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BEFORE THE ARIZONA CORPORATION COMMISSION

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Arizona Corporation Commission

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IN THE MATTER OF THE FORMAL)
COMPLAINT OF ACCIPITER) DOCKET NO. T-03471A-05-0064
COMMUNICATIONS, INC., AGAINST)
VISTANCIA COMMUNICATIONS, L.L.C.,)
SHEA SUNBELT PLEASANT POINT, L.L.C.,)
AND COX ARIZONA TELCOM, LLC.)

**COX ARIZONA TELCOM, LLC'S REPLY
IN FURTHER SUPPORT OF ITS MOTION TO DISMISS**

Cox Arizona Telcom, LLC submits its reply to Accipiter Communications' response to Cox Arizona Telcom's motion to dismiss the complaint in this docket against Cox Arizona Telcom. Much of Accipiter's response ranges well beyond the issues addressed by the motion to dismiss and the claims actually asserted against Cox Arizona Telcom in this docket. The response does not sufficiently refute that the counts of the complaint asserted against Cox Arizona Telcom: (i) fail to state claims upon which relief can be granted and (ii) seek relief beyond the jurisdiction of the Arizona Corporation Commission. For the reasons set forth below and in the motion to dismiss, the Commission should dismiss the complaint as to Cox Arizona Telcom.

Preliminary Statement

Cox Arizona Telcom's motion to dismiss focused entirely on the counts of the complaint asserted against Cox Arizona Telcom. However, Accipiter's response spends pages arguing that Shea and Vistancia Communications are public service corporations – an issue that does not affect the arguments set forth in the motion to dismiss the claims against Cox Arizona Telcom. It also repeatedly comments on "kickbacks" provided under the NELA-CMA and NELA-PAA.¹

¹ The response is filled with inflammatory statements. For example, citing the motion to dismiss

1 However, the payments under those agreements are related to marketing services provided by the
2 developers and for access to private property. The Commission previously has approved reduced
3 charges by a telecommunications company under a preferred provider agreement – so-called
4 “kickbacks” according to Accipiter – in Decision No. 61626 (April 1, 1999) relating to US West’s
5 (now Qwest) service to the Anthem planned community. Accipiter also seeks to have the
6 Commission assert authority well beyond the applicable constitutional and statutory authority and
7 attempts to have this Commission resolve issues that should be resolved in the courts. Finally,
8 even when it addresses the issues actually raised in the motion to dismiss, Accipiter has ignored
9 the plain language of the statutes and existing Commission decisions.²

Argument

A. Accipiter Has Not Refuted the Challenges to the Claims Asserted against Cox Arizona Telcom.

12 In its motion to dismiss, Cox Arizona Telcom addressed the counts in the complaint
13 asserted against Cox Arizona Telcom, not counts asserted against other parties. If the counts
14 against Cox Arizona Telcom fail to state a claim for relief that can be granted against Cox Arizona
15 Telcom, those counts should be dismissed as to Cox Arizona Telcom. Accipiter’s response has

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19 at page 8, lines 17-18, Accipiter asserts that “Cox points out this monopoly arrangement was
20 created to line the developer’s pockets with ratepayer dollars.” The entire sentence of the actual
21 cited text states: “In order to arrive at the conclusion urged by Accipiter, the Commission must
22 review and interpret the Agreements and then reach the conclusion that the Agreements were
‘designed to exclude’ competition (as opposed to achieve some other purpose, such as generate
additional revenue for the developer).”

23 ² Accipiter asserts (at 6) that its allegations must be accepted as true. However, the proper
24 standard in considering a motion to dismiss for failure to state claim upon which relief can be
25 granted is that allegations of *material facts* are deemed to be true; allegations about ultimate
26 conclusions of law or unwarranted deductions of fact (such as “the agreements are
27 anticompetitive” or “Cox is a monopolist”) are not deemed as true. See Aldabbagh v. Department
of Liquor Licenses, 162 Ariz. 415, 417, 783 P.2d 1207, 1209 (App.1989) (“When testing a motion
to dismiss for failure to state a claim, well-pleaded material allegations of the complaint are taken
as admitted, but conclusions of law or unwarranted deductions of fact are not.”); Folk v. City of
Phoenix, 27 Ariz.App. 146, 150, 551 P.2d 595, 599 (1976)(similar).

1 ignored or misunderstood several of the grounds for dismissal of the counts against Cox Arizona
2 Telcom. To the extent it has actually addressed Cox Arizona Telcom's arguments, Accipiter's
3 arguments fail.

