

ORIGINAL

NEW APPLICATION



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BEFORE THE ARIZONA CORPORATION COMM.

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AZ CORP COMMISSION
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T-03943A-11-0462

In the Matter of the Application of **tw telecom**)
inc., tw telecom of arizona llc and their)
Affiliates for a Limited Waiver of the Rules)
Governing Public Utility Holding Companies)
and Affiliated Interests.)
)
)

DOCKET NO. T-03943A-11-_____

Arizona Corporation Commission

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APPLICATION FOR LIMITED WAIVER

tw telecom inc. (“tw telecom”) and **tw telecom of arizona llc** (“TWTA”), hereby apply to the Arizona Corporation Commission (“Commission”) pursuant to A.A.C. R14-2-806, for a limited waiver of the rules governing public utility holding companies and affiliated interests, R14-2-801, *et seq.* (the “Rules”). This limited waiver would be used in the event any future transaction to which tw telecom is a party meets the definition of a Reorganization under Rule 14-2-801(5) and in the event TWTA intends to consummate a transaction otherwise subject to A.A.C. R14-2-804(B). tw telecom and TWTA are not requesting a waiver of A.A.C. R14-2-805 (Annual Filing Requirements of Diversification Activities and Plans).

INTRODUCTION

tw telecom is the ultimate parent company of TWTA, a non-dominant carrier authorized by the Commission to provide competitive local exchange services (including switched and dedicated access services), intraLATA toll services and intrastate interexchange

telecommunications services within the State of Arizona. Given today's market conditions, and the scarcity of funding for competitive telecommunications networks, it is very likely tw telecom will be a party to future transactions that would be considered "Reorganizations," as that term is broadly defined by the Rules. Additionally, tw telecom will continue to adjust the assets and debts of all of its affiliates to maximize network quality, reach and efficiency. Financing and refinancing growth is an integral part of forward-looking strategic planning. A waiver of R14-2-803 and R13-2-804(B) will permit tw telecom to enter into certain transactions without first seeking ACC approval. tw telecom seeks a waiver that would be applicable to it (tw telecom inc.) and all of its current and future affiliated entities.

BACKGROUND INFORMATION

By Decision Nos. 56844 and 58063, the Commission adopted A.A.C. R14-2-801 through 806. The Rules regulate the formation of public utility holding companies and require that a public service corporation obtain Commission approval before entering into a business transaction with an unregulated affiliate.

Under the definitions set forth in R14-2-801(4), a "Holding Company" or "Public Utility Holding Company" is defined as any affiliate that controls a public utility. A "Utility" or "Public Utility" is defined as any Class A investor-owned public service corporation subject to the jurisdiction of the Arizona Corporation Commission.¹ TWTA is a Class A public utility and, as a result, is subject to the Rules. TWTA is a wholly owned subsidiary of tw telecom holdings inc., which is in turn a wholly owned subsidiary of tw telecom. tw telecom is the affiliate (as well as a Public Utility Holding Company) that controls TWTA. Under the Rules, Commission approval is required whenever a utility or an affiliate intends to reorganize an existing public

¹ For telephone utilities, a Class A public service corporation is defined as one that has annual intrastate operating revenues in excess of \$1 million. A.A.C. R14-2-103(A).

utility holding company. A.A.C. R14-2-803(A). "Reorganize" is broadly defined under the Rules to include "[t]he acquisition or divestiture of a financial interest in an affiliate or a utility, or reconfiguration of an existing affiliate or utility's position in the corporate structure or the merger or consolidation of an affiliate or a utility." A.A.C. R14-2-801(5). Prior approval is also required under R14-2-804(B) if a public utility wishes to "obtain a financial interest in any affiliate not regulated by the Commission, or guarantee, or assume the liabilities of such affiliate" or lend to any affiliate not regulated by the Commission \$100,00 or more for over one year. In sum, whenever tw telecom (a company with assets and network facilities spread across the nation) adds or replaces an investor or participates in any sort of merger, financing, refinancing, reconfiguration, or consolidation, the Rules appear to require Arizona Commission approval.

