	OAH 3-2500-17369-2 MPUC No. P-5340,421/IC-06-768

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA PUBLIC UTILITIES COMMISSION

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 Federal Telecommunications Act of 1996	**ARBITRATORS' REPORT**

This matter was arbitrated by Administrative Law Judges Kathleen D. Sheehy and Steve M. Mihalchick on October 16-20, 2006, in the Small Hearing Room of the Public Utilities Commission in St. Paul, Minnesota. The record closed on November 17, 2006, upon receipt of post-hearing briefs.

Jason Topp, Esq., 200 South Fifth Street, Room 2200, Minneapolis, MN 55402; Melissa Thompson, Esq., 1801 California Street, 10th Floor, Denver, CO 80202; Philip J. Roselli, Esq., Kamlet, Shepherd & Reichert, LLP, 1515 Arapahoe Street, Tower 1, Suite 1600, Denver, CO 80202; and John Devaney, Esq., Perkins Coie, 607 14th Street NW, Washington, DC 20005, appeared for Qwest Corporation (Qwest).

Greg Merz, Esq., Gray, Plant, Mooty, 500 IDS Center, 80 South Eighth Street, Minneapolis, MN 55402, appeared for Eschelon Telecom, Inc. (Eschelon).

Julia Anderson, Assistant Attorney General, 1400 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101, appeared for the Department of Commerce (Department).

Kevin O'Grady appeared for the staff of the Public Utilities Commission.

Procedural History

1. Eschelon and Qwest began negotiating this interconnection agreement some time ago. For purposes of this arbitration they have agreed that the window for requesting arbitration was between May 9, 2006, and June 5,

2006. Based on the timelines in 47 U.S.C. § 252(b) and Minn. R. 7811.1700, subps. 19 & 21, all outstanding issues must be resolved by February 9, 2007.[1]

2. The Department intervened as a party. Based on the Department's recommendation, the parties reached agreement to stay certain issues pending the completion of other dockets: Issues 12-68, 12-69, A-96, and A-97 are stayed pending completion of the *UNE Cost Case*;[2] and Issues 9-37, 9-37(a), 9-37(b), 9-38, 9-39 (except caps), 9-40, 9-41, and 9-42 are stayed pending completion of the *Wire Center Proceeding*.[3]

3. To implement the agreement to stay certain issues pending completion of the *Wire Center Proceeding*, the Administrative Law Judges recommend that the Commission decide the issues presented in this Report, but hold this docket open until the *Wire Center Proceeding* is complete. If further proceedings in this matter are necessary at that time, the Commission could return the matter to OAH for arbitration of any specific language issues that remain.

4. During and after the hearing, the parties successfully resolved a number of issues. The issues remaining for decision are those identified in the Disputed Issues List and List of Issues by Subject Matter filed October 31, 2006.

5. After the hearing, Time Warner Telecom, Inc., and Integra Telecom of Minnesota, Inc. (CLEC Participants), filed comments on eight issues as participants under Minn. R. 7812.1700, subp. 10. Although they are not parties, their comments are noted in the sections of this Report discussion those issues.

Arbitrators' Authority

6. The Commission has jurisdiction over this proceeding under § 252(b) of the Telecommunications Act of 1996 (Act) and Minn. Stat. §§ 237.16 and 216A.05. Section 252(b) of the Act provides for state commission arbitration of unresolved issues related to negotiations for interconnection, resale and access to unbundled network elements. Specifically, it authorizes the Commission to "resolve each issue set forth in [an arbitration] petition and the response, if any, by imposing appropriate conditions . . . ." [4] In resolving the open issues and imposing appropriate conditions, the Commission must ensure that the resolution meets the requirements of section 251, including the regulations adopted pursuant to section 251; must establish any rates for

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[1] *See* Petition for Arbitration at 6. Eschelon indicated in an e-mail dated January 10, 2007, that it is willing to extend the Commission's deadline until a reasonable time after receipt of this Report.
[2] *In the Matter of Qwest's Application for Commission Review of TELRIC Rates Pursuant to 47 U.S.C. § 251*, Docket No. P421/AM-06-713.
[3] *In the Matter of CLECs' Request for Commission Approval of ILEC Wire Center Impairment Analysis*, Docket No. P-5692/M-06-211, and *In the Matter of a Commission Investigation Identifying Wire Centers in Which Qwest Must Offer High-Capacity Loop or Transport UNEs at Cost-Based Rates*, Docket No. P-999/CI-06-685.
[4] 47 U.S.C. § 252(b)(4)(C).

interconnection, services, or network elements according to subsection (d); and must provide a schedule for implementation of the terms and conditions by the parties to the agreement.

7. The Act specifically permits a state commission to establish or enforce other requirements of state law in its review of an agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements,[5] as long as state requirements are consistent with the Act and the FCC's implementing rules.[6] State law similarly requires that issues submitted for arbitration be resolved in a manner that is consistent with the public interest, to ensure compliance with the requirements of sections 251 and 252(d) of the Act, applicable FCC regulations, and applicable state law, including rules and orders of the Commission.[7]

8. Many of the disputed issues in this arbitration do not hinge on a specific provision of federal or state telecommunications law, but are either more generic or involve the day-to-day mechanics of using the interconnection agreement (ICA).[8] Unless more specific authority is otherwise noted, the Arbitrators will make recommendations on these disputed provisions that the Arbitrators believe are consistent with the public interest, the requirements of sections 251 and 252(d) of the Act, applicable FCC regulations, and applicable state law, including rules and orders of the Commission.

Burden of Proof

9. The burden of proof in this interconnection arbitration proceeding is on Qwest to prove all issues of material fact by a preponderance of the evidence.[9] In addition, the arbitrators may shift the burden of production as appropriate, based on which party has control of the critical information regarding the issue in dispute. The arbitrators may also shift the burden of proof as necessary to comply with applicable FCC regulations regarding burden of proof, such as rules placing the burden on the incumbent to demonstrate the technical infeasibility of a CLEC's request for interconnection or unbundled access and rules requiring an incumbent to prove by clear and convincing evidence any

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[5] 47 U.S.C. § 252(e)(3).

[6] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* CC Docket Nos. 96-98, First Report and Order, 11 FCC Rcd 15499 ¶¶ 66, 54, & 58 (Aug. 8, 1996) (*Local Competition Order)*; *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability,* Report and Order and Order on Remand and Further Notice of Proposed Rulemaking in CC Docket Nos. 01-338, 96-98, and 98-147 at ¶¶ 193-96 (Sept. 17, 2003) (*TRO*).

[7] Minn. R. 7811.1700, 7812.1700; *see also* Minn. Stat. §§ 237.011, 237.16, subd. 1(a).

[8] The proposed ICA is in the record as Ex. 25A; the proposed exhibits to the ICA are Ex. 25B.

[9] Minn. R. 7812.1700, subp. 23.

claim that it cannot satisfy such a request because of adverse network reliability impacts.[10]

I. GENERAL TERMS/INTERVAL CHANGES.

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

A. The Dispute

10. The parties dispute whether the ICA should include provisions addressing any changes in the intervals in which Qwest will provide products ordered by Eschelon. Eschelon wants the ICA to include the current intervals posted on Qwest's product catalog (PCAT) or Standard Interval Guide (SIG) web postings, so that any proposal by Qwest to lengthen an interval would have to be achieved by amending the agreement. Its second option would provide for amendment of the ICA and Commission approval of all interval changes, not just changes in which intervals are lengthened. Qwest proposes to use its Change Management Process (CMP) to announce changes in intervals, outside of the ICA. Eschelon agrees that the CMP may be used to shorten, but not lengthen, intervals outside of the ICA.

B. Position of the Parties

11. Eschelon proposes the following language for Sections 1.7.2 and 1.7.2.1 of the ICA:

> If the Commission orders, or Qwest chooses to offer and CLEC desires to accept, intervals longer than those set forth in this Agreement, including Exhibit C, the Parties shall amend this Agreement under one (1) of the two (2) options set forth in Section 1.7.1 (an interval Advice Adoption Letter or interval interim Advice Adoption Letter terminating with approval of negotiated Amendment) pertaining to the new interval (rather than new product) (or as otherwise ordered by the Commission). The forms of such letters are attached hereto as Exhibits N -O).
>
> Notwithstanding any other provision in this Agreement, the intervals in Exhibit C may be shortened pursuant to the Change Management Process (CMP) without requiring the execution or filing of any amendment to this Agreement.[11]

12. Qwest proposes the following language for Section 1.7.2:

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[10] 47 C.F.R. §§ 51.5 & 51.321(d).

[11] Disputed Issues List at 1-2. The CLEC Participants support the use of Eschelon's language for this issue.

> Notwithstanding any other provision in this agreement, the attached Exhibit C will be modified pursuant to the CMP process without requiring the execution of an amendment.[12]

13. Eschelon also proposes that intervals for the provision of interconnection trunks will be reflected in Section 7.4.7 and that any changes to those intervals will be made through the process described in Section 1.7.2 (Issue 1-1(a)). Qwest opposes including these intervals in the ICA and would add language permitting changes in the intervals to be made through the CMP.

14. In addition, Eschelon would include in Exhibit C to the agreement intervals for the provision of UDIT rearrangements (Issue 1-1(b)). Qwest disagrees that these intervals apply to UDIT rearrangements and would simply note in Exhibit C that the applicable intervals are available on its website.

15. Eschelon would also include in Section 9.0 of Exhibit C the intervals for LIS trunking (Issue 1-1(c)). Qwest would eliminate this section entirely.

16. Qwest currently has provisioning intervals for products that are provided on an individual case basis (ICB). Eschelon would incorporate those intervals into the ICA; Qwest instead proposes language providing that it shall make every attempt to provide a firm order confirmation (FOC) pursuant to the guidelines contained on its website (Issue 1-1(d)).

17. Finally, Eschelon would include service intervals for loop-mux combinations in Exhibit C; Qwest would simply reference the service interval guide available on its website (Issue 1-1(e)).

18. Eschelon argues that Qwest retains too much control over the CMP process to provide the business certainty regarding critical terms that CLECs need in order to compete meaningfully for customers. It contends that Qwest announces many unilateral changes through CMP that CLECs have had no chance to discuss or develop; that most product or process changes do not require Qwest to consider the comments of CLECs; that Qwest is free to implement noticed changes regardless of opposition by CLECs; and that Qwest has used the process as both a shield and a sword to suit its own purposes. Eschelon further argues that ICA amendments would not be necessary for the vast majority of interval changes because no intervals have been lengthened since 2002 and that Eschelon is only seeking to retain the intervals that Qwest provides today, without change.[13]

19. Qwest argues that its CMP process was developed with CLEC input and approved by the Commission, and the FCC, in connection with Qwest's

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[12] Disputed Issues List at 1.

[13] Ex. 27 (Starkey Direct) at 11-75 (specific problems with CMP); *id*. at 76-92 (intervals); Ex. 28 (Starkey Rebuttal) at 3-34 (CMP); *id*. at 34-42 (intervals); Ex. 29 (Starkey Surrebuttal) at 3-65 (CMP); *id*. at 66-72 (intervals).

§ 271 Application. It argues that requiring intervals to be included in the ICA and changed through ICA amendment gives Eschelon too much control over service interval management and that it needs the flexibility of using the CMP to respond to industry changes. It also argues that using such specific language in Eschelon's ICA will "lock in" processes and prohibit Qwest or other CLECs from requesting changes and that any limitation on Qwest's ability to respond to changes in the industry that hinges on obtaining permission from a single CLEC is unacceptable. In surreply testimony, Qwest contended that if any of Eschelon's "CMP-related proposals" are adopted, it would force Qwest either to seek an ICA amendment from Eschelon before adopting any change request proposed by other CLECs or Qwest, or, in the alternative, to establish entirely separate systems, processes, or procedures for Eschelon at significant cost.[14]

20. The Department's position generally is that the CMP is a mechanism for addressing changes in pre-ordering, ordering/provisioning, maintenance/repair, and billing functions and associated support issues for local services provided by CLECs, but that it is not an exclusive mechanism for addressing these issues and that no legal authority would prohibit the inclusion of what Qwest calls "CMP issues" in an ICA. If the issue has been negotiated by the parties and relates to a term or condition of interconnection, it could potentially be addressed in the ICA. The Department recommends that each issue be decided on its individual merits and that the Commission should consider and balance Eschelon's need for contractual certainty with Qwest's need for uniformity in its systems, processes, and procedures in determining what is just, reasonable, non-discriminatory, and in the public interest. The Department has made no specific recommendation on how to resolve Issue 1-1 or its subparts.[15]

C. Decision

21. The CMP document itself provides that in cases of conflict between changes implemented through the CMP and any CLEC ICA, the rates, terms and conditions of the ICA shall prevail. In addition, if changes implemented through CMP do not necessarily present a direct conflict with an ICA but would abridge or expand the rights of a party, the rates, terms, and conditions of the ICA shall prevail.[16] Clearly, the CMP process would permit the provisions of an ICA and the CMP to coexist, conflict, or potentially overlap. The Administrative Law Judges agree with the Department's analysis that any

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[14] Ex. 1 (Albersheim Direct) at 3-29 (CMP); *id*. at 29-38 (intervals); Ex. 2 (Albersheim Rebuttal) at 2-31 (CMP); *id*. at 31-36 (intervals); Ex. 4 (Albersheim Surrebuttal) at 3-13 (CMP); *id*. at 13-15 (intervals).

[15] Ex. 48 (Doherty Reply) at 2-14); Ex. 49 (Doherty Surreply) at 2-4. *See also* Ex. 52 (Rebholz Reply) at 5 (Minn. R. 7812.0700, subp. 2(b), requires ILECs and CLECs to include quality standards in their ICAs for resale, purchase of network elements, or interconnection that must, at minimum, ensure the CLEC receives service, network elements, and interconnection at least at parity with the services, network elements, and interconnection the ILEC provides to itself or its subsidiaries or affiliates).

[16] Ex. 1 (Albersheim Direct) at RA-1, part 1.0, page 15.

negotiated issue that relates to a term and condition of interconnection may properly be included in an ICA, subject to a balancing of the parties' interests and a determination of what is reasonable, non-discriminatory, and in the public interest.

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

II. INTERPRETATION AND CONSTRUCTION/CHANGE IN LAW.

Issue 2-3: Effective Date of Rate Changes

A. The Dispute

23. The parties agreed on language in Section 22.4.1.2 providing that "Commission-approved rates shall be effective as of the date required by a legally binding order of the Commission." They disagree on whether there should be language in the ICA that establishes a default effective date of a Commission order that changes unbundled network element (UNE) prices, in the event the Commission fails to specify an effective date. They also originally disagreed about which section of the ICA should contain the language.

B. Position of the Parties

24. Qwest wants the language to read that "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."[17] Qwest originally wanted this language to appear in Section 2.2 of the ICA, but has agreed to include it in Section 22 instead.[18]

25. Eschelon objected to the presumption in this language that a change in rates, if no date were specified, would be applied prospectively.[19] Eschelon's first proposal for Section 2.2 would say simply "The rates in Exhibit A and when they apply are addressed in Section 22."[20] Eschelon's second

[17] Disputed Issues List (Oct. 31, 2006) at 6; Ex. 6 (Easton Direct) at 3-4; Ex. 7 (Easton Rebuttal) at 2-3. All subsequent references herein to the Disputed Issues List are to the version dated October 31, 2006.
[18] Qwest Post-Hearing Brief at 2; Ex. 9 (Easton Surrebuttal) at 7.
[19] Ex. 43 (Denny Rebuttal) at 4.
[20] Disputed Issues List at 11; Ex. 42 (Denny Direct) at 7-8; Ex. 44 at 5-8.

proposal for Section 2.2 offers language providing that Section 2.2 "addresses changes to rates that have been previously approved by the Commission, and Section 22 (Pricing) also addresses rates that have not been previously approved by the Commission (Unapproved Rates)." Eschelon's proposed language also includes a lengthy statement concerning each party reserving its rights with respect to effective dates and the ability of a party to request that the Commission establish a specific date or provide other relief. The language also includes a statement that if the Commission enters an order that is silent with respect to effective date, "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."[21] Eschelon would add similar language to Section 22.1.4.2.

26. The Department supports the following language in Section 2.2: "The rates in Exhibit A and when they apply are further addressed in Section 22." In Section 22.1.4.2, the Department recommends that the following language be used instead of the disputed language proposed by either Eschelon or Qwest: "If the Commission issues an order with respect to rates that is silent on the issue of the effective dates for the rates, the rates shall be implemented and applied on a prospective basis from the effective date of the legally binding Commission decision."[22]

C. Decision

27. This issue concerns only the unlikely scenario that the Commission would issue an order changing a UNE price but would fail to address in that order the effective date of the price change. There appears to be general agreement among the parties that in this scenario, the default effective date for such an order would be the date of the decision, and the new rate would apply from that date forward. The Department's proposed language should be adopted because it is easier to understand than Eschelon's, and it clarifies, in a way that Qwest's proposal does not, that the issue is limited to the scenario described above.

Issue 2-4: Effective Date of a Legally Binding Change

A. The Dispute

28. The parties disagree on when an amendment to the ICA concerning any type of legally binding change would be implemented, if the order pronouncing the change does not include a specific implementation date. This scenario is much more likely to occur than the previous scenario concerning an order changing rates by the Commission that fails to specify an effective date.

[21] Disputed Issues List at 12-13.
[22] Department Post-Hearing Brief at 3-4.

