

ORIGINAL



0000022464

BEFORE THE ARIZONA CORPORATION COMMISSION

RECEIVED

Commissioners

2005 JUL 27 P 3:45

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

AZ CORP COMMISSION
DOCUMENT CONTROL

In the Matter of the Application of)
ADELPHIA TELECOMMUNICATIONS,)
LLC lka Adelphia for a Certificate)
of Public Convenience and Necessity)
To Provide Intrastate, Facilities-Based,)
Non-Switched, Dedicated Point-to-)
Point Data Transport Telecommunications)
Services in the)
State of Arizona and Petition for)
Competitive Classification of Proposed)
Services)
)

Docket No. T-04282A-04-0763

BRIEF OF ADELPHIA TELECOMMUNICATIONS, LLC LKA ADELPHIA

Pursuant to the Arizona Corporation Commission ("Commission") Rules of Practice and Procedure, R.14-3-106, and the Administrative Law Judge ("ALJ") Wolfe's request, ACC Telecommunications, LLC, locally known as Adelphia ("Adelphia") hereby respectfully files this brief addressing the lawfulness of individual case basis ("ICB") pricing for its proposed services. As discussed below and pursuant to discussions with staff, Adelphia will file a tariff including minimum and maximum price ranges for the proposed services.

I. SUMMARY

Adelphia filed an application for a certificate of convenience and necessity ("CCN") on October 19, 2004. In its application, Adelphia noted that it seeks authority to provide intrastate, facilities-based non-switched, dedicated point-to-point data transport services, which will allow a

customer to connect two or more intrastate locations. As stated in its application, the “installation, operation, repair and maintenance of Applicant’s dedicated point-to-point data services will be provided by employees and management of Applicant’s local cable affiliate.” Adelphia’s private line services allow customers such as school districts, to transport data communications between different buildings and locations, but Adelphia does not provide customers connection to the public switched telephone network (“PSTN”) or a broadband Internet service bundled with telecommunications.

Adelphia explains below why the Commission should approve Adelphia’s proposed ICB pricing for its dedicated, non-switched, private line services. The nature of Adelphia’s services is that they are provided on a highly individualized basis to school districts that request services. Because the private line services are tailored to meet the individualized needs of the customer and Adelphia does not intend to offer its services based upon single circuits, it is impossible to offer standardized prices per circuits.

Moreover, the Commission has in the past approved ICB pricing for private line services offered by competitive carrier applicants; Adelphia’s proposed services are no different from those offered by those competitive carriers. However, to the extent that the Commission believes that numerical price ranges should be established, Adelphia will revise its tariffs to include a range of minimum and maximum rates for its services.

II. THE COMMISSION’S APPROVAL OF ICB PRICING IS CONSISTENT WITH THE LAW

A. The *Phelps Dodge* Case Demonstrates that the Commission May Consider Competitive Market Forces in Approving Rates for Competitive Services

In *Phelps Dodge Corporation*,¹ the court of appeals invalidated the Commission’s rule

¹ *Phelps Dodge Corporation*, 83 P.3d 573, 2004 Ariz. App. LEXIS 14 (Ariz. Ct. App. 2004).

R.14-2-1611(A) for electric utilities providing that “[m]arket determined rates for Competitive Services... shall be deemed to be just and reasonable.” In so doing, the court found that that the rule prevents the Commission from fully performing its duties under Article 15, Section 3 of the Arizona Constitution, which requires the Commission to establish just and reasonable rates charged by a public service corporation.² The court also held that the Commission’s rule R.14-2-1611(A) violates Article 15, Section 14 of the Arizona Constitution by establishing that market rates are just and reasonable without considering the fair value of property owned by the electric utilities.³

However, the *Phelps Dodge* court did *not find* that the Commission must approve or establish a specific single rate or that the Commission may not consider competitive market forces in reviewing and establishing just and reasonable rates for competitive services. To the contrary, the court recognized that the Commission *may be influenced by market forces* in determining what is “just and reasonable” (although it may not allow competitive market forces alone to set “just and reasonable” rates.)⁴ The *Phelps Dodge* court also held that the Commission may establish a range of rates as just and reasonable, observing that, “assuming the Commission establishes a range of rates that is ‘just and reasonable,’ the Commission does not violate Article 15, Section 3 by permitting competitive market forces to set specific rates within that approved range.”⁵

² *Phelps Dodge*, 83 P.3d at 585, 2004 Ariz. App. LEXIS 14, ***26. The Arizona Constitution, Art. 15, Section 3 requires that the Commission shall prescribe just and reasonable rates and charges to be made and collected by public service corporations.

