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IN THE MATTER OF THE
 APPLICATION OF U S WEST
 COMMUNICATION, INC., A
 COLORADO CORPORATION, FOR A
 HEARING TO DETERMINE THE
 EARNINGS OF THE COMPANY FOR
 RATEMAKING PURPOSES, TO FIX A
 JUST AND REASONABLE RATE OF
 RETURN THEREON AND TO APPROVE
 RATE SCHEDULES DESIGNED TO
 DEVELOP SUCH RETURN

Docket No. T-01051B-99-0105

COX ARIZONA TELCOM, L.L.C.'S

POST-HEARING BRIEF

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1 INTRODUCTION

2 Cox Arizona Telcom, L.L.C. ("Cox") opposes approval of the proposed Settlement
3 Agreement between Commission Staff and Qwest Corporation (the "Agreement" or "Settle-
4 ment Agreement"). Cox believes approval of the Agreement, particularly the Price Cap Plan
5 incorporated into the Agreement, is not in the public interest. The Price Cap Plan introduces
6 an alternative form of regulation in Arizona for the first time. Such a proposal significantly
7 changes the regulatory landscape and impacts both consumers and competitors.
8 Unfortunately, the new form of regulation arises in the context of a settlement between two
9 parties, which necessarily compromises the issues and does not lead to the best long-term
10 policy. Indeed, the Price Cap Plan contains numerous critical flaws and is not in the public
11 interest.

12 First, the Price Cap Plan contains several provisions that could stifle emerging
13 telecommunications competition in Arizona, including: (i) a provision that could allow
14 anticompetitive flexible pricing in focused geographic locations, thus allowing Qwest to
15 target and quash emerging competition; and (ii) price floors for Qwest's flexible pricing that
16 do not cover all of Qwest's common costs for its services or service packages, thus
17 potentially leading to cross-subsidization or predatory pricing.

18 Second, the Price Cap Plan provides for great competitive mischief by allowing the
19 packaging of a Basket 1 essential service (such as basic residential service) with a nominal
20 Basket 3 competitive service to create "new service package" that then enjoys Basket 3
21 flexible pricing. Those packages, when priced close to price floors or offered in certain
22 locations, could be used to stifle emerging competition.

23 Third, the Price Cap Plan is fundamentally ambiguous in many areas and simply lacks
24 necessary standards to allow proper application of its provisions. For example, throughout
25 the hearing, it became apparent that: (i) the Price Cap Plan does not clearly define the price
26 floors for either Basket 1 or Basket 3; (ii) there are no definitions of or limitations on the

1 terms “geographic location” or “purchasing patterns” in Section 4(g) of the Price Cap Plan
2 nor are there any standards to guide application of Section 4(g); and (iii) there is much
3 confusion over combining and pricing of Basket 1 and Basket 3 services. Such ambiguity
4 and lack of standards can only lead to uncertainty and future disputes that will tax the
5 resources of both the regulated community and the Commission.

6 Fourth, the Price Cap Plan effectively amends the Commission’s rules without a
7 formal rulemaking proceeding. For example, at this time, a telecommunications service
8 must meet the standards of A.A.C. R14-2-1108 (“Rule 1108”) to be afforded flexible pricing
9 under A.A.C. R14-2-1109. However, under the Price Cap Plan, Qwest need not meet Rule
10 1108 to gain flexible pricing for any new service or any new service package, even if the
11 service is not fully competitive or if the service package includes key essential services, such
12 as basic residential exchange service. Moreover, it was repeatedly stated that the Price Cap
13 Plan’s requirement that both the retail price and price floor for basic residential exchange
14 service (1FR) do not comport with the Commission’s Imputation Rule, A.A.C. R14-2-
15 1310.C. However, the Settlement Agreement blesses – indeed requires – those violations.

16 Fifth, as currently structured, the operation of the Price Cap Plan will inhibit the
17 ability of interested or affected parties, such as consumers and competitors, from ensuring
18 Qwest’s compliance with the Price Cap Plan. Qwest is *not* required to provide notice to
19 consumers or competitors for a variety of actions under the Price Cap Plan that could impact
20 consumers and competition. Moreover, the ability of competitors to ascertain improper
21 cross-subsidies or predatory pricing is greatly compromised due to the lack of generally
22 available information on the appropriate price floors.

23 In effect, the Price Cap Plan is designed to give Qwest a variety of tools to allow it to
24 compete more effectively with new entrants. However, the Price Cap Plan provides too
25 many tools to Qwest too soon – competition is just emerging in Arizona and the new
26 entrants’ market shares in many segments of the market are minimal, particularly in the