B. Position of the Parties

29. Qwest proposes language that any amendment to the ICA that incorporates 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 that order. If neither party provides the notice within 30 days, the effective date would be the date of the amendment, unless the parties otherwise agree.[23]

30. Eschelon rejects the notice requirement and proposes language that any amendment to the ICA that incorporates a legally binding change would be deemed effective on the date of the order pronouncing the change.[24]

31. The Department supports the Qwest language, but would make the time for providing notice 90 days instead of 30 days.[25]

C. Decision

32. Qwest characterizes its proposal as providing an incentive for parties to take action immediately if they want to ensure speedy implementation of a change in law. Qwest also argues that Eschelon's language would permit parties to take their time to develop intricate legal arguments interpreting changes in law, then present the other party with a huge bill dating back months or years to the date of the order (as in the recent *Level 3 Complaint Proceeding*). Eschelon characterizes Qwest's proposal as providing a party the opportunity to "game the system" by *not* giving notice of a decision that adversely affects the party, thereby possibly delaying when that decision will take effect.

33. What is important here is that the ICA contain a mechanism that will permit the parties to anticipate when and how amendments concerning a change in law without a specific effective date will affect their respective businesses. Qwest's proposal to use a notice provision is more likely to advance this goal than Eschelon's, which would permit a party to "sleep on" its rights indefinitely. "Gaming the system" is not a significant concern here, because both parties are similarly able to protect their rights. The Department's proposal to modify Qwest's language by extending the notice period to 90 days is reasonable and should be adopted.

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[23] Disputed Issues List at 10; Ex. 6 (Easton Direct) at 5-6; Ex. 9 (Easton Surrebuttal) at 4-7.
[24] Disputed Issues List at 10; Ex. 42 (Denny Direct) at 9-15; Ex. 43 (Denny Rebuttal) at 5-7; Ex. 44 (Denny Surrebuttal) at 5-10.
[25] Department Post-Hearing Brief at 4-6.

III. TERMS AND CONDITIONS/COLLECTION.

Issue 5-6: Discontinuation of Order Processing

A. The Dispute

34. Commission approval is required before Qwest may disconnect a CLEC for nonpayment or any other reason.[26] The parties dispute whether Commission approval should also be required before one party can discontinue processing orders from the other party for failure to make full payment (less any disputed amounts) within 30 days of the payment due date.

B. Position of the Parties

35. Qwest's language would permit Qwest to discontinue processing orders for relevant services if Eschelon fails to make full payment, less sums disputed under section 21.8, within 30 days of the payment due date. Qwest then would have to notify Eschelon, and the Commission, at least ten business days prior to discontinuing the processing of orders. Qwest's ICAs with Covad and AT&T contain a similar provision.[27]

36. Qwest rejects the notion that Commission approval should be required before it discontinues processing orders from Eschelon. Qwest contends it needs the ability to limit its financial exposure if Eschelon continues to place new orders for service but fails to timely and fully pay its bills. Qwest contends that Eschelon is a systematically slow payer and that Qwest has had to threaten to discontinue processing orders in the past in order to obtain partial payment of past due balances from Eschelon.[28]

37. Eschelon maintains that the Commission should limit Qwest's unilateral ability to discontinue processing new orders for nonpayment because of the significant consequences to Eschelon if that were to happen. Eschelon contends that it has had significant disputes with Qwest concerning the accuracy of Qwest's bills, the timeliness of Eschelon's payments, and determining amounts in dispute.[29] In addition, Eschelon has presented evidence that Qwest has threatened to discontinue processing orders based on amounts allegedly overdue in states other than Minnesota.[30]

38. Qwest maintains that at the time of the dispute referenced above, Eschelon had significant past due balances in all six states in which it does business with Qwest. It seems fairly clear that Eschelon owed substantially more

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[26] *See* Minn. Stat. § 237.74, subd. 9 (2006).
[27] Disputed Issues List at 17-18; Ex. 6 (Easton Direct) at 8-11.
[28] Ex. 8 (Easton Rebuttal) at 5-6; Ex. 9 (Easton Surrebuttal) at 7-11.
[29] Ex. 45 (DD-3, Trade Secret Version).
[30] *Id*.

to Qwest than the amounts Eschelon maintained were in "disputed" status.[31] Qwest's threat to discontinue processing orders was not without basis.

39. Eschelon has offered two proposals. First, it has proposed language that would require Commission approval before Qwest may discontinue order processing. Eschelon's second proposal contains language that would allow Qwest to proceed with discontinuing order processing pursuant to the notice provisions in the contract, unless Eschelon seeks relief from the Commission.[32]

40. The Department has made no recommendation on this issue.

C. Decision

41. The parties have demonstrated that they are unable to agree on when a late payment is properly classified as "disputed."[33] There are, however, obvious problems with Eschelon's proposal. What standard would the Commission use to determine whether Qwest could discontinue order processing? In what timeframe would the Commission have to make such a decision? Eschelon's second proposal is even more ambiguous—if Eschelon seeks relief from the Commission, then what happens? It would appear that Qwest would have to wait for some sort of Commission decision, and in the meantime, keep accepting orders for service that could potentially increase its exposure to bad debt.

42. These parties have had protracted financial disputes. It is in the public interest to limit, in some reasonable way, Qwest's ability to decide to discontinue processing orders, for the purpose of ensuring that customers are not adversely impacted while the parties' financial disputes are resolved. Eschelon's proposals requiring some type of Commission approval, however, are too ambiguous to implement. Qwest's proposed language gives Eschelon 60 days to pay undisputed amounts (30 days to pay, plus 30 days from the payment due date) before Qwest can give notice of its intention to discontinue order processing; then ten business days (two calendar weeks) more would be required before Qwest could implement the decision.

43. If the decision were limited to the choices offered by the parties, the Administrative Law Judges would recommend that Qwest's language be adopted. Although no party has proposed this, the Commission could require, based on the record, that Qwest shall only discontinue processing orders for service in Minnesota if Eschelon is more than 30 days past the payment due date for services provided in Minnesota. This may not be consistent with the way in which the parties process their bills and payments, but it would preclude Qwest

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[31] *Id.*

[32] Disputed Issues List (Oct. 31, 2006) at 17-19. The CLEC Participants recommend the use of Eschelon's language.

[33] Ex. 45 (DD-3, Trade Secret Version); Ex. 9 (Easton Surrebuttal) at 9-11.

from refusing to process orders in Minnesota based on alleged overdue balances in other states. In addition, if the Commission believed that additional time should be provided, it would be reasonable to extend the notice period to 15 business days (three calendar weeks), which should not significantly increase Qwest's financial exposure.

Issue 5-8: Definition of Repeated Delinquency

A. The Dispute

44. This issue, like several more that follow, relates to the circumstances under which Qwest may demand a deposit to secure future payment. The parties have agreed to language providing that if Eschelon is repeatedly delinquent in making its payments, Qwest may require a deposit to be held as security for the payment before orders will be provisioned and completed. They disagree on the definition of "repeatedly delinquent."

B. Position of the Parties

45. Qwest would define "repeatedly delinquent" to mean payment of any undisputed amount received more than 30 days after the payment due date, three or more times during a 12-month period on the same billing account number.[34] Qwest considers Eschelon, at present, to be repeatedly delinquent.[35]

46. Eschelon would first modify the definition of "repeatedly delinquent" to mean payment of any undisputed "non-de minimus" or "material" amount more than 30 days after the payment due date.[36] Eschelon argues that the term "material' is used frequently throughout the ICA and is not unclear in this context. At the same time, and for the same reasons articulated above regarding discontinuance of order processing, Eschelon argues that because it is difficult to reach agreement with Qwest about what amounts are in disputed status, any use of the term "undisputed amounts" is unclear and ambiguous.

47. Qwest contends the meaning of "non-de minimus" or "material" amounts, as proposed by Eschelon, is unclear and that such unclear language is unnecessary since there is no evidence that Qwest has ever invoked collections or deposit requirements based on insignificant amounts.[37] Eschelon agrees that a $3 million overdue balance, which is what Qwest claimed Eschelon owed when it threatened to discontinue order processing, would be material.[38]

48. The Department has made no recommendation on this issue.

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[34] Disputed Issues List at 19-21; Ex. 6 (Easton Direct) at 12; Ex. 7 (Denney Rebuttal) at 12-14; Ex. 9 (Denney Surrebuttal) at 11-12.
[35] Tr. 1:116.
[36] Ex. 43 (Denney Rebuttal) at 43.
[37] Ex. 6 (Easton Direct) at 13; Ex. 7 (Easton Rebuttal) at 14; Ex. 9 (Easton Surrebuttal) at 11.
[38] Ex. 43 (Denney Rebuttal) at 25.

C. Decision

49. The language proposed by both parties is subject the same criticism—that it is ambiguous either on its face or in its application. Qwest's language will leave open the issue of whether it has properly determined "disputed" status; Eschelon's language will leave room for argument about virtually any overdue sum under $3 million, the only amount that Eschelon has agreed on the record would be material. When the remedy to be invoked for late payment—requiring a deposit to secure the debt—is so potentially significant, it would seem that both parties would benefit from a more clear definition of the triggering event.

50. Of the two proposals, Qwest's language is less ambiguous; and although the parties' recent financial dispute reflects the difficulty in agreeing on undisputed amounts, in the end Qwest did accept Eschelon's calculation of this amount for the limited purpose of determining not to invoke further remedies for overdue payment. This is not a guarantee that Qwest will resolve future disputes in a similar manner; however, resolution of other related issues may provide additional security for Eschelon (see Issue 5-9). With regard to Issue 5-8, Qwest's language should be used.

Issue 5-9: Definition of Repeated Delinquency

A. The Dispute

51. This dispute concerning the same definition of "repeatedly delinquent," concerns how often a party can be repeatedly delinquent before Qwest may require a deposit.

B. Position of the Parties

52. Qwest proposes language defining "repeatedly delinquent" as payment of undisputed amounts more than 30 days after the payment due date "three (3) or more times during a twelve (12) month period" on the same billing account number.[39] Qwest argues that Eschelon's proposal fails to provide the proper incentive for timely payment and that its proposal is a reasonable business practice. In addition, Qwest's language appears in the AT&T and Covad ICAs, and Eschelon's language would therefore provide Eschelon with an unwarranted business advantage over other CLECs.

53. Eschelon proposes language defining "repeatedly delinquent" as payment of overdue amounts "for three consecutive months" on the same billing account number. In the alternative, Eschelon would define the term as payment of overdue amounts "three (3) or more times during a six (6) month period" on

[39] Disputed Issues List at 22-23; Ex. 6 (Easton Direct) at 13; Ex. 7 (Easton Rebuttal) at 12; Ex. 9 (Easton Surrebuttal) at 11.

the same billing account number.[40] Eschelon points out that many newer ICAs between Qwest and other CLECs contain the "three consecutive month" language.

54. The Department has made no recommendation on this issue.

C. Decision

55. 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 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.

Issue 5-11: Disputing Deposit Requirement

A. The Dispute

56. This issue concerns when deposits would be due and payable and whether the deposit requirement should be brought before the Commission for approval.

B. Position of the Parties

57. Qwest proposes language providing that required deposits are due and payable within 30 days after demand and conditions being met.[41] Qwest opposes Eschelon's proposal, which would permit Eschelon to bring such a dispute to the Commission and permit the Commission to set the date on which a deposit is due and payable. Qwest maintains this language is unnecessary because of Eschelon's right to dispute Qwest's billings and is inequitable because it might impair Qwest's right to protect itself from the risk of nonpayment. Qwest argues that although Eschelon is at risk of having to pay a deposit, Qwest is at risk of nonpayment. Qwest maintains that its language balances the needs of the billing and billed parties.[42]

58. Eschelon proposes language providing that required deposits are due and payable with 30 days after demand and conditions being met:

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[40] Disputed Issues List at 22-23; Ex. 42 (Denney Direct) at 57, 62-64; Ex. 43 (Denney Rebuttal) at 25-26; Ex. 44 (Denney Surrebuttal) at 52-53.
[41] Disputed Issues List at 23.
[42] Ex. 6 (Easton Direct) at 16; Ex. 7 (Easton Rebuttal) at 15-16; Ex. 9 (Easton Surrebuttal) at 13.

> unless the billed Party challenges the amount of the deposit or deposit requirement (e.g., because delay in submitting disputes or making payment was reasonably justified due to inaccurate or incomplete billing) pursuant to Section 5.18. If such a Dispute is brought before the Commission, deposits are due and payable as of the date ordered by the Commission.[43]

59. If Eschelon's language is not included, Eschelon would be required to pay a deposit demanded by Qwest before it could seek recourse with the Commission. Eschelon maintains its language would allow the Commission to make the call on when a deposit is paid when there is a disagreement and that Eschelon would not expend or monopolize the resources of the Commission or Qwest by raising a baseless challenge.[44]

60. The Department has made no recommendation on this issue.

C. Decision

61. Under Qwest's language, Eschelon would have the opportunity to challenge the deposit requirement by making the deposit and then potentially seeking relief from the Commission. Under Eschelon's language, Eschelon would have the opportunity to seek relief from the Commission before making the deposit. Commission oversight would be available in either case.

62. If the Commission feels it is necessary to become involved in sorting through the parties' billing and payment issues in the event Qwest demands a deposit, on what would probably be an expedited basis, then Eschelon's language would be appropriate. If the Commission believes these matters are better left to the parties to resolve and that Commission oversight would be sufficient protection to Eschelon after the deposit is made, then Qwest's language should be used. As there is no evidence in the record that Qwest has improperly demanded such a deposit in the past, or that "advance oversight" by the Commission has been necessary in the past, the Administrative Law Judges recommend that Qwest's language be used.

Issue 5-12: Alternative Approach to Deposits

A. The Dispute

63. This dispute concerns Eschelon's alternative language for all of Section 5.4.5, which would eliminate Qwest's ability to demand a deposit for payments that are "repeatedly delinquent" and would replace it with language that would permit Qwest to require a deposit for failure to make full payment of

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[43] Disputed Issues List at 23-24.

[44] Ex. 42 (Denney Direct) at 65; Ex. 43 (Denney Rebuttal) at 27; Ex. 44 (Denney Surrebuttal) at 53.

undisputed amounts 90 days following the payment due date, if the Commission determines that "all relevant circumstances" warrant a deposit.

B. Position of the Parties

64. Eschelon's alternative language for section 5.4.5, which would replace its proposals for Issues 5-8, 5-9, and 5-11, is shown below:

> If the Parties are doing business with each other for the first time, each Party will determine the other Party's credit status based on credit reports such as Dun and Bradstreet. If a Party that is doing business with the other Party for the first time has not established satisfactory credit with the other Party according to the previous sentence, or the Party is being reconnected after a disconnection of service or discontinuance of the processing of orders by the Billing Party due to a previous non-payment situation, the Billing Party may require a deposit to be held as security for the payment of charges before the orders from the billed Party will be provisioned and completed or before reconnection of service. The Billing Party may also require a deposit for the failure of the other Party to make full payment, less any disputed amount as provided for in Section 21 of this Agreement, for the relevant services provided under this Agreement within ninety (90) Days following the Payment Due Date, if the Commission determines that all relevant circumstances warrant a deposit.[45]

65. In Eschelon's view, this option provides the Commission the ability to determine contested deposit requirements on a case-by-case basis.[46]

66. In Qwest's view, this language would unfairly delay Qwest's ability to require security when faced with increasing debt and would require the Commission to micromanage Eschelon's account.[47]

67. The Department has made no recommendation on this issue.

C. Decision

68. As the billing party, Qwest should have the contractual right to require security for repeated delinquency of three successive months. Eschelon's alternative proposal should not be used in lieu of the recommendations made above for Issues 5-8, 5-9, and 5-11.

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[45] Disputed Issues List at 24-25.
[46] Ex. 42 (Denney Direct) at 67-68; Ex. 43 (Denney Rebuttal) at 28-29; Ex. 44 (Denney Surrebuttal) at 53.
[47] Ex. 6 (Easton Direct) at 16-17; Ex. 7 (Easton Rebuttal) at 15-16; Ex. 9 (Easton Surrebuttal) at 14

Issue 5-13: Increase in Deposit Based Upon Review of Credit Standing

A. The Dispute

69. The parties dispute whether Qwest should be permitted to increase the amount of any deposit based upon its review of Eschelon's credit standing.

B. Position of the Parties

70. Qwest proposes language that would permit it to review Eschelon's credit standing and increase the amount of deposit required, but in no event would the maximum amount exceed the amount stated in Section 5.4.5 (the estimated total monthly charges for an average two-month period from the date of the triggering event).[48] Qwest argues that in light of the frequency of telecommunications carriers declaring bankruptcy or simply shutting their doors, Qwest needs to be able to conduct credit reviews of its customers. Qwest maintains that this is a reasonable business practice accepted by every other CLEC doing business with Qwest.[49]

71. Eschelon's first proposal is to delete this language entirely. Its second proposal is to limit the use of this provision to circumstances in which Qwest has already demanded and received a deposit. Eschelon's proposal would also require Commission approval:

> 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 other Party's credit standing and increase the amount of deposit required, if approved by the Commission, but in no event will the maximum amount exceed the amount stated in Section 5.4.5. Section 5.4 is not intended to change the scope of any regulatory agency's or bankruptcy court's authority with regard to Qwest or CLECs.[50]

72. Eschelon argues that Qwest's proposal contains no criteria or standards defining when this provision might be invoked or the circumstances that would warrant modification. It would also nullify the limitations on deposit requirements established in Section 5.4.5 (failure to establish satisfactory credit, repeated delinquency in making payments, or reconnection after disconnection of service or discontinuance of order processing due to previous nonpayment). Under this language, Qwest would have the ability to require a deposit even when Eschelon is current in its payments. Eschelon also argues that there is no defined "triggering event" when Qwest makes a determination to increase a

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[48] Disputed Issues List at 26.
[49] Ex. 6 (Easton Direct) at 18-19; Ex. 7 (Easton Rebuttal) at 16-18; Ex. 9 (Easton Surrebuttal) at 17.
[50] Disputed Issues List at 26-27. The CLEC Participants support the use of Eschelon's language.

deposit amount based on its review of credit standing, which makes the "maximum amount" language ambiguous.[51]

73. The Department has made no recommendation on this issue.

C. Decision

74. 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. Eschelon's language (in alternative 2) is reasonable in that it would permit Qwest to increase a deposit requirement if one is already in place pursuant to Section 5.4.5. Eschelon's language would require Commission approval, however, which would arguably burden the Commission. The Administrative Law Judges recommend adoption of Eschelon's language with deletion of the phrase "if approved by the Commission."

