



BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

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

AZ CORP COMMISSION
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IN THE MATTER OF THE COMPLAINT OF
ESCHELON TELECOM OF ARIZONA, INC.
AGAINST QWEST CORPORATION

DOCKET NO. T-03406A-06-0257
DOCKET NO. T-01051B-06-0257

ESCHELON'S RESPONSE TO QWEST'S MOTION TO RECONSIDER
HEARING SCHEDULE

Eschelon Telecom of Arizona, Inc. ("Eschelon") hereby responds to Qwest's Motion to Reconsider. Eschelon objects to reconsidering the procedural schedule. Qwest is simply reiterating its previous arguments for a delayed schedule. Alternatively, if the Hearing Division is inclined to reconsider the procedural schedule, Eschelon requests that: (i) dispositive motions be filed and heard on threshold issues and (ii) limitations be place on the timing and scope of discovery to avoid any potential abuse over the course of a drawn out procedural schedule. Both of these elements will assist in ensuring that this docket will be resolved efficiently and without undue burden.

Objection to Reconsideration of Procedural Schedule

Qwest's Motion basically reiterates the arguments that is has previously made in oral argument at the May 23, 2006 procedural conference and in its June 2, 2006 filing regarding a proposed schedule, albeit in more detail. Although Qwest may prefer Mr. Steese to act as lead counsel, Qwest's motion does not state that Mr. Steese is the only individual familiar with Qwest's own CMP process. It does not state that there are no other Qwest in-house or outside counsel who

1 could represent Qwest in this docket. Qwest has already assigned two of its corporate lawyers to
2 this case, including Norm Curtright of Phoenix and Melissa Thompson, who has been admitted
3 pro hac vice in this matter. In fact, the motion (at page 3, lines 9-10) indicates that Mr. Steese will
4 simply be replaced if the schedule is not modified. Further, even assuming historical knowledge is
5 relevant, the motion does not suggest that Mr. Steese will be precluded from imparting any
6 historical knowledge he may possess on other Qwest counsel. Mr. Steese is counsel and not a fact
7 witness. Presumably, Qwest also has witnesses knowledgeable about the issues that Qwest
8 believes are relevant.

9 In addition to Mr. Steese's schedule, Qwest cites to two other justifications for
10 reconsideration: (i) potential depositions in this docket and (ii) Mr. Steese's involvement in other
11 interconnection arbitrations that involve issues concerning expedited orders. Both fail. First, in
12 Arizona, depositions are the rare exception in Commission proceedings, particularly when there
13 will be pre-filed testimony. Although there have been informal letter exchanges about possible
14 depositions to allow for scheduling considerations should the need arise, neither party has served
15 formal notices of depositions or subpoenas in this matter actually scheduling depositions. Whether
16 Eschelon will desire to go forward with depositions, for example, may depend on Qwest's
17 responses to discovery (which we have not received as of writing this response) and other factors,
18 such as whether Qwest is allowed to take a number of depositions. Moreover, at least two of
19 Qwest's proposed depositions are directed to an issue that Eschelon had already acknowledged –
20 that Eschelon inadvertently erred in ordering the disconnect at the care center. Qwest should not
21 be allowed to take depositions on undisputed matters. Its desire to do so should not be grounds for
22 reconsidering the schedule. Second, the issue here relates to the expedite process under the
23 existing interconnection agreement in this docket – and Qwest's current obligations under that
24 agreement -- and not how expedite terms will be handled in a future agreement. Also, in Qwest's
25 Answer, Qwest criticized Eschelon, claiming that Eschelon had "hopes" of "contaminating the
26 parties' upcoming arbitration." (*See Answer, p. 1, lines 18-19.*) Qwest appears to be arguing now
27 that the schedule should be revised so that Qwest can influence the arbitration.

1 Finally, although an interim resolution is in place – and Qwest has not sought
2 reconsideration of the resolution – Eschelon desires certainty on the issue of expedites sooner
3 rather than later. Parties are entitled to have their rights resolved. The longer it takes to reach
4 resolution, the more recordkeeping associated with the interim solution will be needed and the
5 more potential for unnecessary or abusive discovery will exist. A hearing that takes place in late
6 January of 2007 will leave the uncertainty hanging for basically another year, given Commission
7 process that must take place after the hearing concludes (post-hearing briefs, proposed order and
8 open meeting).