1 residential market. [Cox Ex. 1 (Collins 11/13/00), pp. 2-3; Cox Ex. 2 (Collins (08/09/00),
2 pp. 2-5] The Staff's consultant who supports the Price Cap Plan acknowledges that the "very
3 purpose" of providing Qwest "with additional freedom – and incentives – to offer packages
4 and bundles of services" under the Price Cap Plan is "to permit Qwest to compete more
5 effectively" against new entrant CLECs. [ACC Ex. 6 (Shooshan 11/20/00), p. 8:14-17]
6 Competing more effectively means being better able to retain (or gain) customers and
7 maintain (or increase) its market share. However, Qwest currently enjoys an over 95%
8 market share for many services. Granting Qwest new tools to maintain that enormous
9 monopoly share and concurrent monopoly power is not in the public interest because it chills
10 competition and the benefits it provides to Arizona consumers. Indeed, the Staff's other
11 consultant, Mr. Dunkel, admitted that, although limiting the growth of competition may be in
12 Qwest's interest, "it may not be in the public interest." [TR 565:13-25 (Dunkel)]¹ RUCO's
13 expert, Dr. Johnson, also emphasized this concern. [TR 428:2 to 429:22 (Johnson); RUCO
14 Ex. 14 (Johnson 11/13/00), p. 31 (the Price Cap Plan "affords Qwest far too much pricing
15 freedom, given the lack of effective competition for most of Qwest's services in the state");
16 RUCO Ex. 15 (Johnson 11/15/00), p. 6-7]

17 Cox's opposition to the Settlement Agreement tracks closely with several other
18 parties, including RUCO, and matches the sentiments expressed during public comment by a
19 variety of entities. [See TR 11:9 to 22:23 (Public Comments)] The consensus is that the
20 Settlement Agreement helps Qwest to the detriment of competition in Arizona. The
21 Settlement Agreement should be rejected.

22 ...

23 ...

24 ...

25
26 ¹ Citations to the hearing transcript will be done as "TR page:line (witness)."

1 **I. IMPROPER AMENDMENTS TO THE RULES**

2 The Price Cap Plan effectively amends two of the Commission's rules – A.A.C. R14-
3 2-1108 and A.A.C. R14-2-1310.C. It does so without meeting the requirements of a
4 rulemaking and therefore violates Arizona law.

5 **A. A.A.C. R14-2-1108**

6 Under current Commission rules, a telecommunications service or package of services
7 can be flexibly priced under A.A.C. R14-2-1109 only if the service or service package meets
8 the requirements of Rule 1108. However, the Price Cap Plan allows Qwest to flexibly price
9 any new service or service package in Basket 3. Both the Staff and Qwest acknowledge that,
10 under the Price Cap Plan, a new service or service package need not meet the requirements
11 of Rule 1108 to be placed in Basket 3 and be subject to, even if the service package contains
12 a Basket 1 service. [TR 264:11-18 (Teitzel); TR 610:24 to 611:18 (Shooshan)] Even more
13 egregious is that Qwest can obtain flexible pricing for a new service or service package in a
14 limited “geographic location” pursuant to Section 4(g) of the Price Cap Plan without meeting
15 the requirements of Rule 1108. [TR 269:11-18 (Teitzel); *see* TR 626:3-6 (Shooshan)] Thus,
16 the Price Cap Plan allows Qwest – and Qwest alone – to bypass Rule 1108.

17 Ironically, the Price Cap Plan stills requires the application of Rule 1108 if a Basket 1
18 service is to be moved to Basket 3 – in effect, acknowledging the importance of Rule 1108 in
19 determining whether a service or service package is appropriate for Basket 3 and its flexible
20 pricing. At a minimum, Rule 1108 sets a standard for factors that must be considered before
21 flexible pricing is appropriate. [*See* Staff Ex. 9 (Dunkel 08/09/00), pp. 12:17 to 14:3 (noting
22 the importance of Rule 1108 in determining if a service is competitive and appropriate for
23 flexible pricing)] That standard includes consideration of such things as market share. The
24 Price Cap Plan provides no similar standards, leaving only an ambiguous silence as to what
25 the Commission should consider before approving or rejecting a proposed new Basket 3
26 service or package. That uncertainty and lack of guidance is bad policy and will lead to

1 disputes in the future.

2 As currently written, the Price Cap Plan is not in the public interest because it
3 contradicts Rule 1108 and effectively amends that rule without a rulemaking. If a price cap
4 plan is adopted at some point, Cox believes that all services or service packages, regardless
5 of whether they are new or not, should meet the requirements of Rule 1108 before they are
6 afforded flexible pricing under A.A.C. R14-2-1109. That comports with the Commission's
7 Rules and is good policy.

8 The Price Cap Plan also modifies Rule 1108 when Qwest requests to move Basket 1
9 service to Basket 3 because it sets a six-month time period for Rule 1108 determination by
10 Commission Staff. Such a time period is not set forth in Rule 1108 and may operate to give
11 Qwest preferential expedited treatment under Rule 1108. Providing such preferential
12 treatment is not in the public interest.

13 **B. A.A.C. R14-2-1310.C**

14 Staff's own consultant acknowledges that the Price Cap Plan creates an exception to
15 the Commission's Imputation Rule (A.A.C. R14-2-1310.C) by allowing the 1FR service to
16 be priced below TSLRIC. [Staff Ex. 6 (Shooshan 11/20/00), p. 8:21-23] Again, this
17 effectively amends the Commission rules without a rulemaking. This "amendment" is
18 particularly egregious because 1FR service can be combined with any Basket 3 service to
19 create a new package subject to flexible pricing. [See, e.g., TR 299:11 to 300:7 (Dunkel)]
20 Thus, the package can be priced below TSLRIC and used to stifle any emerging residential
21 competition.

22 If the Commission believes it is appropriate to keep 1FR at its current retail rate, *then*
23 *the anticompetitive mischief of new 1FR-service packages can be eliminated by prohibiting a*
24 *new Basket 3 service package from including 1FR service* (or by having the price floor for
25 1FR packages in Basket 3 include a Rule 1310.C amount for 1FR).

