will have full party status in an arbitration proceeding before the Commission.

made available to other CLECs at Commission-approved TELRIC rates. At the same time, we believe that Qwest should be held harmless until such time as a final determination is made regarding the legal status of LMC service. Accordingly, the charges for any LMC service provisioned by Qwest from the date of this order until a final and unappealable decision is rendered shall be subject to true-up.

Issues 12-71, 12-72, and 12-73 – Jeopardies.

This issue is addressed at pages 67-71 of the Arbitrator's Decision. The dispute between the parties centers around Eschelon's proposal to include language in the ICA classifying jeopardies and requiring Qwest to send a Firm Order Confirmation or "FOC" at least a day before the attempted delivery of service. The Arbitrator adopted Eschelon's proposals.

In its exceptions, Qwest challenges the decision to require a FOC "at least a day before" the attempted delivery of service. Qwest argues that the Arbitrator incorrectly concluded that there was substantial evidence in the record demonstrating that Qwest had already committed to provide a FOC one day in advance of service delivery.

The Commission finds that the Arbitrator's Decision on this issue should be affirmed. The decision details several reasons why Eschelon's proposal is superior to Qwest's. All of these reasons are persuasive. Moreover, despite Qwest's claim to the contrary, there is sufficient evidence in the record to justify the Arbitrator's conclusion that the weight of the evidence supports Eschelon's position regarding Qwest's commitment to provide advance notice.[6]

In affirming the Arbitrator's Decision on this issue, it is important to reemphasize that if Qwest and Eschelon are able to clear a Qwest-caused jeopardy and deliver service on the original due date without a FOC or with an untimely FOC, it will not count as a missed Qwest commitment for purposes of the performance indicators (PIDs) in Qwest's Performance Assurance Plan (PAP). The "one-day" notice requirement ensures that Eschelon will have an adequate opportunity to prepare to receive service, and further that it will not be penalized (by receiving a CNR and delayed service due date) under circumstances where a Qwest jeopardy cannot be cleared and a new FOC has not been issued.

[6] Appendix A at 71, ftn. 207.

Eschelon Exceptions.

Issues 1-1 and 1-1(a)-(e) – Interval Changes and Placement.

This issue is addressed at pages 7-11 of the Arbitrator's Decision. The dispute deals with whether certain service provisioning intervals should be addressed in the Change Management Process (CMP)[7] or, alternatively, included in the ICA. Service provisioning intervals are extremely important to Eschelon because they directly impact the quality of service provided to customers and ultimately the success of its business operation. Eschelon seeks to include service intervals in the ICA to provide a greater level of business certainty and to prevent Qwest from unilaterally increasing intervals through the CMP.

The Arbitrator found that the CMP includes procedures that can be readily implemented by Eschelon to protect itself against unilateral changes in service intervals. This fact, together with the fact that service intervals are rarely lengthened, persuaded the Arbitrator to find that service intervals currently addressed in the CMP need not be included in the ICA.

Eschelon challenges the Arbitrator's Decision regarding service intervals. It argues, *inter alia*, that the decision misapprehends Eschelon's need for business certainty, misconstrues the interrelationship between the ICA and the governing CMP Document, and inaccurately suggests that the decision will reduce the prospect of litigation. In addition, Eschelon emphasizes that other states have concluded that service intervals should be included in the ICA.

Upon review, the Commission concludes that the Arbitrator's Decision regarding Issue 1.1 is reasonable and should be affirmed. We find that the decision provides Eschelon with the requisite level of business certainty, as well as protection from the possibility of unilateral action on Qwest's part. As emphasized by the Arbitrator, it is very rare for Qwest to seek to lengthen a service interval. If Qwest should propose such a change, the CMP provides a ready means of postponing the change until it can be reviewed by an independent decision maker. This process can be easily implemented by Eschelon and produces a decision without delay or unnecessary expense.

Eschelon's claim that the Arbitrator's Decision is inconsistent with Section 1.0 of the governing CMP Document (defining the relationship between the ICA and CMP) is misplaced.[8] The decision does not require that service intervals currently included in the ICA must now be dealt with in the CMP. Rather, it merely states that service intervals currently included in the CMP shall remain subject to that process. As the Arbitrator noted, the decision merely retains the status quo regarding the treatment of service provisioning intervals.

[7] The CMP is discussed at length in the Arbitrator's Decision. See Appendix A at 2-7.

[8] Section 1.0 of the governing CMP Document is set forth in Appendix A at 7.

Issue 22-90 – Unapproved Rates.

This issue is addressed at pages 75-77 of the Arbitrator's Decision. The dispute between the parties concerns whether the ICA should include procedures for establishing rates where Commission-approved rates do not exist. Eschelon proposed including Sections 22.6.1 and 22.6.1.1 in the ICA, requiring that Qwest obtain Commission approval before charging for a UNE or process that it previously offered without charge. The Arbitrator did not adopt Eschelon's proposals, citing several concerns with the recommended language.

In its comments, Eschelon proposes simplifying Section 22.6.1 as follows:

> 22.6.1 Qwest shall obtain Commission approval before charging for a UNE or process that Qwest has provided previously at no additional charge. Qwest may request a generic cost proceeding pursuant to Commission rules and procedures or, if the rate is negotiated, may request Commission approval of an amendment to this Agreement.

The Commission finds that the revised language proposed by Eschelon effectively eliminates the concerns raised by the Arbitrator while retaining the basic concept that Qwest should obtain Commission approval before charging for a UNE or process previously offered without charge. We agree with Eschelon that such a requirement is reasonable and appropriate. Moreover, we agree that it will minimize the likelihood of complaint proceedings to litigate rate changes arising from this particular scenario. Accordingly, we conclude that Eschelon's revised language for Section 22.6.1 should be included in the ICA.

Issue 22-90(b)-(ae) – Rate Levels.

This issue is addressed at pages 77-82 of the Arbitrator's Decision. Both Qwest and Eschelon agree that the Commission should adopt interim rates for numerous products and services currently provided under unapproved rates. They further agree that the interim rates should remain in effect until permanent rates are established in a comprehensive cost study docket. The dispute relates to the methodology that should be used to develop the interim rates.

Qwest proposed that interim rates be established using TELRIC-based rates approved by the New Mexico Public Utility Commission in its 2005 wholesale cost docket. Alternatively, Eschelon recommended interim rates based on a number of different methodologies. For reasons unnecessary to repeat here, the Arbitrator rejected the interim rate methodologies proposed by the parties and instead recommended establishing interim rates using an average of all commission-approved rates within Qwest's service territory, excluding the highest and lowest rates from the calculation.

In its exceptions, Eschelon continues to support its original interim rate proposals. If, however, the Commission decides to use the Arbitrator's methodology, Eschelon recommends the following modifications:[9]

- Where Arbitrator's method produces a rate that is higher than Eschelon's proposed rate but lower than Qwest's proposed rate, the Arbitrator's proposed rate should be adopted

- Where Arbitrator's method produces a rate higher than Qwest's proposed rate, Qwest's proposed rate should be adopted[10]

- Where Arbitrator's method produces a rate lower than Eschelon's proposed rate, Eschelon's rate should be adopted[11]

In support of its proposals, Eschelon states that:

> It is reasonable to expect that an interim rate adopted by the Commission, if not either of the proposals made by the parties, would at least fall somewhere in between them. In other words, ***as a guiding principle, the rate proposals made by each party in this case should define the lower and upper bounds of the interim rate***. (Emphasis in original.)[12]

[9] Eschelon classifies the interim rate proposals into two broad categories: (1) 108 rates in the "expected" scenario in which Qwest has proposed a rate that is higher than Eschelon; and (2) 29 rates in the "irregular" scenario in which Qwest's proposed rate is lower than Eschelon's proposed rate, for a total of 137 disputed rates. The recommendations listed immediately below apply to the expected scenario. Eschelon contends that logic dictates that all 29 rates in the irregular scenario should be based on Qwest's proposed lower rate. Eschelon Exceptions at 29, Eschelon Surreply at 7-8, ftn. 27.

[10] According to Eschelon, the Arbitrator's method produces a rate greater than Qwest's proposed rate in 63 cases.

[11] According to Eschelon, the Arbitrator's method produces a rate lower than Eschelon's proposed rate in 16 cases.

[12] Eschelon Exceptions at 30.

Qwest opposes Eschelon's proposed modifications to the Arbitrator's interim rate methodology. Under Eschelon's approach, nearly half of the disputed rates would be based on the New Mexico rates originally proposed by Qwest, since those rates are lower than the regionwide average calculated using the Arbitrator's method.[13] Qwest asserts that:

> This is indeed ironic, since it was Eschelon who loudly protested during the arbitration that no rates should be based upon New Mexico. According to Eschelon, it would be improper to base rates on one state, particularly a state like New Mexico that, according to Eschelon, bears no similarity to Oregon. It is obvious why Eschelon has abandoned the principles it espoused in challenging Qwest's New Mexico proposal. In many cases, the New Mexico rates are lower than the region-wide averages (reflecting the reasonableness of Qwest's original proposal), and Eschelon is willing now to adopt those rates because it is more interested in the lowest possible rates than in pricing principles and consistency of methodology.[14]

In its surreply comments, Eschelon rejects Qwest's characterization of its proposed modifications to the Arbitrator's interim rate methodology. It disputes Qwest's claims regarding methodological inconsistency and contends that all of the interim rate proposals forwarded for consideration incorporate more than one methodology. Eschelon also denies that its proposed modifications are designed to produce the lowest rates possible. Rather, it states:

> [I]f the Arbitrator's methodology is used, modifying it to reflect the guiding principle will help balance out the use of several low density states (including New Mexico) that do not closely approximate costs in Oregon. This does not mean, if the Arbitrator's methodology is used, that there will be no New Mexico rates (despite Eschelon's objections in the case to them), but it does mean that some balance will be added to the methodology to account for the use of multiple low density states.[15]

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[13] In contrast, Eschelon's proposed rates would serve as a price floor for only 16 rates. Eschelon's modifications would therefore result in 47 rates (63 minus 16) that are lower than those produced by the Arbitrator's method. Qwest Response at 3.

[14] *Id*. at 2.

[15] Eschelon Surreply at 10.

The Commission finds that the averaging approach recommended by the Arbitrator for calculating interim rates is reasonable and should be adopted. We agree that the Arbitrator's proposal effectively addresses the concerns raised regarding the competing proposals advanced by Qwest and Eschelon.

Eschelon recommends that the rates resulting from the Arbitrator's method should be constrained within the upper and lower limits of the parties' original proposals as described above. We see no need to integrate elements of the parties' original proposals into the methodology proposed by the Arbitrator.[16] More specifically, we question whether it is appropriate to extract out individual rates from a particular proposal in order to constrain the results of an entirely different methodology. For example, there are a number of instances where Eschelon's proposed modifications would establish the recurring rate for a product/service using one methodology and the nonrecurring rate for the same product/service using another. Using different methodologies to establish the recurring and the nonrecurring rates of a particular service is inconsistent with the general principles of rate development and increases the possibility that the overall rate will not be compensatory and that a larger disparity between interim rates and final rates will result.

Eschelon also argues that its proposed modifications are necessary to "balance" the results produced by including the rates from low density states in the Arbitrator's methodology. The Commission is not persuaded that the Arbitrator's method necessarily results in the imbalance suggested by Eschelon. While there is information in the record relating to line density, number of lines, number of wire centers, etc., in different Qwest states, that evidence is insufficient to support the assertion that Qwest's Oregon costs closely approximate those in New Mexico (as proposed by Qwest) or those in Qwest's five largest states (as proposed by Eschelon). The Arbitrator's method mitigates these concerns by averaging out the rates from all of the Qwest states, while eliminating the highest and lowest rates from the equation.

Both parties appear to acknowledge that establishing interim rates in an arbitration proceeding is at best an imperfect process, due in large part to the limited data that can be produced within the time frame allowed. In view of these constraints, the principal question facing the Commission is not whether it is somehow possible to adjust the methodology recommended by the Arbitrator to make it "better" (at least in Eschelon's view), but rather whether that methodology will produce reasonable results that can be implemented in a fair and unbiased manner until permanent rates are established. The Commission concludes that the Arbitrator's method satisfies these requirements and should be adopted.[17]

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[16] On page 5 of its Surreply, Eschelon characterizes the Arbitrator's interim rate proposal as incorporating "multiple methodologies." This argument is clearly a stretch. With limited exceptions designed to accommodate special circumstances, the Arbitrator recommends using a single approach to establishing interim rates.

[17] Eschelon points out that there are seven cases for which the Arbitrator's methodology produces no rate. In such cases, the Commission finds that the interim rate should be calculated by averaging Qwest's proposed rate with Eschelon's proposed rate.

Commission Investigations.

The Arbitrator recommends that the Commission initiate a cost study docket to establish permanent rates for Section 251 products and services, as well as investigations relating to UNE conversions and commingled arrangements. See Appendix A at pp. 42-44, 53-55, 77-83. The Commission agrees with the Arbitrator's recommendations and hereby opens investigations into these matters. The PUC staff and the Administrative Hearings Division shall determine the appropriate procedures for notifying interested persons and conducting the investigations.

ORDER

IT IS ORDERED that:

1. The Arbitrator's Decision in this case, attached to and made part of this Order as Appendix A, is adopted as modified herein.

2. Within 30 days of the date of this Order, Qwest and Eschelon shall, in accordance with the provisions of OAR 860-016-0030(12), file an interconnection agreement complying with the terms of the Arbitrator's Decision as modified herein.

Made, entered and effective JUL 07 2008.

Lee Beyer
Chairman

Ray Baum
Commissioner

John Savage
Commissioner

A party may request rehearing or reconsideration of this order pursuant to ORS 756.561. A request for rehearing or reconsideration must be filed with the Commission within 60 days of the date of service of this order. The request must comply with the requirements in OAR 860-014-0095. A copy of any such request must also be served on each party to the proceeding as provided by OAR 860-013-0070(2). A party may appeal this order by filing a petition for review with the Court of Appeals in compliance with ORS 183.480-183.484.

ISSUED: March 26, 2008

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

ARB 775

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Statutory Authority.

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>
> (2) establish any rates for interconnection, services, or network elements according to subsection (d); and
>
> (3) provide a schedule for implementation of the terms and conditions by the parties to the agreement.

In addition, Section 252(e)(3) of the Act permits the Commission to establish or enforce other requirements of state law in its review of an ICA, provided such requirements are consistent with the Act and the FCC's regulations.

Disputed Issues.

During the course of the proceeding, the parties successfully resolved several issues. The issues remaining in dispute are identified in the 126-page Disputed Issues List filed by the parties on October 5, 2007. Attachment A of this decision summarizes the disposition of each disputed issue.

The Change Management Process.

Several of the disputed issues in this arbitration relate to whether certain processes and procedures should be addressed in the ICA or outside of the contract through Qwest's Change Management Process (CMP). The CMP is a mechanism for managing changes to Operations Support System (OSS) interfaces, products, and services. It was developed jointly by Qwest and a number of competitive local exchange carriers (CLECs), including Eschelon, and is governed by the Wholesale Change Management Document (CMP Document).[1] Section 1 of the CMP Document explains that the CMP "provides a means to address changes that support or affect pre-ordering, ordering/provisioning, maintenance/repair and billing capabilities and associated documentation and production support issues for local services (local exchange services) provided by CLECs to their end users."

Qwest contends that matters relating to Interval Changes and Placement (Issue 1-1), Jeopardies (Issues 12-71 – 12-73), Expedited Orders (Issue 12-67), Controlled Production (Issue 12-87), and Root Cause & Acknowledgement of Mistakes (Issue 12-64) (hereafter also, "the process-related issues"), inherently belong in the

[1] The CMP Document is included in the record as Eschelon Exhibit/53 and Qwest Exhibit 2.

CMP rather than in the ICA.[2] As an incumbent local exchange carrier (ILEC) providing wholesale services to hundreds of CLECs, Qwest emphasizes that its basic procedures—ordering, provisioning, billing, and network access – should be uniform from one CLEC to another. Standardization is essential not only to ensure nondiscriminatory treatment, but also to provide efficient and effective service to the numerous CLECs served by Qwest.

Qwest emphasizes that the CMP is a product of its 47 U.S.C. Section 271 approval process and has been approved by the FCC and all of the 14 states in which it provides service. It states that Eschelon's proposal ignores this industry consensus and would require Qwest to make significant changes to its ordering, provisioning, billing, and network access processes and systems without compensating Qwest for the associated costs in violation of §252(c) and (d) of the Act. It would also impose administrative burdens because Qwest and Eschelon would have to execute an ICA amendment or adoption letter every time Qwest seeks to change a procedure currently governed by the CMP. Because Eschelon's proposal would impair Qwest's ability to make changes in a timely and efficient manner, the Commission should require a compelling justification from Eschelon before it authorizes these procedures to be addressed outside of the CMP.

Qwest also points out that the CMP provides CLECs with ample opportunity to participate in the development of products and processes. In the case of Qwest-initiated changes, CLECs are notified and have the opportunity to comment on the proposed change.[3] If the proposed changes will have an effect on CLEC operating procedures, Qwest must respond to any CLEC comments prior to implementing the change. If a CLEC does not accept Qwest's response, it may seek postponement of the proposed change (Section 5.5), escalate the dispute, or pursue dispute resolution pursuant to procedures set forth in the CMP Document. See Sections 5.5, 14.0, and 15.0.

Eschelon contends that it needs, and is legally entitled to, certainty and reliability in its business relationship with Qwest. In order to achieve this, procedures relating to ordering, provisioning, billing, and network access must be addressed in the ICA rather than in the CMP. Since Qwest is the only source for certain products and services that Eschelon requires to serve its customers, there is an imbalance in the parties' business relationship that leaves Eschelon with very little leverage.

Eschelon maintains that the CMP does not provide the requisite level of business certainty it needs to effectively compete because there is nothing in the CMP to prevent Qwest from unilaterally making changes over the objections of CLECs. Despite Qwest's arguments to the contrary, Eschelon argues that Qwest is not obligated to

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[2] Eschelon Brief at 1, ftn. 1.

[3] The CMP Document specifies five levels of Qwest-originated product/process changes, together with the notice and implementation timelines associated with each level. CMP Document at Section 5.4 and subparts. See also Qwest/1, Albersheim/12-14.

withdraw changes in the CMP even in the face of unanimous CLEC opposition, and, in fact, has implemented important changes over CLEC objection on more than one occasion. The CMP also treats CLECs unequally. For example, unlike Qwest, CLECs cannot implement changes by simply giving notice. Instead, it is entirely up to Qwest to decide whether and how to implement a CLEC-requested change.

Eschelon denies Qwest's claim that the primary purpose of the CMP is to create uniform processes and a centralized mechanism for handling those processes. It points out that Section 1 of the CMP Document specifically acknowledges that individual ICAs may contain terms that conflict with changes implemented through the CMP, and that, in such circumstances, the ICA governs. Furthermore, the provisions of the Act, applicable FCC decisions, and Qwest's own advocacy all affirm that ICAs must be appropriately tailored to meet the specific needs of the CLEC party in order to ensure a meaningful opportunity to compete.

For similar reasons, Eschelon also disputes Qwest's claim that including process/procedure issues in the ICA will give Eschelon veto power in the CMP. Noting that different CLECs have different ICA terms, Eschelon points out that Qwest did not reject or forgo the CMP processes that differed from contract terms in ICAs with other CLECs. In other words, Qwest has shown that it is capable of accommodating contract terms that differ from the CMP consistent with Section 1 of the CMP Document. Moreover, Eschelon claims that it is Qwest who is guilty of exercising veto power by implementing the CMP changes over CLEC objection.

In addition, Eschelon challenges Qwest's claim that the CMP provides CLECs with satisfactory recourse when disagreements occur. It contends that the opportunities within the CMP to escalate or postpone disputed matters offer CLECs very little protection and often end up with Qwest making the final decision.[4] Eschelon emphasizes that Section 15 of the CMP Document expressly allows CLECs to move outside the "CMP loop" by opting to have the Commission resolve disputes. Including procedure/process issues within the ICA would ensure that, when disputes arise, the final decision is made by the Commission rather than Qwest.

Eschelon also disagrees with Qwest's contention that, based on the history of the CMP, the Commission should require Eschelon to demonstrate a compelling justification for altering "existing processes" (*i.e.*, those implemented via the CMP), and locking them into the ICA.[5] It states that Qwest has not cited any authority to support its "burden-shifting argument" and asserts the proper inquiry is whether its proposed contract terms satisfy applicable federal and state statutes and regulations.[6] In addition, Eschelon points out that Qwest's view of CMP history is not shared by the Minnesota

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[4] See, *e.g.*, Eschelon/1, Starkey/45; Eschelon/123, Starkey 41-44.

[5] Qwest/1, Albersheim/8; Eschelon/123, Starkey/6-7.

[6] Eschelon Brief at 15.

Commission, which held 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."[7]

In addition to the concerns mentioned above, Eschelon claims that Qwest has offered no test to distinguish contract terms dealing with "process and procedure" from other contract matters, making it difficult for the Commission to determine which matters should be included in the CMP rather than in an ICA.[8] Eschelon points out that the proposed ICA is replete with agreed-upon language that describes the "manner in which something is accomplished" and could be described as a "process."[9] In support of this argument, Eschelon states:

> 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. 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

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[7] *In the Matter of the Petition of Eschelon Telecom, Inc., for Arbitration of an Interconnection Agreement with Qwest Corporation Pursuant to 47 U.S.C. §252(b) of the Telecommunications Act of 1996*, MPUC No. P-5340, 421/IC-06-768, Arbitrator's Report at ¶22; affirmed by Minnesota Public Utilities Commission March 30, 2007. The Minnesota Arbitrators' Report [MN Arb Rpt] and the Minnesota PUC Order [MN Arb Order] were included in the record as Eschelon/29 and Eschelon/30, respectively. See also, Eschelon Brief at 15-16.

[8] In applying Qwest's proposed standard, Eschelon states that "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.'" Eschelon Brief at 30, citing *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 Rcd. 19337 at ¶8 (rel. October 4, 2002) ("*Qwest Declaratory Ruling*").

[9] Eschelon emphasizes that the FCC has said that processes and procedures are appropriate content for ICAs:

> Individual incumbent LEC and competitive LEC arrangements governing ***the process and procedures*** for obtaining access to an UNE to which a competitive LEC is entitled, are more appropriately addressed in the context of individual interconnection agreements pursuant to section 252 of the Act. Eschelon Brief at 30-31; citing *Unbundled Access to Network Elements, Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313, CC Docket No. 01-338, Order On Remand, 20 FCC Rcd. 2533 (rel. February 4, 2005) (*Triennial Review Remand Order* or *TRRO*) at ¶358.

> abstract and ambiguous standard, but based on the evidence concerning the specific business needs that those provisions are intended to address. (Footnotes omitted.)[10]

As a final matter, Eschelon asserts that Qwest's proposal to relegate "process and procedure" issues to the CMP is a results-oriented approach that allows Qwest to pick and choose which issues must go through the CMP. For example, Eschelon alleges that Qwest agreed to include process details relating to testing in the Covad/Qwest ICA rather than in the CMP, because the latter approach would have subjected Qwest to additional expense. Eschelon stresses that "Qwest's decision to label a change as a matter of 'process' does not mean that the CMP is the only appropriate forum for addressing that change."[11]

Decision. It is understandable that Qwest would want to have pre-ordering, ordering/provisioning, maintenance/repair, and billing issues governed by the CMP as opposed to individual ICAs. Qwest serves multiple CLECs in 14 different states and requires a certain level of standardization in order to provide these products/services in an efficient and cost-effective manner. Since CLECs participated in the development of the CMP, it is reasonable to assume that they also recognize that standardized processes enure to their benefit.

At the same time, Eschelon is correct that the CMP is not the exclusive mechanism for dealing with process-related issues. The structure and purpose of the Act contemplate that ICAs will be tailored to accommodate specific CLEC needs in order to provide those carriers a meaningful opportunity to compete. The FCC has affirmed the individualized nature of ICAs, as well as the fact that process and procedure issues are appropriately included in such agreements. As Eschelon points out:

> Had Congress intended that the interconnection agreement be a 'one size fits all' documents (sic), it would have provided the SGAT as the sole means by which terms and conditions of interconnection would be made available by ILECs. That it did not do so shows that Congress recognized the need for individual CLECs to be able to

[10] Eschelon Brief at 31.

[11] *Id.* at 32. In this context Eschelon notes that the Arizona Commission rejected Qwest's attempt to impose construction charges for line conditioning/reconditioning through the CMP without prior Commission approval. *Id.*, citing *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*").

> enter into agreements that are specific to their particular competitive needs."[12]

Consistent with this construction of the Act, Section 1 of the CMP Document recognizes that the terms and conditions of ICAs may differ from changes implemented through the CMP:

> 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.

This section of the CMP Document was examined in the recently decided Eschelon/Qwest arbitration proceeding in Minnesota. I concur with the Minnesota Arbitrators' finding that the CMP Document "permit[s] the provisions of an ICA and the CMP to coexist, conflict, or potentially overlap."[13] I also agree with their conclusion 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, nondiscriminatory and in the public interest."[14]

For these reasons, the disputed process-related issues should not necessarily be confined to the CMP as proposed by Qwest. Instead, each issue must be evaluated on its merits to determine if it is more appropriately included in the parties' ICA.

