

OPEN MEETING ITEM



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

ORIGINAL



ARIZONA CORPORATION COMMISSION

DATE: January 24, 2005
DOCKET NO: T-02847A-02-0641
TO ALL PARTIES:

Arizona Corporation Commission
DOCKETED
JAN 24 2005

DOCKETED BY

Enclosed please find the recommendation of Assistant Chief Administrative Law Judge Dwight D. Nodes. The recommendation has been filed in the form of an Opinion and Order on:

ACCIPITER COMMUNICATIONS, INC.
(CC&N EXTENSION)

Pursuant to A.A.C. R14-3-110(B), you may file exceptions to the recommendation of the Administrative Law Judge by filing an original and thirteen (13) copies of the exceptions with the Commission's Docket Control at the address listed below by **4:00 p.m.** on or before:

FEBRUARY 2, 2005

The enclosed is NOT an order of the Commission, but a recommendation of the Administrative Law Judge to the Commissioners. Consideration of this matter has tentatively been scheduled for the Open Meeting to be held on:

FEBRUARY 8 AND 9, 2005

For more information, you may contact Docket Control at (602)542-3477 or the Hearing Division at (602)542-4250. For information about the Open Meeting, contact the Executive Secretary's Office at (602) 542-3931

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BRIAN C. McNEIL
EXECUTIVE SECRETARY

1 **BEFORE THE ARIZONA CORPORATION COMMISSION**

2 COMMISSIONERS

3 JEFF HATCH-MILLER, Chairman
4 WILLIAM A. MUNDELL
5 MARC SPITZER
6 MIKE GLEASON
7 KRISTIN K. MAYES

8 IN THE MATTER OF THE APPLICATION OF
9 ACCIPITER COMMUNICATIONS, INC. TO
10 EXTEND ITS CERTIFICATE OF CONVENIENCE
11 AND NECESSITY IN MARICOPA COUNTY.

DOCKET NO. T-02847A-02-0641

DECISION NO. _____

12 OPINION AND ORDER

13 DATE OF HEARING: October 21, 2004

14 PLACE OF HEARING: Phoenix, Arizona

15 ADMINISTRATIVE LAW JUDGE: Dwight D. Nodes

16 APPEARANCES: Mr. Jeffrey W. Crockett, SNELL & WILMER,
17 on behalf of Accipiter Communications, Inc.;
18 and

19 Ms. Maureen Scott, Staff Attorney, Legal
20 Division, on behalf of the Utilities Division of
21 the Arizona Corporation Commission.

22 **BY THE COMMISSION:**

23 On August 22, 2002, Accipiter Communications, Inc. ("Accipiter" or "Company") filed an
24 Application with the Arizona Corporation Commission ("Commission") to extend its Certificate of
25 Convenience and Necessity ("CC&N" or "Certificate") to provide local exchange telephone service
26 to an area in northwest Maricopa County, Arizona, near Lake Pleasant (Ex. A-1).

27 Qwest Corporation ("Qwest") requested intervention by motion filed August 29, 2002.

28 On December 17, 2002, Accipiter filed a letter stating that it had discussed with Qwest the
possibility of negotiating a resolution of Qwest's concerns with the Application. The letter also
stated that Accipiter agreed to toll the applicable time clock requirements.

On December 22, 2003, Qwest filed a Response to Accipiter's Application (Ex. A-4). Qwest
indicated that it resolved its issues and agreed to transfer four sections of its service area to Accipiter.

On February 18, 2004, Qwest filed a letter renewing its intervention request and expressing

1 support for approval of Accipiter's Application.

2 On April 1, 2004, a Procedural Order was issued granting Qwest intervention in this
3 proceeding.

4 On May 12, 2004, Accipiter filed a Notice of Amendment of the Legal Description for the
5 Requested Extension Area (Ex. A-2). Accipiter's Amendment to its Application indicated that it now
6 seeks to include the parts of Qwest's service area that had previously been excluded so that
7 Accipiter's CC&N would cover the entirety of the Vistancia housing development that consists of
8 approximately 7,100 acres in Peoria, Arizona.

