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BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

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

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
Arizona Corporation Commission 0064

DOCKETED

MAR 28 2005

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ACCIPITER'S RESPONSE IN OPPOSITION TO
 COX ARIZONA TELCOM, LLC'S MOTION TO DISMISS.

In this action, Accipiter seeks Commission review of the unlawful actions of a group of public service corporations that have fabricated complete monopoly control over wire communications services in a service area roughly equivalent to the 15th largest city in the State. Among the three public service corporations named in this action, only Cox holds a certificate of public convenience and necessity ("CC&N") issued by the Commission. But even Cox's CC&N is deficient. It provides for competitive telecommunications services, not monopoly services, which Cox is providing to the public in the Vistancia master planned community.

There are many incorrect assertions that permeate Cox Arizona Telcom LLC's ("Cox") Motion to Dismiss. Cox claims again and again that the Commission has no jurisdiction over the other named respondents. But as explained more fully below, both Shea and Vistancia Communications are acting as public service corporations furnishing

1 monopoly telephone service to the public throughout the the Vistancia master planned
2 community, and they are doing this without having first obtained a proper CC&N from
3 the Corporation Commission. The Commission has jurisdiction over these utility
4 providers.

5 Second, Cox repeatedly contends that this action must be dismissed for failure to
6 join indispensable parties. But under A.R.S. 40-246(B) it is clear that complaints against
7 public service corporations are not subject to dismissal for misjoinder or nonjoinder of
8 parties or causes. Nor does Cox elaborate with any indispensable party analysis, or why it
9 contends that the others cannot be joined in this action. This action can proceed against
10 Cox with or without any other parties.

11 Also, Cox apparently contends that all a public service corporation has to do to
12 deprive the Arizona Corporation Commission of jurisdiction is to clothe its wrongful
13 conduct in contractual language, and somehow the Commission's jurisdiction disappears.
14 Common sense dictates that this contention cannot be correct. If it were that easy for a
15 public service corporation to deprive the Commission of jurisdiction, all utility companies
16 would avoid Commission oversight by insulating their actions (lawful or otherwise) in a
17 cloak of contractual language conveniently placed with multiple affiliate entities that do
18 not hold CC&Ns, just as Cox has attempted to do in this case. Contrary to Cox's
19 position, such paper game antics do not deprive the Commission of jurisdiction over
20 complaints against public service corporations.

21 We are amazed that Cox actually argues that it should be allowed to hide behind
22 the actions of its parent, CoxCom, which is the lone member of Cox Arizona Telcom,
23 LLC, and stands in the middle of the whole operation funneling kickbacks of ratepayer
24 dollars directly from its monopoly telecommunications provider arm, Cox Arizona
25 Telcom, and into the pockets of the developer. In this instance Cox's parent, CoxCom,
26 Inc., also matches the definition of a public service corporation. Considering Cox

1 Arizona Telcom's unwillingness to own up to its sole member's actions undertaken on
2 Cox's behalf, we will voluntarily seek to join Cox's parent, CoxCom, Inc., in this matter.
3 However, the current absence of CoxCom from this action is no reason for the
4 Commission to close its eyes to the wrongful conduct of a certificated Arizona public
5 service corporation as Cox wrongfully insists the Commission should do.

6 **1. Vistancia: Roughly the Size of Prescott, the 15th Largest City in the State.**

7 Vistancia is a massive master planned community, currently being developed in
8 the far West Valley on rural land within the outskirts of the City of Peoria. (*Complaint*, ¶
9 3.) Vistancia covers over 11 square miles and includes 17,000 housing units along with
10 820 acres of commercial, mixed use, and other public and recreational amenities. (*Id.*, ¶
11 4.) At build out the development is projected to have a population of 45,000. (*Id.*, ¶ 115.)

