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BEFORE THE ARIZONA CORPORATION COMMISSION

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2005 APR 28 P 1:39

Arizona Corporation Commission

DOCKETED

JEFF HATCH-MILLER - Chairman

WILLIAM A. MUNDELL

MARC SPITZER

MIKE GLEASON

KRISTIN K. MAYES

AZ CORP COMMISSION
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APR 28 2005

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UTILITIES DIVISION STAFF,

Docket No. T-03406A-03-0888

Complainant,

v.

**NOTICE OF FILING REDACTED
DIRECT TESTIMONY OF STAFF
WITNESS ELIJAH ABINAH AND
NOTICE OF FILING OF ERRATA**

ESCHELON TELECOM OF ARIZONA, INC.

Respondent.

The Staff of the Arizona Corporation Commission ("Staff") hereby provides notice of filing the Redacted Direct Testimony of Staff Witness Elijah Abinah, pursuant to the April 27, 2005, Procedural Order in this matter. In addition, two erratas were made to this testimony. First, the Docket Number was corrected at the top of each page. Second, the spreadsheet referred to on page 8 of the testimony was inadvertently omitted from the original filing, and it has been included in this filing. Staff regrets any inconvenience this may have caused.

RESPECTFULLY SUBMITTED this 28th day of April, 2005.

ARIZONA CORPORATION COMMISSION

By:

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 Attorney, Legal Division
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Original and 13 copies of the foregoing filed this 28th day of April, 2005, with:

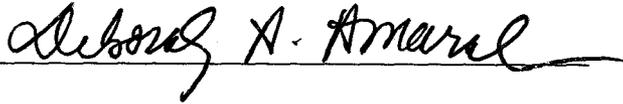
Docket Control
 Arizona Corporation Commission
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 Phoenix, Arizona 85007

1 Copy of the foregoing mailed this 28th day
2 of April, 2005, to:

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BEFORE THE ARIZONA CORPORATION COMMISSION

JEFF HATCH-MILLER
Chairman
WILLIAM A. MUNDELL
Commissioner
MARC SPITZER
Commissioner
MIKE GLEASON
Commissioner
KRISTIN K. MAYES
Commissioner

IN THE MATTER OF THE FORMAL)
COMPLAINT AGAINST ESCHELON)
TELECOM OF ARIZONA, INC.)
_____)

DOCKET NO. T-03406A-03-0888

REDACTED

DIRECT

TESTIMONY

OF

ELIJAH ABINAH

ASSISTANT DIRECTOR UTILITIES DIVISION

ARIZONA CORPORATION COMMISSION

APRIL 25, 2005

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EXECUTIVE SUMMARY

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On April 25, 2005 the Staff of the Arizona Corporation Commission (“Staff”) and Eschelon Telecom, Inc. (“Eschelon”) filed a proposed Settlement Agreement (“the Settlement”) in the following docket: T-03267A-03-0888. Mr. Abinah’s testimony will provide an overview of the Settlement agreement concerning the process, cash payment, obligation to file, ongoing compliance.

INTRODUCTION

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Q. Please state your name and business address for the record.

A. My name is Elijah O. Abinah. My business address is: Arizona Corporation Commission, 1200 W. Washington St., Phoenix, AZ 85007.

Q. How long have you been employed with the Utilities Division?

A. I have been employed with the Utilities Division since January 2003.

Q. What is your position at the commission?

A. I am employed by the Utilities Division ("Staff") of the Arizona Corporation Commission ("ACC" or "Commission") as the Assistant Director.

Q. Please describe your education and professional background.

A. I received a Bachelor of Science degree in Accounting from the University of Central Oklahoma in Edmond, Oklahoma. I also received a Master of Management degree from Southern Nazarene University in Bethany, Oklahoma. Prior to my employment with the ACC, I was employed by the Oklahoma Corporation Commission for approximately eight and a half years in various capacities in the Telecommunications Division.