9 On June 10, 2004, the Commission's Utilities Division Staff ("Staff") filed a letter stating that
10 Accipiter's Amended Application filed on May 12, 2004 was deemed sufficient pursuant to A.A.C.
11 R14-2-502.

12 On September 7, 2004, Staff filed its Staff Report in this matter recommending approval of
13 the Amended Application subject to certain conditions (Ex. S-1).

14 On September 17, 2004, a Procedural Order was issued setting a hearing for October 21,
15 2004, and directing the Company to mail notice to all property owners in the requested extension area
16 and publish notice in a newspaper of general circulation in the extension area.

17 On September 27, 2004, Accipiter filed a Motion to Continue the Hearing Date for 60 days.
18 The Company filed a request to withdraw its Motion to Continue on September 29, 2004.

19 On October 19, 2004, Accipiter filed a Notice of Filing of Proof of Publication and a letter
20 certifying that the required notice had been sent to all property owners in the affected area (Ex. A-3).

21 On October 21, 2004, a hearing was convened before a duly authorized Administrative Law
22 Judge of the Commission at its offices in Phoenix, Arizona. At the conclusion of the hearing, the
23 matter was taken under advisement pending submission of certain late-filed exhibits and issuance of a
24 Recommended Opinion and Order.

25 On November 5, 2004, Accipiter submitted the requested late-filed exhibits (Exs. A-7, A-8,
26 and A-9).

27 * * * * *

28 Having considered the entire record herein and being fully advised in the premises, the

1 Commission finds, concludes, and orders that:

2 **FINDINGS OF FACT**

3 **Background and Overview of Application**

4 1. Accipiter Communications, Inc. is a Nevada corporation that was initially granted a
5 CC&N in Decision No. 59346 (October 11, 1995) to provide local exchange telecommunications
6 services in portions of Maricopa and Yavapai counties, including the Castle Hot Springs and Lake
7 Pleasant Regional Park areas.

8 2. Decision No. 59346 was amended by Decision No. 64843 (May 28, 2002) to permit
9 Accipiter to change the name of its "Lake Pleasant" rate center to the "Phoenix 928" rate center, and
10 to expand the Phoenix local calling area to include Accipiter's service area through an extended area
11 service ("EAS") arrangement with US West Communications (nka Qwest Corporation) (Ex. A-6).

12 3. On August 22, 2002, Accipiter filed an application in the above-captioned docket
13 requesting an extension of its CC&N to include a proposed master-planned development then known
14 as Lakeland Village/White Peak Ranch (nka "Vistancia"). At the time the application was filed,
15 Accipiter was providing service to approximately 85 customers with a total of 207 access lines (Ex.
16 S-1, at 1).

17 4. Qwest Corporation filed a Motion to Intervene on August 29, 2002. Qwest stated that
18 Accipiter's requested extension area was within Qwest's service territory.

19 5. On December 17, 2002, the Company filed a letter stating that Accipiter and Qwest
20 intended to engage in settlement discussions regarding this matter, and that Accipiter agreed to waive
21 the applicable time clock requirements set forth in A.A.C. R14-2-510(E). No additional filings were
22 made in the docket until more than a year later.

23 6. On December 22, 2003, Qwest filed a Response to Accipiter's Application. In its
24 Response, Qwest indicated that, following discussions with Accipiter, Qwest had agreed to transfer
25 four sections of its service area to Accipiter¹ (Ex. A-4).

26 7. On May 12, 2004, Accipiter filed an Amended Legal Description for the Requested
27

28 ¹ According to Accipiter's President and CEO, Charles Gowder, Qwest has no customers or facilities in the areas it has agreed to transfer to Accipiter.

1 Extension Area. Accipiter stated that its amended extension area included the entirety of the
2 Vistancia development, including the areas currently in Qwest's certificated service area. Accipiter
3 claimed that at build-out, the Vistancia development is expected to include more than 17,000 housing
4 units, 820 acres dedicated to commercial, mixed-use and business park facilities, school sites, golf
5 courses, parks and other amenities. As of the date of Accipiter's letter, more than 350 homes had
6 been sold in the development (Ex. A-2).

