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July 14, 2008

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Arizona Corporation Commission
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Arizona Corporation Commission
Docket Control – Utilities Division
1200 West Washington Street
Phoenix, AZ 85007

RE: In the Matter of the Petition of Eschelon Telecom of Arizona, Inc. for Arbitration with Qwest Corporation, Pursuant to 47 U.S.C. Section 252 of the Federal Telecommunications Act of 1996
Docket Nos. T-03406A-06-0572 & T-01051B-06-0572

Dear Sir/Madam:

Enclosed are an original and 15 copies of Eschelon's Response to Qwest's Supplemental Memorandum in Connection with Qwest's Motion to Request Resolution of Disputed Issues Relating to Eschelon's Compliance Filing in the above-referenced matter. I have enclosed an additional copy of this letter and request that you date stamp its receipt and return it to me in the enclosed self-addressed, stamped envelope. We appreciate your assistance.

Sincerely,

Tobe Goldberg

Tobe L. Goldberg
Legal & Regulatory Administrator
612.436.6084 (Direct)
612.436.6816 (Dept. Fax)
tlgoldberg@integratelecom.com

Enclosures
cc w/enclosure to: Jane Rodda, ALJ, ACC
Maureen Scott, ACC
Ernest G. Johnson, ACC
John M. Devaney, Qwest
Norman G. Curtright, Qwest
Jason D. Topp, Qwest
Gregory R. Merz, Gray, Plant
Michael Patten, Roshka, DeWulf & Patten

BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS
MIKE GLEASON, Chairman
WILLIAM A. MUNDELL
JEFF HATCH-MILLER
KRISTIN K. MAYES
GARY PIERCE

IN THE MATTER OF THE PETITION OF ESCHELON TELECOM OF ARIZONA, INC. FOR ARBITRATION WITH QWEST CORP., PURSUANT TO 47 U.S.C. SECTION 252 OF THE FEDERAL TELECOMMUNICATIONS ACT OF 1996	) DOCKET NO. T-03406A-06-0572) DOCKET NO. T-01051B-06-0572)) **ESCHELON'S RESPONSE TO QWEST'S SUPPLEMENTAL MEMORANDUM IN CONNECTION WITH QWEST'S MOTION TO REQUEST RESOLUTION OF DISPUTED ISSUES RELATING TO ESCHELON'S COMPLIANCE FILING**

I. INTRODUCTION

Eschelon Telecom of Arizona, Inc. ("Eschelon") submits this Response to Qwest Corporation's ("Qwest's") Supplemental Memorandum in Connection With Qwest's Motion to Request Resolution of Disputed Issues Relating to Eschelon Telecom's Compliance Filing, dated July 11, 2008 (Qwest's "Supplemental Motion"). Eschelon asks the Commission to reject Qwest's Supplemental Motion. In its Supplemental Motion, Qwest asks the Commission to set a schedule, but no schedule is needed.

Qwest argues in its Supplemental Motion (p. 2) that the language for Issue 9-59 (Maintenance and Repair for Commingled EELs – ICA Section 9.23.4.7) is open. As stated in Eschelon's cover letter to its June 13, 2008 interconnection agreement ("ICA") Compliance Filing (with emphasis added): "Although the language for Issue 9-59 (in

1 Section 9.23.4.7) shows as closed and agreed upon in the enclosed Interconnection
2 Agreement, therefore, this section may be open, ***if*** Qwest proposes language ***and the***
3 ***Commission permits its consideration***." Eschelon, however, has opposed permitting
4 consideration of Qwest's untimely proposal (made after the Compliance Filing, after
5 Qwest's later Motion Regarding the Compliance Filing, and filed in Qwest's Reply
6 Comments). Three months passed with no response or negotiation by Qwest after
7 Eschelon provided proposed language to Qwest on March 7, 2008 in response to the
8 February 22, 2008 ALJ recommendation that the Commission direct the parties to
9 negotiate and "submit with their compliance filing language" regarding Issue 9-59.[1]
10 Qwest also did not respond or negotiate after the Commission adopted the ALJ's
11 recommendation and before the Compliance Filing. Qwest should not be rewarded for
12 ignoring the Commission's stated deadline of providing *language* before the Compliance
13 Filing, so as to permit filing of that language with the Compliance Filing.
14 Because Qwest failed to respond at all to that language before the June 16, 2008
15 Compliance Filing (despite an ALJ recommendation to negotiate received February 22,
16 2008 – almost four months earlier), the only language on this issue submitted with the

