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BEFORE THE ARIZONA CORPORATION COMMISSION

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Arizona Corporation Commission

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FEB 22 2005

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IN THE MATTER OF THE FORMAL
COMPLAINT OF ACCIPITER
COMMUNICATIONS, INC., AGAINST
VISTANCIA COMMUNICATIONS, L.L.C.,
SHEA SUNBELT PLEASANT POINT, L.L.C.,
AND COX ARIZONA TELCOM, LLC.

DOCKET NO. T-03471A-05-0064

COX ARIZONA TELCOM, LLC'S MOTION TO DISMISS

Cox Arizona Telcom, LLC moves to dismiss the complaint filed in this docket against Cox Arizona Telcom. In particular, the counts of the complaint asserted against Cox Arizona Telcom: (i) fail to state claims upon which relief can be granted; (ii) seek relief beyond the jurisdiction of the Arizona Corporation Commission; and (iii) seek relief without the joinder of indispensable parties. For the reasons set forth below, the Commission should dismiss the complaint as to Cox Arizona Telcom.

Preliminary Statement

The complaint in this docket seeks to effectively void a private easement arrangement involving the City of Peoria and a real estate developer, as well as two non-exclusive license agreements related to that arrangement. Accipiter requests that this Commission void agreements between the City of Peoria and the developer (which were approved by the City of Peoria city council) and agreements between entities that are not public service corporations (i.e. the holder of the private easements and CoxCom, Inc., an entity that provides video and high speed internet services). The agreements at issue in this complaint action (the "Agreements") are : (i) the Multi-Use Easements and Indemnity agreement between City of Peoria, Shea Sunbelt Pleasant Point, LLC and Vistancia Communications L.L.C ("MUE&I"); (ii) the Common Services

1 Easements and Restrictions agreement between Shea Sunbelt Pleasant Point, LLC and Vistancia
2 Communications, L.L.C. ("CESR"); (iii) the Non-Exclusive License Agreement between
3 Vistancia Communications and CoxCom, Inc. and related Co-Marketing Agreement ("NELA-
4 CMA" and "CMA"); and (iv) the Non-Exclusive License Agreement between Vistancia
5 Communications and CoxCom, Inc. and related Property Access Agreement ("NELA-PAA" and
6 "PAA").

7 Moreover, in its complaint, Accipiter is asking this Commission to act far beyond its
8 jurisdiction, by doing such things as interpreting the legal effect of contracts, voiding those
9 contracts and finding illegal anticompetitive conduct under Arizona's antitrust statutes. Most, if
10 not all, of the relief sought by Accipiter cannot be granted by the Commission, rather it must be
11 granted by the courts (if at all).

12 Further, Accipiter asks the Commission to void the Agreements even though most of the
13 parties to those agreements have not been joined in this action. Indeed, the missing indispensable
14 parties cannot be joined because the Commission has no jurisdiction over them.

15 Cox Arizona Telcom is not a signatory to any of the Agreements (only its parent, CoxCom,
16 Inc. is a party to the agreements). Cox Arizona Telcom is currently providing service to customers
17 in the Vistancia development pursuant to its effective tariff on file with the Commission and the
18 rules of the Commission. Cox Arizona Telcom has not refused to interconnect with Accipiter or
19 to resell its service to Accipiter and the complaint does not allege that Cox Arizona Telcom has so
20 refused.

21 At best, Accipiter has raised policy concerns about real estate developer practices that
22 impact all local exchange carriers in Arizona. The Commission already has opened a docket to
23 address these policy issues. See Docket No. T-00000K-04-09-0927 (Generic Investigation into
24 Preferred Carrier Arrangements). That docket is the appropriate forum to consider some of the
25 issues raised by this complaint and to develop appropriate policies applicable to all carriers. Those
26 policy issues should not – and cannot -- be decided in this complaint proceeding where Accipiter
27 has requested the Commission to act beyond its jurisdiction.