Issue 1-1 and 1-1(a)-(e) -- Interval Changes and Placement.

Issue 1-1 and its subparts deal with whether the ICA should govern the service intervals within which Qwest provides products and services ordered by Eschelon. Qwest recommends that service intervals continue to be controlled by the CMP. Conversely, Eschelon proposes that service intervals currently posted on Qwest's

[12] Eschelon Brief at 26. Qwest concedes that ICAs have become "increasingly more tailored" "as CLECs have shaped their businesses to have a specialized focus, which is often necessary to survive in today's highly competitive telecommunications market." *Id.* at 28-29, Eschelon/132, Starkey/36.

[13] Eschelon/29, Denney/6; MN Arb Rpt. at ¶21.

[14] *Id.* at 7.

web-based Product Catalog (PCAT) or Service Interval Guide (SIG) be included in the ICA. Under Eschelon's proposal, Qwest would be allowed to shorten service intervals under the CMP, but could not extend them without amending the ICA.[15] Eschelon's alternative proposal would require Commission approval and an ICA amendment for all interval changes, not merely those instances when intervals are lengthened.

Subparts (a)-(e) of Issue 1-1 deal with interconnection trunks, unbundled dedicated interoffice transport (UDIT) facilities, local interconnection service (LIS) trunks, products/services provided on an individual case basis (ICB), and loop-multiplexing combinations (LMCs), respectively. Eschelon proposes that provisioning intervals for these services be included in Exhibit C of the ICA. As noted, Qwest contends that these intervals should be dealt with in the CMP rather than in the ICA. It proposes either deleting Eschelon's proposed language, or including language stating that the applicable intervals are listed in its PCAT or SIG website.

Eschelon maintains that service intervals must be included in the ICA in order to provide the business certainty it needs to compete effectively. As explained above, Eschelon asserts that the CMP provides Qwest with too much control, which it has used to serve its own purposes. Including service intervals in the ICA will eliminate Eschelon's primary concern; *i.e.*, Qwest's ability to implement unilateral changes regardless of CLEC comments or opposition. Eschelon asserts that its proposal will not harm Qwest or impair its flexibility to respond to industry changes, because ICA changes will only be required in the rare instance when intervals are lengthened.

Qwest emphasizes that the standardized processes implemented in the Section 271 approval process are an effective and efficient means of serving CLECs and complying with the numerous obligations imposed by state regulations, ICA terms, and performance standards. It is unreasonable to expect Qwest employees to follow widely varying obligations that may result from including service intervals in individual ICAs. Eschelon's proposal also entails significant administrative burdens because it requires Qwest to obtain ICA amendments or adoption letters in the event of an interval change. These obligations will hamstring potential changes to service intervals, despite the fact that no interval-related disputes have arisen out of the CMP and there is no evidence that Qwest has abused the CMP interval process in the past. Qwest contends that the Commission should not impose these burdens without significant justification.

Decision. Service provisioning intervals are extremely important to Eschelon because they determine how quickly it will be able to serve its end user customers. Longer intervals mean that customers must wait longer to receive service and can have a negative impact on customer perceptions of Eschelon's service quality. By including current service intervals in the ICA, Eschelon can represent with greater confidence that it will be able to provision service within a specific timeframe.

[15] Service intervals are set forth in Exhibit C of the ICA.

Qwest, on the other hand, has a significant interest in maintaining the integrity of the CMP process. Standardized processes enhance efficiencies in ways that benefit both Qwest and CLECs generally. The collaborative process underlying the CMP mechanism is also designed to resolve problems and implement procedural/process changes without the cost and delay associated with litigation.

That said, the dispute between the parties regarding intervals is largely academic. As Eschelon points out, it is "exceedingly rare" for Qwest to lengthen an interval.[16] Indeed, if the past is any indication of the future, it is very likely that the parties will never have occasion to contest this issue. Nevertheless, both Eschelon and Qwest raise concerns that make it necessary to examine the consequences of each party's proposal in circumstances where Qwest seeks to lengthen a service interval.

The principal concern raised by Eschelon is the possibility that Qwest may use the CMP to unilaterally implement longer service intervals.[17] Although Qwest has never taken this particular course of action, Eschelon's apprehension is based on other instances where Qwest implemented the CMP changes unilaterally despite CLEC objections. That concern is evident in the decision rendered in the recent Eschelon/ Qwest Minnesota arbitration:

> 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.[18]

While I agree that Eschelon deserves protection from unilateral action on Qwest's part, my analysis of the circumstances surrounding this issue yields a result different from that obtained in Minnesota. The CMP Document includes a comprehensive set of procedures that can be implemented expeditiously and afford Eschelon the assurance that service intervals will not be increased without having first been reviewed by an impartial decision maker in a proceeding involving all interested

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[16] Since Qwest obtained Section 271 approval, it has shortened intervals 39 times and lengthened intervals only once. Eschelon Brief at 35, ftn. 177.

[17] Eschelon Brief at 34.

[18] MN Arb Report at ¶22.

parties.[19] Specifically, Section 5.5 of the CMP Document authorizes a CLEC (or multiple CLECs) to request postponement of a Qwest-originated product/process change.[20] If Qwest denies the request, it cannot implement the proposed change for 30 calendar days.[21] Upon receipt of notice of Qwest's denial, the CLEC(s) may invoke the dispute resolution process and request that a neutral arbitrator postpone implementation of the change until the matter is resolved. A CLEC can initiate both the dispute resolution process and the interim postponement process by simply sending an email to Qwest.[22] Qwest must respond to the request for interim postponement within two business days, and all parties must file position statements one business day after an arbitrator is selected.[23] The arbitrator must then issue a written decision within five days after receipt of the parties' position statements.

The ability of an independent arbitrator to suspend implementation of a Qwest-initiated change pending a comprehensive review of the overall dispute adequately protects Eschelon from Qwest taking unilateral action regarding service intervals.[24] Put differently, allowing service intervals to remain in the CMP will not deprive Eschelon of the assurance that it will receive a fair and unbiased review of its position regarding any service interval dispute that arises in the future. The process guarantees Eschelon that it will be able to conduct its business operations without the threat of unilateral action by Qwest.

In contrast, removing service intervals from the CMP and including them in Eschelon's ICA would impose a burden on Qwest if it ever needs to lengthen a service interval. In the event of an impasse between the parties, Qwest would be required to seek a contract amendment from Eschelon and any other CLEC that opts into Eschelon's ICA in the future.[25] The magnitude of this undertaking is significantly more

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[19] Eschelon has emphasized that "the problem arises [in the CMP] when it is clear that Qwest and the CLEC disagree and therefore a CLEC desires a decision maker *other than Qwest*." Eschelon Brief at 14. (Emphasis in original.)

[20] The Section 5.5 process described here applies to Level 3 and Level 4 CMP changes. CMP Document, Sections 5.4.4.1 and 5.5.4; Eschelon/53, Johnson/43, 46. Increasing a service interval is considered a Level 4 change. CMP Document, Section 5.4.5, Eschelon/53, Johnson/43-44.

[21] CMP Document, Section 5.5.3.3.

[22] CMP Document, Sections 5.5.4.2 and 15.0.

[23] The CMP provides that the parties will stipulate to an "Agreed Arbitrators List." Qwest must accept an arbitrator chosen from the List. Section 5.5.4.2.

[24] Eschelon also has the option of foregoing dispute resolution under the CMP and seeking relief from a regulatory or legal arena. See CMP Document, Section 15.0; Eschelon/53, Johnson/101. Presumably, Eschelon could request a suspension of a proposed interval change in either of those forums, but without a guarantee that the matter would receive expedited consideration.

[25] Under Eschelon's proposed language, the parties would execute an interim advice letter that would allow Qwest to implement the longer interval on an interim basis until a final contract amendment is approved by the Commission. See Disputed Issues List at 1-3, Eschelon Proposed Interconnection

complicated and financially burdensome than the process available to Eschelon under the CMP, where all affected CLECs can use a single arbitrator to address a multistate dispute in a timely and cost-effective manner.[26]

While there may be valid reasons to depart from the CMP in certain circumstances, this is not one of them. The procedural protections offered by the CMP, coupled with the almost total absence of Qwest-initiated interval increases, effectively eliminate the possibility that there will be an adverse impact on Eschelon's ability to compete. These facts, together with the burdens that would otherwise be imposed on Qwest, argue in favor of maintaining the status quo. Accordingly, Qwest's proposed language for Issue 1-1 and subparts (a)-(e) is adopted.

Issues 2-3 and 2-4 -- Change in Law.

In Section 22.4.1.2 of the ICA, the parties agree to contract language providing that "Commission approved rates shall be effective as of the date required by a legally binding order of the Commission." They disagree concerning the extent to which Section 2.2 of the ICA should also address the effective date of Commission rate orders or other legally binding changes in law. Issue 2-3 concerns whether Section 2.2 should establish a default effective date where a Commission rate order fails to specify an effective date. In Issue 2-4, the parties disagree on when an amendment to the ICA incorporating a legally binding change in law takes effect if the order authorizing the change does not specify an implementation date.

The dispute in Issue 2-3 centers around Qwest's proposal to add the following language to Section 2.2 of the ICA:

> Rates in Exhibit A include legally binding decisions of the Commission and shall be applied on a prospective basis from the effective date of the legally binding Commission decision, unless otherwise ordered by the Commission.[27]

Qwest asserts that the foregoing sentence will remove any ambiguity regarding the effective date of Commission-approved rates.

Agreement, Exhibit M. See also, Section 5.30.2 of the ICA (detailing the procedures applicable in the event of an impasse over a proposed contract amendment.)

[26] See, CMP Document, Section 5.5.4 (allowing multiple CLECs to (a) seek interim postponement of the same proposed change in any given state, and (b) agree to use a single arbitrator to address an issue in all states); Section 5.5.4.4 (authorizing the arbitrator to decide the postponement issue for all states in which dispute resolution proceedings have been initiated.)

[27] Qwest also proposes to include this sentence in Section 22.4.1.2 of the ICA. Disputed Issues List at 14; Qwest Brief at 4-5.

For Issue 2-4, Qwest proposes that Section 2.2 include language stating that an amendment to the ICA incorporating a legally binding change would be effective on the date of the order pronouncing the change, but only if a party provides notice to the other party within 30 days of the effective date of the order. If neither party provides the notice within 30 days, the effective date of the change is the date of the ICA amendment unless the parties agree otherwise. Qwest asserts that its proposal provides an incentive for parties to take immediate action if they want to implement a change in law quickly. It also avoids financial risk by preventing parties from seeking retroactive application of legal changes. Qwest denies that its proposal unfairly requires Eschelon to keep track of legal changes.

Eschelon disagrees with Qwest's proposed amendments to Section 2.2, and offers two alternative proposals for resolving the disputes in Issues 2-3 and 2-4. The first proposal deletes all of the Qwest-proposed language for Section 2.2, except for the language already agreed upon by the parties.[28] Instead of Qwest's language, Eschelon would insert a sentence referencing Section 22, wherein Eschelon contends the issue is dealt with more completely.[29]

Eschelon's second proposal for Section 2.2 includes: (a) a statement obligating each party to ensure that the agreement is amended in accordance with a legally binding change in law; (b) the aforementioned reference to Section 22, along with additional language clarifying the relationship between Section 2.2 and Section 22; (c) a statement reserving the rights of each party with respect to effective dates, including the right to request that the Commission establish a specific date or provide other relief; and (d) a statement providing that if the "Commission enters an order that is silent on the issue, the order shall be implemented and applied on a prospective basis from the date that the order is effective either by operation of law or as otherwise stated in the order (such as 'effective immediately' or a specific date) unless subsequently otherwise ordered by the Commission or, if allowed by the order, agreed upon by the Parties."[30]

Eschelon's second proposal would also amend Section 22.4.1.2 regarding interim rates. The change would state that "each party reserves its rights with respect to whether Interim Rates are subject to true-up." If the Commission issues an order that is silent on the issue of a true-up, the rates would be implemented on a prospective basis from the effective date of the Commission decision. Qwest recommends that its proposed language for Section 2.2 also be included in Section 22.4.1.2.

Decision -- Issue 2-3. This dispute relates to when Commission-ordered rate changes take effect, including the situation where a Commission rate order does not specify an effective date for implementing the rates. As it happens, this is not a concern

[28] Agreed-upon contract language is also referred to as "closed language."

[29] Eschelon's proposed sentence reads as follows: "The rates in Exhibit A and when they apply are further addressed in Section 22."

[30] Disputed Issues List at 9-14; Eschelon/133, Denney/6.

in Oregon because all orders executed by the Commission include the words "Made, entered, and effective" immediately preceding the date the order is signed. Thus, there is no possibility that a Commission rate order will ever be silent regarding the effective date, because the order always takes effect on the date on which it is entered unless another effective date is specified in the order.[31] The Commission's practice is consistent with Oregon Revised Statute 756.565 which provides:

> All rates, tariffs, classifications, regulations, practices and service fixed, approved or prescribed by the Public Utility Commission and any order *made or entered* upon any matter within the jurisdiction of the commission shall be in force and shall be prima facie lawful and reasonable, until found otherwise in a proceeding brought for that purpose under ORS 756.610. (Emphasis added.)

Since the effective date of Commission rate orders is always clearly specified, there is no basis for the concerns articulated by the parties regarding this matter. Accordingly, it is unnecessary to adopt the contract language proffered by either party for Issue 2-3.

Decision -- Issue 2-4. This issue deals with changes in law, other than Commission-ordered rate changes, where the order pronouncing the change does not include an effective date. Qwest asserts its proposal is superior because it provides an incentive for parties to take action to ensure legal changes are implemented in a timely manner. It claims that Eschelon's language has too many "twists and turns" and increases financial exposure by allowing a party to take an indefinite amount of time to seek implementation of a change in law.

Eschelon, on the other hand, argues that Qwest's language allows a party to "game the system" by intentionally failing to give notice of legal changes that adversely affect its interests, thereby delaying the effective date of decision. This approach favors Qwest because it has greater resources and is more likely to be aware of changes in law. Eschelon further alleges that Qwest's proposed language is ambiguous and creates the potential for future disputes.[32]

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[31] It is not uncommon for the Commission to require that rates should be implemented on a date subsequent to the date the order is entered; *e.g.*, "30 days from the date of this order."

[32] For example, Eschelon notes that Qwest's language distinguishes between an order's "implementation date" and its "effective date," allowing Qwest to argue that where an order only specifies an effective date, it does not necessarily specify an implementation date. Eschelon Brief at 39.

From the standpoint of reducing business uncertainty and financial exposure, it is understandable that the parties would want the ICA to specify a method for dealing with changes in law that do not specify an effective date. For the reasons explained above, however, that problem does not exist with respect to orders entered by the Commission in Oregon. Unfortunately, the contract language proposed by the parties does not distinguish between legal changes pronounced by the Commission and those pronounced by other legislative, judicial, and regulatory bodies where there may be some ambiguity concerning the effective date of an order prescribing a change in law. Any attempt to identify and reconcile these differences would likely require substantial modifications to the proposed contract language.

Equally problematic is the potential for confusion generated by the proposed contract language. Although Qwest's language is perhaps less difficult to navigate than Eschelon's, both are subject to differing interpretations that are likely to result in future disputes. For this reason, the only proposed language that should be included in the ICA is Eschelon's recommendation to insert in Section 2.2 the statement that "[E]ach party has the obligation to ensure that the Agreement is amended accordingly." While this may not provide the parties with the level of protection from business uncertainty and financial risk they hoped to achieve, it nevertheless affirms the clear expectation that parties will not "sleep on" their legal rights but rather will take prompt action to ensure that legal changes are incorporated into the ICA.[33]

Issue 4-5 -- Design Changes.

A "design change" occurs when Eschelon submits a change to an order for a facility or service, requiring a Qwest engineer to determine if that facility/service should be provided in a manner different from that called for by the original order. Issue 4-5 relates to Qwest's proposed language for Section 9.3.8 which provides:

> Design Change rates for Unbundled Loops (unless the need for such change is caused by Qwest, in which case this rate does not apply.)

Eschelon is willing to accept Qwest's proposed contract language provided the ICA: (a) reflects that "loop design changes and [Connecting Facility Assignment] CFA changes[34] represent a form of access to UNEs which must be priced at cost-based rates,"[35] and (b) incorporates Eschelon's proposed interim rates

[33] Although Eschelon's proposal to amend Section 22.4.1.2 regarding interim rates is not adopted, it should be noted that there is no restriction on a party's right to request that the Commission order interim rates subject to true-up. As a practical matter, however, such a request should be made before interim rates are implemented in order to facilitate the tracking process required to properly apply the true-up.

[34] CFA changes are a type of design change. They are addressed in greater detail below.

[35] Eschelon Brief at 42.

for loop and CFA changes pending Commission approval of TELRIC-based rates for these activities.

Eschelon's position regarding this issue stems from a continuing dispute between the parties relating to Qwest's decision to begin assessing a separate design change charge for unbundled loops and CFA changes. Qwest began levying charges for these services in late 2005, after several years of not imposing any charge under the ICA.[36] Eschelon contends that these charges have not been approved by the Commission, and are not authorized by either the parties' existing ICA or Qwest's SGAT.[37]

Qwest responds that is entitled under the Act to recover the cost of providing products and services to CLECs, including the cost of loop-design and CFA changes. Despite Eschelon's claims to the contrary, Qwest asserts that it is authorized to recover these costs under the current ICA (and Oregon SGAT), and rejects the notion that it is precluded from levying design charges because it chose not to do so initially.[38] Furthermore, Qwest asserts that issues regarding the legality of charges assessed under its current contract with Eschelon are not proper subjects for an arbitration proceeding to establish a new agreement.[39]

Decision. There does not appear to be a serious dispute over whether Qwest is legally entitled to recover the costs it incurs to provide design changes for CLECs. Although Eschelon challenges the charges levied by Qwest for loop-design and CFA changes under their current contract, this arbitration is not the proper forum in which to assert claims relating to that issue. If Eschelon contends that Qwest has violated their existing ICA, its remedy is to file a complaint with the Commission pursuant to OAR 860-016-0050.

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[36] According to Eschelon, Qwest did not assess charges for loop-design or CFA changes between 1999 and September, 2005. Eschelon/9, Denney/44.

[37] Because Eschelon argues that the rate currently levied by Qwest on loop-design changes and CFA changes is not authorized under the parties' ICA, it contends that it should not have to pay anything for these design changes unless and until Qwest demonstrates that these costs are not recovered elsewhere (such as in recurring rates). For purposes of this ICA, however, Eschelon is willing to pay its proposed interim design change rates until the Commission establishes permanent rates.

[38] Qwest contends that, because the design change element is included in the Miscellaneous Charges section of Exhibit A in the parties' current ICA (and the SGAT), it encompasses design changes for all UNEs, not merely UDIT. Qwest/16, Million/6-7; Qwest Brief at 13. Eschelon disagrees with this interpretation and alleges that Qwest disavowed its position in the Eschelon/Qwest Minnesota arbitration proceeding. Eschelon/125, Denney/15-16, 23-24. As a result, Eschelon argues that Qwest should credit Eschelon and other CLECs with amounts paid for loop-design changes, and should not bill for such changes (including CFA changes) until those rates are authorized in an ICA. Qwest denies these assertions and, as noted, contends that it is improper to seek monies allegedly owed under the current contract in this arbitration docket. Qwest/43, Stewart/4.

[39] Qwest also asserts that because this issue was not raised in Eschelon's petition or addressed in Qwest's response, it is not an open issue subject to arbitration under Section 252 of the Act. Qwest Brief at 8.

Eschelon also states that the ICA must acknowledge that Qwest will provide design changes at cost-based rates. There is no dispute on this point either. Qwest has expressly committed in this arbitration that it will provide design changes to Eschelon under the new ICA at cost-based rates rather than tariffed rates.[40]

The more difficult issue relates to Eschelon's contention that costs incurred to provide design changes may already be recovered by Qwest in other rates. Although Qwest denies this claim, both parties appear to recognize that this question can only be resolved after a comprehensive Commission investigation of Qwest's underlying costs. They also acknowledge that it will take time to complete a cost-study docket and agree that the Commission should implement interim rates for the time being.[41]

Two interrelated issues remain. The first is whether the ICA should specify different charges for UDIT design changes, loop-design changes, and CFA changes. The second relates to the interim design change rates that should be adopted pending conclusion of a Commission cost-study docket and approval of permanent rates. Both issues are addressed below.

Issue 4-5(a) and (c) -- Design Changes/Rates.

Qwest proposes that the Commission adopt a single $51.76 design change rate based on the average cost of performing design changes for multiple products, including loops, transport (UDIT), and CFAs.[42] The proposed rate mirrors the design change charge adopted by the New Mexico Public Utility Commission in its 2005 nonrecurring cost-study docket.[43]

On the other hand, Eschelon asserts that there are significant cost differences associated with provisioning UDIT, loop, and CFA design changes, and that separate pricing is warranted for these services. Eschelon proposes rates of $58.27 for UDIT design changes, $30.00 for loop-design changes, and $5.00 for CFA changes.

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[40] Tr. at 84; Qwest Brief at 7.

[41] Tr. 212.

[42] Qwest initially proposed a rate of $130.10 for all design changes, but revised that rate to $51.76 consistent with the design change charge approved in New Mexico. Qwest/44, Million/13.

[43] As discussed below, Eschelon and Qwest disagree over whether the New Mexico design change rate is intended to apply to all types of design changes. Qwest asserts that references to the terms "end user premises" and "type of channel interface" in the design change description in the Executive Summary of the New Mexico cost study, confirm that it is intended to encompass other design changes, including loop and CFA changes. Qwest Exhibit 45. Qwest also notes that its design change rate "is contained in the Miscellaneous Charges section of the New Mexico SGAT, Exhibit A, just as it is in Oregon, and applies to all design changes requested or required by a CLEC. Qwest/39, Million/17-18; Qwest/44, Million/7, 9.

CFA changes. When a customer desires to obtain service from Eschelon rather than Qwest or another carrier, Eschelon submits a service order to Qwest. A Qwest engineer then connects the customer's loop to Eschelon's equipment collocated in Qwest's central office. To allow Qwest to make the connection, Eschelon provides Qwest with a CFA on the Interconnection Distribution Frame (ICDF) in the central office. Thus, the CFA is the specific location on the ICDF where the Qwest engineer connects the loop. Sometimes, however, Eschelon gives Qwest a CFA location on the ICDF that is incorrect. This requires Eschelon to submit a new CFA and, in turn, requires Qwest to redesign the order, or make a "CFA change."[44]

Eschelon seeks to establish a separate design change rate for CFA changes applicable to 2/4 wire analog loops, also referred to as "same day pair changes" (SDPCs). It proposes to pay an interim rate of $5.00 for each SDPC. Eschelon emphasizes that its proposal does not pertain to all CFA changes and "only applies in a situation in which both Eschelon and Qwest personnel are already working [a coordinated] cutover for a 2 wire/4 wire analog loop and there is a need for a design change to resolve a bad CFA" in limited circumstances."[45] Eschelon asserts that this type of CFA change is the most frequent design change to occur and the least expensive to perform. Compared with UDIT and loop-design changes, SDPCs require a minimal level of activity and can be performed in a matter of seconds or minutes.[46]

Eschelon asserts that the costs associated with CFA changes may already be recovered by Qwest in the rates paid by CLECs for coordinated installations. In any event, since SDPCs involve only one component of the loop installation process, the cost associated with this type of design change should be less than the underlying installation rate.[47] Qwest's proposed design change rate, however, is several times greater than the installation charge for a 2/4 wire analog loop.

Qwest contends that Eschelon's description of the CFA change process either ignores or oversimplifies the actual work required by Qwest personnel.[48] It states that Eschelon has not provided any meaningful evidence or cost support showing how it derived its proposed rates, nor has it demonstrated that those rates will adequately compensate Qwest for the costs incurred to perform design changes.

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[44] The CFA change process is also described at Eschelon/9, Denney/47-50 and Qwest/43, Stewart/5-6.

[45] More specifically, Eschelon's proposal "(1) applies only to 2/4 wire analog voice grade loops cutovers, (2) applies only to coordinated cutovers, (3) excludes batch hot cuts, (4) must be on the day of the cut, and (5) must be during test and turn up." Eschelon/9, Denney/55.

[46] *Id.* at 50-51.

[47] *Id.* at 49.

[48] Qwest/37, Stewart/5-6; Qwest/43, Stewart/5-6.

