



BEFORE THE ARIZONA CORPORATION
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IN THE MATTER OF APPLICATION OF COX
ARIZONA TELCOM, LLC FOR A WAIVER OF
RULE 805 OF THE PUBLIC UTILITY HOLDING
COMPANIES AND AFFILIATED INTERESTS
RULES

Docket No. T-03471A-05-0357

**COX ARIZONA TELCOM'S
EXCEPTIONS TO THE
RECOMMENDED OPINION AND
ORDER**

Cox Arizona Telcom, L.L.C. (Cox) submits its Exceptions on Staff's proposed order docketed October 26, 2005. Cox is requesting that the Commission renew its waiver of A.A.C. R14-2-805 (Rule 805). Rule 805 requires utilities to file voluminous information with the Commission related to Cox and its affiliates' diversification activities. The Commission has twice granted Cox a waiver of Rule 805 and this waiver has been in effect for five years. Cox further remains subject to Rules 803 and 804 in appropriate instances.

Staff's decision to now re-impose the requirements of Rule 805 simply adds additional economic regulation on a competitor in a very competitive industry. Cox believes that Staff's concerns are appropriate for monopoly utility providers but are not suitable to competitive carriers with no market power in a competitive environment. Staff also provides no evidence that a problem exists which would warrant denying a continuation of the Rule 805 waiver. Cox respectfully disagrees with Staff's analysis and requests the Commission renew Cox's Rule 805 waiver.

A. Rule 805 is designed for monopoly utilities, not competitive providers

In a monopoly environment, Rule 805 is necessary to monitor non-regulated utility activities in order for the Commission to further the public interest. The Commission promulgated the Public Utility Holding Companies and Affiliated Interests Rules (Rules) in 1990, prior to the

1 development of competition in the local exchange telecommunications industry. The Rules make
2 little sense when applied without modification to competitive telecommunications providers. The
3 Commission recognized this when it twice granted Cox the waiver it seeks to renew here.

4 The Rules were developed in the context of traditional cost-of-service based ratemaking for
5 monopoly providers. Cox operates in a radically different context, where full fledged economic
6 regulation is out of place. The Arizona Supreme Court, in affirming the Commission's authority
7 to enact the Rules, relied on the Commission's ratemaking powers. *See Arizona Corp. Comm'n v.*
8 *State ex rel. Woods*, 171 Ariz. 286, 297-97, 830 P.2d 807, 817-18 (1992). The Court noted that
9 the Commission must have the power to review transactions which will "so adversely affect [a
10 utility's] financial position that the ratepayers will have to make good the losses... The
11 Commission was given the power to lock the barn door before the horse escapes." *Id.* Here, the
12 competitive marketplace means that Cox has no ability to make its customers "make good the
13 losses." To extend the Court's colorful phrase, even if the horse escapes, Cox's customers can
14 simply pick another horse. As the Commission stated in originally granting Cox a waiver,
15 "ratepayers do not need protection from costs of a utility's affiliates when the ratepayers have the
16 option to secure service from another company." (Decision No. 62582 at 3)(May 17, 2000).
17 Further, Staff simply does not explain how it or the Commission will use Cox's Rule 805 report
18 for ratemaking. Cox's rates are not set using traditional cost-of-service methods. Thus, Cox's
19 Rule 805 report will simply be useless for rate-setting.

20 The Rules also were developed at a time when Arizona's largest electric monopoly was in
21 financial distress because of poor investments in non-regulated affiliates. Captive ratepayers
22 risked paying higher electric rates in order to bail out the company. The Commission's intent was
23 to develop rules so that captive ratepayers who are provided service by large monopoly Class A
24 utilities should not have to pay higher rates to cover poor investments into non-regulated affiliate
25 business activities.