26 ...

1 **II. ANTICOMPETITIVE PRICE CAP PLAN PROVISIONS**

2 Several provisions within the Price Cap Plan create significant anticompetitive
3 impacts on emerging telecommunications competition in Arizona. The apparent justification
4 that Qwest needs these provisions to be able “to compete more effectively” [see Staff Ex. 6
5 (Shooshan 11/20/00), p. 8:14-17] – and, thus, maintain its enormous market share – simply is
6 not in the public interest. Although Cox is not fundamentally opposed to price cap plans,
7 Cox is opposed to price cap plans that create significant potential for anticompetitive impact.
8 The proposed Price Cap Plan contains several such provisions that should be stricken or
9 modified. The Price Cap Plan also lacks certain provisions that could ameliorate
10 anticompetitive impacts or allow more effective monitoring of the impact of the Price Cap
11 Plan.

12 **A. Price Cap Plan Section 4(g)**

13 Section 4(g) of the Price Cap Plan provides that “new services and packages in Basket
14 3 may be offered to select customer groups based on their purchasing patterns or geographic
15 location.” As currently written, this provision will allow Qwest to target areas for flexible
16 pricing, even if there is little or no competition in those areas. Both the Staff consultants and
17 Qwest acknowledge that there is no minimum size for the “geographic location.” [TR 269:2-
18 4 (Teitzel); TR 660:16-21 (Shooshan)] Both the Staff consultants and Qwest believe that
19 new services or service packages under Section 4(g) may be approved without consideration
20 of the level of competition within the geographic location. [TR 269:5-10 (Teitzel); TR
21 625:17 to 626:6, 660:22 to 661:8 (Shooshan)] As a result, Section 4(g) gives Qwest the
22 ability to spot price and allows Qwest to quash emerging competition as competitors begin to
23 serve particular areas. [TR 428:18 to 429:10 (Johnson); Cox Ex. 1 (Collins 11/13/00), pp.
24 11-13] Section 4(g) is particularly harmful due to the reality of how a new entrant
25 telecommunications provider must roll out its service. Typically, a CLEC begins offering
26 service in a small area due to facilities and resource limitations. It cannot offer services over

1 a wide area or to hundreds of thousands of customers because it cannot physically handle a
2 large number of requests for service in a short time frame. However, under Section 4(g),
3 Qwest could focus on those small areas with special packages of services and stop that
4 emerging competition in its tracks. Indeed, Qwest witness Teitzel expressed his belief that
5 Qwest could, for example, offer a new package only to high-volume users in Chandler. [TR
6 267:7-22 (Teitzel)]

7 Cox's fear of spot pricing – that is, price floor pricing by Qwest in areas where a
8 CLEC is just starting to make competitive inroads – is not unfounded. Staff's own
9 consultant acknowledges that Qwest would have the incentive to spot price because it limits
10 the growth of competition. [TR 565:4-25 (Dunkel)] Indeed, Qwest believes it can offer
11 certain prices only to a specific area under Section 4(g) and it need not offer those prices
12 outside the area. [TR 267:7-22, 268:11 to 269:1 (Teitzel)]

13 Cox's concerns also are similar to Commission Staff's own consultants concerns
14 about Qwest's "competitive zone" proposal. The "competitive zone" proposal is closely
15 analogous to Section 4(g) and a comparison of the basic operation of the two proposals
16 dispels assertions to the contrary:²

17 **Competitive Zone Proposal:** In its rate case filing, Qwest proposed a "competitive
18 zone" mechanism for flexible pricing. Under the competitive zone proposal, Qwest would
19 be allowed to have flexible pricing for all services offered in a particular wire center
20 provided that there were other competitors who could serve that wire center, regardless of
21 whether they were actually serving the wire center in any significant way. To gain flexible
22 pricing, Qwest would submit a request to have a wire center designated as a "competitive
23 zone," and then the Commission Staff would have fifteen days to object to Qwest's request.
24 Qwest would not have to meet the requirements of Rule 1108 to flexibly price in a
25

26 ² The two proposals also are similar in effect to the scheme proposed in Proposition 108,
which was rejected by the voters 80% to 20%.

1 competitive zone. [See Staff Ex. 9 (Dunkel 08/09/00), p. 12]

2 **Section 4(g) Proposal:** Section 4(g) provides Qwest an even more effective tool for
3 focusing on areas in which it believes competition is developing or about to develop. Under
4 Section 4(g), Qwest can simply propose to offer a new service package – which could
5 constitute something as simple as basic residential service (Basket 1) plus 10-minutes of
6 intrastate toll service (Basket 3) [See TR 265:11 to 266:6 (Teitzel) (1FR plus Basket 3
7 service could be a new service package); TR 658:26 to 659:12 (Shooshan)] – in a particular
8 geographic location. That location need not be as large as a wire center. Indeed, both
9 Commission Staff and Qwest admit there is no minimum size for that location. [TR 269:2-4
10 (Teitzel); TR 660:16-21 (Shooshan)] They also admit that there need be no particular level
11 of competition present in the area. [TR 269:5-10 (Teitzel); TR 660:22 to 661:8 (Shooshan)]
12 Finally, they both admit that, under Section 4(g), the proposal need not meet the
13 requirements of Rule 1108. [TR 269:11-18 (Teitzel); TR 626:3-6 (Shooshan)] Staff then
14 has 30 days to approve or reject the Qwest proposed new service package.

