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Senior Attorney

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AZ CORP COMMISSION
JUNE 26, 2002
REGISTRATION CONTROL

Commissioner Marc Spitzer
Arizona Corporation Commission
1200 W. Washington
Phoenix, AZ 85007-2996

Arizona Corporation Commission
DOCKETED

JUN 26 2002

Re: June 17, 2002, Request for Comments
Docket Nos. T-00000A-97-0238 & RT-00000F-02-0271

DOCKETED BY	<i>CR</i>
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Dear Commissioner Spitzer,

On June 17, 2002, you requested comments on whether the Qwest interconnection agreements precluding parties from participating in the section 271 proceeding "taint" the integrity of the proceeding. In addition, you requested comments on whether, at a minimum, the section 271 proceeding should be stayed "pending an evidentiary hearing on the effects, if any, of the seven interconnection agreements on this Commission's record." AT&T believes that the effects of the provisions in the agreements go far beyond the effects on the record of the section 271 proceeding. Instead of staying the section 271 proceeding, however, the Arizona Corporation Commission should aggressively seek out further evidence regarding whether Qwest's application is in the public interest and any additional information that may not have been admitted into the record as a result of the unfiled agreements.

As described in a letter to you dated June 24, 2002, from Mr. Jeffery Oxley, Vice President, Eschelon, Qwest interpreted the agreement not to participate in the section 271 proceedings as prohibiting Eschelon from participating in the Change Management Process re-design meetings and the proceedings regarding Qwest's Statement of Generally Available Terms and Conditions ("SGAT"). As further evidenced by a letter dated February 8, 2002, from Mr. Richard A. Smith, President, Eschelon Telecom, Inc., to Mr. Joseph P. Nacchio, Chairman and Chief Executive Officer, Qwest, a copy of which is attached, the effects of the agreements with Eschelon had far more chilling effects than previously disclosed. As the February letter indicates, a Qwest employee threatened to use all her energies to making Eschelon's employees' lives miserable if Eschelon did not leave a CMP re-design working session. If true, the

lack of CLEC participation generally in the section 271 proceeding is not surprising.

Mr. Smith also describes Qwest's attempts to condition payment to Eschelon in exchange for Eschelon turning over all audit reports, work papers and documents regarding the Eschelon audit of the switched access billing records, apparently, to prevent public disclosure. The February letter indicates that Qwest also retained an auditor to determine if Qwest's reporting of switched access minutes was accurate. Considering AT&T raised serious questions regarding the accuracy of the third-party test on the provision of daily usage files, including switched access files, the attempt to gain control of possibly detrimental audit information is very disturbing. Qwest also proposed conditioning payments to Eschelon on Eschelon agreeing to file favorable testimony, pleadings and comments whenever requested by Qwest.

Mr. Smith's letter provides a very disturbing picture of the purpose and use of the provision not to participate in the section 271 proceeding. Qwest used it as an affirmative tool to obtain compliance by Eschelon. Failure to agree could result in unfavorable repercussions.

These two letters highlight the tremendous monopoly power Qwest retains and the influence Qwest maintains over a competitive local exchange carriers' businesses. Eschelon's letters indicate why carriers use the complaint process as a last resort -- the risks are very high that they will suffer as a result. Qwest can make a company's existence miserable with very little effort, and Qwest does not need a provision in an agreement to do so. An initial reaction would be to suggest that antitrust issues are raised by such actions. However, incumbent local exchange carriers have successfully argued that *Goldwasser v. Ameritech Corp.*, 222 F. 3d 390 (7th Cir. 2000), shields them from antitrust suits for violations of the Act. This makes Commission oversight more critical. The *Goldwasser* holding mentions that section 252 was critical to ensuring meaningful oversight of negotiated agreements by the state commissions. *Goldwasser* at 402. However, without the ability to participate in Commission proceedings or to file a complaint with the Commission, a carrier has no avenue of redress and is at the mercy of Qwest.

AT&T believes the integrity of the section 271 process has been tainted. However, it believes that the section 271 process should not be stayed but expanded to take evidence from competitive local exchange carriers that agreed either in writing or orally not to participate in the section 271 proceedings and to take evidence from those carriers that entered into unfiled agreements with Qwest. Additionally, the Commission should reopen the record on the adequacy of the Change Management Process, Qwest's provision of switched access billing records and whether Qwest has violated the nondiscrimination provisions of the section 251 of the Act. Discovery on these issues should be permitted. The

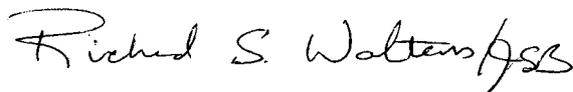
Commissioner Marc Spitzer
June 26, 2002
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Commission must take additional evidence on whether Qwest's entry in the long distance market is in the public interest. Qwest may argue that the problems have been fixed; however, this is irrelevant to a public interest inquiry because it is Qwest's motives, activities and methods of dealing with competitive local exchange carriers that are the focus of any public interest inquiry. Whether problems have been fixed also is irrelevant to any inquiry into Qwest discrimination in meeting its obligations under section 251.