26 In contrast to monopoly providers, Cox is a competitive local exchange carrier that bases
27 its rates on the competitive market in which it operates. The rates that Cox charges its customers

1 are statewide rates filed in its tariffs at the Commission (subject to maximum rates set forth in
2 those tariffs). In this context, complying with Rule 805 is unnecessary in that (1) ratepayers are
3 not captive, as they would be with a monopoly provider, and (2) rates could not be raised unduly in
4 any event because the rates are currently capped and would require Commission approval to be
5 raised. As such, the Commission retains sufficient regulatory oversight to protect consumers from
6 potential rate effects from such non-regulated investments.¹ Cox customers could not be held
7 liable for any poor non-regulated investments since (1) they could choose a different carrier and
8 (2) the Commission would have to approve any increase in its maximum rates.

9 **B. Staff's discussion regarding market conditions do not support denial**

10 In Staff's review of market conditions, it states that since Cox's last waiver of Rule 805,
11 Cox has grown as a competitive carrier. While the facts are that Cox has grown its facilities-based
12 phone business in Phoenix and Tucson over the last two years, Cox remains a modest player in the
13 total number of access lines being served in Arizona. Cox has nowhere near the number of access
14 lines as does the incumbent, Qwest. As such, Cox possesses no monopoly or market power.
15 Indeed, even Staff concedes that Cox "participates in a highly competitive local exchange market
16 dominated by a major ILEC, Qwest." (Staff Memo at 8). These facts do not form any basis for
17 requiring a Rule 805 filing. Just as was the case when the Commission approved Cox's previous
18 two Rule 805 waivers, Cox remains one of many competitors facing an entrenched and dominant
19 incumbent.

20 **C. Staff's analysis is not on point.**

21 Staff tries to confuse the issue with a gratuitous reference to the Vistancia proceeding,
22 docket T-03471A-05-0064, which is still pending before the Commission. Cox disagrees with
23 Staff's comments concerning the actions of its parent and affiliate, CoxCom Inc. related to that
24 docket. Vistancia is being served by a preferred provider agreement ("PPA") and any and all
25 documents entered into regarding such PPA would still not fall under the requirements of Rule 805

26 _____
27 ¹ Moreover, Cox is obligated to comply with Rules 803 and 804 when certain transactions have a material
adverse effect on Cox.

1 Staff does not explain how having Rule 805 information would have prevented the unfortunate
2 situation in Vistancia. Nor does it even point to any particular information required by Rule 805
3 that would be relevant to that matter.

4 Staff speculates that preparing Rule 805 information would not be as “costly or
5 burdensome” as claimed by Cox. (Staff Memo at 8). Staff apparently disagrees with the
6 Commission’s finding that “most of the filing requirements included in A.A.C. R14-2-805 would
7 be burdensome to Cox and of little use to the Commission.” Decision No. 65282 (at 5). Cox
8 explained to Staff that such costs would be difficult to quantify because for Cox to calculate such
9 costs, it would need to perform the very activity from which it seeks a waiver. The fact that Cox
10 has not quantified an approximate cost of compliance with this Rule does not change the fact that
11 it would have to undertake this exercise to come up an approximation. This entails having
12 numerous employees to review and secure the appropriate materials, costs of copying such
13 relevant documentation and compiling such information to file with Staff. This is not an
14 assumption as Staff presumes but a reality of the activities that Cox would need to undertake to
15 comply with Rule 805. As the Commission previously ruled, “generally speaking, to obtain a
16 reasonable estimate of the cost to comply with Rule 805 requires Cox Arizona to perform the same
17 basic functions it seeks to avoid in its waiver application.” (Decision No. 66234 at 3)(September
18 16, 2003). This is no different than asking Staff how much time or cost it would take Staff to
19 conduct a full rate case with any number of utilities. Each case would be different and cost would
20 be difficult to quantify until the case was actually concluded, whether litigated or settled.

21 Staff has no basis for its speculation that preparing such a report would not be burdensome
22 or costly. A simple glance at Rule 805 confirms the point. The Rule requires 11 separate types of
23 detailed information. Staff seizes on one type – transfers between the utility and affiliates – and
24 claims that this information is necessary for basic financial analysis and thus must be available.
25 Staff fails to address the remaining 10 types of information.