4 **1. Count III**

5 In Count III, Accipiter asserts that the Commission should reclassify Cox Arizona
6 Telcom's services for a single real estate development as noncompetitive because no other carrier
7 is currently providing wireline local exchange service in the development. As explained by Cox
8 Arizona Telcom in the motion to dismiss, the Commission's grant of a CC&N to Cox Arizona
9 Telcom in Decision No. 60285 contemplated exactly the situation raised by Accipiter and there is
10 no need for the Commission to take further action. Accipiter does not respond to the fact that the
11 Commission has already addressed this situation in appropriate manner. Moreover, under its
12 express language, Cox's access license for Vistancia is not exclusive and other wireline LECs
13 could provide service in the future, either through their own facilities or through resale of Cox
14 Arizona Telcom service. There also are other options for telecommunications service that may be
15 available in Vistancia now or in the future, such as wireless and Voice over Internet Protocol
16 services.

17 Accipiter also has ignored that Cox Arizona Telcom's tariff offers a single statewide rate
18 for each service it offers and does not provide any different rates, terms or conditions for service in
19 any specific area, including Vistancia. Any reclassification of service for a single development
20 would have absolutely no impact in the rates, terms or conditions offered in the development. The
21 relief requested in Count III is unfounded and unnecessary and Count III should be dismissed.

22 **2. Count IV**

23 In connection with Count IV of the Complaint, Accipiter has requested that the
24 Commission "revoke" the antitrust exemption provided to Cox Arizona Telcom by A.R.S. § 40-
25 286. In its motion to dismiss, Cox Arizona Telcom stated that it does not possess an antitrust
26 exemption under the express language of A.R.S. § 40-286. Accipiter's response continues to
27 ignore the express language of the statute. Cox Arizona Telcom currently holds a competitive

1 telecommunications certificate of convenience and necessity. That CC&N does not contain any
2 grant of an exclusive franchise. Under A.R.S. § 40-281.D, in order for Cox Arizona Telcom to
3 possess “an exclusive franchise or monopoly”, the Commission would have to had found such
4 authority to be in the public interest. Then, and only then, would Cox Arizona Telcom possess the
5 authority to trigger the antitrust exemption in A.R.S. § 40-286. The Commission has made no
6 such finding and the complaint does not so allege. Even if the Commission deemed the Cox
7 Arizona Telcom services in Vistancia to be non-competitive – and they are not – that finding
8 would not be enough to meet A.R.S. § 40-286.

9 Moreover, to the extent Count IV is actually requesting the Commission to find that Cox
10 Arizona Telcom is engaged in illegal anticompetitive activity, Accipiter did not refute the
11 substantial case law cited by Cox Arizona Telcom showing that the Commission does not have
12 authority to determine that Cox Arizona Telcom violated A.R.S. §§ 44-1402 and 44-1403. As
13 Cox Arizona Telcom explained, it is well settled that the Commission has no implied powers, and
14 its powers do not exceed those derived from a strict construction of the Constitution and the
15 implementing statutes. *See, e.g., Tonto Creek Estates Homeowners Ass'n v. Arizona Corp.*
16 *Com'n*, 177 Ariz. 49, 55, 864 P.2d 1081, 1087 (Ct. App. 1993). Beyond its constitutional
17 ratemaking authority, the Commission has no power beyond that expressly bestowed by statute.
18 *See Tonto Creek*, 177 Ariz. at 56, 864 P.2d at 1088. The Commission’s constitutional ratemaking
19 authority does not provide for enforcement of antitrust violations. Moreover, neither the statutes
20 setting forth Commission authority beyond Article 15 of the Constitution, nor A.R.S. §§ 44-1402
21 and 44-1403, expressly provide authority to the Commission to determine “illegal”
22 anticompetitive behavior under A.R.S. §§ 44-1402 and 44-1403.

23 Accipiter’s citation to a general statute (A.R.S. § 40-246) providing that the Commission
24 can hear complaint actions does not overcome that case law. Such general statutes do not provide
25 the specific authority to the Commission to hear and resolve every potential legal issue related to a
26 public service corporation. *See Phelps Dodge Corp. v. Arizona Elec. Power Co-op., Inc.*, 207,
27 Ariz. 95, 112-13, 83 P.3d 573, 590-91, (Ct. App. 2004).

1 Moreover, Cox Arizona Telcom is providing service to Vistancia under *non-exclusive*
2 access agreements. Accipiter could gain access through similar access agreements that Vistancia
3 has already offered to Accipiter. If Accipiter had been the first telecommunications company into
4 Vistancia, it undoubtedly would not be raising the issues in its complaint. However, it had issues
5 concerning its CC&N and its ability to serve all of Vistancia that delayed its ability to provide
6 service – and apparently did not meet the developer’s timeline. The developer does possess the
7 ability to control its private property. Interestingly, A.R.S. § 40-286 states that it “does not alter,
8 modify or affect applicable federal or state laws regarding the rights of an owner of private
9 property relative to provision of or access to telecommunications services on or for that private
10 property.” Accipiter did not have an absolute right to provide telecommunications service to
11 Vistancia in disregard of the developer’s property rights.

