

OPEN MEETING AGENDA ITEM



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BEFORE THE ARIZONA CORPORATION COMMISSION

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AZ CORP COMMISSION
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IN THE MATTER OF THE PETITION OF) DOCKET NO. T-03406A-06-0572
ESCHELON TELECOM OF ARIZONA, INC. FOR) DOCKET NO. T-01051B-06-0572
ARBITRATION WITH QWEST CORPORATION,)
PURSUANT TO 47 U.S.C. § 252 OF THE)
FEDERAL TELECOMMUNICATIONS ACT OF)
1996.)

NOTICE OF ERRATA

Eschelon Telecom of Arizona, Inc., through undersigned counsel, hereby files a Notice of Errata.

Attached is a reformatted version of Attachment 2 to Exceptions to the Recommended Opinion and Order filed on March 7, 2008. The substance of Attachment 2 has not changed.

RESPECTFULLY SUBMITTED this 12th day of March 2008.

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By *Mary Spolito*

**ATTACHMENT 2
TO ESCHELON EXCEPTIONS:**

**ESCHELON PROPOSED MODIFICATIONS TO RECOMMENDED
DISPOSITIONS IN PROPOSED OPINION AND ORDER¹**

**Arizona Qwest-Eschelon ICA Arbitration
Docket Nos. T-03406A-06-0572; T-01051B-06-0572**

¹ *Note:* Eschelon did not receive a Word/writeable version of the recommended Opinion and Order (“ALJ Report”), so Eschelon cannot provide a redline of the document itself. Instead, Eschelon has re-typed only the “Resolution” portion of each issue that is a subject of these Exceptions and redlined that portion.

Resolution (ALJ Report, pp. 20-24)

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

Section 5.4.2 provides the framework for when the Billing Party can discontinue order processing. Under Qwest’s proposed language for Section 5.4.2, the Billing Party has the right to discontinue processing orders if the other party does not pay the undisputed amount of the bill within 30 days of the payment due date. Further, the Billing Party is required to notify the other Party in writing and the Commission on a confidential basis at least ten business days prior to discontinuing the processing of orders for the relevant services. While the proposal is not unreasonable, as it appears to give sufficient time to allow the Billed Party to determine if the bill is disputed, Eschelon raises a concern that the discontinuance of order processing and disconnection can have a significant adverse effect on the end user. In addition, as proposed by Qwest, the remedies could be undertaken even if a very minor portion of the bill would remain unpaid. Billing errors or misunderstandings are likely reasons why a small portion of a bill would remain unpaid, but not be identified as “disputed.” Eschelon’s alternative proposal for Section 5.4.2² is a reasonable compromise. Under this proposal, Commission intervention is not required to affect a discontinuance of order processing or to reject orders, but the Billed Party can seek Commission intervention to prevent such actions when late payment is reasonably justified. We do not believe it is beneficial to either party, or the public, to unnecessarily involve the Commission in relative minor billing disputes. However, we are concerned that end users do not suffer unnecessarily

² Joint Matrix, pp. 18-19 (Eschelon Proposal #2).

on account of a billing dispute not of their making. Because the Billed Party can designate a bill as disputed, the added protections for the benefit of the end user afforded by Eschelon's alternative proposal, if not modified, would unreasonably burden the Billing Party or prevent it from collecting a legitimate past due account.

Section 5.4.3 and Section 5.13 address when and how the Billing Party may disconnect the Billed Party for failure to make full payment of an otherwise "undisputed" bill. Eschelon proposes inserting language into these sections that makes Commission approval a prerequisite to disconnecting service. Under Eschelon's proposal, Section 5.4.3 refers to the process of Section 5.13.1 for disconnecting service. We believe that these Sections should mirror the language we approve for Section 5.4.2 that gives the Billed Party the option to request that the Commission prevent disconnection, rather than require Commission pre-approval in all cases. Because of the nature of disconnection, we also believe the proposed notice language of Section 5.4.3 should be revised, so that there is a meaningful opportunity before disconnection to request that the Commission prevent disconnection. Thus, we shall approve the following language for the relevant portions of Section 5.4.3:

5.4.3 The Billing Party may disconnect any and all relevant services for failure by the billed Party to make full payment, The Billing Party will notify the billed Party at least ten (10) business days prior to disconnection of the unpaid service(s). If the billed Party asks the Commission to prevent disconnection of service(s) (e.g., because delay in submitting dispute or making payment was reasonably justified due to inaccurate or incomplete Billing), the Billing Party will not disconnect the relevant service(s) while the proceedings are pending, unless the Commission orders otherwise. . . . In case of such disconnection, all applicable undisputed charges, including termination charges, if any, shall become due. If the Billing Party does not disconnect the billed Party's service(s) on the date specified in the ten (10) business days notice, and the billed

Party's noncompliance continues, nothing contained herein shall preclude the Billing Party's right to disconnect any or all relevant services of the non-complying Party without further notice after an additional at least ten (10) business days notice. For reconnection of the non-paid service to occur, the billed Party will be required to make full payment of all past and current undisputed charges under this Agreement for the relevant services. . . .

With this addition, we do not find that Eschelon's proposed addition to the language for Section 5.13.1 is required. Section 5.13.1 provides, for disputed amounts, that the party not in default may seek relief under the dispute resolution provision of the interconnection agreement. Our resolution requires the Billed party to take the necessary steps to prevent the Billing Party from taking action with respect to remedies regarding undisputed amounts under these provisions, and does not accept Eschelon's proposal for Section 5.13.1 that the Billing Party notify the Commission of ~~the~~ default or the requirement that Commission approval for disconnection is required in all circumstances.

The disputes concerning Section 5.4.5 (issues 5-8 and 5-9) involve the definition of "repeatedly delinquent" and affect how the parties will determine the other's credit status. Eschelon proposes to insert a "de minimus" standard and to define "repeatedly delinquent" as meaning payment of any undisputed non-de-minimus amount received more than thirty days after the due date, for three consecutive months. As an alternative, Eschelon offers the term "material" instead of "non-deminimus." According to Eschelon, Qwest has agreed to the use of the term "material" in other sections of the ICA. Qwest's proposed language does not refer to a "non-de minimus" amounts or to any other qualifier, and would consider "repeatedly delinquent as being more than 30 days past due three times during a 12 month period." Eschelon is concerned that Qwest could require a significant deposit if Eschelon is occasionally delinquent on small amounts. Eschelon

notes that a two month deposit for it could be \$5 million. The imposition of a deposit for relatively minor past due payments could negatively impact competition. We find that Eschelon's second alternative proposal, which defines "repeatedly delinquent" as three or more times delinquent during a six-month period is a reasonable compromise.³

We believe that although not strictly defined, a word such as "material" can assist in the resolution of disputes when they are brought to the Commission, even if they do not prevent the dispute in the first instance, thus we will adopt Eschelon's proposal to insert "material" in Section 5.4.5.⁴

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

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

³ Joint Matrix, p. 25 (Eschelon Proposal #2).

⁴ Hearing Exhibit E-13 (Denney Direct), p. 80, lines 8-12 (Eschelon Proposal #2).

approach is fair and reasonable for determining when deposits will be due and we will adopt Eschelon's proposed language for this issue.⁵

Issue 5-12 also affects the deposit requirement. For Issue 5-12, Eschelon offered an alternative (third) proposal that, if adopted, would have avoided the need to rule on Issues Nos. 5-8, 5-9 and 5-11. If a deposit is required by Eschelon's credit worthiness as described in Section 5.4.5, Qwest should be able to protect its interests and demand a deposit due within 30 days and without seeking Commission intervention. Unless necessitated and supported by good cause, the Commission should not be required to become involved in a routine business matter. Given our resolution of the meaning of "repeatedly delinquent" above, we find Qwest's proposed language of 30 days to be reasonable and order that it be adopted. In our discussion of Issues 5-8 and 5-9 above, we rejected Eschelon's third proposal for Section 5.4.5, which referred to a deposit due within 90 days.⁶ The repeatedly delinquent language that we adopted above contains the 30-day requirement.⁷