The letters from Eschelon raise serious questions regarding Qwest's business practices. The disclosures by Eschelon may be only the tip of the iceberg. If Eschelon's allegations are true, Qwest has not opened its local exchange market to competition as required by the Act. The Commission has jurisdiction to investigate and resolve the issues raised by the unfiled agreements and the allegations raised by Eschelon.

The section 271 proceeding is a proper forum to conduct such investigation. If an investigation is conducted in the section 252 (e) proceeding, the Commission must recognize the relationship between any evidence gathered in the section 252 (e) proceeding and the section 271 proceeding. Any investigation in the section 252 (e) proceeding, however, should not limit the ability subsequently to raise relevant issues in the section 271 proceeding. Consolidation of the two proceedings may be appropriate going forward.

Sincerely,



Richard S. Wolters

RSW:ls
Enclosure

Cc: Chairman William A. Mundell
Commissioner Jim Irvin
Service List Docket No. T0000A-97-0238
Service List Docket No. RT-00000F-02-0271
Docket Control



February 8, 2002

Mr. Joseph P. Nacchio (by email and express delivery)
 Chairman and Chief Executive Officer
 Qwest
 1801 California St.
 Denver, Colorado 80202

Re: Level 3 Escalation

Dear Mr. Nacchio:

Pursuant to Level 3 of the Escalation Procedures and Solutions Agreement between Eschelon and Qwest, dated November 15, 2000, I ask you to meet with me and resolve the following issues within 10 business days: Platform/UNE-Eschelon ("UNE-E") pricing and compliance by Qwest with terms of our agreements, including the agreement of July 3, 2001 signed by Ms. Audrey McKenney (attached). More generally, we hope that your involvement will improve the business relationship and change its course.

We have not had the opportunity of meeting yet. In public statements, such as those you have made to the Regional Oversight Committee ("ROC"), you have committed to improving the wholesale business relationship and to treating wholesale businesses as customers. Eschelon is a good customer that pays its bills. Last year, we spent approximately \$30 million with Qwest. Qwest has said that this makes us your second largest CLEC wholesale customer. We anticipate that our volume of business with Qwest will only grow. Qwest has several times quoted me in press releases and various publications to the effect that Qwest has a pro-competitive attitude and, unlike its predecessor US West, Qwest is serious about developing its wholesale business with CLECs. Rather than take our service and pricing issues before Commissions, the ROC, legislatures, and the press, Eschelon has attempted to resolve matters on a business basis.

We ask you to resolve this escalation by:

- Adopting promised adjusted UNE-E pricing: Agree to the attached proposed amendment to our existing UNE-E Amendment, Attachment 3.2 (with prices that include "premium" for UNE-E versus UNE-P).
- Honoring existing agreements, including July 3rd letter agreement: Pay to Esche on \$2,450,852 for July 3 - Dec. 31, 2001 due under that agreement (by wire transfer for some and agreeing to current adjustments/set offs for remainder).
- Stopping illegal conduct and deal fairly with Eschelon.

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voice data internet

As executives, we like to keep things short and to the point. Because the escalated issues are complex and have been discussed over many months, however, I need to set out some background for you before we meet. I will devote the rest of this letter, therefore, to providing you information that you need to know before we talk.

Before Qwest would resolve previous legitimate business disputes that were pending late in 2000, Qwest required Eschelon to agree not to oppose Qwest in 271 proceedings. Based on their actions since then, Qwest's Senior Vice Presidents Ms. McKenney and Ms. Dana Filip appear to believe that, by capitulating to Qwest's demand, Eschelon has subjected itself to accepting poor service and surrendering any ability to protest actions proposed or undertaken by Qwest that would harm our business interests. Qwest has gone so far as to try to make resolution of legitimate business issues contingent upon our destruction or surrender of an auditor's documents as well as to require us to submit testimony, regardless of its validity, in legal proceedings if "suitable" to Qwest. Despite Eschelon telling Qwest orally and in writing that it believes this kind of conduct is illegal and unethical, such tactics continue. We hope that this is news to you and that you will change the course of dealings quickly and put them on a legitimate track.

