

ORIGINAL



0000015518

BEFORE THE ARIZONA CORPORATION COMMISSION

RECEIVED

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

COMMISSIONERS 2005 JAN 26 P 4: 34
JEFF HATCH-MILLER, CHAIRMAN
WILLIAM A. MUNDELL AZ CORP COMMISSION
MARC SPITZER DOCUMENT CONTROL
MIKE GLEASON
KRISTIN K. MAYES

Arizona Corporation Commission

DOCKETED

JAN 26 2005

DOCKETED BY	
-------------	--

IN THE MATTER OF QWEST CORPORATION'S
FILING OF RENEWED PRICE REGULATION
PLAN

Docket No. T-01051B-03-0454

IN THE MATTER OF THE INVESTIGATION OF
THE COST OF TELECOMMUNICATIONS
ACCESS.

Docket No. T-00000D-00-0672

**COX ARIZONA TELCOM, LLC's
RESPONSE TO QWEST CORPORATION'S MOTION TO COMPEL**

Cox Arizona Telcom, LLC ("Cox Telcom") responds to Qwest Corporation's (Qwest) motion to compel Cox Telcom to produce: (i) cost information concerning Cox Telcom's telephone service and (ii) cost information concerning cable and broadband services that are provided by Cox Telcom's affiliate. Qwest is pursuing this cost information in a docket that addresses Qwest's telephone rates, *not* Cox Telcom's rates or video/broadband rates. The information sought by Qwest does not address the issues presented in Qwest's Renewed Price Cap Plan. The Commission should deny Qwest's motion to compel.

Background

In this docket, Qwest is basically seeking a new price cap for *Qwest's* non-competitive rates, increased flexibility for pricing *Qwest's* competitive rates and the creation of "competitive zones" for *Qwest* in areas in which there is at least one other competitor. One of the issues raised by flexible pricing is the nature of the parameters for flexible pricing, including a rule setting a price floor and a rule regarding cross-subsidization. Currently, CLECs are subject to such rules in Commission Rules R14-2-1109.A and -1009.C.

1 The genesis of the trail of data requests that ultimately led to Qwest Request Nos. 8.2 and
2 8.3 – the requests at issue here -- was a general statement by Cox witness Wayne Lafferty in his
3 direct testimony about existing Commission pricing rules for CLECs. Among other things, Mr.
4 Lafferty stated that “cross subsidization between a competitor’s various services is also
5 prohibited.” [A copy of the relevant excerpt of Mr. Lafferty’s Direct Testimony is attached as
6 Exhibit A] In its Request No. 4.22, Qwest cited that testimony and then asked a confusing
7 question about Mr. Lafferty’s contention concerning that testimony. As set forth in Cox Telcom’s
8 initial response to Qwest Request No. 4.22, Cox explained that the basis of Mr. Lafferty’s
9 statement was simply A.A.C. R14-2-1109.C.

10 Unsatisfied with that response, Qwest pressed for additional response to the portion of
11 Request No. 4.22 that Cox had objected to as vague and ambiguous. Yet, Qwest never clarified
12 what it meant by “direct costs”, “stand alone basis” or “all of Cox services in Arizona” nor refined
13 the confusing nature of the request. Cox Telcom again objected and then, without waiving the
14 objection, indicated that it was pricing its telecommunications services above “direct costs”.
15 Assuming that Qwest was inquiring through Request No. 4.22 as to whether Cox was complying
16 with Commission Rules, that inquiry was wholly irrelevant to this proceeding.

17 In spite of the irrelevance of its inquiry in Request No. 4.22, Qwest pressed forward with
18 more intrusive, more irrelevant and burdensome discovery. In Request No. 8.2, Qwest asked Cox
19 Telcom to provide Cox Telcom’s recurring and nonrecurring “direct costs” for certain of Cox
20 Telcom’s telecommunications service. In Request No.8.3, Qwest asked about the “direct costs” of
21 video and high speed internet services, which are actually provided by an affiliate of Cox Telcom.

22 **Argument**

23 **Request No. 8.2**

24 Qwest’s attempts to discover Cox Telcom’s highly proprietary cost of service information
25 in Qwest’s own Price Cap docket is simply overreaching. Qwest (at 4) provides only a brief and
26 somewhat cryptic justification for discovery – the cost information for a specific CLEC will
27 somehow help set the general parameters for Qwest’s flexible pricing. Qwest’s brief assertion of

1 possible relevance of its overreaching data requests is misplaced.

