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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

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Qwest Corp.,)

No. CV 08-2374-PHX-JAT

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Plaintiff,)

ORDER

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vs.)

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Arizona Corporation Commission; et al.,)

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Defendants.)

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Currently pending before the Court is Defendant/Cross-Defendant Arizona Corporation Commission’s Motion to Dismiss Eschelon’s Cross-Claim in its Entirety (Doc. #136). The Court now rules on the Motion.

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I. BACKGROUND

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The Telecommunications Act of 1996 (the “Act”) requires incumbent local exchange carriers (“ILECs”), like Qwest, to negotiate and enter into interconnection agreements with competitive local exchange carriers (“CLECs”), like Eschelon. 47 U.S.C. §§251 & 252. ILECs must provide CLECs with access, at cost-based rates known as TELRIC, to network elements that the FCC specifically finds are necessary for CLECs to meaningfully compete. *Id.* For network elements that the FCC finds are not subject to unbundling, and thus not necessary for CLECs, the Act authorizes ILECs to charge CLECs market-based rates under the just and reasonable standard, which are higher than TELRIC rates. *Id.*

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Generally, Qwest provisions orders for unbundled loops according to standard provisioning intervals that, in Arizona, vary from 5 days to 9 days. But there are times when CLECs want the order to be expedited. In the past, Qwest had provided Eschelon with

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1 “emergency” expedites for no additional charge. Effective January 2006, however, Qwest
2 began charging all CLECs a \$200 per day fee to expedite unbundled loops, pursuant to an
3 update in the Change Management Process (“CMP”).

4 Eschelon initiated a complaint docket with the Arizona Corporation Commission (the
5 “Commission”) in April of 2006. Eschelon claimed, among other things, that the imposition
6 of the \$200 per day fee for expedites breached Qwest’s Interconnection Agreement (“ICA”)
7 with Eschelon. The Commission adopted the findings of the ALJ and found that Qwest had
8 breached the ICA with Eschelon. The Commission held that Qwest must provide emergency
9 expedites for no additional charge to not only Eschelon, but to all CLECs.

10 Qwest appealed the Commission’s decision to this Court. Eschelon answered and
11 filed a counterclaim against Qwest and a cross-claim against the Commission and the
12 Commissioners in their official capacities. Qwest filed a Motion to Dismiss Amended
13 Counterclaim and Cross-claim (Doc. #57) on May 11, 2009.

14 The Court granted in part and denied in part Qwest’s motion to dismiss (Doc. #134).
15 The Court granted Qwest’s motion to dismiss the counterclaim against Qwest, but denied
16 Qwest’s motion to dismiss the cross-claim against the Commission. The Court held that
17 Qwest could not move to dismiss the cross-claim against the Commission because Qwest is
18 not a party to that claim. The Commission has since moved to dismiss the cross-claim (Doc.
19 #136).

20 In its September 23, 2009 Order, the Court granted Qwest’s motion to dismiss the 47
21 U.S.C. §207 counterclaim because “prudential concerns mandate that Eschelon raise the
22 issue of the proper rate to be charged for non-emergency expedites with the Commission
23 before proceeding in this Court.” (Doc. #134, p.5.) The Court stated that policy concerns
24 favor giving the Commission the opportunity to first decide the issue. (Id.) In general,
25 requiring agency exhaustion “makes good sense, because the reviewing court needs a full and
26 adequate understanding of the reasons for an agency’s decision” *Fones4all Corp. v.*
27 *Fed. Comm’n Comm’n*, 550 F.33d 811, 818 (9th Cir. 2008). The Court found that Eschelon
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1 did not meaningfully raise the issue of the proper rate for non-emergency expedites before
2 the Commission.

3 The Commission now moves to dismiss the cross-claim based on the Court's
4 prudential exhaustion ruling in the September 23, 2009 Order.