Issue 5-16: Copy of Non-Disclosure Agreement

A. The Dispute

75. Under the ICA, Eschelon will provide forecasts related to interconnection trunks; future central office space collocation requirements; and demand for DS0, DS1, and DS3 capacities that will be terminated on the interconnection distribution frame (ICDF) by Qwest. The parties have agreed to language that would require certain Qwest personnel to execute a non-disclosure agreement with regard to confidential forecasting information. The non-disclosure agreement would preclude any person who receives the information from disclosing it to retail marketing, sales, or strategic planning personnel. The parties disagree about whether Qwest should be required to provide Eschelon with a signed copy of each non-disclosure agreement within ten days of execution.

B. Position of the Parties

76. Eschelon proposes the following language: "Qwest shall provide CLEC with a signed copy of each non-disclosure agreement executed by Qwest personnel within ten (10) Days of execution."[52] Eschelon contends this language is necessary because it will have insufficient information to object if sensitive information is provided to a Qwest employee not authorized to receive it, and it will have no way to confirm if its confidential information is being adequately protected. Eschelon argues that this requirement is similar to the requirements of protective orders routinely issued in contested case hearings.[53]

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[51] Ex. 42 (Denney Direct) at 70-72;
[52] Disputed Issues List at 28;
[53] Ex. 42 (Denney Direct) at 74-77; (Ex. 43 (Denney Rebuttal) at 32-34.

77. Qwest would eliminate Eschelon's language. It contends the language places an unnecessary administrative burden on Qwest and that Eschelon already has the contractual right to request an audit of its compliance with this requirement no more than every three years, unless cause is shown to do it more frequently. It also argues that the burden of complying with such a requirement on an on-going basis, where employees change jobs and new employees take their place, is very different from complying with the obligations of a protective order in a contested case.[54]

78. The Department makes no recommendation on this issue.

C. Decision

79. The agreements are to be signed by people who are authorized to receive the sensitive information. In the agreements, these authorized people agree in writing not to disclose the information to those who are not authorized. Requiring Qwest to provide a copy of the signed agreement will not, in and of itself, provide Eschelon with any information about whether the authorized persons are in compliance, unless Qwest asks an expressly unauthorized person to sign a non-disclosure agreement, which seems unlikely. Although the administrative burden involved in providing Eschelon with a copy of the document would appear to be minimal, Eschelon's language does not achieve the purpose for which it is offered, and it might generate insignificant disputes concerning what might happen if the ten-day deadline were breached. If Eschelon has a well-founded belief that sensitive information has been given to unauthorized personnel, the audit provision would permit it to request a compliance audit at any time. The Administrative Law Judges recommend adoption of Qwest's language.

IV. INTERCONNECTION.

Issue 7-18: Transit Record Charge
Issue 7-19: Transit Record Bill Validation

A. The Dispute

80. Transit traffic is traffic that originates on one telecommunications carrier's network, transits a second carrier's network, and terminates on a third carrier's network. In Section 7.6.3 of the Agreement, the parties agreed that they will provide the requested records to each other, when the records are used to provide information necessary for each party to bill the originating carrier. In Minnesota, the rate for category 11 records is currently set at zero.[55] The dispute here is whether, when Eschelon is the originating carrier as opposed to the terminating carrier, and when it has requested the transit records not for the

[54] Ex. 6 (Easton Direct) at 20-22); Ex. 7 (Easton Rebuttal) at 18-19; Ex. 9 (Easton Rebuttal) at 17-18.
[55] Qwest has not proposed to change this rate in the *UNE Cost Case*.

purpose of billing another carrier but for the purpose of verifying Qwest's transit bills, Qwest should have to provide the records free of charge.

B. Position of the Parties

81. Eschelon proposes the following language for Section 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.[56]

82. Eschelon's proposal for Section 7.6.4 specifies the information Qwest would be obligated to provide for bill validation:

> Qwest will provide the non-transit provider, upon request, bill validation detail including but not limited to: originating and terminating CLLI code, originating and terminating Operating Company Number, originating and terminating state jurisdiction, number of minutes being billed, rate elements being billed, and rates applied to each minute.[57]

83. Eschelon maintains this language is necessary because Qwest's bills do not contain call record detail, but simply contain the number of transit minutes and transit traffic rate. Although Eschelon can obtain information from its switch to identify the person called and the fact that the call is handed off to Qwest, it is not able to identify all the information needed to reconcile Qwest's bills. Eschelon argues that it needs occasional access to a limited number of call records so that it can verify the transit bills. In addition, for Eschelon customers served through Qwest Platform Plus (QPP, the UNE-P replacement product), Eschelon's switch would have no information because these calls go through Qwest's switch.[58]

84. Qwest opposes this language and would delete it from the ICA. Qwest argues that Eschelon's switch provides the best information about traffic it sends to Qwest and that Eschelon should be able to validate Qwest's bills by comparing Eschelon's own records with the bills from the terminating carrier. In addition, Qwest maintains that the Category 11 transit record product was designed to create records for terminating carriers, not originating carriers. To provide what Eschelon is requesting for originating carriers, Qwest would have to

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[56] Disputed Issues List at 29-30.
[57] Disputed Issues List at 30.
[58] Ex. 42 (Denney Direct) at 79-82; Ex. 43 (Denney Rebuttal) at 34-36; Ex. 44 (Denney Surrebuttal) at 57-58.

undertake a significant amount of programming. No other originating carriers have requested this type of record.[59]

C. Decision

85. If Qwest provides 11-01-XX records free of charge to CLECs for the purpose of billing originating carriers, it is hard to see why Qwest should not be required to provide sample records free of charge to Eschelon, once every six months, for the purpose of verifying Qwest's bills. Eschelon's language for Section 7.6.3.1 should be adopted.

86. Eschelon has not directly responded to Qwest's assertion that it would have to make programming changes to provide the information Eschelon is requesting for originating carriers in Section 7.6.4, beyond saying it wants the same "type" of information Qwest currently provides. It is not clear whether the 11-01-XX records referenced in Section 7.6.3.1 contain the same information as that required by Eschelon's proposed language for Section 7.6.4. Qwest should provide to Eschelon whatever records are referenced in 7.3.6.1 for the purpose of verifying bills. If something different would be required by Section 7.6.4, it should not be adopted.

V. COLLOCATION.

Issue 8-20: Available Inventory/Posting of Price Quotes

A. The Dispute

87. "Available inventory" is an available collocation site that has been returned to inventory. Qwest posts these sites on its website, with a list of all reusable and reimbursable elements, and provides a discount on the non-recurring costs for circuit terminations. If Qwest prepares a quote for a CLEC interested in a posted site, it charges a Planning and Engineering Fee to the CLEC. At issue is whether Qwest should also be required to post on its website prior quotes it has prepared for an available collocation space. Also at issue is the extent to which Qwest should be able to charge another Planning and Engineering Fee for later quotes prepared for the same space.

B. Position of the Parties

88. Eschelon proposes the following language:

> if Qwest prepares a Planning and Engineering Fee for a posted Collocation site and for any reason the posted Collocation site is returned to Qwest inventory, Qwest will post the Planning and Engineering Fee quote (with the carrier's name redacted) on the inventory list for that site and, for future requests for that site, will

[59] Ex. 6 (Easton Direct) at 22-23; Ex. 7 (Easton Rebuttal) at 19-20;

> waive the Planning and Engineering Fee, as the quote has already been prepared, unless Qwest establishes a change in circumstance affecting the quoted price.[60]

89. Eschelon's language would thus require that Qwest post any previously prepared quote and waive the Planning and Engineering Fee for a second quote, unless Qwest establishes a change in circumstance affecting the price. Eschelon argues that posting of prices that Qwest has already been paid to create will facilitate the review of used collocation space and aid Eschelon in making efficient decisions regarding the purchase of such space.[61]

90. Qwest's first proposal was to delete this section entirely, because Qwest maintains it is unlikely that a CLEC will ever order a collocation site exactly "as is." Qwest also argued that this is an issue that should be addressed in its Change Management Process (CMP). Since the time of the hearing Qwest has proposed alternative language, which provides as follows:

> if Qwest prepares a quote for a posted Available Inventory collocation site and that quote is not accepted, and the site is returned to Qwest Available Inventory, if another CLEC places an order for that same site within one year of the date of that prior quote, Qwest will provide that prior quote to CLEC if requested by CLEC in that application. If CLEC does request that prior quote with their Available Inventory Application, Qwest shall be permitted to redact any information necessary to protect any confidential information of the carrier for whom the prior quote was prepared. If CLEC requests that the site be provisioned exactly as requested by the prior carrier, and if this results in the same quoted price, Qwest will waive the Planning and Engineering Fee related to preparation of CLEC's quote.[62]

91. Qwest's language would permit CLECs to request and receive prior quotes that are less than one year old, would permit Qwest to redact any information necessary to protect confidential information of the carrier for whom the prior quote was prepared, and would require Qwest to waive a subsequent Planning and Engineering fee only if the CLEC requests that the site be provisioned exactly as requested before and the same price is subsequently quoted.

92. The Department recommends adoption of Eschelon's proposed language. It maintains that, while in the past CLECs may not have ordered identical configurations, it is likely explained in part because Qwest has not

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[60] Disputed Issues List at 30-31.
[61] Ex. 42 (Denney Direct) at 82-83; Ex. 43 (Denney Rebuttal) at 37-39; Ex. 44 (Denney Surrebuttal) at 58-59.
[62] Disputed Issues List at 31-32. *See also* Ex. 16 (Hubbard Direct) at 4-15; Ex. 17 (Hubbard Rebuttal) at 3-6; Ex. 18 (Hubbard Surrebuttal) at 2-6.

posted the price quotes, and there was no incentive for CLECs to take advantage of the available price quotes by ordering the same configurations. The Department recommends that Qwest be required to post prior quotes; if Qwest maintains there is a cost associated with the posting requirement, Qwest should be permitted to submit a cost study in the *UNE Cost Case* to establish the cost likely to be incurred, along with a proposed price.[63]

C. Decision

93. Prior price quotes may be useful to CLECs in making efficient decisions about collocation space. Eschelon's language is reasonable in that it would permit Qwest to charge another Planning and Engineering Fee if the circumstances have changed since the prior quote was prepared. Qwest's language would make it more difficult for CLECs to obtain the prior quotes, would allow Qwest to use its own judgment about what information should be redacted from the prior quotes, and would permit Qwest to charge another Planning and Engineering Fee unless the "same quoted price" is given for the subsequent quote. The Administrative Law Judges recommend that Eschelon's proposed language be used because the information would be easier to access and evaluate. If there is a cost associated with posting this information on Qwest's website, Qwest should be permitted to submit a cost study in the *UNE Cost Case*.

Issue 8-20(a): Available Inventory/Space Augments

A. The Dispute

94. This dispute concerns charges applicable to "special sites," which are collocation sites returned to Qwest through Chapter 7 bankruptcy or abandonment. These sites are not decommissioned and are offered with equipment, racks, cages, DC power, grounding, and terminations in place. They are posted on Qwest's available inventory website. The parties dispute whether Qwest may charge a Planning and Engineering fee instead of a "special site assessment fee" if Eschelon proposes modifications to the space.

B. Position of the Parties

95. The parties have agreed upon the following language:

> CPMC will verify whether the requested site is still available for acquisition by conducting a feasibility study within ten (10) Days after receipt of the application. If the site is not available the CPMC will notify the CLEC in writing. If the site is available a site survey will be arranged with the CLEC and Qwest State Interconnect Manager (SICM). Upon completion of the survey Qwest will

[63] Department Post-Hearing Brief at 6-8; Ex. 52 (Rebholz Reply) at 2-4; Ex. 53 (Rebholz Surreply) at 1-3.

> prepare a quote based on the site inventory and any requested modifications to the site. CLEC must pay in full one hundred percent (100%) of the quoted non-recurring charges to Qwest within thirty (30) Days of receipt of the quote. If Qwest does not receive the payment within such thirty (30) Day period, the quote will expire and the requested site will be returned to Qwest inventory. The CLEC will be charged a special site assessment fee for work performed up to the point of expiration or non-acceptance of the quote.[64]

96. Qwest would add the following sentence at the end of the above language: "If CLEC requests an augment application then CLEC will be charged a Planning and Engineering Fee instead of the special site assessment fee."[65] Qwest maintains that if a CLEC requests the collocation site "as is," Qwest will charge the "Special Site Assessment Fee." If a CLEC requests modifications, Qwest will charge the "higher" Planning and Engineering Fee.[66]

97. It is not clear from Qwest's prefiled testimony which Planning and Engineering Fee Qwest plans to charge, nor is it clear from the prefiled testimony what Qwest believes the "Special Site Assessment Fee" is. During the hearing, Qwest's position was clarified.[67] Exhibit A to the ICA contains several planning and engineering fees for collocation, including one for special sites ($1,051.23) and one for caged collocations ($3,406.46). Eschelon maintains, and Qwest agrees, that through its proposed language Qwest plans to charge the $3,406.46 fee for standard caged collocations if modifications are requested for a special site.

98. Eschelon opposes the additional language, contending the agreed-upon language already specifies that the "special site assessment fee" covers all work performed, including any requested modifications, up to the point of expiration or non-acceptance of the quote. Eschelon asserts the "special site assessment fee" is the $1,051.23 listed as a "planning and engineering fee" on Exhibit A.[68]

99. The Department has made no recommendation on this issue.

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[64] Disputed Issues List at 32-33.
[65] *Id*.
[66] Ex. 16 (Hubbard Direct) at 15-19; Ex. 17 (Hubbard Rebuttal) at 6-8; Ex. 18 (Hubbard Surrebuttal) at 6-7.
[67] *See* Tr. 2:20-23 (special site assessment fee is the special site planning and engineering fee listed in 8.15.2.1 in Ex. A to the ICA); *id*. at 24 (Qwest would apply the planning and engineering fee for standard caged collocations at § 8.4.1 if modifications were requested for a special site).
[68] Ex. 42 (Denney Direct) at 87-89; Ex. 43 (Denney Rebuttal) at 39-41; Ex. 44 (Denney Surrebuttal) at 58-60, DD-24.

C. Decision

100. In Minnesota, Qwest is currently permitted to charge the following rates for special sites: planning and engineering fee, $1,051.23; network assessment fee, $1,652.38; and survey fee $163.65.[69] For standard caged collocations, the planning and engineering fee is $3,406.46.[70] Until September 29, 2006, Qwest charged the special site planning and engineering fee; on that date, it announced it would charge the higher fee.[71]

101. The Commission approved the collocation rates for special sites based upon the agreement of the parties in Docket No. P-421/AM-03-1754 (October 2003 Rate Element Filing). Qwest did not present evidence of the cost model used to produce these rates. As there is a planning and engineering fee specifically for special sites, there appears to be no reason to use the planning and engineering fee for caged collocations for any activities concerning special sites.

102. The agreed-upon language provides that the CLEC will be charged a "special site assessment fee" for work performed up to the point of expiration or non-acceptance of the quote. In Docket No. P-421/AM-03-1754, the special site planning and engineering fee was described as a "Transfer of Responsibility Assessment Fee."[72]

103. The planning and engineering fee contained in Section 8.15.2.1 of Ex. A appears to include the planning and engineering involved in transferring the collocation from one CLEC to another. The Administrative Law Judges conclude that Eschelon's interpretation of this language is correct and that the planning process includes planning any requested modifications. The Administrative Law Judges recommend that the last sentence of the agreed-upon language be changed as follows to clarify: "The CLEC will be charged a special site assessment fee <u>as specified in Section 8.15.2.1 of Ex. A</u> for work performed up to the point of expiration or non-acceptance of the quote."

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[69] These charges were approved as interim rates not subject to true-up, based on the stipulation of the parties, in Docket No. P-421/AM-03-1754 (October 2003 Rate Element Filing).

[70] The caged collocation planning and engineering fee was approved in the *Generic Cost Docket*, Docket No. P-422, 5321, 3167, 466, 421/C-96-1540. *See* Ex. A to ICA, § 8.15.2, Available Inventory—Special Sites—Planning and Engineering Fee; § 8.4.1, Caged Physical Collocation—Planning and Engineering Fee).

[71] Ex. 44 at DD-24.

[72] *In the Matter of Qwest Corporation's Request for Approval of SGAT Elements*, Docket No. P-421/AM-03-1754, Order Approving Stipulation (Aug. 20, 2004), Stipulation Ex. A.

Issue 8-21: DC Power/Usage Pricing
Issue 8-21(b)
Issue 8-21(c)
Issue 8-21(d)

A. The Dispute

104. Qwest currently provides -48 volt DC power to CLEC collocation equipment, and there are currently two separate rate elements: power plant, which is applied on a per-amp basis to the quantity of power ordered; and power usage, which is either applied to the quantity of power ordered, or through the DC power measurement option, to the quantity of power actually used, on feeds greater than 60 amps. The parties disagree about whether the power plant charge should be entirely based on power usage, rather than power requested. The current power pricing scheme is based on power requested, and Qwest advocates continued use of that method; Eschelon wants power to be priced based on the power used. The appropriate method of pricing DC Power is at issue in the *UNE Cost Case*.

