

28, 2004.¹ As explained herein, the Smith deposition as scheduled would be oppressive and constitute an undue burden or expense for Eschelon. The following are the reasons why the deposition should not be allowed:

1. **Mr. Smith is unavailable on October 28, 2004 and cannot be available until November 18, 2004 at the earliest.**

As the attached Declaration of Dennis Ahlers states, Mr. Smith is entirely unavailable until November 18 at the earliest.

Mr. Smith is the President and Chief Executive Officer of Eschelon Telecom, Inc., the parent company of Eschelon Telecom of Washington, Inc. On October 19, 2004, Eschelon Telecom, Inc. publicly announced its acquisition of Advanced TelCom Inc. ("ATI"), another competitive local exchange carrier ("CLEC") based in Santa Rosa, California. Mr. Smith's time will be completely committed to matters associated with this transaction, which is expected to close by the end of 2004. During the weeks of October 25 through November 12, 2004 Mr. Smith will be traveling for meetings in conjunction with this acquisition. On the few days that he is not scheduled to be traveling, he has crucial meetings in Minneapolis. For example, he will return from a trip to California and Nevada on the evening of October 27 and has meetings with Eschelon's investors and Executive Council all day on October 28. On Friday, October 29, Mr. Smith has an Eschelon Board of Directors' meeting. Thus, Mr. Smith's schedule simply does not allow the deposition noted by Qwest.

2. **Qwest has no need to depose Mr. Smith because Qwest has deposed him twice before on the same topic.**

Attorneys for Qwest Corporation deposed Mr. Smith in a civil case relating to the very "unfiled agreements" that are at issue in this Commission proceeding on July 16, 2004 and August 13, 2004 in Minneapolis, Minnesota. The subject matter of this litigation, *Eschelon Telecom of Washington, Inc. et al. v. Qwest Corporation*, Civil No. C03-1296L (USDC, W. Dist. of Washington at Seattle) relates to the Eschelon/Qwest interconnection agreements. Because

¹ This notice is attached hereto.

Mr. Smith has been deposed on the subject matter of the Eschelon agreements at issue in this Commission proceeding, Qwest should not be allowed to have a second bite at the apple for either this proceeding, or the Federal District Court case. Mr. Smith was also deposed about the agreements at issue on October 26, 2002, in the Arizona Corporation Commission investigation into the unfiled agreements. *In the Matter of Qwest Corporation's Compliance with Section 252(e) of the Telecommunications Act of 1966*. Docket No. RT-00000F-02-0271. Qwest's counsel, Mr. Nazarian, attended this deposition. Both deposition transcripts are within the possession of Qwest. Without a clear demonstrated need from Qwest for yet another deposition of Mr. Smith, there is no need for additional deposition testimony from Mr. Smith. Furthermore, under the circumstances, the equities favor requiring Qwest to use the previous depositions, unless Qwest can demonstrate specific necessary questions to its case before allowing any deposition to proceed. Qwest can also use written discovery requests to answer any questions not already addressed in the depositions. Qwest received the prefiled testimony of Mr. Smith on August 31, 2004. Yet it waited seven weeks before noticing a last-minute deposition of a CEO currently embroiled in a major acquisition. Under these circumstances, Eschelon should be protected from the oppression and/or undue burden or expense associated with a third Smith deposition.

3. **If the deposition is allowed, it should be rescheduled to a date consistent with Mr. Smith's schedule and the location should be changed to Minneapolis.**

If the Commission allows the deposition to proceed, clearly it must be rescheduled because Mr. Smith cannot honor that date. Furthermore, as explained to Qwest's counsel, it is Eschelon's position that Qwest should travel to Minneapolis to depose Mr. Smith there. Minneapolis is the headquarters for Eschelon and it is where Mr. Smith was deposed for his two previous depositions. A Minneapolis location will certainly simplify scheduling for Mr. Smith. Qwest's outside counsel, Mr. Nazarian, is based in Washington D.C. and could just as easily travel to Minneapolis as to Olympia, Washington. When weighing the burdens or expenses associated with this deposition, the scales clearly tip in favor of having the deposition where Mr. Smith works and resides, in Minneapolis.


Finally, there is no reason that any deposition has to take place within the next few days. The deadline set for depositions in this case does not expire until December 15, 2004. Thus, if a deposition is necessary, there is time to schedule it for a date in late November or early December, when Mr. Smith can clear a date in his calendar.

4. **Relief Requested.**

Eschelon requests an Order from this Commission that the deposition of Mr. Smith, as noticed, not be allowed. In the alternative, should the Commission allow such deposition, it should be rescheduled to a date convenient to Mr. Smith's schedule and at a location convenient to Mr. Smith, Minneapolis, Minnesota.

Respectfully submitted this 22nd day of October, 2004.

GRAHAM & DUNN PC

By 
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Lisa A. Anderl

Associate General Counsel
Regulatory Law Department

October 20, 2004

Via E-Mail and U.S. Mail

Judith Endejan
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Pier 70 – 2801 Alaskan Way, Suite 300
Seattle, WA 98121-1128

Re: Docket No. UT-033011 - Unfiled Agreements
Notices of Deposition of Richard A. Smith

Dear Ms. Endejan:

Please find enclosed a Notice of Deposition of Richard A. Smith.

Sincerely,

Lisa A. Anderl

LAA/llw
Enclosures

cc: Service List (*via e-mail and U.S. Mail*)

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION,

Complainant,

v.

ADVANCED TELECOM GROUP, INC;
ALLEGIANCE TELECOM, INC.; AT&T
CORP; COVAD COMMUNICATIONS
COMPANY; ELECTRIC LIGHTWAVE,
INC.; ESCHELON TELECOM, INC. f/k/a
ADVANCED TELECOMMUNICATIONS,
INC.; FAIRPOINT COMMUNICATIONS
SOLUTIONS, INC.; GLOBAL CROSSING
LOCAL SERVICES, INC.; INTEGRA
TELECOM, INC.; MCI WORLDCOM, INC.;
McLEODUSA, INC.; SBC TELECOM, INC.;
QWEST CORPORATION; XO
COMMUNICATIONS, INC. f/k/a NEXTLINK
COMMUNICATIONS, INC.,

Respondents

Docket No. UT-033011

NOTICE OF DEPOSITION UPON ORAL
EXAMINATION OF RICHARD A. SMITH

TO: Richard A. Smith, Eschelon Telecom of Washington, Inc.

AND TO: Judy Endejan, attorney of record for Eschelon

YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE that the testimony of Richard A. Smith will be taken upon oral examination at the instance and request of Qwest Corporation in the above-entitled and numbered action before a court reporter at the Washington State Utilities and Transportation Commission, 1300 S. Evergreen Park Drive S.W., Olympia, WA 98504, at 9:30

a.m. on Thursday, October 28, 2004. Said oral examination shall be subject to continuance or adjournment from time to time or place to place until completed, and shall be taken upon the ground and for the reason that said witness will give evidence material to the establishment of Qwest's case.

DATED this ____ day of October, 2004.

QWEST

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