12 To place the size of the Vistancia community in perspective, when measured by
13 number of housing units, Vistancia is roughly the size of the 15th largest city in the State,
14 the City of Prescott¹. Vistancia's 17,000 housing units will add approximately 40% more
15 housing units to the City of Peoria,² and it adds about 1.4% to the total housing units of
16 Maricopa County.³

17 Vistancia is a large city being built as a master planned community. Cox's
18 attempts to compare Vistancia with a fourplex apartment complex or a single owner
19 office building are not even close to reality. The Vistancia master planned community is
20 the equivalent of building Arizona's 15th largest city from scratch. And Cox has paid off
21 the developer through kickbacks of ratepayer dollars to lock up monopoly telephone
22 provider rights to the entire service area without a proper CC&N issued by the
23 Commission.

24 _____
25 ¹ In the 2000 census, the City of Prescott contains 17,144 housing units. See U.S.
26 Census Bureau Census 2000 Housing Units Chart, copies attached as Exhibit 1.

² In the 2000 census, the City of Peoria contains 42,573 housing units. *Id.*

³ In the 2000 census, Maricopa County contains 1,250,231 housing units. *Id.*

1 **2. The Scheme—segregate communications easements and funnel kickbacks of**
2 **ratepayer dollars to the developer in return for monopoly privileges.**

3 The players involved in this unlawful scheme to exert monopoly control over
4 telephone service throughout the entire service area basically boil down to the developer,
5 Shea Sunbelt Pleasant Point, LLC (“Shea”), and the phone company, Cox. Shea and Cox
6 have added some complexity by creating and using a wholly owned subsidiary of the
7 developer, Vistancia Communications, and also by using the sole member/parent of the
8 phone company, CoxCom, Inc.⁴ But CoxCom’s subsidiary telephone service provider
9 Cox Arizona Telcom, LLC, cannot avoid Commission jurisdiction by merely contending
10 it was its controlling parent that signed the deal.

11 To gain monopoly control over all wireline communications services provided in
12 the community, Shea carved out the right to name which communications providers are
13 allowed to use the utility easements in Vistancia. (*Id.*, e.g., ¶¶ 17&24.) Ordinarily, a
14 housing development would involve public utility easements (“PUEs”) which are
15 dedicated by the developer to the municipality for public use by all utility providers. This
16 is typically done in accordance with the City’s subdivision, development, or right-of-way
17 standards. But with Vistancia, the PUE’s had excised from them the right to say which
18 communications providers were allowed in the PUEs.

19 Shea made up a name for these limited PUEs, and called them “Multi-Use
20 Easements” or “MUEs” instead of PUEs. (*Id.*, ¶ 22.) Perhaps a more descriptive name
21 would be “All But Communications—Public Utility Easements,” or “ABC-PUEs,” but
22 Shea chose MUE so we will use that acronym as well. The point is that MUEs are
23 nothing but PUEs minus the communications rights, which are carved out over the exact
24 same easement area and reserved to the developer.

25 _____
26 ⁴ In Finding of Fact #4 of Decision 61596, it states that CoxCom, Inc., is the sole
member of Cox Arizona Telcom II, LLC, which later changed its name to Cox Arizona
Telcom, LLC.

1 Once Shea reserved “communications” from the MUEs, it effectively placed itself
2 in a gatekeeper position yielding monopoly control over the telephone and other
3 communications services offered to each and every member of the public throughout the
4 master planned community. This left Shea with limitless options as to how to use its self
5 created monopoly power.

6 Shea elected to sell off the access rights to the communication easements to a
7 single carrier for whatever terms Shea could get, which from Cox included \$1,000,000 up
8 front, and an agreement by the carrier to pay ongoing kickbacks on a sliding scale of 15 to
9 20 % of the residential ratepayers’ fees keyed to achieving 75 to 96% market penetration
10 and 3 to 5% for commercial phone service. (*Id.*, ¶ 32 & Exh. G & H.) In other words, for
11 Shea to receive its kickbacks, it must maintain monopoly control over the Vistancia
12 community.