5 **II. ANALYSIS AND CONCLUSION**

6 The Commission and Eschelon have stipulated that any 47 U.S.C. §207 claims and/or
7 state law claims against the Commission in the Cross-claim should be dismissed. Pursuant
8 to that Stipulation, the Court will dismiss any and all state law claims and §207 claims
9 against the Commission. (Doc. #136, Stipulation p. 2.) That leaves only the motion to
10 dismiss the §252 cross-claim for decision.

11 **A. Legal Standard**

12 To survive a 12(b)(6) motion for failure to state a claim, a complaint must meet the
13 requirements of Federal Rule of Civil Procedure 8(a)(2). Rule 8(a)(2) requires a "short and
14 plain statement of the claim showing that the pleader is entitled to relief," so that the
15 defendant has "fair notice of what the . . . claim is and the grounds upon which it rests." *Bell*
16 *Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)(quoting *Conley v. Gibson*, 355 U.S. 41,
17 47 (1957)).

18 Although a complaint attacked for failure to state a claim does not need detailed
19 factual allegations, the pleader's obligation to provide the grounds for relief requires "more
20 than labels and conclusions, and a formulaic recitation of the elements of a cause of action
21 will not do." *Twombly*, 550 U.S. at 555 (internal citations omitted). The factual allegations
22 of the complaint must be sufficient to raise a right to relief above a speculative level. *Id.*
23 Rule 8(a)(2) "requires a 'showing,' rather than a blanket assertion, of entitlement to relief.
24 Without some factual allegation in the complaint, it is hard to see how a claimant could
25 satisfy the requirement of providing not only 'fair notice' of the nature of the claim, but also
26 'grounds' on which the claim rests." *Id.* (citing 5 C. Wright & A. Miller, *Federal Practice*
27 *and Procedure* §1202, pp. 94, 95(3d ed. 2004)).

1 Rule 8's pleading standard demands more than “an unadorned, the-defendant-
2 unlawfully-harmed-me accusation.” *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009)(citing
3 *Twombly*, 550 U.S. at 555). A complaint that offers nothing more than naked assertions will
4 not suffice. To survive a motion to dismiss, a complaint must contain sufficient factual
5 matter, which, if accepted as true, states a claim to relief that is “plausible on its face.” *Iqbal*,
6 129 S.Ct. At 1949. Facial plausibility exists if the pleader pleads factual content that allows
7 the court to draw the reasonable inference that the defendant is liable for the misconduct
8 alleged. *Id.* Plausibility does not equal “probability,” but plausibility requires more than a
9 sheer possibility that a defendant has acted unlawfully. *Id.* “Where a complaint pleads facts
10 that are ‘merely consistent’ with a defendant’s liability, it ‘stops short of the line between
11 possibility and plausibility of ‘entitlement to relief.’” *Id.* (citing *Twombly*, 550 U.S. at 557).

12 In deciding a motion to dismiss under Rule 12(b)(6), the Court must construe the facts
13 alleged in the complaint in the light most favorable to the drafter of the complaint and the
14 Court must accept all well-pleaded factual allegations as true. *See Shwarz v. United States*,
15 234 F.3d 428, 435 (9th Cir. 2000). Nonetheless, the Court does not have to accept as true
16 a legal conclusion couched as a factual allegation. *Papasan v. Allain*, 478 U.S. 265, 286
17 (1986).

18 **B. §252 CLAIM**

19 The Commission asserts that the Court must dismiss the §252 cross-claim under the
20 law of the case doctrine, which rests on the premise that the same issue presented a second
21 time in the same case should lead to the same result. The Commission argues that the Court
22 already has decided that Eschelon did not meaningfully raise the issue of the proper rate for
23 non-emergency expedites before the Commission and the Court therefore should not allow
24 Eschelon to proceed against the Commission on this issue in the cross-claim. The Court
25 agrees.

26 Eschelon’s response to the Commission’s motion to dismiss the cross-claim
27 essentially amounts to a motion for reconsideration of the Court’s earlier ruling, without
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1 calling it a motion to reconsider and without attempting to meet the requirements for a
2 motion to reconsider. Eschelon again points to all the places in the record where non-
3 emergency expedites were specifically mentioned. Eschelon also notes that the prudential
4 exhaustion doctrine is discretionary and that the law-of-the-case doctrine does not mean the
5 Court absolutely cannot change its mind.