15 Thus, Section 4(g) is basically identical to the competitive zone proposal – both allow
16 Qwest to request flexible pricing in a specific area without meeting Rule 1108 requirements
17 and the Commission has a very short time to review the request.

18 Both Staff consultants Shooshan and Dunkel opposed the Qwest competitive zone
19 proposal. [See Staff Ex. 9 (Dunkel 08/09/00), p. 10; Staff Ex. 12 (Shooshan 08/09/00), pp.
20 2-5] Mr. Dunkel harshly criticized the competitive zone concept, stating:

21 I recommend that the Commission deny the USWC “competitive
22 zone” proposal. I recommend that whatever regulatory structure
23 is adopted, include a requirement that prices in different
24 geographic areas may not vary by an amount that is greater than
25 the variation that is justified by any variation in the cost of
26 providing service. If the regulatory structure allows price
flexibility or “revenue neutral” restructuring, any such restructure
may not increase the rate differential between geographic areas
that is incorporated in the specifically approved ACC rates,
without specific Commission approval.

1 [Staff Ex. 9 (Dunkel 08/09/00), p. 10; *see* TR 540:22 to 541:4 (Dunkel)] At the hearing,
2 Dunkel confirmed that he believed that the competitive zone proposal was not in the public
3 interest because it would allow Qwest to offer pricing in areas where there is competition
4 while having higher prices in areas where there is no competition. [TR 566:1-8 (Dunkel)]
5 He further acknowledged that Qwest would have an incentive to offer lower rates in areas
6 where it faced some competition to limit the growth of a competitor, which again is not in
7 the public interest. [TR 565:13-25 (Dunkel)] Indeed, Dunkel's concerns about the
8 competitive zone proposal were not allayed by Qwest representations that Qwest would
9 never make an unreasonable request under the competitive zone proposal. Dunkel noted
10 that:

11 In his Rebuttal, Mr. Teitzel stated:

12 For expansion of competitive zones in the future,
13 Qwest would be required to notify the Commission
14 that competition exists in the form of at least one of
15 the three criteria specified in my Direct testimony in
16 a particular wire center. This notification would
17 certainly have to pass the "red face" test. It would
18 be based on much stronger evidence than a
19 competitor serving one customer in a wire center.
20 That is not even reasonable. [Footnote omitted]

21 I agree with Mr. Teitzel that it "is not even reasonable" that
22 Qwest would be allowed to establish a wire center as a
23 competitive zone if a competitor were serving only one
24 customer in a wire center. However, that unreasonable rule
25 is exactly what Qwest is proposing. Once such an
26 unreasonable rule is in place, Qwest could implement that
rule

...

- 22 A. Once the rules are in place, there would be no valid basis to
23 effectively challenge Qwest's utilization of those rules. The
24 time to stop an improper rule is when it is proposed, not later
25 when Qwest is making changes which are improper, but
26 which are allowed by that rule. I urge the Commission not
to adopt improper rules. Qwest is attempting to have the
rules set very lax, but assure the Commission that those lax
rules are meaningless, because supposedly Qwest would not
fully implement them. Obviously, rules that do not provide

1 the proper guidelines should not be adopted. Adopting
2 improper rules based upon Qwest's assurance that it does not
3 "intend" to actually utilize those rules, or utilize them to the
4 full, possible extent, is improper.

5 In addition, once the rules are in place, the "intentions" can
6 change. In the future, Qwest could simply declare that
7 "conditions" have changed, and therefore they are going to
8 implement the rules.

9 [Staff Ex. 11 (Dunkel 09/08/00), p. 43:2 to 44:6]

10 Those concerns are as true for Section 4(g) as they were for the competitive zone
11 proposal. Section 4(g) suffers the same infirmities as the competitive zone proposal. [See
12 also TR 429:11-22 (Johnson)] Section 4(g) simply should be removed from the Price Cap
13 Plan to avoid the inevitable disputes and contested proceedings as Qwest pushes the
14 envelope of Section 4(g).

15 Finally, Commission Staff's consultant on alternative form of regulation did not
16 propose Section 4(g) in the Price Cap Plan. [TR 662:2-10 (Shooshan)] He also did not
17 include a similar provision in his alternative form of regulation set forth last August. [See
18 TR 662:11-22 (Shooshan)] Thus, it appears that the Price Cap Plan contains an ambiguous,
19 overbroad anticompetitive provision that was proposed on the fly by Qwest during the course
20 of settlement negotiations – all without careful consideration, analysis or input by affected
21 parties. It is not in the public interest to dramatically change the competitive landscape in
22 such a manner.³

23 **B. Price Floor Provisions**

24 The proposed price floors for both the non-competitive and the competitive baskets
25 create competitive problems. Either a TSLRIC or a Rule 1310.C (A.A.C. R14-2-1310.C)
26 price floor does not recover all costs of a service because neither one recovers common

³ If the Commission believes a provision similar to Section 4(g) is warranted, it should limit the size of the geographic location to a rate center, which would allow some flexibility for Qwest to operate differently in large urban rate centers as opposed to smaller rural rate centers.