1 The Commission should dismiss Accipiter's complaint as to Cox Arizona Telcom.

2 **Argument**

3 **A. Accipiter Has Not Asserted a Valid Jurisdictional Claim against Cox Arizona**
4 **Telcom**

5 Cox Arizona Telcom will only address below those counts in the complaint that directly
6 implicate it; however, this step should not be construed as an admission that the allegations in the
7 other counts are true, and Cox Arizona Telcom hereby reserves its rights to address these other
8 counts at a later date.

9 **1. Count III**

10 In Count III, Accipiter asserts that the Commission should reclassify Cox Arizona
11 Telcom's services for a single real estate development as noncompetitive. The gist of Accipiter's
12 claim is that the circumstances in 1996 underlying the original "competitive" classification have
13 changed. Of course circumstances have changed over the past nine years; however, the
14 Commission's grant of a CC&N to Cox Arizona Telcom in 1997 contemplated exactly the
15 situation raised by Accipiter and there is no need for the Commission to take further action.

16 In Decision No. 60285, which granted Cox Arizona Telcom, Inc.'s CC&N application,¹ the
17 Commission set forth a condition for Cox Arizona Telcom for those circumstances in the future
18 where Cox Arizona Telcom was the sole provider of services in a specific area:

19 (g) in areas where Cox is the sole provider of local exchange service facilities,
20 Cox provide customers with access to alternative providers of service pursuant to
21 the provisions of A.A.C. R14-2-1112 and any subsequent rules adopted by the
Commission on interconnection and unbundling.

22 Decision No. 60285 at 3, para. 18(g). As set forth below with respect to Count IX, Cox Arizona
23 Telcom is prepared to meet that obligation. As explained there, Cox Arizona Telcom has no
24 unbundling obligation under federal law because it is a competitive service provider.
25 Accordingly, the Commission lacks the authority to impose such a requirement

26 _____
27 ¹ Cox Arizona Telcom, Inc. is the predecessor to Cox Arizona Telcom, LLC and the CC&N
was transferred from the Inc. to the LLC in Decision No.61569.

1 The rationale of Accipiter in seeking the reclassification would be equally applicable – and
2 equally inappropriate – to any situation where the owner of a property allowed access to only one
3 carrier, regardless of whether the property was a 40-story high building, a small garden office
4 complex, a 1000-unit apartment complex or a residential fourplex. A single development is
5 simply not a large enough market to require reclassification. The Commission’s condition in
6 Decision No. 60285 is the proper approach to a circumstance where a property owner denies
7 access.²

8 Moreover, the Commission can take administrative notice that Cox Arizona Telcom’s
9 tariff offers a single statewide rate for each service it offers and does not provide any different
10 rates, terms or conditions for service in any specific area, including Vistancia. Any
11 reclassification of service for a single development would have absolutely no impact in the rates,
12 terms or conditions offered in the development. The relief requested in Count III is unnecessary
13 and Count III should be dismissed.

14 **2. Count IV**

15 In Count IV of the Complaint, Accipiter recites a series of allegations that it contends are
16 anticompetitive and then requests that the Commission “revoke” the antitrust exemption provided
17 to Cox Arizona Telcom by A.R.S. § 40-286. Accipiter repeats this request in Paragraph G of the
18 Prayer for Relief. However, Cox already does not possess an antitrust exemption under the
19 express language of A.R.S. § 40-286. That statute provides, in pertinent part:

20 The provisions of title 44, chapter 10, article 1, shall not apply to any conduct or
21 activity of a public service corporation holding a certificate of public convenience
22 and necessity granted pursuant to this article, which conduct or activity is
23 approved by a statute of this state or of the United States or by the corporation
24 commission or an administrative agency of this state or of the United States
having jurisdiction of the subject matter. This section does not apply to the
provision of competitive electric generation service or other services or to the
provision of any competitive telecommunications services.

25 A.R.S. § 40-286 (emphasis provided). The relief sought under Count IV is illusory – there is no
26

27 ² Here the property owner is not denying access. Accipiter simply does not like the terms of
access required by the property owner.