13 **3. The City Has Been Indemnified to Look the Other Way.**

14 Ordinarily, the city governments protect competing telephone carriers from these
15 forms of discriminatory access requirements, exorbitant charges, and other artificial
16 barriers to entry and use of right-of-ways. Arizona statutes A.R.S. § 9-582 and 9-583,
17 require municipalities to charge only reasonable, competitively neutral, and
18 nondiscriminatory license and permit fees that are proportionate to the cost incurred by
19 the municipality. Additionally, A.R.S. § 9-583(A) provides cities “shall not adopt any
20 ordinance that may prohibit or have the effect of prohibiting the ability of any
21 telecommunications corporation to provide telecommunications service.” But in this case,
22 with the massive Vistancia master planned community at stake, the developer was able to
23 provide the City of Peoria with ample consideration, and even insurance in the form an
24 indemnity agreement, to entice the City to look the other way. (*Complaint*, ¶ 27 & Exh,
25 F.) The City was still allowed to impose the same city fees, the same city permits, the
26 same city standards, and the same city inspections, and the same city control over any

1 telephone provider working in the MUEs, exactly the same as if they had been PUEs. (*Id.*,
2 ¶¶ 23-26.) But instead of following our State statutes, the Mayor and City Council voted
3 on, approved, and caused to be recorded, document after document that were designed
4 specifically to create monopoly control over the utility easements for telephone, and
5 deprive competing providers of equal access to the community.

6 Cox and Shea have convinced the City of Peoria to look the other way. That does
7 not mean the Corporation Commission should do likewise, as Cox requests.

8 **4. Motion to Dismiss—All Allegation Are Accepted by Cox as True.**

9 A Motion to Dismiss is designed to test the sufficiency of the allegations in the
10 Complaint. *E.g.*, AAC, R14-3-106(H). Therefore, when reviewing a motion to dismiss,
11 the allegations in the Complaint are accepted as true, and all facts reasonably susceptible
12 to proof that are needed to support the allegations are assumed proven. *Carrillo v. State*,
13 169 Ariz. 126, 817 P.2d 493 (Ct. App. 1991) Dismissal must not be granted unless there
14 is no set of facts under which the claimant would be legally afforded the relief sought.
15 *Newman v. Maricopa County*, 167 Ariz. 501, 808 P.2d 1253 (Ct. App. 1991).

16 Throughout its Motion to Dismiss, Cox repeatedly denies various allegations in the
17 Complaint. These denials must be ignored. If Cox desires to deny the allegations, it is
18 free to file an Answer in which Cox may admit or deny as many of the allegations as Cox
19 believes appropriate. In the meantime, for the purpose of Cox's Motion to Dismiss, Cox
20 is deemed to have admitted all well pleaded allegations in the Complaint.

21 **5. Shea and Vistancia Communications Are Acting as Public Service**
22 **Corporations.**

23 Apparently, Cox contends that the failure of the other entities involved in this
24 unlawful monopoly to obtain CC&Ns from the Corporation Commission somehow strips
25 away the Commission's jurisdiction, or perhaps Cox denies that Shea and Vistancia
26 Communications are public service corporations. Both contentions are incorrect. Shea

1 and Vistancia are both operating as public service corporations subject to the
2 Commission's jurisdiction, and their failure to obtain CC&Ns for their Vistancia service
3 area does not deprive the Commission of jurisdiction over their public utility related
4 actions.

5 In Arizona, a "public service corporation" is a constitutional concept, whereas a
6 CC&N is a creature of statute that is issued to a public service corporation by the
7 Commission. *Tonto Creek Estates Homeowners Assoc. v. Arizona Corporation*
8 *Commission*, 177 Ariz. 49, 864 P.2d 1081 (Ct. App. 1993); e.g., Arizona Const. Art. 15 §
9 3; A.R.S. § 40-281 *et seq.* The Arizona Courts have made it very clear that a person or
10 entity's status as a "public service corporation" is not controlled by whether or not the
11 public service corporation has decided to comply with the statutes and first obtain a
12 CC&N from the Commission. To the contrary, if a company is acting as a public service
13 corporation providing utility service to the public, the commission has jurisdiction to
14 review its actions for conformance with the laws and commission rules regardless of
15 whether it has bothered to seek a CC&N. *E.g., Tonto Creek*, 177 Ariz. at 58, 864 P.2d at
16 1090 (ordering entity operating a water utility to stop discriminatory treatment of
17 customers and water restrictions, even though the entity had never obtained a CC&N).