Issue 5-13 addresses circumstances when an existing deposit may be increased. Eschelon proposes to add language to Section 5.4.7 that provides that a deposit that is less than the maximum amount allowed may be increased if approved by the Commission. The Minnesota arbitration order found that Qwest's proposed Section 5.4.7 was without standard and ordered deletion of Section 5.4.7. If Qwest has already imposed a deposit pursuant to Section 5.4.5, then it should be able to increase that deposit if there is a change in circumstances that warrant such increase. Because of the potential adverse effect on a competitor's ability to do business, it should not be permitted to

⁵ Joint Matrix, p. 26.

⁶ Joint Matrix, pp. 26-28.

⁷ Joint Matrix, p. 25 (Eschelon Proposal #2).

increase the deposit on a whim. The Billed Party may not have disputed the current deposit amount, but might find a larger deposit to be unduly burdensome and unnecessary under the circumstances. Eschelon's proposed language, for Section 5.4.7, however, requires Commission involvement, even in situations where there is no dispute concerning the increased deposit. We favor a provision that allows the Billing Party to protect its ability to collect monies owed without unnecessary Commission involvement, while protecting the Billed Party from an unreasonable and unjustified deposit increase. Thus, we approve the following language for Section 5.4.7:

If the billed Party has already imposed a deposit pursuant to Section 5.4.5, The Billing Party may review the other Party's credit standing and increase the amount of that deposit required if circumstances warrant, such as but not limited to increased or greater delinquencies in undisputed amounts or significant adverse changes appears in the Billed Party's credit reports, such as Dun and Bradstreet, but in no event will the maximum amount exceed the amount stated in Section 5.4.5. Unless the Billed Party challenges the amount of the increase, by filing a dispute with the Commission, the increased deposit shall be due as provided in Section 5.4.5 concerning initial deposits.

[COMMINGLED EELs, ISSUES 9-58 – 9-59]

Resolution (ALJ Report, p. 68)

Eschelon's proposals for ordering (Issue 9-58), circuit IDs (9-58(a)), and billing (9-58(b)) required a single service request, single circuit ID, and single bill for related to commingled EELs. These proposals would require substantial changes to Qwest's processes that Qwest developed and implemented outside of CMP.⁷ The changes which would result in undetermined, but potentially substantial costs for Qwest. Eschelon claims that Qwest is the cost causer of any costs due to a change in procedures, because Qwest put the procedures in place unilaterally and over Eschelon's objections. It would also appear to affect all other CLECs requesting the same services from Qwest. In the Minnesota arbitration, the Commission deferred these issues to a separate docket. Changes to these processes are better addressed in CMP, or similar forum, or in a generic docket. Consequently, we adopt Qwest's proposed language for issues 9-58, 9-58(a), and 9-58(b) at this time,⁸ without precluding either party from requesting that the Commission address these issues in a separate docket.

For billing, Eschelon proposed alternative language, for Issue 9-58(c), if Qwest's position on Section 9.23.4.6.6 is adopted in arbitration. In its Exceptions to the recommended Opinion and Order, Eschelon modified its proposed billing language (now Section 9.23.4.6.7) to significantly reduce the amount of information in the ICA. For repair, Eschelon also proposed modified language in Exceptions (Issue 9-59). Both of these proposals include a provision that the parties will work together to address the issues and to prevent adverse impacts to the end user customer.⁹

⁸ Joint Matrix, pp. 76-78.

⁹ Attachment 3 to Eschelon Exceptions.

Qwest's proposed procedures for repairs appears to take steps that address some of Eschelon's concerns concerning multiple repair tickets and delay, however, Qwest's proposed contract language does not appear to incorporate its ~~repair~~ proposed procedures.