1 costs. [Cox Ex. 1 (Collins 11/13/00), pp. 13-14] Qwest acknowledges that if a particular
2 service is priced at a TSLRIC price floor or at a Rule 1310.C price floor, the price for that
3 service will not recover common costs attributable to the service; therefore, Qwest would
4 have to recover those common costs from another service. [TR 264:13-17 (Teitzel)] That is
5 a prohibited cross-subsidy. [TR 371:25 to 372:20 (Collins); Cox Ex. 1 (Collins 11/13/00),
6 pp. 13-14; *see* A.A.C. R14-2-1109.C] Moreover, it allows anticompetitive predatory pricing.
7 [See Cox Ex. 1 (Collins 11/13/00), p. 4] The appropriate price floor should be *at least* the
8 Rule 1310.C price for a particular service, plus an additional amount to cover the common
9 costs attributable to the particular service. Cox proposes an 18% markup (which is the
10 current Qwest retail discount to CLECs – an amount that is supposed to represent Qwest’s
11 savings on marketing and other retail activities that it need not incur if it is selling service
12 wholesale to a CLEC). [See Cox Ex. 1 (Collins 11/13/00), p. 6; Commission Decision No.
13 60635] In fact, to avoid price squeezes for new entrants, the price floor for a service should
14 be set at the sum of the attributed UNE rates that constitute the service plus 18%, which
15 represents the wholesale discount for Qwest in Arizona. [See Cox. Ex. 1 (Collins 11/13/00),
16 pp. 6, 13-14; *see* TR 428:18 to 429:10 (Johnson); RUCO Ex. 15 (Johnson 11/15/00), pp. 6-7]

17 A proper price floor for a service package is a more difficult proposition, particularly
18 if the package of services contains one or more Basket 1 services. To avoid a real potential
19 for predatory pricing by Qwest, the price floor for any service package that contains a Basket
20 1 service should include *the current Basket 1 retail price* as part of the price floor, not the
21 Rule 1310.C price. [Cox Ex. 1 (Collins 11/13/00), pp. 5, 10-11] That requirement will help
22 avoid manipulation of “new service packages” through combining essential Basket 1
23 services, such as basic local exchange, with some nominal Basket 3 service, such as 10
24 minutes of intraLATA toll.

25 ...

26 ...

1 **C. Presumption of Basket 3 Placement**

2 The Price Cap Plan improperly assumes that any new service or service package
3 should be placed in Basket 3. That presumption is unfounded because the use of only two
4 baskets of non-competitive services and fully-competitive services provides an artificial
5 situation that does not comport with reality. In fact, the typical situation is that services
6 *gradually* become competitive. [Cox Ex. 1 (Collins 11/13/00), pp. 9-10; RUCO Ex. 14
7 (Johnson 11/13/00), pp. 20, 25-26] It is also inappropriate given the limited competition in
8 Arizona at this time. [See TR 428:2 to 429:10 (Johnson)] Cox's concerns, however, would
9 be lessened if Qwest needed to meet the requirements of Rule 1108 before any new service
10 or service package could be placed in Basket 3. Indeed, Staff consultant Dunkel has noted
11 the importance of Rule 1108 in deciding whether a service should be flexibly priced:

12 Q. MR. TEITZEL PROPOSED TO CLASSIFY CERTAIN
13 WIRE CENTERS AS "COMPETITIVE ZONES". MR.
14 TEITZEL STATES "THE PRESENCE OF SIGNIFICANT
15 COMPETITION IN THESE WIRE CENTERS QUALI-
16 FIES THEM, UNDER ARTICLE 11, R-14-2-1108 OF THE
17 COMMISSION RULES, FOR 'COMPETITIVE' CLASSI-
18 FICATION." DOES MR. TEITZEL'S PROPOSAL MEET
19 THE CRITERIA FOR BEING A COMPETITIVE
20 SERVICE UNDER THE COMMISSION'S RULES?
21 [Footnote omitted]

22 A. No. USWC has not provided evidence that the Commission
23 rules require it to provide to show a service or area is
24 competitive. Many of the services in many areas that USWC
25 considers to be competitive will not meet the requirements of
26 the Commission rule, and are not competitive by standard
criteria.

27 Q. WHAT DO THE COMMISSION RULES REQUIRE BE
28 DEMONSTRATED IN ORDER TO CLASSIFY A
29 SERVICE AS COMPETITIVE?

30 A. Article 11, Section R14-2-1108(B) of the Commission's
31 Rules and Regulations set forth a number of pieces of
32 information that must accompany any USWC petition for
33 classifying a service or group of services as competitive.

34 ...

1 It is important to note that the current rules require an
2 indication of "market power." This is an important
3 requirement. When a company has little market power,
4 customers are protected from excessive rates, because they
5 can go to alternative suppliers if one company's rates are
6 excessive. However, when a company has high market
7 power, that means there is little price-restraining, effective
8 competition, and therefore, customers are not protected by
9 competition.

10 [Staff Ex. 9 (Dunkel 08/09/00), p. 12:17 to 14:3] If the Price Cap Plan is going to be limited
11 to two baskets, Cox urges the Commission to err on the side of putting a new service or
12 package into the non-competitive basket unless and until Qwest can prove that the service or
13 package is fully competitive under Rule 1108.