1 exemption to revoke -- and Count IV, as pleaded, simply fails to state a claim upon which relief
2 can be granted against Cox Arizona Telcom.

3 Moreover, to the extent Accipiter is actually seeking the Commission to find that Cox
4 Arizona Telcom is engaged in illegal anticompetitive activity (see Paragraph G of the Prayer for
5 Relief), the Commission does not have authority to determine that Cox Arizona Telcom violated
6 A.R.S. §§ 44-1402 and 44-1403. It is well settled that the Commission has no implied powers,
7 and its powers do not exceed those derived from a strict construction of the Constitution and the
8 implementing statutes. *See, e.g., Tonto Creek Estates Homeowners Ass'n v. Arizona Corp.*
9 *Com'n*, 177 Ariz. 49, 55, 864 P.2d 1081, 1087 (Ct. App. 1993). Beyond its constitutional
10 ratemaking authority, the Commission has no power beyond that expressly bestowed by statute.
11 *See Tonto Creek*, 177 Ariz. at 56, 864 P.2d at 1088. The Commission's constitutional ratemaking
12 authority does not provide for enforcement of antitrust violations. Moreover, neither the statutes
13 setting forth Commission authority beyond Article 15 of the Constitution nor A.R.S. §§ 44-1402
14 and 44-1403 expressly provide authority to the Commission to determine "illegal" anticompetitive
15 behavior under A.R.S. §§ 44-1402 and 44-1403.

16 Finally, Cox Arizona Telcom denies that it has engaged in any anticompetitive activity in
17 connection with the creation, execution and approval of the Agreements or in any other context
18 contained in the allegations of the Complaint.

19 The Commission lacks jurisdiction to grant the relief requested by Count IV and, therefore,
20 Accipiter has failed to state a claim under Count IV.

21 **3. Count V**

22 In Count V, Accipiter asserts that the defendants, including Cox Arizona Telcom, are
23 interfering with Accipiter's carrier of last resort obligations in violation of A.R.S. § 40-281.B. In
24 connection with that allegation, Accipiter requests the Commission to find that Cox Arizona
25 Telcom violated A.R.S. § 40-281.B and to invalidate the Agreements under the authority of A.R.S.
26 § 40-281.B (see Complaint, Paragraph J of Request for Relief). This claim fails because A.R.S. §
27 40-281.B does not provide authority to the Commission to grant the relief and because parties

1 indispensable to the resolution of the claim have not been joined.

2 First, A.R.S. § 40-281.B simply does not address interference with carrier of last resort
3 obligations and, therefore, does not provide the Commission with the authority to provide the
4 relief requested. A.R.S. § 40-281.B states:

5 B. This section shall not require such corporation to secure a certificate for an
6 extension within a city, county or town within which it has lawfully commenced
7 operations, or for an extension into territory either within or without a city, county
8 or town, contiguous to its street railroad or line, plant or system, and not served by
9 a public service corporation of like character, or for an extension within or to
10 territory already served by it, necessary in the ordinary course of its business. If a
11 public service corporation, in constructing or extending its line, plant or system,
12 interferes or is about to interfere with the operation of the line, plant or system of
any other public service corporation already constructed, the commission, on
complaint of the corporation claiming to be injuriously affected, may, after
hearing, make an order and prescribe terms and conditions for the location of
lines, plants or systems affected as it deems just and reasonable.

13 A.R.S. § 40-281.B (emphasis supplied). Moreover, the statute expressly precludes interference
14 only with facilities that have *already* been constructed. Accipiter has not alleged that it has
15 already constructed any facilities in Vistancia, nor does it allege that the defendants have
16 interfered with facilities that is has constructed.