In the TRO, the FCC prohibited restrictions on commingling, permitted CLECs to commingle UNEs with wholesale services including those offered pursuant to tariff, and required incumbent carriers "to perform the necessary functions to effectuate such commingling upon request."¹⁰ Consistent with the FCC's order, burdensome and discriminatory conditions or operational barriers that make commingled EELs difficult or infeasible to use should be avoided. For example, it is reasonable to require that, if an end user customer can generally expect a repair time commitment interval such as four hours, regardless of whether served using UNEs or special access, the end user customer should not receive a longer repair time commitment simply because the end user is served by a commingled EEL. It is also reasonable to expect that, if Qwest relates the loop and transport components of a commingled EEL for itself, Qwest may also relate them in some manner for CLEC, when needed to avoid billing and repair problems, especially when those problems impact end user customers.

To help ensure that commingling remains an effective competitive option, the agreement should require the parties to work together to minimize operational barriers and should contain sufficient guiding principles in its terms to encourage that result. We direct the parties to negotiate regarding Issues 9-58(c) and 9-59 and submit, with their compliance filing, language that incorporates these findings. ~~Qwest's repair proposal.~~ If

¹⁰ TRO ¶ 579. The FCC defines "commingling" as "the connecting, attaching, or otherwise linking of a UNE or a UNE combination to one or more facilities or services that a requesting carrier has obtained at wholesale from an incumbent LEC pursuant to any method other than unbundling under section 251(c)(3) of the Act, or the combining of a UNE or UNE combination with one or more such wholesale services."

the parties are unable to agree on language, we will re-open the arbitration to address this issues 9-58(c) and 9-59. ~~We adopt Qwest's proposal for the repair process because it seems the most efficient given existing operation systems, however, we have some reservation that it is not as streamlined as it might be. We do not yet have sufficient information in this docket to make a determination if it is the optimal approach. To the extent Eschelon continues to have concerns about unnecessary delays, it should raise these concerns in CMP, or continue to negotiate a better system with Qwest. Therefore, we will re-visit these issues after we receive the parties' compliance filing.~~

[CONTROLLED PRODUCTION, ISSUE 12-87]

Resolution (ALJ Report, p. 90)

The disagreement with regard to controlled production does not seem to be based on problems or abuses encountered in the parties' past dealings, but rather with the concern by Eschelon that Qwest may require unnecessary testing, and by Qwest that Eschelon will not participate in necessary testing. We believe that both parties have significant incentive to engage in testing when required and not to require excessive testing. On balance, ~~we find that although~~ Qwest argues it is in the best position to judge when testing is necessary and the extent of that testing, Qwest has made that judgment in the sense that controlled production is not required by Qwest currently for recertification. Eschelon's proposal simply reflects the status today. Qwest's proposed language does not require Eschelon to engage in controlled production for products or features it does not plan to use. Qwest's language, however, covers only a subset of the recertifications for which Qwest currently does not require controlled production. Consequently, we adopt EschelonQwest's first proposed language.¹¹

¹¹ Joint Matrix, pp. 110-111.

[MULTIPLEXING, ISSUE 9-61]

Resolution (pp.72-73)

It appears that there is no dispute that multiplexing is a feature of UNE transport. In the *Verizon Virginia Arbitration Order* the FCC's Wireline Bureau, the arbitrator in that proceeding, held that multiplexing is a feature of UNE dedicated transport, but is not a separate UNE.¹² The Verizon Virginia Arbitration Order also said that its conclusions "should not be interpreted as an endorsement of Verizon's substantive positions expressed in this proceeding regarding its multiplexing obligations under applicable law."¹³ Qwest agrees that when multiplexing is provided with DS1 and DS3 transport that meets the *TRRO* impairment criteria, it is a UNE and will be provided at TELRIC rates.¹⁴ Eschelon states it is not seeking multiplexing as a stand alone UNE.¹⁵ There is also no dispute that Qwest has offered multiplexing to CLECs at Commission-approved TELRIC rates.