6 First, Eschelon did not timely file a proper motion for reconsideration. Second, even
7 if Eschelon had filed a proper motion, the Court would not reconsider its earlier Order. The
8 Court recognizes that the prudential exhaustion doctrine is discretionary and that §252 does
9 not contain a statutory exhaustion requirement.¹ The Court nonetheless believes that the
10 Commission should have the first chance, after being presented with the issue in a proper
11 procedure, to fully analyze the proper rate for a non-emergency expedite.

12 After reviewing the voluminous record from the proceedings below, the Court finds
13 that Eschelon's reason for bringing its complaint and the vast majority of its arguments and
14 evidence related to the new fee charged by Qwest for emergency expedites. Eschelon felt
15 it should continue to receive emergency expedites at no additional cost, and that is why
16 Eschelon brought its action.

17 Regardless of whether the parties presented some amount of evidence regarding the
18 proper rate for non-emergency expedites, Eschelon did not seek relief on that issue (and
19 therefore did not meaningfully raise the issue), and the Commission did not have the
20 opportunity to fully analyze the issue after presentation of evidence and argument. The Court
21 finds that it does not have an adequate understanding of the reasons for the Commission's
22 temporary continuation, at the recommendation of the ALJ, of the status quo regarding the
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25 ¹The Court does not rely on *Fones4all v. Federal Communication Commission*, 550
26 F.3d 811 (9th Cir. 2008) for the proposition that administrative exhaustion is required on a
27 §252 claim. Rather, the Court in its earlier Order cited *Fones4all* for the general
28 justifications for administrative exhaustion and for the general standard for "meaningfully
raised."

1 non-emergency expedite. Before deciding the issue of the proper rate for non-emergency
2 expedites, the Commission should have the benefit of a proper complaint process and the
3 Court should have the benefit of a fully developed Commission record.

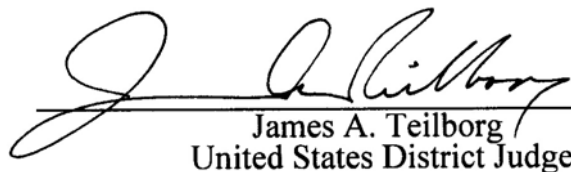
4 In its prior Order in this case, the Court found that Eschelon had failed to exhaust with
5 the Commission the issue of the proper rate for non-emergency expedites and that Eschelon
6 should have done so under the prudential exhaustion doctrine. The law of the case doctrine
7 generally precludes a court from reconsidering an issue previously decided in the same case.
8 *U.S. ex rel. Eitel v. Reagan*, 35 F.Supp.2d 1151,1154 (D.Ariz. 1998)(citing *Thomas v. Bible*,
9 983 F.2d 152, 154 (9th Cir. 1993)). Although the doctrine is discretionary, the Court should
10 reconsider a previously decided issue only if there has been an intervening change of
11 controlling authority, new evidence has surfaced, or the previous disposition was clearly
12 erroneous and would work a manifest injustice. *Id.* (quoting *Leslie Salt Co. v. United States*,
13 55 F.3d 1388, 1393 (9th Cir. 1995)).

14 The parties have not indicated a change in controlling authority or that new evidence
15 has surfaced since the Court's September 23, 2009 Order. Further, although Eschelon and
16 even the Commission may disagree, the Court does not believe that its earlier Order was
17 clearly erroneous and would work a manifest injustice. The Court therefore will decide the
18 issue of the non-emergency expedite rate in this Order in conformity with its earlier Order
19 and will grant the Commission's Motion to Dismiss.

20 Accordingly,

21 IT IS ORDERED Granting Commission's Motion to Dismiss Eschelon's Cross-Claim
22 in its Entirety (Doc. #136).

23 DATED this 22nd day of March, 2010.

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27 James A. Teilborg
28 United States District Judge