Qwest also denies Eschelon's claim that the cost of CFA changes is already included in Qwest's other installation charges. Those costs assume that orders will be processed through Qwest's systems from beginning to end without interruption. However, design change costs are not triggered unless a CLEC asks Qwest to interrupt the order flow to make changes, or unless an order cannot be completed on a due date because the CFA information provided for the order is incorrect.[49]

Qwest further contends that there is very little difference among the various types of design changes. Regardless of whether the design change involves transport, loops, or CFAs, Qwest must interrupt the order flow, correct the information in the systems, and reinitiate the order process so that the order can be completed with the new design or corrected information. The biggest differences in the activities required for different types of design changes are associated with the work performed by Qwest's central office technicians on the installation due date. However, those costs are not reflected in Qwest's proposed design change rate, because they are already captured in other nonrecurring cost studies.[50] As a result, the only times and activities included in the study relate to service order processing and the manual effort required to walk the order through to completion once the automated process has been interrupted because of the need for the design change.[51]

Since the costs associated with providing different types of design changes do not differ significantly, Qwest argues that it is unnecessary to develop separate rates for these services. It contends that neither the "Commission nor the FCC has required Qwest to provide nonrecurring charges to cover every possible nuance of every possible way that every possible product might be provisioned" for CLECs and that it would be inappropriate "to micromanage Qwest's product offerings by requiring it to provide costs and processes to address every possible 'flavor' of provisioning activity in an increasingly competitive environment."[52]

Loop-Design Changes. In addition to the foregoing arguments, Eschelon asserts that the cost study used to develop the $51.76 design change rate adopted in New Mexico was intended to apply only to UDIT. Applying the results of that study to loop-related design changes will therefore allow Qwest to over-recover its costs. Specifically, Eschelon maintains that the cost study used in New Mexico incorporates assumptions applicable to dedicated transport rather than UNE loops. This produces higher design change costs because transport-related design changes involve more complex and higher cost processes than loop-related changes. For example, the cost study assumes more manually intensive Access Service Request (ASR) processes applicable to dedicated

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[49] Qwest/44, Million/14.

[50] Qwest/44, Million/10-11, 13.

[51] Eschelon claims that these activities are already recovered in separate charges paid for coordinated installation. Eschelon/125, Denney/20.

[52] Qwest/39, Million/18-19.

transport, as opposed to Local Service Request (LSR) processes typically used for loops.[53]

Qwest acknowledges that the cost study used to develop its proposed design change rate is based on an ASR order flow, but denies Eschelon's claim that it results in an over-recovery of loop-design costs. The cost study is modeled on a previous study developed for access services that was not limited to transport–specific design changes. More importantly, the ASR flow is used only as a simplifying assumption and has a minimal impact on the overall cost of design changes.[54] Qwest also disagrees with the premise that loop-related design changes involve less work and fewer costs than UDIT design changes. It points out that DS1 and DS3 unbundled loops on fiber systems can require the same type of redesign work required for UDIT.

Qwest also denies that the New Mexico cost study is limited to transport, reiterating that it calculates the average cost of performing a design change for multiple products, including loops, UDIT, and CFAs. Qwest notes that the description of "design change" set forth in the Executive Summary of the cost study refers to two terms, "end user premises" and "type of channel interface," that are not associated with the provision of transport facilities. Qwest contends that if the cost study were limited to transport as Eschelon claims, the design change description would not include any reference to these terms.[55]

Qwest and Eschelon also disagree over the significance of the fact that the design change charge is set forth in the Miscellaneous Charges section of Exhibit A in Qwest's SGAT and the ICAs it has executed with CLECs. Qwest asserts that, if the design change rate were limited to UDIT as Eschelon contends, it would have been listed in the transport section of Exhibit A instead of the Miscellaneous Charges section. The transport section is limited to transport-rates whereas the Miscellaneous Charges section applies to a variety of elements and activities. Qwest argues that including the design change rate in the latter section demonstrates that it is intended to apply to all types of design changes.[56]

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[53] Qwest's study assumes use of transport-related order processing and billing systems rather than systems used for UNE loops. According to Eschelon, the former generally have a lower flow through rate and produce higher costs. Eschelon/9, Denney/52-55.

[54] Qwest explains that its current TELRIC design change study filed in Minnesota assumes an LSR order flow and results in less than a $3.00 order flow-related cost difference between the two studies. Qwest/44, Million/12.

[55] Qwest/39, Million/18; Qwest Exhibit 45. Eschelon disputes Qwest's claims, noting first that it does not comport with cost-study data showing that the design change charge was developed specifically to apply to UDIT not loops or CFA, and second, that the term "type of channel interface" does not contemplate situations involving CFA changes. Eschelon/125, Denney/29.

[56] Qwest/43, Stewart/7-8.

Not surprisingly, Eschelon disagrees with Qwest's interpretation. It points out that the only mention of a design change charge in Qwest's SGAT was found in the ordering section for transport. Thus, for the associated rate in Exhibit A to make sense, it should apply only to transport. Furthermore, the fact that the design change charge was placed in the Miscellaneous Charges section has no bearing on the elements to which it applies. Eschelon notes that there are numerous miscellaneous charges that do not apply to all UNEs.[57]

Decision. For the following reasons, neither of the proffered rate proposals is adopted:

Qwest advances a number of claims that implicate the cost-study data used to develop its proposed single design change charge. For example, it argues that Eschelon's testimony regarding CFA technician time is misplaced because the design change study does not include technician time, and further that design change costs do not vary substantially regardless of the type of design change provisioned. Qwest also discounts Eschelon's claims regarding the ASR order flow because the study produces virtually the same result with an LSR order flow. These assertions undermine many of Eschelon's criticisms of Qwest's cost study. Substantiating those claims, however, requires a detailed examination of the actual cost data used in constructing the underlying studies. Unfortunately, that data is not included in the record of this arbitration proceeding.[58]

Qwest's single design change rate is premised largely on its claim that design change costs are basically the same regardless of the type of design change that is provisioned. The lack of record evidence on this point is critical. If there are substantial disparities in the cost to provision different types of design changes, an averaged rate may be significantly greater or less than the actual cost of providing a particular design service. In that event, the Commission could conclude that the cost/price disparity contravenes the mandate in the Act to establish cost-based rates.[59]

The parties devote a significant amount of effort disputing whether the design change charge described in the New Mexico cost study encompasses design changes other than those involving UDIT. They also dispute whether the placement of the design change rate in the Miscellaneous Charges section of Exhibit A of the Qwest/Eschelon ICA and SGAT means that the rate is applicable to all design services. While the parties have crafted some innovative arguments regarding these issues, the

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[57] Eschelon/125, Denney/23.

[58] This statement is not intended to fault either of the parties' presentations, both of which were extremely thorough. The simple fact is that resolving these types of issues requires a comprehensive analysis of the actual input data used in developing the underlying cost studies.

[59] Such a situation would also violate the telecommunications policy goal established by the Oregon Legislature to minimize implicit sources of support, because purchasers of less costly design services would effectively subsidize purchasers of more costly services. Section 2, Chapter 589, Oregon Laws 1999.

evidence presented is simply too inconclusive to draw any definite conclusions as to what was intended.

While the record is insufficient to support Qwest's single design change rate, there is even less evidence to support Eschelon's proposed loop-design and CFA change rates. I agree with Qwest that Eschelon has not provided any meaningful evidence showing how it derived its proposed rates, and has not demonstrated that those rates will compensate Qwest for the costs incurred to perform design changes.

The parties request that the Commission establish interim rates for design changes that will remain in effect until a cost-study proceeding is completed and new permanent rates are established. Given the length of time necessary to complete a cost investigation, it is likely that the interim rates will be in effect for well over a year. This presents a significant challenge from the Commission's perspective, because it must set rates notwithstanding unanswered questions regarding the parties' proposals as well as uncertainty regarding the potential financial consequences of its decision.

With these concerns in mind, I recommend that the Commission adopt the following interim rates:

Loop-design changes. The difference between Qwest's proposed $51.76 loop-design change rate and Eschelon's proposed $30.00 is not substantial. The Commission should split the difference between these proposals and implement an interim rate of $40.88. This "split the baby" approach is admittedly imperfect, but it effectively equalizes any adverse rate impact that may occur while the interim rates remain in effect.

CFA changes. A different approach is necessary for CFA changes because of the substantial disparity between Eschelon's proposed $5.00 rate and Qwest's $51.76 rate. Absent more compelling evidence, I am persuaded by Eschelon's argument that the cost of performing a CFA change should not exceed the installation cost of the underlying loop facility. Since Eschelon's proposal applies only to CFA changes involving 2/4 wire analog loops, the Commission should adopt a CFA change rate equal to the installation cost of a 2/4 wire analog loop facility. This rate should apply only where the other conditions specified by Eschelon are also present.[60]

Issues 5-6, 5-7, and 5-7(a) -- Discontinuation of Order Processing/Disconnection.

Issues 5-6 and 5-7 concern whether the ICA should require Commission approval before Qwest may discontinue processing Eschelon's service orders or disconnect Eschelon's service for nonpayment. Issue 5-7(a) addresses a similar issue;

[60] That is, the rate would apply only in the circumstances described in ftn. 45, supra, where Eschelon and Qwest personnel are already working [a coordinated] cutover for a 2/4 wire analog loop and there is a need for a design change to resolve a bad CFA.

i.e., whether Commission approval is required before service can be disconnected in the event of a default or violation of any other material provision of the ICA.

Qwest's proposed contract language for Section 5.4.2 allows it to discontinue processing orders for relevant services where Eschelon fails to pay undisputed amounts[61] within 30 days of the payment due date. Qwest must notify the Commission at least 10 days before it stops processing orders, but Commission approval is not required. Qwest's proposed Section 5.4.3 allows it to disconnect relevant services if Eschelon fails to pay undisputed amounts within 60 days of the payment due date. Qwest is not required to notify or obtain Commission approval of the pending disconnection.

Qwest points out that its proposed language was developed as part of the Section 271 process and is currently included in its Oregon SGAT and recently approved ICAs with Covad and AT&T. Qwest considers its payment language a reasonable business precaution designed to encourage timely payment and limit financial risk. Qwest observes that Eschelon has a history of delinquent payments, and maintains that its proposals will provide an effective incentive for the parties to work out payment issues without the need for Commission involvement.

Eschelon offers two alternative proposals for Issue 5-6 (Section 5.4.2). The first allows Qwest to discontinue processing orders only if it receives Commission approval. The second allows Qwest to proceed with the order discontinuation process unless Eschelon asks the Commission to take action to stop the process. Eschelon's proposal for Issue 5-7 (Section 5.4.3) allows Qwest to disconnect relevant services after Qwest has obtained Commission approval. For Issue 5-7(a), Eschelon recommends modifying Section 5.13.1 to require that Qwest notify the Commission of a continuing payment default and receive approval prior to disconnecting service for untimely payment of undisputed amounts.

In response to Qwest's criticism of its payment record, Eschelon asserts that its payment record and credit rating are not significantly different from Qwest's, demonstrating a low risk of nonpayment. Moreover, to the extent that Qwest is concerned with the timeliness of payment rather than nonpayment, that issue is already addressed in agreed-upon contract language governing late payment charges.

Eschelon emphasizes that disconnecting services and discontinuing order processing have very serious consequences for Eschelon and its customers, including the possibility that customers might unexpectedly be left without emergency services. Equally worrisome is the fact that, if the parties disagree on whether a particular payment amount is "undisputed," Qwest's language would allow it to suspend order processing and disconnect service based on its characterization of the disagreement. Eschelon's

[61] Section 21.8 of the ICA provides that the parties may withhold disputed amounts during the pendency of a billing dispute.

proposal, on the other hand, allows the Commission to decide the merits of the disagreement before any disruptive action is taken by Qwest.

Decision. With the modifications noted below, I recommend that the Commission adopt Qwest's contract proposals for Issues 5-6, 5-7, and 5-7(a). As Qwest points out, this language is already included in the Oregon SGAT and Commission-approved ICAs. In adopting the arbitrator's decision in the recent Covad/Qwest arbitration, the Commission agreed that:

> [t]he language offered by Qwest for Sections 5.4.2 and 5.4.3 are industry standard, help limit the ILEC's exposure in the event of CLEC bankruptcy and relate solely to undisputed amounts due and owing. Qwest's proposed language for Sections 5.4.2 and 5.4.3 are adopted and shall be included in the ICA submitted by the parties.[62]

Qwest's language was also adopted (with limited revisions) in the Qwest/ Eschelon arbitration in Minnesota. Noting that it had approved Qwest's language in other ICAs, the Minnesota Commission found no evidence demonstrating that Qwest had exploited its position as an ILEC for anticompetitive purposes.[63] There is likewise no evidence in this proceeding demonstrating any misconduct on Qwest's part.

In support of its position, Eschelon emphasizes the potential harm that could occur if the parties are unable to agree on whether a late payment is "disputed," and Qwest unilaterally decides to suspend order processing or disconnect services. The record demonstrates that this is a legitimate concern, given past disagreements between the parties over amounts in dispute.[64] Because of this, Eschelon stresses that it is crucial to provide the Commission with an opportunity to weigh in on underlying disputes before Qwest invokes suspension or disconnection remedies.

As a practical matter, however, the contract language proposed by Qwest provides Eschelon with the protection it requires. If Qwest decides to suspend order processing, it must notify Eschelon and the Commission at least 10 business days before taking any action. This provides ample time for Eschelon to ask the Commission to review the payment dispute and, if necessary, stay Qwest's proposed suspension pending

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[62] *In the Matter of the Petition by Covad Communications Company for Arbitration of an Interconnection Agreement with Qwest Corporation,* Docket ARB 584, Order No. 05-980, Appendix A at 19. (September 6, 2005.)

[63] On the other hand, the Minnesota Arbitrators expressed concern with ambiguities in Eschelon's proposals, particularly the standards, timeframes and remedies that would apply to the Commission's handling of the parties' dispute. MN Arb Report at 11, Eschelon/29, Denney/11.

[64] Eschelon/9, Denney 75-79. Qwest disputes Eschelon's characterization of the disputes, but acknowledges that the parties have had a series of misunderstandings regarding billing issues. Qwest/33, Easton/19-23.

resolution of the matter. In other words, Eschelon has the opportunity to seek immediate Commission intervention to forestall any unilateral action on Qwest's part; the only difference is that Commission review is not automatic.[65]

Although Qwest's proposal is preferable to Eschelon's, it must be revised to adequately protect customer rights. As currently written, Qwest's language allows it to suspend orders to stop service and to limit customer access to toll/information service blocking capabilities. The Minnesota Commission reasoned that Qwest should not object to processing orders to remove or stop service because it reduces the CLEC's future debt. It also recognized that retail customers are legally entitled to block certain toll/ information services and to decline services they do not request. To correct these problems, the Commission found that Section 5.4.2 of the ICA should be amended to include the following sentence:

> The term 'order processing' does not include orders or requests by CLEC to drop or remove a feature or service for a given end user or end user account, and also does not include orders or requests by CLEC to add any blocking capabilities to an end user account. Qwest may not discontinue processing the removal of features or services, or the addition of blocking capabilities, under any circumstances.[66]

The additional language required by the Minnesota Commission provides an important safeguard for Eschelon's retail customers and should be included in Section 5.4.2 of the ICA.

In addition, Section 5.4.3 should be revised to correspond with Section 5.4.2 regarding advance notice to the Commission. Under Section 5.4.2, Qwest agrees to notify the Commission ten days prior to discontinuing service order processing. The same requirement should apply where Qwest seeks to disconnect service. This will ensure that the Commission receives advance notice in both situations and will facilitate more expeditious handling of the inevitable requests for review. It also corresponds with the notice contemplated in Oregon Administrative Rule 860-016-0050(3)(a) governing interconnection disputes. The following sentences should be inserted after the second sentence in Qwest's proposed language for Section 5.4.3:

> The Billing Party will notify the billed Party and the Commission at least ten (10) business days prior to disconnection of the unpaid service(s). The notice shall

[65] It is difficult to imagine a set of circumstances where the Commission would decline to entertain a dispute involving the potential disconnection or suspension of order processing of a local exchange carrier.

[66] Mn Arb Order at 10; Eschelon/30, Denney/10. In support of its decision, the Minnesota Commission also cited state statutes and rules requiring local service providers: "1) to refrain from charging any customer for services the customer did not request, and 2) to permit the customer to forbid the use of ('block') the customer's line for certain toll and information services."

include a statement of facts and law demonstrating the billed Party's failure to comply with the agreement and the Billing Party's entitlement to relief.

Issue 5-8 -- Definition of "Repeatedly Delinquent"- Amount in Dispute.

In Section 5.4.5, the parties agree that, if Eschelon is "repeatedly delinquent" in making payment, Qwest may demand a security deposit before Eschelon's service will be "provisioned and completed or before service is reconnected." They disagree, however, concerning the definition of "repeatedly delinquent."

Eschelon proposes language requiring that an unpaid balance must be "material" before it is "repeatedly delinquent" and Qwest is eligible to demand a security deposit. Eschelon originally recommended using the term "non-de minimus" but modified its proposal in response to Qwest's criticism that the term is too vague. Eschelon points out that the parties have agreed to use the term "material" in several sections of the contract.

Qwest contends that Eschelon's proposed language remains ambiguous notwithstanding the change in terminology. It further asserts that the proposal is unnecessary because Qwest does not undertake collection activity for minimal dollar amounts.

Decision. Eschelon's recommendation to include the term "material" in the definition of "repeatedly delinquent" is adopted. While it may be unlikely that Qwest would demand a security deposit for an insubstantial sum, including the term "material" in Section 5.4.5 protects Eschelon from that possibility. Since that term is used throughout the contract, Qwest cannot reasonably contend that it should not be used in this context as well.[67] If the parties ever have occasion to disagree over whether an unpaid amount is material, the matter can be resolved without difficulty in the dispute resolution process.[68]

Issue 5-9 -- Definition of "Repeatedly Delinquent" - Frequency of Delinquency.

Issue 5-9 also relates to the definition of "repeatedly delinquent" in Section 5.4.5. The dispute here concerns how often Eschelon may be delinquent before Qwest may require a security deposit.

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[67] Eschelon/9, Denney/90.

[68] Although the parties disagree regarding whether billing disputes are properly dealt with in the CMP, they are encompassed by the dispute resolution procedures in the ICA. Qwest/33, Easton/10; Eschelon/9, Denney 79-81; ICA Section 5.18.

Qwest defines "repeatedly delinquent" to mean payment of any undisputed amount more than 30 days after the payment due date, three or more times during a 12-month period on the same billing account number. This language is contained in the Oregon SGAT as well as in Qwest's recently approved interconnection agreements with AT&T and Covad.[69] As noted above, Qwest asserts that Eschelon has a history of slow payment, and contends that the proposed language will provide "the proper incentive for timely payment."[70]

Eschelon proposes that payment be considered "repeatedly delinquent" if it is made more than 30 days after the due date in three consecutive months. That standard is contained in other Qwest ICAs in Utah and Washington,[71] and was recently adopted by the Minnesota Commission in the Eschelon/Qwest arbitration proceeding.[72] Alternatively, Eschelon proposes that "repeatedly delinquent" be defined as payment more than 30 days after the due date three or more times in a six month period. Eschelon's third alternative abandons the term "repeatedly delinquent" altogether and allows Qwest to seek Commission approval for a deposit if payment is more than 90 days late.[73]

Decision. Both Eschelon and Qwest agree that security deposits are designed to protect against the risk of non-payment.[74] They disagree, however, on whether a primary function of deposits should also be to provide an incentive for timely payment. Qwest's proposal is clearly designed to encourage more timely payment, while Eschelon asserts that the late payment charge in the ICA already accomplishes this objective. Addressing this issue, the Minnesota Arbitrators agreed with Eschelon:

> 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. A remedy this dramatic should be reserved for more serious financial issues than

[69] Qwest/33, Easton/18; Qwest Brief at 14.

[70] Qwest/13, Easton/25; Qwest/33, Easton 12-13.

[71] Eschelon cites Qwest's ICA in Utah with McLeodUSA, and its ICA with ATI, an Eschelon subsidiary, in Washington. Eschelon/9, Denney/93; Eschelon Brief at 54.

[72] The Minnesota Commission agreed with the Arbitrators that "Eschelon's 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." MN Arb Report at ¶55, Eschelon/29, Denney/14; MN PUC Arb Order at 7, Eschelon/30, Denney/7.

[73] *See* Issue 5-12.

[74] Qwest/42, Easton/15; Eschelon Brief at 55.

> late payment three times over the course of one year. Eschelon's 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.[75]

I concur with this reasoning. Eschelon's proposal of three consecutive months identifies the potential risk of nonpayment more accurately than Qwest's, which is more focused on preventing "slow pay" situations. Although Qwest's language is currently included in the Oregon SGAT and Commission-approved ICAs, I am persuaded that Eschelon's proposal identifies more precisely the circumstances under which security deposits should be required.

Issue 5-11 -- Commission Review of Deposit Amount.

Issue 5-11 concerns whether disputes over a deposit requirement should be brought before the Commission before the deposit is due and payable.

Eschelon proposes language providing that, in the event of a dispute over a deposit requirement, the deposit will not be due until the Commission issues an order in the matter. Eschelon contends that this will ensure that it will not "be burdened by having to make a multi-million dollar deposit while the dispute is pending."[76]

Qwest argues that Commission oversight is unnecessary. It emphasizes that the deposit requirement only applies to undisputed past due amounts, and need not be invoked if Eschelon pays undisputed amounts in a timely manner.

Eschelon responds that Qwest reserves to itself the right to determine whether a bill is "undisputed." Thus, Qwest's decision to label an amount as undisputed does not mean that Eschelon does not disagree with the amount requested. In fact, such a dispute is currently being contested by the parties.[77]

Decision. Both proposals contemplate that Eschelon may challenge a Qwest deposit demand by seeking recourse with the Commission. Qwest's proposal requires that Eschelon make the deposit 30 days after demand, regardless of whether Eschelon later files a challenge with the Commission. Eschelon's proposal, on the other hand, allows it to seek relief and obtain a decision from the Commission before any deposit is paid to Qwest.

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[75] MN Arb Report at ¶55; Eschelon 29, Denney/14. The Arbitrators' finding on this issue was subsequently adopted by the Minnesota Commission. MN Arb Order at 7; Eschelon/30, Denney/7.

[76] Eschelon Brief at 56.

[77] *Id.* at 56-57.

Qwest's proposed language should be adopted. Under the "three consecutive month" standard adopted in Issue 5-9, deposits will not be assessed unless there is a substantial risk of nonpayment. Qwest should not have to continue providing service under these circumstances without the reasonable assurance that it will recover its ongoing costs during the Commission's review of Eschelon's challenge to the deposit requirement. This approach is consistent with the Commission's existing rules for payment disputes involving retail customers.[78] Those rules require that customers make financial arrangements to protect the utility from future loss as a precondition to obtaining Commission review. Certainly, the Commission would expect Eschelon to make similar arrangements in a deposit dispute with Qwest.[79] Requiring payment of the disputed amount prior to Commission review effectively serves that function.

Issue 5-12 -- Alternative Deposit Proposal.

Issue 5-12 is Eschelon's alternative proposal for Section 5.4.5, and replaces its proposals for Issues 5-8, 5-9, and 5-11. Having decided those issues, it is unnecessary to address Issue 5-12.[80]

Issue 5-13 -- Review of Credit Standing.

Issue 5-13 concerns Qwest's proposal to revise Section 5.4.7 to allow it to review Eschelon's credit standing and increase the deposit required. The maximum amount of the deposit could not exceed the amount stated in Section 5.4.5.[81] Significantly, Qwest interprets the proposed language to allow it to demand a deposit from Eschelon even though one has not been required previously.

Qwest contends that adjusting deposits to reflect a change in circumstances is a reasonable business practice that will limit its financial exposure. Over the past several years, Qwest has been stranded with large receivables when CLECs have filed for Chapter 7 bankruptcy and exited the local exchange market. These occurrences highlight the need for greater payment and credit protections.

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[78] See OAR 860-021-0015(7)(c).

[79] Although the Commission would undoubtedly deal with a deposit dispute on an expedited basis, Eschelon would still be required to post adequate security to protect Qwest from future loss.

[80] As noted above, the alternative proposal eliminates Qwest's right to demand a deposit for payments that are "repeatedly delinquent" and replaces it with language allowing Qwest to require a security deposit if (a) Eschelon fails to make full payment within 90 days following the payment due date, and (b) the Commission determines that all relevant circumstances warrant a deposit.

[81] Section 5.4.5 provides that "[t]he deposit may not exceed the estimated total monthly charges for an average two (2) month period within the 1st three (3) months from the date of the triggering event which would be either the date of the request for reconnection of services or resumption of order processing as described above for all services."

Eschelon proposes deleting Qwest's language in its entirety. In the alternative, it recommends that Section 5.4.7 limit Qwest to increasing an already existing deposit after Commission approval.

Eschelon argues that Qwest's proposal for Section 5.4.7 renders the deposit limitations in Section 5.4.5 irrelevant because it could impose a deposit even where none of the "triggering events" has occurred. For example, Qwest could require a deposit even if Eschelon has consistently paid its entire bill in a timely manner. Also, despite Qwest's claim that it needs the ability to respond to changed circumstances, its proposed language does not contain that limitation.[82]

Eschelon also emphasizes that Qwest's language does not contain any criteria or standards governing the proposed credit review. In particular, Qwest fails to describe how the credit review will be conducted, the information used in the review, or provide any assurance that the information relied upon will be credible or verifiable.

Decision. Qwest's proposal effectively supplants the deposit triggering events in Section 5.4.5 by allowing Qwest to impose a deposit whenever it has any reason for concern over Eschelon's creditworthiness. As the Minnesota Arbitrators observed, "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."[83] The significant financial consequences associated with imposing a deposit requires a greater degree of specificity than that contained in Qwest's proposal.