7 8. On June 10, 2004, Staff filed a letter stating that Accipiter's Amended Application
8 was deemed sufficient in accordance with A.A.C. R14-2-502.

9 9. On September 7, 2004, Staff filed its Staff Report recommending approval of the
10 Amended Application subject to certain conditions (Ex. S-1).

11 10. On September 17, 2004, a Procedural Order was issued setting a hearing for October
12 21, 2004, and directing the Company to mail notice to all property owners in the requested extension
13 area and publish notice in a newspaper of general circulation in the extension area.

14 11. On September 27, 2004, Accipiter filed a Motion to Continue the Hearing Date for 60
15 days. The Company filed a request to withdraw its Motion to Continue on September 29, 2004.

16 12. On October 19, 2004, Accipiter filed a Notice of Filing of Proof of Publication and a
17 letter certifying that the required notice had been sent to all property owners in the affected area (Ex.
18 A-3).

19 13. The hearing in this matter was held as scheduled on October 21, 2004. The
20 Administrative Law Judge requested that certain late-filed exhibits be submitted by November 5,
21 2004 (Tr. 82-83). Accipiter's counsel agreed to waive the time clock provisions applicable to this
22 proceeding (Tr. 14).

23 14. On November 5, 2004, Accipiter filed the following late-filed exhibits: Vistancia
24 Communications easement agreements (Ex. A-7); proposed language approving the inclusion of the
25 new Accipiter exchange in Accipiter's existing EAS agreement with Qwest (Ex. A-8); and proposed
26 language approving inclusion of the new Accipiter exchange in Accipiter's existing ETC-designated
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28

1 area² (Ex. A-9).

2 15. According to the Staff Report, Accipiter was originally contacted by Shea Homes, the
3 developer of Vistancia, to inquire about the ability of a single carrier to serve the entire development,
4 as opposed to service being provided by multiple incumbent local exchange carriers ("ILECs"). As
5 discussed above, Accipiter and Qwest eventually reached an agreement that would allow Accipiter to
6 serve the entirety of the Vistancia development.

7 16. Through its responses to Staff data requests, Accipiter claimed that it intended to
8 install state-of-the-art telecommunications facilities including a "fiber-to-the-curb" design that would
9 enable the Company to provision a wide array of telephony and broadband services (Ex. S-1, at 2).
10 Accipiter stated that it intends to invest approximately \$5.1 million over a five-year period to place
11 new facilities in the proposed extension area. The Company indicated that it has existing Rural
12 Utility Service ("RUS") funds available for construction of facilities to serve the extension area (*Id.*
13 at 5).

14 Rate Center Alternatives

15 17. In the Staff Report, Staff stated that the requested extension area is physically located
16 in the 623 National Pooling Administrator ("NPA") portion of the Phoenix rate center and is included
17 in the Metro Phoenix local calling area. Although Accipiter's current service area is located in the
18 928 NPA, Accipiter's exchange has two-way EAS with the Phoenix area which allows the
19 Company's customers to be part of the Metro Phoenix local calling area (*Id.* at 3).

20 18. Staff claims that it became aware during review of the Accipiter application that Cox
21 Arizona Telecom, LLC ("Cox") is currently providing telecommunications services in the requested
22 extension area. Cox is assigning numbers from its available 623 numbering resources, which Staff
23 indicates is appropriate for the area and consistent with Cox's obligations under federal and state
24 rules (*Id.*).

25 19. According to Staff, the transfer of a portion of Qwest's service area to Accipiter raises
26 rate center and numbering issues for which Staff proposed the following alternative solutions: (1) that

27 ² Accipiter was designated as an Eligible Telecommunications Carrier ("ETC") for its service area in Decision No. 60549
28 (December 18, 1997). The ETC designation enables the Company to receive support from the federal universal service
fund in order to provision service to high-cost areas.

