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BEFORE THE ARIZONA CORPORATION COMMISSION

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Arizona Corporation Commission
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JUN 7 2011
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GEORGE BIEN-WILLNER, for GLENDALE & 27TH INVESTMENTS, LLC, **COMPLAINANT,** **V.** **QWEST CORPORATION,** **RESPONDENT.**	**DOCKET NO. T-01051B-10-0200** **QWEST CORPORATION'S (1) REPLY IN SUPPORT OF ITS MOTION TO DISMISS AND (2) RESPONSE TO COMPLAINANT'S MOTION TO COMPEL DISCOVERY RESPONSES**

Qwest Corporation ("Qwest") moved to dismiss the complaint on the grounds that the Complainant has twice failed to prefile written testimony, in direct violation of the procedural orders issued in this docket, that such failure deprives the Commission the ability to understand the complaint, and that such failure deprives Qwest of the information it needs to defend itself. The Complainant's Response to Qwest's Motion and the Complainant's Motion to Compel Discovery Responses argue that the Complaint is a simple one that should be heard on the merits, without prefiled testimony, which the Complainant characterizes as a technicality. However, the generalized (and unsupported) additional allegations the Complainant filed in lieu of factual testimony, show that the Complainant seeks to bring forward new complaint counts at

the hearing, with allegations that are not included in the instant Complaint. If the Complainant has other complaints to make beyond that which was stated in the instant Complaint, they must amend their Complaint or file new complaints. The Commission's prefiled testimony requirement supports the important due process requirement that the defendant should be apprised of the matters that are going to be brought against it at the hearing.

The Complainant's Motion to Compel only obfuscates and confuses the central issue regarding the failure to file testimony in compliance with the Commission's procedural orders. In any event the Motion to Compel is improperly brought because (1) the data requests were never served on Qwest and therefore responses cannot be past due; (2) the Complainant never contacted Qwest or its counsel about the data requests prior to filing its Motion to Compel, contrary to the "meet and confer" requirements under the rules of civil procedure. The Motion to Compel also ignores the Commission's request stated in the February 17, 2011 Procedural Order, "The parties are encouraged to attempt to settle discovery disputes through informal, good-faith negotiations before seeking Commission resolution of the controversy."

The Response to the Motion to Dismiss claims that the Complainant cannot submit prepared testimony without the information sought by the Complainant's discovery requests. That claim simply is not believable for the reasons stated below.

First, the Complainant neglects to inform the Commission that Qwest has previously answered data requests propounded by the Complainant (which, unlike the March 3 interrogatories were served upon Qwest). In fact, Qwest has provided the Complainant with many pages of records in response to their earlier requests.

Second, the timeline reveals that the Complainant's claimed inability to file testimony is made now only to save itself from its failure to file even the most basic factual support for its

cause. The February 17 Procedural Order provided for discovery through April 1, and for the Complainant to file its written testimony on March 18. Although Qwest has never been served, Qwest now realizes that the Complainant filed Discovery Interrogatories in the Docket on March 3. Since that time, the Complainant failed to file testimony on March 13, failed to respond to Qwest's April 1 Motion seeking to compel the Complainants to file testimony, failed to object or even to comment with regard to the Commission's April 13 Procedural Order which specifically warned that failure to file written testimony could result in dismissal, and failed to file testimony for a second time, on May 10, as ordered. Yet, the Complainant never raised the matter of its March 3 data requests over that long time period or at any one of the many action points throughout that period. The claim that Qwest's responses are critical to preparation of testimony is belied by the Complainant's inaction. A simple email could have brought the issue of the unserved, unanswered data requests to the fore.[1]

Third, the Complainant's arguments contradict each other. They argue that the case is an uncomplicated matter regarding a specific and narrow complaint. Yet they argue that "[W]ithout the information sought by the [March 3] discovery requests . . . it is also not possible to determine precisely which areas of testimony the [Complainant's] witnesses . . . may cover—let alone submit prepared testimony for any witnesses." (Complainant's Motion p. 3, lines 18-22, emphasis added). The Complainant's Response to the Motion to Dismiss and its Motion to Compel simultaneously argue that (a) they need for Qwest to respond to the voluminous requests for records sought by the March 3 data request and (b) "[t]his is not a complex case that should

[1] As noted above, the March 3 data requests have never been served. Indeed, it seems that the Complainant has stopped providing service upon Qwest for any of its filings. If Qwest's Motion to Dismiss is not granted, Qwest should have a reasonable period of time to object or produce documents and informational responses.

demand complicated testimony or a large volume of documents[.]"[2] Both cannot be true. Qwest submits that (a) the Complainant's admitted inability to testify exists because there was never sufficient basis for the complaint in the first instance, and (b) the demand for responses to the March 3 data request is a classic fishing expedition—in search of some scintilla of evidence to support the claim or in the hope that some other matter might be dredged up.

The Complainant's arguments regarding the Commission's Rules of Practice, offered in support of the proposition that a hearing should go forward without prepared testimony, are erroneous. They argue that since the Commission may deviate from the technical rules of evidence, that it should not enforce its order requiring prepared testimony. Of course, the Complainant overlooks that the Administrative Law Judge's order for prepared testimony is not a "technical rule of evidence", but rather is a purposeful way to assist the Commission in its fact-finding duty. Prepared testimony is specifically provided as something the Commission may order (A.A.C. R14-3-109M), and did in fact order specifically in this proceeding.

The Complainant characterizes the complaint as a "consumer complaint." That is wrong—the Complainant admits that it is a business entity—engaged in the ownership and operation of a former Howard Johnson's hotel, and the owner of an unknown number of other enterprises. Further, the Complainant's attempts to characterize this as a "consumer-versus regulated entity (or "David versus Goliath") dispute," is fantasy. The Complainant has a long history of lodging billing disputes against other regulated entities before the Commission—and it can hardly argue that it is being ground down by the powerful utility. All that Qwest asks is that the Complainant follows the processes the Commission has laid down.

For the foregoing reasons, the Commission should deny the Complainant's implicit

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[2] Complainant's Response, p. 5, lines 6-7.

motion to be relieved of the duty to file prepared testimony. The Complainant's filings of witness lists do not provide a single statement of fact in support of the allegations made in the original complaint. Further, the Commission should grant Qwest's Motion to Dismiss. The Commission specifically stated it may dismiss if the Complainant refused to file testimony the second time, and that is exactly what the Complainant has done, without valid excuse or claims of extenuating circumstances. Last, the Complainant's Motion to Compel becomes moot upon dismissal; however, in any event the Motion to Compel is not ripe for adjudication. Qwest should be given a reasonable period of time to respond to the data requests that were never served upon it, or to state its objections thereto.

RESPECTFULLY SUBMITTED, this 7th day of June, 2011.

QWEST CORPORATION

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ORIGINAL and thirteen (13) copies filed
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