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BEFORE THE ARIZONA CORPORATION COMMISSION

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11 **COMMISSIONER**

Arizona Corporation Commission

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AZ CORP COMMISSION  
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12 IN THE MATTER OF QWEST  
13 CORPORATION'S FILING OF RENEWED  
14 PRICE REGULATION PLAN

DOCKET NO. T-01051B-03-0454

15 **MOTION TO STRIKE AFFIDAVIT OF**  
16 **HARRY M. SHOOSHAN III**

17 On February 25, 2004, Qwest Corporation ("Qwest") filed an Application for Rehearing  
18 and An Immediate Stay of Decision No. 66772. Attached to that Application was the Affidavit  
19 of Harry M. Shooshan III. For the following reasons, Staff believes that the Affidavit of Harry  
20 M. Shooshan III should be stricken, along with all portions of the Application for Rehearing  
21 which rely upon it, and the Commission should place no reliance upon Mr. Shooshan's Affidavit  
22 in deciding this matter.

23 Mr. Shooshan was hired by the Staff in Qwest's last rate case to assist it in developing an  
24 appropriate Price Regulation Plan for Qwest. The Staff and Qwest were adverse parties in the  
25 last Qwest rate case and are in this case as well. Qwest has now evidently employed Mr.  
26 Shooshan (Staff's consultant in the earlier case) to bolster its Petition for Rehearing and Stay in  
27 this case. Mr. Shooshan is, however, using information against the Staff that he likely derived in  
28 large part through confidential internal discussions with the Staff during his employment by Staff  
in the last Qwest rate case. Its use in this case to now support Qwest's position is inappropriate  
and represents a conflict of interest serious enough to require disqualification.

The two-part test for determining whether to disqualify an expert witness who had a prior  
relationship with a party asks: 1) whether it was objectively reasonable for the first party who  
retained the expert to believe that a confidential relationship existed and, 2) whether that party  
disclosed any confidential information to the expert. *English Feedlot, Inc. v Norden*

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2 *Laboratories, Inc.* 833 F.Supp. 1498, 1561 (Colorado 1993). *See also, In re Coy Lee McCarter,*  
3 296 B.R. 750, 756 (2003)(citing *Commerce Indus. Ins. Co. v. E.I. du Pont de Nemours & Co. (In*  
4 *re Malden Mills Indus., Inc.),* 275 B.R. 670, 673 (Bankr.D.Mass. 2002). The party seeking  
5 disqualification bears the burden of establishing both the existence of confidentiality and its non-  
6 waiver. *English Feedlot, 833 F. Supp. at 1501-02.*

7         It is within the judge's discretion to disqualify an expert witness when disqualification  
8 will serve "the purpose of protecting various privileges which may be breached in some fashion  
9 if an expert is permitted to change sides during litigation, or as part of the court's inherent power  
10 to preserve the public confidence in the fairness and integrity of the judicial proceedings." *In re*  
11 *Coy Lee McCarter,* 296 B.R. at 754 (citing *Paul v. Rawlings Sporting Goods Co.,* 123 F.R.D.  
12 271, 277-78 (S.D.Ohio 1988). The Court may also look to "whether disqualification is necessary  
13 to preserve the integrity of the judicial system" even if no disclosure of confidential information  
14 occurred. *Id.* at 756. (citing *Malden Mills Indus., Inc.,* 275 B.R. at 673-74). In general, courts  
15 are reluctant to disqualify a party's expert witness without a finding that an actual conflict of  
16 interest exists; however, all doubts are generally resolved in favor of disqualification. *In re Coy*  
17 *Lee McCarter,* 296 B.R. at 754.

18         Under the two-part standard discussed above, Mr. Shooshan's testimony should not be  
19 allowed. First, Staff reasonably anticipated that a confidential relationship existed between Mr.  
20 Shooshan (its consultant) and itself, and that Mr. Shooshan would not later go out and use  
21 information gathered through confidential internal meetings on these issues against the Staff in  
22 later proceedings. Second, during the internal discussions between Mr. Shooshan and Staff,  
23 including Staff's attorneys who were present at almost all of these meetings, Staff did talk freely  
24 with Mr. Shooshan about many strategic issues, some of which are now the subject of Mr.  
25 Shooshan's Affidavit. At all times Staff considered these internal meetings to cover confidential  
26 information including sharing of internal work-product, strategies and advice and information all  
27 of which was subject to the attorney-client privilege as well. Information subject to the attorney-  
28 client privilege and work-product doctrines is not discoverable. Confidential information

1 includes disclosures containing information in the nature of attorney work-product or privileged  
2 attorney-client communication. *Mitchell v. Wilmore*, 981 P.2d 172, 176 (Colo. 1999). A  
3 particularly clear case for disqualification can be made when an expert is privy to explicit  
4 discussions of strategy related to the pending litigation. *Id.* at 176. Given Mr. Shooshan's  
5 presence at many meetings in which privileged attorney-client communications occurred, Staff  
6 believes that this presents a clear case for disqualification.

7 Further, some of the internal discussions upon which Mr. Shooshan relies in part are  
8 settlement discussions which by their nature are confidential. *See* Shooshan Aff. at ¶8. Rule 408  
9 of the Arizona Rules of Evidence provides that:

10 "[e]vidence of (1) furnishing or offering or promising to furnish, or (2)  
11 accepting or offering or promising to accept, a valuable consideration in  
12 compromising or attempting to compromise a claim, which was disputed as to  
13 either validity or amount is not admissible to prove liability for or invalidity of  
the claim or amount. Evidence of conduct or statements made in compromise  
negotiations is likewise not admissible."

14 Staff believes that it would chill meaningful discussions between Staff and its consultants,  
15 for the Commission to sanction conduct of this nature which would essentially permit Staff  
16 consultants to use information gathered in internal strategy meetings with the Staff and their  
17 attorneys, against the Staff in later proceedings.

18 Finally, Mr. Shooshan did not at any time approach the Staff and request waiver of the  
19 confidentiality requirement.

20 Staff would also note that while Mr. Shooshan developed an initial template for an  
21 alternative regulation plan, many significant modifications were made to that Plan by Staff  
22 before it was put forward in the last rate case. In addition, while Staff does not dispute that Mr.  
23 Shooshan played a substantial role in the earlier case, many of the issues he addresses in his  
24 Affidavit are policy/legal determinations that Mr. Shooshan may have had input into, but by  
25 their nature were ultimately decided by the Staff. Staff's recollections on some of these issues  
26 differ from Mr. Shooshan's.

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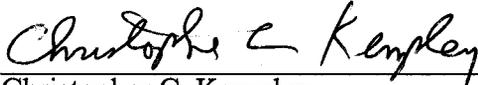
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For the above reasons, Staff respectfully requests that the Affidavit of Mr. Shooshan, and all portions of the Application for Rehearing which rely thereon, be stricken.

RESPECTFULLY SUBMITTED this 16th day of April, 2004.



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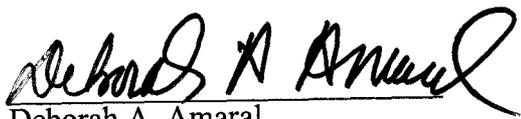
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