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BEFORE THE ARIZONA CORPORATION COMMISSION

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Arizona Corporation Commission

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UTILITIES DIVISION STAFF,

Complainant,

v.

ESCHELON TELECOM OF ARIZONA, INC.

Respondent .

Docket No. T-03406A-03-0888

STAFF'S RESPONSE TO
ESCHELON'S MOTION TO DISMISS

This is a complaint proceeding by the Arizona Corporations Commission Utilities Division ("Staff") against Eschelon Telecom of Arizona, Inc. ("Eschelon"). On December 24, 2003, Staff and Eschelon ("the Parties") entered into a Stipulation extending Eschelon's time to answer Staff's Complaint. On May 20, 2004, Eschelon filed its Motion to Dismiss and Answer to Staff's Complaint. This response demonstrates that Eschelon's Motion should be denied.

I. Introduction

Eschelon moves for dismissal under Arizona Rules of Civil Procedure 12(b)(1) "Lack of jurisdiction over the subject matter," and 12(b)(6) "Failure to state a claim upon which relief can be granted." In support of its Motion, Eschelon argues: (1) "Eschelon had no legal obligation to file interconnection agreements with the Commission and (2) at least four of the ten documents identified in the Complaint were not interconnection agreements and therefore were not subject to the filing requirements under Section 252(e) of the Act." (Eschelon Mot. p.2). Eschelon's arguments are mistaken as to its obligation to file interconnection agreements. The question of which documents meet the definition of an interconnection agreement is a mixed question of fact and law. Both issues are within the Commission's jurisdiction. Further, Eschelon's failure to file the agreements is a claim upon which the Commission may grant relief. The Administrative Law Judge should deny

1 Eschelon's Motion.

2 **II. Section 252(e) of the Act Obligates Eschelon to File Interconnection Agreements.**

3 Section 252(e) of the 1996 Telecommunications Act states "Any interconnection agreement
4 adopted by negotiation or arbitration shall be submitted for approval to the State commission." 47
5 U.S.C. § 252(e)(1). Under Section 252(e) Eschelon is obligated to file interconnection agreements.
6 The Section requires filing of interconnection agreements with state commissions but is silent as to
7 which parties are responsible for filing of interconnection agreements.

8 Where the statute is silent or ambiguous with respect to an issue in question, proper statutory
9 interpretation requires the Commission to review the statutory language, the legislative history, and
10 the policies involved to determine whether the agency responsible for administering the statute has
11 interpreted the statute reasonably, and whether the agency's construction of the statute is permissible.
12 *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43, 45 (1984); *see*
13 *also United States v. 313.34 Acres of Land*, 923 F.2d 698 (9th Cir. 1991); *K Mart Corp. v. Cartier,*
14 *Inc.*, 486 U.S. 281,291 (1988).

15 Staff believes consideration of Section 252(e)'s legislative history, statutory language and the
16 policies behind the Section and the Act itself, reveal that the filing requirement obligates both
17 Incumbent Local Exchange Carriers and Competitive Local Exchange Carrier's ("CLEC's") to file
18 interconnection agreements. This interpretation is shared by Qwest, the Residential Utility
19 Consumers Office of Arizona and the Public Utility Commissions of many Qwest states. Section
20 252(e) is silent concerning Eschelon's filing requirement and it is clear that a reasonable
21 interpretation of the Section would require Eschelon to file interconnection agreements. At the very
22 least, the Commission must hear arguments concerning proper interpretation of the Section.
23 Therefore, Eschelon's Motion must be denied.

24 **III. A.A.C. R14-2-1506 Obligates Eschelon to File Interconnection Agreements.**

25 A.A.C. R14-2-1506 requires interconnection agreements to be submitted to the Commission
26 for approval under Section 252(e). *See* A.A.C. R14-2-1506.A. Because A.A.C. R14-2-1506 requires
27 filing as required under Section 252(e), if agreements are required to be filed by Eschelon under
28 Section 252(e), then the agreements are required to be filed by Eschelon under A.A.C. R14-2-1506.

1 Further, and perhaps more importantly, throughout A.A.C. R14-2-1506 the Commission references
2 filing of interconnection agreements by “*any party*”, or by the “*parties.*” See A.A.C. R14-2-1506(A),
3 (B), and (C). The rule makes clear that Eschelon shares responsibility for filing under the rule.

4 **IV. The Commission Should Hear Arguments Concerning which Agreements are Properly**
5 **Defined as Interconnection Agreements.**

6 A motion to dismiss cannot resolve factual issues. Staff and Eschelon disagree about whether
7 six of the agreements listed in Staff’s complaint are interconnection agreements. (Staff Compl. ¶ 8,
8 Table 1; Eschelon Mot. pp. 2-3). The issue of which of the documents are interconnection
9 agreements can only be resolved by an examination of the facts within the documents themselves,
10 and an application of the law to those facts. The Commission should not rule on which of the ten
11 documents identified by Staff are or are not interconnection agreements without first hearing
12 arguments from the Parties.

13 **V. Conclusion**

14 Eschelon is legally obligated to file interconnection agreements. At the very least,
15 determination of Eschelon’s legal filing obligation can be made by the Commission only after
16 engaging in statutory interpretation of Section 252(e) and A.A.C. R14-2-1506. Determination of
17 which of the documents identified by Staff as interconnection agreements meet the legal definition of
18 an interconnection agreement can be made only after consideration of the facts surrounding each
19 document and an interconnection agreement’s legal definition. The Commission has subject matter
20 jurisdiction to grant relief upon Staff’s claim that Eschelon failed to meet its legal obligation to file
21 interconnection agreements. Therefore, Staff respectfully requests that Eschelon’s Motion be denied.

22 RESPECTFULLY SUBMITTED this 7th day of June, 2004.

23 ARIZONA CORPORATION COMMISSION

24
25 By: 

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1 Original and 13 copies of the foregoing filed
2 this 7th day of June, 2004, with:

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7 Copy of the foregoing mailed this 7th day
8 of June, 2004, to:

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