9 In sum, absent unique circumstances, the ability to have counsel of choice should not
10 trump timely resolution of disputed issues. The schedule of a particular counsel should not delay a
11 hearing in a matter by almost four (4) months. The existing procedural schedule in this docket
12 should remain in place.

13 Alternative Procedural Schedule

14 In the event that the Hearing Division decides to reconsider its procedural schedule,
15 Qwest’s proposal creates potentially unacceptable burdens. Qwest’s Motion does not propose a
16 specific schedule other than to urge that the hearing be held in January 2007. However, Qwest had
17 previously urged substantial time periods between testimony filings. If the hearing is going to be
18 pushed out, Eschelon believes two additional elements should be incorporated into the procedural
19 schedule. First, some of the additional time should be focused on addressing threshold issues
20 through dispositive motions that may help focus the testimony to be filed and may encourage
21 settlement of the remaining issues. Second, in order to avoid any potential for extended and
22 burdensome discovery, there should be a discovery moratorium imposed once the presently-
23 outstanding discovery is answered. And any potential depositions that have been identified would
24 not go forward until the moratorium ends.

25 **a. Dispositive Motions**

26 Eschelon believes that there are certain threshold issues that should be decided early on in
27 the proceeding to increase the focus and efficiency of both discovery and the evidentiary hearing.

1 If reconsideration is granted, Eschelon proposes the following schedule in the alternative for
2 testimony and the hearing in this docket:

3	Dispositive Motions Filed	July 14, 2006
4	Responses to Motions	August 7, 2006
5	Replies to Motions	August 21, 2006
6	Ruling on Motions	By September 15, 2006
7	Eschelon Direct Testimony	September 30, 2006
8	Qwest Response Testimony	October 27, 2006
9	Staff Response Testimony	November 17, 2006
10	Eschelon/Qwest Rebuttal	December 15, 2006
11	Pre-Hearing Conference	January 17, 2006
12	Hearing	January 22-24, 2007

13 This procedure could allow the issues to be narrowed and could allow discovery and the
14 pre-filed testimony to be more focused. Threshold issues to be addressed in the motions could
15 include, for example, the central reason that Qwest gave for the actions it has taken in refusing to
16 grant expedites for unbundled loops:

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18 “Qwest does not sell Unbundled Loops to its end user customers so it is not
19 appropriate to make a comparison to retail in this situation. Qwest is selling a
20 pipe, not a switched POTS service.” (See Qwest CMP November 18, 2005
21 Response, Document No. 000124.)

22 Qwest is claiming there is no retail analogue for loops as a basis for refusing to expedite loop
23 orders. Eschelon’s position is that the Commission, not Qwest, must determine whether the
24 FCC’s tests in the NY 271 Order¹ are met for the provision of UNEs on terms that are just,

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26 ¹ Memorandum Opinion and Order, *In the Matter of the Application by Bell Atlantic New*
27 *York for Authorization Under Section 271 of the Communications Act To Provide In-Region,*
InterLATA Service in the State of New York, FCC 99-404, CC Docket No. 99-295, ¶ 44 (rel.
December 22, 1999).

1 reasonable, and nondiscriminatory -- in “substantially the same time and manner” for an element
2 with a retail analogue and offering a “meaningful opportunity to compete” if there is no retail
3 analogue. The FCC stated specifically that the latter retail analogue test is no less rigorous than
4 the first. (*Id.* ¶ 55.) When Qwest decided to change course after a number of years of operating in
5 an agreed upon manner under the ICA (*see* Answer, p. 9, ¶14, lines 2-3), Eschelon believes that
6 Qwest should have submitted the issue to the Commission to determine application of this test, not
7 implemented its own, unapproved interpretation. *See* ICA, Part A, § 17.1.² Once the legal issues
8 surrounding the reason Qwest gave for its conduct are addressed, many factual issues will be
9 resolved, narrowed, or irrelevant. Deciding such legal issues first, therefore, will limit the need for
10 additional discovery and proceedings on any issues decided as a matter of law.