Eschelon's alternative proposal allows Qwest to increase a deposit if one is already required pursuant to Section 5.4.5. I agree with the Minnesota Arbitrators that this is a reasonable compromise, provided the language requiring prior Commission approval is excluded. Automatically referring these issues to the Commission would burden the administrative process and dissuade the parties from fashioning informal solutions to deposit issues arising during the term of the contract. In addition, Qwest's decision to increase a deposit requirement should be based upon measurable standards such as those proposed in the recent Arizona arbitration proceeding.[84] Accordingly, the following language is adopted for Section 5.4.7:

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[82] Eschelon also disputes Qwest's claim that a deposit imposed as a result of a credit review will offer protection in the event Eschelon files for bankruptcy. It asserts that payments made to a creditor less than 90 days before bankruptcy are avoidable under the law and would likely not be available to Qwest. Eschelon Brief at 59.

[83] Mn Arb Report at ¶74; Eschelon/29, Denney/18.

[84] *In the Matter of the Petition of Eschelon Telecom, Inc., for Arbitration with Qwest Corporation Pursuant to 47 U.S.C. Section 252(b) of the Federal Telecommunications Act of 1996,* Docket Nos. T-03406A-06-0572 and T-01051B-06-0572, Arbitrator's recommended Order and Opinion at 24 (February 22, 2008) (AZ Arb Report).

> If a Party has received a deposit pursuant to Section 5.4.5 but the amount of the deposit is less than the maximum deposit amount permitted by Section 5.4.5, the Billing Party may review the billed Party's credit standing and increase the amount of deposit required if circumstances warrant. Such circumstances include, but are not limited to, increased or greater delinquencies or significant changes appearing in the billed Party's credit reports, such as Dun and Bradstreet. In no event will the maximum deposit exceed the amount stated in Section 5.4.5. Section 5.4 is not intended to change the scope of any regulatory agency's or bankruptcy court's authority with regard to Qwest or CLECs.

Issue 5-16 -- Nondisclosure Agreement.

Section 5.16.9.1 of the ICA provides that Eschelon will supply Qwest with confidential forecasting information under certain circumstances. The parties agree to language requiring Qwest personnel to sign a nondisclosure agreement regarding such information. The nondisclosure agreement provides that the forecasting information may not be disclosed to personnel in retail marketing, sales, or strategic planning. The parties disagree over Eschelon's proposed language requiring that "Qwest shall provide CLEC a signed copy of each non-disclosure agreement executed by Qwest personnel within ten (10) days of execution."

Eschelon argues that its proposed language is necessary because, unless it can verify that access is provided only to authorized persons, it cannot confirm that its confidential data is being adequately protected by Qwest.

Qwest recommends deleting Eschelon's proposed language, arguing that it imposes an unnecessary administrative burden. Strict procedures for handling confidential information are already included in Section 5.16.9.1, developed in the Section 271 workshops. Section 18.3.1 provides further recourse by allowing Eschelon to request an audit to determine Qwest's compliance with the distribution, maintenance and use of Eschelon's protected information.

Eschelon responds that its proposal involves only a minimal burden and that Qwest regularly supplies signed copies of protective agreements in other matters. Eschelon denies that the compliance audit provisions in Section 18.3.1 of the ICA provide adequate protection in this instance, noting that audit rights (a) are limited and may not apply to the disclosure of confidential information, and (b) can only be exercised every three years.

Decision. Section 5.16.9.1 lists the categories of Qwest personnel that are authorized to view Eschelon's confidential forecast data. This includes legal personnel, wholesale account managers, LIS and collocation managers, etc. Other personnel, as noted above, are expressly excluded from accessing the data. The nondisclosure agreement prohibits authorized personnel from disclosing confidential information upon threat of termination.

The nondisclosure agreements in the ICA serve the same function as protective orders issued by the Commission. In both, authorized persons are permitted to view confidential information provided they agree not to disclose that data to unauthorized persons. Effectively, the disclosing party is powerless to prevent an authorized person from improperly disclosing confidential information once they have obtained access. Notwithstanding this fact, the Commission has determined that it is important in the case of protective orders for the disclosing party to know the identity of every person who has executed the order. Without this information, the disclosing party cannot ascertain whether those who have been allowed access to confidential data by the receiving party are, in fact, authorized persons. It is reasonable to anticipate that the Commission would expect Qwest and Eschelon to include a similar requirement in the nondisclosure agreement contained in the ICA.

Qwest's claim that the audit provisions in Section 18 of the ICA adequately address the need to ensure compliance with contract requirements relating to internal disclosure of confidential information is not persuasive. Permitting Eschelon to audit Qwest's compliance only once every three years is simply inadequate in this context. Likewise, I am not convinced that requiring Qwest to provide copies of the signed agreements is necessarily burdensome. The Commission allows a party receiving confidential information to submit an electronic copy of signatory pages executed by authorized persons. Allowing Qwest to follow this procedure, as opposed to mailing copies of signed nondisclosure agreements, would substantially reduce the time and expense associated with this process. Furthermore, Qwest should be allotted 20 days, rather than the 10 days proposed by Eschelon, to submit the electronic signatures.

For the reasons discussed, the following sentence should be included in Section 5.4.7 of the ICA:

> Qwest shall provide CLEC by electronic filing, or other mutually acceptable method, a signed copy of each nondisclosure agreement executed by Qwest personnel within twenty (20) days of execution.

Issue 7-18 -- Transit Record Charge.
Issue 7-19 -- Transit Record Bill Validation Detail.

Transit traffic originates on the network of one telecommunications carrier, transits a second carrier's network, and terminates on a third carriers' network.

Thus, when calls originate on Eschelon's network, travel across Qwest's network, and are terminated on the network of a third carrier, Qwest functions as the transit provider and bills Eschelon for that service. The dispute in Issue 7-18 relates to whether Qwest must supply Eschelon with access to certain transit records without charge so that Eschelon can verify Qwest's bills. The dispute in Issue 7-19 involves the type of transit record information that Qwest should supply to Eschelon for bill verification purposes.

Eschelon proposes to include the following sections in the ICA:

> **7.6.3.1** In order to verify Qwest's bills to CLEC for Transit Traffic, the billed party may request sample 11-01-XX records for specified offices. These records will be provided by the transit provider in EMI mechanized format to the billed party at no charge, because the records will not be used to bill a Carrier. The billed party will limit requests for sample 11-01-XX data to a maximum of once every six months, provided that Billing is accurate.
>
> **7.6.4** Qwest will provide the nontransit provider, upon request, bill validation detail including but not limited to: originating and terminating CLLI code, originating and terminating Operating Company Number, originating and terminating state jurisdiction, number of minutes being billed, rate elements being billed, and rates applied to each minute.

In support of its proposals, Eschelon states that the transit billing records currently received from Qwest do not contain sufficient call detail information to allow Eschelon to verify Qwest's transit bills.[85] Although Eschelon's switch tracks call information originated by Eschelon customers, Eschelon needs to reconcile that information with the call records Qwest used to generate its transit bill. Eschelon asks that Qwest provide occasional access to this information, free of charge, solely for the purposes of bill verification.

Eschelon disputes Qwest's claim that it is possible to validate transit billing by comparing data received from terminating carriers with information produced by Eschelon's switch. Because it has bill and keep arrangements with many terminating carriers, Eschelon never receives billing data from those carriers. Even if Eschelon did have access to this information, it would still need to review Qwest's records if the terminating carrier's data did not match Eschelon's switch data.

Qwest recommends omitting Eschelon's proposed language from the ICA. It argues that Eschelon already has two sources of information that allow it to validate

[85] According to Eschelon, Qwest's invoice is a summary bill and does not record usage "by call by ANI" or usage by date. Eschelon/133, Denney/63.

transit billing. First, Qwest's monthly transit bills provide transit minute details by end office and provide the company code of the terminating carrier. By comparing this information with recordings from its own switch, Eschelon can verify that Qwest transited these calls to the terminating carrier. In addition, Eschelon can compare the bills it receives from the terminating carrier with the details of the Qwest transit bill to determine if there are any inconsistencies in the information provided.

Qwest states that its Category 11 transit record product was designed to create records for terminating carriers, not originating carriers, principally because the originating carriers' switch is already capable of creating such records. Qwest's transit records do not contain the specific information Eschelon seeks in Section 7.6.4, and Qwest would have to undertake significant programming and incur substantial expense to produce that information.[86] Qwest asserts that it should not have to take these steps solely to meet the needs of one carrier.

At the same time, Qwest states that it is willing to work with Eschelon to verify bills when necessary. Qwest and Eschelon personnel have had a number of discussions regarding bill validation issues. Qwest has also offered to provide sample checking of call-by-call reports from selected end offices.

Decision. While it is logical that Eschelon should have a relatively straightforward means of verifying the transit bills it receives, the record discloses that Qwest's mechanized systems do not produce the types of data requested by Eschelon in proposed Section 7.6.4. Eschelon does not appear to dispute this fact; it simply contends that Qwest ought to be able to produce the information underlying the summary data it now provides. The problem with this proposal is that there is no way for Qwest to access the underlying information without having its personnel conduct a manual "data pull," for every end office selected by Eschelon. Qwest alleges -- and it is reasonable to conclude -- that this would be an extremely time-consuming process. Presumably, it would also be an expensive endeavor, for which Qwest would receive no compensation under Eschelon's proposal. It is unreasonable to impose this obligation on Qwest.[87]

Because Qwest cannot produce the information Eschelon seeks in a mechanized format, and because the burden of manually producing the requested information would be substantial, I find that Eschelon's proposed language should be omitted from the ICA. In its testimony, Qwest offered to assist Eschelon in the bill verification process by providing sample checking of call-by-call reports from selected

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[86] Specifically, Qwest states that its existing transit records do not contain the originating and terminating CLLI code, originating and terminating state jurisdiction, rate elements being billed, and rates applied to each minute. Because Qwest cannot mechanically produce this data, it would have to request data pulls for each of the end offices in the sample. Qwest states that this would be an extremely time consuming process, especially since Eschelon's proposed language would allow the sample to encompass data from every end office in the state. Qwest/33, Easton/32-33.

[87] Likewise, Qwest should not be forced to modify its software programming to produce the requested data without a greater understanding of the amount of time and cost associated with that process.

end offices. Absent a better alternative, Qwest's offer should be incorporated in the ICA by including the following language:

> **7.6.3.1** Qwest shall assist CLEC with verifying Qwest's bills to CLEC for Transit Traffic by providing sample checking of call-by-call reports from selected end offices. The end offices selected for sampling, the frequency of the sampling process, and the specific information supplied by Qwest will be negotiated by the Parties. Qwest will provide readily accessible information to CLEC without charge.

Issue 8-21 and subparts (a)-(e) – Power.

The parties resolved these issues subsequent to the arbitration hearing.[88]

Issue 9-31 -- Nondiscriminatory Access to UNEs.

This dispute concerns whether Section 9.1.2 of the ICA should specify that certain UNE-related activities constitute "access to UNEs" and are therefore subject to total element long run incremental cost (TELRIC) pricing under the Act. The disagreement focuses on the third sentence of Section 9.1.2.[89]

Eschelon offers two proposals for the third sentence in Section 9.1.2. The first provides:

> *Access to* Unbundled Network Elements includes moving, adding to, repairing and changing the UNE (through, *e.g.*, design changes, maintenance of service including trouble isolation, additional dispatches, and cancellation of orders).

Eschelon's alternative proposal adds the phrase "and will be provided at TELRIC rates" at the end of the above-quoted sentence.

Eschelon asserts that its proposed language is necessary to clarify that the above referenced activities must be provided by Qwest at TELRIC rates under the Act. It contends that Qwest has attempted to disavow these obligations in the past by issuing

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[88] 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) (filed September 17, 2007).

[89] Except for the third sentence, the parties agree upon the language in Section 9.1.2. The complete text of that section is lengthy and may be found on pp. 34-36 of the Disputed Issues Matrix.

notices announcing unilateral changes that would have either required Eschelon to pay tariff rates for UNE access or limited UNE usage. Although Qwest subsequently withdrew its notices, Eschelon maintains that these events underscore the need for clear contract language regarding Qwest's obligations to provide access to UNEs.

Eschelon observes that the term "moving, adding to, repairing and changing" is generally accepted in the industry and has, in fact, been agreed to by Qwest in this case. It emphasizes that the language applies only to activities that Qwest performs in connection with UNEs, as well as activities that Qwest provides for itself and its retail customers. Furthermore, Section 5.1.6 of the ICA confirms Qwest's right to fully recover its cost of providing access to UNEs.[90]

In contrast to Eschelon's proposal, Qwest recommends that the third sentence of Section 9.1.2 read as follows:

> *Activities available for* Unbundled Network Elements includes moving, adding to, repairing and changing the UNE (through, *e.g.*, design changes, maintenance of service including trouble isolation, additional dispatches, and cancellation of orders) *at the applicable rat*es.

Qwest contends that Eschelon's proposals are unnecessary because Section 9.1.2 already includes multiple provisions detailing Qwest's obligation to provide nondiscriminatory access to UNEs. It also maintains that Eschelon's language is vague and could potentially encompass "countless" yet unidentified activities which would have to be provisioned at TELRIC-based rates.[91] Equally worrisome is the possibility that Eschelon may demand that Qwest perform these activities without compensation, based on the assertion that the costs are already included in recurring rates. Effectively, this would force Qwest to build new facilities and provide access to a superior network, while preventing it from recovering its costs.

Qwest points out that its proposed language includes all of the activities listed by Eschelon, thus responding to any concern that Qwest will refuse to perform them. While Qwest remains concerned about those activities for the reasons outlined above, it argues that its proposal "at least recognizes and establishes that Eschelon may have to pay for those activities 'at the applicable rate,' which could be a rate different from the monthly recurring rate for a UNE or a tariffed rate."[92]

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[90] Section 5.1.6. states in part, "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 order of the FCC and the Commission . . . .

[91] Qwest Brief at 20.

[92] *Id.* at 21.

Decision. Section 251(c)(3) of the Act requires Qwest 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." According to the Federal Communications Commission (FCC), "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."[93] The FCC has emphasized that the requirement to provide "access to UNEs" must be read broadly, concluding that the Act requires that UNEs "be provisioned in a way that would make them useful" and further that "the ability of other carriers to obtain access to a network element for some period of time does not relieve the incumbent LEC of the duty to maintain, repair, or replace the unbundled network element."[94]

Eschelon wants the ICA to confirm that "moving, adding to, repairing, and changing" UNEs falls within the scope of Section 251, thus preventing Qwest from unilaterally implementing tariffed rates for those activities. Qwest, on the other hand, is reluctant to acknowledge that the listed activities constitute access to UNEs out of a concern that Eschelon will either seek TELRIC-based rates for still-unidentified activities, or worse yet, refuse to compensate Qwest for the costs incurred to provision such activities.

Qwest's anxiety over the addition of Eschelon's proposed language is difficult to understand. That language only commits Qwest to provide nondiscriminatory access to certain types of routine modifications that are necessary to provide access to the functionality of a UNE. Qwest's duty to perform these activities is required by the Act and FCC rules[95] and is properly included in the ICA. Although Qwest correctly observes that Section 9.1.2 contains a number of provisions relating to the duty to provide nondiscriminatory access, Eschelon's proposed language will ensure that there is no confusion about whether the above referenced activities fall within the scope of Section 251.

Also unpersuasive are Qwest's arguments that: (a) ambiguity in Eschelon's proposed language will generate countless activities that Qwest will have to provision without adequate compensation, and (b) that Qwest will somehow be forced to build a superior network. These concerns amount to speculation on Qwest's part, as there is nothing in Eschelon's language that requires Qwest to perform activities outside of its

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[93] *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket Nos. 96-98, FCC 96-325, First Report and Order, 11 FCC Rcd. 15499 (1996), at ¶269 *aff'd in part and vacated in part sub nom. Competitive Telecommunications Ass'n v. FCC*, 117 F.3d 1068 (8th Cir. 1997) and *Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *aff'd in part and remanded, AT&T v. Iowa Utils. Bd.*, 525 U.S. 366 (1999), on remand, *Iowa Utils. Bd. v. FCC*, 219 F.3d 744 (8th Cir. 2000), *reversed in part sub nom. Verizon Communications Inc. v. FCC*, 535 U.S. 467 (2002). ("*Local Competition Order.*") See *also* Eschelon/1, Starkey/151-152.

[94] *Id.* at ¶268.

[95] See 47 C.F.R. §51.309, requiring ILECs to maintain, repair and replace UNEs leased by CLECs.

Section 251 obligation. Moreover, the ICA confirms that Qwest is entitled to recover the costs it incurs to provide access to UNEs.

In the Minnesota arbitration, the Arbitrators concluded that Qwest's proposed language "is in fact more ambiguous than Eschelon's, because it would leave unanswered the question of whether routine changes in the provision of a UNE would be priced at TELRIC or at some other 'applicable rate.'"[96] I agree with this finding. In fact, the record demonstrates that this is more than a hypothetical concern, because Qwest has already attempted to impose tariff rates for activities that arguably constitute access to UNEs.[97]

Although Qwest has overstated the potential for future disputes, there remains the possibility that the parties will someday disagree over whether certain activities constitute "access to UNEs." The parties are not without recourse in such an event, as they can always seek resolution from the Commission through the dispute resolution process in the ICA. It is reasonable to expect that the Commission would take an active interest in any dispute regarding the obligation to provide nondiscriminatory access under the Act. Eschelon's first proposal for Section 9.1.2 is adopted.

Issues 9-33 -- Network Maintenance and Modernization/Adverse Effects.

In Section 9.1.9 of the ICA, the parties agree that Qwest may make necessary modifications and changes to UNEs in order to properly maintain and modernize its network. The parties disagree over Eschelon's proposal to insert language relating to the impact of such modifications on end user customers.

Qwest proposes the following language in Section 9.1.9:

> In order to maintain and modernize the network properly, Qwest may make necessary modifications and changes to the UNEs in its network on an as needed basis. Such changes may result in minor changes to transmission parameters.

Eschelon proposes two alternatives for Section 9.1.9. The first adds the following language to the end of the last sentence quoted above:

> but the changes to transmission parameters will not adversely affect service to any CLEC End User Customers (other than a reasonably anticipated temporary service

[96] MN Arb Report at ¶31; Eschelon/29, Denney/32.

[97] Eschelon/9, Denney/35-38.

> interruption, if any, needed to performance the work). (In addition, in the event of emergency, see Section 9.1.9.1).[98]

Eschelon's second alternative mirrors language adopted by the Minnesota Commission and adds the following sentence after the last Qwest-proposed sentence noted above:

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

Qwest argues that it must have the ability to maintain and modernize its telecommunications network without unnecessary interference while also providing Eschelon with the UNE transmission quality required by law. Toward this end, Qwest affirms that its maintenance and modernization activities will "result in UNE transmission parameters that are within the transmission limits of the UNE ordered by Eschelon."[99] Qwest also commits to other provisions designed to ensure that its activities do not improperly interfere with Eschelon's operations, including certain advance notice and informational requirements.

Qwest contends that the "no adverse affect" and "unacceptable changes" terminology used by Eschelon is ambiguous and unrelated to any measurable industry standard.[100] Effectively, this language "would leave Qwest guessing" concerning whether a particular network change is permitted under the ICA. This risk of exposure would discourage maintenance and modernization activities contrary to the Act's goal of fostering the deployment of new, advanced technologies.

Eschelon observes that its proposed terminology is consistent with the approach taken by the FCC in 47 C.F.R. 51.316. That rule requires ILECs to convert wholesale services to UNEs or UNE combinations "without adversely affecting the service quality perceived by the requesting telecommunications carrier's end-user customer."

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[98] This language was modified from Eschelon's initial proposal. Eschelon continues to offer its initial language proposal which reads: "but will not adversely affect service to any End User Customers. (In the event of emergency, however, see Section 9.1.9.1)." Disputed Issues List at 37.

[99] Qwest Brief at 22.

[100] Qwest also contends that the "no adverse affect" language improperly focuses on the service provided by Eschelon to its end-user customers when the appropriate focus should be upon the UNEs and service that Qwest provides to Eschelon. Qwest Brief at 24.

Eschelon also denies that its proposed language will discourage network changes or expose Qwest to risk of undefined consequences when such changes occur. It contends that its proposals merely ensure that end user customers will not suffer significant service disruptions because of minor changes in transmission parameters. If a network modernization or maintenance activity causes this sort of interference, Qwest's sole obligation is to remedy the problem.

Eschelon emphasizes that it is possible for a maintenance or modernization activity to adversely affect customer service even though the change in transmission parameters resulting from the activity remains within specified limits. This situation occurred when Qwest, in furtherance of a network plan to change the default dB loss setting, instructed its technicians to re-set the dB loss to -7.5 whenever they performed a repair. Although the new dB setting was within the standard range, a number of Eschelon circuits were rendered inoperative and Eschelon customers could not use their telephones.

Decision. The problems experienced by Eschelon as a result of Qwest's plan to reset the dB loss parameter demonstrate that Qwest's commitment to comply with industry standards does not always guarantee that Eschelon's end user customers will be protected from significant service disruptions as a result of Qwest's network maintenance or modernization activities. These events may be infrequent, but when they occur, it is reasonable to expect Qwest to assist Eschelon in restoring customer service. Accordingly, additional language should be added to Section 9.1.9 to address this concern.

Of the two proposals offered by Eschelon, the second more clearly delineates the extent of Qwest's obligation to provide assistance in the event of a service interruption. Objective measures of service quality exist, and in most cases it should be relatively easy to determine if service has degraded to a point where a customer has experienced "unacceptable changes." Nevertheless, there is merit to Qwest's concern that this term could be subject to misinterpretation. Language proposed in the recent Arizona arbitration proceeding minimizes that possibility and should be included in the ICA as follows:

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

Issue 9-34 -- Network Maintenance and Modernization/Circuit Identification.

In Section 9.1.9, the parties agree that Qwest will provide advance notice of network changes in accordance with applicable FCC rules. For planned network changes, 47 C.F.R. §51.327 requires that Qwest's notice include, among other things, "the location at which the changes will occur." The parties dispute whether Qwest's notice must also include circuit identification (circuit ID) information where network changes are specific to Eschelon end user customers.

Eschelon proposes modifying Section 9.1.9 as follows:

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

In the alternative, Eschelon recommends using the following language adopted in the Minnesota arbitration proceeding:

> Such notices will contain the location(s) at which the changes will occur *including, if the changes are specific to an End User Customer,*[101] *circuit identification, if readily available,* and any other information required by applicable FCC rules.

Eschelon claims that it needs access to customer address and circuit ID information to identify and provide assistance to end user customers affected by a Qwest network change.[102] Circuit ID is the generally accepted locator within the network and customer address information identifies particular customers. With this data, Eschelon can cross reference its records and determine which customers will be impacted by the change.

Qwest contends that Eschelon's proposals exceed the FCC's notice requirement, are overly burdensome, and force Qwest to perform time-consuming manual searches because electronic access to customer address and circuit ID information is unavailable.[103] Also, because Eschelon does not define what is "specific to an End User Customer," the requirement could be construed to apply even when network changes involve an entire exchange or LATA. Qwest argues that Eschelon already has access to

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[101] Eschelon states that it will accept either "End User Customer" or "CLEC End User Customer."

[102] Eschelon states that the FCC's notice requirement must be read in the context of 47 C.F.R. §51.525(a), which states that notice must be provided where the network change "will affect a competing provider's performance or ability to provide service."

[103] Qwest/14, Stewart/27-28; Qwest Brief at 27.

customer address and circuit ID information in its own records and should not be allowed to shift the responsibility for locating that data to Qwest. Finally, Qwest observes that the Commission rejected a request in the Covad/Qwest arbitration to require Qwest to provide CLEC customer information in notices relating to retirement of copper loops.[104]

Eschelon responds that its proposed language "applies only to changes that are specific to an end user" and cannot reasonably be construed to apply to large scale network changes such as switch upgrades and dialing plan changes. Moreover, its second proposal only provides that Qwest must supply circuit ID information "if readily available." Eschelon further contends that its proposals would not "result in a unique process for Eschelon or costly modifications to Qwest's systems" because Qwest "already possesses and processes this information for impacted circuits."[105] For example, in the case of a recent network change, Qwest produced a document containing customer address and circuit IDs for Eschelon customers impacted by the change.

Decision. Although the parties clearly articulate the parameters of their disagreement, the record does not allow the Commission to draw any definite conclusions regarding their ability to access the disputed information. As the Minnesota Arbitrators' explain:

> [I]t is difficult to determine from the record what exactly is available in Qwest's databases, what is available in Eschelon's databases, or whether in reality the requested information is available to both parties and the real issue is who has to do the work to identify the affected customers. The FCC rules do not set out "maximum" requirements that cannot be surpassed.[106]

The FCC's notice requirements in 47 C.F.R. §51.527 contemplate that Qwest must provide the location at which the network changes will occur. In order for this requirement to be meaningful, Eschelon must be able to identify which of its end user customers will be impacted by the change. If Eschelon cannot advise it customers of a pending activity and service failures result, those customers may choose to abandon Eschelon for another carrier. The thrust of the FCC's notice requirements, the potential for competitive harm, and the absence of a more comprehensive record regarding Qwest's capabilities, all argue in favor of Eschelon's position.