B. Position of the Parties

105. Qwest's language in the sections at issue here provides for billing on a measured basis only for the DC power usage charge.[73] Qwest contends it engineers power plant in accordance with a CLEC's ordered amounts of power capacity, which is a fixed investment in the particular equipment needed to provide the ordered capacity. It contends that Eschelon can reduce its power plant charges through Qwest's "Power Reduction" product, which reduces the amps on a primary or secondary feed. Qwest's "Power Reduction with Reservation" product also reduces the amps but reserves the fuse position on the power board, which would permit "Power Restoration" in the future.[74]

106. Eschelon would delete the word "usage" from Qwest's language so that power measurement would apply to both power plant and power usage charges. Eschelon maintains that in designing power plant in a central office, Qwest engineers the plant to accommodate "peak drain," or "List 1 drain," which is the maximum drain required by the power plant at times of peak demand under normal operating conditions (including equipment of both Qwest and collocators). The power feeder cables ordered by CLECs are sized to accommodate "List 2 drain," which is the maximum current the equipment may draw when batteries providing DC power are approaching a condition of total failure. By assessing its power plant rate based upon the size of Eschelon's feeder cables, instead of

[73] Disputed Issues List at 34-38.
[74] Ex. 16 (Hubbard Direct) at 19-27, 32-37; Ex. 17 (Hubbard Rebuttal) at 11-19; Ex. 18 (Hubbard Surrebuttal) at 7-13.

assessing plant rate based on measured usage, Eschelon maintains it is forced to pay for substantially more capacity than it actually uses.[75]

107. The Department recommends that Qwest's language be used at this time and that any decision to change the pricing method should be made in the *UNE Cost Case*. The Department recommends that the following language be added to Section 8.3.1.6.1: "Any change in the application of the DC Power Plant Charge that is ordered in Docket No. P421/AM-06-713 will apply to the DC Power Plant ordered by the CLEC."[76]

C. Decision

108. Qwest's language should be adopted for this ICA. Although it is theoretically possible that the current pricing scheme results in a discriminatory rate or over-recovers capacity costs from CLECs, there is no evidentiary basis for drawing such a conclusion here. These are issues that should be examined in the *UNE Cost Case*. The Department's recommended language could be added, but the Administrative Law Judges do not believe it is necessary. Any number of prices could change as a result of the *UNE Cost Case;* adding the Department's recommended reference to this portion of the ICA will not add any needed clarification.

Issue 8-21(a): Initial Power Measurement

A. The Dispute

109. In addition to the dispute identified above concerning the term "usage," this issue concerns the process that should apply when the CLEC first orders measured power.

B. Position of the Parties

110. Qwest's language provides that it will bill Eschelon for the requested level of power until Eschelon notifies Qwest that Eschelon wants a measurement, and then Eschelon is responsible for notifying Qwest when the collocation is operating.[77]

111. Eschelon's language states that Qwest cannot bill at all until a measurement is taken, but that Eschelon is responsible for notifying Qwest of when to measure only if Qwest's first measurement is zero.[78]

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[75] Ex. 27 (Starkey Direct) at 93-111; Ex. 28 (Starkey Rebuttal) at 42-54; Ex. 29 (Starkey Surrebuttal) at 72-91.
[76] Department Post-Hearing Brief at 9-10; Ex. 54 (Fagerlund Reply) at 11-13; Ex. 55 (Fagerlund Surreply) at 11. The CLEC Participants agree that this issue should be decided in the *UNE Cost Case*.
[77] Disputed Issues List at 34-35; Ex. 16 (Hubbard Direct) at 27-32.
[78] Disputed Issues List at 34-35; Ex. 27 (Starkey Direct) at 93; Ex. 28 (Starkey Rebuttal) at 52-53.

112. The Department agrees with Qwest that the CLEC should be required to notify Qwest when the equipment is in the space, so that Qwest does not waste resources measuring usage that does not yet exist. The Department disagrees, however, with the language in Qwest's proposal that would permit it to bill Eschelon based on requested power until Eschelon notifies it that the collocation is operating. The Department recommends that Qwest's language be adopted, with the following two sentences added to Section 8.2.1.29.2.2:

> If the CLEC's order for DC Power to a collocation includes a request for measured usage, Qwest will only bill for DC Power Usage for this collocation on a measured basis. The CLEC is responsible for notifying Qwest immediately when DC Power begins to be used in the collocation.[79]

113. In the Department's view, this language will motivate Qwest and Eschelon to work out a process so that power is measured from the very first month that measured power is in place.[80]

C. Decision

114. Qwest's language should be adopted, with the additional language recommended by the Department.

Issue 8-22: Quote Preparation Fee

A. The Dispute

115. The dispute here concerns the circumstances under which Qwest should be able to charge a Planning and Engineering fee (or Quote Preparation Fee) for reducing or restoring power. There are two methods of reducing power: with or without reservation. Power reduction with reservation requires the CLEC to reduce its ordered amperage to zero, while allowing it to reserve its existing fuse/breaker position on the BDFB or power board. Under this option, the CLEC power cables and fuses remain in place until the CLEC either asks for power again or discontinues the power arrangement. The CLEC pays a monthly rate of $58.19 for reservation.[81] Power reduction without reservation permits a CLEC to reduce its ordered amps to a lower level. The same "with and without reservation" options are available for power restoration.

116. Qwest proposes to charge a quote preparation fee (QPF, or planning and engineering fee) of $565.67 for these activities with or without a reservation of the fuse position on the power board; Eschelon will agree to pay it

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[79] Department's Post-Hearing Brief at 11-12; Ex. 54 (Fagerlund Reply) at 13-14; Ex. 55 (Fagerlund Surreply) at 11.
[80] Ex. 55 at 11.
[81] The reservation charge is the "Power Maintenance Charge" at § 8.13.4 of Ex. A to the ICA; the power reduction charges depend on amperage and are contained in § 8.13.

only for power restoration if there has been no reservation of the fuse position on the power board.[82]

B. Position of the Parties

117. Qwest maintains that it is entitled to recover the cost of performing a feasibility study and producing a quote concerning a CLEC request to reduce or restore power. It has proposed the same QPF charges in the *UNE Cost Case* and contends that issues concerning those charges should be addressed in the *UNE Cost Case*.[83]

118. Eschelon proposes to leave the section concerning a QPF for power reduction blank. Eschelon maintains that the only circumstance in which a QPF would be legitimate in connection with reducing power is when there is no reservation and cabling work is required to move from the power board to the BDFB; in this circumstance, Eschelon would agree to pay an individual case basis (ICB) charge. Eschelon would modify the section concerning power restoration to clarify that the QPF would be payable only for power restoration without reservation. Its position is that CLECs pay QPFs when power is originally requested; they pay for the work involved in power reduction and restoration through non-recurring charges (NRCs), and they pay a recurring maintenance fee when power is reduced or restored with reservation. It maintains another QPF is unnecessary, particularly when a CLEC is paying for reservation, because the originally-engineered facilities are left in place.[84]

119. The Department was initially concerned that Qwest proposed to charge an ICB price for the restoration of power and a QPF to prepare the ICB price for reducing or restoring power. It supported making the outcome of this dispute contingent on the outcome of the *UNE Cost Case*.[85] In its post-hearing brief, the Department stated it supports the Eschelon language because "this is a reprice from an initial price of zero and not a new price."[86]

C. Decision

120. Section 8.13 of Ex. A to the ICA reflects both QPFs (planning and engineering fees) and separate fees for the work involved in reducing and maintaining power. These are interim rates that were approved by agreement in Docket No. P-421/AM-03-1754. The cost model that generated these prices is not in evidence, so there is no model to look at for determining how the charges for reducing power and maintaining power were meant to relate to each other or

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[82] Disputed Issues List at 39.
[83] Ex. 16 (Hubbard Direct) at 38-40; Ex. 17 (Hubbard Rebuttal) at 13; Ex. 18 (Hubbard Surrebuttal) at 9; Ex. 23 (Million Rebuttal) at 16-17.
[84] Ex. 42 (Denney Direct) at 91-99; Ex. 43 (Denney Rebuttal) at 42-43; Ex. 44 (Denney Surrebuttal) at 61-63.
[85] Ex. 54 at 14-15; Ex. 55 at 12.
[86] Department Post-Hearing Brief at 13.

when the QPF charge would appropriate. Qwest maintains that the QPF reflects the planning and engineering activities associated with determining the steps necessary to perform the work, whereas the separate charge is for the actual performance of the work. Qwest maintains the costs were split this way so that if the CLEC were to decide not to go through with the work, it could avoid the separate work charge, but Qwest would still be compensated for the planning.[87] This explanation is somewhat contradicted by Qwest's admission that no "quote" is ever generated or provided to a CLEC at the conclusion of this QPF process, so it is unclear how exactly a quote could affect a CLEC's decision not to proceed, or why a quote would ever be necessary when there is an approved fixed charge for performing the work.[88] In any event, Qwest would like to charge both the QPF and the work fee for every such change in power.

121. The proposed charges for power restoration do not appear at all on Ex. A to the ICA and have not yet been approved by the Commission. For these charges, the Department is correct that this is a "reprice" from an initial price of zero. Qwest has agreed that for power restoration, it will charge the NRC for power reduction as opposed to an ICB price. The parties still dispute when the QPF charge is appropriate.

122. The burden here is on Qwest to demonstrate that the QPF charge is appropriate, and it has failed to demonstrate that a QPF is necessary when CLECs wish to reduce or restore power and are paying or have paid for reservation of their facilities. Qwest may be able to show in the *UNE Cost Case* that a different result should follow, based on the cost studies filed in that case.

123. Eschelon has agreed that some work may be necessary to plan for power reduction without reservation, although it would prefer to pay an ICB price that includes the cost of planning. Eschelon has agreed to pay the QPF for power restoration without reservation. It would be inappropriate to recommend ICB pricing for power reduction without reservation, as urged by Eschelon, when a QPF and NRC were set by agreement of the parties in Docket No. P-421/AM-03-1754. Unless and until the Commission approves different charges in the *UNE Cost Case*, Qwest should be permitted to charge the QPF contained in Section 8.13 of Ex. 2 of the ICA for power reduction and restoration when there has been no reservation of facilities.

VI. UNBUNDLED NETWORK ELEMENTS (UNEs).

Issue 9-31: Nondiscriminatory Access to UNEs

A. The Dispute

124. The parties disagree about two phrases in Section 9.1.2 that concern whether certain activities related to UNEs will be provided at TELRIC-

[87] Tr. 2:112.
[88] Tr. 2:118-22.

based rates. Eschelon proposes language that it believes would make clear that these activities are to be TELRIC-priced; Qwest opposes this language, advocating instead that the question whether a change to a UNE is to be priced at TELRIC or otherwise be deferred to the future.

B. Position of the Parties

125. Eschelon proposes the following language for Section 9.1.2:

> Qwest shall provide non-discriminatory access to Unbundled Network Elements on rates, terms and conditions that are non-discriminatory, just and reasonable. The quality of an Unbundled Network Element Qwest provides, as well as the access provided to that element, will be equal between all Carriers requesting access to that element. Access to 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).[89]

126. Eschelon maintains that in the last sentence, "access to" UNEs is necessary to clarify that the referenced activities are to be provided at TELRIC rates. In Eschelon's view, Qwest has attempted improperly to limit the use a CLEC may make of a UNE through unilateral changes announced through the CMP and has recently signaled its intent to charge non-TELRIC rates for additional dispatch, trouble isolation, design change expedites, cancellation, and maintenance of service charges.[90]

127. Qwest would change the last sentence to read:

> *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 rates*.[91]

128. Qwest maintains that the Eschelon language is ambiguous because it lists only a few of the obligations that would be imposed by the language. It further argues that, under Eschelon's language, Qwest could be required to build new facilities and to provide access to a yet unbuilt, superior network. Qwest also contends that Eschelon's language could be interpreted to mean that the price of leasing a UNE includes changes, additions, and

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[89] Disputed Issues List at 44.
[90] Ex. 27 (Starkey Direct) at 122-31; Ex. 28 (Starkey Rebuttal) at 61-77; Ex. 29 (Starkey Surrebuttal) at 95-100.
[91] Disputed Issues List at 44-45 (emphasis added).

modifications without additional payment.[92] Although Qwest does not address directly whether it intends to charge tariff rates for these activities in the future, Qwest does admit, with regard to design changes specifically, that its position is that design changes are not a service required under Section 251 of the Act and are not governed by TELRIC pricing; Qwest maintains that it will raise that issue in a separate proceeding, at some future time, in a manner that would permit all interested parties to present their views.[93]

129. The Department supports Eschelon's proposed language. In the Department's view, Eschelon's language only commits Qwest to providing nondiscriminatory access to the types of routine modifications that are necessary to provide access to the functionality of the UNE.[94]

C. Decision

130. It is difficult to understand Qwest's position that Eschelon's language might require Qwest to provide access to an "as yet unbuilt, superior network" or that it might mean Qwest would be unable to charge at all for making such changes. It is a real stretch to find this kind of ambiguity in Eschelon's language. Qwest has pointed to nothing in the language that would require it to perform an activity that is obviously outside of its existing § 251 obligations.

131. Qwest's proposed language is in fact more ambiguous than Eschelon's, because it would leave unanswered the question whether routine changes in the provision of a UNE would be priced at TELRIC or at some other "applicable rate."

132. Federal law requires that when a CLEC leases a UNE, the ILEC remains obligated to maintain, repair, or replace it.[95] Unless and until the Commission or other authority determines to the contrary, these types of routine changes to UNEs should be provided at TELRIC rates. Eschelon's language should be adopted for this section.

133. At the hearing, Eschelon and the Department expressed concern that, because Qwest has not submitted cost studies for these activities in the *UNE Cost Case*, Qwest intends to simply begin charging market or tariff prices at the conclusion of this case. On December 21, 2006, Qwest indicated in a filing in the *UNE Cost Case* that, upon further review, Qwest agreed that several of these elements should be included in the cost docket, and it provided proposed UNE prices and cost support for those prices.

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[92] Ex. 19 (Stewart Direct) at 11-14; Ex. 20 (Stewart Rebuttal) at 9-15; Ex. 22 (Stewart Surrebuttal) at 4-6.
[93] Ex. 20 (Stewart Rebuttal) at 6.
[94] Ex. 54 (Fagerlund Reply) at 17-18; Ex. 55 (Fagerlund Surreply) at 13; Department's Post-Hearing Brief at 14-15.
[95] 47 C.F.R. § 51.309(c); see also *TRO* ¶ 639 (requiring a LEC to modify an existing transmission facility, in the same manner it does for its own customers, provides competitors access only to a functionally equivalent network, rather than one of superior quality).

134. The Commission could clarify that, if Qwest has not done so already, it should submit cost studies to justify development of TELRIC prices for these activities in the *UNE Cost Case*, if it intends to charge for them, without prejudice to any argument Qwest might make in a different proceeding that such activities are outside the scope of Qwest's § 251 obligations. Qwest should not be permitted to charge non-TELRIC rates for these activities without the express approval of the Commission.

Issue 9-33: Network Maintenance and Modernization/Adverse Effect

A. The Dispute

135. Although the parties agree that Qwest must perform normal maintenance and modernization of its network, they dispute language concerning potential effects on end-user customers.

B. Position of the Parties

136. 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.[96]

137. Eschelon proposes two alternatives, contending it needs assurance that these minor changes to transmission parameters will not interfere with service to end user customers. Eschelon cites to a situation in which Qwest asserted it was meeting industry standards for decibel loss, but the circuit was not operational and Eschelon was unable to provide the service requested. Eschelon would add to the last sentence either of the following phrases:

> but will not adversely affect service to any End User Customers. (In the event of emergency, however, see Section 9.1.9.1).

> but will not adversely affect service to any End User Customers (other than a reasonably anticipated temporary service interruption, if any, needed to perform the work). (In addition, in the event of emergency, see Section 9.1.9.1.).[97]

138. Qwest objects to the Eschelon language, contending it is undefined both as to the obligation imposed and the consequences for potential violation.

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[96] Disputed Issues List at 49; Ex. 19 (Stewart Direct) at 17-24; Ex. 20 (Stewart Rebuttal) at 18-21; Ex. 22 (Stewart Surrebuttal) at 8-9.

[97] Disputed Issues List at 49-50; Ex. 33 (Webber Direct) at 22-40; Ex. 34 (Webber Rebuttal) at 9-14; Ex. 35 (Webber Surrebuttal) at 5-15. The CLEC Participants recommend the use of Eschelon's language.

139. Eschelon further argues that its terminology is no different than the language of 47 C.F.R. § 51.316(b), which requires ILECs, when converting wholesale services to UNEs or to a combination of UNEs, to do so "without adversely affecting the service quality perceived by the requesting telecommunications carrier's end-user customer."

140. The Department agrees that the Eschelon language is vague and would create the potential for future litigation over whether a violation occurred, and if so, whether damages are warranted. The Department recommends the following language in lieu of Eschelon's proposals:

> 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.[98]

141. The Department contends that this language would not disadvantage either company and would assure Eschelon of being able to get its end user customer back in service, while focusing Qwest's responsibilities on fixing any problems caused by necessary changes to its network.[99]

C. Decision

142. The Department's recommended language should be adopted. It appears to balance the reasonable needs of both parties in an even-handed manner. Contrary to Eschelon's argument, the process of converting a service to a UNE is not necessarily the same as the process of modernizing or maintaining the network; accordingly, the "adversely affecting" language of 47 C.F.R. § 51.316(b) does not provide the guidance needed to make this section of the ICA free from ambiguity. The reference to correcting transmission quality to "an acceptable level" does not, as Qwest argues, make this language unacceptably vague. The language merely commits Qwest to taking action to restore transmission quality to that which existed before the network change.

Issue 9-33(a): Relationship Between Section 9.1.9 and Copper Retirement

A. The Dispute

143. The parties had previously agreed upon language in Section 9.1.9 that said "(for retirement of copper loops, see section 9.2.1.2.3)." Because of

[98] Department's Post-Hearing Brief at 17; Ex. 50 (Schneider Reply) at 3-6; Ex. 51 (Schneider Surreply) at 3.