2 First, with respect to pricing parameters that are to be applied to Qwest – and any inequity
3 between those parameters and the CLEC pricing rules – Qwest already knows the applicable
4 CLEC pricing rules. CLECs are currently subject to specific parameters on pricing that are set
5 forth in the Commission rules, such as R14-2-1109, and in other statutes, such as A.R.S. § 40-334.
6 Even if Qwest believes those CLEC rules provide more pricing flexibility to CLECs than Qwest
7 believes it will have under R14-2-1310, that belief does not justify burdensome discovery into the
8 cost information of a single CLEC.

9 Second, if Qwest is complaining about what price floor and imputation parameters it
10 currently faces –or will face -- for its competitive services, then it effectively is seeking to overrule
11 R14-2-1310 – which sets forth the current applicable Commission rules on price floors and
12 imputation for ILECs. A challenge to the propriety of a rule does not give Qwest carte blanche to
13 conduct burdensome discovery of highly-proprietary information of its competitors.

14 Third, if the Commission believes that a CLEC is ignoring the Commission’s rules and
15 setting its prices too low – and should be charging consumers *more* -- the Commission can bring
16 an order to show cause with respect to those concerns. However, the pricing by a specific CLEC
17 simply is not the issue in this docket.

18 Finally, Qwest has overstated their right to discovery, particularly in these circumstances.
19 Discovery into the “direct costs” of a single CLEC’s telecommunications services is irrelevant to
20 the issues in this docket. Arizona courts have rejected discovery into matters having no bearing
21 on the relevant issues of a case. *See, e.g., Magna Investment & Development Corp. v. Pima*
22 *County*, 128 Ariz. 291, 296, 625 P.2d 354, 359 (Ct. App. 1981). In *Magna Investment*, Magna had
23 sued Pima County seeking to reduce the valuation of its department store for tax purposes. Magna
24 owned the anchor tenant in El Con Mall in Tucson. Magna submitted a valuation based on the fair
25 market rental value of its leasehold. In attempting to justify its higher valuation of the anchor
26 tenant leasehold, Pima County sought discovery into the lease terms of smaller tenants in the mall,
27 which generally had higher rent than the anchor. However, the trial court refused to compel

1 discovery of smaller tenant lease terms, including rental rates. The Court of Appeals noted that the
2 smaller tenant lease terms were irrelevant to a valuation based on fair market rental value of a
3 major anchor tenant and, therefore, upheld the denial of discovery.

4 The Magna Investment decision is instructive in this discovery dispute. Here, Cox
5 Telcom's actual costs have no bearing on the legal parameters to be set on Qwest's flexible
6 pricing. All CLECs, including Cox Telcom, are already subject to Commission rules on
7 competitive pricing parameters. Cox Telcom's actual costs also have no bearing on whether
8 Qwest should have areas designated as "competitive zones" for flexible pricing if another CLEC is
9 competing with Qwest in that area. The issue there is the presence of a CLEC, not the CLEC's
10 cost of service. Finally, Cox Telcom's actual costs certainly have no bearing on Qwest's own
11 revenue requirements or the appropriate rates for Qwest's non-competitive services. Discovery of
12 Cox Telcom's actual costs should be denied.

13 **Request 8.3**

14 Qwest's Request 8.3 -- seeking cost information about video and high speed internet
15 services provided by *an affiliate* of Cox Telcom -- is even more overreaching than Request No. 8.2
16 and should be rejected for similar reasons.¹

17 **Relief Requested**

18 The Commission should deny Qwest's motion to compel.
19
20
21
22
23
24
25

26 ¹ Moreover, Cox Telcom is not the entity that possesses the information sought by Request
27 No.8.3.

ROSHKA HEYMAN & DEWULF, PLC
ONE ARIZONA CENTER
400 EAST VAN BUREN STREET - SUITE 800
PHOENIX, ARIZONA 85004
TELEPHONE NO 602-256-6100
FACSIMILE 602-256-6800

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

RESPECTFULLY SUBMITTED January 26, 2005.

COX ARIZONA TELCOM, LLC

By 
Michael W. Patten
ROSHKA HEYMAN & DEWULF, PLC
One Arizona Center
400 East Van Buren Street, Suite 800
Phoenix, Arizona 85004
(602) 256-6100

ORIGINAL and **15 COPIES** of the foregoing filed January 26th, 2005, with:

Docket Control
ARIZONA CORPORATION COMMISSION
1200 West Washington Street
Phoenix, Arizona 85007

Jane Rodda, Esq.
ALJ, Hearing Division
Arizona Corporation Commission
400 West Congress
Tucson, Arizona 85701

Maureen A. Scott, Esq.
Legal Division
Arizona Corporation Commission
1200 West Washington Street
Phoenix, Arizona 85007

Ernest G. Johnson, Esq.
Director, Utilities Division
Arizona Corporation Commission
1200 West Washington Street
Phoenix, Arizona 85007