14 **D. Provisions on Compliance Monitoring**

15 Cox is concerned about the ability of both Commission Staff and interested/affected
16 parties to monitor the Qwest price floors. It appears that there are up to 4,000 different
17 service prices that fall under the Price Cap Plan. [See TR 259:22 to 260:4 (Teitzel)] It also
18 appears that Qwest updates the cost studies for those services on a regular basis
19 (approximately every 1-2 years). [TR 261:23 to 263:14 (Teitzel)] However, the Price Cap
20 Plan is silent on when and how often Qwest must file TSLRIC cost studies or other price
21 floor calculations with the Commission. It also does not contemplate any particular follow
22 up – either on the part of Qwest or the Commission – to consider updated cost studies or
23 price floor calculations at some point after the new service or service package is approved.
24 The lack of such a process or standard undermines the effectiveness of the Price Cap Plan
25 from stopping cross-subsidies or predatory pricing.

26 **III. AMBIGUOUS PROVISIONS AND LACK OF STANDARDS IN THE PRICE CAP PLAN**

Much of the evidentiary hearing on the proposed Settlement Agreement focused on
trying to gain an understanding of the meaning of certain provisions of the Price Cap Plan or
the standards for the application of certain provisions of the Price Cap Plan. The hearing

1 often revealed that Qwest and Staff believe that the Price Cap Plan should be interpreted in a
2 manner not obvious on the face of the Price Cap Plan's express terms. Moreover, many of
3 the most troublesome provisions of the Price Cap Plan contain ambiguous standards – at best
4 – for their application. Given that this Price Cap Plan ushers in a new regulatory paradigm
5 and creates a new competitive landscape, it is important that standards of application are
6 clarified and greatly elaborated upon. Using references to generic (and ambiguous) statutory
7 provisions that were adopted in a regulatory monopoly context, such as A.R.S. § 40-250 or
8 A.R.S. § 40-334, is not sufficient. Without more specificity, future questions and disputes
9 will tax the regulated community, consumers and the Commission's resources. Indeed, most
10 alternative forms of regulation are much more detailed than the five-and-a-half page Price
11 Cap Plan at issue here. The ambiguities and lack of appropriate standards alone justify
12 rejection of the Settlement Agreement.

13 Cox will not dwell on every ambiguity that should be clarified in the Price Cap Plan
14 but will focus on several key provisions that could provide anticompetitive tools to Qwest.⁴

15 First, the definition of the price floor for both Basket 1 and Basket 3 services
16 apparently is not TSLRIC as stated in the Price Cap Plan. Rather, the price floor should be
17 consistent with the Commission's Imputation Rule (A.A.C. R14-2-1310.C), which provides
18 that a service may be priced down to TSLRIC, unless there is a need to impute the prices of
19 "all essential services, facilities, components, functions or capabilities" that are utilized to
20 provide that particular service. Although Commission Staff believes that a provision in the
21 Basket 2 section (Section 3(g)) makes it clear that Rule 1310.C applies to Baskets 1 and 3
22 price floors, Cox urges that the Basket 1 and Basket 3 sections of the Price Cap Plan be
23 revised to expressly set price floors under Rule 1310.C.

24
25 ⁴ Cox has provided proposed revisions to several sections of the Price Cap Plan (Attachment
26 A) without waiving its position that the Price Cap Plan is against the public interest. These proposed
revisions focus on the most troublesome provisions of the Price Cap Plan.

1 Even if it is clear that Rule 1310.C sets price floors, the hearing revealed significant
2 conflict on how Rule 1310.C would be interpreted and applied to determine a price floor.
3 For example, there were conflicting beliefs regarding such critical issues as what constitute
4 essential services and how the loop cost should be allocated among services. [See, e.g., TR
5 542:6 to 543:1; 548:11 to 551:8; 561:15 to 563:3 (Dunkel)] There also is little historical
6 guidance how to interpret Rule 1310.C. [See RUCO Ex. 15 (Johnson 11/15/00), pp. 5-6]
7 Those discrepancies highlight the problems that will arise in the future if the Settlement
8 Agreement is approved without significant clarification of such key issues.

9 Second, there was considerable confusion over what could constitute a new service or
10 a new service package for Basket 3. [See, e.g., TR 664:17 to 668:10 (Shooshan)] Although
11 the testimony at the hearing *may* have clarified the provisions in Section 4(e), those
12 clarifications need to be incorporated into express terms to ensure that everyone understands
13 what is intended. Moreover, there needs to be some standard for determining when a service
14 or service package is truly new and not just a slightly modified version of an existing service
15 or package. Such a standard does not currently exist in the Settlement Agreement, Arizona
16 statutes or Commission regulations or decisions. [See TR 314:7 to 316:17 (Teitzel)
17 (discussing lack of standard)]

18 Third, Section 4(g) of the Price Cap Plan provides that new services or packages can
19 be provided to “selected customer groups based on their purchasing patterns or geographic
20 location, for example.” Such a broad and ambiguous provision could provide Qwest with the
21 ability to focus on a very narrow portion of the market in which competition is just
22 emerging. If Section 4(g) is retained in the Price Cap Plan, the terms “selected customer
23 groups,” “purchasing patterns” and “geographic location” need further explanation and
24 guidance. Witnesses for both Qwest and the Staff admitted that there was no minimum size
25 for a “geographic location” [TR 269:2-4 (Teitzel); TR 660:16-21 (Shooshan)], meaning that
26 it could be as small as a floor in an office building or a single apartment complex. Similarly,

1 Qwest witness Teitzel indicated Section 4(g) would allow Qwest to focus on a group of
2 customers buying a particular product within a particular city. [TR 267:7-22 (Teitzel)] That
3 could mean someone buying Cox phone service in Chandler. Both of these provisions are
4 rife with the potential for anticompetitive spot pricing designed to snuff out emerging
5 competition. [See Cox Ex. 1 (Collins 11/13/00), pp. 11-13] Moreover, it appears Staff does
6 not know how price floors will be set for geographic locations. [See TR 661:9-18
7 (Shooshan)] The actual anticompetitive impact of the spot pricing may be even greater
8 depending on how Staff decides to set geographic location price floors (and how those price
9 floors are factored into price floors outside the area).