26 Staff states that some companies filed one-page Rule 805 reports. Given the 11 detailed
27 types of information required, it is difficult to see how a one-page response is adequate or would in

1 any way further the Commission's regulatory activities. The fact that such submissions were
2 accepted without objection from Staff demonstrates the minimal review that such filings receive.
3 If Staff is suggesting that Cox simply file a one-page response, such a suggestion does not further
4 the public interest.

5 Staff also notes that one company filed two three-ringed binders of information. This
6 demonstrates that an adequate Rule 805 report will vary depending on the size and complexity of
7 each utility. Here, Cox is ultimately part of a large and complex holding company (Cox
8 Communications, Inc.) – which would necessitate a large and complex Rule 805 filing. Yet Staff
9 acknowledges that Cox's revenues comprise "less than 2 percent of Cox Communications' overall
10 revenues." (Staff Memo at 1). Staff fails to note that on other occasions the Commission has
11 approved waivers for utilities that were only small parts of an overall holding company with
12 substantial unregulated assets. (See Decision No. 64243)(November 29, 2001) (granting a waiver
13 of Rule 805 to Morenci Water & Electric, a subsidiary of Phelps Dodge Corp.)

14 Staff's chart shows that only one telecommunications company – Qwest – has been denied
15 a waiver since 1998. (Staff Memo at 7). Nothing has changed since 1998 to justify imposing Rule
16 805 on Cox.

17 Staff also notes its "interest and concern" over the fact that Cox Communications provides
18 broadband service which unaffiliated companies are using to provide VOIP service. (Staff Memo
19 at 5). While the states' role in VOIP regulation remains an unsettled subject, the same is not true
20 of broadband. State authority over broadband is clearly preempted. Because broadband is outside
21 of the Commission's ratemaking authority, providing Rule 805 information would serve no
22 purpose. Further, Staff does not point to any particular Rule 805 information that would be useful
23 in the broadband context. Finally, even if Cox provided Rule 805 information and that
24 information had some relevance to broadband, such information would not concern the
25 unaffiliated VOIP providers accessed by their customers over broadband connections provided by
26 Cox Communications.

27

1 **D. At a minimum, the Commission should renew Cox's waiver for 30 months to**
2 **allow for continued ACC review and oversight.**

3 The Commission has twice voted to approve Cox's request for a Rule 805 waiver without
4 any adverse effect on Arizona consumers. The Commission still retains oversight of Cox's
5 affiliated transactions based on the Cox's continued obligations under its partial waivers of Rules
6 803 and 804. Any material adverse effect of affiliate transactions on Cox Arizona Telcom would
7 be captured by the obligations that Cox has under Rules 803 and 804. In addition, the
8 Commission is always free to investigate a particular matter based on sending data requests. Cox
9 remains obligated to comply with any such Commission data requests. Renewing Cox's Rule 805
10 waiver does not in any way preclude this Commission from additional investigatory actions or
11 additional oversight into any affiliated transactions by Cox Arizona Telcom. Renewing the waiver
12 for an additional 30 months (as it has done twice in the past) still allows the Commission to
13 effectively regulate Cox Arizona Telcom as appropriate in the competitive market.

14 **E. Conclusion.**

15 No adverse effects to Arizona consumers have occurred since Cox first received the waiver
16 of Rule 805 that it seeks to extend in this case. Rule 805 is an appropriate regulatory oversight
17 tool that works for monitoring monopolies' affiliate investments to ensure captive ratepayers do
18 bear any risks for poor investments by the regulated entity. In today's competitive
19 telecommunications world, ratepayers do not face the same risks. Because they are no longer
20 captive, ratepayers can choose the best carrier. Cox is thus subject to the rigors of the marketplace.
21 Further, Cox's rates are tariffed and capped and would require the Commission to approve any
22 increase. Additional economic regulation simply is unnecessary. Indeed, by recommending
23 increased regulatory burdens to competitors, Staff is inadvertently discouraging the very
24 competition which this Commission has so long championed. Any increase in rates would drive
25 customers to less expensive providers for their telecommunications needs. As the Commission
26 previously determined, the "application of Rule 805 is unnecessary where a public utility like Cox
27 Arizona operates in a competitive market, lacks monopoly power, and generated revenues in

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

1 Arizona that represents only a small portion of its total corporate revenues.” (Decision No.
2 66234)(September 16, 2003). A waiver of Rule 805 is appropriate and in the public interest and
3 Cox respectfully requests the Commission approve a continuation of its 30 month waiver. In order
4 to aid the Commission, attached as Exhibit A are proposed modifications to Staff’s draft order that
5 would renew Cox’s waiver while still protecting the public.