³ *Id.*, 83 P.3d at 586, 2004 Ariz. App. LEXIS 14, ***31. Art. 15, Section 14 of the Arizona Constitution also establishes that the Commission shall ascertain the fair value of property within the state of every public service corporation doing business therein.

⁴ *Id.*, 83 P.3d at 585, 2004 Ariz. App. LEXIS 14, *** 26.

⁵ *Id.*, 83 P.3d at 587, 2004 Ariz. App. LEXIS 14, ***34.

B. The Commission Has Approved ICB Pricing for Competitive Telecommunications Services and Presumed That Rates for Competitive Services are Just and Reasonable

Consistent with *Phelps Dodge*, the Commission has applied a relaxed standard of review to the prices of other competitive service offerings where the carriers do not have market power and a fair value rate base of zero.⁶ Moreover, the Commission has considered a telecommunications carrier's lack of market power and its nominal fair value rate base in approving a competitive local exchange carrier ("CLEC")'s *ICB rates* for a competitive service.

Specifically, the Commission approved ICB rates for private line services for data communications – the exact type of competitive telecommunications services Adelpia seeks to offer – in two separate cases when granting CCNs to Computer Network Technology Corporation ("CNTC") and OnFiber Carrier Services ("OnFiber").⁷ In both cases, the Commission found that "rates for competitive services are not set according to rate of return regulation" and that the "fair value rate base is zero" for these competitive carriers. The Commission also noted that staff found that "two factors, lack of market power and the competitive marketplace for the services that CNTC proposes to offer, support a conclusion that a fair value analysis is not necessarily representative of the company's operations and that the rates charged by CNTC *will be reasonable*."⁸ The Commission similarly noted that because OnFiber lacks the market power to adversely affect the market by restricting output or raising prices, the rates charged by OnFiber *will be reasonable*.⁹ Accordingly, the Commission

⁶ The *Phelps Dodge* court explained that the Commission must ascertain the "fair value of the property within the State of every public service corporation doing business therein," and that the Commission then applies a rate of return to the rate base in order to establish just and reasonable rates. 83 P.3d at 583, 2004 Ariz. App. LEXIS 14, ***17.

⁷ *CNTC Order* (Docket No. T-04221A-03-0832); *OnFiber Order* (Docket No. T-03874A-03-0766).

⁸ *CNTC Order* at para. 28.

⁹ *OnFiber Order*, Finding of Fact paras. 18-19. The staff report also stated that "[b]ecause private line services are tailored to meet individual customer's demands, rates are determined on an ICB."

appropriately considered the companies' fair value rate base and the competitive market, in determining that the carriers would offer just and reasonable rates for these competitive services.

This Commission has also approved ICB pricing even for *incumbent* carrier Qwest's *wholesale* services to other carriers – which arguably are not “competitive services.” The Commission stated that although “ICB pricing is ... less desirable than UNE prices supported by a cost study, for the few remaining services offered on an ICB basis, there is currently no alternative.”¹⁰

In addition to approving ICB pricing, the Commission has generally found that rates for competitive services are “not set according to rate of return regulation” and are heavily influenced by the market. Therefore, the Commission has recognized consistently that the fair value rate base of CLECs is so small as not to be useful factors in setting rates.¹¹ Accordingly, the Commission generally conducts a relaxed level of review of the prices of competitive carrier services.

C. The Commission Should Approve ICB Prices for Adelphia's Proposed Services

Consistent with its precedent and relaxed standard of review of competitive services, the Commission should approve ICB pricing for Adelphia's services.

Adelphia is not an incumbent carrier in the state of Arizona, and its services are competitive services.¹² As described in its application, Adelphia planned to offer dedicated point

¹⁰ *In the Matter of the Investigation into Qwest Corporation's Compliance with Certain Wholesale Pricing Requirements for Unbundled Network Elements and Resale Discounts*, (Docket No. T-00000A-00-0194), Decision No. 64922 (2002), 2002 Ariz. PUC LEXIS 11, * 154.

¹¹ The Staff in those cases observed that the “rates for competitive services are not set according to rate of return regulation,” and that it believes that the proposed rates for those carriers are “just and reasonable as they are comparable to other competitive local carriers...” CITE

¹² See *CNTC and OnFiber orders* (classifying dedicated private line services as “competitive”). Indeed, the Commission has permitted flexible pricing for services that include private line and data services even for incumbent carrier U.S. West. See also *In the Matter of US West Communications, for a Hearing to Determine the*

to point, non-switched data transport services on a private line basis. These services are similar to the type of services offered by CNTC and OnFiber at ICB rates, which the Commission has approved in the past, recognizing that competitive carriers do not possess market power and have little ability to control the market or raise prices.