17 The statutes related to the issuance of certificates of convenience and necessity are not
18 within the Commission's plenary ratemaking authority. See Tonto Creek, 177 Ariz. at 56, 864
19 P.2d at 1088 ("Issuing certificates of convenience and necessity is far from a plenary power of the
20 Commission. To the contrary, it is a legislative power delegated to the Commission subject to
21 restrictions as the legislature deems appropriate.") Moreover, the grant of authority to the
22 Commission under a statute is limited to the "clear letter of the statute." See Phelps Dodge Corp.
23 v. Arizona Elec. Power Co-op., Inc., 207, Ariz. 95, 112-13, 83 P.3d 573, 590-91, (Ct. App.
24 2004)(quoting Southern Pac. Co. v. Arizona Corp. Comm'n, 98 Ariz. 339, 343, 404 P.2d 692, 695
25 (1965)). The express language of A.R.S. § 40-281.B – and therefore the authority of the
26 Commission under that statute – does not provide the basis for the claim asserted by Accipiter.
27

1 Second, in light of the relief requested – voiding the Agreements – Accipiter has failed to
2 join indispensable parties, i.e. all of the parties to the Agreements. As set forth in the Complaint
3 and confirmed by the exhibits to the Complaint, the City of Peoria is a party to the “MUE&I”.
4 CoxCom, Inc. is a party to the “NELA-CMA”, the “NELA-PAA”, the “CMA” and the “PAA”.
5 Yet Accipiter seeks to have this Commission extinguish those agreements without joining the
6 parties to the agreement. Under Ariz. R. Civ. P. 19, this claim should be dismissed because: (i)
7 disposition of the claim will impair both Peoria and CoxCom, Inc.’s ability to protect their
8 contractual interest in the Agreements; (ii) Peoria and CoxCom cannot be joined as parties because
9 the Commission lacks jurisdiction over them; and (iii) Accipiter could bring its claims elsewhere
10 and would not be prejudiced by dismissal.

11 To begin with, it cannot be seriously disputed that a party to an agreement being
12 challenged in a complaint action is an indispensable party to that action. Both Peoria and
13 CoxCom should be entitled to protect their contractual interests. Moreover, neither the City of
14 Peoria nor CoxCom, Inc. is a public service corporation subject to the jurisdiction of the
15 Commission. The Commission does not have jurisdiction over a municipality, such as the City of
16 Peoria, even if it provides utility service. *See, e.g., City of Phoenix v. Wright*, 52 Ariz. 227, 80
17 P.2d 390 (1938) CoxCom, Inc. provides cable television and high speed internet service and is not
18 a public service company subject to the Commission’s jurisdiction. *See American Cable*
19 *Television, Inc. v. Arizona Public Service Co.*, 143 Ariz. 273, 278, 693 P.2d 928, 933 (Ct. App.
20 1983). Because the signatories to the Agreements are not subject to Commission jurisdiction,
21 Accipiter cannot remedy its failure to join indispensable parties. Therefore, Count V (and related
22 prayer for relief) cannot proceed and must be dismissed.

23 **4. Count VII**

24 In Count VII, Accipiter makes the wholly unsupported allegation that Cox Arizona Telcom
25 is not providing 2-PIC equal access in the Vistancia development as required by A.A.C. R14-2-
26 1111. In fact, Cox Arizona Telcom is offering 2-PIC equal access to all of its customers in
27 Arizona, including its customers in Vistancia. All of Cox Arizona Telcom’s services in Vistancia

1 are provided pursuant to Cox Arizona Telcom's tariff on file with the Commission and applicable
2 FCC and Commission rules. The Commission can take administrative notice that Cox Arizona
3 Telcom's tariff offers a single statewide rate for each service it offers and does not provide any
4 different rates, terms or conditions for service in any specific area, including Vistancia. The
5 Commission can take administrative notice that Cox Arizona Telcom has not sought or obtained a
6 waiver of Rule 1111. Finally, even though it is not even a party to the Agreements, Cox Arizona
7 Telcom could not "contract away" its obligations under the Commission's rules. Count VII
8 simply fails to state a claim upon which relief can be granted by this Commission.³

9 **5. Count VIII**

10 In Count VIII, Accipiter asserts that the private easement concept, as reflected by the
11 Agreements, should be prohibited because it prevents competition. Accipiter again requests the
12 Commission to invalidate the Agreements. Count VIII and the related request for relief fails
13 because it requires the Commission to interpret the legal significance and effect of contracts and it
14 – again – seeks to invalidate contracts between entities that have not been joined as parties.