18 In addition to Cox, the other two named respondents, Shea and Vistancia
19 Communications (and even Cox's parent, CoxCom), are all acting as public service
20 corporations as that term is used in our constitution and statutes.

21 The question of whether or not a person or entity is a "public service corporation"
22 depends on the business conduct and intent of the company in question. *Id.* There are
23 many factors that can result in a business being branded as a public service corporation.
24 The Arizona Supreme Court set out a number of them in *Natural Gas Serv. Co. v. Serv-*
25 *Yu Coop.* where the issue was whether a natural gas cooperative was acting as a public
26 service corporation., 70 Ariz. 235, 219 P.2d 324 (1950). The *Serv-Yu* factors include:

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1. What the corporation actually does.
2. A dedication to public use.
3. Articles of incorporation, authorization and purpose.
4. Dealing with the service of a commodity in which the public has been generally held to have an interest.
5. Monopolizing or intending to monopolize the territory with a public service commodity.
6. Acceptance of substantially all requests for service.
7. Service under contracts and reserving the right to discriminate is not always controlling.
8. Actual or potential competition with other corporations whose business is clothed with public interest.

Natural Gas Serv. Co. v. Serv-Yu Coop., 70 Ariz. at 237-38, 219 P.2d at 325-26 (1950) (citations omitted).

The *Serv-Yu* factors are met—Shea and Vistancia Communications are public service corporations:

In this case, what the corporation (the developer) actually does, is act as another regulatory body controlling access to the community, and thereby controlling and selecting of the provider of phone service to the public. Sitting in their position as the telecommunications gatekeepers to the community, Shea and its alter ego subsidiary are able—at their whim—to select the carrier that is allowed to provide phone service to the public. They can impose on the telephone carrier whatever conditions of service they may choose. They have chosen Cox alone as the sole privileged public carrier available to the homeowners and businesses, and they have required Cox to pay ongoing kickbacks of ratepayer dollars to the developer in return for the privilege of being their selected carrier to service the public. Factor number 1 is met.

The developer and its affiliate have not reserved the telecommunications rights over the MUE's for any purpose other than to use them to provide public utilities. This is unquestionably a dedication to public use. Factor number 2 is met.

Factor number 3, statements relating to direct statements of a public utilities intent in the company's Articles of Incorporation is the only *Serv-Yu* factor not met by the allegations in the Complaint. However, the failure of a company to expressly state in its

1 Articles that it intends to provide public utilities is certainly not dispositive of whether it
2 is a public service corporation.

3 There is no question wireline telephone service has historically been considered as
4 “dealing with the a service of a commodity which the public has generally been held to
5 have an interest.” Factor number 4 is met.

6 It is also clearly alleged in the Complaint that this arrangement of the Vistancia
7 master planned community with MUEs was created in an effort to monopolize the
8 service, and it has effectively done just that. Factor number 5 is met.

9 The developer and its affiliate through their gatekeeper function fully intend to
10 accept substantially all requests for service and allow their chosen monopoly provider into
11 the easements to provide that service. Factor number 6 is met.

12 The entity that Shea and Vistancia Communications have chosen to provide
13 telephone service, Cox, makes it abundantly clear in its Motion to Dismiss that it is
14 providing telephone services under tariff, not under individual private contract with each
15 homeowner and not reserving the right to discriminate against customers. Factor number
16 7 is met.

17 Clearly there is potential competition for Shea and Vistancia from a business
18 generally considered to be clothed with public interest. Accipiter, an incumbent local
19 exchange carrier, is a classic public utility. This Complaint has been filed because
20 Accipiter is seeking access to the master planned community so that it can compete head
21 on with Shea and Vistancia Communications’ monopoly over telephone service. Factor
22 Number 8 is met.