1 the area code of the extension area be changed to 928 and be included in the Lake Pleasant rate
 2 center; (2) that the area code remain 623, and a new rate center and exchange in the 623 NPA be
 3 established for Accipiter; (3) that the area code remain 623 and Accipiter establish a new exchange in
 4 the 623 NPA of the Phoenix rate center; or (4) some other alternative. Staff requested comments
 5 from both Cox and Accipiter regarding these proposals. Although Cox submitted comments to Staff
 6 expressing concerns with the first two options, it did not suggest a specific preference for which of
 7 the alternatives should be adopted (Ex. S-5). Accipiter stated that it has the inability to implement
 8 any of the proposed alternatives, but indicated initially that the second option was likely to cause
 9 customer confusion (Ex. S-3). Accipiter subsequently stated its preference for the third option (Ex.
 10 S-4). In the Staff Report, Staff discussed the various alternatives and concluded that the third option
 11 would be the least problematic because "there would appear to be no numbering issues and it would
 12 be less likely to cause customer confusion" (Ex. S-1, at 4).

13 20. In developing its recommendations in this docket, Staff indicated that resolution of the
 14 numbering issue is a critical element of this proceeding. Staff believes that its third alternative,
 15 which would leave the 623 area code and Phoenix rate center boundaries as they currently exist,
 16 would minimize impacts on customers, continue to promote efficient use of numbering resources, and
 17 would not reduce the opportunity for competition through the use of number portability. Staff
 18 therefore recommends approval of the transfer of the extension area from Qwest to Accipiter be
 19 granted, subject to the following conditions:

- 20 a) Accipiter must establish a new exchange for the extension area;
- 21 b) the new exchange would be made part of the Phoenix rate center;
- 22 c) the area code for the extension area would remain 623;
- 23 d) Accipiter would request its NPA 623 numbers for the extension
 area at the thousands-block level from the National Pooling
 Administrator;
- 24 e) Accipiter and Qwest would update their respective tariffs within 30
 days of a Commission Decision to reflect transfer of the service
 area; and
- 25 f) Accipiter would charge its existing rates and charges in the
 26 extension area until further order of the Commission.

27 21. At the hearing, Accipiter's President and CEO, Mr. Gowder, stated that Accipiter
 28 agreed to comply with all of the Staff recommendations as a condition of being authorized to extend

1 its CC&N (Tr. 15-17).

2 **Vistancia Easement and Exclusive Marketing Arrangement**

3 22. Mr. Gowder also testified that Accipiter had recently discovered the existence of two
4 matters that caused concern for the Company. The developer of Vistancia, Shea Sunbelt Pleasant
5 Point, LLC ("Shea"), has entered into an agreement called "Common Services Easements and
6 Restrictions" (Ex. A-7) with Vistancia Communications, LLC ("Vistancia Communications"), an
7 entity that is wholly owned by Shea. Under this recorded easement, any telecommunications
8 provider that operates in the Vistancia development would be required to pay Vistancia
9 Communications a fee of \$500,000 for the privilege of extending its facilities across the easement.
10 Full payment of the \$500,000 fee would be due at the time the provider begins to serve its first
11 customer in each phase of the development. Thus, according to Mr. Gowder, if Accipiter were to
12 construct facilities in the first phase of the development called Trilogy, the Company must pay
13 \$500,000 to Vistancia Communications when its first customer is served. A second \$500,000 would
14 be owed to Vistancia Communications at the time Accipiter served its first customer in the second
15 phase of the development, under the recorded easement (Tr. 23-24). The Shea easement also requires
16 revenue sharing with Vistancia Communications for both residential and business customers. Due to
17 the restrictions imposed by the easement, as well as an exclusive marketing arrangement with Cox
18 (see discussion below), Mr. Gowder expressed concern about Accipiter's ability to achieve
19 significant market penetration in Vistancia (Tr. 31). Mr. Gowder also stated that no other utility
20 service providers (*i.e.*, gas, electric, water, or wastewater) are subject to the easement (Tr. 41).