6 RESPECTFULLY SUBMITTED November 4, 2005.

7
8 **COX ARIZONA TELCOM, L.L.C.**

9
10 By 
11 Michael W. Patten
12 ROSHKA HEYMAN & DEWULF, PLC
13 One Arizona Center
14 400 East Van Buren Street, Suite 800
15 Phoenix, Arizona 85004
16 (602) 256-6100

17
18 **ORIGINAL and 13 COPIES** of the
19 foregoing filed November 4th, 2005, with:

20 Docket Control
21 ARIZONA CORPORATION COMMISSION
22 1200 West Washington Street
23 Phoenix, Arizona 85007

24 **COPIES** of the foregoing hand-delivered
25 November 4th, 2005, to:

26 Chairman Jeff Hatch-Miller
27 Arizona Corporation Commission
1200 West Washington Street
Phoenix, Arizona 85007

Commissioner William A. Mundell
Arizona Corporation Commission
1200 West Washington Street
Phoenix, Arizona 85007

Commissioner Marc Spitzer
Arizona Corporation Commission
1200 West Washington Street
Phoenix, Arizona 85007

ROSHKA DEWULF & PATTEN, PLC

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

1 Commissioner Mike Gleason
2 Arizona Corporation Commission
3 1200 West Washington Street
4 Phoenix, Arizona 85007

5 Commissioner Kristin K. Mayes
6 Arizona Corporation Commission
7 1200 West Washington Street
8 Phoenix, Arizona 85007

9 Dwight Nodes, Esq.
10 Administrative Law Judge
11 Hearing Division
12 Arizona Corporation Commission
13 1200 West Washington
14 Phoenix, Arizona 85007

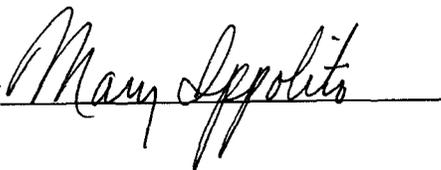
15 Maureen Scott, Esq.
16 Legal Division
17 Arizona Corporation Commission
18 1200 West Washington
19 Phoenix, Arizona 85007

20 Ernest G. Johnson, Esq
21 Director, Utilities Division
22 Arizona Corporation Commission
23 1200 West Washington
24 Phoenix, Arizona 85007

25 Norman Curtright
26 Qwest Corporation
27 4041 North Central Avenue
Phoenix, Arizona 85012

Timothy Berg
Theresa Dwyer
Fennemore Craig
3003 North Central Avenue, Suite 2600
Phoenix, Arizona 85012

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23
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By 

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Exhibit A

INSERT on Page 11, line 4:

COMMISSION ANALYSIS

We appreciate the concerns articulated by Staff, but we reach a different result. Cox Arizona Telcom is but a small part of Cox Communications, Inc. While we consider fair value information, we do not set Cox Arizona's rates using traditional cost-of-service information. Cox Arizona is far from a monopoly and has no market power. Under these circumstances, Rule 805 information is of little value and is unnecessary additional economic regulation. We see no reason to add to the regulatory burden faced by competitive telecommunications providers. Further, Cox Arizona avows that it will fully comply with all Staff or Commission data requests. We insist that Cox Arizona does so. In light of this, we agree with Cox Arizona that its waiver from Rule 805 should be extended for another 30 months.

INSERT on Page 13, line 1 (Conclusion of Law 3) after 2005:

“and the Exceptions filed by Cox Arizona, concludes that it is in the public interest to renew Cox Arizona's waiver of A.A.C. R14-2-805 for an additional 30 months.”

DELETE the remainder of the sentence.

CHANGE on Page 13, line 6 “denied” to “granted.”