23 By fabricating a monopoly stranglehold over the Vistancia master planned
24 community and using their power to exclude all competition from the market in return for
25 kickbacks of ratepayer dollars, Shea and its alter ego subsidiary Vistancia
26 Communications are public service corporations that are not beyond the jurisdiction of

1 the Corporation Commission. In fact, failure to get CC&Ns is a violation subject to the
2 Commission's enforcement and various remedies and penalties.

3
4 **6. Developers Usually Do Not Come Close to Being a Public Service Company,
But Here Shea Has Crossed the Line.**

5 Under normal circumstances, a developer would grant the rights to
6 telecommunication easements along with the PUEs to the municipality, and the
7 municipality would allow all telephone providers nondiscriminatory access to the
8 easements as required by statute. Also, as alleged in Count 7 of the Complaint,
9 Commission Rule R-14-2-506(E)(2)(b) requires developers to provide right-of-way
10 easements suitable to the utility at no cost to the utility and in reasonable time to meet
11 service requirements.

12 As a practical matter, if a developer complies with typical municipal requirements,
13 or complies with the Commission's rules, there is very little chance that the developer
14 would ever come close to being considered a public service corporation. Unless, of
15 course, the developer decided to directly provide some typical public utility service such
16 as providing sewer or water to the development.

17 However, in Vistancia, the developer ignored the Commission rules and ignored
18 the telecommunications right-of-way statutes, and it reserved the communications portion
19 of the easements for itself and then assigned them to its alter ego, Vistancia
20 Communications. Cox points out this monopoly arrangement was created to line the
21 developer's pockets with ratepayer dollars. (Cox's Motion to Dismiss, page 8, lines 17-
22 18.) The developer and its alter ego and Cox and its alter ego should not be surprised
23 they are all acting as public service corporations subject to the Commission's jurisdiction.
24 After all, it is the sale of the utility service to the public that generates all of the revenues
25 being kicked back to the developer in this scheme.

26

1 **7. Cox Is Providing Noncompetitive (Monopoly) Services in Vistancia**

2 Cox incorrectly claims that the situation in Vistancia is merely an area where Cox
3 happens to find itself as the sole provider of competitive LEC services. As Cox's
4 convoluted argument continues, because its CC&N is for competitive services, it must be
5 providing competitive services, and since the services must be competitive, under federal
6 law it has no unbundling obligation, and therefore Cox contends that the Commission
7 lacks any authority to do anything. Cox has again forgotten that it filed a Motion to
8 Dismiss, not an Answer.

9 Cox is providing monopoly service throughout a service area the size of the 15th
10 largest city in the state—not a tiny little apartment building—but an entire CITY. For the
11 purposes of Cox's Motion, it is deemed to have admitted this, whether it likes the facts or
12 not. All of Cox's arguments relating to providing competitive services in Vistancia must
13 be rejected.

14 The Commission's competitive telecommunications rules specifically provide that
15 "[a]ny telecommunications service classified by the Commission as competitive may
16 subsequently be reclassified as noncompetitive if the Commission determines that
17 reclassification would protect the public interest." AAC, R14-2-1108(H). Through a
18 lengthy series of instruments, Cox has outright purchased monopoly power over a
19 development the size of the 15th largest city in this State. Based on the allegations in the
20 Complaint, this Commission has authority to decide whether circumstances have changed
21 such that what was previously classified as competitive services should be reclassified as
22 noncompetitive services. Cox's Motion to Dismiss must be denied.

23 **8. Cox's Contention That it Cannot Be Subject to the Utility Exemption from**
24 **the Anti-trust Law Incorrectly Assumes Cox's Services Are Competitive and**
25 **Not A Monopoly.**

26 Cox claims it has no antitrust exemption. To make that claim, Cox determines by
unilateral edict that it must be offering competitive telecommunications services in its

1 bought and paid for monopoly service area. Under Count III, Accipiter has stated a
2 proper claim for reclassification of Cox's services based on a finding that they are
3 noncompetitive. Once Cox's services are properly reclassified as noncompetitive, Cox
4 would potentially be subject to the anti-trust exemption in A.R.S. § 40-286, provided Cox
5 met the other criteria specified in the statute.