[99] By letter dated December 19, 2006, Qwest objected to the Department's proposal, arguing that its language is just as undefined as Eschelon's and that the Department's suggestions are untimely. The Department has agreed that Qwest's letter of objection should be included in the record.

wording changes in connection with Issue 9-33, they have now proposed different language to make this reference to copper retirement.

B. Position of the Parties

144. Eschelon proposes the following language in Section 9.1.9, which generally addresses network maintenance and modernization:

> This Section 9.1.9 does not address retirement of copper Loops or Subloops (as that phrase is defined in Section 9.2.1.2.3). See Section 9.2.1.2.3.[100]

145. After the hearing, Qwest proposed this language:

> Because the retirement or replacement of copper loops may involve more than just minor changes to transmission parameters, terms and conditions relating to such retirements or replacements are set forth in Section 9.2.[101]

146. The Department has made no recommendation on this issue because it was not identified as an issue until after the hearing.

C. Decision

147. There is little discernable difference between the proposed alternatives. Section 9.2.1.2.3 contains notice provisions for retirement of copper loops and subloops that are different and more specific than the notice provisions of Section 9.1.9. Because the parties previously agreed to language that takes retirement of copper loops and subloops entirely out of Section 9.1.9, and because Qwest's proposed language might be read to take it out of Section 9.1.9 only if such retirements involve more than minor changes to transmission parameters, the Administrative Law Judges recommend use of Eschelon's language to eliminate any ambiguity.

Issue 9-34: Location at Which Changes Occur

A. The Dispute

148. Qwest has agreed to provide advance notice of network changes containing all information required by 47 U.S.C. § 251(c)(5) and FCC rules, 47 C.F.R. Parts 51 and 52. One of the rules, 47 C.F.R. § 51.327, requires public notice of the "location" at which changes will occur. The dispute concerns whether the "location" information in the notice must include the circuit identification and end user customer address information if changes are "specific to an end user customer."

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[100] Disputed Issues List at 49
[101] Disputed Issues List at 49-50.

B. Position of the Parties

149. Eschelon proposes modifying Qwest's language as follows:

> Such notices will contain the location(s) at which the changes will occur *including, if the changes are specific to an End User Customer, the circuit identification and End User Customer address information,* and any other information required by applicable FCC rules.[102]

150. Eschelon maintains this information is necessary to enable it to determine if a network change will affect its end user customers. It argues that circuit ID is the generally accepted locator within the network, and the customer address is the locator within the CLEC's list of customers. If Eschelon has this information, it can cross-reference its own records to determine if its customers will be affected.[103]

151. Qwest objects, arguing that it is not clear what a change "specific to an end-user customer" would be and that this requirement "exceeds" the FCC's minimum requirement, is overly burdensome, and might require Qwest to conduct intensive manual searches of multiple databases. Qwest also argues that Eschelon can obtain the circuit ID of its customers from its own records based on the information provided by Qwest.[104]

152. The Department supports Eschelon's goal, but believes the record is lacking in terms of readily apparent solutions. The Department recommends modifying Eschelon's language as follows, in order to provide that when circuit identification is readily available to Qwest, then Qwest must provide it:

> Such notices will contain the location(s) at which the changes will occur *including, if the changes are specific to an End User Customer, the circuit identification, if readily available,* and any other information required by applicable FCC rules.[105]

C. Decision

153. It 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. If this information is

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[102] Disputed Issues List at 50-51. The CLEC Participants also support this language.
[103] Ex. 33 (Webber Direct) at 32-33); Ex. 34 (Webber Rebuttal) at 14-15; Ex. 35 (Webber Surrebuttal) at 15-16.
[104] Ex. 19 (Stewart Direct) at 24-26; Ex. 20 (Stewart Rebuttal) at 22-23; Ex. 22 (Stewart Surrebuttal) at 9-11.
[105] Department's Post-Hearing Brief at 19; Ex. 50 (Schneider Reply) at 6; Ex. 51 (Schneider Surreply) at 3-4.

readily available, Qwest should provide it. The Department's recommended language should be adopted.

Issue 9-43: Conversion of a UNE to a non-UNE
Issue 9-44
Issue 9-44(a)-(c)

A. The Dispute

154. When Eschelon requests that a UNE be converted to a non-UNE (because, for example, the FCC or Commission has made a determination that CLEC access to a particular product is not impaired) there is generally no change to the physical facilities. Qwest, however, uses different provisioning, billing and inventory systems for UNEs and non-UNE products. Consequently, Qwest requires CLECs to "disconnect" the UNE product and "install" the retail product through numerous record-keeping changes that could potentially cause delay or disruption of service.[106] Eschelon has proposed, in this arbitration proceeding, to require Qwest to change its systems to be more accommodating of CLEC concerns regarding the "seamlessness" of such conversions.

B. Position of the Parties

155. Eschelon proposes to establish a set of conditions that would control Qwest's conversion process: no change in circuit ID (Issue 9-43); conversion carried out as a price change (Issue 9-44); Qwest may re-price through use of an adder or surcharge (Issue 9-44(a); Qwest may create a new Universal Service Ordering Code (USOC) for purposes of charging an adder or surcharge (Issue 9-44(b)); and use of the same USOC for the converted product, so that negotiated volume discounts based on USOCs are not impacted (Issue 9-44(c)). Eschelon also recommends that the Commission order Qwest to change its conversion processes to be more efficient and cost-effective and of higher quality.[107]

156. Eschelon maintains that Qwest has recently issued what Eschelon describes as a "password-protected, non-CMP secret PCAT notice" providing that CLECs need to submit a collocation application to initiate the conversion process (with a service interval of somewhere between 15 and 45 days); that Qwest may stop accepting connect, change, or disconnect orders unless CLECs use this cumbersome conversion process; and that Qwest may be improperly planning to charge for such conversions.[108] Eschelon is concerned that if there is

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[106] *See, e.g.*, Tr. 2:72-82.
[107] Disputed Issues List at 58-59; Ex. 27 (Starkey Direct) at 132-55; Ex. 28 (Starkey Rebuttal) at 78-81; Ex. 29 (Starkey Surrebuttal) at 100-12.
[108] Pursuant to 47 C.F.R. § 51.316(c), except as agreed to by the parties, an ILEC shall not impose any untariffed termination charges, or any disconnect fees, re-connect fees, or charges associated with establishing a service for the first time, in connection with any conversion between a wholesale service or group of wholesale services and a UNE or combination of UNEs.

no language in the ICA addressing this issue, Qwest will attempt to apply this notice to Eschelon, and Eschelon will be at risk of service disruption to its end user customers if any errors take place.

157. Qwest opposes any language addressing changes to or requirements for its conversion process. It maintains that it is entitled to assess an "appropriate" (tariffed) charge for the activities involved in conversion, and it argues that the costs associated with changing its billing and inventory systems would place an unfair burden on Qwest.[109]

158. In the 2001-02 timeframe, when Qwest was converting private lines to UNEs, the Commission approved a TELRIC charge for the conversion process that did not include all the functions Qwest maintains are now necessary to reverse the process, because Qwest did not require a change to the circuit ID number until April 2005.[110]

159. The Department contends that there is insufficient record evidence to permit evaluation of Qwest's conversion processes in this docket; it recommends that such an evaluation take place in a broader docket involving other CLECs. It recommends that the Commission open an investigation docket to determine (1) whether the charge for converting a UNE to a non-UNE should be a TELRIC-based charge; and (2) once the Commission has determined by what method this conversion charge should be priced, Qwest should file an appropriate cost study to determine the price to be used. At the same time, the Commission could consider the process Qwest uses to bill for converted elements and could potentially require Qwest to follow a different process, using forward-looking design and technology; follow its existing process, but charge a fee based on forward-looking design and technology; or use its current process without change. In the meantime, the Department recommends leaving the disputed sections of the ICA intentionally blank, as advocated by Qwest.[111]

C. Decision

160. The Department's recommendation to explore these issues in a generic docket makes sense, and its recommendation to leave the disputed sections of the ICA blank should be adopted. Although there are a number of related dockets pending, this issue is not squarely presented in any of them. Qwest has not proposed any cost studies for conversions in the *UNE Cost Case*. In the *Wire Center Case*, Qwest is maintaining that the Commission should approve its right to assess a charge for conversions, but that Commission approval of the amount of the charge is not required. The Department disagrees

[109] Disputed Issues List at 58-59; Ex. 23 (Million Rebuttal) at 5-16.
[110] Tr. 2:85-88.
[111] Department's Post-Hearing Brief at 22-24; Ex. 54 (Fagerlund Reply) at 18-22; Ex. 55 (Fagerlund Surreply) at 14; Tr. 5:51-52.

with that position. The *Wholesale Rates Case*[112] includes proposed prices for the converted elements, but does not include the price of performing the conversion from a UNE to a non-UNE. If an investigation docket concerning the conversion process were opened, the Commission could address how such conversions should be priced (on an interim basis if necessary) pending completion of the docket.

Issue 9-50: Cross Connect
Issue 9-53: UCCRE

A. Dispute

161. At issue is how Qwest should go about phasing out the provision of a UNE that there is no demand for or that Qwest is no longer obligated to provide. Qwest wants to eliminate from this ICA its obligation to perform wiring changes when the demarcation point is moved in a multi-tenant building (Issue 9-50, Cross Connect) and the Unbundled Customer Controlled Rearrangement Element (Issue 9-53, UCCRE), a functionality that would allow Eschelon to control the configuration of UNEs or ancillary services through a digital cross connect device.

B. Position of the Parties

162. Qwest has never received a CLEC order for these products and wants to phase out these products over time by eliminating them from ICAs as the contracts expire and are replaced. With regard to Issue 9-50, it proposes language that would require Qwest to offer an amendment to Eschelon that would allow Eschelon to request that Qwest perform cross connect jumper work for intrabuilding cable, "[i]f during the term of this agreement a new negotiated ICA or negotiated amendment has been approved by the Commission" that contains this option. Qwest would leave the ICA section concerning Issue 9-53 intentionally blank.[113]

163. Eschelon objects to elimination of these products from its ICA if the products are still available in Qwest's ICAs with other CLECs, contending it constitutes discrimination. Eschelon offers four alternative proposals. First, with regard to Issue 9-50, Eschelon proposes language providing that if Qwest performs cross connect for any other CLEC during the term of the ICA, Qwest will notify Eschelon and offer an amendment to permit Eschelon to request the service under the same terms and conditions. Second, Eschelon offers a detailed proposal for language in Section 1.7.3 outlining the process for obtaining a phase out order from the Commission. The third proposal is a revision of the

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[112] *In the Matter of a Potential Proceeding to Investigate the Wholesale Rates Charged by Qwest*, OAH Docket No. 12-2500-17246-2, MPUC Docket No. P-421, C-05-1996.
[113] Disputed Issues List at 61, 71; Ex. 19 (Stewart Direct) at 37-39, 42-44; Ex. 20 (Stewart Rebuttal) at 33-45; Ex. 22 (Stewart Surrebuttal) at 16-25. *See also* Tr. 3:53.

second intended to address concerns raised by Qwest during the hearing. The fourth proposal only relates to the removal of section 251 UNEs.[114]

164. The Department proposes that a phase-out process be included in the ICA that would require Qwest to obtain Commission approval before eliminating a service; Commission approval would not be required, however, if Qwest were able to obtain, in relatively short order, ICA amendments from all affected CLECs removing the service.[115]

165. The Department recommends that the following language be inserted as Section 1.7.3:

> 1.7.3 **Phase out process.** If Qwest desires to phase-out the provision of an element, service, or functionality included in this agreement, it must first obtain an Order from the Commission approving its process for withdrawing the element, service or functionality. Obtaining such an Order will not be necessary if Qwest (1) promptly phases-out an element, service or functionality from the agreements of all CLECs in Minnesota within a three-month time period when the FCC has ordered that the element, service, or functionality does not have to be ordered, or (2) follows a phase-out process ordered by the FCC.[116]

166. With regard to Issue 9-50, the Department recommends that the service be left out of the ICA since Qwest seems committed to phasing the service out, and that Qwest be given four months to obtain a phase-out order from the Commission. The Department recommends that the following sentence be added to the end of the agreed-upon language of Section 9.3.3.8.3 to effectuate this recommendation:

> Qwest has previously performed this service, and will either obtain a phase-out order (pursuant to Section 1.7.3) from the Commission within four months of the effective date of this Agreement or perform this service if CLEC requests.[117]

167. With regard to Issue 9-53, the Department recommends that Qwest obtain an order from the Commission approving its phase-out process. It recommends that the following language be added to Section 9.9.1 of Eschelon's Proposal #2:

> Qwest shall provide Unbundled Customer Controlled Rearrangement Element (UCCRE) to CLEC in a non-discriminatory

[114] Disputed Issues List at 61-71; Ex. 42 (Denney Direct at 108-112, 116-21; Ex. 43 (Denney Rebuttal) at 52-54, 5-57; Ex. 44 (Denney Surrebuttal) at 67-77.
[115] Ex. 54 (Fagerlund Reply) at 24-29; Ex. 55 (Fagerlund Surreply) at 14-15; Tr. 5:40-45.
[116] Department's Post-Hearing Brief at 27.
[117] Department's Post-Hearing Brief at 28.

manner according to the terms and conditions of Section 9.9 and subparts of the Minnesota SGAT, *unless Qwest obtains a phase-out order (pursuant to Section 1.7.3) from the Commission within four months from the effective date of this Agreement.*[118]

C. Decision

168. The Department's recommendations for Sections 1.7.3, 9.3.3.8.3, and 9.9.1 should be used in the ICA. These recommendations efficiently balance the concerns of both parties and would permit any interested CLEC to provide comment to the Commission if it had concerns about the elimination of a particular element, service, or functionality. The Department's language will be easier to implement than the lengthy procedures proposed by Eschelon.

169. Qwest expressed a lengthy objection to the Department's proposals on this issue, contending that the arbitration authority of state commissions is limited to the open or disputed issues that remain after 135 days of negotiations and that are set forth in the petition for arbitration and response. It contends that because neither Eschelon nor Qwest originally proposed the phase-out process recommended by the Department, the issue is not properly addressed in this arbitration.[119]

170. This argument is misplaced. Issues 9-50 and 9-53 are open and disputed issues that Qwest and Eschelon negotiated but were unable to resolve. Because they were unable to resolve these issues, and others, Eschelon petitioned for arbitration. The Department properly intervened as a party to this arbitration, and it is entitled to propose language that it believes is consistent with the law and will serve the public interest better than language offered by the other parties. Just because these specific words were not negotiated between Qwest and Eschelon does not mean that the Commission lacks authority to resolve the issues by incorporating the Department's proposed language into the disputed provisions of the ICA. Qwest and Eschelon have both had a meaningful opportunity to respond to the Department's proposals, and neither has been prejudiced in any way by the timing of the Department's suggestions.

Issue 9-55: "Loop-Transport Combinations"

A. The Dispute

171. The parties disagree on language defining a commingled extended enhanced loop (EEL) as a "Loop-Transport Combination." Commingled EELs are partly a UNE and partly not.

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[118] Department's Post-Hearing Brief at 29.
[119] Ex. 22 (Stewart Surrebuttal) at 19.

B. Position of the Parties

172. Qwest would title Section 9.23.4 "Enhanced Extended Links (EELs), Commingled EELs, and High Capacity EELs." It has proposed language for that section as follows:

> 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 the Commission jurisdiction) and the non-UNE circuit will be governed by the rates, terms and conditions of the appropriate Tariff.[120]

173. Qwest objects to defining EELs as a "Loop-Transport Combination," as proposed by Eschelon, because not all loop-transport combinations are UNEs. Qwest maintains that different rates and provisioning processes are required for a "loop-transport combination" that is composed entirely of UNEs than for a commingled UNE circuit that is partly a private line.[121]

174. Eschelon would add to the title of Section 9.23.4 "Loop-Transport Combinations: Enhanced Extended Links (EELs), Commingled EELs, and High Capacity EELs." It would make similar references to EELs as being "Loop-Transport Combinations" in the rest of its proposed language for sections 9.23.4 through 9.23.4.6. A portion of Eschelon's proposed language provides: "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."[122]

175. The Department recommends that the term "loop-transport combination" not be used because it is more general than is needed and may cause confusion. The Department recommends that Qwest's language be used.[123]

C. Decision

176. Eschelon's language states that if no component of a combination is a UNE, the combination is not covered by the ICA. This language would permit the inference that if any part of a combination *is* a UNE, the entire combination would be covered by the ICA. Eschelon's following sentence, stating that "the UNE components of any Loop-Transport Combinations are governed by this agreement," do not reflect Qwest's position that the non-UNE

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[120] Disputed Issues List at 74.
[121] Ex. 19 (Stewart Direct) at 49-53; Ex. 20 (Stewart Rebuttal) at 52-60; Ex. 22 (Stewart Surrebuttal) at 28-30.
[122] Disputed Issues List at 74-76; Ex. 27 (Starkey Direct) at 161-69; Ex. 28 (Starkey Rebuttal) at 83-86; Ex. 29 (Starkey Surrebuttal) at 112-19.
[123] Department's Post-Hearing Brief at 29-30; Ex. 54 (Fagerlund Reply) at 29-31; Ex. 55 (Fagerlund Surrebuttal) at 17-18.

portions are *not* governed by this agreement. Qwest could agree to this, but it has not, and accordingly it is entitled to language making clear that the non-UNE portion of a commingled EEL is outside the scope of the ICA. Qwest's language should be used in the ICA.[124]

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

A. The Dispute

177. Before accessing high-capacity EELs, the requesting carrier must certify to the service criteria set forth in the *TRO* to demonstrate it is a bona fide provider of a qualifying service. The parties dispute the language that would permit Qwest to conduct an audit of Eschelon's compliance with service eligibility criteria.