10 Finally, the Price Cap Plan does not set forth adequate standards for approval or
11 rejection of a new service or service package under Section 4(g). [See Cox Ex. 1 (Collins
12 11/13/00), p. 12] The reference to A.R.S. § 40-334 provides little comfort. Taken on its
13 face, A.R.S. § 40-334 ought to prohibit Section 4(g) in its entirety because it forbids “any
14 unreasonable difference as to rate, charges, services, service facilities or in any other respect,
15 either between localities or between classes of service.” However, the A.R.S. § 40-334
16 standard for determining an unreasonable difference is as vague and ambiguous and as
17 lacking in adequate guidance as Section 4(g) – particularly with respect to a competitive
18 environment. Such a lack of clarity makes it difficult for Commission Staff to conduct an
19 effective analysis of proposals by Qwest under Section 4(g) or for interested parties to
20 challenge such proposals. Unless Section 4(g) can be clarified to minimize future
21 uncertainty and conflict, it should be removed from the Price Cap Plan at this time.

22 **IV. PROCESS AND NOTICE ISSUES**

23 Given the expansive competitive “tools” provided to Qwest under the Price Cap Plan,
24 Cox is concerned that there are inadequate procedural safeguards to effectively monitor
25 potential abuse of those tools.

26 ...

1 First, Cox is concerned that the Price Cap Plan provides inadequate notice to
2 interested and affected parties regarding a variety of the processes contemplated under the
3 Price Cap Plan. In particular, there is no notice to consumers or competitors of proposed
4 price changes for Basket 1 services or for the filing of proposed new services or new service
5 packages for Basket 3.⁵ This lack of notice is directly at odds with the policies expressed in
6 Rule 1108.A, which does require notice to competitors any time a telecommunications
7 company seeks to have its services deemed competitive and subject to flexible pricing. This
8 policy is well founded because often competitors are able to present information that the
9 Commission may not be aware of or may lack the resources to uncover. Given the
10 complexities of the issues and the need to avoid harm to the emerging competition in
11 Arizona, Cox urges the Commission to include appropriate notice provisions to consumers,
12 consumer groups and competitors for critical processes under the Price Cap Plan.

13 Second, Cox is concerned about the Commission and affected parties' ability to
14 monitor inappropriate pricing behavior by Qwest for all services that flexibly priced. As
15 noted above, there are up to 4,000 different services that will enjoy some level of flexible
16 pricing and the cost studies for those services are updated regularly. [See TR 259:22 to
17 263:14 (Teitzel)] However, it appears that Staff does not have cost studies for every such
18 service and certainly not updated studies for every such service. [See TR 263:10-14 (Teitzel)
19 (Qwest does not typically submit updated cost studies to Commission); Cox Ex. 1 (Collins
20 11/13/00), p. 11 and Ex. A thereto] The Price Cap Plan needs to provide some process that
21 allows competitors to review cost studies or other Rule 1310.C determinates that set price
22 floors without having to initiate a complaint process against Qwest. Complaint proceedings
23 simply waste the resources of the Commission, Qwest and interested parties. The Price Cap
24

25 ⁵ Cox assumes that the notice requirements of Rule 1108 will apply when Qwest seeks to
26 have a Basket 1 service moved to Basket 3, but Qwest witness, Maureen Arnold, indicated that
Qwest would not provide such notice.

1 Plan also must be much more explicit in describing the price floor information that Qwest
2 must provide to the Commission for all services subject to flexible pricing (those services
3 also should include Basket 1 services because Qwest now has the ability to lower Basket 1
4 services upon approval by Commission Staff). Without such provisions and procedures, it
5 will be impossible to monitor whether Qwest's pricing is appropriate.

6 **V. THE SETTLEMENT AGREEMENT IS NOT IN THE PUBLIC INTEREST**

7 As currently structured, the Settlement Agreement and the Price Cap Plan, are not in
8 the public interest.

9 First, one of the asserted purposes of the Price Cap Plan, which is to allow Qwest "to
10 compete more effectively" with CLECs and to maintain its enormous market share, is wholly
11 inconsistent with the Telecommunications Act of 1996 and this Commission's policy of
12 encouraging competition. Given the current level of competition in Arizona, the Price Cap
13 Plan provides too many tools to Qwest that can be used in an anticompetitive way. At some
14 point, those tools may be appropriate but not now – particularly given Qwest's enormous
15 market share in almost every segment of the local exchange market. Competition is in the
16 public interest. Maintaining Qwest's market share is not.