Q. What are your current Responsibilities?

A. As the Assistant Director, I review submissions that are filed with the Commission and make policy recommendations to the Director regarding those filings.

Q Did you participate in the discussion which gave rise to the Settlement Agreement between Staff and Eschelon Telecom Inc. ("Eschelon")?

A Yes, I did. I was part of the Staff negotiating team.

1 **Q. What is the purpose of your testimony?**

2 A. The purpose of my testimony is to describe the Settlement process and to explain Staff's
3 view regarding the settlement Agreement between Staff of the Arizona Corporation
4 Commission ("Staff") and Eschelon regarding docket No. T-03267A-03-0888 filed by the
5 Utilities Division Staff in the matter of the Formal Complaint against Eschelon Telecom,
6 Inc.

7 **Q What specific issues will your testimony address?**

8 A Specifically, my testimony will address the following areas:

- 9
- 10 • Process
 - 11 • Cash Payment
 - 12 • Obligation to file all interconnection agreements with the Commission
 - 13 • Ongoing Compliance
 - 14 • Resolution of similar issues in other Qwest Jurisdictions
 - 15 • Public Interest

15 **SETTLEMENT PROCESS**

16 **Q. Please discuss the settlement process.**

17

18 A. Staff was contacted by Mr. Mike Hallam who inquired whether Staff might be interested
19 in some type of resolution of the outstanding docket.

20

21 **Q. What was the nature of your conversation?**

22

23 A. Basically, we discussed the desire to address the issue raised by Staff in the complaint and
24 concluded that an agreed upon solution would be beneficial.

25

26

1 **Q. Were other Staff members' participant in this discussion?**

2 A Yes, the staff negotiating team consisted of Mathew Rowell (Chief of Telecom and
3 Energy), Adam Lebrecht, (Executive Consultant 1), David Ronald (Staff Legal Counsel)
4 and myself.

5
6 **Q Did anyone seek to intervene in this matter?**

7 A. No, not to the best of my knowledge..

8

9 **OVERVIEW OF THE SETTLEMENT**

10 **Q. Please provide an overview of the Settlement Agreement.**

11 A. Through the Settlement Agreement, Eschelon has agreed to a variety of concessions
12 including agreement that it has an obligation to file all Interconnection Agreements with
13 the Commission; agreement to file any/all, present interconnection Agreements not
14 already on file with the Commission, cash payment; notification of all future oral
15 Interconnection or Commercial Agreements; and agreement to notify the Commission of
16 all wholesale telecommunications agreements; and notification of any future commercial
17 agreements. The Settlement agreement provides for a total cash payment of \$80,000.00.

18

19 **Q. Please define the term "Interconnection Agreement" as used in this testimony.**

20 A. The term "Interconnection Agreement" as used in this testimony refers to any agreement
21 required to be filed and/or approved by the Commission pursuant to 47 U.S.C. § 252(e) of
22 the Telecommunications Act of 1996 ("the 1996 act") and Arizona Administrative Code
23 ("A.A.C.") R14-2-1506.

24

25

26

1 **Q. What types of services are covered by Section 251 (b) and (c) of the 1996 act?**

2 A. Generally, wholesale services specific to the provision of local service are covered by
3 Section 251 (b) and (c) of the Act. Unbundled Network Elements (“UNEs”), resale
4 services, and charges for collocation are all covered by Section 251 (b) and (c). Intrastate
5 access, interstate access, switched access, special access, and private line service are not
6 covered by section 251 (b) and (c) of the 1996 Act.