Given that Adelphia is a competitive carrier offering competitive services and that its fair value rate base is zero, the Commission should accord little consideration to fair value rate base in considering whether the rates of Adelphia's services are just and reasonable. The Commission should also find that the rates that Adelphia will charge are heavily influenced by the market. Further, consistent with its decisions in the CNTC and OnFiber applications, the Commission should determine that ICB pricing for these private line services is appropriate, because Adelphia lacks market power to harm the market by restricting output or raising prices. However, to the extent that the Commission believes that it needs to approve a range of rates, Adelphia will file revised tariffs that include a minimum and maximum range of rates for its services – which the *Phelps Dodge* court has explicitly recognized is appropriate and lawful.

III. BRAND X DECISION

ALJ Wolfe also requested that Adelphia address in this brief whether the Supreme Court's recent *Brand X* decision is relevant to an analysis of Adelphia's offering.¹³ Adelphia does not believe that the *Brand X* case is applicable to the issues here.

In *Brand X*, the Court upheld the FCC conclusion that cable companies selling broadband Internet service are not providing "telecommunications services" as consistent with the

Earnings of the Company, Fair Value of the Company for Ratemaking Purposes, to Fix a Just and Reasonable Rate Thereon, and to Approve Rate Schedules Designed to Develop such Return, (Docket No. T-01051B-99-0105; Docket No. T-01051B-00-369), Decision No. 63487 (commission approved settlement agreement including pricing for data services under Basket 3, flexibly priced services).

¹³ See *National Cable and Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. ____, 125 S. Ct. 2688 (2005) ("Brand X").

Communications Act. In so holding, the Court found reasonable the FCC finding that a cable company's offering of broadband internet access service is *not* "telecommunications service" because among other things, the cable modem service is an "information service" that uses "telecommunications" as an integral part of the offering. In contrast to the issue presented in *Brand X* as to the nature of cable-modem service offering broadband Internet service, Adelphia does not plan to use its local cable affiliate's plant or property to offer *broadband Internet service*. Instead, Adelphia will only be offering point to point transmission, or telecommunications service, and therefore *Brand X* is not directly relevant to the issues raised here.¹⁴

IV. CONCLUSION

For the foregoing reasons, Adelphia respectfully submits that its ICB pricing in its tariffs for the services that it seeks to offer is just and reasonable. However, pursuant to discussions with staff, Adelphia is willing to file revised tariffs establishing minimum and maximum rates. Accordingly, the Commission should grant Adelphia its CCN and approve the tariff.

Respectfully submitted this 26th day of July 2005,



Daniel Waggoner

Jane Whang

DAVIS WRIGHT TREMAINE LLP

One Embarcadero Center, Suite 600

San Francisco, CA 94111

(tel). 415-276-6500

(fax). 415-276-6599

janewhang@dwt.com

*Attorneys for ACC TELECOMMUNICATIONS, LLC, LKA
ADELPHIA*

¹⁴ However, to the extent that any entity offers cable modem service that provides broadband internet service (such as Adelphia's affiliate Yuma Cablevision, Inc.), such service would be outside of the Commission's jurisdiction pursuant to *Brand X*.

PROOF OF SERVICE

I hereby certify that I have this day served the foregoing documents on all parties of record in this proceeding by delivering a copy via Federal Express, and by mailing a copy thereof, properly addressed with first class postage prepaid to:

Christopher Kempley
Chief Counsel
Arizona Corporation Commission
Legal Division
1200 West Washington
Phoenix, AZ 85007-72996

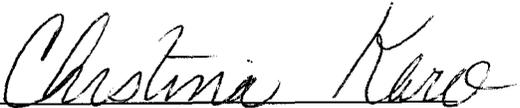
Ernest Johnson
Director
Arizona Corporation Commission
1200 West Washington
Phoenix, AZ 85007-2996

Keith Layton
Arizona Corporation Commission
Legal Division
1200 West Washington
Phoenix, AZ 85007-2996

Administrative Law Judge Teena Wolfe
Arizona Corporation Commission
Hearing Division
1200 West Washington
Phoenix, AZ 85007-72996

Arizona Reporting Services
2627 North 3rd Street, Suite 3
Phoenix, AZ 85004-1104

Dated at San Francisco, California, this 26th day of July, 2005


Christina A. Karo