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[1] On February 22, 2008, the ALJ recommended that the Commission direct the parties to negotiate and "submit ***with their compliance filing language***" regarding Issue 9-59. *See* ALJ Report, p. 68, lines 17-18 (emphasis added). In response to the ALJ's recommendation, Eschelon drafted proposed language and provided its proposal to Qwest and this Commission on March 7, 2008. *See* Attachment 3 to Eschelon's Exceptions. Qwest did not respond or otherwise negotiate with Eschelon. On May 16, 2008, this Commission issued its Order (Decision No. 70356). In its Order, the Commission observed that Qwest had not yet responded to Eschelon's proposal. *See* Order, p. 68, footnote 80. The Commission said that Eschelon's "proffered language appears to be a reasonable effort and good starting point to devise specific contract language. If the parties remain unable to negotiate final contract language concerning repair and maintenance of commingled EELs, as part of their compliance filing, they should request final resolution of this issue." *See* Order, p. 68, footnote 80. The Commission again stated that the "***language***" should be submitted "***with their compliance filing***." *See* Order, p. 67, lines 22-23 (emphasis added). Qwest still did not respond to Eschelon's March 7, 2008, proposal or otherwise negotiate. Therefore, the language of the Compliance Filing properly reflects Eschelon's language (from Attachment 3 to its Exceptions) for Issue 9-59.

1 Compliance Filing, consistent with the Commission's Order, is Eschelon's language.
2 There is no need for the schedule requested by Qwest, because it is appropriate to allow
3 the Compliance Filing to go into effect, as filed.

4 Similarly, regarding Issue 4-5(c) (Design Change Charge), there is no issue
5 properly open in the record requiring any further action in this matter. Compliance Filing
6 Exhibit A presents Section 9.20.13 ("Design Change Charge") exactly as the language
7 proposed by Qwest appears in the March 12, 2007 Joint Matrix in this matter for Section
8 9.20.13 of Exhibit A,[2] except that a footnote was added to comply with the Commission's
9 Order.[3] In addition to the Compliance Filing, the Commission's Order, which applies to
10 the parties, addresses this issue clearly.[4] There is no basis to suggest that Eschelon would
11 not comply with this Commission Order. Eschelon is the party who, through its
12 arbitration petition, brought this issue to the Commission to obtain a Commission
13 decision. After all, while Qwest can unilaterally impose a rate by billing it or refusing to
14 provide service without an amendment (as Qwest has done in the past[5]), Eschelon has no
15 ability to unilaterally impose its position about a Qwest rate on Qwest. Eschelon needs to
16 request Commission oversight, which Eschelon did here.

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[2] See Joint Matrix, p. 16, Issue 4-5(c). All references to the "Joint Matrix" or "Joint Disputed Issues Matrix" are to the parties' joint Arizona Disputed Issues List dated March 12, 2007. See Order, p. 5, lines 2-4.

[3] Footnote 11 of Compliance Filing A states: "The design change charge for loops and CFAs will be reviewed by the Commission in the Phase II of the cost docket." Qwest raised no issue regarding the language of this footnote in Qwest's Motion or Qwest's Supplemental Motion.

[4] Decision No. 70356, p. 15, lines 8-22.

[5] Hrg. Ex. E-16 (Eschelon Denney Surrebuttal), pp. 24-25. In an Eschelon complaint case against Qwest under the existing ICA, Staff in Arizona concluded that "CLECs should not be forced into signing" the expedite amendment. *See* Direct Testimony of Pamela Genung, *In re. Complaint of Eschelon Telecom of Arizona, Inc. Against Qwest Corporation*, ACC Docket No. T-01051B-06-0257, T-03406A-06-0257 (Jan. 30, 2007) ["Arizona Complaint Docket"], p. 34, lines 10-11 (quoted in Hrg. Ex. E-15 (Eschelon Denney Rebuttal), p. 128. The Staff added that "since CLEC interconnection agreements are voluntarily negotiated or arbitrated," Qwest "rather than trying to force Eschelon into signing an amendment," could have taken the issue to arbitration under the Qwest-Eschelon ICA.[5] Genung Testimony, p. 36, line 21 – p. 37, line 2.