7
8 **Q. How many Interconnection Agreements did Eschelon fail to file with the**
9 **Commission?**

10 A. Staff’s complaint alleged that Eschelon failed, in violation of state and federal law, to file
11 and/or seek the Commission’s approval of the following ten (10) Interconnection
12 Agreements:

- 13 a. Confidential/Trade Secret Stipulation dated 2/28/00
- 14 b. Trial Agreement dated 7/21/00
- 15 c. Confidential Purchase Agreement dated 11/15/00
- 16 d. Confidential Amendment to Confidential/Trade Secret Stipulation
17 (Amending 2/28/00 agreement) dated 11/15/00
- 18 e. Escalation Procedures Letter from Qwest dated 11/15/00
- 19 f. Daily Usage Information Letter from Qwest dated 11/15/00
- 20 g. Features Letter from Qwest dated 11/15/00
- 21 h. Confidential Billing Settlement Agreement dated 11/15/00
- 22 i. Status of Switched Access Minute Reporting Letter from Qwest dated
23 7/3/01

1 **OBLIGATION TO FILE CURRENT/UNFILED INTERCONNECTION AGREEMENT**

2 **Q. Please provide an overview of the provisions of Paragraph 4.**

3 A. Eschelon has agreed to file any/all current Interconnection Agreements not already filed
4 with the Commission within forty-five (45) days of the approval of this Settlement
5 Agreement. At this time, neither Staff nor Eschelon are aware of any current
6 Interconnection Agreements that are not on file with the Commission.

7

8 **CONFLICT BETWEEN THIS SETTLEMENT AGREEMENT AND FUTURE LAW**

9 **Q. Please provide an overview of the provisions of Paragraph 5.**

10 A. Staff and Eschelon agree that either party may provide the other with written notice of its
11 belief that a change in the law has effected this settlement agreement. If this should
12 happen, both parties shall agree to meet and negotiate in an effort to bring this Settlement
13 Agreement into compliance with the existing law. If Staff and Eschelon are unable to
14 reach an agreement within sixty (60) days of the written notice that a change in the law
15 has occurred, either party may petition any state or federal court for relief.

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CASH PAYMENT

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Q. Does the agreement provide for a cash payment?

A. Yes.

Q. What is the amount of the cash payment?

A. The cash payment amount is \$80,000.00. Eschelon agrees to pay the sum of \$80,000.00 to the Arizona State Treasurer for deposit in to the General Fund. The administrative penalty shall consist of two forty-thousand dollar (\$40,000.00) payments. The first payment shall be remitted within 30 days of the Effective Date of a Commission Decision approving the Settlement. The second forty-thousand dollar (\$40,000.00) payment shall be remitted within 365 days of the Effective Date of a Commission Decision approving the Settlement.

Q. Mr. Abinah, could the amount of the cash payment be different than what Staff recommends?

A. Yes, but considering all of the issues in the case, Staff believes that \$80,000.00 is a reasonable amount.

Q. Can you please describe the monetary options available to the Commission?

A. I am not a lawyer, but it is my understanding that there are three options available to the Commission. Firstly, consistent with A.R.S. Sec 40-425, the Commission can assess a base fine up to \$5000.00 per agreement. Secondly, under A.R.S Sec 40 -424, the Commission has the authority to assess an additional fine of up to \$5000.00 per day per agreement if the Commission determines that a company is in contempt of the Commission's orders, rules, or requirements. Lastly, the Commission could impose a flat penalty that falls within the range of penalty described above.

1 Q. Is the sum of \$80,000.00 an appropriate fine when compared to the fine assessed to
2 Qwest in Decision No. 66349?

3 A. Yes.

4 Q Can you please explain the methodology utilized by Staff in arriving at that number
5 and why Staff believes the proposed fine is appropriate?

6 A Based on the information provided by the company and the review of the company's
7 annual report, Staff considered the following:

- 8 • Eschelon's number of access line as compared to Qwest
- 9 • Eschelon's number of customer's (Residential and Business)
- 10 • Eschelon's Intrastate (Arizona) revenue,
- 11 • The number of unfiled interconnection agreements.

12 In addition, Staff considered the fact that the fine imposed by the Commission in the
13 settlement agreement involving Qwest, resolved three separate dockets that were
14 consolidated for settlement purposes. (Docket RT-00000F-02-0271, Docket T-00000-A-
15 97-0238 and Docket T-01051B-02-0871).

16
17 Q. Please briefly explain the analysis performed by Staff in arriving at the proposed
18 fine.