The dispute here appears to be whether Qwest is required to provide multiplexing with a UNE loop, where the loop is connected to the multiplexer which terminates directly to Eschelon's collocation, without transport involved. There appears to be two circumstances when Eschelon would be utilizing multiplexing in connection with a loop. Eschelon could install multiplexing at the customer premises to convert a DS0 facility to a DS1, or a DS1 to a DS3. In this circumstance, the multiplexing would appear to be a feature of a high capacity loop and Qwest would make this facility available as it would any high capacity loop. It does not appear that this is the product that is generating the

¹² Verizon Virginia Arbitration Order at ¶ 500.

¹³ Verizon Virginia Arbitration Order at ¶ 490.

¹⁴ Ex Q-18 Stewart Rebuttal at 92.

¹⁵ Ex E-7, Starkey Rebuttal at 149.

controversy. Another possibility is for Eschelon to want to add multiplexing at the Qwest central office collocation site, to aggregate various DS0s and DS1s or DS1s to DS3s. We find no FCC designation changing the availability of multiplexing at TELRIC rates. ~~of this type of multiplexing to be a UNE. Multiplexing is performed at the collocation cage. Eschelon is able to provision multiplexing on its own and is not required to utilize Qwest provisioned multiplexing. In such case, multiplexing is not required for the loop to function, and Qwest should continue not be required to provide the multiplexing at TELRIC prices. We believe that Eschelon's Qwest's proposed language for the affected ICA sections best reflects the current state of the law on this issue, and thus we order the parties to incorporate Eschelon's Qwest's proposed language¹⁶ into their ICA.~~

¹⁶ Joint Matrix, pp. 85-95.

[EXPEDITES, ISSUE 12-67]

Resolution (ALJ Report, pp. 82-83)

Eschelon argues that expedites are one means of providing access to a UNE, and thus must be provided at TELRIC rates. Qwest argues that expedited delivery is a superior service for which it is entitled to charge a market rate. Other state commissions that have addressed this issue are split. Kentucky and Florida have sided with the ILEC, finding there is no obligation to provide expedites at TELRIC rates. The North Carolina commission determined that the ILEC must provide expedites on a cost-based TELRIC rate. The Minnesota commission agreed, stating: found that whether expedites are superior services is irrelevant, as are the charges Qwest assesses its retail customers. The Minnesota commission found that because Qwest provides expedited services to itself, and the cost to itself is merely the cost of expediting the service, Qwest's cost to expedite is also the cost that Qwest should charge CLECs to expedite service because Qwest is not permitted to discriminate.

Qwest invites the Commission to compare the price Qwest charges CLECs at wholesale to the \$200 retail price it charges its own customers at retail. But the law bars Qwest from discriminating in the wholesale market specifically - that is, from imposing different terms and conditions for expedited service on different telecommunications carriers, including itself. Qwest must provide UNEs to CLECs on the same terms and conditions that it provides them to its own retail operations, regardless of what it charges its retail customers. And the cost Qwest bears to provide expedited access to UNEs for its retail customers is simply the cost of expediting the service. This is also the cost that CLECs should bear to expedite access for their customers.

In arguing that expediting a UNE is a 'superior service' which Qwest is not obligated to provide - and certainly is not obligated to provide at cost - Qwest misapplies a term of art. As noted above, the 8th Circuit and the FCC concluded that the 1996 Act does not provide a basis for the FCC to require ILECs to offer 'superior' service - that is, to build facilities for CLECs if the ILEC would not build comparable facilities for itself. In contrast to those circumstances, Qwest not only provides expedited service for itself, Qwest offers the service to others on its

tariff. The concerns articulated by the 8th Circuit and the FCC regarding "superior service" have no relevance to this issue.¹⁷

Minnesota adopted Eschelon's proposed \$100 flat rate charge as an interim rate pending an investigation into an appropriate cost in a pending cost proceeding.