As described by the Commission, the purpose of the Rules is fourfold: (i) to prevent the (commingling of "utility funds" with "non-utility funds;" (ii) to prohibit the cross-subsidization of non-utility activities by utility ratepayers; (iii) to avert any negative impact of non-utility activities on a utility's financial credit; and (iv) to ensure that the utility and its affiliates provide the Commission with the information necessary to "carry out its regulatory responsibility." See Concise Explanatory Statement, proposed Rules Docket No. R-0000-89-194. When the Rules were adopted, the Commission understood that the requirements contained in the Rules would not be applicable in some instances and, as a result, authorized waiver of the Rules if to do so would be in the public interest. A.A.C. R14-2-806(A).

The Rules were enacted in response to a diversification movement by Arizona's electric utilities into areas such as savings and loan companies and hotel investments. At the time of the adoption of the Rules, there was no competitive pricing for electric companies and no

competition for the provision of electric service to customers. In adopting the Rules, the Commission was attempting to protect captive customers of the monopoly utilities from having to bear the costs of such non-utility investments. See Arizona Corp. Comm'n v. State ex rel Woods, 171 Ariz. 286, 289-290, 830 P.2d. 807, 810-811 (1992).

The Commission has recognized that Rule 806 waivers, such as the one requested here, are particularly appropriate in the telecommunications arena. As the list which follows demonstrates, the Commission has granted waivers to many of the larger telecommunications companies in Arizona:

- (1) Qwest/CenturyLink
Decision No. 72493 (July 25, 2011) reaffirming and extending to CenturyLink, Inc. Qwest's limited waiver of the Affiliated Interest Rules previously granted to Qwest Communications Corporation, Qwest Corporation, and their affiliates and their parent Qwest Communications International Inc. in Decision No. 64654 (March 25, 2002);
- (2) AT&T Communications of the Mountain States, Inc. (AT&T)
Decision No. 58258 (April 8, 1993) granting AT&T a limited waiver of the Affiliated Interest Rules. AT&T is required to file a notice of intent to organize or reorganize "only for those organizations or reorganizations that are likely to have a material adverse impact on AT&T's Arizona public utilities."
- (3) Teleport Communications Group and AT&T Corp.
Decision No. 60728 (March 23, 1998) extending waiver held by AT&T to recently acquired Teleport Communications Group ("TCG"). TCG is "required to file a notice of intent to organize or reorganize only for the organizations or reorganizations that are likely to have a material adverse impact on the Arizona jurisdictions operations."
- (4) American Communications Services of Pima County, Inc.
Decision No. 62616 (June 9, 2000) granting limited waiver of Affiliated Interest Rules. ACSI and affiliates are "required to file a notice of intent to enter into the transactions listed in A.A.C. R14-2-803 when a transaction is likely to result in 1.) significant increased capital costs of the Arizona operations; 2.) significant additional costs allocated or charged directly to the Arizona jurisdiction; or 3.) a significant reduction of net income to the Arizona operations."

- (5) MCI
Decision No. 62072 (June 30, 2000) granting a limited waiver to MCI WorldCom Communications, Inc., MCIMetro Access Transmission Services and affiliates. Under this waiver, MCI and affiliates are required to “file a notice of intent to enter into the transactions listed in A.A.C. R14-2-803 when a transaction is likely to result in 1.) significant increased capital costs of the Arizona operations; 2.) significant additional costs allocated or charged directly to the Arizona jurisdiction; or 3.) a significant reduction of net income to the Arizona operations.”
- (6) Cox
Decision No. 62582 (May 17, 2000) granting a limited waiver to Cox Arizona Telcom L.L.C. Under this waiver, Cox and its affiliates are required to “file a notice of intent to enter into the transactions listed in A.A.C. R14-2-803 when a transaction is likely to result in 1.) significant increased capital costs of the Arizona operations; 2.) significant additional costs allocated or charged directly to the Arizona jurisdiction; or 3.) a significant reduction of net income to the Arizona operations.”