On the other hand, Qwest raises valid arguments regarding the potential costs associated with a requirement to produce the requested information. Eschelon's second proposal attempts to narrow the scope of that obligation by requiring that Qwest

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[104] *In the Matter of Covad Communications Company Petition for Arbitration of Interconnection Agreement with Qwest Corporation*, OPUC Docket ARB 584, Order No. 05-980 (September 6, 2005).

[105] Eschelon/1, Starkey/179.

[106] MN Arb Report at ¶, Eschelon/29, Denney/36.

provide the circuit ID information only when "it is readily available." This limitation affirms that Qwest is not expected to incur unreasonable costs to produce customer address and circuit ID information. If the parties disagree over what constitutes "readily available," that matter can be addressed in the dispute resolution process. Eschelon's second proposal is adopted.

Issue 9-43, Issue 9-44, and Issues 9-44 (a-c) -- Conversions.

Section 9.1.15 of the ICA deals with the conversion of UNEs to non-UNE alternative service arrangements (*e.g.*, tariffed services).[107] A UNE conversion may occur, for example, if the FCC determines pursuant to Section 251(d) of the Act that CLECs are no longer impaired in obtaining access to a particular UNE. In these issues, the parties dispute the terms and circumstances under which UNE conversions will take place. Eschelon maintains that UNE conversions do not entail a change in physical facilities and can therefore be provisioned by Qwest without significant cost or delay. Qwest responds that UNE and non-UNE products require different inventory, provisioning, and billing systems.

The specific disagreements center around Eschelon's proposals[108] to adopt language imposing certain conditions on the conversion process, including:

- Assigning the UNE circuit ID number to the converted product (Issue 9-43)
- Treating the conversion as a price change as opposed to an actual physical conversion (Issue 9-44)
- Repricing the conversion by using an "adder" or "surcharge" to reflect the difference between the UNE rate and the new rate for the alternative service arrangement (Issue 9-44(a))
- Assigning a new Universal Service Ordering Code (USOC) to the "adder" or "surcharge" noted above (Issue 9-44(b))
- Specifying that the USOC code used for the converted product will be the same as (or deemed the same as) the USOC of the alternative service arrangement for pricing purposes so that negotiated volume discounts are not impacted (Issue 9-44(c))

[107] The parties agree to the rate for conversions from UNEs to alternative arrangements. Qwest Brief at 28; Eschelon Brief at 78-79. Issue 9-43 and Issue 9-44 (and subparts) deal with the conversion process.

[108] Disputed Issues List at 44-45.

Qwest opposes Echelon's proposed language. Qwest provisions and bills its tariffed products using inventory databases and systems that are separate and distinct from the databases and systems used for UNEs, making it essential to assign a new circuit ID whenever a UNE is converted. It is also necessary to use separate circuit ID numbers for UNEs and tariffed products to comply with FCC rules requiring carriers to maintain accurate records that track inventories of circuits.[109] Furthermore, changing the circuit ID upon conversion ensures that Eschelon receives proper support for testing, maintenance, and repairs from the appropriate Qwest centers. UNEs and private line circuits are ordered, maintained, and repaired differently and out of separate centers and systems. Unique circuit IDs for these different products are needed to route order and repair submissions for these facilities to the appropriate systems and centers.

Qwest asserts that its current process allows it to identify the facilities and services used by its customers accurately and efficiently. Eschelon's proposals would force Qwest to make changes to a myriad of operation support systems, processes, and tracking mechanisms, such as circuit IDs. Those changes would be inefficient and could not be implemented without costly system changes that may not even be technically feasible.

Eschelon contends that Qwest has created a conversion process that is unnecessarily complex and cumbersome[110] contrary to the FCC's recognition that the conversion from a UNE to a non-UNE is "largely a billing function."[111] Even though Qwest acknowledges that a circuit uses the same facilities before and after conversion, and that no engineering or other physical change to the circuit is required, it nevertheless insists on changing the circuit ID whenever a conversion takes place. [112] To make matters worse, Eschelon asserts that Qwest's policy was implemented outside of the CMP and without soliciting CLEC input.

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[109] Specifically, 47 C.F.R. §32.12(b) and (c) require Qwest to maintain subsidiary records in sufficient detail to align specific circuits with the billing, accounting, and jurisdictional reporting requirements related to the services that these circuits support. This means Qwest must be able to distinguish its UNE products separately from its other products (*e.g.*, tariffed private line services) for purposes of tracking and reporting. Qwest accomplishes this through the use of circuit IDs and other appropriate codes, depending on the systems affected by the requirement. Qwest/16, Million/16; Qwest Brief at 29.

[110] According to Eschelon, Qwest has erected 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), 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." (Footnotes/Citations omitted.) Eschelon Brief at 81.

[111] *TRO* at ¶588.

[112] Eschelon/1, Starkey/192-193; Eschelon/6, Starkey/27-28.

Eschelon also asserts that Qwest's conversion process does not comply with the FCC's directive that conversions should be "a seamless process that does not affect the customer's perception of service quality:"[113] Qwest's process of "disconnecting" the UNE and "reconnecting" the non-UNE by changing circuit ID numbers creates the potential for error and disruption of customer service.[114]

Decision. As Eschelon points out, the ability to convert a circuit from a UNE to a non-UNE is a critical aspect of the FCC's *TRO*. That decision contemplates that the conversion process will involve the seamless transition of UNE products and services to alternative service arrangements. The evidence presented by Eschelon raises serious questions as to whether the conversion process implemented by Qwest, apparently without CLEC input, is consistent with the FCC's expectations.

On the other side of the equation is the evidence presented by Qwest concerning its operational requirement to change circuit IDs whenever UNEs are converted to non-UNE arrangements. Qwest underscores the inefficiency, expense, and disruption in service that would result if Eschelon's proposals are adopted.

There is insufficient evidence in the record to adequately evaluate Qwest's conversion processes in this proceeding. It would be unreasonable to adopt Eschelon's proposals to utilize a single circuit ID without a comprehensive analysis of the issue and a better understanding of the consequences resulting from that action. Given these circumstances, the logical alternative is for the Commission to evaluate Qwest's procedures to ensure that they are fully consistent with the conversion process contemplated by the FCC in the *TRO*.

Eschelon's proposed language for Issues 9-43 and 9-44 and subparts is not adopted. I recommend that the Commission initiate a general investigation of Qwest's conversion process for the reasons set forth above.

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

The Unbundled Customer Controlled Rearrangement Element (UCCRE) permits a CLEC to control the configuration of UNEs or ancillary services through a digital cross connect device. The parties disagree over whether UCCRE should be addressed in the ICA.

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[113] *TRO* at ¶586. Eschelon contends that Qwest improperly focuses on the need to maintain adequate records rather than the FCC's directives regarding the conversion process. Eschelon Brief at 82.

[114] Eschelon claims that "[b]ecause Qwest converts circuits by 'disconnecting' the UNE and 'connecting' the non-UNE, a simple typing error could result in a customer being placed out of service. Further, if both Eschelon's and Qwest's systems are not timely and accurately updated to reflect the new circuit i.d.s, there will likely be problems identifying the correct circuit if a circuit requires repair or maintenance, because Qwest and Eschelon may not be using the same i.e. number to identify the circuit." Eschelon/1, Starkey/196; Eschelon Brief at 83-84.

Although Qwest makes UCCRE available to CLECs via the SGAT and ICAs, no CLEC has ever ordered UCCRE, and there no evidence of any foreseeable demand for the service. Qwest also emphasizes that "the FCC has removed from its network unbundling rules the former requirement for ILECs to provide digital cross-connects for UCCRE."[115] Given the lack of demand and the FCC's decision to remove UCCRE from its rules, Qwest has decided to discontinue offering that service on a going-forward basis by phasing out UCCRE as ICAs expire and are replaced with new agreements.

Eschelon disagrees with Qwest's claim that the FCC has removed UCCRE from the list of UNEs that must be provided pursuant to the Act. It points out that there is no discussion in the *TRRO* specifically removing the obligation to provide UCCRE, and it is FCC practice to make such decisions expressly. Moreover, a digital cross connect system is a subset of central office cross connect systems that are still included in the FCC's unbundling rules.[116]

Eschelon contends that as long as Qwest makes UCCRE available to other CLECs in existing contracts, it has an obligation under the Act to provide nondiscriminatory access to all CLECs who may want to use the service. In furtherance of its position, Eschelon offers four alternative proposals. The first provides that, if Qwest offers to provide cross connects or UCCRE for any other CLEC during the term of the ICA, Qwest will notify Eschelon and offer an ICA amendment that provides cross connects or UCCRE on the same terms and conditions provided to the other CLEC.

Eschelon's next three proposals are designed to address Qwest's recommendation to discontinue providing UCCRE by phasing it out as individual contracts expire. Eschelon states that its proposals will permit the phase-out process to take place "while preventing the discriminatory treatment that would result if Qwest is able to selectively eliminate products for some CLECs but not others."[117] The proposals are as follows:

- The first phase-out proposal would require Qwest to obtain a Commission order approving a phase-out process for a particular product, element, service, or functionality (product) included in the ICA. An order would not be necessary if Qwest phases out the product from all CLEC ICAs in the state within three months after an FCC order affecting the product, or follows a phase-out process ordered by the FCC. This proposal was adopted by the Minnesota Commission in the Qwest/Eschelon arbitration proceeding.

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[115] Qwest also asks that the Commission compare former 47 C.F.R. §51.319(d)(2)(iv) with current 47 C.F.R. §51.319(d)(2). Qwest Brief at 30.

[116] See 47 C.F.R. §51.305(a)(2)(iv).

[117] Eschelon Brief at 88.

- The second phase-out proposal would require Qwest to obtain a Commission order phasing out a product, in a general proceeding in which CLECs are provided with notice and an opportunity to be heard.

- The third phase-out proposal requires Qwest to obtain a Commission order before it phases out or ceases providing a product previously offered pursuant to Section 251 of the Act. Qwest must make the product available on a nondiscriminatory basis until the process is approved by the Commission.

Decision. This is fundamentally a dispute over whether a change in law has occurred. Qwest contends that the FCC eliminated UCCRE in the *TRRO*. Eschelon rejects Qwest's interpretation of the FCC's decision. In my view, this dispute cannot be resolved without exploring a number of factual and legal questions regarding the nature of UCCRE and the scope of the FCC's *TRRO* decision.

The ICA provides that the agreement shall be amended when a change in law takes place. If the parties do not agree that a change of law has occurred, the ICA provides that the matter will be resolved through the dispute resolution process in the contract. Qwest claims that the rule changes authorized in the FCC's 2004 *TRRO* decision removed the obligation to provide UCCRE as an UNE under the Act. That being the case, Qwest could have sought to amend the ICA over three years ago. The UCCRE issue finds its way into this arbitration proceeding because Qwest instead decided to phase out UCCRE as individual contracts expire.

As Eschelon points out, the problem with Qwest's phase-out strategy is that the service remains in some CLEC agreements after it is eliminated in others. That creates the possibility that Eschelon may be disadvantaged competitively if Qwest begins providing UCCRE to CLECs who still have that service available to them in their ICAs. Although the likelihood of discrimination is very slight in the case of UCCRE, the concern expressed by Eschelon underscores the possible problems associated with trying to phase out UNEs over time as individual ICAs expire.

In an effort to mitigate the problems associated with Qwest's phase-out strategy, Eschelon has offered three phase-out alternatives of its own. The premise underlying all of these proposals is that UCCRE remains a UNE and that Qwest must obtain Commission approval before it can be phased out. If Qwest is correct, however, and UCCRE no longer qualifies as a UNE under the Act and the FCC's unbundling rules, then Qwest is not necessarily required to obtain state commission approval before it discontinues offering that service. Under the dispute resolution process in the ICA, Qwest could elect to have the matter adjudicated by another "court, agency or regulatory authority of competent jurisdiction."[118]

[118] The dispute resolution process provides for mediation and, if necessary, arbitration of the dispute. In lieu of these procedures, the parties reserve the right to "resort to the Commission or to a court, agency or regulatory authority of competent jurisdiction." ICA, Section 5.18. Thus, the UCCRE dispute could be

Rather than approve Qwest's proposal to discontinue UCCRE in this arbitration or adopt any of Eschelon's phase-out proposals, the better approach is for Qwest to follow the standard change of law procedure and simultaneously request an amendment removing UCCRE from all of its ICAs. Assuming Eschelon and other CLECs disagree with Qwest's legal interpretation of the FCC's *TRRO* decision regarding UCCRE, the matter can then be resolved via the dispute resolution process in the agreements. As noted above, the Commission is only one of several possible forums the parties can choose to resolve their dispute(s). If the parties elect to bring the matter before the Commission, and the Commission decides to entertain the dispute(s), it is reasonable to expect that it would convene a formal proceeding to explore the factual and legal issues raised by the parties.[119]

In view of these concerns, Eschelon's first proposal for Section 9.9 should be included in the ICA. This language will ensure that Eschelon receives nondiscriminatory treatment in the unlikely event that Qwest decides to provide UCCRE to another CLEC pending a final and unappealable decision regarding the legal status of that service. Qwest will not be harmed since UCCRE is not currently being provisioned and probably will not be requested in the future. If Qwest ultimately prevails in its claim that UCCRE is no longer a UNE, Section 9.9 will be amended accordingly.

Issue 9-55 -- Loop-Transport Combinations.

Qwest offers three different products that combine loops and transport -- enhanced extended loops (EELs), high capacity EELs, and commingled EELs. Both EELs and high capacity EELs combine loop and transport UNEs.[120] In the case of commingled EELs, one of the facilities, either the loop or transport, is not a UNE. The parties dispute whether commingled EELs should be considered a "Loop-Transport Combination" as that term is used in Section 9.23.4 (and subparts) of the ICA.

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brought to the Commission, but it could also be taken to a number of other forums, including the FCC or federal district court.

[119] If there are multiple disputes regarding Qwest's proposal to eliminate UCCRE, those disputes would likely be consolidated for disposition.

[120] *UNE Remand Order* at ¶¶15, 253. See also *TRO* at ¶23, ftn. 61, defining an enhanced extended link as "a combination of an unbundled loop, multiplexing/concentrating equipment, and dedicated transport."

Qwest proposes to add the following language to Section 9.23.4:

> When a UNE circuit is commingled with a non-UNE circuit, the rates, terms and conditions of the ICA will apply to the UNE circuit (including Commission jurisdiction) and the non-UNE circuit will be governed by the rates, terms and conditions of the appropriate Tariff.[121]

Qwest argues that its proposed language, together with closed language in Section 24 of the ICA,[122] clearly identifies the distinct labels and terms that apply to its three loop-transport products. It maintains that its proposal is consistent with statements from the FCC and other state Commissions affirming that the UNE component of a commingled product should be governed by UNE terms, and the tariffed component by a price list or tariffed terms.

Eschelon offers two proposals for Section 9.23.4.[123] The first provides:

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

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[121] "Tariff" is a defined term in the ICA and refers to Qwest interstate tariffs and state tariffs, price lists, and price schedules. See Qwest/37, Stewart/34.

[122] Qwest points out that Section 24.1.2.1, already provides that tariffed terms do not apply to the UNE portion of a commingled arrangement. Qwest is willing to include the same language in Section 9.23 to address Eschelon's concerns. Qwest Brief at 37.

[123] Eschelon also proposes minor changes to subparts of Section 9.23.4 that conform with its proposed language.

Eschelon's second proposal is identical except that the last sentence is deleted in favor of the following sentences (which mirror the first two sentences of Section 24.1.2.1):

> 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).

Eschelon contends that its proposed language is designed to preserve the Commission's jurisdiction over the UNE portion of loop and transport 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.[124] It states that the language accurately reflects that EELs, high capacity EELs, and commingled EELs are different types of combinations of loops and transport.

Qwest contends that Eschelon's proposal to use the term "loop-transport combination" clouds critical distinctions between UNE combinations and commingled arrangements. Each of the three loop-transport products offered by Qwest is different from the other and has its own unique pricing and provisioning requirements. Using the generic term "loop-transport combination" creates a significant risk of confusion and improper application of rates.

Eschelon denies that the term "loop-transport combination" is an attempt to create a new product or that it is somehow attempting to bring non-UNEs within the scope of the ICA. It points out that the FCC used "loop-transport combination" in the *TRO* to identify all three types of loop-transport products.[125] Qwest disputes Eschelon's interpretation of the *TRO*.

Decision. Both parties argue that the language proposed by the other is confusing and will create opportunities for mischief. The better question is why it is necessary in the first place to utilize the generic term "loop-transport combination" to encompass all three loop-transport products offered by Qwest. A review of the contract language proposed by the parties for each loop-transport product discloses no significant differences.[126] There is no compelling reason why all three products must be grouped under a single heading.

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[124] Eschelon points out that the nomenclature used to describe combinations of loops and transport take on a larger significance in Issues 9-58 and 9-59, discussed below. Eschelon Brief at 90.

[125] Eschelon Brief at 97, citing *TRO* at ¶¶575-576, 584, 593 and 595.

[126] Disputed Issues List at 58-60; Sections 9.23.4 (defining "Commingled EEL" and "High Capacity EEL"; Section 9.23.4.4 (defining "EEL").

As Eschelon and Qwest acknowledge, Section 24.1.2.1 of the ICA already contains closed language clarifying how the UNE and non-UNE components of commingled arrangements will be governed.[127] The language of that section is clear, concise, and unambiguously applies to all commingled arrangements, including commingled EELs. In the Minnesota arbitration proceeding, the parties agreed that the first two sentences of Section 24.1.2.1 should be included in Section 9.23.4 in lieu of their initial proposals and the Arbitrators' recommendation.[128] There is no reason why a different result should prevail in Oregon. In addition to the language from Section 24.1.2.1, Section 9.23.4 should also include the definitions of Commingled EEL, High Capacity EEL, and EEL, as approved in Minnesota.

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

The *Triennial Review Order* provides that a CLEC obtaining high-capacity EELs may be required to undergo an audit to demonstrate that it is in compliance with service eligibility criteria established by the FCC in its *Supplemental Order Clarification*.[129] The parties agree to service eligibility audits in Section 9.23.4.1.2, but disagree over the steps Qwest must perform before an audit can take place. Issue 9-56 deals with Eschelon's proposal to insert language in Section 9.23.4.1.2 specifying that Qwest may conduct an audit when it "has a concern that CLEC has not met the Service Eligibility Criteria." Issue 9-56(a) addresses Eschelon's proposal to require Qwest to provide written notice articulating the reason for its "concern," including a list of circuits that Qwest alleges are not in compliance with the service eligibility criteria. Qwest recommends deleting Eschelon's proposed language from the ICA.

Eschelon states that its proposals are consistent with the FCC's directive that audits should not become a routine practice, but rather should be undertaken only when the ILEC has a concern that the requesting carrier has not met the relevant service eligibility criteria.[130] Although Eschelon's proposal specifies that Qwest will provide a list of noncomplying circuits, the list is not a prerequisite for conducting an audit, and Qwest need only provide the information it has available. Eschelon emphasizes that

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[127] Eschelon Brief at 90. As noted above, Qwest agrees to also insert the language from Section 24.1.2.1 in Section 9.23.4. See ftn. 122, supra; Qwest Brief at 37.

[128] MN Arb Order at 12; Eschelon/30, Denney/12. As noted, Eschelon proposes including the first two sentences of Section 24.1.2.1 in its second proposal. Qwest's proposed language for Section 9.23.4 is also substantially similar to the language in Section 24.1.2.1.

[129] *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*").

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

the *TRO* reiterates that verification audits conducted by ILECs should be "based upon cause."[131]

Qwest contends that Eschelon's proposal to impose a "for cause" requirement would impermissibly interfere with and weaken the audit rights granted to ILECs in the *TRO*. It argues that the FCC did not intend to limit audits to situations where there is demonstrable cause, but rather established a compensation and reimbursement scheme that provides CLECs with incentives to comply with the service eligibility criteria and ILECs with incentives not to conduct abusive or unfounded audits. Qwest emphasizes that the reimbursement scheme adopted by the FCC to protect CLEC against abusive audits is already included in the ICA in Section 9.23.4.3.1.3.5.

Qwest also alleges that Eschelon's FCC references are taken out of context and fail to address the rulings in the *TRO* relating to audit rights which represent the FCC's last word on the subject. Qwest observes that the Minnesota Commission found no legal support for Eschelon's position.

Decision. Eschelon's proposals seek to prevent Qwest from abusing its audit privilege and burdening Eschelon as a consequence. As Qwest points out, however, the FCC has already adopted an audit policy in the *TRO* that contains a substantial disincentive against abusive audit requests. With respect to this issue, the FCC held:

> 626. We conclude that incumbent LECs should have a limited right to audit compliance with the qualifying service eligibility criteria. In particular, we conclude that incumbent LECs may obtain and pay for an independent auditor to audit, on an annual basis, compliance with the qualifying service eligibility criteria. We conclude that an annual audit right strikes the appropriate balance between the incumbent LECs' need for usage information and risk of illegitimate audits that impose costs on qualifying carriers. . . . . .
>
> 627. To the extent the independent auditor's report concludes that the competitive LEC failed to comply with the service eligibility criteria, that carrier must true-up any difference in payments, convert all noncompliant circuits to the appropriate service, and make the correct payments on a going-forward basis. In addition, we retain the requirement adopted in the *Supplemental Order Clarification* concerning payment of the audit costs in the event the independent

[131] The FCC held: "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 upon self-certification, subject to later verification *based upon cause*, are equally applicable." *TRO* at 622. (Emphasis added.)

> auditor concludes the competitive LEC failed to comply with the service eligibility criteria. Thus, to the extent the independent auditor's report concludes that the competitive LEC failed to comply in all material respects with the service eligibility criteria, the competitive LEC must reimburse the incumbent LEC for the cost of the independent auditor. We expect that this requirement should provide an incentive for competitive LECs to request EELs only to the extent permitted by the rules we adopt herein.
>
> 628. Similarly, to the extent the independent auditor's report concludes that the requesting carrier complied in all material respects with the eligibility criteria, the incumbent LEC must reimburse the audited carrier for its costs associated with the audit. *We expect that this reimbursement requirement will eliminate the potential for abusive or unfounded audits, so that incumbent LEC will only rely on the audit mechanism in appropriate circumstances.* We further expect that these reimbursement requirements will ensure the audit process (and importantly, the resolution of any issues arising out of any audits) occurs in a self-executing manner with minimal regulatory involvement. (Footnotes omitted.). (Emphasis added.)

The above-quoted statements make clear that the FCC expects its reimbursement requirement will prevent ILECs from abusing their limited audit rights. That expectation is well founded, as no rational business entity is going to incur the risk of paying the cost of an audit unless it has a reasonable basis for concern over compliance with the service eligibility criteria. The FCC's reimbursement mechanism is set forth in Section 9.23.4.3.1.3.5 of the ICA, providing Eschelon with added assurance that Qwest will conduct an audit only in appropriate circumstances. In view of these protections, Eschelon's proposed requirements are unnecessary.[132]

In addition, it is likely that Eschelon's proposed language would lead to disputes over whether the "concern" articulated by Qwest is sufficient to justify an audit. If Eschelon disagreed with Qwest on this point, the matter would likely have to be resolved by the Commission,[133] raising the question of what criteria should be applied to determine the proper level of concern to precipitate an audit request. Assuming the Commission were somehow able to overcome that obstacle, the resulting litigation would

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[132] In addition, the *TRO* does not limit an ILEC's audit request to circumstances where it has stated a concern over specific circuits.

[133] The FCC has indicated that details surrounding the implementation of audits should be addressed by state commissions. *TRO* at ¶625.

still conflict with the FCC's stated goal of minimal regulatory involvement in the audit process. For these reasons, Qwest's proposals for Issues 9-56 and 9-56(a) are adopted.

Issue 9-58 and Subparts (a)–(e); Issue 9-59 -- Commingled Arrangements/EELs.

These disputes are similar to those relating to the conversion process discussed in Issues 9-43 and 9-44. The parties disagree on the proper methods for ordering, repairing, billing, and identifying commingled EELs.

Eschelon recommends contract language that would require Qwest to modify the systems currently used for ordering, repairing, billing, and identifying commingled EELs. It proposes:

- Using a single local service request (LSR) form to order commingled EELs. (Issue 9-58.)[134]
- Assigning a single circuit ID to commingled EELs. (Issue 9-58(a).)[135]
    - If the proposal to use a single circuit ID is not accepted, Eschelon alternatively recommends using a single trouble report for the different circuit IDs associated with a commingled EEL in maintenance and repair situations. (Issue 9-59.)[136]
- Using a single billing account number (BAN) for all chargeable rate elements in a loop-transport combination, including a commingled EEL. (Issue 9-58(b).)
    - If the proposal to use a single BAN is not accepted, Eschelon alternatively recommends that Qwest identify and relate the UNE and non-UNE components of a commingled EEL on bills and customer service records. (Issue 9-58(c).)
- Using a single service request, single circuit ID, and single BAN for commingled arrangements other than commingled EELs. (Issue 9-58(d).)

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[134] Disputed Issues List at 63-64; ICA §§9.23.4.5.1 & 9.23.4.5.1.1.