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12 **b. Discovery Guidelines**

13 The parties have exchanged initial written discovery requests. Eschelon has already
14 responded to Qwest’s data requests, requests for production of documents, and requests for
15 admissions. Eschelon has served data requests, requests for production of documents, and requests
16 for admissions on Qwest. Qwest’s responses to some of these requests are due today and others on
17 June 23, 2006. As Eschelon has already responded to Qwest’s written discovery, and as the
18 exchange of such information will provide information helpful to identifying issues for dispositive
19 motions, Qwest needs to respond to Eschelon’s outstanding written discovery.

20 With respect to future discovery including depositions, however, if the schedule in this
21 docket is pushed out, Eschelon requests that the Commission ameliorate the potential of repetitive
22 discovery submitted over a long period of time -- which simply increases the costs to the parties
23 and strains their resources, particularly for a small company such as Eschelon. Eschelon is still
24 very small compared to Qwest. If resources rather than merit determine results, therefore, Qwest

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26 ² *See also In the Matter of U S WEST Communications, Inc.’s Compliance with Section 271 of the*
27 *Telecommunications Act of 1996*, Docket No. T-00000A-97-0238, Decision No. 66242, ¶ 109 (cited in Complaint, p.
6, footnote 1).

ROSHKA DEWULF & PATTEN, PLC
ONE ARIZONA CENTER
400 EAST VAN BUREN STREET - SUITE 800
PHOENIX, ARIZONA 85004
TELEPHONE NO 602-256-6100
FACSIMILE 602-256-6800

1 wins. Resources should not determine results. And procedures should be used to neutralize the
2 great discrepancies in resources, particularly in the area of discovery where the potential for abuse
3 is high.

4 Eschelon requests that, other than the pending written discovery that has been served and
5 should be answered, a moratorium on discovery should be imposed until after a ruling on the
6 dispositive motions or, alternatively, until a reasonable period of time before direct testimony is
7 due.

8 **Conclusion**

9 Eschelon requests that the Commission deny Qwest's Motion to Reconsider the Hearing
10 Schedule. In the alternative, Eschelon requests that the Commission adopt: (i) the modified
11 schedule proposed above which includes dispositive motions and (ii) the proposed guidelines on
12 discovery.

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14
15 RESPECTFULLY SUBMITTED this 14th day of June 2006.

16 ESCHELON TELECOM OF ARIZONA, INC.

17
18 By _____



19 Michael W. Patten
20 J. Matthew Derstine
21 ROSHKA DEWULF & PATTEN, PLC
22 One Arizona Center
23 400 East Van Buren Street, Suite 800
24 Phoenix, Arizona 85004

25 And

26 Karen L. Clauson, Esq.
27 (admitted pro hac vice)
Senior Director of Interconnection/Associate General
Counsel
ESCHELON
730 2nd Avenue S., Suite 900
Minneapolis, MN 55402

ROSHKA DEWULF & PATTEN, PLC
ONE ARIZONA CENTER
400 EAST VAN BUREN STREET - SUITE 800
PHOENIX, ARIZONA 85004
TELEPHONE NO 602-256-6100
FACSIMILE 602-256-6800

1 Original and 15 copies of the foregoing
filed this 14th day of June 2006 with:

2 Docket Control
3 Arizona Corporation Commission
1200 West Washington Street
4 Phoenix, Arizona 85007

5 Copy of the foregoing hand-delivered/mailed
this 14th day of June 2006 to:

6 Amy Bjelland, Esq.
7 Administrative Law Judge
Hearing Division
8 Arizona Corporation Commission
1200 West Washington
9 Phoenix, Arizona 85007

10 Maureen Scott, Esq.
11 Legal Division
Arizona Corporation Commission
12 1200 West Washington
Phoenix, Arizona 85007

13 Ernest G. Johnson, Esq.
14 Director, Utilities Division
Arizona Corporation Commission
1200 West Washington
15 Phoenix, Arizona 85007

16 Norman G. Curtright
17 Corporate Counsel
Qwest Corporation
20 East Thomas Road, 16th Floor
18 Phoenix, Arizona 85012

19 Charles W. Steese
20 Steese & Evans, P.C.
6400 South Fiddlers Green Circle, Ste 1820
Denver, Colorado 80111

21 Melissa Kay Thompson
22 Qwest Services Corporation
1801 California Street, 10th Floor
23 Denver, Colorado 80202

24
25
26 By 
27