17 Second, the Settlement Agreement and the Price Cap Plan contain far too much
18 ambiguity and uncertainty to be in the public interest. Unless the Settlement Agreement and
19 the Price Cap Plan are significantly revised, those documents will undoubtedly lead to
20 numerous disputes and additional litigation, creating a drain on Commission, consumer and
21 industry resources. If the purpose of a settlement is to resolve issues, conserve resources and
22 avoid litigation, this Settlement Agreement does not serve that purpose.

23 Third, the Price Cap Plan attempts to introduce an alternative form of regulation to
24 Arizona. However, alternative forms of regulation should not arise from a settlement
25 between two parties in which important policies and issues may be compromised. Rather, it
26 should be adopted in a separate docket that: (i) involves all interested parties from the

1 beginning; (ii) takes adequate time to thoroughly examine the issues; and (iii) adopts
2 provisions that do not compromise the best policies to serve the public interest. That has not
3 happened here. Moreover, alternative forms of regulations generally are significantly more
4 detailed than the five-and-a-half page Price Cap Plan here. Additional detail would help
5 ameliorate future disputes over interpretation and application of the Price Cap Plan.

6 CONCLUSION

7 Although Cox supports alternative form of regulation in general, this Settlement
8 Agreement with its Price Cap Plan is not an appropriate alternative form of regulation at this
9 time in Arizona. It attempts to do too much too soon and without enough detail to ensure
10 that it will serve the public interest and will not harm emerging competition. The Settlement
11 Agreement is not in the public interest and should be rejected.

12
13 December 18, 2000.

14 Respectfully submitted,

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COX ARIZONA TELCOM, L.L.C.'S
PROPOSED REVISIONS TO
ATTACHMENT A:
TERMS, CONDITIONS AND OPERATION OF THE PRICE CAP PLAN

Price Cap Plan

- 1)c)v) ~~Individual service prices must exceed the service's Total Service Long Run Incremental Cost ("TSLRIC")~~ **Price floors for individual services must meet the pricing requirements of A.A.C. R14-2-1310.C, plus an additional 18% of the price established under A.A.C. R14-2-1310.C,** unless a different cost standard applicable to all telecommunications service providers is determined appropriate by the Commission.
- 4)a) This Basket includes only those services that have been accorded pricing flexibility or have been determined by the Commission to be competitive under A.A.C. R14-2-1108, and new services and new service packages offered by Qwest **that are determined by the Commission to be competitive under A.A.C. R14-2-1108.** Any new services and new service packages offered by Qwest shall be subject to the prior review and approval of the Commission, as provided in subpart e) below. A list of services included in Basket 3 at the inception of this Price Cap Plan is appended hereto as Attachment E.
- 4)e) Any services in Basket 1 may be the components of any new package that would be offered in Basket 3. Each Basket 1 service that is included in a package offered in Basket 3 shall continue to be offered in its current form in Basket 1 as of the commencement of the Price Cap Plan. Such new packages that involve the capped services in Basket 1, or any new services proposed to be included in Basket 3, shall be submitted at least thirty days in advance of the proposed effective date of the tariff of the new package or service ~~and~~ shall be subject to Commission consideration as provided in A.R.S. § ~~40-250~~ **40-250 and shall be determined to be competitive under A.A.C. R14-2-1108.** The price of the new package or service shall ~~exceed the TSLRIC of~~ **meet the pricing requirements of A.A.C. R14-2-1310.C, plus an additional 18% of the price established under A.A.C. R14-2-1310.C for** the package or service. ~~For purposes of combining Basket 1 services with Basket 3 services and setting a floor for that package, the price of 1FR service shall be the applicable retail price for that service.~~
- i) Qwest shall be required to inform consumers, through its marketing of such new packages, including through its bill inserts, educational materials and customer representative scripts, that the services in Basket 1 remain available and can continue to be purchased as separate offerings.

COX ARIZONA TELCOM, L.L.C.'S
PROPOSED REVISIONS TO
ATTACHMENT A:
TERMS, CONDITIONS AND OPERATION OF THE PRICE CAP PLAN

- ii) The mere repackaging of existing Basket 1 services does not qualify the existing services to be “new services.” services” or a “new service package.”
- 4)f) Individual service and package prices in Basket 3 must provide revenues ~~in excess of the service’s or package’s TSLRIC subject to the provisions of subpart e) above,~~ that meet the pricing requirements of A.A.C. R14-2-1310.C, plus an additional 18% of the price established under A.A.C. R14-2-1310.C unless a different cost standard applicable to all telecommunications service providers is determined appropriate by the Commission.
- 4)g) Section 4(g) should be deleted entirely. Alternatively, it should be revised as follows:
- New services and packages in Basket 3 may be offered to selected customer groups based on their purchasing patterns or geographic location, for example. ~~This provision~~ However, the minimum size of a “geographic location” must correspond to one of Qwest’s current rate center boundaries. This provision also shall not be construed to permit red-lining based on criteria such as wealth or race, or to permit Qwest to discriminate against any class of customers in violation of A.R.S. Section 40-334. To avoid discrimination between customer groups if the criteria of “purchasing patterns” is used, all customers within the rate center must be able to order the same package at the same rates.
- 4)i) A Basket 1 service may be moved to Basket 3 upon Qwest meeting the criteria of R.14-2-1108. ~~Staff and Qwest agree that Staff will process such an Application as expeditiously as reasonably possible and, in any event, will complete such processing within a period of six months, unless another time period is agreed to by Qwest, or the six month time period is waived by the Commission.~~