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BEFORE THE ARIZONA CORPORATION COMMISSION

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Arizona Corporation 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
T-01051B-06-0257**

**QWEST'S BRIEF IN OPPOSITION TO
THE ADMINISTRATIVE LAW
JUDGE'S PROPOSED
CONSOLIDATION OF RECORDS IN
SECTION 252 ARBITRATION FOR A
NEW INTERCONNECTION
AGREEMENT, DOCKET NO. T-
03406A-06-0572 T-01051B-06-0572 AND
THIS PROCEEDING**

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I. INTRODUCTION

Qwest Corporation ("Qwest") submits comments in response to the Administrative Law Judge's contemplation about whether to consolidate this complaint proceeding with the Section 252 arbitration between Qwest and Eschelon. Qwest opposes consolidation. As stated in detail below, consolidation of these proceedings would be contrary to the Arizona Administrative Code, and would prejudice Qwest's rights in both proceedings due to Qwest being represented by different lead counsel in the two separate proceedings. Accordingly, the Section 252 arbitration and this complaint proceeding should not be consolidated in any manner.

1 **II. ARGUMENT**

2
3 **A. Consolidating Separate Matters After One Matter Has Been Heard is**
4 **Unauthorized by Arizona Administrative Code § R14-3-109.**
5

6 Pursuant to Arizona Administrative Code § R14-3-109(H), the Section 252 arbitration
7 and the complaint proceeding should not be consolidated because the arbitration hearing has
8 already been tried and as such cannot be consolidated with the complaint proceeding unless the
9 Commission reopens the arbitration hearing and holds a consolidated hearing. Section R14-3-
10 109(H) only provides for consolidation of proceedings at hearing, not consolidation after one
11 matter has been tried:

12 Consolidation. The Commission or the presiding officer may **consolidate two or**
13 **more proceedings in one hearing** when it appears that the issues are
14 substantially the same and that the rights of the parties will not be prejudiced by
15 such procedure. **At such consolidated hearing** the presiding officer shall
16 determine the order in which all the parties shall introduce their evidence and
17 which party or parties shall open and close.
18

19 A.A.C. § R14-3-109(H) (2006) (emphasis added). The plain language of the rule only allows a
20 “consolidated hearing.” Here, the arbitration has already been heard. After the fact
21 consolidation is not permitted by the rule. The only instance in which the Commission
22 consolidated proceedings that had already been heard occurred at the parties’ joint request. See
23 *In re U S WEST Communications, Inc.’s Compliance with § 271 of the Telecommunications Act*
24 *of 1996*, 2004 Ariz. PUC LEXIS 12, 33-34 (Ariz. Corp. Comm’n, April 30, 2004). In every
25 other published Commission decision, the Commission notes the proceedings were consolidated
26 prior to hearing. See e.g., *In re Application of Sonoita Valley Water Co.*, 2007 Ariz. PUC LEXIS
27 10, Decision No. 69259 (Ariz. Corp. Comm’n Jan. 19, 2007) (most recent decision on Lexis
28 noting matters that were consolidated). Because the Section 252 arbitration has already been

1 heard, to consolidate it with the complaint proceeding would contravene the Commission's
2 consolidation procedure allowed under Section R14-3-109(H).

3 **B. Even if Section R14-3-109 Authorized Consolidation at this Late Date, the**
4 **Prerequisite Conditions Are Not Met Because the Issues Are Not**
5 **Substantially the Same and Qwest Would be Unfairly Prejudiced by Such a**
6 **Procedure.**
7

8 Consolidation of these proceedings is inappropriate under Section R14-3-109(H) because
9 (1) the issues are not "substantially the same," and (2) Qwest's rights would be prejudiced by
10 such a procedure. First, the issues of the Section 252 arbitration concern the language to be
11 included in a new interconnection agreement. The complaint proceeding concerns whether
12 Qwest breached its existing interconnection agreement with Eschelon. The two questions are
13 completely different: determining what terms are appropriate for a new agreement to apply
14 prospectively is irrelevant to determining whether past conduct breached the terms of the current
15 ICA, and vice versa.

16 *Secondly, consolidating the proceedings at this point would unfairly prejudice Qwest's*
17 *rights because Qwest is represented in the two cases by different lead counsel.* If the matters
18 were consolidated, Qwest would have to prepare two sets of counsel on the record material of
19 each proceeding, at a substantial expense of time and resources for Qwest. Eschelon, on the
20 other hand, is represented by the same counsel in both cases. The ALJ proposal to consolidate
21 the matters at this late juncture was wholly unforeseeable (attested by the lack of any
22 Commission precedent for consolidating proceedings after one of the matters had already been
23 heard), and would impose a manifestly unfair burden on Qwest. Accordingly, consolidation is
24 not available for these two proceedings under the requirements of Section R14-3-109.

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11 for filing this 2nd day of April, 2007, to:

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20 Copy of the foregoing hand-delivered
21 this 2nd day of April, 2007, to:

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24 The Honorable Lyn Farmer
25 Chief Administrative Law Judge
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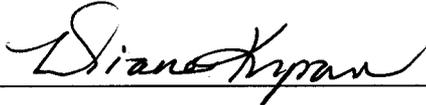
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