1 The Commission ordered Qwest's language, and the Compliance Filing reflects
2 Qwest's own language as it was proposed by Qwest throughout this case. Qwest is over-
3 reaching in asking, long after all the evidence was heard and even after an order was
4 issued and the Compliance Filing was filed, to change its own proposed language. At
5 this very late date Qwest asks, however, to change its own proposal to language that it did
6 not request in the proceeding itself (including in any exceptions or motion for
7 reconsideration). Qwest's request regarding Issue 4-5(c) is therefore also untimely. The
8 Compliance Filing should be allowed to go into effect. As the language of Compliance
9 Filing Exhibit A, as filed, already reflects the Commission's order to use the language
10 actually proposed by Qwest during the proceeding, no order or schedule is needed to
11 accomplish that result.
12 Regarding Issue 9-58(e) (Interval for Commingled Arrangements), Section 24.3.2
13 is the only provision in the Compliance Filing that shows open language. The parties
14 have already filed comments on this issue (in the form of Qwest's Motion Regarding the
15 Compliance Filing, Eschelon's Response, and Qwest's Reply). Even assuming a
16 schedule were needed, therefore, the only timely item to be addressed in the schedule
17 would be the date by which the Commission will rule on the appropriate language for
18 Section 24.3.2. If no order is issued and no schedule is set, the Compliance Filing would
19 go into effect with one open paragraph (Section 24.3.2). Regarding Section 24.3.2 and
20 Issues 9-58 and 9-59, the Commission has issued its Order,[6] which provides guidance to
21 the parties. If a dispute arises, the Commission has already explicitly said that either
22 party may ask the Commission to address these issues in a separate docket.[7]

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[6] Decision No. 70356, p. 66, line 25 – p. 68, line 2.
[7] Decision No. 70356, p. 67, lines 3-5.

III. CONCLUSION

Eschelon respectfully requests that the Commission reject Qwest's Supplemental Motion. The Commission should either expressly grant the relief requested in Eschelon's Response to Qwest's Motion Regarding the Compliance Filing or simply not rule and allow the Compliance Filing to go into effect as filed. Whereas the Compliance Filing accurately reflects the Commission's Order, Qwest's requests regarding Issues 9-59 and 4-5(c) are untimely, and rewarding Qwest for its delay provides the wrong incentives.

Regarding Qwest's Supplemental Motion, even assuming the Commission were to grant Qwest's request to set a schedule, any schedule should be limited to the only timely open item – the date by which the Commission will rule on the appropriate language for Section 24.3.2 (Issue 9-58(e)).

Dated: July 14, 2008

By: _____

Gregory Merz
Gray, Plant, Mooty, Mooty
& Bennett, P.A.
500 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
Telephone: 612 632 3257
Facsimile: 612 632 4257

Michael W. Patten
J. Matthew Derstine
Roshka Dewulf & Patten, PLC
One Arizona Center
400 East Van Buren Street, Suite 800
Phoenix, Arizona 85004
Telephone: 602-256-6100
Facsimile: 602-256-6800

Karen L. Clauson
Senior Director of Interconnection/
Associate General Counsel
730 2nd Ave. South, Suite 900
Minneapolis, MN 55402
Telephone: 612-436-6026
Facsimile: 612-436-6816

COUNSEL FOR ESCHELON TELECOM
OF ARIZONA, INC.

ORIGINAL and 15 copies sent via overnight delivery for filing this 14th day of July, 2008, to:

Arizona Corporation Commission
Docket Control – Utilities Division
1200 West Washington Street
Phoenix, AZ 85007

COPY of the foregoing emailed to:

Jane Rodda
Administrative Law Judge
Hearing Division
ACC
1200 West Washington Street
Phoenix, AZ 85007
JRodda@azcc.gov

Maureen Scott
Legal Division
ACC
1200 West Washington Street
Phoenix, AZ 85007
MScott@azzcc.gov

Ernest G. Johnson
Director, Utilities Division
ACC
1200 West Washington Street
Phoenix, AZ 85007
EJohnson@azcc.gov

John M. Devaney
Perkins Coie
607 14th Street NW
Washington, DC 20005
JDevaney@perkinscoie.com

Norman G. Curtright
Corporate Counsel
Qwest Corporation
20 East Thomas Road, 16th Floor
Phoenix, AZ 85012
Norm.curtright@qwest.com

Jason Topp
Qwest Corporation
200 South 5th Street, Suite 395
Minneapolis, MN 55402
Jason.topp@qwest.com

Gregory R. Merz
Gray, Plant, Mooty
500 IDS Tower
80 S. 8th Street
Minneapolis, MN 55402
Gregory.Merz@gpmlaw.com

Michael W. Patten
Roshka, DeWulf & Patten
400 East Van Buren Street, Suite 800
Phoenix, AZ 85004
mpatten@rdp-law.com