21 23. Given the existence of the easement, Accipiter is evaluating various alternatives for
22 providing service in Vistancia, including payment of the fees required under the easement (Tr. 73) or
23 providing service with "fixed wireless" technology. Mr. Gowder indicated that the fixed wireless
24 option is likely the most cost-effective alternative because it would allow Accipiter to serve Vistancia
25 without building facilities across the restricted easement³. Mr. Gowder described fixed wireless
26 technology as a "point-to-point telephone service that looks just like wireline services except that it's

27 ³ Although it is not entirely clear that using fixed wireless to circumvent the easement restrictions would be permitted by
28 Vistancia Communications, counsel for Accipiter does not believe the easement would restrict the fixed wireless option
because no physical facilities would need to be installed across the easement (Tr. 75).

1 provided over a wireless link from a tower..." (Tr. 34). According to Mr. Gowder, service provided
2 by fixed wireless would require the customer to receive a signal through a small antenna on the
3 customer's home, but would otherwise be equivalent to service provided by landline facilities (Id.).
4 Fixed wireless would enable Accipiter to provide voice, broadband, and several megabits of internet
5 access (Tr. 52). Mr. Gowder stated that Accipiter could have fixed wireless facilities in place to serve
6 Vistancia within 120 to 180 days from commencement of construction (Tr. 55).

7 24. Counsel for Accipiter stated that the Company is also evaluating whether the easement
8 is legally valid. According to Accipiter's counsel, Qwest advised the Company that it was aware of
9 only one other place in the country where such a telecommunications easement was in place.
10 Accipiter believes that the easement may violate Section 253 of the Telecommunications Act of 1996
11 (47 U.S.C. 253)⁴, which prohibits municipalities from erecting barriers to entry. The Company
12 indicated that the easement may also be invalid under a utility company's right of condemnation.
13 Accipiter is concerned that similar restrictions may occur in other developments unless a legal
14 challenge is raised. Despite the ongoing uncertainty with respect to the easement's legality, Accipiter
15 requests that the Commission grant the CC&N extension sought in this proceeding to ensure that the
16 Company has legal standing to challenge the restrictions (Tr. 70-75).

17 25. Accipiter also recently became aware of the existence of an exclusive marketing
18 agreement between the developer and Cox which, according to Mr. Gowder, prohibits any other
19 telecommunications provider from marketing its services within the Vistancia development, including
20 locating within model homes in the development. Although Accipiter is aware of the existence of the
21 exclusive marketing agreement with Cox, the Company has not seen the actual agreement because it
22 is considered confidential by the parties to the agreement. Mr. Gowder testified that, as a result of the
23 agreement, Accipiter's marketing efforts for Vistancia customers would be limited to electronic and
24 print media, as well as perhaps locating a store in an area adjacent to the development (Tr. 20-22, 50).
25 According to Mr. Gowder, Cox has constructed facilities and is currently serving customers in the

26 _____
27 ⁴ 47 U.S.C. 253(a) provides: "No State or local statute or regulation, or other State or local legal requirement, may
28 prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate
telecommunications service." 47 U.S.C. 253(d) allows the Federal Communications Commission to preempt
enforcement of any such statute, regulation or legal requirement to the extent necessary "to correct such violation or
inconsistency."

1 Vistancia development (Tr. 35).

2 26. Staff supports issuance of the requested CC&N extension to Accipiter, subject to
3 compliance with the conditions described above. Staff's witness, Richard Boyles, indicated that Staff
4 was unaware of the specifics of the easement until the hearing in this proceeding (Tr. 60). Mr. Boyles
5 stated that fixed wireless technology is sometimes used in rural markets as an equivalent replacement
6 for wireline loops, and therefore Staff is not concerned with Accipiter's proposal to use fixed wireless
7 as a means of serving customers in the CC&N extension area (Tr. 63-64). With respect to the legal
8 issues raised in this docket, Staff counsel indicated that the easement discussed in this proceeding is
9 the first arrangement of its type that has come to Staff's attention. Due to the seriousness of these
10 issues, Staff intends to request that a generic docket be opened by the Commission to address the
11 preferred provider arrangements described herein. Staff believes the generic docket should consider
12 the impact on other carriers' ability to effectively provide service under both exclusive marketing and
13 restrictive easement arrangements (Tr. 76-78).