In the face of such tactics, Eschelon has spent months attempting to resolve these two issues: the pricing of our Platform product and Qwest's failure to provide us with complete access records. Eschelon entered into agreements with a five-year term to purchase a Platform product from Qwest on November 15, 2000. We would not have agreed to a five-year term without assurances that the pricing of our product would remain competitive, and we received such assurances from Qwest during and after those negotiations. Although the prices in the UNE-E Amendment reflect averaged rates, the Parties anticipated that changes would be needed to ensure that Eschelon remains competitive if rates declined, as both parties expected they would, principally due to geographic deaveraging, as Eschelon's lines are in densely populated urban areas. Repeatedly throughout the previous negotiations, Ms. McKenney responded to Eschelon's concerns about possible reductions in UNE-P rates by stating that Qwest would keep Eschelon competitive by adjusting UNE-E rates to reflect such factors. For this reason, the First Amendment to the Confidential/Trade Secret Amendment, dated November 15, 2000, states in Paragraph 5 that the Parties will address appropriate price adjustments in quarterly meetings. Despite this, Qwest has failed to adjust the UNE-E rates to reflect changes that have occurred since signing the UNE-E Amendment.

We explored an alternative of attempting to negotiate a conversion to UNE-P instead of adjusting UNE-E prices, but that effort failed when Qwest would or could not even confirm the pricing much less address our other concerns about alleged benefits to us. Therefore, we need to pursue our existing UNE-E contract rights, including Qwest's commitment to adjust the pricing. If Qwest has taken any steps to effectuate the UNE-P conversion, Qwest needs to ensure that those steps are reversed. Please ensure that any plans to convert our base to UNE-P are halted. If we want to move any lines to UNE-P, we will simply do so under our current interconnection agreements. Qwest needs to make good on its initial and repeated commitment to provide us with adjusted UNE-E rates.

Our pricing ask to you is simple: Eschelon and Mr. Arturo Ibarra of Qwest have developed a methodology for determining how our UNE-E rates should be adjusted downward. Attached is pricing that reflects our proposal using that methodology. The proposal is in the form of an amended attachment to the previous UNE-E interconnection agreement amendment. As with the current prices, the adjusted prices would be subject to all of the other terms of the amendment (such as the current revenue commitment, etc.). You and I need only settle the issue of Qwest's requested, additional "premium" for advantages that Qwest claims UNE-E offers over UNE-P. Qwest previously proposed \$2.00 for the "premium." We believe that Qwest included in that amount some assumed benefit from receiving DSL with UNE-E, but DSL is now also available with UNE-P. In addition, Qwest's proposed "premium" charge reflects an assumption for features that is higher than the \$0.75 that Qwest proposed as its estimated cost for features in the Utah cost docket. Therefore, we believe the "premium," if applicable at all, is closer to \$1.10. I propose we split the difference and add a "premium" of \$1.55 per line, per month. The attached rates reflect this proposal.

Once we resolve the pricing issue, you and I need to re-establish the Qwest-Eschelon relationship on solid ground. Although much of the past and present negotiations have focused on pricing, Eschelon has consistently indicated that quality of service is of paramount importance to our business. We asked Qwest to deal with quality of service through specific commitments in the first set of agreements in 2000, but Qwest would agree only to a general Implementation Plan that was supposed to establish a process for improving quality of service. Although Qwest's service quality has improved in some areas, significant problems remain. Many of these issues are reflected in a monthly Report Card that Eschelon presents to Qwest. From January through November, on average, more than 65% of the measures have been rated as unsatisfactory. We had to remove the billing accuracy measure from our Report Card, because 100% of our UNE-E bills are inaccurate and will be inaccurate until Qwest completes the process necessary to provide UNE-E, rather than resale, bills (which it committed to do by IQ of last year). Additionally, Qwest has not performed satisfactorily with respect to generating and reporting switched access minutes of use ("MOU"). Qwest has been shorting Eschelon switched access minutes, and Qwest/Arthur Andersen, your auditor, has recognized that. All of these performance problems affect not only our bottom line but also our reputation, and therefore they threaten our ability to compete in the marketplace.

To mitigate our concern that Qwest was denying us essential facilities on reasonable and nondiscriminatory terms, Ms. McKenney executed an agreement on July 3, 2001. That agreement provided Eschelon with \$150,000 per month as compensation for poor performance and compensated us for underreported access minutes. We agreed that the performance payment would not stop until both parties agreed that performance had improved sufficiently. The Parties also agreed that the access payments issue would be resolved by a joint audit. The joint audit was to continue until the auditor came to agreement, within plus or minus five percent, of the actual number of access minutes.