[135] Disputed Issues List at 64-71; ICA §§9.23.4.5.1 & 9.23.4.5.1.1; §9.23.4.5.4; §9.23.4.6.6 (and subparts); §§9.1.1.1.1 & 9.1.1.1.1.2; §§9.23.4.4.3.1, 24.3.2, 9.1.1.1.1 & 9.1.1.1.1.1; and §9.23.4.7 (and subparts);

[136] Under this proposal, Qwest would assess a charge only if it found no trouble on both the UNE and non-UNE portions of the circuit. Eschelon Brief at 100. Qwest disagrees with Eschelon's alternative, but offers to compromise by modifying its repair process for commingled EELs. Qwest Brief at 46-49.

- Specifying that the service interval for provisioning commingled EELs and other commingled arrangements shall be the longer interval of the two facilities being commingled. (Issue 9-58(e).)

Qwest currently uses separate ordering, provisioning, and billing systems for UNE and non-UNE products.[137] Eschelon argues that using separate systems causes unreasonable delays and errors, interferes with bill verification processes and diminishes the usefulness of commingled products. It maintains there is no functional difference between a UNE EEL and a Commingled EEL, [138] and consequently, no reason for the operational obstacles currently imposed by Qwest.[139]

Qwest argues that Eschelon's proposals would require substantial modifications to Qwest's OSS without any compensation for making those changes. Qwest's systems and processes are used in multiple states and would be very costly to modify. In addition, Eschelon's proposed OSS changes and resulting cost obligations would affect all Oregon CLECs ordering commingled arrangements. Those carriers are not parties to this arbitration proceeding.

Qwest asserts that it is commonplace in the telecommunications industry to require carriers to use separate orders and circuit IDs, and that sound reasons exist for doing so. For example, circuit IDs include product specific information that permits proper processing, billing, and monitoring of performance indicator measurements (PIDs). Eschelon's proposals to use a single circuit ID may result in misidentifying the service. Likewise, the proposals to use single LSR and a single BAN would generate billing errors and difficulties applying PIDs.[140]

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[137] When a CLEC orders a commingled EEL (*e.g.,* a UNE Loop commingled with a private line transport circuit), Qwest requires the CLEC to order the UNE loop by submitting a local service request ("LSR") and bills the CLEC using its "CRIS" system. For the private line transport component, Qwest requires the CLEC to submit an access service request ("ASR") and bills the CLEC using its "IABS" system." Each circuit in the commingled EEL is separate and is assigned its own circuit ID. The UNE loop is provided pursuant to terms and conditions that are specific to that facility, whereas the private line transport circuit is provided based on terms and conditions set forth in Qwest's tariffs. Qwest/37, Stewart Rebuttal/43; Qwest Brief at 41.

[138] According to Eschelon, the only difference between a UNE EEL and a Commingled EEL is the price. Otherwise, "the facilities are the same, the function is the same, and the customer's experience is the same." Qwest currently uses a single order, single circuit ID, and single bill for UNE EELs. Eschelon seeks the same treatment for Commingled EELs. Eschelon/9, Denney/179-184; Eschelon Brief at 96, 99.

[139] Eschelon/9, Denney/185-199; Eschelon Brief at 97.

[140] Qwest/14, Stewart/64-67; Qwest Brief at 44. Qwest also criticizes Eschelon's alternative proposal to use the remarks section of the LSR to indicate that specific circuits of a commingled arrangement are connected. Although the remarks section could be used at the time of ordering or repair, Qwest's systems do not retain, much less read, the remarks section of the original LSR once the initial activity has been completed. Qwest/37, Stewart/47; Qwest Brief at 45.

Qwest claims that the CMP process is the proper forum in which to address the provisioning and process issues raised by Eschelon. Qwest recently announced its intent to reactivate issues in the CMP relating to *TRO/TRRO*-related systems changes. Those issues had been deferred pending completion of other dockets.

Eschelon rejects Qwest's recommendation to deal with these issues in the CMP. CLECs attempted to open a dialogue with Qwest regarding this and other *TRO/TRRO* issues for the past two years without success. Qwest's existing process was not developed in the CMP, and Qwest did not solicit any CLEC input. Eschelon contends that Qwest should not be permitted to delay resolution of these issues further by deferring them to CMP.

Decision. As in the case of the conversion process discussed above, the record is insufficient to resolve the issues raised by the parties regarding the appropriate processes for ordering, provisioning, and billing commingled EELs. It would be injudicious of the Commission to adopt Eschelon's proposals without a thorough review of the matter, particularly in view of Qwest's claims that those proposals will result in serious operational problems and substantial implementation costs. In addition, the treatment of commingled EELs is a matter affecting all CLECs doing business in Oregon, not merely the parties to this arbitration. For these reasons, the Commission should initiate a general investigation to consider the issues relating to ordering, provisioning, and billing commingled EELs.[141] For the present, Qwest's recommended language should be included in the ICA.

Issue 9-61 and subparts (a)-(c) -- Loop-Multiplexing Combinations.[142]

Multiplexing combines multiple analog message signals or digital data streams onto a single channel or communications line, thereby increasing the effective carrying capacity of the circuit. A loop-multiplexing combination (loop-mux combination or LMC) includes both loops and multiplexing functionality, but does not include interoffice transport. In an end office, loop-mux combinations allow CLECs to combine UNE loops serving end-user customers into a single, higher bandwidth circuit that is then routed to the CLEC's collocation space.[143] The parties disagree over whether

[141] Qwest argues that this matter is best handled in the CMP, but the evidence suggests that the parties have been unable to make substantial progress in that forum despite the significant passage of time.

[142] Disputed Issues List at 71-81; ICA §9.23.9 and subparts; §24.4 and subparts; §§9.23.2, 9.23.4.4.3; and §9.23.6.2.

[143] Section 9.23.9.1.1 defining Loop-Mux Combinations clarifies that LMCs do not include interoffice transport and are connected to a collocation cage. Also, Section 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 does not seek to use UNE multiplexing to commingle UNEs with tariffed services. Eschelon Brief at 101.

the multiplexing function used in a LMC is a UNE and must be provided at TELRIC rates. This has generated additional disputes regarding whether:

- Loop-mux combinations are UNE combinations or commingled arrangements, and therefore whether they should be addressed in Section 9 of the ICA regarding UNEs (Eschelon proposal) or Section 24 regarding Commingling. (Qwest proposal.) (Issues 9-61 and 9-61(a).)

- Service and installation intervals for loop-mux combinations should be included in the ICA or in Qwest's Service Interval Guide (SIG). (Issue 9-61(b).)

- Rates for loop-mux combinations should be included in the ICA or set forth in Qwest's tariff. (Issue 9-61(c).)[144]

Under 47 C.F.R. §51.307(c), ILECs must provide access to UNEs, "along with all of the unbundled 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."[145] Eschelon asserts that multiplexing is a feature, function, or capability of the loop and must be provided at UNE rates when provided as part of a loop-mux combination.[146] It states that this was reaffirmed in the *TRO*:

> 214. 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 service.[147]

* * * *

[144] Eschelon and Qwest also disagree regarding the appropriate rates for loop-mux combinations.

[145] See also 47 C.F.R. §51.319(a) (defining the "local loop" to include "all features, functions, and capabilities of such transmission facility . . . .")

[146] Eschelon does not seek access to multiplexing as a "stand-alone UNE." Eschelon/132, Starkey/145.

[147] Eschelon also cites ¶635, ftn. 1922 of the *TRO,* wherein the FCC clarified that "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." Eschelon Brief at 102-104; Eschelon/1, Starkey/231.

> 571. In the *Notice,* the Commission sought comment on issues related to the EEL, which is a UNE combination consisting of an unbundled loop and dedicated transport and may sometimes include additional electronics (*e.g.*, multiplexing equipment).

Eschelon contends that its position is further substantiated by FCC Rule 47 C.F.R. §51.319, which provides that deploying or reconfiguring a multiplexer is part of an ILEC's obligations to perform "routine network modifications" both with respect to the provisioning of unbundled loops and unbundled transport.[148] In addition, Eschelon emphasizes that Qwest currently offers LMC at Commission-approved TELRIC rates.[149] It argues that Qwest should be required to continue providing this service as it has in the past.

Qwest disagrees with Eschelon's claim that LMC is a UNE combination that must be provided at TELRIC rates. Since multiplexing is not a stand-alone UNE, it is not a UNE combination when Qwest is asked to combine an unbundled loop and stand-alone multiplexing.[150] Instead, LMC is a commingled arrangement that involves "the connecting or linking of a UNE . . . with a non-UNE tariffed facility (*i.e.,* a tariffed DS1 or DS3 private line or special access service)."[151] Qwest notes that, until the FCC authorized commingling in the *TRO*, CLECs had no readily available mechanism for handing off UNE loops to their collocation spaces where the loops could be connected to higher bandwidth transport facilities. To address this situation, Qwest voluntarily provided LMC to CLECs. However, now that CLECs can purchase commingled arrangements, LMC is no longer necessary to connect UNE loops with tariffed transport facilities.

Qwest asserts that the *TRO* "states very clearly that multiplexing used with commingling is an interstate access service," thus refuting Eschelon's claim that it is entitled to receive multiplexing at TELRIC rates when it is used in a commingled arrangement.[152] Paragraph 583 of the *TRO* states, in part:

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[148] 47 C.F.R. §§51.319(a)(7) and 51.319(e)(4); *see also* Eschelon/132, Starkey/147.

[149] Eschelon/1, Starkey/231-232; Eschelon Brief at 102.

[150] Qwest/37, Stewart/67.

[151] *Id.* at 68; Qwest Brief at 49-50.

[152] Qwest/37, Stewart 69. Qwest notes that South Carolina, Florida, Mississippi, and Alabama have all ruled that tariffed rates govern the multiplexing component of a commingled arrangement. Qwest Brief at 50-52.

> [C]ommingling allows a competitive LEC to connect or attach a UNE or UNE combination with an interstate access service, such as high-capacity multiplexing or transport services. Because commingling will not enable a competitive LEC to obtain reduced or discounted prices on tariffed special access services . . . .

Qwest also rejects Eschelon's claim that LMC is a feature, function, or capability of a UNE loop. It contends that the FCC statements relied upon by Eschelon deal with a different type of multiplexing that takes place between the customer premise and the main distribution frame, consistent with the FCC's definition of the local loop.[153] Here, however, multiplexing is used to commingle a UNE loop and tariffed transport and does not take place between the distribution frame and a customer premise. Moreover, because multiplexing is not required for the loop to function, it cannot reasonably be viewed as a feature, function, or capability of the loop.[154]

Eschelon responds that Qwest mischaracterizes the issue by referring to LMC as a commingled arrangement combining multiplexing with a non-UNE private line transport facility. In fact, closed language in the ICA defines LMC as a UNE loop connected to a multiplexer, connected to the CLEC's collocation with no interoffice transport.[155]

Eschelon also asserts that Qwest's position regarding multiplexing is inconsistent and lacking in legal support. Whereas Qwest claims that multiplexing is not a feature, function, or capability of a loop because loops can function without multiplexing, it acknowledges that multiplexing is a feature, function or capability of unbundled transport even though transport can also function without multiplexing.[156] Furthermore, Eschelon stresses that "there are a number of other things – such as

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[153] 47 C.F.R. §51.319(a) defines the local loop as "a transmission facility between a distribution frame (or its equivalent) in an incumbent LEC central office and the loop demarcation point at an end-user customer premises." Qwest asserts that to qualify as a feature or function of the loop, a piece of equipment must be located with, or be a part of, the transmission facility that runs between a distribution frame (or equivalent frame) and a customer's premises. The multiplexing equipment used to commingle a UNE loop and tariffed transport is *not* located between a distribution frame (or equivalent frame) and a customer's premises. Instead, it is located on the transport (or central office side) of a frame in a central office and thus is not part of the loop transmission facility. Qwest/37, Stewart/70; Qwest Brief at 52-53.

[154] Qwest agrees that multiplexing must be provided at TELRIC rates when it is used to connect a UNE transport and a UNE loop. It also agrees that multiplexing is a "feature, function or capability" of unbundled transport. Qwest/37, Stewart/67-68, 71.

[155] See ftn. 143, supra.

[156] Qwest/37, Stewart/70-71; Eschelon/132, Starkey/147.

repeaters and load coils – that are not required for a loop to function but are clearly features, functions, or capacities of the loop."[157]

Decision. From a procedural standpoint, this issue presents essentially the same problem posed by Qwest's suggested treatment of UCCRE; that is, Qwest wants to discontinue a product that has been made available to Eschelon and other CLECs at Commission-approved TELRIC rates. Again, the trouble with this approach is that other CLECs are deprived of the opportunity to contribute to the outcome because they cannot participate in this arbitration proceeding.[158] To correct this situation, Qwest should request a simultaneous amendment of its ICAs to reflect its interpretation of the law regarding multiplexing and LMC. This will enable all interested CLECs to weigh in on the matter, and, to the extent the parties cannot reach agreement, allow the issue to be resolved via the dispute resolution process set forth in the ICAs.

Even if there were no procedural obstacles to Qwest's approach, there remain outstanding questions regarding the FCC's stance on multiplexing when provided as part of a loop-mux combination. As demonstrated above, the FCC has made a number of statements regarding multiplexing that are susceptible to different interpretation. A more extensive factual and legal examination of this issue is necessary before the Commission (or other decision-making body) can make a fully informed decision on this matter.

For these reasons, Eschelon's proposed language for Issue 9-61 and Issue 9-61(a) is adopted. For Issue 9-61(b), Qwest's proposed language for Section 24.4.4.3 is adopted consistent with the decision regarding service intervals in Issue 1-1.[159] For Issue 9-61(c), Eschelon's proposed LMC rates are adopted. Those rates mirror the current rates listed in Qwest's Statement of Interconnection and Unbundled Elements Price List, Section 2.3, and Exhibit A of Qwest's currently filed Oregon SGAT. Eschelon's proposed rates will maintain the status quo until the issues relating to LMC are resolved elsewhere.

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[157] Eschelon Brief at 103, citing 47 C.F.R. §51.319(a) (defining the loop as including repeaters and load coils); *see also* Eschelon/132, Starkey/146-147.

[158] OAR 860-016-0030(6) provides that only the two negotiating parties will have full party status in an arbitration proceeding before the Commission.

[159] See Disputed Issues List at 79. Eschelon's proposed wording for Sections 9.23.4.4.3 and 9.23.6.2, substituting the term "UNE Combinations" for "EEL" is adopted.

Issue 12-64 and Issue 12-64(a)-(b) -- Root Cause Analysis and Acknowledgment of Mistakes.[160]

Issue 12-64 concerns Eschelon's proposals to require Qwest to provide a root cause analysis and/or written acknowledgment when it commits a mistake relating to products or services provided under the ICA.[161] Eschelon also recommends that Qwest's written acknowledgment be provided with Qwest identification, such as a letterhead, logo, or other indicia (Issue 12-64(a)), and that such acknowledgment be provided on a nonconfidential basis (Issue 12-64(b)). Qwest recommends deleting all of Eschelon's proposed contract language.

Eschelon emphasizes that it relies on Qwest to provide new services, change existing services, and maintain and repair facilities. If Qwest makes a mistake, the service provided to Eschelon's customers may be disrupted, causing harm to Eschelon's business. The root cause analysis/written acknowledgment requirements are designed to address Qwest mistakes that create "service impacting conditions" as defined in the ICA.[162] Eschelon's second alternative was approved by the Minnesota Commission in response to Qwest's failure to "adopt operational procedures to promptly acknowledge and take responsibility for mistakes in processing wholesale orders."[163]

Qwest states that it has undertaken a number of changes regarding root cause analysis in response to the Minnesota proceeding. Because those issues are now documented in Qwest's processes and procedures, it is unnecessary to include Eschelon's proposed language in the ICA. Qwest also chose not to submit the result of the Minnesota decision to the CMP because it did not rise to the level of a regulatory change request. Using the CMP is also unnecessary since Qwest has already developed mechanisms allowing CLECs to obtain root cause analysis.[164]

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[160] Disputed Issues List at 81-85; ICA §12.1.4 and subparts.

[161] Eschelon offers two proposals for Section 12.1.4.1. Both allow Eschelon to request a root cause analysis/written acknowledgment, and specify the information that must be included in Eschelon's request. The difference between the two proposals is that the first encompasses "mistake[s] relating to products and services," whereas the second encompasses "mistake(s) in processing wholesale orders, including pre-order, ordering, provisioning, maintenance and repair, and billing."

[162] Under Eschelon's proposed ICA, Section 12.1.4.1, the ability to request a root cause analysis is limited to mistakes that create a "service impacting condition." This requires that Eschelon follow the usual procedures to correct that condition before requesting raising the matter with Qwest. In addition, other ICA provisions also require Eschelon to investigate problems before reporting them to Qwest. Eschelon Brief at 111.

[163] Eschelon/5, Starkey/1-5; *In the Matter of a Request by Eschelon Telecom for an Investigation Regarding Customer Conversion by Qwest and Regulatory Procedures,* Minnesota Public Utilities Commission, Docket No. p-421/C-03-616, *Order Finding Compliance Filing Inadequate and Requiring Further Filings* (Nov. 12, 2003) ("MN *616 Case*").

[164] Qwest's Account Manager PCAT allows CLECs to request a root cause analysis from a Qwest service manager for "unusual repair events." In addition, Qwest's Maintenance and Repair PCAT provides a process for root cause analysis of chronic repair problems. Qwest/18, Albersheim/32.

Qwest contends that the concerns expressed by Eschelon are not generally shared by other CLECs and would result in a unique "one-off process" for Eschelon. In addition, Qwest claims that the language proposed by Eschelon (a) goes well beyond what was ordered in recent Minnesota arbitration; (b) gives Eschelon unfettered discretion to demand root cause analyses; (c) allows Eschelon to use root cause requests as a delaying tactic; (d) adds vague requirements to Qwest's obligations, and (e) may force Qwest to publicly reveal protected information.

Eschelon disagrees with Qwest's arguments regarding the proposed contract language. It maintains that:

- Concerns relating to root cause analysis and acknowledgment of mistakes apply to all CLECs, not merely Eschelon.[165]

- Contrary to Qwest's claims, the proposed contract language does not exceed the requirements adopted in Minnesota. In fact, the second proposal for Section 12.1.4.1 mirrors the contract language adopted by the Minnesota Commission in the recent Eschelon/ Qwest arbitration.[166] Furthermore, Qwest agreed to virtually all of Eschelon's proposed language in that proceeding.

- Qwest's refusal to consider the Minnesota requirements in the CMP, together with its refusal to include those requirements in the ICA, demonstrates that it is Qwest, not Eschelon, who seeks "unfettered discretion" over the decision to conduct root cause analyses.

- There is no logic behind Qwest's suggestion that Eschelon will use root cause requests to delay responding to its end user customer in order to blame Qwest. If the analysis shows that Qwest is not at fault, the blame will fall on Eschelon. Eschelon does not benefit by causing delays for its own customers and then compounding the problem by wrongly accusing Qwest.

- Eschelon's recommendation that Qwest's written acknowledgment of its mistake include "sufficient pertinent information to identify the issue" is not vague or burdensome as Qwest contends. In fact, the same language was adopted in the Minnesota arbitration.

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[165] Eschelon asserts that Qwest has contradicted itself on this issue, arguing on the one hand that it involves all CLECs, and on the other, that it does not. Eschelon Brief at 107-111.

[166] MN Arb Order at 14; Eschelon/30, Denney/14; Eschelon Brief at 106.

- Qwest's claim that it may be forced to disclose confidential information in its written acknowledgment letter ignores the proposed contract language, which provides only that the letter include sufficient data to identify the issue.

Decision. In its *616 Proceeding,* the Minnesota Commission discussed the obligation imposed on ILECs providing wholesale services to competing carriers under the Act:

> [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. Telecommunications service is an essential service, and few customers will transfer their service to a competitive carrier whose service quality appears to be inferior.[167]

As emphasized, issues relating to root cause analysis and acknowledgment of mistakes have a significant impact on local exchange competition. The requirements adopted in Minnesota are designed to address concerns that affect not only Eschelon, but all CLECs generally. Given that Qwest has declined to consider the Minnesota requirements in the CMP process, it is reasonable for Eschelon to request their inclusion in the ICA.

Qwest argues that it has already adopted adequate procedures to address these issues and that Eschelon's proposed language is fraught with problems. I disagree. First, the root cause processes identified by Qwest are limited to "unusual repair events" and "chronic" problems, and may not encompass all situations warranting a root cause analysis.[168] Second, Qwest's criticisms of Eschelon's proposals do not withstand scrutiny for the reasons outlined by Eschelon above.

Contrary to Qwest's claims, the contract language proposed by Eschelon is clear, straightforward and reasonable. Including these provisions in the ICA will provide Eschelon with a greater level of business certainty without imposing an undue burden on Qwest. Eschelon's second proposal for Issue 12-64 is adopted as are its proposals for Issues 12-64(a) and 12-64(b).

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[167] MN *616 Case* at 8; Eschelon/5, Starkey/1, 13.

[168] Qwest/18, Albersheim/32-34.

Issue 12-67; Issue 12-67(a)-(g) -- Expedited Orders.

Issue 12-67 and subparts (a)-(g) deal with the circumstances under which Qwest should expedite the delivery of products and services ordered by Eschelon. An expedited order, or expedite, requires Qwest to provide a service in less time than it would otherwise take under the normal service provisioning interval. Qwest and Eschelon offer expedites to its customers in emergency situations and to accommodate customer needs when unanticipated circumstances arise.[169] The parties disagree on the following issues:

Issues 12-67, 12-67(c), 12-67(d), and 12-67(f)) -- Location of Contract Language.

Eschelon proposes to include language relating to expedites in Section 12.2 of the ICA (Pre-ordering, Ordering, and Provisioning). Qwest, on the other hand, recommends addressing the subject in Section 7 (Interconnection) and Section 9 (UNEs). Qwest's proposal corresponds with its current practice of distinguishing between expedites for design and nondesign services.

Decision. Because expedites are requests associated with provisioning a CLEC order, it is logical to include them in the ordering and provisioning section of the ICA. This is consistent with the manner in which expedites are addressed in the current Qwest/Eschelon ICA[170] (and this Decision), and is more efficient than repeating terms in different sections. Eschelon's proposed language is adopted.

Issue 12-67(a) (Eschelon's proposal) and Issue 12-67(d) and (g) (Qwest's proposal) -- No-Fee Emergency Expedites.

For several years, Qwest provided expedites to Eschelon and other CLECs in certain emergency situations for both design and nondesign services at no additional cost. In 2006, Qwest implemented revised procedures through the CMP notification, allegedly in response to CLEC abuses of the expedite process. Qwest now offers free expedites only for nondesign services in emergency situations. For design services, Qwest charges a $200 per/day expedite charge without regard to emergencies.[171] Qwest argues that the distinction between nondesign and design and expedites is reasonable because the latter services are more complex and expensive to provision.

Eschelon offers four alternative proposals designed to restore no-fee, emergency expedites for all products and services, including design services. It disputes the reasons offered by Qwest for the 2006 change in policy and asserts that the current

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[169] This might occur, for example, if a customer is unexpectedly disconnected, or because of fire, flood, or national emergency.

[170] In the current Qwest/Eschelon ICA, expedites are addressed in Attachment 5, entitled "Provisioning and Ordering."

[171] Qwest charges $200 per day for each day that the installation is advanced.

process is inconsistent with the parties' existing contract and the CMP. Eschelon emphasizes that its proposals will ensure that its customers receive expedites on the same terms and conditions as Qwest's retail customers.

Decision. Qwest's contract proposal would continue changes in the expedite process that were implemented in 2006, allowing no-fee expedites in specified circumstances for nondesign services only. Qwest argues that its current process was properly implemented through the CMP, but the record casts doubt upon that assertion. Evidence presented by Eschelon strongly indicates that the 2006 changes implemented by Qwest are (a) contrary to the parties' long-standing interpretation of the ICA,[172] (b) inconsistent with representations made to Eschelon and other CLECs in the CMP process,[173] and (c) contrary to the governing provisions of the CMP Document.[174] Because of the outstanding questions surrounding the implementation of Qwest's current process for no-fee expedites,[175] that process should not be incorporated in the ICA.[176]

Eschelon's fourth proposal for Section 12.2.1.2.1 (Issue 12-67(a)) represents a reasonable compromise regarding the issue of no-fee expedites and is therefore adopted.[177] As in the past, no-fee expedites are allowed for all products and

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[172] Eschelon/9, Denney/204-206; Eschelon/32, Eschelon/93, Eschelon/94.

[173] See, *e.g.*, Eschelon/93, Johnson/6; Eschelon/94, Johnson/3-4, 9-10; Eschelon Brief at 120-121.

[174] As noted above, Section 1.0 of the CMP Document provides: In cases of conflict between the changes implemented through this CMP and any CLEC ICA (whether based on the Qwest SGAT or not), the rates, terms, and conditions of such ICA shall prevail as between Qwest and the CLEC party to such ICA. In addition, if changes implemented through this CMP do not necessarily present a direct conflict with a CLEC ICA, but would *abridge* or expand the rights of a party to such agreement, the rates, terms, and conditions of such ICA shall prevail as between Qwest and the CLEC party to such agreement. (Emphasis added.) See *also*, Eschelon/9, Denney/204-206; Eschelon/32, Eschelon/93, Eschelon/94.