B. Position of the Parties

178. Qwest has proposed language providing as follows for Section 9.23.4.3.1.1:

> After CLEC has obtained High Capacity EELs in accordance with Section 9.23.4.1.2, Qwest may conduct a Service Eligibility Audit to ascertain whether those High Capacity EELs comply with the Service Eligibility Criteria set forth in Section 9.23.4.1.2.[125]

179. Eschelon proposes adding the following phrase to the end of the above sentence: "when Qwest has a concern that CLEC has not met the Service Eligibility Criteria." Eschelon also proposes a written notice provision that would require Qwest to specify the cause "upon which Qwest has a concern that CLEC has not met the Service Eligibility criteria" and to provide, upon request, a list of circuits for which Qwest has compliance concerns Issue 9-56(a)).[126]

180. Qwest contends that the language it has proposed is consistent with the *TRO* and that the *TRO* does not limit its right to request an audit "for cause."[127]

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[124] Eschelon points out that the non-UNE portion of a commingled EEL could be covered by a negotiated commercial agreement or some other document that is not specifically a tariff. Qwest could clarify this by adding the phrase "or other agreement outside of this ICA" to the end of its proposed language.
[125] Disputed Issues List at 76-77.
[126] Disputed Issues List at 77.
[127] *See* Report and Order and Order on Remand, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange* Carriers, 18 FCC Rcd 16978 (2003) (TRO), *vacated in part and remanded, USTA v. FCC*, 359 F.3d 554 (D.C. Cir.), *cert. denied*, 125 S.Ct. 313, 316, 345 (2004); Ex. 19 (Stewart Direct) at 54-58; Ex. 20 (Stewart Rebuttal) at 60-63; Ex. 22 (Stewart Surrebuttal) at 30-31.

181. Eschelon argues, largely in reliance on an FCC order that preceded the *TRO*, that Qwest's right to request such audits must be limited to avoid undue burden on CLECs.[128]

182. The Department has made no recommendation on this issue.

C. Decision

183. The *TRO* established certification and auditing procedures based on the general principles that requesting carriers are entitled to unimpeded UNE access based on self-certification, subject to later verification based upon cause.[129]

184. More specifically, the *TRO* provides that ILECs may obtain and pay for an independent auditor to audit, on an annual basis, compliance with the qualifying service eligibility criteria. The FCC concluded that an annual audit right strikes the appropriate balance between the ILEC's need for usage information and the risk of illegitimate audits that impose costs on qualifying carriers. To the extent the independent auditor's report concludes that a CLEC has failed to comply with the criteria, the CLEC 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, if the independent auditor concludes that a CLEC has failed to comply in all material respects with service eligibility criteria, the CLEC must reimburse the ILEC for the cost of the independent auditor. Similarly, if the independent auditor concludes that the CLEC complied in all material respects with the eligibility criteria, the ILEC must reimburse the audited carrier for its costs associated with the audit. In adopting these procedures, the FCC expected that the reimbursement mechanism would provide incentive for CLECs to comply with eligibility criteria and for ILECs to avoid abusive or unfounded audits.[130]

185. The *TRO* clearly permits Qwest to request an independent audit on an annual basis and does not limit audit requests to situations in which Qwest would have articulable concerns about specific circuits. Eschelon's language is inconsistent with the mechanism outlined in the *TRO.* The undisputed portions of Section 9.23.4.3 incorporate the reimbursement mechanism and the annual limitation contained in the *TRO*. The Administrative Law Judges recommend using Qwest's language for Issue 9-56; for Issue 9-56(a), the Administrative Law Judges recommend adopting Qwest's proposal to delete this section.

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[128] Eschelon's Post-Hearing Brief at 81-83; Ex. 42 (Denney Direct) at 128-33; Ex. 43 (Denney Rebuttal) at 60-62; Ex. 44 (Denney Surrebuttal) at 89-90.

[129] Report and Order and Order on Remand, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange* Carriers, 18 Fcc Rcd 16978 at ¶ 622 (2003) (TRO), *vacated in part and remanded, USTA v. FCC*, 359 F.3d 554 (D.C. Cir.), *cert. denied*, 125 S.Ct. 313, 316, 345 (2004).

[130] TRO ¶¶ 626-28.

Issue 9-58: Arrangements for Commingled Elements
Issue 9-58(a)-(e)
Issue 9-59

A. The Dispute

186. As with Issues 9-43 and 9-44 concerning the conversion process, Eschelon here proposes language that would require Qwest to change its ordering, tracking, repair, and billing systems for handling commingled EELs. Eschelon maintains its language would require Qwest to create more efficient processes that are less likely to cause problems for CLECs. Qwest objects to any suggestion that its systems be changed through provisions in the ICA.

B. Position of the Parties

187. Eschelon proposes changes that would require Qwest to allow the ordering of commingled EELs on a single LSR form (Issue 9-58); to assign a single circuit ID to a commingled EEL (Issue 9-58(a)); to permit CLECs to report trouble on a single trouble report and to process trouble reports using a single charge for both UNE and non-UNE circuits (Issue 9-59); to charge for all rate elements using a single billing account number (BAN) (Issue 9-58(b)); in the alternative, to identify on bills (among other things) the UNE element (by circuit ID) that is commingled with the non-UNE (Issues 9-58(c); to permit the option of a single LSR, circuit ID, and BAN for commingled arrangements other than EELs (Issue 9-58(d)); and to use the service interval of the longer of the two facilities being commingled (Issue 9-58(e)). Eschelon argues that Qwest's current practice, which requires separate ordering, tracking, repair, and billing systems for UNEs and non-UNEs, causes unreasonable delays, interferes with the usefulness of ordering a commingled product, and makes bill verification difficult.[131]

188. Qwest again maintains that its systems for UNEs and non-UNEs are different and that it is not obligated to change its procedures. It maintains that changing its procedures would be costly and that such issues should be raised in its CMP so that all CLECs have an opportunity to comment.[132]

189. The Department recommends that evaluation of Qwest's complex processes concerning the handling of commingled elements should take place in a broader docket. The Commission would then be able to evaluate the reasonableness of requiring Qwest to change its processes and the cost of making such changes. In addition, the Commission could evaluate the pricing issues associated with charges (recurring and nonrecurring) for commingling

[131]Disputed Issues List at 78-86; Ex. 42 (Denney Direct) at 133-64; Ex. 43 (Denney Rebuttal) at 63-73; Ex. 44 (Denney Surrebuttal) at 90-98. The CLEC Participants support this language.
[132] Ex. 19 (Stewart Direct) at 58-74; Ex. 20 (Stewart Rebuttal) at 63-93; Ex. 22 (Stewart Surrebuttal) at 32-38.

UNEs with non-UNEs. In the meantime, the Department recommends that Qwest's language be used in the ICA.[133]

C. Decision

190. The Administrative Law Judges agree with the Department's recommendation to open a separate docket to consider these issues. The record is insufficient to evaluate Qwest's ability to change its processes and the costs of making such changes. For now, Qwest's language proposals should be incorporated into the ICA.

Issue 9-61: Loop-Mux Combinations
Issue 9-61(a)
Issue 9-61(b)
Issue 9-61(c)

A. The Dispute

191. Multiplexing (or muxing) equipment allows multiple circuits to be combined into a single larger circuit; it also permits the reverse process (sometimes called de-muxing). A "loop-mux combination" is an arrangement that includes a loop and multiplexing, but no interoffice transport. For example, numerous UNE loops serving end-users might be muxed into a larger circuit in the end office, and the larger circuit would then be delivered to a CLEC collocation in the same end office. At issue here is whether the multiplexing function for a loop-mux combination must be provided at TELRIC rates (as proposed by Eschelon) or at tariffed rates (as proposed by Qwest).

B. Position of the Parties

192. Qwest asserts that FCC rules do not require it to provide multiplexing at TELRIC-based rates unless the multiplexing is provided in conjunction with UNE transport (not a UNE loop). Qwest would move all references to the loop-mux combination to the section of the ICA dealing with commingled elements. Qwest contends that multiplexing is not a "stand-alone UNE" and that it is not obligated to offer it at a UNE price. Qwest also would omit placing references to service intervals in the ICA, contending any changes to service intervals should be made through its CMP as opposed to amending the ICA. Although Qwest previously provided all loop-multiplexing at UNE rates, and the Commission previously approved these rates, Qwest now views multiplexing within a central office as merely a method of connecting a UNE loop with tariffed transport. Qwest will provide multiplexing as a UNE, however, when a UNE loop is combined with UNE transport.[134] Qwest relies on an FCC decision for the

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[133] Department's Post-Hearing Brief at 30-31; Ex. 54 (Fagerlund Reply) at 31-34; Ex. 55 (Fagerlund Surreply) at 18-19.
[134] Disputed Issues List at 88; Ex. 19 (Stewart Direct) at 75-81; Ex. 20 (Stewart Rebuttal) at 93-100; Ex. 22 (Stewart Surrebuttal) at 38-43. *See also* Ex. 32.

proposition that multiplexing is not a stand-alone network element.[135] It also relies on portions of the *TRO* concerning general principles of commingling.[136]

193. Eschelon relies on other language in the *TRO* in contending that multiplexing is also a function of a loop, not just transport, and that Qwest must make the loop-mux combination available at TELRIC rates when multiplexing is provided in connection with UNE loops or UNE transport. Its proposed language describes the loop-mux combination as a UNE combination (as opposed to a commingled arrangement of UNE and non-UNE) and states the appropriate rates are those TELRIC rates contained in Ex. A to the ICA. Other disputed provisions concern service intervals and rates for de-muxing. In addition, Eschelon argues that Qwest must make the loop-mux combination available at TELRIC rates because Qwest is obligated to do so in other ICAs with other CLECs, and Qwest cannot discriminate by refusing to do so for Eschelon.[137]

194. The Department argues that multiplexing in the central office should be provided at TELRIC rates because it is a function associated with the UNE loop and cross-connect elements. For the limited purpose of providing the loop-mux combination, the Department recommends that multiplexing should be provided at TELRIC rates because multiplexing between a UNE loop and a simple cross-connect to a CLEC collocation is appropriately provided at TELRIC rates. Because the Commission has approved UNE prices for multiplexing, and because multiplexing is contained in other ICAs as a UNE, the Department contends that if Qwest wants to "phase out" multiplexing as a UNE (unless, as Qwest concedes, it is provided in connection with UNE transport), Qwest should file a petition to obtain Commission approval for deleting these terms from other ICAs. In the meantime, it should be offered in this ICA at UNE terms and rates.[138] The Department recommends that Eschelon's language be adopted, with three non-substantive corrections to sections 9.23.9.2, 9.23.9.2.1, and 9.23.9.3.2.2(b).[139]

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[135] *In the Matter of Petition of WorldCom, Inc.,for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon-Virginia and for Arbitration,* 17 FCC Rcd. 27,039 at ¶ 491 (FCC Wireline Competition Bureau July 17, 2002) (*Verizon Virginia Arbitration Order*).

[136] *TRO* ¶ 583 (commingling allows a competitive LEC to connect or attach a UNE or UNE combination with an interstate access service, such as high-capacity multiplexing or transport services).

[137] Disputed Issues List at 88-96; Ex. 27 (Starkey Direct) at 169-84; Ex. 28 (Starkey Rebuttal) at 87-92; Ex. 29 (Starkey Surrebuttal) at 120-26. The CLEC Participants also agree with Eschelon's language.

[138] Department's Post-Hearing Brief at 32-34; Ex. 54 (Fagerlund Reply) at 35-36; Ex. 55 (Fagerlund Surreply) at 19-20. *See also* Department Recommendations for Issues 9-50 and 9-53.

[139] Department's Post-Hearing Brief at 34.

C. Decision

195. The FCC has not spoken definitively on this issue. The local loop is defined as "a transmission facility between a distribution frame (or its equivalent) and an incumbent LEC central office and the loop demarcation point at an end-user customer premise."[140] In general, ILECs must provide access to UNEs, along with all of the "features, functions, and capabilities" of the UNE, in a manner that allows a requesting carrier to provide service.[141]

196. In the *Verizon Virginia Arbitration Order*, the FCC rejected the notion that multiplexing is a stand-alone UNE, but required Verizon to offer multiplexing as a feature of UNE dedicated transport.[142] The FCC declined to address the issue whether multiplexing can also be a feature, function, or capability of a UNE loop in the circumstances at issue here:

> [T]he parties appear to disagree over Verizon's obligation to provide multiplexing associated with cross-connects between local loops and collocated equipment. This debate over Verizon's obligations under the contract in particular circumstances relates to implementation of the agreement. While the parties apparently disagree on this implementation point, the specific question is not addressed by contract language proposed by either party for this issue and thus is not squarely presented. We emphasize that our adoption of Verizon's proposed contract language on this issue should not be interpreted as an endorsement of Verizon's substantive positions expressed in this proceeding regarding its multiplexing obligations under applicable law.[143]

197. In the *TRO,* the FCC stated that a 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."[144] It also required ILECs to make routine network modifications such as adding multiplexers to high-capacity loops.[145] The same requirement holds true for adding multiplexers to unbundled transport.[146] In another paragraph, the FCC described an EEL as a UNE combination consisting of an unbundled loop and dedicated transport sometimes including additional electronics (e.g., multiplexing equipment).[147] In requiring ILECs to "commingle" UNEs and tariffed services, however, the FCC gave as an example the attachment of a UNE or UNE

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[140] 47 C.F.R. 51.319(a)(1).
[141] *See* 47 C.F.R. § 51.307(c).
[142] *Verizon Virginia Order* at ¶¶ 498-99.
[143] *Id*. at ¶ 490 (footnotes omitted).
[144] *TRO* at ¶214.
[145] *Id*. at ¶ ¶ 634-35, n. 1922; 47 C.F.R. § 51.319(a)(8)(ii).
[146] 47 C.F.R. § 51.319(e)(5).
[147] TRO at ¶ 571.

combination with an interstate access service "such as high-capacity multiplexing or transport services."[148]

198. Although there may be some merit to Qwest's contention that the multiplexing at issue here should not be considered a feature or function of a loop—because it would take place not between the customer premise and the distribution frame, but between the distribution frame or its equivalent and Eschelon's collocation—neither the *Verizon Virginia Arbitration Order* nor the *TRO* expressly addresses the question whether multiplexing must be offered at UNE rates under this circumstance.

199. Qwest agrees that it must offer multiplexing at UNE rates when it connects two UNEs, or when it is a feature, function, or capability of UNE transport. Given that Qwest has previously provided multiplexing as a UNE when it is provided in conjunction with a UNE loop, as well as when it is provided in conjunction with UNE transport, the Administrative Law Judges agree with the Department's recommendations that Eschelon's language be adopted in the ICA. If Qwest wishes to withdraw or limit multiplexing in the manner it proposes here, it should file a petition with the Commission to obtain permission to modify all ICAs that currently provide for UNE pricing of the multiplexing of a UNE loop into non-UNE transport within a central office.[149]

VII. ACCESS TO OPERATIONAL SUPPORT SYSTEM (OSS).

Issue 12-64: Acknowledgment of Mistakes
Issue 12-64(b)

A. The Dispute

200. The parties disagree about whether and under what circumstances Qwest should be required to acknowledge or provide a root cause analysis of Qwest-caused errors to Eschelon (Issue 12-64) and to Eschelon's end-user customers (Issue 12-64(b)). Eschelon bases its proposal on the Commission's Order in the *Minnesota 616 Order*.[150] Eschelon and Qwest disagree on the scope of this decision, the level of detail that Qwest must provide in such an acknowledgment, and whether Qwest's response may be disclosed to Eschelon end-user customers.

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[148] TRO at ¶ 583.
[149] For Issue 9-61(b), which concerns whether service intervals should be placed in the ICA or should be changed through the CMP, see discussion of Issues 12-XXX.
[150] *In the Matter of a Request by EschelonTelecom for an Investigation Regarding Customer Conversion by Qwest and Regulatory Procedures*, Docket No. P421/C-03-616, Order Finding Service Inadequate and Requiring Compliance Filing (July 30, 2003) (*MN 616 Order*).

B. Position of the Parties

201. Eschelon seeks to include language that would permit it to ask Qwest for root cause analysis and/or acknowledgment of a mistake relating to any products or services provided under the ICA. Eschelon also proposes language that would make any such acknowledgment be provided on a non-confidential basis and not include a confidentiality statement.[151]

202. Qwest agrees to language that would permit Eschelon to ask for acknowledgment of a mistake (but not for root cause analysis) made in the processing of an LSR/ASR under the agreement. Qwest maintains the Commission's order was limited to mistakes in processing the LSR/ASR[152] and should not be broadened to include other activities; the requirement to do a "root cause analysis" would be burdensome; the requirement that it provide "sufficient pertinent information to identify the issue" to be vague; and Qwest objects to language requiring its response to be provided on a non-confidential basis.[153]

203. The Department asserts that the Commission's language was intended to encompass errors that may occur in pre-ordering, ordering, provisioning, maintenance, and billing; it rejects Qwest's argument that the Commission limited its decision to errors in the processing of an LSR/ASR. In any event, the Department argues that nothing in the Commission's decision would preclude the ICA from containing language that would require acknowledgment of mistakes in other areas. The Department recommends adoption of the Commission's express terminology or, in the alternative, adoption of Eschelon's proposed language for Issue 12-64. The Department makes no recommendation as to Issue 12-64(b), which concerns the confidentiality or non-confidentiality of the response.[154]

C. Decision

204. The basic facts underlying the *MN 616 Order* were not disputed. One of Qwest's large business customers decided to transfer its service from Qwest to Eschelon. Eschelon followed Qwest's procedures to complete the service transfer, electronically submitting a wholesale order form on March 27. The form listed April 9 as the date on which service should be transferred to Eschelon. A Qwest employee inadvertently entered the incorrect date on two of the five work orders, causing 80 of the customer's lines to go out of service two weeks before Eschelon was prepared to serve it, with no notice to Eschelon or the customer. By the time its service was restored, and after the customer had

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[151] Disputed Issues List at 97-99; Ex. 33 (Webber Direct) at 40-66; Ex. 34 (Webber Rebuttal) at 22-30; Ex. 35 (Webber Surrebuttal) at 22-30.
[152] An LSR is a Local Service Request. An ASR is an Access Service Request.
[153] Disputed Issues List at 97-99; Ex. 1 (Albersheim Direct) at 39-46; Ex. 2 (Albersheim Reply) at 36-42; Ex. 4 (Albersheim Surreply) at 16-19.
[154] Department's Post-Hearing Brief at 34-37; Ex. 48 (Doherty Reply) at 14-19 and KAD 001; Ex. (Doherty Surrebuttal) at 4.

contacted Qwest retail representatives, the customer had reversed its decision to transfer service to Eschelon. When the customer told Eschelon it no longer wished to transfer service, Eschelon submitted an electronic cancellation order, which Qwest's system rejected because two of the work orders had already been implemented. A Qwest retail representative communicated to the customer that Eschelon had to cancel the orders or the customer might lose service again. When Eschelon sought help from a Qwest wholesale service representative, it found that a Qwest retail employee had already canceled the three remaining work orders, in violation of Qwest policy. In addition, when Eschelon asked Qwest for a written statement to provide the customer to explain what had caused the outage, it took Qwest nearly three weeks to provide an explanation the customer could understand.