Qwest unilaterally terminated the work of its auditors before the audit concluded. Qwest has not paid its obligations under the July 3rd agreement for months. Qwest has made clear its desire to terminate the July 3rd agreement. Eschelon has been willing to accede to Qwest's request, but only if we resolved our pricing, access and service issues. The July 3rd agreement is in full effect, and I expect you to see that Qwest honors its commitments in that letter.

Our access ask to you is simply to bring your payments current under the fully effective and enforceable July 3rd letter agreement. Qwest needs to pay to Eschelon \$1,077,461, in addition to the \$1,373,391 that Eschelon has had to set off in payments to Qwest, to be current through the end of 2001. Since July 3rd, the only amount that Qwest has paid under that agreement is \$450,000. That amount represents only three months (July-September) of the \$150,000 in service credits due each month to Eschelon. The total amount due under the July 3rd letter (after subtracting the \$450,000 paid to date) is \$2,450,852 (\$1,373,391 which Eschelon has withheld in billing adjustments) through December 31, 2001. This total amount includes a voluntary downward adjustment for the time period November 1, 2001 through December 31, 2001 that Eschelon offered to Qwest because Eschelon had hoped Qwest would negotiate in good faith and resolve this issue. Although that did not happen and therefore Eschelon could request the higher amount, Eschelon honors its word and has included this downward adjustment in calculation of the amount due.

As to re-establishing our business relationship on a mutually respectful basis, much needs to be done. Qwest's bad conduct has not been inadvertent or unintentional. Qwest has used threats and inappropriately exploited its monopoly power to convey that service will only get worse and Eschelon will suffer if it does not capitulate to Qwest's unreasonable demands. I offer three compelling examples of Qwest's bad conduct:

Threats and abuse of monopoly power. Ms. Filip, who as Qwest's Executive Vice President for Wholesale holds our lines in her hands, told members of my senior management team that she would make our lives miserable if our employees did not immediately leave a Change Management Re-Design working session. We had every right to be at that session, and we were raising legitimate issues that matter to our everyday business. Given the real harm that someone in Ms. Filip's position could do to a business such as ours, we had no choice but to capitulate. Specifically, on a conference call with the participation of Mr. Greg Casey on October 30, 2001, Ms. Filip threatened that, if our representatives did not leave the meeting immediately, Ms. Filip would devote all of her energies to ensuring that Ms. McKenney succeeded in her objectives. This told us two things: (1) that Ms. Kenney's objectives are adversarial to those of Eschelon, even though Ms. McKenney represents that she is attempting to further her customer's interests through a "business-to-business" relationship; and (2) that Ms. Filip would use her position to intentionally harm our business. When we later repeated this incident and Ms. Filip's threat to make our lives miserable on a conference call with Mr. Gordon Martin, Ms. Filip, Ms. McKenney, and Mr. Richard Co-beta, not only did no one deny the incident, but also Mr. Martin expressed no surprise and made no indication that this type of conduct might not

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be acceptable to him. Mr. Martin simply said that, while Eschelon appeared to be "passionate" about this issue, he was passionate about other issues.

Request to Destroy and Appropriate Audit Documents. Qwest retained Arthur Andersen, and Eschelon retained Pricewaterhouse Coopers ("PWC") to determine whether Qwest's reporting of access minutes was accurate. Clearly, Qwest has been shorting Eschelon switched access minutes. Qwest claimed that the flaws would be eliminated if Eschelon moved to a mechanized UNE-E access process. Two weeks after Eschelon moved to that process, however, Qwest said it was not working (and Eschelon had to return to the old process). Before we moved to the new process, Ms. McKenney told me, over many months, that our position on this issue was wrong, because other carriers were using the new process without complaint. She specifically identified McLeod as a carrier using the new process. If that were true, the process would have worked when we moved to it. It did not. In other words, Ms. McKenney's representations were false. Even worse, *Qwest told Eschelon that it would condition payments otherwise legitimately due to Eschelon upon Eschelon's destroying any evidence of Qwest's access problem, including the auditor's records.* Specifically, on a conference call with the participation of Mr. Greg Casey on October 30, 2001, Ms. McKenney told me to destroy the access audit records or give them all to her. The same day, she also faxed to Eschelon proposed written agreements, signed by Ms. McKenney, that required Eschelon to "deliver to Qwest all reports, work papers, or other documents related to the audit process described in" the July 3, 2001 letter agreement with in 10 days. These documents belong to Eschelon by virtue of its access audit that was paid for solely by Eschelon. Ms. McKenney made it very clear that she wanted no written evidence of the access results documenting missing switched access minutes. Although we realized that we were at great risk due to Qwest's ability to harm our business, we simply could not participate in such conduct and expose our own business to legal liability.