[175] In addition to the foregoing concerns, Qwest has not substantiated its claim that it was necessary to implement the current expedite criteria because CLECs were abusing the process by "submitting spurious emergency expedite requests." Qwest/1, Albershiem/55. These assertions do not correspond to the reasons provided by Qwest at the time it modified its expedite process; nor did Qwest provide any documentation detailing the alleged instances of CLEC abuse. Eschelon/93, Johnson/11; Eschelon/94, Johnson/3-4; Eschelon/108, Johnson/3-4. Eschelon Brief at 120-121.

[176] Qwest argues that Eschelon's arguments regarding the current expedite process should be given no weight because it has not contested the changes Qwest implemented in 2006. Qwest/1, Albershiem/63; Qwest/18, Albershiem/43. Again, the record does not support this claim. Eschelon/141, Johnson/17-19; Eschelon/93, Johnson/12-15; Eschelon/94, Johnson/1-5; Eschelon/1, Starkey/47; see also, Eschelon Brief at 121-122.

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

services, but only in circumstances where Qwest also offers no-fee expedites to its own retail customers. This results in the nondiscriminatory provision of no-fee expedites for both Eschelon and Qwest customers consistent with the requirements of the Act. In addition, Qwest is protected from the possibility of abuse because it is only required to provide no-fee expedites if resources are available. This will ensure that Qwest will not incur additional costs to accommodate expedite requests and will discourage CLECs from requesting expedites unnecessarily.

Issue 12-67(b) (Eschelon's proposal), Issue 12-67(f) (Qwest's proposal), Issue 12-67(g) -- Fee-Based Expedites/Pricing.

Qwest contends that expedites are not UNEs, but rather constitute a "superior service" that ILECs are not obligated to provide at cost-based rates.[178] It proposes to offer expedites to Eschelon at the same tariff rates that Qwest charges its retail customers – currently $200/day.[179]

Eschelon contends that the ICA should allow for fee-based expedites in nonemergency situations. The expedite charge would be assessed in addition to the applicable nonrecurring installation charge for the service.[180] Eschelon recommends an interim expedite rate of $100 until the Commission establishes a TELRIC-based rate in a cost-study proceeding.

Decision. Qwest contends that it is not required to provide expedites to Eschelon because they are not UNEs, but this argument misses the point. Expedites are routinely provided by Qwest in the regular course of business to accommodate customer needs for accelerated installation of service.[181] For Eschelon to offer an equivalent service, it must be allowed to obtain expedited access to UNE loops. Expedites thus enable Eschelon to gain *access to a UNE* so that it can compete effectively with the accelerated installation service offered by Qwest. Both the Act and applicable FCC rules[182] mandate that ILECs provide nondiscriminatory access to UNEs.[183]

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[178] The 8th Circuit Court of Appeals has recognized that the Act does not require ILECs to offer "superior service" – that is, to build facilities for CLECs if the ILEC would not build comparable facilities for itself. *Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 813 (8th Cir. 1997); See *also*, Qwest/1, Albersheim/64.

[179] Qwest's proposed expedite charge is listed in Section 9.20.14 as "ICB" (Individual Case Basis), for which Qwest charges $200 per day. Qwest/1, Albersheim/64, ftn. 39. In addition to paying the tariff rate, Eschelon would have to meet the criteria set forth in the PCAT.

[180] Eschelon's proposed language for Section 12.2.1.2.3 (Issue 12-67(c)) clarifies that the charge for providing an expedite is in addition to the nonrecurring charge to install the facility.

[181] Eschelon/6, Starkey/4; Eschelon/9, Denney/203; Eschelon/7, Starkey/12; Qwest/18, Albersheim/35; Eschelon Brief at 130.

[182] 47 U.S.C. §251(c)(3); 47 C.F.R. §51.511 and §51.513.

[183] With respect to this issue, the Minnesota Commission concluded: "Whether Qwest has an obligation to offer expedited access to UNEs or merely chooses to offer it, it is undisputed that Qwest does offer

Qwest's argument that expedites constitute a "superior service" is similarly flawed.[184] Eschelon is not asking Qwest to provision any services or facilities that it does not already provide to itself and its retail customers.[185] FCC Rule 47 C.F.R. §51.511 specifically requires Qwest to provide nondiscriminatory access to UNEs that is equal in quality to the service it provides to itself and its retail customers.

With respect to pricing, Qwest argues that, to the extent they are offered at all, expedites should be provided at market-based tariff rates. Eschelon suffers no discrimination, Qwest contends, because the same rates are paid by Qwest's retail customers. This argument fails to acknowledge that the Act also requires ILECs to provide access to UNEs on terms and conditions that are no less favorable than those the ILEC provides *to itself.* Qwest does not charge itself a market rate when it expedites orders for its own retail customers; rather, it incurs only the cost of expediting those orders. If Eschelon is forced to pay expedite rates based on whatever the market will bear,[186] Qwest will enjoy an unfair competitive advantage. Because Qwest's market-rate proposal imposes less favorable price terms upon Eschelon, it violates 47 C.F.R. §51.513(b) and denies Eschelon a meaningful opportunity to compete.[187]

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expedited access to its own retail operations. And if Qwest offers expedited access to UNEs for its own retail operations, Qwest has a duty to provide such access on a nondiscriminatory basis to CLECs as well." MN Arb Order at 18; Eschelon/30, Denney/18.

[184] The Minnesota Commission also rejected Qwest's argument on this point, noting that Qwest had "misapplied" the "superior service" concept articulated by the 8th Circuit Court of Appeals and the FCC. *Id.*

[185] Qwest's claim that expedites are a superior service assumes that the provisioning interval for Eschelon to obtain DS1 and DS3 loops is shorter than the interval in which Qwest provisions DS1 and DS3 private lines to its customers. Qwest/18, Albersheim/Qwest/40, Albersheim/23-24. Qwest agreed that it would not be superior service if the provisioning for UNE loops was the same as the interval for provisioning private lines. Tr. at 35. Qwest has also acknowledged that if expedites are not a superior service, then cost-based pricing is appropriate. Eschelon/6, Starkey/31. After the hearing, the parties confirmed that the provisioning interval for DS1 loops in Oregon is the same as the interval for provisioning DS1 private lines.

[186] Qwest/39, Million/26.

[187] State commissions are divided on this issue. The Kentucky and Florida commissions, as well as the recently issued Arbitrator's decision in the Arizona Eschelon/Qwest arbitration find no obligation to provide expedites at TELRIC rates. See Qwest Brief at 59-60; also, AZ Arb Report at 82-83. On the other hand, the North Carolina, Delaware, and Minnesota commissions have concluded otherwise, as has the Arbitrator in the recent Washington Eschelon/Qwest arbitration. See Eschelon Brief 132; MN Arb Order at 18; Eschelon/30, Denney/18; *In the Matter of the Petition for Arbitration of an Interconnection Agreement between Qwest Corporation and Eschelon Telecom, Inc., Pursuant to 47 U.S.C. Section 252,* Docket UT-63061, Arbitrator's Report and Decision at 43 (January 18, 2008). In my opinion, the latter view is more consistent with the intent of the Act.

Eschelon's proposed $100 interim expedite rate is similar to the amount currently charged by Qwest for basic installation of a DS1 capable loop.[188] Since expediting service does not require any additional facilities but only requires performing those activities more quickly,[189] a rate approaching the installation cost is reasonable. Eschelon's interim rate is adopted pending Commission approval of permanent TELRIC-based rate in a cost-study docket.

Issues 12-71, 12-72, and 12-73 -- Jeopardies.

A "jeopardy" occurs when one of the parties is unable to meet a service commitment within the time prescribed in the ICA. Agreed-upon language in Section 9.2.4.4.1 provides that when Eschelon places an order for an unbundled loop that is complete and accurate, Qwest will reply with a Firm Order Confirmation (FOC) within a specified time.[190] The FOC includes the due date[191] on which Qwest will provision the loop. Qwest ensures the accuracy of the due date, but if it must modify that date, it will promptly issue a jeopardy notification to Eschelon stating the reason for the change. Qwest must also submit a new FOC that identifies a new Due Date for provisioning the loop.

The classification of a jeopardy as Qwest-caused or Eschelon-caused ("Customer Not Ready" or "CNR") has significant consequences for the parties. Too many missed commitments can place Qwest out of compliance with the performance indicators (PIDs) in its Performance Assurance Plan (PAP) and subject it to financial penalties.[192] On the other hand, a CNR jeopardy requires Eschelon to submit a

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[188] The record indicates that the installation cost for a DS1 capable loop is $127.67. Eschelon/9, Denney/233-236.

[189] Eschelon/6, Starkey/31 (MN Arb Tr., Vol. 2, p. 97); Eschelon Brief at 117, 128.

[190] The FOC requirement is also included in Qwest's SGAT. *In the Matter of the Statement of Generally Applicable Terms and Conditions for Interconnection, Unbundled Network Elements, Ancillary Services, and Resale of Telecommunications Services Provided by U S WEST Communications, Inc., in the State of Oregon*, OPUC Docket UM 973, Order No. 07-364, Exhibit K (August 22, 2007).

[191] Qwest differentiates between Due Date (DD) jeopardies and Critical Date jeopardies. DD jeopardies indicate that the due date is in jeopardy, while Critical Date jeopardies indicate that a Critical Date prior to the due date is in jeopardy. Qwest's policy is that Critical Date jeopardies can be disregarded, and Eschelon should continue to prepare to receive delivery of service on the due date. In the case of DD jeopardies, Qwest has the responsibility to resolve the jeopardy and advise Eschelon of the new due date when the jeopardy condition is resolved. In other words, Eschelon should not expect delivery of service until it receives a new FOC advising it of the new due date. Eschelon/115, Johnson/3-4, ftns. 5-6; Eschelon/43, Johnson/55-57.

[192] The PAP was adopted by the Commission as part of Qwest's §271 application. It includes PIDs OP-3 (Installation Commitments Met), OP-4 (Installation Interval), and OP-5 (Firm Order Confirmations On Time), all of which distinguish between Qwest-caused delays and CLEC-caused delays. Qwest cannot change the PIDs without Commission approval. Order No. 07-364, Exhibit K.

supplemental order with a new due date that is at least three days after the date of the supplemental order.[193]

Eschelon proposes to include language in the ICA:

- Classifying a jeopardy caused by Qwest as a "Qwest jeopardy" and a jeopardy caused by Eschelon as a "Customer Not Ready (CNR)." Eschelon's alternative proposal would add language clarifying that the jeopardy classifications do not modify the PIDs. (Issue 12-71.) (Section 12.2.7.2.4.4.)

- Providing that Qwest will not classify a jeopardy as a CNR where a Qwest-caused jeopardy occurs and Qwest attempts to deliver service without sending a FOC *at least a day before* the attempted delivery of service. Eschelon will use its best efforts to accept delivery when Qwest is ready, and, if needed, the parties will attempt to set a new appointment time on the same day. If the service cannot be delivered on the same day, Qwest will issue a Qwest jeopardy notice and a FOC with a new due date. (Issue 12-72.) (Section 12.2.7.2.4.4.1.)

- Requiring Qwest to correct an erroneous CNR classification and assign the jeopardy to itself if Eschelon establishes that it did not cause a CNR jeopardy. (Issue 12-73.) (Section 12.2.7.2.4.4.2.)

Eschelon's proposed language for Issues 12-71 thru 12-73 reflects Qwest's current jeopardy process, except for the "day before" requirement noted above.[194] That requirement is intended to address a recurring situation in which Qwest has incorrectly classified Qwest-caused jeopardies as CNR jeopardies. This has happened when (a) Qwest provides an initial jeopardy notice indicating that the due date will be missed because there are no facilities to fill the order; (b) facilities unexpectedly become available on the due date, but Qwest does not provide a FOC (or a timely FOC) informing Eschelon that it is ready to deliver service as originally scheduled; and (c) Eschelon is unable to accept delivery of service.[195] Given the absence of required notice, Eschelon claims it is improper to classify its inability to accept service in this situation as a CNR jeopardy. Qwest acknowledges that it has classified jeopardies as CNR despite its failure to send an FOC.[196]

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[193] 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, it states that Qwest may attempt to deliver the circuit in less time. Qwest/18, Albersheim/57. There is no guarantee, however, that the timeframe will be shorter.

[194] Qwest/1, Albersheim/69; Qwest/18, Albersheim/46; Eschelon/6, Starkey/6; Eschelon Brief at 146.

[195] As discussed below, Eschelon may be unable to accept delivery if it does not have personnel available or cannot secure access to the customer's premises. Eschelon/43, Johnson/57.

[196] Qwest/18, Albersheim/55; Eschelon/115, Johnson (Category A).

Eschelon states that its proposed language will ensure that CNRs are correctly assigned, allowing more timely delivery of service to its customers and advancing the goals set forth in the PAP. In addition, Eschelon asserts that Qwest agreed to the "day before" requirement in the CMP but has since disavowed that commitment, confirming the need for explicit language in the ICA regarding this issue.

Qwest opposes Eschelon's proposed contract language, and recommends that jeopardy-related procedures be handled in the CMP and published in the PCAT. Qwest maintains that Eschelon's proposals (a) will be ineffective and produce delays; (b) are designed to address a problem that rarely occurs; (c) will alter the PIDs and PAP to Qwest's financial detriment; and (d) should be addressed in an industry-wide forum where all CLECs can participate.

Decision. Eschelon's proposed contract language[197] is adopted. Eschelon's proposals essentially mirror Qwest's current practice, the only significant difference being that Eschelon will not be assigned a CNR in the case where Qwest issues a due date jeopardy notice but does not send Eschelon a FOC at least one-day before Qwest attempts to deliver the service.[198] As discussed below, the proposed one-day notice is reasonably required to provide Eschelon with adequate notice of the intended delivery of service.

Eschelon's proposed language ensures that it will not be held responsible where Qwest has failed to meet its contractual obligation to provide adequate notice. As explained above, the ICA requires that Qwest "will submit a new Firm Order Confirmation [FOC] that will clearly identify the new Due Date" following the issuance of a Qwest jeopardy notice. The primary purpose of the FOC is to give Eschelon advance notice of the date when Qwest will deliver the circuit.[199] This allows Eschelon time to (a) schedule sufficient personnel to complete the installation and (b) make arrangements with customers if access to the premises is necessary. While the record shows that both carriers strive to complete delivery on the original due date even when Qwest does not send a new FOC, it is nevertheless a contractual requirement. The ICA cannot reasonably be interpreted to allow Qwest to penalize Eschelon by assigning it a CNR when Qwest has not complied with the notice requirement in the contract.

Contrary to Qwest's claim, the proposed language will improve delivery of service to Eschelon's customers. Whenever Eschelon is assigned a CNR incorrectly, it must submit a supplemental order and request a new due date that is at least three days

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[197] Eschelon's second proposal for Issue 12-71 is adopted.

[198] Eschelon/6, Starkey/6 (Testimony of Qwest Witness Renee Albersheim; MN Arb Tr., Vol. 1, p. 37); Eschelon Brief at 153.

[199] Qwest agrees that the FOC is the agreed upon process by which Qwest informs Eschelon of the due date for delivery of a circuit. Eschelon/7, Starkey/7 (Testimony of Qwest Witness Renee Albersheim; MN Arb Tr.,Vol. 1, p. 38); Eschelon Brief at 167.

after the date of the order, thereby delaying service to its customers. As the Minnesota Commission explained:

> 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.[200]

Where Qwest violates its contractual duty to send a FOC, and as a result Eschelon is denied the opportunity to adequately prepare to accept service so that the due date is missed, Qwest should not be able to shift the consequences of its failure to Eschelon by improperly assigning a CNR and causing Eschelon to receive a delayed due date.

Qwest asserts that its failure to deliver a new FOC does not usually pose a problem and that it is rare for Eschelon to receive a CNR under the circumstances described above.[201] Because Qwest and Eschelon technicians work in close communication, Qwest has been able to deliver circuits on the original due date 76 percent of the time without a FOC after a Qwest jeopardy has occurred.[202] Unfortunately, this means that almost one-fourth of the time Eschelon cannot accept delivery and receives a CNR through no fault of its own. Furthermore, the parties' ability to cooperate in the past provides no guarantee for the future. As Eschelon points out, the informal communication process relied upon by Qwest is not part of the documented jeopardy process and should not supplant the existing contractual obligation to provide a FOC.[203]

According to Qwest, the only way for Eschelon to avoid a CNR is to stand ready to accept service on the original due date, despite the issuance of a Qwest jeopardy.[204] In other words, Eschelon should disregard the jeopardy and be prepared to take service on the chance that the problem will be resolved on the due date.[205] It is not possible to reconcile this outcome with the purpose of the FOC, which is to provide Eschelon with *advance notice* so that it has a reasonable amount of time to prepare to accept service. Eschelon's proposed one-day notice satisfies this requirement.

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[200] MN Arb Order at 21; Eschelon/30, Denney/21.

[201] Qwest Brief at 63.

[202] Tr. 43-44; Qwest Brief at 65.

[203] Eschelon's analysis of technician notes also shows that the communications between technicians often come too late in the process to provide adequate notice. See, *e.g.*, Eschelon/115; Eschelon Brief at 168.

[204] Tr. at 44-47; Eschelon/7, Starkey/14 (Testimony of Qwest Witness Renee Albersheim; AZ Arb Tr., Vol. 1, pp. 67-69); Eschelon Brief at 163, ftns. 840, 842.

[205] Eschelon would be assigned a CNR if Qwest issues a jeopardy notice on the due date and manages to resolve it, but for some reason Eschelon is unable to accept delivery.

Qwest contends that jeopardy issues should be addressed in the CMP because they affect all CLECs.[206] However, Eschelon has presented substantial evidence demonstrating that Qwest has already committed in the CMP to provide a FOC one day in advance of service delivery.[207] Qwest's refusal to acknowledge its CMP commitment, its past practice of improperly assigning CNRs,[208] and the need to ensure adequate notice in the future all substantiate Eschelon's position that jeopardy language must be included in the ICA to provide the requisite level of business certainty.[209]

As a final matter, the record does not support Qwest's claim that Eschelon's proposals will alter the PIDs or PAP. First, Eschelon agrees to use its best efforts to accept delivery of a circuit/service even when Qwest has provided an untimely FOC or no FOC at all. This means that Eschelon will not receive any PAP payments for the untimely or missed FOC if the parties are able to deliver service on the original due date.[210] Second, Eschelon's alternative proposal for Section 12.2.7.2.4.4 expressly states that it does not modify the PIDs.[211] Third, Eschelon's proposals advance the goal of the PIDs by ensuring that jeopardies are correctly classified in the future. Improperly classifying Qwest-caused jeopardies as CNRs not only harms Eschelon, it also results in misapplication of the PIDs and PAP.[212]

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[206] Qwest/1, Albersheim/55-56; Qwest also emphasizes that the "one-day before" requirement is not documented in its PCAT. However, the record discloses that there are other forms of documentation (such as Qwest's CMP minutes) where Qwest's agreement with the "one-day before" requirement can be found. See, *e.g.*, Eschelon/111; see also, Eschelon Brief at 156-162. The evidence also discloses that not all of Qwest's procedures are documented in its PCAT. Eschelon/43, Johnson/80; Eschelon/141, Johnson/22; Eschelon/113, Johnson/1; Eschelon Brief at 156-163.

[207] Qwest denies that it made a commitment to provide a FOC the day before and states that the parties agreed to a different compromise arrangement. Qwest/18, Albersheim/46-49. The weight of the evidence, however, supports Eschelon's position on this issue. See Eschelon/43; Eschelon/110; Eschelon/111; Eschelon/113; See also, Eschelon Brief at 139-143, 156-162, 169-173.

[208] Eschelon provided several examples where Qwest provided no FOC at all, yet claimed that it was appropriate to classify the missed due date as an Eschelon-caused CNR. Eschelon/115; Eschelon Brief at 161. See also Qwest/18, Albersheim/55.

[209] Qwest acknowledges that contractual obligations should be clearly defined. Eschelon/1, Starkey/16-17 (Testimony of Qwest Witness Karen Stewart, MN Arb Tr. , p. 13); Eschelon Brief at 161.

[210] Eschelon Brief at 150-151, 162. In other words, if Qwest and Eschelon are able to clear a Qwest-caused jeopardy and deliver service on the original due date without a FOC or with an untimely FOC, it will not count as a missed Qwest commitment for purposes of the PIDs and PAP.

[211] The Minnesota Commission agreed that Eschelon's proposed language did not alter the PIDs, but adopted the second alternative to eliminate "confusion on that point." MN ARB Order at 21; Eschelon/30, Denney/21.

[212] Ironically, Qwest acknowledges elsewhere that (a) CNRs should be assigned appropriately, and (b) that issuing a CNR is inappropriate if no FOC has been provided. Eschelon/6, Starkey/10 (Testimony of Qwest Witness Renee Albersheim, MN Arb Tr., Vol. 1, p. 93-94); Eschelon Brief at 152, ftn. 803, at 154, ftn. 807. These inconsistencies reinforce Eschelon's claim that contract language relating to jeopardies is necessary.

Issue 12-87 -- Controlled Production.

Qwest occasionally implements new or updated versions of its OSS. When these changes occur, different types of testing are necessary to ensure that the revised system interfaces work properly. Under Section 12.6.9.4 of the ICA, "Controlled Production" testing involves the controlled submission of actual CLEC production requests to the Qwest production environment in order to validate the ability of the CLEC to transmit data that complies with industry standards and Qwest's business rules. The parties agree to contract language regarding the obligation to perform controlled production testing, but disagree concerning Eschelon's right to opt out of that type of testing under certain circumstances.

Eschelon offers two alternative proposals to modify Section 12.6.9.4. Both require controlled production testing for "new implementations," but require Eschelon's consent for the "recertification" of an existing process.[213] Qwest, on the other hand, recommends language stating that controlled production testing is not required "for features or products that the CLEC does not plan on ordering."

Eschelon stresses that its proposals reflect Qwest's current practice of requiring controlled production testing for new implementations only. Testing is costly and time consuming, and Eschelon wants contract language to ensure that it will not have to engage in unnecessary controlled production testing. Eschelon claims that Qwest's proposal only encompasses a subset of the recertifications for which Qwest does not currently require controlled production testing.

Qwest emphasizes that it is responsible under the terms of the CMP Document for determining the need for certification testing.[214] This approach makes sense, Qwest asserts, because the risks associated with an OSS failure are substantial and affect all of Qwest's other wholesale and retail customers. Qwest's decisions to implement testing decisions are made on a product release basis, and involve all CLECs, not merely Eschelon. These facts, coupled with the significant costs required, make it very unlikely that Qwest would ever engage in unnecessary controlled production

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[213] A *new implementation* effort involves transactions that CLEC does not yet have in production using a current IMA version. See Eschelon/43, Johnson/92. Section 12.6.4 of the ICA states that "[r]*e-certification* is the process by which CLECs demonstrate the ability to generate correct functional transactions for enhancements not previously certified." Closed language in Section 12.6.9.4 further states that "[r]ecertification does not include new implementations such as new products and/or activity types."

[214] Qwest notes that the CMP Document provides: "New Releases of the application-to-application interface may require re-certification of some or all business scenarios. A determination as to the need for re-certification will be made by the Qwest coordinator in conjunction with the Release Manager of each Release. Notification of the need for re-certification will be provided to CLEC as the new Release is implemented. The suite of re-certification test scenarios will be provided to CLECs with the Final Technical Specifications. If CLEC is certifying multiple products or services, CLEC has the option of certifying those products or services serially or in parallel, if technically feasible." Qwest/2, CMP Document, Chapter 11, p. 87.

testing. Qwest emphasizes that Eschelon has not shown where Qwest has ever required unnecessary testing.

Decision. Both parties acknowledge that the various types of testing performed by Qwest are critical to ensuring that operation support systems function in a seamless manner. Eschelon does not contend that Qwest has engaged in unnecessary testing or has somehow used the testing process to its advantage. It merely seeks to memorialize Qwest's current practice into the ICA to protect against the possibility that it may someday be required to undergo controlled production testing for recertifications rather than new implementations.

Qwest approaches the issue from a somewhat different perspective. Although it does not deny that Eschelon has a legitimate interest in controlling its costs, Qwest emphasizes that it serves many other wholesale and retail customers, all of whom rely on it to guard against the risk of system failure. Qwest stresses that it needs a measure of control over testing decisions to ensure the integrity of its OSS.

Qwest's position on this issue is more persuasive. Eschelon's concern that Qwest will implement unnecessary testing for recertifications is unwarranted, given the lack of past problems and the significant expense Qwest would have to incur to initiate controlled production testing for all CLEC using its OSS. It has not been Qwest's practice to require controlled production testing for recertifications, and there is no reason to believe that policy will change anytime soon. On the other hand, one cannot exclude the possibility that there may be a recertification process that requires this type of testing in the future. In that event, Qwest should have the ability to implement whatever testing is necessary to protect its network without having to go through the potentially time-consuming process of obtaining Eschelon's consent.

Issue 22-88 -- Rates Exhibit A.
Issue 22-88(a) -- IntraLATA Toll Traffic.

In Issue 12-88, the parties dispute whether Section 22.1.1 should indicate that the rates in Exhibit A apply to "the services provided" under the ICA (Eschelon position) or only to "the services provided by Qwest to Eschelon" (Qwest position). In Issue 12-88(a), the dispute is whether Section 7.11 of Exhibit A should be entitled "Oregon Access Services Tariff" (Eschelon position) or "Qwest's Oregon Access Services Tariff" (Qwest position).