6 Accipiter is seeking a ruling that any such anti-competitive actions by Cox were
7 not pursuant to any CC&N relating to the anti-competitive conduct and that Cox's
8 conduct has not been approved by a statute of this State or the United States, thereby
9 eliminating any exemption offered by A.R.S. § 40-286. Cox's declaration that it is
10 offering competitive services in Vistancia must be rejected for the purpose of its Motion.
11 To the contrary, as alleged in the Complaint, Vistancia is a monopoly service area being
12 served by Cox in violation of its CC&N. Cox's Motion to Dismiss must be denied.

13
14 **9. The Commission Has Authority Under A.R.S. Section 40-246 to Hear the
Claims in the Complaint.**

15 The authority to hear claims against public service corporations is expressly
16 granted to the Commission in A.R.S. § 40-246(A). "Complaint may be made by the
17 commission of its own motion, or by any person or association of persons by petition or
18 complaint in writing, setting forth any act or thing done or omitted to be done by any
19 public service corporation in violation, or claim to be in violation, of any provision of law
20 or any order or rule of the commission . . ." Additionally, it is the Corporation
21 Commission that has authority to grant monopoly status to a public service corporation
22 through the CC&N process. A.R.S. § 40-281. Also, the Corporation Commission has the
23 authority to regulate public service corporations. Ariz Const. Art. 15 § 3; A.R.S. § 40-
24 202. The Complaint sets forth well pleaded allegations regarding the respondents
25 monopolistic actions beyond any CC&N, and violations of Arizona's Uniform Anti-trust
26 laws. The Corporation Commission has authority under A.R.S. § 40-246(A) to hear such

1 violations by public service corporations. In *Tonto Creek*, 177 Ariz. 49, 864 P.2d 1081,
2 the Court of Appeals ruled very clearly that while the Commission did not have the
3 jurisdiction to take a CC&N from a non-party without notice, the Commission certainly
4 did have jurisdiction to order a non-certificated public service corporation that was a party
5 with notice to comply with the Commission rules and State statutes.

6 Cox also incorrectly contends that the Commission cannot have any jurisdiction
7 over any issue relating to a contract. Cox's reading of the case law it cites is far too
8 narrow. *General Cable Corp. v. Citizens Utility Company*, 27 Ariz. App. 381, 385-86,
9 555 P.2d 350, 354-55 (1976), involved an electric customer complaining that the electric
10 rates in a contract were excessive and unreasonable. Of course, the Commission in
11 *General Cable* decided it had no jurisdiction to review such an issue. A.R.S. § 40-246(A)
12 explicitly excludes complaints relating to the reasonableness of any rates or charges
13 "unless it is signed by the major or a majority of the legislative body of the city or town"
14 or 25% of the customers. The Court of Appeals emphasized that it was making a very
15 narrow ruling relating to lack of jurisdiction in this opinion stating that they "do not reach
16 any other question here relating to the jurisdiction of the Corporation Commission to
17 consider rates affecting General Cable." 27 Ariz. App. at 385, 555 P.2d at 354. The
18 *Gamet v. Glen* case cited by Cox involved a common sense situation where the
19 Corporation Commission had held that it had no jurisdiction to determine conflicting
20 water rights and the Appellate Courts agreed. *Gamet v. Glenn*, 104 Ariz. 489, 491, 455
21 P.2d 967, 969 (1969). And *Trico Electric Coop. v. Ralston* involved the Court's
22 interpretation of a contract for sale where the court held that the validity of the sale
23 through an option agreement was for the courts to decide. However, if valid, the
24 agreement must have the sanction and approval of the Corporation Commission before it
25 becomes effective. *Trico Electric Coop. v. Ralston*, 67 Ariz. 358, 196 P.2d 470 (1948).
26 None of these cases hold that there is some kind of broad prohibition that eliminate the

1 Corporation Commission's jurisdiction to review anything relating to a contract as Cox
2 contends.

3 Conversely, the Commission's power relating to the issuance and regulation of
4 CC&Ns has been legislatively granted to the Corporation Commission since statehood.
5 Control over CC&Ns is perhaps the power most central to the Commission's authority
6 and purpose as our public utility regulating body to ever be legislatively delegated.