Attempts to Improperly Influence Testimony. In the same discussions of resolving switched access issues, Qwest also brought into the discussion the outside and unrelated issues of Eschelon's "performance" with respect to regulatory proceedings (on any issue, not merely access). In Qwest's proposed agreements faxed to me on October 30, 2001, Qwest conditioned payments otherwise legitimately due to Eschelon upon Eschelon agreeing that it would "when requested by Qwest file supporting testimony/pleadings/comments and testify whenever requested by Qwest in a manner suitable to Qwest (substantively)." The document, signed by Ms. McKenney, provided no limitation on Qwest's requests, such as that the testimony requested be true and accurate. The agreement simply contained an offer of a monetary inducement to obtain testimony upon request. The same document required that the agreement remain confidential. Therefore, if Eschelon agreed to the proposal, it would be placed in the position of having to offer testimony without disclosing a fact that would bear on the veracity of that testimony - it had been induced. Again, Eschelon could not agree to participate in such activity and rejected the offer. Also, on November 12, 2001, Rick Smith discussed his concerns about the proposal with Ms. Filip and told her that he believed the proposal was illegal and embarrassing. When, on

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January 11, 2002, Eschelon later read the offensive language from the proposed agreement to Mr. Martin, in response to a claim by Ms. Filip that Qwest's conduct in this relationship has been "constructive." Mr. Martin expressed no surprise and made no indication that this type of conduct might not be acceptable to him.

In my first meeting with Mr. Martin, I talked with him, in particular, about my concerns regarding Ms. McKerney's behavior. I asked that she be removed from our account, so that we could deal with someone else. Mr. Martin declined that request and, as these examples show, has not given us any indication that he disapproves of her approach. Unless you condone such conduct, these examples must convey to you the seriousness of these issues, the unacceptable position in which they place Eschelon, and the legal risks that they pose to Qwest.

Despite Qwest's conduct, Eschelon has continued to persevere in its attempts to work with Qwest. Qwest is the only available supplier in virtually all cases. We have cooperated with requests by Qwest to support Qwest with favorable comments, when we believed we could legitimately do so. This has included, for example, statements to the press and a letter to state regulatory commissions supporting aspects of Qwest's PAP. Even in these circumstances, Qwest has turned a potentially positive development into a concern. For example, Qwest drafted and published a statement, which Qwest attributed to me, before I ever saw it. Later, I had little choice but to acquiesce, even though I would have phrased the statement differently, if consulted. I asked Qwest to always consult me in the future. Just recently, however, I noticed that Qwest has re-published the previous quote in Qwest's *Lightspeed* publication, without consulting me. Let me make it very clear now that I retract my previous statements in support of Qwest and all authority that Qwest has to use them. A new course needs to be charted for this wholesale business relationship, but until we have done that, I cannot, in all honesty, say anything good about Qwest.

The previous phases of this escalation have taken far too long. We would like to complete this phase within the allotted 10-day time period. We hope to resolve the outstanding issues to avoid bringing the issues to arbitration before the state commissions under our interconnection agreements and before initiating other legal actions, such as an antitrust suit. To do that, we need to move quickly. Please let me know when you are available to meet with me to discuss these escalation issues.

Sincerely,



Mr. Richard A. Smith
President, Chief Operating Officer & Director

cc: Drake S. Tempest (by email & express delivery)
Gordon Martin (by email)
Audrey McKerney (by email)
Dana Filip (by email)
Richard Corbetta (by email)

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AMENDED ATTACHMENT 3.2

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PRICES FOR OFFERING

STATE	PLATFORM RECURRING	ADDITIONAL CHARGE FOR EACH 50 MINUTE INCREMENT > 525 ORIGINATING LOCAL MOU/MONTH PER LINE
AZ	20.82	0.280
CO	18.18	0.295
ID	33.50	0.295
MN	21.83	0.205
ND	28.65	0.260
NE	36.39	0.300
NM	27.50	0.140
OR	18.78	0.170
UT	22.52	0.270
WA	18.03	0.195

Exhibit A sets forth features that are included in the flat-rated UNE-P Business Recurring Rate, in all forms of those features (except as part of an enhanced service).