~~We find Qwest argues that generally Qwest meets its obligation to provide access to the UNE by provisioning the service within the approved service intervals. The service intervals were set in order to provide CLECs with a meaningful opportunity to compete. We find no convincing authority for us to conclude that expedites are required to provide access to the UNE and have to be provided at TELRIC rates. By definition expedites are "superior" to regular service intervals. Qwest argues Pproviding an expedite for any reason at a nominal fee would in essence eliminate the approved service interval as an effective measure of Qwest's performance. Under Eschelon's proposal, which allows expedites at an nominal interim \$100 flat fee, Qwest argues it has legitimate concern that CLECs would routinely request expedites, which could tax resources and affect Qwest's ability to provide service. Qwest may address these concerns in Phase III of the cost docket.~~

~~Even if Qwest is not required to provide expedites as a UNE, Qwest may not discriminate against Eschelon and must provide expedited service to Eschelon on the same terms and conditions as Qwest provides the service to itself and its own retail customers, regardless of what it charges its retail customers. In Phase II of the cost docket, the Commission declined to use "Qwest's retail rates as a means of determining~~

¹⁷ Order Resolving Arbitration Issues, Requiring Filed Interconnection Agreement, Opening Investigations And Referring Issue To Contested Case Proceeding, *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)*, MPUC Docket No. P-5340, 421/IC-06-768 (March 30, 2007) ("MN Arbitration Order"), p. 18. As indicated above, the Minnesota order was filed as Attachment 1 to Eschelon's Closing Brief.

interconnection and UNE rates.”¹⁸ Qwest provides expedites to its retail customers for any reason for design services at \$200 a day or at no additional charge for non-design services if certain emergency conditions are met. By providing expedites to Eschelon for design services at a fee and at no additional charge for non-design services if certain emergency conditions are met, on the same terms that it provides the service to its retail customers, Qwest is not discriminating against Eschelon. Therefore, for Section 12.2.1.2.1 (Issue 12-67(a)), we reject Eschelon’s language¹⁹ and modify Section 12.2.1.2.1 to state “Intentionally Left Blank.” For these reasons we adopt Qwest’s Eschelon’s proposed treatment language for expedites (except Section 12.2.1.2.1), including for now, Qwest’s Eschelon’s proposed \$2100 per day flat charge. In Phase II of the cost docket, the Commission determined to reconsider ICB rates in the next phase of that proceeding said that “Qwest is directed to develop cost studies for all services offered in this docket on an ICB price basis in Phase III. Qwest should make every effort to develop reasonable cost-based prices for such services even if it has little or no experience actually provisioning the services.”²⁰ Because expedites were are treated as ICB pricing in the Phase II cost docket order, the expedite rate will be considered again in Phase III of the cost docket, and should be considered an interim rate until final resolution of the pricing issue in that docket.

Resolution (ALJ Report, p. 15) – see below (after Issue 22-90)

¹⁸ *In the Matter of the Investigation Into Qwest Corporation’s Compliance With Certain Wholesale Pricing Requirements for Unbundled Network Elements and Resale Discounts*, Docket No. T-00000A-00-194, (“Phase II Order”), Decision 64922, p. 81.

¹⁹ *Joint Matrix*, pp. 100-102 (Eschelon Proposals #1 and #2).

²⁰ *Phase II Order*, Decision No. 64922, p. 75.

[UNAPPROVED RATES, ISSUE 22-90]

Resolution (ALJ Report, p. 97)

In normal circumstances arbitrations are not an appropriate ~~the~~ Commission's preferred forum for determining specific rate elements because the time frame for resolving an arbitration is usually not sufficient to allow for the required inquiry into and analysis of rate elements, and the inefficiencies associated with resolving a rate element that ~~would~~ may only apply to one CLEC. In this case, the parties agreed to waive the statutory time frame. Rates established in this arbitration will be available to other CLECs for opt-in, as set forth in Section 252(i) of the Act. For these reasons, the Commission has heretofore allowed Qwest parties to propose an interim rate for new elements until the Commission is able to examine and approve a rate in a cost docket.