12 In fact, the payment that Cox Arizona Telcom is making to Vistancia is to compensate
13 Vistancia for access through Vistancia’s private property and for the marketing activities at the
14 Vistancia development on Cox Arizona Telcom’s behalf. The concept of compensation to a
15 developer for exclusive marketing arrangements in a large planned development was approved by
16 the Commission back in 1999 with respect to Qwest’s service to Anthem. In Decision No. 61626
17 (Docket No. T-01051B-99-0057, April 1, 1999), the Commission approved a “Preferred
18 Marketing Agreement” between US West and Anthem Arizona. That agreement provided US
19 West would waive its \$427/lot land development fee in exchange for exclusive preferred provider
20 status. *See* Application, Docket No. T-01051B-99-0057. However, US West could recoup its
21 land development fees if the number of access lines did not meet or exceed 95% of the total
22 number of lots within each plat at the end of five years. In approving the agreement, the
23 Commission noted that it was a “new process for providing facilities to serve new housing
24 developments” and that the agreement was “reasonable” and “not anti-competitive because [it did]
25 not prevent other carriers from serving potential customers in the developments.” Decision No.
26 61626 at 5. This decision set a new landscape for serving large planned developments that would
27 require enormous upfront capital expenditures and would ensure that telecommunications service

1 would be available when the first resident moved in.

2 The Agreements here are similar in concept to the Anthem agreement. Cox Arizona
3 Telcom is providing financial benefit to the Vistancia developer in exchange for exclusive
4 marketing arrangements. The Agreements do not prohibit other carriers from serving Vistanica,
5 provided those carriers pay a uniform license fee for the use of the developer's property. If the
6 Commission's policies have changed since 1999, then those changes are best addressed in the
7 generic Preferred Carrier Agreement docket so that the policies can be applied uniformly to all
8 carriers in the future.

9 **3. Count V**

10 In Count V, Accipiter asserts that the defendants, including Cox Arizona Telcom, are
11 interfering with Accipiter's carrier of last resort obligations in violation of A.R.S. § 40-281.B and
12 requests the Commission to void several contracts involving entities that are not parties to this
13 docket. Again, Accipiter has not addressed that fact that A.R.S. § 40-281.B simply does not
14 address interference with carrier of last resort obligations and, therefore, does not provide the
15 Commission with the authority to provide the relief requested.

16 Second, in light of the relief requested – voiding the Agreements – Accipiter apparently
17 believes that the Commission can void contracts without providing due process to the parties to
18 the contracts. Accipiter's summary of the Tonto Creek case (at 12) is telling – the Commission
19 cannot take a CC&N from a *non-party*. Due process demands that the parties to a contract be
20 parties to a complaint action before their contract can be voided in that action. The relief sought in
21 Count V cannot be granted by the Commission without violating basic tenets of due process.

22 **4. Count VII**

23 In Count VII, Accipiter makes the wholly unsupported allegation that Cox Arizona Telcom
24 is not providing 2-PIC equal access in the Vistancia development as required by A.A.C. R14-2-
25 1111. As set forth in the motion to dismiss, Cox Arizona Telcom is offering 2-PIC equal access to
26 all of its customers in Arizona, including its customers in Vistancia. All of Cox Arizona Telcom's
27 services in Vistancia are provided pursuant to Cox Arizona Telcom's tariff on file with the

1 Commission and applicable FCC and Commission rules. If the relief sought by Accipiter is to
2 have the Commission order Cox Arizona Telcom to provide 2-PIC equal access, that relief is
3 already in place by virtue of FCC and Commission rules and the decision granting Cox Arizona
4 Telcom's CC&N.

5 **5. Count VIII**

6 In its motion to dismiss, Cox Arizona Telcom contended that Count VIII and the related
7 request for relief fail because they require the Commission to interpret the legal significance and
8 effect of contracts and – again – to invalidate contracts between entities that are not parties to this
9 action.

10 Accipiter has tried to distinguish the supporting case law cited by Cox Arizona Telcom,
11 arguing that Cox Arizona Telcom has read the cases too narrowly. However, it is Accipiter that
12 has read the cases too narrowly. The cases clearly draw the line, holding that the Commission
13 cannot interpret the legal significance of contracts. The Trico v. Ralston decision is particularly
14 instructive on the delineation in the Commission's authority. Trico Elec. Coop. v. Ralston, 67
15 Ariz. 358, 363-65, 196 P.2d 470, 473-74 (1948). In Trico, the Commission had actually
16 previously approved the option contract at issue. However, an issue later arose over whether the
17 option contract between an electric cooperative was unlawful, illegal and void. The Court held
18 that the Commission lacked authority to consider the construction or validity of a utility's sale of
19 electrical and water distribution lines under an option agreement, clearly stating that the
20 construction and interpretation to be given to legal rights under a contract reside solely with the
21 courts and not with the Corporation Commission. Id.