Eschelon states that its proposed language is more accurate because there are several undisputed sections in the ICA that allow Eschelon to charge Qwest for products and services pursuant to rates set forth in Exhibit A.[215] Likewise, the ICA

[215] Eschelon/9, Denney/244-250, referencing Sections 22.1.3 (reciprocal charges), 7.3.3-7.3.3.2 (trunk nonrecurring charges), 7.3.7-7.3.7.2 (transit traffic), 7.6 (transit records), 8.2.3 (caged and cageless physical collocation), 9.2.5.2 (trouble isolation), 10.2.5.5.3-10.2.5.5.4 (local number portability ordering), and 21.14.1 (daily usage files).

provides that both Eschelon and Qwest will rely on their respective access tariffs for the application of intraLATA toll rates.[216] Eschelon suggests that the qualifying language proposed by Qwest is ambiguous and misleading because it suggests that Eschelon is unable to charge for services under the rates set forth in Exhibit A.

Qwest asserts that Eschelon's proposed language attempts to make the rates in Exhibit A reciprocal, when, in fact, those rates apply only to services Qwest provides to Eschelon. To the extent there are any charges from Eschelon, they are spelled out specifically in the ICA.

Decision. Eschelon's proposed language is adopted. Qwest's addition of the qualifier "by Qwest to CLEC" in Section 22.1.1 is misleading because the ICA clearly specifies that the rates in Exhibit A encompass charges that might be imposed by Eschelon upon Qwest. Similarly, Qwest's qualifying reference in Section 7.11 of Exhibit A creates the misimpression that the rates for intraLATA toll traffic can be found only in Qwest's access tariff, when, in fact, each party bills the other pursuant to its own tariff or price list. Eschelon's proposed language will eliminate this potential source of confusion and bring greater clarity and certainty to the agreement.

Issue 22-89 -- Request for Cost Proceeding.

In Section 22.4.1.3 of the ICA, the parties agree that if interim rates are reviewed and changed by the Commission, the permanent rates established will be incorporated in the ICA. This dispute concerns Eschelon's proposal to add Section 22.4.1.3, reserving the right of both parties to request that the Commission initiate a cost proceeding to replace an interim rate with an approved rate. Eschelon maintains that its proposal is designed to make sure that an interim rate does not remain effective indefinitely. It points out that Qwest agreed to the same proposal in Minnesota.

Qwest states that Eschelon's proposed language is unnecessary because federal and state law already govern the right of a party to initiate a cost proceeding. It also cautions that, by including rights such as this one, it "could create a risk that other rights not listed are excluded."[217]

Decision. Eschelon's proposal to add Section 22.4.1.3 is adopted. The proposed language merely allows a party to request Commission action to replace an interim rate with a permanent one. Qwest's consent to this language in Minnesota indicates that it has also concluded that no harm will come from including Eschelon's proposal in the ICA.

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[216] Eschelon/9, Denney/249, referencing Sections 7.3.7.2 and 7.3.10.1.

[217] Qwest/13, Easton/42.

Issue 22-90 -- Unapproved Rates.

Issue 22-90 concerns whether the ICA should include procedures for establishing rates where Commission-approved rates do not exist. Eschelon proposes that the ICA include the following Sections 22.6.1 and 22.6.1.1:

> 22.6.1 Qwest shall obtain Commission approval before charging for a UNE or process that it previously offered without charge. If Qwest offers a new Section 251 product or service or one that was previously offered with a charge for which a price/rate has not been approved by the Commission in a TELRIC Cost Docket ("Unapproved rate"), Qwest shall develop a TELRIC cost-based rate and submit that rate and related cost support to the Commission for review within sixty (60) Days of the later of (1) the Effective Date of this Agreement, or (2) Qwest offering the rate to CLEC, unless the Parties agree in writing upon a negotiated rate (in which case Qwest shall file the negotiated rate with the Commission within 60 Days). Except for negotiated rates, Qwest will provide a copy of the related cost support to CLEC (subject to an applicable protective agreement, if the information is confidential) upon request or as otherwise ordered by the Commission. If the Parties do not agree upon a negotiated rate and the Commission does not establish an Interim Rate for a new product or service or one that was previously offered under Section 251 with an Unapproved Rate, CLEC may order, and Qwest shall provision, such product or service using such Qwest proposed rate until the Commission orders a rate. In such cases, the Qwest proposed rate (including during the aforementioned sixty (60) Day period) shall be an Interim Rate under this Agreement.
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> 22.6.1.1 For a UNE or process that Qwest previously offered without charge, the rates in Exhibit A do not apply until Qwest obtains Commission approval or the Parties agree to a negotiated rate. If the Parties do not agree on a negotiated rate, the Commission does not establish an Interim rate, and Qwest does not submit a proposed rate and related cost support to the Commission within the time period described in Section 22.6.1 for a new product or service or one that was previously offered under Section 251 with an Unapproved Rate, the Unapproved rate(s) in Exhibit A do not apply. Qwest must provision such products and services pursuant to the terms of this Agreement, at no additional charge, until Qwest submits the rate and related cost support to the Commission for approval.

Qwest recommends deleting Sections §22.6.1 and 22.6.1.1 from the ICA. It states that Eschelon's proposed procedure is unnecessary and more appropriately handled in the Commission's procedural rules rather than in an interconnection

agreement. Qwest further states that it has already agreed in negotiations to serve Eschelon with notice and/or cost studies when Qwest makes such a filing.

Decision. Qwest's recommendation to delete Sections 22.6.1 and 22.6.1.1 is adopted. Eschelon's proposed language raises a number of concerns that are not adequately addressed in the record. These include:

- The proposed language for Section 22.6.1 encompasses new services offered by Qwest. In addition to the filing requirements imposed on Qwest, it provides that if the parties cannot agree, then Qwest's rates will go into effect on an interim basis until permanent rates are established. However, new Qwest services are also dealt with in Sections 1.7.1 and 1.7.1.2 of the ICA. Under those sections, the parties execute an interim advice letter and the new service is provided under Qwest interim rates until permanent rates are established. The extent to which the requirements in Section 22.6 interrelate with those in Section 1.7.1 and 1.7.1.2 has not been explained.

- Section 22.6.1 appears to be inconsistent with Section 22.6.1.1 insofar as they pertain to the situation where Qwest seeks payment for UNEs or processes previously offered without charge. The first sentence in Section 22.6.1 requires that "Qwest shall obtain Commission approval before charging for a UNE or process that it previously offered without charge." Conversely, the first sentence in Section 22.6.1.1 states that the rates in Exhibit A do not apply to a UNE or process previously offered without charge "until Qwest obtains Commission approval *or the Parties agree to a negotiated rate*." (Emphasis added.)

- Section 22.6.1 appears to contemplate that Qwest's rate and cost support data will be filed with the Commission pursuant to the ICA. This could present procedural problems if Qwest intends to make the product or service available to other CLECs. Whereas such matters are normally dealt with in general proceedings where all carriers have the opportunity to take part, the Commission's rules limit participation in interconnection disputes to the parties to the agreement. Thus, Eschelon's proposed language appears to preclude PUC staff and other carriers from participating in the rate-setting process.

- Section 22.6.1 requires that Qwest file cost data within 60 days of the later of the effective date of the ICA, or the date Qwest offers the rate to Eschelon. If Qwest fails to meet this requirement, Section 22.6.1.1 requires that it must provide the service at no charge until it submits the rate/cost support to the Commission for approval. As noted, however, the Commission would normally deal with such matters in a general proceeding wherein it would establish specific procedures

for filing cost data. This creates the possibility that (a) Eschelon's proposed 60-day filing deadline may not correspond with the procedures established by the Commission, and (b) Qwest would be required to provide service without charge in a situation where the Commission's timetable for filing data extends beyond the 60-day filing deadline in Section 22.6.1.

- In the case of services previously offered without charge, Section 22.6.1.1 requires that, if Qwest fails to meet the 60-day filing deadline, it must continue to provide the service at no charge "until it submits the rate and related cost support to the Commission for approval." However, the proposed language does not indicate what rate Qwest is allowed to charge after its makes the required rate/cost support filing. Presumably, Qwest would charge its proposed rate on an interim basis, but this is not specified in Eschelon's proposed language.

Issue 22-90(a) -- Cross Reference, Interim Rates.

In §22.4.1.1, the parties agree that rates included in Exhibit A that have not been approved by the Commission in a cost case and require Commission approval shall be considered "interim rates." They dispute whether interim rates should be applicable "only as described in Section 22.6" (Eschelon) or "until changed by agreement of the Parties or by order of the Commission." (Qwest.)

Decision. Given the decision not to adopt Eschelon's proposed language for Sections 22.6.1 and 22.6.1.1, Eschelon's recommendation for Section 22.4.1.1 is no longer applicable. Qwest's proposal for Section 22.4.1.1 is reasonable and is adopted.

Issue 22-90(b) – (ae) -- Rate Levels.

This dispute relates to the methodology that should be used to develop interim rates for more than 150 products and services currently provided under rates that have not been approved by the Commission.[218] The parties acknowledge the practical reality that arbitration proceedings are not an ideal forum to evaluate cost studies and related evidence used to establish rates for Section 251 products and services. Accordingly, they recommend that the Commission approve interim rates that will remain in effect until permanent rates are established in a comprehensive cost- study docket.[219]

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[218] Qwest/39, Million/30.

[219] Since Oregon has not completed a wholesale cost docket proceeding in recent years, the number of rates in dispute is substantially greater than in other states where the arbitrations have taken place. The disputed

Qwest's Interim Rate Proposal. Qwest recommends basing interim rates on the rates established by the New Mexico Commission in its 2005 cost docket, with two exceptions: First, the New Mexico rate would apply only if it is less than the comparable rate generated by Qwest's unapproved Oregon cost study in docket UM 1025.[220] Second, if New Mexico did not establish a rate for a particular element, the interim rate is the rate produced by Qwest's UM 1025 cost study, minus 30 percent.[221] Qwest maintains that its proposal produces interim rates that (1) adhere to the TELRIC pricing methodology mandated by the FCC; (2) consistently apply the same methodology; (3) utilize relatively current assumptions regarding technology and engineering; and (4) correspond with the historical rate element structure used in Oregon.[222]

Eschelon opposes Qwest's proposal to use the New Mexico rates. It maintains that: (1) the New Mexico rates average 36 percent higher than Eschelon's proposed interim rates; (2) Eschelon does not do business in New Mexico and consequently did not participate in the proceeding that developed those rates; (3) New Mexico is a small, relatively rural state that is likely to have a different cost structure than Oregon; [223] and (5) the cost data underlying the New Mexico rates is not part of the record and has not been made available by Qwest for review.[224]

Qwest maintains that Eschelon's criticisms lack substance. It argues:

- Eschelon's claim that Qwest's proposed rates are dramatically higher is inaccurate. In fact, Eschelon acknowledges that 20 percent of Qwest's rates are equal to or less than the rates that Eschelon itself proposes, and another 17 percent are within five percent of Eschelon's proposed rates.[225]

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rates relate primarily to collocation services, interconnection services, and services associated with Eschelon's access to UNEs. See Disputed Issues List at 102-117.

[220] Docket UM 1025 was a cost-study proceeding that was discontinued in March, 2007. The rates proposed by Qwest in that docket were never approved by the Commission. See Order No. 07-101; Qwest/17.

[221] The 30 percent reduction corresponds with the New Mexico Commission's decision to reduce Qwest's proposed nonrecurring rates by the same amount. Qwest/16, Million/24; Qwest Brief at 70.

[222] While it is often difficult to compare rates from different states, there is a substantial similarity between the rate elements approved in New Mexico and those in Oregon, making the matching process relatively straightforward. Qwest/16, Million/23-24; Qwest Brief at 70.

[223] Eschelon/125, Denney/153-154.

[224] *Id.*

[225] *Id.* at 157.

- Likewise, the assertion that Qwest's rates average 36 percent higher is misleading because Eschelon's calculations are based on a simple average of the percentages by which Qwest's proposed New Mexico rates exceed Eschelon's rate proposals and ignore the level of each rate.[226] Moreover, it is not surprising that the New Mexico rates exceed Eschelon's rates, since Eschelon has proposed a disparate set of methodologies specifically designed to produce the lowest possible rates.

- The fact that Eschelon did not participate in the New Mexico cost docket does not mean those rates are unreliable. Qwest counters that the New Mexico rates are the product of an exhaustive cost docket involving numerous parties, rigorous examination of competing TELRIC cost models, and several days of evidentiary hearings.[227]

- Eschelon does not identify any factors to support its suggestion that New Mexico has a different cost structure than Oregon.[228] Furthermore, Eschelon's proposed rates are susceptible to the same criticism because they are based on rates from five other states – Arizona, Colorado, Minnesota, Utah, and Washington.

Eschelon's Interim Rate Proposals.[229] The interim rates proposed by Eschelon are based on a variety of different methodologies:

1. Rates from other Qwest states where Eschelon provides service.[230] In several instances, Eschelon used an average of rates ordered by state commissions in

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[226] Thus, relatively small differences between rates (*e.g.*, $1.00 vs. $1.50) produce large percentage differences even though the actual financial difference (*e.g.*, a rate difference of $0.50) in the parties' proposals is minimal. Qwest Brief at 71-72.

[227] Qwest/46; Qwest/47; Qwest Brief at 69.

[228] Qwest points out that New Mexico and Oregon are similar in geographical size, with New Mexico ranking as the sixth largest state and Oregon the ninth largest state. Qwest/44, Million/35; Qwest Brief at 72.

[229] Eschelon's proposed interim rates are set forth at Eschelon/9, Denney/269-270.

[230] 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).

the five largest Qwest states[231] where Eschelon does business, has arbitrated an ICA with Qwest, and has participated in the UNE cost proceeding establishing those rates.[232]

2. Rates from the current Eschelon-Qwest ICA.[233] Eschelon proposes that the collocation rates in its current ICA remain in place as interim rates, because (a) Qwest's proposed collocation rates are significantly higher and (b) Qwest did not explain why the current rates should be increased without a cost-study proceeding to determine the reasonableness of those rates.[234]

3. 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.[235] Eschelon used these methods where the rate proposed by Qwest is greater than the rate offered to another CLEC, including its affiliate CLEC, for the same element.

4. Rates adjusted to reflect past Commission decisions on cost-study inputs and assumptions.[236] Where sufficient information was available, Eschelon modified Qwest's cost studies to incorporate inputs previously ordered by the Commission regarding labor times, flow through, separation of mechanical and manual ordering, and overhead factors.[237] Eschelon asserts that Qwest's interim rates should incorporate the Commission's previous cost determinations, particularly when those rates will remain in effect for an indefinite time.[238]

5. Rates based on one-half of Qwest's original proposed rate.[239] Eschelon proposes this approach where it contends that Qwest failed to provide cost

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[231] In some cases, rates from fewer than five states were averaged to develop Eschelon's proposed interim rate.

[232] Eschelon/133, Denney/142-143. Eschelon points out that Qwest has agreed to use the "five state average" methodology in Minnesota for certain labor rates. Eschelon/9, Denney/275; Eschelon Brief at 185.

[233] This methodology was used to develop rates proposed for Issues 22-90(c), 22-90(e), 22-90(k), and 22-90(l).

[234] Eschelon/9, Denney/277-278; Eschelon Brief at 185.

[235] 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).

[236] This methodology was used to develop rates proposed for Issues 22-90(aa) and 22-90(ad).

[237] Eschelon/8, Denney/273.

[238] In the event that Qwest contends that Eschelon's adjustments do not accurately reflect the Commission's prior orders, Eschelon states that the Commission can order Qwest to make a compliance filing of its cost studies incorporating the Commission's previously ordered inputs. Eschelon Brief at 186.

[239] This methodology was used to develop rates proposed for Issues 22-90(r) and 22-90(u).

support and there were no other available means to calculate an appropriate interim rate.[240]

Qwest asserts that the different approaches proposed by Eschelon lack methodological consistency and instead focus on producing the lowest rates possible. The majority of the rates at issue are based on a "selective averaging" approach that includes only a few "hand-picked" states, and produces rates that are "significantly below the true region wide averages."[241] Qwest further maintains that Eschelon followed a "pick and choose" process for other rates, selecting among methodologies until it found the one that generated the lowest rate without regard for developing fair and compensatory rates.

Decision. For the reasons discussed below, neither of the parties' interim rate proposals is adopted. Instead, I adopt an approach that incorporates elements of both proposals and also addresses the principal concerns raised by the parties.

Although there is nothing intrinsically wrong with Eschelon's proposal to rely on different methodologies to develop interim rates, the assumptions underlying significant elements of that proposal are not well-founded. For example, Eschelon's averaging method includes only those states where Eschelon does business, excluding all other states in Qwest's service territory.[242] As Qwest points out, there is no reason to believe that rates approved in other states were subjected to less scrutiny and are inherently less reliable. Moreover, the rates resulting from Eschelon's averaging process are consistently lower than the rates that would have resulted if other states had been included in the averaging calculation.[243] The overall result suggests a methodological bias in favor of lower rates.

There are also outstanding questions regarding Eschelon's choice of methodology. For example, Qwest points out a number of instances where Eschelon could have used more than one method to arrive at a proposed rate, yet chose the method that produced the lower rate.[244] The reasons why Eschelon chose one method over another in such situations are not satisfactorily explained in the record.

If the Commission were forced to decide between the interim rate proposals presented by the parties, Qwest's offering would be the superior choice.

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[240] Eschelon asserts that it could have proposed a zero rate for these elements but proposed an interim rate as a reasonable compromise. Eschelon/9, Denney/280, Eschelon/133, Denney/143.

[241] Qwest Brief at 73.

[242] In the interests of brevity, I have not detailed all of my concerns with the methods proposed by Eschelon.

[243] Qwest Brief, Attachment B; see also, Eschelon/25, Qwest/49.

[244] See, e.g., Qwest Brief at 72-77.

Qwest's proposal does not suffer from the methodological infirmities associated with Eschelon's proposal, uses rates that are the product of a relatively recent TELRIC cost-study proceeding, and incorporates rate elements matching those used in Oregon. The only significant limitation is that there is insufficient evidence in the record to verify that the costs incurred by Qwest in New Mexico closely approximate those incurred in Oregon.[245]

To better accommodate the interests of both parties, the Commission should establish interim rate levels using an average of all commission-approved rates within Qwest's service territory, excluding the highest and lowest rates from the calculation.[246] This approach addresses the principal concerns expressed by both parties. Specifically, including all commission-approved rates in the overall average eliminates Qwest's concern over "selective averaging," as well as Eschelon's concern about relying on the cost results from a single state. In addition, removing both the highest and lowest rates from the averaging calculation will have a smoothing effect that does not negatively impact either party.

There is sufficient data in the record to implement the averaging method recommended above. Exhibit Eschelon/25 lists commission-approved rates from Arizona, Colorado, Minnesota, Utah, and Washington that were used by Eschelon in its proposals. Exhibit Qwest/49 lists other commission-approved rates from Idaho, Iowa, Montana, Nebraska, New Mexico, North Dakota, and Wyoming. These rates are also set forth in Attachment B of Qwest's Brief in a format corresponding to the disputed rates in Issues 22-90(b) thru 22-90(ae). The parties may wish to use Attachment B as a starting point for their interim rate calculations.

In making interim rate calculations, the parties should confine themselves to commission-approved rates in the Qwest states listed above. The number of states included in the average may vary if all of the above-mentioned Qwest states have not adopted a rate for a particular product, service, or element.[247] In the unlikely event that less than two states have adopted a rate for a particular product, service, or element, the applicable rate approved by the New Mexico Commission should be used as the interim rate.

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[245] Qwest Witness Million testified that the costs of many of the services at issue (e.g., loop provisioning processes) are centralized and do not vary substantially from one state to another. Qwest/44, Million/27, 36; Qwest Brief at 74. While this may be true, there is not enough cost data in this record to substantiate that assertion. In past cases, the Commission has been reluctant to adopt rates from another state in the absence of specific cost data. *In the Matter of Metro One Telecommunications for Arbitration of an Interconnection Agreement with U S WEST Communications, Inc., ARB 100, Order No. 99-242, Appendix A at 7.*

[246] For example, if 11 Qwest states have approved a rate for a particular product or service, the highest and lowest rates will be removed from the calculation, producing an average based on rates from the remaining nine states.

[247] The interim rates adopted elsewhere in this order for loop-design/CFA changes (Issue 4-5) and fee-based expedites (Issue 12-67) are not subject to the averaging process.

ARBITRATOR'S DECISION

1. The interconnection agreement between Eschelon and Qwest shall include the contract language adopted in this decision.

2. The Arbitrator recommends that the Commission initiate general investigations relating to UNE conversions (Issues 9-43 and 9-44) and commingled arrangements (Issues 9-58 and 9-59).

3. The Arbitrator recommends that the Commission initiate a cost-study proceeding to establish permanent rates to replace the interim rates adopted in this decision.

4. Pursuant to OAR 860-016-0030(8), the deadline to file comments regarding this arbitration decision is extended. Any person may file written comments within 30 days of the date this decision is served.

Dated at Salem, Oregon, this 26th day of March, 2008.

Samuel J. Petrillo
Arbitrator

Attachment A
Decision Matrix

Issue	Arbitrator's Decision
Issue 1-1 and subparts (a)-(e) – Interval Changes and Placement	Qwest Proposal – pp. 7-11
Issues 2-3 and 2-4 – Change in Law	See pp. 11-14
Issue 4-5 and subparts (a) and (c) – Design Changes	See pp. 14-21
Issue 5-6 – Discontinuation of Order Processing	Qwest Proposal (as revised) –pp. 21-24
Issue 5-7 and 5-7(a) – Disconnection of Service	Qwest Proposal (as revised) – pp. 21-25
Issue 5-8 – "Repeatedly Delinquent" - Amount in Dispute	Eschelon Proposal – pp. 25
Issue 5-9 – "Repeatedly Delinquent" - Frequency of Delinquency	Eschelon First Proposal – pp. 25-27
Issue 5-11 – Commission Review of Deposit Amount	Qwest Proposal – pp. 27-28
Issue 5-12 – Eschelon Alternative Deposit Proposal	p. 28
Issue 5-13 – Review of Credit Standing	Eschelon Second Proposal (as revised) – pp. 28-30
Issue 5-16 – Nondisclosure Agreement	Eschelon Proposal (as revised) – pp. 30-31
Issue 7-18 and 7-19 – Transit Record Charge Issue 7-19 – Transit Record Bill Validation Detail	Qwest Proposal (as revised) – pp. 31-34
Issue 8-21 and subparts (a)-(e) – Power	Resolved – p. 34
Issue 9-31 – Nondiscriminatory Access to UNEs	Eschelon First Proposal – pp. 34-37
Issue 9-33 – Network Maintenance and Modernization/Adverse Effects	Eschelon Second Proposal (as revised) – pp. 37-39

Issue	Arbitrator's Decision
Issue 9-34 – Network Maintenance and Modernization/Circuit Identification	Eschelon Second Proposal – pp. 40-42
Issues 9-43, 9-44, and 9-44(a-c) – Conversions	Qwest Proposal/Commission Investigation Recommended – pp. 42-44
Issue 9-53 – UCCRE	Eschelon First Proposal – pp. 44-47
Issue 9-55 – Loop Transport Combinations	See pp. 47-50
Issues 9-56 and 9-56(a) – Service Eligibility Criteria Audits	Qwest Proposal – pp. 50-53
Issues 9-58, 9-58(a)-(e), and 9-59 – Commingled Arrangements/EELs	Qwest Proposal/Commission Investigation Recommended – pp. 53-55
Issues 9-61 and 9-61(a)-(c) – Loop-Multiplexing Combinations	Issue 9-61, 9-61(a) and 9-61(c) – Eschelon Proposal; Issue 9-61(b) – Qwest proposal pp. 55-59
Issues 12-64 and 12-64(a)-(b) – Root Cause Analysis and Acknowledgment of Mistakes	Issue 12-64 - Eschelon Second Proposal; Issues 12-64(a)-(b) - Eschelon Proposal – pp. 60-62
Issues 12-67 and 12-67(a)-(g) – Expedited Orders	Issue 12-67(a) – Eschelon Fourth Proposal; Issues 12-67 & subparts (b)-(g) – Eschelon Proposal – pp. 63-67
Issues 12-71, 12-72, and 12-73 – Jeopardies	Issue 12-71 – Eschelon Second Proposal; Issues 12-72 & 12-73 – Eschelon Proposal – pp. 67-71
Issue 12-87 – Controlled Production	Qwest Proposal – pp. 72-73
Issue 22-88 – Rates Exhibit A Issue 22-88(a) -- IntraLATA Toll Traffic	Eschelon Proposal – pp. 73-74
Issue 22-89 – Request for Cost Proceeding	Eschelon Proposal – pp. 74
Issue 22-90 -- Unapproved Rates	Qwest Proposal – pp. 75-77
Issue 22-90(a) – Cross Reference, Interim Rates	Qwest Proposal – pp. 77
Issue 22-90(b)-(ae) – Rate Levels	See pp. 77-83