We said in Phase II of the cost docket that an interim rate "shall be no more than the rate Qwest has proposed."²¹ Regarding changes in rates, we agreed with Staff in our 271 Order that Qwest should obtain Commission approval of rate changes prior to their implementation.²² We also agreed with Staff that Qwest should file proposed rates with the Commission, along with cost support, for prior review and approval.²³

Eschelon's proposal for new products or services to not allow the parties to negotiate rates and request an interim rate so that, after filing cost support, Qwest may charge for a new element at the applicable interim rate until Commission approved final rates are determined would be a change in is consistent with our procedure. Eschelon's proposal that Qwest should obtain Commission approval before charging for a service it

²¹ Phase II Decision No. 64922, p. 81, lines 6-9.

²² Decision No. 66242, ACC Docket No. T-00000A-97-0238 (*In the Matter of U.S. West Communications Inc.'s Compliance with Section 271 of the Telecommunications Act of 1996*) (Sept. 16, 2003), at ¶109.

²³ *Id.* at ¶108. Section 252(d) of the Act requires rates to be based on costs.

~~previously offered without charge is also consistent with our procedure. Because it is important to have uniform rates for all services and CLECs, we do not believe it is in the public interest to alter our current procedure as the result of an arbitration proceeding that affects only two parties. Likewise, a~~An arbitration is not the best forum for modifying rates that had been previously approved. Eschelon's proposal applies to rates that have not been approved, including services that Qwest previously offered without charge. ~~proposes changes to these rates.~~ Qwest disputes some of Eschelon's claims and we do not have sufficient evidence to find that Qwest has improperly applied approved rates. A finding of inappropriate conduct is not required to establish interim rates. Consequently, for all of the above reasons, we adopt ~~Qwest~~Eschelon's proposed language for this issue.

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

[DESIGN CHANGES, ISSUE 4-5]

Resolution (ALJ Report, p. 15)

The evidence does not indicate Qwest did not provide a cost study in this docket to show that, when it approved a design change charge of \$72.29, the Commission intended that it apply only to UDIT, and not to loops or CFAs. Qwest provided evidence, such as its location under "miscellaneous charges" in Exhibit A and references to "customer premises;" in the executive summary of the design changes cost study, that Qwest said indicates the charge was intended to apply to design changes for loops as well as transport. Eschelon provided evidence, such as use of ASRs (which are used for ordering UDIT) and not LSRs (which are used for ordering loops), use of Qwest's ordering and billing systems for transport (EXACT/IABS), rather than the ordering and billing systems for UNE loops (IMA/CRIS), an assumption that all of the activities identified are performed every time rather than determining an average cost for the different activities associated with different types of design changes, and reference to "type of channel interface" in the executive summary of the design changes cost study, that Eschelon said indicates the charge was not intended to apply to design changes for loops and CFA changes as well as transport. Furthermore, Qwest admitted that its design change cost study does not include any technician time. Both parties agreed that CFA changes require technician time.

When setting interim rates in Phase II of the cost docket, we considered whether the interim rates were reasonable until consideration in Phase III of the cost docket. Eschelon has failed to demonstrate that its proposed interim \$30 charge for loop design changes and intrim \$7.285 for CFA changes are reasonable interim cost-based proposals,

and determination of final rates in Phase III ~~would~~ permit Qwest to recover its costs. ~~However,~~ Eschelon does raise questions that could indicate that design change charges might be different for different products. While we do not have a sufficient record in this proceeding to set a ~~different~~ final rate for the design change charge for loops and CFAs, ~~nor do we believe an arbitration is the best forum for considering rate changes,~~ we believe that the rates for design change charges for loops and CFAs should be reviewed in the upcoming Phase III of the Qwest cost docket. Thus, we adopt Eschelon ~~Qwest's~~ proposed language, ~~except that~~ and we will order that a footnote be added that indicates that the design change charge for loops and CFAs will be reviewed by the Commission in the Phase III of the cost docket.