15 In order to arrive at the conclusion urged by Accipiter, the Commission must review and
16 interpret the Agreements and then reach the conclusion that the Agreements were "designed to
17 exclude" competition (as opposed to achieve some other purpose, such as generate additional
18 revenue for the developer). It would also have to interpret whether any detrimental impacts were
19 outweighed by the private property rights of the developer or by the interest of the City of Peoria
20 in creating such easements as an incentive to attract development. These are concerns beyond the
21 expertise of the Commission and are beyond the jurisdiction of the Commission. *See General*
22 *Cable Corp. v. Citizens Util. Co.*, 27 Ariz. App. 381, 385-86, 555 P.2d 350, 354-55 (1976)
23 (holding that the Commission was precluded from reviewing the reasonableness of price terms in
24

25 ³ Even if Count VII did assert a colorable claim, this Commission would not have jurisdiction to
26 consider it. As set forth in more detail below with respect to Count VIII, Accipiter's claim in
27 Count VII would improperly require to interpret the legal effect of the Agreements in order to
determine that they preclude Cox to provide 2-PIC equal access – which they do not and could
not.

1 a sale of electrical power: “the construction and interpretation to be given to legal rights under a
2 contract reside solely with the courts and not with the Corporation Commission.”); Gamet v.
3 Glenn, 104 Ariz. 489, 491, 455 P.2d 967, 969 (1969) (“the Commission, in granting a certificate
4 of convenience and necessity, has no jurisdiction to determine conflicting water rights, cannot
5 purport to license wrongful exportation of water and cannot consider the issue of water rights”);
6 Trico Elec. Coop. v. Ralston, 67 Ariz. 358, 363-65, 196 P.2d 470, 473-74 (1948) (holding that the
7 Commission lacked authority to consider the construction or validity of a utility's sale of electrical
8 and water distribution lines under an option agreement).

9 In the General Cable case, General Cable had filed a complaint against Citizens Utilities
10 asserting that the rates being charged under a power supply agreement between the two parties had
11 become unjust, unreasonable and discriminatory. In Decision No. 43317, the Commission
12 dismissed the complaint on the grounds the Commission was “without jurisdiction to determine
13 the legality of the subject contract.” General Cable then appealed this decision to the Superior
14 Court asking the court to rescind the orders of the Commission and grant the relief requested from
15 the Commission. The trial court affirmed the decision of the Commission on the basis that the
16 Commission did not have had jurisdiction to adjudicate the legality of the contract. On appeal, the
17 Court of Appeals affirmed stating:

18 It is our opinion that the case of Trico Electric Cooperative v. Ralston, 67
19 Ariz. 358, 196 P.2d 470 (1948) is controlling in the case before us. In the Trico
20 case the issue was whether an option contract between an electric cooperative was
21 'unlawful, illegal and void,' similar to General Cable's allegations herein. The
22 cooperative contended that the trial court was attempting to usurp the jurisdiction
of the Corporation Commission. The Arizona Supreme Court ruled it was the
function of the courts and not the Corporation Commission to determine the
validity of the option agreement.

23 We agree with the trial court that the construction and interpretation to be
24 given to legal rights under a contract reside solely with the courts and not with the
25 Corporation Commission. Trico, supra; Benwood-McMechen Water Co. v. City
of Wheeling, 121 W.Va. 373, 4 S.E.2d 300 (1939); Mississippi Valley Gas Co. v.
DeSoto Natural Gas District, 235 So.2d 285 (Miss.1970); Norfolk & Western
Railway Co. v. Commonwealth, 143 Va. 106, 129 S.E. 324 (1925).

26 Although we find the courts had exclusive jurisdiction to interpret the
27 contract in this case, we do not reach any other question here relating to the
jurisdiction of the Corporation Commission to consider rates affecting General
Cable.