205. Based on these facts, the Commission found that Qwest had provided inadequate service in (1) failing to adopt operational procedures to ensure the seamless transfer of customers to competitive carriers; (2) failing to adopt operational procedures to prevent its retail division from interfering with Eschelon's ability to serve its customer and to prevent its retail division from providing misleading characterizations of Eschelon's conduct; and (3) failing to adopt operational procedures to prevent its retail service representatives from canceling or otherwise modifying wholesale orders.

206. On July 30, 2003, the Commission ordered Qwest to make a compliance filing detailing its proposals for remedying the service inadequacies identified in the Order, including (1) procedures for ensuring that retail service representatives are properly separated from wholesale operations; (2) procedures for promptly acknowledging and taking responsibility for mistakes in processing wholesale orders; and (3) procedures for reducing errors in processing wholesale orders.[155]

207. Qwest made three compliance filings, eventually agreeing, in response to increasingly specific direction from the Commission, to implement procedures for acknowledging mistakes in processing wholesale orders (not just typographical errors on the LSR/ASR); procedures for ensuring the acknowledgements appear on Qwest letterhead or other indicia to show Qwest is making the acknowledgement; and procedures for preventing the use of a confidentiality designation to ensure that the CLEC can provide the acknowledgement to its end user customer.[156]

208. Qwest's proposed language for the ICA is inconsistent with commitments it made in its compliance filings in the *MN 616* docket. Eschelon's language is not vague or burdensome (to acknowledge a mistake, Qwest has to determine that one was made and why) and it is more consistent with the Commission's order, but it does expand the scope from "mistakes in processing

[155] Ex. 5; Ex. 48 at KAD 001.
[156] Ex. 48 at KAD 001.

wholesale orders" to "mistake[s] relating to products and services provided under this Agreement." To make Eschelon's language more consistent with the Commission's order, the Commission could change this phrase in Section 12.1.4.1 to "mistake[s] in processing wholesale orders." In the alternative, the Commission could adopt Eschelon's proposed language for Issues 12-64 and 12-64(b) as it stands. Either of these alternatives would be consistent with the record and in the public interest.

Issue 12-66: Communications with CLEC Customers

A. The Dispute

209. This dispute concerns communications between Qwest and Eschelon's customer that arise from service outages or other service or billing problems that result from a Qwest-caused error. The parties have agreed to language providing that Qwest will not use the situation as a winback opportunity, but they disagree about language concerning Qwest technicians initiating discussion of Qwest products or services.[157]

B. Position of the Parties

210. The parties have agreed to the following language for Section 12.1.5.5:

> Notwithstanding any other provisions of this Agreement, when a CLEC End User Customer experiences an outage or other service affecting condition or Billing problem due to a known Qwest error or action, Qwest shall not use the situation (including any misdirected call) as a winback opportunity.[158]

211. Eschelon would add to the end of the sentence this phrase: "or otherwise initiate discussion of its products and services with CLEC's End User Customer." Based on the facts involved in the *MN 616* Docket, Eschelon argues that this language is necessary to preclude Qwest from using its own errors or mistakes as an opportunity to win back end user customers.[159]

212. Qwest initially objected, maintaining that no language was necessary and that Section 12.1.5.5 should be left blank because it would prevent Qwest from responding to customer-initiated requests for information. Qwest eventually agreed to the language quoted above, without the phrase at

[157] This issue may be closed. Eschelon has briefed it, and it still appears on the Disputed Issues List; Qwest's brief, however, provides that Issue 12-66 is closed. *See* Qwest's Post-Hearing Brief at 119. If it is closed, whatever language the parties have agreed to should be incorporated in the ICA.
[158] Disputed Issues List at 102.
[159] Ex. 33 (Webber Direct) at 66-79; Ex. 34 at 30–35; Ex. 35 at 30-35.

the end concerning Qwest initiation of discussion of its products and services. Qwest apparently believes this last phrase is unnecessary.[160]

213. The Department has made no recommendation on this issue.

C. Decision

214. Qwest agreed to virtually identical language in Section 12.1.5.4.7, which addresses maintenance and repair and provides in relevant part that "the Qwest technician will not initiate any discussion regarding Qwest's products and services with CLEC End User Customer and will not make disparaging remarks about CLEC." It also provides "[n]otwithstanding the foregoing, if a CLEC End User Customer initiates a discussion with the Qwest technician about Qwest's products or services and requests such information, nothing in this Agreement prohibits the Qwest technician from referring the CLEC End User Customer to the applicable Qwest retail office." Eschelon's proposed language merely extends the same treatment to contacts arising from Qwest-caused errors. Eschelon's proposed language should be adopted.

Issue 12-67: Expedited Orders
Issue 12-67 (a)-(g)

A. The Dispute

215. An expedited order or "expedite" is an order for which Qwest provides the requested service more quickly than it otherwise would under its normal service provisioning interval. Some arise in emergency situations, some do not. Expedites are necessary for Eschelon to respond to the unusual needs of customers and to compete effectively. The parties disagree as to whether the expedite charge charged in addition to the normal installation charges should be priced at a wholesale TELRIC rate or at "just and reasonable" retail rate. For expedites that arose in certain emergency situations, a practice developed where Qwest provided those "emergency expedites" to Eschelon and other CLECs without requiring the additional expedite charge. In 2006, Qwest completed a CMP and now limits no-charge emergency expedites to POTS-type services. Eschelon disagrees with that limitation.

B. Position of the Parties

216. Eschelon proposes a provision restoring no-charge, emergency-based expedites for unexpected events such as natural disasters or critical deadlines such as grand openings, for all services. Eschelon disputes the reasons offered by Qwest for the CMP change. Eschelon alleges that Qwest provides free emergency expedites for its retail customers and selected CLECs and is therefore required to provide them to Eschelon. For non-emergency

[160] Ex. 1 (Albersheim Direct) at 46-52; Ex. 2 (Albersheim Reply) at 42-45; Ex. 4 (Albersheim Surreply) at 19-22.

expedite situations, Eschelon proposes that the ICA contain an option of requesting a fee-based expedite and language clarifying that installation Non-Recurring Charges and similar charges are still applicable. Eschelon proposes that the expedite option be available to UNE combinations. Eschelon proposes that the expedite charge for the non-emergency expedite be set at a TELRIC rate to be determined and that it be set at $100 per day on an interim basis.[161]

217. Qwest notes a distinction between design service (unbundled loops) and non-design services (POTS-type services). It agrees that under the expedite process that preceded the current one, CLECs could obtain expedites for both non-design and design services under certain emergency conditions for free. In Qwest's view, CLECs abused that process and gamed Qwest's system, which placed an undue burden on Qwest and drove it to reconsider the products that it included in the expedite process. Based upon a Change Request submitted by Covad, Qwest implemented the current expedite process of providing free emergency expedites only for non-design services, but charging a per-day expedite charge for design services without regard to emergencies. Qwest argues that the distinction is reasonable and not discriminatory. It also argues that the expedites service is a "superior" service, and not a UNE pursuant to Section 251 of the Telecommunications Act of 1996, and therefore not required to be priced by TELRIC pricing. Thus, Qwest proposes that the expedite charge be set by inserting in Exhibit A to the ICA a reference to its interstate access tariff. The tariff rate is $200.

218. The Department made no recommendations on this issue.

C. Decision

219. The CMP process by which Qwest reached its current position is not the controlling factor on whether emergency situations should create an exception to charging an additional fee for expedited ordering. The more important question is whether Qwest's process is discriminatory. It appears that it is not.

220. First, an expedite for a non-design service is likely to be less involved than one for a design service, so the charge difference has some justification. Second, in addition to the "design" versus "non-design" services distinction, Qwest services may be classified as wholesale versus retail. Qwest proposes to offer expedites under certain emergency conditions for non-design services for free. This applies to both retail non-design services (POTS) and wholesale non-design services (Resale POTS, QPP). Similarly on the other hand, Qwest would charge the expedite fee, even for emergencies, for both retail design services (Private Lines) and wholesale design services (Unbundled Loops). Thus, for an Eschelon end user POTS customer, Eschelon can obtain an emergency expedite at no charge. And both Eschelon and a Qwest retail

[161] Ex. 34 (Webber Rebuttal) at 35-37.

customer will pay the expedite charge for any expedite request. There is no discrimination. On this point, Qwest's position and language should be adopted.

221. As to pricing, Eschelon's position should be adopted. When Eschelon requests an expedite, it will be for accessing a UNE. Under 47 C.F.R. §§ 51.307 and 51.313, it must be provided under Section 251 of the Act and, thus, at TELRIC rates.

222. A TELRIC study should be done. There would likely be some incremental cost to providing expedited service. It is presumably not just a matter of doing the provisioning sooner than the original due date. It would likely involve at least some scheduling changes and additional communications. In the case of natural disasters, there may be other complications that cause additional work just to do the provisioning earlier. The $200 tariff rate seems unreasonable at first glance, particularly in light of the fact that historically in Minnesota TELRIC rates have been substantially less than Qwest's tariffed rates for similar services. Eschelon's proposal for an interim rate of $100 is appropriate. Eschelon's proposal for TELRIC pricing for the expedite charge and an interim rate of $100 should be adopted.

Issue 12-70: Pending Service Order Notification

A. The Dispute

223. When Qwest issues or changes service orders associated with a CLEC's LSR, Qwest notifies the CLEC by an electronic notice called pending service order notification (PSON). The parties disagree as to whether the ICA should specify a minimum level of detail that should be contained in the PSON.

B. Position of the Parties

224. Qwest proposes the following language for Section 12.2.7.2.3:

> Pending Service Order Notification. When Qwest issues or changes the Qwest service orders associated with the CLEC LSR, Qwest will issue a Pending Service Order Notification (PSON) to CLEC. Through the PSON, Qwest supplies CLEC with information that appears on the Qwest service order.[162]

225. Eschelon proposes adding either of the following two phrases to the end of the last sentence:

> providing at least the data in the service order's Service and Equipment (S&E) and listings sections.

[162] Disputed Issues List at 108.

providing at least the data in the service order's Service and Equipment (S&E) and listings sections that Qwest provided to requesting CLECs as of IMA Release 13.0.[163]

226. Eschelon maintains that it needs the additional language so that it can cross-check its service requests against Qwest's PSON to identify any Qwest errors in processing Eschelon's orders before the due date. Today, Qwest provides five types of information in the PSON (listings, bill, control, traffic, and S&E). Eschelon has requested that only two of these five sections be addressed in the ICA.[164]

227. Qwest objects to the additional language, contending the CMP is the more effective method of dealing with this type of system notice and that it is not appropriate to include such language in an ICA.[165]

228. The Department recommends use of Eschelon's second option (data provided as of IMA Release 13.0).[166]

C. Decision

229. The Administrative Law Judges agree with the Department that Qwest's opposition to including this language is overstated. It appears to be unlikely that the inclusion of this language will "freeze" CMP processes, create an administrative burden for Qwest, or cause Qwest to maintain separate systems, processes, and procedures for Eschelon versus other CLECs. The CMP document itself envisions that CMP processes may well differ from those in negotiated ICAs. Qwest has failed to show that maintaining the current level of information in the PSON will harm the CMP process or other CLECs or create a burden for Qwest. This language would not prevent Qwest from adding to the information made available to other CLECs, through the CMP, nor would it prevent Qwest from changing the format of the information. It does not appear that any systems modification would be necessary to comply with this provision. Eschelon credibly contends that this minimal amount of information is reasonable and necessary for it to accurately coordinate the provision of service to new customers. Eschelon's proposed language should be adopted.

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[163] Disputed Issues List at 108-09.
[164] Ex. 33 (Webber Direct) at 109-20; Ex. 34 (Webber Rebuttal) at 42-46; Ex. 35 (Webber Surrebuttal) at 54-57.
[165] Ex. 1 (Albersheim Direct) at 61-66; Ex. 2 (Albersheim Rebuttal) at 47-50; Ex. 4 (Albersheim Surrebuttal) at 29-30.
[166] Department's Post-Hearing Brief at 37-39, 41-44.

Issue 12-71: Jeopardies
Issue 12-72: Jeopardy Classification
Issue 12-73: Jeopardy Correction

A. The Dispute

230. The parties dispute whether the ICA should contain any language regarding jeopardy notices or whether certain jeopardies should be classified as "Customer Not Ready" (CNR), which essentially assigns the fault for the jeopardy to Eschelon. Qwest opposes having any language on these issues other than a reference to its website.

B. Position of the Parties

231. The parties have agreed to language in another section of the ICA providing that when a CLEC 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. The FOC will specify the date on which Qwest will provision the loop. Qwest will ensure the accuracy of the commitment date. If Qwest must make changes to the commitment date, Qwest will promptly issue a jeopardy notice that will clearly state the reason for the change. Qwest will also submit a new FOC that will clearly identify the new date.[167]

232. Qwest's compliance with installation commitments and intervals is monitored through performance indicators (PIDs) developed in connection with Qwest's § 271 application. The Commission has approved, for example, 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. Failure to comply with PIDs can potentially subject Qwest to financial penalties.

233. Eschelon proposes a definition of Qwest-caused and CLEC-caused jeopardies (Issue 12-71), a provision that would preclude Qwest from defining a jeopardy as CLEC-caused unless it has sent a firm order confirmation (FOC) to Eschelon after a Qwest jeopardy occurs but at least a day (or the day) before Qwest attempts to deliver service (Issue 12-72); and a provision requiring Qwest to correct an erroneous jeopardy classification (Issue 12-73).

234. Eschelon argues that one important consequence of being assigned fault is the effect on the due date; if Eschelon is not ready, Qwest procedures require it to supplement its order to request a new due date, which must be at minimum three days from the date of the supplemental order. If Qwest is not ready, however, Qwest does not require a supplemental order. Eschelon maintains the following scenario has occurred and that Qwest has

[167] Ex. 25A, § 9.2.4.4.1.

failed to comply with its own procedures designed to prevent it: a Qwest-caused jeopardy is issued; Qwest fails to notify Eschelon that the jeopardy has cleared through an FOC that provides sufficient notice to Eschelon; and when Qwest attempts to deliver service (despite the earlier jeopardy notice), Eschelon is not ready, resulting in a subsequent jeopardy that Qwest then classifies as CNR. The subsequent CNR jeopardy means that Eschelon must supplement its order to request a new due date. Eschelon argues that Qwest should not be able to classify the subsequent jeopardy as CNR unless Qwest has issued a new FOC with a new date that gives Eschelon approximately one day of notice before it attempts to deliver service.[168]

235. Qwest proposes language providing that specific procedures regarding jeopardies are available on Qwest's wholesale website. Qwest contends it is more appropriate to address procedural issues concerning jeopardies in the CMP process in which all CLECs can participate. In addition, it argues that the requirement to provide an FOC at least a day before it attempts to deliver service is inconsistent with Qwest's current process, might cause extra delay in accomplishing delivery of the service, and would create different system requirements for Eschelon than for all other CLECs. In addition, Qwest maintains it rarely errs in assigning CNR status to a jeopardy.[169]

236. The Department has made no recommendation on this issue.

C. Decision

237. Qwest has already agreed in the ICA to provide a new FOC after the jeopardy notice, regardless of which party caused the jeopardy, which is what Eschelon says it needs in order to ensure it has the resources available to accept service after a jeopardy notice. If Qwest fails to comply with this provision, Eschelon has contractual remedies available.

238. Eschelon's main goal appears to be ensuring both the accuracy of PID results and that Qwest faces the resulting financial consequences for failing to meet PID requirements. Eschelon's proposed language calls only for changes in the jeopardy classification, not the procedures for ordering or provisioning loops. Any changes to or refinements in the way jeopardies are classified should be addressed through a process outside of an individual ICA. Qwest's language should be adopted for this issue.

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[168] Disputed Issues List at 109-111; Ex. 33 (Webber Direct) at 120-41; Ex. 34 (Webber Rebuttal) at 46-53; Ex. 35 (Webber Surrebuttal) at 57-63.

[169] Disputed Issues List at 109; Ex. 1 (Albersheim Direct) at 66-69; Ex. 2 (Albersheim Reply) at 52-54; Ex. 4 (Albersheim Surreply) at 32-34.

Issue 12-74: Fatal Rejection Notices

A. The Dispute

239. The parties dispute whether the ICA should include language requiring Qwest to continue processing a service request if it has erroneously rejected the request, instead of requiring the CLEC to resubmit the service order.