7 Under this authority over CC&Ns, A.R.S. § 40-281(D) explicitly provides that
8 "[t]his article [relating to CC&Ns] shall not be construed as granting or as having granted
9 to any telecommunications corporation an exclusive franchise or monopoly within the
10 territory described by its certificate unless the commission determines after notice and
11 hearing that such an exclusive franchise or monopoly is in the public interest."

12 Apparently Cox now contends that it has moved above the Commission's authority
13 by shrouding its actions in the form of a contract and that it can create its own monopoly
14 terms and provide service throughout its monopolized area without first obtaining a
15 CC&N from the Commission authorizing the monopoly as required by § 40-281. Cox's
16 claim that it can avoid Commission jurisdiction by merely clothing its monopoly in a
17 wrap of contractual language must be rejected by the Commission and Cox's Motion to
18 Dismiss must be denied.

19 The first homeowner in Vistancia that becomes disgruntled with Cox and asks for
20 phone service from the incumbent LEC will be in for a big shock when it learns that the
21 cost of running wire to the house will start with an initial payment of \$500,000. That
22 provision alone alleged in Paragraph 92 of the Complaint constitutes an unlawful and
23 improper interference by Cox with Accipiter's carrier of last resort obligations. Count 5
24 states a lawful claim for relief and Cox's Motion to Dismiss must be denied.

25 Regarding Count VII, Cox improperly contends that its denial of the allegations
26 are sufficient to cause dismissal of the claim regarding lack of 2-PIC equal access in the

1 Vistancia development. Cox's denial notwithstanding, this allegation is deemed admitted
2 for Cox's Motion to Dismiss, and Count VII states a good claim against Cox.

3 **10. Conclusion.**

4 Lastly, this matter should not be sent to the recently opened docket number relating
5 to preferred provider agreements, as Cox requests. That docket contains a single sheet of
6 paper, the letter requesting that the docket be created. This is nothing but a delay tactic
7 by the respondents, intended to set these issues aside while more homes are built and
8 outfitted with monopoly phone service every day.

9 Also, this case is somewhat unique in that the City government has abandoned
10 Accipiter by ignoring the statutory protection that would ordinarily require equal and
11 reasonable access to the utility right-of-ways. As a result, we now have a huge privately
12 created monopoly service area, being controlled by a developer without a CC& N, that is
13 being paid by Cox, also without a CC&N for monopoly services. This unique situation
14 would not fit well in the generic docket, which is intended to study broad policy and
15 planning issues.

16 This case involves discrete and well defined issues relating to several public
17 service corporations operating without CC&Ns that have concocted a scheme to create
18 their own monopoly market for LEC telephone services. And it involves a CLEC that
19 decided to purchase the unlawful monopoly rights, paying for the monopoly through
20 kickbacks of ratepayers' money. There is no question the laws of our State do not allow
21 public service corporations to monopolize a territory unless its CC&N contains a finding
22 from the Commission that is in the public interest. The Shea/Vistancia
23 Communications/Cox monopoly arrangement is certainly not in the public interest.

24 Accipiter respectfully requests that Cox's Motion to Dismiss be denied and the
25 Commission order Cox to answer the Complaint within 10 days.