1 General Cable Corp. v. Citizens Utilities Co., 555 P.2d at 354-55. The Commission does not have
2 jurisdiction to determine the legal effect of the Agreements and the claim must be dismissed.

3 Moreover, in connection with Count VIII, Accipiter requests this Commission to void the
4 Agreements. As set forth above with respect to Count V, such relief is improper due to the failure
5 to join indispensable parties. Count VIII should be dismissed.

6 **6. Count IX**

7 In Count IX, Accipiter asserts that Cox Arizona Telcom should provide Accipiter with
8 interconnection and with access to its network in Vistancia. Notably, Accipiter does not assert
9 that Cox Arizona Telcom has refused such access – because it cannot. Accipiter has never made
10 such a request of Cox Arizona Telcom. Count IX fails because Cox Arizona Telcom is legally
11 obligated to allow Accipiter to resell its services to the residents of Vistancia. *See* 47 U.S.C.
12 251(b)(1). Cox Arizona Telcom is also obligated to interconnect with other LECs. *See* 47 U.S.C.
13 251(a)(1). Again, although Cox Arizona Telcom is not a party to the Agreements, it could not
14 contract away those obligations.

15 No competitive LEC, including Cox Arizona Telcom, is required to provide unbundled
16 network elements under the 1996 Telecommunications Act. That obligation is set forth in 47
17 U.S.C. 251(c)(3) and applies only to incumbent LECs. Ironically, if Accipiter were to build its
18 purported Fiber-to-the-Home (FTTH) network in a “greenfield” environment, such as CoxCom,
19 Inc. did in Vistancia, Accipiter (or any other ILEC) would not have to unbundle its network
20 elements. *See Triennial Review Order* (FCC 03-036), ¶ 275.

21 Count IX is simply a red herring and there is no actual relief that the Commission needs to
22 provide in response to the allegations in Count IX. Cox Arizona Telcom is already obligated both
23 to provide interconnection and to allow the resale of its services. There is no allegation that it has
24 refused to do so. There also is no allegation that the Agreements could preclude Cox Arizona
25 Telcom from interconnecting with Accipiter or could prevent Accipiter from reselling Cox
26 Arizona Telcom’s services – indeed, the Agreements could not do so. Therefore, Count IX fails to
27 state a claim upon which relief can be granted against Cox Arizona Telcom.

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1 **B. Even If Accipiter Has Stated a Valid Claim, the Commission Should Decline**
2 **Jurisdiction**

3 Many of the claims asserted and relief sought by Accipiter in this docket are simply
4 outside the jurisdiction of this Commission. The few remaining claims, as set forth above, do not
5 state a claim upon which relief should be granted. First, the overarching thrust of the Accipiter
6 complaint is to void the private easement arrangement at the Vistancia development. Such action
7 would entail voiding agreements that: (i) are outside the jurisdiction of the Commission to
8 interpret and (ii) involve signatories to the agreements who are not subject to Commission
9 jurisdiction. Second, none of the claims asserted are within the exclusive jurisdiction of the
10 Commission. Third, to the extent the Commission has concerns about developer agreements, such
11 as the Vistancia agreements, the Commission already has a generic docket to address the issues.
12 That docket provides the proper forum for developing equitable guidance that would apply to all
13 telecommunications companies – something that this complaint docket cannot do. Judicial and
14 administrative efficiency are served by the dismissal of this complaint without prejudice.

15 **Relief Requested**

16 The Commission lacks jurisdiction or authority to hear the claims asserted by Accipiter
17 against Cox Arizona Telecom. The complaint should be dismissed as to Cox Arizona Telcom.

18 RESPECTFULLY SUBMITTED this 22nd day of February, 2005.

19 COX ARIZONA TELCOM, LLC.

20 By 
21 _____
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1 Original and 13 copies of the foregoing
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7 Copy of the foregoing hand-delivered
8 this 22nd day of February, 2005 to:

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25 Copy of the foregoing mailed
26 this 22nd day of February, 2005 to:

27 Charles V. Gowder, President
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By 