ROSHKA HEYMAN & DEWULF, PLC
ONE ARIZONA CENTER
400 EAST VAN BUREN STREET - SUITE 800
PHOENIX, ARIZONA 85004
TELEPHONE NO 602-256-6100
FACSIMILE 602-256-6800

1 **COPIES** of the foregoing /mailed
this 26th day of January, 2005, to:

2 Timothy Berg, Esq.
3 Theresa Dwyer, Esq.
4 Darcy R. Renfro, Esq.
5 Fennemore Craig, PC
6 3003 North Central Avenue, Suite 2600
7 Phoenix, Arizona 85012-2913

8 Todd Lundy, Esq.
9 Qwest Law Department
10 1801 California Street
11 Denver, Colorado 80202

12 Scott S. Wakefield, Esq.
13 Residential Utility Consumer Office
14 1110 West Washington, Suite 220
15 Phoenix, Arizona 85007

16 Thomas F. Dixon
17 Worldcom, Inc.
18 707 17th Street, 39th Floor
19 Denver, Colorado 80202

20 Thomas H. Campbell
21 Michael T. Hallam
22 Lewis and Roca
23 40 North Central Avenue
24 Phoenix, Arizona 85004

25 Peter Q. Nyce, Jr
26 Regulatory Law Office
27 U. S. Army Litigation Center
901 N. Stuart Street, Suite 713
Arlington, Virginia 22203

Richard Lee
Snavelly King Majoros O'Connor & Lee, Inc.
1220 L Street N.W., Suite 410
Washington, D.C. 20005

Eric Heath
Sprint
100 Spear Street, Suite 930
San Francisco, California 94105

Steven J. Duffy
Isaacson & Duffy
3101 North Central Avenue, Suite 740
Phoenix, Arizona 85012

Martin A. Aronson, Esq
Morrill & Aronson PLC
One East Camelback, Suite 340
Phoenix, Arizona 85012

Walter W. Meek
Arizona Utilities Investors Association
2100 North Central Avenue, Suite 210
Phoenix, Arizona 85004

Curt Huttzell
Citizens Communications Company of Az.
4 Triad Center, Suite 200
Salt Lake City, UT 84180

Jon Poston
ACTS
6733 East Dale Lane
Cave Creek, Arizona 85331

Jeffrey W. Crockett
Snell & Wilmer
One Arizona Center
400 East Van Buren
Phoenix, Arizona 85004

Albert Sterman
Arizona Consumers Council
2849 East 8th Street
Tucson, AZ 85716

26
27 By 

EXHIBIT

"A"

BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

MARK SPITZER, Chairman
WILLIAM A. MUNDELL
JEFF HATCH-MILLER
MIKE GLEASON
KRISTIN MAYES

IN THE MATTER OF QWEST CORPORATION'S
FILING OF A RENEWED PRICE REGULATION
PLAN

) DOCKET NO. T-01051B-03-0454
)
)
)

IN THE MATTER OF THE INVESTIGATION OF
THE COST OF TELECOMMUNICATIONS
ACCESS

) DOCKET NO. T-00000D-00-0672
)
)
)

DIRECT TESTIMONY

OF

F. WAYNE LAFFERTY

ON BEHALF OF

COX ARIZONA TELCOM, L.L.C.

November 18, 2004

(CONFIDENTIAL VERSION)

1 reclassify competitive zones as non-competitive. However, this control would only
2 provide prospective relief and would not monitor Qwest's performance during the time a
3 zone was deemed competitive. Re-regulation could also be disruptive to customers,
4 especially if Qwest is forced to increase rates to eliminate discriminatory situations.
5

6 **Q. How do Qwest's proposed tariff and pricing obligations for competitive zones**
7 **compare to existing rules for competitors in Arizona?**

8 A. As proposed, Qwest would enjoy significantly less oversight than its competitors.
9 Competitors are required to file tariffs specifying the maximum allowable rate.⁴⁴ Their
10 rates must not be less than their total service long-run incremental cost of providing the
11 service. Cross subsidization between a competitor's various services is also prohibited.
12 Changes to competitors' prices can only be made if the resulting price is below the
13 maximum tariff published rate and above the cost based price floor. Increases above the
14 competitor's maximum tariff price must be submitted to the Commission for approval.⁴⁵
15

16 **Q. Is Qwest's proposal to allow unlimited price changes with no advance notice or**
17 **commission oversight adequate?**

18 A. No. At a minimum Qwest should follow the existing pricing rules for competitors found
19 in Sections R14-2-1109 and R14-2-1110. Competitive neutrality requires Qwest not be
20 afforded flexibility that is not available to its competitors. Qwest has not specified
21 whether it proposes that its maximum rates would be established in tariffs for competitive

⁴⁴ Commission Rule R14-2-1109.

⁴⁵ Commission Rule R14-2-1110.