B. Position of the Parties

240. The parties have agreed to the following language for Section 12.2.7.2.6.1:

> If CLEC submits an LSR or ASR that contains a Fatal Error and receives a Fatal Reject notice, CLEC will need to resubmit the LSR or ASR to obtain processing of the service request.[170]

241. Eschelon would add the following phrase to the above sentence: "Except as provided in Section 12.2.7.2.6.2." In Section 12.2.7.2.6.2, Eschelon proposes the following language:

> If Qwest rejects a service request in error, Qwest will resume processing the service request as soon as Qwest knows of the error. At CLEC's direction, Qwest will place the service request back into normal processing, without requiring a supplemental order from CLEC and will issue a subsequent FOC to CLEC.[171]

242. In lieu of the above language, Qwest would simply reference the specific procedures contained on its wholesale website.

243. Eschelon argues these provisions are necessary because Qwest sometimes does reject a service request in error, and the ICA should address that situation. It further contends that this language is virtually identical to Qwest's current process, as reflected in its PCAT, which provides that "[i]f Qwest rejects a service request in error, we will resume processing as soon as the error is brought to our attention. At your direction, Qwest will place the service request back into normal processing with or without a supplement and issue a subsequent FOC."[172]

244. Qwest contends its language is appropriate because the provision at issue concerns "process detail" that is more appropriately addressed in the

[170] Disputed Issues List at 111.
[171] Disputed Issues List at 111.
[172] Ex. 33 (Webber Direct) at 141-46; Ex. 34 (Webber Rebuttal) at 53-56; Ex. 35 (Webber Surrebuttal) at 63-64.

CMP. It repeats its arguments that including this provision in an ICA will "lock in" the language and preclude any discussion of it by other CLECs in the CMP.[173]

245. The Department has made no recommendation on this issue.

C. Decision

246. Eschelon's language would not require any changes to Qwest's current process or systems, and Qwest has failed to identify any credibly adverse effect on CLECs, itself, or the public interest if this language were incorporated into the ICA. The proposed language exactly reflects Qwest's current practice. The Administrative Law Judges recommend that Eschelon's language be adopted.

Issue 12-76: Loss and Completion Reports
Issue 12-76(a)
Issue 12-86: Trouble Report Closure

A. The Dispute

247. Qwest provides daily loss and completion reports (notifying Eschelon when an end user customer changes to a different local service provider and when other changes in service occur on an end-user's account. Qwest makes trouble report closure information available upon request, and it also permits CLECs to access certain information on maintenance and repairs through an electronic interface. The parties disagree as to whether the information that Qwest currently provides to Eschelon and other CLECs on these reports should be specified in the ICA.

B. Position of the Parties

248. Eschelon has proposed language for the ICA that would specify the current information Qwest provides in loss reports (Issue 12-76) and completion reports (Issue 12-76(a)). In addition, Eschelon proposes language that would require Qwest to make available to CLECs, in the same form it is available today, information concerning the closure of trouble reports. Eschelon argues that it has worked extensively through the CMP to ensure that this information is provided, Qwest has finally agreed to provide it, and Eschelon now seeks to capture those results by specifying them in the ICA.[174]

249. Qwest would delete all of the disputed language. In the section concerning trouble report closure, it would simply reference the procedures available on its wholesale website. Qwest maintains inclusion of this language in

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[173] Ex. 1 (Albersheim Direct) at 63-66; Ex. 2 (Albersheim Reply) at 50-51; Ex. 4 (Albersheim Surreply) at 30-32.
[174] Disputed Issues List at 113-14, 122-23; Ex. 33 (Webber Direct) at 153-60; *id*. at 192-99; Ex. 34 (Webber Rebuttal) at 68-75; *id*. at 119-22; Ex. 35 (Webber Surrebuttal) at 74-76; *id*. at 85-88.

Eschelon's ICA would "lock in" these processes, preclude future changes, and require Qwest to operate in one way for Eschelon and another way for all other CLECs.[175]

250. The Department recommends that Eschelon's language be adopted.[176]

C. Decision

251. The disputed language exactly reflects Qwest's current practice. Inclusion of Eschelon's language in the ICA would not prohibit future changes, whether through the CMP or ICA amendment. Eschelon's language merely defines the minimum elements that make these resources useful to CLECs. Eschelon's language should be adopted for these issues.

Issue 12-87: Controlled Production Testing

A. The Dispute

252. There are several types of testing that take place when Qwest issues updated versions of its existing systems or implements new systems or processes in its Operations Support Systems (OSS). The parties have agreed to language in several sections of the ICA concerning the obligation to conduct mutual testing to ensure the interface systems are working properly. The dispute here is whether Eschelon should be able to choose not to perform "recertification" testing when Qwest upgrades its existing systems (as opposed to implementing new systems).

B. Position of the Parties

253. Eschelon proposes two alternatives for Section 12.6.9.4 that would permit it to opt out of the testing process if it does not intend to use the new functionality on Qwest's system:

> Controlled production is not required for recertification, unless the Parties agree otherwise. Recertification does not include new implementations such as new products and/or activity types.
>
> Qwest and CLEC will perform controlled production *for new implementations, such as new products, and as otherwise mutually agreed by the Parties*.

254. Eschelon maintains its language captures Qwest's current practice and is based on language in Qwest's EDI Implementation Guidelines for

[175] Ex. 1 (Albersheim Direct) at 72-77; *id*. at 90-92; Ex. 2 (Albersheim Reply) at 56-57; *id*. at 59; Ex. 4 (Albersheim Surreply) at 35-39; *id*. at 41.
[176] Department's Post-Hearing Brief at 39-45; Ex. 48 (Doherty Reply) at 20-23; Ex. 49 (Doherty Surreply) at 9-12.

Interconnect Mediated Access (IMA), Version 19.2, page 48. Eschelon seeks to continue this practice in order to eliminate unnecessary time spent testing functionalities that Eschelon does not desire to use.[177]

255. Qwest would delete Eschelon's language entirely. Qwest agrees that Eschelon's language accurately depicts its current practice, which does not require CLECs to recertify if they have successfully completed testing of a previous release; in addition, Qwest admits that Qwest can control whether a CLEC can access its OSS. Qwest opposes Eschelon's proposal because it wants the authority and flexibility to require Eschelon to perform full-blown testing in the future when Qwest believes it is necessary.[178]

256. The Department generally supports Eschelon's first proposal, because Qwest controls whether CLECs have access to a particular application, and a CLEC that waives controlled production testing of that application would not be able to access it. Regardless of the language in this section, Qwest will continue to control access to the application and is free to make any changes or upgrades that it believes are necessary. The Department therefore believes it is unreasonable for a CLEC to be required to participate in testing for a product that it has no plans to use. The Department recommends a slight change to Eschelon's first alternative:

> Controlled production is not required for recertification for features or products that the CLEC does not plan on ordering.[179]

C. Decision

257. The Administrative Law Judges agree that as long as Qwest controls access to particular applications, Eschelon should have the right to determine for itself whether to invest the resources in controlled production testing. Both of Eschelon's proposals draw a distinction between recertification and new implementations, which the Department's proposed language does not. The Department's language, however, would expressly limit Eschelon's option to decline recertification testing to situations in which Eschelon does not plan to use the product.

258. The Administrative Law Judges recommend adoption of Eschelon's first proposal. There is no evidence that Eschelon has or would opt out of recertification testing for any improper purpose. In the alternative, a better blend of Eschelon's first proposal and the Department's language would read as

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[177] Disputed Issues List at 124-25; Ex. 33 (Webber Direct) at 199-205; Ex. 34 (Webber Rebuttal) at 122-27; Ex. 35 (Webber Surrebuttal) at 88-89.
[178] Disputed Issues List at 124-25; Ex. 1 (Albersheim Direct) at 92-101; Ex. 2 (Albersheim Reply) at 59-62; Ex. 4 (Albersheim Surreply) at 42-47. *See also* Tr. 1:75 (Qwest systems control whether a CLEC is allowed to order a particular product).
[179] Department's Post-Hearing Brief at 45-48; Ex. 50 (Schneider Reply) at 14-15; Ex. 51 (Schneider Surreply) at 9.

follows: "Controlled production is not required for recertification for features or products that the CLEC does not plan to order. Recertification does not include new implementations such as new products and/or activity types."

Issue 12-88: Rates in Ex. A
Issue 12-88(a): IntraLATA Toll Traffic

A. The Dispute

259. The parties dispute whether the ICA should include language stating that Ex. A controls rates for all services provided under the agreement (including those Eschelon provides to Qwest), or whether the ICA should state that Ex. A controls only rates for services Qwest provides to Eschelon. They have the same dispute with regard to Ex. A, Section 7.11, which references the Access Services Tariff.

B. Position of the Parties

260. Eschelon's language for Section 22.1.1 provides:

> The rates in Exhibit A apply to the services provided pursuant to this Agreement.[180]

261. Within Ex. A at Section 7.11, Eschelon would refer to the "Minnesota Access Service Tariff" as the source of rates for IntraLATA Toll Traffic.[181]

262. Qwest's language for Section 22.1.1 provides:

> The rates in Exhibit A apply to the services *by Qwest to CLEC* provided pursuant to this Agreement.[182]

263. Qwest would refer to "*Qwest's* Minnesota Access Service Tariff" in Ex. A at Section 7.11 as the source of rates for IntraLATA Toll Traffic.

264. Eschelon points out that there are a number of sections of the ICA containing agreed-upon language that permits Eschelon to charge Qwest for certain products or services, and those sections reference Ex. A to the ICA as the source of the rate. For example, sections concerning trunk non-recurring charges (Section 7.3.3), transit traffic (Section 7.3.7), transit records (Section 7.6), labor charges for audits (Section 8.2.3), trouble isolation charges (Section 9.2.5.9), Qwest-requested managed cuts (Section 10.2.5.5.4), and daily usage files (Section 21.14.1) all reference rates that the CLEC may charge Qwest and most of these sections reference Ex. A as the source of the specific charge.

[180] Disputed Issues List at 125-26.
[181] Ex. 25B (Ex. A to ICA at 4 of 29).
[182] Disputed Issues List at 125-26.

Specifically with regard to intraLATA toll traffic, the parties agreed that each party's tariffed switched access tandem switching and tandem transmission rates apply, and the assumed mileage in Ex. A shall apply (in Section 7.3.7.2); and that where either party acts as an intraLATA toll provider, each party shall bill the other the appropriate charges pursuant to its respective tariff or price list (Section 7.3.10.1). Eschelon argues that it would therefore be confusing, inaccurate, and misleading to use Qwest's language, which suggests that Ex. A only applies to services by Qwest to CLEC and that the only "access service tariff" at issue is Qwest's. [183]

265. Qwest contends that it is unnecessary to use Eschelon's language because the ICA specifically spells out when Eschelon may charge Qwest. Qwest apparently prefers, for reasons of consistency, to keep the language of these sections the same in all ICAs.[184]

266. The Department has made no recommendation on this issue.

C. Decision

267. This is an issue of very little consequence. Qwest is correct that the ICA is clear as to when Eschelon may charge Qwest. Qwest, however, has pointed to no downside of using Eschelon's language, except to say that it is not necessary. Eschelon is correct that its language would make the contract internally more consistent. The Administrative Law Judges recommend adoption of Eschelon's proposed language.

Issue 22-90: Unapproved Rates

A. The Dispute

268. The parties have agreed to language that would require Qwest to develop a TELRIC cost-based rate for new products, the rates for which have not been approved by the Commission, and to file the rate and related cost support with the Commission for review. The parties disagree whether Qwest should be required to provide a notice to the CLEC each time Qwest makes such a filing with the Commission.

B. Position of the Parties

269. Eschelon has proposed two alternatives for Section 22.6.1:

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[183] Ex. 42 (Denney Direct) at 168-79; Ex. 43 (Denney Rebuttal) at 73-76; Ex. 44 (Denney Surrebuttal) at 101-03.

[184] Ex. 6 (Easton Direct) at 24-25; Ex. 7 (Easton Rebuttal) at 21-22; Ex. 9 (Easton Surrebuttal) at 19-20.

> Qwest will provide notice to CLEC of such filing and the proposed rate and, upon request, will provide a copy of the related cost support to CLEC.
>
> [Qwest will file the rate and cost support] 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*.[185]

270. Eschelon maintains this language is necessary so that it has adequate notice of any filing and time to consider whether to participate in a proceeding to challenge the rate.[186]

271. Qwest would delete the disputed language and argues that it is not necessary because Commission procedures ensure that all CLECs receive adequate notice of any proceeding concerning Qwest's rates.[187]

272. Although it initially recommended against adoption of Eschelon's language on the basis that it was not necessary, the Department now recommends adoption of Eschelon's second alternative, because it re-states the existing requirement that a negotiated rate must be filed within 60 days.[188] While the Department does not believe that the requirement that Qwest provide a copy of the filing and the cost support to Eschelon is strictly necessary in Minnesota because CLECs do not appear to have problems obtaining copies of cost studies filed with the Commission, it believes the language of Eschelon's second alternative is helpful.[189]

C. Decision

273. Eschelon's first alternative would require Qwest to affirmatively provide notice to Eschelon of a filing with the Commission, and it would obligate Qwest to provide a copy of the cost support upon request. The notice of filing is unnecessary, because Eschelon can receive such a filing simply by being on a mailing list for Qwest filings in Minnesota.[190] Eschelon's second alternative

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[185] Disputed Issues List at 126-28.
[186] Ex. 42 (Denney Direct) at 179-83; Ex. 43 (Denney Rebuttal) at 76-78; Ex. 45 (Denney Surrebuttal) at 103-08.
[187] Ex. 6 (Easton Direct) at 26; Ex. 7 (Easton Rebuttal) at 22-24; Ex. 9 (Easton Surrebuttal) at 20;
[188] P421/CI-01-1375, Order Approving Rates (October 2, 2002).
[189] Department's Post-Hearing Brief at 48-49; Ex. 54 (Fagerlund Reply) at 6-7; Ex. 55 (Fagerlund Surreply) at 21.
[190] Eschelon may have withdrawn its first proposal, but it still appears on the Disputed Issues List. *See* Ex. 45 (Denney Surrebuttal) at 103.

would eliminate the affirmative obligation to provide a notice of filing but would require Qwest to provide the cost support to Eschelon "upon request or as otherwise ordered by the Commission." Because it would not be burdensome to Qwest, and because Eschelon would be entitled to the information anyway, the Administrative Law Judges recommend adoption of Eschelon's second proposal.

Issue A-95: Private Line/Special Access to Unbundled Loop Conversion
Issue A-95(a): Private Line/Special Access to UDIT Conversion

A. The Dispute

274. The parties disagree on the non-recurring prices to be charged for conversion of a private line or special access circuit to a UNE loop or UNE transport (UDIT).

B. Position of the Parties

275. Eschelon proposes to place in the ICA the Commission-approved rate ($1.35) for conversion of a private line to a loop-mux combination (LMC) or to an EEL as the price for conversion of a private line or special access circuit to a UNE loop or UDIT. It maintains that the function and cost of these conversions is similar and that this conclusion is supported by Qwest's use, in the *UNE Cost Case*, of the same cost study and proposal of the same rate ($86.12) for converting private line to LMC or EEL as for conversion to UNE loop. Eschelon argues that until the completion of the *UNE Cost Case*, the currently-approved rate for a similar function should be used. In Eschelon's words, Qwest should not be able to charge more by creating a new name for an existing service.[191]

276. Qwest maintains that these are new rate elements not previously approved by the Commission. It proposes to use the following rates in the ICA: $39.02 for conversion to unbundled loop, and $122.30 for conversion to UDIT. Qwest states that these are the rates it is offering other CLECs pending the outcome of the cost docket.[192] In the *UNE Cost Case*, Qwest has proposed rates of $86.12 for private line conversion to UNE loop and $113.86 for conversion to UDIT.[193]

277. The Department recommends Eschelon's position with regard to conversion to UNE loop ($1.35) based on its conclusion that the functions are similar to conversion to LMC or EEL and that an approved price accordingly should be used until the Commission approves a different one. The Department recommends that Qwest be permitted to charge $113.86 for conversion to UDIT,

[191] Disputed Issues List at 130; Ex. 43 (Denney Direct) at 187-91; Ex. 44 (Denney Rebuttal) at 79-80; Ex. 45 (Denney Surrebuttal) at 109-111.
[192] Disputed Issues List at 130; Ex. 6 (Easton Direct) at 27-28; Ex. 7 (Easton Rebuttal) at 24-25.
[193] Ex. 42 (Denney Direct) at 189.

the price proposed in that case, because the cost studies in the *UNE Cost Case* show that conversion to UDIT is a different process with a higher cost.[194]

C. Decision

278. The conversion to UNE loop is not a sufficiently "new" process to justify disregarding a previously approved rate. The previously approved rate, $1.35, should be used in the ICA for conversion to UNE loop. The conversion to UDIT appears to involve something more, and Eschelon has not established that the functions are sufficiently similar to conversion to UNE loop. There is no legal authority to require use of the $122.30 rate that Qwest has offered to other CLECs, as that rate has not been approved and is different from the rate proposed in the *UNE Cost Case* ($113.86). The proposed rate for conversion to UDIT, $113.86, should be used in the ICA.

Dated: January 16, 2006

s/Kathleen D. Sheehy

KATHLEEN D. SHEEHY
Administrative Law Judge

s/Steve M. Mihalchick

STEVE M. MIHALCHICK
Administrative Law Judge

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(Five volumes)

NOTICE

Because of the compressed timeframe for a Commission decision in this case, the time period for filing exceptions is limited. Any party wishing to file exceptions to the Arbitrators' Report should do so by January 26, 2007. No replies to exceptions will be permitted.

[194] Department's Post-Hearing Brief at 49-50; Ex. 54 (Fagerlund Reply) at 22-24; Ex. 55 (Fagerlund Surrebuttal) at 22.