While the above list of limited waivers granted by the Commission is not exhaustive, the carriers listed serve the vast majority of telephone customers in Arizona. TWTA requests the limited waiver language used in Decision No. 58258 (No. 2 and 3 above), as it would be more appropriate for a competitive local exchange carrier. If granted, the waiver would waive the requirements of R14-2-804 completely and require tw telecom to file a notice of intent only for those organizations or reorganizations that are likely to have a material adverse impact on tw telecom’s Arizona public utilities.

REQUEST FOR WAIVER

tw telecom submits the following arguments in support of this request for a limited waiver, any one of which would justify issuance of a waiver. First, tw telecom is a national telecommunications provider with only a fraction of its revenues and investments in Arizona. In the coming years, tw telecom will enter into transactions all over the United States that have no

impact on Arizona operations. The sheer size of tw telecom dictates that transactions (*e.g.* new investment, debt refinance, mergers, and acquisitions) will occur outside Arizona and will not affect Arizona customers. These transactions – “Reorganizations” under the rules – will not result in any fundamental change in the affiliate entity that operates in Arizona and should not be subject to a Commission approval requirement.

Second, tw telecom is a non-dominant carrier and, as such, does not exercise monopoly power over a captive service territory or guaranteed revenue base. The Rules were promulgated to protect captive utility ratepayers from rates that “include costs associated with holding company structure, financially beleaguered affiliates, or sweetheart deals with affiliates.” See Concise Explanatory Statement. Because the regulatory environment anticipated by the Rules does not exist for tw telecom, application of the Rules to tw telecom Reorganizations is not necessary.

Third, tw telecom today participates in a telecommunications services industry that is energized by market forces such as consumer demand, competitive pricing and the drive to increase market share through added value and technological innovation. Given that TWTA faces competition in all of the retail services it provides to Arizona customers, there exists virtually no incentive or opportunity for TWTA to attempt to extract from customers unduly high or above-market prices that could be used to subsidize unregulated, affiliated interests. The market effectively provides a natural safeguard against the improper exploitation of telecommunication service profits by tw telecom. This conclusion is consistent with this Commission’s rules governing Competitive Telecommunications Services, R14-2-1101, *et seq.*

Fourth, approval of a limited waiver will allow the market to realize the benefits of future Reorganizations without a separate application to this Commission for each Reorganization

subject to the Rules. If every certified carrier in Arizona (and each national and international affiliate thereof) sought Commission approval before acquiring new debt, accepting new investment, or purchasing additional assets, the Commission Staff would be inundated by Reorganization approval applications. Most of these transactions do not impact Arizona consumers and should not occupy scarce Commission resources. The Commission promulgated the Affiliate Interest Rules to protect against cross-subsidization by a utility in the traditional monopoly environment when that cross-subsidization would affect Arizona consumers. Unfortunately, the text of the Rules reaches a much broader range of transactions. The Rules should be waived by the Commission for entities such as tw telecom which: (1) operate nationally with many affiliates; (2) compete in end-user retail markets with alternative service providers; (3) have no guaranteed source of revenue; and (4) are subject to strong competitive pressures to keep prices low and service quality high.

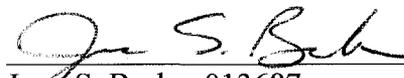
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CONCLUSION

For all the foregoing reasons, tw telecom respectfully requests that the Commission grant it a limited waiver pursuant to A.A.C. R14-2-806 of R14-2-803 and R14-2-804 of the Rules.

RESPECTFULLY SUBMITTED this 22nd day of December, 2011.

By:



Joan S. Burke, 013687

LAW OFFICE OF JOAN S. BURKE, P.C.

1650 North First Avenue

Phoenix, Arizona 85003

Telephone: (602) 535-0396

Joan@jsburkelaw.com

Electronic Service Preferred (ESP)

Attorney for **tw telecom of arizona llc**

ORIGINAL and thirteen (13) copies of the foregoing filed this 22nd day of December, 2011 with:

Docket Control
Arizona Corporation Commission
1200 West Washington Street
Phoenix, Arizona 85007