19 A. According to its 2003 Annual Report, Qwest had [REDACTED] customer lines in Arizona and
20 its total Arizona revenue was [REDACTED]. The \$8,811,000 fine assessed by the
21 Commission in Decision No. 66349, is representative of [REDACTED] per customer line and
22 [REDACTED] of Qwest's 2003 Arizona revenue (see attached spreadsheet).

23
24 Staff believes the monetary fine assessed to Eschelon should be comparable to the amount
25 per customer and the percent of customer revenue imposed upon Qwest.

26

1 According to its 2003 Annual Report, Eschelon had [REDACTED] customer lines and a total
2 Arizona Revenue of [REDACTED]. To determine an adequate fine amount, Staff multiplied
3 Eschelon's total number of customer lines, [REDACTED], by [REDACTED] (the amount Qwest was fined
4 per customer line). This figure comes to [REDACTED]. Staff also multiplied Eschelon's total
5 Arizona revenue of [REDACTED] by [REDACTED] (the amount of Qwest revenue the Qwest
6 was fined). This figure comes to [REDACTED]. To find the average of these amounts, Staff
7 added these numbers ([REDACTED] and [REDACTED]) and divided that number by two. The
8 average of these two numbers is [REDACTED].

9
10 Staff believes that the above comparison between Eschelon and Qwest indicates that the
11 fine agreed to by the parties is comparable to the fine imposed on Qwest in Decision No.
12 66349.

13
14 **NOTIFICATION OF WHOLESALE TELECOMMUNICATIONS AGREEMENTS**

15 **Q. Please describe the provisions of Paragraph 8.**

16 A. Eschelon has agreed to notify the Commission Staff of all future wholesale or commercial
17 telecommunications agreements between Eschelon and other ILECS that relate to the
18 resale, interconnection or purchase of unbundled network elements in Arizona with thirty
19 (30) days of execution.

20 **OBLIGATION TO COMPLY**

21 **Q. Please describe the provisions of Paragraph 7.**

22 A. Eschelon shall comply with section 252 of the 1996 Act, A.R.S §40-203, 40-374, 40-334
23 and A.C.C. R14-2-1112, R14-2-1506 and R14-2-1508.

24 **ACTION TAKEN AGAINST ESCHELON IN OTHER QWEST JURISDICTIONS**

25 **Q. Are you aware of any action that was taken in other jurisdictions against Eschelon as**
26 **it relates to the unfilled agreements?**

1 A. Yes. In the State of Washington, a fine in the amount of \$25,000.00 was imposed against
2 Eschelon.

3
4 **PUBLIC INTREST**

5 **Q. Mr. Abinah, do you believe the agreement is in the public interest?**

6 A. Yes, I do.

7
8 **Q. Please explain why Staff believes this agreement is in the public interest.**

9 A. Staff believes that the commitment expressed by the company to comply with the
10 Commission's orders, rules and regulations, in conjunction with the monetary penalties
11 adequately address the concern raised in Staff's complaint. Resolving this contentious
12 matter through settlement agreement, rather than a contested hearing will enable Staff to
13 devote resources toward other issues pending before the Commission. Also, Staff believes
14 there are risks associated with litigation, the outcome is ultimately determined by someone
15 else. There are times where litigants believe that it would be more preferable to have
16 certainty instead of uncertainty.

17
18 For these reasons, Staff believes that the settlement is in the public interest.

19
20 **Q. Does this conclude your direct testimony?**

21 A. Yes, it does.

ESCHELON

Company Name	Customer Lines	Fine Amount	Fine Per Line	AZ Revenue	Fine Amount	Percent of Revenue
Qwest	[REDACTED]	8,811,000	[REDACTED]	[REDACTED]	8,811,000	[REDACTED]

Company Name	Customer Lines	Fine Amount	Fine Per Line	AZ Revenue	Fine Amount	Percent of Revenue
ESCHELON	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]

PROPRIETARY