22 **6. Count IX**

23 In Count IX, Accipiter asserts that Cox Arizona Telcom should provide Accipiter with
24 interconnection and with access to its network in Vistancia. Accipiter simply has not responded to
25 Cox Arizona Telcom's argument that Count IX should be dismissed. Moreover, as Cox Arizona
26 Telcom previously stated in the motion to dismiss, Count IX is simply a red herring and there is no
27 actual relief that the Commission needs to provide in response to the allegations in Count IX. Cox

1 Arizona Telcom is already obligated both to provide interconnection pursuant to 47 U.S.C. §
2 251(a)(1) and to allow the resale of its services pursuant to 47 U.S.C. § 251(b)(1).

3
4 **B. The Propriety of Preferred Carrier Agreements Should Be Addressed in the
Generic Docket.**

5 As Cox Arizona Telcom previously asserted, to the extent the Commission has concerns
6 about developer agreements, such as the Vistancia agreements, the Commission already has a
7 generic docket to address the issues. That docket provides the proper forum for developing
8 equitable guidance that would apply to *all* telecommunications companies – something that this
9 complaint docket cannot do. The use of the generic docket is particularly appropriate given the
10 Commission’s previous decision approving the concept of preferred provider agreements.

11
12 **C. Accipiter’s Response Raises Other Unfounded Issues that are Irrelevant to
Cox Arizona Telcom’s Motion to Dismiss.**

13 **1. Shea and Vistancia Communications are not Public Service Corporations.**

14 Although unrelated to Cox Arizona Telcom’s motion to dismiss, Accipiter argues the
15 status of Shea and Vistancia Communications. Accipiter has misapplied the Serv-Yu test in
16 arguing that those two entities are public service corporations. See Natural Gas Serv. Co. v. Serv-
17 Yu Coop., 70 Ariz. 235, 219 P.2d 324 (1950). Under the Serv-Yu analysis, neither Shea nor
18 Vistancia is providing telecommunications service to end users. Neither entity is charging end
19 users for actual phone service. That should preclude either one from being designated a public
20 service corporation. Under Accipiter’s analysis, any property owner that controls access through
21 its private property with respect to utilities services arguably would qualify as a public service
22 corporation – an inappropriate result from an improper analysis.

23 **2. Shea and Vistancia Communications do not have an Obligation to Provide
24 Easements.**

25 Accipiter asserts that the Vistancia developers have an obligation to provide Accipiter with
26 all necessary easements to serve Vistancia under A.A.C. R14-2-506.E.2.b. However, Accipiter
27 has Rule 506 turned upside down. If the Vistancia developers had requested service from

1 Accipiter, Accipiter would not have to provide service as an ILEC *unless* the developer provided
2 necessary easements without charge. Rule 506 was written in the context of monopoly providers
3 – an ILEC should not have an obligation to serve but then have to pay usurious easement fees.
4 However, here, the Vistancia developers did not request Accipiter to serve the Vistancia
5 development. As a result, the Vistancia developers were not obligated to provide easements. If
6 the Commission were to order the Vistancia developer to give Accipiter its easement rights for
7 free, the Commission essentially would be condemning the property rights of the Developer
8 without just compensation.

9 Arguably, Accipiter has a right to force the Vistancia developer to convey easement rights
10 by filing a condemnation action. Under A.R.S. § 12-1111, "the right of eminent domain may be
11 exercised by the state, a county, city, town, village, or political subdivision, or by a person, for the
12 following uses....9. Telegraph and telephone lines and conduits for public communication...." In
13 Tucson Electric Power Co. v. Adams, 134 Ariz. 396, 656 P.2d 1257 (App. 1982), the Court of
14 Appeals construed those statutes and stated: "The appellee is a public service corporation as
15 defined in Article XV, Section 2 of the Arizona Constitution. As a public service corporation, the
16 appellee is, for purposes of condemnation, an agency of the State of Arizona" under A.R.S. § 12-
17 1115(C). Id. at 397-98, 656 P.2d at 1258-59. The Court went on to state: "The appellee as a
18 public service corporation has the right to condemn property for a necessary and public use for the
19 purposes provided in A.R.S. § 12-1111." Id. at 398, 656 P.2d at 1259. In effect, Accipiter is using
20 this complaint proceeding in an attempt to have the Commission effectively condemn – for free --
21 private property in Vistancia.

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Relief Requested

The complaint should be dismissed as to Cox Arizona Telcom.

RESPECTFULLY SUBMITTED this 11th day of April, 2005.

COX ARIZONA TELCOM, LLC.

By 

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