14 **Discussion and Resolution**

15 27. We believe Staff's recommendation for approval of Accipiter's amended application,
16 subject to the Company's compliance with the conditions described in the Staff Report, is reasonable
17 and should be adopted. In accordance with Staff's recommendation, Accipiter must establish a new
18 exchange for the extension area being transferred from Qwest; the new exchange must be made part
19 of the Phoenix rate center; the area code for the extension area will remain 623; and Accipiter must
20 request its NPA 623 numbers for the extension area at the thousands-block level from the National
21 Pooling Administrator.

22 28. As indicated above, Decision No. 64843 (May 28, 2002) authorized Accipiter to
23 change the name of its "Lake Pleasant" rate center to the "Phoenix 928" rate center, and to expand the
24 Phoenix local calling area to include Accipiter's service area through a two-way EAS arrangement
25 with Qwest (Ex. A-6). We believe that future customers served by Accipiter in the requested
26 extension area should also have the benefit of two-way EAS with the Metro Phoenix calling area.
27 We therefore direct Accipiter to work with Qwest to modify the existing EAS agreement in order to
28 include the new Accipiter exchange.

ORDER

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IT IS THEREFORE ORDERED that, subject to compliance with the conditions described above in Staff's recommendations, the application of Accipiter Communications, Inc. for an extension of the service area under its Certificate of Convenience and Necessity to include the area described in Exhibit A attached hereto and incorporated by reference be, and is hereby approved.

IT IS FURTHER ORDERED that, as a condition of transfer of the requested sections of land from Qwest Corporation's service area, and extension of Accipiter Communications, Inc.'s CC&N to include those areas, Accipiter Communications, Inc. shall: establish a new exchange for the extension area being transferred from Qwest; establish a new exchange that will be made part of the Phoenix rate center; maintain the current 623 area code for the extension area; and request its NPA 623 numbers for the extension area at the thousands-block level from the National Pooling Administrator.

IT IS FURTHER ORDERED that the new Accipiter exchange shall be included in Accipiter Communications, Inc.'s ETC-designated area.

IT IS FURTHER ORDERED that Accipiter Communications, Inc. and Qwest Corporation shall work to modify the EAS Agreement between the parties to include the new Accipiter exchange.

IT IS FURTHER ORDERED that Accipiter Communications, Inc. and Qwest Corporation shall update their respective tariffs within 30 days of the effective date of this Decision to reflect transfer of the service area from Qwest to Accipiter.

IT IS FURTHER ORDERED that Accipiter Communications, Inc. shall charge its existing rates and charges in the extension area until further order of the Commission.

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1 IT IS FURTHER ORDERED that Staff shall initiate a generic docket, within 30 days of the
2 effective date of this Decision, to consider issues involving exclusive marketing and/or restrictive
3 easement arrangements. This generic docket should include an investigation of the legal issues
4 associated with exclusive marketing and/or restrictive easement arrangements.

5 IT IS FURTHER ORDERED that this Decision shall become effective immediately.

6 BY ORDER OF THE ARIZONA CORPORATION COMMISSION.

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CHAIRMAN COMMISSIONER COMMISSIONER

COMMISSIONER COMMISSIONER

IN WITNESS WHEREOF, I, BRIAN C. McNEIL, Executive Secretary of the Arizona Corporation Commission, have hereunto set my hand and caused the official seal of the Commission to be affixed at the Capitol, in the City of Phoenix, this ____ day of _____, 2005.

BRIAN C. McNEIL
EXECUTIVE SECRETARY

DISSENT _____

DISSENT _____

1 SERVICE LIST FOR: ACCIPITER COMMUNICATIONS, INC.

2 DOCKET NO.: T-02847A-02-0641

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