1 RESPECTFULLY SUBMITTED this 28th day of March, 2005.

2 MORRILL & ARONSON, P.L.C.

3
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10 ORIGINAL and 13 copies of the foregoing
11 filed this 28th day of March, 2005 with:

12 Docket Control
13 Arizona Corporation Commission
14 1200 West Washington Street
15 Phoenix, Arizona 85007

16 COPY of the foregoing hand-delivered
17 this 28th day of March, 2005 to:

18 Lyn A. Farmer, Esq.
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Synda Kogutkiewicz

EXHIBIT 1

U.S. Census Bureau**Census 2000 Housing Units**[Housing Counts Main](#) | [FAQs](#) |

Geographic Area	Housing Units (count)
Census 2000 U.S. Housing Unit Count	
-- Arizona	2,189,189
-- Apache County	31,621
-- Cochise County	51,126
-- Coconino County	53,443
-- Gila County	28,189
-- Graham County	11,430
-- Greenlee County	3,744
-- La Paz County	15,133
-- Maricopa County	1,250,231
-- Mohave County	80,062
-- Navajo County	47,413
-- Pima County	366,737
-- Pinal County	81,154
-- Santa Cruz County	13,036
-- Yavapai County	81,730
-- Yuma County	74,140

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U.S. Census Bureau

Census 2000 Housing Units

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Geographic Area	Housing Units (count)
Census 2000 U.S. Housing Unit Count	
-- Arizona	2,189,189
-- Apache Junction city	22,771
-- Avondale city	11,419
-- Benson city	2,822
-- Bisbee city	3,316
-- Buckeye town	2,344
-- Bullhead City city	18,430
-- Camp Verde town	3,969
-- Carefree town	1,769
-- Casa Grande city	11,041
-- Cave Creek town	1,753
-- Chandler city	66,592
-- Chino Valley town	3,256
-- Clarkdale town	1,546
-- Clifton town	1,087
-- Colorado City town	457
-- Coolidge city	3,212
-- Cottonwood city	4,427
-- Douglas city	5,186
-- Duncan town	384
-- Eagar town	1,713
-- El Mirage city	3,162
-- Eloy city	2,734
-- Flagstaff city	21,396
-- Florence town	3,216
-- Fountain Hills town	10,491
-- Fredonia town	455
-- Gila Bend town	766
-- Gilbert town	37,007
-- Glendale city	79,667
-- Globe city	3,172
-- Goodyear city	6,771
-- Guadalupe town	1,184
-- Hayden town	334
-- Holbrook city	1,906
-- Huachuca City town	844
-- Jerome town	215

-- Kearny town	873
-- Kingman city	8,604
-- Lake Havasu City city	23,018
-- Litchfield Park city	1,633
-- Mammoth town	697
-- Marana town	5,702
-- Mesa city	175,701
-- Miami town	930
-- Nogales city	6,501
-- Oro Valley town	13,946
-- Page city	2,606
-- Paradise Valley town	5,499
-- Parker town	1,157
-- Patagonia town	498
-- Payson town	7,033
-- Peoria city	42,573
-- Phoenix city	495,832
-- Pima town	735
-- Pinetop-Lakeside town	2,750
-- Prescott city	17,144
-- Prescott Valley town	9,484
-- Quartzsite town	3,186
-- Queen Creek town	1,281
-- Safford city	3,718
-- Sahuarita town	1,247
-- San Luis city	3,325
-- Scottsdale city	104,974
-- Sedona city	5,684
-- Show Low city	4,337
-- Sierra Vista city	15,685
-- Snowflake town	1,536
-- Somerton city	1,967
-- South Tucson city	2,059
-- Springerville town	896
-- St. Johns city	1,392
-- Superior town	1,470
-- Surprise city	16,260
-- Taylor town	1,041
-- Tempe city	67,068
-- Thatcher town	1,427
-- Tolleson city	1,485
-- Tombstone city	839
-- Tucson city	209,609

-- Wellton town	1,144
-- Wickenburg town	2,691
-- Willcox city	1,652
-- Williams city	1,204
-- Winkelman town	194
-- Winslow city	3,198
-- Youngtown town	1,783
-- Yuma city	34,475

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